

Triffterer/Ambos

Rome Statute of the International Criminal Court

Rome Statute of the International Criminal Court

A Commentary

edited by
Otto Triffterer†
Kai Ambos

Third Edition

C. H. BECK · Hart · Nomos
2016

Published by

Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
eMail: bestellung@beck.de

Co-published by

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW, United Kingdom,
online at: www.hartpub.co.uk

and

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5, 76530 Baden-Baden,
Germany, eMail: nomos@nomos.de

Published in North America (US and Canada) by Hart Publishing,
c/o International Specialized Book Services, 930 NE 58th Avenue, Suite 300,
Portland, OR 97213-3786, USA, eMail: orders@isbs.com

Recommended citation:

'*[Author's name], Article [#], in: Triffterer/Ambos, The Rome Statute of the ICC, 3rd edition 2016, mn [#]*'

ISBN 978 3 406 64854 0 (Verlag C.H. Beck)
ISBN 978 1 84946 995 1 (Hart Publishing)
ISBN 978 3 8487 2263 1 (Nomos)

© 2016 Verlag C. H. Beck oHG
Wilhelmstr. 9, 80801 München
Printed in Germany by
Kösel GmbH & Co. KG
Am Buchweg 1, 87452 Altusried-Krugzell
Typeset by
Reemers Publishing Services GmbH, Krefeld
Cover: Druckerei C. H. Beck Nördlingen

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Verlag C. H. Beck, or as expressly permitted by law under the terms agreed with the appropriate reprographic rights organisation.

Enquiries concerning reproduction which may not be covered by the above should be addressed to
C. H. Beck at the address above.

In Memoriam

Otto Triffterer

1931–2015

Editor's Preface

This commentary was founded by Prof. Otto Triffterer shortly after the adoption of the Rome Statute of the International Criminal Court. Its first edition appeared in 1999 and quickly became the number one reference for ICC practitioners and academics alike. The second edition followed almost 10 years later in 2008; now, almost eight years afterwards, we hereby publish the third edition. This new edition should have come out some time ago, of course, but *force majeure* has made it impossible to proceed as Otto Triffterer originally planned. In fact, he entrusted the undersigned with the editorial responsibility for this edition and I sincerely hope that the end result of this collective enterprise – a joint effort of editor, authors and publisher – would have been to the full satisfaction of the commentary's founder. Unfortunately Otto Triffterer died on 1 June 2015 and thus could not see how his "baby" has grown and flourished. This edition is therefore dedicated to his memory.

International criminal law is a dynamic, rapidly evolving field. The case law of the International Criminal Court, as the main driver of this development, has grown enormously in the past eight years and expanded into previously unknown areas. Here is not the place to go into detail; suffice it to refer to some articles of the Rome Statute whose commentary in this new edition had to be revised completely and expanded considerably in size (e.g. Articles 7, 8, 11, 17, 25, 56, 61, 64, 65, 72, 83, 98), to say nothing of the completely new entries (Articles 8(2)(e)(xiii)-(xv), *8bis*, *15bis*, *15ter*).

This commentary is (still) a work in progress. We have involved a number of new authors who come from both an academic and a practical background, and this refreshing of the authorship will continue in the next editions. We have introduced some editorial changes; however, these may not have been fully implemented throughout the whole book. We have added a list of general literature and an index, but have decided to abstain from publishing any annexes with normative or other material (which is easily accessible on the internet) in order to avoid any further increase to the size and price of the book.

I am very grateful to all authors, some of whom (especially the new ones) had to update and completely revise some entries in the midst of various other important commitments within extremely short time frames. I am also indebted to the former President of the Court, Judge Song, and the current President, Judge Silvia Fernández de Gurmendi, who prepared a special introduction for this edition shortly after her appointment on 11 March 2015, *inter alia* setting out the Court's future challenges. These considerations are of special importance for the future of this commentary, which is designed not only to set standards in the field of international criminal law but also to be a useful working tool for the Court in the spirit of a constructive engagement with its jurisprudence. I would also like to thank my editorial team at my chair at the Georg-August-Universität Göttingen (in particular Wiebke Westermann and Michael Zornow, but also Muriel Nißle, Joschka Schlake and Cindy Vu) who did a great job in helping to adjust the entries to our new editorial guidelines. Last but not least, it was a great pleasure to cooperate on this project with Dr. Warth of C.H. Beck, who took a personal interest in it and made a smooth publication possible.

Kai Ambos, Göttingen, October 2015

Contents

Editor's Preface	VII
Introductions to the Third Edition by the former President of the ICC Judge Song and the current President Judge Fernandez de Gurmendi	XIII
List of Authors	XIX
General Literature	XXV
Abbreviations	XXXI

COMMENTARY

Preamble	1
----------------	---

PART 1. ESTABLISHMENT OF THE COURT

Article 1. The Court	15
Article 2. Relationship of the Court with the United Nations	22
Article 3. Seat of the Court	41
Article 4. Legal status and powers of the Court	103

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5. Crimes within the jurisdiction of the Court	111
Article 6. Genocide	127
Article 7. Crimes against humanity	144
Article 8. War crimes	295
Article 8 <i>bis</i> . Crime of aggression	580
Article 9. Elements of Crimes	619
Article 10.	644
Article 11. Jurisdiction <i>ratione temporis</i>	657
Article 12. Preconditions to the exercise of jurisdiction	672
Article 13. Exercise of jurisdiction	690
Article 14. Referral of a situation by a State Party	703
Article 15. Prosecutor	725
Article 15 <i>bis</i> . Exercise of jurisdiction over the crime of aggression (State referral, <i>proprio motu</i>)	741
Article 15 <i>ter</i> . Exercise of jurisdiction over the crime of aggression (Security Council referral)	765
Article 16. Deferral of investigation or prosecution	770
Article 17. Issues of admissibility	781
Article 18. Preliminary rulings regarding admissibility	832
Article 19. Challenges to the jurisdiction of the Court or the admissibility of a case	849
Article 20. <i>Ne bis in idem</i>	899
Article 21. Applicable law	932

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22. <i>Nullum crimen sine lege</i>	949
Article 23. <i>Nulla poena sine lege</i>	967
Article 24. Non-retroactivity <i>ratione personae</i>	971
Article 25. Individual criminal responsibility	979
Article 26. Exclusion of jurisdiction over persons under eighteen	1030
Article 27. Irrelevance of official capacity	1037
Article 28. Responsibility of commanders and other superiors	1056
Article 29. Non-applicability of statute of limitations	1107
Article 30. Mental element	1111
Article 31. Grounds for excluding criminal responsibility	1125
Article 32. Mistake of fact or mistake of law	1161
Article 33. Superior orders and prescription of law	1182

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34. Organs of the Court	1197
Article 35. Service of judges	1204
Article 36. Qualifications, nomination and election of judges	1216

Contents

Article 37. Judicial vacancies	1226
Article 38. The Presidency	1236
Article 39. Chambers	1247
Article 40. Independence of the judges	1253
Article 41. Excusing and disqualification of judges	1258
Article 42. The Office of the Prosecutor	1267
Article 43. The Registry	1278
Article 44. Staff	1289
Article 45. Solemn undertaking	1296
Article 46. Removal from office	1299
Article 47. Disciplinary measures	1307
Article 48. Privileges and immunities	1310
Article 49. Salaries, allowances and expenses	1319
Article 50. Official and working languages	1323
Article 51. Rules of Procedure and Evidence	1332
Article 52. Regulations of the Court	1352

PART 5. INVESTIGATION AND PROSECUTION

Article 53. Initiation of an investigation	1365
Article 54. Duties and powers of the Prosecutor with respect to investigations	1381
Article 55. Rights of persons during an investigation	1394
Article 56. Role of the Pre-Trial Chamber in relation to a unique investigative opportunity	1411
Article 57. Functions and powers of the Pre-Trial Chamber	1421
Article 58. Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear	1437
Article 59. Arrest proceedings in the custodial State	1458
Article 60. Initial proceedings before the Court	1472
Article 61. Confirmation of the charges before trial	1484

PART 6. THE TRIAL

Article 62. Place of trial	1551
Article 63. Trial in the presence of the accused	1563
Article 64. Functions and powers of the Trial Chamber	1588
Article 65. Proceedings on an admission of guilt	1621
Article 66. Presumption of innocence	1635
Article 67. Rights of the accused	1650
Article 68. Protection of victims and witnesses and their participation in the proceedings	1681
Article 69. Evidence	1712
Article 70. Offences against the administration of justice	1751
Article 71. Sanctions for misconduct before the Court	1760
Article 72. Protection of national security information	1775
Article 73. Third-party information or documents	1816
Article 74. Requirements for the decision	1826
Article 75. Reparations to victims	1853
Article 76. Sentencing	1871

PART 7. PENALTIES

Article 77. Applicable penalties	1877
Article 78. Determination of the sentence	1891
Article 79. Trust Fund	1901
Article 80. Non-prejudice to national application of penalties and national laws	1909

PART 8. APPEAL AND REVISION

Article 81. Appeal against decision of acquittal or conviction or against sentence	1915
Article 82. Appeal against other decisions	1954
Article 83. Proceedings on appeal	1965
Article 84. Revision of conviction or sentence	1986
Article 85. Compensation to an arrested or convicted person	1998

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Preliminary Remarks	2003
Article 86. General obligation to cooperate	2014
Article 87. Requests for cooperation: general provisions	2019
Article 88. Availability of procedures under national law	2043
Article 89. Surrender of persons to the Court	2046
Article 90. Competing requests	2059
Article 91. Contents of request for arrest and surrender	2068
Article 92. Provisional arrest	2074
Article 93. Other forms of cooperation	2078
Article 94. Postponement of execution of a request in respect of ongoing investigation or prosecution	2103
Article 95. Postponement of execution of a request in respect of an admissibility challenge	2106
Article 96. Contents of request for other forms of assistance under article 93	2111
Art. 97. Consultations	2115
Article 98. Cooperation with respect to waiver of immunity and consent to surrender	2117
Article 99. Execution of requests under articles 93 and 96	2147
Article 100. Costs	2155
Article 101. Rule of speciality	2158
Article 102. Use of terms	2170

PART 10. ENFORCEMENT

Article 103. Role of States in enforcement of sentences of imprisonment	2173
Article 104. Change in designation of State of enforcement	2187
Article 105. Enforcement of the sentence	2190
Article 106. Supervision of enforcement of sentences and conditions of imprisonment	2192
Article 107. Transfer of the person upon completion of sentence	2196
Article 108. Limitation on the prosecution or punishment of other offences	2199
Article 109. Enforcement of fines and forfeiture measures	2205
Article 110. Review by the Court concerning reduction of sentence	2210
Article 111. Escape	2212

PART 11. ASSEMBLY OF STATES PARTIES

Article 112. Assembly of States Parties	2215
---	------

PART 12. FINANCING

Article 113. Financial Regulations	2247
Article 114. Payment of expenses	2252
Article 115. Funds of the Court and of the Assembly of States Parties	2253
Article 116. Voluntary contributions	2263
Article 117. Assessment of contribution	2267
Article 118. Annual audit	2271

PART 13. FINAL CLAUSES

Article 119. Settlement of disputes	2274
Article 120. Reservations	2283
Article 121. Amendments	2298
Article 122. Amendments to provisions of an institutional nature	2305
Article 123. Review of the Statute	2308
Article 124. Transitional Provision	2312
Article 125. Signature, ratification, acceptance, approval or accession	2318
Article 126. Entry into force	2320
Article 127. Withdrawal	2322
Article 128. Authentic texts	2325
Index	2327

Introductions to the Third Edition

Judge Sang-Hyun Song, Former President of the ICC

In 1945, at a time where international law paid little or no regard to individuals, the creators of the Nuremberg International Military Tribunal spearheaded a most remarkable development in modern legal history:

First, the Statute of the Military Tribunal stipulated that individuals can and should be held accountable for crimes which constitute violations of international law. As was famously declared by the judges of the Tribunal in its Judgement, “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

Second, the Tribunal embodied the modern conviction that individuals should only be punished through a fair trial which safeguards the rights of the accused.

As we now today, the Nuremberg proceedings had wide-ranging effects throughout the field of international law. In 1950, only four years after the final verdict against 21 defendants had been rendered, the United Nations’ International Law Commission codified what is often called the legacy of Nuremberg: it adopted a text setting out some of the most fundamental principles of international criminal law recognized in the Charter and the Judgement of the International Military Tribunal. These “Nuremberg Principles” have been widely cited by international lawyers ever since, and are at the core of international criminal law today, as evidenced by the fact that they are mirrored in the Rome Statute. But these Principles are only one part of the Nuremberg Tribunal’s legacy. Shortly after the judgement had been handed down, one of the alternate judges of the Tribunal, Justice John Parker, spoke about the possible legacy of the Tribunal. He said: “It is not too much to hope that what we have done [in establishing the Tribunal] may have laid the foundation for the building of a permanent court with a code defining crimes of an international character and providing for their punishment.”

The 70 years after Nuremberg have seen over 40 years of an “iron curtain” that fell across Europe; the fall of the Berlin Wall; the re-emergence of the concept of international criminal justice in the establishment of the *ad hoc* International Criminal Tribunals by the United Nations in 1993 and 1994 in response to atrocities committed in the former Yugoslavia and the Rwandan genocide; and finally the high point of international criminal justice in the 20th century: the adoption of the Rome Statute in 1998.

The ICC today is a permanent, readily-available court with a broad jurisdiction, currently covering 122 States Parties. With Libya, the Court has received its second situation by way of a – unanimous – referral of the UN Security Council in 2011 (after the UN Security Council referral in 2005 of the situation in Darfur to the ICC). In addition, with the opening of a situation in Côte d’Ivoire by the end of 2011, the Court has received its first situation by way of an *ad hoc* acceptance of jurisdiction pursuant to Article 12(3) of the Rome Statute. In its past 12 years of operation, the ICC has turned into a very busy international judicial institution. Its achievements have been many and varied. Its first trials have come to an end and others are in full swing. The Court has initiated for the first time its reparations regime following the first trial judgement in the case against Mr. *Thomas Lubanga Dyilo*. Reparations proceedings have also commenced following the issuance of the trial judgment in the case against Mr. *Germain Katanga* – the first judgment that has become final before the ICC. The Appeals Chamber is seized of a number of final and interlocutory appeals, with its first appeals judgment rendered on 1 December of this year. Investigations are ongoing in nine situations in eight countries and thirteen arrest warrants still remain outstanding at the end of December 2014. In 2015, trials will start in no less than four cases. Clearly, for the

foreseeable future the ICC will be busy carrying out the mandate it was assigned by the international community.

The most prominent achievements of the Preparatory Commission resulting from its work from 1999 through 2002, the Court's Rules of Procedure and Evidence ("Rules") as well as the Elements of Crimes, have been thoroughly tested since the Court took up its operations on 1 July 2002. States' confidence in these texts as reflected in the adoption by consensus of the Rules and the Elements of Crimes at the first session of the Assembly of States Parties ("ASP") in 2002 has not been disappointed; both texts continue to be applied and interpreted in court and the Court's jurisprudence grows steadily, as amply reflected in this Third Edition. In addition, in 2012 the judges have commenced a "lessons learnt" exercise, looking at the Court's handling of its regulatory framework in judicial proceedings with a view to identifying room for further improvement and streamlining without negatively impacting on the rights of the defence. As a first result of this exercise, the ASP adopted in November 2012 a new Rule 132*bis* in the Rules to allow a single judge instead of a three-judge Chamber to conduct a number of trial preparation functions in the period between the confirmation of charges and the start of the actual trial in order to administer the trial preparation phase more expeditiously and efficiently, whilst ensuring the right to a fair trial. Further important amendments to the Rules have ensued in the following years on the place of the proceedings, prior recorded testimony, and the accused's presence at trial. Another rule seeking to streamline translation issues during the proceedings is currently before States for consideration. The lessons learned exercise has since become a dynamic feature of the Judiciary, seeking to clarify in-built ambiguities in the Rome Statute system, such as the relationship between pre-trial and trial or the precise parameters and scope of victim participation in the proceedings.

Another significant development since the Second Edition of this Commentary is the monumental agreement on the definition of the crime of aggression during the Kampala Review Conference in June 2010. After years of tireless efforts of the ASP's Special Working Group on the Crime of Aggression in elaborating proposals on a provision on the crime of aggression, States Parties adopted by consensus a new Article 8*bis* in the Rome Statute defining the crime of aggression, as well as legal provisions defining the exercise of jurisdiction over the crime of aggression in Article 15*bis*, accompanied by relevant provisions in the Elements of Crimes (ICC-RC/Res.6 of 11 June 2010). The marvel of this renewed victory of the rule of law could only be overshadowed by the preconditions outlined in the resolution regarding the activation the Court's jurisdiction over the crime of aggression at the earliest in 2017 provided the necessary amount of ratifications until then.

No less important is the amendment to article 8(2)(e) of the Rome Statute regarding certain war crimes in non-international armed conflict as adopted during the Review Conference in Kampala. The amendments concern the war crimes of employment of poison or poisoned weapons (xiii); asphyxiating, poisonous or other gases, and all analogous liquids (xiv); and bullets which expand or flatten easily in the human body (xv). The inclusion of these crimes in the Rome Statute is testimony of the increasing convergence of the law of international armed conflict with the law applicable in armed conflict of a non-international character. Further, it demonstrates that the Statute is open to amendments in order to react to major developments in customary international law.

Through its operations since its inception, the Court has raised the visibility of accountability for atrocity crimes and has galvanised the willingness of States to enforce the rule of law. In clarifying the development of international criminal law through its jurisprudence, the ICC pays tribute to the legacy of the *ad hoc* tribunals and contributes to the rising culture of accountability, both on the international plan and in the context of national legal systems. However, while the establishment of the ICC since the Rome Statute of 1998 has been a major accomplishment in the international judicial community, the Court today still faces several important challenges. To make the Rome Statute system truly comprehensive we must achieve universality. More than 70 States have yet to join, including the world's most

populous countries. A majority of the world's population therefore remains outside the Rome Statute's legal protection and limits the reach and applicability of its provisions.

The principle of complementarity, while one of the foundational pillars of the Rome Statute system, bears important challenges for both the ICC and its States Parties. The principle refers to the primacy of the national jurisdictions on the one hand, and the complementary role of the ICC to provide justice when it is not forthcoming at the national level. The ICC is merely a safety net that ensures accountability when the national jurisdictions are unable for whatever reason to carry out that task. Accordingly, the strengthening of national justice systems is crucial for establishing a credible and comprehensive system of deterrence and prevention against atrocity crimes, and to ensure accountability where crimes have occurred. Complementarity is also the area where the link between Rome Statute issues and wider questions of the rule of law and development is best seen. The fight against impunity cannot succeed in a vacuum; it must be mainstreamed across all relevant policies and States in particular have to pay their share.

With the Rome Statute strengthening the rights of victims to participate in court proceedings and its reparations regime, a new challenge has emerged for the ICC: the capability of the Court to manage the expectations of its stakeholders, and victims in particular. The ICC's Outreach and Victim Participation sections actively engage with victims and communities affected by Rome Statute crimes, informing them of their rights to participate in the proceedings pursuant to the ICC's legal framework. However, in the adjudication of mass crimes with often thousands of victims, to ensure meaningful participation of all these victims is an immensely difficult task and inevitably some victims will feel left out by the process.

Another crucial aspect for the credibility and strength of the ICC is the cooperation of States with the ICC and the enforcement of its orders under Part 9 of the Rome Statute. The ICC has no police force of its own, it has to rely entirely on States to execute its arrest warrants or to assist with a number of other core investigative activities. Without the cooperation of States the ICC is powerless. Unfortunately, several suspects subject to ICC arrest warrants have successfully evaded arrest for many years. Political will to bring these persons to justice is crucial. The continued lack of execution of arrest warrants is a constant reminder that more remains to be done.

Finally, as a judicial body the ICC interacts and cooperates with international and national political actors, such as the United Nations Security Council, the African Union, regional organisations and national governments. Therefore, it is crucial that the ICC delineates a boundary and establishes a place for itself amongst these political bodies without becoming one itself. Just as national judicial systems must separate themselves from the executive, so must the ICC separate itself from the influences of the national and international political actors around it. In order for this challenge to be met, the ICC will need unwavering support from the international community to continue its work within the independent and judicially responsible mandate it has been assigned.

I wish to commend Professor Otto Triffterer on his continuous efforts by assembling an array of such distinguished legal experts and their respective works for the publication of this Third Edition. Additional praise is in order for Professor Kai Ambos and his tireless editing work making this volume a reality. It must be recognized that the activities of the ICC are driven by its founding document, the Rome Statute, and its mandate to prosecute the gravest crimes of international concern. This Commentary represents a most valuable contribution to a more erudite understanding and interpretation of the Rome Statute and therefore a powerful tool to document and supplement the development of international criminal law. This third, updated, edition is a further brick in the solidifying wall of the evolving system of international justice.

The Hague, December 2014

Introductions

Judge Silvia Fernandez De Gurmendi, President of the ICC

As the 18th Anniversary of the Rome Conference approaches, the International Criminal Court is entering a time of great change and challenges. The ICC has seen a major change in personnel with several of the ICC's longest-serving Judges completing their service at the Court and six new judges joining the ranks of the Judiciary. A new Presidency of the ICC has been elected earlier in 2015 and, at the end of the year, the ICC will move to its new permanent premises in The Hague. Now in its thirteenth year the Court is still growing; its workload is increasing, its jurisdiction expanding and, according to recent studies, its deterrent effect is growing. The goals envisaged by the participants at the Rome Conference almost two decades ago are beginning to be realised.

However, this growth brings new and complex challenges for the ICC. As the Court confirms its presence as an important actor in the international community and the Court's profile in the international legal system grows, so too do the voices of both its supporters and its critics. Its increased jurisdiction may raise concerns, especially as the Court is called to investigate politically sensitive and divisive situations. At the same time, the ICC's visibility in the world today leads to increased calls on it to investigate and prosecute alleged atrocities. The ICC does so when and where it can but is limited by its jurisdiction, which can only be expanded by States or by the UN Security Council, and its reliance on States to enforce its decisions and aid it in its work. As its workload increases so too does the Court's need for additional resources. However, pressure to keep costs down exists in tandem with calls to intervene and end impunity for atrocities. This pressure has been particularly strong at a time when the world is facing great economic difficulties. As an institution with a mandate to end impunity for the most serious crimes known to mankind, the Court must stand firm and remain committed to this cause. This is part of the burden of the Court's success.

Nevertheless, the Court does not exist in a vacuum. In recognition of the need to work to achieve its goals as efficiently and effectively as possible, the Court has recently undertaken a series of internal reform initiatives. These are not mere cost-cutting exercises, but are part of the natural evolution of the ICC as a judicial institution into a fully-fledged, functioning international court. The *ReVision* project, a large-scale review and reform of the structure of the Registry, is a key example of how the ICC is streamlining its structure and seeking to improve. The Office of the Prosecutor has developed its new strategic plan for the coming years to discharge its duties and utilise its resources in the most effective manner. Both the Chambers and Presidency are also undertaking initiatives to contribute to the smooth functioning of the Court. In particular the Judiciary's 'Lessons Learned' exercise is striving to find ways to streamline the judicial process by developing best practices and proposing amendments to the Rules of Procedure and Evidence or the Regulations of the Court as necessary. Of course all of the efforts to increase efficiency at the Court remain subject to the fundamental values enshrined in the Rome Statute, such as fair trial procedures and rights of victims.

With these changes and the increase in the ICC's case-load, we can expect the Court's body of jurisprudence to develop rapidly. Both the reform initiatives mentioned above and case-law at the Trial and Pre-Trial level may lead to evolutions in the Court's procedure. Furthermore, as cases reach the Appeals level we can expect more authoritative decisions on both procedural and substantive matters of international criminal law. The *Triffterer Commentary on the Rome Statute of the International Criminal Court*, its first edition just one year younger than the Rome Statute itself, has been of immense importance for academics and practitioners alike. Providing detailed and comprehensive analysis on the provisions of the Statute and other legal texts, of their origins in international law and of the context in which they were adopted at the Rome Conference, it is a book of great authority and has been immensely helpful and influential in the early jurisprudence of the Court.

As the ICC grows and its body of jurisprudence increases, case-law will become ever-more relevant to the interpretation and application of the provisions of the Rome Statute. The continuing mandate of *ad hoc* international courts and tribunals means that the ICC will not be the only institution interpreting and developing international criminal law through judicial decisions. Comparative analysis between the jurisprudence of the ICC and that of other international criminal justice bodies will be essential in order to minimise fragmentation of the law. By taking cognisance of developments outside the ICC, this Commentary can highlight discrepancies and controversies in jurisprudence, inviting the Court to reflect on those issues in its case-law. Through this, the Commentary can continue to encourage the inclusive and consistent development of international criminal law, as it has done for the past seventeen years.

I wish to take this opportunity to express a word of appreciation to Professor Kai Ambos who has shouldered the responsibility of editing the third edition of the Commentary. This Commentary is immensely important to all of those who have an interest in the International Criminal Court, and indeed those who have an interest in international criminal justice as a whole. I am confident that I can speak for both those at the International Criminal Court and the wider international community, in congratulating Professor Ambos and indeed all contributors on compiling this edition which includes a great variety of experts from the ICC and many other important institutions. I am sure that this and future editions of the Commentary will continue to provide helpful, in-depth analysis of the Rome Statute for many years to come.

The Hague, April 2015

List of Authors

<i>Name</i>	<i>Position</i>	<i>Contributions to</i>
Hirad Abtahi	First Legal Advisor, Immediate Office of the President, Head of Presidency Legal and Enforcement Unit, ICC	Articles 38–41
Philipp Ambach	Special Assistant to the President, Immediate Office of the President, ICC	Articles 2, 112
Kai Ambos	Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg August University of Göttingen (GAU); Judge at the District Court of Göttingen; Director ‘Centro de Estudios de Derecho Penal y Procesal Penal Latinoamericano’ (CEDPAL) at GAU	Preamble, Article 7 mn 1–29, 105–111, Articles 23, 25, 76
Roberta Arnold	Public Prosecutor, Canton TI, Switzerland; Military examining magistrate, Swiss Military Justice	Article 8 mn 244–267, 409–428, 614–651, 743–757, Article 28 mn 85–139
Mohamed Elewa Badar	Reader in Comparative and International Criminal Law at Northumbria Law School, Newcastle, UK	Article 11
Elisabeth Baumgartner	Head of the Dealing with the Past Program at the Swiss Peace Foundation, swisspeace, lecturer International Criminal Law, University of Lucerne	Article 8 mn 217–243, 355–408
Olympia Bekou	Professor of Public International Law, University of Nottingham	Articles 53, 54
Morten Bergsmo	Director of the Centre for International Law Research and Policy, and Visiting Professor at Peking University Law School	Preamble Articles 15, 16, 42, 53, 54,
Gilbert Bitti	Senior Legal Advisor to the Pre-Trial Division of the ICC	Article 64
Stefanie Bock	Assistant Professor at the University of Göttingen	Article 33
Michael Bohlander	International Co-Investigating Judge in the Extraordinary Chambers in the Courts of Cambodia; Chair in Comparative and International Criminal Law at Durham Law School (currently on leave)	Articles 1, 36
Bruce Broomhall	Professor of Law at the Université du Québec à Montréal	Articles 22, 51
Christoph Burchard	Professor of Criminal Law and Procedure, International and European Criminal Justice, Comparative Law and Legal Theory as well as Principal Investigator at the Cluster of Excellency ‘The Formation of Normative Orders’ at the Goethe University Frankfurt am Main	Articles 27, 71
Veronique Caruana	PhD Candidate, Middlesex University, London	Article 63
Eleni Chaitidou	Legal Officer, Pre-Trial Division, ICC	Articles 14, 61

List of Authors

<i>Name</i>	<i>Position</i>	<i>Contributions to</i>
Roger S. Clark	Board of Governors Professor, Rutgers Law School, New Jersey	Articles 9, 26, 105–107, pre Articles 119 <i>et seq.</i> , Articles 119, 120, 121–123, 125–128
Paula Clarke	Counsel in the Department of Justice, Canada	Article 69
Michael Cottier	Federal Department of Foreign Affairs of Switzerland, Political Directorate, Regional Coordinator South Asia	Articles 8 mn 1–55, 180–181, 217–243, 268–408, 447–483, 514–548, 565–613, 652–742, 758–822
Knut Dörmann	Chief Legal Officer and Head of the Legal Division, ICRC.	Article 8 mn 56–179, 182–216
David Donat-Cattin	Secretary-General of Parliamentarians for Global Action (PGA); Adjunct Assistant Professor of International Law, Center for Global Affairs, NYU	Articles 68, 75
Helen Duffy	Professor Gieskes Chair of International Human Rights and Humanitarian Law at Leiden University	Article 73
Franziska Eckelmans	Legal Officer, Appeals Division, ICC (on leave in 2015)	Articles 81, 83
Mohamed M. El Zeidy	Legal Advisor, Pre-Trial Division, the ICC; Judge and Senior Public Prosecutor, Egyptian Ministry of Justice (1997–2007)	Articles 17, 61
Albin Eser	Director Emeritus MP Institute for Foreign and International Criminal Law, Freiburg; Professor Emeritus of Criminal Law, Criminal Procedure, and Comparative Criminal Law at the University of Freiburg	Article 31
Rolf Einar Fife	Norwegian Ambassador to Paris; Member of the Permanent Court of Arbitration	Articles 77, 80
Elisa Freiburg	Research Fellow at the Chair for Public International Law, University of Potsdam	Articles 8 <i>bis</i> , 15 <i>bis</i> , 15 <i>ter</i>
Robin Geiß	Professor of International Law and Security at the University of Glasgow School of Law	Article 8 mn 429–446, 484–513, 549–564, 823–1009
Julia Grignon	Codirectrice de la Clinique de droit international pénal et humanitaire et du Centre Interdisciplinaire de Recherche sur l’Afrique et le Moyen Orient, Faculté de droit, Université Laval, Québec	Article 8 mn 308–354, 447–483, 514–548, 797–822
Fabrizio Guariglia	Director of the Prosecution Division, ICC	Articles 56, 57, 65
Gerhard Hafner	Professor of European and international Law, University of Vienna	Article 120
Maarten Halff	Electoral Affairs Officer, UNDP	Articles 115–117
Christopher K. Hall†	Senior Legal Advisor on International Justice for Amnesty International	Articles 7, 19, 55, 58, 59
Frederik Harhoff	Professor of Law, University of Southern Denmark	Article 42

List of Authors

<i>Name</i>	<i>Position</i>	<i>Contributions to</i>
Robert O. Harmsen	Visiting Professor International Relations & International Law, Tecnologico de Monterrey, Queretaro Campus	Articles 3, 103, 104, 110, 111
Kenneth Harris	Acting Deputy Director; Office of International Affairs, U.S. Department of Justice	Article 70
Niamh Hayes	Head of Office of the Institute for International Criminal Investigations in The Hague	Article 7 mn 53–86, 136–140, 157–161
Alexander Heinze	Assistant Professor at the University of Göttingen	Article 10
Larissa van den Herik	Professor of Public International Law at the Grotius Centre for International Legal Studies and Vice Dean of Leiden Law School, Leiden University	Article 7 mn 87–94, 144–156
Gudrun Hochmayr	Professor of Criminal Law, European and International Criminal Law, European University Viadrina, Frankfurt/Oder	Articles 56, 57, 65
Dov Jacobs	Assistant Professor in International Law at the Grotius Centre for International Legal Studies at Leiden University	Articles 52, 55
Magda Karagiannakis	Barrister and Academic at La Trobe University School of Law	Articles 43–50
Karim A. A. Khan	Q.C., Barrister, London, specialising in public international law, international criminal law, human rights law, administrative and public law, arbitration, immigration and asylum law; lead Defence counsel in several ICC cases	Articles 34, 60, 78, 79
Alejandro Kiss	Legal Officer of the ICC, Adjunct Professor of International Criminal Law at The Hague University	Article 74
Claus Kreß	Professor of Criminal Law and Public International Law, Chair for German and International Criminal Law, Director of the Institute for International Peace and Security Law, University of Cologne	Pre Articles 86 <i>et seq.</i> , Articles 86–100, 102
David Křivánek	Desk Officer, Division Special Areas of International Law, Legal Directorate-General, Federal Foreign Office, Berlin	Article 8 mn 565–613
Pieter Kruger	Criminal Lawyer, South Africa	Articles 53, 54
Margaret McAuliffe deGuzman	Professor of Criminal Law, International Criminal Law, and Transitional Justice at the Temple University's Beasley School, Philadelphia	Article 21
Yvonne McDermott	Lecturer in Law and Director of the Bangor Centre for International Law, Bangor University, UK	Articles 66, 67
Sabine Mzee	Public Prosecutor, Public Prosecutor's Office, Hannover	Article 8 mn 652–742
Volker Nerlich	Senior Legal Officer, Extraordinary Chambers in the Courts of Cambodia (on secondment from the ICC); Honorary Professor, Humboldt University of Berlin	Articles 82, 84, 85
Daniel D. Ntanda Nsereko	Judge, Appeals Chamber, Special Tribunal for Lebanon; formerly Judge, Appeals Chamber, ICC	Article 18, 19

List of Authors

<i>Name</i>	<i>Position</i>	<i>Contributions to</i>
Odo Annette Ogwuma	Legal Advisor, Immediate Office of the President, Presidency Legal and Enforcement Unit, ICC	Articles 35, 37
Jens David Ohlin	Associate Dean for Academic Affairs & Professor of Law, Cornell Law School, Ithaca	Article 32
Raul C. Pangalangan	Judge of the ICC (from July 2013), and Professor of Law, University of the Philippines	Article 24
Giulia Pecorella	Lecturer at Middlesex University (London)	Articles 12, 13
Jelena Pejic	Senior Legal Adviser to the ICRC	Article 42
Donald K. Piragoff	Q.C., Senior Assistant Deputy Minister, Department of Justice, Canada	Articles 30, 69, 70
Joseph Powderly	Assistant Professor of Public International Law at Leiden University	Article 7 mn 53–86, 136–143, 157–161
Kimberly Prost	Head of the Legal Advisory Section within the Division of Treaty Affairs at the UN Office on Drugs and Crime in Vienna and ‘ombudsperson’ to the UN Security Council’s Al-Qaeda and Taliban Sanctions Committee	Pre Articles 86 <i>et seq.</i> , Articles 86–100, 102
S. Rama Rao	Adjunct Professor, Columbia University (SIPA), Pace Law School, New York; and NALSAR University of Law, India	Articles 112–114, 118
Rod Rastan	Legal Advisor, Office of the Prosecutor, ICC	Articles 11, 72, 73
Astrid Reisinger Coracini	Senior Lecturer at the University of Salzburg and Director of the Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law	Article 20
Emilia Richard	Researcher, Graduate Institute of International and Development Studies, Geneva	Article 8 mn 268–307, 758–796
Darryl Robinson	Associate Professor of Law, Queen’s University, Canada	Article 30
Wiebke Rückert	Deputy Head, Public International Law Section, Federal Foreign Office of Germany	Article 4
Cedric Ryngaert	Professor of Public International Law at the University of Utrecht	Articles 58, 59
William A. Schabas	Professor of International Law at Middlesex University, London; Professor of International Criminal Law and Human Rights at Leiden University; Emeritus Professor of Human Rights Law at the National University of Ireland Galway; Chairman of the Board of the Institute for International Criminal Investigation	Articles 6, 12, 13, 17, 23, 29, 61, 63, 66, 67, 76, 108, 109
Carsten Stahn	Professor of International Criminal Law and Global Justice at Leiden University and Program Director of the Grotius Centre	Articles 7 mn 30–52, 95–104, 112–135
Christopher Staker	Barrister, London, specialising in public international law, arbitration, administrative and public law, international criminal law, immigration and asylum, EU law and human rights	Articles 40, 52, 81, 83–85

List of Authors

<i>Name</i>	<i>Position</i>	<i>Contributions to</i>
Gerard A. M. Strijards	Professor of International Criminal Law by Special Appointment and Senior Legal Advisor to the Prosecutorial Office of the Kingdom of the Netherlands	Articles 3, 103, 104, 110, 111
Immi Tallgren	Senior Research Fellow at the Max Planck Institute for International, European and Regulatory Procedural Law in Luxemburg; Senior visiting fellow, London School of Economics	Article 20
David Tolbert	President of the International Centre for Transitional Justice	Articles 115–117
Otto Triffterer†	Professor of Austrian and International Criminal Law and Procedure at the University of Salzburg	Articles 1, 10, 26–28, 32, 33, 62, 71, 74
Manuel J. Ventura	Director, The Peace and Justice Initiative (The Netherlands); Associate Legal Officer, Appeals Chamber, Special Tribunal for Lebanon; Adjunct Fellow, School of Law, Western Sydney University	Article 19
Renan Villacis	Director, Secretariat of the Assembly of States Parties to the Rome Statute	Articles 115–117
Stefan Wehrenberg	Partner at Blum&Grob Attorneys at Law Ltd. Zurich; Head Legal Advisor at the Office of the Swiss Armed Forces Attorney General	Article 8 mn 244–267, 409–428, 614–651, 743–757
Peter Wilkitzki	Professor of Law at the University of Cologne; Retired Head of Criminal Law Department in the German Federal Ministry of Justice	Article 101
Rebecca Young	Legal Officer, Immediate Office of the President, Presidency Legal and Enforcement Unit ICC	Articles 38–41
Dan Zhu	Assistant Professor of International Law at Fundan University	Articles 15, 16, 42
Andreas Zimmermann	Professor of Public International Law and European Union Law at the University of Potsdam; Director of the Potsdam Centre of Human Rights; Member of the Permanent Court of Arbitration	Articles 5, 8 mn 429–446, 484–513, 549–564, 823–972, 988–1009, Articles 8 <i>bis</i> , 15 <i>bis</i> , 15 <i>ter</i> , 124
Till Zimmermann	Senior research fellow at the chair for criminal law, criminal procedure, legal philosophy and legal sociology at the University of Munich	Article 62

General Literature

- Allen, M.J., *Textbook on Criminal Law* (OUP 12th edition 2013)
- Ambos, K., *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung* (Duncker & Humblot 2002/2004)
- *Treatise on International Criminal Law, Vol. I: Foundations and General Part* (OUP 2013)
 - *Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing* (OUP 2014)
 - *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht – Rechtshilfe* (C.H. Beck 3rd edition 2011, 4th edition 2014)
- Ambos, K., König, S., and Rackow P., eds., *Rechtshilferecht in Strafsachen* (Baden-Baden: Nomos, 2015)
- Amerasinghe, C.F., *Principles of the Institutional Law of International Organizations* (CUP 2nd edition 2005)
- Amnesty International, *The International Criminal Court: Making the Right Choices, Part I: Defining the Crimes and Permissible Defences and Initiating a Prosecution* (1997. AI-Index: IOR 40/01/97)
- *Part II: Organizing the Court and Guaranteeing a Fair Trial* (July 1997, AI Index: IOR 40/11/97)
 - *Part III: Ensuring Effective State Cooperation* (1997, IOR-Index: 40/13/97)
 - *Part IV: Basic Principles Concerning Establishment and Financing of the Court and Final Clauses* (March 1998, AI-Index: 40/4/98)
 - *Part V: Recommendations to the Diplomatic Conference* (May 1998, AI Index: IOR 40/10/98)
- Armenta Deu, T., *Lecciones de derecho procesal penal* (Marcial Pons 2nd edition 2004)
- Ascensio, H., Decaux E. and Pellet, A., *Droit International Pénal* (Pedone 2000)
- *Droit International Pénal* (Pedone 2nd edition 2012)
- Ashworth, A.J., *The Criminal Process: An Evaluative Study* (Clarendon Press 2nd edition 1998)
- Ashworth, A. and Horder, J., *Principles of Criminal Law* (OUP 7th edition 2013);
- Ashworth, A. and Redmayne, M., *The Criminal Process* (OUP 3rd edition 2005)
- Barriga, S. and Krefß, C. (eds.), *The Travaux Préparatoires of the Crime of Aggression* (CUP 2012).
- Bantekas, I. and Nash, S., *International Criminal Law* (Routledge Cavendish 3rd edition 2007)
- Bassiouni, M.C., *International Criminal Law: A Draft International Criminal Code* (1980);
- *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Nijhoff 1987);
 - *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* (Transnational Publishers 1st edition 1994);
 - *Crimes Against Humanity in International Criminal Law* (1992, 2nd edition 1999, 3rd edition CUP 2011);
 - *International Criminal Law*, (Martinus Nijhoff Publishers 1st edition 1987)
 - *International Criminal Law* (Nijhoff 3rd edition 2008)
 - *Introduction to International Criminal Law* (Martinus Nijhoff Publishers 2nd edition 2013)
- Bassiouni, M.C. (ed.), *International Criminal Court Compilation of United Nations' Documents and Draft ICC Statute before the Diplomatic Conference* (Transnational Publishers 1998)
- *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against Peace and Security of Mankind* (1993)
 - *The Statute of the International Criminal Court: A Documentary History, Volumes I and II* (Transnational Publishers 1st edition 1999)
 - *The Legislative History of the International Criminal Court, 3 volumes: An Article by Article Evolution of the Statute* (Transnational Publishers 2005)
 - *International Criminal Law, Vol. I: Sources, subjects and contents, Vol. II: Multilateral and Bilateral Mechanisms, Vol. III: International Enforcement* (Nijhoff 3rd edition 2008);
- Bassiouni, M.C. and Nanda, V.P., *A Treatise on International Criminal Law, Vol. I* (1973);
- Bassiouni M.C. and Manikas, P. *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers 1996)
- Bekou, O. and Cryer, R. (eds.), *The International Criminal Court* (Ashgate 1st edition 2005);
- Black, H.C., *Black's Law Dictionary* (West Group 7th edition 1999)
- Boas, G./Bischoff, J.L./Reid, N.L./Don Taylor III, B., *International Criminal Law Practitioner Library. Vol. III: International Criminal Procedure* (CUP 2011);
- Bohlander, M., *The German Criminal Code – A Modern English Translation* (Hart Publishing 2008)
- Boot, M., *Nullum Crimen Sine Lege and the Subject Matter of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes* (Intersentia 2002)
- Borsari, R., *Diritto punitivo sovranazionale come sistema* (CEDAP 2007)
- Bothe, M., Partsch, K.J. and Solf, W.A., (eds.), *New Rules for Victims of Armed Conflicts*
- *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Nijhoff 1982);
- Boulouc, B., *'Droit Pénal Général'* (23th edition Dalloz 2013);
- Bowett, D.W., *The Law of International Institutions* (Stevens & Sons 4th edition 1982);

General Literature

- Cassese, A. *International Criminal Law* (OUP 2003);
– *International Criminal Law* (OUP 2nd edition 2008)
– (ed.), *The Oxford Companion to International Criminal Justice* (2009);
– *International Criminal Law: Cases and Commentary* (OUP 2011);
Cassese, A. and Gaeta, P., *Cassese's International Criminal Law* (OUP 3rd edition 2013)
Cassese, A., and Jones, J.R.W.D., *The Rome Statute of the International Criminal Court: A Commentary, Vol. I* (OUP 2002)
Cobo del Rosal, M. and Vives Antón, T.S., *Derecho penal. Parte General* (Tirant lo blanch 5th edition 1999);
Chinkin, C., *Third Parties in International Law* (OUP 1993);
Cryer, R., *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime* (CUP 2005)
Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure* (CUP 3rd edition 2014)
- Darby, J., 'Penal Code of the Federal Republic of Germany', in: *The American Series of Foreign Penal Codes*, Vol. XXVIII (Rothman 1987)
Darcy, S. and Powderly, J. (eds.), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010)
David, E., *Principes de droits des conflits armés* (Bruylant 5th edition 2012)
De Hert et al. (eds.), *Code of International Criminal Law and Procedure, Annotated* (Larcier 2013)
Delmas-Marty, M. and Spencer, J.R. (eds.), *European Criminal Procedures* (CUP 2002)
Dixon, R., Khan, K., Fulford, A., Archbold International Criminal Courts: Practice, Procedure and Evidence (Sweet and Maxwell 4th edition 2014)
European Law Students' Association (ELSA) (ed.), *Handbook on the Draft Statute for an International Criminal Court* (ELSA 2nd edition 1998);
Doria, J., Gasser, H.-P. and Bassiouni, M.C. (eds.), *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Publishers 2009)
- Fernandez, F. and Pacreau, X (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article*, two volumes (Pedone 2012)
Feuerbach, P.J.A. von, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (5th edition 1812)
Fiandaca, G. and Musco, E., *Diritto Penale. Parte Generale* (Zanichelli 6th edition 2010);
Figueiredo Dias, J., *Direito penal: Parte general*, Vol. I (Coimbra Editora 2nd edition 2007)
Fischer, H., Krefß, C. and Lüder, S.R. (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* (Arno Spitz 2001)
Fischer, H. and Lüder, S.R. (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof: Beiträge Zur Entwicklung einer effektiven internationalen Strafgerichtsbarkeit* (Berliner Wissenschafts-Verlag 1999)
Fleck, D., (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP 1999, 2nd edition 2008, 3rd edition 2013);
Fletcher, G.P., *Rethinking Criminal Law* (OUP 1978/2002 [reprint]);
– *Basic Concepts of Criminal Law* (OUP 1998);
Frowein, J. A. and Peukert, W., *Europäische Menschenrechtskonvention, EMRK-Kommentar* (Engel 3rd edition 2009).
- Gaeta, P. (ed.), *The UN Genocide Convention, A Commentary* (Oxford University Press, 2009);
Garner, B.A. (ed.), *Black's Law Dictionary* (West 9th edition 2009)
Gless, S., *Internationales Strafrecht: Grundriss für Studium und Praxis* (Helbing & Lichtenhahn 2011)
Gil Gil, A., *Derecho Penal Internacional* (Tecnos 1999)
Grabenwarter, Cristoph, *European Convention on Human Rights-Commentary* (C.H. Beck, Hack, Nomos 2014)
Grützner, H., Pötz, P.-G. and Krefß, C. (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (3rd edition 2007 et seq. loose-leaf)
- Hall, J., *General Principles of Criminal Law* (2nd edition 1960)
Hankel, G., *Die Leipziger Prozesse, deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburger Edition 2003)
Hatchard, J., Huber, B. and Vogler, R. (eds.), *Comparative Criminal Procedure* (BIICL 1996);
Henckaerts, J.M. and Doswald-Beck, L., *Customary International Humanitarian Law*, Vol. I: Rules (CUP 2005);
– *Customary International Humanitarian Law*, Vol. II (CUP 2005)
Human Rights Watch, *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* (1998)
– *Genocide, War Crimes, Crimes against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia* (2004)
- Ingadottir, T., *The International Criminal Court: Recommendations on Policy and Practice* (Transnational Publishers 2003)

General Literature

- Jennings, R. and Watts, A., *Oppenheim's International Law* (Longman 1992);
– *Oppenheim's International Law*, Vols. I and II (Oxford University Press 9th edition 1996)
- Jeschek, H.-H. and Weigend, T., *Lehrbuch des Strafrechts. Allgemeiner Teil* (Duncker & Humblot 5th edition 1996)
- Jones, J.R.W.D and Powles, S., *International Criminal Practice* (Transnational Publishers 3rd edition 2003);
- Kaufmann, *Die Dogmatik der Unterlassungsdelikte* (Schwartz 2nd edition 1988)
- Kadish, S.H., Schulhofer, S.J, Steiker, C.S. and Barkow, R.E., *Criminal Law and its Processes* (Wolters Kluwer 9th edition 2012)
- Khan, K.A. A. and Dixon, R., *Archbold International Criminal Courts. Practice, Procedure and Evidence* (Sweet & Maxwell 4th edition 2013)
- Kittichaisaree, K., *International Criminal Law* (OUP 2002)
- Knoops, G.-J.A., *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Transnational Publishers 2002);
- Kolb, R. and Scalia, D. (eds.), *Droit International Pénal: Précis* (Pedone 2nd edition 2012)
- König, K.-M., *Die völkerrechtliche Legitimation der Strafgewalt internationaler Strafjustiz* (Nomos 2003)
- Krefß, C., Lattanzi, F., Broomhall, B. and Santori, V. (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders, Vol. II: Constitutional Issues, Cooperation and Enforcement* (Nomos 2005);
- LaFave, W.R., *Criminal Law* (4th edition, 2003);
- LaFave, W.R. and Scott, W.A., *Substantive Criminal Law, Vol. I* (West Publishing 1986)
- Larguier, J., *Droit pénal général* (Daloz 18th edition 2001)
- Lattanzi, F. (ed.), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998)
- Lattanzi, G. and Monetti, V. (eds.), *La Corte Penale Internazionale: Organi-Competenza-Reati-Processo* (Giuffrè 2006)
- Lattanzi, F. and Schabas, W. (eds.), *Essays on the Rome Statute of the International Criminal Court, Vol. II* (Editrice Il Sirente, 1999, reprint 2000)
- Lee, R.S. (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International 1999)
- *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001)
- *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005)
- Leroy, J., *Droit Pénal Général* (L.G.D.J. 3rd edition 2010)
- Maier, J., *Derecho procesal penal. Tomo 1. Fundamentos* (del Puerto, 2nd edition 1996).
- McDonald, G.K. and Swaak-Goldman, O. (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. I* (Kluwer Law International 2000)
- Meißner, J., *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (C.H. Beck 2003);
- Merle, R. and Vitu, A., *Traité de droit criminel* (1967)
- Mettraux, G., *International Crimes and the Ad Hoc Tribunals* (OUP 2005)
- Mir Puig, S., *Derecho Penal Parte General* (Reppertor Colección 9th edition 2011)
- Morris, V. and Scharf, M.P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia. Two volumes* (Transnational Publishers, 1995);
- Morris, V. and Scharf, M.P., *The International Criminal Tribunal For Rwanda. Two volumes* (Transnational Publishers 1998)
- Münchener Kommentar zum Strafgesetzbuch: StGB, Vol. III: §§ 80–184 g StGB* (C.H. Beck 2003)
- Muñoz Conde, F. and García Arán, M., *Derecho Penal. Parte General* (Tirant lo Blanch 8th edition 2010)
- Noll, P. and Trechsel, S., *Schweizerisches Strafrecht, Allgemeiner Teil I, Allgemeine Voraussetzung der Strafbarkeit* (Schulthess 6th edition 2004)
- Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Engel 1994)
- Oppenheim, L. L.F., *International Law* (2 Vols., 7th edition by Hersch Lauterpacht 1952)
- Oppenheim, L.L.F. and Lauterpacht, H., *International Law: A Treatise, Vol. II: Disputes, War and Neutrality*, (7th edition 1961)
- Ormerod, D., *Smith and Hogan's Criminal Law* (OUP 13th edition 2011);
- Paust, J.J., Bassiouni, M.C., Williams, S.A., Scharf, M., Sadat, L., Gurulé, J. and Zargaris, B., *International Criminal Law: Cases and Materials* (Carolina Academic Press 4th edition 2013)
- Peter, P., *Kommentar zum Militärstrafgesetz, Besonderer Teil* (Dike 1992)
- Pictet (ed.), *Commentary on the Geneva Convention I* (ICRC 1952)
- (ed.), *Commentary on the Geneva Convention II* (ICRC 1960)
- (ed.), *Commentary on the Geneva Convention III* (ICRC 1960)
- (ed.), *Commentary on the Geneva Convention IV* (ICRC 1958)

General Literature

- Politi, M. and Nesi, G. (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate 2001)
- Pradel, J., *Droit Pénal Comparé* (Dalloz 2nd edition 1995)
- *Droit Pénal Comparé* (Dalloz 3rd edition 2008)
 - *Droit Pénal Général* (Dalloz 19th edition 2012)
- Pulitanò, D., *Diritto penale* (Giappichelli 5th edition 2013)
- Reydams, L. et al. (eds.), *The International Prosecutor from Nuremberg to the Hague* (Oxford University Press 2012)
- Robinson, P.H., *Criminal Law Defenses*, Vol. I (West 1984);
- Rodriguez Devesa, J.M. and Serrano Gomez, A., *Derecho Penal Español. Parte General* (Dykinson 18th edition 1995)
- Röling, B. V.A. and Rüter, C.F. (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East* (2 Vols. 1977)
- Romano, C.P.R./André Nollkaemper, A./Kleffner, J.K. (eds.), *Internationalized criminal courts: Sierra Leone, East Timor, Kosovo and Cambodia* (OUP 2004).
- Roxin, C., *Täterschaft und Tatherrschaft* (De Gruyter 8th edition 2006)
- *Strafrecht Allgemeiner Teil*, Vol. I: *Grundlagen: Aufbau der Verbrechenlehre* (C.H. Beck 4th edition 2006);
 - *Strafrecht Allgemeiner Teil*, Vol. II: *Besondere Erscheinungsformen der Straftat* (C.H. Beck 2003);
- Roxin, C and Schönemann, B., *Strafverfahrensrecht* (Beck 28th edition 2014).
- Sadat Wexler, L. (ed.), Model Draft Statute for the International Criminal Court based on the Preparatory Committee's text to the Diplomatic Conference, Rome, June 15-July 17 1998 (Érés 1998)
- 'Observations on the Consolidated ICC Text before the Final session of the Preparatory Committee', 13*bis* NOUVELLES ETUDES PÉNALES 43 (Érés, 1998)
- Safferling, C., *Towards an international criminal procedure* (OUP 2001);
- *Internationales Strafrecht*. (Springer 2011)
 - *International Criminal Procedure* (OUP 2012)
- Saltzburg, S.A. and Capra, D.J., *American Criminal Procedure* (West 5th edition 1996)
- Sandoz, Y., Swinarski, C. and Zimmermann, B. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Nijhoff, ICRC 1987);
- Satzger, H., *International and European Criminal Law* (Beck, Hart and Nomos 2012)
- *Internationales und europäisches Strafrecht: Strafanwendungsrecht, europäisches Straf- und Strafverfahrensrecht, Völkerstrafrecht* (Nomos 6th edition 2013)
- Schabas, W.A., *The UN International Criminal Tribunals – The former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006);
- *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010)
 - *An Introduction to the International Criminal Court* (CUP 4th edition 2011)
- Schermers, H.G. and Blokker, N.M., *International Institutional Law* (Martinus Nijhoff Publishers 5th edition 2011);
- Schönke, A., and Schröder, H., (eds.), *Strafgesetzbuch. Kommentar* (C.H. Beck 29th edition 2014);
- Schomburg, W., Lagodny, O., Gleß, S., and Hackner, T., *Internationale Rechtshilfe in Strafsachen* (C. H. Beck, 5th edition 2012);
- Seidl-Hohenveldern, I. and Loibl, G., *Das Recht der Internationalen Organisationen* (Heymanns 7th edition 2000);
- Shaw, M. N., *International Law* (CUP 4th edition 1997, 6th edition 2008);
- Sluiter, G., *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia 2002);
- Simma, B. (ed.) *The Charter of the United Nations: A Commentary* (OUP 2nd edition 2002)
- Simma, B., Khan, D.-E., Nolte, G. and Paulus, A. (eds.) *The Charter of the United Nations: A Commentary* (OUP 3rd edition 2012)
- Soyer, J.-C., *Droit pénal et procédure pénal* (L.G.D.J. 15th edition 2000)
- Stahn, C. (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015)
- Stahn, C. and Sluiter, G. (eds.), *The Emerging Practice of the International Criminal Court* (Nijhoff 2008)
- Stefani, G., Levasseur, G. and Boulloc, B., *Droit Pénal Général* (Dalloz 1997)
- Stratenwerth, G., *Schweizerisches Strafrecht, Allgemeiner Teil I* (2nd edition 1998);
- Tams, C.J., Berster, L. and Schiffbauer, B., *Convention on the Prevention and Punishment of the Crime of Genocide* (Beck, 2014);
- Tochilovsky, V., *The law and jurisprudence of the international criminal tribunals and courts: procedure and human rights aspects* (Intersentia, 2nd edition 2014);
- Triffterer, O., *Dogmatische Untersuchungen zur Entwicklung des Materiellen Völkerstrafrechts seit Nürnberg* (Albert Freiburg 1966);
- (ed), *Commentary on the Rome Statute of the International Criminal Court, Observer's notes, article by article*, (Beck/Hart/Nomos 2nd edition 2008)

General Literature

Van Sliedregt, E., *Individual Criminal Responsibility in International Law* (OUP 2012)

Werle, G., *Principles of International Criminal Law* (T.M.C. Asser Press 2nd edition 2009)

– *Völkerstrafrecht* (Mohr Siebeck 3rd edition 2012)

Wiggenhorn, H., *Verlierjustiz: die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg* (Nomos 2005).

Williams, G., *Text Book of Criminal Law* (Steven & Sons 1st edition 1978) and (Steven & Sons 2nd edition 1983).

Zaffaroni, E. R., *Derecho Penal. Parte General* (EDIAR 2nd edition 2002);

Zahar, A. and Sluiter, G., *International Criminal Law* (OUP 2008)

Zappalà, S., *Human Rights in International Criminal Proceedings* (OUP 2005)

Ziegenhahn, D., *Der Schutz der Menschenrechte bei der grenzüberschreitenden Zusammenarbeit in Strafsachen* (Duncker & Humblot 2002).

Ziegler, A., Weber, R. and Wehrenberg, S. (eds.), *Kriegsverbrecher Prozesse in der Schweiz* (Schulthess 2009).

Abbreviations

	A
ABAJ	Journal of the American Bar Association
A.C.	Law Reports Appeal Cases
AC	Appeals Chamber
ACABQ	Advisory Committee on Administrative and Budgetary Questions
ACHR	American Convention on Human Rights
ACLT	Advisory Committee on Legal Texts Established under Regulation 4(1)
ACN	Advisory Committee on Nominations
<i>Ad Hoc</i> Committee Report	Report of the <i>Ad Hoc</i> Committee on the Establishment of an International Criminal Court (GA, 50 th Sess., Supp. No. 22, A/50/22, 1995)
Add. Prot.	Additional Protocol to the four Geneva Conventions
AFDI	Annuaire Français de Droit International
Aff.	Affairs
AFLRev	Air Force Law Review
AfricanCtHum&PRts	African Court on Human and Peoples' Rights
AfricanSecurityRev	African Security Review
AfricanYbIL	African Yearbook of International Law
AI	Amnesty International
AIDP	Association Internationale de Droit Pénal
AJ	Appeals Judgment
AJIL	American Journal of International Law
AJP	Aktuelle Juristische Praxis
AkronLRev	Akron Law Review
AlbanyLJ	Albany Law Journal of Science and Technology
AlbertaLRev	Alberta Law Review
All E.R.	Alle England Law Reports
ALJR	Australian Law Journal Reports
Am	American [n, s]
AMICC	American Non-Governmental Organization Coalition for the International Criminal Court
AmJCrimL	American Journal of Criminal Law
AmsterdamUP	Amsterdam University Press
AmUJLRev	The American University International Law Review
AmUJGenderSocialPol&Law	American University Journal of Gender, Social Policy and Law
Ann.	Annual
AnnDig	Annual Digest of International Law
APIC	Agreement on Privileges and Immunities of the Court
ASIL PROC	Proceedings of the American Society of International Law
ASP	Assembly of States Parties
AU	African Union
AULO	African Union Liaison Office
AustrianJPub&IL	Austrian Journal of Public and International Law
AVR	Archiv des Völkerrechts (German law journal)
AWB	Dutch Administrative Law Act
	B
Bassiouni Draft	M. Cherif Bassiouni, A Draft International Criminal Code And Draft Statute for an International Criminal Tribunal (1987)
BerkleyJILP	Berkeley Journal of International Law Publicist
BGBL	Bundesgesetzblatt (German Federal Gazette)
BGE	Entscheidungen des schweizer Bundesgerichts
BGHSt	Entscheidungen des Bundesgerichtshofes in Strafsachen (case report of the Federal Supreme Court of Germany)
BINUKA	UN Integrated Peacebuilding Office in the CAR
Bk	Book
BostonCollI&CompLRev	Boston College International and Comparative Law Review
BostonCollThirdWorldLJ	Boston College Third World Law Journal
BritJAmLS	British Journal of American Legal Studies
BrookJIL	Brooklyn Journal of International Law
BrownJWorldAff	The Brown Journal of World Affairs
BT-Drs.	Bundestags-Drucksache (printed matter of the German Parliament)

Abbreviations

Bull	Bulletin
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (case report of the Constitutional Court of Germany)
BVfG	Bundesverfassungsgericht (constitutional court of Germany)
BYbIL	British Yearbook of International Law
C	
CalLRev	California Law Review
CalWestInt'lJ	California Western International Law Journal
CambridgeLJ	The Cambridge Law Journal
CambridgeRevIAff	Cambridge Review of International Affairs
CanYbIL	Canadian Yearbook of International Law
CAR	Central African Republic
CaseWesternResJIL	Case Western Reserve Journal of International Law
CBF	Committee on Budget and Finance
CCC	Canadian Criminal Cases
CCPR	Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
<i>cf.</i>	<i>confer</i> (see)
ChineseJIL	Chinese Journal of International Law
CIC	Criminal Investigation Command
CICC	Coalition of Non-Governmental Organizations for the Establishment of an International Criminal Court
CICR	Le Comité international de la Croix-Rouge
CJEU	Court of Justice of the European Union
CLF	Criminal Law Forum
CLQ	Criminal Law Quarterly
CLRev	Criminal Law Review
ColHumRtsLRev	Columbia Human Rights Law Review
ColJIL	Columbia Journal of International Law
ColJTransnatL	Columbia Journal of Transnational Law
ColLRev	Columbia Law Review
Comp	Comparative
conc.	concerning
Conf.	Conference
Const	Constitution [al]
Contemp	Contemporary
CornJIL	Cornell Journal of International Law
CornLQ	Cornell Law Quarterly
CrAppR	Criminal Appeal Reports
Crim	Criminal
CrimL&Phil	Criminal Law and Philosophy
CroatianAnnCrimL&Prac	Croatian Annual of Criminal Law and Practice
Ct	Court
CUP	Cambridge University Press
D	
DaPaulLRev	DePaul Law Review
DCC	Documents containing the charges
DenverJIL&Pol	Denver Journal of International Law and Policy
Dev.	Development
DickJIL	Dickinson Journal of International Law
DispResJ	Dispute Resolution Journal
Doc.	Document
DPA	Department of Political Affairs
DPKO	Department of Peacekeeping Operations
Draft Statute 1953	UN GAOR, 9 th Sess., Supp. No. 12, UN Doc. A/2654 (1954)
Draft Statute 1951	UN GAOR, 7 th Sess., Supp. No. 11, UN Doc. A/2136 (1952)
DRC	Democratic Republic of Congo
DukeJComp&IL	Duke Journal of Comparative & International Law
DurhamLRev	Durham Law Review
E	
E + Z	Entwicklung und Zusammenarbeit
EC	European Community

Abbreviations

ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECommHumRts	European Commission of Human Rights
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECR	European Court Report
ECT	Treaty Establishing the European Community
ECtHR	European Court of Human Rights
ed./eds.	editor/editors
<i>e. g.</i>	<i>exempli gratia</i>
EHRLRep	European Human Rights Law Report
EJCCCLJ	European Journal of Crime, Criminal Law and Criminal Justice
EJIL	The European Journal of International Law
Elements	Elements of Crimes
EmoryILRev	Emory International Law Review
EPIL	Encyclopaedia of Public International Law
ESA	European Space Agency
ESOC	European Space Operation Centre
esp.	especially
EssexHumRtsRev	Essex Human Rights Review
<i>et al.</i>	<i>et alia/et altri</i> (and others)
<i>et seq.</i>	<i>et sequentis</i> (and so forth)
ETS	European Treaty Series
EuCLRev	European Criminal Law Review
EuGRZ	Europäische Grundrechte-Zeitschrift
F	
FA	Foreign Affairs
FARDC	Forces Armées de la République Démocratique du Congo
FDLR	Forces Démocratiques de Libération du Rwanda
FIDH	Fédération internationale des ligues des droits de l'Homme
Final Act	Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court U.N. Doc. A/CONF.183/10
FinishYbIL	Finish Yearbook of International Law
fn.	footnote [s]
FordhamILJ	Fordham International Law Journal
G	
GA	(UN) General Assembly
GA	Goltdammer's Archiv für Strafrecht
GA Res.	(UN) General Assembly Resolution
GAOR	(UN) General Assembly Official Records
Gen.	General
GeorgetownIEnvLRev	Georgetown International Environmental Law Review
GeorgetownLJ	Georgetown Law Journal
GeoWashILRev	The George Washington International Law Review
GermanLJ	German Law Journal
GoJIL	Goettingen Journal of International Law
GYbIL	German Yearbook on International Law
H	
Hague Conv.	Hague Convention respecting the Laws and Customs on Land
HagueYbIL	Hague Yearbook of International Law
HarvHumRtsJ	Harvard Human Rights Journal
HarvILJ	Harvard International Law Journal
HastingsI&CompLRev	Hastings International and Comparative Law Review
HastingsWomenLJ	Hastings Women's Law Journal
HCIJ	High Court of Justice (Israel)
HCP	Hague Convention for the protection of cultural property during armed conflict
HeidelbergJIL	Heidelberg Journal of International Law
HMSO	Her Majesty's Stationery Office
HoustonJIL	Houston Journal of International Law
HRC	United Nation Human Rights Council

Abbreviations

Hum	Human/Humanitarian
HumRtsLJ	Human Rights Law Journal
HumRtsQ	Human Rights Quarterly
HuV – I	Humanitäres Völkerrecht-Informationsschriften (German law journal)
HVO	Hrvatsko vijeće obrane (Croatian Defence Council)
I	I
I&CompLQ	International and Comparative Law Quarterly
<i>i. a.</i>	<i>inter alia</i> (among other things)
IACtHR	Inter American Court on Human Rights
IACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
<i>ibid.</i>	<i>Ibidem</i> (in the same place)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCS	Rome Statute of the International Criminal Court
ICDAA	International Criminal Defence Attorneys Association
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICL	International Criminal Law
ICLRev	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICSS	International Centre for Sport Security
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rev. 49, 22 May 2013, IT/32/Rev.49
<i>id.</i>	<i>idem</i> (the same)
<i>i. e.</i>	<i>id est</i> (that is)
IELR	International Enforcement Law Reporter
<i>i. f.</i>	<i>ipse fecit</i> (done by)
IHL	International Humanitarian Law
IHumRtsL&Prac	International Human Rights Law and Practice
IJChildrenRts	International Journal on Children Rights
IJHumRts	International Journal of Human Rights
ILA	International Law Association
ILC	International Law Commission
ILC Draft Code 1951	Draft Code of Offences against the Peace and Security of Mankind (Part I), Report of the International Law Commission on its third Session, 16 May–27 July, 1951 (A/CN.4/L.15, 1951) http://www.untreaty.un.org/ilc/summaries/7_3.htm
ILC Draft Code 1953	Draft Code of Offences against the Peace and Security of Mankind (Part I), Report of the International Law Commission on its fifth Session, 1 June–14 August, 1953 (A/CN.4/72,1953) http://www.untreaty.un.org/ilc/summaries/7_3.htm
ILC Draft Code 1954	Draft Code of Offences against the Peace and Security of Mankind, the International Law Commission adopted the revised draft on its 6 th Session, 6 June – 18 July, 1954 http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf
ILC Draft Code 1991	UN GAOR, 46 th Sess., Supp. No. 10, UN Doc. A/46/10 (1991) YbILC
ILC Draft Statute 1994	Draft Statute for an International Criminal Court, Report of the International Law Commission on its Forty-Sixth Session, 2 May- 22 July, 1994 (GA, 49 th Sess., Supp. No. 10, A/49/10, 1994), p. 43 et seq. 1996 ILC Draft Code Draft Code of Crimes Against the Peace and Security of Mankind (Part II), 1996, Report of the International Law Commission on the Work of its Forty-Eighth Session, 5 June – 26 August 1996, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10, 9 et seq. http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf
ILF	International Law Forum
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
ILS	International Law Studies
ILSAJ&CompL	ILSA Journal of International and Comparative Law
IMT	(Nuremberg) International Military Tribunal

Abbreviations

IMTFE	International Military Tribunal for the Far East
Ind&CompLRev	Indiana International and Comparative Law Review
IndianYbIL&Pol	Indian Yearbook of International Law and Policy
IOM	Independent Oversight Mechanism
IRevContempL	International Review of Contemporary Law
IRevCrimPol	International Review of Criminal Policy
IRevPenall	International Review of Penal Law
IRevRC	International Review of the Red Cross
IRG	Internationales Rechtshilfegesetz (German law on international judicial cooperation in criminal matters)
IRMCT	International Residual Mechanism for Criminal Tribunals
IRMCTS	Statute of the International Residual Mechanism for Criminal Tribunals
IsLRev	Israel Law Review
IsYbHumRts	Israel Yearbook on Human Rights
ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunication Union

J

J	Journal
JA	Juristische Arbeitsblätter
JAfricanL	Journal of African Law
JapaneseAnnIL	Japanese Annual of International Law
JArmConfl	Journal of Armed Conflict Law
JCE	Joint Criminal Enterprise
JCL&Criminology	Journal of Criminal Law and Criminology
JCompLegIL	Journal of Comparative Legislation and International Law
JCSL	Journal of Conflict and Security Law
JEastAfrStud	Journal of Eastern African Studies
JIaff	Journal of International Affairs
JICJ	Journal of International Criminal Justice
JHumLStud	Journal of International Humanitarian Legal Studies
JILFAff	UCLA Journal of International Law and Foreign Affairs
JILPAC	Journal of International Law of Peace and Armed Conflict
JLS	Journal of Legal Studies
JohnMarshallLRev	John Marshall Law Review
JPubL	Journal of Public Law
JR	Juristische Rundschau
JRWD	The Criminal Code of the Jews
Jud	Judicial
Just	Justice
JZ	Juristen Zeitung

K

KAS	Konrad-Adenauer-Stiftung
KobeULRev	Kobe University Law Review

L

L	Law
L&ContempProbs	Law and Contemporary Problems
LAPE	Law and Practice of International Courts and Tribunals
LeidenJIL	Leiden Journal of International Law
LGBT	Lesbian, Gay, Bisexual and Transgender
lit.	<i>litera</i>
LJ	Law Journal
LJN	Dutch case law database
LNTS	League of Nations Treaty Series
LOAC	Laws of armed conflict
LoyLAI&CompLRev	Loyola of Los Angeles International and Comparative Law Review
LQRev	Law Quarterly Review
LRA	Lord's Resistance Army
LRev	Law Review
LRTWC	Law Reports of Trials of War Criminals

M

MainLRev	Main Law Review
ManchUP	Manchester University Press

Abbreviations

MediterraneanJHumRts	Mediterranean Journal of Human Rights
MelbJIL	Melbourne Journal of International Law
MichJGender&L	Michigan Journal of Gender and Law
MichJIL	Michigan Journal of International Law
MICT	The International Criminal Court for Rwanda
MillRev	Military Law Review
MINUSMA	UN Multidimensional Integrated Stabilization Mission in Mali
MLLWRev	Military Law and Law of War Review
MLRev	Modern Law Review
mn	margin number(s)
MONUC	UN Mission in the DRC
MONUSCO	UN Organization Stabilization Mission in the Democratic Republic of the Congo
MOU	Memorandum of Understanding
MPEPIL	Max Planck Encyclopaedia of Public International Law
MPIL	Max Planck Institute for Comparative Public Law and International Law
MPYbUNL	Max Planck Yearbook of United Nations Law
Mtg.	Meeting
MurdochUElectronicJL	Murdoch University Electronic Journal of Law

N	
NAL	New American Library
NATO	North Atlantic Treaty Organization
NatSec&ArmedConflictLRev	National Security and Armed Conflict Law Review
NavalWarColRev	Naval War College Review
NCarolinaJIL&CommReg	North Carolina Journal of International Law and Commercial Regulation
NCLRev	New Criminal Law Review
NEP	Nouvelles Études Pénales
NethILRev	Netherlands International Law Review
NethQHumRts	Netherlands Quarterly of Human Rights
NethYbIL	Netherlands Yearbook of International Law
NewEnglandJI&CompL	New England Journal of International and Comparative Law
NGO	Non-governmental organization
NJ	Neue Justiz
NJECL	New Journal of European Criminal Law
NJIHumRts	New Journal of International Human Rights
NJW	Neue Juristische Wochenschrift
NLJ	New Law Journal
No./Nos.	number/numbers
NordJIL	Nordic Journal of International Law
NotreDameLRev	Notre Dame Law Review
NstZ	Neue Zeitschrift für Strafrecht
NYJIL&Pol	New York University Journal of International Law and Politics
NYLSchLRev	New York Law School Law Review
NZYbIL	The New Zealand Year Book of International Law
NZZ	Neue Züricher Zeitung

O	
OAS	Organization of American States
OASTS	Organization of American States Treaty Series
OAU	Organization of African Unity
<i>o. b.</i>	<i>Obiter (dictum - by the way)</i>
OEA	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
OJ	Official Journal
OJLS	Oxford Journal of Legal Studies
ÖJZ	Österreichische Juristen Zeitung
OklahomaLRev	Oklahoma Law Review
OKW	Oberkommando der Wehrmacht (former German armed forces high command)
OLA	Office Legal Affairs
ONUC	Opération des Nations Unies au Congo
OPCW	Organization for the Prohibition of Chemical Weapons
Org.	Organisation
OSCE	Organisation on Security and Cooperation in Europe
ÖStPO	Austrian Code of Criminal Procedure

Abbreviations

OTP	Office of the Prosecutor
OUP	Oxford University Press
P	
p./pp.	page/pages
PaceLRev	Pace Law Review
PacificBasinLJ	UCLA Pacific Basin Law Journal
para./paras.	paragraph/paragraphs
PCIJ	Permanent Court of International Justice
PennJIL	Pennsylvania Journal of International Law
PennStILRev	Pennsylvania State University International Law Review
Pol	Policy
POW	Prisoner of War
Preparatory Committee (Consolidated) Draft	Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act (A/Conf.183/2/Add.1, 1998)
Preparatory Committee I 1996	Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, (Proceedings of the Preparatory Committee During March-April and August 1996) (G.A., 51st Sess., Supp. No. 22, A/51/22, 1996)
Preparatory Committee II 1996	Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, (Compilation of Proposals) (G.A., 51st Sess., Supp. No. 22, A/51/22, 1996)
Preparatory Committee Decisions Aug. 1997	Decisions Taken by the Preparatory Committee at its Session Held 4 to 15 August 1997 (A/AC.249/1997/L.8/Rev.1, 1997)
Preparatory Committee Decisions Dec. 1997	Decisions Taken by the Preparatory Committee at its Session Held 1 to 12 December 1997 (A/AC.249/1997/L.9/Rev.1, 1997)
Preparatory Committee Decisions Feb. 1997	Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 Feb. 1997 (A/AC.249/1997/L.5, 1997)
PrepCom	Preparatory Committee on the Establishment of an International Criminal Court
Probs	Problems
Prot	Protocol
PTC	Pre-Trial Chamber
Pub.	Public
Q	
Q	Quarterly
R	
R2P	Responsibility to Protect
RCADI	Recueil des Cours de l'Académie de Droit International
RdC	Recueil de Cours
RDF	Rwanda Defence Force
RDPMDG	Revue de Droit Pénal Militaire et de Droit de la Guerre
Regulations	Regulations of the Court
Rep	Report
Res.	Resolution
Rev	Review
RevICommJurists	Review of International Commission of Jurists
RGDIP	Revue Générale de Droit International Public
RichLRev	University of Richmond Law Review
RICR	Revue internationale de la Croix-Rouge
RIDP	Revue Internationale de Droit Pénal
RoC	Regulations of the Court
RogerWilliamsULRev	Roger Williams University Law Review
Rome Conf.	Rome Conference
Rome Statute	Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 1998
RQDI	Revue Québécoise de Droit International
RSC	Revue de science criminelle et de droit pénal comparé
Rts	Rights
Rules	Rules of Procedure and Evidence
RutgersLJ	Rutgers Law Journal

Abbreviations

SADC	S
SAISRev	South African Development Community
SanDiegoIJL	SAIS Revue of International Affairs
SantaClaraJIL	San Diego International Law Journal
SantaClaraLRev	Santa Clara Journal of International Law
SC	Santa Clara Law Review
SchwZStR	Security Council
<i>scil.</i>	Schweizerische Zeitschrift für Strafrecht
SCLRev	<i>scilicet</i> (that is)
SCSL	Supreme Court Law Review
S.D.N.Y.	Special Court for Sierra Leone
<i>seq.</i>	U.S. District Court – Southern District of New York
Sess.	<i>sequentis</i>
Siracusa Draft	Session
	Association Internationale de Droit Pénal (AIDP)/Istituto Superiore Internazionale di Scienze Criminali (ISISC)/Max Planck Institute for Foreign and International Criminal Law (MPI), International Criminal Court, Alternative to the ILC-Draft (Siracusa-Draft) prepared by a Committee of Experts, Siracusa/Freiburg, July 1995
SouthAfricanYbIL	South African Yearbook of International Law
SouthCaliforniaLRev	Southern California Law Review
StanJIL	Stanford Journal of International Law
Statute/Rome Statute	Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 1998
StGB	German/Austrian Criminal Code
STL	Special Tribunal for Lebanon
StV	Strafverteidiger
SuffolkTransnatLRev	Suffolk Transnational Law Review
SUP	Stanford University Press
Supp.	Supplement
SWGCA	Special Working Group on the Crime of Aggression
TC	T
TEU	Trial Chamber
TJ	Treaty on European Union
TorontoFacLRev	Trial Judgment
TorontoILRev	University of Toronto Faculty of Law Review
TorontoLJ	University of Toronto International Law Review
TransnatL&ContempProbs	University of Toronto Law Journal
TRWC	Transnational Law & Contemporary Problems
	Trials of War Criminals
	U
UCDavisJIL&Policy	University of California Davis Journal of International Law and Policy
UChicagoLRev	University of Chicago Law Review
UCLAJIL&ForeignAffairs	UCLA Journal of International Law and Foreign Affairs
UDHR	Universal Declaration of Human Rights
UFDR	Union of Democratic Forces for the Unity
UK	United Kingdom
U.N./UN	United Nations
UN Doc.	United Nations Document
UNCIO	United Nations Conference on International Organization
UNDP	United Nations Development Programme
UNDSS	United Nations Department of Safety and Security
UNEP	United Nations Environmental Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHAS	United Nations Humanitarian Air Service
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNMIK	United Nations Mission in Kosovo
UNOCI	United Nations Operation in Côte d'Ivoire
UNON	UN Office at Nairobi
UNorthCarolinaPress	University of North Carolina Press
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSCOR	United Nations Security Council Official Record

Abbreviations

UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
UNWCC	United Nation War Crimes Commission
UPaLRev	University of Pennsylvania Law Review
Updated Siracusa Draft	Updated Siracusa Draft, 1994 ILC Draft Statute for an International Criminal Court With Suggested Modifications, prepared by a Universal Postal Unit
UPU	Unites States
U.S.	U.S. Naval War College International Law Studies
USNavalWarCollegeILStudies	University of Toledo Law Review
UTolLRev	Utrecht Law Review
UtrechtLRev	
	V
v.	<i>versus</i>
ValULRev	Valparaiso University Law Review
VandJTransnatL	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Laws of Treaties of 1969
VirgJIL	Virginia Journal of International Law
VirgLRev	Virginia Law Review
Vol./Vols.	Volume/Volumes
VPRS	Victims Participation and Reparation Section
VStGB	Völkerstrafgesetzbuch
VUWellingtonLRev	Victoria University of Wellington Law Review
	W
WakeForestLRev	Wake Forest Law Review
WGA	Working Group on Amendments
WisconsinILJ	Wisconsin International Law Journal
W.L.R.	Weekly Law Reports
Women&IHumRtsL	Women and International Human Rights Law
	Y
YaleJIL	Yale Journal of International Law
YaleLJ	Yale Law Journal
Yb	Yearbook
YbICTY	Yearbook of the International Criminal Tribunal for the Former Yugoslavia
YbIHumL	Yearbook of International Humanitarian Law
YbILC	Yearbook of the International Law Commission
	Z
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZDV	Zentrale Dienstvorschrift (German joint service regulation)
ZFRV	Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik
ZRP	Zeitschrift für Rechtspolitik
ZStW	Zeitschrift für die gesamten Strafrechtswissenschaften
Zutphen Draft	Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands (A/AC.249/1998/L.13, 1998)

Preamble

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

Literature: Ambos, K., 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law', (2013) 33 *OJLS* 293; P.-H. Bolle and K. Hobe (eds.), *Legal Aspects of Crime Prevention – In Memoriam Helge Röstad* (Neuchâtel: International Penal and Penitentiary Foundation 1999); Carnegie Endowment for International Peace, Division of Intercourse and Education, *Report of the International Commission to Inquire into the Causes and Conduct at the Balkan Wars*, Publication No. 4, reprinted 1993; Triffterer, O., 'Der ständige Internationale Strafgerichtshof – Anspruch und Wirklichkeit, Anmerkungen zum "Rome Statute of the International Criminal Court" vom 17. Juli 1998', in: K.H. Gössel and O. Triffterer (eds.), *Gedächtnisschrift für Heinz Zipf* (C.F. Müller 1999), 545; Triffterer, O. 'Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender "Elements of Crimes" für alle Tatbestände des Völkermordes', in: B. Schünemann *et al.* (eds.), *Festschrift für Claus Roxin* (De Gruyter 2001), 1415; Triffterer, O., 'Preliminary Remarks', in: O. Triffterer (ed), *ICC Commentary* (Beck, 2nd ed. 2008), 15.

Content

A. General remarks	1
I. Drafting history	1
II. Legal and political importance	4
B. Analysis and interpretation of elements	6
I. Paragraph 1: Global context	7
II. Paragraph 2: Reminder to victims	8
III. Paragraph 3: Recognition of protected values	9
IV. Paragraph 4: Affirmation of aims to be achieved	12
V. Paragraph 5: Prevention by enforcement	15

VI. Paragraph 6: Recalling to States their duties	16
VII. Paragraph 7: Reaffirmation of the UN Charter principles	18
VIII. Paragraph 8: Non-intervention in internal affairs	19
IX. Paragraph 9: Crimes of international concern	20
X. Paragraph 10: Complementarity	22
XI. Paragraph 11: Respect for and the enforcement of international justice	23

A. General remarks

I. Drafting history

- 1 The Preamble as adopted by the Rome Conference has 11 paragraphs, the majority of which were only included at the final stage of the Conference. This procedure is logical insofar as the Preamble summarizes the aims and purposes of the Statute and thereby mirrors the results achieved as well as the compromises which were agreed upon only at the very end of the Conference.

Early draft statutes, like those of the Committee on International Criminal Jurisdiction of 1951, revised in 1953, did not contain a Preamble. The same is true for the ILA and the AIDP Drafts of the mid-1920s, even though at that time, for instance, the ‘General Treaty for Renunciation of War as an Instrument of National Policy’ of 27 August 1928, included some introductory language starting with ‘persuaded ...; convinced ...; hopeful that ...’¹. The Draft Statute elaborated by the Wingspread-Bellagio Conferences in 1971 and 1972 also did not have any Preamble, nor did those proposed by the ILA at its Belgrade Conference in 1980 and Paris Conference in 1984. The same is true of the Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other international crimes of 1980, and of the Draft Statute presented by M.Ch. Bassiouni in 1987².

- 2 It was the ILC which proposed in its 1994 Draft Statute a Preamble with three paragraphs, beginning with the words: ‘Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court’. The ILC emphasized in paragraph 2 that ‘such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole’, while in paragraph 3 the complementarity ‘to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective’ was mentioned³. This rather short summary of ‘the main purposes of the draft Statute’, as it was expressed in the commentary to this Draft, was included in later drafts; the Siracusa and the Updated Siracusa Draft, for instance, did not change or amend this proposal of the ILC⁴.

The 1995 *Ad Hoc* Committee repeated in its report only ‘the third preambular paragraph of the draft statute’, stating that the ILC ‘did not intend the proposed court to replace national courts’, but it mentioned that the issue required further elaboration⁵. However, according to its discussion reflecting the 1996 Session, the Preparatory Committee Report contains, in addition to the ILC Draft, proposals dealing with paragraph 3 and the question of complementarity between international and national jurisdiction. For the principle of

¹ See for the early drafts Triffterer, *Preliminary Remarks* (2008) mn 2 with further references, and for the just mentioned General Treaty 1928, the Briand Kellogg Pact, League of Nations-Treaty Series (1929) Doc. 7, No. 2137, pp. 190 *et seq.*

² See for these documents Triffterer, *Preliminary Remarks* (2008) mn 4 *et seq.*

³ See for the 1994 ILC Draft Statute, pp. 43 and 44, reprinted in: Bassiouni, *International Criminal Court. Compilation of United Nations Documents and Draft ICC Statute Before The Diplomatic Conference* (1998) 722.

⁴ See for these documents Triffterer, *Preliminary Remarks* (2008) mn 7 *et seq.*; see for a comparison between different initial drafts and the final version Schabas, *Commentary* (2010), pp. 33–40.

⁵ *Ad Hoc* Committee Report, p. 6, reprinted in: Bassiouni, *Court* (1998) 673.

complementarity its phrasing was more disputed than its establishment as such. Correspondingly, it was also proposed 'that it is the primary duty of *States* to bring to justice persons responsible for such serious crimes'⁶. The Preparatory Committee did not deal with the Preamble during its 1997 sessions, but mentioned nevertheless preambular paragraph 3 when dealing with article 35, 'Issues of admissibility'⁷. Referring to the fact that the Preparatory Committee had not considered the Preamble in 1997, the Zutphen Draft repeated only what had been printed in the Preparatory Committee's Report Vol. II. The Consolidated Draft did likewise, albeit with a footnote reference to proposals changing the ILC Draft⁸. The Model Draft Statute presented by L. S. Wexler and M. Ch. Bassiouni replicated the ILC 1994 Draft Statute with the exception that preambular paragraph 3 was shortened to be consistent with paragraph 1 of article 1, a proposition which several persons put to the Preparatory Committee⁹.

What had amounted to a rather embryonic drafting history received fresh impetus at the Rome Conference. As early as 25 June 1998, Spain proposed an expanded Preamble comprising eight paragraphs instead of the original three, covering aspects like the reminder of the sufferings of victims, the relationship to the United Nations, the recognition of protected values, as well as emphasizing, firstly, that 'this Statute should not be interpreted as affecting in any way the scope of the provisions of the Charter relating to the functions and the powers of the organs of the United Nations', and secondly, that 'the relevant norms of general international law will continue to govern those questions not expressly regulated in this Statute'¹⁰.

Andorra proposed on 30 June 1998 that the Preamble should begin with a reference (as it now states in preambular paragraph 1) to our 'common bond, and that our cultures are woven together in a shared history' as well as to the threat to the 'well-being of our world', three aspects which were eventually integrated into the adopted Preamble¹¹. The Dominican Republic proposed (as Spain had done before) that the permanent character of the Court and the need 'to put an end to the impunity with which such acts are committed' be included, mentioning also 'the duty of every State to exercise its penal jurisdiction against those responsible for crimes of international magnitude'¹².

From the outset of its discussion, the Committee of the Whole had entrusted a representative of Samoa 'with the task of coordinating informal consultations on the text for the Preamble to the Statute'. After these consultations concluded, the Co-ordinator submitted to the Committee of the Whole a proposal containing nine preambular paragraphs which in large part dealt with the aspects contained in the adopted Preamble¹³. On 14 July 1998, the Committee of the Whole presented the recommendation of the Co-ordinator in 12 paragraphs¹⁴ with some changes. The Report of the Drafting Committee to the Committee of the Whole shortened the Preamble to 10 paragraphs on 16 July 1998. There was a shortened

⁶ Emphasis added. Discussing the second paragraph of the Preamble it was mentioned (without a concrete proposal) the necessity 'to avoid trivializing the role and functions of the Court and interfering with the jurisdiction of national courts' and that 'genocide met the jurisdictional standard referred to in the second paragraph of the preamble'; see 1996 Preparatory Committee I, pp. 15 and 17 respectively for the discussion on the second paragraph Vol. II, pp. 20, 21 and 36 and for the proposals Vol. II, pp. 1 *et seq.*, but also 155 *et seq.* on the further discussion on the question of complementarity, reprinted in: Bassiouni, *Court* (1998) 383, 385, 387 *et seq.* and 403 respectively 449 and 556 *et seq.* On the travaux re Article 17 see also Schabas and El-Zeid, *article 17*, mn 5 *et seq.*

⁷ See Preparatory Committee Decisions Aug. 1997, p. 10, reprinted in: Bassiouni, *Court* (1998) 320.

⁸ Zutphen Draft, p. 11 with reference to UN Doc. A/51/22, reprinted in: Bassiouni, *Court* (1998) 145; for the Consolidated Draft see Preparatory Committee (Consolidated) Draft, p. 10, reprinted in: Bassiouni, *Court* (1998) 11.

⁹ See 13ter NEP (1998) 1.

¹⁰ See UN Doc. A/CONF.183/C.1/L.22.

¹¹ See UN Doc. A/CONF.183/C.1/L.32.

¹² See UN Doc. A/CONF.183/C.1/L.52.

¹³ See UN Doc. A/CONF.183/C.1/L.61.

¹⁴ See UN Doc. A/CONF.183/C.1/L.73.

reference in preambular paragraph 1 to the ‘common bonds and ... a shared heritage’, and a new reference in paragraph 3 to, ‘[r]ecognizing that such grave crimes threaten the peace, security and well-being of the world’¹⁵.

II. Legal and political importance

- 4 The legal significance of the Preamble was only briefly mentioned during the drafting process. The ILC first pointed out in its commentary to the 1994 Draft Statute that the Preamble of the Statute was ‘intended to assist in the interpretation and application of the Statute, and in particular in the exercise of the power conferred by article 35’, which at that stage of the process was dealing with ‘[i]ssues of admissibility’. Already at that time the question of whether ‘the preamble should be an operative article of the statute, given its importance’, had been discussed¹⁶. The reasons why the latter opinion did not prevail in the end were twofold: First, with reference to article 31 of the Vienna Convention on the Law of Treaties, it was stated that ‘the preamble to a treaty was considered part of the context within which a treaty should be interpreted’. Therefore, any terms of the Preamble ‘would form part of the context in which the statute as a whole was to be interpreted and applied’¹⁷. Second, what was included in the draft Preamble in 1994 was not considered to be sufficiently detailed and precise to substitute ‘a definition or at least a mention ... in an article of the statute’ with a view to removing ‘any doubt as to the importance of the principle of complementarity (for instance) in the application and interpretation of subsequent articles’¹⁸.

Both opinions confirm that the Preamble does not belong in the operative part of the Statute and that its legal significance is limited, i. e., to describe the main purposes of the Statute and results of the negotiation process as well as to reiterate – and perhaps specify – the obligations of States in certain respects. The Preamble, therefore, has to be taken into consideration when interpreting the articles and provisions of the Statute.

As can be seen from the common heading (‘Rome Statute of the International Criminal Court’) the Preamble is an integral part of the Statute. Both the Preamble and the operative part of the Statute must, therefore, be treated equally in comparison with other sources of international law pursuant to article 21 para. 1 ICCS. Of course, the operative articles have a higher rank than the Preamble. The Preamble would normally only need to be considered in cases of doubt, as mentioned by the ILC in its commentary¹⁹.

¹⁵ See UN Doc. A/CONF.183/C.1/L.82. See for an additional aspect of this development mn 7.

¹⁶ For both quotations see 1994 ILC Draft Statute, commentary to the Preamble, paras. 3 and 4, p. 44, reprinted in: Bassiouni, *Court* (1998).

¹⁷ *Ad Hoc* Committee Report, para. 37, p. 7, reprinted in: Bassiouni, *Court* (1998) 674.

¹⁸ *Ad Hoc* Committee Report, para. 36, p. 7 (brackets added) reprinted in: Bassiouni, *Court* (1998) 674; see also para. 54, p. 11: ‘... reflected not only in the preamble but also in an operative provision’. See also 1996 Preparatory Committee I, para. 63, p. 19: ‘... appropriate language could be added to the preamble or on operative provision’ and para 156, p. 36: ‘... the preamble of the Statute to reiterate the obligation of States in this respect’.

¹⁹ 1994 ILC Draft Statute, p. 27, Commentary to the Preamble, para. 3. The Preamble should especially be considered in Art. 35 (now Article 17) in the context of the admissibility test, 1994 ILC Draft Statute, p. 52, Commentary to Art. 35, para. 2, <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf> last accessed 14 May 2015; see further *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-1497, AC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, AC, 25 September 2009, para. 78, <<http://www.legal-tools.org/doc/ba82b5/>> last accessed 14 May 2015 (determining the admissibility criteria ‘[with] regard to paragraph 10 of the Preamble and article 1 [of the Rome Statute]’); conc. with respect to complementarity *Situation in the Republic of Kenya*, No. ICC-01/09-19-Corr, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 53, <<http://www.legal-tools.org/doc/f0caaf/>> last accessed 14 May 2015. See also former ICC Judge Pikis, *The Rome Statute for the ICC* (2010), p. 15, para. 38: ‘The Preamble can neither override nor put a gloss on the meaning of statutory provisions other than the one warranted by their wording. Its interpretative value lies in identifying the wider objectives of a treaty and the drawing of its parameters.’.

Since the Preamble is ‘part of the context within which a treaty should be interpreted’ and ‘intended to assist in the interpretation and application of the Statute’²⁰, it must also be considered when the Statute or specific articles or provisions thereof shall be amended and reviewed according to articles 121–123 ICCS. This ‘limiting or prejudicing’ effect of the Preamble had to be taken into account when drafting the elements of crime (Article 9 ICCS)²¹ and the crime of aggression (Article 8*bis* ICCS)²².

The moral and political importance of the adopted Preamble should not be overlooked. 5
The credibility of States that have signed the Statute, especially those that decide to become States Parties, will in large part depend on their unreserved respect for the principles and standards of the Preamble. This is particularly true with regard to preambular paragraph 6, which recalls the duty of States to exercise their criminal jurisdiction to fulfil the purposes and aims described in the Preamble, even with regard to those international crimes not falling within the jurisdiction of the Court.

In Nuremberg and Tokyo the Allies repeatedly declared that the law according to which they judged the major war criminals would have to be applied in the future to judge their own behaviour. The same is true with regard to all States Parties of the Rome Statute. Their fundamental moral obligation has to be taken as seriously, if not more, as the words of the American Chief Prosecutor, Justice Robert H. Jackson:

‘We must never forget that the record on which we judge these defendants to-day is the record on which history will judge us to-morrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice’²³.

B. Analysis and interpretation of elements

The Preamble was adopted with the rest of the Statute at the Rome Conference by no less 6
than 120 negotiating States, whilst 20 States abstained, and seven voted against it. The chapeau of the Preamble did not, however, appear in the adopted version, even though it was contained in earlier drafts and its absence was pointed out to members of the Drafting Committee before adoption. It had simply been forgotten in the Report of the Drafting Committee to the Committee of the Whole on 16 July 1998²⁴, the most hectic day before the closing session of the Conference on 17 July 1998. It was later reinserted, when, after the Rome Conference, the whole Statute was examined carefully and minor corrections, which had been overlooked during the frenetic last three days of the Conference, were distributed to the participating States and other institutions for approval or objection within a specified time period.

It was obvious that only ‘[t]he States Parties to this Statute’ could ‘[h]ave agreed as follows’, namely to establish the ICC and bring it into operation. Consequently, the omission of the chapeau was considered a clear case of oversight and the alteration accepted. Any interpretation of the Preamble without its chapeau would, in any event, have led to the same result²⁵.

²⁰ See for the first quotes *Ad Hoc* Committee Report, para. 37, p. 7 reprinted in: Bassiouni, *Court* (1998) 674 and for the latter Report of the ILC, 1994 ILC Draft Statute, commentary to the Preamble, para. 3, p. 44 reprinted in: Bassiouni, *Court* (1998) 722.

²¹ See commentary by Clark in this volume.

²² See the commentary by Zimmermann and Freiburg in this volume.

²³ *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg*, Part I, 20 Nov. 1945 to 1 Dec. 1945, p. 51; for the German version and a similar statement by the French Chief Prosecutor Francois de Menthon, see *Der Prozess gegen die Hauptkriegsverbrecher vor dem Internationalen Militärgerichtshof Nürnberg, Vol. II* (1947–1949) 118 respectively *id.*, v (1947–1949) 480.

²⁴ See UN Doc. A/CONF.183/C.1/L.82 in comparison with the Recommendations of the Co-ordinator, 14 July 1998, UN Doc. A/CONF.183/C.1/L.73, which were, with minor changes, adopted by the Committee of the Whole.

²⁵ For the corrections made by the Drafting Committee in cooperation with the Committee of the Whole, see UN Doc. A/CONF.183.C.1/L.61, L.73 and L.82. See also Note from the Secretary General, C.N.502.1998. *Treaties-3* (Depositary Notification).

I. Paragraph 1: Global context

7 Preambular paragraph 1 makes clear that States Parties, when accepting the Statute, are '[c]onscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time'. This represents an important statement of fundamental normative considerations that seem to have become universally recognised. Opening the Preamble with such a declaration serves as a useful reminder that the foundational principles and interests underlying the emerging system of international criminal justice do not exist in a normative vacuum. Rather, they echo, in the arena of international affairs, the loftiest aspirations of an ever advancing civilisation.

Being aware 'that all peoples are united by common bonds, their cultures pieced together in a shared heritage' means that all human beings, regardless of their citizenship and religious, ethnic, social or other origin or identity, are essentially members of one human race simply by being human beings. Born with inherent potentialities and equal in dignity, all human beings enjoy the same fundamental human rights and freedoms that protect interests such as life, physical integrity, personal liberty and individual conscience. Dignity is the core concept here and the basis of the universal enforcement of international criminal law.²⁶ The references to 'common bonds' and 'shared heritage' recognise that humankind is essentially one, despite political, legal or socio-economical divides or considerations of national or geographic separation. The enforcement of international criminal law through an international jurisdiction has the potential to contribute to the further unification of humankind by bringing peace through justice.

At the same time preambular paragraph 1 recognises that the peoples of the world are entitled to preserve the essential diversity of humankind as it traditionally exists as well as evolves in the future. It refers to the cultures being 'pieced together' and that this constitutes a 'delicate mosaic'. Essentially, paragraph 1 addresses the need for the various peoples of the world to afford respect and tolerance for one another.

The unity in diversity of humankind, as recognized by the metaphor of a 'delicate mosaic', was already expressed in a proposal by Andorra of 30 June 1998, which emphasized:

'that our cultures are woven together in a shared history, a delicate tapestry that may at any moment be rent and torn asunder by unspeakable acts of brutality and ignorance that threaten the well-being of our world'²⁷.

The original Andorran image of the 'tapestry' was later replaced with the reference to a mosaic. The delegations of Japan, France and some Islamic States found 'tapestry' to be culturally inappropriate. Once 'tapestry' was replaced with 'mosaic', the verb 'rent' did not make sense any longer. It is noteworthy that the Drafting Committee deleted the image of the 'mosaic' altogether (as it has now become) through document L. 82, but Andorra objected firmly to this change. It was put back in through L. 76, later in the day on 16 July 1998 (although given a higher number, L. 82 was in fact issued before L. 76). The original proposal gradually lost its scope and flavour, as the expression 'be rent and torn asunder' was first replaced with 'be pulled apart' and finally with 'be shattered', and some of its concepts were incorporated into other paragraphs; 'threaten the peace, security and well-being of our world', for instance, was placed in preambular paragraph 3.

Notwithstanding these alterations, the final format of the paragraph expresses the recognition by the States negotiating at the Rome Conference that this 'delicate mosaic', the cultures of all peoples pieced together in a shared heritage, may 'be shattered at any time'. Armed conflicts constitute an integral part of the reality of international affairs, providing sobering

²⁶ See insofar regarding the *ius puniendi* of ICL Ambos (2013) 33 *OJLS* 293 *et seq.*

²⁷ UN Doc. A/CONF.183.C.1/L.32.

material that confirms that such conflicts continue to generate 'grave crimes [that] threaten the peace, security and well-being of the world', as referred to in preambular paragraph 3.

II. Paragraph 2: Reminder to victims

Endeavours to develop international criminal law and to establish an international criminal jurisdiction have been stirred since mid-18th century by 'unimaginable atrocities', shocking not only distinguished individual observers such as Henry Dunant and Friedrich von Martens. Since then new waves of atrocities have moved steadily better organized institutions to exert pressure on combatants to conduct hostilities with at least a bare minimum of humanity. New armed conflicts, however, seemed bent on evoking deeper levels of inhumanity, thus challenging society's increased desire to ensure elementary respect for basic human rights and freedoms.

Over the centuries and especially after World War I the number of victims in armed conflicts had become as unpredictable as the events leading up to such cruelties. At the end of World War II the figures of victims had reached such abhorrent proportions that they unavoidably obscured the individual victim and his or her sufferings. This development shocked people and the conscience of humanity. After this cruel awakening the Allies and the UN devoted their energies to promote the rule of law in an effort to protect themselves and those lacking the economic, political or legal capacity against state sanctioned abuse of power. Earlier, the Carnegie Endowment for International Peace had investigated the causes of the Balkan Wars 1912/13 and reached the axiomatic conclusion that those in power could have stopped the conflict and the attendant atrocities with just one word²⁸. Subsequently, the Allied powers of World War I were too concerned with imposing Carthaginian peace terms and exacting reparations to be far-sighted in relation to the establishment of a permanent international criminal jurisdiction.

The move towards establishing a framework of resistance on behalf of potential victims all over the world nevertheless improved in the 1930s with the endeavours of the international community, as evidenced by the Briand Kellogg Pact, the General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928, and the Convention for the Prevention and Punishment of Terrorism of 1937²⁹. The situation during and after World War II brought victims even closer together and concentrated the human conscience once more on the plight and powerlessness of victims of the most serious international crimes. The sheer numbers of victims and their suffering transcended all imagination. The concept of justice was revisited so that it could be meted out not only in the name of individuals or groups of victims, but also on behalf of humanity as such. In an effort to ensure that this history remains at the forefront of the collective human conscience, the Preamble refers to the suffering of millions of the most innocent human beings³⁰.

²⁸ See Carnegie Endowment for International Peace, Division of Intercourse and Education, *Report of the International Commission to Inquire into the Causes and Conduct at the Balkan Wars*, Publication No. 4, reprinted 1993 with an introduction by Kennan; for the Versailles Peace Treaty see Reichsgesetzblatt of Germany No. 140 (1919). See also Segesser (2006) 31 *Peace & Change* 4, 533 *et seq.*

²⁹ See for the text and the number of ratifications League of Nations-Treaty Series, Doc. 7, No. 2137, pp. 190 *et seq.* (1929), and for the Convention for the Prevention and Punishment of Terrorism Triffterer, *Preliminary Remarks* (2008) mn 2 with fn. 3 there.

³⁰ Besides children and women men are mentioned; the latter may be caught by their own activities which tend to generate an autonomous, self-executing dynamic that strikes back on the individual originator, making him perpetrator and victim. The number of soldiers needing psychiatric treatment after the wars in Vietnam and on the territory of the former Yugoslavia confirms this danger.

III. Paragraph 3: Recognition of protected values

- 9 Whilst preambular paragraph 2 is a *memento ad memoriam*, paragraph 3 recognises that the ‘unimaginable atrocities’ mentioned in paragraph 2 are not just ‘ordinary crimes’ with which society has learned to live (alas, not yet to prevent effectively). Rather, they are ‘such grave crimes’ because they endanger protected legal values of the international community as a whole: ‘the peace, security and well-being of the world’. This formula refers primarily to basic, inherent values of the community of nations, but also to those which belong to the national legal orders but need supplementary protection by the international legal order to counter the threat of abuse of State power. The formula makes clear that attacks by States on the well-being of its own population, especially cases of genocide, deportation or expulsion, are no longer an internal affair, but endanger the international community as such³¹.
- This preambular paragraph contains the basis for international criminal law, namely that this emerging discipline is in reality the criminal law of the community of nations, with the function of protecting the highest legal values of this community against ‘such grave crimes [that] threaten the peace, security and well-being of the world’³².
- 10 The first two values are well known and expressly recognized by the UN Charter. They appear there more than twenty times³³ and have featured prominently in the different ILC Draft Codes of Crimes (formerly: Offences) against the Peace and Security of Mankind³⁴. Article 20 of the 1996 Draft Code expressly states that ‘war crimes constitute[s] a crime against the peace and security of mankind when committed in a systematic manner or on a large scale’.
- 11 Against this background, paragraph 3 marks two developments which ought to be kept in mind when the Statute is interpreted with due consideration being given to the Preamble³⁵:
- The peace and security of mankind were for a long time the only expressions summarizing the basic, inherent values of the community of nations which had to be protected in the interest of all, individuals and States alike. According to common opinion such protection should include, as *ultima ratio* against especially grave violations, *international* criminal law by which such crimes could be punished *directly*. The formula ‘*well-being of the world*’ was added in order to emphasize that not only the narrow security of people, but the distribution of basic conditions for their well-being, especially minimum guarantees for the existence of human life, is at stake. It describes *additional* aspects of value protection, which have to be respected, for instance, when defining aggression (now Article 8bis ICCS) or interpreting elements of crimes.³⁶
 - There is a change in the wording which might be of equal if not greater importance. Previously, ‘peace and security’ were both connected with ‘mankind’ or at least this reference was clearly expressed with regard to ‘security’. The Rome Statute does not mention the word ‘mankind’ anymore, while ‘conscience of humanity’, for instance, appears at the end of paragraph 2. The structure of the paragraph means that the concept of ‘security *and well-being*’ refers to ‘the world’, whilst only peace can stand by itself. However, it may as well be included in these references under the expression ‘peace ... of the world’.

³¹ For details see Triffterer, *Preliminary Remarks* (2008) mn 11 *et seq.*, 20 *et seq.* with fn. 47 and 85. See also *Prosecutor v. Tadić*, Case No. IT-94-I-AR 72, Judgment, Appeals Chamber, 2 Oct. 1995, para. 59, where the Appeals Chamber quotes and confirms from the Trial Chamber (para. 42) that these crimes are ‘transcending the interest of any one State’ and that ‘they affect the whole of mankind’.

³² Triffterer, *Preliminary Remarks* (2008) mn 14 *et seq.* (brackets added).

³³ Triffterer, in: Gössel and Triffterer (eds.), *Gedächtnisschrift für Heinz Zipf* (1999) 545 *et seq.* with references in fn. 110 to the relevant articles of the UN Charter.

³⁴ Already as early as 1928, for instance, it was for States considered ‘their solemn duty to promote the welfare of mankind’ as a whole or at least independent of their individual territory, see note 1, General Treaty 1928, Preamble, para. 1, p. 190.

³⁵ See to this function of the Preamble mn 4.

³⁶ See, e.g., Triffterer, in Schünemann *et al.* (eds.) *Festschrift für Claus Roxin* (2001), 1415 *et seq.*

But the use of the word ‘world’ in preference to ‘mankind’ means more than just mankind or humanity. It includes not only human beings but also the world around them and thus *its* well-being, for instance, the natural environment which is the basis for our lives. This enlargement is mirrored by the war crimes definitions in article 8 para. 2 (b) (iv), where ‘the natural environment’ is expressly mentioned and (xxi), where one of the alternatives is defined as ‘outrages upon personal dignity’³⁷; the latter covers ‘in particular humiliating and degrading treatment’, but goes (far) beyond these two examples and may include cases where the well-being may be violated by interfering with basic living conditions or even without causing physical harm. The ICTY has crystallised this conception with the following words:

‘The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law: indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their person dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person’³⁸.

Whatever may emerge from the jurisprudence of the ICC over the final interpretation to be given to this new approach in paragraph 3, it will be interesting to see if this paragraph provides a basis for broadening the scope of international criminal law by progressively developing new definitions for crimes falling under this concept even if they do not lie within the jurisdiction of the Court³⁹.

IV. Paragraph 4: Affirmation of aims to be achieved

After recognizing in paragraph 3 the theoretical basis and justification of international criminal law by pointing out which values it is meant to protect, paragraph 4 affirms the practical aims of this new discipline. The subject-matter is not all ‘crimes of concern to the international community as a whole’, not even all serious crimes, but only ‘the most serious crimes’. This implies either that there are serious and ordinary crimes ‘of concern to the international community as a whole’ or that such crimes are not ‘of concern to the international community as a whole’. The first interpretation is preferable, because, with reference to paragraph 3, only ‘the most serious crimes’ are ‘such grave crimes’ that threaten to violate protected values of this community, namely ‘the peace, security and well-being of the world’. Furthermore, paragraph 4 clarifies that institutions other than the ICC have to deal with crimes falling outside the group of ‘the most serious crimes of concern to the international community as a whole’.

Paragraph 4 further affirms an objective of criminal policy, namely, that the particularly grave and dangerous group of ‘the most serious crimes ... must not go unpunished’. This has always been the main aim of international criminal law, at least in those cases where its deterrent effect has not been successful. The ICC has confirmed this preambular aim in the context of its interpretation of the inaction scenario within the framework of Article 17.⁴⁰

³⁷ For a corresponding interpretation see *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, Trial Chamber, 10 Dec. 1998, para. 183, p. 72.

³⁸ *Ibid.*

³⁹ For some considerations in this direction see Triffterer, in: Gössel and Triffterer (eds.), *Gedächtnisschrift für Heinz Zipf* (1999) 532 *et seq.* and 545 *et seq.* See also for the basis of such an agreement Triffterer, *Preliminary Remarks* (2008) mn 20 *et seq.*, all with further references.

⁴⁰ *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-1497, AC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, AC, 25 September 2009, para. 79, < <http://www.legal-tools.org/doc/ba82b5/>> last accessed 14 May 2015

How this aim will be reached, is of lesser importance. Since its early beginnings those favouring the development of international criminal law have always been aware that the possibility to prevent or prosecute crimes under international law by a direct enforcement model may lie in the distant future and that, therefore, indirect enforcement by States is needed to guarantee ‘their effective prosecution’. Of course, the prosecutorial practice of the ICC so far clearly shows that not even all international core crimes by most responsible can be investigated and prosecuted by the ICC⁴¹. Hence, it is necessary to state that ‘the effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’, i. e., by making use of the existing international criminal justice system.⁴²

- 14 This paragraph does not deal with the relationship between the jurisdiction of the ICC and national jurisdictions. It primarily makes clear that the ICC requires the support of national criminal justice systems and international cooperation for an effective prosecution of ‘the most serious crimes of concern to the international community as a whole’. This is true not only in cases where the national jurisdiction directly prosecutes such crimes, but also in cases where the ICC is exercising its own jurisdiction; in the latter situation the ICC depends heavily on national cooperation, especially with regard to the arrest or surrender of suspects and the gathering of evidence⁴³.

V. Paragraph 5: Prevention by enforcement

- 15 The aim of paragraph 4, to guarantee ‘that the most serious crimes ... must not go unpunished’, leads logically to the objective expressed in paragraph 5: ‘to put an end to impunity for the perpetrators of these crimes’. But the mere goal of punishing covers only one of the two functions of criminal law, namely the repressive one. Successful crime prevention or deterrence, the first function of criminal law, is the more effective method of protecting legal values in practice. Therefore, both functions and their interrelation are mentioned in paragraph 5. ‘[T]o put an end to impunity’, the necessary substantive and enforcement basis must also be realised. An effective enforcement at the same time contributes to the prevention of such crimes by building awareness and showing potential perpetrators that ‘the most serious crimes of concern to the international community as a whole’ will no longer enjoy immunity from effective enforcement mechanisms⁴⁴. Thus, paragraph 5, considered in connection with paragraph 4, focuses mainly on ‘the prevention of such crimes’, meaning the ‘core crimes’ to which has been referred in the preceding paragraphs of the Preamble, in order to protect the highest values of the international community, mentioned in paragraph 3⁴⁵. Besides, article 27 (‘Irrelevance of official capacity’) is one of the clearest manifestations of this rejection of immunity and impunity in the operative part of the Statute.

(arguing that the anti-impunity purpose ‘would come to naught’ if unwillingness and inability had to be considered in case of inaction in the context of Article 17. As a result ‘a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal Court. Impunity would persist unchecked and thousands of victims would be denied justice.’).

⁴¹ See Triffterer, *Preliminary Remarks* (2008) mn 49 *et seq.*

⁴² On this system see Ambos, *Treatise ICL I* (2013) 56 with further references.

⁴³ See for details Triffterer, *Preliminary Remarks* (2008) mn 50 *et seq.* with further references and especially mn 61.

⁴⁴ See for instance Crosette, ‘A ‘Pinochet Syndrome’ Is Humbling Some Strongmen of the World’, *Harald International Tribune*, 24 Aug. 1999.

⁴⁵ For a general overview on the possibilities and limits to effectively fight criminality see Bolle and Hobe (eds.), *Legal Aspects of Crime Prevention – In Memoriam Helge Röstad* (1999), Stahn (2005) 18 *LeidenJIL* 425 and Triffterer, in: Politi and Nesi (eds.), *The Rome Statute of the International Criminal Court* (2001).

VI. Paragraph 6: Recalling to States their duties

As already stated in paragraph 4, the practical side of the affirmation needs to be supported by national criminal jurisdiction. Thus, paragraph 6 reminds (‘recalling’) the States Parties that it is the duty of every one of them to ‘exercise its criminal jurisdiction over those responsible for international crimes,’ listed in article 5. 16

The wording of paragraph 6 refers to ‘international crimes’, a rather broad notion compared with the list of ‘core crimes’ in article 5. Some aspects of this broader concept emerge from the drafting history of article 5. There was considerable debate as to whether other crimes, like terrorist or drug offences, should be included as well⁴⁶. Moreover, given the context of paragraph 6, it appears that this wording reminds States that their duty is not limited to exercising their criminal jurisdiction over those responsible for crimes within the jurisdiction of the ICC; this has already been affirmed in paragraph 4. The purpose of paragraph 6 is to recall that there is a class of ‘crimes under international law’ for which States have an obligation to prosecute even if these crimes do not fall within the jurisdiction of the Court. As regards these crimes the only dispute was whether there is an obligation to proceed on the basis of universal jurisdiction or on the basis of more traditional jurisdictional links. The paragraph was deliberately left ambiguous. It has been described by Roger S. Clark as ‘a sort of Martens clause which insists that just because the others are not expressly dealt with this does not mean that there is now impunity for them’⁴⁷. Furthermore, it is in the interest of all States to fight transnational organized crimes falling within a broad concept of international crimes, through combined efforts. The Preamble, therefore, reminds States to cooperate not only with the Court on the vertical level, but also pursuant to their mutual interest in order to better protect well established legal values in their respective national legal systems and to be more effective in fighting, for instance, internationally organized crime⁴⁸. 17

VII. Paragraph 7: Reaffirmation of the UN Charter principles

Preambular paragraph 7 reaffirms the purposes and principles of the UN Charter, as expressed by its articles 1 and 2, ‘in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations’. The UNO was created by nations united to ‘save succeeding generations from the scourge of war’⁴⁹. It is exactly during wars that crimes that fall within the jurisdiction of the Court occur most frequently. In wars the life and physical integrity of civilians and other persons protected by international humanitarian law tend to come under massive attack. Maintaining and restoring international peace and security, therefore, bears directly on the need to undertake international judicial intervention in the face of crimes of international concern. To the extent a reaffirmation of fundamental Charter principles may serve as a reminder to States to effectively prevent and stop armed conflicts pursuant to the settlement regimes of the Charter, it contributes to the international prevention of the crimes within the Court’s jurisdiction. As international peace and criminal justice mandates gradually develop more mature modes of co-existence, it may be useful to remind ourselves of the commonality of the fundamental values of human life and person underlying both the Charter and the ICC Statute. 18

⁴⁶ For a very broad notion see Triffterer, *Preliminary Remarks* (2008) mn 60 *et seq.*; see also Zimmermann, *article 5*, mn 5 *et seq.* See also Cassese (2006) 4 *JICJ* 434 *et seq.*

⁴⁷ Personal letter sent to O. Triffterer.

⁴⁸ See for the differentiation between crimes under international law and crimes under national law for which the international cooperation is regulated by international documents Triffterer, in: Gössel and Triffterer (eds.), *Gedächtnisschrift für Heinz Zipf* (1999) 545. See also Triffterer, *Preliminary Remarks* (2008) mn 50 *et seq.*

⁴⁹ Preambular paragraph 1 of the UN Charter.

VIII. Paragraph 8: Non-intervention in internal affairs

- 19 The eighth preambular paragraph emphasizes that nothing in the Statute ‘shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State’. The ICC Statute concerns individual criminal liability and the enforcement of certain norms of international criminal law. It does not deal with State responsibility or the settlement of disputes between States. It is correct that the subject-matter jurisdiction of the Statute includes numerous prohibitions of international law which are applicable in internal armed conflict, but article 8 para. 3 makes clear that this ‘shall not affect the responsibility of a Government to ... defend the unity and territorial integrity of the State, by all legitimate means’. Alleged crimes occurring in internal armed conflicts will undoubtedly be made the subject of extensive presentation of evidence in the Court, but that does not amount to intervention by one or more States Parties in the internal affairs of the State which suffered the internal armed conflict or in the armed conflict as such. It may be warranted to describe it as international judicial intervention pursuant to treaty obligations or Security Council action based on Chapter VII of the UN Charter. But the ICC Statute does not provide a legal basis for intervention in internal affairs or armed conflicts by one or more individual States. One may well question the necessity of including preambular paragraph 8 in the Statute.

IX. Paragraph 9: Crimes of international concern

- 20 Paragraph 9 states the determination, ‘to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole’. The main point here is the signal that only ‘the most serious crimes of concern to the international community as a whole’ may fall within the jurisdiction of the Court. Operative article 1 reaffirms this concern by repeating that the Court ‘shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern’. The fact that it was surprisingly difficult to negotiate the language of article 1 does not reflect meagre support for the restrictive approach taken. Moreover, when agreement had been reached on the language of article 1, the relevant part of preambular paragraph 9 flowed naturally from the former.
- 21 Paragraph 9 does not require that the crime concerned is a crime attacking the international community as a whole directly. It must be ‘of concern to’ the whole international community. Such a concern can be established by different links. The Statute envisages that legally recognised values of the community of nations as a whole are protected by its jurisdiction. A crime whose commission threatens such protected values is punishable directly under international law, even if it may not be punishable according to the law of the State of nationality or territoriality⁵⁰. In any event, the idea is not to construct a threshold whereby war crimes must also be crimes against the whole international community, with genocide and crimes against humanity already incorporating legal interests that go beyond the protection of the individual victim. However, all crimes within the Court’s jurisdiction may, even if attacking individual persons only, threaten the peace and security of mankind and, thus, be of concern to the whole international community and directly punishable under the laws of the international community⁵¹.

⁵⁰ See, for example Triffterer, *Preliminary Remarks* (2008) mn 15 *et seq.* and 25.

⁵¹ See, for example Triffterer, *Preliminary Remarks* (2008) mn 16 *et seq.*

X. Paragraph 10: Complementarity

This subparagraph simply provides ‘that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’. This is an essential quality of the Court’s jurisdictional system. The national criminal justice systems of States Parties have, in principle, jurisdictional primacy vis-à-vis the Court, which represents a reversal of the system of the ICTY and ICTR. It essentially dictates that as long as a national criminal jurisdiction is able and willing to genuinely investigate and prosecute the matter which has come to the Court’s attention, the Court does not have jurisdiction. Of course, the devil lies in the details as can be seen from Article 17–19 ICCS.⁵² 22

The principle of complementarity is applicable also with regard to ‘internationalized’ national Courts or Tribunals, like the Court of Sierra Leone or the Tribunal of East Timor.⁵³ If the Court concludes that such a national forum is available, it must show deference to the national jurisdiction which has seized itself of the matter. The ICC is only meant to supplement national criminal justice systems. Primary responsibility for enforcing criminal liability for violations of the subject-matter jurisdiction of the Court rests on the States Parties. The matter stands in a different light when the Security Council has referred a situation to the Prosecutor pursuant to Chapter VII of the UN Charter as recognised by article 13 (b).⁵⁴

XI. Paragraph 11: Respect for and the enforcement of international justice

The final preambular paragraph expresses the general resolve of the States Parties to the Statute to ‘guarantee lasting respect for and the enforcement of international justice’. This is a resolve to guarantee both lasting respect for international justice and, more importantly, its enforcement. The broad term ‘international justice’ is used, not ‘international criminal justice’. Although the paragraph does not say international enforcement of international justice, its preambular context clearly suggests that ‘international justice’ should be interpreted as ‘international criminal justice’ which involves the enforcement of international criminal law in international and national criminal jurisdictions, including hybrid or internationalized Courts and Tribunals such as the Extraordinary Chambers in Cambodia or the Courts in Kosovo. Thus, reference is again made to the international criminal justice system mentioned above. 23

It is not easy to measure the value of a declaration by a State that it resolves to guarantee lasting respect for international justice. It is difficult to imagine any State that would not be prepared to make such a political declaration but it may prove as mere lip service. This part of the paragraph may prove to have a real function to the extent it serves as a reminder to States Parties of the object and purpose of the Statute and their obligation to co-operate fully with the Court in its investigation and prosecution of crimes within its jurisdiction and to comply with its requests.

The relative importance of the final preambular paragraph lies in the cumulative resolve to guarantee the enforcement of international justice. This amounts to a guarantee by the States Parties that they will enforce international criminal law either through international or national criminal jurisdictions or by special internationalised Courts and Tribunals.

⁵² See the respective commentaries by Schabas/El-Zeid, Nsereko and Hall/Nsereko/Ventura in this volume.

⁵³ On these ‘mixed’ tribunals see Ambos, *Treatise ICL I* (2013), 40 et seq.

⁵⁴ See the commentary by Schabas/Pecorella in this volume.

PART 1 ESTABLISHMENT OF THE COURT

Article 1* The Court

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Literature: Ambos, K. and Othman, M. (eds.), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Max Planck Institute for International Law 2003); Augustinyova, G., 'Introductory Note to Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi': Decision on the Admissibility of the Case against Abdullah Al-Senussi', (2014) 53 *ILM* 273; Bassiouni, M., ed., *International Criminal Law: Enforcement* (Transnational Publishing 1987); Bergsmo, M., Bekou, O. and Jones, A., 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools', (2010) 2 *GoJIL* 791; Bohlander, M., 'Possible Conflicts with the Ad Hoc International Tribunals', in: Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, I (Oxford University Press 2002) 687; Bouzat, P., 'Introduction', in: Bassiouni, M.Ch. (ed.), *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Martinus Nijhoff 2nd edition 1987) XI; Burchard, C., 'Ancillary and Neutral Business Contributions to 'Corporate Political Core Crime' Initial Enquiries Concerning the Rome Statute' (2010) 8 *JICJ* 919; Burke-White, W., 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2008) 19 *CLF* 59; *id.*, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', (2008) 49 *HarvLLJ* 53; El Zeidy, M., 'The Gravity Threshold under the Statute of the International Criminal Court', (2008) 19 *CLF* 35; Jescheck, H.H., Der XIV: Internationae Strafrechtskongreß der AIDP (Tagungsbericht)', (1990) 102 *ZStW* 658; Jessberger, F. and Geneuss, J., 'The Many Faces of the International Criminal Court', (2012) 10 *JICJ* 1081; Kremnitzer, M., 'A Possible Case or Imposing Criminal Liability on Corporations in International Criminal Law', (2010) 8 *JICJ* 909; Kyriakakis, J., 'Corporations and the International Court: The Complementarity Objection Stripped', (2008) 19 *CLF* 115; Murungu, C.B., 'Toward a Criminal Chamber in the African Court of Justice and Human Rights', (2011) 9 *JICJ* 1067; Pocar, F., 'The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law', in: Hestermeyer, H.P., König, D. and Matz-Lück, N. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff 2011) 1705; Rastan, R., 'The Jurisdictional Scope of Situations before the International Criminal Court', (2012) 23 *CLF* 1; Schabas, W.A., 'Introductory Note to Documents of the Review Conference of the International Criminal Court', (2010) 49 *ILM* 5; *id.*, "'Complementarity in Practice': Some Uncomplimentary Thoughts', (2008) 19 *CLF* 5; *id.*, 'The Geometry of Transitional Justice: Choices of Institutional Design', (2005) 18 *LeidenJIL* 425; Smeulers, A., Weerdesteijn, M. and Hola, B., 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance', (2015) 15 *ICLR* 1; Stahn, C. and El Zeidy, M. (eds.), *The International Criminal Court and Complementarity, From Theory to Practice* (Cambridge University Press 2011); Stahn, C., 'Complementarity: A Tale of Two Notions', (2008) 19 *CLF* 87; Tillier, J., 'The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?', (2013) 13 *ICLR* 507; Triffterer, O., 'Prosecution of States for Crimes of State', (1996) 67 *RIDP* 341; *id.*, 'Bestandsaufnahme zum Völkerstrafrecht', in: Hankel, G. and Stuby, G. (eds.), *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (Hamburger Edition 1995) 169; *id.*, 'International Crimes and Domestic Criminal Law, Efforts to Recognize and Codify International Crimes, General Report Part I', (1989) 60 *RIDP* 29; van der Merwe, H.J., 'The Show Must Not Go On: Complementarity, the Due Process Thesis and Overzealous Domestic Prosecutions', (2015) 15 *ICLR* 40; von Weber, H., *Internationale Strafgerichtsbarkeit* (F Dümmler 1934).

* Michael Bohlander would like to thank Viviane Arnolds, PhD candidate at Durham University, for her help in updating the literature resources, and Verity Adams, PhD candidate at Durham University, for her support with the editing process.

The views expressed in this book are solely those of the author and do not represent the views of the ECCC, the United Nations or the Government of the Kingdom of Cambodia.

Content

A. Historical development	1
B. Analysis and interpretation of elements	6
1. ‘An International Criminal Court ... is hereby established’	6
2. ‘a permanent institution’	9
3. ‘the power to exercise its jurisdiction’ ‘as referred to in this Statute’	12
b) ‘over persons for the most serious crimes of international concern’	15
c) Complementarity ‘to national criminal jurisdictions’	18
4. ‘The jurisdiction and functioning ... shall be governed by the provisions of this Statute’	20
C. Relationship to other international criminal courts	21

A. Historical development

- 1 The scope and contents of an introductory article for a Statute establishing an international criminal judicial body underwent several changes from the inception of such an idea and throughout the drafting process of article 1. As early as 1926, drafts by the ILA and the AIDP used the heading ‘Purpose of the Court’ or ‘Tribunal’. All the drafts contained the words ‘is hereby established’ or ‘il est institué’, thus indicating that jurisdiction was meant to be established *eo ipso* when the treaty entered into force, as opposed to requiring a further act of implementation¹.
- 2 However, this changed when the UN, after the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, installed a Committee on International Criminal Jurisdiction. At that time it was undisputed that such jurisdiction was an inherent part of the international community’s legal system, the law of nations, yet the modes of its establishment and exercise were still unclear. Accordingly, the Draft Statute presented by the Committee in 1951, and its revised version in 1953, used the words ‘is thereby established’; this phrase was meant to comprise all possible modes of establishment, for example, a permanent or an *ad hoc* Tribunal, created by resolution of the General Assembly or by the Security Council. ‘[T]hereby’ was seen as referring to aspects outside the document itself, thus indicating the need for some act of implementation to give the draft effect as an international document². During the ensuing development, drafts inclined towards a treaty-based realisation contained the words ‘is hereby established’, indicating that adoption and ratification should be self-executing; others, especially those prepared to compromise on the question of the mode of establishment, continued to use ‘is thereby established’.
- 3 The 1994 ILC Draft Statute employed the first of the above-mentioned varieties, i.e. a more neutral wording. It corresponded with the original task assigned to the ILC by the General Assembly ‘to consider further and analyse the issues concerning the question of an International Criminal Jurisdiction’, and ‘to elaborate the Draft Statute for such a Court as a matter of priority’³ and of ‘preparing a widely acceptable consolidated text of a convention for an international criminal court’⁴. Even though the last mandate made it clear that a

¹ Emphasis added; see for a Draft Statute presented by Bellot to the ILA and its Draft agreed upon at the Vienna Conference 1926 as well as for the AIDP Draft 1928 in French, von Weber, *Internationale Strafgerichtsbarkeit* (1934) 136, 144, 155 *et seq.* For the Convention for the Creation of an International Criminal Court of the League of Nations which especially intended to fight terrorism see *League of Nations O.J.Spec.Supp.* 156 (1936) Doc. C. 547 (I). M.384 (I). 1937. V (1938), reprinted in: Bassiouni, *International Criminal Law: Enforcement* (1987) 191 *et seq.* For the history especially of the AIDP see Bouzat, in: Bassiouni (ed.), *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) XI *et seq.*; Jescheck (1990) 102 *ZStW* 658 *et seq.*

² See for the two Draft Statutes 1951, Report of the Committee, UN Doc. A/AC.48/4, Annex I of 5 Sept. 1951, also 1951 Draft Statute, reprinted in: (1952) *AJIL*, Supp. and the second revised 1953 Draft Statute, Annex to the Report (hereinafter: Draft Statutes 1951 or 1953).

³ See G.A. Res. 40/41 of 28 Nov. 1988 and 46/44 of 9 Dec. 1991 as well as 47/33 of 25 Nov. 1992 and 48/31 of 9 Dec. 1993.

⁴ See G.A. Res. 50/46 of 11 Dec. 1995 (emphasis added).

treaty-based establishment should be pursued, the ILC was averse to limiting the possible avenues too early and therefore repeated its original, neutral version. Since then all relevant documents within the Preparatory Committee contained both versions. Even though the Updated Siracusa Draft in its article 2bis(1) by adopting the words ‘is hereby established’ continued the line of the ILA and the AIDP supporting a treaty-based Court, the subsequent Zutphen Draft included both versions until the Rome Conference decided in favour of the ILA/AIDP view⁵.

The development of the remaining terminology in article 1 cannot be reconstructed with similar precision. It was the Updated Siracusa Draft which finally amended article 1 of the ILC Draft Statute by including an article 2bis(1) on the ‘Purpose of the International Criminal Tribunal’. Yet, the aim of extending the complementary international criminal jurisdiction to ‘other international crimes which the States Parties may add to those crimes listed in article 20’ (now article 5) ... or by conferring jurisdiction from the State to the Tribunal’, was not accepted by the majority of States present at the Preparatory Committee and the Rome Conference⁶. There appeared to be a reluctance to making the Court dependent on States conferring jurisdiction, since this seemed to endanger the idea of the inherent nature of an international criminal jurisdiction and its independent operation.

In the last session of the Preparatory Committee, the Norwegian Government broadened the text of article 1 of the 1994 ILC Draft Statute by suggesting that the Court ‘shall have the power to prosecute’, that it should not have general jurisdiction but only ‘for the most serious crimes of international concern’, mentioning the complementarity principle. This proposal summarised the discussions and was inserted, with a few minor changes such as substituting ‘the power to prosecute persons’ with ‘shall have the power to bring persons to justice’, into the final Consolidated Draft. The Rome Conference added that of the most serious crimes punishable under international law, only those ‘referred to in this Statute’ should fall within the jurisdiction of the Court⁷.

B. Analysis and interpretation of elements

1. ‘An International Criminal Court ... is hereby established’

The reference in article 1 to ‘hereby’ is not to the adoption of the Statute on 17 July 1998 by the Rome Conference but to 1 July 2002, the date of its entry into force in accordance with article 126.

Even though the Court was as such established on that date, the Assembly of States Parties first had to prepare its practical implementation. The Assembly is not an organ of the Court, yet with the entry into force of the Statute it, too, came into existence (article 112(1)). The Assembly was invited for its first session by the Secretary-General of the UN after the deposit of the 60th instrument of ratification, acceptance, approval or accession, under article 126(1). The Assembly had to elect the judges, to adopt its own rules of Procedure under article 112(9) and the Rules of Procedure and Evidence under article 51.

1 July 2002 also marks the beginning of its temporal jurisdiction; referrals, declarations of acceptance of jurisdiction or accession as a State Party to the Rome Statute must not relate to any events which occurred before this absolute barrier.

⁵ For the 1994 ILC Draft Statute, 1996 Preparatory Committee II and for the Zutphen Draft see Bassiouni (ed.), *International Criminal Court: Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998); for the Updated Siracusa Draft see Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 941.

⁶ See for the Updated Siracusa Draft commentary on article 2bis(2) to (4).

⁷ For the Norwegian proposals of 24 Mar. 1988 see UN Doc. A/AC.249/1989/WG.8/DP.1. The Report of the Drafting Committee to the Committee on the Whole of 13 July 1998 already contained this addition ‘as referred to in this Statute’. See UN Doc. A/CONF.183/C.1/L.64.

2. ‘a permanent institution’

- 9 The notion of ‘a permanent institution’ was discussed from the beginning⁸. The emphasis on this element lost some of its importance after the avenue of creation *by treaty* was chosen. The idea was not contained in the Convention for the creation of an International Criminal Court of the League of Nations, for example, but it gained importance after the establishment of two *ad hoc* Tribunals, the ICTY and the ICTR⁹.
- 10 The 1994 ILC Draft Statute included this element in article 4 under the heading ‘Status and legal capacity’, emphasizing in its Report the permanent character. This was repeated in paras. 18 and 19 of the Report of the 1995 *Ad Hoc* Committee and in both Siracusa Drafts in article 4. The Preparatory Committee continued in this vein emphasizing in addition the ‘full-time’ character of the Court. In its proposed article 4 it repeated the wording of the 1994 ILC Draft Statute¹⁰ which also was adopted unchanged in article 4 of the Zutphen and the Consolidated Draft. At the end of the Rome Conference this element was incorporated into article 1 because it was felt that it did not fit under the heading of article 4, ‘Legal status and powers of the Court’¹¹.
- 11 The experiences in dealing with crimes under international law after the Second World War convinced the community of nations of the need for a permanent institution which could react immediately. Article 3 of the 1953 Draft Statute had provided ‘Sessions shall be called only when matters before it require consideration’. One of the arguments for giving the court a permanent character was that a ‘permanent court would obviate the need for setting up *ad hoc* Tribunals for particular crimes, thereby ensuring stability and consistency in international criminal jurisdiction’¹². The flexibility to adjust the size of the Court to the needs of practice was provided for by the article 35(1), (2) and (4), in that judges of the ICC ‘shall be elected as full-time members of the Court’ but shall not all ‘be required to serve on the full-time basis’.

Transitional justice scenarios that have arisen after the 1998 Rome Conference, however, demonstrate that there is ample space – and need – for alternatives compared to the traditional exercise of a permanent international criminal court, for example by the use of regional hybrid courts etc.¹³.

3. ‘the power to exercise its jurisdiction’ ‘as referred to in this Statute’

- 12 The Court does not have the power to try any crimes under international criminal law unless they fall under one of the provisions listed in the Statute. Unlike the ICTY in its (in-) famous *Tadić Jurisdiction Decision* of 2 October 1995 it cannot extend its jurisdictional reach by reference to international customary law¹⁴. The Statute can, of course, be amended to include new or repeal existing offences.
- 13 Once a provision conferring substantive jurisdiction over a particular type of crime on the Court is repealed, the Court must discontinue any proceedings based on such a provision, or in the case of multiple charges based on the same facts remove any characterisation related to

⁸ See for this Draft Bellot, the Draft by the ILA Vienna Conference 1926 and also the 1951 and 1953 Draft Statutes.

⁹ See articles 1 and 8 of the ICTY and articles 1 and 7 of the ICTR Statute.

¹⁰ See 1996 Preparatory Committee I, para. 22 in connection with 1996 Preparatory Committee II, paras. 3 *et seq.*
¹¹ Emphasis added. 1994 ILC Draft Code, article 1 and 4 and for the change between 9 and 13 July 1998 compare UN Doc. A/CONF.183/C.1/L.58 (9 July 1998), respectively UN Doc. A/CONF.183/C.1/L.64 (13 July 1998), where the words ‘shall be a permanent institution’ had been included into an article 1 proposed in the Report of the Drafting Committee to the Committee of the Whole.

¹² *Ad Hoc* Committee Report, para. 12.

¹³ See Stahn (2005) 18 *LeidenJLL*. 425; Ambos and Othman (eds.), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003).

¹⁴ *Prosecutor v. Tadić*, No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, <<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>> accessed 24 February 2015.

the repealed offence from the counts charged, under the effect of the *lex mitior* rule of article 24(2), because in the context of the Rome Statute that is equivalent to a decriminalisation, even if the crime in question remains an offence under customary law. This scenario must be distinguished from the withdrawal by a State Party from the Statute. Article 127(2) orders that such a withdrawal shall not ‘prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective’.

The word ‘Statute’ has to be interpreted restrictively and excludes any other source of law, especially the Rules. This follows also from article 51(5) according to which ‘in the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail’.

b) ‘over persons for the most serious crimes of international concern’. Taking into account the historical development of the Statute, especially the limitation of the Draft Statute 1953 compared to the Draft Statute 1951, the first of which included the word ‘natural’ before ‘person’¹⁵, the scope of the term ‘person’ seems rather wide and could include natural and legal persons, such as corporations, for example. The consequences of the elimination of the word ‘natural’ were, however, not expressly considered. It was not included in the 1994 ILC Draft Statute nor in any of the following Drafts for article 1 or the proposal reported by the Preparatory Committee.

The development of article 1 and other articles of the Statute suggest that only natural persons were meant¹⁶, for example, articles 25(1) and 26. Yet, the Special Tribunal for Lebanon, for example, held in 2015 that it had contempt power over legal persons¹⁷. The discussion has become more controversial in recent years with some authors advocating that consideration might be given to the extension to legal persons.¹⁸

Jurisdiction is limited to ‘the most serious crimes of international concern’. The wording here differs somewhat from other instances in the Statute such as paragraphs 4 and 9 of the Preamble or article 5. The difference, it is suggested, will be without any practical impact. However, there have been comments in the literature about the proper manner of establishing what the ‘most serious crimes’ are, not least under the prosecution policy of the Office of the Prosecutor.¹⁹

c) **Complementarity ‘to national criminal jurisdictions’**. The concept of ‘complementarity’ is not explained in article 1 but addressed in article 17. Hence, complementarity means that national jurisdictions take priority unless the competent State is ‘unwilling or unable genuinely to carry out the investigation or prosecution’. This must be clearly distinguished from the question of acceptance of jurisdiction or how a situation is referred to the Court, under articles 12 and 13. Even a UN Security Council referral does not mean that the Court is absolved from the examination of admissibility under article 17, as was made abundantly clear by the decision on admissibility in the case against Gaddafi and Al-Senussi based on the situation in Libya, where the Court held that as far as one of the accused was concerned, Libya retained domestic control and the case against him was accordingly held to be inadmissible²⁰.

¹⁵ See the Report of the Drafting Committee to the Committee of the Whole, UN Doc. A/CONF.183/CP.1/L.64 of 13 July 1998: ‘The Drafting Committee will return to the issue of ‘persons’ in connection with the definition of the term’.

¹⁶ For the question of a responsibility of legal persons see, for example, Triffterer (1989) 60 *RIDP* 29, 61 *et seq.*; id., in: Hankel and Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen* (1995) 169, 215 *et seq.* and id. (1996) 67 *RIDP* 341, 347 *et seq.* all with further references.

¹⁷ *In the Case against Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali al Amin*, No. STL-14-06, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Appeals Panel, 23 January 2015, <www.stl-tsl.org/en/the-cases/stl-14-06/filings-stl-14-06/orders-and-decisions-stl-14-06/f0004-ar126-1> accessed 24 February 2015. 1 16.

¹⁸ Kyriakakis (2008) 19 *CLF* 115; Burchard (2010) 8 *JICJ* 919; Kremnitzer (2010) 8 *JICJ* 909.

¹⁹ El Zeidy (2008) 19 *ILF* 35; Rastan (2012) 23 *CLF* 1; Smeulers et al. (2015) 15 *ICLR* 1.

²⁰ Augustinyova (2014) 53 *ILM* 273.

19 In recent years, and especially after the Kampala Review Conference²¹ complementarity has taken on an additional meaning under the term of ‘positive complementarity’ which relates to the interaction between the Court and the domestic legal systems with the aim of enhancing domestic compliance with the international criminal law environment of the ICC. The Court actively engages in a number of what might commonly be called ‘outreach activities’ in order, for example, to lobby for accession to and implementation of the Rome Statute by States or to raise the relevant rule of law standards in the jurisdictions of existing States Parties.²² The drafters of the Statute probably did not foresee this development to such a degree. While in principle such an interaction may appear worthwhile, a note of caution might nonetheless be apposite because these activities do, of course, draw on the already strained resources of the Court in addition to its core mandate. As such, its positive complementarity activities are akin to the Court instituting a form of active foreign policy effort, something which as an independent judicial body it may conceptually be ill-suited for and which, given its undoubtedly political overtones, should from a pragmatic point of view more naturally be within the remit of the Assembly of States Parties themselves.

4. ‘The jurisdiction and functioning ... shall be governed by the provisions of this Statute’

20 The Statute is the main source but the reference here is necessarily also to the subsidiary law, i.e. the Regulations which the Statute authorizes the Court to adopt, and the Rules of Procedure and Evidence, the drafting of which the Assembly of States Parties is tasked with, under articles 51 and 52 of the Statute.

C. Relationship to other international criminal courts

21 There is a general concern about the proliferation of international/-ised criminal courts and tribunals²³ and consequently the question arises how the relationship of the ICC to other courts with potentially overlapping jurisdiction should be treated. The Statute makes no provision for this matter. It is doubtful whether one could simply apply the complementarity rule to such international institutions. If one looks at the international tribunals currently in existence, and with the ICTY and ICTR winding down through the instrument of the ineptly named ‘Mechanism’ MICT, the matter would appear to be of mere academic interest. To that extent, as far as any tribunal set up by the Security Council directly under Chapter VII, such

²¹ First ICC Review Conference: Resolutions and Declarations, RC/11 <www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf> accessed 24 February 2015; Report of the Bureau on stocktaking: Complementarity, Taking stock of the principle of complementarity: bridging the impunity gap, Assembly of State Parties, ICC-ASP/8/51, 18 March 2010 <www.icc-cpi.int/en_menus/asp/complementarity/Documents/ICC-ASP-8-51-ENG.pdf> accessed 24 February 2015; Report of the Bureau on complementarity, Assembly of State Parties, ICC-ASP/11/24, 7 November 2012 <www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-24-ENG.pdf> accessed 24 February 2015; Report of the Bureau on complementarity (including draft resolution), Assembly of State Parties, ICC-ASP/12/31, 15 October 2013 <www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-31-ENG.pdf> accessed 24 February 2015; Report of the Bureau on complementarity, Assembly of State Parties, ICC-ASP/13/30, 28 November 2014 <www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-30-ENG.pdf> accessed 24 February 2015; Review Conference on the Rome Statute, Assembly of State Parties, RC/ST/CM/INF.2, 30 May 2012 <www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-CM-INF.2-ENG.pdf> accessed 24 February 2015; Resolution ICC-ASP/12/Res.4, Complementarity, 27 November 2013 <www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res4-ENG.pdf> accessed 24 February 2015.

²² Burke-White (2008) 49 *HarvILJ* 53; *id.* (2008) 19 *CLF* 59; Stahn (2008) 19 *CLF* 87; Schabas (2008) 19 *CLF* 5; *id.* (2010) 49 *ILM* 5; Bergsmo et al. (2010) 2 *GoJIL* 791; Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity, From Theory to Practice* (2011); Jessberger and Geneuss (2012) 10 *JICJ* 1081; Tillier (2013) 13 *ICLR* 507. See critically on the debate as to whether human rights violations in domestic proceedings can trigger the Court’s jurisdiction van der Merwe (2015) 15 *ICLR* 40.

²³ Pocar, in: Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (2011) 1705.

as the ICTY or ICTR, is concerned, the solution would tend towards the primacy of the latter.²⁴ Tribunals established for non-States Parties' territories and/or citizens, regardless by whom, will mostly not come into conflict with the Court's reach by definition; a referral by the UN Security Council in such scenarios is politically highly unlikely, not least given the resource implications, and would not be binding on the Court under article 17 in any event. Tribunals established by an agreement between the UN and certain States, for example, Sierra Leone, for a particular conflict should have priority because they are specifically tailored to cater for those situations in the knowledge that the ICC already exists. National courts with a hybrid international element, such as in Kosovo under UNMIK and soon possibly under EULEX, or Cambodia, would seem to fall under the complementarity umbrella in principle, yet the fact that the international involvement in those courts will often be based on the intervention of or at least the consensus within the UN or the EU with the very aim of providing for a working national system, should make a declaration of admissibility difficult. This leaves the issue of other treaty-based courts to which States Parties to the Rome Statute are also parties and whose jurisdiction would overlap with that of the ICC. That this is not merely an academic question can be seen at the example of the tensions between the African Union and the Court in recent years and the AU's previously declared intention to create its own criminal court.²⁵ While that particular conflict may have been defused by the recent changes to the law on the duty to attend the trial for sitting Heads of State, the general problem is unlikely to go away because these regional courts can be considered as shielding the suspects from the jurisdiction of the ICC. This also raises the doctrinal question of whether the Rome Statute is hierarchically superior to any bilateral treaties any of the States Parties may conclude after acceding to the Statute (see, for example, the commentary below under article 98) or whether the simple *lex posterior* rule applies. It is unclear whether the Rome Statute has anything approaching supranational elements over and above, for example, the reporting mechanism under article 87 to the UN Security Council for non-compliance by non-States Parties following a Security Council Referral, with obligations under the Statute. It seems that if States Parties can avoid the effects of complementarity by reforming their national system so that it is compliant with the Statute, the argument that they might be able to transfer part of their sovereignty to a credible regional court with the same effect cannot be dismissed out of hand.

²⁴ Bohlander, in: Cassese et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 687.

²⁵ See Murungu (2011) 9 *JICJ* 1067.

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Literature: Ambos, K., ‘Confidential Investigations (article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law’, (2009) 12 *NCLRev*, 543; Amnesty International, *The International Criminal Court – Making the Right Choices, Part IV: Establishing and Financing the Court and Final Clauses*, AI Index IOR 40/04/98 (1998); Yáñez-Barnuevo, J. A., and Escobar Hernández, C., ‘The International Criminal Court and the United Nations: A Complex and Vital Relationship’, in: F.Lattanzi and W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, II (2004); Clark, R.S., *The Proposed International Criminal Court: Its Establishment and Its Relationship with the United Nations*, (1997) 8 *CLF* 411; Condorelli, L., and Villalpando, S., ‘The Relationship of the Court with the United Nations’, in: A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, ii (2002); Crawford, J., ‘The Work of the International Law Commission’, in: A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, I (2002), 23; Gallant, K. G., ‘The International Criminal Court in the System of States and International Organisations’, in: F. Lattanzi and W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, II (Editrice Il Sirente, 2004) 17; Johnson, L.D., ‘The Lubanga Case and Cooperation between the UN and the ICC’, (2012) 10 *Journal of International Criminal Justice* 887; Kirsch, P., and Holmes, J.T., ‘The Rome Conference on the International Criminal Court: The Negotiating Process’, (1999) 93 *AJIL* 2; Korecki, L., ‘Procedural Tools for Ensuring Cooperation of States with the Special Tribunal for Lebanon’, (2009) 7 *JICJ* 927; Kress, C., and Lattanzi, F. (eds.), ‘General Aspects and Constitutional Issues’, in: id., *The Rome Statute and Domestic Legal Orders*, I (Baden-Baden et al. 2000); Nesi, G., ‘The International Criminal Court: Its Establishment and its Relationship with the United Nations System; its Composition, Administration and Financing’, in: F.Lattanzi (ed.), *The International Criminal Court; Comments on the Draft Statute* (Napoli, Editoriale Scientifica 1998) 171; Vanhullebusch, M., ‘The Relationship of the ICC with the UN as Defined by the Rome Statute’, in: P. De Hert, J. Flamme, M. Holvoet, and O.Struyven (eds.), *Code of International Criminal Law and Procedure, Annotated* (Larcier 2013) 13; Yee, L., ‘The International Criminal Court and the Security Council’, in: R.S. Lee (ed.), *The International Criminal Court: Making of the Rome Statute* (Kluwer et al. 1999), 146.

Content

A. General remarks	1
B. Analysis and interpretation of elements	3
1. ‘The Court shall be brought into relationship with the United Nations’	3
2. ‘by an agreement’	12
3. ‘approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf’	17
C. The Relationship Agreement between the Court and the United Nations	20
D. The Relationship Agreement in practical application	33
1. Regular dialogue	34
2. Technical cooperation with the UN.....	39
a) Cooperation pursuant to articles 9, 10, 15 of the Cooperation Agreement	40
b) Cooperation pursuant to Memoranda of Understanding	43
c) Cooperation with UN commissions of inquiry	47
d) Cooperation between the Court and the Security Council.....	48
3. Relationship between the Rome Statute and the Relationship Agreement.....	50
4. Sustainable effect of the Relationship Agreement.....	54

A. General remarks*

In particular in the early years of the Court's operations, the importance of article 2 of the Statute has been often overlooked since the focus was on the development of the institution into a fully-fledged international criminal court, carrying out its mandate in an ever-growing number of different situations.¹ However, article 2 goes to the very core of the institution and was – while not one of the most controversial – one of the **fundamental arrangements** necessary for the Court to reach some of its elemental objectives, most prominently – at a future stage from now – universality.² While many other provisions of the Rome Statute stipulate what kind of international institution the Court is meant to be in the eyes of the drafters, article 2 clarifies what we know today is the most essential feature of any international organisation with a mandate reaching far into the ambit of international peace and security³: the relationship with the United Nations ('UN'). When international *ad hoc* tribunals like the ICTY or the ICTR, or internationalised *ad hoc* criminal courts like the SCSL or the ECCC, are being evaluated for their success and significance, their relationship with the UN is one of the decisive factors. This is because the Court – as any of the international(ised) *ad hoc* tribunal established in the past 20 years – is closely linked to a central function of the UN: maintaining international peace and security and promoting and encouraging respect for human rights and for fundamental freedoms without distinction.⁴ Further, it was the UN General Assembly that tasked the freshly established International Law Commission in 1948 at the occasion of the adoption of the Genocide Convention 'to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide' – a request that laid the foundation to the ILC's subsequent efforts in later years to draft a statute for a permanent international criminal court based on the Nuremberg Principles of the 1946 International Military Tribunal.⁵ The Court's principal mandate to 'exercise its jurisdiction over persons for the most serious crimes of international concern'⁶ is thus a mission shared with, or even on behalf of,⁷ the international community and an essential complement to the 'existing collective security system under the UN Charter'⁸, while being **independent from the**

* Section B of this contribution is based on the comprehensive work of Antonio Marchesi, author in the first and second edition of this commentary. The views expressed are those of the author and cannot be attributed to the ICC.

¹ In 2015, the Court was actively engaged in altogether twenty-one cases in eight situations in many of which suspects were either in custody or voluntarily appearing before the Court: Uganda, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Darfur (Sudan), Kenya, Libya, Côte d'Ivoire, and Mali. Preliminary examinations were ongoing in as many as nine potential situations. See ICC OTP Preliminary Examination interactive fact sheet, under: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx [accessed September 2014]; Report on Preliminary Examination Activities 2013, November 2013, *ibid*.

² Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004), 41. See also *Ad Hoc* Committee Report, para. 14.

³ See article 39 of the Charter of the United Nations, 26 June 1945 (entry into force on 24 October 1945; 'UN Charter') (<http://www.legal-tools.org/doc/6b3cd5/>).

⁴ Article 1(1) and (3) of the UN Charter.

⁵ General Assembly resolution GA Res. 260B (III) of 9 December 1948 (177); see also GA Res 489(V) of 12 December 1950. For the Nuremberg Principles see General Assembly Resolution 177(II) of 21 November 1947, 'Formulation of the principles recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal'. According to article 13(1)(a) of the UN Charter, the General Assembly 'shall initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification'; the International Law Commission ('ILC') falls into this remit of competence.

⁶ Art. 1 of the Statute (<http://www.legal-tools.org/doc/7b9af9/>).

⁷ *Prosecutor v. Tadić*, No.IT-94-1-T, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 42 (<http://www.legal-tools.org/doc/ddd6b0/>); confirmed in *Prosecutor v. Tadić*, No. IT-94-1-AR Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 59 (<http://www.legal-tools.org/doc/866e17/>).

⁸ Kress and Lattanzi, *The Rome Statute and Domestic Legal Orders*, Editor's note, p. viii.

UN. It is for this reason that the link between the Court and the UN as ‘the universal organisation representing the international community’ is of crucial importance.⁹ The relevance of this **institutional relationship** is also reflected in the Preamble of the Statute.¹⁰

- 2 The relationship between the Court and the UN has in practice become **multi-faceted** and proven to be instrumental for the Court’s operations. While some of the aspects of this relationship are governed by other articles of the Statute (most prominently the referral power of the UN Security Council to the Prosecutor of a situation pursuant to article 13(b) of the Statute),¹¹ a number of different aspects covered by the ‘relationship agreement’ mentioned in article 2 of the Statute have become subject to frequent and substantive cooperation between the UN and the Court. This shall be further detailed in Sections C and D dealing with the Negotiated Relationship Agreement between the Court and the UN.¹² Preceding that, various options of the Court’s establishment discussed in the years leading up to the adoption of the Rome Statute in 1998 as well as the drafting history of the relationship agreement between the UN and the Court shall be briefly discussed (Section B).

B. Analysis and interpretation of elements

1. ‘The Court shall be brought into relationship with the United Nations’

- 3 The Court’s relationship with the UN determines **essential elements of the Court’s architecture**, from jurisdiction to cooperation to elements of financing.¹³ The importance of a clear definition of the relationship between the two, both for reasons of general policy and for institutional aspects, was already highlighted in 1990 by the ICL.¹⁴ After its authorisation by the General Assembly in 1989 to consider the creation of a permanent international criminal court,¹⁵ the ILC foresaw an international criminal court established by a **multilateral treaty**, outside of the constitutive pillars of the UN, and thus not following the example of the ICJ.¹⁶ It

⁹ Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 42. At the same time, it has to be noted that this relationship should not be overemphasised in its relevance for the establishment of the Court *as such*; it is therefore not necessarily ‘a constitutive element of the creation of the ICC’. This is evident from the fact that the Rome Statute came into force (July 2002) considerably before the relationship between the Court and the UN was laid out in appropriate detail in an agreement pursuant to article 2 of the Statute (2004; see subsection 3). *Cf.* on this particular point *id.*, 45.

¹⁰ Preamble of the Statute, paras. 7, 9.

¹¹ The Statute provides for further examples where the United Nations is materially linked to the Court’s mandate and operations: arts. 13(b) (referral of a situation by the Security Council); 16 (deferral of investigation or prosecution); and 115(b) (funds of the Court and of the Assembly of States Parties). Further, the Secretary-General assumes a number of formal functions in relation to amendments, the revision of the Statute and other issues related to the official deposition of documents (arts. 121–128 of the Rome Statute). *See* for a general overview Yáñez-Barnuevo and Escobar Hernández, in: F. Lattanzi/W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004), 51–61. Finally, regarding the future crime of aggression, articles 8bis, 15bis and 15ter of the Statute establish a strong link to the UN Charter (art. 8bis (1) and (2) for the purpose of material elements of the crime) and the Security Council (arts. 15bis (6)-(8), 15ter regarding jurisdiction) of the Court.

¹² Negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third session, The Hague, 6–10 September 2004* (International Criminal Court publication, ICC-ASP/3/25), Part III, resolution ICC-ASP/3/Res.1, 7 September 2004, annex, p. 96 et seq (<http://www.legal-tools.org/doc/5ea87d/>).

¹³ The issue of the Court’s financing as well as discussions on that matter in preparation of the establishment of the Rome Statute are discussed elsewhere in this Commentary. For a general overview *see* Clark (1997) 8 *CLF* 3, [411], 423–30; Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 59–61.

¹⁴ Report of the International Law Commission on the work of its forty-second session, 1 May – 20 July 1990, *Official Records of the General Assembly, Forty-fifth session, Supplement No. 10, A/45/10, Yearbook of the International Law Commission 1990, vol. II (2)*, para. 140.

¹⁵ UN Doc. A/RES/44/39 (1989).

¹⁶ The International Court of Justice is one of the ‘principal organs of the United Nations’, arts. 7, 92 *et seq.* of the UN Charter.

adopted, at its 46th session on 23 November 1994, a 'Draft Statute for an International Criminal Court', in which draft article 2 (titled 'Relationship of the Court to the United Nations') read:

'The President, with the approval of the States Parties to this Statute ('States parties'), may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.'¹⁷

However, the ILC's draft article 2 was not uncontroversial; it had been preceded by 4 discussions in legal and diplomatic fora regarding the nature and scope of the Court's interaction with the UN.¹⁸ The ILC report on the work of its forty-sixth session in mid-1994 succinctly outlined the available methods of establishing the Court as well as its relationship to the UN.¹⁹ Throughout consultations in the years 1995–1998, the 1994 ILC draft statute²⁰ formed the initial working document.²¹ Similarly, discussions in the *Ad Hoc* Committee on the Establishment of an International Criminal Court in 1995²² as well as the ensuing Preparatory Committee²³ in 1996 focused on the draft text of article 2 proposed by the ILC.²⁴

The main suggestions being considered by delegations were: a) an **amendment to the UN Charter**, making the Court a principal organ of the organisation similar to the ICJ; b) a **resolution** adopted by the General Assembly and/or the Security Council; or c) the **conclusion of a multilateral treaty**.²⁵ Proponents of either of the first two options brought forward that linking a future international criminal court firmly to the UN would clearly demonstrate acceptance of the principle of individual criminal responsibility 'towards the world community, confer the requisite authority on the court, open the way to universal recognition of its jurisdiction and guarantee that it functioned in the general interest.'²⁶

The first approach, to link the Court to the UN by an amendment of the UN Charter, 6 would have required multiple amendments of the latter, starting with article 7 (1) in order to include the Court among the principal organs of the UN. Following the example of the

¹⁷ Text adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's 'Report of the International Law Commission on the work of its forty-sixth session', 2 May-22 July 1994, General Assembly Official Records, Forty-ninth Session, Supplement No. 10 (A/49/10), in: *Yearbook of the International Law Commission*, 1994, Vol. II (Part Two), 45 (<http://www.legal-tools.org/doc/f73459/>).

¹⁸ In its Report on the work of its forty-second session in 1990, the ILC noted that the Court could be established a) by a separate convention; or b) by an amendment to the Charter of the United Nations, 'for example, if the court was to be an organ of the United Nations'. Report of the International Law Commission on the work of its forty-second session, note 14, paras. 139, 140. The possibility of the Court being established by a General Assembly resolution was also discussed. See generally also Vanhullebusch, in: De Hert and others (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013) 13.

¹⁹ Report of the International Law Commission on the work of its forty-sixth session, note 17, pp. 32–34 (paras. 51–55), and Commentary, pp. 45 *et seq.*

²⁰ *Supra* note 17, pp. 43 *et seq.* (para. 91).

²¹ Crawford, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 23 *et seq.*; Nesi, in: Lattanzi (ed.), *The International Criminal Court – Comments on the Draft Statute* (1998) 171, 172.

²² The *Ad Hoc* Committee was established by the General Assembly by A/RES/49/53 of 9 December 1994.

²³ The General Assembly's Preparatory Committee on the Establishment of an International Criminal Court was established by A/RES/50/46 of 11 December 1995.

²⁴ For the ILC discussion see Report of the International Law Commission on the work of its forty-sixth session, note 17, pp. 32–34 (paras. 51–55).

²⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, General Assembly Official Records, Fifty-first Session, Supplement No.22, UN Doc A/51/22 (1996) Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), 13 September 1996, para. 25 (<http://www.legal-tools.org/doc/e75432/>); Nesi, in: Lattanzi (ed.), *The International Criminal Court – Comments on the Draft Statute* (1998), 174–176; Amnesty International, *The International Criminal Court: Making the Right Choices – Part IV: Establishing and Financing the Court and Final Clauses* March 1998, para. 1.

²⁶ Report of the International Law Commission on the work of its forty-fifth session, 3 May – 23 July 1993, Official Records of the General Assembly, Forty-eighth session, Supplement No. 10, UN Doc. A/48/10, Yearbook of the International Law Commission 1993, vol. II (2), p. 16 (para. 60) (<http://www.legal-tools.org/doc/83c6d3/>); see also Report of the International Law Commission on the work of its forty-sixth session, note 17, p. 32 (para. 51).

establishment of the ICJ within the UN Charter,²⁷ the addition of further provisions establishing the Court would have been required. This suggestion was favoured by some delegations since it would have made the Statute and the Court an integral part of the UN Charter and system; cooperation orders of the Court would have binding effect on all UN member states, akin to article 94(1) of the UN Charter regarding ICJ decisions. Delegations noted, however, that this process would be complex and time-consuming.²⁸ Furthermore, mindful of the rather **rigid nature of the UN Charter** regarding its amendment regime, notably requiring two thirds of the member states including all the permanent members of the Security Council,²⁹ some expressed doubts whether one could reach that threshold at all, considering the possibility of **political opposition**.³⁰ Interestingly, the Report of the Preparatory Committee also contained a suggestion to retain the option of adding the Court to the UN framework at ‘any time proposals for amendment to the Charter were otherwise being considered’.³¹

- 7 Some delegations considered it to be ‘efficient, time-saving and feasible’ to set up the Court by a resolution of the General Assembly or of the Security Council as a principal or subsidiary organ thereof.³² In particular with regard to the General Assembly’s competence to ‘establish such subsidiary organs as it deems necessary for the performance of its functions’,³³ reference was made to the advisory opinion of the International Court of Justice of 1954 in the ‘Administrative Tribunal’ case,³⁴ highlighting the General Assembly’s implied powers in this regard. It was, however, questioned whether a General Assembly resolution – which does **not impose binding legal obligations on states** in relation to conduct external to the functioning of the UN itself –³⁵ would provide the necessary legal force for the operation of the Court.³⁶ Finally, it was submitted that a General Assembly resolution could be easily amended or even revoked, therefore failing to provide a sufficiently robust mandate.³⁷
- 8 There was also support for the establishment of the Court under a Security Council resolution. The Security Council created the *ad hoc* international criminal tribunals ICTY and ICTR as ‘subsidiary organs’³⁸, acting under Chapter VII of the UN Charter. By virtue of choosing this constitutive framework, the UN vested the tribunals with a **strong mandate vis-à-vis states**, since article 25 of the UN Charter requires every UN member state to cooperate with the tribunals. No conflicting obligations can be invoked by states as article

²⁷ See UN Charter, Art. 92 *et seq.*

²⁸ 1996 Preparatory Committee I, note 25, para. 25.

²⁹ Followed by these member states ratifying in accordance with their respective constitutional processes, including all the permanent members of the Security Council; UN Charter, Arts. 108, 109.

³⁰ Report of the International Law Commission on the work of its forty-sixth session, note 17, p. 33 (para. 53) and p. 45 (Commentary, para. 1); Clark submits that a Charter amendment would be unacceptable because of the ‘can of worms’ theory: a push for an amendment of the UN Charter for one item would have triggered a plethora of other, unrelated, amendment proposals, including structural changes, the issue of veto powers etc., in: Clark (1997) 8 *CLF* 3, [411], 416; see also Nesi, in: Lattanzi (ed.), *The International Criminal Court – Comments on the Draft Statute* (1998) 174; Vanhullebusch, in: De Hert and others (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013) 13.

³¹ 1996 Preparatory Committee I, note 25, para. 25.

³² *Ibid.*

³³ Art. 22 UN Charter.

³⁴ ICJ, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, 1954 I.C.J. 47, p. 58 *et seq.* See also ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174; Clark (1997), 8 *CLF* 3, [411], 417 (<http://www.legal-tools.org/doc/f263d7/>).

³⁵ Article 10 UN Charter.

³⁶ Report of the International Law Commission on the work of its forty-sixth session, note 17, p. 46 (Commentary, para. 3). Critical on this point see Clark (1997) 8 *CLF* 3 [411] 418 (and footnote 22 in particular).

³⁷ Report of the International Law Commission on the work of its forty-sixth session, note 17, p. 46 (Commentary, para. 3). This is, however, less convincing since the lack of political support could erode a treaty-based body in a similar fashion. *Concurring* Clark (1997) 8 *CLF* 3 [411] 420.

³⁸ For the ICTY: UN SC Resolution S/RES/827(1993) of 25 May 1993, based on the report of the Secretary-General (S/25704 and Add. 1) pursuant to para. 2 of UN SC Resolution S/RES/808(1993) of 22 February 1993; for ICTR: UN SC Resolution S/RES/955(1994) of 8 November 1994 see also UN Charter, articles 39 *et seq.*, 29 and 7(2). Finally, see also under <http://www.un.org/en/sc/subsidiary/> [accessed October 2014].

103 of the UN Charter stipulates the Charter's primacy. However, it was highlighted that the Security Council's competence under the UN Charter to create *ad hoc* tribunals in response to a *particular* situation endangering international peace and security has to be distinguished from the *general* endeavour of creating a *permanent* international criminal court with general powers and competence.³⁹ Also, the full independence of the Court could be questioned as such a subsidiary organ would retain a certain constitutive **link to the Security Council**.⁴⁰ Furthermore, any such resolution would have required the concurring votes (or abstentions) of all permanent members of the Security Council which some doubted could be obtained.⁴¹

Finally, to establish the Court by way of a multilateral treaty as recommended by the ILC 9 in its 1994 draft statute enjoyed general support.⁴² Delegations held that '[a multilateral] treaty could provide the **necessary independence and authority**' for the Court.⁴³ As another important factor vis-à-vis the options of a more direct structural relationship with the UN, it was underlined that states would have the choice whether to become a party to the founding treaty and other relevant instruments to the Court's framework, structure and operations.⁴⁴ Delegations were aware that this choice would come at the cost of full universality (at least during the early stages of the Court's life).⁴⁵ Amongst those supporting this option it was further agreed that the Court would have to be established in a '**close relationship**' to the UN in order to safeguard the Court's legitimacy and general acceptance;⁴⁶ this is reflected by the fact that while the ILC draft stipulated that the Court '*may conclude*' a relationship agreement with the UN, the final draft in 1998 contained the much more forceful language, holding that the Court '*shall conclude*' such an agreement.⁴⁷

Despite these questions remaining open still in 1996,⁴⁸ the issue of the relationship 10 between the Court and the UN was not further discussed in the context of any of the working groups set up by the Preparatory Committee in 1997 and was reconsidered only during the Preparatory Committee's last session in March/April 1998.⁴⁹ The draft agreed upon that occasion reads as follows:

'The Court shall be brought into relationship with the United Nations by an agreement to be approved by the States Parties to this Statute and concluded by the President on behalf of the Court.'⁵⁰

³⁹ 1996 Preparatory Committee I, note 25, para. 25; Clark (1997), 8 *CLF* 3, [411], 416.

⁴⁰ See also Vanhullebusch, in: Paul De Hert and others (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013) 13, Section 1. Also, as noted in the Report of the International Law Commission on the work of its forty-sixth session, note 17, p. 46 (Commentary, para. 3), 'resolutions can be readily amended or even revoked: that would scarcely be consistent with the concept of a permanent judicial body.'

⁴¹ See UN Charter, Art. 27(3). This obviously presupposes that none of the Permanent Member States uses its 'right to veto'; see the Security Voting System under <http://www.un.org/en/sc/meetings/voting.shtml> [accessed October 2014].

⁴² 1996 Preparatory Committee I, note 25, para. 26. See already Report of the International Law Commission on the work of its forty-fifth session, note 26, paras. 59 *et seq.*; Report of the International Law Commission on the work of its forty-sixth session, note 17, p. 46 (Commentary, para. 4).

⁴³ 1996 Preparatory Committee I, note 25, para. 26.

⁴⁴ 1996 Preparatory Committee I, note 25, para. 26. The Report also foresaw a possible role for the General Assembly 'to promote wider acceptance of the instrument' by adopting a resolution urging states to become parties to what would later become the Rome Statute. Further, the Report contained a foreboding to the Rome Statute's regime of settlement of disputes and amendment of the Statute (Part 13): 'the treaty itself could also provide for a review or an amendment mechanism and provisions for the settlement of disputes, which could, according to some, serve as an additional means to attract favourable consideration of the Court by States', *ibid.*

⁴⁵ Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 41.

⁴⁶ See note 1 and subsection 2.

⁴⁷ See Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 42, 45–6, 48.

⁴⁸ 1996 Preparatory Committee I, note 25, paras. 25–26.

⁴⁹ See the Background paper prepared by the Codification Division, Office of Legal Affairs, in preparation of the Preparatory Committee's session titled 'Possible Types of Relationship Between the United Nations and a Permanent International Criminal Court', G.A. Doc. A/AC.249/1998/L.10, Annex, 20 December 1997, para. 2.

⁵⁰ Preparatory Committee (Consolidated) Draft, p. 10.

- 11 The only significant subsequent amendment to this – uncontroversial – draft text was made by the Committee of the Whole in shifting the authority of approval from ‘the States Parties’ to ‘the Assembly of States Parties’.⁵¹

2. ‘by an agreement’

- 12 Already the ILC underlined in its 1994 Report ‘the importance of establishing a close relationship between the United Nations and the court to ensure its international character and its moral authority’.⁵² Also the *Ad Hoc* Committee and thereafter the Preparatory Committee considered a close link between the Court and the UN essential, as this was believed to create ‘a necessary link to the universality and standing of the Court’.⁵³ However, it was stressed that such a relationship should in no way jeopardize the independence of the Court.⁵⁴ It was held that a **special agreement** between the two institutions would be appropriate for the establishment of a link between the institutions.⁵⁵
- 13 It was further suggested that the general principles and substantive questions should be dealt in the Statute itself. The relationship agreement should address only questions of a **technical and/or administrative nature** such as issues of mutual representation, exchange of information and documentation, and provisions on cooperation between the two organisations.⁵⁶
- 14 However, there was some discussion as to the exact shape of the institutional relationship of the independent, treaty-based court and the UN. Some advocated for establishing the Court as a ‘specialised agency’, brought into relationship with the UN through an agreement pursuant to articles 57, 63 of the UN Charter.⁵⁷ This option was not only reflected as an alternative proposal in the Preparatory Committee’s 1996 Report but also in the final report of the Working Group on the establishment of the Court and its relationship with the UN.⁵⁸ Consequently, the following alternative proposal was included in the Preparatory Committee’s 1996 Report:

‘The Court shall, as soon as possible, be brought into relationship with the United Nations. It shall constitute one of the specialised agencies provided for in article 57 of the Charter of the United Nations. The relationship shall form the object of an agreement with the United Nations pursuant to article 63 of the Charter.

The agreement, proposed by the Presidency of the Court, shall be submitted to the General Assembly of the States Parties for approval. It shall provide the means for establishing effective

⁵¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June – 17 July 1998 Official Records, Volume I (Final documents), A/CONF.183/13 (Vol. I), p. 4 (<http://www.legal-tools.org/doc/f68da1/>). The Drafting Committee made some further minor amendments to the language without touching upon the substance of the provision. For the *rationale* behind the shift from States Parties to the Assembly see subsection 3.

⁵² Report of the International Law Commission on the work of its forty-sixth session, note 17, p. 34 (para. 53). It was also discussed, albeit inconclusively, whether the relationship between the proposed court and the UN should be determined ‘as a preliminary matter’ in order to resolve some other issues related to financing and recruitment; others preferred to tackle the draft statute of the court as a priority. *Id.*, para. 55.

⁵³ Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, General Assembly, Official Records – Fiftieth Session, Supplement No. 22 (A/50/22), para. 17 (<http://www.legal-tools.org/doc/5dcb06/>).

⁵⁴ *Ibid.*; 1996 Preparatory Committee I, note 25, para. 29.

⁵⁵ 1996 Preparatory Committee I, note 25, para. 29. This agreement could be ‘either elaborated simultaneously with the Statute (as an annex thereto) or at a later stage’. It was reiterated at that occasion that the agreement should be approved by the States Parties to the Statute.

⁵⁶ 1996 Preparatory Committee I, note 25, para. 30. *Concurring* Clark (1997) 8 *CLF* 3 [411] 422.

⁵⁷ See generally Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 48.

⁵⁸ 1996 Preparatory Committee I, note 25, para. 31 (and for the establishment of the working group para. 368, lit. (b) vii); ‘Possible Types of Relationship Between the United Nations and a Permanent International Criminal Court’, Background paper prepared by the Codification Division, Office of Legal Affairs, G.A. Doc. A/AC.249/1998/L.10, Annex, 20 December 1997, paras. 21 *et seq.* See also Vanhullebusch, in: De Hert and others (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013) 13, Section 1.

cooperation between the Court and the United Nations in the pursuit of their common aims. It shall, at the same time, set forth the autonomy of the Court in its particular field of competence, as defined in this Statute.⁵⁹

Other, more cautious proposals with a view to the future court's **functional independence** 15 as a judicial institution from the UN insisted on the preservation of the Court's autonomy, leaving it open which form the relationship between the two institutions would take.⁶⁰ Options of arrangements along the lines of that concluded between the UN and the International Atomic Energy Agency ('IAEA'), the International Tribunal for the Law of the Sea ('ITLOS'), or the Organisation for the Prohibition of Chemical Weapons⁶¹ were discussed – provided the ICC were to be established as an independent organisation with its own legal personality.⁶²

In view of these discussions, the April 1998 draft text of the Preparatory Commission⁶³ 16 marks a compromise: the establishment of an **institutional link** between the Court and the UN was made a requirement ('shall'); further, while reminiscent of the wording of art. 57 UN Charter ('shall be brought into relationship with the United Nations'), article 2 left it open which exact shape that relationship would take.⁶⁴

3. 'approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf'

Pursuant to the wording of article 2 adopted at the Rome Conference, the approval of a 17 relationship agreement was assigned to the ASP – and no longer the States Parties, arguably rendering it easier to obtain approval of the text since within the ASP a majority vote would be possible; also, the new wording **enhanced the role of the ASP** by adding yet another function to it.⁶⁵

Resolution F, annexed to the Final Act, stipulated that it would be for the Preparatory 18 Commission to draft such an agreement, to be submitted for approval to the ASP.⁶⁶ After discussion of a draft text within a previously established working group at its sixth, seventh and eighth sessions, the Preparatory Commission adopted a *Draft Relationship Agreement between the Court and the United Nations* at its eighth session on 5 October 2001.⁶⁷ After the

⁵⁹ 1996 Preparatory Committee II, p. 4 (<http://www.legal-tools.org/doc/03b284/>).

⁶⁰ 1996 Preparatory Committee I, note 25, para. 31; see also Gallant, in: Lattanzi and Schabas, (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 18–20; Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 63–65.

⁶¹ See Repertory of Practice of United Nations Organs, Vol. IV, Supplement No. 9, art. 57, available at: <http://legal.un.org/repertory/art57.htm> (accessed 13 September 2014).

⁶² Report of the International Law Commission on the work of its forty-sixth session, note 17, pp. 45–46 (Commentary, para. 1); OLA background paper 'Possible Types of Relationship Between the United Nations and a Permanent International Criminal Court', note 49, para. 29. See also Clark (1997) 8 *CLF* 3 [411] 421–23.

⁶³ Preparatory Committee (Consolidated) Draft, p. 10. See also note 10.

⁶⁴ Finally, the States Parties' approval was explicitly placed *ahead of* the conclusion of the agreement by the President of the Court, arguably underlining their active role in this regard.

⁶⁵ This seems to be the *ratio* of a proposal submitted by Spain during the last session of the Preparatory Committee in 1998, UN Doc A/AC 249/1998/DP.6, 26 March 1998 (<http://www.legal-tools.org/doc/7baa44/>). See Nesi, in: Lattanzi (ed.), *The International Criminal Court; Comments on the Draft Statute* (1998) 175–76. This amendment has also brought the approval system in tune with art. 3(2) of the Statute, which provides that the Court's Headquarters Agreement between the International Criminal Court and the Host State (ICC-BD/04-01-08, entry into force on 1 March 2008) similarly requires the ASP's (and not states') approval. See also Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 49.

⁶⁶ Final Act, Annex I, Resolution F, establishing the 'Preparatory Commission for the International Criminal Court' (para. 1 of the Resolution) and tasking it with the preparation of a draft text of a relationship agreement (para. 5(c) of the Resolution).

⁶⁷ Report of the Preparatory Commission for the International Criminal Court (continued), Addendum, UN Doc. PCNICC/2001/1/Add.1, 8 January 2002 (<http://www.legal-tools.org/doc/f608a0/>). See also Report on the negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations,

entry into force of the Rome Statute, the ASP approved the draft relationship agreement without variations at its first session on 9 September 2002.⁶⁸

- 19 Following subsequent negotiations with the UN in February and May 2004 and a number of alterations of the draft text,⁶⁹ a *Negotiated Draft Relationship Agreement* was initiated on 7 June 2004 and subsequently approved by the ASP.⁷⁰ On 4 October 2004, the Secretary General of the United Nations and the President of the Court signed the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*,⁷¹ marking its entry into force.

C. The Relationship Agreement between the Court and the United Nations

- 20 The Relationship Agreement provides the **legal basis for the multifaceted cooperation and coordination** between the Court and the UN. This ranges from a regular dialogue between the officials of the two institutions at the diplomatic level, including reciprocal representation at high-level meetings and proceedings, to technical and practical arrangements at the working level; the latter include the exchange of information and reports, administrative issues, the provision of services and facilities, mutual (logistical) support in the field, travel arrangements and judicial assistance in the OTP's investigative activities, including the securing of evidence and the appearance of UN staff in court to provide testimony.⁷²
- 21 The Relationship Agreement represents an **institutional arrangement sui generis** in that it addresses the specific needs of the Court as an international, independent judicial institution. It therefore differs in many relevant aspects from previous relationship agreements between the UN and other international organisations (such as the IAEA, ITLOS or others).⁷³ The Preamble of the Relationship Agreement establishes the link between the UN and the Court in that the latter reaffirms – as does the Rome Statute's Preamble – ‘the Purposes and Principles of the Charter of the United Nations’.⁷⁴ In addition, it addresses situations that ‘threaten the peace, security and well-being of the world’, thus invoking a Chapter VII quality of its areas of application.⁷⁵ Importantly, the Preamble clarifies the **reciprocity** inherent in the Relationship Agreement, meant to facilitate the ‘discharge of respective responsibilities’ of the two institutions in a ‘mutually beneficial relationship’.⁷⁶
- 22 The Relationship Agreement is subdivided into four sections. The first section contains general provisions (articles 1–3). It clarifies the purpose and main principles governing the relationship between the two institutions. Of note, article 3 defines the main obligations arising from the Relationship Agreement, namely to ‘**cooperate closely**, whenever appropriate’ and to ‘consult on matters of mutual interest’.

ICC-ASP/3/15, 13 August 2004, para. 3 (http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-3-15-English.pdf) [accessed October 2014].

⁶⁸ Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002, Official Records, ICC-ASP/1/3, 243 *et seq.* (<http://www.legal-tools.org/doc/5ea87d/>).

⁶⁹ See Report on the negotiated Draft Relationship Agreement, note 67, paras. 7–18.

⁷⁰ ICC-ASP/3/Res.1, para. 2; Report on the negotiated Draft Relationship Agreement, note 67, para. 5.

⁷¹ ICC-ASP/3/Res.1, Annex (<http://www.legal-tools.org/doc/5ea87d/>).

⁷² See Report of the Court on the status of ongoing cooperation between the International Criminal Court and the United Nations, including in the field, ICC-ASP/12/42, 14 October 2013, para. 4 (http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-42-ENG.pdf) [accessed October 2014].

⁷³ Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 65–67. See also paragraph 15.

⁷⁴ ICC-ASP/3/Res.1, Preamble, para. 2. Preamble of the Rome Statute, para. 7 (<http://www.legal-tools.org/doc/5ea87d/>).

⁷⁵ ICC-ASP/3/Res.1, Preamble, para. 3. Again, this is in conformity with the Preamble of the Rome Statute (para. 2).

⁷⁶ ICC-ASP/3/Res.1, Preamble, para. 8. Reciprocity is one of the core principles in terms of general representation and exchange of information: see arts. 4, 5, 17 of the Relationship Agreement (<http://www.legal-tools.org/doc/5edc7c/>).

Subsequently, the Relationship Agreement turns into two substantive sections, institutional relations (II) and cooperation and judicial assistance (III). Section II can be divided into three topical groups dealing, respectively, with reciprocal representation at sessions or hearings and exchange of information and documents of mutual interest (articles 4, 5, 6 and 7); personnel and HR arrangements, administrative cooperation, the provision of services and facilities (articles 8, 9, 10, 13 and 14); and travel documents and access to the UN Headquarters (articles 11 and 12). 23

The first group of provisions in section II begins with defining the reciprocal access to important meetings and public hearings of representatives of both institutions. Importantly it clarifies the Court's observer status at General Assembly meetings (article 4(2)). It also provides for the President and the Prosecutor of the ICC to address matters of import for the Court at Security Council meetings as appropriate (article 4(3)). Further in this section, article 5 defines the exchange of information between the two institutions in order to 'secure the greatest possible usefulness and utilisation of such information' and, importantly, to avoid duplication of efforts to secure information.⁷⁷ Article 6 provides that the Court may submit reports on its activities to the UN as appropriate, which over the years became an annual practice of the Court.⁷⁸ Pursuant to article 7, the Court may propose items for consideration by the UN.⁷⁹ 24

Turning to the second group of provisions in section II of the Relationship Agreement, article 8 focuses on cooperation concerning HR matters in the area of employment, temporary interchange of staff, and generally the most efficient use of specialised personnel, systems and services.⁸⁰ The same efficiency rule governs the administrative cooperation concerning the use of facilities, staff and services as defined in articles 9 and 10. As will be discussed below,⁸¹ this **administrative and logistical partnership** became a vital part of day-to-day cooperation between both organisations. Finally, article 13 determines that **financial aspects** of the relationship (including in relation to the expenses incurred due to referrals by the Security Council)⁸² are left to 'separate arrangements'.⁸³ 25

The last group of provisions in section II on institutional relations addresses access of Court staff, States Parties' representatives and observers to the UN Headquarters for Bureau and Assembly meetings (article 11), as well as a Court official's entitlement to a UN laissez-passer as a travel document (article 12). 26

The third – and in practical terms highly relevant – section of the Relationship Agreement regulates cooperation and judicial assistance. Article 15 stipulates that the UN undertakes to provide the Court with **any information or documents** requested pursuant to the general cooperation regime of the Rome Statute⁸⁴ and beyond (article 15(1), (2)), as long as any such cooperation is compatible with the UN Charter and the Statute. In order to preserve the safety and security of UN personnel and operations, the disclosure of certain information and documents may be conditioned on '**appropriate measures of protection**', to be ordered by the relevant chamber or put in place by the UN (art. 15(3)). The practical relevance of this 27

⁷⁷ Art. 5(2) of the Relationship Agreement. For the overarching concern to streamline and coordinate processes see also art. 9, seeking to avoid 'the establishment and operation of overlapping facilities and services'.

⁷⁸ See only the Court's 9th (and most recent) Report of the International Criminal Court, UN Doc. A/68/314, 13 August 2013, on its activities for 2012/13 to the General Assembly in accordance with article 6 of the Relationship Agreement and paragraph 19 of GA Resolution 66/262.

⁷⁹ To date, the Court has not made use of this provision.

⁸⁰ On the item of HR-related coordination and the Court's exclusion from the Inter-Organisation Mobility Accord, 2013 Report on Cooperation, note 72, para. 9.

⁸¹ See Section D.

⁸² Article 115(b) of the Statute.

⁸³ The absence of any further specification can be explained with the – at the time already – foreseeable resistance of some UN member states (including permanent members of the Security Council) to fund the Court's activities despite not being a state party to the Rome Statute. See, along similar lines, Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 60–61.

⁸⁴ See in particular article 87(6) of the Statute.

provision cannot be overstated since the Court regularly operates in environments where highly sensitive information is being handled. It comes as no surprise that this issue has already been subject to litigation⁸⁵ and more detailed confidentiality protection arrangements have been reflected in a number of specific agreements and Memoranda of Understanding between the Court and its UN various counterparts in the field.⁸⁶

- 28 Article 16 addresses the **testimony of UN officials** in court proceedings. If necessary, the UN may waive the witnesses' confidentiality obligation vis-à-vis the institution.
- 29 article 17 regulates the communication between the Security Council and the Court in the three major instances of ICC-UN Security Council coordination: article 13(b) of the Statute (referral of a situation to the Court pursuant to Chapter VII of the UN Charter), article 16 of the Statute (request not to commence or proceed with an investigation or prosecution) or article 87, paragraph 5 (b) or paragraph 7 of the Statute (notification of failure by the state to cooperate). Article 17 does **not regulate any substantive matters** between the Court and the UN Security Council in relation to referrals, non-commencement and non-cooperation of States; this has consciously been left to the relevant provisions in the Rome Statute itself and/or UN Security Council resolutions where appropriate.⁸⁷
- 30 Another centrepiece in terms of practical relevance is article 18 on the **cooperation between the UN and the Office of the Prosecutor** ('OTP'). The OTP can enter into any arrangements and agreements with the UN to conduct its investigative activities in the most effective manner. This concerns investigations pursuant to article 54 as well as the Prosecutor's requests for information based on article 15(2) of the Statute in case of a *proprio motu* investigation. Article 18(3) foresees that the provision of documents or information can be conditioned on the confidentiality rule that any such material may solely be used **for the purpose of generating new evidence** and shall not be disclosed 'to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.'⁸⁸ Paragraph 4 of article 18 explicitly foresees the conclusion of specific 'arrangements' between the OTP and the relevant UN programmes, funds and offices regarding cooperation and, importantly, confidentiality and protection parameters.⁸⁹
- 31 Pursuant to article 19 of the Relationship Agreement, the UN undertakes to waive any **privileges and immunities** of a person suspected to have committed Rome Statute crimes who would otherwise be enjoying privileges and immunities granted to UN staff and other persons working for the institution. Finally, article 20 stipulates that any information and documents obtained by the UN from States Parties or other actors in confidence will only be shared with the Court after having sought the consent of the originator to disclose the information or documentation to the Court.
- 32 The final provisions of the Relationship Agreement, from article 21 to article 23, address items of an administrative nature, namely supplementary arrangements, amendments, and entry into force of the Relationship Agreement.

⁸⁵ See Section D.3.

⁸⁶ See Section D.2.b).

⁸⁷ 1996 Preparatory Committee I, note 25, para. 30; Clark (1997), 8 *CLF* 3, [411], 422; Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 51–54.

⁸⁸ As to the need that this provision needs to be applied restrictively in view of the rights of the defence see *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', Appeals Chamber, 21 October 2008, paras. 52–53 (<http://www.legal-tools.org/doc/485c2d/>).

⁸⁹ This provision has been the legal basis for a number of specific Memoranda of Understanding and other agreements between the OTP and its UN interlocutors in the field. See Section D.2.b).

D. The Relationship Agreement in practical application

The Relationship Agreement has become a fundamental tool in the many different facets of cooperation between the Court and the UN as well as many of its sub-organs and agencies.⁹⁰ The Court, as well as its organs, entertains a number of links and channels of dialogue with a multitude of UN sub-organs and agencies, ranging from general information-sharing to detailed cooperation arrangements in operations in the field.⁹¹

1. Regular dialogue

On the diplomatic/institutional level, the principals of the Court (i.e. the President, Prosecutor and the Registrar) frequently hold **high-level consultations** with the UN Secretary-General as well as other senior UN officials on strategic level.⁹² The Court is represented at the UN with a small liaison office ('New York Liaison Office') providing a standing channel of communication and facilitating the maintenance and further development of the relationship and cooperation between the two organisations.⁹³ Furthermore, in accordance with article 6 of the Relationship Agreement the Court issues **annual reports** to the UN General Assembly about its activities.⁹⁴ In addition, the annual **UN-ICC Roundtable** also enables officials from both institutions to meet at the working level to discuss practical cooperation arrangements.

As provided for in the Relationship Agreement, it is not only the Court as an institution that interacts with UN offices regarding issues under the operational umbrella of the Agreement. In particular on the more technical/operational requests for coordination and/or cooperation the OTP interacts with the UN directly. Similarly, the **Defence** is entitled to seek cooperation from relevant UN offices.

Generally, the UN Office of Legal Affairs ('OLA') ensures the transmission and coordination of the judicial cooperation requests from the organs of the Court and parties to the proceedings and the UN and its agencies.⁹⁵ In doing so, OLA also advises the requesting organ or party on the procedure to be followed, provides updates and identifies the relevant interlocutors that the Court may contact in the different UN agencies or peacekeeping missions in the field.⁹⁶

The Court regularly interacts with a large variety of UN bodies and offices, including, most prominently, the Department of Peacekeeping Operations ('DPKO'); the Department of

⁹⁰ This is well reflected by the Court's primary stakeholder, the UN Assembly, when it underlines the 'extraordinary nature and importance of the [Court's] relationship with the United Nations' through the Negotiated Relationship Agreement. 'Report of the Court on the status of ongoing cooperation between the International Criminal Court and the United Nations, including in the field', ICC-ASP/12/42, 14 October 2013, note 72, para. 2.

⁹¹ Following the relevant provisions of the Relationship Agreement in its arts. 10, 15 and 18; see Section C.

⁹² Report of the Bureau on cooperation, ICC-ASP/10/40, 18 November 2011, para. 63. In August 2014, at the occasion of the UN Security Council's visit to The Hague, the Court's President and Deputy Prosecutor were able to hold a high-level meeting with the Security Council members. Earlier in 2014, the ICC President met UN Secretary-General Ban-Ki Moon to discuss matters of mutual interest.

⁹³ Resolution ICC-ASP/11/Res.8, 'Strengthening the International Criminal Court and the Assembly of States Parties', para. 29. See also 'Establishment of a New York Liaison Office for the International Criminal Court and the Secretariat of the Assembly of States Parties – report pursuant to paragraph 11 of resolution ICC-ASP/2/Res.7' (<http://www.legal-tools.org/doc/640a8e/>), ICC-ASP/3/6, 20 July 2004, para. 10 (<http://www.legal-tools.org/doc/5ea87d/>), followed by resolution ICC-ASP/4/Res.4 of 3 December 2005, para. 25 (<http://www.legal-tools.org/doc/22fedc/>).

⁹⁴ See only Report of the International Criminal Court, ICC Doc. A/68/314, 13 August 2013. See also UN General Assembly Resolution A/RES/66/262, 25 October 2012, para. 19.

⁹⁵ Report of the Bureau on Cooperation, ICC-ASP/6/21, 19 October 2007, para. 62. For the OTP, between 2005 and 2013, 212 requests for assistance were sent to the UN, with an execution rate of 73.5%. In 2014, this number has steeply increased due to reinforced investigative operations of the OTP in the field.

⁹⁶ 2013 Report on Cooperation, note 72, para. 5.

Political Affairs ('DPA'); UN Women; the Office of the High Commissioner for Human Rights ('OHCHR'); as well as the Special Advisers and Special Representatives of the Secretary-General.⁹⁷ The ICC also liaises with UN programmes and funds, such as the UN Children's Fund ('UNICEF') and the World Food Programme.⁹⁸

- 38 While the Relationship Agreement extends to the UN's various subsidiary bodies, funds and programmes, departments and offices,⁹⁹ this is not the case for the UN's '**specialised agencies**', which are autonomous organisations (whose work is coordinated through ECO-SOC on the intergovernmental level).¹⁰⁰ Still, the Court entertains regular interaction – outside the confines of the Relationship Agreement – with UN specialised agencies, such as for instance the UN Educational, Scientific and Cultural Organisation ('UNESCO').

2. Technical cooperation with the UN

- 39 In many crisis situations around the globe, including those before the Court, the UN and its sub-bodies often have unique access to a particular territory through their field missions and peacekeeping operations. While article 3 of the Cooperation Agreement provides the **general legal basis** for the Court to request UN cooperation, articles 15 to 18 establish a more detailed foundation for technical assistance and cooperation.¹⁰¹
- 40 a) **Cooperation pursuant to articles 9, 10, 15 of the Cooperation Agreement.** Under the umbrella of the Cooperation Agreement, the Court has in the past years sought a variety of cooperation and assistance measures in almost all of its current situations. This *ad hoc* cooperation ranges from the provision of facilities and services to the disclosure of information and testimony by UN experts and other relevant cooperation foreseen in the Statute's legal framework (*in particular* Part 9 of the Statute). In practice, in most instances the OTP directs routine requests for cooperation to the relevant UN bodies directly. Only where the provision of evidence-related assistance (in most cases related to disclosure of information to the parties in court) is attached to a number of conditions, the relevant chamber may be involved.¹⁰² The OTP may be required to seek an appropriate order from the chamber – e.g. authorising the disclosure of the information subject to the protective measures requested by the UN, such as redactions, limitations on disclosure, or use of *in camera* or *ex parte* proceedings.¹⁰³
- 41 In Kenya, the Court continues to benefit from the UN Office at Nairobi ('UNON') **services and facilities**; exchanges between the offices concern in particular information on the developments in the relevant cases before the Court.¹⁰⁴ In the Central African Republic, the UN Integrated Peacebuilding Office in the Central African Republic ('BINUCA') assisted the Court in its **evacuation operations**, including by accommodating ICC personnel in the UN compound during six months. A regular flow of information on the situation in the country

⁹⁷ Notably Special Representatives on the prevention of genocide, the responsibility to protect, children and armed conflict and sexual violence in conflict.

⁹⁸ Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009, para. 107.

⁹⁹ See http://www.un.org/en/aboutun/structure/org_chart.shtml [accessed October 2014].

¹⁰⁰ The Relationship Agreement merely extends to the core organisation (UN) but not to *separate* organisations affiliated with it.

¹⁰¹ See in particular article 15(1) of the Relationship Agreement, making reference to article 87(6) of the Rome Statute on international cooperation and judicial assistance.

¹⁰² See art. 15(3) of the Relationship Agreement. An example is the testimony of UN personnel as a (expert) witness pursuant to art. 16 of the Relationship Agreement under certain conditions and parameters requested by the relevant UN agency. Art. 15(3) foresees that the Chamber issues appropriate instructions ('the Court may order'). This arrangement has been repeatedly used in the situation in the Democratic Republic of the Congo in the cases of *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, and *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07. See in subsection (d).

¹⁰³ See analogous provisions in art. 72(5)(d) of the Statute.

¹⁰⁴ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11 (http://www.legal-tools.org/en/go-to-database/lftfolder/0_17448/#results); *Prosecutor v. Uhuru Muigai Kenyatta*, No. ICC-01/09-02/11 (http://www.legal-tools.org/en/go-to-database/lftfolder/0_16938/#results). See also paragraph 46.

was provided by BINUCA, thus supporting the Court in continuing its work in relation to the case of Mr. Jean-Pierre Bemba, including notifying cooperation requests to the authorities. In the Democratic Republic of the Congo, the Court continued to rely on the administrative and logistical assistance of the UN Organisation Stabilisation Mission in the Democratic Republic of the Congo ('MONUSCO'), including **air transportation** from Kinshasa and from its Logistics base in Entebbe, Uganda.¹⁰⁵ The UN Multidimensional Integrated Stabilisation Mission in Mali ('MINUSMA') provides operational support to the Court, including by granting access to UN Humanitarian Air Service ('UNHAS') flights to areas of ICC operations throughout the country.¹⁰⁶ Assistance by relevant UN missions under the umbrella of the Cooperation Agreement is also being rendered to **defence teams** in cases before the Court.

The Court also receives cooperation from UN missions that are not located in any of the situation countries. In 2013, the Court organised video conferences to facilitate the testimony of several witnesses from UN premises in three different States.¹⁰⁷ This practice has been followed since. 42

b) **Cooperation pursuant to Memoranda of Understanding.** Where a high volume of requests for cooperation can be anticipated, the Court seeks to conclude Memoranda of Understanding ('MoU's') to facilitate agreed modalities for specific forms of assistance. Operative paragraphs of such MoU's outline in detail such services, facilities and other cooperation rendered and therefore **add specificity and clarity** to the technical interactions in the field. This practice has generated mutual benefits: it allowed the Court to avoid delays in the deployment of its operations and helped reduce costs. Further, the MoU's in force to date have facilitated swift exchanges on issues of mutual interest and allowed effective responses to concerns and misinformation on the ground.¹⁰⁸ 43

Presently, the Court has entered into **four such agreements**: A MoU was concluded with the UN Mission in the DRC ('MONUC') in 2005;¹⁰⁹ the MoU invokes explicitly articles 10, 15 and 18 of the Cooperation Agreement as the relevant modalities of cooperation.¹¹⁰ On 12 June 2013, the Court concluded a similar MoU with the UN Operation in Côte d'Ivoire ('UNOCI'),¹¹¹ following the structure and content of the MoU with MONUC. A third, similar MoU was concluded with MINUSMA on 20 August 2014.¹¹² All three MoU's make specific and detailed provision for **judicial use of evidence** obtained, testimony of members of 44

¹⁰⁵ By way of an example, a total of 448 UN flights have been used between 1st January and 30 September 2013. 2013 Report on Cooperation, note 72, para. 18.

¹⁰⁶ Due to the intensity of OTP investigative operations in the Situation in Mali, the Court has entered into a memorandum of understanding with MINUSMA on 20 August 2014. *See also* subsection b) below.

¹⁰⁷ 2013 Report on Cooperation, note 72, para. 22.

¹⁰⁸ 2013 Report on Cooperation, note 72, para. 14. However, MoU's may also a more informative purpose and facilitate information exchange and administrative cooperation pursuant to arts. 5, 9 of the Relationship Agreement, such as a possible future MoU between the Court and the United Nations Office of Internal Oversight Services, *see*, ICC-ASP/9/Res.5 'Independent Oversight Mechanism', 10 December 2010, paras. 5, 8, reiterating ICC-ASP/8/Res.1.

¹⁰⁹ 'Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court (with annexes and exchange of letters)', New York, 8 November 2005, Volume 2363, II-1292. *See also* 'Report of the Bureau on Cooperation', ICC-ASP/6/21, 19 October 2007, para. 60.

¹¹⁰ MONUC MoU, introduction and arts. 5, 10 *et seq.*

¹¹¹ 'Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Operation in Côte d'Ivoire (UNOCI) and the Prosecutor of the International Criminal Court (with annexes)', New York, 4 June 2013 and 5 June 2013 and The Hague, 12 June 2013, No. II-1371. Cooperation between UNOCI and the Court concerns in relevant part the case of *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11 (http://www.legal-tools.org/en/go-to-database/ltfolder/0_26172/#results) 2 44.

¹¹² 'Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA) and the International Criminal Court', 20 August 2014.

the respective UN mission, assistance in the production and preservation of evidence, and regarding arrests, searches and seizures and securing of crime scenes.¹¹³ The Court entered into another MoU with the United Nations Office on Drugs and Crime on building state capacity regarding the domestic enforcement of sentences of imprisonment pronounced by the Court in accordance with international standards and norms.¹¹⁴ This MoU will become more relevant in the coming years when the Court will have issued an increasing number of final judgments and sentences, putting the ICC enforcement regime to the test.¹¹⁵

- 45 Following its competence pursuant to article 18 of the Relationship Agreement, the OTP has also entered into **specific agreements** with various UN bodies on an *ad hoc* basis, as required. These have focused mainly on requests for obtaining information or evidence, access to UN archives, and interviews of current or former UN staff.¹¹⁶
- 46 Finally, a number of MoU's are concluded by the Registry directly with certain UN subsidiary bodies and offices.¹¹⁷ This includes a MoU with the ICTY regarding the Court's access to the ICTY's 'UN ICTY Judicial Database', facilitating legal research on relevant jurisprudence.¹¹⁸ More related to **administrative support of field missions**, the Registry has concluded a MoU with UNON on the provision of support services and facilities to the Registry of the Court pursuant to articles 8 and 10 of the Relationship Agreement in connection with its activities in Kenya.¹¹⁹ As regards general **security arrangements** in the field, the Court is included in the UN security and safety arrangements provided by the Department of Safety and Security ('UNDSS') in all areas of the Court's operations.¹²⁰ Finally, for each session that the ASP holds at UN Headquarters in New York,¹²¹ a MoU regulates the provision of facilities and services of sessions.¹²²
- 47 c) **Cooperation with UN commissions of inquiry.** In recent years, the Court's OTP has interacted with a number of international commissions of inquiry set up by the UN to carry out investigations in crisis areas, namely in Darfur, Guinea and Libya. In particular, interaction with UN expert panels on investigations in the field provides a valuable source of information for ICC investigators on Rome Statute crimes, in particular during preliminary examinations where the OTP mainly relies on open source information to determine whether or not to open an investigation. A more **systematic cooperation** between the Court

¹¹³ MONUC MoU, Chapter III, Arts. 10–16; UNOCI MoU, Chapter III.

¹¹⁴ 'Memorandum of Understanding Between the International Criminal Court and the United Nations, on Building the Capacity of States to Enforce, in Accordance With International Standards on the Treatment of Prisoners, Sentences of Imprisonment Pronounced by the Court', 26 September 2014, ICC-PRES/15-02-14 (Official Journal Publication).

¹¹⁵ See Part 10 of the Rome Statute, arts. 103 *et seq.*

¹¹⁶ In addition, the OTP has concluded cooperation agreements with a number of (situation) countries, similarly destined at facilitating and assisting OTP investigative activities on the ground. See, for instance, the 'Accord de coopération judiciaire entre la République du Mali et le Bureau du Procureur de la Cour', 13 February 2013.

¹¹⁷ See 'Report of the Bureau on cooperation', ICC-ASP/10/40, 18 November 2011, paras. 56–61.

¹¹⁸ 25 October 2007. In addition, MoUs with OLA (on the process of requesting disclosure of documents obtained from the UN) and the International Development Law Organisation exist; Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009, para. 116.

¹¹⁹ 'Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning the Provision by the United Nations Office at Nairobi of Support Services and Facilities to the Registry of the Court in Connection with its Activities in the Republic of Kenya', 9/13 June 2011.

¹²⁰ The original MoU '[...] Regarding Coordination of Security Arrangements' entered into force on 3 March 2005; it is currently being amended to reflect the modified template approved by the Inter-Agency Security Management Network ('IASMN') in 2010. Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009, para. 109.

¹²¹ Article 112(6) of the Statute.

¹²² 'Memorandum of Understanding Between the International Criminal Court and the United Nations Concerning Provision of Facilities and Services for the thirteenth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, to be held at United Nations Headquarters, from 8 to 17 December 2014', on file with the Secretariat of the Assembly of States Parties.

and relevant UN organs and subsidiary bodies¹²³ is being considered.¹²⁴ Mandates of commissions of inquiry regularly overlap with information sought by the OTP regarding issues such as when and in which locations relevant crimes have been committed; identities of alleged perpetrators and victims; and any information on the existence and quality of national proceedings in relation to such crimes.

d) **Cooperation between the Court and the Security Council.**¹²⁵ In recent years there has been an **increased interaction** of the Security Council with the Court under various formats, including the holding of an open debate on peace and justice, with a special focus on the role of the Court.¹²⁶ This interaction included the Court's President and Prosecutor addressing the Security Council on matters related to the Court's operations pursuant to article 4(3) of the Relationship Agreement¹²⁷ but also led to other high-level occasions where Court officials addressed the Security Council.¹²⁸ It has been suggested that given their **often overlapping and complementary mandates**,¹²⁹ the relationship between the Court and the Security Council could be strengthened 'by extending interaction, including beyond specific situations referred by the Council to the Prosecutor, and by creating space for open discussions on thematic issues.'¹³⁰ A number of specific measures of enhanced interaction have been proposed, which serve to connect the Court and the Security Council over and above the provisions of the Relationship Agreement.¹³¹ These include: liaising with regional and sub-regional organisations; public and diplomatic support; measures on a more technical level, such as the harmonisation of sanctions mechanisms for the identification and freezing of assets and the imposition of travel bans; arrest strategies for persons subject to ICC arrest warrants; and following-up on Security Council referrals, in particular in case of non-cooperation.¹³²

However, although the Court and the Security Council share several traits in their mandates, they still have distinct roles in that the Council is a **political body** within the UN system while the Court is an independent judicial institution. The Security Council's role in the Court's activities has been a delicate topic in negotiations leading up to the Rome Statute,¹³³ as a result, the Statute clearly delineates their **distinct roles**, giving the Court

¹²³ The offices setting up commissions of inquiries vary depending on the situation and UN officers involved, including, amongst others, the UN Secretary-General, the Security Council or the Human Rights Council.

¹²⁴ Presently, the OTP and OHCHR are looking at ways to strengthen possible modalities for cooperation, including through conclusion of a framework MoU. 2013 Report on Cooperation, note 72, para. 28.

¹²⁵ This section does not address the interaction and coordination between the Court and the Security Council regarding situation referrals pursuant to art. 13(b) of the Rome Statute or other issues addressed in art. 17 of the Cooperation Agreement which are being discussed elsewhere in this Commentary.

¹²⁶ Resolution adopted by the UN General Assembly on 22 August 2013 ('Report of the International Criminal Court'), A/RES/67/295, para. 18. See also statement by the President of the Security Council of 12 February 2013 (S/PRST/2013/2) reiterating the importance of state cooperation with the Court 'in accordance with the respective obligations of States'; *id.*, para. 19. See also a list of ensuing events under the heading 'Peace and justice, with a special focus on the role of the ICC' in 2012, in: 2013 Report on Cooperation, note 72, para. 31.

¹²⁷ See the ICC Prosecutor's periodic addresses of the Security Council on the situations in Darfur (Sudan) and Libya pursuant to Security Council referrals under art. 13(b) of the Rome Statute, S/RES/1593 (2005) of 31 March 2005 and S/RES/1970 (2011) of 26 February 2011, respectively.

¹²⁸ *JCC addresses the UN Security Council during the debate on Peace and Justice*, ICC Press Release of 18 December 2012, ICC-CPI-20121018-PR844.

¹²⁹ Both are called upon in case of grave mass atrocities posing a threat to international peace and security; both have a mandate in strengthening the complementary relationship between peace and justice; and both have a preventative mandate. See 2013 Report on Cooperation, note 72, paras. 32–35.

¹³⁰ 2013 Report on Cooperation, note 72, para. 36.

¹³¹ The initiative was originally triggered by Guatemala with a 'concept note' issued during the Guatemalan Presidency of the Security Council at the occasion of the 17 October 2012 Security Council open debate on 'Peace and Justice with a Special Focus on the Role of the International Criminal Court'.

¹³² For details on the possible measures to enhance coordination and cooperation see 2013 Report on Cooperation, note 72, paras. 38–59.

¹³³ Kirsch and Holmes, (1999) 93 *AJIL* 2; Yee, in: R.S. Lee (ed.), *The International Criminal Court: Making of the Rome Statute* (1999) 147; 1994 ILC Draft Statute, pp. 86 *et seq.*, paras. 13–15, 118–121.

sufficient autonomy from the Security Council in many aspects.¹³⁴ These distinct roles and functions of both bodies should always be kept in mind – and preserved.

3. Relationship between the Rome Statute and the Relationship Agreement

- 50 As outlined above, the Relationship Agreement contains rather detailed provisions on cooperation and judicial assistance between the United Nations and the Court.¹³⁵ In particular the provisions enshrined in articles 15, 16, 18 and 20 have a direct bearing on the procedural arrangements in ongoing cases before the Court since they concern information potentially used as evidence in court. The Relationship Agreement foresees certain **protective arrangements** where the UN provides the Court with material under the condition of confidentiality or non-disclosure in order to assure the safety and security of persons and the proper conduct of UN operations.¹³⁶ Juxtaposed with the confidentiality protection arrangements is the fundamental obligation of the OTP to disclose any **exculpatory evidence** and material in its possession pursuant to article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence.
- 51 The Relationship Agreement represents an **international treaty** concluded between two international organisations.¹³⁷ Its interpretation, including the determination of parties' obligations arising from it, is governed by the applicable general principles of international law.¹³⁸ In particular where the OTP enters into specific cooperation arrangements with UN actors pursuant to article 18 of the Relationship Agreement, **tension** may arise between treaty obligations vis-à-vis the UN on the one hand, and Rome Statute obligations vis-à-vis the chamber and the parties to the proceedings on the other.¹³⁹ More concretely, **confidentiality arrangements and disclosure obligations** may clash where the Prosecutor receives information 'on condition of confidentiality and solely for the purpose of generating new evidence' pursuant to article 18(3) of the Relationship Agreement which contains potentially exculpatory material. While the provision mirrors article 54(3)(e) of the Rome Statute regarding the non-disclosure of confidential materials received solely for the purpose of generating new evidence,¹⁴⁰ it goes beyond the latter in stating that such information 'shall not be disclosed to other organs of the Court or to third parties' absent the consent of the UN as the provider

¹³⁴ Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004) 51.

¹³⁵ See Section III of the Relationship Agreement 'Cooperation and judicial assistance'. See also above Section C.

¹³⁶ Articles 15(3), 18(3) and (4) of the Relationship Agreement. Similarly, the Rome Statute contains protective provisions for any person at risk on account of the activities of the Court in 'an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court'. *Prosecutor v. Germain Katanga*, No. ICC-01/04-01/07-475, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', Appeals Chamber, 13 May 2008, para. 54 (<http://www.legal-tools.org/doc/a76f99>) 2 50.

¹³⁷ As for the legal personality of the ICC see art. 4(1) of the Rome Statute.

¹³⁸ See generally art. 27 of the Vienna Convention on the Law of Treaties of 23 May 1969, United Nations Treaty Series, Vol. 1155, I-18232, registered *ex officio* on 27 January 1980 (p. 331) (<http://www.legal-tools.org/doc/6bfcd4/>), and, more on point regarding its applicability (to international organisations) but not yet in force, art. 27(2) of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 21 March 1986; in: *Official Records of the United Nations Conference on the Law of Treaties between States and International Organisations or between International Organisations*, vol. II (United Nations publication, Sales No. E.94.V.5) (<http://www.legal-tools.org/doc/760ef5/>): 'An international organisation party to a treaty may not invoke the rules of the organisation as justification for its failure to perform the treaty.'

¹³⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on non-disclosure of exculpatory materials, note 88, para. 43.

¹⁴⁰ 'The Prosecutor may [...] agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; [...]'

of the information.¹⁴¹ In two cases in the situation in the Democratic Republic of Congo, the *Lubanga*¹⁴² and *Katanga*¹⁴³ cases, the chambers had to tackle such a situation.¹⁴⁴

The Appeals Chamber resolved the matter in *Lubanga* in holding that the competent chamber will have to respect the confidentiality agreement concluded by the Prosecutor under article 54(3)(e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider.¹⁴⁵ However, relying on article 67(2), second sentence, as well as article 64(2)¹⁴⁶ of the Statute, the Appeals Chamber also ruled that the **final assessment** as to whether article 54(3)(e) material *would* have to be disclosed, were it not obtained on the condition of confidentiality, will have to be carried out **by the competent chamber**.¹⁴⁷ In such a case, it is also for the chamber to determine whether and, if so, which **counter-balancing measures** can be taken to guarantee the fairness of a trial despite the non-disclosure of the information.¹⁴⁸ Furthermore, the reliance on article 54(3)(e) of the Statute should be ‘**exceptional**’.¹⁴⁹ Consequently, confidentiality agreements where the provision of information is governed by article 18(3) of the Relationship agreement as a default arrangement are inappropriate.¹⁵⁰

The Appeals Chamber did not address (and has not done so since) the Prosecutor’s possible obligations towards the UN **under international law** to honour the wording of article 18(3) not to disclose material ‘to other organs of the Court’, which arguably includes

¹⁴¹ See also the comparable regime at the ICTY in Rules 68, 70; see more generally Johnson, (2012)10 *JICJ*, 887 (893); L. Korecki, (2009) 7 *JICJ*, 937 *et seq.*

¹⁴² In *Lubanga*, some information and documents the OTP had received pursuant to art. 54(3)(e) of the Rome Statute originated from the UN. *Prosecutor v. Thomas Lubanga Dyilo* No. ICC-01/04-01/06-2842, Judgment pursuant to article 74 of the Statute, Trial Chamber, 14 March 2012, para. 121 (<http://www.legal-tools.org/doc/677866/>); initially the Trial Chamber had stayed the proceedings in reaction to the OTP’s refusal to disclose art. 54(3)(e) information received from the UN (because the latter had refused to consent to any disclosure, relying on art. 18(3) of the Relationship Agreement): *Prosecutor v. Thomas Lubanga Dyilo* No. ICC-01/04-01/06-1401, Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Trial Chamber, 13 June 2008 (<http://www.legal-tools.org/doc/e6a054/>) 2 51. See also Ambos, (2009) 12 *NCLRev*, 543.

¹⁴³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-621, Decision on article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, Pre-Trial Chamber II, 20 June 2008 (<http://www.legal-tools.org/doc/0d8508/>).

¹⁴⁴ The problem has been succinctly brought to the point in *Lubanga* Decision on non-disclosure of exculpatory materials, para. 43: ‘[...] by accepting material on the condition of confidentiality, the Prosecutor potentially puts himself in a position where he either does not disclose material that he normally would have to disclose [pursuant to the disclosure obligations under article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence], or breaches a confidentiality agreement entered into with the provider of the material in question.’

¹⁴⁵ *Lubanga* Judgment on non-disclosure of exculpatory materials, note 88, para. 48.

¹⁴⁶ The Appeals Chamber considered the overall role ascribed to the Trial Chamber in article 64(2) of the Statute to guarantee that the trial is fair and expeditious. *Id.*, para. 46.

¹⁴⁷ *Id.*, paras. 3, 48.

¹⁴⁸ *Id.*, para. 48: ‘If the provider of the material does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information.’ For the practical application of this ruling see *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-1644, Reasons for Oral Decision lifting the stay of proceedings, Trial Chamber I, 23 January 2009, paras. 46 *et seq.* (<http://www.legal-tools.org/doc/94e831/>).

¹⁴⁹ *Lubanga* Judgment on non-disclosure of exculpatory materials, note 88, para. 55, confirming the Trial Chamber’s finding to this effect in its ‘Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, para. 71 (<http://www.legal-tools.org/doc/e6a054/>).

¹⁵⁰ *Lubanga* Judgment on non-disclosure of exculpatory materials, note 88, para. 52, referring to article 10(6) of the MONUC Memorandum of Understanding (‘documents held by MONUC that are provided by the United Nations to the Prosecutor shall be understood to be provided in accordance with and subject to the arrangements envisaged in article 18, paragraph 3, of the Relationship Agreement’). See, however *Katanga* Decision on article 54(3)(e), note 143, para. 52.

the relevant chamber and thus stands in contrast to the Appeals Chamber's holding.¹⁵¹ This is problematic since the ruling of the Appeals Chamber is of **limited authoritative value** in interpreting legal obligations of the Court and the UN arising from the Relationship Agreement under international law. Any ruling from a chamber, while with direct binding effect *inter partes*, i.e. for the parties subject to the relevant legal proceedings before that chamber, can hardly be conceived as having any direct legal effect on the UN with regard to an international treaty concluded with the Court (and not the chamber) as an international organisation.¹⁵²

4. Sustainable effect of the Relationship Agreement

- 54 The coordination and cooperation between the Court and the various UN sub-organs not only provides immediate operational assistance to the Court's criminal procedures but also creates further synergies that go to the complementary nature of the Rome Statute system. The UN and its organs and programmes also play an important role in **strengthening domestic capacities** to address crimes under the Rome Statute, as evidenced by the 'Green-tree process', launched in 2010 by the International Centre for Transitional Justice ('ICTJ') and the UN Development Program ('UNDP'), focusing on rule of law projects to enhance complementarity through the strengthening of domestic criminal justice systems. In addition, in response to the Court's annual reports to the UN pursuant to article 6 of the Relationship Agreement, the General Assembly regularly calls upon states to take their cooperation responsibilities vis-à-vis the Court seriously, and encourages further accessions to the Rome Statute.¹⁵³

¹⁵¹ The Appeals Chamber merely held that '[w]henver material is offered to the Prosecutor on the condition of confidentiality, he will have to take into account the specific circumstances, including the expected content and nature of the documents, and its potential relevance to the defence', and thereupon determine under what exact conditions the material can be accepted in light of possible future obligations pursuant to art. 67(2) of the Rome Statute; *Lubanga* Judgment on non-disclosure of exculpatory materials, note 88, para. 51.

¹⁵² See art. 27 of both Vienna Conventions cited above in note 137. In *Katanga*, the Pre-Trial Chamber had ruled that if (part of) any agreement were found to be contrary to the ICC's statutory framework, 'some of[...]the] confidentiality clauses may be declared null and void', *Katanga* Decision on article 54(3)(e), note 143, para. 63 2 53. Critical (and suggesting that chambers of the ICC do not have such competence) Schabas, Commentary (2010), 679; *concurring* Johnson, 893–894. See also Yáñez-Barnuevo and Escobar Hernández, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004), 68, pleading that for reasons of hierarchy of norms (art. 21 of the Rome Statute) the Relationship Agreement should be purely procedural and administrative in nature, not contradicting any provision of the Statute or the Rules of Procedure and Evidence. On this last point see *already* 1996 Preparatory Committee I, para. 30.

¹⁵³ Resolution adopted by the General Assembly on 29 May 2012 ('Report of the International Criminal Court'), A/RES/66/262, 25 October 2012, paras. 5, 7–8; Resolution adopted by the General Assembly on 22 August 2013 ('Report of the International Criminal Court'), A/RES/67/295, paras. 7–10, 13–14, 23. See also Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009, para. 111.

Article 3 Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ('the host State').

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Literature: Ahluwalia, K., *The Legal Status, Privileges and Immunities of the Specialised Agencies of the United Nations and Certain Other International Organisations* (1964); Behr, S., *Die Exterritorialität der Gesandten unter besonderer Berücksichtigung ihres Zweckes* (1919); Bekker, P.H.F., 'The Work of the International Law Commission on "Relations between States and International Organisations" Discontinued: an Assessment', (1993) 6 *LeidenJIL* 1, 3; Brandon, M., 'The Legal Status of the Premises of the United Nations', (1952) 28 *BYbIL* 90; Conforti, B., *The Law and Practice of the United Nations* (1996) 121; Jenks, C.W., *The Headquarters of International Organisations* (1945); *id.*, *International Immunities* (1961); Muller, A.S., *Internationale Organisations and Their Host States, Aspect of Their Legal Relationship* (1995); Oehler, D., *Internationales Strafrecht, Geltungsbereich des Strafrecht, Internationales Rechtshilferecht, Recht der Gemeinschaften, Völkerstrafrecht* (1983); Schermers, H.G., 'Liability of International Organisations', (1988) 1 *LeidenJIL* 1, 3; Schutte J.J.E., 'Legal and Practical Implications, from the Perspective of the Host Country, Relating to the Establishment of the International Tribunal for the Former Yugoslavia', (1994) 5 *CLF* 2-3, 423; Wright, Q. 'The Juridical Personality of the United Nations', (1949) 48 *AJIL* 509; U.N. Publications, Basic Documents, the Statute, the Rules of Procedures and Evidence and Other Regulatory Instruments, ICTY (1998).

Content

A. General remarks	1
I. The legal status of the Court as counterpart of the host State.....	1
II. Headquarters Agreement/Host State Agreement	5
III. Interim removal.....	6
IV. Host Arrangement	7
B. Analysis and interpretation of elements.....	9
I. The seat/extensions of the seat.....	9
II. Main elements of the Headquarters Agreement	19
III. A mandating clause/settlement of disputes	27
C. Special Remarks: The interim solution – applicability of the ICTY arrangements..	30
I. Ongoing negotiations	30
II. Applicability <i>mutatis mutandis</i> of the ICTY Host Arrangements.....	34
1. Terra incognita.....	34
2. The situation in 1993: three legal instruments as yardsticks.....	35
3. Three categories of possible positive jurisdictional conflicts.....	36
III. The final Seat Agreement	39
1. In general.....	39
2. Article by article in general	43
IV. The ICC premises as enclave within the territorial jurisdiction of the Netherlands	53
V. Transit arrangements	57
VI. Detentional measures	59
VII. Third parties to the ICC Family	63
VIII. Privileges and immunities.....	64
IX. Newly established <i>ad hoc</i> Tribunals	65
X. Asylum proceedings.....	67

A. General remarks

I. The legal status of the Court as counterpart of the host State

1 Just like the ICJ¹, the ICTY and the Appeals Chamber of the ICTR, the ICC is seated at The Hague in the Netherlands which has to act as the host State according to the conditions as set out in the final Seat Agreement as of the 7 July 2007², to be commented below sub C subpara. III. To complicate things, after the conclusion of that final Seat Agreement, the Netherlands decided to host two brand-new *Ad Hoc*-Tribunals sharing some parts of the ICC premises, its detention and penitentiary facilities and annexes and thus prompting rather intricate jurisdictional conflicts and questions between ICC, those *Ad Hoc*-Tribunals on the one hand and the Host Country on the other. Here we are referring to the so-called Annex of the Sierra Leone Tribunal³ and the Lebanon Tribunal or Harirri Tribunal⁴. Additionally, in January 2008 some additional Arrangements to facilitate this seating are underway. The Seat Agreement with the Lebanon Tribunal has been completed in December 2007; the definitive Agreement was officially published on the 21 December 2007. Sub XI of this commentary we will be touching upon those Seat Agreements as far as relevant for the purview of the final Seat Agreement with ICC. Especially the fact that the *Ad Hoc* Tribunals for Sierra Leone and the Lebanon are supposed to use the same penitentiary provisions as set at the disposal of ICC will certainly prompt some practicable problems until ICC will have its own independent premises in the line of dunes at Scheveningen, just across the Scheveningen prison facilities at the Van Alkemadeaan. But that will take some considerable time.

Article 3 of the Rome Statute as it stands now has never been the subject of fundamental discussions neither during the sessions of the diplomatic summit in Rome nor during the preceding meetings of the UN *ad hoc* Commissions or the Preparatory Commission. In its March session of 1998 the latter agreed upon a consolidated text of article 3 mainly identical with the present one⁵. The only difference between the 1998 March text and the present one is the introduction in the latter of an approval of the headquarters agreement by *the Assembly of States Parties*. The March text required the approval of ‘the’ States Parties. The definite article ‘the’ seems to imply the requirement of unanimity among the contracting States

¹ Article 22 Statute of the ICJ: ‘The seat of the Court shall be established at the Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable. 2. The President and the Registrar shall reside at the seat of the Court’.

² See: Zetelverdrag tussen het Internationaal Strafhof en het Gastland (met briefwisseling), ‘s Gravenhage, 7 Juni 2007 (uitgegeven 17 Juli 2007) [Headquarters Agreement between the International Criminal Court and the Host State (with exchanged additional letters), The Hague, 7 June 2007 (published the 17 July 2007)] (Netherlands Treaty Series 2007, No. 125.).

³ See: Notawisseling houdende een Zetelverdrag tussen het Koninkrijk der Nederlanden en het Speciale Hof voor Sierra Leone; ‘s-Gravenhage/Freetown, 19 Juni 2006 [Headquarters agreement between the Kingdom of the Netherlands and the Special Court for Sierra Leone (Ministry of Foreign Affairs of the Kingdom of the Netherlands, Treaties Division DJZ/VE-262/06)] (Netherlands Treaty Series 2006, No. 131).

⁴ See: Verdrag tussen het Koninkrijk der Nederlanden en de Verenigde Naties betreffende de Zetel van het Speciale Tribunaal voor Libanon; (met brieven en verklaringen) New York, 21 Dec. 2007 [Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special Tribunal for Lebanon] (Netherlands Treaty Series 2007, no. 228); See: Stukken van de Tweede Kamer, No. 31.128 No. 1, Brief van de Minister van Buitenlandse Zaken, dd 17 Aug. 2007 [Hansard of the Lower House No. 31.128, No. 1, Letter of the Minister for Foreign Affairs of the Kingdom of the Netherlands dd the 17th of August 2007] and Stukken van de Tweede Kamer, No. 31.128 No. 2, Brief van de Minister van Buitenlandse Zaken dd 21 december 2007 [Hansard of the Lower House No. 31.128 No. 2, Letter of the Minister for Foreign Affairs of the Kingdom of the Netherlands dd 21 December 2007].

⁵ See UN Doc. A/AC.249/1998/WG.8/CRP.1/Add.2, according to which article 3 would run as follows: ‘Seat of the Court. 1. The seat of the Court shall be established at ... in ... (“the host State”). 2. The President, with the approval of the States Parties, may conclude an agreement with the host State, establishing the relationship between that State and the Court. 3. The Court may exercise its powers and functions on the territory of any State Party and, by special agreement, on the territory of any other State’.

Parties. The Preparatory Commission text of article 3 has completely been derived from the original 1994 ILC Draft Statute⁶.

Nevertheless as far as the seat and Headquarters Agreement are concerned, fundamental differences exist with regard to the legal position of the ICC in comparison to that of the ICJ and the above-mentioned *ad hoc* Tribunals. The latter entities are, by virtue of the mere fact that they have been instituted by a Security Council Resolution, organs and sub-organs of the United Nations. The ICJ has been defined as principal judicial organ in article 92 of the UN Charter⁷. *E contrario*, the two *ad hoc* Tribunals have to be considered as sub-organs of the United Nations. Hierarchically they are by virtue of the UN Charter juridically superior to the Netherlands' jurisdiction, which is constitutionally bound to accept their judgements as international law decisions of a self-executing nature. Article 103 of the UN Charter⁸ dictates the host country to set aside its obligations under international law in case those obligations should collide or be incompatible with the host State's obligations with a view to the implementation and the exercise of the criminal jurisdiction vested in those *ad hoc* Tribunals. On the basis of an *a fortiori* interpretation this implies for the Dutch legal system that the Dutch judiciary has to declare Dutch statutes and regulations thereof null and void in as much their content or purview would be incompatible with the nature of the substantive mandate given to those sub-organs. The ICC as a treaty organisation does not possess the same UN Charter derived superiority towards the Netherlands' jurisdiction. At this moment the ICC organisation is not to be considered as a subsidiary body of the United Nations, although strong relations will exist between the two organisations, namely with a view to the exercise of jurisdiction under article 13 (b), in a case in which the UN Security Council refers a situation to the ICC Prosecutor acting under Chapter VII of the UN Charter. This has furthermore been codified by virtue of article 17 (1) of the Relationship Agreement between the International Criminal Court and the United Nations.

The ICC in relation to the UN is an independent juridical entity, which has been mandated through a multilateral treaty to take cognisance of particular crimes. The ICC is therefore to be regarded as a separate treaty organisation. This organisation provides for the institution of a court with criminal jurisdiction. The treaty organisation and not the UN is the counterpart of the host State with whom the Headquarters Agreement is to be concluded. Under international law the ICC therefore has towards the host State a status which is analogous to that of the International Rhine Navigation Judge⁹. This judiciary similarly derives its criminal jurisdiction from a multilateral treaty which affords the exclusive power to take cognisance of contraventions of the Rhine Navigation Police Regulations. As an independent treaty organisation the Rhine Navigation Judiciary concluded a separate Headquarters Agreement for the Central Commission of the Rhine Navigation, of which a chamber of appeal, competent in Rhine Navigation matters, forms a part¹⁰. The same model applies in the case of the ICC.

⁶ UN Doc. A/49/355 (1 Sep. 1994), p. 3.

⁷ 'The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter'.

⁸ 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

⁹ Van Eysinga, *La commission centrale pour la navigation du Rhin* (1935); id., *Evolution du droit fluvial international du congrès de Vienne au traité de Versailles* (1920); see also Dürkopp, *Die Internationalisierung der Elbe* (1931); Oehler, in: Bassiouni and Nanda (eds.), *A Treatise on International Criminal Law* (1973) 262; Oehler, in: Bassiouni (ed.), *International Criminal Law* (1986) 199 *et seq.*; Hulsman, *Le Droit pénal international* (1965) 109 *et seq.* By virtue of the Revised Act on the Navigation on the Rhine all the Rhine riparian States have to acknowledge the jurisdiction of the Rhine Border Courts (Rheinufergerichte) and are obliged to enforce their sentences without any transformation procedure.

¹⁰ See Walther, *La Jurisprudence de la commission centrale pour la navigation du Rhin* (1948).

- 4 The ICC concludes with the host State a Headquarters Agreement, to be approved by the Assembly of States Parties¹¹. The Headquarters Agreement is meant to regulate on a bilateral basis the legal status of the ICC-organisation in its host State. In addition the ICC also concludes a host State Agreement with the host State. In the Headquarters Agreement the international law of the ICC settlement is regulated with the host State. In this regard matters such as privileges, immunities and extraterritorialities as well as the status of the ICC itself, both as a supranational legal entity and as an entity under domestic law of the host State, are meant. With the latter the ICC, as a public international law organisation, must be empowered to conclude treaties and private law contracts. In the host State Agreement the obligations of the host State towards the ICC with regard to criminal law, procedural and judicial assistance obligations concerning pre-trial detention, transit and making available of personnel are envisaged. The Headquarters Agreement governs the penitentiary obligations of the host State such as the obligation to make pre-trial detention facilities available and the manner in which the host State, acting as subsidiary custodian, will function in the execution of the final and irrevocable sentences of ICC in terms of article 103 para. 4, where no other State is willing to accept the obligation to execute the sentence in its own detention facilities¹². Subsequently both the host State and the ICC will conclude separate agreements with the UN for the governance of financial relations and the delineation of competences. The Agreement between the ICC and the UN is called a 'relationship agreement' in the Annex to the Rome Statute. In this manner a triangular treaty relationship based on a series of bilateral treaties results between the ICC, the UN and the host State. This aspect will revert to hereinafter. The ICC can also not be compared to the Scottish Court which has been conferred jurisdiction over the two Lockerbie-bombers, and which had its seat in the Netherlands since April 1999. This Scottish Court is to be seen as a national organ of the United Kingdom which has been granted residential rights by virtue of the Headquarter Agreement for the duration of the Lockerbie procedures defined in Security Council Resolution 1192. The Scottish Court remains, as far as the Netherlands as host country is concerned, a foreign jurisdiction. This is clear from the language in which the host State Agreement is couched. According to Dutch law the ICC, just like the ICTY, has to be considered as emanations of the national Dutch judiciaries which should be expressed in the Headquarters Agreement and the related enabling legislation.

II. Headquarters Agreement/Host State Agreement

- 5 The primary competent authority for the conclusion of the Headquarters Agreement is the President of the ICC in terms of article 3. By virtue of this paragraph the Rome Statute itself

¹¹ In the so-called 'Zutphen Draft' the term 'headquarters agreement' did not appear (UN Doc. A/AC.249/1998/CRP.7 (31 Mar. 1998)). In the operative articles of the Zutphen Draft the terminology 'agreement' or 'host State agreement' were used alternatively. The second paragraph of article 3 of the Zutphen Draft runs as follows: '2. The President, with the approval of the assembly of States Parties, may conclude an *agreement* (emphasis added) with the host State, establishing the relationship between that State and the Court'. In article 86, Option 2, para. 1*ter*, the term 'Host State Agreement' was used by the Zutphen drafters to indicate the bilateral instrument to be drawn up by ICC on one hand and the host State on the other governing the relationship in every aspect (with a view to penitentiary, financial en logistic matters and special obligations envisaging cooperation, assistance and other kinds of facilitation). Its paragraph 1*ter* runs as follows: 'If no State is designated under paragraph 1, the sentence of imprisonment shall be served in the prison facility made available by the host State, in conformity with and under the conditions as set out in the *Host State Agreement* (emphasis added) as referred to in article 3, paragraph 2'. In the Annex to the Zutphen Draft the term 'headquarters agreement' was used in paragraph 4 (c) ('basic principles governing a headquarters agreement to be negotiated between the court and the host country').

¹² This paragraph runs as follows: '4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court'. See hereinafter the comments on article 103.

articulates the capacity and competence – incumbent on an ICC organ – to conclude an agreement between the organisation and a sovereign power, the host State. This is rather unusual. The Statutes of the two *ad hoc* criminal Tribunals, ICTY and ICTR, do not provide for an operative article empowering one of their organs to conclude a Headquarters Agreement with the host State. Those negotiations were conducted by the United Nations through the Secretariat and the Office for Legal Affairs, acting as a kind of trustee for the fresh born judiciaries¹³. The parties deferred signing the contracts until the necessary steps concerning the financial aspects had been taken by the General Assembly. Of course, in the case of the ICC, there is no pre-existing body available to act as a kind of trustee or quartermaster – there do not exist such relations to an already functioning body at the international level. The already mentioned body of the Assembly of States Parties cannot be considered like that: the only task of that entity is to decide on the approvability of the Headquarters Agreement. The President has to be considered as the ICC-organ having apparent authority towards the host State to enter into negotiations to conclude the bilateral instruments needed to host the ICC properly. In line with this the negotiations between the ICC and the host State are conducted by, or in the name of, the President. The basic principles of the Headquarters Agreement are drafted by a new UN Preparatory Commission in accordance with the aforementioned Annex to the Rome Statute¹⁴. Those basic principles envisage the main conditions to guarantee the permanence, impartiality and independence of the ICC towards the host State, which has to respect the ICC as an autonomous judicial entity wielding jurisdictional power without any consultation whatsoever with the host State. It was, nevertheless, the host State which conducted the negotiations of both the Headquarters and host State Agreements with the ICC. It is the State that is the contractual counterpart towards the ICC. The Assembly of State Parties had to be considered as ‘third party’ in this context. The wordings of the final Seat Agreement articulate this pinpointly. See below sub C.III.1.

III. Interim removal

As in the case of the ICJ it is possible for the ICC to transfer its proceedings in regard to a particular case to another place within the host State, a place which has additional security guarantees where indications exist of heightened risk or an immediate danger, or outside the host State. The Statute gives no guidance as to the criteria which could justify such a transfer. The Court can decide to such a transfer in any case where it finds it ‘desirable’ to do so. The same subjective criterion is found in article 22 ICJ Statute¹⁵. Reasons of internal and external security of ICC could be taken into consideration with a view to such a decision, or alternatively together with reasons in the interest of the collection of evidence. The Rome Statute does not define the organ of the ICC that is competent to decide on such a transfer. It is, however, clear that it is for the Presidency to take this decision, acting under article 38 para. 3 (a) in the interest of the ‘proper administration of the Court’. By virtue of the Court’s regulations, more detailed criteria could be drawn up with a view to the Court’s relocation.

¹³ See Schutte (1994) 5 *CLF* 2–3 428 *et seq.*

¹⁴ See the Annex to the Rome Statute as contained in UN Doc. A/CONF.183/C.1/L.49/Rev.1. Resolutions adopted by the UN Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC. ‘The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (...) Having adopted the Statute of the International Criminal Court, Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions; (...) Decides as follows: 1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission as early as possible at the date to be decided by the General Assembly of the United Nations. (...) The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft text of: (a) (...) (c) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country; (d) etc.’. By GA Res. 53/105 of 8 Dec. 1998 the UN Assembly accepted this resolution.

¹⁵ See note 2.

Although the Statute itself does not contain any special provision to that end, either party (Prosecutor and suspect or accused) must be considered to be competent to file a request with the Presidency to replace the seat of the Court outside the host State according to paragraph 3 of this article 3. The same goes for possible victims, wishing to exercise their *ius standi in iudicio* before ICC, stipulating that their personal safety, physical and psychological well-being or other interests on their behalf as defined under article 68 necessitates such a removal of the seat of the Court. The Rome Statute contains no provision obligating any office-bearer of the Court to establish their place of residence at the seat of the ICC. Such an obligation is contained in the ICJ Statute for the President and Registrar of the ICJ. Paragraph 3 of the ICC Statute refers to other operative sections of the Statute providing for cases, bases or legal grounds to justify a decision to replace the Court's seat ('as provided in this Statute')¹⁶. As indicated before the Statute itself does not provide for such cases, bases or grounds. The decision is left entirely to the margins of appreciation of the Court. In case of interim removal of the actual proceedings, the ICC shall have to enter into negotiations with the State on the territory of which it wishes to conduct the trial. It has to conclude an additional, subsidiary temporal Headquarters Agreement. Remarkably enough, article 3 does not articulate which organ will be entitled to do so. Presumably it will be the President again by virtue of an analogous interpretation of paragraph 2; nevertheless, the interesting question remains to be as to whether approval of the Assembly of States Parties is required with a view to such an *ad hoc* removal. If so, such could stall the procedures considerably.

IV. Host Arrangement

- 7 One should constantly bear in mind that an essential divergence exists between a *Headquarters Agreement* on one hand and the *Host Arrangement* on the other. The first instrument describes the bilateral relationship between the international organisation to be hosted and the host State, encompassing legal definitions to be used in this relationship (e.g., what is meant by 'the host country', what is meant by 'the Court or ICC', 'the Registry', 'victims' etc.¹⁷),

¹⁶ See also article 4 para. 2. That Paragraph does not provide for explicit criteria either.

¹⁷ See, e.g., article 1 of the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland concerning a Scottish trial in the Netherlands, (Netherlands Treaty Series 1998, No. 237): 'For the purposes of the present Agreement, the following definitions shall apply: a) the "host country" means the Kingdom of the Netherlands; b) "the Government" means the Government of the Kingdom of the Netherlands; c) "the competent authorities" means national, provincial, municipal and other competent authorities under the law of the host country; d) "Vienna Convention" means the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961; e) "Procurator Fiscal" means the Procurator Fiscal for Dumfries and any person holding a commission from the Lord Advocate to act as Procurator Fiscal or Procurator Fiscal Depute for the purposes of the trial; f) "Sheriff" means a Sheriff of South Strathclyde, Dumfries and Galloway in Scotland and any officials of that Sheriffdom; g) "the accused" means Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, charged with the offences of conspiracy to murder, murder and contravention of the Aviation Security Act 1982 of the United Kingdom of Great Britain and Northern Ireland ("the offences") specified in the Procurator Fiscal's Petition upon which warrant for arrest was issued by the Sheriff of South Strathclyde, Dumfries and Galloway in Scotland on 3 November 1991; h) "Lord Advocate" means the Lord Advocate of Scotland and any officials, Advocate Deputes, Scottish police officers or other persons acting under his directions, or any person directly assisting him; i) "the trial" means the public trial of the accused in respect of the offences and any preliminary proceedings, investigative steps, preparations for the trial, preliminary hearings and appeals following service of the indictment, any determination of law or fact and the imposition of penal sanctions, and any appeal by the accused following conviction, all in accordance with Scots law and practice; j) "solicitors and advocates" means persons, being legally qualified in Scotland, instructed on behalf of the Lord Advocate or on behalf of the accused; k) "witnesses" means persons, including experts, cited to give evidence in the trial of the accused; l) "the Scottish Court" means the High Court of Justiciary (including that Court sitting in appellate capacity) and the Sheriff Court, sitting in the Netherlands in accordance with the provisions of this Agreement; m) "Registrar" means the person designated as such by the Director of Scottish Courts Administration to act on his behalf) "international observers" means persons nominated, by the Secretary-General of the United Nations, to attend the public hearings, pursuant to arrangements between the Secretary-General and the Government of the United Kingdom; o) "the premises of the Scottish Court" means the complex of building and land, including installations and

jurisdictional demarcations, the inviolability to be enjoyed by the organisation, its judicial authority within the territorial jurisdiction of the host State, immunities, privileges, financial sources and obligations *etc.* A wide variety of supplemental and additional agreements drawn up in conformity with the guidelines contained in the Headquarters Agreement, partly in form of a special (private) contract (*e.g.*, the leasing of detention units¹⁸, loan contracts¹⁹, the conclusion of employment contracts with personnel or insurances against accidents) and partly concluded by exchange of letters of understanding, concluded or drawn up in conformity with the guidelines worded in the Headquarters Agreement, usually complete this bilateral instrument. This is illustrated by the current ICTY practice²⁰.

Apart from the Headquarters Agreement, the law concerning the seat of an organisation 8 such as the ICC is to be found in a wide variety of sources at the level of international, supranational regulations and at the domestic level of the host State. Apart from the Headquarters Agreement one could distinguish four layers²¹:

- the constituent instrument of the organisation in question (in our case: the Statute);
- multilateral conventions formulating standards on privileges and immunities (think of the 1961 Vienna Convention on Diplomatic Relations and the General Convention on the Privileges and Immunities of the UN);
- rules of customary international law and decisions of international tribunals;
- national legislation and decisions of national tribunals, specially those of the host State.

An additional, 6th source of law can be mentioned at this point. Namely, the outcome of the settlement of disputes. Dispute settlement, in various forms, occurs between various actors. The settlement of disputes between an international entity and a Host State is no exception. As such, a settlement can also have effects either on the international entity or the Host State. Therefore, it has been added as an extra source of law that cannot strictly be seen as falling under either the decisions of international tribunals, or their national counterparts.

It goes without saying that the Headquarters Agreement should be in line with these sources and should be interpreted on the basic assumption that it *is* in line with those sources, unless the high contracting parties (ICC and host State) have explicitly expressed their will to derogate from one of those sources, which will in particular be the case with regard to the national legislation and decisions of national tribunals.

B. Analysis and interpretation of elements

I. The seat/extensions of the seat

First and foremost an ICC Host Arrangement should provide for a factual description of 9 the seat of the international organisation. Article 3 para. 1 only stipulates that the ICC seat shall be established in The Hague. Additionally, the Headquarters Agreement has to work

facilities, made available by the host country and maintained, occupied and used for the purpose of the trial, including detention of the accused; p) “the Parties” means the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland’.

¹⁸ See, *e.g.*, the Lease Agreement between the State of the Netherlands and the United Nations as of 7 Jan. 1999 with a view to the lease of an additional floor of twelve cells within the Prison Complex Scheveningen pursuant to the foregoing lease contract of 14 July 1994.

¹⁹ See, *e.g.*, the Letter of Agreement between the International Criminal Tribunal for the former Yugoslavia and the Ministry of Justice of the Kingdom of the Netherlands, signed on 20 Oct. 1997, regarding the loan of prison staff to the International Tribunal, entered into force as of 1 Nov. 1996.

²⁰ See, *e.g.*, the exchange of letters of understanding between officials of the International Criminal Tribunal for the Former Yugoslavia and the Government of the Netherlands, concerning arrangements between the International Tribunal and the Government of the Netherlands for the assigned residence of General Blaskic, as ordered by the President of the International Tribunal in his decision of 3 and 17 Apr. 1996, Netherlands Treaty Series 1996, No. 152.

²¹ Here I follow in detail Muller, *International Organisations and Their Host States, Aspect of Their Legal Relationship* (1995) 40 *et seq.*

this out as a bilateral affair by virtue of a geographical delineation of the premises, buildings or parts of buildings set at the disposal of the organisation. The ‘ICC headquarters district’ should be defined with as much pinpoint precision as possible. The underlying rationale of this prerequisite is four pronged.

- 10 (a) First, a pure jurisdictional reason: police officers and civil servants of the host State should know as precisely as possible which areas and buildings are occupied and used by ICC if they are to implement the typical host State obligation to secure the *external security* of those areas and buildings. The premises and buildings defined as ICC-areas shall be under the exclusive control and authority of the ICC organs, specifically the President and the Registrar. Only upon request of those authorities shall the host State provide such police resources or judicial assistance as may be necessary for the preservation of law and order in the ICC district itself. In order to prevent positive and negative jurisdictional conflicts between ICC and the host State a geographical description of the ICC area seems to be indispensable. Within this area or district the ICC organisation and the host State can set up a special legal regime, deviating, as the case may be, from the normal regulations and statutory provisions applicable in the territorial jurisdiction of the host country.
- 11 (b) A factual description of that area is needed with a view to the task incumbent on the host State to provide the ICC-organisation, as established on the described premises with public services such as, postal, telephone, fax and telegraphic services, electricity, water, gas, sewage, collection of waste, fire protection, local transportation and cleaning services. Within the ICC area the Registrar keeps to be the competent authority under whose supervision the host State authorities have to perform those tasks and duties. In agreement or after due consultation with the host State the Registrar has to draw up suitable arrangements to enable the representatives of the public services to inspect, maintain, reconstruct and relocate the utilities, conduits, mains and sewers on the ICC premises.
- 12 (c) A factual description makes clear the scope and extent of the inviolability of the ICC premises as well as the privileges, exemptions and immunities and the mutual rights and obligations thereof.
- 13 (d) ICC shall be entitled to display its emblem and markings, as well the appropriate flag on the premises thus defined.
- 14 The converse of a factual description of the seat is a *functional one*²². The premises of the international organisation should be defined in tight connection with the functions to be exercised by the organisation, following the example set by article 1 (i) of the Vienna Convention on Diplomatic Relations. It has been argued that the latter has the preference in order to prevent the international organisation to be hosted of permitting other organisations or entities to carry out activities falling outside the objectives and purposes of the Headquarters Agreement itself. The ICTY, for example, could, given a mere factual delineation of its premises in the AEGON building (a complex owned by a private insurance company), allow a commercial bank to operate on its premises, having the full enjoyment of the immunities and privileges laid down in the Headquarters Agreement. Nevertheless, for reasons of legal security and in order to maintain the independence of the ICC the factual description seems to be more recommendable: as a matter of principle it should not be with the host State to assess as to whether on the ICC premises certain activities are oriented towards the realisation of the functions entrusted to this judiciary. A functional definition of the ICC premises could give legal ground to the supposition that a certain competence is

²² In the ‘Lockerbie Host State Agreement’ the definition of the Court’s premises is an entirely functional one. See the above mentioned article 1 (o) of that Agreement. Article 1 (b) of the ICTY Headquarters Agreement provides for a mixed definition, defining ‘the Tribunal District’ in connection with its functions and purpose (Agreement concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 29 July 1994, Netherlands/United Nations, Netherlands Treaty Series 1994, No. 189. In Res. (69) 29 the Committee of Ministers of the Council of Europe recommended on 26 Sep. 1969 a mixed definition of the premises of an international organisation.

vested in the host State to adjudicate whether an activity is a functional one or not. That could jeopardize the Court's functioning as an independent entity especially in cases where the disputed activity does not serve *directly* the implementation of ICC-jurisdiction under article 5²³.

The most conducive approach of a factual definition of premises at the disposal of an international organisation seems to be the description of the 'UN headquarters district' laid down in the UN-USA agreement. The legal definition is given in Section 1 (a) under (1) and (2) referring the exact geographical delineation to an Annex to the agreement or any subsequent sub-agreement that might later be concluded²⁴. In such an annex the premises could be defined via a map or via cadastral information. This combines the principle of legal certainty with pragmatic flexibility in case the premises have to be extended beyond the original ones, defined at the moment of the coming into operation of the entity. It is foreseeable – given the potential sweeping scope of the crimes listed under article 5 – that in certain cases of mass trials the ICC will need a considerable extension of its areas, not only with a view to the (criminal) procedures itself but also with a view to sufficient pre-trial detention units and additional penitentiary buildings which could be situated outside the direct vicinity of the original ICC premises. Cases submitted to the ICC could reach tens of thousands. Accordingly, the possibility for substantial expansion of the Registrar's Office and of the Prosecutor's Office should be foreseen. Likewise, the provision laid down in articles 75 and 109 entitling the Trial Chambers to order return of property or proceeds to victims upon their request or on own motion could – given the scope of the crimes under article 5 and the number of victims thereof – dramatically increase number, scope and duration of trials. A possible expansion of requirements for additional chambers should be anticipated in the definition of the 'ICC district'.

The provision laid down in Part 10 that the ICC should supervise execution and enforcement of sentences and handle pardons or commutation of sentences will have space implications as well. The facilities for keeping accused persons, and, as the case may be, witnesses and experts in custody²⁵ prior to and during trial are legally part of the ICC and will be entirely under its authority. The status of the detention barracks together with adjacent buildings shall be identical to the status of the buildings in which the offices and

²³ For example, in case the Victims and Witness Unit is providing for a protective program and security arrangements, in order to protect the identity of victims and witnesses and *others* under article 43 para. 6 of the Rome Statute; see 1996 Preparatory Committee I.

²⁴ See the exchange of Notes of 9 Mar. and 25 May 1966 and the Supplemental Agreement of 26 June 1966 (1966 UNTS 308) together with a second supplemental agreement of 28 Aug. 1969, extending the UN headquarters district. By third supplemental agreement on 10 Dec. 1980 the UN headquarters area was again enlarged (1207 U.N.T.S. 304).

²⁵ Think of the case that a witness has been suspected of the commission of an offence against the administration of justice under article 70 of the Rome Statute. In such a case the Court is competent to order pre-trial detention to secure the appearance of the suspect at trial. All the proposals filed with the UN Preparatory Commission thus far with a view to the elaboration of the Rules mentioned in paragraph 2 of article 70 of the Rome Statute depart from the assumption that it is with the ICC to impose compulsory measures, including committal to prison or other forms of deprivation of liberty, on a witness, reluctant to answer questions put forward in court. See Rule 91 of the Draft Rules of the ICC, PCNICC/1999/DP.1 as of 26 Feb. 1999. In certain cases this could enhance the need to extend the ICC detention premises excessively. In the Host State Agreement envisaging the implementation of the Lockerbie jurisdiction special provisions have been drawn up with a view to the exercise of the Court's jurisdiction over those 'collateral offences' like contempt of court or causing disturbance in the Courtroom. See article 3 para. 3 of that Agreement, running as follows: 'The Government permits the detention of the accused for the purposes of the trial, and, in the event of conviction, pending their transfer to the United Kingdom, within the premises of the Scottish Court in accordance with Scots law and practice. The enforcement of all other sanctions involving the deprivation of persons within those premises is not permitted, except in so far as the Scottish Court orders: (a) the temporary detention of witnesses in the course of their evidence; (b) the temporary detention of witnesses in the course of their evidence; (c) the temporary detention of persons who may have committed offences within the premises of the Scottish Court, including *contempt of court* (emphasis added); (d) the imprisonment of persons found guilty *summarily of contempt of court* (emphasis added)'.

court rooms of the Tribunal are located²⁶. The ICC shall be responsible for the regime, control, treatment of those detained persons and defining their rights and privileges, just like the ICTY which concluded to that end additional arrangements with the host State. Guards shall be ICC officials.

- 17 The host country shall carry responsibility for external security of those extended premises and shall provide certain basic services as well as assistance for particular purposes to be defined either in the Headquarters Agreement either in additional instruments thereof. Furthermore, with a view to exceptional cases, the Headquarters Agreement should allow either party to extend the definition of the ‘ICC-district’ to private dwellings and institutions. Think of an accused suffering from a serious disease, only to be cured in a special hospital. In such a case it must not be excluded – due to the rigidity of the definition of the ICC premises contained in the Headquarters Agreement – to consider (for legal purposes) a certain section of the hospital as an extension of the ICC premises. It depends entirely on the concrete merits of the case as to whether it is advisable to do so, but in this respect ICTY experience has demonstrated the necessity of a flexible definition. The same goes for the case the ICC wants to guarantee an accused a certain privileged pre-trial treatment by permitting him to reside in a safe house in the vicinity of the ICC premises. In such a case the Headquarters Agreement should not preclude the ICC and the host State to consider – on the basis of an exchange of letters of understanding – such a safe house as an extension of the ICC premises in order to make clear which party carries the responsibility for the internal and external security and to avoid jurisdictional conflicts.
- 18 Finally, it seems appropriate in this context to stress that the domestic laws and regulations of the host State do apply within the ICC premises unless the parties have contracted otherwise. It is with the host State to agree to limit the application of its national laws. This strand of thought has been codified in the Headquarters Agreement by virtue of article 8, entitled ‘Law and authority on the premises of the Court’. In principle there should be no legal fiction of extritoriality applicable to the ICC premises for the same reasons as this fiction has long been rejected with regard to the premises of an embassy or a consulate²⁷. The domestic law of the host State does apply, but it cannot be *enforced* by that State without the ICC waiving its relevant immunity in that case.

II. Main elements of the Headquarters Agreement

- 19 The Annex to the Rome Statute²⁸ outlines that the Preparatory Commission shall design a framework of ‘basic principles’ governing a Headquarters Agreement. The following main elements of such an Agreement could be distinguished.
- 20 (a) The Agreement should define the legal personality and capacity of the ICC, both international and national. The international component of the definition should be completely in line with article 4 para. 1. Mainly such overall definition is omitted in Host

²⁶ The ICTY-Headquarters Agreement provides in article I (b) that the prison facilities for carrying out detention on the authority of the Tribunal are part of ‘the premises of the Tribunal’ and thus subject to the same regime and protective measures as the courthouse itself. See Schutte (1994) 5 *CLF* 2–3 423.

²⁷ See already: Beling, *Die strafrechtliche Bedeutung der Extritorialität. Beiträge zum Völkerrecht und zum Strafrecht* (1896); Cf. Sutton, in: Bassiouni/Nanda, *A Treatise on International Criminal Law* (1973) 97 *et seq.*; Muller, *International Organisations* 129 *et seq.*; See also Verdross and Simma, *Universelles Völkerrecht, Theorie und Praxis* (1984) 570 *et seq.*; See the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea, New York, 23 May 1997, article 19: ‘1. Privileges, immunities, facilities and prerogatives as provided for in articles 13 to 17 of this Agreement are granted not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions in connection with the Tribunal. 2. Without prejudice to their privileges and immunities, it is the duty of all persons referred to in articles 13 to 17 to respect the laws and regulation of the State Party in whose territory they may be on the business of the Tribunal or through whose territory they may pass on such business. They also have the duty not to interfere in the internal affairs of that State’.

²⁸ See note 12.

Arrangements, which could give rise to vagueness and subsequent complications at the jurisdictional level between the organisation and the host State, sometimes casting clouds upon that relationship. Most remarkably the ICJ does not dispose of a sufficient, specially drawn up definition of its legal personality. It has to rely on article 104 of the UN Charter and additional sources, amongst which Dutch case law appears. One could hardly challenge that such a definition constitutes a main element of the legal framework governing the relationship between the international organisation and the host State. It is primarily by virtue of that definition that the organisation has to be considered as an entity having the capacity to enter into negotiations with the host State and to conclude the Host Arrangement, a capacity which has to be acknowledged explicitly by the latter as the basis of the capacity to participate in juridical matters at the *national* level. The national elaboration of the definition should spell out the legal capacities resulting from this. The definition should make clear that the juridical personality includes the capacity to contract and to enter into exchange of letters of understanding with the host State concerning practical subjects listed in the Headquarters Agreement itself, like the status of additional premises, the provision of services and facilities to the ICC detention unit, liability and indemnification in case of civil tort²⁹, the execution of transit movements and the responsibilities thereof, enforcement of sentences under article 103 and the like. Furthermore the capacity to acquire and dispose of movable and immovable property should be mentioned and to institute legal proceedings on the same footing as a legal person under domestic legislation of the host State. It should be the Registrar who represents the ICC as legal person towards the host State. Of course, this definition of the personality and capacity of the ICC does only envisage the *external* relations of the ICC towards States (the host State included) and other legal entities and individuals. This definition has nothing to do with the internal competence of the ICC to formulate regulations regarding all day administrative matters, routine functioning, detention rules and disciplinary regulations concerning defence council or persons affiliated with units set up under the guidance of the Registrar *etc.*³⁰. The Host Agreement does not and cannot envisage this pure internal capacity of the ICC. Furthermore, either party is bound in the mutual relationship, with a view to either capacity, to respect the well established distinction between *acta iure imperii* and *acta iure gestionis*. The ICC may institute legal proceedings against the host country, but its claim will be declared inadmissible in case the host country is found to

²⁹ Current practice shows that the unique arrangements at the ICTY concerning the supply of personnel by the host State require appropriate provisions on liability depending on the type of the personnel to be set at the disposal of the International Tribunal. That is one of the reasons why a general mandating clause, empowering the Registrar to enter into negotiations to solve such liability issues with the host State authorities is indispensable. See further hereinafter.

³⁰ The following additional legal instruments concerning *internal* issues of the ICTY are of the utmost importance for all day practice: Doc. IT/125, containing the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal, 12 June 1997 by the Registrar according to Rules 44 and 46 of the ICTY Rules; Doc. IT/73/Rev.6 containing the Directive on Assignment of Defence Counsel (Directive No. 1/94, as amended 30 Jan. 1995, 1 Aug. 1997, revised 17 Nov. 1997, amended 10 July 1998) issued by the Registrar; Document IT/38/Rev.7, containing the Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise detained on the Authority of the Tribunal, adopted on 5 May 1994, amended on 16 Mar. 1995, amended on 3 Dec. 1996, amended on 25 July 1997, amended on 17 Nov. 1997 ('Rules of Detention'). The ICC will be confronted with the same need of such additional instruments. The Statutes of the ICTY and the ICTR do not empower the Registrar with the competence to provide for the promulgation of additional regulation concerning the servicing of the Defence process, the appointment of counsel and rules of Defence ethics. See the *Proposal for the establishment of an independent Office of the defence* (ICDAA) of 21 June 1998, distributed during the Rome diplomatic summit. Nevertheless, the 'solution' chosen by documents IT/125 and IT/73/Rev.6 by allocating such an implied power to the Registrar seems to offer a workable framework. In this context it should be noted that the Rome Statute itself does not address the issue of a 'Defence Unit'. Whereas the Statute defines a Victims and Witnesses Unit, linking it to the Registry (see article 43 para. 6), it does not envisage, not even by implication, such a Defence Unit. Nevertheless, the concept of fair trial and equality of arms presupposes the establishment, within the ICC ambit, of such an institution, preserving the rights and independence of such a Defence Unit, to be recognised as an ICC-linked entity by the host country. One of the tasks of such a Unit should be to draw up criteria of defence attorney's qualifications and a code of ethics together with a disciplinary sanction system for this category.

be acting in its unique sovereign capacity. This, of course, applies also the other way around in case the ICC was acting in its unique and irreducible *function* as international judicial entity. It goes without saying that it is nearly impossible to draw in abstract absolute and impenetrable dividing lines between ‘functional acts’ of the ICC on the one hand and *acta iure gestionis*. The lease of detention units is, as such, a normal civil act as far as the ICC serves as an average lessee, an ordinary commercial actor, towards the other party, mainly the host State. But in a majority of cases, given the penitentiary goals of the buildings to be leased as defined in the contract, one can hardly maintain that the contract has an ordinary civil law object. It depends on the appreciation of the judiciary of the host State which element or aspect predominate the contractual relationship.

- 21 (b) The Agreement should define the jurisdictional immunity of the ICC which should be based on the concept of functional necessity: the exemption from the territorial jurisdiction of the host State is only granted to have the ICC functioning effectively given the object and purposes of its constituent body, the Statute³¹. The same should go for the privileges and immunities to be granted to officials of the ICC: these rights are only accorded in the interest of the judiciary and not for the personal benefit of the persons themselves. The funds, assets and other property owned by the ICC should enjoy immunity from every form of legal process in the host country. Functional necessity, being the justification of this immunity, implies that the ICC may be obliged to waive the immunity in certain cases on request of the host State or that the entity provides for adequate alternative means of redress in cases where a waiver is not possible. The *anticipatory* waiver of immunity may be part of an additional regulation or a contract with the host State or a third party. The Headquarters Agreement should mention the possibility of such an anticipatory waiver by contract, offering criteria which could justify this *ad categoriam* de-immunisation³². In principle, the ICC jurisdictional immunity should not apply to cases of liability for injury to third parties, covered by insurance³³ or cases which could have been covered by insurance. This should clearly be spelled out in the Headquarters Agreement, in accordance with standardised language stemming from generally accepted multilateral conventions on privileges and immunities. It may be clear that an absolute concept of ICC immunity in the long run would undermine its aptitude to function properly, whereas that concept would deter private parties and the host State to provide the ICC additional services, not being covered by explicit obligations in the Headquarters Agreement. National Courts of the host State should have jurisdiction over normal contractual obligations in which the ICC is involved.
- 22 (c) The Headquarters Agreement should provide for guarantees envisaging inviolability of the ICC premises, property, assets and archives more or less on the same footing as Host Agreements do with regard to diplomatic and consular premises, assets and archives. The guarantee is only valid for the premises etc. *used exclusively* for the exercise of the official functions of the ICC³⁴. The thus guaranteed inviolability encompasses two obligations for the host State: a passive duty not to interfere or to enter and an active duty to provide for

³¹ Article 8 of the ‘Lockerbie’ Headquarters Agreement grants this immunity in abstract without any functional test in the article itself: ‘The Scottish Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Scottish Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution’.

³² Article IX para. 3 of the articles of Agreement of the International Monetary Fund articulate such a possibility of an anticipatory waiver by terms of a civil law contract. See Muller, *International Organisations* 163.

³³ Muller, *International Organisations* (1995) 161, stipulates rightly: ‘Insurance contracts usually require the insured party to cooperate with the insurance company in case of legal proceedings. In case of damages involving an organisation which could lay claim to immunity, the insurer would invoke this provision *vis-à-vis* the insured, and demand that an immunity claim be made, thus depriving the damaged party from all means of redress’.

³⁴ See again Res. (69) 26 adopted by the Committee of Ministers of the Council of Europe on 26 Sep. 1969 and Explanatory Report, p. 27.

adequate security arrangements³⁵ and to guarantee the uninterrupted supply of amenities such as water, gas, sewage. With a view to those services, the rates thereof should not exceed the lowest comparable rates accorded to essential agencies and organs of the Government of the host State. The same applies to the extent that the Host State would accord more favourable privileges, immunities and treatment to any other international organisation or tribunal situated in the Netherlands. If this were the case, the ICC would be entitled to enjoy the same or a similar level of these more favourable privileges, immunities and treatment. In case of force *majeure* resulting in a complete or partial disruption of those services, the ICC should, for the performance of its duties, be accorded the priority given to essential agencies and organs of the Government of the host State. The passive duty of the host State to refrain from any action within the premises of the ICC could be lifted by express consent of the chief executive officers on the ICC premises or his duly appointed representative. Consent to enter the premises may be assumed in cases of objective necessity requiring direct protective action and only in the event that it has not been possible to obtain the express consent of the competent ICC-organ. The Headquarters Agreement could provide for a non-exhaustive list of cases in which the host State authorities can be deemed to assume with bona fide that such a case of emergency occurs.

The guaranteed inviolability encompasses the official *vehicles* to be used by the ICC³⁶. This 23 may be obvious, otherwise the ICC organisation would turn out to be the hostage of the host State, imprisoned within the walls of its special inviolability. Aircrafts, boats and automobiles have to be considered as ‘property’ or ‘assets’ in the article of the Headquarters Agreement defining the nature and scope of the inviolability. Without exaggeration, a key management issue for the adequate functioning of the ICC will be the availability of vehicles within its jurisdictional scope and its Registry should have a system to ensure authorised procedures governing inviolability and jurisdictional matters, together with procurement, maintenance and utilisation etc.³⁷ If the ICC is going to use extended penitentiary areas outside the originally defined ICC district – and it is in the likelihood that the organisation will be confronted with the necessity to do so, for reasons of security or of logistics, given the massive scope of a certain procedure (see above under 1) – such will involve a constant stream of transit movements *vice versa* the extended areas and the Court’s offices, just as now is the case when ICTY indictees have to be transported back and forth on an all day basis from the Penitentiary Centre Scheveningen (situated in the outskirts of the Hague) to the ICTY offices in the AEGON building in the centre of the city. This can easily give rise to very complicated jurisdictional conflicts. Just imagine, an armoured car carrying, under ICC auspices³⁸, an accused from the prison to the Court’s room gets a flat tier. The commanding

³⁵ With regard to the ICTY detention units this was done in an additional Agreement on matters relating to Security and Order of the Leased Premises within the Penitentiary Complex Scheveningen, 14 July 1994, ICTY. See the basic principles laid down in article VII of the Headquarters Agreement UN/Netherlands: ‘1. The competent authorities shall exercise due diligence to ensure the security and protection of the tribunal and to secure that the tranquility of the Tribunal is not disturbed by the intrusion of persons or groups of persons from outside the premises of the Tribunal or by disturbances in their immediate vicinity and shall provide to the premises of the Tribunal the appropriate protection as may required. 2. If so requested by the President or the registrar of the Tribunal, the competent authorities shall provide adequate police force necessary for the preservation of law and order on the premises of the Tribunal or in the immediate vicinity thereof, and for the removal of persons there from’.

³⁶ Muller, *International Organisations* (1995) 188 *et seq.*

³⁷ See UN Doc. A/51/789 (6 Feb. 1997), Rep. of the Office of Internal Oversight Services on the Audit and Investigation of the ICTR, Chapter III, para. 3 (a).

³⁸ The present enabling act of the Netherlands with a view to the implementation to the ICTY-jurisdiction simply stipulates in articles 7 and 15 that transit of suspects and indictees will be carried out under the exclusive responsibility of the Dutch Minister of Justice by Dutch civil servants and under their guidance and surveillance. The Dutch authorities will act upon request of the ICTY Registrar; the Dutch personnel is competent to take all the necessary measures to secure internal and external security during transport and to take all conservatory and compulsory steps to prevent the transported person to escape. After the completion of the transport, the accused or indictee being arrived on the ICTY premises, the Registrar will resume the exercise of the premises bound authority over the transported person. In the case of the ‘Lockerbie jurisdiction’ the jurisdictional arrangements

ICC officer in charge decides to blindfold and to handcuff the accused and orders him to get off in order to await a second car for which he immediately has asked and which is reportedly on its way. Just at the moment the accused puts his feet on the pavement, the police authorities, being responsible for the external security of the transport, intervene by instructing the ICC officer and his prisoner to get back into the car, because of confidential information, just gathered by the national intelligence service, revealing that the accused has to be considered as target of an imminent terrorist attack. They order the ICC officer to remove the handcuffs. Furthermore, they want to search the inside of the car without delay (not wanting the ICC officer to ask for permission of the Registrar acting as executive authority in this case). Is the ICC officer entitled to refuse to comply with those orders on the ground of inviolability of the ICC car? An example of a similar situation was put forward by Trial Chamber II in the case of the Prosecutor versus Germain Katanga and Mathieu Ngudjolo Chui. During a Status Conference, the Presiding Judge needed clarification on the exact delimitation of jurisdiction between the ICC and the Host State. For a further analysis of this specific situation, please see Section X. mn ... The same problem could occur with a view to so called safe houses, set at the disposal of the ICC³⁹. It is not the intention to answer those questions in this context. Merely it should be flagged that the Host Arrangement should provide for basic principles, governing these foreseeable overlaps of competences between the ICC and the host State.

- 24 (d) Freedom of communications (including printed matter, photographic and electronic data communications) has to be considered as a specific corollarium of the inviolability to be granted to the ICC. The functional interpretation of this privilege implies that the host State is not allowed to interfere with official communications, falling within the scope of the mandate of the ICC. The competence to decide as to whether a communication is an official one should be primarily with the ICC – which could, of course, give rise to tensions between this judiciary and the host State. It would be highly recommendable to establish a consultative body in which both parties participate whereas it is foreseeable that the ICC is going to use video link, radio and satellite communication facilities on a very large scale, in which

concerning transit, entry, exit and movement within the host country are far more complicated, whereas some movements have to be carried out under the full responsibility and authority of the UN, using official UN vehicles.

³⁹ See the decision taken by the ICTY President on 3 Apr. 1996 on the motion of the defence filed pursuant to rule 64 of the Rules, case No. IT-95-14-T in which the President decided that General Blaskic should be detained in a place other than the UN Detention Unit at PSC, ruling that Blaskic should be authorised to leave the designated residence to meet his Counsel, the diplomatic and consular representatives of the republic of Croatia accredited in the Netherlands, his family and his friends. In the event of such visit Blaskic should be transported to the UN Detention Unit by the personnel responsible for his custody. This led to the safe-house construction pursuant to the above mentioned Exchange of Letters between the Tribunal and the Government of the Netherlands of 12 June 1996 (Netherlands Treaty Series 1996, No. 152) as to the inviolability of this extension of the ICTY premises, the safe-house construction gave rise to several jurisdictional uncertainties between the ICTY and the host State due to the fact, that a 'safe house' as such was not defined in the Host Agreement, not functionally nor geographically. Given the language of the 3 April decision, the host State authorities had to consider entitled Blaskic as an ICTY detainee: the President ruled explicitly out that Blaskic was not in 'detention' but submitted to 'rather a precautionary measure (...) destined to ensure that an indictee shall not abscond before the initiation of trial, thereby evading justice'. See ICTY Press Release CC/PIO/056-E of 3 Apr. 1996 3 23. On the other hand, Blaskic was granted several privileges not quite compatible with a legal status of detainee, specially later on, when the ICTY president by order of 9 Jan. 1997 (IT-95-14-T) pursuant to Rule 64 of the ICTY Rules ruled that Blaskic should have 'access to fresh air' and two hours of physical exercise at request on a daily basis, which would have implied the opportunity of strolling in the adjacent garden of the 'safe-house' (an other possibility was not available, given the location of the 'detention unit'). That placed the host State, responsible for the external security, for a rather complicated task given the vagueness of the colliding competences of either party. At a certain moment, the personnel's guarding the detainee at the safe-house was also entrusted with escorting and transferring the detainee to other locations. The personnel seemed to be thus able to change their legal status from UN guards to Dutch officers and *vice versa* whenever crossing the threshold of the safe-house. To complicate things more, the safe-house happened to be a private property, the landlord not knowing the identity of the enigmatic person to be lodged.

case the host State has to take into consideration its treaty position on cross bordering telecommunication, specially with a view to treaty partners not being ICC-parties.

(e) Whereas the ICC has to be able to act as a financially independent body within the host State, the host State shall have to accord the ICC personnel, irrespective of their nationality, certain fiscal, customs and financial immunities. Traditionally this will encompass exemption from motor vehicle tax in respect of vehicles used for official ICC activities, exemption from all import duties and taxes in respect of goods, including publications and motor vehicles, whose import or export by the ICC is necessary for the exercise of its official activities. Furthermore, the exemptions shall include those from value-added tax paid and services of substantial value, provided only that they are necessary for the official ICC-activities. The Host Agreement will only provide for the main principles governing this kind of exemptions. The details will be spelled out in additional memoranda of understanding or an exchange of letters of understanding.

(f) The Host Arrangement has to provide for special regulations with a view to the legal status of counsel, experts, witnesses and international observers. The host State shall be under the obligation to permit the entry of those persons for the purpose of attending or respectively participating in the trial. Witnesses and experts have to be safeguarded against prosecution, detention or restriction of their liberty by the authorities of the host country in respect of acts or convictions prior to their entry into the territory of the host State. Neither shall they be subjected by the host State to any measure which may affect the free and independent exercise of their functions for the ICC.

III. A mandating clause/settlement of disputes

Flexibility is the overarching word within the context of a Host Arrangement. A Headquarters Agreement can only offer the main guidelines of a framework governing the bilateral relationship between the ICC and the host State. ICTY experience shows that lots of detailed matters show up during the procedures for an international judiciary in a variety which one can hardly pretend to foresee when drawing up the Headquarters- and host State Agreement. Just think of the Dukic-case, when an ICTY-indictee had to be transported, due to a situation of medical necessity, to the private BRONONVO-hospital in the neighbourhood of the Penitentiary Centre Scheveningen to undergo medical treatment in which case the host State and the ICTY Registrar had to figure out the exact jurisdictional relationship between either party with a view to the possibility that the patient would not accept to be under the surveillance of UN personnel operating outside the ICTY premises. According to the Headquarters Agreement, an accused person is under the jurisdiction of the ICTY for as long as he is imprisoned in the Scheveningen detention centre. If he is brought outside those premises to a place not being designated as an official extension of the ICTY premises (see above) he will be directly under the territorial jurisdiction of the Netherlands. If such a person does not have a permit to stay in the Netherlands or not has applied for asylum, the Dutch Government is obliged, on the basis of the Dutch Aliens Act and pursuant obligations under the Schengen Agreement to consider the person as an illegal foreigner who has to be expelled as quickly as possible back to the territory from which he came, which will certainly not accelerate the Court's proceedings. The pre-trial provisions in the ICC-detention units will turn out to be a subject of additional arrangements with a view to medical services, meals, cleaning and maintenance depending on the category of detainees brought on the ICC premises. What will be the legal position of the ICC if the Medical Officer, set at the disposal of the ICC by the host State, orders the detainee to be transported outside the ICC premises, not only with regard to jurisdiction but also with a view to costs and responsibilities⁴⁰? Who

⁴⁰ Although it is not specified in the ICTY-documents, it has been the practice for the ICTY to be responsible for the costs of all specialist treatment and hospitalisation outside the ICTY Prison Complex when a Unit Detainee is referred for such a treatment by the ICTY Medical Officer.

is responsible for adequate medical care during weekends in case the official ICC Medical Officer is not available, when an indictee tried to commit suicide. In such a case additional procedures have to be set up identifying and making available such services in a timely manner. If in such a case the detainee is brought outside the ICC premises, which party may that dispose as an owner over medical reports, records, notes, X-rays, tests and diagnostic data and other materials relating to the medical care and treatment prepared by personnel or facilities provided or made available by the host State authorities? What about national regulations in this respect concerning the fundamental right of privacy?

28 Another inflammatory issue can be liability and indemnification questions in case of tort. The host State Agreement could provide for the main principles in this respect, which could be that the ICC will indemnify the Government of the host State with respect to any claim which arises from acts or omissions taken pursuant to the authority of the ICC and that, reciprocally, that Government will indemnify the ICC with respect to all claims arising out of acts taken pursuant to the authority of the Government. Nevertheless, this overall provision will not do for every case, given the turbulent circumstances in which an event may occur and taking into consideration the unique arrangements which have to be concluded with the ICC concerning the supply of highly trained personnel. This will require more detailed additional provisions on liability. It can be disputable under the direction or control of which party some additional services have been performed. There could be some merit in distinguishing which type of personnel one is referring to with a view to liability questions such as prison guards, medical officers, personnel who provide catering as well cleaning and maintenance services. Even if, by virtue of the Headquarters Agreement, an expert happens to be under the legal overall authority of the ICC Registrar, it could appear that, in reality, the expert is an independent practitioner contracted by the host State government to provide services to the ICC. Thus, the Registrar, not sharing the experience of that expert, cannot be deemed to exercise properly an adequate degree of control over the professional conduct of that expert as he can, for example, over the prison guards. Those issues can only be addressed by exchanging letters of understanding on a case bound basis. The main principles, to be derived from the constant stream of letters of understanding which will begin to flow from the first date of real functioning the ICC as judiciary exercising its jurisdiction, can be codified later on in an addition manual to be inserted in the host State Arrangement. Therefore, it is recommendable to empower the ICC at the level of the Headquarters Agreement with the competence to enter into such an exchange of letters of understanding and to mandate the Registrar to act as representative of the ICC, doing business with the designated representative of the Ministry of Justice of the Netherlands⁴¹.

29 In addition, the Headquarters Agreement should provide for an article concerning settlement of disputes. Of course, in this context, we have to think of disputes between the ICC as international organisation and the host State and not between the organisation acting as private body – performing *acta iure gestionis* – and the host State or disputes between the ICC and private parties. The basic principles of international private law will govern those disputes to be applied by the national judge of the host State. The disputes here envisaged will always concern the interpretation of a part or segment of the Host Arrangement. Of course, the operative article of the Headquarters Agreement dealing with the settlement of this kind of disputes will first impose the obligation on the parties to try to get the dispute resolved by consultation and negotiation. Should this fail, both parties could resort to arbitration or seek a binding advisory opinion of the ICJ⁴². Article 55 of the Headquarters

⁴¹ See article 27 of the ‘Lockerbie’ Headquarters Agreement: ‘With a view to the practical application of this Agreement, letters of understanding may be exchanged between the Registrar and the designated representative of the Ministry of Justice of the Netherlands’.

⁴² Either party has to bind itself on forehand to accept the advisory ICJ opinion to circumvent the provision in the ICJ Statute that only *States* have *ius standi in iudicio* for this UN Court acting as judiciary in contentious cases. See article 34 para. 1 of the ICJ Statute (‘Only states may be parties in cases before the Court’.) According to article 65 para. 1 of the ICJ Statute, however, a ‘body’ is authorised to make a request for an advisory ICJ

Agreement has codified the procedure to be followed in case of a difference on the interpretation or application of the Headquarters Agreement, or subsequent additional arrangement or agreement. In such a situation, an arbitral tribunal, composed of three members, shall be created for the settlement of any difference. Once a decision is reached by this Arbitral Tribunal, the decision thereof shall be final and binding on the parties.

C. Special Remarks: The interim solution – applicability of the ICTY arrangements

I. Ongoing negotiations

The negotiations on the final content of the Headquarters Agreement⁴³ with the ICC have 30 been completed. Under III of this chapter C. we will scrutinize the results; bear in mind that those results are in no way final: additional Host arrangements are, as normally foreseen, the final clauses of the Seat Arrangement refer already to those Additional Arrangements. Those Arrangements are the most important instruments for the all day's nitty-gritty. They started, by virtue of explorative talks, just from the very moment of the entry into force of the national legislation sanctioning the ICC jurisdiction for the entire Kingdom of the Netherlands on the 18 2001⁴⁴. As the Netherlands as host State began to be more aware of all the intricate problems of hosting ICC as a permanent 'on going concern', it seemed more appropriate not to take an irrevocable stand with a view to the Host Arrangements. The host State began to seek for more transitional solutions in this respect leaving for the host State, the Assembly of States Parties and the ICC the widest margins to experiment with the Host instruments, being brand new phenomena at the international level of criminal law. Both Parties, the ICC on one hand and the Netherlands on the other, decided to declare the Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the International Tribunal for the Prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991 applicable *mutatis mutandis* on the relationship between the host State and the Court. This was done by exchange of notes verbales between the Ministry of Foreign Affairs of the Netherlands and the Court as of the 19th of November 2002⁴⁵. These solutions seemed the most practicable, whereas the host country considered the ICTY hosting experiences as kind of dry piloting projects with a view to the definite hosting of the ICC. The wording of this Host Agreement is as simple as one could imagine: article 2 stipulates

opinion ('The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request'); it seems hardly disputable that the ICC will be such a body, entitled to do so, 'in accordance with the Charter of the UN' (as article 65 ICJ Statute requires). See Rosenne, *The World Court. What it is and how it Works* (1989) and R. Ago (1991) *AJIL*439 *et seq.*

⁴³ See with regard to the meaning of this concept above under mn 4.

⁴⁴ In Dutch: Rijkswet houdende goedkeuring van het op 17 juli 1998 tot stand gekomen Statuut van Rome inzake het Internationaal Strafhof, Rijkswet van 5 juli 2001, Staatsblad 2001, Nr 343 (translation: Act for the Kingdom of the Netherlands as of the 5th of July 2001, Official Dutch Monitor of Statutes 2001, Nr 343, containing the sanctioning of the Statute of Rome of the 17th of July 1998 concerning the establishment of an International Criminal Court; by virtue of 'an Act for the Kingdom of the Netherlands' ['Rijkswet'] legislation is launched binding for all the parts of the Kingdom, including the Dutch Antilles and Aruba, former Dutch colonies in the Caribbean. As distinct from a 'Rijkswet' one could distinguish a 'wet' ['act'], only binding for the territory of the Kingdom in Western Europe, the Netherlands itself.

⁴⁵ Notawisseling houdende een interimverdrag tussen het Koninkrijk der Nederlanden en het Internationaal Strafhof betreffende de zetel van het Internationaal Strafhof, 's-Gravenhage 19 november 2002 Tractatenblad 2002 Nr 211 (translation: Exchange of Notes verbales with a view to the conclusion of an interim treaty between the Kingdom of the Netherlands and the International Criminal Court concerning the seat of the International Court, The Hague, the 19th of November 2002, Official Treaty Monitor of the Kingdom of the Netherlands 2002, No. 211), Nos. I and II (Annexes).

plainly that the ICTY Agreement shall apply *mutatis mutandis* to the Court, unless otherwise provided in the current agreement⁴⁶. Nevertheless, straightforward as this interim solution seemed to be, some objections could be raised. The phraseology used in the agreement showed all the features of a treaty, valid for the Kingdom as a whole⁴⁷. This could prompt some surprise for them more acquainted with the constitutional relations within the hemisphere of the Kingdom of the Netherlands: a treaty, binding and enforceable throughout the whole Kingdom should be ratified by virtue of a formal Statute sanctioning the provisions of the treaty, article by article. The explicit consent of the parliaments of the Dutch Antilles and Aruba is indispensable according to the Statute of the Kingdom of the Netherlands, the Constitution of the Kingdom as a whole⁴⁸. The conclusion by the Kingdom of a Host Agreement with an international judiciary as ICC is, without any reasonable doubt, a permanent and persistent matter of 'foreign affairs'. The agreement changes the stand of the Kingdom in relationship to *all* the countries in the world, irrespective as to whether they belong to the ICC family or not. In article 3 of the Constitutional Statute, 'matters concerning foreign relations' as such is defined as affairs of the Kingdom as a whole. One could argue that incidental matters, only regarding the European part of the Kingdom do not fall within the scope of the aforementioned article 3. But seating the ICC can not be considered as such an incidental matter.

- 31 Nevertheless, this agreement has never even been presented to the Lower House of the Dutch Parliamentary. According to the official commentary as voiced by the Dutch Minister for Foreign Affairs, this was 'not necessary', basing this on a certain rendition of the Statute of the Kingdom concerning the approval and promulgation of treaties ('Rijkswet goedkeuring en bekendmaking verdragen')⁴⁹. Nevertheless, this is technically speaking, highly debatable. The special approval of the respective parliaments is not necessary in case the government explicitly has been empowered by Statute to conclude the treaty. In the set of enabling legislations to transform the obligations incumbent on the Kingdom – even in its capacity as host country – following the ratification of the 1998 Rome Statute, one will seek in vain such

⁴⁶ Article 2 runs as follows: 'Unless otherwise provided in this Agreement, the Tribunal headquarters agreement, attached in Annex 1, shall apply *mutatis mutandis* to the Court'.

⁴⁷ See the preamble of the Agreement and operative article 1 thereof: 'The Ministry of Foreign Affairs of the Kingdom of the Netherlands presents its compliments to the International Criminal Court and has the honour to propose, in order to facilitate the work of the Court and with reference to article 3 of the Statute of the Court, that, for the period until the entry into force of the headquarters agreement between the Kingdom of the Netherlands and the Court, an interim headquarters agreement be concluded which shall read as follows:

'ARTICLE 1

- (i) 'The Statute' means the Rome Statute of the International Criminal Court adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court;
- (ii) 'The Court' means the International Criminal Court established by the Statute;
- (iii) 'The Tribunal' means the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by the Security Council pursuant to its resolutions 808 (1993) and 827 (1993);
- (iv) 'The Tribunal headquarters agreement' means the Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Tribunal, signed in New York on 29 July 1994;
- (v) 'The General Convention' means the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946'.

⁴⁸ Statuut voor het Koninkrijk der Nederlanden, Wet van 28 Oktober 1954, houdende aanvaarding van een statuut voor het Koninkrijk der Nederlanden, zoals deze wet laatstelijk is gewijzigd bij de Rijkswetten van 24 april 1995, Staatsblad Nr 233 [tekstplaatsing], 7 Sep. 1998, Staatsblad 597 (translation: Constitutional Statute of the Kingdom of the Netherlands, regarding the acceptance by the three countries of the Kingdom of a Statute for the Kingdom of the Netherlands, as this Statute recently has been changed by virtue of the Statutes of the Kingdom as of the 24 April 1995, Official Dutch Monitor of Statutes Nr 233 (official promulgation of the current texts) and that as of the 7 September 1998, Official Dutch Monitor of Statutes Nr 579).

⁴⁹ See II. D of the Agreement: 'Het in de nota's vervatte verdrag behoeft ingevolge artikel 7, onderdeel a, van de Rijkswet goedkeuring en bekendmaking verdragen niet de goedkeuring van de Staten-Generaal, alvorens in werking te kunnen treden'. (translation: According to article 7, intend a, of the Statute of the Kingdom concerning the approval and promulgation of treaties, this Agreement as contained in the notes does not need the approval of the Houses of Parliament before entering into force).

an operative article, empowering the Dutch government to conclude such kind of Host Agreement without any consent whatsoever of the Parliamentary. The agreement as contained in the exchange of notes infringes in a considerable way on the territorial jurisdiction of the Kingdom, granting the premises of the ICC the legal status of a kind of juridical enclave within the territory of the Netherlands – an issue with some significance for the territorial sovereignty of the Kingdom as a whole, as will be explained later on. The question could be put forward as to whether *such* a treaty could enter into force without the formal approval by Statute, accepted by the Parliamentarians of the three countries, in togetherness constituting the Kingdom of the Netherlands. The agreement as such is antithetical to lots of formal Statutes within the Netherlands formulating the principle that it is with the Netherlands, and only with the Netherlands, to compose the internal public legal order to be enforced by penal enforcement power, the so called rule of absolute positive territoriality – a widely accepted concept of internal sovereignty. Is it, constitutionally speaking, acceptable that from this compulsory principle of national constitutional law could be derived by virtue of an informal exchange of notes verbales? A negative answer is in the likelihood. But that is a question of internal Dutch constitutional law. This question, in the end, has to be resolved by the Dutch judiciary. It is not a question to be ruled upon by the ICC.

Yet this constitutional issue could be of some direct significance for the functioning of the ICC. The Netherlands, as all the signatories to the European Convention on Human Rights (hereafter: ECHR) is bound to grant any person ‘within its jurisdiction’ – in the sense, laid down in article 1 ECHR⁵⁰ – the rights stemming from the ‘*habeas corpus* principle’ as

⁵⁰ Article 1 ECHR runs as follows: **Obligation to respect human rights** ‘The High contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’. The terminology ‘within their jurisdiction’ in this overarching guarantee has its own, treaty-bound, autonomous significance apart from the respective national jurisdictional systems. Even when a ratifier to the ECHR introduces a so called ‘extraterritoriality’ within its national jurisdictional system or a so called juridical enclave – which is the case with a view to the ICJ premises and the OPCW, ICTY and ICTR premises, all situated in the Netherlands as the host country – the ratifier keeps to be fully responsible for breaches of the ECHR guarantees occurring within those extraterritorialities and enclaves. The introduction of those exemptions does not free the ratifier from its state responsibility in this respect. That is only a matter of course. If the introduction of this kind of exemptions would prompt that effect, it would open the door widely for abusing the fictions underlying the exemptions, with a view to discharge the ratifier for the violations of the Convention albeit that the breaches were imputable to the ratifier whereas they occurred factually – geographically speaking – within their territorial jurisdiction. See the fundamental ruling of the European Court of Human Rights in the case *Beer and Regan versus Germany*, application no 28934/95 dd, 18 February 1999. Beer and others were employees of the European Space Agency (ESA). This Agency has its headquarters in Paris. The Agency was established under the Convention for the Establishment of a European Space Agency, the so called ESA-Convention of 30 May 1975 (United Nations Treaty Series 1983, vol. 1297, I-no. 21524). The ESA runs the European Space Operations Centre (ESOC) as an independent operation in Darmstadt, having its own privileged premises in that city leading to a certain legal enclave in relationship to the jurisdiction of the Deutsche Bundesrepublik and prompting immunity from German jurisdiction. The definition of the premises and the radius of action of the enclave have been defined in the Agreement concerning the European Space Operations Centre of 1965 published in the German Official Gazette (Bundesgesetzblatt) II. No 3, 18.1.1969. Beer and the others got stuck into a conflict with the ESOC with regard to their instruments of appointment. Proceedings for German Courts followed in which Beer and the others alleged that the ESOC had violated their civil rights in the sense of article 6 ECHR. The German judges, subsequently, declared the respective actions of Beer and others inadmissible on the mere ground of the ESOC’s immunity from jurisdiction. Beer and others complained in Strasbourg that they had not had a fair hearing by a tribunal on the question of whether a contractual relationship existed between them and the ESA; by virtue of the denial of justice by the German Courts, there had been a violation of article 6 para. 1 of the ECHR, which provides: ‘In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing ...by [a] tribunal...’. The applicants maintained that the right of access to the courts was not met merely by the institution of proceedings. This right, they argued, required that the courts examine the merits of their claim. They considered that the German Courts had disregarded the priority of human rights over immunity rules based on international agreements. They concluded that the proper function of the ESA had not required immunity from German jurisdiction in their particular cases. The Court ruled very fundamentally, legal ground No. 57: ‘The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the

worded in article 5 ECHR. *This is for sure: 'detention' within the Netherlands is only in line with the provisions laid down in this article 5 if the detention is based on a provision defined by law. The detention must be lawful⁵¹. The interim Host Agreement refers to the ICTY Headquarters Agreement. That agreement empowers the ICTY with the competence to provide for detentional measures with a view to its jurisdiction in the Netherlands. The ICTY Headquarters Agreement has been approved by a special Statute. The Dutch government deemed it necessary to provide for such a formal legal basis, given the national principle of legality as it is commonly understood in criminal matters. That Statute declares Dutch legislation not applicable on detentional measures taken by the ICTY. The measures will be falling under the exclusive responsibility of the ICTY Registrar, being the executive*

Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial' and No. 58: 'For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'. See also: case of *Waite and Kennedy versus Germany*, application No 26083/94 dd 18 Feb. 1999 3 32. The assumption underlying the decision taken in the case *Mladen Naletilić versus Croatia*, application No. 51891/99 dd 4 May 2000 3 32 is also that it could be with the European Court of Human Rights to rule on breaches of the ECHR imputable to international judiciaries as the ICTY for which subsequently the host State as ratifier could be held collaterally responsible. In line with this stand see also the decision of the European Court of Human Rights in *Matthews versus United Kingdom* dd 21 Jan. 1999, application No. 24833/94 3 32, especially legal consideration No. 32: 'The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States [of the EU, addition by the author] responsibility therefore continues even after such a transfer'. The Dutch Government is well aware of this collateral responsibility of the Netherlands for violations of the ECHR imputable to ICC even when committed on ICC premises; see: Brief van de Minister van Justitie aan de Voorzitter van de Tweede Kamr der Staten-Generaal (translation: letter of the Minister of Justice to the Chairman of the Lower House of the Parliamentary) Tweede Kamer 28 098 nr 11 (Hansard 28 098 no 11) dd 12 maart 2002 (12 March 2002) [Uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen {Uitvoeringswet Internationaal Strafhof} (translation: enabling legislation with a view to implement the Statute of the International Criminal Court regarding the mutual assistance to and cooperation with the Court and the enforcement of its sentences) and Tweede Kamer 28099 nr 11 (Hansard 28099 no 11) same date, Aanpassing van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige andere wetten aan de Uitvoeringswet Internationaal Strafhof (translation: draft legislation with a view to accommodate the national criminal code book, the code for criminal proceedings and some other statutes to the enabling legislation regarding the ICC jurisdiction).

Two more recent ECtHR cases with regard to the Netherlands acting as host for the ICTY are the cases of *Blagojević and Galić*; The case of *Vidoje Blagojević* against the Netherlands, Admissibility Decision, Application no. 49032/07, 9 June 2009 3 32; and The case of *Stanislav Galić* against the Netherlands, Admissibility Decision, Application no. 22617/09, 9 June 2009 3 32. These two cases relate directly to the scope of the jurisdiction of the Netherlands, acting in its capacity as host State. In the end, both cases were rendered incompatible *ratione personae*. For further information, please consult the cases.

⁵¹ See the wording of article 5 ECHR: **Right to liberty and security** para. 1.

'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (emphasis added):

- a. the *lawful* (emphasis added) detention of a person after conviction by a competent court;
- b. the *lawful* (emphasis added) arrest or detention of a person for non-compliance with the *lawful* (emphasis added) order of a court or in order to secure the fulfilment of any obligation prescribed by *law* [emphasis added];
- c. the *lawful* (emphasis added) arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d. the detention of a minor by *lawful* (emphasis added) order for the purpose of educational supervision or his *lawful* (emphasis added) detention for the purpose of bringing him before the competent legal authority;
- e. the *lawful* (emphasis added) detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- f. the *lawful* (emphasis of the author) arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Paragraph 2. etc.'

authority of this judiciary. That is the idea behind article 17 of the ICTY enabling law⁵². One could foster one's fundamental hesitations as to whether this frees the host country from every responsibility regarding the way that kind of measures are to be enforced on Dutch soil, but that is another matter, to which we will return later on in this commentary. In this respect as far as the ICTY jurisdiction is concerned, the preconditions of article 5 ECHR have been met as far as it has to do with the legal basis of the detentive measures.

Of course the Rome Statute empowers the ICC to take detentive measures. The enforcement thereof within the Dutch jurisdiction is to be governed by the Host Arrangement whereas it is with the host country to make the necessary detentive provisions available. Yet, the legal basis for the enforcement of those measures should be the *law*, that is to say, within the context of ECHR, Dutch law. Could an interim agreement, set up by mere exchange of notes verbales between an entity not ratifier of the ECHR (the ICC) and a national member state of the European Country, referring in blank to a foregoing legal instrument, be considered as a provision by law in the sense of article 5 ECHR? A similar question played already a role in the preliminary injunction proceedings launched by some lawyers before the The Hague District Court on behalf of Milošević directly upon his arrival in the Netherlands in 2001⁵³. The District Court relegated the question to the ICTY being that judiciary hierarchically superseding any Dutch judiciary, an argument – what kind of persuasiveness one would ever attach to it – that is certainly not valid to the ICC as already has been pointed out above in this Commentary under A. 1., mn 3 and 4.

After The District Court relegated the question to the ICTY, Milošević initiated proceedings before the European Court of Human Rights, complaining, amongst others, under article 5 paragraph 1 ECHR that his detention on the territory of the Netherlands, with the active connivance of the Netherlands, lacked a basis in the domestic law of the Netherlands, and that a procedure prescribed by the domestic law had not been followed. The European Court, basing itself on article 31 ECHR, declared the application inadmissible, as Milošević had not pursued his appeal against the judgement given in the proceedings of 31 August 2001. Unfortunately, the legal question with regard to the *habeas corpus* provision under article 5 ECHR has thus remained unsolved. See footnote 53.

II. Applicability *mutatis mutandis* of the ICTY Host Arrangements

1. Terra incognita

Given this legal equality of the ICTY Host Arrangements with the ICC Arrangements, it does make sense to scrutinize the historical origins of the ICTY Headquarters Agreement and its additional instruments like the penitentiary contracts and the numerous memoranda of understanding regarding the transit movements hence and forth to the ICTY premises, the extensions of the seat, the safe houses set at the disposal of the ICTY, provisional release and the legal status of the released persons and the like. When the Security Council decided that the seat of the ICTY would be at The Hague, it made the proviso that the conclusion of

⁵² See: Wet van 21 april 1994, houdende bepalingen verband houdende met de instelling van het Internationaal Tribunaal voor de vervolging van personen aansprakelijk voor ernstige schendingen van het internationale humanitaire recht, begaan op het grondgebied van het voormalig Joegoslavië sedert 1991, Staatsblad 1994, No. 308 (translation: Statute as of the 21 April 1994 containing enabling provisions with a view to the establishment of the International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law, Committed on the Territory of the Former Yugoslavia since 1991, Official Dutch Monitor of Statutes 1994 No 308).

⁵³ See: Rechtbank's Gravenhage LJN AD3266 Zaaknr: KG 01/975 dd 31 Aug. 2001 *Slobodan Milošević versus de Staat der Nederlanden* (translation: District Court of The Hague, LJN No. AD 3266 case KG 01/975 [preliminary injunction procedure] 3 33 as of the 31 of Aug. 2001, *Slobodan Milošević versus the Kingdom of the Netherlands*); appeal withdrawn on the 17 Jan. 2002. The corresponding case before the European Court of Human Rights is the case of *Slobodan Milošević* against the Netherlands, Admissibility Decision, Application no. 77631/01, 19 March 2002. 3 33.

appropriate arrangements between the UN and the Government of the Netherlands would be acceptable to the Council. Approval by the General Assembly was not foreseen. As from the outset, the Council stipulated that the Host Agreement should contain the possibility that the Tribunal might sit elsewhere when it considered it necessary for the efficient exercise of its functions⁵⁴. What the position of the Netherlands as a host country would be during that interim period with a view to its obligations towards the ICTY remained completely unclear.

When negotiations started between the Netherlands and the UN with a view to the conclusion of a Headquarters Agreement on behalf of the ICTY, parties had to tread on courses until then unknown. Of course, there were the precedents of the Nuremberg and Tokyo Tribunals, but the balances of powers in 1945 between the Parties willing to establish the Nuremberg and Tokyo jurisdictions and the territorial host countries – Germany and Japan – were incomparable with the power relations between the UN and the intended host country, the Netherlands, in 1993. In 1945 the territorial states simply had to accept the decision of the Allies that the military Tribunals would be seating within their soil to wield criminal jurisdiction to the extent the Tribunals would deem desirable. It was highly debatable, as far as the Nuremberg Tribunal was concerned, as to whether at that very juncture Germany could exercise any internal sovereignty as a State, where as Germany had accepted the unconditional capitulation and had been divided into four occupational zones. One could even assert that Germany had come to an end as an independent entity at the international level. In the Nuremberg case, there was no room for negotiations between Germany and the Allies with a view to the establishment of the military Tribunal and its Host Arrangements. Regarding the Tokyo Tribunal, the situation was slightly different – the Allies assumed the prolonged existence of Japan as a sovereign entity – but yet, there was no latitude at the side of Japan to conduct real negotiations concerning the seating of the Tribunal. Here were no leeways.

2. The situation in 1993: three legal instruments as yardsticks

35 Of course, in 1993 the situation was completely different. It was the United Nations, which was the asking Party. Given the presence of the ICJ, already seating as a principal organ in The Hague, it seemed only natural to have the ICTY also seating in this city, even though the jurisdictional scope of the latter was not comparable in any respect with that of the first.

Given the wording of the Statute of the ICTY, parties decided to depart from three legal instruments as yardsticks for negotiations:

- the UN Headquarters Agreement;
- the Vienna Convention on Diplomatic Relations⁵⁵;
- the Resolution of the GA of the UN relating to the adoption of the General Convention on the Privileges and Immunities of the United Nations⁵⁶.

The main problem to be tackled was the relationship between the internal public order of the Netherlands as sovereign State in rules, already contained in the ICTY Statute and the

⁵⁴ See: Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Report of the Secretary-General as requested by the GA in the Res. 47/235, A/C.5/48 2 December 1993, mn 3:

'By its resolution 827 (1993) of 25 May 1993, the Security Council, acting under chapter VII of the Charter of the United Nations, approved the report of the Secretary-General, decided to establish the International Court and adopted its Statute. The Security Council also decided that the seat of the International Court would be at The Hague, subject to the conclusion of appropriate arrangements between the United Nations and the Government of the Netherlands that would be acceptable to the Council, but that the Tribunal might sit elsewhere when it considered it necessary for the sufficient exercise of its functions. The Council further requested the Secretary-General to implement urgently the resolution and, in particular, to take practical arrangements for the effective functioning of the Tribunal at the earliest time'.

⁵⁵ The Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961, to which the Kingdom of the Netherlands acceded on 7 December 1984.

⁵⁶ As of the 13 February 1946, GAOR 22 (I). The Kingdom of the Netherlands acceded to this instrument on 19 April 1948.

Rules of Procedure and Evidence, to be drawn later on. To say that the ICTY rules, irrespective the way of their coming into existence and irrespective of their substantive content should always have the priority over Dutch regulations, given article 103 of the UN Charter⁵⁷, seemed to the Dutch negotiators to simply an approach. One could hardly argue that the Dutch statutory provisions on trafficking or the carrying of firearms, the settlement and admission of foreigners, very important with a view to the transit movements of suspects, personnel, victims, witnesses and experts, had automatically to yield to any directive of any ICTY organ. Of course, this stand was originally taken by legal affairs of the UN. But the majority of the relevant Dutch regulations did not constitute an 'obligation under any other international agreement' – to stipulate that would be really preposterous – and only in the event of *such* a collision of international obligations article 103 of the UN Charter would apply. What would the position of the host country be, if the ICTY, without any foregoing understanding with the Netherlands, would decide to release a suspect conditionally indicating him to report himself periodically to the Registry: how would he be considered under the relevant Dutch provisions concerning the settlement and admission of foreigners (the 'Aliens Act')? The answer would be – if no provisions to the contrary would be set up – that the released person should be considered as to be an illegal foreigner. He would be subject to immediate expulsion to his state of origin. Under the current 'Schengen implementation agreement' the Netherlands as a ratifier would be under the obligation to expel the released person as quickly as possible whereas the concurrent and colliding obligation under international law to refrain from this expulsion would be highly debatable. But legal affairs were of the opinion that the host country would be unconditionally bound to respect the ICTY's rulings on release without any interference whatsoever. If it would be clearly, in the interest of international justice, as understood by the ICTY that the released person should remain within the vicinity of the ICTY. Therefore, the host country would be under the obligation to arrange the facilities to make that possible, even if the ICTY would not have ordered that explicitly. Rifts like this seemed not to be bridged easily. This, certainly, would not enhance the exercise of the ICTY jurisdiction.

3. Three categories of possible positive jurisdictional conflicts

During the Host Agreement negotiations as of the 14 May 1993, the Dutch delegation distinguished three categories of positive jurisdictional conflicts between the ICTY and the host country: 36

- a) the legal consequences directly arising from the acceptance of the ICTY Statute by the UN Security Council under Chapter VII of the UN Charter which would equally apply to all the UN Member States; in this respect the legal position of the Netherlands as host country would not differ in any respect from the positions of the other Charter Parties;
- b) the legal consequences prompted by detentional measures ordered by the ICTY to be executed by the host country; these measures would encompass the provisional arrest, provisional detention during the pre-investigative phase, the detention during the trial and, eventually, the enforcement of the irrevocable sentences of imprisonment handed down by the ICTY;
- c) the logistic and legal consequences prompted by the mere hosting of the ICTY as proposed by the Secretary-General of the UN in its concept of a Statute of the ICTY.

The general stand of the Dutch delegation was that it would be necessary to establish as a rule that the procedural rules to be applied before the ICTY would be separated from the national applicable regulations on criminal procedures and substantive criminal law as maintained by the Netherlands at its domestically level. It was foreseeable that individuals,

⁵⁷ This article runs: 'In the event of a conflict between the obligations of the Members of the United Nations under the present charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. See about the general significance of this Charter article in host affairs also above mn 2.

falling under the ICTY jurisdiction, could at the same time fall under the domestically jurisdiction of the host state in the event they would commit crimes after arrival in the Netherlands for which the ICTY could not wield jurisdictional power whilst the Netherlands would have that competence according to its national law or on the basis of its treaty position, for example as member of the European Union.

In explication for the first two categories a) and b):

It was argued by the Secretary-General that the Netherlands, as all the other UN Charter Parties, would be under the obligation, by virtue of article 29 of the ICTY Statute⁵⁸, to cooperate upon request of the ICTY with the Tribunal and to provide for any thinkable form of cooperation and assistance. This obligation would be a mandatory one; exceptions to this obligation were to be considered as unacceptable under international law. Any request of the ICTY should be considered as 'the application of an enforcement measure under Chapter VII of the Charter of the United Nations'. The Dutch delegation did not contest this principle as a general assumption, but asserted that lots of these requests should be executed by the host country simply because of the geographical fact of the location of the ICTY premises. The Netherlands should, therefore, provide for detailed enabling legislation in order to fulfil this general duty as a UN Charter Party, far more than any other UN Charter Party. In this respect the overarching question seemed to be how the relationship would be between this national enabling legislation and the Rules of Procedure and Evidence to be set up on behalf of the ICTY. Could the Rules be derogated by the national regulations? If the latter would be conflicting with the first, which judicial authority would be competent to rule, which one would be prevailing according to Dutch *domestically* law? To stipulate simply that it would be exclusively with the ICTY to decide on these jurisdictional conflicts – as argued by UN legal affairs – would be too simple a solution, whereas the Netherlands in criminal matters is bound – like an overwhelming majority of other UN Charter Parties – to the principle of national legality. In this sense, the Netherlands is to be considered to be a *dualistic* State⁵⁹. If the ICTY would be ordering a compulsory measure to the detriment of the exercise of human

⁵⁸ At that moment article 29 of the Draft ICTY Statute ran as follows:

'Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal'.

⁵⁹ In this context, I am referring to the commonly known antinomy 'dualism' versus 'monism'. See, in detail about this antinomy on its different elaborations: *Supra* note 24, Verdross/Simma, mn 71 *et. seq.* (1984). In the monistic approach international law has the primacy over national law and is automatically legally binding at the national level: international law is, as such, 'self executing' at the domestic level. There is no need for transformation of that international law by national enabling legislation. In a dualistic approach, only national law can be binding at the domestic level. The will of the state plays always a decisive role in making international law really legally binding, operative and enforceable at the domestic level. Without the express consent of the state, international law cannot change the legal position of the individual at that level nor can it bind the state and its organs towards that individual. That means in this context of criminal international law: in order to be 'legal operative', the provisions of treaties dealing with criminal law matters must be implemented in the domestic legal sphere of signatory states by means of enabling legislation in accordance with the *lex certa*-prerequisites flowing from the national legality principle both in substantive and in procedural matters. What is stated in the main text of this commentary applies especially in criminal matters. It is not the opinion of the author that, generally speaking, international law as a legal framework where states interrelate never could be self executing. That depends on the willingness of the states to open their national hemisphere to that kind of law, a willingness that could be derived from constitutional principles a specific state adheres. Some states have this open mind towards international law. Yet, in criminal matters, no state shows that willingness, whereas all states consider their selves submitted to the legal consequences of the national legality principle. See: Fransisco, *Aspects of Implementing the Culpability Principle both under International and National Criminal Law*, Academic Thesis at the Groningen University (the Netherlands) (2003) 18 *et seq.*

rights by an individual residing within the territorial jurisdiction of the host country, the Netherlands could only enforce that measure on the basis of a *national* provision by law. To state that the simple acceptance of the position of a host country in this respect would entail automatically and by virtue of implicit condition the obligation to set aside the constitutional principle of legality would undermine the principle of the rule of law within the jurisdiction of the Netherlands as understood by the ECHR system. Besides that, the UN had not voiced this requirement when asking the Netherlands to host the ICTY.

From the view of the host state, the legal questions under a) and b) were substantially interlinked, prompting the same legal intricacies and logistical problems. Therefore, the Dutch delegation formulated the following questions to be touched upon during the Host Agreement negotiations and the legal provisions to be set up on order to resolve the jurisdictional complications prompted by those questions.

- a) Which laws would be applied regarding arrest and detention in the Netherlands of the ICTY suspects upon their arrival in the Netherlands? It was not disputed that it would be with the ICTY to decide on those compulsory measures but it was argued that this competence would not give the final solution on the issue which penitentiary laws and regulations would apply during the enforcement phase. What laws would apply to the information to be forwarded to the detainee with a view to the legal ground of his deprivation of liberty and the regime to which he would be submitted?
- b) Which law would be applied regarding the detentional time limits for the prolongation by the ICTY ordered measures and which kind of *habeas corpus* law would stand? Should the ECHR jurisprudence apply with a view to the speedy-trial rule and the criterions for 'undue delay'? In this respect, the fact that the Netherlands was to be considered as ECHR ratifier was highly important. The Dutch delegation argued that the accessibility to the Dutch judiciary in these cases could not be excluded by national enabling legislation. Reference was made to the Dutch constitutional *habeas corpus* guarantee in conjunction with the fact that in this respect the ECHR treaty provisions simply supersede national statutory regulations. This applied also to the ECHR doctrine on the 'effective remedy' in cases the ECHR guarantees would have been violated according to article 13 of that Treaty⁶⁰. Certainly, the answer on these questions would have implications on the Prosecutor's obligations to prosecute as quickly as possible, taken into consideration the complexity of the pending case.
- c) Would it be with the ICTY to order the host country to request cooperation and assistance to other States, given the treaty position of the Netherlands in relation to those States which with the Netherlands maintains already existing treaties on cooperation and mutual assistance? Could, for example, the ICTY ask the Netherlands to request a third State to provide extradition to the Netherlands as a bilateral treaty party with the intention to surrender the claimed person to the ICTY? Were the existing regulations and principles on interstate cooperation and assistance sufficient to comply with all the requests of the ICTY especially with a view to the forwarding of information, jeopardizing or prejudicing the national security of the host state⁶¹? What about the conservation of evidentiary substances and the gathering of evidence itself? The same question was putted forward to the transit movements of experts, witnesses, victims and their relations, observers and the like.
- d) Which legal grounds and regulations would apply in case the ICTY would be ordering phone tapping, seizure, domestically search, disfranchisement, freezing of assets, observations, commitment for failure to comply with a judicial order, commitment for perjury or

⁶⁰ Article 13 ECHR runs as follows: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. Given its content, article 13 could be 'self executing' at the national level of an ECHR Party. In the Netherlands it is not, as stated by the Supreme Court of the Netherlands in a decision of 24 February 1960, *Nederlandse Jurisprudentie* (Jurisprudence in the Netherlands) No 483, 1960.

⁶¹ This issue is dealt with under the heading of article 72 Rome Statute; see the commentaries below.

contempt of the Court? In the latter case, the complications seemed to be that the Netherlands did not recognize 'contempt' as a crime as such; the concept was completely unknown.

- e) What would be the obligation of the Netherlands towards the attorneys for the Defence? At the end of 1993 the UN Secretary-General paid for the first time some attention to the need to provide for a Defence Council and related staff⁶². Could they ask the Netherlands for interstate cooperation and assistance on the same footing as the ICTY Registrar and the Prosecutor? Could they seek access to a Dutch court to complain about the reluctance of the host country in this respect? Could they invoke provisions contained in the ICTY Statute before a Dutch court? And, if the answer would be in the affirmative, what if the rendition to be given to the ICTY Statute by the Dutch judge would differ from or collide with a decision given by the ICTY? The only thing which was crystal clear at the outset, was that those defendants who would be brought before the ICTY would be needing their own lawyers, which should be given an 'ICTY affiliated status', prompting the obligation incumbent on the host country to provide for security measures and transit-facilities in order to guarantee them freedom of movement in the Netherlands and the freedom to travel hence and forth to the premises where in site investigations were to be conducted by the ICTY Prosecutor. The UN Secretary-General proposed to provide for Defence Council and related staff enjoying certain privileges and immunities. It was not clear as to whether those privileges and immunities should be granted on the same footing as the Prosecutor and his office would be enjoying. The main focus was laid on the aspects of financing.

38 To the question b) of the Dutch Delegation:

What would be the legal consequences if the ICTY was to ask the Netherlands to enforce a sentence of imprisonment, given the overall willingness of the Netherlands as a Charter Party to enforce the ICTY sentences? Which penitentiary law would apply? It seemed that article 27 of the ICTY Statute would cover this issue⁶³. This article simply declared the '*lex loci*' applicable to the enforcement measures⁶⁴. Nevertheless, according to standing Dutch law, the ICTY sentence should be transformed into a Dutch judicial decision. This could be done by a statutory provision in Dutch law by which all the ICTY sentences were equalised – in abstract – to Dutch sentences without a foregoing so called 'exequatur procedure' in which a Dutch judge transforms the foreign decision into a Dutch sentence. The exclusion by law of this 'exequatur procedure' is known as 'the continued enforcement procedure'. Both parties – Legal Affairs and the Dutch delegation – were of the opinion that this solution was preferable, whereas the UN Charter Parties were under the obligation to recognize the ICTY as an emanation of their own national judiciaries. Yet, the sentenced person would be entitled, according to domestic law, to get commutation of sentence on the same footing as a person sentenced by a Dutch court. The same would apply to abolition, pardon and amnesty. But it was held that those issues were not to be considered as intricacies which only the host country had to deal with – these were matters for all the UN Charter Parties. Therefore, they are not dealt with under the heading of the Commentary on article 3 Rome Statute, albeit that they are tightly linked to the above mentioned issues regarding the enforcement of pre-

⁶² See note 90, mn 45: 'For those defendants who are brought before the Tribunal who are unable to provide their own lawyers, it is foreseen that they would have to be provided with Defence Counsels. Accordingly it is proposed to provide for a Defence Counsel and related Staff. Such functions would not be required until the Prosecutor has had sufficient time to gather and evaluate evidence and begin the preparation of indictments and, in any case are not anticipated to be needed early in 1994. Although the number of indictments and the timing of the trials are unknown at this time, it is proposed to provide resources, as set out below'.

⁶³ See the Report of the Secretary-General pursuant to paragraph 2 of SC Res. 808 (1993) S/25704, 3 May 1993.

⁶⁴ This article runs as follows: '**Enforcement of sentences:** Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal'. See the commentaries on article 103 Rome Statute below.

trial measures ordered by the ICC, especially if the measures are detentional of nature. The latter are typical host state issues, the first are issues regarding the whole the ICC family. Those final enforcement issues are relegated to the Commentary on Part 10 Rome Statute (Enforcement). At the outset of the negotiations on the Host Agreement, it was held by either party that it would be incumbent on the host country to provide for detentional facilities until an UN Charter Party would show up expressing its willingness to enforce the sentence of imprisonment. During that transitional period, the Netherlands had simply to act as enforcing party even if it had not expressed its willingness to do so by virtue of a special enforcement agreement. This turned out to be standing practice after the handing down by the ICTY of its first sentence of imprisonment.

To the question c) of the Dutch Delegation:

Given the decision of the UN to have the ICTY seating in The Hague – about this location there was nearly any discussion⁶⁵ – there was the immanent need to define the status of the ICTY as an entity in the Netherlands, its immunities, extritorialities and privileges, the status of its organs and that of its employees. Article 30 of the ICTY Statute only gave the general parameters of these regulations⁶⁶. It was quite clear that they should be elaborated into detail in the Host Agreements on the Host Arrangements, whereas it was the host country to guarantee those issues towards the ICTY, the UN and the Charter Parties. The same would apply to the persons who would have to appear before the ICTY irrespective as to whether they would have been indicted, summoned or would appear *proprio motu*. The latter issue was not worked out in article 30 ICTY Statute, yet, some provisions had to be set up in this respect at the bilateral level between the ICTY and the host country. It seemed too simple not to provide for additional regulations regarding persons, not really *required* at the Seat of the Court, but whose presence in the vicinity of the ICTY could be indispensable for the proper functioning of the Court. Accused persons should be entitled to see family and spousal relations and the like; the same could go for victims, witnesses and experts, especially when they had to stay for a longer period in the Netherlands. Later on, practice showed the rightness of this assumption. The problems regarding this category of persons, not defined in

⁶⁵ See the comments contained in the Rep. of the Secretary-General pursuant to paragraph 2 of SC Res. 808 (1993) S/25704, sub chapter VII (Gen. Provisions) B, **Seat of the International Tribunal**: 'While it will be for the Security Council to determine the location of the seat of the International Tribunal, in the view of the Secretary-General, there are a number of elementary considerations of justice and fairness, as well as administrative efficiency and economy which should be taken into account. As an International Tribunal to have its seat in the territory of the former Yugoslavia or in any State neighbouring upon the former Yugoslavia. For reasons of administrative efficiency and economy, it would be desirable to establish the seat of the International Tribunal at a European location in which the United Nations already has an important presence. The two locations which fulfil these requirements are Geneva and The Hague. Provided that the necessary arrangements can be made with the host country, the Secretary-General believes that the seat of the International Tribunal should be at The Hague. The corresponding article of the statute would read: article 31 Seat of the International Tribunal: The International Tribunal shall have its seat at The Hague'.

⁶⁶ See Rep. of the Secretary-General pursuant to paragraph 2 of SC Res. 808 (1993) S/25704 3 May 1993, sub chapter VII (General Provisions) A, **The Status, privileges and immunities of the International Tribunal**: 'The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 would apply to the International Tribunal, the Judges, the Prosecutor and his staff, and the Registrar and his staff. The judges, the Prosecutor, and the Registrar would be granted the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law. The staff of the Prosecutor and the Registrar would enjoy the privileges and immunities of officials of the United Nation within the meaning of articles V and VII of the Convention. Other persons, including the accused, required at the seat of the International Tribunal would be accorded such treatment as is necessary for the proper functioning of the International Tribunal'. The corresponding article of the statute would read: 'article 30: **The status, privileges and immunities of the International Tribunal**: 1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges and his staff, and the Registrar and his staff. 2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. 3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article. 4. Other persons, including the accused, required at the seat of the international Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal'.

the ICTY Statute, turned out to be the most difficult ones. Again the main focus during negotiations was laid on practical issues like the obligations of the host country to provide for adequate maintenance, food, heating, electricity, laundry, communications and the financial obligations occurring in this respect: what would be the reimbursement to be granted to the host country⁶⁷? Would there be a consignment account to be paid in advance by the UN to cover the foreseeable costs? *This* solution was chosen, later on, with a view to the hosting of the Lockerbie Tribunal, whereas the ICTY experiences had clearly shown that in this respect the financial arrangements should indemnify the host country more sufficiently. Another issue was the question of the security aspects. It should be the responsibility of the Host Country to guarantee the *external* security of the offices of the Tribunal and the personal protection of high officials outside the ICTY premises. The care for the *internal* security should be with the ICTY Registrar. It should be with the host country to provide for assessments of the level of security and for threat analyses. The latter should take care of police assistance to be rendered in cases of serious incidents.

The Host Country and UN legal affairs tried to separate the issues under a), b) and c) as much as possible. But a total watershed was not sustainable as the current text of the Host Agreement clearly shows. It was in the likelihood that the same problems would arise during the drafting of the Headquarters Agreement with the ICC. There is *one* significant difference: the host country can not be seen as a party who has to set aside its international obligations when colliding with the obligations flowing from the ICC Statute or the Headquarters Agreement on the mere ground that it has to consider Statute and Agreement as hierarchically *superseding* already existing international obligations. As spelled out above the General Remarks of this article under I. mn 3, the ICC will never have the privileged position as subsidiary UN organ, established under Chapter VII of the UN Charter and can therefore not invoke the advantages flowing from article 103 of that Charter. Therefore host country and ICC will have to provide for special provisions to arrange positive jurisdictional conflicts prompted by collision of already existing treaty obligations incumbent on the host state – for example as Member state of the European Union – and the Headquarters Agreement with the ICC. Think of a collision of obligations based on the EU-treaties on interstate cooperation and assistance within the Union and obligations flowing from the ICC Headquarters Agreement. One should constantly bear in mind that the UN Convention on the Law of Treaties is not applicable to treaties concluded between a State and an International Organisation like the ICC. The UN Convention only applies to treaties concluded between sovereign states. Therefore the principles concerning the priority rules in case treaty obligations stemming from different treaties collide (like: *pactum posteriore derogat pactum priore*, or *pactum speciale derogat pactum generale*) do not fit automatically. A solution could be to provide for an operative article by which certain provisions of the UN Convention on the Law of Treaties are declared to be applicable *per analogiam*⁶⁸. The priority rules and the rules concerning interpretation methods are fit to be referred to in that way.

⁶⁷ See note 90, mn 57. At the time of preparation of the report of the Secretary-General to the SC (S/25704/Add.1) the Secretary-General informed the Council that a number of issues were unclear at the time such as detention facilities before and during trials, and imprisonment. Upon further discussions with the Government of the Netherlands, other costs associated with the operation of the Tribunal which are likely to arise have been discussed such as the operating costs of the detention facilities (food, heating, electricity, laundry and communications). It is also foreseen that in view of security concerns, additional requirements would arise in 1994–1995, which is dependent on the level of activities of the Tribunal during the biennium. The question of the rental requirements for a suitable courtroom referred to in paragraph 50, is another aspect of the operation of the Tribunal which would be likely to warrant additional requirements in 1994–1995.

⁶⁸ And not *mutatis mutandis*, whereas, in substance, the counter part of the host country does show features absolutely not comparable with a sovereign State such as the lack of territorial sovereignty, the lack of penal enforcement power of its own and the absence of power to conclude treaties on its own footing. See, again, above mn 3 and 4.

III. The final Seat Agreement

1. In general

Directly after the entry into force of the abovementioned interim Seat Agreement with ICC negotiations began between the Netherlands and the ICC in order to come to a final Seat Agreement⁶⁹. Those negotiations have been completed successfully in 2006; it took, however, due to practical reasons, until the 7th of June 2007, to have the Agreement published in the Netherlands Treaty Series⁷⁰. Mainly, the final Seat Agreement follows the basic assumptions and outlines of the interim solutions as spelt out above⁷¹. In case of interpretational difficulties, one could rely on those solutions and the renditions given to them, especially by the Dutch judiciary.

The Kingdom of the Netherlands concluded Seat Agreements with about thirty international organisations, seating within the Kingdom's realm. Those treaties contain lots of standardised regulations concerning the status, privileges and immunities of those organisations and their personnel. As a matter of course, there are dissimilarities between those Seat Agreements, whereas those organisations differ to each other. The main characteristic feature of ICC – which makes it differ from all the other organisations – is (a) that it is designed to exercise penal enforcement powers within the Netherlands, with all the additional compulsory competences thereof and (b) that the Netherlands has to consider ICC as an emanation of its national judiciary, superseding, hierarchically speaking, all the competences vested into the national criminal courts whatsoever. Besides that, the Seat Agreement provides for regulations with a view to the specific tasks of ICC, regarding the privileges and immunities to the benefit of counsel for the defence, victims, and specific regulations concerning the security, the enforcement of pre-trial measures and measures to be taken pending trial, and, eventually, regarding the enforcement of irrevocable sentences which can not be enforced outside the Kingdom. As the Minister for Foreign Affairs stipulated explicitly in his explicatory note on the final Seat Agreement, normally Seat Agreements do not need the approval of the Dutch Houses of Parliament according to the Statute of the Kingdom on the

⁶⁹ Stukken van de Tweede Kamer 28.498 No.s 2, 9, 11, 13, 16, 17; Stukken van de Tweede Kamer 30.550, No.s V No.'s 1–6; Stukken van de Tweede Kamer 30.100 No. V No. 1 [Hansard of the Lower House No. 28.498, No.'s 2, 9, 11, 13, 16, 17; Hansard of the Lower House No. 30.550 No. V No.'s 1–6; Hansard of the Lower House No. 30.100 No. V, No. 1].

⁷⁰ See footnotes 3–5 above. The Assembly of States Parties approved the final Seat Agreement on the first of December 2006; see the explicatory note of the Minister for Foreign Affairs of the Kingdom of the Netherlands, annex to the Dutch translation of the Agreement.

⁷¹ The preamble of the final Seat Agreement runs as follows:
 ‘The Kingdom of the Netherlands and the International Criminal Court, Whereas the Rome Statute of the international Criminal Court adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries established in the International Criminal Court with power to exercise its jurisdiction over persons for the most serious crimes of international concern; Whereas article 3, paragraphs 1 and 2, of the Rome Statute respectively provide that the seat of the Court shall be established at The Hague in the Netherlands and that the Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter conclude by the President of the Court on its behalf; Whereas article 4 of the Rome Statute provides that the Court shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes; Whereas article 48 of the Rome Statute provides that the Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes; Whereas article 103, paragraph 4, of the Rome Statute provides that, if no State is designated under paragraph 1 of that article, sentences of imprisonment shall served in a prison facility made available by the host State in accordance with the conditions set out in the headquarters agreement; Whereas the Assembly of States Parties, at the third meeting of its first session held from 3 to 10 September 2002, adopted Basic principles governing a headquarters agreement to be negotiated between the Court and the host country, and adopted the Agreement on Privileges and Immunities of the International Criminal Court; Whereas the Court and the host State wish to conclude an agreement to facilitate the smooth and efficient functioning of the Court in the host State; Have agreed as follows’:

approval and promulgation of Treaties⁷². By virtue of article 3 that Statute empowers the government, as asserted several times during the negotiations in reaction to parliamentary queries, to conclude Seat Agreements by *blanc* anticipation. With regard to the final Seat Agreement concluded with ICC this Parliamentary approval on the contrary *is* needed as the Minister stated. The treaty does contain lots of provisions, strongly connected with the special functions and tasks entrusted to ICC, which are not covered by the ambit of the authorisation by *blanc* anticipation as envisaged in the just mentioned Statute. Most strikingly, the Minister did not define those special functions and tasks, which would necessitate the parliamentary approval nor did he explain how the Agreement could be compatible with the Dutch Constitution, explicitly defining in a crystal clear operative article *what* has to be understood under the ‘judiciary’ to which the administration of justice and the law has been assigned in the Netherlands⁷³. Under that judiciary, as a matter of course, the *Dutch* judiciary has to be understood. The history of that article simply shows so. Of course, it is with the government to agree upon a treaty, obliging the Netherlands to equate to *that* judiciary an international, non-national judiciary as ICC is. But that equation does need national enabling legislation; and a Seat Agreement, departing from that equation, does so likewise. And *that* is the reason that it has been felt that parliamentary approval was needed with a view to the entry into force of this Final Agreement.

41 In general, the final Seat Agreement has been composed as a two folded instrument, just as follows:

It contains operative articles envisaging the relations between the Host State the Netherlands and ICC; it elaborates in this respect the Rome Statute and the Treaty on the privileges and immunities of ICC (New York dd the 9 September 2002⁷⁴). The Rome Statute contains several provisions in general concerning the status, privileges and immunities of ICC, its employees and several categories of persons the presence of whom is needed to have the ICC functioning. Those general provisions have been worked out in the even mentioned multi-lateral treaty on privileges and immunities and in this respect the Seat Agreement keeps up with those legal instruments; the treaty – of which all the members of the so called ICC-

⁷² Rijkswet goedkeuring en bekendmaking verdragen juncto artikel 3 van de Wet van 24 Dec. 1947 tot goedkeuring van het Verdrag inzake de voorrechten en immuniteiten van de Verenigde Naties, Staatsblad H. 452 [Statute of the Kingdom of the Netherlands on the approval and promulgation of Treaties in conjunction with article 3 of the Statute of the 24 December on the ratification of the Treaty concerning privileges and immunities of the United Nations, Official Statal Monitor H. 452]. The constitutional question as to whether Seat Agreements with international Tribunals and Courts do not need that parliamentary approval has been dealt with above, C. sub II, mn 31–33.

⁷³ See: article 112 of the Dutch Constitution in conjunction with article 113 of that Constitution. Art. 112 Dutch Constitution runs as follows: ‘–1. Aan de rechterlijke macht is opgedragen de berechting van geschillen over burgerlijke rechten en over schuldvorderingen. –2. De wet kan de berechting van geschillen die niet uit burgerlijke rechtsbetrekkingen zijn ontstaan, opdragen hetzij aan de rechterlijke macht, hetzij aan gerechten die niet tot de rechterlijke macht behoren. De wet regelt de wijze van behandeling en de gevolgen van de beslissingen’. [translation.: ‘–1. It is with the judiciary to rule on litigations concerning civil rights and concerning debts. –2. A Statute may bestow the right to adjudicate in other litigations either on the judiciary either on other courts not being member of the judiciary. The law provides for regulations on proceedings and the legal consequences of rulings and decisions’]. Article 112 stems from an nineteenth centuries’ provision in the former Dutch constitution, scilicet Article 153; it goes without saying that that provision, given the XIXth centuries’ overarching conception of absolute statal sovereignty in all the Western European States, referring to ‘the judiciary’ only meant: the *national* judiciary. One could easily discover that, glancing through the standard commentaries on the Dutch Constitution. Article 113 of the same Constitution runs as follows: ‘–1. Aan de rechterlijke macht is voorts opgedragen de berechting van strafbare feiten. –2. Tuchtrechtspraak door de overheid ingesteld wordt bij de wet geregeld. –3. Een straf van vrijheidsontneming kan uitsluitend door de rechterlijke macht worden opgelegd. –4. Voor de berechting buiten Nederland en voor het oorlogsstrafrecht kan de wet afwijkende regels stellen’. [translation.: ‘–1. It is furthermore with the judiciary to sit on criminal matters. –2. Rules governing disciplinary proceedings shall be given by Statute, if those proceedings have been established by the government. –3. Penalties prompting deprivation of liberty shall only be handed down by the judiciary. –4. By Statute may be provide for special regulations on extraterritorial adjudications and proceedings on international humanitarian law’].

⁷⁴ Netherlands Treaty Series 2004, No. 55.

family are addressees, so it is an instrument *erga omnes* – will be the main interpretative instrument to provide for the correct renditions of the Agreement in cases of unclarities or uncertainties in the latter document.

In addition, the Agreement provides for specific provisions to facilitate the appropriate functioning in the Netherlands, mainly imposing host obligations on that state, providing for guarantees for ICC, its organs and employees. Here, the ICC and the Netherlands are the addressees; those provisions are not set up to work *erga omnes*. More specifically, nor the Assembly of State Parties, nor a specific member of that Assembly are to be seen as addressees. The Assembly has to be seen as a ‘third party’ and the Seat Agreement as a *res inter alios gesta* in relationship to the Assembly. The legal fact that the Assembly devised the ‘Basic principles’ underlying the Seat Agreement, nor the fact that the Assembly had to ‘approve’ the Agreement, does make the Assembly ‘party’ to the Agreement, let alone one of its members in particular. That is exactly the reason why article 1 only defines the Netherlands as ‘host State’ and the Court itself as ‘the parties’ to the Agreement. The definite article ‘the’ (Parties) is significant in this context. There are no other. The States, members of the Assembly are ‘Parties’ to the *Statute*. Not to the Seat Agreement.

2. Article by article in general

Chapter I of the Seat Agreement contains the articles 1 and 2. One has to consider those articles as mere standardised provisions, clarifying the terminology used in the Agreement (article 1⁷⁵) and defining the goals, objectives and radius of action of the Agreement (article 2).

⁷⁵ Article 1 of the final Seat Agreement runs as follows: ‘Use of terms For the purpose of this Agreement: a) “the Statute” means the Rome Statute of the International Criminal Court adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; b) “the Court” means the International Criminal Court established by the Statute; for the purpose of this Agreement, the Secretariat shall be an integral part of the Court; c) “the host State” means the Kingdom of the Netherlands; d) “the parties” means the Court and the host State; e) “States Parties” means States Parties to the Statute; f) “representatives of States” means all delegates, deputy delegates, advisers, technical experts, secretaries, and any other accredited members of delegations; g) “the Assembly” means the Assembly of States Parties; h) “the Bureau” means the Bureau of the Assembly; i) “subsidiary bodies” means the bodies established by the assembly or the Bureau; j) “the officials of the Court” means the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of the Court; k) “the judges” means the judges of the Court elected by the Assembly in accordance with article 36, paragraph 6, of the Statute; l) “the Presidency” means the organ composed of the President and the First and Second Vice-Presidents of the Court in accordance with article 38, paragraph 3, of the Statute; m) “the President” means the President of the Court elected by the judges in accordance with article 38, paragraph 1, of the Statute; n) “the Prosecutor” means the Prosecutor elected by the Assembly in accordance with article 42, paragraph 4, of the Statute; o) “the Deputy Prosecutors” means the Deputy Prosecutors elected by the Assembly in accordance with article 42, paragraph 4, of the Statute; p) “the Registrar” means the Registrar elected by the judges in accordance with article 43, paragraph 4, of the Statute; q) “the Deputy Registrar” means the Registrar elected by the judges in accordance with article 43, paragraph 4, of the Statute; r) “staff of the Court” means the staff of the Registry and the Office of the Prosecutor as referred to in article 44 of the Statute. Staff of the Registry includes staff of the Presidency and of Chambers, and staff of the Secretariat; s) “the Secretariat” means the Secretariat of the Assembly established by resolution ICC-ASP/2/Res.3 dated 12 September 2003; t) “interns” means graduates or postgraduates who, not being members of staff of the Court, have been accepted by the Court into the internship program of the Court for the purpose of performing certain tasks for the Court without receiving a salary from the Court; u) “visiting professionals” means persons who, not being members of staff of the Court, have been accepted by the Court into the visiting professional program of the Court for the purpose of providing expertise and performing certain tasks for the Court without receiving a salary from the Court; v) “counsel” means defence counsel and the legal representatives of victims; w) “witnesses”, “victims” and “experts” means persons designated as such by the Court; x) “the premises of the Court” means buildings, parts of buildings and areas, including installations and facilities made available to, maintained, occupied or used by the Court in the host State in connection with its functions and purposes, including detention of a person, or in connection with meetings of the Assembly, including its Bureau and subsidiary bodies; y) “the Ministry of Foreign affairs” means the Ministry of Foreign affairs of the host State; z) “the competent authorities” means national, provincial, municipal and other competent authorities under the laws, regulations and customs of the host State; aa) “the Agreement on Privileges and immunities of the Court” means the Agreement on Privileges and Immunities of the International Criminal Court referred to in article 48 of the Statute and adopted at the third meeting of the first session of the Assembly held from 3 to 10 September 2002 at the United Nations Headquarters in New York; bb) “the Vienna Convention” means the Vienna

As a matter of course, in comparison with the ICTY Seat Agreement, the list of terminological definitions has been considerably enlarged. Especially noticeable are the definitions devoted to the Assembly of States Parties and the organs and employees of that Assembly. The Seat Agreement contains some provisions with regard to that Assembly, if convening in the host State. The remarkable thing is, that this does not fall, strictly speaking, within the ambit of a Seat Agreement between the Netherlands and ICC as such. Hosting ICC is one thing, hosting the Assembly is another. But it seemed practicable to have the provisions on transit movements, entry into the country, immunities and privileges regarding the delegates and the personnel of the Assembly and its organs (its Bureau for example) in one comprehensive document, whereas ICC and the Assembly are tightly interconnected. Therefore the Seat Agreement sees not only to provisions guaranteeing the adequate functioning of ICC and its independence in relation to the host State, but also to the adequate functioning of the Assembly of States Parties, the organs of the Assembly and its Secretariat. The Assembly, unlike ICC, does not have any legal personality at all as self-standing entity in the relation to the host State⁷⁶. Therefore, it seemed to be impossible to conclude an apart Seat Agreement with the Assembly. The Seat Agreement with ICC offers the legal framework for having the Assembly seating and functioning in the Netherlands. But it is ICC, according to article 33, fourth paragraph, of the Seat Agreement⁷⁷, which has to make due efforts in order to guarantee good compliance at the side of the host State with the provisions pertaining the facilities, immunities, privileges, entry into the host State and unimpeded leaving from there, transit movements and the like to the benefit of persons in any way taking part in a conference of the Assembly. Strictly speaking, ICC does not have any authority over those persons, but it acts like a kind of trustee for the sake of the Assembly. Again it should be stressed, although the Seat Agreement does contain some provisions to the benefit of the Assembly, the Assembly *remains third party*, or better, no party at all. See above. This enlargement of the ambit of the Agreement is in line with the scope of the Agreement on the Privileges and Immunities of the International Criminal Court as of the 9th of September 2002. That Agreement contains in the articles 13 and 25 special provisions regarding the position of delegates attending conferences and meetings of the Assembly and its subsidiary organs. See below in detail sub VII. In this context we would like to flag already that we are *not* referring to the privileges, exemptions and immunities as meant in article 48 of the Statute⁷⁸. That article envisages the exemptions, immunities and privileges to be enjoyed by the Court, its employees and (subsidiary) organs in the territory of *each* State Party. Here we are dealing with that kind of jurisdictional phenomena in relation to the host State, to be observed by the host State and the host State alone. Issues arising from the already mentioned additional Agreement on the Privileges and Immunities of the International Criminal Court as of the 9 September 2002 (New York) are envisaged under article 48 of the Statute as well. Another striking thing is the reference made in article 1, sub z) to ‘the competent authorities’. Here only *Dutch*, national, authorities are meant. The question arises as to whether the definition is not too rigid and inflexible. The

Convention on Diplomatic Relations of 18 April 1961; cc) “the Rules of Procedures and Evidence” means the Rules of Procedure and Evidence adopted in accordance with article 51 of the Statute’.

⁷⁶ As stressed by the Ministers for Foreign Affairs and Justice of the Kingdom of the Netherlands, Stukken Eerste en Tweede Kamer, Zetelverdrag tussen het Internationaal Strafhof en het Gastland; ‘s-Gravenhage, 7 Juni 2007 (Tractatenblad 2007, No. 125), No. 31.274, No.1 (Brief van de Minister van Buitenlandse Zaken met toelichtende nota, Den Haag, 13 Nov. 2007) [Hansard of the Upper and the Lower House, Seat Agreement between the International Criminal Court and the host State, The Hague, the 7th of June 2007 (Netherlands Treaty Series 2007, No. 125), No. 31.274, No. 1 (Letter of the Minister for Foreign Affairs with explicatory note, The Hague, the 13 November 2007)].

⁷⁷ This paragraph 4 of article 33 of the Seat Agreement runs as follows: ‘*General cooperation between the Court and the host State* (...) –3. Without prejudice to the powers of the Prosecutor under article 42, paragraph 2, of the Statute, the Registrar, or a member of staff of the Court designated by him or her, shall serve as the official contact point for the host State, and shall be primarily responsible for all matters in relation to this Agreement. The host State shall be informed promptly about this designation and of any subsequent changes thereof’.

⁷⁸ See article 48 ICCS: ‘–1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes. –2 (*etc.*)’.

Netherlands does host lots of organisations, having special competences in criminal matters, with whom ICC might want to come into contact – if necessary, by the host State as intermediary – with a view to cooperation and assistance. Think of EUROPOL and EUROJUST, and, perhaps, later on, the European Prosecutorial Service as envisaged in the 2007 Lisbon document⁷⁹, being an emanation – in the eyes of the founding fathers of the Lisbon document – of EUROJUST, seating in The Hague. An open ended definition of ‘competent authorities’ – encompassing all authorities being apt to wield competences in the Netherlands in criminal matters would have been more preferable. Just remember the fact that the enlargement of the Seat Agreement by amendment of that definition needs the approval of the Assembly of States Parties – a rather cumbersome exercise.

article 2⁸⁰ defines the purpose and scope of the Seat Agreement. Again, it follows the phraseology of the ICTY Arrangement. The Agreement regulates matters relating to or arising out of the establishment and the proper functioning of the Court in the host State. Again, we stress the geographical limitation of the scope of the Agreement: *in* the host State. The Agreement has to provide, *inter alia*, for the long-term stability and independence of the Court. It has to facilitate its smooth and efficient functioning, including, in particular, its needs with regard to all persons required by the Court to be present at its seat and with regard to the transfer of information, potential evidence and evidence into and out of the host State. The Seat Agreement has to regulate matters relating to or arising out of the establishment and proper functioning of the Secretariat of the Assembly of States Parties in the host State. The provisions as laid down in the Agreement apply, *mutatis mutandis*, to the Secretariat. And, as mentioned – here we are facing the overall solution with regard to the Assembly – the Agreement shall, as appropriate, regulate, *mutatis mutandis*, matters relating to the Assembly, including its Bureau and subsidiary bodies. 44

Chapter II of the Agreement (articles 3–16) contains standardised provisions, mainly on the status, privileges and immunities of the Court. See for more details hereunder ad VIII. 45

Chapter III (articles 17–29) envisages the persons falling under the scope of the Agreement and provides for standardised regulations in line with the already mentioned Vienna Convention on diplomatic relations of 18 April 1961. The pivot issues here are the exemptions, privileges and immunities for, at first instance, the most high-ranking functionaries of the Court (article 17) and, secondly, for the other personnel. The articles 21 and 22 regard the position of representatives of States. Like in the Agreement on the Privileges and Immunities of the International Criminal Court a distinction has been drawn between representatives of States, participating in the procedures of the Court (article 21) and representatives of States, attending the meetings and conferences of the Assembly of States Parties. Just like the Agreement on Privileges and Immunities of the International Criminal Court the Seat Agreement contains apart from that further elaborated regulations concerning the position of different categories of persons, normally not mentioned in Seat Agreements, but the presence of which, given the task and function of ICC, is indispensable for the adequate functioning of the Court. Especially one has to think of counsel, attorneys and persons, assisting the defence, witnesses and victims. Here one has to bear in mind that some non-governmental organisations are specialised in assisting certain groups of victims, like, for example, the ‘women’s caucus’. 46

⁷⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Brussels, 3 Dec. 2007 (OR.fr) CIG 14/07 (Conference of the representatives of the Governments of the Member States), see article 69E.

⁸⁰ Article 2 Seat Agreement runs as follows:

‘This Agreement shall regulate matters relating to or arising out of the establishment and the proper functioning of the Court in the host State. It shall, *inter alia*, provide for long – term stability and independence of the Court and facilitate its smooth and efficient functioning, including, in particular, its needs with regard to all persons required by the Court to be present at its seat and with regard to the transfer of information, potential evidence and evidence into and out of the host State. This Agreement shall also regulate matters relating to or arising out of the establishment and proper functioning of the Secretariat in the host State, and its provisions shall apply, *mutatis mutandis*, to the Secretariat. This Agreement shall, as appropriate, regulate matters relating to the Assembly, including its Bureau and subsidiary bodies’.

- 47 Chapter IV of the Seat Agreement (articles 30–32) envisages a standardised subject: the waiving of immunities, privileges and exemptions granted by virtue of provisions formulated elsewhere in the Agreement. The basic assumption is that privileges, immunities and facilities provided for by the Seat Agreement are accorded to judges, the Prosecutor, the Deputy Prosecutors, the Registrar, members of staff of the Court, the members of subsidiary bodies and to experts, in one word: all the persons under the Seat Agreement, in the interests of the good administration of justice and not for the personal benefit of the individuals themselves. Per category of functionaries, officials or persons affiliated with ICC the wording of this principle has been adapted being the objective parameters the same⁸¹. In Chapter III of the Agreement a great diversity of categories of persons has been mentioned. Therefore, it was necessary to provide for lots of specific regulations on waiving. We could not confine ourselves with an overall stipulation bestowing on one functionary – the Registrar – the general competence of waiving all the exemptions, immunities and privileges mentioned or referred to in Chapter III with a view to all those categories. Besides that, we had to take due care not to come into conflict with the provisions contained in article 48 of the Statute itself and the regulations in the articles 25 and 26 of the Agreement on the Privileges and immunities of the International Criminal Court. Of course, it is not with the host State to decide on waiving, the host State can only ask for it. The authority for waiving differs per category. Sometimes, that competence will be with an absolute majority of the ICC judges (if the request for waiving concerns a judge or the Prosecutor), sometimes a State Party (in case the request concerns a delegate of that State to the Assembly), sometimes the President of the Assembly (in case the request concerns members of subsidiary bodies of the Assembly of States Parties and experts performing functions to the benefit of the Assembly).
- 48 Chapter V, Section 1 (General) of the Seat Agreement (articles 33–38) envisages the cooperation and assistance between the Court and the Dutch authorities. Again, this is a kind of international cooperation and assistance on a pure bilateral basis *sui generis* arising out of the special position of the host State as contracting party. Here, we are *not* dealing with the same provisions as contained in Part IX of the Statute devoted to international cooperation and judicial assistance with *all* the States Parties to the Statute. Nevertheless, it has been tried to apply in those articles of the Agreement some principles underlying Part IX *per analogiam* as far as possible. One of those principles is the principle of reciprocity: the ICC may ask for cooperation, but the host State may do so vice versa. Given the special relationship between the ICC and the host State, one will find some new provisions in this Chapter, not being built into the existing ICTY Seat Agreement and Host Arrangements. The basic principle is that, whenever the Seat Agreement imposes obligations on the competent authorities of the host State, the ultimate responsibility for the fulfilment of such obligations shall rest with the Government of the host State⁸². In this context, it is highly relevant, that the Dutch Government has to carry responsibility not only towards ICC but also towards the both Houses of Parliament which are constantly monitoring as to whether the Netherlands does fulfil its duties as host State properly. Article 33 stipulates that both Parties are bound to designate an official point of contact for the communication of request for cooperation and assistance, being primarily responsible for the due implementation of the Seat Agreement. For the Netherlands, this will be the Division Cabinet Affairs and Protocol of the Ministry for

⁸¹ For the judges, the Prosecutor, the Deputy Prosecutor, the Registrar, the staff of the Court, personnel recruited locally, family members of officials of the Court, interns and visiting professionals, counsel and assisting counsel, witnesses, victims, experts and other persons required to be present at the seat of ICC the wording of the criterion for waiving is as to whether the person acted in the 'interests of the good administration of justice'. For representatives of States, members of the Bureau of the Assembly and intergovernmental organisations the criterion is that the immunity (etc.) has to 'safeguard the independent performance of their functions, in connection with the work of the Assembly, including the Bureau and subsidiary bodies and the Court'.

⁸² See para. 1 of article 33 of the Seat Agreement, running as follows: '*General cooperation between the Court and the host State* –1. Whenever this Agreement imposes obligations on the competent authorities, the ultimate responsibility for the fulfilment of such obligations shall rest with the Government of the host State'.

foreign Affairs. Mainly the task of this Division will be to communicate the requests – unless they are *not* operational (which seldom happens) – as soon as possible to the national competent authorities, which will be the Minister of Justice or the Dutch Prosecutorial Service. This was already standing practice in the relationship with ICTY and ICTR.

Chapter V, Section 2 (Visas, permits and other documents) envisages the granting of visas, permits and other documents by the host State for the officials of the Court and for persons required to be present at the Seat of the Court not being suspects. Whenever a person requests for entry to the Netherlands in order to perform a function at the seat of the Court, the Netherlands is under the obligation to grant unimpeded entry. Yet, it is with the Netherlands to put forward conditions to this entry for the sake of national order or security or to limit the freedom of movement within the country. The same does not apply for visitors of persons detained by the Court, independent bodies of counsel or legal associations, journalists and non-governmental organisations. Here there is no overarching international *obligation* to grant full entry to the Netherlands. Detainees enjoy the right to be visited by their family, counsel and advisors (see below VI) but they are not entitled to be visited by *specific persons in a specific case* at their choice. Here, it is with the Netherlands to put limits to the entry into the country and even to refuse the entry entirely with a view to the national security, order and other public interests, formulated in the national Statute on the admission and settlement of foreigners or the so called Schengen Implementation Agreement (Netherlands Treaty Series 1990, No. 145). The only direct obligation incumbent on the Netherlands by virtue of the Seat Agreement is to ask the ICC for comments before deciding on a request for a visa including the putting forward of certain limits, when granting a visa. For official participants to the ICC proceedings, the granting of visa will be free of costs. That will not apply to the other categories. Again, we are facing standing ICTY practice. With regard to members of staff of international attorneys associations or legal associations, journalists and members of non-governmental organisations that support the fulfilment of the mandate of the Court special provisions have been drawn up in article 40 of the Seat Agreement whereas the presence of those persons at the Courts' premises could be vital for the proper functioning of the Court. The Netherlands accepted the obligation to take all the necessary measures to facilitate the entry into, stay and employment in the host State of representatives of those bodies or organisations, when deployed in, or visiting the host State in connection with activities relating to the Court. The host State engaged in taking all necessary measures to facilitate the entry into and stay of members of the family forming part of the household or such representatives who are deployed in the host State. For the purpose of facilitating the procedure of entry into, stay and employment in the host State of those representatives of bodies or organisations, the host State and ICC shall consult, as appropriate, with each other, and with any independent representative bodies of counsel or legal associations, media, or non-governmental organisations.

Section 3 of Chapter V deals with security and operational assistance from the side of the host State. In short, here we are facing the same kind of arrangements which are already standing practice in relation with ICTY, especially with a view to the implementation of detentional measures (see below sub VI) and transit arrangements (see below sub V). With regard to detentional and penitentiary measures, the main point of departure remains that ICC – like ICTY – will be the principal responsible party for the penitentiary regime and the way detentional measures will be enforced. As a matter of principle, the Netherlands keeps to be only a facilitating party. Yet, in exceptional cases, it could be that the host Country carries a subsidiary, collateral responsibility in this context. Again we refer to what has been said about this collateral responsibility sub V, especially with reference, by footnotes, to the jurisprudence of the ECHR.

Article 49 of the Seat Agreement reformulates the obligation incumbent on the host Country under article 103 of the Statute. It is with the Netherlands to enforce sentences of imprisonment whenever ICC is unable to designate another State willing to enforce. See the commentaries on article 103 of the Statute. The reformulation is rather vague and, to a

certain extent, superfluous where it simply doubles the text of the Statute. At the side of ICC there is no experience whatsoever with this kind of matters of final enforcement. The ICC has expressed, during the negotiations, its desire to conclude special enforcement agreements with ‘willing parties’ under article 103 of the Statute, and if ICC is unable to find them, with the Netherlands as host State on a case-by-case bound basis. The question of enforcement, with its practical arrangements, should be entirely relegated to such special enforcement agreement. ICC has shown its willingness to do everything to find ‘willing parties’ even outside the ICC family and to do more in this context than the Statute indicates. Even after the commencement of the enforcement of a sentence under article 103, paragraph 4, of the Statute, ICC has engaged in the obligation – in the Seat Arrangement – which is rather an odd place to formulate such obligation – to continue its endeavours to designate a State of enforcement. To that end, ICC will communicate to the host State developments that it considers relevant. The Court shall inform the host State as soon as it has found a ‘willing State’. If the host State is to enforce, it may communicate to ICC for its consideration humanitarian concerns or other concerns related to the conditions or modalities of enforcement for the purposes of supervision of enforcement of sentences and conditions of imprisonment.

- 52 Chapter VI of the Seat Arrangement envisages the final clauses and inter-temporal provisions. It will be, according to article 52 of the agreement, with ICC and the Netherlands to draw up additional Host Arrangements without the need of consent of the Assembly of States Parties. As said above sub IV, this was already standing practice in the relation with ICTY. The only addition to this practice is the formal assessment that no formal consent of the Assembly is needed.

IV. The ICC premises as enclave within the territorial jurisdiction of the Netherlands

- 53 As from the outset, both parties – the UN on one hand and the host country on the other – departed from the assumption that the ICTY premises⁸³ would enjoy the status of a so-called ‘juridical enclave’ in the territorial jurisdiction of the Netherlands. The premises as defined and delineated in the Headquarters Agreement⁸⁴ would enjoy the same inviolability as prescribed for the premises of diplomatic missions according to article 22 of the 1961 UN Geneva Convention on Diplomatic Relations⁸⁵. The host state undertook to take all the relevant measures to guarantee that inviolability. To that end, it would take care that the Tribunal would not be disposed of all or any part of the ICTY premises without the express consent of the Tribunal. Immunity from search, seizure, requisition, confiscation, expropria-

⁸³ Originally the Draft Host Agreement referred to ‘the Tribunal District’; but this seemed to both parties too vague an expression. The term ‘district’ as was argued from the side of the host country, has a certain geographical connotation, which suggests that ICTY has an overall continuously connected area at its disposal, which would certainly not be the case; the penitentiary buildings would not be in the near vicinity of the proper Court buildings in the centre of The Hague. The original delineation of the ICTY premises referred to ‘any lands, buildings, parts of buildings’ and ‘facilities made available to, maintained, occupied or used by the Tribunal’. Whereas it was foreseeable that ICTY would be seating on different locations, the term ‘premises’ (plural) had been introduced in the final Agreement. (See: Memorandum of the Ministry of Foreign Affairs as of the 20 July 1993 Nr 35/93). In the Draft as of the 22 July 1993, article IV runs as follows: ‘**Application of the Conventions** The General Convention and the Vienna Convention shall be applicable *mutatis mutandis* to the Tribunal, its property, funds and assets., to the Tribunal district, to the Judges, the Prosecutor and the Registrar and their staff and experts on mission in the host country and the officials of the tribunal’.

⁸⁴ See about the distinction Headquarters Agreement/Host State Agreement/Host Arrangements mn 5 and 6.

⁸⁵ This article runs as follows: ‘1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. 2. The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution’.

tion and any other form of interference, whether by executive, administrative, judicial or legislative action was guaranteed with regard to property, funds and assets of the Tribunal⁸⁶. From the open-ended terminology ‘and any other form of interference’ flows clearly that the list of actions from which the host country is to refrain is an enunciative, not a limitative one. Article IV of the Draft Headquarters Agreement declared the 1948 General Convention on the Privileges and Immunities of the UN and the 1961 Vienna Convention in Diplomatic Relations *mutatis mutandis* applicable to the ICTY premises, its property, funds and assets, to the Judges, the Prosecutor and the Registrar, the officials of the Tribunal and persons performing missions for the ICTY⁸⁷. According to the understanding of the host country, this ‘inviolability’ implied the *applicability* of the national law of the host country within those premises *without the enforceability thereof*. In accordance with this stand, the host country proposed to rephrase the text in such a way that the overall applicability of the national laws and regulations would be a matter of principle, with some exceptions strictly limited to those cases in which the proper functioning of the ICTY would directly require the prevalence over the domestic laws and the like.

The original wording of the Draft seemed to leave the question which Regulation or law would prevail in a certain jurisdictional conflict to the wide discretion of the ICTY, which was hardly acceptable to the host country, given the legal uncertainties which the territorial authorities would have to cope with in this kind of cases⁸⁸. This jurisdictional principle in favour of the host country has been explicitly worded in article VI, paras. 1. and 2. of the Headquarters Arrangement⁸⁹, therefore it would be erroneous to consider the ICTY premises as ‘extritorialities’ in the classic sense. The enforceability is dependent on the consent of the competent authority of the entity to be hosted⁹⁰. As such the Draft Headquarters Agreement⁹¹ designated originally the President of the ICTY⁹² but, for reasons of expediency and practicability this has been changed into the ICTY Registrar⁹³, so did the final text of the

⁸⁶ See article V of the 1994 Draft, first paragraph: ‘Inviolability of the Premises of the Tribunal –1. The premises of the Tribunal shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Tribunal shall not be dispossessed of all or any part of the premises of the Tribunal without the express consent of the Tribunal. The property, funds and assets of the Tribunal, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action’.

⁸⁷ See article IV of the Draft as of the 27 May 1994, running as follows: ‘Application of the General and Vienna Conventions The General Convention and the Vienna Convention shall be applicable *mutatis mutandis* to the Tribunal, its property, funds and assets, to the premises of the Tribunal, to the Judges, the Prosecutor and the Registrar, the officials of the Tribunal and persons performing missions for the Tribunal’.

⁸⁸ Memorandum as of the 20 July 1993 No 35/93 Ministry of Foreign Affairs No 35/93.

⁸⁹ See article VI, paras. 1. and 2. of the Host Agreement: ‘1. The premises of the Tribunal shall be under the control and authority of the Tribunal, as provided in this Agreement. 2. Except as otherwise provided in this Agreement or in the General Convention [on the Privileges and Immunities of the UN, added by the author], the laws and regulations of the host country shall apply on the premises of the Tribunal’.

⁹⁰ Originally this had been expressed in an explicit provision in the Draft article V of the Draft as of the 22 July 1993, paragraph 3: ‘Judicial actions and the service or execution of legal process, including the seizure of private property, cannot be enforced in the Tribunal district except with the consent of and in accordance with conditions approved by the President of the Tribunal’. These provisions seemed both parties rather superfluous. Therefore it has been skipped without altering the purview of the article designating the balance of jurisdictional competences between the Host Country and ICTY.

⁹¹ The terminology used in the current Agreements between the host country and the ICTY and the ICC is not consequent when referring to the legal instruments governing those relations: sometimes ‘Headquarters Agreement’ is used, sometimes ‘Host Agreement’ and sometimes ‘Host State Agreement’. We will try to use in the main text the terminology as spelled out above mn 5.

⁹² Article V para. 2 of the Draft as of the 22 July 1993 runs as follows: ‘2. The appropriate authorities of the host country shall not enter the Tribunal district to perform any official duty, except with the express consent, or at the request of, the President of the Tribunal or an official designated by him. Judicial actions and the service and execution of legal process, including the seizure of private property, may take place within the Tribunal district only with the consent or under conditions approved by the President’.

⁹³ See article V para. 2 of the above mentioned Draft: ‘2. The competent authorities shall not enter the premises of the Tribunal to perform any official duty, except with the express consent, or at the request of, the

Agreement. This consent for the use of enforcement power can be given *ex ante* or *ex post* (after the action being taken) in *general* (for certain categorically denominated events) or *ad hoc*. General consent usually is given by virtue of the exchange of letters of understanding between the Registry and the host country. The Registrar may mandate an official within the Registry to represent him with a view to the all day nitty-gritty issues. The competent counter authority on behalf of the host country is the Minister of Foreign Affairs. This official mandates a servant of his department seconded by an official of the Ministry of Justice, commonly known as 'the liaison officer'. It is the latter who really has to implement the additional arrangements with the ICTY as meant in paragraph 2 of article V of the Host Arrangement. The liaison officer has to maintain contact with the ICTY on a weekly basis.

- 55 With the ICC there is no need for such a frequent contact until now whereas the ICC did not really wield its jurisdiction as defined in the Rome Statute. The same kind of relationship between the ICTY and the Host Country is foreseen for cases of fire or other emergencies⁹⁴. Again there exists a bunch of additional arrangements between the mandated official of the Registry and the liaison officer how to deal with this kind of incidents which requires protective action at the side of the host country. Such an arrangement is also given in case the Registrar deems it necessary to expel or exclude a person from the ICTY premises. Whereas the ICTY does not have real enforcement power of its own to do this in a satisfactory way, the rendering of help by the host state is needed; besides that, the host country can not tolerate such an expelled person lurking around within its territorial jurisdiction. *Ad hoc* consultation how to deal with the expelled or excluded person *afterwards* is indispensable. In a majority of these cases, the expelled person has to be considered as 'illegal foreigner' according to Dutch legislation; it could be in the interest of the ICTY jurisdiction to give the person another, more privileged or special, status. Those are the 'Host Arrangements' already referred to (see above under General Remarks number IV, mn 7 and 8). In this kind of cases consent *ex post* mainly will do; in cases the consent cannot be given *ex ante* – and this will be in the majority cases here envisaged – the consent on behalf of the Registry will be presumed. It has been the understanding of both parties that the Tribunal would need to issue certain operative regulations on the premises of the Tribunal for the purpose of establishing therein the conditions in all respects necessary for the full execution of its functions as a supranational judiciary. The arrangements on the treatment of the suspect, accused or other detainees of ICTY would not be an issue to be dealt with in this kind of Regulations⁹⁵. This has been expressed in a side letter⁹⁶. The Draft Seat Agreement of the 22 July 1993 stipulated that those regulations 'shall be consistent with generally accepted principles of international law, including existing norms and standards in the field of crime prevention, criminal justice and the treatment of offenders'⁹⁷. This posed a problem. It should be noted that the

Registrar or an official designated by him. Judicial actions and the service or execution of legal process, including the seizure of private property, cannot be enforced on the premises of the Tribunal except with the consent of and in accordance with conditions approved by the Registrar'.

⁹⁴ See article V paras. 3–5 of the Host Arrangement: '3. In case of fire or other emergency requiring prompt protective action, or in the event that the competent authorities have reasonable cause to believe that such an emergency has occurred or is about to occur on the premises of the Tribunal, the consent of the Registrar, or an official designated by him, to any necessary entry into the premises of the Tribunal shall be presumed if neither of them can be reached in time. 4. Subject to paragraphs 1, 2 and 3 above, the competent authorities shall take the necessary action to protect the premises of the Tribunal against fire or other emergency. 5. The Tribunal may expel or exclude persons from the premises of the Tribunal for violation of its regulations'.

⁹⁵ In a side letter this has been expressed in the following wording: 'It is the understanding of both parties that none of the regulations made operative by the Tribunal based on the power given to it under article VI para 3 of the Agreement, shall relate to any question of treatment on its premises of the suspect, accused or other persons detained by the tribunal: these matters shall be dealt with by the Tribunal in accordance with its competence under article 15 of its Statute'.

⁹⁶ See below mn 59 *et seq.*

⁹⁷ See article VI, para. 2 of the Draft. '2. The Tribunal shall have the power to make regulations operative within the Tribunal district for the purpose of establishing therein the conditions in all respects necessary for the full execution of its functions. Such Regulations shall be consistent with generally accepted principles of

regulations referred to in the Draft would be different in nature from the rules or regulations in the field of criminal justice and treatment of offenders. The regulations specified in the Draft would be those dealing with special security issues, qualifications for professional and other occupational services, operational services and limitation of liability in respect of acts occurring within the premises of the Tribunal *etc.* Such types of regulations are not codified and, therefore, should not conform necessarily with generally accepted principles of international law. According to the proposal of the host country, the references the ‘generally accepted principles of international law’ were deleted.

It is understood, however, that the Tribunal would need to issue the regulations, superseding the corresponding Dutch laws and regulations in the field of criminal justice and treatment of offenders. Under article 15 of its Statute, the Tribunal is to ‘draft and adopt the Rules of Procedure and Evidence ... governing the pre-trial phase of the proceedings, the conduct of trial and appeals, the admission of evidence, the protection of victims and witnesses and *other appropriate matters* (emphasis added)’. Accordingly, the Tribunal is empowered to take up the issue of regulations in the field of criminal justice and treatment of offenders under the item ‘other appropriate matters’. Therefore, both parties deemed it not advisable to discuss in the Headquarters Agreement the regulations of this kind. It had been contemplated that in preparing such regulations the Tribunal would be guided – as a matter of course without any stipulation by any operative article – by ‘generally accepted principles of international law including existing norms and standards in the field of crime prevention, criminal justice and the treatment of offenders’⁹⁸. It was the understanding that these matters would be taken up by the Tribunal in accordance with its mandate under article 15 of the ICTY Statute. Article VI of the Seat Agreement is phrased according to these lines⁹⁹. The still pending issue is which authority has to be considered to be competent to rule on the inconsistency of the domestic laws of the host country with the Tribunal’s regulation. It was the view of the UN that this would only be with the ICTY. That seems a too simple solution. It is the national judiciary of the host country which rules on the interpretation to be given to the Dutch laws, drafted in the legal language of the host country or that of the EU. What if the Dutch judiciary comes to the conclusion that the rendition given by the ICTY to the Dutch law or regulation is completely antithetical to its wording and the intentions of its legislator and that, accordingly, the inconsistency as stated by the ICTY does not exist at all? In that case, the question has to be solved according to the lines set out in the fourth Paragraph of the Host Agreement: ICTY and Host Country have to seek the mediation of an arbitral Tribunal, according the gist of article XXVIII of the Seat Agreement (see below). Pending arbitration, the ICTY regulations will apply. Originally, the

international law, including existing United Nations norms and standards in the field of crime prevention, criminal justice and the treatment of offenders. The Tribunal shall promptly inform the competent authorities of Regulations thus enacted in accordance with this paragraph. No law or regulation of the host country which is inconsistent with a Regulation of the Tribunal shall, to the extent of such inconsistency, be applicable within the Tribunal district’.

⁹⁸ See the comments of the UN on the Draft as of the 24 May 1994.

⁹⁹ Article VI of the Seat Agreement runs as follows:

‘Law and authority on the premises of the Tribunal:

1. The premises of the Tribunal shall be under the control and authority of the Tribunal, as provided in this Agreement. 2. Except as otherwise provided in this Agreement or in the General Convention, the laws and regulations of the host country shall apply on the premise of the Tribunal. 3. The Tribunal shall have the power to make regulations operative on the premises of the Tribunal for the purpose of establishing therein the conditions in all respects necessary for the full execution of its functions, The Tribunal shall promptly inform the competent authorities of regulations thus enacted in accordance with this paragraph. No law or regulation of the host country which is inconsistent with a regulation of the Tribunal shall, to the extent of such inconsistency, be applicable within the premises of the Tribunal. 4. Any dispute between the Tribunal and the host country, as to whether a regulation of the Tribunal is authorised by this article, or as to whether a law or regulation of the host country is inconsistent with any regulation of the Tribunal authorised by this article, shall be promptly settled by the procedure set out in article XXVIII para. 2 of this Agreement. Pending such settlement, the regulation of the Tribunal shall apply and the law or regulation of the host country shall be inapplicable on the premises of the Tribunal to the extent that the Tribunal claims it to be inconsistent with its regulation’.

host country took the stand that this interim applicability would depend on the content of the regulation in relationship with Dutch law: that applicability could be subject to additional negotiations between the ICTY Registry and the liaison officer. But this was unacceptable to the UN: that solution would only prompt legal uncertainties¹⁰⁰. The host country gave in, in this respect. The host country carries full responsibility for the *external* security of the ICTY offices and for the personal protection of high officials *outside* the offices of the Tribunal. To that end the host country will make on a regular basis assessments of the level of security needed and threat analyses. Incumbent on the host country is the obligation to exercise due diligence to ensure this external security and the protection of the ICTY and to ensure the tranquillity of the Tribunal is not disturbed. Deliberately both parties used in this context very vague wordings: the concrete obligations have to be spelled out in additional memoranda of understanding, part of the Host Arrangements. The costs thereof will be reimbursed by the UN¹⁰¹. This all is applicable *mutatis mutandis* on the relationship with the ICC.

V. Transit arrangements

57 Whereas it was foreseeable that lots of persons would be entering the Netherlands in order to pay a visit to the ICTY premises and to depart from them in order to leave the host country unimpeded, several special provisions were needed to regulate the special status of those transit movements, hence and forth and the jurisdictional relations between host country and UN during these movements within the territorial jurisdiction of the Netherlands¹⁰². This issue turned out to be one of the most intricate ones during the negotiations. The main points of departure with a view to this issue are to be found in article XXIII of the Seat Arrangement¹⁰³. Those points have been worked out in additional transit arrangements concluded between the UN and the Netherlands. Originally this provision, granting freedom of transit, applied to all categories of persons referred to in the Seat Agreement¹⁰⁴, *id est*, according to the understanding of the office of legal affairs of the UN: 'all persons performing

¹⁰⁰ See the comments of UN Legal Affairs as of the 22 Sep. 1993 on the observations of the Netherlands as of the 30 Aug. 1993 concerning the Draft Agreement between the UN and the Kingdom of the Netherlands concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the former Yugoslavia since 1991: 'We are unable to share the conclusion that the phrase '... the regulation of the Tribunal shall apply and ...' would create confusion as to the extent of the applicability of a Regulation. On the contrary, without such an explicit statement that the Regulation of the Tribunal shall be applicable pending the settlement of a dispute as to whether the law or regulation of the host country is inconsistent with a Regulation of the Tribunal, the applicability of the Tribunal Regulation would only be presumed. Since the Netherlands is, in principle, agreeable that the Tribunal's Regulation shall apply provisionally during the settlement of a dispute procedure, we believe it advisable to reflect such an understanding in the Agreement itself. Therefore, the phrase '... the regulation of the Tribunal shall apply...' should be retained in paragraph 4'.

¹⁰¹ Side letter between UN and the host country as of the 2 May 1994 *JTF* (92/94) 3 Host Country Agreement.

¹⁰² In the Draft Agreement as of the 18 July 1993 this issue was taken up in the following wordings: '**Article XXII Entry into, exit from and movement within the Kingdom of the Netherlands** All persons referred to in articles XV, XVI, XVII and XVIII of this Agreement shall have the right of unimpeded entry into, exit from, and movement within, the Kingdom of the Netherlands, as appropriate and for the purposes of the Tribunal. They shall be granted facilities for speedy travel. Visas, entry permits or licenses, where required shall be granted free of charge and as promptly as possible'.

¹⁰³ **Article XXIII Entry into, exit from and movement within the Host Country:** 'All persons referred to in article XIV, XV, XVII, XVIII and XIX of this Agreement as notified as such by the Registrar to the Government shall have the right of unimpeded entry into, exit from, and movement within, the host country, as appropriate and for the purposes of the Tribunal. They shall be granted facilities for speedy travel. Visas, entry permits or licenses, where required, shall be granted free of charge and as promptly as possible. The same facilities shall be accorded to persons accompanying witnesses who have been notified as such by the Registrar to the Government'.

¹⁰⁴ The original article runs as follows: 'persons referred to in articles XV, XVI, XVIII and XVIII of this Agreement shall have the right of unimpeded entry into, exit from, and movement within, the Kingdom of the Netherlands, as appropriate and for the purposes of the Tribunal. They shall be granted facilities for speedy

any mission for the Tribunal or needed for the purposes of the Tribunal'. It was the understanding of legal affairs that this provision even would cover the status of an accused, suspect or culprit 'in transit'¹⁰⁵. This was unacceptable for the host country. Whereas the host country would have to take all the necessary precautionary measures to guarantee the safety of this category of persons, it insisted that the ICTY would inform the host country of their planned arrival as early as possible and that their transit would be submitted to consultation with the host country with a view to the needed arrangements for transport, the blocking of crossroads, the cordoning off of roads and the like. The UN could accept this point of view. This issue was singled out of the original article and covered by a side letter in which the understanding of both parties with a view to 'persons detained on the authority of the Tribunal' had been expressed: the host country undertook not to create any impediment whatsoever to neither entry into or exit from the Netherlands nor the transport between the detention facility and the tribunal of those persons¹⁰⁶. The whole bunch of regulations has been absorbed – for the time being – as far as ICC is concerned by article 44 of the final Seat Agreement, stipulating – in an open end wording – that the transport, pursuant to the Statute and the Rules of Procedure and Evidence, of a person in custody from the point of arrival in the host State to the premises of the Court shall be carried out, at the ICC's request, by the competent authorities of the host State in consultation with the Court.

The question remains what is meant by 'impediments' in this context: the submission of 58 the transport from Scheveningen to the Aegon premises to Dutch traffic regulations and vehicular rules *could* be considered as an impediment; yet, it has been the understanding of the host country that the UN officials during this transport would abide the Dutch law in this respect. The UN could not go along with the wish of the host country to have an overall rest competence to restrict witnesses and experts in their movements for the sake of their own security without revealing to the ICTY on which factual grounds this kind of measures would be taken¹⁰⁷. The obligation to disclose that kind of information could jeopardise the national security interests of the host country itself was argued. The UN was of the opinion, that it would be sufficient to express in the article that the freedom of movement would be conditioned by the 'appropriateness' of this for the functioning of the ICTY and 'for the

travel. Visas, entry permits or licences, where required shall be granted free of charge and as promptly as possible'. (Draft as of the 22 May 1993).

¹⁰⁵ Legal Affairs noted in its comments as of the 22 Sep. 1993:

'Article XXIII: We noted the acceptance of our previous suggestion, the text of this paragraph now incorporates all categories of persons referred to in the Agreement. However, in the view of our previous comments concerning the use of the term 'experts on mission' this should be replaced by the expression 'persons performing missions for the Tribunal'. Whereas the host country from the very beginning of the explorative talks stated that for security reasons the transit regime for indictees, suspects and accused should be singled out from the radius of action of article XXIII, it was obvious that Legal Affairs in this respect departed from a misunderstanding which it was reluctant to leave. In connection with article XXIV as drafted, it commented: 'We note the acceptance of our previous suggestion that witnesses and experts, and in particular, suspects and accused persons should be included in the scope of operation of this article dealing with the issues of entry into, exit from and movement within the Netherlands, on the understanding that these rights are conditioned by the appropriateness' and 'for the purposes of the Tribunal'.

¹⁰⁶ See side letter of the 17 June 1994 Ruc 578 nyvul 186/3922:

'It is the understanding of the Parties that if so requested by the Tribunal, the competent authorities of the host country shall not create impediments to neither entry into and exit from the Netherlands nor the transport between the detention facility and the tribunal of persons detained on the authority of the Tribunal'. Originally the text of the side letter runs as follows: 'It is the understanding of the parties that, if so requested by the Tribunal, the competent authorities of the Host Country shall not create impediments to entry into, exit from and movement within the Host Country of the persons referred to in article 21 above'.

¹⁰⁷ See the counter comments of the Netherlands on the Draft Agreement as of the 22 July 1993 on the 27 July 1993:

'The right of unimpeded movement within the Kingdom of the Netherlands is certainly not applicable to a suspect or accused. It should also be possible to restrict the right of movement of witnesses and experts for the sake of their own security. For this reason it is proposed to limit the scope of application of article XXII to persons referred to in article XV, XVI, XVII and XIX'.

purposes of the Tribunal'¹⁰⁸. The question remains: who is going to decide upon this 'appropriateness' or the need of certain moving 'for the purposes of the Tribunal'? The host country stuck to the stand that it would have the competence to co-decide on this, leaving a principal margin of appreciation to the ICTY, a stand which the ICTY Registry, until now could not accept. The requisition has to be solved, eventually, according to the lines set out in article XXVIII para. 2 of the Seat Agreement. In the original text of the Agreement there was an obligation incumbent on the host country 'to grant [the persons referred to in article XXIII; addition by the author] all the facilities for speedy travel'. The host country objected to this: it was completely unclear what was meant by 'facilities', besides that, in the view of the host country, it should be with the ICTY Registry to take care of the travelling of persons needed in at the ICTY premises 'for the purposes of the Tribunal'. Accordingly, this portion had been skipped. As far as witnesses, experts and counsel are concerned, they will get entry to the host country on the basis of a visa, to be granted by the Dutch national service for the immigration and the settlement of foreigners. The visa will be valid for the period of three subsequent months; after the lapse of those months, the visa could be prolonged for the maximum period of six months. The Dutch embassies and consulates in the new republics on the territory of the Former Yugoslavia are under the instruction to grant those visas at the request of the ICTY registrar. One of the unresolved questions remains what the host country has to do in case of one of those persons, showing up 'for the purposes of the Tribunal' applies for asylum by virtue of the 1951 Geneva Convention on the Status of Refugees or applies for a license to reside or to settle within the Netherlands on the basis of the Dutch statute on the entry and settlement of foreigners. At the moment of writing, a contemporary, judicial dispute is on going with regard to four ICC witnesses, who have all filed applications for asylum during their stay in the Netherlands. For an analysis of the legal elements of these proceedings, see Section X.

VI. Detentional measures

- 59 As from the outset of negotiations it has been the complete understanding of the UN and the host country that detentional measures – irrespective as to whether it would be measures of a pre-trial, a pending trial or to enforce the ICTY sentences – would be under the full responsibility of the ICTY, governed by the ICTY detentional regulations¹⁰⁹. In the Dutch enabling legislation this principle has been expressed by an explicit article¹¹⁰, stipulating the overall non-applicability of Dutch laws – irrespective of their content – on any measure ordered by the ICTY prompting any deprivation of liberty within the premises made

¹⁰⁸ See the UN Comments as of the 13 Aug. 1993 (Comments on the Text of the Draft Agreement as amended):

'Article XXIII: It is noted that witnesses and experts, as well as suspect or accused persons are not included by the Dutch side in the scope of operation of this article. While we generally share the concerns of the host country that in certain situations it would be in the interests of witnesses and experts to be restricted in movement, for the sake of their own security, it would seem to us preferable to reserve for them the right of free movement within the Netherlands which is conditioned by the "appropriateness" and "for the purposes of the Tribunal" in the original draft. In our view, the facilities referred to in this article could be made applicable to the suspect or accused provided that such facilities are "strictly conditioned by the same appropriateness" and "for the purposes of the Tribunal" only'.

¹⁰⁹ This was worded by the host country in a letter to the UN (JFT 992) 3 Host Country Agreement as of the 13 July 1993 (Ministry of Foreign Affairs):

'The facilities for keeping the accused in custody prior to and pending trial are part of the Tribunal and shall be under UN authority. The status of the detention barracks to be reserved for this purpose shall be identical to the status of the building in which the offices and court room of the Tribunal are located. UN shall be responsible for the regime, control, treatment of the accused and defining his rights and privileges. Guards shall be UN officials. The Host Country shall have responsibility for external security and shall provide certain basic services as well as assistance for particular purposes (hospitalisation, medical care, spiritual services)'.

¹¹⁰ Originally article 14, in the final text of the enabling act article 17.

available by the host country to the ICTY¹¹¹. In essence, as set out above sub III, this regime has been prolonged on behalf of the ICC detention centre. The host State has to cooperate with ICC to facilitate the detention of persons and allow ICC to perform its functions within its detention centre, which remains to be the Scheveningen detention unit. See article 46, first para. of the final Seat Agreement.

In this context, two remarks seem to be appropriate.

- One could wonder as to whether this *national* legal provision is in accordance with article VI para. 2 of the Host Agreement, clearly stipulating: ‘Except as otherwise provided in this Agreement or in the General Convention, the laws and regulations of the host country shall apply on the premises of the Tribunal’¹¹². The penitentiary premises of the ICTY have to be considered as ‘premises of the Tribunal’. So, at first sight, this national provision seems to be antithetical to the Seat Agreement and the Host Arrangements.
- Secondly, as already pointed out, this provision seems to be rather vicious; if the Dutch legislation does not apply to the detentive measures of the ICTY, the article in the same Statute excluding the applicability of Dutch laws on those measures does not apply either.

The rationale behind the article is crystal clear: the host country hopes to exclude every responsibility with a view to the enforcement of the ICTY detentive measures, especially with regard to its responsibility towards the detainee under the ECHR. The Dutch legislator expressed this motive several times during the national legislative process. One could, as already pointed out above¹¹³, foster one’s hesitations as to whether this solution will stand in the long run, when a detainee is going to seek access to the Strasbourg Court. As pointed out, a person in a cell of the ICTY *remains* to be within the territorial jurisdiction of the Netherlands. It is that ‘territorial jurisdiction’ which is meant in article 1 ECHR as an autonomous conception in the sense of the overarching guarantee of article 1 ECHR¹¹⁴. No

60

¹¹¹ See: Wet van 21 april 1994, houdende bepalingen verbansd houdende met de instelling van het Internationaal Tribunaal voor de vervolging van personen aansprakelijk voor ernstige schendingen van het internationale humanitaire recht, begaan op het grondgebied van het voormalige Joegoslavië sedert 1991, Staatsblad 1994, nr 308 (translation: Enabling Act as of the 21 April 1994, containing certain provisions with a view to the establishment of the International Tribunal for the Prosecution of Persons responsible for serious violations of International Humanitarian Law committed in the Territory of the former Yugoslavia since 1991, National Monitor of Statutes 1994, No 308). Article 17 as it runs as follows: ‘De Nederlandse wet is niet van toepassing op vrijheidsontneming ondergaan op last van het Tribunaal binnen aan het Tribunaal in Nederland ter beschikking staande ruimten’. (translation: ‘The Dutch laws do not apply on any form of deprivation of liberty ordered by the Tribunal within the premises of the Tribunal made available by the Netherlands’).

¹¹² See about the gist and purview of this provision above mn 53 *et seq.*

¹¹³ See under mn 30 *et. seq.*, in fine.

¹¹⁴ See: *Gentilhomme, Schaff-Benhadi and Zerouki versus France*, Judgment, 14 May 2002, para. 20 3 60; *Bankovic and Others versus Belgium and 16 other Contracting States* (dec.) no. 52207/99, paras. 59–61 ECHR 2001-XIII 3 60; *Cyprus versus Turkey* [GC] no. 2578/94 ECHR 2001-IV, paras. 76–80 3 60; and especially the case *Ilasco and Others versus Moldova and Russia*, Application 48787/99 judgment of 8 July 2004 3 60, especially paras. 310–312: ‘a. The concept of jurisdiction. 310. Article 1 of the Convention provides:

‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention. 311. It follows from article 1 that member States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their ‘jurisdiction’. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which gives rise to an allegation of the infringement of rights and freedoms set forth in the Convention. 312. The Court refers to its case-law to the effect that the concept of ‘jurisdiction’ for the purposes of article 1 of the Convention must be considered to reflect the term’s meaning in public international law (...). From the standpoint of public international law, the words ‘within their jurisdiction’ in article 1 of the Convention must be understood to mean that a State’s jurisdictional competence is primarily territorial (...), but also that jurisdiction is presumed to be exercised normally throughout the State’s territory. This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned (...), acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned. 313. In order to be able to conclude that such an exceptional situation exists, the Court must examine on the one hand all the objective facts capable of limiting the effective exercise of a State’s authority over its territory, and on the other the State’s own conduct. The undertakings given by a Contracting

fiction of extraterritoriality, no exemption can abrogate the obligations prompted by the ECHR incumbent on ratifiers. The Netherlands, as ratifier of ECHR, has to provide for sufficient guarantees for the benefit of the detainee that his detention and the regime answers to the prerequisites underlying the rights as spelled out in the articles 3, 5, 8 and 9 of ECHR. This goes especially for the *habeas corpus* provisions following article 5 ECHR. The simple relegation of a *habeas corpus* issue to the ICTY, let alone to the ICC, on the sole ground that their respective jurisdictional scope is superseding that of the Netherlands, is not compatible with this autonomous point of departure as laid down in long standing jurisprudence of the Strasbourg Court. See the jurisprudence referred to in the Special Remarks under I. of this Commentary on article 3 Rome Statute. Therefore, it is rather regrettable that the Dutch legislator has sought the same legislative 'solution' when dealing with the enabling legislation with a view to the ICC jurisdiction.

61 Nevertheless, at this moment the Dutch government takes the stand that Dutch private law applies to the penitentiary lease contracts concluded between the UN and the host Country. The *lex loci* governs this kind of contracts unless otherwise provided in the Host Arrangement. Until now, the office of Legal Affairs of the UN did not contest this basic assumption at the side of the host country. It seems to be the intent of the Contracting Parties of the Seat Arrangement to limit the applicability of the ICTY regulations strictly to 'the treatment of the suspect or accused of the Tribunal' according to the original wording of article VI para. 3 of the Seat Agreement. Whereas the Rules of Procedure and Evidence of the ICTY provide for the possibility to detain other persons, not being suspects or accused's according to the ICTY Statute, the expression 'persons detained' (by the ICTY) would be more preferable in this context. In this regard one has to think of persons guilty of 'contempt of court' or 'perjury' according to the articles 77 and 91 of the ICTY Rules of Procedure and Evidence. At the proposal of the host country, the wording of article VI has been changed accordingly by avoiding any reference to the detainee as such.

In general the following regulations will apply on ICTY detainees:

- the Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council in Resolution 663 C I (XXIV) of July 1957;
- the Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in Resolution 34/169 of 5 February 1980;
- the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
- the UN basic Principles on the Role of Lawyers;
- the Rules of Detention adopted by the Tribunal¹¹⁵.

In addition to this an additional agreement on security and order in the UN detention unit of the Penitentiary Complex Scheveningen¹¹⁶ as of the 14 July 1994 with several subsequent amendments will apply together with the Rules of Detention adopted by the Tribunal,

State under article 1 of the Convention include, in addition to the duty to refrain from interfering with enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory (...). Those obligations remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take'.

¹¹⁵ See note 66 referring to those Rules.

¹¹⁶ See article 1 of the original Additional Agreement on Security and Order defining the penitentiary ICTY premises and its staff as follows:

'For the purpose of this Agreement the following definitions shall apply: (*post alia*): 'the PCS' means: the Penitentiary Complex Scheveningen, located at the Pompstationsweg in Scheveningen (municipality of The Hague); 'the detention unit' means: the unit of 24 cells with adjacent rooms on the premises of the PCS, leased by the United Nations for the detention of persons on the authority of the Tribunal; 'the General Director' means: the official appointed by the Ministry of Justice of the Kingdom of the Netherlands as the head of Staff of the PCS; 'the Commanding Officer' means: the head of the staff of the Tribunal responsible for the administration of the detention unit'.

regulating visits to persons detained in the detention unit¹¹⁷. See article 52 Rome Statute¹¹⁸ dealing with this kind of regulations to be adopted by the Court. This kind of penitentiary regulations concerning internal operating procedures is, as a matter of course, necessary for the routine functioning of the Court¹¹⁹. See the comments on article 52 Rome Statute below where these penitentiary additional instruments will be considered into detail¹²⁰. The current distribution of jurisdictional competences with a view to the penitentiary units between ICTY and the host country implies the full responsibility for the *internal* order and security on behalf of the ICTY as far as the UN is envisaged. For this unit a 'Commanding ICTY Officer' carries responsibility under the supervision of the General Director¹²¹.

This unit is only part of the penitentiary complex for which a Dutch Official, the already mentioned General Director, appointed by the Dutch Minister of Justice, is fully responsible. He has to take care for the internal security in the penitentiary complex as a whole. To this end he issues security directives, sometimes in coordination with the UN Security Service if the directive applies to the unit¹²². See the general provisions laid down in articles 9¹²³ and 10¹²⁴ of the Agreement on Security and Order. The overall competent authority in penitentiary matters is this General Director. The ICTY Commanding Officer has to seek understanding with the General Director; the latter has to provide for assistance

¹¹⁷ See, *inter alia*, article 19 of the Agreement on Security and Order:

'The Rules of Detention adopted by the Tribunal regulating visits to persons detained in the detention unit shall be without prejudice to such practical arrangements as may be agreed upon between the General Director and the Commanding Officer, in consultation with the Registrar, in accordance with Rule 63 of the Rules of Detention'.

¹¹⁸ Article 51 Rome Statute runs as follows:

'Regulations of the Court,

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning. 2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto. 3. The Regulations and any other amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they will remain in force'.

¹¹⁹ See 1996 Preparatory Committee II, p. 51; Zutphen Draft, article 43 [19] para. 0; U.N.Doc. A./AC.249/1998/DP.1, p. 4; Rep. of the Working Group on Composition and Administration of the Court, UN Doc. A/AC.249/1998/L.14 and UN Doc. A/AC.249/1998/CRP.2/Add.5 and Add.5/Corr.1.

¹²⁰ See the comments of Hans-Jörg Behrens in the First Edition of this Commentary, *article 52*, mn 8.

¹²¹ See, for example, article 16 of the Agreement on Security and Order:

'In case of fire within the PCS, the Commanding Officer shall observe any orders and directives given by the General Director, including orders to allow entry into the detention unit or to have these temporarily evacuated. The General Director shall in such cases take the necessary measures to accommodate evacuated detainees, and shall inform the Registrar accordingly'.

¹²² See the comments of the UN Office for Legal Affairs as of the 22 September 1993:

'Article XXII (Former article XXI):

We note the confirmation that the security directives issued by the competent authorities will apply to the Penitentiary Institution only while the directives on fore prevention will apply to the Tribunal in general'. In the opinion of the UN Security Service, while the overall responsibility for security in the PCS should rest with the competent Dutch authorities, this would be 'in co-ordination with United Nations Security'. Therefore it is suggested that the first part of the proposed paragraph read as follows: '3. The Tribunal shall observe all security directives issued, in co-ordination with the UN Security Service, by the competent authorities responsible for security conditions within the penitentiary institution of the host country ...'.

¹²³ Article 9 runs as follows:

'The General Director shall be responsible for security and order on the premises of the PCS, without prejudice to the specific responsibility of the Tribunal's officials for security and order on the premises leased by it. The General Director is entitled to have any person who is not detained in, or employed as an Un Official or an official of the Netherlands at, the PCS and who causes disturbances or poses an acute risk to security and order in the PCS removed from, or denied access to, the premises of the PCS'.

¹²⁴ Article 10 runs as follows:

'The responsibility of the General Director under article 9 includes the authority to determine the routes to be followed inside the PCS for persons and property to reach the detention unit or leave the premises of the PCS. Such routes may be different for detainees, visitors, personnel employed by the Tribunal or other authorities. The General Director may give further instructions with a view to prevent that person detained on the authority of the Tribunal and their visitors be in contact with other persons present in the PCS'.

at the request of the Commanding Officer in case the internal security or order of the UN has been jeopardised. In case an understanding between Commanding Officer and General Director is not sustainable, the Director may bring the issue, when it is a serious case, to the attention of the ICTY's Registrar¹²⁵. The General Director decides on the access of persons to the complex¹²⁶; in addition, the Commanding Officer decides on the access to the Unit¹²⁷. He provides for security control when a person is seeking access to that unit. The General Director is responsible for security and order on the premises of the penitentiary complex of Scheveningen without prejudice to the specific responsibility of the ICTY's officials for security and order on the premises leased by the ICTY. In case of an escape, it is again the General Director who is responsible for the appropriate measures to be taken. It is a matter of course: whereas he has, in such case, to seek assistance from the host country, this should be left to an official who can speak the language of the host country and who knows which authority should be addressed with a view to any search, re-arrest, surrender or (re-) extradition inside or outside the penitentiary complex premises¹²⁸. It is within the likelihood that the jurisdictional relationship with a view to penitentiary matters between the host country and the ICC will follow the same lines.

VII. Third parties to the ICC Family

- 63 Different from the ICTY, not all the UN Charter Parties will be member of the ICC Family. Therefore, as has been noted above, the possibility exists that the Seat Agreement could collide with already existing treaty obligations towards third Parties for example with a view to rendering interstate cooperation and assistance. It could be possible that such a third Party would ask for the extradition of a witness appearing before the ICC, while, according to the Seat Agreement, the host country has guaranteed his full freedom in transit to the ICC premises hence and forth.

VIII. Privileges and immunities

- 64 In this context, we will be dealing with the exemptions, privileges and immunities as laid down in the Seat Agreement and the Host Arrangements, and *not* with the overall privileges and immunities as envisaged in article 48 of the Statute regulating the privileges and

¹²⁵ See, for example, article 18 of the Additional Arrangement on Security and Order:

'Personnel employed by the Tribunal shall, when present on the premises of the PCS outside the detention unit, observe the rules and instructions applicable on the PCS with respect to security and order. In particular, such personnel shall not be allowed to carry firearms or other weapons on the premises of the PCS. In case of non-observance of such rules or instructions the General Director shall seek an understanding with the Commanding Officer. In serious cases he may bring the matter to the attention of the Registrar of the Tribunal'.

¹²⁶ See, e.g., article 2 of the Additional Agreement on Security and Order:

'Any person, irrespective of his or her status, nationality, function or age, seeking access to the leased premises of the Tribunal, shall, when entering the premises of the PCS, be subjected to security control. The control is carried out under the responsibility of the General Director'. See, in addition to this, article 4 of the Agreement: 'The General Director, or the person carrying out the personal control on his behalf, may refuse access to the PCS to persons who are not willing to comply with any form of personal control as referred to in article 2'.

¹²⁷ See, e.g., the articles 13 and 14 of the Additional Agreement on Security and Order:

'The Commanding Officer shall be responsible for the carrying out of personal and property control at the entry of the detention unit. Under no condition shall persons detained elsewhere in the PCS be given access to the detention unit'. Article 14 runs: 'If, pursuant to a control under article 3, or for any other reason of security or order, the commanding officer refuses access of a person to the detention unit, he or she shall call the assistance of the General Director of the PCS, in order to have the person removed'.

¹²⁸ See, for example, article 17 of the Additional Arrangement on Security and Order:

'In case of an escape of a detainee from the detention unit the Commanding Officer shall immediately inform the General Director, who shall be responsible for any search and re-arrest action on the premises of the PCS. In case of an escape of a detainee from another penitentiary institution of the PCS, the Commanding Officer shall allow entry into the detention unit with a view to carrying out search a re-arrest action'.

immunities to be observed by *all* States Parties to the Statute. The commentaries regarding those exemptions, privileges and immunities will be given under article 48 of the Statute by another author in connection with the Agreement on the Privileges and Immunities of the International Criminal Court as of the 9 September 2002, concluded at UN Headquarters in New York. We flagged this already above sub C. para. III sub 2. Like the ICTY Seat Agreement, ICC will in principle, according to its Seat Arrangement, be enjoying the standardised exemptions, privileges and immunities as laid down in the already mentioned General Convention on the Privileges and Immunities of the UN adopted by the General Assembly of the UN on 13th February 1946 and the 1961 Vienna Convention on Diplomatic Relations. The final Seat Agreement follows the lines as set out in that Convention. In this context, the host Country simply prolongs standing practice, except with a view to the immunities and privileges granted to the Assembly of State Parties, its Bureau, its subsidiary bodies and its affiliated members. We refer to what has been said about that above sub C.III. subpara. 2. In this context, the only brand-new thing is, as we already mentioned, the enlargement of the Seat Agreement to the Assembly of State Parties as *third party*, its Bureau, its organs and subsidiary organs and its personnel. But also here, the guidance offered by the Vienna Convention has been followed. With a view to traffic accidents, under the ICTY Seat Agreement a special additional Host Arrangement applies to the ICTY officials and persons affiliated with the ICTY. The articles XIV¹²⁹ and XV¹³⁰ of the current ICTY Seat Agreement could offer some guidance in this respect. One should bear in mind that those articles only

¹²⁹ Article XIV of the ICTY Seat Agreement runs as follows:

'Privileges and immunities of the judges, the prosecutor and the registrar:

1. The Judges, the Prosecutor and the Registrar shall, together with members of their families forming part of their household and who not have Netherlands nationality or permanent residence status in the host country, enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents, in accordance with international law and in particular under the General Convention and the Vienna Convention. They shall *inter alia* enjoy:
 - a. personal inviolability, including immunity from arrest or detention;
 - b. immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;
 - c. inviolability for all papers and documents;
 - d. exemption from immigration restrictions, alien registration or national service obligations;
 - e. the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
 - f. the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents.
2. In the event the Tribunal operates a system for the payments of pensions and annuities to former Judges, Prosecutors and Registrars and their dependants, exemption from income tax in the host country shall not apply to such pensions and annuities.
3. Privileges and immunities are accorded to the Judges, the Prosecutor and the Registrar in the interest of the Tribunal and not for the personal benefit of individuals themselves. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purpose for which it is accorded shall lie, as concerns the Judges, with the Tribunal in accordance with its rules; as concerns the Prosecutor and the Registrar, with the Secretary-General in consultation with the President'.

¹³⁰ **Article XV Privileges and immunities of officials of the tribunal:**

1. The officials of the Tribunal shall, regardless of their nationality, be accorded the privileges and immunities as provided for in the articles V and VII of the General Convention. They shall *inter alia*: (a) enjoy immunity from legal process in respect of words spoken or written and all facts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Tribunal; (b) enjoy exemption from taxation on the salaries and emoluments paid to them by the Tribunal; (c) enjoy immunity from national service obligations; (d) enjoy immunity, together with members of their families forming part of their household, from immigration restrictions and alien registration; (e) be accorded the same privileges in respect of exchange facilities as are accorded to the members of comparable rank of the diplomatic missions established in the host country; (f) be given, together with members of their families forming part of their household, the same repatriation facilities in time of international crisis as diplomatic agents; (g) have the right to import free of duties and taxes, except payments for services, their furniture and effects at the time of first taking up their pos in the host country. (*etc.*); 5. The privileges and immunities are granted to the officials of the Tribunal in the interest of the Tribunal and not for their personal benefit. The right and the duty to waive the immunity in any particular case, where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Secretary-General'.

apply in the bilateral relationship between the entity to be hosted and the hosting country; the Rome Statute itself governs the immunities, exemptions and privileges of the ICC officials and its affiliated personnel towards the ICC Family as a whole¹³¹. Article 48 Rome Statute refers to a specific agreement on ‘the privileges and immunities of the Court’ which is certainly another legal instrument than the Headquarters Agreement to which article 3 Rome Statute refers. Here, the drafters of the Rome Statute must have envisaged a separate general agreement to be concluded with the Assembly of States Parties. The immunities to be granted by virtue of the Headquarters Agreement – applicable within the territorial jurisdiction of the Netherlands – will be *functional* ones; *id est*: only applicable as long as the person who claims immunity towards the Netherlands is actually performing a function for the ICC’s purposes or is engaged on the ICC’s business¹³². Functional immunity is a different concept from full diplomatic immunity¹³³. In principle, a judge who commits a vehicular accident during weekend will not be entitled to invoke such a ‘functional’ immunity neither towards the host country neither towards the damaged private person. The immunity as meant here will therefore never be an absolute one. By virtue of a side letter it is understood that the UN shall ensure that the officials of the Tribunal and persons performing missions for the Tribunal have third party insurance covering damages arising from a road traffic accident caused by a motor vehicle belonging to or operated on behalf of such an official or such a person. In the event that such officials or persons are not insured the UN shall waive their immunity in respect of such damages. In any case the UN shall waive the immunity of such officials or persons in the event they commit a traffic offence involving such a vehicle¹³⁴.

IX. Newly established *ad hoc* Tribunals

65 In the mean time, the Netherlands decided again to establish a brand-new *ad hoc* Tribunal for the sake of having the former Liberian Head of State Charles Taylor standing trial in The Hague on the premises of ICC. This was done at the request of the so-called Special Court for Sierra Leone, by virtue of a Headquarters Agreement concluded between this Court and the Kingdom of the Netherlands¹³⁵. The UN on the one side and the State of Sierra Leone on the other have established the Special Court itself¹³⁶. The President of the Special Tribunal has the same competence as vested into the ICC itself in article 3 of the Statute: he may temporarily decide to have the Tribunal sitting elsewhere, whenever he considers such desirable¹³⁷. The only criterion for this interim removal is that it is in the ‘interests of justice

¹³¹ See article 48 Rome Statute and the commentary on it below. See the commentary of David Tolbert in the First Edition of this Commentary, mn 4: ‘Although many of the above matters will be covered *vis-à-vis* the host State in the headquarters agreement provided for under article 3, the headquarters agreement is a bilateral agreement that does not apply to other States Parties. Thus, the Court may find itself hard pressed on many of the issues generally covered by privileges and immunities in its operations in other states Parties, much less non-States Parties, without a general agreement on its privileges and immunities, as it does not have recourse to the General Convention’.

¹³² There must be a *functional* bond between the acts performed by the (semi)official and the task bestowed upon the International Organisation. Muller, *International Organisations* (1995) 151 *et seq.*; Bekker, *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of Their Legal Status and Immunities* (1994) 55 *et seq.*

¹³³ See Schermers and Blokker, *International Institutional Law* (1995) 359: ‘Immunity for non-official acts is generally open to objection and contrary to the functionality principle, which underlies all international immunities’.

¹³⁴ Side letter as of the 3 February 1993 (Foreign Affairs).

¹³⁵ See: *Notawisseling houdende een zetelverdrag tussen het Koninkrijk der Nederlanden en het Speciale Hof voor Sierra Leone, s’-Gravenhage/Freetown*, the 19 June 2006, Tractatenblad 131 (translation: exchange of notes verbales with a view to a Seat Agreement between the Kingdom of the Netherlands and the Special Court for Sierra Leone, Official Treaty Monitor of the Kingdom of the Netherlands 2006, No. 131).

¹³⁶ Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 Jan. 2002, see www.sc-sl.org (Internet).

¹³⁷ See mn 6 *et seq.* (Interim removal).

or the administration of the Court¹³⁸. As we saw, this interim removal of ICC has to be in the interest of the 'proper administration of the Court'. Both criterions have not been defined further into detail in any text of the agreements or additional instruments. The presidential decision to remove the seat of the Special Court was taken with a view to the real risk of a total destabilisation of the internal public order of Sierra Leone, due to the mere presence of Taylor. The Netherlands was of the opinion – just as in the case of the Establishment of the 'Lockerbie-Tribunal'¹³⁹ – that in order to function properly as a host country, there should be a resolution of the Security Council, acting under the heading of Chapter VII of the UN-Charter just as it was also the case with a view to the establishment of ICTY and ICTR. The Council handed down such a resolution, mandating the Netherlands to act as a host state and ordering the state to allow the detention and the trial of the former President Taylor by the Special Court in the Netherlands and to facilitate the trial in every respect¹⁴⁰. Again, the Netherlands conducted the Host Agreement negotiations in the direction of prolongation *mutatis mutandis* the Host Agreement concluded with ICTY. The Netherlands promulgated national enabling legislation to that end, referring to the foregoing ICTY enabling legislation¹⁴¹. In article 2 of these enabling law special regulations have been drawn up for Taylor's surrender, transport, transit and detention. The same has been done for 'other persons' if the Tribunal thinks their presence is necessary for the trial. In the articles 3 and 4 of this Statute, the Dutch legislator declares the ICTY enabling legislation applicable *mutatis mutandis*. Article 5 provides for regulations concerning the obligations incumbent on the Netherlands with a view to further facilitations¹⁴². The addressees of those provisions are the national Dutch authorities, not the officials of the Tribunal. Given the applicability *mutatis mutandis*; the remarks made above concerning the applicability *mutatis mutandis* of the ICTY Host Arrangements could be applied *mutatis mutandis* on the Host Arrangements between the Netherlands and the Special Tribunal for Sierra Leone. The thing is that the Sierra Leone Tribunal cannot be compared with the ICTY. It simply is not to be considered as a subsidiary UN organ. The Dutch legal system and the system underlying the Tribunal's jurisdictional scope are equivalent. The Netherlands are under the obligation to refrain from exercising jurisdiction regarding the alleged crimes committed by Taylor before his arrival in the

¹³⁸ See article 4 of the Statute of the Special Court. See article 10 of the Statute: 'The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on one hand, and the Government of the alternative seat, on the other'.

¹³⁹ See notes 14 and 19.

¹⁴⁰ Res. 1688 as of the 16 June (S/RES/1688, 2006, see also Tractatenblad 2006, 131 [Official Treaty Monitor of the Kingdom of the Netherlands 2006 Nr 131]). For the Netherlands, as host country, the following passes from the Res. was the most important one: '7. Decides that the Special Court shall retain exclusive jurisdiction over former President Taylor during his transfer to and presence in the Netherlands in respect of matters within the Statute of the Special Court, and that the Netherlands shall not exercise its jurisdiction over former President Taylor except by express agreement with the Special Court; 8. Decides further that the Government of the Netherlands shall facilitate the implementation of the decision of the Special Court to conduct the trial of former President Taylor in the Netherlands, in particular by (a) Allowing the detention and the trial in the Netherlands of former President Taylor by the Special Court; (b) Facilitating the transport upon request of the Special Court of former President Taylor within the Netherlands outside the areas under the authority of the Special Court; (c) Enabling the appearance of witnesses, experts and other persons required to be at the Special Court under the same conditions and according to the same procedures as applicable to the International Criminal Court for the former Yugoslavia'.

¹⁴¹ Kamerstukken II (Lower House), 2005–2006, 30 610, Nos. 1–5 (Bepalingen verband houdende met de detentie en berechting in Nederland, in overeenstemming met Resolutie 1688 van de Veiligheidsraad van de Verenigde Naties van 16 juni 2006, van Charles Taylor door het Speciaal Hof voor Sierra Leone [wet Speciaal Hof voor Sierra Leone] [translation: Statute providing for regulations with a view to the detention and the trial in the Netherlands of Charles Taylor on behalf of the Special Tribunal for Sierra Leone] in accordance with SC Res. 1688 as of the 16 June 2006; Kamerstukken I (Upper House), 2005–2006, 30610, A).

¹⁴² This article 5 runs as follows: 'The Kingdom of the Netherlands shall allow and facilitate the detention of the accused and other persons in the custody of the Special Court within the detention facility made available by the Court'.

Netherlands. The Security Council Resolution simply dictates so. But when crimes will be committed on Dutch soil by experts, witnesses, victims coming to attend the Taylor Trial – for example perjury before the Tribunal or tampering with evidence – there is no sufficient legal reason why the Netherlands could not exercise jurisdiction by virtue of the rule of territoriality.

- 66 On the 21 December 2007, the Netherlands concluded a Seat Agreement with the United Nations concerning the hosting of the Headquarters of the Special Tribunal for Lebanon¹⁴³. The Seat Agreement is based on the wordings of and assumptions underlying the ICTY Seat Agreement and the Seat Agreement with ICC. The Headquarters of this *Ad Hoc* Tribunal will be located in the former office of the national Dutch Security Service in Leidenschendam, near The Hague. The Tribunal will be sharing some facilities set at the disposal of ICC and ICTY. The difference with ICC is, that the Netherlands has putted forward as bottom line condition for hosting, that it will *not* enforce any sentence of imprisonment handed down by the Tribunal. Imprisonment shall always be served in a state designated by the President of the Special Tribunal from a list of States that have indicated their willingness to accept persons convicted by the Tribunal¹⁴⁴. The President of the Tribunal shall be under the obligation to begin the process of designating a State of enforcement as soon as possible, based on the list of willing States, with a view to the immediate transfer of the convicted person for the purpose of serving a sentence of imprisonment by the Tribunal. Yet, the host State has to make available detention facilities for pre-trial purposes in order to allow the Tribunal to perform its functions within its detention centre¹⁴⁵. As matters stand now, it is in the likelihood that to this end the facilities, used by ICTY and ICC, will be set at the disposal of this *Ad Hoc* Tribunal. Moreover, this will imply transit movements from the detention theatre to the Tribunal's premises and vice versa on the same footing as with regard ICTY and ICC. It will be the host State which has to make the proper arrangements to that end at the request of the Tribunal.

As matters stand now, the ICC family could be facing the new establishment of other *ad hoc* Tribunals, seating in the Netherlands. One could wonder as to whether, in the end that is not going to undermine the jurisdictional credibility of the ICC.

X. Asylum proceedings

- 67 As mentioned in Section II mn 23, an on-going matter that arose for the Netherlands, acting in its capacity as Host State, is that of the asylum proceedings initiated at the national level by four individuals from the Democratic Republic of Congo (DRC). Although these

¹⁴³ Verdrag tussen het Koninkrijk der Nederlanden en de Verenigde Naties betreffende de Zetel van het Speciale Tribunaal voor Libanon (met brieven en verklaring), New York, 21 Dec. 2007 [Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special tribunal for Lebanon (with exchange of letters and interpretative declaration) Netherlands Treaty Series 2007 No. 228; see: Stukken Tweede Kamer No. 31.128 Nr 2, Brief van de Minister van Buitenlandse Zaken dd 21 Dec. 2007 (Hansard Lower Chamber, no. 31.128 No. 2, Letter of the Minister for Foreign Affairs of the Kingdom of the Netherlands dd the 21 Dec. 2007)].

¹⁴⁴ Article 44 of the Seat Agreement:

'*Enforcement of sentences* –1. Imprisonment shall be served in a State designated by the President of the Special Tribunal from a list of States that have indicated their willingness to accept persons convicted by the Tribunal. –2. the President shall begin the process of designating a State of enforcement as soon as possible, based on the list referred to above, with a view to the immediate transfer of the convicted person for the purpose of serving a sentence of imprisonment imposed by the Tribunal. –3. The host State shall be under no obligation to let persons convicted by the Tribunal serve their sentence of imprisonment in a prison facility on its territory'.

¹⁴⁵ article 41 of the Seat Agreement runs as follows: '*Cooperation in detention matters* –1. The host State shall cooperate with the Tribunal to facilitate the detention of persons and to allow the Tribunal to perform its functions within its detention centre. –2. Where the presence of a person in custody is required for the purposes of giving testimony or other assistance to the Tribunal and where, for security reasons, such a person cannot be maintained in custody in the detention centre of the Tribunal, the Tribunal and the host state shall consult and, where necessary, make arrangements to transport the person to a prison facility or other place made available by the host State'.

proceedings are still pending, and a verdict by the national courts not expected until halfway this year¹⁴⁶, a variety of conflicting legal obligations have arisen. All four applicants are Congolese nationals, three of them were transferred to the ICC as witnesses in the Katanga and Chui case, and the other one was transferred to the ICC as a witness in the Lubanga case. The main premise of the case is that these Congolese nationals, who were transferred from the DRC to the ICC to give witness testimony for the Defence, applied for asylum in the Netherlands, basing themselves on the ‘non-refoulement’ principle. According to their applications, they had a ‘well-founded fear’ that they would receive treatment, once returned to the DRC, that would violate, therefore be contrary to, article 3 of the European Convention on Human Rights (‘ECHR’).

This section will analyse and explain the unique legal issues that have been at the centre of these applications, both at the ICC as well as national level. Notwithstanding the legal issues before the ICC, only those issues that concern the host State will be scrutinised. The main legal question at this point is to what extent the Netherlands, on the one side as High Contracting Party to the ECHR and, on the other side as host to the ICC, has to manage conflicting obligations of a legal nature. As the Defence for Germain Katanga rightly put it: ‘The Netherlands is bound by obligations under the ECHR and that the transfer of powers from a state to an international organisation established on its territory does not necessarily exclude that State’s responsibility to ensure that these powers are exercised in accordance with the ECHR. Put differently, the host State may transfer powers to an organisation established on its territory provided the rights and freedoms guaranteed in the ECHR continue to be secured’¹⁴⁷. This reasoning falls exactly in line with the article 1 ECHR provisions and the established case law thereof, as explained already in Section C.I mn 32, especially footnote 50.

The starting point for this analysis is the Status Conference held on the 12 May 2011¹⁴⁸. Faced with a thus far unprecedented legal situation, Trial Chamber II needed to clarify certain legal issues that arose due to the asylum applications. Before commencement of the Status Conference, Trial Chamber II did explicitly mention that it was not in any way competent or have jurisdiction to rule on any application for asylum, and therefore did not intend to consider the merits of any application for asylum. However, the Trial Chamber II did feel the need to request clarifications on a variety of legal questions arising from these specific circumstances¹⁴⁹. This point of view is important, as it will be shown below that the host State has somewhat contested this line of reasoning by the Trial Chamber II, both during this particular Status Conference, as well as during the subsequent filing of submissions thereafter. However, for the time being, our main point of analysis are two legal issues that have been discussed during the Status Conference, namely the legal status of the witnesses from the moment they arrived on Dutch territory and, closely related thereto, the jurisdictional issues that relate to presenting the witnesses to the Dutch authorities who are competent to rule on a request for the status of refugee¹⁵⁰.

After hearing the other parties present their thoughts during the Status Conference, it was the turn for the representatives of the host State to explain and clarify their points of view on the subject-matter at hand, concerning the legal status of the witnesses, and the manner in

¹⁴⁶ Uitspraak Rechtbank ‘s-Gravenhage, LJN: BU9492, Eerste aanleg – meervoudig, Zaaknr: AWB 11/25891, AWB 11/25904, AWB25907, AWB 11/36660, AWB 11/36662, AWB 11/36664, AWB 11/39010, AWB 11/39011 en AWB 11/39012, 28 December 2011, The Hague District Court has ordered that a decision should be rendered at latest by 28 June 2012, see in this regard paragraph 9.10 thereof.

¹⁴⁷ Situation in the Democratic Republic of the Congo in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Decision on an *Amicus Curiae* application and on the ‘*Requete tendant a obtenir presentations des temoins* DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 *aux autorites neerlandaises aux fins d’asile*’ (articles 68 and 93(7) of the Statute), ICC-01/04-01/07-3003-tENG, 9 June 2011 3 68.

¹⁴⁸ Situation in the Democratic Republic of the Congo in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Status Conference held on the 12 May 2011, ICC-01/04-01/07-T-258-ENG 3 69.

¹⁴⁹ *Id.*, page 6, lines 2 *et seq.*

¹⁵⁰ See note 148, for example, pages 57, 60–61, 65, 67 *et seq.*

which, if at all, the Dutch would deal with the Asylum applications. Trial Chamber II wanted clarification whether or not the Dutch representatives shared the view of the Registry both with regard to the legal status of the detainees, as well as its interpretation of article 44 HQA¹⁵¹.

- 71 Interestingly, before clarifying the point of view of the host State with regard to the questions raised by Trial Chamber II, the representative of the host State stated that '[f]or sake of clarity, other than in connection with the functioning of the Court in the host state, the Netherlands *will not accept responsibility* (emphasis added) for the protection of detained witnesses. This would go well beyond the obligations and responsibility of the host State and the Headquarters Agreement and moreover witness protection is the responsibility of the Court'¹⁵². Even though this statement can be interpreted as correct, there is a major difference between the obligations and responsibility of the host State with regard to [ICC] detainees, and the obligations and responsibility that arise in case *any* individual applies for asylum within the jurisdiction of the Netherlands, within the meaning of article 1 ECHR.
- 72 The host State representative then answered the specific question of the legal status of the three detained witnesses with effect from their arrival in the Netherlands and to state what jurisdiction, if any, the host State may exercise in regard to those witnesses. Accordingly, '[u]nder the Headquarters Agreement, the Netherlands has accepted that Dutch laws and regulations remain without effect insofar as necessary for the ICC to function on its territory, see, for instance article 8, paragraph 3 of the Headquarters Agreement. This – and I would call it a *carve out of Dutch jurisdiction* (emphasis added) – applies in particular to persons detained in the Court's detention centre. These are normally persons on trial before the Court. Exceptionally...the detainees are witnesses'¹⁵³. The host State's representative continued by stating that '[u]nder article 93(7)...these witnesses have been temporarily transferred in custody from the Democratic Republic of Congo to the court pursuant to an agreement between them. In accordance with article 44(1) of the Headquarters Agreement, the competent authorities of the host state have transported these detainees on the authority, and thus under the responsibility, of the Court from the point of arrival to the premises of the Court, where they remain in the Court's custody. Therefore, the legal status of these detainees in the Netherlands is that they are in the temporary custody of the Court with the agreement of the DRC and at no time in the custody of the Netherlands. Under the aforementioned 'carve out', the Netherlands does not exercise jurisdiction over them'¹⁵⁴. With regard to the asylum procedure, the representative went on, '[i]f a request for asylum from a detained witness were to reach the Dutch authorities, the minister for immigration and asylum will decide thereon. The position with respect to such a request will be as follows: *Dutch asylum law is part of the aforementioned 'carve out'* (emphasis added). As the transportation of detained witnesses to the point of departure from the Netherlands after their testimony is inherently connected to their detention at the premises of the Court, it follows that *the 'carve out' equally applies during the said transport* (emphasis added). In this respect, article 93(7)(b) of the Rome Statute provides that, and I quote: 'When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested state'¹⁵⁵. Accordingly, '[t]his provision is reflected in the obligation of the host state to transport the detainees directly and without impediment to the point of departure from the host state under article 44 of the Headquarters Agreement'¹⁵⁶.
- 73 The Presiding Judge needed clarification of the words of the Dutch representative, asking whether he correctly understood that '[i]f an application for asylum was sent to the Dutch authorities by a detained witness, the competent Dutch authorities will take a decision on the

¹⁵¹ *Id.*, page 68, lines 7 *et seq.*

¹⁵² *Id.*, page 71, lines 5 *et seq.*

¹⁵³ *Id.*, page 71, lines 15 *et seq.*

¹⁵⁴ *Id.*, pages 71–72.

¹⁵⁵ See note 148, pages 72–73.

¹⁵⁶ *Id.*, page 73, lines 3 *et seq.*

application for asylum¹⁵⁷? The Dutch representative replied that the fact remains that if and when an application is made for asylum, the Dutch authorities are going to make a decision. but with respect to the content thereof, ‘we do not have the right neither do we have the authority or the intention of giving any assessment on the merits. *It’s up to you, the Court*, it is up to the Court to make a decision relating to whether or not a risk exists. In other words we are going to rely on the decision that will be taken by the Court¹⁵⁸.

The Presiding Judge, in summing up the position of the host State, rightly stated that if an application for asylum would be submitted, an answer would be given concerning that application. In this context, it is irrelevant whether that application is submitted from the detention centre or in the course of the transfer or from the courtroom or whether it is submitted by a lawyer who is not on the bar of the Netherlands or by a lawyer who is a member of the bar of the Netherlands. In other words, the *origin* of the application for asylum is irrelevant here. If an application for asylum is filed with the Dutch authorities, an answer will be given – in due course¹⁵⁹. This line of reasoning is consistent with established case law of the ECHR, in that any individual residing, or situated, ‘within the jurisdiction’ of a High Contracting Party, should be able to have recourse to the national courts of that country.

Interestingly enough, the Dutch representative did – again – add that it is the position of the host State that it will not carry out a new assessment of the asylum application and that the host State will rely on the decision that will be taken by the Court. Hearing this argument, the Presiding Judge restated that the ICC was, and is not, a Court that hears asylum matters, as that does not fall within the scope of the Rome Statute and therefore it falls outside the jurisdiction of the Court, a point rightly added by the Presiding Judge. The Dutch representative, answering this line of thoughts, stated that ‘[w]e consider that since the detained witnesses are under the authority of the Court for now and that they are protected by the provisions of the Rome Statute, it is up to the Court to carry out a risk assessment... [-c]onsequently, you are going to reach a decision on whether or not additional protection is necessary¹⁶⁰. Following this line of reasoning, the representative continued with the following: ‘[n]ow if you decide that under the current circumstances it will not be appropriate to send back these three individuals to the Democratic Republic of Congo, that will create a new situation.¹⁶¹ I talked about a ‘carve out’, and we consider that Dutch legislation on immigration and the right to asylum is covered by such ‘carve out’. What I mean is [Sic] that this legislation will not apply in the case of these three individuals. Furthermore, we have a general obligation to review this application whenever it arrives. When this application will be submitted, there is going to be an answer. What I intended to make you understand is that we are not going to start our own investigation on this application. We are going to rely on the fact that the Court takes a decision. And in terms of the structures and the relationship between the Court and the host state we deem it inappropriate for the host state to carry out a re-assessment of the determination you are going to arrive at¹⁶².

¹⁵⁷ *Id.*, pages 74–75.

¹⁵⁸ *Id.*, page 75, lines 8–14.

¹⁵⁹ *Id.*, pages 75–76.

¹⁶⁰ *Id.*, page 77, lines 4–11.

¹⁶¹ In *The Kingdom of the Netherlands v. Nuhanović* (NL:HR:2013:BZ9225), the Dutch Hoge Raad (Supreme Court) in a civil procedure found The Netherlands liable for not taking a Bosnian Muslim minor, fugitive in the Dutchbat compound, with them when they evacuated the Dutchbat compound in Srebrenica. Criterion was whether The Netherlands was in ‘effective control’ of the Dutchbat’s actions at the time of evacuation of the compound. So whether or not the actions are under effective control of another party, the United Nations in the case of Srebrenica or the ICC in the case of detained witnesses, the Dutch court tends to find The Netherlands to be liable on its own count, provided ‘effective control’ can be imputed to the Dutch state. The same applies to detainees in general, when detention takes place under the custody or command of the ICC, if executed by the host country, in the Netherlands or abroad during surrendering or transit, under the guidance of the Royal Constabulary. Think of the surrendering of a convicted criminal to a third party for the sake of continued enforcement by enforcement agreement or the re-extradition of an indictee. This ruling of principle by the Dutch Supreme Court might incur unpredictable collateral responsibilities in tort to the detriment of the host country.

¹⁶² *Id.*, page 77–78.

The Presiding Judge, again, restated that ‘the risk assessment conducted by the Court is done on the basis of the type of protection which is deemed adapted to the situation. And when it comes to asylum matters, the criteria for risk assessment may be different, such criteria may be more or less depending on the legislation or the laws of the state concerned’¹⁶³.

76 At this point, it should be clear that it was the position of the host State that, first of all, the witnesses fall outside the *physical* jurisdiction of the Netherlands, in the sense that the Netherlands does not, or does not want to, wield any authority over them. However, the moment any individual, in this case by filing asylum applications, initiates proceedings before national courts, those individuals fall, in principle, within the full jurisdiction of the laws and legislation in force in the State concerned. Secondly, even *if* these witnesses were to fall under the direct jurisdiction of the Netherlands, thereby reaping the legal benefits of Dutch national law and legislation, the host State would not re-assess the application, but leave that to the discretion of the Court, and rely on that assessment. Seen from this perspective, it could be claimed that any ICC decision on an assessment of the risks for these witnesses has some authority and can be used, at a national level, as proof or evidence of significant proportions. However, at the same time, it is misguided not only to say, but also to believe, that the normal risk assessments and procedures that are in order at the national level should not be respected and followed due to a ‘carve out’ of Dutch jurisdiction. As we will see later on, this view of the Netherlands was flawed and rightly corrected by The Hague Court in its December decision. However, before that decision of a national court is analysed, a variety of proceedings and submissions directly relevant to the host State, should be assessed in light of its *sui generis* character.

77 During its decision of 9 June 2011, Trial Chamber II addressed, amongst others, the question what the precise scope of the duty to protect witnesses as enshrined in article 68 ICCS.

First of all, the Chamber explained the distinction between measures pursuant to article 68 ICCS in order to protect witnesses on account of their cooperation with the Court, and those which it is requested to take in order to protect them against potential or proven human rights violations in the broad sense of the term. The Chamber added that these two types of measures should not be confused with those which, more specifically, protect asylum applicants from the risk of persecution they might suffer if they returned to their country of origin¹⁶⁴. The Chamber continued stating that it is not duty-bound to protect witnesses against risks which they might face not only as a result of their testimony but also as a result of human rights violations. By virtue of its mandate, the Court protects witnesses from risks arising specifically from their cooperation with it, not those arising from human rights violations by the authorities of their country of origin. Article 21(3) of the Statute does not place an obligation on the court to ensure that States parties properly apply internationally recognised human rights in their domestic proceedings. It only requires the Chambers to ensure that the Statute and the other sources of law set forth in article 21(1) and 21(2) are applied in a manner which is not inconsistent with or in violation of internationally recognised human rights¹⁶⁵; from this perspective, neither is the court duty-bound to assess the risks of persecution faced by witnesses who are applying for asylum. Accordingly, the Chamber could not endorse the host State’s argument that the Chamber should conduct an assessment of the risks faced by witnesses in light of the principle known as ‘*non-refoulement*’¹⁶⁶. In the Chamber’s view, ‘only a State which possesses territory is actually able to apply the *non-refoulement* rule. Furthermore, the Court cannot employ the cooperation mechanisms provided for by the Statute in order to compel a State Party to receive onto its territory an individual invoking this rule. Moreover, it cannot prejudge, in lieu of the host

¹⁶³ See note 148, page 78, lines 14–18.

¹⁶⁴ See note 147, para. 59.

¹⁶⁵ *Id.*, para. 62.

¹⁶⁶ *Id.*, para. 64.

state, obligations placed on the latter under the *non-refoulement* principle. In this case, it is therefore incumbent upon the Dutch authorities, and them alone, to assess the extent of their obligations under the *non-refoulement* principle, should the need arise¹⁶⁷.

Secondly, the Chamber stated that, as for any individual, whether detained or not, the witnesses in question are afforded the right to submit an application for asylum; as the '*non-refoulement*' principle is considered to be a norm of customary international law and is an integral part of international human rights protection. All individuals are entitled to enjoy its application by a State¹⁶⁸. In addition, 'the Chamber must also pay particular attention to the right to effective remedy as enshrined *inter alia* in...article 13 of the European Convention on Human Rights...[t]he Chamber cannot disregard this fundamental rule and stresses that, in order for the asylum procedure to be effective, there must be open recourse to it, both in law and in practice, and that there must be no obstacles to the entering of an application for asylum as a result of acts or omissions that may be imputed to the Court¹⁶⁹.

Thirdly, as the witnesses completed their testimonies beginning of May, the issue under consideration remained whether an immediate application of article 93(7) ICCS would constitute a violation of the detained witnesses' rights to apply for asylum. As the matters stood, the Chamber reasoned that applying article 93(7) ICCS in such a narrow sense would be inconsistent with internationally recognised human rights, as required by article 21(3) ICCS. The Chamber reckoned that, if the witnesses were to be immediately returned to the DRC, it would become impossible for them to exercise their right to apply for asylum and they would be deprived of the fundamental right to effective remedy. Lastly, were the Chamber to decide to oblige the host State to cooperate with the court in order to return the witnesses to the DRC immediately, it would be constraining the Netherlands to violate the witnesses' rights to invoke the *non-refoulement* principle¹⁷⁰.

Interestingly enough, at the end of this decision, the Chamber forwarded possible scenario's 78 that might be relevant to the situation at that time. The first, in short, would be to return the detained witnesses to the DRC [in accordance with article 93(7)]; the second would be not to return the detained witnesses to the DRC; and finally, and most interesting for purposes of this analysis, relates to the question as to what should be decided in the event that the Court considers that the protective measures are satisfactory [pursuant to article 68 ICCS] but the decision of the Dutch authorities on asylum or *non-refoulement* is still pending¹⁷¹. This last scenario is the on-going situation at this moment and, as will follow below, the Court found that, as long as the asylum application is ongoing, it cannot send the witnesses back.

The government of the Kingdom of the Netherlands did not agree with this decision and 79 submitted an application for leave to appeal under article 81(1)(d) ICCS¹⁷². It was the Netherlands' contention that it qualified as a party as it had been closely involved in the proceedings in relation to the subject matter of contention. This close involvement mainly relating to the fact that the transfer of the witnesses from the DRC to the ICC had been carried out in close coordination with the Dutch authorities, amongst others by request the lifting of a United Nations Security Council travel ban imposed on one of the witnesses. When the witnesses informed the Chamber of their human rights concerns if returned to the DRC and requested the Chamber to be presented to the Dutch authorities for purposes of requesting asylum, the involvement of the Netherlands intensified¹⁷³. Even though this is an

¹⁶⁷ See note 147, paragraph 64.

¹⁶⁸ *Id.*, para. 67.

¹⁶⁹ *Id.*, para. 69.

¹⁷⁰ *Id.*, para. 73.

¹⁷¹ *Id.*, para. 83–85.

¹⁷² Situation in the Democratic Republic of the Congo in the case of *The Prosecutor v. Germain Katanga and Mathieu Nguadjolo Chui*, The Government of the Kingdom of the Netherlands, 'Application for Leave to Appeal the Trial Chamber's Decision ICC-01/04-01/07-3003 dated 9 June 2011, ICC-01/04-01/07-3020, 15 June 2011.

¹⁷³ See *Supra* note 171, para. 8.

exceptional situation, the Netherlands maintained that the Decision was particularly prejudicial to the Netherlands and without leave to appeal it would be left without a remedy before the Court. Moreover, the Decision could have broad implications for the relationship between the Netherlands and the Court and, consequently, for the functioning of the Court in the Netherlands. The application went on stating that ‘under the Headquarters Agreement’, the Netherlands has accepted that Dutch laws and regulations remain without effect insofar as necessary for the ICC to function on its territory. Under article 44 HQA, the Netherlands is obliged to transport detained witnesses ‘directly and without impediment’ to the point of departure from the Host State; thereby allowing the Court to implement article 93(7)(b) ICSS¹⁷⁴.

More importantly, the Netherlands argued, ‘holding that article 68 must *not* be interpreted in accordance with the rule of non-refoulement runs contrary to said expectation of the Netherlands...it would preclude the Netherlands from complying with its obligations towards the Court to transport the detained witnesses whenever non-refoulement would prohibit the Netherlands from doing so. Such a consequence would be very problematic’¹⁷⁵. As a final matter, the Netherlands argued that ‘the Decision precludes the Netherlands from assisting the Court by transporting the witnesses whenever non-refoulement would prohibit the Netherlands from doing so. Thus, the Decision frustrates the expeditious conduct of the proceedings concerning the detained witnesses’¹⁷⁶.

80 This reasoning of the Netherlands seems to show a one-sided aspect of and run *a contrario* to the original meaning of both the non-refoulement principle *and* those obligations arising from the autonomous functioning of the ECHR provisions of which the Netherlands is a Party to. At this point, the Netherlands’ reasoning is that *because* they cannot send an individual back due to the non-refoulement principle, they are not fulfilling their obligations vis-à-vis the ICC. However, the Netherlands seems to forget that, on the one side, it has obligations arising from other international instruments and sources of law, in this scenario related to human rights provisions and, on the other side, that the ICC also has to acknowledge basic human rights provisions, albeit in a somewhat different fashion as the ICC is not a State. This implies that if, and when, *any* individual that for whatever reason is either detained, or situated, within the ICC territory or under its authority [jurisdiction], decides to file for an asylum application based on the non-refoulement principle, not only would the ICC, by denying said person(s) access to the Dutch courts or counsel, be contravening long-established rules of Customary International Law, of which the *non-refoulement* principle forms an integral part of, but also the Netherlands would be in violation if it, denies access to the national courts thereby denying the application for asylum, purely on the basis of conflicting obligations, as it cannot facilitate the transfer of that individual from the ICC to his (or her) destination of origin. The legal reasoning that a customary rule of international law should be disregarded so that the host State can facilitate the individual to his (her) state of origin, the state for which the individual initially applied for asylum under the non-refoulement principle, seems to be a total disregard for standing human rights practice, and one might question how and why the ‘Legal Capital of the World’ can use such a legal reasoning in the first place.

81 Fortunately, the ICC Appeals Chamber did not have to share its views on these legal maxims, as Trial Chamber II, rightly so, denied leave to appeal as the applications were deemed inadmissible. However, noteworthy is the sentence wherein the Chamber indirectly denies the legal reasoning of the Netherlands by stating that ‘the host State is not acting in the interest of the protection of the witnesses, but in fact raises the question of the respective jurisdiction of the Court and the Netherlands posed by the ongoing asylum proceedings...’¹⁷⁷.

¹⁷⁴ *Id.*, para. 10.

¹⁷⁵ *Id.*, para. 12.

¹⁷⁶ *Id.*, para. 20.

¹⁷⁷ Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ‘Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June, ICC-01/04-01/07-3073-t-ENG, 14 July 2011, para. 7.

Exactly the fact that the Netherlands formulated an *a contrario* reasoning, instead of fulfilling its human rights obligations by granting and allowing an individual to apply for asylum based on the non-refoulement principle, stressing that it would be violating its obligations towards the proper functioning of the ICC and that this should be given priority above a rule of customary international law seems to have struck a legal nerve of the Trial Chamber.

By any means, the Netherlands still wanted to submit further applications as to appeal the decision of 9 June and submitted a document directly to the Appeals Chamber asking for ‘Urgent Request for Directions’ as to the proper procedure to be followed to appeal the Decision, noting the unprecedented nature on the request for leave to appeal and the lack of relevant provisions in the legal framework of the court concerning the appeal which the Netherlands intended to file against the decision before the Appeals Chamber¹⁷⁸. The Appeals Chamber, on the 26 August 2011, dismissed the Urgent Request for Directions *in limine* as the urgent request for directions, amongst others, had been submitted prior to the bringing of any appeal under article 81 or 82 of the Statute and, due to the fact that the urgent request lacked any foundation in the Court’s legal instruments and asked the Appeals Chamber to go beyond and outside the scope of its authority¹⁷⁹.

At this moment the Netherlands had no more judicial recourse or appellate possibilities concerning this subject, and the proceedings continued as stated above. However, the situation, as mentioned under mn ... arose: namely, on the 10 August 2011, Trial Chamber II reached the conclusion that it had fulfilled its obligation under article 68 ICCS to protect the detained witnesses against any harm that may result from the fact that they had testified before it. As soon as the Chamber would receive confirmation of the protective measures – by the DRC – and assuming that the asylum proceedings before the Dutch authorities would still be pending, the Chamber would instruct the Registry to initiate the consultation process referred to in paragraph 85 of its decision of 9 June 2011¹⁸⁰.

On the 24 August 2011, Trial Chamber II decided that, after confirmation by the DRC authorities, the conditions for the return of the three detained witnesses had been fulfilled. Accordingly, from the Chamber’s point of view, the Court had fulfilled its obligations under article 68 of the Statute and there were no further grounds to delay the return of the three detained witnesses to the DRC¹⁸¹. As the Chamber held in its decision of 9 July 2011, the current finding that the requirements of article 68...have been met is limited to risks related

A similar leave to appeal submitted by the Netherlands, based on article 81(1)(d) of the Rome Statute was denied as well by Trial Chamber I in the Lubanga case. However, the Chamber *did* grant leave to appeal on an exceptional basis under article 64(6)(f) of the Rome Statute. For an analysis of the Trial Chamber’s decision, consult the Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, ‘Decision on two requests for leave to appeal the ‘Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application’, ICC-01/04-01/06-2779, 4 August 2011.

¹⁷⁸ Situation in the Democratic Republic of The Congo in the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, The Government of the Kingdom of the Netherlands, ‘Urgent Request for Directions’, ICC-01/04-01/07-3077, 15 July 2011, paras. 5–6.

¹⁷⁹ Situation in the Democratic Republic of The Congo in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, ‘Decision on the “Urgent Request for Directions” of the Kingdom of the Netherlands of 15 July 2011’, ICC-01/04-01/07-3132, 26 August 2011, paras. 6–8.

In the Lubanga case, the Appeals Chamber rejected the Urgent Request for Directions as Leave to Appeal was improperly granted and due to the fact that the Urgent Request for Directions in relation to proceedings on appeal was without foundation; Situation in the Democratic Republic of The Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, ‘Decision on the ‘Urgent Request for Directions’ of the Kingdom of the Netherlands of 17 August 2011, ICC-01/04-01/06-2799, especially paragraphs 7–8. The Urgent Request for Directions was submitted by the Netherlands and included in the Court’s records as document ICC-01/04-01/06-2788.

¹⁸⁰ Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Order to provide confirmation of full implementation of Decision ICC-01/04-01/07-3033’, ICC-01/04-01/07-3097, 10 August 2011, paras. 6–7.

¹⁸¹ Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, ICC-01/04-01/07-3128, 24 August 2011.

to the cooperation of the witnesses with the Court. The Chamber thus takes no position on the alleged risk for violations of the human rights of the detained witnesses in the DRC, or indeed on the question of their alleged persecution by the DRC authorities. *However* (emphasis added)... so long as the request for asylum is still pending before the Dutch authorities, the Court cannot request that the Host State facilitate their return to the DRC. The fact that the asylum request is still pending makes their return temporarily impossible from a legal point of view¹⁸².

- 84 The outstanding question at this moment was whether the witnesses ‘should remain detained pending the final outcome of their request for asylum in The Netherlands and, if so, who should assume responsibility for detaining them...[t]he statute does not provide an answer to this question and ‘a solution must be sought as soon as possible in consultations between the Court, the Host State and the DRC in order to determine whether these witnesses should remain in detention and, if so, in whose custody’¹⁸³. It was, according to the Chamber, therefore ‘incumbent upon the Registry to commence a consultation process with the authorities of the Netherlands and the DRC at once...[i]n any event, given that the obligation of the Court to detain the three witnesses has now, in principle, come to an end, the Chamber is of the view that a solution must be found urgently’¹⁸⁴.
- 85 An interesting insight in the consultation process between the Registry and the Netherlands is given after the Registry submitted a report pursuant to decision ICC-01/04-01/07-3128¹⁸⁵. This report, and the annexes which contained the notes verbales between the Registry and the host State, gives an interesting insight in the procedural and substantive views of the Netherlands concerning the asylum seekers. On 13 September 2011, the Chef de Cabinet of the Presidency and the Deputy Registrar met representatives of the host State at the Dutch Ministry of Foreign Affairs, at that meeting, the issue of the consideration of the asylum applications was discussed. The host state expressed its willingness to process the asylum applications as expeditiously as possible¹⁸⁶. Furthermore, the host State authorities transmitted their observations on the 15 September. In that note verbale, the host State explained that the witnesses should remain at the detention centre while the asylum application was under consideration. The host State also referred to a note verbale of 26 August 2011, in which it set out its position in another (the Lubanga) case¹⁸⁷. The Annex contained three notes verbales of the Dutch authorities; two of those pertained to the Lubanga case while the most recent to the Katanga and Chui case¹⁸⁸. Although different cases, the position of the Netherlands remains the same in both cases, *mutatis mutandis*.
- 86 The main procedure to be followed is as follows: first, the Immigration and Naturalisation Service would need access to the detained witness, or witnesses, at the ICC Detention Centre to conduct interviews to obtain information. Thereafter, the INS would conduct an assessment of the facts and circumstances in connection with the asylum request. Further investigations may, and are likely to, be part of that assessment. Insofar as the INS intend *not* to grant the asylum request, the detained witness will have the opportunity to present his views. Following a formal decision, the detained witness may seek judicial review of this decision, which may be followed by further litigation¹⁸⁹. This, in the most extreme circumstances, could continue up to the European Court of Human Rights, if the need arises. According to the Dutch authorities, these

¹⁸² *Id.*, paras. 14–15.

¹⁸³ *Id.*, para. 16.

¹⁸⁴ *Id.*, para. 17.

¹⁸⁵ Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Registry’s report submitted pursuant to decision ICC-01/04-01/07-3128’, ICC-01/04-01/07-3158-tENG, 16 September 2011.

¹⁸⁶ *Id.*, para. 3.

¹⁸⁷ *Id.*, para. 4.

¹⁸⁸ *Id.*, ICC-01/04-01/07-3158-Anx3.

¹⁸⁹ See note 187, Third Note Verbale of Anx3, Ministry of Foreign Affairs, Protocol Department DKP/NG-2011/643, 2 August 2011.

administrative and judicial proceedings may take considerable time and the Netherlands requires the detained witness(es) to remain at the ICC DC throughout.

The second note verbale related to the proposed consultation between the Registry and the Dutch authorities ‘on the transfer of the witness into the “control” of the Netherlands if the host State intends to defer his departure pending its decision on the asylum application’¹⁹⁰. The Netherlands, firstly, restated that ‘[t]he position of the Netherlands has consistently been that the witness is to remain in custody of the Court during the asylum procedure’¹⁹¹. Secondly, and also of concern, was the following line of reasoning by the Netherlands, which seems to show a certain discontent with the way in which both the proceedings, as well as the position of the ICC, especially the Chambers, has been thus far. The Netherlands stated that ‘the witness has been temporarily transferred in custody from the DRC to the Court pursuant to an agreement between them under article 93(7) of the Statute. Under this agreement the witness shall remain in custody and shall be returned to the DRC when the purposes of the transfer have been fulfilled. This agreement was concluded between the Court and the DRC to facilitate the prosecutions undertaken by the Court. *The Netherlands fails to understand how an obligation to accept undocumented or illegal foreigners into its territory would follow from a bilateral agreement to which it is not a party* (emphasis added). The Court does not have the authority under the Statute or the HQA to transfer the witness to the Netherlands, nor does it have the authority to impose such a transfer upon the host State. Neither, as was acknowledged by the Court, is the Netherlands obligated to accept the transfer of the witness into its control. In this regard the Netherlands would also note that under the current circumstances it lacks jurisdiction to keep the witness(es) in custody throughout the consideration of his asylum application’¹⁹².

The note verbale continued by stating that: ‘it is not the Netherlands that intends to defer the departure of the witness(es). The Netherlands notes that the decision reiterated the responsibility of the Court to ensure that the witness has a real – as opposed to a merely theoretical – opportunity to make his request for asylum to the Dutch authorities before his return to DRC. It is the understanding of the Netherlands that this responsibility implies that the Court will not undertake the transfer of the witness to the DRC during the procedure pertaining to the asylum request. Consequently, the position of the Netherlands remains that the witness is to remain in custody of the Court pending the consideration of the asylum application. *Therefore, the Netherlands does not consider that there is a need to consult with the Registry of the Court at this time* (emphasis added)’¹⁹³.

The third and final note verbale, in the Katanga and Chui case, refers to the above-mentioned notes verbales reiterating the position maintained thus far; an additional remark in this note verbale is that the Netherlands stated ‘[t]hird, and lastly, the Netherlands would refer to discussions between the Ministry of Foreign Affairs and Court authorities to explore the modalities to address concerns that have arisen in this matter’¹⁹⁴. A seemingly open-ended statement that could lead to, for now, an unknown situation.

It is striking that the Netherlands, a country that prides itself with the legal maxims of being the Legal Capital of the World, and The Hague, City of Peace and Justice, would be so adamantly opposed in upholding its own legal obligations arising from its human rights provisions. As the Netherlands questioned the bilateral agreement between the ICC and the DRC, the Netherlands should remember that it signs a variety of agreements itself, whether they are bilateral, multilateral, or even unilateral; one of the multilateral agreements obviously being the European Convention on Human Rights. The obvious [legal] fact

¹⁹⁰ *Id.*, Second Note Verbale of Anx3, Ministry of Foreign Affairs, Protocol Department, DKP-2011/710, 26 August 2011, para. 2.

¹⁹¹ *Id.*, para. 3.

¹⁹² *Id.*, paras. 4–5.

¹⁹³ *Id.*, paras. 6–8.

¹⁹⁴ See note 187, First Note Verbale of Anx3, Ministry of Foreign Affairs, Protocol Department, DKP-2011/777, 15 September 2011, para. 5.

remains that the Netherlands has a variety of legal obligations, not only as a host State, and these legal obligations can include applications for asylum of which any individual within the territory and jurisdiction of the Netherlands has the right to apply for. Whether or not such an application is granted, or denied, is beside the point here; access to the judicial organs, and the rights and obligations arising thereof *is*.

- 88 The constant and structural refusal of the Netherlands until the moment of this writing, can be considered to be baffling. To only be a good Host when it suits you and, not to be a good Host when the result is unwanted, should not be the *modus operandi* of the Netherlands. Most probably, besides the national political influences and factors, allowing any individual that arrives in the Netherlands for reasons relating to the functioning of an international organisation or entity situated in the Netherlands, to apply for asylum, seems to be able to become a precedent that can lead to unknown and unwanted factors for the host State. However, before the Rome Statute was even codified and signed, the Netherlands vehemently lobbied and proclaimed it would host the International Criminal Court, without knowing the exact extent of the obligations and unknown circumstances that could arise. One of these unknown factors, as is obviously apparent at this moment, is that an individual, in this case four witnesses, could come within the jurisdiction of the Netherlands, even though they are situated, or detained, upon the premises of the ICC, where a ‘carve out’ of Dutch jurisdiction exists. This was known to be a possibility but, for whatever [political] reason, it was somewhat ignored. The government reaction to such a situation would be that it would be extremely unlikely to ever occur. However unlikely, it has happened and the Dutch authorities knew it could happen. Now that it has, the Netherlands is trying to deny its obligations thereof, even though legally speaking, from a national law perspective, there is not much leeway for the Dutch authorities to deny the witnesses’ judicial review by national courts of their applications, a matter that has been consistently been tried to deny.
- 89 Whatever the position of the Dutch authorities might have been concerning this subject, on the 28 December 2011, The Hague District Court, sitting in Amsterdam, passed judgement on the question whether or not the asylum applicants were entitled to the (full) provisions of the Dutch Asylum Law of 2000, something the Dutch authorities have consistently denied. One of the first conclusions of The Hague Court was that the Headquarters Agreement does not contain *any* legal provision that would deny, or legally ‘carve out’ the legal provisions of the Dutch Asylum Law. On the contrary, The Hague Court ruled that the Headquarters Agreement *does* allow and enforce the operative provisions of the Dutch Asylum Law¹⁹⁵. Furthermore, The Hague Court ruled that the ICC Implementation Act also has no legal provision that would ‘carve out’ the laws and provisions of the Asylum Law. The Hague Court reasoned that the only laws that could be within the ambit of the ‘carve out’ are those laws and regulations that would impede the proper functioning of the ICC; therein included is not the Dutch Asylum Law¹⁹⁶. Furthermore, The Hague Court ruled that, basing itself on article 93(7) ICCS, said article could not render inapplicable the Dutch Asylum Law in its entirety. Only those provisions that may lead to the proper functioning of the ICC, might be able to be rendered inapplicable, however, as the ICC Chambers’ decision of 9 June, applying article 21(3) ICCS to the circumstances of the case, itself allowed for the application for asylum, this line of thought should be dismissed¹⁹⁷. Finally, the contention by the Dutch authorities that the applicants are not within its jurisdiction, was also denied. Thereby, the fact that even though the applicants are within the jurisdiction of the ICC, does not mean that they cannot apply for Asylum; especially seen from the perspective that, on the one hand, the ICC does not have its own territory as a State does – and that it subsequently came to the same conclusion thereof – and, on the other hand, the applicants *are* factually situated upon Dutch territory, and that in

¹⁹⁵ See note 146, section 9.4.

¹⁹⁶ *Id.*, section 9.5.

¹⁹⁷ See note 146, paragraph 9.6.

principle entitles them to apply for asylum¹⁹⁸. The Hague Court concluded that it could not find *any* legal base, either within the context of national law and legislation, nor at the international level, which would place the applicants outside the jurisdiction of the national courts and laws¹⁹⁹. The Hague Court ended by stating that a decision on the applications for Asylum should be reached by 28 June 2012. The matter is still pending.

Even though the national court has rendered this decision, the Dutch authorities still refuse to either take (full) control of the applicants, or even cooperate with the ICC organs with regard to this matter. A final note thereof is Trial Chamber II's decision of the 1 March pertaining to the Defence Counsel's urgent request to convene a Status Conference²⁰⁰, as the consultations that should have led to a (satisfactory) conclusion between, on the one side, the ICC and the host State and, on the other side, the ICC and the DRC has, thus far, failed to lead to a conclusion tolerable for all sides.

The Chamber, in its decision, explained the predicament they were in: '[a]s a result of the failure of the consultations to produce any alternative solution, the Court has found itself bound in the following position. on the one hand, since the witnesses have finished their testimony and their security in the DRC is guaranteed, the Court has no reason anymore to maintain custody over the witnesses and should return them. On the other hand, the Court's obligation to return the witnesses has been suspended until the final outcome of their asylum claim. Given this situation, the Court has had so far no other choice but to keep the...detained witnesses in its custody, in accordance with article 93(7) of the Statute'²⁰¹. Furthermore, '[a]s regards the *legality of the continued detention* (emphasis added) of the witnesses by the Court since the completion of their testimony, the Chamber notes that the custody of the Court on the basis of article 93(7) ICCS has so far been maintained because the existence of the asylum claim has engendered an extraordinary situation, in which the Court has very little room for manoeuvre. The Chamber reiterates, in this respect, that the processing of the witnesses' asylum applications must not cause the unreasonable extension of their detention under article 93(7) of the Statute and that, in light of *inter alia* article 21(3) of the Statute, the Court cannot contemplate prolonging their custody indefinitely. The Chamber can therefore only deplore that the consultations have failed to produce an alternative solution pending the outcome of the Dutch asylum procedure, especially since the Court has not control over its duration'²⁰².

Taking into account of the Hague District Court's decision of 28 December 2011, 'which has recently become final and which confirms the applicability of Dutch immigration law to the processing and assessment of the witnesses' asylum applications on the basis of the fact that the witnesses are on Dutch territory, the Chamber finds it necessary to ask the Dutch authorities whether:

- 1) they are now in a position to take control of the witnesses pending the outcome of their asylum claim and, in case their application is rejected, to ensure their return to the DRC;
- 2) they consider themselves *obliged* to receive the witnesses in accordance with article 48 of the Headquarters Agreement in case the Court were to find it unreasonable to further detain them on the basis of article 93(7) of the Statute²⁰³.

This is how matters stand at this moment. The witnesses have been granted full access to the provisions of the Dutch Asylum Law of 2000. The ICC will have increasingly more difficulties to legally justify the prolonged detention of the witnesses with regard to article 21(3) ICCS and, the Dutch authorities have yet to assume responsibility of the

¹⁹⁸ *Id.*, para. 9.8.

¹⁹⁹ *Id.*, para. 9.9.

²⁰⁰ Situation in the Democratic Republic of The Congo in The Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, ICC-01/04-01/07-3254, 1 March 2012..

²⁰¹ *Id.*, para. 11.

²⁰² *Id.*, para. 20.

²⁰³ See note 199, para. 21.

applicants. Even though this situation is a first of a kind for the ICC – host State relationship, it seems that the Netherlands cannot postpone the transfer of these applicants indefinitely. The judgement in the Lubanga case has been rendered, and it would be an unexplainable situation if, after the sentencing and reparations judgement have been rendered, and any appeal thereafter, the case would be completely over, while a witness is still in detention. The host State should assume its responsibility under both national as well as international law, and deal with the situation, not try to postpone and hope it will blow over.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Literature: Blokker, N.M., 'International Organisations or Institutions, Implied Powers', in: R. Wolfrum (ed.), *MPEPIL* (OUP 2008-, online edition, <www.mpepil.com>, accessed 15.12.2014); Hall, C.K., 'The First Two Sessions of the United Nations Preparatory Committee on the Establishment of an International Criminal Court', (1997) 91 *AJIL* 177; *id.*, 'The Sixth Session of the United Nations Preparatory Committee on the Establishment of an International Criminal Court', (1998) 92 *AJIL* 548; Hamilton, A., Madison, J. and Jay, J., in: C. Rossiter (ed.), *The Federalist Papers* (1961) 285; Lüder, S.R., 'Some Preliminary Thoughts on the Legal Nature of the International Criminal Court', in: H. Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (Berlin Verlag Spitz 2001) 51; Montaldo, R., 'International Legal Personality and Implied Powers of International Organisations', (1970) 44 *BYbIL* 111; Rensmann, T., 'Internationale Organisationen im Privatrechtsverkehr', (1998) 36 *AVR* 305; Schmalenbach, K., 'International Organisations or Institutions, General Aspects', in: R. Wolfrum (ed.), *MPEPIL* (OUP 2008-, online edition, <www.mpepil.com>, accessed 15.12.2014); Seidl-Hohenveldern, I. and Rudolph, K., 'article 104', in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, ii (OUP 2nd edition 2002) 1311; Tomuschat, C., 'International Courts and Tribunals', in: R. Wolfrum (ed.), *MPEPIL* (OUP 2008-, online edition, <www.mpepil.com>, accessed 15.12.2014); Walter, C., 'Subjects of International Law', in: R. Wolfrum (ed.), *MPEPIL* (OUP 2008-, online edition, <www.mpepil.com>, accessed 15.12.2014).

Content

A. General remarks	1
B. Analysis and interpretation of elements	4
I. Paragraph 1	4
1. International legal personality	4
2. Legal capacity	7
II. Paragraph 2	9
1. Exercise of functions and powers on the territory of any State Party	9
2. Exercise of functions and powers on the territory of any other State	12
3. 'as provided in this Statute'	13

A. General remarks*

Article 4 is a decisive provision for the determination of the **legal nature of the ICC**. The legal nature of an institution is a consequence of the method chosen by States for its establishment. The proposed alternative methods of establishment of the ICC, had they been adopted, would have resulted in a very different kind of Court. 1

The Court could have been established through an amendment of the Charter of the United Nations¹, which would have made the Court's Statute, like the Statute of the ICJ, an integral part of the Charter². The ICC thus would have become a judicial organ of the United Nations. As such, it would have lacked a separate international legal personality³.

Alternatively, the Court could have been established by resolution of the General Assembly and/or the Security Council, which would have made the Court a subsidiary organ of the General Assembly or the Security Council, or possibly a joint subsidiary organ⁴. Setting aside

* This commentary has been written by the author in her private capacity.

¹ Such an amendment would have required adoption in the General Assembly by two-thirds of its members and ratification by two-thirds of the members of the United Nations, including all the permanent members of the Security Council, see article 108 of the Charter of the UN.

² Article 92 of the Charter of the UN.

³ Schermers and Blokker, *International Institutional Law* (2011) 994, § 1571.

⁴ 1994 ILC Draft Statute.

possible challenges to the legitimacy of such a subsidiary body⁵, one consequence must be noted: The Court in this case most certainly would not have possessed an international legal personality separate from that of the organ that established it⁶.

- 2 The ICC, however, has been created through a multilateral treaty⁷, giving it a different legal nature from that which it would have had under either of the other approaches. The ICC is a treaty body in which the States Parties have vested a distinct international legal personality⁸. By endowing the Court with international legal personality, the States Parties created a new **subject of international law**⁹.
- 3 Because the Court possesses international legal personality separate from that of its member States, it possesses an essential element which is characteristic of an international organisation¹⁰. Moreover, it possesses all other elements that are essential to the definition of an international organisation¹¹: The Court consists of an association of the States Parties¹² established by and based upon the Statute as an international treaty¹³, which pursues common aims¹⁴ and has its own special organs¹⁵ to fulfil particular functions within the organisation. Furthermore, the Court is designed as a permanent institution¹⁶ with proper funds for its expenses¹⁷ and a special procedure for revision of the Statute, its constituent treaty¹⁸. All these features leave no doubt as to the legal nature of the ICC: It is an entity established by a treaty governed by international law and capable of generating through its organs an autonomous will distinct from the will of its members. Unlike most other international courts and tribunals¹⁹, the ICC is not a judicial organ of an international organisation, but is **itself an international organisation**²⁰.

B. Analysis and interpretation of elements

I. Paragraph 1

1. International legal personality

- 4 The first sentence of article 4 para. 1 expressly confers international legal personality on the ICC and thereby clarifies that the ICC has the capacity to **possess international rights and duties**.

⁵ *Ibid.*

⁶ Walter, in: Wolfrum (ed.), *MPEPIL* (2008-) mn 13.

⁷ See, e.g., R. S. Clark, *article 125*, mn 1. The majority of States participating in the *ad hoc* Committee and the Preparatory Committee favoured the treaty approach to ensure that the Court would be set up as soon as possible, see Hall (1997) 91 *AJIL* 177, 185. The consensus on the establishment of the ICC by treaty was reflected in the consolidated text which resulted from the final session of the Preparatory Committee, see Hall (1998) 92 *AJIL* 548.

⁸ See express wording of article 4 para. 1.

⁹ On their power to do so see, for instance, Walter in: Wolfrum (ed.), *MPEPIL* (2008-) mn 3.

¹⁰ See the definition of the International Law Commission agreed upon in 2003, Report of the International Law Commission, Fiftyfifth session (5 May–6 July and 7 July–8 August 2003), GAOR 58th Session Supp 10, 38.

¹¹ See also the definition of Schmalenbach, in: Wolfrum (ed.), *MPEPIL* (2008-) mn 3.

¹² See, for instance, *Part 11* of the Rome Statute on the Assembly of States Parties and the commentary thereon by S. Rama Rao and P. Ambach.

¹³ See, for instance, R. S. Clark, *article 125*, mn 1.

¹⁴ See the *Preamble* and the commentary thereon by M. Bergsmo/O. Triffterer†/K. Ambos.

¹⁵ See *article 34* and the commentary thereon by K.A. A. Khan.

¹⁶ See *article 1* and the commentary thereon by O. Triffterer/M. Bohlander.

¹⁷ See *Part 12* and the commentary on it.

¹⁸ See *articles 121 to 123* and the commentary on them by R.S. Clark.

¹⁹ See, for example, Schermers and Blokker, *International Institutional Law* (2011) 435, §§ 597 *et seq.*

²⁰ Seidl-Hohenveldern and Loibl, *Das Recht der Internationalen Organisationen* (2000) 332, mn 2403a. See also Lüder, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 51 *et seq.*

The ILC's Draft Statute did not contain this explicit ILC provision on international legal personality²¹. At that stage of preparations, however, the method of establishment of the Court was still under discussion²². The question of whether the Court would possess international legal personality was therefore still unsettled. Consequently, the Draft could not yet contain such a provision.

On the other hand, even if the Rome Statute did not contain such an explicit provision²³, the international legal personality of the ICC could have been implied, through the attribution of certain functions to the institution. With regard to the legal personality of the United Nations, this was established by the ICJ in its Advisory Opinion on *Reparation for injuries suffered in the service of the United Nations*²⁴. The explicit provision that the ICC shall have international legal personality makes it unnecessary to deduce this personality from the functions attributed to the Court.

International legal personality, *i.e.* the capacity of possessing international rights and duties, clearly exists **in relation to the States Parties** that accepted this provision²⁵. According to the wording of the sentence in the Statute, however, it would not necessarily have to be confined to them alone, but might also refer to **States not Parties** to the Statute.

In its *Reparation* Opinion, the ICJ held that with regard to the United Nations 'fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone'²⁶. This ruling on the objective international personality of the United Nations is confined to this special case. It cannot by analogy be applied to other international organisations. International legal personality in relation to States not Parties to the Statute therefore remains contingent upon their explicit or implied recognition of the organisation. Recognition may be accorded to the ICC by concluding treaties with it, for example.

In contrast to the second sentence of paragraph 1, the first sentence does not contain an explicit **functional limitation** of the international legal personality of the Court. Under general international law, however, such international legal personality of an international organisation is always of a functional nature²⁷. Unlike a State, an international organisation does not possess the totality of international rights and duties recognised under international law; its powers are limited by its purposes and functions as specified in its constituent document²⁸. Consequently, the Court does not, to take just one example, possess unlimited powers to conclude international treaties. The Statute specifically provides for the competence to conclude an agreement with the United Nations²⁹ and a headquarters agreement with the host State³⁰. Moreover, article 86 para. 5 implies the power to conclude agreements with States not Parties as basis for cooperation with the Court under Part 9 of the Statute³¹. Thus, the power of the Court, for example, to conclude international treaties is functionally limited. The attribution of interna-

²¹ 1994 ILC Draft Statute, p. 29.

²² *Ibid.*, p. 22.

²³ Like the UN Charter, the constituent treaties of international organisations often lack provisions on the legal status of the organisation under international law, see Schermers and Blokker, *International Institutional Law* (2011) 989, § 1565.

²⁴ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJRep. 174, 178/179 (1949).

²⁵ Schmalenbach, in: Wolfrum (ed.), *MPEPIL* (2008-) mn 20.

²⁶ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJRep. 174, 185 (1949).

²⁷ Schermers and Blokker, *International Institutional Law* (2011) 993, § 1570.

²⁸ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJRep. 174, 180 (1949).

²⁹ See article 2 and the commentary thereon by P. Ambach.

³⁰ See article 3 and the commentary thereon by G.A.M. Strijards/R.O. Harmsen.

³¹ See the commentary by C. Kreß/K. Prost on article 86.

tional legal personality to the ICC does not change that fact, since only those limited functional powers give substance to the international legal personality³².

2. Legal capacity

7 The second sentence of article 4, para. 1, states that the Court shall have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. This standard provision³³ clarifies that the Court shall possess **at the municipal level** the legal capacity essential for it to carry out its functions. This provision makes it incumbent upon the States Parties to ensure that the ICC enjoys such legal status under national law as may be necessary for it to perform its functions. The effect of this contractual attribution of legal capacity is dependent upon the respective constitutional provisions on the status of international treaties in national law³⁴. Where international treaties automatically become part of the law of the land, the mere ratification of the Statute might be sufficient to vest the ICC with such domestic legal capacity. In other countries, domestic legislation might be required to attain this effect³⁵.

The legal capacity of the ICC extends only as far as the purpose and functioning of the ICC require. This **functional limitation** of the legal capacity is explicitly laid down in article 4, para. 1. The extent of the Court's legal capacity is illustrated in article 2 of the Agreement on the Privileges and Immunities of the ICC. According to this provision on the legal status and juridical personality of the Court, it shall in particular have the capacity to contract, to acquire and to dispose of immovable and movable property and to participate in legal proceedings³⁶.

8 Unlike the provision in the ILC's Draft Statute³⁷, article 4 para. 1 does not expressly limit the legal capacity to the territory of each State Party. As an international treaty (and therefore *res inter alios acta*), however, the Statute cannot impose duties on third States³⁸. The legal capacity of the ICC in **States not Parties to the Statute** does thus not follow directly from article 4 para. 1. It can, however, indirectly follow from it, since private international law accepts legal personality acquired abroad; and this personality must not be affected by the fact that it was granted by a group of states and not by one particular state³⁹. Furthermore, in cases where the UN Security Council referred a situation in a non-Member State to the ICC, it always included in its legally binding decision under Chapter VII of the Charter of the United a decision to the effect that the State concerned 'shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'.⁴⁰ This legal obligation is formulated so widely that it also comprises the obligation to grant to the Court the necessary legal capacity at the municipal level. Therefore, the question of whether national legal capacity in non-member States follows from explicit or implied recognition, from a binding Security Council decision or from conflict-of-law rules, does not seem to become relevant in practice.

³² See also Bowett, *The Law of International Institutions* (1982) 306 *et seq.*

³³ Compare article 104 of the Charter of the United Nations and see Schmalenbach, in: Wolfrum (ed.), *MPEPIL* (2008-) mn 28 and Schermers and Blokker, *International Institutional Law* (2011) 1021, § 1591.

³⁴ See, e.g., Rensmann (1998) 36 AVR 305, 307.

³⁵ Shaw, *International Law* (1997) 127.

³⁶ ICC source: Official Records ICC-ASP/1/3.

³⁷ 1994 ILC Draft Statute, p. 29.

³⁸ See articles 34 and 5 of the VCLT, 23 May 1969, 8 *ILM* 679 and articles 34 and 5 of the VCLT between States and International Organisations or between International Organisations, 21 Mar. 1986, 15 *ILM*. 543 and Chinkin, *Third Parties in International Law* (1993) 25.

³⁹ See Schermers and Blokker, *International Institutional Law* (2011) 1025, § 1598, citing article 1 of The Hague Convention on the recognition of the legal personality of foreign corporations, associations and foundations, 1 June 1956. Seidl-Hohenveldern and Rudolph, in: Simma (ed.), *The Charter of the United Nations. A Commentary* (2002) 1311, mn 41 *et seq.* apply a similar reasoning to article 104 of the Charter of the United Nations.

⁴⁰ Security Council Resolution 1593(2005), para. 2 and Security Council Resolution 1970 (2011), para. 5.

II. Paragraph 2

1. Exercise of functions and powers on the territory of any State Party

Paragraph 2 states that the Court may exercise its functions and powers on the territory of any State Party. The possible exercise of powers is not confined to the territory of the host State where the seat of the Court is established (article 3 para. 1)⁴¹. The Court may sit elsewhere, whenever it considers it desirable (article 3 para. 3)⁴² and may decide on a place of trial other than the seat of the Court (article 62)⁴³.

In all other respects, however, it is not generally foreseen that the Court should exercise its powers and functions directly on the territory of a State Party. On the contrary, the ICC relies upon the cooperation and assistance of the States Parties on their territory. They shall fully cooperate in the investigation and prosecution of the crimes within the jurisdiction of the Court⁴⁴ and shall ensure that procedures under national law are available for such cooperation⁴⁵. The Court may request, in particular, for the arrest and surrender of a person (article 89), for provisional arrest of a person sought (article 92) and for all kinds of assistance specified in article 90. The Court is dependent upon such cooperation of the States Parties for all these kinds of action that have to be taken on their territory.

Likewise, the powers of the Prosecutor are confined to requests for cooperation⁴⁶. One exception, however, is contained in articles 54 para. 2 lit. b and 57 para. 3 lit. d. According to these provisions, the Pre-Trial Chamber may authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9, if the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation⁴⁷. Only in such circumstances does the Statute conceive of a situation where the Prosecutor may act directly within the territory of a State Party without having secured the cooperation of that State under Part 9 of the Statute.

With regard to the enforcement of its sentences, the Court equally relies upon the willingness of the States Parties to cooperate and to accept sentenced persons on their territory⁴⁸. It retains only the competence to supervise the enforcement of a sentence of imprisonment, which does not necessarily imply Court action on the territory of the State Party that accepted the sentenced person.

2. Exercise of functions and powers on the territory of any other State

In contrast to the exercise of functions and powers on the territory of a State Party, such an exercise of functions and powers on the territory of any other State always requires ‘special agreement’. All States Parties consent to the Statute and, since article 120 does not allow reservations to the Statute, they consent to all obligations following from it⁴⁹. The same does not apply to third States, since the Statute neither confers rights nor imposes duties on them (*pacta tertiis nec nocent nec prosunt*)⁵⁰. The Court may exercise its functions and

⁴¹ See article 3 and the commentary thereon by G.A. M. Strijards/R.O. Harmsen.

⁴² See *ibid.*

⁴³ See the commentary by O. Triffterer/T. Zimmermann, article 62.

⁴⁴ See article 86 and the commentary thereon by C. Kreß/K. Prost.

⁴⁵ See article 88 and the commentary thereon by C. Kreß/K. Prost.

⁴⁶ See articles 15 para. 2; 18 para. 5; 19 para. 8 (c); 19 para. 11 and 54 para. 3 (c) and (d).

⁴⁷ See the commentary of M. Bergsmo/O. Bekou on article 54 and the commentary of F. Guariglia/G. Hochmayr on article 57.

⁴⁸ See article 103 and the commentary thereon by G.A. M. Strijards/R.O. Harmsen.

⁴⁹ See the commentary of G. Hafner on article 120.

⁵⁰ See Shaw, *International Law* (1997) 127.

powers on the territory of such other States only by agreement, i. e. by consent. This principle governs the relations between the Court and third States in the field of international cooperation and judicial assistance under Part 9. Even those States that are not Parties to the Statute are encouraged to provide assistance under Part 9 on the basis of *ad hoc* arrangements, agreements or any other appropriate basis⁵¹. Since the prosecution, punishment and deterrence of the crimes covered by the Statute lie in the interest of all members of the international community, third States should agree to cooperate with the Court and provide assistance to the Court, and agree to the exercise of the Court's functions and powers on their territory.

In the cases where the Security Council referred situations in non-States Parties to the ICC, the Council actually urged 'all States to cooperate fully', whether or not party to the Rome Statute.⁵² Such cooperation can, depending on the circumstances, include allowing the exercise of functions and powers on the territory of a non-State party. Furthermore, the requirement of a 'special agreement' of the third State is in such cases altered with regard to the territorial State concerned. When the Security Council refers a situation to the Court, the binding Council resolution adopted under Chapter VII of the UN Charter replaces the agreement of the territorial State to the exercise of jurisdiction. The Court's competence is then founded on the binding Security Council decision, not on State consent. In the same way, the Security Council decisions referring situations to the ICC contained an obligation of the territorial State concerned to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.⁵³ Since cooperation includes allowing for the exercise of functions and powers of the Court on one's own territory, the binding Security Council decisions in these cases legally also replaced the consent requirement with regard to cooperation. In practice, however, whether this obligation to cooperate is being observed of course very much depends upon the will and therefore consent of the authorities concerned.

3. 'as provided in this Statute'

- 13 This passage was inserted into the original provision⁵⁴ after deliberation in the Committee of the Whole during the first week of the Rome Conference⁵⁵. The passage makes clear that the Court's **functions and powers are limited** to those provided for in the Statute. Restating the obvious⁵⁶, the provision is directed against an expansion of the Court's powers beyond the Statute. Such an expansion could possibly derive, for example, from the application of a broad implied-powers-doctrine, according to which an institution has to possess the powers which are necessarily implied in the definition of a certain goal to be reached⁵⁷. Furthermore, customary law or new treaty law can provide avenues for the expansion of the Court's powers and functions. Article 4 para. 2 of the Statute, however, circumscribes all such means of expansion of the Court's power, given its requirement that the Court's powers and functions be provided in the Statute, not elsewhere.
- 14 As to the doctrine of **implied powers**, one has to distinguish a narrower concept from the previously mentioned broader concept. According to the broad approach, the definition of a certain goal to be reached can be deemed sufficient to regard the means necessary to achieve

⁵¹ See the commentary of C. Kreß/K. Prost on *article 87 para. 5*.

⁵² Security Council Resolution 1593(2005), para. 2 and Security Council Resolution 1970(2011), para. 5.

⁵³ Security Council Resolution 1593(2005), para. 2 and Security Council Resolution 1970(2011), para. 5.

⁵⁴ The provision was originally contained in article 3 para. 3 of the Draft Statute, see Preparatory Committee Draft, p. 10.

⁵⁵ UN Doc. A/CONF.183/DC/R.1 and R. 2.

⁵⁶ International Organisations possess only the powers and functions attributed to them in the constituent document they are based upon. Or, as Schermers and Blokker, *International Institutional Law* (2011) 157, § 209 put it: 'They are not competent to determine their own competence'.

⁵⁷ Blokker, in: Wolfrum (ed.), *MPEPIL* (2008) mn 9.

that goal as implied⁵⁸. Since article 4 para. 2 establishes that the functions and powers have to be provided for in this Statute, the provision leaves no room for the application of any such broad construction that could encroach upon the sovereignty of the States Parties.

According to the narrow concept of implied powers, however, only those powers are implied which are necessary for the exercise of explicitly granted powers, in order to attain the objectives of an organisation⁵⁹. Here, the basis for such implied powers are the powers explicitly granted in the constituent document⁶⁰. Implied powers under this approach exist, when a power provided for in the Statute ‘can only be exercised on the basis that other powers exist’⁶¹. This restricted implied-powers-doctrine, therefore, does not conflict with the provision of article 4 para. 2.

With regard to the acquisition of new powers and functions through **subsequent treaties**, 15 the insertion of the passage ‘as provided in this Statute’ complements the provisions on amendments to the Statute and review of the Statute in articles 121 to 123. Under general international law, a subsequent treaty between the parties supersedes an earlier treaty⁶². Here, by contrast, the States Parties have agreed to a differentiated system of and procedure for amendments to the Statute, as laid down in articles 121 to 123⁶³. The attribution of new powers and functions would thus have to be effected through the relevant procedures of amendment, not subsequent treaty law.

The acquisition of additional powers through **customary law** can similarly be examined. 16 Under general international law, subsequent practice of the members of an international organisation can modify the constitution of the organisation if it reflects an agreement among all the States Parties⁶⁴. The States Parties to the Rome Statute, by contrast, have agreed upon certain procedures for the amendment of the Statute and have agreed that the Court may exercise its functions and powers ‘as provided in this Statute’. The insertion of this passage in article 4 para. 2 thus shows that the powers and functions of the ICC are not to be based upon subsequent practice, but upon the Statute itself.

⁵⁸ See, for instance, Hamilton, Madison and Jay, in: Rossiter (ed.), *The Federalist Papers* (1961) 285, where James Madison states that ‘[n]o axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised’.

⁵⁹ See the discussion in Blokker, in: Wolfrum (ed.), *MPEPIL* (OUP 2008-), mn 10 *et seq.*; see also the respective passage of the ICJ on the power to establish the United Nations Administrative Tribunal, *Effect of awards of compensation made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJRep. 47, 56/57 (1954).

⁶⁰ Schermers and Blokker, *International Institutional Law* (2011) 181, § 232.

⁶¹ *Ibid.*, 182 § 233.

⁶² See article 30 of the VCLT.

⁶³ See the commentary on them by R. S. Clark.

⁶⁴ *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1979), ICJRep. 16, 31 (1971). See also, for instance, Amerasinghe, *Principles of the Institutional Law of International Organisations* (2005) 463.

PART 2

JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Literature: Ambos, K., 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?', (2011) 24 *LeidenJIL* 655; *id.* and Timmermann, A., 'Terrorism and customary international law', in B. Saul, *Research Handbook On International Law and Terrorism* (E. Elgar 2014), 20; Arnold, R., *The ICC as a New Instrument for Repressing Terrorism* (Transnational Publishers 2004); *id.*, 'The Prosecution of Terrorism as a Crime Against Humanity', (2004) 64 *ZaöRV*, 979; Becker, A. *Der Tatbestand des Verbrechens gegen die Menschheit – Überlegungen zur Problematik eines völkerrechtlichen Strafrechts* (Duncker & Humblot 1996); Blokker, N., 'The Crime of Aggression and the United Nations Security Council', (2007) 20 *LeidenJIL* 867; Boeving, J., 'Aggression, International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute', (2005) 43 *ColJIL* 557; Boister, N., 'The exclusion of treaty crimes from the jurisdiction of the proposed International Criminal Court: law, pragmatism, politics', (1998) *JArmConFL* 27; Carpenter, A.C., 'The International Criminal Court and the Crime of Aggression', (1995) 64 *NordJIL* 2, 223; Cassese, A., 'On Some Critical Aspects of the Crime of Aggression', (2007) 20 *LeidenJIL* 841; Clark, R.S., 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', (2002) 15 *LeidenJIL* 4, 359; Donat-Cattin, D., 'Crimes against Humanity', in: F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998) 49; Ferencz, B.B., 'Enabling the International Criminal Court to Punish Aggression', (2007) 6 *WashUGLSLR* 551; Fernández de Gurmendi, S., 'The working group on aggression at the Preparatory Commission for the International Criminal Court', (2002) 25 *FordhamILJ*. 3, 589; Fife, R.E., 'Criminalizing Individuals for Acts of Aggression Committed by States', in: M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjørn Eide* (Marinus Nijhoff 2003) 54; Gillett, M. and Schuster, M., 'Fast Track Justice: The Special Tribunal for Lebanon Defines Terrorism', (2011) 9 *JICJ* 989; Hall, C.K., 'The Jurisdiction of the Permanent International Criminal Court over Violations of Humanitarian Law', in: F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998) 19; Heller, K.J., 'Retreat from Nuremberg: The leadership requirement in the Crime of Aggression', (2007) 18 *EJIL* 3, 477; Higgins, R. (ed.), *Terrorism and international law* (Routledge 1997); Hogan-Doran, J. and van Ginkel, J.B., 'Aggression as a crime under international law and the prosecution of individuals by the proposed International Criminal Court', (1996) 18 *NethILR* 3, 321; Jodoin, S., 'Terrorism as a War Crime', (2007) 7 *ICLRev* 7; Kaikobad, K., 'Crimes against International Peace and Security, Acts of Terrorism and Other Serious Crimes: A Theory on Distinction and Overlap', (2007) 7 *ICLRev* 187; Kinkel, K., 'Für einen funktionsfähigen Weltstrafgerichtshof', (1997) *NJW* 2860; Krefß, C., 'Strafrecht und Angriffskrieg im Lichte "des Falles Irak"', (2003) 111 *ZStW* 294; *id.*, 'The Iraqi Special Tribunal and the crime of aggression', (2004) 2 *JICJ* 347; *id.*, 'The German Chief Federal Prosecutor's Decision not to Investigate the Alleged Crime of Preparing Aggression against Iraq', (2004) 2 *JICJ* 245; *id.*, 'The Crime of Aggression before the First Review of the ICC Statute', (2007) 20 *LeidenJIL* 851; Kirsch, S. and Oehmichen, A., 'Die Erfindung von "Terrorismus" als Völkerrechtsverbrechen durch den Sonderstrafgerichtshof für den Libanon' (2011) 10 *ZIS* 800; *id.* and Oehmichen, A., 'Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon' (2011) 1 *DurhamLRev* 32; Kurth, M., *Das Verhältnis des Internationalen Strafgerichtshofes zum UN-Sicherheitsrat* (Nomos 2006); McDougall, C.,

'When Law and Reality Clash – The Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression', (2007) 7 *ICLRev* 277; Mavany, M., 'Terrorismus als Verbrechen gegen die Menschlichkeit – Analyse und Konsequenzen der Zuordnung zum Völkerstrafrecht', (2007) 2 *ZIS* 324; Müller-Schieke, I.K., 'Defining the crime of aggression under the statute of the International Criminal Court', (2001) 14 *LeidenJIL* 2, 409; Nsereko, D., 'Aggression und the Rome Statute of the International Criminal Court', (2002) 71 *NordJIL* 4, 497; Oeter, S., 'Terrorismus – ein völkerrechtliches Verbrechen? Zur Frage der Unterstellung terroristischer Akte unter die internationale Strafgerichtsbarkeit', (2001) 1 *Friedenswarte* 11; Politi, M. and Nesi, G., (eds.), *The International Criminal Court and the Crime of Aggression* (Ashgate 2004); Randelzhofer, A., 'Article 51', in: B. Simma *et al.* (eds.), *The Charter of the United Nations. A Commentary* (OUP 3rd edition 2012) 788; Röling, V. and Rüter, C.F. (eds.), *The Tokyo Judgment – The Military Tribunal for the Far East*, Vol. III (APA UP 1977); Saul, B., *Defining Terrorism in International Law* (OUP 2006); *id.*, 'Legislation from A Radical Hague: The UN Special Tribunal for Lebanon Invents An International Crime of Transnational Terrorism', (2011) 24 *LeidenJIL* 677; *id.*, *Research Handbook on International Law and Terrorism* (Edward Elgar 2014); Schuster, M., 'The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword', (2003) 14 *CLF* 1; Solera, O., *Defining the Crime of Aggression* (Cameron May 2007); Stein, M.S., 'The Security Council, the International Criminal Court, and the Crime of Aggression. How Exclusive is the Security Council's Power to Determine Aggression?', (2005) 16 *Indl&CompLRev* 1; Stein, T., 'Aggression als Verbrechen im Statut des Internationalen Strafgerichtshofes – 'A Bridge Too Far'?', in: H. Müller Dietz *et al.* (eds.), *Festschrift für Heike Jung* (Nomos 2007) 935; Strapatsas, N., 'Is article 25(3) of the ICC statute compatible with the 'crime of aggression'?', (2007) 19 *FloridaJIL* 155; *id.*, 'Rethinking General Assembly Resolution 3314 (1974) as a Basis for the Definition of Aggression', in: O. Olusanya (ed.), *Rethinking international criminal law – the substantive part* (Europa Law Publishing 2007) 156; Tomuschat, C., 'Sanktionen durch internationale Strafgerichtshöfe' in: *Verhandlungen des 60. Deutschen Juristentages*, ii/1 (C. H. Beck 1994), Q 53; Villarino Villa, C., 'The Crime of Aggression before the House of Lords: Chronicle of a Death Foretold', (2006) 4 *JICJ* 866; Westdickenberg, G. and Fixson, O., 'Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes', in: J.A. Frowein *et al.* (eds.), *Verhandeln für den Frieden – Liber Amicorum Tono Eitel* (Springer 2003) 483; Williamson, M., *Terrorism, War, and International Law* (Ashgate 2009); Zimmermann, A., 'The Creation of a Permanent International Criminal Court', (1998) 2 *MPYbUNL* 169; *id.*, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', (2012) 10 *JICJ* 209.

For further literature as to the Kampala Review Conference and its outcome see the literature on Arts. 8bis, 15bis and 15ter.

Content

- A. Introduction: Crimes not included in the Statute of the ICC 1
 - I. Treaty crimes 1
 - II. Terrorism 4
 - III. Drug trafficking 10
 - IV. Mercenarism 13
 - V. Other issues not included 14
- B. Analysis and interpretation of elements 15
 - I. Paragraph 1 15
 - 1. Chapeau 15
 - a) Jurisdiction over the 'most serious crimes of concern to the international community as a whole' 15
 - b) Jurisdiction to be exercised 'in accordance with the Statute' 18
 - 2. Specific crimes 20
 - a) Genocide 20
 - b) Crimes against humanity 21
 - c) War crimes 24
 - d) The crime of aggression 27
 - II. Paragraph 2: Exercise of jurisdiction over the crime of aggression 30
 - 1. The debate leading to the non-inclusion of the crime of aggression up to the Rome Conference 30
 - a) Draft Statute submitted by the International Law Commission 30
 - b) Discussions during the Preparatory Commission 32
 - aa) Definition of the crime of aggression 33
 - bb) Role of the Security Council 35
 - c) Discussions during the Rome Conference 36
 - d) Post-Rome developments 40
 - aa) Discussions in the framework of the Preparatory Commission for the International Criminal Court 40
 - bb) Discussions in the framework of the Assembly of States Parties ... 45

2. Developments during the Kampala Review Conference.....	52
3. Article 5 para. 2: Preconditions for the exercise of the Court’s jurisdiction with respect to the crime of aggression.....	53
4. Outlook.....	67

A. Introduction: Crimes not included in the Statute of the ICC

I. Treaty crimes¹

In the early phases of the discussions on the creation of an international court, treaty-based crimes formed the focal point of the deliberations². During the work of the Preparatory Committee on the Establishment of an International Criminal Court such an approach found, however, less and less support³. Instead, a large majority of States were eager to limit the jurisdiction of the ICC to the core crimes now mentioned in article 5 para. 1 (a)–(d), *i. e.*, genocide, crimes against humanity, war crimes and the crime of aggression.

The main reason was that not all of the conventions providing a possible basis for such ‘treaty crimes’ have found sufficient international acceptance and thus could not be considered as reflecting customary international law.⁴ Besides, if the notion of treaty-based crimes had been included within the subject-matter jurisdiction of the ICC, it would have necessarily followed that only crimes committed on the territory of the respective contracting parties of a given convention could have been made punishable. Furthermore, it would also have been necessary for such States to be among the contracting Parties to the Statute of the ICC. Such an approach would have thus necessarily resulted in a weakening of the concept of automatic jurisdiction of the ICC as now enshrined in article 12 para. 1 of the Rome Statute.

It should be noted, however, that certain of these treaty crimes, although not formally included as such in the Statute, have still found their way into the Statute, albeit in a modified form, under the heading of either a crime against humanity or a war crime. This is *e. g.* the case for the crime of apartheid, now listed as a crime against humanity⁵, or for intentional attacks against UN personnel or other personnel or material involved in an assistance or peacekeeping mission, now included in the list of war crimes⁶.

II. Terrorism⁷

Notwithstanding strong attempts by a number of States prior to and during the Rome Conference, specifically Algeria, India, Sri Lanka and Turkey, acts of terrorism⁸ were neither included in the Statute. In that regard, most States considered it to be particularly problematic that, the adoption of the United Nations Convention on the Suppression of Terrorist

¹ See generally Ambos, *Treatise ICL II* (2014), 222 *et seq.*

² As to the list of possible treaty-based crimes which were discussed during the work of the 3rd Preparatory Committee see PrepCom III Decisions (11–21 February 1997), UN Doc. A/AC.249/1997/L.5, 12 March 1997, pp. 16–17. See also article 20(e) of the 1994 ILC Draft Statute, 1994 *YbILC* Vol. II, Part 2, 38, as well as its Annex, *ibid.*, 70 *et seq.*

³ See PrepCom I (25 March – 12 April 1996), 25 *et seq.*

⁴ For criteria to delimitate treaty crimes from international crimes *stricto sensu* see, Ambos, *Treatise ICL II* (2014), pp. 226 *et seq.*

⁵ For details see Hall and van den Herik, *article 7* para. 1 (j), mn 144 *et seq.*

⁶ For details see Cottier and Baumgartner, *article 8* para. 2 (b) (iii), mn 217 *et seq.*

⁷ See generally as to the notion of terrorism in international law Arnold, (2004) 64 *ZaöRV* 979, 980; Saul, *Defining Terrorism in International Law* (2006); Williamson, *Terrorism, War, and International Law* (2009), 37 *et seq.*; see also the various contributions in Ben Saul, *Research Handbook On International Law and Terrorism* (2014); and specifically as to the question of individual criminal responsibility for acts of terrorism Arnold in Saul, *Research Handbook On International Law and Terrorism* (2014), 282 *et seq.*

⁸ For a general discussion of the questions involved in the fight against terrorism and its relationship with issues of international law see the different articles in Higgins (ed.), *Terrorism and international law* (1997).

Bombings notwithstanding⁹, no generally accepted definition of the ‘crime of terrorism’ did exist at the time. They considered that the possible inclusion of this crime might have politicised the Court to a very high degree¹⁰. A proposal to also include acts of terrorism as such in the list of crimes against humanity¹¹ providing for the individual criminal responsibility of such acts under international law would have also represented a novelty in international law, and would have also run counter to the generally accepted approach during the work of the Rome Conference, *i. e.* an attempt to solely codify pre-existing rules of customary international law.

- 5 Even as of 2014, the international community has, despite the practice by the Security Council after 2001 and further attempts to codify the matter, not been able to agree on a generally acceptable definition of what should be perceived as acts of ‘terrorism’¹², and even less so which acts of ‘terrorism’ should entail individual criminal responsibility. It is for that reason that the longstanding project of a comprehensive international convention banning terrorism has so far not seen light. This is true notwithstanding the fact that the Appeals Chamber of the Special Tribunal for Lebanon (STL) has argued in its decision of 16 February 2011 that a customary rule of international law on the crime of terrorism does indeed exist.¹³ It defines terrorism as the perpetration of a criminal act or threatening such an act with the intent to spread fear among the population or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it, when the act involves a transnational element.¹⁴ The STL bases its decision on an alleged ‘settled practice concerning the punishment of acts of terrorism’. It further claims that ‘this practice is evidence of a belief of states that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*)’.¹⁵ Still, it must be doubted that the STL’s definition of terrorism will establish itself as the decision has not only been met with strong criticism¹⁶, but has not found support in either (international) jurisprudence nor in State practice.
- 6 Notwithstanding the fact that the crime of ‘terrorism’ had not been included in the Rome Statute as such, acts of terrorism could come within the jurisdiction of the Court, provided they fulfil the regular criteria of either genocide (and are accordingly committed with the necessary special intent) or those of specific crimes against humanity (and are accordingly committed as part of a widespread or systematic attack against a given civilian population), or if finally such terrorist acts do constitute at the very same time war crimes.
- 7 Resolution E, adopted by the Rome Conference¹⁷ as part of its Final Act, recommended to the Review Conference, which was to be convened in accordance with article 123 of the Statute¹⁸, that the matter be reconsidered, with the view of arriving at a generally acceptable definition in order for it to be eventually included in the list of crimes within the jurisdiction of the Court.

⁹ The convention was adopted by the United Nations General Assembly on 15 December 1997; for the text see (1998) 37 *ILM* 251 *et seq.*

¹⁰ See in that regard already the critique uttered in the Preparatory Committee, PrepCom I (25 March – 12 April 1996), p. 26.

¹¹ As to the text of such a proposal submitted by India, Sri Lanka and Turkey during the Rome Conference see UN Doc. A/CONF.183/C.1/L.27/Rev.1, 6 July 1998.

¹² Di Filippo in Saul, *Research Handbook on International Law and Terrorism* (2014), 6 *et seq.* For details on the question how far the consensus regarding the definition of terrorism goes, see Ambos and Timmermann in Saul, *Research Handbook on International Law and Terrorism* (2014), 36 *et seq.*

¹³ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, 16 February 2011 [85], [102] (STL Decision).

¹⁴ STL Decision, n. 13, [85].

¹⁵ STL Decision, n. 13, [102].

¹⁶ Ambos (2011) 24 *LeidenJIL* 655; *id.* and Timmermann in Saul, *Research Handbook On International Law and Terrorism* (2014), 36 *et seq.*; Gillett and Schuster (2011) 9 *JICJ* 989; Kirsch and Oehmichen (2011) 10 *ZIS* 800; *id.* and *id.* (2011) 1 *DurhamLRev* 32; Saul (2011) 24 *LeidenJIL* 677.

¹⁷ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court UN Doc. A/CONF.183/10, 17 July 1998.

¹⁸ See Clark, *article 123*, mn 1 *et seq.*

Yet, unlike the crime of aggression, which was discussed in detail by a special working group of the Assembly of States Parties of the Rome Statute leading to the adoption of articles 8*bis*, 15*bis* and 15*ter*, not much attention has so far been paid to the issue of including acts of terrorism in the Rome Statute as part of a possible amendment of the treaty. It is worth noting, however, that the Netherlands had prior to the Kampala Review Conference (informally) put forward an amendment proposal under which, following the model of the crime of aggression, the crime of terrorism would have been added to the list of crimes subject to the Court's jurisdiction listed in article 5 para. 1 of the Statute while the exercise, by the Court, of its jurisdiction with regard to the crime of terrorism would have been stalled until a definition would have been adopted and would have entered into force¹⁹. Yet, this proposal never made it through to the Review Conference once it became obvious that this amendment proposal did not gather enough support so as to formally present it to the Kampala Review Conference. At a meeting of the Working Group on Amendments of the Assembly of States parties of the Rome Statute of 5 June 2013, the Netherlands formally announced that it was no longer pursuing its proposal to amend article 5 of the Rome Statute to expand jurisdiction of the Court to the crime of terrorism²⁰.

For all these reasons, it seems that for the foreseeable future the crime of terrorism will continue not to be included into the list of crimes coming within the jurisdiction of the Court.

III. Drug trafficking

It was Trinidad and Tobago which, in 1989, renewed the process of pushing for the creation of an international criminal court in order to punish the large-scale commission of drug-related crimes²¹. It is thus not surprising that it was this country and other Caribbean States which, during the Rome Conference, formally proposed to include large-scale illicit drug trafficking in the Statute²². However, most delegations then took the position that such acts, notwithstanding their criminal nature under domestic law, were not of the same nature as those now listed in article 5, and that, besides, they were of such a quantity as to eventually flood the Court with proceedings. There was also an almost general feeling that the ICC would not possess the necessary resources to conduct the lengthy and complex investigations which were more effectively undertaken by the respective national authorities co-operating with each other under existing bi- or multilateral arrangements²³.

As in the case of terrorism²⁴, Resolution E, adopted by the Rome Conference²⁵ as part of its Final Act, also recommended that the Review Conference reconsiders illicit drug trafficking with the view of eventually including it in the list of crimes within the jurisdiction of the Court²⁶.

¹⁹ UN Doc. C.N.723.2009.TREATIES-5, 29 October 2009. The proposed draft *article 5*, para. 3 reads: 'The Court shall exercise jurisdiction over the crime of terrorism once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.'

²⁰ See ICC-ASP/12/44, p. 1, 24 October 2013.

²¹ For further details see Tomuschat, 'Sanktionen durch internationale Strafgerichtshöfe' in: *Verhandlungen des 60. Deutschen Juristentages* (1994), Q 53, 57 *et seq.*

²² United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court UN Doc. A/CONF.183/C.1/L.48, 3 July 1998.

²³ PrepCom I (25 March – 12 April 1996), p. 27.

²⁴ See mn 3.

²⁵ See note 17.

²⁶ A proposal submitted by Barbados and other Caribbean States, India, Sri Lanka and Turkey to include both the crime of terrorism and drug crimes into article 5 subject to a provision that the definition and elements of these crimes shall be elaborated by the Preparatory Commission established by virtue of Resolution F adopted by the Rome Conference (see UN Doc. A/CONF.183/C.1/L.71, 14 July 1998), which would have thus gone further than the current wording of article 5 para. 2 of the Statute, did not gather sufficient support.

- 12 Yet, and once again similar to the crime of terrorism, no significant attempts were made to move the issue of a possible inclusion of drug crimes into the Rome Statute forward during the preparation of the Kampala Review Conference. The only attempt at such an inclusion was an amendment proposal made by Trinidad and Tobago supported by Belize²⁷. However, it was not even discussed during the Kampala Review Conference.

IV. Mercenarism

- 13 The Comores and Madagascar had proposed to include the crime of mercenarism in the ICC Statute²⁸. The proposal contained a definition which was identical to the one contained in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the General Assembly in 1989²⁹. This proposal, which was not seriously discussed during the Rome Conference, was not included in the Statute and is, unlike the proposals relating to terrorism and drug-trafficking, not even mentioned in the Final Act of the Conference.

V. Other issues not included

- 14 Other amendment proposals suffered the same fate as those of the Netherlands and Trinidad and Tobago³⁰. These remaining proposals concerned the inclusion of certain weapons in the Rome Statute, the use of which was to constitute a war crime. Firstly, Mexico proposed to include the use or threat of use of nuclear weapons in the definition of war crimes³¹. However, this proposal was, just like the crime of terrorism and the crime of drug trafficking, not even discussed at the Review Conference³². A further amendment proposal put forward *inter alia* by Belgium was only partly brought to the Review Conference. It dealt with the use of certain prohibited weapons in non-international armed conflict³³. In that regard the proposal to include the use of chemical weapons as such, biological weapons, anti-personnel land mines, weapons containing non-detectable fragments, blinding laser weapons and cluster munitions into the list of war crimes did not make it to the Review Conference³⁴. Instead the Assembly of

²⁷ UN Doc. C.N.737.2009.TREATIES-9, 29 October 2009. The draft text provided:

'For the purposes of the present Statute, crimes involving the illicit trafficking in narcotic drugs and psychotropic substances mean any of the following acts, but only when they pose a threat to the peace, order and security of a State or region:

- (a) Undertaking, organizing, sponsoring, ordering, facilitating or financing the production, manufacture, extraction, preparation, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Single Convention on Narcotic Drugs; the 1961 Single Convention on Narcotic Drugs, as amended; the 1971 Convention on Psychotropic Substances, or the 1988 United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances when committed on a large scale and involving acts of a transboundary character;
- (b) Murder, kidnapping or any other form of attack upon the person or liberty of civilians or security personnel in an attempt to further any of the acts referred to in subparagraph (a); and
- (c) Violent attacks upon the official or private premises of persons or institutions with the intention of creating fear or insecurity within a State or States or disrupting their economic, social, political or security structures when committed in connection with any of the acts referred to in subparagraph (a).'

²⁸ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court UN Doc. A/CONF.183/C.1/L.46, 3 July 1998.

²⁹ (1990) 29 *ILM* 91 *et seq.* The Convention, which needs 22 ratifications for its entry into force has so far not yet entered into force since so far only 13 States have become contracting parties. See also article 47 of the Add. Prot. I to the four Geneva Conventions of 1949.

³⁰ See mn 4 and 6.

³¹ UN Doc. C.N.725.2009.TREATIES-6, 29 October 2009.

³² As to the discussion on the inclusion of nuclear weapons in the list of prohibited weapons see also Cottier, *article 8*, mn 569 *et seq.*

³³ See Geiß, *article 8*, mn 828; see also most recently on that question Zimmermann and Sener, *AJIL* 436 *et seq.*

³⁴ The amendment proposals discussed in mn 4, 6 and 8 and others can be found in the Report of the Bureau on the Review Conference, Doc. ICC-ASP/8/43/Add.1, 10 November 2009.

States Parties decided to create a Working Group on Amendments which would further consider the proposed amendments that did not make it to the Kampala Review Conference as from its ninth session in 2010³⁵ and which has since then held so far several sessions *inter alia* consolidating the proposals currently still formally under consideration.³⁶

B. Analysis and interpretation of elements

I. Paragraph 1

1. Chapeau

a) **Jurisdiction over the ‘most serious crimes of concern to the international community as a whole’.** This formula, referring to the most serious crimes of concern to the international community as a whole, repeats a phrase already used in the fourth paragraph of the Preamble³⁷. Unlike the Preamble, article 5 adds, however, an operative part by stating that the Court’s jurisdiction shall be limited to such crimes. This reaffirms, as if it were necessary, that the limitation contained in article 5 cannot be overridden by article 21 para. 1 of the Statute, which only refers to the applicable law, but does *not* circumscribe the subject-matter jurisdiction of the Court.

The fact that article 5 para. 1 then lists genocide, crimes against humanity, war crimes and the crime of aggression confirms that these crimes indeed are of such concern.

This formula may also serve as a guiding principle for the work of the Court as a whole. Thus, the threshold clause contained in article 8 para. 1 of the Statute must be interpreted in line with article 5 in the sense that individual war crimes which are not committed as part of a plan or policy shall only be prosecuted if they are of such a gravity as to indeed be of concern to the international community as a whole. More generally this formula, although somewhat vague, can serve as a useful, legally binding, guiding tool for the Prosecutor when considering whether there is a reasonable basis to proceed with an investigation³⁸, or whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed³⁹.

b) **Jurisdiction to be exercised ‘in accordance with the Statute’.** The fact that the Court shall not have unlimited jurisdiction over any act of genocide, crime against humanity or war crime needed no reaffirmation. Thus, the phrase that the jurisdiction of the Court is supposed to be exercised ‘in accordance with the Statute’, a formula which was already contained in the Draft Statute submitted by the ILC, is of a purely declaratory nature. In particular, it reaffirms the limitations as to the jurisdiction of the Court enshrined in articles 11⁴⁰, 12⁴¹, as well as in the principle of complementarity contained in article 17⁴², the concept of *ne bis in idem* (article 20)⁴³ and other limitations contained throughout the Statute.

As far as the crime of aggression was concerned, article 5 para. 2 contained further requirements before the Court was to be in a position to eventually exercise its jurisdiction with regard to this crime⁴⁴. However paragraph 2 will be deleted once the amendment

³⁵ Press Release, Assembly of States Parties to the Rome Statute of the International Criminal Court [ASP], Assembly of States Parties Concludes its Eighth Session, ICC-ASP-20091126-PR481, 27 November 2009.

³⁶ As to the latest work of the working group see ICC-ASP/12/44, 24 October 2013.

³⁷ See Bergsmo, Triffterer and Ambos, *Preamble*, mn 12 *et seq.* and Triffterer, *Preliminary Remarks* in: Triffterer (ed.), *Commentary on the Rome Statute* (2nd edition 2008), mn 10.

³⁸ See *i.a.* article 15 para. 3 of the Statute.

³⁹ See article 53 of the Statute.

⁴⁰ See Rastan and Badar, *article 11, passim*.

⁴¹ See Schabas and Pecorella, *article 12, passim*.

⁴² See Schabas and El Zeidy, *article 17, passim*.

⁴³ See Tallgren and Reisinger-Coracini, *article 20, passim*.

⁴⁴ See mn 27 *et seq.*

adopted by the Kampala Review Conference has entered into force in accordance with the Resolution RC/Res.6⁴⁵. Thereafter the exercise of jurisdiction for the crime of aggression will then be regulated by articles 15*bis* and 15*ter* of the Statute as amended.

2. Specific crimes

- 20 a) **Genocide.** Genocide proved to be the least problematic crime to be included in article 5 of the Statute. While the definition of the crime of genocide as contained in article 6 is identical to article II of the Genocide Convention⁴⁶, article III of the Convention had to be harmonised with the section on general principles of law, now contained in articles 22–33 of the Statute. Accordingly, the content of article III of the Genocide Convention and in particular the prohibition of public incitement of genocide is found in article 25 of the Statute dealing with individual criminal responsibility, and in particular its paragraph 3 (e)⁴⁷.
- 21 b) **Crimes against humanity**⁴⁸ Similar to the crime of genocide, it was uncontroversial that crimes against humanity, too, should be included in the Statute. Unlike the case of genocide, the exact extent of the list of such crimes and their definition proved, however, to be rather difficult⁴⁹.
- 22 Following the examples of article 6 (c) of the Statute of the International Military Tribunal at Nuremberg⁵⁰, article 5 (c) of the Tokyo Charter⁵¹, article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), article 7 of the Statute of the ICC now contains a comprehensive and generally accepted list of crimes against humanity, which since then has largely influenced, *inter alia*, the drafting of UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (section 5), the Statute of the Iraqi Special Tribunal (article 2), the Statute of the Special Court for Sierra Leone (article 2), as well as the Agreement providing for the Creation of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (which in its article 9 explicitly refers to the definition of crimes against humanity as contained in article 7 of the Rome Statute).
- 23 Article 5 of the Statute also reaffirms that such crimes, given the fact that they are committed as part of a widespread or systematic attack against a given civilian population⁵², constitute a legitimate concern for the international community as a whole.
- 24 c) **War crimes.** The term ‘war crimes’ contained in both article 5 para. 1, as well as in article 8 of the Statute, is derived from article 85 para. 5 of the 1977 Add. Prot. I to the Geneva Conventions. For the purposes of the Statute, it is however not limited to either grave breaches of the four 1949 Geneva Conventions or to those of the 1977 Add. Prot. I. Instead, it also extends to other serious violations of the laws and customs of war applicable in international armed conflict, violations of common article 3 of the four Geneva Conventions and serious violations of the laws and customs of war applicable in internal armed conflicts.

⁴⁵ RC/Res.6, annex I.

⁴⁶ For details see Schabas, *article 6, passim*.

⁴⁷ For details see Ambos, *article 25*, mn 35 *et seq.*

⁴⁸ As to the notion of crimes against humanity see the comprehensive work by Bassiouni, *Crimes against Humanity in International Criminal Law* (1992) 236 *et seq.*, as well as Becker, *Der Tatbestand des Verbrechens gegen die Menschheit – Überlegungen zur Problematik eines völkerrechtlichen Strafrechts* (1996) 176 *et seq.*; Ambos, *Treatise ICL II* (2014) 46 *et seq.*

⁴⁹ For details see Hall and Ambos, *article 7 para. 1, passim*.

⁵⁰ As to the historical development of that term see the Decision of the Trial Chamber of the ICTY in the case *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 618.

⁵¹ Text to be found *i.a.* at Röling and Rüter (eds.), *The Tokyo Judgment – The Military Tribunal for the Far East* (APA UP 1977) Annex A-5.

⁵² As to the interpretation of the chapeau of article 7 para. 1 see Hall and Ambos, *article 7*, mn 3 *et seq.* For the legitimacy of concern for the international community as a whole see Triffterer, *Preliminary Remarks* (2008), mn 20 *et seq.*

The Statute thereby contains a comprehensive stocktaking of the current status of customary international law in the field and indicates where international law might have evolved since the two Add. Prot. were adopted in 1977.

The inclusion of war crimes in article 5, read in conjunction with article 8 para. 1, further demonstrates that even individual war crimes are, under certain given circumstances, also of concern for the international community as a whole and thus subject to the jurisdiction of the Court. 25

Prior to the first Review Conference, Belgium submitted an amendment proposal regarding, amongst others, the modification of article 8⁵³. This proposal, which was not in its entirety forwarded to the Kampala Review Conference, proposed to modify article 8 in order to amend para. 2 e) thereof in order to include three classes of weapons into the list of prohibited weapons in non-international armed conflict, the use of which in international armed conflict had already been criminalised by the Rome Statute. The proposal was adopted at the Review Conference, therefore adding poison and poisoned weapons, gases, and certain kinds of long-prohibited bullets to the prohibited weapons in non-international armed conflict⁵⁴. 26

d) The crime of aggression. Article 5 para. 1 lit. d of the Statute stipulates that the Court shall, apart from genocide, crimes against humanity and war crimes, also have jurisdiction with respect to the crime of aggression. At the same time, as of now the ICC shall not yet exercise its jurisdiction in regard of that crime unless agreement were to be reached to amend the Statute and entered into force. Such an amendment had to be adopted subject to the regular amendment procedure provided for in articles 121 and 123⁵⁵ and was supposed to provide for both, a definition of that crime, but also set the conditions under which the Court shall exercise jurisdiction with respect to this crime. 27

The amendment was adopted during the Kampala Review Conference providing for the addition of articles 8*bis*, 15*bis* and 15*ter* into the Rome Statute⁵⁶. 28

Pending the entry into force of the amendment, the crime of aggression is, its status as a crime under customary international law notwithstanding⁵⁷, *de facto* for the time being not (yet) included in the Statute. One question that might arise is whether the Security Council, given its overriding Chapter VII powers and the supremacy of the Charter of the United Nations pursuant to its article 103, and notwithstanding article 5 para. 2 of the ICC Statute, might explicitly grant the Court, at a given moment and with regard to a specific situation, the competence to exercise its jurisdiction with respect to the crime of aggression notwithstanding the fact that the amendment might not yet have entered into force. Yet, given that article 15*ter*, as adopted, specifically regulates the exercise, by the Court, of its Security Council-based jurisdiction with regard to the crime of aggression, said question is to be answered in the negative. 29

II. Paragraph 2: Exercise of jurisdiction over the crime of aggression

1. The debate leading to the non-inclusion of the crime of aggression up to the Rome Conference

a) Draft Statute submitted by the International Law Commission. In its Draft Statute, the ILC left the question of the definition of the crime of aggression open, since – while including 30

⁵³ UN Doc. C.N.733.2009.TREATIES-8, 29 October 2009.

⁵⁴ RC/Res. 5, 10 June 2010.

⁵⁵ See the comments by Clark, *article 121 and article 123*, as well as by Zimmermann (2012) 10 *JICJ* 209 *et seq.*

⁵⁶ For details see Zimmermann and Freiburg, *articles 8bis, 15bis and 15ter, passim.*

⁵⁷ See for such proposition the judgment of the British House of Lords of 29 March 2006 in *R. v. Jones et al.*, where the House of Lords held that aggression is indeed criminalised under international customary law, (2006) 45 *ILM* 992.

the crime of aggression – it had made no attempt towards a workable definition of this crime⁵⁸.

31 At the same time, the ILC Draft Statute included a provision under which any proceeding dealing with an act of aggression or connected therewith could not be initiated unless the Security Council had previously made a determination that the State in question had indeed committed such an act of aggression⁵⁹.

32 **b) Discussions during the Preparatory Commission.** The discussions concerning both the definition of the crime of aggression, as well as the role for the Security Council, demonstrated the deep divisions that existed among delegations and the States they represented.

33 **aa) Definition of the crime of aggression.** As to the definition of the crime itself, there were two main schools of thought:

One group of countries, including a large number of both Arab, but also African States, favoured an approach which was largely based on the definition contained in A/RES/3314 (XXIX) of 14 December 1974, by which the General Assembly had undertaken an attempt to define aggression. This seemed to be problematic, however, since it is rather doubtful that all of the elements contained in Resolution 3314 can be considered as forming part of customary international law⁶⁰. Besides, Resolution 3314 itself was only drafted in order to serve as a guiding instrument for the Security Council. But even assuming *arguendo* that this provision reflects customary law, it would still be doubtful whether all acts contained therein already *de lege lata* involve individual criminal responsibility. This is confirmed by the fact that the first principle of the Friendly Relations Declaration of the General Assembly, as well as article 5 para. 2 of Resolution 3314, provide that solely the waging of a ‘war of aggression’, but not every act which is supposed to have been outlawed by the text of the resolution, constitutes a crime which entails responsibility in accordance with international law.

34 On the other hand, a majority of countries involved in the negotiation process, and in particular Germany, which was very active in trying to move the discussion forward⁶¹, attempted to present a definition of the crime of aggression which would be both precise and narrowly tailored. The objective was to limit individual criminal responsibility to clear-cut cases of the illegal and massive use of armed force leading to the invasion of foreign territory, relying itself on the few existing precedents and specifically on article 6 (a) of the Statute of the Nuremberg Military Tribunal, which stipulates that the ‘planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing’ constitutes a crime against peace⁶².

35 **bb) Role of the Security Council.** A similar split surfaced as to the role and function of the Security Council with regard to the prosecution of future crimes of aggression. On the one hand, the United States proposed that the definition of the crime of aggression should include a formula according to which the illegality of the act under consideration would be determined by the Security Council⁶³. On the other hand, those countries favouring a broad definition of the crime of aggression also envisaged no role whatsoever for the Security Council. As a compromise, the proposal of the ILC, referred to above⁶⁴, seems to have been

⁵⁸ (1995) *YbILC* Vol. II, Part 2, 38–39.

⁵⁹ Article 23 para. 2 of the ILC Draft Statute 1994.

⁶⁰ But see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits). *ICJ Rep.* 1986, 14, 103, para. 195, where the Court stated that article 3 (g) of Resolution 3314 ‘may be taken to reflect customary international law’.

⁶¹ See the statement made by the then German Minister of Foreign Affairs Kinkel (1997) *NJW* 2860 *et seq.*

⁶² As to the German approach see in particular UN Doc. A/AC.249/1997/WG.1/DP.20, 11 December 1997, A/AC.249/1998/DP.12, 2 April 1998 and finally A/AC.249/1998/CRP.8, 2 April 1998.

⁶³ See the proposals contained in Preparatory Committee Decisions 14 August 1997, p. 7, <<http://www.legal-tools.org/en/go-to-database/record/3413a9>> accessed September 2015.

⁶⁴ See mn 17.

favoured by a large number of States. But like the definition of the crime of aggression, this question was not resolved during the work of the Preparatory Commission.

c) **Discussions during the Rome Conference.** At the Rome Conference, the same two issues re-emerged during the debate on the inclusion of the crime of aggression. Again, no compromise could be reached on either question: 36

First, no generally acceptable definition of the crime of aggression could be agreed upon. 37 In particular, States from the Arab and African regions of the world continued to insist on a rather wide definition largely based on General Assembly Resolution 3314, and indeed even going beyond that definition⁶⁵. On the other hand, Germany continued its efforts to come up with a proposal which could be both in line with relevant precedents and serve as a basis for a compromise⁶⁶. During the Rome Conference, no compromise could be reached.

Second, the role of the Security Council, although not extensively dealt with during the 38 Conference due to both, a lack of time and a missing solution for the definition of the crime of aggression, also remained controversial. A proposal from Cameroon provided that, once a crime of aggression had been submitted to the Court, it would be under an obligation to refer the matter to the Security Council for a declaration as to the existence or non-existence of an aggression⁶⁷. In case of a failure by the Security Council to make such a determination within a reasonable time, the Court would be entitled to commence an investigation. This proposal was not discussed in detail.

Due to this lack of a generally accepted formula in both regards, the bureau proposal 39 submitted to the Diplomatic Conference on July 10, 1998⁶⁸ did not contain any reference to the crime of aggression, but instead simply stipulated that this crime might be referred to a Review Conference. A proposal submitted by the members of the Non-Aligned Movement⁶⁹ then provided for the inclusion of the crime of aggression but that – somewhat similar to the current paragraph 2 of article 5 – the definition of the crime should be elaborated by the Preparatory Commission and later adopted by the Assembly of States Parties. It was against this background that the bureau of the Conference included the compromise text now contained in article 5, and in particular its paragraph 2, in the final text of the Statute of the ICC.

d) **Post-Rome developments.** aa) **Discussions in the framework of the Preparatory 40 Commission for the International Criminal Court.** The Preparatory Commission for the ICC, set up by the Final Act of the Rome Conference, decided to create a working group on the crime of aggression, which however was not able to reach a consensus on the outstanding issues, *i. e.* the definition of the crime and the specific role, if ever, of the Security Council.

In particular most of the States involved maintained their previous position relating to the 41 definition of the crime of aggression⁷⁰. With regard to the second issue, *i. e.* the question which role the Security Council should play with regard to the crime of aggression, two new options were however submitted.

One option⁷¹ – if adopted – would have provided that the Security Council would be 42 requested by the Court as to whether in a given situation the crime of aggression has been committed. In the absence of a decision of the Security Council within a given period of time, the Court could then proceed with its investigations or prosecution.

⁶⁵ For details see UN Doc. A/CONF.183/C.1/L.37, 1 July 1998 and A/CONF.183/C.1/L.56, 8 July 1998. See also the proposal submitted by Armenia (UN Doc. A/CONF.183/C.1/L.38, 1 July 1998) which wanted to include a specific exception for those cases of armed attacks 'required by the principle of equal rights and self-determination of peoples'.

⁶⁶ See also the proposals submitted by Cameroon, UN Doc. A/CONF.183/C.1/L.39, 2 July 1998, under which any manifestly illegal use of armed force would have constituted the crime of aggression.

⁶⁷ UN Doc. A/CONF.183/C.1/L.39, 2 July 1998.

⁶⁸ UN Doc. A/CONF.183/C.1/L.59, 10 July 1998.

⁶⁹ UN Doc. A/CONF.183/C.1/L.75, 14 July 1998.

⁷⁰ For an overview see notably PCNICC/2001/L.3/Rev.1, 11 October 2001.

⁷¹ PCNICC/2001/L.3/Rev.1, Option 1, variation 1, p. 15, 11 October 2001.

- 43 An alternative proposal⁷² – basing itself on the well-known *Uniting for Peace Resolution* of the General Assembly – provided that, if the Security Council was not able to reach any such determination within a given time frame, the General Assembly would then be asked in turn by the Court to make such a recommendation. Again, where no such recommendation is made in due course, the Court could – under the proposal as then submitted – still go forward with its proceedings.
- 44 The working group also considered proposals for possible elements of crimes as to the crime of aggression, which elements were however not thoroughly discussed. The Preparatory Commission finally submitted a report to the first session of the Assembly of States Parties to the Rome Statute, where it – basing itself on the work of the above-mentioned working group – outlined the various options⁷³.
- 45 **bb) Discussions in the framework of the Assembly of States Parties.** During its first session, the Assembly of States Parties in turn decided to create a Special Working Group on the Crime of Aggression⁷⁴, which – given the overall importance of the issues involved – was open not only to the contracting parties of the Rome Statute, but rather to all member States of the United Nations. The Working Group was tasked to submit proposals to the Assembly of States Parties for its consideration at the Review Conference.
- 46 Neither during the first nor during the second session of the Assembly of States Parties was any relevant progress made, the work of the Special Working Group on the Crime of Aggression then still being based of the option paper elaborated by the Preparatory Commission⁷⁵.
- 47 The third session of the Assembly of States Parties, which took place from September 6–10, 2004, once again took note of the report of the Special Working Group on the Crime of Aggression⁷⁶ without taking any further action⁷⁷. Said Working Group had in particular held an inter-sessional meeting in June 2004, where it had considered more technical aspects of aggression without going into the core issues outlined above where in view of the participating States significant progress was unlikely to take place⁷⁸. In particular the working group considered issues related to jurisdiction *ratione temporis*, the possible incorporation and placement of a future provision on aggression, issues of complementarity and admissibility with regard to the crime of aggression, the principle of *ne bis in idem*, and finally the relationship of a possible provision on the crime of aggression with general principles of criminal law.
- 48 In 2005, the Special Working Group on the Crime of Aggression continued its work, including by holding informal inter-sessional meetings, where once again *mutatis mutandis* the same issues were discussed⁷⁹.
- 49 During the informal inter-sessional meeting of said Working Group that took place in June 2006⁸⁰, note of which was taken by the fifth meeting of the Assembly of States Parties⁸¹, the definition of the conduct of the individual concerned was one of the main issues. A broad movement emerged towards, following the Nuremberg precedent, *per se* limiting the individual criminal responsibility to those persons planning, preparing, initiating or executing the crime of aggression, thereby underlying the leadership character of the crime of aggression. Yet, with regard to the very definition of the crime of aggression, there continued

⁷² *Ibid.*, variation 2.

⁷³ PCNICC/2002/2/Add.2, 24 July 2002.

⁷⁴ Continuity of work in respect of the crime of aggression ICC-ASP/1/Res.1, 9 September 2002.

⁷⁵ As to details see ICC-ASP/1/3, 3–10 September 2002, ICC-ASP/1/3/Add.1, 3–7 February and 21–23 April 2003 (in particular ICC-ASP/1/L.4 – Proposal by Cuba, 6 February 2003), as well as ICC-ASP/2/10, 8–12 September 2002, para. 44 and Annex II.

⁷⁶ ICC-ASP/3/14/Rev.1, 26 August 2004.

⁷⁷ See ICC-ASP/3/25, 6–10 September 2004, para. 41.

⁷⁸ See ICC-ASP/3/25, 6–10 September 2004, Annex II (previously issued as ICC-ASP/3/SWGCA/INF.1).

⁷⁹ See as to details ICC-ASP/4/32, 13–15 June 2005.

⁸⁰ ICC-ASP/5/SWGCA/INF.1, 5 September 2006.

⁸¹ ICC-ASP/5/SWGCA/INF.1, 29 September 2006.

to be significant debate. This debate centred around the question whether the list of acts contained in General Assembly Resolution 3314 (XXIX) should indeed serve as a basis for the definition of the crime of aggression, and whether a qualifying element should be added, such as *e.g.* referring to ‘manifest’ or ‘grave’ violations of the prohibition of the use of force⁸².

In 2007, the Special Working Group on the Crime of Aggression of the Assembly of States Parties continued its work⁸³. Not the least, and apart from continuing its work with regard to the issues just mentioned, it also focused on the most controversial relationship between the Court on the one hand and the Security Council on the other with regard to the crime of aggression, an issue also already addressed in article 5 para. 2 of the Statute.

In February 2009, the Special Working Group on the Crime of Aggression submitted its final Report to the Assembly of States Parties. This report was forwarded to the Review Conference⁸⁴. The proposal contained a draft definition of the crime of aggression in the form of a proposed article *8bis*. However, no consensus was reached regarding the role of the Security Council in the exercise of jurisdiction over the crime of aggression now addressed in article *15bis*. Two versions of this draft provision were presented with varying options as to the role of the Security Council⁸⁵. Accordingly, the requirements for the exercise of jurisdiction over the crime of aggression were seen as the most debated issue to be moving on to the Kampala Review Conference.

2. Developments during the Kampala Review Conference

The Special Working Group on the Crime of Aggression’s definition of the crime of aggression was adopted verbatim at the Review Conference⁸⁶. The only additions to this were the elements of crimes⁸⁷ and certain understandings as to the content of the threshold clause. Most of the debate that took place at the Kampala Review Conference centered around the preconditions for the Court exercising its jurisdiction with regard to the crime of aggression. As mentioned previously⁸⁸, many alternatives had been proposed for article 15 and the ensuing debate finally resulted in the creation of two articles, namely articles *15bis* and *15ter*. Article *15bis* deals with State referrals and the *proprio motu* exercise of jurisdiction with regard to the crime of aggression, while article *15ter* deals with Security Council referrals⁸⁹.

3. Article 5 para. 2: Preconditions for the exercise of the Court’s jurisdiction with respect to the crime of aggression

The Court will be only able to exercise its jurisdiction over purported crimes of aggression once the amendment adopted at the Kampala Review Conference has entered into force⁹⁰.

Article 5 para. 2 of the Statute, as adopted in Rome, provided that the definition of the crime of aggression must be in line with the relevant provisions of the Charter of the United

⁸² It is worth noting that the International Court of Justice in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* referred to ‘[t]he unlawful military intervention by Uganda (...) of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter’, ICJ Rep. 2005, 168, para. 165. See also Sep. op. of Judge Simma, *ibid.*, para. 2, which qualified such behaviour as an ‘act of aggression’.

⁸³ For details see Report of the Special Working Group on the Crime of Aggression, ICC-ASP/5/35, 29 January-1 February 2007, as well as the report on its 2007 informal inter-session meeting, ICC-ASP/6/SWGCA/INF.1, 5 September 2006.

⁸⁴ ICC- ASP/7/SWGCA/2, 20 February 2009, the proposals can also be found in Annex II to of the Resolution ICC- ASP/8/Res. 6, 26 November 2009.

⁸⁵ ICC- ASP/8/Res. 6, Annex II, 26 November 2009.

⁸⁶ ICC- ASP/8/Res. 6, 26 November 2009.

⁸⁷ ICC- ASP/8/Res. 6, 26 November 2009.

⁸⁸ See mn 34.

⁸⁹ See Zimmermann and Freiburg, *articles 15bis and 15ter*.

⁹⁰ As to details of the amendment and review procedure under *articles 121 and 123* see generally Clark, *article 121 and article 123*, and specifically with regard to the crime of aggression Zimmermann and Freiburg, *ibid. passim*.

Nations. This reference to the Charter of the United Nations thereby, first and foremost, took into account the fact that under article 103 of the Charter, any definition of the crime must stay within the limits provided by the Charter itself and accordingly *inter alia* had to recognise the legality of military action either authorised by the Security Council under Chapter VII of the Charter of the United Nations or undertaken in the exercise of the right of self-defence under article 51 of the Charter⁹¹.

- 55 Besides, article 5 para. 2 further stipulated that any provision shall also set out the conditions under which the Court shall exercise jurisdiction with respect to this crime, which in turn was supposed to be consistent with the relevant provisions of the Charter of the United Nations. This formula was used in order to address the question which role the Security Council should play for purposes of criminal proceedings involving the prosecution of instances of the crime of aggression. The Statute, by stating explicitly that such a provision must be in line with the Charter of the United Nations, thereby seems to have acknowledged the special role and prerogatives that the main political organs of the organisation, and first and foremost the Security Council, possess when it comes to the maintenance of international peace and security under articles 12, 14, 24 and generally Chapter VII of the Charter⁹².
- 56 It is certainly true that any determination by the Court that the crime of aggression has been committed in a given case would solely focus on the criminal responsibility of one or more individual offenders, eventually responsible for having committed such crime and not deal with issues of State responsibility and the maintenance of international peace and security as such.
- 57 Yet, any such determination by the Court will necessarily contain, provided the person concerned acted as organ of a State within the meaning of article 4 of the ILC Articles on State Responsibility, an implicit determination that the State on behalf of which the individual was acting, committed an act of aggression, said State thus by the same token simultaneously being under an obligation to make reparation for such act under the rules of international law governing the responsibility of States.
- 58 Besides, one might not exclude a situation where the Security Council, acting under Chapter VII, either determines that a given State had *not* committed an act of aggression, but that it had rather been acting either in self-defence or within the framework of a valid Security Council authorisation, or that such action, while constituting a breach of the peace, did not yet amount to an act of aggression.
- 59 Finally, even where any such express positive or negative determination by the Security Council is lacking, the accused could still claim that he or she acted (as was indeed argued by the United States and the United Kingdom in the case of the military action against Iraq in 2003) within the parameters of a Security Council authorisation in which case the Court would eventually be faced with the task to consider the legality of the military action under general international law.
- 60 It is against the background of such scenarios that one has to evaluate the legality under both, the Charter itself and article 5 para. 2 of the Statute, of the amendment regulating the exercise of jurisdiction by the Court with regard to the crime of aggression.
- 61 The amendment adopted in Kampala, provided it were to enter into force, will enable the Court to judge upon alleged acts of aggression without a prior determination by the relevant organs of the United Nations. It could thus indeed, be it only implicitly and eventually *ex post facto*, subject either the action of the organisation, or that of individual States acting under the authority of the United Nations, or both, to the control of the Court (the ICC itself not being an organ of the United Nations⁹³). It could accordingly eventually endanger the

⁹¹ As to questions concerning the use of armed force arising under *article 51* UN Charter see Randelzhofer, in: Simma *et al.* (eds.), *The Charter of the United Nations. A Commentary* (2012) 139.

⁹² For a detailed discussion see already Zimmermann (1998) 2 *MPYbUNL* 202 *et. seq.*

⁹³ The situation is thus significantly and indeed fundamentally different from any form of legal evaluation respectively control of acts of the Security Council or the General Assembly by either the International Court of Justice, the latter itself being the principal judicial organ of the United Nations, or by an *ad hoc* tribunal

effectiveness of the system of collective security set up under the Charter of the United Nations.

The situation is thus comparable to the one addressed by the European Court of Human Rights in *Behrami and Sahramati*⁹⁴. There, the Grand Chamber of the European Court of Human Rights similarly determined that any form of outside judicial control of action (even if the acts as such were undertaken by individual member States or a group of member States) which is crucial to the effective fulfillment by the United Nations Security Council of its Chapter VII mandate and consequently, by the United Nations *in toto* of its imperative peace and security aim, would in itself interfere with the fulfillment of the United Nations' key mission in this field⁹⁵ and should thus be considered not admissible.

Accordingly it is submitted that an amendment, in order to be in line with the requirements of the Charter and article 5, para. 2 itself, should have contained safeguards that would have made sure that the Court were not to prosecute an individual for the crime of aggression without either a prior determination by the relevant organs of the United Nations confirming that the underlying action by the State concerned amounted to an act of aggression, or without them specifically granting the Court jurisdiction over the crime of aggression⁹⁶.

Indeed, under article 24 of the Charter, it is the Security Council that bears the primary responsibility for the maintenance of international peace and security. Under the Charter, it is therefore primarily for the Security Council to eventually determine, acting under Chapter VII of the Charter, whether indeed an act of aggression was committed or to grant the Court jurisdiction over the crime of aggression.

Yet, as confirmed by the International Court of Justice in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁹⁷, the competences of the Security Council, while being of a primary nature in that regard, are not necessarily exclusive⁹⁸. More specifically, the ICJ confirmed that the accepted practice of the General Assembly under the *Uniting for Peace Resolution*, as it has since evolved, is consistent with article 12, para. 1 of the Charter of the United Nations⁹⁹.

Thus, any amendment of the Statute circumscribing the conditions under which the Court may exercise its jurisdiction with regard to the crime of aggression could have also enabled the General Assembly, should the Security Council be unable to exercise its above-mentioned primary responsibility for the maintenance of international peace and security due to the exercise of the veto, to then eventually render the necessary decisions, provided the procedural prerequisites as provided for in the *Uniting for Peace Resolution* are fulfilled.

4. Outlook

As expected, the crimes of terrorism and drug-trafficking were not even seriously considered during the Kampala review process. It also stands to reason that future additions to the Rome Statute will neither deal with those or similar 'treaty crimes'. In contrast thereto, the issue of whether or not, and if so under what conditions, the crime of aggression was to

established by the Security Council itself under Chapter VII as one of its subsidiary organs within the meaning of article 29 of the Charter.

⁹⁴ *Behrami against France*, Appl. No. 71412/01 and *Saramati against France, Germany and Norway*, Appl. Np. 78166/01, Decision of 2 May 2007.

⁹⁵ *Ibid.*, para. 149. It should be also noted that the European Court of Human Rights *expressis verbis* extended its argument to attempts to control or limit voluntary acts of individual States such as the vote of a permanent member of the Security Council in favour of a Chapter VII Resolution, *ibid.*

⁹⁶ See for such a proposal Blokker (2007) 20 *LeidenJIL* [867], 889.

⁹⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion, ICJ Rep. 2004, 136, 148, para. 26.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, para. 28. As a matter of fact the General Assembly has on several occasions qualified certain acts as 'aggressive acts', 'acts of aggression' or 'aggression', see for a detailed overview Blokker (2007) 20 *LeidenJIL* [867], 881.

be included into the Rome Statute constituted the major issue addressed during the Kampala Review Conference. During the conference, the outcome of which will be analysed in detail in the contributions dealing with articles *8bis*, *15bis* and *15ter*, the following main results were reached, namely:

- defining the individual conduct confirming the leadership character of the crime of aggression
- and clarifying the relationship with the general principles of criminal law as contained in the Statute and particularly its article 25 para. 3;
- defining the underlying conduct of the State concerned;
- delimitating the conditions for the exercise of jurisdiction with respect to the crime of aggression.

68 Given the difficulties encountered both before and during the Rome Conference, as well as during the work of both the Preparatory Commission as well as the Special Working Group on the Crime of Aggression of the Assembly of States Parties in reaching a generally acceptable definition of the crime of aggression and in delimitating the appropriate role of the Security Council, and further taking into account the threshold for an amendment to the Statute, reaching consensus on those issues had seemed to be a difficult obstacle to surmount. However, the inclusion of the crime of aggression now reached during the Kampala Review Conference (provided the amendment eventually receives the necessary number of ratifications) raises a significant number of issues related to the law of treaties, as well as that of the Charter of the United Nations.

69 Only time will tell whether indeed the amendment will enter into force and what effects it might have on the international system at large. Indeed, one might wonder whether the ambitious attempt to provide for the jurisdiction of the Court with regard to the crime of aggression, not taking into account the role of the Security Council, might not eventually overburden the Court. Maybe it might be a dangerous illusion to believe that the current imperfections of the international system, the current composition and voting mechanism of the Security Council clearly being a major one of them¹⁰⁰, could be revised or challenged through the backdoor of the system of international criminal law¹⁰¹.

70 Provided, however, the amendment on the crime of aggression were to enter into force, it will by the same token provide for the deletion of article 5 para. 2.

¹⁰⁰ See Zimmermann, *article 27*, in: Simma *et al.* (eds.), *The Charter of the United Nations. A Commentary* (3rd edition 2012), mn 265 et seq.

¹⁰¹ See for such proposition Fife, in: Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjørn Eide* (2003) 54, 73.

Article 6 Genocide

For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Literature: Arnold, R., ‘The Mens Rea of Genocide Under the Statute of the International Criminal Court’, (2003) 14 *CLF* 127; Boot, M., *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court, Genocide, Crimes against Humanity, War Crimes* (2002); Boustanty, K. and Dormoy, D. (eds.), *Genocide(s)* (1999); Burghardt, B. and Geneuss, J., ‘Der Präsident und sein Gericht: Die Entscheidung des Internationalen Strafgerichtshofs über den Erlass eines Haftbefehls gegen Al Bashir’, (2009) 4 *ZIS* 126; Byron, C., ‘Genocide’, in: D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court, Legal and Policy Issues* (2004) 143; Cassese, A., ‘Genocide’, in: *id.*, P. Gaeta and J. R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 335; Cayley, A.T., ‘The Prosecutor’s Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide’, (2008) 6 *JICJ* 829; Folgueiro, H. L., ‘El crimen de genocidio, Análisis del artículo 6 des Estatuto de Roma de la Corte penal internacional’, in: J.A. Guevara B. and T. Dal Maso J., *La Corte penal internacional: Una vision iberoamericana* (Mexico City: Porrúa, 2005) 111–163; Fronza, E., ‘Genocide in the Rome Statute’, in: F. Lattanzi and W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2000) 105; Gil Gil, A., *El genocidio y otros crímenes internacionales* (1999); Greenwalt, A.A.K. ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’, (1999) 99 *Colum.L.Rev.* 2259; von Hebel, H. and Robinson, D., ‘Crimes Within the Jurisdiction of the Court’, in: R. S. Lee (ed.), *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results* (1999) 79; Henham, R. and Behrens, P. (eds.), *The Criminal Law of Genocide* (Ashgate, 2007); Jorgensen, N.H.B., ‘The Definition of Genocide: Joining the Dots in the Light of Recent Practice’, (2001) 1 *ICLRev* 285; Kress, C., ‘The Crime of Genocide Under International Law’, (2006) 6 *ICLRev* 461; Lippman, M., ‘Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium’, (2001) 23 *HoustonJIL* 467; Ntanda Nsereko, D.D., ‘Genocide: A Crime Against Mankind’, in: G. Kirk McDonald and O. Swaak-Goldman (eds.), *The Law and Enforcement of International Offences – The Experiences of International and National Courts* (1998) 113; Oosterveld, V. and Garraway, C., ‘The Elements of Genocide’, in: R. S. Lee *et al.* (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001) 41; Prescott, J.M., ‘Litigating Genocide: A Consideration of the International Criminal Court in Light of the German Jews’ Legal Response to Nazi Persecution, 1933–1941’, (1999) 51 *MaineLRev* 297; Schabas, W.A., *Genocide in International Law* (2nd ed. (2009); *id.*, *Genozid im Völkerrecht* (2003); Shah, S.B., ‘The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court’s Definition of Genocide’, (2002) 16 *EmoryILRev* 351; Triffterer, O., ‘Genocide, its particular Intent to destroy in whole or in part the Group as such’, (2001) 14 *LeidenJIL* 400; Johann Van der Vyver, ‘Prosecution and Punishment of the Crime of Genocide’, (1999) 23 *FordhamLJ* 286; Whitaker, B., *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/1985/6; Zahar, A., ‘Command Responsibility of Civilian Superiors for Genocide’, (2001)14 *LeidenJIL* 591.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	7
1. ‘with intent’.....	7
2. Contextual element.....	9
3. ‘in whole or in part’.....	14
3. Protected groups.....	16
4. ‘as such’.....	18
5. Acts of genocide.....	19
a) ‘Killing members of the group’.....	22
b) ‘Causing serious bodily or mental harm’.....	23
c) ‘inflicting ... conditions of life’.....	25

d) ‘prevent births’	26
e) ‘Forcibly transferring children’	28
C. Special remarks	30
1. Individual responsibility and participation	30
2. Defences	33
3. Relationship to crimes against humanity	34

A. Introduction/General remarks

- Article 6 of the *Rome Statute* defines the crime of genocide, one of four categories of offence within the subject matter jurisdiction of the International Criminal Court. It reproduces the text of article II of the *Convention for the Prevention and Punishment of the Crime of Genocide*¹, which was adopted by the United Nations General Assembly on 9 December 1948. At the time the *Rome Statute* was adopted, the *travaux préparatoires* of the *Convention* were the principal source for interpretation of the definition². The corpus of judicial interpretation of the provision was then remarkably slim: a few interlocutory orders by the ICTY³ and a handful of domestic judgments⁴. The first important ruling by one of the *ad hoc* tribunals, the 2 September 1998 judgment of the Trial Chamber of the ICTR in *Prosecutor v. Akayesu*, was issued several weeks after the adoption of the *Rome Statute*⁵. Since then, however, there have been several important judicial pronouncements by the Appeals Chambers of the *ad hoc* tribunals addressing a range of issues relevant to the interpretation of article 6⁶. The ICJ has indicated that the definition reflects customary law⁷. The International Criminal Court has delivered only one significant ruling dealing with article 6 of the *Statute*. In March 2009, by a majority a Pre-Trial Chamber dismissed the Prosecutor’s application for an arrest warrant charging Sudanese President Omar Al Bashir with genocide. The decision contains a very significant discussion of article 6 including consideration of the significance of the relevant Elements of Crimes.⁸
- The ILC Draft Statute, submitted to the General Assembly in 1994, listed genocide as a crime within the jurisdiction of the court, but it did not define the offence⁹. The 1995 report of the *Ad Hoc Committee* indicated widespread support for retaining the definition in the

¹ 78 UNTS 277 (1951).

² See literature.

³ *Prosecutor v. Karadžić et al.*, Case No. IT-95-5-R & IT-95-18-R, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996; *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61, 20 October 1995.

⁴ *A. G. Israel v. Eichmann*, 36 I.L.R. 18 (D.C.), para. 19 (1968); see also: *A. G. Israel v. Eichmann*, 36 I.L.R. 277 (S.C.) (1968); Safferling, *Public Prosecutor v. Djajic*, 92 AJIL 528 (1998); *Canada, Minister of Citizenship and Immigration v. Mugesera*, File No. QML-95-00171, 11 July 1996 (Immigration and Refugee Board Adjudication Division), reported (in French), (1996)7 *Revue univ. droits de l’homme* 190.

⁵ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, Trial Chamber, 2 Sep. 1998, affirmed: *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, Appeals Chamber, 1 June 2001.

⁶ *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, Appeals Chamber, 5 July 2001; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, Appeals Chamber, 19 Apr. 2004; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgment, Appeals Chamber, 9 July 2004; *Prosecutor v. Ntakirutimana et al.*, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgment, Appeals Chamber, 13 Dec. 2004.

⁷ See *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Requests for the Indication of Provisional Measures, 8 Apr. 1993, I.C.J. Rep. 16 (1993); *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Further requests for the Indication of Provisional Measures, 13 Sept. 1993, I.C.J. Rep. 325 (1993); *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Preliminary Exceptions, 11 July 1996; *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Judgment, 26 Feb. 2007, para. 161.

⁸ *Prosecutor v. Bashir*, Case No. 02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009.

⁹ 1994 ILC Draft Statute, article 20 para. a, p. 70.

1948 *Convention*, although some delegations suggested that it might be expanded to encompass social and political groups¹⁰. Essentially the same sentiments are reflected in the 1996 report of the Preparatory Committee¹¹. The Preparatory Committee's Working Group on the Definition of Crimes, which met in February 1997, took note of a number of modifications that had been proposed, but ultimately returned to the text of the 1948 *Convention*¹². In the Zutphen and Final Drafts, the text of article II of the *Convention* was left untouched, while the text of article III was added, but in square brackets¹³. At the Diplomatic Conference, the Bureau proposed that the definition be taken literally from the 1948 *Convention*¹⁴ and there was virtually no objection¹⁵. Herman von Hebel and Daryl Robinson have observed that '[a]t the Rome Conference, the definition of the crime of genocide was not discussed in substance...' ¹⁶. Although literature on the subject is replete with proposals to amend the definition of genocide, during the Diplomatic Conference only Cuba argued that it might be altered by the inclusion of political and social groups¹⁷. The provision derived from the 1948 *Convention* was referred to the Drafting Committee¹⁸ and returned to the Committee of the Whole by that body without modification¹⁹.

For the purposes of interpreting article 6, it seems appropriate to consider the interpretation applicable not only to article II of the 1948 *Convention*, which it resembles, but also the context of adoption of article II, namely the *Convention* as a whole. This point was made by the Preparatory Committee's Working Group on the Definition of Crimes in the following terms: 'The Working Group noted that with respect to the interpretation and application of the provisions concerning the crimes within the jurisdiction of the Court, the Court shall apply relevant international conventions and other sources of international law. In this regard, the Working Group noted that for purposes of interpreting [the provision concerning genocide] it may be necessary to consider other relevant provisions contained in the Convention for the Prevention and Punishment of the Crime of Genocide, as well as other sources of international law. For example, article I would determine the question of whether the crime of genocide set forth in the present article could be committed in time of peace or in time of war ...' ²⁰.

Although only summary attention was paid to article 6 during the drafting of the *Rome Statute*, some of the issues involved in the crime of genocide were explored in more detail by the Preparatory Commission in preparation of the Elements of Crimes. In particular, the Elements address various aspects of the mental element for the commission of genocide. They also impose a contextual element that does not appear in the Convention itself: 'The conduct took place in the context of a manifest pattern of similar conduct directed against

¹⁰ *Ad Hoc* Committee Report, pp. 12-13, paras. 59-72.

¹¹ 1996 Preparatory Committee I, pp. 17-18, paras. 58-64, 1996 Preparatory Committee II, pp. 56-57.

¹² Preparatory Committee Decisions Feb. 1997, Annex I, p. 2; also UN Doc. A/AC.249/1997/WG.1/CRP.1 and Corr.1. The Working Group met again in December 1997, but did not consider the definition of genocide: Preparatory Committee Decisions Dec. 1997, Annex I.

¹³ Zutphen Draft, pp. 17-18; Preparatory Committee (Consolidated) Draft, pp. 13-14.

¹⁴ UN Doc. A/CONF.183/C.1/L.53, p. 1; also UN Doc. A/CONF.183/C.1/L.59, p. 2.

¹⁵ UN Doc. A/CONF.183/C.1/SR.3, paras. 2, 18, 20 (Germany), 22 (Syria), 24 (United Arab Emirates), 26 (Bahrain), 28 (Jordan), 29 (Lebanon), 30 (Belgium), 31 (Saudi Arabia), 33 (Tunisia), 35 (Czech Republic), 38 (Morocco), 40 (Malta), 41 (Algeria), 44 (India), 49 (Brazil), 54 (Denmark), 57 (Lesotho), 59 (Greece), 64 (Malawi), 67 (Sudan), 72 (China), 76 (Republic of Korea), 80 (Poland), 84 (Trinidad and Tobago), 85 (Iraq), 107 (Thailand), 111 (Norway), 113 (Côte d'Ivoire), 116 (South Africa), 119 (Egypt), 122 (Pakistan), 123 (Mexico), 127 (Libya), 132 (Colombia), 135 (Iran), 137 (United States of America), 141 (Djibouti), 143 (Indonesia), 145 (Spain), 150 (Romania), 151 (Senegal), 153 (Sri Lanka), 157 (Venezuela), 161 (Italy), 166 (Ireland), 172 (Turkey), 174.

¹⁶ von Hebel and Robinson, in: Lee (ed.), *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results* (1999) 89.

¹⁷ UN Doc. A/CONF.183/C.1/SR.3, para. 100.

¹⁸ UN Doc. A/CONF.183/C.1/L.58, p. 9.

¹⁹ UN Doc. A/CONF.183/C.1/L.91, p. 2. Academic commentators also took the view that it was best not to tamper with the *Convention* definition: Sadat Wexler (1997) 13 *NEP* 163, 169; Paust (1998) 13bis *NEP* 27.

²⁰ Preparatory Committee Decisions Feb. 1997, note 11, p. 3, fn. 3; also: Zutphen Draft, note 13, p. 17, fn. 12.

that group or was conduct that could itself effect such destruction'. This paragraph, which appears in the elements of each specific act of genocide, is further developed in the Introduction:

'With respect to the last element listed for each crime: The term 'in the context of' would include the initial acts in an emerging pattern; The term 'manifest' is an objective qualification; Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis'.

The term 'circumstance' appears in article 30 of the *Rome Statute*, requiring as a component of the *mens rea* of crimes that an accused have 'awareness that a circumstance exists'²¹.

- 5 In its draft 'definitional elements' on the crime of genocide, which were circulated at the Rome Conference, the United States had proposed that the mental element of genocide require a 'plan to destroy such group in whole or in part'²². During subsequent debate in the Preparatory Commission, the United States modified the 'plan' requirement, this time borrowing from crimes against humanity the concept of 'a widespread or systematic policy or practice'²³. The wording was widely criticised as an unnecessary addition to a well-accepted definition, with no basis in case law or in the *travaux* of the *Convention*²⁴. Israel however made the quite compelling point that it was hard to conceive of a case of genocide that was not conducted as a 'widespread and systematic policy or practice'. As the debate evolved, a consensus appeared to develop recognizing the 'plan' element, although in a more cautious formulation²⁵. This is reflected in the Elements.
- 6 This provision in the Elements was adopted after a Trial Chamber of the ICTY ruled that genocide could be committed by an individual, acting alone, and in the absence of any State or organisational plan or policy²⁶. The finding was confirmed by the Appeals Chamber²⁷. Later, the ICTY Appeals Chamber invoked its holding on this point with respect to genocide to support a conclusion that under customary law there was no State plan or policy element with respect to crimes against humanity either²⁸. In this respect, the ICTY Appeals Chamber appears to have held that the *Rome Statute*, as completed by the Elements, is narrower than

²¹ Rome Statute, article 30 para. 3.

²² 'Annex on Definitional Elements for Part Two Crimes', UN Doc. A/CONF.183/C.1/L.10, p. 1. The elements also specify that 'when the accused committed such act, there existed a plan to destroy such group in whole or in part'.

²³ The draft proposal specified that genocide was carried out 'in conscious furtherance of a widespread or systematic policy or practice aimed at destroying the group': 'Draft elements of crimes', UN Doc. PCNICC/1999/DP.4, p. 7.

²⁴ Comments by Canada, Norway, New Zealand and Italy, 17 February 1999 (author's personal notes).

²⁵ 'Discussion paper proposed by the Co-ordinator, article 6: The crime of genocide', UN Doc. PCNICC/1999/WGEC/RT.1: 'The accused knew ... that the conduct was part of a similar conduct directed against that group.'

²⁶ *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, Trial Chamber, 14 December 1999, para. 100. One month after *Jelisić*, in *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, Trial Chamber, 2 August 2001, an ICTY Trial Chamber noted that 'that the domestic law of some States distinguishes genocide by the existence of a plan to destroy a group' (para. 571). The Chamber referred to article 211-1 of the French Criminal Code which states that the crime must be committed 'in the execution of a concerted plan to destroy wholly or partially a group'. Subsequently, another Trial Chamber said bluntly that the matter of whether or not there was a legal requirement of a plan had been settled by the Appeals Chamber: *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-I, Judgment on Defence Motions to Acquit, 3 Sep. 2001, para. 62.

²⁷ *Prosecutor v. Jelisić*, note 6, para. 48. Only weeks earlier, the ICTR Appeals Chamber had declined pronouncing itself on '[t]he much-debated question whether genocide could be committed by a person acting alone': *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-A, Judgment, Appeals Chamber, 1 June 2001, (Reasons), para. 172.

²⁸ *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, para. 98, esp. fn. 114. See also: *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 120; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgment, Appeals Chamber, 17 Dec. 2004, para. 98.

customary international law. Nevertheless, in *Kayishema & Ruzindana*, the ICTR wrote: ‘although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organisation’²⁹. Furthermore, it said that ‘the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide’³⁰.

B. Analysis and interpretation of elements

1. ‘with intent’

Article 6 consists of a brief definition, followed by an enumeration of five acts of genocide. 7 The essence of the definition is its precise description of what is commonly called the special or specific intent requirement.³¹ According to the ICTY Appeals Chamber, ‘[g]enocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established’³². In its only significant interpretation of article 6, the ICC has confirmed the significance of a ‘subjective element, normally referred to as “dolus specialis” or specific intent, according to which any genocidal acts must be carried out with the “intent to destroy in whole or in part” the targeted group’³³. An ICTR Trial Chamber said that the ‘[s]pecial intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’³⁴. In *Sikirica*, an ICTY Trial Chamber said: ‘An examination of theories of intent is unnecessary in construing the requirement of intent in article 4 para. 2. What is needed is an empirical assessment of all the evidence to ascertain whether the very specific intent required by article 4 para. 2 is established, that is, the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’³⁵. The ICTR Appeals Chamber has confirmed that genocide is a crime of ‘specific intent’³⁶. In *Krstić*, an ICTY Trial Chamber said that it was not required ‘that the genocidal acts be premeditated over a long period’³⁷. It found that a plan to ethnically cleanse the Srebrenica region ‘escalated’ into genocide only a day or two before the actually deeds were perpetrated³⁸.

Although insisting upon ‘specific intent’ with respect to genocide, this is not a requirement 8 when acts of complicity in genocide, such as aiding and abetting, are concerned³⁹. The ICTY Appeals Chamber has also found that it is possible to commit genocide as part of a ‘joint criminal enterprise’, a concept applied by the *ad hoc* tribunals that corresponds to ‘common purpose’ participation as set out in article 25 para. 3 (d) of the *Rome Statute*. To some judges,

²⁹ *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, Trial Chamber 21 May 1999, para. 94.

³⁰ *Ibid.*, para. 276. Also note 6, *Prosecutor v. Jelisić*, para. 48.

³¹ For a detailed discussion of the different theoretical approaches and calling for a combination of the knowledge-based approaches with the peculiar structure of genocide (‘combined structure- and knowledge-based approach’) Ambos, *Treatise ICL II* (2014), pp. 21 et seq.

³² *Prosecutor v. Krstić*, note 6, para. 134.

³³ *Prosecutor v. Bashir*, Case No. 02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 139.

³⁴ *Prosecutor v. Akayesu*, 2 September 1998, note 5. Also note 7, 26 Feb. 2007, para. 188.

³⁵ *Prosecutor v. Sikirica et al*, note 25, paras. 58–59.

³⁶ *Prosecutor v. Ntakirutimana et al.*, note 6, para. 364; *Prosecutor v. Niyitegeka*, note 6, para. 54.

³⁷ *Prosecutor v. Krstić*, note 26, para. 572. In the same judgment, at para. 711, it said there was no requirement that genocide be committed with premeditation.

³⁸ *Prosecutor v. Krstić*, note 26, para. 619.

³⁹ *Prosecutor v. Krstić*, note 6, paras. 135–144; *Prosecutor v. Ntakirutimana et al.*, note 6, para. 500. For a critical discussion of the ICTY/ICTR case law in this respect see Ambos, *Treatise ICL II* (2014), pp. 32 et seq.

it had appeared that a conviction for genocide, which requires proof that the offender committed acts ‘with intent to destroy’ the group, in whole or in part, was theoretically incompatible with the entire concept of joint criminal enterprise⁴⁰. However, the Prosecutor successfully challenged one of these rulings, and the ICTY Appeals Chamber has established that convictions for genocide are possible under the ‘joint criminal enterprise’ mode of liability⁴¹.

2. Contextual element

- 9 The Elements of Crimes set out a relevant contextual element for the purposes of applying article 6: ‘The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.’ In the *Bashir* arrest warrant decision, the Pre-Trial Chamber acknowledged that the definition in article 6 itself ‘does not expressly require any contextual element’.⁴² It noted the case law of the *ad hoc* tribunals, which have not insisted upon a plan or policy as an element of the crime of genocide.⁴³ In *Jelisić*, a Trial Chamber of the ICTY ruled that there was not sufficient evidence of a plan or policy, but that a conviction for genocide was in any event ‘theoretically possible’ because an individual, acting alone, could perpetrate the crime.⁴⁴ The Trial Chamber decision in *Jelisić* was issued only months before the Elements of Crime were adopted by the Preparatory Commission and it is very likely that it influenced delegates to the Commission. The original United States proposal on the Elements of genocide had borrowed the ‘widespread and systematic’ language from crimes against humanity.⁴⁵ It was replaced by the ‘manifest pattern’ formulation early in 2000.⁴⁶
- 10 In the *Bashir* arrest warrant decision, Pre-Trial Chamber I said that pursuant to the case law of the *ad hoc* tribunals,

‘the crime of genocide is completed by, inter alia, killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs. As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof.’⁴⁷

Pre-Trial Chamber I said that under this interpretative approach, the crime of genocide depends upon proof that the accused had the intent to destroy the protected group, and that as soon as this intent exists and materialises in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group.⁴⁸

⁴⁰ *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on Rule 98bis Motion for Judgment of Acquittal, 31 Oct. 2002, para. 93 6 8; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98bis, 8 Nov. 2003, paras. 30, 55–57.

⁴¹ *Prosecutor v. Brđanin*, Case: IT-99-36-A, Decision on Interlocutory Appeal, 19 Mar. 2004.

⁴² *Prosecutor v. Bashir*, Case No. 02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 117.

⁴³ *Prosecutor v. Bashir*, Case No. 02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 119, citing: *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999, para. 400 (an error; the correct reference is to para. 100); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paras. 520, 523.

⁴⁴ *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999, para. 100; affirmed: *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001.

⁴⁵ ‘Proposal Submitted by the United States of America, Draft elements of crimes’, PCNICC/1999/DP.4.

⁴⁶ ‘Discussion paper proposed by the Coordinator’, PCNICC/2000/WGEC/RT.1.

⁴⁷ *Prosecutor v. Bashir*, Case No. 02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 119 (references omitted). *Contra: Prosecutor v. Bashir*, Case No. 02/05-01/09, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, para. 19, fn. 26.

⁴⁸ *Prosecutor v. Bashir*, Case No. 02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 120.

Noting ‘a certain controversy’ as to whether the contextual element should be recognised,⁴⁹ 11
 Pre-Trial Chamber I distanced itself from the case law of the *ad hoc* tribunals. It highlighted
 the importance of the contextual element set out expressly in the Elements of Crimes.

In the view of the Majority, according to this contextual element, the crime of genocide is 12
 only completed when the relevant conduct presents a concrete threat to the existence of the
 targeted group, or a part thereof. In other words, the protection offered by the penal norm
 defining the crime of genocide – as an *ultima ratio* mechanism to preserve the highest values
 of the international community – is only triggered when the threat against the existence of
 the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent
 or hypothetical.⁵⁰

Judge Ušacka, dissenting, insisted that the Elements of Crimes were only to ‘assist’ the
 Court, and hinted that they might be inconsistent with article 6 although she said the point
 did not need to be determined.⁵¹ The majority of the Pre-Trial Chamber said that it did not
 see any ‘irreconcilable contradiction’ between the definition of genocide in article 6 of the
Rome Statute and the requirement of a contextual element set out in the Elements.⁵²

Quite the contrary, the Majority considered that the definition of the crime of genocide, so
 as to require for its completion an actual threat to the targeted group, or a part thereof, is (i)
 not per se contrary to article 6 of the *Statute*; (ii) fully respects the requirements of article
 22(2) of the *Statute* that the definition of the crimes ‘shall be strictly construed and shall not
 be extended by analogy’ and ‘[i]n case of ambiguity, the definition shall be interpreted in
 favour of the person being investigated, prosecuted or convicted’; and (iii) is fully consistent
 with the traditional consideration of the crime of genocide as the ‘crime of the crimes’.⁵³

The ICTY has rejected arguments that the contextual element in the Elements of Crimes is 13
 consistent with the definition of genocide.⁵⁴ In any case, given the travaux and ICC case law
 so far, it is plausible to read a context element in Article 6 by way of a teleological
 interpretation taking the ‘intent to destroy’ as its ‘carrier’ or ‘holder’.⁵⁵

3. ‘in whole or in part’

In allowing that genocide could be committed ‘in whole or in part’, the drafters of the 14
Convention definition sought to avoid two consequences. First, it was not intended that the
 crime of genocide extend to isolated acts of racially-motivated violence. Thus, there is some
 quantitative threshold. In 1982, a General Assembly Resolution described the massacres at
 Sabra and Shatilla, where the victims numbered in the low hundreds, as genocide, although
 the fierce opposition from many States who considered it to be misuse of the term
 considerably weakens its value as precedent⁵⁶. A footnote added by the Working Group at
 the February 1997 Preparatory Committee affirms this point: ‘The reference to ‘intent to
 destroy, in whole or in part ... a group, as such’ was understood to refer to the specific
 intention to destroy more than a small number of individuals who are members of a

⁴⁹ *Prosecutor v. Bashir*, Case No. 02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 125.

⁵⁰ *Ibid.*, para. 124.

⁵¹ *Prosecutor v. Bashir*, Case No. 02/05-01/09, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, para. 20.

⁵² *Prosecutor v. Bashir*, Case No. 02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 132.

⁵³ *Prosecutor v. Bashir*, Case No. 02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 133.

⁵⁴ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, Appeals Chamber, 19 Apr. 2004, para. 224; *Prosecutor v. Popović et al.*, IT IT-05-88-T, Judgment, 10 June 2010, para. 829.

⁵⁵ Cf. Ambos, *Treatise ICL II* (2014), pp. 17–8.

⁵⁶ GA Res. 37/123 D; UN Doc. A/37/PV.108, para. 152. The resolution was adopted by 123 to none, with 22 abstentions. Paragraph 2, in which the term genocide appeared, was adopted by 98 votes to 19, with 23 abstentions, on a recorded vote: UN Doc. A/37/PV.108, para. 151.

group⁵⁷. Second, however, the expression ‘in whole or in part’ indicates that the offender need not intend to destroy the entire group but only a substantial portion of it. Although some delegations to the Preparatory Committee requested clarification of the term ‘in part’, none was ever provided⁵⁸.

- 15 According to the ICTY Appeals Chamber, a perpetrator of genocide must intend to destroy a *substantial* part of the group. It explained:

‘The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial’⁵⁹.

The Appeals Chamber noted that the Bosnian Muslim population in Srebrenica, or the Bosnian Muslims of Eastern Bosnia, a group estimated to comprise about 40,000 people, met this definition. Though numerically not very significant when compared with the Bosnian Muslim population as a whole, it occupied a strategic location, and was thus key to the survival of the Bosnian Muslim nation as a whole⁶⁰.

There is some support for the view that the term ‘in whole or in part’ may also apply to a *significant* portion of the group. According to a Trial Chamber of the ICTY, in *Jelisić*, it might be possible to infer the requisite genocidal intent from the ‘desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such’⁶¹. The same scenario of relatively small numbers of killings in concentration camps returned in *Sikirica*, but again, the judges could not discern any pattern in the camp killings that suggested the intent to destroy a ‘significant’ part of the local Muslim community so as to threaten its survival. The victims were taxi drivers, schoolteachers, lawyers, pilots, butchers and café owners but not, apparently, community leaders. The Trial Chamber observed that ‘they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and therefore could be called up for military service’⁶². Although not explicitly endorsing the ‘significant part’ gloss on the *Convention*, the Appeals Chamber in *Krstić* did in a sense consider the relevance to the Srebrenica Muslim community of the destruction of approximately 7,000 men: ‘Evidence introduced at trial supported this finding, by showing that, with the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction’⁶³. In *Tolimir*, a majority of the Trial Chamber concluded that the killing of three community leaders constituted genocide because this imperilled the survival of the group as a whole.⁶⁴ The International Court of Justice has said

⁵⁷ Preparatory Committee Decisions Feb. 1997, note 11, p. 3, fn. 1; also: Zutphen Draft, note 13, p. 17, fn. 10. Two commentators said the footnote ‘is misleading and should not appear in its present form. Genocide *can* occur with the specific intent to destroy a small number of a relevant group. Nothing in the language of the *Convention*’s definition, containing the phrase ‘or in part’, requires such a limiting interpretation. Moreover, successful counts or prosecutions of crimes against humanity, of which genocide is a species, have involved relatively small numbers of victims’. Sadat Wexler and Paust (1998) 13*ter* NEP 1, 5 (emphasis in the original, references omitted) (1998).

⁵⁸ 1996 Preparatory Committee I, note 11, p. 17, para. 60. See for a doctrinal discussion of the case law and the academic views Ambos, *Treatise ICL II* (2014), pp. 41 et seq.

⁵⁹ *Prosecutor v. Krstić*, note 26, para. 12. Also note 7, 26 Feb. 2007, para 198.

⁶⁰ *Prosecutor v. Krstić*, note 26, paras. 15–16.

⁶¹ *Prosecutor v. Jelisić*, note 26, para. 82.

⁶² *Prosecutor v. Sikirica et al.*, note 26, para. 80.

⁶³ *Prosecutor v. Krstić*, note 26, para. 28

⁶⁴ *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, 12 December 2012, para. 782.

that ‘[e]stablishing the “group” requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court’s opinion that the qualitative approach cannot stand alone’⁶⁵.

3. Protected groups

Four groups are enumerated as possible targets of the crime of genocide. The drafters rejected proposals aimed at enlarging the scope of the list. Linguistic groups were rejected because it was felt this was redundant. But political, economic and social groups were quite intentionally excluded, because the drafters did not believe they should be protected by the terms of the Convention⁶⁶. During the drafting of the *Rome Statute*, there were unsuccessful efforts to enlarge the definition along these lines⁶⁷. A footnote to the final draft of the Preparatory Committee declares: ‘The Preparatory Committee took note of the suggestion to examine the possibility of addressing “social and political” groups in the context of crimes against humanity’⁶⁸. But the issue refused to die, and in debate in the Committee of the Whole at Rome, Cuba argued again for inclusion of social and political groups. Ireland answered stating ‘we could improve upon the definition if we were drafting a new genocide convention’, but added that this was not the case, and that it was better to stick with the existing definition⁶⁹.

An ICTR Trial Chamber, in the first judicial interpretation of the enumeration, said that it is an *ejusdem generis* list and that all “stable” groups, constituted in a permanent fashion and membership of which is determined by birth’ are comprised⁷⁰. The same Trial Chamber, in a subsequent decision, seemed to hedge its remarks somewhat: ‘It appears from a reading of the *travaux préparatoires* of the Genocide Convention that certain groups, such as political and economic groups have been excluded from the protected groups, because they are considered to be ‘mobile groups’ which one joins through individual, political commitment. That would seem to suggest a *contrario* that the Convention was presumably intended to cover relatively stable and permanent groups’⁷¹. This interpretation appeared to many at the time to be creative and progressive, but it has not been confirmed by the Appeals Chambers of the tribunals, and looks increasingly idiosyncratic as time goes by. Nevertheless, other authorities confirm that the list of groups in the *Convention* definition should receive a large and liberal interpretation. In January 2005, a non-judicial commission of inquiry established by the United Nations to investigate allegations of genocide in Darfur, in western Sudan, wrote that ‘the principle of interpretation of international rules whereby one should give such rules their maximum effect (principle of effectiveness, also expressed by the Latin maxim *ut res magis valeat quam pereat*) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effects’⁷². The Darfur Commission also noted that ‘the approach taken to determine whether a group is a (fully) protected one has evolved from an objective to a subjective standard to take into account that “collective” identities, and in particular ethnicity, are by their very nature social constructs, “imagined” identities entirely dependent on variable and contingent perceptions, and *not* social facts, which are

⁶⁵ *Supra* note 7, 26 Feb. 2007, para. 200.

⁶⁶ UN Doc. A/C.6/SR.128. See: Van Schaack (1997) 106 *Yale L.J.* 2259; Leblanc (1988) 13 *YaleJIL* 268; Ambos, *Treatise ICL II* (2014), pp. 5 et seq. For a proposal that ‘gender’ be included as a protected group, see: Askin, *War Crimes against Women* (1997) 342–344, 392–393. *Contra*: Morris and Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. I (1995) 88.

⁶⁷ 1996 Preparatory Committee I, note 11, pp. 17–18, para. 60, 1996 Preparatory Committee II, p. 57.

⁶⁸ Preparatory Committee (Consolidated) Draft, note 12, p. 11, fn. 2. See also note 11: Preparatory Committee Decisions Feb. 1997, p. 3, fn. 2; Zutphen Draft, note 13, p. 17, fn. 11.

⁶⁹ Author’s personal notes of debate, Committee of the Whole, 17 June 1998.

⁷⁰ *Prosecutor v. Akayesu*, note 43, Sep. 1998.

⁷¹ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, Trial Chamber, 6 Dec. 1999 (reference omitted). Also: *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, Trial Chamber, 27 Jan. 2000, para. 162.

⁷² Rep. of the I Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to SC Res. 1564 of 18 September 2004, Geneva, 25 Jan. 2005, para. 494.

verifiable in the same manner as natural phenomena or physical facts⁷³. Groups must be defined by positive characteristics, and not their absence⁷⁴.

4. ‘as such’

- 18 The words ‘as such’, which appear at the end of the first paragraph of article 6, were added during the drafting of the 1948 *Convention* in order to resolve an impasse between those delegations that felt there should be an explicit motive requirement and those that viewed this as unnecessary and counter-productive⁷⁵. It resolves nothing, however, and leaves the provision ambiguous as to whether or not proof of a genocidal motive is an essential element of the offence. Early judgments of the *ad hoc* tribunals did not address the point. In *Niyitegaka*, the ICTR Appeals Chamber noted that the words ‘as such’ were ‘an important element of genocide’, and that they had deliberately been included in the definition so as to reconcile two diverging approaches with respect to motive. According to the Appeals Chamber, ‘[t]he term “as such” has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term “as such” clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context⁷⁶’.

5. Acts of genocide

- 19 The preliminary sentence in article 6 is completed with an enumeration of five acts of genocide. These encompass forms of physical and biological genocide, but not cultural genocide, which was intentionally omitted by the drafters in 1948⁷⁷. The International Court of Justice referred to the decision to exclude cultural genocide when it ruled that the deliberate destruction of the historical, cultural and religious heritage of a protected group was not an act of genocide contemplated by the Convention⁷⁸. The drafters of the Convention also rejected a proposed amendment, from Syria, that would have added a sixth act of genocide, ‘[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment⁷⁹’. This would suggest that the drafters did not intend for genocide to cover what is known today as ‘ethnic cleansing’. Yet the Commission of Experts for the former Yugoslavia noted that such practices ‘constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention⁸⁰’. According to the International Court of Justice, ‘ethnic cleansing’ can be defined as ‘rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area⁸¹’. Furthermore, [i]n other words, whether a particular operation described as “ethnic cleansing” amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term “ethnic cleansing” has no legal significance of its own. That said, it is clear that acts of “ethnic cleansing” may occur in parallel to acts

⁷³ *Ibid.*, para. 499.

⁷⁴ *Supra* note 7, 26 Feb. 2007, paras. 193–197.

⁷⁵ For the debate, see: UN Doc. A/C.6/SR.75-76.

⁷⁶ *Prosecutor v. Niyitegaka*, note 6, para. 53. Against a reading of motives in genocide by way of the terms ‘as such’ Ambos, *Treatise ICL II* (2014), pp. 39–40 (arguing that this element makes clear that the provision is intended to protect the group as a social entity).

⁷⁷ UN Doc. A/C.6/SR.83.

⁷⁸ *Supra* note 7, 26 Feb. 2007, para. 344.

⁷⁹ UN Doc. A/C.6/234.

⁸⁰ Interim Report of the Commission of Experts, UN Doc. S/35374, para. 56.

⁸¹ *Supra* note 7, 26 Feb. 2007, para. 190.

prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts⁸².

Of course, the debate about whether or not ‘ethnic cleansing’ is subsumed within the definition of genocide loses its relevance within the context of the ICC because even if it fails to meet the definition, it is undoubtedly covered by article 7, crimes against humanity.

In *Krstić*, the ICTY Trial Chamber said ‘there are obvious similarities between a genocidal policy and the policy commonly known as “ethnic cleansing”⁸³. The Trial Chamber seemed to understand that it was necessary to expand the scope of the term ‘destroy’ in the introductory sentence or *chapeau* of the definition of genocide in order to cover ‘acts that involved cultural and other non physical forms of group destruction’⁸⁴. But it also said: ‘Customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. An enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide’⁸⁵. The Appeals Chamber appeared to endorse this approach⁸⁶, as did the International Court of Justice⁸⁷.

In 2005, an ICTR Trial Chamber ruled that genocide occurs when there is deportation or some other forced displacement of populations, even in the absence of evidence of evidence of a plan for physical extermination. Although the Srebrenica massacre involved the summary execution of approximately 7,000 men and boys, the women, children and elderly were moved from the area in buses, raising questions about whether the Bosnian Serb forces really intended the physical extermination of the entire group, or whether they only sought to eliminate persons likely to be enemy combatants. A massacre of prisoners would not, in and of itself, amount to genocide. In *Blagojević*, the ICTY Trial Chamber concluded that the forced displacement of women, children and elderly people amounted to genocide:

[T]he Trial Chamber is convinced that the forced displacement of women, children, and elderly people was itself a traumatic experience, which, in the circumstances of this case, reaches the requisite level of causing serious mental harm under Article 4(2)(b) of the Statute. The forced displacement began with the Bosnian Muslim population fleeing from the enclave after a five-day military offensive, while being shot at as they moved from Srebrenica town to Potočari in search of refuge from the fighting. Leaving their homes and possessions, the Bosnian Muslims did so after determining that it was simply impossible to remain safe in Srebrenica town... Having left Srebrenica to escape from the Bosnian Serbs, the Bosnian Muslim population saw that they must move farther than Potočari to be safe. As they boarded the buses, without being asked even for their name, the Bosnian Muslims saw the smoke from their homes being burned and knew that this was not a temporary displacement for their immediate safety. Rather, this displacement was a critical step in achieving the ultimate objective of the attack on the Srebrenica enclave to eliminate the Bosnian Muslim population from the enclave⁸⁸.

The Trial Chamber concluded the discussion of this point stating that ‘the perpetrators intended that the forcible transfer, and the way it was carried out, would cause serious mental harm to the victims’, and that this fulfilled the requirements of article II of the 1948 definition (set out without significant change in article 4 para. 2 of the ICTY Statute)⁸⁹. The decision is the most liberal and extensive to date, and must be considered by the Appeals Chamber before it can be considered a definitive development in the law. Since *Blagojević*, the Prosecutor of the ICTY has declined to appeal acquittals concerning genocide charges,

⁸² *Ibid.* See also Ambos, *Treatise ICL II* (2014), pp. 15–6 (arguing that ‘ethnic cleansing’ does not per se amount to genocide but may do so if the perpetrator acted with the required *dolus specialis*).

⁸³ *Prosecutor v. Krstić*, note 26

⁸⁴ *Id.*, note 26, para. 577.

⁸⁵ *Id.*, note 26, para. 580.

⁸⁶ *Prosecutor v. Krstić*, note 6, para. 25.

⁸⁷ *Supra* note 7, 26 Feb. 2007, para. 190.

⁸⁸ *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-T, Judgment, Trial Chamber, 17 Jan. 2005, para. 650.

⁸⁹ *Ibid.*, 654.

possibly out of fear that the Appeals Chamber will overrule the expansive interpretation of the Trial Chamber in that case.

- 22 a) **‘Killing members of the group’**. The Elements of Crimes state that ‘[t]he term “killed” is interchangeable with the term “caused death”. In the *Akayesu* judgment, an ICTR Trial Chamber found the term “killing” to be too general, in that it might include involuntary homicide as well as intentional killing. It noted that the French term, ‘meurtre’, is more precise, and opted for the latter. But in *Kayishema & Ruzindana*, another Trial Chamber said there was ‘virtually no difference between the term “killing” in the English version and “meurtre” in the French version’⁹⁰. This view was upheld on appeal, the Appeals Chamber noting ‘that if the word “virtually” is interpreted in a manner that suggests a difference, though minimal, between the two terms, it would construe them both as referring to intentional but not necessarily premeditated murder, this being, in its view, the meaning to be assigned to the word “meurtre”’⁹¹.
- 23 b) **‘Causing serious bodily or mental harm’**. The only real issue that arose during the negotiations concerning the enumeration of acts in article 6 of the *Rome Statute* focused on paragraph b, ‘[c]ausing serious bodily or mental harm to members of the group’. The Preparatory Committee Working Group appended a footnote to the provision, stating that ‘[t]he reference to “mental harm” is understood to mean more than the minor or temporary impairment of mental faculties’⁹². This reflects the view of the United States of America which, at the time of ratification of the *Convention*, formulated the following ‘understanding’: ‘(2) That the term “mental harm” in article II (b) means permanent impairment of mental faculties through drugs, torture or similar techniques’⁹³. The footnote disappeared in the final version of the *Rome Statute*, of course, but the idea was revived in the Elements of Crimes. They state, in a footnote to the relevant Element: ‘This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment’.
- 24 The ICTR has stated that ‘[c]ausing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable’. The ICTR made a particularly useful contribution in extending the notion of bodily and mental harm to cover rape and other forms of sexual violence, although this does not mean that every rape committed while genocide is underway can be prosecuted as a genocidal act.⁹⁴ The ICJ acknowledged that rape and other crimes of sexual violence could well constitute ‘causing serious bodily or mental harm’, but said that ‘on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (*dolus specialis*) to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated’⁹⁵. Less helpful is the comment of the ILC, ‘[th]e bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part’⁹⁶. This simply confuses the *actus reus* and the *mens rea* of the offence. If bodily harm is caused, and if the intent is to destroy a group in whole or in part, then the crime is made out; whether the harm was sufficient to threaten the destruction of the group is really irrelevant.⁹⁷

⁹⁰ *Prosecutor v. Kayishema & Ruzindana*, note 29, para. 104.

⁹¹ *Prosecutor v. Kayishema & Ruzindana*, note 29, para. 151.

⁹² Preparatory Committee Decisions Feb. 1997, note 11, p. 3, fn. 4; also: Zutphen Draft, note 13, p. 17, fn. 13.

⁹³ Note that Robinson, in his seminal study of the *Convention*, considered that mental harm, within the meaning of the *Convention* (article II), ‘can be caused only by the use of narcotics’. Robinson, *The Genocide Convention: A Commentary* (ix) (1960).

⁹⁴ *Rukundo v. Prosecutor* (ICTR-2001-70-A), Judgment, 20 October 2010.

⁹⁵ *Supra* note 7, 26 Feb. 2007, para. 319.

⁹⁶ ILC, *Code of Crimes against the Peace and Security of Mankind*, UN Doc. A/51/332 (1996), p. 126.

⁹⁷ In the same vein Ambos, *Treatise ICL II* (2014), p. 12.

c) ‘inflicting ... conditions of life’. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in ‘whole or in part’ is the third act of genocide enumerated in article II of the 1948 *Convention* and, consequently, in article 6 of the *Rome Statute*. According to the ILC, the subparagraph would cover the case of deportation⁹⁸. Other examples might include placing a group of people on a subsistence diet, reducing required medical services below a minimum and withholding sufficient living accommodations, but only to the extent that such measures are imposed with the intent to destroy the group in whole or in part⁹⁹. According to the Rwanda Tribunal, in *Akayesu*, ‘the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement’¹⁰⁰. According to the ILC, the subparagraph would cover the case of deportation¹⁰¹. Other examples might include placing a group of people on a subsistence diet, reducing required medical services below a minimum and withholding sufficient living accommodations, but only to the extent that such measures are imposed with the intent to destroy the group in whole or in part¹⁰².

d) ‘prevent births’. Imposing measures intended to prevent births within the group is one of two forms of biological genocide contemplated by article 6. The *travaux préparatoires* of article II para. d of the 1948 *Convention* suggest that such measures could include sterilisation, compulsory abortion, segregation of the sexes and obstacles to marriage¹⁰³. Adolf Eichmann was tried, pursuant to an Israeli law derived from the *Convention*, on a charge of ‘devising measures intended to prevent child-bearing among the Jews’. The Court said ‘he devised measures the purpose of which was to prevent child-bearing among Jews by his instruction forbidding births and for the interruption of pregnancy of Jewish women in the Theresin Ghetto with intent to exterminate the Jewish people’¹⁰⁴. The Supreme National Tribunal of Poland found the director of the Auschwitz camp responsible for sterilisation and castration, as a form of genocide¹⁰⁵. Similarly, the United States Military Tribunal condemned Ulrich Greifelt and his associates for sterilisation and other measures aimed at restricting births, which the court qualified as genocide¹⁰⁶.

During hearings before the ICTY, witness Christine Cleirin, a member of the Commission of Experts, reviewed the issue of sexual assault in the former Yugoslavia. She was asked if rape was used systematically to change the ethnic character of the population, by impregnating women. Ms Cleirin answered: ‘The Commission did not have enough information to verify, let us say, these testimonies, who spoke in these terms. I guess it is possible that both happened’¹⁰⁷. In the *Akayesu* judgment of 2 September 1998, the Rwanda Tribunal notes: ‘In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group. Furthermore, the Chamber notes that measures intended to prevent

⁹⁸ *Ibid.*

⁹⁹ Robinson, *The Genocide Convention: A Commentary*, 60, 63–64. Cited with approval by the ILC, *Code of Crimes against the Peace and Security of Mankind*, UN Doc. A/51/332 (1996), p. 126.

¹⁰⁰ *Prosecutor v. Akayesu*, note 5.

¹⁰¹ *Ibid.*

¹⁰² Robinson, *The Genocide Convention: A Commentary*, 60, 63–64. Cited with approval by the ILC, *Code of Crimes against the Peace and Security of Mankind*, UN Doc. A/51/332 (1996), p. 126. See also Ambos, *Treatise ICL II* (2014), p. 13.

¹⁰³ UN Doc. E/623/Add.2; UN Doc. E/447, p. 26; UN Doc. A/C.6/SR.82.

¹⁰⁴ *A. G. Israel v. Eichmann* (D.C.), note 4, para. 244.

¹⁰⁵ *Poland v. Hoess*, (Supreme National Tribunal of Poland), 7 L. Reports of Trials of War Criminals 11, 25 (1948).

¹⁰⁶ *Greifelt et al.*, UNWCC, 13 L. Reports of Trials of War Criminals 1 (U.S. Military Tribunal), p. 17.

¹⁰⁷ *Prosecutor v. Karadžić et al.*, note 3, Transcript of hearing, 2 July 1996, p. 19.

births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate¹⁰⁸.

- 28 e) ‘**Forcibly transferring children**’. The fifth and final act of genocide set out in article 6 is ‘[f]orcibly transferring children of the group to another group’¹⁰⁹. The Elements of Crimes add: ‘The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment’. The Elements also define the term ‘children’ as a ‘person or persons ... under the age of 18 years’, adding that ‘[t]he perpetrator knew, or should have known, that the person or persons were under the age of 18 years’. This final provision in the Elements is inconsistent with article 30 of the *Statute*, which requires that a perpetrator have actual knowledge of a relevant circumstance, and for this reason it is arguably *ultra vires*. It is unlikely that it will be of any real consequence, however, because the fifth act of genocide obviously refers to the transfer of children that result in a loss of their original identity as a group. While this can occur to young children, it seems highly improbable that it could ever apply to adolescents, and thus the issue of mistake of fact about the age of a teenage child, resulting from a lack of due diligence, would never arise.
- 29 The provision in the *Convention* concerning forcible transfer of children was the result of a proposal by Greece during the final stages of drafting of the 1948 *Convention*¹¹⁰, with some delegates arguing of the danger that it could be applied to the evacuation of children from a theatre of war¹¹¹. According to the ILC, ‘[t]he forcible transfer of children would have particularly serious consequences for the future viability of a group as such. Although the present article does not extend to the transfer of adults, this type of conduct in certain circumstances could constitute a crime against humanity ... or a war crime ... Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c) [inflicting conditions of life ...]’¹¹². An ICTR Trial Chamber considered that the objective of the provision is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another¹¹³.

C. Special remarks

1. Individual responsibility and participation

- 30 The genocide provisions of the statutes of the *ad hoc* tribunals reproduce the text not only of article II of the *Convention* but also of article III. The latter text explains that genocide may be committed not only by the principal offender, but also in the form of complicity, conspiracy, attempt and direct and public incitement. Some felt that the same approach should be employed in the *Rome Statute*. However, this would have introduced a degree of redundancy, in that other provisions of the *Statute* also deal with secondary participation and the inchoate offences of conspiracy, incitement and attempt. Indeed, the problem exists in the *ad hoc* statutes. At the Rome Conference, the Working Group on General Principles

¹⁰⁸ *Prosecutor v. Akayesu*, note 5.

¹⁰⁹ Crit. Ambos, *Treatise ICL II* (2014), p. 14.

¹¹⁰ UN Doc. A/C.6/242.

¹¹¹ UN Doc. A/C.6/SR.82 (Lachs, Poland).

¹¹² *Supra* note 78, p. 126.

¹¹³ *Prosecutor v. Akayesu*, note 5.

agreed to omit article III of the *Convention* from the definition of genocide, but on the condition that its provisions were accurately reflected in article 25, dealing with individual criminal responsibility. This result was achieved only partially. The *Statute's* provisions concerning complicity and attempt appear to cover the same ground as the corresponding parts of article III of the *Genocide Convention*¹¹⁴. Article III (c) of the *Convention* creates an offence of incitement that is distinct from incitement as a form of complicity, in that 'direct and public incitement' within the meaning of the *Convention* may be created even if nobody is in fact incited¹¹⁵. During drafting of the *Convention*, the terms 'direct and public' were included so as to limit the scope of the offence, and thereby appease States that were concerned about threats to freedom of expression. The *Rome Statute's* drafters were alive to the problem, and it was for this reason that article 25 para. 3 lit. e, specifies individual criminal liability for a person who '[i]n respect of the crime of genocide, directly and publicly incites others to commit genocide'. Suggestions that inchoate incitement be extended to other crimes within the subject-matter jurisdiction of the Court were rejected.

The Rome Conference falls short of its aim of incorporating article III of the *Genocide Convention* within the *Statute* with respect to 'conspiracy', which is set out in article III (b). Common law and Romano-Germanic traditions have different approaches to the crime of conspiracy¹¹⁶. Under common law, it is an inchoate offence, completed when two or more persons conspire to commit an offence, whether or not that offence is actually committed. The Romano-Germanic codes treat conspiracy as a form of complicity, which is only committed when the underlying crime is also committed or attempted. The drafters of the *Genocide Convention* debated the issue, and opted for the common law approach¹¹⁷. Yet article 25 para. 3 (d) of the *Rome Statute* envisions a form of conspiracy involving 'the commission or attempted commission of such a crime by a group of persons acting with a common purpose', thus rejecting the common law approach.¹¹⁸ There was no real debate on this point, and the inconsistency with the terms of the *Genocide Convention* would appear to be inadvertent¹¹⁹.

Pursuant to article 28 of the *Rome Statute*, genocide may be committed by a military commander or civilian superior who knew or should have known that subordinates were committing or about to commit such crimes. This suggests that it is possible to participate in the commission of genocide even despite real knowledge that the crime is being committed. One judgment of the ICTY questions the compatibility of the concept of command responsibility with the specific intent required for conviction of the crime of genocide¹²⁰. Another Trial Chamber has held, in a judgment that can be readily transposed to the *Rome Statute*, that as a matter of statutory interpretation, a superior can commit genocide on the basis of command responsibility. Accordingly, 'the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) is that the superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent'¹²¹.

¹¹⁴ For complicity, subparagraphs (b), (c) and (d) of article 25 para. 3 of the *Statute* cover, somewhat redundantly, what article III (e) of the *Convention* accomplishes with a single word, 'complicity'. Subparagraph (f) deals with attempt, and spells out in some detail the difficult issue of the threshold for an attempt that article III (d) of the *Convention* leaves to the discretion of the court. See for more details the commentary on article 25 by Kai Ambos.

¹¹⁵ An interpretation of article III (c) of the *Convention* that has been endorsed by the ICTR, in *Prosecutor v. Akayesu*, note 5.

¹¹⁶ Pradel, *Droit pénal comparé* (1995) 240.

¹¹⁷ UN Doc. A/C.6/SR.84. See: *Prosecutor v. Gatete* (ICTR-00-61-A), Dissenting Opinion of Judge Agius, 9 October 2012, paras. 4–5.

¹¹⁸ See also Ambos, *Treatise ICL I* (2013), p. 166.

¹¹⁹ UN Doc. A/CONF.183/C.1/WGGP/L.3.

¹²⁰ *Prosecutor v. Stakić*, note 38, para. 92.

¹²¹ *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, Trial Chamber, 1 Sep. 2004, para. 721. Crit. Ambos, *Treatise ICL II* (2014), pp. 37–8.

2. Defences

- 33 Article IV of the *Genocide Convention* excludes any form of sovereign immunity or defence of act of State, something the *Rome Statute* accomplishes in article 27. The drafters of the *Convention* were unable to agree on exclusion of the defence of superior orders, and as a result there is no provision to this effect. The *Rome Statute* also allows the defence of superior orders, but article 33 imposes as a condition that the order not be manifestly illegal, adding, in paragraph 2, the '[f]or the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful'.

3. Relationship to crimes against humanity

- 34 There is an obvious overlap between the definitions of genocide and crimes against humanity, set out in articles 6 and 7 respectively of the *Rome Statute*. Should charges proceed on the basis of both provisions, judges of the ICC will have to decide whether to allow cumulative convictions. At the *ad hoc* tribunals, cumulative charging, in some cases for both genocide and crimes against humanity, has been allowed. Indeed, it would be fair to describe this as a general practice of the Prosecutor. According to the Appeals Chamber, '[c]umulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence'¹²². This is not considered to violate the rule against double jeopardy¹²³. Of course, the matter is reviewed at the conviction stage, when special rules apply to multiple convictions based on the same facts. There, the concern is that cumulative convictions create 'a very real risk of [...] prejudice' to the accused. Such persons suffer the stigma inherent in being convicted of an additional crime for the same conduct. In a more tangible sense, there may also be consequences such as losing eligibility for early release under the law of the state enforcing the sentence¹²⁴. The ICTR Appeals Chamber, in *Musema*, confirmed that 'reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other'¹²⁵. An element is considered to be 'materially distinct' if it requires proof of a fact not required by the other offence. In articulating the approach, the *ad hoc* tribunals have relied heavily on the *Blockburger* decision of the Supreme Court of the United States¹²⁶.

¹²² *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, Appeals Chamber, 20 Feb. 2001, para. 400. Also: *Prosecutor v. Ntakirutimana et al.*, Case No. ICTR-96-10 & ICTR-96-17-T, Judgment, Trial Chamber, 21 Feb. 2003, paras. 863–864; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgment, Trial Chamber, 3 Dec. 2003, para. 1089; *Prosecutor v. Rutaganda*, note 69, para. 117.

¹²³ *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb. 1999, paras. 8–10.

¹²⁴ *Prosecutor v. Delalić et al.*, note 122, separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, para. 23. These views were endorsed by a unanimous Appeals Chamber in *Prosecutor v. Kunarac et al.*, note 28, para. 169. On the subject of cumulative convictions, see: Stuckenberg, in: Fischer et al. (eds.) *International and National Prosecution of Crimes under International Law, Current Developments* (2001) 559; Valabhji (2002) 10 *Tulane J.I. & Comp.L.* 185; Bogdan (2002) 3 *Melbourne J.I.L.* 1.

¹²⁵ *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment, Appeals Chamber, 16 Nov. 2001, paras. 369–370. Also: *Prosecutor v. Delalić et al.*, note 122, para. 412; *Prosecutor v. Kordić & Čerkez*, note 28, para. 1032; *Prosecutor v. Kunarac et al.*, para. 168; *Prosecutor v. Jelisić*, note 6, para. 82; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgment, Appeals Chamber, 23 Oct. 2001, paras. 387–388.

¹²⁶ ('The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not').

With respect to cumulative convictions for genocide and crimes against humanity, there is much authority for the proposition that genocide is an aggravated form of crimes against humanity¹²⁷. But it has been held that convictions for both genocide and for crimes against humanity are permitted because they have materially distinct elements¹²⁸. In *Musema*, the ICTR Appeals Chamber held that convictions for genocide and for extermination as a crime against humanity, based on the same set of facts, are permissible¹²⁹. According to the Appeals Chamber, genocide requires proof of intent to destroy, in whole or in part, a national, ethnic, racial or religious group, whereas the crime against humanity of extermination requires proof that the crime was committed as part of a widespread or systematic attack on a civilian population¹³⁰. The ICTY Appeals Chamber upheld and developed this conclusion in *Krstić*, overturning the Trial Chamber that had refused to enter cumulative convictions for genocide and crimes against humanity because it considered that ‘both require that the killings be part of an extensive plan to kill a substantial part of a civilian population’¹³¹. The Appeals Chamber said that such an ‘extensive plan’ had been held not to constitute an element of either genocide or crimes against humanity. Moreover, according to the Appeals Chamber, genocide need not be committed as part of a widespread or systematic attack, nor must genocide be limited to a ‘civilian population’¹³².

¹²⁷ For the various authorities, see: Schabas, *Genocide in International Law* (2nd ed. 11 (2009)).

¹²⁸ *Prosecutor v. Musema*, note 125, paras. 369–370; *Prosecutor v. Ntakirutimana et al.*, note 101, para. 864; *Prosecutor v. Nahimana et al.*, para. 1090. See: Palombino (2005) 3 JICJ 778.

¹²⁹ *Prosecutor v. Musema*, note 125, paras. 369–370.

¹³⁰ *Prosecutor v. Musema*, note 125, para. 366.

¹³¹ *Prosecutor v. Krstić*, note 26, paras. 219–227; *Prosecutor v. Kayishema & Ruzindana*, note 29, para. 577–578, 590.

¹³² *Prosecutor v. Krstić*, note 6, paras. 219–227.

Article 7 Crimes against humanity

(1) For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

(2) For the purpose of paragraph 1:

- (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;
- (b) 'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

(3) For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

Directly relevant Elements of Crimes: Article 7: Crimes against humanity.

Literature: 1. General: Allen, M. J., *Textbook on Criminal Law* (OUP 3rd edition 1991); Ambos, K., 'Selected Issues Regarding the "Core Crimes" in International Criminal Law', (2004) 19 *AIDP* 219; *id.* and Wirth, S., 'The Current Law of Crimes against Humanity: An Analysis of UNTAET Regulation 15/2000', *id.* (2002) 13 *CLF* 1; *Treatise on International Criminal Law* (OUP, vol. I, 2013, vol. II, 2014); Aroneanu, E., *Le crime contre l'humanité* (Daloz 1961); Bassiouni, M.C., *Crimes Against Humanity in International Criminal Law* (Kluwer Law International 2nd edition 1999); *id.*, *Crimes Against Humanity: Historical Evolution And Contemporary Application* (CUP 2011); Becker, A., *Der Tatbestand des Verbrechens gegen die Menschlichkeit: Überlegungen zur Problematik eines Völkerrechtlichen Strafrechts* (Duncker & Humblot 1996); Boot, M., *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes* (Intersentia 2002); Chesterman, S., 'An Altogether Different Order: Defining the Elements of Crimes against Humanity', (2000) 10 *DukeJComp&IL* 307; Cryer, R., *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005); *id.* Friman, H., Robinson, D., and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure* (CUP 2014); Cupido, M., 'The Policy Underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate', (2011) 22 *CLF* 275; Delmas-Marty, M., 'Le Crime contre l'Humanité, les Droits de l'Homme et l'Irréductible Humain', (July-Sept. 1994) 3 *RSC* 477; Dinstein, Y., 'Crimes against Humanity', in: Makarczyk, J. (ed.) *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of K. Skubiszewski* (Kluwer Law International 1996) 891; Fenrick, W.J., 'Should Crimes against Humanity Replace War Crimes?', (1999) 37 *ColumJTransnat'IL* 767; Ferencz, B.B., 'Crimes against Humanity', in: Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, Vol. I (North-Holland 1992) 869; Frossard, A., *Le crime contre l'humanité* (R. Laffont 1987); Fujita, H., 'Les Crimes contre l'humanité dans les procès de Nuremberg et Tokyo', (2000) 34 *KobeULRev.* 1; Goldenberg, S.L. 'Crimes against Humanity – 1945–1970', (1971) 10 *WesternOntarioLRev* 1; Gotzel, D., *Terrorismus und Völkerstrafrecht: Die Anschläge vom 11. September 2001, der Tokioter Giftgasanschlag, die Geiselnahme von Beslan und die Täglichen Anschläge im Irak vor dem Internationalen Strafgerichtshof* (Herbert Utz Verlag 2010); Graven, J., 'Les crimes contre l'humanité', (1950) 76 (1) *RdC* 433; *id.*, 'La Définition et la répression des crimes contre l'humanité', (1948) 1 *Revue de Droit International de Sciences Diplomatiques et Politiques* 1; Grynogel, C., 'Le concept de crime contre l'humanité: Hier, aujourd'hui et demain', (1994) 74 *Revue de Droit Penal et de Criminologie* 13; *id.*, 'Un concept juridique en quête d'identité: Le crime contre l'humanité', 63 (3–4) *RIDP* (1992) 1027; Henckaerts, J.-M. and Doswald-Beck, L., *Customary International Humanitarian Law: Rules*, Vol. I (CUP 2005); Jesse, B., *Der Verbrechensbegriff des Römischen Statuts: ein Beitrag zu einer Statutsimmanenten Strukturanalyse des Römischen Statuts des Internationalen Strafgerichtshofs* (Duncker & Humblot 2009); Jia, B.B., 'The Differing Concepts of War Crimes and Crimes against Humanity in International Criminal Law', in: Goodwin-Gill, G. and Talmon, S. (eds.), *The Reality of International Law: Essays in Honor of Ian Brownlie* (Clarendon 1999) 243; Kirsch, S., 'Zweierlei Unrecht: Zum Begehungszusammenhang der Verbrechen gegen die Menschlichkeit', in: Michalke, R., Köberer, W. and Pauly, J. (eds.), *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (De Gruyter Recht 2008) 269; *id.*, 'Two Kinds of Wrong: On the Context Element of Crimes against Humanity', (2009) 22 *LeidenJIL* 525; *id.*, *Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit* (Peter Lang 2009); Kolb, R., 'Droit international pénal', in: Kolb, R. and Scalia, D. (eds.), *Droit International Pénal: Précis* (Helbing Lichtenhahn 2nd edition 2012) 1; König, K.-M., *Die Völkerrechtliche Legitimation der Strafgewalt internationaler Strafjustiz* (Nomos 2003); Krefß, C., 'Der Jugoslawien-Strafgerichtshof im Grenzbereich zwischen internationalem bewaffneten Konflikt und Bürgerkrieg', in: Fischer, H. and Lüder, S.R. (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof: Beiträge zur Entwicklung einer effektiven internationalen Strafgerichtsbarkeit* (Berliner Wissenschafts-Verlag 1999) 15; Kuschnik, B., *Der Gesamttatbestand des Verbrechens gegen die Menschlichkeit: Herleitungen, Ausprägungen, Entwicklungen* (Duncker & Humblot 2009); Lauterpacht, Sir H., 'The Law of Nations and the Punishment of War Crimes', (1944) 21 *BYbLL* 58; Lippman, M., 'Crimes against Humanity', (1997) 17 *BCThirdWorldLJ* 171; Lombois, C., 'Crimes contre l'humanité – crimes de guerre', (1987) 4 *RSC* 937; Luban, D., 'A Theory of Crimes Against Humanity', (2004) 29 *YaleJIL* 85; *id.*, 'Military Lawyers and the Two Cultures Problem', (2013) 26 *LeidenJIL* 315; Masse, M., 'Les crimes contre l'humanité dans le nouveau code pénal français', (1994) 2 *RSC* 376; May, L., *Crimes against Humanity: A Normative Account* (CUP 2005); McCormack, T.L.H. 'Crimes against Humanity', in: McGoldrick, D., Rowe, P. and Donnelly, E. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart 2004) 179; Meron, T., *The Humanization of International Law* (Martinus Nijhoff 2006); Mettraux, G., *International Crimes and the Ad Hoc Tribunals* (OUP 2005); Morris, V. and Scharf, M.P., *The*

International Criminal Tribunal for Rwanda, Vol. I (Transnational Publishers 1998) 186; Palombino, F.M., 'Should Genocide Subsume Crimes Against Humanity?: Some Remarks in the Light of the Krstic Appeal Judgment', (2005) 3 *JICJ* 778; Parenti, P.F., 'Crímenes contra la humanidad. Origen y evolución de la figura y análisis de sus elementos centrales en el Estatuto de Roma', in: Parenti, P.F., Filippini, L.G. and Folgueiro, H. L. (eds.), *Los crímenes contra la humanidad y el genocidio en el derecho internacional: origen y evolución de las figuras, elementos típicos, jurisprudencia internacional* (Ad-Hoc 2007); Paust, J. J., 'Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora', in: *id.*, Bassiouni, M.C., Williams, S.A., Scharf M., Sadat, L., Gurulé, J., and Zargaris, B., *International Criminal Law: Cases and Materials* (Carolina Academic Press 4th edition 2013) 777; Pégrier, C., *Ethnic Cleansing: A Legal Qualification* (Routledge 2013); Roulot, J.-F., *Le crime contre l'humanité* (L'Harmattan 2002); Sadat, L.N., 'Crimes against Humanity in the Modern Age', (2013) 107 *AJIL* 334; Van Schaack, B., 'The Definition of Crimes Against Humanity: Resolving the Incoherence', (1998–1999) 37 *ColTransnatL* 787; Schabas, W., *The international Criminal Court: A Commentary on the Rome Statute* (OUP 2010); Schwelb, E., 'Crimes against Humanity', (1946) 23 *BYBIL* 178; Tuche, P., 'Le crime contre l'humanité', (1993) 18 *Droits* 19; Swaak-Goldman, O., 'Crimes against Humanity', in: McDonald, G.K. and Swaak-Goldman, O. (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. I (Kluwer Law International 2000) 143; Van den Herik, L.J. 'Using Custom to Reconceptualize Crimes Against Humanity', in: Darcy, S. and Powderly, J. (eds.), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 80; Vernon, R., 'What is Crime against Humanity?', (2002) 10 *Journal of Political Philosophy* 231; Werle, G., and Jeßberger, F., *Principles of International Criminal Law* (OUP 3rd edition 2014); Zoller, E., 'La Définition des Crimes contre l'Humanité', (1992) 120 (3) *Journal de Droit International* 549.

2. **Article 7 of the Rome Statute:** Askin, K.D., 'Crimes within the Jurisdiction of the International Criminal Court', (1999) 10 *CLF* 33; Cassese, A., 'Crimes against Humanity', in: Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (OUP 2002) 353; Donat-Cattin, D., 'Crimes against Humanity', in: Lattanzi, F. (ed.), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998) 49; *id.*, 'A General Definition of Crimes against Humanity under International Law: The Contribution of the Rome Statute of the International Criminal Court', (1999) 8 *L'astree Revue de Droit Penal et des Droits de L'homme* 83; Clark, R.S., 'Crimes against Humanity and the Rome Statute of the International Criminal Court', in: Politi, M. and Nesi, G. (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate 2001) 75; *id.*, 'Crimes against Humanity and The Rome Statute of the International Criminal Court', in: *id.*, Feldbrugge, F.J.M. and Pomorski, S. (eds.), *International and National Law in Russia and Eastern Europe* (Martinus Nijhoff 2001) 139; Currat P., *Les crimes contre l'humanité dans le Statut de Rome de la Cour Pénale Internationale* (Bruylant and others 2006); Eboe-Osuji, C., 'Crimes against Humanity: Directing Attacks against a Civilian Population', (2008) 2 *AfricanLegalStudies* 118; Ford, S., 'Is the failure to respond appropriately to a natural disaster a Crime against Humanity – The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis', (2010) 38 *DenverJIL&Pol* 241-2; Halling, M., 'Push the Envelope – Watch It Bend: Removing the Policy Requirement and Extending Crimes against Humanity', (2010) 23 *LeidenJIL* 827; von Hebel, H. and Robinson, D., 'Crimes within the Jurisdiction of the Court', in: Lee, R.S. (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International 1999) 79; Hwang, P., 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court', (1998) 22 *FordhamJLJ* 457; International Criminal Court, Office of the Prosecutor, Legal Advisory Section, Legal Tools Project, ICC Preparatory Works, National Implementing Legislation, Proceedings Commentary, National Implementing Legislation and Case Commentary (http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx); Jalloh, C.C., 'What Makes a Crime Against Humanity a Crime Against Humanity?', (2013) 28 *AmUJILRev* 381; Jurovics, Y., 'article 7 – Crimes contre l'humanité', in: Fernandez, J. and Pacreau, X. (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article*, Vol. I(A. Pedone 2012) 417; Krefß, C., 'On the Outer Limits of Crimes against Humanity: The Concept of Organisation within the Policy Requirement – Some Reflections on the March 2010 ICC Kenya Decision', (2010) 23 *LeidenJIL* 855; McAuliffe de Guzman, M., 'The Road from Rome: The Developing Law of Crimes against Humanity', (2000) 22 *HumRtsQ* 335; Meseke, S., *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (Berliner Wissenschafts-Verlag 2004); Moshan, B.S., 'Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity', (1998) 22 *FordhamJLJ* 154; Robinson, D., 'Defining "Crimes against Humanity" at the Rome Conference', (1999) 93 *AJIL* 43; *id.*, 'Crimes against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience', in: Lattanzi, F. and Schabas, W.A. (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I (Il Sirente 1999) 1391; *id.*, 'Crimes against Humanity', in: Cryer, R., Friman, H., Robinson, D. and Wilmschurst, E., *An Introduction to International Criminal Law and Procedure* (CUP 3rd edition 2014) 229; Schabas, W.A., 'Crimes against Humanity: The State Plan or Policy Element', in: Sadat, L.N. and Scharf, M.P. (eds.), *The Theory and Practice of International Criminal Law – Essays in Honor of M. Cherif Bassiouni* (Nijhoff 2008), 347; Van Schaack, B., 'The Definition of Crimes against Humanity: Resolving the Incoherence', (1998–1999) 37 *Columbia J. Transnat'l L.* 787; Werle, G. and Burghardt, B., 'Do Crimes Against Humanity Require the Participation of a State or a "State-like" Organisation?', (2012) 10 *JICJ* 1151; Schwelb, E., 'Crimes against Humanity', (1946) 23 *BYBIL* 178; Sunga, L.S. 'The Crimes within the Jurisdiction of the International Criminal Court', (1998) 6 (4) *EJCLCJ* 377.

3. **Elements of Crimes:** Badar, M. E., 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity', (2004) 5 *SanDiegoJLJ* 73; Chesterman, S., 'An Altogether Different Order: Defining the Elements of Crimes against Humanity', (2000) 10 (2) *DukeJComp&IL* 307; Hall, C.K., 'The First Five Sessions

of the UN Preparatory Commission for the International Criminal Court', (2000) 94 (4) *AJIL* 773; Rückert, W. and Witschel, G., 'Genocide and Crimes against Humanity in the Elements of Crimes', in: Fischer, H., Kress, C. and Lüder, S.R. (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* (Arno Spitz 2001) 59.

4. Specific crimes: The crime of apartheid: Blishchenko, I.P., 'Study of the International Convention on the Suppression and Punishment of the Crime of Apartheid (with special reference to questions of implementation and responsibility under international law)', in: *United Nations, Notes And Documents* 3/74 (Mar. 1974); Booysen, H., 'Convention on the Crime of Apartheid', (1976) 2 *SouthAfricanYbIL* 56; Clark, R.S. 'The Crime of Apartheid', in: Bassiouni, M.C. (ed.), *International Criminal Law – Crimes*, Vol. I (Transnational Publishers 1986) 299; Final Report on the Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid, UN Doc. E/CN.4/1426 (1981), 19 Jan. 1980; Graefrath, B., 'Apartheid – Ein internationales Verbrechen', (1974) 28 *NJ* 192; *id.*, 'Convention against the Crime of Apartheid', (1972) 11 *German Foreign Policy* 395; *id.*, 'The Crime of Apartheid: Responsibilities and Reparations', (1981) *RevContemporaryL* 31; Namgalies, C., 'Apartheid on Trial', (2004) 15 (3) *CLF* 349.

Deportation and forcible transfer of population: Dawson, G., and Farber, S., *Forcible Displacement Throughout the Ages: Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (BRILL 2012); De Zayas, A.M., 'International Law and Mass Population Transfers', (1975) 16 *HarvILJ* 207; Goldman, R.K., 'Codification of International Rules on Internally Displaced Persons – An Area where Both Human Rights and Humanitarian Law Considerations Are Being Taken into Account', (1998) 325 *IRevRC* 749; Goodwin-Gill, G.S., *International Law and the Movement of Persons between States* (Clarendon 1978); Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 (17 Apr. 1998); Hanum, H., *The Right to Leave and Return in International Law and Practice* (Nijhoff 1987); Jacques, M., *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (CUP 2012); Kalin, W., 'Guiding Principles on Internal Displacement: Annotations', (2000) 32 *StudiesTransnatLPol*; Lavoyer, J.-P., 'Guiding Principles on Displacement – A few Comments on the Contribution of International Humanitarian Law', (1998) 324 *IRevRC* 467; Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel 1993; 2nd edition 2005); Phuong, C., *The International Protection of Internally Displaced Persons* (CUP 2004); Weis, P. *Nationality and Statelessness in International Law* (Sijthoff & Noordhoff 2nd edition 1979); Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc. E/CN.4/826/Rev.1 (1964).

Enslavement – general: Allain, J., 'The Definition of Slavery in International Law', (2009) 52 *HowardLJ* 239; Allain, J. and Hickey, R., 'Property and the Definition of Slavery', (2012) *I&CompLQ* 915; Bassiouni, M.C., 'Enslavement as an International Crime', (1991) 23 (2) *NYUJIL&Pol* 445; Fischer, H., 'The Suppression of Slavery in International Law', (1950) 3 (28) *ILQ* 503; Haenen, I., 'The Parameters of Enslavement and the Act of Forced Marriage', (2013) 13 *ICLRev* 895; Kaye, M., *1807-2007: Over 200 Years of Campaigning against Slavery* (Anti-Slavery International 2005); Lassen, N., 'Slavery and Slaverylike Practices: United Nations Standards and Implementation', (1988) 57 *NordicJIL* 197; Nanda, V.P. and Bassiouni, M.C., 'Slavery and Slave Trade: Steps toward Eradication', (1972) 12 *SantaClaraL* 424; Stahn, C., 'Justice Delivered or Justice Denied: The Legacy of the *Katanga* Judgment', (2014) 12 *JICJ* 809; Thomas, H., *The Slave Trade: The History of the Atlantic Slave Trade: 1440-1870* (Sirron & Schuster 1997); Whitaker, B., Report on Slavery, UN Doc. E/CN.4/Sub.2/1982/20/Rev.1, UN Sales No. E.84.XIV.1.

Enslavement – trafficking: Chuang, J., 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts', (1998) 11 *HarvHumRtsJ* 65; Farrior, S., 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential', (1997) 10 *HarvHumRtsJ* 213; Gallagher, A. T., *The International Law of Human Trafficking* (CUP 2010); Obokata, T., 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System', (2005) 54 *I&CompLQ* 445; Pocar, F., 'Human Trafficking: A Crime Against Humanity', in E. Savona and S. Stefanizzi (eds.), *Measuring Human Trafficking: Complexities and Pitfalls* (Springer 2007); Sembacher, A., 'The Council of Europe Convention on Action Against Trafficking in Human Beings', (2006) 14 *TulaneJL&CompL* 435; Tavakoli, N., 'A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime', (2009) 9 *ICLRev* 77; Toepfer, S.F. and Wells, B.S., 'The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women', (1994) 2 *MichJGender&L* 83; Van der Wilt, H., 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts', (2014) 13 *ChineseJIL* 297.

Imprisonment and deprivation of liberty: Garraway, C., 'Elements of the Specific Forms of Genocide', in: R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 49; Pejic, J., 'Procedural safeguards for internment/administrative detention in armed conflict and other situations of violence', (2005) 858 *IRevRC* 375; Rodley, N., *The Treatment of Prisoners under International Law* (OUP 2nd edition 1999/2002); Shaw, M. N., *International Law* (CUP 7th edition 2014); Study of the right of everyone to be free from arbitrary arrest, detention and exile, UN Doc. E/CN.4/826/Rev.1 (1964).

Murder: Amnesty International, *Disappearances and Political Killings: Human Rights Crisis of the 1990s* (1994); Badar, M., *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing 2013); Bitti, G., 'Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 285; Clark, R., 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', (2001) 12 *CLF* 291; Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP 2003); Heine, G. and Vest, H., 'Murder/Wilful Killing', in: McDonald, G.K. and Swaak-Goldman, O. (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and*

National Courts, i (Kluwer Law International 2000) 175; May, L., 'Targeted Killings and Proportionality in Law: Two Models', (2013) 11 *JICJ* 47; Mettraux, G., 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', (2002) 43 *HarvILJ* 237; Nerlich, V., 'The status of ICTY and ICTR precedent in proceedings before the ICC', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 305; Porro, S., *Risk and Mental Element. An Analysis of National and International Law on Core Crimes* (Nomos 2014); Robinson, D., 'Article 7 (1) (a) – Crime Against Humanity of Murder', in: R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 80; Werle, G. and Jessberger, F., 'Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 *J. INT'L CRIM. JUST.* 35; Zimmermann, B., 'Article 85', in: Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987).

Omitted crimes that some consider to be crimes against humanity: Bantekas, I., 'The Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies', (2006) 4 *JICJ* 466; Robinson, P., 'The Missing Crimes', in: Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (OUP 2002) 497.

Other inhumane acts: Blinderman, E., 'Conviction of Saddam Hussein for the Crime against Humanity of Inhumane Acts' (2009) 30 *UPaJIL* 1239; Davidsson, E., 'Economic Oppression as an International Wrong or as Crime against Humanity', (2005) 23 (2) *NethQHUMRts* 173; DeFalco, R.C. 'Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution', (2011) 5 *IJTJ* 142; Goodfellow, N.A., 'The Miscategorization of "Forced Marriage" as a Crime against Humanity by the Special Court for Sierra Leone', (2011) 11 *ICLRev* 831; Haenen, I., 'Classifying Acts as Crimes Against Humanity in the Rome Statute of the International Criminal Court', (2013) 14 *GermanLJ* 796; Jain, N., 'Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution', (2008) 6 *J. ICJ* 1013; Kuschnik, B., 'Humaneness, Humankind and Crimes Against Humanity', (2010) 2 *GoJIL* 501; Oosterveld, V., 'Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties', (2011) 2 *J. ILS* 127; Rottensteiner, C., 'Denial of Humanitarian Assistance as a Crime under International Law', (1999) 835 *IRevRC* 555; Scheinert, J., 'Refusal to Save Lives: A Perspective from International Criminal Law', (2013) 13 *ICLRev* 627.

Persecution: Roberts, K., 'The Law of Persecution Before the International Criminal Tribunal for the Former Yugoslavia', (2002) 15 *LeidenJIL* 623; Swaak-Goldman, O., 'Persecution', in: McDonald, G.K. and Swaak-Goldman, O. (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. I (Kluwer Law International 2000) 247; *id.*, 'The Crime of Persecution in International Criminal Law', (1998) 11 *LeidenJIL* 145.

Rape and sexual violence: Askin, K.D., *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Nijhoff 1997); *id.*, 'Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC', in: Shelton, D. (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000) 47; Bedot, B. and Hall-Martinez, K., 'Ending Impunity for Gender Crimes under the International Criminal Court', (1999) 6 (1) *BrownJWorldAff* 65; Boling, D., 'Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Escrows International Legal Responsibility?', (1995) 32 *ColumJTransnat'lL* 533; Boon, K., 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent', (2001) 32 *ColumHumRtsLRev* 625; Brownmiller, S., *Against Our Will: Men, Women and Rape* (Bantam 1975); Carpenter, R.C., 'Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations', (2006) 37 (1) *Sec. Dialogue* 83; Chinkin, C., 'Rape and Sexual Abuse of Women in International Law', (1994) 5 *EJIL* 326; Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003); Dolgopoul, U. and Paranjape, S., *Comfort Women: An Unfinished Ordeal* (International Commission of Jurists 1994); La Haye, E., 'The Elements of War Crimes – Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilisation and Sexual Violence', in: Lee, R.S. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 184; MacKinnon, C.A., 'Rape, Genocide, and Women's Human Rights', (1994) 17 *HarvWomen'sLJ* 5; Meron, T., 'Rape as a Crime under International Humanitarian Law', (1993) 87 (3) *AJIL* 424; Niarchos, C.N., 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', (1995) 17 *HumRtsQ* 649; Schomburg, W. and Peterson, I., 'Genuine Consent to Sexual Violence under International Criminal Law', (2007) 101 *AJIL* 121; Sellers, P.V., 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law', in: McDonald, G.K. and Swaak-Goldman, O. (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. I (Kluwer Law International 2000) 247.

Torture: Amnesty International, *Torture in the Eighties* (1984); *id.*, *Combating Torture: A Manual for Action* (2003); Bassiouni, M.C. and Derby, D., 'The Crime of Torture', in: Bassiouni, M.C. (ed.), *International Criminal Law*, Vol. I (Transnational Publishers 1986) 363; Bennoune, K., 'A Practice which Debases Everyone Involved': Corporal Punishment under International Law', (1997) 20 *Ans Consacrés à la Réalisation d'une Idée: Recueil d'articles en l'honneur de Jean-Jacques Gautier* 203; Boulesbaa, A., *The U.N. Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999); Burgers, H.J. and Danelius, H., *The United Nations Convention against Torture: A Handbook against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988); Buchard, C., 'Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment' (2008) 6 *J. ICJ* 159; Byrnes, A., 'Torture and Other Offences Involving the Violation of the

Physical or Mental Integrity of the Human Person', in: McDonald, G.K. and Swaak-Goldman, O. (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. I (Kluwer Law International 2000) 197; Cullen, A., 'Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights', (2003–2004) 34 *CaWILJ* 29; Davidson, J.S., 'No More Broken Bodies: The Definition of Torture in the Late Twentieth Century', (1995) 6 *CanterburyLRev* 5; De Wet, E., 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary International Law' (2004) 15 *EJIL* 97; Rodley, N., 'The Definition(s) of Torture in International Law', (2002) 55 *Current Legal Problems* 467; *id.*, *The Treatment of Prisoners under International Law* (OUP 2nd edition 1999/2002); Seiderman, I.D., *Hierarchy in International Law: The Human Rights Dimension* (Intersentia 2001).

5. *History: Versailles peace conference:* Dadrian, V.N., 'Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications', (1989) 14 *YaleJIL* 221; *History of the United Nations War Crimes Commission and the Development of the Laws of War* (H.M.S.O. 1948); Lansing, R., 'Notes on World Sovereignty', (1921) 15 *AJIL* 13; MacMillan, M., *Peacemakers: Six Months That Changed The World* (John Murray 2003); Matas, D., 'Prosecuting Crimes against Humanity: The Lessons of World War I', (1990) 13 *FordhamILJ* 86; Norton, Ch. E. (ed.), *Orations and Addresses of George William Curtis*, Vol. III (Harper 1894); Report presented to the Preliminary Peace Conference on the Responsibility of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War, Versailles, March 1919, Conference of Paris, 1919 Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32 (1919), reprinted in: (1920) 14 *AJIL* 95 (Supp.) or Friedman, L., *The Law of War: a Documentary History*, Vol. I (Greenwood 1972) 842; Roberts, A. and Guelff, R. (eds.), *Documents on the Laws of War* (OUP 3rd edition 2000).

Nuremberg and Tokyo Tribunals and Allied national court trials for crimes committed during the Second World War: Brand, J.T., 'Crimes against humanity and the Nürnberg Trials', (1949) 28 *OregonLRev* 93; Breyer, S., 'Crimes against Humanity: Nuremberg 1945', (1996) 71 *NYULRev* 1161; Clark, R.S., 'Crimes against Humanity at Nuremberg', in: Ginsburgs, G. and Kudriavtsev, V. N. (eds.), *The Nuremberg Trial and International Law* (Martinus Nijhoff 1990) 177; *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen* (De Gruyter 1948–1950); Fujita, H., 'Les crimes contre l'humanité dans les procès de Nuremberg et de Tokyo', (2000) 34 *KobeULRev* 1; Meyrowitz, H., *La repression par les tribunaux allemands des crimes contre l'humanité et l'apparence a une organisation criminelle: En application de la Loi No 10 du Conseil de Controle Allié* (Pichon et Durand-Auzias 1960); Schwelb, E., 'Crimes against humanity', (1946) 23 *BYbIL* 178.

From Tokyo to The Hague: Goldenberg, S.L., 'Crimes against Humanity – 1945–1970', (1971) 10 *Western-OntarioLRev* 1; Hankel, G., 'Eroberung, Widerstand und Radikalisierung: Überlegungen zum Kombattantenstatus im asymmetrischen Krieg', in: Hankel, G. (ed.), *Die Macht und das Recht: Beiträge zum Völkerrecht und Völkerstrafrecht am Beginn des 21. Jahrhunderts* (Hamburger Ed. 2008) 414; Hogan-Doran, J., 'Murder as a Crime Under International Law and the Statute of the International Criminal Tribunal for the Former Yugoslavia: Of Law, Legal Language, and a Comparative Approach to Legal Meaning', (1998) 11 *LeidenJIL* 165; Martin, P.M., *Le droit international humanitaire à l'épreuve du Tribunal Pénal International sur l'ex-Yugoslavie, Recueil Dalloz de doctrine de jurisprudence et de législation* (1997) 286–292; Njikam O., *The Contribution of the Special Court for Sierra Leone to the Development of International Humanitarian Law* (Duncker & Humblot 2013); Salter, M. and Eastwood, M., 'Post-war Developments of the Martens Clause: The Codification of "Crimes Against Humanity" Applicable to Acts of Genocide', (2011) 2 *JHumLStud* 216; *id.*, 'Establishing the Foundations for the International Criminalisation of Acts of Genocide: From the Martens Clause to the International Criminal Court', in: Behrens, P. and Henham, R., (eds.), *Elements of Genocide* (Routledge 2013) 20.

6. *Decisions of the International Criminal Tribunals for the former Yugoslavia and Rwanda:* Akhavan, P., 'Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide', (2000) 94 *ASIL PROC.* 279; Bux G., 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', (2002) 43 *HarvILJ* 251-2; Cerone, J., 'The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes against Humanity: The Evolution of the Nexus Requirement', (2008) 14 *NewEngL&CompL* 191; Dungal, J., 'Defining Victims of Crimes against Humanity: Martić and the International Criminal Court', (2009) 22 *LeidenJIL* 727; Greenwood, C., 'The Development of International Humanitarian Law by the International Criminal Tribunal for the former Yugoslavia', (1998) 2 *MPYbUNL* 97; Lattanzi, F., 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda', in: Fischer, H., Kress, C. and Lüder, S.R. (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* (Arno Spitz 2001) 473; Mégret, F., *Le Tribunal Pénal International pour le Rwanda* (A. Pedone 2002); Mettraux, G., 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', (2002) 43 *HarvILJ* 237; Rikhof, J., 'Crimes against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda', (1996) 62 *NatJConstL* 233; Scheltema, C. and Van der Wolf, W., *The International Tribunal for Rwanda: Facts, Cases Documents* (Global Law Association 1999); Wauters, J.M., 'Torture and Related Crimes – A Discussion of the Crimes before the International Criminal Tribunal for the Former Yugoslavia', (1998) 11 *LeidenJIL* 155.

7. *Decisions of national courts: Barbie case:* Binder, G., 'Representing Nazism: Advocacy and Identity in the Trial of Klaus Barbie', (1989) 98 *YaleLJ* 1321; Finkielkraut, A., *Remembering in Vain: The Klaus Barbie Trial and Crimes against Humanity* (Roxanne Lapidus (Translator), Columbia University Press 1992); Fournet, C., *Genocide and Crimes against Humanity: Misconceptions and Confusion in French Law and Practice* (Hart

2013); Sadat Wexler, L., 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again', (1994) 32 *ColumJTransnat'l* 289. **Demjanjuk case:** Del Pizzo, L.J., 'Not Guilty – But not Innocent: An Analysis of the Acquittal of John Demjanjuk and Its Impact on the Future of Nazi War Crimes Trials', (1995) XVIII *BCI&CompLRev* 137; Kremnitzer, M., 'The Demjanjuk Case', in: Dinstein, Y. and Tabory, M. (eds.), *War Crimes in International Law* (Brill 1996) 321. **Eichmann case:** Arendt, H., *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin 1963); *Attorney General of the Government of Israel v. Adolf Eichmann*, (Dist. Ct. Jerusalem 1961) 36 *IsLRep* 5; Attorney General of the Government of Israel v. Adolf Eichmann, (Sup. Ct. Israel 1962) 36 *IsLRep* 277. **Finta case:** *R. v. Finta*, 28 C.R. 265 (4th) (Sup. Ct. Canada 1994). **Papon case:** Erhel, C., Auche, M. and de La Baume, R. (eds.), *Le Procès de Maurice Papon* (1 and 2, 1998); **Pinochet case:** Lacabe, M., *The Criminal Procedures against Chilean and Argentinian Repressors in Spain: A Short Summary* (Revision One) (11 Nov. 1998) (<http://www.derechos.net/marga/papers/corri.html> (accessed 31 August 2014)); *Regina v. Bartle*, Judgment, House of Lords, 25 Nov. 1998 (vacated and reargued 18 Jan. – 4 Feb. 1999); **Touvier case:** Grynfogel, C., 'Touvier et la justice, une affaire de crime contre l'Humanité', (1993) 1 *RSC* 62; Masse, M., 'Du Procès de Nuremberg à celui de P. Touvier, en passant par l'affaire Barbie', (1989) 4 *RSC* 798; *id.*, 'L'affaire Touvier: l'échappée belle', (1993) 2 *RSC* 372; Tigar, M.E., Casey, S.C., Giordani, I. and Mardemootoo, S., 'Paul Touvier and the Crime against Humanity', (1995) 30 *TexILJ* 286; Sadat Wexler, L., 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again', (1994) 32 *ColumJTransnat'l* 289.

8. National legislation (general): Amnesty International, *The International Criminal Court: Checklist for Effective Implementation* (AI Index: IOR 40/11/00, 1 Aug. 2000), *id.*, *The International Criminal Court: The Failure of States to Enact Effective Implementing Legislation* (AI Index: IOR 40/019/2004, 1 Sep. 2004).

9. National legislation (specific countries): **Argentina:** Amnesty International Argentina/Human Rights Watch, *Commentary on Argentinean Draft Legislation*; Fernández de Gurmendi, S.A., 'Argentina's Draft Law to Implement the Rome Statute', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 165.

Australia: Boas, G., 'An Overview of Implementation by Australia of the Statute of the International Criminal Court', (2004) 2 *JICJ* 179.

Canada: Hage, R., 'Implementing the Rome Statute: Canada's Experience', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 47; Schwarz, M.J., 'Prosecuting crimes against humanity in Canada: What Must be Proved', (2002) 46 *CLQ* 40.

Belgium: Vandermeersch, D., 'The ICC Statute and Belgian Law', (2004) 2 *JICJ* 133.

Brazil: Letter of Hugo Relva, Amnesty International Coordinator for the International Criminal Court in Latin America to Márcio Thomaz Bastos, Minister of Justice of the Federal Republic of Brazil, 14 Feb. 2003; Steiner, S.H., 'Implementation of the Rome Statute in Brazil', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 179.

Democratic Republic of the Congo: Amnesty International, *Democratic Republic of Congo: Parliament Must Reform and Enact International Criminal Court Bill* (AI Index: AFR 62/002/2006, 3 Feb. 2006);

France: Barrat, O., 'Ratification and Adaptation: "The French Perspective"', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 57.

Germany: Kaul, H.-P., 'Germany: Methods and Techniques Used to Deal with Constitutional, Sovereignty and Criminal Law Issues', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 65.

Ireland: Amnesty International, *Ireland – Comments and Recommendations on the International Criminal Court Bill 2003* (AI Index: EUR 29/001/2004, 29 Apr. 2004).

Italy: Amnesty International, *Italy: Law Reform Needed to Implement the Rome Statute of the International Criminal Court* (AI Index: EUR 30/009/2005, 1 Sep. 2005); Bellelli, R., 'Italian Implementation of the Rome Statute and Related Constitutional Issues', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 215; Roscini, M., 'Great Expectations: The Implementation of the Rome Statute in Italy', (2007) 5 *JICJ* 493.

Japan: Saiki, N., 'Japan's View on the International Criminal Court and Some of Its Issues of Implementation', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 259.

Liechtenstein: Huston, J., 'Ratification and Implementation in Liechtenstein', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 247.

Mexico: Liera, S.F., 'Ratification of the Statute of the International Criminal Court by Mexico', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 275.

Netherlands: Sluiter, G., 'Implementation of the ICC Statute in the Dutch Legal Order', (2004) 2 *JICJ* 158; Verweij, H. and Groenleer, M., 'The Netherlands' Legislative Measures to Implement the ICC Statute', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 83.

New Zealand: Hay, J., 'Implementing the ICC Statute in New Zealand', (2004) 2 *JICJ* 191.

Russia: Orlova, V., 'A Hope for the Future? Prosecuting Crimes against Humanity in Russia's Courts', (2007) 7 *ICLRev* 45.

South Africa: Strydom, H., 'South Africa's Implementation of the Rome Statute', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 105.

Spain Gómez Benítez, J.M., 'Elementos comunes de los crímenes contra la humanidad en el estatuto de la corte penal internacional y necesaria tipificación de estos crímenes en el derecho penal español', (2001) 9 *Cuadernos de Derecho Judicial* 1.

Sweden: Friman, H., 'Political and Legal Considerations in Sweden Relating to the Rome Statute for the International Criminal Court', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 121.

United Kingdom: Wilmshurst, E., 'Implementation of the ICC Statute in the United Kingdom', in: Lee, R.S. (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005) 147.

United States of America: Cassel, D., 'The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes and Crimes against Humanity', (1999–2000) 23 *FordhamIJL* 378.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	3
I. Paragraph 1: List of crimes	3
1. Chapeau	3
a) 'For the purposes of this Statute'	6
b) 'any of the following acts'	13
c) 'committed as part of a[n] ... attack'	14
d) 'widespread or systematic attack directed against any civilian population'	18
e) 'directed against any civilian population'	23
f) 'with knowledge of the attack'	26
g) Special remarks	28
2. The different subparagraphs	30
a) 'Murder'	30
b) 'Extermination'	38
c) 'Enslavement'	39
d) 'Deportation or forcible transfer of population'	44
aa) 'Deportation'	45
bb) 'forcible transfer of population'	46
e) 'Imprisonment or other severe deprivation of physical liberty'	48
aa) 'Imprisonment'	50
bb) 'rules of international law'	51
f) 'Torture'	52
g) 'Rape ... or any other form of sexual violence of comparable gravity'	53
aa) 'Rape'	56
bb) 'sexual slavery'	61
cc) 'enforced prostitution'	63
dd) 'forced pregnancy'	66
ee) 'enforced sterilisation'	67
ff) 'any other form of sexual violence of comparable gravity'	68
gg) Special remarks	69
h) 'Persecution'	70
aa) Definition	71
bb) 'against any identifiable group or collectivity'	72
cc) 'grounds'	74
aaa) 'political, racial, national, ethnic, cultural, religious, gender ... grounds'	77
bbb) Other grounds universally recognised	84
ccc) Connection with acts referred to in this paragraph or crimes within the jurisdiction of the Court	86
i) 'Enforced disappearance of persons'	87
j) 'The crime of apartheid'	92
k) 'Other inhumane acts'	95
aa) Assessment and similarity in character	99
bb) Intentionally causing results	101
aaa) Intention	102

bbb) 'great suffering, or serious injury to body or to mental or physical health'	103
cc) Special remarks	104
II. Paragraph 2: Definitions of crimes or their elements	105
1. 'Attack'	105
a) 'course of conduct involving the multiple commission of acts'	107
b) 'against any civilian population'	108
c) Connection with State or organisational policy	109
2. 'Extermination'	112
a) Main elements	112
b) 'intentional infliction of conditions of life'	118
3. 'Enslavement'	119
a) exercise of powers of ownership	119
b) trafficking	121
4. 'Prohibited movements of population'	123
a) 'Deportation'	124
aa) 'lawfully present'	125
bb) Without permitted grounds	126
b) 'forcible transfer'	127
aa) 'lawfully present'	128
bb) Without permitted grounds	129
cc) Mental element	130
5. 'Torture'	131
a) 'intentional'	131
b) 'severe pain or suffering'	132
c) Persons in custody or under control	133
d) Exception for pain or suffering 'inherent in or incidental to lawful sanctions'	134
e) Special remarks	135
6. 'Forced pregnancy'	136
a) 'unlawful confinement'	137
b) 'forcible made pregnant'	138
c) 'intentional'	139
d) National laws regarding pregnancy	140
7. 'Persecution'	141
a) 'intentional and severe deprivation of fundamental rights'	142
b) 'by reason of the identity of the group or collectivity'	143
8. 'The crime of apartheid'	144
a) Similar inhumane acts	145
b) Context with 'an institutionalised regime of systematic oppression and domination'	146
c) Domination of 'one racial group over any other'	147
d) 'intention of maintaining that regime'	148
e) Special remarks	149
9. 'Enforced disappearance of persons'	150
a) 'arrest, detention or abduction of persons'	151
b) Participation of a State or a political organisation	152
c) Refusal to acknowledge or to give information	153
d) Intention to remove from the protection of the law	154
e) 'for a prolonged period of time'	155
f) Special remarks	156
III. Paragraph 3: Definition of gender	157

A. Introduction/General remarks

- 1 The definition of crimes against humanity has evolved and become further clarified since this concept first received explicit international legal recognition in the *St. Petersburg Declaration of 1868* limiting the use of explosive or incendiary projectiles as 'contrary to the laws of humanity'¹. The concept received further recognition when the First Hague Peace

¹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, reprinted in Roberts and Guelff (eds.), *Documents on the Laws of War* (2000) 53. (The parties agreed to draw up

Conference in 1899 unanimously adopted the Martens Clause as part of the Preamble to the *Hague Convention respecting the laws and customs of war on land*². The Martens Clause has been incorporated virtually unchanged in most subsequent humanitarian law treaties³. The first formal reference to some of the crimes which would be included in the concept of crimes against humanity was given in the *Declaration of France, Great Britain and Russia* on 24 May 1915 denouncing the massacres by the Ottoman Empire of Armenians in Turkey as ‘crimes against humanity and civilisation for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres’⁴. The novelty was, of

additional instruments ‘in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity’). There were earlier uses of the phrase, but often the link with the twentieth century concept of crimes against humanity is either tenuous or non-existent. For example, in 1794, Maximilien de Robespierre called Louis XVI a ‘criminal toward humanity’, but most of ‘crimes’ of the ‘tyrant’ – primarily his conspiracy in league with foreign countries against the government that deposed him, were not specifically identified in his speech and are far removed from the current understanding of what constitutes crimes against humanity. M. M. I. Robespierre, ‘Against Granting the King a Trial’ 3 Dec. 1792, reprinted in *The World’s Famous Orations: Continental Europe* (1906), 380 <<http://www.bartleby.com/268/7/23.html>> accessed 06 August 2014).

More likely, the concept owes more to natural law thinking in some of the early writings on international law, such as Grotius’s views on the natural law limits on the use of armed force in *De Jure Belli Ac Pacis* (On the Law of War and Peace) and Emmerich de Vattel’s concept of ‘offices of humanity’, binding men and nations alike, which were founded on the laws of nature, *The Law of Nations or the Principles of Natural Law* (1758), Book II, Ch. 1, § 2. In the early 19th century, a U.S. Attorney General, citing Grotius, declared that acts of ‘extreme atrocity’ involved ‘crimes against mankind’. 1 Opinion. Attorney General (1821) 509, 513. The Reverend Theodore Parker in 1854 called the US Fugitive Slave Bill a new crime against humanity. *The New Crime against Humanity, A Sermon Preached at the Music Hall*, in Boston, on Sunday 4 June 1854. In 1874, the American editor and leading proponent of public reform, G.W. Curtis, also called slavery a ‘crime against humanity’, in: Norton (ed.), *Orations and Addresses of George William Curtis* (1894) 208. In 1906, in an article that was not published until 1921, R. Lansing, later U.S. Secretary of State and participant in the Versailles Peace Conference (see note 6), stated that the slave trade, along with piracy, was an example of a ‘crime against humanity’ over which any state could exercise universal jurisdiction. Lansing (1921) 15 *AJIL* 13, 25.

² Hague Convention respecting the laws and customs of war on land of 1899, Preamble (‘Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience’). The Martens Clause is named after the Russian diplomat who drafted it, see Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011) 88, fn. 7; Lippman (1997) 17 *BCTHirdWorldLJ* 171, 173; Meron, *The Humanisation of International Law* (2006) 16 *et seq.*; Hankel, in: Hankel (ed.), *Die Macht und das Recht: Beiträge zum Völkerrecht und Völkerstrafrecht am Beginn des 21. Jahrhunderts* (2008) 414, 428-9; Salter and Eastwood (2011) 2 *JHumLStud* 216, 251 *et seq.*; *id.*, in: Paul Behrens and Ralph Henham, (eds.), *Elements of Genocide* (2013) 20.

³ See, e.g., 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, Preamble, para. 8; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 Aug. 1949, 6 UST 3114, 75 UNTS 31, article 63; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 Aug. 1949, 6 UST 3217, 75 UNTS 85, article 62; Convention Relative to the Protection of Prisoners of War (Third Geneva Convention), 12 Aug. 1949, 6 UST 3316, 75 UNTS 135, article 142; Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 6 UST 3516, 75 UNTS 287, article 158; Add. Prot. to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Add. Prot. I), article 1 para. 2; Add. Prot. to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (Add. Prot. II), Preamble.

⁴ Declaration of France, Great Britain and Russia, 24 May 1915, quoted in Schwelb (1946) 23 *BYbIL* 178, 181. The date of 28 May 1915 in this article is a misprint. Dadrian (1989) 14 *YaleJIL* 221, 262, fn. 129. The history of the drafting of the Declaration remains to be fully explored, but the concept appears to reflect in part the similar justifications advanced by Western countries for earlier diplomatic protests and military humanitarian interventions to protect minorities in Lebanon, Romania and Turkey. See *U.S. v. Altstötter (Justice Trial)*, Judgment, U.S. Military Tribunal, Nuremberg, Germany, 4 Dec. 1947, 4 LRTWC 1 (HMSO 1947). According to one account, the Declaration was adopted at the initiative of Russia, over the initial reluctance of Great Britain. Ara Sarafian, *23 May 1915 Declaration by British Government*, Gomidas Institute Notes (http://gomidas.org/NOTES_AND_Studies/23_May_1915_Declaration.pdf), p. 2. According to this note, the Russian draft (FO371/2488/58387) used the phrase ‘crimes committed by Turkey against Christianity and civilisation’, but after objections by France and Great Britain that this wording would offend their Muslim citizens, the British government dropped the phrase

course, that the crimes were committed by citizens of a state against their own fellow citizens, not against those of another state⁵. The 1919 Versailles Peace Conference Commission supported individual criminal responsibility for violations of ‘the laws of humanity’, including murders and massacres, systematic terrorism, putting hostages to death, torture of civilians, deliberate starvation of civilians, rape, abduction of girls and women for the purposes of enforced prostitution, deportation of civilians, internment of civilians under inhuman conditions, forced labour of civilians in connection with the military operations of the enemy, imposition of collective penalties and deliberate bombardment of undefended places and hospitals⁶. In 1920, Turkey agreed in the *Treaty of Sèvres* to bring to justice those responsible for such crimes against Armenians which were committed after the outbreak of the First World War and recognised the concurrent jurisdiction of the courts of the Allies over these crimes; it also conducted several trials of Turkish officials for these crimes⁷. Historically, the relevant conduct has been understood broadly, perhaps even going so far as to treat crimes against humanity in an equivalent manner to human rights and encompassing a wide range of conduct, performed by either state or non-state actors, and in times of war or peace⁸. In any case, it is fair to argue in light of the instruments just mentioned that crimes against humanity had already been embedded in customary international law before the Nuremberg trials⁹.

- 2 Since the Second World War, crimes against humanity have been repeatedly recognised in international instruments as part of international law¹⁰, their definition is, however, vague

‘against Christianity and civilisation’, while the French and Russian versions used the phrase ‘against humanity and civilisation’ (FO371/2488/65759); *ibid.*, p. 2. See also *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 35; Cerone (2008) 14 *NewEnglE&CompL* 191–192.

⁵ Similarly, in the Nuremberg trials ‘crimes against humanity’ were dealt with as crimes committed by Germans against fellow Germans; cf. Article 6 (c) of the *Charter of the International Military Tribunal, annexed to the London Agreement* (Nuremberg or IMT Charter), 8 Aug. 1945, article 6 (c), as amended by the Protocol to Agreement and Charter, London, 6 Oct. 1945; see also Clark, in: Ginsburgs and Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990) 177, 195–198.

⁶ Commission of the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (1919 Peace Conference Commission Report), Versailles, Mar. 1919, Conference of Paris, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Annex., which recommended the establishment of a high tribunal to try persons belonging to enemy countries who were guilty of ‘offences against the laws and customs of war or the laws of humanity’. Somewhat ironically, in the light of his then unpublished article of 1906 (see note 1), Robert Lansing, as an American member of the Commission, joined his fellow US member, James Brown Scott and the two Japanese members in dissenting from this conclusion on the ground that the particular acts listed were not recognised as crimes under international law.

⁷ The Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sèvres), 10 Aug. 1920, articles 226, 230, reprinted in (1921) 15 *AJIL* 179 (Supp.). Although this treaty was signed by Turkey and 21 other countries, it was never put into effect and was replaced by the Treaty of Lausanne, which did not provide for such prosecutions. See Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), 24 July 1923, 28 LNTS 11, reprinted in (1924) 18 *AJIL* 1 (Supp.). For an account of these trials, see Dadrian, 291–334, note 4.

⁸ Cf. Paust, in: *id.* et al., *International Criminal Law: Cases and Materials* (2013) 777.

⁹ Cf. Robinson (1999) 93 *AJIL* 43, 44.

¹⁰ The relevant provisions adopted before 1998 include: Nuremberg Charter note 5, article 6 (c); article II para. 1 (c) of Allied Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity (Allied Control Council Law No. 10), 20 Dec. 1945; article II para. 1 (c), Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946; article 5 (c) of the *Charter of the International Military Tribunal for the Far East, Tokyo (Tokyo Charter)*, article 5 (19 January 1946, T.I.A.S 1589); principle VI (c) of the 1950 *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (Nuremberg Principles)*, ILC Report on Principles of the Nuremberg Tribunal, 29 July 1950, 5 UN GAOR Supp. (No. 12) 11, UN Doc. A/1316 (1950); article 2 para. 10 (inhuman acts) of the 1954 ILC Draft Code; the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity, adopted by GA Res. 2391 (XXIII) of 26 Nov. 1968, article 1 (b); the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention), adopted in GA Res. 3068 (XXVIII), 30 Nov. 1973; article 5 of the 1993 *ICTY Statute*, article 3 of the 1994 *ICTR Statute* and article 18 of the 1996 ILC Draft Code. Since the Rome Statute was adopted, crimes against humanity have been included in UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 June 2000, article 5; Statute of the Special Court for Sierra Leone (*Sierra Leone*

and, in many respects, inconsistent with regard for instance, the different approaches as to whether the crimes against humanity are linked to an armed conflict¹¹, or are to be considered as mere peace crimes¹². The scope of these definitions and their interpretation by international and national tribunals and courts will be discussed below.

B. Analysis and interpretation of elements

I. Paragraph 1: List of crimes

1. Chapeau

Article 7 represents both a ‘codification’ and a ‘progressive development’ of international law within the meaning of article 13 UN Charter¹³. It unites the distinct legal features which may be thought of as the ‘common law’ of crimes against humanity¹⁴. The *chapeau* of paragraph 1 of article 7 establishes the jurisdictional threshold of the Court over crimes against humanity under the *Statute*, while subparagraph 2 (a) defines this threshold in greater detail (see mn 87–93)¹⁵. It captures the essence of such crimes, namely that they are acts which occur during a widespread or systematic attack on any civilian population in either times of war or peace. The drafting history of this provision reveals that little consensus existed in respect of most of these elements before the Diplomatic Conference in Rome. Thus, a more in-depth scrutiny going beyond the mere analysis of the positive law is required in order to understand the *rationale* of crimes against humanity. Historical facts suggest conceptualizing them as state crimes in a broad sense¹⁶. This definition is problematic, however, for two reasons. First, it is limited to the classical relation between a state and its citizens residing in its own territory, leaving out other extraterritorial state-citizen relations and relations between a state and foreign citizens;¹⁷ second, it does not account for non-state actors, at least not explicitly. Replacing ‘state’ by ‘non-state actor’ to accommodate the concept to the now recognised standing of the latter as a potential perpetrator of crimes against humanity seems inadequate, however, since there is clearly a difference between a state’s obligation under international law to guarantee the rule of law and protect its citizens and a similar (emerging) duty of a non-state actor over the territory under its control. Therefore, a concept of crimes against humanity which does not deny their eminent political connotation, but yet downplays the focus on the entity behind these crimes is more

Statute), article 2; Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), article 5. The increase in the number of acts expressly listed as crimes against humanity is less an expansion of the scope of crimes against humanity than the giving of more precise definitions to conduct that was or would have been considered in the category of other inhumane acts under the Nuremberg Charter, note 6, or were identified as such, in the 1919 Peace Conference Commission Report.

¹¹ See *ICTY Statute*, article 5, note 10, and article 6 (c) *IMT Statute*, note 5.

¹² See *ICTR Statute* article 3, note 10.

¹³ See also Clark, in: *id.*, Feldbrugge and Pomorski (eds.), *International and National Law in Russia and Eastern Europe* (2001) 139, 139–156.

¹⁴ Luban (2004) 29 *YaleJIL* 85, 93 *et seq.*, summarizing these legal features as follows (at 108): ‘crimes against humanity are international crimes committed by politically organised groups acting under color of policy, consisting of the most severe and abominable acts of violence and persecution, and inflicted on victims because of their membership in a population or group rather than their individual characteristics’.

¹⁵ The 1994 ILC Draft Statute for an International Criminal Court did not include any definition for crimes against humanity, which had been proposed as a crime within the Court’s jurisdiction in article 20.

¹⁶ Cf. Richard Vernon’s classical definition in Vernon (2002) 10 *JPolPhilosophy* 231, 233, 242, 245: ‘a moral inversion, or travesty, of the state’, ‘an abuse of state power involving a systematic inversion of the jurisdictional resources of the state’, ‘a systematic inversion: powers that justify the state are, perversely, instrumentalised by it, territoriality is transformed from a refuge to a trap, and the modalities of punishment are brought to bear upon the guiltless’.

¹⁷ See the convincing criticism of Luban (2004) 29 *YaleJIL* 85, 94, fn. 28.

convincing¹⁸. ‘Crimes against humanity’, understood in this way, intend to provide penal protection against the transgression of the most basic laws protecting our individuality as political beings and our social entity as members of political communities. They protect both, being international crimes, the collective legal interests of international peace and security¹⁹, but also more concrete individual legal interests such as life, bodily integrity, liberty, and personal autonomy and thus ultimately human dignity²⁰. That also answers another unresolved question since the inception of the concept of crimes against humanity, namely whether they were crimes that were particularly inhumane or were crimes against a collective body of individuals. Probably the best answer is that they are both²¹, a double assault on individuality (the individual and political ‘quality of being human’, ‘humanness’) and groups (‘the set of individuals’, ‘sociability’, ‘humankind’)²². There was no fundamental disagreement over the prerequisite that the acts must be committed as part of an attack on any civilian population²³. However, it was unresolved whether these acts needed to take place during armed conflict, and if they had to occur on discriminatory grounds²⁴. It is evident from the *chapeau* of article 7 that the State delegates finally decided not to include either of these requirements²⁵.

- 4 Another point of divergence arose over whether the attack had to be both widespread *and* systematic, or only one *or* the other²⁶. It seems to clearly follow from the *chapeau* that the matter was resolved in favour of the alternative formulation. Indeed, this was also the approach taken by the UNWCC speaking of crimes ‘which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied ... endangered the international community or shocked the conscience of mankind’²⁷. The concern had always been to exclude isolated and random acts, and ordinary crimes under national law, from the ambit of the Court’s jurisdiction over crimes against humanity²⁸. This has certainly been

¹⁸ Ambos, *Treatise on ICL II* (2014) 47, fn. 14 and main text.

¹⁹ See the Preamble of the ICC Statute, para. 3.

²⁰ Further on the protected legal interests, see Ambos, *Treatise on International Criminal Law* (2014) 48–49, with further references; Werle and Jessberger, *Principles of International Criminal Law* (2014) 333; Satzger, *International and European Criminal Law* (2012) § 14, mn 32; *id.*, *Internationales und europäisches Strafrecht* (2013) § 16, mn 32.

²¹ The following two examples suffice to illustrate the divide. On the one hand J. G. Barsegov, a member of the International Law, noted during the 1989 session that ‘[i]n Russian as in English and French, the term ‘humanity’ could mean both ‘mankind’ and the moral concept whose antonym was ‘inhumanity’. That terminological ambiguity clearly showed that there was a conceptual problem. In order to remove the ambiguity, it was necessary to go back to the sources. ...’ [See in the 24 May 1915 Declaration by France, Great Britain and Russia, note 4] the crimes in question had been characterised as ‘crimes against humanity’ in the sense of ‘crimes against mankind’. 1 *YbILC* 10 (1989) (overlooking the use of the term ‘laws of humanity’ in the St. Petersburg Declaration of 1868, note 1, and, the Martens Clause of 1899, note 2 which can be seen as emphasizing the concept of humaneness rather than the idea of an attack against ‘mankind’. On the other hand, Cassese emphasizes the former concept: Cassese, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 353, 360 (‘They are particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more human beings’).

²² See Luban (2004) 29 *YaleJIL* 85, 86 *et seq.*; Vernon (2002) 10 *JPol’lPhilosophy* 231, 237 *et seq.*, while critical of the element of humanness (see 237), shares the idea of an attack on humankind in the sense of entity and diversity; see also Ambos, *Treatise on ICL II* (2014) 48, fn. 18–20.

²³ *Ad Hoc* Committee Report, paras. 77–80; 1996 Preparatory Committee I, paras. 82–90; Preparatory Committee Decisions Feb. 1997, pp. 4–6; Preparatory Committee (Consolidated) Draft, pp. 30–33.

²⁴ *id.*

²⁵ With the exception, however, of persecution, which in accordance with paragraph 1 (h) requires that the acts be committed on certain discriminatory grounds.

²⁶ See mn 18–22.

²⁷ See *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 179.

²⁸ See *Ad Hoc* Committee Report, note 23, para. 78; and Preparatory Committee I, note 23, paras. 84–85. See also ‘Special Analysis of the ICC Statute (1): Defining Crimes’ On The Record (29 June 1998) 1 (8); Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 459, 466–7.

achieved through the requirement of the acts being *either* widespread or systematic. Either of these conditions will ensure that single, isolated or random acts, which do not rise to the level of crimes against humanity, cannot be prosecuted in the Court under article 7²⁹. The alternative approach has been repeated many times in the case law³⁰, and adopted by some codifications³¹, also represents the prevailing view in the scholarly literature³². The apparent contradiction of this reading to the wording of paragraph 2 (a), requiring that the ‘multiple commission of acts’ be based on a certain policy (and thus apparently opting for a cumulative approach) can be resolved by focusing on the function accorded to the policy element, being

²⁹ As was held in *Prosecutor v. Tadić*, No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997 (PURL: <http://www.legal-tools.org/doc/0a90ae/>), para. 648: ‘It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian ‘population’, and either a finding of widespreadness .. or systematicity’. See also *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998 (PURL: <http://www.legal-tools.org/doc/b8d7bd/>), para. 579: ‘The Chamber considers that it is a prerequisite that the act must be committed as part of a widespread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be part of both’.

³⁰ See *Tadić* (Trial Chamber Judgment), note 29, paras. 646-8; *Akayesu* (Trial Chamber Judgment), note 29, para. 579; *Prosecutor v. Kayishema and Ruzindana*, No. ICTR-95-1-T, Judgment, Trial Chamber, 21 May 1999 (PURL: <http://www.legal-tools.org/doc/0811c9/>), para. 123; *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, Judgment, Trial Chamber, 6 December 1999 (PURL: <http://www.legal-tools.org/doc/f0dbbb/>), paras. 67-8; *Prosecutor v. Musema*, No. ICTR-96-13-A, Judgment and Sentence, Trial Chamber, 27 January 2000 (PURL: <http://www.legal-tools.org/doc/1fc6ed/>), paras. 202-3; *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000 (PURL: <http://www.legal-tools.org/doc/e1ae55/>), para. 207; *Prosecutor v. Kunarac*, No. IT-96-23-T, Judgment, Trial Chamber, 22 February 2001 (PURL: <http://www.legal-tools.org/doc/fd881d/>), para. 427; *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Judgment, Trial Chamber, 26 February 2001 (PURL: <http://www.legal-tools.org/doc/d4fedd/>), para. 178; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, Trial Chamber, 7 June 2001 (PURL: <http://www.legal-tools.org/doc/6164a4/>), para. 77; *Prosecutor v. Limaj and others*, No. IT-03-66-T, Judgment, Trial Chamber, 30 November 2005 (PURL: <http://www.legal-tools.org/doc/4e469a/>), para. 183; *Prosecutor v. D. Milošević*, No. IT-98-29/1-T, Judgment, Trial Chamber, 12 December 2007 (PURL: <http://www.legal-tools.org/doc/e706e2/>), para. 925; *Prosecutor v. Mrksić*, No. IT-95-13/1-T, Judgment, Trial Chamber, 27 September 2007 (PURL: <http://www.legal-tools.org/doc/32111c/>), para. 437 (‘disjunctive rather than cumulative’); *Prosecutor v. Lukić and Lukić*, No. IT-98-32/1-T, Judgment, Trial Chamber, 20 July 2009 (PURL: <http://www.legal-tools.org/doc/af5ad0/>), para. 875; *Prosecutor v. Popović and others*, No. IT-05-88-T, Judgment, Trial Chamber, 10 June 2010 (PURL: <http://www.legal-tools.org/doc/481867/>), para. 756; *Prosecutor v. Bisengimana*, No. ICTR 00-60-T, Judgment, Trial Chamber, 13 April 2006 (PURL: <http://www.legal-tools.org/doc/694dd8/>), para. 43; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, Judgment and Sentence, Trial Chamber, 12 September 2006 (PURL: <http://www.legal-tools.org/doc/fa02aa/>), para. 512, with further references at fn. 715; *Prosecutor v. Setako*, No. ICTR-04-81-T, Judgment and Sentence, Trial Chamber, 25 February 2010 (PURL: <http://www.legal-tools.org/doc/068639/>), para. 476; *Prosecutor v. Munyakazi*, No. ICTR-97-36A-T, Judgment and Sentence, Trial Chamber, 5 July 2010 (PURL: <http://www.legal-tools.org/doc/9b9ee3/>), para. 503; *Prosecutor v. Katanga and Ngudjolo*, No. ICC-01/04-01/07-717, Confirmation Decision, Pre-Trial Chamber, 30 September 2008 (PURL: <http://www.legal-tools.org/doc/67a9ec/>), para. 394; *Prosecutor v. Bemba*, No. ICC-01/05-01/08-424, Confirmation Decision, Pre-Trial Chamber, 15 June 2009 (PURL: <http://www.legal-tools.org/doc/07965c/>), para. 82; *Prosecutor v. Stanisic and Zupljanin*, No. IT-08-91-T, Judgment, Trial Chamber, 27 March 2013 (PURL: <http://www.legal-tools.org/doc/2ed57f/>), para. 28; *Prosecutor v. Stanisic and Simatovic*, No. IT- 03-69-T, Judgment, Trial Chamber, 30 May 2013 (PURL: <http://www.legal-tools.org/doc/066e67/>), para: 971; *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Trial Chamber, 7 March 2014 (PURL: <http://www.legal-tools.org/doc/9813bb/>), para. 1123; *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014 (PURL: <http://www.legal-tools.org/doc/5b41bc/>), para. 223.

³¹ 1996 ILC Draft Code, article 18(‘[i]n a systematic manner or on a large scale’); UNTAET Reg. 2000/15, 6 June 2000, note 10; see *Sierra Leone Statute* article 2, note 10; *Statute of the Iraqi Special Tribunal*, article 12 a.

³² See for example Swaak-Goldman, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000) 143, 157; König, *Die völkerrechtliche Legitimation der Strafgewalt internationaler Strafjustiz* (2003) 260 et seq.; see Meron, *The Humanisation of International Law* (2006) 95-6; see Werle and Jessberger, *Principles of International Criminal Law* (2014) 339; Werle, *Völkerstrafrecht* (2012) mn 877; see Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 466-467; Scheinert (2013) 13 ICLRev 627, 645-6; see Satzger, *International and European Criminal Law* (2012) § 14 mn 35; *id.*, *Internationales und europäisches Strafrecht* (2013) § 16 mn 35; Robinson, in: Cryer, Friman, Robinson and Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 234.

the international element of crimes against humanity³³. This element also serves to single out random acts of violence from the scope of crimes against humanity³⁴. While it is inherent to a systematic attack³⁵, it does not necessarily encompass the widespread qualifier, which is understood quantitatively (requiring a large number of victims). Thus, if a widespread attack were to suffice, even ordinary crimes, if only ‘widespread’ enough, would amount to crimes against humanity³⁶. This would, however, obviously go against the rationale of crimes against humanity. Therefore, a – *quantitatively* – widespread ‘attack’ within the meaning of paragraph 1 would only be a crime against humanity, if at the same time it is – *qualitatively* – based on (‘pursuant to or in furtherance of’) a certain policy³⁷. Thus, paragraph 2 (a) does not require that an attack be both widespread and systematic, but that an attack, regardless of being widespread or systematic, be ‘pursuant to or in furtherance of a State or organisational policy’³⁸.

- 5 The list of crimes against humanity contained in article 7 of the *Statute* and their definitions largely accord with the traditional conception of crimes against humanity under customary international law³⁹. Customary international law should be taken into account

³³ Cf. *Prosecutor v. Tadić*, No. IT-94-1-A and IT-94-1-Abis, Judgment in Sentencing Appeals, Separate Opinion of Judge Shahabuddeen, 26 January 2000; see also Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011) 10; on the rationale of the context element, the reason why a certain criminal conduct becomes a crime against humanity see Ambos, *Treatise on International Criminal Law* (2014) 55–6, with further references.

³⁴ Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 135; Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 459; see 1996 ILC Draft Code, 2 YBILC 94 (1996); see Robinson, in: Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 237; critically thereon, Halling (2010) 23 *LeidenJIL* 827, 831 et seq., 840–1; see also *Prosecutor v. Nikolić*, No. IT-94-2-R61, Review of Indictment, Trial Chamber, 20 October 1995 (PURL: <http://www.legal-tools.org/doc/6e9de4/>), para. 26; Gotzel, *Terrorismus und Völkerstrafrecht: Die Anschläge vom 11. September 2001, der Tokioter Giftgasanschlag, die Geiselnahme von Beslan und die täglichen Anschläge im Irak vor dem Internationalen Strafgerichtshof* (2010) 208.

³⁵ Cf. Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 140–1; Parenti, in: Parenti, Filippini and Folgueiro (eds.), *Los crímenes contra la humanidad y el genocidio en el derecho internacional: Origen y evolución de las figuras, elementos típicos, jurisprudencia internacional* (2007) 50 et seq.; cf. also *Katanga and Ngudjolo* (Confirmation Decision), note 30, para. 396; *Bemba* (Confirmation Decision), note 30, para. 81; *concurring Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 (PURL: <http://www.legal-tools.org/doc/338a6f/>), para. 96, according to which organisation and a ‘regular pattern’ belong to the core of the notion of ‘systematic’. For a critical view of the almost equivalency of ‘systematic’ and ‘policy’ in the early ICC case law, see Halling (2010) 23 *LeidenJIL* 827, 836–7; Sadat (2013) 107 *AJIL* 334.

³⁶ See also Ambos, *Treatise on ICL II* (2014) 69, with further references.

³⁷ On the importance of a connection with the policy and not only the state or organisation, cf. *Katanga* (Trial Chamber Judgment), note 30, para. 1116 7 4.

³⁸ Concurring, Gómez Benitez (2001) 9 *Cuadernos De Derecho Judicial* 1, 27–8; in a similar vein, see Robinson, in: Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 239, requiring at least approval or endorsement from the state; see also Parenti, in: Parenti, Filippini and Folgueiro (eds.), *Los crímenes contra la humanidad y el genocidio en el derecho internacional: Origen y evolución de las figuras, elementos típicos, jurisprudencia internacional* (2007) 45 et seq. (52); Borsari, *Diritto punitivo sovranazionale come sistema* (2007) 312; Kolb, in: Kolb and Scalia (eds.), *Droit International Pénal: Précis* (2012) 1, 103–4. On the contrary, see Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 140, 144, for whom the policy element constitutes only a jurisdictional element; in a different vein, see *Katanga* (Trial Chamber Judgment), note 30, para. 1111 (stressing the autonomy of ‘widespread’ and ‘systematic’ towards the policy element: ‘ce n’est pas tant la politique que le caractère généralisé ou systématique de l’attaque, c’est-à-dire une considération d’échelle et de régularité du modèle employé, qui caractérise avant tout le crime contre l’humanité’) 7 4. For an in depth analysis see Cupido (2011) 22 *CLF* 275, 289 et seq.

³⁹ However, the list of specific acts in paragraph 1 (a) to (j) may not be complete and it is possible that other acts will be recognised as crimes against humanity, either through jurisprudence singling them out as acts of persecution or ‘other inhumane acts’, state practice or amendment of the Rome Statute. See, for example, Bantekas (2006) 4 *JICJ* 466; cf. also Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 419, for whom article 7 is codified customary international law.

when interpreting article 7 and the elements of crimes against humanity under the *Statute*. In interpreting article 7, it must be borne in mind that the amount of jurisprudence in international and national courts and other state practice, particularly legislation, prior to the Rome Diplomatic Conference concerning crimes against humanity was limited. There were a number of important international and national court decisions in the four years after the Conference that had a significant impact on the drafting of the elements of crimes against humanity in the Elements of Crimes and, in turn, the definitions in the *Rome Statute* and Elements of Crimes had an impact on jurisprudence and state practice, particularly legislation. However, such subsequent jurisprudence and state practice, as discussed below, must, in some instances be used as an interpretive aid for article 7 with caution. First, the drafters may well have had different conceptions about the scope of article 7 or the elements. Second, there are often widely differing interpretations of the scope of particular crimes against humanity given by individual Trial Chambers of the *ICTY* and *ICTR* as will be seen below.

a) ‘For the purposes of this Statute’. By the inclusion of this phrase, the definition of crimes against humanity laid down in the *Statute* is plainly intended *only* to be applicable before the International Criminal Court⁴⁰. Accordingly, any adaptations of, or limitations which may be placed upon, the current definition of crimes against humanity under customary international law, or under any other legal provisions, by the *Statute* are not to be construed as an amendment of the customary law or any other position⁴¹.

There has been little agreement for nearly a century, however, on what are the internationalizing factors that distinguish crimes against humanity from ordinary crimes, such as murder, kidnapping, assault, rape and false imprisonment. The 1919 Peace Conference Commission Report did not contain an internationalizing factor for determining when the murders, rapes and other acts listed became crimes against humanity, but the *personal jurisdiction* threshold for determining which crimes would fall within the jurisdiction of the proposed special tribunal to try the Kaiser, an international criminal court, and the national military tribunals was that the persons tried would all be German nationals. In 1943, the United Nations War Crimes Commission spent considerable time wrestling with the question of how to distinguish crimes against humanity from war crimes, but not from ordinary crimes. It suggested two distinctions: first, that crimes against humanity could be committed regardless of the nationality of the victims and the perpetrators and, second, that these crimes were committed against persons ‘because of race, nationality, religious or political belief’⁴². The first three international instruments defining crimes under international law contained jurisdictional thresholds only, not internationalizing factors distinguishing crimes against humanity from ordinary crimes. The *Nuremberg Charter* establishing the International Military Tribunal at Nuremberg in 1945 did not contain an internationalizing factor, although it did contain two jurisdictional thresholds which are generally agreed not to be part of the definition of crimes against humanity. First, it limited the scope of the International Military Tribunal’s *personal jurisdiction* to ‘persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes ... CRIMES AGAINST HUMANITY’ and further

⁴⁰ The same is true of other articles concerned with subject matter jurisdiction, namely articles 6 (Genocide) and 8 (War Crimes).

⁴¹ Indeed, article 10 states that ‘nothing .. shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute’, and article 22 on *nullum crimen sine lege* provides that this article ‘shall not affect the characterisation of any conduct as criminal under international law independently of this Statute’. Nevertheless, carefully reasoned decisions of the Court concerning the scope of article 7 are likely to have a significant impact on the development of customary international law in a number of ways, including the adoption of similar interpretations by national and international courts; *cf.* also Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 144.

⁴² See *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 176.

limited that class of persons to ‘the major war criminals of the European Axis countries’⁴³. Second, it gave the International Military Tribunal jurisdiction over crimes against humanity when committed ‘in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated’⁴⁴ and it required that the victims be civilians. Both the so-called war nexus and the qualification of possible victims as civilians can be explained by the origin of crimes against humanity within the law of armed conflict⁴⁵. Another reason for the requirement of the war nexus was that of state sovereignty and non-intervention: it was argued that without such a nexus crimes against humanity would infringe on the principle of non-intervention⁴⁶. Notwithstanding that, the war nexus so understood amounts to the international element of crimes against humanity, yet, it was always held against this view that the Nuremberg Charter’s war nexus never constituted a material element of crimes against humanity, but merely a precondition for the IMT’s jurisdiction⁴⁷.

- 8 Similarly, the 1946 *Charter of the International Military Tribunal for the Far East* gave the International Military Tribunal *personal jurisdiction* over ‘Far Eastern war criminals who as individuals or as members of organisations are charged with offences which include Crimes against Peace’⁴⁸. That *Charter* gave the International Military Tribunal *subject matter jurisdiction* over certain acts as crimes against humanity committed ‘before or during the war’ or in execution of any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated⁴⁹. *Allied Control Council Law No. 10*, which governed trials after December 1945 by Allied *national* courts sitting in Germany, did not expressly define its personal jurisdiction, although it incorporated the 1943 *Moscow Declaration* and the *Nuremberg Charter*. It recognised as crimes against humanity when they were ‘committed against any civilian population’ or persecutions ‘whether or not in violation of the domestic laws of the country where perpetrated’⁵⁰. In contrast, the Tribunal of the *Justice* case indicated for the first time that a specific context element to exclude isolated crimes is required. It accepted the absence of the nexus⁵¹ and introduced instead another element to ‘exclude isolated cases of atrocity or persecution’, namely ‘proof of conscious participation in systematic government organised or approved procedures’⁵².
- 9 In 1950, the UN International Law Commission made the first of two attempts to incorporate as an internationalizing component of the definition a link to war crimes or

⁴³ The crimes against humanity listed in article 6 (c) fell into two groups, inhumane acts (sometimes called ‘the murder type’), ‘murder, extermination, enslavement, deportation, and other inhumane acts’, and ‘persecutions on political, racial or religious grounds’. This distinction has usually been maintained in international instruments, but when it has been disregarded it has led to problems.

⁴⁴ See Nuremberg Charter, article 6 (c), note 5.

⁴⁵ See *Tadić* (Trial Chamber Judgment), note 29, para. 620: ‘The inclusion of crimes against humanity in the Nurnberg Charter was justified by their relation to war crimes’. See also Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011) 33–4.

⁴⁶ See Lippman (1997) 17 *BCThirdWorldLJ* 171, 183, quoting Justice Jackson; see also Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 15–6.

⁴⁷ The nexus requirement was not even strictly observed by the IMT itself and – perhaps for that reason – had already disappeared in article II(c) of Control Council Law No. 10 (CCL 10); cf. thereon Ambos, *Treatise on ICL II* (2014) 50–1, fn. 38.

⁴⁸ See Tokyo Charter, article 5, note 10.

⁴⁹ *Ibid.*, article 5.

⁵⁰ See Allied Control Council Law No. 10, note 10, article II, para. 1 (c).

⁵¹ See *Justice Trial*, note 4, 974.

⁵² See *Justice Trial*, note 4, 982. The German post-war jurisprudence on Allied Control Council Law No. 10 confirmed the approach of the *Justice* case qualifying criminal conduct as a crime against humanity if committed in ‘Zusammenhang mit der Gewalt und Willkürherrschaft, wie sie in nazistischer Zeit bestanden hat’ (in context with the system of power and tyranny as it existed in the National-Socialist Period – author’s translation), *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen (1948–1950)*, Vol. 10 Case 3, at 14; see also *id.*, Vol. 1 Case 139, at 206 (*Weller* case). The war nexus was not even mentioned.

crimes against peace when it adopted the *Nuremberg Principles*⁵³. In 1951, the first version of the International Law Commission's Draft Code of Offences against the Peace and Security of Mankind required that inhuman acts (which covered crimes against humanity) be committed 'in execution of or in connexion with other offences defined in this article [a broad range of crimes under international law]⁵⁴. However, in part because of proposals by Belgium and Yugoslavia, the attempt to require a link to other crimes under international law as part of the definition of crimes against humanity was subsequently abandoned. In 1954, the International Law Commission adopted the first Draft Code of Offences against the Peace and Security of Mankind (1954 Draft Code), which dropped the link to other offences entirely and replaced the nexus by the more 'Justice case'-like policy requirement that the perpetrator acts 'at the instigation or with toleration of [state] authorities'⁵⁵. The war nexus was abandoned by the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity as well, which applies to '[c]rimes against humanity whether committed in time of war or in time of peace'⁵⁶.

This move from the war nexus to a link with some form of state authority was subsequently confirmed by national case law⁵⁷. In the *Menten* case, the Dutch Supreme Court held in 1981 that the concept of crimes against humanity requires that the crimes 'form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people'⁵⁸. In 1985, the French *Cour de Cassation* ruled in the *Barbie* case that crimes against humanity must be 'committed in a systematic manner in the name of a State practicing a policy of ideological supremacy'⁵⁹. This ruling was repeated in 1992 in the *Touvier* case⁶⁰. A few years later, in 1994, the Supreme Court of Canada held in the *Finta* case:

'What distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of

⁵³ ILC Report on Principles of the Nuremberg Tribunal, Principle VI.c, 29 July 1950, 5 UN GAOR. Supp. (No. 12) 11, UN Doc. A/1316 (1950). In the commentary on this principle the ILC expressed the view that, according to the Nuremberg Charter, the acts listed constituted international crimes only when committed 'in execution of or in connexion with any crimes within the jurisdiction of the Tribunal' (para. 120). The ILC did, however, reject the view of the International Military Tribunal, which declined to make a general declaration that the crimes against humanity could be committed before a war; instead, the ILC considered that they could, if they were committed 'in connexion with a crime against peace' (para. 123). Although these Principles were applicable to trials in national, as well as international, courts, they were never adopted by the UN General Assembly. *cf.* also Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 74–5 Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011) 171 *et seq.*

⁵⁴ 2 YBILC 136 (1951) (a slightly more flexible definition than in the Nuremberg Charter since the Draft Code included offences other than crimes against peace and war crimes).

⁵⁵ 1954 ILC Draft Code, article 2 (10), 2 YbILC 150 (1954). On the implicit return to the alternative link to authority as an expression of the gradual displacement of the laws of war by the then-new Human Rights Law, see Ambos, *Treatise on ICL II* (2014) 52. See also Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 76–7; Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011) 176 *et seq.*

⁵⁶ See article 1 (b) 1968 Convention of the Non-Applicability of Statutory Limitations note 10; *cf.* also Ambos, *Treatise on ICL II* (2014) 52.

⁵⁷ For a detailed overview of the national jurisprudence. see Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 44 *et seq.*

⁵⁸ *Public Prosecutor v. Menten*, Judgment, Supreme Court of the Netherlands, 13 January 1981, 75 I.L.R. 362–3 (1987) 7 9.

⁵⁹ *Federation Nationale des Deportes et Internes Resistants et Patriotes and Others v. Barbie*, 78 I.L.R. 137 (1985). On the Barbie case and its impact on the law of crimes against humanity, see Fournet, *Genocide and Crimes against Humanity: Misconceptions and Confusion in French Law and Practice* (2013) 11–47.

⁶⁰ *Touvier*, 100 I.L.R 352 (1992). The very language of the context element in these cases may be aimed at excluding acts of the Vichy regime or of French officials in Algeria from the scope of crimes against humanity, see pp. 353–5 where the Court explains that the Vichy regime collaborated with Germany only for pragmatic reasons and not for reasons of ideological supremacy. See also Binder (1989) 98 *YaleLJ* 1321, 1336–8.

the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race'⁶¹.

In the 1991 Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission shifted gears, confirming, on the one hand, the move to a policy-oriented requirement and, on the other, to a human rights approach. Article 21 of the Draft introduced the concept of systematic or mass violations and required that the crimes be carried out 'in a systematic manner or on a mass scale'⁶². The latter element combines qualitative ('systematic') and quantitative ('mass scale') criteria and, in a way, converts crimes against humanity into a leadership crime since only leaders are in a position to act systematically or on a large scale. Against this background it is not surprising that the ILC lists as possible perpetrators persons with 'de facto power or organised in criminal gangs or groups'⁶³. Thus, the Draft, in fact, retains the need for some kind of authority, or at least power, behind the crimes, simply clarifying that a non-state actor can also meet this element. Finally, the 1991 Draft Code does not require that the victims of crimes against humanity be civilians⁶⁴. The context-related structure was further confirmed by the final version of the *Draft Code of Crimes against the Peace and Security of Mankind*, in 1996⁶⁵, where, however, the qualifier 'mass' was replaced by the less restrictive term 'large-scale'. The *Draft Code* stated that crimes against humanity were 'any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group'⁶⁶. The systematic or large scale commission of crimes does not refer to the individual, but to the authority behind the crimes⁶⁷, which may also be a non-state actor. Civilians have been reintroduced as victims of the crimes, while a war nexus has been deliberately excluded by the ILC⁶⁸.

- 10 The concept of systematic or large scale was reflected to some extent in a significantly modified form in the jurisdictional thresholds for crimes against humanity of all the recent international criminal tribunals. The two alternatives are reflected in the *Statute* of the *ICTR* and the jurisprudence of the *ICTY*, but the thresholds of each Tribunal are radically different

⁶¹ *R. v. Finta*, 1 R.C.S., (1994) ('*Finta*'), at 812 7 9.

⁶² 1991 ILC Draft Code, article 21, Part 2, 2 *YbILC* 104–105 (1991). Article 21, entitled 'Systematic or mass violations of human rights' replaced the terms 'inhuman acts' and 'persecutions' in the 1954 Draft Code, which had replaced the term 'crimes against humanity'. This element was required for only some of the listed acts, but not for deportation or forcible transfer of population. The reasons why the ILC followed this approach are not entirely clear as article 21 is considerably different from the 1989 Draft presented by its Special Rapporteur on the Draft Code, which contained no internationalizing component. The discussion largely focused on the scope of crimes covered rather than on what should be the internationalizing element. However, the Special Rapporteur identified a variety of factors that he thought distinguished crimes against humanity from ordinary crimes, although his proposed restrictive distinctions have not stood the test of time. First, he stated that the term 'crimes against humanity' 'endows such crimes with their specific characteristics, that is, as crimes of particular infamy and horror, and which emphasizes their status as crimes under international law' (Seventh Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/419 and Add.1 (in 1989 *YbILC*, Vol. II, Part One), para. 32.). Second, he considered that all acts had to be committed based on discriminatory grounds: 'The thing that distinguishes inhuman acts from common crimes is the motive. They are acts that are prompted by ideological, political, racial, religious or cultural intolerance and strike at a person's innermost being, e.g., his convictions, beliefs or dignity' (*id.*, at para. 45). Third, he noted the mass or systematic nature of crimes against humanity, but made clear that 'an individual act may constitute a crime against humanity if it is part of a coherent system and of a series of repeated acts incited by the same political, racial, religious or cultural motive' (*id.*, at para. 62); *cf.* thereon Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011) 178 *et seq.*

⁶³ See 1991 ILC Draft Code, article 21, Commentary, 1 *YbILC* 103 (1991), note 62, para. 5.

⁶⁴ This part draws on Ambos, *Treatise on ICL II* (2014) 53.

⁶⁵ 1996 ILC Draft Code, article 18.

⁶⁶ See ILC Draft Code, note 34, p. 47.

⁶⁷ See *Tadić* (Trial Chamber Judgment), note 29, para. 649; see also Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 78–9. Two years later, the *Rome Statute* followed a similar, but significantly broader, approach in the chapeau to article 7 para. 1.

⁶⁸ See ILC Draft Code, note 34, p. 48.

and, as discussed below, include requirements that are certainly not part of the customary international law definition of crimes against humanity. Art. 5 of the ICTY Statute, in marked contrast to the UN Secretary-General's report⁶⁹, provides that the ICTY would 'have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population'⁷⁰. This war nexus differed from that of the Nuremberg Charter in two respects: On the one hand, the Nuremberg Charter was narrower than the *Statute* in that it required not only a commission of the crimes 'in armed conflict', but also a more specific nexus to one of the other war crimes enumerated in the Charter; on the other hand, the Charter was broader in that it extended the nexus to the mere preparation of an aggressive war. Given this significant deviation from Nuremberg it was since then difficult to that this precedent set a customary law standard⁷¹. As only possible explanation for the armed conflict link in the *Statute* then remains that it describes the limited geographic and temporal scope of the ICTY's jurisdiction. Nevertheless, as described below (mn 16), the ICTY Appeals Chamber restored the omitted component mentioned in the report that the acts be committed as part of a widespread or systematic attack and confirmed that there was no requirement in customary international law of any nexus to armed conflict⁷², even if its jurisdiction under the *ICTY Statute* over crimes against humanity was limited to those crimes committed with a nexus to armed conflict. It further stated that 'the armed conflict requirement is a jurisdictional element'⁷³. The *ICTR Statute* took a radically different approach from the *ICTY Statute* in its jurisdictional threshold, omitting any link to armed conflict⁷⁴, but imposing a requirement of a discriminatory motive for the commission of all acts⁷⁵. As noted below (mn 27), the *ICTR* has, however, acknowledged that the discrimina-

⁶⁹ Report of the Secretary-General pursuant to paragraph 2 of Security Council Res. 808 (1993), paras. 47–48, UN Doc. S/25704/Add.1, 19 May 1993. The report stated that '[c]rimes against humanity are aimed at any civilian population and are prohibited regardless whether they are committed in an armed conflict, international or internal in character' and 'refer to inhumane acts of a very serious nature .. committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. The statement that crimes against humanity must be committed during an armed conflict seems to be based on a narrow reading of the judgment of the Nuremberg Tribunal.

⁷⁰ See *ICTY Statute*, article 5, note 10.

⁷¹ This is all the more true if one follows the view that the Nuremberg war nexus was a merely jurisdictional element; cf. Ambos, *Treatise on International Criminal Law* (2014) 54.

⁷² *Prosecutor v. Tadić*, No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995 (PURL: <http://www.legal-tools.org/doc/866e17/>), para. 141: 'It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict'; confirmed in *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, Trial Chamber, 12 December 2012 (PURL: <http://www.legal-tools.org/doc/445e4e/>), para. 691; thereto Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 151; crit. Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 81 et seq.; Zahar and Sluiter, *International Criminal Law* (2008) 205.

⁷³ *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999 (PURL: <http://www.legal-tools.org/doc/8efc3a/>), para. 249; cf. also Ambos, *Treatise on ICL II* (2014) 54–5, fn. 71–72.

⁷⁴ See *ICTR Statute*, article 3, note 10; the 'civilian population' requirement constitutes a – final – relic of the war crimes origin of the definition of crimes against humanity. Against the war nexus requirement also Robinson, in: Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 233–4.

⁷⁵ See *ICTR Statute*, article 3, note 10. It stated that the *ICTR* would 'have power to prosecute persons responsible for the following crimes when committed 'as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. The statement that crimes against humanity must be based on discriminatory grounds may have originated in a similar statement in the Report of the Commission of Experts on the Former Yugoslavia, established pursuant to Security Council Res. 780 (1992), UN Doc. S/25274, Annex I, para. 49, that crimes against humanity were 'gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim'; against the requirement for a discriminatory animus also Robinson, in: Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 234; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 157.

tory grounds requirement is simply a jurisdictional limitation on the Tribunal and not part of the definition of crimes against humanity.

- 11 Since the Rome Conference, the 2000 UN regulation establishing the Special Panels for Dili in East Timor followed the chapeau of article 7 para. 1 by defining crimes against humanity as ‘any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack’, but it omitted the policy component and other requirements found in article 7 para. 2 (a)⁷⁶. The *Statute of the Special Court for Sierra Leone* gives the Special Court jurisdiction over ‘persons who committed the following crimes as part of a widespread or systematic attack against any civilian population’, but omits the requirement found in the chapeau of article 7 para. 1 of the *Rome Statute* that the crimes be committed ‘with knowledge of the attack’ and the requirements found in article 7 para. 2 (a)⁷⁷. The 2005 law establishing the Extraordinary Chambers of Cambodia goes backwards by containing an internationalizing component based on the jurisdictional threshold in the *ICTR Statute*, stating that crimes against humanity ‘are any acts committed as part of a widespread or systematic attack directed against any civilian population on national, political, ethnical, racial or religious grounds’⁷⁸.

National legislation adopted before the Rome Statute defining crimes against humanity as crimes under national law generally does not contain any internationalizing component or any components similar to those in article 7. However, since the Rome Conference, national legislation and draft legislation usually contains most of the internationalizing components in the chapeau to article 7 para. 1, but, as noted above in this mn, often omits the components found in article 7 para. 2 (a).

- 12 In conclusion, as discussed in more detail below, after a long history of repeatedly changing views, as the only common denominator appears some kind of context, which was required by every drafter or judge dealing with crimes against humanity. In addition, after the abandonment of the war nexus⁷⁹, a link to an authority or power, be it a state, organisation, or group, is required by most provisions on crimes against humanity as well as by the case law of the ad hoc tribunals. The context element has become the internationalizing component of the definition of crimes against humanity, applicable in both international and national courts, differentiating such crimes from ordinary crimes⁸⁰. It is also generally recognised that certain components of the thresholds in the Statutes of the two Tribunals, such as the requirement of a nexus to armed conflict in article 5 of the *ICTY Statute*, and the requirement that the acts be committed on certain discriminatory grounds found in article 3 of the *ICTR Statute* and in article 5 of the *Cambodian Extraordinary Chambers Law*, are not part of the customary international law definition of crimes against humanity.
- 13 **b) ‘any of the following acts’.** This part of the chapeau lists the various *acts* constituting crimes against humanity over which the Court will have jurisdiction. Other acts which are now, or will be in the future, recognised as crimes against humanity, except to the extent that they may be recognised as acts of persecution or other inhumane acts, do not fall within the

⁷⁶ See UNTAET Reg. 2000/15, 6 June 2000, article 5, note 10.

⁷⁷ See *Sierra Leone Statute*, article 2, note 10.

⁷⁸ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006) (Cambodia Extraordinary Chambers), article 5. Like the *ICTR Statute*, however, this threshold imposes the unnecessary double requirement that ‘persecutions on political, racial, and religious grounds’ in addition be committed on ‘political, racial and religious grounds’ (despite the use of ‘and’, any single one of these grounds would be sufficient).

⁷⁹ For a critical view, see Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 147.

⁸⁰ See references in note 82 and main text.

Court's jurisdiction, but might fall within the jurisdiction of other international courts or national courts. It is evident that *any* of the acts listed in paragraph 1 of article 7 alone can constitute crimes against humanity. There is no requirement that more than one of the enumerated acts be committed (for example, murder *and* torture), or combination thereof⁸¹.

c) 'committed as part of a[n] ... attack'. This part of the chapeau develops the context element. It may today well be considered a component of the definition of crimes against humanity in customary international law as the agreed internationalizing factor that transforms acts, such as murder, which otherwise would be simply ordinary crimes under national law, into crimes against humanity⁸². The *rationale* of this 'internationalisation' of certain crimes is the protection of fundamental human rights and underlying human dignity⁸³ against serious systematic and widespread human rights violations caused, supported, or tolerated by state or certain non-state organisations. The Statute and the Elements of Crimes both make clear that the underlying acts must occur as *part* of an attack⁸⁴. However, the acts could constitute the attack itself⁸⁵. For example, the mass murder of civilians may suffice as an attack against the civilian population. There is no requirement that a separate attack against the same civilians, within which the murders were committed, should be proven⁸⁶.

The definition of 'attack' which can either be 'widespread or systematic', as explained below (mn 18–22), is further elaborated upon in paragraph 2 (a) of article 7. This paragraph is discussed below (mn 87–93), and it suffices here to clarify that the meaning of 'attack', as confirmed by the Elements of Crimes, does not necessarily equate with 'military attack' as defined by international humanitarian law⁸⁷. Rather, it refers more generally to a campaign or operation conducted against the civilian population – a 'course of conduct' in the words of paragraph 2 (a)⁸⁸, which involves the (multiple) commission of the underlying acts of

⁸¹ For example, in the *Akayesu* (Trial Chamber Judgment), note 29, the accused was, *inter alia*, convicted of crimes against humanity for torture by itself; see paras. 676–684 7 13.

⁸² Many of the states that have enacted implementing legislation for the *Rome Statute* or prepared draft implementing legislation have incorporated only the threshold in paragraph 1 of article 7, not the explanation of this threshold in paragraph 2 (a) of this article; cf. also Kreß, in: Fischer and Lüder (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof: Beiträge zur Entwicklung einer effektiven internationalen Strafgerichtsbarkeit* (1999) 15, 53; van Schaack (1998–1999) 37 *ColumJTransnatL* 787, 819; see Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 128 *et seq.*; similarly Kirsch, in: Michalke, Köberer and Pauly (eds.), *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (2008) 269, 283, 285 *et seq.*; *id.* 22 *LeidenJIL* 525, for whom the international element is only a jurisdictional element and not an aggravating circumstance regarding the wrong realised by the act (*Unrecht*) or the offender's blameworthiness (*Schuld*); thoroughly *id.*, *Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit* (2009) 107 *et seq.*, 140 *et seq.*

⁸³ Cf. *Prosecutor v. Kupreskić and others*, No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000 (PURL: <http://www.legal-tools.org/doc/5c6a53/>), para. 547 ('[crimes against humanity] are intended to safeguard basic human values by banning atrocities directed against human dignity').

⁸⁴ One of the two contextual elements of each of the crimes against humanity in the Elements of Crimes states: 'The conduct was committed as part of a widespread or systematic attack ...'.

⁸⁵ See Robinson, in: Cryer, Friman, Robinson and Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 242.

⁸⁶ See *Akayesu* (Trial Chamber Judgment), note 29, para. 581.

⁸⁷ Paragraph 3 of the introduction to the elements of article 7 in the Elements of Crimes expressly states: 'The acts need not constitute a military attack'. Article 49 para. 1 of Add. Prot. I defines 'attacks' within the military context as 'acts of violence against the adversary, whether in offence or in defence'. See also 1996 Preparatory Committee I, note 23, para. 86.

⁸⁸ See *Situation in Kenya* (Authorisation Decision), note 35, para. 80; cf. also *Gbagbo* (Confirmation Decision), note 30, para. 209 (the term 'course of conduct' embodies a systematic aspect).

paragraph 1. Thus, the attack need not even involve military forces⁸⁹ or armed hostilities, or any violent force at all⁹⁰. It can involve any mistreatment of the civilian population⁹¹.

- 16 Furthermore, the attack need not – contrary to the previous Nuremberg and Tokyo law⁹² – occur in relation to armed hostilities or an armed conflict. This position accords with the definition of crimes against humanity under customary international law⁹³. The attack can take place before, during or after an armed conflict, it is not required however to be part of it⁹⁴. Nor is it required that each act listed in paragraph 1 occurring within the attack be widespread or systematic, providing that the acts form part of an attack with these characteristics⁹⁵. In other words, if some murders, some rapes, and some beatings take place, each form of conduct need not be widespread or systematic, if together the acts satisfy either of these conditions. It follows that the individual's actions themselves need not be widespread or systematic, providing that they form part of such a widespread or systematic attack.

⁸⁹ See *Situation in Kenya* (Authorisation Decision), note 35, para. 80 (referring to para. 3 of the Introduction to article 7 in the Elements of Crimes).

⁹⁰ It is clear that an 'attack' within the meaning of article 7 need not involve any acts of violence. Although the view was expressed by some in the Preparatory Committee that 'the word 'attack' was intended to indicate some use of force rather than an armed attack and a number of delegations mistakenly believed that the phrase should be retained to avoid significantly changing the existing definition of these crimes', the list of acts demonstrates that not all crimes against humanity involve acts of violence. For example, acts of persecution could be simply legislation, such as the Nuremberg Laws, which were cited as such in the Nuremberg Judgment. In addition, many of the acts constituting the crime of apartheid and imprisonment do not necessarily involve acts of violence. This view was confirmed with respect to crimes against humanity under the *ICTR Statute* in the *Akayesu* (Trial Chamber Judgment), note 29, para. 581: 'An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, for example under the purview of an attack, if orchestrated on a massive scale or in a systematic manner'. See, for example: *ICTY*: see *Kunarac* (Trial Chamber Judgment), note 30, para. 416; *ICTR: Rutaganda* (Trial Chamber Judgment), note 30, para. 70 (citing *Akayesu*); see *Musema* (Trial Chamber Judgment), note 30, para. 205 (citing *Akayesu* and *Rutaganda*). For the contrary view, with respect to crimes against humanity under the *ICTR* and *ICTY Statutes*, see Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 156, contending, without citing any authority, that he 'does not agree with the view that the establishment and maintenance of such a system of apartheid can be regarded as 'non-violent' or that, for that matter, any 'attack' within the meaning of crimes against humanity could be non-violent in the broad sense of the word'.

⁹¹ See *Kunarac* (Trial Chamber Judgment), note 30, para. 416 ('[An attack] may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention'); *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, Trial Chamber, 31 July 2003 (PURL: <http://www.legal-tools.org/doc/32ecfb/>), para. 623 ('it encompasses any mistreatment of the civilian population'); *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment and Sentence, Trial Chamber, 15 May 2003 (PURL: <http://www.legal-tools.org/doc/7e668a/>), para. 327; *Prosecutor v. Kajelijeli*, Judgment and Sentence, Trial Chamber, 1 December 2003 (PURL: <http://www.legal-tools.org/doc/afa827/>), para. 868; cf. also *Katanga* (Trial Chamber Judgment), note 30, para. 1101 ('toute forme de violence'). In this vein also Werle, *Völkerstrafrecht* (2012) mn 872; *id.* and Jessberger, *Principles of International Criminal Law* (2014) 338 ('any mistreatment'); Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 132; Parenti, in: Parenti, Filippini and Folgüero (eds.), *Los crímenes contra la humanidad y el genocidio en el derecho internacional: Origen y evolución de las figuras, elementos típicos, jurisprudencia internacional* (2007) 41; Gless, *Internationales Strafrecht: Grundriss für Studium und Praxis* (2011) mn 824.

⁹² On the armed conflict nexus see already, mn 7 *et seq.*

⁹³ See *Tadić* (Decision on Interlocutory Appeal), note 72, paras. 141-2.

⁹⁴ See *Stakić* (Trial Chamber Judgment), note 91, para. 623; concurring *Prosecutor v. Brdanin*, No. IT-99-36-T, Judgment, Trial Chamber, 1 September 2004 (PURL: <http://www.legal-tools.org/doc/4c3228/>), para. 131; *Prosecutor v. Kordić*, No. IT-95/14/2-A, Judgment, Appeals Chamber, 17 December 2004 (PURL: <http://www.legal-tools.org/doc/738211/>), para. 666; *Prosecutor v. Krajisnik*, No. IT-00-39-T, Judgment, Trial Chamber, 27 September 2006 (PURL: <http://www.legal-tools.org/doc/62a710/>), para. 706; *Popović and others*, (Trial Chamber Judgment), note 30, para. 752; *Prosecutor v. Nahimana and others*, No. ICTR-99-52-A, Judgment, Appeals Chamber, 28 November 2007 (PURL: <http://www.legal-tools.org/doc/04e4f9/>), paras. 916-7; Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 156-7; Currat, *Les crimes contre l'humanité dans le Statut de Rome de la Cour Pénale Internationale* (2006) 95.

⁹⁵ *Prosecutor v. Mrksić* (*Vukovar Hospital Decision*), Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996 (PURL: <http://www.legal-tools.org/doc/9d99b6/>), para. 30.

Indeed, the commission of a single act, such as one murder, in the context of a broader campaign against the civilian population, can constitute a crime against humanity⁹⁶.

It is, thus, important to determine when an individual accused's acts can be regarded as being part of an attack against the civilian population. There must be a sufficient nexus between the unlawful acts of the accused and the attack⁹⁷. The *Statute* does not make clear the precise degree of nexus that is required. However, the relationship can be revealed in a variety of ways, which will depend on the factual circumstances of each case⁹⁸. Reliable indicia would include: the similarities between the accused's acts and the acts occurring within the attack; the nature of the events and circumstances surrounding the accused's acts; the temporal and geographical proximity of the accused's acts with the attack⁹⁹; and, the nature and extent of the accused's knowledge of the attack when the accused commits the acts, as discussed below. Of particular significance, will be the manner in which the accused's acts are associated with, or further the policy¹⁰⁰ underlying the attack¹⁰¹.

In particular, the accused's acts need not be perpetrated during the actual commission of the entire or any part of the widespread or systematic attack¹⁰². It is also not essential that the accused's acts precisely resemble any of the particular acts that characterise the attack, for example, if an accused commits torture when the general pattern of the conduct involves widespread killings of civilians. The fundamental requirement is that the acts must not be *unrelated* to the attack, capable of being characterised as the isolated and random conduct of an individual acting alone¹⁰³.

d) 'widespread or systematic attack directed against any civilian population'. The *Statute* clearly envisages that the attack can be widespread *or* systematic in nature. As we have already seen above, this alternative approach is supported by the case law and the prevailing view in the literature¹⁰⁴. The 'widespread or systematic' requirement is the most widely accepted international element for distinguishing crimes against humanity from common crimes, which do not rise to the level of crimes under international law¹⁰⁵. The disjunctive element, however, is a late development. It did not appear in the St. Petersburg Declaration of

⁹⁶ See *Tadić* (Trial Chamber Judgment), note 29, para. 649: 'Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable'. See also *Vukovar Hospital Decision*, note 95, para. 30; Meyrowitz, *La repression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle* (1960) 282; Greenwood (1998) 2 MPYbUNL 97, 97 *et seq.*, 135.

⁹⁷ See *Akayesu* (Trial Chamber Judgment), note 29, para. 579, and Report of ILC Special Rapporteur, note 62, para. 93.

⁹⁸ The methods of establishing this nexus are likely to be very similar to those employed to prove the statutory link between the acts and an armed conflict under the *ICTY Statute*.

⁹⁹ The ICTY's jurisprudence on establishing the nexus between the acts and an armed conflict is instructive, and in this regard, see *Tadić* (Trial Chamber Judgment), note 29, paras. 629-633.

¹⁰⁰ The definition of the policy element is outlined below.

¹⁰¹ See 1986 ILC Special Rapporteur Report, note 62, para. 93: 'what counted was not the mass aspect, but the link between the act and the cruel and barbarous political system'.

¹⁰² In light of notes 20–21, and *Tadić* (Trial Chamber Judgment), note 29, para. 632.

¹⁰³ See already *mn 4*; see also *Tadić* (Trial Chamber Judgment), note 29, para. 644, which emphasises that crimes against humanity are 'collective' in 'nature' and 'exclude single or isolated acts which ... do not rise to the level of crimes against humanity' Clark, in: *id.*, Feldbrugge and Pomorski (eds.), *International and National Law in Russia and Eastern Europe* (2001) 139, 152; Gómez Benítez (2001) 9 *Cuadernos De Derecho Judicial* 1, 21. *cf.* in the same vein (on widespread and systematic attack) *Prosecutor v. Milutinović and others*, No. IT-05-87-T, Judgment, Trial Chamber, 26 February 2009 (PURL: <http://www.legal-tools.org/doc/9eb7c3/>), para. 150; *Katanga and Ngudjolo* (Confirmation Decision), note 30, para. 394; *Bemba* (Confirmation Decision), note 30, paras. 75, 77, 83; concurring *Prosecutor v. Al Bashir*, No. ICC-02/05-01/09-3, Arrest Warrant Decision, Pre-Trial Chamber, 4 March 2009, para. 81; *Situation in Kenya* (Authorisation Decision), note 35, para. 81; *Katanga* (Trial Chamber Judgment), note 30, paras. 1101, 1123.

¹⁰⁴ See *mn 4* with further references. See also *Vukovar Hospital Decision*, note 95, para. 3; and, 1996 ILC Draft Code, note 10, pp. 94–95.

¹⁰⁵ See *Tadić* (Trial Chamber Judgment), note 29, paras. 646 and 648.

1868¹⁰⁶, the Martens Clause of 1899¹⁰⁷, or the 1919 Versailles Peace Conference Commission's Report¹⁰⁸, although that report cited examples that generally met each of these alternatives. The origin of this international element appears to be an analysis of the Legal Committee of the United Nations War Crimes Commission, which used the two alternatives both as a single cumulative internationalizing element and disjunctively:

‘... As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind warranted intervention by State other than on whose territory the crimes had been committed, or whose subjects had become their victims’¹⁰⁹.

The Nuremberg Tribunal described some of the crimes against humanity involved in the case holding that ‘[T]he policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic’¹¹⁰, but without suggesting that this description was a definition. The phrase then surfaced again in 1993 in the Report of the UN Secretary-General concerning the establishment of the *ICTY*, which stated that ‘[c]rimes against humanity refer to inhumane acts of a very serious nature ... committed as part of a widespread or systematic attack against any civilian population’¹¹¹. While this disjunctive element was not, as noted above, expressly included in article 5 of the *ICTY* Statute, it was incorporated in the jurisprudence of the *ICTY* Trial and Appeals Chambers (see mn 6). It was then expressly included in article 3 of the 1994 *ICTR* Statute, although the French version uses ‘e’ (and) instead of ‘or’. Also, the *ICTR* Trial and Appeals Chambers have used the disjunctive approach in their judgments¹¹². Article 18 of the 1996 Draft Code of Crimes included a similar, but differently worded, disjunctive element (‘systematic manner or on a large scale’). The International Law Commission made clear in its commentary that its definition of crimes against humanity was ‘drawn from the Charter of the Nürnberg Tribunal, as interpreted and applied by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg’¹¹³. In any case, the Rome Statute and subsequent international instruments used the 1993 formulation of ‘widespread or systematic’¹¹⁴.

- 19 The term ‘widespread’ has mainly a quantitative meaning referring to the scale of the attack or, equivalently, to the (large) number of victims. The required multiplicity of victims was

¹⁰⁶ See note 1.

¹⁰⁷ See note 2.

¹⁰⁸ See note 6.

¹⁰⁹ See *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 179.

¹¹⁰ International Military Tribunal (Nuremberg), Judgment and Sentences (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 249. A somewhat similar disjunctive description was used in a national court decision, see *Menten* (Supreme Court Judgment), note 58, at 362: ‘Crimes against humanity in Art. 6 (c) of the London Charter should be understood in the restrictive sense that the crime formed part of a system based on terror, or constituted a link in a consciously pursued policy directed at particular groups of people’.

¹¹¹ See 1993 Report of UN Secretary-General, note 69, para. 48.

¹¹² See *Akayesu* (Trial Chamber Judgment), note 29, para. 579 (‘The act can be part of a widespread or systematic attack and need not be a part of both’) and note 154 (‘Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation’). Whatever the merit of this speculation, and there is some evidence that the difference in wording was deliberate, the conclusion that this element is disjunctive is correct and has been followed by other *ICTR* Trial Chambers, even when some may have doubted whether the *Akayesu* Trial Chamber was correct. See, for example, *Musema* (Trial Chamber Judgment) *supra* note 30, para. 203. On the alternative or cumulative approach, with regard to possible contradiction between paras. 1 and 2 of article 7, see already mn 4.

¹¹³ 2 *YbILC* 47 (1996).

¹¹⁴ See UNTAET Reg. 2000/15, article 5, note 76; *Sierra Leone Statute*, note 10; *Cambodia Extraordinary Chambers Law*, article 5, note 78.

addressed by the 1991 Draft Code of Crimes with the term ‘mass scale’¹¹⁵, but it was abandoned setting a too high threshold and limiting the definition to situations on the scale of the crimes against humanity committed by Hitler, Stalin, Mao Tse-Tung or Pol Pot. Instead, the term ‘on a large scale’ was adopted by the 1996 Draft Code, meaning that ‘the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim’¹¹⁶. The term was considered ‘sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude’¹¹⁷. The ILC’s understanding of the term was followed by the ad hoc tribunals in the interpretation of the term ‘widespread’, by referring either only to the ‘to the [large] number of victims’¹¹⁸, ‘to the multiplicity of victims’¹¹⁹, or to the commission of the acts ‘on a large-scale’¹²⁰ or both to ‘the large-scale nature of the attack and the number of its victims’¹²¹. Some of the early decisions of the ICTY and ICTR Trial Chambers imposed a very high threshold, without further reasoning¹²² and without contributing substantially to the understanding of the term. However, subsequent

¹¹⁵ See 1991 ILC Draft Code, article 21, note 62, (‘The mass scale element relates to the number of people affected by such violations or the entity that has been affected’).

¹¹⁶ 1 *YbILC* 47 (1996).

¹¹⁷ *Ibid.*

¹¹⁸ See *Tadić* (Trial Chamber Judgment), note 29, para. 648, following the ILC’s 1996 Draft Code, Commentary on article 18(4) Draft Code, *YbILC*, ii/2, 15 (1996).

¹¹⁹ See *Kayishema and Ruzindana* (Trial Chamber Judgment), note 30, para. 123.

¹²⁰ See *Blaškić* (Trial Chamber Judgment), note 30, para. 206, quoting the ILC’s Commentary on article 18(4) 1996 ILC Draft Code, note 10. This definition was adopted by various subsequent decisions: *Kordić and Čerkez* (Trial Chamber Judgment), note 30, para. 179; *Prosecutor v. Vasiljević*, No. IT-98-32-T, Judgment, Trial Chamber, 29 November 2002 (PURL: <http://www.legal-tools.org/doc/8035f9/>), para. 35; *Stakić* (Trial Chamber Judgment), note 91, para. 625; *Limaj* (Trial Chamber Judgment), note 30, para. 183; *Popović and others*, (Trial Chamber Judgment), note 30, para. 756; *Prosecutor v. Džorđević*, No. IT-05-87/1-T, Judgment, Trial Chamber, 23 February 2011 (PURL: <http://www.legal-tools.org/doc/653651/>), para. 1588; *Prosecutor v. Gotovina and others*, No. IT-06-90-T, Judgment, Trial Chamber, 15 April 2011 (PURL: <http://www.legal-tools.org/doc/86922c/>), para. 1703; *Tolimir* (Trial Chamber Judgment), note 72, para. 699; *Bisengimana* (Trial Chamber Judgment), note 30, para. 44 (‘large scale, involving many victims’); *Prosecutor v. Nzabirinda*, No. ICTR-2001-77-T, Sentencing Judgment, Trial Chamber, 23 February 2007 (PURL: <http://www.legal-tools.org/doc/e6069d/>), note 30, para. 503; *Katanga and Ngudjolo* (Confirmation Decision), note 30, para. 395; *Bemba* (Confirmation Decision), note 30, para. 83; *Katanga* (Trial Chamber Judgment), note 30, paras. 1098, 1123. *cf.* also Ambos and Wirth (2002) 1 *CLF* 13, 20–1, 30 *et seq.*, with further references; Gómez Benítez (2001) 9 *Cuadernos de Derecho Judicial* 1, 30; Meeseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 133–4; Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 171; Eboe-Osuji (2008) 2 *AfricanJLegStud* 118, 120; Cerone (2008) 14 *NewEnglandJl&CompL* 191, 197; Kolb, in: Kolb and Scalia (eds.), *Droit International Pénal: Précis* (2012) 1, 99–100; van den Herik, in: Darcy and Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (2010) 80, 88.

¹²¹ See *Kunarac*, (Trial Chamber Judgment), note 30, para. 428; *Tadić* (Trial Chamber Judgment), note 29, para. 648; *Blaškić*, (Trial Chamber Judgment), note 30, para. 202; *Prosecutor v. Krnojelac and others*, No. IT-97-25-T, Judgment, Trial Chambers, 15 March 2002 (PURL: <http://www.legal-tools.org/doc/1a994b/>), para. 57; *Kordić* (Appeals Chamber Judgment), note 94, para. 94. See also *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004 (PURL: <http://www.legal-tools.org/doc/88d8e6/>), para. 101; *Prosecutor v. Kunarac and others*, No. IT-96-23-A, Judgment, Appeals Chamber, 12 June 2002 (PURL: <http://www.legal-tools.org/doc/029a09/>), para. 94; *Muvunyi*, (Trial Chamber Judgment), note 30, para. 512 (‘‘Widespread’ refers to the scale of the attacks and the multiplicity of victims.’); *Prosecutor v. Muhimana*, No. ICTR-95-1B-T, Judgment and Sentence, Trial Chamber, 28 April 2005 (PURL: <http://www.legal-tools.org/doc/87fe83/>), para. 527 (‘scale of attack and multiplicity of victims’); *Kajelijeli* (Trial Chamber Judgment), note 91, para. 871 (‘large scale, involving many victims’); *Semanza* (Trial Chamber Judgment), note 91, para. 329; *Musema* (Trial Chamber Judgment), note 30, paras. 203–204.

¹²² See, for example, *Akayesu* (Trial Chamber Judgment), note 29, para. 580 (stating, without citing any authority: ‘The concept of widespread may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’); the definition is repeated in *Rutaganda*, (Trial Chamber Judgment), note 30, para. 69, and *Musema* (Trial Chamber Judgment), note 30, para. 203.

jurisprudence by the ICTY Appeals Chamber has interpreted the term expansively to refer 'to the large-scale nature of the attack and the number of targeted persons'¹²³. Similarly, ICTR Trial Chambers have interpreted the requirement broadly¹²⁴. On the other hand, ICC Pre-Trial Chamber II quoted the mentioned definition, but only for illustrative reasons, stressing at the same time that the widespread element is neither to be assessed strictly quantitatively nor geographically but 'on the basis of the individual facts'¹²⁵. Thus, it is not limited to geographic extent, but can include large numbers in a small area¹²⁶.

20 Article 18 of the 1996 Draft Code of Crimes provided that a crime against humanity meant any one of a number of listed acts 'when committed in a systematic manner'. The ILC explained that this term meant

'pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy'¹²⁷.

The ILC stated further that the Nuremberg Charter did not include such a requirement, but noted that the Nuremberg Tribunal had described many of the inhumane acts as having been committed as part of a policy of terror and in many cases being organised and systematic¹²⁸. Some of the early decisions of the ICTY and ICTR Trial Chambers interpreted this term as setting a very high threshold¹²⁹. For example, the *Tadić* Trial Chamber interpreted the term 'systematic' as indicating 'a pattern or methodical plan'¹³⁰ and the *Akeyesu* Trial Chamber stated, without citing any support, that '[t]he concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'¹³¹. However, subsequent jurisprudence of the ICTY Appeals Chambers and ICTR Trial Chambers has adopted a more expansive definition of 'systematic' as referring: 'to the organised nature of the acts of violence and the improbability of their random occurrence'¹³². The very same elements

¹²³ See note 121.

¹²⁴ *Ibid.*

¹²⁵ See *Situation in Kenya* (Authorisation Decision), note 35, para. 95. The Chamber also adopted the *Blaškić* definition, see note 121.

¹²⁶ *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Charges, Pre-Trial Chamber, 9 June 2014 (PURL: <http://www.legal-tools.org/doc/5686c6/>), paras. 22 ('several locations'), 24 (in 'a broad geographical area' over a long period of time); *Gbagbo* (Confirmation Decision), note 30, para. 224 ('widespread (i) involved a large number of acts; (ii) targeted and victimised a significant number of individuals; (iii) extended over a time period of more than four months; and (iv) affected the entire city of Abidjan').

¹²⁷ 1 YbILC 47 (199).

¹²⁸ *Ibid.*

¹²⁹ Cf. for instance *Blaškić* (Trial Chamber Judgment), note 30, para. 203, which introduced four criteria to define 'systematic' creating however a hypertrophic definition; these requirements are repeated in *Kordić and Čerkez* (Trial Chamber Judgment), note 30, para. 179; for a critic of those requirements see Ambos, *Treatise on ICL II* (2014) 60-1.

¹³⁰ See *Tadić* (Trial Chamber Judgment), note 29, para. 648.

¹³¹ See *Akeyesu* (Trial Chamber Judgment), note 29, para. 580. These two additional requirements ('thoroughly organised and following a regular pattern' and using 'substantial resources') should not be regarded so much as requirements *stricto sensu*, but rather as an illustration of typical 'systematic' attacks. Otherwise, this view would, for example, exclude an attack with machetes from the systematic alternative, since machetes indicate a lack of resources (in terms of the availability of more effective weapons) or that the attack was sloppily organised. See also *Musema* (Trial Chamber Judgment), note 30, para. 204; *Rutaganda* (Trial Chamber Judgment), note 30, para. 69. See also *Prosecutor v. Seromba*, No. ICTR-2001-66-I, Judgment, Trial Chamber, 13 December 2006 (PURL: <http://www.legal-tools.org/doc/e0084d/>), para. 356.

¹³² ICTY: see *Kordić* (Appeals Chamber Judgment), note 94, para. 94; see *Blaškić* (Appeals Chamber Judgment), note 121, para. 101; see *Kunarac* (Appeals Chamber Judgment), note 121, para. 94. ICTR: *Muvunyi* (Trial Chamber Judgment), note 30, para. 512 ('systematic' reflects the organised nature of the attack, excludes acts of random violence, and does not require a policy or plan'). See also *Kajelijeli* (Trial Chamber Judgment), note 91, para. 872 ('Systematic' describes the organised nature of the attack'); *Muhimana* (Trial Chamber Judgment), note 121, para. 527; *Semanza* (Trial Chamber Judgment), note 91, para. 329; *Musema* (Trial Chamber Judgment), note 30, paras. 203-204.

have been repeated by the ICC Pre-Trial Chamber II¹³³. The Appeals Chambers have explained that '[p]atterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence'¹³⁴. The common denominator of the various definitions found in the case law¹³⁵ is that such an attack 'is one carried out pursuant to a preconceived policy or plan'¹³⁶. That does not mean, however, that the plan or policy element is 'a legal element of the crime', but only that it serves as an indicator of the 'systematicity' of the attack¹³⁷. The attack is systematic, because the acts of the individual perpetrators are not random, but guided as to the envisaged object of the attack, namely the civilian population¹³⁸.

It is important to note that '[o]nly the attack, not the individual acts of the accused, must be widespread or systematic'¹³⁹. In addition, *ICTY* Appeals Chambers have underscored that 'the acts of the accused need only be a part of this attack, and all other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random'¹⁴⁰. A more precise definition of the required link between the act and the attack may be derived from the rationale of crimes against humanity, that is, the protection against the particular dangers of multiple crimes supported or tolerated by the authorities. Thus, an adequate test to

¹³³ See *Situation in Kenya* (Authorisation Decision), note 35, para. 96; *Gbagbo* (Confirmation Decision), note 30, para. 223.

¹³⁴ *ICTY: Kordić* (Appeals Chamber Judgment), note 94, para. 94; *Blaškić* (Appeals Chamber Judgment), note 121, para. 101; *Kunarac* (Appeals Chamber Judgment), note 121, para. 94. *ICTR: Kajelijeli* (Trial Chamber Judgment), note 91, para. 872 ('Demonstration of a pattern of conduct will also carry evidential value'); *Muhimana* (Trial Chamber Judgment), note 121, para. 527 ('a deliberate pattern of conduct'). *ICC: Situation in Kenya* (Authorisation Decision), note 35, citing *Katanga and Ngudjolo* (Confirmation Decision), note 30, para. 397; *Prosecutor v. Blagojević and Jokić*, No. IT-02-60-T, Judgment, Trial Chamber, 17 January 2005 (PURL: <http://www.legal-tools.org/doc/7483f2/>), para. 545; *Ntaganda* (Confirmation Decision), note 126, para. 24; cf. also see Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 470-1.

¹³⁵ For more case law references cf. Ambos, *Treatise on ICL II* (2014) 60 with fn. 111.

¹³⁶ See *Bagilishema* (Trial Chamber Judgment), note 30, para. 77; *Vasiljević* (Trial Chamber Judgment), note 120, para. 35; *Katanga and Ngudjolo* (Confirmation Decision), note 30, para. 397; concurring *Al Bashir*, note 103, para. 81; *Gbagbo* (Confirmation Decision), note 30, para. 225 ('preparations for the attack were undertaken in advance', 'the attack was planned and coordinated', 'the acts of violence ... reveal a clear pattern of violence'); cf. also Ambos and Wirth (2002) 1 *CLF* 13, 18 *et seq.*, 30 with further references; concurring Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 136, fn. 110; Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 254; see Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 467 *et seq.*

¹³⁷ See *Blaškić* (Appeals Chamber Judgment), note 121, para. 100; *Brdanin* (Trial Chamber Judgment), note 94, para. 137; *Tolimir* (Trial Chamber Judgment), note 72, para. 698; *Stanišić and Simatović* (Trial Chamber Judgment), note 30, para. 963; *Semanza* (Trial Chamber Judgment), note 91, para. 329; *Muhimana* (Trial Chamber Judgment), note 121, para. 527; Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 172; for more indicators of a 'systematic' attack see *ibid.*, 171; *Prosecutor v. Harun and Kushayb*, No. ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application, Pre-Trial Chamber 27 April 2007 (PURL: <http://www.legal-tools.org/doc/e2469d/>), para. 62 ('policy is an element from which the systematic nature of an attack may be inferred'); see also *Katanga* (Trial Chamber Judgment), note 30, paras. 1098, 1113 ('existence d'un schéma fait de comportements répétitifs...'; emphasis in the original), 1123; *Gbagbo* (Confirmation Decision), note 30, para. 216 ("policy" and ... "systematic" nature of the attack ... both refer to a certain level of planning, concepts should not be conflated'). For a critical view on the high threshold see Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 254-5.

¹³⁸ An attack can, however, be 'systematic' even when there is no plan or policy; on that see *Katanga* (Trial Chamber Judgment), note 30, paras. 1111-13 (1113: 'L'analyse du caractère systématique de l'attaque va dès lors au-delà de l'existence d'une quelconque politique visant à éliminer, persécuter ou affaiblir une communauté').

¹³⁹ See *Kordić* (Appeals Chamber Judgment), note 94, para. 94; *Blaškić* (Appeals Chamber Judgment), note 121, para. 101; *Kunarac* (Appeals Chamber Judgment), note 121, para. 96; cf. also Ambos, *Treatise on ICL II* (2014) 75-6.

¹⁴⁰ See *Kordić* (Appeals Chamber Judgment), note 94, para. 94; *Blaškić* (Appeals Chamber Judgment), note 121, para. 101; *Kunarac* (Appeals Chamber Judgment), note 121, para. 96; *Vukovar Hospital Decision*, note 95, para. 30.

determine whether a certain act was part of the attack is to analyse whether this act would have been less dangerous for the victim if the attack and the underlying policy had not existed¹⁴¹.

22 It is difficult to outline concretely and exactly which factual circumstances are covered by each concept. The adjudication will have to take place on merits of each case. For example, two coordinated attacks on two large buildings with many floors causing thousands of deaths may qualify as widespread because of the number of victims and because the geographic scope of the attack when the total floor space is taken into consideration may well be greater in total and extent than a number of attacks on a group of widely scattered villages. Some practical guidance has already been provided in the case law that arose from the Second World War and, more recently, before the *ad hoc* International Tribunals¹⁴².

23 e) ‘directed against any civilian population’. The acts must be directed at ‘any civilian population’ to constitute a crime against humanity¹⁴³. ‘Population’ refers to a multiplicity of persons sharing common attributes¹⁴⁴. This requirement does not mean, however, that the entire population of a State, entity, or territory must be subjected to the attack¹⁴⁵. As explained by the ICTY Appeals Chamber in the *Kunarac* case,

‘the use of the word ‘population’ does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population’, rather than against a limited and randomly selected number of individuals¹⁴⁶’.

The use of ‘population’ implies the collective nature of the crimes to the exclusion of single acts¹⁴⁷. The use of the term ‘directed against’ means that the civilian population must be the primary object of the attack:

¹⁴¹ Cf. also Ambos, *Treatise on ICL II* (2014) 75–6; Ambos and Wirth (2002) 1 *CLF* 13, 36; concurring Parenti, in: Parenti, Filippini and Folgueiro (eds.), *Los crímenes contra la humanidad y el genocidio en el derecho internacional: Origen y evolución de las figuras, elementos típicos, jurisprudencia internacional* (2007) 59–60. See for examples where this is not the case: Mettraux (2002) 43 *HarvILJ* 237, 251–2.

¹⁴² The Trial Chamber held in the *Tadić* (Trial Chamber Judgment), note 29, that the commission of inhumane acts against the population in one municipality, *Prijedor*, which included three detention camps and mass expulsions from the area, were sufficiently widespread and systematic (see paras. 660 and 714–718); *Ntaganda* (Confirmation Decision), note 126, paras. 22, 24.

¹⁴³ The emphasis on ‘any’ in the phrase ‘any civilian population’ is missing in the Elements of Crimes. In paragraphs 2 and 3 of the Introduction to article 7, the wording ‘a civilian population’ is repeatedly, although not exclusively, used and the first of the two common contextual elements uses ‘a civilian population’. Of course, to the extent of any divergence, article 7 prevails.

¹⁴⁴ Mettraux (2002) 43 *HarvILJ* 237, 255 (‘A ‘population’ is a sizeable group of people who possess some distinctive features that mark them as targets of the attack. The ‘population’ must form a self-contained group of individuals, either geographically or as a result of other common features’); see Werle and Jessberger, *Principles of International Criminal Law* (2014) 334 (‘any group of people linked by shared characteristics that in turn make it the target of an attack’); cf. also *Bemba* (Confirmation Decision), note 30, para. 76; *Prosecutor v. Ruto and others*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012 (PURL: <http://www.legal-tools.org/doc/96c3c2/>), para. 164.

¹⁴⁵ See *Tadić* (Trial Chamber Judgment), note 29, para. 644; *Prosecutor v. Ruto and others*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012 (PURL: <http://www.legal-tools.org/doc/96c3c2/>), para. 164. On the geographical scope of the attack, see Kuschnik, *Der Gesamtbestand des Verbrechens gegen die Menschlichkeit: Herleitungen, Ausprägungen, Entwicklungen* (2009) 276.

¹⁴⁶ See *Kunarac* (Appeals Chamber Judgment), note 121, para. 90 (fn. omitted). Cited approvingly in *Kordić* (Appeals Chamber Judgment), note 94, para. 95, and in *Blaškić* (Appeals Chamber Judgment), note 121, para. 105.

¹⁴⁷ See *Tadić* (Trial Chamber Judgment), note 29, para. 644: ‘the emphasis is not on the individual victim but rather on the collective’. See also, Schwelb (1946) 23 *Brit.Y.B. IL* 178, 191; also Ambos and Wirth (2002) 1 *CLF* 13, 21 with further references; Werle, *Völkerstrafrecht* (2012) mn 862; König, *Die völkerrechtliche Legitimation der Strafgewalt internationaler Strafjustiz* (2003) 260–1; Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 165; Robinson, in: Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 240–1; Parenti, in: Parenti, Filippini and Folgueiro (eds.), *Los crímenes contra la humanidad y el genocidio en el derecho internacional: Origen y evolución de las figuras, elementos típicos*,

‘the expression “directed against” is an expression which “specifies that in the context of a crime against humanity the civilian population is the primary object of the attack”. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst¹⁴⁸.

However, the victims of the attack need not be targeted because of their membership in a certain group¹⁴⁹ – a discriminatory intent is insofar not required¹⁵⁰. It suffices that a multiplicity of victims exists. Insofar, the population requirement does not add anything to the attack requirement, since the multiplicity of the victims is already covered by the ‘widespread’ and ‘systematic’ elements. The population requirement only qualifies the targeted group as being ‘civilian’¹⁵¹.

In determining the scope of the terms ‘civilian’ and ‘civilian population’, the ICTY Appeals Chamber has stated that the provisions in article 50 of Add. Prot. I ‘may largely be viewed as reflecting customary law’¹⁵². Although this article expressly applies to international armed conflict, national and international courts have adopted a similar approach in determining whether a person or a population is civilian for the purpose of deciding whether crimes against humanity in other circumstances have occurred. Paragraph 1 of this article defines a civilian in international armed conflict as:

‘any person who does not belong to one of the categories of persons referred to in article 4 (A) (1), (2), (3) and (6) of the Third Convention and in article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian’¹⁵³.

jurisprudencia internacional (2007) 53; Gotzel, *Terrorismus und Völkerstrafrecht: Die Anschläge vom 11. September 2001, der Tokioter Giftgasanschlag, die Geiselnahme von Beslan und die täglichen Anschläge im Irak vor dem Internationalen Strafgerichtshof* (2010) 204-5.

¹⁴⁸ See *Kunarac* (Appeals Chamber Judgment), note 121, para. 91 (fn. citing Trial Chamber Judgment omitted); *Blaškić* (Appeals Chamber Judgment), note 121, para. 105 (citing *Kunarac*); *Lukić and Lukić* (Trial Chamber Judgment), note 30, para. 874; *Prosecutor v. D. Milošević*, No. IT-98-29/1-A, Judgment, Appeals Chamber, 12 November 2009 (PURL: <http://www.legal-tools.org/doc/44327f/>), para. 58; *Popović and others*, (Trial Chamber Judgment), note 30, para. 753; *Tolimir* (Trial Chamber Judgment), note 72, para. 696; *Stanisic and Simatovic* (Trial Chamber Judgment), note 30, para. 964; *Semanza* (Trial Chamber Judgment), note 91, para. 330; concurring *Prosecutor v. Fofana and others*, No. SCSL-04-14-A, Judgment, Appeals Chamber, 28 May 2008 (PURL: <http://www.legal-tools.org/doc/b31512/>), para. 299; *Bemba* (Confirmation Decision), note 30, para. 77; *Situation in Kenya* (Authorisation Decision), note 35, para. 82; *Katanga* (Trial Chamber Judgment), note 30, para. 1104. cf. also Mettraux (2002) 43 *HarvILJ* 237, 247, 253; *id.*, *International Crimes and the Ad Hoc Tribunals* (2005) 164; Orlova (2007) 7 *ICLRev* 45, 50; Eboe-Osuji (2008) 2 *African J. Legal Studies* 118, 120 *et seq.*; Njikam, *The Contribution of the Special Court For Sierra Leone to the Development of International Humanitarian Law* (2013) 99.

¹⁴⁹ See also McAuliffe de Guzman (2000) 22 *HumRtsQ* 335, 362; Chesterman (2000) 10 *DukeJComp&IL* 307, 325; Pégrier, *Ethnic Cleansing: A Legal Qualification* (2013) 118.

¹⁵⁰ See *Tadić* (Appeals Chamber Judgment), note 73, (‘discriminatory intent ... indispensable ... only with regard to those crimes for which this is expressly required, that is, for article 5(h), concerning various types of persecution’).

¹⁵¹ See also McAuliffe de Guzman (2000) 22 *HumRtsQ* 335, 362-4.

¹⁵² See *Kordić* (Appeals Chamber Judgment), note 94, para. 97 (citing *Blaškić* (Appeals Chamber Judgment), note 121, para. 110). The definitions in article 50 reflect customary international humanitarian law in both international and non-international armed conflict. Henckaerts and Doswald Beck, *Customary International Humanitarian Law: Rules* (2005) 17 (‘Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians’) (stating that this rule ‘applies to non-international armed conflicts’).

¹⁵³ Add. Prot. I, article 50 para. 1. See *Blaškić* (Appeals Chamber Judgment), note 121, paras. 110 *et seq.* (113). For a detailed discussion thereof cf. *Mrksić* (Trial Chamber Judgment), note 30, paras. 443 *et seq.* (463); *Popović and others* (Trial Chamber Judgment), note 30, para. 755; *Dungel* (2009) 22 *LeidenJIL* 727, 738. In this formal understanding see *Bemba* (Confirmation Decision), note 30, para. 78; *Situation in Kenya* (Authorisation Decision), note 35, para. 82; *Katanga* (Trial Chamber Judgment), note 30, para. 1102; see also May (2013) 11 *JICJ* 47, 53-4.

Paragraph 2 of article 50 of the Add. Prot. I states that '[t]he civilian population comprises all persons who are civilians'¹⁵⁴. Early judgments of the ICTY and ICTR Trial Chambers had adopted a narrower concept of the term 'civilian' based on common article 3 of the Geneva Conventions as including all persons who have taken no active part in hostilities, or are no longer doing so, including members of armed forces who laid down their arms and persons placed *hors de combat* by sickness, wounds, detention or any other reason¹⁵⁵. The use of the word 'any' in article 7 para. 1 indicates that the 'civilian population' includes persons of any nationality. Crimes against humanity can, thus, be committed against civilians of the same nationality as the perpetrator, and stateless persons¹⁵⁶. In determining the existence of a civilian population, a court must consider 'the specific situation of the victim at the moment the crimes were committed, rather than his status'¹⁵⁷. This approach is in line with the humanitarian purpose of crimes against humanity, since everyone except an active combatant of a hostile armed force is in a 'specific situation' requiring protection. As for times of peace, where no combatants exist, the term civilian should be interpreted more broadly than its humanitarian law counterpart, including every person, even soldiers¹⁵⁸ or members of the police¹⁵⁹, who are in the need of protection¹⁶⁰.

- 25 Paragraph 3 of article 50 of Add. Prot. I makes it clear that '[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character'¹⁶¹. This clarification has been followed by national and international courts¹⁶². Accordingly, it is not required the attack be directed

¹⁵⁴ Add. Prot. I, article 50 para. 2.

¹⁵⁵ This definition is based upon the categories of persons protected by common article 3 of the Geneva Conventions. Both the *Tadić* (Trial Chamber Judgment), note 29, paras. 637–638, and *Akayesu* (Trial Chamber Judgment note 29, para. 582, adopted this definition; cf. also *Blaškić* (Appeals Chamber Judgment), note 121, para. 114 (contra to note 30 (Trial Chamber Judgment), para. 214); concurring *Prosecutor v. Galić*, No. Case IT-98-29-A, Judgment, Appeals Chamber, 30 November 2006 (PURL: <http://www.legal-tools.org/doc/c81a32/>), para. 144. Differently, but again see *Krajisnik* (Trial Chamber Judgment), note 94, para. 706 ('civilian population, for the purposes of crimes against humanity, includes not only civilians narrowly defined, but also persons who are not taking active part in the hostilities'); also differently *Mrksić* (Trial Chamber Judgment), note 30, para. 463 ('if the victims are non-civilians, the more appropriate charge is war crimes').

¹⁵⁶ See *Tadić* (Trial Chamber Judgment), note 29, para. 635; *Kunarac* (Trial Chamber Judgment), note 30, para. 423; *Katanga* (Trial Chamber Judgment), note 30, para. 1103; cf. also Ambos and Wirth (2002) 1 CLF 13, 22 with further references; Mettraux (2002) 43 *HarvILJ* 237, 254, 256, 299–300; *id.*, *International Crimes and the Ad Hoc Tribunals* (2005) 164–5.; Cassese and Gaeta, *Cassese's International Criminal Law* (2013) 101 *et seq.*; also Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 149, 51; Robinson, in: Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 240; Pégiorier, *Ethnic Cleansing: A Legal Qualification* (2013) 115.

¹⁵⁷ See *Muvunyi* (Trial Chamber Judgment), note 30, para. 513 (citing *Bagilishema* (Trial Chamber Judgment), note 30, para. 79, and *Blaškić* (Trial Chamber Judgment), note 30, para. 214).

¹⁵⁸ Against this background, *Kayishema and Ruzindana* (Trial Chamber Judgment), note 30, para. 127; concurring, Mettraux (2002) 43 *HarvILJ* 237, 257; Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 154; denying such protection to holders of state or other organised power Werle and Jessberger, *Principles of International Criminal Law* (2014) 337; Werle, *Völkerstrafrecht* (2012) mn 869.

¹⁵⁹ See Cassese and Gaeta, *Cassese's International Criminal Law* (2013) 102–3; in favour, Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 156; Borsari, *Diritto punitivo sovranazionale come sistema* (2007) 73; Kolb, in: Kolb and Scalia (eds.), *Droit International Pénal: Précis* (2012) 1, 102 ('hors de combat').

¹⁶⁰ Similarly Kolb, in: Kolb and Scalia (eds.), *Droit International Pénal: Précis* (2012) 1, 102 ('capacité effective de se défendre'); cf. also Ambos and Wirth (2002) 1 CLF 13, 25; Ambos, *Treatise on ICL II* (2014) 64 *et seq.*

¹⁶¹ Add. Prot. I, article 50 para. 3.

¹⁶² See *Tadić* (Trial Chamber Judgment), note 29, para. 638. ICTR Trial Chambers have reached a similar conclusion. See *Akayesu* (Trial Chamber Judgment), note 29, para. 582; *Muhimana* (Trial Chamber Judgment), note 121, para. 528; *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-T, Judgment, Trial Chamber, 17 June 2004 (PURL: <http://www.legal-tools.org/doc/b4e8aa/>), para. 302; *Blaškić* (Trial Chamber Judgment), note 30, para. 214; *Galić* (Appeals Chamber Judgment), note 155, para. 144; *Milutinović and others* (Trial Chamber Judgment), note 103, para. 146; *D. Milošević* (Appeals Chamber Judgment), note 148, para. 59; *Muvunyi* (Trial Chamber Judgment), note 30, para. 513; *Nzabirinda* (Sentencing Judgment), note 120, para. 22; *Katanga* (Trial

against the 'civilian population' as a whole, but only against a sufficient number of individuals.¹⁶³ It is, thus, evident that crimes against humanity cover a broader range of potential victims than war crimes. In addition to not requiring a nexus to armed conflict, in respect of crimes against humanity it is unnecessary to demonstrate that the victims are linked to any particular side in the attack against the civilian population, even if this occurs during armed conflict. War crimes, nevertheless, can only be committed by perpetrators on one side of an armed conflict against persons linked to the adversary¹⁶⁴.

f) 'with knowledge of the attack'. Article 7 explicitly requires that the perpetrator must commit the acts with knowledge of the broader widespread or systematic attack on the civilian population¹⁶⁵. The second contextual element in the Elements of Crimes, common to all the individual acts of crimes against humanity of article 7, requires that '[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population'. This requirement is consistent with the jurisprudence of the *ICTY* and *ICTR*, which has concluded that the perpetrator must know that there is an attack on a civilian population and that she knows that her acts are part of that attack¹⁶⁶. From the fact that 'knowledge' is explicitly mentioned in article 7 and

Chamber Judgment), note 30, para. 1105; *Blaškić* (Appeals Chamber Judgment), note 121, para. 115 (depending on the number of the soldiers); *Gbagbo* (Confirmation Decision), note 30, para. 63 ('presence of combatants' does not contradict 'the civilian nature of population'); cf. also Ambos and Wirth (2002) 1 *CLF* 13, 22, 26, fn. 124; Mettraux (2002) 43 *HarvLLJ* 237, 256–7, fns. 91, 95; *id.*, *International Crimes and the Ad Hoc Tribunals* (2005) 167–8; Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 150; Kolb, in: Kolb and Scalia (eds.), *Droit International Pénal: Précis* (2012) 1, 103; critical Zahar and Sluiter, *International Criminal Law* (2008) 206–7, who deny that Geneva law could 'have any bearing on the law of crimes against humanity'. Similarly Robinson, in: Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 241–2, who excludes only the cases of 'military actions against legitimate military objectives'. Although it is clear that a civilian population must be targeted, determining which particular individual qualifies as a civilian for the purposes of crimes against humanity is more difficult. It follows from the definition of 'civilian' that all non-combatants and persons who have laid down their arms, are included. However, it is unclear which combatants may qualify. It has been held that persons actively involved in resistance movements can be victims of crimes against humanity. In this regard, see *Vukovar Hospital Decision*, note 95, paras. 29 and 32; see *Tadić* (Trial Chamber Judgment), note 29, para. 643; and *Barbie*, note 59, at 139–140. See also the broad definition given to civilians for the purposes of the Geneva Conventions in *Prosecutor v. Delalić* (also known as the *Čelebići* Trial Chamber Judgment), No. IT-96-21-T, Judgment, Trial Chamber, 16 November 1998 (PURL: <http://www.legal-tools.org/doc/6b4a33/>), paras. 244–277.

¹⁶³ See *Katanga* (Trial Chamber Judgment), note 30, para. 1105 ('les civils étaient pris pour cible dans le cours de l'attaque en nombre suffisant ou d'une façon telle que l'attaque était effectivement dirigée contre la population civile'; emphasis added).

¹⁶⁴ See *Delalić* (Čelebići Trial Chamber Judgment), note 162, paras. 193–198.

¹⁶⁵ See *Tadić* (Trial Chamber Judgment), note 29, para. 656, and *Finta*, note 61, 701.

¹⁶⁶ *ICTY*: *Kordić* (Appeals Chamber Judgment), note 94, para. 99; *Blaškić* (Appeals Chamber Judgment), note 121, para. 124; *Kunarac* (Appeals Chamber Judgment), note 121, paras. 99, 102; *Tadić*, (Appeals Chamber Judgment), note 73, para. 248. *ICTR*: *Musema* (Trial Chamber Judgment), note 30, para. 206; *Kayishema and Ruzindana* (Trial Chamber Judgment), note 30, para. 134; *Kajelijeli* (Trial Chamber Judgment), note 91, para. 880; *Semanza* (Trial Chamber Judgment), note 91, para. 332; *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T, Judgment, Trial Chamber, 21 February 2003 (PURL: <http://www.legal-tools.org/doc/9a9031/>), para. 803; *Bagilishema* (Trial Chamber Judgment), note 30, para. 94; *Tolimír* (Trial Chamber Judgment), note 72, para. 700; *Munyakazi* (Trial Chamber Judgment), note 30, para. 504; *Katanga and Ngudjolo* (Confirmation Decision), note 30, paras. 401–2; *Prosecutor v. Al Bashir*, No. ICC-02/05-01/09-95, Second Arrest Warrant Decision, Pre-Trial Chamber, 12 July 2010 (PURL: <http://www.legal-tools.org/doc/307664/>), para. 87; *Katanga* (Trial Chamber Judgment), note 30, paras. 782, 971, 983. See also Ambos (2004) 19 *AIDP* 219, 249; Werle, *Völkerstrafrecht* (2012) mn 462, 894; Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 116, 165–6; Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 161, 164, 170, 173; Robinson, in: Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure* (2014) 229, 243–4; Jesse, *Der Verbrechensbegriff des Römischen Statuts: Ein Beitrag zu einer Statusimmanenten Strukturanalyse des Römischen Statuts des Internationalen Strafgerichtshofs* (2009) 197 et seq.; Ford (2010) 38 *DenverJIL&Pol* 241–2; see Gless, *Internationales Strafrecht: Grundriss für Studium und Praxis* (2011) mn 827; against a mental requirement, see Kirsch, in: Michalke, Köberer and Pauly (eds.), *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (2008) 269, 286.

separately required in the Elements of Crimes for each of the underlying acts follows that the knowledge requirement constitutes an **additional mental element** to be distinguished from the general *mens rea* requirement of article 30¹⁶⁷. In structural terms, the knowledge requirement provides the necessary connection between the perpetrator's individual acts and the overall attack by means of the perpetrator's mindset, and ensures that single, isolated acts, which only happen to have been carried out contemporaneously with an overall attack – so-called 'opportunistic' acts – do not qualify as crimes against humanity and, therefore, cannot be prosecuted under article 7.

While the perpetrators must be aware that their acts form part of the collective attack¹⁶⁸, this does not mean that they must have knowledge of the entire attack in all of its detail¹⁶⁹. The *specific contents* of the required knowledge and its *object of reference* remain in dispute¹⁷⁰. As to the former, according to the risk-oriented or risk-based approach proposed by the *Blaskić* TC, knowledge also includes the conduct 'of a person taking a deliberate risk in the hope that the risk does not cause injury'¹⁷¹. This approach extends knowledge from 'full' or 'positive' or 'actual' knowledge well into the field of recklessness, and, the 'constructive knowledge'¹⁷² which exists when the perpetrator is aware of the risk that his conduct can be objectively construed as part of the broader attack¹⁷³. Regarding the knowledge of the attack itself, as explained in the Elements of Crimes, the perpetrator need not have 'knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation', but it suffices that he is aware of the existence of the attack in general¹⁷⁴. In particular, it is not necessary to demonstrate that the perpetrator knew that his actions were inhumane, or rose to the level of crimes against humanity¹⁷⁵, but only that he was aware of the facts related to the attack which increased the dangerousness of his conduct for the victims or turned this conduct into a contribution to the crimes of others¹⁷⁶. This standard corresponds to the risk-based approach¹⁷⁷.

- 27 It has long been settled that under customary international law the acts need not be committed with a *discriminatory intent* on any particular ground, except for persecution¹⁷⁸. While the 'old' jurisprudence since *Tadić*, based partly on the Secretary General Report on the establishment of the *ICTY*¹⁷⁹ and partly on the wording of article 3 *ICTR* Statute¹⁸⁰, required such a special intent¹⁸¹, that position has always been criticised by scholars¹⁸² and

¹⁶⁷ See Ambos, *Treatise on ICL II* (2014) 77, with further references.

¹⁶⁸ For further case law references see *ibid.*, fn. 226.

¹⁶⁹ See *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen* (1948–1950), Vol. 1, Case 2, at 6–10; Case 4, at 19–25; Case 16, at. 60–2; Case 23, at 91–5; Case 25, at 105–110; Case 31, at 122–126; and Case 34, at 141–143.

¹⁷⁰ See Ambos and Wirth (2002) 1 *CLF* 13, 37 *et seq.*

¹⁷¹ See *Blaskić* (Trial Chamber Judgment), note 30, para. 102; for more concurring case law references, see Ambos, *Treatise on ICL II* (2014) 77, fn. 229.

¹⁷² See *Tadić* (Trial Chamber Judgment), note 29, para. 659; and *Finta*, note 61, 701.

¹⁷³ See Ambos, *Treatise on ICL II* (2014) 77, 78 fn. 230 with further references; *cf.* also Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 468.

¹⁷⁴ See Ambos, *Treatise on ICL II* (2014) 77, 78 fn. 231 with further references; *cf.* also Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 476–8; *Katanga and Ngudjolo* (Confirmation Decision), note 30, para. 401.

¹⁷⁵ *Ibid.*

¹⁷⁶ See Ambos and Wirth (2002) 1 *CLF* 13, 41.

¹⁷⁷ On the advantages of the risk-based approach when the attack is only imminent or has just begun see Ambos, *Treatise on ICL II* (2014) 78, fn. 234–6 and main text.

¹⁷⁸ Affirmation of the Principles of International Law recognised by the Charter of the Nurnberg Tribunal, GA Res. 95(I).

¹⁷⁹ See 1993 Report of UN Secretary-General, note 69, para. 48 ('Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian *ethnic, racial or religious grounds*'; emphasis added).

¹⁸⁰ '... on national, political, ethnic, racial or religious grounds...'

¹⁸¹ See *Tadić* (Trial Chamber Judgment), note 29, paras. 650–652; see also *Rutaganda* (Trial Chamber Judgment), note 30, paras. 75–76.

¹⁸² See, for example McAuliffe de Guzman (2000) 22 *HumRQ* 335, 364–368.

reversed by the *Tadić* appeal decision, which restricted the discriminatory intent to the crime of persecution¹⁸³. This holding has been followed invariably by the ICTY¹⁸⁴. The personal motives of the perpetrator in taking part in an attack on a civilian population are irrelevant in determining whether a crime against humanity occurred providing that it can be shown that the person acted with the required knowledge of the attack, and, in the case of persecution, harboured a discriminatory intent¹⁸⁵:

‘the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons.’ Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack¹⁸⁶.

g) **Special remarks.** An important issue that will have to be addressed during each case before the ICC is what *evidence* will be sufficient to prove the widespread or systematic attack on the civilian population. Such attacks often involve a large number of acts, and complex and multi-layered forms of organisation and conduct¹⁸⁷. It is not always possible to locate evidence concerning every aspect of the attack. One possible approach which may be pursued in certain cases is to focus on the planning, preparation and execution of the overall campaign against the civilian population, in question, at the highest levels of organisation, and use particular incidents to illustrate the various components of the campaign¹⁸⁸. ICC Pre-Trial Chamber II found more recently that ‘established hierarchy’, the existence of a ‘military wing’, with disciplined soldiers, ‘effective system of communication’, ‘chain of

¹⁸³ This part of the Judgment was reversed on appeal; see *Tadić* (Appeals Chamber Judgment), note 73, para. 305 (‘Such an intent is an indispensable ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for article 5 (h), concerning various types of persecution’). The requirement in the chapeau of article 3 of the ICTR Statute, has no basis in international law and applies only to trials in the ICTR; cf. *Prosecutor v. Akayesu*, No. ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001 (PURL: <http://www.legal-tools.org/doc/c62d06/>), paras. 464, 465 (‘... except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity’).

¹⁸⁴ Cf. *Kupreskić* (Trial Chamber Judgment), note 83, para. 558; see *Blaškić* (Trial Chamber Judgment), note 30, para. 260; *Kordić and Čerkez*, (Trial Chamber Judgment), note 30, para. 186; *Popović and others* (Trial Chamber Judgment), note 30, para. 968; *Tolimir* (Trial Chamber Judgment), note 72, para. 849; cf. also *Muvunyi* (Trial Chamber Judgment), note 30, para. 514; *Prosecutor v. Zigiranyirazo*, No. ICTR-ICTR-01-73-T, Judgment, Trial Chamber, 18 December 2008 (PURL: <http://www.legal-tools.org/doc/08e038/>), para. 430. Also, the ICTR interpreted the reference to certain grounds in article 3 as belonging to the nature of the attack, not the perpetrator’s mens rea, cf. *Akayesu* (Appeals Chamber Judgment), note 127, para. 469, cited after *Bagilishema* (Trial Chamber Judgment), note 30, para. 81, fn. 79–80.

¹⁸⁵ *Attorney General v. Eichmann*, Supreme Court of Israel, 29 May 1962, 36 ILR. 277, 243–4 (1968); and *Finta*, note 61, 819.

¹⁸⁶ ICTY: see *Kunarac* (Appeals Chamber Judgment), note 121, para. 103 (fns. omitted). See also *Kordić* (Appeals Chamber Judgment), note 94, para. 99 (quoting *Kunarac*); *Blaškić* (Appeals Chamber Judgment), note 121, para. 124. ICTR: *Prosecutor v. Semanza*, No. ICTR-97-20-A, Judgment, Appeals Chamber, 20 May 2005 (PURL: <http://www.legal-tools.org/doc/a686fd/>), paras. 268–269; *Prosecutor v. Simba*, No. ICTR-01-76-T, Judgment, Trial Chamber, 13 December 2005 (PURL: <http://www.legal-tools.org/doc/373ff0/>), para. 421 (‘A perpetrator must have acted with knowledge of the broader context and knowledge that his acts formed part of the attack, but he need not share the purpose or goals behind the broader attack’) (fn. omitted); *Prosecutor v. Nindabahizi*, No. ICTR-2001-71-I, Judgment and Sentence, Trial Chamber, 15 July 2004 (PURL: <http://www.legal-tools.org/doc/272b55/>), para. 478; *Semanza* (Trial Chamber Judgment), note 91, para. 332.

¹⁸⁷ *Pohl* Case, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. II, p. 59, which stated that in ‘an elaborate and complex operation’, the execution thereof, occurs ‘far removed from the original planners. As may be expected, we find the various participants in the programme tossing the shuttlecock of responsibility from one to the other’.

¹⁸⁸ See *Gbagbo* (Confirmation Decision), note 30, paras. 210 (‘the degree of planning, direction or organisation by a group or organisation’), 217 (‘understand how the organisation operates’ for instance in terms of whether a chain of command or certain internal reporting lines exist).

command’, ‘means and the capability to carry out military operations’ indicate an organisational policy¹⁸⁹. Individual perpetrators could be fitted into such a criminal scheme¹⁹⁰.

- 29 A second question that should be highlighted relates to the *sentencing* for crimes against humanity. While the case law of the ad hoc Tribunals, albeit not unanimously, opted for an equal treatment approach, holding that crimes against humanity are not inherently more serious than war crimes¹⁹¹, it is more convincing to establish an abstract hierarchy between international crimes with genocide being the most serious crime followed by crimes against humanity and war crimes.¹⁹² This follows in particular from the different context elements. As to crimes against humanity and war crimes it is clear that the systematic or widespread attack requirement increases the wrongfulness of the act, and thereby the culpability of the actor to a greater extent than the armed conflict requirement of war crimes¹⁹³. Of course, with regard to the concrete sentencing, one must distinguish between abstract and concrete gravity and take into account other sentencing factors.¹⁹⁴

2. The different subparagraphs

- 30 a) ‘Murder’. Murder as a crime against humanity was recognised as early as the 1915 *Declaration of France, Great Britain and Russia*¹⁹⁵ and was included in the list of violations of the laws of humanity in the 1919 Peace Conference Commission report. It has been listed as the first crime against humanity in every instrument defining crimes against humanity¹⁹⁶. In the light of this history, there was little controversy about including murder as a crime against humanity during the drafting of the Rome Statute¹⁹⁷.

¹⁸⁹ Cf. *Ntaganda* (Confirmation Decision), note 126, paras. 14 *et seq.*; *Gbagbo* (Confirmation Decision), note 30, para. 217.

¹⁹⁰ For example, see the ICTY’s Indictments against *Radovan Karadžić* and *Ratko Mladić* (*Prosecutor v. Karadžić and Mladić*, No. IT-95-5-I, Indictment, 25 July 1995 (PURL: <http://www.legal-tools.org/doc/899c89/>)) and *Dario Kordić* (*Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2, Indictment, 30 September 1998 (PURL: <http://www.legal-tools.org/doc/15d8ed/>)).

¹⁹¹ *Prosecutor v. Furundžija*, No. IT-95-17/1-A, Judgment, Appeals Chamber, 21 July 2000 (PURL: <http://www.legal-tools.org/doc/660d3f/>), para. 247 ([‘T]here is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter’); *Tadić* (Appeals Chamber Judgment), note 73, para. 69 ([‘T]here is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorised penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case’) (reversing the Trial Chamber sentencing judgment which made this distinction). These judgments squarely rejected the approach in the Joint separate opinion of Judges McDonald and Vorah in, which stated that ‘all things being equal, a punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime’. See also note 18, Ambos, 251–2.

¹⁹² Cf. *ibid.*, 252–4.

¹⁹³ Cf. *ibid.*, 252–3.

¹⁹⁴ Cf. *ibid.*, 293–4 and on the sentencing factors 283 *et seq.*

¹⁹⁵ Declaration of France, Great Britain and Russia, 24 May 1915, quoted in Schwelb (1946) 23 *BYIL* 178. For a discussion, see Ambos, *Treatise on ICL II* (2014), 79–84; Werle and Jessberger, *Principles of ICL* (2014), 348–350; Schabas, *Commentary ICC* (2010), 157–158.

¹⁹⁶ *Charter of the International Military Tribunal, annexed to the London Agreement* (1945) (Nuremberg Charter), article 6 (c); Allied Control Council Law No. 10 (1945), article II para. 1 (c); *Charter of the International Military Tribunal for the Far East, Tokyo* (1946) (Tokyo Charter), article 5 (c); *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (1950) (Nuremberg Principles), princ. VI (c); 1954 ILC Draft Code, article 2 para. 10 (inhuman acts); ICTY Statute (1993), article 5 (a); ICTR Statute (1994), article 3 (a); 1996 ILC Draft Code, UNTAET Reg. 2000/15 (2000), sect. 5.1 (a); Statute of the Special Court for Sierra Leone, article 2 (a); and Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)), article 5.

¹⁹⁷ Murder was included as the first crime against humanity in one of the lists in the 1996 Preparatory Committee’s compilation of proposals (known as the Telephone Book of Buenos Aires because of its length), but bracketed with wilful killing, the term used in the grave breaches provisions of the Geneva Conventions, as an

The ILC in 1996 explained why it did not define this crime in the Draft Code: ‘Murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation’¹⁹⁸. However, this finding is misleading. As evidenced in scholarship and practice, there are significant differences between national definitions of murder¹⁹⁹. This was recognised by some delegations in the Preparatory Committee, which argued that the Court, like the other international criminal courts, would need to consider its definition under international law²⁰⁰. For example, under English common law, murder is an unlawful homicide committed with ‘malice aforethought’; such malice implying neither pre-meditation nor ill-will, but either the intention to kill (express malice) or the intention to cause grievous bodily harm (implied malice), whether the accused foresaw the possibility of death or not²⁰¹. French law appears to restrict the crime of murder (*meurtre*) to cases where the person intended to kill the victim²⁰². Unfortunately, few decisions of international courts or commentators discussed the elements of the crime before the diplomatic conference²⁰³. The Nuremberg Judgment did not discuss the elements of the crime of murder.

In Rome, the inclusion of murder as the first in the list of crimes against humanity ‘was approved on the first day of negotiations on the definition of crimes against humanity and was not referred to again in the oral negotiating sessions’²⁰⁴. But no definition was offered in article 7 (2). This gap was subsequently closed through the Elements of Crimes, which use identical material elements in relation to murder as a crime against humanity (Element 1 to article 7 (1) (a)), genocide by killing (Element 1 to article 6 (a)), the war crime of willful

alternative suggesting that the scope of each crime was considered similar. 1996 Preparatory Committee II, p. 65. Other formulations in the two other lists were ‘[wilful] murder [killing or extermination] [including killings by knowingly creating conditions likely to cause death]’ and ‘wilful killing’. *ibid.*, 67, 69. The report stated that some delegations had ‘expressed the view that murder required further clarification given the divergences in national criminal laws. There were proposals to refer to wilful killing or to murder, including killings done by knowingly creating conditions likely to cause death’. 1996 Preparatory Committee I, p. 23. In February 1997, the Preparatory Committee list of crimes simply listed murder, without any further elaboration.

Murder, but without any further explanation, was the first crime against humanity listed in the Zutphen Draft under the chairmanship of Adriaan Bos. The Dutch delegation had invited the chairpersons of the various working groups of the Preparatory Committee to draft a new consolidated Draft that would merge the existing proposals in a workable text for the final meeting of the Preparatory Committee before the Rome Conference in the spring of 1998. The result of the deliberations at Zutphen is available at <<https://www.legal-tools.org/doc/7ba9a4/>> (accessed 4 February 2015). All citations to the Zutphen Draft in this Commentary are to the relevant draft articles. The Zutphen Draft was reorganised and partly revised at the final session of the Preparatory Committee held from 16 March to 3 April 1998 in what is sometimes known as the New York Draft, UN Doc. A/CONF.183/2/Add.2 (1998), which was submitted to the Rome Diplomatic Conference, but the list and order of crimes against humanity in article 5 of the New York Draft remained the same.

¹⁹⁸ 1996 ILC Draft Code, p. 96 (commentary to article 18).

¹⁹⁹ See also Ambos, *Treatise on ICL II* (2014) 80–84; Bassiouni, *Crimes Against Humanity* (2011) 366–368.

²⁰⁰ 1996 Preparatory Committee I, para. 92; Heine and Vest, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000) 175 (discussing the wide range of definitions of murder and homicide under national law); Horder, *Homicide in Comparative Perspective* (2007) (same).

²⁰¹ Allen, *Textbook on Criminal Law* (1991) 255–256. A Parliamentary committee has recommended that unforeseen but unlawful killings be considered manslaughter instead of murder. Report of the Select Committee of the House of Lords on Murder and Life Imprisonment (HL Paper 78–1 1989), para. 68. The government has proposed to amend the law of murder, but as of 1 December 2006, the proposals had not yet been enacted into law.

²⁰² Code Pénal (Daloz 1997–1998), article 221–1 (*‘Le fait de donner volontairement la mort à autrui constitue un meurtre’*).

²⁰³ Professor Bassiouni is a notable exception. He argued in 1992 that state practice, in international and national prosecutions, indicated that ‘murder is not intended to mean only those specific intentional killings without lawful justification’, but also ‘the creation of life – endangering conditions likely to result in death according to reasonable human experience’, such as mistreatment of prisoners of war and civilians, and ‘a closely related form of unintentional but foreseeable death which the common law labels manslaughter’. Bassiouni, *Crimes Against Humanity* (1992) 290–293; *id.*, *Crimes Against Humanity* (2011), 366–368.

²⁰⁴ McCormack, in: McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 179, 190.

killing (Element 1 to article 8 (2) (a) (i)) and the war crime of murder (Element 1 to article 8 (2) (c) (i)-1)²⁰⁵.

- 31 There has been extensive and often contradictory jurisprudence, largely since the Rome Conference, concerning the definitions of murder as a crime against humanity and as a war crime, and in particular the required mental element which differs across common law and Romano-Germanic systems²⁰⁶. As recently as December 2004, the ICTY Appeals Chamber in the *Kordić* case concluded after reviewing jurisprudence in the ICTY and ICTR since the Rome Diplomatic Conference in 1998 that '[t]he elements of murder as a crime against humanity are undisputed'²⁰⁷. However, in the light of divergences in the jurisprudence of the ICTY and ICTR Trial and Appeals Chambers on the definition of this crime, in particular whether it requires premeditation or not and whether recklessness is sufficient, this conclusion is not accurate²⁰⁸. The definition of this crime is gaining clearer contours but it is still evolving. A harsher judgment might be that for nearly a decade ICTY and ICTR Trial Chambers have continued to convict persons in exactly the same circumstances that would lead to acquittals in other Trial Chambers, and the Appeals Chambers of the two Tribunals have failed to resolve this problem, thus denying justice to the accused, victims and the general public²⁰⁹.

There is general agreement, starting with the September 1998 Trial Chamber Judgment in *Prosecutor v. Akayesu*, that (apart from the common contextual elements for crimes against humanity) the *actus reus* for murder as a crime against humanity requires that 'the victim is dead' and that 'the death resulted from an unlawful act or omission of the accused or a subordinate'²¹⁰. ICTR Trial Chambers have generally identified the same two elements as articulated in *Akayesu*²¹¹. The ICTY Trial Chambers have done the same²¹². However, at least one ICTY Trial Chamber has formulated the second element slightly more broadly. In the 2002 *Krnjelac* Judgment, the ICTY Trial Chamber stated the second physical element as: 'The victim's death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility'²¹³.

²⁰⁵ For a differentiated definition see Element 1 to article 7 (1) (b) which adds: 'including by inflicting conditions of life calculated to bring about the destruction of part of a population'.

²⁰⁶ Bassiouni argues that a common definition of the world's major legal systems includes 'what the common law considers to be voluntary and involuntary manslaughter, and what the Romano-Civilist-Germanic systems consider homicide with *dolus* and homicide with *culpa*. However, the latter systems allow consideration of motive while the former does not'. See Bassiouni, *Crimes Against Humanity* (2011), 367. See also Ambos, *Treatise on ICL II* (2014) 80–81.

²⁰⁷ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, para. 113.

²⁰⁸ For a thorough analysis of the conflicting jurisprudence on this question through 2002, see Ambos and Wirth (2002)13 *CLF* 1.

²⁰⁹ The Appeals Chambers could have resolved this conflicting jurisprudence in any case involving murder as a crime against humanity, even if the mental element was not in issue. For example, the ICTY Appeals Chamber decided the question whether crimes against humanity could be committed for purely personal motives even when it had no bearing on the verdict in the case because the question was 'a matter of general significance' and decided that the Trial Chamber's conclusion that they could not was erroneous as a matter of law. *Prosecutor v. Tadić*, IT-94-1-A, 15 July 1999, para. 272.

²¹⁰ *Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, para. 589. These three elements were in addition to the elements common to all crimes against humanity within the definition in article 3 of the Statute.

²¹¹ See, for example, *Prosecutor v. Rutaganda*, ICTR-96-3-T, 6 December 1999, para. 80.

²¹² See *Prosecutor v. Krajišnik*, No. IT-00-39-T, Judgment, Trial Chamber, 27 September 2006, para. 715; *Prosecutor v. Blagojević and Jokić*, No. IT-02-60-T, Judgment, Trial Chamber, 17 January 2005, para. 556; *Prosecutor v. Krnjelac*, No. IT-97-25-T, Judgment, Trial Chamber, 15 March 2002, para. 324; *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, paras. 422, 439; *Prosecutor v. Jelisić*, No. IT-95-10-T, Judgment, Trial Chamber, 14 December 1999, para. 35; *Prosecutor v. Blaškić*, IT-95-14-T, 3 March 2000, para. 217; *Prosecutor v. Kupreškić et al.*, No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, paras. 560–561; *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Judgment, Trial Chamber, 26 February 2001, para. 236; *Prosecutor v. Krstić*, No. IT-93-33-T, Judgment, Trial Chamber, 2 August 2001, para. 485; *Prosecutor v. Kvočka et al.*, No. IT-95-30/1-T, Judgment, Trial Chamber, 2 November 2001, para. 132.

²¹³ *Prosecutor v. Krnjelac*, IT-97-25-T, 15 March 2002, para. 324 (fn. omitted) (citing: *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 236); *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, para. 439.

The first fundamental split in the jurisprudence of the international criminal courts with regard to the mental element of murder as a crime against humanity is whether as part of the *mens rea* the perpetrator has premeditated the murder²¹⁴. The Trial Chamber in *Akayesu* did not require premeditation under article 3 of the ICTR Statute and this view has been followed by some other ICTR Trial Chambers²¹⁵. However, other ICTR Trial Chambers have insisted that premeditation is required under the ICTR Statute, although not under customary international law²¹⁶. Such premeditation need not be an intent to kill a particular individual; 'it is sufficient that the accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds'²¹⁷. It has been described as involving 'intent to kill after a cool moment of reflection'²¹⁸. In contrast, several ICTY Trial Chambers have concluded that premeditation is not required under the identically worded ICTY Statute²¹⁹. In 2014, the Appeals Chamber confirmed in *Đorđević* that 'the case law of the ICTY has been consistent in not requiring premeditation as one of the elements of the crime of murder either as a violation of the laws or customs of war or as a crime against humanity'²²⁰. The split has no significance with regard to the interpretation of the scope of the jurisdictional definition in the Rome Statute of the crime against humanity of murder. The French version of article 7 para. 1 (a) uses the term '*meurtre*', which does not require premeditation, as opposed to '*assassinat*' which implies premeditated killing. Premeditation is thus not necessary²²¹. This argument makes particular sense in relation to system criminality where the perpetrator may have planned, organised or endorsed murder of civilians, while remaining removed from the scene of the crime and lacking intent relating

²¹⁴ On 'unintended' killing and the Nuremberg Charter, see Bassiouni, *Crimes Against Humanity* (2011), 366, arguing that the Charter included 'foreseeable death that the common law labels manslaughter'.

²¹⁵ ICTR judgments concluding premeditation is not required: *Prosecutor v. Musema*, ICTR-96-13-T, 27 January 2000, paras. 214–216; *Prosecutor v. Rutaganda*, ICTR-96-3-T, 6 December 1999, paras. 79–80; *Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, para. 588.

²¹⁶ ICTR judgments requiring premeditation: The first of these judgments was *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 138–139 (concluding that premeditation was required, based not on an interpretation of customary international law, but on the use of the narrow term *assassinat* in the French version of the ICTR and ICTY Statutes as a translation for the English term murder, rather than on the broader term *meurtre* used in the Rome Statute), *Prosecutor v. Kayishema and Ruzindana*, No. ICTR-95-1-A, Judgment (Reasons), Appeals Chamber, 1 June 2001 (issue not addressed because the Prosecutor's appeal filed was late). See also *Prosecutor v. Bagilishema*, ICTR-95-1A-T, 7 June 2001, para. 84, *Prosecutor v. Bagilishema on other grounds*, No. ICTR-95-1A-A, Judgment (Reasons), Appeals Chamber, 3 July 2002; *Prosecutor v. Ntagerura*, No. ICTR-99-46-T, Judgment and Sentence, Trial Chamber, 25 February 2004; *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, Trial Chamber, 15 May 2003, para. 339; *Prosecutor v. Semanza*, No. ICTR-97-20-A, Judgment, Appeals Chamber, 20 May 2005 (issue of definition of murder not addressed); *Prosecutor v. Muhimana*, ICTR-95-1B-T, 28 April 2005, para. 569 (quoting *Prosecutor v. Semanza*, ICTR-97-20-T, 15 May 2003); *Prosecutor v. Muhimana*, No. ICTR-95-1B-A, Judgement, Appeals Chamber, 21 May 2007 (issue of definition of murder not addressed). For an analysis of the Trial Chamber Judgment in *Kayishema and Ruzindana*, see Boot, *Nullum Crimen Sine Lege and the Subject Matter of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes* (2002) 494–496. In the Trial Chamber's Judgment in *Prosecutor v. Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, 21 February 2003, para. 808, it simply said that the accused 'had the requisite intent' without specifying what it was.

²¹⁷ *Prosecutor v. Ntagerura*, ICTR-99-46-T, 25 February 2004, para. 700 (citing *Prosecutor v. Semanza*, ICTR-97-20-T, 15 May 2003, para. 339); *Prosecutor v. Semanza*, ICTR-97-20-A, 20 May 2005 (issue of definition of murder not addressed).

²¹⁸ *Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, para. 139.

²¹⁹ See, for example, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 235; *Prosecutor v. Jelišić*, IT-95-10-T, 14 December 1999, para. 51; *Prosecutor v. Blaškić*, IT-95-14-T, 3 March 2000, para. 216. In contrast, an ICTY Trial Chamber in the *Kupreškić* case defined murder as an 'intentional and premeditated killing', but it did not refer to the latter element in its factual findings, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, 14 January 2000, para. 818. Similarly, the ICTY Trial Chamber in *Krstić* stated that it 'subscribes to the position previously adopted by the ICTR in the *Akayesu* Judgement' with regard to premeditation. *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, paras. 484 and 1119.

²²⁰ *Prosecutor v. Đorđević*, No. IT-05-87/1-A, Judgement, Appeals Chamber, 27 January 2014, para. 548. It added: 'While there is indeed a difference in the approach of some early trial judgments of the ICTR, the Appeals Chamber recalls that it is not bound by decisions of trial chambers', *ibid.*, para. 550.

²²¹ See also Ambos, *Treatise on ICL II* (2014) 83; Werle and Jessberger, *Principles of ICL* (2014) 350.

to a particular victim. This makes it difficult to distinguish the intent to kill as neatly from pre-deliberation as in certain domestic systems²²².

33 The second fundamental split regarding *mens rea* is whether, as with the war crime of murder under common article 3 of the Geneva Conventions (incorporated in article 8 para. 2 (c) (i) of the Rome Statute) and willful killing as a grave breach of those Conventions (article 8 para. 2(a)(i) of the Rome Statute), recklessness is sufficient to prove murder as a crime against humanity²²³. In *Akayesu*, the ICTR Trial Chamber stated that the crime of murder as a crime against humanity under article 3 of its Statute was ‘the unlawful, intentional killing of a human being’, when ‘at the time of the killing the accused or a subordinate had the intention to kill or inflict bodily harm on the deceased having known that such bodily harm is likely to cause the victim’s death, and is reckless whether death ensues or not’ (para. 589). This slightly convoluted formulation requires that the perpetrator intended to kill or inflict bodily harm on the victim, knew that the harm was likely to cause death and was reckless whether death would result. Several of the ICTY Trial Chambers have required that the perpetrator intended to inflict severe, grievous or serious bodily harm²²⁴. A more significant difference has been that ICTY Trial Chambers and the Appeals Chamber have not included recklessness as a component of the mental element of murder as a crime against humanity²²⁵. For example, in the 2002 *Krnojelac* Judgment, the ICTY Trial Chamber stated the mental element of the crime of murder was:

‘That act was done, or that omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:

1. to kill, or
2. to inflict grievous bodily harm, or
3. to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death²²⁶.

One of the Special Panels for Serious Crimes of the District Court for Dili in East Timor (now Timor-Leste), implementing UNTAET Reg. 2000/15, with the same wording as article 7

²²² For a discussion, see Ambos, *Treatise on ICL II* (2014) 83.

²²³ The term ‘willful’ includes both intentional and reckless conduct. *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, paras. 437 and 439 (Add. Prot. I, articles 11 and 85); Zimmermann, *Article 85*, in: Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 3474; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2002) 43; for discussion, see also Ambos, *Treatise on ICL II* (2014), 81; Werle and Jessberger, *Principles of ICL* (2014), 349.

²²⁴ ICTY: *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 485 (‘serious bodily harm’); *Prosecutor v. Krnojelac*, IT-97-25-T, 15 March 2002, para. 324 (‘grievous bodily harm’) (citing: *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 236); *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, para. 439), *Prosecutor v. Delalić et al. (Čelebići)*, No. IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003 (definition of murder not addressed). ICTR: *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgement, Trial Chamber, 13 April 2006, para. 87 (‘grievous bodily harm’).

²²⁵ See *Prosecutor v. Krajišnik*, IT-00-39-T, 27 September 2006, para. 715; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, 17 January 2005, para. 556; *Prosecutor v. Krnojelac*, IT-97-25-T, 15 March 2002, para. 324; *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, paras. 422, 439; *Prosecutor v. Jelisić*, IT-95-10-T, 14 December 1999, para. 35; *Prosecutor v. Blaškić*, IT-95-14-T, 3 March 2000, para. 217; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, 14 January 2000, paras. 560–561; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 236; *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 485; *Prosecutor v. Kvočka et al.*, IT-95-30/1-T, 2 November 2001, para. 132.

²²⁶ *Prosecutor v. Krnojelac*, IT-97-25-T, 15 March 2002, para. 324 (fn. omitted) (citing: *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 236; *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, para. 439). The Trial Chamber in *Krnojelac* added:

‘Many decisions of this Tribunal and of the ICTR have adopted a definition of murder which refers to only one or two of these alternative states of mind. The relevant states of mind have nevertheless been expressed in this way, sometimes in differing terms but to substantially the same effect’, in those decisions: *Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, para. 589; *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, paras. 425, 434–435, 439; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 150–151; *Prosecutor v. Rutaganda*, ICTR-96-3-T, 6 December 1999, para. 80; *Prosecutor v. Jelisić*, IT-95-10-T, 14 December 1999, para. 35; *Prosecutor v. Musema*, ICTR-96-13-T, 27 January 2000, para. 215; *Prosecutor v. Blaškić*, IT-95-14-T, 3 March 2000, paras. 153, 181.

para. 1 (a), has articulated a more restrictive four-part test which requires that the perpetrator's act be a substantial cause of the victim's death²²⁷. Several judgments of the Special Panels have indicated that premeditation is not required with respect to the crime against humanity of murder²²⁸.

Despite the statements by the ICTY Trial Chambers in *Krnojelac* and *Blagojević* that the elements of the crime of murder as a crime against humanity and as a war crime are essentially the same, other ICTY Trial Chamber judgments have recognised that the war crimes of murder under common article 3 of the Geneva Conventions and wilful killing as a grave breach under these Conventions have a broader mental element, by stating, as in the *Celebići* case, that both require 'an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life'²²⁹. In *Strugar*, the ICTY argued that 'necessary mental state exists when the accused knows that it is *probable* that his act or omission will cause death'²³⁰.

In the First Edition of this commentary, it was stated that such precedents, in particular the judgments of the Trial Chambers of the ICTY and the ICTR, would suggest that murder as a crime against humanity falls within the meaning of article 7 when the killing was either intentional or reckless, when the requirements of the chapeau are met. First, murder would occur where the accused or a subordinate intended (see article 30 para. 2 for a definition of intention) to kill the victim, the victim died, and the death was the result of an unlawful act or omission of the accused or a subordinate (where the requirements of superior responsibility under article 28 have been met). Second, murder would occur where the accused or a subordinate intended to inflict grievous bodily harm on the victim having known (see article 30 para. 3 for a definition of knowledge) that such bodily harm was likely to cause the victim's death and was reckless whether death would ensue or not, the victim died, and the death was the result of an unlawful act or omission of the accused or a subordinate (where the requirements of superior responsibility under article 28 have been met). However, as noted above, jurisprudence of international criminal courts subsequent to the First Edition of this commentary has indicated that it will be difficult to predict whether it will be possible to prove the crime against humanity of murder based on recklessness under the ICTY or ICTR Statutes or the UNTAET regulation establishing the Special Panels. In the light of the

²²⁷ The Special Panel stated in the *Los Palos* case: '644. The Panel accepts the opinion of the parties in relation to the general *mens rea* provided by Sect. 18 of UR-2000/15. For this reason, an accused charged with murder as a crime against humanity shall have his or her *mens rea* deemed by this Panel insofar as he or she has shown intent to cause the death of the victim or be (*sic*) aware that it will occur in the ordinary course of events. Accordingly, the Panel lists the four requisite elements of murder as a crime against humanity:

645. The victim is dead.

646. The death of the victim is the result of the perpetrator's act. The act must be a substantial cause of the death of the victim.

648. At the time of the killing, the accused must have meant to cause the death of the victim or was aware that it would occur in the ordinary course of events'.

Prosecutor v. Marques (Los Palos case), No. 09/2000, Judgment, Special Panel for Serious Crimes, Dili District Court, 11 December 2001, paras. 644–649; see also *Prosecutor v. Lino de Carvalho*, No. 10/2001, Judgment, 18 March 2004, pp. 12–13 (adopting position in the *Marques* case). Other judgments (where they are readily available) do not expressly mention the elements of murder as a crime against humanity. See, for example, *Prosecutor v. A. Martins*, No. 11/2001, Judgment, Special Panel for Serious Crimes, Dili District Court, 13 November 2003.

²²⁸ The Special Panels for Serious Crimes of the Dili District Court in East Timor have convicted persons of murder as a crime against humanity where there was no evidence of premeditation. *Prosecutor v. Marques (Los Palos case)*, 09/2000, 11 December 2001, para. 649 ('[I]n a murder, as a crime against humanity, there is no requirement of premeditation as the mental element for murder ... The *mens rea* is restricted to the deliberate intent to cause the death of the victim or that such result would occur in the ordinary course of events'); *Prosecutor v. Martins*, 11/2001, 13 November 2003, (some of the murders were not premeditated); *Prosecutor v. Agostinho Cloe*, No. 4/2003, Judgment, 16 November 2004, para. 15 (murder as a crime against humanity 'does not require deliberate intent or premeditation').

²²⁹ *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, para. 439. Subsequent judgments of the ICTY have reached similar conclusions with regard to these war crimes.

²³⁰ *Prosecutor v. Strugar*, No. IT-01-42-T, Judgment, Trial Chambers, 31 January 2005, para. 236.

inconsistencies in this jurisprudence on this issue, and the ICC's cautious approach towards the incorporation of the rules and practices of other jurisdictions under article 21,²³¹ the weight of this post-Rome Conference jurisprudence in determining the scope of article 7 para. 1, mental element, remains limited. In the ICC context, particular regard must be paid to the hierarchy of sources under article 21²³².

34 The text of article 7 para. 1 (a), which is silent on the mental element for murder, must first be interpreted in the light of the somewhat confusing and circular definitions of intent and knowledge in article 30. However, apart from the two contextual elements of the crime of murder as a crime against humanity, which are common to all crimes against humanity (see mn 14–27 above), the Elements of Crimes list only one material element of this crime: '(1) The perpetrator killed [fn. 7 omitted] one or more persons'. Footnote 7 adds that it 'applies to all elements which use either of these concepts', which would include the crime against humanity of extermination and certain war crimes²³³. In the absence of any mental element with respect to this material element, article 30 applies²³⁴.

35 In ICC jurisprudence, murder as a crime against humanity has been addressed in several cases. As recognised in ICC case-law, for murder to occur 'the victim has to be dead and the death must result from the act of murder' which 'may be committed by action or omission'²³⁵. In order to prove the death of the victim, there is 'no need to find and/or identify the corpse'²³⁶.

The death can be inferred from factual circumstances²³⁷. The necessary causal link between the act of murder and the victims' death can be shown by a number of factors, including 'the location of the alleged murder, its approximate date, the means by which the act was committed with enough precision, the circumstances of the incident and the perpetrator's link to the crime'²³⁸.

36 The mental element of murder requires 'intent and knowledge'. In relation to *conduct*, the accused has *intent* under article 30 para. 2 (a) where 'that person means to engage in the conduct'. Therefore, a person would have the necessary intent to engage in the conduct that

²³¹ *Prosecutor v. Joseph Kony et al.*, No. ICC-02/04-01/05-60, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, Pre-Trial Chamber II, 28 October 2005 (PURL: <https://www.legal-tools.org/doc/9dfa86/>), para. 19. For a contested exception ('customary international criminal procedural law'), see *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11-1274-Corr2, Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation, Trial Chamber V(A), 17 April 2014 (PURL: <https://www.legal-tools.org/doc/e28d64/>), para. 91. See also Nerlich, in: Stahn and Sluiter, *The Emerging Practice of the International Criminal Court* (2009) 305–326.

²³² For an excellent discussion, see Bitti, in: Stahn and Sluiter, *The Emerging Practice of the International Criminal Court* (2009) 285–304.

²³³ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2002), para. 39 (In discussing the elements of the war crime of wilful killing in article 8 para. 2 (a) (i), which were agreed before the elements of crimes against humanity, he stated: 'The term "killed" creates the link to the "title" of the crime, and the term "caused death" was felt necessary to make it clear that conduct such as the reduction of rations for prisoners of war resulting in their starvation and ultimately their death is also covered by this crime.').

²³⁴ Although there was some jurisprudence by the ICTY and ICTR defining the mental element of the crime of murder when the Elements of Crimes were drafted, no agreement could be reached on the *mens rea* after delegates engaged in an extensive discussion of different concepts in various national legal systems in the context of the mental elements required for war crimes. Hall (2000) 94 *AJIL* 773, 781; Robinson, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 80, 81.

²³⁵ *Prosecutor v. Jean Pierre Bemba Gombo*, No. ICC-01/05-01/08-424, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 132.

²³⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 133.

²³⁷ In *Katanga*, Trial Chamber II noted that circumstantial evidence is sufficient provided that the death of the victim is the only reasonable inference. *Prosecutor v. Germain Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, 7 March 2014 (PURL: <https://www.legal-tools.org/doc/9813bb/>), para. 768.

²³⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 133.

amounts to murder where the person meant to carry out the act that killed the victim or caused the death of the victim or meant to omit carrying out an act which led to the same result (such as a prison commandant intentionally failing to provide food or medicine to a prisoner in his or her custody where the failure to do so resulted in the prisoner's death). In relation to a *consequence*, the accused has *intent* under article 30 para. 2 (b) where 'that person means to cause that consequence or is aware that it will occur in the ordinary course of events'. A person has *knowledge* under article 30 para. 3 where there is 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. PTC I held in the *Katanga and Ngudjolo Chui* Decision on the Confirmation of Charges that the offence of murder 'encompasses, first and foremost, cases of *dolus directus* of the first and second degree'²³⁹. A similar view was taken by PTC II in *Bemba*. The chamber clarified that a person would have intent to commit murder if the person 'meant to cause death or was aware that death "will occur in the ordinary course of events", [as] required by article 30(2)(b) of the Statute'²⁴⁰.

It is less clear that the accused would be responsible for murder if he or she was aware that the act or omission *would be likely to lead to death* in the ordinary course of events that the accused would be responsible for murder. Since knowledge includes awareness that a circumstance exists, that circumstance could be the *likelihood* that death would ensue as a result of the actions rather than the *certainty* that death would occur. There would be then no need to show that the person was reckless whether the death occurred or not, only that the person *intentionally* inflicted grievous bodily harm *knowing* that in such circumstances death would be likely to occur. In the Second Edition of this commentary the view was taken that such an interpretation of the crime of murder as a crime against humanity 'would be generally consistent with the majority of decisions by international courts and interpretation of commentators about the customary international law definition of the crime and with the purpose of the Statute, as well as with the broad range of conduct that constitutes extermination under article 7 para. 1 (b), which is murder on a large scale.' But this broad interpretation contrasts with the literal interpretation of article 30 by the Appeals Chamber in *Lubanga*²⁴¹ which confirmed the view put forward in *Bemba* that 'the standard for the foreseeability of events is *virtual certainty*'²⁴². The Appeals Chamber stressed that the verb 'occur' is used with the modal verb 'will', and not with 'may' or 'could', while expressing reservation towards the relevance of 'risk' in interpreting article 30 (2) of the Statute²⁴³. ICC practice differs therefore from the more permissive practice of the *ad hoc* tribunals.

In the context of an armed conflict, unlawful acts or omissions include those in violation of international humanitarian law, as well as those in violation of national law. In time of peace, unlawful acts or omissions include those which would cause 'extra-legal, arbitrary and summary executions' prohibited by article 1 of the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*²⁴⁴, as well as those in

²³⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008 (PURL: <https://www.legal-tools.org/doc/67a9ec/>), para. 423.

²⁴⁰ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 138.

²⁴¹ *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-3121-Red, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, (PURL: <https://www.legal-tools.org/doc/585c75/>) para. 447.

²⁴² *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 362.

²⁴³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, 1 December 2014, (PURL: <https://www.legal-tools.org/doc/585c75/>) paras. 447 and 449. See generally Werle and Jessberger (2005) 3 *JICJ* 35, 41; Clark (2001) 12 *CLF* 291, 334; Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 771; Badar, *The Concept of Mens Rea in International Criminal Law: the Case for a Unified Approach* (2013); Porro, *Risk and Mental Element. An Analysis of National and International Law on Core Crimes* (2014).

²⁴⁴ *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, adopted by the Economic and Social Council (ECOSOC) Res. 1989/65 of 24 May 1989, article 1.

violation of national law. The United States of America has stated that such killings are crimes under the Rome Statute²⁴⁵.

Of course, a commander or a superior could be individually responsible pursuant to article 28 for murder on the basis of command or superior responsibility even though he or she did not actually kill the victim. Footnote 7 states that '[t]he term "killed" is interchangeable with the term "caused death"'. Therefore, a person could be held criminally responsible for murder for both acts and omissions, such as failing to feed or to provide necessary medical attention to a prisoner in his or her custody, where that failure caused the victim's death.

- 38 b) 'Extermination'. Like murder, the crime of extermination has been listed in all instruments concerning crimes against humanity since the Second World War²⁴⁶. It has been used by the ICTY and the ICTR in relation to the massacres in Srebrenica and Rwanda. There was general support for including extermination as a crime against humanity within the Court's jurisdiction, although some questioned whether it duplicated murder and genocide²⁴⁷. Although the crime of extermination included much of the genocide committed during the Second World War and it overlaps with the definition of that crime as defined in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (see commentary to article 6 above and analysis below), the crimes are distinct. The ILC explained the differences between the crimes against humanity of murder and extermination and killings constituting genocide in its comment on article 18 of the 1996 Draft Code:

[Murder and extermination] consist of distinct and yet closely related criminal conduct which involves taking the lives of innocent human beings. Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group

²⁴⁵ During the drafting of the 2004 GA Res. (UN Doc A/C.3/59/L.57/Rev.1) the United States urged that the following language be included: 'Acknowledges that extra-judicial, summary or arbitrary executions are crimes under the *Rome Statute* of the ICC and notes the 97 ratifications or accessions by States and the 139 signatures to date by States of the *Rome Statute* of the ICC'. This language was not included in the resolution as adopted solely because of concerns that the United States of America was seeking to minimize acceptance of the Rome Statute by omitting a call to states to consider ratifying it.

²⁴⁶ It is included in article 6 (c) of the *Charter of the International Military Tribunal* (1945); article II para. 1 (c) of *Allied Control Council Law No. 10*; article 5 (c) of the *Charter of the International Military Tribunal for the Far East* (1946), principle VI (c) of the 1950 *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, article 2 para. 10 (inhuman acts) of the 1954 ILC Draft Code, article 5 (b) of the 1993 ICTY Statute, and article 3 (b) of the 1994 ICTR Statute, article 18 (b) of the 1996 ILC Draft Code, sections 5.1 (b) and 5.2 (a) of UNTAET Reg. 2000/15, article 2 (b) of the Statute of the Special Court for Sierra Leone, and article 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia.

²⁴⁷ Extermination was proposed in the *Ad Hoc* Committee to be included in the list of crimes against humanity, but it was also suggested that this was one of the crimes for which it was necessary to elaborate further its content. *Ad Hoc* Committee Report, p. 17.

Extermination was included in two of the lists of crimes against humanity in the 1996 Preparatory Committee II, pp. 65 and 67, but omitted in the third list. An annex to one of the lists defined extermination as:

'(i) mass murder; or

(i) intentionally inflicting conditions of life [calculated to][which the accused knew or had reason to know would] bring about the physical destruction of a defined segment of the population'.

Ibid., p. 68. The report noted that '[t]he view was expressed that extermination should be deleted as a duplication of murder or clarified to distinguish between the two, with a proposal being made to refer to alternative offences'; 1996 Preparatory Committee I, p. 23. In February 1997, the Preparatory Committee list of crimes simply listed extermination, in the first paragraph of the article on crimes against humanity and in a second paragraph it explained that this crime 'includes the [wilful, intentional] infliction of conditions of life calculated to bring about the destruction of part of a population'.

Extermination was the second crime against humanity listed in the first paragraph of the crimes against humanity section of article 5 [20] of the Zutphen Draft, together with a second paragraph that was identical to the one in the February 1997 Report, and this wording remained unchanged in article 5 of the New York Draft, UN Doc. A/CONF.183/2/Add.2 (1998).

of individuals who do not share any common characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared²⁴⁸.

In the ICC context, some guidance on the definition of extermination may be derived from article 7 (2) (b)²⁴⁹. It states that extermination ‘includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine calculated to bring about the destruction of part of a population’. Extermination differs from murder by the element of ‘mass killing’. This type of criminality may, in particular, require ‘a substantial degree of preparation and organisation’²⁵⁰.

In the First Edition of this commentary the view was expressed that the history of its application in international courts and its definition by commentators suggest that it has the following characteristics: It is murder on a large scale, meaning that it involves large numbers of victims²⁵¹. It probably must satisfy the requirements of article 7 para. 1 (a) for the crime of murder. The person responsible does not need to know who the individual victims are. The killings are directed at groups of individuals, but these groups could include not only the national, ethnical, racial and religious groups which are expressly protected by the Genocide Convention, but a wide variety of other groups, such as political, social, linguistic groups and groups based on their sexual orientation, such as homosexuals, lesbians and transsexuals²⁵². The members of the group would not have to share common characteristics and, perhaps, could simply be groups that existed as such only in the mind of the person responsible, such as all persons believed to be traitors to the State or ‘subversives’. Killings of members of protected groups which amount to genocide under article 6 (a) would, if committed on a large scale, constitute extermination within the meaning of article 7 para. 1 (b), but killings do not need to be on a large scale to constitute genocide and not all cases of extermination would amount to genocide under the Statute. This view has to some extent been confirmed by subsequent jurisprudence of international criminal courts, although that jurisprudence is not entirely consistent, and by the elements of this crime in the Elements of Crimes (see below mn 112–118).

One of the specificities of the ICC Statute is that it contains a synergy to genocide under article 6 (c), through its explicit reference to the infliction of ‘conditions of life calculated to

²⁴⁸ 1996 ILC Draft Code, p. 97. A leading commentator came to a similar conclusion about the scope of examination:

‘The plain language and ordinary meaning of the word extermination implies both intentional and unintentional killing. The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not necessarily perform the *actus reus* which produced the deaths, nor have specific intent toward a particular victim. All of these are necessary elements of murder or its counterpart in the world’s major criminal justice systems. Thus, the individual responsibility of each actor (whether direct, indirect, or vicarious) for a given killing cannot be predicated on the element of specific knowledge of the identity of the victim or personal knowledge of the specific act that was the direct cause of death of a given victim. It is, therefore, necessary in that type of group killing to extend the definitions of “murder” and particularly that of “extermination” to include other forms of intentional and unintentional killing’.

Bassiouni, *Crimes against Humanity* (1992) 291.

²⁴⁹ Ambos argues that the Statute ‘defines “extermination” as the “intentional infliction of conditions of life ... calculated to bring about the destruction of a part of the population”’. See Ambos, *Treatise on ICL II* (2014), 84. But the use of the word ‘includes’ leaves some doubt as to whether this is an exhaustive definition.

²⁵⁰ See *Prosecutor v. Kristić*, IT-98-33-T, 2 August 2001, para. 501.

²⁵¹ According to one of the earliest commentaries on crimes against humanity, extermination under article 6 (c) of the *Charter of the International Military Tribunal* (1945) is apparently to be interpreted as ‘murder on a large scale’. Schwelb, (1946) 23 *BYIL* 178, 192.

²⁵² As to the distinction from the Genocide Convention, see also Ambos, *Treatise on ICL II* (2014), 84; Werle and Jessberger, *Principles of ICL* (2014); Indeed, as one of the drafters confirms, when the continuing need for including the crime of extermination in the list of crimes against humanity was questioned in Rome in the light of the Genocide Convention, ‘[t]hat question was answered emphatically by a number of delegations reminding the negotiators of the verbal agreement to define crimes against humanity broadly enough to cover limitations to the accepted definition of genocide’. McCormack, in: McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 179, 190.

bring about the destruction of part of a population²⁵³. Ambos even goes so far as to argue that the crime ‘essentially consists of the creation of deadly living conditions amounting to widespread “mass” killings, which targets groups of persons²⁵⁴. This view contrasts with the more flexible jurisprudence of the *ad hoc* tribunals which have recognised extermination irrespective of the ‘creation of conditions of life’ leading to death²⁵⁵. It is questionable whether the framing of the Statute is meant to exclude this flexibility. The Elements of Crimes indicate specifically that the ‘conduct could be committed by different methods of killing, either directly or indirectly²⁵⁶. It is thus more convincing to argue that extermination ‘may be applied to acts committed with the intention of bringing about the death of a large number of victims either directly, such as by killing the victim with a firearm, or less directly, by creating conditions provoking the victim’s death²⁵⁷’.

In the ICC context, extermination has been charged in the Darfur Situation. PTC I, in particular, confirmed with reference to ICTY and ICTR case-law that extermination requires that ‘the relevant killings constitute or take place as part of “a mass killing of members of a civilian population”²⁵⁸. Although extermination involves killings on a large scale, individuals may be held criminally responsible under article 7 for even one death, provided that it was part of large-scale killings²⁵⁹. This is made clear by the Elements of Crimes (for the scope of the crime of extermination under article 7, see mn 112–118 concerning article 7 para. 2 (b)).

- 39 c) ‘Enslavement’. Slavery and the slave trade were among the earliest violations of human rights to be recognised as crimes under international law, although they were the subject of a comprehensive treaty only when the *1926 Slavery Convention* was adopted²⁶⁰. Slavery and the slave trade in their traditional forms have all but vanished, but other forms of slavery continue to persist, as well as a wide variety of forms of slavery-like practices, including servitude and forced labour and trafficking, particularly involving women and children (see discussion below in mn 121–122)²⁶¹. International law has evolved to address these new forms²⁶². The prohibition of slavery is also found in provisions of general human rights

²⁵³ Schabas, *Commentary ICC* (2010) 159.

²⁵⁴ Ambos, *Treatise on ICL II* (2014) 84.

²⁵⁵ See *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, para. 144 (‘The actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others’); *Prosecutor v. Kristić*, IT-98-33-T, 2 August 2001, para. 503 (‘there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population’).

²⁵⁶ See Fn 8 to Element 1 of article 7 (1) (b).

²⁵⁷ Emphasis added. See *Prosecutor v. Kristić*, IT-98-33-T, 2 August 2001, para. 498; Bassiouni, *Crimes Against Humanity* (2011) 372; Schabas, *Commentary ICC* (2010) 160.

²⁵⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009 (PURL: <https://www.legal-tools.org/doc/e26cf4/>), para. 96.

²⁵⁹ See also Ambos, *Treatise on ICL II* (2014) 85, stressing the need for a ‘combined effect of a vast murderous enterprise and the accused’s part in it’.

²⁶⁰ *Slavery Convention*, signed 25 September 1926, entered into force 9 March 1927 (committing States ‘[t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms’ and ‘[t]o prevent and suppress the slave trade’). For the early efforts to end slavery and the slave trade in one part of the world, see Thomas, *The Slave Trade: The History of the Atlantic Slave Trade: 1440-1870* (1997). See also Kaye, *1807–2007: Over 200 Years of Campaigning against Slavery* (2005); Allain (2009) 52 *HowardLJ* 239; Allain and Hickey (2012) 61 *ICLQ* 915–938.

²⁶¹ For extensive documentation of contemporary forms of slavery, see <<http://www.antislavery.org>> accessed 5 February 2015.

²⁶² Among the human rights instruments expressly addressing these evils are the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, adopted 7 September 1956, entered into force 30 April 1957; *Convention concerning Forced or Compulsory Labour* (Convention No. 29), adopted 28 June 1930, entered into force 1 May 1932; *Convention concerning the Abolition of Forced Labour* (Convention No. 105), adopted 25 June 1957, entered into force 17 January 1959.

instruments²⁶³. Each of the human rights treaties prohibiting slavery and servitude provide that these prohibitions are non-derogable, although not all of these treaties provide that other forms of enslavement are non-derogable. All forms of slavery are now a violation of international humanitarian law as well²⁶⁴. There was general agreement throughout the drafting process that enslavement should be included in the list of crimes against humanity over which the Court would have jurisdiction²⁶⁵.

The crime against humanity of enslavement has consistently been considered since 1945 to include slavery and most of the subsequent slavery-like practices, as well as related practices of forced labour. Article 6 (c) of the Nuremberg Charter included enslavement as a crime against humanity and deportation to slave labour as a war crime. Several defendants were convicted by the Nuremberg Tribunal of acts of enslavement as crimes against humanity and deportation to slave labour as war crimes. In the *Control Council Law No. 10* trials, the nature of enslavement has been aptly described in the *Pohl* case, as follows:

‘Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.’

Slavery has been recognised as a crime against humanity in subsequent instruments²⁶⁶. The ILC in its comment on article 18 (d) of the 1996 Draft Code listing enslavement as a

²⁶³ See *Universal Declaration of Human Rights*, UNGA Res. 217A (III), 10 December 1948, article 4 (slavery, servitude and the slave trade); *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) (1950), article 4 para. 1 (slavery, servitude, slave trade and forced or compulsory labour); *International Covenant on Civil and Political Rights* (ICCPR) (1966), article 8 (slavery, servitude and forced or compulsory labour); *American Convention on Human Rights* (1969), article 6 para. 1 (slavery, involuntary servitude, slave trade, traffic in women and forced or compulsory labour); and *African Charter on Human and Peoples’ Rights* (African Charter) (1981), article 5 (slavery and the slave trade).

²⁶⁴ Article 4 para. 2 (f) of Add. Prot. II prohibits ‘slavery and the slave trade in all their forms’ in non-international armed conflict.

²⁶⁵ Enslavement was proposed in the *Ad Hoc* Committee to be included in the list of crimes against humanity, but it was also suggested that this was one of the crimes for which it was necessary to elaborate further its content. *Ad Hoc* Committee Report, p. 17.

Enslavement was included as the third crime against humanity in three separate lists (in two, without further elaborations, and in the other, it was described as ‘[including slavery-related practices and forced labour]; [establishing or maintaining over persons a status of slavery, servitude or forced labour]’ in the 1996 Preparatory Committee II, pp. 65 and 67. An explanatory statement was included in an annex to one of the lists which said: ‘Enslavement means intentionally placing or maintaining a person in a condition in which any or all of the powers attaching to the right of ownership are exercised over him’. *id.*, p. 68. The report further explained: ‘Some delegations expressed the view that enslavement required further clarification based on the relevant legal instruments. There were proposals to refer to enslavement, including slavery-related practices and forced labour; or the establishment or maintenance over persons of a status of slavery, servitude or forced labour. The view was expressed that forced labour, if included, should be limited to clearly unacceptable acts’.

1996 Preparatory Committee I, p. 24. In February 1997, the Preparatory Committee list of crimes simply included enslavement, without any further elaboration.

Enslavement, again without further elaboration, was also the third crime against humanity listed in article 5 [20], of the Zutphen Draft, and it remained the same in article 5 of the April 1998 New York Draft.

One participant in the Rome Diplomatic Conference has stated that the drafters focused on the exercise of the powers attaching to the right of ownership as the main characteristic of enslavement, see McCormack, in: McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 179, 191, but, as is clear from the drafting history and the nature of the crime, as described below, the crime includes contemporary forms of slavery, which involve a range of other characteristics.

²⁶⁶ Allied *Control Council Law No. 10*, article II para. 1 (c); *Charter of the International Military Tribunal for the Far East* (1946), article 5 (c); 1950 *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, principle VI (c); 1954 ILC Draft Code, article 2 para. 10 (inhuman acts); ICTY Statute, article 5 (c); ICTR Statute, article 3 (c); 1996 ILC Draft Code, article 18 (d); UNTAET Reg. 200/15, Section 5.1 (c) and 5.2 (b); Statute of the Special Court for Sierra Leone, article 2 (c); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, article 5, and it was included as a charge in several indictments issued by the two International Criminal Tribunals before the Rome Diplomatic Conference.

crime against humanity explained that '[e]nslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognised standards of international law', citing, in an illustrative list, some of the human rights treaties mentioned above²⁶⁷. For the history of international legal steps to abolish trafficking, see mn 121.

- 41 The crime of enslavement has, at least since the end of the Second World War, encompassed three components: slavery, servitude and forced or compulsory labour. *Slavery* is defined in article 1 para. 1 of the *1926 Slavery Convention* as the 'status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. The concept of slavery, like that of servitude, is broad enough to encompass persons carrying out the slave trade. The concept of *servitude* is much broader than the traditional concept of slavery and has been viewed by one commentator as applying 'to all conceivable forms of dominance and degradation of human beings by human beings', including slavery-like practices such as serfdom, debt bondage, traffic in women and children, compulsory betrothal of women, child labour and prostitution where the victims are not merely economically exploited, but totally dependent on others²⁶⁸. *Forced or compulsory labour* has been defined in article 2 para. 1 of ILO Convention No. 29 as 'all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'²⁶⁹. The jurisdiction of the Court over enslavement under article 7 para. 1 is more limited, not only by the chapeau to the article, but also by paragraph 2 (c) (see mn 120). The first part of the latter provision defines enslavement in a similar way to the *1926 Slavery Convention* definition of slavery, but describes the act of enslavement – the exercise of powers of ownership over someone – rather than describing the status or condition of the victim.
- 42 However, despite this language it would be wrong to conclude that the jurisdiction of the Court over the crime of enslavement under paragraph 1 (c) was necessarily limited to the practice of traditional forms of slavery²⁷⁰. Given the horrors of enslavement during the

See, for example, *Prosecutor v. Gagović (Foča)*, No. IT-96-23-I, Indictment, 26 June 1996, para. 4.8 (acts of forcible sexual penetration of a person or forcing a person to penetrate another sexually). 7 40 See discussion below under article 7 para. 1 (g) of rape and other sexual violence. For recent jurisprudence concerning enslavement, see mn 119–120 [article 7 para. 2 (c)].

²⁶⁷ 1996 ILC Draft Code, p. 98.

²⁶⁸ Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005) 199.

²⁶⁹ Not all forced or compulsory labour is prohibited in all circumstances. For standards in peacetime, see International Labour Organisation, *Convention Concerning Forced or Compulsory Labour* (No. 29) (1930); ICCPR, article 8 para. 3 (c). In addition, under strictly limited conditions civilians can be compelled to perform some forms of labour during an armed conflict. *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949* (Fourth Geneva Convention), article 40; Add. Prot. II, article 5 (1) (e). See also *Prosecutor v. Krnojelac*, IT-97-25-T, 15 March 2002, para. 359 7 41; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 542 7 41; *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, paras. 250–335. 7 41.

²⁷⁰ The first five arrest warrants issued by the Court each include counts of enslavement as a crime against humanity. See *Prosecutor v. Joseph Kony et al.*, No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005, Pre-Trial Chamber II, 27 September 2005 (PURL: <https://www.legal-tools.org/doc/b1010a/>) (counts 11, 21 and 28); *id.*, No. ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen, Pre-Trial Chamber II, 8 July 2005 (PURL: <https://www.legal-tools.org/doc/7a2f0f/>) (count 28); *id.*, No. ICC-02/04-01/05-55, Warrant of Arrest for Raska Lukwiya, Pre-Trial Chamber II, 8 July 2005 (PURL: <https://www.legal-tools.org/doc/97466a/>) (count 6); *id.*, No. ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo, Pre-Trial Chamber II, 8 July 2005 (PURL: <https://www.legal-tools.org/doc/313f9b/>) (count 11); *id.*, No. ICC-02/04-01/05-54, Warrant of Arrest for Vincent Oti, Pre-Trial Chamber II, 8 July 2005 (PURL: <https://www.legal-tools.org/doc/f7c78c/>) (counts 6, 11, 21 and 28). However, the arrest warrants are heavily redacted and the Prosecutor's application for Warrants of Arrest under article 58, dated 6 May 2005, as amended and supplemented by the Prosecutor on 13 May 2005 and 18 May 2005, as well as the hearing on the application, remain under seal, so it is impossible to determine what the factual and legal basis was for each count. Situation in Uganda, No. ICC-02/04-01/05-1-US-Exp, Decision on the Prosecutor's Application for Warrants of Arrest under article 58, Pre-Trial Chamber II, 8 July 2005 (PURL: <https://www.legal-tools.org/doc/8db08a/>), unsealed pursuant to Decision ICC-02/04-01/05-52, dated 13 October 2005.

Second World War and the new forms of enslavement practiced in former Yugoslavia and Rwanda, it is difficult to believe that the drafters intended to restrict the Court's jurisdiction to a merely symbolic one over traditional forms of slavery where legislation provided that one human being had the right to own another human being as a mere chattel. No State has such legislation. Had the Court existed in 1945, under such a restrictive reading it would not have had jurisdiction over the persons who used slave labour in Nazi Germany. Moreover, the inclusion of the slavery-like practice of trafficking in persons as one form of enslavement (see mn 121–122), which is not a traditional form of slavery, but normally classified as servitude, is further evidence that the drafters did not wish the Court's jurisdiction to be limited to traditional forms of slavery²⁷¹. The concept of exercising powers of ownership should be understood as broader than simply the exercise of control over another person within a legal framework which enables the person exercising control to go to court to enforce rights under national law over another person as a chattel, given that no State had such a legal system at the time the Rome Statute was adopted. It should also be seen as including the exercise of powers of *de facto* ownership contrary to national law. Indeed, some countries, such as the United States, have prosecuted private individuals for slavery where national law prohibits slavery.

Given the history of the struggle over more than two centuries to abolish slavery, slavery-like practices and forced labour, it is logical to assume that the drafters wished the Court to have jurisdiction over other slavery-like practices such as serfdom and debt bondage, as well as related practices, such as forced or compulsory labour, as crimes against humanity. As described below (see mn 119–121 – article 7 para. 2 (c)), jurisprudence and the Elements of Crimes have confirmed the view expressed in the First Edition of this commentary that the crime against humanity of enslavement includes contemporary forms of slavery. The reference to 'similar deprivation of liberty' in the Elements of Crimes makes it clear that the crime must be understood in a 'functional' sense²⁷². A broad reading receives further support from the interpretation of the concept of 'ownership' in the context of sexual slavery (see article 7 (1) (g), mn 62) which contains an identical description of ownership in Element 1 of the Elements of Crimes. In the *Katanga* Judgment, Trial Chamber I associated the right of ownership over the victim with the creation of a situation of dependence that deprives the victim of all autonomy²⁷³. It took into account in particular the victim's own subjective perception of the situation²⁷⁴. As later confirmed in *Ntaganda*, the exercise of ownership can be shown by a 'combination of factors' such as, 'the detention or captivity in which the victim was held and its duration, the limitations to the victim's free movement, measures taken to prevent or deter escape, the use of force, threat of force or coercion, and the personal circumstances of the victim, including his/her vulnerability'²⁷⁵. In *Katanga*, the Trial Chamber specifically included in article 7 (1) (g)²⁷⁶ situations in which women and girls were forced to 'share' their life with a person with whom they had to perform acts of a sexual nature. In addition, many of these practices would amount to other inhumane acts within the Court's jurisdiction under paragraph 1 (k) when they 'intentionally [cause] great suffering, or serious injury to body or to mental or physical health', which would often occur in such cases. These practices could also amount to persecution where they satisfied the requirements of paragraph 1 (h) and paragraph 2 (g) (see mn 70–86 and 141–143), or, in

²⁷¹ See also Van der Wilt (2014) 13 *Chinese JIL* 297.

²⁷² See Werle and Jessberger, *Principles of ICL* (2014) 354.

²⁷³ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, 7 March 2014 (PURL: <https://www.legal-tools.org/doc/9813bb/>), para. 976. See generally Stahn (2014) 12 *JICJ* 809, 820–821.

²⁷⁴ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, 7 March 2014 (PURL: <https://www.legal-tools.org/doc/9813bb/>), para. 976.

²⁷⁵ *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014 (PURL: <https://www.legal-tools.org/doc/5686c6/>), fn. 209.

²⁷⁶ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, 7 March 2014 (PURL: <https://www.legal-tools.org/doc/9813bb/>), para. 978.

the context of certain systems of racial discrimination, ‘the crime of apartheid’ under paragraph 1 (j) (see mn 92–94).

- 44 d) ‘**Deportation or forcible transfer of population**’. Article 7 (1) (d) protects ‘the right and aspiration of individuals to live in their communities and homes without outside interference’²⁷⁷. It includes both, ‘deportation’ and ‘forcible transfer’. Although these terms have not always been used consistently in international law, it is common to distinguish between deportation, meaning ‘the forced removal of people from one country to another’, and forcible transfer of population, meaning ‘compulsory movement of people from one area to another within the same State’²⁷⁸. As explained below, the drafters of the Rome Statute and the Elements of Crimes intended to preserve this distinction. The Statute embraces thus the conception that it is the ‘forced character of displacement and the forced uprooting of the inhabitants of a territory’, rather than the ‘destination to which these inhabitants are sent’ that establishes criminal responsibility²⁷⁹.

Apart from this fundamental distinction, and specificities in application, the elements of these two crimes are essentially the same. Indeed, as the ICTY Trial Chamber concluded in the *Milošević* case, ‘the values protected by both crimes are substantially the same, namely the “right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location” ’²⁸⁰. In assessing the relevance of the jurisprudence of the ICTY and ICTR discussed below, it is important to bear in mind that the ICTY and ICTR Statutes listed only deportation as a crime against humanity. In determining whether numerous cases of forcible transfer of population within national borders which took place in the countries of the former Yugoslavia amounted to crimes against humanity, the Tribunals had four options. They could find that they constituted deportation under an expanded definition of the crime, that they were acts of persecution, that they were other inhumane acts or that they were simply war crimes. In general, the Tribunals followed the second and third options, but they also defined deportation under their Statutes somewhat more flexibly. Largely for reasons of convenience, the Elements of Crimes uses the term ‘forcibly displaced’ to describe both

²⁷⁷ See *Prosecutor v. Krnojelac*, IT-97-25-A, 17 September 2003, para. 218.

²⁷⁸ The ILC Commentary on article 18 (g) of the 1996 Draft Code explained: ‘Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State’. Part 2, (1996) 2 *YbILC* 48. See also Bassiouni, *Crimes against Humanity* (1992) 301; Mettraux (2002) 43 *HarvILJ* 237, 288. Jurisprudence since the Rome Diplomatic Conference has confirmed this distinction. The Trial Chamber in the *Milošević* case reviewed the law and commentaries and concluded that ‘[t]he jurisprudence of the Tribunal is not uniformly consistent in relation to the element of cross-border movement although, ... the preponderance of case law favours the distinction based on destination’. *Prosecutor v. Milošević*, No. IT-02-54-T, Decision on Rule 98bis, Trial Chamber, 16 June 2004, para. 58. The Trial Chamber, in *dicta*, citing the First Edition of this commentary, concluded that the drafters incorporated the same distinction in the Rome Statute. See also *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, 31 March 2003 para. 670 (finding no persecution by deportation because there was no movement across a state frontier); *Prosecutor v. Stakić*, No. IT-97-24-A, Judgment, Appeals Chamber, 22 March 2006, para. 300 (deportation involves forcible transfers across national frontiers, from occupied territory and, ‘under certain circumstances, displacement across a *de facto* border’) and 302 (rejecting Trial Chamber’s expansion of the definition to include forcible transfers across ‘constantly changing front lines’); *Prosecutor v. Krnojelac*, IT-97-25-T, 15 March 2002, para. 474; *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 521; *Prosecutor v. Blagoje Simić et al.*, No. IT-95-9-T, Judgement, Trial Chamber, 17 October 2003, para. 129; *Prosecutor v. Blaškić*, IT-95-14-T, 3 March 2000, para. 234.

²⁷⁹ See *Prosecutor v. Krnojelac*, IT-97-25-A, 17 September 2003, para. 218.

²⁸⁰ *Prosecutor v. Milošević*, No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, Trial Chamber, 16 June 2004, para. 69 (quoting *Prosecutor v. Simić et al.*, IT-95-9-T, 17 October 2003, para. 130). Indeed, an early decision by an ICTY Trial Chamber concluded that forcible transfers within Bosnia could constitute the crime against humanity of deportation, although, as discussed below, subsequent ICTY decisions have carefully distinguished the two concepts. See *Prosecutor v. Nikolić*, No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61, Trial Chamber, 20 October 1995, para. 23.

deportation and forcible transfer²⁸¹. The elements of the two crimes are discussed both under article 7 para. 1 (d) and para. 2 (d)²⁸².

45
 aa) ‘Deportation’. Although before the Second World War expulsions of aliens and nationals from a country or an occupied territory had occasionally led to international condemnation²⁸³, forced population exchanges between Greece and Turkey after the First World War had actually been required by the Treaty of Lausanne, and as recently as 1945 the Allies approved the expulsion of ethnic Germans and German nationals from countries in Central and Eastern Europe at the end of the Second World War in Europe²⁸⁴. However, three months after the German surrender article 6 (c) of the Nuremberg Charter defined ‘deportation’ as a crime against humanity²⁸⁵. Since that date, the forced deportation by States of their own nationals or of aliens across national frontiers in violation of international law, whether from the territory of the State or from occupied territory, has been recognised as a crime against humanity, as well as a war crime²⁸⁶.

There are at least three decisions by military courts under Allied *Control Council Law No. 10* dealing with deportation as a crime against humanity. In the *Milch* case, Judge Fitzroy D. Phillips, in a concurring opinion, after reviewing the requirements of the war crime of deportation, set out the circumstances when deportation constituted a crime against humanity:

‘Insofar as [article 52 of the Hague Regulations] limits the conscription of labour to that required for the needs of the army of occupation, it is manifestly clear that the use of labour from occupied territories outside of the area of occupation is forbidden by the Hague Regulations.

The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportation for the purpose of compelling the deportees to manufacture weapons for use against their homeland or to be assimilated in the working economy of the occupying country. [...]

The third and final condition under which deportation becomes illegal occurs whenever generally recognised standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of *Control Council Law No. 10* strengthens the conclusions of the foregoing statements that deportation of the population is criminal whenever the purpose of the displacement is illegal or whenever the deportation is characterised by inhumane or illegal methods²⁸⁷.

²⁸¹ Fn. 13 states: “‘Deported or forcibly transferred’ is interchangeable with “‘forcibly displaced’”.

²⁸² The elements of this crime have been endorsed in the *Marques* case. *Prosecutor v. Marques (Los Palos case)*, 09/2000, 11 December 2001, paras. 650–655.

²⁸³ For a historical account, see Bassiouni, *Crimes Against Humanity* (2011) 381–394.

²⁸⁴ The Treaty of Peace between the Allied Powers and Turkey (Treaty of Lausanne), 28 LNTS 11, 24 July 1923. See also De Zayas (1975) 16 *HarvILJ* 207.

²⁸⁵ *Charter of the International Military Tribunal* (1945), article 6 (c). In contrast, article 6 (b) defined ‘deportation to slave labour or for any other purpose of civilian population of or in occupied territory’ as a war crime, a crime of considerably narrower scope. Although it has been claimed that there is some ambiguity in this phrase about whether it includes ‘deportation’ wholly within occupied territory and that the German version used a term meaning within occupied territory, *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, 31 March 2003, Judge Shomburg, (separate opinion), para. 12, this claim is not particularly persuasive. As a criminal statute, any ambiguity in the Nuremberg Charter created by the different language versions would have been read strictly in favour of the accused. Moreover, as the examples cited in this separate opinion indicate, the International Military Tribunal generally used the term deportation when the transfer occurred across a national frontier, even when that frontier was not internationally recognised or was a *de facto* international frontier, as between Alsace under direct German administration and France, although the usage was not always consistent, but the International Military Tribunal did not address the question of the definition of deportation. *ibid.*

²⁸⁶ Deportation is listed as a crime against humanity in article II para. 1 (c) of Allied *Control Council Law No. 10*; article 5 (c) of the *Charter of the International Military Tribunal for the Far East* (1946); principle VI (c) of the 1950 *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*; article 2 para. 10 (inhuman acts) of the 1954 ILC Draft Code; article II (c) of the Apartheid Convention (denying members of a racial group of right to return to their country); article 5 (d) of the ICTY Statute; article 3 (d) of the ICTR Statute; article 18 (g) of the 1996 ILC Draft Code; UNTAET Reg. 2000/15, Section 5.1 (d) and 5.2 (c); Statute of the Special Court for Sierra Leone, article 2 (d); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, article 5.

²⁸⁷ *U.S. v. Milch (The Medical Case)*, Judgment, U.S. Military Tribunal, Nuremberg, Germany, 15 April 1947 (Judge Phillips, concurring), 2 *TWC before the Nuremberg Military Tribunals* 773 (U.S. Gov’t. Printing Office

He then stated that the general language of article II para. 1 (c) of Allied *Control Council Law No. 10* 'has unconditionally contended [sic, presumably 'defined'] as a crime against humanity every instance of the deportation of civilians', distinguishing the war crime of deportation to slave labour and the crime of enslavement, and added that '[t]he Tribunal holds that the deportation, the transportation, the retention, the unlawful use and the inhumane treatment of civilian populations by an occupying power are crimes against humanity'²⁸⁸. In the *RUSHA* case, the court treated forcible transfer of persons from that part of Poland incorporated into Germany across the *de facto* (and unrecognised) boundary to occupied Poland as deportation²⁸⁹. National courts in Latvia and Estonia have convicted persons of deportation as a crime against humanity across their national frontiers to Siberia after the illegal and unrecognised annexation of those countries by the USSR²⁹⁰.

Human rights instruments have since defined the circumstances when deportation of *nationals* is contrary to international law and standards²⁹¹. These instruments have also indicated when deportation of *aliens* is prohibited²⁹². There was strong support during the drafting of the Rome Statute for including deportation in the list of crimes against humanity within the jurisdiction of the Court, although two states had reservations about its scope²⁹³.

1948), quoted in: *U.S. v. Alfried Felix Alwyn Krupp von Bohlen und Halbach (The Krupp Trial)*, Judgment, U.S. Military Tribunal, Nuremberg, Germany, 30 June 1948, 10 LRTWC 69 (London: HMSO 1949).

²⁸⁸ *Ibid.*, 2101. The wording is not free from ambiguity, but it appears that Judge Phillips considered that the deportation of civilians – at least from occupied territory – alone was sufficient to constitute a crime against humanity in contrast to conditions required to constitute a violation of the Hague Regulations.

²⁸⁹ *U.S. v. Greifelt (RUSHA case)* 13 LRTWC 20 (London: HMSO 1949).

²⁹⁰ Internet news articles on the trial of *Mikhail Neverovsky* before Estonian Criminal Courts in 1998/99 are available at <<http://www.guardian.co.uk/GWeekly/Story/0,313625,00.html>>; <<http://www.themoscowtimes.com/sitemap/free/1999/7/article/estonia-convicts-man-for-soviet-deportations/274242.html>> accessed 5 February 2015. Internet news articles on the trial of *Alfons Noviks* and *Mikhail Farbtuh* before Latvian Courts in 1995 and 1999, respectively, are available at <http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=9106&tx_ttnews%5BbackPid%5D=209&no_cache=1#.VNNQ8Z3F-IU>; <http://www.balticworldwide.com/wkcrier/0901_0930_99.htm> accessed 5 February 2015. These cases are cited in *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, 31 March 2003, Judge Shomburg, (separate opinion), para. 14, note 1385. 7 45.

²⁹¹ These include article 9 (prohibition of arbitrary exile), articles 13 (right to return to one's country) and 15 (right to a nationality) of the *Universal Declaration of Human Rights*; article 12 para. 4 of the ICCPR (prohibition on arbitrary deprivation of right to enter one's country); article 3 of Prot. No. 4 to the ECHR (prohibition of expulsion of nationals and the right to enter the national's territory); article 20 (right not to be arbitrarily deprived of one's nationality) and article 22 para. 5 (prohibition of the expulsion of nationals) of the Am. Convention on Hum. Rts.; and article 12 para. 2 of the African Charter (right to return to one's country).

²⁹² See article 13 of the ICCPR (prohibiting arbitrary expulsion of aliens lawfully in the territory); article 4 of Protocol 4 to the ECHR (prohibition of the collective expulsion of aliens); article 22 para. 6 of the Am. Convention on Hum. Rts. (prohibition of the arbitrary expulsion of aliens lawfully in territory); article 22 para. 9 (prohibition of collective expulsion of aliens); article 12 para. 4 (prohibition of the expulsion of aliens lawfully in territory unless pursuant to a lawful decision) and article 12 para. 5 (prohibition of mass expulsion of aliens who are members of national, racial, ethnic or religious groups) of the African Charter.

²⁹³ Deportation was proposed in the *Ad Hoc* Committee Report, p. 17 to be included in the list of crimes against humanity, but it was also suggested that this was one of the crimes for which it was necessary to elaborate further its content.

Deportation was included as the fourth crime against humanity in three separate lists in the 1996 Preparatory Committee's compilation of proposals, but with 'or forcible transfer of population' in square brackets in one of those lists, indicating that some delegations already recognised that, strictly speaking, these were two separate crimes, 1996 Preparatory Committee II, p. 65. Several alternative formulations were proposed at the same time, including:

'[discriminatory and arbitrary] deportation [or unlawful confinement of civilian population] [in violation of international legal norms][which inflicts death or serious bodily injury]' and there was a proposed annex explaining that '[d]eportation means mass deportation or forced transfer of persons from the territory of a State [or from an area within a State] of which such persons are nationals or lawful permanent residents, except where the acts constituting deportation or transfer are for purposes of an evacuation for safety or other legitimate and compelling reasons'.

Ibid., pp. 64–65. As the report explained,

'Some delegations expressed the view that deportation required further clarification to exclude lawful deportation under national and international law. There were proposals to refer to discriminatory and arbitrary deportation in violation of international legal norms; deportation targeting individuals as members of a particular ethnic

bb) 'forcible transfer of population'. The 1919 Peace Conference Report and the 1973 Apartheid Convention recognised the forcible transfer of population within a State's boundaries as a crime against humanity, and the regulation establishing the Special Panels for the District Court of Dili, East Timor did so two years after the Rome Diplomatic Conference²⁹⁴. Similarly, internal displacement is prohibited under international humanitarian law, except in narrowly defined circumstances and on a temporary basis²⁹⁵. Although the ICTY Statute does not list forcible transfer of population as a crime against humanity, the ICTY Trial Chamber in the *Krstić* case held that it was a form of the crime against humanity of inhumane treatment²⁹⁶. Another ICTY Trial Chamber has held that forcible transfers of population 'may constitute persecutions'²⁹⁷.

Principles 5 and 6 of the *Guiding Principles on Internal Displacement* prepared by the Representative of the UN Secretary-General, Francis M. Deng, prohibit arbitrary displacement of persons within a territory, and Principles 7 and 8 define safeguards which must be observed when carrying out any displacement which is permitted by international law²⁹⁸.

group; deportation without due process of law; deportation or unlawful confinement of civilian population; or deportation resulting in death or serious bodily injury'.

1996 Preparatory Committee I, p. 24.

In February 1997, the Preparatory Committee list of crimes included 'deportation or forcible transfer of population' in the first paragraph of the proposed article on crimes against humanity, together with an explanation that for purposes of that paragraph this phrase meant 'the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] [present] [under national or international law] [for a purpose contrary to international law] [without legitimate and compelling reasons] [without lawful justification]'.

Preparatory Committee Decision Feb. 1997, pp. 4–5.

Deportation or forcible transfer of population, was also the fourth crime against humanity listed in the first paragraph of article 5 [20] of the Zutphen Draft, with the same explanation as in the Preparatory Committee Decision Feb. 1997 in the second paragraph, and this wording remained the same in article 5 of the New York Draft, UN Doc. A/CONF.183/2/Add.2 (1998).

In Rome, Israel, supported by the USA, objected to the wording in the explanatory second paragraph as too broad and the final wording of article 7 para. 2 (d) with the concept of forcible was introduced in an attempt to address this concern. However, Israel decided to vote against adoption of the Statute in part because it did not think that this wording addressed its concern. For a brief explanation of this point, see McCormack, in: McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 179, 192–193.

²⁹⁴ 1919 Peace Conference Report (displacement of Armenians within Ottoman Empire, but called 'deportation'), at Annex, 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*, article II (c); UNTAET Reg. 2000/15, Section 5.1 (d) and 5.2 (c). Forcible transfers of population within borders were not expressly listed as separate crimes from deportation in the ICTY and ICTR Statutes, the Statute of the Special Court for Sierra Leone or the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia.

²⁹⁵ Article 49 of the Fourth Geneva Convention prohibits '[i]ndividual or mass forcible transfers' regardless of motive in occupied territories, apart from temporary measures in a particular area, 'if the security of the population or imperative military reasons so demand'. Article 17 para. 1 of Add. Prot. II states: 'The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand'. The Rome Statute defines forced transfers as a war crime (see discussion at mn 145 *et seq.*, at mn 363 *et seq.*, and at mn 950 *et seq.* of article 8 para. 2 (a)(vii) para. 2 (b)(viii) and para. 2 (e) (viii)).

²⁹⁶ *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 532 (*dicta*). See also *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, 17 January 2005, para. 629 (noting that the acts or omissions were of similar seriousness to acts prohibited in article 5, that they caused serious mental or physical suffering or injury or constituted a serious attack on human dignity and were intentional); *Prosecutor v. Brđanin*, No. IT-99-36-T, Judgment, Trial Judgment, 1 September 2004, para. 544 (forcible transfer punishable as other inhumane acts); *Prosecutor v. Kvočka et al.*, IT-95-30/1-T, 2 November 2001, para. 208 (*dicta*), (citing *Kupreškić*); *Prosecutor v. Kupreškić et al.*, IT-95-16-T, 14 January 2000, para. 566 (*dicta*). However, in *Kupreškić*, the Trial Chamber imposed a threshold for determining the existence of an inhumane act under article 5 of the ICTY Statute that is not an element of the crime of forcible transfer under customary international law and is not a requirement under other ICTY jurisprudence (see mn 127): that they 'must be carried out in a systematic manner and on a large-scale'.

²⁹⁷ *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, 17 January 2005, para. 602.

²⁹⁸ *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add. 2. Principle 5 states: 'All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons'. Principle 6 provides:

Other human rights instruments have also spelled out the circumstances when forced displacement of persons within a territory is prohibited²⁹⁹.

47 Unfortunately, the Statute does not expressly distinguish between deportation and transfer. However, given the common distinction between *deportation* as forcing persons to cross a national frontier and *transfer* as forcing them to move from one part of the country to another without crossing a national frontier, as well as the basic presumption that no words in a treaty should be seen as surplus and the drafting history of paragraphs 1 (d) and 2 (d) noted above, it is likely that the usual distinction was intended³⁰⁰. The first non-contextual material element of this crime in the Elements of Crimes, like the Statute, does not expressly distinguish between the two crimes³⁰¹.

The terms, 'forcible' and 'forced', should be given a broad reading, consistent with the purpose of the Statute to include any form of coercion which leads to the departure of people from the area where they are located³⁰². Jurisprudence and the Elements of Crimes have confirmed the interpretation in the First Edition of this commentary.

In the *Simić* case, the ICTY Trial Chamber concluded:

'125. The displacement of persons is only illegal where it is forced, i. e. not voluntary, and "when it occurs without grounds permitted under international law". In other words, displacement motivated

-
1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
 2. The prohibition of arbitrary displacement includes displacement:
 - (a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
 - (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;
 - (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
 - (e) When it is used as a collective punishment.
 3. Displacement shall last no longer than required by the circumstances'.

See also Kälin (2000) 32 *Studies in TransnatLegPol*.

²⁹⁹ See mn 123 *et seq.* and also article 13 para. 1 of the Universal Declaration of Hum. Rts. (recognizing the right to freedom of movement and residence within the borders of a State); article 12 paras. 1 and 3 of the ICCPR (right of everyone lawfully within the territory of a State to liberty of movement and freedom to choose one's residence, subject to certain restrictions); article 2 paras. 1 and 3 of Protocol 4 to the ECHR (right of everyone lawfully within the territory of a State to freedom of movement within the territory and freedom to choose one's residence, subject to certain restrictions); article 22 paras. 1, 3 and 4 of the Am. Convention on Hum. Rts. (everyone lawfully within the territory has a right to movement and residence in it, subject to certain restrictions).

³⁰⁰ The drafting of the predecessor of article 7 paras. 1 (d) and 2 (d) in the Preparatory Committee suggests the delegates recognised a distinction between 'mass deportations or forced transfer of persons from the territory of a State [or from an area within a State]', but the grammatical structure could be read so that deportations and transfers each could apply to both cross-frontier and intra-state boundary movements. However, no delegate at the Preparatory Committee or at the Diplomatic Conference publicly contested the distinction between the two terms made in Amnesty International's paper, *The International Criminal Court: Making the Right Choices – Part I: Defining the Crimes and Permissible Defences and Initiating a Prosecution* (January 1997, AI Index: IOR 40/01/97), Sect. IV.F, which was supplied to all delegations. Government delegates involved with the drafting agree that the addition of the separate term, forcible transfer, was intended to apply to transfers within national borders. Von Hebel and Robinson, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999) 79, 99; Ambos and Wirth (2002) 13 *CLF* 1, 61 (citing First Edition of this commentary). See also *Prosecutor v. Sarmiento*, No. 18/2001, Judgment, Special Panel for Serious Crimes, Dili, East Timor, 16 July 2003, para. 127 ('deportation is the forced removal of people from one country to another, while population transfer applies to compulsory movement of people from one area to another within the same state').

³⁰¹ The first element setting forth the *actus reus* states that '[t]he perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts' (footnote omitted). Although, as in the draft considered by the Preparatory Committee the grammatical structure could be read so that deportation and forcible transfer could apply to either location, it could also be read as following the customary international law distinction. In the light of the drafting history, commentary and subsequent jurisprudence this is the more likely interpretation.

³⁰² See also Friman, in: Cryer et al., *Introduction to ICL* (2014) 248; Ambos, *Treatise on ICL II* (2014) 87.

by an individual's own genuine wish to leave an area is lawful. The requirement that the displacement be forced or forcible has been interpreted broadly by Trial Chambers. The term "forced" is not limited to physical force; it may also include the "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment". The essential element is that the displacement be *involuntary* in nature, that "the relevant persons had *no real choice*". In other words, a civilian is involuntarily displaced if he is "not faced with a genuine choice as to whether to leave or to remain in the area". As noted by the *Krnjelac* Trial Chamber, an apparent consent induced by force or threat of force should not be considered to be real consent.

126. The Trial Chamber is of the view that in assessing whether the displacement of a person was voluntary or not, it should look beyond formalities to all the circumstances surrounding the person's displacement, to ascertain that person's genuine intention. For instance, in situations where persons are relocated following detention in one or several places, coupled with various forms of mistreatment, an expression of consent does not necessarily reflect a person's genuine desire to leave, as the person may not be faced with a real choice. Whether a person would have wished to leave the area absent circumstances of discrimination or persecution may also be considered as indicative of a person's wish. A lack of genuine choice may be inferred from, *inter alia*, threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of – or the threat to commit – other crimes "calculated to terrify the population and make them flee the area with no hope of return"³⁰³.

The Trial Chamber in *Milošević* concluded that the term 'forcible' is 'not restricted to physical coercion'³⁰⁴. A similar approach was taken in *Prlić et al.*³⁰⁵:

The Elements of Crimes follows the same broad approach to defining the term 'forcibly' as international jurisprudence, using the phrasing based on that adopted in the 1998 ICTR judgment in the *Akayesu* case with regard to crimes of sexual violence, and used in other elements of crimes containing this term³⁰⁶.

The ICC addressed the nature of article 7 (1) (d) in the case against Ruto, Kosgey and Sang³⁰⁷. The Prosecutor charged 'deportation or forcible transfer of population'. Based on a 'literal interpretation of the wording used by the Elements of Crimes', PTC II found that 'deportation or forcible transfer of population is an open-conduct crime', composed of several 'different conducts' that can force the victim to leave the area where he or she is

³⁰³ *Prosecutor v. Simić et al.*, IT-95-9-T, 17 October 2003, paras. 125–126 (fns. omitted). See also *Prosecutor v. Krnjelac*, No. IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003, paras. 217–225; *Prosecutor v. Sarmento*, No. 18/2001, Judgment, Special Panel for Serious Crimes, Dili, East Timor, 16 July 2003, para. 127; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, 31 March 2003, para. 519; *Prosecutor v. Sarmento*, No. 18/2001, Judgment, Special Panel for Serious Crimes, Dili, East Timor, 16 July 2003, para. 127; *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 529; *Prosecutor v. Sarmento*, No. 18/2001, Judgment, Special Panel for Serious Crimes, Dili, East Timor, 16 July 2003, para. 127.

³⁰⁴ *Prosecutor v. Milošević*, No. IT-98-29/1-T, Judgement, Trial Chamber, 12 December 2007, para. 75; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, 31 March 2003, para. 519.

³⁰⁵ *Prosecutor v. Prlić*, No. IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para. 50 ('Indeed, the mere threat of resorting to force or physical or mental coercion may be enough, if the targeted population facing this coercive climate or these threats, has no other choice but to leave its territory. It is the absence of genuine choice that renders removal unlawful').

³⁰⁶ Fn. 12 to the first element states: "The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment". This element was based on a proposal by France to use the language in *Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, para. 688, but the use of this language with respect to crimes against humanity was the subject of some controversy and two states, Turkey and the United Arab Emirates, specifically objected to it when the Elements of Crimes were adopted. See Summary of Statements Made in Plenary in Connection with the Adoption of the Report of the Working Group on the Elements of Crimes, UN Doc. PCNICC/2000/INF.4, p. 5; Garraway, 'Elements of the Specific Forms of Genocide', in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 49, 54. However, this footnote to the draft Elements of Crimes has been cited as an authoritative interpretation by at least one internationalised court. See *Prosecutor v. Sarmento*, 18/2001, 16 July 2003, paras. 135–136.

³⁰⁷ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012 (PURL: <https://www.legal-tools.org/doc/96c3c2/>).

lawfully present³⁰⁸. According to the Chamber, the Prosecutor must prove, ‘that one or more acts that the perpetrator has performed produced the effect to deport or forcibly transfer the victim’³⁰⁹. It expressly required ‘a link between the conduct and the resulting effect of forcing the victim to leave the area to another State or location’³¹⁰.

The interpretation of the nature of the crime has repercussions for the question whether article 7 (1) (d) can qualify as a continuing crime³¹¹. Technically, the unlawful consequences of the offence may endure beyond the physical act, i.e. deportation or forcible transfer. But the emphasis on conduct (‘the perpetrator deported or forcibly transferred’) and the framing of the mental element (which does not require intent to forcibly displace persons permanently³¹² or ‘for a prolonged period of time’)³¹³ make it difficult to draw a direct analogy to the continuous nature of enforced disappearance (see article 7 (1) (i)) which is composed of two connected elements: deprivation of physical liberty and failure to provide information³¹⁴. Given the structure of the offence, it is hard to argue that the offence would only be completed once persons are allowed to return home³¹⁵. Deportations or forcible displacements carried out prior to the entry into force of the Statute cannot be investigated or prosecuted (see article 24 (1)). For discussion of further elements of the definition of article 7 (1) (d), see mn 123–130.

- 48 e) ‘Imprisonment or other severe deprivation of physical liberty’. Article 7 (1) (e) protects the ‘liberty of physical movement’³¹⁶. International law and standards have prohibited arbitrary imprisonment and detention, both as a part of human rights law, whether as a crime against humanity or a violation of human rights treaties or standards, and as a part of humanitarian law³¹⁷. Although neither the Nuremberg Charter nor the Tokyo Charter included imprisonment as a crime against humanity, it was included in subsequent instruments³¹⁸. The Statutes of the ICTY and the ICTR merely referred to ‘imprisonment’, without providing much clarification³¹⁹. In jurisprudence, the term was broadly construed. It was made clear that it includes both arbitrary imprisonment and other severe deprivations of liberty restricting liberty of movement, such as detention in ghettos or concentration

³⁰⁸ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-373, 23 January 2012 (PURL: <https://www.legal-tools.org/doc/96c3c2/>), para. 244.

³⁰⁹ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-373, 23 January 2012 (PURL: <https://www.legal-tools.org/doc/96c3c2/>), para. 245.

³¹⁰ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-373, 23 January 2012 (PURL: <https://www.legal-tools.org/doc/96c3c2/>), para. 245.

³¹¹ See Schabas, *ICC Commentary* (2010) 419.

³¹² *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 306.

³¹³ See Element 6 of article 7 (1) (i) (‘enforced disappearance’).

³¹⁴ Footnote 24 of the Elements of the crime against humanity of enforced disappearance of persons clearly indicates that the Court has jurisdiction only if the ‘attack’ occurs after the entry into force of the Rome Statute. For discussion, see Ambos, *Treatise on ICL II* (2014) 112.

³¹⁵ In its General Comment on Enforced Disappearance as a Continuous Crime, the UN Working Group on Enforced or Involuntary Disappearances adopts a flexible approach towards non-retroactivity. It notes in para. 5: ‘one consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non retroactivity. The crime cannot be separated and the conviction should cover the enforced disappearance as a whole’. See Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/16/48, 26 January 2011, para. 39, p. 12.

³¹⁶ See Ambos, *Treatise on ICL II* (2014), 87.

³¹⁷ See, generally, Study of the right of everyone to be free from arbitrary arrest, detention and exile, UN Doc. E/CN.4/826/Rev.1 (1964).

³¹⁸ Allied *Control Council Law No. 10*, article II para. 1 (c); Apartheid Convention, article II (a) (iii); ICTY Statute, article 5 (e); ICTR Statute, article 3 (e); 1996 ILC Draft Code, article 18 (h); UNTAET Reg. 2000/15, Section 5.1 (e); Statute of the Special Court for Sierra Leone, article 2 (e); and Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, article 5. One internationalised court has stated that imprisonment as a crime against humanity is part of customary international law. See *Prosecutor v. Franca da Silva*, No. 4a/2001, Judgment, Special Panel for Serious Crimes, Dili, East Timor, 5 December 2002, para. 90 (‘the customary international law character of imprisonment seems to be undisputed’).

³¹⁹ See article 5 (e) of the ICTY Statute and article 3 (e) of the ICTR Statute.

camps³²⁰. The Rome Statute reflects this trend. It expressly encompasses both classical ‘imprisonment’ and ‘other severe deprivation of physical liberty’. In the discussions of the Statute, concerns were raised that this prohibition might infringe on lawful practices of imprisonment³²¹. The Statute mitigates this risk by adding the qualifier ‘in violation of fundamental rules of international law’.

Guidance in interpreting the crime may be derived from a number of norms and sources. In *Kordić and Čerkez*, the ICTY clarified that the term imprisonment ‘should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population’³²². The Trial Chamber noted that it would have to ‘determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment’³²³. In *Krnjelac*, the Trial Chamber went a step further, claiming that ‘any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under article 5 (e)’³²⁴. There are many relevant legal instruments. But they do not necessarily embrace a ‘common approach to the issue of when a deprivation of liberty is or becomes arbitrary’³²⁵. The prohibition of arbitrary detention and the right to a fair trial have been recognised in many human rights treaties and other instruments³²⁶. The right to fair trial has also been guaranteed in the 1993 ICTY Statute, the 1994 ICTR Statute, the Rome Statute and the Statute of the Special Court for Sierra Leone³²⁷. The right to fair trial has been expressly guaranteed as a non-derogable right in international humanitarian law in the Geneva Conventions and Protocols³²⁸. The Human Rights Committee, noting that certain aspects of this right were non-derogable during armed conflict, concluded that it found ‘no justification for derogation from these guarantees during other emergency situations’ and that ‘fundamental requirements of fair trial must be respected during a state of emergency’³²⁹. The concept of arbitrariness under international law includes the unlawfulness of the imprisonment or deprivation of liberty itself under national law and, even if permitted under national law, unlawfulness under international law.

Some useful specific guidance for interpretation of the crime under the Statute may be found in the approach of the UN Working Group on Arbitrary Detention³³⁰ which has defined three categories which constitute arbitrary deprivation of liberty contrary to international standards:

³²⁰ For a survey, see Werle and Jessberger, *Principles of ICL* (2014), 361; Bassiouni, *Crimes Against Humanity* (2011) 443–444.

³²¹ See Schabas, *Commentary ICC* (2010), 165. See also Cryer *et al.*, *Introduction to ICL* (2014) 249, arguing that ‘[a]fter all, there are many contexts in which persons may be lawfully detained, including following lawful arrest, conviction following trial, lawful deportation or extradition procedures, quarantine, and, during armed conflict, assigned residence, internment on security grounds and internment of prisoners-of-war’.

³²² *Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 302, upheld on appeal.

³²³ *Ibid.*, para. 302.

³²⁴ *Prosecutor v. Krnjelac*, IT-97-25-T, 15 March 2002, para. 112.

³²⁵ *Ibid.*, para. 113.

³²⁶ See, for example, articles 9, 10 and 11 of the Universal Declaration of Hum. Rts. in 1948, articles 9, 14 and 15 of the ICCPR, articles 5, 6 and 7 of the ECHR, articles 7, 8 and 9 of the American Convention on Hum. Rts. and articles 6 and 7 of the African Charter. The ILC Commentary to article 18 (h) of the 1996 ILC Draft Code noted that the deprivation of liberty without due process of law ‘is contrary to the human right of individuals, recognised in the Universal Declaration of Hum. Rts. (article 9) and the ICCPR (article 9)’.

³²⁷ See articles 18, 20–23 and 25 of the ICTY Statute, articles 17, 19–22 and 24 of the ICTR Statute, as well as in the Rules of Procedure and Evidence of the two Tribunals; articles 55, 63 to 69 of the Statute and articles 9, 17 and 18 of the Statute of the Special Court for Sierra Leone, and the Rules of Procedure and Evidence of the Special Court.

³²⁸ Fourth Geneva Convention, article 147; Add. Prot. I, articles 75 and 85 para. 4 (e); Add. Prot. II, article 6 paras. 1, 2 and 3.

³²⁹ Hum. Rts. Committee, General Comment No. 29, States of Emergency (article 4), UN Doc. CCPR/C21/Rev.1/Add.11, para. 16.

³³⁰ Cryer *et al.*, *Introduction to ICL* (2014) 249.

- (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);
- (b) When the deprivation of liberty results from the exercise of the rights and freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States Parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
- (c) When the total or partial non-observance of the international human rights norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III)³³¹.

Another category which may constitute arbitrary detention is when the conditions of detention themselves amount to torture or cruel, inhuman or degrading treatment³³².

- 50 aa) ‘Imprisonment’. It is not clear whether the drafters intended that the word ‘imprisonment’ should be used in its narrow sense of imprisonment after conviction by a court or in its broader sense of detention, as in *Allied Control Council Law No. 10*, but the juxtaposition with ‘deprivation of physical liberty’ might be seen to suggest that the narrower definition was intended³³³. However, under customary international law, imprisonment as a crime against humanity has a broader meaning than imprisonment pursuant to a sentence imposed by a court, and it is more likely that the drafters intended to incorporate the broad customary international law definition³³⁴. It excludes, of course, imprisonment that would be lawful under both national and international law³³⁵. It means ‘arbitrary imprisonment, that is to

³³¹ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1998/44, para. 8.

³³² Rodley, *Treatment of Prisoners* (2009) 465–468.

³³³ The concept appeared in different forms in three separate lists in the 1996 Preparatory Committee’s compilation of proposals (‘Imprisonment [including taking of civilian hostages]’, ‘imprisonment [in violation of international norms on the prohibition of arbitrary arrest and detention] [which inflicts death or serious bodily injury]’ and ‘arbitrary detention’, with an explanation added in an annex regarding the second formulation stating: ‘Imprisonment means the forcible confinement of a person for a prolonged or indefinite period of time in manifest and gross violation of governing legal norms regarding arrest and detention’). 1996 Preparatory Committee II, pp. 65, 68–70. As the report explained:

‘Some delegations expressed the view that this offence required further clarification to exclude lawful imprisonment in the exercise of State authority. There were proposals to refer to imprisonment in violation of due process or judicial guarantees; imprisonment in violation of international norms prohibiting arbitrary arrest and detention; and imprisonment resulting in death or serious bodily injury’.

1996 Preparatory Committee I, p. 24.

In February 1997, the Preparatory Committee list of crimes included [detention or] [imprisonment] [deprivation of liberty][in flagrant violation of international law] [in violation of fundamental legal norms] in the first paragraph of the proposed article on crimes against humanity, together with a footnote stating: ‘It was suggested that this subparagraph does not include freedom of speech [presumably referring to the fundamental legal norms] and that it includes the unilateral blockade of populations’. Preparatory Committee Decision Feb. 1997, p. 4.

The same wording as in the February 1997 report was included in the first paragraph of article 5 [20] of the Zutphen Draft, with the same explanation as in Preparatory Committee Decision Feb. 1997 in the second paragraph, and this wording remained unchanged in article 5 of the New York Draft.

In Rome, Israel, supported by the USA, objected to the wording in the explanatory second paragraph as too broad and the final wording of article 7 para. 2 (d) with the concept of forcible was introduced in an attempt to address this concern. However, Israel decided to vote against adoption of the Statute in part because it did not think that this wording addressed its concern. For a brief explanation of this point, see McCormack, in: McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 179, 192–193.

³³⁴ For example, the ILC Commentary to article 18 (h) of the 1996 Draft Code explained that ‘[t]he term “imprisonment” encompasses deprivation of liberty of the individual’ and would cover ‘arbitrary imprisonment such as concentration camps or other forms of long-term detention’. Part 2, (1996) 2 *YbILC* 49. However, the concept of long-term detention was not retained in the Rome Statute or in the Elements of Crimes.

³³⁵ As one of the drafters later recalled: ‘The intention of the drafters of the *Rome Statute* was not to preclude the incarceration of criminals indicted, tried and convicted according to validly constituted domestic criminal justice systems’. McCormack, in: McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 179, 193.

say, the deprivation of liberty of the individual without due process of law³³⁶. As explained by an ICTR Trial Chamber,

[i]mprisonment as a crime against humanity refers to arbitrary or otherwise unlawful detention or deprivation of liberty. It is not every minor infringement of liberty that forms the material element of imprisonment as a crime against humanity; the deprivation of liberty must be of similar gravity and seriousness as the other crimes enumerated as crimes against humanity ... In assessing whether the imprisonment constitutes a crime against humanity, the Chamber may take into account whether the initial arrest was lawful, by considering, for example, whether it was based on a valid warrant of arrest, whether the detainees were informed of the reasons for their detention, whether the detainees were ever formally charged, and whether they were informed of any procedural rights. The Chamber may also consider whether the continued detention was lawful. When a national law is relied upon to justify a deprivation of liberty, this national law must not violate international law³³⁷.

Even if the initial imprisonment was lawful, it could become unlawful subsequently, for example, by keeping a person in prison after a court had ordered the person's release or the sentence of imprisonment had come to an end³³⁸. In any event, the term 'other severe deprivation of physical liberty' has a wide meaning which would encompass the broad definition of imprisonment under customary international law and would include a wide variety of restrictions on physical liberty, including house arrest³³⁹, restriction to a closed city or similar restrictions which might not be considered to fit within the customary international law definition³⁴⁰. Moreover, the drafting history, although ambiguous with regard to the term imprisonment in the final text, indicates that the drafters wanted the two concepts together to cover a broad range of arbitrary deprivations of liberty³⁴¹.

In determining whether imprisonment or other deprivation of liberty during armed conflict was a crime against humanity, the Court would have to examine whether it was permitted under international humanitarian law, such as the internment of civilians pursuant to article 42 of the Fourth Geneva Convention or confinement for 'activities prejudicial or hostile to the security of the State' under article 5 of that treaty³⁴². Of course, the lawfulness

³³⁶ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, para. 114 (finding, in the context of an occupation that 'imprisonment of civilians is unlawful where civilians have been detained in contravention of article 42 of Geneva Convention IV' and where 'the procedural safeguards required by article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified'), *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 302. This wording is based on the explanation by the ILC Commentary to article 18 (h) of the 1996 ILC Draft Code.

³³⁷ *Prosecutor v. Ntagerura*, ICTR-99-46-T, 25 February 2004, para. 702 (fn. omitted). Similar factors have been taken into account by another internationalised court in assessing the gravity of the conduct (in the light of the Elements of Crimes, see mn 51) and the severity of the deprivation of liberty. These factors include: the length of detention, *Prosecutor v. Cardoso*, No. 4c/2001, Judgment, 5 April 2003, para. 359 ('deprivation of physical liberty for no more than a couple of days in generally good conditions of detention would not be severe'); conditions in which the deprivation of liberty took place, *Prosecutor v. Mesquita*, No. 28/2003, Judgment, 6 December 2004, para. 88 (illegality of roadblock and extreme violence with which the deprivation was committed); conditions of detention, *Prosecutor v. Barros*, No. 1/2004, Judgment, 12 May 2005, paras. 152–153 (locking victims in a small room in unhygienic conditions without proper sanitation facilities and infliction of severe beatings); and the number of victims, *Prosecutor v. Tacaqui*, No. 20/2001, Judgment, 9 December 2004, p. 22.

³³⁸ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 303.

³³⁹ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1993/24, para. 20 (Deliberation 01). Concurring Cryer et al., *Introduction to ICL* (2014) 248.

³⁴⁰ It appears that the crime of 'other severe deprivation of liberty' was added simply to ensure that forms of deprivation of liberty that might not be considered to fall within the conduct previously recognised as prohibited under customary international law as imprisonment rather than to distinguish deprivations of liberty carried out by persons who were not state officials or acting at their instigation or with their consent or acquiescence, since the chapeau to article 7 para. 2 makes clear that persons unconnected with a state can be guilty of any of the acts prohibited under article 7.

³⁴¹ According to the chair of the drafting committee at the Rome Conference, the addition of the phrase 'other severe deprivation of liberty' has 'broadened the scope of meaning of imprisonment to include other conduct that may have been outside the scope of the previous formulations of "imprisonment"'. Bassiouni, *Crimes Against Humanity* (2011), 344.

³⁴² *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 303 (concluding that where civilians have been detained in violation of article 42 of the Fourth Geneva Convention without reasonable

of such internment or confinement must be considered in the light of international human rights law³⁴³. Moreover, detention in violation of international humanitarian law, such as the grave breach of unlawful confinement under article 147 of the Fourth Geneva Convention and article 8 para. 2 (a) (vii) of the Rome Statute would necessarily render the imprisonment or deprivation of liberty unlawful. Although the working group on definitions declined to incorporate proposals to use the term ‘detention’, which has a clearly defined meaning in international law, the term ‘deprivation of liberty’ appears to be even broader in scope (see mn 151) in connection with enforced disappearance concerning the meaning of this term). Indeed, it is likely that article 7 para. 1 (e) would cover – either as imprisonment or as a deprivation of liberty – all circumstances covered under the customary international law definition of the crime against humanity of imprisonment.

There is no indication in the various drafts of this provision of what was meant by ‘severe’. One possibility could be something longer than short-term detentions, for a matter of days or ‘weeks’³⁴⁴, but recent history is rife with widespread or systematic short-term detentions where the conditions were severe, the detention secret or the short-term detentions repeated. Therefore, it will be up to the Court to determine case by case³⁴⁵ whether the deprivation of liberty was severe, taking into account such factors as whether the detainee was subjected to torture or other cruel, inhuman or degrading treatment or punishment, including crimes of sexual violence, or other intimidation; whether the detention was secret or the detainee otherwise cut off from the outside world; and whether the detention was part of a series of repeated detentions. Since the definition necessarily considers ‘imprisonment’ to be a ‘severe deprivation of physical liberty’ by the use of the word ‘other’ to describe ‘severe deprivation of liberty’, there is no requirement to demonstrate that a particular imprisonment is ‘severe’³⁴⁶. The first element of the crime of imprisonment or other severe deprivation of ‘liberty’ makes this clear by requiring that the perpetrator have ‘imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty’.

- 51 **bb) ‘rules of international law’.** The term ‘rules of international law’ is very broad and would include not only treaties and customary international human rights and international humanitarian law, but general principles of law³⁴⁷. Evidence of such general principles of law

grounds and of procedural guarantees in article 43 of that convention, it would be a crime against humanity if the threshold were met). The Trial Chamber in this case saw the crime against humanity of imprisonment and the war crime of unlawful confinement as identical (apart from the thresholds). *ibid.*, para. 301.

In contrast, the Trial Chamber in *Krnjelac* agreed that if the threshold was met, unlawful confinement as a war crime would be a crime against humanity. *Prosecutor v. Krnjelac*, IT-97-25-T, 15 March 2002, para. 111. However, it also concluded that the definition of this crime against humanity was not limited by the grave breaches provisions of the Geneva Conventions. *ibid.* Instead, ‘any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under article 5 (e) [of the ICTY Statute] as long as the other requirements of the crime are fulfilled’. *ibid.*, para. 112. For the purposes of this provision, ‘the deprivation of an individual’s liberty is arbitrary if it is imposed without due process of law’. *ibid.*, para. 113. Based on a number of international instruments, it concluded that a deprivation of liberty would be arbitrary ‘if no legal basis can be called upon to justify the initial deprivation of liberty’, the national law basis for the deprivation of liberty violated international law or ‘[i]f at any time the initial legal basis ceases to apply’. *ibid.*, para. 114. With regard to the mental element, the Trial Chamber described it as follows:

‘The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty’.

Ibid., para. 115. This convoluted description of the mental element would not apply under the Rome Statute (see below).

³⁴³ For an articulation of some of the relevant standards to determine the lawfulness of such internment or confinement, see Pejic, (2005) 858 *IRRC* 375.

³⁴⁴ See Ambos, *Treatise on ICL II* (2014) 89, suggesting that imprisonment should be measured ‘in weeks’.

³⁴⁵ See also Ambos, *Treatise on ICL II* (2014) 89, arguing that a ‘short period of detention under inhumane conditions’ may meet the severity threshold.

³⁴⁶ See also Ambos, *Treatise on ICL II* (2014) 89 (‘imprisonment is severe by definition’).

³⁴⁷ See, for example, Shaw, *International Law* (2014) 49–51, 69–77 (noting that rules of international law can be based on general principles of law as well as on treaties and custom).

can be seen in a wide variety of instruments concerning the rights of detainees, including not only treaties, but other instruments³⁴⁸. These instruments have been cited by human rights treaty bodies and international courts as evidence of the scope of treaty rights. It will be up to the Court to determine what are ‘fundamental’ rules, but surely they would include, at a minimum, all the guarantees of the right to be free from arbitrary detention and to fair trial which the international community has incorporated in treaties or in the charters and rules of international tribunals, such as the rights to prompt access to families, counsel, independent medical attention and a judge, to have the lawfulness of one’s detention promptly determined by a court and to be released if the detention was unlawful, to an independent, impartial and competent court, to representation by counsel, and to an appeal. In the context of international armed conflict, the ICTY Trial Chamber identified two factors in particular that would demonstrate that imprisonment of civilians was arbitrary³⁴⁹. It argued that the imprisonment of civilians would be unlawful where:

- civilians have been detained in contravention of article 42 of Geneva Convention IV, i. e., they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary;
- the procedural safeguards required by article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified’.

The awkwardly and vaguely drafted second and third elements of the crime of imprisonment or other severe deprivation of liberty are potentially inconsistent with the Rome Statute and other international law³⁵⁰ by introducing new and restrictive requirements with respect to *actus reus*, ‘[t]he gravity of the conduct was such that it was in violation of fundamental rules of international law’ and with respect to the mental element, ‘[t]he perpetrator was aware of the factual circumstances that established the gravity of the conduct...’. First, the definition in article 7 para. 1 (e) makes it clear that all forms of imprisonment and all other severe deprivations of liberty are covered, provided that they are in violation of fundamental rules of international law. According to one government delegate involved in the drafting of these elements, this new additional requirement was included for two reasons. First, it was ‘to guide the Court to focus on the legality or illegality of the conduct of [the] perpetrator’³⁵¹. However, in contrast to the various other provisions of the Rome Statute which expressly mention lawfulness or unlawfulness, this term is left out of article 7 para. 1 (e) and the concept is fully addressed in the phrase ‘in violation of fundamental rules of international law’. Second, according to this delegate, it was felt that it would be unfair to the accused to require pursuant to article 30 simply to have knowledge of the factual situation that established the violation. He cited the example of the unfairness of expecting a jailor, if he or she were genuinely uncertain whether the trial satisfied international standards, to take custody or risk prosecution if he or she were given custody after a trial during a state of emergency, involving ‘terrorism’ or a near-collapsed state, where the state had modified

³⁴⁸ These include the UN *Standard Minimum Rules for the Treatment of Prisoners* of 1955 and the European Prison Rules, adopted by the Committee of Ministers of the Council of Europe in Recommendation Rec (2006) 2 on 11 January 2006 (amending the 1987 version), the 1988 UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, the 1990 UN *Basic Principles on the Independence of the Judiciary*, the 1990 UN *Guidelines on the Role of Prosecutors* and the 1990 UN *Basic Principles on the Role of Lawyers*, as well as the ICTY Statute and Rules of Procedure and Evidence (Yugoslavia Rules) and the ICTR Statute and Rules of Procedure and Evidence (Rwanda Rules). Also of note are the *Rules Governing Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained under the Authority of the Special Court for Sierra Leone*, as amended, 14 May 2005.

³⁴⁹ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 26 February 2001, para. 303.

³⁵⁰ For a justification, see Cryer et al., *Introduction to ICL* (2014) 249, arguing that the ‘gravity of the conduct’ requirement excludes ‘minor procedural defects’.

³⁵¹ Von Hebel and Robinson, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999) 79, 89.

criminal procedures. This example is unrealistic, since the Court would never have the resources to try jailors below the level of prison directors. Moreover, this provision needs to be read in connection with the war crime in article 8 para. 2 (c) (iv) of passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are regarded as indispensable. In addition, there is jurisprudence spelling out the duty of jailors in such situations that indicate what are their responsibilities, which suggests that the prosecution would have to prove beyond a reasonable doubt that the jailor knew that the sentence was not issued by a regularly constituted court and that the body failed to afford such judicial guarantees³⁵². A similar approach would seem fair with respect to jailors charged with imprisonment or unlawful deprivation of liberty, although there would be many situations when circumstantial evidence would be sufficient to prove such intent and knowledge.

In ICC practice, article 7 (1) (e) has thus far played only a limited role. The Prosecution alleged in the *Harun and Ali Kushayb* case that ‘the Sudanese Armed Forces and Militia/Janjaweed imprisoned or severely deprived the primarily Fur, Zaghawa and Masalit civilians of their physical liberty’ in August 2003³⁵³. Similar allegations were made in the *Hussein* case³⁵⁴. They are reflected in the corresponding warrants of arrest issued by PTC I.

- 52 f) ‘Torture’. Torture was recognised as a war crime in non-international armed conflict as early as 1863 in the Lieber Code, which largely codified existing rules³⁵⁵. Similarly, the duty of belligerents in international armed conflict to ensure that prisoners of war are ‘humanely treated’ was recognised in the Hague Regulations in 1893³⁵⁶. Torture has been recognised as a crime against humanity since 1919³⁵⁷. It has also been recognised as a non-derogable right, applicable at all times, in various human rights instruments³⁵⁸. The prohibition is also found in numerous human rights treaties and other international standards³⁵⁹. It is also a violation

³⁵² See, for example, *Trial of Hauptsturmführer Oscar Hans*, No. 34, Eidslvating Lagmannsrett, January 1947, and Supreme Court of Norway, August 1947, No. 34 (1948) 6 LRTWC 82.

³⁵³ See *Prosecutor v. Ahmad Muhammad Harun* (‘Ahmad Harun’) and *Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), No. ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 17 April 2007 (PURL: <https://www.legal-tools.org/doc/0b8412/>), para. 70.

³⁵⁴ *Prosecutor v. Abdel Raheem Muhammad Hussein*, No. ICC-02/05-01/12-1-Red, Public redacted version of ‘Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein’, Pre-Trial Chamber I, 1 March 2012, para. 13.

³⁵⁵ Instructions for the Government of Armies of the United States in the Field, US War Department, Adjutant General’s Office, General Orders No. 100 (24 April 1863) (Lieber Code), reprinted in: Friedman (ed.), *The Law of War: A Documentary History* (1972) 158–186, 167, article 16 (stating that ‘[m]ilitary necessity does not admit of cruelty – that is the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions’).

³⁵⁶ *Convention with Respect to the Laws and Customs of War on Land* (Hague II), Regulations Concerning the Laws and Customs of War on Land, 29 July 1899, article 4.

³⁵⁷ See the 1919 Peace Conference Commission Report 113–114; all others article II para. 1 (c) of Allied *Control Council Law No. 10*; article 5 (f) of the ICTY Statute; article 3 (f) of the ICTR Statute; article 18 (c) of the 1996 ILC Draft Code; section 5.1 (f) and 5.2 (d) of UNTAET Reg. 2000/15; article 2 (e) of the Statute of the Special Court for Sierra Leone; and article 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia.

³⁵⁸ These include article 1 of the UN *Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment* (UN Declaration against Torture), UN GA Res. 3452 (XXX) (1975), article 1 of the UN Convention against Torture, articles 4 and 7 of the ICCPR, articles 3 and 15 of the ECHR and articles 5 para. 2 and 27 para. 2 of the American Convention on Hum. Rts.

³⁵⁹ See, for example, *Universal Declaration of Human Rights*, UN GA Res. 217A, 10 December 1948, article 5; UN Declaration against Torture, UN DOC. A/10034 (1975); UN *Convention on the Rights of the Child*, UNGA Res. 44/25 (1989), article 37 (a); UN *Code of Conduct for Law Enforcement Officials*, UN GA Res. 34/169, 17 December 1979, article 5; UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN GA Res. 43/173, 9 December 1988; UN *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN GA Res. 37/194 (1982), Principle 6; African Charter on Hum. and Peoples’ Rts., OAU Doc. CAB/LEG/67/3/Rev. 5, 27 June 1981, article 5; *Inter-American Convention to Prevent and Punish Torture*, OAS TS, No. 67, OEA/Ser.A/42 (1986).

of international humanitarian law³⁶⁰. Indeed, it is now widely recognised as a violation of a *jus cogens* prohibition³⁶¹. There was general support throughout the drafting process for the inclusion of torture as a crime against humanity, but there was considerable debate about the definition, in particular, whether it should be the same as that in the Convention against Torture, other human rights instruments or international humanitarian law³⁶². The ICC definition differs in at least two important respects from the Convention against Torture. Following trends in customary international law, it does not contain an official capacity requirement³⁶³. Unlike the definition of torture as a war crime, torture as a crime against humanity lacks the purpose element under article 1 of the Convention³⁶⁴.

The Court applied article 7 (1) (f) *inter alia* in the *Bemba* case where rape was used as an instrument of torture. PTC II clarified that the same criminal conduct 'can be prosecuted under two different counts'³⁶⁵, namely torture as well as rape (article 7 (1) (g)). It ultimately found that in this particular case the act of torture was subsumed by the more specific

³⁶⁰ Geneva Convention I, articles 3, 50; Geneva Convention II, articles 3, 51; Geneva Convention III, articles 3, 130; Geneva Convention IV, articles 3, 147; Add. Prot. I, article 75, para. 2 (a) (ii); Add. Prot. II, article 4, para. 2 (a).

³⁶¹ See, for example, *Prosecutor v. Furundzija*. No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 153 (citing numerous UN bodies and national court decisions); *Siderman De Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); *In re Estate of Ferdinand E. Marcos Litigation (Trajano v. Marcos)*, 978 F.2d 493, 500 (9th Cir. 1992), cert. denied, *Marcos Manto v. Thajane*, 508 U.S. 972 (1993 *In re Estate of Ferdinand Marcos Human Rights Litigation (Marcos v. Hilao*, 25 F.3d 1467, 1475 (9th Cir. 1994), cert. denied, 115 S.Ct. 934 (1995); *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1196 (S.D.N.Y. 1996). De Wet, (2004) 15 *EJIL* 97; I.

Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (2001). See also Cryer et al., *Introduction to ICL* (2014) 157; Ambos, *Treatise on ICL II* (2014) 89.

³⁶² Torture and ill-treatment were included in the three separate lists in the 1996 Preparatory Committee's compilation of proposals. 1996 Preparatory Committee II, pp. 65, 69 ('torture [or other forms of cruel treatment]', '[cruel treatment including] torture [,rape and other serious assaults of a sexual nature]' and 'torture or any other inhumane act causing great suffering or serious injury to physical or mental integrity or health', 'torture [or other forms of cruel treatment]' and 'torture or any other inhumane act causing great suffering or serious injury to physical or mental integrity or health'). In an annex, the second of these formulations was supplemented by a definition of torture modelled on the definition in article 1 of the Convention against Torture but omitting the purpose element and the link to state officials and substituting it with a custody or physical control requirement: 'Torture means the intentional infliction of severe pain or suffering whether physical or mental, upon a person in the accused's custody or physical control; except that torture shall not include pain and suffering arising only from, inherent in or incidental to, lawful sanctions'. *Ibid.*, p. 69. As the expert explained: 'Some delegations expressed the view that this offence required further clarification. There was a proposal to incorporate relevant provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment without requiring that the acts be committed by a public official if the other criteria were met. There was also a proposal to define this offence in terms of cruel treatment, including torture, and to add mutilation as a separate offence.' 1996 Preparatory Committee I, p. 24.

In February 1997, the Preparatory Committee list of crimes included 'torture', without any other form of ill-treatment, in the first paragraph of the article on crimes against humanity, together with the following definition as the second:

'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person [in the custody or physical control of the accused] [deprived of liberty]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions [in conformity with international law]'. Preparatory Committee Decisions Feb. 1997, p. 5. Another option in the second paragraph would have made the definition the same as in the Convention against Torture.

The same wording as in the February 1997 Rep. was included in the first paragraph of article 5 [20] of the Zutphen Draft, with the same explanation as in the 1997 Preparatory Committee Report in the second paragraph, and this wording remained unchanged in article 5 of the New York Draft.

³⁶³ See also corresponding ICTY jurisprudence, finding that official capacity is not required under customary international law, *Prosecutor v. Kvočka et al.*, IT-95-30/1-T, 2 November 2001, para. 139; *Prosecutor v. Kunarac*, No. IT-96-23& IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 148.

³⁶⁴ Article 1 of the Convention against Torture; *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 195.

³⁶⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 199.

material elements of rape³⁶⁶. For a discussion of the definition of torture as a crime against humanity under article 7, see mn 106–110. For the definition of torture as a war crime under the Rome Statute, see article 8 para. 2 (a) (ii) and (c) (i).

- 53 g) ‘Rape ... or any other form of sexual violence of comparable gravity’. Rape and other forms of sexual violence have been committed on a vast scale throughout history, including recent history up to the present day, particularly as a weapon of war³⁶⁷. Although rape and other forms of sexual violence have been prohibited in various instruments at least since the *Articles of War* issued by King Gustav Adolphus in 1621³⁶⁸, states have failed to address this issue effectively at both the international and national level by defining such conduct as crimes, ensuring effective procedures and investigating and prosecuting such crimes vigorously. Article 7 para. 1 (g) and para. 2 (f) are important steps in addressing these crimes, but it remains to be seen how effectively international and national courts will implement them.

As a war crime, the crime of rape and other forms of sexual violence have been included in various national and international instruments prior to the Second World War. Although rape was expressly identified as a violation of the laws of war in the 1863 Lieber Code³⁶⁹, in most instances crimes of sexual violence were included only in an elliptical fashion and categorised as attacks on honour rather than as crimes of sexual violence against the personal autonomy of the victim³⁷⁰. However, rape and abduction of girls and women for the purpose of enforced prostitution were expressly recognised as a violation of ‘the laws of humanity’ by the 1919 Peace Conference Commission Report³⁷¹. Rape was not included in the definition of crimes against humanity or war crimes in the *Nuremberg Charter* or in the *Tokyo Charter*, although it had been covered by the phrase ‘... other inhumane acts ...’ which had been included in both definitions. Rape charges were brought against defendants before the Tokyo Tribunal, concerning evidence of widespread violence committed by Japanese soldiers against the civilian population of Nanking in 1937³⁷². The *Nuremberg Principles* also did not expressly include rape.

- 54 The first definition of crimes against humanity which expressly included rape, but not other crimes of sexual violence, as a crime against humanity (although not as a war crime)

³⁶⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), paras. 204–205.

³⁶⁷ Askin, *War Crimes Against Women* (1997).

³⁶⁸ Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden, reprinted in: Ogren (1996) 313 *IRRC* 438 (1996), article 88 (‘He that forces any Woman to abuse her; and the matter be proved, he shall dye for it’).

³⁶⁹ Instructions for the Government of Armies of the United States in the Field, US War Department, Adjutant General’s Office, General Orders No. 100 (24 Apr. 1863) (Lieber Code), article XLIV (‘All wanton violence...all rape, wounding, maiming or killing...[is] prohibited under penalty of death, or other such severe punishment as may be seen adequate’).

³⁷⁰ The Declaration of Brussels of 1874, article XXXVII (‘[t]he honour and rights of the family...should be respected’). The 1907 Hague Regulations annexed to Hague Convention IV included crimes of sexual violence implicitly by expressing that ‘Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected ...’, Hague Regulations, article 46; see Meron (1993) 87 *AJIL* 424–428.

³⁷¹ Commission of the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (1919 Peace Conference Commission Report), Versailles, Mar. 1919, Conference of Paris, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Annex), p. 114.

³⁷² Röling and Rüter (eds.), 1 *The Tokyo Judgment: The International Military Tribunal for the Far East*, Apr. 29, 12. Nov. 1946, 1948, at 389 (1977), where the IMTFE found that approximately 20,000 cases of rape occurred within the city during the first month of the occupation. This case came to be known as the ‘Rape of Nanking’. See also Brownmiller, *Against our Will: Men, Women and Rape* 57–62 (1975); Niarchos (1995) 17 *HumRtsQ* 649, 666. These charges did not include evidence concerning the ‘comfort women’, a term which refers to the forced prostitution of women in brothels by the Japanese government before and during the Second World War. See also Boling (1995) 32 *ColumbiaJTransnatL* 467; Dulgopol and Paranjape, *Comfort Women: An Unfinished Ordeal*, I Commission of Jurists (1993); Amnesty International, *Japan: Still waiting after 60 years – Justice for survivors of Japan’s military sexual slavery system*, AI Index: ASA 22/012/05, Oct. 2005.

was *Control Council Law No. 10*. However, there were no prosecutions for rape in the trials conducted on the basis of this instrument.

International humanitarian law treaties continued to fail to address rape and other crimes of sexual violence effectively. Rape was not expressly included as a grave breach or violation of common article 3 of the four Geneva Conventions of 1949, although it would still have been prosecutable under the rubric of ‘violence to life and person’ (which includes the war crime of cruel treatment) or ‘outrages upon personal dignity’ (which prohibits ‘in particular humiliating and degrading treatment’) in common article 3 or the grave breaches of ‘inhuman treatment’ or ‘wilfully causing great suffering or serious injury to body or health’³⁷³. The only direct reference to the crime of rape comes in article 27 of the Fourth Geneva Convention (not a grave breach provision), which states that women shall be protected against ‘any attack on their honour, in particular, rape, enforced prostitution, or any form of sexual assault’³⁷⁴. Although a modest advance, [t]his characterisation of sexual violence as an attack against a woman’s honor was based on the stereotype that a woman is shamed by being the victim of rape and denies the great physical and emotional harm suffered as a result of sexual violence crimes³⁷⁵. Similar flaws infected the two Protocols to the Geneva Conventions adopted in 1977, which included prohibitions of rape and other crimes of sexual violence in both international and national armed conflict, but continued to treat them euphemistically as attacks on honour and dignity³⁷⁶.

A number of developments in the pivotal year of 1993 led to a significant shift in the approach to crimes of sexual violence. The World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, which stated:

‘Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response’³⁷⁷.

The UN General Assembly adopted the Declaration on the Elimination of Violence against Women, with a broad definition of the term ‘violence against women’ and called upon states to take a broad range of measures to prevent and punish such violence³⁷⁸. Professor Theodor Meron, who later served as a member of the US delegation at the Rome Diplomatic Conference, wrote an influential article calling for effective international measures to address rape as a war crime and a crime against humanity³⁷⁹.

Parallel with these developments, as a result of various reports with regard to widespread rape and other sexual abuse committed in the former Yugoslavia, both article 5 (g) of the *ICTY Statute* and, subsequently, article 3 (g) of the *ICTR Statute* expressly include rape as a crime against humanity, but not as a war crime, and without expressly mentioning other crimes of sexual violence³⁸⁰. After considerable pressure from civil society, the Prosecutor of

³⁷³ See Geneva Convention I, article 50; Geneva Convention II, article 51; Geneva Convention III, articles 14 and 130; Geneva Convention IV, articles 27, 147.

³⁷⁴ Geneva Convention IV, article 27.

³⁷⁵ Bedont and Hall-Martinez (1999) 6 *BrownJWorldAff* 65, 70–71.

³⁷⁶ Add. Prot. I, articles 75 para. 2 (b) (outrages upon personal dignity, enforced prostitution and any form of indecent assault) and 76 (rape, forced prostitution and any other form of indecent assault); and Add. Prot. II, article 4 para. 2 (e) (rape, enforced prostitution or any other form of indecent assault). See further Ambos, *Treatise on ICL II* (2014) 95–98.

³⁷⁷ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 25 June 1993, para. 38.

³⁷⁸ UN GA Res. 48/104 of 20 Dec. 1993.

³⁷⁹ Meron (1993) 87 *AJIL*. 424.

³⁸⁰ In his report, the Secretary-General nevertheless stated that in the conflict in the territory of the former Yugoslavia, ‘such inhumane acts have taken the form of so-called ‘ethnic cleansing’ and widespread and systematic rape and other forms of sexual assault, including enforced prostitution’, Report of the Secretary-General pursuant to paragraph 2 of Security Council Res. 808 (1993), para. 48, UN DocS/25704/Add.1, 19 May 1993. By drafting Rule 96 the judges of the ICTY have introduced the term ‘sexual assault’, thereby recognizing

both *ad hoc* Tribunals issued various indictments charging the accused with rape and other sexual abuse which led to a significant number of judgments by these *ad hoc* Tribunals finding the accused guilty of having committed rape and other crimes of sexual violence as crimes against humanity (see discussion below), as well as convictions for war crimes³⁸¹. In fact, one of the most significant (if inadvertent) contributions of the *ad hoc* Tribunals was to establish that evidence of sexual violence could be a relevant underlying fact to establish criminal responsibility for a range of other international crimes in addition to specific crimes of sexual violence, including genocide, extermination, enslavement, torture, persecution, other inhumane acts, grave breaches, outrages on personal dignity and cruel or inhuman treatment³⁸².

Rape was mentioned as a particular form of an unlawful act in the commentary to the *ILC Draft Statute*³⁸³. Article 18 (j) of the *1996 Draft Code* was the first instrument which expressly included enforced prostitution and other forms of sexual abuse in addition to rape as crimes against humanity³⁸⁴.

- 55 Article 7 para. 1 (g) and para. 2 (f) are not the only provisions of the Rome Statute giving the Court jurisdiction over crimes of sexual violence. In addition, the Court can also exercise jurisdiction over such conduct when committed as war crimes under article 8 (in either international and non-international armed conflict), as an act of genocide under article 6 (under the heading of ‘causing serious bodily or mental harm to members of the group’) and as an underlying act for the crimes against humanity of torture, persecution or other inhumane acts, among many other offences for which evidence of sexual violence would also be relevant. The explicit inclusion of rape and other crimes of sexual violence in the Rome Statute is an important advance over their previous categorisation by international instruments as violations of the honour and reputation of women, instead of as criminal acts aimed at the physical and mental integrity of a person. It also led to the express inclusion of an expanded list of crimes of sexual violence as crimes against humanity and war crimes in the establishing Statutes of other international criminal tribunals³⁸⁵. However, it is interesting to note that, in its charging practice to date, the Office of the Prosecutor has not made use of the full range of potential crimes of sexual violence contained in the Rome Statute. The crimes of enforced pregnancy, forced prostitution and enforced sterilisation have not been charged against any defendant to date.

These provisions apply to women and men. The definitions of rape and other sexual violence crimes adopted by the Court are deliberately phrased in gender neutral terms, unlike many national jurisdictions which assign specific body parts to the perpetrator or victim, and

that the Tribunal has jurisdiction over other acts of sexual violence besides rape, Yugoslavia Rules, Rev. 13, 9–10 July 1998. The same rule has been included in the Rwanda Rules, 5th Plenary Sess., 1–8 June 1998.

³⁸¹ The *Akayesu* Trial Chamber was the first which rendered a judgment finding the defendant criminally responsible for the crime of rape and qualifying it as crimes against humanity (see *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998). The first indictment charging defendants with rape as a specific and separate crime was issued by the ICTY in 1996, in which the Prosecutor qualified the crime as a violation of the grave breaches provision (article 2), a violation of the laws and customs of war (article 3) and as a crime against humanity (article 5) (*Prosecutor v. Gagović (Foca)*, No. IT-96-23-1, Indictment, 26 June 1996. See also *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, (Criminal responsibility for aiding and abetting rape while the act of rape itself had not been committed by the accused).

³⁸² See further, Hayes in: Darcy and Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (2010) 140–155.

³⁸³ 1994 ILC Report, p. 76.

³⁸⁴ In its report, the ILC referred to the numerous reports of rape committed in a systematic manner or on a large scale in the former Yugoslavia and noted that these acts are ‘forms of violence that may be specifically directed against women and therefore constitute a violation of the Convention on the Elimination of all Forms of Discrimination against Women’, Part 2, 2 *YbILC*. 50 (1996).

³⁸⁵ UNTAET Reg. 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), Sections 5.1 (g) and 5.2 (e) (‘Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity’); Statute of the Special Court for Sierra Leone Statute, article 2 (‘Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence’); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), article 5 (rape).

are therefore capable of encompassing a broader range of factual scenarios and forms of victimisation, including male victims of rape or sexual assault, female perpetrators, and those forced to carry out acts of rape or sexual violence against their will.

aa) ‘Rape’. Rape falls within the broader category of crimes of sexual violence. There was no definition of rape in international humanitarian or human rights law when the Rome Statute was adopted in July 1998³⁸⁶. However, an immensely influential report by the UN Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during wartime, including internal armed conflict, published during the second week of the Rome Diplomatic Conference, stated that rape is ‘the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim’s vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim’³⁸⁷. Thus, this gender-neutral definition has two components: a physical invasion of the body of the victim and coercion. In *Akayesu*, six weeks after the Rome Diplomatic Conference, after noting that there was at the time no commonly accepted definition of this term in international law, the Trial Chamber of the ICTR, reflecting in part the approach of the UN Special Rapporteur and legal arguments advanced in an *amicus curiae* brief submitted by non-governmental organisations, defined rape as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’³⁸⁸. It noted that rape has been defined in certain national jurisdiction as ‘non-consensual intercourse’, but that variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered intrinsically sexual³⁸⁹. The Trial Chamber noted that coercive circumstance did not need to be evidenced by a show of physical force: ‘Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence’³⁹⁰.

Like the definition of the UN Special Rapporteur, this gender-neutral definition also had the same two components, slightly differently worded: a physical invasion of the body of the

³⁸⁶ Rape and Sexual Assault: A Legal Study, Final Report of the UN Commission of Experts Established Pursuant Security Council Res. 780 (1992), UN DocS/1994/674/Add.2, Vol. I, annex II, para. 2; Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict (1998 Slavery Rapporteur Report), UN DocE/CN.4/Sub.2/1998/13 (22 June 1998), para. 23 (‘No definition of rape can be found in international law’). For a full discussion of the development of the definition of the crime of rape under ICL, see Hayes, in: Darcy and Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (2010) 129; also Ambos, *Treatise on ICL II* (2014) 95 *et seq.*

³⁸⁷ Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998), para. 24. She explained that the definition of rape advanced in the study ‘reflects current international elaborations, modern applications, examples derived from municipal law and practice, working definitions of rape that have been submitted by the Office of the Prosecutor to the International Criminal Tribunal for the Former Yugoslavia and to the International Tribunal for Rwanda, and definitions that have been adopted by various international non-governmental organisations’. During the Rome Diplomatic Conference, one State defined the *actus reus* of rape as ‘the forcible penetration, however slight, of any part of the body of another by the accused’s sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by an object’. UN Doc A/CONF.183/C.1/L.10 (1998), p. 6.

³⁸⁸ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, paras. 596 and 688. See *Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal*, submitted by the Coalition for Women’s Human Rights in Conflict Situations, pursuant to Tribunal Rule 74. The rape charges in this and other ICTR cases were brought only after intense pressure from non-governmental organisations.

³⁸⁹ *Ibid.*, paras. 596 and 686. The Chamber considered that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. *ibid.*, paras. 597 and 687.

³⁹⁰ *Ibid.*, para. 688. ‘[T]he manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime’, Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 25.

victim and coercion. Each definition approaches the crime as an invasion of personal autonomy. Neither definition was based on outdated concepts of absence of consent by the victim, which in national courts often led in practice to the burden of proof perversely shifting to the victim to demonstrate that he or she had not consented and to coerced 'consent' being a defence to a charge of rape. It is also noteworthy that the definition of rape identified in *Akayesu* was deliberately designed to be conceptual rather than exhaustive, in a similar manner to the definition of torture contained in the UN *Convention Against Torture*, since the judges believed that 'the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts'³⁹¹. The deliberate lack of specificity in the *Akayesu* definition of the *actus reus* of the crime of rape was one of the main reasons for the gradual move away from that definition within the jurisprudence of the *ad hoc* Tribunals in favour of a more detailed focus on penetration of specific body parts³⁹².

57 The question of *consent* continued to be a contentious issue in the development of the definition of rape throughout the jurisprudence of the *ad hoc* Tribunals. Although the current jurisprudence in the two leading Appeals Chamber judgments, *Kunarac* in the ICTY and *Gacumbitsi* in the ICTR, have re-emphasised the fundamental nature of the crime as an attack on personal sexual autonomy, they have expressed this aspect of the crime by reintroducing the concept of non-consent as part of the definition³⁹³. However, they have taken some steps to avoid the risk that this new formulation could place the Prosecutors under an unduly heavy burden and force the victim to demonstrate their lack of consent by stating that the circumstances in which international crimes are committed are almost always coercive or involve some element of force³⁹⁴. However, it is ironic to consider that the *ad hoc*

³⁹¹ *Ibid.*, paras. 597, 687.

³⁹² See for example, *Prosecutor v. Furundžija* (Trial Chamber Judgment) paras. 176–181; *Prosecutor v. Kunarac* (Trial Chamber Judgment) para. 438; *Prosecutor v. Semanza* (Trial Chamber Judgment) paras. 344–345.

³⁹³ The ICTY Trial Chamber in *Kunarac*, in an approach approved by the Appeals Chamber, explained: 'The basic principle which is truly common to these legal systems is that serious violations of sexual *autonomy* are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant. In practice, the absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist'. *Prosecutor v. Kunarac*, IT-96-23-T, Judgment, Trial Chamber, 22 February 2001, paras. 457–458 (emphasis in the original). In a definition approved by the Appeals Chamber, the Trial Chamber retained the invasion component, but replaced the coercion component with a non-consent one:

'[T]he *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim'. *Ibid.*, para. 460.

³⁹⁴ The ICTY Appeals Chamber in *Kunarac* stated that 'it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as .. crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible'. *Prosecutor v. Kunarac et al.*, IT-96-23, Judgment, Appeals Chamber, 12 June 2002, para. 130.

In *Gacumbitsi*, the ICTR Appeals Chamber dismissed the objections of the Prosecutor that the *Kunarac* approach would place a high burden on him to prove non-consent. It explained:

'The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible .. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim. Indeed, the Trial Chamber did so in this case.

156. Under certain circumstances, the accused might raise reasonable doubt by introducing evidence that the victim specifically consented. However, pursuant to Rule 96(ii) of the Rules, such evidence is inadmissible if the victim:

(a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
 (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.

Tribunals' concern for respecting the concept of sexual autonomy has inadvertently resulted in a definition of rape which rests on a rebuttable presumption that genuine consent to sexual activity is not possible in circumstances which would trigger their jurisdiction over war crimes, crimes against humanity or genocide³⁹⁵.

For the purposes of the ICC, therefore, the two essential and gender-neutral elements of the crime against humanity of rape in the Elements of Crimes (with the original footnotes) are:

1. The perpetrator invaded³⁹⁶ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent³⁹⁷.

It is significant that the ICC, as the first international criminal tribunal to adopt a gender-neutral definition of rape, should also be the first international court to charge sexual abuse committed *against men* as the specific crime of rape rather than an ancillary or related crime such as torture or outrages upon personal dignity, the form such charges usually took at the *ad hoc* Tribunals³⁹⁸.

While rape has been charged as a crime against humanity in a number of cases at the ICC to date³⁹⁹, the Court has yet to enter a conviction for that crime. Charges of rape have only

Additionally, even if it admits such evidence, a Trial Chamber is free to disregard it if it concludes that under the circumstances the consent given was not genuinely voluntary.

157. As to the accused's knowledge of the absence of consent of the victim, which as Kunarac establishes is also an element of the offence of rape, similar reasoning applies. Knowledge of nonconsent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent'.

Prosecutor v. Gacumbitsi, No. ICTR-2001-64-T, Judgment, Trial Chamber, 17 June 2004, paras. 155–157. Rape has also been included in charges in cases before the Special Court for Sierra Leone.

³⁹⁵ See further, Hayes in: Darcy and Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (2010) 140–155; Ambos, *Treatise on ICL II* (2014) 95–98; Cryer, et al., *Introduction ICL* (2014) 252–253.

³⁹⁶ The concept of 'invasion' is intended to be broad enough to be gender-neutral.

³⁹⁷ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 para. 1 (g) 3, 5 and 6'.

³⁹⁸ See *Prosecutor v. Bemba*, No. ICC 01/05-01/08-424, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009 and *Prosecutor v. Ntaganda*, No. ICC-01/04-02/06-309, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014. See further Sivakumaran. in: de Brouwer, Ku, Römkens and van den Herik (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge 2013); Mouthaan (2013) 13 *ICLRev* 665.

³⁹⁹ *Prosecutor v. Katanga and Ngudjolo*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008; *Prosecutor v. Bemba*, No. ICC 01/05-01/08-424, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009; *Prosecutor v. Kenyatta, Muthaura and Ali* No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012; *Prosecutor v. Laurent Gbagbo* No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014; *Prosecutor v. Ntaganda*, No. ICC-01/04-02/06-309, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014; *Prosecutor v. Ble Goude* No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges Against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014; *Prosecutor v. Kony et al.*, No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 September 2005; *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/06-47, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011; *Prosecutor v. Al Bashir*, No. ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010; *Prosecutor v. Harun and Kushayb* No. ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 1 May 2007; *Prosecutor v. Hussein* No. ICC-02/05-01/12-1-Red, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein, Pre-Trial Chamber I, 1 March 2012 and *Prosecutor v. Simone Gbagbo*, Decision on the Prosecutor's Application Pursuant to article 58 for a Warrant of Arrest Against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012.

been included in one case which has reached the issuance of a trial judgment under article 74 to date, namely the case against Germain Katanga and Mathieu Ngudjolo Chui⁴⁰⁰. In the *Katanga* trial judgment, the judges upheld and endorsed the two elements of the crime of rape outlined above. In relation to the first element of penetration, the Chamber emphasised that it is satisfied whenever the body of a person is invaded in a manner that results in penetration, even if the perpetrator does not engage in the act of penetration him- or herself. This element can be applied equally to situations where the perpetrator him- or herself is penetrated as to situations where he or she causes someone else to be penetrated. In either case, there will have to be some penetration, however slight, of a body part with a sexual organ, or penetration of the anus or vagina with an object or other body part⁴⁰¹.

60 In relation to the second element of *coercion*, the Trial Chamber noted that, outside of the specific situation of a perpetrator profiting from a victim's inability to give genuine consent due to natural, induced or age-related incapacity, the Elements of Crimes do not refer to the absence of consent on the part of the victim and this therefore does not have to be demonstrated. The establishment of the existence of at least one of the circumstances or coercive conditions laid out in the second element (i.e. the use of force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological pressure, abuse of power or taking advantage of a coercive environment) would be sufficient to establish an act of penetration as rape under article 7 para. 1(g)⁴⁰². The Chamber also reiterated that, under rule 70 of the *Rules of Procedure and Evidence*, where it is alleged that the perpetrator used force or took advantage of a coercive environment, the consent of the victim cannot be inferred in any way from his or her words or conduct⁴⁰³.

61 **bb) 'sexual slavery'**. In paragraph 1 (g), sexual slavery is listed as a separate offence, but it should be considered as a particular form of enslavement which includes various forms of slavery⁴⁰⁴. For commentary on the crime of enslavement, see mn 26–30 and 96. The word 'sexual' in the current paragraph denotes the result of this particular crime of enslavement: limitations on one's autonomy, freedom of movement and power to decide matters relating to one's sexual activity⁴⁰⁵. Sexual slavery thus also encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors⁴⁰⁶. According to the Special Rapporteur of the Working Group on Contemporary Forms of Slavery '[p]ractices such as

⁴⁰⁰ Although Katanga and Ngudjolo were tried together, the cases were severed after the closure of the defence case and prior to the issuance of the judgment under article 74. See *Prosecutor v. Katanga and Ngudjolo*, No. ICC-01/04-01/07-3319-tENG/FRA, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, Trial Chamber II, 21 November 2012. All charges against Ngudjolo, including the rape charge, were dismissed on the basis that his individual criminal responsibility under the mode of liability alleged by the Prosecutor had not been proven. See *Prosecutor v. Ngudjolo*, No. ICC-01/04-02/12-3-tENG, Judgement Pursuant to article 74 of the Statute, Trial Chamber II, 18 December 2012. No findings were entered on the definition of the crimes charged.

⁴⁰¹ See *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436-tENG, Judgement Pursuant to article 74 of the Statute, Trial Chamber II, 07 March 2013, para 963.

⁴⁰² *Ibid.*, paras. 964–965.

⁴⁰³ *Ibid.*, para. 966.

⁴⁰⁴ 'Enslavement' in paragraph 1 (c) means 'the exercise of any or all of the powers attaching to the right of ownership over a person...' (paragraph 2 (c)), and 'slavery' means the 'status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised' (article 1 para. 1 of the 1926 Slavery Convention). The definition of 'enslavement' thus contains the *actus reus* of the offense; the word 'slavery' denotes the condition or the status of the victim and should be interpreted as being a consequence or result from acts of enslavement. But see commentary on paragraph 1 (c) 'enslavement'. In her report, the Special Rapporteur used the term 'sexual' as an adjective to describe a form of slavery, not to denote a separate offence. Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN DocE/CN.4/Sub.2/1998/13 (22 June 1998), para. 30. In the ICC, sexual slavery has been included in charges against LRA suspects and Sudanese suspects.

⁴⁰⁵ Bassiouni (1991) 23 *NYUJIL&Pol* 458 (1991).

⁴⁰⁶ Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN DocE/CN.4/Sub.2/1998/13

the detention of women in 'rape camps'⁴⁰⁷ or 'comfort stations', forced, temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, are both in fact and in law forms of *slavery* and, as such, violations of the peremptory norm prohibiting slavery⁴⁰⁸. In practice, it is unclear whether a situation of 'forced marriage' as it has been prosecuted by other international criminal tribunals would be charged as the crime against humanity of enslavement, sexual slavery or other inhumane acts at the ICC⁴⁰⁹.

The two non-contextual elements of the crime against humanity of sexual slavery in the Elements of Crimes are:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁴¹⁰
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.'

The crime against humanity of sexual slavery has been charged in three cases at the ICC to date, only one of which has resulted in a trial judgement and did not include a conviction for sexual slavery⁴¹¹.

Although previous editions of this commentary expressed concerns that the first element of the crime of sexual slavery relating to exercising powers of ownership, which is identical to the equivalent element in the crime against humanity of enslavement, would be misinterpreted restrictively (see mn 96), the first trial judgement to address this issue has taken an expansive and common-sense approach⁴¹². The *Katanga* Trial Chamber held that the list of examples contained in the first element was not intended to be exhaustive, since the 'powers attaching to the right of ownership' can take many forms, but will usually involve the ability to use, enjoy or dispose of a person like a piece of property by placing them in a position of dependence resulting in the deprivation of all autonomy⁴¹³. The exercise of such powers will have to be assessed on a case-by-case basis, taking into account various factors including: the detention or captivity of the victim and its duration; limitation of the freedom to come and go, freedom of choice or freedom of movement of the victim; measures taken to prevent or discourage any attempts at escape; the use of threats, force or other forms of physical or moral coercion; the obligation to engage in forced labour; the exercise of psychological pressure; the degree of vulnerability of the victim; and, significantly, the socio-economic conditions under which the powers were exercised⁴¹⁴.

The Chamber emphasised that the exercise of powers attaching to the right of ownership over another person need not necessarily amount to a commercial transaction, since the notion of servitude is primarily related to the inability of the victim to amend or improve his

(22 June 1998), para. 30. See also Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, UN Doc/E/CN.4/1998/54, para. 42.

⁴⁰⁷ *Prosecutor v. Gagović*, No. IT-96-23-1, Indictment, 26 June 1996, paras. 1.5 and 4.8.

⁴⁰⁸ Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998), para. 8. See also article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), 266 UNTS 3.

⁴⁰⁹ See further Sellers (2011) 44 *CornILJ* 115.

⁴¹⁰ It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.'

⁴¹¹ *Prosecutor v. Katanga and Ngudjolo* No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008; *Prosecutor v. Ntaganda*, No. ICC-01/04-02/06-309, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014; *Prosecutor v. Kony et al.*, No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 September 2005.

⁴¹² See *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436-tENG, Judgement Pursuant to article 74 of the Statute, Trial Chamber II, 07 March 2013.

⁴¹³ *Ibid.*, para. 975.

⁴¹⁴ *Ibid.*, para. 976.

or her situation⁴¹⁵. The crucial issue is the victim's subjective reaction to their deprivation of liberty, their perception of the situation and the reasonable fears they experience⁴¹⁶. This finding implies that a significant enough degree of socio-economic inequality between the victim and the perpetrator could potentially satisfy the criminal element of 'exercising powers attaching to the right of ownership' over another person for the purposes of sexual slavery, provided that the inequality or disparity was severe enough that the victim was so dependent as to make it impossible for him or her to exercise any personal autonomy or to modify or escape from his or her situation.

The *Katanga* Trial Chamber viewed the second element of sexual slavery as relating to the victim's ability to decide the conditions for the exercise of his or her sexual autonomy, and noted that the concept of sexual slavery was particularly likely to cover situations in which women or young girls are forced to share their existence with a person with whom they must engage in acts of a sexual nature⁴¹⁷. The Chamber did not make any finding requiring that such acts must have been the result of force, threat of force or coercion.

- 63 cc) 'enforced prostitution'. The term 'enforced prostitution' is unfortunate from a number of perspectives. It has been argued that sexual slavery also encompasses most, if not all, forms of 'forced prostitution', which generally refers to conditions of control over a person who is coerced by another to engage in sexual activity⁴¹⁸. It has also been argued that 'sexual enslavement' has been diminished by calling it only 'enforced prostitution' which term would muffle the violence, coercion and control 'that is characteristic of sexual slavery'⁴¹⁹. The term 'prostitution', indeed, misleadingly may suggest that sexual services are provided as part of an exchange albeit one coerced by the circumstances. Moreover, the term could be misunderstood to suggest sexual activity initiated by the victim instead of by the offender. Older definitions of enforced prostitution put the emphasis of the 'immoral attack' on the woman's honour⁴²⁰. Here, the same argument may apply as regarding rape when it has not been expressly criminalised in an instrument, but, instead, put in formulations of violations of honour; it then does not recognize the forced character of the act nor the suffering of the victim⁴²¹.
- 64 According to the Special Rapporteur, older definitions of enforced prostitution are nearly indistinct from definitions that seem more accurately to describe the condition of slavery⁴²². For these reasons, she considers the crime of 'forced prostitution' to be a 'potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict situa-

⁴¹⁵ *Ibid.*, para. 976.

⁴¹⁶ *Ibid.*, para. 977.

⁴¹⁷ *Ibid.*, para. 978.

⁴¹⁸ Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN DocE/CN.4/Sub.2/1998/13 (22 June 1998), para. 31. 'The terms 'forced prostitution' or 'enforced prostitution' appear in international and humanitarian conventions but have been insufficiently understood and inconsistently applied'. Because the Special Rapporteur in her report refers to 'forced' instead of 'enforced' prostitution in contrast to this Statute, here the words 'forced prostitution' are put between quotation marks.

⁴¹⁹ Women's Caucus for Gender Justice in the International Criminal Court, *Recommendations and Commentary For December 1997 PrepCom on the Establishment of an International Criminal Court*, UN Headquarters 1–12 Dec. 1997, WC.5.6-9, 6–10.

⁴²⁰ *E.g.*, article 27 of the Fourth Geneva Convention: 'Women shall be especially protected against any attack on their honour, in particular against rape, *enforced* prostitution, or any form of indecent assault'. Article 75 para. 2 (b), Add. Prot. I prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, *enforced* prostitution and any form of indecent assault'. In article 76 para. 1 it is stated that 'Women shall be the object of special respect and shall be protected in particular against rape, *forced* prostitution and any other form of indecent assault' (italics added). Article 4 para. 2 (e), Add. Prot. II contains the same prohibition as in article 75 para. 2 (b), Add. Prot. I, which is also a fundamental guarantee.

⁴²¹ Niarchos (1995) 17 *HumRtsQ* 649, 674.

⁴²² The crime of enforced prostitution has been included in the Geneva Conventions and their Protocols, see mn 42.

tions⁴²³. It has been suggested that this crime ‘was retained in the Rome Statute to capture those situations that lack slavery-like conditions’⁴²⁴. The inclusion of the crime of enforced prostitution might cover a situation that does not amount to slavery or enslavement, but in which a person is compelled to perform sexual acts in order to obtain something necessary for survival or to avoid further harm. Such situations might also not be covered by rape if they do not meet the requirement of an element of coercion or force or threat of force⁴²⁵, although the ICTR in the *Akayesu* case has interpreted this element broadly⁴²⁶. However, they certainly would be covered by the crime of other forms of sexual violence (see mn 53). In those instances, if it would not be possible to prosecute someone successfully for rape or sexual slavery, it would seem preferable to charge that person with other forms of sexual violence.

The two non-contextual elements of the crime of enforced prostitution in the Elements of Crimes are:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person or persons, incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature’.

The first non-contextual element includes a very broad definition of coercion that would probably include all types of coercion that have been used in the past or are currently being used to carry out this crime. The second non-contextual element makes clear that this crime is entirely different in nature from the ordinary crime of prostitution under national law, because it includes expectation by the perpetrator who coerced the victim to engage in one or more acts of a sexual nature, not an expectation of advantage by the person engaging in those acts.

In contrast to the crime of rape, which is a completed offence, sexual slavery constitutes a continuing offence. Enforced prostitution can either be a continuing offence or constitute a separate act. The continuing offences could also encompass crimes of rape and other forms of sexual violence. To prove sexual slavery or enforced prostitution as a continuing offence, there is nevertheless no need to prove rape. Enforced prostitution as a separate act is in itself a ‘form of sexual violence of comparable gravity’ as included in this paragraph (see mn 53).

dd) ‘forced pregnancy’. As a result of various reports⁴²⁷, proposals were made to include this crime within the Court’s subject matter jurisdiction⁴²⁸. The inclusion of this crime was quite a controversial issue as a few delegations feared that policies not to provide abortion

⁴²³ Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc/CN.4/Sub.2/1998/13 (22 June 1998), para. 32. ‘Most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterised and prosecuted as slavery’. *ibid.*, para. 33. Apparently the reason for this argument is the fact that (en)forced prostitution is included in various conventions but have been ‘insufficiently understood and inconsistently applied’, *ibid.*, para. 31.

⁴²⁴ Bedont and Hall-Martinez (1993) 6 *BrownJWorldAff* 65, 73.

⁴²⁵ One State has said that ‘[t]he actus reus of enforced prostitution is enslavement of a sexual nature wherein the ‘forcible’ element need not be present for each individual sex act, but is generally present regarding a mandated activity that involves acts of a sexual nature’, UN Doc. A/CONF.183/C.1/L.10 (1998), pp. 6–7.

⁴²⁶ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 688.

⁴²⁷ According to several interviews conducted by the Commission of Experts for the former Yugoslavia, some captors stated that they were trying to impregnate the women held in camps who are detained until it is too late for them to obtain an abortion. Final Report Commission of Experts, UN DocS/1994/674 (5 May 1994), paras. 248, 250.

⁴²⁸ See, e.g., Chairman’s informal text on crimes against humanity, UN Doc/A/AC.249/CRP.9/Add.4 (11 Apr. 1996), p. 11; Preparatory Committee (Consolidated) Draft, para. 98, which contained a proposal included in the Siracusa Draft, 30.

services might be interpreted as forced pregnancy. For a commentary on the definition of this crime, see mn 108.

- 67 **ee) ‘enforced sterilisation’.** This crime has been punished in the context of medical experiments conducted particularly in concentration camps during the Second World War against both prisoners of war and civilians⁴²⁹. Sterilisation without consent could constitute genocide when committed with the requisite intent to destroy a particular group in whole or in part. Enforced sterilisation in particular is a form of ‘imposing measures intended to prevent births within the group’ within the meaning of article 6 (e) of this *Statute*.

The two non-contextual elements of this crime in the Elements of Crimes (with original footnotes) are:

1. The perpetrator deprived one or more persons of biological reproductive capacity.⁴³⁰
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.⁴³¹

The first non-contextual element proved to be very controversial and one country wished to exclude compulsory measures intended to be applicable to all inhabitants. It is doubtful, however, whether the exception in footnote 19 is consistent with international law. Even imposing non-permanent measures intended to prevent births within a protected group could be used to commit genocide by reducing the birth rate within that group. In addition, such non-permanent measures could violate a wide variety of human rights to personal autonomy even when imposed on a non-discriminatory basis, including the right not to be subjected to arbitrary interference with one’s family⁴³². It is also worth emphasizing that forcible castration or other forms of severe genital mutilation carried out against men would be capable of satisfying the elements of enforced sterilisation⁴³³.

- 68 **ff) ‘any other form of sexual violence of comparable gravity’.** Sexual violence is a broader term than rape. The term is used to describe any kind of violence carried out through sexual means, with a sexual motive or by targeting sexuality. According to the ICTR in the *Akayesu Judgment*, sexual violence, which includes rape, is considered to be any act of a sexual nature committed on a person under circumstances which are coercive⁴³⁴. Sexual violence is not limited to a physical invasion of the human body and may include acts that do not involve penetration or even physical contact⁴³⁵. The words ‘of comparable gravity’ should thus not be understood to exclude acts that do not involve penetration or physical contact, despite the

⁴²⁹ In the Medical Case, several defendants were found guilty of having committed war crimes and crimes against humanity involving different kinds of medical experiments under which sterilisation experiments, see *U.S. v. Brandt, Trials of War Criminals Before Nuernberg Military Tribunals*, Vols. 1 and 2, Case No. 1.

⁴³⁰ ‘The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice’.

⁴³¹ ‘It is understood that ‘genuine consent does not include consent obtained through deception’.

⁴³² UDHR, UN GA Res. 217A (III), 10 Dec. 1948, article 12.

⁴³³ See further Sivakumaran (2007) 18 *EJIL* 253, 265.

⁴³⁴ The Trial Chamber noted in this context that coercive circumstances need not be evidenced by a show of physical force. ‘Threats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal’. *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 688.

⁴³⁵ *Ibid.* According to the Trial Chamber, sexual violence falls within the scope of ‘other inhumane acts’, included in article 3 (i) of the ICTR Statute, (crimes against humanity), of ‘outrages upon personal dignity’, included in article 4 (e) of the ICTR Statute (violations of article 3 common to the Geneva Conventions and of Add. Prot. II), and of ‘serious bodily or mental harm’, included in article 2 para. 2 (b) of the ICTR Statute, (genocide). Regarding Count 14, *Akayesu* had been judged criminally responsible under article 3 (i) for the forced undressing of women and for forcing them to march and for the forcing to perform exercises, naked in public. *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 688. The ICC Office of the Prosecutor has adopted an internal definition of ‘sexual crimes’ which states ‘[a]n act of a sexual nature if not limited to physical violence, and may not involve any physical contact – for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.’ See ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 3.

findings of Pre-Trial Chamber II discussed below. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics⁴³⁶. Sexual violence can take many forms, some more obvious than others. It can include acts committed with a sexual motive or for the sexual gratification of the perpetrator; scenarios where two or more unwilling participants are forced to carry out sexual acts on each other; acts committed for the purpose of humiliation or degradation, such as forcible public nudity; or acts which target the victim's sexual organs or sexual function, such as forcible castration, genital mutilation or sexualised torture. Moreover, according to the Trial Chamber in *Furundžija* case,

‘... international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity’⁴³⁷.

The three non-contextual elements of this crime in the Elements of Crimes are:

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person or persons. incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7 para. 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.’

The first non-contextual element uses the same broad definition of coercion as in the other crimes of sexual violence and appears to be consistent with the approach taken by the ICTR Trial Chamber in *Akayesu*, although it is frustrating that the crucial phrase ‘an act of a sexual nature’ is not defined anywhere in the Rome Statute or the Elements of Crimes. Pre-Trial Chamber II pursued an incomprehensibly restrictive interpretation of this element in its decision on the confirmation of charges in the *Kenyatta* case, using its discretion to recharacterise a charge of other forms of sexual violence (relating to the amateur forcible circumcision of men of Luo ethnicity) on the basis that, in its view, ‘the determination of whether an act is of a sexual nature is inherently a question of fact’ and that ‘not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence’⁴³⁸. The Chamber came to the remarkable conclusion that ‘the evidence... does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men’ and therefore held that the facts should more properly be characterised as the crime against humanity of other inhumane acts on the basis of the severity of the injury inflicted⁴³⁹. Based on the logic of Pre-Trial Chamber II in this case (which has not been followed in the jurisprudence of any other Pre-Trial or Trial Chamber to date), female genital mutilation would not necessarily constitute an act of sexual violence if the severity of the injury inflicted was deemed to be a more relevant legal element than the deliberate targeting of a sexual organ.

The second non-contextual element is an objective test. It should be remembered that in *Akayesu*, the ICTR Trial Chamber found that an incident in which the accused ordered subordinates ‘to undress a student and force her to do gymnastics naked in the public

⁴³⁶ Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998), para. 21.

⁴³⁷ *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 186.

⁴³⁸ See *Prosecutor v. Kenyatta, Muthaura and Ali*, No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, paras. 265–266.

⁴³⁹ *Ibid.* For a detailed critique of this and related decisions, see further Hayes in: in: Hayes, McDermott and Schabas (eds.), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Aldershot 2013) 7.

courtyard of the bureau communal, in front of a crowd, constitutes sexual violence⁴⁴⁰. In the *Bemba* case at the ICC, however, the Pre-Trial Chamber refused to include factual allegations of women being forced to undress in public for the purposes of humiliation within the arrest warrant on the grounds that it did not believe those facts constituted other forms of sexual violence ‘of comparable gravity to the other crimes set forth in article 7(1)(g) of the Statute’⁴⁴¹. The third non-contextual element does not require the perpetrator to make any legal assessment of the gravity of the conduct.

69 **gg) Special remarks.** Rape and sexual violence could constitute genocide when committed with the specific intent to destroy a protected group. In the *Akayesu Judgment*, the Trial Chamber of the ICTR underscored the fact that in its opinion, ‘[acts of rape and sexual violence] constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such’. It found that the acts described are acts as enumerated in article 2 para. 2 of its Statute and that these acts were committed with the required specific intent⁴⁴². Rape and sexual violence have been charged as a constituent act of genocide at the ICC in the case against Omar Al Bashir⁴⁴³.

Rape and sexual violence can also be considered as constituting forms of torture. In the *Akayesu Judgment*, the Trial Chamber of the ICTR stated that ‘[l]ike torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’⁴⁴⁴. According to the judgment of the ICTY in the *Celebici* case, rape, other forms of sexual violence, and other acts constitute torture – for the purpose of articles 2 and 3 of the *ICTY Statute*- if the following criteria are met:

- there must be an act or omission that causes severe pain or suffering, whether mental or physical,
- which is inflicted intentionally,
- and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
- and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity⁴⁴⁵.

The Trial Chamber further stated that ‘it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation’. According to the Trial Chamber, this is inherent in situations of armed conflict⁴⁴⁶.

At the ICC, the issue of the interplay between the crimes against humanity of rape and torture became a point of controversy in the confirmation of charges decision in the *Bemba*

⁴⁴⁰ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 688.

⁴⁴¹ *Prosecutor v. Bemba*, No. ICC-01/05-01/08-14-ENG, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 40.

⁴⁴² *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, paras. 731–734. Article 2 of the ICTR Statute, contains the 1948 Genocide Convention’s definition of the crime. In a 1996 decision of Trial Chamber I of the ICTY, rape was already considered a possible act of genocide, *Prosecutor v. Karadžić and Mladić*, Review of Indictment pursuant to Rule 61, Nos. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, paras. 93 and 94.

⁴⁴³ See *Prosecutor v. Al Bashir*, No. ICC-02/05-01/09-94, Second Decision on the Prosecution’s Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010.

⁴⁴⁴ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 597.

⁴⁴⁵ *Prosecutor v. Delalić (Celebici)*, No. IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, paras. 494–496.

⁴⁴⁶ *Ibid*, paras. 480–496, 495.

case⁴⁴⁷ in relation to an incident where a woman was raped in front of her family members. The Prosecutor had advanced charges of both rape (in relation to the female rape victim) and torture (in relation to the pain and suffering experienced by the female rape victim as a result of the public nature of the rape *and* the pain and suffering experienced by the family members who were forced to watch her being raped). Pre-Trial Chamber II, acting on its own initiative, made the decision to recharacterise the charge of torture as the crime of rape, on the basis of that Chamber's objection to the practice of cumulative charging and its reasoning that, due to the additional legal element of penetration in the crime of rape, the act of torture was 'fully subsumed by the count of rape'⁴⁴⁸. This interpretation was factually unnecessary and legally problematic, not least for having entirely excluded the pain and suffering of the family members from the ambit of the case, since they were victims of the crime of torture but not rape.

The current paragraph contains almost the same wording as article 8 para. 2 (b) (xxii), which is applicable to international armed conflict, and article 8 para. 2 (e) (vi), applicable in non- international armed conflict.

h) 'Persecution'. Persecution had been included in several definitions of crimes against humanity in previous instruments. It had been included in the *Nuremberg and Tokyo Charters*, *Control Council Law No. 10* and the *Nuremberg Principles*. In each of these instruments, a distinction was made between crimes against humanity of the 'murder' type and 'persecution'⁴⁴⁹. For example, the Nuremberg Charter distinguished 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population' from 'persecutions on political, racial or religious grounds'⁴⁵⁰. In the original version, these inhumane acts occurred 'before or during the war' and persecutions had to have been committed 'in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'⁴⁵¹. However, this version was amended in a subsequent protocol to make it clear that both types of crimes against humanity could have been committed before or during the war and that they both had to have been committed in connection with a crime of aggression or a war crime. The *1954 Draft Code* contained a non-exhaustive enumeration of several inhumane acts which included both crimes of the 'murder' type and persecution without making a distinction between these two types of crimes. The *1991 Draft Code* seems not to make such a distinction either, but according to the commentary, persecution '... relates to human rights violations other than those covered by the previous paragraphs ...'.⁴⁵² This constitutes a more restrictive approach than that adopted in other instruments which left open the possibility that acts which independently constitute crimes against humanity could also constitute persecution. Both the *ICTY Statute* and the *ICTR Statute* include the crime of persecution in the list of crimes against humanity⁴⁵³, as does the *1996 Draft Code* and the

⁴⁴⁷ See *Prosecutor v. Bemba*, No. ICC 01/05-01/08-424, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009.

⁴⁴⁸ *Ibid.*, paras. 204–205.

⁴⁴⁹ Schwelb, *Crimes against Humanity* (1946) 23 *BYbIL* 178, 190; *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1943) 179; Paust, in: Paust and Bassiouni (eds.), *International Criminal Law, Cases and Materials* (1996) 1075–1078.

⁴⁵⁰ *Charter of the International Military Tribunal, annexed to the London Agreement*, 8 Aug. 1945, article 6 (c), as amended by the Protocol to Agreement and Charter, London, 6 Oct. 1945.

⁴⁵¹ *Ibid.*

⁴⁵² 1991 ILC Draft Code, 2 *YbILC* (1991) 104, 268. In its commentary, the ILC gave some examples which indeed would not all be covered by other acts which had been included in article 21 of the 1991 Draft Code: '... a prohibition on practising certain kinds of religious worship, prolonged and systematic detention of individuals who represent a political, religious or cultural group, a prohibition on the use of a national language, even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group'.

⁴⁵³ *ICTY Statute*, article 5 (h); *ICTR Statute*, article 3 (h).

international instruments establishing the international criminal courts for East Timor, Sierra Leone and Cambodia⁴⁵⁴. At the national level before the Rome Diplomatic Conference there were few countries that had defined persecution as such as a crime under national law ‘because the acts comprised within the general meaning of persecution, which produce harmful results, are criminalised’ as ordinary crimes⁴⁵⁵.

However, since then many countries have defined persecution as a crime against humanity under national law, usually in accordance with article 7 para. 1 (h) and sometimes also in accordance with article 7 para. 2 (g) of the Rome Statute. The inclusion of persecution in the *Statute* has not been a very contentious issue, despite discussions on the content and definition of this crime.

- 71 **aa) Definition.** The inclusion of the crime against humanity of persecution in article 7 para. 1(h) and article 7 para. 2(g) constitutes the first attempt at substantively defining this offense in a legally binding international instrument. However, as will be elaborated below, this definition draws significantly on the definition originally devised by the ICTY in the *Tadić* case which itself relies on a number of sources, including the 1996 Draft Code, national jurisprudence and academic commentary. For the definition and the conduct that may constitute persecution as a crime against humanity, see mn 112.
- 72 **bb) ‘against any identifiable group or collectivity’.** Paragraph (h) speaks of ‘[p]ersecution against any identifiable group or collectivity’, rather than acts committed against individuals. Various proposals nevertheless suggested that this crime covers conduct against both individuals and groups by which emphasis is put on the notion that groups consist of individual members⁴⁵⁶. This line of reasoning replicates that of the ICTY Trial Chamber Judgment in the *Tadić* case⁴⁵⁷. Acts committed against the group as such are necessarily put into practice against its individual members. Since persecution under this *Statute* is required to be against ‘any’ group or collectivity, it must be understood as including at least a small number of individuals. Indeed, the first and second non-contextual elements of the Elements of Crimes clarify that this crime includes targeting individuals because of their membership in the group or collectivity, as well as targeting the group or collectivity as such. The first element states that the ‘[p]erpetrator severely deprived ... one or more persons of fundamental rights’ and the second element states that ‘[t]he perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such’. The purpose of the distinction between ‘group’ and ‘collectivity’ is not clear⁴⁵⁸.

⁴⁵⁴ UNTAET Reg. 2000/15, 6 June 2000, article 5 (essentially the same as article 7 para. 1 (h) and para. 2 (g) of the Rome Statute); Sierra Leone Statute, article 2 (‘Persecution on political, racial, ethnic or religious grounds’); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), article 5 ‘persecutions on political, racial, and religious grounds’).

⁴⁵⁵ Bassiouni, *Crimes Against Humanity* (1992) 787. The author, a leading authority on international criminal law, reviewed a wide variety of definitions of ‘persecute’ and ‘persecution’ in various languages and concluded that these terms ‘generally entail that someone, with hostile purposes or intentions, pursues another to harass, torment, oppress or harm that person, usually on account of that person’s religious beliefs, views or opinions’. *ibid.*, the author concluded that ‘no specific international crime of ‘persecution’ exists under any source of international law’, but also argued that ‘[i]t is possible to construct a reasoning that ‘persecution’ as defined above, when resulting in a specific violation can be deemed an aggravating factor’. *ibid.*

⁴⁵⁶ See the commentary of 1991 ILC Draft Code, 2 *YbILC* (1991) 104 which refers to both individuals and groups of individuals, p. 268. The Siracusa Draft included the following provision in its article 20-4: ‘persecution, whether based on laws or practices targeting select groups or their members in ways that seriously and adversely affect their ethnic, cultural or religious life, their collective well-being, and welfare, or their ability to maintain group identity’ (emphasis added), p. 30.

⁴⁵⁷ ‘... what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual’s fundamental rights’. (para. 697) ‘... the persecutory act must be intended to cause, and result in, an infringement on an individual’s enjoyment of a basic or fundamental right’, *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 715 (emphasis added).

⁴⁵⁸ The word ‘group’ means ‘a number of persons [or things] located close together, or considered or classed together’. ‘Collectivity’ has not been defined, *The Oxford Concise Dictionary of Current English* (8th ed. 1990) 522.

Persecution under the *Statute* is not limited to acts committed against national, ethnic, racial or religious groups, in contrast to the definition of the crime of genocide. Rather, the group or collectivity and their individual members must be merely ‘identifiable’, based either on objective criteria or on the subjective notions of the accused. After all, in paragraph 1 (h) reference is made to several grounds concerning the discriminatory intent of the person to commit persecution (see mn 64 *et seq.*). Moreover, paragraph 2 (g) defines persecution as the ‘... deprivation of fundamental rights ... by reason of the identity of the group or collectivity’, which, as such, would also imply a subjective element inherent in the interpretation of the word ‘identifiable’. The group or collectivity might therefore also be identifiable by the accused, both as a group or collectivity by virtue of objective criteria, and as a group or collectivity not being the same as the group or collectivity the accused belongs to him or herself. The issue of the identifiable character of the allegedly targeted group was briefly addressed by Judge Sanji Mmasenono Monageng in her dissenting opinion appended to the *Mbarushimana* Confirmation of Charges Decision. In this instance, the Prosecution argued that the *Forces Démocratiques de Libération du Rwanda* (‘FDLR’) specifically targeted the civilian population of the Kivu provinces of the Democratic Republic of the Congo as they were perceived as ‘having called for, collaborated with or supported the FARDC’s [*Forces Armées de la République Démocratique du Congo*] and/or the RDF’s [Rwanda Defence Force] efforts to defeat the FDLR. These civilians were – whether individually or collectively as residents of a given locality – considered enemies by the FDLR’⁴⁵⁹. While the Prosecution was essentially presenting persecution charges for confirmation on grounds of political affiliation, Judge Monageng was of the opinion that the targeted group, i.e. the civilian population of the Kivus, lacked ‘the required specificity, ideological coherence and necessary identifiable characteristics in order to fall within one of the protected groups listed under article 7, be it political or otherwise’⁴⁶⁰. In this instance, it would appear that Judge Monageng mistakenly conflated or confused the nature of the identified group with the prohibited discriminatory grounds provided for under article 7 para. 1 (h). Article 7 para. 1 (h) does not require the existence of a defined political group, only that they be targeted on political grounds; likewise, the other discriminatory grounds listed in article 7 para. 1 (h) are intended to enumerate to the prohibited reasons for *targeting* a specific group or collectivity, not to provide a means of characterizing protected groups.

cc) ‘grounds’. Previous instruments which included persecution as a crime against humanity required that persecution be committed on one of several enumerated grounds. Although these grounds are not identical in each instrument, most list political, racial and religious grounds and some include other grounds, including social, cultural and ethnic grounds. Since the adoption of the Rome Statute, most national legislation and draft legislation implementing the complementarity obligations under the Rome Statute has included all of the grounds listed in paragraph 1 (h). The *Nuremberg Charter* included persecution ‘on political, racial or religious grounds’, as did the *Nuremberg Principles*, in contrast to the *Tokyo Charter* which omitted persecution on religious grounds. In the *1954 Draft Code*, both crimes of the ‘murder’ type and persecution were included as ‘inhuman acts’, which referred to ‘social, political, racial, religious or cultural grounds’. This exhaustive enumeration of grounds was repeated in the *1991 Draft Code*. In the *1996 Draft Code*, the ILC included persecution on ‘political, racial, religious or ethnic grounds’.

‘Collectivité’, as used in the French text, means either a group (le public, l’ensemble des citoyens) or the community, Collins Robert; *French-English English-French Dictionary* (3rd ed. 1993) 154.

⁴⁵⁹ *Prosecutor v. Callixte Mbarushimana*, No. ICC-01/04-01/06-47, Decision on the Confirmation of Charges – Dissenting Opinion of Judge Sanji Mmasenono Monageng, Pre-Trial Chamber I, 16 December 2011, para. 35.

⁴⁶⁰ *Prosecutor v. Callixte Mbarushimana*, No. ICC-01/04-01/06-47, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, para. 36.

75 The *ICTR Statute*, in contrast to previous instruments (with the exception of the definition of crimes against humanity included in the *1954 Draft Code*) not only mentions several grounds in the paragraph covering the crime of persecution (political, racial or religious grounds) but also in the *chapeau* of the article covering crimes against humanity (national, political, ethnic, racial or religious grounds), therefore, requiring a discriminatory intent for all crimes against humanity under that *Statute*⁴⁶¹. The poor drafting of this provision allowed for a number of potentially absurd interpretations, such as requiring that political persecution must be based on political, racial or religious grounds. In the *Akayesu* trial judgment, the first trial judgment to be handed down by the ICTR, the Trial Chamber endorsed discriminatory grounds both as an element of the *chapeau* of crimes against humanity under article 3 (in relation to the nature of the attack) and as a specific element of individual acts qualifying as crimes against humanity⁴⁶². The Appeals Chamber subsequently upheld discriminatory grounds as a contextual element for the purposes of the *ICTR Statute* while rejecting it as a mental element, stating categorically that; ‘except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity’⁴⁶³. The Appeals Chamber, however, further clarified that while a general discriminatory intent was not required for all crimes against humanity, ‘all crimes against humanity, may, in actuality, be committed in the context of a discriminatory attack against a civilian population’⁴⁶⁴. In the context of the *ICTR Statute*, it appears that the discriminatory grounds enumerated in the *chapeau* of article 3 (which are in fact broader than the discriminatory grounds listed for the crime against humanity of persecution) are only intended to qualify the nature of the attack against a civilian population which would trigger the Tribunal’s criminal jurisdiction, not to introduce an additional mental element or form of intent on the part of any particular perpetrator. An element of discriminatory intent was *not* included in article 5 of the *ICTY Statute*.⁴⁶⁵

76 In the *April 1998 New York Draft Statute*, the possibility of including discriminatory grounds in the *chapeau* of what has now become article 7 was still included as an option. Proposals for this possible requirement of discriminatory intent for all crimes against humanity under this Statute included references to political, philosophical, racial, ethnic or religious grounds ‘or any other arbitrarily defined grounds’⁴⁶⁶. In the end, only ‘persecution’ included the requirement of discriminatory intent, enumerating several prohibited grounds. The third non-contextual element in the Elements of Crimes follows the list of grounds in paragraph 1 (h), but states that the ‘targeting’ was based on the listed grounds, rather than that the persecution was against the group or collectivity on such grounds. When the first three non-contextual grounds are read together, however, there does not seem to be any significant difference between the third non-contextual ground and the Rome Statute.

⁴⁶¹ ‘... [t]his provision of the ICTR Statute makes no sense, since it imposes a double requirement of discriminatory motives by requiring that persecutions on political, racial and religious grounds be committed on national, political, ethnic, racial or religious grounds’, Amnesty International, *The International Criminal Court: Making the Right Choices – Part I: Defining the Crimes and Permissible Defences and Initiating a Prosecution* (Jan. 1997, AI Index: IOR 40/01/97), Sect. IV.I.

⁴⁶² *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, paras. 583 and 584.

⁴⁶³ *Prosecutor v. Akayesu*, No. ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, para. 464.

⁴⁶⁴ *Prosecutor v. Akayesu*, No. ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, para. 464.

⁴⁶⁵ It is worth noting the anomalous reasoning of the ICTY Trial Chamber in the *Tadić* case, where it adopted discriminatory intent as a general element of all crimes against humanity on the basis of the Secretary-General’s Report: ‘because the requirement of discriminatory intent on national, political, ethnic, racial or religious grounds for all crimes against humanity was included in the Report of the Secretary-General, although no basis for this statement was cited, and since several Security Council members stated that they interpreted article 5 as referring to acts taken on a discriminatory basis, the Trial Chamber adopts the requirement for all crimes against humanity under article 5’, *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 652. Fortunately, this reasoning was reversed on appeal, *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 305.

⁴⁶⁶ Preparatory Committee (Consolidated) Draft, pp. 25–26.

Neither this element nor the other elements shed any light on the definitions of the grounds listed in the Rome Statute.

aaa) ‘political, racial, national, ethnic, cultural, religious, gender ... grounds’. ‘Political grounds’ could be interpreted within the meaning of grounds ‘of or concerning the State or its government, or public affairs generally’⁴⁶⁷ and might not be limited to grounds that concern membership of a particular political party or adherence to a particular ideology⁴⁶⁸.

Therefore, the word ‘political’ may potentially be understood as including public affairs issues such as environment and health; a political ground for persecution would then cover at least the existence of a difference of opinion concerning these issues as a reason for committing the acts concerned⁴⁶⁹. Since beginning its operations in 2002, the ICC’s Office of the Prosecutor has sought to pursue persecution charges on grounds of ‘political affiliation’ in numerous cases⁴⁷⁰. While these charges have, thus far, been confirmed in four instances⁴⁷¹, the respective Pre-Trial Chambers have offered no guidance as to the definitional boundaries implied by ‘political grounds’⁴⁷².

‘Racial grounds’ are included in all previous instruments although no definition of this ground has ever been given. Persecution on racial grounds should be given at least as broad a reading as the widely accepted definition of racial discrimination in article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination*: ‘any

⁴⁶⁷ *The Oxford Concise Dictionary of Current English* 522 (8th ed. 1990), 922.

⁴⁶⁸ See *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 583 (‘political grounds’ could be regarded as ‘discrimination on the basis of a person’s political ideology’).

⁴⁶⁹ The Report of the Expert Group Meeting on Gender-Based Persecution considered that political opinion or imputed political opinion may be determined from behaviour as well as expressed opinion. It noted that behaviour by a woman that does not conform to cultural or social norms with respect to gender roles may be construed as political opinion with respect to gender roles, otherwise known as the political position of feminism. Peaceful activities by women in the course of armed conflict may be construed by opposing groups to impute political opinion. Political opinion may also be imputed to women as a result of the political opinion of male family members, Report of the Expert Group Meeting on Gender-Based Persecution, organised by the Division for the Advancement of Women and the Centre for Refugee Studies at York University, Canada, held in Toronto from 9–12 Nov. 1997 (EGM.GBP/1997/Report, para. 44). NB these recommendations with respect to legal definitions and standards were made in the context of the meaning of the term ‘political opinion’ in the 1951 Convention relating to the Status of Refugees.

⁴⁷⁰ See *Prosecutor v. Callixte Mbarushimana*, No. ICC-01/04-01/06-47, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, para. 242; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, paras. 269–281; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, (23 January 2012), paras. 281–286; *Situation in the Libyan Arab Jamahiriya*, No. ICC-01/11-01/11-1, Decision on the ‘Prosecutor’s Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 30 June 2011, para. 65; *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014, paras. 204–205, ethnic, national and religious grounds are also cited; *Prosecutor v. Charles Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges Against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014, paras. 122–123, ethnic, national and religious grounds are also cited; *Prosecutor v. Simone Gbagbo*, No. ICC-02/11-01/12, Decision on the Prosecutor’s Application Pursuant to article 58 for a Warrant of Arrest Against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 16, ethnic, national and religious grounds are also cited.

⁴⁷¹ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, paras. 269–281 – confirmed with respect to the accused Ruto and Sang; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, (23 January 2012), paras. 281–286, confirmed with respect to the accused Muthaura and Kenyatta; *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014, paras. 204–205; and *Prosecutor v. Charles Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges Against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014, paras. 122–123.

⁴⁷² See Ambos, *Treatise on ICL II* (2014) 104–108.

distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin⁴⁷³. Given that most definitions of race are now discredited and that there is no universally accepted definition, this term should be given a broad reading.

- 79 The concept of 'national' is broader than citizenship and includes attributes of a group which considers that it is a nation even though the members of the group are located in more than one State⁴⁷⁴.
- 80 The term 'ethnic' is to be understood as being narrower than the term 'ethnicity' in article II of the *Convention on the Prevention and Punishment of the Crime of Genocide*⁴⁷⁵. While both race and ethnicity are recognised as prohibited discriminatory grounds, in practice, the ICC Prosecutor has only charged persecution on ethnic grounds, possibly as it is less controversial and more easily established than racial grounds, the concept of race having become increasingly outmoded since the adoption of the Genocide Convention⁴⁷⁶.
- 81 Although the term 'cultural' is used in a number of international instruments, there appears to be no agreed definition of the term in international law⁴⁷⁷. It would best serve the protective purpose of the *Rome Statute* if it were given an ordinary broad meaning: of or involving culture, that is, 'customs, arts, social institutions, etc. of a particular group or people'⁴⁷⁸.
- 82 Persecution on 'religious' grounds necessarily includes persecution based on the lack of a religion.⁴⁷⁹ It would also include the targeting of individuals based on their chosen or perceived religious affiliation, as well as the targeting of individuals for their failure to adhere to the religious beliefs or precepts of the perpetrator.⁴⁸⁰

⁴⁷³ International Convention on Elimination of All Forms of Racial Discrimination, adopted in GA Res. 2106 A (XX) of 21 Dec. 1965, entered into force 4 Jan. 1969, article 1. As of 13 Mar. 2007, there were 173 States Parties.

⁴⁷⁴ To date, the OTP has pursued persecution charges based on national grounds in three instances: *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014, paras. 204–205; and *Prosecutor v. Charles Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges Against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014, paras. 122–123; and *Prosecutor v. Simone Gbagbo*, No. ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a Warrant of Arrest Against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 16.

⁴⁷⁵ The term 'ethnicity' was inserted in the English version at the suggestion of Sweden to extend the protection of the Convention to a linguistic group and to a group where race was not 'the dominating characteristic, which might rather be defined by the whole of its traditions and its cultural heritage'. Sweden: Amendment to article II of the draft Convention, E/794, UN Doc. A/C.6/230/Corr.1 (1948).

⁴⁷⁶ See *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, para. 58; *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman*, No. ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 1 May 2007, para. 74; *Prosecutor v. Abdel Raheem Muhammad Hussein*, No. ICC-02/05-01/12-1-Red, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein, Pre-Trial Chamber I, 1 March 2012, para. 11.

⁴⁷⁷ The International Covenant on Economic, Social and Cultural Rights, adopted by GA Res. 2200 A (XXI), 16 Dec. 1966, entered into force 3 Jan. 1976, does not clearly distinguish between the three sets of rights covered, but the cultural rights of parents or guardians to choose schools for their children and 'to ensure the religious and moral education of their children in conformity with their own convictions' are protected by article 13 para. 3 and article 15 guarantees the right to take part in cultural life and to enjoy the benefits of science, literature. Article 1 of the Hague Convention of May 14, 1954, for the Protection of Cultural Property in the Event of Armed Conflict defines cultural property as 'movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above[.]'.

⁴⁷⁸ Oxford's Advanced Learner's Dictionary of Current English 291 (4th ed. 1989).

⁴⁷⁹ See Hum. Rts. Committee, General Comment No. 22 (48) (article 18), UN Doc. CCPR/C/21/Rev.1/Add.4 (1993), para. 5 (right to 'have or adopt' a religion includes the right to have atheistic views).

⁴⁸⁰ To date, the OTP has pursued persecution charges based on religious grounds in three instances: *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014, paras. 204–205; and *Prosecutor v. Charles Blé Goudé*, No. ICC-02/

In light of the definition of gender contained in article 7 para. 3, persecution on the basis of gender could potentially encompass a number of different situations. It could include scenarios where male and female members of the same group are targeted in different ways or for different forms of violence depending on their gender (i. e. killing the men and raping the women). On the one occasion where persecution on the grounds of gender was briefly charged at the ICC, in the context of the *Mbarushimana* case, the Prosecution argued in its article 58 submissions that the FDLR committed acts of torture, rape, inhumane acts and inhuman treatment, against women and men seen to be affiliated with the FARDC on the basis of their gender⁴⁸¹. The Prosecution emphasised that, '[s]exual violence – regardless of the gender of the survivor – in addition to being a violation of individuals based on their gender group membership, is a particularly efficient manner to provoke ostracisation of those violated, to break down communities, and to spread disease...When carried out at the rates reported ... it amounts to sexual violence against the individual that is also persecution on the basis of gender against the collective'⁴⁸². While Pre-Trial Chamber I issued an arrest warrant pursuant to these submissions⁴⁸³, the Prosecution subsequently, and without explanation, cited political affiliation alone as the relevant discriminatory ground in the Document Containing the Charges.⁴⁸⁴ This may certainly be viewed as a missed opportunity to test new ground, however, it is nonetheless clear that gender discrimination under article 7 para. 1(h), could logically be extended to situations where male or female members of a group are targeted on the basis of (or for their failure to comply with) gender roles as understood 'in the context of society', i. e. the killing only of all military age men within a group or the particularly sadistic targeting of female combatants. It is potentially significant, however, that the violent targeting of sexual minorities as a group or collectivity, whether done on the basis of the religious beliefs of the perpetrators or on the basis of the victim's perceived departure from their assigned gender roles (i. e. not behaving as men or women as understood in the context of their society), could satisfy the elements of the crime of persecution as defined in the Rome Statute and the Elements of Crimes.⁴⁸⁵

bbb) Other grounds universally recognised. As will be further explained below (see mn 84 115), persecution under the *Statute* requires discriminatory intent: '... what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights'⁴⁸⁶. In its commentary to the *1996 Draft Code*, the ILC spoke of a denial of human rights and fundamental freedoms to which individuals are entitled without distinction as recognised in the *UN Charter*⁴⁸⁷ and the *ICCPR*⁴⁸⁸.

11-02/11-186, Decision on the Confirmation of Charges Against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014, paras. 122–123; and *Prosecutor v. Simone Gbagbo*, No. ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a Warrant of Arrest Against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 16.

⁴⁸¹ *Prosecutor v. Callixte Mbarushimana*, No. ICC-01/04-01/10-11-Red2, Prosecution's Application Under article 58, Pre-Trial Chamber I, 27 January 2011, para. 7.

⁴⁸² *Prosecutor v. Callixte Mbarushimana*, No. ICC-01/04-01/10-11-Red2, Prosecution's Application Under article 58, Pre-Trial Chamber I, 27 January 2011, para. 97.

⁴⁸³ *Prosecutor v. Callixte Mbarushimana*, No. ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana, Pre-Trial Chamber I, 11 October 2010, para. 27.

⁴⁸⁴ *Prosecutor v. Callixte Mbarushimana*, No. ICC-01/04-01/10-311-AnxA-Red, Document de notification des charges presente par l'Accusation en application de l'article 61-3 du Statut de Rome, Pre-Trial Chamber I, 4 August 2011, paras. 96–105 and p. 47.

⁴⁸⁵ See further, Bohlander, M., 'Criminalising LGBT Persons Under National Criminal Law and article 7(1)(h) and (3) of the ICC Statute', (2014) 5 *Global Policy* 401.

⁴⁸⁶ *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 697.

⁴⁸⁷ Articles 1 para. 3 and 55 (c) of the UN Charter refer to 'race, sex, language or religion'.

⁴⁸⁸ Commentary to the 1996 ILC Draft Code, p. 98, cited by Trial Chamber in *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 697. Article 2 para. 1 of the ICCPR contains an illustrative enumeration of grounds on which distinction may not be made in applying the rights contained in the ICCPR, which includes race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, 'or other status'. The Universal Declaration of Human Rights. prohibits distinction on the same grounds.

- 85 The words ‘universally recognised’ should be understood as ‘widely recognised’, and not within the meaning that all States have to recognize a particular ground as impermissible. The former interpretation is closely in accord with the overall purpose of the *Rome Statute*. Most of the distinctions enumerated in both the *Universal Declaration* and the *ICCPR* can be considered to fall within the scope of ‘other grounds that are universally recognised as impermissible under international law’. In this respect, the *ICCPR* and many of the rights recognised in the *Universal Declaration* can be considered reflective of customary international law. These rights can be directly applied through article 21 para. 1(a) and article 21 para. 3 of the *Statute*.⁴⁸⁹
- 86 ccc) **Connection with acts referred to in this paragraph or crimes within the jurisdiction of the Court.** Persecution must be linked to another act enumerated in article 7 para. 1 (genocide, crimes against humanity, war crimes or aggression). The fourth non-contextual element in the Elements of Crimes simply restates the requirement in paragraph 1 (h), but footnote 22 to this element clarifies that ‘no additional mental element is necessary for this element other than that inherent in element 6 [the second common contextual element concerning knowledge of the attack]’. Article 6 (c) of the *Nuremberg Charter* required that persecution as a crime against humanity be in connection with another crime within the jurisdiction of the Tribunal. This requirement was narrowly interpreted as in connection with a crime against peace or a war crime rather than another crime against humanity, thus, limiting the Tribunal’s jurisdiction in practice mainly to crimes against humanity committed after the outbreak of the Second World War in Europe. With respect to the *Rome Statute*, however, persecution must either be in connection with *any* act referred to in paragraph 1, or any other crime within the Court’s jurisdiction⁴⁹⁰.
- 87 i) **‘Enforced disappearance of persons’.** The crime of enforced disappearance of persons appears to have been invented by Adolf Hitler in his *Nacht und Nebel Erlass* (Night and Fog Decree) issued on 7 December 1941⁴⁹¹. The purpose of this decree was to seize persons in occupied territories ‘endangering German security’ who were not to be immediately executed and make them vanish without a trace into the unknown in Germany⁴⁹². No information was to be given their families as to their fate even when, as often occurred, it was merely a question of the place of burial in the ‘Reich’⁴⁹³. Although enforced disappearances were not expressly included in the *Nuremberg Charter*, Field Marshal Keitel was convicted of carrying out such enforced disappearances, although the judgment did not expressly state whether it was a war crime, a crime against humanity or both⁴⁹⁴. However, lawyers involved in drafting the decrees and regulations implementing the *Nacht und Nebel Erlass* and in carrying them out were

⁴⁸⁹ See also the New York Draft, UN Doc. A/CONF.183/2/Add.2 (1998), which mentions ‘other similar grounds’ which includes, for example, social, economic and mental or physical disability grounds’, Preparatory Committee Draft, p. 26.

⁴⁹⁰ See Ambos, *Treatise on ICL II* (2014) 105.

⁴⁹¹ Hitler is known to have admired Stalin’s reign of terror and use of secret arrests and these secret arrests may have been an inspiration for the Night and Fog Decree. See also Ambos, *Treatise on ICL II* (2014) with fn. 479.

⁴⁹² For a description of the origin and implementation of this decree, see Bédarida, in: Amnesty International France, *Les Disparitions* (1994).

⁴⁹³ Shirer, *The Rise and Fall of the Third Reich* (1959) 1139. The text of the decree is reproduced in XI *Trials Of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (Nuremberg, Oct. 1946–Apr. 1949) 527–528 (Washington, D.C. 1949–1953). As Field Marshal Wilhelm Keitel reported Hitler’s purpose, ‘Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal’. Quoted in: the Nuremberg Judgment. A subsequent order issued by Field Marshal Wilhelm Keitel in February 1942 to implement Hitler’s decree provided that in cases where the death penalty was not carried out within eight days of a person’s arrest, ‘The prisoners are to be transported to Germany secretly .. these measures will have a deterrent effect because (a) the prisoners will vanish without leaving a trace. (b) no information may be given as to their whereabouts or their fate’. Quoted in: Shirer, *The rise and the Fall of the Third Reich* (1959)1140.

⁴⁹⁴ Nuremberg Judgment, 1 Oct. 1946 in: (1947) 41 *AJIL* 172, 88; Clark, in: Politi and Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 75, 87.

convicted of both crimes against humanity and war crimes⁴⁹⁵. The central elements of this crime are that a person is deprived of liberty and in the course of that deprivation of liberty deprived of the protection of the law by the refusal to acknowledge the deprivation of liberty or to provide information concerning that person's fate or whereabouts. The essence is thus the uncertainty of others, friends and family, thereby rendering those persons special victims in addition to the disappeared person him or herself who is the direct victim of this crime⁴⁹⁶. It has also been argued that the state-sponsored nature is the characterizing feature of enforced disappearance, which differentiates it from other crimes and adds to its gravity⁴⁹⁷.)

There was a resurgence in the use of enforced disappearances in Guatemala in the 1950s, in Cyprus during the fighting in 1963–1964 and during the Turkish invasion in 1974 and in Argentina, Brazil, Chile, Uruguay and other countries in Latin America in the 1970s and 1980s⁴⁹⁸. As a result, there were a number of important efforts by non-governmental organisations to persuade UN and Organisation of American States (OAS) bodies to respond and to adopt treaties based on drafts prepared by non-governmental organisations that defined enforced disappearances both as a human rights violation and as a crime against humanity⁴⁹⁹. For a quarter century, non-governmental organisations, OAS and UN bodies have been developing mutually reinforcing standards defining enforced disappearance as a human rights violation and characterizing it as a crime against humanity.

After intense lobbying by non-governmental organisations to persuade the UN Commission on Human Rights to take effective action in response to 'disappearances' in Argentina failed, they were able to persuade the Commission to establish the Working Group on Enforced or Involuntary Disappearances 'to examine questions relevant to enforced or involuntary disappearances of persons'⁵⁰⁰. In the course of its work, it adopted a working definition of enforced disappearances as a human rights violation, with three elements:

- (a) Deprivation of liberty against the will of the person concerned;
- (b) Involvement of government officials, at least indirectly by acquiescence;
- (c) Refusal to acknowledge the detention and to disclose the fate and whereabouts of the person concerned⁵⁰¹.

In 1981, the Institut des droits de l'homme du Barreau de Paris (Human Rights Institute of the Paris Bar Association) held a colloquium which adopted a draft convention declaring that 'the expression forced or involuntary disappearance applies to any action or deed capable of undermining the physical, psychological or moral integrity or security of any person' and

⁴⁹⁵ *U.S. v. Altstötter (Justice Trial)*, Judgment, U.S. Mil. Trib., Nuremberg, Germany, 4 December 1947, 4 LRTWC 1 (1948).

⁴⁹⁶ Cryer et al., *Introduction ICL* (2014) 260.

⁴⁹⁷ Giorgou (2013) 11 *JICJ* 1004.

⁴⁹⁸ Sadly, there has been a second resurgence in the practice of enforced disappearances in other countries in recent years, albeit usually on a smaller scale. See, for example, Amnesty International, *United States of America/Jordan/Yemen – Torture and secret detention: Testimony of the 'disappeared' in the 'war on terror'* (AI Index: AMR 51/108/2005, 4 Aug. 2005); Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Alleged secret detentions in Council of Europe member states*, Information Memorandum II, Rapporteur: Mr Dick Marty, AS/Jur (2006) 03 rev, 22 Jan. 2006; Report by Christos Pourgourides, *Enforced Disappearances* (Council of Europe Disappearances Report), Council of Europe, Parl. Ass., Doc. 10679, 19 Sep. 2005, paras. 14–19 (discussing enforced disappearances in Azerbaijan, Belarus, Turkey, Russia [Chechen Republic] and Ukraine); Amnesty International, *URGENT ACTION (Sri Lanka) – 'Disappearance'/fear of torture or ill-treatment/health concern: Professor Sivasubramaniam Raveendranath (m)*, AI Index: ASA 37/035/2006, 20 Dec. 2006.

⁴⁹⁹ For the history of these initiatives, see Brody (1990) 8 *NQHR* 381; Tayler (2001) no. 62–63 *ICJRev.*, 63; Currat, *Les Crimes Contre L'Humanité dans le Statut de la Cour Pénale Internationale* (2006) 476–506.

⁵⁰⁰ E.S.C. Res. 20, 36 UNESCOR Supp. (No. 3) at 180, para. 1, UN DocE/CN.4/1408 (1980). For the background to the establishment of the Working Group, see Guest, *Behind the Disappearances: Argentina's Dirty War Against Human Rights and the United Nations* (1990); Kramer and Weissbrodt (1981) 3 *HumRQ* 18; Rodley (1986) 8 *HumRQ* 700.

⁵⁰¹ Working Group on Enforced or Involuntary Disappearances, General Comment on article 4 of the Declaration, UN DocE/CN.4/1996/38, 15 Jan. 1996, para. 55.

affirming that ‘the practice of ‘forced or involuntary disappearances’ constitutes a crime against humanity⁵⁰². In the same year, an Argentine human rights organisation also prepared a draft convention⁵⁰³.

In 1982, the Latin American Federation of Associations for Relatives of the Detained-Disappeared (FEDEFAM) adopted a draft convention at its annual meeting in Peru modeled on the Convention for the Prevention and Punishment of the Crime of Genocide, which stated that ‘the forced disappearance of persons constitutes a crime against humanity’, and envisaged trials for this crime in an international criminal court⁵⁰⁴. In a resolution adopted on 17 November 1983, the General Assembly of the Organisation of American States (OAS) declared that ‘the practice of the forced disappearance of persons in the Americas ... constitutes a crime against humanity⁵⁰⁵.

In 1986, the First Colloquium on Forced Disappearances in Colombia hosted by the José Alvear Restrepo Lawyers Collective of Bogotá adopted a draft convention declaring that ‘forced or involuntary disappearances of persons constitute crimes against humanity, which States must undertake to prevent and punish without exceptions of any kind’, that was sent to the UN Working Group on Enforced or Involuntary Disappearances⁵⁰⁶. In 1988, FEDEFAM and the Grupo de Iniciativa (an organisation of Argentine non-governmental organisations) organised an international conference in Buenos Aires that led to a new draft convention that built upon all the previous drafts and in the same year the Inter-American Commission on Human Rights began drafting a regional convention⁵⁰⁷.

Also in the same year, Louis Joinet, a French expert in the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, published a draft UN declaration, that was adopted four years later⁵⁰⁸. In the Preamble of the 1992 *UN Declaration on the Protection of All Persons from Enforced Disappearance*, the UN General Assembly declared that ‘the systematic practice of such acts is of the nature of a crime against humanity⁵⁰⁹. In words which echo those of Keitel, the *UN Declaration* defines this crime in its reference to enforced disappearances

‘in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organised groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law’⁵¹⁰.

Parallel with these developments in the UN, the OAS General Assembly asked the Inter-American Commission on Human Rights in 1987 to begin drafting a convention. The final version, which was adopted seven years later, was largely the work of Juan Mendez, a former Amnesty International prisoner of conscience who had been ‘disappeared’ in Argentina, and after he ‘reappeared’ became a member of the Commission. On 10 June 1994, the OAS General Assembly adopted the Inter-American Convention on the Forced Disappearance of

⁵⁰² *Le Refus de L'Oubli: la Politique de Disparition Force, Colloque, Jan./Fev. 1981*, 313 (English text quoted in: Tayler (2001) no. 62–63 *ICJRev.*, 65 and 86.

⁵⁰³ *Projet de la Ligue argentine des droits de l'homme*, in: *id.*

⁵⁰⁴ Tayler (2001) no. 62–63 *ICJRev.*, 65–66, 68.

⁵⁰⁵ Res. 666 (XIII-0/83) in Annual Report of the Inter-American Commission on Human Rights.

⁵⁰⁶ Tayler (2001) no. 62–63 *ICJRev.*, 66, 68.

⁵⁰⁷ Baigun (1988) *Colloquium of Buenos Aires* 343. Tayler (2001) no. 62–63 *ICJRev.*, 66.

⁵⁰⁸ UN DocE/CN.4/Sub.2/1988/17.

⁵⁰⁹ GA Res. 47/133 (1992), Preamble. The UN Working Group on Enforced or Involuntary Disappearances has reached the same conclusion. Report of the Working Group on Enforced or Involuntary Disappearances, UN DocE/CN.4/1995/36 (1994), para. 45.

⁵¹⁰ UN Declaration on the Protection of All Persons from Enforced or Involuntary Disappearance, UN DocE/CN.4/1995/36 (1994), Preamble.

Persons, which reaffirms that ‘the systematic practice of the forced disappearance of persons constitutes a crime against humanity’⁵¹¹.

In 1996, the ILC included ‘forced disappearance of persons’ as a crime against humanity in article 18 (i) of the *1996 Draft Code*. It explained that this term was ‘used as a term of art to refer to the type of criminal conduct which is addressed in the [UN] Declaration and the [Inter- American] Convention’ and that although the crime had not been expressly included in some earlier instruments, it was a crime against humanity ‘because of its extreme cruelty and gravity’⁵¹². There was considerable initial opposition to including this crime against humanity in the Rome Statute, but it was overcome by strong support from countries in Latin America which had recently suffered greatly from this crime. However, there was considerable controversy over its definition⁵¹³. Since the inclusion of this crime in the Rome Statute, it has also been expressly recognised as a crime against humanity with the same definition in the instrument establishing the Special Panels for Serious Crimes within the District Court of Dili, East Timor⁵¹⁴.

Four weeks after the Rome Diplomatic Conference ended, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities adopted a draft convention prepared by Louis Joinet, based on the 1992 UN Declaration⁵¹⁵. An inter-sessional Working Group established by the UN Commission on Human Rights in 2001 began drafting at its first meeting in January 2003 a ‘legally binding normative instrument for the protection of all persons from enforced disappearances’ for consideration and adoption by the UN General Assembly. It completed its work in September 2005 when it adopted the International Convention for the Protection of All Persons from Enforced Disappearance (Disappearances

⁵¹¹ Inter-American Convention on the Forced Disappearance of Persons, Preamble, adopted on 9 June 1994 in Belém do Pará, Brazil, at the 24th regular session of the OAS General Assembly. The Convention entered into force on 29 Mar. 1996. Article II defines the crime:

‘For the purpose of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorisation, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees’.

⁵¹² 1996 ILC Draft Code, p. 102.

⁵¹³ Enforced disappearances were not included in any of the lists of crimes against humanity in the 1996 Preparatory Committee’s compilation of proposals. However, in February 1997, the Preparatory Committee list of crimes in the article on crimes against humanity included ‘enforced disappearances’, with two options in the explanatory second paragraph (a fn. said that ‘[i]t was suggested that some more time was needed to reflect upon the inclusion of this subparagraph’). The first option stated:

‘[“enforced disappearance of persons” means when persons are arrested, detained or abducted against their will by or with the authorisation, support or acquiescence of the State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, thereby placing them outside the protection of the law]’.

Preparatory Committee Decisions Feb. 1997, p. 5. The second, awkwardly worded, option would have made the definition the same as in the 1994 Inter-American Convention on the Forced Disappearance of Persons, ‘as referred to in the Declaration on the Protection of All Persons from Enforced Disappearance’ of 1992, leaving it unclear whether these were alternative formulations.

The same wording as in the February 1997 Report was included in the first paragraph of article 5 [20] of the Zutphen Draft, with the first option (the second had been deleted) as in the Preparatory Committee Decisions Feb. 1997 in the second paragraph, and this wording remained unchanged in article 5 of the New York Draft, UN DocA/CONF.183/2/Add.2 (1998).

⁵¹⁴ UNTAET Regulation 2000/15, Section 5.1 (i) and 5.2 (h). In contrast, enforced disappearances were omitted from the list of crimes against humanity, the Cambodia Extraordinary Chambers Law, reflecting the restrictive conception of an early US proposal about what conduct amounted to a crime against humanity in period over which the Extraordinary Chambers would have jurisdiction (17 Apr. 1975–6 Jan. 1979). Enforced disappearances were also omitted from the list in the Sierra Leone Statute, reflecting a similarly conservative view of the UN Office of Legal Affairs with regard to that court’s temporal jurisdiction (the period since 30 Nov. 1996), despite the adoption earlier that year by the ILC of its Draft Code including this crime.

⁵¹⁵ Draft International Convention on the Protection of All Persons from Forced Disappearance, UN DocE/CN.4/Sub.2/1998/19, Annex, 19 Aug. 1998.

Convention)⁵¹⁶. The UN General Assembly adopted the Disappearances Convention by consensus on 20 December 2006⁵¹⁷. On 6 February 2007, 57 States signed the Disappearances Convention in Paris. In the Preamble, the states parties declare that they are '[a]ware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity'⁵¹⁸. Article 5 states: 'The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law'⁵¹⁹. The minimalist approach in the first part of the sentence is counter-balanced by the saving clause in the second, which qualifies it by making it clear that the meaning of the term in the Convention is 'as defined in applicable international law', which contains no such limitation, and by the Preamble's recognition of the circumstances when an enforced disappearance constitutes a crime against humanity. Therefore, nothing in the Convention can be read as restricting the scope of the definition of an enforced disappearance in international law. Under well-established law, reflected in the jurisprudence of the ICTY and ICTR and in UNTAET Regulation 2000/15, establishing the Special Panel for Serious Crimes in East Timor, and in article 7 of the Rome Statute, even a *single case* of enforced disappearance is a crime against humanity when committed *as part of* a widespread or systematic attack on a civilian population; enforced disappearances do not themselves have to be carried out on a widespread or systematic basis⁵²⁰.

Article 2 of the Disappearances Convention contains the following definition:

'For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law'⁵²¹.

- 90 The ICTY and ICTR have not issued any judgments concerning enforced disappearances. However, two ICTY judgments have stated in *dicta* that enforced disappearances are crimes against humanity⁵²². There is a considerable body of interpretation by the Human Rights

⁵¹⁶ I Convention for the Protection of All Persons from Enforced Disappearance (UN Draft Convention on Disappearance), UN Doc/E/CN.4/2005/WG.22/WP.1/REV.4, 23 Sep. 2005 (*Translated from French*), the new UN Hum. Rts. Council adopted the Convention at its first regular session and recommended that it be sent to ECOSOC, with a recommendation that it be adopted by the GA later that year.

⁵¹⁷ UNGA Res. A/RES/61/177, 20 Dec. 2006.

⁵¹⁸ UNGA Res. A/RES/61/177, 20 Dec. 2006, Disappearances Convention, Preamble.

⁵¹⁹ *Id.*, article 5. This wording, incorporating language from the Preamble to the 1992 UN Declaration, was introduced as a Presidency proposal on 16 Feb. 2005, International Instrument for the Protection of all Persons from Enforced Disappearances, Presidency proposal, 16 Feb. 2005, UN Doc. E/CN.4/2005/WG.22/MIS-C.15.REV.2, despite criticism by Amnesty International that the first part of the sentence did not include enforced disappearances which are part of a widespread or systematic attack on a civilian population involving other prohibited acts, but not necessarily widespread or systematic themselves.

⁵²⁰ Although not all enforced disappearances have been committed on a widespread or systematic basis, since their invention more than half a century ago, they have almost invariably been committed as part of a widespread or systematic attack on a civilian population involving other crimes against humanity such as extrajudicial executions (murder) and torture.

⁵²¹ *Id.*, article 2. The text is virtually identical to that in article 1 of the 16 Feb. 2005 Presidency proposal.

⁵²² *Prosecutor v. Kvočka*, No. IT-95-30/1-T, Judgement, Trial Chamber, 2 November 2001, p. 208; (citing *Kupreskić*), *Prosecutor v. Kvočka*, No. I-98-30/1-A, Judgment, Appeals Chamber, 28 February 2005; *Prosecutor v. Kupreskić*, No. IT-95-16-T, Judgement, Trial Chamber, 4 January 2000, para. 566 (*dicta*), *Prosecutor v. Kupreskić*, No. IT-95-16-A, Judgment, Appeals Chamber, 23 October 2001. However, in *Kupreskić*, the Trial Chamber imposed a threshold for determining the existence of an inhumane act under article 5 of the ICTY Statute, that is not an element of the crime of enforced disappearance under customary international law and is not a requirement under other ICTY jurisprudence (see mn 7–10): that they 'must be carried out in a systematic manner and on a large-scale'. In addition, two decisions of the Special Panels for Serious Crimes, Dili, East Timor, have addressed the questions of enforced disappearance as a crime against humanity, but they are of limited utility. One enunciated a series of elements of the crime that have no basis in international law, such as a requirement that the initial detention had to be illegal, that the perpetrator must refuse both to acknowledge the

Committee and jurisprudence in the Inter-American Court of Human Rights, the European Court of Human Rights and the Human Rights Chamber of Bosnia and Herzegovina identifying the human rights violated in individual cases of enforced disappearance⁵²³. A number of national courts have recognised enforced disappearances as crimes under international law.⁵²⁴ States began defining enforced disappearances as crimes under their own law before 1998 and are now defining it when implementing the Rome Statute in national criminal codes as crimes against humanity⁵²⁵.

arrest, detention or abduction and refuse to give information and that the perpetrator have intended to remove the victim from the protection of the law. See *Prosecutor v. Maubere*, No. 23/2003, Judgment, SPSC, 5 July 2004, p. 14.

⁵²³ Hum. Rts. Committee: See, for example, *Bleier v. Uruguay*, No. 30/1978, 29 March 1982, *Report of the Hum. Rts. Committee*, UN GA OR, 37th Sess., Supp. (No. 40), Annex X; *Quinteros v. Uruguay*, No. 107/1981, 17 September 1981, *Report of the Hum. Rts. Committee*, UN GA OR, 38th Sess., Supp. (No. 40), Annex XXII; *Celis Laureano v. Peru*, No. 540/1993, UN Doc.CCPR/C/56/D/540/1993 (1996). Inter-American Court of Hum. Rts.: *Durand v. Peru*, Nos. 10.009 and 10.078/1987, Judgment, 16 Aug. 2000; *Trujillo Oroza v. Bolivia*, Judgment, 26 Jan. 2000; *Bamaca Velasquez v. Guatemala*, No. 11.129/1993, Judgment, 25 Nov. 2000; *Villigran Morales v. Guatemala*, No. 11.383/1994, 19 Nov. 1999; *Caracazo v. Venezuela*, Judgment, 11 Nov. 1999; *Blake v. Guatemala*, No. 11.219/1993, Judgment, 24 Jan. 1998; *Caballero-Delgado v. Colombia*, No. 10.319/1989, 8 Dec. 1995; *Gondinez Cruz v. Honduras*, No. 8097/1982, Judgment, 20 Jan. 1989; *Velásquez Rodríguez v. Honduras*, No. 7920/1981, Judgment, 29 July 1988. ECtHR: *Cyprus v. Turkey*, Application No. 25781/94, Judgment, 10 May 2001; *Cicek v. Turkey*, Application No. 25704/94, Judgment, 27 Feb. 2001; *Tas v. Turkey*, Application No. 24396/94, Judgment, 14 Nov. 2000; *Kaya v. Turkey*, Application No. 22535/93, Judgment, 28 Mar. 2000; *Kurt v. Turkey*, Application No. 24276/94, Judgment, 25 May 1998. Hum. Rts. Chamber for Bosnia and Herzegovina: *Palić v. Republika Srpska*, No. CH/99/3196, Decision on Admissibility and Merits, 11 Jan. 2001.

⁵²⁴ Argentina: *Riveros* case, Cámara Nacional en lo Criminal y Correccional Federal de la Capital, Sala I, 7 Aug. 2003; *Simón, Julio Héctor y otros s/privación ilegítima de la libertad*, Case N° 17.768, Corte Suprema de Justicia de la Nación, 14 June 2005 (Judge Carlos Fayt, dissenting); Chile: Case Rol N\ho 24.471-2005, Sala Quinta de la Corte de Apelaciones de Santiago, 20 Apr. 2006; Case Rol N\ho 11.821-2003; Sala Quinta de la Corte de Apelaciones de Santiago, 5 Jan. 2004; Panamá: *Heliodoro Portugal* case, Corte Suprema de Justicia, Sala Segunda de lo Penal, 2 Mar. 2004; Perú: *Gabriel Orlando Vera Navarrete* case, Exp.N.º2488-2002- HC/TC, Tribunal Constitucional, 9 Dec. 2004; *Genaro Villegas Namuche* case, Exp.N.º2488-2002- HC/TC, Tribunal Constitucional, 18 Mar. 2004; United States: *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1998) ('[T]he submitted materials are sufficient to establish the existence of a universal and obligatory international proscription of the tort of "causing disappearance" (vacating a previous decision to the contrary). See on the Latin-American legislation also Ambos, ed., *Desaparición Forzada* (2009).

⁵²⁵ Armenia: Criminal Code, article 392 ('kidnapping followed by disappearance'); Australia: International Criminal Courts (Consequential Amendments) Act 2002, No. 42, 2002, Section 268.21 (using Elements of Crimes definition); Belgium: Loi relative aux violations graves du droit international humanitaire, 5 août 2003, article 7, adding article 136ter alinea 9° to the Code Pénal (Rome Statute definition); Bosnia and Herzegovina: Criminal Code, Official Gazette of Bosnia and Herzegovina, 3/03, article 172 (1) (i); Canada: Crimes against Humanity and War Crimes Act, sections 4 (1) (b) & 6 (1) (b); Colombia: Law 589 of 6 July 2000, articles 165 and 166 of the Penal Code; Costa Rica: Law 8272, article 2 (amending Penal Code article 379); Croatia: Decision on The Proclamation of the Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against the International Law on War and Humanitarian Law, No. 01-081-03-3537/2, Zagreb, 24 Oct. 2003, article 1; Cyprus: Law No. 23 (III)/2006, Law amending the Rome Statute for the establishment of the International Criminal Court (Ratification) Law of 2006, Sections 2 & 3; El Salvador: Penal Code, articles 364–366 (1997); Ethiopia: Penal Code, article 281; Guatemala: Decree No. 48–95 of 1995 (Penal Code, article 201 TER); Ireland: International Criminal Court Act 2006, Sections 7 (1) and 9 (1); Mali: Code pénal, Loi N° 01–079 du 20 Août 2001, article 29 (i); Malta: International Criminal Court Act, XXIV 2002, 13 Dec. 2003, section 2; Paraguay: Penal Code, article 236; Peru: Penal Code, article 320; Republic of the Congo: Loi N° 8–98 du 31 octobre 1998: portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité, article 6 (i) et (k); South Africa: Implementation of the International Criminal Court Act, 2002, Sections 1 (vii) and 4 (1) and Schedule I; Trinidad and Tobago: International Criminal Court Act, 2006, Section 10 (2) (i); United Kingdom: International Criminal Court Act, 2001, Sections 50, 51 and 58; Venezuela: Penal Code, article 181-A.

In addition, draft laws in many countries define enforced disappearances as a crime against humanity under national law, including: Bénin: Avant projet de mise en œuvre du statut de la Cour Pénale Internationale au Bénin, article 16 (i) ('disparitions forcées de personnes'); Bolivia: Anteproyecto de Ley de Implementación del Estatuto de Roma de la Corte Penal Internacional, article 31; Central African Republic: République centrafricaine: projet de loi modifiant le code penal, Loi N\ho .. modifiant et complétant les dispositions du Code Pénal Centrafricain, article 52; Democratic Republic of the Congo: Loi modifiant et complétant certaines dispositions du code penale, du code d'organisation et de la compétence judiciaires, du code penal militaire et du code judiciaire militaire, en application du statut de la cour penale internationale, article 10 (adding article 222 alinea 7

For the definition of enforced disappearances, see mn 128.

- 92 j) ‘The crime of apartheid’. The legal system of *apartheid* (‘separateness’ or ‘apartness’)⁵²⁶ was instituted in South Africa as state policy after the Nationalist Party formed a government in May 1948, although many of the racially discriminatory practices which constituted *apartheid* had been practiced for many decades before in South Africa and in other countries, such as Nazi Germany, beginning with the Nuremberg Laws, and the United States, which institutionalised segregation in a substantial number of states, Federal districts and the armed forces for nearly a century. The South African legal system imposed rigid segregation of races in housing, education, medical care, employment and virtually every area of public and private life and in practice involved both systematic and widespread violations of human rights.
- 93 *Apartheid* was repeatedly condemned by the UN General Assembly and, beginning at least as early as 1965, characterised as a ‘crime against humanity’⁵²⁷. The *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, adopted by the General Assembly in 1968, defined crimes against humanity as including ‘inhuman acts resulting from the policy of *apartheid*’⁵²⁸. The UN Security Council called *apartheid* ‘a crime against the conscience and dignity of mankind’ in response to the Soweto Uprising in 1976⁵²⁹. It endorsed the specific characterisation of *apartheid* as a crime against humanity in 1984.⁵³⁰ Moreover, the Council repeatedly declared that *apartheid* was a crime that disturbed international peace and security, a finding which suggests that the Security Council might be willing to refer a situation involving ‘the crime of apartheid’ to the Prosecutor pursuant to article 13 (b) of the *Statute*⁵³¹. In 1971, the International Court of Justice held that the General Assembly was justified in terminating South Africa’s mandate over South West Africa (Namibia), in part because of the imposition of *apartheid* in that territory⁵³². In 1973, the General Assembly adopted the *International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)*, in which the States Parties declared under article I that *apartheid* was ‘a crime against humanity’⁵³³.
- 94 Four years later in Geneva, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts adopted *Protocol I*

in Titre IX to Livre II of Code pénal); France: Projet de loi portant adaptation du droit pénal à l’institution de la Cour pénale internationale, N° 3271, article 2 (amending article 212–1 of the Code pénale); Kenya: International Crimes Bill 2006, section 6 (1) (b); Uganda: International Criminal Court Bill, Bill No. 18 (2006), Section 8.

⁵²⁶ Dugard, *Human Rights and the South African Legal Order*, Vol. V. (1978).

⁵²⁷ GA Res. 2054 (XX), 20 UN GA OR, Supp. No. 14, UN Doc. A/6014 (15 Dec. 1965), pp. 16–18; GA Res 2074 (XX), 20 UN GA OR, Supp. No. 14, UN Doc A/6014 (17 Dec. 1965), pp. 60–61; GA Res 2202 (XXI), 21 UN GA OR, Supp. No. 21, UN DocA/6316 (16 Dec. 1966), pp. 20–21; GA Res 2307 (XXII), 22 UN GA OR, Supp. No. 16, UN DocA/6716 (13 Dec. 1967), pp. 19–20; GA Res 2396 (XXIII), 23 UN GA OR, Supp. No. 18, UN DocA/7218 (2 Dec. 1968), pp. 19–21; GA Res 2671 F (XXV), 25 UN GA OR, Supp. No. 28, UN DocA/8028 (8 Dec. 1970), pp. 31–34; GA Res 2775 E (XXVI), UN GA OR, Supp. No. 29, UN Doc. A/8429 (29 Nov. 1971), pp. 40–47.

⁵²⁸ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted and opened for signature, ratification and accession by GA Res. 2391 (XXIII) of 26 Nov. 1968, article I (b).

⁵²⁹ SC Res 392 (1976).

⁵³⁰ SC Res 556 (1984).

⁵³¹ See, e.g., SC Res 282, 25 UNSCOR at 12 (1970); SC Res 311, 27 UNSCOR at 10 (1972); SC Res 392, 31 UNSCOR at 11, UN Docs/INF/32 (1976) (reaffirming that ‘the policy of *apartheid* is a crime against the conscience and dignity of mankind and seriously disturbs international peace and security’).

⁵³² Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Res. 276 (1970), (1971) ICJ Rep. 16, 57.

⁵³³ Adopted and opened for signature and ratification in GA Res 3068 (XXVIII), 30 Nov. 1973. Article II of that convention defines *apartheid* as follows:

‘For the purpose of the present Convention, the term ‘the crime of *apartheid*’, which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
- (i) By murder of members of a racial group or groups;

to the Geneva Conventions of 1949, which made 'practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination' grave breaches of that instrument, 'when committed willfully and in violation of the Conventions or the Protocol'⁵³⁴. In spite of these codification efforts, the crime of apartheid was omitted from the 1993 ICTY Statute and the 1994 ICTR Statute, possibly based on the view that the persecution in the former Yugoslavia, involving large-scale deportation and forced transfer of population, and in Rwanda, involving genocide, primarily through murder and rape on an enormous scale, was of a different nature than *apartheid* as practiced in South Africa and, therefore, that including this crime was not necessary⁵³⁵. In 1996, the ILC's 1996 *Draft Code* extended the concept of *apartheid* by defining certain types of institutionalised discrimination on racial, ethnic or religious grounds as a crime against humanity⁵³⁶. Despite this long history of international condemnation, inclusion of this crime in the *Rome Statute* was a remarkable achievement, given the long-standing reluctance of Western governments to ratify the *Apartheid Convention*. Indeed, it was only as a result of the intervention by the multiracial South African delegation in Rome 'with the unassailable oral authority of its own painful national experience' leading 'a coalition of sub-Saharan African States to insist that the crime of apartheid be included in its own right in article 7's list of specific acts' that helped to overcome this Western reluctance to include it in the Rome Statute⁵³⁷. It has subsequently been included as a crime against humanity in the regulation establishing the Special Panels for Serious Crimes of the District Court of Dili, East Timor⁵³⁸. States are now defining the

-
- (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
 - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
 - (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
 - (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognised trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
 - (d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
 - (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
 - (f) Persecution of organisations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*'.

⁵³⁴ Add. Prot. I (1977), article 85 para. 4 (c). Article 8 of the Rome Statute does not give the Court jurisdiction over this war crime.

⁵³⁵ The war crime of *apartheid* was not expressly mentioned in the 1993 ICTY Statute, despite an appeal to do so by the International Committee of the Red Cross. Some Preliminary Remarks by the International Committee of the Red Cross on the Setting-Up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia (United Nations Security Council Res. 808 (1993) Adopted on 22 Feb. 1993), DDM/JUR/422 b, 25 Mar. 1993.

⁵³⁶ 'A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group: ... (f) institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population' [...] 1996 ILC Draft Code, article 18 (f). The ILC Commentary on this provision noted that racial discrimination had been characterised as a crime against humanity in the *Apartheid Convention*.

⁵³⁷ McCormack, in: McCormack *et al.* (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 198–199. This crime had not been included in any of the lists of crimes against humanity published by the *Ad Hoc* Committee or the Preparatory Committee.

⁵³⁸ UNTAET Reg. 2000/15, Sections 5.1 (j) and 5.2 (g). In contrast, *apartheid* was omitted from the list of crimes against humanity in the Cambodia Extraordinary Chambers Law, reflecting the restrictive conception of

crime of apartheid as a crime against humanity under national law⁵³⁹. These States have also often recognised the crime of apartheid as a war crime when committed in international armed conflict⁵⁴⁰.

The *Apartheid* Convention was drafted in response to South Africa's policy of racial discrimination. It had as its immediate purpose to coerce the South African government to terminate its discriminatory policies and practices⁵⁴¹. Despite this *ad hoc* background and the reference in article 1 of the Convention to 'similar policies and practices of racial segregation and discrimination as practices in southern Africa', the argument has been presented that the Convention's territorial scope of application is not confined to past southern African situations and that it has more generic potential⁵⁴².

Different opinions exist as regards the customary law status of *apartheid* as a crime against humanity⁵⁴³. Notable in this discussion is the distinction that Dugard and Reynolds draw between the prohibition of *apartheid* which is directed at states and has established itself as a rule of customary international law and the crime of *apartheid* which is directed at individuals and which moves towards customary status but may not have acquired that

an early US proposal about what conduct amounted to a crime against humanity in period over which the Extraordinary Chambers would have jurisdiction (17 Apr. 1975–6 Jan. 1979). Ironically, the United Nations received an instrument of accession from the representative of the Democratic Republic of Kampuchea on 28 July 1981, although the Khmer Rouge government had been overthrown two years earlier. This crime was also omitted from the list in the Sierra Leone Statute, reflecting a similarly conservative view of the UN Office of Legal Affairs with regard to that court's temporal jurisdiction (the period since 30 Nov. 1996), despite the adoption earlier that year by the ILC of its Draft Code including this crime.

⁵³⁹ States that have included the crime of apartheid in their criminal law include: Belgium: *Loi relative aux violations graves du droit international humanitaire*, 5 août 2003, article 7, adding article 136ter alinea 10° to the Code Pénal (Rome Statute definition); Bosnia and Herzegovina: Criminal Code, Official Gazette of Bosnia and Herzegovina, 3/03, article 172 para. 1 (j); Canada: Crimes against Humanity and War Crimes Act, sections 4 para. 1 (b) and 6 para. 1 (b); Colombia: Law 589 of 6 July 2000, articles 165 and 166 of the Penal Code; Costa Rica: Law 8272, article 2 (amending Penal Code article 379); Croatia: Decision on The Proclamation of the Law on the Application of the Statute of the ICC and on the Prosecution of Criminal Acts against the International Law on War and Humanitarian Law, No. 01-081-03-3537/2, Zagreb, 24 Oct. 2003, article 1; Georgia: Law on Amendments to the Criminal Code of Georgia, article 1 (5) (amending article 408 of the Criminal Code); Ireland: International Criminal Court Act 2006, Sections 7 para. 1 and 9 para. 1; Mali: Code pénal, Loi N° 01-079 du 20 Août 2001, article 29 (i); Malta: International Criminal Court Act, XXIV 2002, 13 Dec. 2003, Section 2; South Africa: Implementation of the International Criminal Court Act, 2002, Sections 1 (vii) and 4 para. 1 and Schedule I; Trinidad and Tobago: International Criminal Court Act, 2006, Section 10 para. 2 (j); United Kingdom: International Criminal Court Act, 2001, Sections 50, 51 and 58.

In addition, a number of States have included the crime of apartheid in draft legislation, including: Bénin: *Avant projet de mise en œuvre du statut de la Cour Pénale Internationale au Bénin*, article 16 (j) ('disparitions forcées de personnes'); Bolivia: *Anteproyecto de Ley de Implementación del Estatuto de Roma de la Corte Penal Internacional*, article 30; Central African Republic: *République centrafricaine: projet de loi modifiant le code pénal*, Loi N° 01-079 du 20 Août 2001, article 29 (i); Democratic Republic of the Congo: *Loi modifiant et complétant certaines dispositions du code pénale, du code d'organisation et de la compétence judiciaires, du code pénal militaire et du code judiciaire militaire, en application du statut de la cour pénale internationale*, article 10 (adding article 222 alinea 7 in Titre IX to Livre II of Code pénal); France: *Projet de loi portant adaptation du droit pénal à l'institution de la Cour pénale internationale*, N° 3271, article 2 (amending article 212-1 of the Code pénale) (segregation); Kenya: *International Crimes Bill 2006*, section 6 (1) (b).

⁵⁴⁰ See Add. Prot. I (1977), article 85 para. 4 (c) (defining '[p]ractices of *apartheid* as a war crime').

⁵⁴¹ Dugard, in: Ascencio et al. (eds.), *Droit International Pénal* (2012) 197.

⁵⁴² Dugard in: Ascencio et al. (eds.), *Droit International Pénal* (2012) 199, and Clark, in: Bassiouni (ed.), *International Criminal Law: Vol. I – Sources, Subjects and Contents* (2014) 603, but contra with reference to the *travaux préparatoires*, Eden (2014) 12 *J. I. C. L.* 171, 177–178.

⁵⁴³ The abovementioned reluctance of Western States to ratify the *Apartheid* Convention, together with lack of clarity of the definition and lack of actual prosecutions leads a number of scholars to present the claim even after the adoption of the Rome Statute that apartheid as a crime against humanity finds no basis in customary international law. See Tomuschat (2005) 71 *InstILYb* 213, 238 ('*Apartheid*, to take the most controversial offence, was not recognised in the past as a crime against humanity by Western nations'), 244–246, 246 ('Therefore, on the basis of the available practice, it would be hard to conclude that a rule exists under general international law which establishes *apartheid* as a crime against humanity') (fn. citing Rosalyn Higgins and Christian Tomuschat omitted); 268 (Yoram Dinstein); 279 (M. Mohammed Bennouna); 320 (Christos L. Rozakis); 325 (Antonio Cassese). Also see Bultz (2013) 24 *CLF* 205; Eden (2014) 12 *JICL* 171.

status as yet⁵⁴⁴. The question of the customary status of *apartheid* gains in relevance if crimes linked to policies of states that are not parties to the ICC Statute come under the ICC's scrutiny. Israeli law and practices in the occupied Palestinian territory may come to mind in this respect and indeed Israel's action in the occupied Palestinian territories have been labeled as *apartheid* by the Committee against Racial Discrimination as well as by several UN special rapporteurs⁵⁴⁵.

For the definition of 'the crime of apartheid', see mn 119–127.

k) 'Other inhumane acts'. Article 7 (1) (k) contains a qualified residual clause concerning crimes against humanity which provides leeway to accommodate forms of inhumane conduct not otherwise prohibited under article 7. It covers, as PTC I put it: 'serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute'⁵⁴⁶. The rationale for such a clause was aptly explained in ICTY jurisprudence, with reference to the 'humane treatment' contained in common article 3 of the Geneva Conventions:

'However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes'⁵⁴⁷.

A similar provision already appeared in the definition of crimes against humanity in the Nuremberg Charter, where the words 'other inhumane acts' appeared next to the enumerated acts which constitute the first type of crimes against humanity: 'murder, extermination, enslavement, deportation, and other inhumane acts ..., or persecutions on political, racial or religious grounds ...'⁵⁴⁸. Thus, the words 'other inhumane acts' in the Charter did not refer to persecutions. The same formulation had been included in *Control Council Law No. 10*⁵⁴⁹, the Tokyo Charter⁵⁵⁰ and the Nuremberg Principles⁵⁵¹. The phrase 'other inhumane acts' in these instruments indicates that the lists of expressly named activities were not exhaustive. Deprivation of means of sustenance is an act that this phrase might cover⁵⁵². Article 2 para. 11 of the 1954 Draft Code, containing a provision on crimes against humanity, begins with the words 'inhuman acts such as ...'⁵⁵³, followed by a list of crimes⁵⁵⁴. In contrast with these previous instruments, the 1991 Draft Code did not include such a provision, which

⁵⁴⁴ Dugard and Reynolds (2013) 24 *EJIL* 3, 883.

⁵⁴⁵ Cf. CERD, *Concluding Observations*, UN DocCERD/C/ISR/CO/14-16, 9 March 2012, para. 24; UN special rapporteurs (J. Dugard, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/HRC/4/17, 29 January 2007, at 3, R. Falk, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/65/331, 30 August 2010, para. 3) and scholars (E. g., Dugard and Reynolds (2013) 24 *EJIL* 3, 883..

⁵⁴⁶ See *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, 30 September 2008 (PURL: <https://www.legal-tools.org/doc/67a9ec/>), para. 448.

⁵⁴⁷ See *Prosecutor v. Kupreškić et al.*, IT-95-16-T, 14 January 2000, para. 563.

⁵⁴⁸ *Charter of the International Military Tribunal* (1945), article 6 (c).

⁵⁴⁹ Article 2 para. 1 (c).

⁵⁵⁰ Article 5 (c).

⁵⁵¹ *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (1950), Principle VI (c).

⁵⁵² *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General (The Charter and Judgment of the Nuremberg Tribunal), UN Sales No. 1949.V.7, 67 (1949).

⁵⁵³ According to Ratner and Abrams, after the conclusion of the Genocide Convention, the ILC used the term 'other inhuman(e) acts' as a catchall to describe all non-genocide crimes against humanity. Therefore, the provision in the 1954 Draft Code begins with these words. Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997) 71, n. 155.

⁵⁵⁴ Crimes against humanity were defined in the 1954 ILC Draft Code, p. 150 as follows: 'Inhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities'.

made one State comment that the article was limited in its scope⁵⁵⁵. The Special Rapporteur on the 1991 Draft Code stated that this comment was valid and that providing a complete list of acts constituting crimes against humanity was impossible⁵⁵⁶.

96 Both the ICTY Statute and the ICTR Statute contain the phrase ‘other inhumane acts’ as a catchall provision under the article penalizing crimes against humanity⁵⁵⁷. In *ad hoc* tribunal jurisprudence, fears were expressed that the crime ‘subsumes a potentially broad range of criminal behavior’ and may well be ‘considered to lack sufficient clarity, precision and definiteness [which] might violate the fundamental criminal law principle *nullum crimen sine lege certa*’⁵⁵⁸. But despite initial ‘concerns’⁵⁵⁹ the Appeals Chamber ruled that the ‘notion of “other inhumane acts” contained in Article 5(i) of the Statute cannot be regarded as a violation of the principle of *nullum crimen sine lege* as it forms part of customary international law’⁵⁶⁰. It found authority for this proposition in international legal instruments since 1945 and human rights treaties prohibiting inhuman and degrading treatment⁵⁶¹. Unlike the Rome Statute, the Statutes of the *ad hoc* tribunals do not expressly include offences, such as forcible transfer of population, enforced disappearance or sexual crimes other than rape. These crimes were thus prosecuted under the label of ‘other inhumane acts’, although they constitute independent acts in the context of the Rome Statute.

97 In the 1996 Draft Code the ILC restricted the provision to the following wording: ‘other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm’⁵⁶². According to the ILC, this category of acts is intended to include only additional acts ‘similar in gravity to those listed in the preceding subparagraphs’⁵⁶³. This application of the *ejusdem generis* theory, which warrants equivalence to acts of the same kind, mitigates concerns relating to legal certainty⁵⁶⁴. Secondly, ‘the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity’. The ILC thus included a criterion by which the qualification of an act as ‘inhumane’ would depend on the consequences of the act. The Trial Chamber of the ICTY followed this line of reasoning in the *Tadić* case⁵⁶⁵.

98 This more restrictive approach is reflected in the Rome Statute which ‘has given to “other inhumane acts” a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes.’⁵⁶⁶ It contains limitations regarding both the required action and its consequences. The definition of paragraph(1)(k) and the Elements of Crimes make it clear that an ‘other inhumane act’ must be ‘of a similar character’ to any other act referred to in article 7(1) of the Statute. The Elements of Crimes specify further that the perpetrator must

⁵⁵⁵ Thirteenth Report on the Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/CN.4/466 (24 Mar. 1995) (1995 ILC Special Rapporteur Report), p. 19.

⁵⁵⁶ *Ibid.*, 20. In its 1991 Report, the ILC deemed it necessary to make an exhaustive list of acts, unlike the list contained in the 1954 Draft Code ‘bearing in mind that the draft Code is a criminal code and the principle of *nullum crimen sine lege*’, Part 2, (1991) 2 *YbILC* 103.

⁵⁵⁷ ICTY Statute, article 5 (i); ICTR Statute, article 3 (i).

⁵⁵⁸ *Prosecutor v. Stakić*, No. IT-97-24-T, Judgement, Trial Chamber, 31 July 2003, para. 719.

⁵⁵⁹ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, para. 117.

⁵⁶⁰ *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 315; see also *Prosecutor v. Nuon Chea and Khieu Samphan*, Case 002/01, No. 002/19-09-2007/ECCC/TC, Judgement, Trial Chamber, 7 August 2014, para. 436, arguing that ‘the principle of legality attaches to the entire category of “other inhumane acts” and not to each sub-category of this offence’.

⁵⁶¹ *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, fn. 649.

⁵⁶² 1996 ILC Draft Code, article 18 (k).

⁵⁶³ *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment and Opinion, Trial Chamber, 7 May 1997, paras. 728–729 (citing the 1996 ILC Draft Code, p. 103).

⁵⁶⁴ See also Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (2011), 406; Ambos, *Treatise on ICL II* (2014), 115; critically however *Prosecutor v. Kupreškić*, IT-95-16-T, 14 January 2000, para. 564, arguing that the *ejusdem generis* rule of interpretation ‘lacks precision, and is too general to provide a safe yardstick’.

⁵⁶⁵ *Prosecutor v. Tadić*, IT-94-1-T, 7 May 1997, para. 729.

⁵⁶⁶ See *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, 30 September 2008 (PURL: <https://www.legal-tools.org/doc/67a9ec/>), para. 450.

inflict 'great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act'. These limitations were inserted in response to claims in the drafting process that the language in the Statute was overly vague⁵⁶⁷. The first jurisprudence of the Court reflects this caution, warranted by article 22 of the Statute. PTC II held expressly that 'this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity'.⁵⁶⁸ The reference to 'serious violations' in *Katanga and Ngudjolo Chui* suggests that not every human rights violation qualifies as an other inhumane act.⁵⁶⁹

National legislation implementing the Rome Statute and draft implementing legislation have, with only one or two exceptions, included other inhumane acts as crimes against humanity in their national law. In a domestic context, it has sometimes been associated with categories of crimes not expressly included in the ICC Statute, such as drug trafficking or terrorism.⁵⁷⁰

aa) Assessment and similarity in character. This assessment under paragraph 1 (k) 99 requires several steps. In order to qualify as a crime against humanity, the relevant behaviour must first of all qualify as an 'inhumane act'.⁵⁷¹ As the PTC made clear, the reference to the word 'other' implies a process of exclusion: '[N]one of the acts constituting crimes against humanity according to article 7(1)(a) to (j) can be simultaneously considered as an other inhumane act encompassed by article 7(1)(k) of the Statute'.⁵⁷² It is thus necessary to inquire whether the conduct is already subsumed under any of the other existing 'inhumane acts'. It should have at least one materially distinct element that is not adequately reflected in other acts under paragraph 1.⁵⁷³

Secondly, paragraph 1 (k) requires that the acts must be of a character similar to those referred to in paragraph 1. In the ICC context, this assessment is more complex than in other contexts.⁵⁷⁴ Article 7 encompasses a broader list of underlying acts than previous international legal instruments. They protect diverse interests and values (Rechtsgüter), including the right to life, health, liberty and human dignity.⁵⁷⁵ Paragraph 1 (k) refers not only to acts of the 'murder' type, but also to persecution and the crime of apartheid. These last two crimes include acts which do not necessarily amount to 'great suffering, or serious injury to body or to mental or physical health', but are regarded as inhumane in and of themselves, such as enacting discriminatory legislation. Additional guidance is provided by footnote 30 to the Elements of Crimes which states that '[i]t is understood that "character" refers to the nature and gravity of the act'. The character of acts under paragraph 1 provides indicators for

⁵⁶⁷ See Schabas, *Commentary ICC* (2010)184–185.

⁵⁶⁸ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012 (PURL: <https://www.legal-tools.org/doc/4972c0/>), para. 269.

⁵⁶⁹ See *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, 30 September 2008 (PURL: <https://www.legal-tools.org/doc/67a9ec/>), para. 448, concurring Ambos, *Treatise on ICL II* (2014) 115–116.

⁵⁷⁰ See Schabas, *Commentary ICC* (2010) 185 (with reference to the Supreme Court of Venezuela). The African Union Model Law on Universal Jurisdiction distinguishes these offences from crimes against humanity. See AU, Decision on African Union Model Law on Universal Jurisdiction, EX.CL/731(XXI)c, 9- 13 July 2012, articles 13 and 14.

⁵⁷¹ *Prosecutor v. Kupreškić*, IT-95-16-T, 14 January 2000, para. 566, noting that the *ejusdem generis* principle should be applied '[o]nce the legal parameters for determining the content of the category of "inhumane acts" are identified.

⁵⁷² See *Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, 30 September 2008 (PURL: <https://www.legal-tools.org/doc/67a9ec/>), para. 452.

⁵⁷³ See also Haenen (2013) 14 *GLJ* 796, 814. In *Katanga and Ngudjolo Chui*, the PTC argued that 'murder under article 7 (1) (a), even in its attempted form cannot be charged simultaneously under article 7 (1) (k) of the Statute as other inhumane acts' since 'the clear intent to kill persons cannot be transformed into intent to severely injure persons by means of inhumane acts solely on the basis that the result of the conduct was different from that which was intended and pursued by the perpetrators'. See *Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, 30 September 2008 (PURL: <https://www.legal-tools.org/doc/67a9ec/>), paras. 461 and 463.

⁵⁷⁴ Note that a similarity requirement is also included in paragraph 1 (g) ('sexual violence of comparable gravity'). This might entail a dual application of the *ejusdem generis* theory.

⁵⁷⁵ Kuschnik (2010) 2 *GoJIL* 501, 528.

the comparable gravity and nature of the inhumane act under paragraph 1 (k). Violations of basic human rights may serve as a point of departure, but only meet the required threshold if they are of a character similar to the enumerated inhumane acts. The ICTY and ICTR Trial Chambers have given little guidance on how this similarity is to be determined. Indeed, one ICTR Trial Chamber simply said: ‘As for which acts rise to the level of inhumane acts, this should be determined on a case-by-case basis’⁵⁷⁶. The ECCC considered factors such as ‘the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim, as well as the impact of the act upon the victim’⁵⁷⁷. ICTY and ICTR Trial Chambers have qualified a wide range of acts as other inhumane acts, including:

- forcible transfer of population⁵⁷⁸;
- serious physical or mental injury⁵⁷⁹;
- biological, medical or scientific experiments⁵⁸⁰;
- enforced prostitution⁵⁸¹;
- other acts of sexual violence⁵⁸²;
- acts of sexual violence to and mutilation of a dead body that caused mental suffering to eye-witnesses⁵⁸³; and enforced disappearances⁵⁸⁴.

In case No. 001 (*Duch*), the ECCC Trial Chamber used the label ‘other inhumane acts’ to justify a conviction for the deliberate imposition of ‘deplorable conditions of detention’ of detainees in camp S-21, including, ‘lack of adequate food, hygiene and medical care’⁵⁸⁵. In academic literature, it has been proposed to extend ‘other inhumane acts’ to food deprivation

⁵⁷⁶ *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, Trial Chamber, 7 June 2001, para. 92. The Special Panels for Serious Crimes, Dili, East Timor have found the following acts to be other inhumane acts: cutting off a man’s ear and making him eat it, *Prosecutor v. Cardoso*, No. 4c/2001, Judgment, 5 April 2003, paras. 147 *et seq.*; holding victims for four days and repeatedly punching, kicking and beating them with sticks and rifle butts, *Prosecutor v. Pedro*, No. 1/2001, Judgment, 14 April 2005, paras. 8, 11; severe beating, *Prosecutor v. Medes Correia*, No. 19/2001, Judgment, 9 March 2004; striking victim with machetes and stones and leaving for dead, *Prosecutor v. Ena*, No. 5/2001, Judgment, 23 March 2004; slashing of victim’s body with a machete, *Prosecutor v. Tacaqui*, No. 20/2001, Judgment, 9 December 2004; causing serious injuries to victims during a mass killing, *Prosecutor v. Januario da Costa*, No. 22/2003, Judgment, 27 April 2005; beating and kicking for half an hour, *Prosecutor v. Beno*, No. 4b/2003, Judgment, 16 November 2004, para. 18. The Special Panels were split with regard to whether holding victims in a small room in unhygienic conditions without proper sanitation facilities and denying them food or water constituted other inhumane acts *Prosecutor v. Gouveia Leite*, No. 4b/2001, Judgment, 7 December 2002, para. 161 (other inhumane acts); *Prosecutor v. Cardoso*, No. 4c/2001, 5 April 2003, para. 421 (not other inhumane acts).

⁵⁷⁷ *Prosecutor v. Nuon Chea and Khieu Samphan*, Case 002/01, 002/19-09-2007/ECCC/TC, 7 August 2014, para. 438.

⁵⁷⁸ *Prosecutor v. Milošević*, IT-02-54-T, 16 June 2004, para. 52 (stating that although the Nuremberg Tribunal ‘had no express jurisdiction to deal with forcible transfer, [...] conceivably, that crime could have been covered in the reference to “other inhumane acts”’) and para. 316 (finding sufficient evidence to permit a prosecution to proceed with respect to all counts, including a count charging the accused with forcible transfer as an inhumane act); *Prosecutor v. Krajišnik*, IT-00-39-T, 27 September 2006, paras. 722–732 (conviction for forced transfer charged as an other inhumane act); *Prosecutor v. Kupreškić et al.*, IT-95-16-T, 14 January 2000, para. 56; *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 523 (citing *Prosecutor v. Kupreškić et al.*, IT-95-16-T, 14 January 2000, it said ‘forcible displacement within or between national borders is included as an inhumane act under article 5 (i) defining crimes against humanity’).

⁵⁷⁹ *Prosecutor v. Blaškić*, IT-95-14-T, 3 March 2000, para. 239 (‘serious physical or mental injury’).

⁵⁸⁰ *U.S. v. Brandt (Medical Trial)*, p. 183.

⁵⁸¹ *Prosecutor v. Kupreškić et al.*, IT-95-16-T, 14 January 2000, para. 566.

⁵⁸² *Prosecutor v. Kajelijeli*, No. ICTR-98-44A-T, Judgment and Sentence, Trial Chamber, 1 December 2003, para. 916 (‘[o]ther acts of sexual violence which may fall outside of this specific definition [of rape] may of course be prosecuted [...] as other inhumane acts’) (emphasis in original).

⁵⁸³ *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, 1 December 2003, para. 936 (piercing the side and sexual organs of the body of a woman victim and cutting off the breast of a girl were acts that ‘constitute a serious attack on the human dignity of the Tutsi community as a whole’ and ‘are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them’).

⁵⁸⁴ *Ibid.*

⁵⁸⁵ *Prosecutor v. Duch*, Case 001, No. 001/18-07-2007/ECCC/TC, Judgment, Trial Chamber, 26 July 2010, para. 372.

and policies of mass famine, causing physical and mental suffering of victims⁵⁸⁶ or denial of humanitarian assistance⁵⁸⁷.

Ultimately, the similarity assessment under paragraph 1 (k) involves a value judgment. In ICC context, specific attention has been devoted to article 22 and avoidance of overlap with existing acts under paragraphs (a)–(j). Guidance may be derived from norms prohibiting inhumane treatment under human rights law and international humanitarian law.

In international case-law, it has remained controversial under what circumstance ‘forced marriage’ meets the elements of an ‘other inhumane act’⁵⁸⁸. The SCSL dealt with patriarchal types of ‘bush’ marriages, by which women and girls were forcibly assigned to serve as ‘wives’ to male combatants. The Appeals Chamber argued in the *AFRC* case (*Brima et al*) and the *RUF* case (*Sesay et al*) that such ‘forced marriages’ constitute ‘other inhumane acts’. It held that the conduct is not subsumed by the more specific crime of sexual slavery, since ‘forced marriage’ is not ‘predominantly a sexual crime’ and involves lasting stigma and traumatisa-tion caused by ‘forced conjugal association with another person’ and ‘a relationship of exclusivity between the “husband” and the “wife”’⁵⁸⁹. This interpretation was contested by the *Taylor* Trial Chamber which argued that this conjugal association is ‘not marriage in the universally understood sense’ and should rather ‘be considered a conjugal form of enslavement’, which ‘is better conceptualised as a distinctive form of the crime of sexual slavery’⁵⁹⁰. The ECCC dealt with the ‘forced marriage’ policy of the Khmer Rouge regime which forced men and women to enter into conjugal relations in formal mass ceremonies, in order to secure loyalty to the regime and control over reproduction. It relied on the jurisprudence of the SCSL Appeals Chamber, in order to include ‘forced marriage’ as an ‘other inhumane act’ in Case 002, arguing that ‘victims were forced to enter into conjugal relationships in coercive circumstances’⁵⁹¹.

Existing ICC jurisprudence is closer to the reasoning of the SCSL Trial Chamber in *Taylor*, at least with respect to ‘bush’ marriages or other informal bonds of conjugal association. This may be explained by the specific provisions on enslavement, sexual slavery and ‘other sexual violence’ in the Statute, as well as the broad conception of enslavement (see above mn 43). PTC I held that ‘sexual slavery also encompasses situations where women and girls are forced into “marriage”, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors’⁵⁹². It clarified that sexual slavery can include ‘practices such as the detention of women in “rape camps” or “comfort stations”, forced temporary “marriages” to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery’⁵⁹³. But this does not preclude the recognition of ‘forced marriage’ as ‘an other inhumane act’ in circumstances where the specific nature and gravity of the act goes beyond an attack on ownership and sexual integrity. One illustration might be the Khmer Rouge policy which forcibly conferred a formal bond of marriage, in order to weaken family structures and deprive people of their autonomy and self-determination. Such conduct clearly involved an attack against the institution of marriage as such.

⁵⁸⁶ DeFalco (2011) 5 *IJTJ* 142, 153–155.

⁵⁸⁷ See Rottensteiner (1999) 835 *IRRC* 555–582.

⁵⁸⁸ Oosterveld, (2011) 2 *JHumLStud* 127; Jain (2008) 6 *JICJ* 1013; Goodfellow, (2011) 11 *ICLRev* 831; Haenen (2013) 13 *ICLRev* 895.].

⁵⁸⁹ *Prosecutor v. Brima et al*, No. SCSL-04-16-A, Judgment, Appeals Chamber, 22 February 2008, para. 195; see also *Prosecutor v. Sesay et al*, No. SCSL-04-15-A, Judgment, Appeals Chamber, 26 October 2009, paras. 735 and 736.

⁵⁹⁰ *Prosecutor v. Taylor*, No. SCSL-03-01-T, Judgement, Trial Chamber, 18 May 2012, paras. 427 and 429.].

⁵⁹¹ *Prosecutor v. Nuom Chea et al*, Case 002, No. 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, paras. 1442 and 1443; *Prosecutor v. Nuom Chea and Khieu Samphan*, Case 002/01, No. 002/19-09-2007-ECCCITC, Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, para. 33.

⁵⁹² *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, 30 September 2008 (PURL: <https://www.legal-tools.org/doc/67a9ec/>), para. 431.

⁵⁹³ *Ibid.*

- 101 **bb) Intentionally causing results.** The purpose of this phrase was to avoid a possible violation of the principle *nullum crimen sine lege* by limiting the clause of other inhumane acts. By limiting this provision to acts ‘intentionally causing great suffering, or serious injury to body or to mental or physical health’, the inhumanity of the act must be judged both by its consequences and by the (inhumane) nature of the act as such. Therefore, acts whose consequences and nature were not similar in character to those of the acts listed in paragraph 1 (a) – (i) might not be covered by paragraph (k). In addition to this statutory expression of the mental element of the crime against humanity of other inhumane acts, the third element of this crime in the Elements of Crimes is that ‘[t]he perpetrator was aware of the factual circumstances that established the character of the act’.
- 102 **aaa) Intention.** In contrast to the limitation included in the 1996 Draft Code, paragraph 1 (k) seems to narrow its scope further in that it only penalizes inhumane acts which ‘intentionally caus[e]’ great suffering or serious injury to body or to mental or physical health, in contrast to the wording introduced by the ILC which did not require an element of intent. The Trial Chamber in the *Tadić* case found that the accused ‘intended ... to inflict severe damage to the victim’s physical integrity and human dignity ... [and] that the accused [in other instances] intentionally assisted directly and substantially in the common purpose of inflicting physical suffering upon them ...’, while reference was made to the 1996 ILC Report⁵⁹⁴. Paragraph 1 (k) seems to follow the interpretation of the ICTY and excludes inhumane acts which cause the enumerated consequences without intent⁵⁹⁵. The phrase ‘intentionally causing great suffering, or serious injury to body or to mental or physical health’ very much resembles the wording of one of the grave breaches of the Geneva Conventions: ‘wilfully causing great suffering or serious injury to body or health’⁵⁹⁶, where the word ‘wilfully’ has been replaced by ‘intentionally’⁵⁹⁷.
- 103 **bbb) ‘great suffering, or serious injury to body or to mental or physical health’.** ‘Other inhumane acts’ in the 1996 Draft Code were limited to those which ‘severely damage physical or mental integrity, health or human dignity ...’. The jurisprudence of the *ad hoc* tribunals applied the same standards for the war crime of inhumane and cruel treatment and other inhumane acts.⁵⁹⁸ According to the Trial Chamber Judgment in the *Tadić* case these acts must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity. The phrase in paragraph 1 (k) differs partly from this approach. It does not mention serious injury to physical or mental integrity, nor human dignity, but mentions serious injury to *body*, or to mental or physical *health*⁵⁹⁹. It makes reference to ‘great suffering’, as opposed to ‘severe pain or suffering’, used in the context of the definition of torture under article 7 (2) (e).

Guidance on the meaning of suffering can be drawn from the war crime of willfully causing great suffering under article 8 (2) (iii). According to the Trial Chamber in the *Čelebići* case, citing the Commentaries to the Geneva Conventions⁶⁰⁰, the suffering incurred

⁵⁹⁴ *Ibid.*, para. 730 (emphasis added).

⁵⁹⁵ Thus, this provision is different from article 7 para. 2 (e) defining torture which requires proof of intent to commit the pain or suffering, but not an intent that the pain or suffering be severe (see mn 131).

⁵⁹⁶ See Geneva Convention I, article 50, Geneva Convention II, article 51, Geneva Convention III, article 130, Geneva Convention IV, article 147.

⁵⁹⁷ The concept of willfulness is broader than intention as it includes reckless behaviour. See *supra* note 223.

⁵⁹⁸ See *Prosecutor v. Krnojelac*, IT-97-25-T, 15 March 2002, para. 130; *Prosecutor v. Gotovina et al.*, No. IT-06-90-T, Judgement, Trial Chamber, 15 April 2011, para. 1791.

⁵⁹⁹ The Trial Chamber of the ICTR considered that article 3 of the ICTR Statute, confers jurisdiction to prosecute persons for ‘various inhumane acts which constitute crimes against humanity’. As one of the four essential elements of crimes against humanity under the ICTR Statute, ‘the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health’ (*Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, para. 578) The Rome Statute might have been an inspiration for this requirement, apart from the condition that the act must be inhumane in nature and character; the source of both requirements has not been mentioned by the Trial Chamber of the ICTR.

⁶⁰⁰ *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, para. 509.

within the meaning of ‘causing great suffering’ includes moral suffering, and can thus be both physical and mental. ‘Wilfully causing great suffering or serious injury to body or health’, according to this judgment,

‘constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence’⁶⁰¹.

In this judgment, the Trial Chamber also found that all acts or omissions found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute the grave breach of ‘inhumane treatment’ but noted that this category of acts is not limited to those acts already incorporated in the foregoing two. Inhumane treatment would extend further to acts ‘which violate the basic principle of humane treatment, *particularly the respect for human dignity*’⁶⁰². It could therefore be argued, *a contrario*, that the offence of ‘[wilfully] intentionally causing great suffering or serious injury to body or to mental or physical health’ does not cover acts that cause injury in terms of human dignity insofar as there is a difference between attacks on human dignity and moral suffering.

Ad hoc tribunal jurisprudence made it clear that ‘serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation’⁶⁰³. It must be harm ‘that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life’⁶⁰⁴.

In first ICC jurisprudence, PTC II considered that ‘brutal killings and mutilations in front of the eyes of victims’ family members’ caused ‘serious mental suffering’⁶⁰⁵. The Chamber failed to recognize ‘serious injury to mental health’ in relation attacks on property (e.g., homes, businesses), carried out as a means to ensure forcible transfer of population. It argued that the loss of property ‘in itself’ must establish the ‘occurrence, the type and the intensity’ of the required mental suffering caused⁶⁰⁶. This jurisprudence is in line with calls to distinguish other inhumane acts from ‘basic human rights violations’⁶⁰⁷. It deviates from attempts to artificially overstretch the application of paragraph 1 (k), such as in the context of the Saddam Hussein trial, where attacks against infrastructure, orchards, and date palms in the city of Ad Bujayl were qualified as other inhumane acts by Iraqi High Tribunal⁶⁰⁸.

c) **Special remarks.** The phrase ‘intentionally causing great suffering, or serious injury to body or to mental or physical health’ is an effort to define this paragraph in a way which would be consistent with the principle of *nullum crimen sine lege*. According to article 22 para. 1, a person shall not be held criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. Assuming that this last paragraph (k) is necessary to cover conduct which has not been criminalised in the preceding paragraphs of article 7, the language used would not violate article 22 para. 1 of the Statute in formal terms. Indeed, this provision is no more

104

⁶⁰¹ *Ibid.*, para. 511. ‘The offence of wilfully causing great suffering or serious injury to body or health is distinguished from torture primarily on the basis that the alleged acts or omissions need not be committed for a prohibited purpose such as is required for the purpose of torture’, *ibid.*, para. 442.

⁶⁰² *Ibid.*, paras. 442, 544. The offence of ‘cruel treatment under common article 3 carries the same meaning as inhumane treatment in the context of the “grave breaches” provisions [...]. [This] latter offence extends to all acts or omissions which cause serious mental or physical suffering or injury or constitute a serious attack on human dignity’, *ibid.*, paras. 443, 552.

⁶⁰³ *Prosecutor v. Kristić*, IT-98-33-T, 2 August 2001, para. 513; *Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, para. 502.

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, ICC-01/09-02/11-382-Red, 23 January 2012 (PURL: <https://www.legal-tools.org/doc/4972c0/>), paras. 270–274.

⁶⁰⁶ *Ibid.*, para. 279.

⁶⁰⁷ See Ambos, *Treatise on ICL II* (2014) 115–116.

⁶⁰⁸ See Blindermann (2009) 30 UPaJIL 1239.

broadly worded than other provisions such as the crime against humanity of torture, war crimes of torture and inhuman treatment, crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law or serious violations of common article 3 of the Geneva Conventions, all of which have been included in the Rome Statute and in almost all national implementing legislation or draft implementing legislation (see mn 98)⁶⁰⁹. Its subsidiary character has been recognised in emerging ICC jurisprudence. Article 22 para. 2 of the Statute nevertheless requires strict construction of a definition of a crime and prohibits extending a definition of a crime by analogy⁶¹⁰. On the extent to which the wording in paragraph (k), as well as open-ended formulations in other paragraphs, could be regarded as allowing for such a prohibited interpretation, see article 22 para. 2 mn 36 *et seq.*

II. Paragraph 2: Definitions of crimes or their elements

1. 'Attack'

105 The delegates at the Rome Conference decided to include this definition of 'attack', which had not been proposed in any of the options during the drafting process. Its incorporation signifies that the delegates wished to further specify the scope of application for article 7⁶¹¹. From the jurisprudential definitions of the attack – from the *Akayesu* Trial Chamber⁶¹², which has been adopted by subsequent case law⁶¹³, to the one of the *Kenya* ICC Pre-Trial Chamber which considered an 'attack' as 'a campaign or operation carried out against the

⁶⁰⁹ A similar issue arose in the drafting of common article 3 of the Geneva Conventions. The ICRC commentary on this article eloquently disposes of any concerns about legality that apply with equal force to the long-established category of other inhumane acts:

'Lengthy definition of expressions such as "humane treatment" or "to treat humanely" is unnecessary, as they have entered sufficiently into current parlance to be understood. It would therefore be pointless and even dangerous to try to enumerate things with which a human being must be provided for his normal maintenance as distinct from that of an animal, or to lay down in detail the manner in which one must behave towards him in order to show that one is treating him "humanely", that is to say as a fellow human being and not as a beast or a thing. The details of such treatment may, moreover, vary according to circumstances – particularly the climate – and to what is feasible.

On the other hand, there is less difficulty in enumerating things which are incompatible with humane treatment. That is the method followed in the Convention when it proclaims four absolute prohibitions. The wording adopted could not be more definite: "To this end, the following acts 'are' and 'shall remain prohibited at any time and in any place whatsoever'".

No possible loophole is left; there can be no excuse, no attenuating circumstances. Items (a) and (c) concern acts which world public opinion finds particularly revolting – acts which were committed frequently during the Second World War. One might ask if the list is a complete one. At one stage of the discussions additions were considered – with particular reference to the biological "experiments" of evil memory, practiced on inmates of concentration camps. The idea was rightly abandoned, since biological experiments are among the acts covered by (a). Besides, it is always dangerous to try to go into too much detail – especially in this domain. However, much care was taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise. The same is true of item (c). Item (b) (taking of hostages) and (d) (sentences and executions without a proper trial) prohibit practices which are fairly general in wartime.'

International Committee of the Red Cross, *Commentary on Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 53–54 (1952).

⁶¹⁰ 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'

⁶¹¹ On the negotiations see, for example, Hwang (1998) 22 *FordhamILLJ*. 457, 497–501; on the limiting function of the 'attack' with regard to the Court's jurisdiction, cf. Paust (2010) 43 *John Marshall L Rev.* 691 *et seq.*

⁶¹² See *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998 <<http://www.legal-tools.org/doc/b8d7bd/>> accessed 30 January 2015, para. 581 ('The concept of attack may be defined as an unlawful act of the kind enumerated in article 3(a) to (i) of the Statute, like murder, extermination, enslavement etc.... orchestrated on a massive scale or in a systematic manner').

⁶¹³ For case law references, see Ambos, *Treatise on ICL II* (2014) 58, fn. 94.

civilian population'⁶¹⁴ – it becomes clear that an attack has to at least involve *multiple acts* and emanate from or contribute to a State or organisational *policy*⁶¹⁵.

By 'multiple acts' is meant more than a single, isolated act⁶¹⁶. The use of the phrase 'acts referred to in paragraph 1' does not only refer to an accumulation of the underlying acts contained in paragraph 1⁶¹⁷ ('any act', for example, murder(s), rape(s), and torture(s)), but also encompasses the specific incidents of one particular crime, such as, a particular murder or rape, which are incorporated in each specific generic act. 'Multiple acts', thus, refers either to more than one generic act, even though this is not required, or to more than a few isolated incidents that would fit under one or more of the enumerated acts⁶¹⁸. While the attack requires a multiplicity of (criminal) acts, it does not necessarily need a multiplicity of actors, nor does a single perpetrator have to act at different times⁶¹⁹. For example, if a single perpetrator poisons the water of a large population, he would thereby commit a multiplicity of killings (and thus multiple criminal acts) with a single (natural) act⁶²⁰. Such an interpretation is compatible with the requirement of that the attack be widespread or systematic. Even a systematic attack has to involve more than a few incidents. Similarly, a widespread attack should, and by its very nature is likely to, be based upon or carry forward a policy. A widespread attack need not, however, be systematic and *vice versa*. As described above with regard to the chapeau, each term has distinct and different qualities, which, if satisfied, render the offences a crime against humanity.

a) 'course of conduct involving the multiple commission of acts'. The phrase 'course of conduct' has widespread and systematic connotations⁶²¹. In general, a 'course of conduct' does not only involve isolated and random acts⁶²², but multiple acts as described above, i. e.,

⁶¹⁴ See *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, para. 80; *Prosecutor v. Bemba*, No. ICC-01/05-01/08-424, Confirmation Decision, Pre-Trial Chamber, 15 June 2009, <<http://www.legal-tools.org/doc/07965c/>> accessed 30 January 2015, para. 75; *Situation in the Republic of Côte d'Ivoire*, No. ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to article 15 of the Rome Statute on the Authorisation of an Investigation', 15 November 2011 <<http://www.legal-tools.org/doc/e0c0eb/>> accessed 30 January 2015, para. 31; *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012, <<http://www.legal-tools.org/doc/96c3c2/>> accessed 30 January 2015, para. 109.

⁶¹⁵ See *Blé Goudé*, ICC-02/11-02/11-186, Confirmation Decision, 11 Dec. 2014, paras. 127 ('a course of conduct involving the multiple commission of acts') and 128 ('course of conduct against the civilian population was carried out pursuant to a State or organisational policy'); also Chaitidou, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 47, 65.

⁶¹⁶ See Clark, in: *id.*, Feldbrugge and Pomorski (eds.), *International and National Law in Russia and Eastern Europe* (2001) 139, 152; Gómez Benítez (2001) 9 *Cuadernos De Derecho Judicial* 1, 21; Juróvic, in: Fernández and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 471-2; Rodenhäuser (2014) 27 *LeidenJIL* 913, 924 ('an element of scale'); cf. also *Prosecutor v. Bemba*, No. ICC-01/05-01/08-424, Confirmation Decision, Pre-Trial Chamber, 15 June 2009, <<http://www.legal-tools.org/doc/07965c/>> accessed 30 January 2015, para. 81.

⁶¹⁷ See *Prosecutor v. Kayishema and Ruzindana*, No. ICTR-95-1-T, Judgment, Trial Chamber, 21 May 1999, <<http://www.legal-tools.org/doc/0811c9/>> accessed 30 January 2015, para. 96.

⁶¹⁸ As stated earlier, an accused can be held criminally responsible for crimes against humanity for committing a single act, such as a single rape, within a context of a widespread or systematic attack which may involve the commission of several of the enumerated acts.

⁶¹⁹ See Chesterman (2000) 10 *DukeComp&IL* 307, 316; Werle, *Völkerstrafrecht* (2012) mn 871; *id.* and Jessberger, *Principles of International Criminal Law* (2014) 337-8; Borsari, *Diritto Punitivo Sovranazionale come Sistema* (2007) 310;

⁶²⁰ See Ambos, *Treatise on ICL II* (2014) 59.

⁶²¹ See *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, <<http://www.legal-tools.org/doc/5b41bc/>> accessed 30 January 2015, para. 208 ('involves – although to a lesser extent – quantitative and qualitative aspects that may also be relevant for the establishment of the 'widespread' or 'systematic' nature of the attack under article 7(1) of the Statute.').

⁶²² See *Prosecutor v. Tadić*, No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, <<http://www.legal-tools.org/doc/0a90ae/>> accessed 30 January 2015, para. 644, which held that the requirement of the acts being directed against any civilian population 'ensures that what is to be alleged will not be one particular act, but, instead, a course of conduct'. cf. also Clark, in: *id.*, Feldbrugge and Pomorski (eds.), *International and National Law in Russia and Eastern Europe* (2001) 139, 152; Gómez Benítez (2001) 9 *Cuadernos de Derecho*

more than a few isolated incidents or acts⁶²³. The occurrence, however, of multiple acts alone would not be sufficient to correctly define the term, since an attack is something more than ‘a mere aggregate of random acts’⁶²⁴; instead a certain pattern is required⁶²⁵. The existence of a certain ‘degree of planning, direction or organisation by a group or organisation’⁶²⁶ is the necessary nexus among individual and, otherwise, acts unrelated with each other, rendering them crimes against humanity.

108 b) ‘against any civilian population’. This term has the same meaning as ‘any civilian population’ used in the chapeau and explained there above.

109 c) **Connection with State or organisational policy.** It is controversial whether there is a requirement in customary international law that a crime against humanity be committed pursuant to or in furtherance of a plan or policy⁶²⁷. No international instrument adopted

Judicial 1, 21; Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 471–2.

⁶²³ This consequence is sometimes also attributed to the qualifiers ‘systematic’ or ‘widespread’; crit. thereto Robinson, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 103, 117 *et seq.*, especially 119–20, pointing out the necessity of the policy element ‘to do the job of screening out unconnected ordinary crime.’

⁶²⁴ See *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, <<http://www.legal-tools.org/doc/5b41bc/>> accessed 30 January 2015, para. 209 (‘embodies a systemic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts’).

⁶²⁵ *Prosecutor v. Bemba*, No. ICC-01/05-01/08-424, Confirmation Decision, Pre-Trial Chamber, 15 June 2009, <<http://www.legal-tools.org/doc/07965c/>> accessed 30 January 2015, para. 81; *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, <<http://www.legal-tools.org/doc/5b41bc/>> accessed 30 January 2015, para. 209; Chaitidou, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 47, 66–7.

⁶²⁶ *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, <<http://www.legal-tools.org/doc/5b41bc/>> accessed 30 January 2015, para. 210; also *Blé Goudé*, ICC-02/11-02/11-186, Confirmation Decision, 11 Dec. 2014, para. 146 (‘multiple violent operations tied together mainly by the overarching coordinating role exercised by Laurent Gbagbo’). On the balancing between ‘multiple acts’ and ‘systematic’, on the one hand, and ‘policy’ and ‘widespread’, on the other, in order to distinguish crimes against humanity from ordinary crimes, see Robinson, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 103, 121.

⁶²⁷ See, for example, Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999) 243 *et seq.* (asserting that the international element of crimes against humanity generally is state action or policy); *id.*, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011) 41; Robinson (1999) 93 *AJIL*. 43, 48–51; Paust (2010) 43 *John Marshall L.Rev.* 681, 693 arguing that this ‘additional requirement’ is ‘limiting of ICC jurisdiction over customary crimes against humanity’; further on this discussion, see Robinson, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 103, 108 *et seq.* However, the ILC, which studied the question for half a century did not include a policy requirement in any of its Draft Codes, but only the less onerous threshold that crimes against humanity must be ‘instigated or directed by a Government or by any organisation or group’. 1996 *ILC Draft Code*, article 18. The statement in *Prosecutor v. Tadić*, No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, <<http://www.legal-tools.org/doc/0a90ae/>> accessed 30 January 2015, that the phrase ‘directed against any civilian population’ in article 5 of the *ICTY Statute* confirmed that ‘there must be some form of a governmental, organisational or group policy to commit these acts’, para. 644, has been squarely rejected by subsequent *ICTY* jurisprudence (see main text). National jurisprudence offers little support for a policy requirement in crimes against humanity. The statement by the Netherlands *Hoge Raad* (Supreme Court) in the 1980 *Menten* case, (1981) 75 *ILR* 362, 362–363, that ‘the concept of “crimes against humanity” also requires that the crimes in question form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of peoples’, even if a generally accurate description of the crimes against humanity committed by the Nazis and their collaborators, is not a correct statement of international law with respect to either alternative. The requirement articulated by the French *Cour de Cassation* in the *Barbie*, *Cass.Crim.*, 20 Dec. 1985, 1985 *Bull.Crim.*, No. 407, at 1053, and *Touvier* cases, *Cass.Crim.*, 27 Nov. 27, 1992, 1992 *Bull.Crim.* No. 394, at 1085, that acts must have been affiliated with or accomplished in the name of ‘a state practicing a policy of ideological hegemony’ to constitute crimes against humanity is simply a restrictive interpretation of national legislation which had the result of excluding or minimizing criminal responsibility of Vichy French officials for crimes against humanity and it has been thoroughly discredited to the extent that it purports to state international law. See, for example, Sadat Wexler (1994) 32 *Colum J.TransnatL* 289. Similarly, the statement by the Supreme Court of Canada in its widely criticised judgment in the *Finta* case that ‘[w]hat distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are the essential elements

before or after the *Rome Statute* has included such a requirement⁶²⁸. In any case, the omission of the policy element in the law of an international or hybrid criminal tribunal does not mean that this element cannot be derived from the requirement of the attack, at least in its systematic form⁶²⁹. For any kind of systematic conduct requires, however small, a degree of organisation which, in turn, requires a policy and an entity powerful enough to implement it. Thus, the ‘systematic attack’ element indeed inevitably implies a policy element. Against this background, it is not surprising that subparagraph 2(a) explicitly recognizes this element. The codification reflects the move, described above, from the war nexus requirement to state or organisational authority.

As to the form of the policy, there is no great controversy. It has been repeatedly stated by the *ad hoc* tribunals that ‘[t]here is no requirement that this policy must be adopted formally as the policy of a state’⁶³⁰, nor must the policy or plan ‘necessarily be declared expressly or even stated clearly and precisely’⁶³¹. Thus, in sum, an implicit or *de facto* policy is sufficient. This has also been confirmed by the ICC.⁶³²

of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race’, [1994] 1 *Sup.Ct.Rep.* 701, 814, is not only an interpretation of national legislation, but an incorrect statement of international law, which does not require that crimes against humanity be based on any discrimination, apart from the specific crime of persecution.

⁶²⁸ None of the instruments defining crimes against humanity adopted before 1998 include a plan or policy requirement. See article 6 (c) of the *Charter of the International Military Tribunal, annexed to the London Agreement* (Nuremberg Charter), 8 Aug. 1945; article II para. 1 (c) of *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity* (Allied Control Council Law No. 10), 20 Dec. 1945; article 5 (c) of the *Tokyo Charter*, principle VI (c) of the 1950 *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (Nuremberg Principles), ILC Report on Principles of the Nuremberg Tribunal, 29 July 1950, 5 UN GA OR Supp. (No. 12) 11, UN Doc A/1316 (1950); article 2 para. 10 (inhuman acts) of the 1954 *ILC Draft Code*; the 1968 *Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity*, adopted by GA Res. 2391 (XXIII) of 26 Nov. 1968, article 1 (b); the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid* (Apartheid Convention), adopted in GA Res 3068 (XXVIII), 30 Nov. 1973; article 5 of the 1993 *ICTY Statute*; article 3 of the 1994 *ICTR Statute*, note 10; and article 18 of the 1996 *ILC Draft Code*. Similarly, since the *Rome Statute* was adopted, none of the instruments defining crimes against humanity have included such a requirement. See *UNTAET Regulation 2000/15* (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 June 2000, article 5; *Statute of the Special Court for Sierra Leone* (Sierra Leone Statute), article 2; *Cambodian Law on the Establishment of the Extraordinary Chambers*, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006). Indeed, there is no hint of such a requirement in any of the instruments adopted prior to the Second World War concerning laws or principles of humanity of such a requirement. See, for example, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (1868 Declaration of St. Petersburg), reprinted in: A. Roberts/R. Guelff (eds.), *Documents on the Laws of War* (2nd ed. 1989) 30, 31; *Declaration of France, Great Britain and Russia of 24 May 1915*, 1915, quoted in: E. Schwelb, *Crimes against Humanity*, 23 *BYbIL* (1946) 178, 181; and the Report Presented to the Preliminary Peace Conference (1919 Peace Conference Commission Report), Versailles, Mar. 1919, Conference of Paris, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Annex.

⁶²⁹ This part draws on Ambos, *Treatise on ICL II* (2014) 67–76; cf. also Chaitidou, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 47, 66–7; distinguishing between ‘policy’ and ‘systematic’, Robinson, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 103, 114 *et seq.* (arguing that “‘Policy’ does not necessarily require deliberate planning, direction or orchestration; it requires only that some State or organisation must have at least encouraged the attack...”).

⁶³⁰ See *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 Sep. 1998, para. 580; also *Prosecutor v. Tadić*, No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, <<http://www.legal-tools.org/doc/0a90ae/>> accessed 30 January 2015, para. 653; *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, Judgment, Trial Chamber, 6 December 1999, <<http://www.legal-tools.org/doc/f0dbbb/>> accessed 30 January 2015, para. 69; see *Prosecutor v. Musema*, No. ICTR-96-13-A, Judgment and Sentence, Trial Chamber, 27 January 2000, <<http://www.legal-tools.org/doc/1fc6ed/>> accessed 30 January 2015, para. 204; *Prosecutor v. Kupreskić et al.*, No. IT-95-16-T, Judgment, Trial Chamber, 14 Jan. 2000, para. 551; see *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000, <<http://www.legal-tools.org/doc/e1ae55/>> accessed 30 January 2015, para. 204. See also Robinson, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 103, 122 *et seq.*

⁶³¹ See *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000, <<http://www.legal-tools.org/doc/e1ae55/>> accessed 30 January 2015, para. 205.

⁶³² See *Prosecutor v. Tanga and Ngudjolo*, No. ICC-01/04-01/07-717, Confirmation Decision, Pre-Trial Chamber, 30 September 2008, <<http://www.legal-tools.org/doc/67a9ec/>>, para. 396; *Prosecutor v. Bemba*, No.

The question of the content of the policy is much more complex. Of course, the policy must be to commit crimes against humanity⁶³³. This does not answer, however, the question of what the precise expression of this policy need entail, that is, whether it must manifest itself by active conduct or whether omission (acquiescence, tolerance) suffices. While an active policy seems to be implicit in the systematic qualifier – how can something be planned or organised without the respective active policy of the entity behind it? – it is less clear how a policy can exist with regard to a multiplicity of criminal acts (i.e. a widespread attack) which are not organised or planned (i.e. systematic). This seems only possible if a policy can also consist of an omission, for example in the deliberate denial of protection for the victims of widespread, but unsystematic crimes, thereby tolerating these crimes⁶³⁴. In conclusion, the contents of the policy depend on the nature of the attack as systematic or widespread. In the former case, the policy would provide at least certain guidance regarding the prospective victims in order to coordinate the activities of the single perpetrators. A systematic attack, thus, requires active conduct from the side of the entity behind the policy without necessarily amounting to extensive or repeated activity. Rather, what counts is whether the conduct suffices to trigger and direct the attack⁶³⁵. A widespread attack which is not at the same time systematic is one that lacks any guidance or organisation. The policy behind such an attack may be one of mere deliberate inaction, tolerance, or acquiescence.

110 Clearly, the policy need not be one of a State. It can also be an organisational policy. Non-state actors or private individuals who exercise *de facto* power can constitute the entity behind the policy⁶³⁶. This provision in the article reflects the contemporary position that individuals not linked to a state or its authorities can commit crimes under international law⁶³⁷. It is controversial, however, what kind of non-state entities are included and what criteria they are to fulfil⁶³⁸. According to the case law⁶³⁹, every level in the respective state or other organisation which, as such, exercises *de facto* power in a given territory can also develop an explicit or

ICC-01/05-01/08-424, Confirmation Decision, Pre-Trial Chamber, 15 June 2009, <<http://www.legal-tools.org/doc/07965c/>> accessed 30 January 2015, para. 81. On the case law re policy see also Robinson, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 103, 126 *et seq.*

⁶³³ Cf. for example, *Prosecutor v. Tadić*, No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, <<http://www.legal-tools.org/doc/0a90ae/>> accessed 30 January 2015, para. 653.

⁶³⁴ For examples thereof, cf. Ambos, *Treatise on ICL II* (2014) 70; in the same vein, Robinson, in: Bergsmo, and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 103, 130 *et seq.*; cf. also Rodenhäuser (2014) 27 *LeidenJIL* 913, 925-6.

⁶³⁵ Thus, for example, the identification of possible victims by the authorities and an (implicit or explicit) announcement of impunity from prosecution for crimes against this group would be sufficient.

⁶³⁶ See 1991 *ILC Draft Code*, 266.

⁶³⁷ See 1996 *ILC Draft Code*, 94 and *Prosecutor v. Tadić*, No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, <<http://www.legal-tools.org/doc/0a90ae/>> accessed 30 January 2015, para. 654: ‘the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory’. See also *Kadić v. Karadžić*, 70 *F.3d* 232 (2nd Cir. 1995), cert. denied, 64 *U.S.L.W.* 3832 (18 June 1996) in which it was held that non-state actors could be held liable for the commission of genocide, the most serious form of crimes against humanity; cf. most recently *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement Rendu en Application de l’article 74 du Statut, Trial Chamber, 7 March 2014, <<http://www.legal-tools.org/doc/9813bb/>> accessed 30 January 2015, para. 1119. On this development of the scope of crimes against humanity, from the involvement of a *de jure* state to actors with ‘*de facto* structure and capacity’, cf. Rodenhäuser (2014) 27 *LeidenJIL* 913, 918-20.

⁶³⁸ On the elements of an organisation within the meaning of article 7 cf. *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, para. 93; *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012, <<http://www.legal-tools.org/doc/96c3c2/>> accessed 30 January 2015, para. 185; *Prosecutor v. Bosco Ntaganda* No. ICC-01/04-02/06-309, Decision on the Charges, Pre-Trial Chamber, 9 June 2014, <<http://www.legal-tools.org/doc/5686c6/>> accessed 30 January 2015, paras. 14 *et seq.*, (‘established hierarchy’, ‘military wing’, ‘discipline’, ‘system of communication’, ‘chain of command’, ‘the means and the capability to carry out military operations’).

⁶³⁹ *Prosecutor v. Tadić*, No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, <<http://www.legal-tools.org/doc/0a90ae/>> accessed 30 January 2015, para. 654; *Prosecutor v. Kupreskić et al.*, No. IT-95-16-T, Judgment, Trial Chamber, 14 Jan. 2000 para. 552; see *Prosecutor v. Blaskić*, No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000, <<http://www.legal-tools.org/doc/e1ae55/>> accessed 30 January 2015, para. 205.

implicit policy with regard to the commission, or at least toleration⁶⁴⁰, of crimes against humanity in this territory. As to the quality of the (non-state) entity or organisation, it also seems to be clear that it must be in a position akin, or at least similar, to a state; that is, it must possess similar capacities of organisation and force⁶⁴¹.

In the ICC's view the concept of 'organisation' is predicated on the respective group's 'capability to perform acts which infringe on basic human values' and not 'the formal nature of a group and the level of its organisation'⁶⁴². Thus, it is to be determined on a case-by-case basis whether a respective group amounts to an 'organisation' within the meaning of article 7(2)(a)⁶⁴³. This rather broad approach is, however, not beyond controversy. This became clear in the *Kenya* proceeding where Pre-Trial Chamber II was split on the question with Judge Kaul issuing a dissenting opinion⁶⁴⁴, arguing that the respective entity must 'partake[s]

⁶⁴⁰ *Prosecutor v. Kupreskić et al.*, No. IT-95-16-T, Judgment, Trial Chamber, 14 Jan. 2000 para. 552; cf. also Werle and Jessberger, *Principles of International Criminal Law* (2014) 345-6; Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 465.

⁶⁴¹ See Bassiouni, *The Legislative History of the International Criminal Court* (2005) 245 (non-state actors 'partake of the characteristics of state actors in that they exercise some dominion or control over territory and people, and carry out "policy" which has similar characteristics of those of "state action or policy"'); Schabas, in: Sadat and Scharf (eds.), *The Theory and Practice of International Criminal Law – Essays in Honor of M. Cherif Bassiouni* (2008) 347, 359 ('state-like bodies').

⁶⁴² See *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, para. 90. In paras. 84 and 85 respectively the PTC refers to *Prosecutor v. Katanga and Ngudjolo*, No. ICC-01/04-01/07-717, Confirmation Decision, Pre-Trial Chamber, 30 September 2008, <<http://www.legal-tools.org/doc/67a9ec/>>, para. 396 and *Prosecutor v. Bemba*, No. ICC-01/05-01/08-424, Confirmation Decision, Pre-Trial Chamber, 15 June 2009, <<http://www.legal-tools.org/doc/07965c/>> accessed 30 January 2015, para. 81, both stating that the policy could be made by 'any organisation with the capability to commit a widespread or systematic attack against a civilian population'; cf. also *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, <<http://www.legal-tools.org/doc/5b41bc/>> accessed 30 January 2015, para. 217; *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012, <<http://www.legal-tools.org/doc/96c3c2/>> accessed 30 January 2015, paras. 185; *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement Rendu en Application de l'article 74 du Statut, Trial Chamber, 7 March 2014, <<http://www.legal-tools.org/doc/9813bb/>> accessed 30 January 2015, para. 1119; cf. also *Blé Goudé*, ICC-02/11-02/11-186, Confirmation Decision, 11 Dec. 2014, paras. 128, 186 where the PTC holds that the policy was both organisational (128: 'preparatory activities...planned and coordinated...through the forces under their control ... which included elements of the FDS, militia, mercenaries and pro-Gbagbo youth... constituted an organisation', and 186: 'The pro-Gbagbo forces constituted an organised and hierarchical apparatus of power.') and of a State (128: 'such entity, which comprised part of the State apparatus, may on this basis be also qualified as a State policy.'). Cf. also Jurovics, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 462 *et seq.*; for a thorough analysis of the views held in the *Kenya* Authorisation Decision regarding this element, see Hansen (2011) 43 *George Washington ILRev.* 1, 7 *et seq.*; Chaitidou, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014) 47, 74 *et seq.*

⁶⁴³ See *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, para. 93. The Chamber lists some factors with a view to make this determination, namely: '(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the aforementioned criteria'. *In casu* the majority found that the 'organisational policy' element was met by 'various groups including local leaders, businessmen and politicians' (*ibid.*, para. 117); cf. also *Situation in Côte d'Ivoire*, ICC-02/11-14-Corr, Authorisation Decision, 15 November 2011, para. 46; *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012, <<http://www.legal-tools.org/doc/96c3c2/>> accessed 30 January 2015, paras. 185; *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement Rendu en Application de l'article 74 du Statut, Trial Chamber, 7 March 2014, <<http://www.legal-tools.org/doc/9813bb/>> accessed 30 January 2015, para. 1118 (citing the *Situation in Kenya* (Authorisation Decision)).

⁶⁴⁴ *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, Dissenting Opinion of Judge Kaul, paras. 21-70 (esp. 43-70), conducting a lengthy analysis of the historic origins of crimes against humanity and the proper interpretation of the term 'organisation'; cf. thereon also, Jalloh (2011) 105 *AJIL* 540, 543 *et seq.*

of some characteristics of a State⁶⁴⁵. PTC III concurs with PTC II as to this Chamber's case-by-case approach and the criteria proposed to determine the status of the organisation⁶⁴⁶, noting the disagreement in the Court's jurisprudence and leaving the question open in the concrete case since the stricter requirements of the Kenya PTC II majority have been met anyway⁶⁴⁷. In a similar vein, PTC I repeats the different views expressed, but leaves the question *in casu* also open since 'the organisation alleged by the Prosecutor and satisfactorily established by the available evidence would meet the threshold under either interpretation'⁶⁴⁸. In contrast, the *Katanga* Trial Chamber II⁶⁴⁹ favours the broad understanding of organisation of the majority of the Kenya PTC reaffirming an autonomous and functional, 'capacity-based' understanding of organisation⁶⁵⁰. Thus, TC II stresses generic structural features such as capacity, coordination and cohesion necessary to carry out an attack⁶⁵¹ as opposed to the more formal requirements of organisational structure and control⁶⁵². In particular, the Chamber argues that the restrictive state-like features cannot be reconciled with the *ICC Statute's* objective to punish the most serious international crimes⁶⁵³.

In the academic literature, the discussion has just begun, but there is a certain tendency in favour of a broader interpretation in line with Kenya PTC II's majority view⁶⁵⁴. A comparison,

⁶⁴⁵ *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, Dissenting Opinion of Judge Kaul, para. 51: 'These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale' (footnotes omitted). However, control over a territory is not required, but could be an additional factor in determining the existence of an organisation (para. 51, fn. 56). The controversy persisted in the Chamber, see for example, *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012, <<http://www.legal-tools.org/doc/96c3c2/>> accessed 30 January 2015, paras. 33-4, 184-5 and the Dissenting Opinion of Judge Kaul in it, paras. 8-9; *Prosecutor v. Muthaura and others*, No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012 <<http://www.legal-tools.org/doc/4972c0/>> accessed 30 January 2015, paras. 112, 221, and Dissenting Opinion of Judge Kaul in it, paras. 7-8. Note in this respect also Jalloh (2013) 28 *AmUILRev* 381, 435-441 according to whom the issue can only be resolved by an amendment of the Rome Statute.

⁶⁴⁶ *Situation in Côte d'Ivoire*, ICC-02/11-14-Corr, Authorisation Decision, 15 November 2011, para. 46.

⁶⁴⁷ *Ibid.*, para. 99.

⁶⁴⁸ See *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, <<http://www.legal-tools.org/doc/5b41bc/>> accessed 30 January 2015, para. 217.

⁶⁴⁹ *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement Rendu en Application de l'article 74 du Statut, Trial Chamber, 7 March 2014, <<http://www.legal-tools.org/doc/9813bb/>> accessed 30 January 2015, paras. 1117-22.

⁶⁵⁰ Cf. Stahn (2014) 12 *JICJ* 817; for a similar approach of the ICTY in *Limaj et al.* ('Kosovo Liberation Army') and the SCSL in *Brima et al.* ('Armed Forces Revolutionary Council') Rodenhäuser (2014) 27 *LeidenJIL* 919-20.

⁶⁵¹ *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement Rendu en Application de l'article 74 du Statut, Trial Chamber, 7 March 2014, <<http://www.legal-tools.org/doc/9813bb/>> accessed 30 January 2015, para. 1120; on *Katanga* regarding the organisation element, cf. Chaitidou, in: Bergsmo and Song (eds.), *On the Proposed Crimes against Humanity Convention* (2014), 47, 96.

⁶⁵² Stahn (2014) 12 *JICJ* 817.

⁶⁵³ *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement Rendu en Application de l'article 74 du Statut, Trial Chamber, 7 March 2014, <<http://www.legal-tools.org/doc/9813bb/>> accessed 30 January 2015, para. 1122 ('qu'une conception restrictive de l'organisation, qui exigerait qu'elle présente des caractéristiques quasi-étatiques, ne renforcerait pas l'objectif que poursuit le Statut, qui est la répression des crimes les plus graves', fn. omitted); see also Blé Goudé, ICC-02/11-02/11-186, Confirmation Decision, 11 Dec. 2014, para. 146 where the PTC qualifies the pro-Gbagbo forces as 'an organisation which included both a formal and informal structure composed of different elements, different chains of command and distinct lines of activation'.

⁶⁵⁴ For a broad reading cf. Werle and Jessberger, *Principles of International Criminal Law* (2014) 344-5; Werle and Burghardt (2012) 10 *JICJ* 1151, 1166, 1168-70 (analyzing the meaning of the concept of 'organisation', that encompasses 'any association of persons with an established structure' and concluding that there is no convincing reason to restrict this 'ordinary meaning' and that a broad understanding is called for pursuant to systematic and teleological reasons); for the same result, but with a more victim-oriented approach Sadat (2013) 107 *AJIL* 334, 376-7, arguing that the definition of crimes against humanity has evolved since Nuremberg and therefore, does not require the organisation behind the acts to be state-like; in a similar vein, Jurovics, in:

however, of the criteria or characteristics which the PTC II majority, on the one hand, and Judge Kaul, on the other, list as possible distinguishing features for the determination of an 'organisation'⁶⁵⁵ shows, first, that those criteria are in large part identical (responsible command and hierarchical structure, available means to carry out such an attack, territorial control, and the purpose of the organisation and its acts) and only differ substantially insofar as Kaul regards them as indications of state-likeness⁶⁵⁶ without which an organisation is 'not able to carry out a policy of this nature'⁶⁵⁷. Secondly, the different conclusions reached by academic writers depend, on the one hand, on a different assessment of the state of customary law – indeed, more a question of belief than hard law – and, on the other hand, on the different emphasis given to human rights protection as the object and purpose of crimes against humanity⁶⁵⁸. Thus, the gist of the issue is how to reconcile the call for the broadest possible

Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 461 *et seq.*, arguing, however, that for two crimes a state authority is always required (464, the crime of apartheid – due to its institutional character and its dependence on a 'regime' – and the crime of enforced disappearances – due to the political organisation requirement); Robinson, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 229, 240, 'compatible with the ordinary meaning of the 'organisation', as well as the purpose of the policy element' (fn. omitted); but see previously *id.* (2011) *EJIL TALK!*, suggesting the application of the more stringent criteria under the systematic requirement; Rodenhäuser (2014) 27 *LeidenJIL* 913, 920–8, who follows the Katanga TC and Robinson in their functional and context element based approach and on this basis proposes (minimum) requirements for an organisation to be 'able to orchestrate crimes against humanity under article 7: number of people, common purpose, ability to develop and promulgate a policy with a view to the necessary attack and, where these requirements do not suffice, in addition, the capacity to commit crimes on a significant scale as well as plan and organize an attack and have the internal structure to execute such a policy (summarizing at p. 928); previously Kuschnik, *Der Gesamtbestand des Verbrechens gegen die Menschlichkeit* (2009) 242–3. For a narrower approach, see Krefß (2010) 23 *LeidenJIL* 855, 857–61, arguing in favour of strict construction (863) on the basis of customary law (867–71) since a too broad reading could violate state sovereignty (861, 866), and emphasizing that an international prosecution is (only) warranted in the absence of a national prosecution, a situation most likely to occur when the acts are committed by states or state-like entities; previously Krefß, in: Fischer and Lüder (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof* (1999) 15, 54–5; see also Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 152 ('should probably be construed broadly enough to encompass entities that act like States'); Stahn (2014) 12 *JICJ* 817–8 (arguing that a too broad reading entails the abandonment of the policy element); crit. also Jalloh (2011) 105 *AJIL* 540, 547 arguing that 'the majority's' [broad] interpretation 'undermines by judicial fiat the message emphasised in the preamble and fundamental provisions of the Rome Statute, such as article 17, that the ICC was intended to be a court of last, not first, resort that supplements, instead of supplants, national jurisdictions'; cf. also Hansen (2011) 43 *GeorgeWashingtonILRev* 1, 31 *et seq.*, 35 *et seq.*, 40, who favours a limited application of article 7 (at 31 *et seq.*), but at the same time argues in favour of the application regarding non-state actors, in cases where they utilize 'elements of the state security apparatus or other armed entities' (40, 41). On the danger of an infringement of state sovereignty, due to a too broad reading of the 'organisation', see also *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, Dissenting Opinion of Judge Kaul, paras. 10, 63–5.

⁶⁵⁵ See at the beginning of this margin number.

⁶⁵⁶ *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, Dissenting Opinion of Judge Kaul, para. 51 ('entity which may act like a State or has quasi-State abilities').

⁶⁵⁷ *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010 <<http://www.legal-tools.org/doc/338a6f/>> accessed 30 January 2015, Dissenting Opinion of Judge Kaul, para. 52 (accordingly, he excludes 'groups of organised crime, a mob, groups of (armed) civilians or criminal gangs').

⁶⁵⁸ See, on the one hand, Krefß (2010) 23 *LeidenJIL* 855, 860–1 ('the consequence of a broad, human-value-driven teleological construction of the term 'organisation' in article 7(2)(a) of the Statute would be the creation of new international human rights law directly incumbent on 'organs' or 'agents' of organisations which are not even state-like', 861) and, on the other, Sadat (2013) 107 *AJIL* 334, 376–7 (requiring a state-like organisation 'excludes situations of mass atrocities committed by other organisations, and ignores the evolution of crimes against humanity over the decades since the Nuremberg judgment') and Werle and Burghardt (2012) 10 *JICJ* 1151, 1160–4 ('An interpretation of the term 'organisation' that limits the ordinary meaning by adding a further element can only be convincing if it can be argued that the additional element increases the wrongfulness of these violations of fundamental rights', 1160, on the following pages this is negated by these authors); see also Werle, *Völkerstrafrecht* (2012) mn 887; *id.* and Jessberger, *Principles of International Criminal Law* (2014) 344; also Rodenhäuser (2014) 27 *LeidenJIL* 913, 928 ('Excluding...entity...not hierarchically organised in a state-like manner would defy the Rome Statute's objectives, and to some extent deny reality in many parts of the world');

protection of human rights by way of ICL (here crimes against humanity) with legitimate concerns as to the principle of strict construction (*lex stricta*) and a possible loss of significance or ‘downgrading’ of crimes against humanity. While an (exclusively) human rights approach almost automatically entails a broad interpretation of the *actus reus* of international crimes, an understanding of ICL in the sense of a classical liberal criminal law with its core principles of legality, culpability, and fairness, as defended by this author elsewhere⁶⁵⁹, leads to more narrow interpretations⁶⁶⁰. In any case, the mere risk of a lacuna with respect to the criminalisation of a particular conduct is an inherent feature of criminal law and does, as such, not allow for too broad an interpretation against the letter of the law. In the case at hand, a functional approach inferring the requirements of an organisation within the meaning of article 7(2)(a) from the context element, i.e., this organisation’s capacity to wage a widespread or systematic attack against the civilian population, is most convincing.⁶⁶¹

- 111 It is worth noting that the same considerations applicable to proving the widespread or systematic character of the attack, as discussed above, will have to be taken into account when establishing the multiplicity and organisational components of the attack⁶⁶². As stated above, in proving either the widespread nature or systematic character of the attack, both the statutory requirements of multiplicity and policy will have to be confirmed.

2. ‘Extermination’

- 112 a) **Main elements.** National and international jurisprudence concerning the crime against humanity of extermination provides some guidance concerning its definition under customary international law, but there are a number of significant differences in detail, both between the ICTY and ICTR and among individual Trial Chambers⁶⁶³. The main non-contextual components, or components that are not Tribunal-specific of the definition of extermination that emerge from the jurisprudence are the following: a large number of killings, the same elements as murder, the absence of a requirement that the perpetrator knew the identity of the victims, targeting of a group and the absence of a requirement that the members of the group have common characteristics. The main areas of difference relate to whether the crime must be intentional, as most ICTR Trial Chambers have held, or may include reckless or even negligent conduct, what constitutes a large number of persons and whether an accused must have been responsible for killing a large number of persons or could have killed only a few persons or only one person when part of a mass killing. Judgments since the adoption of the Elements of Crimes in June 2000 have noted that extermination can be carried out by infliction of conditions of life, as contemplated by article 7, paragraph 2 (b) of the Statute.

Hansen (2011) 43 *GeorgeWashingtonILRev* 1, 41 (critical of an ‘uniform standard with a high threshold for the existence of an organisational policy’ for being ‘an obstacle to prosecuting leaders ...who organize widespread attacks on the civilian population by utilizing state security forces for private purposes’).

⁶⁵⁹ Cf. Ambos, *Treatise on ICL I* (2013) 87 *et seq.*

⁶⁶⁰ On the importance of the legal and cultural background (humanitarian vs. military) in approaching issues of IHL, especially military necessity, see Luban (2013) 26 *LeidenJIL* 315.

⁶⁶¹ For the concrete requirements see convincingly Rodenhäuser (2014) 27 *LeidenJIL* 920–8 as summarised supra note 653.

⁶⁶² See *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, <<http://www.legal-tools.org/doc/5b41bc/>> accessed 30 January 2015, para. 208; also *Blé Goudé*, ICC-02/11-02/11-186, Confirmation Decision, 11 Dec. 2014, paras. 127–8 and 131–2; Rodenhäuser (2014) 27 *LeidenJIL*. 913, *IL* 913, 924.

⁶⁶³ With the exception of the 2002 ICTY Trial Chamber Judgment in the *Vasiljević* case, which undertook a careful analytical review of prior judgments, the ICTY and ICTR jurisprudence on this question is generally contradictory, poorly reasoned and of limited guidance in determining the scope of the crime of extermination under customary international law. For a similar assessment, see Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 176, note 3 (‘Where the *Vasiljević* Trial Chamber appears to have undertaken an extensive review of state practice and other relevant precedents in relation to that offence, the definition of “extermination” given in earlier cases often appears to be based on not much more than the Chamber’s intuition as to the meaning of that expression and the almost complete absence of authority in support of the Chambers’ findings’) (citations omitted).

Although persons were convicted of the crime against humanity of extermination by the International Military Tribunal at Nuremberg and by national courts, and international and national courts have referred to extermination in their judgments, these judgments have provided little guidance concerning the scope of the crime⁶⁶⁴. Therefore, the elements of the crime drawn from jurisprudence are largely based on the limited number of judgments in the ICTR (including the *Akayesu*, *Rutaganda*, *Musesma* and *Kayishema* cases) and ICTY (including the *Krstić*, *Vasiljević* and *Stakić* cases). In some cases, the references in the judgments to extermination could be characterised as *dicta*. Most judgments state that extermination must involve the killing of a large number of persons, described in a variety of ways without much precision, including phrases such as ‘the killing of a large number of individuals’⁶⁶⁵, ‘an element of mass destruction’⁶⁶⁶, ‘subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death’⁶⁶⁷, ‘large scale’⁶⁶⁸, which ‘does not command a numerical imperative but may be determined on a case-by case basis’⁶⁶⁹, and ‘the killing of persons on a massive scale’⁶⁷⁰. There is, however, no requirement that there be ‘a vast scheme of collective murder’⁶⁷¹. The large number of victims involved is one of the main distinctions between extermination and murder, but a recurring theme is the aim of eliminating a targeted group of persons⁶⁷².

⁶⁶⁴ For brief overviews of some of this early jurisprudence, which includes judgments of the German Supreme Court in Leipzig, the International Military Tribunal at Nuremberg, US military courts established pursuant to Allied Control Council Law No. 10, the Supreme National Tribunal of Poland in the *Goeth* case, Israeli courts in the *Eichmann* case, French courts in the *Barbie* case, see the discussion in *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 492; *Prosecutor v. Vasiljević*, No. IT-98-32-T, Judgment, Trial Chamber, 29 November 2002, paras. 216–224, *Prosecutor v. Vasiljević*, without addressing this issue, No. IT-98-32-A, Judgment, Appeals Chamber, 25 February 2004.

⁶⁶⁵ *Prosecutor v. Vasiljević*, IT-98-32-T, 29 November 2002, para. 229; *Prosecutor v. Bisengimana*, ICTR-00-60-T, 13 April 2006, para. 72.

⁶⁶⁶ *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-T, Judgment, Trial Chamber, 17 June 2004, para. 309 (‘It is the settled jurisprudence of this Tribunal that extermination, by its very nature, is a crime that is directed against a group of individuals, but different from murder in that it requires an element of mass destruction’); *Prosecutor v. Rutaganda*, ICTR-96-3-T, 6 December 1999, para. 82 (‘an element of mass destruction’); *Prosecutor v. Nahimana*, No. ICTR-99-52-T, Judgment, Trial Chamber, 3 December 2003, para. 1061 (same); *Prosecutor v. Ntagerura*, ICTR-99-46-T, 25 February 2004, para. 701 (‘mass... killing’); *Prosecutor v. Ntakirutimana*, No. ICTR-96-10-A, Judgment, Appeals Chamber, 13 December 2004, para. 521 (‘mass killing’); *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 498 (Given that the Trial Chamber did not reach a final decision on the extermination charge because the accused was convicted on the same facts for genocide and the practice has been not to convict persons for the same conduct on cumulative charges, the discussion of extermination should be seen as *dicta*).

⁶⁶⁷ *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 259 (quoting *Prosecutor v. Ntakirutimana*, ICTR-96-10-A, 13 December 2004, para. 552). This formulation confusingly incorporates the threshold for an attack into the definition of an act constituting a crime against humanity.

⁶⁶⁸ ICTR: *Prosecutor v. Rutaganira*, No. ICTR-95-1C-T, Judgment, Trial Chamber, 14 March 2005, paras. 49–50 (guilty plea, no appeal); *Prosecutor v. Bagilishema*, ICTR-95-1A-T, 7 June 2001, para. 87; *Prosecutor v. Ntagerura*, ICTR-99-46-T, 25 February 2004, para. 701 (‘large scale killing’); *Prosecutor v. Ntakirutimana*, ICTR-96-10-A, 13 December 2004, para. 516; *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, Trial Chamber, 22 January 2004, para. 692; *Prosecutor v. Kayishema and Ruzindana*, No. ICTR-95-1-T, Judgment, Trial Chamber, 21 May 1999, para. 145; *Prosecutor v. Nahimana*, ICTR-99-52-T, 3 December 2003, para. 1061; *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 259.

⁶⁶⁹ *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, para. 145.

⁶⁷⁰ *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, para. 638; *Prosecutor v. Ntagerura*, ICTR-99-46-T, 25 February 2004, para. 701 (‘mass... killing’).

⁶⁷¹ *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 259; *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, para. 640.

⁶⁷² The emphasis on the aim of elimination as more important than the number of victims will ensure that the crime of extermination applies in the case of small indigenous groups of a few hundred persons that were targeted with killings with a view to wiping them out. One ICTR Trial Chamber has claimed that another distinction between the two crimes is the way in which the victims are targeted, but no precedents were cited in support of this proposition and it does not appear to have been followed by other courts. *Prosecutor v. Nahimana*, ICTR-99-52-T, 3 December 2003, para. 1062.

With regard to these two matters, there are several questions that have emerged: how many victims are required, does a group have to be targeted and, if so, what are its characteristics, does the number of victims have to be a substantial proportion of the targeted group, is the number of victims the number killed or targeted by the individual perpetrator or by the perpetrator and others participating in the widespread or systematic attack, can extermination be committed by omission as well as by acts, and, with regard to the *mens rea*, does the perpetrator have to satisfy the same mental element as for murder and does that person have to intend to wipe out or substantially wipe out a group?

113 Although much debate has been devoted to the required threshold of massiveness, it is not entirely clear what number of actual or intended victims is required to constitute extermination. Some ICTY and ICTR Trial Chambers have stated that no specific minimum number of victims is required for the killings to amount to extermination⁶⁷³. However, some of them have stated that there must be more than one victim or a small number of victims⁶⁷⁴. Indeed, they have also frequently stated that the perpetrator would have had to have intended to kill a significant number of victims targeted to distinguish extermination from murder and have indicated a variety of ways that number could be determined. In *Krstić*, the ICTY Trial Chamber suggested in *dicta* that the requirements for extermination would be met if only a relatively small number of people were involved, provided that it was aimed at the eradication of an entire population⁶⁷⁵. This interpretation surely must be correct as it would ensure that if the perpetrator intended to kill only a few hundred people who constituted the last remaining members of the targeted group it would constitute extermination. This was upheld by Appeals Chamber jurisprudence in *Lukić and Lukić* which confirmed that extermination can be committed against a population ‘[...] made up of only a relatively small number of people’, while recalling that ‘large scale’ does not ‘suggest a strict numerical approach with a minimum number of victims’⁶⁷⁶. The Appeals Chamber found that ‘the killing of at least 60 persons’ may be sufficiently large-scale⁶⁷⁷, taking into account a number of relevant factors, including ‘the time and place of the killings; the selection of the victims and the manner in

⁶⁷³ *Prosecutor v. Vasiljević*, IT-98-32-T, 29 November 2002, para. 227 note 587 (‘The Trial Chamber is not aware of cases which, prior to 1992, used the phrase “extermination” to describe the killing of less than 733 persons. The Trial Chamber does not suggest, however, that a lower number of victims would disqualify that act as “extermination” as a crime against humanity, nor does it suggest that such a threshold must necessarily be met’); *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, para. 640 (same); *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, 17 January 2005, para. 573; *Prosecutor v. Brđanin*, IT-99-36-T, 1 September 2004, para. 391. ICTR: *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, 17 June 2004, para. 309 (‘“Large scale” does not suggest a numerical minimum; it must be determined on a case-by-case basis using a common sense approach’); *Prosecutor v. Rutaganira*, ICTR-95-1C-T, 14 March 2005, para. 49; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, 7 June 2001, para. 87.

⁶⁷⁴ At least three ICTR Trial Chambers have stated that a single victim or small, unspecified number of victims would be insufficient. *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, 17 June 2004, para. 309; *Prosecutor v. Ntagirura*, ICTR-99-46-T, 25 February 2004, para. 701; *Prosecutor v. Semanza*, ICTR-97-20-T, 15 May 2003, para. 340.

⁶⁷⁵ *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 501 (Extermination could involve ‘eradicating an entire population, ... made up of only a relatively small number of people. In other words, while extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited’ (*dicta*)).

⁶⁷⁶ See *Prosecutor v. Lukić and Lukić*, No. IT-98-32/1-A, Judgement, Appeals Chamber, 4 December 2012, para. 538. For an indication, see para. 537: ‘While extermination as a crime against humanity has been found in relation to the killing of thousands, it has also been found in relation to fewer killings. The Appeals Chamber recalls that in *Brđanin*, the killing of between 68 to 300 individuals in light of the circumstances in which they occurred, [met] the required threshold of massiveness for the purposes of extermination.’ In *Stakić*, the Trial Chamber found that the killing of less than 80 individuals ‘independently would reach the requisite level of massiveness for the purposes of an evaluation under Article 5(b) of the Statute’, *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, para. 653. In *Krajišnik*, while the conviction for extermination as a crime against humanity was based on the killing of at least 1,916 individuals, the Trial Chamber found that the killing of approximately 66 individuals during the Pionirska Street Incident satisfied the element of massiveness, *Prosecutor v. Krajišnik*, IT-00-39-T, 27 September 2006, paras. 720-721. The ICTR and the Special Court for Sierra Leone have also found the killing of about 60 individuals and less to be sufficiently large-scale to amount to extermination. Concurring Schabas, *Commentary ICC* (2010) 160.

⁶⁷⁷ See *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, 4 December 2012, para. 544.

which they were targeted; and whether the killings were aimed at the collective group rather than victims in their individual capacity⁶⁷⁸.

Extermination must be aimed at a group rather than identified individuals⁶⁷⁹. The group may, but need not, be a national, ethnical, racial or religious group, as in the crime of genocide, but may be any identifiable group⁶⁸⁰. For example, it could be simply a neighbourhood⁶⁸¹. The concept of a targeted group has been expansively defined in some ICTY and ICTR judgments to include all non-members of another group⁶⁸². Only a part of the population needs to be targeted. The ICTY Trial Chamber in *Krstić* has stated in *dicta* that this means ‘a numerically significant part of the population concerned’⁶⁸³. But this view has been criticised⁶⁸⁴. Several Chambers have relied on specific incidents of mass killing to demonstrate the necessary level of massiveness⁶⁸⁵. In *Lukić and Lukić*, a single village was used as reference area. A conviction for extermination was based on multiple killings in two street incidents, in which almost the entire Muslim population was killed. The majority (Judge Van den Wyngaert dissenting) justified this approach by relying on population density in the particular area as a criterion to determine massiveness. It argued that ‘while there may be a higher threshold for a finding of extermination in a densely-populated area’, it would ‘not be inappropriate to find extermination in a less densely-populated area on the basis of a lower threshold, that is, fewer victims’⁶⁸⁶. The ICC Elements of Crimes specifically take into account ‘initial conduct’ in a mass killing of members of a civilian population⁶⁸⁷. This includes first steps in what would later become a mass killing, similar as in the context of genocide⁶⁸⁸.

There also has been considerable divergence of views in the jurisprudence about whether an individual can be convicted of extermination if he or she was responsible for only a small number of killings as part of a large number of persons killed by others or whether the

⁶⁷⁸ See *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, 4 December 2012, para. 338. For a different view see, *Prosecutor v. Lukić and Lukić* IT-08-32/1-T, 20 July 2009, Partly Dissenting Opinion Judge Van den Wyngaert, 338 *et seq.*, arguing that ‘the sheer scale of killings continues to be the most relevant factor in determining whether a mass killing incident has reached the “required threshold of massiveness” for the crime of extermination’ (para. 1117) and that equating mass killings ‘of increasingly low scale’ to extermination would ‘have the unintended result of trivialising both the crime of murder and the crime of extermination’ (para. 1120).

⁶⁷⁹ ICTY: *Prosecutor v. Vasiljević*, IT-98-32-T, 29 November 2002, para. 227 (‘[T]he act of extermination must be collective in nature rather than directed towards singled out individuals’); *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 259; *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, para. 639 (same). ICTR: *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, 22 January 2004, para. 694; *Prosecutor v. Ntagerura*, ICTR-99-46-T, 25 February 2004, para. 701 (‘directed against a population’); *Prosecutor v. Niyitigeka*, No. ICTR-96-14-T, Judgment, Trial Chamber, 16 May 2003, para. 450; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, para. 145 (‘The actor need not act with a specific individual(s) in mind’); *Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, para. 591 (aimed at a group).

⁶⁸⁰ *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 499 (‘The victims need not share national, ethnical, racial or religious characteristics’) (*dicta*).

⁶⁸¹ *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, 22 January 2004, para. 694.

⁶⁸² ICTY: *Prosecutor v. Tadić*, IT-94-1-A, 15 July 1999, para. 249; *Prosecutor v. Krnojelac*, IT-97-25-A, 17 September 2003, para. 187 (the accused, who, ‘as prison warden, retained jurisdiction over all detainees... had sufficient information to alert him to the risk that inhumane acts and cruel treatment were being committed against the non-Serb detainees because of their political or religious affiliation’); *Prosecutor v. Todorović*, No. IT-95-9/1-S, Sentencing Judgment, Trial Chamber, 31 July 2001, para. 12. ICTR: *Prosecutor v. Nahimana*, ICTR-99-52-T, 3 December 2003, para. 1071 (citing ICTY jurisprudence on this point).

⁶⁸³ *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 502. No support for this view was cited and it has been severely criticised. Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 178.

⁶⁸⁴ Mettraux, (2002) 43 *HarvILJ* 237, 285; Ambos, *Treatise on ICL II* (2014) 84–85.

⁶⁸⁵ See e.g., *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, Appeals Chamber, 3 April 2007, paras. 471–472; *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, paras. 653–654.

⁶⁸⁶ See *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, 20 July 2009, para. 938. This reasoning was upheld on appeal. Critically, Partly Dissenting Opinion Judge Van den Wyngaert, para. 1119, arguing that relying ‘upon the victims’ affiliation to a community, may ‘lead to the legally untenable result in which the killing of twenty people in a small village is found to constitute extermination, but the killing of thousands of people in a large city does not’.

⁶⁸⁷ Element 2 to article 7 (1) (b) ‘as part of’, with specification in footnote 10.

⁶⁸⁸ See Elements, article 6, Introduction, clarifying that context includes ‘initial acts in an emerging pattern’.

prosecution must prove that the individual accused was responsible for a large number of killings⁶⁸⁹. The latter approach could, as a practical matter, largely limit the persons who could be convicted of extermination to leaders, undermining whatever deterrent value the Court may have, an approach rejected by the drafters of the Rome Statute with respect to other crimes. While extermination is not a leadership crime⁶⁹⁰, it is not always clear when Trial Chambers state that a large number of persons must have been killed for extermination to have occurred whether this requirement means that in all cases the individual accused must have been responsible for killing a large number of persons or that it is sufficient if the accused took part in a large number of killings, where most of the killings were committed by others. In the ICTR Trial Chamber Judgment in the *Akayesu* case, an individual was convicted of extermination for his role in the killing of a small number of persons as part of a large number of killings, most of which were carried out by others⁶⁹¹. A subsequent ICTR Trial Chamber has stated in the *Kayishema* case in *dicta* that '[a]n actor may be guilty of extermination if he kills, or creates the conditions of life that kills (*sic*), a single person providing the actor is aware that his act(s) or omission(s) forms part of a mass killing event'⁶⁹². However, this view was expressly rejected – without any explanation – by another ICTR Trial Chamber in *Semanza*⁶⁹³. Other ICTR and ICTY Trial Chambers have determined that a large number of persons must have been killed directly or indirectly by the perpetrator⁶⁹⁴. This restrictive approach under the ICTR Statute

⁶⁸⁹ One commentator has contended that 'responsibility for one or for a limited number of such killings is insufficient to constitute an act of extermination'. Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 176–177.

⁶⁹⁰ The framing of Element 1 to article 7 (1) (b) makes it clear that the perpetrator does not necessarily need to enjoy the capacity 'to bring about the destruction of part of a population'. Similarly, the ICTR and ICTY Appeals Chambers have expressly rejected the view that extermination is a crime committed only by leaders. *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 256; *Prosecutor v. Ntakirutimana*, ICTR-96-10-A, 13 December 2004, para. 539.

⁶⁹¹ *Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, para. 744 (conviction for extermination when the accused was responsible for the death of 16 persons). See also *Prosecutor v. Semanza*, ICTR-97-20-T, 15 May 2003, para. 341 ('The material element of extermination is killing that constitutes or is part of a mass killing of members of a civilian population[]' and 'the mental element for extermination is the intent to perpetrate or participate in a mass killing').

⁶⁹² *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, para. 147 (adding that '[a]n event exists when the (mass) killings have close proximity in time and place'). In a footnote to this sentence, the Trial Chamber stated: 'For example, if ten FAR officers fire into a crowd of 200 Tutsis, killing them all. FAR officer X is a poor shot and kills only a single person, whereas officer Y kills 16. Because both X and Y participated in the mass killing and were both aware that their actions formed part of the mass killing event, they will both be guilty of extermination'. See also, *Prosecutor v. Bagilishema*, ICTR-95-1A-T, 7 June 2001, para. 88 ('A perpetrator may nonetheless be guilty of extermination if he kills, or creates conditions of life that kill, a single person, providing that the perpetrator is aware his or her acts or omissions form part of a mass killing event, namely mass killings that are proximate in time and place and thereby are best understood as a single or sustained attack').

⁶⁹³ *Prosecutor v. Semanza*, ICTR-97-20-T, 15 May 2003, para. 340 ('Responsibility for a single or a limited number of killings is insufficient').

⁶⁹⁴ ICTY: *Prosecutor v. Vasiljević*, IT-98-32-T, 29 November 2002, para. 227 note 586 (stating that 'criminal responsibility for "extermination" only attaches to those individuals responsible for a large number of deaths, even if their part therein was remote or indirect. Responsibility for one or for a limited number of such killings is insufficient'; and adding that the *Kayishema* Judgment 'omitted to provide any state practice in support of its ruling on that point, thereby very much weakening the value of its ruling as a precedent', that it had been unable to find any state practice and that the definition of extermination was not at issue on appeal). However, the Trial Chamber did not discuss the similar holding in *Akayesu*. As noted below, the Elements of Crimes followed the *Akayesu* and *Kayishema* approach on this point. The ICTY Trial Chamber Judgment in *Prosecutor v. Brđanin*, IT-99-36-T, 1 September 2004, does not directly address this point, but could be read as supporting the *Vasiljević* approach (see paras. 388–389). ICTR: *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, 22 January 2004, para. 694. ('The Chamber is satisfied that a single killing or a small number of killings do not constitute extermination. In order to give practical meaning to the charge of extermination, as distinct from murder, there must in fact be a large number of killings'); *Prosecutor v. Ntagerura*, ICTR-99-46-T, 25 February 2004, para. 701 ('Responsibility for a single or limited number of killings is insufficient to form the material element of extermination'); *Prosecutor v. Semanza*, ICTR-97-20-T, 15 May 2003, para. 340 ('The scale of killings must be substantial'; 'Responsibility for a single or limited number of killings is insufficient'); *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, 21 February 2003, para. 814 ('There is insufficient evidence as to a large number of individuals killed [one person in one indictment and two in the other] as a result of the

was endorsed by the ICTR Appeals Chamber in the *Ntakirutimana* case when it upheld the acquittal of an accused found responsible for extermination on the ground that his actions 'alone do not satisfy the mass scale killing element for the Appeals Chamber to be able to enter a conviction for extermination'⁶⁹⁵. This restrictive interpretation would mean that when there was sufficient proof against a member of a death squad that was carrying out extermination of only one of those mass killings that person could only be convicted of murder. Such an interpretation, however, has been expressly rejected in the Elements of Crimes which require killing of 'one or more persons'⁶⁹⁶ while placing the emphasis on the question whether the killing took place in the context of a mass killing. One ICTR Trial Chamber has stated that a person may be convicted of extermination for planning the extermination, provided that there is a sufficient link between the planning and the killings⁶⁹⁷.

An ICTR Trial Chamber has held in the *Rutaganira* case that a person can be held individually criminally responsible in certain circumstances for extermination by omission, when the person failed to prevent others from committing the crime. It identified three factors in making that determination: (1) did the accused have power that he or she chose not to exercise?; (2) did the accused enjoy a moral authority over the principal perpetrators which could have prevented them from committing the crime which the accused chose not to exercise?; and (3) did the accused have a legal obligation to act that the accused did not fulfil⁶⁹⁸?

Courts differ fundamentally on the mental elements of extermination. ICTY Trial Chambers have stated that the perpetrator must have the same *mens rea* as for murder, 'which consists of the intention to kill or the intention to cause serious bodily injury to the victim which the perpetrator must have reasonably foreseen was likely to result in death'⁶⁹⁹. The ICTY Appeals Chamber has stated that the *mens rea* for extermination is that the perpetrator 'intended, by his acts or omissions, either killing on a large scale, or the subjection of a widespread number of people, or the systematic subjection of a number of people, to conditions of living that would lead to their deaths'⁷⁰⁰. In contrast, some ICTR Trial Chambers have stated in the *Bagilishema* and *Kayishema* cases that recklessness or gross negligence was sufficient to establish extermination⁷⁰¹. However, in 2003, the ICTR Trial Chamber in the *Semanza* case stated that intent was required, expressly rejecting these two judgments and noting that the ICTR Appeals Chamber had not resolved the inconsistency

116

Accused's actions. Therefore, the Chamber is not satisfied that Elizaphan Ntakirutimana or Gérard Ntakirutimana planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of a crime against humanity (extermination)').

⁶⁹⁵ *Prosecutor v. Ntakirutimana*, ICTR-96-10-A, 13 December 2004, para. 537.

⁶⁹⁶ Element 1 to article 7 (1) (b).

⁶⁹⁷ *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, para. 146 (citing the statement by Egon Schwelb that extermination was included in the Nuremberg Charter to 'bring the earlier stages in the organisation of a policy of extermination under the action of the law'. Schwelb (1946) 23 *BYIL* 178, 192).

⁶⁹⁸ *Prosecutor v. Rutaganira*, ICTR-95-1C-T, 14 March 2005, paras. 68 and 64 (citing *Prosecutor v. Blaškić*, IT-95-14-T, 3 March 2000, para. 284, and *Prosecutor v. Rutaganda*, ICTR-96-3-T, 6 December 1999, para. 41). In *Blaškić*, the ICTY Trial Chamber explained:

'the *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*. In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime'. *Ibid.*, para. 284 in *Rutaganda*, the ICTR Trial Chamber stated the general principle that 'an accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act', *Prosecutor v. Rutaganda*, ICTR-96-3-T, 6 December 1999, para. 41.

⁶⁹⁹ See, for example, *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, para. 642 (expressly rejecting recklessness or gross negligence as 'incompatible with the character of the crime of extermination and with the system and construction of article 5'); *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 495 (intent required).

⁷⁰⁰ *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 259. As noted above with regard to the *actus reus*, this formulation confusingly incorporates the threshold for an attack into the definition of an act constituting a crime against humanity.

⁷⁰¹ *Prosecutor v. Bagilishema*, ICTR-95-1A-T, 7 June 2001, para. 89; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 144, 146.

between these ICTR judgments and ICTY jurisprudence⁷⁰². In 2004, one ICTR Trial Chamber tried in the *Kamuhanda* case to reconcile the two diametrically opposite approaches by stating:

‘We do not interpret *Bagilishema* and *Kayishema* and *Ruzindana* to suggest that a person may be found guilty of a Crime against Humanity if he or she did not possess the requisite mens rea for such a crime, but rather to suggest that reckless or grossly negligent conduct are indicative of the offender’s mens rea. Understood in that way, the *Semanza* position is not at odds with the *Bagilishema* and *Kayishema* and *Ruzindana* judgments’⁷⁰³.

What this means in practical terms is unclear. Surprisingly, these inconsistencies do not appear to have even been raised in any of the appeals until the issue was addressed by the ICTR Appeals Chamber in *Ntakirutimana*⁷⁰⁴. In that case, the Appeals Chamber concluded:

‘Murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population, and the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a mass scale’⁷⁰⁵.

However, the Appeals Chamber did not state what the mental element was for either crime. Three possible additional mental elements of extermination (knowledge of a vast scheme of collective murder, discriminatory grounds and political motives) have been considered by the ICTY and ICTR which are inconsistent with the requirements of the Rome Statute and the Elements of Crimes. They have all been rejected by the ICTY, but one has been accepted by some ICTR Trial Chambers. First, in *Stakić*, the Appeals Chamber affirmed a Trial Chamber Judgment finding that there was no requirement that the perpetrator have knowledge of a ‘vast scheme of collective murder’⁷⁰⁶. In marked contrast, a number of ICTR Trial Chambers have imposed a high burden for prosecutors by holding that ‘[t]he accused must also be shown to have known of the vast scheme of collective murders directed against a civilian population on discriminatory grounds and to have been willing to take part in that scheme’⁷⁰⁷.

Second, there is no requirement for extermination to have been committed on discriminatory grounds (apart from the threshold discriminatory grounds in article 3 of the ICTR Statute, which is not a requirement under the customary international law definition of crimes against humanity)⁷⁰⁸. Third, ‘the ultimate reasons or motives – political or ideologi-

⁷⁰² *Prosecutor v. Semanza*, ICTR-97-20-T, 15 May 2003, para. 341. The Trial Chamber stated:

‘This Trial Chamber is of the view that, in the absence of express authority in the Statute or in customary international law, international criminal liability should be ascribed only on the basis of intentional conduct. Accordingly, the Chamber finds that the mental element for extermination is the intent to perpetrate or participate in a mass killing’.

Ibid. (fn. omitted). See also *Prosecutor v. Ntagerura*, ICTR-99-46-T, 25 February 2004, para. 701 (‘The mental element for extermination is the intent to perpetrate or to participate in mass killing’).

⁷⁰³ *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, 22 January 2004, para. 694 (Ruzindana was a co-defendant in the *Kayishema* case).

⁷⁰⁴ For example, the Appeals Chamber noted in *Prosecutor v. Kamuhanda*, No. ICTR-99-54A- A, Judgement, Appeals Chamber, 19 September 2005, para. 85, that the convicted person did not challenge the Trial Chamber’s definition of extermination.

⁷⁰⁵ *Prosecutor v. Ntakirutimana*, ICTR-96-10-A, 13 December 2004, para. 542.

⁷⁰⁶ *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 259. It expressly rejected the Trial Chamber’s Judgment in *Prosecutor v. Vasiljević*, IT-98-32-T, 29 November 2002, paras. 228 and 229, which had concluded that the perpetrator must have known ‘that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed (*mens rea*)’, thus implying that an objective element of the crime is systematically marking for killing or killing’.

⁷⁰⁷ *Prosecutor v. Bisengimana*, ICTR-00-60-T, 13 April 2006, para. 71. See also *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 144–147; *Prosecutor v. Rutaganda*, ICTR-96-3-T, 6 December 1999, paras. 82–83; *Prosecutor v. Musema*, ICTR-96-13-T, 27 January 2000, para. 217; *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, 22 January 2004, paras. 691, 692; *Prosecutor v. Ndindabahizi*, ICTR-2001-71-I, 15 July 2004, para. 479.

⁷⁰⁸ *Prosecutor v. Vasiljević*, IT-98-32-T, 29 November 2002, para. 228 (no need to prove the accused acted on any discriminatory grounds); *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 500.

cal – for which the offender carried out the acts are not part of the required *mens rea* and are, therefore, legally irrelevant⁷⁰⁹. Jurisprudence has confirmed that in contrast to genocide, there is no requirement that the perpetrator intended to destroy, in whole or in part, the group as such⁷¹⁰.

The Elements of Crimes were adopted before most of the judgments discussed above. It is, therefore, not surprising that this instrument identifies only two non-contextual elements of the crime of extermination that are generally applicable (see below for the intentional infliction of conditions of life). First, '[t]he perpetrator killed one or more persons', thus following the approach in the 1999 *Kayishema* Trial Chamber Judgment cited above⁷¹¹. A footnote explains that '[t]he conduct could be committed by different methods of killing, either directly or indirectly⁷¹². The second element, which distinguishes extermination from murder, requires that '[t]he conduct constituted, or took place as part of, a mass killing of members of a civilian population'. A footnote explains that '[t]he term "as part of" would include the initial conduct in a mass killing⁷¹³. No further guidance is provided in the second element as to the scope of the concept of 'mass killing', and, as has been noted, jurisprudence also provides little guidance. However, since the example of killing by inflicting conditions of life (see below) requires only that this conduct be 'calculated' to bring about the destruction of part of a population, the scope of 'mass killing' will depend on the definition of a population. As has been aptly noted, the use of the words 'calculated to bring about the destruction of part of a population' bears resemblance with the corresponding language in article 6 (c) ('calculated to bring about ... physical destruction' of the group).⁷¹⁴ But in contrast to genocide, extermination does not contain a requirement of a special intent to destroy a group.⁷¹⁵ This becomes clear by a comparison of the Elements of Crimes to article 6.⁷¹⁶ The Elements of Crimes do not include a mental element for the crime of extermination, confirming that it is governed by article 30. This means that the *mens rea* of extermination in the ICC context might differ from *ad hoc* tribunal jurisprudence. Under existing jurisprudence, knowledge that death would be a 'probable consequence' of the act or omission would not suffice (see above the discussion of murder, mn 34).

Technically, the Statute and the Elements leave space to encompass a wide range of criminality into the definition of extermination. But in interpreting the crime, caution should be exercised not to inflate the meaning of the crime, and create overlap with charges for multiple murders under paragraph 1 (a)⁷¹⁷.

b) 'intentional infliction of conditions of life'. Article 7 para. 2 (b) explains that extermination includes 'the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'. As the Cuban delegate explained, such acts could include embargoes which were calculated to achieve this result. The word 'calculated' suggests that the accused must have intended to bring about the destruction of part of a population. It would be in keeping with the purpose of the provision to include a siege of a village as 'part of a population'. Article 7 para. 1 (b) would appear to cover the same acts which are included in article 8 para. 2 (b) (xxv), the war crime of intentional starvation of civilians as a method of warfare in

⁷⁰⁹ *Prosecutor v. Vasiljević*, IT-98-32-T, 29 November 2002, para. 228.

⁷¹⁰ See, for example, *ibid.*, para. 227; *Prosecutor v. Krstić*, IT-93-33-T, 2 August 2001, para. 500.

⁷¹¹ For further background concerning the drafting of the elements of extermination, see Robinson, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 80, 82–84.

⁷¹² Element 1 to article 7 (1) (b), footnote 8.

⁷¹³ Element 1 to article 7 (1) (b), footnote 10.

⁷¹⁴ Ambos, *Treatise on ICL I* (2013) 296.

⁷¹⁵ See also Werle and Jessberger, *Principles of ICL* (2014) 353.

⁷¹⁶ In the context of article 7 paragraph 2 (b) and the Elements of Crimes, the element 'calculated to bring about the destruction' is only listed as an example of a particular form of extermination ('includes', 'including by').

⁷¹⁷ See *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, 20 July 2009, Partly Dissenting Opinion Judge Van den Wyngaert, para. 1120.

international armed conflict. Acts of genocide under article 6 (c) of ‘[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ when committed with an intent to destroy, in whole or in part, certain groups would also constitute extermination within the meaning of article 7 para. 1 (b), which protects a broader range of groups and includes omissions as well as acts.

Some of the judgments cited above indicate that extermination can involve the infliction of conditions of life that lead to the death of a large number of persons⁷¹⁸. However, the first element of the crime of extermination – which reproduces the language of article 7 (2) (b) based on the Genocide Convention – uses a significantly different and probably less restrictive test: killing, ‘including by inflicting conditions of life calculated to bring about the destruction of part of a population’. As noted by one of those who played a leading role in the drafting of article 7, there is some ambiguity about the meaning of ‘calculated’, including whether it is a subjective or objective requirement⁷¹⁹. It requires determining the meaning of a population, rather than applying a numerical test. A footnote clarifies that ‘[t]he infliction of such conditions could include the deprivation of access to food and medicine’. Other conduct that may constitute inflicting conditions of life has been suggested in the *Kayishema* case⁷²⁰.

3. ‘Enslavement’

- 119 a) **exercise of powers of ownership.** There is almost no jurisprudence in international criminal courts concerning the definition of enslavement, apart from decisions concerning sexual enslavement (see mn 61–62 and 121 concerning article 7 para. 1 (g) and para. 2 (c)). However, after a thorough review of the applicable law, the ICTY Appeals Chamber has concluded in the *Kunarac* case that the defining characteristic of the crime against humanity of enslavement is the ‘destruction of the juridical personality’ of a victim ‘as a result of the exercise of any or all the powers attaching to the right of ownership’, echoing the definition of slavery in the 1926 *Slavery Convention* (see mn 41)⁷²¹. In addition, it has also confirmed the view in the First Edition of this commentary that the crime against humanity of enslavement includes contemporary forms of slavery⁷²². In *Kunarac*, the ICTY Appeals Chamber in 2002 provided an extensive explanation of the scope of this crime:

‘117. The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery”, has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with “chattel slavery”, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of “chattel slavery” but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.

⁷¹⁸ ICTY: *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, 17 January 2005, para. 574; *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, para. 641. ICTR: *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 144, 146.

⁷¹⁹ Clark, in: Politi and Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 75, 83.

⁷²⁰ *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, para. 146 (‘The “creation of conditions of life that lead to mass killing” is the institution of circumstances that ultimately causes the mass death of others. For example: Imprisoning a large number of people and withholding the necessities of life which results in mass death; introducing a deadly virus into a population and preventing medical care which results in mass death’). See also *Prosecutor v. Bagilishema*, ICTR-95-1A-T, 7 June 2001, para. 90.

⁷²¹ *Prosecutor v. Kunarac*, IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 117.

⁷²² One commentator has stated that this crime is ‘the same substantively as the offence of slavery under article 3 [Violation of the laws or customs of war] of the ICTY Statute’. Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 179, note 28 (citing *Prosecutor v. Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 523; *Prosecutor v. Krnojelac*, IT-97-25-T, 15 March 2002, paras. 351, 356, 523).

118. The Appeals Chamber will however observe that the law does not know of a “right of ownership over a person”. Article 1 (1) of the 1926 Slavery Convention speaks more guardedly “of a person over whom any or all of the powers attaching to the right of ownership are exercised.” That language is to be preferred.

119. The Appeals Chamber considers that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour”. Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea; this judgement is limited to the case in hand⁷²³.

The *Kunarac* Appeals Chamber did not address the question whether the mere ability to buy, sell, trade or inherit a person or his or her labour or services could be a relevant factor in determining whether enslavement occurred. It concluded that lack of consent was not an element of the crime⁷²⁴. In addition, it declared that it was also not an element of the crime that the victims be enslaved for an indefinite or prolonged period of time⁷²⁵. The Appeals Chamber agreed with the Trial Chamber that the mental element of the crime of enslavement ‘consists of the intentional exercise of a power attaching to the right of ownership’⁷²⁶.

In the ICC context, the elements of enslavement have been specified by the Elements of Crimes⁷²⁷. Element 1 provides: ‘The perpetrator exercised any or all of the powers attaching to the right of ownership over a person, such as by purchasing, selling, lending or bartering such person or persons, or by imposing on them a similar deprivation of liberty’⁷²⁸. In the second edition of this commentary, fears have been expressed that this specification is inconsistent with the Rome Statute because it imposes a more restrictive approach. The replacement of the word ‘includes’ by ‘such as’ could be interpreted as changing the broadly

⁷²³ *Prosecutor v. Kunarac*, IT-96-23 and IT-96-23/1-A, 12 June 2002, paras. 117–119.

⁷²⁴ The *Kunarac* Appeals Chamber explained:

‘120. [T] he Appeals Chamber rejects the Appellants’ contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent. Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent. In the view of the Appeals Chamber, the circumstances in this case were of this kind’.

Id., para. 120. In contrast, in determining whether forced labour as an act of persecution occurred, the Appeals Chamber discussed the lack of consent as a relevant factor. *Prosecutor v. Krnojelac*, IT-97-25-A, 17 September 2003, paras. 191–196 (because it reversed the acquittal on the charge of persecution, it did not determine whether the Trial Chamber had erred on the acquittal for enslavement based on the same facts).

⁷²⁵ The *Kunarac* Appeals Chamber stated:

‘121. The Appellants contend that another element of the crime of enslavement requires the victims to be enslaved for an indefinite or at least for a prolonged period of time. The Trial Chamber found that the duration of the detention is another factor that can be considered but that its importance will depend on the existence of other indications of enslavement. The Appeals Chamber upholds this finding and observes that the duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship. The Appeals Chamber considers that the period of time, which is appropriate, will depend on the particular circumstances of each case’.

Prosecutor v. Kunarac, IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 121.

⁷²⁶ *Prosecutor v. Kunarac*, IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 122. It also stated that it was not necessary ‘to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts’, *ibid.*

⁷²⁷ See also Bassiouni, *Crimes against Humanity* (2011) 380.

⁷²⁸ Element 1 to article 7 (1) (c).

worded illustrative language into a more restrictive list where, if the Court were to follow it, only conduct in the list or similar conduct, which is largely commercial in nature, would constitute enslavement⁷²⁹. These concerns have been mitigated in jurisprudence⁷³⁰. In the *Katanga and Ngudjolo Chui* Confirmation Decision, PTC I included non-commercial practices in the definition of sexual slavery⁷³¹. The *Katanga* Trial Chamber recognised that the powers of ownership listed in the parallel Element 1 of article 7 (1) (g)-2 do not constitute an exhaustive list⁷³². It specified that ownership does not require a 'commercial transaction' but rather relates to the inability of a victim to change his or her condition⁷³³.

The use of the term 'similar deprivation of liberty' in the Elements of Crimes implies that the list is not exhaustive. It has been argued in the previous edition that the term must be interpreted more broadly than the concept of detention (see mn 150 on enforced disappearances) in order to be consistent with the Rome Statute. This understanding is reflected in the *Katanga* Trial Judgment which held that 'deprivation of liberty' can take many forms, and that in this assessment the victim's subjective perception of his or her situation, including reasonable fears, may be taken into account. In the drafting history, this alternative phrase has been criticised as too restrictive⁷³⁴. As a result of these concerns, a footnote partially addresses these concerns. It indicates that 'such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.'⁷³⁵ 'Servile status' under the Supplementary Convention includes debt bondage, serfdom, certain forms of forced marriage and child exploitation, 'whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention'⁷³⁶. The wording of the footnote clearly extends enslavement beyond 'chattel slavery'. It suggests some leeway to take into account contemporary situations analogous to slavery, in particular if the concept of 'ownership' required under article 7 (2) (c) is interpreted in light of the freedom of choice of the victim, rather than the formal power of control of the agent⁷³⁷. It also includes, as article 7 para. 2 (c) states, the exercise of ownership in 'the course of trafficking in persons, in particular women and children' (see following section). The mental element of the crime of enslavement is to be found in article 30.

⁷²⁹ See Hall (2000) 94 *AJIL* 773, 781. One government delegate involved in the drafting of this provision has contended that the term 'such as' makes 'it clear that the list is illustrative and open-ended'. Robinson, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 80, 85. This interpretation, which is the only way to reconcile this language with the Rome Statute, was not universally shared by other government delegates or by non-governmental organisations with experience in working to end enslavement who remained concerned that it could be read restrictively. Another commentator, who was closely involved in the drafting of this provision, stated that the list was 'non-exhaustive', but did not discuss the change from the statutory language, only the effect of the alternative ground. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2002), 328.

⁷³⁰ See also Schabas, *Commentary ICC* (2010), 161.

⁷³¹ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, 30 September 2008 (PURL: <https://www.legal-tools.org/doc/67a9ec/>), para. 430.

⁷³² *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, 7 March 2014 (PURL: <https://www.legal-tools.org/doc/9813bb/>), para. 975.

⁷³³ *Ibid.*, para. 976.

⁷³⁴ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP 2002), 328.

⁷³⁵ See footnote 11 relating to Element 1 to article 7 (1) (c).

⁷³⁶ See article 1 of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Geneva, 7 September 1956, 266 UNTS 3.

⁷³⁷ Based on the wording of article 7 (1) (c), it has been argued that forms of servitude listed in the Supplementary Slavery Convention qualify as enslavement only where they entail the exercise of 'powers attached to the right of ownership'. See Haenen (2013) 13 *ICLRev* 895, 902, fn. 38. But the 'subjective' understanding of ownership adopted in jurisprudence encompasses a potentially wide range of relationships. On the different approaches towards 'ownership', see *R v. Wei Tang*, High Court of Australia, 28 August 2008, (2008) 237 *CLR* 1.

b) **trafficking.** Trafficking in persons is a wider concept than slavery or practices similar to slavery⁷³⁸. It evolved separately and largely independently of the movement to abolish the slave trade and slavery. It has been addressed by a series of 20th century instruments prohibiting the trafficking in persons, particularly women and children, adopted before the Rome Statute⁷³⁹. Under current international treaties adopted during the 20th century prohibiting trafficking in persons, this crime against humanity has been generally viewed as limited to trafficking for the purposes of forced prostitution⁷⁴⁰. The 1949 Trafficking Convention requires States Parties

‘to punish any person who, to gratify the passions of another:

- (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) Exploits the prostitution of another person, even with the consent of that person’⁷⁴¹.

It also requires States Parties to punish persons keeping, managing or financing brothels⁷⁴². However, a major step forward occurred as the 20th century drew to a close when, building upon article 7 para. 2 (c), the UN General Assembly adopted the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Palermo Protocol), supplementing the *United Nations Convention against Transnational Organised Crime*, which prohibits trafficking for reasons other than forced prostitution. Article 3 para. (a) defines trafficking in persons as follows:

“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]’⁷⁴³

Four years later, on 3 May 2005, the Council of Europe adopted the *European Convention on Action against Trafficking in Human Beings*, which declared in its Preamble that ‘trafficking in human beings constitutes a violation of human rights and an offence to the

⁷³⁸ Slavery or slavery-like practices are only one form of relevant exploitation. See Van der Wilt (2014) 13 ChineseJl 297, 303. See generally Gallagher, *The International Law of Human Trafficking* (2010) 177–191; Obokata, (2005) 54 *I&ComplQ* 445; Pocar, in: Savona and Stefanizzi (eds.), *Measuring Human Trafficking: Complexities and Pitfalls* (2007), 1, 5–12.

⁷³⁹ These treaties include: *International Convention for the Suppression of the White Slave Traffic*, 18 May 1904, 35 Stat. 426, 1 LNTS 83 (as amended by the Protocol of 4 May 1949, 92 UNTS 19); *International Convention for the Suppression of White Slave Traffic*, 4 May 1910, 3 LNTS 278 (as amended by the Protocol of 4 May 1949, 92 UNTS 19); *International Convention for the Suppression of the Traffic in Women and Children*, 30 September 1921 (as amended in Protocol signed at Lake Success, New York, on 12 November 1947, 93 UNTS 43); *International Convention on the Suppression of the Traffic in Women of Full Age*, 11 October 1933 (as amended in Protocol signed at Lake Success, New York, on 12 November 1947, 93 UNTS 43); *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, adopted in GA Res 317 (IV) of 2 December 1949, 96 UNTS 272; American Convention on Hum. Rts., 22 November 1969, 1144 UNTS 123, article 6, para. 1; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 12 UNTS 14, article 6. See also GA Res A/52/637 (12 December 1997).

⁷⁴⁰ Chuang (1998) 11 *HarvILJ* 64 (arguing for an expansion of treaty protection to cover modern manifestations of trafficking involving ‘the coerced recruitment and transportation of women not only for forced prostitution, but for a variety of other forced labour and slavery-like practices, such as forced domestic labour, factory labour and commercial marriages’).

⁷⁴¹ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted in GA Res 317 (IV) of 2 December 1949, 96 UNTS 272, article 1.

⁷⁴² *Ibid.*, article 2.

⁷⁴³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, GA Res. 55/25, 8 January 2001, (167 States Parties up to 24 August 2015).

dignity and the integrity of the human being⁷⁴⁴. Article 4 of the European Convention uses exactly the same definition as in the UN Protocol and article 18 requires each State Party to 'adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally'⁷⁴⁵. However the European Convention goes further than the UN Protocol and other instruments concerning trafficking in a number of respects⁷⁴⁶.

- 122 In the ICC context, the inclusion of trafficking as a crime against humanity was contested. The Women's Caucus for Gender Justice lobbied for the inclusion of trafficking as an independent crime. It challenged the focus on ownership, in order to include systematic recruitment and forced labour, as well as exploitation by persons other than the traffickers⁷⁴⁷. The current framing of trafficking as part of enslavement goes back to a proposal by Italy on 3 July 1998 which clarified that the definition of enslavement in paragraph 2 (c) of article 7 of the Rome Statute 'includes the exercise of any or all of the powers attaching to the right of ownership over a person ... in the course of trafficking in persons, in particular women and children'. This clarification is significant since it precludes a perpetrator from claiming that he has not 'enslaved' because he has not literally 'put the person to work'⁷⁴⁸. It implies that certain forms of trafficking can be assimilated to enslavement. The definition of this crime is broader than in previous treaties: it goes beyond sexual exploitation⁷⁴⁹ and is not limited to women and children. But the required link to the exercise of ownership over a person makes it clear that not 'all' forms and elements of network criminality in the trafficking in human beings amount to a crime against humanity under the Statute⁷⁵⁰. The scope of the conduct covered will depend on the interpretation of the concept of exercising powers of ownership, discussed above (see above mn 119–120). Criteria used in existing international jurisprudence (e.g., *Kunarac, Katanga and Ngudjolo Chui, Katanga*) have synergies with the 'means' requirement under the Palermo Protocol ('abuse of power', the 'victim's position of vulnerability'). In the previous edition, it has been argued that the provision should 'be given a broad reading' and that 'it should be interpreted consistently with contemporary understanding of the concept of trafficking in persons'. But in light of the limited jurisdiction of the ICC, some caution is required. Although existing interpretations of the concepts of 'policy' and 'organisation' leave some leeway to take into account trafficking by non-state actors⁷⁵¹, the Court would be ill-equipped to prosecute a vast number of 'organised criminal groups', as defined by the *United Nations Convention against Transnational Organised Crime*⁷⁵².

⁷⁴⁴ European Convention on Action against Trafficking in Human Beings, CM (2005) 32 Addendum 1 final, adopted 3 May 2005. The draft convention has been severely criticised by non-governmental organisations. See, for example, Amnesty International and Anti-Slavery International, Council of Europe, *Recommendations to Strengthen October 2004 Draft of the European Convention on Action against Trafficking in Human Beings*, AI Index: IOR 61/024/2004, 12 November 2004.

⁷⁴⁵ *Ibid.*, articles 4 (a) and 18. Sub-paragraph (b) of article 4 provides that the consent of a victim is 'irrelevant where any of the means set forth in subparagraph (a) have been used'.

⁷⁴⁶ It recognizes trafficking in human beings as a violation of human rights; covers all forms of trafficking regardless of whether it is linked to organised crime; applies to all persons regardless of whether they are women, children or men; and establishes a comprehensive legal framework of specific measures to protect victims and witnesses, including an independent monitoring system. See Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings, para. 51; reproduced in Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, CETS No. 197, Warsaw, 16 May 2005 (<http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>, accessed 13 February 2015).

⁷⁴⁷ For survey, see Robinson, in: Lee *The International Criminal Court* (2001) 80, 84–85.

⁷⁴⁸ Bassiouni, *Crimes against Humanity* (2011) 380.

⁷⁴⁹ A reference to 'purpose of sexual exploitation' following 'women and children' was eliminated. This extends the scope beyond sexual exploitation.

⁷⁵⁰ Concurring Van der Wilt (2014) 13 *ChineseJIL* 297, 308.

⁷⁵¹ On the broad approach towards 'organisation', defined by 'capacity', see mn 110.

⁷⁵² See *United Nations Convention against Transnational Organised Crime*, Palermo 15 November 2000, 2237 UNTS 319. Article 2, which includes 'a structured group of three or more persons, existing for a period of time

There appears to be no jurisprudence by international criminal courts on trafficking as a particular form of enslavement, despite its prevalence in certain countries in the former Yugoslavia⁷⁵³. It is not separately mentioned in the single element of the crime of enslavement, but a footnote recalls the statutory language by stating that ‘[i]t is also understood that the conduct described in this element includes trafficking in persons, in particular women and children’.

4. ‘Prohibited movements of population’

The Rome Statute recognizes two similar, but distinct, crimes against humanity constituting forced displacement of persons: deportation across national frontiers and forcible transfer of population within national frontiers⁷⁵⁴. The Geneva Conventions and its Additional Protocols suggest that the crime of deportation – and by analogy the crime of forcible transfer – relates to a civilian population. The crime itself refers to the broader notion of ‘population’. As noted by the Trial Chamber in *Popović*, the ‘civilian status of the victims’ needs to be established to determine if the chapeau requirements have been met.

It also helps to distinguish lawful acts from criminal ones, since acts of detention and forced movement can ‘in some circumstances ... be perfectly legitimate’⁷⁵⁵. But it is not a separate element of the crime⁷⁵⁶.

a) ‘Deportation’. The crime against humanity of deportation across national frontiers includes only deportation which is unlawful under international law; it excludes lawful deportation. The concept includes deportation of nationals and aliens. Deportation by a State of its *own nationals* is usually prohibited⁷⁵⁷. The scope of lawful deportation of *aliens* from the territory of a State is limited under international law⁷⁵⁸. Like the war crime of ‘deportation to slave labour or any other purpose’ in article 6 (b) of the Nuremberg Charter, the crime against humanity of deportation under the Statute applies regardless of the purpose of the deportation. Deportation under article 7 para. 1 (d) is not limited to deportation from an occupied territory to another country⁷⁵⁹.

aa) ‘lawfully present’. The requirement that the deportation of persons be ‘from the area where they are lawfully present’ must mean not only where they are lawfully present under *national* law, but also where they are lawfully present under international law⁷⁶⁰. Any other reading would make the definition of deportation meaningless as it would permit a government to declare that the people to be deported were not ‘lawfully present’ in the territory of a State or in occupied territory on grounds which were contrary to international law and escape

and acting in concert with the aim of committing one or more serious offences, ... in order to obtain, directly or indirectly, a financial or other material benefit’.

⁷⁵³ Apparently, there has been only one – unsuccessful – prosecution for this crime by the UNMIK Regulation 64 international panels in Kosovo. See, for example, Amnesty International, *Serbia and Montenegro: Shameful investigation into sex-trafficking case* (1 February 2005, AI Index: EUR 70/001/2005); Amnesty International, *Kosovo (Serbia and Montenegro): ‘So Does It Mean that We Have the Rights?’ Protecting the Human Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo* (6 May 2004, AI Index: EUR 70/010/2004).

⁷⁵⁴ See generally on historical development: Dawson and Farber, *Forcible Displacement Throughout the Ages: Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (2012); Jacques, *Armed Conflict and Displacement* (2012); Bassiouni, *Crimes against Humanity* (2011) 381–396.

⁷⁵⁵ *Prosecutor v. Popović et al.*, IT-05-88-T, 10 June 2010, para. 912.

⁷⁵⁶ *Ibid.*, para. 910.

⁷⁵⁷ Weiss, *Nationality and Statelessness in International Law* (2nd edition 1979) 45–61; Goodwin-Gill, *International Law and the Movement of Persons between States* (1978) 202, 213–214, 287.

⁷⁵⁸ For circumstances when deportation of aliens has been considered lawful under international law, see Goodwin-Gill, *International Law and the Movement of Persons between States* (1978) 200–310.

⁷⁵⁹ Although one commentator considered that deportation under the Nuremberg Charter was a crime against humanity only if it applied to civilians in an occupied territory, this view (see Schwelb (1946) 23 *BYBIL* 178, 192), even if it were correct at the time, certainly is not now.

⁷⁶⁰ Concurring Cryer et al., *Introduction to ICL* (2014) 248, fn. 147; Werle and Jessberger, *Principles of ICL* (2014) 360 propose to rely on international law only.

international criminal responsibility⁷⁶¹. *Nationals* have a right to reside in the territory of their own State; although international instruments do not provide a general right to aliens to enter the territory of a State, a State's power to restrict entry to its territory is not unlimited⁷⁶². Lawful presence may arise as a result of *non-refoulement* obligations warranting presence of asylum seekers and refugees⁷⁶³. In ICTY jurisprudence, the notion of presence has been distinguished from requirements for residency. Notably, the Trial Chamber in *Popović* argued that

[t]he clear intention of the prohibition against forcible transfer and deportation is to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities. In that respect, whether an individual has lived in a location for a sufficient period of time to meet the requirements for residency or whether he or she has been accorded such status under immigration laws is irrelevant. Rather, what is important is that the protection is provided to those who have, for whatever reason, come to "live" in the community—whether long term or temporarily ... the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for "residency" to be demonstrated as a legal standard⁷⁶⁴.

Although the question of lawful presence was discussed at some length in the Preparatory Commission, the second material element of this crime listed in the Elements of Crimes simply reiterates the language in article 7 para. 2 (d), thus leaving this matter for the Court to decide, possibly by reference to article 21 on applicable law⁷⁶⁵.

In determining whether persons whose initial presence on lands was unlawful under national – as opposed to international – law, it should be born in mind that under general principles of law common to many legal systems, persons continually present on land can, after a specified lapse of time, gain a valid right to remain on the land or even legal title⁷⁶⁶. Mass expulsions of persons claiming a right to remain present without a fair judicial determination that their presence was unlawful under both national and international law would constitute forcible transfer of population⁷⁶⁷. This restriction is consistent with the right of every human being 'to be protected against being arbitrarily displaced from his or her home or place of habitual residence'⁷⁶⁸. The only specific mental element for this crime is

⁷⁶¹ Concurring Ambos and Wirth (2002) 13 *CLF* 1, 60. Similarly, the provision in the definition of torture in article 1 of the Convention against Torture excluding 'pain or suffering arising only from, inherent in or incidental to lawful sanctions' applies only to sanctions which are lawful under international law. See mn 134.

⁷⁶² Human Rights Committee, General Comment No. 15/27, para. 5 ('in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise'); Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 263–264 (a refugee from a neighbouring State who was tortured may not be refused entry at border but must be granted at least temporary residence).

⁷⁶³ Non-refoulement under article 33 of the 1951 Refugee Convention is not explicitly tied to regular entry of territory. For discussion see Chetail (forthcoming).

⁷⁶⁴ *Prosecutor v. Popović et al.*, IT-05-88-T, 10 June 2010, para. 900; *Prosecutor v. Đorđević*, No. IT-05-87/1-T, Judgment, Trial Chamber, 23 February 2011, paras. 1616 and 1640.

⁷⁶⁵ Robinson, in: Lee (ed.), *The International Criminal Court* (2001) 80, 87.

⁷⁶⁶ Of course, this principle would not apply when the presence of the targeted population was unlawful under international law, for example, when the presence was a war crime under article 8 para. 2 (b) (viii).

⁷⁶⁷ Several international instruments prohibit collective expulsion of aliens. See article 22(1) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3; article 22(9) of the American Convention on Hum. Rts., 22 November 1969, 1144 UNTS 123; article 12(5) of the *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217; article 4 of Protocol No. 4 to the *European Convention on Human Rights*, 16 September 1963, CETS No. 046; and article 26(2) of the Arab Charter on Human Rights, 22 May 2004, reprinted in (2005) 12 *I HumRtsRep.* 893.

⁷⁶⁸ Guiding Principles, principle 6, para. 1. Paragraph 2 explains, in a non-exhaustive list, that '[t]he prohibition of arbitrary displacement includes displacement:

- (a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
- (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;

that the perpetrator be 'aware of the factual circumstances that established the lawfulness of such presence'. Therefore, there is no need to demonstrate that the perpetrator made any legal determination concerning the lawfulness of the victim's presence or was aware that it was lawful.

bb) Without permitted grounds. International law prohibits States from deporting nationals in most cases and from deporting aliens arbitrarily⁷⁶⁹. During armed conflict, deportation is prohibited, except for a few strictly limited grounds for the benefit of the persons concerned and on a temporary basis only. During an international armed conflict, deportation from occupied territory is prohibited under customary international law, as reflected in article 8 para. 2 (a) (vii) of the Rome Statute, prohibiting '[u]nlawful deportation' of persons protected by the Fourth Geneva Convention, and article 8 para. 2 (b) (viii), prohibiting, as another serious violation of the laws and customs applicable in armed conflict, 'within the established framework of international law', 'the deportation ... of all or parts of the population of the occupied territory within or outside this territory'.⁷⁷⁰ Article 49 of the Fourth Geneva Convention prohibits:

'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited regardless of their motive'.

Article 147 of the Fourth Geneva Convention lists the 'unlawful deportation ... of a protected person' as a grave breach of that Convention. The only exception to the prohibition of deportation is that 'the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand'.⁷⁷¹ A similar prohibition applicable to non-international armed conflict, but without any express exceptions, is found in paragraph 2 of article 17 of Add. Prot. II, which states that '[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict'⁷⁷². See article 8 para. 2 (a) (vii), (b) (viii) and (e) (viii) of the Rome Statute. Article 19 of the Third Geneva Convention provides for the evacuation of prisoners of war out of the combat zone and into internment facilities, subject to certain conditions.

The ICTY has only recognised limited grounds permitting forced displacements, based on the legal regime governing evacuations under international humanitarian law. It specified that evacuations must be 'temporary'⁷⁷³ and an 'exceptional measure'. It recognised three justifications. It argued that evacuation is permitted to ensure the security of the population 'when the area in which the population is located is in danger as a result of "military

(d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and

(e) When it is used as a collective punishment'.

⁷⁶⁹ ICCPR, article 12 para. 4 (no one may be arbitrarily deprived of the right to enter own country), article 13 (no alien lawfully in territory may be expelled except by decision in accordance with law); ECHR, Protocol 4, article 3 (no expulsion of nationals or denial of their right to enter) and article 4 (collective expulsion of aliens prohibited). The Commentary on article 18 (g) of the 1996 ILC Draft Code explained that use of the term 'arbitrary' in the crime against humanity of 'arbitrary deportation' was designed 'to exclude the acts when committed for legitimate reasons, such as public health or well-being, in a manner consistent with international law'. Although this concept is part of the crime against humanity of deportation, those particular examples do not appear to have been cited by the drafters of article 7 para. 1 (d) or para. 2 (d) (in contrast to the crime of forcible transfer).

⁷⁷⁰ See also article 85 of Add. Prot. I which prohibits 'the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory in violation of article 49 of the Fourth Convention'.

⁷⁷¹ Article 49 (2) of the Fourth Geneva Convention specifies that 'evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased'.

⁷⁷² Article 8 para. 2 (e) (viii) of the Rome Statute, which is modeled on paragraph 1 of article 17 of Add. Prot. II, uses the broader term 'displacement', rather than 'deportation'.

⁷⁷³ *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, 17 January 2005, para. 597.

operations” or “intense bombing”, since a commander may be duty bound to evacuate in the interest of the protection of the civilian population⁷⁷⁴. It noted that evacuation is allowed for ‘imperative military reasons [...], i.e. when the presence of the population hampers military operations’⁷⁷⁵, while adding that it is ‘unlawful to use evacuation measures based on imperative military reasons as a pretext to remove the population and effectuate control over a desired territory’⁷⁷⁶.

Third, the Tribunal considered to what extent evacuations would be permitted for ‘humanitarian reasons’, i.e., outside the prohibition of article 17 of Additional Protocol II referred to above. It noted that parties to the conflict may displace civilians for certain non-conflict related reasons, such as ‘the outbreak or risk of outbreak of epidemics, natural disasters, or the existence of a generally untenable and life-threatening living situation’⁷⁷⁷, unless the humanitarian crisis ‘is itself the result of the physical perpetrator’s or accused’s own unlawful activity’⁷⁷⁸. Lawful evacuations, covered by the three recognised exceptions, do not form part of the crime. But if they are carried in violation of duties under article 49(3) of the Fourth Geneva Convention or article 17(1) of Additional Protocol II, they can turn into criminal conduct⁷⁷⁹.

- 127 **b) ‘forcible transfer’.** The statutory term ‘forcible transfer of population’ within national frontiers would appear to require the involuntary movement of a number of persons, or at least the intent to force such movement, rather than the unlawful transfer of a single individual, unless it was part of a transfer of a population or group of persons⁷⁸⁰. However, the first material element of this crime listed in the Elements of Crimes requires only the forcible transfer of ‘one or more persons’. Presumably, this formulation was adopted to ensure that lower-level individuals could be convicted of forcible transfers when they themselves were responsible for transfers of only one or more persons out of a targeted group or population⁷⁸¹. Otherwise, only the highest ranking persons could ever be held criminally responsible for the forcible transfer of a population and their subordinates who carried the forcible transfer might escape criminal responsibility for this crime. Since forcible transfer applies within national frontiers, expulsion should be given its ordinary meaning rather than its more technical meaning in the context of deportation. The first material element of the crime of forcible transfer listed in the Elements of Crimes simply repeats the term ‘expulsion or other coercive acts’ without further explanation. However, considering the recent history of internal displacement of people, and the broad definition of the term ‘forcibly’ in footnote 12 to the first material element (mn 47), the largely duplicative phrase ‘expulsion or other coercive acts’ must include the full range of coercive pressures on people to flee their homes, including death threats, destruction of their homes, and other acts of persecution, such as depriving members of a group of employment, denying them access to schools and forcing them to wear a symbol of their religious identity. In the *Krnjelac* case, the ICTY Appeals Chamber held that it is the absence of genuine choice that makes a displacement unlawful and that mere expression of consent is insufficient to demonstrate consent when circumstances deprive the consent of any value⁷⁸².

⁷⁷⁴ See *Prosecutor v. Blagojević and Jokić*, IT-02-60—T, 17 January 2005, para. 598.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ *Prosecutor v. Popović et al.*, IT-05-88 -T, 10 June 2010, para. 901; see also *Prosecutor v. Blagojević and Jokić*, IT-02-60—T, 17 January 2005, para. 597.

⁷⁷⁷ *Prosecutor v. Blagojević and Jokić*, IT-02-60—T, 17 January 2005, para. 600.

⁷⁷⁸ *Prosecutor v. Popović et al.*, IT-05-88-T, 10 June 2010, para. 903.

⁷⁷⁹ See Ambos, *Treatise on ICL II* (2014) 87.

⁷⁸⁰ The requirement that the movement be forced was in part based on concerns by the delegation of Israel, supported by the US delegation. See, McCormack, in: McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 179, 192.

⁷⁸¹ The term ‘population’ has been interpreted in the context of extermination to mean groups as small as a neighbourhood and a similar approach should apply to forced displacement. *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, 22 January 2004, para. 694.

⁷⁸² *Prosecutor v. Krnjelac*, IT-97-25-A, 17 September 2003, para. 229.

aa) ‘lawfully present’. The requirement that the transfer of population be ‘from the area where they are lawfully present’ must mean where they are lawfully present within the territory of the State or occupied territory under international law. Any other reading would make the definition meaningless as it would permit a government to declare that the people to be transferred were not ‘lawfully present’ in the area and escape criminal responsibility⁷⁸³. Although this question was discussed at some length in the Preparatory Commission, the second element of this crime simply reiterates the language in article 7 para. 2 (d), thus leaving this matter for the Court to decide, possibly by reference to article 21 on applicable law⁷⁸⁴. In determining whether persons whose initial presence on lands was unlawful under national – as opposed to international – law, it should be born in mind that under general principles of law common to many legal systems, persons continually present on land can, after a specified lapse of time, gain a valid right to remain on the land or even legal title⁷⁸⁵. Mass expulsions of persons claiming a right to remain present without a fair judicial determination that their presence was unlawful under both national and international law would constitute forcible transfer of population. This restriction is consistent with the right of every human being ‘to be protected against being arbitrarily displaced from his or her home or place of habitual residence’⁷⁸⁶. As may be inferred from *Popović*, protection may encompass ‘internally displaced persons who have established temporary homes after being uprooted from their original community’.⁷⁸⁷ The only specific mental element for this crime is that the perpetrator be ‘aware of the factual circumstances that established the lawfulness of such presence’. Therefore, there is no need to demonstrate that the perpetrator made a legal determination or was aware of the lawfulness of the victim’s presence.

bb) **Without permitted grounds.** The power of States to restrict the freedom of nationals and aliens who are lawfully present to move within the territory is limited by international law to restrictions which are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order (*ordre public*), for the protection of health or morals, or for the protection of the rights of others, provided such restrictions are consistent with other human rights guarantees⁷⁸⁸.

⁷⁸³ Concurring Ambos and Wirth (2002) 13 *CLF* 1, 60. Similarly, the provision in the definition of torture in article 1 of the Convention against Torture excluding ‘pain or suffering arising only from, inherent in or incidental to lawful sanctions’ applies only to sanctions which are lawful under international law. See mn 134.

⁷⁸⁴ See, Robinson, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 80, 87.

⁷⁸⁵ Of course, this principle would not apply when the presence of the targeted population was unlawful under international law, for example, when it the presence was a war crime under article 8 para. 2 (b) (viii).

⁷⁸⁶ Guiding Principles, principle 6, para. 1. Paragraph 2 explains, in a non-exhaustive list, that ‘[t]he prohibition of arbitrary displacement includes displacement:

- (a) When it is based on policies of apartheid, “ethnic cleansing” or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
- (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;
- (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
- (e) When it is used as a collective punishment’.

See also Centre on Housing Rights and Evictions/Zimbabwe Lawyers for Human Rights, *Operation Murambatsvina: A Crime against Humanity* (May 2007).

⁷⁸⁷ *Prosecutor v. Popović et al.*, IT-05-88-T, 10 June 2010, para. 900.

⁷⁸⁸ ICCPR, article 12 para. 3 (only those restrictions ‘which are provided for by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant’); ECHR, Protocol 4, article 2 para. 3 (only restrictions which ‘are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of the *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’); American Convention on Hum. Rts., article 22 para. 3 (restriction permitted ‘only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals,

The first element in the Elements of Crimes of the crime of forcible transfer simply repeats the phrase ‘without grounds permitted under international law’.

The war crime in non-international armed conflict of ‘the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand’, included in article 8 para. 2 (e) (viii) of the Statute (based on Add. Prot. II article 17), indicates that there are strictly limited grounds permitted to displace civilians during a non-international armed conflict⁷⁸⁹. The ICTY Trial Chamber has concluded that, ‘in view of the drastic nature of a forced displacement of persons, recourse to such measures would only be lawful in the gravest of circumstances and only as measures of last resort’⁷⁹⁰. These restrictions during armed conflict suggest that the power of governments to displace population are similarly limited in peacetime to equally compelling grounds⁷⁹¹. Technically, it might be possible to argue that the forced displacement of population for public projects, such as the construction of a highway or dam might fall within the scope of article 7 para. 1 (d), if there were no ‘compelling and overriding public interests’ justifying this measure which met ‘the requirements of necessity and proportionality’⁷⁹², the procedures used did not satisfy due process or if the individuals were not fairly compensated and given freedom of choice concerning their new homes. But including such measures under article 7 (1) (d) might significantly blur the distinction between human rights violations and internationally criminalised conduct.

- 130 **cc) Mental element.** Jurisprudence has been inconsistent on the mental element. Several Trial Chamber judgments at the *ad hoc* tribunals have required an intent to permanently displace the victims of deportation.⁷⁹³ This requirement was introduced in order to distinguish deportation and forcible transfer from lawful evacuation in the interest of protected persons. This jurisprudence contrasts with the wording of article 49 of the Fourth Geneva Convention, which prohibits ‘[i]ndividual or mass forcible transfers’ and deportations ‘regardless of their motive’, i. e. without reference to the aim of non-return. Reliance on the literal reading led to a change of jurisprudence in the *Stakić* case where the Appeals Chamber concluded that ‘deportation does not require an intent that the deportees should not return’.⁷⁹⁴ Subsequent jurisprudence has dropped the intent requirement. It is also not specifically listed in the ICC Elements of Crimes related to deportation or forcible transfer of population. It is thus not convincing to argue that the mental element requires an ‘intent’ that ‘the victim will not return to his or her place of origin’⁷⁹⁵. What counts is intent and knowledge relating to the forcible displacement of persons from territory in which they are lawfully present. This may be doubtful in certain borderline cases, for instance where the forced movement is an intermediary step towards detention.⁷⁹⁶

public health, or the rights and freedoms of others’) and article 22 para. 4 (restrictions ‘by law in designated zones for reasons of public interest’).

The ILC Commentary on article 18 (g) of the 1996 ILC Draft Code, explained that use of the term ‘arbitrary’ in the crime against humanity of ‘arbitrary deportation’ was designed ‘to exclude the acts when committed for legitimate reasons, such as public health or well-being, in a manner consistent with international law’.

⁷⁸⁹ Similar limitations apply to deportations and transfers of all or parts of the population of an occupied territory in the context of international armed conflict or its aftermath in violation of article 8 para. 2 (a) (vii) and para. 2 (b) (viii). See the Fourth Geneva Convention, article 49; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2002), 106–112, 212–214.

⁷⁹⁰ *Prosecutor v. Blagoje Simić et al.*, IT-95-9-T, 17 October 2003, para. 125, note 218.

⁷⁹¹ For example, it has been suggested that such compelling grounds might include a natural disaster. Ambos and Wirth (2002) 13 *CLF* 1, 60.

⁷⁹² Kälin (2000) 32 *Studies in TransnatLegPol*, 17.

⁷⁹³ See e.g., *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, 17 January 2005, para. 601; *Prosecutor v. Brđanin*, IT-99-36-T, 1 September 2004, para. 545; *Prosecutor v. Simić et al.*, IT-95-9-T, 17 October 2003, para. 134; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, 31 March 2003, para. 520.

⁷⁹⁴ *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para. 307.

⁷⁹⁵ But see Werle and Jessberger, *Principles of ICL* (2014) 361.

⁷⁹⁶ See *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, 31 March 2003, para. 537.

5. 'Torture'

a) 'intentional'. Since under article 30 para. 1 the material elements of the crime must be committed 'with intent and knowledge' unless otherwise provided, the express requirement that the infliction of pain or suffering be 'intentional' excludes the separate requirement of knowledge as set out in article 30 para. 3 and is, therefore, consistent with the definition of torture in article 1 of the Convention against Torture, which simply requires intent to do the act which caused the pain or suffering⁷⁹⁷. This interpretation is confirmed by the General Introduction to the Elements of Crimes, which states that it is not necessary for the perpetrator to have known that the harm inflicted was severe⁷⁹⁸. It would not be in keeping with that definition to require proof in addition that the torturer *knew* that the conduct inflicted or was likely to inflict pain or suffering which was severe; it should be sufficient that the torturer intended the conduct and that the victim endured severe pain or suffering⁷⁹⁹. ICTY jurisprudence is consistent with this interpretation⁸⁰⁰. It was expressly confirmed by PTC II in the *Bemba* case. The Chamber held that it is 'sufficient that the perpetrator intended the conduct and that the victim endured severe pain or suffering'⁸⁰¹.

Under customary international law, torture can be committed by an act or an omission⁸⁰². The elements of torture in the Elements of Crimes are inconsistent with the Statute because they omit the crucial mental element of intention that is expressly stated in the Statute. The first of these material elements simply requires that '[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons'⁸⁰³. But first jurisprudence has confirmed the view that 'the infliction of pain or suffering must be "intentional"'⁸⁰⁴.

⁷⁹⁷ The requirement in article 1 of the Convention against Torture that the infliction of pain or suffering be intentional was to exclude pain or suffering which was 'the result of an accident or of mere negligence'. Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 118.

⁷⁹⁸ Elements of Crimes, General Introduction, para. 4 ('With respect to mental elements associated with elements involving value judgement, such as those using the terms "inhumane" or "severe", it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated').

⁷⁹⁹ This interpretation is supported by the ICTY Appeals Chamber in the *Kvočka et al.* case, which rejected the claim on appeal of a deputy commander in a detention camp guard service convicted of the war crime of torture based on a joint criminal enterprise that he did not want the victims to suffer on the ground that the accused knew of the common criminal enterprise (which encompassed torture) and intended to participate in it. *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005, para. 308. There is no difference between the war crime of torture and the crime against humanity of torture on this point.

⁸⁰⁰ *Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1-A, 12 June 2002, paras. 142 and 144 (endorsing a definition of torture, based on the definition of the Convention against Torture and ICTY and ICTR jurisprudence, including the following elements: '(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental' and '(ii) The act or omission must be intentional'.); *Prosecutor v. Furundzija*, IT-95-17/1-A, 21 July 2000, para. 111 (same).

⁸⁰¹ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 194.

⁸⁰² *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, para. 468 ('[O]missions may also provide the requisite material element, provided... that the act or omission was intentional, that is an act which, judged objectively, is deliberate and not accidental'). In contrast, the crime against humanity of other inhumane acts does require an intent to inflict great suffering or serious injury (see mn 102).

⁸⁰³ The suggestion by one government delegate involved in the drafting of the Elements that the silence of the elements means that the mental elements of the crime of torture are those in article 30 para. 1 (intent and knowledge), see Robinson, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 80, 92, cannot be correct; article 30 applies only '[u]nless otherwise provided', which must mean 'unless otherwise provided by the Statute or other international law' (as in the case of the grave breach of willful killing in article 8 para. 2 (a) (i)). Although another government delegate has suggested that this provision could mean 'unless otherwise provided by the Elements of Crimes', see article 30, mn 14 *et seq.*, that would be inconsistent with article 9 para. 1, which makes it clear that the 'Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8', and article 9 para. 3, which requires that the Elements of Crimes 'shall be consistent with this Statute'. Even if this approach were to be followed by the Court, it would not apply where the Statute expressly provides the mental element, as here.

⁸⁰⁴ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 194.

132 b) 'severe pain or suffering'. The phrase 'severe pain' was considered by the drafters of article 1 of the Convention against Torture 'sufficient to convey the idea that only acts of a certain gravity shall be considered to constitute torture'⁸⁰⁵. Such acts include threats of rape and other sexual violence⁸⁰⁶. They also include the pain and suffering suffered by relatives of the 'disappeared'⁸⁰⁷. In international case-law and academic writing, it is frequently argued that the severity requirement distinguishes torture from similar offences (inhuman treatment).⁸⁰⁸ This approach was notably defended in *Krnjelac*, in which the Trial Chamber held:

'Care must be taken to ensure that ... specificity is not lost by broadening each of the crimes ... to the extent that the same facts come to constitute all or most of those crimes. In particular, when relying upon human rights law relating to torture, the Trial Chamber must take into account the structural differences which exist between that body of law and international humanitarian law, in particular the distinct role and function attributed to states and individuals in each regime.'⁸⁰⁹

This view contrasts with the view taken in the second edition of this commentary according to which it would be incorrect to distinguish torture, whether as a crime against humanity or as a war crime, from the numerous other forms of ill-treatment within the Court's jurisdiction, such as the war crimes of inhuman treatment (article 8 para. 2 (a) (ii)) or willfully causing great suffering (article 8 para. 2 (a) (iii)) or the human rights violations of cruel, inhuman or degrading treatment or punishment, on the ground that the pain or suffering endured was more severe⁸¹⁰. In the ICC context, the assumption of a hierarchy of

⁸⁰⁵ Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 117, 117–118 (giving examples of conduct which satisfied this standard).

⁸⁰⁶ *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, 2 November 2001, para. 287; *Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 150 (rape and sexual violence *per se* amount torture).

⁸⁰⁷ *Kingdom of Spain v. Augusto Pinochet Ugarte*, Judgment, Bow Street Magistrates' Court, Mr Ronald David Bartle, Metropolitan Magistrate, 8 October 1999 ('the effect on the families of those who disappeared can amount to mental torture'). The European Court of Hum. Rts. has found that the suffering of relatives of the 'disappeared' amounted to a violation of article 3 of the European Convention on Human Rights in the specific circumstances of the cases. *Cicek v. Turkey*, Application No. 25704/94, Judgment, Eur. Ct. Hum. Rts., 27 February 2001, para. 173 ('The uncertainty, doubt and apprehension suffered by the applicant [mother of two sons who were 'disappeared'] over a prolonged and continuing period of time has undoubtedly caused her severe mental distress and anguish'); *Orhan v. Turkey*, Application No. 25656/02, Judgment, ECtHR, 18 June 2002, para. 40 ('The Court finds that the uncertainty and apprehension suffered by the applicant [whose eldest son and only brothers were 'disappeared'] over a prolonged and continuing period ... has clearly caused him severe mental distress and anguish constituting inhuman treatment contrary to article 3'); *Cyprus v. Turkey*, Application No. 25781/94, Judgment, ECtHR, Grand Chamber, 10 May 2001, para. 157 ('the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of article 3'); *Tas v. Turkey*, Application No. 24396/94, Judgment, ECtHR, 14 November 2000, para. 80 ('Having regard to the indifference and callousness of the authorities to the applicant's concerns [about his 'disappeared'] son and the acute anguish and uncertainty which he has suffered as a result and continues to suffer, the Court finds that the applicant may claim to be a victim of the authorities' conduct, to an extent which discloses a breach of article 3 of the Convention'); *Kurt v. Turkey*, Application No. 24276/94, Judgment, ECtHR., 25 May 1998, paras. 130–134. (mother of 'disappeared' son suffered violation of article 3). The Human Rights Chamber for Bosnia and Herzegovina has concluded that 'the fear and anguish' inflicted on a woman by the unclarified fate of her 'disappeared' husband constituted inhuman and degrading treatment in violation of article 3 of the European Convention on Human Rights. *Palic v. Republika Srpska*, No. CH/99/3196, Decision on Admissibility and Merits, 11 January 2001, para. 91 (5).

⁸⁰⁸ *Prosecutor v. Delalić et al. (Čelebići)* IT-96-21, 16 November 1998, para. 468 *et seq.*: 'Mistreatment that does not rise to the threshold level of severity necessary to be characterised as torture may constitute another offence'; *Prosecutor v. Martić*, No. IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para. 75: 'The pain and suffering inflicted during acts of torture is more severe than the pain and suffering inflicted during other forms of mistreatment and cruel treatment'. Similarly, the European Court of Human Rights held that torture involves 'suffering of a particular intensity or cruelty' which accounts for the 'special stigma' attached to this offence. See *Ireland v. United Kingdom*, 18 January 1978, Series A No 25, para. 167; in academic literature, see Schabas, *Commentary ICC* (2010) 168; Ambos, *Treatise on ICL II* (2014) 91.

⁸⁰⁹ *Prosecutor v. Krnjelac*, IT-97-25-T, 15 March 2002, para. 181.

⁸¹⁰ See, generally, Rodley (2002) 55 *Current Legal Problems* 467. It has been argued that for the reasons explained by Rodley, the academic writing and jurisprudence making this distinction (see, for example, Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 112–113) is incorrect.

forms of suffering is indeed more difficult to establish⁸¹¹. The crime against humanity of other inhumane acts requires ‘great suffering or serious injury’⁸¹². A similar threshold is reflected in the war crime of inhuman treatment (‘severe physical or mental pain’)⁸¹³, the war crime of willfully causing ‘great suffering’⁸¹⁴ and the war crime of cruel treatment (‘severe physical or mental pain’)⁸¹⁵. The different thresholds, i. e., ‘severe’ and ‘great’, are comparable in scope.

Existing case-law has not determined an ‘absolute degree’ of pain required for an act to amount to torture. The first ICC jurisprudence in *Bemba* interpreted the phrase ‘severe pain’ in light of the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights on severity. It stated:

‘although there is no definition of the severity threshold as a legal requirement of the crime of torture, it is constantly accepted in applicable treaties and jurisprudence that an *important degree* of pain and suffering has to be reached in order for a criminal act to amount to an act of torture’.⁸¹⁶

Some guidance may be derived from the jurisprudence of the *ad hoc* tribunals. In *Brđanin*, the ICTY expressly rejected the argument that, for an act causing physical pain or suffering to amount to torture, it must ‘inflict pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death’⁸¹⁷. As noted in the *Naletilić and Martinović* Appeals Judgement, severity must be determined on a case by case basis:

‘[W]hile the suffering inflicted by some acts may be so obvious that the acts amount *per se* to torture, in general allegations of torture must be considered on a case-by-case basis so as to determine whether, in light of the acts committed and their context, severe physical or mental pain or suffering was inflicted’.⁸¹⁸

Examples of torture recognised in the jurisprudence of the *ad hoc* tribunals include: ‘beatings, administering electric shocks, forcing victims to watch executions of others, rape, forcing victims to bury the bodies of their neighbours and friends, and causing burn injuries’⁸¹⁹ as well as ‘mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative’⁸²⁰. In *Bemba*, PTC II refused to confirm torture, arguing that the alleged acts overlapped with rape⁸²¹.

c) Persons in custody or under control. According to the Statute and the Elements, 133 victims must be ‘in the custody or under the control’ of the perpetrator. This is an ICC-specific requirement. It distinguishes the ICC definition from other instruments, which rely on purpose or official capacity. It reflects a control-based conception of torture.⁸²² The terms ‘custody’ and ‘under the control of the accused’ are not synonymous with the terms ‘imprisonment or other severe deprivation of liberty’. The term ‘custody’ would include any form of detention or imprisonment, including arrest by security forces, other restrictions on liberty such as those used in crowd control by security forces or enforced disappearances.

⁸¹¹ See Burchard (2008) 6 *JICJ* 159, 167.

⁸¹² Element 1 to article 7 (1) (k).

⁸¹³ Element 1 to article 8 (2) (a) (ii).

⁸¹⁴ Element 1 to article 8 (2) (a) (iii).

⁸¹⁵ Element 1 to article 8 (2) (c) (i)-3.

⁸¹⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 193.

⁸¹⁷ *Prosecutor v. Brđanin*, IT-99-36-A, 3 April 2007, para. 247.

⁸¹⁸ *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-A, Judgement, Appeals Chamber, 3 May 2006, para. 299.

⁸¹⁹ *Prosecutor v. Martić*, IT-95-11-T, 12 June 2007, para. 76.

⁸²⁰ *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, 2 November 2001, para. 149; critically Ambos, *Treatise on ICL II* (2014) 91.

⁸²¹ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 204.

⁸²² Ambos, *Treatise on ICL II* (2014) 91.

The term ‘under the control of the accused’ is broader and would include any other form of restraint by another, including enslavement (see mn 39 and 119–120).⁸²³ The history of the drafting of the *UN Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Torture* and the Convention against Torture indicates that both these terms should be given a broad reading⁸²⁴. The second element of torture in the Elements of Crimes simply follows paragraph 2 (f) on this point without providing further guidance on the scope of these terms.

134 d) **Exception for pain or suffering ‘inherent in or incidental to lawful sanctions’.** The concept of ‘lawful’ refers to international law or national law which is consistent with international law and standards⁸²⁵. Peter Kooijmans, the UN Special Rapporteur on torture, stated in his 1988 report that the fact that ‘sanctions are accepted under domestic law does not necessarily make them “lawful sanctions” in the sense of article 1 of the Convention against Torture ... It is international law and not domestic law which ultimately determines whether a certain practice may be regarded as “lawful”⁸²⁶. Therefore, the fact that a State authorizes certain treatment or punishment does not exclude criminal responsibility for torture under article 7.

135 e) **Special remarks.** The definition of torture in article 7 differs in a number of significant respects from that in article 1 of the Convention against Torture⁸²⁷. In contrast to article 1 of that treaty, and all other definitions of torture, including as crimes against humanity and war crimes, there is no requirement in paragraph 2 (f) that the severe pain or suffering be for certain types of purposes (although that list is illustrative only)⁸²⁸. Therefore, it is clear that article 7 para. 1 (e) includes random, purposeless or merely sadistic infliction of severe pain or suffering, provided, of course, that it was ‘pursuant to or in furtherance of a State or organisational policy’⁸²⁹. Such purposes need not be the sole purpose of the perpetra-

⁸²³ Concurring Werle and Jessberger, *Principles of ICL* (2014), 365.

⁸²⁴ Neither instrument limits the class of victims, but ‘[t]he history of the Declaration and the Convention make it clear that the victims must be understood to be persons who are deprived of their liberty or who are at least under the factual power or control of the person inflicting the pain or suffering’. Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 120. The requirement of some restraint on liberty or some degree of control was intended to exclude such acts as use of armed force in conflicts. *id.*, 121.

⁸²⁵ The third material element listed in the Elements of Crimes simply follows the language of paragraph 2 (e) of article 7, without further explanation.

⁸²⁶ Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1988/17, para. 42; Bennoune, ‘*A Practice which Debases Everyone Involved: Corporal Punishment under International Law*, (1997) 20 *Ans Consacrés à la Réalisation d’une Idée: Recueil d’articles en l’honneur de Jean-Jacques Gautier* 203–229, concurring Cryer et al., *Introduction to ICL* (2014), 251.

⁸²⁷ Article 1 para. 1 of the Convention against Torture states: ‘For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.

Paragraph 2 of article 1 makes it clear, however, that ‘[t]his article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application’.

⁸²⁸ See also Ambos, *Treatise on ICL II* (2014) 92; Cryer et al., *Introduction to ICL* (2014) 250.

⁸²⁹ The omission of a purpose requirement has been severely criticised by the former UN Special Rapporteur for torture, Sir Nigel S. Rodley, in a thoughtful and comprehensive legal analysis of the *travaux préparatoires* of the Convention against Torture and jurisprudence of international courts; Rodley (2002) 55 *Current Legal Problems* 467. The practical implications of the differences, however, require further exploration. Given the experience of the past decades in which crimes against humanity have been committed in increasingly anarchic way, often by neighbours and by ill-disciplined or completely undisciplined forces, more and more removed from systematic conduct or acts with any real aim of furthering any coherent state or organisational policy, one may wonder whether conceptual consistency might not be at the expense of the protection of victims. For example, some prisoners in a detention centre might have been subjected to severe mental pain and suffering by a special

tor⁸³⁰. One reason for omitting a purpose requirement was the fear by some that any list of purposes would be an exclusive list of purposes, in contrast to the illustrative list of purposes in article 1 of the *Convention against Torture*⁸³¹. These fears were not entirely unfounded, as demonstrated by some ICTY jurisprudence erroneously concluding that the list of purposes under international law is exclusive⁸³². However, a footnote to the title of the elements of torture in the Elements of Crimes reintroduces, in a political compromise, the possibility of a purpose requirement by stating that '[i]t is understood that no *specific* purpose need be proved for this crime' (emphasis supplied). If the Court were to accept this footnote as an authoritative interpretation, then it might find that *some* purpose is required, as in all other definitions of torture. But first jurisprudence clearly speaks against a 'purpose' based interpretation. In *Bemba*, PTC II stated that 'under the Statute, the definition of torture as a crime against humanity, unlike the definition of torture as a war crime, does not require the additional element of a specific purpose'.⁸³³

As noted by the ICTY in *Kunarac*, the characteristic trait of torture lies 'in the nature of the act committed', rather than 'in the status of the person who committed it'⁸³⁴. There is no requirement, in contrast to article 1 of the Convention against Torture, which focuses on state responsibility for the human rights violation of torture, that the pain or suffering be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'⁸³⁵. This omission, which follows from the threshold requirement in paragraph 2 that the attack be pursuant to 'a State or organisational policy', echoes the omission of a similar requirement in the definition of enforced disappearances⁸³⁶. Thus, torture in peacetime or during armed conflict by members of armed political groups not connected to any State could be a crime against humanity under paragraph 2 (f). For requirements as to the organisation of non-state actors, as established in ICC jurisprudence, see above mn 110.

unit of investigators in order to obtain intelligence information about 'terrorist' incidents, while others in the same cells would have been subjected to identical treatment by guards simply to gratify their sadistic urges. The latter might be astonished to know that they had not been tortured, since the infliction of severe pain and suffering was without any apparent purpose, but were instead victims of cruel, inhuman or degrading treatment or punishment. Although most conduct fitting the latter category would amount to the crime against humanity of inhumane acts, it is possible that not all would. Nevertheless, much random, purposeless or sadistic infliction of severe pain or suffering could also be characterised objectively as being committed for the purpose of intimidating the victim for the self-gratification of the torturer, so the number of cases at issue may be relatively small. The approach to the purpose requirement in judgments concluding that rape constitutes the crime against humanity of torture suggests that the Court will take a similar approach to these cases. See, for example, *Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1-A, 12 June 2002, paras. 21–23 (distinguishing the sexual motivation of the torturer from his purposes, which included discrimination against victims because they were Muslims, obtaining information and intimidating or coercing victims).

⁸³⁰ *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, 2 November 2001, para. 153; *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, para. 470.

⁸³¹ Hall (2000) 94 AJIL 773, 781; Rodley (2002) 55 *Current Legal Problems* 467, 491.

⁸³² *Prosecutor v. Krnojelac*, IT-97-25-T, 15 March 2002, para. 186 (rejecting *Furundžija* and *Kvočka*, and concluding that the list of purposes in the Convention against Torture is exclusive and under the principle of legality, it 'is not sufficient to permit the court to introduce, as part of the *mens rea*, a new and additional prohibited purpose'). Other ICTY judgments have taken a more expansive view of the list of purposes. *Prosecutor v. Brđanin*, IT-99-36-T, 1 September 2004, para. 487 (the list of purposes for the war crime or crime against humanity of torture is not exhaustive and it is not relevant if torture is committed for a non-listed purpose); *Prosecutor v. Furundžija*, IT-95-17/1-T, 10 December 1998, para. 162 (the list of purposes in the war crime of torture includes humiliation), *aff'd*; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, 2 November 2001, para. 140 (the list in the Convention against Torture is not an exclusive list); *Prosecutor v. Delalić et al. (Čelebići)*, IT-96-21-T, 16 November 1998, para. 470 (the list of purposes in the Convention against Torture 'do[es] not constitute an exhaustive list, and should be regarded as merely representative').

⁸³³ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, 15 June 2009 (PURL: <https://www.legal-tools.org/doc/07965c/>), para. 195.

⁸³⁴ *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 495.

⁸³⁵ *Prosecutor v. Kunarac*, IT 96-23 & IT-96-23/1-A, 12 June 2002, para. 148.

⁸³⁶ This omission is also consistent with the customary international law definitions of torture as a war crime or a crime against humanity according to the jurisprudence of the ICTY and ICTR.

6. 'Forced pregnancy'

- 136 This crime against humanity proved to be one of the most difficult and controversial to draft⁸³⁷. It was included in large part in reaction to the reports of widespread instances of forced pregnancy in the former Yugoslavia. It had its origins in the Rome Statute in a number of international declarations and resolutions⁸³⁸. As with the other crimes of sexual violence, it was included only after concerted efforts by civil society, in particular, the Women's Coalition for Gender Justice, to overcome opposition by certain states⁸³⁹.
- 137 a) 'unlawful confinement'. The words 'unlawful confinement' should be interpreted as any form of deprivation of physical liberty contrary to international law and standards⁸⁴⁰. In contrast to paragraph 1(e), this definition does not require the deprivation of liberty be 'severe'.
- 138 b) 'forcibly made pregnant'. 'Forcible' means 'done by or involving force'⁸⁴¹ which does not necessarily require the use of violence, but includes any form of coercion. Any form of 'coercion or force or threat of force against the victim or a third person'⁸⁴² negates consent and any form of captivity negates consent⁸⁴³. This principle applies with equal force to the crime of forced pregnancy. An act of forcibly impregnating a woman as such does not necessarily have to be committed by the person confining the woman. Such an act might also be covered by the crime of rape or the phrase 'any other form of sexual violence of comparable gravity'.
- 139 c) 'intentional'. By requiring a form of specific intent, a situation in which a woman, held in 'unlawful confinement', conceives or gives birth to a child as a result of sexual violence as such, does not in itself amount to the crime of forced pregnancy. A perpetrator of forced pregnancy must also have committed the crime of confining a woman, who had been forcibly made pregnant, either 'with the intent of affecting the ethnic composition of any population', or with the intent of 'carrying out other grave violations of international law', which includes the crime of genocide⁸⁴⁴, crime against humanity, war crimes, torture and enforced disappearances. The second aim was added to include many other purposes for which forced pregnancy has been committed⁸⁴⁵. The Elements of Crimes have only one non-contextual element for this crime:

⁸³⁷ See Bedont and Hall-Martinez (1993) 6 *BrownJWorldAff* 65, 73–74. It remains controversial. See McFeely, *No Amnesty For the Unborn Cardinal Martino Says Catholics Should Withdraw Support for Amnesty International Now That the Rights Group Supports Abortion*, National Catholic Register, 17–23 June 2007; Amnesty International, Amnesty International defends access to abortion for women at risk, AI Index: POL 30/012/2007, 14 June 2007; Ambos, *Treatise on ICL II* (2014) 101–102.

⁸³⁸ *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights, Vienna, 25 June 1993, paras. 18 and 38; *Beijing Declaration and Platform for Action*, UN Doc. A/CONF.177/20, 15 Sep. 1995, paras. 114, 132 and 135; *UN Commission Hum. Rts. Res.* 1998/52, 17 Apr. 1998, para. 4; *UN Commission Hum. Rts. Res.* 1998/76, 22 Apr. 1998, para. 13 (a); *UN Commission Hum. Rts. Res.* 1997/44, 11 Apr. 1997, para. 4; *UN Commission Hum. Rts. Res.* 1997/78 (1997), para. 13 (a); *UN Commission Hum. Rts. Res.* 1996/49, 19 April 1997, para. 5; and *UN Commission Hum. Rts. Res.* 1995/85, 8 Mar. 1995, para. 5.

⁸³⁹ Bedont and Hall-Martinez (1993) 6 *BrownJWorldAff* 65 73–74. As part of the political compromise, a phrase was included stating that '[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy' (see discussion in mn 114 below).

⁸⁴⁰ It has also been noted in the commentary on the definition of torture, regarding the concept of 'lawful sanctions', that '[i]t is international law and not domestic law which ultimately determines whether a certain practice may be regarded as "lawful"', Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1998/17, para. 42; see mn 106.

⁸⁴¹ *The Oxford Concise Dictionary of Current English* 522 (8th ed. 1990) 459–460.

⁸⁴² *Prosecutor v. Furundzija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 185.

⁸⁴³ *Ibid.*, para. 271.

⁸⁴⁴ Salzman (1998) 20 *HumRtsQ* 348, 365–366.

⁸⁴⁵ Bedont and Hall-Martinez (1993) 6 *BrownJWorldAff* 65, 73–74 ('For example, during the Second World War, Jewish women were forcibly made pregnant so that they and their fetuses could be used for medical experiments').

- '1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'.

It simply restates the first sentence of paragraph 2 (f) in the form of a criminal statute.

d) **National laws regarding pregnancy.** The last sentence of paragraph 2 (f) is included to ensure that the definition of this crime will not affect national laws regarding pregnancy. The fact that the crime of forced pregnancy would be included in the *Rome Statute* made some delegations fear that national laws prohibiting abortion would have to be deemed being in violation of international law because that would constitute the crime of forced pregnancy. National laws which prohibit abortion do not amount to forced pregnancy as defined under the *Statute*, unless they are intended to affect the ethnic composition of any population or to carry out grave violations of international law.

7. 'Persecution'

In contrast to previous instruments which included the crime of persecution as a crime against humanity, the *Statute* provides for a definition of the crime. In the commentary to article 21 of the *1991 Draft Code*, the ILC stated that persecution 'relates to human rights violations other than those covered by the previous paragraphs ... [which] seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or constantly denied'⁸⁴⁶. In their commentary to this Code several states argued that there is no agreed definition of persecution in any international instrument and one state in particular said that the crime of 'persecution on social, political, racial, religious or cultural grounds' is so vague that it could mean almost anything⁸⁴⁷. This objection was reiterated during the *Ad Hoc* Committee sessions⁸⁴⁸ and the meetings of the Preparatory Committee⁸⁴⁹. However, the drafters in Rome had the benefit of two significant developments. First, the ILC commentary to its 1996 Draft Code, which modified the definition slightly by replacing cultural grounds with ethnic grounds, provided greater precision in stating that the 'common characteristic' of the many forms of persecution was 'the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognised in the Charter of the United Nations (articles I and 55) and the International Covenant on Civil and Political Rights (article 2)'⁸⁵⁰. Second, as discussed below, the ICTY Trial Chamber in its 1997 judgment in the *Tadić* case developed a definition based on an analysis of a number of sources, including the 1996 Draft Code, national jurisprudence and academic commentary. Therefore, it is perhaps not surprising that, despite the objections based on a claim of vagueness, the paragraph covering persecution in its entirety appeared without square brackets in the *April 1998 Draft Statute* for the ICC although important parts of its definition still had to be negotiated⁸⁵¹.

a) '**intentional and severe deprivation of fundamental rights**'. According to article 7 para. 2(g), the act of persecution must concern an 'intentional and severe deprivation of fundamental rights'⁸⁵². The first non-contextual element in the Elements of Crimes simply rewords the statutory requirement to state that '[t]he perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights', and footnote 21 to this

⁸⁴⁶ 1991 ILC Draft Code (1991) 2 YbILC 104, 268.

⁸⁴⁷ 'According to several delegations [...], the list of offences should not include persecution which was considered too vague a concept', UN Doc. A/50/22 (1995), 17. 1995 ILC Special Rapporteur Report 20.

⁸⁴⁸ 'According to several delegations [...], the list of offences should not include persecution which was considered too vague a concept', *Ad hoc Committee Report*, 17.

⁸⁴⁹ UN Doc A/51/22 (1997) 19.

⁸⁵⁰ 1996 ILC Draft Code, article 18, commentary.

⁸⁵¹ Preparatory Committee (Consolidated) Draft, pp. 26–27.

⁸⁵² In its commentary to article 18 (e) of the 1996 ILC Draft Code, the ILC formulated persecution as a 'denial of human rights and fundamental freedoms'.

element states that '[t]his requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes' [noting that the requirement of unlawfulness 'is generally not specified in the elements of crimes']. As far as the word 'intentional' is concerned, the current definition follows the approach of the Trial Chamber in the 1997 judgment in the *Tadić* case. According to this judgment, in order to constitute persecution, some form of discrimination that is *intended* to be and results in an infringement of an individual's fundamental right, is necessary⁸⁵³.

Regarding the word 'severe', it may be that the drafters had the Trial Chamber Judgment in the *Tadić* case in mind in which persecution had been defined as 'the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right' (emphasis added)⁸⁵⁴. The word 'severe' does not refer to the character of the act of persecution as such. It refers to the character of the deprivation of fundamental rights which could be explained as a requirement of the severity of the discrimination⁸⁵⁵. A disadvantage to an identifiable group or collectivity or their individual members is an obvious consequence of a severe form of discrimination⁸⁵⁶.

According to the Trial Chamber Judgment in the *Tadić* case, an act of persecution or an omission can be of varying severity ranging, 'from killing to a limitation on the type of professions open to the targeted group'⁸⁵⁷. Persecution thus does not necessarily require a physical element⁸⁵⁸. For example, 'the issuance of discriminatory orders, policies, decisions or other regulations may constitute the *actus reus* of persecution, provided that these orders infringe upon a person's basic rights' and they reach a sufficient level of gravity⁸⁵⁹. Subsequent jurisprudence of the ICTY and the ICTR identified three broad classes of acts that can amount to persecution in certain contexts: 'Serious bodily and mental harm, infringements upon freedom, and attacks against property'⁸⁶⁰. Some of the acts included within these categories may in and of themselves amount to crimes under international law, such as extermination, while others will not necessarily amount to crimes under international law, except in the context in which they occur, such as for example, 'the act of denouncing a Jewish neighbour to the Nazi authorities', which, since it was committed against the background of the widespread persecution of the Jewish people, has been regarded as amounting to a crime against humanity⁸⁶¹.

⁸⁵³ In this judgment, persecution was defined as 'the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right'.

⁸⁵⁴ *Ibid.*, para. 697.

⁸⁵⁵ The 'denial of human rights and fundamental freedoms' in the context of article 18 para. f of the 1996 ILC Draft Code ('institutionalised discrimination'), 'requires sufficiently serious discrimination'. According to the ILC, both the crime of persecution ('on political, racial, religious or ethnic grounds') and the crime of 'institutionalised discrimination on racial, ethnic, or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population' involve 'the denial of the human rights and fundamental freedoms of individuals based on an unjustifiable discriminatory criterion', although in the case of the latter, the discriminatory plan or policy must be institutionalised. Thus, it would seem that the ILC implicitly required a sufficiently serious discrimination for the crime of persecution as well.

⁸⁵⁶ As one of the elements of 'institutionalised discrimination', the ILC required in article 18 (f) 'a consequential serious disadvantage to members of the group comprising a segment of the population', Commentary to article 18 of the 1996 ILC Draft Code.

⁸⁵⁷ *Prosecutor v. Tadić*, No. IT-94-1-T, Judgement, Trial Chamber, 7 May 1997, paras. 694 and 704.

⁸⁵⁸ *Ibid.*, para. 707.

⁸⁵⁹ *Prosecutor v. Simić*, No. IT-95-9-T, Judgement, Trial Chamber, 17 October 2003, para. 58.

⁸⁶⁰ An alternative form of classification adopted by one ICTY Trial Chamber, *Prosecutor v. Blaškić*, No. IT-95-14, Judgement, Trial Chamber, 3 March 2000, para. 220.

⁸⁶¹ *Prosecutor v. Kupreskić*, No. IT-95-16-T, Judgement, Trial Chamber, 14 January 2000, para. 550.

The category of acts causing physical or mental harm amounting to the crime against humanity of persecution include:

- murder⁸⁶²;
- extermination⁸⁶³;
- incitement to commit murder and extermination⁸⁶⁴;
- pogroms⁸⁶⁵;
- creating and maintaining an atmosphere of terror⁸⁶⁶;
- starvation⁸⁶⁷;
- enslavement⁸⁶⁸;
- use of detainees as human shields⁸⁶⁹;
- biological experiments⁸⁷⁰;

⁸⁶² *International Military Tribunal* (Nuremberg), *Judgment and Sentences* (Nuremberg Judgement), 1 October 1946, (1947) 41 *AJIL* 172, 247 (killing identified as persecution); *Attorney General v. Eichmann*, Supreme Court of Israel, 29 May 1962, (1968) 36 *ILR* 277; *Prosecutor v. Kordić*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 106 (wilful killing and murder); *Prosecutor v. Stakić*, No. IT-97-24-A, Judgement, Appeals Chamber, 22 March 2006, paras. 105–109 (upholding persecution conviction for murder); *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 143 ('As concluded by *inter alia* the Kupreskić Trial Chamber, the crime of persecutions has developed in customary international law to encompass acts that include "murder ..."); *Prosecutor v. Krstić*, No. IT-98-33-T, Judgement, Trial Chamber, 2 August 2001, para. 537 ('the murder of thousands of Bosnian Muslim civilians, in Potoari or in carefully executed mass scale executions... constitute persecutory acts'); *Prosecutor v. Nikolić*, No. IT-94-2-S, Sentencing Judgment, Trial Chamber, 18 December 2003, para. 119 (conviction of persecution for murder); *Prosecutor v. Blaškić*, No. IT-95-14, Judgement, Trial Chamber, 3 March 2000, paras. 224, 226; *Prosecutor v. Kupreskić*, No. IT-95-16-T, Judgement, Trial Chamber, 14 January 2000, para. 629 ('deliberate and systematic killing of Bosnian Muslim civilians'); *Prosecutor v. Babić*, No. IT-03-72-S, Judgement, Trial Chamber, 29 June 2004, para. 50 (murders); *Prosecutor v. Blagojević*, No. IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para. 620 (murders); *Prosecutor v. Đeranić*, No. IT-02-61-S, Sentencing Judgment, Trial Chamber, 30 March 2004, 119 (killing).

⁸⁶³ *International Military Tribunal* (Nuremberg), *Judgment and Sentences* (Nuremberg Judgement), 1 October 1946, (1947) 41 *AJIL* 172, 246 (extermination identified as persecution); *Attorney General v. Eichmann*, Supreme Court of Israel, 29 May 1962, (1968) 36 *ILR* 277; *Prosecutor v. Kordić*, No. IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 106 (extermination); *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 143 ('As concluded by *inter alia* the Kupreskić Trial Chamber, the crime of persecutions has developed in customary international law to encompass acts that include "... extermination..."), *Prosecutor v. Blaškić*, No. IT-95-14, Judgement, Trial Chamber, 3 March 2000, paras. 224, 226; *Prosecutor v. Kupreskić*, No. IT-95-16-T, Judgement, Trial Chamber, 14 January 2000, para. 600.

⁸⁶⁴ *International Military Tribunal* (Nuremberg), *Judgment and Sentences* (Nuremberg Judgement), 1 October 1946, (1947) 41 *AJIL* 172, 296 (conviction of Streicher for crimes against humanity for 'incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution'). ICTR: *Prosecutor v. Ruggiu*, No. ICTR-97-32-I, Judgment, Trial Chamber, 1 June 2000, para. 24 (incitement to murder and extermination); *Prosecutor v. Nahimana*, No. ICTR-99-52-T, Judgment and Sentence, Trial Chamber, 3 December 2003, para. 1072 (hate speech).

⁸⁶⁵ *International Military Tribunal* (Nuremberg), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 224 (identifying pogroms as persecution).

⁸⁶⁶ *Prosecutor v. Nikolić*, No. IT-94-2-S, Sentencing Judgment, Trial Chamber, 18 December 2003, para. 119 (conviction of persecution for creating and maintaining an atmosphere of terror); *Prosecutor v. Blagojević*, No. IT-02-60-T, Judgment, Trial Chamber, 17 January 2005, para. 620 (finding that terrorizing the civilian population is persecution).

⁸⁶⁷ *International Military Tribunal* (Nuremberg), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 247 (starvation identified as persecution); *Attorney General v. Eichmann*, Supreme Court of Israel, 29 May 1962, (1968) 36 *ILR* 277; *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 224.

⁸⁶⁸ *International Military Tribunal* (Nuremberg), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 245 (use of slave labourers) and 246 (use of slave labourers in concentration camps identified as persecution); *Attorney General v. Eichmann*, Supreme Court of Israel, 29 May 1962, (1968) 36 *ILR* 277; *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 224.

⁸⁶⁹ *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 155.

⁸⁷⁰ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 247 (identifying as persecution emersion of concentration camp inmates 'in cold water until their body temperature was reduced to 28 degrees Centigrade, when they died immediately' and other experiments, including: 'high altitude experiments in pressure chambers, experiments to determine how long human beings could survive in freezing water, experiments with poison bullets, experiments with contagious diseases, and experiments dealing with sterilisation of men and women by X-rays and other methods').

- deportation⁸⁷¹;
- forcible transfer of population⁸⁷²;
- torture⁸⁷³;
- rape⁸⁷⁴;
- physical violence not constituting torture⁸⁷⁵;
- cruel and inhumane treatment or subjection to inhumane conditions⁸⁷⁶;
- constant humiliation and degradation⁸⁷⁷; and
- deliberate attacks on civilians and indiscriminate attacks on undefended civilian localities⁸⁷⁸.

⁸⁷¹ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 310 (convicting Von Schirach for deportation of Jews from Vienna as a crime against humanity); *Attorney General v. Eichmann*, Supreme Court of Israel, 29 May 1962, (1968) 36 *ILR* 277; *Prosecutor v. Stakić*, No. IT-97-24-A, Judgment, Appeals Chamber, 22 March 2006, paras. 105–109 (upholding persecution conviction for deportation); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 224.

⁸⁷² *Prosecutor v. Krnojelac*, No. IT-97-25-A, Judgment, Appeals Chamber, 17 September 2003, paras. 221–222; *Prosecutor v. Krstić*, No. IT-98-33-T, Judgment, Trial Chamber, 2 August 2001, para. 537 (‘forcible transfer of the women, children and elderly out of the territory controlled by Bosnian Serbs[] constitute[s] persecutory acts’); *Prosecutor v. Nikolić*, No. IT-94-2-S, Sentencing Judgment, Trial Chamber, 18 December 2003, para. 119 (conviction of persecution for forcible transfer); *Prosecutor v. Blagojević*, No. IT-02-60-T, Judgment, Trial Chamber, 17 January 2005, para. 621 (forcible transfer was part of prosecutorial campaign); *Prosecutor v. Deronjić*, No. IT-02-61-S, Sentencing Judgment, Trial Chamber, 30 March 2004, para. 156 (forcible displacement).

⁸⁷³ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 247 (beating and torture identified as persecution); *Prosecutor v. Kordić*, No. IT-95-14/2-A, Judgment, Appeals Chamber, 17 December 2004, para. 106 (torture); *Prosecutor v. Stakić*, No. IT-97-24-A, Judgment, Appeals Chamber, 22 March 2006, paras. 105–109 (upholding persecution conviction for torture); *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 143 (‘As concluded by *inter alia* the Kupreskić Trial Chamber, the crime of persecutions has developed in customary international law to encompass acts that include “. torture”), *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 226; *Prosecutor v. Kupreskić*, No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, paras. 600–605; *Prosecutor v. Naletilić*, No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, para. 682; *Prosecutor v. Nikolić*, No. IT-94-2-S, Sentencing Judgment, Trial Chamber, 18 December 2003, para. 119 (conviction of persecution for torture).

⁸⁷⁴ *Prosecutor v. Stakić*, No. IT-97-24-A, Judgment, Appeals Chamber, 22 March 2006, paras. 105–109, *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, Trial Chamber, 31 July 2003, paras. 754–757, 791–806 (conviction of persecution for rape); *Prosecutor v. Nikolić*, No. IT-94-2-S, Sentencing Judgment, Trial Chamber, 18 December 2003, para. 119 (conviction of persecution for aiding and abetting rape).

⁸⁷⁵ *Prosecutor v. Kordić*, No. IT-95-14/2-A, Judgment, Appeals Chamber, 17 December 2004, para. 106 (‘serious bodily and mental harm’ and ‘other serious acts on the person such as those presently enumerated in article 5 [of the ICTY Statute]’); *Prosecutor v. Stakić*, No. IT-97-24-A, Judgment, Appeals Chamber, 22 March 2006, paras. 105–109 (upholding persecution conviction for physical violence); *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 143 (‘It is clear in the jurisprudence of the International Tribunal that acts of serious bodily and mental harm are of sufficient gravity as compared to the other crimes enumerated in article 5 of the Statute and therefore may constitute persecutions’.); *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, Trial Chamber, 31 July 2003, para. 753; *Prosecutor v. Simić*, No. IT-95-9-T, Judgment, Trial Chamber, 17 October 2003, para. 78 (intentional beatings, when committed deliberately).

⁸⁷⁶ *Prosecutor v. Simić*, No. IT-95-9-A, Judgment, Appeals Chamber, 28 November 2006, paras. 119–138 (confinement under inhumane conditions); *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 155 (inhumane treatment and deprivation of adequate food and water); *Prosecutor v. Nikolić*, No. IT-94-2-S, Sentencing Judgment, Trial Chamber, 18 December 2003, para. 119 (conviction of persecution for subjecting victims to inhumane conditions); *Prosecutor v. Blagojević*, No. IT-02-60-T, Judgment, Trial Chamber, 17 January 2005, para. 620 (finding that cruel and inhumane treatment constitutes persecution).

⁸⁷⁷ *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 155 (subjecting detainees ‘to physical or psychological abuse and intimidation’); *Prosecutor v. Stakić*, No. IT-97-24-A, Judgment, Appeals Chamber, 22 March 2006, paras. 105–109, *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, Trial Chamber, 31 July 2003, para. 760.

⁸⁷⁸ *Prosecutor v. Kordić*, No. IT-95-14/2-A, Judgment, Appeals Chamber, 17 December 2004, para. 105 (‘unlawful attack[s] launched deliberately against civilians or civilian objects may constitute a crime of persecution’) without the requirement of a particular result caused by the attack(s); *Prosecutor v. Kordić*, No. IT-95-14/2-T, Judgment, Trial Chamber, 26 February 2001, para. 221 (unlawful attack on cities, towns and villages); *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 159 (‘attacks in which

- Infringements on freedom constituting the crime against humanity of persecution include:
- unlawful arrest, detention, imprisonment or confinement of civilians⁸⁷⁹;
 - interrogation of persons who have been arrested and detained and forcing them to sign false and coerced statements⁸⁸⁰;
 - restrictions on movement to certain places and times⁸⁸¹;
 - exclusion from professions⁸⁸²;
 - forced labour⁸⁸³;
 - restrictions on family life⁸⁸⁴;
 - restrictions on the right to citizenship⁸⁸⁵;
 - exclusion of members of a group from national life⁸⁸⁶;
 - compelling members of a group to wear a distinctive sign⁸⁸⁷;
 - registration of members of a group⁸⁸⁸;
 - other infringements upon individual freedom⁸⁸⁹; and
 - deportation or forcible transfer of civilians⁸⁹⁰.

civilians are targeted, as well as indiscriminate attacks on cities, towns, and villages, may constitute persecutions as a crime against humanity’); *Prosecutor v. Nikolić*, No. IT-94-2-S, Sentencing Judgment, Trial Chamber, 18 December 2003, para. 121 (unlawful attack on cities, towns and villages).

⁸⁷⁹ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 244 (citing ‘the arrest of prominent Jewish business men’); *Prosecutor v. Simić*, No. IT-95-9-A, Judgment, Appeals Chamber, 28 November 2006, paras. 106–118 (upholding conviction for persecution based on unlawful arrests and detention); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 234 (‘The unlawful detention of civilians, as a form of the crime of persecution, means unlawfully depriving a group of discriminated civilians of their freedom’); *Prosecutor v. Kupreskić*, No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 629 (‘organised detention’); *Prosecutor v. Naletilić*, No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, para. 642 (‘organised detention of civilians’); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 234 (‘unlawfully depriving a group of discriminated civilians of their freedom’ is unlawful detention amounting to persecution); *Prosecutor v. Babić*, No. IT-03-72-S, Judgment, Trial Chamber, 29 June 2004, para. 50.

⁸⁸⁰ *Prosecutor v. Simić*, No. IT-95-9-T, Judgment, Trial Chamber, 17 October 2003, para. 69.

⁸⁸¹ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 244 (identifying as persecution the restriction of movement of Jews ‘by regulations to specified districts and hours’ and the creation of ghettos on an extensive scale) and 245 (forcing Jews to live in ghettos) and 292 (convicting Von Schirach of crimes against humanity for driving Jews into ‘the ghetto of the East’).

⁸⁸² *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 244 (identifying as persecution ‘[a] series of discriminatory laws .. which limited the offices and professions permitted to Jews’) and 292 (convicting Frick of crimes against humanity for ‘prohibiting Jews from following various professions’).

⁸⁸³ *Prosecutor v. Simić*, No. IT-95-9-A, Judgment, Appeals Chamber, 28 November 2006, paras. 139–159 (upholding conviction of persecution for forced labour).

⁸⁸⁴ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 244 (restrictions on the family life of Jews identified as persecution).

⁸⁸⁵ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 244 (restrictions on the rights of German Jews to citizenship identified as persecution).

⁸⁸⁶ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 244 (describing as persecution the Nazi policy towards the Jews that ‘was directed towards the complete exclusion of Jews from German life’) and 292 (convicting Frick, who ‘drafted, signed, and administered many laws designed to eliminate Jews from German life and economy’, of crimes against humanity).

⁸⁸⁷ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 244 (identifying as persecution ‘an order of the Security Police [by which] Jews were compelled to wear a yellow star to be worn on the breast and back’) and 245 (same).

⁸⁸⁸ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 245.

⁸⁸⁹ *Prosecutor v. Naletilić*, No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, para. 642.

⁸⁹⁰ *Prosecutor v. Simić*, No. IT-95-9-A, Judgment, Appeals Chamber, 28 November 2006, paras. 160–188 (upholding conviction of persecution for forcible displacement); *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 153 (finding that deportation and forcible transfer can amount to persecution as crimes against humanity); *Prosecutor v. Kupreskić*, No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 629 (‘organised .. expulsion’); *Prosecutor v. Naletilić*, No. IT-98-34-T, Judgment, Trial

The majority of courts that have addressed the question have concluded that acts against property can amount to persecution as a crime against humanity, including:

- seizure of assets⁸⁹¹;
- confiscation or destruction of private dwellings⁸⁹², businesses⁸⁹³, religious buildings⁸⁹⁴, cultural or symbolic buildings⁸⁹⁵ or means of subsistence⁸⁹⁶;
- collective fines⁸⁹⁷; and
- boycotts of businesses⁸⁹⁸.

Other examples mentioned as acts of persecution include those of an economic and judicial nature⁸⁹⁹.

However, courts are split about when destruction and plunder of property constitute acts of persecution. The Nuremberg Tribunal and some other international criminal courts have held that wanton destruction of property and plunder during armed conflict amounted to persecution as a crime against humanity⁹⁰⁰. In contrast two military courts established

Chamber, 31 March 2003, para. 711; *Prosecutor v. Babić*, No. IT-03-72-S, Judgment, Trial Chamber, 29 June 2004, para. 50 (deportations and forcible transfers).

⁸⁹¹ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 244 (identifying the seizure of assets of Jews as persecution).

⁸⁹² *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, Trial Chamber, 31 July 2003, para. 764 ('destruction, wilful damage and looting of residential .. properties'); *Prosecutor v. Krstić*, No. IT-98-33-T, Judgment, Trial Chamber, 2 August 2001, para. 537 ('burning of homes .. constitute[s] persecutory acts'); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 227.

⁸⁹³ *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, Trial Chamber, 31 July 2003, para. 764 ('destruction, wilful damage and looting of .. commercial properties'); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 227.

⁸⁹⁴ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 245 (identifying 'the burning and demolishing of synagogues' as persecution); *Attorney-General of the Government of Israel v. Eichmann*, Judgment, District Court, 12 December 1961, (1994) 36 *IL Rep.*, para. 457 (systematic destruction of the synagogues); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 230; *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, Trial Chamber, 31 July 2003, paras. 765–768 ('destruction of an institution dedicated to religion'); *Prosecutor v. Deronjić*, No. IT-02-61-S, Sentencing Judgment, Trial Chamber, 30 March 2004, para. 122 ('destruction of an institution dedicated to religion') (quoting *Stakić*).

⁸⁹⁵ 1991 *ILC Draft Code* (1991) 2 *YbILC* 104, 268 ('systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group'); *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, Trial Chamber, 31 July 2003, para. 768 ('destruction of, or wilful damage to, .. cultural buildings.. may amount to persecutions' and 'the seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 231; *Prosecutor v. Deronjić*, No. IT-02-61-S, Sentencing Judgment, Trial Chamber, 30 March 2004, para. 122 ('destruction of an institution dedicated to religion') (quoting *Stakić*).

⁸⁹⁶ *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 227.

⁸⁹⁷ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 244 (identifying as persecution the imposition of a collective fine of one billion marks) and 274 (noting that Göring had 'persecuted the Jews, particularly after the November 1938 riots', including 'where he raised the billion-mark fine'); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 229.

⁸⁹⁸ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 302 (conviction of Streicher for crimes against humanity for the boycott of Jewish businesses); *Attorney-General of the Government of Israel v. Eichmann*, Judgment, District Court, 12 December 1961, (1994) 36 *ILR* 5, para. 457 (boycott of Jewish businesses and shops); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 230;

⁸⁹⁹ *Attorney-General of the Government of Israel v. Eichmann*, Judgment, District Court, 12 December 1961, (1994) 36 *ILR*, para. 710.

⁹⁰⁰ *International Military Tribunal* (Nuremberg Judgment), *Judgment and Sentences* (Nuremberg Judgment), 1 October 1946, (1947) 41 *AJIL* 172, 281 (conviction of Göring for crimes against humanity, including, for being 'the active authority in the spoliation of conquered territory') and 295 (conviction of Rosenberg for war crimes and crimes against humanity for 'a system of organised plunder of both public and private property throughout the invaded countries of Europe'); *Prosecutor v. Blaškić*, No. IT-95-14, Judgment, Trial Chamber, 3 March 2000, para. 234 ('the destruction of property must be construed to mean the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily'); *Prosecutor v. Naletilić*, No. IT-98-

pursuant to the Allied Control Law No. 10 held that acts against property, although constituting persecution, did not amount to crimes against humanity, on the ground that, unlike the other inhumane acts constituting crimes against humanity, taking industrial property did not affect life or liberty⁹⁰¹. The *Eichmann* case set a very high threshold for determining when plunder amounted to an act of persecution, but did not explain why it set such a threshold⁹⁰².

However, more recent jurisprudence is willing to consider destruction or confiscation of property as an act of persecution in certain circumstances. In the *Kupreskić* case, the ICTY Trial Chamber explained the circumstances when acts against property would constitute persecution as a crime against property and when they would not as follows:

‘There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds: an example is the burning of someone’s car (unless the car constitutes an indispensable and vital asset to the owner). However, the case at hand concerns the comprehensive destruction of homes and property. Such an attack on property in fact constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the burning of a residential property may often be committed with a recklessness towards the lives of its inhabitants. The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution’⁹⁰³.

An act of persecution must result in a ‘deprivation of fundamental rights contrary to international law’. Such a deprivation includes fundamental rights from which no derogation is permitted. In its General Comment no. 24, the Human Rights Committee enumerated a list of rights included in the relevant provisions of the *ICCPR* which may not be the subject of reservations because these provisions represent customary law ‘and *a fortiori* ... have the character of peremptory norms’:

‘... a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language ...’⁹⁰⁴.

34-T, Judgment, Trial Chamber, 31 March 2003, para. 701; *Prosecutor v. Babić*, No. IT-03-72-S, Judgment, Trial Chamber, 29 June 2004, para. 50 (destruction of property).

⁹⁰¹ In marked contrast to the Nuremberg Judgment, in the *Flick Case*, the military court found that the compulsory taking of industrial property did not constitute crimes against humanity. It stated:

‘The ‘atrocities and offenses’ listed in Law No. 10 ‘murder, extermination’ etc., are all offenses against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words ‘other persecutions’ must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category’.

Flick case, 6 TWC 1215. See also *Krauch (I.G. Farben)* case, 8, part 2, *ibid.*, 1129-1130.

⁹⁰² In the *Eichmann* case, the Israeli District Court held that the plunder of property could only be considered to constitute a crime against humanity if it was committed

‘by pressure of mass terror against a civilian population, or if it was linked to any of the other acts of violence defined by the Nazi and Nazi Collaborators Punishment Law, 5710/1950 as a crime against humanity or as a result of any of those acts, i.e. murder, extermination, starvation, or deportation of any civilian population, so that the plunder is only part of a general process...’.

(1968) 36 ILR 241.

⁹⁰³ *Prosecutor v. Kupreskić*, No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 631 (fn. omitted). This view was endorsed in *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 147. See also *Prosecutor v. Kordić*, No. IT-95-14/2-A, Judgment, Appeals Chamber, 17 December 2004, para. 109 (‘The Appeals Chamber finds that the destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecution[] of equal gravity to other crimes listed in article 5 of the Statute’).

⁹⁰⁴ *General Comment adopted by the Hum. Rts. Committee under article 40*, para. 4, of the *ICCPR*, No. 24, UN Doc. CCPR/C/21/Rev.1/Add.6 (11 Nov. 1994), para. 8.

However, as the list of acts which have been found to constitute persecution demonstrates, the rights deprived by an act of persecution include many rights other than non-derogable rights, including the right to freedom of movement⁹⁰⁵. In essence, depriving members of an identifiable group or collectivity, by reason of the identity of this group or collectivity, intentionally and severely of these fundamental rights, contrary to international law, could constitute an act of persecution under the Rome Statute. Whether or not article 7 para. 1(h) recognizes and subsumes each of the categories of acts enumerated above remains to be seen, particularly given article 7 para. 1(h)'s nexus requirement, namely; that the allegedly persecutory act is committed in 'connection with any ... crime within the jurisdiction of the Court'. This implies, in short, that the persecutory act or conduct must be connected to a (single) underlying act of article 5–8bis.⁹⁰⁶ While the *Kupreskić* Trial Chamber took the view that such a nexus requirement 'is not consonant with customary international law', Kai Ambos has argued that it nevertheless 'serves the sole purpose of limiting the Court's jurisdiction to forms of persecution which are of an elevated objective seriousness'.⁹⁰⁷ It is expected, however, that in making any determination with respect to allegedly persecutory acts or conduct not expressly tied to an act falling squarely under article 5–8bis, the Court will invoke the *ejudem generis* rule. It is worth noting in this respect, that in the practice of the Court to date, confirmed charges of persecution have been limited to acts which have also been separately charged as crimes against humanity in and of themselves.⁹⁰⁸

- 143 b) 'by reason of the identity of the group or collectivity'. The intentional and severe deprivation of fundamental rights must have been carried out with discriminatory intent. Various discriminatory grounds are enumerated in paragraph 1 (h), see mn. 57.

8. 'The crime of apartheid'

- 144 Together with the Genocide Convention, the *Apartheid* Convention has been tagged as one of the main antecedents of the ICC Statute⁹⁰⁹. The crime definitions in both Conventions were tailor-made and drafted with very concrete situations in mind, namely the Holocaust and the situation in Southern Africa. This retrospective and *ad hoc* nature of the crime definitions was not fully remedied in Rome. Although the definition of *apartheid* was not copy-pasted as was the genocide definition, the sole reference to racial groups still reveals its historic roots.

Perhaps the only attempt to prosecute a person for the crime of apartheid so far took place in Montevideo during a visit by Pik Botha, the South African Minister of Foreign Affairs, ostensibly in his personal capacity to Uruguay in the mid-1980s. The Uruguayan court, however, dismissed the case⁹¹⁰. Attempts to sue corporations for their involvement and

⁹⁰⁵ Supra note [47, *Stakić* (Trial Chamber Judgment), para. 773 ('Persecution can consist of the deprivation of a wide variety of rights, whether fundamental or not, derogable or not').].

⁹⁰⁶ See Ambos, *Treatise on ICL II* (2014) 105.

⁹⁰⁷ See Ambos, *Treatise on ICL II* (2014) 105.

⁹⁰⁸ *Prosecutor v. Charles Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges Against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014, paras. 115–116, 117–118, 119–121, and 122–123; *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber II, 12 June 2014, paras. 193–199 and 204; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, paras. 225–226, 228–239, 241–242, 248–251, 253–266, and 269–281; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, (23 January 2012), paras. 233, 243, 257, 270–271, 275–277, and 281–286.

⁹⁰⁹ Rosenne, in: Rosenne, *Essays on International Law and Practice* (2007) 391.

⁹¹⁰ The lead lawyer in the case, Fernando Urioste, currently a professor at the *Facultad de Derecho de la Universidad de la República* and at the *Universidad Católica del Uruguay* in Montevideo, was assisted by Wilder Tayler, currently Deputy Secretary General of the International Commission of Jurists.

support of the *Apartheid* regime under the US Alien Tort Statute have been complicated by the US Supreme Court's decision in *Kiobel* but continue nonetheless⁹¹¹.

a) **Similar inhumane acts.** The First Edition of this Commentary noted that the ICC definition of 'the crime of apartheid' appears to be narrower than the definition of *apartheid* in article II of the *Apartheid Convention* in a number of respects. First, article 7 para. 2 (h) seems to define this crime as a residual category for certain inhumane acts under specific circumstances when they do not otherwise fit within one of the other acts listed in article 7 para. 1. The term 'other inhumane acts of a character similar to those referred to in paragraph 1' might seem to suggest that for the purposes of the *Statute* 'the crime of apartheid' includes only those inhumane acts which are not already listed in paragraph 1 (a) – (i) or included in the other residual category of 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' in paragraph 1 (k). However, the second element of the crime of apartheid listed in the Elements of Crimes (see mn 122 below) addresses this awkward drafting by providing that the acts elsewhere in article 7 para. 1 would be included within 'the crime of apartheid'. Given the seriousness of the crime and the possibility of cumulative prosecution of the same conduct as violations of more than one crime (where there was a distinctive element), this element seems to be consistent with the probable intent of the drafters of the *Statute*⁹¹². The acts that are similar to, but not identical to, both of these two categories in the rest of paragraph 1, which constitute 'the crime of apartheid' would include both those types of acts which involve 'great suffering, or serious injury to body or to mental or physical health' within the meaning of paragraph 1 (k), and those acts listed in paragraph 1 (a) – (i) which in some cases might involve a lesser degree of suffering or less serious injury. What are the common characteristics of these two types of crimes against humanity? The common element is that they are all 'inhumane'. Therefore, it is likely that some of the inhumane acts which would constitute 'the crime of apartheid' would include many of the acts listed in article II of the *Apartheid Convention* which are not already covered in article 7 para. 1 of the *Statute*⁹¹³.

All the acts listed in article II of the *Apartheid Convention* as constituting *apartheid* are defined as 'inhuman acts' and there probably is a large degree of overlap between the concepts of 'inhuman acts' and 'inhumane acts'⁹¹⁴. The International Law Commission cited 'mutilation and bodily harm' as examples⁹¹⁵. Among the acts defined as *apartheid* in article II which might be included in 'the crime of apartheid' as defined in article 7 para. 2 (h) is 'cruel, inhuman or degrading treatment or punishment' (article II (a) (ii)), which can impose a degree of physical or mental suffering akin to the acts listed in article 7 para. 1 (a) – (i). Other inhumane acts constituting *apartheid* which might be considered similar to those in paragraph 1 (a) – (i) in the degree of suffering or injury (even if not necessarily at the same level of suffering or injury as in the category of 'other inhumane acts' of paragraph 1 (k)) include the imposition of living conditions calculated to cause the destruction of a racial group (article II (b)), legislative or other measures calculated to prevent a racial group from participating in the life of the country, such as the denial of the right to leave and return to one's country or the right to a nationality (article II (c)) and legislative or other measures 'designed to divide the population along racial lines', such as prohibiting mixed marriages (article II (d)). Although some may contend that some of the other acts listed in article II,

⁹¹¹ For more on *Kiobel*, see the ASIL Agora: Reflections on *Kiobel* with excerpts from 107 *AJIL* 3 and 4 (2013) and *AJIL Unbound* 2014.

⁹¹² Other commentators have also concluded that this element correctly includes acts listed in paragraphs 1 (a)–(i) and (k). Werle and Jessberger, *Principles* (2014) 260; Ambos, *Treatise on ICL II* (2014) 11.

⁹¹³ One commentator has stated that it is possible for the criterion 'inhumane acts of a character similar to those referred to in paragraph 1' to be interpreted using article II of the UN *Apartheid Convention*. *ibid.* 262–263.

⁹¹⁴ The French versions of the *Apartheid Convention* and of the *Statute* use the term '*les actes inhumains*' to translate both 'inhuman acts' and 'inhumane acts'.

⁹¹⁵ 1996 *ILC Draft Code* 50 (commentary to article 18 (k)).

such as the denial of the right to work or to education, although, of course, very serious deprivations, are not of the same nature as the acts listed in article 7 para. 1, this contention overlooks the devastating impact on the lives of those denied these rights recognised by the Universal Declaration of Human Rights and guaranteed by the International Covenant on Economic, Social and Cultural Rights, and on the society deprived of the full potential of its members. Moreover, as indicated in the discussion of persecution (see mn 116–117 above), many of these acts constitute the crime against humanity of persecution). However, many of the other acts listed in article II, such as murder (article II (a) (i)) and torture (article II (a) (ii)), are already covered by article 7 para. 1, so they will fall within ‘the crime of apartheid’ under the *Statute* if the Court decides to follow the interpretation in the second element of the Elements of Crimes.

- 146 **b) Context with ‘an institutionalised regime of systematic oppression and domination’.** The inhumane acts must be ‘committed in the context of an institutionalised regime’. The words ‘institutionalised regime’ appear to qualify the term ‘systematic oppression and domination’. It is this requirement that differentiates *apartheid* from persecution. In fact, those two words embody the characterising feature of *apartheid* and they give the crime its uniqueness. *Apartheid* as a crime against humanity is unique in that it criminalizes behaviour at the international level which is lawful or at least permitted through unofficial policy at the national level. Despite being so crucial, the words ‘institutionalized regime’ are not beyond discussion. Firstly, some argue that the word ‘regime’ implies state involvement⁹¹⁶, whereas others cast the net wider so as to also cover *de facto* states and armed opposition groups⁹¹⁷. Secondly and relatedly, there are different views as to whether the word ‘institutionalised’ presupposes that the *apartheid* is anchored in domestic laws⁹¹⁸ or whether it also captures somewhat more informal policies⁹¹⁹. The latter view may give way to the argument that *apartheid* can be institutionalised by actors other than states. Yet, a too liberal interpretation might be inconsistent with the understanding that it is precisely the fact that *apartheid* is a system created by law and enforced by legal institutions which render it particularly offensive.⁹²⁰ The subsequent requirement that the institutionalised regime be one of ‘systematic oppression and domination’, could also lead to some confusion. The threshold for exercising jurisdiction over crimes against humanity is that they be part of either a widespread or systematic attack on a civilian population and a double requirement of systematic does not make sense (see mn 3, 11). If the intent was to exclude the alternative of ‘widespread’, it should have been possible to do so expressly. The cumulative requirement to prove the existence of both the concept of ‘oppression’ and of ‘domination’, which are essentially the same, could impose a significant burden on the prosecution. According to one dictionary, to oppress is to ‘rule or treat [somebody] with continual injustice or cruelty’, and to dominate is to ‘to have control of or a very strong influence on (people, events, etc.)’⁹²¹.
- 147 **c) Domination of ‘one racial group over any other’.** As indicated above, the fact that the definition of genocide refers to racial, ethnic, national and religious groups and the definition of apartheid only to racial groups can be historically explained. Nonetheless, the question arises how much can reasonably be brought under the term ‘racial group’, the difficulty being that the term and concept of ‘race’ has become almost obsolete. The drafters of the *Apartheid*

⁹¹⁶ See e.g., McCormack in McCormack et al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004).

⁹¹⁷ An argument in this respect was eloquently presented by the late and much respected Christopher Hall in the *apartheid* entry of the previous edition of this commentary.

⁹¹⁸ See e.g. Werle and Jessberger, *Principles* (2014) 338.

⁹¹⁹ Ambos argues that an institutionalised system of racist oppression can also refer to a system where racial oppression and discrimination is institutionalised by a *de facto* policy (Ambos, *Treatise on ICL II* (2014) 114); for a similar position see Dugard, in: Ascencio et al. (eds.), *Droit International Pénal* (2012) 2013.

⁹²⁰ Dugard and Reynolds (2013) 24 *EJIL* 3, 873.

⁹²¹ *Ibid.* 358, 868.

Convention did not define the term racial group nor did the drafters of the ICC Statute., The word 'racial' has a widely accepted meaning in human rights law. The *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted eight years before the *Apartheid Convention*, defines 'racial discrimination' broadly as:

'... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life'⁹²².

In its practice, the Committee on the Elimination of Racial Discrimination has stretched this definition even a bit further⁹²³. The argument has repeatedly been made that human rights concepts and interpretations should not be directly transposed to an international criminal law setting without any adjustment and thus the CERD definitions and interpretations alone may not be sufficient to reinterpret the meaning of the word 'race' beyond its original meaning in an ICC setting. However, techniques of systemic interpretation may push for reference to the broader discriminatory grounds of persecution. Through such reference and arguments of logic and consistency also other types of discriminatory domination could be brought within the realm of the notion of *apartheid*.

d) 'intention of maintaining that regime'. The specific intent that acts be 'committed with the intention of maintaining that regime' was required as a result of concerns that the definition would extend to white supremacist organisations that were not seeking to implement a government segregationist system⁹²⁴. This requirement could be interpreted – perversely – to exclude both acts by those seeking to replace the regime with something worse and by those seeking to replace it with a regime which was less oppressive, but still imposing severe discrimination. In contrast to the *Apartheid Convention*, where there is some ambiguity whether the specific intent of 'establishing and maintaining domination' involves only the intent of the accused or simply of the State⁹²⁵, article 7 para. 1 (h) appears to require a specific intent by the individual accused to commit the act with the intention of maintaining the regime. This is the view taken in the Elements of Crimes as the fifth element of this crime is that '[t]he perpetrator intended to maintain such regime by that conduct', but the correct interpretation will be for the Court to determine. Formally, the 'crime of apartheid' is not limited to leaders and organizers, but also includes low-level perpetrators who committed the prohibited acts with the intention to maintain the regime⁹²⁶. However, Dugard has submitted that it will be impossible to prove the specific intent for individuals other than the leaders. Following this reasoning it can be submitted that *apartheid* is a *de facto* leadership crime⁹²⁷.

⁹²² International Convention of the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by GA Res 2106 A (XX) of 21 Dec. 1965, article 1 para. 1. In contrast, there is little agreement among anthropologists concerning the term.

⁹²³ As also observed by Dugard and Reynolds (2013) 24 *EJIL* 3, 8..

⁹²⁴ McCormack, in: McCormack *et al.* (eds), *The Permanent International Criminal Court* (2004) 199–200 (noting that this concern was simply part of a broader resistance to having the Court exercise jurisdiction over US nationals).

⁹²⁵ Clark, in: Bassiouni (ed.), *International Criminal Law, Vol. I* (1986) 299. But Dugard disagrees, referring to the fundamental criminal law principle of strict interpretation, cf. Dugard, in: Ascencio *et al.* (eds.), *Droit International Pénal* (2012) 203. With reference to Element 5 of the Elements of Crime, Ambos also argues that apartheid requires a specific purpose, in addition to the general intent; Ambos, *Treatise on ICL II* (2014) 114..

⁹²⁶ The drafters rejected the approach of the International Law Commission in article 20 para. 3 of its 1991 ILC Draft Code. In its commentary on this provision, the International Law Commission stated that it had restricted the scope of this crime 'to leaders and organizers – an approach that it has also adopted in relation to other crimes such as aggression .. It has thereby sought to make criminally liable only those who are in a position to use the state apparatus for the planning, organisation or perpetration of the crime'.

⁹²⁷ Dugard, in: Ascencio *et al.* (eds.), *Droit International Pénal* (2012) 203.]. Ambos has taken a similar view regarding genocide with his knowledge- and structure-based approach, cf. Ambos, Ambos, *Treatise on ICL II* (2014) 27 *et seqq.*

149 e) **Special remarks.** The individual elements of ‘the crime of apartheid’ in the Elements of Crimes independent of the common contextual elements largely follow paragraph 2 (k). The first element requires that the perpetrator has ‘committed an inhumane act against one or more persons’. As noted above, the second element seeks to remedy the awkward wording of paragraph 2 (k) that would exclude acts that were prohibited in other parts of article 7 by stating that an inhumane act ‘was an act referred to in article 7 para. 1’ (presumably, also including acts mentioned in paragraph 2, which illustrate the scope of paragraph 1) or ‘was an act of a character similar to any of those acts’. In determining whether an act is of a character similar to any of such acts, a footnote states that ‘[i]t is understood that ‘character’ refers to the nature and gravity of the act’. Given the broad range of acts constituting crimes against humanity, particularly those which constitute persecution (see mn 115 above), the extent to which this general explanation provides adequate guidance to the Court with respect to specific acts remains to be seen. The fourth element repeats the specific contextual requirement of this crime, but does not clarify the scope of the term ‘regime’. The final element repeats the specific mental element of this crime by requiring that the perpetrator have committed the inhumane act with intention ‘to maintain such regime by that conduct’.

9. ‘Enforced disappearance of persons’

150 The crime of enforced disappearance is a complex crime, which can be carried out in a wide variety of ways⁹²⁸. This complexity has posed a number of difficulties in drafting a definition of enforced disappearance as a human rights violation⁹²⁹ but even more so as an international crime⁹³⁰. The peculiarity for enforced disappearance as a crime against humanity is that the *actus reus* consists of two separate but interlinked acts. These acts are (i) the arrest, detention or abduction of persons followed by (ii) a refusal to acknowledge the deprivation of liberty or to provide information concerning that person’s fate or whereabouts⁹³¹. Both acts must be carried out with the authorisation, support or acquiescence of a state or political organisation. It is a continuing crime that comes to an end only when the fate or whereabouts of the person become known. It is invariably carried out by a web of persons, all of whom can be held criminally responsible, but not all persons involved in carrying an enforced disappearance necessarily know of the specific intention of the other perpetrators or even of their existence. The jurisdictional definition in article 7 para. 2 (i) differs somewhat from the human rights definitions. In fact, the ICC definition adds three elements, namely a specific purpose (the act must be committed with the intention of removing the person from the protection of the law), a temporal element (for a prolonged period of time), and a new actor (political organisation). These additions render any discussion on the potential customary nature of enforced disappearance as a crime against humanity more complicated. In the context of determining customary status, it is in any event important to differentiate between the prohibition of enforced disappearance as directed to states under human rights law and the contiguous international crime which is addressed to individuals.

⁹²⁸ Guzman (2001) *ICJRev.* 73, no. 62–63.

⁹²⁹ The Inter-American Court has been crucial in the articulation and refinement of this particular human rights violation. A standard case is *Goiburú et al. v. Paraguay*, Judgement, 22 September 2006. More recent cases are *Rodríguez Vera y Otros (Desaparecidos del Palacio de Justicia) v. Colombia*, Judgement, 14 November 2014; and *Osorio Rivera y Familiares v. Peru*, Judgement, 20 November 2014.

⁹³⁰ Rodley, *Treatment of Prisoners* (2009) 332–337.

⁹³¹ The Parliamentary Assembly of the Council of Europe recently came to the same conclusion, based on a thorough study of the question by Christos Pourgourides, when it declared that enforced disappearances ‘entail a deprivation of liberty, refusal to acknowledge the deprivation of liberty or concealment of the fate and the whereabouts of the disappeared person and the placing of the person outside the protection of the law’. *Council of Europe, Parl. Ass. Res. 1463*, 3 Oct. 2005. See also *Council of Europe Disappearances Report* (2005), *Parl. Ass. Doc. 10679*, 19 September 2005, para 2.

a) ‘**arrest, detention or abduction of persons**’. One of the essential elements of the crime of enforced disappearance is that the victim be deprived of liberty, whether it is by arrest, detention, abduction or some other means⁹³². A person whose initial detention was lawful can subsequently be ‘disappeared’ in custody⁹³³. Although the wording in paragraph 2 (i) is not as broad as in other international instruments, which expressly speak of any deprivation of liberty, the three categories would appear to be broad enough to cover all types of deprivations of liberty involved in an enforced disappearance. The definition of the term ‘detention’ in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment means ‘the condition of detained persons’ and a detained person is defined as ‘any person deprived of personal liberty except as a result of conviction for an offence’⁹³⁴. The Body of Principles expressly states that it applies to ‘the protection of all persons under any form of detention or imprisonment’⁹³⁵. A person convicted of an offence would normally have been arrested, and, in any event, for example, if the person appeared voluntarily, a convicted person would be imprisoned, so the definition in article 7 para. 2 (i) would appear to include all forms of deprivation of liberty covered by other definitions of enforced disappearance⁹³⁶. Although the definition describes these three forms of deprivation of liberty as deprivations of freedom, nothing on the face of the definition suggests that it can be read more narrowly than the internationally accepted definitions in the Body of Principles or that there was any gap in protection⁹³⁷.

b) **Participation of a State or a political organisation**. Until recently, the very concept of enforced disappearance under international human rights law has been a crime of State which can be committed only by state agents or with their consent or acquiescence⁹³⁸. The UN

⁹³² *International Convention for the Protection of All Persons from Enforced Disappearance*, UNGA ResA/RES/61/177, 20 Dec. 2006, article 2 (‘arrest, detention, abduction or any other form of deprivation of liberty’); *UN Declaration on the Protection of All Persons from Enforced Disappearance* (UN Declaration on Disappearance), Preamble (arrest, detention or abduction of persons against their will or otherwise deprived of their liberty); *Inter-American Convention on the Forced Disappearance of Persons* (Inter-American Disappearances Convention), article II (depriving a person or persons of his or their freedom, in whatever way); *Chumbibilcas v. Peru*, No. 10.559, Report No. 1/96, 1 Mar. 1996 (arrest).

⁹³³ *Trujillo Oroza v. Bolivia*, Judgment, Inter-American Court of Human Rights, 26 Jan. 2000 (victim had been arrested and initial detention had been acknowledged before he was ‘disappeared’). See also *Prosecutor v. Mesquita*, Judgement, No. 28/2003, 6 December 2004, para. 85.

⁹³⁴ *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Use of Terms*, adopted by the General Assembly without a vote, GA Res43/173, 9 Dec. 1988.

⁹³⁵ *Ibid.*, Scope of the Body of Principles.

⁹³⁶ The term ‘arrest’, according to the Use of Terms section of the Body of Principles, ‘means the act of apprehending a person for the alleged commission of an offence or by the action of authority’. To the extent that there might be any conceivable gap in the terms ‘arrest’, ‘detention’ or ‘imprisonment’, the deprivation of liberty would be covered by the term ‘abduction’.

⁹³⁷ One US historian has argued that in the specific context of United States history there is a distinction between liberty (the term used in the Rome Statute and in most international instruments) and freedom (the term used in the Inter-American Disappearances Convention), Hackett Fischer, *Liberty and Freedom* (2004) (contending that the Latin term ‘liberty’ implies separation and independence, while the root meaning of ‘freedom’ (akin to ‘friend’) connotes attachment: the rights of belonging in a community of free people). However, that distinction is not reflected in ordinary English usage and certainly not in the context of defining the crime against humanity of enforced disappearances in an international treaty. In normal usage, the meanings in English of liberty and freedom are essentially the same. For example, liberty is defined as: ‘1 freedom from captivity, slavery, restrictions, etc. 2 freedom to act and think as one pleases 3 (usually liberties) a natural right or privilege’. Chambers 21st Century Dictionary 787 (1999). Freedom is defined as: ‘1 the condition of being free to act, move, etc. without restriction. 2 personal liberty or independence, eg from slavery, serfdom, etc. 3 a right or liberty’. *ibid.*, 527. The intention of the drafters to use the broad concept of deprivation of liberty, rather than a more restrictive concept, is confirmed by the French version of article 7 para. 2 (i), which describes ‘disappeared’ persons as ‘*ces personnes sont privées de liberté*’. The French version of the Body of Principles defines a detained person as ‘*toute personne privée de la liberté individuelle*’.

⁹³⁸ *International Convention for the Protection of All Persons from Enforced Disappearance*, article 1 (‘committed by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State’); *UN Declaration on Disappearances*, Preamble (by officials of different branches or levels of Government, or by organised groups or private individuals acting on behalf of, or with the support,

Working Group on Enforced or Involuntary Disappearances deals exclusively with governments⁹³⁹. Enforced disappearances by state agents or with their consent or acquiescence have been distinguished from kidnapping or abduction by armed political groups. The UN Working Group on Enforced or Involuntary Disappearances recognised the distinction between the two types of acts by establishing a separate mechanism to deal with the latter in the former Yugoslavia⁹⁴⁰. The expansion of the definition of enforced disappearance in article 7 para. 2 (i) to include ‘the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, ... a political organisation’, however, can be explained, as with the similar expansion of the definition of the human rights violation of torture when defining the scope of the crime against humanity of torture, because crimes under international law involve individual criminal responsibility rather than state responsibility. In keeping with this fundamental difference between the two categories (human rights violations committed by States and crimes under international law committed by individuals), article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance, while not extending the definition of an enforced disappearance to include abuses committed by non-state actors, independent of any connection with a state or its agents, requires each state party to ‘take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those responsible to justice’⁹⁴¹.

In contrast, in the ICC Statute the notion of ‘political organisations’ has been directly included in the core of the definition. This notion of ‘political organisation’ has not been defined in the Elements of Crime. It has been submitted that not all organisations with political purposes or ambitions are covered, but only those that effectively perform certain state functions⁹⁴². Alternatively, an argument has been made in favour of a streamlined interpretation which is consistent with the *chapeau* notion of organisation policy. However, given the broad understanding of this notion as put forward in the *Kenya* Decision, and upheld in *Katanga and Ngudjolo* and *Bemba Gombo*⁹⁴³, such streamlined interpretation would in fact lead to a very extensive privatisation of the crime of enforced disappearances which is inconsistent with the character of the crime⁹⁴⁴. Therefore, it is better to disconnect the two notions. Perhaps other acts of crimes against humanity are more amenable to a certain privatisation. Yet, the crime of enforced disappearance is premised on the performance of state functions. This requires a narrower interpretation of the concept of political organisation than might be necessary for the *chapeau* reference.

- 153 c) **Refusal to acknowledge or to give information.** A central element of the crime of enforced disappearance since its invention by Adolf Hitler in 1941 has been the refusal to acknowledge the deprivation of liberty or to disclose the whereabouts of the victim⁹⁴⁵.

direct or indirect; consent or acquiescence of the Government); Inter-American Convention, article II (perpetrated by agents of the State or by persons or groups of persons acting with the authorisation, support, or acquiescence of the State); *Chumbibilcas v. Peru*, No. 10.559, Report No. 1/96, 1 March 1996 (arrest) (by state agents or by irregular troops (paramilitary or parapolice) acting with the acquiescence of the state authorities or under their operational control).

⁹³⁹ See, for example, *UN Commission on Hum.Rts.Res.* 1998/40 (17 Apr. 1998); *Report of the Working Group on Enforced or Involuntary Disappearances*, UN DocE/CN.4/1998/43 (1998).

⁹⁴⁰ See *Report of the Working Group on Enforced or Involuntary Disappearances*, UN DocE/CN.4/1998/43 (1998), para. 21 (describing the special process on missing persons).

⁹⁴¹ *International Convention for the Protection of All Persons from Enforced Disappearance*, article 3.

⁹⁴² Cf. Ambos, *Treatise on ICL II* (2014) 111; Ott, *Enforced Disappearance in International Law* (2011) 25.

⁹⁴³ See mn 91–92.

⁹⁴⁴ Both arguments have been made by Giorgou, (2013) 11 *JICJ* 1001–1021..

⁹⁴⁵ *ibid.*, article 2 (a deprivation of liberty ‘followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person’); UN Declaration on Disappearance, Preamble (refusal to acknowledge the deprivation of liberty; refusal to disclose the whereabouts of the person concerned); Inter-American Convention, article II (refusal to acknowledge the deprivation of freedom; refusal to give information on the whereabouts of the victim); *Chumbibilcas v. Peru*, No. 10.559, Report No. 1/96, 1 March 1996 (arrest) (holding of the victim must have been systematically denied by the authorities responsible for public order).

Article 7 para. 1 (i) includes this central element. A refusal presupposes an inquiry from relatives or friends about the disappeared person's whereabouts. The delivery of false information is also understood to be a refusal.

d) **Intention to remove from the protection of the law.** An essential consequence of the crime since Hitler has been the removal of the victim from the protection of the law⁹⁴⁶. However, as the international instruments defining this crime prior to the Rome Statute make clear, the removal from the protection of the law is simply a necessary result of the acts that are involved in committing the crime – refusal to acknowledge the deprivation of liberty or to give information on the fate or whereabouts of the victim⁹⁴⁷. The perpetrator need only have intended to make such a refusal or denial of information, he or she need not have had the additional specific intention to remove the person from the protection of the law. Several scholars have argued otherwise. They submit that in addition to proving that one of the perpetrators intended to refuse or to deny information, at least one of the perpetrators of the crime had a specific intent to remove the victim from the protection of the law⁹⁴⁸.

However, given that the refusal or denial of information thereby immediately places the person outside the protection of the law, by making it impossible for family, doctors or counsel to seek judicial assistance or for judges exercising their supervisory powers over places of detention to act on their own initiative to protect the person who has been 'disappeared' from the face of the earth, the refusal to acknowledge or the denial of information automatically removes the person from the protection of the law. Indeed, it is common for lawyers seeking information about a 'disappeared' person from prison authorities with a view to obtaining a writ of habeas corpus or *amparo* to be met with a refusal to acknowledge the deprivation of liberty or a denial of any information about the fate or whereabouts of the person so that the lawyers cannot even frame an effective request for such a writ or for other judicial assistance addressed to the persons or agencies of government responsible for the continuing deprivation of liberty. This practice is one of the reasons that Amnesty International determined that essential safeguards against enforced disappearances

⁹⁴⁶ Tayler (2001) *ICJRev.* 65, no. 62–63 ('[F]orced disappearance is a complex phenomenon, conceived precisely to evade the legal framework of human rights protection').

⁹⁴⁷ International instruments treat the placement outside the protection of the law as a necessary result of the refusal or denial rather than as a part of the definition. *International Convention for the Protection of All Persons from Enforced Disappearances*, article 2 (making clear that it is the refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person 'which place[s] such a person outside the protection of the law'); UN Declaration on Disappearance, Preamble (thereby placing the victim outside the protection of the law); Inter-American Convention, article II (thereby impeding the victim's recourse to the applicable legal remedies and procedural guarantees); *Report of the UN Working Group on Enforced or Involuntary Disappearance*, UN Doc/E/CN.4/1990/13, para. 340 ('Making people disappear .. Takes the victim out of the protective precinct of the law'). Similarly, the definition of an enforced disappearance by the Working Group in its General Comment on article 4 of the UN Declaration on Disappearance did not list placing a person outside the protection of the law as part of the definition.

⁹⁴⁸ Cf. Ambos, *Treatise on ICL II* (2014) 112; Cryer *et al.*, *Introduction ICL* (2014) 260; Werle and Jessberger, *Principles* (2014) 337, de Frouville, in: Ascencio *et al.* (eds.), *Droit International Pénal* (2000), 377, 381 (correctly noting that the deprivation of the protection of the law is simply a consequence of the refusal or denial and attacking the definition in the Rome Statute). Citing article 7, a UN independent expert claimed that '[t]he subjective elements of guilt seem, however, to put an extremely heavy burden on the prosecution to prove that the individual perpetrator was aware from the very beginning of committing the crime that the deprivation of liberty would be followed by its denial and that he (she) intended to remove the victim from the protection of the law for a prolonged period of time'. Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of *Commission Res. 2001/46*, UN Doc/E/CN.4/2002/71, 8 Jan. 2002, 29. However, for the reasons explained elsewhere in this commentary, the intention to deprive a person of the protection on the law is evidenced in all cases under article 7 para. 2 (i), either by the intention of a perpetrator to refuse to acknowledge the deprivation of liberty or the denial of information about fate or whereabouts since the necessary consequence in each instance is that the victim is removed from the protection of the law and, in any event, the Rome Statute does not expressly require that each perpetrator in the chain of events in this complex crime have performed the same acts and omissions or had the same mental state at each stage of the 'disappearance'.

include the prohibition of secret detention and unauthorised arrest and detention and access to prisoners⁹⁴⁹. It is also why the International Convention prohibits secret detention⁹⁵⁰. In enforced disappearances when the initial deprivation of liberty was unlawful – the overwhelming number of cases – the manner in which it is carried out demonstrates an intention to remove a person the protection of the law – police and security officials are instructed to use methods that would remove the victims from the protection of the law, such as use of plainclothes and unmarked cars without licence plates and, once the person was deprived of liberty, to refuse to acknowledge the deprivation of liberty or refusal of information⁹⁵¹. When those who carry out the initial deprivation of liberty are members of death squads, they know that the very formation of these squads was outside normal legal procedures and designed to remove the victim from the protection of the law. In the light of these common characteristics of the crime, such factors are convincing circumstances that all of those involved in the crime intend to deprive the victim of the protection of the law.

- 155 e) ‘for a prolonged period of time’. None of the human rights definitions of enforced disappearance include a temporal component. This omission is entirely understandable since once there has been a refusal to acknowledge a deprivation of liberty or to give information about the fate or whereabouts of the victim, an enforced disappearance has occurred. Indeed, it is in the first few hours and days after the initial deprivation of liberty and the refusal to acknowledge or to give information that the person is most at risk. In some countries there is a pattern of ‘disappearances’ in which the victim, absent effective outside intervention, is killed after a matter of days and the bodies may be found shortly afterwards, thus, ending the continuing crime. Although it is regrettable that the unnecessary and undefined phrase ‘for a prolonged period of time’ was added to article 7 as a part of a political compromise, a perfectly reasonable construction of this term, which is consistent with the fundamental characteristics of this crime under international law and the object and purpose of the *Rome Statute* is possible.

In contemporary English usage, ‘prolong’ simply means ‘to make something longer; to extend or protract’⁹⁵². Therefore, a prolonged period of time simply means an extended period of time, not a specific period of time in hours, days, weeks, months or years. Given that the moment that there has been a refusal to acknowledge or give information an enforced disappearance has occurred, the reference period which has been prolonged should be as short as possible, bearing in mind that, from the perspective of the ‘disappeared’ person and his or family and friends, each hour will seem like an eternity. For determining those

⁹⁴⁹ In its 14-Point Program for the Prevention of ‘Disappearances’, the organisation specifically states:

‘5. No secret detention

Governments should ensure that prisoners are held only in publicly recognised places of detention. Up-to-date registers of all prisoners should be maintained in every place of detention and centrally. The information in these registers should be made available to relatives, lawyers, judges, official bodies trying to trace people who have been detained, and others with a legitimate interest. No one should be secretly detained.

6. Authorisation of arrest and detention

Arrest and detention should be carried out only by officials who are authorised by law to do so. Officials carrying out an arrest should identify themselves to the person arrested and, on demand, to others witnessing the event. Governments should establish rules setting forth which officials are authorised to order an arrest or detention. Any deviation from established procedures which contributes to a ‘disappearance’ should be punished by appropriate sanctions.

7. Access to prisoners

All prisoners should be brought before a judicial authority without delay after being taken into custody. Relatives, lawyers and doctors should have prompt and regular access to them. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention’.

Amnesty International, *Disappearances and Political Killings* (1994) 290.

⁹⁵⁰ International Convention, article 17.

⁹⁵¹ For descriptions of the various techniques used around the world to carry out enforced disappearances, see Amnesty International, *Disappearances and Political Killings* (1994) 26–30 (Sri Lanka), 34–36, 38–42 (Colombia), 68–73 (Morocco).

⁹⁵² *Chambers 21st Century Dictionary* (1999) 1109.

enforced disappearances over which the Court would be able to exercise jurisdiction, the reference period should not be longer than the short period of time under international law and standards which the state may deny a detained person access to families, counsel, independent medical attention or a judge⁹⁵³. Of course, the power to deny access during this period the state does not mean that the state has no responsibility during that time to acknowledge the deprivation of liberty or to give information about the fate or whereabouts of the person. This suggestion for a reference period has the merit that the time limits have achieved broad international acceptance, avoiding the need to develop new ones, they are judicially manageable and the international law and standards have been evolving in a direction of increased protection for the person deprived of liberty. Moreover, once a person's deprivation of liberty has been prolonged beyond these limits without access to the outside world, the deprivation of liberty may become unlawful and the person entitled to release.

f) **Special remarks.** The elements of enforced disappearances in the Elements of Crimes, 156 which were the product of political compromises that did not always take into account the fundamental characteristics of the crime, may prove to be of somewhat limited assistance to the Court in the interpretation and application of article 7. Of course, the drafters of the elements of this crime were not helped by the problematic aspects of the definition in article 7 paragraph 2 (i). In addition, considerable time was expended on the extraneous question whether the elements should specify whether the Court would have jurisdiction over the continuing crime of enforced disappearance where the initial deprivation of liberty took place before entry into force of the *Rome Statute*, a matter that, strictly speaking, has nothing to do with the elements of the crime, but only to the interpretation of article 11⁹⁵⁴. Indeed, there was no similar debate over the elements of other continuing crimes or crimes occurring over extended periods, such as those of enslavement, imprisonment or other severe deprivation of physical liberty, sexual slavery, enforced prostitution, persecution and the crime of apartheid. The compromise, if it were to be followed by the Court, would exclude many, but not all, enforced disappearances where the initial deprivation of liberty occurred before entry into force of the *Rome Statute*⁹⁵⁵.

The crime of enforced disappearance is multifaceted, but the structure of the elements of this crime may be considered excessively complex and awkward. It would have been simpler and easier to follow if the elements for perpetrators involved in the deprivation of liberty had

⁹⁵³ It is now widely accepted that access to the outside world should be without delay and that, even in exceptional circumstances, denying such access to the outside world for more than 24 or 48 hours would violate the rights of the person detained. For a compilation of the relevant law and standards concerning access, see Amnesty International, *Fair Trials Manual*, AI Index: POL 30/002/1998, 1 December 1998, Chapters 4 (The right of detainees to have access to the outside world) and 5 (The right to be brought promptly before a judge or other judicial officer). In the period when the person is cut off from the outside world, his or her ability to obtain the protection of the law is impeded or completely denied – families and independent medical attention cannot alert lawyers to torture or other human rights violations, lawyers cannot seek judicial protection for those violations and judges cannot supervise the detention. Indeed, one of the primary reasons for guaranteeing such access to the outside world is essential is that such access is a safeguard against enforced disappearances and other human rights violations. Many lives have been saved by prompt reactions within the first hours of an enforced disappearance. These impediments to judicial protection become absolute bars when the very deprivation of liberty or fate and whereabouts of the victim are unknown.

⁹⁵⁴ For accounts of the debate, see Hall (2000) 94 *AJIL* 773, 781; Witschel and Rückert, in: Lee (ed.), *Elements of Crimes* (2001) 98.

⁹⁵⁵ Fn. 24, attached to the title of the elements of this crime, states: 'This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 [the two contextual elements] occurs after the entry into force of the Statute'. For example, if prisoners who were initially deprived of their liberty, lawfully or unlawfully, before entry into force were to 'disappear' in detention in connection with an attack on a civilian population that occurred after that date, then the Court would be able to exercise jurisdiction. See for a differentiation between continuing or ongoing crimes and ongoing situations, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11, Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, PTC III, 3 October 2011, paras. 66–73.

been addressed separately from those relevant to perpetrators involved in the refusal or denial. The drafters stated in the first footnote, attached to the title, that, '[g]iven the complex nature of the crime, it is recognised that its commission will involve more than one perpetrator as part of a common purpose'. According to the first element, the perpetrator either '[a]rrested, detained or abducted one or more persons' or '[r]efused to acknowledge the arrest, detention or abduction or to give information on the fate or whereabouts of such person or persons'. Two footnotes confirm that the term 'detained' includes 'a perpetrator who maintained an existing detention' and that 'under certain circumstances an arrest or detention may have been lawful'. The second element requires that the arrest, detention or abduction have been followed by or accompanied by a refusal to acknowledge or to give information or that the 'refusal was preceded or accompanied by that deprivation of freedom'. The third element requires that the perpetrator have been aware either that the 'arrest, detention or abduction would be followed in the ordinary course of events by a refusal' or that the 'refusal was preceded or accompanied by that deprivation of freedom'.

The fourth element requires that the arrest, detention or abduction have been carried out by, or with the authorisation, support or acquiescence of, a state or political organisation. However, because the French text of the fifth element omits acquiescence with respect to the refusal (almost certainly an error in the text), the fifth element requires that the refusal be with the authorisation or support of the state or political organisation. The omission of acquiescence renders the fifth element in the French version inconsistent with the Rome Statute. The sixth element could have stated that the specific intention to remove victims from the protection of the law for a prolonged period was applicable only to those responsible for the planning of the crime, but, instead, it could be misinterpreted to apply to all persons involved in this complex crime, potentially weakening its impact considerably. Nevertheless, for the reasons explained above, which are fully consistent with ordinary principles of criminal responsibility, this specific intention can be demonstrated simply by the awareness of the likelihood that the deprivation of liberty would be linked to a refusal. In most instances in the past sixty-five years when enforced disappearances were committed it became common knowledge very quickly after the practice began, both within the security forces and among the general public, which deprivations of liberty were likely to become enforced disappearances because of the manner in which they were carried out or maintained, for example, by the use of paramilitary death squads in plainclothes, cars without licence plates, the absence of warrants, secret detention centres and the failure to maintain public registers of detainees in the places of detention. Such an approach would be analogous to the proof of a policy – and awareness of such a policy – by the existence of a widespread or systematic attack (see mn 87) and to the definition of murder as including situations where the perpetrator intended to inflict serious injury on the victim in the reasonable knowledge that it would be likely to cause death (see mn 20).

III. Paragraph 3: Definition of gender

- 157 The meaning of the term 'gender' was the subject of contentious debate regarding almost every article of the draft proposals in which it appeared. It was discussed in the context of prohibited grounds regarding the crime of persecution, regarding the composition of the Court⁹⁵⁶ and in the context of article 21 para. 3 on Applicable Law. The definition of gender

⁹⁵⁶ *New York Draft*, UN DocA/CONF.183/2/Add.2 (1998), article 37, where the words 'gender balance' were included between square brackets. In the final text, a provision is included that the States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for '[a] fair representation of female and male judges'. According to the final text, the States Parties shall also take into account the need to include judges 'with legal expertise on specific issues, including, but not limited to, violence against women and children'. In the April 1998 Draft Statute, the text was formulated as 'the need, within the membership of the Court, for expertise on issues related to sexual and gender violence, violence against children and other similar matters'. *ibid.*, p. 64.

in this paragraph, and its placement in the article which defines crimes against humanity, is mainly the result of the discussions regarding the so-called ‘non-adverse distinction clause’ in article 21. This debate ultimately concentrated on finding a compromise solution between States that favoured the inclusion of a non-adverse-distinction clause including gender, and those States that wanted the sentence in that paragraph to end after the term ‘human rights’. The agreement reached in the context of that debate resulted in the current definition of gender and the applicability of that definition to every other provision in the Statute which refers to ‘gender’⁹⁵⁷. The definition was originally to be added to the provision on persecution under crimes against humanity but was instead placed at the end of article 7.

In United Nations usage, ‘gender’ refers to the socially constructed roles played by women and men that are ascribed to them based on their sex. The word ‘sex’ is used to refer to physical and biological characteristics of women and men, while ‘gender’ is used to refer to the explanations for observed differences between women and men based on socially assigned roles⁹⁵⁸. The distinction between the terms ‘sex’ and ‘gender’ is both factual and normative, and could perhaps best be described as the difference between the concepts of ‘male’ and ‘female’ and the adjectival descriptions of ‘masculine’ and ‘feminine’. The definition of gender contained in article 7 para. 3 seeks to balance both aspects; the definition acknowledges the existence of biological sex, while the inclusion of the phrase ‘in the context of society’ was intended to refer to the socially constructed roles and differences between genders. The definition in paragraph 3, therefore, ‘is broad enough to allow the ICC to interpret the definition to reflect the approaches taken within the United Nations, including nondiscrimination on the basis of sexual orientation, and to avoid regression in the law’⁹⁵⁹.

It is unfortunate, however, that the compromise definition contained in article 7 para. 3 is predicated on the starting point of ‘the two sexes, male and female’, effectively removing biologically intersex individuals from the discussion. It is clear from the drafting history that this was the result of a deliberate effort on the part of conservative states, with one proposed draft going as far as to state that ‘the term [gender] does not imply the existence of more than two sexes’.⁹⁶⁰ However, it seems likely that the constructive ambiguity of article 7 para. 3, read in conjunction with the non-adverse distinction clause contained in article 21 para. 3, would require the Court to interpret any relevant provisions in as broad and inclusive a manner as possible, particularly in relation to the targeting of individuals on the basis of their sexual orientation.

The definition of gender in article 7 para. 3 is also of relevance to the subsidiary term ‘gender violence’, which is used on a number of occasions throughout the Statute, primarily in relation to the prioritisation of sexual and gender violence and violence against children.⁹⁶¹ The Court has not yet produced any judicial interpretation of the terms ‘gender’ or ‘gender violence’ as it has not arisen as a live issue in any case, although it is instructive to note the internal definition of gender violence adopted by the Office of the Prosecutor.⁹⁶² The Office of the Prosecutor defines ‘gender-based crimes’ as those ‘committed against persons, whether male or female, because of their sex and/or socially constructed gender roles’. It is significant that both biological sex and social gender constructs are identified as relevant motivations, as it means that the concept of ‘gender violence’ is broad enough to include both violence which targets women and men in different ways on the basis of their sex and violence which targets women or men as punishment for not complying with their assumed or assigned social gender roles. The definition used by the Office of the Prosecutor also emphasizes that gender

⁹⁵⁷ Bedont and Hall-Martinez (1993) 6 *BrownJWorldAff* 65, 68.

⁹⁵⁸ *Implementation of the Outcome of the 4th World Conference on Women*, Report of the SG, UN DocA/51/322 (3 Sep. 1996), para. 9 refers to the Report of the Fourth World Conference on Women, UN DocA/CONF.177/20 (1995).

⁹⁵⁹ Oosterveld (2005) 18 *HarvHumRtsJ* 55.

⁹⁶⁰ *Ibid.*, 64.

⁹⁶¹ See article 42 para. 9, article 54 para. 1 (b) and article 68 para. 1.

⁹⁶² See ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 3.

violence is not synonymous with sexual violence, and may manifest itself in other, non-sexual forms against both women and girls and men and boys.⁹⁶³

- 161 It remains to be seen how this paragraph will be interpreted by the Court and by states, but a significant number of states parties are omitting the definition of gender from draft and enacted legislation implementing the Rome Statute, which suggests that they will interpret the concept of gender in accordance with the United Nations usage directly, rather than reaching the same result indirectly by interpreting this provision, or, possibly, in accordance with a national law definition.

⁹⁶³ *Ibid.*

Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, 'war crimes' means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
 - (xii) Declaring that no quarter will be given;
 - (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
 - (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
 - (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
 - (xvi) Pillaging a town or place, even when taken by assault;
 - (xvii) Employing poison or poisoned weapons;
 - (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
 - (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
 - (xiii) Employing poison or poisoned weapons;
 - (xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - (xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

General Literature: Abi-Saab, G., 'The Concept of "War Crimes"', in: S. Yee and W. Tieya (eds.), *International Law In The Post-Cold War World – Essays in Memory of Li Haopei* (2001) 99; *id.* and Abi-Saab, R., 'Les crimes de guerre', in: H. Ascensio, E. Decaux and A. Pellet (eds.), *Droit International Pénal* (2000) 265; Abi-Saab, R., *Droit humanitaire et conflit internes: origines et évolution de la réglementation internationale* (1986); Ahlbrecht, H., *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert* (1999); Bartels, R., 'Discrepancies between international humanitarian law on the battlefield and in the courtroom: the challenges of applying international humanitarian law during international criminal trials', in: *International Law Between Conflict and Peace Time: In Search of the Human Face (Liber Amicorum Avril Mc Donald)* (2013); Benvenisti, E., *The International Law of Occupation* (1993); Best, G., *Humanity in Warfare* (1980); *id.*, *War and Law Since 1945* (1994); Bordwell, P., *The Law of War Between Belligerents: A History and Commentary* (1908); Cassese, A., (ed.), *The New Humanitarian Law of Armed Conflict* (1979); Comité international de la Croix-Rouge (ed.), *La convention de Genève relative à la protection des personnes civiles en temps de guerre* (1956); Cottier, M. 'Völkerrechtliche Verantwortlichkeit für Kriegsverbrechen in internen Konflikten', in: Erberich *et al.* (eds.), *Frieden und Recht* (38. Assistententagung öffentliches Recht, Münster) (1998); *id.*, 'War Crimes in International Law: An Introduction', (2005) 1 *Jurnal Hukum Humaniter* 21; Cryer, R., 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study', (2006) 11 *JCSL* 239; Cullen, A., *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010); Delissen, A.J.M. and Tanja, G.J. (eds.), *Humanitarian Law of Armed Conflict – Challenges Ahead* (1991); Detter, I., *The Law of War* (2000); Dinstein, Y., *War Crimes in International Law* (1996); Dörmann, K., (with contributions by Doswald-Beck, L. and Kolb, R.), *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003); *id.*, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes', (2003) 7 *MPYbUNL* 341; Fenrick, W.J., 'The Rule of Proportionality and Protocol I in Conventional Warfare', (1982) 98 *MillRev* 91; *id.*, 'Attacking the Enemy Civilian as a Punishable Offence', (1997) 7 *DukeJComp&IL* 539; Fernandez, J. and Pacreau, X. (eds.), *Statut de Rome de la Cour pénale internationale Commentaire article par article* (Pedone 2012); Fischer, H., 'The Jurisdiction of the International Criminal Court for War Crimes: Some Observations Concerning Differences between the Statute of the Court and War Crimes Provisions of Other Treaties', in: V. Epping, H. Fischer and W. Heintschel von Heinegg (eds.), *Brücken bauen und begehen: Festschrift für Knut Ipsen zum 65. Geburtstag* (2000) 77; *id.* and McDonald, A., (eds.), *Yearbook of International Humanitarian Law* (since 1999)Fleck, D. (ed.), *Beiträge zur Weiterentwicklung des Humanitären Völkerrechts für bewaffnete Konflikte* (1973) 104; Friedman, L., (ed.), *The Law of War, II* (1972); Jinks, D. and Nyamuya Maogoto, J. (eds.), *Applying International Humanitarian Law to Judicial and quasi Judicial Bodies – International and Domestic Aspects* (TMC Asser Press 2014); Frowein, J.A. and Wolfrum, R., 'The Protection of Regional and Other Interests as Structural Element of the Decision-Making Process of International Organizations', (1997) 1 *MPYbUNL* 259; Furet, M.-F., Martinez, J.-C. and Dorandeu, H., *La guerre et le droit* (1979); Gasser, H.-P., *International Humanitarian Law: An Introduction* (1993); Glahn, G., *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957); Green, L.C., *The Contemporary Law of Armed Conflict* (3rd ed., 2008); Greenspan, M., *The Modern Law of Land Warfare* (1959); Grotius, H., 'On the Rights of War and Peace', in: *Classics of International Law* (1995); Von Hebel, H. and Robinson, D., 'Crimes within the jurisdiction of the court', in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999) 79; Henckaerts, J.-M. and Doswald-Beck L., eds., *Customary International Humanitarian Law, three volumes (I: Rules, II, 1 and 2: Practice)* (CUP 2005); *id.*, Henderson, L., *The Contemporary Law of Targeting, Military Objectives, Proportionality and Precautions in Attacks under Additional Protocol I* (2009); Howard, M., Andreopoulos, G. and Shulman, M. R. (eds.), *The Laws of War* (1994); ICRC, *Understanding Humanitarian Law: Basic Rules of the Geneva Conventions and Their Additional Protocols* (1988); Jasica, R., 'Der Kombattantenbegriff in den Zusatzabkommen von 1977 zu den Genfer Abkommen von 1949', in: W. Voit (ed.), *Völkerrechtliche Beiträge der Tagungen der Justitiare und Konventionsbeauftragten des deutschen Roten Kreuzes 1957–1989* (1995) 253; Kalshoven, F. (ed.), *Assisting the Victims of Armed Conflict and Other Disasters* (1989); *id.* and Zegveld, L., *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (2011); Kress, C., 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice', (2001) 30 *IsYbHumRts* 103; La Haye, E., *War Crimes in Internal Armed Conflicts* (2008); Krivánek, D., 'The Weapons Provisions in the Rome Statute of the international Criminal Court and the German Code of Crimes against International Law' (2010); McCoubrey, H., *International Humanitarian Law* (1998); *id.*, 'War crimes jurisdiction and a permanent

International Criminal Court', (1998) 3 *JArmConfl* 9; Mechelynck, A., *La convention de la Haye concernant les lois et coutumes de la guerre sur terre d'après les actes et documents des conférences de Bruxelles de 1874 et de la Haye de 1889 et 1907* (1915); Meindersma, Christa, 'Applicability of humanitarian law in international and internal armed conflict', (1994) 7 *HagueYbIL* 113; Meron, T., 'The Geneva Conventions as Customary Law', (1987) 81 *AJIL* 348; *id.*, 'International Criminalization of Internal Atrocities', (1995) 89 *AJIL* 554; *id.*, 'War crimes law comes of age', (1998) 92 *AJIL* 462; Moir, L., *The Law of Internal Armed Conflict* (2002); Olosolo, H., *Unlawful Attacks in Combat Situations from the ICTY Case Law to the Rome Statute* (2008); Quéguiner, J.-F., 'Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire', (2003) 850 *IRRC* 271; Rédalić, L., *La conduite des hostilités dans les conflits armés asymétriques: un défi au droit humanitaire* (2013); Rogers, A. P.V., *Law on the Battlefield* (3rd ed. 2012); Rogers, A.P.V., *Law On The Battlefield* (2012); Rolin, A., *Le droit moderne de la guerre*, i (1920); Rowe, P., *Defence: The Legal Implications – Military Law and the Laws of War* (1987); Sassòli, M., 'Humanitarian Law and International Criminal Law', in: Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009); *id.*, and Bouvier, A., *Un droit dans la guerre* (2003); *id.*, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (2012); Schindler, D. *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, II RDC 121 (1979); *id.* and Toman, J. (eds.), *The Laws Of Armed Conflicts* (3rd ed. 1988) 10; Schlütter, B., *Developments in Customary International Law, Theory and the Practice of the International Court of Justice and the International Ad Hoc Tribunals for Rwanda and Yugoslavia* (2010); Schwarzenberger, G., *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1968); Sivakumaran, S., *The Law of Non-International Armed Conflict* (2012); Stone, J., *Legal Controls of International Conflict – A Treatise on the Dynamics of Disputes- and War-Law* (1954); Wilmshurst, E. and Breau, S. (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2011); van der Wolf, W.J. (ed.), *War Crimes and International Criminal Law* (WLP 2010); Wuerzner, C., 'Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals', (2008) 90 *IRRC* 907; Zimmermann, A., 'The Creation of a Permanent International Criminal Court', *MPYbUNL* (1998) 169.

Reports: General: United Nations War Crimes Commission (ed *Law Reports of Trials of War Criminals* (XV Vols. 1947–1949) (hereinafter: Law Reports); United Nations War Crimes Commission (ed.), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948); *Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996*, UN Doc.A/51/10 (1996); *Report of the Panel on United Nations Peace Operations* (UN GA A/55/305-S/2000/809, 21 August 2000) (the 'Brahimi Report'); *United Nations Peacekeeping Operations: Principles and Guidelines* (UN Department of Peacekeeping Operations 2008).

Rome Statute: *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc.A/CONF.183/2 (1998); *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, UN Doc.A/AC.249/1998/L.13 (1998); *Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997*, UN Doc.A/AC.249/1997/L.5 (1997); Reports of Commissions of Inquiry and Fact-Finding Mission: *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, A/HRC/3/2* (23 November 2006); *Report of the International Commission of Inquiry on Darfur to the Secretary General, pursuant to Security Council Resolution 1564, S/2005/60* (1 February 2005); *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, United Nations Human Rights Council, A/HRC/12/48 (15 September 2009); *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, Human Rights Council A/HRC/22/59 (5 February 2013).

Case Law post WW II: *Trial of Wilhelm List et al.*, 'The Hostages Trial', US Military Tribunal Nuremberg, 8 July 1947 to 19 Feb. 1948, in: UNWCC, *Law Reports Of Trials Of War Criminals, Vol. VIII; Trial of Alfried*

Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others, [also called 'the Krupp trial'], US Military Tribunal, Nuremberg, 17 Nov. 1947–30 June 1948, in: UNWCC, *Law Reports Of Trials Of War Criminals, Vol. X; K. Brandt and Others Case*, in *Trials Of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. I*; Tribunal militaire de cassation, Switzerland, *Nyontezze*, 27 Apr. 2001.

ICTY: *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 Jan. 2005; *Prosecutor v. Blaskić*, IT-95-14-T, Judgement, Trial Chamber, 3 Mar. 2000; *Prosecutor v. Blaskić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004; *Prosecutor v. Boskovski and Tarculovski*, IT-04-82-T, Judgment, Trial Chamber (10 July 2008); *Prosecutor v. Brđjanin*, IT-99-36-T, Judgement, Appeals Chamber, 1 Sep. 2004; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 Nov. 1998; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 Feb. 2001; *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement, Trial Chamber, 10 Dec. 1998; *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment (5 December 2003); *Prosecutor v. Galić*, IT-98-29-A, Appeal Judgment (30 November 2006); *Prosecutor v. Gotovina, Čermak and Markac*, IT-06-90-T, Trial Judgment (15 April 2011); *Prosecutor v. Gotovina, Čermak and Markac*, IT-06-90-A, Appeal Judgment (16 November 2012); *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 July 2003); *Prosecutor v. Karadžić and Mladić*, IT-95-5-I, (Initial) Indictment, 24 July 1995; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 Feb. 2001; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 Dec. 2004; *Prosecutor v. Krnojelec*, IT-97-25-T, Judgement, Trial Chamber, 15 Mar. 2002; *Prosecutor v. Krstić*, IT-98-33-T, Judgement, Trial Chamber, 2 Aug. 2001; *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgement, Trial Chamber, 2 Nov. 2001; *Prosecutor v. Stakić*, IT-97-24-T, Judgement, Trial Chamber, 21 July 2003; *Prosecutor v.*

Naletilić and Martinović, IT-98-34-T, Judgement, Trial Chamber, 31 Mar. 2003; *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995; *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999.

ICTR: *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2. Sep. 1998.

ICC: *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 Decision on the Prosecution's Application for a Warrant of Arrest (4 March 2009); *Prosecutor v Bemba Gombo*, ICC-02/05-01/09, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (15 June 2009); *Prosecutor v. Laurent Gbagbo* ICC-02/11-01/11 Decision on the Confirmations of Charges (12 June 2014); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 Decision on the Confirmation of charges (26 September 2008); *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Trial Judgment, (8 March 2014); *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, (29 January 2007); *Prosecutor v Lubanga*, ICC-01/04-01/06, Judgment (14 March 2012); *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10 Decision on the Confirmation of charges (16 December 2011); *Prosecutor v Mathieu Ngudjolo Chui* ICC-01/04-02/12, Trial Judgment, (18 December 2012); *Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014).

Content

PART I: INTRODUCTION/GENERAL REMARKS.....	1
I. Elements of war crimes	1
II. International humanitarian law	4
III. Evolution of the law of war crimes	13
IV. Drafting history of article 8 and the elements of war crimes	17
V. Existence of an armed conflict	27
VI. Nexus of the conduct concerned to a specific armed conflict	37
VII. Interpretation of and overview over the offences under article 8.....	43
1. Interpretation.....	43
2. Overview and classification of war crimes under article 8.....	48
PART II: ANALYSIS AND INTERPRETATION OF ELEMENTS.....	
A. Article 8 para. 1: Jurisdiction in respect of war crimes	53
B. Article 8 para. 2: Meaning of 'war crimes'.....	56
I. Preliminary remarks.....	56
1. Clarifications in the Elements of Crimes.....	65
2. Elements describing the context.....	66
3. Elements relating to persons and property protected under the Geneva Conventions	74
II. Grave breaches in detail	77
1. Paragraph 2(a)(i): 'Wilful killing'	77
2. Paragraph 2(a)(ii): 'Torture or inhuman treatment'	86
a) Torture.....	87
b) Inhuman treatment	95
c) Biological experiments	100
3. Paragraph 2(a)(iii): 'Wilfully causing great suffering, or serious injury to body or health'	105
4. Paragraph 2(a)(iv): 'Extensive destruction and appropriation of property' ..	112
5. Paragraph 2(a)(v): Compelling a protected person to serve in the hostile forces.....	127
6. Paragraph 2(a)(vi): Wilfully depriving a protected person of the rights of fair and regular trial.....	136
7. Paragraph 2(a)(vii): Unlawful deportation, transfer or confinement	145
a) Unlawful deportation and transfer	146
b) Unlawful confinement	156
8. Paragraph 2(a)(viii): 'Taking of hostages'	171
C. Article 8 para. 2 lit b: Other serious violations of the laws and customs applicable in international armed conflicts	180
I. Preliminary remarks.....	180
II. Offences under paragraph 2(b)	182
1. Paragraph 2(b)(i): Intentionally directing attacks against civilians not taking direct part in hostilities.....	182
2. Paragraph 2(b)(ii): Intentionally directing attacks against civilian objects..	208
3. Paragraph 2(b)(iii): Attacks on humanitarian assistance or peacekeeping missions in international armed conflict	217

a) Normative origin and drafting history	217
b) Elements	221
aa) Attack	222
bb) Humanitarian assistance missions	223
cc) Peacekeeping mission	228
dd) Entitlement to protection given to civilians or civilian objects	234
ee) <i>Mens rea</i> ('Intentionally directing attacks')	243
4. Paragraph 2(b)(iv): Intentionally launching an attack in the knowledge of its consequences to civilians or to the natural environment (Roberta Arnold)	244
5. Paragraph 2(b)(v): Attacking or bombarding undefended not military objectives (Roberta Arnold)	255
6. Paragraph 2(b)(vi): Prohibited attacks against persons <i>hors de combat</i>	268
a) Normative origins and drafting history	268
b) Persons <i>hors de combat</i>	279
aa) Surrendering persons	284
bb) Persons having no longer any means of defence	291
cc) Persons 'in the power' of the adversary party to the conflict	293
dd) Persons parachuting from an aircraft	299
c) <i>Mens rea</i>	301
d) Killing or wounding	305
7. Paragraph 2(b)(vii): Improper use of distinctive signs	308
a) Normative origins and drafting history	308
b) Common elements	320
aa) Preliminary reflections	321
bb) The common element of the 'improper use'	323
cc) The common element of the result of death or serious personal injury	327
dd) Mental element	329
aaa) Knowledge of the prohibited nature of the improper use	329
bbb) Knowledge that the conduct could result in death or serious personal injury	332
ccc) Any particular intent required?	333
c) Improper use of the flag of truce	334
d) Improper use of signs of the adversary	340
e) Improper use of signs of the United Nations	349
f) Improper use of the distinctive emblems of the Geneva Conventions	355
8. Paragraph 2(b)(viii): Prohibited deportations and transfers in occupied territories	363
a) War crime of transferring parts of the own population into occupied territory	364
aa) Normative origins and drafting history	365
aaa) The underlying issues and the objectives of the prohibition	365
bbb) The normative framework	367
(1) The conceptual framework of the law of belligerent occupation	367
(2) Basic rules prohibiting transfers into occupied territory	370
(3) Drafting history	372
bb) Elements of Crime	378
aaa) <i>Actus reus</i>	378
bbb) <i>Mens rea</i>	385
b) War crime of deporting or transferring all or parts of the population of the occupied territory	386
aa) Normative origin and drafting history	387
bb) Elements of Crime	398
aaa) <i>Actus reus</i>	398
bbb) Exceptions	403
ccc) <i>Mens rea</i>	408
9. Paragraph 2(b)(ix): Intentionally directing attacks against protected buildings	409
a) The different degrees of protection under the laws of armed conflict	410
b) Definition of cultural property and cultural heritage	415
c) The Elements of Crime	419
aa) <i>Actus reus</i>	419
bb) Elements drawn from the ICTY's jurisprudence	424
cc) <i>Mens rea</i>	426

10. Paragraph 2(b)(x): Prohibition of physical mutilation	429
a) Normative origins, drafting history and impact on the further development of international criminal law	429
b) Persons ‘in the power of an adverse party’	434
c) ‘physical mutilation’	436
d) ‘medical or scientific experiments of any kind’	438
e) ‘neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest’	439
f) ‘which cause death to or seriously endanger the health of such person or persons’	441
g) Irrelevance of consent	446
11. Paragraph 2(b)(xi): Perfidious killing or wounding	447
a) Normative origins and drafting history	447
b) The principle	451
c) Treachery and perfidy	452
aa) Treacherous as a synonym of perfidious	452
bb) Definition of perfidy	457
cc) Permitted ruses of war	460
d) Examples of perfidious acts	463
e) ‘Killing or wounding ... individuals belonging to the hostile nation or army’	465
12. Paragraph 2(b)(xii): Quarter	467
a) Normative origins and drafting history	467
b) Material elements	472
aa) Declaration, order or threat	472
bb) Specific content of the declaration, order or threat	475
cc) Position of effective command or control of perpetrator	480
dd) No necessity that hostilities actually be conducted on that basis ...	481
c) Mental element	483
13. Paragraph 2(b)(xiii): Prohibited destruction	484
a) Normative context and scope of application	484
b) Enemy property	502
c) Extent of property protected	504
d) Prohibition of destruction or seizure	507
e) ‘imperatively demanded by the necessities of war’	509
14. Paragraph 2(b)(xiv): Prohibition in regard to rights and rights of actions .	514
a) Normative origins and drafting history	514
b) Material elements	518
aa) Does the war crime only apply to occupied territories?	518
bb) What are ‘rights and actions’	522
c) Further issues	529
15. Paragraph 2(b)(xv): Compelling adversary nationals to take part in war operations	532
a) Normative origins and drafting history	532
b) Material elements	537
aa) Compelling	537
bb) Participation in operations of war directed against their own country	538
16. Paragraph 2(b)(xvi): Pillage	549
a) Normative origins and drafting history	549
b) Definition of ‘pillage’	553
c) Isolated acts and organised forms	555
d) Scope of property protected	557
e) Addressees of the prohibition	561
f) Scope of application	562
17. Paragraph 2(b)(xvii): Employing poison or poisoned weapons	574
18. Paragraph 2(b)(xviii): ‘Employing gases and analogous liquids, materials or devices’	580
a) Humanitarian law base and drafting history	580
b) Material elements	583
aa) Chemical weapons	583
bb) Biological weapons	596
cc) No applicability to nuclear weapons	599
19. Paragraph 2(b)(xix) ‘bullets which expand or flatten easily in the human body’	600
a) Humanitarian law base and drafting history	600

b) Material elements.....	601
c) Mental elements.....	605
20. Paragraph 2(b)(xx): 'Employment of means or methods of warfare included in an annex to this Statute'.....	609
21. Paragraph 2(b)(xxi): 'outrages upon personal dignity'.....	614
a) Introduction.....	614
b) Bases in humanitarian law.....	616
c) Actus Reus.....	622
d) Mens rea.....	643
22. Paragraph 2(b)(xxii): Rape and other forms of sexual violence.....	652
a) Humanitarian law base and drafting history.....	652
b) War crime of rape.....	670
aa) The physical act of rape.....	672
bb) No sexual autonomy (no 'consent'/coercion).....	678
cc) Subjective element.....	692
c) War crime of sexual slavery.....	693
d) War crime of enforced prostitution.....	716
e) War crime of forced pregnancy.....	720
f) Enforced sterilization.....	728
g) War crime of any other form of sexual violence.....	731
23. Paragraph 2(b)(xxiii): Utilizing the presence of a protected person to render certain objects immune from military operations (<i>Roberta</i>).....	743
24. Paragraph 2(b)(xxiv): Intentionally directing attacks against objects or personnel using the emblems of the Geneva Conventions (<i>Roberta</i>).....	752
25. Paragraph 2(b)(xxv): Starvation of civilians as a method of warfare.....	758
a) Humanitarian law base and drafting history.....	758
b) Material elements.....	766
aa) 'starvation'.....	768
bb) 'Objects indispensable to the survival of civilians'.....	771
cc) 'Civilians'.....	773
dd) 'Depriving of'.....	775
ee) Exceptions.....	785
ff) No result of starvation required.....	790
c) Mens rea.....	791
aa) Intent to starve civilians.....	791
bb) Specific intent to starve as a method of warfare.....	793
26. Paragraph 2(b)(xxvi): Conscripting or enlistment of children and their participation in hostilities.....	797
a) Humanitarian law base and drafting history.....	797
b) An unusual war crime.....	807
c) War crime of conscripting or enlisting children.....	810
aa) 'Conscripting or enlisting ... into the ... armed forces'.....	810
bb) 'National armed forces'.....	813
cc) Any need of a nexus to an armed conflict?.....	814
dd) War crime of using children to participate in hostilities.....	817
d) Knowledge that the child is under 15.....	822
D. Article 8 para. 2 (c)-(f) and para. 3: War crimes committed in an armed conflict not of an international character.....	823
I. General remarks.....	823
II. Classification of armed conflicts as 'international armed conflicts' or 'armed conflicts not of an international character'.....	833
1. Armed conflicts taking place exclusively between two or more States.....	837
2. Conflicts which take place within the territory of a given State without third States being involved in the conflict.....	838
3. Armed conflicts where there is fighting between governmental armed forces on the one side and organised armed groups on the other and where at the same time third States are also involved in the armed conflict.....	844
4. Conflicts between a State's regular armed forces and transnational non-state armed groups which do not occur within the territory of the respective State ('transnational armed conflicts').....	856
III. Violations of article 3 common to the four Geneva Conventions.....	867
1. General remarks.....	867
a) Introduction.....	867
b) Existence of an armed conflict not of an international character.....	868
c) Serious violations of article 3.....	877
d) Persons protected by the provision.....	879

e) Possible offenders	886
2. The different subparagraphs.....	887
a) Paragraph 2(c)(i):Violence to life and person	888
aa) Murder	889
bb) Mutilations	893
cc) Cruel treatment	894
dd) Torture	895
b) Paragraph 2(c)(ii): Outrages upon personal dignity.....	900
c) Paragraph 2(c)(iii): Taking of hostages	902
d) Paragraph 2(c)(iv): Passing of sentences and the carrying out of executions without previous judgement	904
IV. Article 8 para. 2(d) scope of application of article 8 para. 2 (c)	909
1. Existence of a non-international armed conflict	909
2. Exclusion of situations of internal disturbances and tensions	910
V. Other serious violations of the laws and customs applicable in armed conflicts not of an international character.....	915
1. Paragraph 2(e)(i): Attacks against the civilian population	917
2. Paragraph 2(e)(ii): Attacks against installations and personnel using the distinctive emblems	922
3. Paragraph 2(e)(iii): Attacks against United Nations and associated personnel	924
4. Paragraph 2(e)(iv): Attacks against cultural objects, places of worship and similar institutions.....	932
5. Paragraph 2(e)(v): Pillage	934
6. Paragraph 2(e)(vi): Rape and other forms of sexual violence	937
7. Paragraph 2(e)(vii): Recruitment of children.....	942
8. Paragraph 2(e)(viii): Prohibition of forced movement of civilians.....	950
9. Paragraph 2(e)(ix): Prohibition of perfidy	959
10. Paragraph 2(e)(x): Quarter	963
11. Paragraph 2(e)(xi): Prohibition of physical mutilations.....	965
12. Paragraph 2 (e)(xii): Prohibited destruction	967
13. Paragraph 2(e)(xiii): Employing poison or poisoned weapons.....	979
14. Paragraph 2(e)(xiv): Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices	980
15. Paragraph 2(e)(xv): Employing bullets which expand or flatten easily in the human body.	982
VI. Article 8 para. 2(f) scope of application of article 8 para. 2 (f)	988
1. Existence of a non-international armed conflict	988
2. Exclusion of situations of internal disturbances and tensions	989
3. Armed conflict that takes place <i>in the territory of a State</i>	990
4. Existence of protracted armed conflict.....	992
5. Possible parties to the conflict.....	997
E. Article 8 para. 3: Maintenance of law and order by legitimate means.....	1001

PART I: INTRODUCTION/GENERAL REMARKS*

I. Elements of war crimes

- Under international law, war crimes are violations of international humanitarian law that are criminalized under international law¹. Therefore, a conduct can only amount to a war crime if it:

* The author is greatly indebted to Dr. Emilia Richard for her valuable comments and expertise for the 3rd edition of this introductory chapter.

¹ To be sure, under a particular national legal system, the term 'war crimes' may be given a specific national meaning, the consequences of which, however, remain internal to the respective State. Some national military codes, manuals, regulations or other national criminal law instruments use the term 'war crimes' in a broader sense (or more rarely in a more narrow sense) than the term would carry under international law. For instance, national law may subsume offenses violating the national military code or discipline such as military disobedience or offenses like 'high treason' under the nationally coined notion of 'war crimes'.

In a non-technical sense, the term 'war crimes' is often used, not least by the media, in a broader and more colloquial sense as a convenient short form to connote particular egregious and internationally repudiated crimes

- constitutes a violation of international humanitarian law (IHL) and
- has been criminalized under treaty or customary international law.

IHL is the law applicable in situations of armed conflict. In contrast to what sometimes has been argued, not all violations of that law necessarily constitute war crimes. Only those violations of IHL that have been specifically ‘criminalized’, that is, for the perpetration of which customary or treaty international law establishes individual criminal responsibility, may qualify as war crimes. Generally, it is only the more serious violations of IHL that have been criminalized under international law.

Hence, for a specific conduct to amount to a war crime, the following elements are required:

- existence of an armed conflict?
- nexus of the conduct to this armed conflict?
- violation of a specific rule of IHL?
- is this violation of IHL criminalized under international law, and if so, does the conduct fulfil all requisite material and mental elements of the offence?

All of these elements are necessary with respect to each of the 53 offenses listed under article 8 para. 2 (a), (b), (c) and (e) of the Rome Statute. Therefore, we shall examine the first two general elements (types of armed conflict and nexus to such conflict) in their own right. Furthermore, we will provide an overview over the numerous offenses under article 8 and elaborate generally how the definitions under article 8 need to be interpreted. First, however, we shall give a short introductory overview over the essence and objectives of international humanitarian law as well as the evaluation of the law of war crimes and the drafting history of article 8.

II. International humanitarian law²

Given the above, correctly interpreting definitions of war crimes requires an understanding of IHL. IHL is also called the law of armed conflict or *ius in bello*, more archaically also the laws and customs of war or simply law(s) of war.

IHL sets rules governing any situation of armed conflict, be it of an international or non-international character. Some acts are prohibited in international conflicts alone, some in internal conflicts alone, and some in all conflicts.

Essentially, IHL seeks to moderate negative effects of armed conflict. In the fog of war, persons in the power of an adversary party to the conflict or in the middle of armed hostilities require special protection. This is why IHL typically protects persons and objects belonging to one of the parties to the conflict from certain abusive or overly destructive conduct by an adversary party to the conflict. Since IHL’s rules have been elaborated and adopted to strike a balance between considerations of military necessity and humanitarian considerations, arguments of ‘military necessity’ cannot (unless a rule provides so specifically) justify the violation of IHL.

connected to a ‘war’. At times, the term and the related notions ‘war criminal’ and ‘war crimes tribunal’ are also used to refer to all so-called core crimes under international law, that is, war crimes (in the above-described technical sense under international law), crimes against humanity and genocide, and, the crime of aggression. The term ‘war crimes’ for a crime against humanity or an act of genocide however is misleading since both offenses do not require a link to an armed conflict (colloquially a ‘war’). Besides, the term ‘war crimes’ has sometimes been used to designate all violations of international humanitarian law, which is incorrect. For the more comprehensive and modern term ‘crimes of armed conflict’ Ambos, *Treatise ICL II* (2014) 117.

² On international humanitarian law, see generally Henckaerts and Doswald-Beck, *Customary*, iii (2005); David, *Principes* (2012); Kalshoven and Zegveld, *Introduction* (2011); Fleck (ed.), *Handbook* (2008); Rogers, *Battlefield* (2012); Detter, *War* (2000); McCoubrey, *International Humanitarian Law* (1998); Gasser, *Introduction* (1993); Bouvier and Sassöli, *Contemporary Practice* (2012); ICRC, *Basic Rules* (1988); Fischer and McDonald (eds.), *Yearbook* (since 1999); Pictet, *Commentaries* (4 Vols., 1952–60); Sandoz et al. (eds.), *Commentary* (1987); [http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf].

- 7 IHL first protects persons not (*e.g.* civilians) or no longer (*e.g.* prisoners of war) actively participating in the hostilities that find themselves in the hands of an adversary. Persons protected under this so-called ‘Geneva law’ branch of IHL include most particularly the wounded, sick, shipwrecked, prisoners of war and any other person detained, interned or otherwise deprived of liberty in connection with an armed conflict, and civilians, particularly the population in an occupied territory. Such persons in the hands of an adversary must be treated humanely. Prohibited are, for instance, torture, rape, scientific experiments or other violations of a person’s dignity or physical or mental integrity. In general, protected persons that are deprived of liberty are entitled to a judicial examination of their status and, insofar they are prosecuted, to fair trial guarantees. The main sources of this IHL branch are the four Geneva Conventions of 1949 as well as the two Additional Protocols of 1977³ and customary international law, which is of particular relevance with regard to the law applicable in non-international armed conflicts.
- 8 The Geneva law branch of IHL also protects property in the hands of an adversary and particularly protects the population, property and pre-existing order of an occupied territory.
- 9 Second, IHL sets limits on how armed warfare and military operations may be conducted in armed conflicts. This so-called ‘Hague law’ branch of IHL clearly establishes that parties to an armed conflict may not adopt whatever means or methods of injuring the adversary. ‘[T]he only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy’⁴. IHL therefore prohibits to target any non-combatant with armed force or any object that does not qualify as a military objective, that is, an object which by its nature, location, purpose or use, makes an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage⁵. IHL provides that members of armed forces cannot be prosecuted for the mere fact of participating in armed hostilities in the context of an international armed conflict, and that they have the right to the special status of prisoners of war when captured. In contrast, in non-international armed conflicts, persons engaging in armed hostilities, *e.g.* against governmental forces, may be prosecuted for these acts under the respective national law, and do not benefit from the prisoner of war status.
- 10 Fundamental IHL principles include the cardinal principle of distinction (between legitimate and prohibited targets) and the correlating obligation of all parties to the conflict to take all feasible precautions to spare civilians and civilian objects⁶. Another fundamental IHL principle, that of proportionality, requires that parties to the conflict must refrain from attacks against military objectives that may be anticipated to cause civilian casualties or damages that are disproportionate in relation to the intended military goal. This includes a prohibition of causing excessive incidental damage or casualties by targeting military objectives. Another general principle is the prohibition to employ means or methods of warfare of a nature to cause superfluous injury or unnecessary suffering. Customary international humanitarian law prohibits for instance the use of a series of methods of warfare, such as perfidy or abusing recognized emblems such as the Red Cross or the Red Crescent, and weapons, such as biological or chemical weapons and restricts the employment of other weapons.

³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 Aug. 1949) (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 Aug. 1949)(GC II); Geneva Convention relative to the Treatment of Prisoners of War (12 Aug. 1949)(GC III); Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949)(GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977)(Add. Prot. I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) (Add. Prot. II).

⁴ Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime (emphasis added).

⁵ See articles 48 *et seq.* Add. Prot. I.

⁶ Article 57 Add. Prot. I.

Important sources of this ‘Hague law’ branch of IHL are most particularly the 1907 Hague Regulations⁷ and the First Protocol Additional of 1977, but also the 1899 and 1907 Hague Conventions and the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict. A considerable number of further treaties prohibit or restrict specific means or methods of warfare, such as the 1980 Classical Weapons Convention and its Protocols. However, customary international law retains great importance.

The treaty rules applicable to non-international armed conflicts are far less numerous and detailed than those applicable in international armed conflicts. The primary treaty provisions applicable in non-international conflicts are article 3 common to the four Geneva Conventions and Additional Protocol II. However, there is a clear tendency in practice and evolving customary international law to apply rules initially intended for international conflicts also to non-international conflicts⁸.

III. Evolution of the law of war crimes

International treaties formerly only dealt with obligations of states. Correspondingly, humanitarian law treaties such as the 1907 Hague Regulations also did not provide for individual responsibility and even less for individual criminal responsibility for violations of humanitarian law. However, after the First World War, endeavors to prosecute individuals for violations of international humanitarian law emerged. For instance, in 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties created by the Preliminary Peace Conference elaborated a list of 32 offenses criminalizing violations of the laws and customs of war for which perpetrators should be prosecuted⁹. In 1946, the Nuremberg Tribunal coined the phrase that ‘[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’¹⁰. The Tribunal thereby held that an individual may be held *criminally responsible directly under international law*, including for war crimes, a principle which fast became generally accepted.

The four Geneva Conventions adopted in 1949 provide for individual criminal responsibility of persons committing grave breaches of the Conventions and require States Parties to provide for domestic criminal jurisdiction over these war crimes, regardless of where and by whom they were committed¹¹. Article 85 of Additional Protocol I of 1977 stipulates an identical obligation with regard to grave breaches of the Protocol. Besides these treaty developments, the four *ad hoc* international criminal tribunals that have been created up to today (Nuremberg, Tokyo, Former Yugoslavia, Rwanda), more recent hybrid tribunals such as the Special Court for Sierra Leone, as well as numerous national criminal proceedings, including on war crimes committed during the two World Wars, have greatly contributed to the development of the international law of war crimes and the specific elements of the offenses¹².

⁷ Regulations concerning the Laws and Customs of War on Land, Annex to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 Oct. 1907.

⁸ Henckaerts and Doswald-Beck, *Customary* (2005); on the law of non-international armed conflicts, see Moir, *Internal Armed Conflict* (2002); Abi-Saab, *Réglementation internationale* (1986); La Haye, *War Crimes in Internal Armed Conflicts* (2008); s. Sivakumaran, *Non-International Armed Conflict* (2012); *The Manual on the Law of Non-International Armed Conflict*, International Institute of Humanitarian Law San Remo (2006): <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf>.

⁹ See *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties Presented to the Preliminary Peace Conference* (29 Mar. 1919), reprinted in: (1920) 14 AJIL 95.

¹⁰ 22 Nuremberg Proceedings (30 Sep. 1946), p. 465.

¹¹ Articles 49–50/50–51/129–130/146–147 GC I-IV.

¹² On the evolution of international criminal law and more particularly international criminal tribunals, see Ahlbrecht, *Strafgerichtsbarkeit* (1999); Ambos, *Treatise ICL I* (2013), 1 *et seq.* On international criminal law more generally, see, e.g., Cassese, *International Criminal Law* (2003); Werle, *Völkerstrafrecht* (2003); Bassiouni, *International Criminal Law* (3 vol., 1999); Paust *et al.*, *International Criminal Law* (1996).

- 15 It is to be noted that until the early 1990 s, it was generally agreed that individuals do not incur criminal responsibility under international law for war crimes committed in *non-international* armed conflicts. However, in a rapid shift of views, the ICTR Statute in 1994 provided for jurisdiction over '[v]iolations of Article 3 common to the Geneva Conventions and of Additional Protocol II', provisions that are applicable in non-international armed conflicts. Based on some national precedents such as military manuals and court decisions¹³, the ICTY then held in 1995 that its jurisdiction over 'violations of the laws or customs of war' extended also to war crimes committed in non-international conflicts¹⁴. Throughout their case law, the *ad hoc* Tribunals, whenever interpreting the elements of a war crime, need to interpret also the underlying humanitarian law provision upon which the war crime is based¹⁵. Thereby, international criminal law and practice has put flesh on the bones of treaty humanitarian law. The adoption of the Rome Statute with article 8 para. 2 (c) and (e) in July 1998 consolidated the view that there is, today, individual criminal responsibility directly under customary international law for war crimes committed in non-international armed conflicts¹⁶.
- 16 However, the rules applicable to international armed conflicts do not automatically apply to an internal armed conflict: '[W]hat may constitute a war crime in the context of an international armed conflict does not necessarily constitute a war crime if committed in an internal armed conflict'.¹⁷ Only some of the rules and principles applicable in international armed conflicts have extended to non-international armed conflicts. However, the general essence of those rules, but not the detailed regulation they may contain, has often become applicable to internal conflicts¹⁸.

IV. Drafting history of article 8 and the elements of war crimes

- 17 Initially, the *International Law Commission (ILC)* mandated to prepare a Draft Statute of the (future) ICC (1989 to 1994), was of the view that the Statute to be drafted should primarily deal with procedural and organizational questions and that the Court should exercise jurisdiction over crimes of international concern as defined by existing treaties¹⁹. The ILC did not deem it necessary to define the crimes in the Statute itself, possibly also because, at that time, the ILC worked separately on the Draft Code of Crimes against the Peace and Security of Mankind. In 1993, the ILC believed that the court should be given jurisdiction not only over 'treaty crimes', but also over crimes generally accepted to be of international concern, that is, crimes 'under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals'²⁰. However, many states criticized the intention to only generally refer to crimes under general international law as being too vague and thus giving the Court too much discretion²¹. To meet these concerns, the ILC limited the Court's jurisdiction over crimes under general international law in its *1994 Draft Statute* to four more specific categories of generally accepted international crimes: the crime of genocide, the crime of aggression, crimes against

¹³ See, e.g., Meron (1995) 89 *AJIL* 559; Graditzky (1998) 322 *IRRC* 29; Cottier, in: Erberich *et al.* (eds.), *Frieden und Recht* (1998).

¹⁴ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 Oct. 1995, paras. 128–137. Article 3 of the ICTY Statute provides for jurisdiction over '[v]iolations of the laws or customs of war', while article 2 provides for jurisdiction over '[g]rave breaches of the Geneva Conventions of 1949'.

¹⁵ Sassoli, *Humanitarian Law and International Criminal Law* 114–117; Ambos, *Treatise ICL II* (2014) 160-1.

¹⁶ On war crimes in non-international armed conflicts, see Krefß (2001) 30 *IsYbHumRts* 103.

¹⁷ *Hadžihasanović*, Command Responsibility Decision, para. 12.

¹⁸ *Tadić*, Interlocutory Appeal, para. 126; see also Ambos, *Treatise ICL II* (2014) 161 *et seqq.*

¹⁹ 1994 ILC Draft Statute, *Commentary on Part 3*, para. 2. See also *ibid.*, *Commentary on article 33*.

²⁰ *Ibid.*, *Commentary on Part 3*.

²¹ *Ibid.*, *Commentary on Part 3*.

humanity, and ‘serious violations of the laws and customs applicable in armed conflict’²². In addition to these four general categories, the 1994 Draft Statute conferred jurisdiction over ‘crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern’ (‘treaty crimes’)²³. The Annex’s exhaustive list included grave breaches of the four 1949 Geneva Conventions and the 1977 Additional Protocol I as defined by these instruments²⁴.

The states participating in the *Ad Hoc* and Preparatory Committees (1995 to spring 1998) 18 considered that the Court’s jurisdiction should, at least initially, be limited to the three or four most serious crimes of concern to the international community as a whole to facilitate general acceptance of the court²⁵. There was broad acceptance that the ‘core crimes’ to be included under the Statute included war crimes, a category well accepted since the Nuremberg trials²⁶. It was considered necessary that the crimes are defined and their constituent elements specified to heed the principle of *nullum crimen sine lege* and ensure full respect of the rights of the accused²⁷, as well as, for a considerable number of states, to limit the discretion of the ICC judges and make the court’s decisions more predictable²⁸.

Yet, no codification or list of war crimes existed under international law at the beginning 19 of the 1990s. Delegations agreed generally that the elaboration of the list of war crimes under ICC jurisdiction should *not* be a *legislation exercise*. Rather than legislating and creating new war crimes, only war crimes *reflecting well established international law* should be included under the Draft Statute²⁹. Delegations informally came to broadly agree on *two cumulative criteria to select and define the war crimes* to be included under the Draft Statute: First, the conduct concerned must amount to a *violation of customary international humanitarian law*. Secondly, the violation of humanitarian law concerned must be *criminalized under customary international law*. An additional, somewhat secondary criterion was whether the war crime in question was *sufficiently serious* to be included under the Draft Statute, since the Court was meant to deal only with the most serious crimes of concern to the international community as a whole.

Already in 1996, the grave breaches provisions of the four 1949 Geneva Conventions were 20 broadly considered part of customary international law. The provisions under article 23 Hague Regulations also became widely considered to reflect customary law, although agreement on their inclusion under the Draft Statute emerged only at a later stage. The wording of the grave breaches and the provisions under article 23 Hague Regulations were incorporated into the Draft Statute essentially without any consideration of whether that language was appropriate for definitions of criminal offenses. In contrast, the customary law status and inclusion of offenses based on other humanitarian law rules gave rise to considerably more debate. Although many aspects of Additional Protocol I were considered part of customary law, particularly the states that were not parties to the Protocol³⁰ opposed the inclusion of Protocol wording, be it to avoid precedents or for the very reasons why they had not become party to the Protocol.

At the Preparatory Committee Session of February 1997, the United States tabled a 21 comprehensive proposal containing a list of defined war crimes³¹. The other proposal stemmed from New Zealand and Switzerland and contained, informed by the ICRC, a longer

²² Article 20 (c) of the 1994 ILC Draft Statute.

²³ Article 20(e) of the 1994 ILC Draft Statute.

²⁴ See articles 50, 51, 130, 147 of the four Geneva Conventions and article 85 of Add. Prot. I.

²⁵ *Ad Hoc* Committee Report, paras. 55–56.

²⁶ See, e.g., *ibid.*, para. 55.

²⁷ *Ibid.*, paras. 57–58.

²⁸ 1996 Preparatory Committee I, para. 55.

²⁹ See, e.g., *ibid.*, para. 54.

³⁰ Add. Prot. I had not been ratified, *i.a.*, by India, Pakistan, the United States, the United Kingdom (State Party since 1 Jan. 1998) and France (State Party since 11 Apr. 2001).

³¹ UN Doc. A/AC.249/1997/WG.1/DP.1 (14 Feb. 1997).

list of war crimes that also drew on Additional Protocol I and on Additional Protocol II³². Substantial progress was reached at that February 1997 Preparatory Committee session³³ and at the December 1997 Preparatory Committee session. The results of the December 1997 session, were forwarded to the Rome Diplomatic Conference essentially unchanged³⁴.

- 22 At the Rome Conference, the inclusion and list of war crimes committed in internal armed conflicts raised the concern of states with ongoing internal conflicts or tensions on their territory. Offenses that were much debated included the war crime of causing excessive incidental casualties or damage, the war crime of deportation or transfer, as well as the definition of the war crime of (en)forced pregnancy. The issue of the inclusion of war crimes relating to the employment of prohibited weapons threatened to lead to block the entire negotiations.
- 23 In view of remaining major differences on various issues just two, three two or three days prior to the Rome Conference's end, the Bureau of the Conference ultimately assembled its 'take-it-or-leave-it' proposal which ultimately was adopted as the text of the 1998 Rome Statute. The Bureau however did not alter the list or definition of war crimes on which agreement had been found. Regarding war crimes committed in non-international armed conflicts, the Bureau struck a compromise, probably more extensive than many NGOs had dared to hope for, between not including any such offenses or only serious violations of common article 3, and including the entire list of offenses still under discussion in the last week of the Conference. The wording that had been agreed on for war crimes in international conflicts generally was also taken as a basis for the formulation of the corresponding war crime in non-international armed conflict.
- 24 With regard to the drafting history of the Elements of Crimes, it was the US delegation that proposed such elements, tabling a first proposal towards the end of the March/April 1998 Preparatory Committee session³⁵. Yet, the majority of delegations at the Rome Conference considered the definitions of crimes in the Draft Statute to constitute a sufficient basis for the interpretation and application by the Court. There was also some fear that such elements might overly constrain the judges' interpretation of the law of war crimes and the development of the law, and that working out such elements could overburden the already enormous workload of the Rome Conference. Moreover, the concept of elements of crimes was unknown to delegates from civil law countries. However, not least to keep the US aboard, the majority eventually agreed on the principle that elements of crimes should be worked out for the crimes under the Rome Statute, under the clear conditions now inserted in article 9, including that such elements would not be legally binding and had to be consistent with the Statute.

³² UN Doc. A/AC.249/1997/WG.1/DP.2 (14 Feb. 1997).

³³ See Report of the Working Group on the Definition of Crimes, Annex I to the Preparatory Committee Decisions Feb. 1997.

³⁴ Cf. Preparatory Committee Decisions Dec. 1997, pp. 4–16 (Article 20C); Preparatory Committee (Consolidated) Draft, pp. 17–30 (article 5 – War crimes).

³⁵ The US delegation proposed that elements of crimes should be adopted for each offense included under the Statute, arguing that such elements were necessary to provide the requisite clarity and precision to adequately instruct the Prosecutor and the Court, to ensure respect for the rights of the accused, as well as to 'give teeth' to the principle of legality, which was considered insufficiently respected by the definitions of the core crimes under the Draft Statute. See Proposal submitted by the United States on Elements of offences for the International Criminal Court, UN Doc. A/AC.249/1998/DP.11 (2 Apr. 1998). For later versions of the US proposal on Elements of Crimes, see UN Doc. A/CONF.183/C.1/L.8, L.9 and L.10 (19 June 1998); UN Doc. PCNICC/1999/DP.4 and Add.1, 2 and 3 (4 Feb. 1999). In addition, the US delegation suggested that elements of crimes could facilitate an agreement on the list of crimes still to be determined and presented such elements as a condition for making the Court acceptable to the US. The US delegation's idea to provide definitional elements of crimes was inspired from their experience with the US criminal justice system, where the concept of such elements is widely used, including by the Model Penal Code and the uniform code of military justice applied the US Courts-Martial. See American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (1985), Part I, General Provisions, 209 *et seq.*; Manual for Courts-Martial (2000 ed., complete revision of the 1984 Manual), Part IV (Punitive Articles). On the US views relating to the elements of crimes under the Rome Statute, see Lietzau (1999) 32 *CornellILJ* 477.

The elaboration of the Elements of Crimes was the first time that circumstantial, material and mental elements of a great number of war crimes were defined in a multilaterally negotiated instrument. Challenges included *inter alia* the ‘translation’ of the provisions under article 8 Rome Statute, that partly reflect archaic treaty language addressed at states, into elements of criminal offenses. The ICC Preparatory Commission considered various text proposals³⁶. The agreed approach for the formulation of the elements of all non-international armed conflict war crimes under article 8 para. 2 (c) and (e) was to adopt the same wording as had been agreed for the corresponding offense in international conflicts, unless there was a specific reason against such an approach. Delegations engaged in the negotiations with the intention to draft the elements of war crimes on the basis of established international law and, again, not to engage in a legislating exercise³⁷. The eventual adoption of the Elements of Crimes by consensus signals the general view of delegations, including delegations from states that have not signed or ratified the Rome Statute, that the elements overall represent an accurate reflection of established humanitarian law and ICL.

Besides the circumstantial, ‘material’ and mental elements adopted for each war crime, the Preparatory Commission also drafted general comments as well as footnotes for particular elements. Nonetheless, the purpose of the Elements of Crimes to provide elements of criminal offenses that add clarity and precision to their definition has been reached only to a certain extent. Some of the elements simply repeat statutory language, while others are not exactly up to the standard of criminal elements developed systematically in a stringent national criminal system, but rather multilateral political compromises that do not always add as much clarity and coherence as desired, as was to be expected with over 100 states from different legal systems participating in the negotiations. Also, the relationship between the Elements and Part 3 of the Rome Statute is not entirely clear, which however reflects in part shortcomings laid of the Rome Statute. Undoubtedly, the definitions under article 8 and the Elements are not ‘self-sufficient’, but judges will need to refer to the underlying humanitarian law rules and these rules’ objective and purpose to properly understand the elements to be proven. Still, the Elements of Crimes have contributed to the development of humanitarian law and specified the content of a number of war crimes, including for instance the war crimes of sexual violence, of torture, or of taking hostages. Also, the war crimes elements confirm and reinforce the tendency to assimilate the humanitarian law applicable to internal armed conflicts to the law applicable to international conflicts. Since the drafters of article 8 as well as the war crimes elements generally intended to reflect established humanitarian law, their product generally can be perceived, despite the fact that the elements do not legally bind the ICC judges, as indicating the *opinio iuris* of a high number of states as to the current state of the customary international law relating to war crimes.

³⁶ Comprehensive, systematic proposals were submitted by the US, UN Doc. PCNICC/1999/DP.4 and Add.1, 2 and 3 (4 Feb. 1999); the co-sponsors Hungary, Switzerland and, except for the first proposal, Costa Rica, UN Doc. PCNICC/1999/DP.5, 8, 10, 11, 20, 22, 23 and 37; and Japan, UN Doc. PNICC/1999/DP.12 (22 July 1999). More occasional proposals or comments on others’ proposals stemmed from a number of countries, including Arab states, Belgium, Colombia and Spain. In the course of the first sessions, the proposals submitted jointly by Costa Rica, Hungary and Switzerland generally became the starting point and main reference for the discussions on the elements of war crimes. These proposals were to a large extent inspired by comprehensive ICRC studies on humanitarian law relevant for interpreting and specifying the meaning of the war crimes definitions under article 8 Rome Statute, see Dörmann, *Elements* (2003). During the three first sessions of the Preparatory Commission in 1999, the Working Group on Elements of Crimes focused on finding a common approach and on drafting the elements in a ‘first reading’, concentrating particularly on material elements. Thereafter, during the March/April and June 2000 sessions, the Preparatory Commission engaged in a kind of a ‘second reading’, focusing on the up to then insufficiently addressed mental elements and their connection with the material elements, the structure of the Elements of Crimes and the overall consistency and technical correctness of the instrument.

³⁷ The ICTY *Kunarac* Appeals Chamber also observed that the ICC definitions contained in the Elements of Crimes and incorporating the *chapeaux* into the substantive definitions of the criminal offences ‘were intended to restate customary international law’, *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 177, fn. 239.

V. Existence of an armed conflict³⁸

- 27 IHL applies automatically once there is, *de facto*, a situation of armed conflict, even if in practice it may often be difficult to ascertain the facts. This is why the first question students of IHL need to ask themselves when solving a case study is, whether and what type of armed conflict exists. To be sure, it is irrelevant how the parties to the conflict qualify the conflict. Also, to determine whether IHL is applicable, it is irrelevant what reasons ('fight against terrorists', 'self-defense' etc.) are invoked by states or other parties to the conflict to legitimate their use of force. The applicability of the *ius in bello* must be strictly separated from issues relating to the so-called '*ius ad/contra bellum*' regulating under what circumstances a state may lawfully use force against another state. Whether or not a state for instance violates the customary prohibition of the use of force against another state, it and all persons fighting on its behalf must respect IHL under any circumstances.
- 28 The war crimes listed under article 8 para. 2 (a) and (b) are applicable only in international armed conflicts. In contrast, the war crimes under article 8 para. 2 (c) are applicable to non-international armed conflicts according to article 3 common to the four Geneva Conventions, while those under article 8 para. 2 (e) apply in situations of a non-international armed conflict the threshold of which is defined anew in article 8 para. 2 (f).
- 29 There is no unique definition of *international armed conflict* under IHL. Common article 2 of the Geneva Conventions of 1949 provides, however, that all four Conventions 'apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Conventions shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'. The unauthorized presence of foreign troops on another state's territory may be an indication of an international armed conflict.³⁹ The Commentary to the First Geneva Convention specifies that '[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. ... If there is only a single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended ...'⁴⁰ The Commentary to the Third Geneva Convention states that for the Convention to apply 'it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4'⁴¹.
- 30 From the above as well as state practice it can thus be concluded that an international armed conflict exists, first, where a state uses armed force against another state or its territory, be it through its armed forces or other, including private actors. Generally, no particular level, duration or territorial expansion of the armed hostilities is required to bring the law of

³⁸ See generally David, *Principes* (2012) 101–194. On the qualification of non-international armed conflicts, see also below, margin notes 222–237, 239–242, 264–269 and 311–319.

³⁹ In the *Lubanga case* for instance, the ICC considered 'that there (was) sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be considered as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army.' ICC, *Prosecutor v. Thomas Lubanga Dyilo* case, ICC-01/04-01/06, para 220. On the ensuing internationalization of an armed conflict see Ambos, *Treatise ICL II* (2014) 135–7.

⁴⁰ Pictet, *Commentaries I* (1952) 34; see also Ambos, *Treatise ICL II* (2014) 138–40.

⁴¹ Pictet, *Commentaries III* (1960) 23.

international armed conflicts into application. Furthermore, IHL applies to situations of partial or total occupation of a territory, whether or not there has been or still is armed resistance⁴².

Under contemporary international humanitarian law, we can distinguish three different minimum thresholds of *non-international armed conflicts*:⁴³ 31

- non-international armed conflicts according to common article 3 (lowest threshold), as applicable to article 8 para. 2 (c) and (d) Rome Statute⁴⁴;
- non-international armed conflicts according to article 8 para. 2 (e) and (f) Rome Statute (slightly higher threshold)⁴⁵; and
- non-international armed conflicts according to article 1 Add. Prot. II (highest threshold, but may have been altered by customary international law, see below).

The threshold of the first category, *common article 3 non-international armed conflicts*, is not defined under treaty law. However, common article 3 negatively states that internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, do not amount to a non-international armed conflict⁴⁶. A non-international armed conflict typically involves armed confrontations within the boundaries of one single state and involving armed confrontations not only of a sporadic nature between the authorities of that state and dissident armed forces or non-governmental organized armed groups, or among such armed groups. The involvement of governmental armed forces may be an indication that the armed conflict threshold has been reached. While common article 3 does not explicitly require the existence of ‘organized armed groups’, state practice and *opinio iuris* seem to suggest a requirement that the groups confronting each other are armed and possess a minimum degree of organization in order to make humanitarian law applicable. With a view to non-governmental armed groups that use force across an international border against a foreign government, it has been argued that such use of force may qualify as a non-international armed conflict⁴⁷. 32

Article 1 *Additional Protocol II* provides for a higher threshold by requiring that it only applies to non-international armed conflicts that ‘take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’. In contrast to common article 3, *Additional Protocol II* thus requires that one of the parties to the conflict are governmental armed forces, that adversary organized armed groups are under responsible command, and that such armed groups exercise territorial control. 33

However, delegations at the Rome Conference were of the opinion that, under contemporary humanitarian law, the territorial control requirement and the condition that one of the parties to the conflict be governmental were inappropriate and even irrelevant in view of modern, far-reaching weaponry and the reality of today’s conflicts, besides, of course, that victims should be protected in any type of armed conflict. Indeed, it appears that the 1974–77 Diplomatic Conference adopting *Additional Protocol II* had not included the situation of two or more non-governmental factions confronting each other without involvement of the 34

⁴² Another case are wars of national liberation according to article 1 para. 4 Add. Prot. I to which Add. Prot. I also applies insofar the movement unilaterally undertakes to apply the Conventions and the Protocol in relation to the specific conflict (article 96 para. 3 Add. Prot. I). This provision stems from the era of decolonization and cases to which it might be applied today are scarce. See also Ambos, *Treatise ICL II* (2014) 134.

⁴³ Generally on the different forms of non-international conflicts Ambos, *Treatise ICL II* (2014) 132–4.

⁴⁴ While the elements of common article 3 are well settled in theoretical terms, their application to particular conflicts in practice often is contentious. See also below, mn 259 *et seq.* and 285 *et seq.*

⁴⁵ See also below, mn 332 *et seq.*

⁴⁶ See article 1 para. 2 of Add. Prot. II of 1977.

⁴⁷ See *e.g.* US Supreme Court, *Hamdan v. Rumsfeld* (30 June 2006). It might also be argued that for instance the use of force by Hezbollah against Israeli armed forces across the border qualify as a non-international armed conflict (but not the armed response by the Israeli armed forces across the border, except if the Lebanese government consents).

government's armed forces because '[s]uch a situation, it appeared to the Conference, was merely a textbook example'⁴⁸. Therefore, the Rome Conference deliberately lowered the threshold for the war crimes under article 8 para. 2 (e) primarily drawn from Additional Protocol II and replaced the three additional prerequisites by the requirement that the conflict be 'protracted'. Since delegations in Rome generally agreed to only codify in article 8 what already constituted customary international law, it seems that the rules under article 8 para. 2 (e) derived from Additional Protocol II, if not all of Additional Protocol II, apply under contemporary customary international law in situations of a 'protracted' non-international armed conflict, and that the additional requirements spelled out under article 1 of the Protocol have become void.

- 35 The *threshold of article 8 para. 2 (e) and (f) Rome Statute* does not include the higher requirements of Additional Protocol II⁴⁹, but rather is identical to the threshold of common article 3, with the only difference that the conflict in addition must be 'protracted'. Both the French⁵⁰ and the Spanish⁵¹ versions of article 8 para. 2 (f) Rome Statute suggest that the term 'protracted' solely refers to the duration of the conflict and simply means 'prolonged'⁵². The notion had been drawn from ICTY case law⁵³, with one Trial Chamber adding that 'in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved'⁵⁴.
- 36 Insofar there is a foreign state A participating in an armed conflict on the territory of state B, the armed conflict in state B still is of a non-international character insofar state A uses force with state A's *consent*, e.g. to support A in its fight against insurgents. Things become more complicated if there are both an international as well as a non-international armed conflict at the same time on the same territory, or if a state covertly supports one party to the conflict in a *prima facie* internal conflict⁵⁵.

VI. Nexus of the conduct concerned to a specific armed conflict

- 37 For a certain conduct to qualify as a war crime, it must have a nexus to an armed conflict. The conduct must not only have been committed during an armed conflict, but must have an additional connection such as a geographical, personal (perpetrator or victim) or other link to the armed conflict. Since any war crime is a criminalized violation of international humanitarian law which applies only to conduct associated with an armed conflict, the nexus to an armed conflict is an essential element of any war crime. It differentiates war crimes, e.g. the killing or rape of a prisoner of war, from 'ordinary' or 'common' crimes under domestic law, such as the common crime of murder or rape⁵⁶. A somewhat related issue is the question of what persons (or objects) are protected against war crimes, and who may qualify as a perpetrator of such crimes.

⁴⁸ Junod, in: Sandoz *et al.* (eds), *Commentary* (1987) 1351. Crit. of territorial control also Ambos, *Treatise ICL II* (2014) 128.

⁴⁹ This has been confirmed by the ICC in the Lubanga judgment, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment (14 March 2012), paras. 536–537.

⁵⁰ '[C]onflits armés qui opposent de manière prolongée ...' (emphasis added).

⁵¹ '[C]onflicto armado prolongado'.

⁵² The German translation agreed upon between Austria, Germany and Switzerland similarly refers to a 'long lasting conflict' ('lang anhaltender Konflikt'). See also Ambos, *Treatise ICL II* (2014) 133.

⁵³ *Prosecutor v. Tadić*, see note 14, para. 70.

⁵⁴ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, Trial Chamber, 16 Nov. 1998, paras. 183–184. The reference to 'terrorist activities' however is inappropriate as the qualification or not of an act as 'terrorist' is irrelevant to determine the applicability of IHL.

⁵⁵ See also Zimmermann, *Preliminary Remarks on article(2)(c)-(f) and para. 3*.

⁵⁶ The issue of the necessary link has not yet received much attention by academia and judicial institutions, possibly also since the nexus was rather evident in traditional inter-state conflicts predominant up to the beginning of the 20th century with relatively clear cut front lines and parties to the conflict. In contemporary non-international or mixed armed conflicts, with often a wider array of different actors and less clear-cut front lines, the existence of a nexus frequently is less obvious.

This issue appears to be linked to the question of a nexus between the victim or affected object and the armed conflict. The Geneva Conventions for instance contain detailed provisions regulating who may qualify as a protected person. 38

The ICTY and ICTR have developed interesting general case law on the question. The Tadić Trial Chamber for instance held that ‘[t]he existence of an armed conflict ... is not sufficient ... For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law’⁵⁷. ICTY Chambers seem to generally agree that a sufficient nexus exists, first, where the offence is committed in the course of actual armed hostilities, that is, during and at the place of combat between the adversary parties to the conflict, such as ‘in the course of fighting or the take-over of a town during an armed conflict’⁵⁸. Secondly, a war crime may also occur ‘at a time when and in a place where no fighting is actually taking place’⁵⁹, remote from the actual battlefield⁶⁰, insofar the act is nonetheless closely related to the armed conflict. This is the case, if ‘the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting’⁶¹. The *Kunarac* Appeals Chamber developed a more systematic theory, which is reproduced here in full:

‘What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. ...

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrators official duties’⁶².

Similarly, the second-last element for each war crime under article 8 Rome Statute requires that ‘[t]he conduct took place in the context of and was associated with’ the armed conflict. 40

⁵⁷ *Prosecutor v. Tadić*, IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 572 (emphasis added). This was confirmed, *i.a.*, by the Delalić Trial Chamber which stated that ‘[i]t is axiomatic that not every serious crime committed during the armed conflict in Bosnia and Herzegovina can be regarded as a violation of international humanitarian law. There must be an obvious link between the criminal act and the armed conflict’. *Prosecutor v. Delalić et al.*, note 48, para. 193. In the same line of thought, the Military Supreme Court of Switzerland held in the *Nyontezze* case with regard to war crimes committed in internal armed conflicts that ‘in order for common article 3 and article 4 of [Additional] Protocol II to be applicable, these acts (and their author) must be in a certain connection with the armed conflict, as international humanitarian law could not be aimed at every attack on life on the territory of a country in an armed conflict’, Tribunal militaire de cassation, Switzerland, *Nyontezze* (27 Apr. 2001), 39.

⁵⁸ *Prosecutor v. Delalić et al.*, see note 48, para. 193.

⁵⁹ ICTY, *Prosecutor v. Kunarac et al.*, see note 34, para. 57 (emphasis added).

⁶⁰ See *Prosecutor v. Tadić*, see note 52, para. 568. See also, *e.g.*, *Prosecutor v. Tadić*, see note 14, para. 68.

⁶¹ *Prosecutor v. Kunarac et al.*, IT-96-23T & IT-96-23/1-T, Judgment, Trial Chamber, 22 Feb. 2001, para. 568.

⁶² *Prosecutor v. Kunarac et al.*, see note 34, paras. 58–60. The holding of the *Kunarac* Appeals Chamber that the armed conflict need not have been ‘causal’ to the commission of the crime also appears to limit or at least specify the relevance of the statement by the Aleksovski Trial Chamber that ‘[i]t is necessary to conclude that the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned because of the conflict at issue’, *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, para. 45 (emphasis added).

Some delegations had considered that the wording ‘in the context of’ alone would be too vague as it might be read as not requiring a specific, but only a temporal and geographical link to the armed conflict.

- 41 In sum, in order to possibly qualify as a war crime a conduct must have a *sufficient nexus* to the armed conflict by being *closely related* to it. The essence and teleological purpose of the humanitarian law rule underlying the offense may give some indication to determine what nexus is required with regard to specific war crimes. Generally, it seems that a sufficient nexus first exists where a war crime is committed *in the course of armed hostilities*. Secondly, drawing on the ICTY *Kunarac* Appeals Chamber’s judgment, an offence appears also sufficiently related to the armed conflict where it is ‘*shaped or dependent upon the environment*’ of the armed conflict in which it is committed, even if occurring temporally and geographically remote from any actual fighting. The armed conflict must, at a minimum, have played a substantial part on the perpetrator’s ability or decision to commit it, the manner in which it was committed, or the purpose for which it was committed⁶³.
- 42 For instance, indications of the existence of a nexus may include where the offence is committed in furtherance of the armed conflict or with the intention to further an objective a party to the conflict pursues through the hostilities, by a member of armed forces or groups against a person or object belonging to adversary armed forces or groups or otherwise to the adversary party to the conflict including against persons detained for reasons related to the conflict, by a person belonging to one party to the conflict against a person or property belonging to an adversary party⁶⁴, or by *exploiting the circumstances and chances of war and in particular its coercive environment*⁶⁵. Situations of armed conflict frequently lead to the breakdown of law and order and the judicial system and armed persons may have far greater power over particularly vulnerable persons than usually. In such circumstances, the additional protection layer of humanitarian law appears essential.

VII. Interpretation of and overview over the offences under article 8

1. Interpretation

- 43 Article 21 Rome Statute lists the sources of law that are relevant for the ICC’s interpretation and application of the war crimes definitions under article 8. Accordingly, the primary sources are, quite evidently, the Rome Statute and the Elements of Crimes, although the latter are not binding on the judges but merely shall ‘assist in the interpretation and application’ of article 8.

⁶³ *Prosecutor v. Kunarac et al.*, see note 34, para. 58. Crit. of a too broad interpretation Ambos, *Treatise ICL II* (2014) 142-3.

⁶⁴ To be sure, anyone can incur individual criminal responsibility for war crimes, and not necessarily only members of armed forces, armed groups, or authorities.

⁶⁵ If the circumstances of an armed conflict are exploited by a person, the perpetrator’s *ability* to commit the offence is influenced by the existence of that conflict, which constitutes one of the alternative possibilities for a sufficient nexus proposed by the *Kunarac* Appeals Chamber, see note 34, *Prosecutor v. Kunarac et al.*, para. 58. The *Kunarac* case law has been explicitly referred to by the ICC in the *Lubanga* case (Confirmation of Charges, §§ 286–288) and *Katanga and Ngudjolo Chui* case (Confirmation of Charges §§ 378–383). Exploiting the coercive environment of the armed conflict also is an element of certain civil war crimes of sexual violence under article 8 para. 2 (e) (vi)-1, 3, 6 Rome Statute, in that the act must be committed ‘by force, or by threat of force or coercion ... , or by taking advantage of a coercive environment...’. The ‘coercive environment’ of which the perpetrator takes advantage can be the violent circumstances created by the armed conflict, such as when forces occupy a village and where latent coercion may exist. However, an additional element required with regard to each of these civil war crimes is that ‘[t]he conduct took place in the context of and was associated with an armed conflict not of an international character’. The primary concern of, in particular, the women’s caucus to also mention ‘coercive circumstances’ was to make clear that proof of such circumstances ‘nullifies any appearance of consent and renders evidence thereof irrelevant’, Women’s Caucus for Gender Justice, Recommendations and Commentary for the Elements, Annex, Submitted to the July/August 1999 Preparatory Commission.

Secondly, article 21 mentions ‘where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’. Thirdly, if the just mentioned sources do not provide sufficient answers, the Court may furthermore inspire itself from national law. 44

The short definitions of the 53 war crimes under article 8 are far from being self-explanatory and the non-binding Elements of (War) Crimes provide only occasionally and in most cases only limited clarification. Therefore, one would still be at loss to adequately understand the elements of the individual war crime without referring to international humanitarian law. 45

To correctly understand and interpret the war crimes under article 8, we must take into consideration the relevant IHL each individual offense is based on. This is also confirmed by the Elements of Crimes which suggest that ‘[t]he elements for war crimes ... shall be interpreted within the established framework of the international law of armed conflict...’⁶⁶. Moreover, the chapeau to article 8 para. 2 (a), (b), (c) and (e) each refer to IHL sources. 46

Hence, we must examine with regard to each war crime what treaty or customary international humanitarian law rules it is derived from, and what violation of humanitarian law it precisely criminalizes⁶⁷, to determine the material and mental elements of the offense. For instance, the concept of ‘civilian’ contained for instance in article 8 para. 2 (b) (i) carries a very precise and carefully delineated meaning under humanitarian law. Similarly, the Geneva Conventions define with much detail who under what circumstances is protected from the grave breaches under article 8 para. 2 (a). Also, conduct that might appear criminal if one exclusively looks at the wording of article 8 may not be unlawful under certain circumstances for which the relevant humanitarian rule provides for an exception to the rule. For instance, even though article 8 para. 2 (b) (viii) clearly criminalizes ‘transfers’ of the population of occupied territory and does not mention any exception, an Occupying Power may, based on customary international humanitarian law (reflected in article 49 para. 2 GC IV) and hence also under article 8, displace members of the population of occupied territory from a given area in order to evacuate them ‘if the security of the population or imperative military reasons so demands’. Similarly, the notion of ‘willful killing’ under article 8 para. 2 (a) (i) is far from criminalizing any intentional killing in armed conflict situations, but only the killing of protected persons. If a member of armed forces kills a member of adversary armed forces on the battlefield and in association with an international armed conflict, this is not a war crime; in fact, humanitarian law even provides that such killing cannot be prosecuted. 47

2. Overview and classification of war crimes under article 8

The long list of the 53 war crimes listed under article 8 para. 2 unfortunately is not well-structured, and in particular the order of the 26 offenses listed under article 8 para. 2 (b) and (e) has little apparent logic. At times similar types of misconduct are not listed next to each other. Also, several offenses overlap with or are even largely identical to another offense. Besides, some single provisions refer to different conducts that could each be qualified as a criminal offence in its own. 48

This lack of conciseness and logical order of the list of war crimes as well as the sometimes archaic language can largely be explained by the drafting history of article 8 Rome Statute. Towards the end of the Rome Conference, time became scarce. During the last days of the Rome Conference, delegations considered to remedy the lack of convincing structure and bring the jumble of offenses under the eventual article 8 para. 2 (b) into some understandable order. However, the time to agree on a new presentation of the list was short and it was 49

⁶⁶ Elements of Crimes, ICC-ASP/1/3 (part II-B) (9 Sep. 2002), p. 125 (introduction to the elements of war crimes), here Annex II. In the same vein Ambos, *Treatise ICL II* (2014) 160-1.

⁶⁷ For an analysis of the relevant humanitarian law rules ‘outside’ the Rome Statute, see also Dörmann, *Elements* (2003).

preferred to stick to its previous (though less than ideal) order in order not to endanger the broad consensus by presenting the list of war crimes in a different order. For the same reasons, overlapping or almost identical war crimes from different sources were not merged together, and archaic language frequently was not ‘modernized’ or adapted to a criminal offense to avoid opening previously agreed language. Therefore, more often than not, the ‘easy’ route of simply reproducing the lists and formulations contained in the different treaty sources was chosen.

50 Nonetheless, there is some structure to article 8.⁶⁸ First, it *categorizes* the offenses mainly *according to the type of conflict* in which the respective war crime is applicable. War crimes committed in international armed conflicts are listed in sub-paragraphs a and b, while war crimes committed in non-international armed conflicts with a threshold according to article 3 common to the Geneva Conventions are contained in sub-paragraph c and war crimes committed in a non-international armed conflict with a threshold spelled out in article 8 para. 2 are contained in sub-paragraph (e).

51 Secondly, article 8 to some degree distinguishes war crimes *according to their humanitarian law source* which primarily are broadly or even universally ratified treaties. Sub-paragraph a contains grave breaches of the four Geneva Conventions of 1949, while the war crimes under sub-paragraph b have been drawn from a number of sources, namely Additional Protocol I of 1977, the 1907 Hague Regulations, other particular international instruments such as treaties prohibiting certain weapons and customary international humanitarian law. The war crimes under sub-paragraph c reflect violations of article 3 common to the four Geneva Conventions. The war crimes under sub-paragraph e are primarily, but not exclusively based on Additional Protocol II of 1977.

52 To gain an overview over what types of conduct are actually criminalized under article 8, it appears useful to regroup the ICC war crimes according to the *criminalized conduct*. Such a regrouping facilitates a rapid idea over what conduct is prohibited under article 8 in a given situation. For instance, a military pilot will be interested to know more about the ‘targeting war crimes’, while someone looking into alleged misconduct at a prisoners of war camp may rather only look at the list of war crimes of mistreatment. The Preparatory Commission indeed negotiated some of the elements of the war crimes in groups of crimes referring to a similar or related substantive content⁶⁹. Some of the national laws providing domestic jurisdiction over the ICC crimes have actually tried to reduce the number of offenses and condense some of the overlapping offenses into one offense, at times also eliminating the

⁶⁸ See also Ambos, *Treatise ICL II* (2014) 118–22.

⁶⁹ At the July/August 1999 Preparatory Commission session, the Coordinator of the Working Group on the Elements of Crimes proposed that the Preparatory Commission should organize its drafting of the elements of war crimes under article 8 para. 2 (b) not according to the order provided under the Rome Statute (para. b through (xxvi)), but rather according to the following four categories, containing a total of nine clusters based on the possible commonality of their elements:

I. ‘Humanitarian’/‘human rights’ provisions:

1. Article 8 para. 2 (c)
2. Article 8 para. 2 (b) (x), (xxi), (xxii)
3. Article 8 para. 2 (b) (viii), (xiii), (xvi)
4. Article 8 para. 2 (b) (xiv), (xv), (xxvi)

II. ‘Hague law’ provisions:

5. Article 8 para. 2 (b) (vi), (vii), (xi), (xii)

III. ‘Conduct of hostilities’ provisions:

6. Article 8 para. 2 (b) (i), (ii), (iii)
7. Article 8 para. 2 (b) (iv), (v), (ix), (xxiv)
8. Article 8 para. 2 (b) (xxiii), (xxv)

IV. ‘Weapons’ provisions:

9. Article 8 para. 2 (b) (xvii), (xviii), (xix), (xx)’.

See <http://www.un.org/law/icc/prepcomm/prepfra.htm>; the approach is for instance reflected in the Proceedings of the Preparatory Commission at its second session (26 July–13 Aug. 1999), UN Doc. PCNICC/1999/L.4/Rev.1 (18 Aug. 1999), 69–76.

distinction between war crimes committed in international as opposed to those committed in non-international armed conflicts⁷⁰.

One possibility⁷¹ to regroup the war crimes under article 8 is suggested as follows:

A. War Crimes Committed in International Armed Conflicts

I. Geneva Law Offenses: War Crimes Against Persons or Objects in the Power of a Party to the Conflict

- | | | |
|-----|--|---------------------|
| 1) | War Crimes against Persons in the Power of a Party to the Conflict | |
| a) | War Crime of Killing a Person | (a)(i)+(b)(vi) |
| b) | War Crimes of Mistreatment | |
| aa) | Torture | (a)(ii)-1 |
| bb) | Wounding or Causing Great Suffering or Serious Injury | (a)(iii) + (b)(vi) |
| cc) | Inhuman Treatment | (a)(ii)-2 |
| dd) | Outrages upon personal dignity | (b)(xxi) |
| ee) | Mutilation | (b)(x)-1 |
| ff) | Subjecting a Person to Experiments | (b)(x)-2; (a)(ii)-3 |
| gg) | Sexual Violence | (b)(xxii)-1 to -6 |
| c) | Other War Crimes against Persons in the power of a party to the conflict | |
| aa) | Compelling Service in Hostile Forces or Participation in Hostile Operations of War | (a)(v) + (b)(xv) |
| bb) | Deporting or Transferring Population of an Occupied Territory | (b)(viii)-1 |
| cc) | Transferring Own Population into Occupied Territory | (b)(viii)-2 |
| dd) | Denying Rights of Fair and Regular Trial | (a)(vi) |
| ee) | Unlawful Confinement | (a)(vii)-2 |
| ff) | Taking Hostages | (a)(viii) |
| ff) | Using Protected Persons as Shields | (b)(xxiii) |
| gg) | Declaring Abolished Rights and Actions | (b)(xiv) |
| hh) | Using, Conscripting or Enlisting Children | (b)(xxvi) |

⁷⁰ The *German International Crimes Code* provides for domestic jurisdiction over ICC crimes and categorizes the war crimes under article 8 para. 2 Rome Statute as follows, abandoning the distinction between war crimes committed in international and non-international armed conflicts:

Section 8: War Crimes Against Persons;

Section 9: War Crimes Against Property and Other Rights;

Section 10: War Crimes Against Humanitarian Operations and Emblems;

Section 11: War Crimes Consisting in the Use of Prohibited Methods of Warfare; and Section 12: War Crimes Consisting in the Employment of Prohibited Means of Warfare.

The German government explained that, in deviation from the order in which the war crimes are listed under article 8 para. 2 Rome Statute and in order to ease the application of law, chapter 2 of part 2 of the Code provide a clearly arranged structure according to the development of the substance of humanitarian law which has been marked by the distinction between the protection of persons and property (Geneva Law) and the limitation of the use of particular methods and means relating to the conduct of hostilities (Hague law). The Code is available at <http://www.iuscrim.mpg.de/forsch/legaltxt/vstgbleng.pdf>. See on this approach also Ambos, *Treatise ICL II* (2014) 120-1. – A Swiss draft of criminal offenses based on article 8 Rome Statute also regroups the 50 war crimes provisions and merges many of them, see <http://www.bj.admin.ch/bj/fr/home/themen/sicherheit/gesetzgebung/intern/strafgerichtshof.html>.

⁷¹ There is as of today no commonly accepted categorization of war crimes in international treaties or even doctrine, apart from the distinction according to their legal source and the type armed conflict in which they were committed.

- 2) War Crimes Against Property in the Power of the Adversary
 - a) Destruction and Appropriation of Property (a)(iv) + (b)(xiii)
 - b) Pillaging (b)(xvi)
- II. *Hague Law Offenses: Violations of Restrictions on the Conduct of Hostilities*
 - 1) War Crimes of Prohibited Targeting
 - a) Targeting of Civilians (b)(i)
 - b) Targeting of Civilian Objects (b)(ii)
 - c) Targeting of Humanitarian or Peacekeeping Personnel or Objects (b)(iii)
 - d) Targeting of undefended places (b)(v)
 - e) Targeting of Buildings Dedicated to Religion, Education, Art, Science or Charitable Purposes, or of Historic Monuments (b)(ix)-1
 - f) Targeting of Hospitals or Places where Sick and Wounded are Collected (b)(ix)-2
 - g) Targeting of Persons or Objects Using the Distinctive Emblems (b)(xxiv)
 - h) Targeting of Persons *Hors de Combat* (b)(vi)
 - 2) Causing Excessive Incidental Death, Injury or Damage (b)(iv)
 - 3) Use of Prohibited Methods of Warfare (in a narrow sense)
 - a) Perfidious Killing or Wounding (b)(xi)
 - b) Improper Use of Distinctive Signs (b)(vii)
 - c) Using Protected Persons as Shields (b)(xxiii)
 - d) Starvation (b)(xxv)
 - e) Killing or Wounding a Person hors de combat (b)(vi)
 - f) Denying Quarter (b)(xii)
 - 4) Employment of Prohibited Weapons
 - a) Employment of Poison or Poisoned Weapons (b)(xvii)
 - b) Employment of Gases and Analogous Liquids, Materials or Devices (b)(xviii)
 - c) Employment of Dum-Dum Bullets (b)(xix)
 - [d) Employment of Means or Methods of Warfare Listed in the Annex to the Statute (b)(xx)]
- B. War Crimes Committed in Non-international Armed Conflicts**
 - I. *Geneva Law Offenses: War Crimes Against Persons or Objects in the Power of a Party to the Conflict*
 - 1) War Crimes against Persons
 - a) War Crime of Murder (c)(i)-1
 - b) War Crimes of Mistreatment
 - aa) Torture (c)(i)-4
 - bb) Cruel Treatment (c)(i)-3
 - cc) Outrages Upon Personal Dignity (c)(ii)

- | | | |
|-----|---|-----------------------|
| dd) | Mutilation | (c)(i)-2 and e)(xi)-1 |
| ee) | Medical or Scientific Experiments | (e)(xi)-2 |
| ff) | Sexual Violence | (e)(vi) |
| gg) | Other Violence to Life or Person | (c)(i)-5 |
| c) | Other War Crimes against Persons | |
| aa) | Taking Hostages | (c)(iii) |
| bb) | Denial of a Fair Process | (c)(iv) |
| cc) | Displacing the Civilian Population | (e)(viii) |
| dd) | Using, Conscripting or Enlisting Children | (e)(vii) |
| 2) | War Crimes Against Objects in the Power of the Perpetrator | |
| a) | Destruction or Seizure of Adversary Property | (e)(xii) |
| b) | Pillaging | (e)(v) |
| II. | <i>Hague Law Offenses: Violations of Restrictions on the Conduct of Hostilities</i> | |
| 1) | Prohibited Targeting | |
| a) | Targeting Civilians | (e)(i) |
| b) | Targeting Assistance or Peacekeeping Personnel or Objects | (e)(iii) |
| c) | Targeting Buildings Dedicated to Religion, Education, Art, Science or Charitable Purposes, or of Historic Monuments | (e)(iv) |
| d) | Targeting Hospitals or Collection Sites of Sick and Wounded | (e)(iv) |
| e) | Targeting Persons or Objects Using the Distinctive Emblems | (e)(ii) |
| 2) | Use of Prohibited Methods of Warfare (in the narrow sense) | |
| a) | Perfidious Killing or Wounding | (e)(ix) |
| b) | Denying Quarter | (e)(x) |

PART II. ANALYSIS AND INTERPRETATION OF ELEMENTS

A. Article 8 para. 1: Jurisdiction in respect of war crimes

To be sure, article 8 para. 1 does not address or even alter the definition of the war crimes under article 8. Plan, policy and a large-scale commission are by no means required elements of war crimes. A single and isolated act, such as the rape or killing of a single person by a single perpetrator, can amount to a war crime. 53

Article 8 para. 1 rather provides a practical guideline for the ICC and above all the Prosecutor on what type of war crimes they should primarily focus, given the limited resources of the ICC.⁷² It indicates factors the Prosecutor should take into account when 54

⁷² It does not seem recommendable for states providing domestic jurisdiction over war crimes such as those under article 8 Rome Statute to establish a similar jurisdictional threshold. The considerations underlying article 8 para. 1 Rome Statute, that is, the limited resources and complementary function of the ICC in an international justice system, are not analogous in national jurisdictions. Furthermore, such a limitation would not seem in conformity with the 'duty of every State to exercise its criminal jurisdiction over those responsible for

determining whether to commence an investigation with regard to a person alleged to have committed war crimes. Indeed, if a party to a conflict has a general policy or plan or if war crimes are committed on a large scale, it may be less likely to change the course without international action.

55 As the words ‘in particular’ make clear, a plan, policy or a large-scale commission is not absolute prerequisite for the Court to commence investigations but rather serves, as already indicated above, as a practical guideline for the Court.⁷³ During the negotiations leading to the adoption of the Rome Statute, the word ‘only’, supported *inter alia* by the US delegation, had not been acceptable to many like-minded states.⁷⁴ Therefore, the Court retains its discretion to exercise jurisdiction also over war crimes that are not committed as part of a plan, policy or large-scale commission of such crimes. The Prosecutor might for instance also take into consideration other factors like the egregiousness of a particular crime, the seriousness and scale of a single crime, or the official function of an alleged perpetrator.

B. Article 8 para. 2: Meaning of ‘war crimes’

Literature a: Grave breaches

Literature: Baxter, J.W., ‘Multilateral Treaties as Evidence of Customary International Law’, (1965–6) 41 *BYbIL* 275; Badar, M.E., ‘Drawing the Boundaries of *mens rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’, (2006) 6 *ICLRev* 313; Dörmann, K., ‘The Legal Situation of ‘unlawful/unprivileged combatants’, (2003) 879 *IRevRC* 45; *id.* (with contributions by Doswald-Beck, L. and Kolb, R.), *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003); *id.*, ‘War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes’, (2003) 7 *MPYbUNL* 341; *id.*, La Haye, E. and von Hebel, H., ‘The Context of War Crimes’, in: Lee R. S. (ed.), *The International Criminal Court* (2001) 112; Draper, ‘The Geneva Conventions of 1949’, (1965) 114 *RCADI* 59; Droegge, C., ‘In Truth the Leitmotiv: The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law’, (2007) 867 *IRevRC* 515; Ferraro, T., ‘Determining the Beginning and End of an Occupation under International Humanitarian Law’, (2012) 885 *IRevRC* 133; von Glahn, G., *The Occupation of Enemy Territory* (1957); Gross, O., ‘The Grave Breaches System and the Armed Conflict in the Former Yugoslavia’, (1995) 16 *MichJIL* 783; Henckaerts, J.-M., *Mass Expulsion in Modern International Law and Practice* (1995); ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (prepared by Nils Melzer) (2009), <<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed 26 January 2015; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2011) 31IC/11/5.1.2, <<http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>> accessed 26 January 2015; Meron, T., ‘The Geneva Conventions as Customary Law’, (1987) 81 *AJIL* 348; Pejic, J., ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence’, (2005) 858 *IRRC* 375; Quéguiner, J.F., ‘Dix ans après la création du Tribunal pénal international pour l’ex Yougoslavie: évaluation de l’apport de sa jurisprudence au droit international humanitaire’, (2003) 850 *IRRC* 271; Roberts, K., ‘The Contribution of the ICTY for the Grave Breaches Regime’, (2009) 7 *JICJ* 743; Sassòli, M. and Olson, L.M., ‘The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case’, (2000) 839 *IRRC* 733; Schwarzenberger, G., *International Law as Applied by International Courts and Tribunals: The Law of*

international crimes’ (preambular paragraph 6 of the Rome Statute) such as those spelled out under the Rome Statute, and would be in violation of the duty of States Parties to the Geneva Conventions to prosecute or extradite persons responsible for grave breaches of the Conventions.

⁷³ See *Prosecutor v. Jean-Pierre Bemba Gombo*, Case ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 211. In the same vein Ambos, *Treatise ICL II* (2014) 119–20.

⁷⁴ The Preparatory Committee forwarded to the Rome Diplomatic Conference 3 options the substance and placement of which were still discussed, and which were followed by what is now article 10 Rome Statute: ‘Elsewhere in the Statute:

Option 1 The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-sale commission of such crimes.

Option 2 The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as part of a plan or policy or as part of a large-sale commission of such crimes.

Armed Conflict, Vol. II (1968); van der Wolf, W.-J. (ed.), *War Crimes and International Criminal Law* (2011); Zimmermann, A. and Geiss, R., in: *Münchener Kommentar, Strafgesetzbuch – Vol 8, Nebenstrafrecht III* (2nd ed. 2013).

I. Preliminary remarks

Grave breaches are particularly serious violations of international humanitarian law.⁷⁵ 56
Article 8 para 2 (a) of the Rome Statute incorporates the list of grave breaches which is contained in the four Geneva Conventions of 1949 (articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV). The Statute merely repeats the definitions of grave breaches contained in the four Geneva Conventions. Further guidance on the interpretation is given in the document on the Elements of Crimes.⁷⁶

The four Geneva Conventions have been ratified by 196 countries as of 21 December 2014 57
and are generally considered to reflect current customary international law.⁷⁷ Each of the Conventions addresses the treatment to be provided to a different group of persons affected by an armed conflict:

- the First Convention (the Sick and Wounded Convention) is concerned with the sick and wounded in the field;⁷⁸
- the Second Convention (the Maritime Convention) is concerned with the sick, wounded and shipwrecked at sea;⁷⁹
- the Third Convention (the Prisoners of War Convention) with prisoners of war;⁸⁰ and
- the Fourth Convention (the Civilians Convention) with civilians.⁸¹

The material scope of application of the Conventions is indicated in common article 2 of 58
the Conventions defining situations of an international armed conflict. Common article 2 thus specifies the context in which the war crimes under article 8 para 2 (a) of the ICC Statute must be committed. The concept of grave breaches is therefore still considered to be limited to international armed conflicts.⁸² In brief, the Conventions apply:

⁷⁵ Independently of the Rome Statute, States are obliged pursuant to the Geneva Conventions to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering the commission of, any of these grave breaches, to search for such persons and to bring them, regardless of their nationality, before their own courts. Alternatively, a state may, if it prefers, hand such persons over for trial to another High Contracting Party. Cf. articles 49 GC I, 50 GC II, 129 GC III, 146 GC IV.

⁷⁶ ICC, *Elements of Crimes*, ICC-ASP/1/3, 9 September 2002, available online at: <http://legal.un.org/icc/asp/1stsession/report/english/part_ii_b_e.pdf> accessed 21 December 2014.

⁷⁷ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, Merits, 27 June 1986, para 220.

⁷⁸ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (available online at <www.icrc.org/IHL> accessed 21 December 2014).

⁷⁹ Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 (available online at <www.icrc.org/IHL> accessed 21 December 2014).

⁸⁰ Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (available online at <www.icrc.org/IHL> accessed 21 December 2014).

⁸¹ Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (available online at <www.icrc.org/IHL> accessed 21 December 2014).

⁸² *Prosecutor v. Tadić*, No. IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, para 80; *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, para 84 (for the reasons see paras. 79 *et seq.*); see also *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para. 74:

‘Within the terms of the Tadić Appeal Decision and Tadić Appeal Judgement, Article 2 [of the ICTY Statute] applies only when the conflict is international. Moreover, the grave breaches must be perpetrated against persons or property covered by the “protection” of any of the Geneva Conventions of 1949’.

The ICTY Trial Chamber seemed to take a more progressive approach in the *Delalić* case:

‘While Trial Chamber II in the Tadić case did not initially consider the nature of the armed conflict to be a relevant consideration in applying Article 2 of the Statute, the majority of the Appeals Chamber in the Tadić Jurisdiction Decision did find that grave breaches of the Geneva Conventions could only be committed in international armed conflicts and this requirement was thus an integral part of Article 2 of the Statute. In his Separate Opinion, however, Judge Abi-Saab opined that “a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict”. The majority of the Appeals

- to all armed conflicts between two or more States parties to the Conventions, even if one or more of the parties to the conflict does not recognize a state of war;
- to all cases of partial or total occupation of the territory of a party to the Conventions even if the occupation meets with no armed resistance; and
- if a party to the Conventions is in conflict with a power which is not, the Conventions shall apply if the power accepts and applies the provisions thereof.

59 The Conventions apply to inter-State armed conflicts, regardless of their level of intensity. The firing of weapons by soldiers of opposing sides across a contested border or the uninvited intervention of the armed forces of one State, even in small numbers, in the territory of another State may trigger the application of the Geneva Conventions.⁸³ An internal armed conflict may become international if another State intervenes with its armed forces on the side of an armed opposition group against the State that is fighting the group (the conflict relation between the two States would be governed by the law of international armed conflict while the conflict relation between the State and the armed opposition group remains governed by the law of non-international armed conflicts) or if – as pointed out in the case law of the ICTY⁸⁴ – some of the participants in the internal armed conflict act on behalf of that other State. In that latter case, in order for armed forces, militias or paramilitary units to be considered acting as *de facto* organs of that State – with the consequence that the law of international armed conflict governs the situation – it is sufficient for the State to exercise overall control over the forces and units. If another State

Chamber did indeed recognise that a change in the customary law scope of the “grave breaches regime” in this direction may be occurring. This Trial Chamber is also of the view that the possibility that customary law has developed the provisions of the Geneva Conventions since 1949 to constitute an extension of the system of “grave breaches” to internal armed conflicts should be recognised’.

Prosecutor v. Delalić et al., IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para. 202. Ultimately, the Trial Chamber made no finding on the question of whether article 2 of the Statute could only be applied in a situation of international armed conflict, or whether this provision was also applicable in internal armed conflicts (*id.*, para 235), but indicated: ‘Recognising that this would entail an extension of the concept of “grave breaches of the Geneva Conventions” in line with a more teleological interpretation, it is the view of this Trial Chamber that violations of common article 3 of the Geneva Conventions may fall more logically within Article 2 of the Statute. Nonetheless, for the present purposes, the more cautious approach has been followed’ (*ibid.*, para 317).

⁸³ Pictet (ed.), *Commentary IV, Article 2*, 20–21; Zimmermann and Geiss, *Münchener Kommentar*, § 8 VStGB, mn 99. See also Kleffner, in: Fleck (ed.), *Handbook IHL* (3rd ed. 2013) 44–46. For a discussion of when a situation of occupation exists, see Ferraro (2012) 885 *IRRC* 133 *et seq.*; see also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, para 78; ICJ, *Armed Activities on the Territory of the Congo* (DRC v. Uganda), Judgement, 19 December 2005, paras. 172–177; Ambos, *Treatise on ICL II* (2014) 138–40, Gasser and Dörmann, in: Fleck (ed.), *Handbook IHL* (3rd ed., 2013) 268–74; von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957), 28–29; Dinstein, *The International Law of Belligerent Occupation* (2009) 42 *et seq.*; Zwanenburg, ‘The Law of Occupation Revisited: The Beginning of an Occupation’, (2007) *YbIHL* 10 109 and 128–9; Bothe (2006) 34 *Collegium*, 26 *et seq.* Relevant ICTY case law can be found in *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para. 215 *et seq.*; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, volume I, Trial Chamber, 29 May 2013, paras. 87 *et seq.*

⁸⁴ For an overview of the relevant case law see Dörmann, *Elements of War Crimes* (2003) 23–24. In *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 7 May 1997, paras. 137–141, the Appeals Chamber found that ‘three distinct criteria could be applied, depending on the nature of the entity in question, to establish that participants in an internal conflict had acted on behalf of another State, thereby lending an international character to the conflict. These are the criteria of: (a) overall control (for armed groups acting on behalf of another State); (b) specific instructions or public approval *a posteriori* (for individuals acting alone or militarily unorganised groups); and (c) assimilation of individuals to State organs on account of their actual behaviour within the structure of the said State’, see *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Volume I, Trial Chamber, 29 May 2013, para. 86. The ICC has also accepted the ‘overall control’ test in *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Judgement pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 211; see also in the same case the Pre-Trial Chamber, paras. 209–211. See also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment, 26 February 2007, para. 404. While the ICJ applies an effective control test for the purposes of state responsibility, it also noted: ‘insofar as the overall control test is employed to determine whether or not an armed conflict is international ..., it may well be that the test is applicable and suitable’. For a critical assessment of the overall test see Sassòli and Olson (2000) 839 *IRRevC* 733. See also Ambos, *Treatise on ICL II* (2014) 135–7.

intervenes in a preexisting non-international conflict on the side of the government against (an) armed opposition group(s) the character of the conflict remains non-international.

As indicated in the *chapeau* to article 8 para 2 (a) of the ICC Statute, grave breaches must be committed ‘against persons or property protected under the provisions of the relevant Geneva Convention’. The war crimes defined in article 8 para 2 (a) (i)-(iii) and (v)-(viii) ICC Statute comprise the prohibited acts committed against persons protected under the Geneva Conventions. Each of the Geneva Conventions contains several provisions listing protected persons.⁸⁵

- Convention I, articles 13, 15, 24–27;
- Convention II, articles 12, 13, 36–37;
- Convention III, articles 4, 33;
- Convention IV, articles 4, 13, 20.

Persons not entitled to the protections under the First, Second or Third Conventions are necessarily protected by the Fourth Convention, provided they fulfil the nationality criteria mentioned therein, *i. e.* essentially to be of a different nationality than that of the party in whose hands they are.⁸⁶ The ICTY in its consistent case law has held that the notion of protected persons in the sense of the Fourth Convention should not be interpreted strictly. Rather than nationality in the legal sense, what counts are bonds demonstrating effective allegiance to a party to an armed conflict, such as ethnicity.⁸⁷

In the case of article 8 para 2 (a) (iv) of the Statute, the acts or omissions must be committed against property regarded as protected under the Geneva Conventions. ‘Protected property’ is not defined in the Conventions. Instead, the Conventions contain a description of property that cannot be attacked, destroyed or appropriated. Without being exhaustive, the following provisions in particular should be mentioned:

- Convention I, articles 19, 20, 33–36;
- Convention II, articles 22, 24, 25, 27;
- Convention IV, articles 18, 19, 21, 22, 33, 53, 57.⁸⁸

In brief, as far as the grave breaches provisions of the Geneva Conventions are concerned:

- the prohibited act must be listed as a grave breach in one of the four Geneva Conventions;
- it must be committed in a situation when common article 2 of the Geneva Conventions applies, that is, in the context of an international armed conflict, including military occupation;
- by a perpetrator, civilian or military, linked to one side of the conflict;⁸⁹ and
- against persons or property protected under a Geneva Convention listing the prohibited act as a grave breach.⁹⁰

⁸⁵ The grave breaches under the Geneva Conventions have been supplemented by article 85 para 2 of Add. Prot. I to cover a slightly broader range of persons: ‘Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol’.

⁸⁶ Dörmann (2003) 879 *IRevRC* 48 *et seq.*; see also *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 271; German Federal Ministry of Defence, *Joint Service Regulation (ZDv) 15/2, Law of Armed Conflict – Manual* – (May 2013), para 341.

⁸⁷ For an overview of the relevant case law from the ICTY see Dörmann, *Elements of War Crimes* (2003) 29–32. The ICC has adopted this approach as well in *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Judgement, Pre-Trial Chamber, 30 September 2008, paras. 289 *et seq.* Also Ambos, *Treatise on ICL II* (2014) 149. For a critical assessment see Sassòli and Olson (2000) 839 *IRevRC* 733; Quéguiner (2003) 850 *IRevRC* 299 *et seq.*

⁸⁸ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, para. 81. See also Pictet (ed.), *Commentary IV, Article 147*, 597.

⁸⁹ Not only military personnel, but also civilians can commit grave breaches during an international armed conflict. Since WW II civilians have been found guilty of war crimes, *e.g.* members of government, including heads of State, party officials and administrators, industrialists and business men, judges and prosecutors, doctors and nurses or concentration camp inmates with indisputable civilian status, see Dörmann, *Elements of War Crimes*, 34 *et seq.* with references to relevant case law; see also Ambos, *Treatise on ICL II* (2014) 145.

⁹⁰ For example, unlawful confinement is a grave breach of the Fourth Geneva Convention but not of the Third Convention. On the protected objects see also Ambos, *Treatise on ICL II* (2014) 150-2.

64 In general, the Geneva Conventions are concerned with the protection of victims of war who are under the control of the party to the conflict with which the perpetrator is linked. The Conventions by and large do not regulate methods and means of warfare or what might be regarded as long distance killing, *e. g.* by artillery, missiles, air delivered weapons, *etc.*

1. Clarifications in the Elements of Crimes

65 As indicated in the previous section, grave breaches of the Geneva Conventions are acts committed in the context of an international armed conflict, including occupation, against persons or property protected under the relevant provisions of the Conventions. Two elements can be derived from this fact: first, the context in which the crimes must be committed and, second, the persons or property against whom or which the crimes must be committed. These two elements lay down the subject matter jurisdiction for all war crimes under article 8 para 2 (a) of the ICC Statute. Consequently, these elements and the accompanying mental elements were drafted in the same way for all the crimes in this section of article 8.

2. Elements describing the context

66 – The conduct took place in the context of and was associated with an international armed conflict.^[34]

– The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

^[34]The term ‘international armed conflict’ includes military occupation. This footnote also applies to the corresponding element in each crime under article 8 (2)(a).

67 The notion of an international armed conflict is not defined in the Elements. For that purpose, recourse must be made to common article 2 of the four Geneva Conventions. In line with that article, footnote 34 of the Elements of Crimes emphasises that the term ‘international armed conflict’ includes military occupation.

68 Considerable importance has been given to describing the nexus which must exist between the conduct of the perpetrator and the international armed conflict as well as to the question of a possible mental element which would be linked to the element describing the context.

69 The words ‘in the context of and was associated with’ an armed conflict are meant to draw the distinction between war crimes and ordinary criminal behavior and to clarify that certain war crimes can be committed after the end of a conflict/the general close of military operations (for example, if a prisoner of war is not released after the end of active hostilities and is tortured then, the conduct would still be prohibited by the Geneva Conventions and could still constitute the war crime of torture, see article 5 GC III). This formulation is largely derived from the case law of the *ad hoc* Tribunals.⁹¹

70 The words ‘associated with’ were meant to reflect the case law of the *ad hoc* Tribunals which states that a sufficient/close/obvious nexus⁹² must be established between the offences and the armed conflict.⁹³ Acts unrelated to an armed conflict are not considered to be war

⁹¹ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, para. 68.

⁹² See *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para 423; *Prosecutor v. Simić*, IT-95-9-T, Judgement, Trial Chamber, 17 October 2003, para 105; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 193; *Prosecutor v. Tadić*, IT 94-1-T, Opinion and Judgement, Trial Chamber, 7 May 1997, para 573; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Judgement, Trial Chamber I, 14 March 2012, para 571. See also Zimmermann and Geiss, *Münchener Kommentar*, § 8 VStGB, mn 119; Werle and Jessberger, *Principles* (2014) 422-5; Ambos, *Treatise on ICL II* (2014) 140-3.

⁹³ The addition of the words ‘in association with’ in the Elements of Crimes was contested by some delegations. It was argued *i.a.* that they were redundant because they were already included in the requirement ‘in the context of’. For a discussion of the *ad hoc* Tribunals’ case law on the nexus requirement, see Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 38 *et seq.*

crimes.⁹⁴ The required connection does not necessarily imply a strict geographical or temporal coincidence between the acts of the perpetrator and the armed conflict.⁹⁵ As a consequence, the acts need not necessarily be committed in the course of fighting or the takeover of a town.⁹⁶ The close connection between the acts and the armed conflict may exist even if substantial clashes were not occurring in the region at the time and place where the crimes were allegedly committed.⁹⁷ It suffices that the acts be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.⁹⁸

Agreement on the mental element linked to the element describing the context could only be reached after long discussions. The question of whether a mental element should accompany the element describing the context at all and, if yes, what kind of mental coverage would be required, in particular whether the article 30 ICC Statute standard would be applicable, was very controversial. Applying the full article 30 standard would have probably required the perpetrator to be aware of the existence of an armed conflict as well as of its international character. The latter requirement especially was rejected by almost all delegations.⁹⁹

⁹⁴ In one judgement the ICTY has given the following additional indication:

‘What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. ...

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties’.

Prosecutor v. Kunarac et al., IT-96-23-A & IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, paras. 58 et seq.; *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, Trial Judgement, 27 September 2007, para 423; *Prosecutor v. Sesay*, SCSL-04-15-T, Judgement, Trial Chamber, 26 October 2009, para 101; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, Trial Chamber, 18 May 2012, para 567; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Chamber, 30 September 2008, para. 382; crit. of a too broad approach however Ambos, *Treatise on ICL II* (2014) 142-3; see also Werle and Jessberger, *Principles* (2014) 422-5.

⁹⁵ See Mettraux, *International Crimes and the Ad Hoc Tribunals*, 40.

⁹⁶ In the *Brđanin* case, the ICTY Appeals Chamber found that ‘the Trial Chamber clearly established the existence of an international armed conflict and furthermore reasonably concluded that the rapes in Teslić, committed as they were during weapons searches, were committed in the context of an armed conflict and were not “individual domestic crimes” as suggested by Brđanin’. *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, Appeals Chamber, 3 April 2007, para 256.

⁹⁷ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras 196–197; *Prosecutor v. Tadić*, IT-94-1-T, Judgement, Trial Chamber, 7 May 1997, para 573.

⁹⁸ *Prosecutor v. Tadić*, IT-94-1-T, Judgement, Trial Chamber, 7 May 1997, para 573; *Prosecutor v. Kunarac et al.*, IT-96-23T & IT-96-23/1-T, Judgement, Trial Chamber, 22 February 2001, para 568. See also *Prosecutor v. Stakić*, IT-97-24-A, Judgement, Appeals Chamber, 22 March 2006, para 342; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003, para 570.

⁹⁹ Up until 2006, the *ad hoc* Tribunals have used an objective test to determine the existence and character of an armed conflict, as well as the nexus between the conduct of the perpetrator and the conflict. Taking this approach, the ICTY in particular, has apparently treated this element as being merely jurisdictional. For example, in the *Tadić* Judgement the Trial Chamber held that: ‘The existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law’, *Prosecutor v. Tadić*, IT-94-1-T, Judgement, Trial Chamber, 7 May 1997, para 572. See also Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (2000) 51. In 2006, the ICTY Appeals Chamber changed its view in *Naletilić and Martinović*. It found that ‘the existence and international character of an armed conflict are both jurisdictional prerequisites and substantive elements of crimes [...] the Prosecution has to show that the accused knew that his crimes had a nexus to an international armed conflict or at least that he had knowledge of the factual circumstances later bringing the Judges to the conclusion that the armed conflict was an international one’,

72 In the end, States negotiating the Elements were not prepared to accept a purely objective test, but felt that some kind of awareness of a nexus between the conduct and an armed conflict was necessary. The mental element ‘[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict’¹⁰⁰ must be read in conjunction with the introduction to the whole section on war crimes. It contains the following interpretative clarification, which is intended to be an integral part of the set of elements:

‘With respect to [the] elements listed for each crime:

There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;

There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with”.

73 The first two paragraphs of the Introduction are drafted in a very straightforward and unambiguous manner. The third paragraph on the other hand remained rather ambiguous. The general idea was that some form of knowledge is required, which is below the article 30 standard.¹⁰¹

3. Elements relating to persons and property protected under the Geneva Conventions

- 74 – Such person or persons/property were/was protected under one or more of the Geneva Conventions of 1949.
- The perpetrator was aware of the factual circumstances that established that protected status.^{[32] [33]}

^[32] This mental element recognizes the interplay between articles 30 and 32. This footnote also applies to the corresponding element in each crime under article 8(2) (a), and to the element in other crimes in article 8 para 2) concerning the awareness of factual circumstances that establish the status of persons or property protected under the relevant international law of armed conflict.

^[33] With respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict. This footnote also applies to the corresponding element in each crime under article 8 (2) (a).

Prosecutor v. Naletilić and Martinović, IT-98-34-A, Judgement, Appeals Chamber, 3 May 2006, paras. 109–122. The Chamber went on to say: ‘the perpetrator only needs to be aware of factual circumstances establishing the armed conflict and its international or internal character’ (para 119). Some national courts did not require proof that the perpetrator was aware of the existence of the armed conflict, the nexus or the protected status of the victim *Prosecutor’s Office of BiH v. Andrun*, X-KRŽ-05/42, Verdict (BiH Ct, App. Div., 19 Aug. 2008) pp. 14–18 available at <http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/BiH/Andrun_second_instance_verdict_19-8-2008.pdf>. See for a discussion on the objective and subjective approaches (preferring the latter) Ambos, *Treatise on ICL I* (2013) 283–8 and id., *Treatise on ICL II* (2014) 143–4.

¹⁰⁰ The original proposal on the mental element read as follows: ‘The accused was aware of the factual circumstances that established the existence of an armed conflict’ (emphasis added). The direct article was dropped in order to indicate that the perpetrator needs only to know some factual circumstances, but definitely not all the factual circumstances that would permit a judge to conclude that an armed conflict was going on.

¹⁰¹ For a more detailed account of the *travaux préparatoires* see Dörmann, *Elements of War Crimes* (2003) 18 *et seq.*; Werle and Jessberger, *Principles* (2014) 425–6 take a similar approach as the one reflected in the Elements of Crimes, *i. e.* no necessity to be aware of the international or non-international character of an armed conflict, nor to be able to classify the conflict correctly from a legal point of view, only awareness of actual circumstances from which the existence of an armed conflict can be deduced. Werle and Jessberger make a distinction for situations, in which a particular conduct only amounts to a war crime when committed in the context of an international armed conflict. In such situation the perpetrator must be aware of the circumstances establishing the international character of the conflict. Zimmermann and Geiss, *Münchener Kommentar*, § 8 VStGB (2013) mn 206–7, require knowledge of the nexus and knowledge of the factual circumstances that are the basis for the existence of an armed conflict, but no requirement to classify the conflict correctly from a legal point of view. In a similar vein Ambos, *Treatise on ICL II* (2014) 143–4.

The Elements do not offer further clarification as to the definition of persons or property protected by the four Geneva Conventions. The Elements must therefore be interpreted in conjunction with the provisions of the Conventions mentioned above (see margin Nos. 60 and 62). The two footnotes explain in more detail the degree of awareness that the perpetrator must have. Footnote 32 clarifies that the perpetrator need not have come to the legally correct assessment that the victim of his/her conduct was a protected person as defined in the Geneva Conventions. A mistake of law defence is thus excluded. While the Elements of Crimes require awareness of the factual circumstances that establish the protected status, the ICTY, when it dealt with grave breaches of the Geneva Conventions, has not required any proof that the alleged perpetrator was aware of the protected status of the victim¹⁰² or, in case of attacks against civilians or murder of a person protected by common article 3, relied on the standard that the perpetrator should have been aware of the protected status.¹⁰³

Footnote 33 of the Elements of Crimes is particularly relevant when prohibited acts are committed against protected persons under article 4 of the Fourth Geneva Convention. The nationality of the person is decisive for protected person status. For example, persons who have the same nationality of the Party to the armed conflict in whose hands they find themselves or the nationality of co-belligerents are not protected by the Convention. In certain situations, however, nationality is not obvious to assess at the moment the prohibited act is committed. It is therefore sufficient that the perpetrator was aware of the fact that the victim belonged to the adverse party, which captures the essence of the protections under the Geneva Conventions.

These common elements apply to all the crimes covered in this section and are therefore not repeated in the ensuing parts dealing with specific crimes.

II. Grave breaches in detail

1. Paragraph 2(a)(i): ‘Wilful killing’

Wilful killing of a protected person is a grave breach under all the Geneva Conventions (articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV). The criminalization is based on the explicit prohibitions in articles 12 of the First Geneva Convention, 12 of the Second Geneva Convention, 13 of the Third Geneva Convention and 32 of the Fourth Geneva Convention.¹⁰⁴ In addition to the four common elements (see margin Nos. 66 and 74), the Elements of Crimes only contain one specific element describing the *actus reus*:¹⁰⁵

¹⁰² *Prosecutor v. Tadić*, IT-94-1-T, Judgement, Trial Chamber, 7 May 1997, para. 577; *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, paras 163–166; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, paras 147–160; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, paras 322–331; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras 244–277; *Prosecutor v. Delalić et al.*, Case IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, paras 52–106; *Prosecutor v. Blaskić*, IT-95-14-T, Judgement, Trial Chamber, paras 125–133; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, paras 167–182; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, para. 151; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 203–208; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, paras 125, 155 and 585; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, paras. 97–105.

¹⁰³ *Prosecutor v. Halilović*, IT-01-48-T, Judgement, Trial Chamber, 16 November 2005, para 36; *Prosecutor v. Milutinović*, IT-05-87-T, Judgement, Trial Chamber, 26 February 2009, para 134.

¹⁰⁴ For further discussion of the origins and the customary nature of the prohibition, see Henckaerts and Doswald-Beck, *Customary IHL* (2005) 311, 574.

¹⁰⁵ The specific elements of the crime of wilful killing or murder were found to be identical in international case law whether the conduct amounted to a grave breach, a war crime or a crime against humanity, see e.g. *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 110. For murder as a war crime and murder as a crime against humanity, see for example *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 422; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 423; *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Judgement, Trial Chamber, 27 March 2013, para 42; *Prosecutor v. Tolimir*, IT-05-88-2-T, Judgement, Trial Chamber, 12 December 2012, para 714; *Prosecutor v. Popović*, IT-05-88-T, Judgement, Trial Chamber, 10 June 2010, para 787; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Judgement, Trial Chamber, 20 July 2009, para 903;

- The perpetrator killed one or more persons.
- 78 During the negotiations of the Elements, on the basis of the different text proposals, there was some debate as to whether the term ‘killed’ or the term ‘caused death’ or both should be used. In the end, States did not see any substantive difference and expressed this understanding in a footnote, which reads: ‘The term “killed” is interchangeable with the term “caused death”’.
- 79 The term ‘killed’ creates the link to the ‘title’ of the crime, and the term ‘caused death’ was felt necessary to clarify the fact that this crime also covers situations such as the reduction of rations for prisoners of war to such an extent that they starve to death. Both terms are used in the relevant case law of the *ad hoc* Tribunals.¹⁰⁶
- 80 The war crime can be committed by act and omission as clarified by international case law.¹⁰⁷
- 81 The notion of willful killing is limited to those acts or omissions which are contrary to existing treaty and customary law of armed conflict.¹⁰⁸
- 82 No specific mental element has been added, which means that in accordance with paragraph 2 to the General Introduction to the Elements of Crimes, the standard of article 30 of the Statute applies, *i. e.* the perpetrator must have meant to kill a person and meant to cause the death or have been aware that the death will occur in the ordinary course of events.
- 83 However, the Elements are in conformity with the Statute only if the article 30 standard and the standard of ‘wilful’ are identical. As indicated in article 9 para 3 of the Statute the Elements must not deviate from the Statute. ‘Wilfully’ is traditionally understood as covering

Prosecutor v. Milutinović, IT-05-87-T, Judgement, Trial Chamber, 26 February 2009, para 136; *Prosecutor v. Martić*, IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para 58; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para 556; for murder and wilful killing as a grave breach, see in particular, *Prosecutor v. Orić*, IT-03-68-T, Judgement, Trial Chamber, 30 June 2006, para 345 and *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para. 380. See also Ambos, *Treatise on ICL II* (2014), 164-5; Werle and Jessberger, *Principles* (2014) 431.

¹⁰⁶ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 424. See also, *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para 153.

¹⁰⁷ For a discussion on the material element of the crime of murder or wilful killing, see *e.g.* *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 111; *Prosecutor v. Delić*, IT-04-83-T, Judgement, Trial Chamber, 15 September 2008, para 46; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para 36; *Prosecutor v. Hadžihasanović*, IT-01-47-T, Judgement, Trial Chamber, 15 March 2006, para 31; *Prosecutor v. Galić* Appeal Judgement, para 147; *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005, para 261; *Prosecutor v. Halilović*, IT-01-48-T, Judgement, Trial Chamber, 16 November 2005, para 35; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 381; *Prosecutor v. D. Milošević*, IT-98-29/1-A, Judgement, Appeals Chamber, 12 November 2009, para 108; *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para. 486; *Prosecutor v. Krajišnik*, IT-00-39-T, Judgement, Trial Chamber, 27 September 2006, para 715; *Prosecutor v. Limaj*, IT-03-66-T, Judgement, Trial Chamber, 30 November 2005, para 241; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para 556; *Prosecutor v. Perišić*, IT-04-81-T, Judgement, Trial Chamber, 6 September 2011, para 102; *Prosecutor v. Gotovina*, IT-06-90-T, Judgement, Trial Chamber, 15 April 2011, para 1725; *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Judgement, 23 February 2011, para 1708; *Prosecutor v. Milutinović*, IT-05-87-T, Judgement, Trial Chamber, 26 February 2009, para 137; *Prosecutor v. Ndiindiliyimana*, ICTR-00-56-T, Judgement, Trial Chamber, 17 May 2011, para 6165; *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-T, Judgement, Trial Chamber, 24 June 2011, para 6165; ECCC, *Kaing*, Judgement, Trial Chamber, 26 June 2010, para 331; *Prosecutor v. Sesay*, SCSL-04-15-T, Judgement, Trial Chamber, 2 March 2009, para 142; *Prosecutor v. Nizeyimana*, ICTR-2000-55C-T, Judgement, Trial Chamber, 19 June 2012, para 1552; *Prosecutor v. Zigiranyirazo*, ICTR-01-73-T, Judgement, Trial Chamber, 26 May 2008, para 442; SCSL, *Prosecutor v. Taylor*, SCSL-03-1-T, Judgement, Trial Chamber, 26 April 2012, para 412; *Prosecutor v. Brima*, SCSL-04-16-T, Judgement, Trial Chamber, 20 June 2007, para 688; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgement, Trial Chamber, 2 August 2007, para 146; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 132, 274; *Prosecutor v. Katanga et al.*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para 287. In favor of the possibility of an omission also Ambos, *Treatise on ICL II* (2014), 165; Vöneky, in: Fleck (ed.), *Handbook* (3rd ed., 2013) 672.

¹⁰⁸ Dörmann, *Elements of War Crimes*, 40-1.

both intent and recklessness.¹⁰⁹ The *ad hoc* Tribunals have interpreted ‘wilful’ as requiring that the death was caused:

- by a perpetrator who acted either:
- intentionally; or
- recklessly, that is, the perpetrator intended to cause serious/grievous bodily harm and was reasonably aware that death was a likely consequence of his or her actions.¹¹⁰

Death, which is the accidental, unforeseeable consequence of the actions of the accused, is therefore not covered. Premeditation is not required as *mens rea*.¹¹¹

Both the *mens rea* and the *actus reus* can be inferred either directly or circumstantially from the evidence in the case.¹¹² With regard to the latter, international courts and tribunals have considered that the death can be proved beyond reasonable doubt even if the body of the victim cannot be recovered.¹¹³

¹⁰⁹ See Zimmerman, in: Sandoz *et al.* (eds.), *Commentary, Article 85*, para 3474; Ambos, *Treatise on ICL I* (2014), 165; Werle and Jessberger, *Principles* (2014) 426. The French version of the commentary uses the concept of ‘dol éventuel’ for recklessness. See also the ICTY Trial Judgement in *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, which affirmed: ‘The *mens rea* constituting all violations of Article 2 of the Statute [containing the list of grave breaches of the four Geneva Conventions] includes both guilty intent and recklessness which may be likened to serious criminal negligence’, para 152.

¹¹⁰ See *e.g. Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para 36. The Chambers of the Tribunal have at times used slight variations in the wording of the concept of recklessness for the purpose of the crime of wilful killing, see *e.g. Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Volume I, Trial Chamber, 29 May 2013, para 112; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 422; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 15 March 2002, para 324; *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para 217; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, paras 235–236; *Prosecutor v. Vasiljević*, IT-98-32-T, Judgement, Trial Chamber, 29 November 2002, para 205; *Prosecutor v. Tolimir*, IT-05-88/2-T, Judgement, Trial Chamber II, 12 December 2012, para 716; *Prosecutor v. Perišić*, IT-04-81-T, Judgement, Trial Chamber I, 6 September 2011, para 102; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber I, 17 January 2005, para 556; *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para 153; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras. 437 and 439; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 248; *Prosecutor v. Sesay*, SCSL-04-15-T, Judgement, Trial Chamber, 26 October 2009, para 142; *Prosecutor v. Brima Kamara et al.*, SCSL-04-16-T, Judgement, Trial Chamber, 20 June 2007, para 688; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgement, Trial Chamber, 2 August 2007, para 146; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, paras. 381, 386; in that judgement the ICTY confirmed the findings of *Prosecutor v. Stakić*, IT-97-24-T, Judgement, Trial Chamber, 31 July 2003 that both *a dolus directus* and *dolus eventualis* are sufficient to establish the crime. The threshold of *dolus eventualis* entails the concept of recklessness, but not that of negligence or gross negligence. Other Chambers speak of ‘indirect intent’ which ‘comprises the perpetrator’s knowledge that the death of the victim was the probable or likely consequence of his act or omission’, *e.g. Prosecutor v. Mucić*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 435; *Prosecutor v. Perišić*, IT-04-81-T, Judgement, Trial Chamber, 6 September 2011, para 104; *Prosecutor v. Delić*, IT-04-83-T, Judgement, Trial Chamber, 15 September 2008, para 48; *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 January 2005, para 235. See generally with regard to article 30 ICC Statute Ambos, *Treatise on ICL I* (2013) 276-8; Werle and Jessberger, *Principles* (2014) 426-7.

¹¹¹ *Prosecutor v. Nindiliyimana*, ICTR-00-56-T, Judgement, Trial Chamber, 17 May 2011, para 2143; *Prosecutor v. Brima*, SCSL-04-16-T, Judgement, Trial Chamber, 20 June 2007, para 690; *Prosecutor v. Orić*, IT-03-68-T, Judgement, Trial Chamber, 30 June 2006, para 348; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 386.

¹¹² *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 387. See also para 3 of the General Introduction to the Elements of Crimes.

¹¹³ See for example *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 15 March 2002, para 326; *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005, para 260; *Prosecutor v. Dorđević*, IT-05-87/1-T, Trial Judgement, 23 February 2011, para 1708; *Prosecutor v. Bošković and Tarčulovski*, IT-04-82-T, Judgement, Trial Chamber, 10 July 2008, para 305; *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para 486; *Prosecutor v. Limaj*, IT-03-66-T, Judgement, Trial Chamber, 30 November 2005, para 241; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 383.

2. Paragraph 2(a)(ii): ‘Torture or inhuman treatment’

86 These acts or omissions are grave breaches under all of the Conventions (articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV). They are prohibited with regard to all protected persons (see articles 12 GC I, 12 GC II, 13 GC III and 27, 32 GC IV).¹¹⁴

87 a) **Torture.** Torture is not specifically defined in any international humanitarian law treaty. It is however defined in other treaties, such as the Torture Convention of 1984, and as a crime against humanity in the Rome Statute (article 7 para 2 (e)). While there is no difference in the two definitions as to the requirement of inflicting severe physical or mental pain or suffering, the Torture Convention contains two further requirements, which are not included in the crime against humanity definition, namely that:

‘[the] pain or suffering, [must be] inflicted on a person for such purposes as obtaining [...] information or a confession, punishing [...], or intimidating or coercing [...], or for any reason based on discrimination of any kind,’

and the

‘pain or suffering [must be] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.¹¹⁵

88 Over the years, the *ad hoc* Tribunals have developed an extensive case law on the customary law definition of torture for the purposes of IHL. The jurisprudence evolved slightly over time, but always took the Torture Convention as guidance.¹¹⁶ It always required the pain or suffering to be inflicted to obtain a specific prohibited purpose along the lines of the Torture Convention. It varied, however, as to whether the list of prohibited purposes was exhaustive or illustrative under customary international law. It also established that the requirement of official involvement under the Torture Convention and relevant under a human rights regime could not be applied as such in the context of international humanitarian law. States relied heavily on this jurisprudence when drafting elements for this war crime and this explains why the specific elements of torture as a crime against humanity and as a war crime are drafted differently. For the war crime, the Elements document therefore contains the following specific elements:

- (1) The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
- (2) The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

89 This approach was largely confirmed in a judgement of the ICTY rendered after the end of the negotiations of the Preparatory Committee. In the *Kunarac et al.* case, the Trial Chamber held that:

‘Three elements of the definition of torture contained in the Torture Convention are, however, uncontentious and are accepted as representing the status of customary international law on the subject:

- (i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- (ii) This act or omission must be intentional.
- (iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal.

¹¹⁴ For further discussion of the origins and the customary nature of the prohibition, see Henckaerts and Doswald-Beck, *Customary IHL* (2005) 315, 321, 574.

¹¹⁵ See article 1 para 1 of the Torture Convention.

¹¹⁶ See also, Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 110 *et seq.*

On the other hand, [the following] elements remain contentious:

- (i) The list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture.
[...]
- (iii) The requirement, if any, that the act be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person. There are some doubts as to whether other purposes have come to be recognised under customary international law.

[...] The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.¹¹⁷

In the same case, the ICTY Appeals Chamber confirmed ‘that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention’.¹¹⁸ Contrary to the cautious approach of the ICTY in, for example, the *Kunarac* Trial Chamber judgement, States, in line with other case law of the *ad hoc* Tribunals¹¹⁹, rejected explicitly the idea that the list of prohibited purposes from the Torture Convention should be construed as being exhaustive and therefore kept the words ‘for such purposes as’ in the Elements.¹²⁰

As pointed out by the ICTY, there is no requirement that the conduct be *solely* perpetrated for a prohibited purpose. It is therefore sufficient that the prohibited purpose is simply part of the motivation for the conduct and need not to be the predominant or sole purpose.¹²¹ It

¹¹⁷ *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, Trial Chamber, 22 February 2001, paras. 483–96.

¹¹⁸ *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, Appeals Chamber, 12 June 2002, para 148. See also *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005, para 284; *Prosecutor v. Limaj*, IT-03-66-T, Judgement, Trial Chamber, 30 November 2005, para 240; *Prosecutor v. Haradinaj*, IT-04-84bis-T, Retrial Judgement, Trial Chamber, 29 November 2012, para 419; *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para 514; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 488; *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Judgement, Trial Chamber, 27 March 2013, para 49.

¹¹⁹ See e.g. *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 470; ICTY, *Prosecutor v. Limaj*, IT-03-66-T, Judgement, Trial Chamber, 30 November 2005, para 239; *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para 515; *Prosecutor v. Haradinaj*, IT-04-84bis-T, Retrial Judgement, Trial Chamber, 29 November 2012, para 418; *Prosecutor v. Martić*, IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para 77; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, paras 486–7.

¹²⁰ See also Ambos, *Treatise on ICL II* (2014), 90, 165.

¹²¹ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 471. See also *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, Appeals Chamber, 22 February 2001, para 155; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, paras. 484, 487; ICTY, *Prosecutor v. Kvočka*, IT-98-30/1-T, Judgement, Trial Chamber, 2 November 2001, para 153; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 15 March 2002, para 184; *Prosecutor v. Haradinaj*, IT-04-84-T, Judgement, Trial Chamber, 3 April 2008, para 128; *Prosecutor v. Haradinaj*, IT-04-84bis-T, Retrial Judgement, Trial Chamber, 29 November 2012, para 418; *Prosecutor v. Limaj*, IT-03-66-T, Judgement, Trial Chamber, Judgement, 30 November 2005, para 219; *Prosecutor v. Martić*, IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para 77; *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para 515. In the specific case of rape, the ICTY Appeals Chamber held that it is irrelevant that the perpetrator may have had a different motivation, if he acted with the requisite intent and for one of the prohibited purposes, *Prosecutor v. Kunarac et al.*, IT-96-23T & IT-96-23/1-T, Judgement, Appeals Chamber, 12 June 2002, para 153 (re-affirmed in *Prosecutor v. Limaj*, IT-03-66-T, Judgement, Trial Chamber, 30 November 2005, para 238; *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para 515. The Appeals Chamber held that ‘even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct ... in pursuance of one of the purposes prohibited by the definition of the crime of torture, in particular the purpose of discrimination’,

stated however as well that in the absence of such purpose even a very severe infliction of pain would not qualify as torture.¹²²

92 If one compares the elements of torture and inhuman/cruel treatment in the Elements of Crimes, the purpose requirement is the only distinguishing feature. Thus, the elements do not follow the *ad hoc* Tribunals' case law, in which it is consistently indicated that 'the degree of suffering required to prove cruel or inhuman treatment was not as high as that required to sustain a charge of torture'.¹²³ The *ad hoc* Tribunals refer to 'severe' pain or suffering for the crime of torture and 'serious' pain or suffering for the crimes of inhuman/cruel treatment.¹²⁴ One may question – in the light of the consistent case law of the *ad hoc* Tribunals – whether the approach taken in the elements, *i. e.* to refer for both crimes to 'severe' pain or suffering is well established under customary international law.

93 The *ad hoc* Tribunals have not specifically identified the threshold level of suffering or pain to be inflicted for mistreatment to amount to torture.¹²⁵ It depends very much on the individual circumstances of each case.¹²⁶ The Tribunals have identified objective and subjective factors. In the *Brđanin* case the ICTY held as follows:

'In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim's age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm. Permanent injury is not required for torture, evidence of the suffering need not even be visible after the commission of the crime'.¹²⁷

94 There is a wealth of case law from international criminal tribunals and post WW II trials that identify practices found to amount to the war crime or grave breach of torture.¹²⁸

No mental element has been added to element 1. Therefore, the article 30 standard applies with regard to the prohibited conduct and consequences.¹²⁹ With regard to the purposes to

Prosecutor v. Kunarac et al., IT-96-23-T & IT-96-23/1-T, Judgement, Appeals Chamber, 12 June 2002, para 153. See also Ambos, *Treatise on ICL II* (2014) 90, 165; Werle and Jessberger, *Principles* (2014) 436.

¹²² *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 486.

¹²³ For example, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 510; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgement, Trial Chamber, 2 November 2001, para 161; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 483; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 246.

¹²⁴ See for example *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para. 543.

¹²⁵ For example, *Prosecutor v. Kunarac et al.*, IT-96-23-A & IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para 149.

¹²⁶ For some examples of case law see Dörmann, *Elements of War Crimes* (2003) 51–55.

¹²⁷ *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 484. See also for objective factors *Prosecutor v. Kvočka*, IT-98-30/1-T, Judgement, Trial Chamber, 2 November 2001, para 143; *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para 514; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 25 March 2002, para 182; *Prosecutor v. Limaj*, IT-03-66-T, Judgement, Trial Chamber, 30 November 2005, para 237; *Prosecutor v. Haradinaj*, IT-04-84bis-T, Retrial Judgement, Trial Chamber, 29 November 2012, para 417; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgement, Appeals Chamber, 3 May 2006, para 300; *Prosecutor v. Martić*, IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para 75. For subjective factors ICTY, *Prosecutor v. Kvočka*, IT-98-30/1-T, Judgement, Trial Chamber, 2 November 2001, para 143; *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para 514; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 25 March 2002, para 182; *Prosecutor v. Limaj*, IT-03-66-T, Judgement, Trial Chamber, 30 November 2005, para 237; *Prosecutor v. Haradinaj*, IT-04-84bis-T, Retrial Judgement, Trial Chamber, 29 November 2012, para 417; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgement, Appeals Chamber, 3 May 2006, para 300; *Prosecutor v. Martić*, IT-95-11-T, Judgement, Trial Chamber, para 75.

¹²⁸ See *e.g.* *Prosecutor v. Mucić*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras 495–496 and 971–977; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, paras 350–352; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, paras 492 and 503–511 and 524; *Prosecutor v. Martić*, IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para 76; IMTPE Judgement, 4 November 1948, para. 406.

¹²⁹ The case law shows that negligent or reckless behavior cannot form the basis for responsibility for torture, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 25 March 2002, para 184; *Prosecutor v. Kunarac*

be obtained specific intent is required. As to the element of severity, paragraph 4 of the General Introduction to the Elements of Crimes applies, *i. e.*, the perpetrator does not have to personally complete a particular value judgement.

b) Inhuman treatment. The IHL treaties do not contain a specific definition of inhuman treatment. However, the essence of this crime may be derived from a number of provisions, in particular from the Geneva Conventions, but also from Additional Protocol I in so far as it reflects customary international law. The ICTY has identified for that purpose articles 12 GC I, 12 GC II, 13, 20, 46 GC III, 27, 32 GC IV, common article 3 GC and articles 75 Add. Prot. I, 4, 7 Add. Prot. II. It concluded that any behavior contrary to these norms constitutes inhuman treatment.¹³⁰ Based on this understanding, the Tribunals identified the essence of the crime as follows:

Inhuman treatment involves acts or omissions against protected persons which are intended to and do cause serious mental or physical sufferings or injury or which constitute a serious attack on human dignity.¹³¹ Following that jurisprudence, the grave breach does not only include an attack on the physical integrity or health of the persons protected, but also the infliction of serious mental harm as well as measures which seriously violate the human dignity of protected persons. By referring to serious mental or physical suffering the crime also covers in the view of the ICTY suffering that falls short of the threshold of severe mental or physical suffering which is required for the grave breach of torture.¹³²

The Elements of Crimes take a somewhat different approach in a departure from the established jurisprudence of the ICTY. The *actus reus* is defined as follows:

‘1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.’

The difference from the ICTY case law consists in the following: The level of pain and injury is qualified in the same way as for torture (‘severe’)¹³³ and a conduct constituting a serious attack on human dignity is not considered a part of the crime. States took the view that such an attack would rather constitute an ‘outrage upon personal dignity, in particular humiliating and degrading treatment’ in the sense of article 8 para 2 (b) (xxi) of the Statute. The *ad hoc* Tribunals have consistently maintained their jurisprudence, which differs from the approach in the Elements of Crimes, even after and despite the latter’s adoption.¹³⁴ It remains to be seen whether the ICC will adopt the *ad hoc* Tribunals’ view or be guided by the Elements of Crimes.

et al., IT-96-23T & IT-96-23/1-T, Judgement, Trial Chamber, 22 February 2001, para 497; *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement Trial Chamber, 10 December 1998, para 162; *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 September 1998, para 594. It is required that the perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether mental or physical, to his or her victims, *Prosecutor v. Kunarac et al.*, IT-96-23T & IT-96-23/1-T, Judgement, Trial Chamber, 22 February 2001, para 153; *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgement, Trial Chamber, 27 September 2007, para 515; *Prosecutor v. Haradinaj*, IT-04-84bis-T, Retrial Judgement, Trial Chamber, 29 November 2012, para 418; *Prosecutor v. Limaj*, IT-03-66-T, Judgement, Trial Chamber, 30 November 2005, para 238.

¹³⁰ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras. 520 and 543.

¹³¹ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras. 442 and 543. This finding has been confirmed by *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para 39.

¹³² See under torture and *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, 29 May 2013, para 119, fn 236 with further references; Werle and Jessberger, *Principles* (2014) 440–1 with further references; Ambos, *Treatise on ICL II* (2014), 165–6.

¹³³ See mn 92.

¹³⁴ See in particular *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras. 516–544; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 446; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 236; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para 256; *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, paras. 154–155; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para 39; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 113.

- 98 The comment made for the war crime of torture on the difficulty of setting a specific threshold level of suffering or pain also applies to this war crime.¹³⁵ There is however a wealth of case law in particular from the *ad hoc* Tribunals that can serve as guidance.¹³⁶ International criminal tribunals found the following examples to amount to inhuman treatment: the forcible digging of trenches under dangerous conditions or the use of prisoners of war as human shields,¹³⁷ beatings, certain inhuman living conditions in a detention centre, attempted murder,¹³⁸ deliberately hiding from ICRC representatives the existence of detainees in order to cause severe mental suffering to the detainees,¹³⁹ or sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim (rape is thereby prohibited, as well as all forms of sexual violence not including penetration).¹⁴⁰ The severity of the conduct must be assessed in light of the circumstances of the case, specifically taking into account ‘the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health’.¹⁴¹
- 99 No mental element has been added to element 1. Consequently, the article 30 standard applies.¹⁴² As to the element of severity, paragraph 4 of the General Introduction to the Elements of Crimes applies, which means that the perpetrator does not have to personally complete a particular value judgement.
- 100 **c) Biological experiments.** The term ‘biological experiments’ is not defined in any provision of the Geneva Conventions. The term in its ordinary meaning covers conduct the primary purpose of which is to study the (unknown) effects of a product or situation (e.g. extreme cold or altitude) on the human body. The grave breach was included in the Conventions as a consequence of the criminal practices to which certain prisoners were subjected during the Second World War. Since the Second World War¹⁴³ no case law has developed dealing specifically with this crime. While the First and Second Geneva Conven-

¹³⁵ See for example *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 25 March 2002, para 131: ‘The assessment of the seriousness of an act or omission is, by its very nature, relative. All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex, and health. The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious’.

¹³⁶ Dörmann, *Elements of War Crimes* (2003) 66–69.

¹³⁷ See ICTY, *Prosecutor v. Blaskić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, paras 713–716 and para 738.

¹³⁸ See e.g. *Prosecutor v. Orić*, IT-03-68-T, Judgement, Trial Chamber, 30 June 2006, para 352; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, paras 115, 117 *et seq.* For a number of other examples coming from human rights case law, see *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras 534–541; Dörmann, *Elements of War Crimes*, 66–69.

¹³⁹ *Prosecutor’s Office of BiH v. Andrun*, X-KRŽ-05/42, Verdict (BiH Ct, App. Div., 19 Aug. 2008), at p. 36: ‘The Accused deliberately and intentionally prevented the International Red Cross in its humanitarian mission in order to cause severe mental suffering to the detainees. The witness Enver Bojčić said that it was psychologically devastating for them and that they saw the act concerned as they were outside the law and that they could be killed by anyone.’ The perpetrator was found guilty of inhuman treatment.

¹⁴⁰ *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 116 with further references.

¹⁴¹ *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 119 with further reference. See also Werle and Jessberger, *Principles* (2014) 441; Zimmermann and Geiss, *Münchener Kommentar*, § 8 VStGB, mn. 139–40 with further references.

¹⁴² Werle and Jessberger, *Principles* (2014) 441, 391. See however, *Prosecutor v. Prlić, et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 120 with further reference: ‘at the moment of the act or omission, the direct perpetrator must have “had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission”’.

¹⁴³ See U.S. Military Tribunal, *Brandt et al.*, A.D. 1947 296–298; carrying out of medical experiments on prisoners of war and civilians; U.S. Military Tribunal, *The Milch case* (1947) 355 *et seq.*

tions refer to ‘biological experiments’ (articles 12 GC I, 12 GC II), several provisions of the Geneva Conventions and Additional Protocol I speak of ‘medical or scientific experiments’ (articles 13 GC III, 32 GC IV, 11 Add. Prot. I) giving some additional clarification. It is understood that the concepts of biological experiments and medical or scientific experiments considerably overlap. The specific elements of the crime were drafted on this basis for the ICC Statute:

1. The perpetrator subjected one or more persons to a particular biological experiment.
2. The experiment seriously endangered the physical or mental health or integrity of such person or persons.
3. The intent of the experiment was non-therapeutic and it was neither justified by medical reasons nor carried out in such person’s or persons’ interest.

Contrary to some initial proposals during the negotiations of the elements of crimes, the crime does not require that death or serious bodily or mental harm be caused. States agreed that the threshold for the grave breach under article 11 para 4 of Additional Protocol I (‘seriously endangers the physical or mental health or integrity of any person’) would also apply to this crime and drafted element 2 accordingly. Thus, the concrete danger of the mentioned harm is sufficient for the crime to be completed, not only when the harm actually occurs. To know whether a person’s health has been seriously endangered is a matter of judgement and a court should determine this not only on the basis of the conduct of the perpetrator, but also on the foreseeable consequences having regard to the state of health of the person subjected to them. 101

Element 3 recognizes that the prohibition of *biological experiments* does not prevent doctors from trying new therapeutic methods which are justified on medical grounds and are dictated solely by a desire to improve the patient’s condition.¹⁴⁴ The prohibition aims to prevent using protected persons as guinea-pigs. The chosen formulation combines aspects of article 11 para 3 of Additional Protocol I, article 13 of the Third Geneva Convention and article 32 of the Fourth Geneva Convention. However, it neither repeats the exact language nor all the detail. Unlike the specific war crime of carrying out medical or scientific experiences under article 8 para 2 (b) (x),¹⁴⁵ the present elements of crime do neither specify that consent is not a defence, nor give clarification as to the relevant medical standards. It is worth recalling that the prohibition of biological experiments contained in the Geneva Conventions is absolute, as wounded or sick persons or detained persons cannot validly give consent to a particular biological experiment which endangers their physical or mental health or integrity. Consent can only justify treatment of an eminently therapeutic nature. 102

As for the *actus reus*, there is clearly overlap between the crime under consideration and the war crime under article 8 para 2 (b) (x). The latter is however wider in so far as it protects persons which are not protected by the four Geneva Conventions, in particular those who do not fulfil the nationality criteria of article 4 of the Fourth Geneva Convention. 103

No mental element has been added to the elements. Consequently, the article 30 standard applies.¹⁴⁶ Given that element 3 refers to the character of the experiment and not to a specific intent of the perpetrator, this element is rather a material element (a circumstance). 104

¹⁴⁴ E.g. Pictet (ed.), *Commentary III, Article 13*, 141; *id.* (ed.), *Commentary IV, Article 147*, 598.

¹⁴⁵ See fn. 46 of the Elements of Crimes. Article 11 para 2 Add. Prot. I explicitly states that it is prohibited to carry out medical or scientific experiments even with the consent of the person. However, in one post-Second World War Trial (the *Doctors’ Trial*, in UNWCC, LRTWC, vii, pp 49–50) the judgement outlined ten basic principles to be observed while performing medical experiments, in order to satisfy moral, ethical and legal concepts. One of these principles was stated as follows: the ‘voluntary consent of the human subject is absolutely essential’ (see also *Brandt and Others Case*, in: *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, i, 11 *et seq.*; see also article 3 ECHR, article 5 ACHPR and article 7 ICCPR) and it must be given freely and by a person who has legal capacity; the ‘duty and responsibility of ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment’; it cannot be delegated to another.

¹⁴⁶ See however Werle and Jessberger, *Principles* (2014) 439–40, who submit that it is sufficient that the perpetrator acts with ‘indirect intent’, thus less would be necessary than what article 30 para. 2 ICC Statute requires. They derive this from article 11 para 4 Add. Prot. I, which uses the term ‘wilful’ and upon which, in their view, the definition in the ICC Statute is based.

3. Paragraph 2(a)(iii): ‘Wilfully causing great suffering, or serious injury to body or health’

105 These acts or omissions constitute grave breaches under all of the Conventions (articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV). The criminalization is based on various prohibitions in all four Geneva Conventions (e.g. articles 12 GC I, 12 GC II, 13 GC III and 27, 32 GC IV). It is an expression of the obligation to treat protected persons humanely and to respect at all times their physical and mental integrity. The Elements of Crimes only contain one specific element, which reads as follows:

‘1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.’

106 In accordance with the case law of the ICTY, this element recognizes that the crime is not limited to causing physical suffering or pain, but includes also the causing of mental suffering or pain.¹⁴⁷ While acts of torture may also fit this definition, contrary to the war crime of torture, this war crime refers to suffering which is caused without a specific purpose. It could be carried out for mere sadism or for no reason at all.¹⁴⁸ It seems that the terms ‘great’ and ‘serious’ indicate that this war crime can also include conduct that falls short of the threshold of severe mental or physical suffering which is required for the war crime of torture.

107 For the purpose of distinguishing this war crime from the war crime of inhuman treatment, the ICTY explained that the present would not cover harm relating solely to the victim’s human dignity.¹⁴⁹ Given that States decided not to include the commission of a serious attack on human dignity in the Elements of Crimes of inhuman treatment, there is hardly any difference between the two crimes in the Elements of Crimes, unless injury is caused, which does not at the same time lead to great physical or mental pain.

108 The jurisprudence of international courts and tribunals has consistently taken the view that the suffering, the first alternative of this grave breach, could be either physical or mental.¹⁵⁰ With regard to the causation of serious injury to body or health, the second alternative, some ICTY Trial Chambers as well as the ICTY Appeals Chamber found that the term ‘health’ could include mental health.¹⁵¹ States negotiating the ICC Elements of Crimes took the view, however, that it would be difficult to conceive of mental injury.¹⁵² The Elements of Crimes for this war crime therefore only include ‘mental or physical’ in relation to the suffering caused.

109 Like for the war crimes of torture and inhuman treatment, the assessment of the seriousness of an act or omission is, by its very nature, relative. All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health. The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious.¹⁵³ As pointed out in the *Krstić* case, the harm or suffering ‘need not cause permanent and

¹⁴⁷ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 339; *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para 156.

¹⁴⁸ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, paras. 340–341; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 442.

¹⁴⁹ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para 245.

¹⁵⁰ See for, example, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras 506–511, in particular para 509 and *Prosecutor v. Kaing Guek Eay (alias: Duch)*, 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, paras 450–455.

¹⁵¹ See *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para 156; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 424; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para 245; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 339.

¹⁵² Dörmann, *Elements of War Crimes*, 76.

¹⁵³ *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 25 March 2002, para 131. See also *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 21 March 2003, paras. 442–443; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 536, citing European

irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation'.¹⁵⁴ Examples of conduct amounting to causing great suffering or serious injury to body or health could be the mutilation of the wounded, their exposure to useless and unnecessary suffering,¹⁵⁵ or severe beatings or severe forms of mistreatment of detainees.¹⁵⁶ Impermissible disciplinary measures or solitary confinement may amount to inflictions of great suffering.¹⁵⁷

No specific mental element has been added, which means that, in accordance with paragraph 2 to the General Introduction to the Elements of Crimes, the standard of article 30 of the Statute applies. The Elements are however only in conformity with the Statute if the article 30 standard and the standard of 'wilful' are identical. As indicated in article 9 para 3 of the Statute the Elements must not deviate from the Statute. 'Wilfully' is traditionally understood as covering both intent and recklessness and has been interpreted as such by international courts and tribunals.¹⁵⁸ They held that it is not sufficient to prove that the alleged perpetrator had the knowledge that his or her conduct might possibly cause the requisite suffering or injury.¹⁵⁹ Ordinary negligence has not been found to be included in the understanding of the word 'wilful'.¹⁶⁰

As to the elements of 'great' suffering and 'serious' injury, paragraph 4 of the General Introduction to the Elements of Crimes applies, according to which the perpetrator does not have to complete a particular value judgement personally.

4. Paragraph 2(a)(iv): 'Extensive destruction and appropriation of property'

These acts are grave breaches under the First, Second and Fourth Conventions (articles 50 GC I, 51 GC II and 147 GC IV). It proved rather difficult to draft the elements of this crime. The reason for this was that the grave breaches provisions refer back to various articles of the Geneva Conventions which define protected property and establish different levels of protection (for example articles 19, 33 and 34 (fixed medical establishments and mobile

Court of Human Rights, *A v. UK*, para. 20. Crit. regarding the determination of the seriousness threshold Ambos, *Treatise on ICL II* (2014) 166.

¹⁵⁴ *Prosecutor v. Krstić*, IT-98-33-T, Judgement, Trial Chamber, 2 August 2001, para. 513. See also *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 September 1998, para 502; *Prosecutor v. Kaing Guek Eay (alias: Duch)*, 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para. 454.

¹⁵⁵ Pictet (ed.), *Commentary I, Article 50*, 372; Werle and Jessberger, *Principles* (2014) 437.

¹⁵⁶ See e.g. *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras 1012–1018, where the accused was found guilty of the grave breach of causing great suffering or serious injury to body or health for having tied a victim to a roof beam and beating him up, for having struck him with a baseball bat and for having poured gasoline on his trousers setting them on fire and burning his legs.

¹⁵⁷ Wolfrum and Fleck, in: Fleck (ed.), *Handbook* (2nd ed. 2008) 696; Vöneky, in: Fleck (ed.), *Handbook* (3rd ed., 2013) 673; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 15 March 2002, para 183.

¹⁵⁸ See Zimmermann, in: Sandoz et al. (eds), *Commentary, Article 85*, para 3474. The French version of the commentary uses the concept of '*dol éventuel*' for recklessness. The threshold of *dolus eventualis* entails the concept of recklessness, but not that of negligence or gross negligence. See also *Prosecutor v. Blaskić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, which affirmed: 'The *mens rea* constituting all violations of Article 2 of the Statute [containing the list of grave breaches of the four Geneva Conventions] includes both guilty intent and recklessness which may be likened to serious criminal negligence', para 152. See also *Prosecutor v. Kaing Guek Eay (alias: Duch)*, 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para 454; Werle and Jessberger, *Principles* (2014) 437. The ad hoc Tribunals have interpreted 'wilful' as requiring that the act or omission must have been intentional, 'being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury', *Prosecutor v. Krstić*, IT-98-33-T, Judgement, Trial Chamber, 2 August 2001, para 511; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 511. Thus both a *dolus directus* and *dolus eventualis* are sufficient to establish the crime.

¹⁵⁹ See e.g. *Prosecutor v. Martić*, IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para 60; *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 January 2005, para 235 and for more details the commentary on wilful killing.

¹⁶⁰ See e.g. *Prosecutor v. Tolimir*, IT-05-88-2-T, Judgement, Trial Chamber, 12 December 2012, para 715; *Prosecutor v. Perišić*, IT-04-81-T, Judgement, Trial Chamber, 6 September 2011, para 104; *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Judgement, 23 February 2011, para 1708; *Prosecutor v. Delić*, IT-04-83-T, Judgement, Trial Chamber, 15 September 2008, para 48; *Prosecutor v. Orić*, IT-03-68-T, Judgement, Trial Chamber, 30 June 2006, para 348; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Judgement, Trial Chamber, 27 February 2009, para 579.

medical units), article 20 (hospital ships) and articles 35 and 36 (medical transports, including medical aircraft) of GC I, articles 18 (civilian hospitals), 21, 22 (means for land, sea and air transport), 33 (prohibition of pillage and reprisals), 53 (real or personal property in occupied territory), 57 (hospitals in occupied territory) GC IV as well as article 154 GC IV in conjunction with relevant provisions of the 1907 Hague Regulations).¹⁶¹ In the case of appropriation or destruction of property the Conventions lay down distinct standards for specific protected property.¹⁶² This may be illustrated with respect to the protection of civilian hospitals on the one hand and property in occupied territories on the other.

113 Article 18 GC IV defines the protection of civilian hospitals against attacks, i.e. against destruction, in the following terms:

‘Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict. [...]’

114 Article 19 GC IV lays down the stringent conditions under which such civilian hospitals may nevertheless be attacked:

‘The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.’

115 Thus, destruction would be unlawful and covered by this crime if no warning had been given. The protection against destruction applies to all civilian hospitals in the territories of the parties to an international armed conflict.

116 Article 53 GC IV defines the protection of property in occupied territory in a different manner:

‘Any **destruction** by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is **prohibited**, except where such destruction is rendered absolutely necessary by **military operations**’ (emphasis added).

In this case, the protection of the rule is limited to occupied territory and the destruction is only unlawful if it is not rendered absolutely necessary by military operations.

117 Considering these examples, the drafting of the Elements of Crimes had to be done in a way that properly reflected these standards. In the end, it was decided to adopt a generic approach, without spelling out the specific standards. The Elements are therefore derived directly from article 8 para 2 (a) (iv), following the structure indicated in the General Introduction to the Elements of Crimes (paragraph 7), without giving further clarification. In addition to the common elements, including the requirement that the property be protected under one or more of the Geneva Conventions of 1949, the specific elements are defined in the following terms:

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.’

118 Both destruction and appropriation can take various forms. For destruction one may consider setting objects on fire, attacking or otherwise seriously damaging them; for appropriation taking, obtaining or withholding property, theft, requisition, plunder, spoliation or

¹⁶¹ See with regard to the connection between the Fourth Geneva Convention and the 1907 Hague Regulations, Dörmann, *Elements of War Crimes* (2003) 82, in particular fn. 3; and with regard to the various other relevant provisions, *id.*, 85–88 (destruction) and 89–91 (appropriation); see also Ambos, *Treatise on ICL II* (2014) 169–70; Werle and Jessberger, *Principles* (2014) 469–70, 473. Interestingly an ICTY Trial Chamber also refers to provisions of GC III, *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para. 128.

¹⁶² See, for example, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para. 336.

pillage.¹⁶³ A partial destruction of property might also constitute this crime if the partial destruction would qualify as extensive.

The meaning of ‘not justified by military necessity’¹⁶⁴ as contained in article 8 para 2 (a) (iv) of the ICC Statute is crucial with regard to the different levels of protection of property. It is important to note that military necessity covers only conduct that is lawful in accordance with the laws and customs of war. Consequently, a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question and to the extent provided for.¹⁶⁵ This means that in the above-mentioned example of civilian hospitals military necessity cannot be invoked to justify an attack against such a civilian hospital in violation of articles 18 and 19 of the Fourth Geneva Convention. To put it in general terms for this specific crime, in case of a prohibition to destroy or appropriate a type of protected property, which does not foresee the exception of military necessity, destruction or appropriation cannot be justified by the argument that it was justified by military necessity.¹⁶⁶ It would have been desirable to clearly express this understanding of military necessity in the Elements of Crimes.

The ICTY tried to address this problem in respect of the first alternative of this crime – destruction – in the following way:

‘[...] (ii) property was destroyed extensively;
(iii) the extensive destruction regards property carrying general protection under the Geneva Conventions of 1949, or
the extensive destruction not absolutely necessary by military operations regards property situated in occupied territory; [...]’¹⁶⁷

Property carrying general protection under the Geneva Conventions of 1949 in the sense of the ICTY covers property regardless of whether or not it is in occupied territory, such as civilian hospitals, medical aircraft and ambulances.¹⁶⁸ While this approach adds more specificity than the one chosen in the Elements for the ICC, the elements identified by the ICTY must still be read in conjunction with the specific provisions of the Geneva Conventions as indicated expressly in the definition of the crime through the term ‘carried out unlawfully’.

Element 3 of the Elements adopted for this crime clarifies that the requirement of ‘extensiveness’ applies to both alternatives – appropriation and destruction. Thus, an isolated act or incident would generally not be sufficient to constitute this crime.¹⁶⁹ As rightly pointed out by the ICTY – without further reasoning –, there may, however, be exceptions, for example the destruction of a civilian hospital.¹⁷⁰ In light of the destructive power of certain

¹⁶³ On the distinction between destruction and appropriation and the other terms (plunder, pillage *etc.*) traditionally used see Dörmann, *Elements of War Crimes*, 84–95; Ambos, *Treatise on ICL II* (2014) 171.

¹⁶⁴ As pointed out by Fenick in the First Edition of this Commentary, what is justified by military necessity must be determined bearing in mind the information available to the perpetrator at the time and without the benefit of hindsight.

¹⁶⁵ De Preux, in: Sandoz *et al.* (eds.), *Commentary, Article 35*, para. 1389; O’Connell, in: Fleck (ed.), *Handbook IHL* (3rd ed. 2013) 36–38; Greenwood, in: Fleck (ed.), *Handbook IHL* (2nd ed. 2008) 37–8; see also *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, prepared by Melzer (2009) ICRC 78–82.

¹⁶⁶ See also Werle and Jessberger, *Principles* (2014) 471–2, 473–4; for a restrictive interpretation also Ambos, *Treatise on ICL II* (2014) 172–3.

¹⁶⁷ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 583. See also *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para 341.

¹⁶⁸ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 581; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para 336; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 586.

¹⁶⁹ Pictet (ed.), *Commentary IV, Article 147*, 601.

¹⁷⁰ *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para 587; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 567; *Prosecutor v. Blaskić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para 157; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2012, para 126. Pictet (ed.), *Commentary IV, Article 147*, 601, referring to a situation where the destruction is intentional. The ordinary meaning of the term ‘extensive’ does not necessarily

weapons a single act may cause extensive destruction. Thus, the assessment must be made on a case-by-case basis.¹⁷¹

122 Consistent with paragraph 6 of the General Introduction to the Elements of Crimes, the elements as adopted do not repeat the requirement of ‘unlawfulness’. As indicated before, the unlawfulness must be determined pursuant to the specific standards as contained in the primary IHL obligations.

123 No mental element has been added to the elements. Consequently, the article 30 standard applies.¹⁷² The Elements are however only in conformity with the Statute if the article 30 standard and the one applicable to this grave breach are identical. The ICTY distinguished the *mens rea* required for destruction from that for appropriation in the following way:

‘With regards to the *mens rea* requirement for destruction of property the perpetrator must have acted with the intent to destroy the protected property or in reckless disregard of the likelihood of its destruction.

With regard to the *mens rea* requisite of appropriation of property, the perpetrator must have acted intentionally, with knowledge and will of the proscribed result’.¹⁷³

124 When assessing the mental element linked to element 2 (‘[...] not justified by military necessity’), the Court will have to judge the situation as it appeared to the defendant at the time of his or her conduct. If the facts were such as would justify the action by the exercise of judgement, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal.¹⁷⁴

125 As to the element of ‘extensive’, paragraph 4 of the General Introduction to the Elements of Crimes applies, according to which the perpetrator does not have to complete a particular value judgement personally.

126 It should be stressed that this war crime essentially covers conduct against property in the power of the enemy.¹⁷⁵ Destruction of property in the course of the conduct of hostilities, in particular air raids or rocket attacks in enemy territory would fall under the unlawful attack charges under article 8 para. 2 (b), such as (ii), (iii), (iv), (v), (ix), (xiii) and (xxiv).

5. Paragraph 2(a)(v): Compelling a protected person to serve in the hostile forces

127 This conduct is a grave breach under the Third and Fourth Geneva Conventions only (articles 130 GC III, 147 GC IV). It is based on a basic, generally recognized principle of the law of armed conflict that strictly prohibits belligerents from forcing enemy subjects to take up arms against their own country. In particular it protects inhabitants of occupied territories from actions offensive to their patriotic feelings or from attempts to undermine their allegiance to their own country.¹⁷⁶ The one specific element of this crime is defined as follows:

‘1. The perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person’s own country or forces or otherwise serve in the forces of a hostile power.’

imply several incidents or acts, it seems much more related to the size of the destruction or the area covered. Therefore, in the view of this author, destruction of a hospital complex could constitute this war crime as pointed out in the case law.

¹⁷¹ See also *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, paras 126, 130, 29 May 2013.

¹⁷² In the same vein Ambos, *Treatise on ICL II* (2014) 174.

¹⁷³ *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, paras. 489–490; see also *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, 29 May 2013, para 127 for destruction of property. Werle and Jessberger, *Principles* (2014) 471, 474, rightly note that the term ‘wantonly’ in the definition of the crime indicates that indirect intent suffices. *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 577 (iv); *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para 341 (iii). See also Badar, 343–346.

¹⁷⁴ See for example *List and Others*, UNWCC, LRTWC, viii 68 *et seq.*

¹⁷⁵ David, *Principles* (3rd ed. 2002), para 4.153; Pictet (ed.), *Commentary IV, Article 147*, 601; Ambos, *Treatise on ICL II* (2014) 169.

¹⁷⁶ Pictet (ed.), *Commentary IV, Article 51*, 292–293; see also Werle and Jessberger, *Principles* (2014) 447.

The formulation is based on both the grave breaches provisions and article 23 of the 1907 Hague Regulations, which prohibits ‘to compel nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war’ and which forms the basis of the war crime under article 8 para 2 (b) (xv). The word ‘otherwise’ in element 1 indicates that the aspect dealt with in the Hague Regulations – ‘to take part in the operations of war directed against their own country’ – is just one particular example of the prohibited conduct described in the Geneva Conventions – ‘serve in the forces of a hostile power’. This approach shows that there is a large overlap between the grave breaches crime defined in article 8 para 2 (a) (v) of the ICC Statute and the crime defined in article 8 para 2 (b) (xv) of the ICC Statute.¹⁷⁷

The formulation of the Hague Regulations is both wider in some aspects and narrower in others. It is wider in so far as the grave breach provision from the Geneva Conventions suggests that the protected persons must be integrated/enlisted into the armed forces,¹⁷⁸ while the provision from the Hague Regulations could cover participation in the military operations without being integrated into such forces.¹⁷⁹ Article 51 of the Fourth Geneva Convention, which is one of the sources for the grave breach, refers to ‘armed or auxiliary forces’. *Fenrick* suggested in the First Edition that the expression ‘forces’ should be given a broad interpretation including, at a minimum, all entities encompassed by article 43 of the First Additional Protocol which defines ‘armed forces’ as ‘all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates’. Given the protective interest of the persons concerned, such a broad meaning of the term ‘forces’ is justified.

The formulation of the Hague Regulations is narrower in so far as it is limited to participation in military operations. The grave breach refers to all enlistment in the armed forces and may thus cover a broader range of activities.¹⁸⁰

By combining the formulation of the grave breach and the formulation of the Hague Regulations the Elements of Crimes suggest that compelling a protected person to work, which serves military purposes, without being integrated/enlisted in the armed forces, may be covered by this crime. However, both the Third and the Fourth Geneva Convention permit requesting certain types of labour, under specific conditions, for prisoners of war (articles 49 *et seq.*) or protected persons in the sense of the Fourth Convention (articles 51 and 52), which may include, for the latter group, work necessary to meet the needs of the occupying army, but must not involve them in the obligation to take part in military operations.¹⁸¹ Such permitted labour does not fall within this war crime.

During the negotiations leading to the Elements of Crimes some States wanted a clear indication that the crime under article 8 para 2 (a) (v) of the ICC Statute was not limited to compelling a protected person to act against his/her own country or forces, but also against

¹⁷⁷ The specific elements of this war crime read as follows: ‘1. The perpetrator coerced one or more persons by act or threat to take part in military operations against that person’s own country or forces. 2. Such person or persons were nationals of a hostile party’.

¹⁷⁸ This issue is disputed, see Werle and Jessberger, *Principles* (2014) 447-8. The Elements of Crimes, by combining the formulation of the grave breach and the one of the Hague Regulations suggest that integration/enlistment is not required. The explanatory note to the German Code of Crimes Against International Law indicates however that actual integration in the armed forces is required, Explanatory Memorandum of the (German) Code of Crimes Against International Law BT-Drs. 14/8524, p. 29. Compelling to particular acts, without integration, may amount to a crime under article 8 para 2 (b) (xv) under its specific conditions, in particular if it amounts to taking part in the operations of war directed against their own country. See also Wolfrum and Fleck, in: Fleck (ed.), *Handbook* (2nd ed. 2008) 697; Zimmermann and Geiss, *Münchener Kommentar*, § 8 VStGB, mn 248.

¹⁷⁹ However, article 51 GC IV also prohibits in a broad manner compelling protected persons to undertake any work which would involve them in taking part in military operations.

¹⁸⁰ Pictet (ed.), *Commentary IV*, Article 51, 293; Gasser and Dörmann, in: Fleck (ed.), *Handbook IHL* (3rd ed. 2013) 287.

¹⁸¹ See articles 49–57 GC III and 51–52 GC IV.

other countries or forces, in particular allied countries and forces.¹⁸² In the end, the Preparatory Committee felt that this particular case would be covered by ‘otherwise serve in the forces of a hostile power’.

- 133 The term ‘hostile forces’ also suggests that compelling to serve in armed forces allied to the ones of the perpetrator would be covered by the crime as well.¹⁸³
- 134 The term ‘to compel’ found in the Geneva Conventions, which has been replaced in the Elements of Crimes with the term ‘to coerce’, was understood as also covering certain forms of pressure or propaganda aimed at securing enlistment in the armed forces.¹⁸⁴ It is submitted that such pressure or propaganda must reach a certain threshold for the purposes of this crime.
- 135 No mental element has been added to the elements. Consequently, the article 30 standard applies.

6. Paragraph 2(a)(vi): Wilfully depriving a protected person of the rights of fair and regular trial

- 136 This conduct is a grave breach under the Third and Fourth Conventions (articles 130 GC III, 147 GC IV).¹⁸⁵ The grave breach under the Geneva Conventions has been supplemented by the grave breach of article 85 para 4 (e) in conjunction with paragraph 2 of Additional Protocol I.
- 137 The specific element of the crime under consideration is defined as follows:
- ‘1. The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.’
- 138 The element clarifies the essence of a deprivation of a fair and regular trial, namely the denial of judicial guarantees. The Third and Fourth Geneva Convention specifically detail the conditions under which protected persons may be brought to trial and contain numerous provisions detailing such guarantees (see in particular articles 99–108 GC III and 71–75 and 126 GC IV). The following guarantees may be mentioned:
- the right of the accused to be judged by an independent and impartial court (article 84 para 2 GC III);
 - the right of the accused to be promptly informed of the offences with which he/she is charged (article 104 GC III, article 71 para 2 GC IV);
 - the rights and means of defence, such as the right to be assisted by a qualified lawyer chosen freely and by a competent interpreter (articles 99 and 105 GC III, articles 72 and 74 GC IV);
 - the principle of individual criminal responsibility (article 87 GC III, article 33 GC IV);
 - the principle of *nullum crimen sine lege* (*i. e.*, no crime without law) (article 99 para 1 GC III, article 67 GC IV);
 - the principle of *non bis in idem* (*i. e.*, no punishment more than once for the same act) (article 86 GC III, article 117 para 3 GC IV);
 - the right of the accused to be informed of his rights of appeal (article 106 GC III, article 73 GC IV);
 - the requirement not to be sentenced or executed without a previous judgement pronounced by a regularly constituted court (articles 100–107 GC III, articles 64–70, 74–75 GC IV, common article 3 to the GC).¹⁸⁶

¹⁸² See also Pictet (ed.), *Commentary IV, Article 51*, 293.

¹⁸³ Zimmermann and Geiss, *Münchener Kommentar*, § 8 VStGB, mn 247.

¹⁸⁴ Pictet (ed.), *Commentary IV, Article 51*, 293, with an explanation of the negotiating history.

¹⁸⁵ For further origins and the customary nature of the prohibition, see Henckaerts and Doswald-Beck, *Customary IHL* (2005) 352–354, 574; for case-law post-World War II, see Dörmann, *Elements of War Crimes* (2003) 102 *et seq.*

¹⁸⁶ *Prosecutor v. Kaing Guek Eav* (alias: Duch), 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para 459. See also Werle and Jessberger, *Principles* (2014) 450-1.

During the negotiations of the Elements of Crimes a clear majority of States supported the view that the crime may also be committed if judicial guarantees other than those explicitly applicable to protected persons in the Geneva Conventions are denied – for example, those fundamental guarantees that are only mentioned in article 75 of the 1977 Add. Prot. I, or the requirement of not carrying out executions without previous judgement pronounced by a regularly constituted court laid down in common article 3 to the Geneva Conventions. In order to clarify this, the words ‘in particular’ were added, thus indicating that the crime is not limited to the denial of judicial guarantees contained in the Geneva Conventions. 139

In addition to providing further clarification with regard to the guarantees mentioned in the Geneva Conventions, article 75 of Add. Prot. I,¹⁸⁷ which is generally accepted as reflecting customary international law, contains the following other guarantees not mentioned in the Conventions: 140

- the presumption of innocence (article 75 para 4 (d) Add. Prot. I);
- the right of the accused to be present at his/her trial (article 75 para 4 (e) Add. Prot. I);
- the right of the accused not to testify against himself/herself or to confess guilt (article 75 para 4 (f) Add. Prot. I); and
- the right of the accused to have the judgement pronounced publicly (article 75 para 4 (i) Add. Prot. I)

The judicial guarantees listed in the Geneva Conventions and Add. Prot. I¹⁸⁸ are firmly based in contemporary human rights law. Findings from various human rights bodies may therefore serve as guidance in interpreting the guarantees.¹⁸⁹ 141

In relation to the war crime under article 8 para 2 (c) (iv) of the ICC Statute one footnote in the Elements of Crimes indicates that ‘the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial’. This footnote clarifies that the denial of a single judicial guarantee does not necessarily amount to a denial of a fair and regular trial. The ICC judges will have to decide on a case-by-case basis and assess the importance of the 142

¹⁸⁷ The relevant parts read as follows:

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
- a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
 - b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
 - c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
 - d) anyone charged with an offence is presumed innocent until proved guilty according to law;
 - e) anyone charged with an offence shall have the right to be tried in his presence;
 - f) no one shall be compelled to testify against himself or to confess guilt;
 - g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
 - i) anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and
 - j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limit within which they may be exercised’.

¹⁸⁸ For further clarification of the content of the guarantees, see Henckaerts and Doswald-Beck, *Customary IHL* (2005) 354–374.

¹⁸⁹ See also for the equivalent crime in the German Code of Crimes Against International Law, Zimmermann and Geiss, *Münchener Kommentar*, § 8 VStGB, mn 187.

denial of the judicial guarantee for the trial. It seems justified to apply the same reasoning to this war crime – in particular if the protected person is found not guilty despite a denial of judicial guarantees. Nothing precludes the denial of one guarantee from amounting to a war crime if it is serious enough.

143 The crime can be committed by act or omission.

144 No specific mental element has been added, which means that in accordance with paragraph 2 to the General Introduction to the Elements of Crimes, the standard of article 30 of the Statute applies. The Elements are however only in conformity with the Statute if the article 30 standard and the standard of ‘wilful’ are identical. As indicated in article 9 para 3 of the Statute the Elements must not deviate from the Statute. ‘Wilfully’ is traditionally understood as covering both intent and recklessness and has been interpreted as such by international tribunals.¹⁹⁰

Thus far, no case law of the *ad hoc* Tribunals has evolved. There is however some case law relating to the Second World War that is relevant for this war crime.¹⁹¹

7. Paragraph 2(a)(vii): Unlawful deportation, transfer or confinement

145 These acts or omissions are grave breaches under the Fourth Geneva Convention (article 147 GC IV).

146 a) **Unlawful deportation and transfer.** The deportation and transfer prohibitions are primarily relevant to occupied territory and primarily concerned with prohibiting the forcible movement of protected persons within the territory (transfer) or their forcible expulsion from the territory (deportation) (article 49 para 1 GC IV). The grave breach under the Fourth Geneva Convention also covers unlawful transfer in the sense of article 45, *i. e.* the transfer of protected persons to another country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.¹⁹² Consequently, the criteria for lawful population movement are set out in articles 45 and 49 of the Fourth Convention.

The one specific element of this crime is defined as follows:

‘1. The perpetrator deported or transferred one or more persons to another State or to another location.’

Consistent with paragraph 6 of the General Introduction to the Elements of Crimes, the elements as adopted do not repeat the requirement of ‘unlawfulness’. That requirement is however of crucial importance for the present crime. For the crime to be committed it must be established that the transfer was in violation of article 45 for protected persons in the sense of Part III, Section II of the Fourth Geneva Convention (‘aliens in the territory of a party to the conflict’) or article 49 (in particular paragraphs 2 and 3) for protected persons in the sense of Part III, Section III of the Fourth Geneva Convention (persons in the hands of an occupying power – this category does not cover the occupying power’s own nationals, see article 4 para 1).

¹⁹⁰ See Zimmermann, in: Sandoz *et al.* (eds), *Commentary, Article 85*, para 3474. The French version of the commentary uses the concept of ‘*dol éventuel*’ for recklessness. The threshold of *dolus eventualis* entails the concept of recklessness, but not that of negligence or gross negligence. See also the ICTY Trial Judgement in *Blaškić*, 2000, which affirmed: ‘The *mens rea* constituting all violations of Article 2 of the Statute [containing the list of grave breaches of the four Geneva Conventions] includes both guilty intent and recklessness which may be likened to serious criminal negligence’, para 152. The standard has been expressly confirmed in *Prosecutor v. Kaing Guek Eav* (alias: Duch), 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para 460. See also Werle and Jessberger, *Principles* (2014) 426–7, 452. The *ad hoc* Tribunals have interpreted ‘wilful’ as requiring that the act or omission must have been intentional, ‘being an act which, judged objectively, is deliberate and not accidental’, *Prosecutor v. Krstić*, IT-98-33-T, Judgement, Trial Chamber, 2 August 2001, para 511; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 511. Thus both a *dolus directus* and *dolus eventualis* are sufficient to establish the crime.

¹⁹¹ See Dörmann, *Elements of War Crimes* (2003) 102–104.

¹⁹² Pictet (ed.), *Commentary IV, Article 147*, 599; Vöney, in: Fleck (ed.), *Handbook IHL* (3rd ed. 2013) 675.

Article 45 imposes specific limitations on transferring aliens to other States Parties to the Convention. In particular, the transferring State must satisfy itself that the receiving State is willing and able to apply the Convention; moreover, the former State keeps a residual responsibility. The second relevant limitation is the prohibition to transfer a protected person to a country where he/she has reason to fear persecution for his/her political opinions or religious beliefs. The term ‘transfer’ under this provision is used in a broad sense, covering any movement of protected persons to another State carried out by the Detaining Power on an individual or collective basis.¹⁹³ 147

Article 49 of the Fourth Convention prohibits all forcible transfers – also within occupied territories,¹⁹⁴ which is clarified in the Elements of Crimes with the words ‘to another location’, as well as deportations of protected persons from occupied territory (paragraph 1). Only the security of the population of the occupied territory (e.g. as a result of military operations or intense bombing)¹⁹⁵ or imperative military reasons (e.g. when the presence of the persons hampers military operations)¹⁹⁶ can justify total or partial evacuation of an occupied area. Such evacuations may only take place within the bounds of the occupied territory, except when for material reasons this is impossible. Protected persons must be transferred back to their homes as soon as hostilities in the area in question have ceased (paragraph 2). 148

The transfer or evacuation is only lawful if in addition, to the greatest practicable extent, the protected persons receive proper accommodation, and the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated (paragraph 3). Doubts have been expressed as to whether the conditions under which the evacuation or transfer is undertaken could in themselves transform an otherwise lawful transfer into a criminal offence.¹⁹⁷ In the *Krupp* case after the Second World War the US Military Tribunal adopted the approach taken by Judge Phillips in the *Milch* case, namely that a ‘deportation becomes illegal [...] whenever generally recognized standards of decency and humanity are disregarded’.¹⁹⁸ This finding, as well as the framework set out in the *Blagojević* case¹⁹⁹ could be relevant also in the context of transfers and evacuations under article 49 of the Fourth Geneva Convention and the related grave breach. The ICTY in the *Prlić et al* case specifically mentions article 49 (3) at the same level as article 49 para. 2, thus it is submitted that article 49 para. 3 must also be considered when assessing the unlawfulness.²⁰⁰ 149

The ICTY has interpreted the notion of ‘forcible’ in article 49 para 1 GC IV broadly, covering any type of coercion as well as using a coercive environment, such as untenable living conditions, continued military operations against particular cities and a life in permanent fear and insecurity.²⁰¹ The requirement that the transfer be ‘forcible’ excludes transfers of protected persons who genuinely wish to leave a place to another location.²⁰² As pointed out by the ICTY: 150

‘Transfers motivated by an individual’s own genuine wish to leave, are lawful. In determining whether a transfer is based on an individual’s ‘own wish’ the Chamber is assisted by Article 31 of the Geneva Convention IV. It provides for a general prohibition of physical and moral coercion covering

¹⁹³ Pictet (ed.), *Commentary IV, Article 45*, 266.

¹⁹⁴ Zimmermann, in: Sandoz *et al.* (eds.), *Commentary, Article 85*, para. 3502, especially note 28.

¹⁹⁵ *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para 598; Pictet (ed.), *Commentary IV, Article 49*, 280.

¹⁹⁶ *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, stressing that in this case there must be overriding, *i. e.* imperative military reasons.

¹⁹⁷ Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 83.

¹⁹⁸ *A. Krupp Trial*, in: UNWCC, LRTWC, Vol. X, 144 *et seq.*

¹⁹⁹ *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para 599.

²⁰⁰ *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, 29 May 2013, para 52.

²⁰¹ Zimmermann and Geiss, *Münchener Kommentar*, § 8 VStGB, mn 174–5, with references to the relevant cases.

²⁰² Pictet (ed.), *Commentary IV, Article 49*, 279.

pressure that is direct or indirect, obvious or hidden and further holds that this prohibition applies in so far as the other provisions of the Convention do not implicitly or explicitly authorize a resort to coercion. The jurisprudence of the Tribunal also supports that the term “forcible” should not be restricted to physical coercion. [...] The determination as to whether a transferred person had a “real choice” has to be made in the context of all relevant circumstances on a case by case basis. Forcible transfer is the movement of individuals under duress from where they reside to a place that is not of their choosing.²⁰³

- 151 However, even in cases where those transferred may have wanted – and in fact may even have requested – to be removed, this does not necessarily mean that they had exercised a genuine choice. The trier of fact must consequently consider the prevailing situation and atmosphere, as well as relevant circumstances, including, in particular, the protected person’s vulnerability, when assessing whether the protected person had a genuine choice to remain or leave and thus whether the resultant transfer was unlawful.²⁰⁴
- 152 It should also be stressed that the war crime under consideration is not limited to mass forcible transfer or deportation, but also covers the transfer or deportation of individual protected persons.²⁰⁵
- 153 Contrary to the approach taken for the parallel crime against humanity, States negotiating the Elements of Crimes took the view that the requirement suggested by some delegations that a protected person must be transferred from his/her ‘lawful place of residence’ is not an element of the war crime of unlawful deportation or transfer. The elements of the crime derived from international humanitarian law are not necessarily the same as for the crime against humanity.²⁰⁶
- 154 There is considerable overlap between this war crime and the war crime under article 8 para 2 (b) (viii) of the ICC Statute in so far as both have their basis in article 49 GC IV. The part of the latter crime dealing with the transfer or deportation of the population of the occupied territory is merely a repetition of the crime under consideration. The new element in article 8 para 2 (b) (viii) of the ICC Statute concerns the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies.²⁰⁷
- 155 The crime can be committed by act or omission.²⁰⁸
No mental element has been added to the elements. Consequently, the article 30 standard applies.
- 156 **b) Unlawful confinement.** The Fourth Geneva Convention acknowledges that the Power in whose hands protected persons may find themselves can take measures of control. These may include, but cannot be more severe than, assigned residence or internment. Such measures of deprivation of liberty or confinement may only be taken if specific conditions

²⁰³ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 March 2003, para 519. See also *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 25 March 2002, para 475; *Prosecutor v. Krstić*, IT-98-33-T, Judgement, Trial Chamber, 2 August 2001, paras. 528 *et seq.* with a reference to the drafting history of article 49 of the Fourth Geneva Convention; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, 29 May 2013, paras. 50 *et seq.*

²⁰⁴ *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para 596; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 51.

²⁰⁵ For a diverging view see Gross (1995) 16 *MichJIL* 783, fn. 140.

²⁰⁶ A different assertion has been made in *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, Trial Chamber, 25 March 2002, para 473. The requirement of being ‘lawfully present’ is an element of the crime in both cases – as a war crime and a crime against humanity, see *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para 595.

²⁰⁷ Zimmermann, in: Sandoz *et al.* (eds.), *Commentary, Article 85*, para. 3504 with regard to the parallel situation of article 147 GC IV and article 85 para 4 (a) Add. Prot. I, which form the bases for the equivalent war crimes under the Rome Statute. Given that in the case of article 49 para 6 GC IV the transfer or deportation would involve nationals of the Occupying Power, they would not be protected persons in the sense of article 4 GC IV when transferred or deported by the Occupying Power. Consequently, that conduct would neither constitute a grave breach under the Geneva Conventions nor a war crime under article 8 para 2 (a) (vii), see also Pictet (ed.), *Commentary IV, Article 49*, 283; David, *Principes* (3rd ed. 2002), para. 4.147.

²⁰⁸ *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Volume I, Trial Chamber, 29 May 2013, para 48.

are met (articles 41 *et seq.* and 78 GC IV). If this is not the case, the conduct may amount to the war crime of unlawful confinement.

The one specific element of this crime is defined as follows:

157

‘1. The perpetrator confined or continued to confine one or more persons to a certain location.’

Consistent with paragraph 6 of the General Introduction to the Elements of Crimes, the elements as adopted do not repeat the requirement of ‘unlawfulness’. However, that requirement is of crucial importance for this crime. For this crime to be committed it must be established that the deprivation of liberty was in violation of articles 42–43 for protected persons in the sense of Part III, Section II of the Fourth Geneva Convention (‘aliens in the territory of a party to the conflict’) or article 78 for protected persons in the sense of Part III, Section III of the Fourth Geneva Convention (persons in the hands of an Occupying Power). Confinement in the first case is only lawful if ‘the security of the Detaining Power makes [the assigned residence or internment] absolutely necessary’ and in the second case, if assigned residence or internment are considered ‘necessary, for imperative reasons of security’.²⁰⁹

The Fourth Geneva Convention leaves a great deal to the discretion of the party to the conflict concerning the initiation of such measures of confinement, which led *Ferrić* to conclude in the first edition that

158

‘[u]nlawful confinement is an offence which would probably be very difficult to prove. Indeed, the belligerent Powers can intern any enemy citizens or aliens on their territory if they consider it absolutely necessary for their security. In the same way, Occupying Powers can intern some of the inhabitants of the occupied territories. The illegal nature of confinement would therefore be very difficult to prove in view of the extended powers granted in this matter to States. Obviously, however, internment for no particular reason, especially in occupied territory, could come within the definition of this breach’.²¹⁰

Nevertheless, it must be stressed that the protected person must pose a real threat to the security. It does not seem to be excluded that a lack of such threat can be proved. The ICTY Appeals Chamber pointed out that confinement is permissible only where there are ‘reasonable grounds to believe that the security of the State is at risk’.²¹¹ When holding that ‘[i]t is upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view’,²¹² the Chamber stressed that the burden of proof to establish the security threat lies with the Detaining Power and it is not up to the protected person to demonstrate that he/she does not pose a security threat.

A Trial Chamber of the ICTY defined the general limits for establishing a security threat in the following terms:

159

‘Subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has serious and legitimate reasons to think that they may seriously prejudice its security by means such as sabotage or espionage’.²¹³

Beyond sabotage and espionage, other activities hostile to the security of a State may also be covered. It is undisputed that the direct participation of civilians in hostilities falls into that category, as do other acts that meet the same threshold.²¹⁴ One can infer from the case

160

²⁰⁹ Another ground for internment is contained in article 42 (2) GC IV: ‘If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.’

²¹⁰ See also Pictet (ed.), *Commentary IV, Article 147*, 599.

²¹¹ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para 72.

²¹² *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 329.

²¹³ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 475.

²¹⁴ *Internment in Armed Conflict: Basic Rules and Challenges*, ICRC Opinion Paper, November 2014, available online at: <<https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges#.VKrfilek5A5s>> (accessed: 5 January 2015).

law of the ICTY, referring to ‘actions which are of direct assistance to an opposing party’, that the activities must involve material, direct harm to the adversary and not just mere support to the forces of the party with which the person is sided.²¹⁵

161 According to the ICTY,

‘the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore, a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures, the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.’²¹⁶

162 Case law of the *ad hoc* Tribunals has also indicated that ‘the mere fact that a person [...] has taken sides with the enemy party cannot be considered threatening the security of the country in which he or she resides’. Likewise, the fact that ‘a man is of military age should not necessarily be considered as justifying the application of these measures’.²¹⁷

163 Lastly, any decision to deprive protected persons of their liberty for security reasons must not be taken on a collective basis, but rather on an individual basis.²¹⁸ The Detaining Power may not decide to detain a population or groups of individuals on the basis that all of their members should be presumed to pose a security threat.

164 Article 75 of Add. Prot. I, which reflects customary international law, complements the provisions of the Geneva Conventions in requiring that any person arrested, detained or interned for actions related to an armed conflict must be informed promptly, in a language he or she understands, of the reasons why these measures have been taken.²¹⁹

165 Prosecutions have been conducted in the past by the ICTY based on facts where procedural rights foreseen in the Geneva Conventions have not been granted. This possibility has been reflected in the Elements of Crimes through the inclusion of the words ‘continued to confine’ in element 1. These words are intended to cover cases where a protected person has been lawfully confined in accordance with in particular articles 27, 42 and 78 of the Fourth Geneva Convention, but whose confinement becomes unlawful at a certain moment later on. Confinement only remains lawful if certain procedural rights, which may be found in articles 43 and 78 of the Fourth Geneva Convention, are granted to the persons detained. Given the great margin of discretion left to the party to the conflict concerning the initiation of such measures of confinement, the ICTY concluded that,

‘the [detaining] party’s decision that [internment or placing in assigned residence of an individual] are required must be “reconsidered as soon as possible by an appropriate court or administrative board”’.²²⁰

166 It added that the judicial or administrative body must bear in mind that such measures of detention should only be taken if absolutely necessary for security reasons. If this was initially not the case, the body would be bound to rescind them. The Tribunal concluded that

‘the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely requires’.²²¹

²¹⁵ Van der Wolf (ed.), *War Crimes and International Criminal Law* 95.

²¹⁶ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 577. This view was confirmed by *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 327; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 134. See also ICTY, Closing statement of the Prosecution, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, Annex 1, pp A1-8 *et seq.*; Pictet (ed.), *Commentary IV, Article 42*, 258.

²¹⁷ *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 134 with further references.

²¹⁸ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 578; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para 284; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, 29 May 2013, para 135.

²¹⁹ Pejić (2005) 858 IRRIC 384.

²²⁰ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 580.

²²¹ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 581.

Therefore, '[a]n initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 GC IV²²² or in the case of confinement of civilians in occupied territory, as prescribed in article 78 of the Fourth Geneva Convention. Two procedures are foreseen in article 43 and *mutatis mutandis* in article 78: Any protected person deprived of his/her liberty is entitled to have such action reconsidered as soon as possible by a court or administrative board.²²³ The ICTY held that 'the Detaining Power must, within a reasonable time, determine on a case-by-case basis whether a detained person constitutes a threat to the security of the State'.²²⁴ Reasonable time has been defined by the Appeals Chamber as 'the *minimum* time necessary to make enquiries to determine whether a view that they pose a security risk has any objective foundation such that it would found a "definite suspicion"'.²²⁵ If the internment or placing in assigned residence is maintained, the court or administrative board/competent body must periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.²²⁶ Again, the assessment of the court or board must be done on an individual basis. As pointed out in article 75 of Additional Protocol I reflecting customary international law and building upon article 132 of the Fourth Geneva Convention, the person must be released with the minimum delay possible and in any event as soon as the circumstances justifying the deprivation of liberty have ceased to exist.

These considerations as expressed by the ICTY in the *Delalić* case are now clearly covered in the elements of this crime. The essence of the war crime may consequently be summarized as follows:

The detention or confinement of protected persons will be unlawful in the following two circumstances:

- When a protected person or persons have been detained in contravention of article 42 of the Fourth Geneva Convention, *i.e.* they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and
- where the procedural safeguards required by article 43 of the Fourth Geneva Convention are not complied with in respect of detained protected persons, even where their initial detention may have been justified.²²⁷

The same applies *mutatis mutandis* to the situation in Occupied Territories covered by article 78 GC IV.

No mental element has been added to the elements. Consequently, the article 30 standard applies.²²⁸

²²² *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para 583. This view was confirmed by *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 322; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 136.

²²³ For the requirements of such court or board, in particular the requirement to have the authority to render final decisions on internment or release, see *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 329. More general on the requirements of the reconsideration procedure Pejić (2005) 858 IRRIC 385 *et seq.*

²²⁴ *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, 29 May 2013, para 135 with further references.

²²⁵ *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 328; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 135.

²²⁶ Pejić (2005) 858 IRRIC 384.

²²⁷ *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 322; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para 72; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 139. See also *Prosecutor v. Kaing Guek Eav* (alias: Duch), 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para 465.

²²⁸ Werle and Jessberger, *Principles* (2014) 456; *Prosecutor v. Kaing Guek Eav* (alias: Duch), 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para 466, the Court held that the requisite mental element would include both culpable intent and recklessness, the general mental element applied by the ICTY to all grave breaches.

8. Paragraph 2(a)(viii): ‘Taking of hostages’

171 This act is a grave breach of the Fourth Geneva Convention only (article 147 GC IV). Hostage taking is specifically prohibited in article 34 of the Fourth Geneva Convention. Article 34 is part of the section ‘Provisions common to the territories of the Parties to the conflict and to occupied territories’ and thus applies to all protected persons in the sense of article 4 of the Fourth Convention. The prohibition of hostage-taking is now firmly entrenched in customary international law and considered a fundamental guarantee. It applies to all persons in the power of an adverse party.²²⁹

172 The specific elements of this crime are defined in the following way:

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.⁷

173 The elements are largely taken from the definition in the 1979 International Convention against the Taking of Hostages. Given that this convention is not an international humanitarian law treaty and that it was drafted in a different legal context, the elements of this war crime were slightly adapted to the context of the law of armed conflict. The Hostage Convention defines hostage-taking in Article 1.1 as

‘any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the ‘hostage’) in order to compel a third party, namely a State, an international organisation, a natural or judicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage’.

174 Taking into account the case law from the Second World War, this definition was considered to be too narrow. The text in the Elements of Crimes, therefore, defines the specific mental element in the following terms, adding the emphasized element:

‘The perpetrator intended to compel a State, an international organisation, a natural or legal person or a group of persons, to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons’.

175 The elements are largely in line with the jurisprudence of the ICTY, which is, however, less specific. The Appeals Chamber stated that the essential element of this crime is the use of a threat concerning detainees in order to obtain a concession or gain an advantage, the latter being equally broad as the requirement from the Hostage Convention – ‘any act’. A hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person (material elements) in order to compel a third party to do or to abstain from doing something as a condition for the safety or release of that person (special intent criterion).²³⁰ Thus, control over the protected person must be established, a qualified threat

²²⁹ For further discussion of the origins and the customary nature of the prohibition, see Henckaerts and Doswald-Beck, *Customary IHL* 334, 336, 574; see also article 75 Add. Prot. I. See also *Prosecutor v. Karadžić*, IT-95-5/18-AR72.5, Decision, Appeals Chamber, 9 July 2009, para 21 (‘any conduct of hostage-taking involving POWs could not but be in violation of the Third Geneva Convention’) and *Prosecutor v. Karadžić*, IT-95-5/18-AR73.9, Decision, Appeals Chamber, 11 December 2012, para 16; David, *Principes* (3rd ed. 2002), para 4.144 (‘La prise d’otage reste donc une infraction même lorsque l’otage est un combattant capturé.’); Dinstein, *The Conduct of Hostilities* (2004) 261–262 (‘No hostages can be taken, whether civilians, combatants (especially, prisoners of war), or even neutrals.’); Salinas Burgos (1989) 270 *IRRC* 203; UK, Military Manual, para 16.1.3 (‘The taking of hostages, whether civilian or military, is now prohibited.’); Ambos, *Treatise on ICL II* (2014) 166–7.

²³⁰ *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para 639. See also the finding of the Trial Chamber in the same case:

‘Within the meaning of Article 2 of the Statute [listing the grave breaches of the GC], civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. However [...] detention may be lawful in some circumstances, inter alia to protect civilians or when security reasons so

explicitly or implicitly be made and through the threat the perpetrator must intend to coerce a third party to achieve the fulfillment of a specific condition.

It is disputed whether the war crime requires an unlawful deprivation of liberty at the outset, or whether an initially unlawful deprivation may also amount to hostage taking if the other elements – threat and intended compelling – are met, possibly at a later stage. The jurisprudence of the ICTY, in line with the original ICRC Commentary on GC IV, requires that the deprivation of liberty must be unlawful.²³¹ The Special Court for Sierra Leone and W. Fenrick in the First Edition of this commentary took a different view.²³² The drafting of element 1, in particular the formulation ‘or otherwise held’, seems to support the latter view.

The threat posed must itself be unlawful. This is particularly the case when it comes to threats to continue to detain. In fact not all such threats are unlawful. When, for example, someone, who is lawfully detained and whose release is not legally required, is threatened with continued detention as part of a negotiation for a prisoner exchange or other negotiation, this would not amount to hostage-taking. It would, however, be unlawful as part of such a negotiation to threaten with continued detention if a release were required by law, *e.g.* Articles 132 *et seq.*

The Appeals Chamber of the SCSL held in the *Sesay* case that ‘[i]t does not follow from a requirement that the threat be made with an intention to coerce that the threat be communicated to the third party’. It thus found that ‘the communication of the threat to a third party is not an element of the offence’.²³³ The communication of the threat to a third party may however prove the intent to coerce.²³⁴

No mental element has been added to the two material elements. Consequently, the article 30 standard applies. Element 3 defines a special intent criterion. The perpetrator need not have the special intent at the moment of gaining control over the protected person, he/she may develop the intent at a later stage.²³⁵

C. Article 8 para. 2 lit b: Other serious violations of the laws and customs applicable in international armed conflicts

Literature: Aldrich, G., ‘Yugoslavia’s Television Studios as Military Objectives’, (1999) 1 *ILF* 149; Ambos, K., ‘International Criminal Responsibility in Cyberspace’, in: Tsagourias, N., and Buchan, R., (eds.), *Research Handbook Cyberspace and International Law* (Elgar 2015); Ambos, K., ‘International Criminal Responsibility in Cyberspace’, in: N. Tsagourias and R. Buchan (eds.), *Research Handbook on Cyberspace and International Law*

impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage’,

Prosecutor v. Blaškić, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para 158.

See also *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, paras. 312 *et seq.*

²³¹ *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para 158; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, paras. 312 *et seq.*; *Prosecutor v. Karadžić*, IT-95-5/18-PT, Prosecution Submission Pursuant to Rule 73 bis(D), 31 August 2009, para 65; Pictet (ed.), *Commentary IV, Article 147*, 600. See also Bassiouni, in: Bernhardt (ed.), *EPIL*, ii (1995) 877–881; Füracker, in: *EPIL* (April 2011), available online at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e808?rskkey=6TIsZw&result=38prd=EPIL>> accessed 6 January 2015.

²³² *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, Appeals Chamber, 26 October 2009, para 598. See also Zimmermann and Geiss, *Münchener Kommentar*, § 8 *VStGB*, mn 133; Ambos, *Treatise on ICL II* (2014) 167.

²³³ *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, Appeals Chamber, 26 October 2009, para 582.

²³⁴ See also Lambert J. J., *Terrorism and Hostages in International Law. A Commentary on the Hostages Convention 1979* (1990), 85.

²³⁵ Zimmermann and Geiss, *Münchener Kommentar*, § 8 *VStGB*, mn 210; see also *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, Appeals Chamber, 26 October 2009, para 597: ‘As a matter of law, the requisite intent [for hostage-taking] may be present at the moment the individual is first detained or may be formed at some time thereafter while the persons were held. In the former instance, the offence is complete at the time of the initial detention (assuming all the other elements of the crime are satisfied); in the latter, the situation is transformed into the offence of hostage-taking the moment the intent crystallises (again, assuming the other elements of the crime are satisfied).’

(Cheltenham: Edgar 2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412626>; accessed 26 January 2015; Blix, H., 'Area Bombardment: Rules and Reasons', (1978) *BYbIL* 31; Boothby, W.H., *The Law of Targeting* (2012); Bothe, M., Partsch, K.J. and Solf, W.A., *New Rules For Victims of Armed Conflicts, Commentary* (1982); Dinstein, Y., *The Conduct of Hostilities Under the Law of International Armed Conflicts* (2nd ed., 2014); Dörmann, K., Applicability of the Additional Protocols to Computer Network Attacks, < https://www.icrc.org/eng/assets/files/other/applicability_ofihltozna.pdf> *id.* (with contributions by Doswald-Beck, L. and Kolb, R.), *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003); *id.*, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes', (2003) 7 *MPYbUNL* 341; *id.*, in: *Münchener Kommentar, Strafgesetzbuch – Vol 8, Nebenstrafrecht III* (2nd ed., 2013); Droegge, C., 'Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians', (2012) 886 *IRRC* 533; Elliott, H.W., 'Open Cities and Undefined Places', (1995) *The Army Lawyer*, 39; Fenrick, W.J., 'The Rule of Proportionality and Protocol I in Conventional Warfare', (1982) 98 *MiLRev* 91; *id.*, 'Attacking the Enemy Civilian as a Punishable Offence', (1997) 7 *DukeJComp&IL* 539; Fleck, D. (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (3rd ed., 2013); *id.*, 'Strategic Bombing and the Definition of Military Objectives', (1997) 27 *IsYbHumRts*; Gardam, J.G.G., *Non-Combatant Immunity as a Norm of International Humanitarian Law* (1993); Gaudreau, J., 'Les Réserves aux Protocoles Additionnels aux Conventions de Genève pour la Protection des Victimes de la Guerre', (2003) 849 *IRevRC* 143; Parks, W.H., 'Air War and the Law of War', (1990) 32 *AFLRev* 1; Henckaerts, J.-M. and Doswald-Beck, L., *Customary International Humanitarian Law, i: Rules* (2005); ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (prepared by Nils Melzer), (2009), <<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed 26 January 2015; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2011) 31IC/11/5.1.2, <<http://www.icrc.org/eng/assets/files/red-cross-crescent-contemporary/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>> accessed 26 January 2015; Quéguiner, J.-F., 'Dix Ans Après la Création du Tribunal Pénal International pour l'Ex-Yougoslavie: Évaluation de l'Apport de sa Jurisprudence au Droit International Humanitaire', (2003) 850 *IRevRC* 271; Robertson, H.B., 'The Principle of the Military Objective in the Law of Armed Conflict', in: M.N. Schmitt (ed.), *The Law of Military Operations: Liber Amicorum Professor Jack Grunawalt*, (1998) *International Law Studies* 72; Rogers, A.P.V., *Law on the Battlefield* (2004); Sassöli, M., 'Targeting: The Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts', in: D. Wippman and M. Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century Armed Conflict* (2005); *id.* and Cameron, L., 'The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*', in: N. Ronzitti and G. Venturini, *Current Issues in International Humanitarian Law of Air Warfare* (2006) 35; Schmitt, M.N., 'Wired Warfare: Computer Network Attack and jus in bello', (2002) 846 *IRevRC* 365; *id.*, "'Direct Participation in Hostilities" and 21st Century Armed Conflict', in: H. Fischer *et al.* (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (2004); *id.*, 'Cyber Operations and the Jus in Bello: Key Issues', (2011) 87 *International Law Studies* 93; Solf W.A., 'Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I', (1986) 1 *AmUJIL&Pol*, 128; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004); United State Department of Defense, *Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of the War*, (10 April 1992) 31 *ILM* 3.

I. Preliminary remarks

180 The *chapeau* of article 8 para 2 (b) refers first to 'serious violations of the laws and customs applicable in international armed conflict'. 'Laws and customs applicable in international armed conflict' is an unusual amalgamation of the older notion of the 'laws and customs of war' and modern IHL terminology. In any event, the phrase makes it clear that all war crimes under paragraph b only apply in international armed conflict situations, and that they may be derived from customary and/or treaty IHL. The *chapeau* moreover adds 'within the established framework of international law'. This phrase may have been added to underline that the offenses under article 8 para 2 (b) must be interpreted in line with 'established' IHL, possibly to exclude an all too progressive interpretation of, for instance, offenses derived from Add. Prot. I.

181 The 26 offenses under article 8 para 2 (b) stem from different sources. Roughly, the wording of ten of the 26 offenses under article 8 para 2 (b) is exclusively based on the 1907 Hague Regulations, four provisions based on the grave breaches provisions of Additional Protocol I, six derive from various other provisions of the Protocol or the Geneva Conventions, three base their wording on other international instruments, and another three derive their wording from more than one international instrument. A categorization of these offenses according to the conduct concerned can be found in the introduction to article 8.

II. Offences under paragraph 2(b)

1. Paragraph 2(b)(i): Intentionally directing attacks against civilians not taking direct part in hostilities

The treaty roots of this provision are in the First Additional Protocol (Add. Prot. I). 182 article 51 para 2 Add. Prot. I states in part ‘The civilian population as such, as well as individual civilians, shall not be the object of attack’. This prohibition is part of customary international law.²³⁶ Article 85 para 3 Add. Prot. I indicates that ‘making the civilian population or individual civilians the object of attack’ is a grave breach when the act is committed wilfully and causes death or serious injury. The war crime under the Rome Statute is defined in a slightly different manner. In particular, no result requirement has been introduced and instead of referring to ‘wilfully’ the Statute requires that the attack be intentionally directed. The essence is the same: it is a war crime to directly target the civilian population or individual civilians. The causing of civilian casualties or injuries incidental to an attack at combatants or other military objectives is not covered by this crime, but by article 8 para. 2 (b) (iv). The specific elements of this war crime are drafted in the following manner:

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.’

The elements do not further explain concepts like ‘attack’, ‘civilian population’, ‘civilians’ 183 and ‘taking a direct part in hostilities’. Clarification can however be found in the underlying treaty and customary law bases.

The term ‘attack’ is specifically defined for IHL purposes and means acts of violence 184 against the adversary, whether in offence or in defence (article 49 para 1 Add. Prot I).²³⁷ Its meaning is unrelated to meanings given to the same term under *ius ad bellum*. It refers to any combat action, thus offensive acts and defensive acts (sometimes also called ‘counter attacks’). Thus, for the purpose of this definition, it does not matter whether the acts are committed by an aggressor or by the party acting in self-defence.

The term ‘acts of violence’ denotes physical force. It covers the use of weapons, but acts such 185 as disseminating propaganda, embargos or non-physical forms of psychological, political or economical warfare would not fall under the notion of attack.²³⁸ However, there is no reason to believe that ‘attack’ is limited to kinetic means and methods of combat. Cyber operations, which can be understood as operations against or via a computer or a computer system through a data stream, by means of viruses, worms, *etc.*, that result in physical damage to persons, or damage to objects that goes beyond the computer program or data attacked are to be qualified as ‘acts of violence’, *i. e.* as an attack in the sense of IHL.²³⁹ Such attacks could be

²³⁶ Henckaerts and Doswald-Beck, *Customary IHL*, III (2005) 3–5.

²³⁷ *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para 52; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para 47; *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 January 2005, para 282; *Prosecutor v. D. Milošević*, IT-98-29/1-T, para 943; *Prosecutor v. Perišić*, IT-04-81-T, Judgement, Trial Chamber, 12 December 2007, para 91; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 184; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para 65; *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision, Pre-Trial Chamber, 30 September 2008, para 266; Werle and Jessberger, *Principles* (2014) 477 with further references.

²³⁸ Solf, in: Bothe *et al.*, *Commentary*, Article 49, 289.

²³⁹ ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 36 *et seq.*; Schmitt, *Wired Warfare*, 377 *et seq.*; Dörmann, *Münchener Kommentar*, § 11 VStGB, mn. 32; Dörmann, *Applicability of the Additional Protocols to Computer Network Attacks*, 1., 2.; Droege (2012) 886 IRevRC, 556 *et seq.*; Boothby, *The Law of Targeting*, 81, 384 *et seq.*; Ambos, in Tsagourias/Buchan, *Handbook Cyberspace*, 2015, XX.

for example the opening of a floodgate of a dam, which leads to the death of persons in the flooded areas – it can't make a difference whether such casualties are caused by a bomb or by means of a cyber attack. What defines an attack is not the violence of the means – as it is uncontroversial that the use of biological, chemical or radiological agents would constitute an attack²⁴⁰–, but the violence of the effects or consequences, even if indirect.

186 It is sometimes claimed that cyber operations do not fall within the definition of 'attack' as long as they do not result in physical damage or when its effects are reversible. If this claim implies that a civilian object may be lawfully shut down/rendered dysfunctional in such cases, it is suggested that this is unfounded under existing law – at least if the consequences go beyond mere inconvenience.²⁴¹ It is worth recalling in this context that the ordinary meaning of 'damage' is 'harm [...] impairing the value or usefulness of something [...]'.²⁴²

187 Article 50 para 1 Add. Prot. I defines civilians as all persons who are not members of the armed forces [in the sense of articles 4 A (1), (2), (3) GC III and 43 of Add. Prot. I] or are part of a *levée en masse* (article 4 A (6) GC III). The civilian population includes all persons who are civilians (article 50 para 2 of Add. Prot. I).²⁴³ This also includes – without explicitly mentioning – journalists (see for example article 79 Add. Prot. I), relief personnel, civilian medical and religious personnel, personnel of national Red Cross and Red Crescent societies, personnel of the ICRC, *etc.* In case of doubt, whether a person is a civilian, that person is to be considered a civilian (article 50 para 1 sent 2 of Add. Prot. I).²⁴⁴ The presence of some individual members of the armed forces within the civilian population does not deprive the population of its civilian character (article 50 para 3 of Add. Prot. I).²⁴⁵

²⁴⁰ See *e.g. Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, paras. 120, 124 for chemical weapons; Boothby, *The Law of Targeting* 384.

²⁴¹ Under IHL, attacks may only be directed at military objectives, while objects not falling within that definition are civilian and may not be attacked. The definition of military objectives is not dependent on the method of warfare used and must be applied to both kinetic and non-kinetic means; the fact that a cyber operation does not lead to the destruction of an attacked object is also irrelevant. Pursuant to article 52 (2) of Add. Prot. I, only objects that make an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a definite military advantage, may be attacked. By referring not only to destruction or capture of the object but also to its neutralization the definition implies that it is immaterial whether an object is disabled through destruction or in any other way (*cf.* ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 36 *et seq.*; Dörmann, *Applicability of the Additional Protocols to Computer Network Attacks*, 1., 2.; on the notion of neutralization in the definition of a military objective, Solf, in: Bothe *et al.*, *Commentary, Article 52*, 325; for a different view Schmitt, *Wired Warfare*, 377 *et seq.*; (more nuanced) *id.*, 87 *ILS* 95; Stein and Maruhn (2000) 69/1 *ZaöRV* 35. Boothby takes the view that if a cyber operation targets a computerized control system and by doing so causes damage to that computer's software or data such that the computer is rendered inoperative and the control function ceases to be performed and requires repair, that would render the cyber operation an attack due to the damage done to the control system, Boothby, *The Law of Targeting*, 386. For an analysis of different views Droegge (2012) 886 *IREvRC*, 556 *et seq.* See also Ambos, *ICL Treatise II* (2014) 124.

²⁴² *The Concise Oxford Dictionary* (9th ed., OUP, 1995) 338.

²⁴³ For the customary law nature see Henckaerts and Doswald-Beck, *Customary IHL*, iii (2005) 17–18; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 48; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Judgment, Trial Chamber, 12 December 2007, para. 945; *Prosecutor v. Prlić et al.*, No. IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para. 185.

²⁴⁴ See also *Prosecutor v. Galić*, Case IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para 50; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Judgement, Trial Chamber, 12 December 2007 para 946. In a criminal law trial the prosecutor would have to prove that 'in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant', *Prosecutor v. Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 November 2006, para 140; *Prosecutor v. Perišić*, IT-04-81-T, Judgement, Trial Chamber, 6 September 2011, para 101.

²⁴⁵ For more detail see Solf, in: Bothe *et al.*, *Commentary, Article 50*, 297; see also *Prosecutor v. Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 November 2006, para 136 *et seq.*, with further references; *Prosecutor v. Kordić and Čerkez*, Case IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para 50; *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 January 2005, para 282; *Prosecutor v. Perišić*, IT-04-81-T, Judgement, Trial Chamber, 6 September 2011, para 94; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 187 *et seq.*

The civilian population and individual civilians are protected against direct attacks. This protection is absolute with one limited exception: civilians only lose the protection against attacks if they take a direct part in hostilities.²⁴⁶ This loss of protection is limited to the time they take a direct part in hostilities ('unless and for such time as', see article 51 para 3 of Add. Prot. I). While the customary nature of the rule on loss of protection against direct attacks in case of direct participation is firmly established,²⁴⁷ it is sometimes questioned whether the same strict temporal approach set out in the Additional Protocols also applies under customary international law.²⁴⁸ Others do not question the temporal dimension of the loss of protection under customary law, but argue that the temporal boundary of direct participation is not clearly settled in state practice.²⁴⁹ The Israeli High Court has however asserted that the temporary loss of protection as laid out in Add. Prot. I 'unless and for such time as' reflects customary international law, thus civilians are again protected against direct attack, once their direct participation in hostilities has ended.²⁵⁰

The notion of direct participation in hostilities is not defined in any IHL instrument and also State practice is far from clear, leaving grey areas in the interpretation of the notion. Against this background the ICRC developed after six years of expert consultations its interpretive guidance in 2009.²⁵¹ However, this publication did not finish the international debate. While it seems that in most cases, a concrete situation will in practice be assessed similarly, certain aspects of the guidance continue to be controversially discussed.²⁵² In any case, the guidance is still the only contribution that covers the notion in all its aspects. In light of this only broad strokes are being presented here, to the extent relevant for the present war crime in international armed conflicts. It is uncontroversial that direct participation in hostilities covers 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces'. State practice is not always clear for activities falling short of this. Two things should be stressed: indirect participation in hostilities does not render a civilian liable to attack and the test is 'participation in hostilities', not 'participation in armed conflict' or 'participation in the war effort', which may be wider concepts. The mentioned test had been exposed in the ICRC commentary to the Additional Protocols and served as a basis for the ICTY case law.²⁵³ It seems however to be too narrow at least as it would exclude for example (unlawful) attacks against civilians or civilian objects. Three elements need to be assessed in accordance with the ICRC Interpretive Guidance: the threshold of harm, direct causation and belligerent nexus in order to determine whether a particular conduct amounts to direct participation in hostilities.²⁵⁴

²⁴⁶ It should be stressed that this loss of protection for direct participation has no consequences for their protection under the Fourth Geneva Convention, when they are in enemy hands and fulfil the nationality criteria of article 4 of that Convention: they are still protected persons.

²⁴⁷ For the customary law nature see Henckaerts and Doswald-Beck, *Customary IHL*, iii (2005) 19–23.

²⁴⁸ Parks (1990) 32 *AFLRev* 118.

²⁴⁹ E.g. Schmitt, in: Fischer *et al.* (eds.), *Krisensicherung und Humanitärer Schutz* (2004) 509–510.

²⁵⁰ Israel, The Supreme Court Sitting as the High Court of Justice, *The Public Committee against Torture in Israel and others v. The Government of Israel and others*, 13 December 2006, HCJ 769/02, paras. 23, 29–30 and 38–43.

²⁵¹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.

²⁵² Cf. for a brief overview of aspects still under debate ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, p. 44. For scholarly critique of certain aspects of the Interpretive Guidance and a response to those views by Nils Melzer, see Goodman R. *et al.*, 'The ICRC interpretive guidance on the notion of direct participation in hostilities under international humanitarian law' (2010) *JIL&Pol* 637; Lubell, *Extraterritorial Use of Force against Non-State Actors* (2010) 140–143, 147–155. See also however Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, A/HRC/14/24/Add.6, 28 May 2010, at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>, accessed January 12, 2015.

²⁵³ Pilloud and Pictet, in: Sandoz *et al.*, *Commentary, Article 51*, para. 1944; *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, (5 December 2003, para 4; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Judgement, Trial Chamber, 12 December 2007, para 947; *Prosecutor v. Perisic*, IT-04-81-T, Judgement, Trial Chamber, 6 September 2011, para. 93.

²⁵⁴ The three cumulative conditions identified by the ICRC were largely supported – albeit not in all detail – by the vast majority of participating experts and are formulated as follows: (1) 'The act must be likely to adversely

- 190 When a civilian shows the initially described conduct (e.g. the killing or injuring of an enemy combatant, destruction or damaging of a military installation, providing tactical information to conduct an attack, or transporting weapons to the front) and a nexus to the hostilities exists, such person may lawfully be attacked. An attack is undisputedly prohibited however if the person only provides a general contribution to the war effort (e.g. providing members of the armed forces with food, work in weapons factories, selling of goods to a party to an armed conflict, financing of a party to an armed conflict or sympathizing with a party to an armed conflict).²⁵⁵
- 191 In any case, direct participation in hostilities is the only situation, in which civilians lose their protection against direct attacks. It was therefore misleading for the ICTY to state in a couple of trial chamber judgements that ‘targeting civilians [...] is an offence when not justified by military necessity’,²⁵⁶ in particular coupled with sometimes overly broad understandings of military necessity.²⁵⁷ As has been stated elsewhere (see mn 119 under article 8 para 2 (a) (iv)), military necessity can only be invoked if explicitly foreseen in a norm and cannot be used as an additional justification. When a prohibition is absolute, like the prohibition of attacking civilians not taking a direct part in hostilities, there is no room for invoking military necessity. This has now been correctly recognized by the ICTY Appeals Chamber.²⁵⁸
- 192 Article 51 para 6 of Additional Protocol I prohibits attacking civilians or the civilian population by way of reprisals. The United Kingdom has entered a reservation to that treaty rule.²⁵⁹ The status of the rule as customary international humanitarian law is not firmly established.²⁶⁰ It therefore seems that the prohibition of reprisals currently reflects ‘the established framework of international law’ as mentioned in the *chapeau* of article 8 para 2 (b) of the ICC Statute only for those States and in relation to those States that have accepted the treaty prohibition.²⁶¹

affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).’, ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 46–64. See also Gasser and Dörmann, in: Fleck, *Handbook* (3rd ed., 2013), 255–256. Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act, ICRC, *Interpretive Guidance*, 65 *et seq.*

²⁵⁵ *Prosecutor v. Strugar*, IT-01-42-A, Judgement, Appeals Chamber, 17 July 2008, para 176 *et seq.*; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Judgement, Trial Chamber, 12 December 2007, para 947; Dinstein, *The Conduct of Hostilities*, 28; Werle/Jessberger, *Principles* (2014) 480-1; Ambos, *ICL Treatise II* (2014) 156 *et seq.* with further references.

²⁵⁶ *Prosecutor v. Blaskić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para. 180; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para. 328.

²⁵⁷ See for example Hampson, in: Gutman and Rieff (eds.), *Crimes of War: What the Public Should Know* (1999) 251 *et seq.*

²⁵⁸ *Prosecutor v. Blaskić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 109; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 54, as revised by a ‘Corrigendum’ of 26 January 2005; *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para. 44; *Prosecutor v. Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 November 2006, para. 130; *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 17 June 2004, para 280; *Prosecutor v. D. Milošević*, IT-98-29/1, Judgement, Trial Chamber, 12 December 2007, para 944; *Prosecutor v. Perisic*, IT-04-81-T, Judgement, Trial Chamber, 27 October 2008, para 96.

²⁵⁹ Some authors have questioned whether such reservation is compatible with the object and purpose of the treaty (see article 19 (c) of the VCLT), e.g. Gaudreau (2003) 849 *IRRC* 170.

²⁶⁰ Henckaerts and Doswald-Beck, *Customary IHL*, III (2005) 520–523. See however *Prosecutor v. Kupreskić*, IT-95-16-T, Judgement, Trial Chamber, 14 January 2000, paras. 527–534; *Prosecutor v. Martić*, IT-95-11-R61, Review of the Indictment, reprinted in: 108 *ILR* 39 47.

²⁶¹ This may explain the Declaration that the United Kingdom made when ratifying the Rome Statute: ‘The United Kingdom understands the term ‘the established framework of international law’, used in article 8 (2)(b) and (e), to include customary international law [...]. In that context the United Kingdom confirms and draws to

During the negotiations of the Elements of Crimes it was initially disputed whether this war crime required a specific result to occur, as is the case with article 85 para 3 (a) of Add. Prot. I, *i. e.* causing death or serious injury to body or health. The majority of delegations pointed out that during the negotiations at the Diplomatic Conference in Rome a result requirement was consciously left out. The crime would also be committed if an attack was directed against the civilian population or individual civilians, but, due to the failure of the weapon system, the intended target was not hit. Independently of the understandings of the Diplomatic Conference in Rome, this view finds strong support in the text of the Statute. Since a result requirement has been explicitly added elsewhere in the Statute, namely in article 8 para 2 (b) (vii) ('Making improper use of a flag of truce, of the flag or the military insignia and the uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, *resulting in death or serious personal injury*' (emphasis added)), one might conclude that, compared to the corresponding grave breach provision, a lower threshold was intentionally chosen in order to emphasise that article 8 para 2 (b) (i) is based on article 51 para 2 of Add. Prot. I. The other side, however, argued that it had been always the implicit understanding that the consequence required by the grave breaches provisions would be applicable with regard to war crimes derived from the grave breaches of Additional Protocol I. If there is a weapon failure the conduct should only be charged as an attempt. In the end, consensus was reached based on the majority view. The elements, therefore, do not require the attack to have a particular result.²⁶²

The ICTY has however held that under customary international law the result as described in the grave breach provision of Additional Protocol I is required.²⁶³ In light of article 10 of the ICC Statute, it is not excluded that there are differences between the definitions of crimes in the Statute and other definitions under existing (or developing) international criminal law.

In the First Edition of this commentary, *W. Fenrick* asserted 'that article 8 para 2 (b) (i) of the Statute is substantially similar to the grave breach provision in the Add. Prot. I as 'intentionally directing' in the Statute is essentially similar to 'wilfully' in the Add. Prot. I. Both expressions encompass both intent and recklessness (see discussion for article 30)'.²⁶⁴

However, the discussions during the negotiations of the Elements of Crimes were rather contentious with regard to the mental element. The issue was how to interpret the expression 'intentionally directing an attack against'. It was debated whether the term 'intentionally' only related to the directing of an attack or also to the object of the attack. In the end, the latter approach was adopted in the elements. The crime thus requires that the perpetrator intended to direct an attack (this follows from the application of article 30 para 2 (a) ICC Statute, which requires that the perpetrator meant to engage in the conduct described, in conjunction with paragraph 2 of the General Introduction to the Elements of Crimes) and that he or she intended civilians to be the object of the attack.²⁶⁵ The latter intent requirement, which is explicitly stated in element 3, also appears to be an application of the default rule contained in article 30. In this particular case the standard of article 30 para 2 (b) applies, *i. e.* the perpetrator meant to cause the consequence or is aware that it will occur in

the attention of the Court its views as expressed, *inter alia*, in its statements made on ratification of relevant instruments of international law, including the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977', see UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, No. 16.34.

²⁶² See Dörmann, *Element of Crimes* 130; *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision, Pre Trial Chamber, 30 September 2008, para. 270.

²⁶³ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 67; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para. 191. In the Galić case the ICTY left this question open, *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para. 43.

²⁶⁴ This has been confirmed in *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para. 54.

²⁶⁵ Applying the article 30 para 2 (a) ICC Statute-test Ambos, *ICL Treatise II* (2014) 175 ('purpose-based intent').

the ordinary course of events. On the basis of paragraph 2 of the General Introduction to the Elements of Crimes the insertion of element 3 seems to be unnecessary, but it was justified *inter alia* by the fact that the term ‘intentionally’ is contained in the Statute and the insertion would add more clarity.

197 In this context, it is interesting to have a closer look at the views expressed by the ICTY Prosecution and the findings of the ICTY with regard to the war crime of unlawful attacks against civilians.

198 In the *Blaškić* case the Prosecution ‘maintained that the *mens rea* which characterises all the violations of Article 3 of the Statute [relevant to the unlawful attack charges], [...] is the intentionality of the acts or omissions, a concept containing both guilty intent and recklessness likeable to serious criminal negligence’,²⁶⁶ and more specifically for the unlawful attack charge:

- b.) the civilian status of the population or individual persons [...] was known or should have been known;
- c.) the attack was wilfully directed at the civilian population or individual civilians; [...].²⁶⁷

199 The Prosecution derived the mental element ‘wilful’ from article 85 para 3 of Add. Prot. I and, like the ICRC Commentary to that provision, interpreted it as including both intention and recklessness. This view was accepted later on in the *Galić* case.²⁶⁸ An underlying reason was that Additional Protocol I imposes a wide range of duties on superiors to ensure that their forces comply with the law and to ensure that precautions are taken to avoid attacks being directed against civilians.²⁶⁹

200 While the ICTY Trial Chamber held in the *Blaškić* case:

‘Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians [...] were being targeted [...].’²⁷⁰

the Trial Chamber required in the *Galić* case the Prosecutor to show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. The ICTY thus accepted that recklessness/*dolus eventualis* is sufficient.²⁷¹ In situations of doubt as to the status of a person, the Prosecution would have to show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.²⁷²

201 Based on these sources – independent of the slightly different standards adopted – it is submitted that the requisite *mens rea* may be inferred from the fact that the necessary precautions (e.g. the use of available intelligence to identify the target) had not been taken before and during an attack.

²⁶⁶ *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para. 179.

²⁶⁷ Quoted in Fenrick (2000) 13 *LeidenJIL* 939.

²⁶⁸ *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para. 54.

²⁶⁹ Fenrick (2000) 13 *LeidenJIL* 940.

²⁷⁰ *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para. 180.

²⁷¹ ‘The attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening’, *Prosecutor v. Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 November 2006, para 140. ‘[...] the prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the person attacked.’, *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para 55; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 192 ‘for there to be intent, the perpetrator has to have acted knowingly and wilfully, that is to say, perceiving his acts and their consequences and purposing that they should come to pass. *Dolus eventualis* occurs when the perpetrator, without being certain that the result will take place, accepts it in the event it does come to pass. Conduct is negligent when the perpetrator acts without having his mind on the act or its consequences’; *Prosecutor v. Martić*, IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para 72; *Prosecutor v. Halilović*, IT-01-48-T, Judgement, Trial Chamber, 16 November 2005, para 36; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Judgement, Trial Chamber, 12 December 2007, paras. 951 *et seq*; *Prosecutor v. Perisic*, IT-04-81-T, Judgement, Trial Chamber, 6 September 2011, para 100. In *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 January 2005, para 283, the Trial Chamber left the question open whether less than ‘direct intent’ would suffice. The Appeals Chamber included however ‘indirect intent’ *Prosecutor v. Strugar*, IT-01-42-A, Judgement, Appeals Chamber, 17 July 2008, paras. 270-1.

²⁷² *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para. 55.

As always in case of conduct of hostilities charges, the Court must assess the information that were available or could reasonably be available to the accused at the moment of the attack. The assessment cannot be made with hindsight. 202

Taking into account the mental element required it remains to be seen whether this war crime also covers the use of indiscriminate weapons, *i.e.* those that are not capable of distinguishing between civilians or civilian objects and military objectives, which include combatants. Such weapons are defined in Additional Protocol I as means of combat that cannot be directed at a specific military objective or the effects of which cannot be limited as required by the Protocol and, consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. The ICJ in its advisory opinion on nuclear weapons has equated the use of indiscriminate weapons with a deliberate attack on civilians.²⁷³ Several ICTY Trial Chambers have concluded that indiscriminate attacks may qualify as direct attacks against civilians.²⁷⁴ They have found that attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians.²⁷⁵ The Appeals Chamber supported in the *Galić* case the view that ‘a direct attack can be inferred from the indiscriminate character of the weapon use’.²⁷⁶ Against this background, it must be assessed in each particular case whether the requisite *mens rea* exists. The fact that precautionary measures as required by Article 57 of Add. Prot. I have not been taken can serve as an indicator.²⁷⁷ 203

In the light of the required mental element and the separate nature of the crime in the ICC Statute (*i.e.* article 8 para 2 (b) (iv)), it seems much more questionable – contrary to what is suggested by the ICTY in the *Galić* case²⁷⁸ – to subsume an attack in violation of the principle of proportionality (*i.e.* an attack that causes excessive incidental civilian casualties or damages) under the present war crime. While an attack which is covered under article 8 para 2 (b) (i) of the ICC Statute must be directed against civilians or the civilian population as such, an attack meant by article 8 para 2 (b) (iv) of the ICC Statute is an attack directed against a military objective, including combatants, but causing incidental civilian casualties or damages.²⁷⁹ Only one particular situation would support the ICTY’s view: if in a given case the anticipated civilian casualties or damages were so important or extensive that the target of the attack was in reality not a military objective but the civilian population.²⁸⁰ In the view 204

²⁷³ ICJ, *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1996, para 78: ‘States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets’.

²⁷⁴ *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para. 57.

²⁷⁵ *Prosecutor v. Blaskić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, paras. 501, 512; *Prosecutor v. Martić*, IT-95-11-R61, Review of the Indictment, reprinted in: 108 *ILR* 39, paras. 18, 23–31; *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 3 October 2002, para. 57; *Prosecutor v. D. Milošević*, IT-98-29/1, Judgement, Trial Chamber, 16 December 2005, para 948; *Prosecutor v. Perišić*, IT-04-81-T, Judgement, Trial Chamber, 27 October 2008, para. 97.

²⁷⁶ *Prosecutor v. Galić*, IT-98-29-A, Judgement, Appeals Chamber, 30 November 2006, para 132; *Prosecutor v. Martić*, IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para 69; see also in the same case the Appeals Chamber, IT-95-11-A, Judgement, Appeals Chamber, 8 October 2008, para 260; *Prosecutor v. Perišić*, IT-04-81-T, Judgement, Trial Chamber, 6 September 2011, para 590; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, para 190.

²⁷⁷ *Diirmann, Elements of War Crimes*, 147; *id.*, *Münchener Kommentar*, § 11 VStGB, mn 147 *et seq.*; *Prosecutor v. D. Milošević*, No. IT-98-29/1, Judgement, Trial Chamber, 16 December 2005, para 948.

²⁷⁸ *Prosecutor v. Blaskić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, paras. 501, 512; *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para. 58. See, however, *Prosecutor v. Kantanga*, ICC-01/04-01/07, Judgement, Trial Chamber II, 7 March 2014, para. 802.

²⁷⁹ In the same vein Ambos, *ICL Treatise II* (2014) 174–5, 176; Werle and Jessberger, *Principles* (2014) 482. Contrary to what Ambos and Werle and Jessberger assert, this does not preclude application of the willfulness standard as foreseen by article 85 (3) Add. Prot. I and ICTY case law. It should be clear, however, – and there is no disagreement with them – that an attack aimed at a military objective that causes non-excessive incidental civilian harm or damage cannot amount to the war crime of an unlawful attack against civilians.

²⁸⁰ This seems to be the view in the *Galić* case: ‘The Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack’, *Prosecutor v. Galić*, IT-98-29-T, Judgement, Trial Chamber, 5 December 2003, para. 60.

of this author, the ICTY should have distinguished more appropriately between the two crimes and treated them separately as in the ICC Statute.

- 205 In some circumstances, it may be obvious that an attack is directed against civilians, because of the type of weapon used (sniper rifles and other direct fire weapons usually have points of impact reasonably close to where they are aimed). In other circumstances, it may be much more difficult to determine whether or not an attack is directed against civilians because the type of weapon used may have a significant, but legally acceptable, degree of error in targeting, or because military objectives are located close to civilians.²⁸¹
- 206 The fact that a civilian is killed or injured as a result of an attack does not automatically mean that a violation of international humanitarian law has occurred. Civilian casualties may occur when weapons are directed against military objectives, but the projectiles miss the target, or when military personnel, acting in good faith but on the basis of erroneous information, attack an object which they believe to be a military objective, but which in reality is not.²⁸² Criminal responsibility would be excluded in the latter case as a consequence of a mistake of fact in the sense of article 32 para 1 of the ICC Statute, since it negates the mental element required by the crime. In the former case the material element 2 would not be met.
- 207 The fact that civilian casualties are caused during an attack directed at a military objective does not, of itself, render the attack unlawful as incidental civilian casualties or damage, which are not expected to be excessive in relation to the concrete and direct military advantage anticipated, are legally acceptable.²⁸³

2. Paragraph 2(b)(ii): Intentionally directing attacks against civilian objects

- 208 This war crime is based largely on article 52 of Additional Protocol I ('Civilian objects shall not be made the object of attack'), which reflects customary international law.²⁸⁴ The war crime under the Rome Statute is drafted in a slightly different manner. The essence is, however, the same: it is a war crime to directly target civilian objects. The causing of civilian damage incidental to an attack at combatants or other military objectives is not covered by this crime, but article 8 para. 2 (b) (iv) of the ICC Statute.²⁸⁵ The specific elements of this crime are formulated in the following way:

1. The perpetrator directed an attack.
2. The object of the attack was civilian objects, that is, objects which are not military objectives.
3. The perpetrator intended such civilian objects to be the object of the attack.'

- 209 As already stated, the elements do not further define the concepts of 'attack', 'civilian objects' and 'military objectives'. The terms are defined in the same way under treaty and customary international law.²⁸⁶ With regard to the term 'attack' reference may be made to the comments under (i), mn 184 *et seq.* Civilian objects are those which are not military objectives (article 52 para 1 Add. Prot. I). In so far as objects are concerned, military objectives are defined as follows:

'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage' (article 52 para 2 Add. Prot. I).

²⁸¹ See Fenrick in the First Edition of this Commentary.

²⁸² *Id.*

²⁸³ This is not an exception to the rule prohibiting attacks against civilians, since civilians are not made the object of the attack, but a military objective. Civilian casualties would be incidental to that attack.

²⁸⁴ Henckaerts and Doswald-Beck, *Customary IHL*, iii (2005) 25–26.

²⁸⁵ Cf. Solf, in: Bothe *et al.*, *Commentary, Article 51*, 300; Blix (1978) *BYbIL* 42; Ambos, *ICL Treatise II* (2014) 175.

²⁸⁶ Henckaerts and Doswald-Beck, *Customary IHL*, iii (2005) 32–33.

- This definition is based on a two-pronged test:
- the nature, location, purpose or use of the objects must make an effective contribution to military action; and
 - their total or partial destruction, capture or neutralisation must offer a definite military advantage in the circumstances ruling at the time.

Both conditions must be met simultaneously.²⁸⁷ There is abundant literature dealing with the definition of military objectives,²⁸⁸ which cannot be summarized in the present commentary. Therefore, only some important points will be highlighted. First, only a material, tangible thing can be a target.²⁸⁹ Secondly, the critical notions of the definition are ‘effective contribution to military action’ and ‘definite military advantage’. It should be stressed that both notions contain the word ‘military’, which excludes, for example, qualifying an object as a military objective if the advantage searched is merely ‘political’.²⁹⁰ These concepts should also exclude attacks merely on civilian morale.²⁹¹ Contribution by nature generally includes all objects directly used by the armed forces, such as weapons, military equipment, military airports or army headquarters. Contribution by location includes objects, which ‘have no military function but which, by virtue of their location, make an effective contribution to military action’, examples include bridges or other constructions and sites of special military importance that must be seized or that the enemy must be prevented from seizing or from which the enemy must be forced to retreat.²⁹² Areas of land may also become a military objective by location, namely if it has tactical importance.²⁹³ Contribution by purpose is concerned with the intended future use of an object while contribution by use with its present function.²⁹⁴ As to the purpose requirement it is important that there are concrete indicators for a future military use, mere suspicion is not sufficient.²⁹⁵ The requirement that the military advantage offered by destruction, capture or neutralization be definite means that the advantage must be concrete and perceptible rather than hypothetical and speculative.²⁹⁶ Military advantage has been interpreted by a number of States in declarations made upon ratification of Additional Protocol I as referring to the advantage anticipated from the *attack as a whole* and not only from isolated or particular parts of the attack.²⁹⁷ It must be

²⁸⁷ Pilloud and Pictet, in: Sandoz *et al.*, *Commentary, Article 52*, para. 2018; Sassoli and Cameron, in: Ronzitti and Venturini (eds.), *Werle and Jessberger, Principles* (2014) 486; Aldrich (1999) 1 *ILF* 149 *et seq.*; Boothby, *The Law of Targeting* 103.

²⁸⁸ See for example Oeter, in: Fleck (ed.), *Handbook IHL* (3rd ed., 2013) 115 *et seq.*; Solf, in: Bothe *et al.* (eds.), *Commentary, Article 52*, 323 *et seq.*; Pilloud and Pictet, in: Sandoz *et al.* (eds.), *Commentary, Article 52*, paras. 2018 *et seq.*; Sassoli and Cameron, in: Ronzitti and Venturini (eds.), *Current Issues in International Humanitarian Law of Air Warfare* (2006) 35 *et seq.*; Dinstejn, *The Conduct of Hostilities* (2004) 89 *et seq.*; Boothby, *The Law of Targeting* (2012) 98 *et seq.*

²⁸⁹ Dinstejn, *The Conduct of Hostilities* (2004) 90–91; Sassoli and Cameron, in: Ronzitti and Venturini (eds.), *Current Issues in International Humanitarian Law of Air Warfare* (2006) 48; Sassöli, in: Wippman and Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (2005) 185 with further references; Oeter, in: Fleck, *Handbook IHL* (3rd ed., 2013) 166 *et seq.*

²⁹⁰ Dinstejn, *The Conduct of Hostilities* (2004) 93; Dörmann, *Münchener Kommentar*, § 11 VStGB, mn 55.

²⁹¹ See also Oeter, in: Fleck (ed.), *Handbook IHL* (3rd ed., 2013) 169–170 referring to ‘influencing the enemy population’s determination to fight’; Sassöli, in: Wippman and Evangelista (eds.), *New Wars, New Laws?* (2005) 186; Bothe (2001) *EJIL* 534; Dinstejn, *The Conduct of Hostilities* (2004) 116; Fenrick (2001) *EJIL* 497.

²⁹² Boothby, *The Law of Targeting* 103; Pilloud and Pictet, in: Sandoz *et al.*, *Commentary, Article 52*, para. 2022.

²⁹³ See Dörmann, *Münchener Kommentar*, § 11 VStGB, mn. 58, with further references to relevant declarations by a number of States upon ratification of Add. Prot. I; Boothby, *The Law of Targeting* 103.

²⁹⁴ See Dörmann, *Münchener Kommentar*, § 11 VStGB, mn 53; Boothby, *The Law of Targeting* 103.

²⁹⁵ *Münchener Kommentar*, § 11 VStGB, mn 53; Sassoli and Cameron, in: Ronzitti and Venturini, p. 58; David, ‘Respect for the Principle of Distinction in the Kosovo’, *YbIHL*, Vol. III (2000) 94–5; Dinstejn, *The Conduct of Hostilities*, 100.

²⁹⁶ UK Ministry of Defence, *The Manual*, No. 5.4.4; Sassöli, in: Wippman and Evangelista (eds.), *New Wars, New Laws?* (2005), 186; W. A. Solf, in: Bothe *et al.* (eds.), *Commentary, Article 52*, 325 *et seq.*; Solf W.A., ‘Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I’, (1986) 1 *AmUJIL&Pol*, 128; Werle and Jessberger, *Principles* (2014) 487.

²⁹⁷ UK Ministry of Defence, *The Manual*, No. 5.4.4. See also Solf, in: Bothe *et al.* (eds.), *Commentary, Article 52* (1982) 324 *et seq.*

stressed, however, that this clarification refers to a finite event, and must thus not be confused with winning the entire war as a military advantage.²⁹⁸

- 212 The formulation ‘in the circumstances ruling at the time’ is a clear indication that States were not prepared to establish a list of objects that constitute military objectives in all circumstances at all times. This element emphasises that in the evolving circumstances of armed conflicts objects which may have been military objectives yesterday may no longer be military objectives today and *vice versa*.²⁹⁹ Nevertheless, there have always been attempts to find guidance in looking at State practice to identify those objects that are normally military objectives. In the First Edition of the present Commentary *W. Fenrick* referred to a tentative, non-exhaustive list established by *A.P.V. Rogers*, a former British Director of Army Legal Services, based on the First Add. Prot. definition and his own review of State practice:

‘Military personnel and persons who take part in the fighting without being members of the armed forces, military facilities, military equipment, including military vehicles, weapons, munitions and stores of fuel, military works, including defensive works and fortifications, military depots and establishments, including War and Supply Ministries, works producing or developing military supplies and other supplies of military value, including metallurgical, engineering and chemical industries supporting the war effort; areas of land of military significance such as hills, defiles and bridgeheads; railways, ports, airfields, bridges, main roads as well as tunnels and canals, oil and other power installations; communications installation, including broadcasting and television stations and telephone and telegraph stations used for military communications’.³⁰⁰

Even with such a list, where objects are concerned, it remains a requirement that they meet both elements of the definition of military objective.

- 213 Civilian objects may only be attacked if and for such time they become – due to their location, purpose or use – military objectives. At that moment they cease to be civilian objects.³⁰¹ It was therefore misleading when the ICTY stated in couple of Trial Chamber judgements that ‘targeting civilian property [...] is an offence when not justified by military necessity’,³⁰² in particular, when coupled with the ICTY’s sometimes overly broad understandings of military necessity.³⁰³ As has been stated elsewhere (see mn 119 under article 8 para 2 (a) (iv)), military necessity can only be invoked if explicitly foreseen in a norm and cannot be used as an additional justification. When a prohibition is absolute as for the prohibition of attacking civilian objects, there is no room for invoking military necessity.³⁰⁴ This has now been correctly recognized by the ICTY.³⁰⁵
- 214 Article 52 para 1 of Additional Protocol I prohibits attacking civilian objects by way of reprisals. The United Kingdom has entered a reservation to that treaty rule (as in the case of attacking civilians or the civilian population by way of reprisals, see mn 192).³⁰⁶ The status of the rule as customary international humanitarian law is not firmly established.³⁰⁷ It therefore seems that the prohibition of reprisals currently reflects ‘the established framework of interna-

²⁹⁸ Dinstein, *The Conduct of Hostilities* (2004) 94; Sassoli and Cameron, in: Ronzitti and Venturini (eds.), *Current Issues in International Humanitarian Law of Air Warfare* (2006) 48; Dörmann, *Münchener Kommentar*, § 11 VStGB, mn 56.

²⁹⁹ Solf, in: Bothe *et al* (eds.), *Commentary, Article 52* (1982) 326; Dinstein, *The Conduct of Hostilities* (2004) 93–94; Sassoli and Cameron, in: Ronzitti and Venturini (eds.), *Current Issues in International Humanitarian Law of Air Warfare* (2006) 47.

³⁰⁰ Rogers, *Law on the Battlefield* (2nd ed. 2004) 37; see however Boothby, *The Law of Targeting* (2012) 102.

³⁰¹ Henckaerts and Doswald-Beck, *Customary IHL*, iii (2005) 34–35.

³⁰² *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para. 180; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para. 328.

³⁰³ See for example Hampson, in: Gutman and Rieff (eds.), *Crimes of War* (1999) 251.

³⁰⁴ See also Dörmann, *Elements of Crimes* (2003) 149.

³⁰⁵ *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 January 2005, para. 280.

³⁰⁶ Some authors have questioned whether such reservation is compatible with the object and purpose of the treaty (see article 19 (c) of the VCLT), e.g. Gaudreau, (2003) 849 *IREvRC* 170.

³⁰⁷ Henckaerts and Doswald-Beck, *Customary IHL*, iii (2005) 520–525.

tional law’ as mentioned in the *chapeau* of article 8 para 2 (b) of the ICC Statute only for those States and in relation to those States that have accepted the treaty prohibition.³⁰⁸

As in the case of the war crime of attacking civilians, the elements do not require that a particular result be caused – contrary to the jurisprudence of the ICTY. The reasons that led to this approach are the same as described under (i), see *mn 193 et seq.*

With regard to the mental elements required, reference may be made to the explanations given for the war crime of attacking civilians (see (i), *mn 195 et seq.*). The same approach was taken *mutatis mutandis* for all crimes covering unlawful attacks.

3. Paragraph 2(b)(iii): Attacks on humanitarian assistance or peacekeeping missions in international armed conflict

Literature: Beigbeder, Y., *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian assistance* (Nijhoff Leiden 1991); Bourloyannis-Vrailas, M.C., ‘Crimes against United Nations and associated personnel’, in: G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts. Commentary, I* (Brill Leiden 2000) 337; Del Mar, K., ‘Opérations de Maintien de la Paix et Droit des Conflits Armés’, in: V. Chetail (ed.), *Permanence et Mutations du Droit des Conflits Armés* (Bruylant Brussels 2013); Emanuelli, C.C., ‘The Protection afforded to Humanitarian Assistance Personnel under the Convention on the Safety of United Nations and Associated Personnel’, (1996) 1 *HU-V* 4 *et seqq.*; Engdahl, O., *Protection of Personnel in Peace Operations: The Role of the ‘Safety Convention’ Against the Background of General International Law* (Nijhoff Leiden 2007); *id.*, ‘Prosecution of Attacks Against Peacekeepers in International Courts and Tribunals’, (2012) 51 *Rev. de Droit Militaire et de Droit de la Guerre* 249; Fleck, D., ‘The legal status of personnel involved in United Nations peace operations’, (2013) 891/892 *IRRC* 613; Gadler, A., ‘The Protection of Peacekeepers and International Criminal Law’, (2010) 11 *GLJ* 586; Galićki, Z., ‘Les Atteintes à la Sécurité du Personnel des Nations Unies et des Personnels Associés’, in: H. Ascensio, E. Decaux and A. Pellet (eds.), *Droit International Penal* (Pedone Paris 2012) 341; Marong, A.B.M., ‘Fleshing Out the Contours of the Crime of Attacks against United Nations Peacekeepers – The Contribution of the Special Court for Sierra Leone’, in: C.C. Jalloh, *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP 2014); Sivakumaran, S., ‘War Crimes before the Special Court for Sierra Leone. Child Soldiers, Hostages, Peacekeepers and Collective Punishments’, (2010) 8 *JICJ* 1009; Spagnolo, A., ‘The Crime of Attacking Peacekeepers’, in: F. Pocar, M. Pedrazzi and M. Frulli, *War Crimes and the Conduct of Hostilities. Challenges to Adjudication and Investigation* (Edward Elgar Cheltenham 2013); Muriithi, T., ‘The African Union’s Evolving Role in Peace Operations: The African Union Mission in Burundi, The African Union Mission in Sudan and the African Union Mission in Somalia’, (2008) 17 *African Security Review* 69 *et seqq.*; Olakounlé Yabi, G., *The Role of ECOWAS in Managing Political Crisis and Conflict: The Cases of Guinea and Guinea-Bissau* (2010) <<http://library.fes.de/pdf-files/bueros/nigeria/07448.pdf>> (16 January 2015); Villani U., ‘The Security Council’s Authorization of Enforcement Action by Regional Organizations’, (2002) 6 *MPYbUNL* 553; Heje, C., ‘United Nations Peacekeeping: An Introduction’, in: E. Moxon-Browne (ed.), *A Future for Peacekeeping?*, (1998) 1; Rudolph, K., ‘Peace-Keeping Forces’ in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. I (1995) 957; Hill, S.M. and Malik, S.P., *Peacekeeping and the United Nations* (1996); ‘UN Peacekeeping Principles and Guidelines’, (2008) UN Department of Peacekeeping Operations; Bloom, E.T., ‘Protecting Peacekeepers: the Convention on the Safety of United Nations and Associated Personnel’, (1995) 89 *AJIL* 621; Bourloyannis-Vrailas, M.C., ‘Convention on the Safety of United Nations and Associated Personnel’, (1995) 44 *ICLQ* 560; Allain, J. and Jones, J., ‘A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind’, (1997) *EJIL* 110; von Hebel, H. and Robinson, D., ‘Crimes within the jurisdiction of the Court’, in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (Nijhoff Leiden 1999) 110; de Waart, P.J.L.M., ‘Long-term development aspects of humanitarian assistance in armed conflict’, in: F. Kalshoven (ed.), *Assisting the Victims of Armed Conflicts and Other Disasters* (1989) 67; Kalshoven, F., ‘Assistance to the victims of armed conflicts and other disasters’, in: *id.*, 13; Mascalisster-Smith, P., ‘Rights and duties of the agencies involved in providing humanitarian assistance and their personnel in armed conflict’, in: *id.* 99; Bothe, M. *et al.* (eds.), *The OSCE in the Maintenance of Peace and Security: Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes* (1998); Frank, D., in: Lee, R.S. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 146 *et seqq.*

³⁰⁸ This may explain the Declaration that the United Kingdom has made when ratifying the Rome Statute: ‘The United Kingdom understands the term “the established framework of international law, used in Article 8(2)(b) and (e), to include customary international law [...]”. In that context the United Kingdom confirms and draws to the attention of the Court its view as expressed, inter alia, in its statement made on ratification of relevant instruments of international law, including the Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977’, see note 182, UK Ministry of Defence, *The Manual*, No. 16.34.

- 217 a) **Normative origin and drafting history.** After a dramatic increase in attacks on UN peacekeeping forces in the 1990s³⁰⁹ the UN General Assembly adopted the UN **Convention on the Safety of United Nations and Associated Personnel** in 1994³¹⁰. Article 9 of the convention criminalizes intentional ‘murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel murder’ as well as violent attacks of premises, private accommodation or means of transportation of UN or associated personnel (including threat and attempt). State parties to the convention are obliged to make these crimes ‘punishable by appropriate penalties which shall take into account their grave nature’. Article 71 para- 2 of the Protocol I to the Geneva Convention stipulates that ‘personnel participating in relief actions’ shall be ‘respected and protected’ but does not refer to humanitarian and peacekeeping missions.³¹¹ The prohibition of directing an attack against personnel and objects involved in a humanitarian or peacekeeping mission in accordance with the Charter of the United Nations is considered as **customary law**, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law.³¹²
- 218 Article 19 of the 1996 **ILC Draft Code of Crimes Against the Peace and Security of Mankind** contained attacks against ‘United Nations and associated personnel involved in a United Nations operation’ (murder, kidnapping or other attack upon the person or liberty of any such personnel; violent attack upon the official premises, the private accommodation or the means of transportation) as a crime against humanity, due to its ‘exceptionally serious gravity’.³¹³ Further, para 2 stipulated that article 19 shall ‘not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.’ In addition, article 19 of the ILC Draft Code required that the crimes were to be committed ‘with a view to preventing or impeding that operation from fulfilling its mandate’. It was rightly criticised that it would practically be impossible to define when UN forces are to be considered combatants, and when not. Further, the specific *mens rea* would require to establish that the perpetrator knew what kind of mandate existed during the commission of the crime, an element of crime that would be almost impossible to prove.³¹⁴
- 219 Throughout the Ad Hoc and Preparatory Committees and a large part of the Rome Conference, delegations considered to include violations of the Convention on the Safety of United Nations and Associated Personnel as a ‘treaty crime’³¹⁵, without substantially debating

³⁰⁹ The Security Council has repeatedly condemned attacks against personnel of peacekeeping operations; e. g. SC Res 788 (1992); SC Res 813 (1993); SC Res 987 (1995). See also: Spagnolo, in: Pocar *et al.* (eds.), *War Crimes and the Conduct of Hostilities. Challenges to Adjudication and Investigation* (2013) 153 *et seq.*; Bourloyannis-Vrailas, in: McDonald and Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law*, (2000) 337 *et seq.*; Galićki, in: Ascensio *et al.*, (eds.), *Droit International Penal* (2012) 341 *et seq.*

³¹⁰ The Convention was adopted by resolution 49/59 of the General Assembly dated 9 December 1994 and entered into force on 15 January 1999 (United Nations Treaty Series, vol. 2051, p 363). See: Engdahl, *Protection of Personnel in Peace Operations* (2007) 205 *et seq.*; Bloom (1995) 89 *AJIL* 621; Bourloyannis-Vrailas (1995) 44 *ICLQ* 560.

³¹¹ Werle/Jessberger, *Principles* (2014), mn. 1421; Sandoz *et al.*, *Commentary* (1987) 831.

³¹² *Prosecutor v. Sesay, Kallon and Gbao*, No. SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 218; Henckaerts (2005) 87 *IRRC* 192; Frank, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 145.

³¹³ The International Law Commission underlined in its commentary to the Draft Code of Crimes against the Peace and Security of Mankind (51 UN GAOR Supp. (No. 10) at 14, UN Doc A/CN.4/L.532, corr.1, corr.3 1996) that ‘[a]ttacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community. These crimes are of concern to the international community as a whole because they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind.’ *ICL Draft Code of Crimes against the Peace and Security of Mankind with Commentaries*, *YbILC* (1996) (ii, part 2) 51.

³¹⁴ Allain and Jones (1997) *EJIL* 114.

³¹⁵ von Hebel and Robinson, in: Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (1999) 110.

the content and scope of this treaty crime.³¹⁶ Only towards the end of the Rome Conference, when it became clear that treaty based crimes would not be included as such, the negotiations focused on including attacks on humanitarian and peacekeeping missions as a war crime. The qualification as a war crime led to an extension of the prohibition's scope of application to humanitarian assistance and non-UN peacekeeping missions. In response in particular to concerns about peacekeeping missions that might use force and become involved in war type operations, it was stipulated that attacks on missions would incur individual criminal responsibility only as long as the personnel and objects involved in the missions 'are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'. However, article 8 para 2 (b) (iii), as it stands now, does not reflect the full scope of the war crime under international customary law since it limits the protection to humanitarian assistance or peacekeeping missions 'as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.' By thus limiting the scope of application, article 8 para 2 (b) (iii) does in fact not seem to criminalize any conduct which would not be covered by the criminalization of attacks on civilians and civilian objects contained in article 8 para 2 (b) (i) and (ii)³¹⁷, notwithstanding that it is unclear and controversial to what extent and under what conditions personnel and objects involved in peacekeeping missions are entitled to the same protection as civilians and civilian objects. Nevertheless, delegations wanted to explicitly condemn and criminalize attacks against humanitarian assistance and peacekeeping missions and thereby indicate the exceptional seriousness of such most serious crimes of international concern and to avoid a potential lacuna.³¹⁸

During the negotiations of the Elements of Crime of article 8 para 2 (b) (iii) Rome Statute, 220 discussions evolved around the question whether the non-combatant status of potential victims of the crime and protected objects should be further defined. However, since the differentiation between combatant and non-combatant as well as military and non-military object seems difficult and does not only depend on the mandate of a peacekeeping mission, the wording of article 8 para 2 (b) (iii) Rome Statute was maintained largely in the Elements of Crime. Further, the requirement of a 'harmful result' of the attack was not included.³¹⁹

b) Elements. The Elements of Crime of article 8 para 2 (b) (iii) Rome Statute read as 221 follows:

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²

aa) Attack. According to the case law of the SCSL and the ICC, the attack³²⁰ **does not need** 222 **to cause actual damage or injury**³²¹ and is to be understood as an 'act of violence against the

³¹⁶ The identical draft passed from session to session with virtually no debate on the substance. See Preparatory Committee (Consolidated) draft 33; Zutphen Draft 35; Preparatory Committee Decisions February 1997 16.

³¹⁷ von Hebel and Robinson, in: Lee, *The Making of the Rome Statute* (1999) 110, 110; Frank, in Lee: *Elements of Crimes* (2001) 145. See Dörmann, article 8 para 2 (b) (i) and (ii) and also Arnold, article 8 para 2 (b) (xxiv).

³¹⁸ Werle/Jessberger, *Principles* (2014), mn. 1420.

³¹⁹ Frank, in: Lee (ed) *The International Criminal Court* (2001)146 *et seq.*

³²⁰ For a general overview: Marong, in: Jalloh (ed.), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (2014) 303 *et seqq.*

³²¹ RUF Trial Judgement (n 312) para 220; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, para 65; Sivakumaran, *Non-International Armed Conflict* (2012) 324; *id.* (2010) 8 *JICJ* 1009.

adversary, whether in offence or in defence' as defined in article 49 Add.Prot. I³²², thus going beyond a strict Hague law perspective.³²³ The broad understanding of the term 'attack' may also be inferred from article 9 of the Convention on the Safety of United Nations and Associated Personnel, which contains a catalogue of possible violations³²⁴ that could be used to interpret article 8 para 2 (b) (iii) Rome Statute.³²⁵ According to the SCSL, it also includes the unlawful deprivation of liberty of the victim³²⁶, while a threat alone does not suffice.³²⁷ For further details regarding the term 'attack', please refer to the commentary of article 8 para 2 (b) (i) and (ii) Rome Statute.³²⁸

223 **bb) Humanitarian assistance missions.** The objects of the attack first mentioned in article 8 para 2 (b) (iii) Rome Statute are personnel, installations, material, units or vehicles involved in a humanitarian assistance mission. Since there is no specific and generally accepted definition of the term 'humanitarian assistance mission', it is not clear which standards are applicable to this generic category that covers a diversity of phenomena. Since such a mission must be 'in accordance with the Charter of the United Nations' it must refrain from the use of force and interference in internal affairs.³²⁹ It is considered as a rule of customary international law that 'humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction' must be allowed and facilitated by the parties to a conflict.³³⁰

224 In the absence of any case law on 'humanitarian assistance mission', standards derived from humanitarian law with regard to humanitarian organizations and relief actions may provide a useful legal framework.³³¹ In particular, articles 70 and 71 Add.Prot. I on 'relief

³²² *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, *RUF Trial Judgement*, 8 February 2010, para 65, para 220; *Prosecutor v. Sesay, Kallon and Gbao*, No. SCSL-04-15-T, *RUF Trial Judgement*, 2 March 2009, para 220.

³²³ Sivakumaran draws the attention to the fact that the ICTY had 'taken the view that, in the context of attacks against civilians, the unlawful attack must have resulted in death or serious injury'. Sivakumaran (2010) 8 *JICJ*, 1025; for the discussion in the Preparatory Committee on this issue see: Dörmann, *Elements of War Crimes* (2003) 153.

³²⁴ E.g. murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty (article 9 paras 1 -3 UN Convention on the Safety of United Nations and Associated Personnel), *UN Convention on the Safety of United Nations and Associated Personnel* (United Nations Treaty Series, vol. 2051, p 363).

³²⁵ Werle/Jessberger, *Principles*, OUP 2014, no. 1426.

³²⁶ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, *RUF Trial Judgement*, 2 March 2009, paras 1891 and 1897, affirmed in: *Prosecutor v. Sesay, Kallon and Gbao*, No. SCSL-04-15-A), *RUF Appeals Judgement*, 26 October 2009, para 500.

³²⁷ According to the SCSL judges 'peacekeepers are by definition deployed in areas of actual or recent armed conflict, often in precarious situations before the warring factions have disarmed and while tensions remain high.' Therefore, 'attack' is at least a 'forceful interference which endangers the person or impinges on the liberty of the peacekeeper.' *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, *RUF Trial Judgement*, 2 March 2009, para 1889.

³²⁸ See Dörmann above Art. 8 para 2 (b)(i) and (ii).

³²⁹ See eg: de Waart, in: Kalshoven (ed.), *Assisting the Victims of Armed Conflicts and Other Disasters* (1989) 71 *et seq.*; Kalshoven, in: *ibid.*, 19 *et seq.*; Mascalister-Smith, in: *ibid.* 99; Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations. The Right and Duty to Humanitarian Assistance* (1991) 4 *et seq.*; Barber, 2009 91 *IRRC* 371 *et seq.*

³³⁰ Article 70 para 2 Add.Prot. I; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law. I: Rules* (2005) 194 *et seq.*

³³¹ Humanitarian law contains standards, which are not only confined to Red Cross and Red Crescent institutions and actions but refer also to other humanitarian organisations and their relief actions in situations of armed conflict. Article 10 GC IV provides that '[t]he provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief' (emphasis added). See also article 18 para 2 GC I, article 125 GC III, articles 63 para 1 and 142 GC IV, and articles 15 para 1, 17, 61–66, and 81 para 4 Add.Prot. I.

actions’ may offer some indications for interpretation.³³² In order to be accorded the privileges of article 70 para. 3 Add.Prot. I, relief actions intended to alleviate the suffering of the civilian population, must be ‘humanitarian and impartial in character and conducted without any adverse distinction’ and are ‘subject to the agreement of the Parties concerned [...]’.³³³ Such missions ‘shall not be regarded as interference in the armed conflict or as unfriendly acts.’³³⁴ The participation of relief personnel necessary in relief actions, in particular for the transportation and distribution of the consignments is ‘subject to the approval of the Party in whose territory they will carry out their duties [...]’ and must be respected and protected.³³⁵ According to article 70 para. 3 Add.Prot. I, states are permitted to prescribe technical arrangements and locally supervise distributions. However, it is submitted that a humanitarian mission should not be excluded from the protection of article 8 para 2 (b) (iii) Rome Statute when it does not have the agreement of the host state. In any event, the individuals and objects involved in such missions are still generally entitled to the protection of civilians provided they do not engage in the hostilities.

The UN Convention on the Safety of United Nations and Associated Personnel³³⁶ may 225 give further guidance in defining protected personnel although the field of application is not necessarily identical to the Rome Statute³³⁷ and limited to UN personnel.

It is submitted that ‘humanitarian assistance’ in particular consists of relief actions with 226 the purpose of ensuring the provision of supplies essential to the survival of the civilian population. Such supplies should at the very least include food, medical supplies, clothing and means of shelter³³⁸, and should necessarily also extend to the required means of transport. Protected personnel may include administrative staff, coordinators and logistic experts, doctors, nurses and other specialists and relief workers. It is submitted that the term also extends to assisting refugees and internally displaced people with the agreement of the parties to the conflict. ‘Humanitarian assistance’ may also include developmental aspects but in a strict understanding the notion does not seem to extend to development aid as such, which pursues rather long-term objectives than immediate assistance after or during disasters and conflicts.

The term ‘humanitarian assistance’ covers also assistance by non-governmental and inter-governmental organizations, for instance the ICRC and specialized agencies and programs of the United Nations such as UNHCR, UNICEF, UNESCO, or the World Food Programme. However, while humanitarian assistance may, in addition, be offered by individual states, questions as to the humanitarian and impartial character of such missions are more likely to be raised.

For further details reference is made to the commentary on article 8 para 2 (b)(xxiv) Rome 227 Statute for the specific crime of attacking personnel displaying the distinctive emblems of the Red Cross or Red Crescent.³³⁹

³³² Werle/Jessberger, *Principles* (2014) mn. 142-424.

³³³ Article 70 para 1 Add.Prot. I.

³³⁴ Id.; In the Nicaragua case the ICJ stated: ‘There is no doubt that the provision of strictly humanitarian assistance to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.’ *Nicaragua v. USA, Merits, Judgement* (1986) ICJ Rep 124, para 242 (see also *Dissenting Opinion Schwebel* 351, para 180).

³³⁵ Article 71 paras 1 and 2 Add.Prot. I.

³³⁶ Article 1 (n 310) Convention on the Safety of United Nations and Associated Personnel.

³³⁷ Dörmann, *Elements of War Crimes* (2003) 156-7.

³³⁸ Article 69 Add.Prot. I. The US Congress defined permissible humanitarian assistance in legislation regarding support to the Nicaraguan resistance movement as ‘the provision of food, clothing, medicine and other humanitarian assistance, and it does not include the provision of weapon systems, ammunition, or other equipment, vehicles, or material which can be used to inflict bodily harm or death.’ Quoted in: *Nicaragua v. USA, Merits, Judgement* (1986) ICJ Rep, para 97.

³³⁹ See Arnold below article 8 para 2(b)(xxiv).

- 228 cc) **Peacekeeping mission.** As a second possible object of attack, article 8 para 2 (b) (iii) Rome Statute mentions ‘peacekeeping mission in accordance with the Charter of the United Nations’. This variation is more controversial than attacks on ‘humanitarian assistance missions’, since opinions diverge regarding the understanding of the term ‘peacekeeping’. The term ‘peacekeeping mission’ has originated in the UN system and is most commonly used to refer to operations authorized or established by the UN. Also, the Rome Conference initially intended to only criminalize attacks on UN peacekeeping missions, and the legislative history does not seem to offer an intent to depart fundamentally from the principles and standards developed in regard to peacekeeping missions established or authorized by the UN, which therefore provide a useful basis of departure as to what kind of operations should be subsumed under this article.
- 229 Traditionally, a distinction is made between ‘peacekeeping’ and ‘peace enforcement’ missions³⁴⁰, depending on the mandate given to them by the UN Security Council either under Chapter VI or ‘within Chapter VI in conjunction with Chapter VII [...]’.³⁴¹ However, in practice it is difficult to distinguish peacekeeping missions with a so-called ‘robust’ mandate³⁴², allowing for use of force that goes beyond strict self-defence, from peace-enforcement missions.³⁴³ Peace-enforcement troops have the authority to use offensive force and are thus considered as combatants and legitimate targets in armed conflicts.³⁴⁴
- 230 Even though peacekeeping missions established or authorized by the UN Security Council are not mentioned or defined explicitly in the UN Charter,³⁴⁵ it is uncontested that their establishment is lawful and fully respects the Charter.³⁴⁶ Peacekeeping missions are generally established, mandated or authorized by international organisations. However, even if the organisation retains the control and command over the peacekeeping mission, the contingents assigned to the mission are generally provided by member states of the organisation concerned. It is suggested that peacekeeping and observer missions established by regional organizations such as the AU³⁴⁷,

³⁴⁰ Sivakumaran, *Non-International Armed Conflict* (2012), 325.

³⁴¹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 222: ‘It is noteworthy that in practice, the Security Council has never referred to Chapter VI in its resolutions establishing peacekeeping forces.’

³⁴² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 223, where it is stated: ‘It is likewise important to mention that in more recent times, the Security Council has referred to Chapter VII in resolutions that establish peacekeeping missions in difficult or unstable situations, typically in relation to internal conflicts, in order to provide more robust mandates to the peacekeepers and to demonstrate the Security Council’s resolve. Further, this Chamber observes that the Security Council has, on occasion, established multidimensional peacekeeping missions under Chapter VII with extremely broad mandates that included civilian administration.’ (footnotes omitted). The RUF judgement refers to UNMIK in Kosovo, UNTAET in East Timor and UNMIL in Liberia. (*id.*, fn 406).

³⁴³ Sivakumaran, (2010) 8 *JICJ* 1026.

³⁴⁴ Marong, in: Jalloh, *The Sierra Leone Special Court and its Legacy* (2014) 291, 293 *et seq.*

³⁴⁵ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, para 69.

³⁴⁶ UN missions were the sole object of negotiations up to the end of the Diplomatic Conference in Rome. However, in the cases *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010 and *Prosecutor v. Nourain and Jerbo Jamus*, ICC-02/05-03/09-PT, Decision on the Confirmation of Charges, 7 February 2011, the ICC deals with attacks on the African Union Mission in Sudan (AMIS).

³⁴⁷ The preamble of the ‘Peace and Security Council (PSC) Protocol’ of the AU refers to the Charter of the United Nations, ‘conferring on the Security Council primary responsibility for the maintenance of international peace and security, as well as the provisions of the Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer cooperation and partnership between the United Nations, other international organizations and the African Union, in the promotion and maintenance of peace, security and stability in Africa.’ Peace and Security Council (PSC) Protocol adopted by the 1st Ordinary Session of the Assembly of the African Union in Durban, 9 July 2002 (<<http://www.peaceau.org/uploads/psc-protocol-en.pdf>>, accessed 20 October 2014). See also: Murithi (2008) 17 *African Security Review* 69 *et seq.*

OSCE³⁴⁸, EU³⁴⁹ or ECOWAS³⁵⁰ in accordance with the UN Charter³⁵¹ are also covered by article 8 para 2 (b) (iii) Rome Statute.³⁵²

Although, there is no official definition of the term peace-keeping, which has ‘developed out of practical experience’³⁵³ as a ‘unique and dynamic instrument’ and ‘as a way to help countries torn by conflict create the conditions for lasting peace’³⁵⁴, peacekeeping missions are generally understood to be actions involving the temporary deployment of military personnel typically in a situation of tension but where no or no generalized fighting takes place, after hostilities have ceased de facto or to prevent the breaking out of fighting.³⁵⁵ Peacekeeping missions ‘are not static’ and ‘their features may vary depending [...] on the context in which they operate.’³⁵⁶ Peacekeeping missions may take observation tasks such as monitoring peace agreements and cease-fires, truces or armistices, may interpose themselves between the opposing parties, so as to hinder movements across the lines and to create buffer zones to prevent from a resumption of hostilities, may assist the parties in withdrawing or disarming their forces, or may verify limitations of forces and armaments. Whether the provision applies to fact-finding and peace-building missions is open to interpretation. In any case, personnel and objects of such missions in principle enjoy the protections civilians are entitled to in armed conflicts if the situation can still be qualified as an armed conflict.

Both the ICC and the SCSL³⁵⁷ found that ‘three basic principles are accepted as determining whether a given mission constitutes a peacekeeping mission, namely (i) consent of the parties; (ii) impartiality; and (iii) the non-use of force except in self-defence.’³⁵⁸ Contrary to

³⁴⁸ Bothe et al. (eds.), *The OSCE in the Maintenance of Peace and Security: Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes* (1998).

³⁴⁹ The Lisbon Treaty amends the Treaty on European Union and stipulates that ‘[t]he common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.’ Treaty of Lisbon (OJ C 306, 17.12.2007) (<<http://eur-lex.europa.eu/images/n/pdf-hover.png>>, accessed 20 October 2014), para 49. Such peace-keeping missions ‘shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.’ (id); for on-going military EU peacekeeping missions see: <<http://www.eeas.europa.eu/csdp/missions-and-operations/>> (last accessed 10 October 2014).

³⁵⁰ For general information see: <<http://www.ecowas.int/ips/ii/security/>>. Olakounlé Yabi, *The Role of ECOWAS in Managing Political Crisis and Conflict: The Cases of Guinea and Guinea-Bissau* (2010) <<http://library.fes.de/pdf-files/bueros/nigeria/07448.pdf>> (accessed 20 October 2014).

³⁵¹ The UN Security Council has repeatedly condemned attacks against peacekeeping forces set up by regional organisations (eg SC Res 788 (1992) para 4 and SC Res 813 (1993) para. 6 on ECOWAS peace-keeping forces in Liberia) and has asked the parties to the conflict to ensure their safety (SC Res 993 (1995) preamble and SC Res 1036 (1996) para 8, on CIS peace-keeping forces) and freedom of movement (SC Res 913 (1994) preamble on UNPROFOR in Bosnia and Herzegovina).

³⁵² *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, paras 75 et seqq., referring to article 52 para 1 of the UN Charter, which provides that ‘[n]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided, that such, arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.’ Article 53 para 1 of the UN Charter states that ‘no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.’ See also: Villani (2002) 6 *MPYbil* 555.

³⁵³ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, para 69.

³⁵⁴ *Id.*, citing UN Peacekeeping webpage, retrieved from <http://www.un.org/en/peacekeeping/> (last visited 20 October 2014).

³⁵⁵ See generally Heje, in: Moxon-Browne (ed.), *A Future for Peacekeeping?* (1998) 1; Rudolph, in: Wolfrum (ed.), *United Nations: Law, Policies and Practice, Vol. I* (1995) 957 (with further references); Hill and Malik, *Peacekeeping and the United Nations* (1996).

³⁵⁶ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010 para 70.

³⁵⁷ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 225.

³⁵⁸ *Id.*, 71, referring to the *UN Peacekeeping Operations: Principles and Guidelines* (UN Department of Peacekeeping Operations 2008) 31; *Report of the Panel on United Nations Peace Operations* (UN GA A/55/305-S/2000/809, 21 August 2000) (‘Brahimi Report’); *Supplement to an Agenda for Peace: Position Paper of the*

peace-enforcement missions, consent of the host state, respectively of the warring parties³⁵⁹ in an internal armed conflict, ‘is a prerequisite for a peacekeeping mission to be stationed on its territory’³⁶⁰ and ‘is also sought in practice.’³⁶¹ Impartiality means that ‘United Nations peacekeeping operations must implement their mandate without favour or prejudice to any party.’³⁶² This implies mainly that the peacekeepers adhere to the principles of the UN Charter and the objectives of their mandate and that they ‘should not condone actions by the parties that violate the undertakings of the peace process or international norms and principles.’³⁶³

- 233 Peacekeeping forces must not use force other than for the purpose of self-defence.³⁶⁴ However, the concept of self-defence for these missions has evolved and does include the ‘right to resist attempts by forceful means to prevent the peacekeeping operation from discharging its duties under the mandate of the Security Council.’³⁶⁵ The SCSL has acknowledged in the RUF judgment ‘that the operative United Nations doctrine on this issue is that peacekeeping operations should only use force as a measure of last resort, when other means have failed.’³⁶⁶ Due to the extensive interpretation of the notion of ‘self-defence’³⁶⁷, including the defense of the mandate and of civilians the question whether peacekeeping forces are still entitled to the same protection as civilians or have become combatants becomes more difficult and must be resolved on a case by case basis.³⁶⁸ Some authors argue for an enhanced protection of peacekeepers through the ‘evidentiary presumption that these troops enjoy international legal protection, unless specific circumstances before the Court clearly demonstrate that they were in fact combat forces.’³⁶⁹
- 234 **dd) Entitlement to protection given to civilians or civilian objects.** The fourth element of the crime is the entitlement to the protection given to civilians or civilian objects under the international law of armed conflict.
- 235 Personnel involved in **humanitarian assistance missions** are entitled to self-defence to the extent protected persons such as medical personnel are permitted to self-defence under

Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations (UN SG A/50/60-S/1995/1, 3 January 1995) 33.

³⁵⁹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 226: ‘In non-international conflicts, this consent is obtained from the warring parties, not out of legal obligation, but rather to ensure the effectiveness of the peacekeeping operation.’ See also: *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010 paras 107 *et seqq.*

³⁶⁰ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, para 72, referring to article 2 para 7 of the UN Charter.

³⁶¹ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, para 72, referring to the UN Peacekeeping Principles and Guidelines, (2008) 31.

³⁶² UN Peacekeeping Principles and Guidelines (2008) 33: ‘Impartiality is crucial to maintaining the consent and cooperation of the main parties, but should not be confused with neutrality or inactivity. United Nations peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in their execution of their mandate [...]’

³⁶³ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 227, referring to the *Report of the Panel on United Nations Peace Operations* (UN GA A/55/305-S/2000/809, 21 August 2000) 50, and the *UN Peacekeeping Operations: Principles and Guidelines* (UN Department of Peacekeeping Operations 2008) 33.

³⁶⁴ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009 para 228.

³⁶⁵ UN Peacekeeping Principles and Guidelines *United Nations Peacekeeping Operations: Principles and Guidelines* (2008) 34.

³⁶⁶ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 228, referring to the UN Peacekeeping Principles and Guidelines, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008) 34.

³⁶⁷ Marong, in: Jalloh, *The Sierra Leone Special Court and its Legacy*: (2014) 291, 295 *et seqq.*

³⁶⁸ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, para 83.

³⁶⁹ Marong, in: Jalloh, *The Sierra Leone Special Court and its Legacy* (2014) 305. Marong agrees with the findings in the *RUF Trial Judgement, Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, paras 233 *et seq.*; he however contemplates that ‘international peacekeeping runs a great risk of being undermined unless the rules of the game are changed to enhance protections for those who make priceless sacrifices in the service of peace and security for humankind.’ See also Sharp (1996) 7 *DukeJComp&IL* 93.

international humanitarian law, without forgoing the protection they are entitled to as civilians. According to Add.Prot. I, personnel of civilian medical units may be ‘equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge’, and may be guarded by armed guards or escorts, without being deprived of their protected status.³⁷⁰ Such self-defence protection is particularly important when bandits, plunderers or common criminals present a possible danger, and when in a so-called *conflit destructuré* no disciplined armed force possesses firm authority over certain areas through which relief convoys need to pass or in which the humanitarian assistance will be delivered.³⁷¹ Using force to gain access to a certain area or to certain persons would disqualify the involved personnel and objects from this protection. In the case of hostile acts beyond self-defence, it is submitted in analogy to article 13 para. 1 Add.Prot. I that, at least in cases where the mission in general remains within its humanitarian mission, the protection ceases only after a warning has remained unheeded,³⁷² unless such warning was impossible under the circumstances.

Peacekeepers are considered to be civilians only insofar as they fall within the definition of civilians laid down for non-combatants in customary international law and under Additional Protocol II – specifically, that they do not take a direct part in hostilities.³⁷³ By doing so, they would become combatants. Where peacekeepers become combatants, they can be legitimate targets for the extent of their participation in accordance with international humanitarian law.³⁷⁴ 236

With regard to attacks on **installations, material, units or vehicles** involved in a peacekeeping mission the question arises when they are no longer entitled to protection as a civilian object under international humanitarian law. Article 52 Add.Prot. I provides that civilian objects may not be attacked, namely all objects which are not military objectives. Military objectives are defined in para 2 of article 52 Add.Prot. I as limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’ Installations, material, units or vehicles involved in a peacekeeping mission are not military objectives ‘unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’³⁷⁵ 237

International humanitarian law applies to all armed conflicts and to all parties to the conflict, and therefore also to any peacekeeping mission present in an armed conflict. In order to determine whether a certain person or object enjoys protection under IHL as a civilian or as a civilian object, respectively, it is irrelevant whether a force, a person or an object is part of a ‘UN mission’. Peacekeeping as well as peace-enforcement missions do not readily fit in the categories of IHL, which has been drafted and has emerged without a focus on the particularities of such missions. While there has been considerable controversy about 238

³⁷⁰ Article 13 Add.Prot. I; Article 22 GC I provides basically the same.

³⁷¹ *Working Paper submitted jointly by the International Federation and the ICRC: Follow-up to Resolution 5 (Armed Protection of Humanitarian Assistance)* Council of Delegates, Geneva 1–2 December 1995, 95/CD/12/1.

³⁷² Article 13 para 1 first sentence Add.Prot. I.

³⁷³ *Prosecutor v. Nourain and Jerbo Jamus*, ICC-02/05-03/09-PT, Decision on the Confirmation of Charges, 7 February 2011, para 66; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, para 89; Dörmann, *Elements of War Crimes* (2003) 155; Sivakumaran, (2010) 8 *JICJ* 1026.

³⁷⁴ To the definition of ‘direct participation in hostilities’ see: *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision 8 February 2010, para 80, referring to *Prosecutor v. Pavle Strugar*, IT-01-42-A, Appeal Judgement, 17 July 2008, para 177.

³⁷⁵ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision 8 February 2010, para 89, referring to *Prosecutor v. Stanislav Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para 51: ‘... such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action’.

exactly what rules apply and on what legal basis, it seems now broadly accepted that IHL applies generally if not fully (which is the only possible interpretation according to humanitarian law logic) to UN **peace-enforcement operations** which are authorized to use force to achieve their objective and which in fact engage in hostilities against armed forces; it is also generally accepted that UN operations in which the basic mandate is not to engage in combat but that might become involved in hostilities must respect international humanitarian law insofar applicable.³⁷⁶ Article 2 of the Convention on the Safety of United Nations and Associated Personnel only appears to assume that IHL applies to peace-enforcement operations.³⁷⁷ However, again, humanitarian law itself is clear in that it applies to all and any armed conflict and parties to the conflict. Therefore, legally, there can hardly be an exception.

239 As with all civilians, their protection would not cease if the personnel use armed force only in exercising their right to individual self-defence.³⁷⁸ The use of force by peacekeepers in **self-defence in the discharge of their mandate**, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers.³⁷⁹ However, the term ‘self-defence’, as applied by the United Nations to its peacekeeping forces, is frequently used and understood in a substantially broader sense than the strict self-defence permitted to protected persons according to humanitarian law.³⁸⁰ While the notion of self-defence was interpreted extensively for certain missions³⁸¹, the Secretary-General did not strictly follow this approach in his Supplement to an Agenda for Peace and for instance did not consider the use of armed force for protection of humanitarian convoys or protection of safe areas as self-defence.³⁸²

240 It may be argued that a formal authorization of peace-enforcement missions to use force on their own initiative contrary to self-defence excludes its personnel and the entire mission from the entitlement to the protection accorded to civilians. It seems reasonable to exclude an entitlement to the protection of civilians when a ‘peacekeeping force’ is authorized to use force to a degree which essentially reaches the use of offensive force. A mission may of course also forgo the entitlement to civilian protection when the mandate is changed after an initial ‘static’ peacekeeping mandate, as for instance when the mandate is extended to a full-blown enforcement operation under Chapter VII.

241 An open question is whether all personnel and objects involved in a peacekeeping mission forgo the protection they are entitled to as civilians, respectively civilian objects if solely a part of it in fact becomes engaged in hostilities.³⁸³ While in such a case the whole peacekeeping operation may not anymore be perceived as neutral by combatants of the parties, the perception certainly cannot be the sole determining factor.

³⁷⁶ Cf. endeavours to limit the obligation to respect IHL, in order to avoid that UN missions are politically considered ‘parties to the conflict’, to having to respect ‘at least’ or ‘only’ the ‘principles and spirit’ of such law: Article 28 of the Model Agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, UN Doc. A/46/185 (23 May 1991), Annex, article 28; article 17 of the Agreement between the United Nations and the Government for the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda, signed on 5 Nov. 1993, quoted in: Greenwood (1998) 1 *YbIHL* 3 and 20–21; *idem.* (1996) 7 *DukeComp&IL* 185; Gasser (1995) 2 *Hu-V.* 72.

³⁷⁷ Article 20 (a) of the Convention on the Safety of United Nations and Associated Personnel; also Emanuelli (1996) 1 *Hum-V.* 4 *et seq.*

³⁷⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 233; Dörmann, *Elements of War Crimes* (2003) 159.

³⁷⁹ Sivakumaran, (2010) 8 *JICJ* 1026.

³⁸⁰ For instance, when the Security Council considered setting up the UN Interim Force in Lebanon in 1978, the Secretary-General stated that ‘[t]he Force will be provided with weapons of a defensive character. It shall not use force except in self-defence. Self-defence would include resistance to attempts by forceful means to prevent [the United Nations force] from discharging its duties under the mandate of the Security Council.’ Report of the Secretary-General, S/12611, p. 2 (emphasis added).

³⁸¹ Concerning ONUC, see Arsanjani, in: Condorelli *et al.* (eds.), *Les Nations Unies et le Droit International Humanitaire* (1996) 134 *et seq.*

³⁸² See UN Doc A/50/60–S/1995/1, para 34.

³⁸³ The Convention on the Safety of United Nations and Associated Personnel (n 310) provides that if *any* of the personnel of an enforcement operation engage as combatants the Convention shall not apply to the entire operation.

In determining whether the peacekeeping personnel or objects of a peacekeeping mission are entitled to civilian protection the **totality of the circumstances** existing at the time of the alleged offence must be considered,³⁸⁴ including, the relevant Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.³⁸⁵

e) *Mens rea* ('**Intentionally directing attacks**'). In addition to the standard *mens rea* requirement provided in article 30 Rome Statute, the offence has a **specific intent mens rea**, insofar as the perpetrator must have intended that the personnel, installations, material, units or vehicles of the peacekeeping mission be the primary object of the attack.³⁸⁶ The crime encompasses a **dolus directus of the first degree**.³⁸⁷ The perpetrator must have known or had reason to know that the personnel, installations, material, units or vehicles were protected. It is not necessary to establish that the perpetrator actually had legal knowledge of the protection to which the personnel and objects were entitled under international humanitarian law, but he must have been aware of the factual basis for that protection.³⁸⁸ Therefore, the defence of mistake of law provided for in article 32 Rome Statute is excluded, 'as only knowledge in relation to facts establishing that the installations, material, units or vehicles and personnel were involved in a peacekeeping mission is necessary, and not legal knowledge pertaining to the protection thereof.'³⁸⁹

4. Paragraph 2(b)(iv): Intentionally launching an attack in the knowledge of its consequences to civilians or to the natural environment

Literature: Roberta Arnold, *The protection of the civilian population from the effects of hostilities*, 4 *Humanitäres Völkerrecht* 159 (2004); *id.*, *The ICC as a New Instrument for Repressing Terrorism* (2004); *id.*, *The protection of the Environment Under the Laws of War*, in: Rain Liivoja/Timothy L.H. McCormack (ed.), *Routledge Handbook of the Law of Armed Conflict* (London: Routledge) (2015); Antoine Bouvier (ed), *How does law protect in war?*, Vol. II, (3rd edn, ICRC 2011); Antoine Bouvier, 'Protection of the Natural Environment in time of Armed Conflict' (1991) 285 (31) *IRRC* 567; Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final Report, § 283 < <http://www.icty.org/sid/10052>>; Michael Bothe, Carl Bruch, Jordan Diamond, David Jensen, 'International law protecting the environment during armed conflict: gaps and opportunities', 2010 *IRRC* Vol. 92 nr. 879 569; Michael Cottier, Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the [ICTY] Prosecutor's Report of 13 June 2000, in: Horst Fischer/Claus Kress/Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* 505 (2001); Knut Dörmann *et al.*, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003); Harold Wayne Elliott, 'Open Cities and Undeclared Places', *The Army Lawyer* 39 (1995); William J. Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare', 98 *MilLRev* 91 (1982); *id.*, 'Attaching the Enemy Civilian as a Punishable offence', 7 *DukeJComp&IL* 539 (1997); Hans-Peter Gasser, 'Protection of the Civilian Population', in: Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* 209 (1999); Hermann Von Hebel/Darryl Robinson, 'Crimes within the jurisdiction of the court', in: Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* 79 (1999); Yoram Dinstein, 'Protection of the environment in international armed conflict' in: J. A. Frowein and R. Wolfrum (ed) (2001), 5 *MPYbUNL* 523; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2009, Vol. I); Julian Fernandez et Xavier Pacreau, *Commentaire du Statut de Rome de la CPI* (Pedone 2012); Karen Hulme, *War Torn Environment:*

³⁸⁴ Frank, in: Lee (ed.), *Elements of Crimes* (2001), 146 *et seq.*

³⁸⁵ *Prosecutor v. Sesay, Kallon and Gbao*, No. SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 234; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, para 84.

³⁸⁶ *Prosecutor v. Sesay, Kallon and Gbao*, No. SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 232.

³⁸⁷ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision 8 February 2010, para 93.

³⁸⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, RUF Trial Judgement, 2 March 2009, para 235.

³⁸⁹ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-PT, Pre-Trial Decision, 8 February 2010, para 94; See: Piragoff and Robinson below article 30; Frank, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Trial Judgement, 2 March 2009147.

Interpreting the Legal Threshold (Martinus Nijhoff Publishers 2004; *id.*, 'Climate change and international humanitarian law', in: Rosemary Gail Rayfuse & Shirley V. Scott (Ed.), *International Law in Era of Climate Change*, (Cheltenham: Edward Elgar Publishing Ltd 2012), 190–218; *id.*, 'Taking care to protect the environment against damage: a meaningless obligation?' (2010) 92 (879) *IRRC* 675; ICRC's 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL', 200, Geneva; Jessica C. Lawrence and Kevin Jon Heller, 'The limits of article 8(2)(b)(iv) of the Rome Statute, the first ecocentric environmental war crime', (2007) 20 *Georgetown International Environmental Law Review* 61; N. Melzer, "'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" Adopted by the Assembly of the ICRC on 26 February 2009', reprinted in 2008 (872) *IRRC*; William H. Parks, 'Air War and the Law of War', 32 *AFLRev* 1 (1990); ICRC, 'Guidelines on the Protection of the Environment in Times of Armed Conflict', Annex to the ICRC Report to the 48th session of the UN General Assembly, 1993, <<http://www.icrc.org/eng/resources/documents/misc/57jn38.htm>; ICTY, Final Report of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, §§ 18/23, <<http://www.icty.org/sid/10052>; International Court of Justice (ICJ), Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, 242, § 30, <<http://www.icj-cij.org/docket/files/95/7497.pdf>; Anthony P.V. Rogers, *Law on the Battlefield* (2004); Yves Sandoz/Christophe Swinarski/Bruno Zimmermann *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987); Adam Roberts, 'Failures in protecting the environment' in: P.J. Rowe (ed.) *The Gulf War 1990–91 in International and English Law*, (Routledge 1993); Sandesh Sivakumaran, *The law of non-international armed conflict*, (OUP 2012); Michael N. Schmitt, 'Green War: An Assessment of the Environmental Law of International in Armed Conflict' in: M. N. Schmitt (ed), *Essays on Law and War at the Fault Lines* (2012 TMC Asser) 361; Waldemar A. Solf, 'Article 57', in: Michael Bothe/Karl J. Partsch/Waldemar A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982); Mara Tignino, 'Water, international peace, and security', (2010) 92 (879) *IRRC* 647; Otto Triffterer, 'Ius in bello: Eskalation durch 'Kollateralschäden' wie durch Kriegsverbrechen – Beweisbarkeit und Vermeidbarkeit?', in: Reinhard Moos/Udo Jesionek/Otto F. Müller, *Strafprozessrecht im Wandel: Festschrift für Roland Miklau zum 65. Geburtstag* 559 (2006); United Nations Environment Programme, *Protecting the Environment During Armed Conflict*, 'An Inventory and Analysis of International Law', (November 2009) 6, <http://postconflict.unep.ch/publications/int_law.pdf.

- 244 Pursuant to the Elements of Crime, the *actus reus* of article 8 para. 2 (b) (iv) requires that:
- (a) The perpetrator launched an attack;
 - (b) The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term *and* severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
- 245 Article 8 para. 2 (b) (iv) is somewhat similar to the grave breach provision contained in article 85 (3) (b) Add. Prot. I, except for the fact that:
- it includes 'widespread, long-term and severe damage to the natural environment' while the Add. Prot. I does not, and
 - it states that loss, injury or damage must be 'clearly' excessive while the Add. Prot. I does not.
- This provision may be actually divided into two parts. The general aim is to prohibit the intentional launching of attacks which may cause clearly excessive collateral damages on (a) civilians, on the one hand, and on (b) the natural environment, on the other.
- 246 (a) The clause referring to collateral damages among *civilians* was principally drawn from articles 51 para. 5 (b), 85 para. 3 (b), 35 para. 3 (b) and 55 para. 1 Add. Prot. I and reflects the three pillar principles of International Humanitarian Law (IHL): distinction, military necessity and proportionality. The principle of distinction is based on the idea that only combatants should engage in hostilities and, consequently, only military objectives, including combatants, may be targeted legitimately. For this reason a combatant, whose task is to fight, will not be held criminally liable for having killed an enemy. In fact IHL, unlike human rights law, accepts that violence and the loss of lives are intrinsic to war. However, a civilian, who will take up arms for reasons other than self-defence or the *levée en masse*, will be prosecutable for murder or killing pursuant to ordinary criminal law. Since civilians must abstain from combat activities, at the same time they shall be spared from their effects. In modern times, however, there has been an increasing involvement of civilians in hostilities and there have been major doctrinal developments concerning the direct participation of civilians in hostilities.³⁹⁰ As a

³⁹⁰ See note 131, Gasser, H.-P., *Protection* 210; R. Arnold, 'The protection of the civilian population from the effects of hostilities', 4 *Humanitäres Völkerrecht* 166 (2004). See in particular the ICRC's 'Interpretive Guidance

general rule, article 52 para. 1 Add. Prot. I states that civilian objects shall not become the *primary target* of an attack. This means that as long as an attack is not *primarily* aimed at civilians, or civilian objects, it may be justified under the laws of war. However, two other relevant criteria need to be taken into consideration in the equation: the principles of proportionality and military necessity. Only so-called ‘collateral damage’, *i.e.* losses among the civilian population and damages to civilian property which were necessary to fulfil the military mission and which were proportionate in relation to the military advantage sought, may be justified³⁹¹.

At Rome, discussions were raised in particular on how to formulate the ‘proportionality’ principle. According to article 57 Add. Prot. I, the criterion is that the anticipated collateral damage ‘would be excessive in relation to the concrete and direct military advantage anticipated’. However, several States were afraid that this would be applied too strictly by the Court, which would judge the situation *ex post*. In fact, the expression ‘concrete and overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Thus, some delegations preferred the more flexible criterion of ‘not justified by military necessity’. Eventually a compromise was achieved: the wording of Add. Prot. I was taken as a basis, with the additional inclusion of the wording ‘clearly’ and ‘overall’. This would permit the responsible person to have a wider margin of appreciation³⁹². Thus, the perpetrator must have known that the attack would cause incidental death, injury or damage to the natural environment, of a clearly excessive nature in relation to the military advantage sought. The assessment is to be made by the Court on an objective basis from the perspective of a reasonable commander³⁹³.

Another relevant issue is whether the proportionality test is to be made in relation to the *overall* objective sought (*i.e.* the mission’s objective) or merely the attack under scrutiny. Pursuant to *K. Dörmann* and others, the military advantage sought may or may *not* be temporally or geographically related to the object of the attack. However, it seems that the requirement of foreseeability was meant to exclude advantages which are vague and to avoid the possibility of relying on *ex post* justifications. For instance, according to Add. Prot. I, the expression ‘concrete and direct’ was intended to show that the advantage sought should be *substantial* and *relatively close*. Advantages which would only appear in the long term should be avoided³⁹⁴. According to a study on IHL customary rules, states like Australia, Belgium, Canada, Germany, Italy, the Netherlands, Spain, UK, US, and Nigeria, also interpret this rule as meaning the *advantage anticipated from the military attack considered as a whole* and not only from isolated or particular parts of the attack. The destruction, capture or neutralization must offer a *definite military advantage* in the circumstances ruling at the time. Thus, it is not allowed to launch an attack which only offers *potential or indeterminate* advantages. Those ordering or executing the attack must have sufficient information. In case of doubt, the safety of the civilian population must be taken into consideration³⁹⁵.

According to the Elements of article 8 para. 2 (b) (iv) ICC Statute (war crime of excessive incidental death, injury or damage), the expression *concrete and direct overall military advantage* refers to a military advantage:

on the Notion of Direct Participation in Hostilities under IHL’, 200; Geneva and N. Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ Adopted by the Assembly of the ICRC on 26 February 2009, reprinted in 2008 (872) IRRC. This whole issue of the IRRC was dedicated to this topic.

³⁹¹ Arnold, R., *The ICC as a New Instrument for Repressing Terrorism* 75 (2004); Fernandez J., et Pacreau, X., *Commentaire du Statut de Rome de la CPI*, (Paris: Pedone, 2012), at 519 *et seq.*

³⁹² Hebel, H., von/Robinson, D., ‘Crimes within the jurisdiction of the court’, in: Lee, R. S., (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, negotiations, results* 111 (1999).

³⁹³ See note 33, Dörmann, K., *Elements of war crimes* 164.

³⁹⁴ See note 33, Dörmann, K., *Elements of war crimes* 161–163.

³⁹⁵ See note 2, Sandoz Y./Swinarski Ch./Zimmermann B. (eds.), *Commentary* 636, No. 2024. See note 261, Arnold, R., *The protection* 171 (2004).

‘that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *ius ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict’.

250 Pursuant to the Commentary to the Additional Protocols, instead, the expression was intended to show that:

‘the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded’³⁹⁶.

251 So, there seems to be a slight difference of interpretation between Add. Prot. I, which, unlike the ICC Statute, requires temporal closeness. However, both provisions seem to share the common denominator that a definite military advantage is required for *each* chosen target³⁹⁷. This apparently supports the view that only those attacks which pursue an advantage in relation to the *concrete* attack launched are encompassed. No meaning was given to ‘attack as a whole’, but *K. Dörmann* argues that this certainly cannot be interpreted as meaning the whole conflict. In this regard, *W. A. Solf* holds the view that the assessment must be made in light of the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation³⁹⁸. At the same time, Australia and New Zealand also interpret this meaning that there is a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved³⁹⁹.

251 Regarding the question whether the damage must have occurred, the Preparatory Committee followed the view that for the crime to be committed it is not necessary that the attack had a particular result. This understanding is expressed in the phrasing that ‘the attack was such that it would cause’⁴⁰⁰.

253 (b) Concerning the clause referring to the *natural environment* – which is the only one in the entire ICC Statute – its language is inspired by articles 35 para. 3 and 55 Add. Prot. I. These ban attacks which would cause widespread, long-term *and* severe damage to the natural environment. Their threshold, thus, is higher than the one set by the *Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976* (ENMOD)⁴⁰¹, which provides for disjunctive criteria.⁴⁰² A similar content can be found in Rules 43–45 of the ICRC’s Study on customary law, which moreover re-state the principle according to which, prior to launching an attack, precautionary measures shall be taken⁴⁰³. Unfortunately, like the provisions in Add. Prot. I, neither the ICC Statute nor its

³⁹⁶ See note 2, Sandoz, Y./Swinarski, Ch./Zimmermann, B. (eds.), *Commentary* 684, No. 2209.

³⁹⁷ See note 2, Sandoz, Y./Swinarski, Ch./Zimmermann, B. (eds.), *Commentary* 636, No. 2028.

³⁹⁸ Solf, W. A., *Article 57*, in: Bothe, M./Parsch, K. J./Solf, W. A., *New Rules for Victims of Armed Conflicts, Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982).

³⁹⁹ Henckaerts, J.-M., ‘The conduct of hostilities: target selection, proportionality and precautionary measures under international humanitarian law’, in: Hector, M./Jellema, M. (ed.), *Protecting Civilians in 21st Century Warfare*, Speeches and proceedings of the Red Cross Symposium, 8 December 2000 16–17 (2001).

⁴⁰⁰ See note 33, Dörmann, K., *Elements of war crimes* 162. This is also the position held by the international community with regard to the protection of the environment under article 35 para. 3 and article 55 Add. Prot. I, on which the ICC provision is based, as it will be discussed next. See Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final Report, § 15) see <http://www.icty.org/sid/10052> (last viewed 18 Oct. 2014); Rogers, A. P. V., see at 169; Arnold, R., *Routledge Handbook*.

⁴⁰¹ Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976 (ENMOD), 5 October 1978, (1977) 16 *ILM* 88–94.

⁴⁰² For details, see Arnold, R., *Routledge Handbook*.

⁴⁰³ Rule 43 refers to the general IHL principles on the conduct of hostilities apply to the natural environment; Rule 44 refers to the principle of Due Regard for the Natural Environment in Military Operations and Rule 45 refers to the prohibition to Cause Serious Damage to the Natural Environment. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law, Vol. I – Rules*, (Cambridge: CUP; 2009), at 144–160. ICTY’s Report on NATO’s bombing campaign in Kosovo, cited by A Bouvier, *How does law*, Case 38, at 21.

Elements specify the meaning of the words ‘widespread, long – term and excessive’. There seems to be agreement in the doctrine, however, that the requirement of ‘long-term’ damage under the Add. Prot. I refers to some decades (at least two or three) as opposed to months or a season, as it is instead the case under the ENMOD⁴⁰⁴. Due to this high-threshold, it is unlikely that battlefield damage incidental to conventional warfare – like the sort of damage caused by heavy shelling during World War I battles on the Western Front – would not normally fall under this provision, a view expressed also by the ICTY in its report on NATO’s bombing campaign in Kosovo⁴⁰⁵. Some authors like Lawrence and Schmitt, even argue that by relying on the interpretation of Add. Prot. I, the ICC provision will even become a ‘virtual nullity’, since the AP I standard, to use Schmitt’s words, is ‘nearly impossible to meet in all but the most egregious circumstances’⁴⁰⁶. The notion ‘severe’ under Add. Prot. I may be interpreted as meaning the prejudicing of the continued survival of the civilian population or involving the risk of major health problems, whereas ‘widespread’ may indicate effects which go beyond the standard of several hundred square kilometres set forth by ENMOD⁴⁰⁷. The United Nations Environment Programme suggested to read the notions ‘widespread’ as encompassing an area on the scale of several hundred square kilometres; ‘long-term’ as a period of months, or approximately a season; and ‘severe’ as involving serious or significant disruption or harm to human life, natural economic resources or other assets⁴⁰⁸. An analogous interpretation may be adopted for Article 8 para. 2 (b) (iv) ICC Statute. The major difference between this provision and those contained in the Add. Prot. I and ENMOD, however, is the inclusion of a proportionality test⁴⁰⁹, requiring a military advantage foreseeable by the perpetrator at the relevant time and which may or may not be temporally or geographically related to the object of the attack⁴¹⁰. Accordingly, only those attacks which are being launched in the knowledge that this will cause widespread, severe and long term damage to the environment, *and* which would be clearly excessive with regard to the anticipated military advantage, shall be considered as a war crime⁴¹¹. A degree of discretion is granted to military commanders and, in any event, prosecutors would probably be reluctant to prosecute unless the proportionality requirement was clearly breached. Determining the proper standard is difficult⁴¹². A major difficulty, then, will lie in the possibility for the commander, prior to the attack, to quantify the damage and to assess whether this is proportionate or not. The assessment of what kind of damage is actually incidental casualty or damage which is not disproportionate is legally permissible. The ICTY, in its *Report on NATO’s bombing*, observed that the *ICC Statute* recognizes ‘operational reality’ and that the use of the word *clearly* ensures that criminal responsibility would be entailed only in cases where the excessiveness of the incidental damage was obvious⁴¹³.

Concerning the *mens rea*, also in this case article 8 para. 2 (b) (iv) is somewhat similar to the grave breach provision in article 85 Add. Prot. I, except for the fact that the first refers to

⁴⁰⁴ See the Understanding to Art. 1 ENMOD.

⁴⁰⁵ Report of the Drafters’ Committee, Conference document CDDH/215/Rev. 1, para. 27; Bouvier, *How does law*, (n 6), 606.

⁴⁰⁶ Lawrence, J. C. and Heller, K. J., ‘The limits of article 8(2)(b)(iv) of the Rome Statute, the first ecocentric environmental war crime’, (2007) 20 *Georgetown International Environmental Law Review* 61, at 68, citing Michael Schmitt.

⁴⁰⁷ See Rogers, A. P. V., see at 171 and Arnold, R., *Routledge Handbook*.

⁴⁰⁸ UNEP (n 13) 5, § 1 of the Recommendations.

⁴⁰⁹ Dörmann K., *Elements of war crimes*, 166; Fenrick, W., ‘The Rule of Proportionality and Protocol I in Conventional Warfare’ (1982) 98 *MillRev* 91; See however Hulme, K., *War Torn Environment: Interpreting the Legal Threshold* (Martinus Nijhoff Publishers 2004) 78, in whose view this requirement is pleonastic.

⁴¹⁰ Elements of Crime, UN Doc PCNICC/2000/1/Add.2 (2000), FN 36 and 37, see <http://www1.umn.edu/humanrts/instree/iceelementssofcrimes.html> (last viewed 18 Oct. 2014); ICTY (n 39) § 50; Dörmann, see at 176; Lawrence, see at 86.

⁴¹¹ See note 263, Hebel, von H./Robinson, D., *Crimes* 112.

⁴¹² Fenrick, W. J., ‘The Rule of Proportionality and Protocol I in Conventional Warfare’, 98 *MillRev* 91 (1982).

⁴¹³ Arnold R., *Routledge Handbook*; ICTY, Final Report of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, § 21.

‘intentionally’ launching an attack while the Add. Prot. I refers to ‘wilfully’ launching an attack. The Elements provide that the perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such. Thus, this may be intent (*dolus directus*) or constructive intent (*dolus eventualis*).⁴¹⁴

5. Paragraph 2(b)(v): Attacking or bombarding undefended not military objectives

Literature: Knut Dörmann *et al.*, *Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003); Jean-Marie Henckaerts/Louise Doswald-Beck, *Customary international humanitarian law, Vol. I – Rules*, (Cambridge: CUP; 2009); William J. Fenrick, ‘The Rule of Proportionality and Protocol I in Conventional Warfare’, 98 *MillRev* 91 (1982); *id.*, ‘Attacking the Enemy Civilian as a Punishable Offence’, 7 *DukeJComp&IL* 539 (1997); Leslie C. Green, *The Contemporary Law of Armed Conflict* (2000); William H. Parks, ‘Air War and the Law of War’, 32 *AFLRev* 1 (1990); Didier Pfirter, ‘Article 8(2)(b)(v) – Attacking Undefended Places’, in: Roy S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001); Anthony P.V. Rogers, *Law on the Battlefield* (2004); Marco Sassòli/Antoine Bouvier, ‘Un droit dans la guerre (2003); Harold Wayne Elliott, ‘Open Cities and Undefended Places’, *The Army Lawyer* 39 (1995).

- 255 According to article 8 para. 2 (b) (v) it is a war crime: ‘Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives’. Pursuant to the Elements of Crime, this norm is fulfilled if:
1. The perpetrator attacked one or more towns, villages, dwellings or buildings
 2. Such towns, villages, dwellings or buildings were open for unresisted occupation
 3. Such towns, villages, dwellings or buildings did not constitute military objectives
 4. The conduct took place in the context of and was associated with an international armed conflict
 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
- 256 This prohibition is nowadays recognized as forming part of customary law (Rule 37 of the ICRC Study on Customary Law), applicable to all types of armed conflicts, even though under the ICC Statute this has been only made applicable within the context of international armed conflicts. It was included in the Brussels Declaration and in the Oxford Manual⁴¹⁵, and later codified in article 25 of the Regulations annexed to Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, article 59 (non-defended localities) of Add. Prot. I and article 3 sub-para. c of the ICTY Statute, which all contain a similar language, with the only difference that the provision of the ICC Statute incorporates the principle of military necessity and distinction, explicitly stating that such acts are prohibited if these targets did not constitute a military objective.
- 257 The term ‘attack’ is defined in article 49 para. 1 Add. Prot. I of 1977 as covering any ‘acts of violence against the adversary, whether in offence or in defence’. Because of this definition, the additional specifications of ‘bombarding’ and ‘by whatever means’ in article 8 para. 2 (b) (v) have lost significance, as it was instead the case for the interpretation of article 25 of the Hague Regulations.
- Article 59 Add. Prot. I reiterates article 25 of the Regulations. Paragraph 1 holds that: ‘It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities’.
- 258 The Preparatory Committee, in drafting article 8 para. 2 (b) (v), however, decided to stick to the language of the 1925 Regulations rather than to adopt the wording of article 59 Add. Prot. I, particularly the conditions set forth in paragraph 2⁴¹⁶. This prohibits ‘The attack or

⁴¹⁴ Hulme, K., *War Torn* (n.2) 74. In the Romanic systems, this would correspond to what is called as ‘dolus directus’ and ‘dolus eventualis’ respectively.

⁴¹⁵ See Brussels Declaration, Article 15 (cited in: Henckaerts, J.-M. and Doswald-Beck, L., Vol. II, Ch. 11, § 233); Oxford Manual, Article 32 (cited in: Henckaerts, J.-M. and Doswald-Beck, L., Vol. II, Ch. 11, § 234).

⁴¹⁶ This was apparently the view of the Preparatory Committee. On this see note 33, Dörmann, K., *Elements of war crimes* 177.

bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended'. Pursuant to it, an undefended locality is any inhabited place near or in a zone where armed forces are in contact and which is open to occupation by the adversary. It must fulfil the following conditions:

- (a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
- (b) no hostile use may be made of fixed military installations or establishments,
- (c) no acts of hostility may be committed by the authorities or by the population,
- (d) no activities may be undertaken in support of military operations.

As long as these criteria are met, no attack can be launched on the locality by any means whatsoever. Thus, the notion of 'undefended' is not to be confused with the notions of 'neutralized' or 'demilitarized' zone⁴¹⁷. Unlike demilitarized zones, which require an agreement between the parties, non-defended areas can be established via a unilateral declaration notified to the enemy Party. The Party shall acknowledge receipt of the notification. Otherwise, the criteria are practically the same⁴¹⁸. Neutralised zones are instead defined in article 15 of the IV Geneva Convention of 1949. These are established in fighting areas and intended to shelter from the dangers of war all persons, without distinction, who are not taking part, or no longer taking part, in hostilities and who do not perform any work of a military nature while they remain in these zones. Like demilitarised zones, they are established by agreement between the Parties concerned on the proposal of the Party setting them up. Such zones were set up, e.g., during the armistice negotiations at Panmunjom during the Korean War, 1952-53⁴¹⁹. They may encompass whole towns and they are intended to protect the wounded and sick, both combatants and civilians, and also civilians who are taking no part in hostilities⁴²⁰.

Pursuant to article 59 para. 2 Add. Prot. I, non-defended localities must meet the following criteria:

1. all combatants and mobile military equipment must have been evacuated
2. no hostile use shall be made of fixed military installations/establishments
3. no acts of hostility shall be committed by the authorities or the population
4. no activities in support of military operations shall be undertaken.

These, however, were not retained, notwithstanding the Swiss proposal. The only element that matters is that the area be open for unresisted occupation⁴²¹. The latter criterion is the one which particularly defines the notion of 'non defended localities'. One of the underlying arguments for preferring the phrasing of the 1925 Hague Regulations was that the latter's scope is broader than that of Add. Prot. I.

From the definition of undefended locality, it follows that the zone must be close to in the combat area⁴²². As remarked by *W. Fenrick*, in the First Edition of this Commentary, 'undefended' has a technical meaning and does not include objects which are behind enemy lines, even if there are no combatants or weapons located close to the objects.

As remarked previously, a peculiarity of article 8 para. 2 (b) (v) ICC Statute is the specification that beyond being an undefended place, the area must additionally not be a 'military objective'. It is namely conceivable that an undefended place be a military objective, in which case it would become a lawful target. Military objectives are defined in article 52 para. 2 Add. Prot. I. According to this, an objective can be considered of a military character if by its nature, location, purpose or use it makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling

⁴¹⁷ See respectively article 15, 1907 Hague Convention IV and article 60 Add. Prot. I.

⁴¹⁸ Mulinen, de F., *Handbook on the law of war for armed forces* 100, para. 419 (1987).

⁴¹⁹ Green, L. C., *The Contemporary Law of Armed Conflict* 90 (2000).

⁴²⁰ See note 2, Rogers, A.P.V., *Law* 131.

⁴²¹ Pfirter, D., 'Article 8(2)(b)(v) – Attacking Undefended Places', in: Lee, R. S. et al. (eds.), *Elements of Crimes* 152.

⁴²² Sassòli, M./Bouvier, A., *Un droit dans la guerre* 216 (2003).

at the time, offers a definite military advantage. *K. Dörmann* and others hold that, by comparing the constituent elements for a non-defended locality and a military objective, a non-defended locality cannot be considered a military objective that may be lawfully attacked⁴²³. However, it is possible to imagine the presence of some fixed military installations in an undefended area that, for strategic and tactical reasons, may need to be destroyed. Also in this case, as already discussed in relation to article 8 para. 2 (b) (iv), the issue is whether the concrete military advantage is to be considered in relation to the ongoing attack or to the military operation or mission overall. A somewhat middle position is held, *e.g.*, by *A.V. P. Rogers*, who remarks that the presence of supplies of military value to the enemy or the presence of railway establishment, telegraphs or bridges in a town may not per se constitute a sufficient excuse for bombarding it, in that the area is open to occupation by troops. However, he observes that the situation may be different in respect of military objectives such as munitions factories in undefended towns behind enemy lines, which cannot be occupied without opposition⁴²⁴.

264 On the other hand, in recent years, the opposite concept of ‘*defended place*’ has been subordinated to the concept of ‘legitimate military objective’. Defended places generally include: forts or fortified places; a city or town surrounded by detached defence positions, when the city or town is part of an indivisible defence network; or a place which is occupied by a combatant military force or through which such a force is passing. The occupation of such a place by medical units alone is not sufficient to make it a defended place.

265 According to *W. Ferrick*, one must also be cognisant of the military doctrine of ‘*defence in depth*’. This doctrine calls for a *plan of defence* which covers an entire territory, including the use of reserve, national guard or territorial defence forces and irregular units, spread throughout the territory, in order to counter advances by the enemy or to defend against any type of attack behind the forward area of the battle lines. Such a plan of defence can virtually negate the concept of an undefended area.

266 However, pursuant to footnote 38 to the Elements of article 8 para. 2 (b) (v),

[t]he presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not itself render the locality a military objective’.

267 In some instances it could be namely argued that police forces constituting part of the armed forces, as it is the case for the Italian Carabinieri, may militarise the area. This, however, pursuant to the Elements, shall not be the case.

Regarding the *mens rea*, the author must have been aware of the undefended character of the area.

6. Paragraph 2(b)(vi): Prohibited attacks against persons *hors de combat*

Literature: Goodman, R., ‘The Power to Kill or Capture Enemy Combatants’, (2013) 24 *EJIL* 819; Oeter, S., ‘Methods and Means of Combat’, in: D. Fleck (ed.), *The Handbook of International Humanitarian Law* (OUP 2008); Robertson, H. B. (Jr.), ‘The Obligation to Accept Surrender’ (2010), *NavalWarColRev*103 (1993), reprinted in: J.N. Moore and R.F. Turner (eds.), ‘Readings on International Law from the Naval War College Review 1978–1994’, (1995) 68 *USNavalWarCollegeILStudies* 541, 548–551; Schmitt, M. N., ‘Wound, Capture, or Kill: A Reply to Ryan Goodman’s “The Power to Kill or Capture Enemy Combatants”’, (2013) 24 *EJIL* 855. Doswald-Beck, L. (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994) 184; Thomas, A.R., and Duncan, J.C., (eds.), *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* (1999) 407.

268 a) **Normative origins and drafting history.** It is a fundamental principle of humanitarian law that the only legitimate aim of armed warfare is to weaken the military force of the adversary, for which it is sufficient to weaken the military force of the adversary and in particular render the members of these forces *hors de combat*. As early as 1868, the

⁴²³ Dörmann, K., *Elements of war crimes* 177.

⁴²⁴ Rogers, A.P.V., *Law* 132.

St. Petersburg Declaration recognized that ‘the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy’, and ‘[t]hat for this purpose it is sufficient to disable the greatest possible number of men’. Article 35 para. 2 Add. Prot. I in addition provides that ‘[i]t is prohibited to employ ... methods of warfare of a nature to cause superfluous injury or unnecessary suffering’. Since combatants are *hors de combat* because they are no longer able or willing to fight, it is unlawful to kill or injure them, even if they belong to adversary forces and/or were previously engaged in hostile action⁴²⁵. This principle also underlies article 8 para. 2 (b) (vi) Rome Statute.

The protection of article 8 para. 2 (b) (vi) is significant since it protects combatants during the *interval* between the moment he or she becomes *hors de combat* on the battlefield and his or her attainment of a more secure status (e.g. prisoner of war)⁴²⁶. 269

The wording of article 8 para. 2 (b) (vi) has been taken from article 23 (c) Hague Regulations. However, the term ‘enemy’ has been replaced by ‘combatant’ (meaning ‘adversary combatant’). This slight change as well as the title of the elements of this crime (‘War crime of killing or wounding a person *hors de combat*’) express the negotiators’ view that the protected category of persons are persons *hors de combat* as defined under contemporary international humanitarian law and more particularly article 41 Add. Prot. I. Taking into account the contemporary humanitarian law rules relating to persons *hors de combat* suggests a more extensive scope of application of the offense as would result from a strictly literal interpretation. 270

The prohibition to kill or wound a person *hors de combat* reflects customary law, which prohibits attacking combatants who no longer participate in the fighting, who have surrendered, or who are no longer able to fight, either because they have no means of defending themselves or because they are overpowered.⁴²⁷ Several military manuals explicitly prohibit the killing or wounding of a person *hors de combat*⁴²⁸. In addition to article 23 (c) Hague Regulations, particular groups of persons *hors de combat* enjoy general protection under articles 12 GC I, 12 GC II, 13–14 GC III, and articles 16 and 33 GC IV. 271

However, the central rule elaborating on the prohibition is article 41 Add. Prot. I. Its first paragraph provides that: 272

‘1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.’

This paragraph not only forbids directing an attack against persons who are known to be *hors de combat*, but also against those who, in the circumstances should be recognized to be *hors de combat*, i.e. what a reasonable man should have recognized.⁴²⁹ 273

The second paragraph of Article 41 provides that: ‘A person is *hors de combat* if: 274

- a) he is in the power of an adverse Party;
 - b) he clearly expresses an intention to surrender; or
 - c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
- provided that in any of these cases he abstains from any hostile act and does not attempt to escape.’

⁴²⁵ The respect of this prohibition lies in the interest of both sides, as is true with regard to the respect of IHL generally. Combatants who do not trust that the adversary will respect the prohibition to kill persons *hors de combat* will not surrender but continue fighting to the last man.

⁴²⁶ The status of prisoners of war applies only to those persons who have ‘fallen into the power’ of the adversary. See Sandoz *et al.*, *Commentary* (1987), paras. 1612–1613.

⁴²⁷ See Rule 47 and related state practice, in: Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Vol. I* (2005); Bothe *et al.*, *New Rules for Victims of Armed Conflicts* (1982) 252. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion), paras. 79/81; Eritrea Ethiopia Claim Commission, *Prisoners of War – Ethiopia’s Claim*, 4, (Partial Award), paras. 29/33/52 *et seq.*/63 *et seq.*, Eritrea Ethiopia Claim Commission, *Prisoners of War – Eritrea’s Claim* 17, (partial Award), paras. 38–42/57 *et seq.*

⁴²⁸ See, e.g., *U.S. Commander’s Handbook on the Law of Naval Operations*, para. 6.25, sections 3, 4 and 5.

⁴²⁹ See CDDH/236/Rev.1, para 23. See Bothe *et al.*, *New Rules for Victims of Armed Conflicts* (1982) 253.

- 275 This paragraph covers several categories of persons: persons in the hands of the adverse party (paras. 2(a) and (c)), as well as persons that are generally not in the custody of the adverse party (para. 2(b)). The category of persons described in paragraph 2 (b) is provided with a needed protection against the immediate dangers that lie in the interval between becoming *hors de combat* on the battlefield and the attainment of a safer status.
- 276 Numerous trials on war crimes committed during World War II have involved convictions on the charge of attacking persons *hors de combat*⁴³⁰. For instance, in 1945 the U.S. Military Commission sentenced Gunther Thiele and Georg Steiner to death, the first for wrongfully and unlawfully ordering the killing of a prisoner of war, and the second for actually killing him⁴³¹. The accused were found guilty of a violation of the ‘laws of war as expressed in solemn treaties’, that is, article 2 of the 1929 Geneva Prisoners of War Convention⁴³² and article 23 (c) Hague Regulations. The Canadian Military Court in Aurich (Germany) found Brigadeführer Kurt Meyer responsible for a war crime in view of the killing by troops under his command of prisoners of war. The Judge Advocate pointed out that the killing of prisoners of war was a war crime under international custom and usage as well as under the Hague Regulations and the 1929 Geneva Convention⁴³³. In the *Peleus* Trial, five accused were found guilty for having killed crew members of a sunken ship while on rafts. The ‘killing of unarmed enemies’ was qualified as a prohibition of ‘fundamental usage of war’, and the Court stated that ‘[t]o kill helpless survivors of a torpedoed ship was a flagrant breach of the law of nations’. In addition, the Court said that ‘the right to punish persons who broke such rules of war had clearly been recognised (for many years)’⁴³⁴.
- 277 Article 85 para. 3 (e) Add. Prot. I makes it a grave breach of the Protocol to cause death or serious injury by wilfully ‘making a person the object of attack in the knowledge that he is *hors de combat*’.⁴³⁵ Also, several national legislations criminalize killing or wounding a person *hors de combat*⁴³⁶.
- 278 Killing or injuring a person *hors de combat* may amount to further war crimes under ICC jurisdiction. In particular, a person *hors de combat* that has already ‘fallen into the power’ of the adversary is also protected under the grave breaches provisions pertaining, *inter alia*, to the protection against killing or wounding spelled out under article 8 para. 2 (a) (i)-(iii) Rome Statute. Attacking protected places where sick or wounded persons *hors de combat* are present might constitute a war crime under article 8 para. 2 (b) (ix) or (xxiv) and declaring that no quarter will be given is a war crime under article 8 (2)(b)(xii).
- 279 **b) Persons hors de combat.** Article 8 para. 2 (b) (vi) does not use the term of ‘persons *hors de combat*’. However, the provision needs to be read in the light of contemporary customary international law. The Elements of Crimes to article 8 para. 2 (b) (vi) therefore rightly make clear by their title and element 2 that this offense criminalizes the killing or wounding of ‘persons *hors de combat*’, as the prohibition stemming from article 23 (c) Hague Regulations would be phrased in contemporary IHL. Correspondingly, it is submitted that article 41 para. 2 Add. Prot. I, which defines the notion of persons *hors de combat*, is directly relevant to the interpretation of article 8 para. 2 (b) (vi). Article 41 para. 2 Add. Prot. I essentially

⁴³⁰ For a list of examples relating to the killing of prisoners of war without due cause usually tried on the basis of article 23 (c) Hague Regulations, see XV *Law Reports* 99, fn. 2 (1949).

⁴³¹ U.S. Military Commission at Augsburg, *Thiele and Steinert*, III *Law Reports* 56 (1947).

⁴³² This article provided in its second paragraph that prisoners of war ‘shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity’.

⁴³³ Canadian Military Court at Aurich, *Kurt Meyer* (10–28 Dec 1945), IV *Law Reports* 97 (1948), pp. 107–110.

⁴³⁴ *Peleus Trial (In re Eck and Others)*, *AnnDig.* (1946) 248 (1951); British Military Court at Hamburg, Heinz Eck *et al.* (*The Peleus Trial*) (17–20 Oct. 1945), I *Law Reports* 1 (1947), pp. 2 and 13.

⁴³⁵ See Sandoz *et al.*, *Commentary* (1987), paras 3491–3493 (discussing the required *mens rea*) and CDDH/III/SR.29 Vol. XIV, at 281 para. 60; at 282, para. 62 (Netherlands).

⁴³⁶ See, e.g., Chapter 22, § 6, No. 3 of the Swedish Penal Code, (‘attacks on civilians or anyone put out of action’; article 379 as well as articles 375, 376 and 382 of the 1994 Penal Code of the Republic of Slovenia; article 287 (a) (as well as articles 283 and 284) of the Penal Code of the Empire of Ethiopia of 1957; article 609 of the Spanish Military Penal Code (*Ley orgánica* 10/95 of 23 Nov. 1995).

reflects and rephrases the prohibition of article 23 sub-para. (c) Hague Regulations in more modern and more precise language, thereby specifying how that prohibition is to be understood under contemporary international law⁴³⁷.

The Elements of Crimes use the term ‘persons’ instead of ‘combatants’. The term ‘person’ is broader and more appropriate, as it does not exclude civilians who engaged in hostilities and became *hors de combat* or members of armed forces not technically qualifying as ‘combatants’ but who nevertheless become *hors de combat* when falling into the power of the adverse party⁴³⁸. The use of the term ‘person’ in Article 41 supports this position. 280

According to article 41 para. 2 Add. Prot. I, a person is *hors de combat* when he or she clearly expresses an intention to surrender, is incapable of defending himself or herself because rendered unconscious or otherwise incapacitated by wounds or sickness, or is ‘in the power’ of an adverse party to the conflict, provided that ‘in any of these cases he abstains from any hostile act and does not attempt to escape. A wounded or sick combatant who continues to fight is not *hors de combat* and may therefore be attacked’⁴³⁹. No argument of military necessity can justify any derogation from the prohibition to fight a person *hors de combat*⁴⁴⁰. 281

The definition of person *hors the combat* as contained in Article 23 (b) of the Hague Regulations is broader than the one established by the Add. Prot. I. In the *Kononov* case, the European Court of Human Rights also seems to have adopted a broad definition of *hors de combat*, by including into this prohibition the one precluding any attack against a defenseless combatant. In this case, the Grand Chamber considered that ‘even if the deceased villagers were considered combatants or civilians who had participated in hostilities, *jus in bello* in 1944 considered the circumstances of their murder and ill-treatment a war crime since those acts violated a fundamental rule of the laws and customs of war protecting an enemy rendered *hors de combat*.’⁴⁴¹ The judges further held that ‘(f)or this protection to apply, a person had to be wounded, disabled or unable for another reason to defend him/herself (including not carrying arms), a person was not required to have a particular legal status, and a formal surrender was not required.’⁴⁴² It is submitted here that the contemporary law of armed conflict includes a broad definition of *hors de combat* and that the definition contained in Article 8 (2) (b) (vi) goes in the same direction. 282

A person *hors de combat* thus enjoys particular attention before being able to enjoy a safer status as for instance the status of a prisoner of war. The prohibition benefits four categories of persons: Anyone who clearly indicates an intention to surrender; anyone who is defenseless because of unconsciousness, shipwreck, wounds or sickness; anyone who is in the power of an adverse party; and persons parachuting from an aircraft. These categories of persons are examined in more detail below. 283

aa) Surrendering persons. The first category of persons covered by article 8 para. 2 (b) (vi) Rome Statute are persons who surrender. Article 41 para. 2 (b) Add. Prot. I requires that the intention to surrender must be ‘clearly expressed’. In land warfare, there are no formal requirements how such surrender must be communicated. Often, the intention to surrender is signaled by literally ‘laying down the arms’ and holding up the hands or, where arms cannot be laid down such as in the case of a tank, ceasing to fight and showing a white flag⁴⁴³. 284

⁴³⁷ See Thomas and Duncan (eds.), *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* (1999) 407; Robertson (Jr.) in: Moore and Turner (eds.), *Readings on International Law from the NavalWarCollRev 1978–1994* (1995) 547. See Sandoz et al., *Commentary* (1987), paras. 1601–1602; Bothe et al., *New Rules for Victims of Armed Conflicts* (1982), 252.

⁴³⁸ See Sandoz et al., *Commentary* (1987), para. 1614.

⁴³⁹ On the ceasing of the protection after hostile acts, see *id.*, at paras. 1621–1624.

⁴⁴⁰ See *id.*, para. 1609. Cf., U.S. Military Commission at Augsberg, *Thiele and Steinert III Law Reports* 56 (1948), at 58–59; *Peleus Trial* Ann. Dig. (1946) 249 (1951), at 249.

⁴⁴¹ ECtHR, *Kononov v. Latvia* case, Grand Chamber, 17 May 2010, para. 216.

⁴⁴² *Id.*

⁴⁴³ (298) See, e.g., Sandoz et al., *Commentary* (1987), paras. 1618–1619; Robertson (Jr.), *The Obligation* (1995) 548–551.

- 285 In 1947, the Judge Advocate in the *Von Ruchteschell* case even argued that, even if the accused did not receive any signal of surrender, he could still be convicted if he deliberately or recklessly avoided any question of surrender by making it impossible for the attacked vessel to make a signal⁴⁴⁴.
- 286 Based on this case it might be argued that refusing any possibility for surrender when attacking might constitute a war crime insofar the refusal was feasible and would not have led to disproportionate military disadvantage, such as when surprise or speed is critical to an attack's success. However, it appears that such conduct more appropriately is considered under the heading of the war crime of denying quarter, not least since no persons legally qualifying as persons *hors de combat* are being killed.
- 287 Surrendering means to cease fighting and give oneself into the power of the adversary, not resisting capture by the enemy. Thus, a wounded or sick person continuing to fight is not surrendering⁴⁴⁵. Also, the surrender is 'at discretion', that is, unconditional. The only right is to be treated according to international humanitarian law and in particular, if applicable, to be treated as a prisoner of war⁴⁴⁶.
- 288 The surrender must not be *mala fide*: Signaling a surrender with intent to betray the adversary's confidence in the surrender in order to gain a military advantage constitutes an act of perfidy and is therefore prohibited.⁴⁴⁷ Conversely, it would also constitute an act of perfidy to invite the confidence of a person in that his or her surrender would be accepted while intending to betray that confidence and refuse the surrender⁴⁴⁸.
- 289 Case law has repeatedly dealt with the notion of surrendering persons. In 1997, in the case before the Inter-American Commission on Human Rights concerning the events at La Tablada in Argentina, the perpetrators of the initial attack on the Argentine military barracks alleged that, after the fighting ceased, agents of the State participated in the summary executions and torture of some of the captured attackers.⁴⁴⁹ The Commission could not identify the precise time or day of the putative surrender attempt. Nor could it know what was happening at the same time in other parts of the base where other attackers were located. Accordingly, when it came on the question of whether the surrender could constitute an act of perfidy, it held that '(i)f these persons, for whatever reasons, continued to fire or commit hostile acts, the Argentine military might not unreasonably have believed that the white flag was an attempt to deceive or divert them.'⁴⁵⁰
- 290 More recently, the European Court of Human Rights considered a case dealing with the question of whether a member of an insurgent group had 'laid down his arms', thereby taking no further part in the fighting. His intention to surrender was not clear and he had been secretly carrying a handgun. In addition, he had embarked on an animated quarrel with the applicant, and had then drawn his gun with unknown intentions. The Grand Chamber considered that in order to produce legal effects, any intention to surrender needs to be signaled in a clear and unequivocal way, namely by laying down arms and raising hands or at the very least by raising hands only.⁴⁵¹ Ultimately, the Court considered that the insurgent did not express in such a manner any intention to surrender.⁴⁵²
- 291 **bb) Persons having no longer any means of defence.** Persons '*having no longer means of defence*' are not anymore capable of armed resistance. They may be incapacitated to fight

⁴⁴⁴ British Military Court in Hamburg, *Von Ruchteschell case*, (21 May 1947), *AnnDig.* (1946) 248 (1951).

⁴⁴⁵ However, that person might still be protected as a person *hors de combat* if incapable of defending himself or herself and of causing any real danger to the adversary.

⁴⁴⁶ See Sandoz *et al.*, *Commentary* (1987), paras. 1618–1619.

⁴⁴⁷ See article 37 Add. Prot. I.

⁴⁴⁸ (302) See paragraph 111 (b) of the San Remo Manual and the commentary to article 8 para. 2 (b) (vii) and (xi).

⁴⁴⁹ Interamerican Commission on Human Rights, Juan Carlos Abella v. Argentina (*La Tablada case*), Case 11.137 (Argentina) Report N° 55/97, 18 November 1997, OEA/Ser.L/V/II.95, para 3.

⁴⁵⁰ *La Tablada case*, para 184.

⁴⁵¹ ECHR, *Korbely v. Hungary*, 19 September 2008, paras 14, 15 and 90.

⁴⁵² *Id.*, paras 90–91.

because they are wounded or sick, or have lost control over weapons or a vehicle or ship. According to article 41 para. 2 (c) Add. Prot. I, a person is also *hors de combat* if that person ‘has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself’. According to article 8 Add. Prot. I, wounded and sick persons are those who need medical care as a result of a trauma, disease or other physical or mental disorder or disability, and who refrain from any act of hostility. In addition, it is submitted that also shipwrecked persons should be considered persons *hors de combat*⁴⁵³. Unconscious, wounded, sick or shipwrecked persons are protected from the moment they are incapable of defending themselves. Of course, if such a person is preparing to fire or is actually firing, he or she is not protected from attack regardless of his or her wounds or sickness⁴⁵⁴. However, a person that wants to continue fighting, but due to the incapacitation is incapable of committing any hostile act, would nonetheless appear to be *hors de combat*.

But Article 8(2)(b)(vi) might go further than Article 41(2)(c) Add. Prot. I. Indeed, the provision explicitly refers to combatants ‘having no longer means of defence’, a direct reference to the incapability of defending himself. The criterion of the ‘incapable of defending himself’ already appeared in Article 41(2)(c) but only with respect to the wounded, sick or unconscious persons, which augured against interpreting it as applicable when the fighter is not wounded. However, the notion of defenselessness can be found in Article 23(c) of the Hague Regulations, which prohibits the killing or wounding an enemy ‘who having laid down his arms, or having no longer means of defense, has surrendered at discretion’. The customary law character of the characterization of defenselessness as an independent *hors de combat* basis has also been confirmed in the authoritative Bothe *et al.* Commentaries.⁴⁵⁵ 292

cc) Persons ‘in the power’ of the adversary party to the conflict. Persons are protected under article 8 para. 2 (b) (vi) Rome Statute from the moment on in which they are rendered *hors de combat* and without any time-limit, as long as they are still *hors de combat* (and do not again take up arms). The provision thus continues to protect persons that ‘have fallen into the power’ of the adversary as long as they are in that power. The definition of ‘in the power’ of the enemy irrefutably protects any person who has become a prisoner of war. In the Hague Regulations and in the 1929 Prisoner of War Convention, the person was protected as soon as ‘captured’.⁴⁵⁶ The 1949 Third Geneva Convention adopted the sentence ‘fallen into the power’ of the enemy’,⁴⁵⁷ thereby clarifying that it had a wider significance than the word ‘captured’ found in the 1929 Convention, by covering the case of soldiers who surrendered without fighting.⁴⁵⁸ Article 8 para. 2 (b) (vi) also applies to *prisoners of war* and other persons deprived of liberty. This approach is confirmed by several court decisions with regard to war crimes committed during World War II, convicting the accused on the basis of article 23 sub-para. (c) Hague Regulations for having killed prisoners of war without due cause⁴⁵⁹. The UN War Crimes Commission cited the prohibition of article 23 sub-para. (c) 293

⁴⁵³ See paragraph 47 (j) of the San Remo Manual. Cf. *Llandoverly Castle case*, *AnnDig.* (Years 1923–1924) 436 (1933): ‘In war on land the killing of unarmed enemies is not allowed (compare [article 23 (c) Hague Regulations]), similarly, in war at sea, the killing of shipwrecked people, who have taken refuge in life-boats, is forbidden’.

⁴⁵⁴ See Sandoz *et al.*, *Commentary* (1987), para. 1620.

⁴⁵⁵ Bothe *et al.*, *New Rules for Victims of Armed Conflicts* (1982) 252: ‘Under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless.’.

⁴⁵⁶ Article 3 Hague Regulations, Article 1 1929 Geneva Convention.

⁴⁵⁷ Geneva Convention III, Article 4.

⁴⁵⁸ Pictet, *Commentary* (1959) 50.

⁴⁵⁹ See the list of examples related to the killing of prisoners of war without due cause, UNWCC, *XV Law Reports* 99 (1949).

Hague Regulations to bear out that ‘[t]he killing of prisoners of war without due cause is a clear violation of both customary and conventional international law’⁴⁶⁰.

294 While the offense’s scope of application thus overlaps with the scope of the Rome Statute’s grave breaches provisions criminalizing, *inter alia*, killing or wounding a prisoner of war, article 8 para. 2 (b) (vi) Rome Statute is broader and applies to any person in the power of the adversary that has become *hors de combat*. This includes civilians directly participating in hostilities, but not only.

295 It is submitted that Article 8 (2) (b) (vi) follows the contemporary law of armed conflict.⁴⁶¹ The notion of ‘in the power of the adversary’ refers also to other categories of persons than combatants who surrendered and the wounded and sick. This can already be found in the 1970 UN Secretary General report which stated that ‘It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied.’⁴⁶² It was the first time that the idea of defencelessness was mentioned. Few years later, this notion found its way into the 1973 ICRC Draft Additional Protocols to the Geneva Convention. In its relevant parts, Draft Article 38 provided:

1. It is forbidden to kill, injure, ill-treat or torture an enemy hors de combat. An enemy hors de combat is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:
 - (a) is unable to express himself, or
 - (b) has surrendered or has clearly expressed an intention to surrender
 - (c) and abstains from any hostile act and does not attempt to escape.⁴⁶³ Textually, the reference to no ‘means of defence’ applied only to those who had ‘laid down their arms’.

296 An enemy who ‘no longer has any means of defence’ constituted a new class of protected persons. As explained by the Commentary, ‘(t)he underlying principle is that violence is permissible only to the extent strictly necessary to weaken the enemy’s military resistance, that is, to the extent necessary to place an adversary hors de combat and to hold him in power, but no further. The reaffirmation of this rule should dissipate any uncertainty concerning its applicability in certain situations, for instance when troops ordered not to surrender have exhausted their means of fighting...’⁴⁶⁴

297 Ultimately, Draft Article 38 was codified as Article 41 in the final text, with Article 41(2)(a) providing for the separate condition of *hors de combat*, to be ‘in the power of an adverse party.’⁴⁶⁵ The terminology used in the Geneva Convention, ‘fallen into the power’, was replaced by ‘is in the power’. The Article’s Commentary argued that there could be a significant difference between ‘being’ in the power and having ‘fallen’ into the power.⁴⁶⁶ It explained that the change was meant to encompass a defenceless adversary when it is at the mercy of the attacker by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat or when a formal surrender is not possible as the rules of some armies purely and simply prohibit any form of surrender. In these situations, a defenceless adversary is *hors de combat* whether or not he has laid down arms,⁴⁶⁷ and it is

⁴⁶⁰ UNWCC, XV *Law Reports* 99 (1949). The provision at the end of article 41 para. 2 Add. Prot. I, specifying that the protection of persons *hors de combat* does not apply if they attempt to escape, also appears to primarily apply to detained persons *hors de combat*.

⁴⁶¹ For a complete update of the contemporary law dealing with the question of capture rather than kill, see Goodman (2013) 24 *EJIL* 819. See also Schmitt (2013) 24 *EJIL* 855.

⁴⁶² UN Secretary-General, Report on Respect for Human Rights in Armed Conflict, UN Doc. A/8052, 18 Sept. 1970 (hereinafter Secretary-General 1970 Report), para. 107.

⁴⁶³ ICRC, *Draft Additional Protocols to the Geneva Conventions of 12 Aug. 1949: Commentary* (Oct. 1973), (hereinafter ICRC, 1973 Draft Protocols with Commentary), 44.

⁴⁶⁴ ICRC, *Draft Additional Protocols Commentary* (1973) 43.

⁴⁶⁵ Sandoz *et al.*, *Commentary* (1987), para 1610.

⁴⁶⁶ *Id.*, at para 1612.

⁴⁶⁷ *Id.*, at para 1612. Bothe *et al.* concurred by stating that ‘under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of

prohibited to kill him due to its vulnerable position.⁴⁶⁸ Obviously the safeguard only applies as long as the person concerned abstains from any hostile act and does not attempt to escape.⁴⁶⁹ Here the crucial question is whether the individual is unambiguously in the captors' control, such that he poses no risk to the captors or civilians (e. g., a risk of suicide bombing) and taking custody would be operationally feasible in the attendant circumstances.⁴⁷⁰ If the person in the power of the adversary engages in a hostile act or tries to escape, he or she forfeits the protection of article 41 Add. Prot. I (and thus of article 8 para. 2 (b) (vi)), until he or she may become *hors de combat* again⁴⁷¹. The use of force against a fleeing person however may not amount to a refusal to give quarter and must be proportional⁴⁷².

In 1973, a US military court dealt with the *Calley case*⁴⁷³. The trial involved cases of 298 murder as a war crime, where the *mens rea* of the accused was clear and the evidence definitively established the non-combatant status of the victims. The appellate court found that even if one were to consider the My Lai residents as 'part of the enemy', they could not be killed after they had fallen under the control of US armed soldiers and offered no resistance (they had become *hors de combat*).

dd) Persons parachuting from an aircraft. It is not clear whether persons parachuting 299 from an aircraft in distress, who are protected from attack under article 42 AP I, must be considered persons *hors de combat* protected under article 41 Add. Prot. I and article 8 para. 2 (b) (vi) Rome Statute⁴⁷⁴. Unless they achieve to clearly signal their intention to surrender or apparently are wounded, such persons do not precisely fit into any of the three categories mentioned in article 41 para. 2 Add. Prot. I.

Under humanitarian law, persons parachuting from a disabled aircraft may not be attacked 300 insofar they are not bound upon hostile missions⁴⁷⁵. However, parachute troops and airborne combat units are beyond doubt a lawful military objective even while parachuting in order to launch an (airborne) attack⁴⁷⁶. In practice, it likely will be difficult to ascertain that troops parachuting have no hostile intention (anymore)⁴⁷⁷.

resistance either because he has been overpowered or is weaponless'. Bothe *et al.*, *New Rules for Victims of Armed Conflicts* (1982) 252. See also Dörmann, *Elements of War Crimes* (2003) 190. See also the various statements made by delegations: CDDH/III/SR.29 xiv, para. 52 (USSR); see also CDDH/III/SR.29 Vol. xiv, para. 74 (Czechoslovakia); CDDH/III/SR.29 Vol. xiv, paras 60 and 62 (Netherlands); CDDH/III/SR.29 Vol. xiv, para. 69 (Finland).

⁴⁶⁸ See also state practice such as for e.g., *Commander's Handbook on the Law of Naval Operations* (1987) 118 ('Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured.'). Kenya's *Law of Armed Conflict Manual* (1997), 'the enemy combatant who is no longer in a position to fight is no longer to be attacked, and is protected'; Ecuador ('Combatants cease to be subject to attack when they have individually laid down their arms to surrender [or] when they are no longer capable of resistance'). For more state practice see Practice Relating to Rule 47', in: Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, ii (2005).

⁴⁶⁹ Sandoz *et al.*, *Commentary* (1987), para 1614.

⁴⁷⁰ Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"', 860.

⁴⁷¹ See *Crusius case*, decided by the German Reichsgericht and cited in, *Llandovery Castle case*, *AnnDig* (1923–1924) 438 (1933).

⁴⁷² See article 42 GC III; Bothe *et al.*, *New Rules for Victims of Armed Conflicts* (2013) 222–223.

⁴⁷³ USA, *US v. Calley*, *Court of Military Appeals, Judgment of 21 December 1973*.

⁴⁷⁴ E. David considers that the category of persons *hors de combat* under the Protocol includes such persons, David, *Principes* (2012) 304.

⁴⁷⁵ U.S. Army, *Field Manual* 27–10, para. 30. A U.S. Military Commission found Peter Back guilty of war crime for having killed an American airman forced to parachute over German territory and who 'was then without any means of defence', U.S. Military Commission at Ahrweiler, *Peter Back* (16 June 1945), III *Law Reports* 60 (1947).

⁴⁷⁶ See article 42 para. 3 Add. Prot. I; U.S. Army, *Field Manual* 27–10, para. 30; Peter Back (16 June 1945), III *Law Reports* 60 (1947).

⁴⁷⁷ See Oeter, in: *The Handbook of International Humanitarian Law* (2008) 178; Sandoz *et al.*, *Commentary* (1987), para. 1652; Bothe *et al.*, *New Rules for Victims of Armed Conflicts*(1982) 227.

- 301 c) **Mens rea.** In accordance with article 30 Rome Statute, which is applicable ‘unless otherwise provided’, all material elements of the war crime of attacks against persons *hors de combat* must be committed with intent and knowledge i.e. Article 30(2) and (3) Rome Statute. The perpetrator must, first, have been aware that the person he or she intended to kill or injure was *hors de combat*. Element 3 for this war crime confirms this by requiring that ‘[t]he perpetrator was aware of the factual circumstances that established this status’⁴⁷⁸.
- 302 Second, the perpetrator must have meant to cause death or injury or at least have been ‘aware’ that death or injury ‘will occur in the ordinary course of events’ (article 30(3) Rome Statute).
- 303 However, one point that is less clear is whether, with respect to persons *hors de combat* not in the power of the adversary, article 8 para. 2 (b) (vi) requires that the perpetrator actually targets such persons or whether also incidental casualties of persons *hors de combat* caused by an attack against a legitimate military target could amount to the war crime of killing or wounding a person *hors de combat*. The wording of article 41 Add. Prot. I only prohibits to make persons *hors de combat* ‘the object of attack’, that is, direct an attack against such persons as such. Delegates at the 1974–77 Conference intentionally deviated from the Hague wording of ‘killing or wounding’ in order ‘to make clear that what was forbidden was the deliberate attack against persons *hors de combat*, not merely killing or injuring them as the incidental consequence of attacks not aimed at them *per se*’⁴⁷⁹. The fact that the Rome Statute deliberately adheres to the formulation in article 23 (c) Hague Regulations gives rise to a presumption that the requisite threshold of Article 8(2)(b)(vi) is lower than the threshold under Article 41(1) of Add. Prot. I.⁴⁸⁰
- 304 Article 85 para. 3 (e) also does not criminalize incidental casualties of persons *hors de combat*. Besides, none of the World War II cases decided on the basis of article 23 (c) Hague Regulations involved incidental casualties of persons *hors de combat*. On the other hand, the wording of article 8 para. 2 (b) (vi) Rome Statute ‘killing or wounding’ is fairly broad, and article 8 para. 2 (b) (iv) protects only civilians from such incidental casualties⁴⁸¹. There might thus be a protection gap if persons *hors de combat*, for instance when collected in great numbers in a certain area, are not also protected against excessive incidental casualties⁴⁸². If incidental casualties of persons *hors de combat* are subsumed under article 8 para. 2 (b) (vi), individual criminal responsibility under the Rome Statute should be limited to casualties clearly excessive to the military advantage anticipated.
- 305 d) **Killing or wounding.** The wording ‘killing or wounding’ implies that there must be a result of death or physical injury.
- 306 While it is submitted that omission may give rise to criminal responsibility under the Rome Statute, it is not entirely clear under what circumstances this would apply with regard to article 8 para. 2 (b) (vi). It appears appropriate that killing or wounding a person *hors de combat* by omission may amount to the war crime defined under article 8 para. 2 (b) (vi) under certain circumstances. This would appear to at least be the case insofar the perpetrator has, first, the requisite mental elements, in particular being aware of the *hors de combat status* of the combatant and intending his or her death or injury, and when, second, the omission

⁴⁷⁸ Article 41 para. 1 Add. Prot. I however also prohibits attacking a person ‘who, in the circumstances, should be recognized to be *hors de combat*’. Yet, an argument that the standard of article 41 para. 1 Add. Prot. I is relevant because it is an ‘otherwise provided’ standard of the requisite *mens rea* relevant under article 30 Rome Statute is made less convincing by the fact that article 85 para. 3 (e) of the same Protocol qualifies such attack only as a grave breach if committed ‘in the *knowledge* that he is *hors de combat*’ (emphasis added). Besides, the (non-binding) General Comment to the Elements of Crimes rules out such interpretation.

⁴⁷⁹ O.R. XV, at 384, CDDH/236/Rev.1, para. 23.

⁴⁸⁰ Van der Wolf, *War Crimes and International Criminal Law* (2010) 2.

⁴⁸¹ While the Diplomatic Conference for instance decided to go beyond article 85 Add. Prot. I and add, under certain circumstances, excessive incidental damage of the natural environment to the list of objects the incidental damage of which qualifies under article 8 para. 2 (b) (iv), it did not also extend the offense to excessive casualties of persons *hors de combat*.

⁴⁸² Excessive incidental casualties of persons *hors de combat* would violate general principles of international humanitarian law. See Bothe *et al.*, *New Rules for Victims of Armed* (1982) 253.

violates a duty under humanitarian law, except, for instance, where the circumstances did not permit to comply with the duty or would have subjected the perpetrator to undue disadvantage or hazard⁴⁸³. Consequently, withholding medical care for a wounded prisoner of war, starving such prisoner to death, or not helping to rescue shipwrecked violates a duty under humanitarian law and might thus amount to the war crime defined under article 8 para. 2 (b) (vi) Rome Statute.

The U.S. Commander's Handbook on the Law of Naval Operations for instance considers it a 'war crime under international law' to be 'failing to provide for the safety of survivors as military circumstances permit'⁴⁸⁴. In 1946, the British Military Court in Hamburg sentenced Moehle to five years of imprisonment for having ordered that no help shall be given to rescue members of a sunken ship, including not handing food and water to survivors in lifeboats⁴⁸⁵. In the Von Ruchteschell case, the same Military Court convicted the accused for having sunk a ship without making any provision for the safety of the survivors⁴⁸⁶. The Netherlands East Indies Statute Book Decree No. 44 of 1946 considered a war crime the '[r]efusal of aid or prevention of aid being given to shipwrecked persons'⁴⁸⁷.

7. Paragraph 2(b)(vii): Improper use of distinctive signs*

Literature: See article 8 para. 2 (b) (xi) and Arnold, R., 'Flags of Truce', in: R. Wolfrum (ed.), *MPIL* (Oxford Public International Law 2006); Bordwell, P., *The Law of War between Belligerents: A History and Commentary* (Callaghan & co. 1908); Cauderay, G.C., 'Visibility of the Distinctive Emblem on Medical Establishments, Units and Transports', (1990) 277 *IRRC* 295; CICR, *Étude sur l'usage des emblèmes: Problèmes opérationnels et commerciaux et autres problèmes non opérationnels*, 2011; Department of the Navy, Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps, and Department of Transportation, U.S. Coast Guard, *U.S. Commander's Handbook on the Law of Naval Operations* (1995); Doswald-Beck, L. (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995); Fleck, D., 'Ruses of War and Prohibition of Perfidy', (1974) 13 *RDPMDG* 281–282; Heintze, H.-J. and Dijkzeul, D., 'Emblems, Internationally Protected', in: R. Wolfrum (ed.), *MPIL* (Oxford Public International Law 2011); ICRC, 'Study on Second Set of War Crimes within Article 8' (30 July 1999), (2)(B) *Rome Statute* 49; Jobst, V., 'Is the Wearing of the Enemy's Uniform a Violation of the Laws of War' (1941) 35 *AJIL* 436–437; Madden, M., 'Of Wolves and Sheep: A Purposive Analysis of Perfidy Prohibitions in International Humanitarian Law', (2012) 17 *JCSL* 439; McCoubrey, H. and White, N.D., *International Law and Armed Conflict* (Dartmouth 1992); 'Model Law Concerning the Use and Protection of the Emblem of the Red Cross or Red Crescent', (1996) 313 *IRRC*, 486; Novak, G., 'Wounded, Sick and Shipwrecked', in: R. Wolfrum (ed.), *MPIL* (Oxford Public International Law 2011); Pfanner, T., 'Military Uniforms and the Law of War', (2004) 86 *IRRC* 853; Politakis G.P., 'Stratagems and the prohibition of perfidy with a special reference to the laws of war at sea' (1993) 45 *AustrianJPubIL* 3, 301–306; de Preux, J., 'Article 37 Add. Prot. I', in: Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987); de Preux, J., 'Article 38 Add. Prot. I', in: Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 463; Rabus, W., 'Protection of the Wounded, Sick and Shipwrecked', in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP 3rd ed. 2013) 293; Sandoz, Y., 'Usages corrects et abusifs de l'emblème de la croix rouge ou du croissant rouge', in: F. Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters* (Kluwer Academic Publishers 1989); Schlögel, A., 'Geneva Red Cross Conventions and Protocols', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, ii (North-Holland Publishing Company 1995) 531; Slim, H., 'Protection of the Red Cross and

⁴⁸³ See also Proposal submitted by the United States of America to the Preparatory Commission for the International Criminal Court, Draft elements of crimes, Addendum, UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999), pp. 4 and 10. In practice, judges may be inclined to infer an intent to kill if the foreseeable consequence of such failure to fulfill a duty is death or injury.

⁴⁸⁴ *U.S. Commander's Handbook*, para. 6.25, section 5. See also Thomas and Duncan (eds.), *Annotated Supplement* (para. 6.2.5, fn. 63) (stating that article 12 GC II makes it clear that, while during World War II the killing of survivors was often practiced and appeared to be approved by the submarine high command, such acts are unlawful since the coming into force of the Geneva Conventions).

⁴⁸⁵ *Moehle case ('Laconia Order' case)*, British Military Court in Hamburg (16 Oct. 1946), *AnnDig* (Year 1946) 246 (1951).

⁴⁸⁶ British Military Court in Hamburg, *Von Ruchteschell case*, (21 May 1947), *AnnDig* (Year 1946) 247 (1951).

⁴⁸⁷ (321) UNWCC, XI *Law Reports* 94 (1949).

* The authors are indebted to Jérôme Massé for his research assistance.

Red Crescent Emblems and the Repression of Misuse', (1989) 272 *IRRC* 408; Solf, W. A., 'Article 37 Add. Prot. I', in: M. Bothe *et al.*, (eds.), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers 1982) 214; Solf, W., 'Article 38 Add. Prot. I', in: M. Bothe *et al.* (eds.), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers 1982) 208; Solf, W., 'Article 39 Add. Prot. I', in: M. Bothe *et al.* (eds.), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers 1982) 214; Stephens, D. and Skousgaard, T., 'Flags and Uniforms in War', in: R. Wolfrum (ed.), *MPIL* (Oxford Public International Law 2009); Thomas, A.R. and Duncan, J.C., (eds.), *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (Naval War College 1999); UNWCC, *History* (1948) 490–491; Zimmermann, B., 'Article 85', in: Y. Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987).

308 a) **Normative origins and drafting history.** The effective protection of protected persons such as the sick and wounded and persons caring for them depends to a significant degree on the recognition and respect of protective signs. An abuse of such signs can jeopardize the life and well-being of such protected persons and calls humanitarian missions into question. Protective signs have been recognized early on.

309 The 1864 Geneva Convention introduced the sign of the Red Cross custom, and the use of the white flag to indicate a desire to negotiate had been established long before. In 1907, article 23 (f) Hague Regulations prohibited in addition to the general prohibition of perfidy '[t]o make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention'.

This prohibition was reinforced in 1977 by articles 38 and 39 Add. Prot. I. Article 38 Add. Prot. I provides that:

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.
2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization'.

311 Article 39 paras. 1 and 2 Add. Prot. I in addition states that:

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations'.

Not least in the field of naval and air warfare, state practice and customary law with respect to the use of the listed signs are particularly relevant.

312 Article 85 para. 3 (f) Add. Prot. I makes it a grave breach to cause death or serious injury by perfidiously using, in violation of article 37 Add. Prot. I, the protective signs recognized by the Geneva Conventions or the Additional Protocol I, which also includes, *inter alia*, the distinctive emblems of the United Nations but excludes adversary signs. Even before the adoption of the Rome Statute, many states had criminalized the perfidious or improper use of these internationally protected signs in their respective domestic legal system⁴⁸⁸. Yet, prior to the Rome Statute, no international treaty specifically criminalized the (mere) 'improper' use of all of the signs listed under article 8 para. 2 (b) (vii).

⁴⁸⁸ See, e.g., Swedish Penal Code, Chapter 22, § 6, No. 2, (which qualifies as a crime against international law not only the killing or injuring of an opponent by means of treachery or deceit, but also, *i.a.*, the abuse of the insignia of the Red Cross, of the insignia of the United Nations, of insignia mentioned in the act concerning the protection of certain International Hospital and Health Care insignia, of parliamentary flags as well as of other internationally recognized insignia); article 386 of the 1994 Penal Code of the Republic of Slovenia (abuse of international signs); article 294 of the Penal Code of the Empire of Ethiopia of 1957; article 75 of the Spanish Military Penal Code (Ley orgánica 13/1985 of 9 Dec. 1985).

While the inclusion under the ICC's jurisdiction of the war crime of perfidiously killing or wounding was not controversial as such, not all proposals of enumerations of war crimes included the war crime of improperly using protected signs. An early proposal suggested proposed to define the offense as follows:

'(d) making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, of the uniform of multinational forces in the context of a peace-making or peace-keeping operation, as well as the distinctive badges of the Geneva Convention'⁴⁸⁹.

The February 1997 Preparatory Committee resulted in a bracketed and partly differently worded proposal:

'(d) (making improper use of flag of truce [sic] of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive emblems of the Geneva Conventions, [thereby inflicting death or serious personal injury upon the enemy])'⁴⁹⁰.

The wording agreed on at the December 1997 Session of the Preparatory Committee was not amended thereafter and became article 8 para. 2 (b) (vii) Rome Statute⁴⁹¹.

During the negotiations of the elements for this war crime, the Preparatory Commission did not limit the scope of application of article 8 para. 2 (b) (vii) Rome Statute to cases of perfidy primarily because of the opposition of the ICRC. The ICRC intended to ensure that the mere improper use of the different signs, and in particular the distinctive emblems of the Geneva Conventions, is also covered under article 8 para. 2 (b) (vii), insofar it leads to a later injury or death of a protected person because the sign lost its protective effect due to combatants losing their trust in their appropriate use.

The wording of article 8 para. 2 (b) (vii) is largely drawn from article 23 (f) Hague Regulations. In addition to the old Hague prohibition, the Rome Statute's definition also protects UN signs (drawing on article 38 para. 2 Add. Prot. I), and contains a more modern designation with regard to the emblems of the Geneva Conventions. An important difference to article 23 (f) Hague Regulations and articles 38 (and 39) Add. Prot. I, which are not primarily definitions of criminal offenses, is the added requirement that the improper use '[result] in death or serious personal injury'. This wording was inspired by the grave breaches provision of article 85 para. 3 Add. Prot. I which requires a causation of death or serious injury to body or health, and appears to have been inserted as only the more serious breaches were to constitute crimes under ICC jurisdiction.

The ICRC study on customary international humanitarian law confirms the customary nature of the prohibition of improper use of distinctive signs.⁴⁹² In a Chapter dedicated to 'Deception' (Chapter 18), the study contains one rule per sign instead of a general rule for all signs. Namely, rule 58 prohibits the improper use of the white flag of truce, rule 59 of the distinctive emblems of the Geneva Conventions, rule 61 of other internationally recognized emblems, rule 62 of the flags or military emblems, insignia or uniforms of the adversary and rule 60 the use of the United Nations emblem and uniform (except as authorized by the organisation).

Killing or wounding an adversary by improperly using an internationally protected sign may also amount to the war crime of perfidious killing or wounding under article 8 para. 2 (b) (xi) Rome Statute, even if is emphasized that not any improper use of such sign would amount to perfidy. In addition, the person killed or wounded must be the person whose confidence was betrayed under article 8 para. 2 (b) (xi), or at least one of his or her party to the conflict, while article 8 para. 2 (b) (vii) applies to the killing or wounding of any person as an (even unintended, see below) consequence of the improper use.

⁴⁸⁹ 1996 Preparatory Committee II, p. 63.

⁴⁹⁰ Preparatory Committee Decisions Feb. 1997, p. 10.

⁴⁹¹ Preparatory Committee Decisions Dec. 1997, p. 7 (except for the correction of a minor grammatical mistake).

⁴⁹² Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 205-218.

- 320 **b) Common elements.** The Elements of Crimes separate the offenses defined under article 8 para. 2 (b) (vii) Rome Statute into four categories. Prior to describing these four categories, we shall first examine elements common to all four categories.
- 321 **aa) Preliminary reflections.** The wording of article 8 para. 2 (b) (vii) Rome Statute raises many questions. Strictly literally interpreted, it can be read as criminalizing as a war crime, for instance, any use of the UN signs that is not fully consistent with the often complex regulations of the United Nations, or any use of the distinctive emblems of the Geneva Conventions, that would by coincidence result in death or serious personal injury, even if there was no bad intent and even if the inconsistency was minor. However, such a wide interpretation is inappropriate: a nurse drawing the Red Crescent in the wrong colours or shapes, or a UN volunteer improperly using his or her uniform without any hostile intent should, of course, not be made criminally liable for having committed a war crime because someone gets killed or wounded as a coincidental result of that use. It is thus necessary to read the provision in light of its origin and objective.
- 322 Even if article 8 para. 2 (b) (vii) has been defined broadly and without reference to any special intent, it is submitted that given the negotiating history and normative origins of the prohibition, it must be interpreted as primarily if not exclusively applying to persons improperly using one of the enumerated signs to gain a military advantage or to commit an act prohibited by international humanitarian law, such as feigning protection under a sign to transport munitions or to be able to plunder. This is also suggested by the Elements of Crimes. The elements for article 8 para. 2 (b) (vii) Rome Statute clearly limiting its potentially very broad scope of application by specifying in what way or for what purpose the sign must have been used in order to qualify as a war crime. Notwithstanding, the general phrase ‘in a manner prohibited under the international law of armed conflict’ contained in element 2 to article 8 para. 2 (b) (vii)–2,–3 and –4 leaves questions open and seems to be due to the difficulty of delegations to ascertain the precise content of humanitarian law with regard to the particular signs. A restrictive interpretation of this war crime to apply only to improper uses to gain a military advantage or to commit an act prohibited by international humanitarian law seems consistent with the requirement that the conduct ‘took place in the context of and was associated with an international armed conflict’.
- 323 **bb) The common element of the ‘improper use’.** Article 8 para. 2 (b) (vii) Rome Statute criminalizes the ‘improper’ use of the listed signs. But when is a specific use ‘improper’? Does it mean ‘unlawful’ use, use ‘not provided for by law’, or use not consistent with socially respected customs that may not constitute (customary) law?
- 324 The term ‘improper use’ was drawn from article 23 (f) Hague Regulations as well as, with regard to the distinctive emblems of the Red Cross and Red Crescent, from article 38 para. 1 Add. Prot. I. According to the ICRC Commentary on article 38 para. 1 Add. Prot. I, ‘a considerable number of delegations [at the 1974–77 Diplomatic Conference] would have liked the term “improper” to be defined more precisely, and the final draft of the ICRC provided for the prohibition of the use of recognized signs “in cases other than those provided for in international agreements establishing those signs and in the present Protocol”⁴⁹³. Comparing articles 37 and 38 Add. Prot. I, the term ‘improper use’ appears to cover a wider range of prohibited conduct than the prohibition of perfidy. It is also submitted that article 8 para. 2 (b) (vii) does not refer to ‘improper’ under national law or tradition but rather under international law or tradition, given that the provision defines an international crime and as there was an understanding at the Rome Conference that only war crimes under customary international law should be included under article 8 Rome Statute.
- 325 Element 3 of article 8 para. 2 (b) (vii) Rome Statute requires that the perpetrator knew (or should have known) ‘of the prohibited nature of such use’. Even if the general understanding

⁴⁹³ de Preux, in: Y. Sandoz *et al.* (eds), *Commentary* (1987) 448, para. 1533, citing article 36 para. 1 of the Draft Protocol.

of the term ‘improper’, including in its French or Spanish translations⁴⁹⁴, does not primarily point to unlawfulness, a footnote to article 8 para. 2 (b) (vii)–1, –2 and –4 (thus with regard to the flag of truce, the distinctive emblems of the Geneva Conventions and enemy signs) specifies that ‘[t]he term “prohibited nature” denotes illegality’, which typically refers to state-made law, rather than social or organizational norms and rules. This specification, however, is not contained in the elements of article 8 para. 2 (b) (vii)–3 on the use of UN signs, as their use is primarily regulated by UN regulations.

Moreover, the Elements of Crimes suggest that the term ‘improper use’ be understood as referring to a use “prohibited under the international law of armed conflict”⁴⁹⁵. As the offences listed under article 8 para. 2 (b) Rome Statute are ‘violations of the laws and customs applicable in international armed conflict, within the established framework of international law’, it can be argued that a use merely violating a social or organizational rule but not any rule of (customary or treaty) humanitarian law would not qualify as a war crime under the Rome Statute. Also, while article 8 para. 2 (b) (vii) appears to comprehensively criminalize virtually any abuse of the listed signs⁴⁹⁶, a use of these signs taking place in a situation or for a purpose not specifically provided for by the rules establishing them, but which respects the general protective spirit for which they were intended is not necessarily prohibited, given that unforeseeable situations may always arise⁴⁹⁷. Nonetheless, it is submitted that an ‘improper use’ includes the use of one of the listed signs in cases not provided for under international humanitarian law to gain a military advantage or to commit another act prohibited under international humanitarian law.

c) The common element of the result of death or serious personal injury. Article 8 para. 2 (b) (vii) Rome Statute requires that the improper use of the distinctive sign is ‘resulting in death or serious personal injury’. This wording partly derives from article 85 para. 3 Add. Prot. I, which requires the result of ‘death or serious injury to body or health’. Is the serious injury to *health* sufficient under the Rome Statute? While the Rome Statute does not clearly exclude this interpretation, the term ‘injury’ is commonly used to cover physical wounds or damage rather than damage to the mental health⁴⁹⁸. Clearly, sole damage to objects is not a sufficient result.

Under article 8 para. 2 (b) (vii) Rome Statute, and in contrast to the war crime of perfidious killing or wounding, it need not be the person improperly using the sign, nor anyone of his or her party to the conflict, that kills or wounds an adversary or intends such result⁴⁹⁹. Article 8 para. 2 (b) (vii) can be read as having a broader scope of application and possibly even applying to the situation where the improper use eroded an adversary’s confidence in that the sign is always properly used, and thereafter kills or wounds a person identified and protected by the same sign in order to avoid a military disadvantage in case that person would be improperly using the sign⁵⁰⁰. While article 85 para. 3 Add. Prot. I requires that death or serious injury is ‘caused’ by the conduct described in paragraphs a – f of the provision, article 8 para. 2 (b) (vii) requires that the improper use ‘resulted’ in death or serious personal injury⁵⁰¹. The wording ‘resulting in’ might suggest that a less direct causal link is necessary between the improper use and the death or injury. However, while chances

⁴⁹⁴ ‘Le fait d’utiliser *indûment* ...’ and ‘[u]tilizar *de modo indebido* ...’ (emphasis added).

⁴⁹⁵ See the second element of article 8 para. 2 (b) (vii)–2 to –4. Element 2 of article 8 para. 2 (b)(vii)–1 implies the same.

⁴⁹⁶ See, e.g., Oeter, *Methods* (1995) 202; ICRC, ‘Study on Second Set of War Crimes within Article 8’ (30 July 1999), (2)(B) Rome Statute 49.

⁴⁹⁷ See de Preux, in: Y. Sandoz et al. (eds), *Commentary* (1987) 448–449 (para. 1534).

⁴⁹⁸ ‘[B]lessures graves’, ‘lesiones graves’, respectively (emphasis added).

⁴⁹⁹ Cf. de Preux, in: Y. Sandoz et al. (eds), *Commentary* (1987) 448, para. 1532.

⁵⁰⁰ See German Draft International Crimes Code, p. 75.

⁵⁰¹ However, the French and Spanish language versions of article 8 para. 2 (b)(vii), which were translated from the text agreed on in English (as almost all provisions were mainly negotiated in English) provide ‘*et ce faisant, de causer ...*’ and ‘*y así causar...*’, respectively (emphasis added).

are that internationally protected signs will be less respected in future situations once they have been improperly used, and while such use consequently may eventually lead to deaths or injuries of protected persons, it will often be difficult to provide evidence of a concrete causal link between the abuse and such indirect result in particular cases.

In any event, even if no result of death or injury occurs, the person that improperly used a sign can be prosecuted for attempt insofar he had the requisite state of mind.

- 329 **dd) Mental element. aaa) Knowledge of the prohibited nature of the improper use.** In view of articles 30 and 32, it would generally appear appropriate to exclude the criminal responsibility of a perpetrator if he or she has not been aware of the ‘improper’ nature of his or her use of a particular sign. Indeed, article 32 para. 2 (second sentence) provides that ‘[a] mistake of law may ... be a ground for excluding criminal responsibility if it negates the mental element required by such a crime ...’.
- 330 In view of the lack of clarity but importance of what state of mind is required under article 8 para. 2 (b) (vii), the Preparatory Commission suggested that, except for the use of UN signs, it is sufficient that ‘[t]he perpetrator knew or *should have known* of the prohibited nature of such use’⁵⁰². Thereby, the Elements of Crimes appear to deviate from article 30 Rome Statute (which is permitted by the introductory words of article 30) by providing criminal responsibility for *negligence*. This seems to establish a duty of persons involved in an armed conflict to inform themselves what use of the flag of truce, the distinctive emblems of the Geneva Conventions or signs of the adversary is prohibited under international humanitarian law⁵⁰³.
- 331 In contrast, the use of UN signs is only criminalized if ‘[t]he perpetrator *knew* of the prohibited nature of such use’⁵⁰⁴. Footnote 41 of the Elements of Crimes explains that ‘[t]he “should have known” test required in the other offences found in article 8 para. 2 (b) (vii) is not applicable here because of the variable and regulatory nature of the relevant prohibitions’. This phrase was included as delegations deemed it too harsh to require knowledge of rules not contained in international treaties but merely in organizational regulations that in addition easily change. Of course, the should-have-known test in any event would have left it for the judge to decide whether or not the person could have been expected to be aware of the particular prohibition concerned or not, taking into account factors such as the variable and regulatory nature of the prohibition.
- 332 **bbb) Knowledge that the conduct could result in death or serious personal injury.** Article 8 para. 2 (b) (vii) requires that the improper use ‘*resulted*’ in death or serious personal injury, while article 85 para. 3 Add. Prot. I requires that death or serious injury is ‘*caused*’ by the prohibited conducts⁵⁰⁵. The wording ‘*resulting in*’ might not only suggest that the causal link need not be as direct but also that a lesser level of intent or even no such intent of the perpetrator is necessary. However, given that the ‘*result*’ required under article 8 para. 2 (b) (vii) Rome Statute appears to be a material element, more specifically, a required consequence, article 30 para. 2 (b) Rome Statute seems to provide that the perpetrator must at least have been ‘*aware that [the consequence] will occur in the ordinary course of events*’, which

⁵⁰² Element 3 of article 8 para. 2 (b)(vii)–1, –2 and –4 (emphasis added).

⁵⁰³ Fns. 39, 40, and 43 (to element 3 of article 8 para. 2 (b)(vii)–1,–2 and –4) explain that the should-have-known standard ‘recognizes the interplay between article 30 and article 32’. This phrase could be understood as meaning that the lacking awareness of the improper nature of the sign’s use amounts to a ‘mistake of law’ under article 32 para. 2 which ‘*may ... be a ground for excluding criminal responsibility if it negates the mental element required by such a crime*’ (emphasis added). The cited element thus specifies, within the ‘discretion’ given by the ‘*may*’ in article 32 para. 3, the cases in which such a mistake of law will constitute a ground excluding criminal responsibility. The vague formulation of this phrase may be due to the difficulty of negotiators to find a systematic approach to the general issue of the mental element and in particular the relationship between Part. III of the Rome Statute and the particular definitions under article 8 and the Elements.

⁵⁰⁴ Element 3 of article 8 para. 2 (b) (vii)–3 (emphasis added); reprinted here in Annex II.

⁵⁰⁵ See above, mn 77.

appears to come close to *dolus eventualis*⁵⁰⁶. Element 5 to article 8 para. 2 (b) (vii)-1 through -4 suggests the requirement that '[t]he perpetrator knew that the conduct *could* result in death or serious personal injury' (emphasis added), which implies a lesser degree of expected probability and a lower standard of *mens rea* than article 30 para. 2 (b) Rome Statute.

ccc) **Any particular intent required?** Would the improper use of the listed signs resulting in death or injury also qualify as a war crime under ICC jurisdiction when the intent of the person improperly using them was in no way related to gaining a military advantage or to committing another unlawful act⁵⁰⁷? 333

c) **Improper use of the flag of truce.** Rules of international law on how flags of truce are to be used date far back. As recalled by the ICRC Study on customary international humanitarian law, the prohibition of improper use of the flag of truce is a 'long-standing rule of customary international law already recognised in the Lieber Code, the Brussels Declaration and the Oxford Manual'⁵⁰⁸ and were codified in articles 32–34 Hague Regulations. Article 32 Hague Regulations provides that the bearer of a flag of truce is inviolable from being attacked and from being taken prisoner. Also, a person who shows a flag of truce to express an intention to negotiate or surrender may qualify as a person *hors de combat* that must not be made the object of attack⁵⁰⁹. Article 23 (f) Hague Regulations prohibits to make improper use of a flag of truce, and article 38 para. 1 Add. Prot. I prohibits its deliberate misuse. Article 37 para. 1 (a) Add. Prot. I prohibits the perfidious use of the flag of truce⁵¹⁰. All of these provisions are of customary nature⁵¹¹. 334

A truce is an understanding, in the course of an armed conflict, to suspend hostilities, usually for a fixed time. The term may also refer to peace or the cessation or absence of hostilities. According to established practice, the flag of truce is white and indicates the desire of the person carrying it to communicate with his or her adversary⁵¹². The white flag, however, is not only used to symbolize a wish to negotiate truces or cease fires but also to indicate a decision to cease combat. The term 'flag of truce' thus sometimes is understood to also include a white flag indicating a willingness to surrender⁵¹³. 'Any other use, for example, to gain a military advantage over the enemy, is improper and unlawful.'⁵¹⁴ 335

Contemporary warfare, however, often is conducted with modern means of technological communication and without eye-sight of the adversary. While the protection of the flag of truce may still be of importance in face-to-face combat or negotiations, radio messages may be more effective and more commonly used to signal a willingness to negotiate, cease fire or surrender. It may thus be asked whether improperly using more modern ways of communication could also amount to the war crime of improperly using the flag of truce under article 8 para. 2 (b) (vii) Rome Statute⁵¹⁵. The German Military Manual states that '... It is also prohibited to make improper use of *other distinctive signs equal in status* with that ... of the flag of truce ...'⁵¹⁶. 336

⁵⁰⁶ See above, Dörmann, *article 8 para. 2 (a) (i)*, mn 17.

⁵⁰⁷ See above, Dörmann, *article 8 para. 2 (a) (ii)*, mn 36.

⁵⁰⁸ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 205.

⁵⁰⁹ See above, *article 8 para. 2 (a) (vi)*, mn 64 *et seq.*

⁵¹⁰ See also above, *article 8 para. 2 (a) (vi)*, mn 123 *et seq.*

⁵¹¹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 205-7.

⁵¹² See, e.g., article 32 Hague Regulations.

⁵¹³ See Arnold, in: Wolfrum (ed.), *MPIL*, (2006). Cf., U.S. Army, *Field Manual* 27–10 (1956), Nos. 458–467; U.S. Commander's Handbook, section 11.9.5. See also, more generally, Greenspan, 'The Modern Law of Land Warfare' (1959) 380 *et seq.*; Oppenheim and Lauterpacht, *International Law*, ii (1944) 425 *et seq.*

⁵¹⁴ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 207.

⁵¹⁵ On the challenges of electronic warfare with respect to the improper (and perfidious) use of signs, see Politakis, G.P., 'Stratagems and the prohibition of perfidy with a special reference to the laws of war at sea' (1993) 45 *AustrianJPubL* 301-306. See also, ICRC, Study on Second Set of War Crimes 49.

⁵¹⁶ *German Joint Services Regulations*, No. 1019, in Fleck (ed.), *Handbook* No. 230 (1999) (emphasis added). See also U.S. Army, *Field Manual* 27–10 (1956), No. 458(1) (second sentence) (stating that '[i]n current practice,

- 337 As regards individual criminal responsibility for improperly using the flag of truce, as early as 1863, article 114 of the Lieber Code considered the abuse of the flag of truce ‘an especially heinous offense’ for which the bearer who abused it for surreptitiously obtaining military knowledge can be deemed a spy. Article 33 para. 3 Hague Regulations also provides that a bearer of a flag of truce may be detained temporarily in case of abuse. The Responsibilities Commission of the 1919 Paris Peace Conference included the ‘misuse of flags of truce’ among its list of violations of the laws and customs of war to be prosecuted⁵¹⁷. The Nuremberg Tribunal even selected the improper use of flags of truce as an example of war crimes, pointing out that even though the Hague Regulations do not explicitly designate such a practice as criminal, past offenders have been tried and punished as war criminals for many years⁵¹⁸. While the perfidious use of the flag of truce gives rise to criminal responsibility under article 85 para. 3 (f) Add. Prot. I insofar causing death or serious injury, the mere improper use of the flag, however, is not as such criminalized by the Geneva Conventions or the First Additional Protocol.
- 338 Certainly, a perfidious use of the white flag would qualify under article 8 para. 2 (b) (vii). According to the ICRC Commentary on article 38 para. 1 (second sentence) Add. Prot. I, ‘[t]o raise the white flag without a reason or for the sole purpose of deflecting attention away from a military operation in progress, or for other purposes conflicting with the law of armed conflict, such as threatening not to give quarter, constitutes a breach and may give rise to sanctions’⁵¹⁹. The US Army Field Manual states that ‘Flags of truce must not be used surreptitiously to obtain military information or merely to obtain time to effect a retreat or secure reinforcements or to feign a surrender in order to surprise an enemy’⁵²⁰.
- 339 Element 2 of article 8 para. 2 (b) (vii)–1 Rome Statute requires that the white flag was used ‘in order to feign an intention to negotiate when there was no such intention on the part of the perpetrator’. The formulation of this element appears to have been drawn from the prohibition of perfidy under article 37 para. 1 Add. Prot. I less the requirement of an intent to betray the confidence created by the feigning⁵²¹.
- 340 **d) Improper use of signs of the adversary.** In contrast to the flag of truce and the distinctive emblems of the Geneva Conventions, which identify for instance non-combatants or persons *hors de combat*, and the UN signs, which indicate a special status, the flag, military insignia and uniform of the adversary do not indicate any protected status under humanitarian law, and their improper use does not undermine the respect of international signs. In fact, feigning to belong to the armed forces of the adversary appears to always have been practiced to a certain degree, and it is unclear to what extent such feigning is prohibited under contemporary customary international law or else constitutes a permitted ruse of war⁵²².
- 341 As regards land warfare, it seems largely accepted in state practice and doctrine that the use of the adversary’s signs is not permitted while actually engaging in an armed attack. It is, however, unclear whether and to what extent it is a permitted ruse of war to use adversary’s signs during withdrawal or preparation of an attack insofar the disguise is abandoned before actual fighting begins, for instance to gain the advantage of surprise in attack or to lead the enemy to disperse its forces⁵²³.

radio messages to the enemy and messages dropped by aircraft are becoming increasingly important as a prelude to conversations between representatives of the belligerent forces’).

⁵¹⁷ 1950 ILC Draft Code II – Report by J. Spiropoulos Special Rapporteur, p. 264, para. 69.

⁵¹⁸ General Military Government Court of the U.S. Zone of Germany, *Skorzeny et al.* (1949) IX *Law Reports* 93.

⁵¹⁹ de Preux, in: Y. Sandoz et al. (eds), *Commentary* (1987) 458, para. 1552.

⁵²⁰ U.S. Army, *Field Manual* 27–10 (1956), No. 53. See also *ibid.*, No. 467; *German Joint Services Regulations* (Zentrale Dienstvorschrift (ZDV)) 15/2 (1992), reprinted in Fleck (ed.), *Handbook* No. 230 (1999).

⁵²¹ See article 8 para. 2 (b) (xi).

⁵²² Article 37 para. 2 Add. Prot. I states that ruses of war are not prohibited, see article 8 para. 2 (b)(xi). For a deeper analysis of State practice, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 213–218.

⁵²³ For the doctrine, see, e.g. Jobst (1941) 35 *AJIL* 436–437, (holding that article 23 (f) Hague Regulations absolutely prohibits using enemy uniforms for purposes of deceiving the enemy) (with further references up to

In the *Skorzeny* case German soldiers used American uniforms and American vehicles in order to freely move behind American lines in order to sabotage and generally disrupt. *Skorzeny* however was acquitted without legal reasoning. The Commentator noted that the Tribunal had to determine whether the wearing of enemy uniforms was a lawful ruse of war, differentiating between the use of enemy uniforms in actual fighting as opposed to such use during operations other than fighting. The defense quoted H. Lauterpacht who had stated that, '[a]s regards the use of the national flag, the military ensigns, and the uniforms of the enemy, theory and practice are unanimous in prohibiting such use during actual attack and defense, since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe'⁵²⁴. The defense argued that the German soldiers had instructions to reach their objectives in enemy uniforms, but as soon as they were detected, they were to discard their American uniforms and fight under their true colours⁵²⁵. The acquittal has been interpreted as suggesting that the use of the Germans made of the enemy's uniform was not 'improper'⁵²⁶.

In another war crimes case, German soldiers were accused of having violated international rules of land warfare by disguising to remove an explosive charge placed by the Dutch at a bridge to forestall a crossing by the Germans. The comment by Committee I of the United Nations War Crimes Commission notes that this means of deception was clearly a permitted ruse of war recognized under article 24 Hague Regulations, while improper when used during the time of actual attack or defense. The Committee continues in interpreting the time of actual attack in a broad way: As '[i]n this particular case the Dutch uniform was used by the accused at a time when Dutch territory was being invaded and actual fighting was going on[,] [t]hose improperly wearing the uniform could not be considered as spies in the circumstances and were therefore war criminals', having violated article 23 (f) Hague Regulations⁵²⁷.

The US Army Field Manual states that '[i]n practice, it has been authorized to make use of national flags, insignia, and uniforms as a ruse. [article 23 (f) Hague Regulations] does not prohibit such employment, but does prohibit their improper use. It is certainly forbidden to employ them during combat, but their use at other times is not forbidden'⁵²⁸. A comment to article 40 of the Swiss Manual also states that 'it is for instance prohibited to attack and fight the enemy while wearing the enemy's uniform'⁵²⁹. Article 8 para. c of the 1880 Oxford Manual prohibits '[t]o attack an enemy while concealing the distinctive signs of an armed force'.

While article 39 para. 1 Add. Prot. I absolutely prohibits the use of signs of states not parties to the conflict and prohibits the use of UN signs except as authorized by the UN, article 39 para. 2 Add. Prot. I prohibits the use of uniforms of adverse parties only '*while engaging in attacks or in order to shield, favour, protect or impede military operations*' (emphasis added), thereby clarifying the law to some degree. The ICRC Commentary suggests that the formulation in article 39 para. 2 Add. Prot. I also covers the preparatory

1941); Stephens and Skousgaard, in: Wolfrum (ed.), *MPIL* (2009); McCoubrey and White, *International Law and Armed Conflict* (1992) 226–227; UNWCC, *History* (1948) 490–491; Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 212–215; de Preux, in: Sandoz *et al.* (eds.), *Commentary* (1987) 465–469, paras. 1572–1579. Bordwell also states that '[t]he use of the national flag and of the uniform of the enemy is allowed for purposes of approach, but before fighting is begun, the true character of the ship or of the soldiers must be disclosed. This right of approach is well settled, although made little if any use of in recent times, especially on land. Complaints of fighting in the uniform of the enemy, however, have been numerous'. Bordwell, *The Law of War between Belligerents* (1908) 283–284. On State practice, see just below.

⁵²⁴ Oppenheim and Lauterpacht, *International Law*, ii (1952) 335.

⁵²⁵ *Skorzeny et al.*, IX *Law Reports* (1949) 90.

⁵²⁶ Rowe, *Defence* (1987) 113. Fleck however argues that the acquittal in this case cannot be taken as a yardstick, because the analysis of the acquittal in IX *Law Reports* 90–93 (1949), does not consider the legislative background of article 23 (f) Hague Regulations nor the situation of modern armed conflicts, Fleck (1974) 13 *RDPM* 281–282.

⁵²⁷ UNWCC, *History* (1948) 490–491.

⁵²⁸ U.S. Army, *Field Manual* 27–10 (1956), No. 54.

⁵²⁹ Swiss Army Regulations on the Laws and Customs of War, article 40, 12 (1978).

stage to an attack, referring to article 44 para. 3 Add. Prot. I⁵³⁰. In addition, the use of adversary signs is not criminalized as a grave breach under the Protocol, in contrast to the signs named under articles 37 and 38 Add. Prot. I⁵³¹. As regards *sea warfare*, No. 110 of the San Remo Manual can be considered to reflect customary international law⁵³² in stating that ‘Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag ...’⁵³³, even if it seems this statement has not always been true in history⁵³⁴. Several national military manuals confirm this statement. The US Commander’s Handbook on the Law of Naval Operation for instance states that ‘Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy, Warships must, however, display their true colors prior to an actual armed engagement’⁵³⁵. The German Joint Services Manual provides that ‘Ruses of war are permissible also in naval warfare. Unlike land and aerial warfare, naval warfare permits the use of false flags or military emblems (article 39 para. 3 Add. Prot. I). Before opening fire, however, the true flag shall always be displayed’⁵³⁶.

346 With respect to *air warfare*, a commentary to Nos. 109–111 of the San Remo Manual points out that, contrary to warships, aircraft have never been entitled to bear false markings⁵³⁷. Article 19 of the 1923 Hague Rules of Air Warfare also categorically stated that ‘[t]he use of false external marks is forbidden’⁵³⁸. This absolute prohibition is confirmed by national military manuals⁵³⁹.

347 In sum, it appears broadly accepted that it is at least improper for combatants to wear the uniforms of the enemy or display enemy signs *while actually engaging in an attack*. The suggestion of element 2 of article 8 para. 2 (b) (vii)–2 Rome Statute that the improper use of adversary signs needs to have been made ‘in a manner prohibited under the international law of armed conflict while engaged in an attack’ in order to qualify as a war crime under the jurisdiction of the ICC seems reasonable and generally in accordance with the laws and customs of war. This limitation of the offense’s scope of application to the moment in which persons actually engage in attack is a welcome clarification. The use of enemy uniforms etc. for exercise purposes or by prisoners of war or grounded parachutists who try to get back to their lines would thus for instance not amount to the offense defined under articles 8 para. 2 (b) (vii) Rome Statute⁵⁴⁰. It should also be taken into consideration that the capture of enemy

⁵³⁰ de Preux, in: Sandoz *et al.* (eds), *Commentary* (1987) 467 (para. 1575).

⁵³¹ Article 85 para. 3 (f) Add. Prot. I only prohibits the wilful and perfidious use of ‘protective’ signs recognized by the Conventions or the Protocol, thus not including adversary signs.

⁵³² See however, Politakis, *Stratagems* 272–301 and 307, (examining various World War examples and concluding that ‘[f]ar from pointing to an international custom, the degenerated practices of the two World Wars demonstrated that there do not exist commonly admitted principles’ with respect to the use of flags of the enemy or other states in the conduct of armed conflict at sea). See also Heintschel von Heinegg, *The Law of Armed Conflicts at Sea*, in: Fleck (ed.), *Handbook IHL* (OUP 2013), 422.

⁵³³ L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995) 28.

⁵³⁴ Madden, M., ‘Of Wolves and Sheep: A Purposive Analysis of Perfidy Prohibitions in International Humanitarian Law’, (2012) 17 *J S L* 439, at 445, 446.

⁵³⁵ U.S. Commander’s Handbook, section 12.5.1.

⁵³⁶ German Joint Services Regulations, No. 1018, in Fleck (ed.), *Handbook IHL* (1999). See also Swiss Army Regulations, article 48.

⁵³⁷ Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995) 184.

⁵³⁸ Hague Rules of Air Warfare, Drafted by a Commission of Jurists at The Hague, Dec. 1922–Feb. 1923.

⁵³⁹ German Joint Services Regulations, No. 1018, in Fleck (ed.), *Handbook IHL* (1999). US Commander’s Handbook, section 12.5.2, also states that ‘[t]he use in combat of enemy markings by belligerent military aircraft is forbidden’. A comment to that rule indicates that ‘[t]his rule may be explained by the fact that an aircraft, once airborne, is generally unable to change its markings prior to actual attack as could a warship. Additionally, the speed with which an aircraft can approach a target (in comparison with warships) would render ineffective any attempt to display true markings at the instant of attack’, Thomas and Duncan (eds.), *Annotated Supplement* (1999) 513, fn. 14.

⁵⁴⁰ *Cf.*, de Preux, in: Sandoz *et al.* (eds), *Commentary* (1987) 463 (para. 1565); Fleck, *Ruses of War* 282; Bothe, *Flags and Uniforms in War* 403; Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 214.

material and belligerent occupation may result in particular situations in which the use of objects with adversary signs does not necessarily violate the prohibition to improperly use adversary signs.

The terms ‘flag or ... military insignia and uniform’ of the enemy refer to concrete visual objects. These terms should be understood to include distinguishing marks on airplanes, vehicles and buildings. However, electronic means of identification are not covered by the wording, at least in a strict literal interpretation. It has in addition been maintained that the prohibition does not apply to the ruse of using the adversary’s codes, passwords and countersigns to aid military operations⁵⁴¹. 348

e) Improper use of signs of the United Nations. The improper use of the flag, military insignia and uniform of the United Nations is prohibited by articles 37 para. 1 (d) and 38 para. 2 (d) Add. Prot. I and criminalized under article 85 para. 3 (f) Add. Prot. I. Rule 60 of the ICRC Study on customary international humanitarian law introduces a nuance in that it prohibits the *use* of the United Nations emblem and uniform (except as authorized by the organisation), and not only their *improper use*.⁵⁴² 349

Even when UN personnel are or become involved in an armed conflict, the improper use of the UN signs should still be considered to qualify under article 8 para. 2 (b) (vii)–3, and not merely be treated as an improper use of enemy signs (article 8 para. 2 (b) (vii)–2) which may amount to a war crime only when the persons using them engage in an attack. Even if used by peace-enforcement operations, UN signs constitute ‘protective’ signs serving to protect ‘neutral’ zones as well as objects or personnel not involved in an armed conflict or in other places, times and circumstances⁵⁴³. 350

Element 2 of article 8 para. 2 (b) (vii)–3 suggests that in order for an improper use of UN signs to qualify as a war crime under the Rome Statute, the perpetrator must have made such use ‘in a manner prohibited under the international law of armed conflict’. At first sight, this element seems to limit the cases to which article 8 para. 2 (b) (vii) is applicable, as it could be maintained that UN regulations providing who is permitted to use UN signs under what circumstances do not (all) constitute rules of the international law of armed conflict. However, article 38 para. 2 Add. Prot. I prohibits all use ‘of the distinctive emblem of the United Nations’ that is not authorized by the United Nations. Element 2 is consequently somewhat circular and suggests, at least in a literal interpretation, that all use of UN signs not authorized by the UN may qualify under article 8 para. 2 (b) (vii) as long as the other prerequisites are given, even if delegations at the Preparatory Committee may have intended this element 2 to limit the scope of article 8 para. 2 (b) (vii). 351

The same phrase however could also be read as limiting the scope of application of article 8 para. 2 (b) (vii)–3 to those cases in which a *substantive* rule of the Geneva Conventions or the Add. Prot. I or another direct source of humanitarian law rules *directly* prohibit a particular use, that is, without referring to a vague general formula like an ‘improper use’. This would certainly be the case regarding the prohibition of perfidy⁵⁴⁴. 352

With respect to *naval warfare*, No. 110 of the San Remo Manual can be considered to reflect customary international law in stating that ‘... Warships and auxiliary vessels ... are prohibited ... at all times from actively simulating the status of: ... (d) vessels protected by the United Nations flag; ...’. 353

Protected are ‘the flag or ... the military insignia and uniform ... of the United Nations’. The term ‘military insignia ... of the United Nations’ may be considered to refer to 354

⁵⁴¹ Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 214.

⁵⁴² Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 210.

⁵⁴³ Signs of adversary parties are not considered ‘protective’ signs under article 85 para. 3 (f) Add. Prot. I. See, Zimmermann, in: Sandoz *et al.*, *Commentary* (1987) 998, paras. 3495–3499; W. Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 517. See also de Preux, in: Sandoz *et al.* *Commentary* (1987), 439 (para. 1509). The argument that UN operations have a different legitimacy even if engaging in armed conflict and therefore should be better protected appears less convincing as it mixes elements of *ius ad bellum* into the *ius in bello*.

⁵⁴⁴ See articles 37 para. 1 (d) and 85 para. 3 (f) Add. Prot. I.

distinguishing marks or signs or badges of authority that identify personnel as members of the military, police or civilian components of the UN or its specialized agencies, or vehicles, vessels, aircraft, buildings or other objects of the UN or its specialized agencies⁵⁴⁵. It is unlikely that delegations at the Rome Conference intended to exclude signs used by UN personnel involved in non-military activities by using the term ‘military’. Rather, this term was drawn from the Hague wording referring to the signs of the enemy, while delegations appear not to have realized that this term might not be fully appropriate with regard to UN signs. Articles 37 para. 1 (d) and 38 para. 2 Add. Prot. I use the terms ‘signs’ and ‘emblems’ without such qualifier.

Protected signs thus certainly include the blue UN flag and other UN insignia like UN badges or UN helmets⁵⁴⁶.

- 355 f) **Improper use of the distinctive emblems of the Geneva Conventions.** As early as 1863, the Lieber Code prohibited the abuse of the Red Cross. The Responsibilities Commission of the 1919 Paris Peace Conference included, besides the prohibition of ‘deliberate bombardment of hospitals’ and ‘attack and destruction of hospital ships’, also the ‘breach of other rules relating to the Red Cross’ in its list of violations of the laws and customs of war. The proper use of the emblems of the Geneva Conventions is regulated by numerous provisions of the Geneva Conventions and Additional Protocol I. Article 23 (f) Hague Regulations also prohibits ‘[t]o make improper use of ... the distinctive badges of the Geneva Convention’. Article 38 Add. Prot. I prohibits ‘to make improper use of the distinctive emblem of the Red Cross, Red Crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol ...’. Article 85 para. 3 (f) Add. Prot. I makes it a grave breach to cause death or serious injury by perfidiously using, in violation of article 37 Add. Prot. I, the protective signs recognized by the Geneva Conventions or the First Additional Protocol. Moreover, Article 6 of Add. Prot. III provides that the relevant provisions of the Geneva Conventions and of the 1977 Add. Prot. governing *inter alia* the misuse of the distinctive emblems ‘shall apply equally to the third Protocol emblem’. In addition, recalling also the Oxford Manual and the Brussels Declaration, the ICRC Study on customary international humanitarian law contains a rule prohibiting the improper use of the distinctive emblems of the Geneva Conventions.⁵⁴⁷
- 356 The ‘distinctive emblems of the Geneva Conventions’ are the Red Cross, the Red Crescent and the red lion and sun on a white ground⁵⁴⁸. Additionally, article 8 para. 2 (b) (vii) may in the future also be applied, at least with regard to parties to the conflict bound by the 2005 Additional Protocol III, to improper use of the additional emblem of the new ‘red crystal’, composed of a red frame in the shape of a square on edge on a white ground⁵⁴⁹.
- 357 Other internationally recognized emblems and signs or signals which are protected or recognized by the Geneva Conventions or the First or Third Additional Protocols do not constitute distinctive emblems of the Geneva Conventions. A different issue is whether the improper use of distinctive signals or other methods of identification different from the visual sign of the Red Cross or Red Crescent, which are recognized by the Annex of the Additional Protocol and used to indicate the same status and protection as the Red Cross or

⁵⁴⁵ See articles 1 (Definitions) and 3 (Identification) of the UN Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/RES/49/59 (9 Dec. 1994). The use of the United Nations flag is regulated by a code issued by the Secretary-General: The United Nations Flag Code and Regulations, UN Doc. ST/SGB/132 (January 1967), cited in, de Preux, in: Sandoz *et al.* (eds.), *Commentary* (1987) 459 (para. 1559).

⁵⁴⁶ It might even cover non-blue signs identifying personnel or objects associated with the UN, such as the yellow berets of unarmed Swiss assistance personnel providing medical or other civilian services to UN peace-keeping operations.

⁵⁴⁷ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 207 (rule 59).

⁵⁴⁸ See article 8 para. 1 Add. Prot. I, article 38 GC I, and article 41 GC II. The protection of the distinctive emblems of the Conventions is further developed by article 38 Add. Prot. I, and models of the emblems are found in Figure 2 (article 4) of the Regulations Concerning Identification, Annex I to Add. Prot. I (as amended on 30 Nov. 1993).

⁵⁴⁹ See article 2 *et seq.* of the 2005 Add. Prot. III.

the Red Crescent, such as radio signals when there is no direct eye contact, could also be subsumed under article 8 para. 2 (b) (vii)–4 Rome Statute⁵⁵⁰. The German Military Manual for instance states that ‘... it is prohibited to misuse the emblem of the Red Cross or to give a ship, *in any other way*, the appearance of a hospital ship for the purpose of camouflage. It is also prohibited to make improper use of *other distinctive signs equal in status with that of the Red Cross* (article 45 GC II; article 37 Add. Prot. I) ...’⁵⁵¹.

The protective emblems of the Geneva Conventions generally identify and protect sick or wounded persons as well as units and installations transporting or sheltering them and persons retrieving or caring for the⁵⁵². The emblems protect ‘medical units and transports, or medical and religious personnel, equipment or supplies’⁵⁵³. Who is entitled under what circumstances and for what particular purpose to use the distinctive emblems of the Geneva Conventions is regulated with more specificity by the First, Second and Fourth Geneva Conventions, Part II of the First Additional Protocol and articles 2 to 6 of the Third Additional Protocol⁵⁵⁴. Given that the abuse of the emblems can substantially weaken the protection they might otherwise provide, the abuse of the emblems is categorically prohibited by the Geneva Conventions and Additional Protocols I and III.

Element 2 of article 8 para. 2 (b) (vii)–4 Rome Statute suggests that the term ‘improper use’ must be understood as a use ‘for combatant purposes in a manner prohibited under the international law of armed conflict’. Footnote 42 of the Elements of Crime further spells out that ‘[c]ombatant purposes’ in these circumstances means purposes directly related to hostilities and not including medical, religious or similar activities. This specification appears reasonable, as it would not make sense that any use of the emblems not perfectly in accordance with the applicable prescriptions potentially qualifies under article 8 para. 2 (b) (vii) even if occurring in good faith to help sick and wounded.

The US Army Field Manual considers the following conducts as examples of an ‘improper use’ of the emblem of the Red Cross, which could all be subsumed under element 2 to article 8 para. 2 (b) (vii)–3 Rome Statute: ‘Using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants; displaying the emblem on vehicles containing ammunition or other nonmedical stores; and in general using it for cloaking acts of hostility’⁵⁵⁵. A US Intermediate Military Government Court sentenced the accused Hagendorf on a charge of having ‘wrongfully used the Red Cross emblem in a combat zone by firing a weapon at American soldiers from an enemy ambulance displaying such emblem’⁵⁵⁶. The commentator remarked that ‘[i]t is hard to conceive of a more flagrant misuse than the firing of a weapon from an ambulance by personnel who were themselves protected by such emblems and by the [Geneva] Conventions, in the absence of an attack upon them’⁵⁵⁷.

⁵⁵⁰ Such other methods of identification are covered by the prohibition of improper use of signs under article 38 para. 1 Add. Prot. I. Israel uses the red shield of David, while considering to ratify Add. Prot. III.

⁵⁵¹ German Joint Services Regulations, No. 1019, in Fleck (ed.), *Handbook* No. 230 (1999) (emphasis added).

⁵⁵² On the protection of the wounded, sick and shipwrecked, see generally, e.g., Rabus, in: Fleck (ed.), *Handbook IHL* (2013) 293. It is submitted that article 8 para. 2 (b)(vii) applies to the protective use of the emblem for those engaged on tasks provided for by the Geneva Conventions and the Add. Prots. It does not apply to the indicative use of the Red Cross to show authorized affiliation with international or national Red Cross organizations, which in armed conflict will always be done with an emblem of a small size which may not be displayed on armbands or rooftops and which is not covered as such under article 38 Add. Prot. I. See Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 208, fn. 1; de Preux, in: Sandoz *et al.* (eds.), *Commentary* (1987) 450–451, paras. 1539–1540.

⁵⁵³ Article 8 para. 1 Add. Prot. I.

⁵⁵⁴ On the protection of the emblem and repression of abuses, see in particular articles 38, 44, 53 and 54 GC I; articles 41 to 45 GC II; articles 18, 20 and 22 GC IV; articles 8 to 31 (above all article 18), 37, 38 and 85 para. 3 (f) Add. Prot. I. See also Arnold, *article 8 para. 2 (b) (xxiv)*.

⁵⁵⁵ See U.S. Army, *Field Manual* 27–10 (1956), No. 55.

⁵⁵⁶ U.S. Intermediate Military Government Court at Dachau, *Heinz Hagendorf* (8–9 August 1946), XIII *Law Reports* 146 (1949).

⁵⁵⁷ *Ibid.*, at 148.

361 Delegations intended to cover abuses to kill or wound the adversary as well as cases in which the distinctive emblems are used to gain another military advantage which then leads to death or injury because the confidence that the emblems are properly used by all sides has been lost or was reduced.

362 As regards the law of naval warfare, No. 110 of the San Remo Manual can be considered to reflect customary international law in stating that ‘... Warships and auxiliary vessels ... are prohibited ... at all times from actively simulating the status of: (a) hospital ships, small coastal rescue craft or medical transports; (b) vessels on humanitarian missions; ... (f) vessels entitled to be identified by the emblem of the Red Cross or Red Crescent’.

8. Paragraph 2(b)(viii): Prohibited deportations and transfers in occupied territories

Literature: Benvenisti, E., *The international Law of Occupation* (PUP 1993); Brecht, F., *Anwendbarkeit des humanitären Völkerrechts im Israel-Palästina-Konflikt* (Duncker & Humblot Berlin 2009); Haslam, E. ‘Unlawful Population Transfer and the Limits of International Criminal Law’, (2002) 61 *CambridgeLJ* 66; Henckaerts, J.M., *Mass Expulsion in Modern International Law and Practice* (Nijhoff Leiden 1995); Kretzmer, D., ‘The Advisory Opinion: The Light Treatment of International Humanitarian Law’, (2005) 99 *AJIL* 88; Meindersma, C. ‘Legal Issues Surrounding Population Transfers in Conflict Situations’, (1994) 41 *NethLLRev* 31; Meron, T., ‘Deportation of Civilians as a War Crime Under Customary Law’, in: D. Gomien (ed.), *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Scandinavian University Press 1993) 201; Roberts, A., ‘Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967’, (1990) 84 *AJIL* 44; Dörmann, K. ‘Preparatory Commission for the International Criminal Court: The Elements of War Crimes. Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-International Armed Conflicts’, (2001) 83 *ICRC* 481 *et seqq.* <https://www.icrc.org/eng/assets/files/other/461-488_dormann.pdf> accessed 16 January 2015; Olson, W. ‘UN Security Council Resolutions Regarding Deportations from Israeli-Administered Territories’, (1987–88) 24 *StanJIL* 611; *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vi (1977), 291; von Hebel, H., ‘The Elements of War Crimes’, in: R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers New York 2001) 159; ‘Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches’ 29, Drucksache 14/8524, <<http://dip21.bundestag.de/dip21/btd/14/085/1408524.pdf>> accessed 19 October 2014; *Elon Moreh case*, No. H.C. 390/79, reprinted in: Shamgar, M. ‘Legal Concepts and Problems of the Israeli Military Government – the Initial Stage’, in: M. Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967–1980: The Legal Aspects* (Alpha Press Jerusalem 1982) 404, 419–26; ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ ICJ Advisory Opinion, *ICJ Reports* 2004, 136, delivered on 9 July 2004. <<http://www.icj-cij.org/docket/files/131/1671.pdf>> accessed 15 October 2014; Pégurier, C., *Ethnic Cleansing: A Legal Qualification* (Routledge New York 2013); Lehmler, L., *Die Strafbarkeit von Vertreibungen aus ethnischen Gründen im bewaffneten nicht-internationalen Konflikt* (Nomos Baden-Baden 1999); Mulaj, K., *Politics of Ethnic Cleansing: Nation-State Building and Provision of In-Security in Twentieth-Century Balkans* (Lexington Books Lanham 2008); Preece, J.J., ‘Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms’, (1998) 20 *HumRtsQ* 817; Köhler, S., *Das Massenvertreibungsverbot im Völkerrecht* (Verlag Spitz Berlin 1999); Henckaerts, J.M., *Mass Expulsion in Modern International Law and Practice* (Nijhoff Leiden 1995); Dawson, G. and Farber, S., *Forcible Displacement Throughout the Ages: Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Nijhoff Leiden 2012); de Zayas, A., ‘International Law and Mass Population Transfers’, (1975) 16 *HarvILJ* 211; Meron, T., ‘Deportation of Civilians as a War Crime Under Customary Law’, in: D. Gomien (ed.) *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Scandinavian University Press Oslo 1993) 201; ‘Australian Law Concerning Trials of War Criminals by Military Courts’, in: *Law Reports of Trials of War Criminals, Selected and prepared by the United Nations War Crimes Commission* (London 1948), vol. V 95; Solf, W.A. and Cummings, E.R., ‘A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949’, (1977) 9 *CaseWesternResJIL* 232 *et seqq.*; Junod, S., ‘Article 17’, in: Y. Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Nijhoff 1987) 1471; Roberts, R., ‘Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967’, 1990 84 *AJIL* 44, 83 *et seqq.*; Gasser, H.P., ‘Protection of the Civilian Population’, in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (1995) 246 and 251; Meindersma, C., ‘Legal Issues Surrounding Population Transfers in Conflict Situations’ (1994) 4141 *NILR* 31; Zimmermann, B., ‘Article 85’, in: Y. Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Nijhoff 1987).

363 The prohibited acts contained in Art. 8 b (viii) Rome Statute are twofold and constitute two different crimes. First, it criminalizes the direct or indirect transfer by an occupying power of parts of its own civilian population into the territory it occupies. Second, the

deportation or transfer of all or parts of the population of the occupied territory within or outside this territory is prohibited.⁵⁵⁸ Both manners of transfer and deportation have severe humanitarian, economic, political and social long-term consequences, by changing the demographic composition of a territory, protracting conflicts and creating factual situations which are difficult to reverse.⁵⁵⁹ The creation of such *faits accomplis* render the settlement of conflicts more complicated,⁵⁶⁰ in particular with regard to land restitution and return of refugees and internally displaced people. Both acts are only criminalized in international armed conflicts.⁵⁶¹

a) **War crime of transferring parts of the own population into occupied territory.** The war crime of transferring parts of the population of the Occupying Power into the occupied territory aims at protecting the status as well as the population and property of occupied territory against the long-lasting effects of settlements by the Occupying Power and its population. 364

aa) **Normative origins and drafting history.** aaa) **The underlying issues and the objectives of the prohibition.** The transfer by an Occupying Power of its own civilian population into territory it occupies usually has substantial lasting consequences. Such transfers not only change the demographic composition within the occupied territory, but experience shows that they often lead to restrictions of the original inhabitants' free movement as well as constraints of property and other fundamental rights. In addition, inhabitants of the occupied territory that may have become refugees or been internally displaced during the prior armed conflict may encounter added difficulties to return because of the transfers. The new settlers may defend, often protected by the Occupying Power, their new housing and settlements and resist the original inhabitants' return and reappropriation of property and housing 365

Occupying Powers often initiate, promote, support or at least tolerate transfers and shifts in the demographic composition of the occupied territory to factually weaken the position of the resident population of the occupied territory and solidify its territorial and political claim over the territory, not infrequently with the end goal to annex the territory or parts of it. Implantations of settlements and settlers can constitute a powerful and difficult-to-reverse means of ethnic cleansing. 366

bbb) **The normative framework.** (1) **The conceptual framework of the law of belligerent occupation.** Article 2 common of the GC defines in para 2 the scope of application of the conventions. They also apply to 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.' Occupation in international humanitarian law is defined in Regulation 42 of the Annex to the Hague Convention respecting the Laws and Customs of War on Land,⁵⁶² which reads: 367

⁵⁵⁸ Dörmann, *Elements of War Crimes* (2001) 83 ICRC. <https://www.icrc.org/eng/assets/files/other/461-488_dormann.pdf> accessed 16 January 2015 461 481 *et seq.*

⁵⁵⁹ The indictment in the case of the Major War Criminals before the IMT Nuremberg in 1945 held, under the title 'Germanization of Occupied Territories': '[...] the defendants methodically and pursuant to plan endeavored to assimilate those territories politically, culturally, socially and economically into the German Reich. The defendants endeavored to obliterate the former national character of these territories. In pursuance of these plans and endeavors, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists.' IMT Nuremberg, Case of the Major War Criminals, Indictment, 20 November 1945, Count 3(J) pp 63–65. Excerpts in Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law. Practice* (2005) vol. II p. 2968 Note 420.

⁵⁶⁰ The UN SC held in its Resolution 465, 1 March 1980 on Israeli settlement policies in the occupied territories that 'Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.' S/RES/465 (1980) 1 March 1980, para 5.

⁵⁶¹ Werle and Jessberger, *Principles* (2014) mn. 1238.

⁵⁶² Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

‘Territory is considered occupied when it is actually placed under the authority of the hostile army’. Under international law, occupation must be limited in time due to the general ban of use of force stipulated in the UN Charter. The political, social and cultural life in occupied territories should be changed as little as possible. Therefore, the objective of 85 para 4 (a) AP I is to avoid that the demographic, social and political conditions are altered by the Occupying Power to the social and economic detriment of the population living in the occupied territory.⁵⁶³

- 368 A party to a conflict occupying territory is not free to act as it likes within that territory. International humanitarian law provides rules specifying the rights and obligations of a belligerent power with regard to the occupied territory and its inhabitants. International law and more particularly the UN Charter generally ban the use of force and, as a consequence, also the acquirement of foreign territory by force. Therefore, annexing conquered territory is prohibited. Hence, under international law, any belligerent occupation must necessarily be temporary. Correspondingly, **international humanitarian law provides for obligations of Occupying Powers as an interim military administrator**, essentially similar to a trusteeship. The Occupying Power for instance is not permitted to change the law in force in the territory ‘unless absolutely prevented’ (article 43 Hague Regulations). The political and public life and the occupied territory itself, including its demographic composition, should be changed as little as possible and without effecting the situation after the end of the armed conflict.⁵⁶⁴ According to article 46 Hague Regulations, reflecting customary international law, the private property in occupied territory ‘must be respected’ and ‘cannot be confiscated’. Article 53 GC IV provides in addition that:

‘Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations’⁵⁶⁵

- 369 Reprisals against civilians and their property as well as collective penalties or measures of intimidation are prohibited.⁵⁶⁶ The extensive destruction or appropriation of property not justified by military necessity may also amount to a war crime under article 8 para. 2 (a) (iv) and (b) (xiii) Rome Statute.
- 370 (2) **Basic rules prohibiting transfers into occupied territory.** The prohibition of the transfer of parts of their own civilian population by states into a territory they occupy is considered as a norm of **customary international humanitarian law** applicable in international armed conflicts.⁵⁶⁷
- 371 Article 49 para 6 GC IV provides that ‘[t]he Occupying Power shall not deport or transfer parts of its own population into the territory it occupies.’ The UN Security Council has repeatedly condemned transfers of an Occupying Power’s own population into occupied territory, considering it ‘a flagrant violation of the [Fourth] Geneva Convention.’⁵⁶⁸ Arti-

⁵⁶³ ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, 3504.

⁵⁶⁴ Gasser, in: Fleck and Bothe, *Handbook* (2008) 246 and 251.

⁵⁶⁵ See also articles 48 *et seq.* AP I.

⁵⁶⁶ Article 33 para 3 GC IV; articles 20 and 51 para 6 AP I.

⁵⁶⁷ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005), vol. I, 462 *et seq.* The national legislation of many states as well as numerous military manuals prohibit the deportation or transfer by a party to the conflict of parts of its civilian population into the territory it occupies. This prohibition is supported by a number of official statements and reported practice. Further, attempts to alter the demographic composition of an occupied territory have repeatedly been condemned by the UN SC, *cf.* Henckaerts and Doswald-Beck, *Customary IHL* (2005), vol. II, 2956 *et seq.*

⁵⁶⁸ The UN Security Council stated for instance that ‘Israel’s policy and practices of settling parts of its population and new immigrants in [the Palestinian and other Arab territories occupied since 1967] constitute a flagrant violation of the [Fourth] Geneva Convention’, UN SC Res. 465 (1980) para 5. In another resolution, it has called upon Israel to ‘desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied ...

cle 85 para. 4 (a) AP I, which was adopted by consensus,⁵⁶⁹ explicitly criminalizes the act as a **grave breach of Additional Protocol I**.⁵⁷⁰ Many states penalize the transfer of own civilian population by Occupying Powers.⁵⁷¹

(3) **Drafting history.** The International Law Commission included the ‘establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory’ as exceptionally serious war crime in article 22 para 2 (b) of its 1991 Draft Code of Crimes against the Peace and Security of Mankind.⁵⁷² In its 1996 Draft Code, the International Law Commission included as a war crime, insofar ‘committed willfully in violation of international humanitarian law: (i) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies’ as a violation of international humanitarian law (lit. c ii).⁵⁷³

The wording of article 8 para 2 (b)(viii) Rome Statute, in particular regarding the transfer of its own population by an Occupying Power to territories under its occupation was **controversial during the preparatory and the Rome negotiations** due to political disagreement. Israel opposed the inclusion of any war crime based on article 85 para 4 (a) AP I, supported, to a limited extent, only by the United States. The overwhelming majority of the delegations in Rome however rejected the argument of Israel⁵⁷⁴ that this grave breach would not be part of customary international law⁵⁷⁵ and preferred a wording based on the first part of article 85 para. 4 (a) AP I. However, the Arab delegations wished to clarify by way of the offense’s definition that it does not only apply to the direct organization by the Occupying Power of such transfers, but also criminalizes measures of an occupying power and its agents that (indirectly) encourage, facilitate or promote the transfer of its population into the occupied territory. After intense negotiations opposing primarily Arab states and Israel, the wording ‘directly or indirectly’ was added.⁵⁷⁶ Most state parties did not consider this addition

and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories’, SC Res 446 (1979) para 3. See also SC Res 452 (1979); SC Res 476 (1980); Olson (1987–88) 24 *StanJIL* 611.

⁵⁶⁹ *Official Records (1977) Vol. VI CDDH/SR.44*, 291. This provision was not least adopted in view of the Israeli settlements on the Golan Heights and on the West Bank.

⁵⁷⁰ Article 147 GC IV does not appear to criminalize a violation of article 49 para 6 GC IV, since it only criminalizes an ‘unlawful deportation or transfer [...] of a protected person’, and since the Occupying Power’s own population is not the object of protection of article 49 GC IV. Pictet, *Commentary on the Geneva Convention (1952–1960)*, 599.

⁵⁷¹ See list in Henckaerts and Doswald-Beck *Customary IHL (2005)*, vol. II, 2958 *et seq.*

⁵⁷² The commentary to article 22 stated that this crime constituted ‘a particularly serious misuse of power, especially since such an act could involve the disguised intent to annex the occupied territory. Changes to the demographic composition of an occupied territory seemed to the Commission to be such a serious act that it could echo the seriousness of genocide.’ Draft Code of Crimes against the Peace and Security of Mankind, Document A/46/10. Report of the International Law Commission on the work of its forty-third session, 29 April–19 July 1991, *Official Records of the General Assembly, Forty-sixth session, Supplement No. 10*. http://legal.un.org/ilc/documentation/english/A_46_10.pdf (last visited on 20 October 2014).

⁵⁷³ *ICL Draft Code of Crimes against the Peace and Security of Mankind with commentaries* (51 UN GAOR Supp. (No. 10) at 14, UN Doc. A/CN.4/L.532, corr.1, corr.3 1996) *YbILC* (1996) (vol II part 2) 53.

⁵⁷⁴ Israel, which is party to AP I opposed the inclusion of the crime of transferring own population into occupied territory by an Occupying Power, arguing that this grave breach was not part of customary international law. See: von Hebel and Robinson, ‘Crimes within the Jurisdiction of the Court’, in: Lee (ed.), *The Making of the Rome Statute* (Nijhoff Leiden 1999) 112 *et seq.*

⁵⁷⁵ Four options of definitions were submitted to the Rome Conference: ‘(f) **Option 1:** the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies; **Option 2:** the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; **Option 3:** (i) the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory; (ii) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; **Option 4:** no paragraph (f): Preparatory Committee (Consolidated) Draft, p 20 (Art. 5 – War crimes – B.(f)).

⁵⁷⁶ Hebel and Robinson (n 574) 113 affirm that the Arab group also intended to cover the case where the Occupying Power does not take effective steps to prevent the population from organizing such transfers, an omission which, however, is not clearly implied by the term ‘indirectly’.

as an extension of the scope of article 85 para 4 (a) AP I, but rather as a clarification.⁵⁷⁷ As a result, the part of article 8 para. 2 (b) (viii) Rome Statute criminalizing the transfer of the occupying power's own population is identical with article 85 para. 4 (a) Add. Prot. I with the exception of the wording 'directly or indirectly'⁵⁷⁸, the omission of the reference to article 49 GC IV and to a specific standard of *mens rea*.

374 The drafting of the **Elements of Crime** of Article 8(2)(b)(viii) proved difficult too and caused major controversy around the questions whether a transfer must be forcible, whether the crime shall be limited to large-scale transfers of the population and whether the economic situation of the local population must be worsened and their separate identity be endangered by the transfer.⁵⁷⁹ A particular difficulty in drafting the elements stemmed from the need to 'translate' the Occupying Power's obligation not to transfer its own population in occupied territory into a criminal offense defining the circumstances under which a particular individual incurs criminal responsibility for his or her conduct.

375 The Preparatory Committee strived to determine, first, for what precise acts an individual becomes criminally responsible for the war crime spelled out in article 8 para. 2 (b) (viii), and, second, in what way – if at all – the Occupying Power needs to be involved in some way. Four different proposals for the elements for article 8 para. 2 (b) (viii)-1 were tabled.⁵⁸⁰ The US proposal suggested material as well as mental elements that cannot be found in nor derived from article 49 para. 6 GC IV and article 85 para. 4 (a) AP I, including the requirements that the transfer was compulsory, worsened the economic situation of the local population, endangered their separate identity, and that the perpetrator had a special intent. In addition, the US comment to these proposals suggested that transfers could be justified where serving the 'public order and safety' (article 43 Hague Regulations). Since these

⁵⁷⁷ von Hebel, in: Lee (ed.), *Elements of Crimes* (2001) 159.

⁵⁷⁸ In the commentary to the Draft of the German Code of Crimes Against International Law (Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, Drucksache 14/8524, (2002) <<http://dip21.bundestag.de/dip21/btd/14/085/1408524.pdf>> accessed 19 October 2014) 29, the drafters stated that the provision reflects customary international law and obviously and in any event covers both direct and indirect acts of transfer, which is why the phrase 'directly or indirectly' is not repeated in the Code.

⁵⁷⁹ Dörmann, *Elements of War Crimes* (2001) 83 *IRRC* 481 *et seq.*

⁵⁸⁰ *Proposal by the United States of America*, UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999):

- '1. That the act took place in the course of a military occupation with respect to territory where authority of a hostile army was actually established and exercised.
2. That the accused intended to effect the compulsory transfer, on a large scale, of parts of the population of the Occupying Power into such occupied territory.
3. That the accused effected such transfer of nationals of the Occupying Power into such occupied territory.
4. That the accused intended that such transfer would endanger the separate identity of the local population in such occupied territory.
5. That the transfer worsened the economic situation of the local population and endangered their separate identity.
6. That the transfer was without, and the accused knew it was without, lawful justification or excuse'.

Proposal by Costa Rica, Hungary and Switzerland, UN Doc. PCNICC/1999/WGEC/DP.8 (19 July 1999):

- '... 2. The perpetrator: (a) Transferred, directly or indirectly, parts of its own population into the territory it occupies';

Proposal by Japan UN Doc. PCNICC/1999/WGEC/DP.12 (22 July 1999):

- '1. The act took place in the context of military occupation with respect to territory where authority of a hostile army was established and exercised.
2. The Occupying Power caused the transfer, directly or indirectly, of parts of its own civilian population into the territory it occupies,
3. The accused was responsible for such transfer or deportation.
4. Such transfer or deportation was conducted in violation of article 49 of the Fourth Geneva Convention'.

Proposal by Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Morocco, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia, the United Arab Emirates and Yemen, UN Doc. PCNICC/1999/WGEC/DP.25 (10 Aug. 1999):

- '... 2. The perpetrator, directly or indirectly:

- (a) Induced, facilitated, participated or helped in any manner in the transfer of civilian population of the Occupying Power into the territory it occupies; ...

3. The perpetrator acted wilfully and knowingly'.

additional requirements would have considerably increased the threshold of the required evidence, they were unacceptable to a great number of delegations. The elements proposed by Arab states specified the forms of an individual's participation in the transfer that may give rise to his criminal responsibility, ie the perpetrator 'induced, facilitated, participated or helped in any manner'.⁵⁸¹ This specification however was considered unnecessary, since Part III of the Rome Statute specifies the possible forms of participation giving rise to responsibility under the Statute and did not gather sufficient support among other delegations. The Japanese proposal was the only one explicitly addressing how the Occupying Power and the perpetrator, respectively, must be involved in the transfer, stating that the Occupying Power 'caused' the transfer, while the accused had to be 'responsible' for such transfer. The proposal by Costa Rica, Hungary and Switzerland (hereinafter 'Swiss proposal') essentially merely replaced the wording of the Rome Statute 'the Occupying Power' by 'the perpetrator'. The formulation that '[t]he perpetrator (a) Transferred ... *its* own population', however, was orally amended when the Swiss delegation presented it to the Preparatory Commission so as to read 'the perpetrator (a) Transferred, directly or indirectly, parts of the population of the occupying power into the occupied territory it occupies'.⁵⁸²

While all four proposals were commented upon, the Swiss proposal became the primary focus of the discussions at the August 1999 session of the Preparatory Commission.⁵⁸³ The negotiations were increasingly conducted informally between the Arab group and Israel supported by the US. The Arab group opposed the oral amendment of the Swiss proposal by Switzerland and preferred the previous wording, since the amendment explicitly referred to the occupying power and therefore might be interpreted as requiring some form of government involvement. Israel also preferred to keep the wording 'its own population' and to simply add a footnote to the elements according to which '[t]he term transfer needs to be interpreted in accordance with the relevant provisions of international humanitarian law' 405 Delegations eventually decided to keep the original, written formulation of the Swiss proposal, which grammatically is illogical since an individual perpetrator cannot have an 'own population', but ironically allowed for a compromise between the Arab group and Israel (as well as the US).

In contrast with the Rome Statute, article 85 para. 4 (a) Add. Prot. I and article 49 para. 6 GC IV, the Elements for article 8 para. 2 (b) (viii) omit the word 'civilian'. The Costa Rican/Hungarian/Swiss delegations, who had presented the initial wording leading to these elements and which already omitted that word, had not meant thereby to indicate any departure from the wording of the Additional Protocol or the Fourth Geneva Convention. The same seems to apply to the delegations participating in the negotiations in Rome. Namely, subsequent to the compromise between the Arab group and Israel (and the US), Turkey had proposed informally to add the word 'civilian' again to the elements of article 8 para. 2 (b) (viii) to bring it into line with the Rome Statute. Yet, this proposal was rejected in order not to reopen the carefully balanced compromise, and not because there was a disagreement on substance.⁵⁸⁴

bb) Elements of Crime. aaa) Actus reus. A first element of the war crime of transferring an Occupying Power's population into occupied territory is a *transfer* of persons into

⁵⁸¹ The wording however did not strictly elaborate on the meaning of 'directly or indirectly'. The elements proposed by the Arab states applied the wording 'directly or indirectly' also to the war crime of transferring or deporting population of the occupied territory, which however is inconsistent with the wording of article 8 para. 2 (b) (viii).

⁵⁸² *Proposals in relation to elements of article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court*, UN Doc. PCNICC/1999/WGEC/INF/3 (12 Aug. 1999), fn. 1.

⁵⁸³ The Preparatory Commission session of August 1999 was unable to find agreement on a generally acceptable compromise and merely compiled the four proposals, *Proposals in relation to elements of article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court*, UN Doc. PCNICC/1999/WGEC/INF/3 (12 Aug. 1999).

⁵⁸⁴ Israel might have hoped to create an opportunity to argue that certain provisions are not part of customary law. However, the footnote states what in any event applies for all the definitions of the Rome Statute as well as elements thereto and therefore is superfluous.

occupied territory. The wording ‘transfer’ denotes a *physical displacement* that is, as the offense’s objective suggests, of a **certain duration**.⁵⁸⁵ An only short-term displacement into the occupied territories, such as a tourist visa, clearly would not suffice.

379 As the definition of the war crime under the Rome Statute as well as article 49 para. 6 GC IV and article 85 para. 4 (a) AP I make it clear that the persons transferred must be **persons belonging to the Occupying Power’s own civilian population**.⁵⁸⁶ The relocation of members of the armed forces into the occupied territory to perform military tasks as occupiers does not qualify under article 8 para 2 (b) (viii).⁵⁸⁷ However, the contrary would seem to apply if members of the armed forces would establish themselves permanently with their families in private settlements or houses in the occupied territory.

380 The wording ‘parts of its own civilian population’ suggests that the commission of the offense must involve the displacement of a certain **minimum number of individuals**. However, even the settlement of a few individuals would qualify.⁵⁸⁸

381 Since the aim of the provision is to protect the population of the occupied territory, it is **irrelevant whether the transfer is voluntary or not**. It derives from a comparison of the wording used in para 1 of article 49 GC IV with its para 6. While para 1 refers to ‘forcible transfer’, the wording used in para 6 is simply ‘transfer’.⁵⁸⁹ The ICJ held in its *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that article 49 GC IV ‘prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.’⁵⁹⁰

382 Article 8 para 2 (b) (viii) Rome Statute criminalizes the transfer of the population ‘by the Occupying Power’ without specifying for which precise conduct criminal responsibility incurs for an individual. However, the wording implies some **involvement of the state**.⁵⁹¹ Settlements in occupied territory thus appear to only amount to war crimes if the Occupying Power’s authorities are involved. Isolated individuals buying a house in accordance with the

⁵⁸⁵ In the commentary to the Draft of the German Code of Crimes Against International Law (Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, Drucksache 14/8524) (2002) 29, the drafters concluded that the transfer must be of a certain duration. <<http://dip21.bundestag.de/dip21/btd/14/085/1408524.pdf>> accessed 19 October 2014.

⁵⁸⁶ The wording of the elements ‘the perpetrator (a) Transferred [...] parts of its own population’ may be interpreted in accordance *e.g.* with the analogous German meaning of ‘die eigene Bevölkerung’, which suggests that the perpetrator as well as persons transferred into the occupied territory belong to the same population of the Occupying Power.

⁵⁸⁷ While the elements refer only to ‘population’, the Rome Statute refers to ‘civilian population’. While the Elements of Crimes in any event come second to the definitions in the Rome Statute, the above-mentioned drafting history confirms that the omission of the word ‘civilians’ in the elements was not meant to indicate any departure from the Fourth Geneva Convention and Additional Protocol I.

⁵⁸⁸ Werle (n 561) note 1226. The German government has taken the view that the transfer of only ‘a few persons’ is sufficient to fulfil the required elements ‘since the objective of the provision is the protection of the civilian population residing in the occupied territory’, stating that this applies also to transfers into uninhabited areas to manifest the state of occupation. See commentary to the Draft of the German Code of Crimes Against International Law (n 585) 29. (translation by author) (‘Da Zweck der Vorschrift der Schutz der im besetzten Gebiet ansässigen Zivilbevölkerung ist, reicht die Überführung einiger weniger, zur Zivilbevölkerung der Besatzungsmacht gehöriger Personen zur Tatbestandserfüllung aus. Dies gilt auch in den Fällen, in denen die Überführung in unbewohnte Gebiete erfolgt, um den Besatzungszustand zu manifestieren’).

⁵⁸⁹ Bredt, *Anwendbarkeit des humanitären Völkerrechts im Israel-Palästina-Konflikt* (2009) 113 *et seq.*; Werle (n 561) note 1226; Dörmann, *Elements of War Crimes* (2003) 211. In the judgment 22 October 1979 in the *Elon Moreh* case, the Supreme Court of Israel declared an Israeli settlement to be illegal based on article 52 of the Hague Regulations (which deals with requisitions). It had therefore little bearing on settlements that did not involve requisitions and Article 49 GC IV was not considered at all. *Elon Moreh case*, No. H.C. 390/79, reprinted in Shamgar ‘Legal Concepts and Problems of the Israeli Military Government – the Initial Stage’, in: Shamgar (ed), *Military Government* (1982) 404, 419–26.

⁵⁹⁰ ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ ICJ Advisory Opinion, ICJ Reports 2004, 136, delivered on 9 July 2004. <<http://www.icj-cij.org/docket/files/131/1671.pdf>> accessed 15 October 2014, para. 120.

⁵⁹¹ *Elements of War Crimes* (2003) 211.

applicable rules (including the law of the occupied territory) and in a wholly private capacity without any incentive by the Occupying Power or coercive measures by that power *vis-à-vis* the local population, would not appear to qualify under article 8 para. 2 (b) (viii) Rome Statute. It is also uncertain whether private actors such as the director of a company moving parts of the Occupying Power's population to settle into the occupied territory or of a company constructing houses in settlements in occupied territory could be made criminally responsible for the offense under article 8 para. 2 (b) (viii).

However, **government involvement may be direct or indirect.** As stated above, the wording 'the transfer, directly or indirectly,' was introduced by the drafters to include transfer policies without direct involvement of the state. Direct transfer would for instance include the provision of government settlement plans for its own population in occupied territory and the construction of housing by the state.⁵⁹² Indirect involvement of the Occupying Power would include policies and measures to induce and facilitate migration into occupied territory, such as economic and financial incentives, subsidies, and tax exonerations.⁵⁹³

The question remains, whether the **incriminated conduct must be attributable to the Occupying Power** or whether it would be sufficient that the Occupying Power fails to take effective steps to prevent the movement of its population into the occupied territory. Certainly, state agents, including government officials and parliamentarians, incur criminal responsibility under article 8 para. 2 (b) (viii) for conducting, ordering, soliciting or inducing a transfer as well as for aiding, abetting or assisting in its commission for the purpose of its facilitation according to article 25 Rome Statute. They may for instance decide upon the construction of settlements (direct act) or financial subsidies, tax breaks and other indirect transfer policies. Superiors and military commanders may in addition become criminally responsible for acts of subordinates under article 28 Rome Statute.

bbb) Mens rea. According to the ICC Elements of Crime, the perpetrator must be aware of 'factual circumstances that established the existence of an armed conflict.' Further, there are no requirements of a special intent that goes beyond the elements of article 30 Rome Statute.⁵⁹⁴ The use of the term 'wilful' suggests that indirect intent suffices, which might be relevant in particular for the crime of indirectly transferring own population to occupied territory.⁵⁹⁵ The underlying motive for the transfer is irrelevant.⁵⁹⁶ Neither the definition under the Rome Statute nor the Elements of Crimes provide any indication for a requirement of a particular motive or special intent.⁵⁹⁷

b) War crime of deporting or transferring all or parts of the population of the occupied territory. The war crime of deporting or transferring all or parts of the population of the

⁵⁹² Meindersma (1994) 4141 *NethILRev* 31; ICJ Advisory Opinion (n 590) para 120, referring to UN SC resolutions 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980, which described 'Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories' as a 'flagrant violation' of the Fourth Geneva Convention (para 5).

⁵⁹³ ICJ Advisory Opinion (n 590) para. 120; Meindersma (1994) 41 *NethILRev* 31 (n 592) 51; *Commentary German Code of Crimes Against International Law* (2002) (n 585) 29: The Commentary on the German International Crimes Code states that: 'The element of 'transfer' can be fulfilled by indirect or direct acts. A typical direct act of transfer is the settlement of the population of the occupying power in the occupied territory. Indirect acts of transfer are, *inter alia*, the provision of financial or other incentives for citizens of the Occupying Power to settle in the occupied territory'; the original German text reads as follows: 'Die Tathandlung des 'Überführens' kann durch unmittelbare oder mittelbare Handlungen erfüllt werden. Typische unmittelbare Überführungshandlung ist die Ansiedlung der eigenen Bevölkerung im besetzten Gebiet. Als mittelbare Überführungshandlungen sind u. a. die Bereitstellung von finanziellen oder anderen Anreizen für die eigenen Staatsbürger bei Wohnsitznahme im besetzten Gebiet anzusehen.'

⁵⁹⁴ von Hebel, in: Lee (ed.), *Elements of Crimes* (2001) 161.

⁵⁹⁵ Werle, *Völkerstrafrecht* (2012) 1229; Haslam (2002) 61 *CambridgeLJ* 68.

⁵⁹⁶ Werle, *Völkerstrafrecht* (2012), note 1226.

⁵⁹⁷ Progress report of the Special Rapporteur Awn Shawkat Al-Khasawneh on the human rights dimensions of population transfer, including the implantation of settlers, UN Doc. E/CN.4/Sub.2/1994/18 (30 June 1994), para 73.

occupied territory within or outside this territory under article 8 para 2 (b) (viii) Rome Statute essentially criminalizes the same conduct as article 8 para 2 (a) (vii) Rome Statute.⁵⁹⁸

- 387 **aa) Normative origin and drafting history.** The deportation or transfer of the population of an occupied territory outside or within that territory violates the basic principle of the law of occupation not to create a factual situation, which is difficult to reverse, in particular with regard to the demographic composition of the population. It also causes severe grievances for the persons uprooted by the transfer or deportation. They have to abandon their homes, lose their property and are often separated from their families.⁵⁹⁹ History shows that transfers or deportations of people have often been used by Occupying Powers to enhance their rule over the occupied territory and to weaken its societal fabrics, sometimes as part what became known in the 1990^{ties} as ‘ethnic cleansing’.⁶⁰⁰
- 388 The prohibition of transfer and deportation of all or parts of the population of the occupied territory is considered as a **norm of customary international humanitarian law** applicable in international armed conflicts.⁶⁰¹ As early as 1863 the prohibition of the deportation of civilians appeared in the Lieber Code, which provided that ‘private citizens are no longer [...] carried off to distant parts’.⁶⁰² The 1907 Hague Regulations, however, did not explicitly prohibit deportations. Commentators suggested that the reason for this omission was that deportations were no longer practiced by ‘civilized nations’ and that the delegations therefore did not include an explicit ban.⁶⁰³
- 389 Yet, during both World Wars, mass deportations from territories occupied by Germany were common, in particular to supplement German forced labour and Germans were also deported in the aftermath of the armed conflicts.⁶⁰⁴ After World War I, the Responsibilities Commission of the 1919 Peace Conference included ‘deportation of civilians’ in its list of violations of the laws and customs of war to be punished.⁶⁰⁵ After the horrible crimes committed during World War II, deportation was criminalized in article 6(b) of the Charter of the International Military Tribunal in Nuremberg. ‘[D]eportation to slave labour or for any other purpose of civilian population of or in occupied territory’ constituted a war crime.⁶⁰⁶ In the Nuremberg trials, several defendants were found guilty for the deportation

⁵⁹⁸ See Dörmann above Art. 8 para 2 (a) mn 145 *et seq.* Article 8 para 2 (b) (viii) provides that the deportation or transfer of the protected person takes place ‘within or outside the territory’. This however is also the case for article 8 para 2 (a) (vii), since it specifies that the protected persons are deported or transferred ‘to another State or to another location’. The only difference arises from the somewhat different scopes of protected persons under GC IV and AP I. The main difference between the two articles is that under article 8 para 2 (a) (vii) Rome Statute the deportation of even one person qualifies as a war crime, while article 8 para 2 (b) (viii) Rome Statute refers to the deportation and transfer of ‘all or parts of the population of the occupied territory’.

⁵⁹⁹ ‘There is doubtless no need to give an account here of the painful recollections called forth by the ‘deportations’ of the Second World War, for they are still present in everyone’s memory. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions.’ Pictet, *Commentary on the Geneva Convention (1952–1960)*, 278.

⁶⁰⁰ On ‘ethnic cleansing’ see eg: Pégurier, *Ethnic Cleansing: A Legal Qualification* (2013); Lehmler, *Die Strafbarkeit von Vertreibungen aus ethnischen Gründen im bewaffneten nicht-internationalen Konflikt* (Nomos Baden-Baden 1999); Mulaj, *Politics of Ethnic Cleansing* (2008); Preece (1998) 20 *HumRtsQ* 817.

⁶⁰¹ Köhler, *Das Massenvertreibungsverbot im Völkerrecht* (1999); Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Nijhoff Leiden 1995) 143 *et seq.*; Dawson and Farber, *Forcible Displacement Throughout the Ages* (2012) 49; for more references see: Henckaerts and Doswald-Beck, *Customary, Vol. I* (2005) 457 *et seq.* and *id.* *Customary, Vol. II* (2005) 2908 *et seq.*

⁶⁰² *Id.* 2911.

⁶⁰³ Pictet, *Commentary on the Geneva Convention (1952–1960)* 279; de Zayas (1975) 16 *HarvILJ* 211.

⁶⁰⁴ Meindersma (n 592) (1994) 41 *NethILRev* 39 *et seq.*; De Zayas (n 603) 228; Pictet, *Commentary on the Geneva Convention (1952–1960)* 278.

⁶⁰⁵ ‘Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties’ (1920) 14 (No 1/2) *AJIL* 114.

⁶⁰⁶ Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including ‘deportation, and other inhumane acts committed against any civilian population, before or during the war.’ Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that ‘deportation to slave labour or for any other purpose of civilian population of or in occupied territory’ is a war crime and that

of civilians during the war.⁶⁰⁷ Deportation is also criminalized under a number of national legislations.⁶⁰⁸

In 1947, the ICRC proposed detailed provisions with regard to deportation and transfer of civilians in occupation, which were largely adopted by the Diplomatic Conference of 1949.⁶⁰⁹ Hence, paragraphs 1 to 5 of article 49 GC IV provide for a comprehensive prohibition of deportations and transfers of civilians in occupied territories:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

According to article 147 GC IV and 85(4)(a) AP I these acts are **grave breaches** of the Geneva Convention, unless the security of the civilians involved or imperative military reasons make them absolutely necessary. Further, the prohibition of unlawful deportation of transfer of civilians in occupied territory is contained in numerous military manuals and in the legislation of many states. It is also supported by a number of resolutions adopted by international organisations.⁶¹⁰

Article 20 of the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind lists the crime of ‘unlawful deportation or transfer [...] of protected persons’ generally as a violation of international humanitarian law (lit a vii) without referring specifically to the situation of occupation.⁶¹¹

‘deportation and other inhuman acts done against any civilian population’ is a crime against humanity. Henckaerts and Doswald-Beck, ii (n 601) (2005) 2911.

⁶⁰⁷ eg US Military Tribunal at Nuremberg *Erhard Milch* (20 December 1946–17 April 1947) VII *Law Reports* 27 (1948) in particular 46–47 and 53–58. For references to further trials, see Meron, in: Gomien (ed), *Broadening the Frontiers of Human Rights* (1993) 201.

⁶⁰⁸ See eg: ‘Australian Law Concerning Trials of War Criminals by Military Courts’ cited in *Law Reports of Trials of War Criminals* (1948) vol V 95; article 2 para 5 of the French Ordinance of 28 Aug 1944 cited in: (1948) III *Law Reports of Trials of War Criminals* 96, see also 52; article 611 Nos 4 and 5 of the Spanish Military Penal Code (Ley orgánica 10/95 of 23 Nov 1995). The Penal Code of Ethiopia lists as an offence against the law of nations ‘the compulsory movement or dispersion of the population, its systematic deportation, transfer or detention in concentration camps or forced labour camps’, article 282 (c) of the Penal Code of the Empire of Ethiopia of 1957. See also the different regulations conferring jurisdiction over war crimes to different US Military Commissions (1948) III *Law Reports TWC* 106–107; article II of the Chinese War Crimes Law of 24 Oct 1946 considered a war criminal any ‘[a]lien combatants or non-combatants who during a war or a period of hostilities or prior to the occurrence of such circumstances nourish intentions of enslaving, crippling, or annihilating the Chinese Nation by such methods as (a) mass deportation of it nationals’ cited in: (1949) XIV *Law Reports TWC* 153.

⁶⁰⁹ Pictet, *Commentary on the Geneva Convention* (1952–1960) 278.

⁶¹⁰ Henckaerts and Doswald-Beck, i (2009)457 and idem, ii (2009)paras 39–64, 65–156, 204–226.

⁶¹¹ ICL *Draft Code of Crimes against the Peace and Security of Mankind with commentaries* (51 UN GAOR Supp. (No. 10) at 14, UN Doc A/CN.4/L.532, corr.1, corr.3 1996) *YbILC* (1996) (vol II part 2) 53.

- 396 Contrary to the crime of ‘transferring parts of the own population to occupied territory by the Occupying Power’, discussed above, the prohibition of the deportation and transfer of protected persons in or from occupied territories was not controversial in the negotiations of the Rome Statute.⁶¹²
- 397 The deportation or transfer of the population of an occupied territory might also amount to the crime against humanity of ‘deportation or forcible transfer of population’ (article 7 (d) Rome Statute)⁶¹³ or even the crime of genocide (article 6 Rome Statute), in particular when such displacements are part of an ‘ethnic cleansing’ or ‘scorched earth’ policy.⁶¹⁴
- 398 **bb) Elements of Crime.** **aaa) Actus reus.** Article 8 b (viii) Rome Statute criminalizes the act of deporting or transferring ‘all or parts of the population of the occupied territory within or outside this territory’. The displacement must be **forcible**, which is understood as including not only actual physical force but also other means of coercion. It does not apply to voluntary movements of civilians.⁶¹⁵
- 399 Forcible transfer is prohibited within **the boundaries of occupied territory and outside this territory**.⁶¹⁶ It is often contented that the term ‘deportation’ refers to displacement outside the occupied territory while ‘transfer’ denominates to movements outside such territory.⁶¹⁷ However, the wording of article 45 para 1, article 49 para 6 GC IV and article 85 para 4(a) AP I suggests that transfer can also take place both within⁶¹⁸ and across⁶¹⁹ the boundaries of the occupied territory.
- 400 The destination of the transfer or deportation is irrelevant. Article 49 para 1 GC IV refers to deportations ‘from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not’.
- 401 Article 8 para 2 (b)(viii) Rome Statute refers to transfer and deportation of ‘all or parts of the population of the occupied territory’ without specifying whether the victims must be civilians and without referring to ‘protected persons’ in particular. However, article 49 para 1 GC IV prohibits only the transfer and deportation of ‘protected persons’, which are, according to article 4 para 1 and 2 GC IV ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the

⁶¹² Dörmann, ‘Elements of War Crimes’ (2001) 83 *IRRC*; 481; von Hebel, in: Lee (ed.), *Elements of Crimes* (2001) 159.

⁶¹³ See Stahn above Art. 7 para 1 (d) and para 2 (d) ‘Deportation or forcible transfer of population’ mn 44 *et seq.*

⁶¹⁴ See Schabas above Art. 6 mn 19–20.

⁶¹⁵ *Prosecutor v. Radislav Krstić*, IT-98-33-T, Judgement, 2 August 2001, paras 519–532. During the drafting of the Geneva Conventions the issue was controversial. See Pictet (n 9) 278: ‘[...] there was some discussion on the wording. The draft submitted by the International Committee of the Red Cross reads: ‘Deportations or transfers of protected persons out of occupied territory are prohibited...’; the Diplomatic Conference preferred not to place an absolute prohibition on transfers of all kinds, as some might up to a certain point have the consent of those being transferred. The Conference had particularly in mind the case of protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country. In order to make due allowances for that legitimate desire the Conference decided to authorize voluntary transfers by implication, and only to prohibit ‘forcible’ transfers.’ (footnotes omitted).

⁶¹⁶ This goes also for article 85 para 4(a) AP I.

⁶¹⁷ *Prosecutor v. Krstić* (n 615) para 521; ILC Draft Code (n 573) 122; Henckaerts (n 601) 144.

⁶¹⁸ This results first from a systematic reading of the first paragraph of article 49 GC IV in connection with that article’s second paragraph. The second paragraph provides that also a displacement within the occupied territory is ‘[n]evertheless’ allowed under certain circumstances, implying that para 1 also applies to transfers within the occupied territory. Moreover, article 85 para 4 (a) AP I explicitly criminalizes the deportation or transfer within or outside the occupied territory, requiring that such deportation or transfer must be in violation of article 49 GC IV, thereby suggesting that article 49 GC IV also prohibits certain displacements within the occupied territory. Second, the prohibition of forcible transfers also within an occupied territory is confirmed in element 1 for article 8 para 2 (a) (vii) Rome Statute, which provides that one or more persons is deported or transferred ‘to another State or to another location’, meaning another location within the occupied territory.

⁶¹⁹ Zimmermann; in: in Sandoz *et al.* (eds.), *Commentary* (1987) 1000, para. 3502; fn. 28; Solf and Cummings (1977) 9 *Case Western Res JIL* 232 *et seq.*; Pictet (n 9) 278 *et seq.* and 59.

conflict or Occupying Power of which they are not nationals.⁶²⁰ Article 4 para 4 GC IV makes it clear, that prisoners of war are not protected persons. In principle, article 85 para. 4 (a) AP I protects protected persons against deportations and forcible transfers since the conduct prohibited under it must be ‘in violation’ of article 49 GC IV. Yet, since article 8 para 2 (b)(viii) Rome Statute and its Elements of Crime do not explicitly refer to those articles of the GC IV, the term ‘population’ could include non-civilians as well, in particular since the first part of the sentence explicitly refers to transfer of parts of the Occupying Power’s ‘own civilian population into the territory it occupies’, while the second sentence does not use the term ‘civilian’.

While article 49 para 1 GC IV explicitly includes ‘**individual**’ transfer and deportation, article 8 para 2 (b)(viii) Rome Statute prohibits the transfer and deportation of ‘all or parts of the population’. This wording which corresponds with article 85 para 4 (a) AP I. It clearly deviates from the terms used in the Geneva Conventions, suggests that more than one person must be deported or transferred in order that the act qualifies as a crime under article 8 para 2 (b)(viii) Rome Statute, although transfers and deportations of small numbers of persons may suffice. Similarly, the Security Council has qualified the permanent expulsion by the Occupying Power Israel of nine Palestinian civilians as a deportation.⁶²¹

bbb) Exceptions. According to the ICRC Commentary on article 49 GC IV the prohibition of transfers and deportations is absolute and allows of no exceptions, apart from those stipulated in paragraph 2.⁶²² Concretely, para 2 of article 49 GC IV authorizes the Occupying Power to evacuate an occupied territory wholly or partly ‘when the safety of the population or imperative military reasons so demand’. The ICRC commentary defines evacuations as ‘a provisional measure entirely negative in character’, which is ‘often taken in the interests of the protected persons themselves.’⁶²³ Paras two to five of article 49 GC IV define several requirements for the transfer to be lawful. If these requirements are met the act would not be punishable under article 8 para 2 (b)(viii) Rome Statute either. According to the ICRC Commentary, evacuation of the population by the Occupying Power is for instance allowed and necessary if ‘an area is in danger as a result of military operations or is liable to be subjected to intense bombing’ or if ‘the presence of protected persons in an area hampers military operations’ and only if ‘overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate.’⁶²⁴

Article 49 para 2 (first sentence) GC IV provides that only a ‘given area’ may be evacuated. This suggests that only a specific, geographically limited area may be evacuated.⁶²⁵ Further, the evacuation must always be a provisional, temporary measure limited to the time-span during which the justifying ground, such as hostilities in the area of initial residence, persists. Article 49 para 2 (third sentence) GC IV correspondingly provides that, ‘as soon as hostilities in the area [where the evacuated persons were evacuated from] have ceased’, they ‘shall be transferred back to their homes’. The Occupying Power consequently may be required to transfer back or repatriate evacuated persons before the end of all hostilities. Additionally, when evacuating or transferring evacuated persons back, the Occupying Power must ensure certain minimum humanitarian standards to the greatest practicable extent, including in particular proper accommodation to receive the displaced persons and satisfactory conditions

⁶²⁰ According to para 2, ‘[n]ationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.’

⁶²¹ SC Res 608 (14 January 1988).

⁶²² Pictet, *Commentary on the Geneva Convention (1952–1960)* 279.

⁶²³ *Id.* 280.

⁶²⁴ *Id.*

⁶²⁵ The Commentary on article 49 para 2 GC IV surprisingly suggests that even the entire occupied territory can be evacuated, which can hardly have been the intention of the drafters of article 49 para 2 GC IV; Pictet 280.

of hygiene, health, safety and nutrition (article 49 para. 3).⁶²⁶ Also, article 78 AP I provides that families must not be separated and additional safeguards should be applied to the evacuation of children. Article 49 para. 4 GC IV further provides that the Occupying Power must *inform* the Protecting Power or the ICRC of any transfer or evacuation ‘as soon as it has taken place’.

405 Clearly, compelling protected persons – above all persons from the occupied territory who are in the hands of the Occupying Power – to serve in the armed or auxiliary forces of the Occupied Power or to work outside the occupied territory definitely does not justify any transfer or occupation (article 51 para 2 GC IV). Also, ‘protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein’ (article 76 para 1 GC IV). The statement that the prohibition against deportation and transfer allows for no exceptions other than those stipulated in article 49 para. 2 GC IV may be of a customary character as regards displacements outside the occupied territory.

406 As regards the prohibition of transfers within the occupied territory, the detention of protected persons or their serving of sentences in a location within the occupied territory other than the detainee’s regular residence is not prohibited.⁶²⁷ Furthermore, the existing international humanitarian law rules do not appear to address the possible necessity to realize public infrastructure projects particularly in case of a long-term occupation (despite the premise under international law that occupations are to be temporary). In such very exceptional situations, the expropriation of some property and the displacement of a limited number of protected persons may be lawful, insofar it is in the clear interest of the population of the occupied territory and insofar the displaced persons are fully compensated and given free choice of residence within the occupied territory.

407 Conversely, evacuations do not justify ‘transfers of population with the aim of altering the demographic composition of the territory concerned for political, racial or religious reasons or transfers involving the disguised intent to annex the territory.’⁶²⁸ Displacing people in order to exercise more effective control over a dissident ethnic group⁶²⁹ as well as scorched earth strategies cannot be justified under article 49 para 2 GC IV.

408 ccc) **Mens rea.** According to the Elements of Crime the perpetrator must have been ‘aware of factual circumstances that established the existence of an armed conflict.’ As for the crime of the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, there are no requirements of a special intent beyond the elements of article 30 Rome Statute.

9. Paragraph 2(b)(ix): Intentionally directing attacks against protected buildings

Literature: Arnold, R., ‘The Protection of the Civilian Population from the Effects of Hostilities’, (2004) 3 *HUV-I* 159; Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP 2003); Elliott, H.W., ‘Open Cities and undefended Places’, (April 1995), *The Army Lawyer* 39; Fenrick, W.J., ‘The Rule of Proportionality and Protocol I in Conventional Warfare’, (1982) 98 *MilRev* 91; *id.*, ‘Attacking the Enemy Civilian as a Punishable Offence’, (1997) 7 *DukeJComp&IL* 539; Frigo, M., ‘Cultural Property v. Cultural Heritage: A ‘Battle of Concepts’ in International Law?’, (2004) 86 *IRRC* 367; Frulli, M., ‘The Criminalization of

⁶²⁶ See also articles 25–27 and 82 GC IV and article 74 AP I. The limitation of the obligation to ensure these standards to ‘the greatest practicable extent’ was intended ‘to cover the contingency of an improvised evacuation of temporary character when urgent action is absolutely necessary in order to protect the population effectively against an imminent and unforeseen danger. If the evacuation has to be prolonged as a result of military operations and it is not possible to return the evacuated persons to their homes within a comparatively short period, it will be the duty of the Occupying Power to provide them with suitable accommodation and make proper feeding and sanitary arrangements’. Pictet (n 9) 281.

⁶²⁷ See article 76 GC IV and article 70 para 2 GC IV.

⁶²⁸ Final Report of the Special Rapporteur Mr Al-Khasawneh, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Human Rights Dimension of Population Transfer, including the Implantation of Settlers and Settlements, E/CN.4/Sub.2/1997/23, 27 June 1997, para 40.

⁶²⁹ Junod, ‘Article 17 Additional Protocol II’ (n 619) 1473; Roberts (1990) 84 *AJIL* 44, 83 *et seq.*

Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency,' (2011) 22 (1) *EJIL* 203; Parks, W.H., 'Air War and the Law of War', (1990) 32 *AFLRev* 1; Pfirter, D., 'Article 8(2)(b)(v) – Attacking Undefended Places', in: R.S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001); Rogers, A.P.V., *Law on the Battlefield* (MUP 2004); Roberts, A. and Guelff, R., *Documents on the Laws of War* (OUP 3rd edn 2000).

Article 8 para. 2 (b) ix ICC Statute qualifies as a serious violation of the laws of war to intentionally direct attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, *provided they are not military objectives*. Its mirror provision – applicable to non-international armed conflicts – is article 8 para. 2 (e)(iv). It is largely derived from articles 27 and 56 of the Regulations annexed to the 1907 IV HC Respecting the Laws and Customs of War on Land and numerous provisions of the Geneva Conventions of 1949 on the protection of hospitals and where the sick and wounded are collected⁶³⁰. It also restates the prohibition contained in the 1954 Hague Convention for the protection of cultural property during armed conflict (HCP) – which was complemented by the 1977 Additional Protocols to the Geneva Conventions of 1949⁶³¹ – and its Second Additional Protocol of 1999 (II AP to HCP)⁶³².

Since neither the ICC provisions nor the Elements thereto go into the details of the notion of cultural property and the degree of protection recognized thereto by customary law, it is useful to briefly illustrate the current status of the laws of armed conflict (LOAC) in this regard.

a) **The different degrees of protection under the laws of armed conflict.** The LOAC grant different levels of protection, depending on the importance of the cultural property. Basic protection as 'civilian' objects is granted to all cultural property not being used for military purposes (so-called civilian-use rationale)⁶³³, pursuant to the principle of distinction.

Specific norms are then dedicated to cultural property which has an added value for being of great importance to the *cultural heritage of every people*, as provided by definition contained in article 1 HCP⁶³⁴.

'Special' or 'enhanced protection' shall be granted to selected cultural property.

Special protection⁶³⁵ shall be granted to a limited number of refuges intended to shelter movable property, as well as to centers containing cultural property of *very great importance*, which has been entered in a specific 'International Register of Cultural Property under Special Protection', maintained by the Director General of UNESCO. Copies shall be provided to the UN Secretary General and the High Contracting Parties⁶³⁶.

⁶³⁰ In particular articles 19–23 GCI, articles 22–23, 34–35 GC II, articles 18–19 GC IV, articles 12 and 53 Add. Prot. I. See also Dörmann, *Elements of War Crimes* (2003) 216.

⁶³¹ Article 53 Add. Prot. I, according to which 'Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals.

⁶³² See Werle and Jessberger, *Principles* (2014) mn. 1313-1315.

⁶³³ Frulli (2011) 22 (1) *EJIL* 203, 204.

⁶³⁴ According to this, the term 'cultural property' shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.

⁶³⁵ Article 8 of the 1954 HCP; article 53 of Add. Prot. I and article 16 Add. Prot. II to the GCs; Customary International Law, see Roberts and Guelff, *Documents on the Laws of War* (2000) 372.

⁶³⁶ Article 12 of the Regulations for the Execution of the HCP, attached to the 1954 HCP.

- 412 Pursuant to article 9 HCP, objects under special protection are subject to immunity (article 9), unless they are used for military purposes (waiver; article 8). The immunity shall be withdrawn only in exceptional cases of *unavoidable military necessity*, and only for such time as that necessity continues. This can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever possible, the opposing Party shall be notified reasonably in advance of the waiver decision and cessations of violations shall also be requested in within a reasonable time. Attack shall, thus, be the last resort. The Party withdrawing immunity shall inform the Commissioner-General for cultural property as soon as possible.
- 413 ‘Enhanced protection’ is a new concept introduced by articles 1 and 10 of AP II to the 1954 HCP, which entered into force in 2000. This shall be granted to property fulfilling cumulatively the following three conditions: a) it shall be considered as *cultural heritage of the greatest importance for humanity*; b) it must be protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection; and c) it must not be used for military purposes or to shield military sites and a declaration must have been made by the Party which has control over the cultural property, confirming that it will not be so used. Each High Contracting Party shall submit a list of such property to the Committee for the Protection of Cultural Property in the Event of Armed Conflict established by the II AP to the HCP (art. 24 II AP to the HCP)⁶³⁷.
- 414 Depending on the degree of importance, cultural property shall be identified with either a single (ordinary cultural property) or triple distinctive emblem (cultural property under special protection), as defined by art. 16–17 HCP.
- 415 **b) Definition of cultural property and cultural heritage.** There is no universally accepted definition of cultural property or cultural heritage⁶³⁸. Attempts to define these notions, however, have been made in the 1954 HCP and most recently by the ICC OTP.
- 416 Pursuant to article 1 1954 HCP, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’.
- 417 The adjective ‘cultural’ is generally used with reference to historic monuments and art works, whereas the term ‘spiritual’ is generally being used with reference to worship places. At the same time it is possible to assign to a cultural value to a church and a spiritual value to a historic monument or work of art⁶³⁹. Religious objects may also fall under the protection of Add.Prot. I or the 1954 HCP if they constitute the cultural or spiritual heritage of peoples (Add.Prot. I) or fulfill the criteria of article 1 HCP⁶⁴⁰. In alternative, they may enjoy basic protection as civilian objects under the general principle of distinction. The same holds true for objects dedicated to education and science. For instance, in the *Kordic and Cerkez Case*, the ICTY held that:

‘educational institutions are undoubtedly immovable property of great importance to the cultural heritage of peoples (in the sense of article 1 of the 1954 Hague Convention) in that they are without exception centres of learning, arts, and sciences, with their valuable collections of books and works of

⁶³⁷ See for details Frulli (2011) 22 (1) *EJIL* 203, 204.

⁶³⁸ Frulli (2011) 22 (1) *EJIL* 203, 206, with reference to Frigo (2004) 86 *IRRC* 367.

⁶³⁹ Sandoz *et al.* (eds.), *Commentary* (1987) 646, Nos. 2064–2065.

⁶⁴⁰ Dörmann, *Elements of War Crimes* (2003) 221.

arts and science. The Trial Chamber also notes one international treaty which requires respect and protection to be accorded to educational institutions in times of peace as well as in war (i. e. the Roerich Pact)⁶⁴¹.

In its ‘article 53’ Report on Mali of 16th January 2013, the ICC’s Office of the Prosecutor (ICC OTP)⁶⁴² observed that article 8(2)(e)(iv) outlaws violations of the special protection granted to historic monuments, works of art or places of worship which constitute the *cultural or spiritual heritage of peoples*, as reflected in Art. 53 Add. Prot. I. The ICC OTP attempted a definition by stating that ‘the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of the people’. In its view, the religious and historical buildings in Timbuktu, which belong to the World’s Heritage since 23 December 1988, clearly fall within this category⁶⁴³. 418

c) The Elements of Crime. aa) Actus reus. Article 8(2)(b)(ix) ICC Statute outlaws intentional attacks against these different types of protected cultural objects, without however providing for different levels of protection⁶⁴⁴. It simply states that specific buildings shall not be the object of attack. A merit, however, is that it does not require any result (damage)⁶⁴⁵. Pursuant to the Elements of Crime, the following criteria must be met: 419

1. The perpetrator directed an attack
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, *which were not military objectives*.
3. The perpetrator intended such building or buildings to be the object of the attack
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The notion of attack refers to the one contained in article 49(1) Add Prot. I to the GCs⁶⁴⁶, which was commented in relation to article 8 para. 2 (b) (v) ICC Statute. It is sufficient that the attack was intentionally directed against one of the following four categories of protected objects⁶⁴⁷: a) cultural objects; b) buildings dedicated to religion; c) other buildings dedicated to education; d) places for the collection of those in need. The inclusion of category d), which has nothing to do with cultural property⁶⁴⁸ and which may be covered by article 8 para. 2 (b) (xxiv) ICC Statute (buildings using the distinctive emblems of the GCs) makes article 8 para. 2 (e)(iv) a ‘civil-use’ provision that overlooks the cultural-value approach adopted by Protocol II to the 1954 HCP⁶⁴⁹. This is reflected *inter alia* by the lack of any specific protection granted to movable property, in departure from the 1954 HCP and its AP II. Movable property may be protected in alternative by article 8(2)(a)(iv) and article 8(2)(b)(xiii) on the one hand, or article 8(2)(b)(xvi) and article 8(2)(e)(v) banning pillage, on the other. The first, however, lack specificity, are usually interpreted as referring to immovable property, and are applicable to international armed conflicts, only⁶⁵⁰. The latter, instead, which were resorted to by the ICC OTP in its ‘Mali Report’⁶⁵¹, provide for a military necessity justification in their Elements. 420

⁶⁴¹ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 Feb. 2001, para. 360.

⁶⁴² This is aimed at assessing whether there is reasonable basis to proceed with an investigation. See page 31 of the Report.

⁶⁴³ See ICC OTP, Situation in Mali, Article 53(1) Report, 16 January 2013, p. 31.

⁶⁴⁴ See on this Frulli (2011) 22 (1) *EJIL* 203, 212; Werle and Jessberger, *Principles* (2014) mn. 1316-7.

⁶⁴⁵ Pfirter, in: Lee (ed.), *Elements of Crimes* (2001) 163, Dörmann, *Elements of War Crimes* (2003) 215. This is a difference with regard to Art. 3 (d) ICTY Statute.

⁶⁴⁶ Dörmann, *Elements of War Crimes* (2003) 216..

⁶⁴⁷ Dörmann, *Elements of War Crimes* (2003) 215.

⁶⁴⁸ Its basis are Articles 19–23 GC I, articles 22–23, 34–35 GC II, articles 18–19 GC IV, articles 12–13 Add. Prot. I, articles 24–31 Add. Prot. I.

⁶⁴⁹ Frulli (2011) 22 (1) *EJIL* 203, 207 and 211.

⁶⁵⁰ Frulli (2011) 22 (1) *EJIL* 203, 213.

⁶⁵¹ ICC OTP, Situation in Mali, Article 53(1) Report, 16 January 2013, pp. 24, 31-2.

- 421 Pursuant to the culture-specific provisions, there are only few very precise situations in which these objects shall lose protected status⁶⁵². Generally, they shall be protected as long as they are not misused by the adverse Party; in case of doubt with regard to their civilian status, they shall be presumed not to be used for military reasons (article 52 para. 3 Add. Prot. I)⁶⁵³. Article 1 AP II to the HCP defines as a military objective ‘an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.’
- 422 A common feature of the 1954 HCP, its AP II and article 8 para. 2(b)(ix) ICC Statute, is that protected status will be waived if cultural property is used for military purposes. Moreover, in exceptional cases of *unavoidable military necessity*, even the *special* protected status may be waived, for as long as such necessity continues. In this case, advance notice shall be made (article 6 II AP to the HCP; article 11 HCP). In any case, the Parties shall take precautionary measures in attack and against the effects of the hostilities, for instance by choosing the proper means and methods in the exercise of targeting and by removing sensitive property from military locations (Art. 7 and 8 AP II to the HCP).
- 423 A difference with regard to other LOAC provisions, is that article 8 para. 2 (b)(ix) of the ICC Statute does not proscribe the use of cultural property in support of the military effort or as objects of reprisals (Add. Prot. I), nor its exposure to the risk of becoming military objectives (article 4 of the 1954 HCP, articles 85(4)(d) and 53 Add Prot. I and article 16 AP II)
- Since the Elements of Crime are very close to those established by the jurisprudence of the ICTY⁶⁵⁴, it is worth referring to it.
- 424 **bb) Elements drawn from the ICTY’s jurisprudence.** In *Kordic and Cerkez*, the ICTY interpreted article 3 (d) ICTY Statute, which is very close to article 8 para. 2(b)(ix) of the ICC Statute, in light of article 27 of the 1907 Hague Regulations, article 53 Add. Prot. I, the Roerich Pact and the 1954 HCP. In order to define cultural property, it referred to article 1 HCP⁶⁵⁵.
- 425 Further elements of the crime under article 3(d) ICTY Statutes were examined in the *Strugar Case*⁶⁵⁶, which dealt with the large scale destruction of the Old Town of Dubrovnik (Croatia), a city that has been on the World Heritage List since 1979, that occurred on 6th December 1991. The accused, Pavle Strugar, a retired Lieutenant-General of the then Yugoslav Peoples’ Army (JNA), was convicted to eight years imprisonment for, inter alia, destruction or wilful damage done to cultural property under Articles 3 (d) and 7 (3) of the Statute. The sentence was confirmed by the Appeals Chamber in its judgement of 17th July 2008. The Trial Chamber held that since there had been no military objectives in the immediate vicinity, the destruction or damage of property in the Old Town on that day was not justified by military necessity, meaning that it had retained protected status. By reference to the *Naletilic Case*⁶⁵⁷, the Court observed that, contrary to the holdings in *Blaskic*, protection does not require that the concerned institutions are not located in the immediate vicinity of military objectives. By discussion the protection granted to institutions dedicated to *religion*, it held that the crime would be satisfied if: (i) the general requirements of article 3 of the Statute were fulfilled; (ii) the destruction regards an institution dedicated to religion; (iii) the property was not used for military purposes; (iv) the perpetrator acted with the intent to destroy the property⁶⁵⁸. The Trial Chamber observed that there may be a waiver of the

⁶⁵² Dörmann, *Elements of War Crimes* (2003) 227.

⁶⁵³ Frulli (2011) 22 (1) *EJIL* 203, 213.

⁶⁵⁴ Kittichaisaree, *International Criminal Law* (2002) 170.

⁶⁵⁵ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 Dec. 2004, paras. 359 *et seq.*

⁶⁵⁶ *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 Jan. 2005. The findings refer to the Kordić case. For a summary see the Press Release of the ICTY; Doc. CT/P.I.S./932 e, 31 Jan. 2005.

⁶⁵⁷ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 Mar. 2003, para 604.

⁶⁵⁸ *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, Trial Chamber, 31 Mar. 2003, para 605.

protection, when the enlisted objects have been used for military purposes⁶⁵⁹. It further concluded that the special protection may not be lost simply because of military activities or installations in the immediate vicinity of the cultural property. In such a case, however, the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were ‘directed against’ that cultural property, rather than the military installation or use in its immediate vicinity⁶⁶⁰. This holds true also under the ICC Statute⁶⁶¹. In sum, the Trial Chamber concluded that an act will fulfill the elements of the crime of destruction or wilful damage of cultural property, within the meaning of article 3 (d) ICTY Statute and in so far as that provision relates to cultural property, if: (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question⁶⁶². To be noted, however, is that the Elements of Crime of article 8 para. 2(b) (ix) of the ICC Statute do not require actual damage⁶⁶³. In the *Jokic Case*, the judges stressed once more that attacks against cultural heritage bear an inherent gravity, in that:

‘The whole of the Old Town of Dubrovnik was considered, at the time of the events contained in the Indictment, an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history. The shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of mankind’⁶⁶⁴.

c) Mens rea. In the *Blaškić Case*, the Trial Chamber of the ICTY held that: 426

‘The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts’⁶⁶⁵.

The author must thus have carried out the attack notwithstanding this awareness of the objects’ protected status and their failure to qualify as military objectives. It is not necessary that he made a legal assessment of the protected status. He merely needs to know the factual circumstances, which grant the objects special status. It has been argued that this is unnecessary in light of article 30 ICC Statute. However, the requirement was retained for clarity purposes⁶⁶⁶. 427

A parallel provision is contained in article 8 para. 2 (e) (iv) applicable to non-international conflicts, for which the same elements of crime have been drafted. 428

10. Paragraph 2(b)(x): Prohibition of physical mutilation

Literature: Bothe, M., Partsch, K.J., and Solf, W.A., *New Rules for the Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) 109; Dörmann, K., *Elements of War Crimes under the Rome Statute of ICC* (CUP 2003) 229 *et seq.*; LaHaye, E., ‘Article 8(2)(b)(x)’, in: R. S. Lee *et al.* (eds.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001) 164 *et seq.*; ICRC Mehring, S., ‘Medical War Crimes’, in: *MPYbUNL* 229–279.

a) Normative origins, drafting history and impact on the further development of international criminal law. The prohibition of physical mutilations and unwarranted medical experiments further elaborates the prohibition already contained in article 8 para. 2 429

⁶⁵⁹ *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 Jan. 2005, para. 308.

⁶⁶⁰ *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 Jan. 2005, para. 310.

⁶⁶¹ Kittichaisaree, *International Criminal Law*, 170.

⁶⁶² *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 Jan. 2005, para. 308.

⁶⁶³ *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 Jan. 2005, para. 307.

⁶⁶⁴ *Prosecutor v. Jokic*, Judgement, IT-01-42/1, Trial Chamber, 18 Mar. 2004, at para. 51.

⁶⁶⁵ *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3 Mar. 2000, para. 185. See also *Prosecutor v. Strugar*, IT-01-42-T, Judgement, Trial Chamber, 31 Jan. 2005, para. 311.

⁶⁶⁶ Pfrtner, in: Lee (ed.), *Elements of Crimes* (2001) 163; cf. Ambos, *Treatise on ICL II* (2014), 175; Werle and Jessberger, *Principles* (2014), no. 1318.

(a) (ii) of the Statute⁶⁶⁷. The prohibition as contained in article 8 para. 2 (b) (x) of the Statute is largely based on article 11 of the First and article 5 para. 2 (e) of the Second Additional Protocol of 1977. Similar prohibitions are also already contained in article 12 para. 2 of the First and Second Geneva Convention as well as in article 13 para. 1 of the Third Geneva Convention and finally in article 32 of the Fourth Geneva Convention. Those provisions in turn were based on criminal prosecutions that had taken place in the aftermath of World War II⁶⁶⁸. Finally, similar provisions can be found in article 2 (b) of the ICTY Statute ('biological experiments' as a grave breach of the Geneva Conventions), article 4 (a) ICTR Statute and article 3 (a) of the Statute for the Special Court for Sierra Leone ('mutilation' as violation of common article 3 and Add. Prot. II), section 6.1. (b) (x) of UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (wording identical to the one contained in the Rome Statute), as well as article 13 (b), No. 10 of the Statute of the Iraqi Special Tribunal (the wording being again identical to the one contained in the Rome Statute, except that it refers to 'persons of another nation').

430 By virtue of article 11 para. 4 of Add. Prot. I any act or omission which seriously endangers the health of a person constitutes a grave breach of the Protocol and under its article 85 para. 5 accordingly a war crime, when committed against a person not belonging to the same side of the conflict as the offender.

431 A provision, related to non-international armed conflict, which is *mutatis mutandis* identical to article 8 para. 2 (b) (x) is contained in article 8 para. 2 (e) (xi) of the Statute⁶⁶⁹, the only difference being that the words 'in the power of an adverse party' were replaced by the words 'in the power of another party to the conflict'.

432 The idea of including a prohibition based on article 11 of Add. Prot. I first appeared in the ICRC proposal formally submitted by New Zealand and Switzerland⁶⁷⁰. A slightly modified version then found its way into a compromise paper which was the outcome of informal consultations among a group of interested countries which was then tabled by Germany⁶⁷¹. It was in this way then introduced into the Statute as article 8 para. 2 (b) (x).

433 The elements of crimes, adopted by the Assembly of States Parties, provide with regard to the war crime of mutilation that:

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct caused death or seriously endangered the physical or mental health of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest
4. Such person or persons were in the power of an adverse party.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict;
 - respectively with regard to the crime of prohibited medical or scientific experiments that
 1. The perpetrator subjected one or more persons to a medical or scientific experiment.
 2. The experiment caused death or seriously endangered the physical or mental health or integrity of such person or persons.

⁶⁶⁷ See Dörmann, *article 8 para. 2 (a) (ii)*.

⁶⁶⁸ See, Brandt *et al.*, *Judgment of 20 Aug. 1947, Trials of War Criminals, Vol. II, 171 et seq.*; Supreme National Tribunal of Poland, *Judgment of 2 Apr. 1947 (Hoess)*, UNWCC, *Law Reports of Trials of War criminals, vii, (1947–49) 14 et seq.*; *Judgment of 17 Apr. 1947 (Milch)*, *Trials of War Criminals, Vol. II, 773 et seq.*

⁶⁶⁹ See Zimmermann and Geiß, *article 8 para. 2(e)(xi)*.

⁶⁷⁰ UN Doc A/AC.249/1997/WG.1/DP.2, para. 1 (d).

⁶⁷¹ UN Doc A/AC.249/1997/WG.1/DP.23/Rev.1, section B (h).

3. The conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person's or persons' interest.
4. Such person or persons were in the power of an adverse party.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

b) Persons 'in the power of an adverse party'. Unlike article 11 of Add. Prot. I, the scope *ratione personae* of which applies to both, persons who are in the power of the adverse party and to any other person who is interned, detained or otherwise deprived of liberty due to the armed conflict, article 8 para. 2 (b) (x) of the Statute extends its protection solely to the first group. Accordingly, any act otherwise proscribed under article 8 para. 2 (b) (x) of the Statute does not come within the jurisdiction of the Court when committed against nationals of a State not a party to the conflict who are present in the territory of a party to the conflict, against nationals of the territorial State itself or against nationals of co-belligerents⁶⁷². Given article 10 of the Statute, they remain, however, protected, where applicable, by article 11 of Add. Prot. I.

The term 'in the power of the adverse party' has to be understood in a broad sense as referring to prisoners of war, other persons held by an adverse party such as mercenaries or members of guerilla groups who have not complied with the requirement to wear their arms openly⁶⁷³, civilian internees, persons who have been refused authorization to leave the territory, which is *de facto* under the control of the respective party to the conflict, and finally inhabitants of occupied territories⁶⁷⁴. This broad interpretation of the terms 'in the power of an adverse party' has already been confirmed with regard to the four Geneva Conventions of 1949⁶⁷⁵, and is in line with both the *travaux préparatoires* of the Add. Prot. I⁶⁷⁶, and a teleological interpretation of article 8 para. 2 (b) (x) of the Statute. It has furthermore been confirmed by the ICTY in the *Kovačević* case⁶⁷⁷.

c) 'physical mutilation'. Article 8 para. 2 (b) (x) of the Statute does *not* criminalize all acts which are prohibited under article 11 of the Add. Prot. I but solely includes physical mutilations and unwarranted medical and scientific experiments.

The term 'physical mutilations' covers acts such as amputations, injury to limbs⁶⁷⁸ and forms of sexual mutilations⁶⁷⁹. This is confirmed by element 1 of the elements of crimes adopted with regard to the war crime of mutilation as contained in article 8 para. 2 (b) (x) of the Statute. Said element provides that the term mutilation covers in particular acts permanently disfiguring the victim, or by permanently disabling or removing an organ or appendage of the victim⁶⁸⁰.

d) 'medical or scientific experiments of any kind'. The use of the term 'medical or scientific experiments' prohibits using any of the persons protected under this article as so-called 'Guinea-pigs'. Only such acts are prohibited which do not serve a therapeutic purpose, but which are rather undertaken in order to gain medical or scientific knowledge.

⁶⁷² Bothe *et al.* (eds.), *New Rules* (1982) 112.

⁶⁷³ Bothe *et al.* (eds.), *New Rules* (1982) 111.

⁶⁷⁴ Sandoz *et al.*, *Commentary* (1987), mn 468.

⁶⁷⁵ ICRC, GC IV *relative to the Protection of Civilian Persons in Time of War*, 47.

⁶⁷⁶ See the declaration made by the United States delegation during the diplomatic conference leading to the adoption of the Add. Prot. I, quoted by: Bothe *et al.* (eds.), *New Rules* (1982)112.

⁶⁷⁷ *Prosecutor v. Kovačević*, No. IT-97-24-PT, Prosecutor's Pre-trial Brief, para. 579.

⁶⁷⁸ Sandoz *et al.*, *Commentary* (1987), mn 478.

⁶⁷⁹ For an example of sexual mutilation see the decision in, *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 45.

⁶⁸⁰ See also *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T, Judgment, Trial Chamber I, 2 March 2009, (RUF Case), para. 180.

- 439 e) ‘neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest’. Any of the acts proscribed can be only justified if indicated by the State of health of the person concerned or undertaken in his or her interest. Thus, for example, amputations might be lawful if performed to save the life or overall health of the patient. On the other hand, medical and scientific experiments solely undertaken for scientific purposes cannot be considered to be either justified by the medical, dental or hospital treatment of the person concerned nor can they be considered to be carried out in his or her interest. The sole exception could be such treatments that, while involving a certain degree of experimentation, constitute the sole possibility to save the life of the patient and are thus indicated by the health of the individual⁶⁸¹.
- 440 Notwithstanding the fact that a Swiss proposal⁶⁸² to define situations where the conduct in question is neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest by using language from article 11 of the Add. Prot. I was not formally adopted, it may still be said that this definition encapsulates the very notion of medical or scientific experiments. This is confirmed by the fact that said formula, which refers to ‘any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty’ is now contained in footnote 46 added to the text of element 3 of the respective element of crime.
- 441 f) ‘which cause death to or seriously endanger the health of such person or persons’. Under article 8 para. 2 (b) (x) of the Statute the relevant act must have either caused the death or must have seriously endangered the health of a given person. Conversely, the Special Court for Sierra Leone has dismissed this requirement in the context of a non-international armed conflict as superfluous with respect to Article 3 of its Statute, arguing that albeit contained in article 11 para. 4 of Add. Prot. I, it does not form part of the violation under common article 3 and article 4 para. 2 of Add. Prot. II⁶⁸³. Indeed, article 8 para. 2 (c) (i), unlike article 8 para. 2 (b) (x) and article 8 para. 2 (e) (xi), does not contain such a result requirement. Accordingly, the war crime contained in article 8 para. 2 (c) (i) does not require that the conduct caused death or seriously endangered the physical or mental health of the victim⁶⁸⁴. While a deadly outcome of either a mutilation or an experiment is evident, the other alternative of seriously endangering the health of a given person is of less specificity. It is also noteworthy that this requirement applies to both alternatives, acts of mutilations and scientific experiments. This is, in particular, not only confirmed by the French text of the statutory provision which uses the plural (‘et qui entraînent la mort’) but also by the fact that the elements of crimes with regard to both, acts of mutilations and scientific experiments, contain the almost identical element 2⁶⁸⁵.
- 442 It must be noted, however, that element 2 related to the war crime of medical or scientific experiments unlike element 2 related to the war crime of mutilation, more closely follows the wording of article 11 para. 4 of Add. Prot. I, by also encompassing experiments which seriously endanger the physical or mental *integrity* of a person covered by said provision. This may be understood as indicating that even such experiments which on the long-term do not endanger the *health* of the victim of the experiment, but which nevertheless still entail a significant intrusion into the victim’s physical integrity are also covered by the elements of crimes. This raises the question, however, whether the Assembly of States Parties, by

⁶⁸¹ Bothe *et al.* (eds.), *New Rules* (1982) 114.

⁶⁸² PCNICC/1999/WGEC/DP.8.

⁶⁸³ *Prosecutor v. Alex Brima et al.*, SCSL-04-16-T, Judgment, Trial Chamber II, 20 June 2007 (AFRC Case), para. 725. See also SCSL, *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Trial Judgment, 2 March 2009, para. 182.

⁶⁸⁴ Dörmann, *Elements of War Crimes* (2003) 396.

⁶⁸⁵ See also LaHaye, *Article 8(2)(b)(x)*, in: Lee *et al.* (eds.), *Elements of Crimes* (2001) 164 *et seq.*

adopting the elements of crimes under article 9 of the Statute may broaden the scope of application of the provisions of the Rome Statute.

It is also important to note that article 8 para. 2 (b) (x) does not contain the requirement that the act under consideration has indeed *affected* the health of the person concerned. Instead, it is sufficient that the health is *endangered* by the respective act. Such endangering requires that the act or omission causes an objective danger in the concrete case which is attributable to the alleged offender and which could have easily turned into a violation of the health of the victim. It follows, that any action that has then actually resulted in such an injury would accordingly *a fortiori* fulfill the requirements of article 8 para. 2 (b) (x)⁶⁸⁶.

The term ‘seriously’ seems to indicate both, that the health (respectively the integrity) of the victim was *clearly* endangered and that the danger involved was also of some *magnitude*⁶⁸⁷.

Given the normative context on which article 8 para. 2 (b) (x) of the Statute is based, *i. e.* article 11 of the Add. Prot. I, it seems appropriate to consider that the notion of health embraces both, physical *and* mental health. This is confirmed by element 2 of the elements of crimes adopted with regard to the provision under consideration, which with regard to both, the war crime of mutilation and that of medical or scientific experiments, extends to the physical as well as to the mental health of the victim.

g) Irrelevance of consent. Footnote 46 of the elements of crimes applicable to both, the war crime of mutilation and the one of scientific experiments clarifies in line with article 11 para. 2 of Add. Prot. I (‘even with their consent’), if ever there was need, that consent may not serve a defense to this crime⁶⁸⁸.

11. Paragraph 2(b)(xi): Perfidious killing or wounding*

Literature: Adam S., *Kriegslisten und Perfidieverbot in der Geschichte des Kriegsaktionenrechts vor Abschluss der Haager Landkriegsordnung von 1899* (Peter Lang 1992); Fleck, D., ‘Kriegslisten und Perfidieverbot’, in: *id.* (ed.), *Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte* (1973) 105; *id.*, ‘Ruses of War and Prohibition of Perfidy’, (1974) 13 RDPMDG 269; Furrer, H.-P., *Perfidie in der Geschichte und im heutigen Kriegsvölkerrecht* (1988); Gimmerthal, M., *Kriegslist und Perfidieverbot im Zusatzprotokoll vom 10. Juni 1977 zu den vier Genfer Rotkreuz-Abkommen von 1949 (Zusatzprotokoll I)* (1990); Hall, M.T., ‘False Colors and Dummy Ships: The Use of Ruse in Naval Warfare’, (Summer 1989) *NavalWarColRev*, reprinted in: J.N. Moore and R.F. Turner (eds.), ‘Readings on International Law from the Naval War College Review 1978–1994’, (1995) 68 *USNavalWarCollegeIL Studies*; Rusinova, V., ‘Perfidy’, in: R. Wolfrum (ed.), *MPIL* (OUP 2008); Oeter, S., ‘Methods and Means of Combat’, in: D. Fleck (ed.), *The Handbook Of Humanitarian Law In Armed Conflicts* (1995); Politakis, G.P., ‘Stratagems and the Prohibition of Perfidy with a Special Reference to the Law of War at Sea’, (1993) 45 *AustrianJPubIL*; Dehn, J.C., ‘Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World’s Reaction’, (2008) 6 *JICJ*; Roach, A., ‘Ruses and Perfidy Deception during Armed Conflict’, (1991–1992) 23 *UToILRev* 395; Madden, M., ‘Of Wolves and Sheep: A Purposive Analysis of Perfidy Prohibitions in International Humanitarian Law’, (2012) 17 *JCSL* 439; Green, B.D., ‘Bridging the Gap That Exists for War Crimes of Perfidy’, (2010) 2010 *Army Law* 45; Watts, S., ‘Law-of-War Perfidy’, (2014) 219 *MillRev* 106; Ipsen, K., ‘Ruses of War’, in: R. Wolfrum (ed.), *MPIL* (OUP 2010); Meron, T., *Bloody Constraints – War and Chivalry in Shakespeare* (1998); ‘Goyau, G., L’église catholique et le droit des gens’, 6 *RCADI* 139; Lieber, F., *Instructions for the Government of Armies of the United States in the Field*, originally published as U.A. War Department, Adjutant General’s Office, General Orders No. 100 (24 Apr. 1863), reprinted in: D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts* (3rd ed. 1988) 10; de Preux, J., ‘Article 37, 40, 44, 46 Add. Prot. I.’ in: Y. Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987); Ipsen, K., ‘Perfidy’, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, ii (1995) 978; M. Bothe *et al.*, ‘Die Genfer Konferenz über humanitäres Völkerrecht, Verlauf und Ergebnisse’, (1978) 38 *ZaöRV* 24; Fleck, D., ‘Ruses of War and Prohibition of Perfidy’, (1974) 12 *Revue de Droit Penal Militaire et de Droit de la Guerre* 278; Solf, W., ‘Article 37, 40 Add. Prot. I.’, in: M. Bothe *et al.* (eds.), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Nijhoff 1982) 204; Thomas, A.R. and Duncan, J.C. (eds.), *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* (1999); *San Remo Manual on International Law*

⁶⁸⁶ For details see Ambos, *article 25*.

⁶⁸⁷ See for a similar approach, Sandoz, *et. al.*, *Commentary*, (1987) mn 478: ‘clearly and significantly endangered’.

⁶⁸⁸ See also LaHaye, *Article 8(2)(b)(x)*, in: Lee *et al.* (eds.), *Elements of Crimes* (2001) 16.

* The authors are indebted to Jérôme Massé for his research assistance.

Applicable to Armed Conflicts at Sea, (1995) 209 IRRC; Kalshoven, F. *Assisting the Victims of Armed Conflict and Other – Disasters* (1989); David, E., *Principes de Droit des Conflicts Armés* (3rd ed. 2002); Zimmermann, B., 'Article 85 Add. Prot. I', in: Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987); Kalshoven, F., 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva 1974–1977, Part II, (1978) IX *NethYbIL*; Fenrick, J., 'Introductory Report', in: W. Heintschel von Heinegg (ed.), *The Military Objective and the Principle of Distinction in the Law of Naval Warfare* (1991); Mechelynck, A., *La Convention de La Haye* (1915); Triffterer, O., 'Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender 'Elements of Crimes' für alle Tatbestände des Völkermordes', in: B. Schünemann *et al.* (eds.), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001* (2001); 'Zum Beachtungsanspruch des Völkerstrafrechts in staatlichen Rechtssystemen', in: Landesgruppe Österreich der Internationalen Strafrechtsgesellschaft (AIDP) (ed.), *Internationale Strafgerichtshöfe und Menschenrechte* (2007).

- 447 a) **Normative origins and drafting history.** The wording of article 8 para. 2 (b) (xi) is identical to article 23 sub-para. b of the 1907 Hague Regulations and was included in the Statute without any debate on its content or scope of application. The prohibitions of perfidy (and treachery) are among the oldest principles of international humanitarian law. They were derived from the principle of chivalry⁶⁸⁹, and reflect customary international law⁶⁹⁰.
- 448 While article 23 (b) Hague Regulations does not define the notion of 'treachery', the chapeau of article 37 para. 1 Add. Prot. I provides a general definition of perfidy under contemporary international law. Various other provisions of international law prohibit, or are directly related to the prohibition against treacherous or perfidious acts in international armed conflict, in particular articles 23 sub-para. f, 24, 33 para. 3, 34, 35, 40 and 41 of the Hague Regulations and articles 38, 39, 44 para. 3, 46 para. 3 and 85 para. 3 (f) Add. Prot. I⁶⁹¹.
- 449 Some of these provisions qualify the abuse of particular protective signs recognized under humanitarian law to exploit the adversary's respect of them as an act of perfidy, since such an act may seriously undermine the respect of these signs designed to minimize suffering and damage by identifying protected persons and objects. The perfidious use of protective signs recognized by the Conventions or the Additional Protocol is a grave breach under article 85 para. 3 (f) Add. Prot. I. The perfidious use of such signs may not only qualify as a war crime of perfidy under article 8 para. 2 (b) (xi), but also as the war crime of improperly using internationally protected signs under article 8 para. 2 (b) (vii). Perfidy or treachery in the context of armed conflict has also been criminalized in domestic legislations⁶⁹².
- 450 At the negotiations within the Preparatory Commission on the Elements of War Crimes, it was broadly agreed that article 8 para. 2 (b) (xi) must be understood as criminalizing perfidy, or at least as criminalizing certain forms of perfidy, and that the definition of perfidy under article 37 Add. Prot. I should be taken as the basis to interpret the meaning of this offence⁶⁹³.

⁶⁸⁹ On custom, chivalry and perfidy, see Meron, *Bloody Constraints – War And Chivalry In Shakespeare* (1998), for instance, 11–15. As early as during the 13th century, Thomas d'Aquino distinguished permissible ruses from ruses that were prohibited because a promise was given or a wrong fact affirmed, cited in: Goyau (1925) 6 *RCADI* 139. See also Mike Madden who states that the rule already existed during the 7th century, Madden, (2012) 17 *JConfSecL* 441.

⁶⁹⁰ See *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal, Appeals Chamber, 2 Oct. 1995, para. 125, in which the Appeals Chamber of the ICTY cites the prohibition of perfidy as an example of a general principle of customary international law. Already the Lieber Instructions of 1863 prohibited perfidy in its articles 16 and 65, while admitting deception in its article 101, see Lieber, *Instructions for the Government of Armies of the United States in the Field*, originally published as U.S. War Department, Adjutant General's Office, General Orders No. 100 (24 Apr. 1863), reprinted in: Schindler and Toman (eds.), *The Laws of Armed Conflicts* (3rd ed. 1988) 10. See also article 18 (b)–(d) of the 1880 Oxford Manual and article 13 (b) of the 1874 Brussels Declaration and Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2009) 221.

⁶⁹¹ See in addition articles 12 para. 4, 28 paras. 1–3, 51 para. 7, 53 (b) Add. Prot. I and articles 6 and 8–11 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Geneva Conventions do not directly regulate the prohibition of perfidy as it is a rule regarding the conduct of warfare (so-called Hague Law).

⁶⁹² See, e.g., Chapter 22, § 6, No. 2 of the Swedish Penal Code (defining as a crime against international law the killing or injuring of an opponent by means of treachery or deceit).

⁶⁹³ The proposals by the United States, by Costa Rica, Hungary and Switzerland and by Japan for elements of this war crime all suggested to apply definitions of perfidy wholly or partly based on the definition in article 37

b) **The principle.** Even in armed conflicts combatants may not use any form of deception. 451
The prohibition of perfidy originally derives from a general appeal to the chivalry and good faith of combatants not to betray the good faith of the adversary, even in times of war. One concrete example under contemporary international humanitarian law is for instance the prohibition to abuse protective signs and rules of international humanitarian law designed to minimize suffering and damage and protect certain persons and objects.

c) **Treachery and perfidy.** aa) **Treacherous as a synonym of perfidious.** Article 8 para. 2 452
(b) (xi) Rome Statute criminalizes the *treacherous* killing or wounding individuals belonging to the hostile nation or army. The elements for this war crime make it clear that it must be understood as prohibiting the killing or wounding an adversary *by resort to perfidy* as defined under article 37 para. 1 Add. Prot. I⁶⁹⁴.

This clarification of the meaning of the term ‘treacherously’ in article 8 para. 2 (b) (xi) is 453 justified for the following reasons. First, the concept of treachery raises several questions as to what it covered even at the time of its inclusion in the Hague Regulations. It is even less clear what the concept would prohibit under contemporary humanitarian law. States negotiating the First Additional Protocol at the 1974–1977 Diplomatic Conference, while reaffirming and further developing the concept contained in article 23 (b) Hague Regulations, replaced the term of ‘treachery’ by ‘perfidy’⁶⁹⁵ and defined the latter’s meaning. Several authors consider that the prohibition of article 23 (b) Hague Regulations has been replaced or partially modified by articles 37–39 Add. Prot. I⁶⁹⁶. Others suggest that article 23 (b) Hague Regulations today must be interpreted as referring to the concept of perfidy⁶⁹⁷.

Second, treachery often is understood as referring to a breach of allegiance or loyalty of a 454 subject *vis-à-vis* his *own* state or nation⁶⁹⁸. This interpretation of treachery thus has little to do with humanitarian law rules regulating the conduct of hostilities in times of armed conflict *vis-à-vis* adversaries. International law does not appear to prohibit acts of treason within the own lines⁶⁹⁹. In 1946, an Australian Military Court has listed examples of acts of war treason such as giving information to the enemy or conspiracy against the own armed forces⁷⁰⁰. This confirms that ‘acts of war treason’ are not violations of humanitarian law,

Add. Prot. I for the interpretation of the offence. See *Proposal by Costa Rica, Hungary and Switzerland*, UN Doc. PCNICC/1999/WGEC/DP.8 (19 July 1999), *Proposal by Japan* UN Doc. PCNICC/1999/WGEC/DP.12 (22 July 1999), *Proposal by the United States of America*, UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999).

⁶⁹⁴ This had already been suggested by Cottier, *article 8 para. 2 (b) (xi)*, in the First Edition of this Commentary 219 *et. seq.* (mn 116–118).

⁶⁹⁵ J. de Preux however holds that the term perfidy was favored because the French term ‘*trahison*’ was too restricted in its meaning, De Preux, *Article 37 Add. Prot. I*, 431–432 (paras. 1488–1489).

⁶⁹⁶ Ipsen, in: Bernhardt (ed.), *Encyclopedia* 978.

⁶⁹⁷ See, e.g., Bothe *et al.*, (1978) 38 *ZaöRV* 24; Fleck (1974) 13 *RDPMDG* 278 (for whom article 23(b) Hague Regulations ‘implies that it is forbidden to take advantage of the ‘good faith’, that is to say of the trust and confidence of individuals belonging to the hostile army or nation’).

⁶⁹⁸ *New Shorter Oxford English Dictionary* 3379 (2nd ed. 1993).

⁶⁹⁹ Oppenheim and Lauterpacht, *International Law* (1912) 314. ‘International Law gives a right to belligerent to use [espionage and war treason]’, Australian Military Court at Rabaul, *Hashi et al.* (1948) V *Law Reports* 28.

⁷⁰⁰ ‘War treason consists of all such acts (except hostilities in arms on the part of the civilian population, spreading of seditious propaganda by aircraft, and espionage) committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy. War treason may be committed, not only in occupied enemy country, or in the zone of military operations, but anywhere within the lines of a belligerent.

The following are the chief cases of war treason that may occur:

- (1) Information of any kind given to the enemy;
- (2) Voluntary supply of money, provisions, ammunition, horses, clothing, and the like, to the enemy;
- (3) Any voluntary assistance to military operations of the enemy, be it by serving as guide in the country, by opening the door of a defended habitation, by repairing a destroyed bridge, or otherwise;
- (4) Attempting to induce soldiers to desert, to surrender, to serve as spies, and the like; surrender, and espionage offered by soldiers;
- (5) Attempting to bribe soldiers or officials in the interest of the enemy, and negotiating such bribe;
- (6) Liberation of enemy prisoners of war ...;
- (7) Conspiracy against the armed forces, or against individual officers and members of them;

since they pertain to acts against members of the own party to the conflict which often take place far from the battlefield, including in states where no armed hostilities are conducted.

455 Third, the terms perfidy and treachery can be understood as synonyms⁷⁰¹.

456 Fourth, delegations in Rome hardly intended to criminalize disrespectful behavior of loyalty towards the own troops as a war crime to be prosecuted by the ICC as a most serious crime.

Therefore, it is submitted that article 8 para. 2 (b) (xi) indeed prohibits perfidious acts: Here, the term ‘treacherously’ must be understood as referring to the concept of *perfidy* under contemporary international law.

457 **bb) Definition of perfidy.** Elements 1 and 2 for article 8 para. 2 (b) (xi) Rome Statute provide:

- ‘1. The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.
2. The perpetrator intended to betray that confidence or belief’.

458 The elements therefore mirror the widely accepted definition of perfidy provided by the second sentence of article 37 para. 1 Add. Prot. I⁷⁰². Perfidious acts thus involve a breach of good faith in the context of an armed conflict deliberately induced in order to gain a military advantage⁷⁰³. The ‘requirement of a specific intent to breach the adversary’s confidence sets perfidy apart from an improper use, making perfidy a more serious violation of international humanitarian law’⁷⁰⁴. However, it is not any good faith that is protected⁷⁰⁵, but only confidence invited with regard to a *protection provided for by international humanitarian law*: The ‘victim’ is induced to either trust that he or she is entitled to protection under humanitarian law, or that he or she must accord such protection to the perpetrator⁷⁰⁶. This

(8) Wrecking of military trains, destruction of the lines of communication or of telegraphs or telephones in the interest of the enemy, and destruction of any war material for the same purpose;

(9) Intentional false guidance of troops by a hired guide, or by one who offered his services voluntarily; (10) Rendering courier, or similar, services to the enemy’.

Ohashi et al. (1948) V *Law Reports* 29. For other sources confirming that one or more of these acts must be considered as acts of (war) treason, see, e.g., Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 204 (bribing a member of the armed forces of an adversary State to assassinate his or her commander); Oppenheim and Lauterpacht, *International Law* (1912) 314 ((1) Information of any kind given to the enemy. (2) Voluntary supply of money, provisions, ammunition, horses, clothing, and the like to the enemy. ... (6) Liberation of enemy prisoners of war. ...). It has furthermore been argued that article 23 (b) Hague Regulations also prohibits recruiting hired killers, placing a price negotiating desertion, on the head of an adversary or offering a reward for the capture of an adversary ‘dead or alive’, proscription and outlawry of an adversary, without however, precluding attacks on individual soldiers or officers, U.S. Army, *Field Manual* 27–10, para. 31. See also Greenspan, *The Modern Law* (1953) 317.

⁷⁰¹ For instance, U.S. Army, *Field Manual*, No. 31 uses perfidy and treachery as synonym terms of the international law of armed conflict. *The Oxford English Dictionary* (2nd ed. 1989), defines treachery as, *inter alia*, act of perfidy or treason.

⁷⁰² The definition of perfidy in paragraph 111 of the San Remo Manual is virtually identical to the Protocol’s definition. The definition found at Rule 65 of the ICRC study corresponds verbatim with the prohibition found at article 37(1) Add. Prot. I.

⁷⁰³ See also the explanation of Oppenheim and Lauterpacht which is often cited as the ‘classical explanation’: ‘whenever a belligerent has expressly or tacitly engaged, and is therefore bound by a moral obligation, to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith’, Oppenheim and Lauterpacht, *International Law* (6th ed. 1944) 430; Lieber defined perfidy indirectly by stating that a ruse permits of ‘such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist’, 1863 Lieber Code, article 15.

⁷⁰⁴ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 223.

⁷⁰⁵ A general rule protecting any good faith would not provide a precise guideline to distinguish perfidious acts of deception from lawful deception, that is, ruses of war.

⁷⁰⁶ See de Preux, in: Sandoz *et al.* (eds.), *Commentary* (1987) 435–436 (para. 1500); Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 204–205; Ipsen, in: Bernhardt, *Encyclopedia* (1997) 978; *German Joint Services Regulations* (Zentrale Dienstvorschrift) 15/2 (1992), para. 472 (defining perfidy as ‘acts misleading the adverse party into the

includes entitlements or obligations to accord protection under international law applicable in naval warfare⁷⁰⁷, even if the law on perfidy and permitted ruses of war may be somewhat different in naval warfare. The German Joint Services Regulations for instance defines perfidy as ‘acts misleading the adverse party into the belief that there is a situation affording protection under international law’⁷⁰⁸.

Drawing on the definition of article 37 para. 1 Add. Prot. I⁷⁰⁹, it is therefore proposed that 459 perfidious acts are *acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international humanitarian law, with intent to betray that confidence.*

c) **Permitted ruses of war.** However, deception is not generally prohibited. So-called 460 ruses of war have always been permitted⁷¹⁰. Article 37 para. 2 First Add. Prot. defines ruses of war as ‘acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law’. The essential distinction between perfidy and ruses of war, *i. e.* non-perfidious deception, is thus that the latter do not invite the confidence of an adversary with respect to a protection under the law of armed conflict and do not violate any other rule of this law.

Deceiving the adversary about the military strength and location of the own forces and the 461 own intentions and plans has always been practiced. Traditional and lawful tactics to mislead the adversary and to induce him to act recklessly are the use of camouflage, decoys, mock operations, and misinformation⁷¹¹, for instance by transmitting false or misleading messages or signals⁷¹², as well as surprise attacks, simulating inactivity, use of small units to simulate large forces, and putting up dummy weapons, installations or vehicles⁷¹³. The possibilities of deception have become even more varied with today’s optical, electronic and other technical means.

Other measures which are not condemned by the prohibition of perfidy, but which are not 462 considered to be ruses of war, include the use of spies and secret agents⁷¹⁴, encouraging defection or insurrection among enemy civilians or desertion, surrender or rebellion among enemy combatants⁷¹⁵, and corrupting enemy soldiers or civilians by bribes.

belief that there is a situation affording protection under international law’), reprinted in in Fleck (ed.), *Handbook IHL* (1999). Article 15 in connection with article 16 of the 1863 Lieber Code, defines perfidy indirectly by stating that ‘such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war or supposed by the modern law of war to exist’ is allowed.

⁷⁰⁷ See de Preux, in: Sandoz *et al.* (eds.), *Commentary* (1987) 435, para. 1500, fn. 25; Thomas and Duncan (eds.), *Annotated Supplement* (1999) 510, fns. 5 and 6, para. 12.2.

⁷⁰⁸ *German Joint Services Regulations* (Zentrale Dienstvorschrift) 15/2 (1992), No. 472, reprinted in: Oeter, in: Fleck (ed.), *Handbook* (1995) 200.

⁷⁰⁹ The San Remo Manual contains a definition with almost identical terms as article 37 para. 1 Add. Prot. I, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Prepared by international lawyers and naval experts convened by the International Institute of Humanitarian Law, adopted in June 1994, (1995) 309 *IRevRC*, para. 111.

⁷¹⁰ See article 101 of the Lieber Code, article 14 of the Brussels Declaration and article 24 of the 1907 Hague Regulations. See generally Politakis (1993) 45 *AustrianJPubIL* 3 253; Bourdoncle, *De l’influence des Ruses sur l’évolution du droit de la guerre* (1958) 31–133.

⁷¹¹ See article 37 para. 2 second sentence Add. Prot. I.

⁷¹² Unless this would constitute a prohibited improper use of the signals enumerated under article 8 para. 2 (b) (vii), and unless it does not otherwise amount to a perfidious act.

⁷¹³ See Hall (Summer 1989) *NavalWarColRev*, reprinted in: Moore and Turner (eds.) (1995) 68 *USNavalWar-CollegeILStudies* 491 *et seq.*; Oeter, in: Fleck (ed.), *Handbook* (1995) 199–200; Solf, in: Bothe *et al.* (eds.), *New Rules* (1982); de Preux, in: Sandoz *et al.* (eds.), *Commentary* (1987), para. 1521. See also the extensive lists of military manuals, *e.g.*, U.S. Army, *Field Manual*, No. 51; Swiss Army, *Manuel Des Lois Et Coutumes De La Guerre* (1963).

⁷¹⁴ See article 39 para. 3 Add. Prot. I; article 24 of the 1907 Hague Regulations; de Preux, in: Sandoz *et al.* (eds.), *Commentary* (1987), para. 1766.

⁷¹⁵ However, the assassination of a particular individual arguably may be considered to be an act of treason.

463 d) Examples of perfidious acts. Largely based on article 37 para. 1 Add. Prot. I⁷¹⁶, the following are examples of perfidious acts (provided they result in killing or wounding individuals belonging to the hostile nation or army):

- *The feigning of civilian, non-combatant status*⁷¹⁷. The distinction between civilians and combatants is central to the law of armed conflict, and attacks on civilians are prohibited⁷¹⁸. Consequently, feigning such protected status may amount to an act of perfidy. However, article 44 para. 3 Add. Prot. I recognizes that there are situations of armed conflicts where an armed combatant cannot distinguish himself from the civilian population (a guerrilla combatant in occupied territories or in wars of national liberation), and provides that he does not commit a perfidious act if he carries his arms openly during each military engagement and during the time he is visible in a military deployment preceding the launching of an attack⁷¹⁹.
- The feigning of *protected status by the use of internationally recognized symbols* such as the flag of truce, of signs, emblems or uniforms of the United Nations, or of the distinctive emblems of the Geneva Conventions⁷²⁰. Article 85 para. 3 (f) Add. Prot. I makes it a grave breach of the Protocol to perfidiously use, in violation of article 37 Add. Prot. I, the protective signs recognized by the Conventions or the First Protocol, insofar death or serious injury to body or health is caused. This includes⁷²¹:
 - the distinctive emblems of the Geneva Conventions, including non-visual signals⁷²²;
 - other protective signs and emblems recognized by the Geneva Conventions⁷²³;
 - the flag of truce⁷²⁴;
 - emblems of cultural property⁷²⁵;
 - signs, emblems or uniforms of the United Nations⁷²⁶;
 - signs, emblems or uniforms of a neutral or other State not party to the conflict⁷²⁷;
 - other internationally recognized protective signs,⁷²⁸ including other signs recognized by the Geneva Conventions and the First and Third Additional Protocols⁷²⁹.

⁷¹⁶ See also the San Remo Manual which states that '[p]erfidious acts include the launching of an attack while feigning: (a) exempt, civilian, neutral or protected United Nations status; (b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts', San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Prepared by international lawyers and naval experts convened by the International Institute of Humanitarian Law, adopted in June 1994, (1995) 309 *IREVRC* para. 111.

⁷¹⁷ Article 37 para. 1 (c) Add. Prot. I.

⁷¹⁸ See Dörmann, *article 8 para. 2 (b) (i)*.

⁷¹⁹ See de Preux, in: Sandoz *et al.* (eds.), *Commentar* (1987), paras. 1691–1715; Kalshoven, *Assisting The Victims of Armed Conflict and Other Disasters* (1989); David, *Principes* (3rd ed., 2002) 358–371.

⁷²⁰ Articles 37 para. 1 (a) and 85 para. 3 (f) Add. Prot. I.

⁷²¹ Cf. Zimmermann, in: Sandoz *et al.* (eds.), *Commentary* (1987) 998–999, paras. 3494–3499. Various states have complied with the obligation to provide for criminal jurisdiction over perfidious use of internationally recognized and protected signs, see, e.g., article 386 of the 1994 Penal Code of the Republic of Slovenia; article 612 para. 4 of the Spanish Military Penal Code (*Ley orgánica* 10/95 of 23 Nov. 1995).

⁷²² See article 38 para. 1 (first sentence) Add. Prot. I as well as article 18 para. 5 Add. Prot. I and articles 3, 7–9 of Annex I to Add. Prot. I.

⁷²³ See article 6 of Annex I to GC IV (hospital and safety zones); article 66 para. 4 Add. Prot. I and article 16 of Annex I to Add. Prot. I ('international distinctive sign of civil defence'). See also article 56 para. 7 Add. Prot. I and article 17 of Annex I to Add. Prot. I ('international special sign for works and installations containing dangerous forces'); articles 59 para. 6 and 60 para. 5 Add. Prot. I (signs agreed upon between parties to the conflict for non-defended localities or demilitarized zones).

⁷²⁴ Article 38 para. 1 (second sentence) Add. Prot. I.

⁷²⁵ *Ibid.*

⁷²⁶ Articles 37 para. 1 (d) and 38 para. 2 Add. Prot. I.

⁷²⁷ Articles 37 para. 1 (d) and 39 Add. Prot. I.

⁷²⁸ An example of perfidious use of such other protective signs may be to feign distress by giving a signal of SOS or MAYDAY (recognized by the Radio Regulation of the International Telecommunications Union), see para. 111(b) of the San Remo Manual. Even the use of signs agreed upon bilaterally, such as signs identifying non-defended localities and demilitarized zones (articles 59 and 60 Add. Prot. I), to incite confidence with intent to betray that confidence may be perfidious.

⁷²⁹ See articles 85 para. 3 (f) and 38 para. 1 Add. Prot. I.

Improperly using a flag of truce, the flag or the military insignia and uniform of the enemy or of the United Nations, or the distinctive emblems of the Geneva Conventions constitutes a war crime under article 8 para. 2 (b) (vii) Rome Statute insofar resulting in death or serious personal injury⁷³⁰.

- *The feigning of an intent to surrender*⁷³¹, *to cease fire, or to negotiate a truce*. Beyond the misuse of a flag of truce criminalized by article 8 para. 2 (b) (vii)⁷³², declaring or otherwise clearly demonstrating to the enemy that one demands a cease fire or suspension of arms, while intending to betray him, may constitute an act of perfidy⁷³³. Furthermore, persons who express an intention to surrender must be recognized as persons *hors de combat* and may not be made the object of an attack⁷³⁴. The categorical prohibition to attack this category of persons calls for the criminalization of the abuse of their protection, and the feigning of an intent to surrender with an intention to betray the adversary's confidence in order to kill or wound him thus clearly amounts to a perfidious act. However, it seems less certain that prisoners of war who attack their guards while they are being detained would commit an act of perfidy criminalized under the ICC Statute⁷³⁵. If combatants have surrendered, have been disarmed and are in custody of the adversary party to the conflict, they most likely did not surrender with an intent to kill or wound the guards, and prisoners of war do not feign any entitlement to protection⁷³⁶.
- *The feigning of an incapacitation by wounds or sickness*⁷³⁷, *or of distress*. A person who has been rendered unconscious or is otherwise incapacitated by wounds or sickness and therefore is incapable of defending himself is a person *hors de combat* and therefore may not be made the object of attack⁷³⁸. Again, as a counterpart to this fundamental protection, feigning to be *hors de combat* with an intent to kill or wound the enemy whose confidence was invited is an act of perfidy and a war crime under this provision. Similarly, the feigning of distress, in particular by misuse of internationally protected or recognized distress signals such as SOS or MAYDAY⁷³⁹, evokes the obligation to aid and rescue those in distress, and consequently its abuse with an intent to betray the confidence of the enemy constitutes an act of perfidy.
- *The feigning of belonging to a neutral or other State not party to the conflict by the use of their signs*. Such feigning is prohibited by article 39 para. 1 Add. Prot. I, is an act of perfidy according to article 37 para. 1 of the Protocol, and seems to be a grave breach according to article 85 para. 3 (f) of the Protocol⁷⁴⁰.
- *The feigning of belonging to the enemy by the use of signs of the enemy*⁷⁴¹? Feigning to be a member of the adversary's or another States' armed forces is not directed at feigning a protection under international humanitarian law⁷⁴², and therefore does not constitute

⁷³⁰ See Cottier, *article 8 para. 2 (b) (vii)*.

⁷³¹ See article 37 para. 1 (a) Add. Prot. I.

⁷³² See Cottier, *article 8 para. 2 (b) (vii)*.

⁷³³ While the protection of the white flag may still be of importance in face-to-face negotiations, today's warfare is conducted with modern means of technological communication and conduct of warfare without eye-sight is common. Radio messages may be more effective and more commonly used to signal a desire to cease fire, negotiate or surrender. On the new challenges of electronic warfare in regard to improper or perfidious use of signs, see Politakis (1993) 45 *AustrianJPubl* 3 301–306.

⁷³⁴ See Cottier, *article 8 para. 2 (b) (vi)*.

⁷³⁵ de Preux, in: Sandoz *et al.* (eds.), *Commentary* (1987), para. 1504, fn. 34, considers it 'not very likely' that such attacks are acts of perfidy.

⁷³⁶ Such acts may, however, compromise the protection under the Third Geneva Convention and under article 41 Add. Prot. I.

⁷³⁷ Article 37 para. 1 (b) Add. Prot. I.

⁷³⁸ See Cottier, *article 8 para. 2 (b) (vi)*.

⁷³⁹ See *Radio Regulation of the International Telecommunications Union*.

⁷⁴⁰ Zimmermann, in: Sandoz *et al.* (eds.) *Commentary* (1987), mn 3497.

⁷⁴¹ Article 39 para. 2 Add. Prot. I.

⁷⁴² In this regard, the United States proposal at the first session of the Preparatory Committee to consider the improper use of the adversary's signs as a war crime, 'e.g., if the use of an enemy uniform does ... cause

perfidy in the strict sense⁷⁴³. Furthermore, it has always been controversial to which degree feigning to belong to the enemy's forces is unlawful. According to article 8 para. 2 (b) (vii), which criminalizes the 'improper use' of the flag, military insignia or uniform of the adversary, such acts may give rise to criminal responsibility⁷⁴⁴. The Preparatory Commission might usefully address the issue to what degree feigning to be a member of the adversary's armed forces gives rise to criminal responsibility.

465 e) 'Killing or wounding ... individuals belonging to the hostile nation or army'. Perfidy *per se* does not amount to a war crime under the jurisdiction of the ICC, as article 8 para. 2 (b) (xi) only criminalizes *killing or wounding* by resort to perfidy. The conduct must result in death or injury to complete the crime. This is confirmed by the element 3 of this war crime. The Statute does not require any qualified level of the injury⁷⁴⁵. It may be furthermore recalled that article 25 para. 3 (f) Rome Statute provides also for criminal responsibility for unsuccessful attempts if the perpetrator has taken 'action that commences [the crime's] execution by means of a substantial step'. In contrast to article 37 para. 1 Add. Prot. I, capturing by resort to perfidy is not covered by article 8 para. 2 (b) (xi) Rome Statute.

466 The confidence created by the perfidious act must have been used to kill or injure (element 4). As the Elements of Crimes confirm, a perpetrator must have participated both in the invitation of the confidence as well as the killing or injuring to be punishable for perfidious killing or injuring. Standing besides a fellow soldier holding up a white flag to deceive the adversary, and then killing an adversary by betraying that confidence so created, would be a sufficient participation in the invitation of the confidence.

Article 8 para. 2 (b) (xi) applies only to the killing or wounding of individuals belonging to the hostile nation and army. This includes both combatants and civilians of the adversary party.

12. Paragraph 2(b)(xii): Quarter*

467 a) **Normative origins and drafting history.** This provision draws on article 23 (d) of the 1907 Hague Regulations and was included in the ICC Statute without any debate on its substance. The consideration underlying the prohibition of declarations that there shall be no survivors is analogous to the aim of the prohibition to kill or wound persons *hors de combat* criminalized under article 8 para. 2 (b) (vi) Rome Statute: When a combatant surrenders, is wounded, or is otherwise incapable of defending him- or herself, he is no threat anymore and it would therefore violate fundamental principles of humanitarian law to kill him or her. To deny quarter provides no (proportional) military advantage as it is sufficient to render the adversary *hors de combat*⁷⁴⁶.

468 Initially, the rule by which the conquered adversary must not be exterminated was applied only to peoples of the same race or religion, not being applied with regard to strangers. Up to the eighteenth century, belligerents often declared that they would not make any prisoners if

detrimental belief in an obligation or protection arising under the law of armed conflict', *Proposal by the United States*, UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999) 11, presents some difficulty.

⁷⁴³ Article 37 Add. Prot. I does not list the feigning to be a member of the adversary's or another State's armed forces among the examples of perfidy, and article 39 regulates such acts slightly different from the treatment of internationally protected signs in articles 37, 38 and 85 para. 3 (f) Add. Prot. I, Kalshoven (1978) IX *NethYbLL* 163, seems to consider the feigning to be a member of the adversary's armed forces not an act of perfidy but of treachery, while Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 204, considers article 39 para. 2 as prohibiting the *perfidious* use of the enemy insignia.

⁷⁴⁴ See Cottier, *article 8 para. 2 (b) (vii)*.

⁷⁴⁵ The U.S. had proposed that the result needs to be 'death or serious injury', *Proposal by the United States of America*, UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999) 11–12. This requirement of a heightened level of injury was not adopted by the Preparatory Committee.

* The authors are indebted to Jérôme Massé for his research assistance.

⁷⁴⁶ A practice of denying quarter even tends to stiffen the resistance of the adversary and may in addition prompt the adversary to adopt a similar policy. Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 217.

the people in besieged fortresses would continue to obstinately defend themselves⁷⁴⁷. However, the prohibition against ‘declaring that no quarter will be given’ has since become well established and now reflects customary international law⁷⁴⁸.

The 1919 Responsibility Commission listed giving no quarter among the violations to be prosecuted (No. 28). Several accused in post-World War II trials were convicted for the war crime of denying quarter⁷⁴⁹. This offense also constitutes a war crime under the municipal law of several states⁷⁵⁰. 469

At and prior to the Rome Conference, there was virtually no debate on the content of the war crime adopted as article 8 para. 2 (b) (xii) Rome Statute. During the negotiations of the elements for this ICC war crime⁷⁵¹, both the US⁷⁵² and the Swiss⁷⁵³ proposals constituted the basis for discussion. 470

Declaring or ordering not to give any quarter may amount to another war crime, and in particular the war crime of killing persons *hors de combat* (article 8 para. 2 (b) (vi) Rome Statute), insofar the perpetrator incurs command responsibility under article 28 Rome Statute or insofar the perpetrator ordered, solicited or induced such killing and the killing in fact occurs or is attempted (article 25 para. 3 (b) Rome Statute). The course of conduct criminalized under article 8 para. 2 (b) (xii) Rome Statute thus is largely covered by the war crime of killing or wounding persons *hors de combat* covered by article 8 para. 2 (b) (vi). 471

b) Material elements. aa) Declaration, order or threat. Article 8 para. 2 (b) (xii) Rome Statute criminalizes the act of ‘declaring’ that no quarter will be given. However, this term 472

⁷⁴⁷ While the Lieber Code generally prohibited giving no quarter, it did not rule it out under certain exceptional circumstances. Cf. articles 60–71, 1863 Lieber Code. Article 60 stated in part that ‘[i]t is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; ...’.

⁷⁴⁸ See, e.g., article 23 (d) Hague Regulations; article 40 Add. Prot. I; de Preux, in: Sandoz *et al.* (eds), *Commentary* (1987) 474, para. 1589. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 161: in rule 46 the ICRC also refers to the Oxford Manual and the Brussels Declaration.

⁷⁴⁹ A British Military Court found an accused guilty of ‘committing a war crime ... in that he ... in violation of the laws and usages of war gave orders to [his] platoon that no prisoners were to be taken and that any prisoners taken were to be shot’, British Military Court at Hamburg, *Wickman* (1949) XV *Law Reports* 133. In another war crimes trial it was decided that the mere giving of an order that subordinate submarine commanders were to destroy ships and their crews was a serious violation of the laws and customs of war, British Military Court in Hamburg (1951) *Ann. Dig.* (Year 1946) 64, *Moehle Case*, (1949) IX *Law Reports* 75, 78 and 80. In the *Peleus Trial*, a Commander of a German submarine was sentenced to death for having ordered the killing of survivors of a sunken merchant vessel, an order carried out by four others who killed survivors on rafts, British Military Court at Hamburg, *Eck et al.* (1947) I *Law Reports* 2 and 13. S.S. Brigadeführer Kurt Meyer was found to have committed a war crime in that he, ‘in violation of the laws and usages of war, incited and counseled troops under his command to deny quarter to Allied troops’, Meyer (1948) IV *Law Reports* 98 and 108. See also British Military Court at Brunswick, *Von Falkenhorst* (1949) XI *Law Reports* 18–30. See also Fenrick, in: Heintschel von Heinegg (ed.), *The Military Objective* (1991) 11–17.

⁷⁵⁰ See, e.g., *U.S. Commander’s Handbook* (1999), para. 6.2.5, section 4 (regarding the ‘[d]enial of quarter (i.e., killing or wounding an enemy hors de combat or making a genuine offer of surrender)’ as a ‘representative’ war crime under international law). ‘Directions to give no quarter’ also constituted war crimes under the Australian War Crimes Law, (1948) V *Law Reports* 96, and the Netherlands East Indies Statute Book Decree No. 44 of 1946, (1948) XI *Law Reports* 94.

⁷⁵¹ On the drafting history relevant to particular elements, see below, article 8 para. 2 (b) (ii) and (iii).

⁷⁵² *Proposal by the United States of America*, UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999)13:

1. [Link with armed conflict].
2. That the accused was a person in command who had force under the accused’s effective command and control or authority and control.
3. That the accused made a declaration or gave an order to those subordinate forces that any bona fide surrender by the enemy be refused, even if it would be reasonable to accept, and that all enemy persons proffering surrender be killed.
4. That in so declaring or ordering, the accused intended that his or her stated intent be executed.
5. That one or more persons were killed by forces acting in furtherance of the declaration of the accused’.

⁷⁵³ *Proposal by Costa Rica, Hungary and Switzerland*, UN Doc. PCNICC/1999/WGEC/DP.8 (19 July 1999);

1. [Link with armed conflict]
2. The perpetrator ordered that these shall be no survivors, threatened an adversary therewith, or conducted the hostilities on this basis’.

must be understood to include also forms of expression other than a formal declaration. As the elements of this war crime point out, the provision prohibits ‘declarations’ as well as ‘orders’ that no quarter shall be given. In addition, an explicit *threat* that no quarter will be given, typically with a view to provoke an immediate surrender or to terrorize the adversary, also appears to amount to a declaration prohibited under article 8 para. 2(b) (xii). However, the Elements are not entirely clear on this point. On the one hand, element 2 suggests that a declaration or order may be ‘given in order to *threaten* an adversary’ (emphasis added). On the other hand, however, element 3 requires that ‘[t]he perpetrator was in a position of effective command or control over the subordinate forces *to which the declaration or order was directed*’⁷⁵⁴.

- 473 Does the war crime of declaring that no quarter shall be given under article 8 para. 2 (b) (xii) Rome Statute extend to the act of *conducting hostilities on that basis*? While article 40 Add. Prot. I entitled ‘Quarter’ (also) reaffirms article 23 (d) Hague Regulations, it not only prohibits ‘to order that there shall be no survivors’ and ‘to threaten an adversary therewith’, but also ‘to conduct hostilities on this basis’⁷⁵⁵. However, does article 40 Add. Prot. I restate the meaning of article 23 (d) Hague Regulations under modern humanitarian law⁷⁵⁶.
- 474 At the Preparatory Committee the Swiss proposal consisting of interpreting article 8 2 (b) (xii) Rome Statute to also subsume the actual conduct of hostilities on the basis that there shall be no survivors did not find sufficient support. The proposal to add the wording ‘or conducted hostilities on that basis’, which essentially repeats article 40 Add. Prot. I, was opposed by several delegations at the Preparatory Committee and consequently was not included. In any event, this restrictive view (insofar it would be upheld by the ICC) would not overly limit the Court’s jurisdiction, since the conduct of hostilities on the basis of not leaving survivors is likely to regularly amount (also) to the war crime of killing or wounding persons *hors de combat* covered by article 8 para. 2 (b) (vi) Rome Statute.
- 475 **bb) Specific content of the declaration, order or threat.** According to the Rome Statute, the declaration, order or threat must express that ‘no quarter will be given’. The meaning of the term ‘quarter’ in article 23 (d) Hague Regulations likely derives from its designation of the quartering and the accommodation of troops; denying quarter thus would mean not to provide such accommodation and security, and, by implication, life⁷⁵⁷. Article 40 Add. Prot. I as well as the elements to this war crime suggest that the meaning of the prohibition to deny ‘quarter’ is restricted to ‘*leaving no survivors*’⁷⁵⁸. This interpretation appears appropriate in the context of defining ‘one of the most serious crimes of international concern’. Thus, declaring ‘that no quarter will be given’ must be understood, in the context of article 8 para. 2 (b) (xii) Rome Statute, as referring to not sparing the conquered adversaries’ lives, meaning killing or leaving to a foreseeable death all conquered adversaries, including those proffering a *bona fide* surrender or persons that are otherwise *hors de combat*.
- 476 The elements appear to also cover contingent orders or declarations (‘leaving no survivors if X or Y does not happen’), as the elements explicitly cover declarations with an intent to threaten the adversary.

⁷⁵⁴ Emphasis added. Threatening the adversary however would not usually be considered as a declaration directed to the own subordinate forces, and it is not necessary that the threat is also directed to the own forces. The ambiguity might have resulted from the fact that the wording ‘to threaten an adversary’ was added at the end of the informal negotiations.

⁷⁵⁵ Paragraph 43 of the San Remo Manual contains the identical wording as article 40 Add. Prot. I. The ‘Explanations’ to that paragraph 43 state that the inclusion of this rule is ‘merely an affirmation that the provision concerned is already applicable to naval warfare’, and that ‘[t]he present text is a further development of [article 23 (d) Hague Regulations]’, Doswald-Beck (ed.), *San Remo Manual* (1994) 118–119.

⁷⁵⁶ See Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 216–217 (‘Article 40 reaffirms, in more modern language, the prohibition of the 1907 Hague Regulations, Art. 23(d)’).

⁷⁵⁷ See De Preux, in Sandoz *et al.* (eds.), *Commentary* (1987) 475, para. 1591, fn. 8; Mechelynck, *La Convention De La Haye* (1915) 245.

⁷⁵⁸ Emphasis added. The plenary meeting of the 1974–77 Conference confirmed that the content of article 40 Add. Prot. I was perfectly in accordance with its title ‘quarter’, OR, Vol. VI, 103–104 (CDDH/SR.39, paras. 67–69).

While the war crime of denying quarter does not appear to prohibit ‘harshness’ in killing adversary combatants, it seems not necessarily limited to prohibiting the killing of persons that are *hors de combat*⁷⁵⁹, in contrast to article 8 para. 2 (b) (vi). As *de Preux* implies, the prohibition to deny quarter might also be considered to limit the conduct of warfare against combatants and the use of both conventional and other weapons⁷⁶⁰. Certainly, the prohibition does not imply that particular weapons *per se* are illegal. However, to some degree, the rule of proportionality also applies with regard to attacking combatants and with regard to the way weapons are used; the deliberate and pointless extermination of adversary combatants may constitute disproportionate casualties as compared to the military advantage anticipated if it would be feasible and sufficient to only render the adversary *hors de combat*⁷⁶¹. Based on this argument, the war crime under article 8 para. 2 (b) (xii) Rome Statute of ordering that there shall be no survivors could be considered to criminalize to some extent serious violations of the prohibition to use means or methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

In the *von Ruchteschell* case, the Judge Advocate advised the Military Court in 1947 that ‘even if they found that no signal indicating surrender had been received by the armed raider the accused could still be convicted if they came to the conclusion that he deliberately or recklessly avoided any question of surrender by making it impossible for the [targeted] vessel to make a signal’⁷⁶². Based on this consideration it appears arguable that an attack in a way not leaving any possibility for surrender could amount to the war crime of denying quarter if the refusal of a possibility to signal surrender, or the killing of all of the adversaries, (clearly) did not represent any (proportional) military advantage, which might however for instance be the case when surprise or speed are critical to the attack’s success.

Element 3 and the comment to the elements for article 8 para. 2 (b) (xii) proposed by the United States would have made such interpretation difficult⁷⁶³. However, neither element 3 nor the comment have been retained.

cc) Position of effective command or control of perpetrator. At the Preparatory Committee negotiations, several delegations wanted to ensure that declarations or orders that were not serious, such as jokes or declarations that obviously could not be effective because of a lack of control or influence over forces, would not amount to the war crime of denying quarter under the Rome Statute. Hence, element 3 requires – partly inspired by US proposals – that the perpetrator must have been ‘in a position of effective command or control over the subordinate forces to which the declaration or order was directed’. This requirement limits the criminal responsibility to those declarations that in fact may be expected to exert some influence on the subordinate forces and to be implemented or leading to an increased disregard of humanitarian duties. Declarations of a soldier lacking any command or control over other soldiers would thus not qualify under article 8 para. 2 (b) (xii). A position of *de facto* command or control over forces however suffices⁷⁶⁴.

⁷⁵⁹ The famous Commando Order of Hitler of 18 October 1942 for instance provided that ‘all enemy troops encountered by German troops during so-called commando operations [...] are to be exterminated to the last man, either in combat or in pursuit’ and that ‘if such men appear *to be about to surrender*, no quarter should be given them on general principle’ (emphasis added), U.S. Military Commission at Rome, *Dostler* (1951) *AnnDig* (1946) 281; *Von Falkenhorst* (1949) XI *Law Reports* 18–30, *id.* (1951) *AnnDig* (1946) 282; U.S. Military Tribunal at Nürnberg, *Von Leeb et al.* (1953) *AnnDig* (1948) 389.

⁷⁶⁰ *De Preux*, in: Sandoz *et al.* (eds.), *Commentary* (1987), paras. 1598–1599.

⁷⁶¹ *De Preux*, in: Sandoz *et al.* (eds.), *Commentary* (1987), para. 1598.

⁷⁶² *Von Ruchteschell* (1951) *AnnDig* (Year 1946) 248.

⁷⁶³ The comment stated that ‘bringing a preponderance of force to bear against enemy military objectives or enemy personnel does not constitute denial of quarter. Neither is a commander obligated to offer an opportunity to surrender before carrying out an attack, since surprise or speed may be critical to the success of attack’. See note 401, Proposal submitted by the United States of America 13.

⁷⁶⁴ For the opposite opinion see Triffterer, in: Schünemann *et al.* (eds.), *Festschrift für Claus Roxin zum 70. Geburtstag* (2001) 1432; Triffterer, in: *Landesgruppe Österreich der Internationalen Strafrechtsgesellschaft (AIDP) (ed.), Internationale Strafgerichtshöfe und Menschenrechte* (2007) 104.

- 481 dd) No necessity that hostilities actually be conducted on that basis. The wording of article 8 para. 2 (b) (xii) Rome Statute that the perpetrator be ‘declaring’ that quarter be denied contains no indication that the declaration must actually be implemented. The elements of this war crime appear to confirm this, since they on the one hand specify in detail what the objective of the declaration or order and the perpetrator’s command position needs to be, but on the other hand do not mention any requirement that the hostilities actually be conducted on the basis that no quarter shall be given. Indeed, several delegations at the Preparatory Committee found the element proposed by the U.S. ‘[t]hat one or more persons were killed by forces acting in furtherance of the declaration of the accused’⁷⁶⁵ not acceptable or not in conformity with the Statute, and this element was therefore not included.
- 482 Consequently, there is no need of a result such as that persons *hors de combat* actually be killed without mercy by forces acting in furtherance of the declaration, order or threat. It constitutes a serious violation of humanitarian law *per se* to declare, threaten or order that no quarter shall be given in a position of effective command or control (and with the requisite intent). Such ‘declarations’ may well produce or increase a disregard of humanitarian obligations including ignoring possibilities and signs of surrender or incapacitation.
- 483 c) **Mental element.** Element 2 for article 8 para. 2 (b) (xii) Rome Statute specifies that the perpetrator must pronounce the declaration or give the order with the intention to threaten the adversary or to conduct hostilities on the basis that there shall be no survivors. This element was inserted to avoid that a joke, or a statement or order that evidently cannot be implemented, are excluded from the scope of application of the offense.

13. Paragraph 2(b)(xiii): Prohibited destruction

Literature: Benvenisti, E., *The International Law of Occupation* (2nd ed. 2012); Gasser, H.-P., ‘Protection of the Civilian Population’, in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995); von Glahn, G., *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (in particular 176 et seq.) (1957); Kolb, R., ‘Etude sur l’Occupation et sur l’Article 47 de la IV^{ème} Convention de Genève du 12 Août 1949 Relative à la Protection des Personnes Civiles en Temps de Guerre – Le Degré d’Intangibilité des Droits en Territoire Occupé’, (2012) *AfricanYbIL* 267 et seq.; Dinstein, Y., *The International Law of Belligerent Occupation* (2009); Timraz et al. v. *Commander of IDF Forces in the Gaza Strip*, partly summarised and reproduced in: (1993) *IsYbHumRts* 337 et seq.; Zimmermann, A., ‘State Succession and the Nationality of Natural Persons – Facts and Possible Codification’, in: P.M. Eisenmann and M. Koskeniemi (eds.), *State Succession – Codification Tested Against the Facts* (1999); Fatatouros, A., ‘National Legal Persons in International Law’, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, ii (1995) 877, 879; Dominicé, C., *La Notion du Caractère Ennemi* (1961), in particular 51 et seq.; Hosang, H., ‘Destroying or seizing the enemy’s property: article 8 (2) (b) (xiii)’, in: Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Procedure and Evidence (Transnational Publishers 2001) 171; Carnahan, B., ‘Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity’, (1998) 92 *AJIL* 213 et seq.; Rolin, A., *Le Droit Moderne de la Guerre*, i (1920) 339; Stone, J., *Legal Controls of International Conflict* (1954) 443; Garner, J.W., ‘Treatment of Enemy Aliens’, (1919) 13 *AJIL* 22; Politis, N., ‘L’interprétation anglaise de l’article 23 h du Règlement de La Haye’, (1911) 18 *RGDIP* 249; Freeman, A.V., ‘War Crimes by Enemy Nationals Administering Justice in the Occupied Territory’, (1947) 41 *AJIL* 579; Picciotto, C.M., ‘Alien Enemy Persons, Firms and Corporations in English Law, (1917–1918) 27 *YaleLJ* 171–172; Hyde, C.C., *International Law*, Vol. III (2nd ed. 1947) 1714; Stirling-Zanda, S., ‘The Individual Criminal Responsibility of Judicial Organs in International Law in the Light of International Practice’, (2001) 48 *NethILRev* 1 67; Greenspan, M., *The Modern Law of Land Warfare* (1959) 47; Politis, N., ‘Lois et Coutumes de la Guerre sur terre. L’interprétation anglaise de l’article 23 h du Règlement de La Haye’, (1911) 18 *RGDIP* 249; Davis, G.B., ‘The Amelioration of the Rules of War on Land’, (1908) 2 *AJIL* 70; Bordwell, P., *The Law of War Between Belligerents: A History and Commentary* (1908) 283–284; Rowe, P., *Defence: The Legal Implications – Military Law and the Laws of War* (1987) 285; Hosang, H., ‘Compelling Participation in Military Operations: article 8 (2) (b) (xv)’, in: Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 173–174.

- 484 a) **Normative context and scope of application.** The wording of the prohibition of destroying the enemy’s property contained in article 8 para. 2 (b) (xiii) of the Statute is completely based on article 23 (g) of the 1907 Hague Convention Respecting the Laws and

⁷⁶⁵ Proposal submitted by the United States of America – Draft elements of crime, Addendum, 13 (element 5).

Customs of War on Land. A provision which is quite similar in nature is to be found in the part of the Statute dealing with grave breaches of the four Geneva Conventions, namely in article 8 para. 2 (a) (iv)⁷⁶⁶.

Besides, a parallel provision relating to non-international armed conflicts is contained in article 8 para. 2 (e) (xii) of the Statute⁷⁶⁷. 485

Similar prohibitions are also contained in articles 46, 47, 52 and 53 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land⁷⁶⁸, article 18 of the Third Geneva Convention, article 53 of the Fourth Geneva Convention of 1949 and finally article 54 of Add. Prot. I. Given the wording of the chapeau of article 8 para. 2 (b), it is against this background that article 8 para. 2 (e) (xii) of the Statute has to be interpreted. It is also worth noting that article 3 (b) ICTY-Statute contains a somewhat similar prohibition, while Section 6.1 (b) (xiii), as well as article 13 (b) No. 14 of the Statute of the Iraqi Special Tribunal (which however refers to ‘property of an adverse party’) are, *mutatis mutandis*, identical with article 8 para. 2 (b) (xiii) of the Rome Statute. 486

The elements of crimes, adopted by the Assembly of States Parties, provide with regard to the war crime of destroying or seizing the enemy’s property that: 487

1. The perpetrator destroyed or seized certain property.
2. Such property was property of a hostile party.
3. Such property was protected from that destruction or seizure under the international law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not justified by military necessity.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The question of seizure or destruction of the property of the enemy can mainly arise with regard to three situations: 488

- destruction of enemy property as the consequence of combat activities,
- destruction or seizure of property of enemy aliens located on the territory of a belligerent State and finally,
- destruction or seizure of enemy property located in occupied territories⁷⁶⁹.

Thus, the question arises, which of the three situations just outlined, article 8 para. 2 (e) (xii) of the Statute is supposed to cover.

Article 23 (g) of the 1907 Hague Convention Respecting the Laws and Customs of War on Land on which the wording of both, article 8 para. 2 (b) (xiii) and article 8 para. 2 (e) (xii) of the Statute are based, forms part of Section II of the just mentioned 1907 Hague Convention which deals with hostilities. More particularly, it is contained in its Chapter I, which defines the limits as to the means of injuring the enemy. Thus, at first glance it might seem as if article 8 para. 2 (b) (xiii) (just like article 8 para. 2 (e) (xii) of the Statute) would regulate means and methods of warfare. This is *arguably* further confirmed by the fact that article 46 of the 1907 Hague Regulations, contained in Section III dealing with occupation, enshrines a 489

⁷⁶⁶ For details see Dörmann, *article 8 para. 2 (a) (iv)*.

⁷⁶⁷ See Zimmermann and Geiß, *article 8 para. 2 (e) (xii)*.

⁷⁶⁸ As to the prohibition of pillage see also Zimmermann and Geiß, *article 8 para. 2 (b) (xvi)*.

⁷⁶⁹ Besides, the issue of protected property also arises as far as the property of captured prisoners of war is concerned; see *i.a.* both, article 4 para. 3 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land as well as article 18 of the Third Geneva Convention relative to the Treatment of Prisoners of War under which personal belongings of a prisoner of war, unlike arms and equipment, shall not be subject to seizure or destruction. It is submitted, however, that this specific prohibition is not included in the rule enshrined in article 8 para. 2 (e) (xii) of the Statute. This is due to the fact that the protection of prisoners of war is already addressed in article 8 para. 2 (a), (i), (ii), (iii), (v) and (vi).

specific provision on the protection of private property in case of occupation, which in turn was however not introduced into the Rome Statute.

- 490 Still, it has to be noted that means and methods of warfare are already being dealt with extensively *inter alia* in article 8 para. 2 (b) (ii) and (iv) of the Statute. If one was therefore to interpret article 8 para. 2 (b) (xiii) as to also regulate the means and methods of warfare, it would be largely redundant and superfluous.
- 491 Even more importantly, allowing the military necessity exception entailed in article 8 para. 2 (b) (xiii) to be invoked in the realm of the conduct of hostilities could undermine the principle of distinction in as much as it could potentially be used to extend the range of legitimate military targets beyond the confines of the accepted definition of military objectives as it is contained in article 52 para. 2 of Add. Prot. I and customary international law. After all, on the basis of article 8 para. 2 (b) (xiii) the destruction of certain civilian objects could be justified on the basis of military necessity; whereas an attack against civilian objects would amount to a war crime under article 8 para. 2 (b) (ii), which does not admit of such a military necessity justification.
- 492 Thus, it is submitted that the provision under consideration, notwithstanding the fact that it has its roots in the part of the 1907 Hague Regulations dealing with hostilities, does not regulate the means and methods of warfare to be applied in the case of international armed conflict notwithstanding the fact that the elements of crimes do not contain such a limitation and that the ICTY has also applied (the however different provisions of) article 3 (b) and (d) of its Statute with regard to property not subject to the control of the offender⁷⁷⁰.
- 493 The ICTY, however, avoids the above mentioned risk of undermining the principle of distinction in the realm of the conduct of hostilities by defining military necessity with reference to the definition of military objectives in article 52 para. 2 of Add. Prot. I⁷⁷¹. In other words, according to the ICTY, military necessity and military objectives, at least for purposes of the crime of wanton destruction, carry the same meaning. As a result, according to the ICTY military necessity may never justify the targeting of civilian objects⁷⁷².
- 494 While this approach as such cannot be disputed, the interpretation of the ICTY leads to an overlap of the crimes contained, on the one hand, in article 8 para. 2 (b) (ii) and on the other in (xiii). Accordingly in the context of international armed conflicts article 8 para. 2 (b) (xiii) would be rendered redundant. Moreover, the very same approach would make the targeting of civilian objects a war crime even in non-international armed conflicts through the backdoor of the war crime of wanton destruction as laid out in article 8 para. 2 (e) (xii). Yet, under the Rome Statute such an interpretation would not be maintainable, given that the crime of intentionally directing attacks against civilian objects was deliberately excluded from the catalogue of war crimes applicable to non-international armed conflicts. Therefore, the first situation, *i. e.* the destruction of enemy property as the consequence of the conduct of hostilities, cannot be comprised by the provision in article 8 para. 2 (b) (xiii).
- 495 It must be noted, however, that the ICC, in the *Katanga* decision, followed the approach of the ICTY and accorded a broader meaning to article 8 para. 2 (b) (xiii). The Chamber applied article 8 para. 2 (b) (xiii) also to attacks against civilian and military objectives, *i. e.* to

⁷⁷⁰ See *e.g.* *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgment, Trial Chamber, 26 Feb. 2001, paras. 346 *et seq.*, as well as *Prosecutor v. Strugar*, IT-01-42-T, Judgment, Trial Chamber, 31 Jan. 2005, paras 290 *et seq.* But see also for a concurring view Werle, *Völkerstrafrecht* (3rd ed., 2012), 1256, as well as Sect. 9, para. 1 of the German Code of Crimes against International Law implementing the provision here under consideration, which insofar refers to the destruction, appropriation or seizure of property of the adverse party contrary to international law, ‘such property being in the power of the perpetrator’s party’.

⁷⁷¹ *Prosecutor v. Strugar*, IT-01-42-T, Judgment, Trial Chamber, 31 Jan. 2005, para. 295; *Prosecutor v. Galić*, IT-98-29-T, Judgment, Trial Chamber, 5 Dec. 2003, para. 51.

⁷⁷² *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, Appeals Chamber, 17 Dec. 2004, para. 36; para. 54; *Prosecutor v. Galić*, IT-98-29-A, Judgment, Appeals Chamber, 30 Nov. 2006, para. 130; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgment, Trial Chamber, 15 Apr. 2011, para. 1766.

the realm of the actual conduct of hostilities⁷⁷³. In this context the Chamber held that article 8 para. 2 (b) (xiii) does not apply to property that qualifies as a military objective in the sense of article 52 para. 2 of Add. Prot. I nor to proportionate collateral damage, i. e. incidental civilian damage the destruction of which was justified under the principle of proportionality⁷⁷⁴. It would seem to follow that disproportionate collateral damage, in the view of the chamber, would qualify as a war crime under article 8 para. 2 (b) (xiii). However, as it would seem difficult to apply a different interpretation with regard to the similarly worded article 8 para. 2 (e) (xii) in the context of non-international armed conflict, the interpretation adopted in *Katanga* leads to the problematic result that both the intentional targeting of civilian objects as well as violations of the proportionality principle (war crimes in the context of international armed conflicts according to article 8 para. 2 (b) (ii) and (iv)) would be criminalized as war crimes under article 8 para. 2 (e) (xii) in the context of non-international armed conflict as well, despite the fact that the drafters of the Rome Statute have deliberately omitted these crimes from the catalogue of crimes applicable in non-international armed conflicts. While this regulatory gap is certainly deplorable, closing it against the clear will of the States party to the Rome Statute is not maintainable. Notably, in the *Garda* case the Pre-Trial Chamber I itself pointed out that the negotiators of the Statute were certainly aware of this marked [with respect to article 8 para. 2 (b) (ii)] difference between international armed conflict and armed conflict not of an international character⁷⁷⁵.

Moreover, the extension of the war crime of the destruction of the enemy's property to the conduct of hostilities creates a double-standard. In the *Katanga* decision the Chamber differentiated (i) a conduct of hostility context, i. e. a situation *before* property has fallen into the hands of the attacking party, during which destruction could only be justified if the property destroyed qualified as a military objective, and (ii) a situation in which property had already fallen into the hands of the attacking party and in which its destruction could be justified more generally by military reasons⁷⁷⁶. In other words, whereas civilian objects would be categorically excluded as legitimate objects of destruction in a conduct of hostilities context by virtue of a narrow definition of the military necessity exception which is equated and thereby limited to the definition in article 52 para. 2 of Add. Prot. I, in an occupation-context a wider range of objects, including civilian objects, could potentially lawfully be destroyed given that a wider definition of military necessity would apply. It seems that a more coherent, less complicated approach that leads to similar results but avoids the problem of criminalizing behavior in the realm of non-international armed conflicts that the drafters of the Rome Statute did not want to be criminalized in non-international armed conflicts, would be to exclude the conduct of hostilities context from the ambit of both article 8 para. 2 (b) (xiii) and article 8 para. 2 (e) (xii) altogether. In the *Katanga* case the Chamber distinguished between 'conduct of hostilities crimes' and other crimes⁷⁷⁷. Against this background it is submitted that article 8 para. 2 (b) (xiii) and article 8 para. 2 (e) (xii) should not be regarded as 'conduct of hostilities crimes'.

As to the applicability of article 8 para. 2 (b) (xiii) to the seizure of enemy property *within a belligerent State's own territory* in the case of an international armed conflict, it has to be noted that this question has not been dealt with by any of the codified rules (including article 23 (g) of the 1907 Hague Convention Respecting the Laws and Customs of War on Land).

⁷⁷³ *Prosecutor v. Katanga and Ngudjolo Chui*, 01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 Sept 2008, para. 311.

⁷⁷⁴ *Prosecutor v. Katanga and Ngudjolo Chui*, 01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 Sept. 2008, para. 313.

⁷⁷⁵ *Prosecutor v Garda*, 02/05-02/09, Decision on the confirmation of charges, Pre-Trial Chamber I, 8 Feb. 2010, para. 85.

⁷⁷⁶ *Prosecutor v. Katanga and Ngudjolo Chui*, 01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 Sept. 2008, para. 318.

⁷⁷⁷ *Prosecutor v. Katanga and Ngudjolo Chui*, 01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 Sept. 2008, para. 267.

Thus, given the fact that article 8 para. 2 (e) (xii) of the Statute is identical in wording to that provision, it seems not to apply for that reason alone to such situations. Besides, it is doubtful whether clear rules which are applicable to seizure of foreign property located in the belligerents' own territory have developed. Finally, even if one was to admit that such rules do exist, their violation would in no case constitute a war crime. It is accordingly submitted that any such acts do *not* come within the scope of application of either article 8 para. 2 (b) (xiii) or (e) (xii). The ICTY, with respect to Article 3 (b) of its Statute, has adopted a somewhat wider interpretation, holding that 'the protection afforded under Article 3 (b) of the Statute includes all property in the territory involved in the conflict'⁷⁷⁸. The reference to 'territory involved in the conflict' would seem to comprise enemy as well as a State's own territory, especially in view of the fact that more recently the ICTY has been even more explicit by referring to 'any territory involved in the conflict'⁷⁷⁹.

498 Given the very wording of the provision and the fact that belligerent occupation is the situation where enemy property is, apart from the two other situations just referred to, most likely to be exposed to acts of a belligerent, it is submitted that article 8 para. 2 (b) (xiii) of the Statute was indeed meant to address the fate of any enemy property located in territories which have come under the *de facto* control of a belligerent⁷⁸⁰, regardless of whether the situation (yet) formally amounts to an occupation as defined in article 2 para. 2 common to the four Geneva Conventions or not⁷⁸¹. Again, the ICTY with respect to Article 3 (b) of its Statute has referred more generally to property 'located in enemy territory and in territory not under effective occupation'⁷⁸². In that regard, one has to take note of the fact that otherwise the inclusion of the prohibition of seizing the enemy's property in article 8 para. 2 (b) (xiii) of the Statute would have, given the realities of modern warfare, not made much sense. To the contrary, situations of seizures frequently arise within the context of belligerent occupation. This interpretation of article 8 para. 2 (b) (xiii) of the Statute is further confirmed by the drafting history of the provision.

499 The original proposal submitted by the United States, finally leading to the inclusion of article 8 para. 2 (b) (xiii) into the Statute⁷⁸³, had explicitly stated that only the seizure or destruction of such enemy property 'within one's custody or control' was supposed to be covered by that provision. During informal consultations among a certain number of States, where agreement could be reached to include that provision, it was further agreed to delete the just mentioned words in order for the provision to be completely in line with the original text of the 1907 Hague Regulations Concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land with the understanding, however, that such deletion would not expand the scope

⁷⁷⁸ *Prosecutor v. Orić*, IT-3-68-T, Judgment, Trial Chamber, 30 June 2006, para. 582; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, Appeals Chamber, 17 Dec. 2004, para. 36; para. 74; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgment, Trial Chamber, 26 Feb. 2001, para. 347; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgment, Trial Chamber, 31 Mar. 2003, para. 580; *Prosecutor v. Brđanin*, IT-99-36-T, Judgment, Trial Chamber, 1 Sep. 2004, paras. 381, para. 592.

⁷⁷⁹ *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgment, Trial Chamber, 15 Apr. 2011, para. 1766.

⁷⁸⁰ See as to the applicability of article 23 (g) of the 1907 Hague Regulations (identical in wording to article 8 para. 2 (b) (xiii) of the Statute) to situations of occupation also the decision of the Israeli Supreme Court in *Timraz et al. v. Commander of IDF Forces in the Gaza Strip*, partly summarised and reproduced in: (1993) *IsYbHumRts* 337 *et seq.*

⁷⁸¹ As to the notion of belligerent occupation under customary international law, as reflected in article 42 of the Hague Regulations of 1907, according to which territory is considered to be occupied when it is actually placed under the authority of the hostile army, see para. 172 with further references.

⁷⁸² *Prosecutor v. Orić*, IT-3-68-T, Judgment, Trial Chamber, 30 June 2006, para. 582; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, Appeals Chamber, 17 Dec. 2004, para. 74; *Prosecutor v. Kordić and Čerkez*, Case IT-95-14/2-T, Judgment, Trial Chamber, 26 Feb. 2001, para. 347; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgment, Trial Chamber, 31 Mar. 2003, para. 580; *Prosecutor v. Brđanin*, No. IT-99-36-T, Judgment, Trial Chamber, 1 Sep. 2004, para. 592.

⁷⁸³ UN Doc A/AC.249/1997/WG.1/DP.1, part (B), (v).

of application of that provision. Accordingly this clarification was no longer contained in the Zutphen text submitted to the Rome Conference for its consideration⁷⁸⁴.

Given this context of the norm as well as the chapeau of article 8 para. 2 (b) of the Statute according to which the provisions of sub-paragraph b have to be interpreted ‘within the established framework of international law’, the individual elements of the prohibition have to be interpreted in light of relevant rules of customary international law such as those embodied *inter alia* in articles 46, 52, 53, 54, 55 and 56 of the 1907 Hague Regulations. Besides, one must also take into account the fact that under article 8 para. 2 (a) (iv) only the extensive destruction and appropriation of property which is carried out wantonly and in an unlawful manner is proscribed. This is confirmed by element 3 of the elements of crimes adopted with regard to the crime of destroying or seizing the enemy’s property according to which the property concerned must have been protected against the destruction or seizure under applicable rules of international humanitarian law.

In this regard ICTY Trial Chambers have held that ‘in order to constitute a violation of the laws or customs of war, the destruction must be both ‘serious’ in relation to an individual object and cover a substantial range of a particular city, town or village’⁷⁸⁵. The ICRC Customary Law Study, however, goes further, albeit for general international humanitarian law rather than for purposes of international criminal law, by simply stipulating, without any additional requirements as to the quality and extend of the destruction, that ‘[t]he destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity’⁷⁸⁶. In the *Katanga* decision the Chamber relied on the jurisprudence of the ICTY and recalled that ‘in order to constitute a grave breach, destruction [...] must be extensive, unlawful, and wanton’⁷⁸⁷ [and that] [t]he notion of ‘extensive’ is evaluated according to the facts of the case; however, even a single act such as the destruction of a hospital, may suffice to characterize an offence under this count’⁷⁸⁸.

b) Enemy property. When defining the term ‘enemy property’, two different problems arise: First, one has to define the term ‘enemy’ and secondly, one has to decide whether only private property is protected against seizure and destruction or whether to the contrary the prohibition also extends to public property.

In order to be protected against destruction or seizure, the property under consideration must possess an enemy character. This enemy character is further described in the elements of crimes by requiring that the property concerned constitutes property of a hostile party. Thus, any such act directed against property belonging to either nationals of the belligerent itself or to nationals of third States, not participating in the conflict, does not come within the realm of the provision. In the same vein, the ICC, in the *Katanga* decision, has held that article 8 para. 2 (b) (xiii) requires, ‘the destruction, by action or omission, of property belonging to an ‘enemy’ or ‘hostile’ party to the conflict’ and that this means that the property in question ‘must belong to individuals or entities aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator’⁷⁸⁹. In the case of physical persons, one has to therefore determine the nationality⁷⁹⁰ of the victim of the destruction or seizure,

⁷⁸⁴ UN Doc A/CONF.183/2/Add.1, article 5, War crimes, B., (k).

⁷⁸⁵ *Prosecutor v. Orić*, IT-3-68-T, Judgment, Trial Chamber, 30 June 2006, para. 583; *Prosecutor v. Strugar*, IT-01-42-T, Judgment, Trial Chamber, 31 Jan. 2005, para. 294.

⁷⁸⁶ Henkaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005) 50.

⁷⁸⁷ *Prosecutor v. Brđanin*, IT-99-36-T, Judgment, Trial Chamber, 1 Sep. 2004, paras 584–585.

⁷⁸⁸ *Prosecutor v. Katanga and Ngudjolo Chui*, Case 01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 Sept. 2008, para. 314; *Prosecutor v. Elastić*, IT-95-14-T, Judgment, Trial Chamber, 3 March 2000, para. 157.

⁷⁸⁹ *Prosecutor v. Katanga and Ngudjolo Chui*, 01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 Sept. 2008, para. 310.

⁷⁹⁰ In the case of an armed conflict not of an international character the adversarial character of an individual is determined, given the lack of different nationalities in most cases, by the fact whether he or she can be considered to belong to another party to the conflict, for details see Zimmermann and Geiß, *article 8 para. 2 (e) (xii)*, mn 326.

which especially in situations involving instances of state succession might prove rather difficult⁷⁹¹. In the case of legal persons, state practice during World War II but also that during armed conflicts after 1945 has almost universally applied the so-called control test, *i. e.* States have determined the nationality of a given corporation and accordingly eventually its enemy status according to the nationality of controlling shareholders, principal corporate officers and the presence of other substantial interests⁷⁹².

- 504 c) **Extent of property protected.** The wording of article 8 para. 2 (b) (xiii) of the Statute does not qualify the property that is protected from either seizure or destruction. It has to be noted, however, that the rules of customary law concerning enemy property enshrined in the 1907 Hague Convention Respecting the Laws and Customs of War on Land are clearly based, as demonstrated by articles 46 and 53 of the annexed Regulations, on the distinction to be drawn between private property on the one side and government property on the other. In that regard, property of municipalities and institutions dedicated to religion, charity, education and arts and sciences shall be considered private property⁷⁹³. Where doubts exist as to the ownership, State practice tends to presume that property constitutes public and not private property unless the contrary is proven⁷⁹⁴. In that regard it has to be also noted that during the drafting of the elaboration of the elements of crimes the United States and Colombia had proposed to specifically refer in the elements of crimes to ‘private or public’ property⁷⁹⁵. Yet, later on agreement was reached during negotiations on the elements of crimes that the term ‘property’ would in any event include both, private and public property⁷⁹⁶.
- 505 Movable government property which may be used for military purposes can legally be confiscated⁷⁹⁷. Besides, even as far as private property is concerned, the occupying power can, within certain limits, also request requisitions in kind from the local population⁷⁹⁸. Finally, all private property⁷⁹⁹ that may be used for hostile purposes and immovable government property might be seized, though not confiscated⁸⁰⁰, under the rules enshrined in both article 53 paras. 1 and 2 and article 55 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land⁸⁰¹. The elements of crimes specifically require that the property concerned in order for the destruction or seizure to constitute a crime within the jurisdiction of the Court, must have been protected from that destruction or seizure under the international law of armed conflict.
- 506 For the purposes of humanitarian law, the notion of State property does not only include property wholly owned by the respective State but also the property of institutions in which the State has a substantial interest or in which it exercises at least substantial control⁸⁰².

⁷⁹¹ For such an example see the decision of the ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, Trial Chamber, 16 Nov. 1998, paras. 251 *et seq.*; see generally as to the relationship between state succession and the nationality of individuals Zimmermann, in: Eisenmann and Koskeniemi (eds.), *State Succession* (1999).

⁷⁹² Fatatouros, in: Bernhardt (ed.), *Encyclopedia* (1995) 495 *et seq.*; for a more thorough analysis see Dominicé, *La Notion du Caractère Ennemi* (1961), in particular 51 *et seq.*

⁷⁹³ See article 56 para. 1 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land and Gasser, in: Fleck (ed.), *Handbook* (1995) 262.

⁷⁹⁴ *v. Glahn*, *The Occupation of Enemy Territory* (1957) 179; Israeli Supreme Court in *Al Nawaret al.*, summarised and partly reproduced in: (1986) *IsYbHumRts* 321 *et seq.*

⁷⁹⁵ See respectively PCNICC/DP.4/Add.2 and PCNICC/1999/WGEC/DP.16.

⁷⁹⁶ Hosang, in: Lee *et al.* (eds.), *Elements of Crimes* (2001) 171.

⁷⁹⁷ See article 53 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land; Gasser, *Protection* 260.

⁷⁹⁸ Gasser, in: Fleck (ed.), *Handbook* 259: ‘the right to demand requisitions is laid down in article 52 Hague Reg and customary law’ [emphasis added].

⁷⁹⁹ As to the specific situation of civilian hospitals see article 57 of the Fourth Geneva Convention.

⁸⁰⁰ Private property that has been actually used for hostile purposes and that is found on the battlefield might be confiscated, see for that proposition the decision of the Israeli High Court, *Al Nawar v. Minister of Defence et al.*, Case No. 574/82, Judgment, 11 August 1985, 321 *et seq.*

⁸⁰¹ Gasser, in: Fleck (ed.), *Handbook* (1995) 261.

⁸⁰² *v. Glahn*, *Occupation* (1957) 179; Israeli High Court, *Al Nawar v. Minister of Defence, et al.*, Case 574/82, Judgment, 11 August 1985, 321 *et seq.*, quoting Schwarzenberger’s *Treatise on International Law*. But see also for

d) **Prohibition of destruction or seizure.** In general terms, article 8 para. 2 (e) (xii) of the Statute prohibits both, the destruction and the seizure of enemy property. Where however a pure seizure is sufficient under the doctrine of military necessity to secure a military advantage, only such measures may be taken. Besides, articles 53 para. 2 and 55 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land, while providing for the possibility to seize certain property items do not contain a right to confiscate. Indeed, article 55 specifically stipulates, that as far as immovable Government property is concerned, the occupant may only administer them in accordance with the rules of usufruct unless again military necessity requires other measures such as *e.g.* the destruction of specific buildings.

Given the fact that article 8 para. 2 (a) (iv) only criminalizes the ‘extensive destruction and appropriation of property’ and taking into account that the ICC’s jurisdiction shall be limited to the most serious crimes of concern to the international community as a whole⁸⁰³, it is submitted that singular incidents of illegal seizures or acts of destruction, which only concern items of marginal value and which are not committed on a somewhat larger scale would normally not be subject to the jurisdiction of the ICC. Yet the elements of crimes simply refer to the destruction or seizure of ‘certain’ property thus implying that even single incidents of destruction or seizure might already constitute a crime under this provision.

e) **‘imperatively demanded by the necessities of war’.** By using the words ‘unless (...) imperatively demanded by the necessities of war’ the Statute, as beforehand the 1907 Hague Convention Respecting the Laws and Customs of War on Land refers to the concept of military necessity⁸⁰⁴. First of all, it has to be stressed, however, that not every situation of military necessity, but only *imperative* reasons of military necessity, *i.e.* most serious military reasons which are of an imperative nature, may justify acts otherwise prohibited under this provision. While the Swiss draft for the elements of crimes had quite in line with the text of the Statute referred to acts ‘imperatively demanded by the military necessity’⁸⁰⁵, the elements of crimes now simply require that the ‘destruction or seizure was not justified by military necessity’, the underlying reason being that military necessity *tout court* was understood as being the equivalent of the more elaborate terms used in the Hague Convention and accordingly in the Statute itself⁸⁰⁶.

Accordingly, the mere fact that the acts under consideration serve security needs or contribute to the security of the area at large is not, in itself, sufficient to justify any of the otherwise prohibited acts⁸⁰⁷, unless it can be proven that there is indeed an imperative need to do so, *i.e.* that there are no other means to secure military safety. In particular, national-security needs in a broad sense may not justify takings of private property⁸⁰⁸.

In the *Katanga* decision the Chamber held that military necessity covers, ‘[...] *inter alia*, a situation in which: (i) the property destroyed constituted a military objective before having fallen into the hands of the attacking party; and (ii) having fallen into the hands of the attacking party, its destruction was still necessary for military reasons. However, this ground for justification can only be invoked if the laws of armed conflict provide for it and only to the extent that these laws provide for it’⁸⁰⁹. As was already mentioned above, if article 8 para. 2 (b) (xiii) from the outset is only applied to situations in which a certain degree of *de*

a more far-reaching proposition applying a functional test under which the nature of the property would be judged according to its actual governmental or non-governmental use *id.*, 325.

⁸⁰³ For details see Zimmermann, *article 5*, mn 8.

⁸⁰⁴ As to the historical development and the current status of that concept see most recently Carnahan, (1998) 92 *AJIL* 213 *et seq.*

⁸⁰⁵ PCNICC/1999/WGEC/DP.8.

⁸⁰⁶ Hosang, in: Lee *et al.* (eds.), *Elements of Crimes* (2001) 171.

⁸⁰⁷ But see for a divergent position the decision of the Israeli Supreme Court in *Ayub et al. v. Minister of Defence et al.* (Beth El case), summarised and partly reproduced in: (1979) *IsYbHumRts* 337 *et seq.*

⁸⁰⁸ See for such a limitation the decision of the Israeli Supreme Court in *Dweikat et al. v. The Government of Israel et al.* (Elon Moreh case), summarised and partly reproduced in: (1979) *IsYbHumRts* 345 *et seq.*

⁸⁰⁹ *Prosecutor v. Katanga and Ngudjolo Chui*, 01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 Sept. 2008, para. 318.

facto territorial control has been established, as is proposed here, the divergent military necessity standards suggested in the *Katanga* decision can be avoided⁸¹⁰.

- 512 Yet, the limitation that military necessity can *only* be invoked ‘if the laws of armed conflict provide for it and only to the extent that these laws provide for it’ is misleading since the military necessity exception forms part of the war crime in article 8 para. 2 (b) (xiii) itself and precisely because the underlying provisions of international humanitarian law (see only article 23 (g) of the 1907 Hague Regulations or article 53 of the Fourth Geneva Convention) explicitly provide for such an exception. Thus, in order to prove military necessity under the Rome Statute, it is not necessary to provide an additional legal basis under the laws of war to justify its invocation. Rather, it suffices that the military necessity exception is provided for in article 8 para. 2 (b) (xiii) itself.
- 513 In the practice of the Nuremberg Tribunal a policy of ‘scorched earth’ was not recognised to be justified by military necessity⁸¹¹. In the *Orić* case the ICTY Trial Chamber held that, except for the rare occasions in which such preventive destruction [i.e. the destruction of houses from which previously a serious danger had emanated in order to prevent the inhabitants, including combatants, to return and resume the attacks] could arguably fall within the scope of ‘military necessity’, the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime⁸¹².

14. Paragraph 2(b)(xiv): Prohibition in regard to rights and rights of actions

- 514 a) **Normative origins and drafting history.** Article 8 para. 2 (b) (xiv) is identical with article 23 para. h of the 1907 Hague Regulations. The Rome Conference included the war crime of declaring abolished, suspended or inadmissible in a court of law the rights and actions of adversary nationals in the ICC Statute without any substantial debate that would provide an indication how to interpret the wording of the offence. Regardless of its rather inapt drafting, article 8 para. 2 (b) (xiv) was, together with all other acts which are ‘especially forbidden’ by article 23 of the Hague Regulations, somewhat automatically included in the Statute because article 23 in its entirety was considered as reflecting customary international law. Delegations did not attempt to clarify the wording and translate it into an intelligible criminal offence. Few if any delegations took notice to the contention of scholars that article 23 para. h of the Hague Regulations should have been contained in a special convention on the effects of armed conflict on private law contracts rather than in a humanitarian law treaty⁸¹³, and that ‘whatever be the true purpose of article 23 (h), its drafting is inapt to express it’⁸¹⁴.
- 515 Indeed, there are only few judicial decisions and little state practice that allow to clarify the scope and meaning of this provision under customary international law, and the prohibition generally receives no or only little comment in contemporary treatises on the law of armed conflict⁸¹⁵. In the Justice Trial, the U.S. Military Tribunal at Nuremberg admitted that ‘the authorities are not in accord as to the proper construction of article 23 (h) of the regulations annexed to the Hague Convention of 1907’.
- 516 The Preparatory Commission did not discuss the substance of the offense under article 8 para. 2 (b) (xiv): The elements for this war crime essentially restate the wording of the Rome

⁸¹⁰ *Id.*

⁸¹¹ See the case against *Alfred Jodl*, in: *Law Reports of Trials of Major War Criminals* (1949) 517.

⁸¹² Hosang, in: Lee *et al.* (eds.), *The International Criminal Court* (2001) 171, *Prosecutor v. Orić*, IT-3-68-T, Judgment, Trial Chamber, 30 June 2006, para. 588; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, Appeals Chamber, 17 Dec. 2004, paras. 419, 426.

⁸¹³ Rolin, *Le Droit Moderne De La Guerre* (1920) 339.

⁸¹⁴ Stone, *Legal Controls of International Conflict* (1954) 443.

⁸¹⁵ For writings up to mid-20th century, see Garner (1919) 13 *AJIL* 22 (1919); N. Politis, L’interprétation anglaise de l’article 23 h du Règlement de la Haye, 18 *RGDIP* 249; Stone, *Legal Controls* (1954) 441–443; Freeman (1947) 41 *AJIL* 579; Picciotto (1917–1918) 27 *YaleLJ* 171–172; Oppenheim and Lauterpacht, *International Law* 309–313 and 445; Hyde, *International Law* (2nd ed. 1947) 1714, fn. 7. See furthermore Stirling-Zanda (2001) 48 *NethILRev* 1, 67.

Statute provision and do not resolve the main controversies with regard to the meaning of article 23 (h) Hague Regulations and therefore article 8 para. 2 (b) (xiv). The ICC will have to clarify the elements of this prohibition.

Related to the war crime under article 8 para. 2 (b) (xiv) is the war crime of denying rights of fair and regular trial under article 8 para. 2 (a) (vi), which protects rights of due process and thus certainly criminalizes the deprivation of the rights of a fair and regular trial of protected persons once proceedings have been initiated. While article 8 para. 2 (a) (vi) also covers individual cases of denial of access to justice, article 8 para. 2 (b) (xiv) rather aims at legislative or general administrative acts or possibly also to court decisions with wide implications but not isolated individual cases. 517

b) Material elements. aa) Does the war crime only apply to occupied territories? Article 8 para. 2 (b) (xiv) clearly prohibits certain conduct by an Occupying Power *vis-à-vis* the population of that occupied territory. In such territory, the general abolition, suspension or inadmissibility in a court of law of the rights and rights of actions of the population of the occupied territory would clearly violate fundamental principles of the law of belligerent occupation. An Occupying Power must not exercise full sovereignty over occupied territory. Its legitimate authority is limited as the nature of the occupation regime is supposed to be only provisional. While an Occupying Power has the authority to restore and ensure as far as possible public order and safety, it must respect, ‘unless absolutely prevented, the laws in force in the country’ (article 43 Hague Regulations). 518

However, a first fundamental controversy regarding the meaning of article 8 para. 2 (b) (xiv) relates to whether its *territorial* scope of application extends also to the own territory of the party to the conflict abolishing certain rights of, e.g. foreign nationals residing on its territory. No word under article 8 para. 2 (b) (xiv) or article 23 (h) Hague Regulations suggests that the scope of the provision is limited to occupied territory or precludes its application to the own territory of the Occupying Power or any other party to an armed conflict. Rather, it generally prohibits the abolition etc. of ‘the rights and actions of the nationals of the hostile party’, and not ‘of the population of an occupied territory’. The wording of article 8 para. 2 (b) (xiv) thus rather suggests its applicability to the rights and actions of *any* nationals of a hostile party in a situation of armed conflict. This is confirmed by a systematical interpretation of article 23 (h) Hague Regulations, as it is placed in section II of the Hague Regulations concerning hostilities generally, and not in section III dealing with the law of belligerent occupation. 519

The prohibition under article 23 (h) Hague Regulations was in fact ‘introduced on a German initiative intended to cover suits in a belligerent’s own courts’⁸¹⁶. According to Picciotto, Germany thus consequently contended that the provision relates to the ‘inability to enforce the execution of a contract by recourse to the *tribunals of the state in regard to which he is an alien enemy*’⁸¹⁷. This view has overwhelmingly been shared by continental writers⁸¹⁸. 520

The British and American delegations at the Hague Conference adopting the Hague Regulations however appear to have intended to limit the application of article 23 (h) Hague Regulations to occupied territories. According to the English view at the beginning of the 20th century, ‘the subsection bears a strictly limited application to occupied territory’⁸¹⁹. A main Anglo-Saxon argument was the systematic position of article 23 (h) Hague Regulations in the section regarding the limitation of the action of military commanders in the actual theater of hostilities, thus not applying in the entire territory of parties to the conflict that is far away from the battlefield⁸²⁰. 521

⁸¹⁶ Stone, *Legal Controls* (1954) 443 (fn. 163). See also Garner (1919) n13 *AJIL* 24–25. M. Greenspan has furthermore contended that the general practice admitted the right of a resident enemy alien to institute legal proceedings in the country of residence, Greenspan, *The Modern Law* (1959) 47.

⁸¹⁷ Picciotto (1917–1918) 27 *YaleLJ* 171–172 (emphasis added).

⁸¹⁸ See the references in Garner (1919) n13 *AJIL* 26 (fn. 10).

⁸¹⁹ Picciotto (1917–1918) 27 *YaleLJ* 171–172.

⁸²⁰ Garner (1919) n13 *AJIL* 25–26; Picciotto (1917–1918) 27 *YaleLJ* 171–172. At that time, the English law automatically suspended the rights of actions of subjects of hostile states *insofar* they had *no domicile* in England,

In any event, the abolishment, suspension or inadmissibility of the rights and actions must be related to an armed conflict.

- 522 **bb) What are ‘rights and actions’.** Article 8 para. 2 (b) (xiv) prohibits the declaration that the ‘rights’ or ‘actions’ of nationals of the hostile party are abolished, suspended or inadmissible. The term ‘actions’ must be understood as legal claims or rights of actions, including the right of access to courts of law. This is confirmed by the French wording ‘il est notamment interdit: ... h) de déclarer éteints, suspendus ou non recevables en justice, les droits et actions des nationaux de la Partie adverse’. The German translation of article 8 para. 2 (b) (xiv) agreed between Austria, Germany and Switzerland also uses the terms ‘Rechte und Forderungen’ which basically means ‘rights and (legal) claims’. The US Army Field Manual interprets article 23 (h) Hague Regulations as a prohibition relating to rights and rights of action⁸²¹. As was stated by the UN War Crimes Commission, the provision refers to the general ‘deprivation of rights of access to courts’⁸²² of litigious standing⁸²³.
- 523 An additional important question concerning article 8 para. 2 (b) (xiv) is whether it only relates to rights and rights of actions regarding civil and commercial claims, or whether it also protects *other fundamental rights and guarantees such as rights granted by criminal law, the national constitution or human rights law*, including fair trial rights and the right of access to courts. Writers usually only examined the provision under the perspective that it relates to civil claims. Garner for instance referred to the ‘execution of a contract by recourse to ... tribunals’ and to ‘preventing access to civil courts’⁸²⁴. The Netherlands Special Court of Cassation also limited the scope of the provision to civil claims in 1949⁸²⁵.
- 524 However, it is not unlikely that delegations at the Rome Diplomatic Conference may have thought and intended to adopt an offense also relating to rights and actions other than relating to civil contracts and claims. The experience of the Second World War and in particular the abolition of most or all rights of Poles and Jews or other groups in occupied territories or in Germany may have influenced the support for this provision and its inclusion in the ICC Statute. Stone stated that there is ‘some historical link of the rule denying *locus standi* with the general placing of enemy subjects *ex lege*, exposing them not only to confiscation of their poverty, but to physical restraint, and even killing’⁸²⁶. Nothing in the offence’ wording restricts it necessarily to civil claims.
- 525 Moreover, in the Justice Trial, the US Military Tribunal at Nuremberg was of the opinion that the ‘Night and Fog Decree’ (Nacht und Nebel Erlass) of the Hitler regime clearly violated article 23 (h) Hague Regulations as well as other provisions of the 1907 Hague Regulations. This decree essentially aimed at imprisoning without trial all persons in occupied territories (in particular Poles and Jews in Poland) opposed to the Nazi regime even if they had not committed any serious offence, secretly taking them to Germany, keeping them incommunicado and making them disappear without trace⁸²⁷. The same U.S.

id., 172; J. Stone, *Legal Controls* (1954) 442. On the English view and how it was developed, see Politis (1911) 18 *RGDIP* 249. On the U.S. view, see also Davis (1908) 2 *AJIL* 70. See also Von Glahn, *Occupation* (1957) 108; Oppenheim and Lauterpacht, *International Law* (1952) 309–313 and 445.

⁸²¹ U.S. Army, *Field Manual* 27–10 (1956), No. 372.

⁸²² UNWCC, *XV Law Reports* 125 (fn. 1) (1949).

⁸²³ See, e.g., Picciotto (1917–1918) 27 *YaleLJ* 171; Stone, *Legal Controls* (1954) 441–443.

⁸²⁴ See, e.g., Picciotto (1917–1918) 27 *YaleLJ* 171. See also, e.g., Stone, *Legal Controls* (1954) 441–443.

⁸²⁵ Netherlands Special Court of Cassation, *Rauter* (1949) *XIV Law Reports* 120; Netherlands Special Court of Cassation, *Zuehlke* (1949) *XIV Law Reports* 144–145.

⁸²⁶ Stone, *Legal Controls* (1954) 441 (fn. 155).

⁸²⁷ The ‘Night and Fog Decree’ was a plan to combat so-called resistance movements in occupied territories. ‘[P]ersons who committed offences against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial and punishment in Germany. ... Hitler’s Night and Fog programme was instituted for the deport for the deportation to Germany of many thousands of inhabitants of occupied territories for the purpose of making them disappear without trace. ... [T]hey were kept secretly and not permitted to communicate in any manner with their friends and relatives. ... The foregoing procedure under the NN Decree was clearly in violation of

Military Tribunal at Nuremberg moreover found that ‘the introduction and enforcement of the law [of 4 December 1941] against Poles and Jews in occupied Poland resulted in a violation of [article 23 (h) Hague Regulations]’⁸²⁸. This law provided for the possibility of the death penalty even for minor offences or where ‘the offence points to particularly objectionable motives or is particularly grave for other reasons’ and abolished essential rights of the accused⁸²⁹.

[The defendants] original purpose was to imprison without trial all those persons who were opposed to the government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was widely extended, and in course of time concentration camps became places of organised and systematic murder ...⁸³⁰.

‘The enforcement of such laws as that of 4th December, 1941, against the Poles and Jews, so clearly exceeded what was demanded by the needs of “public order and safety” that the Tribunal was not called upon to analyse article 43 of the Hague Convention any more than it was article 23(h), and the Tribunal did not in fact rely so much upon a claim that German courts were illegally set up in occupied territories as upon the illegality under international law of the law which they applied ...’⁸³¹.

The US Military Tribunal at Nuremberg thus obviously considered that article 23 (h) 526 Hague Regulations also prohibits the introduction and enforcement of laws providing for the deprivation of liberty of persons for no (serious) offence and to the denial and abolishing of their rights to a fair and regular trial. Under contemporary international law, article 64 GC IV provides that, subject to certain exceptions, the penal laws of the occupied territory shall remain in force, and that the tribunals of the occupied territory shall continue to function in respect of all offences covered by these penal laws.

The official comment on § 9 para. 2 of the German draft International Crimes Code of 527 2 May 2001 furthermore states that the offense under article 8 para. 2 (b) (xiv) Rome Statute ‘covers not only economic warfare, which in the past has often used the abolition and suspension of claims of nationals [Angehörigen] of the war adversary for its goals. Also *other discriminatory measures and restrictions of the rights* can qualify under the offense’⁸³².

Therefore, the general wording of article 8 para. 2 (b) (xiv) and the precedents permit to 528 understand article 8 para. 2 (b) (xiv) as prohibiting not only the abolition *etc.* of property and commercial rights, but also other discriminatory measures and restrictions of the rights of the nationals of the adversary party to the conflict.

c) **Further issues.** Article 8 para. 2 (b) (xiv) only applies to the abolition *etc.* of ‘the rights 529 and actions of the nationals of a hostile party’. In a literal reading, the word ‘the’ might be understood as requiring that all the rights and actions of the persons belonging to the adversary party are abolished *etc.* However, element 1 for article 8 para. 2 (b) (xiv) only requires that ‘certain rights or actions’ are abolished *etc.* This is appropriate, even though this

articles 5, 43, 46 and also 23 (h) Hague Regulations’. U.S. Military Tribunal at Nürnberg, *Altstötter* (1948) VI *Law Reports* 55–57 and 59. See also *ibid.*, 8 *et seq.*

⁸²⁸ *Altstötter* (1948) VI *Law Reports* 63 (see also at 94).

⁸²⁹ *Altstötter* (1948) VI *Law Reports* 10–14.

⁸³⁰ *Altstötter* (1948) VI *Law Reports* 63.

‘Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. Others in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behaviour. ... *The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged.* ... The extension to and application in [the occupied Polish territories] of the discriminatory law against Poles and Jews was in furtherance of the avowed purpose of racial persecution and extermination’. *Altstötter* (1948) VI *Law Reports* 62 (emphasis added).

⁸³¹ (1949) XV *Law Reports* 125, referring to *Altstötter* (1948) VI *Law Reports* 96–104.

⁸³² ‘Der Tatbestand umfasst nicht nur die Wirtschaftskriegführung, die in der Vergangenheit vielfach die Aufhebung und Aussetzung von Forderungen von Angehörigen des Kriegsgegners zur Erreichung ihrer Ziele nutzte. Auch *anderweitige Diskriminierungsmaßnahmen und Rechtsbeschränkungen* können darunter fallen’ (emphasis added).

war crime would generally appear to require the abolition etc. of important, substantial rights and actions, and not only trivial, isolated rights or even one single action.

- 530 The wording of article 8 para. 2 (b) (xiv) also suggests that the abolition *etc.* must generally concern rights and actions of *all or at least a substantial part of the persons belonging to the adversary party*. In view of the objective of the provision, it may also be sufficient if the rights and actions of a defined group of the adversary party, *e.g.* a specific ethnic group of the adversary, are effected. Article 8 para. 2 (b) (xiv) however certainly *does not apply to cases of individual withdrawal of rights*⁸³³.
- 531 Article 8 para. 2 (b) (xiv) literally criminalizes the *declaration* that rights and actions of the nationals of the hostile party are abolished *etc.*⁸³⁴ However, the Preparatory Committee rightly considered that a mere declaration incapable of actually effecting the abolition *etc.* of these rights and actions, for instance a random man in the street idly declaring any sort of things, should not give rise to individual criminal responsibility for the war crime under article 8 para. 2 (b) (xiv). On the other hand, the word ‘declaring’ should not be understood too narrowly, for instance certainly including legislative or even general administrative acts aiming at generally abolishing *etc.* certain rights and actions of persons belonging to the adversary party to the conflict. Therefore, element 1 for article 8 para. 2 (b) (xiv) requiring that the perpetrator ‘effected the abolition [etc.] of certain rights and actions’ (emphasis added) appears appropriate⁸³⁵. The means how the perpetrator achieves the intended result of denial of judicial access however is not of relevance. A legal abolition *etc.* of rights and actions would be sufficient. It is not necessary that courts have actually refused legal actions and access to them⁸³⁶.

15. Paragraph 2(b)(xv): Compelling adversary nationals to take part in war operations

- 532 a) **Normative origins and drafting history.** Delegations adopted article 8 para. 2 (b) (xv) without any substantial debate as to its content and scope. The wording of the offence is identical with the final paragraph of article 23 of the 1907 Hague Regulations.
- 533 Forcing or pressuring nationals of the adversary to participate in efforts directly related to the war effort is furthermore prohibited under article 52 of the 1907 Hague Regulations⁸³⁷ as well as the Geneva Conventions and the First Additional Protocol. Articles 49–57 GC III and articles 40, 51 and 95 GC IV regulate in more detail under what conditions prisoners of war, aliens in the territory of an adversary party, inhabitants of occupied territories and civilian internees may be required to do specific types of work.
- 534 The ICRC Commentary has affirmed that ‘a basic principle, universally recognised in the law of war, strictly prohibits belligerents from forcing enemy subject to take up arms against their own country’⁸³⁸. On the one hand, the prohibition underlying article 8 para. 2 (b) (xv)

⁸³³ This view is also taken under § 9 para. 2, German Draft International Crimes Code (2 May 2001) which requires that the rights or claims of ‘all or an *essential part* of the persons belonging to the adversary party’ (emphasis added) are effected. The commentary to that provision explains that this threshold not explicitly contained in article 8 para. 2 (b) (xiv) ‘carries out the goal and objective of Article 8 para. 2 letter b (xiv), which ... bases on a methodical or systematic process and does not aim at covering individual conduct. In view of the great range of possible alternative conducts that could be covered, individual cases of withdrawing rights thus are not covered’. The commentary also affirms that embargo measures decided by the UN Security Council on the basis of Chapter VII of the UN Charter would not be covered.

⁸³⁴ The words ‘*court of law*’ clearly qualify the inadmissibility, that is, inadmissibility in a court of law of the rights and actions, and do not mean that the declaration would have to be uttered in a court of law.

⁸³⁵ See also Oppenheim and Lauterpacht, *International Law* (6th ed. 1994) 335, Bordwell, *The Law of War* (1908) 285. A similar case is the war crime under article 8 para. 2 (b) (xii) of ‘[d]eclaring that no quarter will be given’, with regard to which the elements require that the perpetrator who declared or ordered that there shall be no survivors ‘was in a position of effective command or control over the subordinate forces to which the declaration or order was directed’. On the drafting history of the elements for article 8 para. 2 (b)(xiv), see also Hosang, in: Lee *et al.* (eds.) *Elements of Crimes* (2001) s 173–174.

⁸³⁶ See also Hosang, in: Lee *et al.* (eds.), *Elements of Crimes* (2001) 173–174.

⁸³⁷ See also articles 45 and 46 Hague Regulations.

⁸³⁸ Pictet (ed.), *Commentary IV*, Article 51 291.

(and (a)(v)) may have been adopted by States in order to exclude an infringement of each others' sovereign 'right' to their nationals' allegiance. The underlying objective of the prohibition appears to be, in the words of the ICRC Commentary, 'to prevent enemy aliens from being employed for purposes which conflict with the interests of their home country and are incompatible with their conscience and patriotic sentiments'⁸³⁹. Moreover, a participation in military operations against their own countries may put the individuals concerned in a difficult position upon their return to their country.

Compelling prisoners of war or civilians to serve in hostile forces or participate in operations of war during World War II has been found illegal under the laws of war in various war crimes trials referred to below, and has also been criminalized under various domestic legislations⁸⁴⁰. 535

Compelling a person under 15 to serve in hostile forces or to participate in military operations may also amount to the war crime spelled out under article 8 para. 2 (b) (xxvi) Rome Statute, consisting in conscripting or enlisting children or using them to participate actively in hostilities. Moreover, in the *Aleksovski* case, an ICTY Trial Chamber found that forcing detainees to dig trenches constitutes an outrage upon personal dignity amounting to a violation of the laws or customs of war under article 3 of the ICTY Statute⁸⁴¹. 536

b) Material elements. aa) Compelling. The voluntary service in adversary armed forces or voluntary participation in adversary military operations is not prohibited, but only coercing or forcing, 'by act or threat' (element 1 for article 8 para. 2 (b) (xv)) to such actions amounts to a war crime. This is confirmed by the holding of the U.S. Military Tribunal in the *Weizsäcker et al.* case that 'it is not illegal to recruit prisoners of war who volunteer to fight against their own country, but pressure or coercion to compel such persons to enter into the armed services obviously violates international law'⁸⁴². 537

bb) Participation in operations of war directed against their own country. Article 8 para. 2 (b) (xv) criminalizes compelling nationals of the adversary party 'to take part in the operations of war directed against their own country ...'. According to article 23 para. 2 Hague Regulations and the wording of article 8 para. 2 (b) (xv) Rome Statute, the operations of war must be *directed against the country to which the compelled person belongs*. This is confirmed by element 1 for article 8 para. 2 (b) (xv) which requires military operations 'against that person's own country or forces'⁸⁴³. 538

The interpretation of the notion of '*operations of war*' under article 8 para. 2 (b) (xv) Rome Statute is not easy, since in contemporary armed conflicts many types of work might be regarded as contributing to the country's war effort. Certainly, the term at least covers *any armed hostilities*, at least insofar directed against the compelled person's own country. Forcing someone to shoot combatants of his own country or to load a rocket to be propelled against troops of his country may clearly amount to a war crime under article 8 para. 2 (b) (xv). 539

It is less clear and appears controversial, however, whether and to what degree 'operations of war' also extend to actions only indirectly linked to armed hostilities. Does article 8 540

⁸³⁹ Pictet (ed.), *Commentary IV, Article 40* 254.

⁸⁴⁰ See, e.g., Chapter 22 (§ 6) (No. 6) of the Swedish Penal Code; article 282 (d) of the Penal Code of the Empire of Ethiopia of 1957; article 611 No. 3 of the Spanish Military Penal Code (Ley orgánica 10/95 of 23 Nov. 1995).

⁸⁴¹ *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, paras. 229 and 122–129.

⁸⁴² U.S. Military Tribunal at Nürnberg, *Weizsäcker et al.* (1949) 16 *AnnDig* 357.

⁸⁴³ However, this interpretation is not the only possible: The Fourth Geneva Convention does not contain such a condition. Articles 40 para. 2 and 51 para. 2 GC IV clearly prohibit any involuntary work directly relating to the conduct of military operations, whether they are directed against the home country or not. This change has been considered important for the protection of adversary nationals by the Commentator of the ICRC (Pictet (ed.), *Commentary IV, Article 51* 297) and could arguably be considered as the contemporary meaning of the Hague prohibition.

para. 2(b) (xv) also criminalize compelling to war-related labor such as producing munitions or driving soldiers behind the front lines? As is true with respect to all war crimes, it is important to distinguish between what is merely prohibited under international law from what is, in addition, criminalized under the Rome Statute.

- 541 In the *Krupp* trial, the U.S. Military Tribunal at Nuremberg found that article 52 Hague Regulations, which similarly to article 23 para. 2 Hague Regulations prohibits involving inhabitants in ‘taking part in military operations against their own country’, had been violated by the employment of deportees in armament production⁸⁴⁴. *Erhard Milch* was charged with participation in ‘plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation with war operations, including the manufacture and transportation of arms and munitions’, wherefore he was convicted for having forcibly recruited foreign workers for employment in German industry in violation of articles 52 and 6 Hague Regulations as well as article 31 of the 1929 Geneva Convention⁸⁴⁵. *Tanabe Koshiro* similarly was found guilty of ‘employing prisoners of war in an unlawful way’ in violation of article 6 Hague Regulations and article 31 of the 1929 Geneva Convention as the building of ammunition dumps or depots was considered work connected with the operations of war⁸⁴⁶.
- 542 The International Military Tribunal at Nuremberg furthermore appears to have interpreted the words ‘taking part in military operations against their own country’ widely ‘so as to include any work for the German war effort, including “German industry and agriculture”, and not merely “work on German fortifications and military installations”’⁸⁴⁷.
- 543 The United Nations War Crimes Commission, however, appears to have taken a more restrictive stance. Its Committee I in many cases ‘made a distinction between military operations and military preparations and declined to list as accused war criminals those responsible for forcing civilians to render assistance in constructing military roads, fortifications and the like behind the lines of military operations’⁸⁴⁸, suggesting however that impelling ‘inhabitants to do work at places or to construct fortifications at places where military operations were actually being conducted or were imminent’ might amount to a war crime⁸⁴⁹.
- 544 The Commission argues that ‘the practice of belligerents has distinguished between military operations and military preparations, and has not condemned as inadmissible compulsion upon inhabitants to render assistance in the construction of military roads, fortifications, and the like behind the front, or in any other works in preparation for military operations’⁸⁵⁰. Moreover, it points out that ‘all attempts [at negotiations on international instruments] to extend the prohibition to services which imply an obligation to take part in military preparations and the like have hitherto [up to the World War II] failed’⁸⁵¹.
- 545 The Geneva Conventions of 1949 also deal with the question of what work inhabitants of occupied territory or prisoners of war may be compelled to do. Insofar as these provisions

⁸⁴⁴ UNWCC, LRTWC, Vol. X 144 *et seq.*, *Krupp et al.*, X *Law Reports* 167 (1949). The same Tribunal also stated that ‘it is apparent that the compulsory labour of the civilian population for the purpose of carrying out military operations against their own country is illegal’, Von Leeb *et al.* (1953) *Ann. Dig.* (1948) 389, *id.*, (1949) XII *Law Reports* 89 and 92–93. The Dutch Court of Appeal subsumed construction of coast defences and seemingly ‘war preparations’ under ‘operations of war’, Court of Appeal (The Hague), *Bouquet and v. Slom*, (1947) 14 *Ann. Dig.* 308. A French Ordinance of 28 Aug. 1944 made ‘forced labour of civilians’ a war crime in its article 2 para. 5, see (1948) III *Law Reports* 52 and 96.

⁸⁴⁵ *Milch* (1948) VII *Law Reports* 27, 28 and 43. On employment in the metal industry, see also General Tribunal at Rastadt of the military Government for the French Zone of Occupation in Germany, *Roehling et al.* (1948) 15 *Ann. Dig.* 410–411. See also Oppenheim and Lauterpacht, *International Law* (6th ed. 1944) 335, Bordwell (1908) *Law of War* 285–286.

⁸⁴⁶ Netherlands Temporary Court-Martial at Macassar, *Koshiro* (1949) XI *Law Reports* 2.

⁸⁴⁷ British Command Paper Cmd. 6964, pp. 56–60, cited in (1949) XV *Law Reports* 120.

⁸⁴⁸ UNWCC, *History* 491 (1948) (emphasis of ‘behind’ added).

⁸⁴⁹ *Ibid.*

⁸⁵⁰ UNWCC, *History* 277 (1948) (emphasis in the original).

⁸⁵¹ UNWCC, *History* 228 (1948) (emphasis in the original).

‘permit’ compelling protected persons to do a certain type of work such compelling cannot constitute a war crime. Beyond that, however, it must be asked to what degree these provisions may be considered as reflecting the (customary) meaning of article 23 para. 2 Hague Regulations (respectively the war crime derived from that provision) as it has evolved since 1907.

According to article 50 GC III, prisoners of war may indeed be compelled to various types of work, including agriculture; industries other than metallurgical, machinery and chemical industries, ‘public works and building operations which have no military character or purpose’, ‘transport and handling of stores which are not military in character or purpose’, and ‘public utility services having no military character or purpose’. Moreover, article 52 para. 1 GC III provides that prisoners of war may not be employed on labor which is ‘of an unhealthy or dangerous nature’.

With regard to aliens in the territory of a party to the conflict who are nationals of an adversary, article 40 para. 2 GC IV provides that such persons ‘may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations’.

In occupied territories, article 51 para. 2 GC IV ‘permits’ ‘work which is necessary either for the needs of the army of occupation or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country’⁸⁵² unless such work ‘would involve them in the obligation of taking part in military operations’. The ICRC Commentary on the wording ‘work which is necessary for the needs of the army of occupation’ specifies that the clause covers services such as ‘billeting and the provision of fodder, transport services, the repairing of roads [etc.] and laying telephone and telegraph lines. On the other hand it is generally agreed that the inhabitants of the occupied territory cannot be requisitioned for such work as the construction of fortifications, trenches or aerial bases. It is the *maintenance needs* of the army of occupation and *not its strategic or tactical requirements* which are referred to here’⁸⁵³. Thus, while according to the ICRC Commentary it is ‘quite certain ... that the Occupying Power cannot demand that protected persons should revive the war industry of the occupied country, nor force them to produce war material’, they may for instance be compelled to do agricultural work which does not directly relate to the war effort. The ICRC Commentary rightly points out that ‘the Fourth [Geneva] Convention applies to civilians and civilians are by definition outside the fighting. Any action on the part of the Occupying Power which had the effect of involving them, directly or indirectly, in the fighting and so preventing them from benefiting by special protection under the Convention must be regarded as unlawful’⁸⁵⁴.

16. Paragraph 2(b)(xvi): Pillage

Literature: Maschke, H., *Das Krupp-Urteil und das Problem der Plünderung* (1951); Stewart, J., *Corporate War Crimes: Prosecuting Pillage of Natural Resources* (2011) 19; Heck, H. et al., ‘Law Reports of Trials of Major War Criminals’, in J. Stewart: *Corporate War Crimes: Prosecuting Pillage of Natural Resources* (2011) 20; Gasser, H.-P., ‘Protection of the Civilian Population’, in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995);

a) Normative origins and drafting history. Pillage was prohibited already in the Lieber Code of 1863 according to which ‘all pillage or sacking, even after taking place by main force [...] are prohibited under the penalty of death’⁸⁵⁵. The wording of the prohibition of pillage

⁸⁵² According to the Commentary, ‘public utility services’ must be understood as services ‘such as water, gas and electricity services, transport, health and similar services’, J.S.Picet (ed.), *Commentary*, IV, Article 51, 295. Besides, the Occupying Power may not compel protected persons to ensure the security of the installations anywhere compulsory work is being performed, article 51 para. 2 (third sentence) GC IV.

⁸⁵³ J.S.Picet (ed.), *Commentary*, IV, Article 51, 297 (footnote omitted).

⁸⁵⁴ For details see 146, *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. IX, ‘The Krupp Case’, in particular, 23 *et seq.* and 1338 *et seq.*

⁸⁵⁵ *Instructions for the Government of Armies of the United States in the Field (Lieber Code)* 24 April 1863, Article 44.

contained in article 8 para. 2 (b) (xvi) of the Statute was drawn from article 28 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land. It is also formally forbidden under article 47 of that Convention.

550 The list of war crimes in the Nuremberg Charter similarly included ‘plunder of public and private property’. It was under this count that several persons were indicted and sentenced by a US Military Tribunal under Control Council Law No. 10⁸⁵⁶.

551 The prohibition of pillage has furthermore been reiterated in article 33 of the Fourth Geneva Convention of 1949⁸⁵⁷. Finally, a similar prohibition is also contained in article 4 para. 2 (g) of the Add. Prot. I of 1977 as well as in article 4 para. 3 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Besides, article 3 (e) of the Statute of the ICTY (referring to ‘plunder of public and private property’), article 4 (f) of the ICTR Statute (‘plunder’), as well as section 6.1. (b) (xvi) UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, article 13 (b) No. 17 of the Statute of the Iraqi Special Tribunal (the wording of both of which is identical to the one in the Rome Statute), and finally article 3 (f) of the Statute of the Special Court for Sierra Leone (‘pillage’) contain similar prohibitions and make them war crimes subject to the jurisdiction of the respective tribunal.

An identical provision to article 8 para. 2 (b) (xvi), which in turn applies to non-international armed conflicts is contained in article 8 para. 2 (e) (v) of the Statute⁸⁵⁸.

552 The idea of including a prohibition of pillage into the list of war crimes which are subject to the jurisdiction of the ICC was contained in both the original proposals submitted by New Zealand and Switzerland⁸⁵⁹ and the one introduced by the United States⁸⁶⁰. The exact wording of current article 8 para. 2 (b) (xvi) found its way into the Statute, however, from the text submitted by the United States.

553 **b) Definition of ‘pillage’.** There is no official definition of the term of ‘pillage’. It should be understood, however, as the unauthorized appropriation or obtaining of property in order to confer possession of it on oneself or on a third party against the will of the rightful owner. Accordingly, the definition embraces acts of plundering, looting and sacking⁸⁶¹. This is confirmed by the elements of crimes adopted with regard to article 8 para. 2 (b) (xvi) which respectively refer to the fact that the perpetrator (1) must have appropriated certain property, (2) the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use, and that (3) the appropriation took place without the consent of the owner⁸⁶². It seems to be doubtful, however, whether the very notion of pillage, as the jurisprudence of the ICTY seems to imply, necessarily by and of itself contains an element of violence⁸⁶³.

554 More over, the requirement that the appropriation be carried out for ‘private or personal use’, as required in the second element, has rightly been criticized as overly restrictive and without foundation in historical as well as recent jurisprudence⁸⁶⁴. The ICTY Trial Chamber in the *Hadžihasanović* case held that the laws of war ‘do not allow arbitrary and unjustified pillage for army purposes or for the individual use of army members’⁸⁶⁵. Even more explicitly, the

⁸⁵⁶ For details UNWCC, LRTWC, Vol. X, 144 *et seq.* Trials Of War Criminals Before The Nuremberg Military Tribunals, ‘The Krupp Case’, in particular, 23 *et seq.* and 1338 *et seq.*

⁸⁵⁷ See also article 15 para. 1 of the GC I and article 18 para. 1 of the GC II.

⁸⁵⁸ For details see Zimmermann and Geiß, *article 8 para. 2 (e) (v)*.

⁸⁵⁹ UN Doc A/AC.249/1997/WG.1/DP.2, 2. (vi).

⁸⁶⁰ UN Doc A/AC.249/1997/WG.1/DP.1, (B) (ix).

⁸⁶¹ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007, para. 754; see also *Prosecutor v. Fofana et al.*, SCSL-04-14-T, Judgment, 2 August 2007, para. 751.

⁸⁶² See also *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 26 September 2008, para. 328.

⁸⁶³ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 591.

⁸⁶⁴ Stewart, *Coperate War Crimes* (2011) 19.

⁸⁶⁵ *Prosecutor v. Hadžihasanović*, IT-01-47-T, Judgment, Trial Chamber, 15 March 2006, para. 52 (emphasis added).

Special Court for Sierra Leone has held that ‘the requirement of ‘private or personal use’ is unduly restrictive and ought not to be an element of the crime of pillage’⁸⁶⁶.

c) **Isolated acts and organised forms.** The prohibition covers both, pillage through individual acts without the consent of the military authorities resulting from isolated acts of indiscipline, as well as organized pillage⁸⁶⁷. It also covers officially authorized forms of plundering when the appropriation of the respective property was not imperatively demanded by military necessity. 555

Given the fact that the jurisdiction of the ICC shall be limited to the most serious crimes of concern to the international community as a whole⁸⁶⁸, it is submitted that isolated incidents of pillage, which only concern items of marginal value and which are not committed on a somewhat larger scale would normally not be subject to the jurisdiction of the ICC. It has to be noted, however, that the elements of crimes, as adopted by the Assembly of States Parties, do not make reference to any such limitation. 556

d) **Scope of property protected.** As a matter of principle, the prohibition extends to all types of property, whether they belong to private persons or to communities or the State⁸⁶⁹. In the *Katanga* decision the Chamber held that ‘the pillaged property – whether moveable or immovable, private or public – must belong to individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator’⁸⁷⁰. 557

The scope of the prohibition is however limited by a belligerent’s right of requisition and seizure⁸⁷¹. This seems to be inherent in the very term of ‘pillage’. The elements of crimes conform to this approach by stating in footnote 47 accompanying the elements of crimes that ‘appropriations justified by military necessity cannot constitute the crime of pillaging’ since under such circumstances the appropriations concerned would have never taken place for private for personal use. 558

This provision in the aforesaid footnote 47, however, has rightly been described as inaccurate⁸⁷². Because contrary to what footnote 47 seems to imply, military necessity must never function as an independent justification under the laws of war, except in those cases where ‘military necessity’ is explicitly mentioned as a legitimate exception to a given rule⁸⁷³. Pillage, however, is prohibited in absolute terms without any mentioning of a permissible ‘military necessity-exception’. 559

Moreover, during the negotiation of the Hague Regulations ‘military necessity’ was considered but dismissed as an acceptable justification for pillage because relevant exceptions had already been included into the Hague Regulations⁸⁷⁴. Therefore, rather than relying on ‘military necessity’ as such, in the *IG Farben* case the U.S. Military Tribunal referred to the acquisition of ‘private property against the will and consent of the former owner, [and] such action, not being expressly justified by any applicable provision of the Hague Regulations...’⁸⁷⁵. Similarly, and more recently, the ICTY Trial Chamber in the *Martić* case defined 560

⁸⁶⁶ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007, para. 754; see also *Prosecutor v. Fofana et al.*, SCSL-04-14-T, SCSL Trial Chamber, 2 August 2007, para. 160.

⁸⁶⁷ Sandoz et al. (eds.), *Commentary* (1987), para. 4542.

⁸⁶⁸ For details see Zimmermann, *article 5*, mn 8.

⁸⁶⁹ Sandoz et al. (eds.), *Commentary* (1987) 244.

⁸⁷⁰ *Prosecutor v. Katanga and Ngudjolo Chui*, 01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 Sept. 2008, para. 329.

⁸⁷¹ For details as to the right of requisition and seizure see above Zimmermann, *article 8 para. 2 (b) (xiii)*, mn 484 et seq.

⁸⁷² Stewart, *Corporate War Crimes* (2011) 21.

⁸⁷³ See only Heck et al., *Law Reports of Trials of Major War Criminals Vol. I*, ‘Peelus Case’, cited in: Stewart, *Corporate War Crimes* (2011) 20.

⁸⁷⁴ Stewart, *Corporate War Crimes* (2011) 20.

⁸⁷⁵ *United States v. Krauch et al.*, *Trials of War Criminals Before the Nuremberg Military Tribunals Vol. III*, ‘The IG Farben Trial’ 1081, 1133.

pillage as appropriation of either public or private property without the consent of the owner, subject to the same set of limitations set out in the 1907 Hague Regulations⁸⁷⁶.

- 561 e) **Addressees of the prohibition.** The prohibition is addressed not only to combatants but to any person, without restriction.
- 562 f) **Scope of application.** The prohibition of pillage seems to apply not only to occupied territory *stricto sensu* but also to the period which precedes the actual occupation of territory⁸⁷⁷. Accordingly, it also applies during the time of ongoing military operations⁸⁷⁸. This is confirmed by the fact that article 33 of the Fourth Geneva Convention, which had already enshrined the customary law prohibition of pillage, forms part of the general provisions of the Fourth Geneva Convention relating to the status of civilians⁸⁷⁹. Besides, the very wording of article 8 para. 2 (b) (xvi) was, as mentioned, derived from article 28 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land, which in turn figures in chapter I of that Convention dealing with means and methods of warfare. Finally, the elements of crimes, as adopted, neither contain any hint of such a limitation.
- 563 Yet, the *Katanga* decision held that the war crime of pillaging might only occur when the enemy's property has come under the control of the perpetrator since in the Chamber's view. Only then would the perpetrator be in a position to 'appropriate' such property⁸⁸⁰.
- 564 The addition of the words 'even when taken by assault' further underlines the fact that the prohibition applies to all different kinds of military situations, *i.e.* it applies regardless of whether a given area was conquered by force or whether the adversarial forces surrendered.

Preliminary remarks on subparagraphs (xvii)–(xx):

Prohibited weapons: Drafting History

- 565 The Statute confers the ICC jurisdiction over the employment of the prohibited weapons specifically described in article 8 para. 2 (b) (xvii), (xviii) and (xix). In addition, article 8 para. 2 (b) (xx) provides explicitly for the possibility to confer on the Court jurisdiction over further weapons fulfilling certain requirements by including them in an annex to the Statute.
- 566 The inclusion of offences relating to prohibited weapons was one of the most controversial and difficult issues to resolve at the Rome Conference⁸⁸¹. With regard to means of warfare and in particular weapons, contemporary international humanitarian law essentially takes two approaches. On the one hand, a general principle of humanitarian law prohibits the use of means of warfare that cause superfluous injury or unnecessary suffering or are inherently indiscriminate, leaving it to practice to specify what types of weapons and other means of warfare are thereby excluded. On the other hand, certain weapons are banned *per se* under specific treaties and customary international law. In view of these two basic and parallel approaches of humanitarian law, negotiators of the Rome Statute debated whether the ICC should have jurisdiction over exhaustively listed prohibited weapons, or rather over a generic category of weapons which would be open to evolution over time in view of the evaluation of the customary law concerned⁸⁸².

⁸⁷⁶ *Prosecutor v. Martić*, IT-95-11-T, Judgment, Trial Chamber, 10 June 2007, para. 102.

⁸⁷⁷ As to the scope of application of destroying or seizing the enemy's property under article 8 para. 2 (b) (xiii) of the Statute see Zimmermann and Geiß, above, mn 144 *et seq.*

⁸⁷⁸ Gasser, in: Fleck (ed.), *Handbook* (1995), mn 536.

⁸⁷⁹ Gasser, in: Fleck (ed.), *Handbook* (1995), mn 536.

⁸⁸⁰ *Prosecutor v. Katanga and Ngudjolo Chui*, 01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 Sept. 2008, para. 330.

⁸⁸¹ On the drafting history of article 8(2)(b)(xvii)–(xx), see von Hebel and Robinson, in: Lee (ed.), *The Making of the Rome Statute* (1999), 113–116; Schabas, *An Introduction to the International Criminal Court* (2001) 48–49; Clark (1998) 28 *CalWestILJ* 379; *id.*, *Letter to: Readers of my Tribute to Howard Berman on Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or which are Inherently Indiscriminate* (4 Aug. 1998).

⁸⁸² Some of the general clauses proposed up to the adoption of the Rome Statute were based on article 23 (e) Hague Regulations ('arms, projectiles, or material calculated to cause unnecessary suffering'), while others drew on the more modern language in Additional Protocol I, prohibiting the employment of 'weapons, projectiles and

While the 1994 ILC Draft Statute did not include any offence criminalizing the employment of prohibited weapons⁸⁸³, the Preparatory Committee considered such offence early on. The 1996 Preparatory Committee sessions resulted in two different options of weapons-related offences, the first of which criminalized the ‘employment of poisonous weapons or other weapons calculated to cause unnecessary suffering’⁸⁸⁴, while the other option contained an exhaustive list of prohibited weapons, referring to biological and chemical weapons as well as ‘projectiles which are explosive or charged with fulminating or inflammable substances’ and expanding and flattening bullets⁸⁸⁵. At the February 1997 session of the Preparatory Committee, the offence of employing poison or poisoned weapons met broad agreement and was therefore included without brackets⁸⁸⁶. In addition, the report of that session contains a longer, bracketed list of weapons, including reference to the ‘us[e] or the threat of use of nuclear weapons’. However, the list was still controversial, as was the question whether it should be exhaustive or indicative, and whether a general clause should head it⁸⁸⁷.

The December 1997 Preparatory Committee session resulted in four different options⁸⁸⁸. The first option contained a closed list of weapons referring to biological and chemical weapons as well as the three types of weapons now contained in paragraphs (xvii), (xviii) and (xix). The second option combined the same list of weapons with an open-ended clause allowing the Court to extend the list by those weapons that ‘become the subject of a comprehensive prohibition pursuant to customary or conventional international law’. The third option contained no list of weapons but only a general clause ruling out weapons and methods of warfare ‘which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate’. The last option contained a longer list of prohibited weapons, including anti-personnel mines, blinding laser weapons and ‘such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law’. These four options were eventually transmitted to the Rome Conference⁸⁸⁹.

During the first weeks of the Diplomatic Conference, there was a deadlock on the weapons issue which was only resolved – as is often the case with regard to the most difficult issues at multilateral negotiations – in the final days of the Conference⁸⁹⁰. A general clause was

material and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering’ (article 35) and weapons which are inherently ‘indiscriminate’ (in particular articles 51 para. 4 and 85 para. 3 (b) Add. Prot. I).

⁸⁸³ In contrast, article 20 (e) (i) of the 1996 ILC Draft Code criminalized the ‘employment of poisonous weapons or other weapons calculated to cause unnecessary suffering’.

⁸⁸⁴ 1996 Preparatory Committee II 60 (2a) and 62 (2a).

⁸⁸⁵ 1996 Preparatory Committee II 64: ‘(j) using certain categories of projectiles which are explosive or charged with fulminating or inflammable substances, such as those referred to in the St. Petersburg Declaration of 1868; (k) using bullets which expand or flatten easily inside the human body, as defined in the Hague Declaration of 29 July 1899;

(l) using asphyxiating, poisonous or other gases and bacteriological methods as defined in the Geneva Protocol of 1925, as well as microbial agents or toxins, as defined in the 1972 Biological Weapons Convention;

(m) using chemical weapons as defined in article 2 of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction’.

⁸⁸⁶ Preparatory Committee Decisions Feb. 1997 10.

⁸⁸⁷ Preparatory Committee Decisions Feb. 1997 10–11.

⁸⁸⁸ Preparatory Committee Decisions Dec. 1997 8–11.

⁸⁸⁹ Preparatory Committee (Consolidated) Draft 22–24.

⁸⁹⁰ A first semi-formal sign of movement was the Bureau proposal on 6 July 1998, 12 days before the end of the Rome Conference, to narrow down the options to the following three options (the first of which was based on the first two proposals forwarded to the Diplomatic Conference), Discussion Paper of the Bureau on Part 2, UN Doc. A/CONF.183/C.1/L.53 (6 July 1998), article 5 (o):

‘Option 1

Employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering:

- (i) Poison or poisoned weapons,
- (ii) Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
- (iii) Bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

supported by many delegations but rejected by others, the latter ones arguing, *inter alia*, that its vagueness did not allow combatants to know what weapons would fall under ICC jurisdiction. The nuclear powers and other delegations strongly opposed an open clause automatically including weapons that might, in the future or by the judges, be considered contrary to customary international law.

570 The vast majority of delegations agreed that the employment of biological and chemical weapons should be included as war crimes under ICC jurisdiction. Yet, a few delegations from states of the non-aligned movement, sensitive to the threat of neighbouring states possessing nuclear weapons, viewed biological and chemical weapons (based on the 1993 Convention definition) as the ‘poor man’s weapons of mass destruction’, and did not agree on nuclear weapons to be treated differently. Arab states, India, Pakistan and Pacific states strongly sponsored the inclusion of nuclear weapons under ICC jurisdiction, and they were supported by a number of other states from Africa, Asia and Latin America. However, especially the nuclear powers (apart from Pakistan and India) adamantly opposed any reference to nuclear weapons. When it became clear that an agreement to include nuclear weapons could not be reached⁸⁹¹, delegations from the non-aligned movement strongly opposed the inclusion of biological and chemical weapons⁸⁹². Since this issue was a no-go for both sides, the Conference’s Bureau proposed, as a ‘compromise’ incorporated in the take-it-or-leave-it global package of the last day, a list which did not include any explicit reference to either nuclear, biological or chemical weapons⁸⁹³. Neither did the list refer to blinding laser weapons or the controversial issue of anti-personnel mines.

571 Since the majority of delegations considered the short list of prohibited weapons under the Statute clearly unsatisfactory, subparagraph (xx) was adopted as a reminder and ‘space-holder’ to explicitly refer to the possibility to add, at a future Review Conference or Assembly of States Parties, further weapons and means of warfare to the jurisdiction of the ICC. Of course, subparagraph (xx) might seem superfluous considering that articles 121 and 123 of the Statute provide that Review Conferences may amend the Rome Statute. However, it was meant to signal that, given that the list of weapons included under the Rome Statute in 1998 was considered too short by many delegations, the future inclusion of additional weapons under ICC jurisdiction was deemed necessary and desirable by the Rome Conference.

-
- (iv) Bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,
 - (v) Chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,
 - (vi) Such other weapons or weapons systems as become the subject of a comprehensive prohibition, subject to a determination to that effect by the Assembly of States Parties, in accordance with the procedure laid down in article 111 of this Statute;

Option 2

Employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate:

[(i) – (v) are identical with (i) – (v) of Option 1]

- (vi) Nuclear weapons,
 - (vii) Anti-personnel mines,
 - (viii) Blinding laser weapons,
- [(ix) is identical with (vi) of Option 1];

Option 3

Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of international humanitarian law³.

⁸⁹¹ ‘To use the Statute to ban such weapons, despite 50 years of unsuccessful disarmament talks, might [have been] fatal for the creation of the Court’, von Hebel and Robinson, in: Lee (ed.), *The Making of the Rome Statute* (1999) 115.

⁸⁹² The Bureau proposal of 10 July 1998 had excluded nuclear weapons but still retained biological and chemical weapons, Bureau Proposal on Part 2, UN Doc. A/CONF.183/C.1/L.59 (10 July 1998), p. 6.

⁸⁹³ UN Doc. A/CONF.183/C.1/L.76 and Adds. (dated 16 July 1998, but coming out between 1 and 3 a.m. of 17 July 1998). Just before the adoption of the Draft Statute, the issue of nuclear weapons was again raised just in the Committee of the Whole, see Lee, *The Rome Conference and Its Contributions to International Law*, in: Lee (ed.), *The Making of the Rome Statute* (1999) 24–25.

Armed conflicts since 1998 have continued to witness the employment of means of warfare the legality of which is disputed. New technologies will continue to lead to the development of new and often controversial weapons⁸⁹⁴. Whether further weapons should be criminalized under the Rome Statute is therefore likely to continue to be one of the controversial issues at future Review Conferences and Assemblies of States Parties. 52

Against this background, it is not entirely surprising that no new weapons were incorporated under article 8 para. 2 (b) (xx) at the first Rome Statute Review Conference 2010 in Kampala. Both Belgium⁸⁹⁵ and Mexico⁸⁹⁶ had originally proposed to criminalize the use of further means of warfare, including biological, chemical and nuclear weapons. However, to avoid certain and strong controversy on the weapons issue – as was done also with regard to other issues that were highly controversial in Rome – it was eventually agreed to submit for discussion in Kampala only the proposal to criminalize the use of weapons listed in article 8 para. 2 (b) (xvii) – (xix) also in the context of armed conflicts not of an international character, and therefore include them under subparagraph (e). Delegations generally agreed that the prohibition of the use of these weapons in non-international armed conflicts reflects customary international law⁸⁹⁷. The plenary of the Review Conference therefore adopted this proposal by consensus and as the only amendment to the Statute regarding weapons⁸⁹⁸. 573

17. Paragraph 2(b)(xvii): Employing poison or poisoned weapons

Poison and poisoned weapons have been used as a means of warfare in ancient as well as more recent history and up until today⁸⁹⁹. Article 8 para. 2 (b) (xvii) is drawn from and identical to article 23 (a) Hague Regulations. The use of poison and poisoned weapons in times of armed conflict has been banned since ancient times⁹⁰⁰ and is subject to a well-established prohibition⁹⁰¹. Article 70 of the 1863 Lieber Code provided that '[t]he use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war'. 574

Poisoning wells has also been considered a violation of the laws and customs of war by the Responsibilities Commission of the 1919 Paris Peace Conference⁹⁰² and a war crime under 575

⁸⁹⁴ As, e. g., the use of cluster munitions and weaponry containing depleted uranium, see ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia.

⁸⁹⁵ The Belgian proposal included: the penalization of poison, poisonous gases and expanding bullets in article 8 para. 2 (e); the express criminalization of biological and chemical weapons as well as anti-personnel mines in both international and non-international armed conflicts; and the criminalization of weapons prohibited by Protocols I and IV to the Conventional Weapons Convention, i. e., non-detectable fragments and blinding laser weapons in both international and non-international armed conflicts. Letter by Belgium to the UN Secretary-General, Draft Amendments to the Rome Statute on War Crimes, 29 September 2009.

⁸⁹⁶ Mexico proposed to add the following provision to article 8 para. 2 (b): '... Employing nuclear weapons or threatening to employ nuclear weapons.' Letter by Mexico to the UN Secretary-General, Draft Amendments to the Rome Statute on War Crimes, Amendment to Article 8 of the Rome Statute of the International Criminal Court regarding the use of Nuclear Weapons, 29 September 2009.

⁸⁹⁷ See ICRC Study on Customary IHL (2005) Rules 72 and 77.

⁸⁹⁸ Resolution RC/Res. 5, Annex I.

⁸⁹⁹ This method appears to have been used by the ancient Greeks, to poison the indigenous populations of colonies including today's United States, as well as in contemporary conflicts. See, e. g., Detter, *The Law of War* (2000) 252.

⁹⁰⁰ The Indian Code of Manu of around 200 Before Christ for instance provided that 'when the king fights his foes in battle, let him not strike with weapons concealed (in wood), nor with barbed, poisoned ... These are the weapons of the wicked', Sinha (2005) 87 *IRevRC* 291. Grotius had stated that the law of nations – 'at least among the better peoples' respectively 'the European and culturally related peoples' – for a long time had prohibited to kill the enemy with poison, to use poisoned weapons or to poison wells, Grotius, *De iure belli ac pacis* (1625), Third Book, Fourth Chapter, XV and XVI. Such a prohibition was also found in article 13 (a) of a Project of an International Declaration concerning the Laws and Customs of War of the 1874 Brussels Conference and in article 8 of the 1880 Oxford Manual.

⁹⁰¹ See, e. g., Green, in: *id.* (ed.), *Essays of the Modern Law of War* (1999) 352.

⁹⁰² 'Report of the Commission' (1920) 14 *AJIL* 115.

national laws⁹⁰³. The inclusion of this war crime under the Rome Statute was not controversial at the Rome Conference⁹⁰⁴. The poisoning of wells as well as water or food supplies clearly amounts to '[e]mploying poison or poisoned weapons' under article 8 para. 2 (b) (xvii).

576 In some writers' view, article 8 para. 2 (b) (xvii) also extends to the employment of at least *certain biological* weapons. For instance, *Detter* considers the prohibition of poison or poisoned weapons 'the first prohibition of [chemical and biological weapons] and it is clear that it covers weapons deliberately contaminated with germs or poisonous agents'⁹⁰⁵. *Greenspan* similarly states that '[g]as and bacteriological warfare may be regarded as particular instances of infringements against the general prohibition of poison or poisoned weapons in war'⁹⁰⁶. Also, the US Department of the Air Force has defined 'poison' as 'biological or chemical substances causing death or disability with permanent effects when, in even small quantities, they are inserted, enter the lungs or bloodstream, or touch the skin'⁹⁰⁷.

577 It is not clear whether, as some argue, by implication the prohibition of poison also covers *gas*⁹⁰⁸. The Oxford English Dictionary defines 'poison' as '[a]ny substance which, when introduced into or absorbed by a living organism, destroys life or injures health, irrespective of mechanical means or direct thermal changes. Popularly applied to a substance capable of destroying life by rapid action, and when taken in small quantity'⁹⁰⁹, thus possibly also applying to gas. However, the employment of gas is clearly covered under article 8 para. 2 (b) (xviii), which is the more pertinent provision in this context.

578 The Preparatory Commission avoided the difficult task of defining 'poison'. Instead, it adopted a threshold relating to the effects of the substance used, changing the nature of the absolute prohibition of poison under the Rome Statute to a prohibition of using a certain substance in a certain way that can be expected to create a defined result. Element 2 for article 8 para. 2 (b) (xvii) requires that '[t]he substance [employed or released by the employed weapons] was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties'. The reference only to toxic properties suggests, firstly, that biological weapons are not covered. Secondly, the reference only to 'death or serious damage to health' suggests that attacks against animals or plants, for instance the use of herbicides, that do not seriously endanger the health of humans are not covered under subparagraph (xvii). Thirdly, the requirement of the result of 'death or serious damage to health in the ordinary course of events' establishes a minimum threshold⁹¹⁰. The phrase 'in the ordinary course of events' requires interpretation. The effect of certain substances on humans depends on factors such as the dosage and the concentration effecting the organism, the state and sensitivity of the organism as well as how the substance enters the organism. Alcohol, medicines and even numerous components of food consumed daily by millions of humans can be deadly in a high dosage. As Paracelsus rightly found, the difference between a poison and a medicine often lies only in the dosage. One way to understand the phrase 'in the ordinary course of events' might be as requiring that the amount or rather concentration of the substance would in circumstances comparable to those in which it is intended to be used likely cause death or serious damage to health. It is, therefore, to be construed as a restrictive requirement of this provision; it is meant to exclude from the scope of article 8

⁹⁰³ See, e.g., Australian Law Concerning Trials of War Criminals by Military Courts, V *Law Reports* 96 (1948); Netherlands East Indies Statute Book Decree No. 44 of 1946, XI *Law Reports* 94 (1949); Chinese Law governing the Trial of War Criminals of 24 Oct. 1946, XIV *Law Reports* 154 (1949); for further examples, see ICRC Study on Customary IHL (2005) Rule 72.

⁹⁰⁴ It had already been proposed in article 20 (e) (i) of the 1996 ILC Draft Code.

⁹⁰⁵ *Detter*, *The Law of War* (2000) 252.

⁹⁰⁶ *Greenspan*, *The Modern Law* (1959) 359.

⁹⁰⁷ U.S. Air Force's 1976 manual, *International Law: The Conduct of Armed Conflict and Air Operations* 6-5.

⁹⁰⁸ See Kelsen, *Principles of International Law* (1966) 97. See also Oeter, in: Fleck (ed.), *Handbook IHL* (2013), marginal no. 437.

⁹⁰⁹ *Oxford English Dictionary* VII (1933) 1056.

⁹¹⁰ The addition of the qualifier 'serious' initially met some opposition, but was eventually adopted.

para. 2 (b) (xvii) such means of warfare the result of which – death or serious damage to health – is not inherent in the weapon itself, but rather accidental.

Article 8 para. 2 (b) (xvii) overlaps to a considerable degree with the war crime of using 579 gases and analogous liquids, materials and devices under article 8 para. 2 (b) (xviii), since the latter prohibition applies also to poisonous gases and possibly to poison in general, see below. With regard to gaseous forms of poisonous weapons, however, subparagraph (xviii) must be considered *lex specialis* in relation to subparagraph (xvii).

18. Paragraph 2(b)(xviii): ‘Employing gases and analogous liquids, materials or devices’

a) **Humanitarian law base and drafting history.** Article 8 para. 2 (b) (xviii) is drawn from 580 the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare which prohibits ‘the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices’. This prohibition is considered part of customary international law⁹¹¹.

The Protocol itself indicates that it reaffirms a pre-existing ban. In fact, the prohibition is 581 reflected with similar or even identical wording in several international instruments, in particular the 1899 Hague Declaration concerning Asphyxiating Gases (IV, 2), the Washington Treaty relating to the Use of Submarines and Noxious Gases in Warfare of 6 February 1922, which never entered into force since France did not ratify it, and in several peace treaties of 1919–1920, most notably in article 171 para. 1 of the Versailles Peace Treaty which contains the words ‘[t]he use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited ...’⁹¹².

As described above, the inclusion of offences criminalizing the employment of weapons of 582 mass destruction was one of the most controversial issues at the Rome Conference. While an offense explicitly referring to ‘chemical weapons’ or to the 1993 Chemical Weapons Convention was not retained, subparagraph (xviii) survived. It cannot be excluded that some delegates at the Rome Conference were not fully aware that the eventually agreed language generally had been understood to also refer to chemical weapons. The wording dating back to 1925 gave rise to substantial discussion within the Preparatory Commission, including the question as to how far developments in the law relating to chemical and biological warfare since 1925 had to be taken into account, given the exclusion of an explicit reference to the 1993 Convention. The Preparatory Commission tried to partially clarify the vague wording stemming from the 1925 Protocol, debating in particular whether and, if so, to what extent the use of riot control agents would be criminalized under article 8 para. 2 (b) (xviii).

b) **Material elements. aa) Chemical weapons.** The wording of the 1925 Geneva Protocol, 583 as repeated in article 8 para. 2 (b) (xviii), has generally been understood to apply to a broad range of chemical weapons⁹¹³. The UN General Assembly for instance recognized in its Resolution 2603 A of 1969, adopted with 80 votes in favor, 3 against and 36 abstentions, that ‘the Geneva Protocol embodies the generally recognized rules of international law prohibiting the use in international armed conflicts of *all biological and chemical methods of warfare*, regardless of any technical developments’ and declared ‘as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Protocol], the use in

⁹¹¹ See, e.g., Goldblat, *Arms Control: The New Guide to Negotiations and Agreements* (2002) 137; Oeter, in: Fleck (ed.), *Handbook IHL* (2013), marginal no. 437; UN Doc. A/RES/2603 A (XXIV) (16 Dec. 1969); Final Declaration of the Conference of States Parties to the 1925 Geneva Protocol and other Interested States on the Prohibition of Chemical Weapons (7–11 Jan. 1989).

⁹¹² See, e.g., Goldblat, *Arms Control* (2002) 135; Van Wynen and Thomas, *Legal Limits on the Use of Chemical and Biological Weapons* (1970).

⁹¹³ See, e.g., Goldblat (1997) *IRevRC* 251, (‘the Geneva Protocol ... banned the use of asphyxiating, poisonous or other gases, usually referred to as chemical weapons’).

international armed conflict of: (a) *Any chemical agents of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effects on man, animals or plants ...*⁹¹⁴. Similarly, states parties to the 1993 Chemical Weapons Convention ‘recall[ed] that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the [1925 Geneva Protocol], [r]ecogniz[ed] that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925 ... [and were] [d]etermined ... to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925’⁹¹⁵. The UN Security Council likewise has condemned ‘the use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq, in violation of obligations under the [1925 Geneva Protocol]’⁹¹⁶.

584 Based on the differing French and English version, there are two main interpretations as to what types of *gases* are ruled out by the prohibition. The English wording covers *all* types of gases since it refers to ‘asphyxiating, poisonous or *other* gases’ (emphasis added) without qualifying the term ‘other’. The French version of both article 8 para. 2 (b) (xviii) as well as the 1925 Geneva Protocol (which is authentic in both French and English) however refers to *similar* gases⁹¹⁷, suggesting that only gases with an effect similar to asphyxiation or poisoning are covered. According to *Bothe*, the drafting history of the 1925 Geneva Protocol as well as the *opinio iuris* after World War I indicates however that all types of gases were meant to be prohibited⁹¹⁸. Several authors⁹¹⁹ as well as the above-cited resolution of the UN General Assembly⁹²⁰ affirm that ‘any’ gaseous chemical substance is prohibited. Element 1 for article 8 para. 2 (b) (xviii) reflects the view of the Preparatory Commission that all gases are covered under the prohibition: ‘The perpetrator employed a gas ...’. One can therefore say that while the text of the Protocol allows both a restrictive and a broad interpretation, states parties to the Protocol have interpreted it broadly⁹²¹.

585 A particularly difficult issue debated by the Preparatory Commission is whether the prohibition under article 8 para. 2 (b) (xviii) also applies to *riot control agents* such as tear gas (insofar, of course, as it is used in the context of an armed conflict). One author, *Spaight*, noted in 1947 that ‘[t]he Gas Protocol prohibits ... not only poisonous and asphyxiating gases but also ‘other gases’ and (to emphasize the comprehensiveness of the prohibition) ‘all analogous liquids, materials or devices’. It condemns, therefore, not only lethal but also non-toxic or anesthetic gases. The argument that the use of a gas is permissible because its effect is not to kill but merely to stupefy temporarily those within its radius of action, cannot be sustained in face of the definite terms of the treaty’⁹²².

586 In 1930, the Preparatory Commission for the Disarmament Conference attempted to clarify this issue with regard to the 1925 Geneva Protocol. The French, the British as well as eleven other members of the Commission took the view that also lachrymatory gases such as tear gas are prohibited under the Protocol. Only the US, which was not party to the Protocol at that time, dissented and argued that it would be inconsistent to prohibit the use of gases in

⁹¹⁴ UN Doc. A/RES/2603 A (XXIV) (16 Dec. 1969) (emphasis added).

⁹¹⁵ Preamble, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 13 Jan. 1993.

⁹¹⁶ UN Doc. S/RES/620 (26 Aug. 1988).

⁹¹⁷ ‘Le fait d’utiliser des gaz asphyxiants, toxiques ou *similaires* ...’ (emphasis added), as corrected on 30 November 1999.

⁹¹⁸ See, e.g., *Bothe*, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. III (1982) 84.

⁹¹⁹ See, e.g., *Bothe*, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. III (1997) 84; Sandoz, *Des Armes Interdites en Droit de la Guerre* (1975) 88. See also Detter, *The Law of War* (2000) 258.

⁹²⁰ UN Doc. A/RES/2603 A (XXIV) (16 Dec. 1969).

⁹²¹ Baxter and Buergenthal (1970) 64 AJIL 866.

⁹²² *Spaight*, *Air Power and War Rights* (3rd ed., 1947), cited in Whiteman (1968) 10 *Digest of International Law* 459. See also Rousseau, *Le Droit des Conflits Armés* (1983) 119 *et seq.*

armed conflict situations while they could be used in peacetime for police purposes⁹²³. The British government changed its position on 2 February 1970 because of its desire to use tear gas in Northern Ireland, announcing that the UK considered CS (a particular type of tear gas) and other such gases as outside the Protocol's scope, arguing that CS is not significantly harmful to man in other than exceptional circumstances and that CS smoke could be distinguished from older forms of tear gas as they existed in 1930⁹²⁴.

However, the 1993 Chemical Weapons Convention does not prohibit riot control agents as long as they are not used as a *method of warfare* but intended for '[l]aw enforcement including domestic riot control purposes', and provided the types and quantities are consistent with such purposes⁹²⁵. Article II para. 7 of the Convention defines 'riot control agents' as '[a]ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure'. Some however argue that the vague phrase 'as a method of warfare' includes any action involving 'combatants', including traditional hostage rescue missions and human shields scenarios⁹²⁶.

Today, the US considers the Protocol as applying to lethal and incapacitating agents, which are defined as 'chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated'⁹²⁷. Executive Order No. 11850 provides in more detail the US policy regarding riot control agents in armed conflict situations⁹²⁸. The use of riot control agents and chemical herbicides in war requires the approval of the US President⁹²⁹. In view of the US ratification of the Chemical Weapons Convention, the US Operational Law Handbook notes that 'the authority to use RCA is potentially easier to obtain when the United States is not involved in a "war"', while also referring to the President's certification document which states that 'the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations'⁹³⁰.

The Preparatory Commission had devoted particular attention to the question whether article 8 para. 2 (b) (xviii) would also apply to riot control agents. It was argued that it would

⁹²³ League of Nations, Preparatory Commission, Disarmament Conference, X, 6th sess. 311 (1931), cited in Detter, *The Law of War* (2000) 257 (fn. 358 and 359). See also Roberts and Guelff (eds.), *Documents on the Laws of War* (3rd ed., 2000) 155–156.

⁹²⁴ Statement by the Foreign Secretary, 795 HC, 1970, col. 18, cited in, Detter, *The Law of War* (2000) 257 (fn. 364). See also Roberts and Guelff (eds.), *ibid.*, 156.

⁹²⁵ See articles I para. 5 and II paras. 1 (a) and 9 (d).

⁹²⁶ U.S. Army, Judge Advocate General's School, *Operational Law Handbook* (2002) 16, Chapter 2.

⁹²⁷ See U.S. Army, *Operational Law Handbook* (2002) 15, Chapter 2; U.S. Army, *Field Manual* (1956) 27–10, paras. 38 c and 38 d.

⁹²⁸ 'The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within US bases and installations or around their immediate defensive perimeters, and first use of riot control agents in war except in defensive military modes to save lives such as:

- (1) Use of riot control agents in riot control situations in areas under direct and distinct US military control, to include controlling rioting prisoners of war.
- (2) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
- (3) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.
- (4) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations'.

Executive Order No. 11850, 40 Fed. Reg. 16187 (1975), cited in: U.S. Army, *Operational Law Handbook* (2014) 29, Chapter 2.

⁹²⁹ *Ibid.*

⁹³⁰ Cited in U.S. Army, *Operational Law Handbook* (2014) 29, Chapter 2. These situations are defined as those 'in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces'. The certification was made upon the requirement of the Senate that 'the U.S. is not restricted by the [Chemical Weapons Convention] in its use of riot control agents, including the use against 'combatants' in any of the following cases: when the U.S. is not a party to the conflict, in consensual (Chapter VI, UN Charter) peacekeeping operations, and in Chapter VII (UN Charter) peacekeeping operations', *ibid.*

be paradoxical if peace-keeping forces striving to control riots in situations where humanitarian law might apply, such as in UNMIK in Kosovo, could use bullets but not tear gas, since the latter generally would be less harmful.

590 However, a major concern at the time of the adoption of the Geneva Protocol of allowing any gas, including riot control agents, in armed conflict situations was that the adversary is usually unable to determine, at least *prima facie*, what types of gas and chemical substances are being used against them. Consequently, they may mistakenly reply ‘in kind’, leading to a full-out chemical weapons war. While this risk may have been higher in situations like the World War I trenches, a number of delegations as well as the ICRC argued that it should still not be underestimated. Also, it is difficult to distinguish between lethal and non-lethal agents. Gases generally considered ‘non-lethal’ may well be deadly or extremely harmful when used in high dosage, against particularly vulnerable persons like children or under other circumstances⁹³¹. The risk of a response ‘in kind’ because of mistaking irritating or disabling agents for lethal chemical weapons may be less predominant in a contemporary peace-keeping environment where international forces *de facto* discharge police functions including riot control (for instance in Kosovo after June 1999), and maybe also in long-term occupations with an occupying power discharging law and order functions.

591 In any event, the Preparatory Commission took the view that the use of non-lethal riot control agents in many circumstances would not constitute a war crime under the Rome Statute. Element 2 for article 8 para. 2 (b) (xviii) requires that ‘[t]he gas, substance or device was such that it *causes death or serious damage to health in the ordinary course of events ...*’ (emphasis added), establishing a minimum threshold focusing on the agent’s effect. This threshold however again requires interpretation. As explained above, substances generally described as non-lethal may become lethal depending on dosage, circumstances etc. The use of tear gas in closed rooms for instance may considerably raise the risk of death⁹³². While many were of the opinion that the minimum threshold focusing on the agent’s effect would exclude prosecution by the ICC of conduct that may be unlawful under general or broadly accepted conventional international law, the threshold was accepted based on jurisdictional grounds, that is, that the ICC should only deal with the most serious crimes. To ensure that the elements, seen by many delegations as more restrictive than required under general or conventional international law⁹³³, will be read as specific to the jurisdiction of the ICC and not as a reflection of international law, footnote 48 was added to element 2, underlining that ‘[n]othing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to development, production, stockpiling and use of chemical weapons’. Nonetheless, there is no room for generalization: Insofar as a certain type of riot control agent has asphyxiating or toxic properties or is fashioned in a way to bring

⁹³¹ On non-lethal weapons and international law more generally, see, e.g., Heintze (2000) 18 *Sicherheit und Frieden* 2.

⁹³² For an overview of the hostage crisis in a Moscow theatre in 2002 during which a type of riot control agent was used and why, nonetheless, this incident does not serve to argue that riot control agents should be included as criminal under article 8 para. 2 (b) (xviii), see Křivánek, *The Weapons Provisions in the Rome Statute of the International Criminal Court and in the German Code of Crimes Against International Law* (2010) 49–52.

⁹³³ See, for instance, article II paras. 1 and 2 of the 1993 Chemical Weapons Convention:

‘For the purposes of this Convention:

1. ‘Chemical Weapons’ means the following, together or separately:
 - (a) Toxic chemical and their precursors, except where intended for purposes not prohibited under this Convention [see para. (9)], as long as the types and quantities are consistent with such purposes;
 - (b) Munitions and devices, specifically *designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices; ...*
2. ‘Toxic Chemicals’ means: Any chemical which through its chemical action on life processes *can cause death, temporary incapacitation or permanent harm to humans or animals*. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere’ [emphasis added].

about death or serious damage to health in the ordinary course of events, the criminalization of its use according to Article 8 (2) (b) (xviii) of the Statute is not questionable⁹³⁴.

By requiring ‘death or serious damage to health’, element 2 for article 8 para. 2 (b) (xviii) also suggests that *herbicides* (agents the toxic effect of which mainly works on plants) were not meant as being automatically covered under the elements. Whether the 1925 Geneva Protocol also covers attacks against animal or plant life, including herbicides, is in fact controversial⁹³⁵. Nonetheless, the UN General Assembly declared in 1969 that the use in warfare of chemical agents which have their direct toxic effects on plants is ‘contrary to the generally recognized rules of international law’⁹³⁶. Also, the 1993 Chemical Weapons Convention recognizes in its Preamble ‘the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare’ (emphasis added).

The term ‘*device*’ in ‘all analogous liquids, materials and devices’ is very broad and means technique, procedure and method⁹³⁷. Some delegations initially were in favor of deleting the word ‘device’ in the elements. It was, however, repeated also in the elements, since the term had been included in the 1925 Geneva Protocol to provide as broad a definition as possible. A commentary to the Protocol notes that the term ‘device’ ‘marks once more the intention of the authors [of the 1925 Geneva Protocol] to give to their definition a comprehensive and open-ended character’ and that otherwise ‘[i]t could be claimed, for instance, that ... an aerosol, which is a suspension of solid particles or liquid droplets in air, is neither a gas nor a liquid, a material or a substance’⁹³⁸. Correspondingly, article 8 para. 2 (b) (xviii) might also extend to aerosol bombs, which are for instance used to fight combatants hiding out in a narrow valley or in caves.

In elements 1 and 2, the use of the word ‘substance’ instead of liquids and materials was not meant to indicate any change in substance⁹³⁹. The term ‘analogous’ however is incorrectly used in element 1. In the 1925 Geneva Protocol, the term ‘analogous’ is used to provide that the effects of the liquid, material or device must be similar to the effects of ‘asphyxiating, poisonous or other gases’⁹⁴⁰. The ICJ has affirmed that the words ‘analogous materials or devices’ ‘have been understood, in the practice of States, in their ordinary sense as covering *weapons whose prime, or even exclusive, effect is to poison or asphyxiate*’⁹⁴¹. The German Military Manual also states that the prohibition ‘does not refer to unintentional and insignificant secondary effects of otherwise permissible means of warfare’⁹⁴². Oeter commented that ‘if the asphyxiating or poisoning effect is merely a side-effect of a physical mechanism intended principally to cause totally different results (as, e.g., the use of nuclear weapons), then the relevant munitions do not constitute a

⁹³⁴ Garraway points to the understanding reached at the Rome Conference that ‘the use of riot control agents in most circumstances would be excluded from the scope of this offence’ (emphasis added); Garraway, in: Lee *et al.* (eds.), *Elements of Crimes* (2001) 180.

⁹³⁵ Bothe for instance finds in 1982 that ‘in the light of reservations and opposition expressed in UN debates, the expressions of *opinio juris* are not as numerous as would be necessary for the formation of a customary rule’ prohibiting herbicides. Bothe, in: *Encyclopedia of Public International Law, Vol. III* (1982) 85. The US is also of the view that the prohibition does not cover herbicides, see, e.g., Executive Order No. 11850, cited in: U.S. Army, *Operational Law Handbook* (2014) 29, Chapter 2.

⁹³⁶ UN Doc. A/RES/2603 A (XXIV) (16 Dec. 1969).

⁹³⁷ The original French wording adopted in July 1998 in Rome referred to ‘*engins analogues*’ (emphasis added), which means rather tool, machine, apparatus. The wording corrected on 30 Nov. 1999 however refers to ‘*procédés analogues*’ (emphasis added), which means procedure, technique, method.

⁹³⁸ Stockholm Int’l Peace Research Institut (ed.), *The Problem of Chemical and Biological Warfare*, Vol. III (1973) 45.

⁹³⁹ See also Garraway, in: Lee *et al.* (eds.), *Elements of Crimes* (2001) 180.

⁹⁴⁰ *Ibid.*

⁹⁴¹ ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), para. 55 (emphasis added).

⁹⁴² *Law of Armed Conflict, Manual*, Joint Service Regulation 15/2, May 2013, DSK V230100262, marginal no. 472.

“poisonous gas”⁹⁴³. *Bothe* similarly found that ‘[w]here the primary injuring effect of a weapon results from heat or pressure, the weapon is not to be regarded as a chemical agent of warfare’⁹⁴⁴.

595 While many countries had initially reserved their right to use gases prohibited under the 1925 Geneva Convention as a reaction to their employment by an adversary, accepting only the obligation not to use them first⁹⁴⁵, article 120 of the Rome Statute does not permit any reservations. Article 8 para. 2 (b) (xviii) Rome Statute therefore applies to any employment – ‘first’ or ‘second’ use – of such gases in armed conflict situations.

It results from the above that a wide range, if not most chemical weapons can be subsumed under article 8 para. 2 (b) (xviii)⁹⁴⁶.

596 **bb) Biological weapons.** A further issue is whether article 8 para. 2 (b) (xviii) and more specifically the phrase ‘analogous liquids, materials or devices’ also applies to *biological weapons*. Biological agents of warfare have been defined as ‘living organisms, whatever their nature, or infective material derived from them – which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked’⁹⁴⁷. While toxins produced by living organisms scientifically constitute chemical agents, they are generally considered together with or as biological agents of warfare⁹⁴⁸.

597 Whereas the wording of subparagraph (xviii) does not clearly exclude its application also to liquids, materials or devices containing or using biological agents, the states that adopted the 1925 Geneva Protocol apparently took the view that the phrase ‘the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices’ does not extend to the use of bacteriological methods of warfare. This is implicit in the Protocol’s formulation that ‘the High Contracting Parties ... accept [the] prohibition [of the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices] [and] agree to *extend* this prohibition to the use of bacteriological methods of warfare ...’ (emphasis added). Even though the term ‘bacteriological’ is scientifically narrower than the term ‘biological’, it has generally been understood that the Geneva Protocol’s extension to ‘bacteriological methods of warfare’ applies to all biological weapons, including to viruses, fungi or rickettsiae not known at the time the Geneva Protocol was adopted⁹⁴⁹.

598 In view of the above as well as the reference to the ‘asphyxiating or toxic properties’ of the gas, substance or device in element 2, it appears that biological weapons are not generally covered under article 8 para. 2 (b) (xviii). Yet, the use of biological weapons could well result in excessive incidental civilian casualties and therefore amount to a war crime under article 8 para. 2 (b) (iv).

⁹⁴³ Oeter, in: Fleck (ed.), *Handbook IHL* (2013), marginal no. 437.

⁹⁴⁴ *Napalm* for instance may lead to asphyxiation by the reduction of oxygen and may lead to festering burn injuries often leading to cancerous degenerations. Since its primary effects are, however, fire and heat, it is doubtful whether bombs using Napalm could be qualified as ‘analogous’ devices, *Bothe*, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I (1982) 566.

⁹⁴⁵ Besides, a number of states have wholly or partially withdrawn their earlier reservations, and it seems doubtful whether, today, retaliation in kind with weapons prohibited under the 1925 Geneva Protocol accords with contemporary international law or the 1972 and 1993 conventions. See, e.g., Roberts and Guelff (eds.), *Documents* (2000) 155.

⁹⁴⁶ Compare, however, the wording of article 8 para. 2 (b) (xviii) with, e.g., section 12 para. 1 no. 2 of the German Code of Crimes against International Law, which explicitly penalizes the use of chemical weapons. See also *Law of Armed Conflict, Manual*, Joint Service Regulation 15/2, May 2013, DSK V230100262, marginal nos. 466 *et seq.*, and Křivánek, *The Weapons Provisions* (2010) 118 *et seq.*

⁹⁴⁷ UN Doc. A/RES/2603 A (XXIV) (16 Dec. 1969).

⁹⁴⁸ See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972; *Bothe*, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I (1982) 566; Rauch, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. III (1982) 45; Oeter, in: Fleck (ed.), *Handbook IHL* (2013), marginal no. 441.

⁹⁴⁹ See, e.g., Goldblat (1997) *IRRevRC* 251; Rauch, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. III (1982) 45.

cc) **No applicability to nuclear weapons.** Article 8 para. 2 (b) (xviii) does not appear to apply to *nuclear weapons*, if only because the primary effects of nuclear weapons are not asphyxiating, poisonous or similar effects, but rather explosive, light/heat and radiation effects⁹⁵⁰.

19. Paragraph 2(b)(xix) ‘bullets which expand or flatten easily in the human body’

a) **Humanitarian law base and drafting history.** The wording of article 8 para. 2 (b) (xix) is drawn from the 1899 Hague Declaration (Declaration 3) Concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body. This proscription is considered part of customary international humanitarian law⁹⁵¹. Bullets with certain features, such as bullets not completely surrounded by hard casing or notched with incisions, tend to flatten and expand when impacting upon the human body. This effect may cause significantly more serious injury than an equivalent standard bullet would, injury which often is particularly difficult to treat and may be unnecessary to arrive at legitimate military aims. This is why the declaration prohibited such bullets, ‘inspired by the sentiments which found expression in the [1868] Declaration of St. Petersburg⁹⁵²:

‘Considering: That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity ...’.

The intended object of the prohibition in the 1899 Hague Declaration was the projectile developed by the British Army for use against tribesmen in India, which had become known as the ‘dum-dum bullet’⁹⁵³.

b) **Material elements.** Article 8 para. 2 (b) (xix) criminalizes bullets that have the *effect* described⁹⁵⁴. The offense thus applies both to bullets having that effect because of the fashion in which they are manufactured, as well as to standard bullets ‘converted’ by individual soldiers and combatants on the battlefield, namely by piercing them with incisions⁹⁵⁵.

As to the types of bullets prohibited, article 8 para. 2 (b) (xix) mentions two examples of bullets ‘which expand or flatten easily in the human body’, namely bullets ‘with a hard envelope which does not entirely cover the core’ or ‘with a hard envelope which ... is pierced with incisions’. As the words ‘such as’ in the offense’s definition make clear, this list of

⁹⁵⁰ See, however, ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* paras. 55–56 (8 July 1996) and the Dissenting Opinion of Judge Weeramantry, in particular at IV(2)(d) and III(7) (‘The deliberate act of spreading lethal disease, be it by chemicals or germs or poisons or noxious fumes, has, even in ancient times been considered to be contrary to the laws of war. ... Nowhere in the age-old history of the laws of war – ancient or modern – is there found a principle which permits the poisoning of the enemy forces, leave alone the poisoning of the enemy population *en masse*. This is what nuclear weapons do (see my Dissent in the General Assembly Request, section II) – apart, that is, from poisoning the populations of non-combatant countries’); Dissenting Opinion of Judge Koroma. See also, e.g., Oeter, in: Fleck (ed.), *Handbook IHL* (2013), marginal no. 432; Kalivretakis (2001) 15 *EmoryILRev* 683; Matheson (1997) 91 *AJIL* 417; Chesterman (1997) 44 *NethILRev* 149.

⁹⁵¹ McCoubrey, *International Humanitarian Law* (1998) 232–233.

⁹⁵² Preamble of the 1899 Hague Declaration, referring to the Declaration to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, signed at St. Petersburg 29 Nov.–11 Dec. 1868.

⁹⁵³ Dum Dum was a British arsenal near Kolkata, where these bullets were invented, Vagts, *The Hague Conventions and Arms Control*, (2000), 94 *AJIL* 34. On the historical background of this declaration, see Kalshoven (1985 II) 191 *RDC* 213–217.

⁹⁵⁴ The original French version adopted in Rome ‘le fait d’utiliser des balles qui *se dilatent* ou s’aplatissent’, was corrected (on 30 Nov. 1999) to ‘le fait d’utiliser des balles qui *s’épanouissent* ou s’aplatissent’ (emphasis added), in accordance with the French text of the 1899 Declaration.

⁹⁵⁵ See, e.g., McCoubrey, *International Humanitarian Law* (1998) 232.

prohibited bullets is only illustrative and not exhaustive. Further guidance to determine what bullets might be covered under article 8 para. 2 (b) (xix) can be found in the ‘sentiments which found expression in the [1868] St. Petersburg Declaration’, to which the Preamble of the 1899 Hague Declaration refers, including the prohibition of the ‘employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable’. These intentions, although not necessarily the technical specifications laid down in the 1868 St. Petersburg Declaration, remain valid to date. The German Military Manual prohibits more broadly ‘projectiles designed: to burst open or deform upon entering the human body; that start to tumble in the human body; or to cause shock waves leading to extensive tissue damage or even lethal shock’⁹⁵⁶. The US Department of the Army also has considered that a bullet ‘that will explode on impact with the human body would be prohibited by the law of war from use for antipersonnel purposes’⁹⁵⁷.

603 At any rate, in accordance with the clear wording of article 8 para. 2 (b) (xix), the bullets must ‘expand or flatten easily in the human body’. During the negotiations of the material elements for article 8 para. 2 (b) (xix), several delegations were concerned that the use of bullets, which expand or flatten easily in the human body, would be criminalized under any circumstances relating to armed conflicts. However, expanding bullets are used by some domestic police forces and other law enforcement agencies particularly for situations like hostage liberations where the use of an expanding instead of a conventional bullet decreases the risk of collateral damage to the hostages⁹⁵⁸. While hostage-taking may not typically arise in international armed conflicts of a traditional nature, it has occurred repeatedly in recent conflicts and, as was argued, may increasingly occur in future conflicts and conflicts with ‘terrorism’-related aspects. In addition, international peace-keeping forces are increasingly entrusted with police-like tasks in ongoing conflicts. Some delegations accordingly argued that expanding bullets were, under contemporary international law, not absolutely prohibited and that the ICC should not have jurisdiction over their use in situations such as a hostage liberation.

604 The Preparatory Commission however did not define situations in which the use of expanding bullets would not fall under ICC jurisdiction, but rather decided to require that the use of such bullets ‘violates the international law of armed conflict because they expand or flatten easily in the human body’. While this does not clarify the underlying issue, it opens the possibility to argue before the Court that a particular use of expanding bullets in hostage-taking situations or similar situations in a domestic law enforcement capacity would not violate such law⁹⁵⁹. It is however submitted that the use of such bullets as a method of warfare in a traditional warfare situation remains prohibited.

605 **c) Mental elements.** The transformation of the state obligation of not employing expanding bullets into a criminal offense defining the circumstances under which an individual incurs criminal responsibility poses particular problems with regard to article 8 para. 2 (b) (xix). Article 30 Rome Statute appears to require more than the knowledge and intent to use a bullet (which would effectively amount to a strict liability standard), namely the knowledge that the bullet used expands or flattens easily in the human body in the ordinary course of events. Many simple foot soldiers however may be oblivious to the precise scientific effect on the human body of the bullet they receive or change according to a common practice in their company. They might however know that the bullet causes particularly grave injuries.

⁹⁵⁶ *Law of Armed Conflict, Manual*, Joint Service Regulation 15/2, May 2013, DSK V230100262, marginal no. 440.

⁹⁵⁷ Memorandum for US Army Armament Research, Development and Engineering Center (19 Feb. 1998), cited in *ICRC Study on Third Set of War Crimes Within Art. 8(2)(B) Rome Statute* 16 (4 August 1999). The ICRC also stated that there was a general consensus at an Expert Meeting in Geneva from 29 to 30 March 1999 on exploding bullets that ‘the prohibition on the intentional use against combatants of bullets which explode upon impact with the human body, which originated in the 1868 St. Petersburg Declaration, continues to be valid’, *ibid.*

⁹⁵⁸ Another form of domestic use of such bullets, for instance, is aircraft security.

⁹⁵⁹ See Garraway, in: Lee *et. al.* (eds.), *Elements of Crimes* (2001) 181.

The Preparatory Committee debated various solutions to this difficult problem. One was that the perpetrator ‘knew or should have known’ that such bullets expand or flatten easily, a clear deviation from the article 30 standard⁹⁶⁰. Another proposal was that the perpetrator must be ‘aware of the prohibited status of the bullet’. This however would have introduced a strict mistake of law defense deviating from the article 32 standard. 606

As Garraway points out, the solution eventually adopted was to focus on the purpose of and ‘philosophy’ behind the prohibition⁹⁶¹. As stated above, the 1899 Hague Declaration refers to the sentiments expressed in the 1868 St. Petersburg Declaration which prohibits the employment of arms ‘which uselessly aggravate the sufferings of disabled men, or render their death inevitable’. The Preparatory Commission thus eventually adopted the mental requirement that the perpetrator ‘was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect’⁹⁶². 607

This of course leaves the ICC judges with the (difficult) task of interpreting the vague term ‘uselessly’ as used in element 3. The mental requirement in element 3 is a creation of the Preparatory Commission and must be interpreted in accordance with the Rome Statute and the underlying prohibition. In view of the objective of the 1899 Hague Declaration, element 3 clearly cannot mean that a person knowing that the expanding or flattening effect of a bullet offers a military advantage becomes immune to criminal responsibility. Delegations at the Preparatory Committee certainly did not want to automatically exempt from criminal responsibility persons of high rank issuing expanding bullets to be used in traditional warfare situations, irrespective of whether this person is convinced that the effect serves military goals since aggravating the wounds of adversary soldiers. The prohibition of dum-dum bullets does not allow for a ‘military necessity’ exception. 608

20. Paragraph 2(b)(xx): ‘Employment of means or methods of warfare included in an annex to this Statute’

Article 8 para. 2 (b) (xx) does not contain any operative definition of an offense. Instead, it refers to the possibility of a Review Conference, the first having taken place in Kampala in 2010 without any amendments based on this provision, or an Assembly of States Parties to add further weapons or methods of warfare under the jurisdiction of the ICC in accordance with the relevant amendment provisions set forth in articles 121 and 123 Rome Statute. This assertion in subparagraph (xx) is essentially superfluous, since states parties to the Rome Statute are free to add new crimes to the Rome Statute regardless of this specific provision. Nonetheless, it was adopted as a political signal that the current list of prohibited weapons is unsatisfactory and far from exhaustive⁹⁶³. 609

Article 8 para. 2 (b) (xx) stipulates that weapons, projectiles or material or methods of warfare to be added must, *firstly*, be ‘of a nature to cause superfluous injury or unnecessary suffering’ or be ‘inherently indiscriminate’ in violation of international humanitarian law. This wording is particularly based on concepts articulated in articles 48 and 51 paras. 4 and 5 Add. Prot. I. *Secondly*, these weapons, projectiles, material or methods of warfare must be the subject of a ‘comprehensive prohibition’. These conditions raise the question of the relation between article 8 para. 2 (b) (xx) and articles 121 and 123. Since states are free to bind themselves contractually, a Review Conference or Assembly of States Parties must also legally 610

⁹⁶⁰ The elements for article 8 para. 2 (b) (vii)-1, -2 and -4, (b) (xxvi) and (e) (vii) contain such a deviation.

⁹⁶¹ See Garraway, in: Lee *et. al.* (eds.), *Elements of Crimes* (2001) 182.

⁹⁶² It would have been preferable – since clearer – if the Preparatory Commission had repeated the entire relevant wording of the 1868 St. Petersburg Declaration. Element 3 could for instance have required that ‘[t]he perpetrator knew or should have known that the nature of the bullet was contrary to international humanitarian law or that it uselessly aggravates the sufferings of disabled men or renders their death inevitable’.

⁹⁶³ For the drafting history of this provision, *see above*.

be free to deviate from the two conditions under article 8 para. 2 (b) (xx)⁹⁶⁴. Nonetheless, the two conditions bear at least some political relevance. It is unlikely that states parties to the Rome Statute will want to criminalize the use of weapons that are not subject to a ‘comprehensive prohibition’ or are not ‘of a nature to cause superfluous injury or unnecessary suffering’ or ‘inherently indiscriminate’, considering these are the same notions that are the basis of the criminalization of the weapons in subparagraphs (xvii) – (xix).

611 The prohibition to cause unnecessary suffering or superfluous injury and the obligation to distinguish between combatants and non-combatants, that is, between legitimate military targets and illegitimate civilian targets, have become cardinal principles of international humanitarian law. Accordingly, weapons of a nature to cause such suffering or injury or which are inherently indiscriminate have become prohibited under humanitarian law⁹⁶⁵. Unnecessary suffering or superfluous injury may be understood as suffering or injury that is disproportionate and excessive in relation to the lawful military advantage pursued. Article 51 para. 4 Add. Prot. I prohibits indiscriminate attacks and defines them as ‘... b) those which employ a method or means of combat which cannot be directed at a specific military objective; or c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction’⁹⁶⁶.

612 The meaning of the term ‘comprehensive prohibition’ is not entirely clear. Earlier drafts had used the wording ‘such other weapons or weapons systems as become the subject of a *comprehensive prohibition pursuant to customary or conventional international law*’⁹⁶⁷. A comprehensive prohibition may exist under customary international law as evidenced by the *opinio iuris* and practice of States, or under conventional international law, in particular where a treaty prohibiting the employment of a specific weapon has been widely ratified. In both cases, almost universally accepted treaties would provide clear evidence of a comprehensive prohibition. It is not necessary that all States without exception have ratified such treaty. The qualified majority of states parties at a Review Conference or Assembly of States Parties will determine which weapons can be considered as subject of a comprehensive prohibition when debating adding further weapons under the jurisdiction of the ICC. After all, it is noteworthy that the delegations in Rome were mindful to criminalize only such conduct that could be based on a rule of customary international law.

⁹⁶⁴ Articles 121 and 123 do not exclude any part of the Statute from being amended, and article 121 para. 5 explicitly refers to an amendment also of article 8. The requirements stipulated in article 8 para. 2 (b) (xx) could therefore also be amended according to the general amendment provisions.

⁹⁶⁵ See ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, paras. 78 *et seq.* (8 July 1996). As early as 1868, the Declaration of St. Petersburg stated that ‘[t]he only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy’ and condemned the use of weapons ‘which *uselessly aggravate the suffering of disabled men, or render their death inevitable*’ (emphasis added). International provisions affirming this principle include article 23 (e) Hague Regulations which prohibits ‘to employ arms, projectiles, or material calculated to cause unnecessary suffering’ (the wording ‘calculated to’ of the 1907 Hague Regulations stems from an incorrect translation of the authentic French wording ‘propre à causer des maux superflus’, see ICRC, *Comments on Informal Working Paper on War Crimes of 13 Oct. 1997* (2 Dec. 1997), at (3); article 35 para. 2 Add. Prot. I; Preamble and article 3 of the Second Protocol to the 1981 Conventional Weapons Convention; article 3 of the ICTY Statute; Preamble of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997 (‘Basing themselves ... on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants’). See, e.g., Oeter, in: Fleck (ed.), *Handbook IHL* (2013), marginal nos. 401, 448.

⁹⁶⁶ According, for instance, to the US Department of the Air Force, ‘[i]ndiscriminate weapons are those incapable of being controlled, through design or function, thus they cannot with any degree of certainty, be directed at military objectives. ... In addition, some weapons, though capable of being directed at military objectives, may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage’. U.S. Air Force’s 1976 manual, see note 678, para. 6-3. For a detailed study of relevant materials and instrument, see ICRC *Study On Third Set Of War Crimes Within Art. 8(2)(B) Rome Statute* 17–29 (4 Aug. 1999).

⁹⁶⁷ Emphasis added. See, e.g., Preparatory Committee Decisions Dec. 1997, pp. 10 and 11; Preparatory Committee (Consolidated) Draft, pp. 23 and 24.

With regard to future considerations to add further prohibited weapons to the list under the Rome Statute, we may refer to the considerations during the Rome Conference to include land mines⁹⁶⁸ and blinding laser weapons⁹⁶⁹ as well as the issue of explicit references to biological⁹⁷⁰ and chemical⁹⁷¹ as well as nuclear weapons⁹⁷². Certainly, it is impossible to know what weapons will further be invented and developed. It is likely that the future will prove a need to prohibit and criminalize the use of yet unknown or not commonly deployed weapons⁹⁷³.

21. Paragraph 2(b)(xxi): ‘outrages upon personal dignity’

Literature: Hersh, S.M., ‘Torture at Abu Ghraib’, (10 May 2004) *The New Yorker* <<http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>> accessed 21 October 2014; Oosterveld, V., ‘Evaluating the Special Court for Sierra Leone’s Gender Jurisprudence’, in: C.C. Jalloh (ed.), *The Sierra Leone Special Court and its Legacy* (CUP 2014) 234; Pictet, J.S. (ed.), *The Geneva Conventions of 12 August 1949: Commentary, Vol. IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958); Sandoz, Y., Swinarski, Ch. and Zimmermann, B. (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949* (ICRC 1987).

a) Introduction. Article 8 para. 2 (b) (xxi) prohibits outrages upon personal dignity, in particular, humiliating and degrading treatment in *international* armed conflict. 614

The Preparatory Commission⁹⁷⁴ for the ICC defined the elements for the ‘[w]ar crime of outrages upon personal dignity’ under article 8 para. 2 (b) (xxi) as: 615

‘1. The perpetrator humiliated or otherwise violated the dignity of one or more persons. 2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity. 3. The conduct took place in the context of and was associated with an international armed conflict. 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict’⁹⁷⁵.

⁹⁶⁸ The Convention on the Prohibition of the Use, Stockpiling Production and Transfer of Anti-Personnel Mines and On Their Destruction was opened for signature at Ottawa 3 Dec. 1997 and entered into force on 1 Mar. 1999. As of 1 July 2014 there were 162 states parties to the Convention (see www.icbl.org). According to article 1 (1) of the Convention, each state party undertakes never under any circumstances to use anti-personnel mines. While the use of anti-personnel mines hardly was prohibited under customary international law at the time of the Rome Conference in June/July 1998, the number of states parties to the Ottawa Convention is considerable and continues to grow.

⁹⁶⁹ On 1 July 2015, 105 states were parties to the Protocol on Blinding Laser Weapons (Protocol IV) of 13 October 1995 to the 1980 UN Convention on Certain Conventional Weapons, which entered into force on 30 July 1998. Blinding laser weapons have become prohibited even before they had been integrated in the weapons arsenals of armed forces and used in armed conflict.

⁹⁷⁰ The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972 entered into force in 1975, and had, as of 1 July 2015, 172 States Parties. Biological weapons are also prohibited by the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925 (with 137 States Parties as of 1 July 2015), *see above*.

⁹⁷¹ The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 13 January 1993 (entry into force on 29 April 1997) had, as of 1 July 2014, 190 States Parties (www.opcw.org). This Convention reaffirms and strengthens in particular the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925.

⁹⁷² For an overview of the types of weapons that might be considered to be included, see also Křivánek, *The Weapons Provisions* (2010) 165 *et seq.*

⁹⁷³ See, e.g., L. Doswald-Beck/G.C. Cauderay, *The development of new anti-personnel weapons*, 279 IRevRC 565 (1990); ICRC, *Weapons that may Cause Unnecessary Suffering or Have Indiscriminate Effects, Report of the Work of Experts* (1973).

⁹⁷⁴ The Preparatory Commission for the Establishment of an International Criminal Court was established by resolution F of the Final Act, which adopted the Rome Statute of the International Criminal Court on 17 July 1998. One of the mandates Resolution F established for the commission was that ‘[t]he Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including draft texts of ... Elements of Crimes’.

⁹⁷⁵ Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes, PCNICC/2000/1/Add.2, p. 33 (2000) (hereinafter: Report of the Preparatory

A footnote to ‘persons’ under the first element clarified that the term may include persons who are dead. The Commission further clarified that:

‘[i]t is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim’.

This definition remained unchanged when the Elements of Crime were adopted at the 2010 Review Conference at Kampala⁹⁷⁶.

616 **b) Bases in humanitarian law.** The humanitarian law treaty basis of article 8 para. 2 (b) (xxi) derives verbatim from common article 3 para. 1 (c) of the Geneva Conventions of 1949. Common the principle of respect for the human personality and guarantees of humane treatment, to situations of *internal* armed conflict⁹⁷⁷. The Pictet Commentary to common article 3 para. 1 proclaims that the violations under items (a) to (d), like those of article 27 of the Geneva Convention IV⁹⁷⁸, are prohibited ‘absolutely and permanently, no exceptions or excuses being tolerated’⁹⁷⁹. In specific regard to violations of outrages upon personal dignity, the provision proscribes acts that were committed frequently during World War II and that the world public opinion found particularly revolting⁹⁸⁰.

617 A similar proscription of outrages upon personal dignities exists in the Add. Prots. of 1977 to the Geneva Conventions. Article 4 para. 2 Add. Prot. II provides *Fundamental Guarantees* to all persons who do not take direct part in or have ceased to take part in the hostilities. The provision explicitly prohibits ‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’⁹⁸¹. The Pictet Commentary to the Protocol underscores that article 4 para. 2 (e) reaffirms and supplements common article 3 para. 1 (c) of the Geneva Conventions of 1949⁹⁸². The non-exhaustive list of conduct implicitly proscribed by common article 3 para. 1 (c), explicitly banned under article 4 para. 2 (e) rape, enforced prostitution and indecent assaults of any kind, the latter being forbidden acts, given by way of example.

618 A further treaty basis for outrages upon personal dignity is found in Article 75 para. 2 Add. Prot. I. The provision closely follows the text of article 4 Add. Prot. II⁹⁸³. Article 75 para. 2 (b) reads, ‘outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault’. The ICRC Commentary to the Add. Prot. I acknowledges article 75 para. 2 (b)’s tie to both common article 3 and article 27 of Geneva Convention IV⁹⁸⁴.

In addition to treaty law, article 8 para. 2 (b) (xxi) reposes on recognized general customary law. The Add. Prot. I and the Geneva Conventions, replete with common article 3

Commission); see <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement>> accessed 19 Oct. 2014.

⁹⁷⁶ See <<http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>> accessed 17 Oct. 2014.

⁹⁷⁷ The guarantee of humane treatment unites common article 3 with several provisions in the four Geneva Conventions, such as article 27, and articles 31–34 of GC IV.

⁹⁷⁸ Acknowledgement of an organic relationship between common article 3 and article 27 of GC IV is essential to any analysis of article 8 para. 2 (b) (xxi) of the ICC Statute. The Commentary to common article 3 notes that ‘humane treatment’ must be understood within the meaning of article 27. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary* (1958), Article 27, 38. The meaning attributed to outrages against personal dignity will be discussed in the concluding paragraphs of this section.

⁹⁷⁹ Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary* (1958), Article 27, 38.

⁹⁸⁰ *Ibid.*

⁹⁸¹ The phrase ‘rape, enforced prostitution and indecent assault of any kind’ derives directly from article 27 of the GC IV.

⁹⁸² Sandoz *et al.* (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949* (1987), mn 4539.

⁹⁸³ *Ibid.*, mn 3037.

⁹⁸⁴ *Ibid.*, mn 1048.

are accepted customary law. The ‘core of Protocol II’, most likely including article 4 para. 2 (e), are also, beyond doubt part of the corpus of customary law⁹⁸⁵.

The ICTY and the ICTR have similar subject matter jurisdiction over acts such as those proscribed in article 8 para. 2 (b) (xxi) of the Rome Statute. Article 4 (e) of the ICTR Statute, reflective of article 4 para. 2 of the Add. Prot. II allows for prosecution of ‘outrages on personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and indecent assault of any kind’. By way of contrast, the ICTY Statute neither explicitly common article 3 nor enumerates outrages upon personal dignity. The *Tadić* Appellate Chamber, however, held that article 3 of the ICTY Statute acts as a residual clause and covers, *inter alia* violations of the laws or customs of war that are not enumerated, empowering the Tribunal to include common article 3 offences within its subject matter jurisdiction⁹⁸⁶. 619

The Statute for the Special Court for Sierra Leone also incorporates under its list of serious violations of common article 3: ‘Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’⁹⁸⁷. 620

The Statute of the Iraqi Special Tribunal proscribes outrages upon personal dignity in all types of armed conflict. In article 13 (b) war crimes explicitly include: 621

‘...Serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (21) Committing outrages upon personal dignity, in particular humiliating and degrading treatment’⁹⁸⁸.

Under article 13 (c) it is underscored that outrages upon personal dignity is applied:

‘in cases of an armed conflict ... [when] committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause’.

c) **Actus Reus.** Acts potentially encompassed within article 8 para. 2 (b) (xxi) can readily be examined under the root principles of Geneva Law that prompted the drafting of common article 3 para. 1 (c), as well as article 4 para. 2 (e) Add. Prot. II, and article 75 para. 2 (b). Accordingly, article 8 para. 2 (b) (xxi) is determined by overriding principle of humane treatment, as articulated in article 27 of Geneva Convention IV⁹⁸⁹. The Pictet Commentary to article 27, noted that what constitutes humane treatment – the correct way to behave towards a human being – flowed from the principles of respect. Clearly outrages on personal dignity originate out of this comprehensive respect for the person, honour, and family rights as recognized by the Geneva Conventions. 622

However, the Pictet Commentary to article 27 warned that: 623

‘It seems useless and even dangerous to attempt to make a list of all the factors that make treatment “humane”’⁹⁹⁰.

The drafters of common article 3 para. 1 (c) refrained from inserting a finite list that constituted outrages upon personal dignity. The now famous caveat in regard to torture also rationalized the conceptual, rather than detailed, nature of subsection (c). 624

‘However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.

⁹⁸⁵ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 Oct. 1995, para. 117.

⁹⁸⁶ *Tadić* (Appeals Chamber Decision), see note 989, para. 69, whereby the Appeals Chamber held that protections of common article 3 apply through article 3 (of the ICTY Statute) to persons taking no active part in hostilities.

⁹⁸⁷ Article 3 (e), Statute for the Special Court for Sierra Leone.

⁹⁸⁸ Article 13 (b), Statute of the Iraqi Special Tribunal.

⁹⁸⁹ See Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary* (1958), Article 27, 38: ‘What [common] Article 3 guarantees such person is *humane treatment*. We shall explain later, when discussing Article 27, the sense in which ‘humane treatment’ should be understood’.

⁹⁹⁰ Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary* (1958), Article 27, 204.

The form of wording adopted is flexible, and at the same time, precise. The same is true of item (c)⁹⁹¹. (emphasis added).

625 The Commentary to article 75 para. 2 (b) Add. Prot. I confirms that outrages on personal dignity are not confined to specific acts, but:

‘refers to acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts’⁹⁹².

626 In paragraph two, article 27 of Geneva Convention IV introduces the phrase ‘rape, enforced prostitution and indecent assault of any kind’ to illustrate acts that are inconsistent with human treatment. Respective provisions of the Additional Protocols included versions of the article 27 phrase to typify what is considered inhumane conduct. But neither Protocol attempts to name each act proscribed by outrages on personal dignity, nor could a finite list encompass ‘indecent assault of any kind’.

627 Article 8 para. 2 (b) (xxi) of the Statute does not incorporate the language of article 27 of Geneva Convention IV, ‘rape, enforced prostitution and indecent assault of any kind’. It appears to intentionally use the common article 3 language, rather than the expanded wording of the Additional Protocols. The Statute of the Iraq Special Tribunal also lists rape and other acts of sexual violence of ‘comparable gravity’ separately, immediately following its article 13 (c)⁹⁹³. However, the drafting intent allows one to confidently assume that the scope of article 8 para. 2 (b) (xxii), deliberately encompasses a wide range of inhumane acts.

628 ICTY and ICTR jurisprudence has shed light on acts incorporated within the meaning of outrages upon personal dignity, humiliating and degrading treatment. In the *Prosecutor v. Akayesu*⁹⁹⁴, the first case to opine on the *actus reus* of outrages upon personal dignity, the Trial Chamber held that sexual violence of many different levels may be classified as outrages upon personal dignity, and that such violence need not be limited to physical invasion of the body or even physical contact. The *Akayesu* Trial Chamber held that where the accused ordered the Interhamwe to undress a student and force her to perform gymnastics in a public courtyard, sexual violence that could qualify as an outrage upon personal dignity had occurred⁹⁹⁵.

629 In the *Prosecutor v. Furundžija*⁹⁹⁶ the Trial Chamber convicted the accused of torture and ‘outrages upon personal dignity, including rape’, as incorporated through article 3 of the ICTY Statute. The accused, a commander of the Jokers, a special Herceg-Bosna military force, arrested and then interrogated a civilian Muslim woman at the Jokers’ Headquarters. During the interrogation the woman was subjected to rapes, death threats, and threats of sexual mutilation. She was forced to swallow the body fluids and eat the human waste of a physical perpetrator. The Trial Chamber held that:

‘The general principle of respect for human dignity ... is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person’⁹⁹⁷.

‘... [S]exual assaults were committed publicly; members of the Jokers were watching and milling around the door of the pantry. They laughed at what was going on. The Trial Chamber finds that

⁹⁹¹ *Ibid.*, 39.

⁹⁹² *Ibid.*, Article 75 para. 2 (b). These crimes directly cause harm to the physical and mental well-being of persons.

⁹⁹³ Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary* (1958), Article 27, ‘(22) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity’.

⁹⁹⁴ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 Sep. 1998, para. 688.

⁹⁹⁵ *Ibid.*

⁹⁹⁶ *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 Dec. 1998.

⁹⁹⁷ *Ibid.*, para. 183.

Witness A suffered severe physical and mental pain along with public humiliation, ... in what amounted to outrages upon her personal dignity and sexual integrity⁹⁹⁸.

The interpretation suggests that outrages upon personal dignity result from separate physical and mental pain of sexual abuse.

In the *Prosecutor v. Kunarac et al.*⁹⁹⁹ the Trial Chamber found the Accused guilty of 630 outrages against personal dignity. The *Kunarac* Trial held and subsequently the *Kunarac* Appeals Chamber confirmed that the specific acts of rape, compelling victims to dance naked on a table, and lending and selling victims to other men were all properly characterized as outrages upon personal dignity¹⁰⁰⁰. The Trial Chamber expressed the view that the acts must cause ‘serious humiliation or degradation to the victim’ there is no requirement that such suffering be ‘lasting’. There is, however, no minimum temporal element to the offence¹⁰⁰¹. If the humiliation were extremely fleeting it might be difficult to prove it was serious.

The *Kunarac* Trial Chamber also held that outrages upon personal dignity should be 631 evaluated on an objective rather than a subjective basis. The humiliation must be of such intensity that any reasonable person would be outraged¹⁰⁰². The crime requires:

‘(i) that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii) that he knew that the act or omission could have that effect’¹⁰⁰³.

The *Kunarac* Appeals Chamber upheld this ‘objective threshold’, and reaffirmed that the 632 Trial Chamber was under no obligation to define the specific acts which may constitute outrages upon personal dignity¹⁰⁰⁴. Notably, in defining the elements of article 8 (2) (b) (xxi), the Preparatory Commission for the ICC supported the idea that there should be an objective threshold for determining if an outrage upon personal dignity has occurred.

Other ICTY and ICTR cases have ruled that using detainees as human shields or trench 633 diggers; forcing detainees to relieve bodily functions in their clothing; imposing conditions of constant fear of being subjected to physical, mental, or sexual violence on detainees; forced incest; burying corpses in latrine pits; leaving infants without care after killing their guardians; and removing a fetus from the womb comprise outrages upon personal dignity¹⁰⁰⁵.

In the *Prosecutor v. Delalić et al.*¹⁰⁰⁶ the indictment did contain charges of outrages upon 634 personal dignity, but rather charged several counts on ‘inhuman treatment’ and ‘cruel treatment’, that the Trial Chamber deemed violated ‘the respect for human dignity’¹⁰⁰⁷. The *Delalić* Judgment held the following acts to constitute an attack on one’s human dignity: forcing a father and son to physically beat each other¹⁰⁰⁸, leading detainees to plead for mercy so as not to be stunned by an electric cattle prod¹⁰⁰⁹, or; forcing brothers to perform oral sex on each other before other prisoners¹⁰¹⁰. These acts are likely to fall within the perimeter of outrages upon personal dignity within the meaning of article 8 para. 2 (b) (xxi).

Even though many cases involving rape and outrages upon personal dignity in the past 635 have dealt with crimes committed against women, however, the publicity and scandal

⁹⁹⁸ *Ibid.*, para. 272.

⁹⁹⁹ *Prosecutor v. Kunarac et al.*, IT-96-23T & IT-96-23/1-T, Judgment, Trial Chamber, 22 Feb. 2001, para. 568.

¹⁰⁰⁰ *Kunarac et al.* (Trial Chamber Judgment), see note 1003, para. 159.

¹⁰⁰¹ *Kunarac et al.* (Trial Chamber Judgment), see note 1003, para. 501.

¹⁰⁰² *Kunarac et al.* (Trial Chamber Judgment), see note 1003, paras. 504–506.

¹⁰⁰³ *Kunarac et al.* (Trial Chamber Judgment), see note 1003, para. 514.

¹⁰⁰⁴ *Kunarac et al.* (Trial Chamber Judgment), see note 1003, paras. 162–163.

¹⁰⁰⁵ See *Prosecutor v. Bagosora*, ICTR-96-7, Decision on Motion for Judgment of Acquittal, Trial Chamber, 2 Feb. 2005, para. 40 and fn. 84 (in which this ICTR Trial Chamber cites examples from *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, para. 229 and *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, Trial Chamber, 2 Nov. 2001, para. 173).

¹⁰⁰⁶ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 Nov. 1998.

¹⁰⁰⁷ *Delalić et al.* (Trial Chamber Judgment), see note 1010, para. 544.

¹⁰⁰⁸ *Delalić et al.* (Trial Chamber Judgment), see note 1010, paras. 1067–1070.

¹⁰⁰⁹ *Delalić et al.* (Trial Chamber Judgment), see note 1010, paras. 1052–1059.

¹⁰¹⁰ *Delalić et al.* (Trial Chamber Judgment), see note 1010, paras. 1062–1066.

surrounding the humiliation of male prisoners in *Abu Ghraib* provides a vivid reminder that men also need the protection of such laws. In commenting on the sexual poses that male prisoners were forced to assume, the *New Yorker* observed:

‘Such dehumanization is unacceptable in any culture, but is especially so in the Arab world. Homosexual acts are against Islamic law and it is humiliating for men to be naked in front of other men, Bernard Haykel, a professor of Middle Eastern studies at New York University, explained ‘Being put on top of each other and forced to masturbate, being naked in front of each other – it’s all a form of torture...’¹⁰¹¹.

636 Cases involving male sexual assault, including sexual humiliation will certainly be justiciable under the safeguards of article 8 para. 2 (b) (xxi).

637 Although *Furundžija* did not distinguish outrageous acts between physical components of sexual violence, such as oral rape, and non-physical components of sexual violence, such as forced nudity or public display, when determining what constitutes outrages upon personal dignity *Bagasora*, *Aleksovski*, *Kunarac* and *Akayesu* affirmed that acts not of a sexual nature readily violate the prohibition. A finer analysis might evolve from the jurisprudence of the ICC when one considers the article 8 para. 2 (b) (xxi) compared to specific acts prohibited in subparagraph (xxii). The latter lists ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or other form of sexual violence also constituting a grave breach of the Geneva Conventions, and thus separates them from outrages upon personal dignity’¹⁰¹².

638 Although the Trial Chamber held that the circumstances must be coercive, it held that such coercion ‘may be inherent in certain circumstances, such as armed conflict’¹⁰¹³.

639 The SCSL confirmed and solidified the gender’s jurisprudence of ICTR and ICTY in its considerations of the war crime of outrages against personal dignity¹⁰¹⁴. Based on the appeal judgement *v. Kunarac et al.* and the ICC’s elements of crime, the Trial Chambers of SCSL in the AFRC, RUF and Taylor cases adopted similar elements of crime:

- i. The perpetrator humiliated, degraded or otherwise violated the personal dignity of the victim;
- ii. The humiliation, degradation or other violation was so serious as to be generally considered as an outrage upon personal dignity;
- iii. The perpetrator intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity; and
- iv. The perpetrator knew that the act or omission could have such an effect.¹⁰¹⁵

640 In the *Prosecutor v. Taylor* the Trial Chamber considered ‘that sexual slavery, including abduction of women and girls as ‘bush wives’, a conjugal form of sexual slavery, is humiliating and degrading to its victims and constitutes a serious attack on human dignity, falling within the scope of outrages upon personal dignity’¹⁰¹⁶ and found the Accused guilty of such outrages upon personal dignity. Based on the *Kunarac* judgement the RUF judgement holds that ‘the actus reus of the offence is that there was an act or omission that caused serious humiliation, degradation or otherwise violated the personal dignity of the victim. The second element reflects that determination ... must be based on an objective assessment. It is not necessary that the act cause ‘lasting suffering’ to the victim’.¹⁰¹⁷

641 The relevance of the SCSL’s considerations of the war crime of outrages upon personal dignity on one hand side lies in the fact that it was largely supportive of already-existing

¹⁰¹¹ Hersh (10 May 2004) *The New Yorker*.

¹⁰¹² The separation of acts between article 8 para. 2 (b) (xxi) and article 8 para. 2 (b) (xxii) apparently is a deliberate attempt by the drafters to remove any connotation of the harm inflicted by sexual violence being focused on the shame, loss of honor or moral turpitude of the victim/survivor or that persons family.

¹⁰¹³ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 Sep. 1998, para. 688.

¹⁰¹⁴ Oosterveld, in: Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy* (2014) 234, 253.

¹⁰¹⁵ *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 431 with fn 1044.

¹⁰¹⁶ *Taylor* (Trial Chamber Judgment), see note 1019, para. 432.

¹⁰¹⁷ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgment, Trial Chamber I, 2 March 2009 (RUF Judgment), para. 176. See also *Prosecutor v. Brima, Kamara and Kanu*, SCSL 04-16-T, Judgment, Trial Chamber II, 20 June 2007, para. 716, 718 and 719.

jurisprudence of the ICTY¹⁰¹⁸ on the matter. On the other hand, especially the Taylor Judgment provided important additional detail to the jurisprudence: In this Judgment the Chamber found that the specific act of sexual slavery amounted to an outrage of personal dignity, and that an outrage upon personal dignity could be aggravated by the addition of public element, such as rape in front of family members; or an additional element which deepens the humiliation and degradation, such as forced undressing prior to rape; or insertion of an object into the victim's vagina after the rape or gang rape¹⁰¹⁹.

Though, in Taylor the Chamber also took a very strict approach and did not consider evidence of sexual violence other than rape and sexual slavery under outrages upon personal dignity as the Prosecution did not provide notice to the Accused 'that any other forms of sexual violence were charged under this count'¹⁰²⁰. 641

d) *Mens rea*. In its General Introduction, the ICC Commission stated that for each material element there is a requirement of intent and knowledge (unless otherwise stated), and such a *mens rea* may be inferred through relevant circumstances and facts. Where value judgements are involved (the Commission gives examples such as 'inhumane' or 'severe') there is no need for the perpetrator to have 'personally completed a particular value judgement'¹⁰²¹. Arguably, 'outrage' is another such value judgement where this would not be necessary. 643

Certain aspects of the ICTY's jurisprudence on the *mens rea* of the prohibition of outrages upon personal dignity might supplement the Commission's general *mens rea* requirement. In the *Aleksovski* Appeals Judgment the appellant's contention that the *mens rea* of required specific intent was answered thus: 644

In particular, the Appeals Chamber does not interpret the observation in the ICRC Commentary on the Additional Protocols, that the term 'outrages upon personal dignity' refers to acts 'aimed at humiliating and ridiculing' the victim, [FN71] as necessarily supporting a requirement of a specific intent on the part of a perpetrator to humiliate, ridicule or degrade the victims. The statement seems simply to describe the conduct which the provision seeks to prevent. The Trial Chamber's indication that the *mens rea* of the offence is the 'intent to humiliate or ridicule' the victim [FN72] may therefore impose a requirement that the Prosecution was not obliged to prove and the Appeals Chamber does not, by rejecting this ground of appeal, endorse that particular conclusion¹⁰²².

The appellant further raised the issues of whether a discriminatory intent comprised part of the requirement of the *mens rea* of outrages upon personal dignity. Again, the ground was denied because: 645

'... the Appeals Chamber finds that it is not an element of offences under Article 3 of the Statute, nor of the offence of outrages upon personal dignity, that the perpetrator had a discriminatory intent or motive'¹⁰²³.

The *Aleksovski* Appeals Chamber, nonetheless, clarified that evidence of discrimination might be further proof of the perpetrators intent or knowledge, holding: 646

'This does not mean that evidence that an accused who had responsibility for detention conditions discriminated between detainees in the conditions and facilities provided would be irrelevant. If, because of deliberate discrimination between detainees, poor conditions of detention affect only one group or class of detainees, while other detainees enjoy adequate detention conditions, this is evidence which could contribute to a finding that the *mens rea* of the offence of outrages upon personal dignity is satisfied'¹⁰²⁴.

¹⁰¹⁸ I.e. the Kunarac Appeal Judgment.

¹⁰¹⁹ Oosterveld, in: Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy* (2014) 234, 254; Taylor (Trial Chamber Judgment), see note 1019, 1196.

¹⁰²⁰ Taylor (Trial Chamber Judgment), see note 1019, para. 1194; Oosterveld, in: Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy* (2014) 234, 254.

¹⁰²¹ Report of the Preparatory Commission, see note 979, p. 18.

¹⁰²² *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Judgment, Appeals Chamber, 30 May 2001, para. 27.

¹⁰²³ *Aleksovski* (Appeals Chamber Judgment), see note 1026, para. 28.

¹⁰²⁴ *Aleksovski* (Appeals Chamber Judgment), see note 1026, para. 27, fn. 73.

647 outrages upon personal dignity, the *Aleksovski Appeals Chamber* concluded that an outrage against personal dignity might be motivated ‘by contempt for the human dignity of another person’; however, it does not make such a motivation an element of the offence to be proved beyond reasonable doubt. The Defendant in the *Kunarac* case argued that to be found guilty of the crime he must have known his actions would (not just could) have the effect of serious humiliation. The *Kunarac Appeals Chamber*, however, again supported the Trial Chamber’s reasoning:

‘As the relevant act or omission for an outrage upon personal dignity is an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, an accused must know that his act or omission is of that character – i. e., that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the actual consequences of the act’¹⁰²⁵.

648 Furthermore, both the Trial Chamber and the Appeals Chamber concurred that rarely would the nature of an accused’s knowledge be an issue, since once the objective threshold is met it would be difficult for the Defendant to argue that he or she did not have the same awareness as any reasonable person in the given situation¹⁰²⁶.

649 Confirming the ICTY *Kunarac* and *Aleksovski* Judgments the SCSL Trial Chamber recognised in its RUF Judgment that ‘the *mens rea* does not require that the Accused had a specific intent to humiliate or degrade the victims’, but that ‘the act or omission must, however, have been done intentionally and that the Accused must have known that his act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity’. The Chamber considered that there is neither a ‘requirement to establish that the Accused knew of the actual consequences of the act, but only of its possible consequences’ nor that there is an ‘additional requirement to establish that the Accused had a discriminatory intent or motive’¹⁰²⁷.

650 In its Article 8 War Crimes Introduction, the Commission also explains that in regard to the *mens rea* regarding an international conflict, the perpetrator only need be aware of the factual circumstances that established the armed conflict. There is no need for awareness of facts that make it international or non-international, or for any legal judgement regarding an armed conflict or its international or non-international character.

651 The foregoing commentary on outrages upon personal dignity, in particular humiliating or degrading treatment extends to internal armed conflict under article 8 para. 2 (c) (ii)¹⁰²⁸.

22. Paragraph 2(b)(xxii): Rape and other forms of sexual violence

Literature: Ambos, K., ‘Sexual offences in International Criminal Law, with a special focus on the Rome Statute of the International Criminal Court’, in: M. Bergsmo et al. (eds.), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 143; Ambos, K., ‘The first Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A comprehensive analysis of the Legal Issues’ (2012) 12 *ICLRev* 115; Ambos, K., ‘Thematic Investigations and Prosecution of International Sex Crimes: Some Critical Comments from

¹⁰²⁵ *Prosecutor v. Kunarac et al.*, IT-96-23T & IT-96-23/1-T, Judgment, Trial Chamber, 22 Feb. 2001, para. 512; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, paras. 165–166.

¹⁰²⁶ *Prosecutor v. Kunarac et al.*, IT-96-23T & IT-96-23/1-T, Judgment, Trial Chamber, 22 Feb. 2001, para. 513.

¹⁰²⁷ See *Prosecutor v. Sesay, Kallon and Gbao*, para. 177.

¹⁰²⁸ Report of the Preparatory Commission, see note 979, 39. The elements for article 8 (2) (c) (ii) are ‘1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons. 2. The severity of the humiliation, degradation, or other violation was of such degree as to be generally recognized as an outrage upon personal dignity. 3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities. 4. The perpetrator was aware of the factual circumstances that established this status. 5. The conduct took place in the context of and was associated with an armed conflict not of an international character. 6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict’. A footnote attached to ‘persons’ is identical to the one attached to the parallel element in article 8 (2) (b) (xxi).

a Theoretical and Comparative Perspective', in: M. Bergsmo, *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 291; Kelly D. Askin, *War Crimes Against Women* (1997); Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 *EJIL* 326 (1994); Cohen, D., 'Prosecuting Sexual Violence from Tokyo to the ICC', in: M. Bergsmo et al. (eds.), *Understanding and Proving International Sex Crimes* (2012) 13; Buss, D., 'Learning our lessons? The Rwanda Tribunal record on prosecuting rape', in: C. McGlynn and V.E. Munro (eds.), *Rethinking Rape Law. International and Comparative Perspectives* (Routledge 2010) 61; Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law', 5 *HastingsWomen'sLJ* 2, 243 (1994); Sharon A. Healey, 'Prosecuting Rape under the Statute of the War Crimes Tribunal for the former Yugoslavia', 21 *BrookJIL* 2, 327 (1995); Gekker, E., 'Rape, Sexual Slavery, and Forced Marriage at the International Criminal Court: How *Katanga* utilizes a ten-year-old rule but overlooks new jurisprudence' (2014) 25 *HastingsWomen'sLJ* 105; Greijer, S., 'Thematic Prosecutions for Crimes against Children' in: M. Bergsmo (ed.), *Thematic Investigations of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 137; Grewal, K., 'The Protection of Sexual Autonomy under International Criminal Law. The International Criminal Court and the Challenge of Defining Rape' (2012) 10 *JICJ* 373; Herring, J. and Dempsey, M.M., 'Rethinking the criminal law's response to sexual penetration. On theory and context', in: C. McGlynn and V.E. Munro (eds.), *Rethinking Rape Law. International and Comparative Perspectives* (Routledge 2010) 30; ICC-OTP, 'Strategic plan June 2012–2015' (October 2013); ICC-OTP, 'Policy Paper on Sexual and Gender Based Crimes' (June 2014); ICTR-OTP, 'Prosecution of sexual violence – Best practices manual for the investigation and prosecution of sexual violence crimes in post-conflict regions: Lessons learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda' (30 January 2014); Koeing, A., Lincoln, R. and Groth, L., 'The jurisprudence of sexual violence' (May 2011) Working Paper of the Sexual Violence and Accountability Project, Human Rights Center/University of California, Berkeley < http://www.law.berkeley.edu/HRCweb/pdfs/SVA_Jurisprudence.pdf > accessed 22 January 2015; Françoise Krill, 'The Protection of Women in International Humanitarian Law', 249 *IRRC* 337 (1985); Theodor Meron, 'Rape as a Crime under International Humanitarian Law', 87 *AJIL* 424 (1993); Luping, D., 'Investigation and prosecution of sexual and gender-based crimes before the International Criminal Court' (2009) 17 *AmUJGenderSocialPol&L* 431; Maystre, M. and Rangel, N., 'Analytical and comparative digest of the ICTY, ICTR and SCSL jurisprudence on international sex crimes', in: M. Bergsmo et al. (eds.), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 511; Mischkowski, G. and Mlinarevic, G., "...and that it does not happen to anyone anywhere in the world' The trouble with rape trials – Views of witnesses, prosecutors and judges on prosecuting sexualized violence during the war in the former Yugoslavia' (medica mondiale 2009) < http://www.medica-mondiale.org/fileadmin/redaktion/5_Service/Mediathek/Dokumente/English/Documentations_studies/medica_mondiale_and_that_it_does_not_happen_to_anyone_anywhere_in_the_world_english_complete_version_dec_2009.pdf > accessed 29 January 2015; Mouthaan, S., 'Sexual violence against men and international law – Criminalizing the Unmentionable' (2013) 13 *ICLRev* 65; Mouthaan, S., 'The prosecution of gender based crimes at the ICC: Challenges and opportunities' (2011) 11 *ICLRev* 775; Olugbuo, B.C., 'Thematic prosecution of international sex crimes and stigmatization of victims and survivors: Two Sides of the same coin?', in: M. Bergsmo (ed.), *Thematic Investigations of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 109; Sellers, P.V., 'The prosecution of sexual violence in conflict: The importance of human rights as means of interpretation' (2007) < http://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf > accessed 29 January 2015; Stahn, C., 'Justice delivered or justice denied? The legacy of the *Katanga* judgement' (2014) 12 *JICJ* 809; Dorothy Q. Thomas/Regan E. Ralph, *Rape in War: Challenging the Tradition of Impunity*, 14 *SAISRev* 81 (1994); Tamara L. Tompkins, 'Prosecuting Rape as a War Crime: Speaking the Unspeakable', 70 *NotreDameLRev* 847 (1995); United Nations Department of Peacekeeping Operations, *Review of the sexual violence elements of the judgements of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820* (United Nations 2010); United Nations General Assembly/Security Council, 'Conflict-related sexual violence. Report of the Secretary General' A66/657-S/2012/33, 13 January 2012; Wildermuth, P. and Kneuer, P., 'Addressing the challenges to prosecution of sexual violence crimes before International Tribunals and Courts', in: M. Bergsmo et al. (eds.), *Understanding and Proving International Sex Crimes* (2012) 65; Women's Initiative for Gender Justice, 'ICC partially convicts *Katanga* in third trial judgement, acquitting *Katanga* of rape and sexual slavery' (May 2014) Legal Eye On The ICC < <http://www.iccwomen.org/WI-LegalEye5-14/LegalEye5-14.html#1> > accessed 30 January 2015.

a) **Humanitarian law base and drafting history.** The inclusion of article 8 para. 2 (b) (xxii) 652 – as well as the almost identical parallel provisions in article 8 para. 2 (e) (vi) and article 7 para. 1 (g)¹⁰²⁹ – with its list of progressively defined crimes of sexual violence constituted a great advance for the protection of the rights of women in times of armed conflict¹⁰³⁰. The

¹⁰²⁹ Despite the deviating contextual elements of war crimes under article 8 para. 2 (e) and crimes against humanity under article 7, these three provisions are to be interpreted identically; see Ambos, in Bergsmo et al. (eds.), *International Sex Crimes* (2012) 143, 151.

¹⁰³⁰ For an analysis and evaluation of the offences of sexual violence under the Rome Statute and/or their drafting history, see generally K. D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 *AJIL* 97 (1999); B. Bedont/K. Hall-Martinez, *Ending Impunity for Gender*

list reflects a new awareness about the seriousness of these sexual offenses in times of armed conflict and the fact that they frequently remained unpunished. Delegations at the Rome Conference were determined to signal to the world that such violence amounts to most serious crimes of concern to the international community as a whole that must not go unpunished. The progressive list and definition of the offenses relating to sexual violence is not least the result of sustained lobbying by the women's rights movement.

653 In prior humanitarian law codifications, rape and other forms of sexual violence were not articulated as such and had to be subsumed under general forms of mistreatment such as 'inhuman and degrading treatment' or 'wilfully causing great suffering or serious injury to body or health' and the relating nonspecific war crimes¹⁰³¹. These general offenses however do not recognize or might even trivialize the specific physical and often particularly acute long-term psychological harm and social stigma caused by sexual violence such as rape. Also, the criminalization of these general forms of mistreatment does not signal specifically and unmistakably that sexual violence is intolerable under any circumstances, including in armed conflict situations.

654 It was therefore deemed crucial by women's rights advocates as well as the delegations in Rome that rape and the other forms of sexual violence eventually listed are recognized by the Rome Statute as war crimes in their own right and as being equally serious as other forms of violence criminalized under international humanitarian law. Article 8 para. 2 (b) (xxii) gives a clear signal to the ICC Prosecutor that such forms of violence also need to be prosecuted. There is no longer any need to establish that the sexual conduct concerned can be subsumed under a generic form of mistreatment. Moreover, the Rome Statute confirms that rape and other forms of sexual violence may also amount to grave breaches subject to universal jurisdiction¹⁰³².

Crimes under the International Criminal Court, 6 *BrownJWorldAff* 1, 65 (1999); J. G. Gardam/M. J. Jarvis, *Women, Armed Conflict And International Law* (2001); D. M. Koenig/K. D. Askin, *International criminal law and the International Criminal Court Statute: crimes against women*, in: D. M. Askin/K. D. Koenig (eds.), *Women And International Human Rights Law* (2000); B. S. Moshan, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity*, 22 *FordhamILJ* 154 (1998); C. Möller, *Das tatbestandliche Verbot sexueller Gewalt in bewaffneten Konflikten: Von den 'Lieber Instructions' zum Vertragsstatut von Rom*, 18 *Sicherheit und Frieden* 36 (2000); V. Oosterveld, 'The Making of a Gender-Sensitive International Criminal Court', 1 *ILF* 38 (1999); P. Viseur Sellers, 'The Context of Sexual Violence: Sexual Violence as violations of International Humanitarian Law', in: G. Kirk McDonald/O. Swaak-Goldman (eds.), *Substantive And Procedural Aspects Of International Criminal Law The Experience Of International And National Courts* (2000). A useful resource in particular on more recent developments regarding sexual offenses under ICC jurisdiction is available at <http://iccwomen.org>.

¹⁰³¹ On the prohibition of sexual violence in international humanitarian and relating war crimes law prior to the adoption of the Rome Statute, see generally K. D. Askin, 'War Crimes Against Women: Prosecution In International War Crimes Tribunals' (1997); Askin (1999) 93 *AJIL* 97; C. Chinkin, 'Rape and Sexual Abuse of Women in International Law', 5 *EJIL* 326 (1994); R. Copelon, 'Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law', 5 *HastingsWomen'sLJ* 2, 243 (1994); K. Fitzgerald, 'Problems Of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law', 8 *EJIL* 638 (1997); S. A. Healey, 'Prosecuting Rape under the Statute of the War Crimes Tribunal for the former Yugoslavia', 21 *BrookJIL* 2, 327 (1995); F. Krill, 'The Protection of Women in International Humanitarian Law', 249 *IRRC* 337 (1985); Th. Meron, 'Rape as a Crime under International Humanitarian Law', 87 *AJIL* 3, 424 (1993); D. Q. Thomas/R. E. Ralph, 'Rape in War: Challenging the Tradition of Impunity', 14 *SAISRev* 81 (1994); T. L. Tompkins, 'Prosecuting Rape as a War Crime: Speaking the Unspeakable', 70 *NotreDameLRev* 847 (1995); Sellers, in: McDonald/Swaak-Goldman (eds.), *Substantive and Procedural Aspects of ICL* (2000); M. T. A. Wilbers, 'Sexual abuse in times of armed conflict', 7 *LeidenJIL* 43 (1994). See also K. D. Askin, 'Women and International Humanitarian Law', in: K. D. Askin/D. M. Koenig (eds.) *Women's Human Rights: A Reference Guide* (1999); C. Chinkin, 'Women, the Forgotten Victims of Armed Conflict?', in: H. Durham/T. L. H. McCormack (eds.) *The Changing Face Of Conflict And Efficacy Of International Humanitarian Law* (1999); J. G. Gardam/H. Charlesworth, 'Protection of Women in Armed Conflict', 22 *HumRQ* 1, 148 (2000); R. Coomaraswamy/L. M. Kois, 'Violence Against Women', in: K. D. Askin/D. M. Koenig (eds.) *Women's Human Rights: A Reference Guide* (1999); D. Buss, 'Prosecuting Mass Rape: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic', 10 *Feminist Legal Studies* 91 (2002); Möller, *Das tatbestandliche Verbot sexueller Gewalt in bewaffneten Konflikten* (2000) 36. For an updated list of article on women's issues in international humanitarian law, see also <http://www.law-lib.utoronto.ca/Diana/>.

¹⁰³² This results in particular from the drafting history of the Rome Statute as well as the Elements of Crimes and the state views expressed at the negotiations, and, arguably, also from the last part of article 8 para. 2 (b) (xxii).

Today, it is widely recognized that rape and other forms of sexual violence committed in armed conflict amount to war crimes as well as grave breaches. This however is a rather new development. Before, rape was sometimes seen as a natural consequence of war and military commanders, at times despite formal prohibitions, allowed or implicitly acquiesced to their troops' practice or even 'right' to rape the women of the adversary as a reward for fighting¹⁰³³. Even in more recent conflicts, rape has been used as a means of warfare, war strategy or policy¹⁰³⁴, and troops committing sexual violence were only infrequently prosecuted and punished. In the conflict in Yugoslavia in the 1990s, rape and forced pregnancy were utilized as instruments of targeted ethnic cleansing¹⁰³⁵. Similarly, systematic sexual crimes, especially rapes, during the genocide in Rwanda in 1994 were identified as a constituent part of the genocidal conduct.¹⁰³⁶

However, towards the end of the 20th century, it has been increasingly recognized that rape is both a war crime and a grave breach of the Geneva Conventions. Many national military codes prohibited and criminalized rape by soldiers in the early 20th century or even earlier. Article 44 of the 1863 Lieber Code prohibited 'all rape ... under the penalty of death'¹⁰³⁷. Article 46 Hague Regulations also stipulated the respect of '[f]amily honour and rights' which sometimes has been interpreted as (indirectly) prohibiting sexual violence.

As regards the criminalization of sexual violence on an international level, rape and the '[a]bduction of girls and women for the purpose of enforced prostitution' were included in the list of violations of the laws and customs of war prepared by the Responsibilities Commission of the 1919 Paris Peace Conference¹⁰³⁸. Nonetheless, rape or other forms of sexual violence were not specifically included under the jurisdiction of the Nuremberg and Tokyo International Military Tribunals and were not specifically charted in the indictments nor prosecuted, even though such offenses have been reported and documented, while article II para. 1 (c) Control Council Law No. 10 included rape as a crime against humanity. Rapes of civilian women and medical personnel were however prosecuted successfully in Tokyo under the categories of 'inhumane treatment', 'ill-treatment' and 'failure to respect family honour and rights'. More particularly, the then Foreign Minister *Hirota* and Generals *Toyoda* and *Matsui* were convicted by the Tokyo Tribunal for command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults, and the US Military Commission convicted *Yamashita* for command responsibility for rape as a war crime¹⁰³⁹.

¹⁰³³ One well-known example of sexual violence in armed conflict has been the institutionalization of sexual slavery by the Japanese Army during World War II. Already in the 17th century, Grotius stated that whoever committed rape, 'even in war, should everywhere be subject to punishment', pointing out, however, that in many places the raping of women in time of war was considered permissible, Grotius, *Rights of War* (2005) 657, Third Book, Fourth Chapter. See also Askin, *War Crimes against Women* (1997) 18 *et seq.*

¹⁰³⁴ See, e.g., Askin, *War Crimes against Women* (1997) 274; United Nations General Assembly/Security Council, 'Conflict-related sexual violence. Report of the Secretary General' A/66/657-S/2012/33, 13 January 2012, paras. 5, 17–57; United Nations Department of Peacekeeping Operations, *Review of the sexual violence elements of the judgements of the ICTY, ICTR and SCSL* (United Nations 2010).

¹⁰³⁵ See, e.g., Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (27 May 1994), section IV.F. and Annex IX and IXA; Askin, *War Crimes against Women* (1997) 273–287.

¹⁰³⁶ *Prosecutor v. Seromba*, No. ICTR-2001-66-A, Judgment, Appeals Chamber, 12 March 2008, para. 46; see also Ambos, in Bergsmo et al. (eds.), *International Sex Crimes* (2012) 143, 170 with fn 138; see also *Prosecutor v. Karemera and Ntirumpats*, No. ICTR-98-44-T, Judgment and Sentence, Trial Chamber III, 2 February 2012, paras. 1666–1668.

¹⁰³⁷ See also article 47 Lieber Code of 1863, reprinted in: Schindler/Toman (eds.), *Laws of Armed Conflict* (1988) 10.

¹⁰³⁸ See also Askin, *War Crimes against Women* (1997) 42–45.

¹⁰³⁹ See Askin, *War Crimes against Women* (1997) 164–203; B. V. A. Röling/C. F. Rüter (eds.), 1 *The Tokyo Judgment: The International Military Tribunal For The Far East*, Apr. 29, 12. Nov. 1946, 1948, at 385 (1977); B. V. Röling/C. F. Rüter (eds.), II *The Tokyo Judgment*, 965, 971–972, 988–989 (1977). In the *Yamashita* case, the US Military Commission stated that 'where murder and rape ... are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held

Several national laws criminalize rape and other forms of sexual violence such as forced prostitution committed in connection with an armed conflict situation as a war crime¹⁰⁴⁰.

- 658 After WW II, article 27 para. 2 GC IV provided that '[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'. Article 75 para. 2 (b) Add. Prot. I prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault',¹⁰⁴¹ while article 76 adds particular provisions on the protection of women: '1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. 2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority...'
- 659 However, these instruments characterize the named forms of sexual violence merely as an attack on the *honor* of women or other individuals and do not include such violence as grave breaches in their own rights nor specify that they may amount to specific grave breaches, failing to treat and specifically address them as most serious crimes of violence.
- 660 The non-binding UN General Assembly Resolution 3318 of 14 December 1974 contained a 'Declaration on the Protection of Women and Children in Emergency and Armed Conflict', which called on states to make '[a]ll efforts ... to spare women and children from the ravages of war', proclaiming that '[a]ll forms of repression and cruel and inhuman treatment of women and children ... committed by belligerents in the course of military operations or in occupied territories shall be considered criminal'.
- 661 In the 1990s, it became increasingly recognized that rape and other forms of sexual violence may amount to war crimes and grave breaches such as 'torture', 'inhuman treatment', and 'wilfully causing great suffering, or serious injury to body or health'¹⁰⁴². Of particular importance in this respect is the **jurisprudence of the ICTY and ICTR**, which

responsible, even criminally liable, for the lawless acts of his troops ...', US Military Commission in Manila, *Yamashita* (7 Dec. 1945), reprinted in L. Friedman (ed.), *The Law of War: A Documentary History* 1597, Vol. II (1972). For further references, see Meron (1993) 87 *AJIL* 424, 426 (fn. 14); *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 168.

¹⁰⁴⁰ See, e.g., Australian Law Concerning Trials of War Criminals by Military Courts of 1945, V *Law Reports* 95 (1948); article 374(1) of the 1994 Penal Code of the Republic of Slovenia (coercion into prostitution, rape); article 612(3) of the Spanish Military Penal Code (Ley orgánica 19/95 of 23 Nov. 1995) (induced or forced prostitution), article 142 of the Penal Code of the Socialist Federal Republic of Yugoslavia; Chinese Law governing the Trial of War Criminals of 24 Oct. 1946, XIV *Law Reports* 152 *et seq.* (1949). Enforced prostitution in an armed conflict has been prosecuted by a number of national courts, see XV *Law Reports* 121 (1949). See also U.S. Military Commission in Manila, *Yamashita* (7 Dec. 1945), reprinted in Friedman (ed.), *Law of War* (1972) 1599.

¹⁰⁴¹ See also article 4 Add. Prot. II. On the historical development of prosecutions of sexual violence since WW II, see Cohen, in: Bergsmo et al. (eds.), *International Sex Crimes* (2012) 13 *et seq.*

¹⁰⁴² The UN Special Rapporteur on human rights in the former Yugoslavia Macowiecki stated that '[r]ape in [the context of article 27] is a grave breach of the Fourth Geneva Convention (article 147) and as such, a war crime', UN Special Rapporteur Macowiecki of the Commission on Human Rights, Report on the Situation of Human Rights in the Territory of the Former Yugoslavia pursuant to Commission Resolution 1992/S-1/1 of 14 Aug. 1992, E/CN.4/1993/50 (1993), para. 89. The UN Special Rapporteur Linda Chavez stated that '[r]ape and sexual abuse of women and girls in situations of armed conflict (whether international or internal) constitute a grave breach of international humanitarian law' and that such sexual violence 'constitutes torture and inhuman treatment which causes suffering and serious bodily injury', Preliminary report of the special rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict, UN Doc. E/CN.4/Sub.2/1996/26 (16 July 1996), paras. 14 and 15 (see also paras. 16–19 and 25). The ICRC furthermore has confirmed *inter alia* in its Aide-mémoire of 3 Dec. 1992, in its statement of 14 Feb. 1997 before the Preparatory Committee, and in its Recommendations to the Rome Diplomatic Conference that the grave breach of 'wilfully causing great suffering or serious injury to body or health' covers rape. See, e.g., also Pictet (ed.), *Commentaries Geneva Conventions iv* (1960) article 147, 598; Final Declaration of the International Conference for the Protection of War Victims (30 Aug. to 1 Sept. 1993) (Geneva) (1 Sept. 1993), para. I3 (reiterating that acts of sexual violence directed notably against women and children 'constitute grave breaches of international humanitarian law'); 1998 UN Slavery Rapporteur Report, paras. 56–66; U.S. *Department of State letter to Senator A. Specter* (27 Jan. 1993), quoted in, Meron (1993) 87 *AJIL* 424, 427 (fn. 22).

elaborates on the definitions of international crimes involving forms of sexual violence.¹⁰⁴³ Article 4 para. 2 of the ICTR Statute confers jurisdiction over ‘outrages upon personal dignity, in particular ... rape, enforced prostitution and any form of indecent assault’, drawing on article 4 para. 2 (e) Add. Prot. II. In contrast, the ICTY Statute does not explicitly provide that forms of sexual violence amount to war crimes that can be prosecuted by the ICTY. In a number of cases, however, the ICTY Office of the Prosecutor has charged rape and other forms of sexual violence as war crimes under the ICTY Statute. More particularly, ICTY Chambers have consistently affirmed that such conduct may amount to a grave breach or a serious violation of the laws and customs of war¹⁰⁴⁴. The *Čelebići* Trial Chamber affirmed that ‘[t]here can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law’, referring to articles 27 GC IV, 4 para. 2 Add. Prot. II, 76 para. 1 Add. Prot. I, 46 Hague Regulations (which according to the ICTY implicitly prohibits rape and sexual assault by protecting family honor and rights) and 6 (c) of the Nuremberg Charter¹⁰⁴⁵.

The first proposals of lists of war crimes to be included under the Rome Statute had either not contained a specific reference to sexual violence or linked them to outrages upon personal dignity, reproducing the wording contained in article 75 para. 2 (b) Add. Prot. I albeit adding rape to it¹⁰⁴⁶. This reflected the traditional approach to sexual violence in prior international humanitarian law. The recognition as a grave breach was first proposed by New Zealand and Switzerland in the February 1997 session of the Preparatory Committee when ‘rape, enforced prostitution and other sexual violence of comparable gravity’ were listed in brackets as examples of the grave breach of wilfully causing great suffering or serious injury to body or health¹⁰⁴⁷. The December 1997 session then separated sexual violence from the more general categories and created a separate, unbracketed category of war crimes in its own right for ‘rape, sexual slavery, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions’¹⁰⁴⁸. This was not least the success of the lobbying of the Women’s Caucus for Gender Justice in the ICC, which coordinated the strategy of a great number of women’s human rights NGOs. The only form of sexual violence where dissent remained very strong prior even at the Rome Conference was the crime of ‘forced pregnancy’, with the Vatican arguing that this notion should be replaced by ‘forced impregnation’ for fear of a precedent with regard to abortions

662

¹⁰⁴³ On related jurisprudence of the ICTY and ICTR, see ICTR-OTP, ‘Prosecution of sexual violence – Best practices manual (2014), Annex B pp. 1 *et seq.*; Mouthaan (2011) 11 *ICLRev* 775, 782 *et seq.*, UN Department of Peacekeeping Operations, *Review of the sexual violence elements of the judgements of the ICTY, ICTR and SCSL* (2010); Buss, in: McGlynn and Munro (eds.), *Rethinking Rape Law* (2010) 61 *et seq.*; Mischkowski and Mlinarevic, ‘The trouble with rape trials’ (2009) 1 *et seq.*; Maystre and Rangel, in: Bergsmo *et al.* (eds.), *International Sex Crimes* (2012) 511 *et seq.*

¹⁰⁴⁴ See in particular *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 10 December 1998, paras. 596–598; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, paras. 475–496; *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, paras. 165–186 (as well as paras. 266–275, 279 and 295); *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, paras. 436–464 (as well as, *e.g.*, paras. 6–11, 28–84, 162–197, 205 *et seq.* and also paras. 515 *et seq.* and 544–557); *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001, paras. 175–183 (as well as, *e.g.*, paras. 98–109). See also *Prosecutor v. Musema*, ICTR-96-13-A, Judgment, Trial Chamber, 27 Jan. 2000, paras. 220–229 and 285; *Prosecutor v. Tadić*, IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, *e.g.* paras. 154, 165, 175, 193–194, 198, 206, 222, 231–232, 237, 377, 398, 425–427, 452, 468, 470, 536, 646); *Prosecutor v. Krstić*, IT-98-33-T, Judgment, Trial Chamber, 2 August 2001, paras. 509 and 513. For a list of ICTY and ICTR Rule 61 rulings and indictments alleging sexual violence, see Askin (1999) 93 *AJIL* 97, 99 (fn. 13) and 115–122.

¹⁰⁴⁵ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 476.

¹⁰⁴⁶ 1996 Preparatory Committee II, pp. 61 (para. 2(j)) and 63 (para. 3(e) (‘outrages upon personal dignity, in particular rape, enforced prostitution and other sexual violence of comparable gravity’)).

¹⁰⁴⁷ 1996 Preparatory Committee II, p. 6 (para. A(c)).

¹⁰⁴⁸ Preparatory Committee Decisions Dec. 1997, p. 11 (para. B(*pbis*)). Various delegations, such as Finland and Switzerland on 8 Dec. 1997, also stated in the December Preparatory Committee that rape was a grave breach.

or laws restricting or outlawing abortions. The establishment of the list of war crimes of sexual violence under the Rome Statute and even more so the drafting of their elements by the Preparatory Commission was to some extent a creative legislating exercise¹⁰⁴⁹, since these forms of violence had not *per se* constituted war crimes in their own right prior to the adoption of the Rome Statute and since relating international humanitarian law rules were not overly precise. The drafting history of the list and definition of the specific offences in article 8 para. 2 (b) (xxii), including the dynamics concerning the debate on the inclusion of forced pregnancy, took a course largely parallel to the debate on the corresponding crimes against humanity provision in article 7 para. 1 (g), to the commentary of which accordingly can be referred.

- 663 Conduct qualifying as a war crime of sexual violence might at times also qualify as war crimes under the Rome Statute criminalizing general forms of mistreatment, such as the war crimes of torture (paragraph (a) (ii)-1), inhuman treatment (paragraph (a) (ii)-2), wilfully causing great suffering or serious injury to body or health (paragraph (a) (iii)), wounding a person *hors de combat* (article 8 para. 2 (b) (vi)), outrages upon personal dignity (paragraph (b) (xxi)), or might be inherent in the commission of conscripting and enlisting child soldiers (article 8 para. 2 (b) (xxvi))¹⁰⁵⁰. In addition, conduct addressed by the war crime of enforced sterilization may also amount to mutilation (paragraph (b) (x)) and conduct qualifying as forced pregnancy may also amount to unlawful confinement (paragraph (a) (vii)-2).
- 664 Moreover, conduct amounting to one of the six listed types of war crimes of sexual violence may amount to another type of sexual violence as a war crime. Sexual slavery for instance may well involve one or more acts amounting to rape or another form of sexual violence. Similarly, enforced prostitution may be connected to sexual slavery or involve other sexual violence. The UN Special Rapporteur on Contemporary Forms of Slavery indeed affirmed that '[s]exual slavery ... encompasses most, if not all forms of forced prostitution'¹⁰⁵¹. Lastly, the types of sexual violence listed under article 8 para. 2 (b) (xxii) are also criminalized as crimes against humanity under article 7 para. 1 (g) Rome Statute, provided the requisite elements are met¹⁰⁵². Sexual violence may furthermore amount to genocidal acts under article 6 para. (e) Rome Statute, in particular where forced pregnancy, rape, or enforced sterilization qualifies as 'imposing measures intended to prevent births within the group'¹⁰⁵³.
- 665 In its recent policy paper on sexual violence, the ICC-OTP announced a **policy of prioritization** with regard to crimes of a sexual nature, which is reflected in an approach to 'ensure that charges for sexual and gender-based crimes are brought whenever there is sufficient evidence to support such charges. [The OTP] will bring charges for sexual and gender-based crimes explicitly as crimes *per se*, in addition to charging such acts as forms of other violence within the competence of the Court where the material elements are met, e. g., charging rape as torture. The Office will seek to bring cumulative charges in order to reflect the severity and multifaceted character of these crimes fairly, and to enunciate their ranges, supported by the evidence in each case. In appropriate cases, the office will charge acts of sexual and gender-based crimes as different categories of crimes within the Court's jurisdic-

¹⁰⁴⁹ On the drafting history of the Elements of Crimes on sexual violence, see Rückert/Witschel, in: Fischer/Kress/Lüder (eds.), *International and National Prosecution* (2001) 80–87; Dörmann, in: Fischer/Kress/Lüder (eds.), *International and National Prosecution* (2001) 131–133.

¹⁰⁵⁰ see *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 16, 36, 577, 589, 598, 629–630, 890–896, 913, where TC I acknowledged sexual violence against Congolese child soldiers, but could not convict for such crimes since they have not been charged (*ibid.*, esp. paras. 36, 629–630, 913); crit. *ibid.*, Separate and Dissenting Opinion of Judge Odio Benito, paras. 6, 16, 20 observing that the sexual element of the committed crimes becomes invisible and regretting a discrimination of the victims; crit. Ambos (2012) 12 *ICLRev* 115, 137–138. with fn. 156; see also Greijer, in: Bergsmo (ed.), *Thematic Investigations* (2012) 137, 157 *et seq.*

¹⁰⁵¹ 1998 UN Slavery Rapporteur Report, para. 31.

¹⁰⁵² See Ch. K. Hall, *article 7*, mn 41 *et seq.*

¹⁰⁵³ See W. A. Schabas, *article 6*, mn 21.

tion (war crimes, crimes against humanity, genocide), in order to properly describe, *inter alia*, the nature, manner of commission, intent, impact and context. The Office will also seek to highlight the gender-related aspects of other crimes within its jurisdiction – for example, the recruitment of child soldiers and enslavement, and, in the case of the latter, their manifestation as trafficking in persons, in particular women and children.¹⁰⁵⁴

Also, one among the six strategic goals of the ICC-OTP in its current overall prosecutorial strategy is to pay particular attention to sexual and gender based crimes and those against children.¹⁰⁵⁵ 666

During the past years, the prosecution of sexual and gender based crimes in international criminal law gained increasing attention. The commission of sexual violence as international crimes comes along with noteworthy procedural particularities. Such crimes are often highly traumatic for its victims and witnesses, who therefore need to be protected sufficiently in accordance with articles 54 (1) (b) and 68 (1) ICC Statute – not least to prevent a secondary traumatization.¹⁰⁵⁶ Some argued for a need of prioritized, **thematic focused prosecutions of international sexual crimes**. Such a focused prosecution would entail a higher degree of the condemnation of sexual crimes in conflict situations.¹⁰⁵⁷ Relevant staff engaged in the prosecution of sexual crimes should be trained to handle respective specialties.¹⁰⁵⁸ However, while it is increasingly acknowledged that a widespread commission of sexual crimes is inherent part of many conflict situations,¹⁰⁵⁹ one could easily argue for a general need of such trainings for all staff members engaged in the field and witness examinations, especially when taking into account that the extent of sexual crimes may not be visible during the first investigative steps. 667

With the exception of the war crime of forced pregnancy, which by its nature can only be committed against women, the drafters of the Rome Statute intended all of the war crimes of sexual violence under article 8 para. 2 (b) (xxii) to be defined, in principle, in a **gender-neutral** way. Thus, both victims as well as perpetrators may be of any sex and gender. This also results from the almost entirely gender-neutrally wording of the elements of crimes for article 8 para. 2 (b) (xxii), and with regard to the war crime of rape is underscored in footnote 50 of the elements. Anything else than a gender neutral interpretation would contrast article 7 (3), which clarifies that the ‘term ‘gender’ refers to the two sexes, male and female, within the context of society’,¹⁰⁶⁰ and furthermore against the prohibition of discrimination pursuant to article 21 (3). Although thus far the majority of cases involving sexual offences at the international tribunals deals with violence against females, charges of rape against males are for the first time dealt with in *Ntaganda*.¹⁰⁶¹ The ICRC Commentary to article 75 Add. Prot. I indeed states that ‘[t]he provision relating in Article 75 to enforced 668

¹⁰⁵⁴ OTP, ‘Policy Paper SGBC’ (2014), summary paras. 7–8; on a contextualization of sexual violence in ICL, see Oosterveld, in: Bergsmo (ed.), *Thematic Investigations* (2012) 189 *et seq.*

¹⁰⁵⁵ ICC-OTP, ‘Strategic plan June 2012–2015’ (2013) para. 5, 58 *et seq.*

¹⁰⁵⁶ The ICC-OTP perceives itself obliged to caution and protective measures under Art. 68(1) ICC Statute, see OTP, ‘Policy Paper SGBC’ (2014) summary para. 5 and paras. 60 *et seq.* On best practices by the ICTR, see ICTR-OTP, ‘Prosecution of sexual violence – Best practices manual’ (2014) 1–81; Buss, in: McGlynn and Munro (eds.), *Rethinking Rape Law* (2010) 61 *et seq.*; for a study examining challenges of rape trials at the ICTY, see Mischkowski and Mlinarević, ‘The trouble with rape trials’ (2009); Wildermuth and Kneuer, in: Bergsmo et al. (eds.), *International Sex Crimes* (2012) 65, 116 *et seq.*; Olugbuo, in: Bergsmo (ed.), *Thematic Investigations* (2012) 109 *et seq.*

¹⁰⁵⁷ Ambos, in Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes* (2012) 291 *et seq.*, Mouthaan (2011) 11 *ICLRev* 775, 786 *et seq.*

¹⁰⁵⁸ OTP, ‘Policy Paper SGBC’ (2014) summary para. 15 and paras. 60 *et seq.*, 118–119; collecting pro and contra arguments, Bekou, in: Bergsmo (ed.), *Thematic Investigations* (2012) 233 *et seq.*

¹⁰⁵⁹ Listing widespread sexual and gender based crimes in ongoing conflict situations: United Nations General Assembly/Security Council, ‘Conflict-related sexual violence. Report of the Secretary General’ A66/657-S/2012/33, 13 January 2012, paras. 17–57.

¹⁰⁶⁰ Article 7 (3) Rome Statute.

¹⁰⁶¹ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-309, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, para. 52. For an in-depth account on sexual violence against men in international law, see Mouthaan (2013) 13 *ICLRev* 65.

prostitution and indecent assault applies to everybody covered by the article, *regardless of sex*¹⁰⁶². The gender-neutrality of sexual offenses has also been affirmed by the UN Special Rapporteur on Contemporary Forms of Slavery McDougall: ‘Rape is defined in gender-neutral terms, as both men and women are victims of rape. However, it must be noted that women are more at risk of being victims of sexually violent crimes and face gender-specific obstacles in seeking redress. Although this report retains ‘penetration’ in the definition of rape, it is clear that the historic focus on the act of penetration largely derives from a male preoccupation with assuring women’s chastity and ascertaining paternity of children. It is important, nevertheless, to emphasize that all forms of sexual violence, including but not limited to rape, must be condemned and prevented’¹⁰⁶³.

669 The ICC has not yet issued a conviction based on allegations of sexual crimes pursuant to article 8 (2) (b) (xxii). In March 2014, it acquitted *Katanga*, inter alia., for charges of accessory to rape and sexual slavery as a crime against humanity and as a war crime under article 8 (2) (e) (vi).¹⁰⁶⁴ However, a number of ongoing cases address charges of sexual violence. Charges of rape and sexual slavery were confirmed in the cases against *Katanga and Ngudjolo Chui, Ntaganda*¹⁰⁶⁵ and *Bemba Gombo*¹⁰⁶⁶, moreover in the Kenyan case against *Muthaura, Kenyatta and Ali*¹⁰⁶⁷, and in the situation concerning the Ivory Coast in the cases against *Gbagbo*¹⁰⁶⁸ and *Goudé*¹⁰⁶⁹. Also, the following arrest warrants and summons to appear contain charges involving sexual violence: in the situation in Sudan, the arrest warrants for *Al Bashir*¹⁰⁷⁰ *Ahmad Harun*¹⁰⁷¹, *Hussein*¹⁰⁷² and *Ali Kushayb*¹⁰⁷³. In the

¹⁰⁶² Pilloud/Pictet, in: Sandoz/Swinarski/Zimmermann (eds.), *Commentary Additional Protocols* (1987) 874 (No. 3049) (emphasis added) (arguing that this is also supported by the fact that ‘Article 76 (*Protection of women*), relating to the special protection to which women are entitled, reiterates the provision relating to enforced prostitution and indecent assault, specifically mentioning rape’, *id.*

¹⁰⁶³ A footnote to the cited paragraph states that ‘[v]iolent crimes of a homosexual nature are not explicitly mentioned in international humanitarian law ... That international humanitarian law, insofar as it provides protection against rape and other sexual assaults, is applicable to men as well as women is beyond any doubt as the international human right not to be discriminated against (in this case on the basis of sex) does not allow derogation’, 1998 UN Slavery Rapporteur Report, para. 24.

¹⁰⁶⁴ *Procureur v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Chambre de Première Instance II, 7 mars 2014; by the time of writing, no translation of the judgement into English was delivered yet. See ICC, ‘Summary of Trial Chamber II’s Judgment of 7 March 2014, pursuant to article 74 of the Statute in the case of The Prosecutor v. Germain Katanga’ (2014) < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/986/14_0259_ENG_summary_judgment.pdf > accessed 30 January 2015, para. 35–36 and p. 30; see also Stahn (2014) 12 JICJ 809, 820 *et seq.*; Women’s Initiative for Gender Justice (May 2014) *Legal Eye on the ICC*.

¹⁰⁶⁵ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-309, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, paras. 36, 49–52 (rape as CaH and war crime under article 8(2)(e)(vi)), and 53–57 (sexual slavery as CaH and war crime under 8(2)(e)(vi)), 76–82 (rape and sexual slavery as war crime under 8(2)(e)(vi)).

¹⁰⁶⁶ *Prosecutor v. Bemba Bombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 15 June 2009, para. 286.

¹⁰⁶⁷ *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, Count 5–6 on pp. 12–13, paras. 254 *et seq.*, 428 c (on Cah).

¹⁰⁶⁸ *Prosecutor v. Gbagbo*, ICC-02/11-01/11-656, Decision on the Confirmation of Charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014, paras. 74, 195–196, Count 2 on p. 128 (on CaH).

¹⁰⁶⁹ *Prosecutor v. Goudé*, ICC-02/11-02/11-186, Decision on the Confirmation of Charges against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014, paras. 117–118, 188, 194 (Count 2, rape as CaH).

¹⁰⁷⁰ *Prosecutor v. Al Bashir*, ICC-02/05-01/09-1, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, p. 6 (recognizing a high amount of rapes) and para. vii.

¹⁰⁷¹ *Prosecutor v. Harun*, ICC-02/05-01/07-2, Warrant of arrest for Ahmad Harun, Pre-Trial Chamber I, 27 April 2007, count 10 and 39 (both persecution, article 7 (1) (h), count 14 (rape, article 8 (2) (e) (vi)), count 42–43 (rape under article 7 (1) (h) and 8 (2) (e) (vi)).

¹⁰⁷² *Prosecutor v. Hussein*, ICC-02/05-01/12-2, Warrant of Arrest for Abdel Raheem Muhammad Hussein, Pre-Trial Chamber I, 1 March 2012, pp. 4, 9.

¹⁰⁷³ *Prosecutor v. Kushayb*, ICC-02/05-01/07-3, Warrant of arrest for Ali Kushayb, Pre-Trial Chamber I, 27 April 2007, count 10 and 39 (both persecution, article 7 (1) (h), count 14 (rape, article 8 (2) (e) (vi)).

Ugandan situation, charges of rape and sexual slavery are included in the arrest warrants for Kony¹⁰⁷⁴ and Otti¹⁰⁷⁵.

b) War crime of rape. According to the ICTY, ‘international law ... regards rape as the most serious manifestation of sexual assault’¹⁰⁷⁶. However, there had been no definition of rape in international humanitarian or human rights instruments prior to the Elements of Crimes elaborated by the Preparatory Commission. Domestic legal systems contain different definitions of rape¹⁰⁷⁷. A common denominator of the way rape is understood in both the Elements of Crimes as well as national legal systems and international case law is the distinction of two basic elements of this crime: The physical act, and the lack of valid consent or presence of coercive or similar circumstances.

In the Elements of Crimes, rape is defined as follows¹⁰⁷⁸: 671

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.’

aa) The physical act of rape. The UN Special Rapporteur on Contemporary Forms of Slavery McDougall has suggested that the physical element of rape be defined as ‘the insertion ... of any object, including but not limited to a penis, into a victim’s vagina or anus; or the insertion ... of a penis into the mouth of the victim’¹⁰⁷⁹. 672

However, in the first case of the *ad hoc* international criminal tribunals to consider the definition of rape as a crime under international law, an ICTR Trial Chamber considered there was no commonly accepted definition of the term in international law, adding that ‘while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. ... The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’¹⁰⁸⁰. 673

The *Furundžija* Trial Chamber of the ICTY analyzed the specific elements of the crime of rape in more detail. Again, the *Furundžija* Trial Chamber found that the precise elements of rape could not ‘be drawn from international treaty or customary law, nor ... general principles of international criminal law or ... general principles of international law’. Consequently, the Chamber considered it necessary to ‘look for principles of criminal law common to the major legal systems of the world’ in order to ‘arrive at an accurate definition based on the criminal law principle of specificity (... ‘*nullum crimen sine lege stricta*’)’¹⁰⁸¹. The *Furundžija* Trial Chamber concluded that the main common element was (forced) 674

¹⁰⁷⁴ *Prosecutor v. Kony et al*, ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, Pre-Trial Chamber II, 27 September 2005 (Count 2 and 3 on pp. 12–13: rape; Count 1 on p. 12: sexual slavery).

¹⁰⁷⁵ *Prosecutor v. Kony et al*, ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti, Pre-Trial Chamber II, 8 July 2005 (Count 3 on p. 13: rape; Count 1 on p. 12: sexual slavery).

¹⁰⁷⁶ *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 175.

¹⁰⁷⁷ *Rape and Sexual Assault: A Legal Study*. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (S/1994/674/Add.2 (Vol. I), Annex II; see also Ambos, in: Bergsmo et al. (eds.), *International Sex Crimes* (2012) 143, 149–150, recognizing a ‘cultural conditionality of criminal prohibitions that becomes particularly obvious in the context of sexual offences’.

¹⁰⁷⁸ ICC Elements of Crimes for Arts. 7 (1) (g)-1, 8 (2) (b) (xxii)-1 and 8 (2) (e) (vi)-1.

¹⁰⁷⁹ 1998 UN Slavery Rapporteur Report, para. 24.

¹⁰⁸⁰ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 10 December 1998, paras. 686 and 688 (emphasis added), confirmed in *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, paras. 478–479.

¹⁰⁸¹ *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 177.

physical penetration¹⁰⁸². However, while many national legal systems were found to specify that rape can only be committed against a woman, others provide that rape can be committed against a victim of either sex, and still others use wording open for interpretation¹⁰⁸³. Another major discrepancy the Chamber found was that some domestic legal systems qualify forced oral penetration as rape while others qualify such act as sexual assault. The *Furundžija* Trial Chamber qualified the forced penetration of the mouth by the male sexual organ as the war crime of rape for two reasons. First, such penetration constitutes ‘a most humiliating and degrading attack upon human dignity’ and ‘an extremely serious sexual outrage’ that can be ‘just as humiliating and traumatic as vaginal or anal penetration’. Second, forced oral sex in prosecutions before the ICTY ‘is invariably an aggravated sexual assault as it is committed in time of armed conflict on defenseless civilians’¹⁰⁸⁴. In conclusion, the *Furundžija* Trial Chamber came to the following definition of the physical act of rape:

‘the sexual penetration, however slight:

- a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- b) of the mouth of the victim by the penis of the perpetrator; ...’¹⁰⁸⁵.

675 Element 1 for article 8 para. 2(b) (xxii)-1 Rome Statute suggests that the physical act of rape consists in that:

‘[t]he perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body’ (footnote omitted).

676 This formulation was, at the time of its adoption by the Preparatory Commission, one of the most progressive and broader definitions of rape under international and even national law. The definition derives to a large degree from the above-described jurisprudence of the two *ad hoc* Tribunals. The long and relatively complicated formulation is the result of the Preparatory Commission’s intention to draft a **gender-neutral** definition.

677 The general requirement that the perpetrator ‘invaded’ the body of a person is somewhat vague but was preferred as it appears broader than the term ‘penetrated’ and was ‘intended to be broad enough to be gender-neutral’¹⁰⁸⁶. Penetrating ‘any part of the body of the victim or of the perpetrator’ would include penetrating not only the anal or genital opening but in particular also the mouth. Therefore, the wording of the Elements also covers forcing a victim to perform fellatio on the perpetrator or another person¹⁰⁸⁷, performing fellatio on a victim, or even sexual intercourse forced on a man by a woman. The Elements also qualify as rape the penetration of the anal or genital opening of the victim with any object or any other part of the body (e.g. fingers). The ICTR has qualified as rape the thrusting of a piece of wood into the sexual organs of a woman as she lay dying¹⁰⁸⁸.

678 **bb) No sexual autonomy (no ‘consent’/coercion).** Under national legislations, sexual activity generally is not prohibited if there is consent. Similarly, it can be argued that the

¹⁰⁸² *Ibid.*, para. 180; similar Ambos, in: Bergsmo et al., *International Sex Crimes* (2012), 143, 153 (‘every sexual penetration may constitute rape, whereas sexual behavior falling short of a penetration is not covered’).

¹⁰⁸³ *Ibid.*, para. 180.

¹⁰⁸⁴ *Ibid.*, paras. 182–184.

¹⁰⁸⁵ *Ibid.*, para. 185. This definition has been confirmed in *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 438, and (more implicitly) also in *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001, paras. 175–176.

¹⁰⁸⁶ Fn. 50 to element 1 for article 8 para. 2 (b) (xxii)-1.

¹⁰⁸⁷ In an *obiter dictum*, the *Čelebići* ICTY Trial Chamber found ‘that the act of forcing [the victims] to perform fellatio on one another ... could constitute rape for which liability could have been found if pleaded in the appropriate manner’, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, paras. 1062–1066 (emphasis added) (the Trial Chamber instead determined inhuman as well as cruel treatment). See also *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgment, Trial Chamber, 31 July 2001, paras. 39–40 (and para. 66).

¹⁰⁸⁸ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 10 December 1998, para. 686.

above-described physical act of invading a person’s body cannot amount to a war crime where both sides consent. However, can there be genuine consent of a protected person in the particular situation of an armed conflict, since the environment of such conflict generally is coercive and dominated by unequal relations of power and fear?¹⁰⁸⁹ A prisoner of war may well formally ‘consent’ to sexual acts with the guards, but may do so only because of fear for her or his life. How should the issue of consent and criminal responsibility therefore be addressed with regard to sexual activity related to armed conflict?

The ICTY *Furundžija* Trial Chamber analyzed major legal systems of the world and found that all jurisdictions required:

‘an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless’¹⁰⁹⁰.

Some jurisdictions were also found to indicate that the force or intimidation can be committed against a third person¹⁰⁹¹. According to the *Furundžija* Trial Chamber’s concise formula, rape requires ‘coercion or force or threat of force against the victim or a third person’¹⁰⁹², noting that the threat of force may be ‘express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression’¹⁰⁹³.

The *Kunarac* ICTY Trial Chamber however found the concise *Furundžija* formula to be more restrictive than required by international law as it does not refer to ‘other factors which would render an act of sexual penetration **non-consensual or non-voluntary** on the part of the victim, which ... is ... the accurate scope of this aspect of the definition in international law’¹⁰⁹⁴.

In the *Kunarac* Chamber’s view, the national legal systems surveyed in *Furundžija* indicated that the common basic underlying principle was ‘that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim’. It also pointed out that the *Furundžija* judgment itself referred to the alternative of the perpetrator acting without the victim’s consent and thereby suggested that the absence of consent or voluntary participation is relevant¹⁰⁹⁵. Against this background, the *Kunarac* Trial Chamber set out the following alternative factors in order to classify the sexual activity concerned as rape:

- (i) the sexual activity must be accompanied by force or threat of force to the victim or a third party;
- (ii) the sexual activity must be accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- (iii) the sexual activity must occur without the consent of the victim’¹⁰⁹⁶.

With regard to ‘[s]pecific circumstances which go to the vulnerability or deception of the victim’, the *Kunarac* Trial Chamber stated that the emphasis of national provisions concerned:

‘is that the victim, because of an incapacity of an enduring or qualitative nature (e.g. mental or physical illness, or the age of minority) or of a temporary or circumstantial nature (e.g. being subjected to psychological pressure or otherwise in a state of inability to resist) was unable to refuse to

¹⁰⁸⁹ For an in-depth account on the question, see Herring and Dempsey, in: McGlynn and Munro (eds.), *Rethinking Rape Law* (2010) 30 *et seq.*; Luping, (2009) 17 *AmUJGenderSocialPol&L* 431, 474.

¹⁰⁹⁰ *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 180 (footnotes omitted).

¹⁰⁹¹ *Ibid.*, para. 180.

¹⁰⁹² *Ibid.*, para. 185.

¹⁰⁹³ *Ibid.*, para. 174.

¹⁰⁹⁴ *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 438 (emphasis in the original). Linking this development to the adoption of the Elements of Crimes: Werle/Jessberger, *Principles ICL* (2014), para. 974.

¹⁰⁹⁵ *Ibid.*, para. 440 (emphasis in the original), referring to *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 180.

¹⁰⁹⁶ *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 442, confirmed by *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001, para. 177. See also *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgment, Appeals Chamber, 7 July 2006, paras. 127–132.

be subjected to the sexual acts. The key effect of factors such as surprise, fraud or misrepresentation is that the victim was subjected to the act without the opportunity for an informed or reasoned refusal. The common denominator underlying these different circumstances is that they have the effect that the victim's will was overcome or that her ability freely to refuse the sexual acts was temporarily or more permanently negated¹⁰⁹⁷.

In conclusion, the *Kunarac* Trial Chamber stated that:

[t]he basic principle which is truly common to these [domestic] legal systems is that serious violations of sexual *autonomy* are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.

683 In practice, the absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist¹⁰⁹⁸.

684 Focusing on rape as a serious violation of sexual autonomy, the *Kunarac* Trial Chamber concluded that a sexual penetration qualifies as rape where it occurred ‘without the consent of the victim’, with consent having to be ‘given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances’¹⁰⁹⁹.

685 The *Kunarac* Appeals Chamber confirmed the Trial Chamber’s findings and, besides noting that there was no ‘resistance’ requirement, made some clarifications with regard to the element of force:

‘Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. ... A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

A threat to retaliate ‘in the future against the victim or any other person’ is [in some domestic jurisdictions] a sufficient *indicium* of force so long as ‘there is a reasonable possibility that the perpetrator will execute the threat. ... [I]t is worth observing that the circumstances ... that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible’¹¹⁰⁰.

686 The *Kunarac* Appeals Chamber went on to note several national criminal provisions which establish a *strict liability* of a person in a certain power position for engaging in sexual acts with a ‘victim’ under his influence because of the victim’s particular vulnerability due to the unequal power distribution. Given the inherent coerciveness of the situation, national legislatures thus decided that there was a need to presume non-consent and no evidence of apparent consent should be permitted. The provisions referred to penalize for instance sexual acts with prisoners and persons in custody of public authority regardless of whether the victim consented. An April 1998 amendment to the German Criminal Code for instance added ‘exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator’s influence’ as equivalent to ‘force’ or ‘threat of imminent danger to life or limb’¹¹⁰¹.

687 The *Furundžija* Trial Chamber also seemed to suggest a non-refutable and abstract presumption of non-consent when stating that ‘any form of captivity vitiates consent’¹¹⁰². In a similar line of thought, the ICTR *Akayesu* Trial Chamber case merely required that rape be committed ‘under circumstances which are coercive’, noting that ‘coercive circumstances

¹⁰⁹⁷ *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 452.

¹⁰⁹⁸ *Ibid.*, paras. 457–458 (emphasis in the original).

¹⁰⁹⁹ *Ibid.*, para. 460. The *Kvočka* Trial Chamber endorsed these holdings, *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001, paras. 176–177; arguing for sexual autonomy as the central principle underlying the definition of rape: Grewal (2012) 10 *JICJ* 373.

¹¹⁰⁰ *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, paras. 129–130 (footnotes omitted); see also *Prosecutor v. Bagosora*, No. ICTR-98-41-T, Judgment and Sentence, Trial Chamber I, 18 December 2008, para. 2199.

¹¹⁰¹ *Ibid.*, para. 131 (see also paras. 132–133).

¹¹⁰² *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 271.

need not be evidenced by a show of physical force. ... [C]oercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal¹¹⁰³. In same vein, the *Karamera* TC held that ‘Given the horrific circumstances surrounding these attacks, it is clear that there could have been no consent for these acts of sexual violence’.¹¹⁰⁴

At the ICC, the *Bemba* Pre-Trial Chamber III held that ‘the term ‘coercion’ ... does not require physical force. Rather, threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence.’¹¹⁰⁵ 688

The UN Special Rapporteur on Contemporary Forms of Slavery also argued in 1998 that ‘[t]he manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates [sic] the need for the prosecution to establish a lack of consent as an element of the crime’¹¹⁰⁶. 689

Within the Preparatory Commission, it was basically uncontroversial that sexual activity would not generally amount to a war crime where both sides genuinely consent. What was much debated, however, was how to define the type of ‘consent’ and the circumstances that may ‘justify’ sexual activity otherwise qualifying as rape with regard to the particular situation of an armed conflict. Eventually, the Preparatory Commission decided not to frame the issue of ‘consent’ in terms of a ground for excluding criminal responsibility, but rather to suggest (in element 1 for article 8 para. 2 (b) (xxii)-1), that one of the following four alternative circumstances must be made out in order for the physical act (described under element 1) to amount to a war crime: 690

1. The act was committed ‘by force’.
2. The act was committed ‘by threat of force or [by] coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person’ ...
3. The act was committed ‘by taking advantage of a coercive environment’ ...
4. The invasion ‘was committed against a person incapable of giving genuine consent’, with footnote 51 specifying that ‘a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity’.

With regard to the interpretation of element 2, the analysis of the alternative circumstantial elements of rape in the *Kunarac* judgment may be helpful, since their formulation is partly similar and because the Elements of Crimes possibly inspired the subsequently delivered *Kunarac* decision. The Elements for instance also clearly suggest that taking advantage of a coercive environment suffices. The term ‘coercive environment’ can be understood as referring to, *inter alia*, vertical power relations between troops conquering a village and the inhabitants of that village or between a detained person and his or her guards. 691

¹¹⁰³ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 10 December 1998, para. 688.

¹¹⁰⁴ *Prosecutor v. Karamera and Ndirumpats*, Judgment and Sentence, TC III, 2 February 2012.

¹¹⁰⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, PTC III, 15 June 2009; see also *Prosecutor v. Katanga and Chui*, ICC-01/04-1/07-717, Decision on the confirmation of charges, TC I, 30 September 2008, para. 440.

¹¹⁰⁶ After suggesting that ‘rape’ must be committed ‘under conditions of force, coercion or duress’, the UN Special Rapporteur McDougall added that ‘[l]ack of consent or the lack of capacity to consent due, for example, to coercive circumstances or the victim’s age, can distinguish lawful sexual activity from unlawful sexual activity under municipal law. The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime. In addition, consent is not an issue as a legal or factual matter when considering the command responsibility of superior officers who ordered or otherwise facilitated the commission of crimes such as rape in armed conflict situations. The issue of consent may, however, be raised as an affirmative defense as provided for in the general rules and practices established by the International Criminal Tribunal for the Former Yugoslavia ...’, 1998 UN Slavery Rapporteur Report, paras. 25.

692 cc) **Subjective element.** The mental element requires, pursuant to article 30 Rome Statute, either *dolus directus* of the first or of the second degree.¹¹⁰⁷

693 c) **War crime of sexual slavery.** The notion of ‘sexual slavery’ has not as such been defined under international humanitarian law treaties or other international conventions. In contrast, the more generic concept of ‘slavery’ has been defined in various conventions and considered a *jus cogens* norm in customary international law¹¹⁰⁸. Slavery (as well as slave trade) in its traditional forms was one of the earliest crimes to be recognized under international law. The 1926 Slavery Convention contains the first international definition of the offense. While the traditional forms of slavery (and slave trade) have almost ceased to exist, other forms of slavery and slavery-like practise such as servitude, forced labour and trafficking in women and children persist, including in situations of armed conflict. Besides the notorious ‘comfort women stations’ maintained by the Japanese during World War II, where more than 200’000 women were kept and forced to provide sexual services to Japanese soldiers¹¹⁰⁹, and the use of slave labor by Nazi Germany¹¹¹⁰, instances of slavery and sexual slavery could also be witnessed, *inter alia*, in the ‘rape camps’ in the former Yugoslavia¹¹¹¹ or the Rwanda or Liberia conflicts¹¹¹². International instruments have evolved to address these newer forms of slavery and slavery-like practices¹¹¹³. Article 4 para. 2 (f) Add. Prot. II prohibits ‘slavery and the slave trade in all their forms’¹¹¹⁴. Enslavement has been considered a crime against humanity since 1945¹¹¹⁵, and some

¹¹⁰⁷ According to article 30, ‘intent and knowledge’ is required. See also *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the confirmation of charges, TC I, 30 September 2008, para. 346; and *Prosecutor v. Ntaganda*, No. ICC-01/04-02/06-309, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, PTC II, 9 June 2014, paras. 134 and 170.

¹¹⁰⁸ 1998 UN Slavery Rapporteur Report, para. 28 and Annex, para. 12. Update to the 1998 UN Slavery Rapporteur Report, UN Doc. E/CN.4/Sub.2/2000/21 (6 June 2000), paras. 9 and 51 (qualifying also sexual slavery ‘as an international crime and a violation of *jus cogens* norms in the exact same manner as slavery’). On international law concerning slavery more generally, see, e.g., M. Ch. Bassiouni, *Enslavement as an International Crime*, 23 *NYJIL&Politics* 445 (1991); Lassen, 57 *NordicJIL* 197 (1988). Further references are available at <http://www.law-lib.utoronto.ca/diana/slavery/articles.htm>.

¹¹⁰⁹ See, e.g., 1998 UN Slavery Rapporteur Report, Annex; Update to the 1998 UN Slavery Rapporteur Report, UN Doc. E/CN.4/Sub.2/2000/21 (6 June 2000), paras. 71–78; Judgment of the (*ad hoc* and non- governmental, NGO-created) Women’s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery in the matter of the Prosecutors and the Peoples of the Asia-Pacific Region vs. Emperor Hirohito et al. and the Government of Japan, available at <http://iccwomen.org>; T. Yu, ‘Reparations for former comfort women of World War II’, 36 *HarvJL* 528 (1995); K. Parker/J. Chew, ‘Compensation for Japan’s World War II war-rape victims’, 17 *HastingsL&ComplRev* 497 (1994).

¹¹¹⁰ See, e.g., *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, paras. 523–527; XXII International Military Tribunal, Judgment, 469, 476–481, 485–495, 502–516, 525–526, 536–537, 541–542, etc. 1947); U.S. Military Tribunal at Nürnberg, *Erhard Milch* (20 December 1946–17 April 1947), II Nuremberg Military Tribunal 355 (1997) (e.g. 773, 789–791); U.S. Military Tribunal at Nürnberg, *O. Pohl and Others*, (3 Nov. 1947), V Nuremberg Military Tribunal (1997); U.S. Military Tribunal at Nürnberg, *C. Krauch and Others (IG Farben)* (14 Aug. 1947–29 July 1948), X *Law Reports* 53 (1949); 53; U.S. Military Tribunal at Nürnberg, *F. Flick and Others*, VI Nuremberg Military Tribunal (1997).

¹¹¹¹ See, e.g., *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, paras. 728–744 (Counts 18 and 22).

¹¹¹² See, e.g., 1998 UN Slavery Rapporteur Report, para. 30.

¹¹¹³ See, e.g., Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 7 Sep. 1956; Convention concerning Forced or Compulsory Labour of 28 June 1930 (ILO Convention No. 29); Convention concerning the Abolition of Forced Labour of 25 June 1957 (ILO Convention No. 105); article 4 UDHR (prohibiting servitude and slavery and slave trade in all their forms); article 8 ICCPR (prohibiting slavery, slave-trade, servitude and forced or compulsory labor); article 4 ECHR (prohibiting slavery, servitude, forced or compulsory labor); article 6 ACHR (prohibiting slavery, involuntary servitude, slave trade, traffic in women and forced or compulsory labor); article 5 ACHPR (prohibiting slavery and slave trade). For an overview over the different instruments, see Bassiouni (1991) 23 *NYJIL&Politics* 445, 459–517.

¹¹¹⁴ One of the proposals compiled in the 1996 Preparatory Committee Report but not taken up into later compilations had included the war crime of ‘slavery, [and the slave trade,] [slave-related practices, and forced labour] in all their forms’, 1996 Preparatory Committee II 61 (para. 2(k)).

¹¹¹⁵ See, e.g., articles 6(c) Nürnberg Charter, 5(c) Tokyo Charter, 5(c) ICTY Charter, 3(c) ICTR Charter, 18(d) of the 1996 ILC Draft Code, and 7 paras. 1 (c), 2 (c) as well as 1 (g) Rome Statute. See generally Ch. K. Hall/K. Ambos, *Article 7*.

countries also considered that offence a war crime¹¹¹⁶. The ICTY has analyzed the elements of and international law relating to ‘enslavement’ in some detail in the *Kunarac* case¹¹¹⁷.

The **definition of slavery under international law** may serve as a guideline on how to understand the notion of ‘sexual slavery’, as the war crime of sexual slavery can be regarded as a particular form of slavery, namely slavery involving acts of a sexual nature¹¹¹⁸. This approach has also been adopted by the elements for article 8 para. 2 (b) (xxii)-2: While element 1 for the war crime of sexual slavery in essence (as we shall see) requires that the perpetrator engaged in slavery, the second element requires additionally that ‘[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature’, addressing a particular type of slavery. This second element would certainly be met when a perpetrator exercised the power of control over sexual access involving rape or other forms of sexual violence¹¹¹⁹. 694

The **traditional concept of slavery** has been defined by the 1926 Slavery Convention. Its article 1 para. 1 contains what has been qualified as ‘the first comprehensive and now the most widely recognized definition of slavery’¹¹²⁰. 695

‘[T]he status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.

The ICTY *Kunarac* Appeals Chamber has referred to this traditional concept of slavery as ‘*chattel slavery*’, a term ‘used to describe slavery-like conditions. To be reduced to ‘chattel’ generally refers to a form of movable property as opposed to property in land’¹¹²¹. 696

The same Appeals Chamber distinguishes from the traditional concept of ‘chattel slavery’ the concept of **slavery under contemporary international law, encompassing various contemporary forms of slavery**. While these contemporary forms of slavery are also based on the exercise of any or all of the powers attaching to the right of ownership, the victim is subject to a **lesser degree of the destruction of the juridical personality**. The Appeals Chamber considered that ‘these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law’ already in 1992¹¹²². 697

Within the SCSL jurisprudence, it was discussed controversially whether forced marriages may constitute the crime of sexual slavery. In *Brima et al.*, the Appeals Chamber overruled a conviction for sexual slavery,¹¹²³ and convicted for ‘other inhuman acts’ as a crime against humanity instead, while holding that ‘forced marriage is not predominantly a sexual crime’.¹¹²⁴ In *Sesay et al.*, forced marriages were considered as both sexual slavery as well as ‘other inhuman acts’ cumulatively.¹¹²⁵ 698

Element 1 for article 8 para. 2 (b) (xxii)-2 Rome Statute spells out the general element of sexual slavery by requiring that ‘[t]he perpetrator exercised any or all of the powers attaching 699

¹¹¹⁶ See, e.g., article II of the Chinese War Crimes Law of 24 October 1946, XIV *Law Reports* 153 (1949), (‘shall be considered a war criminal ... [a]lien combatants or non-combatants who during a war or a period of hostilities ... or prior to the occurrence of such circumstances ... nourish intentions of enslaving, crippling, or annihilating the Chinese Nation ... by such methods as ... (a) ... enslaving ... of its nationals’).

¹¹¹⁷ *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, paras. 106–124; *Prosecutor v. Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, paras. 515–543.

¹¹¹⁸ See 1996 ILC Draft Code, *Article 18*, para. 10; 1998 UN Slavery Rapporteur Report, para. 30.

¹¹¹⁹ The Women’s Caucus for Gender Justice had indeed proposed that the Elements require such exercise of power of control over sexual access, Women’s Caucus for Gender Justice, Revised proposal for elements under article 8 para. 2 (b) (xxii), 1 (4 August 1999).

¹¹²⁰ 1998 UN Slavery Rapporteur Report, para. 27.

¹¹²¹ *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, para. 117, fn. 145.

¹¹²² *Ibid.*, para. 117.

¹¹²³ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, TC, 20 July 2007, paras. 703–713.

¹¹²⁴ *Prosecutor v. Brima et al.*, SCSL-04-16-A, Judgment, AC, 22 February 2008, para. 195, see also paras. 181–203.

¹¹²⁵ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgment, TC, 2 March 2009 (no appeal). Crit. on a lack of allegations regarding forced marriages in the ICC *Katanga* case, Gekker (2014) 25 *Hastings Women’s LJ* 105, 106 *et seq.*

to the right of ownership over one or more persons’, a formulation directly derived from article 1 para. 1 of the 1926 Slavery Convention¹¹²⁶.

700 This definition suggests a technical and relatively limited element of legal ‘ownership’. However, no such ‘right’ exists under contemporary national as well as international law¹¹²⁷. National legal provisions that provided for a ‘right’ of one person to own another person have been abolished. The notion of slavery under the Rome Statute cannot, therefore, be interpreted as limited to the traditional form of slavery practiced before World War II. Not even most of the slave labor used by the Nazis during World War II would qualify as a form of slavery under such a restrictive reading since not acquired through commercial exchanges and consequently¹¹²⁸. Similarly, some of the ‘comfort women’ used by the Japanese were not sold or purchased but kidnapped, coerced and deception¹¹²⁹. It can hardly have been the intention of the drafters of the Rome Statute to create only a symbolic ICC jurisdiction over slavery. Article 8 para. 2 (b) (xxii) rather appears to have been intended to take into account the evolution of customary international law since World War II, which recognizes a number of situations as slavery. This broader approach is confirmed by the examples of slavery listed in element 1 and footnote 53 for article 8 para. 2 (b) (xxii)-2, which clearly go beyond the traditional technical notion of slavery and interpret the definition of slavery spelled out in element 1 as covering forms of slavery recognized under international law as it has evolved since World War II¹¹³⁰. A similar approach had also been taken by the ILC when it defined enslavement, included as a crime against humanity in its 1996 Draft Code, as ‘establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as the 1926 Slavery Convention ...; the 1956 Supplementary Convention ...; the [ICCPR]; and the 1957 [ILO] Convention No. 29 ...’¹¹³¹.

701 The fact that a person was not bought, sold or traded or that no pecuniary benefit exists does not, therefore, defeat a claim of slavery¹¹³². The reference to ‘ownership’ and the examples mentioned in element 1 (‘purchasing, selling, lending or bartering ... or ... imposing a similar deprivation of liberty’) however may indicate that slavery refers to subjecting a person to **treatment akin to the treatment of chattel**, that is, a possession or movable good¹¹³³, such as when a person is (significantly) deprived of his or her autonomy.

¹¹²⁶ ‘Slavery’ denotes the status or condition in which the victim finds himself, while the *actus reus* of the crime of slavery is ‘enslavement’, that is, establishing or maintaining a status of slavery.

¹¹²⁷ See also *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, para. 118.

¹¹²⁸ Ch. K. Hall, *Article 7*.

¹¹²⁹ 1998 UN Slavery Rapporteur Report, Annex, para. 7. See also *ibid.*, Annex, para. 9 (f). The UN Slavery Rapporteur however stated that ‘the Japanese military’s enslavement of women throughout Asia during the Second World War was a clear violation, even at that time, of customary international law prohibiting slavery’, *ibid.*, Annex para. 12.

¹¹³⁰ See also Bassiouni (1991) 23 *NYJIL&Politics* 445, 456–459.

¹¹³¹ 1996 ILC Draft Code, *Article 18*, para. 10. The Commentary on article 4 para. 2 (f) Add. Prot. II also appears to suggest that the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practises Similar to Slavery of 1956 and ‘certain institutions and practices comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labour’ also may amount to the prohibited ‘slavery and the slave trade *in all their forms*’ (emphasis added), Junod, in: Sandoz/Swinarski/Zimmermann (eds), *Commentary Additional Protocols* (1987) 1376 (No. 4541).

¹¹³² See 1998 UN Slavery Rapporteur Report, paras. 28 and 45 as well as Annex, para. 22; Update to the 1998 UN Slavery Rapporteur Report, UN Doc. E/CN.4/Sub.2/2000/21 (6 June 2000), para. 8; *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 542.

¹¹³³ A drafting proposal that became the discussion basis for the drafting of the elements of the war crime of sexual slavery had indeed proposed an element requiring that the perpetrator ‘treated a person as chattel by exercising any or all of the powers attaching to the right of ownership, including sexual access through rape or other forms of sexual violence’, Proposal submitted by Costa Rica, Hungary and Switzerland on certain provisions of article 8 para. 2 (b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi), UN Doc. PCNICC/1999/WGEC/DP.8 (19 July 1999) 4. This proposal had been inspired by the 1998 UN Slavery Rapporteur Report which perceived ‘treatment of a person as chattel’ as a requirement of slavery, *ibid.* para. 28.

Indeed, **control and deprivation of one's autonomy** – such as restrictions on the freedom of movement or also the control of sexual access – can be considered essential elements of slavery. The wording of element 1 for article 8 para. 2 (b) (xxii)-2 Rome Statute actually suggests that slavery must involve a '**deprivation of liberty**'. The UN Special Rapporteur has stated that '[t]he mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery. In all cases, a subjective, gender-conscious analysis must also be applied in interpreting an enslaved person's reasonable fear of harm or perception of coercion. This is particularly true when the victim is in a combat zone during an armed conflict ... and has been identified as a member of the opposing group or faction'¹¹³⁴.

Commentators on sexual slavery rarely explicitly address the question whether slavery requires that a person is deprived of liberty *without lawful process*. Insofar the deprivation of liberty must be unlawful, sexual violence occurring during a deprivation of liberty in accordance with international humanitarian law, for instance imprisoning prisoners of war or common criminals in internal conflicts, would not qualify as sexual slavery. The US Military Tribunal held in the *Pohl* case that persons are 'slaves if without lawful process they are deprived of their freedom by forceful restraint'¹¹³⁵.

The lack of resistance or of consent need not be proven for the war crime of sexual slavery. It may however be indirectly relevant with regard to the question whether the accused exercises a power attaching to the right of ownership. Circumstances which render it impossible to express consent, however, would be sufficient to presume the absence of consent¹¹³⁶.

The ICTY *Kunarac* Trial Chamber has considered various factors as possible indications that a particular phenomenon is a form of enslavement¹¹³⁷.

As the *Kunarac* Appeals Chamber held, it is **not possible to enumerate exhaustively all of the contemporary forms of slavery** which are comprehended in the expansion of the original idea. The central question turns on the *quality* of the relationship between the accused and the victim, with a number of factors determining that quality. For instance, it is not necessary that the enslavement or deprivation of liberty lasted indefinitely or at least for a prolonged

¹¹³⁴ 1998 UN Slavery Rapporteur Report, para. 29. The Women's Caucus for Gender Justice had even argued that 'there are many situations in the desperate situations of armed conflict where enslavement is inflicted without deprivation of liberty', Women's Caucus for Gender Justice, Revised proposal for elements under article 8 para. 2 (b) (xxii) 1 (4 Aug. 1999).

¹¹³⁵ U.S. Military Tribunal at Nürnberg, *O. Pohl and Others* (3 November 1947) *V Nuremberg Military Tribunal* (1997) 970.

¹¹³⁶ *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, para. 120.

¹¹³⁷ '[I]ndications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. ... international law ... make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The "acquisition" or "disposal" of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor ...; however, its importance in any given case will depend on the existence of other indications of enslavement. [F]actors ... to be taken into consideration in determining whether enslavement was committed ... [thus] are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. ... [T]he mere ability to buy, sell, trade or inherit a person or his or her labours or services ... is insufficient, such actions actually occurring could be a relevant factor'. *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, paras. 542–543 (footnotes omitted), confirmed in *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, para. 119. See also 1998 UN Slavery Rapporteur Report, para. 29.

period of time. The duration however may be one factor that can be considered, with its importance depending on the existence of other indications of enslavement and on the context¹¹³⁸. Also, ‘slaves may be well fed, well clothed, and comfortably housed, but ... [t]here is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery’¹¹³⁹.

707 The *Kunarac* Trial Chamber found two accused guilty of the crime against humanity of enslavement (besides rape and outrages upon personal dignity), as they, *inter alia*, denied two victims ‘any control over their lives ... during their stay there. They had to obey all orders, they had to do household chores and they had no realistic option whatsoever to flee the house ... or to escape their assailants. They were subjected to other mistreatments, such as ... rape ... The two women were treated as the personal property of Kunarac and DP 6. ... Both men personally committed the act of enslavement’¹¹⁴⁰.

708 Another accused, *Kovač*, was found guilty of the crime against humanity of enslavement (again besides rape and outrages upon personal dignity) for, *inter alia*, selling two female victims and ‘locking them up and by psychologically imprisoning them, and thereby depriving them of their freedom of movement. During that time, he had complete control over their movements, privacy and labour. He made them cook for him, serve him and do the household chores for him. He subjected them to degrading treatments, including beatings and other humiliating treatments’¹¹⁴¹.

709 The first examples element 1 for article 8 para. 2 (b) (xxii)-2 Rome Statute mentions as qualifying as exercising powers attaching to the right of ownership are ‘**purchasing, selling, lending or bartering such a person or persons**’¹¹⁴². These (trans)actions of a commercial nature certainly are examples of the exercise of ownership and reflect the notion of slavery as it traditionally has been understood. Even the 1926 Slavery Convention had defined ‘slave trade’ in its article 1 para. 2 as including ‘all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves’.

710 Element 1 for article 8 para. 2 (b) (xxii)-2 however adds that ‘**imposing ... a similar deprivation of liberty**’ (emphasis added) also amounts to exercising powers attaching to the right of ownership, with footnote 53 to element 1 providing some examples of such similar deprivation of liberty. Yet, the examples listed make it clear that the term ‘similar’ does not mean that the deprivation of liberty must have a similar commercial element¹¹⁴³.

711 The first of the examples in footnote 53 is ‘in some circumstances ..., **exacting forced labour**’. International law does not prohibit all forced labor or service in armed conflicts, while particularly prohibiting compelling protected persons to serve in the armed forces or involving them in military operations of the adversary and setting strict conditions for the requisition of labor and services in armed conflicts such as those spelled out in articles 40 and 51 GC IV¹¹⁴⁴.

¹¹³⁸ *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, paras. 119 and 121. With regard to the *mens rea*, the *Kunarac* Appeals Chamber stated that ‘[i]t is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts’, *ibid.*, para. 122.

¹¹³⁹ U.S. Military Tribunal at Nürnberg, *O. Pohl and Others*, (3 Nov. 1947), *V Nuremberg Military Tribunal* (1997) 970.

¹¹⁴⁰ *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, paras. 742 and 745.

¹¹⁴¹ *Ibid.*, paras. 775–782.

¹¹⁴² The proposal to add ‘abducting’ to this list did not eventually find its way into the Elements.

¹¹⁴³ The UN Special Rapporteur on Contemporary Forms of Slavery correctly stated that ‘[i]t is unnecessary and inappropriate to require any element of commercial transaction for the crime of sexual slavery. Most contemporary forms of slavery, including sexual slavery, do not involve payment or exchange ...’. Update to the 1998 UN Slavery Rapporteur Report, UN Doc. E/CN.4/Sub.2/2000/21 (6 June 2000), para. 29.

¹¹⁴⁴ See *Prosecutor v. Kunarac et al.*, IT-96-23T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, paras. 528–530 and 542.

A second example in footnote 53 is ‘otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956’ (emphasis added). Article 1 in connection with article 7 (b) of that Convention provides that a person of servile status means a person in the condition or status resulting from any of the following institutions or practices:

- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
- (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
- (c) Any institution or practice whereby:
 - (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
 - (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
 - (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour’.

A third example mentioned in footnote 53 is the ‘*trafficking in persons, in particular women and children*’. The 1949 Trafficking Convention suggests that a person engages in trafficking in persons when he ‘to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person’¹¹⁴⁵. The 1999 Trafficking Protocol (not yet entered into force) provides a more recent definition of ‘trafficking in persons’:

‘the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person [or by other means (subparagraph (c))], for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’¹¹⁴⁶.

A number of other international instruments prohibit the trafficking of persons¹¹⁴⁷. The UN Sub-Commission’s Working Group on Contemporary Forms of Slavery has stated that ‘trans-border trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights’¹¹⁴⁸.

¹¹⁴⁵ UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, UN GA Res. 317 (IV) (2 Dec. 1949), Art. 1(1).

¹¹⁴⁶ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, UN Doc. A/RES/55/25 (15 November 2000), article 3. See A. Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’, 23(4) *HumRQ* 4, 975(2001).

¹¹⁴⁷ See, e.g., article 6 para. 1 ACHR; article 6 CEDAW; article 11 para. 1 of the 1989 UN Convention on the Rights of the Child; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN Doc. A/RES/54/263 (25 May 2000). See also L. Chiang, ‘Trafficking in Women: An International Issue’, in: K. D. Askin/D. M. Koenig (eds.) *Women’s Human Rights: A Reference Guide* (1999); J. Chuang, ‘Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Concerns’, 11 *HarvHumRtsJ* 65 (1998); C. K. Hall, *Article 7*, First Edition of this Commentary, 160–161 (mn 96); S. F. Toepfer/B. S. Wells, ‘The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women’, 2 *MichJGender&L* 83 (1994).

¹¹⁴⁸ Report of the Working Group on Contemporary Forms of Slavery on its twenty-third session, UN Doc. E/CN.4/Sub.2/1998/14 (6 July 1998), recommendation 4, para. 1.

- 715 The list of examples in element 1 and footnote 53 of what may constitute a ‘**similar deprivation of liberty**’ is non-exhaustive. Correspondingly, other acts or omissions may amount to enslavement as defined in element 1 such as those indicated by the ICTY in the *Kunarac* case. One example is a **forced marriage**¹¹⁴⁹ (which in any event appears to qualify under ‘otherwise reducing a person to servile status’). Forced marriages may be distinguished from ‘arranged marriages’, in that arranged marriages, which exist in various parts of the world, are based on the consent of both parties (while not necessarily of both persons to be married) whereas forced marriages involve the lack of consent of at least one of the parties¹¹⁵⁰. The UN Special Rapporteur on Contemporary Forms of Slavery considered that ‘The repeated rape and sexual abuse of women and girls under the guise of ‘marriage’ constitutes slavery, as the victims do not have the freedom to leave, to refuse the sham ‘marriage’ or to decide whether and on what terms to engage in sexual activity’¹¹⁵¹. The Special Rapporteur therefore perceived sexual slavery as encompassing ‘situations where women and girls were forced into ‘marriage’, domestic servitude or other forced labour that ultimately involves forced sexual activity ... by their captors’¹¹⁵², qualifying as sexual slavery situations such as the sexual abuse of Burmese women and girls ‘after being forced into ‘marriages’ or forced to work as porters or minefield sweepers for the military’ or the forcing by Liberian combatants of women and girls into working as cooks and holding them as sexual slaves¹¹⁵³. It can also be argued that the *control over sexual access itself* is a form of exercising a power of ownership over a person¹¹⁵⁴.
- 716 d) **War crime of enforced prostitution.** ‘Enforced prostitution’ is prohibited under article 27 para. 2 GC IV as an attack on women’s honour and under article 75 para. 2 (b) Add. Prot. I as an outrage upon personal dignity. Article 76 para. 1 furthermore states that ‘[w]omen shall be the object of special respect and shall be protected in particular against ... *forced prostitution ...*’ (emphasis added)¹¹⁵⁵.
- 717 Enforced prostitution has been made punishable for instance under Australian and Chinese laws of 1945 and 1946, respectively¹¹⁵⁶. In a post-World War II trial, the Japanese hotel-keeper *Awochi* was found guilty of the ‘war crime of enforced prostitution’ for having forced Dutch women to practice prostitution in the premises of the club-restaurant in Batavia which at that time was occupied by Japanese forces¹¹⁵⁷.

¹¹⁴⁹ See 1998 UN Slavery Rapporteur Report, paras. 8 and 30.

¹¹⁵⁰ See Report of the Working Group on Contemporary Forms of Slavery on its twenty-fifth session, UN Doc. E/CN.4/Sub.2/2000/23 (21 July 2000), para. 114.

¹¹⁵¹ Update to the 1998 UN Slavery Rapporteur Report, UN Doc. E/CN.4/Sub.2/2000/21 (6 June 2000), para. 13.

¹¹⁵² See 1998 UN Slavery Rapporteur Report, para. 30.

¹¹⁵³ See 1998 UN Slavery Rapporteur Report, para. 30. See also Update to the 1998 UN Slavery Rapporteur Report, UN Doc. E/CN.4/Sub.2/2000/21 (6 June 2000), paras. 10–22 and 53.

¹¹⁵⁴ The UN Special Rapporteur defined ‘slavery’ as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence’, 1998 UN Slavery Rapporteur Report, para. 27. See also Women’s Caucus for Gender Justice, Revised proposal for elements under article 8 para. 2 (b) (xxii) 1 (4 Aug. 1999).

¹¹⁵⁵ As regards human rights instruments, article 6 CEDAW for instance requires states to, *i.a.*, suppress ‘all forms of ... exploitation of prostitution of women’, and the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, UN Doc. A/RES/317 (IV) (2 Dec. 1949), requires States in its article 1 para. 2 ‘to punish any person who, to gratify the passions of another: ... Exploits the prostitution of another person, even with the consent of that person’. The ILC also included ‘enforced prostitution’ in its list of crimes against humanity under the 1996 ILC Draft Code.

¹¹⁵⁶ Commonwealth of Australia War Crimes Act of 1945, V *Law Reports* 94–95 (1948), (referring to a list of war crimes including the ‘abduction of girls and women for the purpose of enforced prostitution’); Chinese Law governing the Trial of War Criminals of 24 Oct. 1946, XIV *Law Reports* 154 (1949), (‘Kidnapping females and forcing them to become prostitutes’). This war crime had also been included in the list of offences of the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.

¹¹⁵⁷ *Awochi* had been charged with having ‘in time of war and as a subject of a hostile power, namely Japan’ and ‘owner of the Sakura-Club, founded for the use of Japanese civilians’, committed ‘war crimes by, in violation of the laws and customs of war, recruiting women and girls to serve the said civilians ...’, and then under direct

The term ‘prostitution’ seems to suggest that sexual services are provided as part of an exchange and that the sexual activity may be offered and initiated by the victim and not necessarily by the perpetrator or a ‘client’. However, as the adjective ‘enforced’ makes clear, the victim is coerced or compelled to such exchange or offer, particularly to avoid harm to him- or herself or someone else or to obtain something necessary for survival¹¹⁵⁸. Enforced prostitution may cover a single act as well as a continuing situation¹¹⁵⁹. Again, this war crime of sexual violence protects women as well as men or children from enforced prostitution¹¹⁶⁰. In contrast for instance to rape, the ‘client’ engaging in an individual sexual act may not use any force or coercion or not even be aware of coercive circumstances.

The Elements for article 8 para. 2 (b) (xxii)-3 Rome Statute require two particular elements, the first being that the perpetrator caused the victim ‘to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent’¹¹⁶¹.

Secondly, the perpetrator or another person (including the ‘client’) ‘obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature’.

e) War crime of forced pregnancy. The Rome Statute is the first international, legally binding instrument that explicitly prohibits forced pregnancy, and criminalizes it as a war crime (and crime against humanity). The crime of forced pregnancy combines both (en)forced impregnation (pregnancy as a result of rape or some involuntary medical procedure) as well as (en)forced maternity (being forced to carry the pregnancy to term)¹¹⁶², the latter of which may have devastating consequences for the victim (social, financial, emotional, etc.) and has been used for reasons of ethnic cleansing. The notion of

or indirect threat of the Kempei (Japanese Military Police) should they wish to leave, forcing them to commit prostitution with the members of the said club’, which the women and girls “were not able to leave freely”. The accused was found guilty of the war crime of ‘enforced prostitution’ based on article 1 para. 7 of Netherlands East Indies Statute Book Decree No. 44 of 1946 concerning the ‘Definition of War Crimes’ and establishing the jurisdiction over such crimes of the Netherlands Temporary Court-Martial at Batavia. The war crime was defined as ‘[a]bduction of girls and women for the purpose of enforced prostitution’. With regard to the ‘enforced prostitution’, on which the court put the accent, the court found that women and girls ‘intended for prostitution had to take up residence in a part of the club shut off for that purpose and from which they were not free to move’, having been under the serious threat with the Japanese military police should they try to leave, which threats, ‘in view of the nature of the police, ‘were rightly considered as being synonymous with ill-treatment, loss of liberty or worse’. Netherlands Temporary Court- Martial at Batavia, *Washio Awochi* (25 Oct. 1946), XIII *Law Reports* 122–124 (1949).

¹¹⁵⁸ The UN Special Rapporteur on Contemporary Forms of Slavery defined ‘[f]orced prostitution’ as generally referring to ‘conditions of control over a person who is coerced by another to engage in sexual activity’, noting, however, that ‘[t]he terms ‘forced prostitution’ or ‘enforced prostitution’ appear in international and humanitarian conventions but have been insufficiently understood and inconsistently applied’, 1998 UN Slavery Rapporteur Report, para. 31.

¹¹⁵⁹ See M. Boot, revised by C. K. Hall, *Article 7 para. 1 (g)-3*. The Commentary on article 27 para. 2 defined the term enforced prostitution as ‘the forcing of a woman into immorality by violence or threats’, Pictet (ed.), *Commentaries Geneva Conventions Vol. IV* (1960) article 27, 206. This old interpretation however is unsatisfactory, as it euphemistically puts the emphasis on the ‘immorality’.

¹¹⁶⁰ See Pilloud/Pictet, in: Sandoz/Swinarski/Zimmermann (eds.), *Commentary Additional Protocols* (1987) 874 (No. 3049).

¹¹⁶¹ Fn. 53 of the Elements of Crimes applies also, stating that ‘[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity’. With regard to coercive environment and consent, reference can be made to what has been said with regard to the crime of rape, see above.

¹¹⁶² Some activists for the rights of the women did not support the term and definition of forced pregnancy, since it combines two crimes – the (en)forced impregnation (pregnancy as a result of rape or some involuntary medical procedure) and the (en)forced maternity (being forced to carry the pregnancy to term) – they deem should be addressed separately in their own right, Koenig/Askin, in: Askin/Koenig (eds.), *Women&IHumRtsL* (2000) 14 (fn. 50).

forced pregnancy became recurrently used in the UN system after reports from the conflict in the former Yugoslavia that Bosnian women were raped, impregnated and held in camps until it was too late for them to obtain an abortion, forcing them to bear the child of the rapist's ethnicity as part of a policy of 'ethnic cleansing'¹¹⁶³. The 1993 Vienna Declaration and Program of Action as well as the 1995 Beijing Platform of Action considered forced pregnancy as a violation of the fundamental principles of international human rights and humanitarian law and the Platform noted that grave violations of the human rights of women, including forced pregnancy, occur in particular under policies of ethnic cleansing¹¹⁶⁴.

721 During the 1996 Preparatory Committee meetings, it had been proposed to include 'forced impregnation' as a crime against humanity under ICC jurisdiction¹¹⁶⁵. While consensus on the crimes of sexual violence that should be covered under the Rome Statute was largely reached during the December 1997 session of the Preparatory Committee, the proposed offence of 'enforced pregnancy' remained controversial and was opposed above all by the Holy See which preferred no such crime or at least a change of the wording to 'forced impregnation'¹¹⁶⁶. The primary concern of the Holy See was that the term (en)forced pregnancy 'could be interpreted as a justification of abortion, either in situations of armed conflict or as a precedent for other situations'¹¹⁶⁷. The Holy See also argued that the term 'forced pregnancy' is *per se* ambiguous, '[s]ince it is difficult to view the birth of an innocent human being as a crime; instead we have here a combination of crimes to which heavy penalties have already been attached: sexual violence, unlawful confinement, etc.'¹¹⁶⁸. 'Forcible impregnation' however was not acceptable to the delegations supporting the earlier, unbracketed wording 'forced pregnancy' text as it referred only to making a woman pregnant, whereas 'enforced pregnancy' involved *keeping* the woman pregnant.

722 The definition of the offence became a highly controversial issue at the Rome Conference itself. In order to allow for a compromise acceptable for all, interested delegations proceeded

¹¹⁶³ Final Report of the UN Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (27 May 1994), paras. 248 and 250 as well as Annex IX (Rape and Sexual Assault) (fn. 22). The Women's Caucus on Gender Justice in the ICC notes that forced pregnancy also occurred in Rwanda as well as during the period of African-American slavery, when women held as slaves were forced to bear children and were subjected to torture, beatings and other forms of coercion and deprivation if they did not, with some of these pregnancies being the result of rape, Women's Caucus for Gender Justice, *The Crime of Forced Pregnancy* (26 June 1998), available at <http://iccwomen.org/icc/rome/crime.htm>.

¹¹⁶⁴ Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (12 July 1993), para. 38 ('Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response' (emphasis added)); Beijing Platform of Action, Report of the Fourth World Conference on Women (Beijing, 4–15 Sep. 1995), UN Doc. A/CONF.177/20 (17 Oct. 1995), Annex II, paras. 132 and 11, as well as paras. 114, 135 and 142 (c). In resolutions on the elimination of violence against women and on the rights of the child, the Human Rights Commission has since 1995 repeatedly qualified forced pregnancy as a violation of international human rights and humanitarian law, calling for an effective response to such violations, see, e.g., UN Doc. E/CN.4/1995 (8 Mar. 1995), para. 5. See also generally A. T. Goldstein, *Recognizing Forced Impregnation as a War Crime* (1993).

¹¹⁶⁵ 'There were proposals to refer to rape committed on national or religious grounds; rape, other serious assaults of a sexual nature, such as forced impregnation; or outrages upon personal dignity ... with attention being drawn to recent acts committed as part of a campaign of ethnic cleansing', 1996 Preparatory Committee I, para. 98.

¹¹⁶⁶ The Holy See formally tabled a proposal during the March–April 1998 Preparatory Committee session, see UN Doc. A/AC.249/1998/DP.13 (1 Apr. 1998).

¹¹⁶⁷ J.-L. Tauran, *The Defence of Life in the Context of International Policies and Norms* (11 Feb. 2000) (text at fn. 25) available at: http://www.vatican.va/roman_curia/secretariat_state/index.htm.

¹¹⁶⁸ *Id.*, fn. 25. At the Rome Diplomatic Conference, the Women's Caucus stated that '[i]t is difficult to understand how the debate about the crime of enforced pregnancy has become a debate about abortion', suggesting that it was never their intention to have any effect on the legitimacy or legality under international law of national laws which criminalize the termination of pregnancy, Women's Caucus for Gender Justice, *The Crime of Forced Pregnancy* (26 June 1998), available at: <http://iccwomen.org/icc/rome/crime.htm>. See also Koenig/Askin, in: Askin/Koenig (eds.), *Women and Int'l Human Rights Law* (2000)14 (fn. 50).

to work out a compromise definition, with the Holy See as well as a few catholic and Arabic states insisting on a clear and unambiguous definition of the crime primarily to avoid that it might be used as a precedent with regard to abortion-issues. The adoption of the wording ‘forced pregnancy’ instead of ‘enforced pregnancy’ (emphasis added), which might more easily be understood as criminalizing laws against abortion, as well as the circumstantial element of pregnancy resulting from an act of force and the element of unlawful confinement of the pregnant woman was reached relatively easily. Particularly difficult, however, was to reach agreement on what ‘intent’ the perpetrator must have had. While Catholic and Arab states insisted on a high- threshold ‘ethnic-cleansing’ intent, others considered that such intent was only one of various reasons why the crime might be committed. A compromise definition which made the inclusion of the crime against humanity and war crime of forced pregnancy acceptable to all delegations was only reached on the second-last day of the Conference¹¹⁶⁹:

‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy’ (article 7 para. 2 (f) Rome Statute). 723

The second sentence meets the main concern of the Holy See and other states in making it clear that national laws prohibiting abortion or otherwise providing for rules against abortion, or more precisely, adopting, applying or enforcing such laws, do not amount to forced pregnancy as defined under the Rome Statute. 724

A first, circumstantial element pre-existing the confinement is that the woman concerned has been **forcibly made pregnant**, be it by the perpetrator or any other person. The adjective ‘forcibly’ refers to the use of force or other coercion, that is, the lack of consent, such as in the case of rape or insemination without consent. 725

The main element of the *actus reus* of forced pregnancy however consists of **unlawfully confining** a woman that has previously and forcibly been made pregnant. Confining should be understood broadly as any form of deprivation of physical liberty. The term unlawful should, similarly to its use in other parts of the Rome Statute, be interpreted as meaning contrary to international law and standards. Yet, the Preparatory Commission did not stipulate in element 1 for article 8 para. 2 (b) (xxii)-4 and article 7 para. 1 (g)-4 that the confining must be ‘unlawful’. However, in view of the aim of the prohibition, confining a woman made forcibly pregnant in accordance with international humanitarian law (for instance as a prisoner of war) is insufficient to incur criminal responsibility under article 8 para. 2 (b) (xxii)-4, unless, it is submitted, the woman is prevented from accessing medical services and from a feasible abortion in time with the necessary special intent. 726

In any event, the Rome Statute requires that the perpetrator had a **special intent**¹¹⁷⁰. First, such intent can consist of affecting a population’s ethnic composition, including ethnic cleansing or otherwise weakening an ethnic group. Secondly, intent to carry out ‘other grave violations of international law’¹¹⁷¹ is sufficient even if rather vague. This second alternative may for instance cover medical experiments contrary to international law, while not covering pure sadism or, apparently, the mere intention that the child always reminds the woman and her family or community of what happened¹¹⁷². The Women’s Caucus For Gender Justice in 727

¹¹⁶⁹ On the drafting history, see Steains, in: Lee *et al.* (ed.) *Making of the Rome Statute* (1999) 365–369; von Hebel/Robinson, in: Lee (ed.), *Making of the Rome Statute* (1999) 100; Bedont/Hall-Martinez (1999) 6 *BrownJWorldAff* 1, 65.

¹¹⁷⁰ The Preparatory Commission had proposed to specify the intent by adding the words ‘to keep the woman pregnant’, a formulation which, however, met considerable opposition by some delegations, wherefore the Commission went back to the wording of the Statute, Rückert/Witschel, in: Fischer/Kress/Lüder (eds.), *International and National Prosecution* (2001) 85.

¹¹⁷¹ The term ‘other’ actually does not appear correct, as affecting the ethnic composition of any population is not as such a violation of international law.

¹¹⁷² See also T. A. Salzman, ‘Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia’, 20 *HumRQ* 365–366 (1998).

the ICC had intended at the Rome Conference that the crime of ‘forced pregnancy’ would also cover ‘[t]he impregnation of Jewish women under the Nazi regime in order to conduct medical experiments on them and/or their fetuses’, an offense that clearly could qualify under article 8 para. 2 (b) (xxii)-4, as well as ‘[t]he current trend to kidnap pregnant women, hold them, and sell their babies on the black market’, an offense that cannot be subsumed under article 8 para. 2 (b) (xii)- 4 since the women were not forcibly made pregnant (but might qualify under other war crimes such as sexual slavery)¹¹⁷³.

728 **f) Enforced sterilization.** Enforced sterilization has been punished in the context of war crimes trials relating to medical experiments conducted particularly in concentration camps during World War II¹¹⁷⁴.

729 According to element 1 for article 8 para. 2 (b) (xxii)-5, the *actus reus* of enforced sterilization consists of ‘depriving [a person of his or her] biological reproductive capacity’. This wording thus criminalizes the deprivation of a person to produce offspring. As footnote 54 of the Elements of Crimes makes clear, such deprivation does not cover ‘birth-control measures which have non-permanent effect in practice’, such as birth-control pills which can be stopped to be taken and the impact of which can be reversed. The war crime of enforced sterilization thus requires intent to permanently deprive of reproductive capacity.

730 The qualifying adjective ‘enforced’ suggests that the sterilization must be forcible, such as when it is against the will of the victim. Element 2 for article 8 para. 2 (b) (xxii)-5 however approaches this issue somewhat differently, suggesting that the sterilization only amounts to a war crime if it was neither justified by the medical or hospital treatment of the victim nor carried with his or her genuine consent¹¹⁷⁵. Footnote 55 adds that ‘consent obtained through deception’ does not qualify as ‘genuine consent’, excluding for instance misinformation regarding the permanence or reversibility of the sterilization. The consent thus must be informed. Footnote 51 states that ‘a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity’. In addition, it is submitted that justifying consent would have to be voluntary, anything else making little sense, in particular in times of armed conflict. However, a sterilization which is required and thus ‘justified’ in view of the health of the person concerned might still amount to the war crime of enforced sterilization insofar it is ‘forcible’ (including when occurring against the person concerned capable, voluntary and informed will); once more, the relationship between the Statute’s wording (‘enforced’) and the elements suggested by the Elements of Crimes is not entirely clear.

731 **g) War crime of any other form of sexual violence.** Forms of sexual violence that cannot be qualified under one of the five above-analyzed specific types of sexual violence offenses listed under article 8 para. 2 (b) (xxii)-1 to -5 may still come under ICC jurisdiction insofar they qualify under the residual, open-phrased clause of ‘any other form of sexual violence also constituting a grave breach of the Geneva Conventions’.

732 International humanitarian law prohibits not only rape and specific forms of sexual violence, but more generally ‘any form of indecent assault’. For instance, article 27 para. 2 GC IV provides that ‘[w]omen shall be protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’. Similarly, article 76 para. 1 Add. Prot. I provides that ‘[w]omen shall be the object of special respect

¹¹⁷³ See Women’s Caucus For Gender Justice In the ICC, *Priority Concerns Respecting War Crimes Article B(p bis)* (not dated, on file with the author).

¹¹⁷⁴ Article II of the Chinese War Crimes Law of 24 Oct. 1946 considered a war criminal any ‘[a]lien combatants or non-combatants who during a war or a period of hostilities ... or prior to the occurrence of such circumstances ... nourish intentions of enslaving, crippling, or annihilating the Chinese Nation ... by such methods as ... destroying [people’s] power of procreation’, XIV *Law Reports* 153 (1949). See also Supreme National Tribunal of Poland, *Rudolf F. F. Hoess* (11–29 Mar. 1947), VII *Law Reports* 14–16 (1948); U.S. Military Tribunal No. 1, *K. Brandt et al.* (‘Medical Case’, Case No. 1), I+II *Nuremberg Military Tribunal* (1997).

¹¹⁷⁵ See also above, article 8 para. 2 (b) (xxii)-1.

and shall be protected in particular against rape, forced prostitution and any other form of indecent assault’. Article 4 para. 2 Add. Prot. II prohibits, in internal armed conflicts, ‘at any time and in any place whatsoever ... outrages upon personal dignity, in particular ... any form of indecent assault’, thereby appearing to detail common article 3 sub-para. (c) and arguably extend the protection against indecent assaults also in international armed conflicts to protected persons other than women. Article 27 para. 1 GC IV furthermore provides that ‘[protected persons] shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity’.

Drawing on article 4 para. 2 (e) Add. Prot. II, the ICTR Statute in its article 4 para. 2 provides jurisdiction over ‘outrages upon personal dignity, in particular ... rape, enforced prostitution and any form of indecent assault’. The *Čelebići* Trial Chamber also stated that ‘[t]here can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law’ (emphasis added), referring *inter alia* to article 46 Hague Regulations, which according to the ICTY implicitly prohibits rape and sexual assault by protecting family honour and rights¹¹⁷⁶. The *Furundžija* Trial Chamber held that ‘international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity’¹¹⁷⁷. The *Akayesu* ICTR Trial Chamber considered ‘sexual violence ... as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident ... in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. ... Sexual violence falls within the scope of ‘other inhumane acts’, ... ‘outrages upon personal dignity’, ... and ‘serious bodily or mental harm’ set forth in ... the Statute’¹¹⁷⁸. On the basis of the *Akayesu* decision, the *Kvočka* Trial Chamber held that sexual violence includes sexual mutilation (insofar not amounting to enforced sterilization), forced marriage (insofar not amounting to sexual slavery), forced abortion and even sexual molestation¹¹⁷⁹. The *Todorović* Trial Chamber qualified biting into a penis and kicking in the genital area as a sexual assault¹¹⁸⁰.

The UN Slavery Rapporteur defined sexual violence as ‘any violence, physical or psychological, carried out through sexual means or by targeting sexuality’, and stated that it ‘covers both physical and psychological attacks directed at a person’s sexual characteristics, such as forcing a person to strip naked in public, mutilating a person’s genitals, or slicing off a woman’s breasts. Sexual violence also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner’¹¹⁸¹.

In the negotiations leading to the adoption of the Rome Statute, the February 1997 Preparatory Committee proposed to incorporate ‘rape, enforced prostitution and *other sexual violence of comparable gravity*’ (in brackets) as examples of the grave breach of wilfully causing great suffering or serious injury to body or health¹¹⁸², using the ‘comparable gravity’ as a threshold. The December 1997 Preparatory Committee session then made the sexual violence offences, including ‘any other form of sexual violence also constituting a grave breach of the Geneva Conventions’¹¹⁸³, war crimes in their own right.

¹¹⁷⁶ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 476.

¹¹⁷⁷ *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 186.

¹¹⁷⁸ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 10 December 1998, para. 688.

¹¹⁷⁹ *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001, para. 180 (fn. 343).

¹¹⁸⁰ *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgment, Trial Chamber, 31 July 2001, para. 38 (and para. 66).

¹¹⁸¹ 1998 UN Slavery Rapporteur Report, paras. 21–22 (references omitted).

¹¹⁸² 1996 Preparatory Committee II, p. 6 (para. A(c)).

¹¹⁸³ Preparatory Committee Decisions Dec. 1997, p. 11 (para. B(*pbis*)).

736 According to element 1 for article 8 para. 2 (b) (xxii)-6, the first element of the war crime of ‘any other form of sexual violence’ consists of either **committing an act of a sexual nature** against a person or **causing a person to engage in an act of a sexual nature**. In the Kenyan situation, PTC II rejected to apply ‘other form of sexual violence’ on male circumcisions and penile amputations arguing as follows:

‘not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence. In this respect, the Chamber considers that the determination of whether an act is of a sexual nature is inherently a question of fact. The Chamber finds that the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other.’¹¹⁸⁴

737 Regrettably, the aforementioned decision failed to explain why the penile amputations were not to be subsumed under ‘enforced sterilization’. Secondly, to qualify as sexual violence under the Rome Statute, and not merely as an act of a sexual nature, such conduct must be qualified by an element of *coercion*, defined in the same way as in respect of the war crime of rape.

738 Thirdly, element 2 specifies that the conduct must have been ‘of a **gravity comparable** to that of a grave breach of the Geneva Conventions’ (emphasis added). This interpretation of the wording of the Rome Statute ‘*also constituting* a grave breach of the Geneva Conventions’ (emphasis added) however is less than obvious. The unclear meaning of the phrase ‘also constituting ...’ indeed gave rise to extensive debate and a sustained lobbying effort of the ICC Women’s Caucus. When analyzing the meaning of the phrase ‘also constituting a grave breach of the Geneva Conventions’ in article 8 para. 2 (b) (xxii) Rome Statute, it is helpful to distinguish between this phrase’s implications with regard to the five specific forms of sexual violence listed before the comma on the one hand, and with regard to the residual clause on the other hand.

739 In respect of the **meaning with regard to the five specific forms of sexual violence**, there are three possibilities: First, the phrase may be considered not at all to apply to the five specific forms of sexual violence, since, as can be argued, there is a comma separating the five forms from the phrase and since the phrase was only meant to indicate a threshold for the residual clause. Second, it can be argued that the phrase is merely an affirmation that the five specific forms of sexual violence in any event – without any need to prove it – amount to grave breaches. This meaning has been particularly propagated by the ICC Women’s Caucus. Thirdly, it could also be argued that even the five specific forms of sexual violence only come under ICC jurisdiction if it is demonstrated that under applicable international law, the specific act or the specific form of sexual violence amounts to a grave breach. This third way of interpretation must be rejected, since it was the specific intention of delegations at the Rome Conference to make the specifically listed forms of sexual violence war crimes in their own right and precisely to avoid the need to have to subsume these sex crimes under a more general form of mistreatment. This has been confirmed *e contrario* by the elements of article 8 para. 2 (b) (xxii) which require only with regard to the residual clause that the sexual violence be ‘of a gravity comparable ...’, while omitting any such requirement with regard to the five specific forms of sexual violence. The specific forms of sexual violence thus either do not require amounting to a grave breach or *per se*, at any rate, amount to such a grave breach.

740 With regard to the meaning and implication of the phrase ‘also constituting a grave breach of the Geneva Conventions’ *for the residual clause* ‘any other form of sexual violence’, we can distinguish two main interpretations. First, the clause might be considered to provide that ‘any other form of sexual violence’ only comes under ICC jurisdiction insofar it *also qualifies* as a grave breach of the Geneva Conventions. The conduct concerned must thus demon-

¹¹⁸⁴ *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382, Decision on the Confirmation of Charges pursuant to article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras. 265–266 (on CaH).

strably either have fulfilled the elements of a grave breach¹¹⁸⁵, or the particular ‘other form of sexual violence’ must be recognized, under applicable international law, as a grave breach of its own (possibly including those not yet recognized as grave breaches at the time of the adoption of the Rome Statute)¹¹⁸⁶.

After intensive lobbying of the Women’s Caucus, the ICC Preparatory Commission however suggested another interpretation, namely, that the phrase ‘also constituting a grave breach of the Geneva Conventions’ means ‘of gravity comparable to that of a grave breach of the Geneva Conventions’ (element 2, emphasis added). This interpretation, however, goes against the wording of the definition under the Rome Statute and, according to article 9 para. 3 Rome Statute, would thus not appear to bind the judges. All the same, it is the interpretation the states participating in the Preparatory Commission as well as the Assembly of States Parties wished to give to the phrase. From a teleological perspective, this interpretation appears to accord with the main rationale behind the phrase, since delegations at the Rome Conference above all intended to fix a certain threshold and to exclude ‘lesser’ forms of sexual violence or harassment that would not amount to most serious crimes of concern to the international community as a whole and thus not warrant prosecution before the ICC. ‘Any other form of sexual violence’ consequently must, in order to come under ICC jurisdiction, reach the minimum threshold of gravity comparable to a grave breach of the Geneva Conventions, such as torture, inhuman treatment, biological experiments, wilfully causing great suffering or serious injury to body or health, or, arguably, one of the five specific forms of sexual violence listed under article 8 para. 2 (b) (xxii), insofar these are deemed to *per se* constitute grave breaches.¹¹⁸⁷

23. Paragraph 2(b)(xxiii): Utilizing the presence of a protected person to render certain objects immune from military operations

Literature: Anderson, K., *Statement at the Conference of the Swiss Foundation for World Affairs, International Humanitarian Law and Human Rights: How Relevant are they in today’s wars?* (2003); Arnold, R., *The ICC as a New Instrument for Repressing Terrorism* (2004); *id.*, ‘Training With the Opposition: The Status of the ‘Free Iraqi Forces’ in the US’ war against Saddam Hussein’, (2003) 33 *HeidelbergJIL* 3, 631; Dinstein, Y., *The Conduct of Hostilities under the Law of International Armed Conflict* (2004); Elliott, H.W., ‘Open Cities and Undefended Places’, (1995) *The Army Lawyer* 39; Fenrick, W.J., ‘The Rule of Proportionality and Protocol I in Conventional Warfare’, (1982) 98 *MillRev* 91; *id.*, ‘Attacking the Enemy Civilian as a Punishable Offence’, (1997) 7 *DukeJComp&IL* 539; Frank, D., ‘Commentary on Art. 8(2)(b)(xxiii)-Using protected persons as shields’, in: R. S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001) 199–201; Haas, J., ‘Voluntary human shields: status and protection under international humanitarian law’, in: R. Arnold and P.-A. Hildebrand (eds.), *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges* (2005); ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, adopted by the Assembly of the ICRC on 26 February 2009*, (2008) 90 (872) *IRRC* 991; Parks, W.H., ‘Air War and the Law of War’, (1990) 32 *A.F.L.Rev.* 1; Schmitt, M.N., ‘Bellum Americanum: The US view of Twenty-First Century War and Its possible implications for the law of armed conflict’, (1998) 19 *MichJIL* 1051; Schmitt, M., ‘Human Shields in International Humanitarian Law’, (2008–2009) 47 *ColJTransnatL* 292.

Article 8 para. 2(b)(xxiii) of the ICC Statute the first instance of criminalization of the use of human shields as an autonomous crime.¹¹⁸⁸ This is not a new phenomenon, however, and

¹¹⁸⁵ From a teleological point of view, an exception might be construed with regard to the scope of protected persons. This seems also warranted for article 8 para. 2 (b) (xxii) in comparison to article 8 para. 2 (e) (vi), the latter of which does not contain such a restriction of the scope of protected persons (‘any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions’).

¹¹⁸⁶ A third was of interpretation that the phrase was only inserted to state that all six forms of sexual violence constitute grave breaches – besides constituting serious violations of the laws and customs applicable in international armed conflict – is not warranted, even if women’s rights advocates sometimes strived to lobby for this interpretation, since the Rome Conference clearly wished to fix a minimum threshold for the residual clause.

¹¹⁸⁷ See also Werle and Jessberger, *Principles ICL* (2014), para. 1180; Ambos, *Treatise on ICL Vol. II* (2014), p. 168 with fn. 390 (with further references).

¹¹⁸⁸ Report on the Seminar on ‘International Humanitarian Law and Current Armed Conflicts: Fausto Pocar and Marco Pedrazzi, The Involvement of the Civilian Population in Hostilities’, International Institute of Humanitarian Law Rome, 25 February 2011, at 2.

its ban was already set forth by article 51 para. 7 Add. Prot. I, which outlaws the use of civilians to shield points, areas, or military forces and articles 23 and 28 IV GC, article 19 I GC and article 12 Add. Prot. I, which prohibit the use of prisoners of war and medical units for the same purposes. The existing jurisprudence, however, in particular that of the ICTY, always condemned this type of conduct by charging it under different counts, such as ‘inhumane treatment’ (i.e. as a grave breach of the Geneva Conventions of 1949) or cruel treatment;¹¹⁸⁹ ‘an outrage on personal dignity’¹¹⁹⁰ pursuant to common art. 3 to the four Geneva Conventions, or hostage taking.¹¹⁹¹ In the indictment against Radovan Karadžić (President of the Bosnia Serb area) and Ratko Mladić (Chief of its Armed Forces), the former Prosecutor Richard Goldstone alleged that ‘Bosnian Serb military personnel physically secured or otherwise held the UN peacekeepers against their will at potential NATO air targets, including the ammunition bunkers at Jahorinski Potok, the Jahorina radar site and a nearby communications centre in order to render these locations immune from further NATO air strikes’ in 1995.¹¹⁹²

744 Thus, this provision, which is based on the principle of distinction, synthesizes the content of the various humanitarian norms outlawing the use of ‘human shields’. At the same time, it refers to the duty to take precautions against the effect of an attack, stated in article 58 Add. Prot. I.

745 Even though the use of human shields in non-international armed conflicts has been condemned by States and by the United Nations, for example, with respect to the conflicts in Liberia, Rwanda, Sierra Leone, Somalia, Tajikistan and the former Yugoslavia and although it may be considered as amounting to customary law,¹¹⁹³ no mirror provision applicable to non-international conflicts is to be found in the ICC Statute. An alternative, however, is to apply Article 8 para. 2(c) iii of the ICC Statute, which prohibits the taking of hostages.¹¹⁹⁴

746 According to the Elements of Crime, the following criteria need to be met:

1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.
2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

747 In modern warfare there will inevitably be many instances where civilians and civilian objects will be located close to military objectives. Military headquarters, barracks, and militarily significant factories, for example, may often be located in urban areas adjacent to the civilian population. Military hospitals will usually be located on military bases. It may be necessary to send an armoured division through a city.

748 This provision prohibits parties to a conflict from taking action during the conflict to use civilians or other protected persons to shield military forces by, for example, locating military hospitals or prisoner of war camps or civilian internee camps or groups or school children

¹¹⁸⁹ *Prosecutor v. Blaskić*, IT-95-14-T, Trial Chamber, Judgment, §§ 186; 716, 750 (Mar. 3, 2000). 186; For an analysis see Schmitt (2008–2009) 47 *ColJTransnatL* 292, at 307.

¹¹⁹⁰ *Prosecutor v. Aleksovski*, IT-95-14/I-T, Trial Chamber, Judgment, 229 (June 25, 1999).

¹¹⁹¹ *Prosecutor v. Timohir Blaskić*, IT-95-14-T, para. 750.

¹¹⁹² *Prosecutor v. Karadžić and Mladić*, IT-95-5-I, Indictment, (July 24, 1995), § 47.

¹¹⁹³ See Rule 97 (Human Shields, Henckaerts and Doswald-Beck, *Customary*, 338; Report on the Seminar on ‘International Humanitarian Law and Current Armed Conflicts: Fausto Pocar and Marco Pedrazzi, The Involvement of the Civilian Population in Hostilities’, *International Institute of Humanitarian Law Rome*, 25 February 2011, at 2; Schmitt (2008–2009) 47 *ColJTransnatL* 292, at 307.

¹¹⁹⁴ Report on the Seminar on ‘International Humanitarian Law and Current Armed Conflicts: Fausto Pocar and Marco Pedrazzi, The Involvement of the Civilian Population in Hostilities’, *International Institute of Humanitarian Law Rome*, 25 February 2011, at 2.

next to ammunition dumps. Criminal liability, however, arises not only if a person moves protected persons to the vicinity of a military objective, but also when he or she takes advantage of the location of protected persons in the area. Finally, responsibility arises when the military objective is moved towards the protected persons. The fact that the protected person may be a voluntary is irrelevant: the movement itself of the military personnel or objects is sufficient *per se*¹¹⁹⁵.

If a party to a conflict violates this provision, an attacking party remains bound to comply with the rule of proportionality and to pay due heed to the additional incidental casualties which might result. A military commander may not ignore incidental civilian casualties with a dismissive assertion that the other side located its defence industries in major cities to shield them from attack. However, as long as the ‘collateral damages’ remain proportionate and justified by military necessity, the mere fact that there may be civilians placed as ‘shield’ in front of a military objective does not render the latter immune from attack. However, the attacker will have to observe the precautionary measures set forth in article 57 Add. Prot. I (precautions in attack)¹¹⁹⁶.

Another interesting aspect is that of so-called voluntary human shields. These are persons who have freely chosen to place themselves near potential military targets in the hope that their presence will delay or prevent the attack¹¹⁹⁷. The voluntary element clearly distinguishes them from civilians taken as hostages and used as human shields¹¹⁹⁸. They qualify as civilians, in that they do not fulfill the definition of combatants provided by article 4 para. (A) III GC (*i.e.* the mirror image of the definition of prisoner of war, a status given only to combatants)¹¹⁹⁹ and article 43 Add. Prot. I. Some authors like *Yoram Dinstein* have tried to argue that voluntary human shields are civilians who decided to engage in combat and who, therefore, should be considered as ‘unlawful combatants’¹²⁰⁰. However, the fact that a civilian decides to engage, unlawfully, in combat, does not change his or her civilian status. The civilian, however, may be held criminally liable for having unlawfully engaged in the hostilities and lose protection for the time of his/her involvement in the hostilities¹²⁰¹. A third view, is that these are civilians who have compromised their civilian status and who, if injured or killed, should not be regarded as civilian collateral damage because they have volunteered to be at the military target. If captured they are not prisoners of war¹²⁰². They certainly are not, in that they retain civilian status and civilians have no right to prisoner of war treatment. Thus, as civilians, they will enjoy the same protection as other civilians under the principle of proportionality (*i.e.* civilian collateral casualties will have to be proportionate to the military advantage sought). It is then a different issue, whether the threshold of proportionality shall differ, in that they have themselves put at risk by voluntarily placing themselves in front of a military objective. It may be argued, that the proportionality rule (and the precautionary principle), in this case, shall apply in a more flexible way¹²⁰³, even though the obligations set forth in articles 51 para. 7 Add. Prot. I and 28 IV GC, from which article 8 para. 2 (b) (xxiii) is drawn apply both in the case where civilians are hostages and where they have volunteered as human shields¹²⁰⁴.

¹¹⁹⁵ Frank, in: R. S. Lee et al. (eds.), *Elements of Crimes*, see note 281, 200.

¹¹⁹⁶ Sandoz et al. (eds.), *Commentary*, see note 2, 628 (para. 1989 *et seq.*).

¹¹⁹⁷ See Haas, in: Arnold and Hildbrand (eds.), *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges* (2005).

¹¹⁹⁸ See Schmitt (1998) 19 *MichJIL* 1077; Haas, *Voluntary human shields*, see note 915, 5.

¹¹⁹⁹ On the distinction between civilians and combatants see Arnold, *The ICC*, see note 262, 125 *et seq.*

¹²⁰⁰ Dinstein, *The Conduct of Hostilities*, see note 201, 130; Haas, *Voluntary human shields*, see note 915, 5.

¹²⁰¹ Arnold (2003) 63 *HeidelbergJIL* 3, 642. See article 51 para. 3 Add. Prot. I. See on this ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, adopted by the Assembly of the ICRC on 26 February 2009, (2008) 90 (872) *IRRC* 9991, at 1025.

¹²⁰² Haas, *Voluntary human shields*, see note 915, 6.

¹²⁰³ See on this Pocar and Pedrazzi, ‘The Involvement of the Civilian Population in Hostilities’, *International Institute of Humanitarian Law Rome*, 25 February 2011, at 3; Schmitt (2008–2009) *ColJTransnatL* 292 at 310.

¹²⁰⁴ See Haas, *Voluntary human shields*, see note 915, 12–13.

751 The issue of voluntary human shields was also heavily debated during an expert meeting organised in 2011 by the San Remo Institute for International Humanitarian Law. According to one view, voluntary human shields are by definition directly participating in hostilities, but the majority of experts held, instead, that also voluntary human shields would normally have to be considered as civilians. Ultimately, a broad consensus emerged on the fact that, regardless of whether they are to be considered as directly participating in hostilities, there would be no point in attacking them on their way to or from the military objective; and the fact that the voluntary human shields issue is of little practical relevance, as it is very difficult to verify their free will. In case of doubt, they surely would have to be considered involuntary, thus civilians.¹²⁰⁵ As far as the mental elements are concerned, element 1, *i. e.* the moving or taking advantage of the location of one or more protected persons, is covered by article 30 of the Statute, whereas a second and separate element is the ulterior motive to shield a military objective from an attack¹²⁰⁶.

24. Paragraph 2(b)(xxiv): Intentionally directing attacks against objects or personnel using the emblems of the Geneva Conventions

Literature: Dörmann, K., *Elements of war crimes under the Rome Statute of the International Criminal Court – Sources and Commentary* (2003); Wayne Elliott, H., ‘Open Cities and Undefended Places’, (1995) *The Army Lawyer* 39; Fenrick, W.J., ‘The Rule of Proportionality and Protocol I in Conventional Warfare’, 98 *MillRev* 91 (1982); *id.*, ‘Attacking the Enemy Civilian as a Punishable Offence’, 7 *DukeJComp&IL* 539 (1997); Parks, W.H., ‘Air War and the Law of War’, 32 *AFLRev* 1 (1990); Pfüter, D., ‘Commentary to Art. 8(2)(b)(xxiv)’, in: R.S. Lee, *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001) 201–203; Rogers, A.P.V., *Law on the Battlefield* (1996).

752 Pursuant to the Elements of Crime, this crime is fulfilled if:

1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.
2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.

753 Article 8 para. 2 (b) (xxiv) is principally based on article 38 Add. Prot. I, stating that:

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of *other emblems*, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict *other internationally recognized protective emblems*, signs or signals, including the flag of truce, and the protective emblem of cultural property.
2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

754 Other relevant provisions are articles 24–27, 36, 39–44 of the GC I, articles 42–44 of the GC II, articles 42–44 of the GC III, articles 18–22 of the GC IV and articles 8, 12, 13, 15, 18, 23 and 24 Add. Prot. I. The protection from attacks of medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law has been recognised as a customary law principle applicable both to international and non-international armed conflicts.¹²⁰⁷ The mirror provision of the ICC Statute applicable in this latter kind of context is Article 8(2)(e)(ii). The official distinctive emblems in use at present are the Red Cross, the Red Crescent and, since the adoption by the 29th International Conference of the Red Cross and Red Crescent in Geneva on 20– 21 June 2006, of the III Protocol Additional to the Geneva Conventions of 1949, also the Red Crystal. Israel has been using the red shield of David (Magen David Adom – MDA). This symbol *per se* is not officially recognized (although now it may enjoy better protection by joint use with the Red Crystal)

¹²⁰⁵ Pocar and Pedrazzi, ‘The Involvement of the Civilian Population in Hostilities’, International Institute of Humanitarian Law Rome, 25 February 2011, at 2.

¹²⁰⁶ Frank, see note 912, 201.

¹²⁰⁷ Henckaerts and Doswald Beck, Customary, 102.

but, as it has been used to protect the same range of persons and objects as are entitled to use the Red Cross or Red Crescent, the principle is that attacks should not be directed against persons or objects displaying the red shield of David. Another important aspect is that whereas the Geneva Conventions protect persons and objects lawfully using the emblems of the Red Cross, Red Crescent and Red Crystal, other signs have been added by Additional Protocol I (e.g. flashing blue lights for ambulances, special radio frequencies or radar identification signals, etc. referred to in Annex 1 to Add. Prot. I, Chapter III, articles 6–9)¹²⁰⁸. The extended scope of protected signs under Add. Prot. I is reflected by the wording of Element I¹²⁰⁹.

In relation to the issue of the MDA, it is interesting to note that in June 2003, an agreement was signed between the ICRC and the Magen David Adom (MDA). This marked an important step in deepening cooperation between the two organizations, which had been working together closely for some time before that. In 2004, this agreement culminated in the signing on 9 June of a 2-year Cooperation Framework agreement and a one-year extension to the project agreements on Movement Integration, Law and Fundamental Principles, Emergency Medical Services/Disaster Preparedness Management and Restoring Family Links as per ICRC standard criteria. The areas of cooperation include also the dissemination of international humanitarian law. Moreover, with the support of the ICRC and the International Federation, the MDA has increasingly fulfilled the role of a fully-fledged national society at the international level. Since December 2000 the MDA has hosted a representative of the International Federation at its headquarters in Tel Aviv, with the aim of facilitating the full integration of the MDA into the International Movement. The ICRC and the International Federation have helped the MDA develop contacts with various national societies and MDA specialists have taken part in several annual meetings of National Society legal advisers, organized by the ICRC in Geneva¹²¹⁰. All these joint activities suggest that the MDA, as far as the emblem is concerned, should enjoy protection analogous to that granted to the officially recognized Red Cross and Red Crescent emblems. This view is supported also by Element I, according to which it is prohibited to attack persons or objects carrying a distinctive emblem in accordance with international law. All the agreements referred to above indicate that the MDA is carried in accordance with international law, even though it is not officially recognized under the four GCs and their two Add. Prots.

Persons entitled to display the distinctive emblem are:

- medical personnel, staff engaged in administration of medical units and establishments, and chaplains, article 24 GC I, articles 36–37 GC II,
- staff of national red cross/Red Crescent societies and other authorized voluntary aid societies, and of neutral country red cross/Red Crescent societies and
- members of armed forces specially trained as orderlies, stretchers bearers while so employed.

Objects and facilities entitled to display the emblem are:

- medical units and establishments,
- medical transports,
- medical aircraft,
- hospital ships,
- coastal rescue craft,
- hospital and safety zones and localities.

Concerning the *mens rea*, element I is covered by the *mens rea* contained in article 30 of the Statute¹²¹¹. In relation to non-international conflicts, a parallel provision is contained in article 8 para. 2 (e) (ii) ICC Statute.

¹²⁰⁸ Pfirter, *Article 8(2)(b)(xxiv)*, in: see note 281, Lee et al. (eds.), *Elements Of Crimes* 202. See note 33, Dörmann, *Elements of war crimes* 350.

¹²⁰⁹ See note 923, Pfirter, *Article 8(2)(b)(xxiv)*, 202.

¹²¹⁰ ICRC, Press Release on Israel, 22 Feb. 2005, at: <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList325/COE42770148ABB7FC1256E2E003C6777>; https://www.icrc.org/eng/resources/documents/misc/israel_mda_040204.htm

¹²¹¹ See note 921, Pfirter, *Article 8(2)(b)(xxiv)*, 203.

25. Paragraph 2(b)(xxv): Starvation of civilians as a method of warfare

Literature: Buckingham, D.E., 'A Recipe for Change: Towards an Integrated Approach to Food under International Law', (1994) 6 *PaceLLRev* 296; Dinstein, Y., 'Siege warfare and the starvation of civilians', in: A.J.M. Delissen and G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict – Challenges Ahead* (Martinus Nijhoff Publishers 1991); Van der Herik, L., 'Economic, Social and Cultural Rights – International Criminal Law's Blind Spot?', in: E. Riedel *et al.* (eds.), *Economic, Social and Cultural Rights: Contemporary Issues and Challenges* (OUP 2014); Melzer, N., *ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009); Mudge, G.A., 'Starvation as a Means of Warfare', (1970) 4 *The International Lawyer* 228; Pejic, J., 'The right to food in situation of armed conflict: the legal framework', (2001) 83 *IRRC* 1097.; Riordan, K.J., 'Shelling, Sniping and Starvation: The Law of Armed Conflict and the Lessons of the Siege of Sarajevo', (2010) 41 *VUWLRev* 149; Rogers, A.P.V., *Law on the battlefield* (Juris Publishing, 3rd ed., 2012); Rosenblad, E., 'Starvation as a Method of Warfare-Conditions for Regulation by Convention', (1973) 7 *The International Lawyer*. 252; Henckaerts, J.-M. and Doswald-Beck, L., *The ICRC Customary International Humanitarian Law, I* (CUP 2005); *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994) 179; Rogers, A.P.V., *Law on the Battlefield* (Juris Publishing, 3rd ed. 2012); Physicians for Human Rights, *War Crimes in the Balkans: Medicine Under Siege in the Former Yugoslavia 1991–1995* (1996) 91–99; Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003) 363; Blix, H., 'Means and Methods of Combat', in: UNESCO (ed.), *International Dimensions of Humanitarian Law* (1988) 144.

- 758 a) **Humanitarian law base and drafting history.** A central principle of international humanitarian law is that civilians shall be spared and protected from the effects of the hostilities.¹²¹² The civilian population as such must not be targeted and incidental injuries and suffering of civilians resulting from an otherwise lawful attack on a military objective must be proportional to the military advantage anticipated. It appears only consequent that using starvation of civilians as a method of warfare and destroying objects indispensable to the survival of the civilian population is also prohibited under international humanitarian law. Today this prohibition reflects customary international law¹²¹³.
- 759 Formerly siege warfare by way of starvation was considered as an acceptable method of warfare and was lawful, including with regard to civilians inside the walls or borders of the besieged city or region¹²¹⁴. This rule was first restricted by article 23(g) Hague Regulations, which prohibits 'to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war', a prohibition essentially restated in article 53 GC IV. With the adoption of the Geneva Conventions, the prohibition became more detailed, but did not substantially modify the military necessity derogation contained in article 53 GC IV¹²¹⁵. Article 53 GC IV constitutes the foundation of the prohibition of starvation of the civilian population as a method of warfare, together with Articles 23 and 55.¹²¹⁶ Moreover, articles 59 to 62 GC IV establish a duty to allow the free passage of specific

¹²¹² See, e.g., article 51 Add. Prot. I; article 3 common to the Geneva Conventions.

¹²¹³ See, e.g., Buckingham (1994) 6 *PaceLLRev* 296; Henckaerts and Doswald-Beck, *The ICRC Customary International Humanitarian Law* (CUP 2005), Rules 53 and 54 and related practice; *San Remo Manual on International Law Applicable to Armed Conflict at Sea* 179, para. 102 (a); Eritrea Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, para. 105.

¹²¹⁴ See, e.g., Dinstein, in: Delissen and Tanja (eds.), *Humanitarian Law of Armed Conflict* (1991); Rogers, *Law on the battlefield* (3rd ed. 2012) 140; Bothe *et al.*, *New Rules* (2nd ed. 2013) 378-9. For instance, Article 17 of the 1863 Lieber Code declared that '[w]ar is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy'.

¹²¹⁵ On the regulation of the use of starvation before the adoption of Additional Protocol I and II, see Mudge (1970) 4 *The International Lawyer*. 228; Rosenblad (1973) 7 *The International Lawyer* 252. See also Bothe *et al.*, *New Rules* (1982) 378-9. Despite not modifying the military necessity derogation, Geneva Convention IV did ameliorate the rules applicable to sieges in that it obliges the Parties to endeavour to conclude local agreements for evacuating the wounded and sick, infirm and aged persons, children and maternity cases (see Article 17 GC IV).

¹²¹⁶ According to these provisions, passage is to be granted for shipments of medicines and medical supplies, objects necessary for religious services and basic food, clothing, and medical supplies for those in special need of protection.

consignments and protect and regulate relief actions¹²¹⁷. Articles 108 *et seq.* and 142 GC IV and article 72 *et seq.* and 125 GC III provide further rules on relief for detained persons.

Today, the most direct prohibition of starvation as a method of warfare is contained in article 54 Add. Prot. I. The provision also provides for a certain protection of objects indispensable to the survival of the civilian population. At the time of the adoption of the Protocol, this provision was considered as a new principle of international law applicable in armed conflict, whereas today, this rule would rather be seen as an application of the prohibition to attack civilians. Practice since has made this a customary rule. Also, the duty set forth in Article 55 GC IV has been extended to further supplies essential to the population's survival by article 69 Add. Prot. I. Moreover, articles 70 and 71 Add. Prot. I establish a duty to allow the free passage of specific consignments and protect and regulate relief actions. Paragraphs 103–104 of the San Remo Manual on International Law Applicable to Armed Conflict at Sea reflect the corresponding obligation to provide for free passage of foodstuffs and other essential supplies.

Moreover, the deliberate starvation of civilians also appears to constitute, today, a war crime under customary international law. The 1919 Responsibilities Commission included the '[d]eliberate starvation of civilians' in the list of offenses constituting 'violations of the laws and customs of war' that should be prosecuted¹²¹⁸, and many national laws criminalize the deliberate starvation of civilians¹²¹⁹. Furthermore, the UN Security Council has repeatedly condemned the 'deliberate impeding of the delivery of food and medical supplies'¹²²⁰ and affirmed the individual criminal responsibility of those that commit or order the commission of such acts.¹²²¹ Recently, the UN Security Council adopted several Resolutions on the conduct of hostilities in the Syrian Arab Republic.¹²²² Resolution 2139 specifically affirms that the use of starvation as a weapon of combat is prohibited by international humanitarian law and that forced starvation of civilians in Syria has to end.¹²²³

¹²¹⁷ Article 23 (g) Hague Regulations may also be considered as indirectly relevant in that it prohibits '[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'. See also articles 52 *et seq.* Hague Regulations and article 53 GC IV.

¹²¹⁸ The Nuremberg Tribunal however had held that it was, though regrettable, not unlawful for the besieging force to drive back, including by firing on, civilians that were trying to flee besieged Leningrad, von Leeb *at al.* (1953) *AnnDig* (1948) 389; *id.*, XI *Nuremberg Military Tribunals No. 10*, 462, 541.

¹²¹⁹ See, e.g., *German Joing Services Regulations*, para. 1209 (ZDv) 15/2 (1992) (listing the '[s]tarvation of civilians by destroying, removing, or rendering useless objects indispensable to the survival of the civilian population (e.g., foodstuffs, means for the production of foodstuffs, drinking water installations and supplies, irrigation works)' as a 'grave breach of international humanitarian law'), reprinted in Fleck (ed.), *Handbook IHL* (1999); Australian Law Concerning Trials of War Criminals by Military Courts, reproduced in UNWCC, V *Law Reports* 95 (1948); article 374 para. 1 of the Penal Code of the Republic of Slovenia of 1994; article 282 (b) of the Penal Code of the Empire of Ethiopia of 1957; article 612 para. 3 ('[i]njures gravely, deprives or does not procure indispensable alimentation ... to protected persons') and article 613 (c) of the Spanish Military Penal Code (Ley orgánica 10/95) of 23 Nov. 1995.

¹²²⁰ (934) See, e.g., UN SC Res. 771 (1992), preamble; UN SC Res. 661 (1990) para 3; UN SC Res. 666 paras 3–8; UN SC Res. 670 (1990) para 3; See also Declaration on the Protection of Women and Children in Emergency and Armed Conflict, UN G.A. Res. 3318 (XXIX), para. 6 ('women and children belonging to the civilian population ... shall not be deprived of shelter, food, medical aid or other inalienable rights').

¹²²¹ See, e.g., UN SC Res. 787 (1992), para. 7 ('Condemns all violations of international humanitarian law, including in particular ... the deliberate impeding of the delivery of food and medical supplies to the civilian population ... and reaffirms that those that commit or order the commission of such acts will be held individually responsible in respect of such acts'); UN SC Res. 794 (1992), para. 5 ('Strongly condemns all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts'). See Buckingham (1994) 6 *PacILRev* 285.

¹²²² See e.g., UN SC Res. 2139 (2013); UN SC Res. 2118 (2013); UN SC Res. 2043 (2012).

¹²²³ Para 5 of the Resolution requests that the parties to the conflict cease depriving civilians of food and medicine as a weapon of war. The Resolution also requests that the parties to the conflict '(f)acilitate the expansion of humanitarian relief operations, in accordance with international humanitarian law...' and '(c)alls upon all parties to immediately lift the sieges of populated areas ... demands that all parties allow the delivery of humanitarian assistance ... and enable the rapid, safe and unhindered evacuation of all civilians who wish to leave.' (2013) *UN SC Res.* 2139.

- 762 As to the drafting history of article 8 para. 2 (b) (xxv), the 1996 Preparatory Committee had first considered to include an offense of ‘starving of the civilian population and prevention of humanitarian assistance from reaching them’¹²²⁴. This wording was changed in the Preparatory Committee session of February 1997 to a short ‘starvation of civilians’¹²²⁵. At the December 1997 session, however, this short wording was considered too vague and open. Delegations consequently agreed during that session on the wording that eventually prevailed in article 8 para. 2 (b) (xxv), providing that starvation is a war crime under the jurisdiction of the Court only where used as a method of warfare, drawing this qualifier largely from article 54 Add. Prot. I. Accordingly, the war crime of starvation of civilians under the Rome Statute is effected by intentionally ‘depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions’¹²²⁶. Article 8 para. 2 (b) (xxv) is important in that it is the first time that the war crime of starving civilians as such has been criminalized. Its inclusion under the Rome Statute as a war crime when committed in an international armed conflict was not controversial.
- 763 Acts qualifying as the war crime of starvation defined under article 8 para. 2 (b) (xxv) Rome Statute might also amount to other war crimes under the jurisdiction of the ICC. The destruction of foodstuffs and facilities indispensable for the survival of civilians, for instance, may amount to a prohibited attack against civilian objects (article 8 para. 2 (b) (ii)), or a prohibited destruction of property of the adversary (article 8 para. 2 (b) (xiii) and (a) (iv)). The destruction of or damage to such indispensable objects, including widespread, long-term and severe incidental damage to the natural environment, as a result of an (otherwise) lawful attack against a legitimate military objective, might in addition amount to the war crime of causing excessive incidental damage defined under article 8 para. 2 (b) (iv). The evaluation whether the damage was excessive should also take into account the sustenance value to civilians of the destroyed objects. Lastly, article 8 para. 2 (a) (iii) criminalizing the willful causation of great suffering or serious injury to body or health of an adversary in the power of the party to the conflict to which the perpetrator belongs might be applicable¹²²⁷, as well as the war crime of unlawful deportation or transfer, or unlawful confinement defined in Article 8 (2) (a) (vii).
- 764 Furthermore, starvation may also constitute a crime under international criminal law outside the context of an armed conflict. For instance, severe and large-scale deprivation of food could be qualified as genocide, when all the other crime elements are met, by ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ (article 6 para. c). The Elements of Crime clarifying that the reference to ‘conditions of life’ may include the deliberate deprivation of resources for survival, such as food or medical services.¹²²⁸ Moreover, starvation may also qualify as a crime against humanity (article 7 paras. 1 (b), (d), or (k) and (2) (b)). More precisely, the crime against humanity of extermination can cover food deprivation, as explicitly mentioned in Article 7 (2) (b) and in the Elements of Crime.¹²²⁹
- 765 Interestingly, President Al Bashir has been charged by the ICC Prosecutor with methods of destruction other than direct killing as an integral part of an overall genocidal policy and of the commission of crimes against humanity. These methods included: (i) subjecting the

¹²²⁴ See 1996 Preparatory Committee II 61.

¹²²⁵ Preparatory Committee Decisions Feb. 1997 11.

¹²²⁶ Preparatory Committee Decisions Dec. 1997 12. Thereafter, the provision was not anymore debated as to its substance. Until the very end of the Rome Conference, in accordance with the law of non-international armed conflict, many delegations also favored to include starvation as a war crime in non-international armed conflicts, but the ‘final package’ did not include it in the list of war crimes in internal armed conflict situations. See UN Doc. A/CONF.183/C1/SR.5, para. 75.

¹²²⁷ See Physicians for Human Rights, *War Crimes in the Balkans: Medicine under Siege in the Former Yugoslavia 1991–1995* (1996) 91–99.

¹²²⁸ See Lee (ed.), *Elements of Crime* (2001), Article 6(c), Element 4, fn. 4.

¹²²⁹ Lee (ed.), *Elements of Crime* (2001), Article 7(2)(b), Element 1, fn. 9.

group to destruction of their means of survival in their homeland; (ii) systematic displacement from their homes into inhospitable terrain where some died as a result of thirst, starvation and disease; (iii) usurpation of the land; and (iv) denial and hindrance of medical and other humanitarian assistance needed to sustain life in IDP camps.¹²³⁰ The Prosecution however did not charge Al Bashir with the war crime of starvation, which also would have included the above-mentioned slow-death measures.

b) Material elements. The war crime of starvation as a method of warfare under article 8 para. 2 (b) (xxv) needs to be interpreted in particular in light of article 54 para. 1 Add. Prot. I on which the war crime is based, and to some degree by other IHL rules relating to relief actions. While the first paragraph of article 54 Add. Prot. I spells out generally that ‘[s]tarvation of civilians as a method of warfare is prohibited’, the precise meaning of this prohibition is developed in paragraphs 2 to 5 of article 54¹²³¹ and by the articles dealing with relief actions¹²³². Similarly, the first part of article 8 para. 2 (b) (xxv) contains the general prohibition of ‘[i]ntentionally using starvation as a method of warfare’, while the second part of the provision specifies what is meant (‘depriving [civilians] of objects indispensable to their survival’, and further specify (‘including wilfully impeding relief supplies as provided for under the Geneva Conventions’). While article 54 Add. Prot. I is reproduced only incompletely in the second part of article 8 para. 2 (b) (xxv), there is no indication that delegations intended to deviate from article 54 Add. Prot. I and its modalities and exceptions. The Elements of Crimes do not add much to the definition.¹²³³

Besides, article 8 para. 2 (b) (xxv) Rome Statute confirms the existence of a duty not to intentionally impede relief supplies provided for under customary international humanitarian law. Despite the fact that article 8 para. 2 (b) (xxv) Rome Statute does not create or imply an obligation, *e.g.* to provide for sufficient food, water or other essential supplies, that does not otherwise exist under international law¹²³⁴, this does not impede the other applicable rules to come into play, such as the obligation to allow humanitarian relief actions subject to considerations of military necessity. International humanitarian law contains important rules designed to ensure the provision of humanitarian assistance to persons in need in armed conflict. Additional Protocol I specifies that offers of relief shall not be regarded as interference in the armed conflict or as unfriendly acts. The parties to a conflict and each State party to the Protocol must allow and facilitate rapid and unimpeded passage for all relief consignments, equipment and personnel, even if such assistance is destined for the civilian population of the adverse party. The parties to the conflict must protect relief consignments and facilitate their rapid distribution.¹²³⁵

aa) ‘starvation’. There is no definition given for ‘starvation’ in art 54(1) API, since its ordinary meaning is well understood. Accordingly, ‘starvation’ has different meanings. First, the concept in article 8 para. 2 (b) (xxv) certainly applies to suffering from lack of food or water. Starvation is ‘the action of subjecting people to famine, *i.e.*, extreme and general

¹²³⁰ ICC, *The Prosecutor v. Al Bashir*, No. ICC-02/05-01/09, Second Decision on the Prosecution’s Application for a Warrant of Arrest, 12 July 2010, para. 34.

¹²³¹ See Sandoz *et al.* (eds), *Commentary* (1987), para 2091: ‘[A] general principle only of course becomes fully operative when it is accompanied by rules of application: the remainder of [article 54 Add. Prot. I] is concerned with such application, as are several other articles in the Protocol, particularly those relating to relief actions’. At the 1974–1977 Diplomatic Conference, some concern was expressed about the scope of the general principle, but the Rapporteur expressed the view that the scope of the principle eventually adopted in article 54 para. 1 Add. Prot. I was developed by the remainder of the article and by the articles dealing with relief actions, CDDH/215/Rev. 1, para. 73; CDDH/III/264/Ref. 1, XV Official Records, 348–349.

¹²³² CDDH/215/Rev.1, para 73; CDDH/III/264/Rev.1, XV Official Records, pp. 348–349.

¹²³³ See Lee (ed.), *Elements of Crimes* (2001), War Crimes, Article 8(2)(b)(xxv).

¹²³⁴ ‘[T]he actus reus for this offence could be the failure to fulfil a lawful duty This offence does not impose or imply a duty of care that does not otherwise exist in international law (*e.g.*, to provide food for a civilian population)’, Proposal submitted by the United States of America UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999) 18.).

¹²³⁵ Article 70 Add. Prot. I.

scarcity of food'.¹²³⁶ Deprivation of safe water may also, in extreme situations, have direct repercussions for the life and health of individuals.¹²³⁷ For instance, in the Darfur report, the Commission of Inquiry recognized how water was used as a method of warfare: water pumps and wells were destroyed and poisoned by dropping the carcasses of cattle into them.¹²³⁸ Water needs a particular attention also because it is a survival mean for the civilian population when it comes to sanitations or as dangerous forces in the case of dams. The 26th ICRC International Conference stressed in this respect that 'water is a vital resource for victims of armed conflict and the civilian population and is indispensable to their survival' and called upon parties to conflict to take 'all feasible precautions to avoid, in their military operations, all acts liable to destroy or damage water sources and systems of water supply, purification and distribution solely or primarily used by civilians.'¹²³⁹

769 However, the meaning of 'starvation' is not necessarily restricted to a deprivation of food and water, but may also cover the deprivation of other essential things such as clothing, medical supplies or objects needed to harvest and process food. Article 8 para. 2 (b) (xxv) specifies that its prohibition of starvation extends to the deprivation of objects indispensable to the survival of the civilians. This is confirmed by the Elements of Crimes which require the completion of only one specific material element (other than a nexus to an armed conflict), namely that the perpetrator 'deprived civilians of objects indispensable to their survival'.¹²⁴⁰ Supporting the view that other objects than food and water are covered by the concept of starvation is the fact that article 8(2)(b)(xxv) specifies that the prohibition also extends to 'wilfully impeding relief supplies as provided for under the Geneva Conventions'. Such supplies are not limited to foodstuffs, but may include clothing, medical supplies and other objects. The above suggests that the word 'starvation' must be understood in a broader sense than only 'deprivation of food or water'.

770 Besides, dictionaries suggest that the notion of 'starvation' is not only understood as referring to having too little food to sustain life or health, but also as standing for deprivation or insufficient supply of some other essential things. In sum, the transitive verb of starving has not only the more restrictive meaning of killing by hunger or depriving of or keeping insufficiently supplied with food, but more generally can be understood as meaning to deprive of or to insufficiently supply with some essential commodity or something necessary to live, including causing to die of cold¹²⁴¹. In its intransitive form, to starve can correspondingly be understood to signify to suffer from deprivation or 'die, especially slowly from hunger, cold, grief, disease etc.'¹²⁴². In view of the above, it is submitted that 'starvation' in article 8 para. 2 (b) (xxv) Rome Statute also extends to the deprivation of objects other than food and water insofar they are vital to the civilians' survival¹²⁴³.

771 **bb) 'Objects indispensable to the survival of civilians'**. Objects indispensable to the survival of civilians' are not defined in international humanitarian law. But this concept certainly includes the basic objects for subsistence of food and (clean) water. Furthermore, it is submitted that the notion also extends to facilities indispensable to produce, harvest,

¹²³⁶ Sandoz *et al* (eds.), *Commentary* (1987), para 1456.

¹²³⁷ Van der Herik, in: Riedel *et al.* (eds.), *Economic, Social and Cultural Rights* (OUP 2014) 12.

¹²³⁸ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, 25 January 2005, paras 235 and 305.

¹²³⁹ Resolution 2F (a-b); *IRRC* (1996) 68.

¹²⁴⁰ Lee (ed.), *Elements of Crimes* (2001), Article 8(2)(b)(xxv), Element 1, at 31.

¹²⁴¹ See, e.g., *New Shorter Oxford English Dictionary* (2nd ed. 1993); *The Oxford English Dictionary* (2nd ed. 1989); *Webster's Ninth Collegiate Dictionary*; *Webster's Ninth Collegiate Dictionary* (1989).

¹²⁴² *New Shorter Oxford English Dictionary* (2nd ed. 1993).

¹²⁴³ The interpretation of 'starvation' in the ICRC Commentary and the ICRC study for the definition of the elements for article 8 para. 2 (b) (xxv) therefore appears too restrictive, as both only refer to causing the civilians to suffer hunger, even if 'shelter or clothing' were mentioned as possible objects indispensable to survival, see Sandoz *et al* (eds.), *Commentary* (1987), paras 653 and 655 (Nos. 2089 and 2103); *ICRC, Study on Third Set of War Crimes within Art. 8(2)(b) Rome Statute* (4 Aug. 1999), at 43. Cf. Dörmann, *Elements of War Crimes* (2003) 363 *et seq.*

process or stock foodstuffs and assure the availability of water, such as the objects listed under article 54 para. 2 Add. Prot. I, namely ‘agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works’.

However, given what has been stated above, the notion of ‘objects indispensable to the survival of civilians’ is not necessarily limited to objects related to food and water. It is correspondingly submitted that article 8 para. 2 (b) (xxv), in line with the corresponding provision in Additional Protocol I, also prohibits the deprivation of other objects vital to the survival of a population and in particular medical supplies as well as basic shelter and clothing critical for the civilians’ survival under given climatic conditions¹²⁴⁴. Lastly, it is submitted that under certain circumstances, electricity sources may also be included in the notion of ‘objects indispensable to the survival of civilians’. Indeed, the Office of the High Commissioner for Human Rights concluded that stopping electricity sources may amount to the deprivation of objects indispensable for the survival of civilians, especially of hospital patients who die if electricity supplies are stopped for too long.¹²⁴⁵

cc) ‘Civilians’. Starvation methods are unlawful when directed against the civilian population. However, there is no rule prohibiting starvation of enemy combatants, unless they become *hors de combat* through wounds, sickness, shipwreck or capture. Article 8 para. 2 (b) (xxv) of the Rome Statute appears to be primarily intended to protect civilians from an adverse party to the conflict. However, it not only protects civilians belonging to an adverse party to the conflict finding themselves on that adverse party’s territory or in occupied territory, but also any other civilian population such as civilians belonging to the own party to the conflict or finding themselves on the territory of the own party to the conflict¹²⁴⁶.

There is no definition of civilian under international humanitarian law. The identification of civilian persons needs to be negatively effectuated. They are those who are not directly participating in hostilities. A civilian can also be defined as an individual who finds himself on the territory of a party to the conflict of which he does not have the nationality.¹²⁴⁷ This approach can be defined as the nationality criteria, which has not always been very pertinent. The protection civilians enjoy is lifted as soon as they are directly participating in hostilities and for the whole duration of their participation¹²⁴⁸. The threshold of participation and the duration is difficult to determine precisely¹²⁴⁹. Importantly, international humanitarian law deals with these difficulties by clarifying that in case of doubt as to the status of a person or an object, they are to be presumed civilians¹²⁵⁰. In addition, the presence of isolated

¹²⁴⁴ The list provided in article 54 para. 2 Add. Prot. I is not exhaustive as the words ‘such as’ make clear. See Solf, in: Bothe *et al.* (eds.), *New Rules* (1982) 339–340 (‘... the Committee action in adopting an illustrative listing indicates that other life sustaining objects such as clothing and shelter needed to sustain life under prevailing climatic conditions may also be covered by the prohibition’); Sandoz *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* paras. 2102–2103; The Netherlands East Indies Statute Book Decree No. 44 of 1946 considered as a war crime the ‘[i]ntentional withholding of medical supplies from civilians’ (1949)XI *Law Reports* 94.

¹²⁴⁵ UN OHCHR, Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and IHL Committed within the Territory of the DRC between March 1993 and June 2003 (Geneva: OHCHR, 2010), para 330.

¹²⁴⁶ Article 49 para. 2 Add. Prot. I provides that ‘[t]he provisions of [Protocol I] with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party’. Article 54 Add. Prot. I also concerns ‘attacks’. Furthermore, article 54 para. 5 Add. Prot. I provides that a derogation from the prohibition of starvation may be made with respect to the civilian population in the own territory under the own party’s control where required by imperative military necessity. *A contrario*, civilians finding themselves in the territory of the starving party are also covered. The term ‘civilian population’ in Article 53(3)(b) refers rather to the population of an immediate area. (See CDDH/215/Rev.1, para 76). Article 54 Add. Prot. I in no way suggests that the ‘civilians’ with respect to whom its legal injunctions apply must be understood in a manner different from the general definition in article 50 Add. Prot. I.

¹²⁴⁷ See Article 4 GC IV and Article 50 Add. Prot. I.

¹²⁴⁸ See article 51(3) Add. Prot. I and Sandoz *et al.*, *Commentary* (1987), paras. 1942–1945.

¹²⁴⁹ See generally the ICRC *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

¹²⁵⁰ See Article 50(1) Add. Prot. I for civilian persons and Article 52(3) Add. Prot. I for civilian objects.

combatants within the civilian population does not relieve this population of its civilian quality.¹²⁵¹

- 775 **dd) ‘Depriving of’.** The conduct prohibited under article 8 para. 2 (b) (xxv) is to ‘deprive’ civilians of objects indispensable to their survival. This first can be done, as spelled out by article 54 para. 2 Add. Prot. I, by *attacking, destroying, rendering useless, or removing* indispensable objects. Such active deprivation includes, for instance, destroying crops by defoliants or poisoning wells or springs, a particularly egregious form of starving civilians¹²⁵².
- 776 Secondly, a deprivation of indispensable objects could be fulfilled by *impeding relief supplies*, including transports and supplies of food, water, drinking water installations, blankets, clothing and other objects to protect against cold and weather, as well as medical supplies. Article 8 para. 2 (b) (xxv) explicitly covers the impeding of relief supplies ‘as provided for under the Geneva Conventions’. It is not entirely clear whether this phrase also refers to supplies as provided for under Add. Prot. I, which supplements the Geneva Conventions.¹²⁵³ However, in view of the fact that most Add. Prot. I provisions are now considered customary international law, the correct view seems to refer also to supplies provided for in the Protocol. Be it as it may, impeding relief supplies as provided under Add. Prot. I can also be subsumed under article 8 para. 2 (b) (xxv) by way of the general formula of ‘depriving civilians of objects indispensable to their survival’.
- 777 Relevant provisions of the Geneva Conventions with respect to relief supplies obliges States Parties to allow the free passage of certain types of goods intended for specific categories of the civilian population belonging to another State Party. This includes article 23 GC IV which requires every state to ‘allow the free passage of all consignments of medical and hospital stores ... intended only’ *for civilians of another state* and to ‘likewise permit the free passage of all consignments of essential foodstuff, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases’. State practice also indicates that each party to the conflict must refrain from deliberately impeding the delivery of relief supplies to civilians in need in areas under its control.
- 778 Additional Protocol I compensated the obviously limited scope of this provision. Article 70 Add. Prot. I more generally requires parties to a conflict to ‘allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with [Section II of Part IV of Add. Prot. I]’ with regard to the *civilian population of its own as well as the civilian population of the adverse party to the conflict*, except with regard to the civilian population in occupied territories the supply of which the Occupying Power must ensure on the basis of article 69 Add. Prot. I.
- 779 With regard to *relief supplies for civilians in occupied territories*, the Fourth Geneva Convention and Additional Protocol I have provisions dealing with relief assistance to civilians. An Occupying Power has an obligation to ensure the provision of food and medical supplies to the civilian population of an occupied territory and should bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. (articles 55 GC IV and 69 para. 1 Add. Prot. I). If the civilian population in the occupied territory is inadequately supplied, the Occupying Power must agree to and facilitate the relief by all means at its disposal. Articles 59 to 62 GC IV require the Occupying Power to permit the free passage of consignments of foodstuffs, medical supplies and clothing, and, if read in conjunction with article 69 Add. Prot. I, also bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship. Besides, personnel participating in relief actions must be respected and protected under article 71 Add. Prot. I.

¹²⁵¹ See Article 50(3) Add. Prot. I.

¹²⁵² See Sandoz *et al.*, *Commentary* (1987), para. 2101. The poisoning could also amount to the war crime under article 8 para. 2 (b) (xvii).

¹²⁵³ Additional Protocol I, article 70(2), broadens the Geneva Conventions obligations to cover ‘rapid and unimpeded passage of all relief consignments, equipment and personnel’.

Articles 72–75 and 125 GC III and Annex III to GC III provide obligations of parties to the conflict with regard to *prisoners of war*, including the obligation of parties to the conflict to allow that prisoners of war receive individual parcels or collective shipments containing foodstuffs, clothing, medical supplies and other objects. In addition, articles 108, 109 and 142 GC IV contain special rules on relief for *detained persons* which, *inter alia*, provide that relief societies ‘shall receive from [the detaining] Powers ... all facilities ... for distributing relief supplies’.

In all of these cases, the provision of relief supplies is subject to certain conditions. Relief actions must be humanitarian and impartial in character and conducted without any adverse distinction. Article 70 para. 1 Add. Prot. I requires for instance the agreement of the party to the conflict controlling the territory through which the supplies must pass. This party may furthermore prescribe technical arrangements, including search, and make the permission conditional on a local supervision by a Protecting Power (article 70 para. 3 Add. Prot. I). However, article 70 para. 2 Add. Prot. I makes it clear that the parties to the conflict ‘shall allow and facilitate rapid and unimpeded passage of all relief consignments’, thus establishing an obligation in principle. Indeed the fact that consent is required does not mean that the decision on a relief operation is left to the discretion of the parties. The correct view is therefore that a State must accept relief actions when the civilian population is not adequately supplied and its survival is threatened and when relief which is humanitarian and impartial in nature is available and able to remedy the situation. Refusing a relief action or relief consignments is not a matter of discretion and agreement can be withheld only for exceptional reasons, not for arbitrary or capricious ones¹²⁵⁴. A refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat.

Economic sanctions or *blockades* that deprive civilians of objects indispensable to the survival of civilians could also be prohibited under article 8 para. 2 (b) (xxv) Rome Statute, insofar these measures take place in the context of and are associated with an armed conflict and insofar the requisite mental elements are present, except if one of the exceptions to the prohibition applies. Where a blockade or sanctions regime in the context of an armed conflict has the effect of starving the civilian population, the obligation to allow relief supplies to reach the population is triggered. Indeed, it should be emphasized that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians.¹²⁵⁵ Article 8 para. 2 (b) (xxv) Rome Statute confirms this obligation under Add. Prot. I by specifying that ‘impeding relief supplies’ may amount to the war crime of starvation. If the civilian population of the blockaded territory is however adequately provided with essential commodities, the blockaded objects are not ‘indispensable to their survival’ and thus could not fall under the prohibition of starvation¹²⁵⁶.

The prohibition to use starvation of civilians by depriving them of objects indispensable to their survival applies also to *naval blockades* insofar they may affect civilians on land¹²⁵⁷.

¹²⁵⁴ Sandoz *et al* (eds.), *Commentary* (1987), para. 2808.

¹²⁵⁵ *Id.* at para 2095.

¹²⁵⁶ Relief supplies assisting the civilian population with foodstuffs, water and medical supplies (on ‘humanitarian grounds’) should also for this reason generally be excluded from a blockade or sanctions regime if this regime might otherwise lead to starvation of civilians, irrespective of the basis on which these sanctions are decided and implemented. In fact, when deciding on economic sanctions with regard to situations of armed conflict, the Security Council in practice generally provided for ‘humanitarian exceptions’. See, e.g., UN Doc. S/Res/661 (6 Aug. 1990), para. 3 (c) (excluding ‘supplies strictly intended for medical purposes, and, in humanitarian circumstances, foodstuffs’); UN Doc. S/Res/666 (13 Sep. 1990); UN Doc. S/Res/670 (...), para. 3; UN Doc. S/Res/687 (3 Apr. 1991), paras. 20 *et seq.*; UN Doc. S/Res/757 (30 March 1992), paras. 4(c), 5 and 7; UN Doc. S/Res/820 (17 April 1993), para. 22 (a) and (b); UN Doc. S/Res/942 (23 Sep. 1994), paras. 7 (b) and (13 (b)); UN Doc. S/Res/943 (23 Sep. 1994), paras. 2 and 3 (excepting ‘foodstuffs, medical supplies and clothing for essential humanitarian needs’); UN Doc. S/Res/967 (14 Dec. 1994); UN Doc. S/Res/1302 (8 June 2000). See David, *Principes de droit des conflits armés* 259–261.

¹²⁵⁷ This follows clearly from the wording of article 49 para. 3 Add. Prot. I. The interpretation of the Rapporteur at the 1974–1977 Conference that the rule of article 54 para. 1 Add. Prot. I does not modify the law applicable to naval blockade, cited in Sandoz *et al.*, *Commentary* (1987), para. 2092, appears to be an interpreta-

Paragraphs 102–104 of the San Remo Manual state that a party declaring or establishing a naval blockade must allow the free passage of foodstuffs and medical supplies for the civilian population (as well as medical supplies for members of the armed forces) even in naval warfare. For example, the International Fact-finding Mission to investigate violations of international law resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance in 2010 considered that the policy of blockade or closure regime, including the naval blockade imposed by Israel on Gaza was inflicting disproportionate civilian damage,¹²⁵⁸ and was therefore illegal. The Mission further found that the Israeli blockade constituted collective punishment of the people living in the Gaza Strip and thus was illegal and contrary to article 33 of the Fourth Geneva Convention.¹²⁵⁹

784 Thirdly, it is submitted that a qualified *failure to fulfill a duty under international humanitarian law* may also amount to depriving civilians of objects indispensable to their survival. For instance, an Occupying Power may fail to ensure food and medical supplies to the civilian population within the occupied territories¹²⁶⁰. In their proposal for the elements of crimes, the United States mentioned another example by commenting that ‘[a]s with murder, the *actus reus* for this offence could be the failure to fulfil a lawful duty: for example, feeding prisoners under the accused’s care’¹²⁶¹.

785 **ee) Exceptions.** Article 54 Add. Prot. I specifies that under specific exceptional circumstances objects indispensable to the survival of persons may be attacked, destroyed, removed or rendered useless. Firstly, *objects being used as sustenance exclusively for armed forces* may lawfully be attacked insofar this provides a definite military advantage (article 54 para. 3 (a) Add. Prot. I)¹²⁶². This obviously raises difficult issues related to evidence. Normally, this exception is generally applicable to supplies already in the hands of the adverse Party’s armed forces because it is only at that point that one could know that the objects will be used exclusively by the enemy armed forces. Furthermore, this test needs substantial refinement because objects in the military supply system intended for the sustenance of prisoners of war, the civilian population of occupied territory or persons classified as civilians serving with, or accompanying the armed forces, would fall within the terms of this exception.¹²⁶³

786 Secondly, actions against means of subsistence that *serve civilians but additionally are used ‘in direct support of military action’* are not prohibited, unless such actions ‘may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement’ (article 54 para. 3 (b) Add. Prot. I)¹²⁶⁴. However, as the ICRC Commentary rightly underlines, it is hard to see how foodstuffs, crops, livestock and supplies of drinking water could be used ‘in direct support of military action’. This phrase thus makes it clear that it is not lawful to attack means of subsistence that serve to feed both the civilian

tion against the explicit wording of article 49 para. 3 Add. Prot. I and therefore does not appear convincing. David, *Principes de droit des conflits armés* (3rd ed. 2002) 261–263.

¹²⁵⁸ United Nations Human Rights Council, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, para. 59, UN Doc. A/HRC/15/21 (Sept. 27, 2010).

¹²⁵⁹ *Id.*, para 60.

¹²⁶⁰ See article 55 GC IV and article 69 Add. Prot. I.

¹²⁶¹ *Proposal by the United States of America*, UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999) 18.).

¹²⁶² However, Pilloud and de Preux assert that installations for drinking water and irrigation works are not covered by the exception provided under article 54 para. 3 (a) Add. Prot. I, since they are hardly used solely for the benefit of armed forces, Sandoz *et al.*, *Commentary* (1987), paras. 2109 and 2112.

¹²⁶³ See Bothe *et al.*, *New Rules* (1982) 382–383, referring to Third Conventions, Art. 4(a)(4) and (5), Protocol I, Art. 50.

¹²⁶⁴ Article 23 (g) Hague Regulations prohibits such actions unless they are ‘imperatively demanded by the necessities of war’. The Spanish Penal Code provides for criminal jurisdiction over whoever ‘[a]ttacks, destructs, deprives of, or makes unusable goods indispensable for the survival of the civilian population, except if the adversary Party uses these goods in *direct support* of a military action or *exclusively* as means of subsistence of its armed forces’, article 613 (c) of the Spanish Military Penal Code (*Ley orgánica* 10/95 of 23 Nov. 1995) (emphasis added).

population and armed forces, unless such means are used in direct support of military action such where a food-storage place is used as cover or as an arms depot¹²⁶⁵. An attack would in any event be unlawful if it could be anticipated to have serious effects on supplies for the civilian population and the latter would thereby be forced to starve or move away.

Moreover, the principle of *proportionality* and the obligation to take precautions remain applicable. A commander who plans or conducts an attack is under an affirmative duty to take all feasible precautions in the choice of means and methods of attack in order to prevent erroneous targeting and to avoid or in any event minimize incidental injury to civilians and civilian objects. In this respect, where it is not clear whether means of subsistence only serve armed forces, a reasonable inquiry must take place¹²⁶⁶. 787

Thirdly, the deprivation of objects indispensable to the survival of civilians as *incidental* result of an otherwise lawful attack on a different military objective is not as such prohibited under article 54 Add. Prot. I. It however would be unlawful if it may be expected to cause excessive incidental damage. The result of starvation of civilians needs to be taken into account in weighing the proportionality of such incidental damage. 788

Fourthly, *with regard to territory under a party's own control*, article 54 para. 5 Add. Prot. I provides that derogations from the prohibition to attack, destroy, remove or render useless objects indispensable to the survival of civilians may be made ‘*in the defence of (this party's) national territory against invasion ... where required by imperative military necessity*’ (emphasis added).¹²⁶⁷ 789

Objects indispensable to the survival of civilians must *not* be made the object of *reprisals* (article 54 para. 4 Add. Prot. I).

ff) No result of starvation required. Article 8 para. 2 (b) (xxv) Rome Statute criminalizes ‘using starvation as a means of warfare’, specifying that also impeding relief supplies may qualify as the war crime of starvation. The only material element required by the elements of crimes is that there is a deprivation of certain objects. This suggests that it is not required that people actually die of starvation, and it would not even seem necessary that people actually starve as a result of the deprivation of indispensable objects. It appears sufficient that civilians are deprived of objects indispensable to their survival, that is, a deprivation that would cause them in the future to starve, without requiring that the deprivation takes its effect over time¹²⁶⁸. The perpetrator nonetheless must have *intended* to starve the civilians as a method of warfare. 790

¹²⁶⁵ Sandoz *et al.*, *Commentary* (1987), para. 2110. The absolute prohibition ruling out reflections of proportionality unless the means of subsistence are used in ‘direct support of military action’ has been criticized as overly inflexible by Dinstein who argues that ‘[t]he broad injunction against sieges affecting civilians is untenable in practice’ and that ‘an absolute prohibition of starvation of civilians in siege warfare is unjustifiable as well as utopian’. He would prefer that siege warfare with attendant starvation ‘is legitimate, provided that an offer is made by the besieging force to allow civilians to depart from the encircled town’; Dinstein, in: Delissen and Tanja (eds.), *Humanitarian Law of Armed Conflict* (1991) 151–152. However, the increasing number of armed conflicts where ‘ethnic cleansing’ belongs to the main goals of a party to the conflict, including by means of forcing the population of a certain region, town or village to move away, shows the possible dangers to adopt Dinstein’s suggestion. Also, civilians in a besieged town may often fear to render themselves under the control of the attacking party, and in large towns and with regard to far-reaching modern warfare, it may also be practically difficult to apply such a solution, see David, *Principes de droit des conflits armés*(3rd ed. 2002) 260–261.

¹²⁶⁶ See U.S. Department of Defense, *Letter from the General Council to Chairman, Senate Committee on Foreign Relations* (5 April 1971), reprinted in: (1971) 10 *ILM* 1302.

¹²⁶⁷ This appears to allow to a certain degree a policy of ‘scorched earth’ on the own territory in order to slow down an advancing invader. Pilloud and de Preux contend that this exception only applies to own territory, and not to adversary territory under one’s own control, Sandoz *et al.*, *Commentary* (1987), para. 2119. This means that this derogation can be made only by a Belligerent Party acting in defence of its national territory against invasion (within that part of the national territory which is under its own control), and only when it is motivated by ‘imperative military necessity’. See also Dinstein, in: Delissen and Tanja (eds.), *Humanitarian Law of Armed Conflict* (1991) 149–150; Blix, in: UNESCO (ed.), *International Dimensions of Humanitarian Law* 144.

¹²⁶⁸ The element proposed by the United States that required ‘4. That, as a result of the accused’s acts, one or more persons died from starvation’, *Proposal by the United States of America*, UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999) 18), was not included in the Elements of Crimes adopted by the Preparatory Commission.

- 791 c) **Mens rea. aa) Intent to starve civilians.** The crime must be committed with the intent to use the starvation as a *method of warfare*, that is, to deliberately provoke, increase or prolong the starvation by deprivation of objects indispensable for the survival with an aim to gain a military advantage, including for instance forcing civilians to transfer to another area or State¹²⁶⁹. In addition, it is required that the perpetrator wanted to take civilians as a target. In accordance with article 30 Rome Statute, all material elements of the war crime of starvation of civilians must be committed with intent and knowledge. The perpetrator must thus have intended, first, to deprive civilians of objects indispensable to their survival.
- 792 Article 8 para. 2 (b) (xxv) explicitly provides that ‘*willfully* impeding relief supplies ...’ is also covered by the provision. The standard of ‘*willfully*’ includes recklessness and insofar would differ from the general standard under article 30 Rome Statute. However, delegations at the Diplomatic Conference may not have had the intent to deviate from the general rules regarding the mental element. Indeed, the General introduction of the Elements makes it clear that article 30 Rome Statute applies if no specific reference is made in the Elements to a particular mental element, which is not the case. Indeed, according to the Elements of the Crime, the requirement is that the perpetrator intended to starve civilians as a method of warfare.¹²⁷⁰ The intent requirement is explicitly stated in the elements of the crime and also appears to be an application of the default rule codified by Article 30. Accordingly, in order to prove the *mens rea* for the crime of intentionally using starvation of civilians as a method of warfare, because the word ‘*intentionally*’ is contained in the Article 8(2)(b)(xxv), the Prosecution will only have to prove the intent, as referred to in Article 30(2).¹²⁷¹ If the word ‘*intentionally*’ was not contained in the provision, the Prosecution, in order to prove the *mens rea*, would need to prove intent *and* knowledge, i. e. Article 30(2) and (3).
- 793 **bb) Specific intent to starve as a method of warfare.** Article 8 para. 2 (b) (xxv) Rome Statute requires that the perpetrator be ‘*intentionally* using starvation of civilians as a method of warfare’. Element 2 requires that ‘[t]he perpetrator intended to starve civilians as a method of warfare’. This suggests that the perpetrator must have had the specific intent to starve civilians ‘as a method of warfare’. This excludes starvation as a result of unintended mismanagement.
- 794 The requirement that the starvation be used ‘as a method of warfare’ however calls for interpretation. Firstly, the expression ‘*methods of combat*’ generally refers to the manner in which armed forces engage in combat or to the way in which weapons are used.¹²⁷² It must be conducted to achieve a military advantage or other objective vis-à-vis an adversary party to the international armed conflict. In addition, starvation can also result from an act of omission. To deliberately decide not to take measures to supply the population with objects indispensable for its survival can become a method of combat by default, and would also be prohibited.¹²⁷³ Secondly, this notion certainly covers starvation *to gain a military advantage*, such as using starvation to achieve a speedier subjection of a besieged town or village, as was medieval warfare practice, or to pressure on the adversary to accept some other aim of the attacker. Another example may be to deprive civilians of indispensable goods in order to force them to move out of a certain area in order to facilitate the control over that area.

¹²⁶⁹ For instance, burning down crops puts the civilian population before the uneasy choice to either starve or move away, which may present a military gain in that the political and physical control over this territory or area is enhanced or will be easier to establish.

¹²⁷⁰ Element 2, article 8(2)(b)(xxv), 31.

¹²⁷¹ The relevant parts of Article 30 read as follow: ‘(1) *Unless otherwise provided*, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent *and* knowledge. (2) For the purpose of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.’ (emphasis added).

¹²⁷² Sandoz *et al.*, *Commentary* (1987), para. 1957.

¹²⁷³ *Id.*, para 4800.

In today's armed conflicts, humanitarian assistance is increasingly denied as part of a deliberate policy to target civilians. This is why the scope of application of article 8 para. 2 (b) (xxv) may cover a wider range of motives. In particular, paragraph 2 of article 54 Add. Prot. I states it is prohibited to attack objects indispensable to the survival of the civilian population 'for the specific purpose of denying them their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive'. The ICRC Commentary on article 54 para. 1 Add. Prot. I also states that '[t]o use [starvation] as a method of warfare would be to *provoke it deliberately* ... It is clear that activities conducted for this purpose would be incompatible with the general principle of protecting the population, which the Diplomatic Conference was concerned to confirm and reinforce. Starvation is referred to here as a method of warfare, *i. e.*, a weapon to *annihilate or weaken the population*'¹²⁷⁴. This reading gains support by the US proposal of elements on this war crime¹²⁷⁵.

It could thus be argued that the starvation and denial of the sustenance value of indispensable objects to the civilian population was a sufficient specific purpose of the perpetrator. In certain situations, it might be difficult to prove the specific intent to use starvation as a method of warfare, but if the outcome of impeding humanitarian assistance is obvious according to the ordinary course of events, the intention can be inferred. Accordingly, depriving civilians of indispensable objects with the intention, for instance, to 'ethnically cleanse' a region or town from a certain group of civilians, or to force targeted civilians to move away or take some other action intended or ordered by the perpetrator, would seem to meet the *mens rea* required under article 8 para. 2 (b) (xxv)¹²⁷⁶.

26. Paragraph 2(b)(xxvi): Conscription or enlistment of children and their participation in hostilities*

Literature: Ambos, K., 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues', (2012) 12 *ICLRev* 115; Brett, R. and McCallin, M., *Children: The Invisible Soldiers* (1996); van Bueren, G., 'The international legal protection of children in armed conflicts', (1994) 43 *I&CompLQ* 809; Cohn, I. and Goodwin-Gill, G.S., *Child Soldiers: The Role Of Children In Armed Conflicts* (Clarendon Press 1994); Delissen, J.J.M., 'Legal Protection of Child Combatants after the Protocol: Reaffirmation, Development or a Step Backwards?', in: A.J.M. Delissen and G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead* (Martinus Nijhoff Publishers 1991) 156–157; Dutli, M.T., 'Captured child combatants', (1990) 278 *IREvRC* 421; Garraway, C., 'Elements of the Specific Forms of Genocide', in: R.S. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001); Graf, R., 'The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment', (2012) 10 *JICJ* 945; Hamilton, C. and Tabatha, A.E.-H., 'Armed Conflict: the protection of children under international law', (1997) *IJChildrenRts* 1; Happold, M., 'Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities', (2000) 47 *NethLLRev* 27; Happold, M., 'International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision in Prosecutor v. Samuel Hinga Norman', (2002) 3 *YbIHuM* 226; von Hebel, H. and Robinson, D., 'Crimes within the Jurisdiction of the Court', in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International 1999) 118, 206; Heintze, H.-J., 'Children need more protection under international humanitarian law: recent developments

¹²⁷⁴ *Id.* paras 2089–2090 (emphasis added).

¹²⁷⁵ '3. That the accused's act was intended as a method of warfare with the specific purpose of denying such objects to the targeted civilian population', *Proposal by the United States of America*, UN Doc. PCNICC/1999/DP.4/Add.2 (4 Feb. 1999) 18.

¹²⁷⁶ There is no indication that the Rome Diplomatic Conference intended to exclude starvation out of a motive of ethnic cleansing from the offense's scope of application. Rather than excluding the application of the offense to such conducts, the qualification 'as a method of warfare' likely was inserted not least to keep with the well-established international humanitarian law concept of starvation (as reflected, above all, under article 54 Add. Prot. I), to distinguish the war crime from the inadvertent and not specifically intended consequence often occurring in war times of starving of the civilian population, and to make it clear that no new international obligation or concept is created. The wording underlines that the conduct must be associated with an armed conflict, and that the rule does not criminalize, for instance, a failure to generally live up to internationally promoted standards of good governance.

* The authors are indebted to Jérôme Massé for his research assistance.

concerning Article 38 of the UN Child Convention as a challenge to the International Red Cross and Red Crescent movement', (1995) 4 *HuV-I* 200; Helle, D., 'Optional protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child', (2000) 839 *IRevRC* 797; ICRC, 'Optional Protocol to the Convention on the Rights of the Child concerning involvement of children in armed conflicts, Position of the International Committee of the Red Cross', (1998) 322 *IRevRC* 107; Junod, S., 'Article 4 Add. Prot. II', in: Y. Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 1380; Kalshoven, F., *Constraints on the Waging of War* (Martinus Nijhoff Publishers 1987) 91; Krill, F., 'United Nations Convention on the rights of the child: a controversial article on children in armed conflicts', (1989) 12 *Dissemination* 11; Laucci, C., *Digest of Jurisprudence of the Special Court for Sierra Leone 2003–2005* (Martinus Nijhoff Publishers 2007); Mann, H., 'International Law and the Child Soldier', (1987) 36 *I&CompLQ* 32; Maslen, S., 'Relevance of the Convention on the Rights of the Child to children in armed conflict', (1996) *TransnatL&ContempProbs* 329; Pilloud, C. and Pictet, J.S., 'Article 77 Add. Prot. I', in: Y. Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987); de Preux, J., 'Article 43 Add. Prot. I', in: Y. Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 506; Vité, S., 'Between Consolidation and Innovation: The International Criminal Court's Trial Judgment in the Lubanga Case', (2012), 15 *YbHumL* 61.

797 a) **Humanitarian law base and drafting history.** The use of child soldiers in many of today's armed conflicts has become a matter of increasing international concern¹²⁷⁷. Easily manipulated and not questioning orders, children are at the risk of being exploited and even of being used as 'cannon fodder', under drugs or not, as decoys or in risky combat actions adult combatants are not willing to undertake. Besides the risk to their physical well-being active participation in armed hostilities teaches them the rule and culture of violence, disrupts their education and frequently results in gravest traumas, since children are even less capable to deal with the horrors of war than grown adults. Social reintegration poses particular problems for children that have never seen anything else than conflict and violence. Also, children's combat behavior is more erratic; they may more easily shoot indiscriminately at anything that moves. Since their conduct is more difficult to predict, they can present an increased danger for persons protected under humanitarian law, including civilians, humanitarian workers or persons *hors de combat*¹²⁷⁸. Interestingly enough, the very first judgment of the ICC, namely the Lubanga case issued on March 14, 2012¹²⁷⁹, is related to children in armed conflicts. Even if the situation in which that case took place has been classified by the Court as a non-international armed conflict (to which article 8 para. 2 (e) (vii) rather applies)¹²⁸⁰, the findings of the Court are obviously crucial to the interpretation of article 8 para. 2 (b) (xxvi) of the Rome Statute. Indeed, the numerous issues dealt with by the Court in that case receive the same reading no matter the classification of the situation. Besides, the Preliminary Chamber of the Court, when ruling on that case, left the classification of the situation (international or non-international in character) open. Therefore, the conclusions made in the *Lubanga* case could well be applied whatever the nature of the conflict, in the future¹²⁸¹.

798 The recruitment of children into armed forces or groups and their participation in armed conflicts has only recently become an object of international legal regulation¹²⁸². The first

¹²⁷⁷ Several factors may explain this. First, most of today's armed conflicts are of an internal nature, and the use of child soldiers appears more frequent in internal than in international conflicts. Children under fifteen have been reported to have participated in more than two dozen current or recent armed conflicts. Also, the roles they are called to play appear to have expanded. Not least, the proliferation of small caliber arms makes it easier to use child soldiers. Second, the age at which many societies and not least the 'international community' consider childhood to end has augmented. See, e.g., Happold, (2000) 7 *NethILRev* 28–29.

¹²⁷⁸ See Pilloud and Pictet, in: Sandoz *et al.* (eds.), *Commentary* (1987) 900 (No. 3183); *Impact of Armed Conflict on Children, Report of the expert of the Secretary-General, Machel, submitted pursuant to General Assembly resolution 48/157*, UN Doc. A/51/306 (26 Aug. 1996), paras. 34–62.

¹²⁷⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012.

¹²⁸⁰ [*ibid.*, para. 568.] or [*Prosecutor v. Thomas Lubanga Dyilo*, 14 March 2012, ICC-01/04-01/06, para. 568 in which the Trial Chamber has decided that: 'g]iven the Chamber's conclusion that the UPC was engaged in a NIAC [...] it [was] unnecessary to interpret or discuss Article 8(2)(b)(xxvi).']

¹²⁸¹ Cf. Geiss and Zimmermann, article 8 2 e) (vii).

¹²⁸² See generally Happold (2000) 47 *NethILRev* 27; Hamilton and Tabatha (1997) *IJChildrenRts* 1; Maslen (1996) *TransnatL&ContempProb* 329; Cohn and Goodwin-Gill, *Child Soldiers: The Role of Children in Armed*

international instruments specifically addressing the issue are the 1977 Additional Protocols to the Geneva Conventions. The late development of armed conflicts directly concerns the relation between these children and the party to the conflict to which they belong. However, international humanitarian law, on the one hand, does not typically regulate relations between a party to a conflict and persons belonging to it. On the other hand, international human rights law, traditionally regulating relations between a state and its own citizens, does not typically regulate issues specifically relating to armed conflict situations. Today, the issue is both regulated by human rights instruments, such as the Convention for the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict, or the African Charter on the Rights and Welfare of the Child, as well as by international humanitarian law, either conventional or of customary nature.

Article 77 para. 2 Add. Prot. I provides that '[t]he Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces'¹²⁸³. With regard to non-international armed conflict situations, article 4 para. 3 (c) Add. Prot. II prohibits to 'allow' children under fifteen to 'take part in hostilities'. According to the ICRC study on customary international humanitarian law, these provisions are of customary nature. Rule 136 of this study states that '[c]hildren must not be recruited into armed forces of armed group' while rule 137 says that '[c]hildren must not be allowed to take part in hostilities'. Both rules apply indifferently in international or non-international armed conflicts.

Article 38 paras. 2 and 3 of the virtually universally ratified 1989 UN Convention on the Rights of the Child similarly states: 800

'2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. ...'

In addition, the International Labour Organization Convention No. 182 of 17 June 1999 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour requires States Parties to prohibit the worst forms of child labour, 'including forced or compulsory recruitment of children for use in armed conflict'¹²⁸⁴. The 1990 African Charter on the Rights and Welfare of the Child¹²⁸⁵ provides in paragraph 2 of its article 22 entitled 'Armed Conflicts' that States Parties 'shall take all necessary measures to ensure that no child ['defined in its article 2 as every human being below the age of 18 years'] shall take a direct part in hostilities and refrain in particular, from recruiting any child'¹²⁸⁶.

At the negotiations of the Preparatory Committee and the Rome Conference, the majority 801 felt strongly that using child soldiers or recruiting them into armed forces should be a war crime under the jurisdiction of the ICC, considering that violating this virtually universally accepted prohibition was of most serious concern. Yet, a few states, and in particular the United States (who, together with Somalia, is the last state not having ratified the UN Child Convention), were of the view that the underlying prohibition had more of a human rights than humanitarian law character and had not been criminalized under customary international law. The precise formulation of article 8 para. 2 (b) (xxvi) required intense negotiations on particular issues of controversy. The most debated issues included the required degree of

Conflicts (1994); van Bueren (1994) 43 *I&CompLQ* 809; Delissen, in: Delissen and Tanja (eds.), *Humanitarian Law of Armed Conflict* (1991) 156–157.

¹²⁸³ On the drafting history, see Mann (1987) 36 *I&CompLQ* 32.

¹²⁸⁴ See article 3 (a) of the Convention, which entered into force on 19 Nov. 2000.

¹²⁸⁵ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 Nov. 1999.

¹²⁸⁶ See also, e.g. UN SC. Res. 1261 (25 Aug. 1999) and UN SC Res. 1314 (14 Aug. 2000); UN GA Res.52/145 (12 Dec. 1997), para. 12 ('urg[ing] all the Afghan parties to respect fully international humanitarian law and ... to prohibit the drafting and recruitment of children as para-combatants, [and] to ensure their reintegration into society ...').

participation in hostilities of the children, the activities proscribed, the insertion of the adjective ‘national’ before ‘armed forces,’ and the age limit of the children; issues that all have been discussed by the ICC in its first judgment.

- 802 The Preparatory Committee had forwarded four options to the Rome Diplomatic Conference: ‘Option 1: forcing children under the age of fifteen years to take direct part in hostilities. Option 2: recruiting children under the age of fifteen years into armed forces or using them to participate actively in hostilities. Option 3: (i) recruiting children under the age of fifteen years into armed forces or groups; or (ii) allowing them to take part in hostilities. Option 4: [no such war crime]’¹²⁸⁷. The Rome Conference eventually adopted option 2 as sub-paragraph (b) (xxvi) with only two changes: The replacement of the term ‘recruiting’ by ‘conscripting or enlisting’, particularly to meet the concern of the United States who sometimes reach children at an early stage with their recruitment campaigns, and the addition of the word ‘national’ before armed forces to meet a concern by Arab states.
- 803 Several states, supported by a few strongly lobbying NGOs, had strived to raise the relevant age to 18. This was rejected by delegations, primarily based on the argument that there was no adequate support for the customary status of the age limit of 18 in international law, which indeed appeared at least doubtful¹²⁸⁸. Several delegations however remained unhappy that the age limit under sub-paragraph (b) (xxvi) is not higher than 15 years.
- 804 The goal to raise the minimum age of child soldiers became also one of the key issues during the negotiations leading to the adoption on 25 May 2000 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Even if some of the Protocol’s provisions are not beyond criticism and are hardly in line with the general principles of humanitarian law¹²⁸⁹, the Optional Protocol certainly further elaborates the protection of children against recruitment and participation in hostilities¹²⁹⁰.

¹²⁸⁷ 1998 ILC Draft Statute, pp. 24–25.

¹²⁸⁸ Articles 77 para. 2 and 38 of the Convention on the Rights of the Child apply to children who have not attained the age of 15 years, while containing an obligation of States Parties to endeavor to give priority to the oldest persons when recruiting persons under the age of eighteen years. Even the Optional Protocol on the involvement of children in armed conflict adopted in 2000, that is, after the adoption of the Rome Statute, does not provide for the age of 18 for the recruitment by states and does not contain a direct criminalization of recruitment by states of children under 18. See also ICRC (1998) 322 *IRevRC* 107, at Parts I and II (referring to legal arguments and arguments based on practice for the minimum age of 18). The UN Committee on the Rights of the Child has not (yet) answered a question of one state party in this regard, see Initial Report of Switzerland under the Optional Protocol on the involvement of children in armed conflict, Summary Record, UN Doc. CRC/C/SR.1082, para. 9. While the Committee’s concluding observations in this case lack an affirmation of the customary law status of a war crime of recruiting children under 18, it underlines that states parties to the Optional Protocol should provide for criminal jurisdiction over recruitment of children under 18 from that state party’s territory for military activities abroad, Consideration of Reports Submitted by States Parties under article 8 Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Concluding observations: Switzerland, UN Doc. CRC/C/OPAC/CHE/CO/1 (17 Mar. 2006), para. 8.

¹²⁸⁹ As a matter of principle, international humanitarian law establishes the same obligations of parties to the conflict. Article 4 of the Optional Protocol, which was mainly negotiated by human rights experts since it was a Protocol to a human rights convention, however burdens armed groups more strongly than state forces, prohibiting the former to recruit or use persons under the age of 18 years, while states parties only must take ‘feasible measures to prevent such recruitment and use ...’.

¹²⁹⁰ ‘Article 1: States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2: States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

Article 3: 1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection. ... 3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that ... (d) Such persons provide reliable proof of age prior to acceptance into national military service. ...

Article 4: 1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. 2. States Parties shall take all feasible measures to

Article 4 para. c of the Statute of the Special Court for Sierra Leone established by an Agreement between the United Nations and Sierra Leone affirms the Court’s power to criminally prosecute persons who committed the ‘serious violation [...] of international humanitarian law’ of ‘[c]onscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities’¹²⁹¹, taking into account the recently adopted formulation of article 8 para. 2 (b) (xxvi) Rome Statute¹²⁹². With regard to this earlier draft, the UN Secretary-General’s report had affirmed that ‘the prohibition on child recruitment has by now acquired a customary international law status’ and appeared to consider that the crime defined in article 4 para. c of the draft Statute and committed in internal armed conflict had the character of customary international law since, at least, 30 November 1996¹²⁹³.

Article 28 D, related to war crimes, of the Protocol on Amendments to the Protocol on the Statute of the African Court of justice and human rights¹²⁹⁴ refers to the age of 18 regarding conscription, enlistment and active participation in hostilities.

b) An unusual war crime. The three offenses defined under article 8 para. 2 (b) (xxvi) Rome Statute, namely conscription, enlistment and use of children to actively participate in hostilities, comprise a particularity distinguishing them from most other war crimes. They primarily *protect children against their own authorities* as is clear from the essence of article 8 para. 2 (b) (xxvi). Perpetrator and victims of these war crimes thus may belong to the same party to the conflict. This criminalization of acts committed against or ‘*vis-à-vis*’ persons belonging to the same party to the conflict deviates fundamentally from the general thrust of international humanitarian law and the law of war crimes, which typically regulate acts committed against persons belonging to an adversary party to the conflict. Relations between a State and its own nationals are more characteristically the subject of human rights law. The prohibitions underlying the offense defined in sub-paragraph b (xxvi) thus comprise typical human rights aspects and indeed partially are based on human rights instruments, while undoubtedly having a link to armed conflicts and the preparation for such conflicts.

However, the wording of the provision in no way excludes its application to the use, enlistment or conscription of *children belonging to another party to the conflict* or indeed of *any other child*¹²⁹⁵. It would not make sense to protect children belonging to the same party to the conflict but not those not belonging to that party. These considerations apply to both the use of children to participate actively in hostilities as well as to their enlistment or conscription into armed forces.

prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices. ...’.

On the new Optional Protocol, see, e.g., Happold (2002) 3 *YbIHuML* 226.

¹²⁹¹ *Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002 pursuant to Security Council resolution 1315 (2000) of 14 Aug. 2000*, available at <<http://www.rscsl.org/Documents/scsl-statute.pdf>> accessed 20 January 2015.

¹²⁹² An earlier draft had criminalized the ‘[a]bduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities’, enclosure ([Draft] Statute of the Special Court for Sierra Leone) to the *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915 (4 October 2000). On the recent practice of the Special Court, see Laucci, *Digest of Jurisprudence of the Special Court for Sierra Leone 2003–2005* (2007).

¹²⁹³ See *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915 (4 October 2000), paras. 12 (in connection with article 1 of the enclosed Draft Statute) and 17.

¹²⁹⁴ As adopted during the 23rd Ordinary Session of the Assembly of Heads of State and Government of the African Union, available at <http://www.au.int/en/sites/default/files/PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20AFRICAN%20COURT%20-%20EN_0.pdf> accessed 20 January 2015.

¹²⁹⁵ The ICRC Commentary to article 77 para. 2 Add. Prot. I notes ‘that this provision is primarily concerned with the nationals of the recruitment State, though without excluding nationals of other States’ and that article 77 ‘is not subject to any restrictions as regards its scope of application; it therefore applies to all children who are in the territory of States at war, whether or not they are affected by the conflict’. See Pilloud and Pictet, in: Sandoz et al. (eds.), *Commentary* (1987) 902 (No. 3191) and 898–899 (Nos 3174 and 3177).

- 809 Enlisting or conscripting children under 15 belonging to another party to a conflict into the armed forces additionally might amount to the grave breach of compelling service in the forces of a hostile Power (article 8 para. 2 (a) (v) Rome Statute) or the war crime of coercing participation in military operations against the person's own country or forces (article 8 para. 2 (b) (xv) Rome Statute), war crimes which apply to persons belonging to the adverse party to the conflict irrespective of their age.
- 810 c) War crime of conscripting or enlisting children. aa) 'Conscripting or enlisting ... into the ... armed forces'. If there was no definition neither in international law of the notions of 'conscripting' and 'enlisting' into armed forces, nor in the Elements of Crimes, the ICC in its first judgment has given its interpretation of these two war crimes. "[E]nlisting" is defined as "to enrol on the list of a military body" and "conscripting" is defined as "to enlist compulsorily". Therefore, the distinguishing element is that for conscription there is the added element of compulsion.¹²⁹⁶ Moreover according to the Court "[t]he manner in which a child was recruited, and whether it involved compulsion or was "voluntary", are circumstances which may be taken into consideration by the Chamber at the sentencing or reparations phase, as appropriate. However, the consent of a child to his or her recruitment does not provide an accused with a valid defence."¹²⁹⁷ It must also be noticed that the Court is of the opinion that these war crimes are 'continuous in nature' since '[t]hey end only when the child reaches 15 years of age or leaves the force or group'¹²⁹⁸.
- 811 Up to the beginning of the Rome Conference, the proposals for the eventual article 8 para. 2 (b) (xxvi) included only the term 'recruiting'¹²⁹⁹. At the Rome Conference, however, a small number of delegations, including the United States, feared that the term recruiting could be understood as also prohibiting *recruitment campaigns* addressed to children under the age of fifteen, even though such endeavors to have persons join the armed forces do not necessarily aim at an immediate beginning of military training within the armed forces. In order to exclude that the war crime would also extend to such early recruitment campaigns, the United States proposed the eventually adopted wording of 'conscripting or enlisting'¹³⁰⁰. The ICC, however, later has considered that "conscripting" and "enlistment" are both forms of recruitment¹³⁰¹.
- 812 Another concern particular to the United Kingdom delegation was to rule out the application of the provision to children under fifteen who enter *schools funded, supervised or operated by the armed forces*. In view of the terms eventually selected and the negotiating history, article 8 para. 2 (b) (xxvi) does not apply to recruitment campaigns nor membership in scout groups. However, the enrolment in educational institutions operated or supervised by armed forces could qualify insofar it constitutes or is tantamount to an 'enlistment into armed forces'¹³⁰². This would not appear to be the case if children under 15 in these

¹²⁹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, para. 608.

¹²⁹⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06, 14 March 2012, para. 617.

¹²⁹⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06, 14 March 2012, para. 618.

¹²⁹⁹ See Mann (1987) 36 *I&CompLQ* 32. According to major English dictionaries, 'to recruit' is defined as 'to enlist new soldiers; to get or seek for fresh supplies of men for the army', *The Oxford English Dictionary* 191, and 'to persuade someone to become a new member of an organization, esp. the army', *The Cambridge International Dictionary* (1995) 1188.

¹³⁰⁰ See von Hebel and Robinson, in: Lee (ed.), *The Making of the Rome Statute* (1999) 118.

¹³⁰¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06, 14 March 2012, para. 607.

¹³⁰² In this regard, it may be interesting to consider that according to article 3 para. 5 of the Optional Protocol on the Involvement of Children in Armed Conflicts the requirement for States Parties to raise the recruitment age to at least 16 years does not apply 'to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the convention on the Rights of the Child'. Articles 28 and 29 of the Convention on the Rights of the Child recognize the right of the child to education, require states to take measures to ensure that school discipline is administered in a manner consistent with the child's human dignity, and states certain goals of the education. Article 3 para. 5 of the Optional Protocol thus implies that, in the view of the states adopting the Protocol, the prohibition under article 38 of the Convention to recruit children under 15 may also apply to enrolment in schools operated by or under the control of the armed forces, and provides that such schools must respect the child's human dignity and direct the education towards certain educational

institutions receive an essentially civilian curriculum providing secondary education or vocational training. However, if the enrolment of children under 15 in such institution would mean that they thereby are eligible for armed combat in the event of an armed conflict or that they may be used to participate in hostilities even if under 15, the effects would be sufficiently similar to a direct enlistment into the armed forces to be considered, considering the offense's humanitarian object and purpose, as qualifying under article 8 para. 2 (b) (xxvi). But what if children enrolled in such a school receive a primarily military training, including in military combat, but do not in any way become eligible for armed combat before they reach 15 years?

bb) 'National armed forces'. The wording 'national armed forces' was accepted as a compromise. The adjective 'national' was added to 'armed forces' in order to meet the concerns of several Arab States who feared that 'armed forces' alone might be applied to the Intifada and young Palestinians joining it. An earlier proposal had suggested the words 'regular armed forces'. Several delegations however strongly opposed a limitation of the scope of article 8 para. 2 (b) (xxvi) to 'regular' armed forces. Article 43 para. 1 Add. Prot. I provides that the armed forces of a party to the conflict 'consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party'. The party to the conflict thus need not be represented by a recognized government or authority or state¹³⁰³. In the *Lubanga* case, referring *inter alia* to article 43 of Add. Prot. I and to its commentary, the Preliminary Chamber considered 'that, under article 8 (2) (b) (xxvi) of the Statute, the term "the national armed forces" is not limited to the armed forces of a State'¹³⁰⁴. Furthermore, the Trial Chamber, even if it focused on article 8 para. 2 (e) (vii) of the Rome Statute, given the classification of the situation as a non-international conflict, still specified that '[s]ubject to one significant difference in wording (conscription or enlistment of children into "national armed forces" (Article 8(2)(b)(xxvi) of the Statute) as opposed to "armed forces or groups" (Article 8(2)(e)(vii) of the Statute), the elements of these two crimes are similar'¹³⁰⁵. This confirms the conclusion according to which the ruling of the Court in the *Lubanga* case also applies to international armed conflict, *i. e.* to article 8(2)(b) (xxvi). 813

cc) Any need of a nexus to an armed conflict? Article 8 para. 2 (b) (xxvi) criminalizes 'conscripting or enlisting children under the age of fifteen years into the national armed forces'. While the second part of sub-paragraph (xxvi) contains an explicit reference to 'hostilities' and seems to require the existence of hostilities and, thus, an armed conflict, the first part of the provision relating to conscription and enlistment does not contain any such reference. 814

The *legal sources* of the prohibition underlying the offense other than the Rome Statute do not restrict its applicability to times of armed conflict. The relevant parts of article 77 para. 2 Add. Prot. I¹³⁰⁶ and article 38 of the Convention on the Rights of the Child as well as the Optional Protocol to that Convention do not contain any restriction of the prohibition of recruitment of children to times of armed conflict. 815

goals (which, it is submitted, cannot be exclusively military objectives). For the different options that were discussed during the negotiations leading to the adoption of the Optional Protocol, see, *e.g.*, Report of the working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its second session, E/CN.4/1996/102 (21 Mar. 1996), in particular paras. 102 *et seq.* See also Helle (2000) 839 *IRevRC* 801–80 805.

¹³⁰³ See de Preux, in: Sandoz *et al.* (eds.), *Commentary* (1987) 506 *et seq.*, paras. 1659 *et seq.*. See also article 1 para. 4 Add. Prot. I.

¹³⁰⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the confirmation of the charges, Pre-Trial Chamber I, 29 January 2007, para. 285.

¹³⁰⁵ *Prosecutor v. Lubanga*, 14 March 2012, ICC-01/04-01/06, para. 568.

¹³⁰⁶ Article 3 Add. Prot. I specifies that the Conventions and the Protocol apply during armed conflict, '[w]ithout prejudice to the provisions which are applicable at all times'. Common article 2 to the Geneva Conventions similarly implies that certain provisions of the Geneva Conventions (and through article 1 para 3 Add. Prot. I also of Add Prot. II) must be 'implemented in peacetime'.

816 Yet, a main *objective* of the prohibition of incorporating children into armed forces appears to be, as above seen, to protect them from involvement in armed conflict. Having children incorporated into the armed forces makes it difficult to keep them out of armed conflicts since that would upset the mechanics of armed forces. Armed hostilities may suddenly and unexpectedly break out, and it is unrealistic to expect that all children will immediately be expelled from armed forces as soon as an armed conflict breaks out. Keeping children out of armed forces also helps to avoid that they might qualify as legitimate targets under humanitarian law. Permitting children's conscription and enlistment in times of peace is hardly coherent with the aim of protecting them. The provision is given full effectiveness only if conscription and enlistment of children is proscribed both in the presence as well as absence of an armed conflict. In addition, permitting conscription or enlistment of children in times of peace would lead to not overly convincing consequences. If an armed conflict should suddenly break out, the retention in the armed forces of a child conscripted or enlisted prior to the conflict's outbreak would either be considered lawful, in which the prohibition to conscript or enlist children would be greatly undermined. The other possibility is to consider the retention of the children unlawful and a war crime, since such retention is equivalent to a conscription or enlistment. This however would also seem an awkward and not very practical solution, and would not reach those who first conscripted or enlisted the children. To this end, the ICC in the *Lubanga* case clarified that '[a]lthough it may often be the case that the purpose behind conscription and enlistment is to use children in hostilities, this is not a requirement of the Rome Statute.'¹³⁰⁷ The Chamber further rejects 'the defence contention that "the act of enlistment consists in the integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in hostilities on behalf of the group."¹³⁰⁸

817 **dd) War crime of using children to participate in hostilities.** The wording '*using them to participate actively*' was introduced in the Preparatory Committee meeting of March/April 1998. The proposal deviates from treaty provisions applicable to international armed conflicts which prohibit the '*direct*' participation of children in hostilities¹³⁰⁹. Article 4 para. 3 (c) Add. Prot. II, reaffirmed by rule 137 of the ICRC study of customary international humanitarian law, provides that children under fifteen shall not be 'allowed to take part in hostilities', which excludes *any* participation of children in non-international armed conflicts. Paradoxically, thus, the protection of children is broader in non-international than in international conflicts¹³¹⁰. The Rome Conference remedied this discrepancy to some degree by criminalizing the use of children to '*actively*' participate in hostilities, a wording that may be understood to prohibit a broader range of participation than '*direct*' participation. The ICC later confirmed this interpretation in its judgment of 2012, stating that 'the expression "direct participation" [...] was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities.'¹³¹¹ Indeed, working in a munitions factory for instance might be considered an *active* but not a *direct* participation¹³¹², what the Court also believes. According to the judges, what matters is 'whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.'¹³¹³

¹³⁰⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06, 14 March 2012, para. 609.

¹³⁰⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06, 14 March 2012, para. 609.

¹³⁰⁹ See in particular article 77 para. 2 Add. Prot. I and article 1 of the 2000 Option Protocol to the Rights of the Child Convention.

¹³¹⁰ See also ICRC (1998) 322 *IRevRC* 107, Part III (referring to legal arguments and arguments based on practice for the prohibition of direct and indirect participation).

¹³¹¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06, 14 March 2012, para. 627.

¹³¹² It is therefore regrettable that the Optional Protocol, adopted after the Rome Conference, refers only to '*direct*' participation. See also Pilloud and Pictet, in: Sandoz *et al.* (eds.), *Commentary* (1987) 901 (No. 3187); Helle 839 *IRevRC* 801–802; Happold 47 *NethLLRev* 35–36; Kalshoven, *Constraints on the waging of war* (1987) 91.

¹³¹³ *Prosecutor v. Lubanga*, ICC-01/04-01/06, 14 March 2012 para. 628.

The formulation that eventually found its way into article 8 para. 2 (b) (xxvi), including the words ‘to participate actively’, was introduced with a footnote at the March-April 1998 session of the Preparatory Committee which specified under what understanding the wording was to be adopted. As delegations adopted the provision without opposing to this proposed understanding of the wording, and since this understanding seemed to find general agreement also at the negotiations of the elements of this war crime¹³¹⁴, the wording of the footnote may serve as an interpretational guideline:

“The words “using” and “participate [actively]”¹³¹⁵ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology¹³¹⁶.”

As confirmed by the ICC in its first judgment, this understanding also keeps with the underlying aim of the provision to keep children out of armed hostilities and takes into account the risks for their physical as well as psychological well-being resulting from such involvement. It for instance clearly rules out that children are used as spies, and hopefully thereby also diminishes the chances that children are correspondingly perceived and treated by an adversary party¹³¹⁷.

To be sure, the child that actively participates in hostilities does not commit any criminal act under article 8 para. 2 (b) (xxvi). Sub-paragraph b (xxvi) makes it an offence to ‘use’ such participation. The ‘use’ specifies the connection that must exist between the person using the participation and the child’s active participation.

However, it is not necessary that the child is forced to participate, even if the Rome Conference adopted the language of ‘using them to participate actively’ and not the proposed alternative wording ‘allowing them to take part’. Inciting a child by words or acts to carry guns to a front line also qualifies under article 8 para. 2 (b) (xxvi). Furthermore, even if a child is participating in hostilities on its own volition, ‘using’ that child for such purpose and profiting from its ‘work product’ would still be prohibited. Military commanders that do not take measures to ensure that children under fifteen are not used to participate actively in hostilities may in addition be criminally responsible on the basis of their command responsibility (article 28 Rome Statute).

d) Knowledge that the child is under 15. According to the default standard of the requisite *mens rea* spelled out in article 30 of the Rome Statute, the perpetrator must have been aware of the circumstance that the child was under the age of 15 years. This ‘awareness’ may include *dolus eventualis*, that is, a situation in which the perpetrator did not know that the child was under 15, but thought this might be possible and went ahead anyway. According to element 3 to article 8 para. 2 (b) (xxvii), it is even sufficient that ‘[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years’. This standard of *mens rea* clearly deviates from the requirement of awareness

¹³¹⁴ As all interpretative footnotes contained in the 1998 ILC Draft Statute, the footnote to the present war crime did not either appear in the text of the Statute itself. The drafters of both the Rome Statute and the Elements of Crimes however clearly had the footnote in mind when drafting and adopting the two instruments. At the Preparatory Commission, it had been proposed to insert the footnote in the elements. The length and type of the footnote however was not adapted to the concise Elements of Crimes. Also, it was pointed out that the footnote had already been recorded in the *travaux préparatoires* of the Rome Statute and that academic literature would or had already referred to it (including the prior edition of this Commentary), an argument which eventually prevailed. See note 263, Von Hebel and Robinson, in: Lee (ed.), *The Making of The Rome Statute* (1999) 118; Garraway, in: Lee *et al.* (eds.), *Elements of Crimes* (2001) 206.

¹³¹⁵ It was specified orally during the negotiations when the language and footnote were presented and explained that the qualifier ‘actively’ was unintentionally omitted in the document containing that language.

¹³¹⁶ 1998 ILC Draft Statute 25 (fn. 12 to article 5, War Crimes, B (t) Option 2).

¹³¹⁷ See Happold, (2000) 47 *NethILRev* 36.

under article 30 Rome Statute. The formulation ‘should have known’ appears to imply that it is sufficient that the perpetrator could have known the age of the child had he not been wilfully blind to it or had he taken reasonable and feasible safeguards to avoid using or conscripting or enlisting a child under 15, in particular when the person’s appearance did not permit to exclude with certainty that he or she clearly was above 15 years. This essentially creates a duty to take reasonable and feasible safeguards against using or conscripting or enlisting children under 15.¹³¹⁸

D. Article 8 para. 2 (c)–(f) and para. 3: War crimes committed in an armed conflict not of an international character

Literature General: Abi-Saab, G., ‘Wars of National Liberation in the Geneva Conventions and Protocols’, (1979) IV *RdC* 353; Aldrich, G., ‘Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I’, (1985/86) 26 *VirgJIL* 703; Ambos, K., ‘Aktuelle Probleme der deutschen Verfolgung von ‘Kriegsverbrechen’ in Bosnien-Herzegowina’, (1999) *NStZ* 226; Arnold, R., ‘The development of the notion of war crimes in non-international conflicts through the jurisprudence of the UN Ad Hoc Tribunals’, (2002) 3 *HuV-I* 134; *id.*, *The ICC as a New Instrument for Repressing Terrorism* (2004); Bothe, M., ‘War crimes in non-international armed conflicts’, in: Y. Dinstein, *War Crimes in International Law* (1996) 293; Breitegger, A., ‘Aktuelle Beiträge der internationalen Strafjustiz zur Entwicklung des humanitären Völkerrechts’, (2010) 11 *ZIS* 712–725; Byron, C., ‘Armed conflicts: international or non-international?’, (2001) *JCSL* 63; Cassese, A., ‘The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law’, (1984) 3 *PacificBasinLJ* 71; *id.*, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’, (2007) 18 *EJIL* 649; Corn, G., ‘Hamdan, Lebanon, and the Regulation of Armed Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict’, (2006) 40 *VandJ.TransnatL* 295; Corn, G. and Talbot Jensen, E., ‘Transnational Armed Conflict: A Principled Approach to the Regulation of Counter-Terror Combat Operations’, (2009) 42 *ISLRev* 46; Cullen, A., *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010); Fleck, D., ‘Humanitarian protection in non-international armed conflicts – the new research project of the International Institute of Humanitarian Law’, (2000/2001) *IsYbHumRts* 1; Frulli, M., ‘The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency’, (2011) 22 *EJIL* 203–217; Geiß, R., ‘Armed violence in fragile States – Low intensity conflicts, spill-over conflicts and sporadic law enforcement operations by third parties’, (2009) *IRevRC* 127–142; Geiß, R. and Siegrist, M., ‘Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?’, (2011) 93 *IRevRC* 11; Graditzky, T., ‘La responsabilité pénale pour violation du droit international humanitaire applicable en situation de conflit armé non international’, (1998) *RICR* 29; Gray, C., ‘Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterisation and Consequences’, (1996) *BYbIL* 165; Green, L., ‘Criminal responsibility of individuals in non-international conflicts’, (2002) *GYbIL* 82; Hall, C. K., ‘The Jurisdiction of the Permanent International Criminal Court over Violations of Humanitarian Law’, in: F. Lattanzi (ed.), *The International Criminal Court – Comments on the Draft Statute* (1998) 19; Kellenberger, J., ‘Humanitäres Völkerrecht gilt im Libanon-Konflikt’, (30 July 2006) *NZZ* 3; Kleffner, J.K., ‘Scope of Application of Humanitarian Law’, in: Fleck, D., *The Handbook of IHL* (2013) 43; Kolb, R., ‘The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes (2000–2004)’, (2004) 75 *BYbIL* 269; Kreß, C., ‘Der Jugoslawien-Strafgerichtshof im Grenzbereich zwischen internationalem bewaffnetem Konflikt und Bürgerkrieg’, in: H. Fischer and S. Lüder (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem internationalen Strafgerichtshof – Beiträge zur Entwicklung einer effektiven internationalen Strafgerichtsbarkeit* 15; *id.*, ‘Some Reflections on the International Legal Framework governing Transnational Armed Conflicts’, 15 *JCSL*, 245–274; *id.*, ‘War crimes committed in non-international armed conflict and the emerging system of international criminal justice’, (2000/2001) *IsYbHumRts* 103; Kretzmer, D., ‘Targeted killings of suspected terrorists: extra-judicial executions or legitimate means of defense?’, (2005) 16 *EJIL* 171–212; Kritsiotis, D., ‘The Tremors of Tadić’, (2010) 43 *ISLRev* 262–300; Kussbach, E., ‘Die Rechtsstellung nationaler Befreiungsbewegungen im humanitären Völkerrecht’, in: H. Miehsler *et al.* (eds.), *Jus humanitatis – Festschrift zum 90. Geburtstag von A. Verdross* (1980) 499; La Haye, E., *War Crimes in Internal Armed* (2010); Lubell, N., *Extraterritorial Use of Force against Non-State Actors* (2010); MacCoubrey, H., ‘War crimes jurisdiction and a permanent International Criminal Court’, (1998) *JArmConflL* 9; Meindersma, C., ‘Applicability of humanitarian law in international and internal armed conflict’, (1994) *HagueYbIL* 113; Meron, T., ‘Cassese’s Tadić and the law of non-international armed conflicts’, in: L. Chand Vorah *et al.* (eds.), *Man’s Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese* (2003) 553; *id.*, ‘Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout’, 92 *AJIL* 236 (1998); *id.*, ‘War crimes law comes of age’, (1998) 92 *AJIL* 462;

¹³¹⁸ The question is dealt with in the Lubanga case by the Trial Chamber. See *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 1014-1017. See also Ambos (2012) 12 *ICLRev* 115, at 150.

Paust, J., 'Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions', (2004) 79 *Notre Dame LRv* 1335; Pejić, J., 'The protective scope of common article 3: more than meets the eye', (2011) 93 *IRevRC* 189; Schabas, W. A., 'Punishment of non-state actors in non-international armed conflict', (2003) *Fordham ILLJ* 907; Schindler, D., *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, II *Recueil de Cours* 117 (in particular 133 *et seq.* and 145 *et seq.*) (1979); Schöndorf, R. S., 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?', (2004) 37 *NYJIL&Pol.* 1; Sivakumaran, S., 'Re-envisioning the International Law of Internal Armed Conflict', (2011) 22 *EJIL* 219–264; *id.*, 'War crimes before the Special Court for Sierra Leone – Child Soldiers, Hostages, Peacekeepers and Collective Punishments', (2010) 8 *JICJ* 1009–1034; Spieker, H., 'The International Criminal Court and non-international armed conflicts', (2000) *Leiden JIL* 395; Spinedi, M., 'On the Non-Attribution of the Bosnian Serbs' conduct to Serbia', (2007) *JICJ* 829; Stewart, J., 'Towards a single definition of armed conflict in International Humanitarian Law: A critique of internationalized armed conflict', (2003) *IRevRC* 313–350; Vité, S., 'Typology of armed conflicts in International Humanitarian Law, legal concepts and actual situations', (2009) *IRevRC* 69–94; Werle G. and Jessberger F., *Principles of International Criminal Law* (2014); Willmott, D., 'Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court', (2004) *MelbJIL* 196; Zimmermann, A., 'The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality', (2007) 11 *MPYbUNL* 99; Zischg, R., *Nicht-internationaler bewaffneter Konflikt und Völkerrecht* (in particular 26 *et seq.*) (1996).

Specific literature on the elements of crimes: Ambos, K., 'Some preliminary reflections on the *mens rea* requirements of the crimes of the ICC Statute and of the elements of crimes', in: L. Chand Vorah *et al.* (eds.), *Man's Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese* (2003) 11; Dörmann, K., 'Preparatory Commission for the International Criminal Court: the elements of war crimes – Grave breaches and violations of article 3 common to the Geneva Conventions of 12 August 1949', (2000) *RICR* 771; *id.*, 'Preparatory Commission for the International Criminal Court: the elements of war crimes – Part II: other serious violations of the laws and customs applicable in international and non-international armed conflicts', (2001) *RICR* 461; *id.*, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary* (2002); *id.*, 'War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the elements of crimes', (2003) *MPYbUNL* 341; von Hebel, H. and Kelt, M., 'Some comments on the elements of crimes for the crimes of the ICC Statute', (2000) *YbIHuM* 273; Triffterer, O., 'Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender "Elements of Crimes" für alle Tatbestände des Völker-mordes', in: B. Schünemann (ed.), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001* (2001) 1415.

I. General remarks

During the work of both, the Preparatory Committee on the Establishment of an International Criminal Court as well as during the Rome Conference, the inclusion of war crimes committed in armed conflicts not of an international character was rather difficult to achieve. Given the fact that more and more of the armed conflicts of today do not possess an exclusive international character and that besides, proving such a character might be difficult, it seemed to be mandatory to most delegations to include in the Statute at least a core of acts that would constitute war crimes also in situations of non-international armed conflicts.

The two main proposals submitted to the Preparatory Committee in February 1997 demonstrated however a significant divergence in this regard. While the proposal elaborated by the ICRC, formally submitted by New Zealand and Switzerland¹³¹⁹, contained a rather elaborate list of war crimes applicable to armed conflicts not of an international character, the proposal submitted by the United States¹³²⁰ limited the list of war crimes applicable to non-international armed conflicts to serious breaches of article 3 common to the four Geneva Conventions of 1949. Over time the position of the United States changed to the extent that they became one of the proponents of including war crimes committed in internal armed conflicts into the Statute. Conversely, a number of countries including *inter alia* India, Pakistan, China and Turkey, were rather reluctant in either accepting any provision dealing with internal armed conflict or could at most agree to include the reference to common article 3.

The current list now contained in article 8 para. 2 (e) is significantly longer than the list of prohibited acts mentioned in the Add. Prot. II to the four Geneva Conventions. Still, the

¹³¹⁹ UN Doc A/AC.249/1997/WG.1/DP.2.

¹³²⁰ UN Doc A/AC.249/1997/WG.1/DP.1.

Statute does not completely follow the approach of the ICTY, which had stated that ‘what is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’¹³²¹. Since the adoption of the Rome Statute the tendency to assimilate the rules applicable in international and in non-international armed conflict, as demonstrated by recent national codifications of international criminal law such as *e.g.* the German Code of Crimes against International Law or by the ICRC study on customary international humanitarian law, has some exceptions notwithstanding been further reinforced.

826 It should also be mentioned that most of the provisions of the part dealing with internal armed conflict exactly mirror provisions already contained in article 8 para. 2 (b) dealing with international armed conflict. Given this partial identity, the comments will in those cases be limited to a pure reference to the respective other provisions¹³²².

827 On the whole, approximately half of the provisions, *i.e.* article 8 para. 2 (b) (ii), (iv), (v), (vi), (vii), (xiv), (xv–xxi), (xxiii), (xxiv) and (xxv), were not taken over from the part on international armed conflict. This is partly due to the fact that some of the provisions are by their very nature not applicable to internal warfare such as *e.g.* article 8 para. 2 (b) (xiv) which as far as international armed conflicts are concerned, refers to the act of declaring abolished in a court of law the rights and actions of the nationals of the hostile party. Other proposed provisions concerning internal armed conflicts were considered by at least a certain number of participating States, not to have yet reached the status of customary international law and for this reason were not included.

828 At the time of the Rome Conference this was also true with respect to the non-inclusion of provisions relating to the use, in internal armed conflicts, of prohibited weapons. Accordingly, notwithstanding the (correct) determination by the Appeals Chamber of the ICTY in the case against *Dusko Tadić*¹³²³, that also in cases of civil strife, customary rules have developed which prohibit the use of specific weapons¹³²⁴, a provision similar in nature to article 8 para. 2 (b) (xvii)–(xix) was at a rather late stage of the negotiations deleted from the proposal finally submitted by the Bureau to the Rome conference¹³²⁵. The resulting lacunae, however, was remedied at the Kampala Review Conference¹³²⁶. Following a proposal drafted by Belgium¹³²⁷ the Kampala Review Conference, by consensus, adopted three crimes regarding the use of prohibited weapons in non-international armed conflict. Specifically, article 8 para. 2 (e) of the Statute was extended to include the crimes of *employing poison or poisoned weapons (xiii), employing asphyxiating, poisonous or other gases, and all analogous liquids materials or devices (xiv), employing bullets which expand or flatten easily in the human body (xv)*. These new provisions which have not yet entered into force replicate the provisions found in article 8 para. 2 (b) (xvii), (xviii) and (xix) of the Statute that apply to international armed conflict as adopted in Rome.

829 Finally, notwithstanding article 8 para. 2 (d), (f) and para. 3, the general scope of application of the provisions dealing with internal armed conflicts is, compared with Add. Prot. II, significantly larger. In particular, it also applies to armed conflicts between several organized armed groups¹³²⁸.

¹³²¹ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, para. 119.

¹³²² Such references, do not however, necessarily imply a complete identification with the view of the authors commenting on the respective provisions dealing with international armed conflict.

¹³²³ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, paras. 127 *et seq.* (127 and 134).

¹³²⁴ See in particular para. 124 of the above mentioned judgement which stipulated that ‘... there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons [the Court here refers to chemical weapons, the author] is also prohibited in internal armed conflicts’.

¹³²⁵ See, *e.g.* the working document submitted by the bureau on 6 July 1998 (UN Doc A/CONF.183/C.1/L.53), which in its article 5 (War Crimes), D., I) had left the issue still open.

¹³²⁶ See below commentary to article 8 para. 2 (e) (xiii), (xiv) and (xv).

¹³²⁷ The so-called ‘Belgian proposal’ is included in Annex III to Resolution ICC-ASP/8/Res.6, 26 November 2009, available at: <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf> last accessed May 2015.

¹³²⁸ For details see below Zimmermann and Geiß, *article 8 para. 2 (f)*, 988 *et seq.*

The provisions dealing with non-international armed conflict apply from the initiation of such an armed conflict¹³²⁹ and extend beyond the mere cessation of hostilities until a peaceful settlement is achieved¹³³⁰. Until that moment international humanitarian law continues to apply in the whole territory under the control of one of the Parties to the conflict, irrespective of whether actual combat takes place there or not¹³³¹.

Not every serious crime committed during the respective internal armed conflict can, however, be regarded as a violation of article 8 para. 2 (c) and (e) of the Statute. In order to amount to a war crime such acts must possess a certain nexus with the armed conflict, such as having been committed in the course of the fighting. The rationale of the nexus requirement is to distinguish war crimes from domestic crimes and to prevent random criminal occurrences from being characterized as war crimes¹³³². The ICTY Appeals Chamber has held that '[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed'¹³³³. Yet, the establishment of the nexus does not require that the armed conflict be causal to the commission of the crime¹³³⁴. Instead and in line with the jurisprudence of both, the ICTY and the ICTR, it is sufficient that the alleged acts were related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict¹³³⁵. In the *Katanga* decision the ICC has held that '[a]s neither the Statute nor the Elements of Crimes define the phrases 'in the context of' and/or 'was associated with', the Chamber applies the case-law of the international tribunals'¹³³⁶. The two tribunals, the Special Court for Sierra Leone as well as the ICC Pre-Trial Chambers have held that there is a sufficient nexus provided the armed conflict played a substantial role in the perpetrator's ability to commit the crime, in his decision to commit it, the manner in which it was committed or the purpose for which it was committed¹³³⁷. Hence, if it can be established [...] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict¹³³⁸. It should be noted, however, that the

¹³²⁹ *Ibid.*

¹³³⁰ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, para. 70; see also *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, paras. 183 and 194; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the confirmation of charges, Pre-Trial Chamber II, 15 June 2009, para. 229.

¹³³¹ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, para. 70.

¹³³² *Prosecutor v. Boskoski and Tarculovski*, IT-04-82-T, Judgment, Trial Chamber II, 10 July 2008, para. 293; Ambos, *Treatise on ICL II* (2014) 140 *et seq*; Werle and Jessberger, *Principles* (2014) 422 *et seq*.

¹³³³ *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96- 23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 58; *Prosecutor v. Blagojević*, IT-02-60-T, Judgment, Trial Chamber I, 17 January 2005, para. 536.

¹³³⁴ *Prosecutor v. Nđindiliyimana et al.*, ICTR-00-56-T, Judgment, Trial Chamber II, 17 May 2011, para. 2132, quoting *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Judgment, Trial Chamber I, 18 Dec. 2008, para. 2231; *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment, Trial Chamber, 15 May 2003, para. 517, quoting *Prosecutor v. Kunarac et al.*, T-96-23 & IT-96- 23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 58. See also *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgment, Appeals Chamber, 26 May 2003, para. 569; *Prosecutor v. Setako*, ICTR-04-81-A, Judgment, Appeals Chamber, 28 September 2011, para. 249; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, Trial Chamber, 20 June 2007, paras. 246–247; *Prosecutor v. Perišić*, IT-04-81-T, Judgment, Trial Chamber I, 6 September 2011, para. 73.

¹³³⁵ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, para. 70; and *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 193.

¹³³⁶ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 381.

¹³³⁷ *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96- 23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 58; 7, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003, para. 569; for further details see Kolb (2004) *BYIL* 280–281. See also *Prosecutor v. Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 90; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 Jan. 2007, para. 288. *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 563.

¹³³⁸ *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96- 23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 58.

catalogue of additional criteria for the establishment of the nexus-requirement as proposed by the ICTY Appeals Chamber in *Kunarac* by making reference e. g. to the question whether the perpetrator is a combatant or whether the victim is a member of the opposing party¹³³⁹, appears to be overly limited since a war crime may be committed irrespective of whether the perpetrator or the victim is a combatant/fighter or a civilian.

832 It should also be noted that the introduction to the elements of crimes relating to war crimes in its last part provides that the offender must have been aware of the factual circumstances that established the existence of an armed conflict that this requirement is implicit in the terms ‘took place in the context of and was associated with’. On the other hand, said introduction also provides that there is no requirement that the perpetrator must have been aware of the facts that established the character of the conflict as either being international or non-international.

II. Classification of armed conflicts as ‘international armed conflicts’ or ‘armed conflicts not of an international character’

833 Determining whether a given armed conflict must be characterised as an *international armed conflict* or an *armed conflict not of an international character* is of major importance, given that under the ICC Statute, only in the former case the Court would be competent to judge upon those serious violations of the laws and customs of war enshrined in article 8 para. 2 (b) of the Statute. On the other hand, the prohibitions contained in article 8 para. 2 (c) and (e) apply in accordance with lit. (d) and (f) of said provision only in situations of armed conflicts *not of an international character*. In the *Lubanga* judgment of March 2012 the Trial Chamber has accordingly emphasized the continuous importance of distinguishing the two conflict categories under the Rome Statute¹³⁴⁰.

834 Such determination, however, often proves to be a rather difficult issue involving both complicated legal and factual questions. Indeed, four situations have to be distinguished where this distinction has to be made, *i. e.*

- (1) armed conflicts which take place exclusively between two or more States¹³⁴¹;
- (2) armed conflicts which take place within the territory of a given State without third States being involved in the armed conflict¹³⁴²;
- (3) armed conflicts where there is fighting between governmental armed forces on the one side and organised armed groups on the other and where at the same time third States are also involved in the armed conflict¹³⁴³;
- (4) and finally those armed conflicts between a State’s regular armed forces and transnational non-state armed groups which do not occur within the territory of the respective State¹³⁴⁴.

835 It is in particular with respect to the third and fourth categories that problems arise regarding either the necessary threshold of involvement of such third State in order for a given conflict to become internationalised or the very legal character of such transnational armed conflicts. Recently, the temporal and geographical scope of application of international humanitarian law pertaining to non-international armed conflicts has also become an issue of controversy. Legal issues might, however, also arise in the two other situations, such as, *e. g.*, the question whether situations described in article 1 para. 4 of Add. Prot. I of 1977 do also, *for the purposes of the Statute of the ICC*, amount to international armed conflicts.

836 In any event, the very object and purpose of IHL militates in favour of the protection deriving from this body of law to be as broad as possible. Yet, given that the protection

¹³³⁹ *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, Trial Chamber II, 18 May 2012, para. 567.

¹³⁴⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC 01/04-01/06, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 539.

¹³⁴¹ See below (aa).

¹³⁴² See below (bb).

¹³⁴³ See below (cc).

¹³⁴⁴ See below (dd).

accorded by the rules on international armed conflicts is broader than those relating to internal conflicts, it seems to be appropriate, in case of doubt, to apply those governing international armed conflicts¹³⁴⁵. Likewise, and in regard specifically to article 8 of the Statute, it would not be in line with the overall intention of the Rome Statute if, for example, the intentional launching of an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians as provided for in article 8 para. 2 (b) (iv) would only be applicable in armed conflicts between States as such, but not if such attack is being conducted by a non-State actor operating from the territory of a given State. The same consideration might refute the suggestion to let the applicability of e. g. article 8 para. 2 (b) (and rules governing international armed conflicts generally) be dependent on the will of the affected third State.

1. Armed conflicts taking place exclusively between two or more States

Armed conflicts which take place between two or more States clearly possess an international character¹³⁴⁶. In the *Lubanga* decision the Chamber, relying on the ICJ's holding in the *Case concerning Armed Activities on the Territory of the Congo*, stated that it 'considers an armed conflict to be international in character if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistances'¹³⁴⁷. Examples of other recent international armed conflicts are the conflict between Eritrea and Ethiopia (1998–2000), as well as the conflicts in Afghanistan (2001–2002), Iraq (2003–2004), Georgia (August 2008) and the military intervention by members of NATO in Libya (2011). It is in such situations that article 8 para. 2 (a) and (b) of the Statute apply. It is worth noting, however, that this is true regardless of whether or not one of the parties to the conflict has been recognized as constituting a State by the respective adversary, provided that it indeed possesses the necessary requirements to be considered a State under international law¹³⁴⁸. This has also been confirmed throughout the jurisprudence of the ICTY, which, on several occasions, has qualified the conflict between Yugoslav forces on the one side and Croatian or Bosnian forces on the other, as being international in character, notwithstanding the fact that the then Socialist Federal Republic of Yugoslavia respectively the Federal Republic of Yugoslavia had at the relevant time not (yet) recognized the respective other State¹³⁴⁹.

¹³⁴⁵ See for a similar view following *mutatis mutandis* the authors' position on the matter the OTP's Article 53(1) Report 'Situation on Registered Vessels of Comoros, Greece and Cambodia' of 6 November 2014, available at <http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53%281%29-Report-06Nov2014Eng.pdf> accessed 24 June 2015, para. 35 ('Additionally, as the protection accorded by the rules on international armed conflicts is broader than those relating to internal conflicts, it seems appropriate for the limited purpose of a preliminary examination, in cases of doubt, to apply those governing international armed conflicts.').

¹³⁴⁶ See the majority decision of the ICTY in the *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, para. 8, where the court states that 'an international armed conflict requires the involvement of two States'.

¹³⁴⁷ *Prosecutor v. Lubanga Dyilo*, ICC 01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 Jan. 2007, para. 209; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Rep. 2005, 168, 229, para. 172; See also *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 240; *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 223. See also *Prosecutor v. Lubanga, Dyilo*, ICC 01/04-01/06, Judgment, 14 March 2012, paras. 541, 542.

¹³⁴⁸ See also article 4 Add. Prot. I which states that the application of both Add. Prot. I as well as the four Geneva Conventions of 1949 shall not affect the legal status of the Parties to the conflict.

¹³⁴⁹ See in particular the confirmation of the indictment by Judge Riad in *Prosecutor v. Mrksic et al.*, No. IT-95-13-I, Confirmation of the indictment, 7 November 1995, ICTY Jud. Rep. 1994/95 II, p. 1091; *Prosecutor v. Nikolic*, IT-94-2-R61, Review of indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial chamber, 20 October 1995, ICTY Jud. Rep. 1994/95 II, 771; *Prosecutor v. Karadžić & Mladić*, Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, 16 July 1996, para. 30, quoted by Jones, *The Practice* 19 and finally the judgment rendered by *Prosecutor v. Tadić*, IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 569.

2. Conflicts which take place within the territory of a given State without third States being involved in the conflict

- 838 Armed conflicts occurring in the territory of a State in which no third State is involved might take two different forms: There might exist
- either an armed conflict between, on the one side, governmental armed forces and on the other side, one or more organised armed groups
 - or an armed conflict exclusively between armed groups¹³⁵⁰.
- 839 With regard to armed conflicts that take place exclusively between armed groups, it seems obvious that such a situation cannot amount to an *international* armed conflict. Indeed, article 8 para. 2 (f) expressly qualifies armed conflicts that take place between several organized armed groups as constituting armed conflicts not of an international character.
- 840 As to the first alternative mentioned above, however, *i. e.* armed conflict between governmental armed forces on the one hand and organized armed groups on the other without third States being involved, it might be said that such situations will normally also fall within the category of internal armed conflicts as provided for in article 8 para. 2 (c) and (e). Article 1 para. 4 of Add. Prot. I provides, however, that at least for the purposes of said protocol, the notion of international armed conflicts as defined in article 2 common to the four Geneva Conventions of 1949, also encompasses so-called wars of national liberation¹³⁵¹. That notion emerged from several resolutions of the General Assembly and notably Res. 3103 (XXVIII) adopted on 12 December 1973 which stated that ‘armed conflicts involving the struggle of peoples against colonial and alien domination and racist régimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions’. The debate leading to the adoption of Add. Prot. I of 1977 demonstrated to what extent such an approach was controversial¹³⁵². Still, article 1 para. 4 of Add. Prot. I now provides that international armed conflicts include ‘armed conflicts in which peoples fight against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’.
- 841 It might be said that, as of today, the rule contained in article 1 para. 4 of Add. Prot. I has become a generally binding rule of customary international law¹³⁵³ with the possible exception of those countries which have persistently objected to the formation of such rule including *inter alia* Israel¹³⁵⁴. Besides, it is binding on all parties of Add. Prot. I as forming part of their respective treaty obligations. Accordingly, whenever an armed conflict occurs on the territory of a State Party to Add. Prot. I in which article 1 para. 4 of said protocol comes into play, the armed conflict possesses an international character.
- 842 The question therefore arises whether this rule applies only as far as general humanitarian law (and particular Add. Prot. I) is concerned or whether it extends to the Statute of the ICC as well. In that regard, one has to first take into account the fact that article 8 of the Statute does not contain a clause similar to article 1 para. 4 of Add. Prot. I. To the contrary, the definition of *internal* armed conflicts as contained in article 8 para. 2 (f) seems to encompass any form of protracted armed conflict between governmental authorities and organized armed groups. Accordingly, *argumentum e contrario*, one might be tempted to argue that any such situation – even if falling within the

¹³⁵⁰ See article 8 para. 2 (f), second phrase, second alternative of the Statute. *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 231; *Prosecutor v. Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 57.

¹³⁵¹ See for that notion, *e.g.*, Abi-Saab (1979) IV Rdc 353 *et seq.*, in particular 370 *et seq.* and 403 *et seq.*

¹³⁵² For a detailed description of this debate see Abi-Saab (1999) IV RDC 403 *et seq.*

¹³⁵³ See for such a proposition, *e.g.*, Cassese (1984) 3 *PacificBasinLJ* 71; but see also for a different position Aldrich (1985/86) 26 *VirgJIL* 703: ‘the provision is a dead letter’ and Klefner, in: Fleck, *Handbook* (2013) 46.

¹³⁵⁴ Cassese (1984) 3 *PacificBasinLJ* 71.

scope of application of article 1 para. 4 of Add. Prot. I – can for the purposes of the Statute of the ICC not be considered to constitute an *international* armed conflict.

On the other hand, this would entail the necessary result that any such war of national liberation would eventually be subject to two different set of rules, *i.e.* those applying to international armed conflicts for purposes of general rules of humanitarian law and those applying to internal armed conflicts under the Statute of the ICC. Notwithstanding, the practical relevance of such a result would be rather limited. First, the scope of application of article 1 para. 4 was intended to be limited to a narrow group of situations. In fact, as far as can be seen to date no conflict has ever been qualified in accordance with article 1 para. 4 of Add. Prot. I. Second, countries most concerned have in the past avoided becoming parties to Add. Prot. I. Besides, wars against colonial domination are now a thing of the past¹³⁵⁵ and the reference to racist régimes only applies to ‘régimes founded on racist criteria’ such as, *e.g.*, the former apartheid régime in South Africa¹³⁵⁶. In particular, said provision was not deemed to apply to conflicts in which a certain ethnic group or the inhabitants of a given territory attempt to secede outside a colonial context¹³⁵⁷. Besides, in order to internationalise the conflict – and as a consequence to eventually also make applicable article 8 para. 2 (a) and (b) of the Statute of the ICC –, the respective authority representing the people struggling for self-determination must beforehand have made a declaration in accordance with article 96 para. 3 of Add. Prot. I¹³⁵⁸.

3. Armed conflicts where there is fighting between governmental armed forces on the one side and organised armed groups on the other and where at the same time third States are also involved in the armed conflict

Non-international armed conflicts might become internationalised by the fact that one or more States become involved in the conflict. Yet, two scenarios ought to be distinguished: 844

If third States intervene on the side of the governmental armed forces, this does not alter the conflict qualification, *i.e.* the conflict continues to qualify as a non-international armed conflict¹³⁵⁹. Thus, although due to the external intervention such a conflict features an international element and could thus be said to have been internationalized in the colloquial sense of the term, the legal qualification of the conflict remains unaffected.

If, however, one or more third States intervene on the side of the organized armed group, the conflict qualification might, depending on the degree of intervention, be altered. Thus, in the *Lubanga* Case the Chamber referred to the *Tadić* decision¹³⁶⁰ and held that ‘... an internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside with an internal armed conflict – if (i) another State intervenes in that conflict through its troops [on the side of an armed group fighting the government of a State] (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)’¹³⁶¹.

As to the issue of direct intervention on the side of the organized armed group, it was the Appeals Chamber of the ICTY which held that, due to the involvement of the Croatian Army 845

¹³⁵⁵ Ambos, *Treatise on ICL II* (2014) 134; Kleffner, in: Fleck, *Handbook* (2013) 46.

¹³⁵⁶ Sandoz *et al.* (eds.), *Commentary* (1987) No. 112.

¹³⁵⁷ Kleffner, in: Fleck, *Handbook* (2013) 46.

¹³⁵⁸ As to further problems involved in the procedure provided for in article 96 para. 3 see Sandoz *et al.* (eds.), *Commentary* (1987) Nos. 1088–1089.

¹³⁵⁹ Geiß and Siegrist (2011) 93 *IRevRC* 11, 15.

¹³⁶⁰ *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeal Chamber, 15 July 1999, para. 84.

¹³⁶¹ *Prosecutor v. Lubanga Dyilo*, ICC 01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 209. In the *Katanga* decision the Chamber qualified the conflict as an international armed conflict but did not explain whether it considered the conflict to be international due to a direct intervention or due to an indirect intervention, *i.e.* Uganda’s overall control over the relevant armed groups; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 240.

in Bosnia-Herzegovina and due to the involvement of the Yugoslav National Army in hostilities in Croatia, as well as in Bosnia-Herzegovina until its formal withdrawal, the respective conflict possessed an international character¹³⁶². Similarly, in the *Katanga* decision the Chamber found ‘sufficient evidence to establish substantial grounds to believe that Uganda directly intervened in this armed conflict through the Ugandan People Armed Forces (‘the UPDF’)¹³⁶³.

846 Direct intervention, however, need not necessarily always occur on the side of one of the parties of an armed conflict. For example, in March 2011 when certain NATO States directly intervened in Libya where at the time a non-international armed conflict between Libyan governmental forces and the forces of the National Libyan Council was ongoing, this intervention triggered an international armed conflict between the respective intervening States and Libya alongside the ongoing non-international armed conflict. Similarly, when NATO States directly intervened in the Kosovo conflict in 1999, they did not intervene on the side of the UCK, but rather on their own behalf. In such cases of independent direct intervention the qualification of the already ongoing non-international armed conflict remains unaffected. Instead, such independent intervention triggers an additional armed conflict which may qualify as an international or a non-international armed conflict depending on whom the intervener is fighting against. Admittedly, however, there are currently no clear-cut criteria for the determination of whether an intervention is ‘independent’ or in support of one of the parties to the conflict. The mere fact, however, that one side of the conflict *de facto* benefits from such an intervention, as was the case for the armed groups in Libya and Kosovo, seems insufficient to internationalize the whole conflict. On the other hand, the mere intention of the intervener cannot be decisive either, given that conflict qualification is always to be assessed on the basis of objective criteria. Therefore, the determination hinges on the degree of collaboration between the intervener on the one hand and the parties to the conflict on the other.

847 As far as the conflict in Bosnia-Herzegovina and clashes between the Croatian Government and Croatian Serb rebel forces in the Krajina region are concerned, the ICTY Appeals Chamber held that those conflicts had to be considered as to be of an internal nature, unless a direct involvement of the Federal Republic of Yugoslavia could be proven¹³⁶⁴. This ‘indirect intervention’ standard was further developed by Trial Chamber II of the ICTY in its decision of May 7, 1997 where the majority considered that an armed conflict might only be qualified as an *international* armed conflict if the relevant military actions can be imputed to a third (State) party involved in the conflict, *i. e.* if the third party exercises *effective control* over the organized armed group(s)¹³⁶⁵. In that regard the Chamber applied the test developed by the International Court of Justice (ICJ) in the *Nicaragua* case¹³⁶⁶ for purposes of State responsibility. It considered that even where the third party plays a role of vital importance for the insurgent, for example through granting logistical support, but lacks command and control of the insurgent armed forces, the conflict does *not* possess an international character¹³⁶⁷. Judge McDonald, to the contrary, while applying the same agency test derived from the *Nicaragua* judgement, found in her dissenting opinion that the appropriate test is one of ‘dependency and control’ and that a showing of ‘effective control’ is not required¹³⁶⁸ in order to internationalise the armed conflict.

¹³⁶² *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 72.

¹³⁶³ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 240. However, the Chamber additionally also relied on the support Uganda had provided to the armed groups; *ibid.*

¹³⁶⁴ *Ibid.*

¹³⁶⁵ *Prosecutor v. Tadić*, IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, reprinted in: (1997) *ILM* 928; *cf.* also the review of that decision by Scharf, *AJIL* 718 *et seq.* (1997).

¹³⁶⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ Reports 1986, 14, 62, para. 109.

¹³⁶⁷ *Prosecutor v. Tadić*, IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, reprinted in: (1997) *ILM* 928.

¹³⁶⁸ Separate and Dissenting Opinion McDonalds in the above-mentioned case, para. 4.

One might seriously question whether the standard developed by the ICJ in the *Nicaragua* case for purposes of State responsibility might validly be applied in order to determine whether a given armed conflict is international or internal¹³⁶⁹. Indeed, as stated by a Trial Chamber of the ICTY in the *Rajic* case, even when applying the *Nicaragua* standard, a significant and continuous military intervention by an outside State in support of one of the fighting factions is sufficient to transform the conflict into an international one¹³⁷⁰.

This was further confirmed by the decision of the ICTY in the *Aleksovski* case, where the majority – while still upholding the *Nicaragua* test as such – found that the decisive test is to consider whether the insurgent groups ‘are acting on behalf of a foreign State’¹³⁷¹, *i. e.* that they are either ‘acting under the overall control’ of that State¹³⁷² or that there is at least an ‘indirect involvement of that country in the armed conflict’¹³⁷³.

In order to determine such overall control or involvement, one should apply a standard which takes into account a bundle of factors, namely

- the possible extent of the direct foreign military intervention;
- the historical, ideological and political ties that exist between the insurgents and the third party¹³⁷⁴;
- the extent of logistical support granted, including the dependency of the insurgents from such outside support;
- the extent of the integration of the respective military command structures;
- the recognition of actors involved in the conflict by outside parties and finally
- the position taken by relevant United Nations organs and in particular the position taken by the Security Council.

A similar approach was chosen by a Trial Chamber of the ICTY in the *Čelebići* case¹³⁷⁵ which *inter alia* also referred to the common purpose between the third State involved (*i. e. in casu* the FRY) and the insurgents (*i. e.* the Bosnian Serbs)¹³⁷⁶. Finally, it was the Appeals Chamber of the ICTY, which in its last decision in the *Tadić* case¹³⁷⁷, found that the *Nicaragua* test is not persuasive¹³⁷⁸. Instead, it considered that the control required by the third party may be deemed to exist when that State has a role in organising, co-ordinating or planning the military actions of the organized armed group, in addition to financing, training and equipping the group or providing operational support to it¹³⁷⁹, thus demonstrating a close personal, organisational and logistical interconnection between the insurgents and the respective third State¹³⁸⁰. The *Tadić* Appeals decision also found that control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character and does not necessarily include the issuing of specific orders by the State or the direction of each individual operation¹³⁸¹. This standard of overall control was also confirmed by the Pre-Trial

¹³⁶⁹ See for such a distinction, *e.g.*, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 23; see also Dissenting Opinion Rodrigues in the *Aleksovski* case, *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, para. 21 and already Meron (1998) 92 *AJIL* 237.

¹³⁷⁰ See *Prosecutor v. Rajić*, No. IT-95-12, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, 13 September 1996, para. 13.

¹³⁷¹ *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, 25 June 1999, para. 10.

¹³⁷² *Ibid.*, para. 27.

¹³⁷³ *Ibid.*, para. 11.

¹³⁷⁴ For the relevance of this factor, *e.g.*, the decision of the Bayerisches Oberstes Landesgericht in the case of *Public Prosecutor v. Djajić*, (1998) *NJW* 394.

¹³⁷⁵ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, paras. 204 *et seq.*

¹³⁷⁶ *Ibid.*, para. 262.

¹³⁷⁷ *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999.

¹³⁷⁸ *Ibid.*, paras. 116 *et seq.*

¹³⁷⁹ *Ibid.*, para. 137.

¹³⁸⁰ See for that proposition the unpublished decision of the German Oberlandesgericht Düsseldorf 2 StE 8/96, positively quoted by the Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 129, note 154.

¹³⁸¹ *Prosecutor v. Tadić*, IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 137.

Chamber I in its *Lubanga* decision of 29 January 2007 and in the subsequent Trial Chamber judgment of 14 March 2012¹³⁸².

- 852 Yet, it has to be noted, that this overall control test may not be applied with regard to situations of occupation since the law of occupation requires a direct and effective degree of control by the respective occupying power in accordance with customary international law, as reflected in Article 42 of the Hague Regulations of 1907¹³⁸³. Against this background, Pre-Trial Chamber I, in the *Lubanga* decision, had held that there was sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of an international character from July 2002 to 2 June 2003¹³⁸⁴, while in light of the paucity of evidence before it, the Chamber was not in a position to find that there was sufficient evidence to establish substantial grounds to believe that Rwanda played a role that can be described as direct or indirect intervention in the armed conflict in Ituri¹³⁸⁵.
- 853 However, a somewhat different reasoning was adopted in the *Katanga* decision where the Chamber did not explicitly qualify Uganda as an occupying Power but relied on a direct intervention of Uganda through the Ugandan People Armed Forces (UPDF) finding sufficient evidence for a ‘direct participation of significant numbers of UPDF troops in several military operations on behalf of different armed groups’ and also ‘that Uganda was one of the main supplier of weapons and ammunitions to these armed groups and that the respective recipients’ ability to successfully attack other groups was aided by this Ugandan military assistance’¹³⁸⁶.
- 854 Notably, in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ held, in sharp contrast to the ICTY Appeals Chamber judgment in the *Tadić* case, that the ‘overall control’ test as developed throughout the jurisprudence of the ICTY, was not appropriate concerning the determination of State responsibility¹³⁸⁷. Nevertheless, the ICJ observed, that since ‘logic does not require the same test to be adopted in resolving two issues, which are very different in nature’¹³⁸⁸, the ‘overall control’ test may still be applicable and suitable when deciding whether an armed conflict is international or non-international in nature¹³⁸⁹.
- 855 Finally, the issue of a possible internationalisation of a particular, otherwise non-international armed conflict arises where UN peacekeeping forces, acting under a ‘robust’ mandate, are involved in the conflict. Yet, any such involvement is not, as such, capable of changing the legal character of the conflict itself for purposes of article 8 of the Statute and thus is not,

¹³⁸² *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 541; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 211.

¹³⁸³ *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, para. 214 *et seq.*; but see also *Prosecutor v. Blaškić*, IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 149; for further details see, Kolb (2004) 75 *BYIL*. 283–285; *Armed Activities on the Territory of the Congo* (DRC v. Uganda), *ICJ Rep.* 2005, 168, 229, para. 172; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Rep.* 2004, 167, para. 78 and p. 172, para. 89; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 212.

¹³⁸⁴ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 220.

¹³⁸⁵ *Ibid.*, para. 226. In its judgment of 14 March 2012, however, the Trial Chamber in view of the conduct under consideration qualified the conflict as a non-international armed conflict, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 565–567.

¹³⁸⁶ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 240.

¹³⁸⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, *ICJ Rep.* 2007, para. 402 *et seq.*

¹³⁸⁸ *Ibid.*, para. 405; for a critical appraisal of this consideration see Spinedi (2007) *JICJ* 829.

¹³⁸⁹ *Ibid.*, para. 404; Cassese (2007) 18 *EJIL* 649; Werle and Jessberger *Principles* (2014), 415.

in itself, capable of internationalising it. This conclusion may be derived from the very structure of article 8 of the Statute itself, and more specifically from the fact that directing attacks against peacekeeping forces constitutes a war crime in both, international armed conflicts under article 8 para. 2 (b) (iii), and in non-international armed conflicts under article 8 para. 2 (e) (iii). It thus logically follows that, at least for purposes of the Rome Statute and regardless of any qualification for purposes of international humanitarian law generally, an armed conflict also involving UN peacekeeping troops does not necessarily and by itself, constitute an international armed conflict. Rather, the overall conflict must be qualified as being either of an international or a non-international character irrespective of the involvement of peacekeeping forces as such.

4. Conflicts between a State's regular armed forces and transnational non-state armed groups which do not occur within the territory of the respective State ('transnational armed conflicts')

As a result of the attacks of September 11, 2001 there has been an intensive and still ongoing international debate on how to qualify the subsequent military operations forming part of the so-called US-led 'war on terror' between a State's regular armed forces – in particular those of the United States and their allies – and non-state entities. And even though it seems that the 'global war on terror' phraseology has now been dropped from diplomatic parlance, the qualification problems associated with the extraterritorial use of force against non-state actors have remained. These operations are characterized by the fact that they do not occur within the territory of the respective State, but that they take place within the territory of (a) third State(s). Qualification problems in this context have arisen *e.g.* with regard to the 2006 conflict between the Israeli armed forces and Hezbollah forces in Northern Lebanon, with respect to the 2007 conflict between Turkish governmental forces and Kurdish armed groups in Northern Iraq, concerning Colombian military operations against the FARC on the territory of Ecuador in 2008 or, more recently, with regard to Kenya's military operation against Al-Shabaab on the territory of Somalia which commenced in October 2011. 856

On the one hand, such conflicts possess an extraterritorial character, given that military force is being used on the territory of another State. On the other hand, they typically lack a genuine inter-state element, given that the military action is not directed against another State as such, but rather against non-state entities such as Al Qaeda, Hezbollah, the PKK or Al-Shabaab that are present on another State's territory. Such conflicts may thus be best described as 'transnational armed conflicts'¹³⁹⁰ or 'extra-state hostilities'¹³⁹¹. It should be noted however, that these are merely descriptive terms suitable to capture a new phenomenon but not (yet) a new legal category of armed conflict. Thus, the problem remains to qualify a given transnational armed conflict as either an international or a non-international armed conflict or both. As the very term to describe the phenomenon indicates, this type of conflict raises some analytical difficulties concerning the traditional international/non-international dichotomy in international humanitarian law generally, and the Rome Statute in particular, as the emergence of this new kind of conflict was not foreseen when the respective treaties, including the Rome Statute, were drafted. 857

Although the term 'transnational armed conflict' is appropriate in pointing out the crucial characteristics of the phenomenon as such, it has to be first emphasized, however, that in most cases, counter-terrorist operations will not even constitute an armed conflict within the meaning of the Geneva Conventions or the ICC Statute. In legal terms they rather possess the character of police missions aimed at repressing severe crime, even if carried out by regular armed forces¹³⁹². As such they are comparable to the contemporary counter-piracy opera- 858

¹³⁹⁰ See, *e.g.*, Corn (2007) 40 *VandJTransL* 295, 299.

¹³⁹¹ Schöndorf (2004) 37 *NYJIL&Pol* 1, 3.

¹³⁹² See, *e.g.*, Paust (2004) 79 *NotreDameLRev* 1335, 1342.

tions in the Gulf of Aden, which, albeit carried out by the navies of various states, qualify as multinational police operations that are governed primarily by human rights law rather than humanitarian law. Likewise, isolated terrorist acts such as those that have occurred *inter alia* in London, Mumbai, Madrid, Casablanca or Bali, are usually not capable of yet amounting to an armed conflict¹³⁹³. It follows that, as a rule, article 8 of the Statute will, at least as a matter of principle, not be applicable to these new forms of organised violence, even if the United States Supreme Court in *Hamdan v. Rumsfeld* has taken the position that common article 3, as a minimum standard, was applicable to the conflict during which the detainee had been captured, thereby implicitly confirming the U.S. government's assertion that counter-terrorist operations conducted by U.S. forces¹³⁹⁴ forming part of the so-called 'war on terror' constituted an armed conflict in the sense of international humanitarian law and thus also within the meaning of the Rome Statute. The ICRC has however rightly rejected the assumption that there is an ongoing armed conflict of global dimensions and has instead, adopted a case-by-case approach concerning the classification of the various different situations of violence that have occurred in the fight against terrorism¹³⁹⁵.

859 Such a case-by-case approach reveals that, notwithstanding the general caveat regarding the application of international humanitarian law in the fight against terrorism mentioned above, there have been a number of cases in which the hostilities between a State's armed forces and a non-State actor with the primary goal to suppress terrorist activities did indeed amount to an armed conflict, the most important examples being the war waged by the U.S.-led coalition in Afghanistan that started in October 2001, and the 2006 Second Lebanese War between Israel and Hezbollah

860 In cases where counter-terrorist operations of a State indeed result in an armed conflict, an important distinction has to be drawn.

On the one hand, if the conflict between the State and an organised armed group takes place on a territory subject to belligerent occupation by the acting State, it might be argued that it would possess an international character where and to the extent that the armed group either belongs to the armed forces of the occupied State respectively to the entity representing the people in question¹³⁹⁶. This is due to the fact that it would be contradictory to, on the one hand, have the belligerent occupation as such being governed by the Fourth Geneva Convention and customary international law, and, on the other hand, regulate the conduct of hostilities on the occupied territory between occupying forces and insurgent forces representing the occupied territory by norms governing internal conflict only¹³⁹⁷. Yet, article 1, para. 4 Add. Prot. I confirms that only certain types of armed conflicts taking place in a situation of occupation might amount to international armed conflicts since even under article 1, para. 4 Add. Prot. I armed conflicts taking place in occupied territories only qualify as international armed conflict provided further criteria are met, namely that the non-State group involved in the conflict is representative of a people exercising its right of self-determination and thus requiring that the non-State party to the conflict constitutes more than a mere group *de facto* exercising control over a certain part of the occupied territory.

861 On the other hand, if the armed conflict is taking place on the territory of a third State which is, as such, not party to the hostilities in question, the situation is more complex. One example is the war between Israel and Hezbollah, where this non-state group operated on

¹³⁹³ Arnold, *Repressing Terrorism* (2004) 111 *et seq.* See also mn 302.

¹³⁹⁴ *Hamdan v. Rumsfeld*, 548 U.S. 65 (2006).

¹³⁹⁵ Pejic (2011) 93 *IRevRC* 189, 196.

¹³⁹⁶ In the Lubanga decision the Pre-Trial Chamber held 'that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of an international character from July 2002 to 2 June 2003' and thereby arguably assumed that occupation internationalizes any other conflict; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 220.

¹³⁹⁷ Cassese, *International Law* (2005) 420. This line of reasoning was affirmatively cited by the Supreme Court of Israel in its decision on the Israeli government's 'targeted killings' policy in the Occupied Palestinian Territories, see *The Public Committee Against Torture in Israel v. The Government of Israel*, (2006) 769/02 HCl, para. 18 *et seq.*

and from Lebanese territory, the actions of which could however not be attributed to the State of Lebanon¹³⁹⁸. In its *Hamdan* decision, the U.S. Supreme Court held that such kind of incidents come within the scope of non-international conflicts, relying on an analysis of the term ‘non-international’ itself. The Court rightly held that non-state armed entities are not and are not even able to be ‘High Contracting Parties’ of the Geneva Conventions. According to this view, the phrase ‘not of an international character’ has to be literally interpreted and thus comprises every kind of armed conflict that is not carried out between nations, *i.e.* sovereign States¹³⁹⁹. In sharp contrast thereto, however, the Supreme Court of Israel took a position which is antithetic to this conclusion. The Israeli Supreme Court argued that the above considerations regarding situations of belligerent occupation are not restricted to such situations, but that the law dealing with international armed conflicts should apply in any case of armed conflict that crosses the borders of a State, thus equating the term ‘international’ with ‘transborder’¹⁴⁰⁰.

The better view, however, is to qualify conflicts that involve a non-state actor as non-international armed conflicts even if they involve a cross-border element. The concept of international armed conflict as it is laid out in article 2 common to the Geneva Conventions as well as customary international law, requires States to be on each side of the conflict¹⁴⁰¹. Certainly, article 1 para. 4 of Add. Prot. I¹⁴⁰² evidences that if a specific rule exists, the concept of international armed conflict may exceptionally be extended also to conflicts between States and non-state actors. However, article 1 para. 4 of Add. Prot. I has remained controversial, as far as can be seen it has never been applied in practice and its conditions are evidently not fulfilled in the transnational scenarios under consideration.

Of course, the extension of the non-international armed conflict model to transnational constellations, *i.e.* a State fighting a non-state actor in the territory of another State, is not without problems either. The traditional conception of a non-international armed conflict has certainly been that of an internal armed conflict confined to the territory of a single State. This traditional conception is vividly reflected in the wording of common article 3 of the four Geneva Conventions which speaks of conflicts ‘occurring in the territory of one of the High Contracting Parties’, and even more clearly in the wording of article 1 para. 1 of Add. Prot. II which talks of conflicts ‘which take place in the territory of a High Contracting Party’.

Moreover, the ICTY Appeals Chamber in *Tadić* spoke of armed conflicts ‘within a state’¹⁴⁰³ and also the Rome Statute in article 8 para. 2 (f) speaks of conflicts ‘that take place in the territory of a State’. Thus, even more explicitly in the *Bemba* decision the ICC Chamber concluded that an armed conflict not of an international character ‘takes place within the confines of a State territory’¹⁴⁰⁴. All of these various references to State territory would seem to defy the assumption of a global armed conflict.

But do they also defy the idea of an extraterritorial non-international armed conflict in the territory of another State? Whereas the wording of article 1 para. 1 of Add. Prot. II, namely the word ‘its’ indeed requires that the armed group controls part of the territory of the state which it is fighting¹⁴⁰⁵, the wording of common article 3, which refers to ‘the territory of one of the High Contracting Parties’ and thus not necessarily only to the territory of the State party to the conflict, is open enough to also accommodate the extraterritorial dimension. Increasingly, such an evolutive reading of common article 3 finds support in the literature

¹³⁹⁸ See Zimmermann (2007) 11 *MPYbUNL* 99, 109 *et seq.*

¹³⁹⁹ Cassese, *International Law* (2005) 67.

¹⁴⁰⁰ *The Public Committee Against Torture in Israel v. The Government of Israel* (2006) 769/02 *HCI*, para. 18.

¹⁴⁰¹ *Prosecutor v. Lubanga Dyilo*, No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 541. See also Krefß (2010) 15 *JCSL* 255.

¹⁴⁰² See above mn 251.

¹⁴⁰³ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, para. 70.

¹⁴⁰⁴ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 231.

¹⁴⁰⁵ Lubell, *Use of Force* (2010) 100.

and arguably also in State practice, at least in as much as an extraterritorial dimension of the concept of non-international armed conflicts is accepted in situations like Afghanistan, where external States in support of the Afghan government are party to a non-international armed conflict outside their own territory¹⁴⁰⁶. Thus, it is submitted that the conception of a non-international armed conflict is best suited and increasingly supported, *inter alia* by the US Supreme Court's *Hamdan* decision, to capture extraterritorial violence of a certain intensity between a State and an organized armed group.

866 This of course does not bar the existence of a parallel international armed conflict between the intervening State and the State on whose territory the fighting between the external State and the non-state actor takes place. Thus, an international armed conflict would clearly come into existence if there was fighting between the two State's armed forces or if the intervening State occupied part of the host State's territory¹⁴⁰⁷. The possibility of a mixed armed conflict, i. e. the concurrent existence of an international and a non-international armed conflict was not only endorsed by the ICRC with respect to the armed conflict in Lebanon in 2006¹⁴⁰⁸. Moreover, this possibility has also been endorsed in the *Lubanga* decision, where the Chamber held that an armed conflict may be 'international in character alongside an internal armed conflict'¹⁴⁰⁹. Similarly, in the *Lubanga* judgment the Trial Chamber held that 'international and non-international armed conflicts may coexist'¹⁴¹⁰.

III. Violations of article 3 common to the four Geneva Conventions

Literature: Gasser, H.-P., 'Armed Conflicts Within the Territory of a State', in: W. Haller *et al.* (eds.), *Im Dienst an der Gemeinschaft, Festschrift für D. Schindler* (1989) 225; *id.*, 'Protection of the Civilian Population', in: Fleck, D. (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (2008) 237; Green, L. C., 'Criminal responsibility of individuals in non-international conflicts', (2002) *GYbIL* 82; Hall, C. K., 'The Jurisdiction of the Permanent International Criminal Court over Violations of Humanitarian Law', in: F. Lattanzi (ed.), *The International Criminal Court – Comments on the Draft Statute* (1998) 19 (in particular 36–38); Kreß, C., 'War crimes committed in non-international armed conflict and the emerging system of international criminal justice', (2000/2001) *IsYbHumRts* 103; La Haye, E., *War Crime in Internal Armed Conflicts* (2010); Meindersma, C., 'Violations of common article 3 of the Geneva conventions as violations of the laws or customs of war under article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia', (1995) *NethILRev* 375; Moir, L., 'Violations of Common Article 3 of the Geneva Conventions', in: J. Doria *et al.* (eds.), *The Legal Regime of the ICC: Essays in Honour of Prof. I. P. Blishchenko* (2009) 619; Momtaz, D., 'War crimes in Non-International Armed Conflicts Under the Statute of the International Criminal Court', (1999) *YbILC* 177; Pejić, J., 'The Protective Scope of Common Article 3: More than meets the eye', (2011) 93 *IRevRC* 189–225; Schabas, W. A., 'Punishment of non-state actors in non-international armed conflict', (2003) *FordhamILJ* 907; Schindler, D., 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', (1979) II *Recueil de Cours* 121; Schmitt, M., 'Deconstructing direct participation in hostilities: The constitutive elements', (2010) 42 *NYJIL&Pol* 697; Sivakumaran, S., 'Courts of Armed Opposition Groups – Fair Trial or Summary Justice?', (2009) 7 *JICJ* 489–513; Spieker, H., 'The International Criminal Court and non-international armed conflicts', (2000) *LeidenJIL* 395; Zimmermann, A., 'The Creation of a Permanent International Criminal Court', (1998) *MPYbUNL* 169 (in particular 196–197); *id.*, 'Implementing the Statute of the International Criminal Court – the German Example', in: L. Vohrah *et al.* (eds.), *Man's Inhumanity to Man – Essays in Honour of Antonio Cassese* (2003) 977.

1. General remarks

867 a) **Introduction.** The inclusion of violations of common article 3 into the Statute was opposed by a few States, namely China, India, Indonesia, Pakistan and also Turkey. This is surprising since this provision, according to the ICJ, contains a minimum yardstick in cases

¹⁴⁰⁶ See *ibid.*, 111; Pejić 93 (2011) *IRevRC* 201; Kreß (2010) 15 *JCSL* 255; Kretzmer, (2005) 16 *EJIL* 189 *et seq.*; Werle and Jessberger, *Principles* (2014), 419, 420.

¹⁴⁰⁷ Kreß (2010) 15 *JCSL* 256.

¹⁴⁰⁸ Kellenberger (30 July 2006) *NZZ* 3.

¹⁴⁰⁹ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 209.

¹⁴¹⁰ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 540, referring to *Prosecutor v. Tadić*, see note 14, para. 84.

of civil strife¹⁴¹¹. Furthermore, both the Appeals Chamber of the ICTY as well as the ICTR¹⁴¹² had already *prior* to the Rome conference explicitly confirmed that under current rules of customary international law, violations of common article 3 even in internal armed conflicts entail the individual criminal responsibility of the person committing such acts¹⁴¹³. The criminalization of serious violations of common article 3 was further confirmed by article 4 of the Statute of the ICTR. Since the Rome conference this development has been further confirmed by both, founding instruments of international criminal tribunals such as the Statute of the Special Court for Sierra Leone or the regulation adopted by the United Nations administration of East Timor providing for the jurisdiction of special courts in East Timor as well as the one of the Iraqi Special Tribunal, as well as finally by domestic legislation such as, for example, the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*)¹⁴¹⁴.

b) **Existence of an armed conflict not of an international character.** Common article 3 868 expressly states that ‘in cases of armed conflict not of an international character ... each Party shall be bound to apply, as the minimum’ its provisions. Thus the formula contained in the chapeau of article 8 para. 2 (c) of the Statute does not seem to contain a significant distinction when compared to the formula already used in common article 3 itself¹⁴¹⁵.

The ICRC has taken the position that the conflict under consideration, in order to qualify 869 for the purposes of common article 3 as an armed conflict, must have lead to combat and to the use of armed forces¹⁴¹⁶. Notwithstanding the threshold requirements contained in article 8 para. 2 (d) and (f) of the Statute, it is generally established that for a non-international armed conflict, whether it involves only armed groups or also governmental armed forces on one side of the conflict, two objective requirements must be met.

First, the hostilities must reach a certain level of intensity¹⁴¹⁷. The Appeals Chamber in the 870 *Tadić* case held that there is an armed conflict ‘whenever there is [...] *protracted* armed violence between governmental authorities and organised armed groups or between such groups within a state’¹⁴¹⁸. With regard to the ICC Statute the Pre-Trial Chamber in Bemba held that the threshold contained in the first sentence of article 8 para. 2 (d) and (f), first sentence, of the Statute requires any armed conflict not of an international character to reach a certain level of intensity which exceeds that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature¹⁴¹⁹. In fact, it was already in the *Akayesu* judgement that the ICTR had stated that ‘the term armed conflict in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent [and that] [t]his consequently rules out situations of internal

¹⁴¹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), *ICJ Rep.*, 1986, 14, 114, para. 218.

¹⁴¹² *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 608.

¹⁴¹³ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, paras. 128 *et seq.* The relevant part of the judgement explicitly stipulated that ‘... customary international law imposes criminal liability for serious violations of common article 3’.

¹⁴¹⁴ For further details see e.g. Zimmermann, in: Vohrah *et. al.* (eds.), *Inhumanity* (2003) 977.

¹⁴¹⁵ But see also Hall, in: Lattanzi (ed.), *Comments* (1998) 37–38.

¹⁴¹⁶ See CICR (ed.), *Convention de Genève* (1956) 40 *et seq.* (in particular 42).

¹⁴¹⁷ See only *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 225.

¹⁴¹⁸ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70. See also *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 233; *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 229.

¹⁴¹⁹ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 225.

disturbances and tensions¹⁴²⁰. In assessing the required intensity of the conflict Trial Chambers of the ICTY have considered a variety of indicative criteria¹⁴²¹ such as the gravity of attacks and their recurrence¹⁴²², the number of victims¹⁴²³, the temporal and territorial expansion of violence and the collective character of hostilities¹⁴²⁴, the mobilization of volunteers and the distribution and type of weapons among both parties to the conflict¹⁴²⁵, whether various parties were able to operate from a territory under their control¹⁴²⁶, an increase in the number of government forces¹⁴²⁷, the fact that the conflict led to a large displacement of people¹⁴²⁸ as well as whether the conflict had attracted the attention of the UN Security Council and whether it was specifically addressed or even qualified as such by the Security Council¹⁴²⁹.

- 871 Second, the non-governmental armed group(s) involved in the conflict must possess a certain degree of organization¹⁴³⁰ said requirement being inherent in the very notion of ‘armed groups’ notwithstanding the fact that unlike Art. 8 para. 2 (f) neither Art. 8 para. 2 (c) nor common Art. 3 GC I-IV as such *expressis verbis* contain such requirement. In *Lubanga* the Pre-Trial Chamber held that ‘the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character’¹⁴³¹.

¹⁴²⁰ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 620; recalled in *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 230.

¹⁴²¹ For a summarily depiction of these various indicative factors, see *Prosecutor v. Fatmir Limaj* et al., IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, paras. 94–134, 170; *Prosecutor v. Ramush Haradinaj et al.*, No. IT-04-84-T, Judgment, Trial Chamber, 3 April 2008, para. 49. The ICTY uses the same test as the ICTY, see *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, paras. 619–26; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, No. ICTR-95-1-T, Judgment, Trial Chamber II, 21 May 1999, para. 170; *Prosecutor v. Musema*, ICTR-96-13-A, Judgment and Sentence, Trial Chamber I, 27 January 2000, para. 250; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgment and sentence, Trial Chamber I, 6 December 1999, paras 92–93; *Prosecutor v. André Ntagerura et al.* (Case Name ‘Cyangugu’), No. ICTR-99-46-T, Judgment and sentence, Trial Chamber III, para. 767; *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment, Trial Chamber, 15 May 2003, paras. 355 and 514; *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-T, Judgment, Trial Chamber I, 7 June 2001, paras. 99–101; *Prosecutor v. Jean de Dieu Kamuhanda*, No. ICTR-95-54A-T, Judgment, Trial Chamber II, 22 January 2004, paras. 721–24. For an analysis of the relevant jurisprudence see La Haye, *War Crimes in Internal Armed Conflicts* (2010) 9 et seq.

¹⁴²² *Prosecutor v. Tadić*, Opinion and Judgment, Trial Chamber, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 565; *Čelebići Case*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, paras. 186–89.

¹⁴²³ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 235.

¹⁴²⁴ *Prosecutor v. Tadić*, Opinion and Judgment, Trial Chamber, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, paras. 566, 568; *Prosecutor v. Kunarac*, Judgment, Trial Chamber, 22 February 2001, para. 567, *Čelebići Case*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 186, *Prosecutor v. Stakić*, IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003, para. 572.

¹⁴²⁵ *Čelebići Case*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 188; *Prosecutor v. Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 30–31; *Prosecutor v. Limaj*, IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, paras. 136, 138, 156, 169, 161, 164–166.

¹⁴²⁶ *Čelebići Case*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 187; *Prosecutor v. Limaj*, IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, paras. 146, 158, 159.

¹⁴²⁷ *Prosecutor v. Limaj*, IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, paras. 146, 159 and 164–65.

¹⁴²⁸ *Prosecutor v. Limaj*, IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, para. 167.

¹⁴²⁹ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 235; *Čelebići Case*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 190; *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 567.

¹⁴³⁰ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 234. See also *Prosecutor v. Limaj*, IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, paras. 94–134, 170.

¹⁴³¹ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 233.

In order to assess the second requirement, i.e. the organization of the parties to the conflict, the ICTY has taken into account such factors as the existence of headquarters, designated zones of operation and the ability to transport and distribute arms¹⁴³². In the *Limaj* case the Trial Chamber pointed out that *some degree of organization* by the parties will suffice to establish the existence of an armed conflict¹⁴³³. In assessing whether the Kosovo Liberation Army (KLA) possessed the characteristics of an organized armed group the Trial Chamber in *Limaj* took into account *inter alia* the following criteria: the structure of the KLA with a general staff and the existence of eleven zones with one commander for each zone¹⁴³⁴, the weapons distribution channels¹⁴³⁵, the use of uniforms¹⁴³⁶, the adoption of internal regulations¹⁴³⁷, the nomination of a spokesperson¹⁴³⁸, the issuance of orders¹⁴³⁹, political statements and communiqués¹⁴⁴⁰, the establishment of headquarters¹⁴⁴¹, the capacity to launch co-ordinated action between KLA units¹⁴⁴², the establishment of a military police and disciplinary rules¹⁴⁴³, the ability of the KLA to recruit new members¹⁴⁴⁴ and its capacity to provide military training¹⁴⁴⁵.

With respect to the jurisprudence of the ICC, the Pre-Trial Chamber in *Bemba* concurred 872 with Pre-Trial Chamber I in the *Lubanga* case (albeit in the context of article 8 para. 2 (f) of the Statute which, unlike Art. 8 para. 2 (c), expressly requires the armed groups involved in the conflict to be ‘organized’) by stressing the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time¹⁴⁴⁶. In the *Bemba* decision the Chamber added that organized armed groups must be under responsible command and that in this regard, responsible command entails some degree of organization of those armed groups, including the possibility to impose discipline and the ability to plan and carry out military operations¹⁴⁴⁷. In the *Callixte Mbarushimana* decision, the Chamber, referred *inter alia* to the FDLR’s hierarchical structure and high level of internal organization, the existence of a political and a military wing, and the FDLR’s constitutive instruments which included a statute, a ‘règlement d’ordre intérieur’ and a disciplinary code which provided the organisation’s internal disciplinary system¹⁴⁴⁸. Against this background the Chamber was satisfied that there are substantial grounds to believe that the FDLR as an armed group possessed the degree of organisation required under article 8 para. 2 (f) of the Statute¹⁴⁴⁹.

¹⁴³² Prosecutor v. Milošević, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 23–24.

¹⁴³³ Prosecutor v. Limaj, No. IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, para. 89 (emphasis added).

¹⁴³⁴ *Ibid.*, paras. 94–97.

¹⁴³⁵ *Ibid.*, paras. 121–22.

¹⁴³⁶ *Ibid.*, paras. 123–24.

¹⁴³⁷ *Ibid.*, paras. 98 and 110–12.

¹⁴³⁸ *Ibid.*, paras. 99 and 102.

¹⁴³⁹ *Ibid.*, paras. 100, 105, 109.

¹⁴⁴⁰ *Ibid.*, paras. 101–3.

¹⁴⁴¹ *Ibid.*, para. 104.

¹⁴⁴² *Ibid.*, para. 108.

¹⁴⁴³ *Ibid.*, paras. 113–17.

¹⁴⁴⁴ *Ibid.*, para. 118.

¹⁴⁴⁵ *Ibid.*, paras. 119–20.

¹⁴⁴⁶ Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 234; Prosecutor v. Bemba, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 233; Prosecutor v. Garda, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 91.

¹⁴⁴⁷ Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 232; Prosecutor v. Bemba, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 234.

¹⁴⁴⁸ Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, Decision on the confirmation of Charges, Pre Trial Chamber I, 16 December 2011, para. 104.

¹⁴⁴⁹ *Ibid.*, para. 106.

- 873 The sole notion of ‘armed conflict’ in and of itself already excludes the applicability of article 8 para. 2 (c) to internal disturbances, a result that is further confirmed by article 8 para. 2 (d) of the Statute¹⁴⁵⁰. Paragraph 1 of the introduction to the war crimes part of the elements of crimes adopted by the Assembly of States Parties under article 9 specifically confirms that the elements of crimes adopted with regard to article 8 para. 2 (c) are subject to the limitations contained in article 8 para. 2 (d) of the Statute. In that regard it referred, in particular, to the criteria referred to during the drafting of common article 3 in 1949¹⁴⁵¹. Thus, the very term of ‘armed conflict’ in itself already presupposes the existence of hostilities between armed forces organized to a greater or lesser extent¹⁴⁵².
- 874 As a matter of principle, the prohibitions contained in article 8 para. 2 (c) also apply outside the actual theatre of military operations, *i. e.* in the whole territory under the control of a party, regardless of whether or not actual combat takes place¹⁴⁵³, provided, however, that there is a nexus between the conduct concerned and the armed conflict¹⁴⁵⁴, *e. g.* that the acts in question are not solely committed by the respective perpetrator for purely personal motives¹⁴⁵⁵.
- 875 Since article 8 para. 2 (c) of the Statute, unlike the second sentence of article 8 para. 2 (f), does not contain a reference to a *protracted* armed conflict, there is no minimum duration requirement of the conflict as such. Moreover, the limitations contained in article 1 para. 1 of Add. Prot. II do not, subject to the exclusionary rule contained in article 8 para. 2 (d) of the Statute¹⁴⁵⁶, apply as such. In both the *Bemba* and the *Lubanga* decisions it was pointed out that the requirement contained in article 1 para. 1 of Add. Prot. II, that the organized armed group(s) exert control over a part of the territory, is not a requirement under article 8 para. 2 (f) and thus even less under article 8 para. 2 (c)¹⁴⁵⁷.
- 876 In order to render article 8 para. 2 (c) applicable, the conflict must not possess an international character¹⁴⁵⁸.
- 877 **c) Serious violations of article 3.** Article 8 para. 2 (c) of the Statute presupposes that ‘serious’ violations of common article 3 have taken place. This limitation is in line with relevant precedents and in particular with both, article 4 of the Statute of the ICTR¹⁴⁵⁹ and the jurisprudence of the Appeals Chamber of the ICTY¹⁴⁶⁰. This limitation can be seen as a concretisation of article 5 of the Statute, which limits the jurisdiction of the Court to those crimes which are of concern to the international community as a whole¹⁴⁶¹.

¹⁴⁵⁰ As to the exclusion of mere internal disturbances and similar tensions contained in article 8 para. 2 (d) see below mn 910 *et seq.*

¹⁴⁵¹ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 619; for a more detailed analysis of these criteria see Pictet (ed.), *Commentary iv*, (1958) article 3, 36.

¹⁴⁵² *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 620.

¹⁴⁵³ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 69; confirmed by *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 185 and *Prosecutor v. Kayishema*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, paras. 176, 182 *et seq.*

¹⁴⁵⁴ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, paras. 572 and 617.

¹⁴⁵⁵ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 636.

¹⁴⁵⁶ For details see Zimmermann and Geiß, *article 8 para. 2 (d)*, mn 910.

¹⁴⁵⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 236; *Prosecutor v. Lubanga Dyllo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 233.

¹⁴⁵⁸ For further details see Zimmermann and Geiß, *Preliminary remarks on article 8 para. 2 (c) – (f)*, mn 823.

¹⁴⁵⁹ The chapeau of that provision reads: ‘The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed *serious* violations of article 3 common to the Geneva Conventions ...’ (emphasis added).

¹⁴⁶⁰ See *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 128, which stated that ‘customary international law imposes criminal liability for *serious* violations of common article 3’ (emphasis added). But see also for a contrary proposition Hall, in: Lattanzi (ed.), *Comments* (1998) 38.

¹⁴⁶¹ For details see Zimmermann, *article 5*, mn 15.

In practice, it is however hard to imagine which violations of one of the provisions contained in article 8 para. 2 (c) (i)–(iv) would not at the same time *ipso facto* also qualify as serious violations of common article 3. This is confirmed by the decisions of the Appeals Chamber of the ICTY in the *Tadić* case which held for purposes of article 3 of the Statute of the ICTY that acts constitute *serious* violations of the laws and customs of war if they ‘constitute a breach of a rule protecting important values’ (which is clearly the case with regard to common article 3) and that ‘the breach must involve grave consequences for the victim’¹⁴⁶². Thus, the only possible example of a non-serious violation of common article 3 might be the singular passing of a short term (!) imprisonment without adequate judicial guarantees. In all other cases, and in particular when acts threatening the physical integrity and safety of persons are committed, the threshold of ‘serious violations’ of common article 3 will always be fulfilled.

d) Persons protected by the provision. Article 8 para. 2 (c) does not contain a new list of persons who may qualify as victims of one of the acts listed in article 8 para. 2 (c) (i)–(iv). Instead, it simply reiterates the group of individuals already mentioned in common article 3 itself. The text presupposes, as is indicated by the word ‘including’, that the notion of ‘persons taking no active part in hostilities’ embraces the two other notions of ‘members of armed forces who have laid down their arms’ and ‘persons placed *hors de combat*’. Indeed, these three notions seem to overlap. Consequently, in the *Bemba* decision the Pre-Trial Chamber II simply noted that article 8 para. 2 (c) of the Statute covers crimes committed by persons taking no active part in hostilities¹⁴⁶³. It has to be noted, however, that the list following the word ‘including’ (‘y compris’ in the French text) is not exhaustive. The Preparatory Commission drafting the elements of crimes under article 9 of the Rome Statute has further defined the group of persons protected under article 8 para. 2 (c) by providing that the persons concerned are either *hors de combat*, or are civilians, medical personnel, or religious personnel (including non-confessional non-combatant military personnel carrying out a similar function)¹⁴⁶⁴.

The notion of ‘persons taking no active part in hostilities’ does not only refer to civilians in the strict sense, but also comprises those persons who, while beforehand having possessed the status of combatants or ‘fighters’, have ceased to take a direct part in hostilities¹⁴⁶⁵. Indeed, both the ICTY and the ICTR have considered the terms ‘taking active part in hostilities’ and ‘taking direct part’ (as e.g. used in articles 4 and 13 of Add. Prot. II) to have the same meaning¹⁴⁶⁶.

According to the ICRC’s Interpretive Guidance on the notion of direct participation in hostilities, in order to qualify as a direct participation in hostilities, a specific act must meet three cumulative criteria: First, the act must meet the required threshold of harm, *i. e.* it must be likely to adversely affect the military operations of a party to an armed conflict or alternatively, to inflict death, injury, or destruction. Second, there must be a direct causal link between the act and the harm and thirdly, there must be a belligerent nexus in that the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of the other¹⁴⁶⁷. What is more, the ICRC

¹⁴⁶² *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 94.

¹⁴⁶³ See *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 237.

¹⁴⁶⁴ See the element of crimes which is common to all provisions contained in article 8 para. 2 (c).

¹⁴⁶⁵ Bothe *et al.* (eds.), *New Rules* (1982) 640.

¹⁴⁶⁶ See *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 629, respectively *Prosecutor v. Tadić*, IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 615. See also *Prosecutor v. Katanga and Ngudjolo Chui*, CC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 266.

¹⁴⁶⁷ ICRC, Interpretive guidance on the notion of direct participation in hostilities (2009), available at: <<http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>> last accessed September 2015, 46. For a critique see Schmitt (2010) 42 *NYJIL&Pol* 697, 739.

recommends that for the purposes of the principle of distinction in non-international armed conflict, persons who are members of State armed forces or organized armed groups of a party to the conflict do not qualify as civilians and that in non-international armed conflicts, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals who have a ‘continuous combat function’, i. e. whose continuous function it is to take a direct part in hostilities¹⁴⁶⁸.

882 In the Appeal Judgment in the *Strugar* case the ICTY provided examples of ‘direct participation in hostilities’, namely bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, and transporting weapons in proximity to combat operations¹⁴⁶⁹. In the *RUF* case the Appeals Chamber of the Special Court for Sierra Leone held that the use of force in self-defence, whether by peacekeepers or civilians, does not constitute a direct participation in hostilities¹⁴⁷⁰.

883 In order for individuals to qualify as ‘members of armed forces who have laid down their arms’, two requirements must be fulfilled:

First, the individuals concerned must have been members of armed forces. In case of governmental forces this would include all the armed forces constituted under the respective domestic law even if they are not formally part of the respective military¹⁴⁷¹. In case of non-governmental armed forces, it presupposes the existence of a certain structure and organs as well as a system for allocating authority and internal discipline¹⁴⁷².

Besides, those persons must have laid down their arms, *i. e.* must have indicated their intention to cease combat activities¹⁴⁷³.

884 The notion of ‘persons placed *hors de combat* by sickness, wounds, detention or any other cause’, taken over from common article 3 into article 8 para. 2 (c) of the Statute, is nowadays defined in article 41 para. 2 of the Add. Prot. I of 1977 under which a person is *hors de combat* if he or she is in the power of an adverse party; he or she has clearly expressed an intention to surrender or has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself or herself, provided, however, that in any case he or she abstains from any hostile act and does not attempt to escape. Besides, article 8 para. 2 (c) of the Statute in line with common article 3, confirms that detention, too, puts a person *hors de combat* and that furthermore also other similar situations can bring about such a status.

885 The ICTY has held in the *Tadić* case¹⁴⁷⁴ that the protection under common article 3 extends *at least* to all those persons, covered in the case of an international armed conflict, by the grave breaches regime, *i. e.* civilians, prisoners of war, wounded and sick members in the field and wounded and finally sick members of the armed forces at sea.

886 e) **Possible offenders.** It has to be noted that both, military personnel and civilians can be possible perpetrators of the crimes listed in article 8 para. 2 (c)¹⁴⁷⁵.

¹⁴⁶⁸ *Ibid.*, 27. For a critique of the ‘continuous combat function-category’ see Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on targeted killings, A/HRC/14/24/Add.6, 28 May 2010, para. 65.

¹⁴⁶⁹ *Prosecutor v. Strugar*, IT-01-42-A, Judgment, Appeals Chamber, 17 July 2008, para. 177.

¹⁴⁷⁰ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-A, Judgment, Appeals Chamber, 26 October 2009, para. 530; citing *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Judgement, Trial Chamber, 18 December 2008, paras. 2175, 2239; Dörmann, *Elements of War Crimes* (2003), 455–456.

¹⁴⁷¹ Sandoz *et al.* (eds), *Commentary* (1987), mn 4462.

¹⁴⁷² Sandoz *et al.* (eds), *Commentary* (1987), mn, mn 4463.

¹⁴⁷³ Sandoz *et al.* (eds), *Commentary* (1987), mn, mn 1618.

¹⁴⁷⁴ *Prosecutor v. Tadić*, IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 615.

¹⁴⁷⁵ *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, paras. 443–445.

2. The different subparagraphs

The fact that the chapeau of article 8 para. 2 (c) of the Statute uses the term ‘namely’ 887 indicates that the list of crimes in (i)–(iv) is exhaustive. Otherwise the use of the words ‘in particular’ would have been appropriate. This is further confirmed by the equally authentic French version, which refers to ‘*les actes ci-après*’. Accordingly the violation of other obligations also contained in common article 3, and in particular the violation of the obligation referred to in its paragraph 2 to collect and care for the wounded and sick, does not constitute a criminal offence under article 8 para. 2 (c) of the Statute¹⁴⁷⁶.

a) Paragraph 2(c)(i): Violence to life and person. Article 8 para. 2 (c) (i) prohibits 888 violence to life and persons, and in particular, criminalizes murder of all kinds, mutilation, cruel treatment and finally torture.

The term ‘violence’ frequently occurs throughout the Statute¹⁴⁷⁷. The elements of crimes related to article 8 para. 2 (c) do not further define the notion of violence. In the context of article 8 para. 2 (c) (i), it only refers to acts of physical violence directed against the life or physical integrity of a person. This may be derived, *argumentum e contrario*, from the fact that article 4 para. 2 (a) of Add. Prot. II expressly went beyond the scope of the prohibition contained in common article 3 to also cover violence to the mental well-being of a person¹⁴⁷⁸. Any such acts directed against the mental well-being of persons such as *e.g.* giving the impression that a person would be executed, might, however, come either under the term of cruel treatment¹⁴⁷⁹ or under that of ‘torture’¹⁴⁸⁰.

aa) Murder. The term ‘murder’ is also used in article 7 para. 1 (a) of the Statute as constituting a 889 crime against humanity. Article 7 does not, however, contain a definition of that term. The ICTY as well as the Special Court for Sierra Leone have held that the elements of the offence of murder as a crime against humanity and as a war crime are identical¹⁴⁸¹. However, in the context of crimes against humanity, such acts must have been committed as part of a widespread or systematic attack against a *civilian* population¹⁴⁸². In the context of article 8 para. 2 (c) (i), to the contrary, also the killing of adversary combatants constitutes a crime, provided they have laid down their arms or have been placed *hors de combat* by sickness, wounds, detention or any other cause¹⁴⁸³. The elements of crimes rightly take the position that apart from persons being *hors de combat*, also civilians, medical personnel, as well as religious personnel (including non-confessional non-combatant military personnel carrying out a similar function) taking no active part in the hostilities, are possible victims. Thus, it is necessary to establish that at the time of the commission of the crime the victims were taking no active part in the hostilities¹⁴⁸⁴.

With respect to personnel involved in peacekeeping missions, in the *Abu Garda* Decision, 890 the Chamber noted that protection does not cease if such persons only use armed force in exercise of their right to self-defence and that any determination as to whether a person is

¹⁴⁷⁶ See also Hall, in: Lattanzi (ed.), *Comments* (1998) 38 who before the Rome conference argued for the inclusion of that provision into the current article 8 para. 2 (c) of the Statute. Any such inclusion would have, however, raised the general issue of the punishability of omissions, see Ambos, *article 25*, mn 53 *et seq.*

¹⁴⁷⁷ See *inter alia* article 7 para. 1 (g), article 8 para. 2 (b) (xxii), article 8 para. 2 (d) and (f) and finally article 8 para. 2 (e) (vi).

¹⁴⁷⁸ Sandoz *et al.* (eds), *Commentary* (1987), mn 4532.

¹⁴⁷⁹ See below mn 894.

¹⁴⁸⁰ See below mn 895.

¹⁴⁸¹ *Prosecutor v. Blagojević*, IT-02-60-T, Judgment, Trial Chamber I, 17 January 2005, para. 556; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, Trial Chamber II, 15 March 2002, para. 323; *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, para. 248; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 412.

¹⁴⁸² For details see Hall and Ambos, *article 7*, mn 18 *et seq.*

¹⁴⁸³ See already above mn 884 *et seq.*

¹⁴⁸⁴ See above mn 884 *et seq.* See also *Prosecutor v. Nourain and Jamus*, No. ICC-02/05-03/09, Decision on the confirmation of charges, Pre-Trial Chamber I, 7 March 2011, para. 102.

directly participating in hostilities must be carried out on a case-by-case basis¹⁴⁸⁵. With regard to the attacks on AMIS personnel, the Chamber in the *Jerbo* decision found that there was no evidence suggesting that prior to the attack or at the time of the attack AMIS personnel took any direct part in hostilities or used force beyond self-defence¹⁴⁸⁶.

Even single individual murders amount to a violation of that provision, provided the required nexus to the armed conflict is established.

891 As has rightly been pointed out by the ILC¹⁴⁸⁷, murder is a crime that is clearly understood and well defined in the domestic law of every State. The ICTR, ICTY and the Special Court for Sierra Leone have consistently defined murder as the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death¹⁴⁸⁸. In the specific context of article 8 para. 2 (c) (i), it refers to the intentional killing of one or more persons protected under that provision without lawful justification. This is confirmed by the elements of crimes with respect to the war crime of murder committed in non-international armed conflict, which uses the formula ‘killed one or more persons’.

892 The crime of murder requires a causal link between the conduct and the result and may be committed by action or omission¹⁴⁸⁹. It must be established beyond reasonable doubt that the perpetrator’s conduct substantially contributed to the death of the victim¹⁴⁹⁰. This does not necessarily require proof that the dead body of that person has been recovered¹⁴⁹¹. The death of the victim may be demonstrated through circumstantial evidence, provided it is the only inference that may reasonably be drawn from the acts or omissions of the perpetrator¹⁴⁹². Such circumstantial evidence may include factors such as proof of incidents of mistreatment against the alleged victim, pattern of mistreatment and disappearances of individuals in the location in question, general climate of lawlessness, length of time which has elapsed since

¹⁴⁸⁵ *Prosecutor v. Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, confirmed in *Prosecutor v. Nourain and Jamus*, ICC-02/05-03/09, Decision on the confirmation of charges, Pre-Trial Chamber I, 7 March 2011, para. 102.

¹⁴⁸⁶ *Ibid.*, para. 703.

¹⁴⁸⁷ (1996) ILC Yearbook 96.

¹⁴⁸⁸ See e.g. *Prosecutor v. Blagojević*, IT-02-60-T, Judgment, Trial Chamber I, 17 January 2005, para. 556; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgment, Appeals Chamber, 28 February 2005, para. 259; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 423; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, Trial Chamber II, 15 March 2002, para. 324; *Prosecutor v. Jelisić*, IT-95-10-T, Judgment, Trial Chamber, 14 December 1999, para. 35; *Prosecutor v. Blaškić*, IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 181; *Prosecutor v. Stakić*, IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003, para. 584; *Prosecutor v. Krstić*, IT-98-33-T, Judgment, Trial Chamber, 2 August 2001, para. 485. For ICTR jurisprudence, see *Prosecutor v. Kayishema*, ICTR-95-1-T, Judgment, Trial Chamber II, 21 May 1999, para. 140; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgment, Trial Chamber I, 7 June 2001, paras. 84–85. Regarding the Special Court for Sierra Leone see *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 412.

¹⁴⁸⁹ *Prosecutor v. Perišić*, IT-04-81-T, Judgment, Trial Chamber I, 6 September 2011, para. 103; *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 274. See also *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 287.

¹⁴⁹⁰ *Prosecutor v. Orić*, No. IT-3-68-T, Judgment, Trial Chamber, 30 June 2006, para. 347; *Prosecutor v. Brima et al.*, IT-95-11-T, Judgment, Trial Chamber, 12 June 2007, para. 689; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 413.

¹⁴⁹¹ *Prosecutor v. Perišić*, IT-04-81-T, Judgment, Trial Chamber I, 6 September 2011, para. 103; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgment, Appeals Chamber, 28 February 2005, para. 260; *Prosecutor v. Martić*, IT-95-11-T, Judgment, Trial Chamber, 12 June 2007, para. 59; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, Trial Chamber II, 15 March 2002, para. 326; *Prosecutor v. Tadić*, IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 240.

¹⁴⁹² *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgment, Appeals Chamber, 28 February 2005, para. 260; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 458; *Prosecutor v. Tadić*, IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 240; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, Trial Chamber II, 15 March 2002, para. 327; *Prosecutor v. Vasiljević*, IT-98-32-A, Judgment, Appeals Chamber, 25 February 2004, para. 120; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, Trial Chamber, 20 June 2007, para. 689; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 413.

the person disappeared and the fact that the alleged victim has not been in contact with others whom he would have been expected to contact¹⁴⁹³.

bb) Mutilations. The prohibition of ‘mutilations’ applies in both international armed conflicts¹⁴⁹⁴, as well as in internal conflicts¹⁴⁹⁵. Reference can therefore be made to the definition developed within the commentary on article 8 para. 2 (b) (x)¹⁴⁹⁶. It has to be noted, however, that notwithstanding the fact that the article 8 para. 2 (b) (x) uses the term ‘physical mutilations’, both provisions have to be nevertheless understood as having synonymous meanings since the ‘mutilation’ in itself refers to an act of physical violence. This is confirmed by the fact that the respective elements of crimes adopted with regard to both provisions are, *mutatis mutandis*, identical in that regard. Conversely, in the context of a non-international armed conflict, the Special Court for Sierra Leone has dismissed the requirement of causing death or seriously endangering the health of a person as superfluous with respect to Article 3 of its Statute, arguing that albeit contained in article 11 para. 4 of Add. Prot. I, it does not form part of the violation under common article 3 and article 4 para. 2 of Add. Prot. II¹⁴⁹⁷.

Indeed, article 8 para. 2 (c) (i), unlike article 8 para. 2 (b) (x) and article 8 para. 2 (e) (xi), does not contain such a result requirement. Accordingly, the war crime contained in article 8 para. 2 (c) (i) does not require that the conduct caused death or seriously endangered the physical or mental health of the victim¹⁴⁹⁸.

cc) Cruel treatment. Unlike the other terms used in article 8 para. 2 (c) (i), the notion of ‘cruel treatment’ is not contained in other provisions of Part 2 of the Statute¹⁴⁹⁹. It is however contained in most of the universal or regional human rights instruments such as, *inter alia*, article 7 of the Covenant on Civil and Political Rights, article 5 of the Universal Declaration of Human Rights, article 5 para. 2 of the American Convention on Human Rights and article 5 second sentence of the African Charter on Human and People’s Rights¹⁵⁰⁰. With regard to humanitarian law, references to cruel treatment are contained in article 87 of the Third Geneva Convention and article 4 para. 2 (a) of Add. Prot. II. According to the jurisprudence of the ICTY¹⁵⁰¹, the offence of cruel treatment under common article 3 (and accordingly under article 8 para. 2 (c) (i) of the Statute) carries the same meaning as inhuman treatment in the context of the grave breaches provisions¹⁵⁰². In the same vein, the Preparatory Commission drafting the elements of crimes considered that the content of the term ‘inhuman treatment’ as contained in article 8 para. 2 (a) (ii) and that of the term of ‘cruel treatment’ as used in article 8 para. 2 (c) (i) are identical. Accordingly the elements for both crimes are also identical in that regard. Thus, for the purposes of common article 3, all acts of torture by the same token also constitute cruel treatment¹⁵⁰³. However, this latter offence further extends to all intentional acts or omissions which cause serious mental or physical suffering or injury or constitute a serious attack on human dignity¹⁵⁰⁴. Thus, treatment that does not meet the purposive requirement for the offence of torture constitutes cruel

¹⁴⁹³ *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, Trial Chamber II, 15 March 2002, para. 327.

¹⁴⁹⁴ Article 8 para. 2 (b) (x).

¹⁴⁹⁵ Article 8 para. 2 (e) (xi).

¹⁴⁹⁶ See Zimmermann and Geiß, *article 8 para. 2 (b) (x)*, mn 437.

¹⁴⁹⁷ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, Trial Chamber, 20 June 2007, para. 725. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgement, Trial Chamber I, 2 March 2009, para. 182.

¹⁴⁹⁸ Dörmann, *Elements of War Crimes* (2003) 396.

¹⁴⁹⁹ But see article 55 of the Statute, which provides that a person who is subject to an investigation under the Statute, shall not be subjected to any form of cruel, inhuman or degrading treatment or punishment; for details see Hall and Jacobs, *article 55*, mn 6.

¹⁵⁰⁰ The European Convention does not refer to ‘cruel treatment’; instead its article 3 uses the terms torture and inhuman or degrading treatment or punishment.

¹⁵⁰¹ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 443.

¹⁵⁰² See above Dörmann, *article 8 para. 2 (a) (ii)*, mn 95.

¹⁵⁰³ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 443.

¹⁵⁰⁴ *Ibid.*

treatment¹⁵⁰⁵. Indeed, whether a particular act amounts to cruel treatment is to be determined on a case-by-case basis¹⁵⁰⁶. In the *Limaj* case, the Trial Chamber held that under the specific circumstances of this case ‘unlawful seizure’, ‘unlawful detention for prolonged periods’ and ‘interrogation’ in and of themselves did not amount to a serious attack on human dignity within the meaning of cruel treatment under Article 3 of the Statute of the ICTY, thereby leaving open the possibility of a different legal qualification of such acts under different circumstances¹⁵⁰⁷. In the *Taylor* judgment the Trial Chamber of the SCSL noted that cruel treatment may encompass also acts of mutilation¹⁵⁰⁸.

895 **dd) Torture.** Finally, the notion of ‘torture’ appears also in both the list of crimes against humanity¹⁵⁰⁹ and the list of the grave breaches of the four Geneva Conventions¹⁵¹⁰. Notwithstanding the fact that article 8 para. 2 (c) of the Statute – unlike article 8 para. 2 (b) (xxii)– does not *expressis verbis* refer to the notion of torture as defined for the purposes of crimes against humanity, that term still has to be applied in line with the definition contained in article 7 para. 2 (e)¹⁵¹¹.

896 The ICTY has defined the crime of torture as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental¹⁵¹², for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground against the victim or a third person¹⁵¹³. In the context of internal armed conflicts, it thus in particular also includes acts by non-state actors involved in the armed conflict since outside the Torture Convention the public official requirement of torture does not constitute a requirement under customary international law in relation to the criminal responsibility of an individual¹⁵¹⁴. This view was shared by the Preparatory Commission drafting the elements of crimes which therefore are identical in that regard for both crimes. Indeed it was the ICTY which had already stated that ‘[t]he characteristics of the offence of torture under common article 3 [which is mirrored in article 8 para. 2 (c) (i) of the Rome Statute] and under the ‘grave breaches’ provisions of the Geneva Conventions [*i. e.* article 8 para. 2 (a) (ii) of the Rome Statute], do not differ¹⁵¹⁵.

897 With respect to the question whether ‘severe pain or suffering’ has been caused, the Appeals Chamber in *Brđanin* had to consider whether a new, higher standard regarding the requisite amount of harm had developed under customary international law, as had been claimed by the accused who based his argument on the so-called 2002 Bybee Memorandum¹⁵¹⁶. The argument was rightly rejected by the Appeals Chamber, for lack of any support of the argument that a new intensity threshold had developed under customary international law. *Inter alia* the Chamber held that already the Torture Convention’s drafting history makes it clear that ‘severe pain or suffering’ is not synonymous with ‘extreme pain or suffering’¹⁵¹⁷. Thus, it follows that acts inflicting physical pain may amount to torture even

¹⁵⁰⁵ *Ibid.*

¹⁵⁰⁶ *Prosecutor v. Limaj*, IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, para. 232.

¹⁵⁰⁷ *Ibid.*

¹⁵⁰⁸ *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 435.

¹⁵⁰⁹ Hall and Stahn, *article 7 para. 1 (f)*.

¹⁵¹⁰ Dörmann, *article 8 para. 2 (a) (ii)*.

¹⁵¹¹ For details see Hall and Stahn, *article 7 para. 2 (e)* and *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, paras. 446 *et seq.*

¹⁵¹² *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, Appeals Chamber, 3 April 2007, para. 242; *Prosecutor v. Brđanin*, IT-99-36-T, Judgment, Trial Chamber, 1 September 2004, para. 481; *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 162; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 468.

¹⁵¹³ *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgment, Appeals Chamber, 28 February 2005, para. 289; *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001, para. 141.

¹⁵¹⁴ *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgment, Appeals Chamber, 28 February 2005, para. 284; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, para. 148.

¹⁵¹⁵ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 443.

¹⁵¹⁶ *Prosecutor v. Brđanin*, IT-99-36-T, Judgment, Trial Chamber, 1 September 2004, para. 246.

¹⁵¹⁷ *Ibid.*, para. 249.

when they do not cause pain of the type accompanying serious injury¹⁵¹⁸. Whether ‘severe pain or suffering’ has been inflicted is a fact-specific inquiry and the findings of the Appeals Chamber in the *Naletilić and Martinović* Appeal Judgment remain valid: ‘Existing case-law has not determined the absolute degree of pain required for an act to amount to torture. Thus, while the suffering inflicted by some acts may be so obvious that the acts amount *per se* to torture, in general allegations of torture must be considered on a case-by-case basis so as to determine whether, in light of the acts committed and their context, severe physical or mental pain or suffering was inflicted’¹⁵¹⁹.

It has to be mentioned in particular that rape or other forms of sexual violence, too, notwithstanding that it they are not explicitly mentioned in article 8 para. 2 (c) (i) of the Statute, can also constitute torture¹⁵²⁰.

In the *Bemba* decision the Chamber pointed out that the perpetrator’s intent to inflict pain or suffering for such a purpose as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind, constitutes a specific intent, which has to be proven by the Prosecutor¹⁵²¹.

b) Paragraph 2(c)(ii): Outrages upon personal dignity. Article 8 para. 2 (c) (ii) prohibits outrages upon personal dignity and in particular criminalizes humiliating and degrading treatment. Common article 3 of the Geneva Conventions as well as article 4 para. 2 (e) of Add. Prot. II prohibit outrages upon personal dignity. The wording of this provision, as well as the respective wording of the elements of crimes as adopted under article 9 of the Statute, is identical to article 8 para. 2 (b) (xxi) of the Statute, reference to which can accordingly be made¹⁵²².

In the *Bemba* decision Pre-Trial Chamber II found that in this particular case the count of outrage upon personal dignity under article 8 para. 2 (c) (ii) was fully subsumed by the count of rape, which was deemed the most appropriate legal characterization of the conduct presented¹⁵²³. In the *Taylor* judgment the Trial Chamber of the Special Court for Sierra Leone held that ‘[...] sexual slavery, including the abduction of women and girls as ‘bush wives’, a conjugal form of sexual slavery, is humiliating and degrading to its victims and constitutes a serious attack on human dignity, falling within the scope of outrages upon personal dignity’¹⁵²⁴.

c) Paragraph 2(c)(iii): Taking of hostages. Article 8 para. 2 (c) (iii) prohibits the taking of hostages, which in the case of an international armed conflict, constitutes a grave breach of the Geneva Conventions. The very same prohibition is accordingly also contained in article 8 para. 2 (a) (viii) of the Statute, reference to which can accordingly be made¹⁵²⁵ even more so since the respective wording of the elements of crimes as adopted under article 9 of the Statute is also identical.

There has been some disagreement about whether unlawful detention is a requirement of the offence or whether an initially lawful detention could also suffice. The wording of the respective elements of crimes which refer to persons ‘otherwise held hostage’ as well as the finding of the Special Court for Sierra Leone in the *RUF* case according to which ‘the precise

¹⁵¹⁸ *Ibid.*, para. 251.

¹⁵¹⁹ *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgment, Appeals Chamber, 3 May 2006, para. 299; cited and confirmed in *Prosecutor v. Brđanin*, IT-99-36-T, Judgment, Trial Chamber, 1 September 2004, para. 251.

¹⁵²⁰ See as to the jurisprudence of the two *ad hoc* Tribunals, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 597 and as far as the ICTY is concerned *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 496.

¹⁵²¹ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 294.

¹⁵²² See Arnold and Wehrenberg, *article 8 para. 2 (b) (xxi)*.

¹⁵²³ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 312.

¹⁵²⁴ *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 432.

¹⁵²⁵ See Dörmann, *article 8 para. 2 (a) (viii)*.

means by which the individual falls into the hands of the perpetrator is not the defining characteristic of the offence; it is rather, a secondary feature' and 'it could not be otherwise, for it would mean that the crime of hostage-taking could never arise out of an initially lawful detention'¹⁵²⁶ militate in favour of a broad understanding which also comprises an initially lawful detention¹⁵²⁷. Accordingly, it is not required that the requisite intent be present at the moment of the initial detention, it may crystallize also at a later stage¹⁵²⁸.

- 904 d) Paragraph 2(c)(iv): Passing of sentences and the carrying out of executions without previous judgement. Article 8 para. 2 (c) (iv) prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court¹⁵²⁹, affording all judicial guarantees which are generally recognized as indispensable. It is similar in nature, although not completely identical, to the prohibition contained in article 8 para. 2 (a) (vi) of the Statute¹⁵³⁰. Accordingly the elements of crimes adopted with respect to the two provisions also slightly differ: on the one hand the elements concerning article 8 para. 2 (a) (vi) refer to the deprivation of a fair and regular trial by 'denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949'¹⁵³¹; on the other hand, the elements adopted with regard to article 8 para. 2 (c) (iv) require that the court involved 'did not afford the essential guarantees of independence or impartiality, or [...] did not afford all other judicial guarantees generally recognized as indispensable under international law'. Article 8 para. 2 (c) (iv) guarantees certain minimum due process rights before either a sentence is passed or an execution against a person protected by article 8 para. 2 (c) takes place.
- 905 The provision does, however, generally leave intact the right of the established authorities to prosecute, try and eventually also punish, both members of armed forces and civilians, who may have committed an offence related to the ongoing internal armed conflict¹⁵³².
- 906 The sentences pronounced may include capital punishment where provided for in the respective domestic law and where not prohibited by treaty law. Unlike article 6 of Add. Prot. II, common article 3 [and accordingly neither article 8 para. 2 (c)] does not, as such, prohibit the pronouncement of the death penalty upon persons under the age of 18. Still, under certain specific circumstances, the death penalty might still amount to cruel treatment under article 8 para. 2 (c) (i)¹⁵³³ and might thus constitute a crime under the Statute¹⁵³⁴.
- 907 The term 'regularly constituted court' appears in both common article 3 as well as in article 75 para. 4 of Add. Prot. I¹⁵³⁵. Given the fact that the Statute, unlike the chapeau of article 6 para. 2 of Add. Prot. II, has *verbatim* retained the language of common article 3, also non-governmental armed groups are, notwithstanding the problems involved¹⁵³⁶, bound to set up 'regularly constituted Courts' before a sentencing might take place, thereby prohibiting special courts set up on an *ad hoc*-basis¹⁵³⁷.

¹⁵²⁶ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-A, Judgment, Appeals Chamber, 26 October 2009, para. 598.

¹⁵²⁷ See Sivakumaran (2010) 8 *JICJ* 1009, 1032.

¹⁵²⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-A, Judgment, Appeals Chamber, 26 October 2009, para. 597; See also Sivakumaran (2010) 8 *JICJ* 1009, 1033.

¹⁵²⁹ Since a court of law is normally constituted of several persons, a footnote added to element 1 with regard to article 8 para. 2 (c) (iv) clarifies that the term '[t]he perpetrator' as used in the elements of crimes does not address the different forms of individual criminal responsibility as regulated by articles 25 and 28 of the Statute'.

¹⁵³⁰ See Dörmann, *article 8 para. 2 (a) (vi), passim*.

¹⁵³¹ For further details see Dörmann, *article 8 para. 2 (a) (vi)*.

¹⁵³² Sandoz *et al.* (eds.), *Commentary* (1987), mn 4597.

¹⁵³³ See in particular the decision of the European Court of Human Rights in the Soering case, *Soering v. United Kingdom*, Ser. A, No. 161.

¹⁵³⁴ Triffterer, *Preliminary Remarks*, in: Triffterer (ed.), *Commentary on the Rome Statute* (2nd edition 2008) mn 76, fn. 120, holds with reference to article 80 the opinion that the death penalty as such cannot constitute such a crime.

¹⁵³⁵ See also article 66 GC IV which refers to 'properly constituted Courts'.

¹⁵³⁶ Sandoz *et al.* (eds.), *Commentary* (1987), mn 4600; Sivakumaran (2009) 7 *JICJ* 489.

¹⁵³⁷ Gasser, in: Fleck (ed.), *Handbook* (2008) mn 576.

The Courts called upon to pronounce sentences must afford all judicial guarantees which are generally recognised as indispensable. This formula by using the term ‘indispensable’ seems to be less broad than the one contained in article 75 para. 4 of Add. Prot. I, which more generally refers to ‘generally recognised principles of regular judicial procedure’. The wording of the chapeau of article 6 para. 2 of Add. Prot. II is *mutatis mutandis* identical to common article 3¹⁵³⁸ (and thus also to article 8 para. 2 (c) (iv) of the Statute). Therefore, one can argue that the *minimum* list of essential guarantees contained in article 6 para. 2 (a)–(f) of Add. Prot. II¹⁵³⁹ also applies to article 8 para. 2 (c) (iv) of the Statute. This is true notwithstanding the fact that a Swiss/Hungarian/Costa Rican proposal¹⁵⁴⁰ to include a specific list of indispensable guarantees in the elements of crimes was not accepted since the rejection of this list was not based on the non-acceptance of the guarantees listed, but was rather based on the idea that such an illustrative list could suggest that rights omitted were not indispensable, that there could be a discrepancy between the proposed list and those guarantees contained in the Statute itself, and finally that violation of just one guarantee might not necessarily constitute a war crime¹⁵⁴¹. With regard to the latter concern, a footnote accompanying the elements of crimes provides that ‘the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial’¹⁵⁴². This does not preclude, however, that depending on the circumstances the denial of one single guarantee might not in itself amount to a violation of this provision¹⁵⁴³.

IV. Article 8 para. 2(d): scope of application of article 8 para. 2 (c)

Literature: See Preliminary remarks on para. 2 (c)–(f) and para. 3.

1. Existence of a non-international armed conflict

The first part of article 8 para. 2 (d) simply repeats the requirement already contained in article 8 para. 2 (c) that a non-international armed conflict must exist before that last provision becomes applicable¹⁵⁴⁴. Article 8 para. 2 (d) therefore limits the jurisdiction of the Court, a fact that is further confirmed by the introduction to the war crimes section of the elements of crimes adopted under article 9 of the Statute¹⁵⁴⁵. Said introduction specifically provides that ‘[t]he elements for war crimes under article 8 para. 2 (c) and (e) are subject to the limitations addressed in article 8 para. 2 (d) and (f), which are not elements of crimes’. Accordingly the Preparatory Commission drafting the elements of crimes did not discuss the meaning and content of article 8 para. 2 (d).

2. Exclusion of situations of internal disturbances and tensions

The first and the second part of the provision are linked by the word ‘thus’ (‘donc’ in the French version). The Statute thereby, similar to the last words of article 1 para. 2 of Add. Prot. II, reaffirms that any internal conflict, in order to qualify under the Statute as an ‘armed

¹⁵³⁸ Bothe *et al.* (eds.), *New Rules* (1982) 650: ‘... preamble of para. 2 [of article 6 Add. Prot. II] is taken over from common article 3 para. 1 (d) with *minor drafting changes*’ (emphasis added).

¹⁵³⁹ For detailed comments on that list Bothe *et al.* (eds.), *New Rules* (1982) 651–652 as well as ICRC *Commentary*, mn 4602–4610.

¹⁵⁴⁰ PCNICC/1999/WGEC/Dp. 10, 19 July 1999.

¹⁵⁴¹ Dörmann, *Elements of War Crimes* (2003) 409.

¹⁵⁴² See note 59 accompanying element 4 adopted with regard to article 8 para. 2 (c) (iv).

¹⁵⁴³ Dörmann, *Elements of War Crimes* (2003) 409.

¹⁵⁴⁴ For details see already above Zimmermann and Geiß, *article 8 para. 2 (c)*, mn 833 *et seq.*

¹⁵⁴⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 225.

conflict not of an international character’, must be above the lower threshold contained in the second half of that phrase.

- 911 The threshold was literally taken over from article 1 para. 2 of Add. Prot. II with the sole exception that the last ‘and’ was replaced by an ‘or’. This seems, however, to simply constitute a technical error which was not supposed to have any substantive impact on the interpretation of the provision. Accordingly one can, in order to interpret that provision, largely draw from the *travaux préparatoires* and the interpretation of that provision¹⁵⁴⁶.
- 912 It is submitted that the pure notion of ‘armed conflict’, as defined above¹⁵⁴⁷, would have in itself been sufficient to remove the situations referred to in the second part of article 8 para. 2 (d) from falling within the scope of application of article 8. This was confirmed in the *Akayesu* judgement where the ICTR stated that the ‘term armed conflict in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent [and that] [t]his consequently rules out situations of internal disturbances and tensions’¹⁵⁴⁸. Thus, this last part of the provision is mainly of a declaratory and illustrative nature.
- 903 The notion of ‘internal disturbances and tensions’ is not defined in article 8 para. 2 (d). Instead the provision simply contains a non-exhaustive list of examples which might however serve as guidance in order to determine the existence of internal disturbances and tensions. Generally speaking, one might say that internal disturbances exist when a State uses armed force to maintain order without that use of force amounting to an armed conflict. Internal tensions might be said to exist when such force is used as a preventive measure¹⁵⁴⁹.
- 914 The ICTY has held that situations of ‘civil unrest’ and ‘terrorist activities’ do not amount to an armed conflict¹⁵⁵⁰. Within the context of the Statute of the ICC, the latter exclusion is further confirmed by the fact that the Rome Conference had deliberately decided to exclude terrorist acts from the jurisdiction of the ICC¹⁵⁵¹ notwithstanding the fact that terrorist acts might, depending on the circumstances and in particular their scale, constitute crimes against humanity.

V. Other serious violations of the laws and customs applicable in armed conflicts not of an international character

Literature: See Preliminary remarks on para. 2 (c)–(f) and para. 3.

- 915 It must be considered one of the main positive results of the Rome Statute that the provisions on war crimes committed in internal armed conflict were not limited to violations of common article 3, but that they also extent to other serious violations of the laws and customs of war¹⁵⁵², especially since Add. Prot. II had at the time of its drafting not yet retained the concept of grave breaches.
- 916 The wording of the chapeau of article 8 para. 2 (e) is, apart from the replacement of the words ‘in international armed conflicts’ by the words ‘in armed conflicts not of an international character’, identical to the wording of the chapeau of article 8 para. 2 (b), reference to which is therefore made¹⁵⁵³.

¹⁵⁴⁶ See in that regard in particular Sandoz *et al.* (eds), *Commentary*, mn 833 *et seq.*

¹⁵⁴⁷ Zimmermann and Geiß, *article 8 para. 2 (c)*, mn 260.

¹⁵⁴⁸ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 620; see also Situation in the Central African Republic in the Case of: *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 230.

¹⁵⁴⁹ Sandoz *et al.* (eds), *Commentary* (1987), mn 4477.

¹⁵⁵⁰ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 185. See also for further references Zimmermann and Geiß, *article 8, para. 2 (c)*, mn 833 *et seq.*

¹⁵⁵¹ For details see Zimmermann, *article 5*, mn 4.

¹⁵⁵² For details of the extent of that inclusion see Zimmermann and Geiß, *Preliminary Remarks on para. 2 (c)–(f) and para. 3: War crimes committed in an armed conflict not of an international character*, mn 833 *et seq.*

¹⁵⁵³ See Dörmann, *chapeau to article 8 para. 2 (b), para. 180*.

1. Paragraph 2(e)(i): Attacks against the civilian population

Literature: See article 8 para. 2 (b) (i).

The prohibition to direct attacks against the civilian population as such as well as against individual civilians is already contained in article 13 para. 2 of Add. Prot. II of 1977. Besides, both article 8 para. 2 (e) (i) of the Statute as well as the respective elements of crimes adopted in that regard are identical in wording to the parallel provision contained in article 8 para. 2 (b) (i) and the elements adopted thereto, reference to which can accordingly be made¹⁵⁵⁴. 917

It should be noted, however, that the closely linked prohibition not to direct attacks against civilian *objects* which, as far as *international* armed conflicts are concerned, is contained in article 8 para. 2 (b) (ii) of the Statute, is not reflected in the part on serious violations of the laws and customs of war committed in *internal* armed conflict. This is mainly due to the fact that a provision similar in nature to article 52 para. 1 of Add. Prot. I is lacking in Add. Prot. II and that accordingly the customary law nature of such a prohibition in *internal* armed conflict seemed to be doubtful. 918

Article 8 para. 2 (e) (i) of the Statute does not require that the civilian population is the sole and exclusive target of the attack¹⁵⁵⁵. In this regard ICC Chambers distinguish two scenarios, namely (i) when individual civilians not taking direct part in the hostilities or the civilian population are the sole target of the attack or (ii) when the perpetrator launches the attack with two distinct specific aims: (a) a military objective, within the meaning of articles 51 and 52 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (‘the AP I’); and simultaneously, (b) the civilian population or individual civilians not taking direct part in the hostilities¹⁵⁵⁶. However, the Chamber in the *Mbarushimana* decision pointed out that this latter scenario must be distinguished from disproportionate attacks in violation of the principle of proportionality in which case the targeting of the civilian population is not the aim of the attack but an incidental consequence thereof¹⁵⁵⁷. 919

With respect to the notion of direct participation in hostilities the Chamber in the *Mbarushimana* decision, like the Chamber in the *Abu Garda* decision, noted that neither a customary nor treaty law definition of this notion exists, but that the ICRC’s study on the direct participation in hostilities provided useful guidance¹⁵⁵⁸. Nevertheless, the Chamber adopted a rather restrictive interpretation of what amounts to a direct participation in hostilities and noted that loss of protection ‘is *only* clear when a civilian uses weapons or other means to commit violence against human or material enemy forces, unless in self-defence¹⁵⁵⁹. Moreover, the Chamber pointed out that ‘practice indicates that supplying food and shelter and sympathizing with one belligerent party is an insufficient reason to deny civilians protection against attack¹⁵⁶⁰. Although the Chamber in the *Mbarushimana* case referred to the ICRC’s study as ‘useful guidance’, it is not clear whether it intended to approve of the ICRC’s approach according to which all members of an organized armed group who have a ‘continuous combat function¹⁵⁶¹ no longer qualify as civilians. 920

The Chambers statement that ‘a civilian population comprises all civilians as opposed to members of armed forces and *any other legitimate* combatants’ is ambiguous because the 921

¹⁵⁵⁴ See Dörmann, *article 8 para. 2 (b) (i) and Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 265 *et seq.*

¹⁵⁵⁵ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the confirmation of charges, Pre-Trial Chamber I, 16 December 2011, para. 142.

¹⁵⁵⁶ *Ibid.*; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, paras. 272, 273.

¹⁵⁵⁷ *Ibid.*

¹⁵⁵⁸ *Ibid.*, para. 148.

¹⁵⁵⁹ *Ibid.*

¹⁵⁶⁰ *Ibid.*

¹⁵⁶¹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 27.

reference to ‘members of armed forces’ is not necessarily to be equated only with members of (regular) state armed forces and could also be said to comprise the armed forces of a non-state party to the conflict. However, the reference to ‘any other *legitimate* combatants’ rather militates in favour of a narrow understanding of the wording ‘members of armed forces’, *i. e.* one which only comprises legitimate combatants of the State’s regular armed forces. However, such an approach would lead to the result that in a non-international armed conflict the non-state party’s armed forces would continue to qualify as civilian and would therefore remain part of the civilian population. This, however, is contrary to the basic tenet of the principle of distinction and it is for this reason that the better view is to qualify those members of organized armed groups who have a continuous combat function, for the purposes of the conduct of hostilities, as ‘fighters’ without civilian status¹⁵⁶².

2. Paragraph 2(e)(ii): Attacks against installations and personnel using the distinctive emblems

Literature: See article 8 para. 2 (b) (xxiv).

922 Article 11 para. 1 of Add. Prot. II prohibits to direct attacks against medical units and transports. Besides, article 12, second phrase of Add. Prot. II contains the obligation to respect the distinctive emblem of the Geneva Conventions. This basic obligation now forms the object of article 8 para. 2 (e) (ii) of the Statute, also providing for individual criminal responsibility in times of internal armed conflict.

923 Article 8 para. 2 (e) (ii) of the Statute is identical in wording to the parallel provision contained in article 8 para. 2 (b) (xxiv), reference to which can accordingly be made¹⁵⁶³. The same is true with regard to the respective elements of crimes which are also identical.

3. Paragraph 2(e)(iii): Attacks against United Nations and associated personnel

Literature: See article 8 para. 2 (b) (iii) and Emanuelli, C.C., ‘The Protection afforded to Humanitarian Assistance Personnel under the Convention on the Safety of United Nations and Associated Personnel’, (1996) *HuV-I* 4; Kirsch, P., ‘The Convention on the Safety of United Nations and Associated Personnel’, (1995) *International Peacekeeping* 102; Lepper, S. J., ‘War crimes and the protection of peacekeeping forces’, (1995) *AkronLRev* 411; Weiner, R. O. and Ni, A.F., ‘Beyond the laws of war: peacekeeping in search of a legal framework’, (1996) *ColHumRtsLRev* 293; Bangura, M. A., ‘Prosecuting the crime of attack on peacekeepers: A Prosecutor’s challenge’, (2010) 23 *LeidenJIL* 165–181.

924 The inclusion of both, article 8 para. 2 (b) (iii) and (e) (iii) of the Statute, is closely linked to the non-inclusion of violations of the Convention on the Safety of United Nations and Associated Personnel into the Statute¹⁵⁶⁴. It is largely based on, although not identical to, a proposal submitted to the Rome Conference by Spain¹⁵⁶⁵.

925 Both provisions, *i. e.* article 8 para. 2 (b) (iii) and (e) (iii), are identical in wording. Reference is therefore made to the commentary on article 8 para. 2 (b) (iii)¹⁵⁶⁶. It has to be noted, however, that the original text, as adopted at the Rome Conference, had still referred in article 8 para. 2 (e) (iii) to the protection granted to peace-keeping operations and related missions ‘under the law of armed conflict’, as compared to the current version which refers to the protection given ‘under the international law of armed conflict’¹⁵⁶⁷.

926 In the *Garda* decision, the Pre-Trial Chamber I, with respect to the question whether a given mission constitutes a peacekeeping mission, absent any specific legal basis in the UN Charter, noted three characteristic principles for a mission to qualify as a peacekeeping

¹⁵⁶² *Ibid.*

¹⁵⁶³ See Arnold and Wehrenberg, *article 8 para. 2 (b) (xxiv)*.

¹⁵⁶⁴ See Zimmermann, *article 5*, mn 3.

¹⁵⁶⁵ UN Doc A/CONF.183/C.1/L.1.

¹⁵⁶⁶ See Cottier and Baumgartner, *article 8 para. 2 (b) (iii)*.

¹⁵⁶⁷ See *Corrections to the Rome Statute of the International Criminal Court*, UN Doc C.N.777.1998. TREATIES-8 (Annex).

mission, ‘namely (i) consent of the parties; (ii) impartiality; and (iii) the non-use of force except in self-defence’¹⁵⁶⁸.

Moreover, the Majority in the *Garda* decision concluded that with respect to article 8 para. 2 (e) (iii) of the Statute, personnel involved in peacekeeping missions enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities and that such protection does not cease if such persons only use armed force in exercise of their right to self-defence¹⁵⁶⁹. 927

The Chamber also noted the non-exhaustive list of criteria established by the Special Court for Sierra Leone in the *RUF* case in order to determine whether peacekeeping personnel were entitled to protection¹⁵⁷⁰. The criteria referred to by Trial Chamber I of the Special Court for Sierra Leone were: ‘(a) the relevant Security Council resolutions for the operation; (b) the role and practices actually adopted by the peacekeeping mission during the particular conflict; (c) their rules of engagement and operational orders; (d) the nature of the arms and equipment used by the peacekeeping force; (e) the interaction between the peacekeeping force and the parties involved in the conflict, (f) any use of force between the peacekeeping force and the parties in the conflict, and (g) the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel’¹⁵⁷¹. This list was confirmed by the Appeals Chamber, which noted that out of these criteria, ‘the most important are those that relate to the facts on the ground, in particular, any use of force by the peacekeeping mission’¹⁵⁷². Indeed, it seems that the indicative criteria set up by the Trial Chamber of the Special Court for Sierra Leone at least in part conflate the issue of whether a mission qualifies as a peacekeeping mission and whether personnel involved in such a mission enjoys protection from attack. As far as the latter issue, i.e. loss of protection due to a direct participation in hostilities, is concerned, it is difficult to see what relevance a Security Council Resolution could have in this regard. Therefore, in accordance with the Appeals Chamber, the focus should be exclusively on those criteria that relate to the facts on the ground. 928

With respect to the protection of civilian objects in non-international armed conflict, the Chamber in the *Garda* decision took note of the absence of a war crime equivalent to article 8 para. 2 (b) (ii) in the catalogue of crimes pertaining to non-international armed conflict¹⁵⁷³. However, in view of the customary law character of the definition contained in article 52 para. 2 of Add. Prot. I, which also applies to non-international armed conflicts¹⁵⁷⁴, the Majority concluded that ‘installations, material, units or vehicles involved in a peacekeeping mission in the context of an armed conflict not of an international character shall not be considered military objectives, and thus shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’¹⁵⁷⁵. 929

¹⁵⁶⁸ Situation in Darfur, Sudan in the Case of: *Prosecutor v. Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 71. Notably, the Majority’s legal interpretation of each of the elements of the crime provided for in article 8(2)(e)(iii) of the Statute in the *Abu Garda* decision in paragraphs 64–94 was confirmed in *Prosecutor v. Nourain and Jamus*, ICC-02/05-03/09, Decision on the confirmation of charges, Pre-Trial Chamber I, 7 March 2011, para. 61.

¹⁵⁶⁹ *Ibid.*, para. 83. See also: *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-A, Judgment, Appeals Chamber, 26 October 2009, para. 530.

¹⁵⁷⁰ *Ibid.*, para. 84.

¹⁵⁷¹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgement, Trial Chamber I, 2 March 2009, para. 234.

¹⁵⁷² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-A, Judgment, Appeals Chamber, 26 October 2009, para. 529.

¹⁵⁷³ *Prosecutor v. Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 85.

¹⁵⁷⁴ Henckaerts and Doswald-Beck, *Customary*, i (2009) 25–36; the ICTY Appeals Chamber reached the same conclusion in following cases: *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 59 and *Prosecutor v. Galić*, IT-98-36-T, Appeal Judgment, 30 November 2006, para. 190.

¹⁵⁷⁵ *Prosecutor v. Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 89.

- 930 With respect to the *mens rea* the Chamber in the *Garda* decision confirmed that the Chamber's findings in the *Katanga* decision also apply to article 8 para. 2 (e) (iii) and that therefore, 'in addition to the standard *mens rea* requirement provided in article 30 of the Statute, the perpetrator must intend to make individual civilians not taking direct part in the hostilities or the civilian population the object of the attack. This offence therefore; first and foremost, encompasses *dolus directus* of the first degree'¹⁵⁷⁶.
- 931 Finally, in the *Garda* decision the Majority was of the view that the fifth element of the Elements of Crimes relating to article 8 para. 2 (e) (iii) of the Statute 'excludes the defence of mistake of law provided for in article 32 of the Statute, as only knowledge in relation to facts establishing that the installations, material, units or vehicles and personnel were involved in a peacekeeping mission is necessary, and not legal knowledge pertaining to the protection thereof'¹⁵⁷⁷.

4. Paragraph 2(e)(iv): Attacks against cultural objects, places of worship and similar institutions

Literature: See article 8 para. 2 (b) (ix).

- 932 Even in times of internal armed conflict, cultural objects as well as places of worship are already protected under article 16 of Add. Prot. II of 1977. Besides, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict also applies. It must, however, be considered a novelty that such behaviour, even when committed in non-international armed conflicts, is considered a war crime, even more since new elements, such as the protection of buildings dedicated to education, were added.
- 933 The wording of article 8 para. 2 (e) (iv) of the Statute (and indeed the elements of crimes adopted in that regard) is identical to the wording of sub-paragraph b (ix) (respectively to the wording of the elements of crimes adopted concerning article 8 para. 2 (b) (ix)), reference to which can accordingly be made¹⁵⁷⁸.

5. Paragraph 2(e)(v): Pillage

Literature: See article 8 para. 2 (b) (xvi).

- 934 The wording of the prohibition of pillage contained in article 8 para. 2 (e) (v) of the Statute was drawn from article 28 of the Regulations Concerning the Laws and Customs of War on Land annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.¹⁵⁷⁹ Such prohibition is also contained in article 4 para. 2 (g) of Add. Prot. II of 1977. In the *Jerbo* decision the Chamber recalled that '[a]ccording to the Elements of Crimes, for a conduct to constitute the crime provided for under article 8 para. 2 (e) (v) of the Statute, the following objective elements are required: (i) the perpetrator appropriated certain property; and (ii) the appropriation was without the consent of the owner'¹⁵⁸⁰. In the *Bemba* decision the Chamber observed that article 8 para. 2 (e) (v) of the Statute 'entails a somewhat large-scale appropriation of all types of property, such as public or private'¹⁵⁸¹, movable or immovable property, which goes beyond mere sporadic acts of violation of property rights'¹⁵⁸². The

¹⁵⁷⁶ *Ibid.*, para. 93; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 271.

¹⁵⁷⁷ *Prosecutor v. Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 94.

¹⁵⁷⁸ See Arnold and Wehrenberg, *article 8 para. 2 (b) (ix)*.

¹⁵⁷⁹ Ambos, *Treatise on ICL II* (2014) 169.

¹⁵⁸⁰ *Prosecutor v. Nourain and Jamus*, ICC-02/05-03/09, Decision on the confirmation of charges, Pre-Trial Chamber I, 7 March 2011, para. 111. See also *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 452.

¹⁵⁸¹ See also *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 453.

¹⁵⁸² *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 317. With regard to article 8 para. 2

Chamber further observed that a ‘certain monetary value’ of the property at issue is not required but that in view of the Court’s mandate set out in article 1 of the Statute and the formulation ‘other serious violations’ in article 8 para. 2 (e), ‘cases of petty property expropriation may not fall under the scope of article 8 para. 2 (e) (v) of the Statute’ and that the seriousness of the violation in question has to be assessed in light of the particular circumstances of the case.

In the *Taylor* judgment the Trial Chamber pointed out that ‘the perpetrator must have specifically intended to deprive the owner of the property and to appropriate it for private or personal use’¹⁵⁸³. In the *Taylor* judgment Trial Chamber II of the Special Court for Sierra Leone further held that the crime of pillage ‘[...] covers both organised or systematic appropriation and the isolated acts of individuals’¹⁵⁸⁴.

The wording of article 8 para. 2 (e) (v) of the Statute is identical to the wording of article 2 para. 2 (b) (xvi), reference to which can accordingly be made¹⁵⁸⁵. Identical considerations also apply with regard to the respective elements of crimes adopted by the Assembly of States Parties.

6. Paragraph 2(e)(vi): Rape and other forms of sexual violence

Literature: See article 8 para. 2 (b) (xxii) and Healey, S. A., ‘Prosecuting Rape under the Statute of the War Crimes Tribunal for the former Yugoslavia,’ (1995) 21 *BrookJIL* 2, 327; Meron, T., ‘Rape as a Crime under International Humanitarian Law’, (1993) 87 *AJIL* 424; Maedl, A., ‘Rape as weapon of war in the eastern DRC? The victim’s perspective’, (2011) 33 *HumRtsQ*. 128–147.

The wording of article 8 para. 2 (e) (vi) is, *mutatis mutandis*, identical to the wording of article 8 para. 2 (b) (xxii) to which can accordingly be made¹⁵⁸⁶.

In its decision of 15 June 2009 in the *Bemba* case Pre-Trial Chamber II found that the victims ‘were raped, by force, or by threat of force or coercion’¹⁵⁸⁷. The ICTY and ICTR, as well as the Special Court for Sierra Leone, all have held that ‘[f]orce or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape’¹⁵⁸⁸.

It has to be noted, however, that as far as forms of sexual violence other than rape are concerned, reference is made – unlike in the case of international armed conflicts, where reference is made to those acts also constituting grave breaches of the Geneva Conventions – to common article 3. Accordingly the elements of crimes adopted with regard to article 8 para. 2 (e) (vi), which are otherwise identical to the ones adopted with regard to article 8 para. 2 (b) (xxii), also differ in that regard.

The last phrase brings ‘any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions’ within the jurisdiction of the ICC¹⁵⁸⁹. It has to be understood as meaning that acts of sexual violence other than rape, sexual slavery, enforced sterilisation and enforced prostitution committed in internal armed conflict would only come within the jurisdiction of the ICC if, and to the extent, that they

(b) (xvi) see also *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, paras. 329–331.

¹⁵⁸³ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 319; See also *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 331, albeit with respect to article 8 para. 2 (b) (xvi); *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 452.

¹⁵⁸⁴ *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 453.

¹⁵⁸⁵ See Zimmermann and Geiß, article 8 para. 2 (b) (xvi), *passim*.

¹⁵⁸⁶ See Cottier and Mzee, article 8 para. 2 (b) (xxii).

¹⁵⁸⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision pursuant to article 61 (7) (a) and (b) of the Rome Statute on the charges of the Prosecutor, Pre-Trial Chamber II, 18 September 2009, para. 286.

¹⁵⁸⁸ *Prosecutor v. Tharcisse Renzaho*, ICTR-97-31-T, Judgment, Trial Chamber I, 14 July 2009, para. 791; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Judgment, Trial Chamber, 18 December 2008, para. 2199; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, para. 129; *Prosecutor v. Sesay, Kallon and Gbao*, see note 312, para. 147.

¹⁵⁸⁹ Ambos, *Treatise on ICL II* (2014) 168; Werle and Jessberger, *Principles* (2014) 442.

also constitute by the same token a serious violation of common article 3¹⁵⁹⁰. This interpretation of the relevant formula is confirmed by the use of the term ‘also’, as well by the very fact that the second alternative ‘any other form of sexual violence’ is separated by a comma from the other alternatives, thus making it clear that the additional formula ‘constituting a serious violation of article 3 common to the four Geneva Conventions’ has to be understood as a qualifying element.

- 941 The formula, by using the word ‘also’, further confirms, if need existed, that the *specific* acts listed in article 8 para. 2 (e) (vi) of the Statute, *i.e.* rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization, all *per se* constitute serious violations of common article 3¹⁵⁹¹.

7. Paragraph 2(e)(vii): Recruitment of children

Literature: See article 8 para. 2 (b) (xxvi).

- 942 The main idea underlying article 8 para. 2 (e) (vii) of the Statute can already be found, although in a somewhat modified way, in article 4 para. 3 (c) of Add. Prot. II as well as in article 38 paras. 2 and 3 of the United Nations Convention on the Rights of the Child.
- 943 The wording of article 8 para. 2 (e) (vii) of the Statute is similar to the wording of article 8 para. 2 sub-para. b (xxvi), reference to which can accordingly be generally made¹⁵⁹². One main difference in the wording of these provisions, however, has to be noted: in the case of an international armed conflict according to article 8 para. 2 (b) (xxvi) only the conscription or enlistment of children into *national* armed forces constitutes a crime. In contrast thereto, in case of an armed conflict not of an international character, the prohibition of conscription or enlistment of children by virtue of the wording of article 8 para. 2 (e) (vii) extends to all *armed forces* article 8 para. 2 (e) (vii) speaks of enlisting children under the age of fifteen years ‘into armed forces or groups’. Besides, given the specificities of internal armed conflict, the conscription or enlistment of children into *armed groups* is similarly punishable.
- 944 In light of this textual difference the respective elements of crimes, which otherwise are identical, also differ in that regard. It must be noted, however, that Pre-Trial Chamber I in the *Lubanga* decision of 29 January 2007 leveled out this textual difference in the wording of article 8 para. 2 (b) (xxvi) and 8 para. 2 (e) (vii) by holding that under article 8 para. 2 (b) (xxvi) of the Statute, the term ‘national armed forces’ is not limited to the armed forces of a State¹⁵⁹³. This interpretation of the term ‘national armed forces’ was confirmed in the *Katanga* decision of 26 September 2008¹⁵⁹⁴. In *Lubanga* the Chamber referred to article 43 of Add. Prot. I and its commentary as well as article 1 of the 1907 Hague Regulations concerning the laws and customs of war and rightly noted that, in the context of an international armed conflict, Add. Prot. I does not require that the armed forces be governmental forces¹⁵⁹⁵. Moreover, the

¹⁵⁹⁰ See already Zimmermann (1998) *MPYbUNL* 194–195. But see also Hall, in: Lattanzi (ed.), *Comments* (1998) 33, who seems to take a different view.

¹⁵⁹¹ See in that regard in particular the decision of the Trial Chamber in the *Čelebići* case, which found that rape does, under certain circumstances, constitute torture, (*Prosecutor v. Delalić*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 496) and *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 597 and thus also constitute a violation of paragraph 1 (a) of common article 3. See also the findings of the Inter-American Commission on Human Rights, *Fernando and Raquel Mejía v. Peru*, (Report No. 5/96, Case 10970, (1995) *Ann. Report of the Inter-American Comm. on Hum. Rts.* 157 as well as of the European Court of Human Rights, *Aydın v. Turkey*, Judgment of 25 September 1997, para. 86), which have determined that rape of women by state organs constitutes a specific form of torture; see finally also the report of the Special Rapporteur of the Commission on Human Rights, UN Doc E/CN.4/1995/34, para. 18, where the Special Rapporteur refers to the fact that rape constitutes a specific traumatic form of torture.

¹⁵⁹² See Arnold and Wehrenberg, *article 8 para. 2 (b) (xxvi)*.

¹⁵⁹³ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 285.

¹⁵⁹⁴ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 249.

¹⁵⁹⁵ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 272.

Chamber considered whether the adjective ‘national’ qualifying the term ‘armed forces’ implies a limitation to governmental armed forces. It relied on the jurisprudence of the ICTY¹⁵⁹⁶, which has accorded the term ‘national’ as it is found in article 4 para. 1 of the Fourth Geneva Convention a wider meaning beyond mere nationality and held that ‘interpreting the term ‘national’ to mean ‘governmental’ can only undermine the object and purpose of the Statute of the Court, which is none other than to ensure that ‘the most serious crimes of concern to the international community as a whole’ must no longer go unpunished¹⁵⁹⁷.

Unfortunately, however, the Chamber did not consider at all why the drafters of the Statute had introduced this textual difference in articles 8 para. 2 (b) (xxvi) and para. 2 (e) (vii) in the first place. Given that a parallel interpretation of the word ‘national’ in article 4 para. 1 of the Fourth Geneva Convention and in article 8 para. 2 (b) (xxvi) of the Rome Statute is certainly not compelling, the argumentation is primarily supported by the overall object and purpose to punish most serious crimes. This is also reflected in the concluding remark of the Chamber according to which ‘it would be absurd that Thomas Lubanga Dyilo could incur criminal responsibility for the crime of enlisting or conscripting children under the age of fifteen years only in the context of an internal armed conflict solely because the FPLC, as an armed force, could not be described as a ‘national armed force’ within the meaning of article 8 para. 2 (b) (xxvi) of the Statute’¹⁵⁹⁸. Of course, the textual difference between articles 8 para. 2 (b) (xxvi) and para. 2 (e) (vii) of the Statute marks a rare instance in which – at least in view of the different wording – the ambit of criminalized behaviour is wider in relation to non-international armed conflicts than it is with respect to international armed conflicts. The Chamber in *Lubanga* has levelled out this difference largely on the basis of the object and purpose of the Rome Statute not to let serious offences go unpunished.

As desirable as such an equalization-approach appears, such a line of argumentation, without at least giving due regard to the original intention of the drafters of the Rome Statute, is problematic. After all, the very same logic could be used to level out other intentional differences between the criminalization of behaviour in international and non-international armed conflicts. Against this background the Trial Chamber in its *Lubanga* judgment spoke of a ‘significant difference in wording’ between article para. 2 (b) (xxvi) and article para. 2 (e) (vii)¹⁵⁹⁹ and emphasized that despite all tendencies towards the assimilation of international and non-international armed conflicts the Court must heed the distinction contained in the Rome Statute and that ‘[t]he Chamber does not have the power to reformulate the Court’s statutory framework’¹⁶⁰⁰. Judge Benito, however, in her separate and dissenting opinion followed the reasoning of the Pre-Trial Chamber arguing that ‘It would be contrary to the ‘object and purpose’ of the Rome Statute and contrary to internationally recognised human rights (and thus contrary to Article 21(3) of the Rome Statute) to exclude from the prohibition of child recruitment, and armed group, solely for the nature of its organization (State or non-state armed group)’¹⁶⁰¹.

Since the Statute does not limit the prohibition of enlistment and conscription to the national or regular armed forces of a given State, it has to be understood as embracing all organized governmental armed forces, groups and units including, where applicable, those formations of the armed forces not included in the definition of the army under the domestic legislation of that State¹⁶⁰², but still enjoying combatant status.

¹⁵⁹⁶ *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, para. 166.

¹⁵⁹⁷ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 281.

¹⁵⁹⁸ *Ibid.*, para. 284.

¹⁵⁹⁹ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 568.

¹⁶⁰⁰ *Ibid.*, para. 539.

¹⁶⁰¹ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, para. 13.

¹⁶⁰² See for a similar definition of the notion of ‘armed forces’ in article 1 para. 1 Add. Prot. II, Sandoz *et al.* (eds.), *Commentary* (1987) mn 4462.

948 Given the fact that article 8 para. 2 (f) limits the scope of application of article 8 para. 2 (e) of the Statute to situations in which *organized* armed groups are involved, the notion of ‘groups’ as contained in article 8 para. 2 (e) (vii) has to be similarly limited to such groups, *i. e.* armed groups, which possess a minimum of organization. In this regard the Special Court for Sierra Leone has ruled that the elements of ‘armed forces or groups’ entail that the armed forces or groups must be under responsible command, which entails a degree of organization which should be such as to enable the armed groups to plan and carry out concerted military operations and to impose discipline within the armed group¹⁶⁰³. On the other hand since neither article 8 para. 2 (e) (vii) nor article 8 para. 2 (f) of the Statute mention the further requirements which are otherwise to be found in article 1 para. 1 of Add. Prot. II, such as in particular the exercise of territorial control and the requirement of being under responsible command, they do not form part of the elements to be proven as far as the second alternative of article 8 para. 2 (e) (vii) is concerned.

949 Moreover, it should be noted that the requirement of using children to participate actively in hostilities, at least with respect to non-international armed conflicts, is not to be equated with a direct participation in hostilities that may lead to a loss of protection from direct attack. The Special Court for Sierra Leone (Trial Chamber I) seems to assume that these notions are similar¹⁶⁰⁴. However, whereas the purpose of article 8 para. 2 (e) (vii) is the protection of children by describing the scope of what amounts to a prohibited use of children, direct participation in the realm of the conduct of hostilities pertains to the loss of protection from direct attack. Against this background it appears plausible in light of the object and purpose to better protect children in times of armed conflict to accord a wider meaning of the phrase ‘active participation in hostilities’ under international criminal law. Such a wider interpretation has been endorsed in the *Lubanga* judgment of March 2012¹⁶⁰⁵. This argument finds some support in the wording of article 4 (3) (c) of Add. Prot. II which, unlike the wording of article 77 para. 2 of Add. Prot. I regarding international armed conflicts, merely prohibits to allow children ‘to take part in hostilities’, while omitting the word ‘direct’¹⁶⁰⁶. From this it may be inferred that a wider meaning can be accorded to the notion of active participation in hostilities with respect to the war crime of using children for military activities linked to combat than it would have in the realm of the conduct of hostilities where direct participation in hostilities amounts to an exception to the general rule according to which civilians are protected from direct attacks and where accordingly it should be interpreted restrictively. Therefore, in *Lubanga* the trial chamber held that ‘[t]hose who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a *myriad of roles* that support the combatants’¹⁶⁰⁷. The decisive factor in deciding, therefore, if an ‘indirect’ role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a *potential target*¹⁶⁰⁸. In the *Taylor* judgment, the Trial Chamber II of the Special Court for Sierra Leone also referred to whether the ‘children would constitute legitimate military targets’¹⁶⁰⁹ and adopted a similar approach of assessing active participation on a case-by-case basis holding that: ‘[u]sing children to participate actively in the hostilities

¹⁶⁰³ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, Trial Chamber, 20 June 2007, para. 738.

¹⁶⁰⁴ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgement, Trial Chamber I, 2 March 2009, para. 1723. Notably, Trial Chamber II adopted a wider approach *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 444.

¹⁶⁰⁵ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 627.

¹⁶⁰⁶ Sivakumaran (2010) 8 *JICJ* 1019.

¹⁶⁰⁷ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 628 (emphasis added).

¹⁶⁰⁸ *Ibid.* (emphasis added). Judge Benito argued in favor of an even broader interpretation of the notion ‘to participate actively in hostilities’; *Prosecutor v. Lubanga Dyilo*, Separate and Dissenting Opinion Benito, ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, para. 15.

¹⁶⁰⁹ *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 1604.

encompasses putting their lives directly at risk in combat, but may also include participation in activities linked to combat such as carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields¹⁶¹⁰. On this basis the Chamber held that *inter alia* ‘the use of a child to guard a diamond mine put the child at sufficient risk to constitute illegal use of the child...’ given that the diamond mines in Sierra Leone were crucial sources of revenue for the warring parties¹⁶¹¹. Conversely, the Chamber held that the performance of domestic chores does not constitute active participation in hostilities¹⁶¹². Under international humanitarian law the terms direct participation and active participation in hostilities are synonymous¹⁶¹³. Therefore, a wide interpretation of the term ‘active participation’ in the context of article 8 para. 2 (e) (vii) potentially could have repercussions on the interpretation of the notion of direct participation in hostilities in other contexts, namely when a civilian’s loss of protection from direct attack is at issue. Such an overly wide interpretation of the criteria leading to the loss of protection of civilian persons, however, cannot be sustained. It would be contrary to the general rule according to which civilians are protected from direct attack.

8. Paragraph 2(e)(viii): Prohibition of forced movement of civilians

Literature: Fleck, D., ‘Kriegslisten und Perfidieverbot’, in: *id.* (ed.), *Beiträge zur Weiterentwicklung des humanitären Völkerrechts für bewaffnete Konflikte* (1973) 116; Geissler, N., *Der völkerrechtliche Schutz der internally displaced persons* (1999) in particular 111 *et seq.*; Gimmerthal, M., *Kriegslist und Perfidieverbot im Zusatzprotokoll vom 10. Juni 1977 zu den vier Genfer Rotkreuz-Abkommen von 1949* (1990) (*Zusatzprotokoll I*); Henckaerts, J.-M., ‘Deportation and transfer of civilians in time of war’, (1993) *VandJTransnatL* 469; Hofmann, R., ‘Internally displaced persons and das Völkerrecht’, in: U. Beyerlin *et al.* (eds.), *Recht zwischen Umbruch und Bewahrung – Festschrift für Rudolf Bernhardt* (1995) 417; *id.*, ‘International Humanitarian Law and the Law of Refugees and Internally Displaced Persons’, in: European Commission, *Law in Humanitarian Crises – How Can International Humanitarian Law Be Made Effective in Armed Conflicts?* (1995); Jasica, R., ‘Der Kombattantenbegriff in den Zusatzabkommen von 1977 zu den Genfer Abkommen von 1949’, in: W. Voigt (ed.), *Völkerrechtliche Beiträge der Tagungen der Justitiare und Konventionsbeauftragten des Deutschen Roten Kreuzes 1957–1989* (1995) 261; Lerner, N., ‘Ethnic cleansing’, in: Y. Dinstein (ed.), *War Crimes in International Law* (1996) 107; Meindersma, C., ‘Legal issues surrounding population transfers in conflict situations’, (1994) *NethILRev* 31; Melzer, N., *ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Law* (2009); Finucane, B., ‘Enforced disappearance as a crime under international law: A neglected origin in the laws of war’, (2010) 35 *YaleJIL* 171; Ott, L., *Enforced Disappearance in International Law* (2011); Geiß, R., ‘Ethnic Cleansing’, *MPEPIL* (2012, online version).

The wording of the prohibition of forced movement of civilians was literally taken, some 950 minor drafting changes notwithstanding, from article 17 para. 1, first sentence of Add. Prot. II¹⁶¹⁴, which in turn was derived from article 49 para. 2 of the Fourth Geneva Convention. As far as *international* armed conflicts are concerned, a similar prohibition can be found in article 8 para. 2 (b) (viii) of the Statute¹⁶¹⁵ which does not cover, however, the Party’s own nationals in national territory not occupied by an adverse Party.

As recent examples of internal armed conflicts have demonstrated, practices of so-called 951 ‘ethnic cleansing’ in order to facilitate in the future the domination of one ethnic group over another in a given area or in order to create a *fait accompli* for a future peace settlement, have become a common practice of many armed conflicts. Besides, the need for such a prohibition might arise, where similar policies are used in counter-insurgency operations in order to deprive guerrilla groups of the support they derive from the local population¹⁶¹⁶.

¹⁶¹⁰ Also *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber II, 18 May 2012, para. 444.

¹⁶¹¹ *Ibid.*, para. 1459.

¹⁶¹² *Ibid.*, para. 1411.

¹⁶¹³ Melzer, *Interpretive Guidance* (2009) 43.

¹⁶¹⁴ It has to be noted that the French text uses a slightly modified wording of article 17 para. 1 Add. Prot. II since it does not refer to ‘raisons militaires impératives’ but to ‘impératifs militaires’ which does not, however, entail a difference in substance as compared to the first mentioned provision.

¹⁶¹⁵ See Cottier and Baumgartner, *article 8 para. 2 (b) (viii)*.

¹⁶¹⁶ Bothe *et al.* (eds.), *New Rules* (1982) 691. For genocide by so-called ‘ethnic cleansing’ see Schabas, *article 6*, mn 19.

- 952 The use of the term ‘ordering’ makes it clear that only acts which are directly aimed at removing the respective civilian population from a given area are prohibited. Thus, other acts which do not possess such a character but which lead to the same result, such as the intentional starvation of the civilian population in order to force them to leave a certain area, are not prohibited by article 8 para. 2 (e) (viii) of the Statute. This is confirmed by the fact that an explicit prohibition to that effect had been part of the original proposal submitted by New Zealand and Switzerland¹⁶¹⁷, which was not retained. Such acts might, however, be covered by article 8 para. 2 (e) (iii) or (xii) of the Statute.
- 953 Violations of article 8 para. 2 (e) (viii) of the Statute cannot be solely committed by the person actually ordering a displacement, but by anybody whose individual criminal responsibility is engaged by virtue of articles 25 *et seq.*¹⁶¹⁸, notwithstanding the fact that element 3 of the elements of crimes adopted with regard to article 8 para. 2 (e) (viii) requires that ‘[t]he perpetrator was in a position to effect such displacement by giving such order’.
- 954 Given the fact that article 8 para. 2 (e) (viii) of the Statute, unlike article 17 para. 2 of Add. Prot. II which speaks of ‘civilians’, refers to the ‘civilian population’, it seems that only the forced displacement of a minimum number of civilians is prohibited. This conclusion is however somewhat contradicted by the fact that the elements of crimes adopted with regard to article 8 para. 2 (e) (viii) interchangeably use both terms.
- 955 Article 17 para. 2 of Add. Prot. II also contains a specific prohibition to compel civilians to leave their own country¹⁶¹⁹. Thus, the question arises whether a similar behaviour is also prohibited under article 8 para. 2 (e) (viii) of the Statute. Given the broad wording of article 8 para. 2 (e) (viii) of the Statute, it seems to be correct to assume, however, that such cross-boundary measures also constitute forced displacements.
- 956 The displacement must further occur for ‘reasons related to the conflict’. Accordingly displacements which take place for other reasons such as epidemics or natural disasters are not covered by that provision¹⁶²⁰.
- 957 The ordering of a displacement of a civilian population does not constitute a war crime under the Statute if it is done to protect that very same population from dangers.
- 958 Article 8 para. 2 (e) (viii) of the Statute, by using the words ‘imperative military reasons’, seems to imply that not every situation of military necessity might justify a displacement of a civilian population since the text indicates that only most serious military reasons, which are of an imperative nature, can do so¹⁶²¹. It has to be noted, however, that the elements of crimes adopted by the Assembly of States Parties imply that the term ‘imperative military reasons’ and the notion of ‘military necessity’ have the same meaning.

9. Paragraph 2(e)(ix): Prohibition of perfidy

Literature: See article 8 para. 2 (b) (xi).

- 959 The prohibition of perfidy as contained in article 8 para. 2 (e) (ix) of the Statute resembles article 23 (b) of the 1907 Hague Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land. Unlike the parallel provision contained in article 8 para. 2 (b) (xi) of the Statute, which is completely identical to that provision, the text of article 23 (b) of the 1907 Hague Regulations has been modified in order to make it compatible with the specificities of armed conflicts not of an international character.
- 960 More specifically, since armed conflicts not of an international character do not take place between different States, the words ‘individuals belonging to the hostile nation or army’, as

¹⁶¹⁷ UN Doc A/AC.249/1997/WG.1/DP.2, War Crimes, para. 3 (xi).

¹⁶¹⁸ For details see Ambos, *article 25*.

¹⁶¹⁹ Sandoz *et al.* (eds.), *Commentary* (1987) mn 4858.

¹⁶²⁰ *Ibid.*, No. 4855 with further references to the drafting history of article 17 Add. Prot. II.

¹⁶²¹ *Ibid.*, No. 4853; see also Geissler, *Internally displaced persons* (1999) in particular 126 *et seq.* See also Dörmann, *Elements of War Crimes* (2003) 474: ‘military necessity is qualified by referring to “imperative military reasons”. The situation should be scrutinized most carefully, as the adjective “imperative” reduces to a minimum cases in which displacement may be ordered’ (with further references).

contained in article 23 (b) of the 1907 Hague Regulations, were replaced by the words ‘combatant adversary’. The Elements of Crimes, which were otherwise taken over from those adopted with regard to article 8 para. 2 (b) (xi), were accordingly modified.

Unlike in the case of article 8 para. 2 (b) (xi) of the Statute, where also the perfidious killing of civilians, *i. e.* persons not falling within the definitions contained in articles 43 and 44 of Add. Prot. I, belonging to the enemy nation can constitute a crime coming within the jurisdiction of the Court¹⁶²², the scope of application of article 8 para. 2 (e) (ix) of the Statute is limited to the treacherous killing or wounding of combatant adversaries. It has to be noted that this provision does *not* refer to enemy combatants, but instead to combatant adversaries, *i. e.* to adversaries who take part in hostilities. This careful distinction was made in order to avoid the impression that there might exist the notion of ‘combatants’ in non-international armed conflict¹⁶²³. This interpretation is further confirmed by the French text, which refers to ‘un adversaire combatant’ and *not* to ‘un combatant adversaire’. Given this interpretation of article 8 para. 2 (e) (ix) of the Statute, the treacherous killing of any person, who is participating in the fighting on behalf of the adversarial side, is prohibited.

Otherwise, the content of both provisions, article 8 para. 2 (e) (ix) and (b) (xi) of the Statute as well as the respective elements of crimes, are identical. Reference to those provisions is accordingly made¹⁶²⁴.

10. Paragraph 2(e)(x): Quarter

Literature: See article 8 para. 2 (b) (xii).

The wording of the prohibition to order that there shall be no survivors, as now contained in article 8 para. 2 (e) (x) of the Statute, was drawn from article 23 (d) of the 1907 Hague Convention Respecting the Laws and Customs of War on Land. Such prohibition is also contained in article 40 Add. Prot. I but it has no equivalent in Add. Prot. II.

The wording of article 8 para. 2 (e) (x) of the Statute, as well as the elements of crimes as adopted in that regard, are identical to the wording of article 8 para. 2 (b) (xii) and to the respective elements of crimes, reference to which can accordingly be made¹⁶²⁵.

11. Paragraph 2(e)(xi): Prohibition of physical mutilations

Literature: See article 8 para. 2 (b) (x).

In case of an internal armed conflict coming within the jurisdiction of the ICC, the mutilation of persons not taking part in hostilities is already prohibited by virtue of article 8 para. 2 (c) (i) of the Statute. This general prohibition is further elaborated by article 8 para. 2 (e) (xi), the text of which is based on both article 11 Add. Prot. I and article 5 para. 2 (e) Add. Prot. II.

Compared with the parallel provision relating to international armed conflict¹⁶²⁶, the only difference that can be discerned is that the words ‘in the power of an adverse party’ were replaced by the words ‘in the power of another party to the conflict’. The same is true, *mutatis mutandis*, with regard to the respective elements of crimes. Given the definition of armed conflict as contained in article 8 para. 2 (f) of the Statute¹⁶²⁷, therefore any mutilation or unwarranted medical or scientific experiment undertaken on behalf of either governmental authorities or on behalf of organized armed groups comes within the definition of article 8 para. 2 (e) (xi).

¹⁶²² See Cottier and Grignon, *article 8 para. 2 (b) (xi)*, mn 115 *et seq.*, as well as Fleck, in: *id.* (ed.), *Bewaffnete Konflikte* (1973) 116: ‘Artikel 23 b HLKO verbietet mit der “meuchlerischen Tötung oder Verwundung” die Ausnutzung der Arglosigkeit eines Soldaten oder Zivilisten der gegnerischen Partei ...’ (emphasis added) as well as Gimmerthal, *Kriegslist* (1990) 50 and Bothe et al. (eds.), *New Rules* (1982) 204.

¹⁶²³ Add. Prot. II does neither acknowledge such status, see Jasica, in: Voit (ed.), *Beiträge* (1995) 261.

¹⁶²⁴ See Cottier and Grignon, *article 8 para. 2 (b) (xi)*.

¹⁶²⁵ See Cottier and Grignon, *article 8 para. 2 (b) (xii)*.

¹⁶²⁶ See Zimmermann and Geiß, *article 8 para. 2 (b) (x)*.

¹⁶²⁷ See Zimmermann and Geiß, *article 8 para. 2 (f)*.

12. Paragraph 2 (e)(xii): Prohibited destruction

- 967 The wording of the prohibition of destroying the property of an adversary, now contained in article 8 para. 2 (e) (xii) of the Statute, was drawn from article 23 (g) of the 1907 Hague Convention Respecting the Laws and Customs of War on Land. A similar prohibition is also contained in article 53 of the Fourth Geneva Convention of 1949, but no similar provision can be found in Add. Prot. II, except that its article 14 prohibits the destruction of objects which are indispensable to the survival of the civilian population.
- 968 Compared with the parallel provision relating to international armed conflict¹⁶²⁸, *i. e.* article 8 para. 2 (b) (xiii) of the Statute, which is completely identical to article 23 (g) of the 1907 Hague Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land, two differences between the Hague Law and article 8 para. 2 (e) (xii) of the Statute have to be noted:
- 969 On the one hand, the words ‘the enemy’s property’ were replaced by the words ‘the property of an adversary’. The same is true, *mutatis mutandis*, for the elements of crimes, as compared to the elements of crimes adopted with regard to article 8 para. 2 (b) (xiii). On the other hand, the term ‘war’ was replaced by the notion of ‘conflict’. Both of these changes are due to the specific character of internal armed conflicts. As to the use of the term ‘adversary’ instead of ‘enemy’, it has to be noted that in non-international armed conflicts, the members of the different parties to the conflict are usually nationals of the same State and as such cannot be considered ‘enemies’ in the technical sense. In the context of article 8 para. 2 (e) (xii) of the Statute, the term ‘adversary’ thus refers to any person, who is considered to belong to another party to the conflict, such as the government, insurgents or as article 8 para. 2 (f) of the Statute demonstrates, belongs to an opposing organized armed group.
- 970 Since article 8 para. 2 (e) (xii) of the Statute, unlike article 8 para. 2 (e) (ix), does not refer solely to combatant adversaries, both the property of persons participating in hostilities and that of civilians is protected against destruction or seizure.
- 971 Since the term ‘war’ commonly refers to cases of armed conflicts between different States (see *e.g.* article 2 common to the four Geneva Conventions), it was replaced in article 8 para. 2 (e) (xii) as well as in the elements of crimes by the term ‘conflict’ respectively ‘armed conflict not of an international character’, which can already be found in the *chapeau* of article 8 para. 2 (e). Given that the war crime of intentionally directing attacks against civilian objects as it is laid out in article 8 para. 2 (b) (ii) as well as the war crime of intentionally causing disproportionate collateral damage, as laid out in article 8 para. 2 (b) (iv) of the Statute, were deliberately omitted from the catalogue of war crimes applicable to non-international armed conflicts in article 8 para. 2 (e) of the Statute, the crime contained in article 8 para. 2 (e) (xii) should not be interpreted to apply to the conduct of hostilities as such. In order to maintain a meaningful distinction between the war crime of intentionally directing attacks against civilian objects and of causing disproportionate collateral damage on the one hand, and the war crime of destroying or seizing the property of an adversary on the other hand, as it is required by the very systematic of article 8 of the Statute itself, at least a minimum degree of *de facto* territorial control should be required for the crime contained in article 8 para. 2 (e) (xii).
- 972 Otherwise, the content of both, article 8 para. 2 (e) (ix) and (b) (xi) (and indeed the respective elements of crimes) is identical, reference to which can accordingly be made¹⁶²⁹.

¹⁶²⁸ See Zimmermann and Geiß, *article 8 para. 2 (b) (x)*.

¹⁶²⁹ See Zimmermann and Geiß, *article 8 para. 2 (b) (x)*.

**Preliminary remarks on subparagraphs (xiii)–(xv):
Prohibited weapons in non-international armed conflicts**

Literature: See article 8 para. 2 (b) (xvii)–(xx) and Geiß, R., ‘Poison, gas and expanding bullets – the extension of the list of prohibited weapons at the Review Conference of the International Criminal Court in Kampala’, (2011) *YbIHumL* 337–352; Watkin, K., ‘Chemical agents and expanding bullets – limited law enforcement exceptions or unwarranted handcuffs?’, (2006) 36 *IsYbHumRts* 43–69; Coupland, R. and Loye, D., ‘The 1899 Hague Declaration concerning Expanding Bullets – A treaty effective for more than 100 years faces complex contemporary issues’, (2003) 85 *IRevRC* 135–142; Fry, J., ‘Gas smells awful – U.N. forces, riot-control agents, and the chemical weapons convention’, (2009/10) 31 *MichJIL* 475–558; Boothby, W. H., *Weapons and the Law of Armed Conflict* (2009); Zimmermann, A. and Sener, M., ‘Chemical Weapons and the International Criminal Court’, (2014) 108 *AJIL* 436–448.

At the Kampala Review Conference, following a proposal by Belgium¹⁶³⁰, three war crimes 973 relating to the use of prohibited weapons in non-international armed conflict were adopted by consensus. Article 8 para. 2 (e) of the ICC Statute was extended to include the crimes of: (xiii) Employing poison or poisoned weapons, (xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, and (xv) Employing bullets which expand or flatten easily in the human body. This is the first time that crimes relating to prohibited weapons have been adopted specifically with regard to non-international armed conflicts, even though the ICTY has interpreted article 3 of its Statute, which refers to the ‘employment of poisonous weapons or other weapons calculated to cause unnecessary suffering’ to include war crimes committed in international as well as non-international armed conflicts¹⁶³¹.

The ‘Belgian proposal’ aimed to streamline the law applicable in international and non- 974 international armed conflicts, to bring article 8 of the ICC Statute more in line with existing customary international law and to respond to humanitarian needs in contemporary armed conflicts¹⁶³². Indeed, the International Committee of the Red Cross (ICRC) has argued for a long time that the prohibition to use poison, gas and expanding bullets by virtue of customary international law also applies to non-international armed conflicts and that infringements of these prohibitions incur individual criminal responsibility¹⁶³³. This position has been confirmed by the ICTY¹⁶³⁴ and increasingly it has found support among States. The German international criminal code (‘Völkerstrafgesetzbuch’), for example, prohibits the use of these weapons in international and non-international armed conflicts¹⁶³⁵.

The original ‘Belgian proposal’ had been far more extensive than what was ultimately 975 adopted in Kampala¹⁶³⁶. Belgium had initially proposed to amend the Statute’s weapons provisions not only with respect to internal armed conflicts but also in relation to international armed conflicts, by adding crimes relating to the use of biological and chemical

¹⁶³⁰ The so-called ‘Belgian proposal’ is included in Annex III to Resolution ICC-ASP/8/Res.6, 26 November 2009, available at: <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf> last accessed September 2015.

¹⁶³¹ Geiß (2011) *YbIHumL* 337–352.

¹⁶³² See Assembly of State Parties, 8th Session, Report of the Bureau on the Review Conference, ICC-ASP/8/43/Add.1, Annex I, 10 November 2009, p. 2, available at: <http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-43-Add.1-ENG.pdf> last accessed September 2015.

¹⁶³³ See only the ICRC Statement at the First Review Conference of the Statute of the International Criminal Court (ICC) Kampala, 31 May – 11 June 2010, available at: <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-ICRC-ENG.pdf> last accessed September 2015.

¹⁶³⁴ In the *Čelebići* case it was stated that: ‘The Trial Chamber finds that both the substantive prohibitions in common article 3 of the Geneva Conventions, and the provisions of the Hague Regulations (which contain both the prohibition of poison and the use of weapons which might cause unnecessary suffering (article 23 a) and e)) constitute rules of customary international law which may be applied by the International Tribunal to impose individual criminal responsibility for the offences alleged in the Indictment’; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 316.

¹⁶³⁵ See article 12 (1) Nr. 1–3 of the German ‘Völkerstrafgesetzbuch’, available at: <<http://www.gesetze-im-internet.de/bundesrecht/vstgb/gesamt.pdf>> last accessed September 2015.

¹⁶³⁶ United Nations, Reference: C.N.733.2009.TREATIES-8, Belgium: Proposal of Amendments, 29 October 2009.

weapons as well as to the use of anti-personnel mines¹⁶³⁷. In addition, Belgium had originally suggested amendments concerning the weapons defined in Protocols I and IV of the 1980 Conventional Weapons Convention, i.e. the Protocol on Non-Detectable Fragments (Protocol I, 1980) and Blinding Laser Weapons (Protocol IV, 1995) – and during the very early stages, the Cluster Munitions Convention and Protocols II and III of the 1980 Conventional Weapons Convention on Mines, Booby-traps (Protocol II, 1980) and Incendiary Weapons (Protocol III, 1980)¹⁶³⁸. Belgium had argued that these proposals corresponded to treaty prohibitions that are widely ratified and widely considered to have acquired international customary law status¹⁶³⁹. The proposed amendments, however, did not find broad support and were dropped already at the November 2009 session of the Assembly of States Parties. From the beginning Belgium had always emphasized that it was not the intent of the sponsors of these proposals to insist for amendments to be transferred to the Kampala Review Conference if they did not attract an overwhelming support¹⁶⁴⁰.

976 Already in 1998 an early ICC Draft Statute, adopted by the Preparatory Committee in April 1998, had contained parallel provisions concerning prohibited weapons in international and non-international armed conflicts. In the course of the Rome Conference and in spite of objections raised by Sweden and Australia¹⁶⁴¹, however, the weapons provisions pertaining to non-international armed conflicts were dropped. Apparently this was part of a tacit package deal, according to which nuclear weapons – one of the most contentious issues in 1998 – were deleted from the list of prohibited weapons altogether, while the attempt to adopt provisions dealing with the use of weapons also in non-international armed conflicts was abandoned in return¹⁶⁴².

977 Notably, a similar constellation recurred prior to the Kampala Review Conference. Parallel to the Belgian proposal, Mexico submitted a proposal suggesting to include a prohibitory paragraph on ‘employing or threatening to employ nuclear weapons’ in article 8 of the Statute¹⁶⁴³. Obviously, this contentious issue could have stalled any progress at the Kampala Review Conference, especially given the fact that the conference had already to deal with the highly controversial issue of the crime of aggression. Therefore, the Assembly of State Parties, at its 8th meeting in November 2009, decided that the issue of nuclear weapons should not be discussed at the Kampala conference and that instead it would be addressed at the 9th session of the Assembly of State Parties¹⁶⁴⁴. With this all potential obstacles to the adoption of the truncated ‘Belgian proposal’ had been removed. Thus, the three crimes were adopted not only by consensus but, with the exception of the crime of ‘employing bullets which expand or flatten easily in the human body’, also without any significant debate.

978 In terms of substance the three provisions contain nothing new. The crimes now contained in article 8 para. 2 (e) (xiii), (xiv) and (xv) correspond to historic categories of prohibited weapons. They are specifications of the general prohibition of weapons that are of a nature to cause superfluous injury or unnecessary suffering or are by nature indiscriminate. Moreover, the newly adopted provisions replicate the provisions found in article 8 para. 2 (b) (xvii), (xviii) and (xix) of the Statute and the same Elements of Crimes apply to both categories of crimes. In accordance with article 121 para. 5 of the ICC Statute the amendments will enter

¹⁶³⁷ United Nations, Reference: C.N.733.2009.TREATIES-8, Belgium: Proposal of Amendments, 29 October 2009, ‘Amendment 2’, p. 5.

¹⁶³⁸ *Ibid.*, ‘Amendment 3’, p. 6.

¹⁶³⁹ *Ibid.*, pp. 2, 5, 6.

¹⁶⁴⁰ *Ibid.*, p. 3.

¹⁶⁴¹ See, UN Doc. A/CONF.183/C.1/SR.34, paras. 4 (Sweden), 108 (Australia).

¹⁶⁴² Cottier and Křivánek, article 8 para. 2(b), Preliminary remarks on subparagraphs (xvii)-(xx), mn 570.

¹⁶⁴³ See *Assembly of State Parties, 8th Session, Report of the Bureau on the Review Conference*, ICC-ASP/8/43/Add.1, Annex III, 10 November 2009, pp. 9–11, available at: <http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-43-Add.1-ENG.pdf> last accessed September 2015.

¹⁶⁴⁴ Available at: <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf> last accessed September 2015.

into force for those State Parties which have accepted them one year after the deposit of their instruments of ratification or acceptance.

13. Paragraph 2(e)(xiii): Employing poison or poisoned weapons

Literature: See article 8 para. 2 (b) (xvii).

The prohibition of poison is one of the oldest prohibitions of a means of warfare under international law¹⁶⁴⁵. An early example for a codified reference to the prohibition is article 70 of the 1863 Lieber Code, which provides that ‘the use of poison in any manner be it to poison wells, or food, or arms, is wholly excluded from modern warfare’. Moreover, the use of poison or poisonous weapons is prohibited in international and non-international armed conflicts by virtue of customary international law¹⁶⁴⁶. The wording of the crime contained in article 8 para. 2 (e) (xiii) of the Statute is drawn from and identical with article 23 (a) of the 1907 Hague Regulations. Moreover, the wording of article 8 para. 2 (e) (xiii) is, *mutatis mutandis*, identical to the wording of article 8 para. 2 (b) (xvii), reference to which can accordingly be made¹⁶⁴⁷. The only potentially contentious issue concerning this crime is the definition of ‘poison’; specifically the question in how far the use of gas and certain biological weapons are covered¹⁶⁴⁸. This issue, however, was not touched upon during the Kampala Review Conference. In fact, already in 1998 the Preparatory Commission had avoided the difficult task of defining ‘poison’. Instead it adopted a threshold relating to the effects of the substance used. This threshold-requirement is reflected in the corresponding Elements of Crimes which require that ‘the substance was such that it causes death or serious damage to health in the ordinary course of events through its toxic properties’¹⁶⁴⁹. Since these same Elements of Crimes apply to the amendment contained in article 8 para. 2 (e) (xiii), it was not necessary to further discuss this issue at the Kampala conference.

14. Paragraph 2(c)(xiv): Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices

Literature: See article 8 para. 2 (b) (xviii).

The wording of article 8 para. 2 (e) (xiv) is drawn from the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare which in turn reaffirmed earlier prohibitions laid out in the 1899 Hague Declaration concerning Asphyxiating Gases and, for example, article 171 of the Versailles Peace Treaty¹⁶⁵⁰. According to the ICRC Customary Law Study the prohibition of employing chemical weapons is a customary law rule applicable in international and non-international armed conflicts¹⁶⁵¹. The wording of article 8 para. 2 (e) (xiv) is, *mutatis mutandis*, identical to the wording of article 8 para. 2 (b) (xviii), reference to which can accordingly be made¹⁶⁵².

During the Rome Conference in 1998, the most contentious issue with regard to the prohibition of certain gases was the question of how far the use of riot control agents, such as tear gases, would henceforth be criminalized under the article 8 para. 2 (b) (xviii) of the ICC

¹⁶⁴⁵ With regard to the new crime see generally Geiß (2011) *YbIHL* 337–352.

¹⁶⁴⁶ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, I (2009) 72.

¹⁶⁴⁷ Cottier and Krivánek, *article 8 para. 2(b)(xvii)*, mn 574 *et seq.*

¹⁶⁴⁸ *Ibid.*

¹⁶⁴⁹ Elements of Crime, ICC-ASP/1/3 (part II-B), p. 28, available at: <<http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>> last accessed September 2015; see Cottier and Krivánek, *article 8 para. 2(b)(xvii)*, mn 574 *et seq.*

¹⁶⁵⁰ Article 171 (1) of the Versailles Peace Treaty provides: ‘The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.’ The text is available at: <<http://net.lib.byu.edu/~rdh7/wwi/versa/versa4.html>> last accessed September 2015.

¹⁶⁵¹ Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, I (2009)74.

¹⁶⁵² Cottier and Krivánek, *article 8 para. 2(b)(xviii)*, mn 581 *et seq.*

Statute¹⁶⁵³. As with the war crime of employing poison or poisonous weapons, the problem was ultimately ‘resolved’ in the Elements of Crimes. The explicit reference to a gas, substance or device that causes ‘death or serious damage to health in the ordinary course of events’ in the second element, means that the use of riot-control agents is typically excluded from the ambit of the war crime of using asphyxiating, poisonous or other gases. Because ‘in the ordinary course of events’ the use of riot-control gases usually does not cause death or serious damage to health. This discussion was not revisited in Kampala. This is somewhat astounding given that it is first and foremost in the context of non-international armed conflicts, i. e. in conflicts in which State armed forces oppose organized armed groups that the distinction of law-enforcement and other military operations is often brought to the fore and where the use of riot-control agents is more likely to occur than in international armed conflicts. The absence of any significant discussion of this matter in Kampala indicates that the compromise that was found during the Rome Conference, as it is now reflected in the Elements of Crimes, i. e. the reference to a substance’s effects in the ordinary course of events, is regarded as a suitable compromise also with respect to non-international armed conflicts. It follows that the use of riot-control agents in the context of a non-international armed conflict typically will not amount to a war crime. Because even in the rare instance that the employment of a riot-control agent leads to death or serious injury, e. g., loss of eyesight in case of the use of tear gas, in order to amount to a war crime in the sense of article 8 para. 2 (e) (xiv), it would still be necessary to show that this occurred ‘in the ordinary course of events’, which it seems will only rather exceptionally be the case.

15. Paragraph 2(e)(xv): Employing bullets which expand or flatten easily in the human body

Literature: See article 8 para. 2 (b) (xix). Scheffer, D., *ASIL Insights: States Parties approve new crimes for International Criminal Court*, 22 June 2010, available at: <<http://www.asil.org/insights/volume/14/issue/16/states-parties-approve-new-crimes-international-criminal-court>> last accessed September 2015.

982 The prohibition of expanding bullets was introduced in 1899 by the Hague Declaration concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body. The 1899 Declaration in turn was inspired by the 1868 Declaration of St. Petersburg, which aimed to outlaw excessively cruel weapons and constituted a direct reaction to the development of the so-called ‘dum-dum bullet’. The wording of article 8 para. 2 (e) (xv) is drawn from the 1899 Declaration and *mutatis mutandis*, identical to the wording of article 8 para. 2 (b) (xix), reference to which can accordingly be made¹⁶⁵⁴.

983 It must be noted, however, that some delegations in Kampala were rather reluctant to extend the ICC’s jurisdiction over the crime now contained in article 8 para. 2 (e) (xv). They argued that the use of such bullets is necessary and particularly useful in certain law enforcement operations. In fact, similar concerns had already been expressed at the Rome conference in relation to article 8 para. 2 (b) (xix)¹⁶⁵⁵. Indeed, the use of certain bullets that have the properties of the bullets described in article 8 para. 2 (e) (xv), in particular semi-jacketed or hollow-tipped bullets, has two operational advantages in certain law enforcement operations¹⁶⁵⁶. First, bullets that expand – unlike the standard military full metal-jacket bullets – tend to remain in the body of the targeted person. This characteristic minimizes the risks for bystanders. Secondly, precisely because all or most of the energy of an expanding bullet is transferred to the body of the targeted person these bullets have considerable so-called ‘man-stopping-power’, which minimizes the risk for law enforcement officials and bystanders. Therefore, these bullets can be of particular utility when confronting an armed

¹⁶⁵³ *Ibid.*, mn 589 *et seq.*

¹⁶⁵⁴ Cottier and Krivánek, *article 8 para. 2(b)(xix)*, mn 600 *et seq.*

¹⁶⁵⁵ *Ibid.*, mn 603.

¹⁶⁵⁶ See also Hampson, *Study on human rights protection during situations of armed conflict, internal disturbances and tensions*, submitted to the Council of Europe, Steering Committee for Human Rights (CDDH), DH-DEV(2002) 1, para. 32.

person in an urban environment, in a crowd, in hostage rescue operations, at check-points and during house-searches. The ICRC Customary Law Study accordingly acknowledges that expanding bullets are commonly used by the police in law enforcement situations¹⁶⁵⁷.

Against this background, at the Kampala conference some delegations would have preferred to insert an explicit exception regarding the use of expanding bullets for law enforcement purposes into the Elements of Crimes. Ultimately, however, the Elements of Crimes remained unaltered. Nevertheless, the concerns of these delegations about an overly broad criminalization of the use of expanding bullets in non-international armed conflicts found expression in Resolution 5 concerning the Amendments to article 8 of the Rome Statute as it was adopted by the Review Conference on 10 June 2010. 984

First of all, Resolution 5 in its seventh unnumbered preambular paragraph stipulates that the Elements of Crimes ‘...specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirms the *exclusion from the Court’s jurisdiction of law enforcement situations*’¹⁶⁵⁸. Indeed, it is possible to conduct concurrent law enforcement operations in the context of an ongoing armed conflict. For example, police operations in response to a theft or bank-robbery without a nexus to a specific armed conflict remain outside the laws of war and are issues of criminal law enforcement irrespective of whether they are carried out in the course of an armed conflict. However, there is a risk that parties to an armed conflict could use the wording in Resolution 5 in order to qualify other operations, i.e. operations that have a nexus to a specific armed conflict, such as for example certain house-searches, check-point controls or similar operations, *per se* as law enforcement operations in order to circumvent the jurisdiction of the ICC. In this regard it must be noted that the Elements of Crimes do not contain such a sweeping ‘law-enforcement exception’. Rather, what matters according to the fourth element of crime, to which Resolution 5 refers, is the general requirement of whether there is nexus of the conduct in question to the armed conflict or not. 985

Secondly, preambular paragraph 9 of Resolution 5 stipulates that the crime of using expanding bullets is committed ‘*only* if the perpetrator employs the bullets *to uselessly aggravate* suffering or the wounding effect upon the target of such bullets, as reflected in customary international law’¹⁶⁵⁹. In this regard, some delegations in Kampala referred explicitly to the ‘*specific intent*’ to ‘uselessly aggravate suffering or the wounding effect’ in the target¹⁶⁶⁰. Such a ‘specific intent requirement’, however, is incongruous with the established Elements of Crimes. The third element of crime merely requires that the perpetrator ‘was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect’¹⁶⁶¹. A ‘specific intent requirement’, as opposed to the ‘awareness-requirement’ contained in the Elements of Crimes, would considerably narrow the scope of the crime. 986

It has already rightly been pointed out that a Resolution by the Review Conference does not affect the Elements of Crimes and that the wording of the Resolution should be understood as being consistent with the knowledge element specified in the Elements of Crimes¹⁶⁶². Indeed, Article 21 para. (1) (a) of the Statute establishes a hierarchy of applicable law by providing that ‘[t]he Court shall apply: In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence’. Nevertheless, the problem remains that 987

¹⁶⁵⁷ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, I (2009) 77.

¹⁶⁵⁸ Resolution RC/Res.5, 10 June 2010, preambular 7 (emphasis added).

¹⁶⁵⁹ Resolution RC/Res.5, 10 June 2010, preambular 9 (emphasis added).

¹⁶⁶⁰ Scheffer, ASIL Insights: States Parties approve new crimes for International Criminal Court, 22 June 2010, available at: <<http://www.asil.org/insights/volume/14/issue/16/states-parties-approve-new-crimes-international-criminal-court>> last accessed September 2015.

¹⁶⁶¹ Elements of Crimes, third element on article 8 para. 2(e)(xv).

¹⁶⁶² Amnesty International, Public Statement, Comments regarding the language included in the resolution amending article 8 of the Rome Statute, adopted in plenary on 10 June 2010, available at: <http://www.iccnw.org/documents/AI_Public_Statement_on_Weapons_Amendment_20100611_SJ.pdf> last accessed May 2015.

there is agreement that expanding bullets are not prohibited absolutely¹⁶⁶³, that they may lawfully be used in specific law enforcement operations and that in modern, asymmetric armed conflicts the distinction between law enforcement operations and the conduct of hostilities is sometimes blurred. For the purposes of the Rome Statute this means that whenever expanding bullets are used in operations that have a nexus to a specific armed conflict, the decisive issue will be whether the perpetrator ‘was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect’ in accordance with the third element of crime¹⁶⁶⁴.

VI. Article 8 para. 2 (f): scope of application of article 8 para. 2 (e)

Literature: See above Preliminary Remarks on para. 2 (c)-(f) and para. 3 and Cullen, A., ‘The definition of non-international armed conflict in the Rome Statute of the International Criminal Court: An analysis of the threshold of application contained in article 8 (2) (f)’, (2008) 12 *JCSL* 419–445; Zimmermann, A., ‘Die Wirksamkeit rechtlicher Hegung militärischer Gewalt – Ausgewählte Aspekte der Anwendbarkeit und Systemkohärenz des humanitären Völkerrechts’, in: *id. et Al.* (eds.), *Moderne Konfliktformen – Humanitäres Völkerrecht und privatrechtliche Formen* (2010) 7, 11.

1. Existence of a non-international armed conflict

988 The first part of the first sentence of article 8 para. 2 (f) of the Statute simply repeats the requirement, already contained in article 8 para. 2 (c) of the Statute, that a non-international armed conflict must exist before the prohibitions contained in article 8 para. 2 (e) become applicable¹⁶⁶⁵. Article 8 para. 2 (f) therefore, like article 8 para. 2 (d), limits the jurisdiction of the Court¹⁶⁶⁶. This is further confirmed by the introduction to the war crimes section of the elements of crimes adopted under article 9 of the Statute. Said introduction specifically provides that ‘[t]he elements for war crimes under article 8 para. 2 (c) and (e) are subject to the limitations addressed in article 8 para. 2 (d) and (f), which are not elements of crimes’. Accordingly the Preparatory Commission, when drafting the elements of crimes, did neither discuss the meaning and content of article 8 para. 2 (d) nor (f).

2. Exclusion of situations of internal disturbances and tensions

989 The second part of the first sentence of article 8 para. 2 (f) – parallel to article 8 para. 2 (d) – also excludes situations of internal disturbances and tensions from the scope of application of article 8 para. 2 (e)¹⁶⁶⁷.

3. Armed conflict that takes place in the territory of a State

990 The original Bureau proposal submitted to the Rome Conference¹⁶⁶⁸ had foreseen that the armed conflict, in order for the Court to be able to exercise its jurisdiction, must take place in the territory of a State Party to the Statute of the ICC. If included in that way, the provision might have been interpreted as to exclude the exercise of jurisdiction by the ICC over situations of internal armed conflicts for violations of the crimes now listed in article 8 when committed in the territory of a non-State Party even if the Security Council had referred the situation to the ICC by virtue of article 13 (b) of the Statute¹⁶⁶⁹ or where the State concerned had accepted the Court’s jurisdiction under article 12 para. 3 of the Statute.

¹⁶⁶³ Dörmann, *Elements of War Crimes* (2003) 292..

¹⁶⁶⁴ Cottier and Krivánek, *article 8 para. 2(b)(xix)*, mn 607.

¹⁶⁶⁵ For details see already Zimmermann and Geiß, *article 8 para. 2 (c)*, mn 270 *et seq.*

¹⁶⁶⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 225.

¹⁶⁶⁷ For details see already Zimmermann and Geiß, *article 8 para. 2 (d)*, mn 297 *et seq.*

¹⁶⁶⁸ UN Doc A/CONF.183/C.1/L.59, introductory paragraph to Section D, second sentence, p. 9.

¹⁶⁶⁹ For details to referrals by the Security Council see Schabas and Pwrella, *article 13*, mn 16.

As article 8 para. 2 (f) is now phrased, the crimes committed within the context of an internal armed conflict can also be prosecuted by the ICC even if the State in the territory of which the internal armed conflict took place is not a contracting party, provided that either there has been a Security Council referral under article 13 (b) of the Statute¹⁶⁷⁰, the crimes have been committed by a person who possesses the nationality of a contracting party in accordance with article 12 para. 2 (b) of the Statute¹⁶⁷¹, or where the territorial State has accepted the Court's jurisdiction *ad hoc* on the basis of article 12 para. 3 of the Statute.

4. Existence of protracted armed conflict

It was the Appeals Chamber of the ICTY, which in its decision in the *Tadić* case¹⁶⁷² first determined that an armed conflict exists when there is 'protracted armed violence ... within a State'¹⁶⁷³. This threshold, the inclusion of which into the Statute was proposed in a slightly modified form by Sierra Leone¹⁶⁷⁴, is significantly lower than the one contained in article 1 para. 1 of Add. Prot. II which requires sustained and concerted military operations and which indeed had still been referred to in the Bureau proposal of 19 July 1998¹⁶⁷⁵.

The term 'protracted' seems to imply a certain time element, which as far as article 1 of Add. Prot. II is concerned, is contained in the term 'sustained'. It has to be noted, however, that unlike in the case of sustained armed violence, the operations need not be kept going continuously by the conflicting Parties. This is confirmed by the French version, which unlike the French version of article 1 para. 1 of Add. Prot. II, does not refer to military actions which can be qualified as being 'opérations continues' but simply to the fact that the armed conflicts between the different parties must take place 'de manière prolongée'. In this regard the Chamber in *Lubanga* held that the requirement of 'protracted armed conflict' in article 8 para. 2 (f) focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time¹⁶⁷⁶. This was confirmed in the *Bashir* decision where the Chamber also observed that 'to date, control over the territory by the relevant organised armed groups has been a key factor in determining whether they had the ability to carry out military operations for a prolonged period of time'¹⁶⁷⁷.

Nevertheless, it has been clarified that the element of territorial control as such is not a determinative criterion for the establishment of a non-international armed conflict¹⁶⁷⁸. Notwithstanding it may be used – as was the case in the *Bashir* and *Katanga* decisions, as

¹⁶⁷⁰ Schabas and Pewrella, *article 13*, mn 16.

¹⁶⁷¹ See Schabas and Pewrella, *article 12*, mn 18.

¹⁶⁷² *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70.

¹⁶⁷³ This view was confirmed by the decisions *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 183 and in *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 59.

¹⁶⁷⁴ UN Doc A/CONF.183/C.1/L.62.

¹⁶⁷⁵ UN Doc A/CONF.183/C.1/L.59, introductory paragraph to Section D, second sentence, p. 8.

¹⁶⁷⁶ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 234; *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 233; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of charges, 16 December 2011, para. 103.

¹⁶⁷⁷ *Prosecutor v. Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest, 4 March 2009, para. 60. See also *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 239 where the Chamber held that the armed groups in question 'had the capacity to plan and carry out sustained and concerted military operations, insofar as they held control of parts of the territory of the Ituri District'.

¹⁶⁷⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 236; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 536.

an indicative criterion. Nevertheless, Chambers of the ICC have pointed out that ‘in addition to the requirement that the violence must be sustained and have reached a certain degree of intensity, article 1.1 of the Additional Protocol II provides that the armed groups must: (i) be under responsible command implying some degree of organisation of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the implementation of the Protocol; and (ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations’¹⁶⁷⁹. In this context they have held that the *Tadić* definition, which requires ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’ echoes the two criteria of Additional Protocol II, except that the ability to carry out sustained and concerted military operations is no longer linked to territorial control¹⁶⁸⁰. In other words ICC Chambers have linked and assimilated the requirement of protracted armed violence to the threshold contained in article 1 para. 1 of Add. Prot. II¹⁶⁸¹. Thus, in addition to the requirement that armed groups must have a certain degree of organization, ICC Chambers have also referred to the ability to plan and carry out sustained military operations¹⁶⁸². In *Katanga* the Chamber went further by referring not only to sustained but also to *concerted* military operations¹⁶⁸³.

995 There has been ample debate whether by virtue of the reference to ‘protracted armed conflict’ article 8 para. 2 (f) of the Statute sets a higher threshold than article 8 para. 2 (d) or whether a uniform conception of non-international armed conflict applies under the Rome Statute, the separation of article 8 para. 2 (d) and (f) merely being the result of convoluted drafting and diplomatic concessions made during the drafting stages¹⁶⁸⁴. Notably, in the *Bemba* decision the Chamber explicitly contemplated the possibility of such a uniform interpretation of article 8 para. 2 (d) and (f). It held that the argument could be raised as to whether the requirement of ‘protracted armed conflict’ may nevertheless be applied also in the context of article 8 para. 2 (d) of the Statute. Yet, irrespective of such a ‘possible interpretive approach’, the Chamber did not deem it necessary to decide on the matter in the case at hand given that the period in question covered approximately five months and was therefore to be regarded as protracted in any event¹⁶⁸⁵.

996 Notably, however, in the *Bemba* decision the Chamber assimilated articles 8 para. 2 (d) and (f) in so far as it held that ‘[e]ven though mention of opposing parties to the conflict is made *expressis verbis* in article 8(2)(f) of the Statute but not in article 8(2)(d) of the Statute, the Chamber holds that this characteristic element in the context of an armed conflict not of an international character is a well-established principle in the law of armed conflict underlying the 1949 Geneva Conventions to which the Statute refers in article 8(2)(c) and (d) of the Statute [and that] [t]herefore, the Chamber holds that this element also applies to article 8(2)(c) of the Statute’¹⁶⁸⁶.

¹⁶⁷⁹ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 232; *Prosecutor v. Bashir*, ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest, 4 March 2009, para. 59.

¹⁶⁸⁰ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 233; *Prosecutor v. Bashir*, ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest, 4 March 2009, para. 59.

¹⁶⁸¹ See Zimmermann, in: *id. et. al* (eds.), *Moderne Konfliktformen* (2010) 7, 11.

¹⁶⁸² *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 233; *Prosecutor v. Bashir*, ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest, 4 March 2009, para. 59.

¹⁶⁸³ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 239.

¹⁶⁸⁴ See only Cullen (2007) 12 *JCSL* 419–445.

¹⁶⁸⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 235.

¹⁶⁸⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 232.

5. Possible parties to the conflict

By virtue of its article 1 para. 1 Add. Prot. II to the four Geneva Conventions only applies 997 to situations where the armed forces of a Government confront dissident armed forces or where the governmental forces fight against insurgents who are organized in armed groups. Notwithstanding an ICRC proposal to the contrary, Add. Prot. II does not apply to armed conflicts between several armed groups such as in the case of so-called failed States¹⁶⁸⁷. Similarly, the Bureau proposal of 10 July 1998 had also still contained that concept¹⁶⁸⁸.

In contrast thereto, article 8 para. 2 (f) of the Statute has, also in that regard upon initiative 998 by Sierra Leone¹⁶⁸⁹, taken up the wider *Tadić* formula¹⁶⁹⁰ and accordingly now covers armed conflicts which occur either between governmental authorities and organized armed groups or between such groups¹⁶⁹¹. Thus three situations are covered:

- armed conflicts between governmental authorities and dissident governmental authorities,
- armed conflicts between governmental authorities and organized armed groups and
- armed conflicts between several organized armed groups.

For the purposes of article 8 para. 2 (f) of the Statute, the term ‘governmental authorities’ 999 (‘les autorités du gouvernement’) has replaced the term ‘armed forces’. Given this fact and the broad character of this term, it has to be understood as including not only the regular armed forces of a State, but rather all different kinds of armed personnel provided they participate in the required protracted armed violence, including, where applicable, units of national guards, the police forces, border police or other armed authorities of a similar nature.

The term ‘organized armed groups’ implies some kind of organization, capable of carrying 1000 out protracted armed violence. It is important to note, however, that the Statute, given the experiences of the last twenty years after the adoption of Add. Prot. II deliberately does not require that such armed forces have a responsible command or that they effectively exercise control over part of the territory of a State¹⁶⁹². In other words, it is clear that article 8 para. 2 (f) has not adopted the stricter threshold of article 1 para. 1 of Add. Prot. II. Thus, there might also exist an armed conflict involving guerilla groups acting in small independent operational groups or similar forms of armed groups, provided that there is indeed protracted armed violence on a larger scale which can be characterized as an armed conflict.

E. Article 8 para. 3: Maintenance of law and order by legitimate means

Literature: See Preliminary Remarks on article 8 para. 2 (c)-(f) and para. 3, and Baptista, E. C., *Jus cogens em direito internacional* (1997); Dupuy, R. J. and Leonetti, A., ‘La notion de conflit armé à caractère non-international’, in: A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (1979) 258; Furet, M.-F., Martinez, J.-C. and Dorandeu, H., *La guerre et le droit* (1979) 173–175 and 187–188; Hannikainen, L., *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988); Kasto, J., *Jus Cogens and Humanitarian Law* (1994); Milanovic, M. and Hadzi-Vidanovic, V., ‘A taxonomy of armed conflict’, in: N. D. White (ed.), *Research Handbook on International Conflict and Security Law* (2013) 256.

¹⁶⁸⁷ For details see Sandoz *et al. Commentary* (1987), mn 4461.

¹⁶⁸⁸ UN Doc A/CONF.183/C.1/L.59, introductory paragraph to Section D, second sentence, p. 8.

¹⁶⁸⁹ UN Doc A/CONF.183/C.1/L.62.

¹⁶⁹⁰ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, Appeals Chamber, 2 October 1995, para. 70.

¹⁶⁹¹ *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, paras. 231, 232; *Prosecutor v. Bashir*, ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest, 4 March 2009, para. 60; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 26 September 2008, para. 239; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 234.

¹⁶⁹² *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 536; *Prosecutor v. Bemba*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 236.

- 1001 The wording of article 8 para. 3 of the Statute is taken from article 3 para. 1 of Add. Prot. II. The first part of that last provision which provides that ‘nothing in this Protocol [*i. e.* Add. Prot. II] shall be invoked for the purpose of affecting the sovereignty of a State’ was however not retained since that might have undermined the whole idea of the ICC as such. It is noteworthy that while the Preparatory Commission drafting the elements of crimes under article 9 of the Statute specifically provided in the introduction to the elements on war crimes that both article 8 para. 2 (d) and article 8 para. 2 (f) limit the jurisdiction of the Court, no reference is made to article 8 para. 3 in the text of the elements of crimes as such nor in its introduction.
- 1002 It has to be further noted that the addition of a provision which – somewhat in line with the idea contained in article 3 para. 2 of Add. Prot. II – would have excluded the jurisdiction of the Court where an external party had interfered in the conflict¹⁶⁹³ as indeed proposed during the drafting of the Statute, was not included in the text of the Statute.
- 1003 The fact that article 8 para. 3 of the Statute refers to the responsibility of *a* Government to maintain or re-establish law and order, as compared to Add. Prot. II, which refers to the responsibility of *the* Government, is to be considered a pure technical change which does not alter the substance of the provision. In practice therefore, article 8 para. 3 of the Statute might, if ever, only legitimize actions taken on behalf of the respective Government of the State in which the internal armed conflict is taking place and its armed forces, but not actions by members of armed forces of a third State, or action taken by insurgents or non-governmental armed groups. Accordingly, the first question the Court would have to ask itself in a given case is whether an accused who is relying on article 8 para. 3 of the Statute, was indeed acting on behalf of the legitimate Government of the State concerned.
- 1004 Of course, it may at times be disputed who the respective Government is at a given time. In particular, difficulties in the application of article 8 para. 3 may arise where, in the course of a non-international armed conflict, States begin to recognize the rebel forces as the new legitimate Government of a country and where a change of the Government is at issue. With respect to article 8 para. 3 of the Statute, the question is raised up until which point in time an accused may claim to have acted on behalf of the old government and from when on an accused could claim having acted on behalf of the new government. Of course, recognition respectively de-recognition, which in any case may take different forms¹⁶⁹⁴, by individual States can hardly be decisive as to whether an accused may rely on article 8 para. 3 of the Statute. For the sake of legal certainty in the realm of article 8 para. 3 of the Statute, a change in the Government should only be assumed once the aspirant Government has gained widespread control over the country and where it has been widely recognized¹⁶⁹⁵.
- 1005 The Statute of the ICC provides that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment. Thus, a provision like article 8 para. 3 of the Statute, which refers to the powers and responsibilities of the organs of a State seems at first glance to be misplaced in the Statute. Still, it has to be noted that whenever a Government is taking an action which is legitimate under article 8 para. 3 of the Statute, any participation therein can *ipso facto* not give rise to individual criminal responsibility. Accordingly article 8 para. 3 of the Statute would have been better placed in article 21¹⁶⁹⁶.
- 1006 The fact that article 8 para. 3 of the Statute only refers to action which is undertaken to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State clarifies that action undertaken for other purposes, *i. e.* for example to pursue a genocidal policy, can never be justified. Thus, one might say, that article 8 para. 3 of the Statute not only excludes illegitimate *means* but also the pursuance of illegitimate *goals*.

¹⁶⁹³ The proposal contained in UN Doc A/CONF.183/C.1/L.74 was submitted by Indonesia, the Philippines, Thailand and Vietnam.

¹⁶⁹⁴ *Ibid.*

¹⁶⁹⁵ Milanović and Hadzi-Vidanovic, in: White and Henderson (ed.), *Handbook* (2013) 256.

¹⁶⁹⁶ For details see McAuliffe deGuzman, *article 21*.

The most crucial part of the provision under consideration are the last words which underline that only ‘legitimate means’ might be used to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State. If the State’s authority had been totally reserved in that regard, the part of the Statute on internal armed conflict would have run the risk to be almost completely deprived of its very substance and meaning¹⁶⁹⁷. 1007

The reference to ‘legitimate means’ in a way therefore refers back to the list of war crimes contained in article 8 para. 2 (c) and (e) of the Statute, since any act which would run counter to one of the specific prohibitions contained therein cannot be considered legitimate. Otherwise these specific prohibitions would themselves have become pure shells. Accordingly, even reasons of state security might not be invoked in order to justify the commission of any of the war crimes listed in article 8 para. 2 (c) and (e) of the Statute¹⁶⁹⁸. 1008

This interpretation of para. 3 is further confirmed by the fact that at least the content of common article 3 is by now considered to constitute a peremptory norm of general customary international law¹⁶⁹⁹, derogation of which is not allowed by virtue of article 53 of the Vienna Convention on the Law of Treaties. 1009

¹⁶⁹⁷ See for a parallel proposition with regard to article 3 para. 1 Add. Prot. II, Sandoz *et al.* (eds.), *Commentary* (1987) mn 4501.

¹⁶⁹⁸ *Ibid.*

¹⁶⁹⁹ See for even more far-reaching propositions Hannikainen, *Peremptory Norms* (1988) 620–621; Kasto, *Jus Cogens* (1994) 50–51 and Baptista, *Jus Cogens* (1997) 464 and 474.

Article 8bis Crime of aggression

1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Literature: Ambos, K., 'The Crime of Aggression after Kampala', (2010) 53 *GYbIL* 463; Anggadi, F., French, G. and Potter, J., 'Negotiating the Elements of the crime of aggression', in: S. Barriga. and C. Krefß(eds.), *The Travaux Préparatoires of the Crime of Aggression* (CUP 2012) 58; Barriga, S., 'Negotiating the Amendments on the crime of aggression', in: S. Barriga and C. Krefß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (CUP 2012) 3; Barriga, S. and Grover, L., 'A Historic Breakthrough on the Crime of Aggression', (2011) 105 *AJIL* 517; Bertram-Nothnagel, J. F., 'A Seed for World Peace Planted in Africa: The Provisions on the Crime of Aggression Adopted at the Kampala Review Conference for the Rome Statute of the International Criminal Court', (2010) 2 *African Legal Aid Quarterly* 9; Blokker, N. and Krefß, C., 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala', (2010) 23 *LeidenJIL* 889; von Braun, L. and Micus, A., 'Judicial Independence at Risk: Critical Issues regarding the Crime of Aggression Raised by Selected Human Rights Organizations', (2012) 10 *IJCJ* 111; Broms, B., 'The Definition of Aggression', (1977) 154 (I) *RdC* 299; Bruha, T., *Die Definition der Aggression* (Duncker & Humblot 1980); Cassese, A., 'On Some Problematical Aspects of the Crime of Aggression', (2007) 20 *LeidenJIL* 841; Cherif Bassiouni, M. and Ferencz, B., 'The Crime Against Peace and Aggression: From its Origins to the ICC', in: M. Cherif Bassiouni (ed.), *International Criminal Law*, I (Martinus Nijhoff 3rd edition 2008); Clark, R. S., 'Amendments to the Rome Statute of the International, Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010', (2010) 2 *GoJIL* 689; Clark, R.S., 'The Crime of Aggression', in: C. Stahn., and G. Sluiter(eds.), *The emerging practice of the International Criminal Court* (Martinus Nijhoff 2009) 709; Creegan, E., 'Justified Uses of Force and the Crime of Aggression', (2012) 10 *IJCJ* 59; Dinstein, Y., 'The Distinction Between War Crimes and Crimes Against Peace', (1994) 24 *IsYbHumRts* 1; Dinstein, Y., *War, Aggression and Self-Defence* (CUP, 5th edition, 2011); Ferencz, B., *Defining International Aggression: The Search for World Peace* (Oceana 1975); Ferencz, D. M., 'The Crime of

Aggression: Some Personal Reflections on Kampala', (2010) 23 *LeidenJIL* 905; Gaja, G., 'The Long Journey Towards Repressing Aggression', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court*, I (OUP 2002) 427; Glaser, S., 'Quelques remarques sur la définition de l'aggression en droit international pénal', in: S. Hohenleitner, L. Lindner and F. Nowakowski(eds.), *Festschrift Rittler* (Scientia 1957) 383; Glueck, S., *The Nuremberg Trial and Aggressive War* (Knopf 1946); Gray, C., *International Law and the Use of Force* (OUP, 2nd edition, 2004); Griffiths, R. L., 'International Law, the Crime of Aggression and the Ius Ad Bellum', (2002) 2 *ICLRev* 301; Heller, K. J., 'Retreat from Nuremberg: the Leadership Requirement in the Crime of Aggression', (2007) 18 *EJIL* 477; Heller, K. J., 'The Uncertain Legal Status of the Aggression Understandings', (2012) 10 *JICJ* 229; Heinsch, C. R., 'The Crime of Aggression after Kampala: Success or Burden for the Future?', (2010) 2 *GoJIL* 713; Hummrich, M., *Der völkerrechtliche Straftatbestand der Aggression* (Nomos 2001); Kaul, H.-P., 'Is It Possible to Prevent or Punish Future Aggressive War-making?', (2011) *FICHL Occasional Paper Series* 1; Kemp, G., *Individual Criminal Liability for the International Crime of Aggression* (Intersentia 2010); Krefß, C., 'The Crime of Aggression Before the First Review Conference', (2007) 20 *LeidenJIL* 851; Krefß, C., 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', (2009) 20 *EJIL* 1129; Krefß, C., Barriga, S., Grover, L. and von Holtzendorff, L., 'Negotiating the Understandings on the crime of aggression', in: S. Barriga, and C. Krefß, (eds.), *The Travaux Préparatoires of the Crime of Aggression* (CUP 2012) 81; Krefß, C. and von Holtzendorff, L., 'The Kampala Compromise on the Crime of Aggression', (2010) 8 *JICJ* 1179; McDougall, C., *The Crime of Aggression under the Rome Statute of the International Criminal Court* (CUP 2013); Mancini, M., 'A Brand New Definition for the Crime of Aggression: The Kampala Outcome', (2012) 81 *NordJIL*. 227; Manson, R., 'Identifying the Rough Edges of the Kampala Compromise', (2010) 21 *CLF* 417; May, L., *Aggression and Crimes Against Peace* (CUP 2008); Milanovic, M., 'Aggression and Legality: Custom in Kampala', (2012) 10 *JICJ* 165; Müller-Schieke, I. K., 'Defining the Crime of Aggression Under the Statute of the International Criminal Court', (2001) 14 *LeidenJIL* 409; Murphy, S. D., 'Aggression, Legitimacy and the International Criminal Court', (2009) 20 *EJIL* 1147; O'Connell, M. E. and Niyazmatov, M., 'What is Aggression? Comparing the Jus ad Bellum and the ICC', (2012) 10 *JICJ* 189; Paulus, A., 'Second Thoughts on the Crime of Aggression', (2009) 20 *EJIL* 1117; Politi, M., 'The ICC and the Crime of Aggression: A Dream that Came Trough and the Reality Ahead', (2012) 10 *JICJ* 267; Randelzhofer, A. and Dörr, O., 'Article 2 (4)', in: B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (OUP, 3rd ed., 2012) 200; Randelzhofer, A. and Nolte, G., 'Article 51', in: B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (OUP, 3rd ed., 2012) 1397; Reisinger Coracini, A., 'Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute's Complementarity Regime', in: C. Stahn and G. Sluiter(eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 727; Reisinger Coracini, A., 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last ... in Reach ... over Some', (2010) 2 *GoJIL* 745; Rosenfeld, F., 'Individual Civil Responsibility for the Crime of Aggression', (2012) 10 *JICJ* 249; Sayapin, S., *The Crime of Aggression in International Criminal Law* (Springer 2014); von Schaack, B., 'Negotiating at the Interface between Law and Politics: The Crime of Aggression', (2011) 49 *ColJTransnatL.*, 505; von Schaack, B., 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression', (2012) 10 *JICJ* 133; von Schaack, B., 'The Aggression Amendments: points of Consensus and Dissension', in *American Society of International Law* (ed.), *Proceedings of the 105th Annual Meeting*, (2012) *ASIL* 154; Schabas, W. A., 'Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime"', in: M. Politiani G. Nesi(eds.), *The International Criminal Court and the Crime of Aggression* (Ashgate 2004) 17; Scharf, M. P., 'Universal Jurisdiction and the Crime of Aggression', (2012) 53 *HarvILJ* 357; Scheffer, D., 'The Complex Crime of Aggression under the Rome Statute', (2010) 23 *LeidenJIL* 897; Schmalenbach, K., 'Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen', (2010) 65 *JZ* 745; Sellars, K., 'Delegitimizing Aggression, First Steps and False Starts after the First World War', (2012) 10 *JICJ* 7; Sellars, K., *Crimes Against Peace' and International Law* (CUP 2013); Solera, O., *Defining the Crime of Aggression* (Cameron May 2007); Stone, J., 'Hopes and Loopholes in the 1974 Definition of Aggression', (1977) 71 *AJIL* 224; Trahan, J., 'A Meaningful Definition of the Crime of Aggression', (2012) 33 *PennJIL*. 101; Trahan, J., 'Is Complementarity The Right Approach For The International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions', (2012) 45 *CornJIL* 569; Trahan, J., 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', (2011) 11 *ICLRev* 49; Ventura, M. and Gillett, M., 'The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity', (2013) 12 *WashUGlobalStudRev.* 523; Weigend, T., 'In general a principle of justice: The Debate on the 'Crime against Peace' in the Wake of the Nuremberg Judgement', (2012) 10 *JICJ* 41; Weisboard, N., 'Judging Aggression', (2011) 50 *ColJ.TransnatL.* 82; Wenaweser, C., 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective', (2010) 23 *LeidenJIL* 883; Werle, G., 'The Crime of Aggression between International and Domestic Criminal Law', in: S. Manacorda and A. Nieto Martín (eds.), *Criminal Law between War and Peace* (Cuenca 2009) 405; Wills, A. G., 'The Crime of Aggression and the Resort to Force against Entities in Statu Nascendi', (2012) 10 *JICJ* 83; Zimmermann, A., 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', (2012) 10 *JICJ* 209; Zimmermann, A., 'The Creation of a Permanent International Criminal Court', (1998) *MPyBUNL* 169; Zourek, J., 'Enfin une définition de l'agression', (1974) 20 *AFDI* 9.

See also the literature on articles 5, 15bis and 15ter.

Content

A. Introduction.....	1
B. Drafting history of article 8bis	3
C. Relationship of article 8bis with other provisions of the Statute	6
I. Article 5 para. 2	6
II. Article 10	7
III. Articles 15bis and 15ter	9
IV. Article 20 para. 3	10
V. Article 25 para. 3bis	12
VI. Article 31 para. 1 lit. c)	13
D. Article 8bis para. 1	14
I. 'For the purpose of this Statute (...)'	14
II. '(...) 'crime of aggression' (...)'	17
III. '(...) means the planning, preparation, initiation or execution (...)'	21
1. '(...) planning (...)'	23
2. '(...) preparation (...)'	28
3. '(...) initiation or execution (...)'	31
IV. '(...) by a person in a position effectively to exercise control over or to direct the political or military action of a State (...)'	33
1. General issues	33
2. '(...) by a person (...)'	35
3. '(...) in a position effectively to exercise control over or to direct the political or military action (...)'	36
4. '(...) of a State (...)'	43
V. '(...) of an act of aggression (...)'	45
VI. '(...) which, by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations.'	46
1. '(...) constitutes a (...) violation of the Charter of the United Nations'...	46
2. '(...) by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations.'	50
a) General questions	50
b) '(...) by its character (...)'	61
c) '(...) gravity (...)'	62
d) '(...) and scale (...)'	63
e) '(...) constitutes a manifest violation (...)'	65
aa) General questions	65
bb) Contentious cases of 'manifest' violations of the Charter of the United Nations	69
aaa) Preventive and pre-emptive self-defense	70
bbb) Self-defense against non-State actors	74
ccc) Humanitarian intervention/Responsibility to Protect	77
ddd) Implicit authorizations by the Security Council and 'revitalization' of previous Security Council authorizations ...	80
eee) Intervention upon invitation	82
fff) Rescue of nationals abroad	85
E. Article 8bis para. 2	87
I. General questions	87
II. Chapeau	88
1. 'For the purpose of paragraph 1 (...)'	88
2. '(...) 'act of aggression' (...)'	89
3. '(...) means the use of armed force (...)'	90
4. '(...) by a State (...)'	91
5. '(...) against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.'	94
6. 'Any of the following acts (...) in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974 (...)'	99
7. '(...) regardless of a declaration of war (...)'	104
8. '(...) shall (...) qualify as an act of aggression?'	106
III. Article 8bis para. 2 lit. a) – g)	107
1. Lit. a): invasion, attack, military occupation or annexation	107
a) General issues	107
b) '(...) invasion (...)'	108
c) '(...) or attack (...)'	109
d) '(...) by the armed forces of a State (...)'	111

e) ‘(...) of the territory of another State (...)’	113
f) ‘(...) or any military occupation, however temporary, resulting from such invasion or attack (...)’	115
g) ‘(...) or any annexation by the use of force of the territory of another State or part thereof (...)’	121
2. Lit. b): bombardment or use of weapons	123
a) ‘Bombardment by the armed forces of a State against the territory of another State (...)’	123
b) ‘(...) or the use of any weapons by a State against the territory of another State’	126
3. Lit. c): blockade	128
4. Lit. d): attack on the land, sea or air forces, or marine and air fleets of another State	132
5. Lit. e): violation of stationing agreements and unlawful extension of presence	136
a) General issues	136
b) Violations of stationing agreements	137
c) Unlawful extension of presence	139
6. Lit. f): allowing one’s territory to be used for an act of aggression	140
7. Lit. g): sending of irregular forces	144
a) General issues	144
b) ‘The sending by or on behalf of a State (...)’	145
c) ‘(...) of armed bands, groups, irregulars or mercenaries (...)’	150
d) ‘(...) which carry out acts of armed force against another State of such gravity as to amount to the acts listed above (...)’	154
e) ‘(...) or its substantial involvement therein.’	155
8. Other forms of aggression not listed	157
F. Article 8bis and the exercise of domestic jurisdiction over the crime of aggression	159

A. Introduction

Article 8bis consists of three parts. Article 8bis para. 1 defines the ‘crime of aggression’,¹ consisting of an ‘act of aggression’ which, ‘by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’. Article 8bis para. 2 then defines such an ‘act of aggression’² by largely referring to the wording of United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974 (hereinafter: GA Resolution 3314 [‘Definition of Aggression’])². The chapeau of article 8bis para. 2 accordingly sets out the notion of an ‘act of aggression’ in a generic manner, while article 8bis para. 2 lit. a)–g) then lists specific types of such acts of aggression. Finally, article 8bis para. 1 also defines the various modalities of the crime of aggression, as well as circumscribes who might commit any such crime of aggression.

Under the Kampala amendment, the first sentence of article 9 para. 1 now also provides that Elements of Crimes under article 9, as adopted by the contracting parties at Kampala, shall assist the Court in the interpretation and application of article 8bis, too. The respective elements of crimes relating to article 8bis have been adopted as Annex II of Resolution RC/Res. 6, and have accordingly been incorporated into the overall elements of crimes without any specific issues arising as to their legal relevance and impact on the interpretation of the statutory provision concerned, *i. e.* article 8bis³.

¹ Also see Ambos (2010) 53 *GYbIL* 463, 482, who differentiates between the ‘micro level’ of the individual crime (para. 1) and the ‘macro level’ of the collective State act of aggression (para. 2).

² UN Doc A/RES/29/3314 (XXIX) (14 December 1974), Annex: Definition of Aggression.

³ See generally on the normative relevance and impact of the elements of crimes adopted under article 9 Godirov and Clark, *article 9, passim*.

B. Drafting history of article 8bis

- 3 While the drafting history of article 8bis prior to the Kampala Review Conference is discussed above⁴, it is worth noting that the main debates concerning the crime of aggression that took place during the said conference focused on the conditions for the Court's exercise of its jurisdiction when it comes to the crime of aggression. In particular, the **Kampala negotiations focused on the respective role of the Security Council**.
- 4 Somewhat in contrast thereto no changes occurred during the Kampala Review Conference *vis-à-vis* the **substance of the definition of the crime of aggression**, which was adopted verbatim as already contained in the proposal by the **Special Working Group on the Crime of Aggression (SWGCA)**⁵.
- 5 While the Kampala Review Conference did not bring along discussions on the definition of aggression itself or on the Elements of Crimes (of which a complete draft text was already existent⁶), the President's First Paper reflected progress on the drafting of the two Understandings related to the substance of the crime of aggression, namely **Understandings no. 6 and 7**, which aim to further define the **content and substance of the crime**⁷.

C. Relationship of article 8bis with other provisions of the Statute

I. Article 5 para. 2

- 6 With the entry into force of the amendment on the crime of aggression in accordance with para. 1 of the enabling Resolution RC/Res.6, **article 5 para. 2 of the Statute lost its relevance**. From the moment defined in article 15bis/ter paras. 2 and 3 onwards, the Court will furthermore be able, in accordance with article 5 para. 1, to exercise its jurisdiction with regard to the crime of aggression, subject to the temporal limitations laid down in article 15bis/ter para. 2.

II. Article 10

- 7 Understanding no. 4, as adopted by the Kampala Review Conference with regard to the amendment on the crime of aggression, which ought to be taken into account as an additional tool of interpretation within the meaning of article 31 para. 2 lit. b) of the Vienna Convention on the Law of Treaties⁸, provides that **article 8bis** defining the crime of aggression (and accordingly also the underlying acts of aggression) ought to have **no bearing on general international law**. It provides:

‘It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.’

⁴ Zimmermann, *article 5*, mn 30 *et seq.*

⁵ ICC- ASP/8/Res. 6, 26 November 2009.

⁶ Anggadi, French and Potter, in: Barriga and Krefß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 58, 59.

⁷ President's First Paper, 10 June 2010, in: Barriga and Krefß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 774. For the drafting process of the Understandings, also see Krefß, Barriga, Grover and von Holtendorff, in: Barriga and Krefß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 81, 91 *et seq.* For details on the respective Understandings and their drafting details, see mn 38.

⁸ 1155 UNTS 331.

Said understanding thus not only contains an explicit reference to article 10 of the Rome Statute, but mirrors article 10, reference to which can therefore be made⁹. Indeed given that article 8bis, containing the definition of the crime of aggression, was inserted into Part 2 of the Rome Statute, Understanding no. 4 is redundant since the very same effect is already reached by article 10, which specifically refers to the interpretation of ‘this part’ *i. e.* Part 2.

III. Articles 15bis and 15ter

While article 8bis contains the substantive definition of the crime of aggression, articles 15bis and 15ter contain the requirements for the Court to exercise its treaty-based jurisdiction (article 15bis) respectively its jurisdiction to be exercised on the basis of a Security Council referral (article 15ter).

IV. Article 20 para. 3

Para. 7 of the enabling resolution adopted at the Kampala Review Conference (Resolution RC/Res.6) provides that the chapeau of article 20 para. 3, as revised, will also refer to persons who have been tried by another court for conduct also ‘proscribed under Article (...) 8bis.’ They shall accordingly, as a matter of principle and subject to the *bona fide* character of the domestic proceedings as defined in article 20 para. 3, not be tried by the Court with respect to the same conduct. This is true notwithstanding the adoption of Understanding no. 5 of the ‘Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression’, which *inter alia* provides that ‘the amendments [on the crime of aggression] shall not be interpreted as creating the (...) obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State’. While it has been claimed that this Understanding aims at discouraging States from proceeding with domestic cases for the commission of the crime of aggression, the inclusion of a reference to article 8bis into the text of article 20 para. 3 confirms, if there was need, that the principle of complementarity fully applies also when it comes to the crime of aggression. At the same time, the sole legal effect of any possible lack of genuine domestic proceedings under the principle of complementarity is that the ICC could then exercise its jurisdiction; yet, to state the obvious, this does not amount to any form of legal obligation to prosecute any possible crime of aggression.

Given the fundamental distinction between *jus ad bellum* and *jus in bello* rules, it is however only domestic proceedings addressing violations of the *jus ad bellum* amounting to a crime of aggression that can bar the Court from exercising its jurisdiction with regard to article 8bis.

V. Article 25 para. 3bis

In line with article 8bis para. 1 according to which the crime of aggression may only be committed by ‘a person in a position effectively to exercise control over or to direct the political or military action of a State’, article 25 para. 3bis provides that, while the various forms of perpetration, as well as aiding and abetting, as foreseen in article 25 para. 3, also apply with regard to the crime of aggression, any person to be eventually held criminally responsible with regard to the said crime by the Court must have been in a position required by both article 8bis para. 1 and article 25 para. 3bis.

⁹ See Triffterer/Heinze, *article 10, passim*, in particular mn 13.

VI. Article 31 para. 1 lit. c)

- 13 Article 31 para. 1 lit. c) refers to the notion of **self-defense** as a possible ground excluding criminal responsibility under the Statute under specific narrow circumstances. Yet, this reference is only made so as to exclude criminal responsibility with regard to certain specific acts. Said provision **does not** however, by the same token, also **address the issue of inter-State self-defense** under article 51 of the Charter of the United Nations¹⁰ respectively under the applicable rule of customary international law. Moreover, to the extent military force is being used within the limits of article 51 of the Charter respectively customary international law, such action does not amount to a violation of the Charter of the United Nations at all, and even less a manifest violation thereof which, therefore, *ipso facto*, excludes such action to even constitute an act of aggression within the meaning of article 8bis para. 2.

D. Article 8bis para. 1

I. ‘For the purpose of this Statute (...)’

- 14 The introductory words of article 8bis para. 1, ‘[f]or the purpose of this Statute’ are identical to the very same formula used in articles 6, 7 and 8 para. 2 respectively. The phrase confirms, in line with article 10¹¹, that the definition of the crime of aggression, just like the definition of genocide under article 6, of crimes against humanity under article 7, or finally of war crimes under article 8, is meant to be **only relevant for the purpose of the Court’s exercise of jurisdiction**.
- 15 The drafters of the Kampala amendment found it appropriate and necessary, however, to further confirm this as part of the enabling Resolution RC/Res.6, which in its Annex III contains ‘Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression’. **Understanding no. 4** accordingly provides:

‘It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.’

- 16 This does not prejudice, as indeed article 10 confirms, however, that the definition of the crime of aggression, when compared with articles 6, 7 and 8, is even more closely interrelated with customary international law generally, and the Charter of the United Nations in particular, than those other provisions, and might thus influence the further development of general international law beyond the parameters of international criminal law, the saving clause in the chapeau of article 8bis para. 1 notwithstanding.

II. ‘(...) ‘crime of aggression’ (...)’

- 17 Article 8bis is centered around the term of the **‘crime of aggression’ instead of referring to a ‘war of aggression’**, the latter terminology having been used in both, the statutes of the two post-World War II International Military Tribunals¹², as well as in article 5 of GA Resolution 3314 (‘Definition of Aggression’). Indeed, while the latter distinguished between ‘aggression’

¹⁰ 1 UNTS 16.

¹¹ See generally on article 10, Triffterer/Heinze, in this volume, in particular, mn 2.

¹² Article 6 lit. a) of the Charter of the International Military Tribunal (1950) 1 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, xi; article 5 lit. a) of the Charter of the

as such (giving rise to international responsibility only¹³) and a ‘war of aggression’ (only the latter amounting to a ‘crime against international peace’ under the terms of the aforesaid resolution¹⁴), article 8bis instead chooses another approach by using the terms ‘act of aggression’ as defined in para. 2 (committed by a State) and the ‘crime of aggression’ as defined in para. 1 (committed by an individual). Article 8bis thus avoids any reference to the loaded notion of a ‘war of aggression’.

Article 8bis para. 1 provides that certain ‘acts of aggression’, namely those which due to their character, gravity and scale, constitute manifest violations of the Charter of the United Nations, entail **individual criminal responsibility** under the Court’s statute. Article 8bis thereby confirms the idea that certain qualified violations of the prohibition of the use of force and thus the *jus ad bellum*, just like serious violations of the *jus in bello*, as well as acts of genocide and crimes against humanity, do not only entail State responsibility, but also carry with them individual criminal sanctions under international law.

This approach, at least as a matter of principle, stands in line with both, **article 6 lit. a) of the Statute of the International Military Tribunal and with article 5 lit. a) of the Charter of the International Military Tribunal for the Far East**, under which the ‘planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances’, respectively the ‘planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances’, constituted a crime against peace. This approach had then been followed in article 5 para. 2 of GA Resolution 3314 (‘Definition of Aggression’) according to which a ‘war of aggression’ was said to constitute a crime against international peace. Finally, it had been the ILC which incorporated in its 1996 **Draft Code of Crimes against the Peace and Security of Mankind** the crime of aggression.¹⁵

The concept of individual criminal responsibility for the crime of aggression is also mirrored in State practice, since a significant, although not yet overwhelming number of States have, albeit with variations, incorporated the crime of aggression into their respective domestic law or are in the process of doing so¹⁶. What is more is that recent domestic court decisions¹⁷ have also confirmed the **customary law** character of the individual criminal responsibility for the crime of aggression arising under international law.

III. ‘(...) means the planning, preparation, initiation or execution (...)’

The phrase ‘(...) planning, preparation, initiation or execution (...)’ is, mainly for obvious historical reasons, largely identical to the formula used in both, article 6 lit. a) of the Charter of the International Military Tribunal in Nuremberg and in article 5 lit. a) of the Charter of the International Military Tribunal for the Far East, except that in the English version of article 8bis para. 1 the term ‘waging of a war’ was replaced by the term ‘execution’, which is due to the fact that the term ‘war of aggression’ was replaced by the word ‘act of aggression’. This seems to constitute, however, a mere linguistic change rather than a change entailing a difference in substance, even more so since the French version had retained the term ‘l’exécution d’un acte d’agression’. In the equally authentic French versions of the two texts there are however further differences when one compares the Nuremberg and Tokyo formula with the current wording. More specifically, the phrase ‘la direction, la préparation, le déclenchement ou la poursuite’ (of a war of aggression) was

International Military Tribunal for the Far East, in: Boister and Cryer (eds.), *Documents on the Tokyo International Military Tribunal, Charter, Indictment and Judgments* (2008) 8.

¹³ See article 5 para. 2, 2nd sentence of GA Resolution 3314 (‘Definition of Aggression’).

¹⁴ See article 5 para. 2, 1st sentence of GA Resolution 3314 (‘Definition of Aggression’).

¹⁵ International Law Commission, *ILC Yearbook 1996*, ii (part ii), 15, 42.

¹⁶ As to the current status of States having incorporated the crime of aggression into their domestic law see <http://crimeofaggression.info/documents//1/Status_Report-ENG.pdf> last accessed September 2015, 6 *et seq.*

¹⁷ See e.g. the decision of the House of Lords, *R v. Jones et al.* (2006) 45 *ILM* 992.

replaced by the ‘**planification, la préparation, le lancement ou l’exécution**’ of an act of aggression. These changes were not all strictly necessitated by the above-mentioned change in terminology of a ‘war of aggression’ (as used in both, the Nuremberg and the Tokyo statutes) versus the ‘act of aggression’ terminology, as used in the Kampala amendment to the Rome Statute.

- 22 Any proposition that the first three forms of conduct, as contained in article 8bis, namely the planning, preparation or initiation of an act of aggression are identical as far as their substance is concerned, would make the three terms largely redundant. They thus have to be understood as comprising **different, albeit similar, forms of committing the crime of aggression** as defined in article 8bis para. 1. Accordingly, the mere participation in a single one of the four alternative stages of committing the crime already entails criminal responsibility, provided however that the act of aggression has eventually been committed in the first place¹⁸.

1. ‘(...) planning (...)’

- 23 At first glance, the use of the term ‘**planning**’ (‘**la planification**’ in French) might imply that even the mere preparation of plans for a future act of aggression, provided such act of aggression were to reach the threshold provided for in article 8bis para. 1, could already amount to the commission of the crime of aggression, even if the aggression as such were then not to take place. Such a far-reaching understanding of the notion of ‘planning’ would have been in line with the fact that under article 2 para. 4 of the Charter of the United Nations already the threat of the use of force does amount to a violation of international law generally, and the Charter of the United Nations in particular¹⁹. Yet, the **third of the Elements of Crimes** concerning article 8bis, adopted simultaneously in Kampala with the amendment proper, confirms that the respective act of aggression must indeed have been committed. It specifically provides:

‘The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.’²⁰

- 24 Accordingly, the **act of aggression must have actually taken place** so as to render the planning thereof a crime under international law entailing individual criminal responsibility. This deliberate limitation to **exclude mere attempts of aggression** from the scope of application of article 8bis, which must be taken at face value, stands in line with **customary international law**, given that all relevant precedents only considered acts of aggression that had actually taken place to eventually constitute a crime of aggression²¹. Article 25 para. 3 lit. f), providing for criminal responsibility in case of attempt, does not contradict this requirement that the actual act of aggression must have taken place since the term ‘attempt’, as used in article 25 para. 3 lit. f), applies to the individual act of participation in a given crime (of aggression as it were) rather than to the act of aggression committed by a State, which act has to be completed²². A 2005 SWGCA discussion paper mentioned two (albeit one might say rather academic) examples of such attempts to commit the crime of aggression: first, when a high-level State official begins to participate in a meeting aimed at preparing an act of aggression, before being prevented from taking part in the actual

¹⁸ See mn 15 as to the requirement that the act of aggression has indeed taken place.

¹⁹ Randelzhofer and Dörr, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 200, mn 42–43; Stürchler, *The Threat of Force in International Law* (2009).

²⁰ See RC/Res.6, Annex II, Amendments to the Elements of Crimes for Article 8bis, Elements, para. 3, which reads:

‘The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.’

²¹ ICC–ASP/4/32, Annex II.B, 380.

²² Mancini (2012) 81 *NordJIL* 227, 242.

decision-making; and second, when a high-ranking military officer is close to giving an important order in the course of the execution of the use of force, but is prevented from completing the act of ordering²³.

In line with an interpretation of article 8bis in conformity with customary international law, the term ‘planning’ does not cover the general consideration of political plans to eventually, at a later stage only, commit an act of aggression. Rather, it is only the participation in the development of specific (military or other) plans and operations of the State concerned with the commitment of a specific act of aggression that ought to fall within the meaning of the term ‘planning’, in order not to excessively extend the scope of application *ratione temporis* of the crime.

Such a narrow interpretation is confirmed by the French (but also the Spanish) text of article 8bis para. 1, which, unlike the Nuremberg and Tokyo precedents, does not use the term ‘direction’ anymore. Yet, this term would have already excluded any such temporal extension, while the French term ‘planification’ (and ‘planifica’ in the Spanish text), as now used in the context of article 8bis, even more strongly confirms that the notion of ‘planning’ solely refers to the ability of the perpetrator to direct the aggression by way of drawing up ‘a design or scheme’²⁴ for the aggression that is then being committed.

This limited understanding of the notion of ‘planning’ is further confirmed by the context of article 8bis in that the group of possible offenders is defined as those persons able ‘to exercise control over or to direct the political or military action of a State’. This limitation of the scope *ratione personae* of the crime underlines that it is only concrete and specific actions constituting (qualified) violations of the prohibition of the use of force (rather than mere threats of force) that are being criminalized, but not acts which do not yet amount to such violations.

2. ‘(...) preparation (...)’

Similar considerations do apply, *mutatis mutandis*, to the notion of ‘preparation’: only those offenders that fulfill the leadership criteria laid down in article 8bis and then participate (within the meaning of article 25) in an act of aggression, be it only in its very initial stages, *i. e.* when the aggression is still only being prepared, but not yet implemented, commit the crime of aggression, provided the further criteria of article 8bis are also fulfilled.

In contrast to the ‘planning’ of an act of aggression, the ‘preparation’ of such an act refers to the taking of concrete steps to implement the plan²⁵. *Inter alia*, such preparation may consist, depending on which specific alternative of article 8bis para. 2 is being committed by the State concerned, *e. g.* in the transport of weaponry or other military material to be used for the act of aggression, in the actual deployment of troops to the vicinity of a border to start hostilities, or in acts of a similar nature that will, when seen from an outside perspective, form part and parcel of the forthcoming actual violation of the prohibition of the use of force.

In that regard one has to, in particular, take note of the decision of the ICJ in the *Nicaragua case*, according to which ‘in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited’²⁶. Hence, the participation by a person exercising control of a State in the military build-up of a given State is, in and of itself, legal under international law, and may thus *a fortiori* neither be considered to entail individual criminal responsibility under the heading of ‘preparation’ of the crime of aggression even if, later on, an act of aggression is being committed by that very State.

²³ ICC-ASP/2/10, Annex II., as summarized in: Barriga and Krefß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 471, 480.

²⁴ Greenspan, *The Modern Law of Land Warfare* (1959) 455.

²⁵ Greenspan, *The Modern Law of Land Warfare* (1959) 455.

²⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), *ICJ Rep.* 1986, 14, 135, para. 269.

3. ‘(...) initiation or execution (...)’

- 31 The ‘initiation’ of an act of aggression describes the **very commencement** of the use of armed force, as defined in article 8bis para. 2. Given that various of the alternative acts of aggression as defined in article 8bis para. 2 (such as a naval blockade²⁷ or the mere extension of the presence of armed forces in foreign territory beyond the termination of a stationing agreement²⁸) do not require the actual start of hostilities²⁹, the question when exactly the respective ‘act of aggression’ is being initiated depends on which form of such an act of aggression is being considered.
- 32 Finally, the term ‘execution’ covers **all subsequent acts** of actually carrying out and performing acts of aggression, following the initiation of such acts, as described above³⁰.

IV. ‘(...) by a person in a position effectively to exercise control over or to direct the political or military action of a State (...)’

1. General issues

- 33 The crime of aggression can be committed **only by leaders of the State**, to which the underlying act of aggression is attributable. Without this limiting criterion, every individual soldier of the armed forces having contributed to the hostilities would otherwise, as a matter of principle, have to face trial. Article 8bis thus constitutes the only one of the four crimes, for which the Court has substance-matter jurisdiction under article 5 of the Rome Statute, which limits the range of potential perpetrators of such a crime. This pays tribute to the different **nature of the crime of aggression**, which, in contrast to the Statute’s other crimes listed in article 5, is not focused on the protection of individuals or on the protection of a given protected group, but rather on the protection of a State from the use of armed force by another State³¹ and thereby by the same token also aims at the protection of the international legal system with the prohibition of the use of force at its core.
- 34 Already article II para. 2 lit. f) of Law No. 10 of 20 December 1945 by the Control Council for Germany³² considered a ‘high political, civil or military (including General Staff) position [...] or [a] high position in the financial, industrial or economic life’ a prerequisite in order to fall within the group of possible offenders when it comes to crimes against peace. In the same vein in 1950, the ILC concluded that only ‘high-ranking military personnel and high State officials’ could be capable of waging a war of aggression³³. Accordingly, the consent that also for purposes of the Court’s Statute, the crime of aggression ought to remain a leadership crime became established early in the drafting process for what is now article 8bis, namely in the 2002 Coordinator’s Paper of the Preparatory Committee’s Ninth Session³⁴.

²⁷ See mn 128.

²⁸ See mn 139.

²⁹ But see Dinstein, *War, Aggression and Self-Defence* (5th edition 2011) 141.

³⁰ See mn 31.

³¹ Heinsch (2010) 2 *GoJIL* 713, 722; also see Dinstein (1994) 24 *IsYbHumRts.* 1, 4 *et seq.*

³² Control Council Law No. 10 (1950) 1 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, xvi.

³³ International Law Commission, *Principles of International Law recognized in the Charter of the Nuernberg Tribunal and in the Judgment of the Tribunal, with commentaries*, ILC Yearbook 1950, ii, 376, para. 117.

³⁴ PCNICC/2002/WGCA/RT.1, in: Barriga and Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 398: ‘For the purpose of this Statute, a crime of aggression means an act committed by a person who, being in a position to exercise control over or direct the political or military action of a State [...]’ In the Coordinator’s paper of the tenth session of the Preparatory Committee, the word ‘effectively’ has been added to the definition, PCNICC/2002/WGCA/RT.1/Rev.1, in: Barriga and Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 412: ‘[...] being in a position effectively to exercise control over or to direct the political or military action of a State [...]’.

2. ‘(...) by a person (...)’

The use of the term ‘by a person’³⁵ in article 8bis para. 1 exercising control over or directing the political or military action of a State does not indicate that only one person can be responsible of the crime of aggression. As a matter of fact, footnote 1 attached to the second Element of Crimes adopted concerning the crime of aggression and related to the leadership requirement confirms in unequivocal terms that ‘[w]ith respect to an act of aggression, **more than one person** may be in a position that meets these criteria of exercising such degree of control’³⁶. This stands in line with the judgment of the United States Military Tribunal which, in the *High Command* case, stressed that even in a dictatorship, more than one individual can bear responsibility for the planning, preparation, initiation or the execution of an act of aggression³⁷.

3. ‘(...) in a position effectively to exercise control over or to direct the political or military action (...)’

In practice, the group of people exercising sufficient control over or directing the political or military action of a State, in order to be covered by the leadership requirement as set out in article 8bis para. 1, encompasses at the very least **heads of States and governments, as well as ministers of defense and other military leaders** such as high-level generals³⁸. Given the wording of the provision which refers to the ability to *effectively* exercise or direct the action of the State from which the act of aggression emanates, it is the factual capability to exercise such control or direction that is decisive, rather than the formal rank, *de jure* position or title of the person concerned³⁹. Accordingly, also mere *de facto* heads of States or government or *de facto* commanders of armed forces of a State, who are in a position of effective control of their respective State, are subject to the Court’s aggression-related substance-matter jurisdiction.

At the same time, heads of State exercising **merely ceremonial functions**, but not being able, neither *de jure* nor *de facto*, to participate in the decision-making process which leads to the alleged act of aggression contemplated in article 8bis para. 2, are not capable of committing the crime of aggression within the meaning of the Court’s Statute.

In order to possibly commit the crime of aggression, a person concerned must either have **alternatively been able to exercise control over or to direct the political or military action** of the State in question. While the ‘to direct’ limb of the phrase hints more at a positive action taken by the person concerned, the ‘to control’ limb seems to indicate that the crime of aggression might also be committed by way of supervision, provided the person concerned could thereby exercise effective influence on the course of action leading to the act of aggression.

Within the framework of the SWGCA, it was considerably debated whether **industrialists who are closely involved with the State’s actions** should be covered by this provision. The post-1945 Nuremberg trials against high-ranking German industrialists demonstrated the potential of industrialists’ involvement in the crime of aggression. As a matter of fact, article II para. 2 lit. f) of Control Council Law No. 10 of 1945 included persons as possible indictees

³⁵ Emphasis added.

³⁶ RC/Res.6, Annex II, Amendments to the Elements of Crimes for Article 8bis, Elements, para. 2, fn. 1, emphasis added.

³⁷ *High Command* case (*United States of America v. Wilhelm von Leeb et al.*) (1950) 12 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, 462, 486: ‘No matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing, planning and waging such a war’.

³⁸ Heinsch (2010) 2 *GoJIL* 713, 722.

³⁹ UN Doc PCNICC/2002/WGCA/L.1/Add.1 (18 January 2002), Preparatory Commission for the International Criminal Court, Historical Review of Developments relating to Aggression, Addendum, 32, referring to the Nuremberg trials; Werle and Jessberger, *Principles of International Criminal Law* (3rd edition 2014) 542.

of crimes against peace, who ‘held high position in the financial, industrial or economic life’ of Germany, one of its Allies, co-belligerents or satellites. In the trial of the major war criminals, Gustav Krupp, the head of the Krupp AG, was indicted *inter alia* for participation in the Nazi conspiracy to commit crimes against peace and its eventual commission⁴⁰. The final judgment stressed that business men cooperated in Hitler’s aggressive war and made themselves parties to his plan⁴¹. Though in the subsequent *I.G. Farben and Krupp* cases, all defendants were acquitted of charges with regard to crimes against peace due to a lack of evidence, the respective tribunals stated that this should not be interpreted as excluding respective responsibility in general⁴². In the *High Command* and in the *Ministries* cases, the tribunals adopted a ‘shape or influence’ criterion, relying on whether the defendants had had the power to shape or influence the State’s policy⁴³. In the *Roehling* case, the leader of the coal and metal business Roehling was convicted of having encouraged and contributed to the preparation and conduct of aggressive wars⁴⁴.

- 40 However, a SWGCA proposal to use language closer to that of the Nuremberg decisions, namely the ‘**shape and influence**’ formula instead of the ‘exercise control over or to direct’ formula was rejected, which might be perceived as a legitimate decision, given that in democracies the ‘shape and influence’ criterion might affect an excessively large range of individuals⁴⁵. On the other side, the actual terms of article 8bis para. 1 do not *per se* exclude economic (or religious, or revolutionary) leaders from criminal responsibility, as long as their position allows them to exercise control over or to direct a State’s political or military action⁴⁶.
- 41 It is further sufficient that any possible indictee has exercised control over or directed **either the political or the military action** of the State concerned. In the former case, *i. e.* in the case of a political direction or control, there must however be a link between such a political role on the one hand, and the military action giving rise to the indictment relating to the crime of aggression on the other.
- 42 Finally, the term ‘political or military action’ ought to be understood in light of the overall object and purpose of the provision. Accordingly, it is only the control or direction of ‘political or military action’ that leads to an act of aggression that is relevant in order to determine whether a person can have possibly committed the crime of aggression.

4. ‘(...) of a State (...)’

- 43 It is only persons that direct the actions of a State that are suitable offenders under article 8bis para. 1. Article 8bis para. 1 thus reiterates the **inter-state character of the crime of aggression**, as laid down in the chapeau of article 8bis para. 2 with its **double statehood requirement** (‘by a State’/‘against (...) another State’)⁴⁷.

⁴⁰ Before being considered medically unfit for trial, (1947) 1 *Trial of the Major War Criminals before the International Military Tribunal*, 27, 42, 75.

⁴¹ Judgment, (1948) 22 *Trial of the Major War Criminals before the International Military Tribunal* 424 *et seq.*, 468.

⁴² *Farben* case (*United States of America v. Krauch et al.*) (1952) 8 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, 1081, 1125 *et seq.*; *Krupp* case (*United States of America v. Krupp et al.*) (1950) 9 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, 390, 393; also see Heller (2007) 18 *EJIL* 477, 483 *et seq.*

⁴³ *High Command* case (*United States of America v. Wilhelm von Leeb et al.*) (1950) 12 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, 462, 489; *Ministries* case (*United States v. von Weizsäcker et al.*) (1952) 14 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, 314, 425.

⁴⁴ *Roehling* case (*Military Government of the French Zone of Occupation in Germany v. Roehling et al.*) (1952) 14 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, 1075, 1095. Later on, the conviction was reversed by the Superior Military Government Court of the French Zone of Occupation in Germany.

⁴⁵ Ambos (2010) 53 *GYbIL* 463, 490.

⁴⁶ Ambos (2010) 53 *GYbIL* 463, 490; Heinsch (2010) 2 *GoJIL* 713, 723; Sayapin, *The Crime of Aggression in International Criminal Law* (2014) 260; Werle and Jessberger, *Principles of International Criminal Law* (3rd edition 2014) 550.

⁴⁷ See mn 91 *et seq.*

Since the text of article 8bis para. 1 refers to ‘a’ State (rather than to ‘his or her State’), 44 there is **no requirement that the offender possesses the nationality of the State** from which the underlying act of aggression would then emanate. As a matter of fact, there have been situations in the past where a ruler of State A (also) controlled the political or military action of State B, leading State B to then commit an act of aggression.

V. ‘(...) of an act of aggression (...)’

Given that article 8bis para. 2 contains an explicit definition of what is meant by the term 45 ‘act of aggression’, as used in article 8bis para. 1⁴⁸, the (anyhow limited) practice of the Security Council under article 39 of the Charter of the United Nations, which uses the same terminology of ‘act of aggression’ is only relevant in that it sheds light on the meaning of the various terms used in article 8bis para. 2.

VI. ‘(...) which, by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations.’

1. ‘(...) constitutes a (...) violation of the Charter of the United Nations’

In order to eventually constitute a crime of aggression, the underlying act of aggression 46 must, first and foremost, constitute a violation of the Charter. According to article 2 para. 4 of the Charter of the United Nations⁴⁹, all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. The Charter itself knows two exceptions to this provision, namely either an authorization by the Security Council to use force under Chapter VII (possibly combined with Chapter VIII in case of military action by a regional organization or arrangement) or the right of self-defense under article 51 of the Charter (the Charter’s enemy State clauses in articles 53 and 107 having become obsolete⁵⁰).

Unlike article 2 para. 4 of the Charter of the United Nations, which in its last part refers to 47 the use of force ‘inconsistent with the Purposes of the United Nations’⁵¹, article 8bis simply refers to (aggravated) uses of force in (manifest) ‘violation of the Charter’. It is however generally acknowledged that for purposes of the Charter prohibition of the use of force, such acts are lawful not only in those cases that are explicitly specified in the Charter itself as exceptions to article 2 para. 4, but also in scenarios universally recognized under customary international law as accordingly not amounting to a violation of the Charter⁵². Given that article 8bis para. 1 in turn refers back to the question as to whether a given use of force constitutes a violation of the Charter, exceptions to the prohibition of the use of force, as recognized in customary international law, are also relevant when it comes to make a finding on the crime of aggression as set out in article 8bis.

In line with article 2 para. 4 of the Charter, which is addressed to all members of the 48 organization, article 8bis para. 1 refers to **violations of the Charter of the United Nations (rather than violations of customary law)**, which as a matter of fundamental rules of treaty

⁴⁸ See mn 88 *et seq.*

⁴⁹ 15 UNCTAD 335.

⁵⁰ As to the possibility of deleting the enemy state clauses from the Charter as part of an overall reform see UN Docs. A/RES/50/52 (11 December 1995), para. 3; A/RES/60/1 (16 September 2005), para. 177, as well as Eitel, in: Varwick and Zimmermann (eds.), *Die Reform der Vereinten Nationen – Bilanz und Perspektiven* (2006) 315.

⁵¹ As to this notion see Randelzhofer and Dörr, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 200, mn 37 *et seq.*

⁵² Randelzhofer and Dörr, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 200, mn 38.

law only applies to its contracting parties. In the unlikely (but not completely academic⁵³) event that individuals being nationals of a State, which is not a member of the United Nations, but nevertheless bound by the Kampala amendment on the crime of aggression, are responsible for the use of armed force, the question arises whether such acts may then possibly amount to ‘violations of the Charter’ despite the fact that the State concerned is not bound by the Charter as such. Yet, an interpretation of article 8bis in light of its object and purpose seems to indicate that what is meant by article 8bis are not (manifest) violations of the Charter of the United Nations *per se*, but rather (also) violations of the substantive **parallel customary law prohibition on the use of force**⁵⁴ as *enshrined* in the Charter, also being binding upon non-member States by virtue of customary law.

- 49 As confirmed by **no. 2 of the introduction to the Elements of Crimes** relevant for article 8bis, as adopted in Kampala, ‘[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.’

2. ‘(...) by its character, gravity and scale constitutes a *manifest* violation of the Charter of the United Nations.’

- 50 a) **General questions.** In contrast to the rather broad definition of aggression, as contained in the GA Resolution 3314 (‘Definition of Aggression’) for the purposes of State responsibility, and so as to eventually provide guidance to the Security Council when making a determination under article 39 of the Charter of the United Nations, which does not require any aggressive intent and, besides contains, as will be shown below, a broad list of possible acts of aggression⁵⁵, article 8bis **limits criminal accountability to severe acts by using a threshold** that can be found neither in the Charter of the United Nations, nor in GA Resolution 3314 (‘Definition of Aggression’). This **threshold clause** captures the ‘qualitative difference’ between an *act* of aggression and the individual *crime*⁵⁶.
- 51 This part of article 8bis para. 1 has accordingly been criticized for providing a *carte blanche* for all uses of armed force that do not yet amount to a certain scale⁵⁷, thereby **eventually leading to a weakening of the general prohibition of the use of force**, as contained in article 2 para. 4 of the Charter of the United Nations and in customary international law, at least when it comes to the use of military force below the threshold now laid down in article 8bis. On the other hand, a **comparison with the regime of international humanitarian law**, where during the last 20 years a line of jurisprudence involving only serious violations of international humanitarian law has evolved, indicates that the prosecution of merely such grave violations can nevertheless strengthen the overall obedience towards the general rule (even if not all violations of international humanitarian law were falling within the jurisdiction of the various international criminal courts and tribunals)⁵⁸.
- 52 As the drafting history indicates, the said restriction of manifest violations of the Charter of the United Nations was inserted in order ‘to **exclude some borderline cases**’⁵⁹ of the use of

⁵³ See *e.g.* the situation of Palestine having become a contracting party of the Rome Statute without being at the same time a member of the United Nations, and possibly also became bound by the Kampala amendment on the crime of aggression under the principle codified in article 40 para. 5 of the Vienna Convention on the Law of treaties, given that Palestine acceded to the Rome Statute after the Kampala amendment had already entered into force; as to the various ways to become bound by the aggression-related amendments see Zimmermann and Freiburg, article 15bis, mn 13–14.

⁵⁴ As to this questions, *i.e.* the identity in content of the treaty-based prohibition of the use of force and the respective customary law prohibition see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ Rep. 1986, 14, 93 *et seq.*, paras. 174 *et seq.*

⁵⁵ See mn 107 *et seq.*

⁵⁶ Ambos, *Treatise on ICL II* (2014) 199.

⁵⁷ Heinsch (2010) 2 *GoJIL* 713, 726; Paulus (2009) 20 *EJIL* 1117, 1122.

⁵⁸ Heinsch (2010) 2 *GoJIL* 713, 731; also see Öberg (2009) 873 *RevRC* 163.

⁵⁹ Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, Assembly of State Parties, 5th session 2006, ICCASP/5/SWGCA/INF.1 (5 September 2006), para. 19; emphasis added.

force, which, while amounting to a violation of article 2 para. 4 of the Charter of the United Nations, did not warrant to be considered a crime of aggression. More specifically, the threshold clause is meant to serve a twofold purpose:

For one the formula was meant to **exclude** ‘(...) **minor border skirmishes and other small-scale incidents**’⁶⁰ from the scope of application of article 8bis. This was meant to take into account the judgment of the ICJ in the *Nicaragua* case (as confirmed by both the Court itself in the *Oil Platforms* case, and by the Eritrea-Ethiopia Claims Commission). In the former case, the Court had observed for one that it is ‘necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’⁶¹. It also found that in considering whether a given operation amounts to an armed attack, ‘its scale and effects’ have to be taken into account⁶². By the same token the Court had further found that ‘a mere frontier incident’ does not yet amount to an armed attack⁶³, while the Eritrea-Ethiopia Claims Commission even went further when stating that ‘[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter [of the United Nations]’⁶⁴. Accordingly, it was argued that a somewhat more limited use of military force, while prohibited under article 2 para. 4 of the Charter, should even less constitute a crime of aggression.

At the same time the restriction was also inserted so as to **exclude from its scope of application acts whose illegal character would be debatable** rather than manifest⁶⁵.

The need for this restriction was however seriously debated in the SWGCA. In the end the opponents of any such limitation agreed in return for the removal of other restrictions. It is against this background that the requirement of a ‘war of aggression’ was deleted from former drafts, and that any limitations to the list of potential acts of aggression (as defined in GA Resolution 3314 [‘Definition of Aggression’]) were rejected. Instead, article 8bis now contains the criterion that any act of aggression within the meaning of article 8bis para. 2 must also by its character, gravity and scale constitute a manifest violation of the Charter of the United Nations.

This narrow concept was confirmed in **Understandings no. 6 and 7** annexed to RC/Res. 6 (2010), which provide:

‘6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.’

respectively

‘7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.’

Understanding no. 6, just like article 8bis para. 2 itself, draws largely on language forming part of GA Resolution 3314 (‘Definition of Aggression’). In line with preambular paragraph 5 of the annex to the said resolution, which contains the definition of aggression, Understanding no. 6 perceives aggression as ‘the most serious and dangerous form of the illegal use

⁶⁰ Barriga, in: Barriga and Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 3, 29.

⁶¹ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits), ICJ Rep. 1986, 14, 101, para. 191; see also *Oil Platforms (Iran v. USA)*, ICJ Rep. 2003, 161, 187, para. 51.

⁶² *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits), ICJ Rep. 1986, 14, 103, para. 195.

⁶³ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits), ICJ Rep. 1986, 14, 103, para. 195.

⁶⁴ Eritrea-Ethiopia Claims Commission, *Jus ad Bellum* (Partial Award, Ethiopia’s Claims 1–8, 19 December 2005), (2009) 135 ILR 479, para. 11.

⁶⁵ Barriga, in: Barriga and Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 3, 29.

of force’, without however thereby adding much (if anything) to the actual definition contained in article 8bis itself, given that the very text of article 8bis even requires a *manifest* violation of international law.

57 What is more is that Understanding no. 6, almost (though not completely verbatim) echoing article 2 of GA Resolution 3314 (‘Definition of Aggression’), ‘requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations’. While article 2 of the GA Resolution 3314 (‘Definition of Aggression’) was meant to acknowledge the prerogatives of the Security Council in making (or not making) a determination of aggression, as contemplated in article 39 of the Charter of the United Nations⁶⁶, this part of Understanding no. 6 in turn is addressed to the organs of the Court when making determinations as to whether an *act* of aggression has been committed. In doing so, the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations, have to be then taken into account. It is thus somewhat striking that under the Kampala formula, the gravity of the relevant act serves a twofold purpose: under Understanding no. 6 it contributes to determine whether (in line with GA Resolution 3314 [‘Definition of Aggression’]) even an *act* of aggression has taken place. Once this first threshold is fulfilled, any such act (accordingly thereby amounting to an act of aggression) must then be judged upon once again *inter alia* in light of its gravity in order to determine whether it amounts to a manifest violation of the Charter and thus constitutes a *crime of aggression*. It is however somewhat difficult to see what different factors could then be taken into account in order to determine the gravity of such an act when it comes to this second layer of gravity. What is more is that Understanding no. 6 refers to the gravity of the relevant act *and its consequences*, while article 8bis para. 1 simply refers to the gravity as such. This seems to imply that for purposes of the second step, *i.e.* the process of determining a manifest violation of the Charter, and thus potentially a crime of aggression, the consequences of the act ought not to be further taken into account. This is due to the fact, that such consequences seem to not *ipso jure* form part of the concept of ‘gravity’, as confirmed by the wording of Understanding no. 6 where, as shown, the notion of ‘gravity’ and the ‘consequences’ of an act are put side by side.

58 Article 8bis para. 1 mentions three specific criteria to determine whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, namely the character, gravity and scale of such an act. Understanding no. 7 then further attempts to clarify the relationship between the three factors of character, gravity and scale.

For one, by referring in the plural to the fact that the three components of character, gravity and scale must be sufficient (‘doivent être suffisamment importants’ in the French version), to justify a ‘manifest’ determination, it seems to provide that all of those three components must be fulfilled to the degree necessary⁶⁷. On the other hand, the wording of the last sentence of Understanding no. 7, which refers to the fact that ‘[n]o one component can be significant enough to satisfy the manifest standard by itself leaves in the blur whether all three components – character, gravity and scale – must be fulfilled⁶⁸, or whether the fulfillment of two of them would be sufficient. During the drafting process of what was to become Understanding no. 7, a consensus on this issue was hard to reach. Notably, in particular the United States, despite of not even being a State party of the Statute and thus not being subject to the Court’s jurisdiction under article 15bis para. 5⁶⁹, favored a cumula-

⁶⁶ Article 2 of the Definition of Aggression reads: ‘The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.’

⁶⁷ Werle and Jessberger, *Principles of International Criminal Law* (3rd edition 2014) 549.

⁶⁸ Ambos (2010) 53 *GYbIL* 463, 484.

⁶⁹ Zimmermann and Freiburg, article 15bis, mn 34 *et seq.*

tive approach, thereby arguably *per se* excluding humanitarian interventions from the scope of application of article 8bis, given the alleged humanitarian character of such military operations⁷⁰. Not least the Iranian delegation argued in turn that the fulfillment of two of these three criteria ought to be sufficient; however, the final compromise as proposed by Canada and the United States was adopted without opposition⁷¹.

The final wording of what is now Understanding no. 7 constitutes a **compromise**, which, however, does not necessarily solve the issue. On the one hand, the second sentence of Understanding no. 7, and in particular the phrase ‘*No one component (...) by itself*’ could be read as a support for a strict interpretation of the manifest standard, *i. e.* one under which the fulfillment of only two of the three elements would suffice for an act of aggression to amount to a manifest violation of the Charter of the United Nations. 59

On the other hand, an interpretation of article 8bis para. 1 as such in line with its very wording, as required by article 31 para. 1 of the Vienna Convention on the Law of Treaties, militates in favor of a cumulative requirement, since article 8bis para. 1 uses the conjunctive ‘and’ instead of an ‘or’ (‘by its character, gravity *and* scale’). Likewise, the first sentence of Understanding no. 7 refers to ‘*the three components of character, gravity and scale*’⁷² which ‘*must be sufficient*’. While this part of Understanding no. 7 is not fully conclusive, given that it could be also read as meaning that apart from those three components there is no need for further criteria to be also fulfilled, it seems that the last sentence of Understanding no. 7 at least requires that *two* of the components are fulfilled. Such interpretation, *i. e.* that **one component is not sufficient, while a fulfilment of all the three of them is not required either**, would also be in line with the character of Understanding no. 7 as a compromise formula. Such result can also be understood as being compatible with the very wording of article 8bis para. 1 (‘character, gravity and scale’), since the ‘and’ contained therein could very well be understood as not necessarily requiring that all three components of ‘character and gravity and scale’ are fulfilled at the same time. 60

b) ‘(...) *by its character* (...)’. The term ‘character’ refers, as confirmed by the French wording (‘*par sa nature*’), to the **nature of the act of aggression** to be possibly qualified as a crime of aggression. Given the drafting history of article 8bis para. 1, this is to be understood as referring to the (actual) subjective motivation of the persons responsible for the use of force, *i. e.* whether they rather aim at occupying or annexing foreign territory or whether instead they, for example, aim at protecting fundamental human rights of a given population⁷³. 61

c) ‘(...) *gravity* (...)’. The terms ‘gravity’ and ‘scale’ are intertwined and somewhat hard to distinguish. Yet, given that it cannot be assumed that the text contains redundant wording, one might say that the gravity requirement relates more to the **seriousness or significance of the use of force**, *i. e.* constitutes more of a qualitative criterion, while the scale is more a quantitative criterion. This is confirmed, once again, by the French and Spanish texts of article 8bis para. 1, in which the terms ‘*gravité*’/‘*gravedad*’ versus ‘*ampleur*’/‘*escala*’ make this distinction clearer. Accordingly, the notion of ‘gravity’ involves a determination as to the **nature of the means used**. To give but one example, it thus seems easier to assume that the invasion or bombardment of a foreign country, contemplated in article 8bis para. 2 lit. a) and b) respectively can, by their very nature, more easily fulfill the criterion of gravity, than, for example, a mere violation of a stationing agreement, provided for in article 8bis para. 2 lit. e). 62

In determining the gravity of an act of aggression, the **amount of damage caused** to the attacked state ought to also be taken into account. In this regard, it has to be noted, however, that for purposes of article 8bis it is **irrelevant whether such damages by the same token did**

⁷⁰ See mn 54.

⁷¹ Kreß, Barriga, Grover and von Holtendorff, in: Barriga and Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 81, 96 *et seq.*

⁷² Emphasis added.

⁷³ See also mn 77.

(or did not) amount to a violation of applicable rules of *jus in bello* (and possibly even war crimes within the meaning of article 8). This is due to the fundamental distinction of *jus ad bellum* and *jus in bello*, only the former being regulated by article 8bis.

- 63 d) ‘(...) and scale (...)’. As previously mentioned⁷⁴, the notion of ‘scale’ (‘ampleur’ in French/‘escala’ in Spanish) refers to the **level or magnitude** of the alleged act of aggression. In order to evaluate such ‘scale’, one has to take into account the use of armed force *ratione loci* and *ratione temporis*. Put otherwise, the more widespread and the longer such force is being employed, the easier it is to make a positive finding as to the required scale of the military operation, so as to constitute a crime of aggression.
- 64 It is worth noting, however, that **only those parts of the military operation that by the same token run counter to the prohibition of the use of force** might be taken into account. Thus, for example, a military use of force justified under article 51 of the Charter of the United Nations might constitute an illegal use of force to the extent to which the alleged acts of self-defense are no longer proportionate, e.g. because they extend far beyond the actual armed confrontation and threat⁷⁵. In the same vein, what might constitute, like in the case of the attack of the United States against Iraq in 2003, an act of aggression, can later turn into an occupation in line with international law, once the Security Council, acting under Chapter VII of the Charter, provides for a legal basis for such an occupation.⁷⁶
- 65 e) ‘(...) constitutes a manifest violation (...)’. aa) **General questions**. According to the Amendments to the Elements of Crimes relating to article 8bis adopted in Kampala, ‘[t]he term ‘manifest’ is an objective qualification’⁷⁷, which is thus **independent from subjective opinions**⁷⁸ as to the legality or illegality of the respective military operation or indeed, as to its character as a manifest violation of the Charter of the United Nations. As a matter of course, as again the Elements of Crimes relating to article 8bis confirm, there is neither a ‘requirement to prove that the perpetrator has made a legal evaluation as to the ‘manifest’ nature of the violation of the Charter of the United Nations.’⁷⁹ The perpetrator must have been aware, however, as again confirmed by the Elements of Crimes relating to article 8bis, ‘of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations’, and, besides, he must have also been aware of the further ‘factual circumstances that established such a manifest violation of the Charter of the United Nations’⁸⁰.
- The very same considerations would then accordingly also apply *mutatis mutandis* to the various components constituting the manifest character of the violation of the Charter of the United Nations, namely the factual elements determining the character, the gravity, and the scale of the act of aggression.
- 66 In practice, the Court might have difficulties assessing whether a given act of aggression constitutes a *manifest* violation of the Charter of the United Nations. As a court of international criminal law, some consider its **legitimacy to rule on questions of *jus ad bellum*** as doubtful⁸¹, especially concerning ‘grey area’ cases. An excessive use of its respective authority might provide States with a further reason to criticize the Court⁸². On the other

⁷⁴ See mn 62.

⁷⁵ See e.g. the example of the taking of an airport several hundred kilometers away from the actual front given by the ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 223, para. 147.

⁷⁶ UN Doc. S/RES/1483 (22 May 2003).

⁷⁷ RC/Res.6, Annex II, *Amendments to the Elements of Crimes for Article 8bis*, Introduction, para. 3.

⁷⁸ Heinsch (2010) 2 *GoJIL* 713, 727.

⁷⁹ See RC/Res.6, Annex II, *Amendments to the Elements of Crimes for Article 8bis*, Elements, Introduction, para. 4.

⁸⁰ RC/Res.6, Annex II, *Amendments to the Elements of Crimes for Article 8bis*, Elements, paras. 4, 6; see also further Pigaroff and Robinson, *article 30, passim*.

⁸¹ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 158; Fife, in: Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide* (2003) 53, 73; Kreß (2007) 20 *LeidenJIL* 851, 859.

⁸² McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013), 163.

hand, the long and tedious process of including the crime of aggression into the Rome Statute indicates that, eventually, the State parties must have been very aware of the responsibility and competence they were thereby referring to the ICC.

At the same time, the requirement of a ‘manifest’ violation might lead to a situation in which in almost all relevant cases justifications for an illegal use of force might be adduced that are, while being wrong on substance, not that far-fetched so as to enable the State concerned, as well as the alleged offenders, to at least make a plausible claim that the said use of force was not ‘manifestly’ illegal⁸³, which involves the **risk of making article 8bis de facto** not only jurisdiction-wise (given the Court’s limited scope of jurisdiction under article 15bis⁸⁴) but also substance-wise, largely **a *lettre morte* or, at best, symbolic in nature**.

The broad notion of ‘manifest’ violations of the prohibition of the use of force and the ensuing ‘grey areas’ when it comes to contentious cases of the use of force has to be also seen in light of the principle of *nullum crimen, nulla poena sine lege certa* and in light of **article 22 para. 2**, which provides that ‘[t]he definition of a crime shall be strictly construed, (...) shall not be extended by analogy’, and that ‘[i]n case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted’⁸⁵. That provision will prove its particular relevance with regard to criminal responsibility arising from the above-mentioned grey areas of the use of force. In such instances, the Court will then have to take into account not only the case law of the ICJ, but also relevant State practice (as well as the practice of the political organs of the United Nations) concerning previous, somewhat similar situations of the use of force⁸⁶.

bb) Contentious cases of ‘manifest’ violations of the Charter of the United Nations. While there is no fixed ‘canon’ of scenarios where the issue will most likely arise, whether a given military action will amount to a violation of the Charter of the United Nations, let alone a ‘manifest’ one, issues of preventive/pre-emptive self-defense, self-defense against non-state actors operating from the territory of another State, humanitarian intervention, implicit authorizations and revitalization of previous Security Council resolutions, interventions upon invitation, as well as the rescue of one State’s own nationals abroad will be among the most likely scenarios in which the issue of whether such uses of forces amount to a manifest violation of the Charter of the United Nations will arise.

aaa) Preventive and pre-emptive self-defense. Article 51 of the Charter of the United Nations provides that nothing in the Charter shall impair the **inherent right of individual or collective self-defense**, if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. This definition has, ever since its incorporation into the Charter, given rise to a number of controversies.

For one, while the ICJ (and following its jurisprudence also the Ethiopian-Eritrean Claims Commission)⁸⁷ has held that the **term of armed attack is narrower than the scope of article 2 para. 4**⁸⁸, only the gravest forms of the use of force constituting armed attacks⁸⁹, the matter has remained somewhat controversial⁹⁰. This raises the question whether an **armed response to a use of force, which is short of an armed attack** within the meaning of the jurisprudence of the ICJ would then not only be unlawful under the Charter, but rather also *manifestly* unlawful within the meaning of article 8bis para. 1.

⁸³ See for such proposition Paulus (2009) 20 *EJIL* 1117, 1122 *et seq.*

⁸⁴ For details see Zimmermann and Freiburg, *article 15bis, passim*, in particular mn 4 and 5.

⁸⁵ For details as to article 22, see Broomhall, in this volume.

⁸⁶ Schmalenbach (2010) *JZ* 745, 747.

⁸⁷ See already mn 53.

⁸⁸ Randelzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 1397, mn 6.

⁸⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ Rep. 1986, 14, 101, para. 191; *Oil Platforms (Iran v. USA)*, ICJ Rep. 2003, 161, 186, para. 51.

⁹⁰ Wilmshurst (2006) 55 *ICL* 963.

- 71 If an armed attack occurs, the exercise of the right of self-defense must be both, **necessary and proportionate**⁹¹. However, surpassing the threshold of necessity and proportionality will not automatically lead to a manifest violation of the Charter of the United Nations.
- 72 Finally, article 51 does not *expressis verbis* refer to a right of **anticipatory self-defense**. However, it is widely accepted that States have a right of anticipatory self-defense against an *imminent* attack⁹² under customary law, as the customary right of self-defense exists alongside the Charter of the United Nations⁹³, provided there is ‘a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation’ as set out in the famous *Caroline formula*⁹⁴. Such instances of preventive self-defense involving the use of armed force would then not amount to a violation of the Charter, let alone a manifest one.
- 73 In contrast thereto, instances of alleged ‘pre-emptive’ self-defense against a possible attack which is said to occur in the farer future, as alluded to in the United States National Security Strategy of 2002, which stipulated that the right of **pre-emptive self-defense** which would be legal ‘even if uncertainty remains as to the time and place of the enemy’s attack’⁹⁵, would not only amount to a violation of the Charter as such, but also to a manifest one. This assumption is supported by the unequivocal reaction by the international community to Israel’s bombing of the Iraqi nuclear reactor **Osirak** in 1981⁹⁶, and to the US-led **invasion of Iraq** in 2003⁹⁷. At the very least, as of today, the ICJ has clarified in its judgment in the *Armed Activities* case between the DRC and Uganda that ‘Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down’ and that ‘[i]t does not allow the use of force by a State to protect perceived security interests beyond these parameters’ given that ‘[o]ther means are available to a concerned State, including, in particular, recourse to the Security Council’⁹⁸. Given this unequivocal 2005 statement by the principal judicial organ of the United Nations, it stands to reason that any future instance of such alleged ‘pre-emptive’ self-defense would amount to a ‘manifest’ violation of the Charter of the United Nations.
- 74 **bbb) Self-defense against non-State actors.** Self-defense against non-State actors, namely terrorist groups, operating from the territory of another State, remains a matter of dispute. For purposes of article 8bis, this raises the question whether the use of military force against such groups, when taking place in a third State (the ‘target State’), constitutes a manifest violation of the Charter.
- If the target State itself can be held responsible for the acts carried out by such groups under the regular rules of State responsibility, and further provided such terrorist acts are comparable to acts of regular armed forces, the right to self-defense would be triggered⁹⁹. This would then in turn not only exclude a manifest violation of the Charter, but any such violation *tout court*.
- 75 Were this however not the case, *i. e.* in situations in which the acts of the non-state actor are **not attributable to a State**, the ICJ in its Advisory Opinion on the *Construction of a Wall* case found that the inherent **right of self-defense only applies ‘in the case of armed attack by one State against another State’**¹⁰⁰. This approach has however been challenged not only

⁹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ Rep. 1986, 14, 94, para. 176; *Oil Platforms, (Iran v. USA)*, ICJ Rep. 2003, 161, 198, para. 76; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 1996, 226, 245, para. 41.

⁹² Bowett (1972) 66 AJIL 1, 4.

⁹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ Rep. 1986, 14, 94, para. 176.

⁹⁴ (1857) 29 BFSP 1126, 1138.

⁹⁵ <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html>> last accessed September 2015.

⁹⁶ UN Doc S/RES/487 (19 June 1981); Sifris (2003) 4 *MelbJIL* 521, 537.

⁹⁷ Also see mn 80.

⁹⁸ *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 223, para. 148.

⁹⁹ Shaw, *International Law* (7th edition 2014) 823.

¹⁰⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, 136, 194, para. 139, emphasis added.

by the practice of the Security Council when adopting Resolution 1368 one day after the terrorist attacks of 9/11 in which it referred to ‘the inherent right of individual or collective self-defence in accordance with the Charter’¹⁰¹. This was affirmed by Resolution 1373, as the Security Council, acting under Chapter VII, adopted several measures on international terrorism, obliging all states to ‘[t]ake the necessary steps to prevent the commission of terrorist acts’¹⁰². What is more is that the ICJ in its *Armed Activities case between the DRC and Uganda* left it deliberately open whether attacks emanating from non-State actors may trigger the right of self-defence¹⁰³. Yet, there is at least some amount of **State practice** indicating that large-scale terrorist attacks, especially when originating from the territory of States which deliberately failed to prevent them, can amount to an armed attack in the sense of article 51 of the Charter of the United Nations, hence triggering the right of self-defence¹⁰⁴.

At the very least and given the current debate on the matter, it thus seems to be safe to assume that the use of military force as a reaction to armed attacks emanating from non-State actors would *not amount to a ‘manifest’ violation* of the Charter of the United Nations, as required by article 8bis para. 1 in order for such use of force to eventually constitute a crime of aggression. 76

cc) Humanitarian intervention/Responsibility to Protect. In cases of massive human rights violations where the Security Council does not authorize the use of force, and where self-defence is not applicable either, it has been argued that the concept of **humanitarian intervention** may justify the use of force¹⁰⁵. This concept is an attempt to legalize the use of armed force in and directed against a foreign state for the prevention or discontinuation of massive human rights violations. State practice referred to, in order to justify the legality of such behavior, encompasses the interventions by India in Bangladesh (1971), Vietnam in Cambodia (1978), Tanzania in Uganda (1979), the USA in Grenada (1983) and, most prominently, NATO member States in **Kosovo (1999)**. 77

However, one might doubt whether these examples do indeed fulfill the requirements to provide for a new rule of customary international law, namely extensive and uniform state practice as well as sufficient *opinio iuris*¹⁰⁶, even more so since both of the two interventions for *primarily* humanitarian reasons, the Indian invasion in Bangladesh¹⁰⁷ as well as the NATO intervention in Kosovo¹⁰⁸, were condemned by a majority of States, while even the NATO states themselves (apart from Belgium), in front of the ICJ, did not rely on the concept of humanitarian intervention¹⁰⁹.

One may argue that the approval of the relatively new concept of the ‘**Responsibility to Protect**’ (R2P) implies that humanitarian intervention has by now amounted to international custom, or is currently in the process of doing so. Still, even under the concept of ‘R2P’ it is mainly, if not exclusively, the Security Council that might provide for an authorization to use military force¹¹⁰. 78

¹⁰¹ UN Doc S/RES/1368 (12 September 2001), preambular part, para. 3.

¹⁰² UN Doc S/RES/1373 (28 September 2001), para. 2(b).

¹⁰³ *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 223, para. 147.

¹⁰⁴ Shaw, *International Law* (7th edition 2014) 824–5; also see UN Doc S/RES/1701 (11 August 2006) referring to the attacks by Hezbollah in Lebanon upon Israel; more restrictive Tams (2009) 20 *EJIL* 359, 378 *et seq.*

¹⁰⁵ Lillich (1967) 53 *IowaLRev* 325, 347; Greenwood (2000) 49 *ICLQ* 926; cf. Simma (1999) 10 *EJIL* 1.

¹⁰⁶ Article 38(1) lit.b ICJ Statute; *North Sea Continental Shelf (Germany v. Denmark)*, ICJ Rep. 1969, 3, 43 para. 74; *Right of Passage over Indian Territory (Portugal v. India)*, ICJ Rep. 1960, 6, 40.

¹⁰⁷ UN Doc A/RES/2793(XXVI) (7 December 1971); Schachter (1984) 82 *MichLRev* 1620, 1629.

¹⁰⁸ China (UN Doc S/PV/3988 [24 March 1999]); Russia (*ibid.*); India (UN Doc S/1999/328 [26 March 1999]); Non-Aligned Movement (UN Doc S/1999/451 [21 April 1999]); Rio Group (UN Doc A/53/884 [26 March 1999]); Group of 77 (UN Doc A/55/74 [12 May 2000]), para. 54.

¹⁰⁹ *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, ICJ, Oral Pleadings of Belgium, CR 99/15, 11, para. 16.

¹¹⁰ World Summit Outcome, UN Doc A/RES/60/1 (24 October 2005), paras. 79, 139; UN Doc S/RES/1674 (28 April 2006); UN Doc A/59/565 (2 December 2004), para. 203.

- 79 Yet, if one were to take the position that a humanitarian intervention constitutes a violation of the Charter of the United Nations, it still remains a matter of discussion whether, by its *character*, it would then also constitute a *manifest violation* thereof and could thus also amount to a crime of aggression. It was during the Kampala Review Conference, that the then Legal Adviser of the US Department of State insisted that the inclusion of that sentence had to be understood in a way that any humanitarian intervention carried out, in order to prevent genocide, war crimes, or crimes against humanity, could *ipso facto* not constitute a *manifest violation* of the Charter of the United Nations¹¹¹. A respective understanding to that effect as proposed by the United States was however not adopted¹¹². Yet, this does not automatically indicate that such humanitarian intervention would then amount to a *manifest violation* of the Charter, in light of its goals and hence its character¹¹³.
- 80 **ddd) Implicit authorizations by the Security Council and ‘revitalization’ of previous Security Council authorizations.** Chapter VII of the Charter of the United Nations enables the Security Council to authorize measures which are necessary to maintain peace and security, including the authorization to use military force. In 2003, the United States, as well as the United Kingdom, given the **absence of an explicit Security Council authorization** to use military force against Iraq, tried to justify their invasion of Iraq by relying on an ‘implicit’ authorization contained in Security Council Resolution 1441 (2002) and/or on an alleged ‘revitalization’ of the authorization to use all necessary means to restore peace and security in the region as contained in Resolution 678 (1990)¹¹⁴. Those attempts were however vehemently rejected by the majority of States¹¹⁵, although due to the lack of precedence and in light of the somewhat divided scholarly views on the matter, the invasion **might not have, at the time, amounted to a *manifest violation*** of the Charter of the United Nations¹¹⁶.
- 81 It is in light of these very experiences that the Security Council has in its more recent practice either specifically stated that it only authorized measures under article 41 of the Charter (*i. e.* non-military measures)¹¹⁷, or that the use of military force would require an additional resolution¹¹⁸. At least in those latter cases, the use of military force without such additional explicit authorization would then amount to a manifest violation of the Charter of the United Nations, and hence constitute a crime of aggression.
- 82 **eee) Intervention upon invitation.** Another contentious scenario which might, depending upon the circumstances of the individual case, amount to a manifest violation of the Charter as contemplated in article 8bis, relates to ‘**interventions upon invitation**’, *i. e.* military interventions by foreign troops in an internal armed conflict upon the invitation of the legitimate government of the State concerned¹¹⁹. Given a valid (rather than a fabricated)

¹¹¹ Statement by Harold Koh to the Conference, 4 June 2010, available at <<http://www.State.gov/s/l/releases/remarks/142665.htm>> last accessed September 2015.

¹¹² Mancini (2012) 81 *NordJIL* 227, 236.

¹¹³ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 162.

¹¹⁴ UN Doc S/2003/350 (21 March 2003); UN Doc S/2003/351 (21 March 2003); Foreign & Commonwealth Office UK, Iraq: Legal Position Concerning the Use of Force (17 March 2003), <<http://www.parliament.stationery-office.co.uk/pa/cm200203/cmselect/cmstaf/405/3030407.htm>> last accessed September 2015.

¹¹⁵ Russia, France, China and Chile (UN Doc S/PV.4714 [7 March 2003]); the Non-Aligned Movement and the League of Arab States (UN Doc S/PV.4726 [26 March 2003]); Belgium (UN Doc A/58/PV.8 [23 September 2003]); Germany (Federal Administrative Court, Judgment of 21 June 2005, 2 WD 12.04).

¹¹⁶ Ambos, *Treatise on International Criminal Law*, ii (2014) 201.

¹¹⁷ See the practice relating to sanctions on Iran: UN Docs. S/RES/1737 (23 December 2006); S/RES/1747 (24 March 2007); S/RES/1803 (3 March 2008); S/RES/1929 (9 June 2010).

¹¹⁸ See already UN Doc S/RES/1737 (23 December 2006), para. 24 c), which ‘[adopt further appropriate measures under Article 41 of Chapter VII of the Charter of the United Nations to persuade Iran to comply with these resolutions and the requirements of the IAEA, and] underlines that further decisions will be required should such additional measures be necessary’, thereby not even referring to measures according to article 42 but only to article 41 of the Charter of the United Nations; the same provision has been repeated verbatim in the following resolutions.

¹¹⁹ Nolte, ‘Intervention by Invitation’, in: *MPEPIL*, mn 1.

official invitation by the government of the territorial State concerned, that State's sovereignty is considered not to be violated by following up on the invitation, hence neither amounting to an illegal use of force, nor even less an act of aggression, as defined in article 8bis. This view is supported, *inter alia*, by recent State practice including the sending of a Regional Assistance Mission to the Solomon Islands (created by the Pacific Islands Forum in order to restore international security)¹²⁰, as well as the French intervention in Mali since 2012.

However, in situations when the respective government is **no longer to be considered the effective government of the State** concerned (and thus no longer able to represent the State or to issue a legally valid 'invitation' or consent), intervention to support such government becomes illegal¹²¹. Yet, depending on the facts of the ground, which in many cases will be disputed, such use of force might not yet be 'manifestly' illegal, as required by article 8bis so as to constitute a crime of aggression.

On the other hand, where the intervening State uses a **fabricated 'invitation'** forced upon the respective government, any such military intervention would then constitute an obvious and manifest violation of the Charter of the United Nations¹²².

fff) Rescue of nationals abroad. While in the 19th century, it has been a common practice to use military force in order to protect nationals abroad, the adoption of the Charter of the United Nations rendered such actions more controversial, since attacks on individuals abroad do not amount to an armed attack against the home State of the persons concerned itself¹²³. Still, there is relevant State practice and *opinio juris*, which indicates that at least a significant number of States take the position that military operations limited in their scale, duration and purpose are legal under international law. Most prominently, following the Israeli rescue operation in the **Entebbe** incident, the debates in the Security Council were inconclusive and the opinion of States on the matter were divided, even when the UN Secretary General, Kurt Waldheim, condemned these actions as a serious violation of Uganda's sovereignty¹²⁴. The position taken in 1993 by the United Kingdom FCO might be taken as a guideline in that respect. The United Kingdom argued that '[f]orce may be used (...) against threat to one's nationals if: (a) there is good evidence that the target attacked would otherwise continue to be used by the other State in support of terrorist attacks against one's nationals; (b) there is, effectively, no other way to forestall imminent further attacks on one's nationals; (c) the force employed is proportionate to the threat'¹²⁵.

On the other hand, and somewhat similar to interventions upon invitation, the concept of using military force, in order to (allegedly) rescue threatened nationals **may give rise to abuse**, the invasion of Grenada in 1983 and of Panama in 1989 by the United States possibly being examples at hand¹²⁶. It would thus, once again, depend on the circumstances of the specific case to determine whether indeed, the operation was not only limited in kind, but also aiming at rescuing nationals genuinely in danger, or whether instead the concept was only relied on to justify an otherwise manifest violation of the Charter of the United Nations.

¹²⁰ French (2005) 24 *AfricanYbIL* 337, 426 *et seq.*

¹²¹ Shaw, *International Law* (7th edition 2014) 835; Nolte, 'Intervention by Invitation', in: *MPEPIL*, mn 11.

¹²² As to the necessary degree of consent and further details see Nolte, 'Intervention by Invitation', in: *MPEPIL*, mn 12.

¹²³ Shaw, *International Law* (7th edition 2014) 829; Beyerlin (1977) *ZaöRV* 213, 220.

¹²⁴ Shaw, *International Law* (7th edition 2014) 829; *cf.* UN Doc S/PV.1939 (9 July 1976), para. 13.

¹²⁵ (1993) 64 *BYbIL* 732.

¹²⁶ Shaw, *International Law* (7th edition 2014) 830, also see there for further practice.

E. Article 8bis para. 2

I. General questions

87 Both the chapeau of, as well as the list of acts amounting to acts of aggression contained in Art 8bis para. 2, mirror the wording of articles 1 and 3 of GA Resolution 3314 ('Definition of Aggression') adopted by the United Nations General Assembly in 1974. The definition of aggression contained in the said resolution aimed, as confirmed by operative paragraph 4 of the resolution, at guiding the Security Council, when making a determination on the existence of an act of aggression within the meaning of article 39 of the Charter of the United Nations. Notwithstanding, the SWGCA nevertheless supported its adaption to the context of criminal responsibility, an aspect which has been somewhat heavily criticized¹²⁷.

II. Chapeau

1. 'For the purpose of paragraph 1 (...)'

88 The introductory words of article 8bis para. 2 confirm that the definition of what constitutes an act of aggression under this very paragraph is only meant to be relevant in order to find out whether or not a crime of aggression within the meaning of article 8bis para. 1 has been committed. In line with Understanding no. 4 already discussed above¹²⁸, neither article 8bis para. 2 nor indeed article 8bis *in toto* are meant to have a direct impact on general international law in line with article 10.

2. '(...) 'act of aggression' (...)'

89 As confirmed by the list of examples forming part of article 8bis para. 2, an 'act of aggression' requires a lower degree of gravity than the notion of an 'armed attack' within the meaning of article 51 of the Charter of the United Nations. As a matter of fact, as shown above¹²⁹, short-term military actions, while already arguably amounting to an act of aggression, do not necessarily constitute an armed attack, or indeed a crime of aggression as defined in article 8bis.

3. '(...) means the use of armed force (...)'

90 Article 8bis aims primarily at upholding the general prohibition of the use of force, as contained in article 2 para. 4 of the Charter of the United Nations, the latter prohibiting both the threat and use of force generally. By using the formula 'use of armed force', the wording of article 8bis para. 2 embraces a more restrictive approach than article 2 para. 4 of the Charter of the United Nations, the wording of which refers to the 'use of force' in general (as well as the threat of force, which in any event would exceed the adequate subject of criminalization given the current status of customary law on the matter)¹³⁰. Hence undeniably, political or economic force is not covered by article 8bis¹³¹. It ought to be noted, however, that even the scope of article 2 para. 4 is limited to the use of military force, as confirmed by para. 7 of the Preamble of the Charter of the United Nations, as well as by article 44 thereof, and, finally, by the Friendly Relations Declaration¹³².

¹²⁷ Heinsch (2010) 2 *GoJIL* 713, 723.

¹²⁸ See mn 7.

¹²⁹ *Supra* mn 53.

¹³⁰ Kreß and von Holtzendorff (2010) 8 *JICJ* 1179, 1190.

¹³¹ Broms (1977) 154 (I) *RdC* 299, 342.

¹³² UN Doc A/RES/25/2625 (24 October 1970); as to further details see Randelzhofer and Dörr, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 200, mn 17 *et seq.*

4. ‘(...) by a State (...)’

As already indicated by article 8bis para. 1 (‘by a person in a position effectively to exercise control over or to direct the political or military action of a State’)¹³³, article 8bis para. 2 clarifies for good that **an act of aggression in the sense of this provision can only be committed by a State, not by private actors**¹³⁴. Accordingly, leaders and high-rank members of paramilitary or terrorist groups cannot be capable of the crime of aggression with respect to acts committed by those groups. The prosecution of such private individuals under such circumstances remains entirely within the various States’ domestic jurisdiction. 91

Under certain circumstances, the commission of **armed force by private actors can nevertheless be attributable to a State** under the regular rules of State responsibility, as codified in the ILC Articles on State Responsibility¹³⁵ and, in particular, article 8 thereof. Accordingly, the ‘**effective control standard**’, as developed by the ICJ in its *Nicaragua* judgment, and more recently confirmed in its judgment on the merits in the (Bosnian) *Genocide* case, applies in order to eventually determine whether an act of aggression, even when committed by private actors, is nevertheless attributable to a State and thus constitutes ‘the use of armed force by a State’ within the meaning of article 8bis para. 2¹³⁶. 92

A specific form of such ‘indirect’ use of force by a State is then referred to in article 8bis para. 2 lit. g) as one possible act of aggression¹³⁷. 93

5. ‘(...) against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.’

This formula largely resembles the wording of article 2 para. 4 of the Charter of the United Nations, except that in line with article 1 of GA Resolution 3314 (‘Definition of Aggression’) the words ‘**against the sovereignty**’ were added and that the words ‘inconsistent with the purposes of the United Nations’ were replaced by the words ‘inconsistent with the Charter of the United Nations’. While – with regard to GA Resolution 3314 – the addition of ‘sovereignty’ resulted from the focus of the newly independent (former colonial) countries on their sovereignty, the term ‘inconsistent with the Charter of the United Nations’ was meant to cover also formal provisions of the Charter, such as those of Chapter VI¹³⁸. 94

These words must however not be read in a way to imply that the provision is meant to only cover those instances of the use of military force which are directed against or aim at altering or abolishing another State’s sovereignty, territorial integrity or political independence¹³⁹. As a matter of fact, the respective latter parts of the wording of both, article 1 of the GA Resolution 3314 (‘Definition of Aggression’), and already beforehand the similar formula of ‘in any other matter inconsistent with Purposes of the United Nations’ in article 2 para. 4 of the Charter of the United Nations are meant to reconfirm the **general character of the prohibition of the use of force**¹⁴⁰. The notion of ‘integrity’ should be understood as ‘inviolability’, prohibiting any kind of forcible trespassing involving the use of military force¹⁴¹. 95

¹³³ See mn 43.

¹³⁴ Sayapin, *The Crime of Aggression in International Criminal Law* (2014) 260.

¹³⁵ UN Doc A/56/83 (12 December 2001).

¹³⁶ See mn 146 *et seq.*

¹³⁷ See mn 144 *et seq.*

¹³⁸ Bruha, *Die Definition der Aggression* (1980) 114.

¹³⁹ Randelzhofer and Dörr, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 200, mn 37.

¹⁴⁰ Randelzhofer and Dörr, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 200, mn 37 and 39 (referring to the travaux préparatoires of article 2 para. 4).

¹⁴¹ Randelzhofer and Dörr, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 200, mn 37; Dinstein, *War, Aggression and Self-Defence* (5th edition 2011) 91.

- 96 The term ‘of another State’ indicates that **only situations involving two States** are covered¹⁴². Neither mere inner-State conflicts, nor acts against private actors are encompassed unless, obviously, such acts, while being directed against non-State actors take place on the territory of another State. The term’s standing within the provision does *not* mean that the use of armed force ‘in any other manner inconsistent with the Charter of the United Nations’ does not require an action *directed* against another State.
- 97 The applicability of article 8bis para. 2, as indeed the applicability of the prohibition of the use of force in general, does not depend on the *de facto* effectiveness of another State’s sovereignty, or put otherwise the prohibition (and eventually the exposure to punishment under article 8bis) **also encompasses the use of armed force against so-called ‘failed States’**¹⁴³.
- 98 The last alternative ‘or in any other manner inconsistent with the Charter of the United Nations’ serves to fill in possible gaps in the scope of application of article 8bis para. 2. At the same time, it ensures that the use of military force that is in line with the Charter, and in particular when justified as an exercise of the right to self-defense under article 51 of the Charter of the United Nations, or when authorized by the Security Council under Chapter VII of the Charter, does not amount to an act of aggression¹⁴⁴. At the same time, the more formalistic notion of the ‘Charter of the United Nations’ in article 8bis para. 2 (in contrast to ‘the Purposes of the United Nations’ formula, as used in article 2 para. 4 of the Charter of the United Nations) indicates that also instances of the use of armed force allegedly in line with such purposes might amount to an act of aggression¹⁴⁵.

6. ‘Any of the following acts (...) in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974 (...)’

- 99 The phrase ‘[a]ny of the following acts’ must be read as meaning ‘*all* of the following acts’ rather than as ‘*only* the following acts’, since the list of acts enumerated in article 8bis para. 2 (just like the one in GA Resolution 3314 [‘Definition of Aggression’]) was **not meant to be an exhaustive one**.¹⁴⁶ Indeed, the chapeau of article 8bis para. 2 2nd sentence states that the provision has to be interpreted in accordance with GA Resolution 3314 (‘Definition of Aggression’), article 4 of which in turn explicitly provides that ‘[t]he acts enumerated above are not exhaustive and [that] the Security Council may determine that other acts [also] constitute aggression under the provisions of the Charter’. This is confirmed by the drafting history of the GA Resolution 3314 (‘Definition of Aggression’), according to which the list of acts of aggression laid down in lit. a) – g) (and accordingly now also the list of acts contained in article 8bis para. 2) was not intended as an exclusive and strict rule, but rather as interpretation material for the Security Council¹⁴⁷.
- 100 During the drafting process in the SWGCA of what is now article 8bis, there were proposals such as one by Germany, which wanted to introduce a more clearly defined narrow definition of what amounts to an act of aggression, restricting the potential scope of such acts¹⁴⁸. In the end, however, there was no majority for such proposals. The majority of delegations in favor of the current text held, as summarized in the Official Records of the SWGCA, that even ‘[a]cts other than those listed could [...] be considered acts of aggression,

¹⁴² Broms (1977) 154 (I) *RdC* 299, 342.

¹⁴³ Randelzhofer and Dörr, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 200, mn 40; for further details see Geiß, *Failed States* (2005) 123 *et seq.*

¹⁴⁴ Broms (1977) 154 (I) *RdC* 299, 343.

¹⁴⁵ See also already mn 77.

¹⁴⁶ For a different view, see Ambos (2010) 53 *GYbIL* 463, 487.

¹⁴⁷ Broms (1977) 154 (I) *RdC* 299, 355.

¹⁴⁸ Krefß (2009) 20 *EJIL* 1129, 1136.

provided that they were of a similar nature and gravity to those listed and would satisfy the general criteria contained in the chapeau of paragraph 2¹⁴⁹.

While this **open-ended character of the list of possible acts of aggression** seems to be relatively unproblematic (and even necessary) in the context of Security Council decisions under article 39 of the Charter of the United Nations, this vagueness might conflict with the **criminal law principle of legality**, as enshrined in article 22¹⁵⁰. However, it seems to be generally acknowledged that the principle of legality has a narrower scope in international law as compared to domestic (criminal) law¹⁵¹. Accordingly, other clauses of international criminal law comprise somewhat similar open-ended elements as well, such as article 3 ICTY Statute¹⁵², or specifically within the framework of the Rome Statute itself article 7 para. 1 lit. k) ICC Statute, which refers to '[o]ther inhumane acts of a *similar character* intentionally causing great suffering, or serious injury to body or to mental or physical health'¹⁵³. Notwithstanding, it is still recommendable to ensure that the notion of what constitutes a crime of aggression (and accordingly also as a *condicio sine qua non* what constitutes an act of aggression) is not expanded too extensively. Any other possible acts of aggression not listed as such in article 8bis para. 2 lit. a) – g) should accordingly be narrowly construed and may only be considered as such provided they possess *mutatis mutandis* the same character and gravity as one or more of the acts listed¹⁵⁴.

At the same time, as the first introductory provision of the Elements of Crimes pertaining to article 8bis confirms, 'any of the acts referred to in article 8bis, paragraph 2, qualify as an act of aggression.' Put otherwise, it must be assumed that **any of the acts listed can, as a matter of principle, reach the threshold, as set out in article 8bis para. 1**. Finding otherwise would not only run counter to the provision just quoted but also, and even more importantly, to the very structure of article 8bis *in toto*.

Finally, over time, the military operations of a State may fulfill one or even more of the alternatives listed in article 8bis para. 2 even if they, when they began, did not yet amount to an act of aggression.

7. '(...) regardless of a declaration of war (...)'

In modern international law, a declaration of war does no longer constitute a necessary requirement for either the existence of an armed conflict, or indeed an act of aggression. It was already during the drafting process of the **1933 Convention for the Definition of Aggression**¹⁵⁵ that the requirement of such a declaration had become obsolete, given that article 2 para. 1 of the said treaty had referred to a declaration of war as one among several examples of acts of aggression, indicating its character as nothing but one specific form of aggression.

After World War II, declarations of war have become very rare. With the Geneva Conventions of 1949¹⁵⁶, such declarations have also lost their legal significance for purposes of international humanitarian law, since common **article 2 para. 1 of the four Geneva Conventions** provides that the Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. Accordingly, it does not

¹⁴⁹ ICC-ASP/6/20/Add.1, Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Sixth Session, New York, 2–6 June 2008, Official Records, Annex II, Report of the Special Working Group on the Crime of Aggression, 14, para. 34.

¹⁵⁰ See generally Broomhall, *article 22*, in this volume.

¹⁵¹ Heinsch (2010) 2 *GoJIL* 713, 724.

¹⁵² 'The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, *but not be limited to*: [...]'.
Such violations shall include, *but not be limited to*: [...].

¹⁵³ Emphasis added; as to this provision see Hall and Stahn, *article 7*, mn 95 *et seq.*

¹⁵⁴ Clark (2010) 2 *GoJIL* 689, 696.

¹⁵⁵ 147 *LNTS* 69.

¹⁵⁶ 75 *UNTS* 31; 75 *UNTS* 85; 75 *UNTS* 135; 75 *UNTS* 287.

matter for purposes of article 8bis whether one or both parties refer to their use of military force eventually constituting an act of aggression as a mere ‘police operation’, a ‘humanitarian’ or ‘peacekeeping operation’, or simply deny being involved in any such use of force in the first place.

8. ‘(...) shall (...) qualify as an act of aggression:’

- 106 The acts named in article 8bis para. 2 lit. a) – g) do not constitute examples of *crimes of aggression*, but merely of *acts of aggression*. In order for such an act to also qualify as a crime of aggression coming within the jurisdiction of the Court, it therefore must also fulfill the additional conditions set out in article 8bis para. 1.

III. Article 8bis para. 2 lit. a) – g)

1. Lit. a): invasion, attack, military occupation or annexation

- 107 a) **General issues.** Article 8bis para. 2 lit. a) refers to the **classic form of aggression**, subdivided into the invasion, the attack, the military occupation or annexation of the territory of a foreign State. This provision reflects customary international law¹⁵⁷. At most, one can discuss whether the inclusion of military occupation and annexation was really necessary or is, at least partially, redundant given that both forms of aggression presuppose that an invasion or attack has previously taken place¹⁵⁸.
- 108 b) ‘(...) invasion (...)’. An ‘invasion’ requires that the aggressor State’s armed forces illegally trespass another State’s frontiers, thereby breaching the principle of the **inviolability of State borders**¹⁵⁹. It does not matter whether such invasion then takes place by land forces, by way of a military operation via the sea, or by airborne troops. Classical examples of an invasion would be the **invasion of Poland by German troops in September 1939**, or the **invasion of Kuwait by Iraqi armed forces in 1990**.
- 109 c) ‘(...) or attack (...)’. The term ‘**attack**’ describes ‘the act of falling upon with force or arms, of commencing battle’, ‘an offensive operation’; an onset or an assault¹⁶⁰. Given the context within which the term ‘attack’ is used in article 8bis, namely for purposes of the *jus ad bellum*, the *jus in bello* definition of ‘attack’ as contained in **article 49 para. 1 of the Additional Protocol I to the Geneva Conventions**¹⁶¹ (namely that ‘attack’ means ‘acts of violence against the adversary, whether in offence or in defence’) is **irrelevant**. At the same time, any such act must not necessarily amount to an armed attack within the meaning of article 51 of the Charter of the United Nations¹⁶², in order for it to constitute an ‘attack’ within the meaning of article 8bis para. 2. Rather, it is article 8bis para. 1 that would determine the necessary threshold so as for the act of aggression concerned in form of an ‘attack’ to eventually even amount to a crime of aggression.
- 110 It ought to be also noted that **any use of armed force in line with international law** and, in particular, either in exercise of the right of self-defense under article 51 of the Charter of the United Nations, or by virtue of an authorization by the Security Council under Chapter VII of the Charter, **does not constitute an ‘attack’** within the meaning of article 8bis para. 2 lit. a).
- 111 d) ‘(...) by the armed forces of a State (...)’. In order for either an invasion or an attack to constitute an act of aggression for purposes of GA Resolution 3314 (‘Definition of Aggres-

¹⁵⁷ Dinstein, ‘Aggression’, in: *MPEPIL*, mn 25; also indicated by *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Separate Opinion of Judge Simma, *ICJ Reports* 2005, 334, 335, para. 3.

¹⁵⁸ Broms (1977) 154 (I) *RdC* 299, 348.

¹⁵⁹ Sayapin, *The Crime of Aggression in International Criminal Law* (2014) 266.

¹⁶⁰ Cf. Oxford English Dictionary Online.

¹⁶¹ 1125 *UNTS* 3.

¹⁶² As to the threshold requirements for a use of force amounting to an armed attack see already mn 37.

sion’), and accordingly now also for purposes of article 8bis para. 2 lit. a), it must (at least also) involve the **armed forces** of the invading respectively attacking State. The provision thus constitutes a *lex specialis* to the **general rules of attribution**, as having been codified in the ILC’s Articles on State Responsibility. More specifically, any forms of invasion or attack taking place by ‘armed bands, groups, irregulars or mercenaries’, the acts of which could eventually be (also) attributed to the sending State under article 8 of the ILC Articles of State Responsibility, are governed by article 8bis para. 2 lit. g).

For purposes of *jus in bello*, the ‘armed forces’ of a party to an armed conflict (and thus also of a State when it comes, as in then scenarios covered by article 8bis, to international armed conflicts) are defined in article 43 para. 1 Additional Protocol I to the Geneva Conventions as **all organized armed forces, groups and units which are under a command responsible to that State for the conduct of its subordinates**, regardless of whether they **constitute land, naval or air forces**. Given that this definition was not only adopted in 1977, *i. e. after* GA Resolution 3314 (‘Definition of Aggression’) had been adopted, but also for purposes of *jus in bello*, it cannot, as such, be considered as authoritative when it comes to article 8bis para. 2 lit. a), but may serve as a helpful tool in defining the group of persons, action of which is relevant to determine whether an invasion respectively an attack has taken place. In any event, given the object and purpose of the provision, namely to protect the attacked respectively the invaded State, the acts of any organs of a State which involve the use of military force are to be considered acts of ‘armed forces’, such acts by non-organs being covered by article 8bis para. 2 lit. g). 112

e) ‘(...) of the territory of another State (...)’. In order to make a finding as to whether an act of aggression in the form of an ‘invasion’ or ‘attack’ has taken place, the Court will eventually have to make a finding as to whether (as might be claimed) the alleged aggressor State has a **valid title to the territory** concerned, or rather not. If the former were the case, there would be not an invasion of or attack of the territory of another State, even if the said other State had effective control of such territory. Put otherwise, the provision does protect the sovereignty of the invaded or attacked State. In contrast thereto, where the **attacked State only exercised *de facto* control over the territory**, sovereignty however lying with the invading State, there would not be, as required, an invasion or attack of the territory of another State. 113

It is worth noting that the first part of article 8bis para. 2 lit. a) dealing with the invasion or attack of ‘the territory of another State’ does not, unlike the latter part thereof, also refer to the invasion or attack of ‘the territory of another State *or part thereof*’. It stands to reason, however, that it is the very act of invading or attacking a foreign State that amounts to an act of aggression as such, even if the aim is to ‘only’ do so on **limited geographic basis**. 114

f) ‘(...) or any military occupation, however temporary, resulting from such invasion or attack (...)’. Under **article 42 of the Hague Regulations of 1907**, having codified customary law on the matter, (military) ‘occupation’ refers to situations where a State’s military forces exercise effective control and authority over the territory of another State¹⁶³. In line with **article 49 para. 2 of the 4th Geneva Convention**, a situation of occupation may also arise where the said occupation (*i. e.* in the case of article 8bis the one which is the result of an invasion or attack) meets with no armed resistance. 115

The words ‘however temporary’ confirm that even a temporary occupation, *i. e.* one which is limited in time, amounts to an act of aggression. Yet, in order to reach the threshold provided for in article 8bis para. 1, a certain **minimum duration** of the occupation is required so as to provide for a violation of the prohibition of the use of force serious enough 116

¹⁶³ Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, in: Scott, *The proceedings of the Hague Conferences* (1920) 621; also see *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 230, para. 173.

to constitute a crime of aggression. This is true, in particular, where the occupation is not only limited in time, but also merely extent to a small border area only.

- 117 Notwithstanding the fact that the part of article 8bis para. 2 lit. a) dealing with occupation does not, contrary to the part dealing with annexation of territory, *explicitly* state that even a **partial occupation** (just like a partial annexation) amounts to an act of aggression, an interpretation of the provision in line with customary international law provides that this is the case, a possible *argumentum e contrario* notwithstanding.
- 118 Under the terms of article 8bis para. 2 lit. a), the occupation must result from an ‘invasion’ or ‘attack’, and must thus be the **result of a use of force in violation of international law**. Thus, an occupation of foreign territory which came about as the result of an exercise of the right of self-defense does not, as such, constitute an act of aggression¹⁶⁴. During the drafting of GA resolution 3314 (‘Definition of Aggression’), the question whether an ‘**excessive defensive**’ occupation caused by the exercise of the right of self-defense, but lasting for several years or even decades after the initial exercise of such a right, constitutes an act of aggression, could not be agreed upon. Accordingly, the question was deliberately left open¹⁶⁵, nor was it addressed again when article 8bis was drafted. However, an unreasonably long-lasting occupation might amount to an ‘excess’ of self-defense, and might then, depending on the specific circumstances, constitute an act of aggression by and of itself¹⁶⁶.
- 119 While, under the terms of article 8bis para. 2 lit. a), the *invasion* or *attack* must be directed against the territory of a foreign State, the **provision does not require the ensuing occupation to then necessarily also relate to the territory of another State**. This is confirmed by the very text of article 8bis para. 2 lit. a), which refers to ‘*any* military occupation’. As a matter of fact, as the case of Palestine demonstrates, even an **inter-State armed conflict** might lead to the occupation of territory which, at least at the time the occupation took place, did not form part of a foreign State, or later on did not possess that status anymore.
- 120 Finally, where the Security Council, like in the case of Iraq, *ex post facto* legitimizes an **occupation regime**, even one created by a violation of the Charter of the United Nations¹⁶⁷, this either does not constitute an occupation covered by article 8bis para. 2 lit. a) in light of its object of purpose, or at the very least such an occupation would then not amount to a violation of the Charter, and even less a manifest one, the illegality of the prior invasion or attack notwithstanding.
- 121 g) ‘(...) or any annexation by the use of force of the territory of another State or part thereof (...)’. ‘**Annexation**’ covers the forcible acquisition of a State’s territory by another state in violation of international law. Additionally, an annexation normally requires a previous effective occupation, combined with the intention to appropriate the territory permanently¹⁶⁸. Under article 8bis para. 2 lit. a), any such annexation must be the result of the use of force.
- 122 In line with the practice of the Security Council, even **acts of a State purporting to extend its domestic laws** to occupied territory and assimilating it to its own territory, while not formally ‘annexing’ as such, might nevertheless amount to a (*de facto*) **annexation**¹⁶⁹ also covered by that part of article 8bis para. 2 lit. a) here under consideration. In particular, this might be true where an occupying power physically separates part of the occupied territory adjacent to its own territory from the remainder of the occupied territory and, at the same

¹⁶⁴ Bruha, *Die Definition der Aggression* (1980) 246.

¹⁶⁵ Bruha, *Die Definition der Aggression* (1980) 245 *et seq.*

¹⁶⁶ For the question whether an excessive exercise of the right of self-defense may generally amount to a manifest violation of the Charter of the United Nations, see mn 71.

¹⁶⁷ UN Doc S/RES/1483 (22 May 2003).

¹⁶⁸ Hofmann, ‘Annexation’, in: *MPEPIL*, mn 1.

¹⁶⁹ Hofmann, ‘Annexation’, in: *MPEPIL*, mn 33; see e.g. UN Doc S/RES/497 (17 December 1981), para. 1: ‘[...] the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect’.

time, transfers its own population into that very part of the occupied territory, while eventually simultaneously clearing it from the indigenous population¹⁷⁰.

2. Lit. b): bombardment or use of weapons

a) ‘Bombardment by the armed forces of a State against the territory of another State (...)’. The term ‘bombardment’ describes any attack from land, sea, or air bases with heavy weapons which, like artillery, shells, missiles, or aircraft, are capable of destroying enemy targets at a greater distance beyond the specific battle lines¹⁷¹. In contrast to article 8bis para. 2 lit. a), lit. b) encompasses cases which do not require the attacking State’s armed forces to physically cross the border. The notion of ‘bombardment’ against the territory of another State covers not only situations where the weapon system is located on the attacking State’s territory, but also where such systems have already been deployed on the territory of the State being attacked.

Given that article 8bis para. 2 lit. b) criminalizes violations of the *jus ad bellum*, it does not (only) criminalize bombardments of certain protected persons or objects, deriving from the principles of proportionality and distinction inherent in the *jus in bello* and criminalized by various provisions of article 8. Rather, the norm refers generally to bombardments of another State’s territory in general¹⁷².

The further elements of the provision covering bombardments, namely that such bombardment is undertaken by ‘the armed forces of a State’ and is further directed ‘against the territory of another State’ are identical to the terms used in article 8bis para. 2 lit. a), reference to which is therefore made¹⁷³.

b) ‘(...) or the use of any weapons by a State against the territory of another State’. The second alternative of article 8bis para. 2 lit. b) refers to the use of ‘any weapons’. Accordingly, while during the drafting process of what was to become GA Resolution 3314 (‘Definition of Aggression’) it had been proposed to introduce a specific reference to weapons of mass destruction, those weapons were in the end only referred to in the fifth preambular paragraph of the said resolution. Article 8bis in turn does not contain any such reference at all. However, the term ‘use of any weapons’¹⁷⁴ is broad enough to include the different kinds of weapons of mass destruction.

As in the case of the first alternative of article 8bis para. 2 lit. b) referring to ‘bombardments’, the use of weapons must be directed against another State¹⁷⁵. It is worth noting, however, that the second alternative of article 8bis para. 2 lit. b) generally refers to ‘the use of any weapons by a State’. This stands in contrast to the first alternative thereof, which requires the ‘bombardment by the armed forces of a State’¹⁷⁶. It thus stands to reason that any such use of weapons therefore constitutes an act of aggression by the respective State, whenever the action involved can be attributed to the attacking State under general rules of the law of State responsibility, even when not emanating from the armed forces of this State as such.

3. Lit. c): blockade

Article 8bis para. 2 lit. c) criminalizes ‘[t]he blockade of the ports or coasts of a State by the armed forces of another State’. The term ‘blockade’ describes belligerent operations to prevent vessels from entering or exiting ports or coastal areas belonging to another nation.

¹⁷⁰ See for such proposition *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, 136, 184, para. 121.

¹⁷¹ McDonald and Bruha, ‘Bombardment’, in: *MPEPIL*, mn 1.

¹⁷² Sayapin, *The Crime of Aggression in International Criminal Law* (2014) 267.

¹⁷³ See mn 111 *et seq.* and mn 113.

¹⁷⁴ Emphasis added.

¹⁷⁵ For further details see mn 113.

¹⁷⁶ Emphasis added.

It can take various forms, such as interdiction operations by vessels, or by mining the access routes to harbors. While a blockade has always been a common measure of economic warfare and constitutes a violation of the State's territory, it can also be directed against the armed forces of another State, in order to prepare an invasion or to cut off the other State's troop supply¹⁷⁷. Given that a blockade does not necessarily involve the actual use of armed force, it is lit. c) of article 8bis para. 2 that raises in particular the question whether such operations would always reach the threshold provided for in article 8bis para. 1¹⁷⁸.

Under **international humanitarian law** (once States have entered into an armed conflict), a blockade is only prohibited if it has the sole purpose of starving the civilian population or denying it other objects essential for its survival, or if the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade¹⁷⁹. However, since article 8bis generally, and article 8bis para. 2 lit. c) in particular, do not criminalize violations of the *jus in bello*, but rather those of the *jus ad bellum*, such restrictions do not apply. Rather, **any blockade may constitute an act of aggression**, even if it abided by the limitations set out in international humanitarian law.

129 The blockade must then have the effect of blocking access to either the ports or the coasts of a State. Given that the provision uses both terms in the plural, it stands to reason that the **blockade of one single port** does not fulfill the necessary criteria in order to constitute a blockade within the meaning of article 8bis para. 2 lit. c), unless such port would provide for the only access to the coasts of the victim State, and would thus by the same token amount to a blockade of the coasts of such victim State.

130 Since the provision covers only the coastal part of a State's transportation system, **landlocked States are not protected**. As a matter of fact, already when GA Resolution 3314 ('Definition of Aggression') was drafted, a proposal in the respective Special Committee aimed at introducing an equivalent for the barring of passage to the open sea, but a majority of States was not willing to expand the scope of what is now the equivalent provision in article 8bis para. 2 lit. c). While one might assume an exception for land-locked States (and therefore an act of aggression) in extreme cases, *e.g.* when a State cuts off all communication routes of another State¹⁸⁰ for purposes of State responsibility, no such analogy seems to be permissible, given the unequivocal wording of article 8bis para. 2 lit. c) in light of article 22 para. 2 1st sentence¹⁸¹.

131 Article 8bis para. 2 lit. c) once again requires that the **blockade is being undertaken by the term 'armed forces' of the attacking State**, and may thus be carried out by land, air or naval forces¹⁸².

4. Lit. d): attack on the land, sea or air forces, or marine and air fleets of another State

132 Article 8bis para. 2 lit. d), which refers to '[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State', is *mutatis mutandis* identical to lit. a), reference to which is therefore made¹⁸³. Its special purpose consists in the **protection of State positions abroad**. At least for purposes of article 8bis para. 2 lit. d) it is however only military facilities that are considered to constitute such protected positions, but

¹⁷⁷ Heintschel von Heinegg, 'Blockade', in: MPEPIL, mn 1; Sayapin, *The Crime of Aggression in International Criminal Law* (2014) 268.

¹⁷⁸ See mn 46 *et seq.*

¹⁷⁹ Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995), Article 102.

¹⁸⁰ Randelzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 1397, mn 24.

¹⁸¹ For details see Broomhall, *article 22*, mn 36 *et seq.*

¹⁸² Randelzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 1397, mn 24; see as to the notion of 'armed forces' also mn 111 *et seq.*

¹⁸³ *Supra* mn 109 *et seq.*

not diplomatic missions and nationals¹⁸⁴. On the other hand, the provision also applies to military positions of a State on disputed territory¹⁸⁵. The term ‘fleets’ was chosen carefully to indicate that an attack on commercial fishing vessels or civilian aircraft would not amount to an act of aggression within the meaning of article 8bis para. 2 lit. d)¹⁸⁶. Even less would then boarding and search operations against commercial vessels, regardless of their legality under international law, fulfill the criteria laid down in article 8bis para. 2 lit. d).

The 2003 judgment of the ICJ in the *Oil Platforms* case had left open whether ‘the mining of a single military vessel might be sufficient to bring into play the “inherent right of self-defence” and would thus also constitute an armed attack¹⁸⁷. Such determination is then in turn relevant for purposes of article 8bis para. 1, when it comes to the gravity of the act and in order to decide whether such operation would then also eventually amount to a crime of aggression.

It remains unclear whether the attack has to directly target such military positions (e.g. by shooting at a ship or killing its crew), or whether the provision also applies when the attack merely forcefully hinders a plane or a ship to follow its course¹⁸⁸. At the very least, however, such latter operations will hardly ever fulfill the ‘character’, ‘gravity’, and ‘scale’ criteria, as contained in article 8bis para. 1¹⁸⁹.

Given its wording, which specifically relates to attacks ‘on the land, sea or air forces, or marine and air fleets of another State¹⁹⁰, article 8bis para. 2 lit. d) **does not cover attacks on a State’s objects stationed in outer space¹⁹¹**. This is confirmed by the fact that GA Resolution 3314 (‘Definition of Aggression’) was adopted seven years after the Outer Space Treaty¹⁹², which leads to the conclusion that the drafters excluded space objects deliberately from the scope of application of the provision, and the same is true with respect to the Kampala Review Conference, which again could have easily included space objects into the definition of protected military ‘outposts’.

5. Lit. e): violation of stationing agreements and unlawful extension of presence

a) **General issues.** Article 8bis para. 2 lit. e) stipulates that ‘[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement’ constitutes an act of aggression. The provision has been drafted not the least in the light of post-World War II practice of forming military alliances, which routinely provide for army installments of one State within other member States¹⁹³, but which may be misused against either the receiving State, or indeed for military action against a third State, thereby exposing the receiving State in turn then being the object of military counter-attacks.

The paragraph includes **two specific forms of acts of aggression**, one being the use of force in contravention of the specific conditions of the agreement providing for the stationing of troops, while the second encompasses the use of force after the armed forces should have already left the foreign territory due to the lapse or termination of the agreement.

b) **Violations of stationing agreements.** With respect to the **first alternative**, namely ‘[t]he use of armed forces of one State which are within the territory of another State with the

¹⁸⁴ Verdross and Simma, *Universelles Völkerrecht* (3rd edition 1984) 290, mn 473.

¹⁸⁵ Randelsofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 1397, mn 26, with reference to the Argentinian invasion on the Falkland Islands in 1982.

¹⁸⁶ Broms (1977) 154 (I) *RdC* 299, 351.

¹⁸⁷ *Oil Platforms, (Iran v. USA)*, ICJ Rep. 2003, 161, 195, para. 72.

¹⁸⁸ Bruha, *Die Definition der Aggression* (1980) 117.

¹⁸⁹ See mn 50 *et seq.*

¹⁹⁰ Emphasis added.

¹⁹¹ Sayapin, *The Crime of Aggression in International Criminal Law* (2014) 273.

¹⁹² 610 UNTS 205.

¹⁹³ Broms (1977) 154 (I) *RdC* 299, 352.

agreement of the receiving State, in contravention of the conditions provided for in the agreement’, it ought to be noted that it requires that the stationing forces are being ‘used’, the French text using the term ‘*emploi*’. This does not seem to imply, however, that such troops then have to necessarily use military force against the territorial State in the sense of an attack. On the other hand, the term ‘use of armed forces’ implies that there must be **some element of genuine coercion** inherent in the behavior of the troops of the sending State, a mere technical violation of a stationing agreement not amounting to the actual use of armed forces within the meaning of the provision.

138 In line with the text of the provision, the said armed forces must find themselves on the territory of the receiving State with the agreement of the receiving State. Given the further wording, such ‘**agreement**’ has to take the form of a treaty, as confirmed by both the English and the French text, first using the general wording ‘with the agreement’/‘avec l’agrément’, but then later referring to the conditions set out in the respective ‘agreement’/‘accord’.

139 c) **Unlawful extension of presence.** With respect to the second case, namely the ‘extension of [the] presence [of armed forces]¹⁹⁴ of one State which are within the territory of another State with the agreement of the receiving State] beyond the termination of the agreement’, it ought to be noted that, as the ICJ held in the *Armed Activities* case, an agreement ‘facilitat[ing] the orderly withdrawal of (...) foreign forces (...) carries no implication as to [their] (...) military presence having been accepted as lawful¹⁹⁵. At most, the principle of *bona fide* might imply that States must be given a reasonable amount of time to withdraw their troops, once a stationing agreement has been terminated¹⁹⁶.

6. Lit. f): allowing one’s territory to be used for an act of aggression

140 Article 8bis para. 2 lit. f) regulates a State assisting another State in perpetrating an act of aggression by allowing its territory to be used by said other State to commit an act of aggression.

For one, the State must use the territory which was placed at its disposal to actually commit an ‘act of aggression’ against a third State within the meaning of article 8bis para. 2 lit. a) – e), or lit. g).

141 Furthermore, given the fact that the territory must have been placed at the disposal of the State undertaking the act of aggression, it is **only the voluntary provision of territory** that itself then constitutes an act of aggression. Accordingly, cases in which a State has unsuccessfully tried to prevent such misuse¹⁹⁷, or in which the State has been illegally invaded and occupied itself by the aggressor State, which now uses the territory to commit acts of aggression against additional States, are not covered by article 8bis para. 2 lit. f). On the other hand, it does not matter whether the territorial State had placed its territory at the disposal of the State committing the act of aggression by way of a treaty, or otherwise.

142 As a matter of principle, it is obviously **not prohibited to allow another State to use one’s territory for the stationing of armed forces or the installment of arms**¹⁹⁸. In order for the receiving State therefore to itself commit an act of aggression, it must be aware of the kind of use of its territory to be made by the primary aggressor State in order to itself then qualify as an aggressor State¹⁹⁹. What is more is that the provision further requires that there must be some specific ‘*action* [...] in allowing its territory [...], which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a

¹⁹⁴ As to the notion of armed forces see mn 111 *et seq.*

¹⁹⁵ *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 210, paras. 97, 99.

¹⁹⁶ Randelzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 1397, mn 29.

¹⁹⁷ Randelzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 1397, mn 30, with further references.

¹⁹⁸ Sayapin, *The Crime of Aggression in International Criminal Law* (2014) 269.

¹⁹⁹ Broms (1977) 154 (I) RdC 299, 353.

third State²⁰⁰. Put otherwise, the conclusion of a stationing agreement by the host State without then taking any further steps towards allowing an act of aggression to take place does not yet fulfill the requirements underlying article 8bis para. 2 lit. f). This is confirmed by the drafting history of that part of GA Resolution 3314 ('Definition of Aggression') mirroring article 8bis para. 2 lit. f). In particular, the wording 'with the acquiescence and agreement of the former' contained in a draft of the said resolution was substituted by the current wording, in order to exclude merely passive behavior from the scope of lit. f)²⁰¹.

Finally, it is only the status of the host State *vis-à-vis* the Rome Statute generally and the Kampala amendments specifically that is relevant when it comes to determine whether the Court has jurisdiction under article 15bis para. 4 and para. 5 respectively. 143

7. Lit. g): sending of irregular forces

a) **General issues.** Article 8bis para. 2 lit. g) covers forms of 'indirect' aggression by sending irregular forces of various kinds into another State to then carry out acts of armed force in such latter State. In accordance with article 8bis para. 1, it is then not the actual persons carrying out the acts of armed violence belonging to non-State armed groups that eventually commit a crime of aggression, but rather the persons controlling or directing the State policy of sending such irregular forces into another State. 144

b) 'The sending by or on behalf of a State (...)'. While what is now article 8bis para. 2 lit. g) had been very controversial during the drafting process of what was to become GA Resolution 3314 ('Definition of Aggression'), in its *Nicaragua* case, as later confirmed in the *Armed Activities on the Territory of the Congo* case, the ICJ considered it to constitute a reflection of customary international law²⁰². 145

The term 'sending' implies (and thus also requires) a sufficiently close link between the 'sending' State and the non-State group actually carrying out the armed operations, so that the latter would then have to either be qualified as *de facto* organs of the sending State, or at least as being controlled by the 'sending' State within the meaning of article 8 of the ILC Articles on State Responsibility²⁰³. 146

This triggers the question as to the necessary degree of control that is required to equate the sending and conduct of the mentioned non-State actors – armed bands, groups, irregulars and mercenaries – with direct acts of the sending State under the said article 8 of the ILC Articles. In its *Nicaragua* judgment, the ICJ held that such control must amount to 'effective control'. By 'effective control', the Court meant a situation where the State directly controls the perpetration of specific acts²⁰⁴. 147

As is well-known, the Appeals Chamber of the ICTY contested the *Nicaragua* judgment's effective control test. In its *Tadić* case, the Tribunal argued that the *Nicaragua* test was inconsonant with both the logic of the law of State responsibility and with judicial, as well as with State practice²⁰⁵, the required degree of control being one of 'overall' control over subordinate armed forces or military or paramilitary units 'going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations'²⁰⁶. 148

²⁰⁰ Emphasis added.

²⁰¹ See Bruha, *Die Definition der Aggression* (1980) 263.

²⁰² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ Rep. 1986, 14, 103, para. 195; also see *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 222, para. 146.

²⁰³ Randelzhofer and Nolte, in: Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 1397, mn 33.

²⁰⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ Rep. 1986, 14, 64 et seq., para. 115.

²⁰⁵ *The Prosecutor v. Duško Tadić*, No. IT-94-1, Judgment, Appeals Chamber, 15 July 1999, paras. 115–45.

²⁰⁶ *The Prosecutor v. Duško Tadić*, No. IT-94-1, Judgment, Appeals Chamber, 15 July 1999, para. 145.

- 149 In its 2007 judgment in the in the *Bosnian Genocide* case, the ICJ however rightly upheld the position laid out in the *Nicaragua* judgment and plainly rejected the criticism brought up by the ICTY in the *Tadić* case. The Court argued that the *overall* control criterion was useful for concluding whether a State was involved in a conflict on another State's territory and hence whether a conflict was international, but underlined that the ICTY was not called upon to decide on questions of State responsibility²⁰⁷. Accordingly, **in order for insurgents to having been sent 'by or on behalf of a State'** for purposes of article 8bis para. 2 lit. g), they must **either qualify as *de facto* organs, or be within the effective control of the 'sending' State.**
- 150 c) '(...) of armed bands, groups, irregulars or mercenaries (...)'. For purposes of the *jus ad bellum* issue addressed in article 8bis para. 2 lit. g) 'armed bands' and 'groups' do *not* seem to require a certain degree of organization and organizational coherence and hierarchy, such as a command structure and the capacity to sustain military operations. This is confirmed by an *argumentum e contrario* with article 8 para. 2 lit. f), which unlike article 8bis para. 2 lit. g) here under consideration, refers to 'organized' armed groups. The term 'groups' should also encompass private military and security companies²⁰⁸.
- 151 'Irregulars' are understood as opposed to the term of 'regular armed forces' as used in international humanitarian law. Under article 43 para. 1 of the Additional Protocol I to the Geneva Conventions, the armed forces of a State party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. In contrast thereto, the term 'irregular forces' comprises militia or voluntary corps²⁰⁹ not subject to a formal chain of command, and not forming part of the armed forces of a party to a conflict.
- 152 The term 'mercenary' is defined in both, article 47 of the Additional Protocol I to the Geneva Conventions and in article 1 of the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries²¹⁰. Accordingly, a mercenary is any person who is specially recruited locally or abroad in order to fight in an armed conflict; is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; is not a member of the armed forces of a party to the conflict; and has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
- 153 The third parties listed in article 8bis para. 2 lit. g), namely armed bands, groups, irregulars and mercenaries, are not meant to encompass single individuals (although the last two may theoretically do so) since they were supposed to commit acts similar in gravity to the one otherwise listed in article 8bis para. 2²¹¹.
- 154 d) '(...) which carry out acts of armed force against another State of such gravity as to amount to the acts listed above (...)'. The various actors just referred to (*i. e.* armed bands, groups, irregulars and mercenaries) must actually 'carry out acts of armed force against another State of such gravity as to amount to the acts listed above', *i. e.* as listed in article 8bis para. 2 lit. a) – f). Not only must they therefore use 'armed force' as defined above²¹², but

²⁰⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007, 43, 210, para. 404.

²⁰⁸ Sayapin, *The Crime of Aggression in International Criminal Law* (2014) 270.

²⁰⁹ Cf. Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Regulation 1.

²¹⁰ 2163 UNTS 75.

²¹¹ Broms (1977) 154 (I) RdC 299, 354.

²¹² See mn 111.

those acts must also be directed against a third State. Finally, such acts must be similar in gravity to the other acts mentioned in article 8bis. It is worth noting, however, that the comparison only relates to the gravity of their acts but not to their scale, or indeed their character²¹³.

e) '(...) or its substantial involvement therein.' In contrast to the first alternative of article 8bis para. 2 lit. g), *i. e.* the 'sending by or on behalf of a State', the second alternative, *i. e.* '[the State's] substantial involvement', pays tribute to the difficulties of providing evidence for the first alternative²¹⁴. This second alternative is vaguer than the first one and has not yet been sufficiently addressed by international courts. In the *Armed Activities* case, the ICJ did not properly differentiate between these two alternatives of article 3 lit. g) of GA Resolution 3314 ('Definition of Aggression') (now reproduced in article 8bis para. 2 lit. g)), but merely indicated that this form of State aggression generally **requires a careful assessment of the standard and burden of proof**²¹⁵.

As a matter of principle, **allowing non-State actors to make use of one's territory in order to prepare for acts of aggression** similar to those listed in article 8bis para. 2 against persons or property situated in another State may be considered as the respective host State's 'substantial involvement' within the meaning of article 8bis para. 2 lit. g)²¹⁶. It remains doubtful, however, whether a mere failure to take repressive measures against such acts (be it for a lack of ability or willingness) ought to be already considered to give rise to a substantial involvement, and thus eventually even give rise to a punishment for a crime of aggression.

8. Other forms of aggression not listed

Given that article 8bis para. 2 merely repeats the respective wording of GA Resolution 3314 ('Definition of Aggression'), modern methods of warfare, such as the use of 'cyberforce', unforeseeable in 1974, but a major topic in modern international law²¹⁷, have not been listed in article 8bis either. However, as shown above, the list of possible acts of aggression, as contained in article 8bis para. 2, is not exhaustive²¹⁸, although any other acts should be interpreted narrowly and must equate the character of the acts listed in order to also amount to an act of aggression for purposes of article 8bis para. 2.

In that context, it is worth noting that in the context of the notion of 'armed attacks' in the sense of article 51 of the Charter of the United Nations, the ICJ has held that the **exercise of the right to self-defense does not depend on the type of weapon employed for a given attack**²¹⁹. Still, it remains difficult to interpret this statement in a way that electronic measures could be treated as 'weapons' in the sense of article 8bis para. 2 lit. b)²²⁰. At the very least, methods of 'cyber warfare' would have to bring about destructive effects comparable to those of conventional weapons, such as the disabling of the State's infrastructure²²¹ in order to constitute an act of aggression within the meaning of article 8bis para. 2.

²¹³ For the content of these three terms see mn 61 *et seq.*

²¹⁴ Broms (1977) 154 (I) *RdC* 299, 354.

²¹⁵ *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 222, para. 146.

²¹⁶ Sayapin, *The Crime of Aggression in International Criminal Law* (2014) 260.

²¹⁷ See generally Schmitt (ed.), *Tallin Manual on the International Law Applicable to Cyber Warfare* (2013).

²¹⁸ *Supra* mn 99 *et seq.*

²¹⁹ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 1996, 226, 244, para. 39.

²²⁰ For a different view, see Randalzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 1397, mn 43.

²²¹ Randalzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (3rd edition 2012) 1397, mn 43, with further references.

F. Article 8bis and the exercise of domestic jurisdiction over the crime of aggression

- 159 The exercise of the Court's jurisdiction with regard to the crime of aggression is, just as with regard to the other crimes within the jurisdiction of the Court, governed by the **principle of complementarity** set out, in particular, in article 17. In accordance therewith, no. 5 of the 'Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression', adopted as part of the enabling Resolution RC/Res.6, underlines 'that the amendments [i. e. articles 8bis, 15bis and 15ter] shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State'²²².
- 160 For one, the phrase confirms, if ever there had been need, that the principle of complementarity underlying the Court's overall jurisdictional scheme, **does not carry with it an implicit obligation to punish the respective crime**, which crime is subject to the Court's complementary jurisdiction.²²³ On the other hand, said formulation leaves it deliberately open, however, whether States are entitled or eventually even obliged, under general international law, to exercise their domestic criminal jurisdiction with regard to the crime of aggression committed by their own nationals, individuals other than their own nationals or, eventually, even exercise universal jurisdiction in that regard.

²²² RC/Res.6, Annex III, *Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, para. 5.

²²³ Werle and Jessberger, *Principles of International Criminal Law* (3rd edition 2014) 556.

Article 9 Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority;
- (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Literature: Badar, M. E., 'Dolus Eventualis and the Rome Statute without it?', (2009) 12 *NCLRev* 433; Barriga, S. and Kress, C., *The Travaux Préparatoires of the Crime of Aggression* (2012); Barriga, S. and Grover, L., 'A Historic Breakthrough on the Crime of Aggression', (2011) 105 *AJIL* 517; Bassiouni, M.C. (ed.), *The Statute of the International Criminal Court: A Documentary History* (1998); *id.*, *Substantive Criminal Law* (1978); Beddard, R. 'Retrospective Crime', (1995) 145 *NLJ* 663; Campbell, T., *Seven Theories of Human Society* (1980); Clark, R.S., 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', (2001) 12 *CLF* 291; *id.*, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings', (2008) 19 *CLF* 519; *id.*, 'Elements of Crimes in Early Confirmation Decisions of the Pre-Trial Chambers of the International Criminal Court', (2008) 6 *NZYBIL* 209; *id.*, 'Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It', (2009) 20 *EJIL* 1103, 1106-13; *id.*, 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010', (2010) 2 *GoJIL* 689; Dewey, J., 'Logical Method and Law', (1924) 10 *CornLQ* 17; Dörmann, K., Doswald-Beck, L. and Kolb, R., *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (2002); Finnin, S., *Elements of Accessorial Modes of Liability: Article 25 (3) (b) and (c) of the Rome Statute of the International Criminal Court* (2012); Friman, H., 'Offences and Misconduct against the Court', in: R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 605; Glaser, S., *Infraction internationale* (1957); Kelsen, H., 'Will the Judgment of the Nuremberg Trial Constitute a Precedent in International Law?', (1947) 1 *ILQ* 153; *id.*, *Pure Theory of Law* (1989); McLachlan, C.L., 'The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention', (2005) 54 *ICLQ* 2779; Meron, T., 'International Criminalization of Internal Atrocities', (1995) 89 *AJIL* 554; Oosterveld, V., 'Gender-Based Crimes against Humanity', in: L. N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (2011) 78; Plawski, S., *Etude des principes fondamentaux du droit international pénal* (1972); Pound, R., *An Introduction to the Philosophy of Law* (1951); Popper, *The Poverty of Historicism* (1957); Robinson, P.H., 'Should the Criminal Law Abandon the Actus Reus/Mens Rea Distinction?', in: S. Shute, J. Gardner, and J. Horder (eds.), *Action and Value in Criminal Law* (1993) 187; Trahan, J., 'The Rome Statute's Amendment on the Crime of Aggression: Negotiating at the Kampala Review Conference', (2011) 11 *ICLRev* 49; Triffterer, O., 'Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender 'Elements of Crimes' für alle Tatbestände des Völkermordes', in: B. Schünemann *et al.* (eds.) *Festschrift für Claus Roxin* (2001) 1114; Wise, E.M., 'Part 3. General Principles of Criminal Law', 13^{ter} *NEP* (1998) 49.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	9
I. Paragraph 1.....	9
1. 'Elements of Crimes'.....	11
a) Material Elements of Crimes.....	13
aa) Conduct.....	14
bb) Circumstances.....	17
cc) Consequences.....	20
dd) Causation.....	23
b) Mental Elements of Crimes.....	25

aa) Intent, knowledge or both.....	26
bb) Inferring knowledge.....	27
cc) Knowledge of consequences.....	28
dd) Intent as to conduct and consequences.....	29
ee) Knowledge and the causation puzzle.....	30
2. 'shall assist'.....	31
3. 'interpretation and application'.....	32
4. Adoption.....	35
II. Paragraph 2.....	36
1. 'Amendments to the Elements ...'.....	36
2. Subjects entitled to propose amendments.....	37
a) Any State Party.....	37
b) The judges.....	38
c) The Prosecutor.....	39
III. Paragraph 3.....	40
C. Special remarks: The juridical weight of the Elements of Crimes.....	41

A. Introduction/General remarks

1 Article 9 deals with the elements of crimes enumerated in articles 6, 7 and 8 and potentially the crime of aggression when the amendment process concerning it is completed pursuant to article 5 para. 2 of the Statute¹. 'Elements' are those basic building blocks of a physical ('material') or mental kind that taken together constitute 'the crime' or provide the necessary and sufficient conditions for the prosecution to establish 'guilt'. Initially when the Statute was being drafted, and at some later stages of its consideration, it was not intended to include such an article. As can be seen from the draft prepared by the ILC² and several reports of the Preparatory Committee, the respective text was absent in the Draft Statute. After some delegations expressed their concerns about the conformity of the definitions of crimes within the subject-matter jurisdiction of the ICC with the *nullum crimen sine lege* principle, the Preparatory Committee, at one of its meetings, took note of the proposal to elaborate the precise elements of crimes³. It was argued that the crimes 'should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*)⁴. Furthermore, it was suggested that each crime should be 'defined in a separate article identifying the essential elements of the offences and the minimum qualitative and quantitative requirements'⁵. Those requirements were meant to include, *inter alia*, the indication of circumstances in which, perpetrators by which and victims against which certain acts would constitute a crime⁶. The way the negotiations

¹ Article 9 as adopted in 1998 does not refer specifically to elements for the crime of aggression, but Res. F annexed to the Final Act contemplated the drafting of 'a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to the crime'. For the text of the Final Act and Annexes thereto see UN Doc A/CONF.183/10, reproduced in Vol. I of the official records of the Conference, UN Doc A/CONF.183/13, p. 67 (2002). The aggression Amendments adopted in 2010 in Kampala contemplate (a) adding a reference to Elements for the new article 8bis in article 9, and (b) a negotiated list of Elements for aggression. See ICC Doc. RC/Res. 6 (2010), Annex I, para. 6 (amendment to article 9) and Annex II (amendments to Elements of Crimes re aggression). Modes of liability under article 25(3) of the Statute have taken on significant importance in the early jurisprudence of the Court. For some creative suggestions about drafting Elements for those provisions, see Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3) (b) and (c) of the Rome Statute of the International Criminal Court* (2012).

² 1994 ILC Draft Statute.

³ 1996 Preparatory Committee I, p. 17, para. 56, p. 41, para. 180. The Preparatory Committee also noted that not all delegations welcomed the proposal. The U.S. was, throughout, the most insistent delegation on the elements issue. For the view that precise elements of crimes should be elaborated see also *ad hoc* Committee Report p. 12, para. 57. For the reports of the Preparatory Committee see Bassiouni (comp.), *The Statute of the International Criminal Court: A Documentary History* (1998).

⁴ 1996 Preparatory Committee I, note 3, p. 16, para. 52.

⁵ *Ibid.*, para. 53.

⁶ *Ibid.*

developed from 1996 onwards, it was contemplated that the detail in the definition of the crimes within the jurisdiction of the Court (war crimes, in particular) would far exceed that in such instruments as the Nuremberg and Tokyo Charters and the Statutes of the Tribunals for Former Yugoslavia and Rwanda. There would, moreover, for the first time in the constituent instrument of an international tribunal – or indeed in any concluded international criminal law treaty – be a comprehensive general part to go with the special part. Adding possibly even more detailed elements would take the principle of legality up yet another level.

That a person may only be convicted and punished on the basis of law is a long and well-established legal principle. Indeed, it is one of the most fundamental principles that underlie the concept of the rule of law. It derives from a broader principle that legal consequences of human behaviour must be predictable. To ensure this, the law should be precisely formulated. This is widely recognized not only by academic writers⁷, but also by international case law. Thus, for instance, the European Court of Human Rights has insisted that:

‘... a norm cannot be regarded as a ‘law’ unless it is *formulated with sufficient precision* to enable a citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’⁸ (emphasis added).

It does not take much imagination to realize the utmost importance of this passage in the field of criminal law. Given its repressive character, a person must not only be able to foresee but, indeed, has the right to know in advance what types of conduct will be regarded as criminal by the competent authorities. This principle has been approved by the European Court of Human Rights in the *Kokkinakis* case, where it stated that:

‘... an offence must be clearly defined by law. This condition is satisfied where *the individual can know* from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him liable’⁹ (emphasis added).

Another important value involved is that, in the absence of precise definitions, there is always the possibility of arbitrary enforcement by the prosecution.

Now, the question arises with regard to the degree of certainty of the definitions of crimes: what does it mean to ‘be clearly defined by law’? It might be argued, for instance, that for a definition to be clear, it should be precisely stated. But does that take us any further from the initial uncertainty? The other possible way of addressing the question is, perhaps, to say that a definition should be narrowly formulated. But this is a misleading point also, since ‘clarity’, ‘precision’ and ‘narrowness’ are different notions¹⁰. There is, yet, another term that is used – ‘specificity’¹¹. Specificity, as opposed to generality, of a provision refers to its detailed character. This is quite understandable. The more detailed a provision is, the easier its application. It is also important from the point of view of predictability, *i. e.* if a particular legal provision is detailed, that a person can reasonably be expected to be able to foresee the legal consequences of his or her conduct which falls within the scope of that provision. But one has to bear in mind that ‘detailed’ is not to be understood as limited to a particular set of factual situations known to lawmakers in advance¹². Of course, it goes without saying that,

⁷ See literature.

⁸ See *Sunday Times v. UK*, 2 EHRR 245, Series A, Vol. 30, para. 49.

⁹ See *Kokkinakis v. Greece*, Series A 260-A (1993).

¹⁰ ‘Clarity’ refers to the state or quality of being easy to understand; ‘precision’ means accuracy; ‘narrowness’ is to be understood as ‘limited in range or scope’. It should be noted, however, that among the three, the first and the second notions, that is, ‘clarity’ and ‘precision’ are to some extent interdependent, since one can reasonably say that the more accurate a definition is, the clearer its meaning, while such logical a connection can hardly be made with regard to the notion of ‘narrowness’. For the differences among the meanings of the said notions see *e.g.* Crowther (ed.), *Oxford Advanced Learner’s Dictionary of Current English* (1998) 203, 206, 772, 773, 907.

¹¹ *Supra* note 4.

¹² This is quite apart from the more philosophical query concerning the prescriptive, rather than descriptive, nature of legal propositions.

when the law is being drafted, lawmakers do reflect in the text their conceptualized vision of some past events that gave rise to the moral necessity to criminalise a particular type of conduct¹³. But this is just the point that, when doing so, they do not compile a complete catalogue of prohibited acts or omissions, but rather define them by means of general terms like, for instance, ‘making improper use of a flag of truce’ or ‘committing outrages upon personal dignity’¹⁴. General terms, in order to satisfy the requirements of *nullum crimen sine lege* principle, should be certain, that is to say, beyond reasonable doubts¹⁵. In other words, there must be a common understanding among legal professionals as to their core meaning. On the other hand, it also seems to be widely accepted that terms should not be given an absolute meaning. In the case of *Sunday Times v. UK*, the European Court of Human Rights has insisted that:

‘... whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague ...’¹⁶.

- 4 However, the very fact that we recognize the inherent vagueness of terms we use should not be exaggerated. Not unreasonably, it can be argued that vague terms can cause ambiguity which, in turn, makes us unable to ensure full respect for the rights of the accused¹⁷. This is especially true of the non-retroactivity principle, since vague terms are potentially capable of being interpreted in such a way that extends the original definition of a particular crime to such factual situations which were not intended to be covered by that definition¹⁸. As the European Commission of Human Rights held in the *Gay News* case:

‘... it is excluded ... that any acts not previously punishable should be held by the courts to entail criminal liability, or that existing offences should be extended to cover facts which previously did not constitute a criminal offence’¹⁹.

¹³ The phrase ‘events that gave rise to the moral necessity’ should not be understood as expressing the author’s opinion as to the possibility of derivation of ‘ought’ from ‘is’ – it is just a figure of speech.

¹⁴ ‘Even ‘the war’ or ‘the army’ are abstract concepts, strange as this may sound to some. What is concrete is the many who are killed; or the men and women in uniform, etc. ...’; Popper, *The Poverty of Historicism* (1957) 136.

¹⁵ It is because we define our practice by means of language, we very often come to confusion or misunderstanding about what that practice really is. Therefore, it becomes crucial that we, first of all, have a clear concept before defining it. The lack of such a concept can easily lead to the ‘extreme generality [of the definition] amounting to vacuity when ill-defined and amorphous concepts are used to cover very many different things to no significant explanatory benefit’. Campbell, *Seven Theories of Human Society* (1980) 44. It may be worth mentioning here the name of a Polish scholar R. Lemkin who is said to be the first to invent in 1944 the term ‘genocide’ instead of previously used one – ‘the Holocaust’ – which was given quite specific meaning, viz., the mass killing of Jews by the Nazis before and during the Second World War.

¹⁶ *Supra* note 8.

¹⁷ For the view that ambiguity in terms can affect the rights of the accused see note 3, *Ad Hoc* Committee Report, p. 12, para. 57.

¹⁸ This concern has been reflected in article 22 para. 2 of the *Rome Statute* which provides that ‘the definition of a crime shall be strictly construed and shall not be extended by analogy’.

¹⁹ See *Gay News & Lemon v. UK*, Vol. 28, D. R. 77, para. 9. Note: in the mentioned volume that case is referred to as *X Ltd. & Y v. UK*. It should be noted, however, that the two phrases used in the Commission’s decision, – ‘not previously punishable’ and ‘previously did not constitute a criminal offence’, – have different implications. The former implies that certain act was either permitted, or at least not prohibited, or, while prohibited, not sanctioned by an appropriate penal provision. The latter, quite obviously, means that an act was not considered as criminal prior to the entry into force of a particular enactment. But this, by itself, is not to say that that act was legal, since while all criminal acts are illegal, not all illegal acts are criminal. It deserves to be mentioned here, how an academic writer as eminent as Professor Hans Kelsen addressed this query in his comments on the judgment of the Nuremberg Tribunal: ‘A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems ... to be an exception to the rule against *ex post facto* laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has already provided only collective responsibility ... Since ... the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice’. Kelsen (1947) 1 *ILQ* 153. Interestingly, the International Military Tribunal characterized the principle *nullum crimen sine lege* as ‘not a

So far, only some substantial issues of the definitions were being considered, in particular that they should be certain and contain the essential elements of crimes. But defining crimes is also a matter of method. During the Preparatory Committee's meetings different views were expressed with regard to the method of the definitions²⁰. The view that crimes which had already reached the customary law status should be included into the Statute seemed to be widely accepted, even though there were doubts as to whether particular crimes were, at the moment, part of the customary international law. Obtaining a consensus on just which crimes were currently part of customary law was no mean feat. Not surprisingly, quite a number of delegations viewed the Statute as a codifying instrument and therefore opposed the idea that newly made crimes be included into it. Others, given that the application of the Statute was to be prospective, had few qualms about engaging in progressive development of the law. Apart from that, delegations had to come to an agreement not only on which crimes should be within the subject-matter jurisdiction of the ICC, but also on how to define them. Some delegations favoured that crimes 'should be defined by enumeration of the specific offences rather than by reference to the relevant legal instruments'²¹. By doing so they were seeking to 'provide greater clarity and transparency, to underscore the customary law status of the definitions, to avoid a lengthy debate on the customary law status of various instruments, to avoid possible challenges by States that were not parties to the relevant agreements, to avoid the difficulties that might arise if the agreements were subsequently amended and to provide a uniform approach to the definitions of the crimes irrespective of whether they were the subject of a convention'²². There was also a suggestion to combine the two approaches.

Those who thought of the Statute as merely a procedural instrument put forward an argument that the elaboration of the precise elements of crimes would duplicate or even interfere with the work of the ILC on the Draft Code of Crimes against the Peace and Security of Mankind²³. Other delegations were of the opinion that the crimes should be defined exhaustively rather than illustratively 'so as to ensure the principle of legality, to provide greater certainty and predictability ... and to ensure respect for the rights of the accused'²⁴. Some of them proposed that 'the constituent elements of crimes should be set forth in the Statute or in an annex to provide ... additional guidance to the Prosecutor and the Court ... and to avoid any political manipulation of the definitions'²⁵. This proposal was opposed by several delegations. They regarded such a scrupulous elaboration of elements of crimes as a 'complex and time-consuming task'. Furthermore, they considered it unnecessary 'to provide the detailed elements of crimes, [since] ... the general definitions contained in the relevant instruments had been sufficiently precise for their practical application'²⁶. Reference was also made to the statutes of the two international criminal tribunals – for the

limitation of sovereignty, but ... in general a principle of justice'. On this view it was not unjust to punish those who knew they were acting in 'defiance of all international law'. Nevertheless the Tribunal considered that the acts had been made criminal by 1939: 'The Charter makes the planning or waging of war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law [R]esort to a war of aggression is not merely illegal, but is criminal', cited from (1947) 41 *AJIL* 172.

²⁰ 1996 *Preparatory Committee I*, note 3, p. 16, para. 54.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*, para. 52. As it turned out the ILC's final version of its Draft Code, which became available during the 1996 meetings of the Preparatory Committee, was a pale shadow of former efforts. Its very general listing of offences was quickly over-shadowed by much more detailed drafting in the Rome Statute. For the 1996 Draft Code, see *Report of the International Law Commission*, UN GAOR, 51st Sess., Supp. No. 10, at 9, UN Doc A/51/10 (1996).

²⁴ *Ibid.*, para. 55. See also notes 8, 9 and 17.

²⁵ *Ibid.*, p. 17, para. 56.

²⁶ *Ibid.*

former Yugoslavia and for Rwanda – which merely enumerate the crimes within their subject-matter jurisdiction and lack any provision whatsoever concerning the constituent elements thereof²⁷. It should, perhaps, be noted here, that several crimes were not included into the Statute purportedly because, apart from the political considerations, there was no appropriate definition, identifying the essential elements of the crimes concerned, which the majority of delegations could accept²⁸. Nevertheless, the lack of such a definition did not prevent the inclusion of the crime of aggression within the subject-matter jurisdiction of the ICC, subject to being defined later²⁹.

- 7 The concern was also expressed as to whether it would be necessary or possible at all to elaborate precise elements for each crime included into the Statute³⁰. Thus, for instance, article 7 para. 1 (k) refers to ‘other inhumane acts’³¹. The wording does not, by itself, make it clear which acts should be deemed to be ‘inhumane acts of a similar character’, even though it does provide for a particular harm requirement. This encouraged some delegations to oppose the inclusion of the said provision into the Statute. They argued that it ‘... would not provide the clarity and precision required by the principle of legality, would not provide the necessary certainty concerning crimes that would be subject to international prosecution and adjudication, would not sufficiently guarantee the rights of the accused and would place

²⁷ See, for instance, articles 2 (Grave breaches of the Geneva Conventions), 3 (Violations of the laws or customs of war), 4 (Genocide) and 5 (Crimes against humanity) of the Statute of the ICTY.

²⁸ They were the so-called treaty-crimes, such as *crimes of terrorism* (e.g. offences under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Convention for the Suppression of Unlawful Seizure of Aircraft, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, International Convention against the Taking of Hostages, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf), and *crimes involving the illicit traffic in narcotic drugs and psychotropic substances* (e.g. 1961 Single Convention on Narcotic Drugs, 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances). See Res. E adopted at the end of the Rome Conference and annexed to the Final Act of the Conference, note 1, regretting ‘that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court...’ and recommending that the matter be taken up at a Review Conference. It was not possible to obtain a consensus that these matters should be addressed at the first Review Conference in 2010 and the matter is being addressed at glacial pace in a Working Group on Amendments.

²⁹ See article 5 para. 2 of the *Rome Statute* and note 1. For more on the successful efforts to define the crime of aggression, see Barriga and Kress (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012); Barriga and Grover (2011) 105 *AJIL* 517; Clark (2010) 2 *GoJIL* 689; Trahan (2011) 11 *ICLRev* An important part of the drafting of the amendments entailed fitting the new material into the existing structure of the general part of the Statute and the existing Elements of Crimes. See Elements of the Crime of Aggression, Proposal Submitted by Samoa, UN Doc PCNICC/2002/WGCA/SP.2 (2002) and Clark (2009) 20 *EJIL* 1103, 1106-13.

³⁰ Interestingly, delegations that favoured the further elaboration of elements of crimes within the subject-matter jurisdiction of the Court seemed to be not very much concerned about the offences against the administration of justice contained in articles 70 and 71 of the Statute, since none of their proposals dealt with elements thereof. Does this mean that those offences were considered to be of such minor importance that the elaboration of their elements could be left entirely to the Court and to domestic tribunals? Or, are the definitions of the offences against the administration of justice so clear that they can be taken for granted? And, if so, what about the weight of the principle of legality so jealously advocated by all delegations? During the work of the Preparatory Commission after Rome, no serious effort was made to devise elements for these offenses, although the Rules that spell out some of the ‘principles and procedures’ governing them suggest that the general principles of criminal law contained in Part 3 of the Statute will apply, perhaps with some awkwardness. See generally, discussion of articles 70 and 71 in this Commentary and Friman, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 605. Nor did the principle of legality or the desire for further elements extend to explicating the grounds for the exclusion of responsibility contained in article 31 of the Statute – they are left quite open-ended.

³¹ Subparagraph (k) of article 7, para. 1 reads as follows: ‘Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’. As adopted, the Elements of Crimes try to deal with the open-ended nature of this subparagraph by defining ‘character’ in a footnote asserting that: ‘It is understood that ‘character’ refers to the nature and gravity of the act’. In the course of discussion of the provision and its elements, candidates for inclusion in the category included mutilation, human experimentation and particularly violent assaults. For other potential examples, see Oosterveld, in: Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (2011) 78, 99–100.

an onerous burden on the Court to develop the law³². No doubt these general words have to be read *ejusdem generis* in light of the specific proscriptions that precede them in article 7.

Disputes as to whether precise elements of crimes should be elaborated and included into the Statute continued at the Rome Conference as well. Although all delegations agreed that crimes should be defined with clarity and precision, not all of them were in favour of further elaboration of their constituent elements³³. The main disputable issues were the placement of elements (in the Statute or in an annex, or otherwise) and their legal force. The delegation of the United States of America proposed at the Rome Conference to make in the text of article 5 (Crimes within the jurisdiction of the Court) a cross-reference to an annex, where elements were supposed to be placed³⁴. After several discussions a particular article XX appeared in the Bureau Proposal paper³⁵. There it was proposed that elements of crimes should be 'formulated, interpreted and applied in a manner consistent with the terms of articles'³⁶ defining crimes within the subject-matter jurisdiction of the ICC. According to the paragraph 4 of article XX, it appeared that the Prosecutor could not exercise his or her power to commence an investigation before elements were adopted³⁷. A few days after the Bureau proposed to insert article XX into the Part 2 of the Draft Statute, the delegation of the United States of America proposed to modify the text by adding, *inter alia*, wording which was said to be aimed at revealing the real purpose of having the precise elements of crimes elaborated³⁸. None the less, some delegations doubted that this proposal was intended to impose additional limitations on the Court's jurisdiction.

The final version of the provision concerning Elements of Crimes appeared in the Draft Statute in 16 July 1998 formulated by the Bureau of the Committee of the Whole³⁹. It was

³² 1996 Preparatory Committee I., note 3, p. 25, para. 101.

³³ Several of the NGOs represented at the Rome Conference did not welcome the proposal either. Thus, for instance, International Commission of Jurists commented: '... the ICJ considers that the current definition of crimes in the Draft Statute generally meets the requirements of the principle of *nullum crimen sine lege*. There is no need at this stage for any further elaboration on the material and mental elements of crimes'. *Definition of Crimes, ICJ Brief No. 1 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (June 1998), p. 3.

³⁴ See UN Doc A/CONF.183/C.1/L.8 submitted to the Committee of the Whole on 19 June 1998. The text of the US's proposal read as follows: 'At the end of the 'Crimes within the jurisdiction of the Court' section, add the following language:

'Definitional elements for these crimes, contained in annex XXX, shall be an integral part of this Statute, and shall be applied by the Court in conjunction with the general provisions of criminal law, in its determinations'. This proposal was accompanied by proposal containing suggested definitional elements, UN Doc A/CONF.183/C.1/L.10. This was a revised version of material circulated in New York towards the end of the Preparatory Committee's work but not taken up in the draft of the Statute sent to Rome.

³⁵ The Bureau – the steering body of the Committee of the Whole – proposed on 10 July 1998 that a separate article, dealing with elements of crimes, be placed in Part 2 of the Draft Statute (Jurisdiction, admissibility and applicable law). See UN Doc A/CONF.183/C.1/L.59. It should be noted, however, that previously on 6 July 1998 the Bureau, in its discussion paper submitted to the Committee of the Whole, referred to the need to draft a specific provision concerning elements of crimes. See UN Doc A/CONF.183/C.1/L.53 (bold text at p. 10). The Bureau's proposal was opposed by a number of delegations. NGOs, as has already been mentioned (see note 33), also expressed their concerns as to whether it was really needed to further work on those elements. Thus, a representative of the International Committee of the Red Cross, in her statement of 8 July 1998, said: 'If such a document [annex containing elements of crimes] is drafted, it is of imperative importance that it be done with extreme care. A great deal of existing law is to be found in detailed treaty provisions and in both international and national law that interprets international humanitarian law provisions. An inaccuracy could create the danger of such a document amounting to unintended international legislation rather than a reflection of existing law'. (Information conveyed by New Zealand). See UN Doc A/CONF.183/INF/10.

³⁶ See UN Doc A/CONF.183/C.1/L.59.

³⁷ The original text of paragraph 4 of the Bureau's proposed article XX reads as follows: 'Elements of crimes shall be adopted before the Prosecutor commences an investigation'. See note 35.

³⁸ The new proposal of the US delegation concerning the Bureau paper of 10 July 1998 was to continue paragraph 1 of article XX by the following sentence: 'They [elements of crimes] shall be applied by the Court in reaching determinations as to guilt'. See UN Doc A/CONF.183/C.1/L.69 (14 July 1998). Detailed draft elements had been submitted by the US delegation to the Committee of the Whole on 19 June 1998. See note 34, UN Doc A/CONF.183/C.1/L.10.

³⁹ See UN Doc A/CONF.183/C.1/L.76/Add.2.

numbered article 9 and its text was slightly amended compared with the previously proposed ones. Delegations agreed, after all, to include such an article into the Statute and adopted it in the so-called ‘package deal’⁴⁰.

B. Analysis and interpretation of elements

I. Paragraph 1

- 9 ‘Crime’, as a concept, is a theoretical construction. This is why definition is so important⁴¹. Defining, in its turn, is not merely a matter of choosing among terms. If we accept that a word is, to a considerable extent, a name of a concept, then it becomes quite clear why it is necessary to be consistent in terminology when defining that concept. From this point of view, it may be of interest to note that the term ‘definitional elements’, used in the draft annex proposed by the United States delegation⁴², does not seem to be entirely satisfactory, since it may be understood either as elements of the crimes as such or as elements of the definitions of crimes. Of course, elements of crimes are expressed in definitions but, this is just the point that, they are quite often expressed by means of different terms. Thus, for instance, pursuant to article 30 of the general part of the Statute, a mental element is an indispensable constituent element of all crimes within the subject-matter jurisdiction of the ICC. It is, therefore, essential for criminal liability under the *Rome Statute*. Nevertheless, it can be easily noticed that in the ‘special part’ of the Statute, articles 6, 7 and 8, the mental element of various crimes is not defined identically⁴³. Different terms are used in the Statute to express the mental element of crimes: ‘deliberately’, ‘with knowledge’, ‘intentional[ly]’, ‘with the intent’, ‘with the intention’, ‘wilful[ly]’, ‘wantonly’. These appear, on their face, to be elements of definitions and led to some difficulties when the Preparatory Commission came to elaborate on the Elements of Crimes. The problem arose largely because the general part provisions were, to a substantial degree, drafted by Justice officials without careful regard to what was happening with the special part; the special part materials were, for the most part, negotiated by Foreign Affairs and Military officials with careful regard to existing treaty

⁴⁰ The ultimate document adopted at Rome, A/CONF.183/C.1/L.76/Add.2, came out late at night on 16 July 1998 – the day before the Rome Conference finished its work. There was no discussion of substantive issues concerning the Statute in the Committee of the Whole during that day. Most delegations were unwilling to break the hard-won compromise on the next and final day of the Conference when the Committee did not meet until the evening. In the evening, procedural motions were adopted taking remaining proposed amendments off the table and then the Bureau’s proposed Statute was adopted as a package without amendment.

⁴¹ During the Preparatory Committee’s sessions, delegations had to make a choice between the two proposed words ‘definition’ and ‘description’. The Preparatory Committee, at one of its meetings, noted that ‘the choice of using the word ‘description’ or ‘definition’ was dependent upon answering the question whether the definition of crimes would be solely within the Statute (in which case the term ‘definition’ would be appropriate) or whether further elaboration of the elements of the definition of a crime in the Statute might be contained in an annex (in which case the term ‘description’ might be appropriate given that this term could encompass both the statutory definition and the annexed elaboration of elements)’. See 1996 Preparatory Committee II, note 3, p. 82. Ultimately, the word ‘definition’ was chosen (see *e.g.* article 22 para. 2 of the *Rome Statute*). Needless to say, for some, the word ‘description’ is an unhappy term, in particular for the purposes of criminal law (see note 12). As was suggested elsewhere: ‘... just as the mere describing of certain conduct as violating international law does not make it so, yet it may be so as a general principle of international law, so also describing certain conduct as criminal under international law does not *ipso facto* make it an international crime. ... [T]he actual crime’s existence and character are dependent not on [its description in a particular international instrument] but on general principles of international law’. See Study on Ways and Means of Ensuring the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, including the Establishment of the International Jurisdiction Envisaged by the Convention, (E/CN.4/1426, 1981), p. 6, para. 28 and p. 7, para. 33.

⁴² See UN Doc A/CONF.183/C.1/L.10.

⁴³ The drafters of the aggression amendments in the new article 8 *bis* seem to have been aware of the problem and avoided using any ‘mental’ words that might cause confusion with article 30.

language, much of which had state responsibility rather than individual criminal responsibility in mind. In drafting the Elements, most of these varying ways of expressing culpability elements were rendered in terms of intent and knowledge⁴⁴.

Once we realize that ‘crime’ is a theoretical construction, it becomes crucial to identify its constituent elements in order to have clear legal criteria as to who may be held criminally responsible and for what⁴⁵. Consequently, one has to be very careful when defining crimes so as to duly reflect all the necessary requirements concerning the principle of *nullum crimen sine lege*. This is particularly true of the international criminal law, since number, content and meaning of those elements can and, indeed, do vary from one legal system to another. Thus, for instance, in civil law countries causation is not considered to be a separate element of a crime, while in common law systems it typically is. It is important that such conceptual difficulties not be overlooked or underestimated.

1. ‘Elements of Crimes’

Article 9 of the *Rome Statute* refers to the Elements of Crimes within the jurisdiction of the ICC without explaining further what is meant⁴⁶. In the Preparatory Committee’s reports the principal issues concerning the said elements were addressed in the ‘*General Principles of Criminal Law*’ part of the Draft Statute. There two separate articles were drafted: article 28 *Actus Reus* and article 29 *Mens Rea*⁴⁷. These two articles, together with other relevant provisions, were meant to provide for clear guidance in respect of *corpus delicti* of crimes included into the Draft Statute. At an early stage of the drafting in New York, the ‘*actus reus*’ article included an effort to deal with causation, but this was omitted before Rome. In Rome, the draft on the floor asserted in paragraph 1 that conduct for which a person can be criminally responsible can constitute either an act or an omission or a combination thereof. Paragraph 2 asserted that, unless it was otherwise provided, a person can be responsible for an omission only where (a) the omission is part of the definition of the crime either expressly or by necessary implication, or (b) that person failed to perform an act that he has an obligation to perform in order to prevent the resulting crime. Subsequently, at the Rome Conference, article 28 was deleted, in part at least since it was said to be redundant⁴⁸; article 29 was renamed ‘mental element’ and became article 30 of the Statute.

With the provision on *actus reus*, formerly contained in draft article 28 removed, it was left to article 30 to provide a structure of what might reasonably be regarded as the elements of the crimes within the jurisdiction of the Court. Article 30 was the focus of much discussion during the drafting of the Elements by the Preparatory Commission, since it appeared to provide a key to the connections between the special and general parts of the Statute. Article 30, as has been noted, is headed ‘mental element’. It asserts, in paragraph 1, that

⁴⁴ See note 49 and para. 2 of the General Introduction to the Elements, quoted in the text following that note.

⁴⁵ See note 6.

⁴⁶ Compare with article 22 (Elements of an International Crime) of the Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other International Crimes. See (E/CN.4/1426, 1981), p. 37. That draft asserted that an international crime ‘shall contain four elements: a material element, a mental element, a causal element and harm’. ‘Material element’ was further described as a voluntary act or omission. A serious defect of this important effort to address the subject was its failure to come to grips with ‘circumstance’ elements, a defect addressed in article 30 of the Rome Statute. On the other hand, note the references in the text to the absence of a causation provision in the Rome Statute. Causation had been addressed in the Apartheid Draft.

⁴⁷ Such terminology is widely used in both common law and civil law countries.

⁴⁸ See Report of the Working Group on General Principles of Criminal Law, UN Doc A/CONF.183/C.1/WGRP/L.4/Add.1 (29 June 1998) and note the following comment in ‘Chairman’s suggestion for articles 21, 26 and 28’, UN Doc A/CONF.183/C.1/WGGP/L.1 (15 June 1998): ‘Another option would be to have no article dealing with omission. It seems that the substantive content of paragraph 2 (a) is largely covered by whatever is stated in the definitions of the crimes, and paragraph 2 (b) would to some extent be covered by article [28] on command responsibility at least if the approach is taken to state this as a responsibility rather than non-immunity.’ One suspects that another part of the explanation for its deletion was simply that it had become too hard to achieve a consensus on it.

‘[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the *material elements* are committed with intent and knowledge’ (emphasis added). The reference to ‘material elements’ (a term which replaced ‘physical elements’ late in the day with no explanation on the record) invites the question: what might be material elements? An examination of the definitions of intent and knowledge that follow in paragraphs 2 and 3 suggests that the drafters conceived material elements as being of three possible types: conduct elements; consequence elements and circumstance elements. These terms represent concepts that are all familiar in various legal systems, although the terminology varies. Thus article 30 para. 2 (a) defines ‘intent’ in relation to ‘conduct’ (‘a person has intent where ... that person means to engage in the conduct’). It defines intent also ‘in relation to a consequence’ in para. 2 (b) (where ‘that person means to cause that consequence or is aware that it will occur in the ordinary course of events’). Finally, knowledge is defined in a way which introduces the concept of a ‘circumstance’. (Para. 3 says that ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.) A reasonable inference from these definitions of mental elements is that they are defined with reference to the appropriate non-mental (‘material’) elements that were at the basis of the drafters’ conceptual scheme.

Conduct, one normally thinks of as amounting to an act or omission. A consequence (or a ‘result’, or ‘harm’) is what follows from the act or omission. There is, however, overlap and many participants in the Rome process and afterwards seemed to have different notions of what constituted each of these categories. Moreover, some legal systems, especially in the common law, have a distinct category of element called ‘causation’. Causation represents a link between conduct and consequence. As a result of the omission of the earlier draft on *actus reus* (which itself hardly contained a comprehensive understanding of causation) there is no specific reference to causation in the Rome Statute. It must probably be subsumed in some way in either conduct or consequences. The reference to ‘circumstances’ was a crucial one and caused much debate during the drafting of the Elements. It is seldom defined, yet we know it when we see it. It relates to the nature of the prohibited conduct, or to the nature of the consequences, or to the situation in which they occur. It is not something in itself that the perpetrator ‘does’, but is rather part of the ‘scene’. In bigamy, that I am already married is a circumstance element when I am charged with going through a second ceremony already being married. That the property belonged to another is a circumstance element in theft or wilful damage. International Criminal Law is rife with similar possibilities. Did this take place in and armed conflict (national or international)? Was the victim protected by the Geneva Conventions? Was the killing (to be a crime against humanity) part of a widespread or systematic attack on a civilian population? The drafters of the Elements ultimately decided to adopt a structure thus based on article 30’s distinction between mental and material elements and on the three kinds of material elements therein mentioned.

- 12 The requirement of ‘intent and knowledge’ was understood as a default rule during the drafting of the Elements, to be departed from if clearly required by the Statute (and in a few other instances when it was thought sensible in light of existing case-law or the instincts of the participants)⁴⁹. Accordingly, the General Introduction to the Elements provides, in relevant part:

⁴⁹ For the argument that the drafters of article 30 meant to exclude liability as a general rule based on negligence (as that term is understood by either common lawyers or civil lawyers), recklessness (as understood by common lawyers) and *dolus eventualis* (as understood by civil lawyers) see Clark (2001) 12 *CLF* 299 *et seq.*; *id.* (2008) 19 *CLF* 519 at 525 and 529, cited in Decision of Trial Chamber, 14 March 2012, *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, para. 1011 note 2722; Badar (2009) 12 *NCLRev* 433. The Elements do not contain any references to culpability based on recklessness or *dolus eventualis*. Controversially, however, they do include a few examples of forms of negligence (all of them cases where some sort of mistake may be involved): Elements, article 6 (e), Genocide by forcibly transferring children (perpetrator ‘knew or should have known that the person or persons were under the age of 18 years’); article 8 para. 2 (b) (vii) –1, –2 and –4, War crimes of improper use of flags, insignias, emblems, etc. (‘Perpetrator knew or should have known of the prohibited nature

2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, *i.e.*, intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standards, based on the Statute, including applicable law under its relevant provisions are indicated below.

7. The elements of crimes are generally structured in accordance with the following principles:
As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;
When required, a particular mental element is listed after the affected conduct, consequence or circumstance;
Contextual circumstances are listed last.⁷

The category ‘contextual circumstances’ was a spin-off from ‘circumstance’ that some participants thought was an unnecessary (but probably harmless) division of the circumstance category. In practice it refers to only three items, a manifest pattern of similar conduct in the case of genocide⁵⁰; a widespread or systematic attack against a civilian population, in the case of crimes against humanity; and an armed conflict, in the case of war crimes. These are the basic circumstance elements that give the crimes the ‘international’ character that makes them appropriate for jurisdiction in an international tribunal.

a) **Material Elements of Crimes.** It is useful to say some more about each of the material elements derived from article 30, conduct, circumstances and consequences. It will also be helpful to say a little about ‘causation’ which represents either a ‘missing’ element, to be filled in later by the Court, or something implicit in conduct and consequences. 13

aa) **Conduct.** ‘Conduct’, in most criminal law usages, comprises both an act and an omission⁵¹. For a conduct to be punishable or to constitute a crime, it must be voluntary, 14

of such use’); article 8 para. 2 (b) (xxvi), and article 8 para. 2 (e) (vii), War crime of using, conscripting or enlisting children in international and non-international conflict, respectively (‘knew or should have known that such person or persons were under the age of 15 years’). Whether these examples were compliant with article 30 and the meaning of existing ‘case-law’ (if any) was hotly debated before a consensus was arrived at. Sooner or later they are bound to give rise to arguments based on article 9 para. 3 about their consistency with the Statute. In *Lubanga Dyilo*, the Trial Chamber did not need to address the issue, since the prosecution undertook to prove, and the Chamber found, that Lubanga ‘was fully aware that children under the age of 15 had been, and continued to be, enlisted and conscripted by the UPC/FPLC and used to participate actively in hostilities during the timeframe of the charges.’ (Para. 1347.) Thus, subjective knowledge was present.

⁵⁰ This was a highly disputed addition in the Elements. While many participants thought it was implicit in the basic understanding of what constitutes genocide, others noted that there is no specific language to that effect in article 6 of the Statute or in the Genocide Convention, from which article 6 is taken. It, too, will no doubt give rise to argument before the Court about whether it is consistent with the Statute, as required of the Elements by article 9 para. 3. Equally controversial was the mental element that should be applied to it. Some participants saw it as merely a jurisdictional element (albeit of a ‘material/circumstance’ kind) to which no mental element was necessary. Others thought that it should be subject to article 30’s intent and knowledge standard. The result was a convoluted compromise that tells to Court that it is on its own without any ‘assistance’ from the Elements: ‘Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis’. (Introduction to Elements for Genocide.) It should perhaps be noted that the ‘additional element’ added by the Preparatory Commission requires proof of a ‘manifest pattern’ which is presumably determined objectively; it does not require proof of a plan or policy. One is reminded of the *dictum* of the Appeals Chamber of the ICTY that ‘the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crimes’. (*Prosecutor v. Jelisić*, Case No. IT-95-10-AA, Judgement, Appeals Chamber, 5 July 2001).

⁵¹ The draft article on *actus reus* provided: ‘Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof’. See Preparatory Committee (Consolidated) Draft, p. 64, article 28.

that is to say, it must have been willed by a perpetrator⁵². The two notions ‘act’ and ‘omission’ are in no way self-evident. Nor is it always *prima facie* clear where the distinction between them lies, since they can both lead to the same result⁵³. Furthermore, one can reasonably ask: when does a failure to act amount to an omission for the criminal law purposes? Or, what are the legal implications of the difference between ‘causing harm’ and ‘letting harm occur’⁵⁴?

Many delegations questioned the appropriateness of omissions for the purposes of the *Rome Statute*. It was argued that crimes within the jurisdiction of the ICC can be committed only by an act. Indeed, it follows from the wording of the definitions that many crimes stipulated in the Statute are capable of being committed only by some kind of violent act. Such terms as ‘deliberately inflicting’, ‘forcibly transferring’, ‘attack’, ‘employing the weapons’, ‘rape’, ‘torture’, ‘taking of hostages’, *etc.* leave no doubt as to whether a crime so defined can be committed by an omission.

- 15 Quite obviously, for a person to be held criminally responsible for an omission, a particular crime should be defined in terms of failure to act. The draft article on *actus reus* contained a specific reference to this requirement providing that ‘... a person may be criminally responsible and liable for a punishment for an omission where ... the omission is specified in the definition of the crime’⁵⁵. As has been noted the very definitions of most of the crimes under the *Rome Statute* explicitly provide that they can be committed only by an act. Yet, there are some that can be said to provide room for such an interpretation that encompasses omissions as well. Thus, such a crime as wilful killing (article 8 para. 2 (a) (i)) is capable of being interpreted in such a way that includes faults of omission too. In that case it would cover, for instance, failure to feed prisoners of war, or to provide medical care to wounded persons, or to rescue shipwrecked persons belonging to hostile armed forces⁵⁶. Coming back to the question whether a failure to act amounts to an omission for the purposes of criminal law, it has to be kept in mind that a person may only be held criminally responsible for an omission when there existed a prior duty to act. Here, the specific question arises in respect of the source of such duty. The draft article on *actus reus* made criminal responsibility for an omission conditional upon pre-existing duties under the Statute⁵⁷. A provision so worded could raise concerns as to its scope. It might be understood, if taken literally, in its strictest sense according to which the Statute is the only source of such duties⁵⁸. On the other hand, there are those who would argue that a criminal statute can hardly be said to establish ‘primary’ duties to act or abstain from acting in a certain way. Indeed, it is the *Hague Conventions* of 1907, the *Geneva Conventions* of 1949 together with the two Additional Protocols of 1977, a number of other international instruments (and

⁵² The term ‘willed conduct’ in this context should, perhaps, be clarified in a sense that it refers to the controllability thereof as opposed to *actio libera in causa*. Furthermore, the word ‘willed’, here, is not to be understood as imposing a particular *mens rea* threshold, such as ‘specific intention’, *etc.*

⁵³ Is, for example, ‘starvation’ a result of the deprivation of access to food (in which case it, seemingly, constitutes an act) or failure to feed (in which case it constitutes an omission)?

⁵⁴ Is, for instance, failure to feed prisoners to be qualified as ‘causing harm’ or ‘letting harm to occur’? And, does the distinction really make a practical difference?

⁵⁵ Preparatory Committee (Consolidated) Draft, note 51, pp. 64 *et seq.*, article 28 para. 2 (a).

⁵⁶ Pictet (ed.), *Commentary on the Geneva Convention I* (1952) 371; *id.* (ed.), *Commentary on the Geneva Convention II* (1960) 267; *id.*, *Commentary on the Geneva Convention III* (1960) 626 *et seq.*; *id.* (ed.), *Commentary on the Geneva Convention IV* (1958) 597. A footnote to the Elements asserts that the conduct element of extermination – one of the crimes against humanity (article 7 para. 1 (b)) – ‘could include the deprivation of access to food and medicine’.

⁵⁷ The draft article 28 provided that: ‘... a person may be criminally responsible and liable for punishment for an omission where the person ... is ... under a pre-existing [legal] obligation *under this Statute* to avoid the result of [the] crime ...’. Preparatory Committee (Consolidated) Draft, note 51, pp. 64–65 (paragraph 2 (b)). (Emphasis added.)

⁵⁸ The Preparatory Committee noted that some ‘delegations thought that, in the context of the offences of the Statute, breach of an obligation under the Statute to avoid the result of a crime was sufficient’. See note 51 (fn. 15, p. 66).

possibly customary law) that proscribe particular types of conduct. Therefore, the source of pre-existing duties is potentially much wider than the Statute itself. However one makes the analysis, it will be impossible to interpret the Statute in some instances without a reference out to such sources in order to understand duties.

Omissions are criminally punishable only where a person failed to prevent the harm from which victims have a special right or, speaking in Hohfeldian terms, privilege to be protected. Persons entitled to a special protection and their respective rights are well determined. Yet, the Statute's most specific aspect of criminally punishable omissions (article 28) is failure of a person occupying a particular position of power to prevent the commission of a crime by his or her subordinates. Here a person appears to be responsible for crimes committed by others. But this is so only at first glance. In fact, it is just a figure of speech. No one may be held responsible for crimes which he or she has not committed or participated in their commission himself or herself. Individual responsibility is a fundamental principle of criminal law. What indeed a commander or other superior is responsible for is his or her own criminal conduct, that is to say, failure 'to take all necessary and reasonable measures within his or her power to prevent or repress [the commission of crimes within the jurisdiction of the Court] or to submit the matter to the competent authorities for investigation and prosecution'⁵⁹. Moreover, in this context, the very crimes that have been committed by subordinates are conceived of as being a result of superior's failure to exercise control properly over them as explained article 28 mn 22 *et seq.*

bb) Circumstances. Acts and omissions do not take place in a vacuum. In most, if not in all, instances human beings act or abstain from acting because they think, rightly or wrongly, that those particular circumstances so require. It is therefore very important in order to justly evaluate human conduct to take into account the attendant circumstances. An act that *prima facie* seems to be a crime does not necessarily lead to perpetrator's responsibility or punishment. Thus, for instance, a person who commits such an act while defending himself or herself may not be held criminally liable provided that the method of defence was proportionate to the real danger to his or her life. This is a matter of grounds for excluding of criminal responsibility⁶⁰. Apart from that, the same acts committed in different circumstances are not qualified identically. Thus, such acts as rape, torture, deportation, *etc.* can be qualified either as crimes against humanity or war crimes, depending, *inter alia*, upon the attendant circumstances. In the *Rome Statute* those circumstances are generally defined in the chapeau of the respective articles. There, the special thresholds have been provided for, so as to distinguish particular categories of crimes. Let us take, for instance, torture. This

⁵⁹ See article 28 paras. 1 (b) and 2 (c) of the *Rome Statute*. Interestingly, and quite in contrast to the argument suggested in the text, this provision has been commented in such a way that makes the Statute itself a source of the duty concerned. See Wise, 'Part 3. General Principles of Criminal Law', *13ter NEP* (1998) 49 *et seq.* Here, the author, while commenting on responsibility of commanders and other superiors, writes: 'In this instance, the Statute itself imposes a duty to act'. Some remain of the opinion that a criminal statute does not impose a duty, but rather reinforces one provided for elsewhere. Thus, concerning the responsibility of commanders it is article 87 of the Add. Prot. I that stipulates duties 'to prevent or suppress', the breach of which serves as a ground of criminal responsibility of commanders and other superiors (see also article 86 of the Protocol). On the relationship between treaties and the general law, see McLachlan (2005) 54 *ICLQ* 2779.

⁶⁰ During the discussion of the Elements by the Preparatory Commission post-Rome, some delegations were strongly of the view that the grounds of exclusion of responsibility should be regarded as 'elements' of the relevant crimes. Others took a different view. No definitive conclusion was reached and the Preparatory Committee took a pragmatic approach by simply leaving the issue for another day. This pragmatic conclusion is recorded in paragraph 5 of the General Introduction to the Elements thus: 'Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements listed under each crime'. In the United States, the Model Penal Code includes within the definition of 'element of an offense' such 'conduct', 'attendant circumstances' and 'result of conduct' as 'negatives an excuse or justification for such conduct'. The most important practical effect of this definition, under the structure of the Code, is that the burden of proving that the conditions for the defence are *not met* lies with the prosecution – the burden of proof in respect of all elements lies on the prosecution. Justifications and excuses, in the Model Penal Code, seem to be examples of 'attendant circumstances'.

offence, in order to be qualified as a crime against humanity, needs to be committed 'as part of a widespread or systematic attack directed against any civilian population'⁶¹. It follows from the wording of this provision that isolated acts of torture, while being criminally punishable under national jurisdictions, do not constitute a crime against humanity, as defined in the *Rome Statute*, and consequently, do not fall within the jurisdiction of the ICC. So, it might be argued that if the circumstances mentioned above are present, then even a single act of torture can lead to criminal responsibility of a perpetrator⁶². However, this is excluded by article 7 para. 2 lit. a of the *Rome Statute*. That article defines 'attack directed against any civilian population', in the context of which certain acts need be committed so as to be qualified as crimes against humanity, as 'a course of conduct involving the multiple commission of [those] acts'. The phrase 'multiple commission of acts' explicitly provides that a single act does not constitute a crime against humanity, even if committed as part of a widespread or systematic attack directed against any civilian population.

- 18 Furthermore, some crimes can only be committed in very specific circumstances. These are the so-called 'war crimes'. The very term explicitly provides that there must be an armed conflict so as to particular offences can be qualified as 'war crimes'. Indeed, such acts as 'bombarding of towns which are undefended and which are not military objectives', 'killing a combatant who has surrendered at discretion', etc. clearly imply, by their definition, active hostilities and do not raise conceptual difficulties. But the issue is complicated by the fact that quite a number of crimes can be committed both in time of peace and in time of war. Thus, for instance, genocide is such a crime⁶³. So are crimes against humanity⁶⁴. In this view, if we, again, take torture as an example, but this time committed during an armed conflict, we can be slightly puzzled. What does make torture a war crime? Is it sufficient that it merely be committed during an armed conflict? In case of the positive answer to the latter question, do we not assume that crimes against humanity cannot be committed during an armed conflict? Can the nature of an armed conflict (international or non-international) affect the qualification of torture as a war crime as opposed to a crime against humanity?

Again, the very term 'torture' does not specify acts by means of which it can be committed. From this point of view, what does make 'torture' different from 'inhumane treatment' or 'outrages upon personal dignity'? Can, for instance, rape be regarded as a form of torture? If it can, then how is it supposed to be differentiated from rape as a separate crime provided for by article 7 para. 1 (g) and article 8 para. 2 (b) (xxii)⁶⁵?

⁶¹ See article 7 para. 1 of the Statute.

⁶² As the ICTY has held: '... a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails criminal responsibility and an individual perpetrator need not to commit numerous offences to be held liable'. See *Prosecutor v. Tadić*, No. IT-94-1-T, Judgement and Opinion, Trial Chamber, 14 July 1997, para. 649.

⁶³ Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide provides that 'genocide, whether committed in time of peace or in time of war, is a crime under international law'. Somewhat surprisingly, article 6 of the *Rome Statute* which defines the crime concerned in terms of the *Genocide Convention* lacks the specific reference to the possibility of committing genocide in time of peace as well as in time of war, but that must be implicit.

⁶⁴ '... customary international law no longer requires any nexus between crimes against humanity and armed conflict'. See *Prosecutor v. Tadić*, No. IT-94-1-A, Decision on Jurisdiction, Appeals Chamber, 15 July 1999, para. 141.

⁶⁵ Obviously, the last three questions cannot be satisfactorily answered if only the conduct element of crimes is taken into consideration. As paragraph 9 of the General Introduction to the Elements puts it: 'A particular conduct may constitute one or more crimes'. Circumstances, or 'contextual circumstances', are crucial in determining whether, for instance, a homicide may be prosecuted as genocide, a crime against humanity or a war crime – or all three. Like many legal words, 'circumstance' may have more than one meaning, depending upon context. We have already discussed in the text the use of 'circumstance' to denote one of the material elements of a crime. Note, however, how the word is used in paragraph 3 of the General Introduction to the Elements: 'Existence of intent and knowledge can be inferred from relevant facts and circumstances'. Here 'circumstances' is used to describe physical characteristics of the situation which, in themselves, are probably not 'elements' of the offence but which enable the fact-finder to draw relevant inferences about one of the elements. Intent to kill, for example, may be inferred from the use of a machete on someone's head. Note also the reference

Apart from that, some acts can be qualified as a particular crime only when there is a connection with other crimes. Thus, for instance, persecution has been defined in the *Rome Statute* in such a way that makes its adjudication by the ICC conditional upon the connection of the crime concerned with any other crime within the subject-matter jurisdiction of the Court. Consequently, persecution on specified grounds of persons belonging to any identifiable group or collectivity does not amount to a crime against humanity, as defined in the *Rome Statute*, if committed out of the context of any crime defined in articles 6, 7 and 8 of the Statute. That the attendant circumstances or context in which acts are committed do serve as a qualifying criterion can also be illustrated by the crime of apartheid. Article 7 para. 2 (h) of the *Rome Statute* defines apartheid as inhumane acts committed in the context of an institutional regime of systematic oppression and domination by one racial group over any other racial group or groups. It is this particular context, *inter alia*, that makes it possible to make a distinction between the two crimes – apartheid and genocide⁶⁶.

A context is not necessarily composed only of factual circumstances. For the qualification of quite a number of crimes specific legal requirements are indispensable. Thus, for a deportation or forcible transfer of population to be a crime against humanity, there must be two legal requirements: first, persons being deported or forcibly transferred must be lawfully present in the area concerned, and second, deportation or forcible transfer must be conducted without grounds permitted under international law⁶⁷. Here, as in the case of torture considered above, a particular conceptual difficulty can arise. How should acts of deportation or transfer defined respectively in article 7 para. 2 (d) and article 8 para. 2 (a) (vii) be differentiated? Obviously, the fact that deportation or transfer is taking place during an armed conflict does not, by itself, make it a war crime⁶⁸. There must be a connection with the course of an armed conflict⁶⁹. In other words, the qualifying criterion is not just an overlap in time, but also, and most importantly, an interconnectedness between the acts concerned and the conduct of military operations, including their planning and preparation. The last comment equally concerns any other war crime enumerated in article 8 para. 2.

Crimes can also be qualified, *inter alia*, on the basis of their object. Thus, the object of crimes against humanity is a civilian population only, while acts constituting war crimes can, and normally are, directed against persons belonging to armed forces too. Furthermore, war crimes can also be committed against the civilian population in occupied territories, while victims of crimes against humanity can be any civilian population, including the population of the Occupying Power, if there is one. Apart from that, the object of war crimes can be not only human beings, but also property, installations, material, vehicles, the natural environment, historic monuments, hospitals and any other object specifically defined and protected

in article 28 para. a (i) of the *Rome Statute* (responsibility of military commander) to 'the circumstances at the time' which phrase is used to set up the possibility of negligence liability. 'Circumstances' when used to describe a situation for evidentiary purposes typically (but not invariably) appears in the plural. 'Circumstance' when used to describe an element typically (but not invariably) appears in the singular.

⁶⁶ In the Preamble of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), which also has a normative dimension, there is a reference to the overlapping character of acts of genocide and apartheid. Thus, it says that 'certain acts of [genocide] may also be qualified as acts of apartheid'.

⁶⁷ See article 7 para. 1 (d) and 7 para. 2 (d) of the Statute. In an example of a finesse used many times in drafting The Elements, para. 3 of the Elements of the 'crime against humanity of deportation or forcible transfer of population' requires the prosecution to prove only that: 'The perpetrator was aware of the factual circumstances that established the lawfulness of such presence'. This drafting technique is used to avoid the difficulties connected with the 'mistake of law' defence in article 32 of the Statute. The element in question is regarded as a factual one and thus the emphasis is shifted to the perpetrator's evaluation of the facts rather than an evaluation of the (more difficult) legal situation. Whether such efforts are consistent with the Statute may provide room for future argument pursuant to article 9 para. 3 of the *Rome Statute*. For a similar finesse, see note 73.

⁶⁸ Otherwise we will not be able to reasonably argue that crimes against humanity can be committed both in time of war and in time of peace. Furthermore, it is now well-established that crimes against humanity need not be connected with military conduct (see note 64).

⁶⁹ That there must be a connection with an armed conflict is implicit in all war crimes. But, perhaps, most explicitly it has been provided for in paragraph 2 (e) (viii) of article 8 which criminalises 'ordering the displacement of the civilian population *for reasons related to the conflict ...*' (emphasis added).

by international humanitarian law. The object of some crimes like, for instance, murder, extermination, deportation, taking of hostages, *etc.* is defined in general terms. However, there are crimes that have a very specific object. Among such crimes ‘forcibly transferring children of the group to another group’, ‘compelling a prisoner of war to serve in the forces of a hostile Power’ can be exemplified. The very definitions of these crimes explicitly state the object against which certain acts are directed: children and a prisoner of war, respectively. Yet, the definitions of some other crimes do not verbally name their object, but the natural meaning of their context leave no doubt as to what a certain criminal act is directed against. Thus, for instance, ‘forced pregnancy’ can only be understood as some kind of violent acts the victim of which is a woman, since, naturally, only women are capable of being impregnated⁷⁰. Despite the fact that such crimes as ‘rape’, ‘sexual slavery’ and ‘enforced prostitution’ are mostly committed against women, men also can be victimized by the crimes concerned⁷¹. The Elements follow the Statute in taking a gender neutral approach to such crimes by using the word ‘persons’ to describe victims, except in those cases like ‘forced pregnancy’ that can only be committed against women.

20 cc) **Consequences.** ‘Material element of a crime’ can also include some kind of harmful result. Needless to say, that for harm to be a constituent element of a crime, it must be provided for by a definition thereof⁷². In other words, whenever a crime is conceived of as including harmful result and a definition of that result is provided, harm becomes an indispensable material element of the crime concerned which the *Rome Statute* subsumes under the category of ‘consequences’. For the qualification of most of the crimes within the subject-matter jurisdiction of the ICC, causing a certain physical result is decisive. Thus, crimes defined in terms of ‘killing’, ‘murder’, ‘extermination’, ‘physical destruction’, ‘loss of life’ are all about causing death to human beings. The definitions of some other crimes concern physical (bodily) or mental harm. Wherever the object of a crime is something tangible (property, installations, hospitals, buildings dedicated to a certain purpose, such as religion, education, art, *etc.*) or defined in terms of a certain area (towns, villages, or other areas immune from military operations), or even conceived of more generally, as in case with natural environment, the damage caused to such an object constitutes a harmful result. Apart from physical, mental and property kinds of harm, there can also be moral ones. Thus, harm caused by acts constituting such crimes as persecution, imprisonment, enforced disappearance, deprivation of the rights of fair and regular trial, conscripting or enlisting children under the age of fifteen into armed forces, *etc.* is clearly moral, since it concerns the basic human rights. All these can be considered ‘consequences’.

21 The consequence requirement can be explicitly provided for by a definition (*e.g.* ‘wilful killing’, ‘extensive destruction of property’) or be implicit in the concept of a crime (*e.g.* ‘bombarding of towns which are undefended and which are not military objectives’, ‘rape’). If a definition of a crime, apart from the reference to harm itself, contains also a particular value-judgment in respect of the harm concerned, then the actually caused harm must be of a certain character which meets a statutory evaluative requirement. Such an evaluative requirement can, as harm itself, be either explicitly provided for by a definition (*e.g.* ‘causing

⁷⁰ For the statutory definition of ‘forced pregnancy’ see article 7 para. 2 (f).

⁷¹ In quite a number of national jurisdictions the statutory object of such crime as rape can only be women. Moreover, there may well be a case where a criminal law provision is worded or judicial practice is developed in such a way that excludes criminal responsibility of a man who has raped his wife.

⁷² Article 22 (Elements of an International Crime) of the Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other International Crimes provided that ‘[t]he element of harm shall depend upon the definition of the crime ...’. See E/CN.4/1426,1981, p. 37. That harm must be provided for by a definition of a crime does not mean, however, that it must necessarily be verbally stated; it is possible to arrive at the respective conclusion by means of deduction if a particular crime has been conceived of as including a certain harm requirement. Thus, for instance, the concept of crimes defined in terms of directing attacks against civilian population or certain objects perhaps implies that there must be some harmful result, even though definitions of such crimes in the Statute and the Elements do not contain any reference to harm.

serious bodily or mental harm’, ‘wilfully causing *great* suffering, or *serious* injury to body or health’) or implicit in the concept of a crime (e.g. ‘torture’, ‘inhumane treatment’, ‘outrages upon human dignity’)⁷³.

It has been mentioned above that a consequence is a constituent element of a crime only when it has been so conceived and its definition provided. It is therefore not an indispensable element of all crimes. Indeed, the concept of such crimes as ‘declaring that no quarter will be given’, ‘declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of a hostile party’, ‘ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand’ does not require any harmful result. It means that merely ‘declaring’ or ‘ordering’ constitutes, in this context, a completed crime⁷⁴. Harm, in this case, would be contingent upon the subsequent acts of subordinates and serve as an aggravating factor – or as an element of further crimes, responsibility for which might fall to be decided under articles 25 and 28 of the Statute. 22

dd) Causation. Whenever a crime is conceived of as including both act/omission and a certain harmful result, a specific conceptual difficulty arises. This is a matter of causation. It is quite common to think that the connection between act/omission and a certain harmful result is of factual nature. However, this is too much simplistic an approach. Of course, if a soldier shoots at civilians not taking part in hostilities or combatants who have surrendered at discretion and they immediately die, such a connection between the act of the former and death of the latter can be explained in terms of cause-in-fact, since the act and the result concerned are physical and therefore capable of being linked to each other as cause and effect. But suppose that those combatants died not immediately, but subsequently in a hospital where they were intentionally deprived of medical care. What, in this case, would be the cause of their death? Obviously, the very fact that the wounded died not immediately, but subsequently, did not break the chain of causation. Speaking in physical terms, the cause (but perhaps now *one* cause) had always been the same, *i. e.* they died because they were shot. Moreover, deprivation of medical care is not a physical act, if it is an act at all, and it is conceptually difficult to view it as the physical cause of death of the wounded persons concerned. But what is it, then, that medical personnel are responsible for? Yet we have little difficulty in concluding that it is entirely appropriate to attribute the deaths, as a legal matter, both to the soldier who did the shooting and the medical personnel who failed to act or who acted improperly. Legal cause, then, can very much be a question of legal attribution. There can be more than one cause and not every one of them need to be regarded as ‘but for’ antecedents of the proscribed result. 23

Another, perhaps even more puzzling example, is the crime of ‘making improper use of a flag of truce ... resulting in death or serious personal injury’. It is evident that making

⁷³ Para. 4 of the General Introduction to the Elements provides that ‘With respect to mental elements associated with elements involving value judgement, such as those using the terms ‘inhumane’ or ‘severe’, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated’. On how this provision came about, see Clark (2001) 12 *CLF* 322 *et seq.* For similar efforts to avoid difficulties with circumstance elements involving ‘legal’ evaluations, see note 67.

⁷⁴ That ‘ordering’, in this context, constitutes a completed crime is important. It is important inasmuch as it differs from giving orders to commit any other crime within the subject-matter jurisdiction of the ICC. In the latter case ‘ordering’ is a form of participation in or contribution to the commission of a crime ‘which in fact occurs or is attempted’. See article 25 para. 3 (b) of the *Rome Statute*. Two issues – qualification of a crime and determination of the role that a person played in the commission thereof – must be conceptually differentiated. However, there seems to be an exception to this. Article 25 para. 3 (e) provides that a person who ‘in respect of the crime of genocide, directly and publicly incites others to commit genocide’ shall be criminally responsible and liable for punishment. Direct and public incitement to commit genocide was criminalised already in 1948 by the article III (c) of the *Genocide Convention* and conceived of as having a feature of a completed crime, *i. e.* no subsequent act or harm is required so as to a person be held criminally responsible and liable for punishment. Like an attempt, it is an ‘inchoate’ offence. The *Genocide Convention*, article III (b), also criminalised the inchoate offence of conspiracy to commit genocide, even where the genocide did not occur. This is not carried forward into the *Rome Statute*.

improper use of a flag of truce or of the military insignia and uniform of the enemy or of the United Nations cannot by itself cause death or serious personal injury. In this view, what meaning is to be given to the word ‘resulting’? Furthermore, the principle of causation is unhelpful for determination of criminal responsibility of commanders or superiors, as defined in article 28 of the *Rome Statute*, or any person who orders, solicits or induces the commission of a crime. The consequences of such an order or incitement cannot be consistently described or explained in terms of factual causation. Some notions of attribution are essential⁷⁵.

- 24 It was once proposed, however, to define causal element as follows: ‘conduct is the cause of a result when it is an antecedent but for which the result in question would not have occurred ...’⁷⁶. The concept of ‘but for’ is at the very core of this definition. It provides that if a particular result would have occurred but for an antecedent conduct, then the latter cannot be regarded as its cause. Thus, as is seen, this concept is of an exclusionary nature and is hard to apply to cases where multiple causes are involved. Nor is it of any help for the matter of imputation of criminal responsibility⁷⁷. ‘But for’ causation is especially unhelpful in analyzing the responsibility of those such as aiders or abettors or participants in a group with a common purpose whose responsibility falls to be determined under article 25 of the Statute. Their actual contribution of a ‘causal’ nature may be quite minimal – certainly not of a ‘but for’ nature – and yet their criminal responsibility is believed to be appropriate. The draft article 28 on *actus reus* also contained a reference to causation. The linguistic form of it was, however, optional, that is, three alternative words were proposed to be used in respect of the connection between the harm and individual’s conduct: ‘caused’, ‘accountable’, and ‘attributable’⁷⁸. If the choice is limited only to these terms, then, to be consistent, the last one is preferable⁷⁹. After all, the question to be solved by the Court is not – ‘What is the cause of a particular harmful result?’, but rather – ‘Who is [justly] responsible for that result?’⁸⁰.

- 25 **b) Mental Elements of Crimes.** A material element of a crime is thus necessary but not sufficient for the qualification thereof. Most, if not all, of the questions, posed above, cannot be satisfactorily answered if a particular mental state of a perpetrator is not taken into consideration. Moreover, and as far as criminal responsibility is concerned, a person may be held liable for punishment only if his or her conduct was voluntary or willed⁸¹. It is, indeed, an elementary point that only when a person controlled his or her conduct, is it just to

⁷⁵ In this regard, comments during the drafting process that causation was ‘largely a factual matter which the Court itself could consider and decide upon’ missed the mark. 1996 Preparatory Committee I, note 3, p. 45, para. 198; Preparatory Committee Decisions Feb. 1997, p. 27, fn. 22; Zutphen Draft, p. 59, fn. 97.

⁷⁶ See article 22, Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other International Crimes, (E/CN.4/1426, 1981), p. 37.

⁷⁷ ‘Imputation, which expresses itself in the concept of responsibility, is ... not the connection between a certain behavior and an individual who thus behaves – as assumed by traditional theory; for this, no connection by a legal norm is necessary, because the behavior and the behaving individual cannot be separated ... Imputation, implied in the concept of responsibility, is the connection between a certain behavior, namely a delict, with a sanction’. Kelsen, *Pure Theory of Law* (1989) 81.

⁷⁸ See e.g. 1998 Preparatory Committee, note 51, p. 65, article 28 para. 3: ‘A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission’.

⁷⁹ ‘The idea that an accused can be held responsible only for harmful results which are attributable to his own conduct is, in fact, somewhat wider than a causation rule. It carries forward the basic proposition ... that criminal responsibility is individual and therefore a matter of what the accused has or has not done – not a matter of what others have done or what extraneous circumstances have accidentally produced’. Wise, ‘Part 3. General Principles of Criminal Law’, *13ter NEP* (1998) 49.

⁸⁰ ‘That an individual is responsible for his behavior means that he may be punished for this behavior; and that he is irresponsible, or not responsible, means that he, for the same behavior ... may not be punished. That means, that in the first case a definite behavior is, in the second case this behavior is not, connected with punishment; that the behavior is or is not a condition for punishment; that punishment is or is not imputed to the behavior’. Kelsen, *Pure Theory of Law* (1989) 81.

⁸¹ See note 52.

impute responsibility to him or her. An appropriate mental state on the part of a person who is responsible for the material element is therefore indispensable for determination of guilt. Apart from that, it is also very important for the qualification of crimes. For instance, it is the specific mental state requisites that lie at the very basis of the concept of such crime as genocide, and that are conceived of as providing a criterion for differentiation thereof from such a crime against humanity as extermination. To put it in other way, mental state requisites are conceived of as constituting a *mental element* of a crime. The latter, as a crime itself, is a theoretical construction and it is therefore of utmost importance to be consistent in terminology so as to a definition be in accordance with a concept.

aa) Intent, knowledge or both. The principal issues of mental element of crimes are generally defined in article 30. There it has been provided that '[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'. The conjunctive 'and' implies that the mental element is composed of two sub-elements: first, intellectual sub-element – *knowledge*; second, moral sub-element – *intent*. This means (at least for many civil lawyers) that the state of mind of a perpetrator must encompass both sub-elements in order that responsibility be imputed to him or her. Common lawyers tend to see the 'and' as disjunctive – in some situations intent (as to result, for example) is crucial; in others (such as circumstance elements) it is knowledge that is important⁸².

It has already been mentioned more than once that it is indispensable that conduct be voluntary. By this it is meant that a person must control his or her behaviour, *i. e.* be aware of what he or she is doing so as to be held responsible. Without this requirement there can be no responsibility⁸³. Awareness of the nature of a conduct implies awareness of the attendant circumstances. For quite a number of crimes, as defined in the *Rome Statute*, it is required that a person be aware of not only what he or she is doing, but also of what conduct others are engaged in or even of what others are intending or have planned to do. For instance, the intent of the perpetrator 'to destroy in whole or in part a national, ethnical, racial or religious group, as such' (which must presuppose some awareness) is decisive for the qualification of the accused conduct as genocide⁸⁴; awareness of a widespread or systematic attack is needed in order to qualify a particular conduct as a crime against humanity; a person to be held responsible for a conduct contributing to the commission or attempted commission of a crime by a group must be aware of the intention of the group to commit that crime; the knowledge of what forces or subordinates were doing or about to do is also indispensable for criminal responsibility of commanders or other superiors.

bb) Inferring knowledge. For the purpose of criminal responsibility, knowledge can (in some situations) be not only actual but also imputed. In the first case, it is a matter of proof. It has to be proved that a person knew, at the time the crime was being committed, that he or she was engaged in criminal conduct. Of course, as paragraph 3 to the General Introduction to the Elements notes, 'Existence of intent and knowledge can be inferred from relevant facts and circumstances'. In the case of imputed knowledge, what is required is proof that there existed events of which a person in the situation of the accused cannot be reasonably said to be unaware. Not knowing what is known to everyone is, although possible, not a reasonable defence. The specific aspect of this appears in respect of criminal responsibility of commanders⁸⁵. Thus, article 28 para. 1 (a) has made responsibility of a commander conditional; *inter alia*, upon attributed knowledge of crimes committed by forces under his or her effective

⁸² Clark (2001) 12 CLF 302 *et seq.* The General introduction to the Elements, reproduced in Annex II of this work, reflects this ambiguity when it refers to 'intent, knowledge or both'.

⁸³ See article 32 para. 1 of the *Rome Statute*.

⁸⁴ Note also the 'contextual element' note 50, added to genocide by the Preparatory Commission.

⁸⁵ The specificity of a commander's responsibility is in his or her ability to control armed forces. That position imposes a special duty to know what those forces are doing or about to do. The negligent attitude to the duty

command and control. The phrase ‘owing to the circumstances at the time, should have known’ makes it impossible for a commander to reasonably deny knowing about criminal conduct which forces under his or her effective command and control were engaged in. This is the most striking application in the Statute itself of the ‘unless otherwise provided’ language at the beginning of article 30 of the Statute. Article 28 provides an explicit exception to the intent and knowledge standard both with a kind of negligence standard for military commanders and, a recklessness or *dolus eventualis* standard (in article 28 para. b) for other superiors.

- 28 **cc) Knowledge of consequences.** Knowledge, as defined in article 30 para. 3, means awareness not only of an existing circumstance but also ‘that a consequence will occur in the ordinary course of events’. Knowledge about a consequence that is likely to occur is perhaps better called foresight. Foresight, however, is even more complex a concept than knowledge. It is ‘knowledge’ about what has not yet occurred. The issue is also complicated by the degree of uncertainty in the likelihood of a particular result. Did the given act inevitably lead to the result the foresight of which is attributed to a perpetrator, or may be that result was only one of several possible consequences of the act concerned? Furthermore, for the purpose of criminal responsibility, foresight is never taken separately, but only in connection with intent or recklessness. Indeed, foresight of particular consequences is very important for determination that a person acted or abstained from acting intentionally or recklessly. From this point of view, it is somewhat strange that article 30 defined both knowledge and intent in terms of ‘awareness that a consequence will occur in the ordinary course of events’. Since recklessness seems to have been rejected as a basis of responsibility under the Statute (and, at least in the Elements, none of the drafting leaves this as a possibility) then the appropriate standard (knowledge) involves foresight of a near certainty – awareness that it *will occur* in the ordinary course of events.
- 29 **dd) Intent as to conduct and consequences.** Knowledge about the attendant circumstances is, of course, very important. But for quite a number of crimes within the jurisdiction of the ICC it is not sufficient that a person merely be aware of what conduct he or she is engaged in. The statutory definitions of those crimes clearly provide that there must be some kind of intent. The concept of intent is also complex. It has, as defined in article 30 para. 2, two contextual meanings: one is related to conduct, another – to a consequence. It follows from this that, whenever a crime is conceived of as including both conduct and harmful result, it has to be proved before the Court that a person acted or abstained from acting intentionally and that the result in question was also intended. If the concept of a crime does not encompass harm, then it is enough to prove that an act or omission was intended. It is not required, it should be noted, that a person specifically intends to commit ‘a crime’. If it is proved that he or she was acting intentionally in respect of conduct of a consequence or knowingly in respect of a circumstance, then it becomes irrelevant whether a perpetrator was aware of criminal nature of the conduct concerned, unless there exist situations provided for in articles 32 and 33 para. 1 (a), (b) and (c)⁸⁶.
- 30 **ee) Knowledge and the causation puzzle.** In addition, it should be noted that intent also provides, to some extent, a solution to the puzzling issue of causation, considered above. That is to say that, when it is proved that a person, engaged in criminal conduct, intended the occurrence of a particular harmful result, that result can be said to be caused by him or her.

concerned creates a risk of the forces becoming uncontrolled. Uncontrolled armed forces, in their turn, are potentially capable of committing crimes.

⁸⁶ A full appreciation of intent and knowledge requires an understanding of how mistakes of fact and law amount to a denial of the relevant mental element. Articles 32 and 33 present potential grounds for the exclusion of responsibility related in particular to knowledge in respect of circumstance elements. For the different approaches to the exceedingly difficult questions of mistake of law in this context, see Triffterer, *Article 32*, this Commentary, and Clark (2001) 12 *CLF* 308 *et seq.* See also note 73 concerning elements involving a ‘value judgement’.

Thus, for instance, if a person, who is in charge of providing medical care to wounded, intentionally deprives them of it in the knowledge that such a deprivation will inevitably lead to their death, then, for the purpose of criminal responsibility, the conduct concerned can be regarded as the cause of the harmful result in question. This is so, even though it may be quite appropriate to regard another cause as also relevant, such as a particular physical act or series of acts – a shooting or shootings for instance.

2. ‘shall assist’

It has been mentioned that the text of article 9 reflects the political compromise reached at the very end of the Rome Conference. The phrase ‘shall assist’ is one of the results of that compromise. It substituted for the previously proposed wording. Indeed, during the Rome Conference it was suggested that elements of crimes ‘shall be applied by the Court in reaching determinations as to guilt’⁸⁷. Undoubtedly, ‘shall be applied’ is much stricter wording than ‘shall assist in application’. It implies that annexed elements of crimes are as binding as the main provisions of the *Rome Statute*, that the Court has very narrow discretion, if at all, concerning application thereof, and that the definitions of crimes are not certain enough to be applied as such⁸⁸. From this point of view, the phrase ‘shall assist in application’ is quite flexible. It connotes that it is the definitions of crimes, first of all, that are to be applied, that the Court does have, to a reasonable extent, discretion in the interpretation thereof, and that the binding force of the statutory definitions of crimes and annexed elements is hardly the same.

3. ‘interpretation and application’

It has long become common to a considerable number of jurists to think that the process of adjudicating is composed of three stages: first, finding or choosing a particular rule to be applied; second, interpreting the found or chosen rule; third, applying the interpreted rule. Such mode of thinking is largely formed by the positivistic, in particular extreme versions of analytical jurisprudence. It conceives law as a logically complete system of rules that provide all possible and correct answers to individual cases. Furthermore, and as far as logic is concerned, the concept of judicial process is definitely affected by the syllogistic pattern of reasoning. This is to say that, all a judge has to do, according to such a conception, is to deduce a particular conclusion from the two given premises. The simplest way of describing this process is the following:

- Rule ‘R’ provides that a certain type of conduct is a crime (major premise);
- A person ‘A’ had been engaged in that type of conduct (minor premise);
- ‘A’ has committed a crime; or, ‘A’ is a criminal (conclusion).

This, it has to be said, is too much simplistic a conception. First of all, a judge never starts from the major premise. What is done at the beginning of the process of adjudication is an examination of a particular factual situation brought before the Court. A judge must be convinced that all necessary evidence has been duly scrutinized before he or she could decide whether the conduct in question is a crime. Furthermore, it is not always *prima facie* clear which provision is to be applied to a given case. Is, for instance, forced castration or

⁸⁷ See UN Doc A/CONF.183/C.1/L.69; also UN Doc A/CONF.183/C.1/L.8.

⁸⁸ These considerations, *inter alia*, encouraged a number of delegations during the Diplomatic Conference to oppose the elaboration of elements of crimes with a view of their being annexed to the Statute. It is also worth considering, how the very idea of elaboration of elements of crimes corresponds to the requirements for necessary qualifications that candidates for election to the Court ought to meet (see article 36 para. 3 (b) of the *Rome Statute*). After all, those who meet those requirements are not lay people or soldiers in the field, who need be clearly instructed of what they are allowed or not allowed to do. Nor is a criminal statute a military manual. On the other hand, probably the main proponents of drafting elements were the military members of the United States delegation. For them, the paradigm of elements seems to have been (not unreasonably) military manuals. Their concern, in particular, was for articulating clear rules for soldiers and they were more concerned with the material than the mental elements.

sterilization a war crime, as defined in article 8 para. 2 (b) (x) and (e) (xi), or a crime against humanity, as defined in article 7 para. 1 (g), or a crime of genocide, as defined in article 6 para. d? Indeed, the reasoning process is not as one that has been described above. But nor is it totally contrary to it. The two premises are interrelated. Examination of facts and choosing a rule to be applied constitute a harmonic process and cannot be separated⁸⁹. Moreover, since any rule is to an extent vague, the contextual interpretation thereof is unavoidable⁹⁰. For this, judges do use discretion. It is wrong to think that discretion in application is used only when a case is hard, *i. e.* when it is not clear whether it falls under any legal provision. Given the constant changes that take place in circumstances, it is even necessary to keep the law flexible so that it can be easily adapted to new situations⁹¹. Of course, criminal law provisions may not be interpreted to the detriment of an accused and extended by analogy⁹². But this is not to be understood as prohibition of developing law by judges. Thus, the very Statute allows the ICC to ‘apply principles and rules of law as interpreted in its previous decisions’⁹³. Furthermore, as the European Commission of Human Rights held in one of its decisions:

‘... constituent elements of an offence such as e.g. the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case law of courts. On the other hand, it is not objectionable that existing elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence’⁹⁴.

- 34 It follows from this passage that law-applying and law-developing are to a considerable extent interrelated. Indeed, application of law, including criminal law, is a creative rather than a mechanical process. That detailed rules are easy to be applied is true only with regard to simple cases. For hard cases, detailed rules are unhelpful. Moreover, paradoxically, the more detailed rules are, the more cases are left uncovered by them⁹⁵. From this point of view, again, what weight is to be given to the Elements of Crimes? Obviously, they should not be treated as having the same binding force as the statutory definitions of crimes. They are to operate as guidance rather than rules⁹⁶.

4. Adoption

- 35 Article 9 provides that elements of crimes ‘shall be adopted by a two-thirds majority of the members of the Assembly of States Parties’. This provision should be read within the context of Annex I (F) (5) (b) to the Final Act⁹⁷ and article 112 para. 2 (a). In the first mentioned document it has been provided that elements of crimes shall be drafted by the Preparatory Commission. It should be noted, however, that during the Preparatory Committee’s sessions it was once proposed that elements of crimes be elaborated by absolute majority of judges, provided that elements so elaborated did not create any new crime. Elements elaborated by

⁸⁹ Dewey (1924) 10 *CornellLQ* 17.

⁹⁰ By ‘contextual interpretation’ here is meant that an interpreting authority must take into account the context to which a rule is applied. It does not refer to any particular rule of interpretation, such as the ‘mischief rule’.

⁹¹ ‘... the law must be able to keep pace with changing circumstances’, note 8, *Sunday Times v. UK*. (Notice again the different meaning of ‘circumstances’ in this statement from its meaning in article 30 of the *Rome Statute*. See note 65).

⁹² See *Rome Statute* article 22 para. 2.

⁹³ See *Rome Statute* article 21 para. 2.

⁹⁴ See *Gay News & Lemon v. UK*, Vol. 28, D. R. 77, para. 9.

⁹⁵ ‘As the relations with which the law must deal become more numerous and situations calling for legal treatment become more complicated, it is no longer possible to have a simple, definite, detailed rule for every sort of case that can come before a tribunal ...’; Pound, *An Introduction to the Philosophy of Law* (1951) 77.

⁹⁶ It should perhaps be noted that the words ‘interpretation and application’ which appear in this article and in article 119, the dispute settlement provision in the Statute, are common words in compromissory clauses of treaties. As such, they carry much interpretative baggage. See generally the useful discussion in Judge Higgins’s Separate Opinion in *Oil Platforms (Iran v. U.S.)*, Preliminary Objection, 1996 *ICJ* 847.

⁹⁷ For the Final Act see note 1.

the Court were supposed to be subject to further approval by States Parties. It was also suggested that elements not yet approved might provisionally be applied by the Court prior to their approval, but an element not approved should lapse after all⁹⁸. Later, at the Rome Conference, it was proposed that elements of crimes be adopted by the Preparatory Commission itself⁹⁹. But some delegations considered that the proposal gave too much competence to the Preparatory Commission and that it could lead to the practice of international legislating beyond the consent of sovereign States. It was therefore decided, for the sake of compromise, to entrust it to the Assembly of States Parties. The Preparatory Commission could only recommend draft elements of crimes for adoption. It is the Assembly of States Parties which had the final say in this issue, although it in fact adopted the Preparatory Commission's language unchanged¹⁰⁰.

According to article 9, for elements of crimes to be adopted, the decision ought to be reached by a two-thirds majority of the members of the Assembly of States Parties. This provision is to be kept in contrast to the one stipulated in article 112 para. 7 (a) which says that, unless a consensus can be reached, 'decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitute the quorum for voting'. It is clear from the text of article 9 that there must be a two-thirds majority of the total number of the members of the Assembly of States Parties, not just of those taking part in voting, in order that elements of crimes be adopted.

In actual practice, the Assembly of States Parties adopted the Elements at its first meeting by consensus, exactly as they came from the Preparatory Commission with no attempt to improve upon that body's efforts¹⁰¹.

II. Paragraph 2

1. 'Amendments to the Elements ...'

Paragraph 2 of article 9 deals with procedural aspects of amendments to the elements of crimes, *i. e.* subjects entitled to propose them and their adoption. It provides that amendments to the elements of crimes shall be adopted by a two-thirds majority of the members of the Assembly of States Parties. As is seen, the rule of adoption of amendments to the elements is identical to the one of adoption of the very elements of crimes. But there are some substantial issues which do not seem to be evidently easy to resolve. Thus, for instance, why have such a strict rule of amending the elements? Does it not treat amendments to the elements of crimes as a matter of subsequent legislation? To what extent, if at all, has the Court discretion in developing the original elements of crimes? What if amendments significantly changed the elements? What, then, about cases previously adjudicated by the Court? How is the Court to decide a case before it, if the elements were amended during the trial? Of course, one can say that such a strict rule of amending the elements is necessary in order to keep them consistent with the principle of *nullum crimen sine lege* and also reflect the consent of sovereign States, that amending the elements is, indeed, a matter of legislation, that the Court is to apply the law as it is and not to develop it, let alone the creation thereof, that the amended elements are subject to the principle of *lex posterior derogat legi priori*, if new elements are more favourable to the person being investigated, prosecuted or convicted, and to the principle of *lex ad praeteriam non valet*, if new elements are to the detriment of him or her.

There is hardly any reasonable argument that could be put forward against these considerations, except for the one that concerns the role of courts in developing law. But

⁹⁸ For the details of the proposal see Zutphen Draft, p. 50.

⁹⁹ The proposal submitted by the delegation of the U.S. of America. See UN Doc A/CONF.183/C.1/L.69.

¹⁰⁰ See *Rome Statute* article 112 para. 2 (a).

¹⁰¹ Doc. ICC-ASP/1/3, para. 22 (2002). The Elements of the Crime of Aggression were likewise adopted by consensus at the Kampala Review Conference.

the difficulty is one of the reasonableness of having at all such a provision included into the Statute, its interpretation within the context of other provisions thereof, and the legal force of elements and amendments thereto. Does such a strict rule of adopting and amending the elements give to the latter the same binding force as the statutory definitions of crimes? Obviously not. This is clear also from the differences between the rules for amending the Statute itself and the rules for amending the Elements of Crimes. Are amendments to the Elements conceived of as changes in the original concepts of the crimes? Definitely not. Why, then, have such a rule? Why not leave it completely to the Court? Unfortunately, these questions are now rhetorical. None the less, it still does make sense to ask whether the Court may itself elaborate concrete elements of crimes and provisionally apply them on an *ad hoc* basis when questions arise that are not dealt with in the Elements as adopted (or in the Court's opinion dealt with wrongly), provided that the principle of *nullum crimen sine lege*, defined in article 22, is respected.

2. Subjects entitled to propose amendments

- 37 a) **Any State Party.** That any State Party to an international treaty may propose amendments thereto, is an elementary point, which derives from the principle of sovereign equality of States. All States Parties to an international treaty ought to have equal rights with regard to its concluding and amending. A treaty that disrespects this principle cannot be valid *ab initio*. Why only States Parties are entitled to propose amendments is also quite clear. According to the *pacta tertiis nec noscent prosunt* principle, States, not bound by an international treaty, are not entitled under it either. It has, however, be kept in mind that amendments to the Elements of Crimes are subject to a procedure very different from the one designed for amendments to the statutory provisions¹⁰².
- 38 b) **The judges.** Article 9 para. 2 provides that the judges acting by an absolute majority may also propose amendments to the Elements of Crimes. Provided that there are 18 judges of the Court¹⁰³, 10 of them shall constitute an absolute majority. The principal issues of the role of judges in developing law have been briefly considered above. It is somewhat regrettable that judges have not been expressly allowed to elaborate elements of crimes on a case by case basis. Instead, they would have to do what judges were in principle not supposed to do. They would have to draft amendments and then propose them to the Assembly of States Parties. The inconsistency of this task with judicial functions is evident. The judges would be supposed to draft in advance legal provisions which they would have to apply subsequently. One suspects that the judges will find a way simply to make rulings of law that they will avoid characterizing as being concerned with elements, thereby avoiding the theoretical complications in having them 'ratified' by the Assembly of States Parties.
- 39 c) **The Prosecutor.** That the Prosecutor also has been entitled to propose amendments to the elements of crimes is hardly surprising. After all, if judges may do that, why should not the Prosecutor? Furthermore, because the Prosecutor ought to investigate all facts and evidence relevant to an assessment of whether there is criminal responsibility, and, in doing so, investigate incriminating and exonerating circumstances equally¹⁰⁴, he or she is required to very well know what the constituent elements of crimes are. This requirement connotes knowing about changing circumstances in which crimes are committed. If the Prosecutor considers that, owing to the significantly changed circumstances, that were not previously intended to be covered by original elements of crimes, there is a need to criminalise particular aspects of human behaviour, he or she may initiate the amending process by

¹⁰² Note, however, that those amendments 'to provisions of an institutional nature' that fall within article 122 of the Statute are to be adopted by a very similar process to that provided for adopting and amending The Elements.

¹⁰³ According to article 36 para. 2 the number of judges can be increased, as well as reduced, but not below 18.

¹⁰⁴ *Rome Statute*, article 54 para. 1 (a).

proposing to the Assembly of States Parties newly drafted elements. Moreover, the Prosecutor is probably in the best position to assess whether there are any shortcomings or gaps in the law to be applied. Needless to say there are some limits on the extent to which the Assembly of States Parties can interpret or re-interpret the meaning of the definitions in the Statute for the benefit of the judges or the Prosecutor by re-examining The Elements. At some point, an amendment to the Statute itself would become necessary. The Prosecutor has no formal power to recommend amendments to the Statute itself but would have to convince a State Party to do so¹⁰⁵.

III. Paragraph 3

Paragraph 3 of article 9 provides that ‘the elements of crimes and amendments thereto shall be consistent with [the] Statute’. This provision clearly means that the relation between the Statute and the annexed elements of crimes, as well as amendments thereto, is not subject to the *lex posterior derogat legi priori* principle. Furthermore, it follows that the statutory definitions of crimes rank higher than annexed elements thereof. Consequently, the principle to be applied here is *lex superior derogat legi inferiori*. It becomes much clearer when this provision is taken in the light of article 51 para. 5 related to the Rules of Procedure and Evidence. That article provides that ‘in the event of conflict between the Statute and the Rules of Procedure and Evidence, *the Statute shall prevail* – (emphasis added)’. So, it is for the Court to decide to what extent annexed elements of crimes and amendments thereto are consistent with the Statute¹⁰⁶. It also seems that the Court has the power of judicial review in respect of the former. 40

C. Special remarks: The juridical weight of the Elements of Crimes

Paragraph 1 of article 9 says that the Elements ‘shall assist’ the Court. Implicit in the notion of assistance is that sometimes the Elements will not be helpful – they may be unhelpful or just plain wrong and in such instances should be put aside by the Court. This conclusion is underscored by paragraph 3’s admonition that the Elements ‘shall be consistent with this Statute’. Reading the two paragraphs together, it is apparent that The Elements have less juridical weight than the Statute itself. The Court should, no doubt, give substantial deference to the conclusions of the Preparatory Commission and the Assembly of States Parties as to what the appropriate standards are. Ultimately, though, it is the Court’s call on whether what is promulgated in The Elements is consistent with the Statute itself (including the principles of interpretation contained in article 21 thereof.¹⁰⁷ 41

¹⁰⁵ See Clark, *Article 121*, mn 6.

¹⁰⁶ It is this consideration, *inter alia*, that makes strange the provision entitling the Court to propose amendments to the elements of crimes.

¹⁰⁷ Note that, in terms of the dispute settlement provisions in article 119 of the *Rome Statute*, deciding upon the compatibility of a particular Element with the Statute will always arise in the consideration of a case involving a particular individual and therefore will inevitably be a matter ‘concerning the judicial functions of the Court’ and thus within its competence to decide. See Clark, *Article 119*, mn 11.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Literature: Acquaviva, G., ‘Was a Residual Mechanism for International Criminal Tribunals Really Necessary?’, (2011) 9 *JICJ* 789; Ambos, K., ‘The Crime of Aggression after Kampala’, (2010) 53 *GYbIL* 463; Arsanjani, M.H. and Reisman, W.M., ‘The International Criminal Court and the Congo’, in: L.N. Sadat and M.P. Scharf (eds.), *The Theory and Practice of International Criminal Law* (Martinus Nijhoff Publishers 2008) 325; Baughen, S., ‘Holding Corporations to Account: Crafting ATS Suits in the UK?’, (2013) 2 *BritJAmLS* 533; Bos, ‘1948–1998: The Universal Declaration of Human Rights and the Statute of the International Criminal Court’ (1998–1999) 22 *FordhamLLJ* 229; A. Chandrachud, N., ‘Continuing Relevance of Customary International Law in the Development of International Humanitarian Law’, (2009) 21 (2) *SriLankaJIL* 55; Conforti, B. and Focarelli, C., *The Law and Practice of the United Nations* (Martinus Nijhoff Publishers 4th edition 2010); Denis, C., ‘Critical Overview of the “Residual Functions” of the Mechanism and its Date of Commencement (including Transitional Arrangements)’, (2011) 9 *JICJ* 819; Edwards, G.E., ‘International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy’, (2001) 26 *Yale JIL* 323; Globke, C., *Die Auslieferung an den Internationalen Strafgerichtshof* (Mohr Siebeck 2009); Greenawalt, A.K.A., ‘The Pluralism of International Criminal Law’, (2011) 86 *IndLJ* 1063; Grover, L., *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014); *id.*, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’, (2010) 21 *EJIL* 543; Heinsch, R., ‘The Crime of Aggression After Kampala’, (2010) 2 *GoJIL* 713; Heinze, A., *International Criminal Procedure and Disclosure* (Duncker & Humblot 2014); Heller, K., ‘The Uncertain Legal Status of the Aggression Understandings’, (2012) 10 *JICJ* 229; Krefß, C. *et al.*, ‘Negotiating the Understandings on the crime of aggression’, in: Barriga and Krefß (eds.), *The Trauvaux Préparatoires of the Crime of Aggression* (CUP 2012) 81; Lüders, B., *Die Strafbarkeit von Völkermord nach dem Römischen Statut für den Internationalen Strafgerichtshof* (BWV Berliner Wiss.-Verlag 2004); Kim, Y.S., *The International Criminal Court (A Commentary of the Rome Statute)* (Wisdom House 2003); Lyons, C.W., ‘Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict’, (2012) 47 *WakeForestLRev* 799; Mancini, M., ‘A Brand New Definition for the Crime of Aggression’, (2012) 81 *NJIL* 227; McDougall, C., *The Crime of Aggression under the Rome Statute of the ICC* (CUP 2013); Meyer, T., ‘Codifying Custom’, (2011–2012) 160 *UPaLRev* 995; Milanović, M., ‘Is the Rome Statute Binding on Individuals?’, (2011) 9 *JICJ* 25; Nabil Jurdi, N., ‘The Domestic Prosecution of the Crime of Aggression After the International Criminal Court Review Conference’, (2013) 14 *MelbJIL* 129; Olásolo, H., *Estudios de derecho penal internacional* (Instituto Nacional de Ciencias Penales 2010); Paust, J., ‘The International Criminal Court Does Not Have Complete Jurisdiction Over Customary Crimes Against Humanity and War Crimes’, (2009–2010) 43 *JohnMarshallLRev* 681; Pinto Soares, P., ‘Positive Complementarity and the Law Enforcement Network’, (2013) 46 *IsLRev* 320; Rayfuse, R., ‘The Draft Code of Crimes against the Peace and Security of Mankind’, (1997) 8 *CLF* 43; Sadat, L.N., ‘Custom, Codification and Some Thoughts About the Relationship Between the Two’, (1999–2000) 49 *DePaulLRev* 909; *id.*, *The International Criminal Court and the Transformation of International Law* (Transnational Publishers 2002); *id.*, ‘Crimes Against Humanity in the Modern Age’, (2013) 107 *AJIL* 334; Saif-Alden Wattad, M., ‘The Rome Statute and Captain Planet’, (2009) 19 *FordhamEnvntLRev* 265; Sató, H., ‘Modes of International Criminal Justice and General Principles of Criminal Responsibility’, (2012) 4 *GoJIL* 765; *id.*, ‘The Defense of Superior Orders in International Law’, (2009) 9 *ICLRev* 117; Sheppard, D., ‘The International Criminal Court and “Internationally Recognized Human Rights”’, (2010) 10 *ICLRev* 43; Trahan, J., ‘The Rome Statute’s Amendment on the Crime of Aggression’, (2011) 11 *ICLRev* 49; van der Vyver, J.D., ‘Prosecuting the Crime of Aggression in the International Criminal Court’, (2010–2011) 1 *NatSec&ArmedConflictLRev* 1; Young, R., ‘“Internationally Recognized Human Rights” Before the International Criminal Court’, (2011) 60 *ICLQ* 189.

Content

A. General remarks: Drafting history and purpose	1
B. Analysis and interpretation of elements	9
I. Subject matters	10
1. Articles and rules ‘in this Part’	11
2. Scope of international law concerned: ‘existing or developing rules’	13
3. Interpretation ‘limiting or prejudicing in any way’	14
II. Interpretation ‘for purposes other than this Statute’	16
C. Special remarks: Relation to articles 21 and 22	17

A. General remarks: Drafting history and purpose

Article 10 is the only article in the Statute without a heading. This is due to the fact that early proposals left open the question of whether a comparable rule should be included in this Statute as a separate article or be placed in article 5, which at that time (partly as draft article 20) was already headed ‘Crimes within the jurisdiction of the Court’¹. The Draft was nominated ‘Y’ with the note that it was ‘relating to the part of the Statute dealing with the definition of crimes’². In addition, it was mentioned that ‘[a]rticle 21 paragraph 3 (*Nullum crimen sine lege*), and article 20 (Applicable law) deal with related issues’³.

At that time, the purpose of the draft was not to limit the further development of the recently established and increasingly recognized punishability of crimes under international law⁴; the mere fact that there was dispute over which of these crimes should fall under the jurisdiction of the Court and that a compromise may limit them to ‘the most serious crimes of international concern’ (article 1), should not bar their progressive development towards new crimes within this category nor raise the impression that the lack of an agreement about an international jurisdiction for certain crimes would mean that such crimes and their punishability directly under international law do not exist. At that stage, for instance, aggression was not included in article 5. The discussion touched the problem of whether a codification of international law should merely declare and systematize existing rules or also include ‘progressive development’⁵. With regard to aggression the finally achieved compromise was, for example, the acknowledgement of such a crime and the acceptance of the jurisdiction of the Court over all its alternatives, but the exercise of the jurisdiction had been postponed by former article 5 para. 2 until ‘a provision is adopted...defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime’.

When the issue was finally decided at the end of the Rome Conference in favour of a *separate* article, no appropriate heading covering all aspects addressed was at hand. In addition, some participants hoped that article 10 of the Draft Statute⁶ might make way for the definition of aggression⁷, which is now provided for in article 8*bis*. According to this idea, article 9 of the Draft Statute⁸ could later be amended by article 10 Draft Statute as its new

¹ See also Arsanjani and Reisman, in: Sadat and Scharf (eds.), *Theory and Practice of ICL* (2008) 325, 333.

² See Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, p. 25; see also Bassiouni, *The Legislative History of the International Criminal Court*, ii (2005) 83–84; Bennouna, ‘Article 10’, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article*, i (2012) 561.

³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, p. 25. The quoted sentences were repeated with the same wording, only referring to the old numbers for articles 20 and 21 from the Zutphen Draft; see Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13, 4 February 1998, p. 32.

⁴ See also Arsanjani and Reisman, in: Sadat and Scharf (eds.), *Theory and Practice of ICL* (2008) 325, 333.

⁵ See article 15, ILC Statute, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981; see also Rayfuse (1997) 8 *CLF* 43, 78 *et seq.* In fact, while a majority of states where in favour of that clause, India and the United States supported the deletion of Article Y’, see Kim, *International Criminal Court* (2003) 198.

⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute, article 10, which concerned the relationship between the U.N. Security Council and the International Criminal Court, in Bassiouni, *The Statute of the International Criminal Court* (1998) 132–133; Barriga and Kreß (eds.), *The Trauvaux Préparatoires of the Crime of Aggression* (2012), p. 251.

⁷ Cf. the 1998 Rome Summary Records (18 June) (excerpts), *inter alia* statement of Diaz Paniagua in Barriga and Kreß (eds.), *The Trauvaux Préparatoires of the Crime of Aggression* (2012), p. 263, para. 81 (‘[...] the crime of aggression should be included in the Statute, but [...] the definition should be discussed in the context of article 10.’); Fadl (Sudan) in *ibid.*, p. 266, para. 125; Hamdan (Lebanon) in *ibid.*, p. 267, para. 131.

⁸ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute, article 9, which was headed ‘Acceptance of the jurisdiction of the Court’, see Bassiouni, *The Statute of the International Criminal Court* (1998) 131.

paragraph 4 and then renamed number 10, while the definition of the crime of aggression and 'the conditions under which the Court shall exercise jurisdiction with respect to this crime' could be included in a new article 9.

Following years of intensive deliberations and preparatory work of the 'Special Working Group on the Crime of Aggression', the States Parties agreed on a definition of the crime of aggression, including special conditions for the exercise of its jurisdiction,⁹ at the first Review Conference of the ICC¹⁰. However, the view was expressed that article 8*bis* significantly departs from customary international law¹¹. As a result, an 'Understanding'¹², based on a U.S. proposal¹³, was added to the amendments to reiterate, recalling article 10, that those amendments must 'not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'¹⁴ However, the legal status of these Understandings – and their legal value – remains unclear¹⁵. Since the Understandings are annexed to Resolution RC/Res. 6, they could not become part of the Rome Statute itself¹⁶. Some therefore doubt that they have any effect whatsoever, considering that article 21 does not refer to understandings as such¹⁷, and arguing that article 31 para. 2 VCLT is not applicable in these circumstances¹⁸. Be that as it may, even if Understandings had a bearing on the interpretation of the Rome Statute through a contextual interpretation¹⁹, it is unlikely that this is of any relevance with regard to Understanding 4, since it resembles article 10 to a large extent²⁰.

- 3 Earlier drafts for a Statute did not provide any rule comparable with what is now article 10²¹. Such a provision did not appear necessary or advisable whatsoever, since constant development and permanent improvement was somehow guaranteed by the sources of

⁹ Resolution RC/Res.6, The Crime of Aggression (28 June 2010). For a detailed analysis see Ambos, *Treatise on ICL II* (2014) 34 *et seq.*; Ambos (2010) 53 *GYbIL* 463 *et seq.*; Trahan (2011) 11 *ICLRev* 49, 49; van der Vyver (2010–2011) 1 *NatSec&ArmedConflictLRev* 1, 1; Mancini (2012) 81 *NJIL* 227.

¹⁰ For an analysis of the Review Conference see Ambos, *Treatise on ICL I* (2013) 34 *et seq.*

¹¹ RC/11, Annex III, Report of the Working Group on the Crime of Aggression, p. 47, para. 16 ('Furthermore, a view was expressed that the definition on aggression would not reflect customary international law and that this should be recognized in the understandings. Only the most serious forms of illegal use of force constituted aggression.'). See also Koh (Legal Adviser, U.S. Department of State), Statement at the Review Conference of the International Criminal Court, available at <<http://www.state.gov/s/l/releases/remarks/142665.htm>> accessed 24 May 2015.

¹² Annex III of Resolution RC/Res.6 contains seven 'Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression', see in more detail Heller, (2012) 10 *JICJ* 229–248.

¹³ Trahan (2011) 11 *ICLRev* 49, 73–76. There is a certain irony in the fact that the US made this proposal, considering that it supported the deletion of article Y (being now article 10) at the Rome Conference, see Kim, *International Criminal Court* (2003) 198.

¹⁴ Review Conf. Res. RC/Res.6, ICC Doc. ICCASP-RC/11, Annex III, Understanding 4 (June 11, 2010); van der Vyver (2010–2011) 1 *NatSec&ArmedConflictLRev* 1, 51.

¹⁵ See generally McDougall, *Aggression* (2013) 113 *et seq.*

¹⁶ McDougall, *Aggression* (2013) 113; Heller, (2012) 10 *JICJ* 229, 234 *et seq.*

¹⁷ Heinsch (2010) 2 *GoJIL* 713, 730; McDougall, *Aggression* (2013) 114.

¹⁸ Heller, (2012) 10 *JICJ* 229, 237 *et seq.*; Heinsch (2010) 2 *GoJIL* 713, 730; McDougall, *Aggression* (2013) 114 *et seq.*, who – however – is in favour of applying article 32 para. 1 VCLT, see *ibid.* at 117 *et seq.*

¹⁹ A broad contextual interpretation would necessarily also have to take into account these 'Understandings'. A way to conduct such a contextual interpretation within the Rome Statute is described in Heinze, *International Criminal Procedure* (2014) 92 *et seq.*

²⁰ In the same vein Heller (2012) 10 *JICJ* 229, 232. It can be assumed, however, that the question about the legal value of Understanding 4 would have become more relevant if the U.S.A. had succeeded in adding a clause that went beyond the wording of article 10, reading: '[...] and shall not be interpreted as constituting a statement of the definition "crime of aggression" or "act of aggression" under customary international law.', see Kreß in: Barriga and Kreß (eds.), *The Trauvaux Préparatoires of the Crime of Aggression* (2012) 81, 93. This 'would have explicitly divorced the new treaty definition from existing customary international law' and was therefore opposed by a large number of delegations, see *ibid.*

²¹ See for the 1926 Bellot and ILA as well as the AIDP and the 1937 Draft Statute of the League of Nations, the 1951 Draft Code, Draft Statute and 1954 Draft Code Triffterer, 'Preliminary Remarks' (2008), mn 2 *et seq.* with further references. See also Bassiouni, *The Legislative History of the International Criminal Court*, ii (2005) 95, where no other drafts are mentioned.

international law as mentioned in article 38 ICJ Statute. It was important to leave all doors open for establishing a most effective direct enforcement model as soon as possible²². Examples for such a development are, for instance, the Genocide Convention 1948²³ and the Geneva Conventions 1949²⁴. Genocide had been experienced in the Second World War in all its cruel appearances. But all endeavours to include political and cultural groups and thus to broaden the scope of genocide in these directions were unsuccessful²⁵. However, it was not questioned that former codifications of the definition of war crimes could *not* bar the amendments to that definition introduced by the Add. Prot. I and II 1977²⁶, since this progressive development was independent from the source of international law²⁷. Moreover, both the Conventions against Apartheid²⁸ and Torture²⁹ show that there was and still is an open development in that regard. Accordingly, the renewed mandate of the ILC in 1981³⁰ concerning the Draft Code has been extended to ‘take into account’ the progressive development of international law since 1954³¹.

The Statutes for the ICTY and the ICTR are without a corresponding regulation. At that time, it appeared self-evident that the jurisdiction of both *ad hoc* Tribunals, limited to certain criminological appearances restricted by a time period and under territorial aspects, as expressed in common article 1 of the ICTY and of the ICTR Statute, could neither bar the interpretation of the existing international law beyond their limited aims nor prejudice its future development.

However, once the Preparatory Committee was charged with drafting ‘a widely acceptable consolidated text of a convention’³², it was considered more important to find possibilities for a compromise than to strive for a perfect solution in one or the other direction – even at that early stage of the drafting process.

²² For the legal possibilities within the ILC see, for instance, Rayfuse (1997) 8 *CLF* 43, 43 *et seq.* with further references; Ambos, *Treatise on ICL I* (2013) 16 *et seq.*, and in general for international criminal law Triffterer, ‘Preliminary Remarks’ (2008), mn 14 *et seq.* Prior to the ‘resurrection’ of the ICC project in 1989, there was ‘little law and even fewer mechanisms to enforce the three “core” crimes deemed most heinous of all at Nuremberg’, see Sadat (1999–2000) 49 *DePaullRev* 909, 909.

²³ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, which came into force on 12 January 1951. See Ambos, *Treatise on ICL I* (2013) 10.

²⁴ In more detail, see Ambos, *Treatise on ICL I* (2013) 11 *et seq.*

²⁵ Cf. Schabas, ‘Article 6’, in *this volume*, mn 16.

²⁶ Cf. Cottier, ‘Article 8’, in *this volume*, mn 7, 11, 17.

²⁷ Cottier, ‘Article 8’, in *this volume*, mn 7 (‘The main sources of this IHL branch are the four Geneva Conventions of 1949 as well as the two Additional Protocols of 1977 and customary international law, which is of popular relevance with regard to the law applicable to non-international armed conflicts.’, fn. omitted); Chandrasanan (2009) 21 *Sri Lanka JIL* 55, 61 (‘The Additional Protocols 1 & 11 of 1977, further codified and developed existing customary rules relating to international armed conflict and to a lesser extent non international armed conflict.’). Even the 1907 Hague Convention on Laws and Customs of War contained a clause that read: ‘The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.’, see Convention Respecting the Laws and Customs of War on Land, 18 October 1907, article 2; see also Meyer (2011–2012) 160 *UPaLRev* 995, 1040.

²⁸ Apartheid was declared a crime against humanity in a series of international instruments, from the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (GARes. 2391 (XXIII)) of 26 November 1968, entered into force 11 November 1970. See article 1(b): ‘[...] and inhuman acts resulting from the policy of apartheid [...]’ to the International Convention on the Suppression and Punishment of the Crime of Apartheid (GARes. 3068 (XXVIII)), 28 UN GAOR Supp. (No. 30) at 75, UN Doc.A/9030 (1974), 1015 UNTS 243, entered into force 18 July 1976. See article 1(1): ‘The States Parties to the present Convention declare that apartheid is a crime against humanity [...]’. See generally Ambos, *Treatise on ICL II* (2014) 113 *et seq.*

²⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (GA Res. 39/46 of 10 December 1984, entered into force 26 June 1987).

³⁰ GA Res. 36/106, 10 December 1981; also in *YbILC* 1983 II 2, 12 *et seq.*; 1984 II 2, 9 *et seq.*; 1985 II 2, 9 *et seq.*

³¹ See GA Res. 36/106 in *UNYBbILC* 1983 II 2, 12, para. 38 (‘[...] taking duly into account the results achieved by the process of the progressive development of international law; [...]’).

³² See GA Res. [on the report of the Sixth Committee (A/51/627)], UN Doc.A/RES/51/207 of 16 January 1997 (emphasis added), available at <<http://www.un.org/ga/documents/gares51/ga51-207.htm>> accessed 19 February 2015.

This attitude was confirmed by the fact that on 15 December 1997 the General Assembly adopted Resolution 52/160³³ (without a voting), in which it mandated the Diplomatic Conference to finalize and adopt a *convention* on the establishment of an international criminal court³⁴. It recognized ‘the importance of concluding the work of the conference through the promotion of *general agreement* on matters of substance’³⁵. The precondition of such an agreement was, of course, that this progressive development could not be barred by any target or result.³⁶ This precondition seems to be without an alternative from both a theoretical and practical point of view: New conventions may be created on the subject matter and other aspects and the laws and customs of war may do the same within their respective legal framework.

- 5 The Rome Statute itself is the best example of the fact that elements of crimes may be codified, thereby providing more detailed guidance on the interpretation of crimes than it has been the case with earlier codifications. This becomes self-evident comparing the definitions in the Statutes of the ICTY and the ICTR with those contained in the Rome Statute, for example with regard to ‘other inhumane acts’ as crimes against humanity: Unlike the rather general reference to ‘other inhumane acts’ in the Statutes of the *ad hoc* Tribunals, article 7 para. 1 (k) of the Rome Statute defines these acts in more specific terms³⁷.
- 6 Against this background the purpose of article 10 appears as a kind of ‘reservation clause’³⁸, as it is contained in the Statute notwithstanding article 120, according to which ‘[n]o reservations may be made to this Statute’, for instance in article 124 with regard to war crimes for a period of seven years. Article 10 clarifies that all articles in Part 2 are limited to the purpose of building an agreement between the States Parties and shall have no binding effect going beyond the subject matter and the scope of the Statute and the Party’s agreements. This means that States are bound, for instance, by the definitions of crimes, as contained in articles 6–8, when exercising their national jurisdiction on behalf of the international community as a whole over crimes falling within the jurisdiction of the Court and also when cooperating (vertically) with the Court, which is exercising its complementary jurisdiction. But otherwise, with regard to their (merely) internal *ius puniendi* over other crimes under international law and cooperation on the horizontal level with other states, they are free to decide scope and notion of these issues. With regard to the introduction of article 8*bis*, article 10 and Understanding 4³⁹ have the effect that the amendments should not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State⁴⁰.

³³ See GA RES/52/160 [on the report of the Sixth Committee (A/52/651)], 15 December 1997, available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/52/160> accessed 24 May 2015.

³⁴ See also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Introduction and Draft Organization of Work, UN Doc. A/Conf.183/2 (1998), paras. 6 *et seq.*, available at <http://www.legal-tools.org/uploads/tx_ltpdb/doc18476.pdf> accessed 24 May 2015.

³⁵ See GA RES/52/160 [on the report of the Sixth Committee (A/52/651)], 15 December 1997, p. 1 (emphasis added), available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/52/160> accessed 24 May 2015.

³⁶ See also Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 265.

³⁷ With regard to the lack of precision of that category, see, e.g., *Prosecutor v. Kupreškić*, No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 563. With regard to ‘other inhumane acts’ having a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes, see *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the confirmation of charges, PTC I, 30 September 2008, para. 450. For further references see Ambos, *Treatise on ICL II* (2014) 114 *et seq.*

³⁸ It could also be labelled as a ‘preservation’ clause to preserve the ‘role of custom in the development of normative standards of conduct in the area of international criminal justice’, see Sadat, *ICC and Transformation of International Law* (2002) 263. In the same vein Satō (2009) 9 *ICLRev* 117, 136, or a ‘without prejudice clause’, see Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 264, 265.

³⁹ Annex III of Resolution RC/Res.6.

⁴⁰ Review Conference of the Rome Statute, International Criminal Court, Non-Paper by the Chair: Further Elements for a Solution on the Crime of Aggression, ICC Doc RC/WGCA/2 (25 May 2010) [4]; Nabil Jurdi (2013) 14 *MelbJIL* 129, 138–140.

The ‘reservation’ in article 10 appears to be understandable, since codifications like the Rome Statute have advantages and disadvantages⁴¹. The advantage is that both the provisions and especially elements of crimes are more precise than they *usually* are when defined by the laws and customs of war or other customary international law. A codification increases certainty and awareness of prohibitions and thereby vindicates the rule of law and the possibility of achieving a preventive effect⁴². However, the Rome Statute illustrates very clearly that its articles represent a *minimum* amount of consent in many aspects. States thus shape international law by codifying parts of the unwritten rules on the subject. -The purpose of article 10 is *first*, to avoid the impression that what has thus been codified is the only possible interpretation or a reflection of the minimum consent in the community of nations as a whole and *second*, to guard against these impressions being used to thwart the future development of international law outside the Statute⁴³. The Statute thus expresses what is in any event accepted in international law. ‘Nothing in this Part (therefore) shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than (which means not laid down in) this Statute’ (brackets added).

Up to the last minute and during the Rome Conference, it was proposed to include the draft, headed ‘Y’,⁴⁴ in article 5, ‘since it [article 10] applies to all (at that time only) three crimes within the Court’s jurisdiction’ and was not only applicable within the context of war crimes⁴⁵. When aggression was included at the last minute of the Rome Conference – with the two conditions described in former article 5 para. 2 – the need to leave open additional interpretation and development had increased still further.

B. Analysis and interpretation of elements

Article 10 is construed differently compared to all other articles in the Statute, combining two elements of legal drafting: With regard to all articles in Part 2 – in which article 10 is situated approximately in the middle – it first presupposes a permissible interpretation (as also mentioned in article 9) of these articles and, second, prescribes that this interpretation shall have no ‘limiting or prejudicing’ effect on ‘existing or developing rules of international law for the purposes other than this Statute’⁴⁶, which means *outside* the Statute on the national and the international level.

I. Subject matters

The scope of article 10 includes and combines three subject matters with regard to which it provides an exception at the end.

1. Articles and rules ‘in this Part’

The introductory wording refers to Part 2 as a whole, *scil.* articles 5–21 inclusive. ‘Nothing in this Part’ comprehends each provision and rule within these articles. The restriction to Part 2 reflects the result of the drafting process: Even the original idea of including what is

⁴¹ In more detail Grover (2010) 21 *EJIL* 543, 570.

⁴² See, for instance, Olásolo, *Estudios de derecho penal internacional* (2010) 61 *et seq.*; Grover (2010) 21 *EJIL* 543, 570 with further references. About ‘legal certainty’ as a goal of codification Heinze, *International Criminal Procedure* (2014) 107 *et seq.* with further references.

⁴³ In the same vein Satō (2009) 9 *ICLRev* 117, 136.

⁴⁴ In more detail Schabas, *The International Criminal Court* (2010) 269.

⁴⁵ Bassiouni and Wexler, *Model Draft Statute for the International Criminal Court*, 13ter *NEP* (1998) 4, brackets added; Sadat (1999–2000) 49 *DePaulLRev* 909, 917.

⁴⁶ About the phrase ‘[f]or the purpose of this Statute’ in other articles of the Rome Statute see Paust (2009–2010) 43 *JohnMarshallLRev* 681, 682.

now article 10 in a paragraph of article 5 involved a reference to both article 5 itself and the following articles providing for definitions of the crimes listed in article 5. This proposal extended to the case the draft called 'Y' should be situated as a separate article in this part.

As previously mentioned, during the drafting process, Part 2 was headed only 'crimes within the jurisdiction of the Court', which listed not only definitions of crimes but also more or less comprehensive regulations for the exercise of the jurisdiction of the Court. Part 2 is now more comprehensively named 'Jurisdiction, admissibility and applicable law' and contains much more detailed regulations on the subject matter than the original one in the drafting process. This extension was necessary, because Part 2 contains two of the most difficult compromises achieved at the Rome Conference, first on the question of complementarity and second on trigger mechanisms.

Compromises necessarily result in the parties giving up parts of their original demands. Against this background it becomes clear why the mutual concessions that were made to achieve the compromise were limited to the original motivating purpose as far as possible: to establish the ICC and not destroy the hope of the community of nations that its basic legal values would be protected by an international criminal jurisdiction inherent to this community. This compromise can therefore not be applied to law *outside* the Statute by interpreting the rules of Part 2 as 'limiting or prejudicing in any way existing or developing rules of international law'. The aim was to leave space for a 'limiting or prejudicing' internal interpretation of Part 2 but to exclude its effect beyond the scope of this Statute. In particular, the compromises regulated in Part 2 shall not bar the development 'outside' the Statute.

- 12 Article 10 expresses no opinion on the interpretation of articles and rules in other Parts of the Rome Statute. Its applicability is rather limited to Part 2. Nevertheless, the drafting process of the provision indicates that a limiting or prejudicing interpretation of all those articles outside Part 2, which were adopted as a compromise or describe a *status quo*, should equally not bar the interpretation of 'existing or developing rules of international law for purposes other than this Statute'⁴⁷. This applies, for instance, to article 25, which covers – together with all other articles in Part 3 – only some of the general principles of criminal law that have to be applied by the ICC in accordance with article 21⁴⁸. Thus, article 10 can be viewed as generally rejecting the provisions of the Rome Statute to be universally binding law and was even used for an attempt to argue against the influence of the Rome Statute on the 'jurisprudence of other courts applying ICL'⁴⁹.

International cooperation and judicial assistance, described in Part 9, may also need additional regulations to guarantee the most effective prevention of crimes under international criminal law and to exclude impunity for abuses of power. The very structure of the Rome Statute as a convention between the States Parties supports this notion. States Parties to the Rome Statute can only agree upon a limiting and prejudicing interpretation 'within the jurisdiction of the Court' and within the boundaries of the Statute, notwithstanding the Statute's actual influence on the evolution of ICL by establishing minimum rules of conduct.⁵⁰

Amendments and Review Conferences have, therefore, a limited power to change the law for internal purposes. They may, but they not necessarily have binding effect, for example, on present and future regional *ad hoc* Tribunals, when they interpret the Statute in a certain dimension.

⁴⁷ In the same vein Satō (2012) 4 *GoJIL* 765, 796.

⁴⁸ See also Milanović (2011) 9 *JICJ* 25, 30. Crit. Baughen (2013) 2 *BritJAmLS* 533, 546 with fn. 77.

⁴⁹ Greenawalt (2011) 86 *IndLJ* 1063, 1108: 'If the Rome Statute happens to fill some gaps in substantive ICL primarily for the convenience of agreeing on a single approach for purposes of the ICC's own jurisprudence, then there is no particular reason why the ICC's approach should dictate the jurisprudence of other courts applying ICL.' This view, however, disregards the actual influence of the Rome Statute on the evolution of international law and serves as an illustrating example that article 10 can be read in two ways, which will be elaborated in more detail below (mn 16).

⁵⁰ See mn 16.

2. Scope of international law concerned: 'existing or developing rules'

The scope of the formulation 'existing or developing rules of international law' covers the whole legal order of the community of nations, whatever rules belonging to this field are addressed. Although there is no explicit reference to customary international law, it nevertheless is 'the thrust of the text'⁵¹. Thus, article 10 is to be read as a reminder that the Part 2 provisions cannot be invoked to narrow or otherwise negatively affect existing or developing customary rules. This being said, it seems that in some instances the Statute 'arguably goes beyond customary law'⁵². The introduced article *8bis*, for instance, may help broaden the scope of application of the existing customary rule on the crime of aggression⁵³. This is an illustrating example that the Rome Statute and the amendments to it will eventually influence the evolution of customary international law⁵⁴.

Since international criminal law is part of international law insofar as that term comprehends the legal order of the community of nations, it is also concerned with the law of immunities and privileges, that may develop differently from what is now generally accepted or agreed upon by the States Parties to the Statute⁵⁵. The question becomes vital with regard to article 27 and the draft articles on State responsibility; the latter were adopted by the ILC at its 53rd session (2001)⁵⁶.

Even though the individual criminal responsibility is regulated outside Part 2, the relevant article 25 refers in paragraph 4 expressly to the fact that 'no provision in this Statute relating to individual criminal responsibility should affect the responsibility of States under international law'. This confirms that the interpretation of articles and rules of Part 2 cannot bar such a development or claim to be obeyed as a binding guideline. Of course, it is up to the progressively developing process concerning international law to consider the jurisprudence of the ICC in the same manner as is already done with regard to the ICTY and the ICTR. Theoretically, the development of changes in humanitarian law, for instance defining new crimes against humanity – not yet falling within the jurisdiction of the Court –, cannot be blocked by the Statute. However, from a practical point of view, it can be expected that on subject matters the Statute deals with in a compromising way, such a (progressive) development outside the possibilities provided for by review or an amendment of the Statute appears improbable.

⁵¹ Schabas, *The International Criminal Court* (2010) 270. In the same vein Satō (2009) 9 *ICLRev* 117, 136 ('This provision might be significant in enabling some "vacuum" of customary international law to be preserved consciously.'). Saif-Alden Wattad (2009) 19 *FordhamEnvtlLRev* 265, 270 with fn. 26; Globke, *Auslieferung* (2009) 302. For a more differentiated view see Milanović (2011) 9 *JICJ* 25, 30 ('The point of this article is obviously to divorce the Statute from customary law, although this is not necessarily fatal to the jurisdictional reading of the Statute.').

⁵² Milanović (2011) 9 *JICJ* 25, 30; Grover (2010) 21 *EJIL* 543, 564 with further references.

⁵³ Mancini (2012) 81 *NJIL* 227, 246.

⁵⁴ Mancini (2012) 81 *NJIL* 227, 246.

⁵⁵ In 2011, the PTC I of the ICC found that there was no difference in that regard, see *Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-139, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, PTC I, 12 December 2011, paras. 9 *et seq.*, 43 ('[T]he Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; [...]'). See also *Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-140-ENG, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, PTC I, 13 December 2011, para. 13. For a general analysis see Werle and Jessberger, *Principles of International Criminal Law* (2014) 270 *et seq.*, 277 with further references; Ambos, *Treatise on ICL I* (2013) 406 *et seq.*, 413.

⁵⁶ The Commission has dealt with this topic on its 51st Session in Geneva, 3 May–23 July 1999; see GA Res. 53/102 (9 Dec. 1998). See in more detail Triffterer/Burchard, 'Article 27', in *this volume*, mn 11 *et seq.*

3. Interpretation ‘limiting or prejudicing in any way’

- 14 This element concerns the interpretation of articles or rules contained in this Part in a certain way. The provision precludes only an interpretation which is ‘limiting or prejudicing in any way’. A ‘limiting’ interpretation is narrowing or thwarting the enlargement of the scope of what is regulated in an article or rule of the Statute⁵⁷. ‘Prejudicing’ includes both possibilities, making them a binding rule for future applications in the subject matter, which has already been dealt with under mn 13⁵⁸.
- 15 In that regard, the establishment of both the *ad hoc* and hybrid or ‘mixed’ Tribunals needs to be mentioned. Especially the hybrid or ‘mixed’ tribunals are Janus-faced in that regard: On the one hand, they are situated on site (except the STL), i.e. ‘where the crimes of their subject matter jurisdiction took place’⁵⁹. This ensures ‘a certain proximity to the local, crime-affected population’⁶⁰ and thereby contributes to the positive complementarity paradigm of the ICC⁶¹. On the other hand, the establishment of these tribunals, as well as Truth and Reconciliation Commissions, is not advisable after the ICC has come into operation and exercises its jurisdiction over the crimes in question⁶². Nevertheless, there may be exceptional circumstances, like for governments in transition, which make it preferable for the Security Council to establish an *ad hoc* Tribunal parallel to the ICC. This is particularly important with regard to *ad hoc* Tribunals for crimes committed outside the jurisdiction of the ICC. Thus, what is defined in article 17 para. 2 with regard to unwillingness will only be applicable to cases before the ICC and cannot be ‘interpreted as limiting or prejudicing in any way’ the law to be applied in cases before the ICTY and the ICTR (and the Mechanism for International Criminal Tribunals⁶³). The same is true for present or later established post-conflict institutions like the Truth and Reconciliation Commission or special hybrid courts, dealing with crimes under international law.

II. Interpretation ‘for purposes other than this Statute’

- 16 The formulation ‘for purposes other than this Statute’ implies that for purposes of the Statute every admissible interpretation of any article or rule may limit or prejudice the applicability of other ‘existing or developing rules’⁶⁴. For instance, article 9 provides for the development of *new* scope and notions of elements of crimes only as long as they are ‘consistent with this Statute’ in accordance with paragraph 3. Furthermore, the elements of crimes state at the end of each of the definitions of the specific forms of genocide: ‘The conduct took place in the context of a manifest pattern of similar conduct directed against

⁵⁷ Similarly Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 267 (‘The reference to “limiting” might be to the exclusion of some crimes under customary international law or retrogressive definitions of crimes in the Rome Statute’).

⁵⁸ See also Triffterer, ‘Preliminary Remarks’ (2008), mn 63.

⁵⁹ Ambos, *Treatise on ICL I* (2013) 51.

⁶⁰ Ambos, *Treatise on ICL I* (2013) 51.

⁶¹ For a definition see Review Conference, Resolution ICC-ASP/8/Res.9. In more detail see Pinto Soares (2013) 46 *IsLRev* 320 *et seq.*

⁶² In the same vein Wilmshurst, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 181, 199 with further references (‘It is to be expected that there would be opposition if the establishment of similar courts under the UN auspices were proposed in the future with jurisdiction coinciding with that of the ICC’).

⁶³ Established by SC Resolution 1966 (2010) of 22 December 2010. See <<http://www.unmict.org/en>> accessed 24 May 2015; Acquaviva (2011) 9 *JICJ* 789, 793; Denis (2011) 9 *JICJ* 819.

⁶⁴ See also Arsanjani and Reisman, in: Sadat and Scharf (eds.), *Theory and Practice of ICL* (2008) 325, 334 (‘While this may not exclude interpretations involving reasonable adaptation of a particular provision to specific circumstances, it would appear [...] to be a far cry from a general license to engage in extensive interpretation of the Statute’).

that group or was conduct that could itself effect such destruction⁶⁵. This contextual element is not provided for in the wording of article 6 and has been rejected by both the *ad hoc* Tribunals⁶⁶ and the ICJ⁶⁷. Nevertheless, the Pre-Trial Chamber in Al Bashir affirmed the necessity of such an element, clarifying that only then the ‘threat against the existence of the targeted group [...] becomes concrete and real, as opposed to just being latent and hypothetical’⁶⁸. For the Chamber, article 10 became ‘meaningful insofar as it provides that the definition of the crimes in the Statute and the Elements of Crimes shall not be interpreted “as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”⁶⁹. As a result, the majority of the Pre-Trial Chamber considered that ‘Elements of Crimes and the Rules must be applied unless the competent Chamber finds an irreconcilable contradiction between these documents on the one hand, and the Statute on the other hand’⁷⁰.

Another example is article 8 para. 3, which is in part phrased similarly to article 10. Especially with regard to this regulation, the purpose of article 10 becomes obvious: Whatever the development in international law with regard to article 2 para. 7 of the UN Charter may be⁷¹ – where the jurisdiction of the ICC is concerned, the approach authorized by article 8 para. 3 may be interpreted in a limiting or prejudicing way for the application of the Statute of the ICC, but not for the outside development of rules of international law concerning this subject matter.

Finally, in its decision authorizing the Prosecutor to proceed with an investigation in the Kenya situation, the majority of Pre-Trial Chamber II referred to the jurisprudence of other tribunals with regard to the element ‘State or organizational policy’ in Article 7 para. 2 (a)⁷². It did so with regard to, *inter alia*, the form and content of the ‘policy’ and the entity behind

⁶⁵ See Elements of Crimes, ICC-ASP/1/3, Article 6 (a)-4, 6 (b)-4, 6 (c)-5, 6 (d)-5, 6 (e)-7; Ambos, *Treatise on ICL II* (2014), 17; Schabas, *The International Criminal Court* (2010) 272.

⁶⁶ See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC I, 4 March 2009, paras. 117 *et seq.*; *Prosecutor v. Jelisić*, No. IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001, para. 48; *Prosecutor v. Kayishema and Ruzindana*, No. ICTR-95-1-A, Judgement, Appeals Chamber, 1 June 2001, para. 138; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgement, Trial Chamber, 12 December 2012, para. 745.

⁶⁷ Cf. ICJ, *Bosnia and Herzegovina v. Yugoslavia*, Judgment, 26 February 2007, paras. 373 (‘The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.’) and 376; see also Bennouna, ‘Article 10’, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article*, i (2012) 565. The ICJ confirmed its view in *Croatia v. Serbia*, Judgment, 3 February 2015, para. 143 *et seq.* It also clarified, that the criterion applied by the ICTY Trial Chamber in the Judgment in the Tolimir case (see *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, Trial Chamber, 12 December 2012, para. 745) was ‘in substance identical with that laid down by the Court in its 2007 Judgment’, see para. 148.

⁶⁸ *Prosecutor v. Bashir*, ICC-02/05-01/09-3, 4 March 2009, para. 124. Drawing on the *telos* of article 6 to argue in favour of a contextual element Ambos, *Treatise on ICL II* (2014), 18.

⁶⁹ *Prosecutor v. Bashir*, ICC-02/05-01/09-3, 4 March 2009, para. 127.

⁷⁰ *Prosecutor v. Bashir*, ICC-02/05-01/09-3, 4 March 2009, para. 128. Accordingly, the context element may be regarded ‘as part of the (subjective) offence definition, more concretely, the “intent to destroy” requirement, as its “carrier” or “holder”’, see Ambos, *Treatise on ICL II* (2014), 18; Lüders, *Völkermord* (2004), 93 *et seq.*

⁷¹ The non-intervention clause in this article reads: ‘Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.’ However, the interpretation of that article does not allow for an application to the human rights field, *scil.* states cannot ‘plead this rule as a bar to international concern and consideration of internal human rights’, see Shaw, *International Law* (6th ed. 2008) 273. In other words, article 2 para. 7 of the Charter cannot bar the development of human rights law. See in detail Conforti and Focarelli, *Law and Practice* (2010) 165 *et seq.*

⁷² *Situation Kenya*, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, PTC II, 31 March 2010, para. 86 *et seq.* About this decision in more detail see Sadat (2013) 107 *AJIL* 334, 368 *et seq.*

that policy⁷³. In his dissenting opinion, Judge Kaul questioned these jurisprudential references to other tribunals. He instead invoked article 10⁷⁴ and conducted a careful and lengthy analysis of both the historic origins of crimes against humanity and article 7 para. 2 (a)⁷⁵.

Nevertheless, since a codification of international law also includes ‘progressive development’⁷⁶, the provisions of the Rome Statute ‘will eventually influence the evolution of international law’⁷⁷ and state practice⁷⁸. As an example serves the interpretation of article 7: Notwithstanding the interpretive provision of article 10, Article 7 is increasingly regarded as codifying the customary international law of crimes against humanity⁷⁹, *inter alia* by the European Court of Human Rights⁸⁰, the Inter-American Court of Human Rights⁸¹, U.S. federal courts⁸², the UK House of Lords⁸³ and the UK Court of Appeal⁸⁴. Moreover, the case law of the ICTY points to the Rome Statute to that effect⁸⁵. As *Sadat* puts it, ‘[i]t is an explicit

⁷³ *Situation Kenya*, ICC-01/09-19, 31 March 2010, para. 86 *et seq.* About these elements see in more detail Ambos, *Treatise on ICL II* (2014), 67 *et seq.* with further references.

⁷⁴ *Situation Kenya*, ICC-01/09-19, 31 March 2010, Dissenting Opinion of Judge Hans-Peter Kaul, para. 32: ‘[...] to conduct a careful analysis before drawing an analogy with or relying on the jurisprudence of other tribunals. Article 10 of the Statute reinforces the assumption that the drafters of the Statute may have deliberately deviated from customary rules as evinced in the jurisprudence of other courts and tribunals in providing that “[n]othing in this Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than in the Statute.” (Fn. omitted).

⁷⁵ *Situation Kenya*, ICC-01/09-19, 31 March 2010, Dissenting Opinion of Judge Hans-Peter Kaul, para. 33 *et seq.* See for further examples Lyons (2012) 47 *WakeForestLRev* 799, 823 *et seq.*

⁷⁶ See mn 1.

⁷⁷ Schabas, *The International Criminal Court* (2010) 271.

⁷⁸ Grover (2010) 21 *EJIL* 543, 571 with further references in fn. 183.

⁷⁹ *Sadat* (2013) 107 *AJIL* 334, 372–374.

⁸⁰ *Korbely v. Hungary*, No. 9174/02, Judgment, 19 September 2008, Dissenting Opinion of Judge Loucaides (‘[O]ne may take the recent Rome Statute of the International Criminal Court as declaratory of the definition in international law of this crime.’). See also Schabas, *The International Criminal Court* (2010) 271.

⁸¹ *González Medina and Family v. Dominican Republic*, Judgment (Preliminary objections, merits, reparations and costs), 27 February 2012, para. 128 with fn. 154; *García and Family Members v. Guatemala*, Judgment (Merits, Reparations and Costs), 29 November 2012, para. 97 with fn. 138; *Gudiel Álvarez et al. (‘Diario Militar’) v. Guatemala*, Judgment (Merits, Reparations and Costs), 20 November 2012, para. 193 with fn. 190; *The Rio Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 4 September 2012, para. 115 with fn. 189; *Contreras et al. v. El Salvador*, Judgment (Merits, Reparations and Costs), 31 August 2011, para. 82 with fn. 102; *Gelman v. Uruguay*, Judgment (Merits and Reparations), 24 February 2011, para. 65 with fn. 64, para. 67.

⁸² *Wiwa v. Royal Dutch Petroleum Co.* Not Reported in F.Supp. 2 d, 2002 WL 319887 S.D.N.Y., February 28, 2002, at 9–10.

⁸³ *R. v. Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.1) [2000] 1 A.C. 61 House of Lords at 78 (‘The Rome Statute of the International Criminal Court (adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998) provides for jurisdiction in respect of genocide as defined, crimes against humanity as defined but in each case only with respect to crimes committed after the entry into force of this statute.’). See also *R. v. Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.2) [2000] 1 A.C. 119 House of Lords.

⁸⁴ *UK Court of Appeal, SK (Zimbabwe) v. Secretary of State for the Home Department* [2012] 1 W.L.R. 2809 Court of Appeal (Civil Division), 2835 (‘This citation of authority and learning no doubt needs to be treated with care. The ICTY Statute is not the same as the Rome Statute, for the former lists the crimes against humanity without specifying requirements and elements and instead derives those from customary international law; and it has been said (by Professor Cassese) that the Rome Statute’s requirement of the “in connection with” link is not required by customary international law. Nevertheless, in my judgment it is not possible to read such texts without the strong impression that the drafters and interpreters of the various Statutes, which after all are by and large equally based on the same material, are uniformly seeking the same ingredients for such crimes: a combination of flexibility and definition, and a concentration on the most serious of crimes, marked by really serious consequences, so that, in one or another form, under one or another label, the crimes against humanity will be recognised for what they are intended to be. [...]’).

⁸⁵ See, e.g., *Prosecutor v. Stakić*, No. IT-97-24-T, Judgement, Trial Chamber II, 31 July 2003, para. 672 with fn. 1329; *Prosecutor v. Slobodan Milošević*, No. IT-02-54-T, Judgement, Trial Chamber III, 16 June 2004, fn. 43 and accompanying text; *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgement, Trial Chamber II, 15 March 2002, para. 473 with fn. 1424; *Prosecutor v. Krstić*, No. IT-98-33-T, Judgement, Trial Chamber, 2 August 2001, para. 522. For further examples see Schabas, *The International Criminal Court* (2010) 271.

acknowledgment that the Statute establishes minimum rules of conduct and that others (and the Court itself) must read it that way at all times⁸⁶. However, the references mentioned as examples of the codification of customary international law and the view that the Statute establishes minimum rules of conduct somehow invalidate article 10 as promoting the progressive development of international law outside the Statute, since article 10 ‘cuts both ways’ and can also be used to ‘stress the differences between the text in the Statute and their less prolix ancestors in the Geneva Conventions and related instruments’⁸⁷.

C. Special remarks: Relation to articles 21 and 22

During the drafting process it has been repeatedly mentioned that what are now articles 21 and 22 ‘deal with related issues’⁸⁸. Article 21 provides article 10 with substance and specificity⁸⁹. This is true with regard to article 21 para. 3, according to which even the interpretation of the Statute, that shall be applied ‘in the first place’, ‘must be consistent with recognized human rights, and be without any adverse distinction founded on grounds such as gender ...’⁹⁰. As article 10 promotes the continuing existence of customary law, allowing it ‘to develop alongside treaty law even where the two contain identical rules’⁹¹, article 21 para. 3 has the same function with regard to ‘internationally recognized human rights’, which continue ‘to evolve inexorably’⁹². Despite the fact that its meaning is still unclear⁹³, the phrase ‘internationally recognized human rights’ recognizes customary international human rights⁹⁴. In a dissenting opinion to a decision of the ICC Appeals Chamber, Judge Pikiš therefore pointed out that ‘[i]nternationally recognized may be regarded those [sic] human rights acknowledged by customary international law and international treaties and conventions’⁹⁵. Article 21 therefore enables the judges ‘to develop jurisdictional boundaries by importing extraneous materials as part of the task of identifying applicable law’⁹⁶. As described elsewhere in this volume⁹⁷, an ICC Trial Chamber has once declined to apply an

⁸⁶ Sadat (1999–2000) 49 *DePaullRev* 909, 923. Diff. Grover (2010) 21 *EJIL* 543, 571.

⁸⁷ See Schabas, *An Introduction to the International Criminal Court* (2011) 93, who, *inter alia*, offers the example of Judge Schomburg’s separate and partially dissenting opinion in *Prosecutor v. Galić*, No. IT-98-29-A, Judgement, Appeals Chamber, 30 November 2006, p. 218, para. 20: ‘[...] [E]ven though I am fully aware of Article 10 of the Statute of the International Criminal Court, it must be pointed out that the Rome Statute does not have a provision referring to terrorization against a civilian population. If indeed this crime was beyond doubt part of a customary international law, in 1998 (!) states would undoubtedly have included it in the relevant provisions of the Statute or in their domestic legislation implementing the Statute.’, fn. omitted. See also Grover (2010) 21 *EJIL* 543, 571.

⁸⁸ See mn 1.

⁸⁹ Bassiouni, *Introduction to International Criminal Law* (2013), 657.

⁹⁰ Generally McAuliffe deGuzman, ‘article 21’, in *this volume*, mn 48 *et seq.*; Bennouna, ‘Article 10’, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article*, i (2012) 563 *et seq.*

⁹¹ Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 268.

⁹² Schabas, *An Introduction to the International Criminal Court* (2011) 211.

⁹³ For a detailed interpretation of the phrase ‘internationally recognized human rights’ see, e.g., Sheppard (2010) 10 *ICLRev* 43, 48 *et seq.*; Young (2011) 60 *ICLQ* 189 *et seq.*; Edwards (2001) 26 *YaleJIL* 323, 378 *et seq.*

⁹⁴ Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 119, 120; Bos (1998–1999) 22 *FordhamLJ* 229, 234 (‘In so far as human rights instruments are universally recognized as part of international customary law, the ICC must respect them in its proceedings.’).

⁹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-424, Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la défense en réponse au mémoire d’appel du Procureur”’, AppC, 12 September 2006, Separate opinion of Judge Georgios M. Pikiš, para. 3; about this decision see also Sheppard (2010) 10 *ICLRev* 43, 48.

⁹⁶ Young (2011) 60 *ICLQ* 189, 207.

⁹⁷ McAuliffe deGuzman, ‘article 21’, in *this volume*, mn 52.

article of the statute by invoking article 21 para. 3⁹⁸. This provision therefore proved to be a tool for ‘interpreting the Court’s sources of law expansively or even disregarding them entirely’ in case a Court’s provision falls short of human rights protections⁹⁹ – just as article 10 addresses, *inter alia*, those provisions that fall short of custom.

Other ‘principles and rules of international law ...’ rank – article 21 para. 1 (b) – ‘[i]n the second place’ (following the Statute) and shall be applied (only) ‘where appropriate’¹⁰⁰. It goes without saying that what has been declared to be ‘appropriate’ for cases within the jurisdiction of the Court, may not be appropriate for those within an internationalized (national) jurisdiction.

- 18 Article 22 para. 3 (originally drafted for the same Part as article 10 and now situated at the beginning of Part 3) proceeds along the same line as article 10, by stipulating that a (progressive) development of law ‘independently of this Statute’ shall not be limited or prejudiced by article 22 or its interpretation (‘This article shall not affect ...’).¹⁰¹ However, this only applies to the principle *nullum crimen sine lege* and with regard to ‘the characterization of any conduct as criminal under international law’¹⁰². This supports the notion, that the application of article 10 as a general rule is not limited to Part 2 where the article is situated, especially considering the drafting process, where – as already mentioned – the reference to article 10 was made in the context of what is now article 21, ‘Applicable law’, and even the bounds of Part 2 in article 22, ‘*Nullum crimen sine lege*’, which is now situated in Part 3¹⁰³.

⁹⁸ *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3003-tENG, Decision on an Amicus Curiae Application and on the ‘Requête Tendante à Obtenir Présentations des Témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux Autorités Néerlandaises aux fins d’asile’ (Articles 68 and 93(7) of the Statute), TC II, 9 June 2011, para. 73. The decision was later overturned on appeal, see *Prosecutor v. Ngudjolo Chui*, No. ICC-01/04-02/12-158, Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of Congo concluded pursuant article 93 (7) of the Statute, AppC, 20 January 2014, para. 29.

⁹⁹ McAuliffe deGuzman, ‘article 21’, in *this volume*, mn 52.

¹⁰⁰ See McAuliffe deGuzman, ‘article 21’, in *this volume*, mn 9 *et seq.*; see also Triffterer, ‘Preliminary Remarks’ (2008), mn 64 *et seq.*

¹⁰¹ See also Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 267 *et seq.*

¹⁰² See Broomhall, ‘article 22’, in *this volume*, mn 51; see also Triffterer, ‘Preliminary Remarks’ (2008), mn 62. According to Grover, ‘[l]egality is an adjudicative tool, meaning that the outcomes it produces do not speak to whether conduct is condemned or not by the international community.’, Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014) 268.

¹⁰³ See mn 1 and 16; see also Bassiouni, *Introduction to International Criminal Law* (2013), 657 with fn. 24.

Article 11

Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Literature: Bourgon, S., 'Jurisdiction *ratione temporis*', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002); Cazala, J., 'Article 11 – Compétence *ratione temporis*', in: J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire Article par Article* (Éditions A. Pedone 2012); Condorelli, L. and Villalpando, S., 'Can the Security Council Extend the ICC's Jurisdiction?', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002); Heri, C., 'Enforced Disappearance and the European Court of Human Rights' *ratione temporis* Jurisdiction: A Discussion of Temporal Elements in *Janowiec and Others v. Russia*', (2014) 12 *JICJ* 751; Rastan, R., 'Testing Cooperation: The ICC and National Authorities', (2008) 21 *LeidenJIL* 431; *id.*, 'Jurisdiction', in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015); Saland, P., *International Criminal Law Principles*, in: R.S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations and Results* (Kluwer Law International 1999); Sarooshi, D., *The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers* (Clarendon 1999); *id.*, 'The Peace and Justice Paradox', in: D. McGoldrick *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart 2004); Schabas, W., *Genocide in International Law* (CUP 2nd edition 2009); El Zeidy, M., 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', (2005) 5 *ICLRev* 83.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	13
I. Paragraph 1: Entry into force of the Statute.....	13
1. Continuing crimes	16
2. Continuing crimes under human rights instruments.....	17
3. Continuing crimes under the Rome Statute	21
II. Paragraph 2: Entry into force for particular States	28

A. Introduction/General remarks

Article 11 establishes the temporal threshold for the activation of the Court's jurisdiction 1 at the date of entry into force of the Statute, which occurred on 1 July 2002. Whereas the other facets of the Court's jurisdiction – jurisdiction *ratione materiae*, *ratione personae* and *ratione loci* – may be modified or applied in the alternative, paragraph 1 of article 11 represents an absolute bar on the scope of the Court's competence.¹ Paragraph 2 of article 11 regulates the activation of the Court's temporal jurisdiction for States joining the ICC after its entry into force. For those signatory States that deposited the instruments necessary to bring the Statute into force, temporal threshold will apply from the date of the entry into force of the Statute itself, per article 11(1). For those States that become Parties to the Statute thereafter temporal jurisdiction will apply from the first day of the month after the 60th day

¹ Subject-matter jurisdiction may evolve through amendment to the Statute. Personal and territorial jurisdiction can be exercised in the alternative for genocide, crimes against humanity and war crimes, are modified to be applied cumulatively for aggression, and might be applied either alternatively or cumulatively for any other category of crimes to be added to the Statute. Although the Assembly of States Parties theoretically may amend any aspect of the ICC Statute at any time, any amendment of article 11 would also require modification to articles 22 and 24 and is thus unlikely.

following the deposit by such State of its instrument of ratification, acceptance, approval or accession.² Nonetheless, article 11(2) recalls that an acceding State may also lodge a declaration under article 12(3) with respect to the time period during which it remained a non-Party State, thereby investing the Court with jurisdiction from an earlier time although no earlier than the restriction contained in article 11(1).

- 2 Article 11 should be read together with article 24 which provides that no-one will be held criminally responsible under the Statute for conduct prior to the entry into force of the Statute.³ The two provisions obtain the same result: article 11 specifies procedurally the date from which the prospective exercise of temporal jurisdiction should be calculated, while article 24 encapsulates the principle of non-retroactivity itself.⁴ Article 22(1) further enshrines the principle that no person shall be criminally responsible under the Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court (*nullum crimen sine lege*). While the latter focusses on the necessity for an appropriate statutory prohibition existing at the time the offence is committed, the reference to ‘crime within the jurisdiction of the Court’ necessarily includes the notion of the temporal restriction expressed in article 11.⁵
- 3 The drafting history for articles 11 (temporal jurisdiction), 22 (*nullum crimen sine lege*) and 24 (non-retroactivity) is closely interrelated and together provides the context for the chapter under review. The early ILC Draft Statutes did not contain a provision on temporal jurisdiction. This is because the jurisdictional scheme was linked from the outset to existing crimes under international treaties which had already entered into force. The mandate of the ILC to study the desirability and possibility of establishing a mechanism for the adjudication of international crimes first arose from the General Assembly’s adoption of the Genocide Convention, with its accompanying reference in article VI to the possibility of prosecution before an ‘international penal tribunal’. Part B of the resolution that adopted the Genocide Convention invited the ILC to consider the establishment of ‘an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international convention’.⁶ Thus, early on the question of an international criminal court was framed as one which would serve as a procedural vehicle for the application of crimes which were codified elsewhere.⁷ As the ILC’s work progressed on the parallel project to develop a Code of Crimes Against the Peace and Security of Mankind, it was envisaged that the future court would either apply the Code of Crimes once adopted as a treaty or otherwise exercise jurisdiction by reference to specified crimes that were prohibited under other multilateral treaties in force. This explains why, as late as 1994, the

² See Article 126.

³ See Pangalangan, in: Triffterer/Ambos (3rd ed.) mn 12, who notes the notion of conduct in article 24 includes both acts and omissions. See also Saland, in: Lee (ed.), *The International Criminal Court: the Making of the Rome Statute* (1999) 196–197.

⁴ Pangalangan, in: Triffterer/Ambos (3rd ed.) mn 8.

⁵ See Broomhall, in Triffterer/Ambos (3rd ed.) mn 52.

⁶ A/RES/260 (III) B, 9 December 1948. The wording is based on a Sixth Committee resolution adopted on the joint proposal of The Netherlands and Iran assigning consideration of the creation of an international tribunal to the ILC, in view of intractable differences during the negotiation of the genocide convention as to the viability of establishing such a court at that time; A/C.6/248. See discussion in Schabas, *Genocide in International Law* (2009) 444–454. While the General Assembly had called for the codification of international offences as early as 1946 (see *infra* note 10), the mandate to also consider the establishment of a court as a corollary to the draft code of crimes was first posited in 1948.

⁷ As the commentary to the ILC draft Statute recalled, one of the basic ideas underlying the jurisdictional scheme was that ‘the court should exercise jurisdiction over crimes of an international character defined by existing treaties, and that—as a corollary—the statute itself would be primarily procedural and adjectival’; A/49/10, p. 36. This same concept appears in the 1992 Report of the Working Group on the Question of an International Criminal Jurisdiction, see Report of the International Law Commission on the work of its forty-fourth session, A/47/10, reprinted in 1992 *YbILC* Vol II, pp. 67–68. As the commentary to the 1994 ILC Statute goes on to observe: ‘It is not its function to define new crimes. Nor is it the function of the statute authoritatively to codify crimes under general international law. With respect to certain of these crimes, this is the purpose of the draft Code of Crimes against the Peace and Security of Mankind ...’; *ibid.*, p. 38.

final ILC draft Statute presented to the General Assembly contained only a provision on *nullum crimen sine lege* linked to the relevant entry into force date under each treaty.⁸ Given the existence of a relevant temporal limitation for the crimes contained in each of these instruments which were external to the draft Statute, and absent codification of substantive law in the Statute itself, the Commission appears to have considered unnecessary the need to define a temporal threshold for the exercise of ICC jurisdiction. Since the entry into force of each instrument differed, it would in any event have been difficult to establish a uniform temporal bar.

Considerations of non-retroactivity, nonetheless, played a central role in early discussions on the *nullum crimen* principle and are often referred to interchangeably in documents from this period. The concept of non-retroactivity forms a key focus of debates in the ILC during the 1950s, with concern often expressed for the need to avoid the criticism levelled in Nuremberg and Tokyo with respect to the retroactive application of penal law.⁹ Indeed, one of the first decisions of the General Assembly, after affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal, was to call for the codification of relevant offences thereunder in an 'International Criminal Code'.¹⁰ Thus, throughout the subsequent discussions within the United Nations surrounding the draft code and the draft statute, central focus was given to the need to ensure that any international criminal jurisdiction asserted by the future court would be done on the basis of offences clearly articulated in extant applicable law.

After the ILC presented its finalized text for the draft Statute in 1994, States were quick to reject in the Ad Hoc Committee the approach of applying substantive law by reference. Instead, the Committee moved to elaborate the crimes within the draft Statute itself, based largely on the same *nullum crimen* concerns: '[a]s regards the specification of crimes, the view was expressed that a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) and that the constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused'.¹¹ With the idea of including substantive crimes came for the first time discussion on the need to

⁸ Draft article 39 provided that an accused would not be held guilty: (a) in the case of genocide, aggression, war crimes and crimes against humanity 'unless the act or omission in question constituted a crime under international law'; and (b) in the case of other treaty crimes 'unless the treaty in question was applicable to the conduct of the accused at the time the act or omission occurred'; *Report of the International Law Commission on its forty-sixth session, A/49/10(1994)*, reprinted in 1994 *YbILC* Vol II, pp. 55-56, referring to crimes under draft article 20(a)-(e). The same approach had been adopted in article 41 of the earlier 1993 ILC draft Statute which applied *nullum crimen sine lege* by reference to crimes in force through other instruments, except that 1993 draft foresaw three categories of applicable law: '(a) a treaty which was in force [and applicable with respect to the accused]; (b) customary international law; or (c) national law enacted in conformity with the relevant treaty'; *Report of the International Law Commission on its forty-fifth session, A/48/10(1993)*, reprinted in 1993 *YbILC* Vol II, p. 119, referring to crimes under draft articles 22 and 26. The bracketed text was contained in the draft provision and accompanying commentary in view of the difference of opinion within the Commission as to whether, for the principle of legality to apply, the State party must have domestically incorporated the relevant crime pursuant to the relevant treaty obligation or whether criminal responsibility could flow directly under international law from the treaty concerned.

⁹ Question of International Criminal Jurisdiction, Report by RJ. Alfaro, Special Rapporteur, A/CN.4/15, 3 March 1950, reproduced in 1950 *YbILC* Vol II., pp. 14-16.

¹⁰ A/RES/95(1), 11 December 1946: 'Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal'. The following year the General Assembly, in resolution 177(II) of 21 November 1947, tasked the ILC with the formulation of the Nuremberg principles as well as a draft code of crimes against the peace and security of mankind.

¹¹ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, A/50/22, 6 September 1995, p. 12. For discussion on the negotiations over subject-matter jurisdiction in terms of 'core crimes' and other 'treaty crimes' see Zimmerman, in: Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), art. 5, at mn 1-7.

establish a general temporal bar: ‘Several delegations were of the view that it would be important to include in the statute the principle of the non-retroactivity of its provisions’.¹²

- 6 This basic link to the principle of non-retroactivity, considered as ‘fundamental to any criminal legal system’, was recalled in subsequent Preparatory Committee discussions which recognized both the need for the principle of non-retroactivity to be ‘clearly spelled out in the Statute’ and that ‘the temporal jurisdiction of the Court should be limited to those crimes committed after the entry into force of the Statute’.¹³ The compilation prepared by the informal working group at the 1996 sessions of the Preparatory Committee dealing with general principles of criminal law developed three proposals, under the overall heading draft ‘Article A’, to deal with the separate, but related concepts of *nullum crimen/nulla poena sine lege*, non-retroactivity and the temporal start-date of jurisdiction. The first essentially retained the approach of the ILC in article 39 of the 1994 draft Statute, but added that the conduct must not only have constituted a crime within the jurisdiction of the Court, but also that ‘such conduct occurred after the entry into force of this Statute’.¹⁴ Proposal 2 combined a temporal specification with the principle of *nullum crimen sine lege*: ‘This Statute applies only to a conduct that is done after the entry into force of this Statute, and no conduct shall be punished by this Court unless it is an offence under the definition of the crimes of this Statute’.¹⁵ Proposal 3, entitled ‘Jurisdiction *ratione temporis*’ essentially contained the three elements that found their way into the final adopted text for article 11: (i) date of entry into force of the Statute; (ii) date of entry into force for States acceding to the Statute at a later date; and (iii) declarations lodged by States to cover the period between (i) and (ii). Specifically, proposal 3 provided: ‘The Court has jurisdiction only in respect of acts committed after the date of entry into force of this Statute’; ‘When a State becomes party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its instrument of ratification or accession’; and ‘A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the Court has jurisdiction in respect of the acts that it specifies in the declaration’.¹⁶ The only part of Proposal 3 that did not survive in any form into the final text is draft paragraph 2, which dealt with the possibility of temporal overlap with the mandate of pre-existing *ad hoc* tribunals established by the Security Council and the latter’s primacy: ‘The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an *ad hoc* international criminal tribunal. The Security Council may, however, decide otherwise’.¹⁷
- 7 When the issue was taken up anew in 1997, the Preparatory Committee largely left the proposals untouched, save for their placement. The February 1997 session reproduced *nullum crimen sine lege* as article A, based largely on article 39 of the 1994 ILC draft Statute, while non-retroactivity appeared as new article *Abis*.¹⁸ The latter contained a draft paragraph 2 which retained in bracketed holding text the bulk of the 1996 Proposal 3 as described above. The August 1997 session further adopted, in bracketed optional text, an untitled article 21*ter* relating to the temporal jurisdiction: paragraph 1 contained in un-bracketed text

¹² Report of the Ad Hoc Committee, A/50/22, p. 12.

¹³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/51/22, Vol. I, 13 September 1996, pp. 43–44. The discussion linked these concepts to the *nullum crimen/nulla poena sine lege* principle.

¹⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/51/22, Vol. II, 13 September 1996, p. 79.

¹⁵ *Ibid.*, p. 80.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Decisions taken by the Preparatory Committee at its session held from 11 to 21 February 1997, A/AC.249/1997/L.5, 12 March 1997, pp. 19–20.

the existing formulation of present day article 11(1).¹⁹ The rest of the paragraph in bracketed text recalled the second element of the 1996 Proposal 3, but omitted any reference to the third element related to declarations.²⁰ Paragraph 2 of article 21*ter* maintained the reference to Security Council established tribunals.²¹

The draft text submitted to the Rome Conference following the inter-sessional meeting in Zutphen in January 1998 retained the formula adopted by the February 1997 Preparatory Committee in article A (*nullum crimen sine lege*), renumbered as article 15, and article *Abis* (non-retroactivity), renumbered as article 16,²² while article 8, now entitled 'Temporal jurisdiction', replicated article 21*ter* from the August 1997 session with the accompanying explanatory note: 'N.B. There is an interrelationship between this article and article 16[A *bis*] (Non-retroactivity).'

In Rome, the initial proposal of the Bureau of the Committee of the Whole was to combine the provisions on temporal jurisdiction and non-retroactivity.²³ The proposal, formulated in three parts, consisted of paragraph 1, corresponding to the present article 24(1); paragraph 1*bis*, corresponding to the present article 11(2); and paragraph 2, corresponding to the present article 24(2). The wording of each mirrored closely the texts as finally adopted, save for minor modification. For example, the phrase appearing in the Zutphen draft to describe the activation of temporal jurisdiction for acceding States was changed from 'after the deposit by that State of its instrument of ratification or accession' to the more precise wording 'after the entry into force of this Statute for that State', which mirrors the formulation of present in article 126.

The Bureau proposal also deleted the draft paragraph on previously established ad hoc Tribunals. As noted above, the provision would have granted exclusive jurisdiction to such tribunals, established by the Security Council under Chapter VII of the UN Charter, where they were created prior to the entry into force of the Statute and continued to exercise temporal jurisdiction thereafter. The practical impact of the provision would have been limited to the territory of the former Yugoslavia in the light of open-ended prospective jurisdiction of the ICTY, since the temporal jurisdiction of the ICTR was already limited to events occurring during 1994. This question was not just theoretical, since after the adoption of the Rome Statute the ICTY asserted jurisdiction over events occurring first in Kosovo and later in Macedonia. The risk of competing jurisdictions may well have been limited in the light of complementary. Although the ICTY is not a State with jurisdiction within the meaning of article 17, the ICC Prosecutor may well have reflected on the object and purpose of article 17 and article 53(1)(b), and consulted with the ICTY Prosecutor in the same way it is meant to consult and seek additional information from national authorities, in determining whether to proceed. With the adoption of completion strategies for the ICTY and the cut-off date for the submission of pending indictments in December 2004, this question has now become moot.

In the final package presented by the Bureau, it decided to separate out the provisions on temporal jurisdiction and non-retroactivity into the placement they now more appropriately occupy in Part 2 on jurisdiction, admissibility and applicable law, and Part 3 on general principles of criminal law, respectively.²⁴

¹⁹ The only difference is the words 'in respect of' as opposed to the finally adopted 'with respect to'.

²⁰ The concept of declarations nonetheless continued to be treated in draft article 21*bis* and 22.

²¹ *Decisions taken by the Preparatory Committee at its session held from 4 to 15 August 1997*, A/AC.249/1997/L.8/Rev.1, 14 August 1997, p. 5.

²² *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, A/AC.249/1998/L.13, 4 February 1998. Paragraph 2 of article 16[*Abis*], which contained bracketed holding text from former 1996 Proposal 3, was now deleted with the explanation that the proposals were treated under other provisions, namely articles 7[21 *bis*] (Preconditions to the exercise of jurisdiction), 8[21*ter*] (Temporal jurisdiction) and 9[22] (Acceptance of the jurisdiction of the Court).

²³ See A/CONF.183/C.1/L.53 (6 July 1998) and A/CONF.183/C.1/L.59 (10 July 1998).

²⁴ The final wording of article 11 as adopted appears in the Bureau's package proposal for Part 2; A/CONF.183/C.1/L.76/Add.2 (16 July 1998).

- 12 In relation to the operation of article 11 with other provisions of the Statute, discussions in Rome also examined the tension between the notion of ‘continuing crimes’ and the Court’s limitations *ratione temporis*. For example, during the 9th meeting of the Committee of the Whole the representative of Lebanon pointed out that draft article 8 on temporal jurisdiction ‘did not cover acts that began before but continued after the entry into force of the Statute. Care should be taken not to bar prosecution for such acts, and the words “unless the crimes continue after that date” should be added at the end of paragraph 1’.²⁵ As Per Saland, Chairman of the Working Group on General Principles of Criminal Law, observes, the impossibility of reaching consensus on the issue was ultimately resolved in Rome by keeping the construction ambiguous, thereby leaving it to the Court to settle the issue.²⁶ As discussed below, the Preparatory Commission returned to the issue in the context of the elements of the crimes of enforced disappearance,²⁷ reducing the scope for some of the ambiguity, while leaving other issues unresolved.

B. Analysis and interpretation of elements

I. Paragraph 1: Entry into force of the Statute

- 13 The temporal parameters of the Court’s jurisdiction are restricted to crimes committed after its entry into force, which occurred on 1 July 2002. This date also serves as the entry into force of the Statute with respect to the territory and nationals of those States that deposited their instruments of ratification, acceptance, approval or accession as part of the 60 needed to bring the treaty into effect.²⁸
- 14 The phrase ‘jurisdiction ... with respect to crimes’ refers to the crimes listed in article 5. Although the term ‘crime’ in article 5 is distinguished from the use of ‘offence’ under article 70 of the Statute, it is axiomatic that the Court will not be faced with alleged offences against the administration of the Court that pre-date the actual investigation or prosecution of such crimes. Article 11 does not treat the Court’s temporal jurisdiction with respect to new crimes added to the Statute, which are regulated separately according to the amendment procedure in article 121. Instead, it establishes an absolute bar on the retroactive exercise of ICC jurisdiction prior to its entry into force. With respect to prospective temporal jurisdiction, the start-date for the exercise of jurisdiction over war crimes committed on the territory or by the nationals of a State Party may be postponed for an initial 7 year period pursuant to article 124.²⁹
- 15 Whereas the treaty-based limitations on the exercise of personal and territorial jurisdiction can be overcome by a Security Council referral, this is not the case for the Court’s temporal parameters.³⁰ Under the former, the Security Council does not amend the jurisdictional scheme of the Statute, but instead enables an extension of the existing bases of jurisdiction to the territory and/or nationals of States that would not otherwise be amenable to the Court’s reach. The ability to do so flows from the Council’s powers under Chapter VII of the United Nations Charter to take compulsory measures with respect to UN Member States, as well as

²⁵ A/CONF.183/C.1/SR.9, 20 Nov. 1998, para. 73.

²⁶ Saland, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (1999) 196–197, referring to the lack of agreement on the choice of a verb to go with the word ‘conduct’ in article 24 – such as ‘committed’, ‘occurred’, ‘commenced’ or ‘completed’ – was only resolved by suggesting the removal of any verb, even if stylistically it did not read well in English, enabling thereby the Court to settle the issue.

²⁷ See commentary on article 7 in this edition.

²⁸ See article 126 on entry into force provisions.

²⁹ See *infra* note 76.

³⁰ See commentary below on art. 11(2), mn 28, *et seq.*, for States that become Party to the Statute after its entry into force.

the obligation of UN Member States to accept and carry them out.³¹ The Council's actions, thus, modify the obligations of the concerned UN Member State(s) towards the ICC: creating obligations where there were none, and enabling the exercise of ICC jurisdiction which would otherwise be invalid. The ICC Statute does not create or confer the Council's power in this regard, but merely provides a procedural vehicle (article 13(b)) to enable the Court to recognize and act upon such measures, which are based on authority external to the Statute itself.³² By contrast, the Council cannot alter or modify the ICC Statute, for example by amending the temporal bar contained in article 11, just as it cannot amend the subject-matter jurisdiction of the Court or the operation of any other provision. Unlike the *ad hoc* Tribunals, the ICC is not a subsidiary organ of the Council in the sense that the principal organ possesses the competence to determine the membership, structure, mandate and duration of existence of its subsidiary organ.³³ Since the ICC is a distinct international organization, the Security Council cannot authorize the Court to exceed the scope of its own powers under the Statute and so act *ultra vires* its own legislative framework.³⁴ For this reason, other international courts and tribunals, including the varying categories of 'hybrid' or 'internationalized' jurisdictions, such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, Special Panels for Serious Crimes in East Timor or the Extraordinary African Chambers within the courts of Senegal, may continue to be set up by the international community to deal with historical allegations notwithstanding the establishment of the ICC.³⁵

1. Continuing crimes

In terms of crimes that pre-date the Statute's entry into force, but whose occurrence continues past 1 July 2002, it may be worth distinguishing between two different categories of 'continuing crimes': (a) conduct where the *actus reus* is partly completed in the past, the effects of which continue to this day; and (b) conduct that constitutes an ongoing course of criminal activity, all of whose material elements continue to occur on a daily basis.³⁶ In the case of the former, the notion of continuing crimes is particularly helpful because of the bifurcated character of certain crimes. For example, the crime of enforced disappearance involves (i) arrest, detention or abducted (first stage), followed by (ii) refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of that individual (second stage), which together form the *actus reus*, but may be separated over extended periods of time.³⁷ The term 'continuing crimes' serves to emphasise the persisting responsibility of State

³¹ See Articles 25 and 103, United Nations Charter.

³² The same considerations apply to article 16 of the Statute. See Rastan, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 157 at fn. 75.

³³ Sarooshi, *The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers* (1999) 130; Condorelli and Villalpando, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court* (2002) 572.

³⁴ Sarooshi, in: McGoldrick et al. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 106–107. The principle of attribution holds that an international organisation cannot act beyond the powers attributed to it by its constituent treaty; cf. Schermers and Blokker, *International Institutional Law: Unity within Diversity* (2011) 157; Rastan, (2008) 21 *LeidenJIL* 431–444. The principle is also sometimes referred to as the 'principle of speciality'; see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, 8 July 1996, ICJ Report 1996, para. 25.

³⁵ Cazala, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour pénale internationale: Commentaire article par article* (2012) 570.

³⁶ See El Zeidy (2005) 5 *ICLRev* 83–119, 90–99. See also Williams, in: Triffterer (ed.), *Commentary* (2008), art. 11, mn 2; and Ambos, *Treatise on International Criminal Law*, Volume II (2014), p. 112, referring to the concept of 'Dauerdelikt'.

³⁷ For the crime of enforced disappearance under article 7(1)(i) of the Rome Statute, the material elements require that the perpetrator arrested, detained or abducted an individual (originating act) and subsequently refused to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of that individual (ongoing act); or in the alternative, that the perpetrator (i) refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or person, and (ii) such refusal was preceded or accompanied by that deprivation of freedom.

authorities in these circumstances.³⁸ As described below, although footnote 24 of the elements of crimes has clarified the exercise of jurisdiction with respect to bifurcated crimes which only partly occur within the temporal jurisdiction of the Court, there appears to be much greater scope with respect to conduct that constitutes an ongoing course of criminal activity.

2. Continuing crimes under human rights instruments

- 17 Established in 1980 by the United Nations Human Rights Commission to examine questions relevant to enforced or involuntary disappearances of persons, the Working Group on Enforced or Involuntary Disappearance has in particular helped develop the conceptual elements of the definition of enforced disappearance and the attendant notion of continuing crimes, leading to the adoption in 1992 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance. With regard to article 17 of the Declaration,³⁹ the Working Group stated in its General Comment of 2011: '[w]hen an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction'.⁴⁰ The Working Group further held that 'one consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non-retroactivity. The crime cannot be separated and the conviction should cover the enforced disappearance as a whole'.⁴¹ Nonetheless, following the entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance, the Committee on Enforced Disappearance, which was established thereunder, took the opposite approach based on the much more restrictive language of article 35 of the Convention.⁴² In particular, article 35 limits the Committee's competence 'solely in respect of enforced disappearances which commenced after the entry into force of this Convention' or in the case of acceding States, 'enforced disappearances which commenced after the entry into force of this Convention for the State concerned'.⁴³ Accordingly, the Committee held that it will not adjudicate cases that commenced before the Convention entered into force for the State concerned.⁴⁴

³⁸ See e.g. *Chapman Blake v. Guatemala*, Merits, IACtHR Series C No 36, *IHRL* 1419 (IACtHR 1998), [1998] IACtHR 1 (24 January 1998). See also discussion in Pangalangan, in this volume, art. 24, mn 13.

³⁹ Article 17(1) of the Declaration on the Protection of All Persons from Enforced Disappearance provides: 'Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified'; A/RES/47/133 (18 December 1992).

⁴⁰ Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*, para. 3, reproduced in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc.A/HRC/16/48, 26 January 2011, p. 12. The Working Group was established by the Human Rights Commission by resolution 20 (XXXVI) of 29 February 1980 and most recently renewed by Human Rights Council resolution A/HRC/RES/27/1 of 25 September 2014.

⁴¹ *Ibid.*, para. 5.

⁴² The Committee on Enforced Disappearances and the Working Group on Enforced or Involuntary Disappearances continue to coexist side by side in view of their separate and independent mandates, although they are intended to collaborate and coordinate their activities.

⁴³ Article 35 of the International Convention for the Protection of All Persons from Enforced Disappearance provides: '1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention. 2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned'; A/61/448 (20 December 2006), UNTS Vol. 2715, entered into force 23 December 2010.

⁴⁴ Committee on Enforced Disappearances, *Statement on the Ratione Temporis Element in the Review of Reports Submitted by States Parties under the International Convention for the Protection of All Persons from Enforced Disappearance*, 15 November 2013, Annex IV, p. 19.

In a number of decisions on communication received pursuant to the First Optional Protocol (individual complaints mechanisms) to the ICCPR, the Human Rights Committee has declared that ‘it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the Covenant for a State party, unless it is a violation that continues after that date or has effects which themselves constitute a violation of the Covenant after that date’.⁴⁵ Thus, for example, in *Ibrahima Gueye et al. v. France*, it held that the discriminatory effects of legislation enacted prior to the Optional Protocol came into force for France constituted a present day violation of article 26 of the Covenant.⁴⁶ In other cases, including those of enforced disappearance, the Committee was not satisfied that the violations persisted after the relevant entry into force date based on the facts of the case at hand.⁴⁷

At the regional level, the Inter-American Court of Human Rights (IACtHR) has since the late 1980s pioneered the development of case law on the continuing nature of violations under the American Convention on Human Rights, including in cases of enforced disappearance.⁴⁸ As the Inter-American Court has held: ‘the Court has competence to examine human rights violations that are continuing or permanent even though the initial act violating them took place before the date on which the Court’s contentious jurisdiction was accepted, if the said violations persist after the date of acceptance, because they continue to be committed; thus, the principle of non-retroactivity is not violated’.⁴⁹ In the case of *Rio Negro Massacres v. Guatemala*, e.g. based on the foregoing the IACtHR held itself competent to examine alleged continuing human rights violations arising from facts occurring between 1980 to 1982, prior to the entry into force its contentious jurisdiction for Guatemala in 1987, in relation to forced disappearance; the absence of an impartial and effective investigation into the facts of the case; the adverse effects on the personal integrity of the next of kin and survivors in relation to investigation of the facts; the failure to identify those who were executed and disappeared; the ‘destruction of the community’s social fabric’, and forced displacement.⁵⁰ However, the Inter-American Court did not consider itself competent to rule on other allegations which occurred prior to 9 March 1987 for which no continuing violation could be established.⁵¹

A similar approach has been followed broadly by the European Court of Human Rights (ECtHR), although more recent cases have sought to define the outer scope of its temporal jurisdiction vis-à-vis continuing crimes. In *Cyprus v. Turkey*, in relation to alleged article 2 violations (right to life) that occurred in 1974, the ECtHR held that the ongoing failure of Turkey to discharge the procedural obligation to investigate such violations amounted to a

⁴⁵ *Ibrahima Gueye et al. v. France*, Human Rights Committee, Communication No. 196/1986, 6 April 1989, para. 5.3. See also *Miguel A. Millan Sequeira v. Uruguay*, Communication No. 6/1977, UN Doc.CCPR/C/OP/1 at 52 (1984), para. 16; *Sandra Lovelace v. Canada*, Communication No. R.6/24, UN Doc.Supp.No. 40 (A/36/40) at 166 (1981), para. 7.3; *Eugeniusz Kurowski v. Poland*, Human Rights Committee, Communication No. 872/1999, 11 April 2003, para. 6.4.

⁴⁶ *Ibrahima Gueye et al. v. France*, para. 10.

⁴⁷ See *Norma Yurich v. Chile*, Communication No. 1078/2002, UN Doc.CCPR/C/85/D/1078/2002 (2005) and *Cifuentes Elgueta v. Chile*, HRC Communication No. 1536/2006, UN Doc.CCPR/C/96/D/1536/2006, 28 July 2009, para. 8.5. in both cases the Committee observed that the original acts of arrest, detention or abduction, as well as the refusal to give information about the deprivation of freedom occurred before the entry into force of the Covenant for the State party, and no acts of refusal to give information appeared to continue after the entry into force of the Optional Protocol (individual complaint mechanism). It also considered as relevant the fact that upon ratifying the Optional Protocol, Chile made a declaration to the effect that the Committee’s competence applied only in respect of acts occurring after the entry into force for Chile of the Optional Protocol or, in any event, acts which began after 11 March 1990.

⁴⁸ See e.g. *Velásquez Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988. Series C No. 4, para. 155–185, *Chapman Blake v. Guatemala*, Preliminary objections, IACtHR Series C no 27, (1996), para. 39; *González Medina and family members v. Dominican Republic*, Preliminary objections, merits, reparations and costs, Judgment of February 27, 2012. Series C No. 240, para. 50.

⁴⁹ *Rio Negro Massacres v. Guatemala*, Judgment of 4 September 2012, IACtHR, para. 37.

⁵⁰ *Ibid.*, para. 38.

⁵¹ *Ibid.*, para. 39.

continuing violation.⁵² In *Veeber v. Estonia*, the ECtHR similarly stated that while the Convention is binding on each of the Contracting States only in respect of facts occurring after its entry into force in respect of that Party, it ‘recalls that it has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitations of the competence of Convention organs.’⁵³ In more recent decisions, the ECtHR sought to clarify further the distinction between the substantive obligations under the Convention (e.g. right to life) and the ‘detachable’ procedural obligations that attach thereto (obligation to carry out an effective investigation) and which may persist even if the alleged act occurred prior to the relevant entry into force date, and in so doing placing conditions on their application.⁵⁴ In a set of principles developed in the cases of *Šilih v. Slovenia* and *Janowiec and Others v. Russia*, the ECtHR held that its temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occur before the critical date is not open-ended. It developed a three-tiered test to govern its application: (i) where the death occurred before the critical date, the ECtHR’s temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date; (ii) the procedural obligation will come into effect only if there was a ‘genuine connection’ between the death as the triggering event and the entry into force of the Convention; and (iii) a connection which is not ‘genuine’ may nonetheless be sufficient to establish the ECtHR’s jurisdiction if it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way.⁵⁵ Applying these principles, in the *Šilih* case, the ‘genuine connection’ standard was satisfied since the lapse of time between the triggering event and the ratification date remained reasonably short, and a significant proportion of the investigative steps required for ensuring compliance with the procedural obligation under Article 2 were carried out after the ratification date. By contrast, in *Janowiec and Others v. Russia*, which dealt with much older violations related to the notorious Katyń massacre during WWII, the ECtHR held that the time lapse between the deaths (1940) and the ratification date (5 May 1998) was too long in absolute terms for a ‘genuine connection’ to be established between the death of the applicants’ relatives and the entry into force of the Convention in respect of Russia.⁵⁶ In relation to the alternative ‘convention values’ test in *Janowiec*, the ECtHR set out its understanding by holding ‘reference to the underlying values of the Convention to mean

⁵² See e.g. *Cyprus v. Turkey*, 25781/94, Judgment (Merits), 10 May 2001, para. 136: ‘... the Court concludes that there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances’.

⁵³ See also *Papamichalopoulos and Others v. Greece*, Judgment, 24 June 1993, paras. 40–46, and *Loizidou v. Turkey*, Judgment (Merits), 18 December 1996, para. 41.

⁵⁴ *Šilih v. Slovenia*, Judgment (Merits and Just Satisfaction), 9 April 2009, para. 159: ‘the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty ... In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date’.

⁵⁵ *Janowiec and Others v. Russia*, Judgment (Merits and Just Satisfaction), 21 October 2013, para. 141. See also *Šilih v. Slovenia*, Judgment (Merits and Just Satisfaction), 9 April 2009, para. 162–163. In *Varnava and Others v. Turkey*, the Court further clarified the distinction between the obligation to investigate a suspicious death and the obligation to investigate a suspicious disappearance: ‘A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred... This situation is very often drawn out over time, prolonging the torment of the victim’s relatives. It cannot therefore be said that a disappearance is, simply, an “instantaneous” act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation... This is so, even where death may, eventually, be presumed.’

⁵⁶ *Janowiec and Others v. Russia*, Judgment (Merits and Just Satisfaction), 21 October 2013, paras. 157. Recalling its findings in *Šilih*, the Court also stated: ‘for a “genuine connection” to be established, both criteria must be satisfied: the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force’; *ibid.*, paras. 147–148.

that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.⁵⁷ It nonetheless held in the case at hand that although the ‘Convention values’ clause could apply to events that predated Russia’s adherence to the Convention, it should not be applied to events which occurred prior to the adoption of the Convention itself, on 4 November 1950.⁵⁸

3. Continuing crimes under the Rome Statute

Although the question of continuing crimes was left unresolved in Rome, it was expressly addressed by the Preparatory Commission in footnote 24 of the elements of crimes for the crime of enforced disappearance. The footnote states that both stages of the material elements of the crime need to occur after the entry into force of the Statute, as part of an attack that is within the temporal jurisdiction of the Court.⁵⁹ This clarification removes the scope for the Court to interpret article 7(1)(i) as permitting the type of continuing crimes approach sustained in other fora when examining the persisting responsibility of States to provide redress for disappearance that commenced prior to the relevant statutory temporal limitation clause. It might be argued that footnote 24 is highly specific to the crime of enforced disappearance and as such does not provide guidance for other crimes within the jurisdiction of the Court. The more reasonable position, in the light of the debates surrounding the adoption of footnote 24 and the matters of principle it addresses, is that it provides guidance also for how other crimes should be addressed where only one part of the material elements carries over into the temporal jurisdiction of the Court and the other part remains completed in the past.

Distinguishable from the above are cases that constitute ‘continuing crimes’ in the sense of an ongoing course of criminal activity. In these cases, the conduct repeats itself, meaning all of the material elements of the crime recur each day and may therefore be properly described as a series of discrete acts that are completed each time they are committed. Since the acts concerned can be distinguished between those that occur prior to and those that occur after the relevant entry into force date, issues related to temporal limitations or the principle of non-retroactivity do not arise in the same way. Even if the conduct has identical parameters in terms of location, subject-matter, and participants (such as repeat acts of torture in detention committed by the same perpetrator against the same victim), those acts that occur after the relevant entry into force date will fall within the applicable temporal scope, even if it formed part of a course of conduct or ongoing criminal activity that began at an earlier date.

By way of example, Trial Chamber I in its Judgment in the *Lubanga* case observed that the crime of the conscription or enlistment of children under the age of fifteen years occurred every day that the underage children continued to be illegally recruited. As the Trial Chamber stated: ‘These offences are continuous in nature. They end only when the child

⁵⁷ *Ibid.*, para. 150. As the Court further observed: ‘The heinous nature and gravity of such crimes prompted the contracting parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible and not subject to any statutory limitation in the domestic legal order.’

⁵⁸ See *Janowiec and Others v. Russia*, Judgment (Merits and Just Satisfaction), 21 October 2013, Joint Partly Dissenting Opinion of Judges Spielmann, Villiger and Nussberger and Partly Dissenting and Partly Concurring Opinion of Judge Wotjyczek. See discussion in Heri, ‘Enforced Disappearance and the European Court of Human Rights’ *ratione temporis* Jurisdiction: A Discussion of Temporal Elements in *Janowiec and Others v. Russia*, (2014) 12 JICJ 751-768.

⁵⁹ Elements of Crimes, article 7(1)(i). As Ambos observes, this means that the Statute excludes individual acts of enforced disappearance committed after the entry into force of the Statute, but before the collective attack; *Treatise on International Criminal Law*, Volume II (2014), p. 112. Nonetheless, since the relevant conduct must always have a nexus with the chapeau of article 7 any individual act would perforce need to occur within the context of the attack in question.

reaches 15 years of age or leaves the force or group'.⁶⁰ In its confirmation decision, the Pre-Trial Chamber had similarly held: 'the crime of enlisting and conscripting is an offence of a continuing nature – referred to by some courts as a "continuous crime" and by others as a "permanent crime". The crime of enlisting or conscripting children under the age of fifteen years continues to be committed as long as the children remain in the armed groups or forces and consequently ceases to be committed when these children leave the groups or reach age fifteen'.⁶¹

- 24 These observations appear to lend support to the proposition that for the crime of conscription or enlistment of children the moment of first recruitment may not be the decisive factor. Although the initial act of recruitment will constitute a discrete event, arguably the essence of the probation is not merely the original moment of conscription or enlistment, but rather the child's continuing membership in the armed group or force, for the duration of such membership while under the age of fifteen years.⁶² In line with the reasoning in *Lubanga*, because the act of underage membership occurs every day that the child remains enlisted or conscripted, it may be said to commence and be completed on each successive day it continues to occur. In contrast to the bifurcated *actus reus* for the crime of enforced disappearance which may be separated over time, with possibly only the denial part occurring within the temporal jurisdiction of the ICC, all of material elements of the crime of conscription or enlistment of children (continuing membership of an armed group or force for the duration of such membership while under the age of fifteen years) occur each successive day.⁶³ The ICC could thus exercise jurisdiction where an underage child was recruited prior to the entry into force of the Statute⁶⁴ and continued, post entry into force date, to be a member of such armed group or force while under the age of fifteen.⁶⁵ The same considerations would apply to the use of children under the age of fifteen to participate actively in hostilities where, again, this straddled the applicable temporal threshold.

The above reasoning appears to be supported by footnote 25 of the Elements, which deals with the material elements for the first stage of the crime of enforced disappearance, namely: arrest, detention and abduction. The footnote clarifies that 'detention' for the purpose of article 7(1)(i) includes 'a perpetrator who maintained an existing detention'. This means that

⁶⁰ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 618 <<https://www.legal-tools.org/doc/677866/>>. The term 'continuing crimes' is also referred to by Pre-Trial Chamber III in its article 15 authorisation decision: 'Bearing in mind the volatile environment in Côte d'Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into "continuing crimes" – those whose commission extends past the date of the application. Thus, crimes that may be committed after the date of the Prosecutor's application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011. They must, at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes). Therefore if the authorisation is granted, it will include the investigation of any ongoing and continuing crimes that may be committed after the 23 June 2011 as part of the ongoing situation'. However this appears to be a misnomer, since the Chamber here appears to be referring to the continuing nature not of specific acts, but of related crimes in general; *Situation in the Republic of Côte d'Ivoire*, Situation No. ICC-02/11, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', Pre-Trial Chamber III, ICC-02/11-14-Corr, 15 November 2011, para. 179 <<https://www.legal-tools.org/doc/e0c0eb/>>; on this point see Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-15, paras. 64–70 <<https://www.legal-tools.org/doc/ea2793/>>.

⁶¹ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para. 248 <<https://www.legal-tools.org/doc/b7ac4f/>>.

⁶² Rastan, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 173.

⁶³ The elements provide in relevant part that: (i) 'The perpetrator conscripted or enlisted one or more persons into [the national armed forces][an armed force or group]...'; and (ii) 'Such person or persons were under the age of 15 years'; Elements of Crimes, article 8(2)(b)(xxvi) and article 8(2)(e)(vii).

⁶⁴ *I.e.* entry into force of the Statute within the meaning of article 11(1) or entry into force of the Statute for the State concerned within the meaning of article 11(2).

⁶⁵ See similarly El Zeidy (2005) 5 *ICLRev* 90–99.

a case of enforced disappearance may fall within the temporal jurisdiction of the Court without impacting on article 11 or footnote 24, where a perpetrator detains a person prior to July 2002, continues to hold that person in detention after that date, and thereafter refuses to give information on the fate or whereabouts of the person (i. e. disappearance in custody) – since in this scenario all of the material elements of the crime (i. e. both stages of the crime of enforced disappearance) would occur after the entry into force of the Statute.

These same considerations would hold for any other crimes all of whose material parameters continue to occur after the temporal threshold of the Court jurisdiction, even if they formed part of a course of conduct that commenced at an earlier date, without offending articles 11, 22 and 24 of the Statute. 25

The above reasoning could also apply to modes of participation with regard to acts committed after the entry into force of the Statute that were in furtherance of, to take one mode of liability as an example, an order given prior thereto. If such an order remained in effect and crimes continued to be committed as a consequence thereof, assuming the evidentiary nexus for this proposition could be satisfied, it appears reasonable to argue that an accused who gave the standing order could be held criminally responsible under the Statute for ongoing acts committed in pursuance thereof. The same logic could be applied with respect to other modes of liability under the Statute.

The above distinction between ongoing crimes that repeat themselves and crimes that were partially completed in the past also finds support in the approach taken by the ICTR Appeals Chamber in the *Nahimana et al.* case. In particular, in that case the Trial Chamber had found that the crime of direct and public incitement to commit genocide ‘is an inchoate offence that continues in time until the completion of the acts contemplated’, thereby justifying its extension beyond the express temporal restriction contained in the ICTR Statute, which limits the Tribunal’s jurisdiction to events occurring during 1994. In so doing, the Trial Chamber found that articles in the local publication *Kangura* and RTLM radio broadcasts, including those occurring prior to 1994, constituted one continuing incitement to commit genocide such that the Tribunal could convict the appellants on the basis of the totality of the articles and broadcasts (i. e. including those occurring in 1993).⁶⁶ The Appeals Chamber reversed this finding holding that the crime of direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time.⁶⁷ It found that even if it could be concluded that the totality of the articles and broadcasts constituted one continuing incitement to commit genocide, the appellants could only be convicted for acts of direct and public incitement to commit genocide carried out during 1994.⁶⁸ As such, alleged crimes occurring in before the temporal start-date of 1 January 1994 fell outside of the Tribunal’s competence, even if they were connected to or formed part of a broader ongoing crime.⁶⁹ 26

Finally, setting aside the question of continuing crimes, international courts and tribunals have accepted the admission of evidence which pre-dates the applicable temporal jurisdiction for contextual purposes. In the above *Nahimana* case, for example, the Appeals Chamber held that a Trial Chamber may validly admit evidence relating to pre-1994 acts and rely on it where such evidence is aimed at clarifying a given context; establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994; or demonstrating a deliberate pattern of conduct.⁷⁰ Thus, in relation to the case at hand, the Appeals 27

⁶⁶ *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, No. ICTR-99-52-T, Judgment, Trial Chamber, 3 December 2003, para. 1017.

⁶⁷ *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, No. ICTR-99-52-A, Judgment, Appeals Chamber, 28 November 2007, para. 723.

⁶⁸ *Ibid.*, paras. 724–725.

⁶⁹ *Ibid.*, para. 723.

⁷⁰ *Nahimana et al.* (Appeals Chamber Judgment), note 67, paras. 310, 315, citing *inter alia* to *Prosecutor v. Aloys Simba*, No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, Appeals Chamber, 29 July 2004, p. 4; *Prosecutor v. Aloys Ntabakuze*, No. ICTR-97-34-A, Decision on the Interlocutory Appeal against the Decision of 13 April 2000 of Trial Chamber III, Appeals Chamber, 13 November 2000, p. 5; *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, No. ICTR-99-52-A, Decision on the Inter-

Chamber opined that ‘the 1993 broadcasts could explain how the RTLM listeners perceived the 1994 broadcasts and the impact these broadcasts may have had. Similarly, the pre-1994 Kangura issues were not necessarily inadmissible, since they could be relevant and have probative value in certain respects’.⁷¹ A similar approach was taken by Pre-Trial Chamber II in its confirmation decision in the *Bemba* case in relation to Prosecution submissions that the Court could infer the accused’s *mens rea* by referring to prior behaviour of his troops in the Central African Republic (CAR) in 2001 and in the Democratic Republic of the Congo (DRC) in 2002, prior to the 2002 intervention in the CAR which formed the subject matter of the case.⁷² Both events fell outside of the temporal scope of the case, while the former fell outside of the temporal scope of the Statute altogether.⁷³

II. Paragraph 2: Entry into force for particular States

- 28 For States that become Parties after 1 July 2002, paragraph 2 of article 11 stipulates that the temporal jurisdiction of the Court will apply from the entry into force of the Statute for that State. As provided in article 126, this will occur on the first day of the month after the 60th day following the deposit of by that State of its instruments of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. Nonetheless, the State concerned may have already expressed its consent to the exercise of the Court’s jurisdiction by lodging a declaration pursuant to article 12(3) of the Statute. In such case, the temporal jurisdiction of the Court may have already been activated, possibly with open-ended formulation, meaning that there will be a seamless transition from the temporal jurisdiction exercised in accordance with article 12(3), while the State remained a non-Party State, and that exercised pursuant to the treaty accession provisions of article 126.⁷⁴ It is also possible that the transition between temporal jurisdiction exercised pursuant to a declaration and as a State Party is not seamless, meaning a declaration may have been lodged for a confined time period in the past, resulting in a gap. Although temporal jurisdiction will not be contiguous in this instance, it will still represent an exception to the rule set out in article 126(2) insofar as the Court will have the possibility to exercise jurisdiction with respect to an earlier period. Finally, where a new State Party has not previously lodged a declaration it may do so at the time of accession to the Statute or

locutory Appeal, Appeals Chamber, 5 September 2000, p. 6, and Separate Opinion of Judge Shahabuddeen, paras. 21, 26 and 32.

⁷¹ *Nahimana et al.* (Appeals Chamber Judgment), note 67, para. 725. See also Bourgon, in Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 550–551, who observes that evidence of preparatory and planning for genocide that pre-dates the Court’s temporal jurisdiction may be relevant to establishing the *mens rea* of the accused, citing in support the Separate Opinion of Judge Shahabuddeen in *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, No. ICTR-99-52-A, Decision on the Interlocutory Appeal, Appeals Chamber, 5 September 2000, para. 11. See *a contrario* Joint Separate Opinion of Judge Lal Chand Vohrah and Judge Rafael Nieto-Navia, *ibid.*

⁷² *Prosecutor v. Bemba, Situation in the Central African Republic*, Situation No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, ICC-01/05-01/08-424, 15 June 2009, para. 373 <<https://www.legal-tools.org/doc/07965c/>>.

⁷³ Although the Chamber ultimately disagreed both with the Prosecutor’s assertion that Bemba’s *mens rea* under article 30 could be generally inferred from alleged past behaviour of his troops as well as the correspondence of the facts at hand, it did nonetheless consider itself competent to examine the earlier incidents for the purpose of its determination in the case at hand; *ibid.*, para. 377.

⁷⁴ See e.g. the open-ended article 12(3) declaration lodged on 18 April 2003 by Côte d’Ivoire accepting the exercise of jurisdiction for crimes committed in its territory since 19 September 2002; *Situation in the Republic of Côte d’Ivoire*, Situation No. ICC-02/11, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, Pre-Trial Chamber III, ICC-02/11-14-Corr, 15 November 2011, para. 10 <<https://www.legal-tools.org/doc/e0c0eb/>>. By letter of 3 May 2011 Côte d’Ivoire re-affirmed the continuing validity of 18 April 2003 declaration; *ibid.*, para. 11. Côte d’Ivoire subsequently deposited its instrument of ratification on 15 February 2013.

anytime thereafter.⁷⁵ It is also possible that a State on becoming a Party to the Statute or at any time thereafter lodges a declaration pursuant to article 12(3). Thus, article 11(2) provides that the conditions on the start of the Court's temporal jurisdiction, which are linked to entry into force of the Statute for that State, apply 'unless that State has made a declaration under article 12, paragraph 3.'

Article 11, paragraph 2, uses the same restraining formulation as article 11, paragraph 1, when regulating that the Court may exercise its jurisdiction 'only with respect to' crimes committed after the relevant start date. Nonetheless, the logic contained in the phrase 'the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State' does not mean that the Court is barred from exercising jurisdiction over that State's nationals who commit crimes on the territory of another State Party (or a State that has lodged a declaration). Pursuant to articles 12(2) and 12(3), the ordinary regime for the exercise of ICC jurisdiction on the basis of the territoriality principle will apply: the phrase '[i]f a State becomes a Party to this Statute' does not endow new States Parties with the right of an opt-out over the earlier exercise of ICC jurisdiction with respect to its nationals. For the same reason, the phrase does not mean that the Security Council cannot provide jurisdiction with respect to the territory or nationals of that State for the time period before it became a State Party. It merely serves to describe, without prejudice to either articles 12 or 13, the relevant start date of the Court's temporal jurisdiction for that State.⁷⁶

Where the ICC exercises jurisdiction on the basis of active personality in relation to alleged crimes committed on the territory of a non-Party State by the nationals of several States Parties, the temporal start date for the exercise of jurisdiction may create uneven results. For example, assuming such nationals are deployed as part of a multinational coalition, the entry into force provisions might result in temporal jurisdiction applying for the nationals of some States Parties from 1 July 2002 in accordance with article 11(1), while for other States Parties temporal jurisdiction might apply from a later date in accordance with article 11(2).⁷⁷ To reduce the impact of any such discrepancy on the distribution of alleged crimes attributed within the situation, the Court could prompt the State Party concerned to consider remedying any temporal limitation in line with the process envisaged in Rule 44(1), whereby '[t]he Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the Statute or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3'.

Finally, it should be noted that article 11 governs the exercise of temporal jurisdiction for the Statute as a whole; it does not regulate the exercise of temporal jurisdiction with respect to amendments to the Statute for new crimes, which are treated in article 121. Thus, for example, an entirely separate jurisdictional regime has been created thereunder for the crime of aggression, including both for the entry into force of the amendment as well as for its exercise with respect to particular States.⁷⁸

⁷⁵ See e.g. declaration lodged in February 2004 by Uganda extending the exercise of the temporal jurisdiction by the Court back to 1 July 2002; *Prosecutor v. Kony et al., Situation in Uganda*, Situation No. ICC-02/04-01/05, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, Pre-Trial Chamber II, ICC-02/04-01/05-282, 14 March 2008, para. 78 <<https://www.legal-tools.org/doc/12ef1e/>>. As Uganda deposited its instrument of ratification on 14 June 2002, the Statute entered into force for Uganda on 1 September 2002.

⁷⁶ In this sense, article 11(2) operates differently to article 124, which does provide an express right for State Parties to *opt-out* of the Court's jurisdictional regime over war crimes, even if committed by that State Party's nationals on the territory of another State, since the provision articulates an express exception to the operation of article 12, stating: 'Notwithstanding article 12, paragraph 1 and 2 ...'. Although the provision refers only to the first two paragraphs of article 12, its application must logically extend also to jurisdiction exercised pursuant to article 12(3), since the latter refers itself back to article 12(2). For discussion see Zimmerman, in: Triffterer (ed.), *Commentary* (2008) art.124, mn 5–7, who notes that two possible readings on the restrictive scope of such a notification.

⁷⁷ See Rastan, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), p. 170.

⁷⁸ See Zimmerman 'Article 15bis' and 'Article 15ter'. See also [Zimmerman/Geiß], Article 8(2)(e)(xiii)-(xv).

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Literature: Ambos, K., 'International Core Crimes, Universal Jurisdiction And § 153 *et seq.* of The German Criminal Procedure Code: A Commentary On The Decisions Of The Federal Prosecutor General And The Stuttgart Higher Regional Court In The Abu Ghraib/Rumsfeld Case', (2007) 18 *CLF* 43; *id.*, 'Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" be Held Criminally Responsible on the Basis of Universal Jurisdiction?' (2009) 42 *CaseWResJIL* 405; Buchan, R., 'The Mavi Marmara Incident And the International Criminal Court', (2014) 25 *CLF* 465; Lauterpacht, H., 'Law of nations and the punishment of war crimes', (1944) 21 *BYbIL* 58; Joyner, C.C., 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', (1996) 59 *LAPE* 153; Kaul, H.P., 'Preconditions to the Exercise of Jurisdiction', in: Cassese A. *et al.*, *The Rome Statute of The International Criminal Court: A Commentary* (Oxford University Press 2002) 583; Kirsch, P. and Holmes, J.T., *The Rome Conference on an International Criminal Court: The Negotiating Process*, (1999) 93 *AJIL* 1; Kress, C. and von Holtendorff, L., 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *JICJ* 1179; Politi, M., 'The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects After the First Session of the Preparatory Committee', (1997) 13 *Nouvelles Etudes Pénales* 115; *id.*, 'The ICC and the *Crime of Aggression*: A Dream that Came Through and the Reality Ahead', (2012) 10 *JICJ* 267; Scheffer, D. J., 'The United States and the International Criminal Court', (1999) 93 *AJIL* 17; *id.*, 'Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court', (2001) 167 *MillRev* 1; *id.*, 'How to turn the tide using the Rome Statute's temporal jurisdiction', (2004) 2 *JICJ* 26; Stahn, C., 'The "End", the "Beginning" off the End" or the "End of the Beginning"? Introducing Debates and Voices on the Crime of "Aggression"', (2010) 23 *LeidenJIL* 875; Zimmermann, A., 'Palestine and the International Criminal Court: *Quo Vadis?* Reach and Limits of Declarations under Article 12(3)', (2013) 11 *JICJ* 303.

Content

A. Introduction/General remarks	1
I. The ILC Draft	3
II. The Preparatory Committee's Draft	4
III. Rome 1998 – the options	5
1. The German proposal	6
2. The Korean proposal	8
3. The United Kingdom proposal	9
4. The United States proposal	10
5. State 'opt-in' and case-by-case proposals	11
6. The Bureau Compromise	12
B. Analysis and interpretation of elements	13
I. Paragraph 1: Jurisdiction over crimes	13
II. Paragraph 2	14
1. Acceptance by States Parties	14
2. The different subparagraphs	15
a) Territorial jurisdiction	15
b) Nationality of the accused	18
III. Paragraph 3: Acceptance by non-States Parties	19
C. Conclusions	22

A. Introduction/General remarks

Article 12 on preconditions for the actual exercise of jurisdiction is fundamental to an effective ICC. The views of States were wide ranging and until the proverbial eleventh hour on 17 July 1998, in Rome, where under the Rules of Procedure of the Conference the text had to be adopted by midnight, article 12 was still a make or break provision. Even after the Conference it retains its notoriety as one of the most controversial, if not the most controversial issues.¹ Article 12 is intimately related to article 5 on crimes within the jurisdiction of the ICC², article 13 on exercise of jurisdiction³ article 17 on complementarity⁴ and article 124 (the transitional provision)⁵. In effect these provisions dealing with the intertwined aspects of jurisdiction 'were the most complex and most sensitive, and for that reason remained subject to many options as long as possible'⁶. They were, beyond doubt, indicative of the necessity to adopt a package deal. The approach taken is firstly that the offence *ratione materiae* is found in the list of core crimes contained in article 5 and defined in articles 6, 7 and 8. Secondly, the preconditions for the ICC exercising jurisdiction in the specific case must be met. Thirdly, the case must be initiated in accordance with the provisions of article 13.

From the ILC Draft Statute⁷, to the Draft Statute prepared by the Preparatory Committee⁸ and finally to the negotiations at the Rome Conference⁹, a fundamental issue in all stages of the debate was whether in cases other than where the situation was referred to the Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter¹⁰, the ICC would have vested in it inherent jurisdiction to prosecute the crimes listed in article 5 on account of ratification or acceptance of the Statute. Alternatively, would State consent be a precondition and if so for which crimes, on what basis and by which State or States.

I. The ILC Draft

The 1994 Draft Statute¹¹ was complicated and geared towards producing a Court that would operate on a restrictive consent basis and with strict Security Council control under article 23. The crimes listed were broader than article 5 of the Rome Statute. Article 21 para. 1 (a) provided for inherent jurisdiction in a case of genocide, with no additional requirement of acceptance¹². However, article 21 para. 1 (b) stipulated that the Court could exercise its jurisdiction for the other crimes referred to in article 20, namely aggression, war crimes, crimes against humanity and certain treaty crimes¹³, where the complaint was brought in accordance with article 25 para. 2 and the jurisdiction of the Court over the particular crime was accepted, under article 22, by the custodial State and by the State on the

¹ Scheffer (1999) 93 *AJIL* 17, 21.

² See A. Zimmermann, *article 5*, mn 10 second edition.

³ See S. A. Williams/W. A. Schabas, *article 13*, mn 1 second edition.

⁴ See S. A. Williams/W. A. Schabas, *article 17*, mn 2 second edition.

⁵ See A. Zimmermann, *article 124*, mn 4-7 second edition.

⁶ Kirsch and Holmes (1999) 93 *AJIL* 1, 2.

⁷ 1994 ILC Draft Statute, 29.

⁸ UN Doc.A/CONF.183/2/Add.1 (3 Apr. 1998).

⁹ See Bureau Discussion Paper, UN Doc.A/CONF.183/C.1/L.53 (6 July 1998) 11-12 [then article 7] and Bureau Proposal, UN Doc.A/CONF.183/C.1/L.59 (10 July 1998) 10-12 [then articles 7*bis* and 7*ter*].

¹⁰ See article 13 (b).

¹¹ 1994 ILC Draft Statute.

¹² The complaint was to be brought under article 25 para. 1, 1994 ILC Draft Statute, by a State Party which was also a contracting party to the *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277(1951), as envisaged by article VI.

¹³ Article 20 (e) and Annex. Examples included the anti-terror violence conventions such as the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 860 UNTS 105 and the 1988 *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, UN Doc.E/CONF.82/15(19 Dec. 1988), reprinted in (1989) 28 *ILM* 497.

territory of which the act or omission in question occurred, a type of ‘ceded jurisdiction’¹⁴. As well, in a case where the custodial State had received a request¹⁵ under an international agreement from another State to surrender a person for prosecution, unless the request was rejected, the acceptance by the requesting State was required. Under article 22 the ILC Draft detailed the modalities of acceptance by States Parties. It can be classified as an ‘opting in’ system with States specifying the crimes for which jurisdiction was accepted¹⁶. The Court did not have inherent jurisdiction, therefore, based on a State ratifying or acceding but needed a special declaration whether at the time of becoming a Party or at a later time. The ILC was of the view that this approach best reflected its general approach to the Court’s jurisdiction¹⁷, that it is based on State consent with the ‘Court intervening upon the will of the States concerned, rather than whenever required for protecting the interests of the international community’¹⁸. Article 23 para. 1 provided for referral by the UN Security Council acting under Chapter VII of the UN Charter for crimes referred to in article 20. With respect to aggression article 23 para. 2 detailed the prerequisite that the Security Council first determine that a State had committed aggression before a complaint of or directly related to an act of aggression could be brought. The consent regime in the ILC Draft was criticized as being ‘complicated and cumbersome at best’¹⁹, and likely ‘to cripple the proposed Court at worst’²⁰.

II. The Preparatory Committee’s Draft

- 4 In both the *Ad Hoc* Committee²¹ set up by the General Assembly to review the ILC 1994 Draft Statute and in the Preparatory Committee established in 1996²², the same fundamental questions were raised. In the Preparatory Committee there was widespread, albeit not uniform, agreement that there should be inherent jurisdiction over genocide²³. However, as in the *Ad Hoc* Committee, there were different views on whether war crimes and crimes against humanity should be so treated²⁴.

States supporting inherent jurisdiction for all core crimes underscored the need for it because of the gravity of the crimes. Those opposing stressed State sovereignty, the consensual nature of the Court and the necessity of such to obtain maximum State support. In fact, some States argued that the preconditions of State consent set out in article 21 para. 1 (b) of the ILC Draft should have been more expansive including also the mandatory consent of the States of nationality of the accused and the victim. In the Zutphen Draft Report²⁵ which was produced to facilitate the last Preparatory Committee session the options on jurisdictional preconditions were contained in articles 6 [21] and 7 [21*bis*] as produced by the Working Groups of the Preparatory Committee²⁶. The articles had square brackets indicating again various alternatives and diverse positions of States.

¹⁴ It must, however, be recalled that the ILC Draft reduced the conditions for the exercise of jurisdiction set out in its earlier 1993 Draft. See Report of the ILC on the Work of its Forty-Fifth Session, 3 May-23 July 1993, UN GAOR, 48th Sess., Supp. No. 10, UN Doc. A/48/10. See Crawford (1994) 88 *AJIL* 140; Warbrick (1995) 44 *I&CompLQ* 466, and Blakesley (1997) 13 *NEP* 177, 204.

¹⁵ Article 21 para. 2.

¹⁶ See 1994 ILC Draft Statute, commentary to article 22, 82. Note that in its 1993 Draft, the ILC Working Group had proposed two alternatives to this article, which were based on ‘opting out’. 1994 ILC Draft Statute, 83. Under the ‘opting out’ approach, the Court’s jurisdiction would have been accepted by all States Parties except for those crimes expressly designated.

¹⁷ *Ibid.*, 83.

¹⁸ Politi (1997) 13 *NEP* 149. See the *Ad Hoc* Committee Report.

¹⁹ Sadat and Wexler (1997) 13 *NEP* 163, 173.

²⁰ *Ibid.*

²¹ UN Doc.A/RES/49/53 (9 Dec. 1994).

²² UN Doc.A/RES/50/46.

²³ 1996 Preparatory Committee I, 29.

²⁴ Politi, (1997) 13 *NEP* 149–150.

²⁵ Zutphen Draft.

²⁶ Preparatory Committee Decisions Aug. 1997, 3.

III. Rome 1998 – the options

The several options contained in the Draft Statute²⁷ of the Preparatory Committee as well as other proposals were put before delegations in the Committee of the Whole. These ranged from the proposals on universal jurisdiction by Germany and automatic jurisdiction using broad bases of jurisdiction by South Korea at one end of the spectrum to the restrictive mandatory consent of all interested States proposed by some delegations. The Bureau discussion paper tried to narrow the options and its subsequent proposal likewise did so, while still retaining alternatives²⁸. The final package struck a compromise. Nevertheless, the then entrenched positions of some delegations proved to be irreconcilable. The result was that the consensus approach to adoption was thwarted and an unrecorded vote was called for late in plenary on 17 July 1998, the Statute being adopted by 120 votes in favour to 7 against with 21 abstentions. Article 12 as adopted is not as restrictive as it could have been.

1. The German proposal

The German proposal contained in article 9 para. 1, further option of the Draft Statute was based on the rationale that States individually have a legitimate basis at international law to prosecute the crimes listed in article 5 based on universal jurisdiction. It was submitted that the ICC should have the same capacity that contracting States have.

It has been well established in customary and conventional international law that certain crimes are against the universal interest, offend against universal public policy and are universally condemned. Thus, the perpetrators are considered *hostis humanis generis*, enemies of humankind and any State that obtains custody over them has a legitimate ground to prosecute in the interest of all States based on universal jurisdiction over the offence. The State needs no direct connection with the crime²⁹. It merges jurisdiction over the person with jurisdiction over the offence³⁰. In this way such serious and heinous crimes will not escape justice by falling into a jurisdictional vacuum. There is no requirement that any other States involved through territorial locus of the crime, nationality of the accused or victims must consent. The origins of universal jurisdiction can arguably be traced to international piracy on the high seas³¹, the slave trade³² and more latterly to war crimes³³, crimes against

²⁷ UN Doc.A/CONF.183/2/Add.1, articles 6 (b), 7, 9 (further option) and further option for article 7.

²⁸ Kirsch and Holmes (1999) 93 *AJIL* 1, 9.

²⁹ Ambos (2007) 18 *CLF* 43, 54–46; Ambos (2009) 42 *CaseWResJIL* 405, 421 and 443–444; Joyner (1996) 59 *LAPE* 167; Randall (1988) 66 *TexasLRev* 785 and American Law Institute, Restatement (Third) (1987) The Foreign Relations Law of the United States § 404.

³⁰ Lauterpacht (1944) 21 *BYBIL* 58, 61.

³¹ As to the right of every State to seize a pirate ship or aircraft on the high seas or otherwise outside the jurisdiction of any State and arrest the persons on board see article 19 United Nations *Convention on the Law of the Sea*, 1982, UN GAOR, Vol. XVII, 139; (1982) 21 *ILM* 1245, The *SS Lotus* Case (*France v. Turkey*) (1927), PCIJ Series A, No 10, 70 per Justice Moore and *In re Piracy Jure Gentium*, (1924) A.C. 586 (Sp. Ref. J.C.P.C.).

³² See Green (1984) *International Law* 179. The assimilation of slave-trader to pirate probably stems from the fact that slave trading was declared by the British Parliament to be piracy (1824), 5 *Geo. IV*, c. 113, ss. 9–10. See *R. v. Zulueta*, 1 Cat. & K. 215, 1 Cox C.C. 20 and *LeLouis* (1817), 2 Dods. 210. There is no indication that the 1926 *Slavery Convention*, 60 LNTS 253, as amended by the *Protocol of 1953*, 182 UNTS 51, or the *Supplementary Convention of 1956*, Canada Treaty Series No. 7 subjected alleged perpetrators to universal jurisdiction. But for rights of visit on the high seas of suspected slave-trading steps see article 110 para. 1 (b) of the *United Nations Convention on the Law of the Sea* 1982. Note Bassiouni and Nanda (1972) 12 *Santa ClaraLRev* 424.

³³ The International Military Tribunal at Nuremberg was established under the *London Charter* of 8 Aug. 1945 8 UNTS 279. The IMT held that the allied powers in signing the Charter had ‘done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law’: (1948) *Trials Of The Major War Criminals* 22 461. See article 6 (b) of the Charter. See also e.g., under Control Council Order No. 10, *Trial of Otto Sandrock and Three Others* (“The Almelo Trial”) 1 *LRTWC* 35, 42 (1945); the ‘*Hostages Case*’ 8 *LRTWC*, Case No. 47, 43 (1947) and the *Remmele* trial, 15 *LRTWC* 44 (1947). Note also the application of the principle for grave breaches of the four 1949 *Geneva Conventions*:

humanity³⁴ and genocide³⁵. The International Court of Justice has yet to make a definitive pronouncement on the subject, although the views of several of its judges, which vary considerably, were set out in individual opinions in the *Arrest Warrant* case³⁶. The *ad hoc* international criminal tribunals have recognised universal jurisdiction by authorising the transfer of cases to States under this principle³⁷. The transfer of cases by the two Tribunals on the basis of universal jurisdiction has been frequently described to the Security Council in the bi-annual reports of the Presidents and Prosecutors, without any objection from members of the Council³⁸.

The German proposal attracted strong support from some delegations³⁹ and from many of the NGOs⁴⁰. The view central to this proposal was that to limit the potential of the ICC by requiring some form of State consent beyond ratification would detract from the effectiveness of the Court and even the rationale and philosophical underpinnings of it. Thus, the impact of the German proposal would have been to give the ICC universal jurisdiction⁴¹ over the

Article 49 *Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31; article 50 *Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Armed Forces at Sea*, 75 UNTS 85; article 129 *Geneva Convention (III) Relative to the Treatment of Prisoners of War* 75 UNTS 135 and article 146 *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* 75 UNTS 287; First Add. Prot. of 1977, 1999 Canada Treaty Series No. 2 and article 28 of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 249 UNTS 240. There is also national legislation to support universal jurisdiction, as detailed by the ICRC, *Universal Jurisdiction v. State Consent*, Doc. ICRC/NYC (12 Oct. 1997), 2. Domestic prosecutions also evidence the use of universal jurisdiction: see *Polyukhovich v. Commonwealth of Australia* (1991), 172 CLR 501, 562–3, 565 (Aust.H.C.); Note also in a civil claim context the discussion of universal jurisdiction in *Kadić v. Karadžić*, 70 F.3 d 232, 243 (2nd cir. 1995).

³⁴ On account of the grammatical construction of article 6 (c) the Charter the IMT was restricted in its jurisdiction to crimes against humanity connected to the conduct of the war: 1 *Trials Of The Major War criminals* 17 (1947); Secretary General of the United Nations, *Memorandum, The Charter And Judgment Of The Nuremberg Tribunal* 66 (1949). Prosecutions by the Allied Military Tribunals acting under Control Council Order No. 10 were not so restricted. See *Alstoetter et al., The Justices Trial VI LRTWC* 1, 45–46 (1947). Domestic consideration includes *Attorney General of Israel v. Eichmann*, 36 I.L.R. 26 (1961–1962); *Demjanjuk v. Petrovsky*, 776 F. 2 d 571, 582 (1985, U.S. CA. Sixth Cir.) *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie* 78 I.L.R. 125, 130 (1983) (Cass.Crim.) and *R. v. Finta* 1 S.C.R. 701 (1994). Note also article 5 para. 2 of the 1984 *Torture Convention*, 1465 UNTS 85.

³⁵ The 1948 *Genocide Convention* 78 UNTS 277 does not provide for universal jurisdiction, but for jurisdiction by the State where the offence was committed and by an international penal tribunal (article VI). However, the Convention does not prohibit States using other bases of jurisdiction and it has been argued that universal jurisdiction may be exercised on the basis of customary international law. As to what is not prohibited is permitted see the *SS Lotus Case (France v. Turkey)* (1927), PCIJ Series A, No 10, 70. Concerning genocide as a crime under customary international law see *Reservations to the Convention on Genocide (Ad. Op.)* (1951) ICJ Rep. 23; *Attorney-General of Israel v. Eichmann* (1961), 36 ILR 18, 39 (Dist. Ct.); (1962), 36 ILR 277, 304 (Supreme Ct.) and Restatement, (Third) (1987) The Foreign Relations Law of the United States § 404, Reporter's Note on § 404, 256. Note Beresin: Bassiouni (ed.), *International Criminal Law: Crimes* (1986) 271, 275. Further, it is submitted that the interest in the prevention of genocide is an *erga omnes* obligation. See *Barcelona Traction, Light and Power Company Ltd. Case (Prelim. Obj.) (Belgium v. Spain)*, (1970) ICJ Rep. 32; GA Res. 96 I and Joyner (1996) 59 LAPE 167, 168.

³⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, [2002] ICJ Reports 3.

³⁷ Rules of Procedure and Evidence [of the International Criminal Tribunal for the former Yugoslavia], Rule 11bis, paras. (A)(ii) and (iii), as amended 10 June 2004; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule ii bis, paras. (A)(ii) and (iii), as amended 15 May 2004; *Prosecutor v. Bagaragaza*, No. ICTR-2005-86-11bis, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, Trial Chamber, 13 Apr. 2007.

³⁸ E.g., UN Doc.S/PV. S/PV.4999, 5, 18–19.

³⁹ E.g., UN Doc.A/CONF.183/SR.3, para. 21 (Czech Republic), para. 42 (Latvia), para. 76 (Costa Rica); UN Doc.A/CONF.183/SR.4, para. 12 (Albania), paras. 20–21 (Germany); UN Doc.A/CONF.183/SR.6, para. 4 (Belgium), para. 69 (Luxembourg); UN Doc.A/CONF.183/SR.8, para. 18 (Bosnia and Herzegovina), para. 62 (Ecuador).

⁴⁰ E.g., ICRC (UN Doc.A/CONF.183/SR.4, para. 70), I Commission of Jurists, Lawyers Committee for Hum. Rts., AI and Hum. Rts. Watch. Also: UN Doc.A/CONF.183/SR.2, para. 119; UN Doc.A/CONF.183/SR.3, para. 123; UN Doc.A/CONF.183/SR.4, para. 70.

⁴¹ Note that Germany also called this 'the German version of automatic jurisdiction'. See statement by H.-P. Kaul, Acting Head of the German Delegation in the Committee of the Whole, 9 July 1998, 1. Thus, Germany

listed crimes with no need for a separate consent of interested States. As Germany indicated⁴² the universal principle's application would have eliminated loopholes. For example, if consent of at least the territorial State was necessary and if genocide was committed in State X against nationals of State X and X is not a Party to the Statute and the Security Council does not refer the matter to the ICC⁴³ the crime would not be cognizable by the Court. Similarly, it is true in the case of internal armed conflicts that the territorial State and State of nationality will often be one and the same. The ICC would only have jurisdiction if that State had long before the conflict become a State Party or if not through political domestic pressures agreed *ad hoc* or again if the Security Council acted under Chapter VII⁴⁴. As well, the restrictions of State consent would mean that even where the custodial State was a Party to the Rome Statute and wanted to surrender the accused to the ICC, the Court would not be able to exercise jurisdiction without the consent of the other involved States.

If the German proposal had been marketable in Rome, the end result would have been the deletion of article 12 [article 7 in the Draft Statute] on preconditions. Related to this issue, it must be emphasized, is the safeguard contained in article 17 on complementarity. The ICC would have only exercised such universal jurisdiction where a national system was unwilling or unable to investigate and/or prosecute effectively. Therefore, the universal principle would not have divested national criminal courts of their primary role in prosecutions of listed crimes.

Clearly, the universal principle would have given the ICC jurisdiction if the core crimes were committed in the territory of any State, Party or non-Party to the Statute. However, non-States Parties would have been under no international legal obligation to cooperate with the Court. Therefore, the second ground of the German proposal contained in article 9 para. 2 further option, was that non-States Parties could accept the obligation to cooperate on an *ad hoc* basis, with respect to any listed crime⁴⁵.

2. The Korean proposal

Sensing opposition to the German concept of universal jurisdiction, the Republic of Korea's proposal⁴⁶, that appeared two days into the Conference on 17 June 1998, provided for so-called automatic jurisdiction. The Korean view was that by becoming a Party a State would be considered to have accepted the jurisdiction of the ICC. The jurisdictional nexus was that any one or more of four involved States Parties have consented to the ICC exercising jurisdiction over a case; either the territorial State, the states of nationality of the accused and the victim or the custodial State. This proposal differed from those below in that it allowed for the selective consent by ratification of one of the four States including the custodial State. In reality there was no difference in philosophy between the German and Korean proposals, as the universal principle is based solely upon the person accused being in the custody of the prosecuting State. The Korean proposal enjoyed wide support⁴⁷ but was not acceptable to many States who wanted a second layer of State consent⁴⁸.

used 'inherent' and 'automatic' in the same way to mean that the ICC should be vested with universal jurisdiction upon ratification by States. This must be contrasted with the term 'automatic' as used in the Korean Proposal, the United Kingdom Proposal, the Bureau Proposal and in the final text of the Statute where although acceptance of the Court's jurisdiction is automatic there are preconditions. However, they did not require a second State consent as did the opt-in and State consent regimes.

⁴² Statement by H.-P. Kaul, Acting Head of the German Delegation, Rome Conference, 19 June 1998.

⁴³ See article 13 (b).

⁴⁴ Bertram-Nothnagel, Report to the Union Internationale des Avocats 10 (12 Aug. 1998).

⁴⁵ Contrast the Statutes of the ICTY and the ICTR set up by UN Security Resolutions 827 (25 May 1993) and 955 (8 Nov. 1994), acting under Chapter VII of the Charter, which obligate all States to cooperate.

⁴⁶ UN Doc.A/CONF.183/C.1/L.6 (18 June 1998). A similar proposal had been made earlier by Sweden: ICRC (UN Doc.A/CONF.183/SR.4, para. 70), I Commission of Jurists, Lawyers Committee for Hum. Rts., AI and Hum. Rts. Watch, 4.

⁴⁷ Terra Viva, *Seoul Floats a Compromise on Jurisdiction*, No. 6, 7 (22 June 1998) and The International Criminal Court Monitor, 1 (10 July 1998): 79 % of the States present supported the Korean Proposal.

⁴⁸ *Ibid.*

3. The United Kingdom proposal

- 9 The United Kingdom⁴⁹, in further option for article 7 para. 1, provided for jurisdiction by States Parties of the ICC for crimes listed in article 5, with necessarily the same in built safeguard of complementarity. However, in article 7 para. 2 the further requirement was that both the custodial State and the State where the crime occurred consented to the jurisdiction of the ICC by being States Parties. Concern was expressed that to get the cumulative consents would be difficult⁵⁰. On 19 June 1998, the proposal was amended to delete the custodial State⁵¹.

4. The United States proposal

- 10 In cases where the Security Council does not trigger the Court's jurisdiction, the United States supported⁵² as fundamental the consent of the territorial State *and* the State of nationality of the accused person, or at a minimum only the consent of the State of nationality⁵³. The United States insisted that the ICC have no jurisdiction over the nationals of non-States Parties to the Statute. It was argued that to do so would violate article 34 the 1969 *Vienna Convention on the Law of Treaties*⁵⁴, as treaties cannot be binding on non-Party third States. The position was that it would not be acceptable for United States citizens to be accountable in a Court not accepted by the United States. The United States made it clear that it could not adhere to a text that allowed for United States forces operating abroad to be brought even conceivably before the ICC, even where the United States had not become a Party to the Statute. The United States position was that this would derogate from the ability of the United States to act as a major player in multinational humanitarian and peacekeeping operations. Protection against frivolous and arbitrary charges and other forms of inappropriate investigations and prosecution was called for⁵⁵. Of course, the United States position still left open referral of a situation by the Security Council acting under Chapter VII of the Charter as provided for in article 13 (b) of the Statute, subject of course to the veto of one of the P5. This in the United States view was the only way 'to impose the court's jurisdiction on a non-party state'⁵⁶. In effect this proposal would have resulted in an ICC controlled by the Security Council, a type of permanent *ad hoc* criminal tribunal⁵⁷.

The indispensable requirement of the acceptance of the State of nationality of the accused was not acceptable to the overwhelming majority of States as it was seen as causing a probable paralysis of the ICC. Other States had tried to assuage the United States concerns by stressing the provisions on complementarity contained in article 17 of the Statute and judicial cooperation in article 98 para. 2, that requires consent of the sending State as a precondition for the surrender to the ICC by the 'host' State of persons present in that State pursuant to international agreements. This would have meant that U.S. forces on for example peace-keeping missions or elsewhere abroad under Status of Forces Agreements would not have been amenable to prosecution before the ICC unless the U.S. consented.

⁴⁹ UN Doc.A/AC.249/WG.3/DP.1.

⁵⁰ See e.g., Lawyers Committee for Hum. Rts., Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction 1 ICC Briefing Series 8 (May 1998)5.

⁵¹ ICRC (UN Doc.A/CONF.183/SR.4, para. 70), ICJ Brief, 3.

⁵² UN Doc.A/CONF.183/C.1/L.70 (14 July 1998).

⁵³ See testimony of Ambassador D. Scheffer, Head of the United States Delegation in Rome, before the United States Senate Foreign Relations Committee, 23 July 1998.

⁵⁴ 1155 UNTS 331 (1969).

⁵⁵ The passive personality basis of jurisdiction in the Korean proposal would have been a protective deterrent for such forces, giving jurisdictional acceptance to the State of nationality of victims.

⁵⁶ Testimony of Ambassador D. Scheffer, Head of the United States Delegation in Rome, before the United States Senate Foreign Relations Committee, 23 July 1998.

⁵⁷ Podgers (1998) ABAJ Sept 64, 67.

5. State 'opt-in' and case-by-case proposals

The State 'opt-in' proposal in article 6 para. 2, article 7, option 1 and article 9, option 1 of the Draft Statute was markedly different from the previous proposals as it required an actual second consent other than being a Party to the Statute. This declaration of consent over specified crimes could have been placed at the time of ratification or at a later stage. The thrust of the proposal was that before the ICC could assume jurisdiction as many as five States potentially would have had to have consented to the exercise of jurisdiction by the Court over the crime in question: that is the custodial State, the territorial State, the State that had requested extradition of the person from the custodial State, unless the request was rejected, the State of nationality of the accused and the State of nationality of the victim. The ICC would have been less competent under this proposal than States are currently under international law to prosecute domestically, where the consent of other involved States is not necessary⁵⁸.

The case-by-case approach contained in article 7, option 2 of the Draft Statute would have needed the specific consent of the States outlined *above* in the 'opt-in' Proposal. Ratification would, therefore have had little meaning in practical reality and States would have been able to render immune from consideration of the Court any individual when it seemed politically desirable. This proposal would have rendered the ICC ineffective in many cases.

In effect, both the opt-in and case-by-case consent proposals would have been jurisdiction 'à la carte'. This would have resulted in practical terms in a significantly weakened Court with most often the ICC only having jurisdiction when the Security Council referred a situation to it, with the built in Charter problem of the veto power. This would have been particularly so should both proposals have been adopted and States had preferred to follow the case-by-case approach. States as a result could have ratified with no intention of ever allowing cases to go before the Court. This would have resulted in an ineffectual Court in the majority of cases and as well have 'foment[ed] selectivity and arbitrariness'⁵⁹.

6. The Bureau Compromise

The Bureau discussion paper⁶⁰ 'had narrowed the range of options but had deliberately taken a cautious approach'⁶¹. The Proposal⁶² had likewise retained several options. Both of these had dropped the German Proposal⁶³. The Bureau Proposal in article 7 para. 1 adopted the Korean Proposal for genocide alone. For war crimes and crimes against humanity, three options were presented in article 7 para. 2: (1) the Korean Proposal, (2) the acceptance by the territorial and custodial States and in (3) the acceptance by the State of nationality of the accused alone. Some States voiced strong objections against the Korean Proposal stating that it was quasi-universal jurisdiction. However, other States pointed out that it would have been in keeping with the ability at international law of the custodial State to prosecute itself for international crimes, *stricto sensu*. They viewed the other options as too restrictive, in particular option 3 based on nationality of the accused. As well, article 7*bis* on acceptance of jurisdiction in both the discussion paper for treaty crimes and possibly for one or more of the core crimes and in Option 2 of the Proposal for crimes against humanity and war crimes was controversial as it replicated the opt-in regime. Article 7*bis* Option 1 reproduced the

⁵⁸ Lawyers Committee for Hum. Rts., Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction 1 *ICC Briefing Series* 8 (May 1998)5.

⁵⁹ Hum. Rts. Watch, *Justice in the Balance: Recommendations for an Effective International Criminal Court* 46 (1998).

⁶⁰ UN Doc.A/CONF.183/c.1/L.53 (6 July 1998) 11-13.

⁶¹ Kirsch and Holmes (1999) 93 *AJIL*1, 9.

⁶² UN Doc.A/CONF.183/C.1/L.59 (10 July 1998) 10-12.

⁶³ According to The Rome Treaty Conference Monitor, 10 July 1998, 2 '23 states displayed their dismay that universal jurisdiction was not reflected'. Note also the reaction of the German Delegation, as expressed in Statement by H.-P. Kaul, Acting Head of the German Delegation, Rome Conference, 19 June 1998.

automatic jurisdiction over all core crimes by States Parties. Thus, as late as 10 July 1998, with only one week left there was no consensus. The United States and other States emphasized that ‘universal jurisdiction or any variant of it’ was unacceptable⁶⁴.

The result was the introduction into the final package by the Bureau of a new article on preconditions on 17 July 1998, the present article 12 in the Statute. This article combines State acceptance of jurisdiction with preconditions for the exercise of jurisdiction by the ICC. It allows disjunctively for the acceptance, by being States Parties, of one or more of the territorial State or the State of nationality of the accused. The transitional provision contained in article 12⁶⁵ was also part of the compromise to gain the agreement of France to the Statute⁶⁶. It provides that States Parties may opt out of the ICC’s war crimes jurisdiction for a period of seven years when the alleged crimes were committed in its territory or by its nationals. States that had lobbied for the opt-in acceptance and the preconditional conjunctive approach or the State of nationality of the accused alone remained opposed. From the outset issues of jurisdiction had been a key concern for the United States⁶⁷. For the United States it was the four words ‘one or more of’ that caused the ultimate dissent. On this issue the United States proposed an amendment during the last hours of the Conference in the Committee of the Whole⁶⁸. It reads:

‘With respect to States not party to the Statute the Court shall have jurisdiction over acts committed in the territory of a State not party, or committed by officials or agents of a State not party in the course of official duties and acknowledged by the State as such, only if the State has accepted jurisdiction in accordance with this article.’

The amendment was resoundingly defeated by a no-action motion⁶⁹, adopted by 113 in favour to 17 against with 25 abstentions.

B. Analysis and interpretation of elements

I. Paragraph 1: Jurisdiction over crimes

- 13 States by becoming parties to the Statute accept the jurisdiction of the ICC for the crimes provided in article 5 of the Statute, namely, genocide, crimes against humanity, war crimes and aggression⁷⁰. It follows option 1 of the Bureau Proposal in article 7*bis*. Article 12 para. 1 therefore assumes the position of automatic jurisdiction over the listed crimes, with no possibility to opt out. However, as far as the crime of aggression is concerned, it seems that in 2010 States Parties have established a different jurisdictional regime. On the one hand, should the amendment come into force, the Court would exercise its jurisdiction in accordance with article 12⁷¹; on the other hand, prior to ratification or acceptance of the Kampala amendment, a State Party might lodge a declaration with the Registrar whereby it would exclude the Court’s jurisdiction over any act of aggression it would commit⁷². Nevertheless, by ratifying or accepting the amendment, it would allow the Court to exercise

⁶⁴ Kirsch (Nov.-Dec. 1998) *ASIL Newsletter* 1, 8.

⁶⁵ See A. Zimmermann, *article 124*, mn 1 second edition.

⁶⁶ The United States had earlier argued for a ten year transitional period for war crimes and crimes against humanity. Statement by David Scheffer, US Ambassador at Large for War Crimes Issues, American University, Washington, DC, September 2000.

⁶⁷ The Rome Treaty Conference Monitor, 18 July 1998, No. 26, 2.

⁶⁸ UN Doc. A/CONF.183/C.1/L.90 (16 July 1998).

⁶⁹ Proposed by Norway. Sweden and Denmark spoke for and China and Qatar against. UN Doc.A/CONF.183/C.1/SR.42, paras. 20–31.

⁷⁰ RC/Res.6, Annex I.

⁷¹ According to article 15*bis* (4).

⁷² As for the uncertainties and possible contrasts with article 121(5) see Cryer et al., *Introduction ICL* (2014) 324.

its jurisdiction in relation to any act of aggression which might occur on its territory, every time such an act is committed by another Party who has ratified the amendment, or, alternatively, by any accepting State under paragraph 3 of article 12, which has not lodged a similar declaration⁷³.

II. Paragraph 2

1. Acceptance by States Parties

In cases where pursuant to article 13 (a) or (c), a situation is referred to the Prosecutor by a State Party⁷⁴ or where the Prosecutor has initiated an investigation *proprio motu*⁷⁵, State acceptance is necessary⁷⁶. As discussed above, this complex and controversial issue resulted in a compromise put to the Committee of the Whole in the final package. It was an attempt by the Bureau to find a middle ground between the opposite positions of States: between those who had for the most part a preference for universal jurisdiction or a list of alternative States (territorial State, State of nationality of the accused or the victim and the custodial State) where it was sufficient that one had accepted the jurisdiction of the Court by ratifying and those that insisted on either State Party acceptance by the State of nationality of the accused or even the stricter requirement that there be acceptance conjunctively from a list of States as had been proposed in the ILC Draft⁷⁷. Article 12 as adopted by the Conference is the accommodation that was struck. It reduced the preconditions. The jurisdictional nexus is that the territorial State or the State of nationality of the accused are States Parties. These are the two primary bases of jurisdiction over the offence in international criminal law⁷⁸ and are universally accepted.

2. The different subparagraphs

a) **Territorial jurisdiction.** Territorial jurisdiction is a manifestation of State sovereignty⁷⁹. A State has plenary jurisdiction over persons, property and conduct occurring in its territory,

⁷³ In accordance with article 121 para. 5. See Kress and von Holtendorff (2010) 8 *JICJ* 1179, 1214. See also Politi (2012) 10 *JICJ* 267, 279.

⁷⁴ In accordance with article 14.

⁷⁵ In accordance with article 15.

⁷⁶ As for the inapplicability of article 12, paragraph 2, to article 13 (b), namely in case of a referral by the UN Security Council, see: *Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Al Abd-Al-Rahman ('Aukushayb')*, No. ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58 (7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 16; *Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-320, Fourth Decision on Victims' Participation, Pre-Trial Chamber III, 12 December 2008, para. 59; *Prosecutor v. Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36; *Situation in the Libyan Arab Jamahiriya*, No. ICC-01/11-01/11-1, Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi And Abdullah Al Senussi', Pre-Trial Chamber I, 27 June 2011, para. 9. In line with this interpretation of the Statute, according to the Kampala amendment State consent is irrelevant in the case of a UN Security Council's referral pertaining to an alleged crime of aggression. See RC/Res.6, Annex III, Understanding 2.

⁷⁷ At the outset of the Conference many delegations including China, France, India, Mexico and several non-aligned States had supported the 'state consent' proposal, requiring consent even from States Parties for each prosecution.

⁷⁸ The various UN Conventions dealing with international terrorism use these bases of jurisdiction along with passive personality and the presence of the accused (custodial State) to allow for extradition or prosecution by domestic criminal courts. See e.g., article 6 of the 1979 *International Convention Against the Taking of Hostages*, 1316 UNTS 205 and article 6 of the 1997 *International Convention on the Suppression of Terrorist Bombings*, UN Doc. A/RES/52/164.

⁷⁹ *Compania Naviera Vascongado v. Steamship Cristina*, (1938) A.C. 485, 496. The territorial principle has been interpreted in some domestic courts to allow for criminal prosecution when a significant portion of the elements of the crime occur in the State. See, the Canadian case of *Libman v. The Queen*, (1985) 2 Supreme Court Reports 178. The territory of a State includes its land mass, internal waters, the twelve nautical mile territorial sea and the airspace above all of the former. Jurisdiction is recognised at international law as extending to conduct

subject only to obligations or limitations imposed by international law⁸⁰. This is the universally accepted working rule in international criminal law and can be found in bilateral extradition treaties and multilateral conventions⁸¹. Thus if a listed crime is committed in State A, a State Party to the ICC Statute, by a national of State B, whether or not State B is a State Party, State A will have enabled the ICC to take jurisdiction, whether the alleged offender is present in State A or in another custodial State Party⁸². The ICC is not, as has been argued by the United States, taking jurisdiction over non-States Parties, in violation of article 34 of the *Vienna Convention on the Law of Treaties*⁸³. When an alien commits a crime, whether a domestic common crime or an international crime such as hostage taking, on the territory of another State, a prosecution in the latter State is not dependent on the State of nationality being a Party to the pertinent treaty or otherwise consenting⁸⁴. It is not a case of a non-State Party being bound and the ICC overreaching its jurisdiction, but rather the individual being amenable to the jurisdiction of the ICC where crimes are committed in the territory of a State Party. There is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute⁸⁵.

At the time of ratification a few States made declarations concerning the territorial scope of the Rome Statute. In contrast with many other multilateral international instruments, there is no specific provision for this in the Statute. The Netherlands made a harmless but reassuring statement to the effect that the Statute applies not only to its European territory but also to the Netherlands Antilles and Aruba. More troublesome was Denmark's declaration that it does not intend the Statute to apply to the Faroe Islands and Greenland⁸⁶. While this was no doubt motivated by admirable sentiments of respect for local autonomy, it had the effect of excluding the reach of the Court from a territory which, on its own, has no right to correct the situation, because neither the Faroe Islands nor Greenland are sovereign States and as a result they cannot accede to the Statute. Were a case to arise, the Court might well take the lead from analogous cases before the European Court of Human Rights⁸⁷ and rule the Danish declaration to be an illegal reservation without any effect, in accordance with article 120 of the Statute, thereby recognising jurisdiction over the disputed territories. The ILC Special Rapporteur on the question of reservations has written that

‘a statement by which a State purported to exclude the application of a treaty to a territory meant that it sought “to exclude or to modify” the legal effect which the treaty would normally have, and such a statement therefore constituted, according to the Special Rapporteur, a “true” reservation, *rationae loci*’⁸⁸.

committed on board maritime vessels and aircraft registered in a State. See *e.g.*, article 6 para. 1 (a) of the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (1988), 27 *ILM* 672. Note Sadat Wexler (1998) 13 *NEP* 25 includes also the State of registration of spacecraft or space stations.

⁸⁰ See *e.g.*, *North Atlantic Status of Forces Agreement*, 1951, 1953 *Canada Treaty Series* No. 13, and the *Agreement Concerning the Jurisdictional Immunities of U.N. Forces Between the United Nations and Cyprus*, 1964, 492 *UNTS* 57.

⁸¹ Furthermore, international terrorism conventions oblige States parties to amend their domestic law to provide for wide bases of jurisdiction including universality and also utilize the principle of *aut dedere, aut judicare*, obliging States to extradite or prosecute.

⁸² Once the preconditions of article 12 para. 2 have been met, other States Parties are obliged to cooperate with the ICC. See Krefß and Prost, *article 86*, mn 2–7 second edition. on the general obligation to cooperate, and Krefß and Prost, *article 89* mn 5–13 on the surrender of persons to the Court.

⁸³ 1155 *UNTS* 331 (1969).

⁸⁴ Note *United States v. Fawaz Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991). Prosecution was based on the passive-personality principle for hijacking and hostage taking. Lebanon, the State of nationality was not a Party to the 1979 *International Convention Against the Taking of Hostages*, 1316 *UNTS* 205, or the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 860 *UNTS* 105.

⁸⁵ The argument that such delegation is either illegal or unprecedented has been put forward since the adoption of the Statute, by Scheffer (1999) 32 *CornellLLJ* 529.

⁸⁶ See also the declaration by New Zealand concerning Tokelau.

⁸⁷ *Loizidou v. Turkey* (Preliminary Objections), Series A, No. 310.

⁸⁸ Report of the ILC on the Work of its Fiftieth Session, 20 Apr.–12 June 1998, 27 July–14 Aug. 1998, UN Doc.A/53/10 and Corr.1, para. 498.

The problem has become largely hypothetical, because Denmark withdrew the declaration in 2006.

According to article 12 para. 2(a) the Court may also exercise its jurisdiction with respect to crimes committed on board a vessel or aircraft, if the State of registration is a State Party to the Statute. It is on the basis of this provision that on 14 May 2013 the Union of the Comoros referred to the Court the situation regarding the 31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip. While the flotilla was comprised of eight vessels, the Court could have exercised its jurisdiction only over those acts which occurred on board of the Mavi Marmara, the Rachel Corrie, and Eleftheri Mesogios/Sofia, which were registered in the States Parties of Comoros, Cambodia, and Greece, respectively. In this respect, the Court could have acted regardless of the nationality of those allegedly responsible for the commission of the crimes at issue. In November 2014, Prosecutor Fatou Bensouda decided not to proceed to open an investigation as she considered that the situation did not meet the requirement of ‘gravity’⁸⁹.

Moreover, as far as the crime of aggression is concerned, when the Kampala amendments enter into force, the Court will not be able to exercise its jurisdiction over nationals of States not Parties, no matter where these acts might occur⁹⁰. This is an evident departure from the spirit of article 12, whose explicit reference in article 15*bis* para. 4 might find an explanation only if interpreted as aiming to regulate the preconditions to the Court’s exercise of its jurisdiction over aggression committed by nationals of a State Party within the territory of another State Party, or in all cases that might arise after a non-party State’s acceptance of the Court’s jurisdiction under article 12 para. 3.

b) Nationality of the accused. The nationality basis of jurisdiction is well entrenched in the domestic law of the majority of States. By virtue of such State practice and *opinio juris* it is a permissive rule derived from international custom that establishes extraterritorial jurisdiction⁹¹. Civil law jurisdictions provide for its use extensively and relate it to domestic common crimes as well as to crimes against the common interests of States. It is a corollary to their rules concerning the non-extradition of nationals. Common law States, on the other hand, use it for the most part only with regard to crimes prescribed by international law as envisaged in article 5 of the Rome Statute and international treaty crimes such as are contained in the international terrorism conventions⁹². In this context it is universally accepted.

None of the initial prosecutions appear to have been based on nationality of the accused. In the prosecutions concerning the situations in Uganda, the Democratic Republic of Congo, Sudan (Darfur), Kenya, Central African Republic, Côte d’Ivoire, and Libya there are no allegations that the accused persons are nationals of a State Party. Nor did the Security Council give the Court jurisdiction over acts of Sudanese or Libyan nationals committed outside of their own States. It adopted such an approach when the International Criminal Tribunal for Rwanda was established, authorising the international tribunal to prosecute crimes on Rwandan territory and crimes committed by Rwandan nationals in neighbouring States⁹³.

The Prosecutor has examined the possibility of cases based on nationality rather than territory. In his first report on communications submitted in accordance with article 15, the Prosecutor noted that there had been several allegations of acts perpetrated by nationals of

⁸⁹ Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation 14 May 2013 from Comoros, 14 May 2013; OTP, Situation on Registered Vessels of Comoros, Greece and Cambodia. Article 53(1) Report, 6 November 2014. See also OTP, Situation in the Republic of Korea Article 5 Report, 23 June 2014, paras. 38–40. Cf. Buchan (2014) 25 *CLF* 465, 498.

⁹⁰ In accordance with article 15*bis* para. 5.

⁹¹ *The Steamship Lotus (France v. Turkey)* (1927), PCIJ Ser. No. 10.

⁹² See e.g., the 1973 *Convention on the Prevention and Punishment of Internationally Protected Persons Including Diplomatic Agents*, 1977 Canada Treaty Ser. No. 43, article 3 para. 1 (b).

⁹³ UN Doc.S/RES/955 (1994).

coalition forces during the invasion of Iraq, in 2003⁹⁴. Iraq is not at present a State Party to the Rome Statute. He pursued this in more depth in his second report, in February 2006, and especially in the statement concerning Iraq-related prosecutions. There he indicated that inquiries had been made concerning nationals of States Parties with respect to acts perpetrated on the territory of Iraq⁹⁵. However, on the same occasion the then Prosecutor Moreno Ocampo announced his decision not to seek an authorization to initiate an investigation in relation to the Iraqi situation as the ‘gravity’ requirement appeared not to be met. On 13 May 2014, Prosecutor Bensouda decided to re-open a preliminary examination of the situation in Iraq. In particular, her office will analyse alleged crimes attributed to the armed forces of the United Kingdom deployed in Iraq between 2003 and 2008⁹⁶. Should the Prosecutor decide to open an investigation, the Court’s jurisdiction would then be based on article 12 para. 2(b)⁹⁷. With respect to the crime of aggression, according to article 15*bis* para. 5 the Court cannot exercise its jurisdiction over those acts committed by nationals of States Parties within the territory of a State not Party to the Statute. Therefore, the jurisdictional regime envisaged for the crime of aggression significantly departs from that of article 12 para. 2(b).

An exception to the general principle of jurisdiction over nationals is explicitly set out in the Rome Statute with respect to persons under the age of eighteen at the time of the offence⁹⁸.

III. Paragraph 3: Acceptance by non-States Parties

- 19 In addition to the territorial and personal jurisdiction that results from ratification of the Statute with respect to a State Party, article 12 para. 3 also contemplates the possibility of a non-party State accepting the jurisdiction of the Court on an *ad hoc* basis. The provision requires such a State to lodge a declaration with the Registrar by which it accepts the exercise of jurisdiction by the Court ‘with respect to the crime in question’. The Statute describes such a State as an ‘accepting State’. The final sentence in article 12 para. 3 says that ‘[t]he accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9’. However, there does not seem to be any consequence should an accepting State fail to cooperate as required⁹⁹.
- 20 Article 12 para. 3 is the residue of a provision in the 1994 ICL Draft Statute by which State consent was contemplated on a case-by-case basis. Article 12 para. 3 allows the Court to exercise jurisdiction if a non-party State makes a declaration ‘with respect to the crime in question’ committed on its territory or by one of its nationals. The reference to ‘crime’ rather than ‘situation’ might have implied that this is not analogous to a referral by a State Party or by the Security Council.¹⁰⁰ The text of article 12 para. 3 could indeed seem ambiguous in this respect. Does this refer to one of the crimes listed in article 5? In other words, are non-party States to make declarations accepting the jurisdiction of the Court with respect to one or more of genocide, crimes against humanity, war crimes, and aggression? Or is the provision to mean the acceptance of jurisdiction with respect to a specific incident or situation¹⁰¹?

⁹⁴ ‘Communications Received by the office of the Prosecutor of the ICC’, 16 July 2003, 2.

⁹⁵ ‘Letter of Prosecutor dated 9 February 2006’ (Iraq).

⁹⁶ OTP, Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq, 13 May 2014.

⁹⁷ See OTP, Report on Preliminary Examination Activities 2014, 6 December 2014, paras. 44–45.

⁹⁸ Article 26.

⁹⁹ On article 12 para. 3, see: Stahn *at al.* (2005) 99 *AJIL* 421; Freeland (2006) 75 *NordicJIL* 211; Stahn (2006) 75 *JIL* 243. See also, *e.g.*, *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, Pre-Trial Chamber I, 11 December 2014, on the occasion of which Pre-Trial Chamber I merely reminded Côte d’Ivoire of its obligation to surrender Simone Gbagbo to the Court.

¹⁰⁰ Scheffer (2004) 2 *JICJ* 26.

¹⁰¹ Kaul, in: Cassese *at al.* (eds), *The Rome Statute of The International Criminal Court: A Commentary* (2002) 583, 616. Also: Bassiouni, (1999) 32 *CornellILJ* 443, 453–454; Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (2005) 84–85.

To prevent abusive and one-sided use of article 12 para. 3 the ASP has modified its application somewhat. Rule 44 of the Rules of Procedure and Evidence states:

Declaration provided for in article 12 para. 3

1. 'The Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the Statute or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3.
2. When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply.'

The provision in the Rules was promoted by the Americans in an attempt to 'fix' what they considered to be perverse consequences of article 12 para. 3¹⁰². The United States argued that article 12 para. 3 would allow a Saddam Hussein to invoke the jurisdiction of the Court for crimes committed by the United States in Iraq, and yet prevent it from doing the same with atrocities committed by the regime against the people of the country¹⁰³. The Rule means such a one-sided manipulation of the jurisdiction is impossible. Some supporters of the American position have taken the view that reciprocity flows automatically from the logic of a 'sensible reading' of article 12 para. 3 in any event, and that there is no need for a rule to clarify things¹⁰⁴. Others have claimed that even with the rule 44, the problem persists. According to Jack Goldsmith,

[t]his vague provision does not, as many have stated, guarantee that Article 12(3) parties will consent to jurisdiction for all crimes related to the consent. But even if it did, the Iraqs of the world could consent under Article 12(3) and simply not show up. Rule 44(3) improves the anomaly of Article 12(3), but does not fix it¹⁰⁵.

In any case, the Trial Chamber has noted that

'while States may choose to consent or not to the jurisdiction of the Court through declarations provided for in article 12(3) of the Statute, the scope of such declarations is predetermined by the ICC legal framework. Most notably rule 44 of the Rules explicitly limits the discretion of States in framing the situation that may be investigated by the Court. This rule mandates the Registrar to remind accepting States that "the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply" (emphasis added). Rule 44 of the Rules was adopted in order to ensure that States that chose to stay out of the treaty could not use the Court "opportunistically". Indeed, there were concerns that the wording of article 12(3) of the Statute, and specifically the reference to the acceptance of jurisdiction "with respect to the crime in question", would allow the Court to be used as a political tool by States not party to the Statute who could selectively accept the exercise of jurisdiction in respect of certain crimes or certain parties to a conflict'¹⁰⁶.

Therefore, the Court has made it clear that when States lodge a declaration under para. 3 they cannot give the Court jurisdiction over certain crimes only¹⁰⁷; rather, with regard to a precise 'situation', they may expressly stipulate in this sense, but always acting in compliance

¹⁰² Scheffer (1999) 93 *AJIL* 17, 18–20.

¹⁰³ Scheffer (2001) *MillRev* 167 1, 8.

¹⁰⁴ Wedgwood (1999) 32 *CornellLLJ* 535, 541 (1999).

¹⁰⁵ Goldsmith (2003) 70 *UChicagoLRev* 89, fn. 11.

¹⁰⁶ *Prosecutor v. Laurent Koudou Gbagbo*, No. ICC-02/11-01/11-212, Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)', Pre-Trial Chamber I, 15 August 2012, para. 59. See: Kaul, in: Cassese et al. (eds), *The Rome Statute of The International Criminal Court: A Commentary* (2002) 583, 616. Also: Bassiouni, (1999) 32 *CornellLLJ* 443, 453–454; Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (2005) 84–85.

¹⁰⁷ As for the crime of aggression, it is still unclear how article 12 para. 3 could reconcile with article 15bis para. 4 and the possibility of opting out. See Stahn (2010) 23 *LeidenJIL* 875, 880.

with the legal framework provided by the ICC Statute¹⁰⁸. Importantly, the Court still needs to investigate the exact content of such a framework¹⁰⁹. In this respect, it seems that States' discretion might be limited to the sphere of the jurisdiction *ratione temporis*¹¹⁰. In particular, States might indicate a starting date or a specific situation for the entire duration of which the Court would have jurisdiction. Even in such cases, however, '[t]he relevant timeframe of the investigation, if authorised, will be determined by the Chamber on the basis of the Prosecutor's Request and the supporting materials, as well as the victims' representations under Article 15 of the Statute¹¹¹.'

Moreover, it should be recalled that a declaration under article 12 para. 3 does not trigger the exercise of jurisdiction, and the Prosecutor is under no obligation with respect to article 53 of the Statute should he or she decide not to proceed¹¹². Indeed, '[u]pon receipt of a referral or a declaration pursuant to article 12 para. 3, the Office will open a preliminary examination of the situation at hand. However, it should not be assumed that a referral or an article 12 para. 3 declaration will automatically lead to the opening of an investigation'¹¹³.

- 21 Declarations under article 12 para. 3 have been lodged on behalf of Côte d'Ivoire, Uganda, Palestine, Egypt, and Ukraine. Côte d'Ivoire signed the Rome Statute on 30 November 1998, but it only ratified it in February 2013. However, on 11 October 2011 Pre-Trial Chamber III authorised the Prosecutor to initiate an investigation with regard to the crimes allegedly committed in conjunction with the elections that took place in November 2010. The jurisdictional basis for such an investigation is a declaration that Côte d'Ivoire lodged on 18 April 2003¹¹⁴. Subsequently, Pre-Trial Chamber III broadened the period covered by the investigation, which at first had 28 November 2010 as its starting date, and extended it to those facts that have been unfolding since 19 September 2002, that is, the date indicated in the 2003 declaration¹¹⁵. This suggests that declarations lodged under article 12 para. 3 may have both a retroactive and a prospective application¹¹⁶. The possibility for a declaration to backdate the Court's jurisdiction with respect to the accepting State seems to find confirma-

¹⁰⁸ See *Prosecutor v. Laurent Koudou Gbagbo*, No. ICC-02/11-01/11-321, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, Appeals Chamber II, 12 December 2012, para. 84.

¹⁰⁹ *Ibid.*, fn 152.

¹¹⁰ As for the jurisdiction *ratione materiae*, see *Prosecutor v. Laurent Koudou Gbagbo*, note 108, para. 59. Moreover, it is likely that the Court will deem contrary to the spirit of rule 44 any limitations to both the jurisdictions *ratione personae* and *ratione loci*. Compare with Williams and Schabas in the Second edition of this Commentary (2007) 559.

¹¹¹ *Situation in the Republic of Cote D'Ivoire*, No. ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', Pre-Trial Chamber III, 15 November 2011, para. 15.

¹¹² *Prosecutor v. Laurent Koudou Gbagbo*, note 108, para. 57. See also OTP, Policy Paper on Preliminary Examinations, November 2013, fn. 25; Müller (2010) 8 *JICJ* 1267, 1278.

¹¹³ OTP, Policy Paper on Preliminary Examinations, November 2013, para. 76.

¹¹⁴ Republic of Côte d'Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court, 18 April 2003. See *Situation in the Republic of Côte D'Ivoire*, No. ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, 3 October 2011, para. 15. Note that subsequent to the 2003 declaration, Côte d'Ivoire submitted two letters, in 2010 and 2011. However, both Pre-Trial Chamber I and Appeals Chamber II have made it clear that the Court's jurisdiction is only determined by the first document. See *Prosecutor v. Laurent Koudou Gbagbo*, note 108, para. 66; *Prosecutor v. Laurent Koudou Gbagbo*, ICC-02/11-01/11-321, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, Appeals Chamber II, 12 December 2012, para. 92. Compare with *e.g. Prosecutor v. Laurent Koudou Gbagbo*, No. ICC-02/11-01/11-9-Red, Public redacted version of 'Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo', Pre-Trial Chamber III, 30 November 2011, para. 12.

¹¹⁵ *Situation in the Republic of Côte D'Ivoire*, No. ICC-02/11-36, Decision on the 'Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010', Pre-Trial Chamber III, 22 February 2012, para. 37. See Republic of Côte d'Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court, 18 April 2003. Compare with *Situation in the Republic of Côte D'Ivoire*, note 111, para. 212.

¹¹⁶ See Zimmermann (2013)11 *JICJ* 303, 311.

tion in the *travaux préparatoires* and in the declaration lodged with the Registrar by Uganda¹¹⁷. In support of his application for arrest warrants of leaders of the Lord's Resistance Army, the Prosecutor included a 'Declaration on Temporal Jurisdiction', dated 27 February 2004, whereby the Republic of Uganda accepted the exercise of the Court's jurisdiction for crimes committed following the entry into force of the Statute on 1 July 2002. Because Uganda ratified the Rome Statute on 14 June 2002, it only entered into force with respect to Uganda on 1 September 2002, two months after the entry into force of the Statute itself. As indicated by the Prosecutor in a letter to the President of the Court, article 12 para. 3 was indeed the authority for Uganda's 'Declaration of Temporal Jurisdiction'¹¹⁸. Thus, both a State Party and a non-party State can, no matter when a declaration under article 12 para. 3 is lodged, backdate the Court's jurisdiction in its regard to any date after 1 July 2002. Then, it would be up to the Court to judge whether such an extension would be compatible with 'the ICC legal framework'¹¹⁹. In this respect, it seems that the Court is likely to uphold a backdated jurisdiction regarding a single, ongoing situation of crisis¹²⁰. These considerations maybe relevant to the debate related to the declaration lodged on 23 January 2009 by Ali Khashan, acting as Minister of Justice of the Government of Palestine. Through such a declaration the Palestinian Authority accepted the Court's jurisdiction for 'acts committed on the territory of Palestine since 1 July 2002'. Following a preliminary examination, on 3 April 2012 the Office of the Prosecutor issued a decision according to which:

'The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction'¹²¹.

Indeed,

'In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term "State" under article 12(3) which would be at variance with that established for the purpose of article 12(1)'¹²².

Subsequently, on 29 November 2012 the General Assembly of the United Nations accorded Palestine the status of 'non-member observer State'¹²³. Also, on 8 December 2014 for the very first time, Palestine was invited to participate in the ASP as an observer State¹²⁴. On 1 January 2015 Mahmoud Abbas, President of the State of Palestine, lodged a declaration under article 12 para. 3 with the Registrar, whereby accepting the Court's jurisdiction over the crimes allegedly committed within the occupied Palestinian territory, including East Jerusalem, since 13 June 2014¹²⁵. According to such a declaration, this is 'without prejudice to any other declaration the State of Palestine may decide to lodge in the future'. The following day, Palestine also transmitted to the United Nations documents relating to its

¹¹⁷ Wills (2014)12 *JICJ* 407, 415.

¹¹⁸ The Prosecutor, Luis Moreno Ocampo, Letter to the President of the International Criminal Court, 17 June 2004, ICC-01/04-1.

¹¹⁹ See *Prosecutor v. Laurent Koudou Gbagbo*, note 108, para. 59.

¹²⁰ *Ibid.*, para. 63.

¹²¹ OTP, Decision on the Situation in Palestine, 3 April 2012, para. 8.

¹²² OTP, Decision on the Situation in Palestine, 3 April 2012, para. 6.

¹²³ UN Doc. A/RES/67/19 (29 November 2012).

¹²⁴ See e.g. Sengupta (8 December 2014) *NYTimes* <<http://www.nytimes.com/2014/12/09/world/middleeast/palestinians-become-observers-at-meeting-on-international-criminal-court.html>> accessed 13 December 2014.

¹²⁵ Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014; ICC, ICC-CPI-20150105-PR1080, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, 5 January 2015; ASP, ICC-ASP-20150107-PR1082, The State of Palestine accedes to the Rome Statute, 7 January 2015.

accession to the Statute¹²⁶. A few days after the UN Secretary General's acceptance of Palestine's accession to the Statute, on 16 January 2015, the Office of the Prosecutor opened a preliminary examination of the situation in Palestine. Since, in relation to such a state, the Statute was supposed to enter into force only in April 2015, this decision must rely on the declaration lodged pursuant to article 12 para. 3.¹²⁷

On 13 December 2013, lawyers acting on behalf of the Egyptian Freedom and Justice Party sought to accept the Court's jurisdiction pursuant to article 12 para. 3 with respect to alleged crimes committed on the territory of the State of Egypt from 1 June 2013. However, the Office of the Prosecutor concluded that as a matter of international law the applicants lacked the *locus standi* to accept the Court's jurisdiction on behalf of Egypt as they were not in possession of 'full powers'. By applying the legal test of 'effective control,' the Office of the Prosecutor concluded that the head of the Freedom and Justice Party, Dr Morsi, had no longer the legal capacity to incur new international legal obligations on behalf of the State of Egypt. Therefore, on 25 April 2014 the Registrar communicated to the applicants the Prosecutor's decision to disregard the declaration¹²⁸.

Following a declaration lodged with the Registrar on 9 April 2014 by the then acting President of Ukraine, Oleksandr Turchynov¹²⁹, the Office of the Prosecutor announced the initiation of a preliminary examination concerning Ukraine. The declaration in question, which refers *expressis verbis* to a Parliamentary act (*i. e.*, the Declaration of Verkhovna Rada of Ukraine), accepts the Court's jurisdiction over alleged crimes committed within Ukraine's territory from 21 November 2013 to 22 February 2014. As for the compatibility of the Declaration of Verkhovna Rada of Ukraine with the 'legal framework of the Statute', a number of issues might need to be taken into consideration. In particular, such an act makes reference to a specific category of crimes (crimes against humanity), limits the Court's jurisdiction over those senior officials who were at office at the relevant time and, most importantly, indicates the names of Yanukovych Viktor Fedorovych, ex President of Ukraine, Pshonka Viktor Pavlovych, ex Prosecutor-General of Ukraine, and Zakharchenko Vitalii Yuriovych, ex Minister of Internal Affairs of Ukraine. Thus, apart from providing a limited temporal jurisdiction, it seems that Ukraine has attempted to restrict the Court's *ratione materiae* and *ratione personae* jurisdiction. In this respect, should the Prosecutor decide to ask for an authorization to initiate an investigation, he or she might consider that by lodging such a declaration Ukraine has agreed to comply with the relevant provisions of the Statute, such as article 5. Indeed, the Prosecutor has already deemed that he is not bound by the wording of a State referral when it is contrary to the principles of the Statute¹³⁰; therefore, there is no reason to believe that he or she would act in a different way in case of a *proprio motu* investigation following a declaration under article 12 para. 3. Rather, it is likely that the Prosecutor will treat this as a mere tool through which a State not Party has conferred jurisdiction to the Court over a 'situation'.

¹²⁶ ICC, ICC-CPI-20150105-PR1080, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, 5 January 2015.

¹²⁷ ICC, ICC-OTP-20150116-PR1083, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.

¹²⁸ OTP, ICC-OTP-20140508-PR1003, The determination of the Office of the Prosecutor on the communication received in relation to Egypt, 8 May 2014. See also *Request Under Regulation 46(3) of the Regulations of the Court*, No. ICC-RoC46(3)-01/14-3, Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', Pre-Trial Chamber II, 12 September 2014.

¹²⁹ Ukraine, Declaration Accepting the Jurisdiction of the International Criminal Court, 9 April 2014.

¹³⁰ The Prosecutor, Luis Moreno Ocampo, Letter to the President of the International Criminal Court, 17 June 2004, ICC-01/04-1. Note: *Prosecutor v. Calliste Mbarushimana*, ICC-01/04-01/10-451, Decision on the 'Defence Challenge to the Jurisdiction of the Court', Pre-Trial Chamber I, 26 October 2011, ft 41.

C. Conclusions

Article 12 is a product of compromise supported by the overwhelming majority of States. 22 It endeavours to satisfy the many interests that were evidenced at the Rome Conference and before. It is far from perfect but was all that was possible at the time. At the time of its adoption, it looked like a serious gap, to the extent that the acceptance of the Statute by the custodial State does not act as a precondition for the exercise of jurisdiction by the ICC¹³¹. Many believed that it would result in atrocities going unpunished because the territorial State or State of nationality would not be parties or would not consent *ad hoc*, and the UN Security Council would fail to act. The First Edition of this Commentary, published in 1999, said that ‘in all probability it may be assumed that the States likely to be the locus of such crimes or whose nationals are suspect will not be among the first to ratify or otherwise agree to be bound by the Statute. Initially at least once the ICC is operative, reliance will have to be on the Security Council’¹³². Many other writers were sharply critical¹³³.

That projection was probably too conservative. Many of the first countries to ratify the Statute were themselves the scene of armed conflict, with the attendant atrocities, war crimes and other acts falling within the jurisdiction of the Court. They include, for example, Fiji, Sierra Leone, Colombia, Uganda, Democratic Republic of Congo, Afghanistan, Cambodia, Macedonia and Burundi. These ratifications were unexpected, particularly by those who insisted that the Court should be premised on universal jurisdiction because conflict-afflicted States, primarily in the South, would never join. Obviously, they tend to disprove the arguments that were advanced at Rome by those who were critical of the compromise on jurisdiction in article 12. They suggest that States are ratifying the Statute precisely because they view the Court as a promising and realistic mechanism capable of addressing civil conflict, human rights abuses and war. This is entirely consistent, of course, with the logic of those who have argued over the years that international justice contributes to peace and security.

Indeed, we might ask, in hindsight, whether sixty ratifications would have been achieved so quickly had the broad universal jurisdiction proposal actually been adopted. The problem with the universal jurisdiction approach is that it leaves little incentive for States to join the Court. One way or another, whether or not States ratify the Statute, if the Court is based on universal jurisdiction, crimes committed on their territory are subject to its jurisdiction in any case. On the other hand, under the current regime as set out in article 12, States must ratify the Statute if they wish to send a message of deterrence that war crimes, crimes against humanity, genocide, and possibly aggression in the near future will not go unpunished on their territories. This they seem to be doing, in ever-increasing numbers. In other words, far from dooming the Court to inactivity, the limited jurisdictional scheme of article 12 would appear to have contributed to the rate of ratification.

¹³¹ Lawyers Committee for Hum. Rts., *The Rome Treaty for an ICC: A Brief Summary of the Main Issues*, 2 ICC Briefing Series, 1.

¹³² See Williams on Article 12 in the first edition of this Commentary (1999) 341.

¹³³ Kaul, in: Cassese at al. (eds), *The Rome Statute of The International Criminal Court: A Commentary* (2002) 583, 616. Also, Glasius, *The International Criminal Court* (2006) 61–76.

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Literature: Akande, D., 'The Effects of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', (2012) 10 *JICJ* 299; Condorelli, L. and Ciampi A., 'Comments on the Security Council Referral of the Situation in Darfur to the ICC', (2005) 3 *JICJ* 590; Fernandez de Gurmendi, S.A., 'The Role of the Prosecutor', in: Lee, R.S. (ed.), *The International Criminal Court: The Making of The Rome Statute* (Martinus Nijhoff Publishers 1999) 175; Politi, M., 'The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects After the First Session of the Preparatory Committee', (1997) 13 *NEP* 115; Stahn, C., 'Libya, the International Criminal Court and Complementarity A Test for "Shared Responsibility"', (2012) 10 *JICJ* 325; Wilmshurst, E., 'Jurisdiction of the Court', in: Lee, R.S. (ed.), *The International Criminal Court: The Making of The Rome Statute* (Martinus Nijhoff Publishers 1999) 140; Yee, L., 'The ICC and the Security Council', in: Lee, R.S. (ed.), *The International Criminal Court* (1999) 143.

Content

A. Introduction/General remarks	1
1. The ILC Draft	2
2. The Ad Hoc Committee	6
3. The Preparatory Committee	9
4. The Rome Conference	11
B. Analysis and interpretation of elements	14
I. Paragraph 1: State Party referral	15
II. Paragraph 2: Referral by the Security Council	16
III. Paragraph 3: Independent prosecutor.....	20
C. Conclusion	21

A. Introduction/General remarks

1 The issue of how a case would be initiated, the so-called 'trigger mechanisms' for the exercise of jurisdiction by the ICC was, along with the other jurisdictional issues, of 'the most complex and most sensitive'¹ nature. The views expressed by States at all stages were wide-ranging and often immovable. The debate may be summed up as revolving around the following questions: (1) What was the role that the Security Council would play? (2) Should States Parties, and if so which, have to refer situations to the Prosecutor? (3) Should the Prosecutor, independently of the Security Council and States Parties, be able to initiate an investigation?

In the Rome Statute² a number of provisions relate to article 13. These are article 12 on preconditions to the exercise of jurisdiction, article 14 on referral by a State Party, article 15 on the role of the Prosecutor and the checks and balances on that role and article 16 on the deferral of investigation or prosecution following a Security Council resolution under Chapter VII of the UN Charter. To avoid overlap with the discussion in this commentary

¹ Kirsch and Holmes, (1999) 93 *AJIL* 2.

² 2187 UNTS 90 (2002) (hereinafter: 'Rome Statute').

of these articles, the background and analysis of article 13 will not delve into the complexities of their interrelationship in the course of the negotiations. In order to comprehend the inextricably intertwined nature of these provisions they should be read together.

1. The ILC Draft

In the commentary to article 12 on preconditions it is highlighted that jurisdictional issues as a whole were complicated and the thrust of the International Law Commission's 1994 Draft Statute³ was geared towards State consent and Security Council control. In contrast to the Statutes of the ICTY⁴ and the ICTR⁵, the ILC Draft Statute did not give the Prosecutor any independent powers to begin an investigation *ex officio*⁶.

The trigger mechanisms for the crime of genocide were distinguished from the other crimes covered. Article 21 para. 1 (a) and article 25 para. 1 provided for inherent jurisdiction of the ICC over the crime of genocide, in other words no additional requirement of acceptance by States Parties was necessary. The complaint initiating the preliminary phase of the criminal procedure was to be lodged by a State Party to the Statute that was also a Contracting Party to the *Genocide Convention*⁷ and consequently entitled to rely on article VI of that agreement. For all the other listed crimes article 25 para. 2 of the ILC Draft provided that a State Party that had accepted the jurisdiction of the ICC with respect to the particular crime or crimes under the 'opting-in' scheme set out in article 22 of that Draft, which necessitated a special declaration, could lodge a complaint with the Prosecutor alleging that such a crime appeared to have been committed. The ILC believed that resort to the ICC should be restricted to States Parties and that this might encourage ratification and in practical terms ensure cooperation with the Court in matters such as the provision of evidence⁸.

Article 25 para. 4 of the ILC Draft stipulated that where the Security Council under article 23 para. 1 had referred a matter to the ICC acting under Chapter VII of the UN Charter, then State Party acceptance under article 21 and the lodging of a State complaint would not be necessary⁹. The type of situation envisaged was, for example, where in similar circumstances the Security Council had the authority to establish *ad hoc* tribunals under Chapter VII. It would have allowed the Security Council to use the ICC as an alternative to setting up future *ad hoc* tribunals. Some ILC members had wanted to extend this power also to the UN General Assembly, particularly because of the veto power potentially being exercised by one or more of the P5. However, it was decided on further consideration that this would not be in keeping with the Charter, as the General Assembly does not have powers therein to affect directly the rights of States against their will¹⁰. Article 23 para. 2, dealing specifically with acts of aggression laid down the stricture that the trigger for the ICC to take jurisdiction would only be where the Security Council had determined that a State had committed the act of aggression which was the subject of the complaint.

A difficult issue was present in draft article 23 para. 3. There it was provided that no prosecution could be commenced under the Statute arising from a 'situation' which was

³ 1994 ILC Draft Statute, 29.

⁴ UN Doc. SC/RES. 827 (25 May 1993), Annex, article 18.

⁵ UN Doc. SC/RES. 955 (8 Nov. 1994), Annex, article 17.

⁶ In the Rome Statute the term *proprio motu* is used but the meaning of an investigation by the Prosecutor on an independent initiative is the same. According to the commentary to article 25 of the 1994 ILC Draft Statute, 90, one member of the Commission had suggested such an independent role where it appeared that otherwise a crime within the ICC's jurisdiction would not be investigated. However, other members stressed the need for State Party or Security Council support, at least at the initial stage of development.

⁷ *Convention on the Prevention and Punishment of Genocide*, 78 UNTS 277 (1948).

⁸ 1994 ILC Draft Statute, 89.

⁹ The ILC understood that the UN Security Council would not normally refer actual cases against individuals but 'matters' in the sense of situations to which Chapter VII of the UN Charter applied. The Prosecutor would then have had the responsibility of determining which individuals should be charged.

¹⁰ 1994 ILC Draft Statute, 86.

‘being dealt with’ by the Security Council under Chapter VII, unless the Security Council decided otherwise. The Security Council could, therefore, have obstructed the ICC from acting. Several members of the ILC, as well as States, had grave reservations with respect to this provision, as the Security Council would have been able to block prosecutions by having a situation placed on its agenda. Thus, ‘the processes of the Statute [could have been] prevented from operating through political decisions’¹¹ taken by the Security Council. Of concern too was that article 23 para 3 would introduce into the Statute substantial inequality between States members of the Security Council and non-State members and between the P5 and other States. The compromise suggested in the ILC was to delete draft article 23 para. 3 and to include in the preamble a provision that would provide for the paramouncy of the UN Charter¹².

2. The Ad Hoc Committee

- 6 In 1995 the *Ad Hoc* Committee on the Establishment of an ICC was set up by the General Assembly. With respect to trigger mechanisms a number of questions were raised arising out of the work of the ILC¹³. Diverse views were presented by delegations. Amongst the suggestions were that complaints concerning genocide should not be limited to States Parties to the *Genocide Convention*¹⁴. Others took the view that only States with a direct interest in the case, such as the custodial State, the territorial State or the State of nationality of the victim or suspect and which were able to furnish documents and other evidence should be entitled to lodge complaints. The argument for this was that it would avoid substantial costs that would be involved in lengthy investigations relating to frivolous or otherwise politically motivated or unsubstantiated complaints¹⁵. Further suggestions were made that complainant States should pay some portion of the costs of proceedings but this was opposed by other delegations¹⁶. As well, it was put forward that victims of crimes or their relatives be authorized to trigger the jurisdiction of the Court and that a special commission be set up within the structure of the Court to review such and determine whether the necessary criteria were present to support the initiation of further action¹⁷.
- 7 It was here in the *Ad Hoc* Committee that some delegations proposed that the role of the Prosecutor should be more fully elaborated and expanded to include the right to initiate *proprio motu* an investigation without State complaint or referral by the Security Council¹⁸. However, different views were expressed on this fundamental issue.
- 8 Several delegations agreed with the ILC’s provisions concerning the ability of the Security Council to refer matters to the Court as it would obviate the need for further *ad hoc* tribunals and also that such referrals under Chapter VII of the UN Charter would it was stated enhance the Court’s effectiveness¹⁹. Emphasis was laid on the fact that it would be a referral of a matter or situation and not a specific case against an individual. Different views were expressed as to whether such referral obviated the need for State consent²⁰. Several other delegations, to the contrary, expressed serious reservations, even opposition to such a role for the Security Council, stating that it would reduce ‘the credibility and moral authority of the court, excessively limit its role and undermine its independence, impartiality and autonomy’²¹ as well as politicize the new institution.

¹¹ 1994 ILC Draft Statute, Commentary, 87 para. 13.

¹² *Ibid.*, 88 para. 15.

¹³ *Ad Hoc* Committee Report, paras. 112–118.

¹⁴ *Convention on the Prevention and Punishment of Genocide*, 78 UNTS 277 (1948).

¹⁵ 1994 ILC Draft Statute, para. 112.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para. 117.

¹⁸ *Ibid.*, para. 113.

¹⁹ *Ibid.*, para. 120.

²⁰ *Ibid.*, para. 120.

²¹ *Ibid.*, para. 121.

3. The Preparatory Committee

These issues necessarily re-emerged at the first session of the Preparatory Committee in 1996. There was, however, 'little significant movement'²². The divergent views on the role of the Security Council remained²³. Concerning State complaints, whilst some delegations were satisfied with the ability to do so for crimes, others felt that substantial modification was needed. They were uneasy with complaints against specific individuals or crimes but argued that 'situations be referred to the Prosecutor'²⁴.

It was evident that there was growing support among delegations for empowering the Prosecutor with independent power to initiate investigations and thus to trigger the ICC's jurisdiction *proprio motu* on the basis of information from any source²⁵. However, even in the so-called like-minded group of States, that supported an effective and impartial ICC, there were differences on the precise parameters of such a role²⁶. On the other hand some delegations were of the view that widespread acceptance of the Statute would not be achieved if the Prosecutor was to have such a role²⁷.

In the 1997 session of the Preparatory Commission these remained contentious issues and the debate was 'long and difficult'²⁸. Draft article 21 contained the trigger mechanisms. Clearly, there was strong support for State Party referral but there remained the divergence of opinion on the issues of inherent jurisdiction versus 'opt-in', referrals of 'matters', 'situations' or 'crimes'²⁹ or whether referral should be limited to States Parties with a 'direct interest'³⁰. The ability of the Prosecutor to initiate prosecutions³¹ and the role of the Security Council³² were potential deal-breakers. These divergent views presented in alternative format in square brackets rendered it questionable whether at that stage consensus could be reached as the hard-line taken by some delegations did not reflect conciliatory action. If such a text had gone to Rome, it would have made the 'process of decision making ... very difficult indeed'³³.

The Inter-Sessional meeting in Zutphen followed the same approach in article 6[21] as to trigger mechanisms and the substance of complaints by States, referral by the Security Council and the *proprio motu* investigatory powers of the Prosecutor in articles 10[25], 45[23] and 46[25]bis respectively. The potential titles in article 6[21] both in square brackets indicated options: 'exercise of jurisdiction' and 'preconditions to exercise of jurisdiction'. As these suggest this article sought to present together trigger mechanisms and also preconditions to the ICC exercising jurisdiction³⁴.

The last session of the Preparatory Committee took place in March-April 1998. All of the jurisdictional issues were on the table 'without any expectation that ... [they] would be resolved'³⁵. The hope was that they would be clarified for the Rome Conference. A number

²² Wilmschurst in: Lee (ed.), *The International Criminal Court: The Making Of The Rome Statute* (1999) 131.

²³ 1996 Preparatory Committee I, paras. 129-144. Volume I contains the Proceedings of the Committee in March-April and August 1996. Volume II contains the Proposals.

²⁴ *Ibid.*, paras. 145-148.

²⁵ *Ibid.*, paras. 149-151. See article 25 para. 2*quat.* in square brackets 1996 Preparatory Committee II and Fernandez de Gurmendi, in: Lee (ed.), *The International Criminal Court: The Making of The Rome Statute* (1999) 177.

²⁶ Fernandez de Gurmendi, in: Lee (ed.), *The International Criminal Court: The Making of The Rome Statute* (1999) 177.

²⁷ *Ibid.* See also 1996 Preparatory Committee I, paras. 149-151.

²⁸ Wilmschurst in: Lee (ed.), *The International Criminal Court: The Making Of The Rome Statute* (1999) 131.

²⁹ Preparatory Committee Decisions Dec. 1997, article 25, Option 1.

³⁰ *Ibid.*, Option 2.

³¹ *Ibid.*, article 25*bis* contained the substance of the role of the Prosecutor.

³² *Ibid.*, article 23 with several options for the various paragraphs detailed the role of the Security Council.

³³ Wilmschurst in: Lee (ed.), *The International Criminal Court: The Making Of The Rome Statute* (1999) 131, 132.

³⁴ See Zutphen Draft. Note that articles 10[23] dealt with the role of the Security Council, article 45[25] with complaints by States and article 46[25*bis*] with the Prosecutor.

³⁵ *Ibid.*

of proposals were put forward by States including the United Kingdom³⁶ and Germany covering jurisdictional issues³⁷. As well, specifically on the role of the Prosecutor proposals by Argentina and Switzerland³⁸ that had been put forward in the August 1997 session and had been included in the Zutphen draft appeared in article 12 of the 1998 Preparatory Committee Draft Statute, providing for *proprio motu* powers with certain checks and balances³⁹.

4. The Rome Conference

- 11 Trigger mechanisms were discussed in the Committee of the Whole during the first and second weeks of the Rome Conference⁴⁰. With a few exceptions it appeared to be acceptable to delegations that States Parties could refer ‘situations’ to the ICC. The roles of the Prosecutor and the Security Council were the key issues remaining there.

The relevant articles in the Draft Statute on the role of the Prosecutor were article 6 para. 1 (c) and para. 2, articles 7, 9, 12 and 13 and article 6 lit. (b) of further option. The Conference was still divided on giving independent powers to the Prosecutor to investigate and prosecute. However, the majority of delegations were in favour of the *proprio motu* role for the Prosecutor subject to the safeguards against abuse provided in article 13. The NGOs also were pressing for an independent Prosecutor as essential for an effective and credible ICC. The thrust of the argument was that State complaints and Security Council referral were insufficient in that the ICC would operate on behalf of the international community as a whole and the ICC Prosecutor should have the same investigatory and prosecutorial powers, including the ability to receive information from any source, as in the cases of the ICTY and the ICTR⁴¹. Without this it would have been difficult to see what cases would go before the ICC, other than ‘nationals from States that have “fallen out of favour”’⁴². The track record in international human rights has illustrated the unwillingness of States to lay complaints⁴³. The same concerns surfaced in Rome that had been expressed in the Preparatory Committee, in essence that to give the Prosecutor such power would overwhelm the Prosecutor and overburden the ICC and would lead to an abuse of prosecutorial power. Some States feared ‘an overzealous or politically motivated Prosecutor targeting unfairly or in bad faith, highly sensitive political situations’⁴⁴. As before, these concerns were met by the various checks and balances contained in draft article 13, which was to become article 15 in the final Statute as well as final articles 19 on challenges to the jurisdiction of the Court and article 42 on the rigorous qualifications necessary for the Prosecutor and the method of election by the Assembly of States Parties.

- 12 The Bureau Discussion Paper presented to the Committee of the Whole on 6 July 1998⁴⁵, contained in article 6 the trigger mechanisms. With respect to the Prosecutor article 6 (c) presented two options. Option 1 provided for the Prosecutor to initiate an investigation in accordance with article 12 containing the checks and balances and Option 2 provided for no such prosecutorial role. During the discussions that followed many delegations spoke in favour of Option 1. However, some States indicated that more safeguards were needed. The

³⁶ UN Doc. A/AC.249/1998/WG.3/DP.1 (1998).

³⁷ UN Doc. A/AC.249/1998/DP.2 (1998).

³⁸ Preparatory Committee Decisions Aug. 1997.

³⁹ Preparatory Committee (Consolidated) Draft, 2–167. As to the checks and balances on the Prosecutor note the proposal submitted by Argentina and Germany at the last session of the Preparatory Committee in Apr. 1998 contained in UN Doc. A/AC.249/1998/WG.4/DP.35 (25 Mar. 1998). This appeared as article 13 in the Preparatory Committee Draft Statute.

⁴⁰ Wilmshurst in: Lee (ed.), *The International Criminal Court: The Making Of The Rome Statute* (1999) 131, 133.

⁴¹ See article 18 para. 1 of the Statute of the ICTY and article 17 para. 1 of the ICTR.

⁴² I Commission of Jurists, *Exercise of Jurisdiction and Complementarity*, *ICJ Brief No. 2* (June 1998) 2.

⁴³ Human Rights Watch, *Justice In The Balance* (1998) 65.

⁴⁴ Fernandez de Gurmendi in: Lee (ed.), *The International Criminal Court* (1999) 181.

⁴⁵ UN Doc. A/CONF.183/C.1/L.53.

Bureau Proposal that followed on 10 July 1998⁴⁶, replicated article 6 Option 1 with no alternative Option. It indicated as a note that additional safeguards might be added and consequently the drafting of article 6 changed. However, even though informal consultations were held on additional safeguards, new proposals were not submitted⁴⁷. In the remaining days of the Conference, there was still no consensus on the *proprio motu* role of the Prosecutor. The final package that emerged on 16 July 1998 included as article 13 the Bureau Proposal on the *proprio motu* role of the Prosecutor in conjunction with article 15.

The triggering of the Court's jurisdiction by the Security Council remained until the end a matter of controversy with 'a small but vocal minority opposing any role' for it. The provisions of the Preparatory Committee's Draft Statute concerning the Security Council were contained in article 6 para. 1 (a), article 10, and articles 6 [second] (b) and 10 of Further Option. Both article 6 and the further option for article 6 had several square brackets as to 'matters' or 'situations' being the subject of the referral and whether or not reference should be made to Chapter VII of the Charter. The majority of delegations supported the need to give the Security Council such a role as had been discussed in the negotiations leading to Rome. It 'acknowledge[d] the enforcement powers of the Council' under the Charter⁴⁸. In the Preparatory Committee the possibility of the Security Council referring specific cases to the ICC for prosecution had been rejected and the issue was whether the term 'situation' or 'matter' be inserted. Those delegations that preferred 'situation' did so because of its more general nature, rejecting 'matter' as being 'too specific for the independent functioning of the Court'⁴⁹. Both the Bureau Discussion Paper and Proposal as well as the final package used 'situation' as does article 13 (b) of the Statute as adopted. 'Situation' is also found in article 13 (a) on State Party referrals. Necessarily, once the Security Council refers a situation to the Prosecutor, the Prosecutor is independent and the Security Council cannot influence the conduct of the individual criminal prosecutions that may result.

Those delegations that had opposed any Security Council involvement had argued that it would politicize the ICC and undermine its credibility. As before Rome the arguments of inequality based on the role of the P5 was presented and that the veto would be used to stop referrals involving these States or their more indirect interests. Some objections were also presented that the Security Council lacked the capacity to refer to the ICC under the Charter. However, that argument was rejected in the context of the ability of the Security Council to create the ICTY acting under Charter VII in the case of *Prosecutor v. Dusko Tadić*⁵⁰. A similar reply was applicable to the prospective ICC. 13

B. Analysis and interpretation of elements

The ICC has jurisdiction over the criminal offences listed in article 5, namely, genocide, crimes against humanity, war crimes and the crime of aggression. These crimes are defined in articles 6, 7, 8 and *8bis*⁵¹. As far as the crime of aggression is concerned, however, the application of article 13 lit. (a) and (c) and article 13 (b) will be subject to the conditions set out in articles *15bis* and *15ter*⁵². 14

⁴⁶ UN Doc. A/CONF.183/C.1/L.59.

⁴⁷ Fernandez de Gurmendi in: Lee (ed.), *The International Criminal Court* (1999) 186-187.

⁴⁸ Yee, in: Lee (ed.), *The International Criminal Court* (1999) 147.

⁴⁹ Yee, in: Lee (ed.), *The International Criminal Court* (1999) 148.

⁵⁰ *Prosecutor v. Tadić*, No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, Trial Chamber 10 Aug. 1995. Also: *Prosecutor v. Milošević*, No. IT-02-54-T, Decision on Preliminary Motions, Trial Chamber, 8 Nov. 2001; *Prosecutor v. Kanyabashi*, No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, Trial Chamber II, 18 June 1997, para. 27.

⁵¹ RC/Res. 6, Annex I.

⁵² *Ibid.*, paras 3 and 4. See also Annex III to the same Resolution, Understandings 1 and 3.

I. Paragraph 1: State Party referral

- 15 States Parties can trigger the exercise of jurisdiction by the Court with respect to the crimes contained in article 5. There can be no *ad hoc* referrals by non-party States, even those that have made declarations pursuant to article 12 para. 3. Any State Party may refer a situation to the Court. This power is not restricted to States with a direct interest or involvement in the situation. Referral by a State Party must be done in accordance with article 14. It is worth noting that Pre-Trial Chamber I has held that

‘pursuant to articles 13 and 14 of the Statute, a State Party may only refer to the Prosecutor an entire “situation in which one or more crimes within the jurisdiction of the Court appear to have been committed”. Accordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated. In the case at hand, as the situation of crisis referred was ongoing at the time of the Referral (“situation qui se déroule dans mon pays”), the boundaries of the Court’s jurisdiction can only be delimited by the situation of crisis itself.’⁵³

II. Paragraph 2: Referral by the Security Council

- 16 Article 13 lit. b triggers the jurisdiction of the Court, but it also may create jurisdiction in the case of crimes committed on the territory of a State that has not yet joined the Court⁵⁴. Moreover, in referring the situation to the Court the Security Council can backdate the jurisdiction *ratione temporis* to any time after the entry into force of the Statute (*i.e.*, 1 July 2002)⁵⁵. The Security Council may also, acting pursuant to article 13 lit. b, trigger the jurisdiction of the Court with respect to a State that has already ratified or acceded to the Statute.

The Relationship Agreement between the United Nations and the Court makes specific provision for cooperation in the event of a Security Council referral.

- ‘1. When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.
[...]
3. Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances’.⁵⁶

⁵³ *Prosecutor v. Calliste Mbarushimana*, No. ICC-01/04-01/10-451, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, Pre-Trial Chamber I, 26 October 2011, para. 27.

⁵⁴ See, e.g., *Prosecutor v. Omar Hassan Ahmad Al Bashir* (‘*Omar Al Bashir*’), No. ICC-02/05-01/09-3, Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 40.

⁵⁵ See, e.g., *Prosecutor v. Bahr Idriss Abu Garda*, No. ICC-02/05-02/09-1, Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber I, 7 May 2009, para. 2.

⁵⁶ Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, article 17.

If it triggers the Court's jurisdiction, the Council must live within the parameters of the Statute with respect to such matters as jurisdiction. For example, it could not request that the Court consider the atrocities committed by the Khmer Rouge in Cambodia during the late 1970s because article 11 of the Statute clearly declares that the Court cannot judge crimes committed prior to the entry into force of the Statute. In such cases, the Council would be required to set up an additional *ad hoc* tribunal. For the same reason, the Council could not transfer the powers of the existing *ad hoc* tribunals to the International Criminal Court.

Whether the Security Council must also meet the other admissibility criteria and respect the principle of complementarity when it refers a situation is a matter that seems to have been intentionally left unresolved at the Rome Conference⁵⁷. Article 18 seems to imply that a Security Council referral need not meet the admissibility criteria of article 17 because it contemplates challenges based on admissibility only in the case of a State Party referral or a case based upon the Prosecutor's *proprio motu* authority. However, the Prosecutor has made it abundantly clear, in reports to the Security Council, that even a situation referred by the Council must be admissible pursuant to the provisions of article 17⁵⁸. There have been no objections from members of the Council. Most importantly, the Court has held that 'the entire legal framework of the Statute, including its complementarity and cooperation regimes, applies also in the situations following a referral by the Security Council under article 13(b) of the Statute'⁵⁹. The Court has indeed considered the admissibility of the cases arising both from Darfur, Sudan and Libya⁶⁰. In respect of the latter situation, the Appeals Chamber has confirmed a decision by Pre-Trial Chamber I according to which, pursuant to article 17 para. 1(a), the case against Abdullah Al-Senussi was declared inadmissible before the Court⁶¹.

Referral to the International Criminal Court by the Security Council of the situation in Darfur, in western Sudan, was proposed by the International Commission of Inquiry in its January 2005 report. The Commission said that resort to the International Criminal Court would have at least six major merits. First, it said that the Court was established 'with an eye to crimes likely to threaten peace and security', and that this was 'the main reason why the Security Council may trigger the Court's jurisdiction under article 13 para. b'. Second, the Commission said that investigation and prosecution of crimes perpetrated in Darfur would 'be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations'. The Commission said investigation and prosecution in the Sudan of persons with authority and prestige, who wielded control over the State apparatus, was difficult or even impossible. It said that holding trials in The Hague, 'far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions'. Third, it argued that only the authority of the Court, reinforced by that of the United Nations Security Council, 'might compel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings'. Fourth, the Commission said the

⁵⁷ Philips (1999) 10 *CLF* 61, 73.

⁵⁸ See, e.g., UN Doc. S/PV.5216, 2; UN Doc. S/PV.5321, 3; UN Doc. S/PV.5459, 4; UN Doc. S/PV.5589, 2.

⁵⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11-354, Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, Pre-Trial Chamber I, 14 June 2013, para. 20. See also e.g.: *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11-254, Decision requesting Libya to provide observations concerning the Court's request for arrest and surrender of Abdullah Al-Senussi, Pre-Trial Chamber I, 18 January 2013, para. 10.

⁶⁰ See e.g. *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11-163, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, Pre-Trial Chamber I, 1 June 2012, para. 28 and fn 34.

⁶¹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11-565, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi', Appeals Chamber, 24 July 2014. See also: *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013.

Court was best suited to ensure a 'veritably fair trial'. Fifth, the International Criminal Court could be activated immediately, as opposed to alternative mechanisms such as mixed or internationalised courts. Finally, proceedings before the Court 'would not necessarily involve a significant financial burden for the international community'⁶². The Commission said that the Sudanese justice system was unable and unwilling to address the situation in Darfur⁶³.

In March 2005, after several weeks of backroom discussions during which the United States proposed several other options in order to address impunity in Darfur, before ultimately conceding the referral, the Security Council sent the 'Situation in Darfur' to the Court. The representative of Argentina to the Security Council noted this was 'the first time that the Security Council, making use of article 13 of the Rome Statute, has referred to the Prosecutor a situation in which – according to the report, whose veracity we do not doubt – it appears that one or more types of crimes over which the Court has jurisdiction have been committed. We believe that this is undoubtedly a crucial precedent'⁶⁴. Resolution 1593 reads as follows:

'The Security Council,

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Also recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

Taking note of the existence of agreements referred to in Article 98–2 of the Rome Statute,

Determining that the situation in Sudan continues to constitute a threat to international peace and security, Acting under Chapter VII of the Charter of the United Nations,

1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;
3. Invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;
4. Also encourages the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;
5. Also emphasizes the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;
6. Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;
7. Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;
8. Invites the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;
9. Decides to remain seized of the matter.'

⁶² Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004', Geneva, 25 Jan. 2005, paras. 571–572.

⁶³ *Ibid.*, para. 586.

⁶⁴ UN Doc. S/PV.5158, 7.

Although Resolution 1593 purports to exclude jurisdiction over ‘nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court’⁶⁵, it also does so with respect to all other jurisdictions, except those of the State of nationality of the suspect. This is quite plainly contrary to treaty provisions binding upon virtually all United Nations Member States, including the United States. It is well known that the four Geneva Conventions oblige a State Party ‘to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts’⁶⁶. Similar duties are imposed by the Convention Against Torture⁶⁷.

In its statement at the time Resolution 1593 was adopted, the French representative appeared to refer to this difficulty, noting ‘that the jurisdictional immunity provided for in the text we have just adopted obviously cannot run counter to other international obligations of States and will be subject, where appropriate, to the interpretation of the courts of my country’⁶⁸. The representative of Brazil described operative paragraph 6 as ‘a legal exception that is inconsistent in international law’⁶⁹. Moreover, Denmark said:

‘We also believe that the International Criminal Court (ICC) may be a casualty of resolution 1593 (2005). Operative paragraph 6 of the resolution is killing its credibility – softly, perhaps, but killing it nevertheless. We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of the ICC under the Rome Statute once the exercise of its jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council. Nevertheless, that eventuality may well be worth the sacrifice if impunity is, indeed, ended in Darfur; if human rights are, indeed, finally *protected and promoted; and if, indeed, the rule of law there is upheld*⁷⁰.

On 26 February 2011, the UN Security Council adopted Resolution 1970, whereby it referred to the Court the situation in the Libyan Arab Jamahiriya since 15 February 2011⁷¹. This second Security Council referral adopted almost the same language of the one concerning the situation in Darfur, Sudan. As a consequence, it maintained the same flaws observed as for the former one⁷². In this respect, it should however be recalled that the Court has constantly considered that such Security Council Resolutions impose obligations only on Sudan and Libya⁷³. This means that all the other States which are not Parties to the Statute are by no means prevented from complying with their international obligations. Yet, had

⁶⁵ The provision is also similar to one included in a 2003 Security Council resolution concerning Liberia. See: UN Doc. S/RES/1497 (2003), para. 7.

⁶⁶ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (1949), article 49; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (1950), article 50; Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (1950), article 129; Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950), article 146.

⁶⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 UNTS 85, article 5.

⁶⁸ UN Doc. S/PV.5158, 8.

⁶⁹ *Ibid.*, 11.

⁷⁰ *Ibid.*, 6.

⁷¹ UN Doc. S/RES/1970 (2011).

⁷² See Stahn (2012) 10 *JICJ* 325, 328.

⁷³ *Prosecutor v. Saif-Al-Islam Gaddafi And Abdullah Al-Senussi* No. ICC-01/11-01/11-420, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, Pre-Trial Chamber I, 28 August 2013, paras. 14–15. See also *Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-162, Decision Regarding Omar Al-Bashir’s Potential Travel to the United States of America, Pre-Trial Chamber II, 18 September 2013, paras. 10–11; *Prosecutor v. Saif-Al-Islam Gaddafi And Abdullah Al-Senussi* No. ICC-01/11-01/11-477, Decision on the ‘Defence Application on behalf of Mr. Abdullah Al Senussi for Leave to Appeal against the ‘Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and Refer the matter to the Security Council’”, Pre-Trial Chamber I, 13 November 2013, para. 10; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-199, Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal Republic of Ethiopia, Pre-Trial Chamber II, 29 April 2014, paras.12–13.

such Resolutions been also addressed to other non-party States to the Statute, they might have imposed conflicting obligations upon them.

The answer to such incompatibility may lie in article 103 of the Charter of the United Nations, according to which: '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. The Court has indeed relied on this provision, together with article 25 of the UN Charter, when it has assessed the obligations upon States Parties and both Sudan and Libya to 'cooperate fully' with the Court⁷⁴.

Whatever the legality of paragraphs 6 of both Resolutions, they are most certainly incompatible with the Rome Statute⁷⁵. It should be recalled that when Uganda referred its conflict to the Court in such a way as to exclude jurisdiction over certain individuals, the Prosecutor responded with his own interpretation by which no such exception *ratione personae* could be effective⁷⁶. This is why the concept of referral in the Rome Statute relates to 'situations' rather than 'cases'. The language was adopted specifically to avoid the danger of one-sided referrals, which could undermine the legitimacy of the institution. In this respect, Pre-Trial Chamber I has affirmed that the Security Council, when referring a situation to the Court, 'has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the rules as a whole'⁷⁷. When the Security Council performed a similar manoeuvre, however, both Prosecutors were silent. They might have sent the Resolutions back telling the Security Council that it was impossible to proceed on such bases, and to reprise the adoptions without paragraphs 6.

Assuming that paragraphs 6 of both Resolutions 1593 and 1970 are illegal, the question of severability arises. If the impugned paragraphs cannot be excised from the Resolutions, then the entire referrals might be invalid. Certainly a future scenario cannot be automatically excluded whereby the Prosecutor seeks authorization to proceed with a case against an individual in a peacekeeping force who is not a national of a State Party for acts committed *e.g.* in Sudan. How could the Prosecutor rule this out at the present time? Even if the current Prosecutor were to undertake not to take such an initiative, she could not bind his successor. And this leads to the possibility that the Court might rule on the legality of paragraphs 6 – and the Resolutions as a whole – after a prosecution had already been undertaken and perhaps, even, after one had been completed. Would the Court then declare the Resolutions and the referrals to be valid, notwithstanding the offending paragraph, which it would deem inoperative? Or would it refuse to sever paragraphs 6 and conclude that the referrals as a whole were fatally flawed?

- 18 The important question of funding arises with respect to both referrals by the Security Council. In the case of tribunals formally created by the Council, it is normal that they be financed out of United Nations resources. The International Criminal Court is not a United Nations organ, and it seems unreasonable that its facilities be offered to the United Nations free of charge, so to speak. Article 115 of the Rome Statute contemplates two sources of funds for the Court, assessed contributions made by States Parties and '[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to

⁷⁴ See *e.g.*, *Prosecutor v. Omar Hassan Ahmad Al Bashir* ('Omar Al Bashir'), note 54, paras. 245–247; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11-72, Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 7 March 2012, para. 12; *Prosecutor v. Omar Hassan Ahmad Al Bashir* ('Omar Al Bashir'), No. ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014, paras 30–31.

⁷⁵ Compare with Akande (2012) 10 *JICJ* 299, 309.

⁷⁶ *Situation in Uganda*, No. ICC-02/04-01/05, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 Dec. 2005, paras. 3–4.

⁷⁷ *Prosecutor v. Omar Hassan Ahmad Al Bashir* ('Omar Al Bashir'), note 54, para. 45; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, note 59, para. 20.

the expenses incurred due to referrals by the Security Council'. But paragraph 7 of Resolution 1593 and paragraph 8 of Resolution 1970 state that 'none of the expenses incurred in connection with the referral including expenses related to investigations and prosecutions in connection with that referral, shall be borne by the United Nations'; rather, 'such costs shall be borne by the parties to the Rome Statute and those states that wish to contribute voluntarily'. When Resolution 1593 was adopted, the United States delegate said:

We are pleased that the resolution recognizes that none of the expenses incurred in connection with the referral will be borne by the United Nations and that, instead, such costs will be borne by the parties to the Rome Statute and those that contribute voluntarily. That principle is extremely important and we want to be perfectly clear that any effort to retrench on that principle by this or other organizations to which we contribute could result in our withholding funding or taking other action in response. That is a situation that we must avoid⁷⁸.

According to Professor Condorelli, '[t]he Security Council's unilateral ruling out of the provision of funds by the United Nations to the Court in connection with Darfur is thus at odds not only with the decision to refer, but also with the duty of good faith negotiations, which flows from the obligation mutually agreed upon between the ICC and the United Nations. The position of the United Nations is unlikely to be flexible on this point'⁷⁹. However, during the debate on Resolution 1593 none of the members of the Security Council took exception to the provision in question. Like most initiatives in the Security Council, the Resolution was a diplomatic conference. Those States favouring referral to the Court must have felt they had the better of the Americans, and that the poisonous paragraphs injected by the latter did not fatally compromise the referral itself.

Article 13 para. b requires that the Security Council act under Chapter VII of the Charter of the United Nations. Resolutions 1593 and 1970 specifically declare that the Council is acting under Chapter VII. There can be little doubt that the application of Chapter VII in the context of both the Darfur and the Libyan conflicts was consistent with the Charter. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has noted, 'there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of article 39 [of the Charter of the United Nations] may include, as one of its species, internal armed conflicts'⁸⁰. The Court is likely to show great deference for a determination by the Security Council that it is exercising its authority under article 39, although a challenge based upon the claim that the Council might be acting irregularly or *ultra vires* (that is, outside of its powers) cannot be excluded. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has noted, '[t]he Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be'⁸¹. In other words, the Security Council cannot refer *any* situation to the Court.

Both Prosecutors have made bi-annual reports to the Security Council on the progress, or lack of it, in implementing Resolutions 1593 and 1970⁸². This notwithstanding, the Prosecutor is under no obligation to do so pursuant to the Statute and the Security Council

⁷⁸ UN Doc. S/PV.5158, 3–4.

⁷⁹ Condorelli and Ciampi (2005) 3 *JICJ* 590, 594. See also: Fletcher and Ohlin (2006) 4 *JICJ* 428, 429–430.

⁸⁰ *Prosecutor v. Tadić*, No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, (1997) 105 I.L.R. 453, 35 *ILM* 32, para. 30.

⁸¹ *Prosecutor v. Tadić*, No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, (1997) 105 I.L.R. 453, 35 *ILM* 32, para. 28.

⁸² As for the situation in Darfur, Sudan see: UN Doc. S/PV.5216; UN Doc. S/PV.5321; UN Doc. S/PV.5459; UN Doc. S/PV.5589; UN Doc. S/PV.5687; UN Doc. S/PV.5789; UN Doc. S/PV.5905; UN Doc. S/PV.6028; UN Doc. S/PV.6135; UN Doc. S/PV.6230; UN Doc. S/PV.6336; UN Doc. S/PV.6440; UN Doc. S/PV.6548; UN Doc. S/PV.6688; UN Doc. S/PV.6778; UN Doc. S/PV.6887; UN Doc. S/PV.6974; UN Doc. 7080; UN Doc. S/PV.7199; UN Doc. S/PV. 7337. As for the situation in Libya, see: UN Doc. S/PV.6528; UN Doc. S/PV. 6647; UN Doc. S/PV. 6772; UN Doc. S/PV.6855; UN Doc. S/PV.6962; UN Doc. S/PV.7059; UN Doc. S/PV.7173; UN Doc. S/PV.7306.

‘invites’ rather than ‘orders’ the Prosecutor to present such reports. In December 2014, in her report concerning the situation in Darfur, Sudan, Prosecutor Bensouda claimed that ‘[i]t is becoming increasingly difficult for me to appear before the Council to update it when all I am doing is repeating the same things I have said over and over again, most of which are well known to the Council’⁸³. Indeed,

‘[i]n the almost 10 years that my Office has been reporting to the Council, no strategic recommendation has ever been provided to my Office, and neither have there been any discussions resulting in concrete solutions to the problems we face in the Darfur situation. We find ourselves in a stalemate that can only embolden perpetrators to continue with their brutality. As I have stated previously on many occasions, we must engage to define a new approach to the Darfur situation. That requires strategic thinking and changes from all sides. Faced with an environment where my Office’s limited resources for investigations are already overstretched, and given the Council’s lack of foresight on what should happen in Darfur, I am left with no choice but to put investigative activities in Darfur on hold as I shift resources to other urgent cases, especially those where trial is approaching. It should thus be clear to the Council that unless there is a change of attitude and approach to Darfur in the near future, there will continue to be little or nothing to report to it for the foreseeable future. The question for the Council to answer is what meaningful purpose my reporting was intended to serve and whether that purpose is being achieved’⁸⁴.

III. Paragraph 3: Independent prosecutor

- 20 The Prosecutor has the power to initiate an investigation with respect to crimes listed in article 5. The *proprio motu* power is essential to the effective functioning and independence of the ICC. Article 15 must be complied with. It is this article that provides the necessary safeguards against abuse of the prosecutorial function.

C. Conclusion

- 21 Article 13 is a vital part of the complex and interwoven jurisdictional provisions in the Rome Statute. Together with articles 11, 12, 14–19, it demonstrates the package deal nature of the negotiating process and the final product. Article 13 strikes the right balance and is of crucial importance in the establishment of an effective ICC. However, as far as the situations triggered by the UN Security Council are concerned, they relate to States not Party to the Statute, which do not ‘cooperate fully’ with the Court, in disregard of the mandatory nature of the Security Council’s decisions. At the same time, the Council does not provide for any help in terms of financial or strategic support for the purposes of implementing such Resolutions. This jeopardizes the effectiveness of the Court, whose relationship with the Security Council is in fact put at risk. In this respect, the report submitted in December 2014 by Prosecutor Bensouda is emblematic of such a contradictory relationship⁸⁵.

⁸³ UN Doc. S/PV.7337.

⁸⁴ UN Doc. S/PV.7337.

⁸⁵ UN Doc. S/PV.7337.

Article 14 Referral of a situation by a State Party*

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Other relevant provisions: Rule 45, see Annex I. Regulations 45 and 46 of the Regulations of the Court.

Literature: Akhavan, P., 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court', (2005) 99 *AJIL* 403; Akhavan, P., 'Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?', (2010) 21 *CLF* 03; Amnesty International, 'The International Criminal Court. Making the Right Choices – Part I: Defining the crimes and permissible defences and initiating a prosecution', (1997) *AI Index IOR* 40/001/97 and 'Part V: Recommendations to the diplomatic conference', (1998) *AI Index IOR* 40/010/98; Arsanjani, M.H. and Reisman, M., 'The Law-In-Action of the International Criminal Court', (2005) 99 *AJIL* 385; Bakker, C.A.E., 'Le principe de complémentarité et les "auto-saisines": un regard critique sur la pratique de la Cour pénale internationale', (2008) *RGDIP* 361; Bergsmo, M., 'The Jurisdictional Régime of the International Criminal Court' (Part II, Article 11–19), (1998) 6 *EJCLCJ* 29; Bitti, G., 'Article 53', in: Fernandez, J. and Pacreau, X. (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, ii (Pedone 2012) 1173; Bitti, G., 'Chronique Internationale: Chronique de jurisprudence de la Cour pénale internationale', (2010) 4 *RSC* 959; Buchan, R., 'The Mavi Marmara Incident and the International Criminal Court', (2014) 25 *CLF* 465; de Frouville, O., 'Article 14, Renvoi d'une situation par un État partie', in: Fernandez, J. and Pacreau, X. (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article* i (Pedone 2012) 619; El Zeidy, M.M., 'Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny', in: Stahn, C. (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015, 179); El Zeidy, M.M., 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', (2005) 5 *ICLRev* 83; El Zeidy, M.M., 'The legitimacy of withdrawing State Party referrals and ad hoc declarations under the Statute of the International Criminal Court', in: Stahn, C. and Sluiter, G. (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 55; El Zeidy, M.M., *The Principle of Complementarity in International Criminal Law* (Martinus Nijhoff 2008) 211 *et seq.* and 274 *et seq.*; European Law Students' Association and No Peace Without Justice, *Handbook on the Draft Statute for the International Criminal Court* (ELSA, the European Law Students' Association 2nd edition 1998); Gaeta, P., 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?', (2004) 2 *JICJ* 949; Gaja, G., 'Issues of Admissibility in Case of Self-referrals', in: Politi, M. and Gioia, F. (eds.), *The International Criminal Court and National Jurisdictions* (Ashgate 2008) 49; Human Rights Watch, *Justice in the Balance. Recommendations for an Independent and Effective International Criminal Court* (Human Rights Watch 1998); Kirsch, P. and Robinson, D., 'Referral by States Parties', in: Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds.), *The Rome Statute Of The International Criminal Court: A Commentary*, Vol. I (OUP 2002) 619; Kleffner, J., 'Auto-referrals and the complementarity nature of the ICC', in: Stahn, C. and Sluiter, G. (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 41; Kress, C., '"Self-Referrals" and "Waivers of Complementarity", Some Considerations in Law and Policy', (2004) 2 *JICJ* 944; Lawyers' Committee for Human Rights, *The International Criminal Court Trigger Mechanism and the Need for an Independent Prosecutor*, International Criminal Court Briefing Series 1, Vol. IV (July 1997); Maged, A., 'Withdrawal of Referrals – A Serious Challenge to the Function of the ICC', (2006) 6 *ICLRev* 419; Marchesi, A., 'Initiation of Proceedings Before the International Criminal Court', in: Lattanzi, F. (ed.), *The International Criminal Court. Comments on the Draft Statute* (Napoli: Editoriale scientifica 1998) 127; Müller, A.Th. and Stegmüller, I., 'Self-Referrals on Trial, From Panacea to Patient', (2010) 8 *JICJ* 1267; Olàsoló, H., *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff 2005); Rastan, R., 'Situation and case: defining the parameters', in: Stahn, C. and El Zeidy, M.M. (eds.), *The International Criminal Court and Complementarity. From Theory to Practice*, Vol. I (CUP 2012) 421; Rastan, R., 'The Jurisdictional Scope of Situations Before the International Court', (2012) 23 *CLF* 1; Robinson, D., 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse', (2011) 9 *JICJ* 355; Schabas, W., '"Complementarity in Practice": Some Uncomplimentary Thoughts', (2008) 19 *CLF* 5; Schabas W., 'Prosecutorial Discretion and gravity', in: Stahn, C. and Sluiter, G. (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 229;

* The views expressed herein are those of the authors alone and do not reflect the views of the International Criminal Court.

Schabas, W., 'Article 14', in: Schabas, W. (ed.), *The International Criminal Court: A Commentary on The Rome Statute* (OUP 2010) 305; Scharf, M. and Dowd, P., 'No Way Out? The Question of Unilateral Withdrawals or Referral to the ICC and Other Human Rights Courts', (2009) 9 *ChicJIL* 573; Stegmiller, I., 'The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?', (2013) 24 *CLF* 475.

Content

A. Drafting history/General remarks.....	1
B. Analysis and interpretation of elements.....	9
I. Paragraph 1.....	9
1. 'A State Party'.....	9
2. 'may refer...a situation...'	21
3. 'for the purpose of determining...'	36
II. Paragraph 2.....	38

A. Drafting history/General remarks

1 The right of States to initiate proceedings before the ICC by lodging a complaint was never questioned during the preparatory process. In fact, the first proposal on the subject introduced by the Special Rapporteur on a draft Code of Offences against the Peace and Security of Mankind limited the right of initiating proceedings to States.¹ One year later, the Special Rapporteur suggested that both States and international organizations should have the right to bring complaints before the Court.²

While the Special Rapporteur's proposals do not specify which States should be entitled to lodge complaints, the first report of the 'Working Group on the question of an international criminal jurisdiction', set up by the ILC in 1992, limits the right of complaint to 'any State party which has accepted the court's jurisdiction with respect to the offence in question' and to any 'State which has custody of the suspect and which would have jurisdiction under the relevant treaty to try the accused for the offence in its own court'.³ In article 29 of its 1993 Draft Statute, the Working Group refers to '[a]ny State Party with jurisdiction over a particular crime under the terms of an international convention and which has accepted the jurisdiction of the Court pursuant to article 23 of the Statute with respect to the crime or other State with such jurisdiction and which has accepted the jurisdiction of the Court pursuant to article 23; or any State which has accepted to the Court's jurisdiction under article 26...'.⁴

2 Article 25 of the Draft Statute that was adopted by the ILC in 1994, after having reconsidered the articles elaborated by the Working Group, reads as follows:

1. A State party which is also a Contracting party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.
2. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

¹ The Special Rapporteur submitted, as a test of opinion, the following draft provision: 'Criminal proceedings in respect of crimes against peace and security of mankind shall be instituted by States' (Ninth Report of the Special Rapporteur on a draft Code of Offences against the Peace and Security of Mankind, UN Doc. A/CN.4/435, (1991) 2 *YbILC*, Part 1).

² According to the Special Rapporteur's revised proposal, '[o]nly States and international organizations shall have the right to bring complaints before the Court' (Tenth Report of the Special Rapporteur on a draft Code of Offences against the Peace and Security of Mankind, UN Doc. A/CN.4/442, (1992) 2 *YbILC*, Part 1).

³ Report of the ILC on the Work of its Forty-Fourth Session, UN GAOR, 47th Sess., Supp. No. 10, UN Doc. A/47/10 (1992), Annex, paras. 514–516.

⁴ Report of the ILC on the Work of its Forty-Fifth Session, UN GAOR, 48th Sess., Supp. No. 10, UN Doc. A/48/10 (1993), 111–12. In 1993 the Working Group was reconvened with the specific task of elaborating a draft statute for an international criminal court.

3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.
4. In a case in which article 23(1) applies, a complaint is not required for the initiation of an investigation.⁵

Thus, unlike the Working Group's Draft, the ILC's Draft limited the right of complaint to States Parties to the Statute. The main argument in favour of this option was that the necessary cooperation of States with the Court can be legally imposed only on States Parties.⁶ Also, such a limitation could, according to the Commission, have the effect of encouraging ratifications.⁷ However, insofar as it assigned the right of complaint only to States Parties having accepted the Court's jurisdiction over the crime referred to in the complaint, it assumed a mechanism of *ad hoc* acceptance of jurisdiction. Since the Diplomatic Conference adopted a system of 'automatic' jurisdiction, the ILC's provision on State complaints was no longer viable.⁸

Being a State Party, however, is not sufficient for a State to be entitled to lodge a 3 complaint. Draft article 25 lays down the further requirement that the complainant State be a party to the 1948 Genocide Convention if the complaint concerns an alleged case of genocide; or that the complainant State has accepted the Court's jurisdiction over the crime that is the object of the complaint, if the complaint concerns any of the other crimes falling within the Court's jurisdiction. The limitation of the right to lodge complaints of genocide to States Parties to the 1948 Genocide Convention (as well as to the Statute of the Court) was the object of strong criticism ever since it was proposed. Its opponents pointed out that customary law allowed any State to try persons allegedly responsible of acts of genocide, on the basis of universal jurisdiction, and that it would therefore be inconsistent to prevent States entitled to try a person 'directly' from lodging a complaint before the ICC.⁹

Draft article 25 was discussed in the sessions of the *Ad hoc* Committee in 1995 and of the 4 Preparatory Committee in 1996, during which both extension and restriction of the categories of States entitled to lodge complaints were proposed. During the sessions of the *Ad hoc* Committee, proposals aimed at extending the possibility of lodging complaints included that States entitled to lodge a complaint concerning genocide should not be limited to States Parties to the 1948 Genocide Convention and the more far-reaching proposal that any State Party be entitled to lodge a complaint in relation to any crime falling within the Court's jurisdiction; conversely, restrictive proposals were aimed at limiting complainant States to the territorial, custodial or the national State of the victim or of the alleged perpetrator, *i. e.* to the States with a 'direct interest' in the case.¹⁰ This restrictive approach was reiterated during the 1996 sessions of the Preparatory Committee, but was strongly

⁵ 1994 ILC Draft Statute.

⁶ In 1993 'the Working Group felt that the interests of the international community in providing a universal mechanism for prosecuting, punishing and deterring international crimes wherever they occur weighed in favour of making this particular treaty institution available to all States', Report of the ILC, note 4.

⁷ Report of the Working Group on a Draft Statute for an International Criminal Court, UN Doc.A/CN.4/L.491/Rev.2/Add.2.

⁸ Acceptance of the Court's jurisdiction over the crimes listed in the Statute is in principle implicit in the ratification of the Statute. Article 124, however, allows States which ratify the Statute to opt-out from the Court's jurisdiction over war crimes for a period of seven years.

⁹ This reasoning was extended from genocide to crimes against humanity and war crimes also in a paper submitted by the delegation of Germany to the last session of the Preparatory Committee, according to which 'Under current international law, all States may exercise *universal* criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. [...] Given this background, there is no reason why the ICC [...] should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting States themselves [...]' (*The jurisdiction of the International Criminal Court. An informal discussion paper submitted by Germany*, 23 March 1998, UN Doc. A/AC.249/1998/DP.2).

¹⁰ *Ad hoc* Committee Report, 25.

opposed by those who believed that the crimes under the Statute, such as genocide, crimes against humanity and war crimes, are, in their nature, of concern to the international community as a whole.¹¹ Some delegations that spoke during the Preparatory Committee sessions favoured specific acceptance of jurisdiction for each crime falling within the Court's jurisdiction as a condition, in addition to ratification, for lodging complaints.¹²

5 At this point in the negotiations, there was also a change in terminology. During the 1996 sessions of the Preparatory Committee it was proposed, for the first time, that State complaints should in fact be understood as a State entitlement to refer 'situations', leaving to the Prosecutor the task of prosecuting individual persons suspected of having committed a crime in the context of the 'situation' concerned.¹³ This division of roles, aimed to avoid the awkwardness of States, as such, selecting individual suspected perpetrators for prosecution by the ICC, gained grounds as the negotiations progressed and ultimately found its way into the Statute.¹⁴

6 The different positions expressed during the discussions which took place in 1996 are reflected in a rather lengthy draft text which includes all the possible alternatives.¹⁵ The different options are also reflected in a later, shorter version of the draft provision, included as article 25 in the report of the August 1997 session of the Preparatory Committee. This text, which was accepted without changes as article 45 of the 'Zutphen Draft', became article 11 of the Final Draft Statute adopted by the Preparatory Committee in its April 1998 session and presented to the Rome Diplomatic Conference. The text reads as follows:

Paragraph 1

Option 1

[[A State which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948][A State Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime]] may lodge a complaint [referring a [matter] [situation] in which one or more crimes within the jurisdiction of the Court appear to have been committed to][with] the Prosecutor [alleging that [a crime of genocide][such a crime][a crime under article 5, subparagraphs [(a) to (d) or any combination thereof]] appears to have been committed][and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.]]

Option 2

[A State Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime][that has direct interest] listed under (a) to (d) below may lodge a complaint with the Prosecutor alleging that [such a crime] [a crime under article 5 [(a) to (d) or any combination thereof]] appears to have been committed:

- (a) a State on the territory of which the act [or omission] in question occurred;
- (b) a State of the custody;
- (c) a State of the nationality of the suspect;
- (d) a State of the nationality of the victims.]

¹¹ 1996 Preparatory Committee I, 34, para. 147.

¹² *Id.*, para. 148. The author of the previous commentary added that 'also, as a result of the 'complementary' nature of the ICC, any State with a specific connection with the alleged facts is in a position to fulfil its obligation to punish before any proceedings before the Court are initiated. If it does not do so, then, the international community and each of its members have an additional interest in prosecuting the crime in question', see the section on restriction of State complaints in Marchesi, in: Lattanzi (ed.), *The International Criminal Court. Comments on the Draft Statute* (1998) 127.

¹³ According to the Report 'Some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them, for this could encourage politicisation of the complaint procedure. Instead, according to these delegations, States Parties should be empowered to refer 'situations' to the Prosecutor in a manner similar to the way provided for the Security Council in article 23 para. 1. Once a situation was referred to the Prosecutor, it was noted, he or she could initiate a case against an individual. It was suggested, however, that in certain circumstances a referral of a situation to the Prosecutor might point to particular individuals as likely targets for investigation' (1996 Preparatory Committee I, 34, para. 146).

¹⁴ 'As the PrepCom negotiations continued over the years, this view gathered support, and in fact became the clearly predominant view. By the time of the Rome Conference, support for referral of situations rather than cases was sufficiently clear that the issue was hardly controversial', Kirsch and Robinson, in: Cassese et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002) 621.

¹⁵ 1996 Preparatory Committee II, 108–109.

[2. A State Party, which, for a crime under article 5 subparagraph (e), has accepted the jurisdiction of the Court pursuant to article 9 and is a party to the treaty concerned may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.]

[3. As far as possible, a complaint shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.]

[4. The Prosecutor shall notify the Security Council of all complaints lodged under article 11].⁷

During the Diplomatic Conference, trigger mechanisms were the object of considerable debate, both formal and informal. The discussion concentrated, however, mainly on the role of the SC and the powers of the Prosecutor, rather than on the referral mechanism of States. The issue of jurisdiction, which is closely connected to the initiation of proceedings by States, was also the object of difficult negotiations that lasted until the final moments of the Conference. As for State referrals as such, a provision which extends the right of referral to all States Parties to the Statute with respect to all the crimes falling within the Court's jurisdiction was adopted without much opposition in the overall context of the numerous interrelated issues being negotiated at the Diplomatic Conference.¹⁶

At the time, commentators observed that State referrals, a typical interstate trigger mechanism, may not be particularly suitable for the purpose of individual criminal justice, even when the proceedings are to take place before an international body such as the ICC. Furthermore, State referrals, according to several commentators, at most provide an *additional* means of initiation of proceedings. Certain precedents, including the failure of the interstate complaint procedure provided for by the ICCPR, indicated that Governments are not generally inclined to set off independent international inquiries into human rights violations by other Governments: consideration of human rights issues in international *fora* is tendentially limited to political bodies, such as the United Nations Commission on Human Rights, where it is frequently selective and instrumental to other aims.¹⁷ Skepticism over State complaints as a means of initiating proceedings before the Court did not however translate, during the drafting process, into any concrete proposal of eliminating State complaints.¹⁸ Rather, the main aim of those who did not believe that the system should rely entirely on a possibly ineffective and politically biased method of initiating an investigation was to ensure that the Prosecutor also be assigned *ex officio* powers of initiation of proceedings.¹⁹ As mentioned, a number of proposals were made with the aim either of extending or of further restricting the categories of States entitled to lodge complaints according to the ILC's Draft.

B. Analysis and interpretation of elements

I. Paragraph 1

1. 'A State Party'

As shown by the *travaux préparatoires*, the only requirement provided for in article 14 for States to enjoy a right of referral before the Court is that they be Parties to the Statute. None of the other additional requirements provided for either in the ILC's Draft or in the

¹⁶ One aspect concerning State complaints which was debated during the Conference was whether to maintain or delete the provision in No. 4 of Draft article 11 (article 25 of the August 1997 Draft; article 45 of the Zutphen Draft) according to which '[t]he Prosecutor shall notify the Security Council of all complaints lodged under article 11'. Conference document A/CONF.183/C.1/L.53 of 6 July 1998 maintains both options, while Conference document A/CONF.183/C.1/L.59 of 10 July 1998 no longer mentions notification to the SC.

¹⁷ See, *inter alia*, Amnesty International (1997) *AI Index IOR 40/001/97 95 et seq.* and European Law Students' Association (ed.), *Handbook on the Draft Statute for the International Criminal Court* (1998) 46.

¹⁸ It is worth pointing out that deletion of Draft article 11, but *not elimination of State complaints*, was proposed by a group of experts convened in Chicago in mid-1998, who suggested that 'the detailed provisions of this article unnecessarily encumber the Statute and [should] be moved to the Rules of Procedure and Evidence' (but not of state complaints) (*Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15 - July 17, 1998, 13ter NEP* (1998) 28).

¹⁹ See, in particular, Lawyers' Committee for Human Rights, *Court*.

restrictive proposals made during the Preparatory Committee sessions have been retained as a condition. Most importantly, no direct ‘interest’ must be demonstrated by the State referring a situation to the ICC.

- 10 Whether or not a State can be considered a State Party is to be assessed in light of the statutory provisions, in particular articles 125 and 126. The State must have ratified, accepted, approved or acceded to the Statute and the relevant instrument must have been deposited with the Secretary-General of the UN. Following the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute entered into force on 1 July 2002. For any other State ratifying, accepting, approving or acceding to the Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute enters into force ‘on the first day of the month after the 60th day following the deposit by such State’, in accordance with article 126(2). As a result, the referral will trigger the Court’s intervention for crimes which have taken place after the date the Statute entered into force for the State (article 11(2)). Should the Prosecutor intend to intervene in relation to crimes committed before that date, then the Court’s exercise of jurisdiction can only be triggered through another mechanism.
- 11 The Statute does not determine who on behalf of the State can submit the referral. To respond to this question, one may draw upon rules of international law in the context of treaty-making, as laid down in the VCLT, in particular articles 7 and 8. Article 7(1)(a) VCLT encapsulates the basic principle that a person is only considered to be representing a State or to express the consent of the State to be bound if he or she produces appropriate ‘full powers’.²⁰ The production of such powers is a ‘fundamental safeguard’ for other States (or, in our case, the Court) that this person is acting ‘with the necessary authority’.²¹ Article 7(2)(a) VCLT deviates from this principle insofar as heads of State or government or ministers of foreign affairs (*ex officio* representatives) are exempted from producing full powers as they are considered to have such powers by virtue of their official functions.²² That means that, as a matter of international law, referrals signed by any of these office-holders will be presumed having been submitted with the requisite authority on behalf of the State. Conversely, referrals signed by other persons will only be considered to bind the State if full powers have been presented.²³ Article 8 VCLT sets out the consequence of the lack of authorization and clarifies that any ‘act [...] performed by a person who cannot be considered under article 7 [VCLT] as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State’. Finally, domestic law may impact the validity of

²⁰ For the purpose of the present Convention: [...] (c) ‘full powers’ means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty’ (article 2(c) VCLT).

²¹ Aust, A., *Modern Treaty Law and Practice* (CUP 2000) 57. Alternatively, article 7(1)(b) VCLT provides that a person may act without producing full powers if ‘it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers’.

²² These three office-holders are also referred to as the ‘Big Three’, see Aust, *Modern Treaty Law and Practice* (2000) 60. This well-established rule in international law has been confirmed repeatedly by the ICJ: ‘In this connection, the Court observes that, in accordance with its consistent jurisprudence, it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments’, see *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002)*, ICJ, Judgment of 3 February 2006, ICJ Reports 2006, para 46 (with further references to previous case law); see also *Legal Status of Eastern Greenland (Denmark v. Norway)*, PCIJ, 1933, PCIJ Ser A/B No. 53, 71.

²³ As has been acknowledged by the ICJ, other officials may act on behalf of the State if the issue upon which they are acting falls under the purview of their official responsibilities and field of competence. Nevertheless, the ICJ paid due regard to the circumstances of the case before accepting the submission that the person represented the State, see *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002)*, ICJ, Judgment of 3 February 2006, ICJ Reports 2006, paras 47–48 (addressing the question whether the Minister of Justice could bind Rwanda).

the act only under very narrowly defined circumstances, namely in case the ‘violation was manifest and concerned a rule of [the State’s] internal law of fundamental importance’ (article 46(1) VCLT).²⁴ This approach, however, does not apply when the act is performed by *ex officio* representatives who are presumed beyond all dispute under international law to have authority to represent and bind the State they represent. Doubts as to the authority of the representative to lodge a referral should be clarified as soon as possible. The Prosecutor of the Court, as the receiving body of the referral instrument, will regularly have to pay heed to this point and, if need be, request verification of the power to make a referral on behalf of the State.

State Party referrals play a significant role in the Court’s operation. At the time of writing, 12 out of the ten situations referred to the ICC Prosecutor, six have been referred by States Parties pursuant to article 14 thus triggering the Court’s exercise of jurisdiction. Only two have been referred by the SC (Darfur, Sudan; Libya) and two situations have been triggered by the Prosecutor’s activation of his *proprio motu* powers (Kenya; Côte d’Ivoire). Yet, these developments were not predictable at the time when Luis Moreno Ocampo assumed his responsibilities as the Court’s first Prosecutor. In his report to the Second ASP on 8 September 2003 he alluded to his *proprio motu* powers under article 15 but expressed a clear preference for State referrals.²⁵ The referrals of the Republic of Uganda (2003) and the DRC (2004) are the result of the Prosecutor’s persistent and active efforts to receive State Party referrals.²⁶

The first referral to be received by Prosecutor Moreno Ocampo emanated from the Republic of Uganda and made reference to the “situation concerning the Lord’s Resistance Army” in northern and western Uganda.²⁷ The referral letter was dated 16 December 2003 and submitted confidentially;²⁸ receipt of the referral was publicly announced on 29 January 2004.²⁹ As to the 13

²⁴ Kovacs, P., ‘Article 7 Convention of 1969’, in: Corten, O. and Klein, P. (eds.), *The Vienna Convention on the Law of Treaties*, Vol. I (OUP 2011), para. 46.

²⁵ ‘Our role could be facilitated by a referral or active support from the DRC. The Court and the territorial State may agree that a consensual division of labour could be an effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others’ hands and yet agree to a prosecution by a Court perceived as neutral and impartial. The Office could cooperate with the national authorities by prosecuting the leaders who bear most responsibility for the crimes. National authorities with the assistance of the international community could implement appropriate mechanisms to deal with other individuals responsible. A referral or active support from African and Western countries that have taken a role in the peace process as well as other States Parties would show their commitment to the goal of putting an end to the atrocities in the region’; see Second ASP to the Rome Statute of the ICC, *Report of the Prosecutor of the ICC, Mr Luis Moreno Ocampo*, 8 September 2003 (available at <http://legal.un.org/icc/asp/aspfra.htm>).

²⁶ See the Prosecutor’s statement in the ‘Report on the Activities performed during the first three years (June 2003–June 2006)’, 7: ‘While *proprio motu* power is a critical aspect of the Office’s independence, the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court. This policy resulted in referrals for what would become the Court’s first two situations: Northern Uganda and the DRC. The method of initiating investigations by voluntary referral has increased the likelihood of important cooperation and on-the-ground support’. Questioning the legal basis for the Prosecutor to actively seek such referrals, see El Zeidy, *Principle of Complementarity* (2008) 215–216; and Kress (2004) 2 JICJ 947.

²⁷ See *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-68, Decision to convene a status conference on the investigation in the situation in Uganda in relation to the application of article 53, PTC II, 2 December 2005, para. 4 (<http://www.legal-tools.org/doc/1adaf1/>). However, the Prosecutor, in the press release ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’, 2004, ICC-20040129-44 (available on the website of the Court), made reference to crimes allegedly committed (only) in Northern Uganda.

²⁸ See, *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-68, Decision to convene a status conference on the investigation in the situation in Uganda in relation to the application of article 53, PTC II, 2 December 2005, para. 4 (<http://www.legal-tools.org/doc/1adaf1/>). The Chamber confirmed that the actual referral letter is attached as annex A to the Prosecutor’s request for a warrant of arrest against Joseph Kony and four Lord’s Resistance Army commanders, which is, however, to date not publicly accessible.

²⁹ See Press Release ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’, 2004, ICC-20040129-44 (available on the website of the Court) and Prosecutor’s Information to the

authority submitting the referral, it is noted that the information publicly available is unclear. According to PTC II, the referral letter was signed by the Attorney-General of the Republic of Uganda.³⁰ The Prosecutor, in turn, stated, in a press release dated 29 January 2004, that ‘President Yoweri Museveni took the decision to refer the situation’ to the Court.³¹ A few months later, he informed the Presidency that his office had ‘received a referral from the government of Uganda’.³² Despite these inconsistencies, it seems that the Prosecutor at the time was satisfied that the referral letter was lodged by an authority having full powers to do so.

At the time of the referral, the Republic of Uganda was a State Party. It had signed the Statute on 17 March 1999 and had deposited its instrument of ratification on 14 June 2002. Accordingly, for Uganda, the Statute entered into force on 1 September 2002, pursuant to article 126(2). This means that the referral could only trigger the Court’s exercise of jurisdiction in relation to crimes committed after the Statute entered into force for Uganda, *i. e.* as of 1 September 2002. Uganda, however, sought the Court’s intervention in response to crimes allegedly committed as of 1 July 2002. With a view to closing the two-month gap, Uganda lodged, at the same time, an *ad hoc* declaration under article 12(3), as provided for under article 11(2), thus extending the temporal jurisdiction back to 1 July 2002.³³ After having concluded the preliminary examination, the Prosecutor decided, on 29 July 2004, to open an investigation into the situation.³⁴

- 14 The second referral was submitted by the Democratic Republic of the Congo (DRC), a State Party to the Statute since 1 July 2002. The referral letter was dated 3 March 2004 and submitted confidentially³⁵; receipt of the referral was publicly announced on 19 April 2004.³⁶ The referral letter was signed by the President of the DRC, Joseph Kabila, who outlined the situation as ‘qui se déroule dans mon pays depuis le 1^{er} juillet 2002, dans laquelle il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis’.

Presidency dated 17 June 2004 as annexed to *Situation in Uganda*, ICC-02/04-1, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, Presidency, 5 July 2004 (<http://www.legal-tools.org/doc/b904bb/>). On 29 January 2004, the Prosecutor held a press conference with the President of the Republic of Uganda in London.

³⁰ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-68, Decision to convene a status conference on the investigation in the situation in Uganda in relation to the application of article 53, PTC II, 2 December 2005, para. 4 (<http://www.legal-tools.org/doc/1ada1f/>).

³¹ See Press Release ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’, 2004, ICC-20040129-44 (available on the website of the Court).

³² Prosecutor’s Information to the Presidency dated 17 June 2004 as annexed to *Situation in Uganda*, No. ICC-02/04-1, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, Presidency, 5 July 2004 (<http://www.legal-tools.org/doc/b904bb/>). As soon as the Prosecutor receives a referral by a State Party, he or she shall inform the Presidency in writing, pursuant to regulation 45 of the Regulations of the Court. Subsequently, the Presidency assigns the situation to an existing PTC or constitutes a PTC to which it assigns the situation pursuant to regulation 46 of the Regulations of the Court. The assignment of the situation number is effectuated by the Registry according to regulation 27 of the Regulations of the Registry. The situation carries the number ICC-02/04 (being the second referral accepted in 2004) and is currently assigned to PTC II.

³³ Prosecutor’s Information to the Presidency dated 17 June 2004 as annexed to *Situation in Uganda*, No. ICC-02/04-1, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, Presidency, 5 July 2004 (<http://www.legal-tools.org/doc/b904bb/>) (‘In addition to the referral, the government of Uganda has made a declaration under article 12, paragraph 3, of the Rome Statute, accepting the jurisdiction of the Court as of the entry into force of the Rome Statute, and hence, temporal jurisdiction extends back to 1 July 2002’). See also *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, PTC II, 27 September 2005, para. 32 (<http://www.legal-tools.org/doc/b1010a/>).

³⁴ See OTP Press Release ‘Prosecutor of the International Criminal Court opens an investigation into Northern Uganda’, 2004, ICC-OTP-20040729-65 (available on the website of the Court).

³⁵ The referral letter of the DRC is contained in annex A1 to *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-32-AnxA1, Submission of Formatted and Redacted Documents, Office of the Prosecutor, 12 March 2006 (notification date) (<http://www.legal-tools.org/doc/d22114/>).

³⁶ See OTP Press Release ‘Prosecutor receives referral of the situation in the Democratic Republic of Congo’, 2004, ICC-OTP-20040419-50 (available on the website of the Court); *Situation in the Democratic Republic of Congo*, ICC-01/04-1, Decision Assigning the Situation in the Democratic Republic of the Congo to Pre-Trial Chamber I, Presidency, 5 July 2004 (<http://www.legal-tools.org/doc/218294/>).

After having concluded the preliminary examination, the Prosecutor decided, on 23 June 2004, to open an investigation into the situation.³⁷ It was the Court's first investigation.

The third referral stems from the Central African Republic (CAR), a State Party to the Statute since 1 July 2002. The CAR referral letter was dated 18 December 2004³⁸ and was signed by a duly authorised representative of then CAR President François Bozizé.³⁹ It is reported that the referral involves crimes under the jurisdiction of the Court 'committed anywhere on the territory of the Central African Republic since 1 July 2002'.⁴⁰ Upon concluding the preliminary examination, the Prosecutor decided to open an investigation into the situation on 22 May 2007.⁴¹

The fourth referral was submitted by the Republic of Mali, a State Party since 1 July 2002. The referral letter is dated 18 July 2012 and signed by the State's Minister of Justice.⁴² It is noted that the Prosecutor appears to have accepted that the referral was made on behalf of the Malian government.⁴³ In the referral, the Republic of Mali makes reference to the commission of crimes against humanity and war crimes which have been committed 'depuis le mois de Janvier 2012 sur son territoire', asking the Prosecutor to 'déterminer si une ou plusieurs personnes identifiées devraient être accusées des crimes'. Upon conclusion of the preliminary examination, the Prosecutor decided to open the investigation into the situation on 16 January 2013.⁴⁴

The fifth referral was submitted by the Union of the Comoros, a State for which the Statute had entered into force on 1 November 2006.⁴⁵ The letter of referral, dated 14 May 2013, was signed by two Turkish lawyers.⁴⁶ They presented a power of attorney given by the State's Minister of Justice who authorized them to represent the Union of the Comoros before the ICC.⁴⁷ In her notification to the Presidency, the Prosecutor expressed her acceptance inasmuch as she referred to the lawyers as 'legal representatives of the Government of the Union of the Comoros'.⁴⁸ The 14 May 2013 referral letter made reference to crimes allegedly

³⁷ See OTP Press Release 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', 23 June 2004, ICC-OTP-20040623-59 (available on the website of the Court). The situation carries the number ICC-01/04 (being the first referral accepted in 2004) and is currently assigned to PTC I.

³⁸ The actual referral letter is attached as annex 1A to the Prosecutor's further submission of information to the request for a warrant of arrest against Jean-Pierre Bemba Gombo, see *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-739, Prosecution's Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo pursuant to Articles 17 and 19(2)(a) of the Rome Statute, OTP, 29 March 2010, paras 6 *et seq.* (<http://www.legal-tools.org/doc/a5e670/>). The referral letter is to date not publically accessible.

³⁹ Prosecutor's Information to the Presidency dated 22 December 2004 as annexed to *Situation in the Central African Republic*, ICC-01/05-1, Decision assigning the situation in the Central African Republic to Pre-Trial Chamber III, Presidency, 19 January 2005 (<http://www.legal-tools.org/doc/5532e5/>).

⁴⁰ *Ibid.* See also OTP Press Release 'ICC – Prosecutor receives referral concerning Central African Republic', 7 January 2005, ICC-OTP-20050107-86 (available on the website of the Court).

⁴¹ See OTP Press Release 'Prosecutor opens investigation in the Central African Republic', 22 May 2007, ICC-OTP-20070522-220 (available on the website of the Court). The situation carries the number ICC-01/05 (being the first referral submitted in 2005) and is currently assigned to PTC II (previously PTC III).

⁴² See *Situation in the Republic of Mali*, ICC-01/12-1-Anx, Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II, Presidency, 19 July 2012 (<http://www.legal-tools.org/doc/793de5/>).

⁴³ OTP, *Situation in Mali. Article 53(1) Report*, 16 January 2013, para. 2 ('On 18 July 2012, the Malian Government referred "the Situation in Mali since January 2012" to the ICC').

⁴⁴ OTP, *Situation in Mali. Article 53(1) Report*, 16 January 2013; OTP Press Release 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"', 16 January 2013, ICC-OTP-20130116-PR869 (available on the website of the Court). The situation carries the number ICC-01/12 (being the first referral submitted in 2012) and is currently assigned to PTC I (previously PCT II).

⁴⁵ The Union of the Comoros had signed the Statute on 22 September 2000 and subsequently deposited its ratification instrument of the Statute on 18 August 2006.

⁴⁶ *Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-1-Anx1, Decision assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I, Presidency, 5 July 2013, p. 2 (<http://www.legal-tools.org/doc/d5e455/>).

⁴⁷ *Ibid.*, 20.

⁴⁸ Prosecutor's Information to the Presidency dated 26 June 2004 contained in *Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-1-Anx2, Decision Assigning

committed in international waters during the raid by the Israeli Defense Forces on the Humanitarian Aid Flotilla ('Gaza Freedom Flotilla'), bound to Gaza. The Gaza Freedom Flotilla, which had departed from the Republic of Turkey, consisted of eight vessels in total, six of which were purportedly attacked on 31 May 2010; a seventh vessel was attacked on 6 June 2010. It was submitted that the majority of the crimes ('nine victims were killed on board and more than dozens were seriously injured')⁴⁹ had taken place on the vessel MV Mavi Marmara, registered in the Union of the Comoros. Two other vessels were registered to the Hellenic Republic and the Kingdom of Cambodia. Bearing in mind the jurisdictional parameters to be assessed under article 53(1)(a), the Prosecutor deemed it necessary to receive further clarifications regarding the scope of the referral. As regards the territorial jurisdiction, the Prosecutor enquired whether the referral concerned only the MV Mavi Marmara vessel carrying the Comoros flag or also other flotilla vessels bearing State Party flags. As regards the temporal jurisdiction, the Prosecutor sought information as to whether the referral also encompassed the 6 June 2010 incident. In relation to the temporal scope of the referral, the Union of the Comoros responded that its referral encompasses 'all other crimes flowing from this initial incident [*i.e.* the Flotilla raid on 31 May 2010] including crimes committed on 6 June 2010 and onwards'.⁵⁰ In terms of territorial scope, the Union of the Comoros clarified that the referral also 'encompasses other flotilla vessels bearing State Party flags in addition to the Mavi Marmara'.⁵¹

The latter clarification puts a spotlight on a noteworthy detail: a State Party, for the first time in the history of the ICC, referred a situation to the Court involving potential crimes that have occurred not only on its territory or, as in the present case, on board of a vessel registered to that State (commonly referred to as 'self-referral'); but also the alleged crimes that occurred on board of vessels registered to other State Parties, the Hellenic Republic and the Kingdom of Cambodia, which did not lodge a referral nor officially joined the Union of the Comoros in their referral initiative. Given the fact that the Court's activities hitherto had been triggered by 'self-referrals' (*i.e.* referrals of the territorial State), this type of referral to date is an exceptional novelty. Upon conclusion of the preliminary examination, the Prosecutor decided not to open an investigation into the situation.⁵²

the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I, Presidency, 5 July 2013 (<http://www.legal-tools.org/doc/d23b51/>). The situation carries the number ICC-01/13 (being the first referral submitted in 2013) and is currently assigned to PTC I.

⁴⁹ *Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-1-Anx1, Decision assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I, Presidency, 5 July 2013, 3 and 5 (<http://www.legal-tools.org/doc/d5e455/>). The Union of the Comoros also submitted that, in addition to the nine victims killed, 'more than 600 civilians from more than thirty countries on board of the Gaza flotilla were victimized by the conduct of the [Israeli Defense Forces]', *ibid.*, 9.

⁵⁰ *Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-1-Anx2, Decision assigning the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia to Pre-Trial Chamber I, Presidency, 5 July 2013, 2 (First letter dated 29 May 2013) (<http://www.legal-tools.org/doc/d23b51/>).

⁵¹ *Ibid.*, 3 (Second letter dated 21 June 2013).

⁵² OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia. Article 53(1) Report*, 6 November 2014, filed in the situation record under No. ICC-01/13-6-AnxA (<http://www.legal-tools.org/doc/6b833a/>); OTP Press Release 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met"', 6 November 2014. Even though the Prosecutor concluded that there was a reasonable basis to believe that war crimes (but not crimes against humanity) had been committed, at least in the context of the interception and takeover of the Mavi Marmara vessel by the Israeli Defense Forces, she considered that the potential cases arising from an investigation into the situation 'would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute', see OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia. Article 53(1) Report*, 6 November 2014, 59-60. Upon notification of the Prosecutor's decision (rule 105(1)), the referring State submitted a request to PTC I with a view to reviewing the Prosecutor's decision not to initiate an investigation (article 53(3)(a), rule 107). Upon review, PTC I, by majority, requested the Prosecutor to reconsider her decision, *Situation on Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*,

Another point worthy of attention in the fifth referral letter was Comoros' mentioning that the ICC 'will also have jurisdiction over this matter if it decides to accept the declaration made by the Palestinian Authority under Article 12(3) of the Rome Statute in January 2009', as the Flotilla raid is 'directly linked to the Gaza situation'.⁵³ It is recalled that prior to receiving the Comoros referral, on 3 April 2012, former Prosecutor Moreno Ocampo had declined to make a legal determination as to the qualification of Palestine as a State for the purpose of lodging a declaration under article 12(3).⁵⁴ Consequently, the Prosecutor did not proceed upon the *ad hoc* declaration by the Palestinian Authority.⁵⁵ The scenario raised by the Comoros referral begs the question as to what are the effects of a referral if the Court's jurisdiction for the events in question was already triggered previously by another mechanism. Should the events for which the Court's intervention is sought coincide or be linked, then the Prosecutor may proceed on the basis which first triggered the Court's jurisdiction.

The sixth referral emanates from the CAR which already had referred a situation to the Court in 2004. Violence erupted again on CAR territory in late 2012 prompting the ICC Prosecutor, Fatou Bensouda, to make three statements in relation to the events at the time.⁵⁶ Eventually, on 7 February 2014, the Prosecutor announced the opening of a new preliminary examination of the allegations of crimes on CAR territory since 1 September 2012, which appeared to fall under the jurisdiction of the Court.⁵⁷ The Prosecutor's *proprio motu* initiative was based on her analysis of reports available to her and she indicated that she

No. ICC-01/13-34, Decision on request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, PTC I, 16 July 2015 (<http://www.legal-tools.org/doc/2f876c/>); the partly dissenting opinion is registered under No. ICC-01/13-34-Anx-Corr (<http://www.legal-tools.org/doc/0fceb2/>). The Prosecutor appealed the PTC I decision. Prior to the Prosecutor's decision in November 2014, one commentator had argued that all article 53(1) requirements, including the gravity test, were met, see Buchanan (2014) 25 *CLF* 465.

⁵³ *Ibid.*, 6–7.

⁵⁴ On 22 January 2009, the Palestinian Authority had lodged a declaration under article 12(3) accepting the exercise of jurisdiction of the Court for 'acts committed on the territory of Palestine since 1 July 2002'. On 3 April 2012, the former ICC Prosecutor rendered his decision, stating that for the purpose of interpreting article 12, 'it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determinations whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term "State" under article 12(3) which would be at variance with that established for the purpose of article 12(1)'; see OTP, 'Update on Situation in Palestine', 3 April 2012 (available on the website of the Court). In a later statement, Prosecutor Fatou Bensouda added that the 'Office of the Prosecutor of the ICC has never been in a position to open an investigation for lack of jurisdiction (...)'. Indeed, she confirmed that the jurisdiction over the situation in Palestine had not been triggered yet ('The Office's approach to Palestine will be no different if the Court's jurisdiction is ever triggered over the situation.'). See OTP Press Release 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: "The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine"', 2 September 2014 (available on the website of the Court). For a critical analysis of Palestine's *ad hoc* declarations, see El Zeidy, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015).

⁵⁵ In light of the 2012 decision of the Prosecutor, it can only be speculated why the Union of the Comoros took this position. Perhaps the referring State was of the view that the 2009 *ad hoc* declaration had not lost its validity but was considered to become 'operative' at a later stage. Indeed, this moment arrived with the adoption of GA Res. 67/19 of 29 November 2012 (UN Doc A/RES/67/19), granting Palestine the status of a 'non-member observer State' in the UN. The question of whether the 2009 *ad hoc* declaration was still valid became moot with Palestine's accession to the Rome Statute and the lodging of a new *ad hoc* declaration under article 12(3) which backdated the Court's potential intervention to events having taken place 'in the occupied Palestinian territory, including East Jerusalem' as of 13 June 2013 without making any reference any longer to the first *ad hoc* declaration, see 'Declaration Accepting the Jurisdiction of the International Criminal Court', dated 31 December 2014 and signed by President of the State of Palestine, Mahmoud Abbas (declaration available on the website of the Court).

⁵⁶ See OTP Press Releases 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to situation in Central African Republic', 22 April 2013; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to situation in Central African Republic', 7 August 2013; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to the escalating violence in the Central African Republic', 9 December 2013 (all statements available on the website of the Court).

⁵⁷ See OTP Press Release, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic', 7 February 2014 (available on the website of the Court).

would ‘[engage] with the CAR authorities with a view to discussing ways and means to bring perpetrators to account, including at the national level’. Perhaps as a result of those discussions, the CAR presented its second referral to the Court on 30 May 2014, requesting the Court’s intervention for the events that have taken place on its territory since 1 August 2012.⁵⁸ The referral letter was signed by incumbent CAR President Catherine Samba Panza who defined the situation in general terms as follows:

‘Depuis au minimum le mois d’août 2012, avec l’apparition et le développement de différents groupes armés sur le territoire national, des crimes parmi les plus graves ont été commis à Bangui et dans le reste du pays tels que des meurtres, des viols et autres violences sexuelles, des actes de pillages, des déplacements, forces de populations et autres’.

Upon conclusion of the preliminary examination already underway at the time of the referral, the Prosecutor decided to open an investigation into the situation CAR II on 24 September 2014.⁵⁹

- 19 All of the above referrals are examples of what is commonly referred to as ‘self-referrals’.⁶⁰ Their permissibility under articles 13(a) and 14 is discussed controversially in academic writings. The arguments advanced pertain, *inter alia*, to the drafters’ intention at the time,⁶¹ the compatibility of such practice with the States’ obligation to prosecute domestically international crimes (para. 6 of the Preamble of the Statute),⁶² and other practical consequences and policy considerations.⁶³
- 20 Not only the Prosecutor, but also the Judges of the Court seem to have accepted the practice of ‘self-referrals’ as such without raising any critical questions. Indeed, PTC I in the *Lubanga* case, albeit in the context of admissibility, embraced the concept of ‘self-referrals’ and declared it to be ‘consistent with the ultimate purpose of the complementarity regime’.⁶⁴ In its decision on admissibility of 10 March 2009, PTC II in the *Kony et al* case did not address this matter.⁶⁵ Equally, the AC in the admissibility proceedings in the *Katanga/Ngudjolo* case did not cast a critical eye on the practice of ‘self-referrals’. But with the following sentence it may have implied to open the discussion at an appropriate later stage:

⁵⁸ *Situation in the Central African Republic II*, No. ICC-01/14-1-Anx1, Decision assigning the situation in the Central African Republic II to Pre-Trial Chamber II, Presidency, 18 June 2014 (<https://www.legal-tools.org/doc/9304eb/>).

⁵⁹ OTP, *Situation in the Central African Republic II. Article 53(1) Report*, 24 September 2014; OTP Press Release, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic’, 24 September 2014, ICC-OTP-20140924-PR1043 (available on the website of the Court). The situation carries the number ICC-01/14 (being the first referral rebutted in 2014) and is currently assigned to PTC II.

⁶⁰ In relation to the referral of the Union of the Comoros, the referral captures also the vessel of other States Parties which had not joined the referral or otherwise referred the (same) situation to the Court, see mn 17.

⁶¹ See, for example, Schabas, in: Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (2012) 311; Arsanjani and Reisman (2005) 99 *AJIL* 386–387; arguing against such an interpretation of the drafting history, Robinson (2011) 9 *JICJ* 355.

⁶² See a discussion in El Zeidy, *Principle of Complementarity* (2008) 220–221; Kress (2004) 2 *JICJ* 945–946. Both authors propose, having regard to the ultimate goal of preventing impunity, that the States be accorded the choice to seize the Court with a referral. Referring in agreement to the interpretation put forth by those two authors, the AC in the *Katanga/Ngudjolo* case confirmed: ‘Moreover, there may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the “duty to exercise [its] criminal jurisdiction”, as envisaged in the sixth paragraph of the Preamble’, see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-1497 (OA 8), Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, AC, 25 September 2009, para. 85 and footnote 179 (<http://www.legal-tools.org/doc/ba82b5/>).

⁶³ See, for example, Gaeta (2004) 2 *JICJ* 949; Arsanjani and Reisman (2005) 99 *AJIL* 385; El Zeidy, *Principle of Complementarity* (2008) 222; Kress (2004) 2 *JICJ* 948; de Frouville, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article* (2012) 628–629.

⁶⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, PTC I, 10 February 2006, para. 35 (<http://www.legal-tools.org/doc/c60aaa/>).

⁶⁵ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-377, Decision on admissibility of the case under article 19(1) of the Statute, PTC II, 10 March 2009 (<http://www.legal-tools.org/doc/44f5b3/>).

‘[T]he Appeals Chamber is mindful that the Court, acting under the relevant provisions of the Statute [i. e. article 17(1)(c) and (d), article 19(1), and article 53] and depending on the circumstances of each case, may decide not to act upon a State’s relinquishment of jurisdiction in favour of the Court’ (emphasis added).⁶⁶

2. ‘may refer... a situation...’

Any State Party is free to refer a situation to the Court; the entitlement to refer a situation is not reserved for a particular category of States (‘a’ State Party).⁶⁷ The Statute also does not establish an obligation on the State Party to justify its motives for doing so. Under the Statute, State Party referrals are on a par with SC referrals⁶⁸ but differ on one important point: while the SC is called upon to refer situations to the Prosecutor ‘acting under Chapter VII of the Charter of the United Nations’ (i. e. only situations involving a threat to international peace and security), States Parties may refer any situation ‘in which one or more crimes within the jurisdiction of the Court appear to have been committed’, without there being a threat to international peace and security.

The referral is a written declaration⁶⁹ by way of a unilateral act that has binding effects.⁷⁰ As a consequence, it requires the Prosecutor to consider its content in the framework of a preliminary examination without, however, obligating him or her to actually opening an investigation.⁷¹ During the preliminary examination, the Prosecutor evaluates the information made available and assesses whether the criteria under article 53(1)(a)-(c) are met. At the end of this process, the Prosecutor makes a determination as to whether an investigation should be initiated. Should the determination be in the negative, the Prosecutor will inform the referring State⁷² which, in turn, may request a review of the Prosecutor’s determination.⁷³ In case the Prosecutor makes an affirmative determination, he or she will initiate the investigation.⁷⁴ As can be seen, the referral itself only *prompts* the Prosecutor to look into a

⁶⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497 (OA 8), Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009, para. 85 (<http://www.legal-tools.org/doc/ba82b5/>).

⁶⁷ See also Kirsch and Robinson, in: Cassese et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol I (2002) 622–623.

⁶⁸ The activation of the Prosecutor’s *proprio motu* investigative powers requires that authorization be given first by the PTC, in accordance with article 15(4). No such judicial intervention is required following a State or SC referral. In relation to the crime of aggression, the Prosecutor may only open an investigation into that crime, following a State party referral, if the Pre-Trial Division has authorised such investigation, unless the SC has previously made a determination of an act of aggression (article 15*bis*). In this regard, the State Party referral is treated similar to the Prosecutor’s *proprio motu* initiative in respect to other article 5 crimes.

⁶⁹ Rule 45 imposes the written form (‘A referral of a situation to the Prosecutor shall be in writing’) but does not ask for a particular type of document. Thus, given the clear wording of rule 45, a situation cannot be referred orally to the Prosecutor.

⁷⁰ ‘When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding’, see *Nuclear Tests Case (Australia v. France)*, ICJ Reports 1974, Judgment of 20 December 1974, ICJ, para. 43. In the case of article 14, the binding nature of the referral is to activate the Court’s operation in relation to the situation at hand.

⁷¹ See also regulation 25 of the Regulations of the Office of the Prosecutor (‘The preliminary examination and evaluation of a situation by the Office [of the Prosecutor] may be initiated on the basis of: [...] (b) a referral from a State Party or the Security Council’ (emphasis added)). Given the clear language employed in article 53(1) and rule 104 (‘shall’), the use of the word ‘may’ in regulation 25 of the Regulations of the Office of the Prosecutor must be understood as permissive in nature. It does not grant the Prosecutor discretion. The Statute, which must be applied in the first place (article 21(1)(a)), is determinative on this question.

⁷² Rule 105(1) and (3).

⁷³ Article 53(3)(a). See the request for review submitted by the Union of the Comoros on 29 January 2015.

⁷⁴ The initiation of the investigation is publicly announced by way of a press release. In recent years, the Court’s second Prosecutor, Fatou Bensouda, publishes an *Article 53(1) Report* in which she details her assessment of the preliminary examination under article 53(1)(a)-(c) and informs the general public of her conclusion.

particular set of events; it aims at *activating* international investigative and prosecutorial activities of the Prosecutor's Office but does not anticipate the Prosecutor's final determination under article 53(1). Whether or not (or to what extent) the Prosecutor will investigate, is a question to be determined by the ICC Prosecutor, subject to the PTC's article 53(3) review powers.⁷⁵

- 23 The referral, once submitted to the Prosecutor, is binding insofar as it definitely requires the Prosecutor to act. To what extent, if any, the referral can be unilaterally withdrawn by the referring State is nowhere regulated in the statutory documents. As the Court was never confronted with such a scenario, it is of no surprise that to date no case law exists addressing this question. Whether or not this avenue is open to referring States has been discussed in scholarly writings. Those arguing against such a possibility emphasize that it would be incompatible with the procedural regime established in the Statute and contravene the object and purpose of the Statute.⁷⁶ Indeed, the referral produces legal consequences in that it activates the Court's operation in a particular situation. Once the referral is unilaterally pronounced, the State Party has no means to stop the process it set off. By the same token, any later amendment of a referral by the State (*e.g.* imposing an end-date for the referral) may prove to be inadmissible if it is aimed at influencing the Prosecutor's prosecutorial choices and excluding certain individuals from the Court's reach.⁷⁷
- 24 The referral is addressed to the Prosecutor who acknowledges receipt. Subsequently, the Prosecutor may seek further clarifications and, for example, enquire into the requisite authority of the submitting person or the scope of the referral.⁷⁸ As soon as the situation has been referred to the Prosecutor, he or she shall inform the Presidency about it.⁷⁹ Thereafter, the Presidency shall assign the situation to a newly constituted or existing PTC.⁸⁰ The assignment of the situation to a PTC does not signify the initiation of judicial proceedings. Rather, it ensures that questions, for which judicial intervention may be required at this stage, can be brought before a Chamber.⁸¹
- 25 The subject-matter of a referral is a 'situation in which one or more crimes within the jurisdiction of the Court appear to have been committed'. The term 'situation' is nowhere defined in the Statute. As mentioned before, the drafters of article 14 clearly preferred the notion 'situation' so as to prevent States from referring specific crimes or cases against specific suspects and thus use the Court for political agendas.⁸² Hence, the 'situation' set out

⁷⁵ By the same token, the chapeau of article 13 is cautiously phrased ('The Court *may* exercise its jurisdiction (...)')(emphasis added)).

⁷⁶ Arguing against a possibility of withdrawal, see, for example, El Zeidy, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 55; Müller and Stegmüller (2010) 8 *JICJ* 1290 *et seq*; de Frouville, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article* (2012), 640–642; Ambos, *Internationales Strafrecht* (2014) § 8 mn 17 (case 1); arguing in favour of allowing the State to withdraw its referral, at least within a very narrow temporal window, see Scharf and Dowd (2009) 9 *ChicJIL* 573; and Maged, (2006) 6 *ICLRev* 419, who advocates for an amendment of the Rules.

⁷⁷ One may argue, however, that any negative consequences of amendments by the State may be circumvented by the Prosecutor by invoking his or her article 15 powers.

⁷⁸ See, for example, the clarifications sought by the Prosecutor from the Union of the Comoros, mn 17.

⁷⁹ Regulation 45 of the Regulations of the Court; regulation 25(2) of the Regulations of the Office of the Prosecutor.

⁸⁰ Regulation 46 of the Regulations of the Court.

⁸¹ For example, the taking of statements at the seat of the Court during the preliminary examination phase pursuant to rule 104(2) in conjunction with rule 47. The PTC assigned with the situation remains the competent Chamber for all (pre-trial) cases emanating therefrom. Regulation 46(2) of the Regulations of the Court foresees that upon request of a presiding judge of a pre-trial chamber, 'the President of the Pre-Trial Division may decide to assign a matter, request or information arising out of that situation to another Pre-Trial Chamber in the interests of the administration of justice'.

⁸² Concerns had been expressed at the time that the referring State should not be able to 'limit the referral to include crimes committed by one side to a conflict in a situation (...) or restrict the nationality of those who can be investigated and prosecuted. (...) [R]ather, [t]he prosecutor must be free to investigate all persons who may be responsible for crimes within the court's jurisdiction in a situation', note 17, Amnesty International (1997) *AI Index IOR* 40/001/97 34.

in the referral may not be so specific so as to pinpoint to a specific person or group of persons or indicate specific crimes.⁸³ What can be inferred from the above is that the concept of a 'situation' must be understood in a generic and broad fashion: a description of facts, defined by space and time, which circumscribe the prevailing circumstances at the time ('conflict scenario').⁸⁴ The prevailing circumstances or conflict scenario establish the broader context *in which* 'one or more crimes within the jurisdiction of the Court appear to have been committed'. A 'crime' refers to the legal definition of a criminal behavior; the crimes within the jurisdiction of the ICC are listed in article 5 (jurisdiction *ratione materiae*). Accordingly, the State Party in the referral will regularly set out its own assessment as to whether one or more crimes pursuant to article 5 appear to have been committed.⁸⁵ Considering that the referral does not bind the Prosecutor in the article 53(1) determination, it is not necessary that the State Party present a comprehensive and in-depth legal analysis covering all crimes.⁸⁶ As the requirement 'within the jurisdiction of the Court' suggests, this assessment may also encompass all other jurisdictional facets.⁸⁷ To what extent the situation fits in the jurisdictional regime of the Statute will be determined by the Prosecutor (article 53(1)) and, ultimately, by the Judges (article 19(1)). The State Party is free to analyse the jurisdictional prerequisites and present its own conclusions. In fact, it is most likely that the referring State will have conducted a first analysis prior to referring the situation. Yet, the assessment of those prerequisites, even less their correct determination, is not a *conditio sine qua non* ingredient for lodging the referral.⁸⁸

The referring State's own assessment at this stage must not meet exacting standards. The Statute stipulates that the crimes only 'appear to have been committed'. While the term 'appear' lacks statutory definition, guidance may be found in jurisprudence of the Court

⁸³ Depending on the circumstances, the mentioning of specific crimes or specific perpetrators may be unavoidable. Such information assists the Prosecutor in identifying potential targets of the investigation. But this information will not restrict the Prosecutor in his or her prosecutorial choices targeting one or more individuals.

⁸⁴ The information could also refer to the State's own nationals who appear to have committed crimes. Should the Prosecutor intend to go beyond the factual boundaries of the scenario encompassed in the referral, he or she must invoke the *proprio motu* powers under article 15.

⁸⁵ In the jurisprudence of the Court, the component 'one or more crimes (...) have been committed' has been interpreted broadly so as to encompass also future crimes (*i. e.* crimes which had not occurred at the time of the State referral), as long as a nexus is established between the future crime(s) and the situational scope underlying the State referral at the time, see *infra* mn 33.

⁸⁶ Referring States have treated this aspect of the referral quite differently. Examples range from setting out a catalogue of specific crimes which, in the view of the State concerned, appear to have been committed, such as murder, rape, pillaging, *etc.* (see referrals of the Republic of Mali or CAR [in relation to CAR II]) to making reference only to the Statute without any further specification (see the DRC referral in which reference is made merely to the '*crimes relevant de la compétence de la Cour Pénale Internationale*'). As can be seen, the minimalist approach adopted by the DRC (which essentially repeated the text of article 14) was not considered by the Court to impact the validity of the referral.

⁸⁷ In its judgment of 14 December 2006, the AC held: '[t]he notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction – jurisdiction *ratione loci* – and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute. The jurisdiction of the Court is laid down in the Statute: Article 5 specifies the subject-matter of the jurisdiction of the Court, namely the crimes over which the Court has jurisdiction, sequentially defined in articles 6, 7, and 8. Jurisdiction over persons is dealt with in articles 12 and 26, while territorial jurisdiction is specified by articles 12 and 13(b), depending on the origin of the proceedings. Lastly, jurisdiction *ratione temporis* is defined by article 11; see *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-772 (OA 4), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, AC, 14 December 2006, paras 21–22 (<http://www.legal-tools.org/doc/1505f7/>).

⁸⁸ Another commentator, however, interprets article 14(2) to impose a stricter verification exercise as to the jurisdictional prerequisites. He proposes that 'if a State Party's referral fails to comply with the formal and material requirements provided for in [articles 13(a) and 14], it should be treated as an [article 15(1) communication] of the *notitia criminis*', see Olásolo, *The Triggering Procedure of the International Criminal Court* (2005) 105.

which interprets the term (albeit in different procedural context), such as PTC III's interpretation of the term in the context of adjourning the confirmation of charges hearing.⁸⁹ Applying the rationale of PTC III to our discussion, it follows that the threshold of 'appear' within the meaning of article 14 is not high; it involves a *prima facie* assessment and does not require to be premised on a comprehensive evidentiary discussion. Simply put: the *possibility* that crimes within the jurisdiction of the Court have been committed suffices. Again, this approach complies with the procedural regime established in the Statute: the referral is only meant to call upon the Court to act.

- 27 As seen above, while the State Party chiefly marks out the scope of the situation by reference to acts defined by time and space, and/or perpetrators, it is at first the Prosecutor who will determine whether the 'situation' complies with the procedural regime of the Statute, in particular its jurisdictional parameters. For the investigation (and selection of 'cases') will only take place within the boundaries of a 'situation' over which the Court is empowered to exercise jurisdiction. In the case law of the Court, a 'situation' has been defined by reference to the 'territorial, temporal and possibly personal parameters'.⁹⁰ The temporal parameter gives clarity as to whether the alleged crime falls within the period set out in article 11. The territorial and personal parameters are in the alternative. The territorial parameter enquires whether the crime occurred on the territory of a State Party pursuant to article 12(2)(a) (extending to vessels registered to States Parties) or of a State which lodged an *ad hoc* declaration under article 12(3). The personal parameter pertains to the perpetrator of the crime(s) who is a national of a State Party (article 12(2)(b)) or a non-State Party which lodged an article 12(3) declaration.
- 28 The drafters' preference for non-specific referrals (in relation to suspects or crimes) has also been adopted and promoted in the practice of the Court. Indeed, in the context of the first referral from Uganda, this was a live issue as the referring State made reference to the 'situation concerning the Lord's Resistance Army in northern and western Uganda', directing the Prosecutor's attention to one side of the conflict. In response, former Prosecutor Moreno Ocampo clarified that he would not restrict his investigation to crimes committed by the LRA only but, as a matter of law, consider all groups committing crimes in Northern Uganda, including the Ugandan Army.⁹¹ When assigning the situation to PTC II, the

⁸⁹ In the *Bemba* case, PTC III, in the context of adjourning the confirmation of charges hearing pursuant to article 61(7)(c)(ii), explained, for example: 'In the English language, the word "appear" means to "give a specified impression". (...) At this stage the Chamber is not called upon to prove that the requirements of the "different crime" are definitely satisfied. To make its determination under article 61(7)(c)(ii) of the Statute, the Chamber deems it sufficient to rather make a *prima facie* finding that it has doubts as to the legal characterization of the facts as reflected in the document containing the charges', *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 25 (<http://www.legal-tools.org/doc/81d7a9/>).

⁹⁰ *Situation of the Democratic Republic of the Congo*, ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, PTC I, 17 January 2006, para. 65 (<http://www.legal-tools.org/doc/2fe2fc/>). This decision was reversed on appeal but on other grounds. The AC did not find fault with the definition of 'situation' as such and PTC I's approach was endorsed by other PTCs. For the definition of the jurisdictional parameters, see the AC Judgment of 14 December 2006, note 87. For a comprehensive analysis of the jurisdictional confines of a situation, see Rastan, in: Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity*, Vol. I (2011) 421.

⁹¹ 'We notified Uganda that we would interpret the referral as *concerning all crimes under the Statute committed in Northern Uganda* and that our investigation would be impartial. In a July 2004 report to the Parliament the Government of Uganda confirmed their understanding of this interpretation. [...] We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Uganda forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the [Uganda army]. We therefore started with an investigation of the LRA. At the same time, we also collected information on other groups from a variety of sources' (emphasis added), see 'Statement by the Chief Prosecutor on the Ugandan Arrest Warrants', 14 October 2005, 2–3 (available on the website of the Court). In a statement to the diplomatic corps in 2004, the Prosecutor stated: 'I am unable to share the referral itself, as it contains detailed information provided in confidence. (...) However, I can confirm that the scope of the referral will be interpreted in accordance with principles underlying the Statute' (emphasis added), see OTP, 'Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps', 12 February 2004, 5 (available on the website of the

Presidency went even further and decided to assign to the Chamber the ‘situation in Uganda’, without restricting the situation to Northern Uganda, as referred to by the Prosecutor.⁹² The same even-handed approach was also taken, for example, in the situation CAR II insofar as Prosecutor Fatou Bensouda announced extending her investigation into crimes allegedly committed by all groups involved in the armed conflict.⁹³

Conversely, the State’s *prima facie* findings as regards the qualification of the crimes did not have a binding effect on the Prosecutor’s article 53(1) determination following a referral. The Republic of Mali, for example, referred the situation to the Prosecutor indicating that ‘[ces] faits sont constitutifs de crimes contre l’Humanité et Crimes de Guerre qui relèvent de la Compétence de la Cour Pénale Internationale (CPI) en vertu des articles 7 et 8 de son Statut’.⁹⁴ Nonetheless, following her preliminary examination, the Prosecutor found that ‘[at] this stage, the information available does not provide a reasonable basis to believe that crimes against humanity under Article 7 have been committed in the Situation in Mali’.⁹⁵ Consequently, she determined that there was ‘only’ a reasonable basis to believe that war crimes had been committed.⁹⁶ Finally, the Prosecutor’s decision not to open an investigation into the events surrounding the Gaza Freedom Flotilla, following a referral by the Union of the Comoros, is another example that the examination of the jurisdictional parameters of the ‘situation’ of the referring State is not binding upon the Prosecutor. Contrary to what the referring State suggested,⁹⁷ the Prosecutor initially opined that the potential cases arising from the investigation would not be of sufficient gravity to justify further action by the ICC (article 53(3)(b)) and consequently declined to open an investigation in 2014.

As regards the description of the factual scope of the ‘situation’, the practice has been rather flexible. Following a minimalist approach, the DRC referred generally to ‘la situation

Court). Nevertheless, fact is that the OTP, during the time this situation is before the Court, initiated proceedings only against LRA commanders and did not expand its investigation to other armed groups nor to the Ugandan forces. The fact that over 11 years have passed since the referral reached the Prosecutor begs the question whether the OTP will enquire into the criminal conduct of other actors, including the Ugandan Army, at all or whether the Prosecutor has taken an implicit decision not to prosecute other perpetrators (article 53(2)).

⁹² It is questionable, however, whether an administrative act, such as the assignment of a situation to a Chamber, which goes beyond the wording of the referral, can expand the geographical scope of the referral. In this respect, the Statute does not bestow any authority on the Presidency.

⁹³ The Prosecutor determined that the alleged crimes committed in the situation ‘are mostly attributable to armed groups such as Séléka and anti-balaka’ groups. She also included in her assessment the purported criminal conduct of CAR armed forces and the Presidential Guard of former CAR President Bozizé; however, she stated that more information was needed to make a determination as to whether they qualify as crimes falling under the jurisdiction of the Court, see OTP, *Situation in the Central African Republic II. Article 53(1) Report*, 24 September 2014, 27–28, paras 9 and 10 (available on the website of the Court).

⁹⁴ See Mali’s referral letter contained in *Situation in the Republic of Mali*, ICC-01/12-1-Anx, Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II, Presidency, 19 July 2012, 2 (<http://www.legal-tools.org/doc/94d977/>).

⁹⁵ OTP, *Situation in Mali. Article 53(1) Report*, 16 January 2013, 27, para. 128.

⁹⁶ This independence and objectivity in assessing the facts of the situation during the preliminary analysis, including all parties to a conflict, is not the *domaine réservé* of the Prosecutor. One may argue that this approach is equally applicable to the judicial assessment of *proprio motu* authorization requests for the commencement of an investigation under article 15(4). This seems to have been the rationale followed by the Majority Judges of PTC III in the article 15 authorization process regarding the situation of Côte d’Ivoire, when they, in deviation of the conclusions presented by the Prosecutor, expanded their analysis of the Prosecutor’s article 15(3) request and supporting material, *inter alia*, to both parties of the conflict with regard to, in particular, crimes against humanity allegations, see *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-14-Corr, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, 15 November 2011 (<http://www.legal-tools.org/doc/e0c0eb/>). Critically seen by dissenting judge, see *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-15-Corr, Corrigendum to ‘Judge Fernández de Gurmendi separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, PTC III, 5 October 2011 (<http://www.legal-tools.org/doc/eb8724-1/>); Rastan (2012) *CLF* 1.

⁹⁷ See for the State’s assessment of gravity in the referral of the Union of the Comoros, as annexed to the Presidency’s decision assigning the situation to PTC I, note 46, paras 25–28 (‘The crimes committed meet the test of gravity provided for under Articles 17(1)(d) and 53 of the Rome Statute’).

qui se déroule dans mon pays depuis le 1^{er} juillet 2002 dans laquelle il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis’ and did not single out any particular conflict nor specify the prevailing circumstances on its territory at the time. The Republic of Mali extended the scope of the referral to the entire territory (‘la situation au Mali depuis le mois de Janvier 2012’) but specified further in the referral the geographical area (‘Nord du territoire’) and the nature of the crimes which appeared to have been committed, thus allowing to identify or narrow down the pertinent factual contours of the ‘situation’. And on the other end of the spectrum, the Union of the Comoros described in a detailed manner the incidents involving the Gaza Freedom Flotilla for which it sought the Court’s intervention. Interestingly, it was in relation to the most detailed referral of the Union of the Comoros that the Prosecutor requested clarifications. One may argue, however, that this became necessary because of the way in which the Union of the Comoros had presented its referral and not because the incidents had been described specifically.

- 31 To date, the former and present Prosecutors have not dismissed any referral instrument outright. Rather, any shortcomings or ambiguities were cured by way of interpretation⁹⁸ or the seeking of further clarifications from the referring State.⁹⁹ Limitations to the States’ freedom in framing the ‘situation’ is given by PTC I in the context of the *Mbarushimana* case:

‘The Statute cannot be interpreted as permitting a State to permanently abdicate its responsibilities by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration. Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity.’¹⁰⁰

- 32 The scope of the situation is also important in the context of case selection. As highlighted by PTC I, ‘it is only within the boundaries of the situation (...) for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated’.¹⁰¹ In other words, a case cannot exceed the parameters of a referred situation under investigation. This question became a live issue for the first time in the *Mbarushimana* case. More specifically, it was, *inter alia*, the temporal occurrence of the crimes for which Callixte Mbarushimana was prosecuted that intrigued the Chamber to enquire whether or not they were covered by the referred situation (‘situation qui se déroule dans mon pays depuis le 1^{er} juillet 2002’).
- 33 In August 2010, the Prosecutor requested the issuance of a warrant of arrest for Callixte Mbarushimana (article 58) who was believed to bear criminal responsibility for the commission of crimes against humanity and war crimes committed by a particular armed group in the Kivu provinces of the DRC since early 2009. Before issuing the warrant of arrest, the Chamber requested further clarifications: leaving behind a literal reading of articles 13(a) and 14, the Judges accepted that the ‘the subject-matter of the referral consists of events that either *occurred before* or *are still ongoing* at the time of its submission to the Prosecutor’ (emphasis added).¹⁰² Considering however the time lapse between the submission of the DRC referral and the events described in the article 58 application, the Prosecutor was requested to explain ‘in what manner and to what extent such events [*i.e.* those presented in the article 58 application] are linked to the *situation of crisis* that triggered the DRC investigation’ (emphasis added).¹⁰³

⁹⁸ See the referral of the Republic of Uganda.

⁹⁹ See the referral of the Union of the Comoros.

¹⁰⁰ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-451, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, PTC I, 26 October 2011, para. 21 (<http://www.legal-tools.org/doc/864f9b/>).

¹⁰¹ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, PTC I, 28 September 2010, para. 6 (<http://www.legal-tools.org/doc/04d4fa/>).

¹⁰² *Situation in the Democratic Republic of Congo*, ICC-01/04-575, Decision requesting clarification on the Prosecutor’s Application under Article 58, PTC I, 6 September 2010, para. 6 (<http://www.legal-tools.org/doc/b63d59/>). In interpreting the component ‘one or more crimes (...) appear to have been committed’ in article 14, the Chamber read the provision in context with article 53(1)(a) which requires that there is a ‘reasonable basis to believe that a crime within the jurisdiction of the Court *has been or is being committed*’ (emphasis added).

¹⁰³ *Ibid.*, para. 11.

Following the observations of the Prosecutor, the Chamber rendered its decision on the warrant of arrest on 28 September 2010 in which it first addressed, as a matter of jurisdiction, whether the case fell within the DRC situation as encompassed by the referral. The Judges commenced their enquiry by noting the wide geographical ('dans mon pays') and temporal ('qui se déroule... depuis le 1^{er} juillet 2002') parameters set out in the DRC referral letter. They then proceeded to analyze the temporal limits of the 'situation' by using the test they previously had developed with a view to ascertaining the nexus between the events for which *Mbarushimana* was prosecuted and the events which prompted the DRC to refer the 'situation' to the Court:

'The Prosecutor's Application refers to crimes allegedly committed between January 2009 and the date of the application, within the context of an armed conflict in the Kivu Provinces, DRC. In the view of the Chamber, for the case at hand not to exceed the parameters defining the DRC situation under investigation, the crimes referred to in the Prosecutor's Application must have *occurred in the context of the ongoing situation of crisis* that triggered the jurisdiction of the Court through the above mentioned referral. In the view of the Chamber, it is only within the boundaries of the situation of crisis for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated. Such a situation can include *not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral* (emphasis added).'¹⁰⁴

Having analysed the information provided by the Prosecutor, the Chamber found that the relevant armed group associated with *Mbarushimana* was involved in the commission of crimes in the East of the DRC, in particular the South Kivu province, already around the time of the referral. As a result, the Judges accepted 'on a *prima facie* basis' that the case fell 'within the context of the DRC situation of crisis encompassed by the referral' and issued a warrant of arrest for *Mbarushimana*.¹⁰⁵

Subsequently, the Defense lodged a challenge to the jurisdiction of the Court which was rejected by the Chamber.¹⁰⁶ In response to the Defense argument that the Prosecutor had not proven that the armed group associated with *Mbarushimana* had committed crimes *prior* to the lodging of the DRC referral, the Chamber reiterated that crimes committed after the lodging of the referral would fall within the jurisdiction of the Court provided they were linked to the situation of crisis: 'It is the existence, or non-existence, of such link, and not the particular timing of the events underlying an alleged crime, that is critical in determining whether that crime may or may not fall within the scope of the referral'.¹⁰⁷

The 'situational linkage' jurisprudence, as proposed in the *Mbarushimana* case, was later noted by PTC III in the context of its authorization of the commencement of the Prosecutor's *proprio motu* investigation into the situation in the Republic of Côte d'Ivoire.¹⁰⁸ In a decision dated 3 November 2011, the Majority of PTC III authorized the commencement of the investigation in relation to crimes committed as of 28 November 2010, extending it to any 'continuing crimes' past the date of the Prosecutor's article 15 application.¹⁰⁹ In a

¹⁰⁴ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, PTC I, 28 September 2010, para. 6 (<http://www.legal-tools.org/doc/04d4fa/>).

¹⁰⁵ *Ibid.*, para. 7.

¹⁰⁶ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-451, Decision on the 'Defence Challenge to the Jurisdiction of the Court', PTC I, 26 October 2011 (<http://www.legal-tools.org/doc/864f9b/>).

¹⁰⁷ *Ibid.*, para. 41. For an analysis of the Chamber's jurisprudence on this point, see Rastan (2012) *CLF* 1; Bitti (2010) 4 *RSC* 959.

¹⁰⁸ The Republic of Côte d'Ivoire had lodged *ad hoc* declarations under article 12(3) and former Prosecutor Moreno Ocampo decided to trigger the Court's jurisdiction by activating his *proprio motu* powers under article 15.

¹⁰⁹ A corrigendum of this decision was filed on 15 November 2011, see *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', PCT III, 15 November 2011 (<http://www.legal-tools.org/doc/e0c0eb/>); the dissenting opinion is registered under ICC-02/11-15-Corr, Corri-

second decision, the Chamber extended the temporal scope of its authorization to crimes committed as of 19 September 2002 until 28 November 2010.¹¹⁰ The procedural framework is, of course, different; but one point may be useful for the purpose of our discussion: unlike PTC I, the Majority Judges of PTC III in their first authorization decision do not adopt the ‘situation of crisis’ term as their own but rather offer some objective criteria according to which the nexus between the crimes and the overall ‘situation’ is established.

‘Thus, the crimes that may be committed after the date of the Prosecutor’s application will be covered by any authorization, *insofar as the contextual elements of the continuing crimes are the same* as for those committed prior to [the lodging of the Prosecutor’s article 15 application]. They must, at least in a broad sense, *involve the same actors and have been committed within the context of either the same attacks* (crimes against humanity) *or the same conflict* (war crimes). Therefore, if the authorization is granted, it will include the investigation of any ongoing and continuing crimes that may be committed after [the lodging of the Prosecutor’s article 15 application] as part of the ongoing situation’. (emphasis added)¹¹¹

- 35 The Prosecutor seems to have accepted the *Mbarushimana* formula and applied it in the context of the CAR II referral. It is recalled that the first referral of the CAR encompassed crimes within the jurisdiction of the Court ‘committed anywhere on the territory of the CAR since 1 July 2002’.¹¹² Hence, one could have argued that this referral gave the Prosecutor the basis to investigate also the events since September 2012. Yet, in her Article 53(1) Report, following the second referral of the CAR, Prosecutor Fatou Bensouda explained that the second referral constituted

‘a new situation unrelated to the “situation of crisis” previously referred to the ICC by the CAR authorities in December 2004.

Although certain individuals may have played roles in both of these differing situations, a distinction between the two periods is apparent both with regard to the armed groups involved, and the political context of the events. The previous situation in the CAR, which began in 2002, involved armed groups which originated from the north-western region of the country and at least one armed group from the Democratic Republic of the Congo (“DRC”). In contrast, the roots of the recent situation can be traced to the armed groups which emerged in the north-east of the country in 2007, notably the Union des forces démocratiques pour le rassemblement (Union of Democratic Forces for Unity, “UFDR”). The emergence of these armed groups can be linked in particular to the weakness of state authority in the north-east. The group included fighters from that region and from the neighbouring states of Chad and Sudan. These groups evolved into the Séléka coalition which from 2012 onwards progressively gained control of territory and eventually overthrew the Government.

The above-mentioned factors contributed to the Office’s conclusion that the serious allegations of crimes potentially falling within the jurisdiction of the ICC and committed since August 2012 constituted a new situation.’¹¹³

gendum to Judge Fernández de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 5 October 2011 (<http://www.legal-tools.org/doc/eb8724/>).

¹¹⁰ *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-36, Decision on the ‘Prosecution’s provision of further information regarding potentially relevant crimes committed between 2002 and 2010’, PTC III, 22 February 2012 (<http://www.legal-tools.org/doc/de6177/>).

¹¹¹ *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-14-Corr, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, PTC III, 15 November 2011, para. 179 (<http://www.legal-tools.org/doc/e0c0eb/>). In the Chamber’s second authorization decision delivered on 22 February 2012, however, these criteria were not stipulated again. For an analysis of the Chamber’s authorization decisions, see Rastan (2012) *CLF* 1. Likewise, PTC II, in the *Mudacumura* case (which shares great similarities with the *Mbarushimana* case) did not make explicit reference to the concept of ‘situation of crisis’ but offers the formula that the crimes ‘are sufficiently linked to the situation which initially triggered the referral to the Court’, see *Prosecutor v. Sylvestre Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor’s Application under Article 58, PTC II, 13 July 2012, para. 14 (<http://www.legal-tools.org/doc/ecfae0/>).

¹¹² See, mn 15.

¹¹³ OTP, *Situation in the Central African Republic II. Article 53(1) Report*, 24 September 2014, 15–16, paras 9 and 10.

3. ‘for the purpose of determining...’

As noted earlier, by means of the referral the State Party neither instructs the Prosecutor to 36
open an investigation nor limits the Prosecutor’s future prosecutorial choices; rather, the State *requests* the Prosecutor to investigate the ‘situation’, *i. e.* the conflict scenario ‘in which one or more crimes within the jurisdiction of the Court appear to have been committed’, ‘for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes’. Upon taking an affirmative decision under article 53(1), the Prosecutor opens an investigation into the ‘situation’ with a view to identifying, amidst a plurality of individuals and events, specific perpetrators and specific incidents during which one or more article 5 crimes seem to have been committed.¹¹⁴

‘At any time after the initiation of the investigation’,¹¹⁵ the Prosecutor shall approach the 37
PTC with an application for the issuance of a warrant of arrest or summons to appear if there are ‘reasonable grounds to believe’ that the person identified has committed one or more crimes falling under the jurisdiction of the Court (article 58(1) and (7)). As of the moment the warrant of arrest or summons to appear has been issued by the competent PTC, proceedings in relation to a particular ‘case’ commence, which run in parallel to those related to the ‘situation’; both proceedings are conducted before the same PTC. As PTC I explained on 17 January 2006:

‘The Chamber considers that the Statute, the Rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceedings, initiated by any organ of the Court, that they entail. (...) Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation (...) as well as the investigation as such. Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or summons to appear.’¹¹⁶

II. Paragraph 2

As far as possible, a referral shall specify the relevant circumstances and be accompanied by 38
such supporting documentation as is available to the State referring the situation’. A similar provision is included throughout the preparatory process in the draft article dealing with State complaints.¹¹⁷ The only change made during the Diplomatic Conference was to adjust the language to referral of situations as opposed to complaints relating to specific crimes.

The provision has, in general, attracted little attention. The only comment we wish to recall, which was made shortly before the Rome Conference, is that it should not ‘become the basis for declaring that the court lacks jurisdiction or that cases investigated are inadmissible because the referral did not submit all the information the state could have with more diligence’.¹¹⁸

¹¹⁴ ‘L’enquête ouverte dans la situation que l’on peut qualifier “d’enquête-mère” va donc donner naissance à des enquêtes dans des affaires, que l’on peut qualifier “d’enquêtes-filles”, enquêtes à géométrie variable qui peuvent coexister pendant de nombreuses années’, Biti, in: *Statut de Rome de la Cour pénale internationale. Commentaire article par article* (2012) 1183.

¹¹⁵ Article 58(1).

¹¹⁶ See, for example, *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, PTC I, 17 January 2006, para. 65 (<http://www.legal-tools.org/doc/2fe2fc/>). The definitions of ‘situation’ and ‘case’ have been embraced and referred to by all PTCs ever since. For a vivid description, see Olásolo, *The Triggering Procedure of the International Criminal Court* (2005).

¹¹⁷ See article 25 para. 3 of the ILC’s Draft and article 25 of the Preparatory Committee’s 1997 Draft (which became article 45 in the Zutphen Draft and article 11 of the Draft presented to the Diplomatic Conference).

¹¹⁸ Amnesty International (1997) *AI Index IOR* 40/001/97 34, note 17.

- 39 Together with or following the submission of the referral instrument, States Parties regularly provided the Prosecutor with a report/memorandum and other supporting material on the crimes for which the State sought the Court's intervention.¹¹⁹

¹¹⁹ For more information, see the referral letters of, for example, the Republic of Mali, the Union of the Comoros and the Central African Republic (CAR II).

Article 15 Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non- governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Literature: Jones, J.R.W.D., 'The Office of the Prosecutor', in: A. Cassese *et al.*, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002) 269.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	8
I. Paragraph 1.....	8
1. 'may initiate'.....	9
2. 'investigations'.....	10
3. 'proprio motu'.....	11
4. 'on the basis of information'.....	12
II. Paragraph 2.....	13
1. First sentence.....	13
2. Second sentence.....	14
III. Paragraph 3.....	20
1. 'reasonable basis'.....	21
2. 'proceed with an investigation'.....	23
3. 'shall'.....	24
4. 'supporting material'.....	25
5. Victim representations.....	27
IV. Paragraph 4.....	29
V. Paragraph 5.....	33
VI. Paragraph 6.....	34
1. First sentence.....	34
2. Second sentence.....	37

A. Introduction/General remarks

- 1 Article 15 of the Statute lays down the procedure for initiating investigations by the Prosecutor acting on his or her own motion (*proprio motu*). It should be read in conjunction with article 13 para. c which provides for three ways of ‘triggering’ the Court’s jurisdiction: by State Party referral, by Security Council referral or by the Prosecutor’s initiation of an investigation ‘in accordance with article 15’. The ability of the ICC Prosecutor to initiate investigations *proprio motu* was the most controversial aspect of the Court’s trigger mechanism and was one of the main political/legal issues that had to be resolved before the Statute could be assured of adoption. Both opponents and proponents of the Prosecutor’s *proprio motu* power – and the chasm was very wide – agreed that its inclusion or absence would fundamentally affect the Court’s structure and functioning. The idea was considered so radical at the start of the ICC process that the ILC had not even provided for it in the 1994 ILC Draft Statute¹. In fact, the commentary to the ILC Draft Statute mentions that only one member of the Commission suggested that the Prosecutor should be able to initiate an investigation in the absence of a complaint. Other members felt that investigations and prosecutions should not be undertaken without State Party or Security Council support, ‘at least not at the present stage of development of the international legal system’².
- 2 Debates within the *Ad Hoc* Committee held in 1995 disproved the ILC’s view. Many delegations supported an enhanced role for the Prosecutor who, it was said, should be able to work on behalf of the international community rather than just on behalf of a State Party or the Security Council³. The poor record of the state complaint mechanism within the human rights treaty system and the fortunate competence of the Prosecutor of the ICTY/R were also used to buttress the cause of expanded prosecutorial powers⁴. The opposing view was that the lack of a State Party or Security Council referral should be taken to mean that a crime was not of international concern. There should, therefore, be no reason for the Prosecutor to act on his or her own motion⁵.
- 3 The 1996 Preparatory Committee debates continued to mirror, and further elaborate, the two basically different positions with respect to *proprio motu* power⁶. The March–April 1996 Preparatory Committee session was, however, important, because it was at this meeting that the idea of judicial review of *proprio motu* proceedings was introduced⁷. It was suggested that a case initiated by the Prosecutor be submitted to a chamber of the Court which would, upon a hearing, decide whether it should be pursued or discontinued. The proceedings would be *in camera* and confidential in order to prevent publicity and to protect the ‘interest of the States’⁸. Interestingly enough, the proposal on judicial review as a mechanism that would prevent abuse of prosecutorial discretion was not inserted in the compilation of specific drafting proposals issued after the completion of the Preparatory Committee’s work. The text adopted⁹ simply reproduced the corresponding articles of the Statutes of the ICTY and the ICTR, which read:

¹ 1994 ILC Draft Statute (<https://www.legal-tools.org/doc/17ad09/>).

² *Id.*, p. 90.

³ See *Ad Hoc* Committee Report, p. 26 (<https://www.legal-tools.org/doc/b50da8/>).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ See 1996 Preparatory Committee I, p. 35 (<https://www.legal-tools.org/doc/e75432/>).

⁷ See *ibid.*, Draft Summary, Trigger Mechanism, UN Doc. A/AC.249/CRP.5, pp. 8–9 (<https://www.legal-tools.org/doc/bee01c/>). Pursuant to the Draft Summary, judicial review was to be applied not only when proceedings were initiated by the Prosecutor, but also when a complaint was ‘lodged by a state or an individual’. The notion that State Party initiated proceedings needed pre-investigation judicial review was abandoned and the idea that individuals could be a separate trigger mechanism never had any serious support.

⁸ *Ibid.*, p. 9.

⁹ See 1996 Preparatory Committee II, p. 109 (<https://www.legal-tools.org/doc/03b284/>).

The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, inter-governmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed¹⁰.

The August 1997 Preparatory Committee session did not add very much to the proposal already on the table with respect to *proprio motu* power¹¹. The provisions included in the Committee's report reflected attempts to either narrow the sources of information which could serve as a basis for prosecutorial action or to expand them¹². It should be understood that the idea of *proprio motu* powers as such was still contested and not assured of majority support¹³.

By the time the last Preparatory Committee session was held in March-April 1998, it was clear that there were still two solid positions on the issue of *proprio motu* power to initiate investigations. The first group of states – primarily the so-called 'like-minded' ones – were of the view that the Court must have an independent Prosecutor if it was to be effective in punishing and deterring serious crimes of concern to the international community as a whole. Their rationale was that without a *proprio motu* power, the Court would be prevented from acting in situations where, for political or other reasons, neither a State Party nor the Security Council were able or willing to initiate proceedings. These delegations believed that the Prosecutor should have independent authority to trigger the Court's jurisdiction, which means that the first judicial check on prosecutorial action would coincide with the confirmation of an indictment¹⁴. The second group of delegations based their opposition to prosecutorial independence on concerns about the risks of politically motivated or frivolous *proprio motu* proceedings. They interpreted prosecutorial independence to mean that the Prosecutor should have full freedom to decide whom to investigate once the Court's jurisdiction was triggered by a State Party or the Security Council, but that the Prosecutor should not be granted a separate, *proprio motu*, triggering power¹⁵.

Given the depth of opposition to an independent Prosecutor it became clear that the fears of States belonging to the second group would have to be addressed by means of additional checks on prosecutorial power if the proposition of a *proprio motu* Prosecutor was to stand any chance of success. A compromise solution, that provided the basis for what eventually became article 15 of the Rome Statute, was introduced, interestingly in retrospect, by Argentina and Germany in March 1998¹⁶. The proposal laid out some sources that could submit information on the alleged commission of a crime to the Prosecutor and the Prosecutor's right to seek additional information from other sources. Most importantly, it obliged the Prosecutor to seek authorisation from the Pre-Trial Chamber before proceeding with an investigation on his or her initiative, thus introducing early judicial review of

¹⁰ *Ibid.*, article 25 (2*quat*); ICTY Statute, article 18 para. 1; and ICTR Statute, article 17 para. 1.

¹¹ See Preparatory Committee Decisions Aug. 1997, p. 9, article 25*bis* (<https://www.legal-tools.org/doc/11411b/>). It was at this session that the term *proprio motu*, which eventually prevailed, was introduced into the Draft Statute.

¹² The relevant text reads:

'[Article 25*bis* Prosecutor
The Prosecutor [may] [shall] initiate investigations [*ex officio*] [*proprio motu*] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 20 (a) to (d) from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources]. The entire article was in brackets, signifying lack of agreement about its inclusion in the Draft Statute.'

¹³ Article 25*bis* was reproduced without change, although renumbered article 46, in the Zutphen Draft, p. 86.

¹⁴ The term indictment was abandoned in later drafting work, so the Statute, as finally adopted, refers to the confirmation of 'charges'. See, *e.g.*, article 61.

¹⁵ See CICC Report on the March-April 1998 session of the Preparatory Committee on the Establishment of an International Criminal Court, NGO Coalition for an International Criminal Court (1998), pp. 23–24 (<https://www.legal-tools.org/doc/ef5a84/>).

¹⁶ See Proposal submitted by Argentina and Germany, article 46, Information submitted to the Prosecutor, UN Doc. A/AC.249/1998/WG.4/DP.35 (25 March 1998) (<https://www.legal-tools.org/doc/896cf4/>).

proceedings initiated on the Prosecutor's own motion. That proved decisive. The text also specified the criteria which would guide the Pre-Trial Chamber in authorising the commencement of an investigation: First, the Pre-Trial Chamber would have to conclude, based on the Prosecutor's request and on the accompanying material, that there is 'a reasonable basis to proceed'. Second, the Chamber would have to assess that the case 'appears to fall within the jurisdiction of the Court'. Third, the Pre-Trial Chamber would have to have 'regard' for the Draft Statute's provisions on admissibility.

The major part of article 15 of the Statute is identical to the Argentine-German proposal, except that it leaves out the Pre-Trial Chamber's duty to take issues of admissibility into account when authorising the start of an investigation. Both the initial proposal and article 15 do, however, provide that authorisation shall be without prejudice to subsequent determinations by the Court as to the jurisdiction and admissibility of a case.

The joint proposal was well received at the March-April 1998 Preparatory Committee session and proved important to the acceptance of a Prosecutor with *proprio motu* power. It was reproduced, with no changes, in the Draft ICC Statute that was submitted to the Diplomatic Conference¹⁷.

- 6 While opening statements in the plenary session of the Conference showed majority support for the proposition that the Prosecutor should be able to trigger the Court's jurisdiction¹⁸, it was uncertain until the very end whether *proprio motu* power – even with the additional safeguard of the Pre-Trial Chamber – would survive. Of the several key issues that were at the heart of the compromise on which the Statute rests, the retention of an independent role for the Prosecutor seemed the most tenuous¹⁹. The uncertain outcome of the debate on prosecutorial independence²⁰ was reflected in the first of two Bureau papers, issued on 6 July 1998, the aim of which was to narrow down drafting options on the major issues of the Statute. The paper provided for two possibilities: the inclusion of a *proprio motu* power along with Pre-Trial Chamber supervision or the omission of the corresponding article from the Draft Statute²¹. Numerically, at least, the tide seemed to turn after a Committee of the Whole debate showed that the majority of delegations favoured the retention of a *proprio motu* power²². The second Bureau paper provided for only two options: keeping a *proprio motu* triggering role for the Prosecutor as already described or keeping it and adding further safeguards before the Prosecutor can act²³. As evidenced by article 15, the first option prevailed.

¹⁷ See Preparatory Committee (Consolidated) Draft, article 13 (<https://www.legal-tools.org/doc/66f2fb/>). The Draft Statute still contained article 12 as well (formerly numbered 46 and 25bis). Articles 12 and 13 obviously overlapped in content and contained different terms ['sufficient basis' (article 12) and 'reasonable basis' (article 13)] to describe the point at which the Prosecutor would determine that he or she should proceed with an investigation.

¹⁸ See NGO Coalition Trigger Mechanisms and Admissibility Team, Draft Summary of Country Positions on articles 10–20 based on Opening Statements, 22 June 1998 (on file with authors).

¹⁹ Certain delegates told the authors privately in Rome that *proprio motu* powers were being used as a bargaining chip in finalising the 'package' and that an independent role for the Prosecutor might be entirely omitted from the Statute.

²⁰ An especially strong stand against *proprio motu* powers was enunciated in a speech delivered on behalf of the US delegation. See 'The Concerns of the United States Regarding the Proposal for a Proprio Motu Prosecutor', 22 June 1998 (<https://www.legal-tools.org/doc/6dae4d/>). For an NGO rebuttal of US claims, see Lawyers Committee for Human Rights: 'Response to US Concerns Regarding the Proposal for a Proprio Motu Prosecutor', 24 June 1998 (on file with authors).

²¹ See Bureau Discussion Paper, Part 2, Jurisdiction, Admissibility and Applicable Law, UN Doc. A/CONF.183/C.1/L.53 (1998), pp. 16–17 (<https://www.legal-tools.org/doc/30dcec/>). This document merged what were previously articles 12 and 13 into a single article – 12 – entitled 'Prosecutor', thus eliminating the already mentioned textual overlap. It also introduced the breakdown of paragraphs that was adopted for article 15. The final text of article 15 further streamlined the wording, particularly of article 12 para. 1.

²² See The Numbers: NGO Coalition Special Report on Country Positions, CICC Monitor, 10 July 1998. According to the Report, 76 percent of delegations that participated in the Committee of the Whole debate supported *proprio motu* powers (61 states in favour, 19 against) (on file with authors).

²³ See Bureau Proposal, Part 2, Jurisdiction, Admissibility and Applicable Law, UN Doc. A/CONF. 183/C.1/L.59 (1998), pp. 14–15 (<https://www.legal-tools.org/doc/3a3c70/>).

It is a sign of the developing nature of international law that a *proprio motu* power was included in the Statute despite the ILC's initial rejection of the idea. On the other hand, it is clear that the international community was unwilling, at this stage of the evolution of international law, to model the ICC Prosecutor after prosecutors in national criminal justice systems. The insertion of Pre-Trial Chamber authorisation for the commencement of *proprio motu* investigations is proof of that reluctance. This comes as no surprise. It is true that Pre-Trial Chamber review is not the only check on prosecutorial discretion provided for in the Statute. Other safeguards against potential abuse of power may be found, for example, in the admissibility provisions, in the thresholds on definitions of crimes within the Court's jurisdiction and in the criteria laid down for election of the Prosecutor. An additional obstacle to unwarranted prosecutorial activism is judicial confirmation of charges against persons suspected of crimes within the Court's jurisdiction. Finally, the restrictions on the Court's exercise of jurisdiction and possible Security Council deferral of an investigation or prosecution also provide checks on proceedings initiated *proprio motu*.

Nevertheless, it came as a surprise to many that States were willing to accept an independent international prosecutor who can freely conduct preliminary examination of allegations of core international crimes and make public statements about such activities. An international prosecutor is not a part of an executive in the way national prosecutors are, nor does he or she relate to public interest in the same manner. It is clear that the role given to the Pre-Trial Chamber as the authoriser of Prosecutor-initiated investigations was the decisive factor for many States. The Pre-Trial Chamber represents the inherent constitutional check on the Prosecutor which some States required in order to accept a *proprio motu* power to initiate investigations. This makes the practice of the Prosecutor pursuant to articles 13 para. c and 15 and his or her general approach towards the Pre-Trial Chamber vital for the way some States perceive the Court.

The Prosecutor did not actually invoke article 15 until November 2009, in an application to initiate an investigation with respect to the post-election violence in Kenya.²⁴ On 23 June 2011, the Prosecutor filed his request for authorization from the Pre-Trial Chamber to commence an investigation into crimes allegedly committed during the post election violence in Côte d'Ivoire since November 2010.²⁵ Authorizations were made by the Pre-Trial Chamber in both situations.²⁶

B. Analysis and interpretation of elements

I. Paragraph 1

Article 15 para. 1 states the basic principle that the Prosecutor may initiate investigations on his or her own motion on the basis of information on crimes within the jurisdiction of the Court. The inclusion of this principle in the Statute facilitated the adoption of article 13 para. c, which provides that the Court's jurisdiction may be exercised over relevant crimes if the Prosecutor has initiated an investigation in respect of such crimes in accordance with article 15. Adequate familiarity with article 15 is, therefore, necessary for a proper understanding of

²⁴ Situation in Kenya, No. ICC-01/09-3, Request for Authorization of an Investigation pursuant to Article 15, 26 November 2009 (<https://www.legal-tools.org/doc/c63dcc/>).

²⁵ Situation in the Republic of Côte d'Ivoire, No. ICC-02/11-3, Request for authorization for an investigation pursuant to article 15, 23 June 2011 (<https://www.legal-tools.org/doc/1b1939/>).

²⁶ Situation in the Republic of Kenya, No. ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 March 2010 (<https://www.legal-tools.org/doc/338a6f/>); Situation in the Republic of Côte d'Ivoire, No. ICC-02/11-14, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, 3 October 2011 (<http://www.legal-tools.org/doc/7a6c19/>).

the mechanisms for the activation of the Court’s jurisdiction contained in article 13. Moreover, article 15 has been referred to as the ultimate expression of prosecutorial independence in the Statute and hailed as one of its great achievements. At the same time it has been invoked in criticism of the Statute as an example of its alleged jurisdictional overreach. Both approaches amount to erroneous representations of the reality of the Statute’s jurisdictional regime.

1. ‘may initiate’

- 9 It is no coincidence that article 15 uses both the term ‘may’ and the term ‘initiate’. The Prosecutor’s initiation right is unconditional and discretionary, but carefully balanced by the need for authorisation by a Pre-Trial Chamber. It is activated through the Prosecutor’s own motion, and not through other parties such as States or the Security Council. Article 15 para. 1 refers to ‘initiate’, not start. This is an important distinction which critics of the Court sometimes fail to point out. The Prosecutor can not start investigations on his own motion.

States were not prepared to accept such a power for the Prosecutor.

The Prosecutor is empowered to take certain initial steps to obtain and analyse information with a view to determining whether there is a reasonable basis to proceed with an actual investigation, as elaborated by article 15 paras. 2 and 3. Article 15 does not itself provide guidance for the exercise of the Prosecutor’s discretion in the same way as, for example, article 53 para. 1 does. The link between articles 15 and 53 has been established by Rule 48 of Rules of Procedure and Evidence, which provides that in determining whether there is a reasonable basis to proceed with an investigation under article 15 para. 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1(a) to (c). The power to initiate investigations under article 15 para. 1 would seem to reflect a notion of prosecutorial independence, which again seeks support in the fundamental interest of impartial justice. There is no unequivocal notion of prosecutorial independence in international criminal law and justice. Actors in international criminal justice will have different views on the scope of the notion. But it is clear that the exercise of the discretion to initiate an investigation may not be arbitrary. Not only is the discretion carefully framed by narrow jurisdictional parameters. Its actual exercise must be guided by the principle reflected in article 1’s emphasis on ‘the most serious crimes of international concern’. It is the seriousness of the alleged crimes that must lead the Prosecutor’s exercise of discretion under article 15 para. 1. Herein lies some protection against the application of double standards in the Prosecutor’s selection of crimes to target, as well as a part of the defence against frivolous or politically motivated charges built into the Statute.

2. ‘investigations’

- 10 Paragraph 1 uses the word ‘investigations’. This should not be misconstrued. Paragraph 6 of article 15 refers to ‘the *preliminary examination* referred to in paragraphs 1 and 2’ (emphasis added), an expression which more adequately captures the nature of the activities which the Prosecutor may undertake during the initiation phase. That is a helpful term. When initiating an investigation, the Prosecutor may take investigative steps such as those outlined in article 15 para. 2, but not conduct an actual investigation. The Prosecutor may conduct a preliminary examination to determine whether there is a reasonable basis to proceed with an investigation. Only when the Pre-Trial Chamber has judicially approved a prosecutorial request to proceed may a full investigation be launched.

3. ‘proprio motu’

- 11 The expression ‘*proprio motu*’ should be understood as in one’s own motion. The point is that the Prosecutor may act on his or her own initiative, without any formal referral act or formal duty to initiate. This language goes to the core of articles 13 para. c and 15 insofar as

it encapsulates the principle of prosecutorial independence, widely considered as one of the components of impartial justice. The decision to initiate an investigation would fall squarely within prosecutorial discretion or the equivalent in most national jurisdictions. It should be the norm, not the exception. The version of article 15 that emerged from the negotiation process was, however, reduced in scope and judicially curtailed in a way which may help to reduce State concerns – some of which are entirely legitimate – that the Prosecutor is not appropriately accountable. At the time this third edition was completed, such State concerns still persisted.

4. ‘on the basis of information’

The Prosecutor may not initiate an investigation without any basis in alleged facts. The Prosecutor must respond to information on crimes within the jurisdiction of the Court that has come into the possession of his or her Office. There is no requirement, however, that the information has come from a specific source. The source is irrelevant according to article 15 para. 1, as long as information is in the possession of the Office of the Prosecutor and the decision to initiate an investigation is based on such information. The Prosecutor is obliged to protect the confidentiality of all information submitted under article 15 paras. 1 and 2.²⁷

II. Paragraph 2

1. First sentence

The first sentence of paragraph 2 provides that the Prosecutor ‘shall analyse the seriousness of the information received’. Although ‘information received’ would primarily seem to refer to the information on which the decision to initiate investigations was made pursuant to paragraph 1, the term would also apply to information which the Office of the Prosecutor receives after the decision has been made to start a preliminary examination. It would seem that *all* incoming information is covered by ‘information received’. In its early practice the Office of the Prosecutor has chosen to use the term ‘communication’ to describe the initial material received.

The use of the word ‘shall’ makes it clear that this is a binding obligation on the Prosecutor. It is essential that information submitted to the Prosecutor be properly considered, both as a matter of basic prosecutorial professionalism and in order to maintain confidence in the Office of the Prosecutor, without which it will gradually become difficult to prepare and prosecute cases, especially all those that depend on witness testimony.

The extent of consideration required is described as ‘analyse’, which would seem to point to sufficient attention by a qualified member of the Office of the Prosecutor with a view to assessing the seriousness of the information at hand.

The theme of the analysis is ‘seriousness’, a purely evidentiary test, as opposed to one of appropriateness. The seriousness of the information may both concern the nature of the alleged crimes and the strength of the incrimination contained in the information.

2. Second sentence

The second sentence of paragraph 2 refers to the preceding sentence and depends to a certain extent on it for its correct interpretation. The Prosecutor may, for the purpose of analysing the seriousness of the information received, ‘*seek additional information* from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court’ (emphasis added). This provision authorises the Prosecutor to take investigative steps in the course of the preliminary examination, thus

²⁷ Rule 46 of the Rules of Procedure and Evidence.

seeking information additional to that on which the decision to initiate an investigation was based. The investigative steps must be taken for the purpose of analysing the seriousness of the information received. The object must be to obtain additional information which will shed more light on the alleged criminal conduct and the responsibility for it. An initial allegation will normally be insufficient for the Prosecutor to make a balanced, professional judgement of whether to proceed to the Pre-Trial Chamber with a request for a full investigation. Many negotiating States were clearly concerned that it should not be possible for the Prosecutor to act prematurely, on an inadequate basis. Paragraph 2 places the obligation on the Prosecutor to properly consider the material received and grants the power to seek further information when necessary.

- 15 The sources which the Prosecutor may turn to for further information must be 'reliable'. Paragraph 2 mentions the examples of States, organs of the United Nations, intergovernmental and non-governmental organisations, but the use of the broad formulation 'other reliable sources' make it unnecessary to establish which sources would more specifically fall within the listed categories. Only the Prosecutor can determine whether or not a source is sufficiently reliable to be approached with a request to provide information on alleged criminal conduct to his or her Office. The provision does not provide guidance for the interpretation of the reliability standard, but simply refers to 'reliable sources that he or she deems appropriate'. Facing judicial scrutiny by the Pre-Trial Chamber of both his or her request to proceed to a full investigation and the supporting material, the Prosecutor will necessarily be concerned with the reliability of the information on the alleged criminal conduct. This will normally be the main concern of the Prosecutor when considering what is an appropriate source.
- 16 Receiving 'written or oral testimony at the seat of the Court' is a further investigative step that paragraph 2 provides for the Prosecutor's preliminary examination. Both written and oral testimony of the nature referred to here would be investigative steps that can be taken without any compulsory measures and will not necessarily require the consent of one or more States in order to be executed. The information may be an oral statement, a written account or documentary evidence. These are generally speaking practical sources of evidence in war crimes prosecutions, that can be very significant in specific cases, but at the same time the work of the *ad hoc* Tribunals shows that it is only in exceptional cases that a potential witness will find his or her own way to the seat of the Court. Paragraph 2 *in fine* does, however, empower the Prosecutor to facilitate such gathering of information more actively. The term 'seat of the Court' should include possible field offices and temporary arrangements which the Office of the Prosecutor of the permanent Court may establish and which may prove to be more accessible to witnesses relevant to the new situation which the Prosecutor is preliminarily examining. Rule 47 of the Rules of Procedure and Evidence gives further guidance to the taking of testimony under article 15 para. 2.
- 17 The purpose of article 15 para. 2 would be defeated if one adopted an unnecessarily restrictive interpretation of the paragraph, suggesting that it is exhaustive in its listing of investigative steps which the Prosecutor may take during the preliminary examination. The Prosecutor's decision to request the Pre-Trial Chamber to authorise a full investigation must be well-founded and sound. States negotiating article 15 shared the concern that a prosecutorial power to initiate investigations *proprio motu* must not be allowed to lead to frivolous or politically motivated charges being advanced. Delegates were not only concerned with the rights of individuals who may be considered suspects at the preliminary stage. The mere fact that the Prosecutor requests authorisation from the Pre-Trial Chamber to fully investigate a situation contains the potential of what may be experienced as embarrassment by the Governments of the territorial State(s) and State(s) of nationality. In other words, there were obvious interests behind the current structure of article 15 para. 2 which allows for necessary investigative steps to be taken to ensure that the Prosecutor's conclusion on reasonable basis pursuant to paragraph 3 is well-founded.

In order to obtain further information, the Prosecutor in practice did not limit preliminary examination activities to his or her office in The Hague. Field missions were carried out by the Prosecutor, *inter alia*, in Colombia, Georgia, and Guinea.²⁸ The ability of the Prosecutor to seek out relevant information in places where the alleged crimes have taken place during the preliminary examination phase has also been explicitly spelled out in the OTP's policy paper.²⁹

If the Prosecutor were to be in doubt how far paragraph 2 goes, he or she could turn to the Pre-Trial Chamber for further guidance.

III. Paragraph 3

The situation where the Prosecutor concludes his or her preliminary examination pursuant to paragraphs 1 and 2 is the subject of paragraph 3. If the Prosecutor's conclusion is that 'there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected'. In other words, to continue the inquiry into alleged criminal conduct by means of a full investigation, the Prosecutor must submit an application for authorisation to the Pre-Trial Chamber with supporting material. In cases where the Court's jurisdiction is triggered through article 13 (c), this is the only way the Prosecutor can get from a preliminary examination to the stage of an actual investigation with the associated powers under article 54. When triggering is done pursuant to article 13 (a) or (b), article 15 does not apply and the Prosecutor proceeds directly to the article 53 stage. Rule 50 of the Rules of Procedure and Evidence contains further guidance on the procedure for authorizations by the Pre-Trial Chamber.

1. 'reasonable basis'

The test against which the Prosecutor must make his or her determination is one of 'reasonable basis'. This is an evidentiary test, not one of appropriateness. Rule 48 provides that the Prosecutor 'shall consider the factors set out in article 53, paragraph 1(a) to (c)' when determining whether there is a reasonable basis to proceed. It is clear that the phrase 'reasonable basis to proceed' is identical in both paragraphs 3 and 4 and in the chapeau of article 53, paragraph 1. These provisions, as noted by the pre-trial judges in the Kenya decision, 'prescribe the same standard to be considered both by the Prosecutor and the Pre-Trial Chamber'.³⁰ Although it is for the Prosecutor to determine what 'reasonable basis' means for the consideration of the information at hand, he or she knows that the Pre-Trial Chamber will apply the same test when it considers the Prosecutor's request pursuant to paragraph 4. The Prosecutor's conclusion cannot be arbitrary, but must be reasoned. He or she may not engage in a mere prediction of what the Pre-Trial Chamber will accept, but, rather, must exercise prosecutorial discretion independently by critically assessing the reliability of the information. In the situations of both Kenya and Côte d'Ivoire, the Prosecutor in reaching his conclusion examined each of the factors set out in article 53(1)(a)-(c), namely, jurisdiction, admissibility (including gravity), and interests of justice. A policy paper on preliminary examinations further spells out the Prosecutor's understanding of the requirements of a 'reasonable basis' test.³¹ Needless to say, the practice of the Pre-Trial Chamber is the key source for the determination of the more precise content of 'reasonable basis'.³²

²⁸ ASP, 'Report on the activities of the Court', ICC-ASP/12/28, 21 October 2013, paras. 72–74 (<https://www.legal-tools.org/doc/b22709/>).

²⁹ Office of the Prosecutor, 'Policy Paper on Preliminary Examinations', November 2013, para. 85 (<https://www.legal-tools.org/doc/acb906/>).

³⁰ Kenya (Pre-Trial Chamber II Decision), para 21.

³¹ Office of the Prosecutor (Policy Paper), p. 8–17.

³² Rule 48 of the Rules of Procedure and Evidence.

- 22 The Prosecutor must also consider the reference to ‘the most serious crimes of international Concern’ in article 1. This language provides general guidance as to the nature of the conduct that may be subjected to investigation and prosecution by the Office of the Prosecutor. Paragraph 3, just as paragraph 4, aims in part at protecting the Court from frivolous or politically motivated charges. At the same time it is necessary to keep in mind that the ‘reasonable basis’ test is not one of beyond reasonable doubt, and all that is at stake in paragraphs 3 and 4 is whether the Prosecutor should be allowed to investigate a situation, not if one or more specific individuals should be liable to criminal responsibility and punishment. The test of a ‘reasonable basis’ does not rise to the level of ‘reasonable grounds’ in article 58 or ‘substantial grounds’ in article 61.

2. ‘proceed with an investigation’

- 23 Proceeding with an investigation is the natural step for the Prosecutor once the preliminary examination has reached the point where he or she concludes that there is a reasonable basis to proceed. By ‘investigation’ is meant a full investigation pursuant to articles 53 and 54, with the possibilities and limitations which those provisions entail. To ‘proceed’ with an investigation is to move from article 15 into the realm of article 53 and other provisions in Part 5 of the Statute. The Prosecutor is not requesting the Pre-Trial Chamber to start proper investigations immediately upon authorisation pursuant to paragraph 4. Article 53 applies regardless of how the Court’s jurisdiction has been triggered under article 13, also in the cases of prosecutorial initiation of investigations pursuant to articles 13 (c) and 15.

3. ‘shall’

- 24 The Prosecutor ‘shall’ submit a request for authorisation with supporting material to the Pre-Trial Chamber when he or she has concluded that there is a reasonable basis to proceed with an investigation. This is a binding obligation on the Prosecutor. He or she is not at liberty to exercise discretion in applying to the Chamber to proceed when he or she considers that there is a sufficient basis. One could take the position that Article 53, on the other hand, provides a further opening for prosecutorial discretion in this regard, by incorporating a consideration of interests of justice in the Prosecutor’s final determination of whether to actually proceed with an investigation following authorisation by the Pre-Trial Chamber. Although the precise relationship between articles 15 and 53 was far from clear to the negotiating delegations, it would be erroneous to suggest that the burden on the Prosecutor is lighter under article 15 than in the article 13 (a) and (b) situations. After the Rome Conference, Rule 48 of the Rules clarified that, in reaching a conclusion that there is a reasonable basis to proceed with an investigation, the Prosecutor must consider the same factors he or she assesses upon reception of a referral by a State or the Security Council, which are contained in Article 53, paragraph 1 (a) to (c). Article 53 ensures an equal prosecutorial burden in all triggering modes outlined in article 13. New circumstances may arise after the Pre-Trial Chamber has given its authorisation under article 15 para. 4 which further justifies the applicability of article 53 on articles 13 (c) and 15 situations.

4. ‘supporting material’

- 25 The ‘supporting material collected’ will primarily be material which the Office of the Prosecutor has gathered pursuant to article 15 para. 2. The use of the word ‘collected’ does not exclude the initial information which the Prosecutor received and on which the decision to initiate an investigation pursuant to paragraph 1 was made. The reference to ‘any’ material should not be misconstrued to mean any and all. That would defeat the purpose of the provision, which is to ensure that the Prosecutor’s request is sufficiently substantiated for the Pre-Trial Chamber to be able to apply the ‘reasonable basis’ test. The Prosecutor is obliged to

forward as much supporting material as is required to show to the Chamber that his or her conclusion under paragraph 3 is well-founded and that the preliminary examination should proceed to a proper investigation.

Pre-Trial Chamber II noted in its decision on Kenya that, due to the limited powers the Prosecutor has during this preliminary phase, the information available to the Prosecutor is not expected to be ‘comprehensive’ or ‘conclusive’, compared to evidence gathered during the investigation.³³

5. Victim representations

It is clear from the discussion of paragraphs 1 and 2 above that the Prosecutor may receive information from victims. This is likely to be an important source for the Prosecutor also at the stage of preliminary examination, prior to the actual investigation, which will normally rely heavily on witness testimony. The value of the second sentence of paragraph 3 is that victims are entitled to make representations to the Pre-Trial Chamber as well, in accordance with the relevant provisions of the Rules (see Rule 50). It is, of course, for the Prosecutor and Pre-Trial Chamber to determine the relevancy and weight of any information coming from victims.

In both situations of Kenya and Côte d’Ivoire, as soon as the Prosecutor informed the Presidency of his intention to make a request under article 15, paragraph 3 of the Statute to open an investigation *proprio motu*, the OTP published a notice on the ICC website informing the victims of those crimes to make representations to the ICC. Following the Prosecutor’s requests, the Pre-Trial Chamber directed the Victims Participation and Reparations Section (VPRS) to receive victims’ representations on the subject and summarize these representations into one consolidated report.³⁴ The reports produced by the VPRS played an important role in the Pre-Trial Chamber’s assessment of the Prosecutor’s requests. This can be seen from the Chamber’s extensive reference to these two reports in its decisions on both situations. Some information contained in the reports has been considered by the judges as being able to ‘corroborate the Prosecutor’s submissions.’³⁵

IV. Paragraph 4

Paragraph 4 regulates the Pre-Trial Chamber’s exercise of discretion in response to a request by the Prosecutor pursuant to paragraph 3. The power to authorise a full investigation rests with the Pre-Trial Chamber alone. Whilst the Prosecutor may decide to *initiate* an investigation, the authority to *start* a full investigation is the Pre-Trial Chamber’s prerogative. This is the sobering reality of the Statute, in contrast to the picture which some have tried to paint of an ICC Prosecutor with powers so far-reaching as to constitute a liability to the efficacy of the Court. The Prosecutor’s investigative autonomy pursuant to articles 13 (c) and 15 is clearly judicially curtailed.

More specifically, paragraph 4 empowers the judges to consider the Prosecutor’s request with supporting material against a reasonable basis standard and the jurisdictional threshold of the Statute, with a view to authorising the commencement of the investigation. On first appearance, by including a cumulative two-fold test, paragraph 4 goes beyond paragraph 3 which only includes the same test of ‘reasonable basis’. This, however, does not necessarily

³³ Kenya (Pre-Trial Chamber II Decision), note 26, para. 27.

³⁴ Situation in the Republic of Kenya, No. ICC-01/09-4, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, Pre-Trial Chamber III, 10 December 2009, para. 9 (<https://www.legal-tools.org/doc/908205/>); Situation in the Republic of Côte d’Ivoire, No. ICC-02/11-6, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, Pre-Trial Chamber III, 6 July 2011, para. 9 (<https://www.legal-tools.org/doc/45f4fd/>).

³⁵ See for example Kenya (Pre-Trial Chamber II Decision), note 26, para. 196.

suggest a double standard between these two paragraphs. The Pre-Trial Chamber in its decision on Kenya noted that ‘there is a degree of redundancy in article 15(4) of the Statute insofar as the first requirement necessitates assessment of a ‘reasonable basis to proceed’ under article 53(1)(a) of the Statute and the second requirement equally prescribed assessment of whether ‘the case appears to fall within the jurisdiction of the Court’’.³⁶ As such, in the view of the pre-trial judges, a review of article 53 paragraphs (1)(a)-(1)(c) would make it unnecessary for the Chamber to duplicate its assessment of jurisdiction under article 15(4) of the Statute.³⁷ In any event, the reach of the expression ‘the jurisdiction of the Court’ under either this paragraph or article 53 paragraph (1)(a) is wide, insofar as it includes all of the Court’s jurisdictional requirements, not only the subject-matter jurisdiction. The requirement of article 12 that either the territorial State or a State of nationality of an alleged perpetrator has accepted the Court’s jurisdiction is an important distinguishing feature of the jurisdictional regime of the Court. Likewise, the Pre-Trial Chamber must not find that the Court’s jurisdiction is excluded because article 124 on temporary opt-out for the war crimes category applies, if the situation is to proceed to investigation. The pre-trial judges indeed held in practice that ‘an examination of the necessary jurisdiction prerequisites under the Statute must be undertaken’, which includes jurisdiction *ratione materiae* referred to by article 5, jurisdiction *ratione temporis* specified under article 11, and jurisdiction *ratione personae* embodied in article 12 of the Statute.³⁸

30 The Pre-Trial Chamber must not necessarily find that all jurisdictional requirements of the Statute are clearly satisfied. Paragraph 4 only requires that ‘the case *appears* to fall within the jurisdiction of the Court’ (emphasis added). The Chamber has full discretion in its determination of this appearance. It would seem that the purpose of paragraph 4 is not to require a thorough examination of this question at the preliminary stage of the process. The paragraph places an obligation on the Chamber to conduct an ‘examination of the request and the supporting material’. If there is no indication during this examination that the Court does not have jurisdiction over the case, the Pre-Trial Chamber should be able to conclude that ‘the case appears to fall within the jurisdiction of the Court’. Article 19 provides for further judicial consideration of the jurisdictional requirements. Article 15 para. 4 *in fine* points to this article when it states that the Pre-Trial Chamber’s jurisdictional finding pursuant to paragraph 4 will be ‘without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case’.

31 Like in paragraph 3, the ‘reasonable basis’ standard in paragraph 4 is purely evidentiary and 27 not one of appropriateness. As confirmed by the pre-trial judges in the Kenya case, it is identical with the standard that paragraph 3 sets for the Prosecutor prior to the submission of the request to the Pre-Trial Chamber. In other words, when making a judicial determination as to the authorization of an investigation, the pre-trial judges must embark on the same analysis of whether the requirements set out in article 53, paragraphs (1)(a)-(c) are satisfied. The more precise content of the ‘reasonable basis’ test has gradually emerged through the practice of the Pre-Trial Chamber. In the Kenya decision, the Pre-Trial Chamber pointed out that the ‘reasonable basis to believe’ test set out in article 53(1)(a), which is one constitutive element of article 53(1), is the lowest evidentiary standard provided for in the Statute.³⁹ The Chamber then noted that the Statute contains three higher evidentiary standards in the course of the different stages of the proceedings, including ‘reasonable ground to believe’ under article 58 (for the issuance of an arrest warrant or summons for appear), ‘substantial grounds to believe’ pursuant to article 61, paragraph 7 (for the confirmation of charges), and ‘beyond reasonable doubt’ envisaged by article 66, paragraph 3 (for the finding of guilt).⁴⁰

³⁶ *Ibid.*, para. 66.

³⁷ *Ibid.*, para. 68.

³⁸ *Ibid.*, paras. 37–39.

³⁹ *Ibid.*, para. 27.

⁴⁰ *Ibid.*, para. 28.

According to the Chamber, among all three thresholds, the one required for the issuance of an arrest warrant pursuant to article 58 of the Statute is closest to the ‘reasonable basis to believe’ standard in article 53(1)(a).⁴¹ As such, the majority judges agreed that the threshold in article 53(1)(a) requires ‘the Chamber be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘have been or is being committed’’.⁴² This approach was subsequently endorsed by the majority pre-trial judges in the Côte d’Ivoire decision.⁴³ It is however not yet settled in the present ICC jurisprudence as to how low this standard is, a question asked by Judge Kaul in his dissent opinion to the Kenya decision.⁴⁴ In fact, the applicable standard is inseparable from the methodology the Chamber employs in examining the Prosecutor’s requests. Judge Kaul pointed out that ‘the Pre-Trial Chamber’s decision pursuant to article 15(4) of the statute is not of a mere administrative or procedural nature, and should by no means be a “rubber-stamping instance”’.⁴⁵ It instead requires a ‘substantial and genuine examination’ by the judges of the Prosecutor’s requests following a ‘serious, thorough and well-considered approach’.⁴⁶ On the other hand, a relatively generous approach than the one applied by the majority in both situations was suggested by Judge Fernández in her separate opinion to the Côte d’Ivoire decision. In her view, the examination to be conducted by the Pre-Trial Chamber should be of ‘a limited nature’ and confined to ‘ascertain the accuracy of the statement of facts and reasons of law advanced by the Prosecutor’, which seems to suggest an even lower threshold.⁴⁷

The pre-trial judges must keep in mind the reference to ‘the most serious crimes of concern to the international community as a whole’ in preambular paragraph 9 and ‘the most serious crimes of international concern’ in article 1. This language provides general guidance to the Pre-Trial Chamber. However, the Chamber’s application of the ‘reasonable basis’ standard should primarily be steered by the underlying purpose of paragraph 4, that of providing a judicial filter which will protect the Court from the damaging effects of frivolous or politically motivated charges. While the Pre-Trial Chamber judges⁴⁸ in both situations of Kenya and Côte d’Ivoire – majority as well as dissenting⁴⁹ – have all acknowledged that the ‘reasonable basis’ standard should be construed and applied against the above underlying purpose of paragraph 4, they obviously cannot agree on how to implement it in practice. It is important for the judges, in implementing the Pre-Trial Chamber’s supervisory role over the Prosecutor’s *proprio motu* power in the future, to fully take into account the implications of the limited purpose of this paragraph 4. Provided the Prosecutor observes basic standards of prosecutorial professionalism and demonstrates that an investigation strategy has been adopted by his or her Office – the latter remained questionable at the time this third edition was being completed – there should be a presumption that, when the Prosecutor has made a request pursuant to paragraph 3 and has submitted material in support of the application, there is a reasonable basis to proceed to a regular investigation.

⁴¹ *Ibid.*, para. 29.

⁴² *Ibid.*, para. 35.

⁴³ Côte d’Ivoire (Pre-Trial Chamber III Decision), note 26, para. 24.

⁴⁴ Situation in the Republic of Kenya, No. ICC-01/09-19-Corr, Dissenting Opinion of Judge Hans-Peter Kaul to the Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 15 (<https://www.legal-tools.org/doc/f0caaf/>).

⁴⁵ *Ibid.*, para. 19.

⁴⁶ *Ibid.*, paras. 15, 19.

⁴⁷ Situation in the Republic of Côte d’Ivoire, No. ICC-02/11-15, Judge Fernández de Gurmendi’s separate and partially dissenting opinion to the Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire, 3 October 2011, para. 28 (<https://www.legal-tools.org/doc/ea2793/>).

⁴⁸ Kenya (Pre-Trial Chamber II Decision), para. 16; *Supra note 3*, Côte d’Ivoire (Pre-Trial Chamber III Decision), note 26, para. 21.

⁴⁹ Kenya (Dissenting Opinion of Judge Kaul), note 44, para. 15; Côte d’Ivoire (Judge Fernández’s separate and partially dissenting opinion), note 26, para. 17.

32 The power that the Pre-Trial Chamber possesses under paragraph 4 is to ‘authorize the commencement of the investigation’. With such an authorisation the Prosecutor may proceed to the consideration of launching a full investigation. Article 53 para. 1 provides guidance to the Prosecutor for this independent consideration which the Prosecutor is obliged to undertake. If the Court’s jurisdiction has been triggered by a referral by a State Party or the Security Council pursuant to article 13 (a) and (b) respectively, article 15 does not apply and thus, the question of a Pre-Trial Chamber authorisation of the commencement of the full investigation becomes moot. In those situations the Prosecutor proceeds to the consideration under article 53 para. 1 directly.

The Pre-Trial Chamber may ‘request additional information from the Prosecutor and from any of the victims who have made representations, and, if it considers it appropriate, may hold a hearing’.⁵⁰ The Chamber shall issue its decisions with reasons and give notice to victims who have made representations.⁵¹

V. Paragraph 5

33 Paragraph 5 concerns the situation where the Pre-Trial Chamber refuses to accept the Prosecutor’s request to authorise a full investigation pursuant to paragraph 4, whether because it does not find that there is a reasonable basis to proceed or that the case does not appear to fall within the jurisdiction of the Court. The paragraph provides that such refusal ‘shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation’. The term ‘shall not preclude’ does not mean that the Prosecutor can present his or her second request to the Pre-Trial Chamber as soon as new facts or evidence have been uncovered. The obligation to ‘analyse the seriousness of the information received’ in paragraph 2 applies to the Prosecutor with regard to the new facts or evidence as well. If the Prosecutor upon consideration of the new material concludes that there is a reasonable basis to proceed with a full investigation, he or she may submit a new request pursuant to paragraph 5.

VI. Paragraph 6

1. First sentence

34 The final paragraph of article 15 regulates the situation where the Prosecutor has determined that there is no reasonable basis for an investigation. Article 15 para. 3 makes it clear that the Prosecutor has full discretion in the determination of whether the information he or she has obtained and analysed amounts to a reasonable basis. If the conclusion is negative, paragraph 6, first sentence, places an obligation upon the Prosecutor to ‘inform those who provided the information’ promptly and responsibly.⁵² The discussion of paragraph 1 and 2 above shows that the Prosecutor may receive information from any source and can seek additional information from States, organs of the UN, intergovernmental or non-governmental organisations, or ‘other reliable sources that he or she deems appropriate’. The overall number of sources made available to the Prosecutor at the stage of his or her preliminary examination can in other words be very high and the range broad. The intention of the drafters of article 15 para. 6 was not, however, to add another burden to the responsibilities of the Prosecutor.

Rather, by using the expression ‘those who provided the information’, the drafters would seem to have singled out those that bring a situation to the Prosecutor’s attention and on whose information the Prosecutor will base his or her decision to initiate a preliminary

⁵⁰ Rule 50 para. 4 of the Rules of Procedure and Evidence.

⁵¹ Rule 50 para. 5 of the Rules of Procedure and Evidence.

⁵² Rule 49 para. 1 of the Rules of Procedure and Evidence.

examination pursuant to article 15 para. 1. These sources should stand out as the original providers of information to the Prosecutor. The Prosecutor is obliged under article 15 para. 6 to inform such sources of his or her conclusion that there is no reasonable basis to proceed with an investigation upon the conclusion of the preliminary examination. It may be necessary for the Prosecutor to develop guidelines on how to fulfil the requirements of this paragraph.

By ‘preliminary examination’ in paragraph 6 is meant the investigative steps which the Prosecutor may take after he or she is seized of a situation but prior to his or her determination of whether there is a reasonable basis to proceed with an investigation pursuant to paragraph 3. These steps include, but are not limited to, analysing information received from any source, seeking information from a broad range of reliable sources indicated in the text, and receiving written or oral testimony at the seat of the Court. The Prosecutor also has an evidence preservation capacity pursuant to article 54 para. 3 (f) *i.f.* which may be relevant in this context. The use of the term ‘preliminary examination’ with reference to article 15 paras. 1 and 2 is helpful in the sense that it gives the investigative activities in question a name, in distinction from investigation proper pursuant to article 53.

It worth noting that the OTP has, in its policy paper, defined the scope of preliminary examination narrower than that envisaged by this paragraph. According to the policy paper, different from the information arising from referrals by a State Party or the Security Council, the information on alleged crimes received under article 15 does not automatically lead to the start of a preliminary examination of a specific situation.⁵³ An initial phase of assessment, which aims to filter out information on crimes that are manifestly outside the jurisdiction of the Court, is a precondition for the Prosecutor to open an a preliminary examination on the basis of article 15 communications.⁵⁴ In other words, preliminary examination only applies to article 15 communications that were not rejected by the initial assessment. This approach seems to have distinguished initial assessment from preliminary examination. No matter how to make the delimitation, these investigative activities as a whole may only be ‘preliminary’, that is, at one point in time the Prosecutor must pause to make the determination of whether there is a reasonable basis to proceed with a full investigation. The preliminary examination should not be used as a pretext for conducting the actual investigation. It is, however, the Prosecutor who decides *when* the determination pursuant to article 15 para. 3 will be made. The way this discretionary power has been exercised by the Prosecutor has been subjected to serious criticism.⁵⁵ The term ‘reasonable basis’ in paragraph 6 is to be interpreted in the same way as in paragraphs 3 and 4 which have been discussed above. Paragraph 6 does not prescribe any mode to be used by the Prosecutor when informing those who provided the information. Insofar as the text simply refers to ‘inform’, it is up to the Prosecutor to choose how to inform the relevant sources of information, pursuant to the Rules of Procedure and Evidence.

2. Second sentence

Article 15 para. 6 *in fine* provides that a negative determination pursuant to article 15 para. 3, which has been communicated to those who initially provided information to the Prosecutor in accordance with the first sentence of paragraph 6, does not ‘preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence’. Based on the experience of the two *ad hoc* Tribunals it is to be expected that there will be a steady flow of information coming in to the Office of the Prosecutor as soon as the Prosecutor embarks upon a preliminary examination

⁵³ Office of the Prosecutor (Policy Paper), note 29, paras. 75, 80.

⁵⁴ *Ibid.*, paras. 75, 78.

⁵⁵ See Chan, *Judicial Oversight over Article 12(3) of the ICC Statute* (Torkel Opsahl Academic EPublisher 2013, <https://www.legal-tools.org/doc/bc46c4/>), and Xiao and Zhang, *A Realist Perspective on China and the International Criminal Court* (Torkel Opsahl Academic EPublisher 2013, <https://www.legal-tools.org/doc/9ff2b7/>).

of a situation. The mode of initial inquiry provided for in article 15 paras. 1 and 2 remains open to the Prosecutor even after his or her determination that there is no reasonable basis to proceed with a full investigation provided new facts or evidence is available. The Prosecutor is the arbiter of whether the requirement that there be new facts or evidence is satisfied. Normally the promise of new facts or evidence will lie precisely in the further information that has been submitted to the Office of the Prosecutor.

Article 15bis
Exercise of jurisdiction over the crime of aggression
(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Literature: Ambos, K., 'The Crime of Aggression after Kampala', (2010) 53 *GYbIL* 463; Clark, R. S., 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010', (2010) 2 *GoJIL* 689; Heller, K. J., 'The Uncertain Legal Status of the Aggression Understandings', (2012) 10 *JICJ* 229; Krefß, C. and von Holtzendorff, L., 'The Kampala Compromise on the Crime of Aggression', (2010) 8 *JICJ* 1179; McDougall, C., *The Crime of Aggression under the Rome Statute of the International Criminal Court* (CUP 2013); Reisinger Coracini, A., 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last ... in Reach ... over Some', (2010) 2 *GoJIL* 745; Schmalenbach, K., 'Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen', (2010) *JZ* 745; Zimmermann, A., 'The Creation of a Permanent International Criminal Court', (1998) *MPYbUNL* 169; Zimmermann, A., 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', (2012) 10 *JICJ* 209.

See also the further references *supra* at article 5 and article 8bis, as well as those *infra* at article 15ter.

Content

A. Article 15bis within the Statute's overall jurisdictional scheme.....	1
B. Drafting history of article 15bis.....	2
C. Article 15bis para. 1: exercise of jurisdiction over the crime of aggression in accordance with article 13 paras. (a) and (c).....	3
I. 'The Court (...)'.....	3
II. '(...) may exercise jurisdiction (...)'.....	4
III. '(...) over the crime of aggression (...)'.....	5
IV. '(...) in accordance with article 13, paragraphs (a) and (c) (...)'.....	6
V. '(...) subject to the provisions of this article.'.....	7
D. Article 15bis, para. 2.....	8
I. General nature and effect of article 15bis para. 2.....	8
II. 'The Court may exercise jurisdiction (...)'.....	9
III. '(...) with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.'.....	10
1. 'with respect to crimes of aggression (...)'.....	10
2. 'with respect to crimes of aggression (...)'.....	11
3. '(...) committed one year after the ratification or acceptance of the amendments by thirty States Parties.'.....	12
a) Continuous crimes of aggression.....	12
b) '(...) ratification or acceptance of the amendments (...)'.....	13
c) '(...) ratification or acceptance of the amendments (...)'.....	14
E. Article 15bis, para. 3: Activation of the Court's treaty-based aggression-related jurisdiction.....	15
I. General nature and effect of article 15bis para. 3.....	15
II. 'The Court shall exercise jurisdiction over the crime of aggression (...)'.....	16
III. '(...) in accordance with this article (...)'.....	17
IV. '(...) subject to a decision to be taken after 1 January 2017 (...)'.....	18
V. '(...) by the same majority of States Parties as is required for the adoption of an amendment to the Statute.'.....	19
F. Jurisdiction <i>ratione temporis</i> , activation of the Court's jurisdiction and Understanding no. 3.....	20
G. Article 15bis para. 4.....	21
I. Jurisdiction <i>ratione personae</i> and opting-out option (Article 15bis para. 4, 1 st sentence).....	21
1. 'The Court may (...)'.....	21
2. '(...) in accordance with article 12 (...)'.....	22
a) Article 12 para. 1.....	22
b) Article 12 para. 2.....	23
c) Article 12 para. 3.....	24
3. '(...) exercise jurisdiction over a crime of aggression (...)'.....	25
4. '(...) arising from an act of aggression committed by a State Party (...)'.....	26
5. '(...) unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar.'.....	27
a) General questions.....	27
b) Scope <i>ratione personae</i> of opt-out declarations.....	28
c) Timing and effects <i>ratione temporis</i> of opt-out declarations.....	29
d) Breadth of declarations to be made under article 15bis para. 4.....	30
e) Addressee of opt-out declarations.....	31
II. Withdrawal of opt-out declarations (Article 15 para. 4 2 nd sentence).....	32
1. 'The withdrawal of such a declaration may be effected at any time (...)'.....	32
2. '(...) and shall be considered by the State Party within three years.'.....	33
H. Article 15bis, para. 5: Exclusion of jurisdiction concerning non-parties.....	34
I. General questions.....	34
II. 'In respect of a State that is not a party to this Statute (...)'.....	35
III. '(...) the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.'.....	36
I. Article 15bis, para. 6.....	37
I. General questions.....	37
II. 'Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression (...)'.....	38
III. '(...) he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.' ..	39
J. Information of the United Nations (Article 15bis para. 6 2 nd sentence).....	40

K. Article 15bis para. 7: Determination by the Security Council of an act of aggression and start of investigations	41
L. Article 15bis para. 8: Lack of determination by the Security Council of an act of aggression and authorization of investigations by the Pre-Trial Division.....	42
I. ‘Where no such determination is made within six months after the date of notification (...)’	42
II. ‘(...) the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15 (...)’	43
III. ‘(...) and the Security Council has not decided otherwise in accordance with article 16.’	44
M. Article 15bis para. 9: Independence of the Court.....	45
N. Article 15bis para. 10: Relationship with Article 5.....	46
O. Understanding no. 5: domestic jurisdiction over the crime of aggression	47

A. Article 15bis within the Statute’s overall jurisdictional scheme

Of the three different ways of triggering the Court’s jurisdiction established under article 13, article 15bis, as introduced into the Statute as part of the Kampala compromise on the crime of aggression, relates to article 13 paras. a) and c) only. Accordingly, article 15bis deals with referrals by a State party and with *proprio motu* investigations by the Prosecutor. Specific questions related to Security Council referrals in turn are addressed in article 15ter, as far as the crime of aggression is concerned.

While the enabling Resolution RC/Res. 6, adopted at the Diplomatic Conference in Kampala, ‘[r]ecall[s] paragraph 1 of article 12 of the Rome Statute’, it is worth noting that article 15bis contains significant deviations from the regular jurisdictional scheme underlying article 12 of the Statute. This is a result of the long and difficult process of finding an agreement on both, the definition of the crime of aggression as such and the parameters, under which the court should eventually be in a position to exercise its jurisdiction over the crime of aggression.

Article 15bis also deviates from article 5 para. 2 (*ante* Kampala), which stated that the Court shall exercise its jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction. While it would not have been in accordance with the very wording of article 5 to interpret it in the sense that a mere adoption could have sufficed for the Court to be able to exercise its aggression-related jurisdiction,¹ Resolution RC/Res.6 clarified, while being adopted under article 5 para. 2 ICC Statute, that the amendment and its entry into force is governed by article 121 para. 5.²

B. Drafting history of article 15bis

While the SWGCA, in preparation for the Kampala conference, had formulated only one draft for what was to become the current article 8bis, there were various alternatives for what is now article 15bis. The most controversial question was whether proceedings should possibly also be initiated by actors other than the United Nations Security Council. The permanent members of the Security Council, as well as some other States, had proposed that a determination by the Security Council under article 39 United Nations Charter should be required for the exercise of the Court’s jurisdiction³. This position was opposed particularly by States that are members of the Non-Aligned Movement. During the Kampala Conference,

¹ For a more detailed discussion of the matter see Zimmermann (2012) 10 *JICJ* 209, 212 *et seq.*, as well as Clark, *article 121*, mn 11 *et seq.*

² RC/Res. 6, para. 6, no. 1.

³ For a significant more detailed discussion as to the drafting history of current article 15bis prior to the Kampala Conference see Zimmermann, *article 5*, mn 30 *et seq.* Werle and Jessberger, *Principles of International*

it became clear that the insistence on a monopoly for the Security Council to trigger the Court's jurisdiction concerning the crime of aggression would hinder any consensus to eventually be reached. The final compromise, reached on the very last day of the Kampala Conference⁴, as now reflected in article 15bis, therefore provides that it is not only the Security Council, but also State Parties to the Statute and the Prosecutor that can initiate proceedings even with respect to an alleged crime of aggression.

Given its principled position on the matter, France, despite the fact of not having formally opposed the consensus leading to the adoption of article 15bis, still took the position in an explanatory declaration that 'it cannot associate itself with [the] text as it disregards the relevant provisions of the Charter of the United Nations enshrined in article 5 of the Rome Statute'. According to France, article 15bis, as adopted, 'restricts the role of the United Nations Security Council and contravenes the Charter of the United Nations under the terms of which the Security Council alone shall determine the existence of an act of aggression'⁵.

In order to differentiate between proceedings triggered by State Parties or *proprio motu* by the Prosecutor on the one hand and the Security Council on the other hand, as well as for the sake of clarity, it was decided to include, apart from article 8bis containing the substance of the crime of aggression, two separate additional articles into the Rome Statute by way of an amendment: article 15bis dealing with State referrals and proceedings initiated by the Prosecutor *proprio motu*, and article 15ter covering Security Council referrals.

C. Article 15bis para. 1: exercise of jurisdiction over the crime of aggression in accordance with article 13 paras. (a) and (c)

I. 'The Court (...)'

- 3 Since article 34 defines what is to be understood by 'the Court', the introductory words of article 15bis para 1 confirm, if there was any need, that accordingly **all organs of the Court** are subject to the jurisdictional limitations provided for by article 15bis.

II. '(...) may exercise jurisdiction (...)'

- 4 Somewhat in contrast to article 15bis para. 3, the English version of article 15bis para. 1 specifies that the Court **may (rather than shall) exercise** its jurisdiction if the respective requirements set out in article 15bis are fulfilled. It must be noted, however, that both the equally authentic French and Spanish texts refer in paras. 1 and 2 to the fact that the Court can exercise ('peut exercer'/'podrá ejercer') its jurisdiction in accordance with article 13 para. a) and c). Thus the English 'may' ought to be better understood as circumscribing the Court's ability ('can'/'peut'/'podrá') to exercise jurisdiction rather than providing some specific form of discretion beyond any discretion otherwise provided for in the Statute.

III. '(...) over the crime of aggression (...)'

- 5 By referring to the exercise of jurisdiction over the **crime of aggression**, article 15bis para. 1 also confirms that the underlying **act of aggression**, while in most, if not all, cases triggering State responsibility as a matter of general international law, is not the object of the

Criminal Law (3rd ed. 2014) 546 *et seq.*; Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing* (2014) 190 *et seq.*

⁴ Barriga, in: Barriga and Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 3, 32.

⁵ Statement of France (with which the United States of America associated themselves) in explanation of position before the adoption of resolution RC/Res.6 on the crime of aggression, Review Conference of the Rome Statute of the International Criminal Court, Off. Rec., Annex VII, p. 122.

proceedings before the Court as such. Nevertheless, the Court will obviously have to consider it and possible grounds excluding the alleged illegality of any such underlying acts of aggression. It is indeed this interconnection that gave rise to the concerns as to the role of the Security Council. It stands to reason, however, that any determination by the Court that an act of aggression has been committed by organs of a State (eventually evoking those organs' individual criminal responsibility) cannot provide for any form of *de jure* binding effect as to the legal relations between the States involved in the use of armed force, even if, *de facto* and politically, such a determination might be of relevance. This holds true despite the fact that there is no provision similar to article 15bis para. 9, which would *expressis verbis* exclude any such external effect of the Court's decisions for purposes of State responsibility.

IV. '(...) in accordance with article 13, paragraphs (a) and (c) (...)'

In line with the compromise reached in Kampala, Article 15bis para. 1 provides first that 6
 '[t]he Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c)'.⁶ Article 15bis therefore does not cover or regulate Security Council referrals, which are governed exclusively by article 15ter read in conjunction with, and subject to, article 13 para. (b).

Yet, and to state the obvious, **article 16**, enabling the Security Council to request the Court not to commence respectively or to proceed with an investigation or prosecution, also applies to the crime of aggression when such an investigation or prosecution has been triggered by either a State party or *proprio motu* by the Prosecutor, as confirmed by article 15bis para. 8.⁷

V. '(...) subject to the provisions of this article.'

Para. 1 of article 15bis further clarifies that, while acknowledging the possibility of State 7
 referrals and investigations by the prosecutor under article 13 paras. (a) and (c) respectively even when it comes to the crime of aggression, any such proceedings are subject to the specific requirements and conditions, as contained in article 15bis paras. 2–10.

D. Article 15bis para. 2

I. General nature and effect of article 15bis para. 2

During the negotiation process, the issues related to the **entry into force** of the amend- 8
 ment on the crime of aggression and the extent of the Court's **jurisdiction *ratione temporis*** concerning this crime proved to be among the most intricate and disputed ones. This led to the solution now contained in article 15bis paras. 2 and 3 (and further set out in Understanding no. 3), the compatibility of which with the amendment provisions of the Rome Statute remains, to say the least, doubtful⁸. Likewise, the inter-relationship between article 15bis para. 2, article 15bis para. 3 and Understanding no. 3 is complex and bears significant legal difficulties.

As far as the Court's *treaty-based* jurisdiction with regard to the crime of aggression is concerned, those issues are governed by article 15bis paras. 2 and 3 while article 15ter paras. 2 and 3 regulate the same questions when it comes to the Court's aggression-related jurisdiction triggered by a Security Council referral under Chapter VII of the Charter of the United Nations.

⁶ As to the specific content of article 13, paras. (a) and (c) see Schabas and Pecorella, *article 13*, mn 15 and 20 respectively.

⁷ As to details on article 16, see Bergsmo, Pejic and Zhu, *article 16, passim*.

⁸ See generally Zimmermann (2012) 10 *JICJ* 209, *passim*.

While article 15bis paras. 2 and 3 are inter-related (just as *mutatis mutandis* article 15ter para. 2 and 3 concerning Security Council referrals), they still deal with different issues. It is to be noted at the outset, however, that neither of the two provisions (nor indeed the parallel provisions in article 15ter) regulate the entry into force of the Kampala amendment as such. Rather, para. 1 of Resolution RC/Res.6 adopted at the Kampala Diplomatic Conference provides that the entry into force takes place in accordance with article 121 para. 5, any doubts regarding the applicability of said provision notwithstanding⁹.

In contrast thereto, article 15bis para. 2 regulates for which crimes of aggression the Court has jurisdiction *ratione temporis*, while article 15bis para. 3 regulates the ‘activation’ of the Court’s aggression-related substance-matter jurisdiction.

Under article 15bis para. 2 (just like under article 15ter para. 2) the Court will thus only be able to exercise its jurisdiction *with respect to* crimes of aggression ‘committed one year after the ratification or acceptance of the amendments by thirty States Parties’. Put otherwise, article 15bis para. 2 circumscribes the Court’s temporal jurisdiction rather than providing for the entry into force of the amendment or providing for the ‘activation’ of the Court’s jurisdiction concerning the crime of aggression. Article 15bis para. 2 therefore constitutes a *lex specialis* to article 11 para. 2 to the extent to which the issue is specifically governed by article 15bis para. 2. Thus, under article 15bis para. 2, even with regard to a State ratifying the Rome Statute after the amendment as such has entered into force pursuant to article 121 para. 5, the Court may not exercise its jurisdiction with respect to a crime of aggression committed by that State’s nationals, unless 30 States have by then already ratified or accepted the amendment, additionally one year has lapsed since that 30th ratification or acceptance, and the condition provided for in article 15bis para. 3 has also been fulfilled.¹⁰

II. ‘The Court may exercise jurisdiction (...)’

- 9 This part of article 15bis para. 2 is identical to the introductory words of article 15bis para. 1 without raising any additional or separate issues of interpretation.¹¹

It is worth noting, however, that unlike article 24 para. 1 in relation to which article 15bis para. 2 (respectively article 15ter para. 2) constitutes *lex specialis* which stipulates that ‘[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute’, article 15bis para. 2 (respectively article 15ter para. 2) does not address the (substantive) criminal liability of the offender. Rather it merely limits the Court’s temporal jurisdiction. Notwithstanding this conceptual difference the effect is the same, namely that a person committing a crime of aggression within the meaning of article 8bis prior to the critical date shall not face prosecution by the Court.

III. ‘(...) with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.’

1. ‘with respect to crimes of aggression (...)’

- 10 The phrase ‘(...) with respect to crimes of aggression committed (...)’¹² confirms that it must be the specific *crime of aggression*, as set out in article 8bis para. 1, that must have taken place after the lapse of the one-year period after the 30th ratification or acceptance, rather than the underlying *act* of aggression, although in most cases, though not necessarily, both will coincide.

⁹ For details see Zimmermann (2012) 10 JICJ 209 *et seq.*, *passim*; McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 252; Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing* (2014) 216 *et seq.*

¹⁰ See *infra* mn 15.

¹¹ See mn 4.

¹² Emphasis added.

2. ‘with respect to crimes of aggression (...)’

The wording of article 15bis para. 2 further confirms that the **ratification** of the Kampala amendment by thirty States and the additional lapse of a one-year period constitute a *condicio sine qua non* for the Court’s exercise of its aggression-related temporal jurisdiction. 11

Article 15bis para. 2, by specifically using the words ‘**with respect to**’ rather than simply stating that the Court may only exercise its jurisdiction ‘one year after the ratification or acceptance of the amendments by thirty States Parties’, indicates that the fulfillment of this condition defines the extent of the Court’s temporal jurisdiction concerning the crime of aggression, namely those crimes committed one year after the 30th ratification or acceptance, as defined below¹³. Article 15bis para. 2 therefore does not seem to define the time-frame when such jurisdiction, once established, may be *exercised*. This latter question is then, under the Statute as such, regulated by article 15bis para. 3. Put otherwise, *under the wording of article 15bis para. 2*, the Court can accordingly in principle also exercise its jurisdiction *with respect to crimes committed prior to the decision provided for in article 15bis para. 3*, but can effectively do so only after this decision was made.¹⁴

3. ‘(...) committed one year after the ratification or acceptance of the amendments by thirty States Parties.’

a) **Continuous crimes of aggression.** In order to fall within the Court’s temporal jurisdiction the respective crime of aggression (and thus normally also the underlying act of aggression) must have been committed, as article 15bis para. 2 confirms, at least one year after the ratification or acceptance of the amendments by thirty States Parties. Yet, at least certain of the acts of aggression defined in article 8bis para. 2, such as article 8bis para. 2 lit. a) 2nd alternative (‘any military occupation, however temporary, resulting from such invasion or attack’) or lit. g) 2nd alternative (‘any extension of their presence [*i.e.* the presence of troops] in such [foreign] territory beyond the termination of the agreement’), are of a **continuous character** within the meaning of article 14 para. 2 ILC Articles on State Responsibility, *i.e.* the breach of the obligation ‘extends over the entire period during which the act continues and remains not in conformity with the international obligation’.¹⁵ 12

While said standard has primarily been developed for purposes of State responsibility, it nevertheless has also been adopted, albeit reluctantly, for purposes of international criminal law¹⁶. Given the nature of the abovementioned acts of aggression, individuals might very well come within the Court’s **jurisdiction *ratione temporis*** with regard to the commission of the crime of aggression provided the commission of the (continuous) act of aggression itself occurred within the jurisdictional reach *ratione temporis* of the Court.

b) ‘(...) **ratification or acceptance of the amendments (...)**’. It is noteworthy that article 15bis para. 2 (just like article 15ter para. 2), contrary to the wording of article 121 paras. 4 and 5, refers to the ‘**ratification or acceptance**’ of the amendments by thirty States parties rather than to *the deposit of an instrument of ratification or acceptance*. This difference in wording, even if its drafters might eventually have thought to use a formula which was only shorter yet was meant to be identical in content, could also be perceived as implying that any such ‘*ratification/acceptance*’ refers to the amendment becoming *binding* for the ratifying/accepting State, rather than referring to the *act of depositing* the instrument of ratification or acceptance. Under article 121 para. 5, however, any such ratification/acceptance only takes effect one year *after the deposit of the instrument of ratification/acceptance*. If this prolonged process is applicable, the likelihood of reaching the necessary thirty ratifications before the 13

¹³ See *infra* mn 12.

¹⁴ As to the impact of Understanding no. 3 on this interpretation of article 15bis para. 2 see *infra* mn 20.

¹⁵ UN DOC A/56/83 (12 December 2001).

¹⁶ See Pangalangan, article 24, mn 13 *et seq.*

decision contemplated in article 15bis para. 3 (respectively in article 15ter para. 3) will be taken after 1 January 2017 decreases. In other words, this might postpone the Kampala amendment on the crime of aggression becoming effective.

- 14 c) '(...) ratification or acceptance of the amendments (...)'. It is not entirely clear what article 15bis para. 2 means when it refers to the 'acceptance' of the amendments alongside a possible 'ratification'. At the time of writing, 23 States, namely Andorra, Austria, Belgium, Botswana, Costa Rica, Croatia, Cyprus, the Czech Republic, Estonia, Georgia, Germany, Latvia, Liechtenstein, Luxembourg, Malta, Poland, Samoa, San Marino, Slovakia, Slovenia, Spain, Trinidad and Tobago, as well as Uruguay, have so far acceded to the amendment on the crime of aggression by submitting a formal declaration to the depositary.¹⁷ It is thus beyond doubt that those 23 ratifications are to be counted towards the quorum required by article 15bis para. 2 (respectively by article 15ter para. 2).

Besides, twelve more States, including most recently the State of Palestine¹⁸, have acceded to the Rome Statute after the Kampala amendment on the crime of aggression had been adopted, *i. e.* after 11 June 2010,¹⁹ without expressing an intention *not* to be bound by the treaty, as amended. At the same time, no State having ratified the Rome Statute after the Kampala Diplomatic Conference, has so far also ratified or acceded to the amendment on the crime of aggression. This stands in line with the practice concerning the amendment to article 8²⁰ where similarly none of the States having become parties to the Rome Statute after the Kampala Conference has so far separately acceded to the article 8 amendment.

The wording of article 15bis para 2 (and the parallel wording of article 15ter, para. 2) refers to the fact that '[t]he Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties'²¹. This raises two questions: for one, has a State, ratifying the Rome Statute after 11 June 2010, thereby also automatically *accepted* the Kampala amendment, and, secondly, can such a State then accordingly be also counted towards the necessary quorum of thirty States.

In that regard, it is worth recalling preambular paragraph 3 of Resolution RC/Res.5, also adopted in Kampala, and dealing with the amendments to article 8 of the Rome Statute. The said provision specifically '[c]onfirm[ed] that, in light of the provision of article 40, paragraph 5, of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendment contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute'. In contrast thereto, Resolution RC/Res.6, dealing with the crime of aggression, contains no such provision. Yet, given that the principle underlying article 40 para. 5 of the Vienna Convention on the Law of Treaties constitutes customary international law²², it still applies, the lack of any specific reference to article 40 para. 5 of the Vienna Convention on the Law of Treaties notwithstanding. As a matter of fact, at least those States that have ratified the Rome Statute after the Kampala amendment on the crime of aggression has entered into force for the first State have thus, to use the formula contained in

¹⁷ See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en (accessed September 2015).

¹⁸ See as to the question of Palestinian statehood and the status of Palestine vis-à-vis the Rome Statute generally Zimmermann (2013) 11 *JICJ* 303 *et seq. passim*; see also the depositary note concerning Palestine, CN.12.2015.TREATIES-XVIII.13 (2 January 2015), as well as the communications by Canada (23 January 2015), <https://treaties.un.org/doc/Publication/CN/2015/CN.62.2015-Eng.pdf>; by the United States of America (23 January 2015), <https://treaties.un.org/doc/Publication/CN/2015/CN.64.2015-Eng.pdf>; and by Israel (23 January 2015), <https://treaties.un.org/doc/Publication/CN/2015/CN.63.2015-Eng.pdf>.

¹⁹ These States include Cabo Verde, Côte d'Ivoire, Grenada, Guatemala, Maldives, Moldova, Philippines, Seychelles, St. Lucia, Tunisia, Vanuatu and most recently the State of Palestine, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (accessed September 2015).

²⁰ On the content of this amendment see Geiß, *article 8*, mn 973 *et seq.*

²¹ Emphasis added.

²² See for such proposition *inter alia* Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) article 40, mn 15.

article 40 para. 5 of the Vienna Convention on the Law of Treaties, 'become parties to the treaty *after the entry into force of the amending agreement*'.²³ This is due to the fact that, as shown²⁴, the entry into force of the Kampala amendment on the crime of aggression is not governed by the jurisdictional clauses contained in article 15bis paras. 2 and 3 (respectively in article 15ter paras. 2 and 3), but rather by article 121 para. 5. It thus seems that at least those States that have (or will have) ratified the Rome Statute after that date ought to be counted towards the quorum laid down in article 15bis para. 2 unless they have expressed a different intention, in line with article 40 para. 5 of the Vienna Convention on the Law of Treaties.

This understanding is confirmed by the fact that article 15 para. 2 specifically refers to the 'ratification or acceptance of the amendments'²⁵, an *ex post* ratification of the amendment then being a specific form of acceptance under article 40 para. 5 of the Vienna Convention on the Law of Treaties. In fact, none of the States that ratified the Rome Statute after the Kampala review conference has submitted a declaration expressing an intention not to be considered as a party to the amended treaty within the meaning of the said article 40, para. 5. Accordingly, such States will then, just like States that had become parties prior to the entry into force of articles 8bis, 15bis and 15ter, also have the right to opt out from the Court's jurisdiction on the crime of aggression under article 15bis para. 4.

It is true that the wording of article 15bis para. 2 (just like that of article 15ter para. 2) specifically refers to the 'ratification or acceptance of the amendments by thirty States parties' rather than to the acceptance by thirty States *tout court*. Yet, article 2 para. 1 lit. g) of the Vienna Convention on the Law of Treaties defines a '[State] party' as meaning 'a State which has consented to be bound by the treaty and for which the treaty is in force'. This might be understood as also comprising newly acceding States.

On the other hand, it seems that delegations participating in the Kampala Conference, when using the formula '[t]he Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties' in article 15bis para. 2, simply meant to replicate the wording of article 121 paras. 4 and 5, which refer to the point in time after instruments of ratification or acceptance have been deposited. It thus seems that the drafters of article 15bis para. 2 (and of article 15ter para. 2) omitted the reference to the deposition of instruments only to be more concise rather than to convey another meaning, as outlined above. Yet, this intention is neither reflected in the *travaux préparatoires* of the provision, nor in the text itself.

The contrary position, namely that 30 States need to formally ratify or accept the amendments as such, rather than either ratify or accede to the amended treaty *in toto*, in order for the amendments to become applicable, stands in line, however, with a press communiqué distributed by the ICC on the occasion of San Marino's ratification of the amendment on the crime of aggression, which stated that '[t]he Court may exercise jurisdiction over the crime of aggression once thirty States Parties have *ratified* the amendments'²⁶ instead of using the more precise terminology 'ratified or accepted' formula used in article 15bis (and in article 15ter), para. 2.

This somewhat more restrictive position also seems to be shared by the depositary, the United Nations Secretary General. More specifically, the United Nations Secretary General has taken the position that new parties to the Statute must explicitly ratify the amendments, or are otherwise deemed to be party to the original 1998 version of the Rome Statute as agreed upon in Rome.²⁷

²³ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 265.

²⁴ *Supra* mn 1, 8.

²⁵ Emphasis added.

²⁶ Press Release No. ICC-ASP-20141119-PR1065, Assembly of States Parties to the International Criminal Court, 19 November 2013, see http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR1065.aspx.

²⁷ Cf. e.g. the depositary notification for Cote d'Ivoire, referring to the Rome Statute as agreed upon in Rome on 17 July 1998: <https://treaties.un.org/doc/Publication/CN/2013/CN.150.2013-Eng.pdf>.

In the end, this discussion could turn out to be rather theoretical when it comes to answering the question from what moment onwards the Court will be able to exercise its aggression-related jurisdiction, given the current momentum in the ratification process. As a matter of fact, by mid-2015, 23 ratifications have already been submitted, leaving a considerable amount of time to reach the necessary thirty ratifications before 2017. Nonetheless, the very same issue might still be relevant for yet another purpose.

At least when taken at face value and leaving aside Understanding no. 3 for the time being²⁸, article 15bis para. 2 determines the earliest point in time with regard to which the Court may exercise its aggression-related treaty-based jurisdiction, namely covering all such crimes ‘committed one year after the ratification or acceptance of the amendments by thirty States Parties’. Accordingly, provided one were to share the position that States acceding to the Statute post-Kampala were to be counted towards the quorum of thirty States, the decision to be reached after January 1, 2017 under article 15bis para. 3 might retroactively activate the Court’s jurisdiction *ratione temporis* for crimes of aggression committed in 2014, *i. e.* after 30 States had become bound by the Kampala amendment including those States that ratified the Statute after the Kampala amendment had already entered into force.

E. Article 15bis, para. 3: Activation of the Court’s treaty-based aggression-related jurisdiction

I. General nature and effect of article 15bis para. 3

- 15 Leaving aside once again the complexities of the amendment process leading to the adoption of the amendment on the crime of aggression at the Kampala Review Conference, which puts into question its compatibility with regular rules of the law of treaties²⁹, article 15bis para. 3 (as well as article 15ter para. 3 regarding the Court’s Security Council-based jurisdiction) provides that the Court may only exercise its aggression-related jurisdiction once a decision has been taken to that effect after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

This has rightly been described as an ‘activation’ of the Court’s aggression-related jurisdiction which might thus be considered existing, but still ‘dormant’ pending this very decision. In a way, the current situation is thus somewhat similar to the one prior to the entry into force of the Kampala amendment under article 5 para. 1 lit. d) and para. 2 as it then stood, which provided that while the Court already had jurisdiction over the crime of aggression from the very beginning of its existence, it could not yet exercise it.³⁰

II. ‘The Court shall exercise jurisdiction over the crime of aggression (...)’

- 16 The use of the word ‘shall’ in article 15bis para. 3 as compared to the ‘may’ in paras. 1, 2 and 5 of article 15bis (‘ejercerá’/‘podrá ejercer’ in Spanish; ‘peut exercer’/‘exerce’ in French) seems to imply that, once the decision has been made under article 15bis para. 3, the Court is duty-bound to exercise its jurisdiction, obviously subject to those statutory rules governing such an exercise of jurisdiction.

As in paras. 1, 2 and 4 of article 15bis, para. 3 once again reconfirms that the Court will only exercise jurisdiction vis-à-vis **natural persons** allegedly having committed a crime of aggression (rather than exercising jurisdiction concerning alleged acts of aggression).³¹

²⁸ On the relevance of Understanding no. 3 as to the activation of the Court’s jurisdiction see *infra* mn 20.

²⁹ Zimmermann (2012) 10 *JICJ* 209.

³⁰ For further details see Zimmermann, *article 5*, mn 27 *et seq.*

³¹ See mn 5, 10, 25.

III. ‘(...) in accordance with this article (...)’

The wording of article 15bis para. 3 further clarifies and once more confirms that any exercise of jurisdiction over the crime of aggression shall take place in accordance with article 15bis as constituting *lex specialis* to the regular jurisdictional rules also contained in the Statute. 17

IV. ‘(...) subject to a decision to be taken after 1 January 2017 (...)’

Article 15bis para. 3 further provides that in order to ‘activate’ the Court’s jurisdiction, a positive decision in that regard has to be taken after 1 January 2017. Under the wording of article 15bis para. 3, the purpose of the provision is not to regulate the Court’s temporal jurisdiction (that question being decided by article 15bis para. 2), but rather to determine only from what point onwards the Court ought to actually exercise its jurisdiction. 18

The formula ‘subject to a decision’ contained in article 15bis para. 3 (as well as in 15ter para. 3) implies, however, that the States Parties might decide otherwise, *i.e.* might provide that the Court shall not have jurisdiction for acts of aggression eventually committed in the period between the 30th ratification has become effective and the point in time the decision under para. 3 was taken (if ever there was such period at all, *i.e.* if the decision under article 15bis para. 3 is taken only after the threshold required by article 15bis para. 2 was reached).

V. ‘(...) by the same majority of States Parties as is required for the adoption of an amendment to the Statute.’

The last part of article 15bis para. 3, by using the phrase ‘the same majority of States Parties as is required for the adoption of an amendment to the Statute’, makes reference to article 121 para. 3.³² Accordingly, any decision under article 15bis para. 3 to activate the Court’s jurisdiction requires a positive decision by two thirds of the State Parties to the Statute, in accordance with article 121, para. 3 rather than a two-thirds majority of those States present and voting when any such decision is to be taken. The term ‘States Parties’ in this context is referring to the then current number of States Parties rather than to the current number of States Parties. 19

The decision in question, just like the adoption of an amendment, can either be taken at a meeting of the Assembly of States Parties or, should the opportunity arise, at a Review Conference.

F. Jurisdiction *ratione temporis*, activation of the Court’s jurisdiction and Understanding no. 3

The already complex questions of the Court’s temporal jurisdiction on the one hand and of the ‘activation’ of its aggression-related jurisdiction on the other, as laid out in article 15bis/ter para. 2 (regulating the former) and in article 15bis/ter para. 3 (regulating the latter), is further complicated by the terms of Understanding no. 3, adopted by the negotiating States in Kampala as Annex III of the enabling Resolution RC/Res. 6, whereby the Kampala amendment on the crime of aggression was adopted. This understanding provides in quite unequivocal terms: 20

‘It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15bis, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.’

³² On article 121 para. 3 see Clark, *article 121*, mn 9; Werle and Jessberger, *Principles of ICL* (2014) 555.

In that regard, one has to first note that by making reference to article 13, paragraph (a) or (c) only, the understanding was meant to only govern the Court's *treaty-based* aggression-related jurisdiction, a fact further confirmed by the exclusive reference in the text of Understanding no. 3 to article 15bis para. 3 (but not to article 15ter para. 3).³³

What is more is that the Understanding reverses the effect of the **quorum** provided for in article 15bis para. 2 on the one hand³⁴, and of the **decision** referred to in article 15bis para. 3 on the other³⁵ as proscribed by the two provisions.

With regard to the former, the text of the Understanding, contrary to the content of article 15bis para. 2, foresees that the Court may only exercise its jurisdiction a year after the ratification or acceptance of the amendments by thirty States Parties. It thus seems that the said Understanding, contrary to the wording of article 15bis para. 2 (which instead uses the phrase 'with respect to') provides for a definite time-frame for the *exercise* of jurisdiction by the Court, rather than circumscribing the *extent of the Court's temporal jurisdiction*, regardless of when such jurisdiction would then actually be exercised. This is true notwithstanding the heading of Understanding no. 3, which refers to 'Jurisdiction *ratione temporis*'.

With regard to the latter, *i. e.* article 15bis para. 3, it provides that the Court's **jurisdiction *ratione temporis*** is limited in that 'the Court may exercise its jurisdiction only *with respect to* crimes of aggression committed after a decision in accordance with article 15bis, paragraph 3, is taken'. This stands, once again, in contrast to the actual wording of article 15bis para. 3 which, as shown above³⁶, conversely merely regulates the exercise, by the Court of its jurisdiction rather than circumscribing its temporal jurisdiction.

Given that, at best, the said Understanding constitutes an agreement relating to the text of the amendment made in connection with the conclusion of the treaty within the meaning of **article 32 para. 2 lit. a) of the Vienna Convention on the Law of Treaties**, it may only serve as an interpretative tool, which may not, however, set aside the clear text of the treaty as such. It is thus submitted that the Understanding's aim was only to further define what was previously agreed upon while not *limiting* the effect of article 15bis para. 2 and para. 3 respectively. Put otherwise, the temporal limitations as to the *reach* of the Court's temporal jurisdiction (as laid down in article 15bis para. 2), and as to the *exercise* of such jurisdiction (as laid down in article 15bis para. 3) would stand unabated while Understanding no. 3 would add further limitations, as set out above.

Thus, on the whole and taking the *combined* effect of article 15bis para. 2, article 15bis para. 3 and Understanding no. 3 into account,

- the Court will only be able to exercise its jurisdiction one year after the 30th ratification or acceptance has become effective³⁷ and after the decision contemplated in article 15bis para. 3 has been made
and
- the Court's jurisdiction may then be only exercised with respect to crimes of aggression committed after the 30th ratification or acceptance has become effective and after the decision provided for in article 15bis para. 3 has been made.

³³ As to the parallel provision in article 15ter see Zimmermann and Freiburg, *article 15ter*, mn 6.

³⁴ See mn 8 *et seq.*

³⁵ See mn 15 *et seq.*

³⁶ *Supra* mn 8.

³⁷ See mn 13 *et seq.*

G. Article 15bis para. 4

I. Jurisdiction *ratione personae* and opting-out option (Article 15bis para. 4 1st sentence)

1. ‘The Court may (...)’

The introductory words of article 15bis para. 4 are identical to the ones used in article 15bis para. 1; both phrases should thus also be interpreted in the same manner, *i.e.* as merely circumscribing the extent of the Court’s jurisdiction³⁸, the present provision being concerned with the Court’s jurisdiction *ratione personae*.

2. ‘(...) in accordance with article 12 (...)’

a) **Article 12 para. 1.** By using the words ‘in accordance with article 12’ article 15bis provides that, as a matter of principle, the general rules governing the Court’s exercise of jurisdiction as enshrined in article 12³⁹ also apply when it comes to the crime of aggression, subject however to the extent to which article 15bis constitutes a *lex specialis*.

Subject to a State party’s exercise of the opt-out possibility provided for in article 15bis para. 4, a State that is a contracting party is, under article 12 para. 1, thus deemed to have accepted the Court’s jurisdiction also with regard to the crime of aggression, as contained in article 5 para. 1 lit. d),⁴⁰ regardless of whether it has, in one way or the other, specifically accepted the Kampala amendments on the crime of aggression.

b) **Article 12 para. 2.** Accordingly, the Court is thus, as a matter of principle and subject to article 15bis para. 5⁴¹, in a position to *first* exercise its treaty-based aggression-related jurisdiction with regard to crimes of aggression committed on either the **territory of a State party or committed against vessels or aircraft registered in a State party**, provided that in any case the said State party has not opted out from the Court’s aggression-related jurisdiction. In the latter respect, *i.e.* concerning possible crimes of aggression committed against vessels or aircraft registered in a State party, it is particularly worth noting that under article 8bis para. 2 lit. d) even the attack against the sea or air forces, or the marine and air fleets of another State can amount to the crime of aggression⁴².

Besides, under article 12 para. 2 lit. b), the Court may also, again subject to both article 15bis para. 5 and the opting-out option available to State parties, exercise its treaty-based aggression-related jurisdiction provided the accused is a national of a State party.

c) **Article 12 para. 3.** Article 12 para. 3 enables States, not parties to the Statute, to accept the exercise of jurisdiction by the Court with respect to the crime in question, by way of a declaration lodged with the Registrar. However, in line with **Rule 44 of the Court’s Rules of Procedure and Evidence**, article 12 para. 3 has to be understood as an acceptance of jurisdiction with regard to an overall situation and with respect to all ‘crimes referred to in article 5 of relevance to the situation’.

In that regard it seems to be in line with the object and purpose of article 15bis para. 5, namely to protect third States, not parties of the Statute to also allow article 12 para. 3 declarations to apply to the crime of aggression, the categorical wording of article 15 para. 5

³⁸ See mn 4.

³⁹ For further details see Schabas and Pecorella, article 12, *passim*; Ambos, *Treatise on ICL II* (2014) 219.

⁴⁰ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 254; Krefß and von Holtzendorff (2010) 8 *JICJ* 1179, 1213.

⁴¹ See *infra* mn 34 *et seq.*

⁴² For details see Zimmermann and Freiburg, article 8bis, mn 132 *et seq.*

‘the Court *shall not exercise* its jurisdiction’ notwithstanding. Moreover, given the interpretation of article 12 para. 3, as laid down in Rule 44 of the Rules of Procedure and Evidence, any such declaration does also entail the acceptance of the Court’s treaty-based aggression-related jurisdiction by the State making the declaration.

Given the unequivocal wording of article 12 para. 3, which only refers to States which are *not* parties to this Statute as eventually making such declarations, it does not apply *as such* to ‘non-accepting’ State parties which have opted out from the Court’s treaty-based, aggression-related jurisdiction under article 15bis para. 4. At the same time, there appears to be no reason why a State should not be permitted to partially withdraw its opting-out declaration by means of an *ad hoc* declaration in accordance with the idea underlying article 12 para. 3.

3. ‘(...) exercise jurisdiction over a crime of aggression (...)’

- 25 Once again, these introductory words of article 15bis para. 4 are identical to the ones used in article 15bis para. 1, reference to which⁴³ is therefore made.

4. ‘(...) arising from an act of aggression committed by a State Party (...)’

- 26 Under article 15bis para. 4, the initiation of proceedings requires the **aggressor State’s consent**. As a matter of principle, Article 15bis para. 4 therefore provides for the Court’s treaty-based, aggression-related jurisdiction only if the underlying act of aggression has been, as the provision puts it, ‘committed by a State party’. Accordingly, the said act of aggression, as defined in article 8bis para. 2, must be attributable to a State Party of the Statute under the regular rules of States responsibility as they have been enshrined in the ILC’s Articles on State Responsibility. For the purposes of article 15bis para. 4 it therefore does not matter whether such a State Party has ratified or otherwise accepted⁴⁴ the Kampala amendments on the crime of aggression, unless such a State Party has opted out from the Court’s treaty-based, aggression-related jurisdiction⁴⁵.

The crime of aggression must furthermore ‘**arise from**’ (‘résultant d’un acte d’agression’ in the French version of the text and ‘resultante de un acto de agresión’ in the Spanish text) an act of aggression attributable to a State Party that has not made an opting-out declaration. Article 15bis para. 4 does not require, however, that the act of aggression is then necessarily committed by a national of a State Party. Indeed, there might be scenarios in which *the act of aggression* (rather than the crime of aggression) is committed by nationals of third States, but where the act is nevertheless attributable to a State Party which has not made an opting-out declaration, *e.g.* under article 8 of the ILC Articles on State Responsibility. Provided the crime of aggression was then committed by nationals of a State Party bound by the amendments and occurred on the territory of such a State, the Court is in a position to exercise its treaty-based, aggression-related jurisdiction.

5. ‘(...) unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar.’

- 27 a) **General questions.** Article 15bis, para. 4 *presupposes* the consent of States Parties to the Court’s exercise of its treaty-based, aggression-related jurisdiction. However, a State party has the option to declare that it does not accept the Court’s treaty-based jurisdiction over the crime of aggression by lodging a declaration with the Registrar. This provision is remarkable, given its absence in the likewise newly introduced article 8 para. 2 (e) lit. (xiii), (xiv) and (xv) ICC Statute. The establishment of such an opt-out procedure for the crime of aggression became a necessary negotiation strategy during the Kampala Review Conference, aiming

⁴³ See mn 4.

⁴⁴ For detail as to this question see mn 13 *et seq.*

⁴⁵ Kreß and von Holtendorff (2010) 8 *JICJ* 1179, 1213.

mainly at convincing France and Great Britain to stop insisting on the monopoly of the Security Council when it comes to the crime of aggression.⁴⁶

Yet, this compromise, as enshrined in the **opt-out procedure**, is hardly, if at all, compatible with article 121, para. 5, which under the enabling resolution adopted at the Kampala Diplomatic Conference constitutes the treaty provision providing for the entry into force of the Kampala amendments and which states that amendments only apply vis-à-vis those States Parties which have accepted them⁴⁷. As a matter of fact, article 15bis, para. 4 attempts to force States parties which are not willing to accept the Court's treaty-based, aggression-related jurisdiction to formally opt out of this jurisdiction, instead of simply allowing them to remain silent and rely on their non-acceptance of the amendment. Put otherwise, once the conditions of article 15bis, paras. 2 and 3 are fulfilled, the amendment will enter into force for all States parties except those that have submitted an opting-out declaration, making it thus *mutatis mutandis* (but for the opting-out option) subject to the amendment procedure provided for in article 124 para. 4.

Given the doubts about the compatibility of the opting-out procedure as laid down in the Kampala amendments with the amendment provisions of the Statute, States might, at any given moment prior to the critical date, make declarations taking just this position. By the same token, they might then indicate that they therefore do not feel the need to formally lodge an opt-out declaration, in order not to be bound by the amendment, given that article 121 para. 5 has to be interpreted just in this manner.

b) Scope *ratione personae* of opt-out declarations. The opt-out option applies to all State parties to the Rome Statute, irrespective of whether they have previously ratified the amendment, have otherwise accepted it by ratifying the Statute after the amendment had already been adopted⁴⁸, or finally have not accepted the Kampala amendments at all.⁴⁹ 28

There is no hint in the text of article 15bis para. 4 that would prevent even a State that has itself participated in bringing about the 'activation' of the Court's treaty-based, aggression-related jurisdiction by way of its ratification or acceptance from 'protecting' its own citizens from the Court's jurisdiction by submitting an opting-out declaration to the Registrar in accordance with article 15bis para. 4.

In contrast thereto, the opting-out option under article 15bis para. 4 is not available to **non-State parties**, them being protected against the Court exercising its treaty-based, aggression-related jurisdiction vis-à-vis their nationals or concerning acts on their territory by article 15bis para. 5.

c) Timing and effects *ratione temporis* of opt-out declarations. Opt-out declarations under article 15bis para. 4 may be lodged with the Registrar even before the Court's treaty-based, aggression-related jurisdiction becomes activated under article 15bis paras. 2 and 3⁵⁰, and might also accompany a notification of ratification of the Kampala amendments.⁵¹ 29

It is not, however, beyond doubt whether the term 'previously' refers to a point in time prior to the commission of an act of aggression, or rather to one prior to the exercise, by the Court, of its jurisdiction in a given case. However, the very structure of the text, which links the declaration to the commission of the act of aggression, seems to militate in favor of an interpretation requiring the declaration to be made prior to the act of aggression rather than to the exercise of jurisdiction by the Court.⁵² It is also only this interpretation, which is fully

⁴⁶ Krefß and von Holtendorff (2010) 6 *Vereinte Nationen* 260, 262; Ambos, *Treatise on ICL II* (2014) 193.

⁴⁷ For further details see Zimmermann (2012) 10 *JICJ* 209, 220 *et seq.*; Ambos (2010) 53 *GYbIL* 463, 504; Schmalenbach (2010) *JZ* 745, 750 *et seq.*

⁴⁸ See for such possibility mn 14.

⁴⁹ Clark (2010) 2 *GoJIL* 689, 704; McDougall, *The Crime of Aggression under the Rome Statute of the ICC* (2013) 253.

⁵⁰ For details see mn 8 *et seq.*

⁵¹ See also mn 13.

⁵² Ambos (2010) 53 *GYbIL* 463, 505; Reisinger Coracini (2010) 2 *GoJIL* 745, 777.

in line with the object and purpose of the provision. Were it otherwise, a State could commit an act of aggression and would, if the Court started an investigation, subsequently still be able to bar the Court from exercising its jurisdiction, almost until the very last minute before proceedings are about to begin. Nonetheless, given that article 15bis para. 4 does not contain any precise deadline, no specific period of time has to lapse between the point in time at which the declaration is made and the time during which the act of aggression takes place, in order for the former to be effective.

In order to prevent States from misusing the opt-out option, a certain **minimum period of time** is required before such a declaration becomes effective, thereby ensuring that the opt-out did not occur with the specific plan in mind to commit an act of aggression within the immediate future. As a matter of fact, to paraphrase the ICJ in its *Nicaragua* judgment concerning the right of a State to denounce a declaration under article 36 para. 2 ICJ Statute accepting the jurisdiction of the ICJ, it appears from the requirement of good faith that such unilateral declarations should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal even when it comes to treaties that contain no provision regarding the duration of their validity.⁵³ The necessary time to have lapsed before any such opting out becomes effective would then depend on the circumstances of the specific case.

In the normal course of events lodging such a declaration in the immediate **temporal context of an act of aggression** with the intent to prevent the Court from exercising jurisdiction in this case, will not, however, fulfill the definition of the crime of aggression's planning and preparation phase.⁵⁴ As a matter of fact, the sole aim of such opting out might simply be to avoid having the use of force by one State, albeit eventually a controversial one, not being exposed to judicial scrutiny rather than pursuing a plan to commit the crime of aggression.

Despite the fact that an opt-out declaration under Article 15 para. 4 2nd sentence concerning the Court's treaty-based, aggression-related jurisdiction may be made for an unlimited period of time, it could still from the very beginning be made, if a State party wishes, for a limited time period, given that it can also be revoked at any time.⁵⁵

30 d) **Breadth of declarations to be made under article 15bis para. 4.** Article 15bis, para. 4 further raises the issue of whether an opt-out declaration can also be limited to one of the **jurisdictional links** provided for in article 12, *i. e.* the nationality of the perpetrator *or* the place of the offence. Unlike article 124, the very wording of which refers to declarations, pursuant to which either war crimes committed by a State party's nationals or those committed on its territory (or both) may be excluded from the jurisdiction of the Court, article 15 para. 4 refers generally to the Court's jurisdiction 'over a crime of aggression, arising from an act of aggression committed by a State Party' that may be excluded by way of an opting-out declaration. This might at first glance invite an *e contrario* argument. On the other hand, one has to take into account the fact that an opting-out declaration under article 15bis para. 4 limits the Court's otherwise existing treaty-based, aggression-related jurisdiction. It thus seems to be appropriate to also allow for a more limited opting-out declaration to be made under article 15bis para. 4⁵⁶, third parties being protected anyhow by virtue of article 15bis para. 5.

31 e) **Addressee of opt-out declarations.** Article 15 para. 4 expressly states that an opt-out declaration ought to be lodged with the Court's **Registrar**. This stands in contrast to possible

⁵³ See *mutatis mutandis Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment (Jurisdiction of the Court and Admissibility of the Application) *ICJ Rep.* 1984, 392, 419, para. 63, as well as *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment (Preliminary Objections) *ICJ Rep.* 1998, 275, 295, para. 33.

⁵⁴ But see for a somewhat different position Reisinger Coracini (2010) 2 *GoJIL* 745, 777.

⁵⁵ On this issue see *infra* mn 32.

⁵⁶ See also McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 267.

opting-out declarations to be made under article 124, which is silent on the matter and in reliance on which the only two declarations made so far under article 124 were both addressed to the depositary rather than to the Registrar.⁵⁷

II. Withdrawal of opt-out declarations (Article 15 para. 4, 2nd sentence)

1. ‘The withdrawal of such a declaration may be effected at any time (...)’

As the text of article 15 para. 4 2nd sentence unequivocally confirms, and given the character of an opting-out declaration as a unilateral act limiting the obligations of a State party arising under the Statute it may, just like generally reservations to treaties under the law of treaties and declarations made under article 124⁵⁸, be **withdrawn** at any time.

Given that the opting-out declaration has to be lodged, under article 15bis para. 4 1st sentence with the Court’s Registrar, the *actus contrarius* of withdrawing such a declaration would then also have to be addressed to the Registrar. This is *mutatis mutandis* confirmed by the practice under article 124, as France, which had previously made a declaration under article 124, in 2008 notified the depositary (*i.e.* the addressee of its original article 124 declaration) of its intention to withdraw it.⁵⁹

It is somewhat surprising though, that the drafters of article 15bis para. 4 2nd sentence thought it appropriate to choose a different **wording** as compared to article 124 (article 15bis: ‘The withdrawal of such a declaration may be effected at any time (...)’/‘Le retrait d’une telle déclaration peut être effectué à tout moment (...)’ – article 124: ‘A declaration under this article may be withdrawn at any time.’/‘Il peut à tout moment retirer cette déclaration.’). Yet, it still seems that the content of both provisions is nevertheless identical.

Once the **period of time** for which an opting-out declaration was made under article 15 para. 4 2nd sentence lapses, the Court may fully exercise its treaty-based, aggression-related jurisdiction even with regard to a crime of aggression arising from an act of aggression committed by the State Party that had previously lodged the opting out-declaration.

The wording of article 15 para. 4 2nd sentence is silent on the question, whether, once an opting out-declaration has been withdrawn, the Court may then **retroactively** exercise its jurisdiction with regard to a crime of aggression arising from an act of aggression committed by the State Party prior to the said withdrawal. Yet, in order to provide for a full *effet utile* of the provision, it seems that the Court would still, *i.e.* even after the opting-out declaration concerning the Court’s treaty-based, aggression-related jurisdiction has expired, not be able to exercise its jurisdiction with regard to such a crime of aggression arising from an act of aggression committed by the State Party prior to the withdrawal of the declaration.

2. ‘(...) and shall be considered by the State Party within three years.’

The last part of the 2nd sentence of article 15 para. 4 contains an obligation of a State Party having lodged an opt-out declaration with the Registrar to *bona fide* contemplate (‘envisager’ in the French text) a withdrawal of such a declaration previously made. Obviously, this **does not entail an obligation to actually withdraw any such declaration**, and, besides, said obligation only becomes applicable three years after any such declaration has been made. Accordingly, not withdrawing such a declaration does not amount to a violation of the Statute.

Unlike article 124, article 15bis para. 4 is not subject to a **mandatory reassessment procedure** by a review conference.

⁵⁷ For details see Zimmermann, *article 124*, mn 16.

⁵⁸ On the withdrawal of declarations made under *article 124* see Zimmermann, *article 124*, mn 9 and 15.

⁵⁹ Zimmermann, *article 124*, mn 9.

H. Article 15bis, para. 5: Exclusion of jurisdiction concerning non-parties

I. General questions

- 34 Article 15bis para. 5, the relevant wording of which is *mutatis mutandis* identical to article 121 para. 5, provides that in respect of a **State that is not a party to the Statute**, the Court shall not exercise its jurisdiction when the crime of aggression was committed by that State's nationals or on its territory. Article 15bis para. 5 thus derogates, when it comes to the crime of aggression, from the Court's general jurisdictional set-up provided for in article 12, under which even crimes committed by nationals of a State that is not a contracting party come within the Court's jurisdiction, provided they are committed on the territory of a contracting State. Put otherwise, given the combined effect of article 15bis para. 5 and para. 4, the Court's treaty-based, aggression-related jurisdiction is limited to acts of aggression committed between the currently 123 contracting parties of the Rome Statute minus those States that decide to lodge an opt-out declaration with the Registrar under article 15bis para. 4.

II. 'In respect of a State that is not a party to this Statute (...)'

- 35 The first part of article 15bis para. 5 clarifies that it only deals with the legal situation of states that are not parties to the Statute at the relevant time, while the legal situation of states that are parties to the Statute, but have not ratified or accepted the Kampala amendment on the crime of aggression, is governed by article 15bis para. 4.⁶⁰

III. '(...) the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.'

- 36 Article 15bis para. 5 applies to proceedings both, directed against nationals of a state not a party to the Statute and related to a crime of aggression committed on the territory of such a state, even when committed by a national of a State party and committed against such a non-State party.

One might argue though that properly understood, article 15bis para. 5 was meant to leave the option open for the Court to exercise jurisdiction where either nationals of a State not a party to the Statute commit a crime of aggression *on the territory of a state party*, or *where nationals of a State Party* commit the crime of aggression on the territory of a third state not a State Party of the Statute, *i. e.* where an alternative jurisdictional link exists. In line with the debate surrounding the proper understanding of article 121 para. 5, this is commonly referred to as the so-called '**positive understanding**' of article 15bis para. 5.⁶¹ Such an understanding is refuted, however, if there is need, by the equally authentic French texts of both, article 15bis para. 5 and article 121 para. 5, which clarify that the phrase is intended to provide for a full exclusion of jurisdiction vis-à-vis the State Party that does not accept the amendment,⁶² given that the French version of article 15bis, para. 5 provides that '[l]a Cour n'exerce pas sa compétence à l'égard du crime d'agression⁶³ quand celui-ci est commis par des ressortissants de cet État ou sur son territoire.'⁶⁴ This stands in contrast to the wording of

⁶⁰ For details see mn 21.

⁶¹ With respect to article 121 para. 5: Reisinger Coracini (2008) 21 *LeidenJIL* 699, 707.

⁶² Zimmermann (2012) 10 *JICJ* 209, 217; see also McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 256.

⁶³ Emphasis added.

⁶⁴ Article 121 para. 5 in turn reads: 'La Cour n'exerce pas sa compétence à l'égard d'un crime faisant l'objet de cet amendement lorsque ce crime a été commis par un ressortissant d'un État Partie qui n'a pas accepté l'amendement ou sur le territoire de cet État'; emphasis added.

article 124, the wording of which foresees that the state making the declaration under article 124 ‘does not accept the jurisdiction of the Court.’⁶⁵ Yet, even this latter formula is understood in light of its object and purpose as barring the Court’s war crime-related jurisdiction *in toto vis-à-vis* the state that has made a declaration under article 124, even if otherwise a jurisdictional link were to exist (‘**negative understanding** of article 124’)⁶⁶. *A fortiori* such a negative understanding must then also apply to article 15bis para. 5. Accordingly, the Court may, under no circumstances (apart from article 15ter), exercise its jurisdiction with regard to a given crime that has been committed by nationals of a non-ratifying State party or on its territory, even if the Court would otherwise enjoy jurisdiction on the basis of the crime being committed on the territory or by the nationals of another contracting party⁶⁷. This leads to the somewhat counter-intuitive result that even where a state, not party to the Statute, is the victim of the underlying act of aggression committed by nationals of a state that has fully accepted the Court’s treaty-based, aggression-related jurisdiction, the Court cannot exercise such jurisdiction, subject however to a declaration made by the respective third state under article 12 para. 3, accepting the Court’s jurisdiction *ad hoc*.⁶⁸

I. Article 15bis, para. 6

I. General questions

Under article 15 paras. 6–9, the Court’s exercise of its treaty-based, aggression-related 37 jurisdiction does not depend on a previous **determination by the Security Council of an act of aggression** committed by the State concerned. This constitutes one of the fundamental results reached during the Kampala Review Conference.

Paras. 6–9 then lay down, in significant further detail, the various aspects of the relationship between the Court (and mainly the Prosecutor) on the one hand, and the Security Council on the other: according to article 15bis, para. 6, when the Prosecutor wishes to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made such a determination.⁶⁹ If it has, the Prosecutor may proceed (para. 7).⁷⁰ If the Security Council has not made such a determination within six months after the date of **notification**, further investigations require both an authorization by the Pre-Trial Division in accordance with the procedure contained in article 15 and that the Security Council has not decided otherwise in accordance with article 16 (para. 8).⁷¹ Finally, para. 9 provides that any finding on the existence of an act of aggression by an organ outside the Court shall not bind the Court.⁷²

II. ‘Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression (...)’

The introductory words of article 15bis para. 6 are identical to the ones used in article 15 38 para. 3 except that in the English and French texts the word ‘if/’si’ (as used in article 15

⁶⁵ Emphasis added.

⁶⁶ See Zimmermann, *article 124*, mn 14.

⁶⁷ Werle and Jessberger, *Principles of ICL* (2014) 554; Schmalenbach (2010) *JZ* 745, 749; cf. Ambos (2010) 53 *GYBIL* 463, 506; see also the statement by Japan, RC/11, Annex VII, at 121, criticizing that ‘(...) the new article 15bis 1quarter [now article 15bis para. 5] (...) solidifies a blanket and automatic impunity of nationals of non-State Parties (...)’.

⁶⁸ See mn 24.

⁶⁹ For details see *infra* mn 39.

⁷⁰ For details see *infra* mn 41.

⁷¹ For details see *infra* mn 42.

⁷² For details see *infra* mn 45.

para. 3) were replaced by the word ‘where’/‘lorsque’ in article 15bis para. 6, while the Spanish text uses the very same terminology ‘si’ (*i. e.* amounting more to an ‘if’) on both occasions. This leads to the conclusion that there is no difference in meaning. At most, one could say that article 15bis para. 6 employs the term ‘where’, in order to express the idea that situations might arise where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation generally, without, however, reaching the same conclusion concerning the crime of aggression. It ought to be noted, however, that there might be also cases in which the prosecutor concludes that there is a reasonable basis to proceed with an investigation specifically in respect of a crime of aggression, without at the same time reaching the same conclusion as to the other crimes listed in article 5, and indeed obviously *vice versa*.

Given the identical standard used in both, article 15bis para. 3 and article 15bis para. 6, namely that there must be a ‘reasonable basis to proceed with an investigation’, the standard developed in the Court’s jurisprudence as to what is meant by ‘reasonable basis to proceed’ under article 15 para. 3⁷³ also applies when it comes to article 15bis para. 6 with the sole difference that said ‘reasonable basis’ refers to a sub-category of crimes listed in article 5 only, namely the crime of aggression.

III. ‘(...) he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.’

- 39 The second part of the first sentence of article 15bis para. 6 constitutes the first element in the close interrelationship that the Statute establishes between the Court on the one hand and the Security Council on the other. In order to avoid any contradictions between the Court and the Security Council to the extent possible and without infringing upon the independence of the Court and its organs, article 15 para. 6 obliges the Prosecutor, before moving ahead with any further steps concerning a possible crime of aggression to *first* clearly establish, as confirmed by the French term ‘s’ assure’, whether the Council has not already dealt with the matter and made a **determination that an act of aggression has indeed been committed**.

Under article 15bis para. 6 any such determination can only be made by the Security Council as such by way of a resolution adopted under Chapter VII of the Charter. This is due to the fact that the language used in article 15bis para. 6, namely the words ‘determine’ and ‘act of aggression’, were taken from article 39 of the Charter of the United Nations. Such a determination cannot thus be made by the President of the Security Council by way of a Presidential Statement and even less so by way of a statement by the Security Council’s President made to the press, the latter being made anyhow not on behalf of the Security Council, but rather on behalf of its individual members.

As a matter of practice, the Security Council would then normally, provided it ever were to make such a determination, integrate it into the preamble of the respective resolution. Any such determination, to state the obvious, would not however, by the same token, also provide for a referral to the Court under article 15ter.⁷⁴

In the past, the Security Council has only used the term ‘act of aggression’ on two occasions, namely in 1985, when it condemned Israeli air raids on PLO targets in Tunisia as an ‘act of aggression’ respectively an ‘act of armed aggression’⁷⁵ and when it demanded that South Africa ceases ‘all acts of aggression’ against Angola⁷⁶.

Under article 15bis para. 9 any such determination, even when made, would however not be binding upon the Court.⁷⁷

⁷³ For details see Bergsmo, Pejić and Zhu *article 15*, mn 20 *et seq.*

⁷⁴ For further details see Zimmermann and Freiburg, *article 15ter*, mn 4.

⁷⁵ UN Doc S/RES/573 (5 October 1985), operative paras. 1 and 2.

⁷⁶ UN Doc S/RES/577 (6 December 1985), *passim*.

⁷⁷ For details see *infra* mn 45.

The ‘State concerned’ referred to in para. 6 is the state the alleged ‘act of aggression’ of which gives rise to the investigation for the possible commission of a crime of aggression.

J. Information of the United Nations (Article 15bis para. 6 2nd sentence)

Under article 15bis para. 6 2nd sentence, the Prosecutor is under an obligation to keep the **Secretary-General of the United Nations** informed of the situation before the Court and to provide the United Nations with relevant information and documents concerning possible proceedings. This obligation supplements the more general obligations arising under the Relationship Agreement concluded between the Court and the United Nations. The obligation enshrined in article 15bis para. 6 2nd sentence is not contained in article 15 and is thus unique to the crime of aggression, demonstrating the particular relevance of such proceedings for the United Nations, and, in particular, the Security Council. It goes without saying that any such information received by the Secretary General would then, as a matter of course, be forwarded to the **Security Council** by the Secretary General, given that the main purpose of this information is to trigger the 6-month period provided for in article 15bis para. 8 to commence and, by the same token, to provide the Security Council with a 6-month period to consider whether to make use of its powers under article 16.⁷⁸

K. Article 15bis para. 7: Determination by the Security Council of an act of aggression and start of investigations

Once the Security Council has made a determination within the meaning of article 15bis para. 6⁷⁹, the Prosecutor may then proceed with a full **investigation** pursuant to articles 53 and 54 in respect of a crime of aggression (rather than a mere preliminary examination), thus moving from the proceedings from article 15 into the realm of article 53 and other provisions in Part 5 of the Statute,⁸⁰ without the need of a formal Security Council or State referral.

It is indeed worth noting that, unlike in the case of possible investigations concerning other crimes listed in article 5, a **State referral** is of no relevance when it comes to investigating a crime of aggression. In case a situation is referred to the Prosecutor by a State, possibly involving both crimes under article 5 lit. a) – c) and the crime of aggression, the Prosecutor would thus be in a position to immediately start investigations with regard to the former, but would have to wait for six months before doing so with respect to the alleged crime of aggression. Even then, the Prosecutor would eventually have to seek authorization by the **Pre-Trial Division** under article 15bis para. 8, provided that no relevant determination by the Security Council is forthcoming.⁸¹

L. Article 15bis para. 8: Lack of determination by the Security Council of an act of aggression and authorization of investigations by the Pre-Trial Division

I. ‘Where no such determination is made within six months after the date of notification (...)’

Article 15bis para. 8 addresses the situation in which the Security Council, after having been informed via the Secretary General of a pending preliminary investigation concerning a

⁷⁸ See *infra* mn 42 *et seq.*

⁷⁹ See mn 39.

⁸⁰ See *mutatis mutandis* Bergsmo, Pejić and Zhu, *article 15*, mn 21.

⁸¹ See *infra* mn 42 *et seq.*

possible crime of aggression, does not make a finding of an act of aggression, as outlined above⁸², within the prescribed six month period either because the Security Council simply remains silent on the matter or because a draft resolution that would have made such a determination has failed to garner the necessary majority, as required by article 27 of the Charter of the United Nations.⁸³

The six month period contemplated in article 15bis begins, as the text puts it, with ‘the date of notification’, *i.e.* at the point in time at which the Secretary General has been informed by the Prosecutor pursuant to article 15bis para. 6 2nd sentence.⁸⁴

II. ‘(...) the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15 (...)’

- 43 In case the Security Council fails to make a determination within the meaning of article 15bis para. 7⁸⁵ (or indeed even determines that no act of aggression has been committed in a given case), Article 15bis para. 8 provides for an alternative, namely that the Prosecutor, seeking to act *proprio motu*, must then seek permission by the Pre-Trial Division of the Court.

As the text itself confirms by making reference to the procedure contained in article 15, the procedure is *mutatis mutandis* identical to the one provided for in the said provision as far as the other crimes listed in article 5 are concerned.⁸⁶ The sole, yet important, difference lies in the fact that while article 15 paras. 3 and 4 provide for an authorization by a Pre-Trial Chamber consisting of three judges (article 39 para. 2 lit. b) (iii)), article 15bis para. 8 requires an authorization by the **Pre-Trial Division** consisting of no less than six judges (article 39 para. 1 2nd sentence), which confirms the relevance and political sensitivity of the decision to eventually enable such an investigation to go forward.

III. ‘(...) and the Security Council has not decided otherwise in accordance with article 16.’

- 44 This part of article 15bis para. 8 confirms in a declaratory manner the prerogatives of the Security Council provided for in **article 16**⁸⁷. Accordingly, the Council, acting under Chapter VII of the Charter of the United Nations, may also request the Court not to commence or proceed with an investigation or prosecution for a (renewable) period of 12 months with respect to an alleged crime of aggression. It seems, however, given the placement and the context of the provision as forming part of article 15bis, article 15bis para. 8 enables the Security Council to ‘tailor’ its request under article 16 to exclusively concern the crime of aggression. Put otherwise, it seems that the Security Council might prevent, for a renewable period of twelve months, the Court from investigating the crime of aggression, while at the same time letting the Court consider the very same facts concerning possible violations of the *jus in bello*, acts of genocide or crimes against humanity.

⁸² See mn 39.

⁸³ As to the voting requirements under article 27 UN Charter see Zimmermann, *article 27, passim*, in Simma *et al.* (eds.), *The Charter of the United Nations* (3rd ed. 2012).

⁸⁴ For details see mn 40.

⁸⁵ See mn 41.

⁸⁶ For details on article 15 see Bergsmo, Pejić and Zhu, *article 15, passim*.

⁸⁷ See Bergsmo, Pejić and Zhu, *article 16, passim*.

M. Article 15bis para. 9: Independence of the Court

Article 15bis para. 9 confirms that the Court, when asked to make a finding on a crime of aggression, which under article 8bis presupposes that an act of aggression has been committed for which a state then incurs state responsibility, is not bound by a finding made by an institution which does not form part of the Court. A literal reading of the wording seems to imply that the Court would not be bound only by a *positive determination* that an act of aggression has occurred. This is due to the fact that article 15bis para. 9 refers to '[a] determination of an act of aggression'⁸⁸ rather than stating that a determination *on* an act of aggression by an organ outside the Court would be without prejudice to the Court's own findings under this Statute. On the other hand, para. 9, in its English version, does *not* make use of the definite article 'the'⁸⁹, which would have further reinforced this limited understanding of para. 9 as applying to positive determinations only as being not binding for the Court. At the same time, the French text does just this when referring to '[l]e constat d'un acte d'agression'⁹⁰ rather than referring to '*un* constat d'un acte d'agression'. This is further confirmed by the Spanish version ('La determinación de que *hubo* acto de agresión'⁹¹), which by using a past tense defines a determination in terms of article 15bis para. 9 as the positive assertion that an act of aggression has occurred.

It seems, however, that an interpretation in line with the provision's object and purpose, namely to safeguard the judicial integrity and independence of the Court, invites a broader interpretation. It follows that any form of determination relating to an act of aggression, be it a *positive or a negative* one (for example one stating that a state allegedly having committed an act of aggression had instead acted in the exercise of its right under article 51 of the Charter of the United Nations), cannot therefore have an impact on the Court's ability to independently make a determination concerning the act of aggression that has possibly led to the commission of a crime of aggression. As a matter of fact, were it otherwise and would accordingly an *argumentum e contrario* apply, the reference to article 16 in article 15bis para. 8 would at least be partially redundant, since any negative determination that no act of aggression has occurred would then at least *de facto* bar the Court from exercising its jurisdiction in a meaningful manner, without the need for the Security Council to make use of its article 16 powers.

During the negotiations leading to the adoption of the Kampala amendments on the crime of aggression, it was the independence of the Court vis-à-vis the Security Council that formed the core of the debate. The reference in the text to any 'organ outside the Court', the findings of which shall not prejudice to the Court's own findings under this Statute, is however broader. Accordingly, article 15bis para. 9 does not apply only to determinations by the Security Council as to the existence or non-existence of an act of aggression, but also to judicial findings made for purposes of State responsibility *e.g.* by the **International Court of Justice**, or by **arbitral tribunals** such as the Ethiopian-Eritrean Claims Commission. In line with the jurisprudence of the International Court of Justice⁹², the underlying judicial philosophy of which applies *mutatis mutandis*, the Court should however, in principle, accept as highly persuasive relevant findings made by other judicial bodies that have dealt with the underlying act of aggression.

⁸⁸ Emphasis added.

⁸⁹ Article 15bis para. 9 would have thus read: '*The* determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.'

⁹⁰ Emphasis added.

⁹¹ Emphasis added.

⁹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Judgment (Merits), ICJ Rep. 2015, para. 182; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Merits), ICJ Rep. 2007, 43, 134, para. 223.

Finally, the last words of article 15bis para. 9 ('the Court's own findings *under this Statute*') are in line with the first sentence of Understanding no. 4, namely that any findings, by the Court, on the commission on a crime of aggression are not supposed to have a bearing on the general concept of the prohibition of the use of force under general international law.⁹³

N. Article 15bis para. 10: Relationship with Article 5

- 46 Setting out the parameters of the exercise, by the Court, of its treaty-based, aggression-related jurisdiction, article 15bis contains manifold deviations from article 12, 13 and 15. In order to avoid these peculiarities to have any impact on the exercise of the Court's jurisdiction with respect to the other crimes referred to in article 5, namely genocide, crimes against humanity and war crimes, article 15bis para. 10 specifies that the Court's exercise of its jurisdiction remains unaffected. This, however, may lead to **practical hurdles**, for example, when nationals of various states are suspects in the same proceedings involving both violations of the *jus ad bellum*, as well as possibly also acts of genocide, crimes against humanity and war crimes. In such a scenario a split jurisdictional regime might apply. This would depend on whether certain suspects might also be prosecuted for having committed the crime of aggression or rather not, because their home state is either not a contracting party of the Statute or because, while being a state party, it has opted out from the Court's aggression-related jurisdiction under article 15bis para. 4.

O. Understanding no. 5: domestic jurisdiction over the crime of aggression

- 47 Understanding no. 5 adopted at the Kampala conference⁹⁴ provides:

'It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.'

It thereby confirms in a declaratory manner that the inclusion of the amendments on the crime of aggression in the Statute have no bearing on the exercise of domestic jurisdiction over the crime of aggression, either by way of obliging a State to do so or by implying a parallel right. It is noteworthy however that the said Understanding refers solely to the exercise of **domestic jurisdiction** with respect to an act of aggression *committed by another State*. This might be perceived as implying *e contrario* that, when it comes to the exercise of domestic jurisdiction with respect to an act of aggression committed by the forum State, the amendments might have created such an obligation, while a right to do so exists as a matter of course anyhow. Yet, under the principle of complementarity a State is not *obliged* to exercise criminal jurisdiction over its own nationals, the sole consequence of a non-exercise of domestic jurisdiction with respect to an alleged crime of aggression being that the Court would then be in a position to do so, provided it has jurisdiction.

⁹³ See also Zimmermann and Freiburg, *article 8bis*, mn 15.

⁹⁴ As to the normative relevance of those understandings see Heller (2012) 10 *JICJ* 229.

Article 15ter

Exercise of jurisdiction over the crime of aggression (Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Literature: See the literature on articles 5, 8bis and 15bis, as well as Ambos, K., 'The Crime of Aggression after Kampala', (2010) 53 *GYbIL* 463; Blokker, N., 'The crime of aggression and the United Nations Security Council', (2007) 20 *LeidenJIL* 867; Clark, R. S., 'Amendments to the Rome Statute of the International Criminal Court', (2010) 2 *GoJIL* 689; McDougall, C., *The Crime of Aggression under the Rome Statute of the International Criminal Court* (CUP 2013); Reisinger Coracini, A., 'The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last ... in Reach ... over Some', (2010) 2 *GoJIL* 745; Schmalenbach, K., 'Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen', (2010) *JZ* 745; Stein, M. S., 'The Security Council, the International Criminal Court, and the Crime of Aggression', (2005) 16 *Indl&ComplRev* 1.

Content

A. Article 15ter within the Statute's overall jurisdictional scheme	1
B. Drafting history of Article 15ter	2
C. Article 15ter para. 1: exercise of jurisdiction over the crime of aggression in accordance with article 13 para. (b)	3
I. General issues	3
II. 'The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b) (...)'	4
III. '(...) subject to the provisions of this article.'	5
D. Entry into force and jurisdiction <i>ratione temporis</i> over the crime of aggression (article 15ter paras. 2 and 3; Understanding no. 1)	6
E. Article 15ter para. 4: Independence of the Court	7
F. Article 15ter para. 5: Relationship with Article 5	8

A. Article 15ter within the Statute's overall jurisdictional scheme

Of the three different ways of triggering the Court's jurisdiction established under article 13, article 15ter, as introduced into the Statute as part of the Kampala compromise on the crime of aggression along article 15bis and 8bis, relates to article 13 para. (b). Accordingly, article 15ter exclusively deals with referrals by the Security Council, while State referrals, as well as proceedings started *proprio motu* by the Prosecutor, are addressed in turn, as far as the crime of aggression is concerned, by article 15bis.

While article 15bis contains significant deviations from the regular jurisdictional scheme underlying the Court's Statute, article 15ter is much more in line with the regular jurisdictional scheme otherwise applying in case of Security Council referrals, as provided for in article 13 para. (b). Not the least, this holds true for the fact that in case of a Security Council referral, as opposed to when the Court exercises its treaty-based aggression-related

jurisdiction¹, the Court might even, as confirmed by Understanding no. 2, be able to exercise its aggression-related jurisdiction, when respective crimes of aggression were committed on the territory of a State not having accepted the Court’s aggression-related jurisdiction, or by nationals of such a State.²

B. Drafting history of Article 15ter

- 2 As shown³, the content of article 15bis, and in particular the question whether the Court should be in a position to exercise its treaty-based jurisdiction concerning the crime of aggression, regardless of whether the Security Council had previously made a determination as to the occurrence of an act of aggression or not, constituted one of the most vividly debated issues prior to and during the Kampala Review Conference. In contrast thereto, during the negotiation process there existed, by and large, a consensus that *mutatis mutandis* the jurisdictional scheme underlying article 13 para. (b) should also apply when it comes to the crime of aggression alongside the eventual exercise, by the Court, of its treaty-based, aggression-related jurisdiction.

From early on, the Special Working Group agreed in principle that a Security Council referral should not depend on whether the respective States had ratified the amendments,⁴ an assumption not challenged during the Kampala Review Conference. However, during the Conference, the participants discussed (initiated by a proposal by Argentina, Brazil and Switzerland [ABS]) whether Security Council referrals should be possible after a single ratification of the amendments, in accordance with article 121 para. 5. Though this idea has not been adopted eventually, the respective ABS proposal turned out as the momentum triggering the introduction of a separate article 15ter. A further proposal by the ABS States (handed in together with Canada on 9 June 2010) featured a consent-based jurisdiction regime, including an opt-out option, and a non-exclusive Security Council filter,⁵ and constituted the basis for the final drafting process.

C. Article 15ter para. 1: exercise of jurisdiction over the crime of aggression in accordance with article 13 para. (b)

I. General issues

- 3 Given that article 15ter para. 1 is, *mutatis mutandis*, identical to article 15bis para. 1, the very same considerations which apply to article 15bis para. 1 as outlined above⁶, also apply with regard to article 15ter para. 1 with the obvious exception that the last part of article 15ter para. 1 makes reference to article 13 para. (b), rather than to paras. (a) and (c).

II. ‘The Court may exercise jurisdiction over the crime of aggression *in accordance with article 13, paragraph (b) (...).*’

- 4 In line with the compromise reached in Kampala, Article 15ter para. 1 provides that ‘[t]he Court may exercise jurisdiction over the crime of aggression in accordance with article 13,

¹ For details see Zimmermann and Freiburg, *article 15bis*, mn 21 *et seq.*

² For details see *infra* mn 4.

³ See Zimmermann and Freiburg, *article 15bis*, mn 2.

⁴ Barriga, in: Barriga and Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 3, 40.

⁵ Barriga, in: Barriga and Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 3, 49, 51; also see Ambos, *Treatise on ICL II* (2014) 192 *et seq.*

⁶ See Zimmermann and Freiburg, *article 15bis*, mn 3–7.

paragraph (b)).⁷ Article 15ter thus exclusively covers Security Council referrals, State referrals and proceedings initiated *proprio motu* by the Prosecutor being regulated by article 15bis para. 1.⁸

Such referrals are then governed by the regular requirements contained in article 13 para. (b), namely that the situation has been referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.⁹

As already indicated by the very term itself, any such ‘referral’ by the Security Council **does not require an explicit previous determination of an act of aggression**, nor would such a referral amount to one, even less so since the Council rarely ever makes such specific determinations.¹⁰ What is more, one might even wonder, whether the Security Council even has to formally act under Chapter VII, or whether instead a reference to Chapter VII might be implied in any such referral.¹¹

In contrast to article 15bis para. 4, article 15ter does not provide for the possibility of a State’s opting out of the Court’s aggression-related Security Council-based jurisdiction. The Court may thus exercise its jurisdiction under article 15ter regardless of whether a State Party has opted out from the Court’s treaty-based aggression-related jurisdiction under article 15bis para. 4 or whether it is not a State Party at all. This is confirmed by Understanding no. 2 which provides:

‘It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.’

III. ‘(...) subject to the provisions of this article.’

Para. 1 of article 15ter further clarifies that, while acknowledging the possibility of Security Council referrals under article 13 para. (a) even when it comes to the crime of aggression, such proceedings are then subject to the specific requirements and conditions contained in article 15ter paras. 2–5, as constituting *lex specialis*.

One issue, however, not addressed as such in article 15ter is whether the Security Council may, when referring a situation under article 13 para. (b) in conjunction with article 15ter para. 1, either make a **selective referral** by only referring the crime of aggression, or, on the contrary, while referring a situation as such, could by the same token refrain from also endorsing the Court with a Security Council-based aggression-related jurisdiction. Yet, given that under article 13 para. (b), the Security Council refers ‘a situation’ rather than a specific crime¹², and further given that article 15ter para. 1 makes reference to the Court, exercising its jurisdiction ‘in accordance with article 13, paragraph (b)’ in case of a Security Council referral potentially involving the commission of the crime of aggression, it seems that the Security Council is faced with an **either/or-situation**: it can either refer a situation as such (thereby enabling the Court to also exercise substance-matter jurisdiction vis-à-vis the crime of aggression), or not refer such a situation at all (thereby preventing the Court from prosecuting any of the other crimes listed in article 5, unless the Court could exercise its

⁷ As to the specific content of article 13, paras. (a) and (c) see Schabas and Pecorella, article 13, mn 15 and 20 respectively.

⁸ See Zimmermann and Freiburg, article 15bis, mn 6.

⁹ For further details see Schabas and Pecorella, article 13, mn 16 *et seq.*

¹⁰ See already Zimmermann and Freiburg, article 15bis, mn 39.

¹¹ As to the question whether the Security Council may implicitly act under Chapter VII, without formally invoking its Chapter VII powers see generally Zimmermann, ‘Humanitarian Assistance and the Security Council’, Israeli Law Review (forthcoming 2015).

¹² Apart from the wording of article 13, this is also confirmed by article 44 para. 2 Rules of Procedure and Evidence. While this provision relates to article 12 para. 3 of the Statute, it underscores that even where the Statute (mistakenly) refers to the acceptance, by a State, of the Court’s jurisdiction with respect to a ‘crime in question’, any such acceptance relates to an overall situation rather than a specific crime; for further details see Schabas and Pecorella, article 13, mn 15 *et seq.* with further references.

treaty-based jurisdiction over those crimes, but had no jurisdiction over the crime of aggression, given the jurisdictional limitations contained in article 15bis paras. 4 and 5).¹³

One might also assume, however, that as a third alternative the Security Council could *de facto* limit the Court's substance-matter jurisdiction by deliberately **circumscribing the Court's temporal jurisdiction in a specific manner**. The Security Council could thus refer a 'situation' covering only a limited period of time, *e.g.* 'the situation in State x from date y to date z', thereby enabling investigations only with regard to the alleged crimes having taken place during that specific period, such as the initial crime of aggression, without providing the Court with jurisdiction over *e.g.* war crimes, which might have taken place only after that date, or indeed *vice versa*.

With regard to the question of whether the Security Council might circumscribe the individuals who shall face prosecution, States as well as the Court seem to have accepted a division of roles between the Security Council and the Prosecutor¹⁴, given that Security Council Resolution 1593 (2005)¹⁵, as well as Security Council Resolution 1970 (2011)¹⁶, have both specifically excluded certain groups of individuals from the Court's jurisdiction. However, when it comes to limiting a 'situation' not by way of defining the individuals coming within the Court's jurisdiction *ratione personae*, but by way of referring a certain period of time only, such a limitation would still comply with the Security Council's position towards the Court, as the Council would not try to act as a Prosecutor, who has to select individual defendants when assessing the results of his own investigations. Rather, the Security Council would merely make use of its **prerogatives under Chapter VII of the Charter**, in order to assess which factual situations (and if so within what limits) constitute a threat to international peace and security in accordance with article 39 of the Charter of the United Nations.

It is also worth noting that where the Court is in a position to exercise its treaty-based jurisdiction over the crimes listed in articles 5 para. 1 lit. (a) to (c), but not its treaty-based jurisdiction related to the crime of aggression due to the jurisdictional aggression-specific limitations contained in article 15bis paras. 4 and 5, a Security Council referral under article 13 para. (b) (in conjunction with article 15ter para. 1) would *de facto* amount to such a **partial referral**.

D. Entry into force and jurisdiction *ratione temporis* over the crime of aggression (article 15ter paras. 2 and 3; Understanding no. 1)

- 6 Article 15ter paras. 2 and 3, as well as Understanding no. 1, are *mutatis mutandis* identical to article 15bis paras. 2 and 3 respectively except that Understanding no. 1 refers to 'a decision in accordance with article 15ter, paragraph 3', while Understanding no. 3 refers to such a decision taken 'in accordance with article 15bis, paragraph 3'. Accordingly, the same considerations that apply to those latter provisions¹⁷ also apply to the former.

It is worth noting however that these two understandings, as adopted in Kampala, as well as article 15bis para. 3 and article 15ter para. 3 *each* refer to 'a decision'. This could be taken to imply that there ought not to necessarily be one single decision, identical in content, even if for all practical purposes it is to be expected that there will be only one such decision laying

¹³ See Schmalenbach (2010) JZ 745, 751.

¹⁴ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 276 *et seq.*; For the opposing view, see Condorelli and Villalpando, in: Cassese, *The Rome Statute of the International Criminal Court: A Commentary, Volume ii* (2002) 627, 633, who argue that the Security Council may limit the referral of a situation to certain individuals, but that such a limitation does not prevent the Prosecutor from stopping to proceed on these grounds or from initiating further investigations.

¹⁵ UN DOC S/RES/1593 (31 March 2005), Situation in Darfur, para. 6.

¹⁶ UN DOC S/RES/1970 (26 February 2011), Situation in Libya, para. 6.

¹⁷ See Zimmermann and Freiburg, *article 15bis*, mn 8 *et seq.*

down identical parameters for the exercise of both, the Court's treaty-based and its Security Council-based aggression-related jurisdiction.

E. Article 15ter para. 4: Independence of the Court

Article 15ter para. 4 is completely identical to article 15bis para. 9. Accordingly, the same 7 considerations applying to this latter provision¹⁸ also apply to the former. It is worth noting, however, that even a referral by the Security Council under Chapter VII in conjunction with article 13 para. (b) and article 15ter para. 1 does not necessarily *per se* amount to such a determination, given that article 39 of the Charter of the United Nations does not require an act of aggression to have taken place in order to trigger the Security Council's Chapter VII powers. Accordingly, and on the whole, even once the Security Council has referred a situation to the Court, the latter remains independent and may deviate from the findings of the Security Council.¹⁹

F. Article 15ter para. 5: Relationship with Article 5

Once more, Article 15ter para. 5 is completely identical to article 15bis para. 10. 8 Accordingly, the same considerations which apply to this latter provision²⁰ also apply to the former.

¹⁸ See Zimmermann and Freiburg, *article 15bis*, mn 45.

¹⁹ Clark (2010) 2 *GoJIL* 689, 703; Reisinger Coracini (2010) 2 *GoJIL* 745, 749; Werle and Jessberger, *Principles of ICL* (2014) 553; for a view with a differing emphasis see McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013) 278, who stresses that 'this paragraph should not be taken to mean that Security Council resolutions determining that an act of aggression has occurred will be of no material effect in the Court reaching its own conclusion as to whether the definition of an act of aggression under Article 8bis (2), or indeed the crime of aggression under Article 8bis (1), has been met'.

²⁰ See Zimmermann and Freiburg, *article 15bis*, mn 46.

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Literature: Bourgon, S., 'Jurisdiction *ratione temporis*', in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, i (2002) 554; Cryer, R., 'The Security Council, Article 16 and Darfur', *Oxford Transitional Justice Research Working Paper Series*, 29 October 2008 (<https://www.legal-tools.org/doc/2871fa/>); Frowein, J.A. and Kirsch, N., 'Article 39' in: Simma, B., Khan, D.-E., Nolte, G. and Paulus, A. (eds.) *The Charter of the United Nations: A Commentary* (OUP 3rd edition 2012) 1272; Mokhtar, A., 'The Fine Art of Arm-twisting: The US, Resolution 1422 and Security Council Deferral Power under the Rome Statute', (2003) 3 *ICLRev* 295; Scheffer, D., 'The Security Council's Struggle over Darfur and International Justice', *The Jurist*, 20 August 2008 (<https://www.legal-tools.org/doc/6ca103/>).

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	12
1. 'investigation or prosecution'	12
2. 'commenced or proceeded with'	17
3. 'period of 12 months'	22
4. 'resolution adopted under Chapter VII'	23
5. 'request may be renewed under the same conditions'	26

A. Introduction/General remarks

- 1 Article 16 empowers the Security Council to prevent or stop an ICC investigation or prosecution for a renewable period of 12 months by means of a resolution adopted under Chapter VII of the UN Charter. It defines one critical aspect of a three-pronged relationship between the Court and the Security Council provided for in the Statute and its Amendment: apart from the power to defer proceedings, the Council can also trigger the Court's jurisdiction¹, and play a role with respect to the crime of aggression². The drafting of the article was very contentious, reflecting the widely divergent views expressed throughout the negotiating process on what the link should be between the Court as a judicial body and the Security Council as a political organ of the United Nations. Even when it became clear in Preparatory Committee negotiations, that a majority of States supported some form of Security Council deferral power, the modalities of its exercise remained controversial. The present wording of article 16 emerged only in the last stages of the Diplomatic Conference³.
- 2 The initial 1994 ILC Draft Statute had defined the relationship between the ICC and the Security Council very differently⁴. In fact, rather than granting the Council the power to defer

¹ Article 13 (b).

² Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res. 6, 11 June 2010, annex I, art. 15bis(8).

³ See the Bureau's 10 July 1998 Proposal, UN Doc. A/CONF.183/C.1/L.59 ('Part 2. Jurisdiction, admissibility and applicable law'), p. 13.

⁴ See 1994 ILC Draft Statute, II, B, I ('Draft Statute for an international criminal court'), article 23 para. 3, p. 85. The totality of the relationship between the ICC and the Security Council was initially provided for in one article of the ILC Draft Statute. Article 23 para. 1 dealt with the Council's power to trigger the Court's jurisdiction, subparagraph 2 specified its role in proceedings related to an act of aggression, and subparagraph 3 defined what eventually evolved into the Council's deferral power in article 16 of the Statute. The ILC Draft did not envisage any enforcement role for the Council. The entire article was renumbered article 10 in the so-called

proceedings, article 23 para. 3 provided that '[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides'. As envisaged by the ILC, the burden would rest on the Court to monitor the Security Council's agenda in order to determine whether a prosecution could be initiated. The Council would not need to request deferral because the ICC would have to exercise self restraint with respect to prosecutions arising from situations being dealt with by the Council under its Chapter VII authority, unless the Council otherwise decided. The ILC commentary to the Draft Statute specified that the relationship between the two bodies was structured analogously to the relationship between the Security Council and the UN General Assembly pursuant to article 12 of the UN Charter⁵. Although the commentary clarified that the Council 'should be acting'⁶ to maintain or restore international peace and security for the Court to be precluded from commencing a prosecution arising out of a Chapter VII situation, the ILC Draft did not require that the Council pass a resolution on deferral. In other words, no permanent member of the Council would be able to prevent the Council from blocking a prosecution by the Court. The commentary also noted the view of some ILC members who thought that article 23 para. 3 of the ILC Draft Statute was 'undesirable', because 'the processes of the Statute should not be prevented from operating through political decisions taken in other forums'⁷. The commentary included the view that article 23 as a whole should possibly be omitted because of the inequality it created between members of the Security Council and non-member States, as well as between the Council's permanent members and other States⁸. It was even suggested that a savings clause referring to 'the paramountcy of the Charter' be inserted in a preambular paragraph to the ICC Statute as a way of resolving the ICC-Security Council relationship⁹.

More elaborate explanations of the different positions with respect to article 23 para. 3 ILC 3 Draft Statute were presented in the discussions held within the *Ad Hoc* Committee in 1995¹⁰ and later the Preparatory Committee¹¹. Three basic views were enunciated. According to the *first*, the Security Council's power to approve prosecutions had to be retained as an acknowledgment of the Council's primary responsibility for the maintenance of international peace and security under article 24 para. 1 of the UN Charter. The ICC, it was said, should not be able to act 'in defiance'¹² of the Charter or to insert itself in 'delicate'¹³ matters being dealt with by the Council. Proponents of this position maintained that article 23 para. 3 ILC Draft Statute should be amended to include not only Chapter VII situations, but all situations which were being dealt with by the Council¹⁴. Pursuant to a *second* view, article 23 para. 3 ILC Draft Statute should be deleted because it infringed on the judicial independence of the Court¹⁵. It was noted that the Council had been seized of a high number of situations – without effectively dealing with them – for decades, and that the ICC would be precluded from taking action in similar situations in the future under the ILC proposal. More importantly, it was emphasized that the International Court of Justice was not subject to

Zutphen Draft, pp. 39–41, and only became article 16, devoted solely to the Council's deferral power, at the conclusion of the Rome Conference.

⁵ Article 12 para. 1 of the UN Charter provides: 'While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests'.

⁶ 1994 ILC Draft Statute, note 4, p. 87.

⁷ *Ibid.*, p. 45.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ See *Ad Hoc* Committee Report, pp. 28–29.

¹¹ See 1996 Preparatory Committee I, pp. 33–34.

¹² *Ibid.*, p. 33.

¹³ *Ibid.*

¹⁴ *Ibid.* See also the Statement of the United States Delegation 'Trigger Mechanism: The Role of the Security Council and of Complaints by States, articles 23 and 25', Apr. 1996 (on file with the authors).

¹⁵ 1996 Preparatory Committee I, note 11, p. 33.

similar Security Council control and that the UN Charter allowed concurrent action by the two bodies with respect to the same situation¹⁶. The *third* view was that some safeguard for the Charter position of the Security Council should be preserved, but that article 23 para. 3 ILC Draft Statute was not adequate in that it was too broad and vague. It lacked criteria for determining when a situation was being ‘dealt with’ by the Council, or an interpretation of what ‘threat to or breach of the peace’ meant. It also failed to limit the amount of time that the Council could be seized of a Chapter VII situation. A suggestion was made to amend the provision so that the ICC would be empowered to proceed with a prosecution if the Council did not take action ‘within a reasonable time’¹⁷. It was also proposed that the paragraph be amended to permit the ICC to initiate a prosecution unless the Security Council formally asked the Court not to do so in accordance with article 27 of the UN Charter¹⁸.

- 4 The breakthrough in ICC negotiations on article 23 para. 3 ILC Draft Statute came at the August 1997 session of the Preparatory Committee when Singapore formally proposed an amendment reversing the structure of the ICC-Security Council relationship as initially provided for in the 1994 ILC Draft Statute. Under the Singapore text, which became the basis of the second option of article 23 para. 3 ILC Draft Statute in further drafting work,

‘[n]o investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect’¹⁹.

The proposal substituted Security Council approval of ICC proceedings with the notion of a deferral power and prepared the ground for what is now article 16 of the ICC Statute. Canada added to the Singapore proposal by suggesting the 12 month renewable deferral period²⁰ and Costa Rica further proposed that deferral be requested by a ‘formal and specific decision’ of the Security Council²¹. Even though the Singapore proposal included both investigation and prosecution within the ambit of the Security Council’s deferral power, it should be noted that the corresponding text of option 2 of article 23 para. 3 ILC Draft Statute as agreed on during the August 1997 Preparatory Committee session still referred only to prosecution²².

- 5 It was UK support, as expressed in the course of the December 1997 session of the Preparatory Committee, that signaled a breakthrough in terms of the political viability of the Singapore proposal. The UK was the first permanent Security Council member to endorse the change of emphasis in ICC-Security Council relations provided for in Singapore’s amendment²³.

Furthermore, it was a British text for article 10 para. 2 (formerly article 23 para. 3 ILC Draft Statute), introduced at the March-April 1998 Preparatory Committee session, that served as a basis for the final wording of what is now article 16²⁴. Pursuant to the UK

¹⁶ *Ibid.*

¹⁷ 1996 Preparatory Committee I, note 11, p. 34.

¹⁸ *Ibid.* For the wording of the specific proposals, see 1996 Preparatory Committee II, pp. 75–77.

¹⁹ Proposal by Singapore on article 23, Non-Paper/WG.3/No.16 (8 Aug. 1997) (<https://www.legal-tools.org/doc/8ec1f1/>).

²⁰ Under the Canadian text, ‘[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of twelve months where the Security Council has, acting under Chapter VII of the Charter of the United Nations, notified the Court to that effect. Notification that the Security Council is continuing to act may be renewed at twelve month intervals’, see Proposal Submitted by Canada for article 23 (11 Aug. 1997) (on file with the authors).

²¹ Under the Costa Rican text, ‘[n]o investigation or prosecution may be commenced or proceeded with under this statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, taken a formal and specific decision, and limited for a certain period of time, to that effect’, see Proposals by Costa Rica on article 23: Paragraph 3 on Singapore’s Proposal, Non-Paper/WG.3/No.23 (11 Aug. 1997) (<https://www.legal-tools.org/doc/2fde08/>).

²² Preparatory Committee Decisions Aug. 1997, p. 8.

²³ See Legal Experts Agree on an Outline for a Global Criminal Court, *New York Times*, 14 Dec. 1997, p. A 8.

²⁴ Proposal by the United Kingdom of Great Britain and Northern Ireland: Trigger Mechanism, UN Doc. A/AC.249/1998/WG.3/DP.1 (25 Mar. 1998).

proposal, which was also included in the Draft ICC Statute which the Preparatory Committee forwarded to the Rome Conference,

[n]o investigation or prosecution may be commenced or proceeded with under this Statute [for a period of twelve months] after the Security Council [, acting under Chapter VII of the Charter of the United Nations,] has requested the Court to that effect; that request may be renewed by the Council under the same conditions²⁵.

As may be noted, the text includes investigation, as well as prosecution, within the scope of the Council's deferral power.

By the time the first of two Bureau papers narrowing down drafting options on the major 6 issues of the ICC Statute was released at the Rome Conference, the initial 1994 ILC proposal on Security Council approval of ICC proceedings had been omitted²⁶. Debates in the Committee of the Whole had shown that the majority of States supported some variant of the Singapore proposal, while a minority still favoured no role for the Council at all²⁷. As a result, the *first* Bureau paper provided three options for article 10 para. 2 – its retention in the wording that had been suggested by the UK, a revised version of the UK proposal²⁸, or the deletion of the paragraph as such²⁹. The *second* Bureau paper essentially contained the same three options, the first of which became article 16 of the ICC Statute. It is essentially the UK wording, amended to provide that a Security Council request for deferral must be made in the form of a resolution adopted under Chapter VII of the UN Charter. Option 2 contained a modified variant of the deferral process. It limited the Council's power by specifying that deferral could only result in the suspension of ICC proceedings, which implied that the Council could not prevent the opening of an investigation or prosecution as such. It also omitted specific reference to a 12 month deferral period, suggesting that a suspension of an investigation or prosecution could be shorter as well³⁰. Option 3, once again, provided for the deletion of any reference to a Security Council deferral power.

The drafting history of article 16 gives rise to at least three comments. *First*, political 7 considerations were not surprisingly given more weight than legal arguments in the determination of the appropriate role for the Security Council in ICC proceedings. *Secondly*, the Security Council's deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict. *Thirdly*, article 16 provides an unprecedented opportunity for the Council to influence the work of a judicial body.

It was clear from the start of the ICC process that the ICC-Security Council relationship 8 was one of the main political problems that had to be resolved if the negotiations were to reach a successful conclusion. Security Council influence over ICC proceedings was a key element of the so-called 'package' of issues – which also included subject-matter jurisdiction, complementarity, exercise of jurisdiction and the trigger mechanism – with a crucial bearing on the Court's independence and efficacy. Striking a widely acceptable balance between these elements was at the heart of the three and half years of preparatory work on the ICC Statute and of the five-week Rome Conference.

²⁵ Preparatory Committee (Consolidated) Draft, p. 39.

²⁶ See Bureau Discussion Paper of 6 July 1998, 'Part 2. Jurisdiction, admissibility and applicable law', UN Doc. A/CONF.183/C.1/L.53 (1998), pp. 15–16.

²⁷ See The Numbers: NGO Coalition Special Report on Country Positions, CICC Monitor, 10 July 1998 (on file with the authors).

²⁸ Bureau Discussion Paper, note 26, did not indicate what those revisions might be. Option 2 of article 10 para. 2, on p. 16. just says 'A revised version of option 1'. The revisions were, however, included in the next Bureau paper, note 3, mentioned below.

²⁹ Bureau Discussion Paper, note 26, pp. 15–16.

³⁰ Article 10, option 2 reads: 'In the event that the Court is requested by the Security Council, acting by resolution adopted under Chapter VII of the Charter of the United Nations, to suspend its investigation or prosecution of a situation for a specified period of time, then the Court shall suspend such activity for such a period of time; that request may be renewed by the Security Council under the same conditions', see Bureau's Proposal, note 3, p. 13.

- 9 It was a widely held view among delegates and observers in the negotiating process that the initial article 23 para. 3 ILC Draft Statute subordinated the Court to Security Council control in a way which would have significantly undermined its ability to operate. To have required, in effect, the Council's approval of prosecutions, given the fact that Chapter VII situations are precisely those in which most crimes within the Court's jurisdiction are likely to be committed, could have made the Court ineffective. The veto of one permanent Security Council member would have sufficed to prevent or stop the ICC from acting, thereby rendering the Court politically dependent on the Council. The importance of the Singapore proposal, as incorporated into article 16, is that it allows the Court to proceed if only one permanent Security Council member objects to the issuance of a resolution requesting deferral. Because of the public nature of such a resolution and, most likely, the public nature of the crimes that the Court will be asked to desist from addressing, deferral will be politically more difficult to justify than approval.
- 10 While article 16 requires that the Security Council take positive action to prevent or stop an ICC investigation or prosecution, it is conceivable that some requests for deferral will garner the necessary nine Council votes and no use of the veto power. As deferral can only be requested by a resolution adopted under Chapter VII of the UN Charter, it is likely that the ICC will be prevented or stopped from acting exactly in those serious situations where crimes within the Court's jurisdiction have been committed. In practice, article 16 allows the Council to request the Court not to investigate or prosecute when the requisite majority of its members conclude that judicial action – or the threat of it – might harm the Council's efforts to maintain international peace and security pursuant to the Charter. This is not an easy argument to go forward with insofar as the Council has established international criminal jurisdictions with the justification that this would contribute to the maintenance and restoration of peace³¹. Article 16 will be the vehicle for resolving conflicts between the perceived requirements of peace and justice where the Council assesses that the peace efforts need to be given priority over international criminal justice. This might raise problems of selectivity and political control over prosecutorial discretion which one must hope will not affect the Court's long term credibility. The permanent members of the Security Council that are ICC State Parties have a particular responsibility in this regard. Article 16 is also unprecedented in terms of the legal relationship it establishes between the Security Council and a judicial body. Neither the ICJ in its work nor national courts dealing with crimes arising from situations on the Security Council's agenda under Chapter VII are under an express obligation to defer proceedings upon a request by the Council.
- 11 The practice of the UN Security Council since 2002 as regards article 16 has been deeply controversial. In resolution 1422 (2002) of 12 July 2002, the Council requested, 'consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise'³². The resolution also expressed 'the intention to renew the request [...] under the same conditions each 1 July for further 12-month periods for as long as may be necessary'³³. The resolution was very controversial, generating broad public debate³⁴. Nevertheless, one

³¹ See the reference to how the establishment of the ICTY 'would contribute to the restoration and maintenance of peace' in UN Security Council resolution 808 (1993) of 22 Feb. 1993 (preambular paragraph nine) and 827 (1993) of 25 May 1993 (preambular paragraph six). Interestingly, the corresponding resolution 955 (1994) of 8 Nov. 1994 refers to how the establishment of the ICTR 'would contribute to the process of national reconciliation and to the restoration and maintenance of peace' (preambular paragraph seven).

³² Operative paragraph 1.

³³ *Ibid.*, operative paragraph 2.

³⁴ See the comprehensive report by Amnesty International: 'The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice', May 2003, AI Index IOR 40/006/2003.

year later, on 12 June 2003, the Council adopted resolution 1487 (2003) which repeated the request to the Court for another 12-month period with the same expression of intention to continue the requests for as long as may be necessary³⁵. Resolutions 1422 and 1487 were criticized by a considerable number of government representatives at the time of adoption³⁶ and generated broad public debate, which questioned the compatibility of these resolutions with article 16 of the Rome Statute³⁷.

In resolution 1497 (2003) of 1 August 2003, concerning the situation in Liberia, the Council did not refer to article 16, but nonetheless decided 'that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State'³⁸. The lack of reference to Article 16 did not immunize resolution 1497 from criticisms of its inconsistency with the Rome Statute. During the passage of this resolution, a number of states similarly claimed that the Security Council did not invoke article 16 in a manner envisaged by its drafters.

In resolution 1593 (2005) of 31 March 2005, whereby the Council referred the situation in Darfur to the Prosecutor of the Court, operative paragraph 6 provided that officials or personnel from a contributing State outside Sudan which is a non-State Party shall be subjected in the same way to the exclusive criminal jurisdiction of that State in connection with AU or UN operations in Sudan³⁹. It is not clear upon which legal basis this paragraph relies. In the preamble of the resolution, the Council simply recalled 'article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect'⁴⁰. It is not obvious why a resolution referring a situation to the ICC should contain this deferral provision. An identical operative paragraph 6 and preambular reference to article 16 of the Rome Statute was included in the resolution 1970 (2011) of 26 February 2011, which referred the situation in Libya to the ICC.

Article 16 was also an issue before the Security Council when the African Union called for a deferral of the situation in Darfur following the application by the ICC Prosecutor for an arrest warrant against the Sudanese President in 2008. In the Kenya situation, the Security Council was once again asked to consider a deferral resolution, which would have postponed the ICC proceedings against the Kenyan President and his deputy, who face charges related to 2008 post-election violence. So far the Security Council has not approved any deferral requests in relation to these situations.

B. Analysis and interpretation of elements

1. 'investigation or prosecution'

The article 16 bar to ICC proceedings pursuant to a Security Council deferral request applies to both 'investigation' and 'prosecution'. The inclusion of 'investigation' within the Council's deferral power was initially proposed in August 1997 by Singapore and reiterated

³⁵ See the first and second operative paragraphs.

³⁶ Statements of the Representatives of Canada, Germany, Argentina, Ukraine, Colombia, Samoa, Malaysia, Fiji, Cuba, UN SCOR, 57th Sess., 4568th mtg., UN Doc.S/PV.4568, 10 July 2002; see also Statements of the Representatives of Netherlands, Switzerland, France, Greece, New Zealand, Argentina, Uruguay, Malawi, South Africa, Brazil, Nigeria, Trinidad and Tobago, UN SCOR, 58th Sess., 4772nd mtg., UN Doc.S/PV.4772, 12 June 2003.

³⁷ *E.g.*, see Mokhtar (2003) 3 *ICLRev*, 295, 307–317.

³⁸ Operative paragraph 7.

³⁹ Operative paragraph 6.

⁴⁰ Second preambular paragraph.

in the March 1998 UK text that eventually became the basis for article 16. The ICC Statute does not define either an investigation or a prosecution, but indicates that an investigation involves action that may be taken with respect to both a situation and/or an individual⁴¹, whereas a prosecution comprises only actions taken with respect to a specific person. Both investigations and prosecutions are the responsibility of the Office of the Prosecutor, headed by the Prosecutor⁴².

- 13 An investigation comprises the totality of investigative actions undertaken by the Prosecutor under the ICC Statute after an investigation has started in order to ensure the confirmation of charges against an individual suspected of having committed crimes within the Court's jurisdiction. Investigations are initiated by the Prosecutor upon the referral of a situation either by a State Party to the Statute or the Security Council⁴³, or by the Prosecutor acting *proprio motu*⁴⁴. The Prosecutor shall initiate an investigation if he or she finds, after having evaluated the information made available to him or her, that there is a reasonable basis to proceed, considering the factors provided for in article 53 para. 1 (a)-(c). When the Prosecutor initiates an investigation *proprio motu*, he or she must first obtain the authorization of the Pre-Trial Chamber as specified in article 15 before article 53 comes into play.
- 14 The drafting history of the ICC Statute makes it clear that the term 'situations' that may be referred to the Prosecutor by a State Party or the Security Council was deliberately used to exclude the referral of individual cases for investigation⁴⁵. The Statute is silent on whether the Prosecutor may *proprio motu* initiate an investigation with a specific individual in mind, but it would be only logical to assume that he or she may do so.
- 15 Since both 'investigation' and 'prosecution' can be prevented or stopped by the Security Council under article 16, it has no practical significance to draw a temporal line or otherwise distinguish between the two phases when interpreting the article. Under one possible reading, prosecution comprises actions taken after the Pre-Trial Chamber has issued a warrant of arrest or a summons to appear pursuant to article 58⁴⁶. The more realistic view, however, is that prosecution comprises actions taken once charges against an individual have been confirmed in accordance with article 61⁴⁷. Based on this reading, it is fair to assume that prosecution under the Rome Statute encompasses the totality of actions undertaken by the Prosecutor to secure the conviction of a person against whom charges have been confirmed in accordance with article 61. Prosecution ends with the rendering of a final judgment, if necessary on appeal.
- 16 It may not be concluded, however, that by referring to both 'investigation' and 'prosecution', article 16 extends the Security Council's deferral power to the totality of activities of the Prosecutor. The Statute clearly states that steps taken by the Prosecutor prior to the Pre-Trial Chamber's authorization of an investigation only constitute a 'preliminary examination', not the beginning of an investigation⁴⁸. Indeed, the purpose of the authorization is to enable the Prosecutor to start an investigation. Among the steps which the Prosecutor can take before an investigation starts are seeking 'information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or

⁴¹ See, e.g., articles 14, 15 and 55.

⁴² See article 42 paras. 1 and 2.

⁴³ See articles 13 (a) and 14, and 13 (b) respectively; and article 53 paras. 1 and 2.

⁴⁴ See articles 13 (c) and 15; and article 53 paras. 1 and 2.

⁴⁵ The commentary to the 1994 ILC Draft Statute already stated that the Security Council 'would not normally refer to the Court a 'case' in the sense of an allegation against named individuals', see 1994 ILC Draft Statute, note 4, p. 85. The initial ILC proposition under article 25 of the 1994 Draft Statute was that States Parties would be able to lodge complaints with the Prosecutor against specific individuals. That position, as evidenced by the wording of article 14 of the Rome Statute, was modified in the ICC negotiating process.

⁴⁶ This reading could also be based on article 53 para. 2 of the Statute which implies that a sufficient basis for prosecution may be a warrant or summons issued under article 58.

⁴⁷ Article 61 also has a higher standard of evidence required ('substantial' as opposed to 'reasonable' grounds to believe that the person committed the crime charged).

⁴⁸ See article 15 para. 6.

she deems appropriate', receiving 'written or oral testimony at the seat of the Court', as well as analysing the information received⁴⁹. The Security Council cannot prevent the Prosecutor from taking these steps on the basis of article 16. The practice of the Office of the Prosecutor of in-depth preliminary examination serves interests of both quality and rational administration of justice. There is a presumption that the Office can undertake the same types of activities in an article 16 situation as it has been doing in its established preliminary examination practice.

2. 'commenced or proceeded with'

Article 16 provides that no investigation or prosecution may be commenced or proceeded with after a Security Council deferral request has been issued. Two questions may be posed with respect to this element of article 16. The *first* is when is an investigation or prosecution 'commenced', and the *second* is, how is the Council informed that an investigation is about to commence? 17

As regards the first question, the commencement of an investigation does not depend on how the Court's jurisdiction is triggered. The investigation is commenced when the Prosecutor determines that there is a 'reasonable basis to proceed' with an investigation and renders a decision to that effect. The Statute does not specify whether such a decision must be formal, but this may be implied from the text of article 53 para. 3, which explicitly refers to and elaborates the consequences of the Prosecutor's 'decision not to proceed'⁵⁰. Article 53 para. 1 does not, however, entail any formal procedure which the Prosecutor must go through to open an investigation, except (i) the obligation to consider the criteria in *litera* (a)-(c), and (ii) to inform the Pre-Trial Chamber if a decision not to proceed is only based on an interest of justice consideration. The Prosecutor must consider whether there is a reasonable basis to proceed with an investigation both under article 15 para. 3 and article 53 para. 1. In the latter case there is only judicial supervision of the Prosecutor's conclusion if he or she decides that an investigation would not serve the interests of justice⁵¹. When peace considerations reach the level of interests of justice, the system of the Rome Statute is that the Prosecutor can decide not to commence an investigation or prosecution on that basis, whereas it is the UN Security Council that can suspend investigations or prosecutions on that basis. 18

As to the second question, the Statute does not oblige the Court to inform the Security Council about the commencement of an investigation. Article 18 para. 1, however, requires the Prosecutor to notify States Parties and other States that 'would normally exercise jurisdiction over the crimes concerned' that a situation has been referred to the Court by a State Party pursuant to article 13 (a) and that the Prosecutor has determined that there would be a reasonable basis to commence an investigation. The article also obliges the Prosecutor to notify the above-mentioned States if he or she initiates an investigation *proprio motu*. Even though the Prosecutor has no duty to inform the Security Council as such about the commencement of an investigation initiated upon a State Party referral or on his or her own motion, the Council members will have ample opportunity to learn of it even if the investigation is not based on a referral of a situation by the Council itself. The practice of the 19

⁴⁹ See article 15 para. 2.

⁵⁰ Regulation 12, Section 4, Part 2 of the Draft Regulations of the Office of the Prosecutor, prepared at the Court in 2003, addresses the 'Decision to start or not to start investigation'.

⁵¹ The relationship between articles 15 and 53 was not adequately considered by the negotiating delegations. On the one hand, the burden on the Prosecutor cannot be lighter when the Court's jurisdiction is triggered through article 13 (c) rather than article 13 (a) or (b). Article 53 para. 1 (b) requires that the Prosecutor considers whether the case would be admissible under article 17. Article 15 para. 3 does not. On the other hand, it is only when the Prosecutor decides *not* to proceed with an investigation under article 53 para. 1 that the Pre-Trial Chamber may stand in the Prosecutor's way, which may in some situations serve the object and purpose of the Statute.

Office of the Prosecutor so far suggested that it would announce a decision by the Prosecutor to open an investigation through a press release⁵².

- 20 Article 16 permits the Security Council not only to prevent the start of an investigation or prosecution, but also to stop an investigation or prosecution already underway. It contains no express guidelines for dealing with the many evidentiary and practical problems which are likely to be caused by the issuance of a deferral request once proceedings have begun. Does such a deferral request mean that a person arrested by a custodial state must be set free? What will happen to potential witnesses who are co-operating with the Prosecutor prior to the Council's issuance of a deferral request, whose lives may be in danger absent continued protection by the Court? The drafters of the Statute knew of the implications of a request aimed at deferring ongoing proceedings, but rigid approaches which lead to unreasonable results, such as putting lives at risk or violating international human rights, should be avoided. As the result of a Belgian proposal submitted to the Rome Conference, a *nota bene* was incorporated in the last draft of article 10, option 1, pointing to the need for 'further discussion' of preservation of evidence⁵³. The discussion did not lead to the inclusion of relevant language in article 16.
- 21 In principle, the Security Council may regulate how measures can be taken by the Court in response to the procedural and evidentiary implications of a deferral request by the Council, in a Chapter VII decision pursuant to article 16⁵⁴. Although the Prosecutor may conduct measures of preliminary examination as described in article 15 para. 2 also after the issuance of a deferral request, those measures are entirely inadequate when faced, for example, with the threat of imminent destruction of evidence. In the face of such problems caused by article 16 deferral, and absent Security Council guidance, the Prosecutor may apply article 54 para. 3 (f) to take steps for the necessary preservation of evidence. He or she may wish to turn to the Pre-Trial Chamber to ensure that measures are taken, which are consistent with the requirements both of a successful resumption of an investigation or prosecution or essential interests of justice.

3. 'period of 12 months'

- 22 Article 16 provides that the Security Council may request the deferral of proceedings for a period of 12 months. The actual wording of the article suggests that the Council's deferral request must pertain to the time period specified, but the Council may of course decide that the period be shorter. If viewed in light of Article 16, the Security Council resolution 1497, which contains no time limit, arguably goes against this period requirement. It should be assumed that the 12 month period starts running not from the day on which the deferral request is adopted by the Security Council, but from the date it is received by the Court.

4. 'resolution adopted under Chapter VII'

- 23 The requirement that a deferral request be issued in the form of a Chapter VII Security Council resolution was the last textual modification of article 16 agreed to at the Rome Conference. As the drafting history suggests, the purpose of this amendment was to ensure that the Council takes a formal vote on deferral in keeping with article 27 of the UN Charter⁵⁵. It was emphasized that, otherwise, the mere discussion of a Chapter VII situation

⁵² See, e.g., the ICC press release 'ICC-OTP-PR-20070522-220_EN' dated 22 May 2007, 'Prosecutor opens investigation in the Central African Republic' (<https://www.legal-tools.org/doc/7c1d44/>); see also ICC press release 'ICC-OTP-20130116-PR869' dated 16 January 2013, 'ICC Prosecutor opens investigation into war crimes in Mali: The legal requirements have been met. We will investigate' (<https://www.legal-tools.org/doc/f98b58/>).

⁵³ See Bureau's Proposal, note 3, p. 13.

⁵⁴ It is an open, but not very practical question, whether this would apply to Chapter VII decisions pursuant to article 13 (b) as well.

⁵⁵ It is noted that article 13 (b) of the ICC Statute, which confirms the Security Council's *referral* power, applies the term 'acting under Chapter VII' of the UN Charter, rather than on the basis of 'a resolution adopted under Chapter VII' as specified in article 16.

in consultations could maybe be deemed as Security Council ‘action’ with respect to that situation, providing a ground for barring Court proceedings⁵⁶. The majority of delegations felt that this would unduly harm the independence of the Court.

Obbliging the Council to issue a Chapter VII resolution serves two other purposes as well. *First*, it ensures that the deferral of an investigation or prosecution is undertaken on the basis of a legally binding Security Council decision, thereby establishing a legal duty on states not to act contrarily to the deferral request. *Secondly*, given that a Chapter VII resolution pertains to threats to the peace, breaches of the peace and acts of aggression, issuing such a resolution may make the Council acknowledge implicitly that ICC proceedings would be detrimental to the maintenance of international peace and security. In political terms, the costs of such an acknowledgment to Security Council credibility might prove high.

It is generally understood that according to Article 39 of the UN Charter, any resolution adopted under Chapter VII should be prefaced by a determination that there exists a ‘threat to the peace, breach of the peace, or act of aggression’⁵⁷. Curiously, the Security Council resolutions 1422, 1487, and 1497, though adopted under Chapter VII, contain no such determination, which results in a perilous relationship with the UN Charter and article 16 of the Rome Statute.

While it is only logical to conclude that Security Council deferral requests will be directed at investigations or prosecutions triggered by a State Party referral or initiated by the Prosecutor acting *proprio motu*, an interesting question is whether article 16 also applies to proceedings triggered by the Council itself. The wording of article 16 would permit that interpretation, but there may be reasons why this is not an entirely sound conclusion. It was understood from the beginning of the ICC process after the 1994 ILC Draft Statute that the referral of a situation to the Prosecutor by the Security Council would in reality be analogous to the establishment of an *ad hoc* criminal tribunal⁵⁸. The ICTY or ICTR Statutes do not recognize any power of the Council to prevent or stop the Tribunals from investigating or prosecuting specific individuals. In addition, the argument that Article 16 can be used as a check on Security Council referrals is not easy to substantiate from the perspective of the drafting history of the Rome Statute⁵⁹. In practice, however, the interpretation that article 16 applies in cases of a Security Council referral has been consistently supported by states. The preambular reference to article 16 in referral resolutions 1593 and 1970 gives the impression that the deferral provision is capable of application in relation to situations that the Security Council itself has referred to the ICC. It can also be demonstrated from the fact that none of the states that addressed the possible deferral in the debates on the Al-Bashir case argued that the Security Council did not have the power to invoke article 16 in that situation⁶⁰.

5. ‘request may be renewed under the same conditions’

Article 16 provides that a request for deferral of ICC proceedings may be renewed under the same conditions as the initial one, which means that renewal must be effected by a

⁵⁶ See, e.g., Role of the Security Council According to article 23 ILC Draft, Statement by H.-P. Kaul, Head of the German Delegation, 8 Aug. 1997, p. 2 (on file with the authors).

⁵⁷ Frowein and Kirsch, in: Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2012) 1272, 1294.

⁵⁸ This proposition was already acknowledged by the ILC in its commentary to the 1994 Draft Statute, see 1994 Draft Statute, note 4, p. 85. Article 12 para. 2 of the ICC Statute eliminates the need for State consent to the conduct of ICC proceedings when they have been triggered by the Council. The Statute also provides that the Security Council may be called on to serve as an enforcement mechanism when States Parties fail to co-operate in Court proceedings triggered by the Council, see article 87 para. 7.

⁵⁹ One view is that the original intent underpinning article 16 was to block premature state party referrals or *proprio motu* investigations by the Prosecutor, see Scheffer, *The Jurist*, 20 August 2008 (<https://www.legal-tools.org/doc/6ca103/>) 2; for an opposite view, see Cryer, *Oxford Transitional Justice Research Working Paper Series*, 29 October 2008 (<https://www.legal-tools.org/doc/2871fa/>) 2.

⁶⁰ See UNSC 5947th Mtg., UN Doc.S/PV. 5947, 31 July 2008; see also UNSC 6028th Mtg., UN Doc.S/PV. 6028, 3 December 2008.

Security Council resolution adopted under Chapter VII of the UN Charter. The wording strictly speaking suggests that a new request for deferral would apply for an additional 12 month period, not a shorter or longer one. It must be assumed that non-renewal of a deferral request automatically allows the ICC to take up an investigation or prosecution where it was left off. In other words, any new deferral request further suspends ICC action, but does of course not permanently stop it. At the same time, it must be noted that article 16 contains no express limitation on the number of times a request for deferral may be renewed, which theoretically means that a deferral could be indefinite as a matter of practice. This could lead to a situation which would defeat the balance of interests on which article 16 is based. It is not clear whether, under the terms of article 16, the Council could allow the 12 month period of a deferral request to expire and then resubmit it after a certain period of time, during which the Court has resumed proceedings.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court;

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice;

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Literature: Alai, C. and Mue, N., 'Complementarity and the Impact of the Rome Statute and the International Criminal Court in Kenya', in C. Stahn, and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, ii (CUP 2011) 1222; Ambos, K., *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach* (Springer 2010); Apuuli, K.P., 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda', (2005) 15 *CLF* 408; *id.*, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', (2006) 4 *JICJ* 179; Arbour, L. and Bergsmo, M., 'Conspicuous Absence of Jurisdictional Overreach', in: H. von Hebel *et al.* (eds.), *Reflections on the International Criminal Court* (T.M.C. Asser Press 1999) 131; Arsanjani, M.N., 'Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court', in: H. von Hebel *et al.* (eds.), *Reflections on the International Criminal Court* (T.M.C. Asser Press 1999) 57; Benzing, M., 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity', (2004) 7 *MPYbUNL* 591; Bitti, G., 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 281; *id.*, 'Article 21 of the Statute of the International Criminal Court and the Respect for the Hierarchy of Sources of Law before the ICC', in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, forthcoming 2015); Bleich, J.L., 'Complementarity', (1997) 13 *NEP* 231; Bos, A., 'Foreword', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009); Buergenthal, T., 'Truth Commissions Functions and Due Process', in: C. Tomuschat *et al.* (eds.), *Völkerrecht als Wertordnung. Common Values in International Law* (N.P. Engel Verlag 2006) 103; Burke-White, W., 'Complementarity in Practice: The International Criminal Court as Part of a System of Multilevel Global Governance in the Democratic Republic of Congo', (2004) 18 *LeidenJIL* 557; *id.*, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2008) 19 *CLF* 59; Cassese, A., 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (OUP 2002) 7; Clarke, W., Herbst, J., 'Somalia and the Future of Humanitarian

Intervention', (1996) 75 *Foreign Affairs* 70; Crawford, J., *The Creation of States in International Law*, 2nd ed., (OUP 2006); De Guzman, M. M., 'Gravity and the Legitimacy of the International Criminal Court', (2009) 32 *FordhamILJ* 1400; *id.*, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', (2012) 33 *MichJIL* 265; Dugard, J., 'Possible Conflicts of Jurisdiction with Truth Commissions', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 693; El Zeidy, M.M., 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2002) 23 *MichJIL*, *id.*, 'The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422', (2002) 35 *VandJTransnatL* 1503; *id.*, 'The Ugandan Government Triggers the First Test of the Complementarity Principle', (2005) 5 *ICLRev* 83; *id.*, 'Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court', (2006) 19 *LeidenJIL* 741; *id.*, 'The Gravity Threshold under the Statute of the International Criminal Court', (2008) 19 *CLF* 35; *id.*, *The Principle of Complementarity in International Criminal Law* (Martinus Nijhoff Publishers 2008); *id.*, 'From Primacy to Complementarity and Backwards: (Re) visiting Rule 11 bis of the Ad hoc Tribunals', (2008) 57 *I&CompLQ* 408; *id.*, 'Admissibility in International Criminal Law', in: W. Schabas and N. Bernaz (eds.), *Routledge Handbook of International Criminal Law* (Routledge 2010) 211; *id.*, 'Commentary on the "Prosecutor v. Radoslav Brdjanin, Decision on Application for Disqualification"', in: A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, xix (Hart Publisher 2010) 280; *id.*, 'The Genesis of Complementarity', in: C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (CUP 2011) 71; *id.*, 'Ad hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny', in Stahn C. (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 179; Fairlie, M.A. and Powderly, J., 'Complementarity and Burden Allocation', in: C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, i (CUP 2011) 642; Gaeta, P., 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?', (2004) 2 *JICJ* 949; Gioia, F., 'State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court', (2006) 19 *LeidenJIL* 1095; Gurulé, J., 'United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions', (2001–2) 35 *CornILJ* 1; Harris, DJ, O'Boyle, M. and Warbrick, C., *Law of the European Convention on Human Rights* (Butterworths 1995); Hayner, P.B., *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Rutledge, 2002); Heller, KJ, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process', (2006) 17 *CLF* 255; Holmes, J.T., 'The Principle of Complementarity', in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) 41; *id.*, 'Complementarity: National Courts Versus the ICC', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (OUP 2002) 674; Jurdi, N. N., *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2013); Kirsch, P. and Holmes, J.T., 'The Rome Conference on the International Criminal Court: The Negotiating Process', (1999) 93 *AJIL* 2; Kleffner, J., *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2008); Klip, A., 'Complementarity and Concurrent Jurisdiction', (2004) 19 *Nouvelles Etudes Pénales* 173; Kress, C., "'Self-Referrals" and "Waivers of Complementarity": Some Considerations in Law and Policy', (2004) 2 *JICJ* 944; Llewellyn, JJ., 'A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Inlet to Injury in Transitional Contexts?', (2001) 24 *DalhousieLJ* 192; Meyer, F., 'Complementing Complementarity', (2006) 6 *ICLRev* 549; Mokhtar, A., 'The Fine Art of Arm-Twisting: The U.S. Resolution 1422 and Security Council Deferral Power under the Rome Statute', (2002) 3 *ICLRev* 295; Murphy, R., 'Gravity Issues and the International Criminal Court', (2006) 17 *CLF* 281; Müller A. and Stegmiller, I., 'Self-Referrals on Trial: From Panacea to Patient', (2010) 8 *JICJ* 1267; Newton, M., 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', (2001) 167 *MillRev* 20; Nouwen, S., 'Complementarity in Uganda: Domestic Diversity or International Imposition?', in: C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II (CUP 2011) 1120; *id.*, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013); Nseroko, D.D.N., 'The International Criminal Court: Jurisdictional and Related Issues', (1999) 10 *CLF* 87; Olásolo, H., 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor', (2005) 5 *ICLRev* 121; Philips, R.B., 'The International Criminal Court Statute: Jurisdiction and Admissibility', (1999) 10 *CLF* 61; Rastan, R., 'Situation and Case: Defining the Parameters', in: C. Stahn, and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, i (CUP 2011) 421; Robinson, D., 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', (2003) 14 *EJIL* 481; *id.*, 'The inaction controversy: Neglected words and new opportunities', in: C. Stahn, and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (CUP 2011) 460; Rojo, E., 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace Without Justice" to "No Peace with Victor's Justice"', (2005) 18 *LeidenJIL* 829; Ryngaert, C., *Jurisdiction in International Law* (OUP 2008); Schabas, W.A., 'The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone', (2003) 25 *HRQ* 1035; *id.*, 'Prosecutorial Discretion and Gravity', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 229; *id.*, 'Complementarity in Practice: Some Uncomplimentary Thoughts', (2008) 18 *CLF* 5; Schabas, W. A., 'The rise and fall of complementarity', in: C. Stahn, and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (CUP 2011) 150; Scharf, M., 'The Amnesty Exception to the Jurisdiction of the International

Criminal Court’, (1999) 32 *CornILLJ* 507; Slade, T. N. and Clark, R. S., ‘Preamble and Final Clauses’, in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) 421; Ssenyonjo, M., ‘Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court’, (2005) 10 *JConflict&SecurityL* 405; Stahn, C., ‘The Ambiguities of Security Council Resolution 1422 (2002)’, (2003) 14 *EJIL* 85; *id.*, ‘Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’, (2005) 3 *JICJ*. 695; *id.*, ‘Complementarity: A Tale of Two Notions’, (2008) 19 *CLF* 87; *id.*, ‘Taking Complementarity Seriously: on the sense and sensibility of “classical”, “positive”, and “negative” complementarity’’, in: C. Stahn, and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice, i* (CUP 2011) 233; Stahn, C., and El Zeidy, M.M. (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011); Van der Wilt, H.G. and Lyngdorf, S., ‘Procedural Obligations under the European Convention on Human Rights: Useful Guidelines for the Assessment “Unwillingness” and “Inability” in the Context of the Complementarity Principle’, (2009) 9 *ICLRev* 39.; Wierda, M. and Otim, M., ‘Courts, Conflict and Complementarity in Uganda’, in: C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice, Vol. II* (CUP 2011) 1155; Yang, L., ‘On the Principle of Complementarity in the Rome Statute of the International Criminal Court’, (2005) 4 *ChineseJIL* 121; Zartman, W. I., ‘Introduction: Posing the Problem of State Collapse’, in Zartman(ed.), *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Rienner 1995).

Content

A. Introduction/General remarks.....	1
I. The ILC Draft and the Ad Hoc Committee	5
II. The Preparatory Committee	10
III. The Rome Conference	17
B. Analysis and interpretation of elements	23
I. Paragraph 1	23
1. Inactivity	27
2. ‘same case’	31
3. Burden of proof	36
4. ‘unwilling or unable’	38
5. ‘genuinely’	41
6. Decision not to prosecute by State.....	44
7. Double jeopardy.....	53
8. Insufficient gravity	54
II. Paragraph 2	61
1. ‘shielding the person’	65
2. Unjustified delay	67
3. Lack of impartiality or independence.....	70
III. Paragraph 3: Collapse or unavailability of the national judicial system	74

A. Introduction/General remarks

The concept of admissibility in international criminal procedure concerns the forum 1 allocation of cases between national and international criminal jurisdictions. In the domain of international criminal law, when two judicial systems coexist (whether at the horizontal or vertical level),¹ each empowered to exercise competence over the same case(s), it becomes quite common to establish mechanisms to regulate which jurisdiction proceeds and under what conditions.² Admissibility in international criminal procedure or international criminal

¹ [The views expressed in this chapter are those of the authors and do not necessarily reflect those of the International Criminal Court]. In this context, horizontal refers to the conflict of jurisdiction between inter-state judicial systems while the vertical refers to conflict of jurisdiction between one or more national justice systems and an international judicial organ. This concept should be clearly distinguished from the notion of admissibility of evidence, which lies at the heart of the law of evidence. The latter is beyond the scope of this chapter.

² In the same vein, Schabas, *An Introduction to the International Criminal Court*. (4th ed., CUP 2011) 187. For instance, at the horizontal level, there is a growing tendency to solve possible conflicts of jurisdiction in the context of crimes under international law through the principle of ‘subsidiarity’. According to this principle, the territorial State or the State of nationality enjoys ‘jurisdictional priority’ as far as it proves ability and willingness to prosecute. In other words, any other State which demands to prosecute international crimes, say on the basis of universal jurisdiction, can do so only as far as the State directly affected fails to do so. Thus, there is a sort of an admissibility test, which assists in resolving issues of competing jurisdictional claims. See Ryngaert, *Jurisdic-*

law seeks to solve the potential conflict of jurisdiction that might arise between the two tier legal fora, the national and the international.

This is actually the *status quo* if one follows the development of international criminal law over the last seventy years and in particular, the last two decades. Starting with the attempts undertaken by official, unofficial and semi-official bodies during the Second World War (1941–1943), these bodies proposed the establishment of an international judicial forum or an inter-Allied court, which was meant to function alongside domestic courts, to prosecute the Nazis for their crimes committed in the course of the war.³ There was a growing tendency to organize the relationship between the proposed court and domestic jurisdictions by creating a procedure which allowed the international machinery to exercise its competence only under exceptional circumstances. The underlying idea was to give preference to the role of domestic courts and solve any possible conflict of jurisdiction at both levels through a sort of admissibility procedure, which aimed at filtering the cases to be dealt with before the international forum.⁴ In essence, this is similar to the existing mechanism under the Rome Statute,⁵ as designed by its drafters.

- 2 The experience of the Nuremberg International Military Tribunal (IMT), which finally overruled these initiatives, was notably different. The three main Allied powers (Britain, the United States and the Soviet Union) made a statement in the Moscow Declaration of 30 October 1943,⁶ later referred to in the London Agreement of 8 August 1945 establishing the IMT,⁷ that German war criminals should be judged and punished in the countries in which their crimes were committed. However, this declaration was limited to the case of relatively minor offenders. ‘German criminals whose offenses [had] no particular geographical localization [and who were labelled as major war criminals] [would] be punished by joint decision of the government of the Allies’.⁸ The joint decision resulted in the creation of the IMT, which was called upon to try only the ‘major war criminals’, while the remaining offenders referred to in both the Moscow Declaration and the London Agreement were to be dealt with before national criminal jurisdictions under the confines of Control Council Law No. 10.⁹

tion in International Law (OUP 2008) 211–18. See more recently, *Report of the Secretary General: The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc. A/68/113, 26 June 2013, para. 25; also *Report on the Scope and Principle of Universal Jurisdiction: Information provided by the Kingdom of Spain*, No. 094 FP, 29 April 2013, in particular para. 16; *Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments: The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc. A/65/181, 29 July 2010, 26 (observations by Chile and Cuba).

³ See for example the work done by the London International Assembly, the International Commission for Penal Reconstruction and Development and the United Nations War Crimes Commission. The London International Assembly was established in 1941 under the auspices of the League of Nations Union, although it was not an official body. Its mandate was mainly to make recommendations in relation to the question of war crimes committed during the course of World War II and to find solutions to ensure effective punishment for those who bear responsibility for these crimes. See on the London International Assembly, *Historical Survey of the Question of International Criminal Jurisdiction*, UN Doc. A/CN.4/7/Rev.1, 1949, at 18; *International Commission for Penal Reconstruction and Development: Proceedings of the Conference held in Cambridge on the 14th November, 1941, Between Representatives of Nine Allied Countries and of the Department of Criminal Science in the University of Cambridge*, at 11; *United Nations War Crimes Commission Progress Report*, Doc C.48, 12 September 1944.

⁴ *Ibid.*

⁵ *Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 17 July 1998, UN Doc.A/CONF.183/9 [hereinafter Rome Statute], article 17.

⁶ *The Tripartite Conference at Moscow*, October 19–30, 1943, reprinted in: *International Conciliation*, No. 395, at 599–605 (1943) [hereinafter Moscow Declaration].

⁷ *London Agreement of August 8, 1945*, reprinted in: (1947) 1 *Trial of Major War Criminals Before the International Military Tribunal* 8 [hereinafter London Agreement] 8.

⁸ *Ibid.*

⁹ *Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity*, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, 31 January 1946; also, Cassese, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (OUP 2002) 7.

Therefore, this allocation of cases between the IMT and domestic courts, including military tribunals, did not give rise to the need to further establish conditions or criteria to regulate which forum was to proceed with the case under consideration. The Allies' decision to divide the responsibilities between the two tier jurisdictions in this categorical manner, on the basis of the accused's level of responsibility, resolved from the outset any possible conflict of jurisdiction that could have arisen and thus actually served as an admissibility procedure. This filtering process was carried out in accordance with article 14 of the IMT Charter.¹⁰ The situation in the Far East was quite similar. The International Military Tribunal for the Far East (IMTFE) was created 'for the just and prompt trial and punishment of the major war criminals in the Far East'. The remaining Japanese war criminals lacking a 'leadership background' were dealt with in their respective 'occupied or colonized territories'.¹¹

When the *ad hoc* tribunals were established in the early 1990s the idea that these tribunals would exercise exclusive jurisdiction over the core crimes referred to in their statutes was rejected (retaining instead also the competence of national courts). This led to the inevitable conclusion to set up a system by which to resolve the positive conflict of jurisdiction between the two level fora. The Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹² and the International Criminal Tribunal for Rwanda (ICTR)¹³ as well as their respective Rules of Procedure and Evidence¹⁴ embody identical provisions which serve this purpose. The Statute of the Special Court for Sierra Leone thereafter followed the same path.¹⁵ Although the statutory provisions governing these tribunals speak of 'primacy' and do not explicitly rely on the term 'admissibility' or 'complementary jurisdiction', as is the case with the Rome Statute, they manage to remedy the potential conflict of jurisdiction between the tribunals and any domestic court by way of setting out certain defined criteria to that effect in their respective Rules of Procedure and Evidence.¹⁶

Moreover, responding to a settled plan for complementing the mandates of the *ad hoc* tribunals (particularly the ICTY and ICTR),¹⁷ these tribunals began to develop new methods to reallocate cases by amending their Rules of Procedure and Evidence. These amendments actually created a filtering system more akin to an admissibility mechanism, which guaranteed that not every case that came or was already before the tribunal would be dealt with.¹⁸

The Rome Statute comes with the most complex and developed system of admissibility the field of international criminal law has experienced. This is not surprising. The drafters of the Rome Statute had in mind the creation of a *permanent* international institution expected to function as a residual jurisdiction: a court which operates under exceptional circumstances, when there are no genuine prospects that domestic courts will respond to certain grave atrocities by way of investigating, prosecuting and trying alleged perpetrators responsible for

¹⁰ Charter of the International Military Tribunal, 8 August 1945, article 14(b) <<http://avalon.law.yale.edu/imt/imtconst.asp>> accessed 5 March 2015.

¹¹ El Zeidy, in: Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) 71, 124–125.

¹² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res. 827/1993, reprinted in: (1993) ILM 1192, article 9.

¹³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, SC Res 955/1994, reprinted in: (1994) ILM 1598, article 8.

¹⁴ See *ICTY Rules of Procedure and Evidence*, UN Doc. IT/32/Rev. 49, 22 May 2013, Rule 9 [hereinafter ICTY Rules]; *ICTR Rules of Procedure and Evidence*, UN Doc. ITR/3/Rev. 22, 10 April 2013, Rule 9 [hereinafter ICTR RPE].

¹⁵ See *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed on 16 January 2002, annex: Statute of the Special Court for Sierra Leone, article 8; *Rules of Procedure and Evidence*, Rule 9 [hereinafter SCSL RPE].

¹⁶ See for instance, *ICTY Rules*, Rule 9; *ICTR RPE*, Rule 9.

¹⁷ See for instance, SC Res. 1503 (2003), UN Doc. S/RES/1503 and SC Res. 1534 (2004), UN Doc. S/RES/1534.

¹⁸ For a detailed discussion see, El Zeidy, in: Schabas and Bernaz (eds.), *Routledge Handbook of International Criminal Law* (Routledge 2011) 211, 213–217; also El Zeidy (2008) 57 *I&CompLQ* 408.

one or more of the core crimes referred to in the Rome Statute. The sort of exceptional circumstances which limit the role of the Court's exercise of its jurisdiction is reflected in what is known as article 17,¹⁹ under the heading 'Issues of admissibility'.²⁰

Article 17 dealing with admissibility issues is the cornerstone of the Rome Statute of the International Criminal Court (ICC). Paragraphs 1(a)-(c) embody the principle of complementarity which is one of the 'underlying principles' of the Statute.²¹ That the aim of the Statute is not to negate State sovereignty is also manifested in article 17, which illustrates clearly that the concerns of States with respect to their sovereign interests in criminal justice were at the forefront of the negotiations from the earliest stages. Article 17 provides for inbuilt safeguards that preserve national interests and judicial integrity on the domestic level. This pivotal article was essential for the Statute to be marketable in Rome.

Article 17 also reflects another fundamental principle of international law, that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes',²² as the preamble to the Rome Statute states. Only when they fail to fulfil this duty should the Court operate to ensure there is no impunity gap.

The ICC may not proceed with a case when the concerned States are investigating, prosecuting, or trying in good faith. The prevailing view during the negotiations of the Rome Statute was that the ICC was not to have primacy over national criminal courts, which is the situation with the *ad hoc* tribunals,²³ but rather would complement them. However, '[d]efining the precise nature of this relationship was both politically sensitive and legally complex'.²⁴ This is apparent if one observes the close connection and interplay between article 17 and other provisions such as preamble paragraph 10, articles 1, 12, 15, 18, 19, 20, 53 and 95. At the outset of the negotiations at the Rome Conference, some States were of the view that the primary obligation to prosecute the crimes under consideration lay with States themselves and that the ICC would only have a role to play when 'the national judicial system was unable to investigate or punish transgressors'.²⁵ Other States and many non-governmental organizations (NGOs) wanted a more effective role for the Court, arguing that the ICC should be able to intervene 'where the proceedings under a national judicial system were ineffective and where a national judicial system was unavailable'.²⁶

The importance of 'complementarity' has been confirmed by the first Prosecutor of the ICC in his public statements. According to Prosecutor Moreno Ocampo, '[a]s a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned'.²⁷ He has insisted that:

'The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses.'²⁸

¹⁹ Rome Statute, article 17.

²⁰ This provision is complemented by a number of articles which aim at elaborating on the full process of the admissibility proceedings. The core of these provisions are found under the headings 'Preliminary Rulings Regarding Admissibility' (article 18) and 'Challenges to the Jurisdiction of the Court or the Admissibility of a Case', article 19. See, Nsereko, D., 'Article 18', in this volume; *id.*, 'Article 19'. Also of relevance to the operation of admissibility in the course of trial proceedings, see Coracini, R. A., 'Article 20', in this volume.

²¹ See also, Arsanjani, in: von Hebel *et al.* (eds.), *Reflections on the International Criminal Court* (1999) 57, 67.

²² Preamble, para. 6; See also, Slade and Clark, in: Lee (ed.), *The Making of the Rome Statute* (Kluwer Law International 1999) 421.

²³ But see margin 5 above.

²⁴ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41. See also as to the complexity and sensitivity of the jurisdictional issues as a whole, Kirsch and Holmes (1999) 93 *AJIL* 2.

²⁵ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 42.

²⁶ *Ibid.*

²⁷ Paper on some Policy Issues before the Office of the Prosecutor (2003), 2.

²⁸ *Ibid.*

Moreover, according to the Prosecutor, 'the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States'.²⁹

I. The ILC Draft and the Ad Hoc Committee

In the 1994 Draft Statute of the International Law Commission (ILC)³⁰ the third paragraph of the Preamble provided that the ICC was intended to complement national criminal justice systems in those cases where trial procedures 'may not be available or may be ineffective'. The ILC made clear in its commentary that the Court was intended to operate in cases where there was no prospect of trial in national courts. Specifically, it stated that: 'The emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters.'³¹ It would not, therefore, take primacy over national courts and would not effect bilateral inter-State extradition or other forms of international judicial assistance. The purposes set out in the Preamble, including complementarity, were intended to assist in the interpretation and application of the Statute, particularly the exercise of the power conferred by draft article 35 dealing with issues of admissibility. Some members of the ILC believed that the Preamble should be an operative part of the Statute.³²

Article 35 of the draft Statute set out three grounds of inadmissibility. Firstly, when the case had been duly investigated by a State with jurisdiction over the crime and the decision of that State not to proceed to prosecution was apparently well founded. Secondly, where the crime was under investigation by a State which had or may have had jurisdiction over it, and there was no reason for the Court to take any future action with respect to the crime at that time. Thirdly, the crime was not of such gravity to justify any further action by the ICC. The rationale behind this provision was that the ICC should only be dealing with cases outlined in the Preamble, that is where it was really desirable to do so. However, some members were of the view that it was not necessary as the relevant factors could be taken into consideration at the jurisdictional level, notably under draft article 20(e) dealing with crimes within the jurisdiction of the Court and draft article 21 dealing with preconditions to the exercise of jurisdiction. To challenge the jurisdiction of the ICC on the basis that there existed an effective or available trial procedure in a State with jurisdiction over the criminal offence, the ILC proposed in draft article 34(a) that the interested State must do so before the commencement of the trial. In addition the accused could challenge under article 34(b) the jurisdiction at that time or at any later stage of the trial.

Further, in article 42, para. 1 the draft Statute affirmed the *non bis in idem* principle. A person could not be prosecuted before any other court for criminal conduct for which he or she had already been tried by the ICC and conversely not by the ICC where a prosecution had occurred in another court.

The ILC Draft was considered by the Ad Hoc Committee on the Establishment of an International Criminal Court set up by the General Assembly in 1994.³³ In its 1995 Report³⁴ the Committee stated that many delegations had noted that the commentary to the Preamble clearly indicated that the ILC did not intend that the ICC should replace national criminal courts.³⁵ The Report described the principle of complementarity as 'an essential element in

²⁹ *Ibid.*, 5.

³⁰ *Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court*, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994) 29.

³¹ *Ibid.* 44.

³² *Ibid.*

³³ UN GA Res. 49/53 (9 December 1994).

³⁴ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995).

³⁵ *Ibid.*, para. 29.

the establishment of an international criminal court'.³⁶ However, it was found that further elaboration of the principle was necessary 'so that its implications for the substantive provisions of the draft statute could be fully understood'.³⁷ There was a divergence of opinion on primacy of jurisdiction in the Committee. Some delegations emphasized that the principle of complementarity should create a strong presumption favouring national criminal court jurisdiction, in that States had a vital interest in prosecuting violations of their laws.³⁸ For example, the United States requested that the Preamble be amended to clarify the primary obligation on States to prosecute the listed crimes and if a State had a judicial system in active operation and entertained a *bona fide* investigation and/or prosecution then the ICC should not be able to intervene.³⁹ Other delegations, to the contrary did not want to create such a presumption. Rather, while national courts would have concurrent jurisdiction with the ICC, the latter would have primacy of jurisdiction.⁴⁰ A view was also expressed that a balanced approach was necessary, in that the primacy of national courts should be safeguarded, but at the same time the ICC should not be merely residual to national jurisdictions.⁴¹

The ILC Draft provided that the ICC had the capacity to decide that a case before it was inadmissible. Some delegations, for example China,⁴² had expressed concerns about this authority. However, not to have permitted the ICC to examine the effectiveness of domestic processes would have undermined the Court.

- 9 Two views on placement of the concept of complementarity were expressed. One view was that the principle of complementarity could be elaborated in the Preamble. According to article 31 of the 1969 *Vienna Convention on the Law of Treaties*, a preamble to a treaty is considered an integral part of a treaty for the purposes of interpretation and application.⁴³ The second view was that a reference to this important principle in the Preamble alone was insufficient and it should also be placed in an article in the Statute. There would in this manner be no doubt about the vital nature of complementarity in the interpretation and the application of other articles in the Statute.⁴⁴

As one commentator has noted, the approach put forward by the ILC 'contributed to the eventual resolution of the complementarity question. ... The fact that a pre-eminent international legal body such as the ILC would accept this important principle gave added weight during the negotiations on this point'.⁴⁵

II. The Preparatory Committee

- 10 This issue first came before the Preparatory Committee in March-April 1996. Similarly as in the Ad Hoc Committee there were widely differing views expressed by States as to 'how, where, to what extent and with what emphasis complementarity should be reflected in the

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*, para. 31.

³⁹ Bleich (1997) 13 *NEP* 231, 235–236, referring to a United States statement made to the *Ad Hoc Committee on 31 March 1995*, UN Doc. A/AC.244/1/Add.2, at 9. The United States position was that a national jurisdiction would only be considered unavailable or ineffective where the alleged crime did not fall within the jurisdiction of the State; where the State declined to exercise its jurisdiction without first having a full and appropriate investigation or in otherwise unreasonable manner or where the judicial process in the State is not *bona fide*.

⁴⁰ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), para. 32.

⁴¹ *Ibid.*, para. 33.

⁴² Bleich (1997) 13 *NEP* 231, 234, where he notes that China preferred that the decision rest with domestic courts or the Security Council.

⁴³ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), para. 37.

⁴⁴ *Ibid.*, para. 36.

⁴⁵ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 44.

statute⁴⁶. The Committee in its 1996 Report⁴⁷ observed that it was crucial that a proper balance be struck between the ICC and national authorities in order to make the Statute acceptable to a large number of States. Some States wanted to add to the no good faith and no credible national justice system grounds for the ICC assuming jurisdiction that of sham trials⁴⁸. Others had made the point that the limited resources of the ICC should not be exhausted by it taking up cases that could more easily as well as effectively be dealt with by national courts. Further, as the exercise of police power and criminal law is a State prerogative, the jurisdiction of the ICC was said to be an exception to that prerogative⁴⁹. The ILC preambular text was criticized at the same time by some as too vague and others as too intrusive⁵⁰. With respect to article 35 of the ILC draft Statute the central article on admissibility, several delegations felt that the three grounds listed seemed too narrow. It was suggested that it include *non bis in idem*, contained in article 42 and speciality contained in article 55 of that draft. As well, the view was expressed that it should be expanded to encompass cases not only being investigated but which were being prosecuted or had been prosecuted, subject to qualifications in respect of impartiality, diligent prosecution and so on⁵¹. The further observation was made that draft article 35 (b) referred to a crime that was under investigation as a ground for inadmissibility. However, there was no mention of whether the investigation was ineffective, whether certain procedures were unavailable or whether it was part of a sham trial. Several States came forward with proposals containing approaches that differed from the ILC draft Statute and these were included in the Report⁵². These issues were not dealt with again until the August 1997 session when a number of States introduced new proposals and informal consultations were initiated⁵³.

In order to try to get consensus on the topic of complementarity by the end of the August 1997 session, the coordinator of the informal sessions concentrated on the main issue, leaving procedural challenges to admissibility, *ne bis in idem* and other related matters until later⁵⁴. The negotiating approach was a rolling text and after the preliminary stage no square brackets were used, except for the first paragraph, which had not been discussed at that time⁵⁵. This was to be in contrast to other articles in the draft Statute. Draft article 35 was produced by the coordinator following a week of intense negotiations. This was 'one of the great achievements of the August 1997 Preparatory Committee'⁵⁶. 11

Paragraph 1 provided that the ICC should determine of its own motion that a case was inadmissible. Then in addition other alternatives were presented in four sets of square brackets. Admissibility could be raised on the application of the accused or at the request of an interested State or a State which had jurisdiction over the crime at any time prior to the commencement of proceedings. 12

In order to achieve consensus, a text box introduced the draft article. It provided that the draft that followed was 'intended to facilitate the work towards the elaboration of the Statute

⁴⁶ *Report of the Preparatory Committee on the Establishment of an International Criminal Court, i* (Proceedings of the Preparatory Committee During March-April and August 1996), UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996), para. 153 [hereinafter 1996 Preparatory Committee I]. Volume II contains the Proposals.

⁴⁷ *Ibid.*, paras. 153-169.

⁴⁸ *Ibid.*, para. 154.

⁴⁹ *Ibid.*, para. 153.

⁵⁰ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 45.

⁵¹ *Report of the Preparatory Committee on the Establishment of an International Criminal Court, i*, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996), para. 164.

⁵² *Report of the Preparatory Committee on the Establishment of an International Criminal Court, ii*, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996), para. 159.

⁵³ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 45. Holmes, Acting Head of the Canadian Delegation was appointed to coordinate these informal consultations and to report back to the Preparatory Committee.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 46.

⁵⁶ Amnesty International, *The International Criminal Court: Making the Right Choices – Part V: Recommendations to the Diplomatic Conference* 35 (May 1998).

of the Court'. It represented a 'possible way to address the issue of complementarity and [was] without prejudice to the views of any delegation'. It was stated that the draft text did 'not represent agreement on the eventual content or approach to be included in this article'. In addition, nine footnotes were included to explain the text. Finally, following a last minute argument by Mexico that more time was necessary to look at this article, after the fourth paragraph of the article an alternative approach was presented and the following language suggested: 'The Court has no jurisdiction where the case is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it.' This disclaimer alternative would have given the ICC no ability to review the genuine nature of the proceedings.

- 13 Although some States including France, the United Kingdom and the United States were of the view that the ICC should not act as an appeals tribunal or engage in judicial review of national decisions, whereas others were committed to giving the ICC a role to take jurisdiction where national proceedings were ineffective, a wide degree of consensus began to emerge. The Court would not take jurisdiction unless the State with criminal jurisdiction over the offence was unable or unwilling to carry out the investigation or prosecution. To obtain this consensus concessions were made on all sides. Inability was not controversial in principle and was added to the draft article. The issue of unwillingness was more difficult to negotiate as some delegations had concerns regarding State sovereignty and also constitutional guarantees in domestic systems against double jeopardy. However, at the end of the day the majority view was that if unwillingness was not a ground for the ICC to assume jurisdiction and refute the presumption that a national system was handling the case in an adequate manner it would be almost a signal to States that they could easily prevent the ICC from taking jurisdiction by initiating an investigation or prosecution. Nevertheless, some States continued to remain opposed and therefore the text box and the alternative approach remained included.
- 14 The majority of the delegations accepted the text 'as an acceptable and welcome compromise ... [and] that view ultimately prevailed in Rome'⁵⁷ with minor re-drafting, changes to numbering of other articles referred to and deletion of the alternatives contained in the square brackets in paragraph 1. The Inter-Sessional Meeting in Zutphen suggested the deletion of the first paragraph as the interests of the accused and interested States were met in then article 12[36] on challenges to jurisdiction⁵⁸. It was also agreed that complementarity should be emphasized in the Preamble. However, the Preamble redrafting did not occur in the Preparatory Committee⁵⁹. Article 15 of the draft Statute contained in the final Report of the Preparatory Committee followed the Zutphen suggestions. There was general agreement that if a crime was not serious enough the case should be inadmissible. Amongst the footnotes that accompanied the text were numbers 42 and 43. Footnote 42 noted that article 15 para. 1 (c) 'should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties'. It was agreed that these issues would be revisited in the light of revisions to article 18 on *ne bis in idem*. The issue of national amnesty or pardon preventing a prosecution before the ICC was acutely controversial. Footnote 43 stated that some delegations would have preferred the inclusion at the end of para. 1 of a new subparagraph that would have stated that 'the accused is not liable under article 92 (Rule of speciality) to be prosecuted before or punished by the Court'.
- 15 As an adjunct to article 15 was the proposal made by the United States delegation at the March-April 1998 Preparatory Committee to the effect that a new article 16 be included that *would* provide for complementarity at an earlier stage, prior to an investigation being commenced. This proposal was not acceptable to the like-minded group of States and was

⁵⁷ *Ibid.*, 46–47.

⁵⁸ *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, UN Doc. A/AC.249/1998/L.13. See article 11[35].

⁵⁹ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 47.

‘received with great scepticism’⁶⁰. Its general thrust was that it would have created lengthy procedures that would have affected the Prosecutor’s ability and was not necessary given the other safeguards contained in article 15 but also articles 13 and 17. It was put into the Draft Statute, but entirely in square brackets.

The Preparatory Committee’s text accomplished many things, but two major improvements on the ILC text must *be* emphasized. Article 15 expanded the grounds where the ICC can assume jurisdiction and introduced the principle of good faith. For a case to be inadmissible a Statute must have acted genuinely in investigating and prosecuting. On account of the inter-twined nature of the various jurisdictional articles it was to be of great importance in the lead-up time to Rome and the actual negotiations there that there was a good conception on the part of States as to how complementarity would work. It was, therefore, to assist in having a more focused debate on the issues of preconditions and trigger mechanisms. 16

III. The Rome Conference

During the negotiations leading up to the adoption of the Statute on 17 July 1998, the complementarity principle was a pivotal issue in the debate. The ICC was not seeking to undermine or detract from national criminal jurisdiction, but would only assume jurisdiction where a State was unwilling or able to do so in good faith. It was an amazing feat to have sent to Rome a text uncluttered with square brackets and this principle was soon seen as, in effect, the cornerstone to the successful adoption of the Statute. It was recognized that despite the disclaimer contained in the text box that the text represented ‘the agreement of an overwhelming number of delegates. [...] Any attempt by a government to [have weakened article 15 would have] endangere[d] agreement on the rest of the consolidated text and [have] caused the diplomatic conference to fail.’⁶¹ 17

In essence the article could not be opened up for substantial change or the package based on compromise would have folded. This was made clear in the general debate in the Committee of the Whole by the coordinator. Not all States were completely satisfied but saw the article as a delicately balanced compromise. However, some delegations including China, Egypt, Mexico, Indonesia, India and Uruguay wanted to reopen the negotiations⁶². Thus, the intention of the coordinator, who had continued with his role at the request of the Bureau of the Committee of the Whole in Rome, was to ‘resist holding informal consultations for as long as possible’⁶³ for two reasons. First, he viewed open-ended consultations as almost an invitation to delegations to suggest new proposals which could have led to the complementarity article being unraveled⁶⁴. Second, he was of the view that bilateral contacts with delegations would afford him a better opportunity of gauging concerns of States opposed to the Draft Statute’s text and their bottom lines⁶⁵. Three problems with the text surfaced as indicated by the coordinator⁶⁶. These were that some States viewed paragraph 2 as giving the ICC too much discretion in deciding whether a State was unwilling, and that no objective criteria were included to guide the Court. ‘Undue delay’ in paragraph 2 (b) was found to be too low a threshold for unwillingness. Lastly, ‘partial collapse’ of a national judicial system as a ground for the ICC to determine inability was viewed as not sufficient. 18

⁶⁰ International Commission of Jurists, *Exercise of Jurisdiction and Complementary*, ICJ Brief No. 2, 11 (June 1998).

⁶¹ Amnesty International, *The International Criminal Court: Making the Right Choices – Part V: Recommendations to the Diplomatic Conference* 35 (May 1998).

⁶² Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 52.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 53.

- 19 In the weeks that followed these concerns were addressed. In the Bureau Discussion Paper of 6 July 1998⁶⁷ and the Bureau Proposal of 10 July 1998⁶⁸, both submitted to the Committee of the Whole, the first concern was met by including in the determination of what constitutes unwillingness in paragraph 2 (c) after the phrase ‘The proceedings were not or are not being conducted independently or impartially’ the following language ‘in accordance with the norms of due process recognized by international law [...]’. At the end of the day following further bilateral consultations the coordinator refined the language to read ‘having regard to the principles of due process recognized by international law’ and this was inserted not in paragraph 2 (c) but rather in the chapeau to paragraph 2 in the final package where it thus applied to all parts of the paragraph. The second concern that of ‘undue delay’ in paragraph 2 (b) was resolved by the use of the term ‘unjustified delay’ which addressed the fears of those delegations that did not want the ICC second guessing national decisions. ‘Unjustified’ was viewed as providing for a higher standard than ‘undue’ and that it was implicit that a State would have the right to in fact justify its actions in delaying proceedings domestically before the Court could determine that a case was indeed admissible. It went also into the final package. The issue of ‘partial collapse’ proved to be more difficult to solve. Some delegations argued that there could be a partial collapse in a country of its national judicial system, yet it would not necessarily mean that an investigation and/or prosecution could not take place in good faith. The adjective ‘partial’ which had been present since the 1997 August Preparatory Committee’s Report, remained in the Bureau’s Discussion Paper and Proposal. However, in the final package presented to the Committee of the Whole the Bureau changed the text to read ‘substantial collapse’, in line with a proposal from Mexico.⁶⁹
- 20 Concerning the Preamble, article 15 para. 1 of the Preparatory Commission’s Draft Statute had referred to article 3 of the Preamble and footnote 39 to that reference in the text had noted that suggestions had been made that complementarity should be further clarified either in article 15 itself or elsewhere in the Statute. The draft Preamble had emphasized that ‘such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective’. Again a footnote, number 2, had indicated that some delegations had expressed their opposition to this wording and had asked that the wording be made consistent with article 1 and thus read ‘Emphasizing further that such a court shall be complementary to national criminal jurisdictions’. According to the coordinator although the need for a preambular reference was discussed in Rome delegations decided that it was not necessary as article 15 of the draft, to become article 17 of the final Statute, already had elaborated on it⁷⁰. The Drafting Committee at the Rome Conference, however, suggested that to make the text as clear as possible there should be a reference to complementarity in both article 1 on ‘The Court’ and the Preamble. The final package, thus, contained in the chapeau to article 17, references to paragraph 10 of the Preamble and article 1 where complementarity is mentioned. It was this latter reference that had not been in the draft Statute or the Bureau Discussion Paper or Proposal. The wording was made consistent as had been noted in footnote 2 mentioned above.
- 21 The United States proposal for the bracketed article 16 in the Preparatory Commission’s Draft Statute on preliminary rulings on admissibility was on the table in Rome for the first time for all practical purposes. Admittedly, it had been submitted at the March–April session of the Preparatory Commission in 1998, but there had been no time for discussion. Thus, during the period between April and June, when the Conference began in Rome, the United States was able to submit a revised proposal, which took into account concerns that had been expressed⁷¹. The text that appeared in the Bureau’s Discussion Paper as article 16 was

⁶⁷ UN Doc. A/CONF.183/C.1/L.53, 17–19.

⁶⁸ UN Doc. A/CONF.183/C.1/L.59, 15–16.

⁶⁹ UN Doc. A/CONF.183/C.1/L.14/REV.1.

⁷⁰ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 55.

⁷¹ *Ibid.*, 69. See UN Doc. A/CONF.183/C.1/L.25 (29 June 1998) for the revised proposal.

modified from the revised proposal. Concerns were raised by some States and NGOs concerning article 16, but ‘a growing number of delegations [...] stated [...] that bilaterally to the coordinator that [it] [...] was key to their acceptance of the complementarity regime and the *proprio motu* role of the Prosecutor’⁷². Further consultations produced further improvements in the text and the Bureau included it in the Proposal and finally in the package. It was apparent that article 18, as it was finally to be numbered, had become inextricably linked to article 17 on complementarity.

The complementarity principle strikes a balance between state sovereignty and an effective and credible ICC. Without it there would have been no agreement. As has been analysed here and elsewhere in this Commentary, article 17 is linked to a network of inter-related provisions which indicate the fact that this Statute’s adoption was probably the most complex multilateral negotiation ever undertaken. 22

B. Analysis and interpretation of elements

I. Paragraph 1

It is clear from the drafting history that the sophisticated admissibility regime created by the Rome Statute seeks to balance the supranational power entrusted to the Court with the power of national jurisdictions in such a way as to ensure States that ‘they would remain master over their own judicial proceedings’ as long as they do not *allow* perpetrators of serious crimes to go unpunished.⁷³ Article 17, as it stands, is drafted in a manner which aims at achieving this delicate result. However, as Pre-Trial Chamber II has noted, ‘the exercise of national criminal jurisdiction by States [being a right or even more an existing duty] is not without limitations. These limits are encapsulated in the provisions regulating the inadmissibility of a case, namely articles 17–20 of the Statute’,⁷⁴ which govern the exceptions to the exercise of national jurisdiction. 23

Article 17(1) sets out, in sequence, a set of requirements to be examined before the Court can make an inadmissibility determination. The chapeau of article 17 is drafted in the negative. It uses the term ‘inadmissible’ as opposed to ‘admissible’. The 1994 Draft Statute prepared by the ILC, which inspired the Rome Statute, relied on the same term.⁷⁵ The ILC did not tackle the reason behind this formulation. Nor did the 1995 *Ad hoc Committee* which replaced the ILC in revising said draft directly address this issue.⁷⁶ But it was clear in the course of the negotiations which followed before the Preparatory Committee in 1996 that the drafters intended to place the emphasis in favour of national proceedings, in the sense that the exercise of jurisdiction by the ICC is not the rule, but rather the exception.⁷⁷

Article 17(1)(a)-(c) embodies three different scenarios depending on the stage and nature of national proceedings. These sub-paragraphs mainly organize the relationship between

⁷² Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 71.

⁷³ Bos, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) xvii.

⁷⁴ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011 <<https://www.legal-tools.org/doc/dbb0ed/>> accessed 5 March 2015, para. 44.

⁷⁵ *Report of the International Law Commission on the Work of its Forty – Sixth Session* (2 May – 22 July 1994), with *Annex Draft Statute for an International Criminal Court*, UN Doc. A/49/10, 1994 YILC Vol. II, Part Two, Article 35, 52.

⁷⁶ *Report of the Ad hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), paras 29–51.

⁷⁷ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. A/51/22 (1996), para. 154 (noting that complementarity ‘is not a question of the Court having primary jurisdiction or even concurrent jurisdiction. Rather, its jurisdiction should be understood as having an exceptional character’).

national jurisdictions and the ICC by way of checking the existence or absence of domestic efforts with respect to a given situation or case. Accordingly, they are commonly represented by the term ‘complementarity’ and they are treated as the first limb of the admissibility provision. The fourth scenario lies under sub-paragraph (d) and is known as the gravity test. Gravity represents the second limb of the admissibility provision. It follows that article 17(1)(a)-(c) (‘complementarity’) together with sub-paragraph (d) (‘gravity’) form what is commonly known as the ‘admissibility’ or ‘inadmissibility’ determination. The ICC has endorsed this distinction in its case-law.⁷⁸

- 24 Although the Statute does not indicate in technical terms whether the two components are to be studied in any particular order, in one of the early communications received by his Office, the Prosecutor appeared to have opted for assessing the issue of gravity before the issue of complementarity.⁷⁹ Seven years later, the Prosecutor followed the same methodology in responding to a referral received on behalf of the Union of the Comoros concerning the ‘31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip’.⁸⁰ The Prosecutor’s assessment was confined to the criterion of gravity, and she found no need to proceed with an examination of complementarity.⁸¹ By contrast, in one of the early cases before the Court, Pre-Trial Chamber I, for instance, spoke of complementarity as being ‘the first part of the admissibility test’.⁸² Since then, it has been quite common practice for the Chambers of the Court to start an admissibility determination with an examination of complementarity,⁸³ unless the element of gravity has been particularly challenged.⁸⁴ Yet, following this order in making an admissibility determination does not have, as such, any substantial value rather than merely following the structure of article 17(1) or the circumstances underlying each particular case.⁸⁵ Starting with the regime of complementarity, article 17(1)(a) requires that the ‘case [be at least in the process] of being investigated or prosecuted by a State which has jurisdiction over it’, in order to enter a finding of inadmissibility, ‘unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’. The reference to the term State in this context should extend to States which are entitled to join

⁷⁸ *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 5 March 2015, para. 29. However, the Appeals Chamber in one of its early decisions divided the admissibility provision into three prongs. It stated that admissibility refers ‘in the first place to complementarity (article 17(1)(a) to (b), in the second place to *ne bis in idem* (articles 17(1) (c), 20) and thirdly to the gravity of the offence (article 17(1) (d))’, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006 <<https://www.legal-tools.org/doc/1505f7/>> accessed 5 March 2015, para. 23.

⁷⁹ *Letter of Prosecutor dated 9 February 2006* (Iraq) 9.

⁸⁰ *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, 6 November 2014, 3.

⁸¹ *Ibid.*, para. 148.

⁸² *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-520-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrests, Article 58, Pre-Trial Chamber I, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 5 March 2015, paras. 30 and 41.

⁸³ See, *inter alia*, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012 <<https://www.legal-tools.org/doc/96c3c2/>>, para. 38; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011 <<https://www.legal-tools.org/doc/dbb0ed/>>, paras. 48 *et seq.*

⁸⁴ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012 <<https://www.legal-tools.org/doc/4972c0/>> accessed 5 March 2015, paras. 39–40 (noting that the Defence did not challenge the admissibility of the case on the basis of complementarity, but rather on the ground of lack of sufficient gravity. Accordingly, the Chamber begun its examination and confined it to this latter element).

⁸⁵ *Ibid.*; *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, 6 November 2014.

the treaty in accordance with article 125 of the Statute,⁸⁶ and also those none-State parties with jurisdiction over the situation/case.⁸⁷ Nonetheless, providing an overly narrow interpretation to article 17 could lead to an increase in the impunity gap.

There may, for example, be entities whose status is contested but which enjoy an undisputed control of the territory and have the capacity to exercise jurisdiction. An example is Taiwan which, although unable to become a State Party in accordance with article 125 of the Statute because of the controversy surrounding its status at the United Nations, might otherwise be granted a limited standing before the Court as a State with jurisdiction within the meaning of article 17. Less clear cut examples might concern categories relating to disputed territories, such as Kosovo (which is recognised by many Western Countries, but is disputed by Russia) or South Ossetia (which is recognised by Russia, but disputed by the Western Countries). In these situations the Court might nonetheless be willing to consider arguments as to the entity's standing for the purpose of articles 17 and 19(2)(a), notwithstanding their controversial status under international law. More problematic would be entities which exhibit less State-like competencies. For example, under international humanitarian law and article 28 of the Rome Statute, civilian and military commanders of organized groups bear responsibility for crimes committed by their subordinates, and have a duty to prevent and punish such crimes, including by means of internal disciplinary or court martial procedures.⁸⁸ However, it is less clear that such forms of punishment would equate to the exercise of criminal jurisdiction by 'a State', or that such organised armed groups would have standing for the purpose of articles 17 and 19(2)(a).

The situation might be different in case of the application of article 20(3), where the accused person would have gone through a proper trial for the same conduct shaping the case of the ICC Prosecutor. In a scenario as such, it may be argued that the element of lack of State involvement in the trial proceeding might not be the decisive factor. Rather the decisive factor might rest on the fact that the person should not be tried twice for the same conduct even if his trial was not conducted by a State-like entity.

The requirement in the first sentence of article 17(1)(a) that 'the case is being investigated or prosecuted' opened the door in the early years of the Court's operation for experts to envisage the most practical interpretation of this provision to cover scenarios where a State does not act or decides voluntarily to relinquish the exercise of jurisdiction in favour of the Court due to good cause without necessarily being labelled as an 'unwilling' or 'unable' state.

Before Prosecutor Luis Moreno Ocampo took office, in July 2003, the Office of the Prosecutor commissioned an expert study on what it termed 'complementarity in practice'. Several prominent authorities on international criminal law, both academics and practitioners, participated in preparing a report.⁸⁹ Using terms like 'partnership', 'dialogue with States' and 'burden-sharing', they argued for the desirability of a benign and constructive relationship between national justice systems and the ICC. The expert report emphasised forms of cooperation and assistance. Amongst other things, it contemplated what was labelled as 'uncontested admissibility'. The document set out a rather novel construction of the scope of the duty of States to bring perpetrators to justice:

'Article 17 specifies the consequences for admissibility where a state is investigating or prosecuting, but does not expressly oblige states to act. However, paragraph 6 of the preamble refers to the "duty" of States to exercise criminal jurisdiction. While the preamble does not as such create legal

⁸⁶ This encompasses the category which fall under the 'all States' formula such as Palestine, Summary of Practice of the Secretary-General As Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, paras 81-2; see also in relation to Palestine, El Zeidy, M. M., 'Ad hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny', in Stahn C. (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015), 199.

⁸⁷ See for example, Rome Statute, articles 17(1)(a)-(c), 18(1), (2), 19(2)(b).

⁸⁸ Rome Statute, article 28. For a discussion, see Kleffner, J., *Complementarity in the Rome Statute and National Criminal Jurisdiction* (OUP 2008), 109-110.

⁸⁹ Informal Expert paper: 'The Principle of Complementarity in Practice' (2003) (on file with the author), ICC-01/04-01/07-1008-AnxA.

obligations, the provisions of the Statute may be interpreted in the light of the preamble. The duty to “exercise criminal jurisdiction” should be read in a manner consistent with the customary obligation *aut dedere aut judicare*, and is therefore satisfied by extradition and surrender, since those are criminal proceedings that result in prosecution. However, as noted above, the reference to a duty also reflects the spirit of the Statute that States are intended to carry the main burden of investigating and prosecuting. This is necessary for the effective operation of the ICC. In the types of situations described here, to decline to exercise jurisdiction in favour of prosecution before the ICC is a step taken to enhance the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes. This is distinguishable from a failure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity.⁹⁰

In effect, the experts developed a theory by which a State respected its obligation to prosecute by failing to prosecute. A State would be judged on its compliance with the duty to prosecute by an analysis of its motives rather than its actions.

The Prosecutor himself began to endorse this philosophy, by which the Court’s operations might result from cooperation rather than antipathy:

[T]here may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others’ hands and yet agree to a prosecution by a Court perceived as neutral and impartial.⁹¹

This philosophy of prosecutorial initiative was intimately linked to the concept of ‘self-referral’, by which States triggered the jurisdiction of the Court with respect to crimes committed on their own territory. Although a self-referral would lead to a scenario of inaction or inactivity, these are two distinct concepts. The former is a question of jurisdiction while the latter is one related to admissibility.⁹²

26 The concept of ‘uncontested admissibility’ was further developed by an expert consultation held under the auspices of the Office of the Prosecutor in late 2003. It concluded that ‘[t]here may also be situations where the Office of the Prosecutor (OTP) and the State concerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn State is unable to carry out effective proceedings against persons most responsible’.⁹³ Moreover, ‘[t]here may even be situations where the admissibility issue is further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution’.⁹⁴

Two scenarios were envisaged. In the first, the experts considered the case of a suspect who had fled to a third state: ‘All interested parties may agree that the ICC has developed superior evidence, witnesses and expertise relating to that situation, making the ICC the more effective forum. Where the third State has not investigated, there is simply no obstacle to admissibility under Article 17, and no need to label the State as “unwilling” or “unable” before it can cooperate with the Court by surrendering the suspect.’ Under the second scenario, a State ‘incapacitated by mass crimes’ or alternatively ‘groups bitterly divided by conflict’ who feared prosecution at each other’s hands would ‘agree to leadership prosecution by a Court seen as

⁹⁰ *Ibid.*, p. 19, fn. 24.

⁹¹ ‘Paper on Some Policy Issues before the Office of the Prosecutor’ (2003) 5, <http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> accessed 7 March 2015.

⁹² For a discussion on self-referrals, their validity and consequences, see Kres (2004) 2 *JICJ* 944; Gaeta (2004) 2 *JICJ* 949; El Zeidy (2005) 5 *ICLRev* 83; *id.*, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff 2008) 211–222, 274–283; Müller and Stegmillar (2010) 8 *JICJ* 1267; Chaitidou, E., ‘Article 14’, this volume.

⁹³ Informal Expert paper: ‘The Principle of Complementarity in Practice’ (2003) 3, ICC-01/04-01/07-1008-AnxA.

⁹⁴ *Ibid.* 18. Also 20. This was actually the case with the first referrals before the ICC in the situations of Uganda, Democratic Republic of the Congo, and Central African Republic. The practice continued in relation to subsequent referrals such as the situations in Mali and Central African Republic II. For a detailed discussion, see Chaitidou, E., ‘Article 14’, this volume.

neutral and impartial. In such cases, declining to exercise primary jurisdiction in order to facilitate international jurisdiction is not a sign of apathy or lack of commitment.⁹⁵

This philosophical approach to complementarity underpins five situations currently before the Court: those in Uganda, the Democratic Republic of Congo (DRC), Central African Republic I and II (CAR), and Mali. So far this philosophy has been accepted without much question by the Pre-Trial Chambers. For instance, in authorising the issuance of warrants of arrest concerning the Uganda situation, Pre-Trial Chamber II assigned to the situation and the cases related thereto, invoked a letter of 28 May 2004 from the Government of Uganda stating it had been ‘unable to arrest [...] persons who may bear the greatest responsibility’ for the relevant crimes; that ‘the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility’ for those crimes; and that the Government of Uganda ‘has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible’.⁹⁶ Similarly, in the case against Jean-Pierre Bemba emanating from the CAR situation, Pre-Trial Chamber III acknowledged that ‘the CAR judicial authorities abandoned any attempt to prosecute Mr. Jean-Pierre Bemba for the crimes referred to in the Prosecutor’s Application’ and still it proceeded with the issuance of a warrant of arrest against him.⁹⁷

1. Inactivity

Pursuant to the ‘uncontested admissibility’ theory developed by the Office of the Prosecutor, the complementarity test is satisfied by inactivity, rather than by an overt manifestation of a State’s unwillingness or inability to proceed. Although the concept of inactivity has been endorsed by the Pre-Trial Chambers in their jurisprudence, the exact scope of article 17(1)(a)-(b) remained controversial and unsettled for several years from the beginning of the Court’s operation. This uncertainty resulted from some conflicting academic writings on the subject, coupled with an admissibility decision issued by Trial Chamber II in June 2009⁹⁸. Also, the absence of any judicial pronouncement at the time on the part of the Appeals Chamber regarding the actual scope of this provision and how it was intended to operate in practice contributed to such uncertainty.

In *Lubanga*, Pre-Trial Chamber I stated: ‘The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have *remained inactive in relation to that case* or are unwilling or unable, within the meaning of article 17(1)(a) to (c), 2 and 3 of the Statute’ (emphasis added).⁹⁹ According to the Pre-Trial Chamber this interpretation rests on ‘*a contrario* [reading] of article 17, paras. 1(a) to (c) of the Statute’.¹⁰⁰ Having examined the available information, the Pre-Trial Chamber concluded that ‘no State with jurisdiction over the case [...] against Mr [...] Lubanga is acting, or has acted in relation to [such case]. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability’.¹⁰¹ Similarly, in *Abu Garada*, the same

⁹⁵ *Ibid.* 19.

⁹⁶ *Situation in Uganda*, ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 September 2005 <<https://www.legal-tools.org/doc/b1010a/>> accessed 5 March 2015, para. 37.

⁹⁷ *Prosecutor v. Jean Pierre Bemba Gombo*, ICC-01/05-01/08-14-tENG, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 10 June 2008 <<https://www.legal-tools.org/doc/fb80c6/>> accessed 5 March 2015, para. 21.

⁹⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 June 2009 <<https://www.legal-tools.org/doc/e4ca69/>> accessed 5 March 2015.

⁹⁹ *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 5 March 2015, para. 29.

¹⁰⁰ *Ibid.*, fn. 19.

¹⁰¹ *Ibid.*, para. 40.

Chamber, albeit with a different composition, also noted that according to the information provided by the Prosecutor,

‘no State with jurisdiction over the case against Mr Abu Garda is acting, or has acted, in the manner described in article 17 of the Statute in relation to the facts alleged in this case. Accordingly, in the absence of any State action, it is not necessary to address any issues relating to the unwillingness or inability of any given State to investigate or prosecute the case.’¹⁰²

- 28 By contrast, in its decision of 16 June 2009, Trial Chamber II put forward a different interpretation of article 17(1) to the effect that a case shall be determined admissible only if the relevant state was deemed unwilling to carry out the proceedings. According to the Trial Chamber, there are two types of unwillingness envisaged by article 17, one explicit and the other implicit. As to the latter, the Chamber said:

[A] State may not want to protect an individual, but, for a variety of reasons, may not wish to exercise its jurisdiction over him or her. This second form of ‘unwillingness’, which is not expressly provided for in article 17 of the Statute, aims to see the person brought to justice, but not before national courts. The Chamber considers that a State which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in article 17.¹⁰³

This interpretation deviated from the prevailing view endorsed by the Pre-Trial Chambers, and together with few scholarly writings, caused some uncertainty about the correct construction of article 17. It was not until 25 September 2009 that this controversial question was settled. On that date, the Appeals Chamber rendered its first judgment on the subject-matter in relation to an appeal lodged against the 16 June 2009 Decision and stated:

‘Such an interpretation is not only irreconcilable with the wording of the provision, but is also in conflict with a purposive interpretation of the Statute. The aim of the Rome Statute is ‘to put an end to impunity’ and to ensure that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’. This object and purpose of the Statute would come to naught were the said interpretation of article 17 (1) of the Statute as proposed by the Appellant to prevail. It would result in a situation where, despite the inaction of a State, a case would be inadmissible before the Court, unless that State is unwilling or unable to open investigations. The Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so. Thus, a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal Court.’¹⁰⁴

- 29 Thus, article 17(1) as a whole requires the Court to initially check the existence or absence of one or more of the following four scenarios before making its determination on the inadmissibility of a given case: (1) the State having jurisdiction is investigating or prosecuting the case (article 17(1)(a)); (2) the State has investigated and concluded that there is no basis on which to prosecute (article 17(1)(b)); (3) the person has already been tried for the conduct which forms the subject of the complaint (article 17(1)(c)); and (4) the case is of insufficient gravity to proceed before the Court (article 17(1)(d)).

If for example, the answer to the first scenario is in the negative, the plain language of article 17(1) will render the case admissible before the Court. Accordingly, there is no need to examine a State’s ‘unwillingness’ or ‘inability’ under article 17(2) and (3) as argued in the

¹⁰² *Prosecutor v. Bahar Idriss Abu Garada*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010 <<https://www.legal-tools.org/doc/cb3614/>> accessed 5 March 2015, para. 29.

¹⁰³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 June 2009 <<https://www.legal-tools.org/doc/e4ca69/>> accessed 3 March 2015, para. 77.

¹⁰⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009 <<https://www.legal-tools.org/doc/ba82b5/>> accessed 5 March 2015, para. 79.

16 June 2009 Decision and rejected by the Appeals Chamber in the 25 September 2009 Judgment. In the latter judgment, the Appeals Chamber proceeded on this point by saying:

‘[I]n considering whether a case is inadmissible under article 17(1)(a) and (b)[...], the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d)[...].’¹⁰⁵

The Appeals Chamber also made a similar pronouncement in a more recent judgment rendered on 30 August 2011, where it stated that ‘it should be underlined, however, that determining the existence of an investigation must be distinguished from assessing whether the State is ‘unwilling or unable genuinely to carry out the investigation or prosecution’, which is the second question to consider when determining the admissibility of a case’.¹⁰⁶

It follows that the ‘unwillingness’ or ‘inability’ tests will only come into play if there is an affirmative finding on the part of the Court that national proceedings are underway (i. e., in a scenario of action where there are at least on-going investigations on the part of the State). In this case, the Court needs to test the quality of such proceedings. 30

2. ‘same case’

An affirmative finding on the part of the Court that national proceedings are taking place 31 renders a case inadmissible *only* in so far as the investigation, prosecution or trial is proven by evidence and targets the same ‘case’ which is the subject of the Court’s consideration. Therefore, not every investigation, prosecution or trial conducted at the national level will satisfy the first three scenarios for the purpose of securing a decision of inadmissibility in favour of the State concerned. There may still be scenarios whereby a State has indeed initiated an investigation but still the Court considers that that State remains inactive. This is due to the fact that the relevant State failed to prove by way of providing the necessary evidence that the ongoing investigations target the same case.¹⁰⁷

Depending on the particular stage of the proceedings, the scope and the level of assessment 32 of a case before the Court varies. At the early stages of the proceedings, namely in the course of investigating an entire *situation* referred to the Court by either a State Party¹⁰⁸ or the Security Council acting under Chapter VII of the UN Charter,¹⁰⁹ or the Prosecutor acting *proprio motu*,¹¹⁰ the admissibility assessment will be against the backdrop of a potential case.

¹⁰⁵ *Ibid.*, para. 78; see also Robinson, ‘The inaction controversy: Neglected words and new opportunities’, in: C. Stahn, and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, i (CUP 2011) 462 *et seq.*

¹⁰⁶ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 August 2011 <<https://www.legal-tools.org/doc/ac5d46/>> accessed 5 March 2015, para. 41.

¹⁰⁷ *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte D’Ivoire’s Challenge to the Admissibility of the Case against Simone Gbagbo, Pre-Trial Chamber I, 11 December 2014 <<https://www.legal-tools.org/doc/ef697a/>> accessed 5 March 2015, paras 34 and 40; *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-520-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 5 March 2015, para. 37; *Prosecutor v. Ahman Harun & Ali Kushayb*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007 <<https://www.legal-tools.org/doc/e2469d/>> accessed 5 March 2015, paras 21, 24.

¹⁰⁸ Rome Statute, articles 13(a) and 14(1).

¹⁰⁹ *Ibid.*, article 13(b).

¹¹⁰ *Ibid.*, articles 13(c) and 15.

This notion was introduced for the first time by Pre-Trial Chamber II in its decision of 31 March 2010 authorizing the Prosecutor to initiate an investigation in relation to the situation in the Republic of Kenya.¹¹¹ The rationale underlying the assessment of admissibility against the backdrop of a potential case is that at the early stages of the investigation into a situation, it is unlikely that suspects will have been identified or the precise conduct or its legal characterization will be that clear. This does not mean that at the early stages of an investigation, a certain level of precision is not required. To the contrary, it is required that the contours or defining parameters of the potential case are known 'such that the Court is able to compare [what is being investigated by the State] against what is being investigated by the [ICC] Prosecutor'.¹¹²

The idea of a potential case was further clarified in the 31 March 2010 Decision by the same Pre-Trial Chamber II when it stated:

'[T]he reference to a "case" in article 53(l)(b) of the Statute [same as reflected in article 17] does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term "case" in the context in which it is applied. The Chamber considers, therefore, that since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation.'¹¹³

In the 30 August 2011 Judgment, the Appeals Chamber adopted the same line of reasoning when it said:

'The meaning of the words "case being investigated" in article 17(1)(a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53(1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.'¹¹⁴

- 33 The admissibility assessment should be more precise and rigorous after the Prosecutor has conducted his/her investigation (in the context of articles 15 and 53(1) of the Statute) and is in a position to request the relevant Pre-Trial Chamber to issue a warrant of arrest or a summons to appear pursuant to article 58 of the Statute (and in the context of article 19 of the Statute as explained in the following section). At this stage, admissibility is assessed against a 'concrete case', where there is an actual identified suspect and an exact criminal conduct known to the Court. Therefore, the defining elements of a concrete case have been confirmed by the Appeals Chamber as the 'individual and the alleged conduct'.¹¹⁵

For the purpose of an admissibility determination of a concrete case, the Appeals Chamber noted that domestic investigations 'must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court'.¹¹⁶ Although articles 20(3) together with article 90(1) of the Statute refer to the 'same person' and the 'same conduct',

¹¹¹ *Situation in the Republic of Kenya*, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 March 2010, <<https://www.legal-tools.org/doc/338a6f/>> accessed 5 March 2015, para. 48.

¹¹² *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', Appeals Chamber, 21 May 2014 <<https://www.legal-tools.org/doc/0499fd/>> accessed 5 March 2015, para. 84.

¹¹³ *Ibid.*, para. 48. Also for the criteria to be applied in the assessment of a potential case, see paras 49–50.

¹¹⁴ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 August 2011 <<https://www.legal-tools.org/doc/ac5d46/>> accessed 5 March 2015, para. 39.

¹¹⁵ *Ibid.*, para. 40.

¹¹⁶ *Ibid.*, para. 40.

which confirms that this is the correct test,¹¹⁷ the Appeals Chamber surprisingly deviated from the language of the Statute by adding the word ‘substantially’, without providing any explanation regarding the legal basis or the rationale for this addition.¹¹⁸ In clarifying the scope of ‘substantially the same conduct’, the Appeals Chamber stated in its 21 May 2014 Judgment on the appeal against the decision on the admissibility of the case against Saif Al-Islam Gaddafi that this test encompasses the conduct of the suspect and ‘that [conduct] described in the incidents under investigation which is imputed to the suspect’.¹¹⁹ In this case, it was Saif Al-Islam Gaddafi’s use of the Security Forces to commit the crimes through the direct perpetrators in the course of the various incidents described in the arrest warrant decision. The Appeals Chamber’s reference to imputation of conduct of the physical perpetrators to the suspect suggests on its face that the Appeals Chamber requires that the domestic authorities investigate and charge on the basis of the same mode of liability. Although it is easier to make an admissibility assessment by the Court if the domestic authorities relied on the same mode of participation, requiring the State to investigate on the basis of the exact mode of liability is far reaching. It should be sufficient that the relevant State charge on the basis of different modes of liability in so far as the investigation captures the core conduct of the suspect as framed by the ICC Prosecutor.¹²⁰ Arguably, the Appeals Chamber made the above pronouncement without further clarification in view of the particular facts of this case which involves a mode of liability of indirect co-perpetration without realizing that it might raise a question as such.

The Appeals Chamber’s wording also suggests that an admissibility determination before the Court is incident-specific and that the question of sameness of cases depends on the degree of overlap between the incidents investigated by the Court and those carried out at the national level. Certainly, the more straight forward test should have been one which involves an examination of whether the State is investigating the same incidents as those before the Court. However, since the Appeals Chamber added the term substantially to the test, it became clear that the question of investigating all the incidents subject of the Prosecutor’s case is no more required. What is required as the Appeals Chamber noted, ‘is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one the Prosecutor is investigating’.¹²¹ This requires a considerable overlap between the incidents investigated by the national authorities and those which form the Prosecutor’s case. The

¹¹⁷ Rastan, in: Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011) 421, 444.

¹¹⁸ Notably, the Appeals Chamber in its final findings in paragraph 47 stated that the ‘same person/same conduct test applied by the Pre-Trial Chamber was the correct test’. Thus, there is no mention of the term ‘substantial’ in this paragraph. See, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 August 2011 <<https://www.legal-tools.org/doc/ac5d46/>> accessed 5 March 2015, para. 47; see also in the context of interpreting article 4 of Protocol 7 to the *European Convention on Human Rights*, the European Court of Human Rights (ECtHR) has considered that a determination of the same offence which triggers the *ne bis in idem* prohibition could either arise from ‘identical facts or facts which were substantially the same’ (emphasis added), ECtHR, *Marguš v. Croatia*, Application no. 4455/10, Judgment of 27 May 2014, para. 114; *Sergey Zolotukhin v. Russia*, Application no. 14939/03, Judgment of 10 February 2009, para. 82. It is not clear whether the Appeals Chamber was guided by the language and less restrictive approach of the ECtHR or not, given that the jurisprudence of the Appeals Chamber lacks any reference to that effect.

¹¹⁹ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Appeals Chamber, Judgement on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled ‘Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi’, Appeals Chamber, 21 May 2014 <<https://www.legal-tools.org/doc/0499fd/>> accessed 5 March 2015, paras 62 and 70.

¹²⁰ But see, Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013) 106 (arguing that the ‘Court has defined the term ‘case’ so narrowly that domestic proceedings are not considered to have taken place in the same ‘case’ unless they cover the same person, conduct, incidents and, possibly, mode of criminal responsibility as the case before the Court’).

¹²¹ *Ibid.*, para. 73.

present approach leaves the State with some discretion to pick and choose some of the incidents to be investigated, including those which suffer from weak evidence, and which could accordingly lead to an acquittal of the suspect(s).

- 35 Obviously the substantially same conduct test involves not only an objective assessment but also a subjective one because what may appear to sufficiently mirror the Prosecutor's case may vary from one Chamber to the other. The real problem lies in the difficulty to draw the demarcation line between what may and may not constitute substantially the same incidents. If, for instance, the Prosecutor's case focuses on ten incidents and the domestic authorities have investigated only six or seven of ten, would this number meet the test? Or should the test not necessarily rely on the number of incidents investigated, but rather on the significance of the suspect's conduct even in the context of a limited number of incidents? By deviating from the strict test envisaged by the Statute, and introducing an open-ended notion, the Appeals Chamber left the door open for several questions that apparently cannot be answered in the abstract but on the basis of the facts of future cases to be examined. Clearly the Appeals Chamber preferred a more flexible approach and a lower degree of scrutiny in the course of an admissibility determination. The *substantially* same conduct approach adopted by the Appeals Chamber, initially in the 30 August 2011 Judgment and later developed in the Libya case, led the Defence team in a different case to argue for a very broad interpretation of the same conduct test.¹²²

3. Burden of proof

- 36 With respect to the burden of proof and evidentiary aspects, Pre-Trial Chamber II clarified in the 30 May 2011 Decision, that the relevant State must submit concrete evidence revealing ongoing investigations at the national level.¹²³ This finding has been upheld by the Appeals Chamber in the 30 August 2011 Judgment. The Appeals Chamber expressly ruled that the relevant State challenging the admissibility of a case bears the burden of proof.¹²⁴ In order to discharge its burden, the State 'must support its statement [that it is investigating the relevant case] with tangible proof to demonstrate that it is actually carrying out relevant investigations [...] there must be evidence with probative value',¹²⁵ and of 'a sufficient degree of specificity'.¹²⁶ This may take the form of 'interviewing witnesses or suspects, collecting

¹²² *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-436-Red, Decision on the 'Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut', Pre-Trial Chamber I, 11 June 2013 <<https://www.legal-tools.org/doc/8b3a54/>> accessed 5 March 2015, para. 9 (where the Defence argued in favour of a broad interpretation of conduct thereby allowing a finding of inadmissibility even if the national proceedings covered different crimes (economic crimes) or factual allegations than those captured under the case before the Court). Notably, the Court left the door open and did not respond to the argument whether or not this is a possible interpretation. Instead, the Chamber found that there is a situation of inactivity in relation to Gbagbo 'since November 2011'. *Ibid.*, paras 27–28. But see the most recent judgment rendered by the Appeals Chamber where it confirmed an earlier finding of Pre-Trial Chamber I concerning economic crimes in its decision of 11 December 2014 regarding Simone Gbagbo. Referring to the relevant part of the Pre-Trial Chamber's decision which states that 'the conduct underlying the alleged economic crimes was "clearly of a different nature" from the conduct alleged in the proceedings before the Court', the Appeals Chamber found that 'it was not unreasonable for the Pre-Trial Chamber' to arrive at this conclusion. *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-75-Red, Judgment on the appeal of Côte D'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte D'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", Appeals Chamber, 27 May 2015, para. 99.

¹²³ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011 <<https://www.legal-tools.org/doc/dbb0ed/>>, paras 60 and 64–65.

¹²⁴ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 August 2011 <<https://www.legal-tools.org/doc/ac5d46/>> accessed 5 March 2015, paras 61, 83.

¹²⁵ *Ibid.*, para. 61.

¹²⁶ *Ibid.*, paras 61–62.

documentary evidence, or carrying out forensic analysis'.¹²⁷ More recently, Pre-Trial Chamber I clarified that the required evidence for the purposes of article 17 is not confined to 'evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes'.¹²⁸ Rather the required evidence may extend to 'all material capable of proving that an investigation or prosecution is ongoing'.¹²⁹ This includes 'directions, order and decisions issued by authorities in charge [...] as well as internal reports, updates, notifications or submissions contained in the file [related to the domestic proceedings]'.¹³⁰

It follows that Chambers of the Court have imposed a quite demanding admissibility assessment. Not every investigation will satisfy the first limb of the complementarity test, let alone future promises of investigative activities or judicial reform as it was with the Kenya cases four years ago.¹³¹ Finally, although the burden of proof mainly rests on the State, sometimes the burden of proof might be shared with other parties apart from the challenging State. This may be the case, if for instances, the Defence puts forward certain factual allegations in the course of the admissibility proceedings. In this case, it will be for the Defence to sufficiently substantiate these factual allegations.¹³²

4. 'unwilling or unable'

As mentioned earlier, the 'unwilling or 'unable' tests come into play if it has been proven that the same case is at least being investigated by the relevant State with jurisdiction over that case. Only then these criteria become relevant in order to consider the quality or seriousness of the purported investigations. In this regard, it is worth noting that the current practice of the Court in relation to the assessment of admissibility based on the notion of inaction or inactivity makes the demarcation line between this criterion and unwillingness or inability not easy to discern. The level of detail imposed on States for meeting their burden of proof that they are carrying out the required national investigations led to an overlap between the criterion of inaction and that of unwillingness or inability set out in the second half of the provision. This is so because in order to determine whether or not there are indeed investigations on the ground, Chambers have also been testing, *inter alia*, the quality

¹²⁷ *Ibid.*, paras 1 and 40.

¹²⁸ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-239, Decision Requesting Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 7 December 2012 <<https://www.legal-tools.org/doc/f8a7cf/>> accessed 5 March 2015, paras. 10–11; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte D'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo, Pre-Trial Chamber I, 11 December 2014 <<https://www.legal-tools.org/doc/ef697a/>> accessed 5 March 2015, para. 29.

¹²⁹ *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte D'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo, Pre-Trial Chamber I, 11 December 2014 <<https://www.legal-tools.org/doc/ef697a/>> accessed 5 March 2015, para. 29.

¹³⁰ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-239, Decision Requesting Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 7 December 2012 <<https://www.legal-tools.org/doc/f8a7cf/>> accessed 5 March 2015, paras 10–11; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte D'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo, Pre-Trial Chamber I, 11 December 2014 <<https://www.legal-tools.org/doc/ef697a/>> accessed 5 March 2015, para. 29.

¹³¹ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011 <<https://www.legal-tools.org/doc/dbb0ed/>>, para. 64; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 August 2011 <<https://www.legal-tools.org/doc/ac5d46/>> accessed 5 March 2015, para. 41.

¹³² *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled 'Decision on the Admissibility of the Case against Abdullah Al-Senussi', Appeals Chamber, 24 July 2014 <<https://www.legal-tools.org/doc/ef20c7/>> accessed 5 March 2015, para. 167.

of the domestic investigations. The level of detail now required for this in the evidence presented was initially meant for testing the State's unwillingness and inability. Such an overlap has been acknowledged in two of the recent decisions issued by Pre-Trial Chamber I.

In *Al-Senussi*, Pre-Trial Chamber I recognized that:

‘[T]he two limbs of the admissibility test [i.e., inactivity and unwillingness or inability], while distinct, are nonetheless, intimately and inextricably linked. Therefore, evidence put forward to substantiate the assertion of ongoing proceedings covering the same case [...] before the Court may also be relevant to demonstrate their genuineness. Indeed, evidence related, *inter alia*, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs since such aspects, which are significant to the question of whether there is no situation of “inactivity” at the national level, are also relevant indicators of the State’s willingness and ability genuinely to carry out the concerned proceedings.’¹³³

Similarly, in *Simone Gbagbo*, the Chamber argued in similar terms that ‘[c]onsiderations with respect to the quantity and quality of the alleged investigative steps may [...] be relevant to the determination of whether an “investigation” is indeed being conducted, like they may be to the assessment of genuineness of the concerned investigation in order to establish [...] whether the State is “unwilling” or “unable” to carry it out’.¹³⁴

39 Nevertheless, despite this apparent overlap, there might be situations in which testing the quality or seriousness of an ongoing investigation will require additional analysis and details. This would be the case if, for example, subsequent to a finding of inadmissibility, the domestic process is experiencing a deliberate prolongation. This would reveal a lack of will to bring the person to justice. Such information will not be available if an admissibility determination is conducted at relatively early stages of the domestic investigations. It will become clear that there was a deliberate delay in the proceedings only after a certain lapse of time from the start of the investigation. Such a scenario fits better the criterion of unwillingness rather than inactivity. This may be identified by way of conducting a *proprio motu* assessment by the relevant Chamber in accordance with article 19(1) or based on new facts presented by the Prosecutor under article 19(10). At this stage, it becomes clear that despite the existence of an investigation, the State is unwilling genuinely to carry out the proceedings.

40 Hitherto, the notion of ‘unwilling’ has received little attention in the jurisprudence of the Court. This is in part due to the fact that the Prosecutor as well as the Chambers of the Court have heavily relied on the criterion of ‘inaction’ or ‘inactivity’, which made it unnecessary to delve into this criterion. By contrast, recent jurisprudence has tackled some of the elements of inability, especially in the cases emanating from the situation in Libya as it will be discussed in more detail below. Although an assessment of inability, same as in the case of unwillingness, requires first to prove the existence of ongoing investigations, one of the Pre-Trial Chambers surprisingly disregarded this two tier test and examined inability despite its initial finding that there was a situation of inactivity on the part of the State.¹³⁵ By so doing, the Chamber mixed the two limbs of the admissibility test.

5. ‘genuinely’

41 Paragraph (1) of Article 17 conditions the words ‘unwilling or unable’ with the adjective ‘genuinely’. In *Lubanga*, Pre-Trial Chamber I alluded to this important dimension of the

¹³³ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013 <<https://www.legal-tools.org/doc/af6104/>> accessed 5 March 2015, para. 210.

¹³⁴ *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte D’Ivoire’s Challenge to the Admissibility of the Case against Simone Gbagbo, Pre-Trial Chamber I, 11 December 2014 <<https://www.legal-tools.org/doc/ef697a/>> accessed 5 March 2015, para. 30.

¹³⁵ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 31 May 2013 <<https://www.legal-tools.org/doc/339ee2/>> accessed 5 March 2015, paras 134–135, 137–138.

complementarity determination.¹³⁶ The term ‘genuinely’ would seem to be an implied reference to the tests set out in paragraph (2) of Article 17. For example, Article 17(2) addresses a situation where some form of trial is underway, but it provides guidelines for assessing whether the trial is in fact ‘genuine’.

During the drafting of the Statute, the matter of inability, at least in principle, was not particularly controversial. However, unwillingness was a different story. The sensitive issue was that the ICC would be passing judgment on the performance of national systems. Many delegations took the position that subjective criteria should be deleted. However, as some subjectivity on the part of the Court was necessary, the term ‘genuinely’ was adopted as being ‘the least objectionable word’, rather than ‘effectively’ or ‘diligently’, for example.¹³⁷

Neither the Statute nor the Rules or the Regulations of the Court define the term ‘genuine’.⁴² Equally, in both *Gaddafi* and *Al-Senussi*, the most recent decisions on the subject, which have tackled the second limb of the admissibility test, no reference was made to the meaning of the word ‘genuine’. Instead, the Pre-Trial Chamber entered a purely factual and collective finding on the ability of Libya under article 17(3) without providing any legal interpretation to each and every *relevant* element of article 17(3) related to the circumstances of the case.¹³⁸

The plain meaning of the word ‘genuine’ is ‘authentic or real – something that has the quality of what it is purported to be or to have’.¹³⁹ The drafting history does not seem to provide clear guidance for the usage of the term.¹⁴⁰ One commentator argued that the concept carrying the most ‘resemblance to genuineness is perhaps the concept of good faith’.¹⁴¹ This interpretation finds support in two decisions of the European Court of Justice where it used the terms ‘good faith’ and ‘genuine’ interchangeably.¹⁴²⁴³

Reading the word ‘genuinely’ in its context (‘unless the State is unwilling or unable *genuinely* to carry out the investigation or prosecution’) suggests that the term genuinely applies to the last part of the sentence – namely, to qualify the phrase ‘to carry out the investigation or prosecution’. Based on this interpretation, the Court should be satisfied that the investigation or prosecution carried out by the State in question is ‘genuine’ or is conducted in good faith before deciding to defer to the national jurisdiction. To say otherwise means that any national proceedings, even if insufficient, will act as a stumbling block in the face of the ICC.¹⁴³ For an investigation to be deemed genuine it requires the State to use ‘all the legal means at its disposal’ in the conduct of a serious criminal process that identifies the suspects involved and leads to actual trial and appropriate punishment if necessary.¹⁴⁴

¹³⁶ *Situation in the Democratic Republic of the Congo*, Pre-Chamber I, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, ICC-01/04-520-Anx2, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 5 March 2015, para. 32.

¹³⁷ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 49.

¹³⁸ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 31 May 2013 <<https://www.legal-tools.org/doc/339ee2/>> accessed 5 March 2015, paras 215 and 218; also, para. 216 refers to the overall finding of unwillingness; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013 <<https://www.legal-tools.org/doc/af6104/>> accessed 5 March 2015, paras 294 *et seq.*, and 311.

¹³⁹ *Black’s Law Dictionary*, (West Group 7th edition 1999) 695.

¹⁴⁰ Holmes, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 674.

¹⁴¹ *Ibid.*

¹⁴² Case C-499/99 *Commission v. Kingdom of Spain* [2002] ECR I-6031, para. 24; Case C-105/02 *Commission v. Federal Republic of Germany* [2006], paras 93–94; Case C-275/04 *Commission v. Kingdom of Belgium* [2006], paras. 82–83.

¹⁴³ ICC, *Report on Preliminary Examination Activities 2013*, November 2013, para. 138 (noting that [t]he Office will evaluate whether specific national proceedings have been or are being carried out genuinely’); see also, Informal Expert Paper: *The Principle of Complementarity in Practice*, (2003), at 8, fn 8–9.

¹⁴⁴ *Paniagua Morales et al.* (‘Panel Blanca’), *Judgment of 8 March 1998*, IACtHR (Ser. C) No. 37 (1998), in particular paras 94, 139, 160, 169, 171 and 178; See also *Garrido and Baigorria v. Argentina*, Reparations (Art. 63(1) American Convention on Human Rights), *Judgment of 27 August 1998*, IACtHR (Ser. C) No. 39 (1998) para. 73.

Certainly this calls for an *objective*¹⁴⁵ scrutiny in testing the quality of national proceedings as a whole from the moment it starts until the phase it has reached by the time of the admissibility assessment.¹⁴⁶

6. Decision not to prosecute by State

44 According to sub-paragraph (b) of Article 17(1), a case is also inadmissible where the Court determines that it has in fact been investigated by a State that has jurisdiction over it and the State has decided not to prosecute the person concerned. Similar to the situation of article 17(1)(a), sub-paragraph (b) follows a division between two phases. The first phase revolves around the existence or absence of domestic proceedings, while the second phase comes into play to test how genuine the national decision is or was pursuant to article 17(2) and/or (3). The test under the first half of sub-paragraph (b) is cumulative due to the existence of the conjunction ‘and’: ‘[t]he case has been investigated [...] and the State has decided not to prosecute’. Thus, it must be first determined whether the State has carried out investigations which meet the requirements specified under sub-paragraph (a) and developed above. If the answer is in the affirmative there is a need to check whether the State has thereafter decided not to prosecute. If the State has taken such decision not to prosecute, there is also a need to check that the decision not to prosecute did not result from the State’s unwillingness or inability to carry out genuine proceedings.¹⁴⁷

45 The key element under sub-paragraph (b) lies in defining the scope of a decision not to prosecute. Not every decision taken by the State constitutes a decision not to prosecute. Arguably, only final decisions closing an investigation and preventing a prosecution against a suspect/accused before any court may constitute a decision not to prosecute. In *Katanga*, the Appeals Chamber was confronted with a similar question regarding the scope of a decision not to prosecute. Referring to a decision issued by the DRC’s *Auditeur Général* on 17 October 2007 to close domestic proceedings against Germain Katanga, the Appeals Chamber stated:

“This decision was not a decision not to prosecute in terms of article 17 (1) (b) of the Statute. It was, rather, a decision to surrender the Appellant to the Court and to close domestic investigations against him as a result of that surrender. The thrust of this decision was not that the Appellant should not be prosecuted, but that he should be prosecuted, albeit before the International Criminal Court.”¹⁴⁸

The Appeals Chamber believed that this interpretation is in line with the purpose of the provision and the overall purpose of the Statute mirrored in its preamble namely, to put an end to impunity. It proceeded by stating the rationale underlying this interpretation:

¹⁴⁵ See by analogy the parallel standard applied by the International Court of Justice in the *Nuclear Tests Case (Australia v. France)*, 1974 ICJ, 20/12/1974, para. 57; *Nuclear Tests Case (New Zealand v. France)*, 1974 ICJ, 20/12/1974, paras 58 and 60; *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania (First Phase)*, *Advisory Opinion of 30/03/1950*, (1950) ICJ Reports, at 74.

¹⁴⁶ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009 <<https://www.legal-tools.org/doc/ba82b5/>> accessed 5 March 2015, para. 56 (noting that the ‘admissibility of a case must be determined on the basis of facts as they exist at the time of the proceedings concerning the admissibility challenge’); also *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-234, Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’, Appeals Chamber, 28 July 2011 <<https://www.legal-tools.org/doc/3d65de/>> accessed 5 March 2015, para. 10.

¹⁴⁷ See, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009 <<https://www.legal-tools.org/doc/ba82b5/>> accessed 5 March 2015, para. 76 (noting that ‘in article 17 (1) (b), unwillingness and inability refer to the decision of a State, after investigation, not to prosecute the person concerned: “unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”’).

¹⁴⁸ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009 <<https://www.legal-tools.org/doc/ba82b5/>> accessed 5 March 2015, para. 82.

‘If the decision of a State to close an investigation because of the suspect’s surrender to the Court were considered to be a “decision not to prosecute”, the peculiar, if not absurd, result would be that because of the surrender of a suspect to the Court, the case would become inadmissible. In such scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute. Thus, a “decision not to prosecute” in terms of article 17 (1) (b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC (footnotes omitted).’¹⁴⁹

A year later, the Appeals Chamber had to rule once more on a similar question concerning the scope of a decision not to prosecute in the context of the case against Jean-Pierre Bemba arising from the CAR situation. In responding to an argument put forward by the accused that the decision of the Public Prosecutor of Bangui Regional Court to dismiss the charges against him on 16 September 2004 was not determinative to terminate the proceedings, the Appeals Chamber stated:

[N]either the Court of Appeal of Bangui [Judgment of 16 December 2004] nor the Court of Cassation [Judgment of 11 April 2006] agreed that the prosecution against Mr Bemba should end; instead, both determined that charges which had been dismissed by the Senior Investigating Judge against Mr Bemba should be upheld, and simultaneously submitted the matter to the competent authority in order for the matter to be referred to the ICC. [...] ¹⁵⁰ In sum, there is nothing to indicate that the Trial Chamber erred in its determination that there was no decision not to prosecute within the meaning of article 17 (1) (b) of the Statute. In the view of the Appeals Chamber, the Trial Chamber correctly relied on the judgments of the Court of Appeal of Bangui and the Court of Cassation as indicating *prima facie* the current status of the judicial proceedings in the case of *État Centrafricain c. Ange-Félix Patassé, et al.* These appellate decisions were also not decisions not to prosecute within the meaning of article 17 (1) (b) of the Statute.¹⁵¹

It follows from the above that decisions not to prosecute do not encompass those national 46
decisions to refer a situation to the ICC, be it a judicial decision and/or a political decision from the executive. Rather a decision not to prosecute for the purpose of rendering a case admissible before the Court must be one which aims at evading justice. Even then the decision should attain finality in order to satisfy sub-paragraph (b).

Also of the relevance to the discussion on decisions not to prosecute, is the debate at the 47
Rome Conference about the attitude that the Court should take to alternative methods of accountability. So far the Court has not taken up these questions in a judicial decision. At the Rome Conference, South Africa was the most insistent on this point, concerned that approaches like its Truth and Reconciliation Commission, which offered amnesty in return for truthful confession, would be treated by the Court as a decision not to prosecute, thereby opening the door to international prosecution. While there was widespread sympathy with the South African model, many delegations recalled the disgraceful amnesties accorded by South American dictators to themselves, the most poignant being that of former Chilean president Augusto Pinochet. But drafting a provision that would legitimise the South African experiment yet condemn the Chilean one proved elusive. It has been suggested that, at the very least, genuine but non-judicial efforts at accountability that fall short of criminal prosecution might have the practical effect of convincing the Prosecutor to set priorities elsewhere.¹⁵²

¹⁴⁹ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009 <<https://www.legal-tools.org/doc/ba82b5/>> accessed 5 March 2015, para. 83.

¹⁵⁰ *Prosecutor v. Jean Pierre Bemba Gombo*, ICC-01/05-01/08-962-Corr, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 24 June 2010 Entitled ‘Decision on the Admissibility and Abuse of Process Challenges’, Appeals Chamber, 19 October 2010 <<https://www.legal-tools.org/doc/37e559/>> accessed 5 March 2015, para. 68; For the Trial Chamber decision, see *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, 24 June 2010 <<https://www.legal-tools.org/doc/a5de24/>> accessed 6 March 2015.

¹⁵¹ *Ibid.*, para. 74.

¹⁵² For a comprehensive discussion of these issues, see: Stahn (2005) 3 *JICJ* 695.

In his early reports to the Security Council on Darfur, the Prosecutor of the International Criminal Court has acknowledged the significance of such alternative approaches to accountability, suggesting that these are relevant to the exercise of his discretion, but without, however, indicating that they may pose an obstacle to admissibility of a case.¹⁵³ Speaking of traditional reconciliation mechanisms in Darfur, he said: ‘These are not criminal proceedings as such for the purpose of assessing the admissibility of cases before the International Criminal Court, but they are an important part of the fabric of reconciliation for Darfur, as recognized in resolution 1593 (2005).’¹⁵⁴

- 48 Judges of the Court might consider that a sincere truth commission project amounts to a form of investigation that does not suggest ‘inactivity’, ‘unwillingness’ or ‘inability’ on the part of the State to genuinely administer justice, thereby meeting the terms of article 17(1)(a) and (b).¹⁵⁵ However, one of the legal problems of this approach lies in the fact that an investigation carried out by a non-judicial body such as a truth commission is not a criminal investigation *stricto sensu*, and as such, it would not necessarily lead to a prosecution. When sub-paragraph (a) refers to a ‘prosecution’, which is always a judicial activity, carried out by a purely judicial organ of the relevant State, one gets the sense that article 17(1) is concerned with ‘judicial proceedings’ as opposed to alternative mechanisms of justice. However, perhaps there is some room for accepting a ‘preliminary investigation’ carried out by a truth commission such as, the Israeli Kahan Commission of Inquiry established to investigate the 1982 Sabra and Shatila massacre, in so far as it is empowered to recommend a criminal prosecution,¹⁵⁶ and is acting on behalf of the State.
- 49 Should that not be enough, the Statute also declares inadmissible a case that is not ‘of sufficient gravity to justify further action by the Court’.¹⁵⁷ Moreover, the Prosecutor is invited to consider, in determining whether or not to investigate a case, whether ‘[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice’.¹⁵⁸ Yet judicial attitudes are impossible to predict, and judges or prosecutors might well decide that it is precisely in cases like the South African one where a line must be drawn establishing that amnesty for such crimes is unacceptable.¹⁵⁹
- 50 The issue of amnesty initially proved to be a complication in the prosecutions relating to one of the earliest situations before the Court namely, the *Situation in Uganda*, which was referred to the ICC in December 2003 in accordance with article 14 of the Rome Statute. Arrest warrants for five leaders of the Lord’s Resistance Army were issued in mid-2005, and they appeared to have provoked the rebels to sue for peace. On a visit to the Court, the Ugandan Minister for Security, Amama Mbabazi, noted that the issuance of warrants had

¹⁵³ UN Doc. S/PV.5321, at 3.

¹⁵⁴ UN Doc. S/PV.5459, at 3.

¹⁵⁵ On the different types of truth commissions and their mandates see Buergenthal, in: Tomuschat *et al.* (eds.), *Volkerrecht als Wertordnung. Common Values in International Law* (N.P. Engel Verlag 2006) 103; Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Rutledge 2002). On the relationship between truth commissions and international courts see Schabas (2003) 25 *HumRtsQ* 1035. See also in the context of the ICC, Stahn (2005) 3 *JICJ* 695; Robinson (2003) 14 *EJIL* 481.

¹⁵⁶ Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach* (Springer 2010) 61–62, fn. 121. The Kahan Commission, officially known as ‘Commission of Inquiry into the Events at the Refugee Camps in Beirut’, was established by the Israeli government on 28 September 1982. However this might not be the case with respect to the Truth, Justice and Reconciliation Commission in Kenya which was agreed upon to establish an ‘accurate, complete and historical record of gross human rights violations committed between 12 December 1963 and 28 February 2008’. The Commission was suffering from credibility problems and thus even if it had the ability to ‘unearth evidence’ and recommend prosecutions, this would not have been sufficient to meet the requirements of article 17. See, Alai and Mue, in: Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, ii (CUP 2011) 1222, 1123–1224, 1230.

¹⁵⁷ Rome Statute, article 17(1)(d).

¹⁵⁸ *Ibid.*, article 53(1)(c).

¹⁵⁹ Nsereko (1999) 10 *CLF* 87, 119–20; Scharf (1999) 32 *CornILJ* 507; Dugard, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 693.

contributed to driving the Lord's Resistance Army leaders to the negotiating table. In September 2006, Jan Egelund, the United Nations Under-Secretary-General for Humanitarian Affairs and Emergency Relief made similar observations in a briefing to the Security Council.¹⁶⁰ Speaking to the Assembly of States Parties in November 2006, Prosecutor Moreno Ocampo said:

'The Court's intervention has galvanized the activities of the states concerned. [...] Thanks to the unity of purpose of these states, the LRA has been forced to flee its safe haven in southern Sudan and has moved its headquarters to the DRC border. As a consequence, crimes allegedly committed by the LRA in Northern Uganda have drastically decreased. People are leaving the camps for displaced persons and the night commuter shelters which protected tens of thousands of children are now in the process of closing. The loss of their safe haven led the LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006.'¹⁶¹

But to the extent that the charges against the Lord's Resistance Army might have helped to provoke peace negotiations, they also soon proved to be a potential obstacle to their successful completion.¹⁶² Jan Egelund reported to the Security Council that in meetings with internally displaced persons, civil society and the parties themselves, the 'International Criminal Court indictments were the number one subject of discussion [...] All expressed a strong concern that if the indictments were not lifted, they could threaten the progress in these most promising talks ever for northern Uganda'.¹⁶³ The rebel leaders quite predictably have insisted that the arrest warrants be withdrawn as a condition for the peace settlement. President Yoveri Museveni of Uganda, who had triggered the prosecutions two years earlier when he referred the situation in northern Uganda to the Court, asked the Prosecutor to withdraw the warrants. He promised those who had been charged that they would have immunity from arrest in Uganda.¹⁶⁴ Richard Goldstone, who was the first operational prosecutor of the ICTY, remarked:

'It would be fatally damaging to the credibility of the international court if Museveni was allowed to get away with granting amnesty. I just don't accept that Museveni has the right to use the International Criminal Court like this.'¹⁶⁵

Opinions have been sharply divided on how to react to the demands from the Lord's Resistance Army, and from President Museveni.¹⁶⁶ Some take the extreme view that under no conditions can there be any compromise with prosecution, whatever the consequences in terms of prolonging the conflict. Others see it more strategically, noting the positive contribution to the peace process of the arrest warrants. They argue that the warrants should be maintained, at least as long as they continue to have this effect, although without lifting this to the level of absolute principle. Actually maintaining these warrants for so many years has proved to be merited. After ten years from their issuance, the ICC has managed to obtain custody of Dominick Ongwen, a member of the Lord's Resistance Army whose arrest has been sought by the Court. Ongwen surrendered to the ICC¹⁶⁷ with the cooperation of a number of States including his home country Uganda, making it even more compelling to wait further for an arrest of the remaining suspects or their voluntary appearance.

¹⁶⁰ UN Doc. S/PV.5525, at 4.

¹⁶¹ *Opening Remarks*, Luis Moreno Ocampo, Fifth Session of the Assembly of States Parties, 23 November 2006.

¹⁶² This is discussed by Apuuli (2005) 15 *CLF* 408; Apuuli (2006) 4 *JICJ* 179; Ssenyonjo (2005) 10 *JConflict&SecurityL* 405.

¹⁶³ UN Doc. S/PV.5525, 4.

¹⁶⁴ McGreal, (9 January 2007) *The Guardian*.

¹⁶⁵ *Ibid.*

¹⁶⁶ See generally, Nouwen in: Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011) 1120, 1130–1131, 1138; Wierda and Otim, in: Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011) 1155.

¹⁶⁷ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-424, Decision Severing the Case against Dominic Ongwen, Pre-Trial Chamber II, 6 February 2015 <<https://www.legal-tools.org/doc/16fb19/>> accessed 6 March 2015, 3; also, Transcript of Hearing, 26 January 2015, No. ICC-02/04-01/05-T-10-ENG, <<http://www.icc-cpi.int/iccdocs/doc/doc1908336.pdf#search=ICC-02%2F04-01%2F05-T-10-ENG>> accessed 7 March 2015.

52 There is some authority for the view that so-called ‘blanket amnesties’ are prohibited by customary international law,¹⁶⁸ and there is a growing tendency to that effect.¹⁶⁹ However, this argument is not without its flaws. For example, States seem prepared to respect the amnesty for the crime against humanity of apartheid that has provided the underpinning for the democratic transition in South Africa. Although theoretically many States are in a position to prosecute former South African officials, on the basis of universal jurisdiction, there is simply no political willingness to upset the political compromises made by former President Nelson Mandela and others. To put it differently, some ‘blanket amnesties’ seem to have been endorsed by the international community, and this suggests that the claims of a prohibitive customary norm are overstated¹⁷⁰.

One way of addressing the question of amnesty in conflicts such as that of Uganda or any other conflict of a similar nature might be for the Security Council to invoke article 16 of the Rome Statute and order a deferral of the prosecutions,¹⁷¹ in the interests of promoting international peace and security. When the matter was discussed in September 2006, at a symposium organised by the Office of the Prosecutor, Gareth Evans, who headed the International Crisis Group, remarked:

‘I have no doubt that dealing with impunity and pursuing peace can work in tandem even in an ongoing conflict situation: these are not necessarily incompatible objectives. The prosecutor’s job is to prosecute and he should get on with it with bulldog intensity. If a policy decision needs to be made, in a particular case, to give primacy to peace, it should be made not by those with the justice mandate, but with the political and conflict resolution mandate, and that is the Security Council. The Statute allows for this in Article 16, and this is the way the international community should be thinking about it.’¹⁷²

Deference to the Security Council, acting under article 16, may be the way to resolve the difficulty, assuming the wisdom of staying international justice in the interests of peace-making.

7. Double jeopardy

53 The third ground is one accepted by the majority of States in their domestic practice. A case shall be inadmissible where the person in question has already been tried for the criminal conduct that is the subject of the complaint. In this regard, there is a clear interplay between article 17(1)(c) and article 20(3). The reference to the term ‘conduct’ under subparagraph 1(c) is reiterated in article 20(3): ‘conduct also proscribed under article 6, 7, 8 or 8 bis’. In such a case a trial before the ICC for the ‘same conduct’ proscribed under articles 6, 7, 8 and 8 *bis* would be impermissible because of the *ne bis in idem* rule contained in article 20 para. 3.¹⁷³ Defining the term conduct for the purposes of articles 17(1)(c) and 20(3) should be reconciled with the interpretation, given to conduct for the purposes of subparagraph (a). Accordingly, a trial of the accused by a national court for substantially the same conduct should also suffice to block a second trial before the ICC.

¹⁶⁸ *Prosecutor v. Kallon*, SCSL-04-15AR72(E) and *Prosecutor v. Kamara*, SCSL-04-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004. See also, *Prosecutor v. Kondewa*, SCSL-2004-14-AR72(E), Separate Opinion of Justice Robertson, 25 May 2004.

¹⁶⁹ See more recently, *inter alia*, *Gelman v. Uruguay*, Judgment of February 24, 2011 (Merits and Reparations), IACtHR, paras. 195–197, 215–227; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2010. IACtHR, Series C No. 219, para. 171.

¹⁷⁰ For a twofold distinction between blanket and conditional amnesties Ambos, *Treatise ICL I*, 2013, pp. 422 *et seq.*

¹⁷¹ El Zeidy (2002) 35 *VandJTransnatL* 1503; Mokhtar (2002) 3 *ICLRev* 295; Stahn (2003) 14 *EJIL* 85.

¹⁷² ICC, *Newsletter*, No. 9, October 2006, 5.

¹⁷³ See the detailed discussion in Coracini, R. C., ‘Article 20’, this volume; also El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008) 283–298; generally, Stahn, ‘Taking Complementarity Seriously’, in: C. Stahn, and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, i (CUP 2011) 242.

8. Insufficient gravity

The final ground of inadmissibility is where the case is not of sufficient gravity to justify further action by the ICC. The idea of introducing gravity as a constituent element of the admissibility provision was first advanced by Professor James Crawford in the course of a meeting of the ILC's working group which took place in May 1994.¹⁷⁴ Professor Crawford proposed that the working group 'ought to consider whether an international criminal court should not have the power to stay a prosecution on specified grounds [such as] the fact that the acts alleged were not of sufficient gravity to warrant trial at the international level'.¹⁷⁵ This idea would prevent the proposed court from being 'swamped by peripheral complaints involving minor offenders',¹⁷⁶ he added. Also, the idea was logical since it would help the proposed court to manage the 'case-load [against] the resources available'¹⁷⁷ and respond to the concerns expressed by many States that the 'court might exercise jurisdiction in cases that were not of sufficient international significance', said other members.¹⁷⁸ Accepting gravity as an integral element of the admissibility provision gained support within the Preparatory Committee in 1996,¹⁷⁹ and during the Rome Conference. The draft provision appearing in the Bureau Discussion Paper at the Rome Conference was retained without any change¹⁸⁰ and finally appeared under article 17(1)(d) of the Statute.¹⁸¹

Article 17(1)(d) of the Rome Statute states that a case may be declared inadmissible when it 'is not of sufficient gravity to justify further action by the Court'.¹⁸² According to the structure of article 17(1), gravity is an essential component for the Court's admissibility determination. Thus, a State may have been inactive with respect to national proceedings, which prompts the ICC's intervention; yet the Court may still determine that the case is inadmissible because it 'is not of sufficient gravity to justify further action by the Court'. Although the core crimes falling within the jurisdiction of the Court are all serious, the reference to gravity aims at filtering the type of cases to be dealt with before the Court. This view was confirmed in one of the early decisions on the subject-matter in the *Lubanga* case, in which Pre-Trial Chamber I stated:

[T]he gravity threshold is in addition to the drafters' careful selection of crimes included in articles 6 to 8 of the Statute [...]. Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.¹⁸³

As a result, 'the relevant conduct must present particular features which render it especially grave'.¹⁸⁴ It went on to explain the concept:

The Chamber holds that the following two features must be considered. First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale. If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes (which are defined by both

¹⁷⁴ 'Summary Record of the 2330th Meeting' (1994) *YbILC*, i, 9.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ 'Summary Record of the 2333rd Meeting' (1994) *YbILC*, i, 33.

¹⁷⁸ 'Summary Record of the 2356th Meeting' (1994) *YbILC*, i, 193.

¹⁷⁹ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 47.

¹⁸⁰ See *Bureau Discussion Paper*, UN Doc. A/CONF. 183/C.1/L.53, article 15(1)(d), 6 July 1998; *Bureau Discussion Paper*, UN Doc. A/CONF. 183/C.1/L.59/Corr.1, article 15(1)(d), 11 July 1998.

¹⁸¹ *Report of the Committee of the Whole*, UN Doc. A/CONF.183/8, article 17[15](1)(d), 17 July 1998; *Rome Statute*, article 17(1)(d).

¹⁸² See, generally, Murphy, (2006) 17 *CLF* 281.

¹⁸³ *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 6 March 2015, para. 41; See generally, De Guzman, (2009) 32 *Fordham ILJ* 1400. For a critical view see also, De Guzman (2012) 33 *MichJIL* 265, 286–289.

¹⁸⁴ *Ibid.*, para. 45.

contextual and specific elements) included within the material jurisdiction of the Court. Second, in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community.¹⁸⁵

In the specific circumstances of the *Lubanga* case, the Pre-Trial Chamber said the ‘social alarm’ component of the gravity test was particularly relevant, ‘due to the social alarm in the international community caused by the extent of the practice of enlisting into armed groups, conscripting into armed groups and using to participate actively in hostilities children under the age of fifteen’.¹⁸⁶ In support of this affirmation, the Pre-Trial Chamber cited a United Nations report, and two of the indictments at the Special Court for Sierra Leone charging enlistment of child soldiers.¹⁸⁷

Pre-Trial Chamber I said that the gravity threshold was intended to ensure that the Court pursued cases only against ‘the most senior leaders’ in any given situation under investigation.¹⁸⁸ It said that this factor was comprised of three elements. The first is the position played by the accused person. The second is the role played by that person, ‘when the State entities, organizations or armed groups to which they belong commit systematic or large-scale crimes’. The third is the role played by such State entities, organizations or armed groups in the overall commission of crimes. According to the Chamber, because of the position such individuals play they are also ‘the ones who can most effectively prevent or stop the commission of those crimes’.¹⁸⁹ The Chamber explained that the gravity threshold was ‘a key tool provided by the drafters to maximize the Court’s deterrent effect. As a result, the Chamber must conclude that any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention’.¹⁹⁰

The Pre-Trial Chamber further justified its emphasis on senior leaders with reference to current practice at the *ad hoc* United Nations international criminal tribunals. It noted Security Council Resolution 1534, which mandates the ‘completion strategy’ of the *ad hoc* tribunals. The Resolution calls for them to ‘concentrate on the most senior leaders suspected of being responsible’. Reference was also made to Rule 28(A) of the Rules of Procedure and Evidence of the ICTY, which authorises the Bureau to block the approval of indictments that do not meet the ‘senior leaders’ standard, and to Rule 11 *bis*, which establishes ‘the gravity of the crimes charged and the level of responsibility of the accused’ as the standard to be imposed in transferring cases from the international to the national courts.¹⁹¹ Rulings by the *ad hoc* tribunals pursuant to Rule 11*bis* may provide useful guidance to the ICC in applying the concept of gravity to admissibility decisions.¹⁹² The Pre-Trial Chamber compared the *ad hoc* tribunals, with their limited jurisdiction over one crisis situation, to the ICC, with its broad personal, temporal and territorial jurisdiction. ‘In the Chamber’s view, it is in this context that one realises the key role of the additional gravity threshold set out in article 17(1)(d) of the

¹⁸⁵ *Ibid.*, para. 46.

¹⁸⁶ *Ibid.*; also paras 65–66.

¹⁸⁷ But see Human Security Centre, *Human Security Report 2005: War and Peace in the 21st Century* (OUP 2005) 113–116. The Report calls Sub-Saharan Africa the epicentre of the phenomenon of child soldiers, although it also says that ‘the number of armed conflicts has been declining for more than a decade. And when wars end, soldiers—including child soldiers—are usually demobilised. So it is more likely that the number of child soldiers serving around the world has declined rather than increased in recent years’.

¹⁸⁸ *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 6 March 2015, para. 50.

¹⁸⁹ *Ibid.*, paras 51–53.

¹⁹⁰ *Ibid.*, para. 48.

¹⁹¹ *Ibid.*, paras 55–58.

¹⁹² See, e.g., *Prosecutor v. Ademi et al.*, IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, Referral Bench, 14 September 2005, <<https://www.legal-tools.org/en/doc/908808/>> accessed 7 March 2015, para. 28; *Prosecutor v. Stankovic*, IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis*, Referral Bench, 17 May 2005, para. 19; *Prosecutor v. Janković*, IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis*, Referral Bench, 22 July 2005, para. 19.

Statute in ensuring the effectiveness of the Court in carrying out its deterrent function and maximising the deterrent effect of its activities', the Pre-Trial Chamber concluded.¹⁹³

Pre-Trial Chamber I also referred approvingly to the Prosecution's Policy Paper, issued in September 2003, which stated:

'The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.'¹⁹⁴

But the judges also noted that because the gravity threshold was comprised within article 17, it was not an issue to be left to the discretion of the Prosecutor.¹⁹⁵

When applying these criteria to the case *sub judice*, the Pre-Trial Chamber found that the *Lubanga* case met this test, while the case brought against his co-perpetrator, Bosco Ntaganda, failed to meet an essential requirement, namely Ntaganda was not among the most senior leaders. Pre-Trial Chamber I found that he was the third in the chain of command of the military wing of the *Union des Patriotes Congolais/Forces Patriotiques pour la libération du Congo* (UPC/FPLC) movement.¹⁹⁶ In particular, the Pre-Trial Chamber did not believe that during the relevant period, Ntaganda was a key actor in the decision-making process of the UPC/FPLC's policies/practices or had *de jure* or *de facto* power to change them or prevent their implementation.¹⁹⁷ Accordingly, the Pre-Trial Chamber rejected the Prosecutor's request to issue a warrant of arrest against Ntaganda. Despite its developed explanation referred to above, Pre-Trial Chamber I's decision failed to stand on appeal. In its judgment of 13 July 2006, the Appeals Chamber expressed disagreement with the Pre-Trial Chamber's line of reasoning¹⁹⁸ and in particular, the limitation it imposed on the Court's jurisdiction when it required that the Prosecutor focus only on the most senior leaders. According to the Appeals Chamber, the 'test developed by the Pre-Trial Chamber [was] based on a flawed interpretation of article 17(1)(d) of the Statute¹⁹⁹ [...] and] the imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved'.²⁰⁰ The Appeals Chamber proceeded by saying that the Pre-Trial Chamber's pronouncement that 'any perpetrators other than those at the very top [we]re automatically excluded from the exercise of the jurisdiction of the Court',²⁰¹ 'could severely hamper the preventive, or deterrent, role of the Court which is the cornerstone of the creation of the [ICC]'.²⁰² The Appeals Chamber considered that making an assessment of the particular role of the suspect varies 'considerably depending on the circumstances of the case' and thus such an assessment should not be carried out 'excessively on formalistic grounds'.²⁰³

¹⁹³ *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 6 March 2015, para. 60.

¹⁹⁴ *Ibid.*, para. 61, citing *Paper on Some Policy Issues Before the Office of the Prosecutor* (2003) 7.

¹⁹⁵ *Ibid.*, para. 62. The debate has evolved somewhat differently at the Special Court for Sierra Leone, although this can easily be explained by the applicable legal provisions: *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, Trial Chamber, 20 June 2007, para. 653.

¹⁹⁶ *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 6 March 2015, paras 86-9.

¹⁹⁷ *Ibid.*, para. 87.

¹⁹⁸ *Situation in the Democratic Republic of the Congo*, ICC-01/04-169, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', Appeals Chamber, 13 July 2006, paras 68-82.

¹⁹⁹ *Ibid.*, para. 73.

²⁰⁰ *Ibid.*, para. 74.

²⁰¹ *Ibid.*, para. 75.

²⁰² *Ibid.*

²⁰³ *Ibid.*, para. 76.

57 The Appeals Chamber's finding is not beyond criticism either. Although it rejected the test established by the Pre-Trial Chamber,²⁰⁴ it failed to provide an alternative one, thus, leaving it for the different Chambers to decide. Further, one fails to understand why excluding low-level perpetrators may work against retribution, prevention and deterrence. Cases involving low-level perpetrators may equally be dealt with effectively at the national level be it before the courts of the territorial State or any other State on the basis of universality. The ICC was never meant to deal with all cases in the world involving the commission of crimes falling within the jurisdiction of the Court. To the contrary, it was meant only to address a limited number of cases and particularly those which are of certain degree of seriousness. The seriousness of a particular case certainly involves the role and the position played by the suspect in relation to the commission of the crimes, because based on that position and role the suspect enjoys the power to direct or orchestrate when, how and whether a crime will be committed. This is unlikely to be the case with low-level perpetrators who are not in a position to do so. It may be argued that investigations of low-level perpetrators are warranted because they could lead to the person who is at the top of the hierarchy. However, this is not sufficient *per se* to justify dealing with 'peripheral cases', which the ILC's working group aimed at preventing by introducing the element of gravity. Certainly the assessment of the level and role of a particular suspect is relative and depends on the facts of each particular case. However, it should be noted that the decision to focus on a low-level perpetrator also falls within the prosecutorial strategy. As such, the assessment should be carried out carefully before seizing the relevant Pre-Trial Chamber. It is for the Prosecutor to conduct a thorough investigation until her office manages to reach the appropriate stage where the necessary evidence regarding those at the top of the hierarchy becomes available. Instead of charging low level perpetrators, the Prosecutor may rely on their testimonies as witnesses. By doing so, a similar goal which aims at reaching those who are at the top of the hierarchy could be achieved. Otherwise, and if one follows the Appeals Chamber's logic on this particular point, the additional gravity threshold under the Rome Statute becomes futile.

58 Similar to the assessment of complementarity, a gravity determination varies depending on the stage of proceedings before the Court. At the preliminary stages of the proceedings (article 53(1)(b)) the gravity assessment is also carried out against the backdrop of a potential case that would arise from investigating a particular situation. In the 31 March 2010 Decision, Pre-Trial Chamber II defined the parameters of a potential case to include: '(i) the groups of persons involved that are likely to be the object of an investigation [...]; and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation [...]'.²⁰⁵ The Chamber proceeded by clarifying that the first element involves an examination of whether 'such groups of persons capture those who may bear the greatest responsibility for the alleged crimes committed'.²⁰⁶

²⁰⁴ This does not suggest that all the findings of the Appeals Chamber were incorrect. Rather, the Appeals Chamber's reasoning on this particular element was not that convincing.

²⁰⁵ *Situation in the Republic of Kenya*, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 March 2010 <<https://www.legal-tools.org/doc/338a6f/>> accessed 6 March 2015, para. 59; *Situation in Côte D'Ivoire*, ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', Pre-Trial Chamber III, 15 November 2011 <<https://www.legal-tools.org/doc/e0c0eb/>> accessed 6 March 2015, para. 204.

²⁰⁶ *Situation in the Republic of Kenya*, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 March 2010 <<https://www.legal-tools.org/doc/338a6f/>> accessed 6 March 2015, para. 60; *Situation in Côte D'Ivoire*, ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', Pre-Trial Chamber III, 15 November 2011 <<https://www.legal-tools.org/doc/e0c0eb/>> accessed 6 March 2015, para. 204. Thus, realizing that the Appeals Chamber's approach in the 13 July 2006 Judgment could be misleading and might result in an abuse of application in future cases in the sense of *mainly* focusing on less serious situations involving low-level perpetrators, Pre-Trial Chambers II and III re-introduced the idea of concentrating on those who are at the top of the echelon.

With respect to the second element, the Chamber considered that a quantitative assessment of gravity is not sufficient.²⁰⁷ Sometimes the commission of crimes is accompanied by some aggravating or qualitative factors which make them specifically grave.²⁰⁸ For instance, United Kingdom troops were present in Iraq as a result of an act of aggression. The act was committed in violation of the prohibition on the use of force, arguably the most sacred principle of the contemporary legal order. The ICC cannot yet exercise jurisdiction over the crime of aggression.²⁰⁹ But aggression is nevertheless described in the Rome Statute as a 'grave crime' that 'threaten[s] the peace, security and well-being of the world',²¹⁰ and one of 'the most serious crimes of concern to the international community as a whole'.²¹¹ Logically, there is an additional dimension of gravity when war crimes are committed by troops as a result of an act of aggression. Although much fewer in number,²¹² perhaps the crimes of the United Kingdom troops should be judged as being inherently more serious than those of rebel groups trying to overthrow an authoritarian regime, such as the Government of Uganda, which has itself been condemned by the International Court of Justice for serious violations of international human rights and humanitarian law.²¹³ It follows that assessing the gravity of the crimes whether in the context of a situation (potential case) or a concrete case involves a quantitative as well as qualitative dimension.²¹⁴ What differs is the level of rigor in conducting such assessment which will depend on the stage of the proceedings. In reaching conclusions regarding the qualitative and quantitative dimensions, one may consider the factors referred to in rule 145(1)(c) and (2)(b)(iv) of the Rules of Procedure and Evidence regarding sentencing. Both Pre-Trial Chambers and the Prosecutor have unified their approach towards the assessment of gravity and have accepted these factors for carrying out such assessment.

Indeed, in the Kenya situation, Pre-Trial Chamber II concluded that the following factors 'could provide useful guidance' in ruling on gravity:

- (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity);
- (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i. e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families.²¹⁵

²⁰⁷ *Situation in the Republic of Kenya*, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 March 2010 <<https://www.legal-tools.org/doc/338a6f/>> accessed 6 March 2015, para. 62; *Situation in Côte d'Ivoire*, ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire', Pre-Trial Chamber III, 15 November 2011 <<https://www.legal-tools.org/doc/e0c0eb/>> accessed 6 March 2015, para. 203.

²⁰⁸ *Ibid.*; also Schabas, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 229, 245–246.

²⁰⁹ *Rome Statute*, article 15*bis* (2) and (3).

²¹⁰ *Ibid.*, Preamble para. 3.

²¹¹ *Ibid.*, Preamble para. 4.

²¹² It must be noted that the Prosecutor indicated that the crimes of British troops in Iraq appeared to be dealt with adequately by the country's own justice system. Thus, the Iraq investigation would ultimately have stumbled on the complementarity threshold. Clearly, however, the Prosecutor's decision not to proceed against British troops in Iraq was predicated on 'gravity', viewed in a purely quantitative manner, and not on an alleged failure of the United Kingdom to investigate and prosecute the allegations. See also: *Report on the Activities of the Court*, No. ICC-ASP/5/15, <http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-15_English.pdf> accessed 7 March 2015, para. 58.

²¹³ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, (2005) ICJ Rep. 168.

²¹⁴ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010 <<https://www.legal-tools.org/doc/cb3614/>> accessed 6 March 2015, para. 31.

²¹⁵ *Situation in the Republic of Kenya*, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 March 2010 <<https://www.legal-tools.org/doc/338a6f/>> accessed 6 March 2015, para. 62.

Similarly, Pre-Trial Chamber I relied on the same factors for assessing gravity in the *Côte D'Ivoire* situation,²¹⁶ and the Prosecutor has equally followed this path in conducting such an assessment. This is best exemplified in the most recent examination of gravity in the context of the flotilla incident.²¹⁷ In reflecting on the scale of the crimes and number of victims, the Prosecutor considered that the killing of a total of ten passengers out of five-hundred and the injury of fifty to fifty-five passengers was not sufficient to meet the gravity test.²¹⁸ The Prosecutor also did not deem the 'mistreatment and harassment of passengers' by the Israeli Defence Forces as sufficient to satisfy the factor of 'nature' of commission, given that the Israeli Defence Forces' behaviour did not amount to 'torture or inhuman treatment'.²¹⁹ Nor did she consider that the impact of these crimes and the manner of their commission rose to the required level.²²⁰ Having examined these factors, the Prosecutor found that the 'potential case(s) that could be pursued as a result of an investigation into this situation [was] limited to an event encompassing a limited number of victims [...] with limited countervailing qualitative considerations'.²²¹ Accordingly, the 'flotilla incident d[id] not fall within the intended and envisioned scope of the Court's mandate',²²² the Prosecutor concluded.

- 60 The flotilla incident represents the most recent practice before the Court which reveals the core nature of the gravity assessment. This examination can never be purely objective. A high level of subjectivity will always be involved. An application of any of the factors referred to above will be always relative. What the Prosecutor has deemed insufficient to satisfy the factors underlying the gravity test in the flotilla incident may be satisfactory for another organ of the Court empowered to carry out the same examination.²²³ It follows that when it comes to the assessment of gravity, there is no hard rule to follow, particularly if, for instance, the situation/case does not involve an uncontested number of victims, such as hundreds of victims. This renders an examination of gravity more difficult to control than that of complementarity.

II. Paragraph 2

- 61 It is clear from a textual interpretation that the list set out in article 17(2) is exhaustive, and thus, should not be extended beyond what is provided in the text of sub-paragraphs (a)-(c). The chapeau of article 17(2) stipulates that for the purpose of determining 'unwillingness' in a certain case, the 'Court shall consider, whether one or more of the following exist, as applicable'. Some scholars argued that the scenarios referred to under article 17(2) are merely illustrative.²²⁴ This view stands to be corrected. Reading the phrase 'shall consider'

²¹⁶ *Situation in Côte D'Ivoire*, ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', Pre-Trial Chamber III, 15 November 2011 <<https://www.legal-tools.org/doc/e0c0eb/>> accessed 6 March 2015, para. 204.

²¹⁷ *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, 6 November 2014; see also Regulation 29(2) of the *Regulations of the Office of the Prosecutor*.

²¹⁸ *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, 6 November 2014, para. 138.

²¹⁹ *Ibid.*, para. 139.

²²⁰ *Ibid.*, paras 140-141.

²²¹ *Ibid.*, para. 144.

²²² *Ibid.*, para. 142.

²²³ *Situation on Registered Vessels of Comoros, Greece and Cambodia*, ICC-01/13-34, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, Pre-Trial Chamber I, 16 July 2015 <<http://www.legaltools.org/doc/2f876c/>> accessed 9 September 2015; see also, Partly dissenting opinion of Judge Péter Kovács, ICC-01/13-34-Anx-Corr, <<http://www.legal-tools.org/doc/c854cf/>> accessed 9 September 2015, paras 14-29, (where the dissenting judge introduced for the first time in the jurisprudence of the Court, the idea of comparative gravity).

²²⁴ Hall, C.K., *Suggestions Concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations*, 28 March 2003, <http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/hall.pdf> accessed 7 March 2015, at 16; Robinson (2003) 14 *EJIL* 481 500.

together with the last phrase ‘whether one or more of the *following* exist’ suggests that the list is exhaustive rather than ‘illustrative’. Had the drafters intended such an interpretation they could have used the formulations ‘such as’, ‘for example’ or ‘including but not limited to’ which appear under some other provisions of the Statute.²²⁵ Moreover, article 17 is drafted in the negative form indicating a preference to genuine national proceedings. ‘Unwillingness’ is an exception to this rule, and accordingly, the provision should not be broadly construed by treating the list under paragraph (2) as illustrative rather than exhaustive.

The language of the three sub-paragraphs uses the word ‘proceedings’ which demonstrates that testing the willingness of a State comes into play only if at least investigative actions are underway and there is a need to test the quality of these proceedings as mentioned earlier. The quality of national proceedings may be detected by three alternative, yet related tests. The first test aims at determining whether the national proceedings are aimed at ‘shielding the person from criminal responsibility’, while the second and third mainly rely on the duration of the proceedings and/or whether they were carried out independently or impartially. The first test encompasses an element of subjectivity when it comes to the assessment of the quality of proceedings in view of States’ actual intentions.²²⁶ As argued by one commentator, in order to prove that the respective State was ‘shielding the person from criminal responsibility’, the Prosecutor should prove a ‘devious intent on the part of the State, contrary to its apparent actions’.²²⁷ Arguably this is not the case in relation to the second and third criteria given that they lean more towards objectivity of assessment. Inserting key elements such as ‘unjustified delay’ in sub-paragraph 2(b) and the lack of ‘independence or impartiality’ in sub-paragraph (c) certainly enhances objectivity of assessment and reduces the element of subjectivity²²⁸ – a result which the drafters aimed to achieve.

The Court’s assessment regarding sub-paragraphs (a)-(c) should be carried out having regard to principles of ‘due process recognized by international law’.²²⁹ As noted in the procedural history, this phrase was supposed to serve sub-paragraph (c), and it was finally agreed in Rome, after entering bilateral negotiations, that the term serves the entire paragraph on unwillingness. The insertion of this phrase cannot be superfluous. Apparently it requires that the Court’s assessment of the quality of justice, as mirrored in sub-paragraph 2(a)-(c) takes into consideration both procedural and substantive rights (covering the entirety of the domestic process) embodied in human rights instruments and developed in the jurisprudence of regional and international judicial bodies. This reading is also in line with article 21(3), which requires that the ‘application and interpretation’ of the Statute ‘must be consistent with internationally recognized human rights’. The latter requirement has been endorsed in the jurisprudence of the Court.²³⁰ Although due process of law may include the

²²⁵ *Rome Statute*, articles 90 (6) and 97 (chapeau). See also the chapeau of article 53(1) which stipulates that ‘[i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether [(a)...(c)]’. The list of the three conditions which flow from the chapeau of article 53(1) has always been considered as exhaustive and nowhere in the practice of the Court is there a slightest indication that the usage of the phrase ‘the Prosecutor shall consider whether’ refers to an illustrative list.

²²⁶ In the same vein, Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach* (Springer 2010) 66–67.

²²⁷ Arbour et al. in: von Hebel et al. (eds.), *Reflections on the International Criminal Court* (T.M.C. Asser Press. 1999) 131.

²²⁸ See also rule 51 of the Rules of Procedure and Evidence which makes clear that ‘[i]n considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted’. This does not deny the fact that even in applying international standards to determine the quality of domestic proceedings a subjective element will quite often be involved given that the assessment will vary from one case to another depending on the particular circumstances of each case.

²²⁹ *Rome Statute*, article 17(2).

²³⁰ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2) (a) of the

rights of the accused,²³¹ a violation of the person's rights should not in and of itself be the decisive factor in an admissibility determination. Article 17 rests on a core idea, namely the existence or absence of genuine national proceedings. This is the determinative factor in ruling on admissibility. Due process becomes applicable only insofar as it is relevant to the interpretation of sub-paragraphs (a)-(c). This interpretation finds support in the 11 October 2013 Al-Senussi Decision.²³² The Defence invoked a number of alleged human rights violations, which included, *inter alia*, the lack of access to a lawyer, illegal rendition, lack of independence of the national judge and allegations of torture. Having considered these allegations the Chamber correctly concluded that the 'assessment of Libya's [...] willingness to carry out its proceedings against Mr Al-Senussi [...] is limited to those considerations that have the potential to bear upon any of the scenarios envisaged under article 17(2)'.²³³ On appeal, the Appeals Chamber endorsed the stated principle, but it apparently went beyond it when it stated:

'Taking into account the text, context and object and purpose of the provision, this determination is not one that involves an assessment of whether the due process rights of a suspect have been breached *per se*. In particular, the concept of proceedings "being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice" should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection. However, there may be circumstances, depending on the facts of the individual case, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be "inconsistent with an intent to bring the person to justice"'.²³⁴

- 64 Thus, although the Appeal Chamber upheld the Pre-Trial Chamber's principled interpretation, it went further and apparently accepted that the Court may render a finding of admissibility in case of 'egregious' human rights violations against the suspect and read an additional element in sub-paragraph (c) (respect of the suspect's human rights). Although gross human rights violations or procedural irregularities may taint any judicial process, unfortunately article 17 was not *per se* designed to operate as a remedy for such irregularities in the sense of other provisions such as articles 59 and 67. Rather the provision was drafted to resolve the positive conflict of jurisdiction between the two tier fora. Surprisingly, the Appeals Chamber seemed to understand this point somehow elsewhere in the judgment, when it clarified that the 'Court was not established to be an international court of human rights [...]. [I]f the interpretation of the Defence were adopted, [...] [a]case could be admissible merely because domestic proceedings do not fully respect the due process rights

Statute of 3 October 2006, Appeals Chamber, 14 December 2006 <<https://www.legal-tools.org/doc/1505f7/>> accessed 6 March 2015, paras 36–39; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1119, Decision on Victims' Participation, Trial Chamber I, 18 January 2008 <<https://www.legal-tools.org/doc/4e503b/>> accessed 6 March 2015, paras 34–35. Also on article 21 and the extensive jurisprudence related thereto, see Bitti, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 281; *id.*, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, forthcoming 2015).

²³¹ *Baena-Ricardo et al. (270 Workers v. Panama)*, Judgment of February 2, 2001, IACtHR (Ser. C) No. 72 (2001), para. 137 (where the Court defined the term 'due process' as consisting of 'the right of all persons to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial judge or tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or her or for the determination of her or his rights').

²³² *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013 <<https://www.legal-tools.org/doc/af6104/>> accessed 5 March 2015, para. 235.

²³³ *Ibid.*, para. 243.

²³⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled 'Decision on the Admissibility of the Case against Abdullah Al-Senussi', Appeals Chamber, 24 July 2014 <<https://www.legal-tools.org/doc/ef20c7/>> accessed 5 March 2015, paras 2–3 and 230.

of a suspect'.²³⁵ It is apparent from reading the entire judgment that the Appeals Chamber was struggling to find the right balance, which is certainly not easy to draw.²³⁶ Be that as it may, the Appeals Chamber apparently went beyond the plain meaning and intended purpose of article 17(2), namely to prevent a State from hiding a suspect or an accused from criminal responsibility on the basis of one or more of the scenarios set out in subparagraph (a)-(c), as will be discussed in more detail below. It seemingly did this in order to reconcile articles 17 and 21(3) of the Statute. Yet, it did so in a rather confusing way. In one instance the Appeals Chamber correctly acknowledged that due process rights are not the determinative factor in deciding on the inadmissibility of a case, while in the last sentence of paragraph 230 quoted above, the Appeals Chamber seems to have left room for the contrary. By doing so, the Appeals Chamber opened the door for the ICC to sit as a purely human rights court and provided it with a mandate that was not entrusted to it by the drafters of the Statute.

1. 'shielding the person'

At the outset one should know that drawing an exhaustive list of all scenarios which reflect a State's intention to 'shield a person from criminal responsibility' is not possible. This depends to a great extent on the factual circumstances of each particular case. It is possible, however, to provide some guidelines on the basis of an analysis of the practice of other international judicial bodies. This could be a useful guidance to the Court in making its determination and as stated above in line with article 21(3) which requires that the 'application and interpretation of law [...] be consistent with internationally recognized human rights'.²³⁷

Article 17(2)(a) is a test for discerning the bad faith of a State by way of checking the effectiveness of national proceedings. Thus any intentional deficiency or serious negligence in conducting national proceedings that lead to negative results, through certain acts or omissions, might reflect a State's intention to 'shield [the] person from criminal responsibility'. It follows that the more thorough and serious the domestic investigation is, the more difficult it will be to find proof of an 'intent to shield' and vice versa. In this regard, the European Court of Human Rights (ECtHR) implicitly endorsed this line of reasoning in a number of cases related to a violation of the right to life and the prohibition of torture. The ECtHR made it clear that a criminal investigation must be serious and effective. For an investigation to be considered effective certain conditions have to be met. Failing to meet these conditions without adequate justification creates a presumption that the State is shielding the person concerned from criminal responsibility.

In *Nachova*, the ECtHR Grand Chamber provided the following elements for ruling that national criminal proceedings were effective: 1) The national authorities must take all reasonable steps available to secure the evidence concerning the incident, including eyewitness testimony and forensic evidence; 2) The conclusions of the investigation must be based on thorough, objective and impartial analysis of all the relevant elements; and 3) any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness.²³⁸ When the ECtHR applied these elements to the facts and circumstances of the case it concluded that: 1) The investigating authorities disregarded some relevant facts including highly technical ones; 2) There was a lack of strict examination of all the material circumstances; and 3) the national authorities conducted the investigation in an excessively

²³⁵ *Ibid.*, para. 219.

²³⁶ *Ibid.*, paras 219, 230 and fn. 449 (where it is clear that the Appeals Chamber was trying to attain a balance).

²³⁷ See generally Bitti, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (forthcoming 2015).

²³⁸ *Nachova and others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, ECtHR, Judgment of 6 July 2005, para. 113.

narrow legal framework, ignoring indispensable and obvious investigative steps.²³⁹ In view of its examination, the ECtHR concluded that the ‘authorities ignored those significant facts and, without seeking any proper explanation, merely [...] terminated the investigation. The investigator and the Prosecutors thus *shielded* Major G. from prosecution’ (emphasis added).²⁴⁰ This suggests that the failure of a State to meet these conditions set out by the ECtHR renders national proceedings ineffective. Said deficiencies in the proceedings if accompanied by a lack of ‘proper explanation’ by the State, indicate that the State is acting in bad faith for the purpose of shielding the person concerned. Similarly, in *Timurtas*, the ECtHR relied on similar conditions to test the quality of national proceedings including the State’s failure to provide convincing explanations. Yet, instead of using the phrase ‘shielding from prosecution’, it said that the national investigations ‘had been perfunctory and superficial’.²⁴¹ Additional factors which reveal the ineffectiveness of national proceedings may also be found in other decisions of the ECtHR. In *Kuznetsov*, the Court considered that the lack of ‘any contemporaneous records which could demonstrate step by step the nature of the investigation carried out into the allegations’ is a factor which reveals the State’s bad faith in carrying out a serious investigation.²⁴² Moreover, in *Tepe*, the failure to involve a ‘forensic specialist’ in cases that involved unnatural death and the decision of the prosecutor to refrain from carrying out a ‘full medico-legal autopsy’, which would have provided valuable information, were considered ‘striking omission[s]’,²⁴³ which contributed, *inter alia*, to the view that the investigation was ineffective, and by implication the State intended to carry out improper proceedings.

- 66 The Inter-American Court on Human Rights (IACtHR) adopted similar standards in testing the quality of domestic investigations and the intention of the relevant State *vis-à-vis* said proceedings. In *Velasquez-Rodriguez*, the IACtHR stated that investigations must be carried out in a ‘serious manner and not as mere formality preordained to be ineffective’. These investigations must have an ‘objective and be assumed by the State as its own legal duty’ aiming at an ‘effective search for the truth’ by the government.²⁴⁴ Accordingly, the State must ‘use the means at its disposal [...] to identify those responsible, [and] to impose the appropriate punishment’.²⁴⁵ When the IACtHR applied these standards, it concluded that domestic proceedings were ineffective, in violation of article 1(1) of the Convention.²⁴⁶ Despite the fact that the IACtHR did not explicitly pronounce that the deficiency in conducting effective investigations resulted from the State’s bad faith to ‘shield’ the person from prosecution, this conclusion may be deduced from the Court’s overall reasoning. Differently, in *Mack*, after identifying further deficiencies in the national proceedings such as ‘altering or hiding’ the report of the police investigations by substituting the original with another, under orders from a State’s authority, and the manipulation of evidence by the

²³⁹ *Ibid.*, paras 114–117.

²⁴⁰ *Ibid.*, para. 116.

²⁴¹ *Timurtas v. Turkey*, Application 23531/94, ECtHR, Judgment (Merits and Just Satisfaction) of 13 June 2000, paras 88 and 110.

²⁴² *Kuznetsov v. Ukraine*, Application No. 39042/97, ECtHR, Judgment (Merits and Just Satisfaction) of 29 April 2003, para. 106.

²⁴³ *Tepe v. Turkey*, Application No. 27244/95, ECtHR, Judgment (Merits and Just Satisfaction) of 9 May 2003, paras 181–182.

²⁴⁴ *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, IACtHR (Ser. C) No. 4 (1988), para. 177; *Villagran Morales et al. v. Guatemala* (The ‘Street Children’ Case), Judgment of 19 November 1999, IACtHR (Ser. C) No. 63 (1999), para. 226.

²⁴⁵ *Ibid.*, para. 211.

²⁴⁶ These reasons may be summarized as follows: 1) Failure of the organs of Executive Branch to carry out a serious investigation, as there was no investigation of public allegations of a series of disappearances; 2) The investigation carried out in accordance with the Commission’s decision was done by the armed forces, the body accused of being involved in the practice; 3) No proceedings were initiated under national law to establish the responsibility of the perpetrators and punish them; and 4) Ignoring the Commission’s request for information; this was interpreted by the Commission as evidence for the accuracy of the allegations against the State. *Ibid.*, paras 179–180.

Ministry of National Defence, the IACtHR concluded that these acts in view of the circumstances of the case 'demonstrate[d] that there was an attempt to cover-up those responsible[...] and this constitute[d] an obstruction of justice and an inducement for those responsible of the facts to remain in situation of impunity'.²⁴⁷

Although these scenarios are by no means exhaustive, they may serve as guidelines for the Court.

2. Unjustified delay

A State will be determined by the Court to be unwilling where there has been an unjustified (unjustifiable) delay in the proceedings which in the circumstances is seen to be inconsistent with an intent to bring the person concerned to justice. The coordinator of the negotiations at the Rome Conference was of the view that this subparagraph was added to offset the onus of proof that will be on the Prosecutor to establish bad faith in paragraph 2(a). Again, as in subparagraph (a) above, what is being determined is the good faith of the involved State. If it were determined, for instance, that the duration of the proceedings was lengthy, this would not be sufficient *per se* to render the case admissible before the Court. There is an additional common element which must accompany these findings namely, that the delay was according to the particular circumstances of the case 'inconsistent with an intent to bring the person to justice'.²⁴⁸ This requirement suggests that the drafters intended to set the bar higher before making any negative finding against the will of the relevant State to carry out its proceedings. Also, there is an apparent overlap between this element and the requirement of shielding the person from criminal responsibility. A delay in conducting national proceedings in such a manner which reveals intent not to bring the person to justice is actually a form of shielding that person from criminal responsibility. Certainly any such finding pursuant to article 17(2) cannot be reached in the abstract. Rather the Court must look into the investigative actions carried out by the State in order to assess whether there was an element of bad faith or the State conducted genuine proceedings. Pre-Trial Chamber I has recently addressed this criterion in the 13 October 2013 Al-Senussi Decision. However, the Chamber failed to provide proper *legal* analysis as to the intended scope of this provision, the meaning of terms such as 'unjustified delay' or 'inconsistent with an intent to bring the person concerned to justice', and the interplay between this sub-paragraph and subparagraph (a). Instead, the Pre-Trial Chamber made a purely factual and subjective analysis without setting out the parameters of the law being guided by the ample jurisprudence developed by international human rights bodies and other international criminal tribunals regarding the ways of assessing delays in criminal proceedings. In making its determination on the length of the proceedings against Al-Senussi, the Chamber correctly considered the dates on which the case moved from one stage to the other, the dates of witnesses' interviews, and the wide scope of factual allegations brought against the suspect. In view of these circumstances, the Chamber concluded that 'a period of less than 18 months between the commencement of the investigation [...] and the referral of the case [...] to the accusation Chamber cannot be considered to constitute an unjustified delay inconsistent with an intent to bring [the suspect] to justice'.²⁴⁹ Although the Chamber's conclusion may be factually justified, the overall assessment remains subjective and quite arbitrary, given that it has not been conducted against a well-defined legal standard as is the case with other human rights bodies or other international criminal tribunals. This does not mean that the ICC must

²⁴⁷ *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, IACtHR (Ser. C) No. 101 (2003), paras. 166–173.

²⁴⁸ *Rome Statute*, article 17(2).

²⁴⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013 <<https://www.legal-tools.org/doc/af6104/>> accessed 5 March 2015, paras 227–229.

automatically transfer the exact standard. Rather it means that the ICC should have developed its own standard being guided by the rich jurisprudence of these judicial bodies.

68 Turning to the requirements of sub-paragraph (b), in order to make a finding on the basis of this provision, three questions have to be answered. First, whether there has been a delay in the proceedings; secondly, whether such a delay was ‘unjustified’; and, thirdly, whether such an ‘unjustified delay’ was, in the circumstances of the situation or case, accompanied by the intention not ‘to bring the person concerned to justice’. These elements are accordingly cumulative. The terms ‘unjustified’ and the ‘intent to bring the person to justice’ are key for the interpretation of this provision. The term ‘unjustified’ provides the State with the opportunity to explain the reason, if any, for the delay before the Court makes a determination on admissibility, rendering this test more objective.²⁵⁰ The intention not ‘to bring the person concerned to justice’ presumably obliges the Court to inquire into the circumstances of each situation or case separately, in order to determine whether, according to the facts of a given case, the intention was to avoid the accused facing justice. Thus, the underlying meaning of ‘unjustified delay’ under Article 17(2)(b) does not target or cover any sort of delay that has no link or connection with the idea of shielding an accused from facing justice; rather it *directly* affects the domestic proceedings leading to the punishment of the alleged perpetrators. In making an overall evaluation of compliance with article 17(2)(b), as stated earlier the Court is to be guided by ‘the principles of due process recognized by international law’. The Court ‘must’ also make sure that its conclusions are ‘consistent with internationally recognized human rights’. Neither the Statute nor the Rules or Regulations of the Court state what may constitute a delay within the meaning of Article 17(2)(b). Nor do they spell out what may constitute a ‘justified’ or ‘unjustified’ delay. Human rights instruments aim at guaranteeing a trial within a ‘reasonable time’²⁵¹ and without ‘undue delay’.²⁵² This ‘underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility’.²⁵³ They are also designed to ensure that an accused does not have to ‘lie under a charge for too long’²⁵⁴ in a ‘state of uncertainty about his fate’.²⁵⁵ When reading the cases decided by the bodies monitoring the application of these instruments, one may observe that the protection underlying the right is not triggered until ‘an individual is subject to a ‘charge’’. When compared to the language mirrored in article 17(2)(b), it becomes apparent that the provision of the Statute is broader in reach and application. Under the Rome Statute, an investigation begins with a ‘situation’ as opposed to a ‘case’. This means that in the early phases of an investigation there are no concrete identifiable suspects for the

²⁵⁰ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 54; see also *ICC Rules of Procedure and Evidence*, No. ICC-ASP/1/3 and Corr.1, part II.A (2002), Rule 51. It should be noted, however, that article 14(3) (c) of the *International Covenant on Civil and Political Rights (ICCPR)*, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, talks of ‘undue delay’; yet, the Human Rights Committee (HRC) still requires the State to provide it with explanation of any sort of unwarranted delay. See, *inter alia*, *Sahadeo v. Guyana*, HRC, Communication No. 728/1996, UN Doc.CCPR/C/73/D/728/1996, 10 November 1996.

²⁵¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECtHR)*, signed 4 November 1950, entered into force 3 September 1953, 213 UNTS 221, ETS. 5, articles 5(3) and 6(1); *American Convention on Human Rights (Pact of San José) (ACHR)*, signed 22 November 1969, entered into force 18 July 1978, OASTS 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc.21, rev. 6 (1979), articles 7(5) and 8(1). This term appears in article 5(3) as well as article 6(1). Although the periods may overlap, article 6(1) is broader in scope as it covers delays in the entire proceedings in relation to all parties. Thus, this section is confined to looking at issues relating to article 6(1). For the distinction between the protection of articles 5(3) and 6(1) see *Matznetter v. Austria*, Application No. 2178/64, ECtHR, Judgment (Merits) of 10 November 1969, para. 12; *Stogmuller v. Austria*, Application No. 1602/62, ECtHR, Judgment (Merits) of 10 November 1969, para. 5.

²⁵² ICCPR, articles 9(3) and 14(3) (c). While article 14(3) (c) speaks of trial ‘without undue delay’, article 9(3) mentions ‘trial within a reasonable time’.

²⁵³ *H. v. France*, Application No. 10073/82, ECtHR, Judgment (Merits and Just Satisfaction) of 24 October 1989, para. 58.

²⁵⁴ *Wemhoff v. Germany*, Application No. 2122/64, ECtHR, Judgment (Merits and Just Satisfaction) of 27 June 1968, para. 18.

²⁵⁵ *Stogmuller v. Austria*, Application No. 1602/62, ECtHR, Judgment (Merits) of 10 November 1969, para. 5.

purpose of prosecution. It follows that the evaluation of the speed or delay resulting from the domestic process would begin during the situation phase, which is earlier than is required under the human rights instruments, namely to have an identified person who is 'subject to a charge', or arrest, or being officially notified that he will be prosecuted.²⁵⁶ Moreover, article 17(2)(b) is concerned with a broader pattern of events, in the sense that it is not designed to address delays that touch upon the rights of the accused *stricto sensu*, but rather to address delays relating to the *entire* criminal process within the general scheme of events; that is, a delay which directly impacts on the idea of bringing an accused to justice. This line of reasoning does not intend to argue that the standard designed by the human rights bodies developed below is not applicable by analogy to the ICC criminal process. Rather, it tends to show that the criterion of 'unjustified delay', in the context of the ICC, serves a broader goal, and thus, the Court should adjust the standard to the unique nature of the ICC judicial procedure. It also follows that there are phases in the criminal process that require assessment, which might have been outside the scope of the jurisprudence of these human rights bodies when they examined delays in national proceedings. Nonetheless, the standards applied by these bodies may still serve as guidelines for the ICC in assessing the entire criminal process. Assessing a delay in national proceedings cannot be carried out according to strict time limits. Finding a violation of the principle of reasonableness of time varies depending on the particularities of each case. In *König*, the ECtHR ruled that the 'reasonableness of the duration of proceedings covered by Article 6 para. 1 (art. 6–1) of the Convention [in civil as well as in criminal matters] must be assessed in each case according to its circumstances'.²⁵⁷ Similarly, in *Ratiani*, according to the Human Rights Committee (HRC) 'what constitutes "undue delay" depends on the circumstances of each case'.²⁵⁸ As the ICTR stated in one of its early decisions, this assessment cannot be 'translated into a fixed number of days, months or years'.²⁵⁹ Nevertheless, the assessment of the duration of a criminal process has always been carried out within certain confines and according to a set of criteria initially developed by the ECtHR and later followed by the IACtHR as well as the *ad hoc* tribunals. In the leading *König* case, the ECtHR developed three criteria on the basis of which an assessment of the duration of the criminal proceedings may take place. The Court referred to the following three criteria: 1) the complexity of the case; 2) the conduct of the applicant; and 3) the conduct of the judicial authorities.²⁶⁰ The Court continues to apply the same criteria.²⁶¹ In *Lazariu*, one of the most recent cases, the ECtHR reiterated 'that the

²⁵⁶ *Eckle v. Germany*, Application No. 8130/78, ECtHR, Judgment (Merits) of 15 July 1982, para. 73; *Wemhoff v. Germany*, Application No. 2122/64, ECtHR, Judgment (Merits and Just Satisfaction) of 27 June 1968, para. 19. The IACtHR considers the starting point for examining national proceedings is the arrest of the accused. See *Suarez – Rosero v. Ecuador*, Judgment of 12 November 1997, IACtHR (Ser. C) No. 35 (1997), para. 70. This is the period that begins in the application of article 6(1) proceedings. However, the period regarding article 5(3) of the Convention and its counterparts in the other human rights instruments begins on the day the accused is taken into custody or detention. See, *inter alia*, *Labita v. Italy* Application No. 26772/95, ECtHR, Judgment (Merits and Just Satisfaction) of 6 April 2000, paras 145 and 147.

²⁵⁷ *König v. Germany*, Application No. 6232/73, ECtHR, Judgment (Merits) of 28 June 1978, para. 99; also, *Palka v. Poland*, Application No. 49176/99, ECtHR, Judgment (Merits and Just Satisfaction) of 11 October 2005, para. 28.

²⁵⁸ *Ratiani v. Georgia*, HRC, Communication No. 975/2001, UN Doc. CCPR/C/84/D/975/2001, 4 August 2005, para. 10.7.

²⁵⁹ *Prosecutor v. Andre Rwamakuba*, No. ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, Article 20 of the Statute, Trial Chamber III, 3 June 2005, <<https://www.legal-tools.org/en/doc/b76164/>> accessed 7 March 2015, para. 26.

²⁶⁰ *König v. Germany*, Application No. 6232/73, ECtHR, Judgment (Merits) of 28 June 1978, para. 99.

²⁶¹ With the exception that the phrase 'judicial authorities' appearing in the third condition was replaced by the broader term 'relevant authorities' to cover acts or omissions attributed to any responsible organ of the State. Also in some decisions a related element was added – namely 'the importance of what is at stake for the applicant in litigation'. See, *inter alia*, *Majewski v. Poland*, ECtHR, Judgment (Merits and Just Satisfaction) of 11 October 2005, para. 38. But this element has no significant application in the context of this study, as it is confined to civil rights before administrative courts. On this point see *Buchholz v. Germany*, Application No. 7759/77, ECtHR, Judgment (Merits) of 6 May 1981, para. 49.

reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case' and with reference to the same criteria spelled out above.²⁶²

69 The IACtHR also followed the same path. In *Lacayo*, the IACtHR recognizing the similarity between article 8(1) of the American Convention on Human Rights and article 6(1) of the European Convention on Human Rights, accepted that the criteria developed by the ECtHR equally applied.²⁶³ In *Mugiraneza*, the Appeals Chamber of the ICTR also developed criteria inspired to a great extent by those of the ECtHR. The Appeals Chamber found it necessary to consider the following factors: '1) The length of the delay; 2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law; 3) The conduct of the parties; 4) The conduct of the relevant authorities; and 5) The prejudice to the accused if any'.²⁶⁴ Complexity encompasses all aspects necessary for deciding a case such as those referred to in *Mugiraneza*. Also the ECtHR spoke of similar elements revealing the complexity of a case and which accordingly render the delay justified. These may include a large amount of documentary evidence,²⁶⁵ the number of suspects involved,²⁶⁶ the number of witnesses,²⁶⁷ the size and complexity of the acts committed²⁶⁸ or the nature of the charges,²⁶⁹ the possibility of reaching these witnesses.²⁷⁰ Quite often delays in criminal proceedings can be attributed to other factors apart from the unique nature of the case. Delays may be caused by a certain behavior on the part of the suspect,²⁷¹ or the relevant authorities. This latter element is the most relevant for making a finding under article 17(2)(b). This is so because the actions undertaken or disregarded by the relevant authorities investigating or prosecuting a particular situation/case reflect their intention in relation to bringing a person to justice. The jurisprudence of the ECtHR and the IACHR could be also useful in this regard.²⁷²

²⁶² *Lazariu v. Romania*, Application No. 31973/03, ECtHR, Judgment (Merits) of 13 November 2014, para. 147. Notably, in this case the Court also referred to the element of 'what was at stake for the applicant in the dispute'.

²⁶³ *Genie-Lacayo v. Nicaragua*, Judgment of 29 January 1997, IACtHR (Ser. C) No. 30 (1997), para. 77.

²⁶⁴ *Prosecutor v. Prosper Mugiraneza*, No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, Appeals Chamber, 27 February 2004, <<https://www.legal-tools.org/en/doc/87a7a4/>> accessed 7 March 2015.

²⁶⁵ *Ferrantelli and Santangelo v. Italy* (1), Application No. 19874/92, ECtHR, Judgment (Merits and Just Satisfaction) of 7 August 1996, para. 42 (where the Court, despite thinking the case complex when 'examined as a whole', reached the conclusion that the time requirement in article 6(1) had not been complied with because, 'and this is the decisive consideration, the applicants were not convicted with final effect until sixteen years after the events').

²⁶⁶ *Hager v. Finland*, Application No. 14724/02, ECtHR, Judgment (Merits and Just Satisfaction) of 17 January 2006, para. 29; *Eckle v. Germany*, Application No. 8130/78, ECtHR, Judgment (Merits) of 15 July 1982, paras 81, 85–87 (where the Court found that in the circumstances of the case as a whole, the delay was excessive and unjustified, despite the large amount of evidentiary material); and in the context of the IACtHR, *Genie-Lacayo v. Nicaragua*, Judgment of 29 January 1997, IACtHR (Ser. C) No. 30 (1997), paras 69 and 78 (noting that although the case was complex, due to 'very extensive' investigations and 'evidence copious' when weighed in light of the entire circumstances, a period of 5 years since the date when an order to initiate proceedings was issued was deemed lengthy and violated article 8(1) of the Convention).

²⁶⁷ *Wemhoff v. Germany*, Application No. 2122/64, ECtHR, Judgment (Merits and Just Satisfaction) of 27 June 1968, para. 20 (opinion of the Commission shared by the Court).

²⁶⁸ *Neumeister v. Austria*, Application No. 1936/63, ECtHR, Judgment (Merits) of 27 June 1968, para. 20.

²⁶⁹ *Calleja v. Malta*, Application No. 75274/01, ECtHR, Judgment (Merits and Just Satisfaction) of 7 April 2005, para. 128.

²⁷⁰ *Neumeister v. Austria*, Application No. 1936/63, ECtHR, Judgment (Merits) of 27 June 1968, para. 20; *Wemhoff v. Germany*, Application No. 2122/64, ECtHR, Judgment (Merits and Just Satisfaction) of 27 June 1968, para. 20 (opinion of the Commission shared by the Court).

²⁷¹ *Rylski v. Poland*, Application No. 24706/02, ECtHR, Judgment (Merits) of 4 July 2006, para. 76; *Corigliano v. Italy*, Application No. 8304/78, ECtHR, Judgment (Merits and Just Satisfaction) of 10 December 1982, paras 40 and 42.

²⁷² *Eckle v. Germany*, Application No. 8130/78, ECtHR, Judgment (Merits) of 15 July 1982, paras 27, 29–33, 74, 83–84; *Pelissier and Sassi v. France*, Application No. 25444/94, ECtHR, Judgment (Merits and Just Satisfaction) of 25 March 1999, paras 25–26 and 73; *Philis v. Greece* (no. 2) (1), Application No. 19773/92, ECtHR, Judgment (Merits and Just Satisfaction) of 27 June 1997, para. 40; *Genie-Lacayo v. Nicaragua*, Judgment

3. Lack of impartiality or independence

Should the ICC determine that the proceedings were not or are not being conducted independently or impartially and are in fact being conducted in a manner which in the circumstances is inconsistent with an intent to bring the person to justice, the case will be admissible. Originally, this was to be put under the heading of inability, in the sense that the State could not provide for impartial proceedings and procedural guarantees for the accused person. However, during negotiations in Rome it appeared that proceedings could be defective even if they are not a sham. This would be the case if, for example, the State was acting in good faith, but other persons acted to cause a mistrial or to taint the evidence.²⁷³

Just as in the case of article 17(2)(b), Pre-Trial Chamber I refrained in its 11 October 2013 Al-Senussi Decision from developing the legal standard in relation to the interpretation of article 17(2)(c) and engaged in a purely factual analysis. In making its findings on the issue of impartiality and independence, the Chamber, for instance, considered that statements issued by public officials and which might violate the suspect's presumption of innocence are not sufficient to taint the domestic process. What matters is whether these statements were made by members of the judicial authorities dealing with the case.²⁷⁴ The Chamber also considered the information presented by the Libyan government under rule 51 of the Rules of Procedure and Evidence²⁷⁵ which showed that its courts met international human rights standards. This included information related to the conduct of judicial proceedings against the former Libyan prime minister in a different case and the acquittal of the former foreign minister.²⁷⁶ In light of this information and some other relevant information, the Chamber concluded that it was not persuaded that there was 'a systemic lack of independence and impartiality of the judiciary such that would demonstrate, alone or in combination with other relevant circumstances, that the proceedings against [the suspect]', were not conducted independently or impartially within the meaning of article 17(2)(c).²⁷⁷ Although this conclusion could be factually correct if applied against a well-developed legal standard, the Chamber refrained from doing so. It spoke of Libya meeting international human rights standards without showing what these international standards were, what is the meaning of independence or impartiality in the context of article 17(2) and how other international judicial bodies and regional human rights bodies have carried out this assessment. Thus, in making such a determination, the Court should have been guided by the ample jurisprudence of the regional human rights bodies and other international criminal tribunals in order to establish its own legal standard in resolving questions related to the quality of domestic investigations in terms of impartiality or independence.²⁷⁸

of 29 January 1997, IACtHR (Ser. C) No. 30 (1997), para. 80; *Cantos v. Argentina*, Judgment of 28 November 2002, IACtHR (Ser. C) No. 97 (2002), para. 56.

²⁷³ Holmes, in: Lee (ed.), *The Making of the Rome Statute* (1999) 41, 51. The only problem here is that article 17 speaks of unwillingness of a State. So if there were persons who are not affiliated with the State who intended to taint evidence, it is quite difficult to conclude that the State was unwilling due to partial proceedings, especially that these irregularities were not caused by the State. Although this is a narrow interpretation, the plain reading of article 17 'unless the State is unwilling' may suggest so. The recent jurisprudence of the Court tends to go in this direction. See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013 <<https://www.legal-tools.org/doc/af6104/>> accessed 5 March 2015, para. 241.

²⁷⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013 <<https://www.legal-tools.org/doc/af6104/>> accessed 5 March 2015, para. 241.

²⁷⁵ *ICC Rules of Procedure and Evidence*, No. ICC-ASP/1/3 and Corr.1, part IIA (2002), Rule 55(2).

²⁷⁶ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013 <<https://www.legal-tools.org/doc/af6104/>> accessed 5 March 2015, paras 253-255.

²⁷⁷ *Ibid*, paras 241-258.

²⁷⁸ El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008), 166-171, 175-203 (providing detailed examples based on the jurisprudence of the human rights bodies and international criminal tribunals on how to test these elements); Van der Wilt and Lyngdorf (2009) 9 *ICLRev* 39.

72 Article 14(1) of the International Covenant on Civil and Political Rights states that 'everyone shall be entitled' to a fair hearing by an independent and impartial tribunal.²⁷⁹ Further, article 6(1) of the European Convention on Human Rights,²⁸⁰ as well as Article 8(1) of the American Convention on Human Rights, employ similar language.²⁸¹ However, these provisions speak of an 'independent and impartial tribunal'. This language is quite different than that found in article 17(2)(c) which refers to national proceedings 'not being conducted independently or impartially'. It is possible to examine independence or impartiality of proceedings through the scope of independence and impartiality of a tribunal. National proceedings conducted by a tribunal which lacks independence or impartiality will certainly have a bearing or impact on the national process. To put it differently, a tribunal which falls short of prerequisites of independence and impartiality raises doubt about the independence or impartiality of the national proceedings conducted by this judicial body.²⁸² The notion of 'independence' refers to a body which is 'independent of the executive and also of the parties'.²⁸³ In *Crociani et al.*, the ECtHR also spoke of independence from Parliament as being a feature of an independent tribunal.²⁸⁴ Also in *Fell*, the ECtHR referred to other aspects of independence when it required that a tribunal should pay 'regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'.²⁸⁵ These elements referred to in *Fell* have been developed in legal doctrine²⁸⁶ and in subsequent jurisprudence.²⁸⁷ On the other hand, impartiality 'denotes absence of prejudice or bias'.²⁸⁸ The IACtHR reached the conclusion that 'lack of necessary independence' has an effect on rendering 'impartial decisions'.²⁸⁹ This conclusion finds support in legal doctrine. According to one commentator, a judicial body lacking independence of the executive will not 'comply with the requirement of impartiality in cases to which the executive is a party'.²⁹⁰ In one of its early decisions, the ICTY Trial Chamber ruled that 'whether a court is independent and impartial depends [...] upon its constitution, its judges and the way in which they function'.²⁹¹ Same as in assessing delays in the criminal process, the ECtHR also developed criteria for testing independence and impartiality. In *Piersack*, the ECtHR elaborated a two tier test, one subjective and the other objective. In relation to the subjective test, it relied 'on the personal conviction of a given judge in a given case'.²⁹² In

²⁷⁹ ICCPR, article 14 (1).

²⁸⁰ ECtHR, article 6 (1).

²⁸¹ ACHR, article 8 (1).

²⁸² In *Norman*, the Appeals Chamber of the SCSL argued in similar terms when it stated: '[A]n objection that the Court lacks judicial independence is basically, and in substance, an objection to the fairness of the trial and an allegation that the right of the accused to a fair hearing is likely to be infringed by the trial'. *Prosecutor v. Sam Hinga Norman*, No. SCSL-2004-14-AR72 (E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), Appeals Chamber, 13 March 2004, para. 4.

²⁸³ *Ringeisen v. Austria*, Application No. 2614/65, ECtHR, Judgment (Merits) of 16 July 1971, para. 95.

²⁸⁴ *Crociani, Palmiotti, Tanassi, Lefebvre D'ovidio v. Italy*, Application Nos. 8603/79; 8722/79; 8723/79, Eur. Comm. H.R., Decision of 18 December 1980 on the Admissibility of the Applications, at 212, 221.

²⁸⁵ *Campbell and Fell v. The United Kingdom*, Application No. 7819/77; 7878/77, ECtHR, Judgment (Merits and Just Satisfaction) of 28 June 1984, para. 78.

²⁸⁶ Harris, D. J. et al., *Law of the European Convention on Human Rights* (Butterworths 1995), 232.

²⁸⁷ See, *inter alia*, *Barbera, Messegue and Jabardo v. Spain*, Application No. 10590/83, ECtHR, Judgment (Merits) of 6 December 1988, paras 53–59; *Ocalan v. Turkey*, Application No. 46221/99, ECtHR, Judgment (Merits and Just Satisfaction) of 12 March 2003, para. 119; *Thomas Eccles and others v. Ireland*, Application No. 12839/87, Eur. Comm. H.R., Decision of 9 December 1988 on the Admissibility of the Application; *Sramek v. Austria*, Application No. 8790/79, ECtHR, Judgment (Merits and Just Satisfaction) of 22 October 1984, para. 42.

²⁸⁸ *Piersack v. Belgium*, Application No. 8692/79, ECtHR, Judgment (Merits) of 1 October 1982, para. 30.

²⁸⁹ *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and (8) American Convention on Human Rights), *Advisory Opinion OC-9/87* of 6/10/1987, IACtHR (Series A) No. 9, para. 24.

²⁹⁰ Harris, D. J. et al., *Law of the European Convention on Human Rights* (1995) 234.

²⁹¹ *Prosecutor v. Duško Tadić a/k/a 'Dule'*, No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, Appeals Chamber, 10 August 1995, para. 32.

²⁹² *Piersack v. Belgium*, Application No. 8692/79, ECtHR, Judgment (Merits) of 1 October 1982, para. 30.

Demicoli, the Court spoke of the ‘interest of a particular judge in a given case’.²⁹³ Also a judge was deemed partial if he/she ‘had displayed any hostility or ill-will’,²⁹⁴ had acted ‘with personal bias’,²⁹⁵ or made special arrangements to be assigned with a case based on personal reasons.²⁹⁶ Regarding the objective test, as stated in *Marin*, it aims at considering whether a judge ‘offered guarantees sufficient to exclude any legitimate doubt in this respect’.²⁹⁷ The distinction in application between the subjective and objective tests was pointed out in *Warsicka*, where the ECtHR said in relation to the latter that ‘quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality’.²⁹⁸ Appearance is an important factor and the key factor is whether the lack of impartiality ‘can be held to be objectively justified’.²⁹⁹ The ECtHR has tackled different factual examples representing these elements in other jurisprudence.³⁰⁰ Applying either of the two tests depends on the particular circumstances of the case *sub judice*. As stated in *Micallef*,

‘there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test).’³⁰¹

In the context of international criminal tribunals, it is worth referring to one of the first 73 notable judgments issued by the ICTY Appeals Chamber. In *Furundžija*, the Appeals Chamber inspired by the jurisprudence of the ECtHR, developed a set of conditions for testing impartiality. According to the Appeals Chamber:

‘A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification from the case is automatic; or ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.’³⁰²

The ICC may develop its own legal standard according to the established practice of these judicial bodies and adjust it to its procedure which is certainly quite distinct in nature.

²⁹³ *Demicoli v. Malta*, Application No. 13057/87, ECtHR, Judgment (Merits and Just Satisfaction) of 27 August 1991, para. 40.

²⁹⁴ *De Cubber v. Belgium*, Application No. 9186/80, ECtHR, Judgment (Merits) of 26 October 1984, para. 25.

²⁹⁵ *Hauschildt v. Denmark*, Application No. 10486/83, ECtHR, Judgment (Merits and Just Satisfaction) of 24 May 1989, para. 47.

²⁹⁶ *Kyprianou v. Cyprus*, Application No. 73797/01, ECtHR, Judgment (Merits and Just Satisfaction) of 15 December 2005, para. 119.

²⁹⁷ *Valentina Marin v. Romania*, Application No. 47448/13, ECtHR, Decision of 2 September 2014, para. 22; *Langborger v. Sweden*, Application No. 11179/84, ECtHR, Judgment (Merits and Just Satisfaction) of 22 June 1989, para. 32.

²⁹⁸ *Warsicka v. Poland*, Application No. 2065/03, ECtHR, Judgment (Merits) of 16 January 2007, para. 37.

²⁹⁹ *Morel v. France*, Application No. 34130/96, ECtHR, Judgment (Merits) of 6 June 2000, para. 42; *Ferarantelli and Santangelo v. Italy*, Application No. 19874/92, ECtHR, Judgment (Merits and Just Satisfaction) of 7 August 1996, para. 58.

³⁰⁰ See, *inter alia*, *Fehr v. Austria*, Application No. 19247/02, ECtHR, Judgment (Merits and just Satisfaction) of 3 February 2005, para. 30; *Depiets v. France*, Application No. 53971/00, ECtHR, Judgment (Merits) of 10 February 2004, para. 35.

³⁰¹ *Micallef v. Malta*, Application No. 17056/06, ECtHR, Judgment of 15 October 2009, para. 95.

³⁰² *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000, <<https://www.legal-tools.org/en/doc/c96f8e/>> accessed 7 March 2015, para. 189; for further details on the test, see, El Zeidy, in: Klip and Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, xix (Hart Publisher 2010) 280.

III. Paragraph 3: Collapse or unavailability of the national judicial system

- 74 When determining the inability of the State to investigate or prosecute in a particular case, the ICC shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain either the accused or the necessary evidence and testimony or otherwise carry out the proceedings. Situations such as ‘Somalia, lacking a central government, or a state of chaos due to a civil war or natural disasters, or any other event which leads to public disorder’³⁰³ were contemplated. When the Rome Statute was being drafted, the proposed complementarity mechanism was harshly criticised by experienced international criminal law personalities such as the Prosecutor of the *ad hoc* tribunals. Louise Arbour argued essentially that the regime would work in favour of rich, developed countries and against poor countries. Although the Court’s Prosecutor might easily make the claim that a justice system in an underdeveloped country was ineffective and therefore ‘unable’ to proceed, essentially for reasons of poverty, the difficulties involved in challenging a State with a sophisticated and functional justice system would be virtually insurmountable. It was feared that there was a danger that the provisions of article 17 would become a tool for overly harsh assessments of the judicial machinery in developing countries.
- 75 However, the current practice before the Court does not seem to be heading in that direction. Pre-Trial Chamber I’s acknowledgement of the revival of the justice system in Ituri in 2005 is a welcome development in this respect.³⁰⁴ In *Lubanga*, Pre-Trial Chamber I ruling on the request for issuing a warrant of arrest against the suspect corrected the Prosecutor’s position regarding the capacity of the Congolese justice system to carry out domestic proceedings. It noted the fact that Lubanga had been detained for nearly a year, and that proceedings were underway against him before national courts, which indicated that the Prosecutor’s position ‘that the DRC national justice system continues to be unable in the sense of article 17(1)(a) to (c) and (3), of the Statute does not wholly correspond to the reality any longer’.³⁰⁵ The Chamber still issued the warrant of arrest despite the Chamber’s acknowledgment of the DRC’s improved capacity to proceed because the State had not been investigating the same case as before the Court, and thus, there remained a situation of inactivity.

In the *Situation in Central African Republic*, the Prosecutor explained a rather lengthy delay between referral and his decision to initiate an investigation arguing that there was uncertainty about whether or not the State concerned was able to prosecute.³⁰⁶ Several years later, Trial Chamber III noted two decisions issued by the Bangui Court of Appeal and the *Cour de Cassation*, the country’s highest judicial body, ‘describing the court’s inability to undertake [the proceedings before the Court]’.³⁰⁷ The same Chamber also noted the position of the CAR representative who ‘stressed that [...] the presence of the MLC militia on the territory of CAR, as well as the areas of conflict, ma[d]e it impossible, given the security considerations, to organise and hold a trial against Mr Bemba on the territory of the CAR’.³⁰⁸ In a more recent development in the situation of Mali referred to the Court on

³⁰³ Arsanjani, in: von Hebel *et al.* (eds.), *Reflections on the International Criminal Court* (1999) 57, 70.

³⁰⁴ *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006 <<https://www.legal-tools.org/doc/73acb4/>> accessed 5 March 2015, para. 36.

³⁰⁵ *Ibid.*

³⁰⁶ *Situation in the Central African Republic*, ICC-01/05-7, Prosecution’s Report Pursuant to Pre-Trial Chamber III’s 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, Pre-Trial Chamber III, 15 December 2006 <<https://www.legal-tools.org/doc/1dd66a/>> accessed 6 March 2015, paras 9 and 12–20.

³⁰⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, 24 June 2010 <<https://www.legal-tools.org/doc/a5de24/>> accessed 6 March 2015, paras. 134, 245.

³⁰⁸ *Ibid.*

18 July 2012, the Malian authorities indicated to the Prosecutor that the 'Malian courts were, following the withdrawal of the judicial services from the northern cities, unable to prosecute crimes allegedly committed by armed groups in Mali'.³⁰⁹ The Prosecutor has decided to open an investigation into alleged crimes committed on the territory of Mali since January 2012. Arguably the Prosecutor has done so mainly on the basis of the fact that, *inter alia*, 'no judicial proceedings have been instituted'³¹⁰ and that 'no other State with jurisdiction is conducting or has conducted national proceedings'.³¹¹ In all of these situations referred to the Court, it was these States initially acknowledging their lack of ability to carry out proceedings related to these situations rather than the Court. This suggests that at least the practice of the Court in relation to under developed countries has been so far moderate, despite the conclusions reached by Pre-Trial Chamber I in the *Gaddafi and Al-Senussi* case.³¹²

Article 17(3) sets out a number of scenarios whereby the Court can make a finding on the admissibility of the case on the basis of this criterion. To determine inability 'the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'.³¹³ Unlike the notion of unwillingness, the test of inability is much less subjective and rather inspired by elements of objectivity. The test has nothing to do, for instance, with determining the intentions of a State to shield a person from criminal responsibility. Rather, the test quite often relies on more straightforward facts revealing whether the State is actually in a position to conduct domestic proceedings in relation to a particular situation/case. This is clear from the scenarios provided in this provision such as the inability: 1) to obtain the accused; 2) to obtain the necessary evidence; or 3) to obtain the necessary testimony. Since the inability of the State could be the result of different reasons, the drafters of the Statute desired to close any gap and therefore added the phrase 'or otherwise unable to carry out its proceedings'. This latter insertion was intended to serve as a catch all clause for those situations which were not envisaged.³¹⁴ For the Court to make a finding on the inadmissibility of the case on this ground, it is not sufficient to show, for instance, that the State cannot obtain the accused. Rather it must be shown that the inability to obtain the accused was due to either a 'total or substantial collapse' of the State's 'national justice system' or its 'unavailability'. So far, the Court has been cautious to make any judicial pronouncement regarding a 'total or substantial collapse' of any State's judicial system. Libya, for example, could currently represent a scenario of failed State³¹⁵. Logically, such failure signals a sort of collapse in the organs of the State including its national judicial system. As observed by Prof. Crawford, 'failed State would seem to encompass various instances of governmental crisis and breakdown'.³¹⁶ It resembles a situation of 'State collapse [...] where the structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new'.³¹⁷ It also reveals that 'a state's fundamental institutions have so deteriorated that it needs long-term external help, not to

³⁰⁹ *Situation in Mali: Article 53(1) Report*, 16 January 2013, para. 137; Also Referral Letter by the Government of Mali, 13 July 2012 <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Pages/situation%20index.aspx> accessed 6 March 2015.

³¹⁰ *Ibid.*, para. 138.

³¹¹ *Ibid.*, para. 140.

³¹² See mn 77–79.

³¹³ *Rome Statute*, article 17(3). For a detailed discussion on the legal interpretation of the different elements of article 17(3), see El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008) 223 *et seq.*

³¹⁴ *Ibid.* 223–224.

³¹⁵ Engel, A., 'Libya As A Failed State: Causes, Consequences, Options', *The Washington Institute for Near East Policy*, Number 24-November 2014, p. 1, available at, http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote24_Engel-3.pdf.

³¹⁶ Crawford, J., *The Creation of States in International Law*, 2nd ed., (OUP 2006) 720.

³¹⁷ *Ibid.*; Zartman, W. I., 'Introduction: Posing the Problem of State Collapse', in Zartman(ed.), *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Rienner 1995) 1.

institutionalized foreign control but to create stronger domestic institutions capable of self-government'.³¹⁸ Nevertheless, what matters for the purpose of article 17(3) is the impact of such failure or the extent of the collapse on the actual operation of the national judicial system and on those relevant organs involved in the national proceedings. At least a 'substantial collapse' of the national judicial system is required to meet the threshold of article 17(3). This entails a collapse "of such intensity [which] affects a significant or considerable part of the domestic justice system – a degree of intensity that is sufficient to paralyze the system in fulfilling its functions regarding investigation, prosecution, trial and execution of sentence".³¹⁹ Maybe the collapse of such nature was not that clear when the Court ruled on the two admissibility challenges against Saif Al-Islam and Al-Senussi. However, nowadays there is a clear change of circumstance and it is for the Prosecutor to make an assessment as to whether the available information supports a finding that the present situation in Libya is of such an intensity that affects the proper functioning of its national justice system. Despite the apparent existence of new facts, the Prosecutor has not so far requested a review of the 11 October 2013 Al-Senussi Decision pursuant to article 19(10) of the Statute.³²⁰

77 Be it as it may, relying on the element of 'unavailability' of the State's national judicial system instead of its collapse has been the prevailing trend before the Court in its jurisprudence on inability. In the 24 June 2010 Bemba Decision,³²¹ Trial Chamber III considered, *inter alia*, the decision of the *Cour de Cassation* referred to above, the difficulty in securing the presence of Bemba due to his 'alleged power', the lack of necessary protective measures for witnesses, the 'complexity and the extent of the prosecution case', the expected lengthy duration of proceedings and the limited 'judicial services' available, and concluded that the 'national judicial system [in] CAR [was] *unavailable* [...] to handle these proceedings' (emphasis added).³²² Although the Chamber could have also relied on alternative elements of inability such as the inability to obtain the accused or the necessary evidence, it has not done so. This is understandable given that there were *various* reasons which impeded the national authorities from carrying out the national process. The Chamber apparently relied on the broader phrase 'otherwise unable to carry out its proceedings', in order to capture the wide range of problems facing the country. In a more recent and elaborate decision on inability (the 31 May 2013 Gaddafi Decision), Pre-Trial Chamber I found that Libya was neither able to secure the accused or obtain the necessary testimony, nor otherwise able to carry out the proceedings against Saif Al-Islam Gaddafi. The Chamber's finding was linked to the unavailability of the Libyan justice system.³²³ According to the Chamber, Libya 'continued to face substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these difficulties, [...] its national system

³¹⁸ Clarke, W., Herbst, J., 'Somalia and the Future of Humanitarian Intervention', (1996) 75 *Foreign Affairs* 84.

³¹⁹ See also, El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008) 224–226.

³²⁰ Rome Statute, article 19(10); rule 62 of the RPE. However, see *Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970(2011)*, para. 16 (noting that on the basis of the Prosecutor's access to the data regarding the national proceedings against Al-Senussi, the information obtained from the United Nations Support Mission in Libya, the Libyan Prosecutor General's office, and from independent civil society, she concluded that her office 'is not in possession of new facts that would fully satisfy [...] that the basis on which the case against Mr Al-Senussi had previously been found inadmissible before the ICC has been negated').

³²¹ Although in this decision Trial Chamber III failed to provide a legal interpretation to the different constituent elements of article 17(3), it still relied on this provision from a purely factual perspective to arrive at its conclusion.

³²² *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, 24 June 2010 <<https://www.legal-tools.org/doc/a5de24/>> accessed 6 March 2015, paras 245–246.

³²³ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 31 May 2013 <<https://www.legal-tools.org/doc/339ee2/>> accessed 5 March 2015, para. 205.

cannot yet be applied in full in areas or aspects relevant to the case, being thus ‘unavailable’ within the terms of article 17(3) of the Statute’.³²⁴

With respect to the inability to obtain the accused, there were several allegations by the Libyan government that the suspect will be transferred from his place of detention under the custody of a militia in Zintan.³²⁵ However, the Libyan authorities failed to secure such transfer to Tripoli,³²⁶ where his trial should have been conducted. As such, the Chamber considered that this is a form of inability to obtain the accused within the meaning of article 17(3) of the Statute.³²⁷ Also, the failure of the central government to conduct interviews with two witnesses held in detention, beyond the reach of the Libyan authorities was a factor in determining that Libya was unable to obtain the necessary testimony as provided in article 17(3).³²⁸ The same holds true with respect to the lack of witness protection programmes, which was another indication for the Chamber that Libya lacked the means to protect witnesses who agreed to testify.³²⁹ Further, the lack of independent legal representation for the suspect by way of securing a qualified lawyer to defend the suspect throughout the proceedings was an indication that Libya was ‘otherwise unable to carry out its proceedings’.³³⁰ This was due to the fact that the lack of a counsel constituted a bar to the conduct of a trial, which in effect meant that Libya was unable to carry out its national proceedings against the suspect.

By contrast, in the 11 October 2013 Al-Senussi Decision, the same Chamber did not consider that the lack of witness protection programmes and absence of control by the central government over certain ‘detention facilities’ constituted inability. Instead, the Chamber believed that these factors were decisive only in the 31 May 2013 Gaddafi Decision as they ‘prevent[ed] Libya from obtaining “the necessary evidence and testimony”’.³³¹ This was not the case in the 11 October 2013 Al-Senussi Decision where Libya managed to gather ‘a considerable amount of evidence’ against the suspect despite the security concerns or lack of governmental control in relation to some prisons.³³² Thus, according to this precedent, the decisive factor in making a ruling on the State’s inability is whether the domestic proceedings have been ‘prejudiced’ by the existence of security challenges.³³³ In the context of the *Al-Senussi* case, the Chamber considered that the overall progressive steps undertaken in relation to the judicial proceedings against him ‘[did] not result in Libya’s inability genuinely to carry out its proceedings’.³³⁴ This indicates that a determination of inability should not be conducted in the abstract and thus it requires a case-by-case assessment.

³²⁴ *Ibid.*

³²⁵ *Ibid.* para. 206.

³²⁶ *Ibid.* paras. 206–207.

³²⁷ *Ibid.* para. 208.

³²⁸ *Ibid.* para. 210.

³²⁹ *Ibid.* para. 211.

³³⁰ *Ibid.* paras. 213–214.

³³¹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013 <<https://www.legal-tools.org/doc/af6104/>> accessed 5 March 2015, para. 297.

³³² *Ibid.* para. 298.

³³³ *Ibid.* paras. 299–301.

³³⁴ *Ibid.* paras. 301 and 303.

Article 18

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Literature: John T. Holmes, *Complementarity: National Courts versus the ICC*, in: Antonio Cassese/Paola Gaeta/John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* 667 (2002); *id.*, *Jurisdiction and Admissibility*, in: Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* 321 (2001); *id.*, *The Principle of Complementarity*, in: Roy S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute – Issues – Negotiations – Results* 41 (1999); Héctor Olásolo, *The Triggering Procedure of the International Criminal Court* (2005); Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007); Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008); Joe Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008); William A. Schabas, 'Article 18: Preliminary Rulings Regarding Admissibility/Décision préliminaire sur la recevabilité', in: *The International Criminal Court: A Commentary On The Rome Statute* 353 (2010); Joe Stigen, 'The Admissibility Procedures', in: Carsten Stahn/Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: from Theory to Practice* 503, Vol. I (2011); Silvain Sana, 'Article 18: Décision préliminaire sur la recevabilité', in Julian Fernandez/Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire Article par Article* 711, Vol. I (2012).

A. Introduction

I. Historical developments and drafting history

This provision was first proposed for inclusion into the Statute as article 11*bis* during the last Preparatory Committee proceedings – less than four months before the Statute was finalised – at the urging of the United States¹. It was included in the Preparatory Committee Draft and repositioned as article 16 without substantive alteration². The ILC Draft³ did not contain anything like it, since it did not provide for an independent Prosecutor with the power to initiate investigations *proprio motu*. Under the ILC Draft, only States and the Security Council could trigger the jurisdiction of the Court⁴. It was only after it became apparent during the Preparatory Committee and the Rome Diplomatic Conference meetings that a majority of States favoured an independent Prosecutor with *proprio motu* powers, that the provision was introduced as a check on the Prosecutor's powers.

The drafters of the Statute recognized that States already had jurisdiction over the crimes that the ICC was being set up to try. They also recognized the advantages of national jurisdiction over that of the ICC⁵. So, unlike the drafters of the Statutes of the Yugoslavia and Rwanda Tribunals who gave those Tribunals primacy over national courts, the drafters of the ICC Statute made the ICC's jurisdiction secondary or complementary to that of States⁶. States have a prior right to exercise that jurisdiction. As long as they are exercising it genuinely and effectively, the Court must defer to them. Thus where both a State and the Court have simultaneously asserted jurisdiction over the same situation or case, the Court must yield to State jurisdiction. But, under the ILC Draft, the earliest stage at which 'an interested State' could have asserted its jurisdiction and stopped the Court's involvement was at the post-investigation phase, after charges would have already been framed and proffered against a particular individual or individuals⁷. However, a number of States, notably the United States, favoured an arrangement where an interested State could stop the Court's involvement at an earlier stage. What eventually became article 18 was inserted at their insistence, as it would help them attain that desideratum⁸.

Preparatory Committee Draft article 16 contained five subsections. It applied to *all* the mechanisms by which the Court's jurisdiction could be triggered – State Party referral, UN Security Council referral or the Prosecutor acting *proprio motu*. Once the Prosecutor had determined that a sufficient basis existed to commence an investigation, a public announce-

¹ See *Proposal submitted by the United States of America: Article 11 bis – Preliminary rulings regarding admissibility*, UN Doc. A/AC.249/1998/WG.3/DP.2 (25 Mar. 1998). This proposal was included as Article 11 *bis* in the Preparatory Committee's draft of Part 2 of the Statute: *Draft Statute for the International Criminal Court – Part 2: Jurisdiction, Admissibility and Applicable Law*, UN Doc.A/AC.249/1998/CRP.8 (2 Apr. 1998), pp. 33–34.

² See *Report of the Preparatory Committee on the Establishment of an International Criminal Court – Addendum: Part One – Draft Statute for the International Criminal Court*, UN Doc.A/CONF.183/2/Add.1 (14 Apr. 1998), pp. 42–43.

³ See ILC Draft Statute for an International Criminal Court, in *Report of the International Law Commission on the Work of its Forty-sixth Session* (2 May – 22 July 1994), UN Doc.A/49/10 (1994), in: *Yearbook of the International Law Commission 1994 – Volume II, Part Two* (1997), UN Doc.A/CN.4/SER.A/1994/Add.1 (Part 2), pp. 26–74.

⁴ ILC Draft articles 21, 23, 25, *Ibid.*, pp. 41–46.

⁵ See *Report of the Ad hoc Committee on the Establishment of an International Criminal Court*, UN Doc.A/50/22 (6 Sep. 1995), para. 31.

⁶ See paragraph 10 of the Preamble, as well as articles 1 and 17 of the Statute.

⁷ See ILC Draft article 35, *supra* note 3, p. 52, concerning 'Issues of admissibility' under which 'the accused' or 'an interested State' could challenge the admissibility of 'a case' already before the Court, on the ground, *inter alia*, that the case 'has been duly investigated' or is 'under investigation'.

⁸ See Statement of the US Delegation on Article 11*bis* – *Preliminary Rulings Regarding Admissibility*, UN Doc.A/AC.249/1998/WG.3/DP.2 (3 Apr. 1998). Generally see Bleich (1997) 13 *NEP* 230.

ment would follow and only States Parties would be formally notified. A State with jurisdiction would then have an undetermined number of days in which to inform the Court that it was investigating the same matter, and the Prosecutor would have to defer to that State upon its request ‘unless the Prosecutor determine[d] that there [was] a total or partial collapse or unavailability of the State’s national judicial system, or the State [was] unwilling or unable’ to carry out genuine investigations and prosecutions. Such a determination had to be confirmed by the Pre-Trial Chamber before an investigation could start. The relevant State could appeal the Pre-Trial Chamber’s confirmation but would need either a two-thirds majority or a unanimous Appeals Chamber bench in order to succeed. A deferral by the Prosecutor to a State’s investigation would be open to review by the Prosecutor at either a six month or one year interval and he or she could request periodic reports from that State on the progress of its investigations and prosecutions. States Parties would have to respond to such requests without undue delay. A challenge pursuant to Preparatory Committee Draft article 16 did not prejudice a State’s right to challenge the admissibility of a case pursuant to what is now article 19⁹.

- 4 Upon the introduction of Preparatory Committee Draft article 16 at the Diplomatic Conference, the United States representative posited that due to the support for the referral of overall situations to the Court by the UN Security Council, a State party, or the Prosecutor acting *proprio motu*, ‘it would [...] seem necessary to provide for a procedure, at the outset of a referral, which would recognize the ability of national judicial systems to investigate and prosecute the crimes concerned.’ Under the proposal, ‘the Prosecutor would be able to proceed immediately to conduct an independent investigation if, in the face of a challenge by a national judicial system, the Prosecutor could persuade the judge to allow him to do so.’ The proposed article ‘concerned an overall matter referred to the Court at an earlier stage, when no particular suspects had been identified’ and was intended to be consistent with (but independent from) what is now contained in article 19 paras. 2 and 4, where a State or the person concerned could challenge the admissibility of a concrete case relating to specific persons¹⁰.
- 5 The initial reaction of States to the Draft article 16 was mixed; some States supported it¹¹ or only parts of the article¹², others opposed it¹³ or expressed doubt¹⁴, while various other States awaited further clarifications before they would take a firm stance on the matter¹⁵.
- 6 The United States eventually submitted a revised version of Preparatory Committee Draft article 16 containing seven subsections¹⁶ which was incorporated into a Bureau discussion paper on jurisdiction, admissibility and applicable law and was left open for further discussions; no alternative proposals for article 16 were provided to the delegates¹⁷. This version

⁹ Preparatory Committee Draft article 16 paras. 1–5.

¹⁰ UN Doc.A/CONF.183/C.1/SR.11 (22 Jun. 1998), para. 25 (Mr. Scheffer – United States of America).

¹¹ UN Doc.A/CONF.183/C.1/SR.11 (22 Jun. 1998), paras. 27 (Mr. Gonzalez Glavez – Mexico), 29 (Mr. Salinas – Chile), 33 (Mr. Bazel – Afghanistan); UN Doc.A/CONF.183/C.1/SR.12 (23 Jun. 1998), paras. 2 (Mr. Nagamine – Japan), 3 (Ms. Cueto – Cuba), 5 (Mr. Effendi – Indonesia), 10 (subject to a reservation regarding the criteria for determining unwillingness) (Mr. Rama Rao – India), 22 (subject to improved drafting) (Mr. Bello – Nigeria), 40 (Mr. Niyomrerks – Thailand).

¹² UN Doc.A/CONF.183/C.1/SR.11 (22 Jun. 1998), para. 47 (Ms. Le Fraper du Hellen – France); UN Doc.A/CONF.183/C.1/SR.12 (23 Jun. 1998), para. 1 (Mr. Abdelkader Mahmud – Iraq).

¹³ UN Doc.A/CONF.183/C.1/SR.11 (22 Jun. 1998), paras. 28 (Mr. Wilmshurst – Belgium), 40 (Ms. Lehto – Finland), 43 (Mr. Yopez Martinez – Venezuela), 46 (Ms. Wyrozumska – Poland); UN Doc.A/CONF.183/C.1/SR.12 (23 Jun. 1998), paras. 16 (Mr. Zellweger – Switzerland), 21 (Ms. Kolshus – Norway), 25 (Mr. Fadl – Sudan), 34 (Mr. Stillfried – Austria), 46 (Mr. Diaz Paniagua – Costa Rica).

¹⁴ UN Doc.A/CONF.183/C.1/SR.11 (22 Jun. 1998), paras. 34 (Ms. Wilmshurst – United Kingdom), 35 (Ms. Diop – Senegal); UN Doc.A/CONF.183/C.1/SR.12 (23 Jun. 1998), paras. 13 (Mr. Nyasulu – Malawi), 26 (Mr. Politi – Italy), 35 (Mr. Minoves Triquell – Andorra), 36 (Ms. Wong – New Zealand).

¹⁵ UN Doc.A/CONF.183/C.1/SR.11 (22 Jun. 1998), paras. 36 (Mr. Skillen – Australia), 38 (Mr. Syquia – The Philippines), 39 (Mr. Zimmermann – Germany), 41 (Ms. Vargas – Colombia), 42 (Mr. Nathan – Israel).

¹⁶ See *Proposal submitted by the United States of America: Article 16 – Preliminary rulings regarding admissibility*, UN Doc.A/CONF.183/C.1/L.25 (29 Jun. 1998).

¹⁷ See *Bureau Discussion Paper: Part 2 – Jurisdiction, admissibility and applicable law*, UN Doc.A/CONF.183/C.1/L.53 (6 Jul. 1998), article 16 paras. 1–7.

dropped the requirement of a public announcement when the Prosecutor determined that a sufficient basis to commence an investigation existed, expanded the notification requirements of the Prosecutor to include ‘any non-States Parties that may have jurisdiction’ and permitted such notification on a confidential basis ‘to protect persons or prevent destruction of evidence’. It set a one-month deadline upon which a State could inform the Prosecutor that it was investigating the relevant matter. Additionally, the Prosecutor’s ability to review deferrals was set to six months after the date of the referral but was also expanded to any time where ‘significant change[s] of circumstances indicat[ed] that the State ha[d] become unwilling or unable to genuinely carry out the investigation.’ The Prosecutor could also seek the Pre-Trial Chamber’s permission, pending a ruling on his or her determination that a State was unwilling or unable to proceed with an investigation, to pursue investigative steps where a unique opportunity arose to obtain important evidence or where there was a significant risk that such evidence would subsequently become unavailable. The requirement of a two-thirds majority or a unanimous Appeals Chamber bench for a successful appeal of the Pre-Trial Chamber’s decision on the Prosecutor’s determination was dropped and the Prosecutor was also afforded the opportunity to appeal. Pending the outcome of an appeal, the Appeals Chamber could authorize the Prosecutor to proceed with an investigation¹⁸.

Some States were still not entirely convinced with the article or opposed it outright¹⁹, with some expressing the view that it imposed hurdles upon the functioning of the Court²⁰. Nevertheless, it received support from numerous other States²¹, particularly in light of the principle of complementarity and the Prosecutor being afforded *proprio motu* powers²², or that it would be more palatable upon further redrafting²³.

In light of further discussions, the article was again amended and presented as part of a larger Bureau proposal on articles relating to jurisdiction, admissibility and applicable law²⁴. Significantly, this version dropped from within its ambit the trigger mechanism of a UN Security Council referral and altered the standard for the Prosecutor’s determination to commence an investigation from ‘sufficient basis’ to ‘reasonable basis’. While the Prosecutor’s notification obligation could still be effected on a confidential basis to States and non-States Parties, he or she could also ‘limit the scope of the information provided’ so as to protect persons, prevent destruction of evidence and additionally, to prevent the absconding of persons. Further, the Prosecutor’s ability to determine formally whether a State was unwilling or unable to investigate upon that State’s request for a deferral (subject to confirmation by the Pre-Trial Chamber) was changed. Now, authority had to be sought from the Pre-Trial Chamber in order for the Prosecutor to proceed with his or her

¹⁸ *Ibid.*, article 16 paras. 1–6.

¹⁹ UN Doc.A/CONF.183/C.1/SR.29 (9 Jul. 1998), paras. 156 (Mr. Oumarmaiga – Mali), 178 (Ms. Kasyanju – Tanzania); UN Doc.A/CONF.183/C.1/SR.30 (9 Jul. 1998), paras. 13 (Mr. Onkelinx – Belgium), 70 (Ms. Daskalopoulou-Livada – Greece), 118 (Mr. Yañez-Barnuevo – Spain); UN Doc.A/CONF.183/C.1/SR.31 (9 Jul. 1998), paras. 17 (Mr. Ngatse – Congo), 25 (Ms. La Haye – Bosnia and Herzegovina), 43 (Mr. Pandler – Hungary).

²⁰ UN Doc.A/CONF.183/C.1/SR.29 (9 Jul. 1998), para. 66 (Mr. Dabor – Sierra Leone); UN Doc.A/CONF.183/C.1/SR.30 (9 Jul. 1998), para. 17 (Mr. Robinson – Jamaica); UN Doc.A/CONF.183/C.1/SR.31 (9 Jul. 1998), para. 38 (Ms. Plejić-Marković – Croatia).

²¹ UN Doc.A/CONF.183/C.1/SR.30 (9 Jul. 1998), paras. 31 (Mr. Bello – Nigeria), 34 (Ms. Shahen – Libyan Arab Jamahiriya), 78 (Mr. Effendi – Indonesia), 80 (Mr. Azoh-Mbi – Cameroon), 90 (Ms. Mekhemar – Egypt), 96 (Ms. Lehto – Finland), 104 (Mr. Güney – Turkey); UN Doc.A/CONF.183/C.1/SR.31 (9 Jul. 1998), paras. 11 (Mr. De Saram – Sri Lanka), 22 (Mr. Abdalla Ahmed – Iraq), 30 (Mr. Hadi – United Arab Emirates).

²² UN Doc.A/CONF.183/C.1/SR.29 (9 Jul. 1998), paras. 102 (Mr. Wenaweser – Liechtenstein), 145 (Mr. Ivan – Romania), 186 (Mr. Kaul – Germany); UN Doc.A/CONF.183/C.1/SR.30 (9 Jul. 1998), para. 24 (Mr. Hafner – Austria); UN Doc.A/CONF.183/C.1/SR.31 (9 Jul. 1998), paras. 29 (Mr. Nega – Ethiopia), 42 (Mr. Mirzaee Yengejeh – Iran).

²³ UN Doc.A/CONF.183/C.1/SR.29 (9 Jul. 1998), paras. 123 (Mr. Rwelamira – South Africa), 161 (Mr. Al Hussein – Jordan); UN Doc.A/CONF.183/C.1/SR.30 (9 Jul. 1998), paras. 62 (Mr. Krokmal – Ukraine), 123 (Mr. Politi – Italy); UN Doc.A/CONF.183/C.1/SR.31 (9 Jul. 1998), paras. 19 (Mr. Mahmood – Pakistan), 37 (Mr. Gonzalez Galvez – Mexico).

²⁴ See Bureau Proposal: Part 2 – Jurisdiction, admissibility and applicable law, UN Doc.A/CONF.183/C.1/L.59 (10 Jul. 1998), article 16 paras. 1–7.

investigation (rather than the Chamber confirming (or not) the Prosecutor's determination). The Prosecutor could still defer to a State's investigation if the State with jurisdiction was not notified by the Prosecutor of his or her determination or if the State failed to inform the Prosecutor of its investigation within the one-month deadline. Pre-Trial Chamber oversight was also added to the Prosecutor's review of deferrals upon significant changes in the State's willingness and ability to genuinely investigate. However, where the State concerned failed to provide information to the Prosecutor on the progress of its investigations and/or prosecutions, the Prosecutor could seek a ruling from the Pre-Trial Chamber on the State's unwillingness or inability to carry out such actions²⁵.

- 9 While the amended article 16 still provoked some opposition among States, such opposition was noticeably less than that to previous versions²⁶. Instead, States either supported the provision as presented²⁷, or expressed reservations as to its drafting (rather than opposing the article as a whole)²⁸, with States again stressing complementarity and its utility as a check on the Prosecutor's *proprio motu* powers²⁹. Further behind the scenes negotiations and redrafting ensued, eventually leading to the article's text as it presently appears in the Statute and to the repositioning into its final resting place as article 18³⁰. It was adopted together with other provisions on jurisdiction, admissibility and applicable law the following evening by the Committee of the Whole³¹ and approved as part of the final Statute that same evening³².

II. Purpose

- 10 This provision serves four principal purposes. First, it underscores the primary responsibility and right of States Parties to investigate and prosecute crimes within the Court's jurisdiction. As sovereign States they have a right to prosecute and punish crimes that take place on their territory or otherwise fall within their jurisdiction. They also have a duty as members of the family of nations to investigate and prosecute those crimes. In a sense, then, the provision aims at giving them 'the right to act first', *Recht des ersten Zugriffs*³³. Second, the provision enables States to assert their superior jurisdiction at an early stage, before the Prosecutor gets involved through investigations where, '[o]ften[] no individual suspects will have been identified [...], nor will the exact conduct nor its legal classification be clear.'³⁴

²⁵ *Ibid.*, article 16 paras. 1–5. It is worth noting in this context that the records do not appear to show specific discussions among States that would shed light on the reason(s) why the UN Security Council trigger mechanism was dropped from article 16 para. 1.

²⁶ UN Doc.A/CONF.183/C.1/SR.33 (13 Jul. 1998), paras. 21 (Mr. Caflisch – Switzerland), 85 (Ms. Plejić-Marković (Croatia)); UN Doc.A/CONF.183/C.1/SR.34 (13 Jul. 1998), paras. 58 (Mr. Rwelamira – South Africa), 100 (Ms. Wyrozumska – Poland).

²⁷ UN Doc.A/CONF.183/C.1/SR.34 (13 Jul. 1998), paras. 52 (Mr. Güney – Turkey), 84 (Mr. Panin – Russian Federation); UN Doc.A/CONF.183/C.1/SR.35 (13 Jul. 1998), paras. 36 (Mr. Effendi – Indonesia), 65 (Mr. Al Adhami – Iraq), 75 (Mr. Pandler – Hungary).

²⁸ UN Doc.A/CONF.183/C.1/SR.33 (13 Jul. 1998), paras. 67 (Mr. Asamoah – Ghana), 72 (but reserving its position on the article) (Mr. Westdickenberg – Germany); UN Doc.A/CONF.183/C.1/SR.34 (13 Jul. 1998), paras. 30 (Mr. Van Boven – The Netherlands), 37 (Mr. Yañez-Barnuevo – Spain), 113 (Mr. Gonzalez Galvez – Mexico); UN Doc.A/CONF.183/C.1/SR.35 (13 Jul. 1998), paras. 13 (Mr. Bello – Nigeria), 43 (Mr. Rodriguez Cedeño – Venezuela), 55 (Mr. Mahmood – Pakistan), 74 (Mr. Da Costa Lobo – Portugal); UN Doc.A/CONF.183/C.1/SR.36 (13 Jul. 1998), para. 39 (Mr. Minoves Triquell – Andorra).

²⁹ UN Doc.A/CONF.183/C.1/SR.34 (13 Jul. 1998), paras. 8 (Mr. Saland – Sweden), 90 (Mr. Vergne Saboia – Brazil); UN Doc.A/CONF.183/C.1/SR.35 (13 Jul. 1998), paras. 17 (Mr. Politi – Italy), 32 (Mr. Bouguetaia – Algeria), 48 (Mr. Manongi – Tanzania), 52 (Mr. Wenaweser – Liechtenstein), 82 (Ms. O'Donoghue – Ireland), 85 (Ms. Skelemani – Botswana).

³⁰ See Part 2 – *Jurisdiction, admissibility and applicable law*, UN Doc.A/CONF.183/C.1/L.76/Add.2 (16 Jul. 1998), article 18 paras. 1–7.

³¹ UN Doc.A/CONF.183/C.1/SR.42 (17 Jul. 1998), paras. 35–36.

³² UN Doc.A/CONF.183/SR.9 (17 Jul. 1998), paras. 8–10.

³³ See Ambos (1997) 53 *RevICommJurists* 45.

³⁴ *Prosecutor v. Muthaura et al.*, Case No. ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the

Third, it ensures that the Prosecutor, in the exercise of his or her discretionary powers, is accountable to some superior authority. Some States, accustomed to a prosecutor who, under their national systems, is accountable to some higher authority (such as the Minister of the Interior and ultimately Parliament) were wary of an international Prosecutor who was accountable to nobody. They feared that their national sovereignty might be compromised by decisions of a lone individual who, under the guise of investigations, might have other hidden political agendas or ulterior motives aimed at embarrassing targeted States. The provision serves to allay these fears via the involvement of the Pre-Trial Chamber, composed as it is of independent judges from different nations and legal systems. The Chamber helps check what some States perceived as a 'loose cannon' Prosecutor with unbridled powers by vesting it with the power to grant or to withhold authorization for his or her investigations. Fourth, the involvement of the Chamber at such an early stage of the proceedings also serves to protect the Prosecutor from unfounded accusations of bias and from political manipulations on the part of some powerful States. This is all the more important since any State Party may refer a situation in *another* State Party to the Prosecutor for investigation and prosecution³⁵. However, as of 31 May 2015, there have been no public decisions issued by the Court pursuant to article 18 proceedings.

III. Scope

Article 18 applies only when the Prosecutor is acting in response to a referral by a State Party under article 13 para. (a) or when he or she is acting on his or her own initiative under articles 13 para. (c) or 15 (which can also be exercised subsequent to an *ad hoc* declaration under article 12 para. 3³⁶). The article does not apply where the Prosecutor is acting in response to a referral by the Security Council, under Chapter VII of the United Nations Charter³⁷. While the *travaux préparatoires* reveal that article 18 was not so originally restricted³⁸, it remains unclear exactly why Security Council referrals were removed from within its scope³⁹. However, it should be noted that the Council has primacy in matters involving international peace and security. Its decisions are binding on all States. Judicial proceedings are among the measures that it may opt for as a means of maintaining or restoring international peace and security. Once it has opted for and sanctioned such measures, there is no need for the Prosecutor to seek and obtain any further authorization from the Pre-Trial Chamber or from any other authority. The Prosecutor must forthwith proceed to investigate the situation referred to him or her under article 13 para. (b) of the

Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 Aug. 2011, para. 38; *Prosecutor v. Ruto et al.*, Case No. ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 Aug. 2011, para. 39.

³⁵ See article 13 para. (a).

³⁶ See for example, *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', Pre-Trial Chamber III, 15 Nov. 2011 (where the Prosecutor sought authorization from the Pre-Trial Chamber to exercise his *proprio motu* powers to commence an investigation into the situation in Côte d'Ivoire's following that State's article 12 para. 3 declaration).

³⁷ See article 13 para. (b).

³⁸ See *Proposal submitted by the United States of America: Article 11 bis – Preliminary rulings regarding admissibility*, UN Doc. A/AC.249/1998/WG.3/DP.2 (25 Mar. 1998), article 11 *bis* para. 1; Preparatory Committee Draft article 16 para. 1; *Proposal submitted by the United States of America: Article 16 – Preliminary rulings regarding admissibility*, UN Doc.A/CONF.183/C.1/L.25 (29 Jun. 1998), article 16 para. 1; *Bureau Discussion Paper: Part 2 – Jurisdiction, admissibility and applicable law*, UN Doc.A/CONF.183/C.1/L.53 (6 Jul. 1998), article 16 para. 1; *supra* notes 1, 9, 16, 17.

³⁹ See *Bureau Proposal: Part 2 – Jurisdiction, admissibility and applicable law*, UN Doc.A/CONF.183/C.1/L.59 (10 Jul. 1998), article 16 para. 1; *supra* notes 24, 25.

Statute, unless he or she determines that there is no reasonable basis to proceed⁴⁰. If his or her findings so warrant, the Prosecutor must then commence the necessary criminal proceedings against the person(s) concerned. It should also be recalled that by virtue of rule 163 subrule 2, article 18 has no application to (article 70) offences against the administration of justice.

IV. Source of the rule

- 12 The rule requiring judicial authorization to commence criminal investigations appears to be novel. There would appear to be no precedent for it either in international law or national or comparative law. Generally speaking, most of the developed legal systems of the world do not assign a role to the judiciary at the initial stages of criminal investigations. The only time when the judiciary gets involved in the process is when the investigators seek its authorization to use coercive measures, such as arrest and detention, search and seizure, or wiretapping and surveillance. It is only when the investigations are under way or when they are over but before trial that the judiciary gets involved, usually to confirm the indictment or charges before the suspect can be arraigned. In confirming the indictment or charge, the judiciary seeks to establish that the indictment or charge discloses a *prima facie* case or *einen hinreichenden Tatverdacht* (sufficient suspicion). This role may be played by a Grand Jury, as in the United States; or by a magistrate at a preliminary hearing, as in many Commonwealth countries; or by a *juge d'instruction* (investigating judge) in France and other countries of the French civil law tradition; or by a Prosecution Review Board, as in Japan. The Statute and Rules of both the ICTY and the ICTR also require a judge to review an indictment and, if satisfied that it discloses a *prima facie* case, confirm it before an arrest warrant for the accused person named therein can be issued⁴¹.

B. Analysis and interpretation of elements

I. Paragraph 1

1. 'Situation'

- 13 Generally, a referral from a State Party should not be limited to specific cases, in the sense of an allegation against a named individual or individuals for having committed a specific crime or crimes. A situation includes a whole set of circumstances, such as a war, a conflict or any other untoward episode, in which one or more of the crimes within the Court's jurisdiction might have been committed⁴². The purpose of the Prosecutor's investigation is to find out what, if any, crimes have been committed in the situation and by whom. The practice of the Court so far tends to suggest that the referring State or the Security Council

⁴⁰ For example, on 31 March 2005 the Security Council, via Resolution 1583 (2005), referred the situation in the Darfur region of the Sudan to the ICC Prosecutor and on 6 June 2005 he announced 'that the statutory requirements for initiating an investigation were satisfied'. See ICC Press Release, *The Prosecutor of the ICC Opens Investigation in Darfur*, ICC-OTP-0606-104, 6 June 2005. Similarly, on 26 February 2011 the Security Council, via Resolution 1970 (2011), unanimously referred 'the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court.' On 3 March 2011, only 5 days after the referral, the Prosecutor announced that after a preliminary examination he had determined that an investigation was 'warranted'. See ICC Press Statement, *ICC Prosecutor to Open an Investigation in Libya*, 2 March 2011. This practice is now part of the ICC Prosecutor's policy on preliminary examinations where the Security Council refers situations to his or her office: ICC Prosecutor, *Policy Paper on Preliminary Examinations*, November 2013, paras. 73, 76, 80, 92, notes 53, 61.

⁴¹ Article 19 ICTY Statute and rule 47 ICTY Rules of Procedure and Evidence; article 18 ICTR Statute and rule 47 ICTR Rules of Procedure and Evidence. Generally see Nsereko, in: Klip and Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals* Vol. IV (2002).

⁴² For other provisions referring to 'situation' see article 13 paras. a and b, article 14 para. 1, and 15, paras. 5 and 6.

have the power to define both the geographical and temporal scope of a 'situation' they refer to the Prosecutor. Thus, in the first referral by the Security Council, the Council limited the situation to the Darfur region of the Sudan⁴³, while its second referral the situation included the whole country of Libya⁴⁴. Regarding temporal limits, the Democratic Republic of the Congo and the Central African Republic fixed the dates of the situations they referred to be 'since 1 July 2002', the date when the Rome Statute came into force, across their entire territory⁴⁵. The Security Council similarly fixed 1 July 2002 as the starting date for the Darfur situation⁴⁶, and 15 February 2011 for the Libyan situation⁴⁷. However, the referral of particular parties in a given situation is viewed more cautiously. Thus, while the Ugandan referral spoke of the 'situation concerning the Lord's Resistance Army'⁴⁸, subsequent ICC documents have referred, additionally, to the territory of 'northern and western Uganda' together with the Prosecutor's conclusion that 'the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA'⁴⁹. Similar misgivings are to be expected when the Security Council specifically excludes persons from the ambit of the situations it refers to the ICC Prosecutor⁵⁰.

2. 'Reasonable basis'

The Prosecutor need not act on the allegations of a State Party (or a State that has accepted the Court's jurisdiction on an *ad hoc* basis) unless he or she is satisfied, after a preliminary examination, that there is 'a reasonable basis' to do so⁵¹. For this reason, therefore, any State that refers a situation to the Prosecutor must also furnish him or her with sufficient credible information to help him or her decide whether there is indeed substance in the allegations to justify him or her going forward with the matter⁵². This is equally true where the Prosecutor acts *proprio motu* on information received from sources mentioned in article 15 of the Statute. He or she must be satisfied that on the strength of such information there is 'a reasonable basis to proceed with an investigation'⁵³. It must be stressed, though, that 'reasonable basis' is not the same as 'reasonable grounds to believe'. The latter is a higher

⁴³ Resolution 1593 (2005), 31 March 2005, para. 1.

⁴⁴ Resolution 1970 (2011), 26 February 2011, para. 4.

⁴⁵ See ICC Press Release, *Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo*, ICC-OTP-20040419-50, 19 April 2004; ICC Press Release, *Prosecutor Receives Referral Concerning Central African Republic*, ICC-OTP-20050107-86, 7 January 2005.

⁴⁶ *Supra* note 43.

⁴⁷ *Supra* note 44.

⁴⁸ See ICC Press Release, *President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC*, ICC-20040129-44, 29 January 2004.

⁴⁹ *Situation in Uganda*, ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 Sep. 2005, paras. 30–31; *Situation in Uganda*, ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti, Pre-Trial Chamber II, 8 Jul. 2005, paras. 30–31; *Situation in Uganda*, ICC-02/04-01/05-55, Warrant of Arrest for Raska Lukwiya, Pre-Trial Chamber II, 8 Jul. 2005, paras. 18–19; *Situation in Uganda*, ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo, Pre-Trial Chamber II, 8 Jul. 2005, paras. 20–21; *Situation in Uganda*, ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen, Pre-Trial Chamber II, 8 Jul. 2005, paras. 18–19.

⁵⁰ See for example, *supra* note 43, para. 6 (where the Security Council purports to exclude 'nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute'); *supra* note 44, para. 6 (where the Security Council purports to exclude 'nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute').

⁵¹ This is also true of referrals by the Security Council. See generally ICC Prosecutor, *Policy Paper on Preliminary Examinations*, November 2013, *supra* note 40.

⁵² With respect to a Security Council referral, all members of the United Nations are also duty bound under the UN Charter, depending on the terms of the referring resolution, to cooperate with the Prosecutor by way of furnishing information and other logistical or material support to enable him or her to execute his or her mandate under the referral. See article 25, UN Charter. In practice, however, the Security Council resolutions that referred the situations in the Darfur region of the Sudan and in Libya have simply 'urge[d]' UN member states to cooperate with the Court: *supra* note 43, para. 2; *supra* note 44, para. 5.

⁵³ See article 15 para. 3, article 53 para. 1.

standard that is used when issuing an arrest warrant or issuing a summons to appear⁵⁴ and is inappropriate at the pre-investigation stage⁵⁵.

3. 'shall notify all States Parties'

- 15 Where the Prosecutor decides that there is a reasonable basis for mounting an investigation, he or she must notify (1) 'all States Parties' and (2) 'those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned'.
- 16 The purpose of the notification would seem to be twofold: (1) to give information to the general assemblage of the States Parties; and (2) to put those States that otherwise have jurisdiction over the crimes involved on notice that the Prosecutor intends to initiate an investigation into the matter. In the second situation, the State concerned is given an opportunity either to assert its superior jurisdiction or to let the Prosecutor go forward with his or her investigation.
- 17 A question arises whether the Prosecutor has an obligation to notify States that are not Party to the Statute. The answer to the question turns on the meaning of the clause 'and those States which [...] would normally exercise jurisdiction over the crimes concerned'. One possible construction of the clause is to limit it to States Parties, 'and [particularly] those States which [...] would normally exercise jurisdiction over the crimes concerned'. Indeed these States are the only ones that are contractually entitled to know of the activities of the Prosecutor and have bound themselves under the complementarity principle to exercise jurisdiction. The other construction is to say that the clause refers to States that are not parties to the Statute⁵⁶. An example of a State that 'would normally exercise jurisdiction over the crimes concerned' is one whose national commits one of the crimes within the Court's jurisdiction or the State on whose territory such a crime is committed. The view that the intention of the drafters was to include States that are not parties appears to be strengthened by the deliberate use of the conjunction 'and'. If, however, this was their intention, then why did they provide in paragraph 5 that '*States Parties* shall respond to such requests without undue delay'? Does this not tend to suggest that their intention was to limit the application of article 18 to States Parties only? In any case, a State that is not a Party to the Statute cannot invoke its provisions to claim treatment similar to that accorded to States Parties. Light can be brought to bear on this ambiguity by reverting to the *travaux préparatoires*. Draft article 16 para. 1 (the precursor to what is now article 18 para. 1) made *explicit* reference to 'non-States Parties' in the Prosecutor's notification requirement.⁵⁷ However, this language was subsequently deleted⁵⁸. Although the records do now show

⁵⁴ See article 58 para. 1(a). This was the position taken by Pre-Trial Chambers II and III: *Situation in Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 Mar. 2010, paras. 27–35; *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, Corrigendum to Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, 15 Nov. 2011, para. 24.

⁵⁵ But see Ventura (2013) 12(1) *The Law and Practice of International Courts and Tribunals* 49–80.

⁵⁶ This appears to be the view taken by the Office of the Prosecutor. See ICC Prosecutor, *Paper on Some Policy Issues before the Office of the Prosecutor*, September 2003, p. 5: '[t]he exercise of the Prosecutor's functions under article 18 of notifying States of future investigations will alert States with jurisdiction to the possibility of taking action themselves. In a case where multiple States have jurisdiction over the crime in question the Prosecutor should consult with those States best able to exercise jurisdiction [...] with a view to ensuring that jurisdiction is taken by the State best able to do so.' See also *Situation in Republic of Kenya*, Case No. ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 Mar. 2010, para. 51.

⁵⁷ See *Bureau Discussion Paper: Part 2 – Jurisdiction, admissibility and applicable law*, UN Doc.A/CONF.183/C.1/L.53 (6 Jul. 1998), article 16 para. 1; *Bureau Proposal: Part 2 – Jurisdiction, admissibility and applicable law*, UN Doc.A/CONF.183/C.1/L.59 (10 Jul. 1998), article 16 para. 1; *supra* notes 17, 18, 24, 25.

⁵⁸ See *Part 2 – Jurisdiction, admissibility and applicable law*, UN Doc.A/CONF.183/C.1/L.76/Add.2 (16 Jul. 1998), article 18 para. 1.

clearly the reason(s) for this removal, it could serve as an indication of the drafters' intention to exclude States that are not Parties to the Statute.

The Prosecutor determines the method of notification to States that are entitled to be so notified⁵⁹. As to what authorities in those States he or she must address the notification is a matter on which both the Statute and the Rules are silent. The Prosecutor will presumably address the notification to the authorities that the States Parties are required to designate for the purpose of receiving requests for cooperation⁶⁰.

According to the Rules, the notification must contain, at the very minimum, information about acts that may constitute crimes under the Statute⁶¹. This is necessary because it is that kind of information that enables the State to respond to the Prosecutor's notification appropriately. To this end, a State that considers the information insufficient is entitled to request the Prosecutor for additional information or for further and better particulars; but it does not affect the one-month time limit referred to in article 18 para. 2. The Prosecutor is obliged to respond to such a request 'on an expedited basis'⁶².

4. 'on a confidential basis'

The Prosecutor may notify the State(s) entitled to be notified of his or her intentions to commence investigations on a confidential basis. He or she may also decide to limit the scope of the information he or she provides to the relevant State(s). The purpose of such limitations is to ensure that the information does not fall into the wrong hands, which, as a result, may hurt innocent individuals, particularly potential witnesses and other information providers, or may destroy valuable evidence, or assist suspects and witnesses to abscond. How much information the Prosecutor is entitled to withhold from States is a matter on which both the Statute and the Rules are silent; it is one that is apparently left to the discretion and good judgment of the Prosecutor. A problem may, however, arise when a State requests the Prosecutor for additional information or for further and better particulars, as noted above, to enable it to decide whether to defer to the Prosecutor or to commence or facilitate its ongoing investigations. Would the Prosecutor be entitled to withhold the additional information or further and better particulars on account of the risks involved in furnishing it? For the sake of avoiding unnecessary conflict, it would be advisable for the Prosecutor and the State concerned to reach some amicable understanding under which the Prosecutor would furnish the State with some additional information on condition that the State keeps it confidential and ensures that it is not used to cause political disadvantages for States possibly involved, to hurt people, or to let others abscond or destroy evidence.

⁵⁹ The practice to date is to communicate the notification by way of a letter. See, for example, *Situation in the Democratic Republic of Congo*, ICC-01/04-19, Decision to Hold Consultation under Rule 114, Pre-Trial Chamber I, 21 Apr. 2005, p. 2; *Situation in Uganda*, ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 Sep. 2005, para. 36; *Situation in Uganda*, ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti, Pre-Trial Chamber II, 8 Jul. 2005, para. 36; *Situation in Uganda*, ICC-02/04-01/05-55, Warrant of Arrest for Raska Lukwiya, Pre-Trial Chamber II, 8 Jul. 2005, para. 24; *Situation in Uganda*, ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo, Pre-Trial Chamber II, 8 Jul. 2005, para. 26; *Situation in Uganda*, ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen, Pre-Trial Chamber II, 8 Jul. 2005, para. 24; *Prosecutor v. Lubanga and Ntaganda*, ICC-01/04-02/06-20-Anx2, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 Feb. 2006, para. 22(iii); *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-14-tENG, Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 Jun. 2008, para. 17.

⁶⁰ See article 87 para. 1(a). Also see rules 176 and 177.

⁶¹ Rule 52 para. 1.

⁶² *Ibid.*, para. 2.

II. Paragraph 2

1. ‘Within one month of receipt’

- 21 States that wish to forestall the Prosecutor’s investigations must respond within one month after receiving the notification. Given the urgency of the matter and the need to move fast before valuable evidence is destroyed or witnesses have disappeared, one month is deemed ample time within which States may respond⁶³. Since the precise time for a State to respond is prescribed, it behoves the Prosecutor to ensure that the notification is served personally on the State officials designated to receive it and that such officials issue receipts for it.

2. ‘a State may inform the Court’

- 22 Any State that receives the Prosecutor’s notification and otherwise has jurisdiction in the matter may respond to the Prosecutor’s notification. In its response, such a State may inform the Court that ‘it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts’ that might amount to crimes under the Statute. What if a State has not investigated the criminal acts alleged prior to receiving the Prosecutor’s notification but, prompted by the notification, now wishes to institute investigations into those acts? Is it precluded from requesting the Prosecutor to defer to its jurisdiction? It is submitted that it is not. The spirit and general tenor of the Statute is to give due deference to State jurisdiction. Thus a State that has not yet started investigations but is otherwise able and willing to do so must be given a chance to do so under article 18 para. 2. It is in this spirit that it may request for and the Prosecutor should furnish it with additional information to enable it to do so.
- 23 Where the Prosecutor decides to assert international jurisdiction upon receiving no responses or information from States that otherwise have jurisdiction, he or she should include the lack of response from States in the application for either authorization to investigate⁶⁴, or the issuance of an arrest warrant or, as the case may be, a summons to appear. That statement serves to inform the Pre-Trial Chamber that the Prosecutor has fulfilled his or her obligation under article 18, para. 1, and that the State concerned has been afforded the opportunity to assert its right to exercise jurisdiction but has declined, failed or neglected to do so⁶⁵.

⁶³ The Rules, *ibid.*, explicitly provide that any request by a State for additional information ‘shall not affect the one-month time limit provided for in article 18, paragraph 2’.

⁶⁴ But see the comments of Pre-Trial Chamber II which could be read as suggesting that article 18 only applies upon the granting of authorization to the Prosecutor to investigate: ‘defining the scope of the potential case(s) at this stage may well serve an effective application of article 18 of the Statute, which is immediately applicable when a Pre-Trial Chamber authorises the commencement of an investigation [pursuant to the exercise of the Prosecutor’s *proprio motu* power].’ *Situation in Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 Mar. 2010, para. 51 (emphasis added). The Prosecutor appears to have gone further and submitted that ‘such notification can only occur after an affirmative determination of the Chamber on the Prosecutor’s application [to commence a *proprio motu* investigation].’ *Situation in the Republic of Kenya*, ICC-01/09-3, Request for Authorisation of an Investigation Pursuant to Article 15, Office of the Prosecutor, 26 Nov. 2009, para. 113 (emphasis added); *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-3, Request for Authorisation of an Investigation Pursuant to Article 15, Office of the Prosecutor, 23 Jun. 2011, para. 180 (emphasis added).

⁶⁵ See *Situation in the Democratic Republic of Congo*, ICC-01/04-19, Decision to Hold Consultation under Rule 114, Pre-Trial Chamber I, 21 Apr. 2005, pp. 2–3; *Situation in Uganda*, ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 Sep. 2005, para. 36; *Situation in Uganda*, ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti, Pre-Trial Chamber II, 8 Jul. 2005, para. 36; *Situation in Uganda*, ICC-02/04-01/05-55, Warrant of Arrest for Raska Lukwiya, Pre-Trial Chamber II, 8 Jul. 2005, para. 24; *Situation in Uganda*, Case No. ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo, Pre-Trial Chamber II, 8 Jul. 2005, para. 26; *Situation in Uganda*, ICC-02/04-01/05-57, Warrant

3. ‘the Prosecutor shall defer to the State’s investigation’

Along with the information that it is investigating or has investigated the possible crimes disclosed by the Prosecutor’s notification, a State may ‘request’ the Prosecutor to defer to its investigation. Such a State must, however, make the request in good faith and for genuine reasons, not merely for the purpose of stymieing the Prosecutor’s efforts or frustrating the ends of international justice. To ensure that the State is acting genuinely and in good faith, the Rules require that any State that requests the Prosecutor for deferral must do so in writing and must at the same time furnish the Prosecutor with information concerning its investigation⁶⁶. If the Prosecutor considers such information to be inadequate, he or she may ask that State for additional information⁶⁷. When the State complies, the Prosecutor must defer to the State’s investigation without any more ado, unless the Pre-Trial Chamber orders otherwise. In as much as the Prosecutor has no choice in the matter but to defer, the ‘request’ is really not a request. It is a demand or an assertion by the State of its right to primacy. This demand is predicated on the presumption that the State’s assertion and exercise of its jurisdiction is regular, fair and otherwise effective, until the contrary is proven. Where the State concerned does not respond at all to the Prosecutor’s notification or, if it does, it does not ‘request’ the Prosecutor to defer to its investigations, then the Prosecutor may go ahead with his or her investigations. In such a case it is conceivable that both the State and the Prosecutor may be simultaneously investigating the same matter. However, if the Prosecutor proceeds to file a case before the Court whilst the State’s investigations or proceedings are still pending, such a case may be ruled inadmissible by the Court under article 17 of the Statute, unless it is shown that it falls under one of the exceptions of that article.

4. ‘unless the Pre-Trial Chamber [...] decides to authorize the investigation’

The Pre-Trial Chamber, rather than the Trial Chamber, deals with the pre-trial phase of the cases before the Court⁶⁸. This arrangement helps to preserve the Trial Chamber’s independence and impartiality. The Pre-Trial Chamber was the price that the advocates of an effective and independent Prosecutor had to pay. The Chamber serves to counterbalance the Prosecutor’s *proprio motu* powers and to ensure accountability in the exercise of those powers.

Notwithstanding a State’s assertion of its right to primacy, the Chamber may, in the interests of international justice and on an application by the Prosecutor, override that right and authorize the Prosecutor to carry on with the investigations. Where the Prosecutor makes such an application⁶⁹, he or she must do so in writing and must set out ‘the basis for the application’. The Prosecutor must also furnish the Pre-Trial Chamber with the information concerning the investigations of the relevant State, which that State has provided to him or her when it requested the deferral⁷⁰. This information apprises the Chamber of the nature

of Arrest for Dominic Ongwen, Pre-Trial Chamber II, 8 Jul. 2005, para. 24; *Prosecutor v. Lubanga and Ntaganda*, ICC-01/04-02/06-20-Anx 2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 Feb. 2006, para. 22(iii)-(iv); *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-14-tENG, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 Jun. 2008, para. 17. With regard to the Kenya Situation, the Kenyan Government did not inform the Prosecutor of any ongoing investigations and did not request the Prosecutor to defer to it, but instead indicated to him that he may apply for authorization to open an investigation. The Prosecutor applied for and obtained the Pre-Trial Chamber’s authorization to investigate. However, the Kenyan Government subsequently challenged the Court’s jurisdiction under article 19, para. 2(b). See *Prosecutor v. Ruto, et al.*, ICC-01/09-01/11-19 and ICC-01/09-02/11-26, Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, Government of Kenya, 31 Mar. 2011, para. 3.

⁶⁶ Rule 53.

⁶⁷ *Ibid.*

⁶⁸ See also articles 15, 39 and 57.

⁶⁹ Regulation 38 para. 1(b) limits such an application (and responses thereto) to no more than 100 pages.

⁷⁰ Rule 54 para. 1.

and extent of the State's investigations. Lastly, the Prosecutor must notify the relevant State of the application and provide it with a summary of the basis of such an application⁷¹. This notification enables the State to respond to or to oppose the application, if it so wishes.

- 27 In accord with the principle that he who asserts must prove, the Prosecutor bears the evidentiary and legal burden to prove by a preponderance of evidence that valid grounds exist to justify the Pre-Trial Chamber granting him or her the authority to carry out the investigations. It is suggested that that evidence must be cogent. This suggestion is predicated on complementarity, a fundamental principle of the ICC regime, which gives primacy to State jurisdiction. That primacy should not be overridden save on cogent or substantial grounds.
- 28 The issues of the admissibility of specific cases before the Court under article 17 are, to some extent, similar to those that confront the Pre-Trial Chamber on an application by the Prosecutor under article 18 para. 2 for authority to investigate. They both involve overriding a State's jurisdiction in favour of international jurisdiction. For that reason the Rules specifically require the Pre-Trial Chamber to consider, to the extent possible, 'the factors in article 17 in deciding whether to authorize an investigation'⁷². These factors include the State's unwillingness or inability genuinely to investigate. The Prosecutor may also rely on these factors, particularly as they are amplified under article 17 paras. 2–3, in his or her application before the Pre-Trial Chamber. In addition, pending the Pre-Trial Chamber's decision, the relevant State may postpone the execution of requests under Part IX (International cooperation and judicial assistance) as per article 95. However, the Appeals Chamber has held that article 95 has no application in article 19 appellate proceedings. Therefore, to be able to postpone such matters, a State must seek and obtain from the Appeals Chamber suspensive effect of the impugned decision⁷³. It would be odd if this were not likewise in the context of article 18.
- 29 The Rules leave it to the Pre-Trial Chamber to adopt the most appropriate procedures to follow in disposing of the Prosecutor's application⁷⁴. They also vest in the Chamber the discretion to hold or not to hold a hearing. Whatever procedure the Chamber adopts, it must afford the State that requested the deferral an opportunity to be heard before it makes any final decision on the Prosecutor's application⁷⁵. Additionally, it must communicate the decision and its reasoning to the Prosecutor and to the State concerned as soon as possible⁷⁶.

III. Paragraph 3: 'State's investigation shall be open to review'

- 30 The Prosecutor may review his or her deferral to a State's investigation at the lapse of six months since the deferral or 'at any time when there has been a significant change of circumstances'. The changed circumstances must relate to or be 'based on the State's unwillingness or inability genuinely to carry out the investigation'. A State's unwillingness or inability genuinely to carry out the investigation, when properly proven, entitles the Prosecutor to assert international jurisdiction and, with authorization from the Pre-Trial Chamber, to investigate the matter. That a State has a prior right to investigate is no license

⁷¹ Rule 54 para. 2.

⁷² Rule 55 para. 2. See *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 Aug. 2011, para. 37; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 Aug. 2011, para. 38.

⁷³ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-387, Decision on the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, para. 27.

⁷⁴ Rule 55 para. 1.

⁷⁵ Rule 55 para. 2.

⁷⁶ Rule 55 para. 3.

for it to sit back and do nothing or to carry out the investigations in such a tardy and inefficient manner so as to appear to be calculated to shield the perpetrators of international crimes from justice. In order to completely oust international jurisdiction and to stop the Prosecutor’s involvement, a State’s exercise of its national jurisdiction must be and must appear to be genuine and effective.

Where the Prosecutor alleges a change of circumstances, he or she may apply in writing to the Pre-Trial Chamber for authorization to investigate⁷⁷. As before, the Prosecutor must accompany the application with the ‘basis for the application’⁷⁸ together with any information provided by the relevant State pursuant to article 18 para. 5⁷⁹. He or she must also notify the State concerned of the application⁸⁰. The Prosecutor must prove upon a preponderance of evidence that the alleged change of circumstances does indeed exist. The Pre-Trial Chamber conducts the proceedings in the same way as has been outlined in para. 18 above⁸¹. Importantly, the Chamber must afford the State concerned an opportunity to be heard or to oppose the Prosecutor’s application for authorization to investigate a matter which is already supposedly under investigation at the national level⁸².

IV. Paragraph 4

1. Appeal against the decision of the Pre-Trial Chamber

The Prosecutor or a State aggrieved by a decision of the Pre-Trial Chamber may appeal against that decision to the Appeals Chamber in accordance with article 82 of the Statute. Reference to article 82 underscores the parties’ right to appeal, among other things, against a decision of either the Pre-Trial or Trial Chamber ‘with respect to jurisdiction or admissibility’ (article 82 para. 1(a)). According to the Rules, a party wishing to appeal against the decision of the Pre-Trial Chamber must file the appeal ‘not later than five days from the date upon which such party is notified of the decision’⁸³.

2. ‘on an expedited basis’

The procedures before the Pre-Trial Chamber and any resulting appeals, though necessary, delay the Prosecutor’s investigative initiatives. To avoid such delays, article 18 para. 4 provides that the appeal against the Pre-Trial Chamber’s decision ‘may be heard on an expedited basis’. Although neither the Statute nor the Rules spell out the full import of such expedited procedures, it must perforce involve skipping some procedural steps and giving priority to the appeal over other work before the Appeals Chamber. It is doubtless within the rights of the party appealing to ask the Appeals Chamber to hear the appeal on an expedited basis. Such party bears the burden to show the need for adopting this procedure. The Chamber, for its part, has the discretion to grant or to turn down the request. Where the interests of justice so demand, the Appeals Chamber may also order, on its own motion, that the appeal be heard on an expedited basis pursuant to the inherent power of any Chamber to regulate the proceedings of which it is seized. However, before making such an order, the Chamber must give both parties an opportunity to be heard on the matter.

3. Effect of the decision pending appeal

According to article 82 para. 3 of the Statute, ‘[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of

⁷⁷ Rule 56 para. 1.

⁷⁸ *Ibid.*

⁷⁹ Rule 56 para. 2.

⁸⁰ Rule 56 para. 3.

⁸¹ *Ibid.*

⁸² Rule 56 and 54.

⁸³ Rule 154 para. 1.

Procedure and Evidence'. Rule 156 sub-rule 5 provides that, '[w]hen filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.' The import of these provisions is that where the Pre-Trial Chamber has authorized the Prosecutor to commence an investigation, the Prosecutor is entitled to proceed forthwith and to receive full co-operation from the State concerned, unless the Appeals Chamber orders otherwise. However, to avoid the friction between the Prosecutor and the State concerned that this course of action is likely to engender, it might be prudent, depending on the particular circumstances of a case, for the Appeals Chamber, if the State so requests, to suspend the operation of the Pre-Trial Chamber's decision pending the finalization of the appeal. However, as the Appeals Chamber has pointed out, 'neither article 82(3) of the Statute nor rule 156(5) of the Rules of Procedure and Evidence stipulate in which circumstances suspensive effect should be ordered'. Consequently, 'this decision is left to the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion'⁸⁴. Nevertheless, the Court has considered various factors in determining whether to grant suspensive effect. These include whether the impugned decision '(i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the appeal'⁸⁵. Needless to say, the onus lies on the appealing party to satisfy the Appeals Chamber upon a preponderance of evidence that there are indeed compelling reasons to warrant the exercise of its discretion to suspend the Pre-Trial Chamber's decision pending the outcome of the appeal.

V. Paragraph 5: 'periodically inform the Prosecutor'

- 35 Where the Prosecutor defers to a State's investigations, he or she may request that State to keep the Prosecutor periodically apprised of the progress of the investigations. According to the provision, 'States Parties shall respond to such requests without undue delay'. This is as it should be, because when a State undertakes to investigate and to prosecute international crimes, it does so on behalf of the entire international community⁸⁶. So, it is only proper that such a State be required to account for the way it executes its mandate to the Prosecutor who would otherwise be responsible for investigating and prosecuting those crimes on behalf of the international community. Failure on the part of that State to respond on time, or at all,

⁸⁴ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-1290, Decision on the Request of Mr. Thomas Lubanga Dyilo for Suspensive Effect of his Appeal Against the Oral Decision of Trial Chamber I of 18 January 2008, Appeals Chamber, 22 Apr. 2008, para. 7. See also *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-1347, Decision on the Requests of the Prosecutor and the Defence for Suspensive Effect of the Appeals Against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, Appeals Chamber, 22 May 2008, para. 10; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-1444, Reasons for the Decision on the Request of the Prosecutor for Suspensive Effect of his Appeal Against the 'Decision on the Release of Thomas Lubanga Dyilo', Appeals Chamber, 22 Jul. 2008, para. 8.

⁸⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08-817, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges', Appeals Chamber, 9 Jul. 2010, para. 11. See also *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-391, Decision on the Requests of Mr Ruto and Mr Sang for Suspensive Effect, Appeals Chamber, 29 Feb. 2012, paras. 9–10; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-401, Decision on the Request of Mr Kenyatta and Mr Muthaura for Suspensive Effect, Appeals Chamber, 29 Feb. 2012, paras. 9–10; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2953, Decision on the Admissibility of the Appeals Against Trial Chamber I's 'Decision Establishing the Principles and Procedures to be Applied to Reparations and Directions on the Further Conduct of Proceedings', Appeals Chamber, 14 Dec. 2012, para. 82; *Prosecutor v. Katanga*, ICC-01/04-01/07-3344, Decision on the Request for Suspensive Effect of the Appeal Against Trial Chamber II's Decision on the Implementation of Regulation 55 of the Regulations of the Court, Appeals Chamber, 16 Jan. 2013, para. 6.

⁸⁶ See, for example, *The Attorney General of Israel v. Eichmann*, 36 ILR 277, at 304; and *Demjanjuk v. Petrovsky*, 776 F. 2 d 582 (1985), U.S. Court of Appeals, 6th Circuit; Mohacsi and Polt (1996) 67 *IRRevPenall* 334; Triffterer, 2nd edition, *Preliminary Remarks*, mn 15 *et seq.* and 50.

would be grounds for the Prosecutor to review the deferral and to seek the Pre-Trial Chamber’s authorization to commence investigations.

VI. Paragraph 6: ‘preserving evidence’

The phrase ‘to pursue necessary investigative steps’ means no more than to investigate. 36
The powers given to the Pre-Trial Chamber to authorize the Prosecutor to investigate under this paragraph are ‘exceptional’ or unusual because the Prosecutor’s application for authority to investigate would still be pending, or the Prosecutor would have already deferred to the State’s investigations (as per article 18 para. 2). So, authority will not ordinarily be granted, unless the Prosecutor shows, with cogent evidence, an urgent need for it⁸⁷. The purpose of authorizing these ‘investigative steps’ is to preserve evidence that is in danger of getting lost, or to take advantage of ‘a unique opportunity to obtain important evidence’ that may otherwise not be available afterwards. This provision is mirrored somewhat in article 19 para. 8, with the important exception that it does not include the ‘exceptional basis’ language of paragraph 6. This suggests that under paragraph 6 it may be more onerous for the Prosecutor to obtain authorization than it would be under article 19 para. 8. An example of an exceptional situation that would justify the Pre-Trial Chamber authorizing the Prosecutor to take steps under this paragraph would include a war that paralyses the national authorities’ investigations, uproots or displaces potential witnesses, or results in fatalities or in evidence being destroyed. It is to be noted that investigative steps authorized by the Pre-Trial Chamber pursuant to article 18 para. 6 override any postponement by a State to carry out or execute requests for cooperation under Part IX as per article 95.

VII. Paragraph 7

1. ‘A State which has challenged a ruling’

A State that unsuccessfully challenged an article 18 ruling of the Pre-Trial Chamber before 37
the Appeals Chamber is given another bite at the cherry to challenge the admissibility of a case under article 19 of the Statute. The challenge must be referred to the same Pre-Trial Chamber if the challenge is mounted before the confirmation of the charges. If the challenge is mounted after confirmation, it must be referred to the Trial Chamber⁸⁸. The Pre-Trial Chamber or, as the case may be, the Trial Chamber determines the admissibility of the case in accordance with article 17.

2. ‘may challenge the admissibility of a case’

The admissibility challenge will be directed at a *case* founded on the outcome of the 38
Prosecutor’s investigations. As noted earlier, a case, as opposed to a situation, is a specific allegation against a specific individual or individuals accusing him, her or them of committing specific crimes. A case’s contours are defined by the information contained in the warrant of arrest or, as the case may be, a summons to appear issued by the Pre-Trial Chamber⁸⁹.

⁸⁷ Regulation 38 para. 2(c) limits an application by the Prosecutor (and responses thereto) pursuant to article 18 para. 6 to no more than 50 pages.

⁸⁸ See article 19 para. 6.

⁸⁹ See *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Appeals Chamber, 30 Aug. 2011, para. 39; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Appeals Chamber, 30 Aug. 2011, para. 40.

3. 'additional significant facts or significant change of circumstances'

- 39 The grounds for the challenge must be 'additional significant facts' or 'significant change of circumstances'. The State concerned must show that, because of these facts or change of circumstances, it is now investigating or prosecuting or has investigated or prosecuted the case in question. Possible facts or change in circumstances may include the end of a war, the coming to power of a new government that is better disposed to exercise national jurisdiction fairly and effectively, and genuine national peace and reconciliation arrangements under which the defendants might have been granted amnesty or pardon.

Article 19

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
- (c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

- (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
- (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
- (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the

State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Directly relevant rules: Rules 58–62; 122 sub-rule 2; 133; 154 sub-rule 1; 156.

Literature: Bergsmo, M. (ed.), *Complementarity And The Exercise Of Universal Jurisdiction For Core International Crimes* (2010); Cameron, I., 'Jurisdiction and Admissibility Issues Under the ICC Statute', in: D. McGoldrick (ed.), *The Permanent International Criminal Court* (2004) 65; El Zeidy, M.M., 'The Principle of Complementarity: A New Machinery to Implement International Law', (2002) 23 MichJIL 869; id., *The Principle Of Complementarity In International Criminal Law* (2008); Ellis, M.S., *Sovereignty and Justice: Balancing the Principle of Complementarity Between International and Domestic War Crimes Tribunals* (2014); Fernández de Gurmendi, S.A. and Friman, H., 'The Rules of Procedure and Evidence of the International Criminal Court', (2000) 3 YblHumL 289; Fourmy, O., 'Powers of the Pre-Trial Chambers', in: A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, ii (2002) 1207; Holmes, J.T., 'Complementarity: National Courts versus the ICC', in: A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 667; id., 'Jurisdiction and Admissibility', in: R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 321; id., 'The Principle of Complementarity', in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations – Results* (1999) 41; *Informal expert paper: The principle of complementarity in practice*, ICC-OTP 2003: International Criminal Court, ICC Legal Tools, ICC Preparatory Works and Statute Amendments, National Implementing Legislation, Publications (<http://www.legal-tools.org>) (available 2014); Kleffner, J.K., *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007); id. and Kor, G., *Complementary Views On Complementarity* (2006); Nsereko, D. 'The ICC and Complementarity in Practice', (2013) 26 LeidenJIL 247; Olásolo, H., *The Triggering Procedure of the International Criminal Court* (2005); Schabas, W.A., 'Article 19: Challenges to the Jurisdiction of the Court or the Admissibility of a Case/Contestation de la compétence de la Cour ou de la recevabilité d'une affaire', in: id. (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (2010) 361; Stigen, J., *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008); id., 'The Admissibility Procedures', in: C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, i (2011) 503; Trigeaud, L., 'Article 19: Contestation de la compétence de la Cour ou de la recevabilité d'une affaire', in: F. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article*, i (2012) 735.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	2
I. Paragraph 1: The Court's satisfaction of jurisdiction and <i>proprio motu</i> admissibility determination of a case	2
II. Paragraph 2: Challenges	13
1. Admissibility	14
2. Jurisdiction	17
3. Right to challenge	20
a) Accused or persons sought	21
b) Investigating or prosecuting States	26
c) Article 12 States	28
d) Certain aspects of the procedure for considering challenges	30
III. Paragraph 3: Right to seek rulings and to submit observations	34
IV. Paragraph 4: Limits on the number of challenges	39
V. Paragraph 5: Prompt challenges by States	45
VI. Paragraph 6: Allocation of responsibility and appeals	48
VII. Paragraph 7: Suspension of investigation	54
VIII. Paragraph 8: Permitted steps	56
1. Necessity	59
2. Taking statements and completing prior steps	60
3. Preventing the absconding of persons	62
IX. Paragraph 9: Acts of the Prosecutor or warrants not affected	64
X. Paragraph 10: New facts for review	65
XI. Paragraph 11: Information after a deferral	69

A. Introduction/General remarks

The 1994 International Law Commission's Draft Statute of the International Criminal Court (ILC Draft Statute) included a provision (article 34) permitting challenges to the Court's jurisdiction, in accordance with the rules, 'to ensure that the Court adheres carefully to the scope of jurisdiction defined by the Statute'¹. Challenges to jurisdiction could be made 'prior to or at the commencement of the hearing, by an accused or any interested State' and, 'at any later stage of the trial, by an accused'². In addition, article 24 stated that '[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it'³. Independently of these two provisions, article 35 of the ILC Draft Statute also provided that the Court might, 'on application by the accused or at the request of an interested State, at any time prior to the commencement of the trial, or on its own motion, decide, having regard to the purposes of this Statute, that a case before it is inadmissible' on grounds which are now found, in a more detailed and modified form, in article 17 of the *Rome Statute*⁴. The ILC Draft Statute provided that the accused and an interested State had the right to be heard and that the challenges would be decided by the Trial Chamber, or the Appeals Chamber, if the Trial Chamber considered that because of the importance of the issues they should be referred to that Chamber⁵. This scheme, although modified in a number of important respects, in particular, by the addition of the separate article 18 procedure (based on a US proposal) for challenging admissibility at an earlier stage than the article 19 procedure, has largely been retained in the *Rome Statute*⁶. One particular problem that has been carried over from the

¹ 1994 ILC Draft Statute, Commentary to article 34.

² 1994 ILC Draft Statute, article 34.

³ 1994 ILC Draft Statute, article 24.

⁴ 1994 ILC Draft Statute, article 35. The ILC explained:

'Article 35 allows the court to decide, having regard to certain specified factors, whether a particular complaint is admissible and in this sense it goes to the exercise, as distinct from the existence, of jurisdiction. This provision responds to suggestions made by a number of States, in order to ensure that the court only deals with cases in the circumstances outlined in the preamble, that is to say where it is really desirable to do so'; 1994 ILC Draft Statute, Commentary to article 35.

⁵ 1994 ILC Draft Statute, article 36.

⁶ The structure and purpose of the two articles are similar, but, as explained below in more detail, there are a number of significant differences. For example, article 18 applies only to admissibility challenges by any States (as per article 18 para. 2); article 19 applies to admissibility and jurisdictional challenges by States and by the accused (as per article 19 para. 2(a)-(c)). Article 18 para. 2 requires the Prosecutor, after a State admissibility challenge, to defer to a State investigation; article 19 para. 7 requires the Prosecutor to suspend the investigation after a State admissibility challenge, but not after a State jurisdictional challenge or a challenge on either ground by an individual. Article 18 applies when a State has referred a situation or the Prosecutor is acting *proprio motu* (as per article 18 para. 2); article 19 applies also to referrals by the Security Council under article 13 para. (b). Article 18 para. 2 permits the relevant Chamber to authorize the investigation to continue after a State admissibility challenge pending a determination; article 19 does not contain this option. Article 18 para. 4 expressly authorizes expedited interlocutory appeals; article 19 does not. Article 18 para. 5 requires States Parties to respond without delay to Prosecutor requests for information about deferred investigations and prosecutions; article 19 para. 11 does not. Article 18 para. 6 permits the relevant Chamber to authorize certain investigative steps during a deferral of an investigation only on an exceptional basis; article 19 para. 8(a)-(c) permits the relevant Chamber to authorize a broader range of investigative steps and without requiring an exceptional basis. Article 18 para. 2 requires a State making an admissibility challenge to do so within a month after it receives notification from the Prosecutor that he or she has determined there would be a reasonable basis to commence an investigation following a State referral or acting *proprio motu*; article 19 para. 5 simply requires that a State entitled to make a challenge shall do so at the earliest opportunity, but without mentioning a time limit or consequences for failing to do so. The practice of the Prosecutor in all the situations referred by States, the Security Council and when acting *proprio motu*, has been to commence investigations before identifying specific cases to prosecute. Since States will generally not know, when the Prosecutor notifies them concerning an investigation, which case(s) he or she intends to prosecute, it will only be able to mount an article 18 challenge effectively by listing every single investigation or prosecution it is conducting or has conducted. It is thus possible that article 18 challenges will be limited in comparison to those under article 19. Indeed, as of 31 May 2015, not a single State has made an article 18 challenge with regard to any of the situations that have been referred to the Court by States Parties or initiated

ILC Draft Statute (and occurs in other articles), is that ‘Court’, which is defined in article 34 as having six organs, is sometimes used in the *Rome Statute* to mean simply the Pre-Trial Chamber or the Trial Chamber, and sometimes it appears to include the Office of the Prosecutor and other organs as well⁷. In article 19, the term ‘Court’ is used in both its broader and narrower senses, as indicated below⁸.

B. Analysis and interpretation of elements

I. Paragraph 1: The Court’s satisfaction of jurisdiction and *proprio motu* admissibility determination of a case

- 2 In contrast to the Nuremberg Charter, which the International Military Tribunal found precluded it from considering challenges to its jurisdiction⁹, the *Rome Statute* requires the Court to determine whether it has jurisdiction in any case before it. This provision accords with the generally accepted principle of the administration of justice, according to which international courts have the power to ascertain their jurisdiction in a particular matter before them. As stated by the Appeals Chamber of the ICTY in *Tadić*, the power of a court to determine whether it has competence:

‘is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its “jurisdiction to determine its own jurisdiction”. It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals’¹⁰.

- 3 The Court has explicitly recognized that it too possesses this inherent power. For example, a Pre-Trial Chamber held that:

‘[i]t is a well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence. Such a power and duty, commonly referred to as “*Kompetenz-Kompetenz*” in German and “*la compétence de la compétence*” in French, [...] is enshrined in article 19, paragraph 1, of the Statute, pursuant to which “the Court shall satisfy itself that it has jurisdiction in any case brought before it” [...].’¹¹

by the Prosecutor *proprio motu*, although with respect to the latter there are signs that Kenya considered this option: *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-19 and ICC-01/09-02/11-26, Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, Government of Kenya, 31 Mar. 2011, para. 3.

⁷ This particular matter caused complications in the *Kenyatta* case where it became a contested issue as to whether the Prosecutor or a Chamber could issue requests for cooperation to States Parties under article 93 para. 1 (which refers only to ‘the Court’). See *Prosecutor v. Kenyatta*, ICC-01/09-02/11-908, Decision on Prosecution’s Applications for a Finding of Non-Compliance Pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date, Trial Chamber V(b), 31 Mar. 2014, paras. 16–33.

⁸ When ‘Court’ means the Pre-Trial Chamber for the purposes of article 19: ‘Orders or rulings of the Pre-Trial Chamber issued under article[] [...] 19 [...] must be concurred in by a majority of its judges’. *Rome Statute*, article 57 para. 2(a).

⁹ Trials of German Major War Criminals (with the dissenting opinion of the Soviet Member), Nuremberg, 30 Sep. and 1 Oct. 1946, 38 (London: H.M.S.O., Cmd. 6964).

¹⁰ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995, para. 18. The Appeals Chamber of the Special Tribunal for Lebanon has further held ‘that a customary rule has evolved on the inherent jurisdiction of international courts, a rule which among other things confers on each one of them the power to determine its own jurisdiction (so-called *compétence de la compétence* or *Kompetenz-Kompetenz*).’ *In re El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, Appeals Chamber, 10 Nov. 2010, para. 43.

¹¹ *Situation in Uganda*, ICC-02/04-01/05-147, Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, Pre-Trial Chamber II, 9 Mar. 2006, paras. 22–23.

This view has been echoed in other decisions¹². Therefore, the requirement in this paragraph that the Court satisfy itself in any case before it that it has jurisdiction was not strictly necessary¹³.

The statutory duty of the Court to satisfy itself that it has jurisdiction (*ratione personae*, *loci, materiae* and *temporis*) is limited to ‘any case’ which is ‘brought before it’, which is narrower than ‘a situation’ within the meaning of articles 13, 14 and 18. The concept of a ‘case’ implies that an individual or individuals had been targeted during an investigation of a ‘situation’. This is reinforced by the requirement that a ‘case’ once identified by the Prosecutor must then be ‘brought before’ the Court (either before the Pre-Trial or Trial Chamber), which further implies that formal proceedings beyond the initiation of an investigation of a situation and the questioning of a suspect under article 55 (in those instances where it was possible to do so before an arrest warrant or summons was sought). Indeed, this is confirmed by the basic understanding of the difference between a ‘case’ and a ‘situation’ as articulated by a Pre-Trial Chamber in the following – now often repeated – holding:

[T]he Statute, the Rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceedings, initiated by any organ of the Court, that they entail. Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, [...] entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear¹⁴.

¹² See *Prosecutor v. Kony et al.*, ICC-02/04-01/05-377, Decision on Admissibility of the Case under Article 19(1) of the Statute, Pre-Trial Chamber II, 10. Mar. 2009, para. 45; *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 Jun. 2009, para. 23; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-01, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, 8 Mar. 2011, para. 8; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-01, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, 8 Mar. 2011, para. 8.

¹³ This provision had its origin in article 24 of the ILC Draft Statute, which stated that ‘[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it’. The ILC commentary on this provision explained: ‘This article is intended to spell out the duty of the court (and of each of its organs, as appropriate) to satisfy itself that it has jurisdiction in a given case. Detailed provisions relating to challenges to jurisdiction are contained in article 34. But even in the absence of a challenge there is an *ex officio* responsibility on the court in matters of jurisdiction’.

1994 ILC Draft Statute, Commentary to article 24.

The formulation in article 24 of the ILC Draft Statute was retained unchanged throughout the drafting process until the 1998 Zutphen Draft. See 1996 Preparatory Committee II p. 159 (the first sentence of the French proposal under then article 36 on verification of jurisdiction in the Preparatory Committee’s 1996 compilation of proposals); Preparatory Committee Decisions Aug. 1997, p. 318 (Article 24).

In the Zutphen Draft, adopted in Jan. 1998, this provision, then numbered article 0 [24] para. 1, was marked for deletion as unnecessary ‘in view of a similar text in paragraph 1 of article 12 [36]’. Zutphen Draft p. 165. The text of article 12 [36] modified the wording slightly to read: ‘At all stages of the proceedings, the Court (a) shall satisfy itself as to its jurisdiction over a case pursuant to article 24’. (The final phrase was deleted because this draft article was to be deleted.). *Ibid.*, p. 167. In the New York Draft, which was the final text sent to the Rome Conference, these provisions of the Zutphen Draft were left unchanged. Preparatory Committee (Consolidated) Draft, articles 14 and 17.

¹⁴ *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-t-ENG-Corr, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 Jan. 2006, para. 65 (leave to appeal this decision was denied and the Appeals Chamber subsequently denied an appeal on procedural grounds: *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, 13 Jul. 2006). See also *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 Feb. 2006, para. 21; *Situation in the Democratic Republic of the Congo*, ICC-01/04-93, Decision Following the Consultation held on 11 October 2005 and the Prosecution’s Submission on Jurisdiction and Admissibility Filed on 31 October 2005, Pre-Trial Chamber I, 9 Nov. 2005, p. 4: ‘at this stage of the proceedings

As a corollary, ‘an initial determination on whether the case against [the accused] fall[s] within the jurisdiction of the Court [...] is a prerequisite for the issuance of a warrant of arrest’ or a summons to appear¹⁵. It is similarly a prerequisite for the confirmation of charges in a given case¹⁶. However, the Court would not have a duty under article 19 para. 1 to make a determination on its own motion that it had jurisdiction over an investigation into a situation (as opposed to a case) being conducted by the Prosecutor¹⁷. This is particularly important, as part of the investigation of the situation by the Prosecutor will be to determine whether the Court does have jurisdiction (see article 53 para. 1(a)). Of course, if it were clear that the Prosecutor was acting wholly outside of the Court’s jurisdiction (such as investigating a situation which arose and ended before the *Statute* entered into force) the Pre-Trial Chamber could exercise the Court’s inherent power to determine its own jurisdiction as articulated above – since article 19 para. 1 would not apply.

no warrant of arrest or summons to appear has been issued and thus no case has arisen’; *Situation in Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 Mar. 2010, para. 41: ‘the Statute is drafted in a manner which tends to solve questions of admissibility at different stages of the proceedings [...]. These stages begin with a ‘situation’ and end with a concrete ‘case’, where one or more suspects have been identified for the purposes of prosecution’.

¹⁵ *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 Feb. 2006, para. 18. It must be emphasized that this decision also determined that an *admissibility* determination was similarly a prerequisite for the issuance of an arrest warrant or a summons to appear. On that point, this decision is no longer good law as it has been overruled by the Appeals Chamber (see *Situation in the Democratic Republic of the Congo*, ICC-01/05-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, Appeals Chamber, 13 Jul. 2006, paras. 42–45). Nevertheless, the view that a *jurisdiction* determination is a prerequisite continues to be good law, having been repeated in a number of article 58 decisions: *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1-Red-tENG, Decision on the Prosecution Application for a Warrant of Arrest, Pre-Trial Chamber I, 6 Mar. 2007, para. 23; *Prosecutor v. Harun and Abd-Al-Rahman (Kushayb)*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 Apr. 2007, para. 13; *Prosecutor v. Bemba*, ICC-01/05-01/08-14-tENG, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 Jun. 2008, para. 11; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-01, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, 8 Mar. 2011, para. 9; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-01, Decision on the Prosecutor’s Application for Summonses to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, 8 Mar. 2011, para. 9; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-36-Red, Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber II, 13 Jul. 2012, para. 7; *Prosecutor v. Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber II, 13 Jul. 2012, para. 9.

¹⁶ See *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 67(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 Jun. 2009, para. 24; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 Jan. 2012, para. 25; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 Jan. 2012, para. 23.

¹⁷ Prior editions of this commentary to article 19 alluded to a debate as to whether a situation or a case is before the Court when the Pre-Trial Chamber authorizes the Prosecutor to commence a *proprio motu* investigation pursuant to article 15 paras. 3–4 (which uses the word ‘case’). This has since been resolved, with Pre-Trial Chamber II holding that the use of ‘case’ in that context, in light of its prior analysis of the same word appearing in article 53 para. 1(b), ‘shall be understood as relating to potential cases within the *situation* at stake’. Thus, the Chamber proceeded to ‘authorize[] the commencement of an investigation into the *situation* in the Republic of Kenya in relation to crimes against humanity [...] committed between 1 June 2005 and 26 November 2009’ (emphasis added). See *Situation in Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 Mar. 2010, para. 64, Disposition. See also *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-14-Corr, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, Pre-Trial Chamber III, 15 Nov. 2011, para. 18. In other words, since the Chamber only authorizes the Prosecutor to investigate a *situation proprio motu*, Article 19 remains inapplicable.

When the Court is making a determination as to whether it has jurisdiction over the case with which it is seized: 5

‘it must meet the following three conditions: (i) the crime must be one of the crimes set out in article 5 of the Statute (jurisdiction *ratione materiae*); (ii) the crimes must have been committed within the timeframe specified in article 11 of the Statute (jurisdiction *ratione temporis*); an (iii) the crime must satisfy one of the other two criteria laid down in article 12 of the Statute, namely, it must either have been committed on the territory of a State Party or by a national of that State, or have been committed on the territory of a State which has made a declaration under article 12(3) of the Statute or by nationals of that State.’¹⁸ 6

Nonetheless, the UN Security Council can modify the last of these criteria so as to include the territory and nationals of States who are not parties to the Court by referring a situation to the Prosecutor pursuant to article 13 para. (b).

In contrast to the *duty* of the Court to determine whether it has *jurisdiction* in a case brought before it, the second sentence of paragraph 1 simply provides that the Court (the Pre-Trial Chamber or Trial Chamber) *may*, on its own motion (*proprio motu*), determine the *admissibility of a case* in accordance with article 17¹⁹. The provision does not thus impose a duty but merely confers discretion on the Court in the matter. To date, the Pre-Trial Chambers have considered the exercise of this discretion in the context of applications for warrants of arrest or summonses to appear or in the course of confirmation proceedings. In its earliest decision on the matter in *Lubanga and Ntaganda*, the Appeals Chamber laid down guidelines which Pre-Trial Chambers should follow when considering whether or not to exercise their discretion: 6

[A] Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect. Such circumstances may include

¹⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-14-t-ENG, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 Jun. 2008, para. 12. See also *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-9-Red, Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest Against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 Nov. 2011, para. 9; *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-3, Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest Against Charles Blé Goudé, Pre-Trial Chamber III, 6 Jan. 2012, para. 8; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-2-Red, Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest Against Simone Gbagbo, Pre-Trial Chamber III, 2 Mar. 2012, para. 8; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-36-Red, Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber II, 13 Jul. 2012, para. 8; *Prosecutor v. Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber II, 13 Jul. 2012, para. 10.

¹⁹ The second sentence of paragraph 1 had its origin in article 35 of the ILC Draft Statute, which provided that ‘[t]he Court may [...] of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible’ on grounds similar to those now found in article 17. During the drafting of the Statute, the formulation in article 35 of the ILC Draft Statute shifted significantly from giving the Court the discretion on its own motion to determine simply that a case was inadmissible to giving it a broader discretion to determine admissibility. In the *Ad Hoc* Committee in 1995:

‘[S]ome delegations put forward the view that it would be preferable if the principles set out in article 35 in regard to admissibility and conferring a discretion upon the court to decide that a case before the court was inadmissible on the grounds set out in subparagraphs (a) to (c) were laid down as a condition rather than by way of conferring a discretionary power’.

In the 1996 Preparatory Committee I, p. 39:

‘[T]he view was expressed that the Court should be able to declare, at any time and of its own motion [...] a case inadmissible. In this respect, it was also noted that the Court should retain the right to recommence proceedings after a fundamental change of circumstances, or to review its own decision on the admissibility of a case’.

The Preparatory Committee’s 1996 compilation of proposals did not include any modification of the language concerning the ability of the Court to determine on its own motion the inadmissibility of a case. See 1996 Preparatory Committee II, pp. 159 *et seq.* However, at its Aug. 1997 session, the Preparatory Committee draft of what was now article 36 (Challenges to the jurisdiction of the Court or the admissibility of a case) stated in paragraph 1: ‘At all stages of the proceedings, the Court [...] (b) may, on its own motion, determine the admissibility of the case pursuant to article 35 [the predecessor of article 17]’. Preparatory Committee Decisions Aug. 1997, p. 318 (Article 36).

The same phrasing with regard to the Court’s discretion to determine admissibility was retained in the Zutphen draft, adopted in January 1998, in what was now numbered article 12 [36] para. 1. (Zutphen Draft, 44) and in the New York draft, which was the final text sent to the Rome Conference (Preparatory Committee (Consolidated) Draft, article 17).

instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review. In these circumstances it is also imperative that the exercise of this discretion take place bearing in mind the rights of other participants.²⁰

In that particular case the Appeals Chamber held that the Pre-Trial Chamber had erred in holding that admissibility was a mandatory consideration and that in exercising what should have been their discretion, ‘the Pre-Trial Chamber [ha]d not give[n] sufficient weight to the interests of [the accused].’ This was particularly so because the Chamber acted *ex parte* (Prosecutor only) and *before* the accused was able to challenge the matter pursuant to article 19 para. 2(a). If the matter was then taken to the Appeals Chamber, it too would potentially decide on admissibility prior to article 19 para. 2(a) proceedings. In such circumstances ‘[t]he right of the suspect to challenge the admissibility of the case before the [Court] thus would be seriously impaired’.²¹

- 7 Following the above guidelines, the majority of Pre-Trial Chambers have declined to exercise their discretion at the arrest warrant or summons to appear stage²². Only a small number of Pre-Trial Chambers in a few cases have gone against this trend where domestic proceedings concerning the accused existed, as occurred in *Harun and Abd-Al-Rahman (Kushayb)*²³, *Ngudjolo*²⁴ and *Katanga*²⁵. *Bemba* is a rare case where the Pre-Trial Chamber exercised its

²⁰ *Situation in the Democratic Republic of the Congo*, ICC-01/05-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, Appeals Chamber, 13 Jul. 2006, para. 52.

²¹ *Situation in the Democratic Republic of the Congo*, ICC-01/05-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, Appeals Chamber, 13 Jul. 2006, paras 42–45, 48–51, 53.

²² See *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1-Red-tENG, Decision on the Prosecution Application for a Warrant of Arrest, Pre-Trial Chamber I, 6 Mar. 2007, paras. 10–15; *Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 Mar. 2009, paras. 46–51; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-15-AnxA, Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber I, 7 May 2009, para. 4; *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-1, Second Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber I, 27 Aug. 2009, para. 4; *Prosecutor v. Al Bashir*, ICC-02/05-01/09-94, Second Decision on the Prosecutor’s Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 Jul. 2010, para. 44; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Callixte Mbarushimana, Pre-Trial Chamber I, 28 Sep. 2010, para. 9; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-01, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, 8 Mar. 2011, para. 12; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-01, Decision on the Prosecutor’s Application for Summonses to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, 8 Mar. 2011, para. 12; *Situation in the Libyan Arab Jamahiriya*, ICC-01/11-01/11-1, Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’, Pre-Trial Chamber I, 27 Jun. 2011, paras. 11–12; *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-9-Red, Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest Against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 Nov. 2011, paras. 22–24; *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-3, Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest Against Charles Blé Goudé, Pre-Trial Chamber III, 6 Jan. 2012, para. 12; *Prosecutor v. Hussein*, ICC-02/05-01/12-1-Red, Decision on the Prosecutor’s Application under Article 58 Relating to Abdel Raheem Muhammad Hussein, Pre-Trial Chamber I, 1 Mar. 2012, para. 10; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-2-Red, Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest Against Simone Gbagbo, Pre-Trial Chamber III, 2 Mar. 2012, para. 12; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-36-Red, Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber II, 13 Jul. 2012, para. 13; *Prosecutor v. Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber II, 13 Jul. 2012, para. 18.

²³ See *Prosecutor v. Harun and Abd-Al-Rahman (Kushayb)*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 Apr. 2007, paras. 18–25.

²⁴ See *Prosecutor v. Ngudjolo*, ICC-01/04-01/07-3, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 Jul. 2007, paras. 17–22.

²⁵ See *Prosecutor v. Katanga*, ICC-01/04-01/07-4, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, Pre-Trial Chamber I, 6 Jul. 2007, paras. 17–21.

discretion where it appeared that the judicial authorities in the Central African Republic had abandoned their attempts to prosecute the accused on the ground that he enjoyed immunities as Vice-President of the Democratic Republic of the Congo.²⁶ However, the general practice is for the Court to wait for an admissibility challenge pursuant to article 19 para. 2 before venturing into the subject, absent clear circumstances requiring an admissibility determination at an earlier stage in the interests of justice. Indeed, this is consistent with the linear approach intended by the drafters of articles 15, 18 and 19²⁷. Where no such challenge is filed, and the matter has not been broached in the arrest warrant or summons to appear decision, it may be appropriate for the Chamber to undertake the analysis *proprio motu* at the confirmation of charges stage²⁸.

The Court can nonetheless react to new developments pursuant to article 19 para. 1:

‘Considered as a whole, the *corpus* of [the Statute’s] provisions delineates a system whereby the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario. Otherwise stated, the Statute as a whole enshrines the idea that a change in circumstances allows (or even, in some scenarios, compels) the Court to determine admissibility anew.’²⁹

Thus, even though in the cases arising from the situation in Uganda the Pre-Trial Chamber originally exercised its discretion and held them to be admissible when issuing arrest warrants (without much elaboration³⁰), it deemed it necessary to revisit the issue years later. This was in light of comments made by the government of Uganda and the establishment of a specialised division of the High Court of Uganda with jurisdiction over serious crimes committed during an armed conflict in the country.³¹ The Pre-Trial Chamber found

²⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08-14-TENG, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 Jun. 2008, paras. 20–22.

²⁷ The exact relationship between articles 15, 18 and 19, the final versions of which were adopted only on the last day of the Rome Diplomatic Conference, was not resolved in the *Rome Statute*. When it came to drafting the *Rules*, France proposed an integrated approach that would have required admissibility and jurisdiction challenges to be made at the article 15 stage, while other states preferred a linear approach. According to two of the key participants in the negotiations:

‘The Rules settle this matter following a ‘linear’ approach, according to which both schemes – the Article 15 procedure and the Articles 18 and 19 regime – are not to be merged but considered separately and consecutively. Consequently, it is clear that the Article 15 procedure is not the appropriate forum for states and other parties to raise jurisdiction or admissibility challenges. The Prosecutor must include an assessment of admissibility in his or her determination whether to seek authorization from the Pre-Trial Chamber to initiate an investigation, but notice to states shall only be provided after a positive decision to commence an investigation is taken. In respect of an investigation triggered in accordance with Article 15, such notice will arguably only be given upon authorization by the Pre-Trial Chamber, which would then normally provide the eligible states and others with the first practical opportunity to raise issues of jurisdiction and admissibility’.

Friman and Fernández (2000) 3 *YbHumL* 289, 295. See also Holmes, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 328–329.

²⁸ See *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on Confirmation of Charges, Pre-Trial Chamber I, 8 Feb. 2010, paras. 25–34; *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red, Corrigendum on the ‘Decision on Confirmation of Charges’, Pre-Trial Chamber I, 7 Mar. 2011, paras. 25–28.

²⁹ *Prosecutor v. Kony et al.*, ICC-02/04-01/05-377, Decision on Admissibility of the Case under Article 19(1) of the Statute, Pre-Trial Chamber II, 10. Mar. 2009, para. 28.

³⁰ *Situation in Uganda*, ICC-02/04-01/05-1-US-Exp, Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58, Pre-Trial Chamber II, 8 Jul. 2005, p. 2; *Situation in Uganda*, ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 Sep. 2005, para. 38; *Situation in Uganda*, ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti, Pre-Trial Chamber II, 8 Jul. 2005, para. 38; *Situation in Uganda*, ICC-02/04-01/05-55, Warrant of Arrest for Raska Lukwiya, Pre-Trial Chamber II, 8 Jul. 2005, para. 26; *Situation in Uganda*, ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo, Pre-Trial Chamber II, 8 Jul. 2005, para. 28; *Situation in Uganda*, ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen, Pre-Trial Chamber II, 8 Jul. 2005, para. 26.

³¹ See *Prosecutor Kony et al.*, ICC-02/04-01/05-320, Decision Initiating Proceedings under Article 19, Requesting Observations and Appointing Counsel for the Defence, Pre-Trial Chamber II, 21 Oct. 2008, pp. 6–7; *Prosecutor v. Kony et al.*, ICC-02/04-01/05-377, Decision on Admissibility of the Case under Article 19(1) of the Statute, Pre-Trial Chamber II, 10. Mar. 2009, paras. 33–44. Given this precedent, there is nothing that prevents Pre-Trial Chambers from undertaking similar action notwithstanding the fact that they have previously expressly *refused* to exercise their discretion to consider admissibility pursuant to article 19 para. 1.

that the cases continued to be admissible before the Court. On appeal, the Appeals Chamber was able to give further clarification on the matter. It held that:

[it] will not interfere with the Pre-Trial Chamber's exercise of discretion to make a determination *proprio motu* on the admissibility of a case merely because the Appeals Chamber, if it had the power, might have made a different ruling. [...] [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion under article 19(1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions.³²

The Appeals Chamber found that, according to the circumstances of the case, the Pre-Trial Chamber did not abuse its discretion. It based its finding on the grounds that: (i) the Pre-Trial Chamber's proceedings were not in camera but public; (ii) the Prosecutor, victims and the Government of Uganda participated; (iii) *ad hoc* Defence Counsel was appointed by the Chamber to facilitate submissions from a defence perspective; and (iv) the case did not involve gravity considerations (which were not susceptible to change). Further, it found that the issue of predetermination did not arise as the Pre-Trial Chamber's ruling was based on a 'factual scenario [that] was identical to the factual scenario prevailing at the time when the Chamber issued the warrants of arrest', since despite the creation of a specialised division of the High Court of Uganda, there was still inaction by the authorities with respect to the case³³. The Appeals Chamber also held that in circumstances where the suspects had not yet appeared before the Court, they were not entitled to legal representation when the Court exercises its article 19 para. 1 discretion with respect to admissibility³⁴.

- 9 Lastly, it is important to recall, as a Pre-Trial Chamber has correctly held, that it is 'beyond controversy that the accused will always be entitled to raise a [jurisdictional or admissibility] challenge under article 19(2) of the Statute, whether or not the Chamber has exercised its powers under article 19(1)'³⁵.
- 10 Regarding the procedure applicable to determinations of jurisdiction and admissibility when the relevant Chambers are acting on their own motion, the Appeals Chamber has stated that:

'rule 58(2) [...] gives the relevant Chamber broad discretion over the conduct of proceedings pursuant to articles 19(1) and (2) of the Statute. The Appeals Chamber, however, finds that such discretion is not unlimited. It has to be exercised in conjunction with other relevant legal provisions'³⁶.

With regard to the standard of proof, Pre-Trial Chamber II in the first five cases in the Uganda situation simply found that the cases 'appear[ed] to be admissible'³⁷. This was a

³² *Prosecutor v. Kony et al.*, ICC-02/04-01/-5-408, Judgment on the Appeal of the Defence Against the 'Decision on the Admissibility of the Case under Article 19(1) of the Statute' of 10 March 2009, Appeals Chamber, 16 Sep. 2009, paras. 79–80.

³³ *Prosecutor v. Kony et al.*, ICC-02/04-01/-5-408, Judgment on the Appeal of the Defence Against the 'Decision on the Admissibility of the Case under Article 19(1) of the Statute' of 10 March 2009, Appeals Chamber, 16 Sep. 2009, paras. 85–86.

³⁴ *Prosecutor v. Kony et al.*, ICC-02/04-01/-5-408, Judgment on the Appeal of the Defence Against the 'Decision on the Admissibility of the Case under Article 19(1) of the Statute' of 10 March 2009, Appeals Chamber, 16 Sep. 2009, paras. 63–68.

³⁵ *Prosecutor v. Kony et al.*, ICC-02/04-01/05-377, Decision on Admissibility of the Case under Article 19(1) of the Statute, Pre-Trial Chamber II, 10 Mar. 2009, para. 26.

³⁶ *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-321, Judgment on Appeal of Mr Laurent Gbagbo Against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of Proceedings, Appeals Chamber, 12 Dec. 2012, para. 39.

³⁷ *Situation in Uganda*, ICC-02/04-01/05-1-US-Exp, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, Pre-Trial Chamber II, 8 Jul. 2005, p. 2; *Situation in Uganda*, ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 Sep. 2005, para. 38; *Situation in Uganda*, ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti, Pre-Trial Chamber II, 8 Jul. 2005, para. 38; *Situation in Uganda*, ICC-02/04-01/05-55, Warrant of Arrest for Raska Lukwiya, Pre-Trial Chamber II, 8 Jul. 2005, para. 26; *Situation in Uganda*, ICC-02/04-01/05-56, Warrant of

relatively low standard of proof. Pre-Trial Chamber I, on the other hand, stated in the *Lubanga and Ntaganda* case that it was applying the intimate conviction (*intime conviction*) approach when determining whether there was a reasonable basis to issue arrest warrants, albeit a more restrictive version than is sometimes employed. This was because the judges would be 'bound, pursuant to article 58 para. 1 of the Statute, by the factual basis and the evidence and information provided by the Prosecution in the Prosecution's Application, the Prosecution's Submission and the Prosecution's Further Submission'³⁸. This language was reproduced almost *verbatim* in the subsequent decision concerning the arrest warrant in *Ntaganda*³⁹. While both decisions in these cases were originally issued under seal, the above language has not been repeated in any subsequent public arrest warrant or summons to appear decision to date.

Subsequent decisions on arrest warrants or summonses to appear, made without the participation of the suspects⁴⁰, reveal inconsistencies and ambiguity as to the evidentiary standard which the Prosecutor has to meet with respect to jurisdiction and admissibility. Some decisions have simply held that, on the basis of the evidence and information presented, the case fell within the jurisdiction of the Court and appeared to be (or was) admissible.⁴¹ Others have repeated such language but have confined it only to jurisdiction⁴². Some have seemingly applied the 'reasonable grounds to believe' test⁴³, while others have

Arrest for Okot Odhiambo, Pre-Trial Chamber II, 8 Jul. 2005, para. 28; *Situation in Uganda*, Case No. ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen, Pre-Trial Chamber II, 8 Jul. 2005, para. 26.

³⁸ *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 Feb. 2006, para. 14–15. The doctrine of *intime conviction*, which dates to the French Revolution, but has its roots in Roman law, means that the judge or juror decides, according to his or her conscience rather than according to formal rules of proof.

³⁹ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1-Red-tENG, Decision on the Prosecution Application for a Warrant of Arrest, Pre-Trial Chamber I, 6 Mar. 2007, paras. 18–19, 24–25.

⁴⁰ One noticeable exception to this occurred in the *Kony et al.* case, where the Pre-Trial Chamber reconsidered admissibility years after it had issued warrants of arrest. In doing so, it invoked rule 58 sub-rule 2 and permitted the Prosecutor, victims, the Ugandan Government and a specially appointed Defence Counsel to make submissions. See *Prosecutor v. Kony et al.*, ICC-02/04-01/05-320, Decision Initiating Proceedings under Article 19, Requesting Observations and Appointing Counsel for the Defence, Pre-Trial Chamber II, 21 Oct. 2008, pp. 7–8.

⁴¹ See *Prosecutor v. Harun and Abd-Al-Rahman (Kushayb)*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 Apr. 2007, para. 25; *Prosecutor v. Ngudjolo*, ICC-01/04-01/07-3, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 Jul. 2007, paras. 16, 22 (but also utilising the 'reasonable grounds to believe' standard with respect to the crimes at issue at para. 12); *Prosecutor v. Katanga*, ICC-01/04-01/07-4, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, Pre-Trial Chamber I, 6 Jul. 2007, paras. 16, 21 (but also utilising the 'reasonable grounds to believe' standard with respect to the crimes at issue at para. 12); *Prosecutor v. Bemba*, ICC-01/05-01/08-14-tENG, Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 Jun. 2008, paras. 19, 22 (but also utilising the 'reasonable grounds to believe' standard with respect to the crimes at issue at para. 13).

⁴² *Prosecutor v. Abu Garda*, ICC-02/05-02/09-15-AnxA, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber I, 7 May 2009, para. 3; *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-1, Second Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber I, 27 Aug. 2009, para. 3; *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-9-Red, Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 Nov. 2011, para. 16 (but also utilising the 'reasonable grounds to believe' standard with respect to the crimes at issue at para. 11 and relying on its prior decision authorizing an investigation at paras. 12–15); *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-3, Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Charles Blé Goudé, Pre-Trial Chamber III, 6 Jan. 2012, para. 9 (relying on the analysis it had previously conducted in the *L. Gbagbo* case); *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-2-Red, Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Simone Gbagbo, Pre-Trial Chamber III, 2 Mar. 2012, para. 9 (relying on the analysis it had previously conducted in the *L. Gbagbo* case); *Prosecutor v. Ntaganda*, ICC-01/04-02/06-36-Red, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, 13 Jul. 2012, para. 12; *Prosecutor v. Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, 13 Jul. 2012, para. 17.

⁴³ *Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecutor's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 Mar. 2009, para. 28(i) (but also simply

held that jurisdiction must ‘attain the degree of certainty’⁴⁴. Given that this analysis is regularly conducted first at the article 58 para. 1(a) or article 58 para. 7 stage (at least with respect to jurisdiction), it would be reasonable for the Court to apply the ‘reasonable grounds to believe’ test.

- 12 It should also be noted that in some instances when the Chambers applied article 19 para. 1 at the confirmation of charges stage or in the course of final judgments, they simply referred back to their prior determinations in earlier proceedings and found that conditions had not changed;⁴⁵ alternatively, they undertook a rudimentary analysis particularly in light of past findings in the relevant case⁴⁶. As aforementioned, the exception to this has been in cases where no article 19 para. 2 challenges were filed by the persons concerned⁴⁷.

II. Paragraph 2: Challenges

- 13 Under article 18 para. 7, States which might have had their preliminary challenges to the admissibility of an investigation rejected by the Court, may still make a further challenge to a case pursuant to article 19. However, article 18 para. 7 requires that the State, when making an article 19 challenge must demonstrate the existence of ‘additional significant facts or significant changes of circumstances’. The aim of this requirement is to limit the possibilities of frivolous challenges. As of 31 May 2015, there have been no public article 18 challenges by States. Consequently, there have been no cases arising out of article 18 para. 7 and article 19 wherein this requirement would have been tested. However, ways by which frivolous challenges can be further minimized are dealt with below in the discussions of paragraphs 4, 5, 6 and 7. In contrast to challenges to admissibility under article 18 or, if there are new developments, under article 19, States are limited to one challenge to jurisdiction, absent exceptional circumstances. However, nothing prevents a State from filing an article 19 challenge without first having filed one under article 18. The procedure for considering these challenges is discussed below at the end of this section.

stating that the case ‘falls within the jurisdiction of the Court’ at paras. 35, 40); *Situation in the Libyan Arab Jamahiriya*, ICC-01/11-01/11-1, Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’, Pre-Trial Chamber I, 27 Jun. 2011, para. 5; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Callixte Mbarushimana, Pre-Trial Chamber I, 28 Sep. 2010, para. 3 (but also simultaneously applying a *prima facie* standard at para. 7); *Prosecutor v. Hussein*, ICC-02/05-01/12-1-Red, Decision on the Prosecutor’s Application under Article 58 Relating to Abdel Raheem Muhammad Hussein, Pre-Trial Chamber I, 1 Mar. 2012, para. 5 (but also simply stating that the case ‘falls within the jurisdiction of the Court’ at para. 9).

⁴⁴ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-01, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, 8 Mar. 2011, para. 9 (but also relying on its prior decision authorizing an investigation at paras. 10–11); *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-01, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, 8 Mar. 2011, para. 9 (but also relying on its prior decision authorizing an investigation at paras. 10–11).

⁴⁵ See for example *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, 29 Jan. 2007, paras. 164–166; *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 Jun. 2009, paras. 22–26; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 Mar. 2012, para. 9; *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-3-tENG, Judgment Pursuant to Article 74 of the Statute, Trial Chamber II, 18 Dec. 2012, paras. 15–16; *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment Pursuant to Article 74 of the Statute, Trial Chamber II, 7 Mar. 2014, paras. 14–15.

⁴⁶ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 Jun. 2014, para. 7; *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges Against Laurent Gbagbo, Pre-Trial Chamber I, 12 Jun. 2014, para. 18; *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-186, Decision on the Confirmation of Charges Against Charles Blé Goudé, Pre-Trial Chamber I, 11 Dec. 2014, para. 11.

⁴⁷ See *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on Confirmation of Charges, Pre-Trial Chamber I, 8 Feb. 2010, paras. 25–34; *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red, Corrigendum on the ‘Decision on Confirmation of Charges’, Pre-Trial Chamber I, 7 Mar. 2011, paras. 25–28.

1. Admissibility

Paragraph 2 specifies that ‘[c]hallenges to the admissibility of a case on the grounds referred to in article 17’ may be made by certain individuals or States. This provision thus limits the grounds for challenges to admissibility to those listed in article 17. In this context the Appeals Chamber has noted that:

‘a challenge to admissibility [...] is not the mechanism under which to raise alleged violations of human rights of the accused in the course of the prosecutorial process. [...] Unless alleged prejudices and violations are relevant to the criteria of article 17 of the Statute, they cannot render the case inadmissible’⁴⁸.

It is also important to underline that ‘[g]enerally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge’⁴⁹. The Appeals Chamber has further clarified that ‘the expression “time of the proceedings” [...] clearly refer[s] to the time of the proceedings on the admissibility challenge before the [relevant] Chamber and not subsequent proceedings on appeal’⁵⁰. A Pre-Trial or Trial Chamber can nonetheless ask for further submissions in admissibility challenge proceedings should it be deemed necessary and appropriate⁵¹. Where circumstances change subsequent to a challenge, the correct course of action is to approach the relevant Chamber on the basis of article 19 para. 4 (by the concerned person or a State) or article 19 para. 10 (by the Prosecutor, where Court has determined that the case is inadmissible)⁵². Furthermore, a determination on the admissibility of a case ‘is made on the basis of the case brought by the Prosecutor without delving into consideration of the evidence put forward to sustain those charges’, as this would conflate a Chamber’s inquiry into the admissibility of a case with that of the merits of the same case.⁵³

⁴⁸ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 Sep. 2009, para. 113. See also *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr. Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on Admissibility of the Case Against Abdullah Al-Senussi’, Appeals Chamber, 24 Jul. 2014, para. 230.

⁴⁹ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 Sep. 2009, para. 56. See also *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-75-Red, Judgment on the Appeal of Côte d’Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo’, Appeals Chamber, 27 May 2015, para. 32.

⁵⁰ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-234, Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal Against the Pre-Trial Chamber’s Decision on Admissibility’, Appeals Chamber, 28 Jul. 2011, para. 10; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-202, Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal Against the Pre-Trial Chamber’s Decision on Admissibility’, Appeals Chamber, 28 Jul. 2011, para. 9; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-75-Red, Judgment on the Appeal of Côte d’Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo’, Appeals Chamber, 27 May 2015, para. 32.

⁵¹ See for example, *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-239, Decision Requesting Further Submissions on Issues Related to the Admissibility of the Case Against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 7 Dec. 2012; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-44, Decision on Further Submissions on Issues Related to Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 28 Aug. 2014.

⁵² See *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 Sep. 2009, para. 56; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi’, Appeals Chamber, 21 May 2014, para. 44; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr. Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on Admissibility of the Case Against Abdullah Al-Senussi’, Appeals Chamber, 24 Jul. 2014, paras. 57–58.

⁵³ *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-185, Decision on the Defence Challenge to the Admissibility of the Case Against Charles Blé Goudé for Insufficient Gravity, Pre-Trial Chamber I, 12 Nov. 2014, para. 17 (where

15 For a number of cogent reasons, the burden of proof of demonstrating the inadmissibility of a case falls on the person or State making the challenge⁵⁴. First of all, it is a fundamental principle of law that the party making allegations concerning a matter in dispute has the legal burden of proof (*onus probandi actori incumbit*)⁵⁵. Second, the Prosecutor will have conducted an extensive review of the admissibility criteria and, given the limited resources available and the limited number of cases he or she will be able to investigate, the Prosecutor would be unlikely to decide to investigate a particular case without a strong basis. Third, most States will already have had an opportunity to challenge the admissibility of a case under article 18. Fourth, it is particularly appropriate to impose the burden on States making challenges to admissibility pursuant to article 17 paras. (a) and (b), since these States will have most of the information relevant to the determination in their possession. Indeed, another general principle of law is that when the matters at issue are exclusively or largely within the knowledge of one party, the burden of proof may be regarded as resting on that party to provide a satisfactory explanation⁵⁶. The Court has accepted this notion – that the moving party bears the burden of proof in this context:

‘The Rome Statute framework does not expressly provide where the burden of proof lies on an admissibility [...] application [...] However, the compelling logic of the situation is that should an accused challenge the admissibility of the case under Article 19(2)(a) of the Statute [...], it falls to him to establish the facts and other relevant matters that are said to support the argument’⁵⁷.

the suspect submitted an admissibility challenge on the basis that the case against him was not of sufficient gravity to justify further action by the Court).

⁵⁴ See Klefner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007) 227, (citing First Edition of this Commentary). Article 17 para. 1 does not allocate responsibility with respect to burdens of proof; it simply states the circumstances when the relevant Chamber must determine whether a case is admissible or inadmissible.

⁵⁵ Mawhinney (1993) *CanYbIL* 343, 354 (quoting a Canadian government brief citing ‘the fundamental principle of law expressed in the Latin maxim *actori incumbit probatio* – or, the burden of proof rests with the claimant’). See also Lillich (ed.), *Fact-Finding Before International Tribunals* (1990) 34; Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (1996) 369. Several states made this point clear during the drafting process. E.g., one of the first proposals concerning admissibility challenges provided that ‘[i]n every case, the State or person challenging a submission to the Court under paragraph 2 of this article [before initiation of the investigation] shall provide all information concerning the conduct of the investigations and the judicial procedures which may support a finding of inadmissibility in the case submitted to the Court’ and had to provide a memorandum in support of the challenge at the trial stage. 1996 Preparatory Committee II, pp. 161, 163 (articles 39 para. 5 and 116, para. 1). In the opening plenary session of the Rome Conference, the delegation of the Republic of Korea declared that ‘[t]he State Party that raised the question of complementarity should bear the burden of proof’, UN Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC, Rome, 15 June – 17 July 1998, Official Records, Vol. 2, 69–70).

⁵⁶ See, e.g., *Avşar v. Turkey*, Judgment, Application No. 2567/94 [2001] ECHR, 10 Jul. 2001, para. 392; *Salman v. Turkey*, Judgment, Application No. 21986/93 [2000] ECHR, 27 Jun. 2000, para. 100; (‘Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control or custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation’.) See also *El-Masri v. the Former Yugoslav Republic of Macedonia*, Judgment, Application No. 39630/09 [2012] ECHR, 13 Dec. 2012, para. 152. *Bleier v. Uruguay*, Communication No. 30/1978, Human Rights Committee, UN Doc. CCPR/C/OP/1 at 109 (1985), para. 13.3. As the ICJ stated in its first case, *Corfu Channel Case*, 1949 ICJ Rep. pp. 4, 18:

‘By reason of this exclusive [territorial] control [exercised by a State within its own frontiers], the other State, the victim of the breach of international law, is often unable to furnish direct proof of facts giving rise to international responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence’.

This strongly suggests that when the Prosecutor is seeking a determination that a case is admissible pursuant to article 19 para. 3, he or she should not bear the burden of proof or, if he or she does, then the standard of proof should be relatively low (see discussion of article 19 para. 3, margin No. 34 below).

⁵⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, 24 Jun. 2010, para. 201. See also *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, Pre-Trial Chamber I, 26 Oct. 2011, para. 4. In addition, rule 58 sub-rule 1: ‘a request or application made under article 19 shall be made in writing and contain the basis for it’ (emphasis added).

The Appeals Chamber (with Judge Ušacka dissenting⁵⁸) has held likewise when States have challenged admissibility⁵⁹, although it may be reasonable, in certain circumstances, to place an evidentiary burden on the Defence to sufficiently substantiate allegations that they make⁶⁰.

With respect to the standard of proof required on admissibility questions, a number of factors suggest that it may differ to some extent depending on the stage of proceedings involved⁶¹. The standard of proof under article 19 para. 2 for a State or the person concerned to demonstrate inadmissibility should be a balance of probabilities or a preponderance of the evidence standard⁶² (rather than simply a *prima facie* case or beyond a reasonable doubt). At least one Pre-Trial Chamber has explicitly addressed this issue and has expressly endorsed this proposition. In *Bemba*, when the accused filed an admissibility challenge, Trial Chamber III opined that:

‘As to the standard of proof in these circumstances, although the Rome Statute framework [...] does not provide guidance, the overwhelming preponderance of national and international legal systems apply what is frequently called the ‘civil standard’ of proof (a balance of probabilities) when the burden lies upon the defence in criminal proceedings. There is no reason to depart from that approach in these circumstances’⁶³.

In *L. Gbagbo*, on the other hand, the Pre-Trial Chamber, required ‘tangible proof’ of Mr Gbagbo’s assertions that a national investigation or prosecution was ongoing⁶⁴. Similarly, in

⁵⁸ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red-Anx2, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi’ – Dissenting Opinion of Judge Ušacka, Appeals Chamber, 21 May 2014, para. 61: ‘I consider that placing the burden of proof to show that a State is investigating or prosecuting solely on the challenging State[...] appears unfair and undermines the principle of complementarity’. See also *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565-Anx2, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on Admissibility of the Case Against Abdullah Al-Senussi’ – Separate Opinion of Judge Ušacka, Appeals Chamber, 24 Jul. 2014, para. 16.

⁵⁹ *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, para. 61; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, para. 62: ‘a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible’. See also *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi’, Appeals Chamber, 21 May 2014, para. 178; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on Admissibility of the Case Against Abdullah Al-Senussi’, Appeals Chamber, 24 Jul. 2014, para. 166; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-75-Red, Judgment on the Appeal of Côte d’Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo’, Appeals Chamber, 27 May 2015, paras 29, 128.

⁶⁰ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on Admissibility of the Case Against Abdullah Al-Senussi’, Appeals Chamber, 24 Jul. 2014, para. 167.

⁶¹ Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007) 232.

⁶² The last edition of this Commentary suggested, as an alternative, a ‘clear and convincing’ standard. At least one Pre-Trial Chamber has rejected this in admissibility proceedings: *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, 24 Jun. 2010, para. 203.

⁶³ *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, 24 Jun. 2010, para. 203. This holding remained undisturbed on appeal: *Prosecutor v. Bemba*, ICC-01/05-01/08-962-Corr, Corrigendum to Judgment on Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’, Appeals Chamber, 19 Oct. 2010. For a list suggesting some of the factors relevant to the standard of proof for States and persons concerned to demonstrate inadmissibility in challenges pursuant to article 19 para. 2, see Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007) 235. However, these factors do not necessarily apply to the Prosecutor when seeking a ruling pursuant to article 19 para. 3 (see margin No. 34 below).

⁶⁴ *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-436-Red, Decision on the ‘Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut’, Pre-Trial Chamber I, 11 Jun. 2013, paras. 24–25.

the *Muthaura et al.* and *Ruto et al.* cases, the Appeals Chamber when dealing with Kenya's challenge to the cases, held that in order to discharge its burden 'the State must provide the Court with evidence of a sufficient degree of specificity and probative value that it is indeed investigating the case'⁶⁵. This approach was reiterated in the *Gaddafi and Al-Senussi* case⁶⁶ (albeit with Judge Ušacka dissenting⁶⁷) and the *S. Gbagbo* case⁶⁸. By deciding as they did, both the Pre-Trial Chamber and Appeals Chamber did not thereby pronounce themselves on the applicable standard of proof in the matters before them. Rather, they merely reiterated the fact that those who challenge the admissibility of a case bear the burden of proof and went on to suggest the nature and quality of evidence needed to discharge the burden. Nonetheless, there is evidently a need for the Appeals Chamber to clearly and definitively pronounce itself on this issue. It also needs to clarify whether the same standard applies to challenges brought by an individual or by a State. On this point there appears to be no rhyme or reason why there should be different standards.

2. Jurisdiction

- 17 Although challenges to admissibility are mentioned first in article 19 para. 2, rule 58 sub-rule 4 requires the Court to 'rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility'⁶⁹. Paragraph 2, like paragraph 1, does not define jurisdiction, but the concept is well understood and thus challenges can be made on any of the accepted jurisdictional grounds: territorial (*ratio loci*), subject matter (*ratione materiae*), personal (*ratione personae*) and temporal (*ratione temporis*) grounds. Grounds that fall outside of these parameters are not jurisdictional challenges and stand to be dismissed as such. This has been the case with challenges claiming abuse of process or

⁶⁵ *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 Aug. 2011, para. 61; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 Aug. 2011, para. 62. See also *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-44, Decision on Further Submissions on Issues Related to the Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 28 Aug. 2014, para. 7.

⁶⁶ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi', Appeals Chamber, 21 May 2014, para. 205.

⁶⁷ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red-Anx2, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi' – Dissenting Opinion of Judge Ušacka, Appeals Chamber, 21 May 2014, paras. 60, 62: 'the materials provided [by the State] should be taken at their face value[...] [S]tringent standards would impose unnecessarily high requirements on States with a legal and judicial system in transition'. See also *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565-Anx2, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on Admissibility of the Case Against Abdullah Al-Senussi' – Separate Opinion of Judge Ušacka, Appeals Chamber, 24 Jul. 2014, para. 16.

⁶⁸ See *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-75-Red, Judgment on the Appeal of Côte d'Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo', Appeals Chamber, 27 May 2015, paras 29, 128.

⁶⁹ See *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-185, Decision on the Defence Challenge to the Admissibility of the Case Against Charles Blé Goudé for Insufficient Gravity, Pre-Trial Chamber I, 12 Nov. 2014, para. 10 (incorrectly citing rule 58 sub-rule 1). This requirement was based on the French proposed rules for Part 2 of the *Rome Statute*. U.N. Doc. PCNICC/1999/WGRPE/43, 23 Nov. 1999. An alternative proposal submitted by Bolivia, Chile, Colombia, Peru and Spain, providing that the Court could reject *in limine* clearly unfounded admissibility challenges, was rejected. UN Doc. PCNICC/2000/WGRPE (2) DP.2, 20 Mar. 2000. See Holmes, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 321, 345–346.

violations of human rights⁷⁰ and challenges relating to the interpretation/definition of crimes under the *Statute*⁷¹.

Although the Court has not specifically pronounced on the matter, jurisdictional challenges should, like admissibility challenges, be determined on the basis of the facts as they exist at the time of the challenge. Unlike with admissibility challenges, circumstances relating to the Court's jurisdiction are not generally – with one exception herein discussed – susceptible to change. Should changes indeed occur subsequent to a challenge, then the person or State can avail themselves of article 19 para. 4. On the other hand, the Prosecutor cannot invoke article 19 para. 10 as this only relates to a decision that a case is inadmissible, rather than one concerning jurisdiction. However, this limitation is offset by the Prosecutor's ability under article 19 para. 3 to seek a ruling on jurisdiction and the fact that the Court is under an ongoing *obligation* under article 19 para. 1 to satisfy itself that it has jurisdiction over cases (which is also not the case with admissibility where the Court has only the discretionary power to make a determination). In this respect, there have been three instances where the Court has lost its jurisdiction (*ratione personae*) subsequent to the issuing of a warrant of arrest or summons to appear or the decision confirming the charges. These relate to the *Kony et al.* (specifically the suspect Lukwiya), *Gaddafi et al.* (specifically the suspect M. Gaddafi) and the *Banda and Jerbo* (specifically the accused Jerbo) cases, where the person concerned died or, in the case of Jerbo, was presumed on the evidence presented to have died⁷². In such circumstances the Defence would be in a position to challenge the Court's jurisdiction. However this has not been the practice. Instead, in the case of Jerbo, the Defence notified the Trial Chamber of the information in their possession that their client had died and the Court itself noted article 19 para. 1 in terminating the proceedings⁷³.

As with admissibility, the burden of demonstrating that the Court lacks jurisdiction falls on the person or State making the challenge. It is also particularly appropriate to impose the burden on States making challenges to jurisdiction, since these States often will have most of the information relevant to the determination in their possession (see margin No. 15 above). This

⁷⁰ See *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, paras. 20–24; *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-321, Judgment on the Appeal of Mr Laurent Koudou Gbagbo Against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, Appeals Chamber, 12 Dec. 2012, paras. 100–102.

⁷¹ See *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-414, Decision on the Appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang Against the Decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', Appeals Chamber, 24 May 2012, paras. 25–33; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-425, Decision on the Appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta Against the Decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', Appeals Chamber, 24 May 2012, paras. 32–38. But note the dissents of Judge Kaul in the preceding proceedings: *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute – Dissenting Opinion of Judge Kaul, Pre-Trial Chamber II, 23 Jan. 2012, paras. 23–40; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute – Dissenting Opinion of Judge Kaul, Pre-Trial Chamber II, 23 Jan. 2012, paras. 30–45.

⁷² See *Prosecutor v. Kony et al.*, ICC-02/04-01/05-248, Decision to Terminate the Proceedings Against Raska Lukwiya, Pre-Trial Chamber II, 11 Jul. 2007; *Prosecutor v. Gaddafi et al.*, ICC-01/11-01/11-28, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, Pre-Trial Chamber I, 22 Nov. 2011; *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-512-Red, Decision Terminating the Proceedings Against Mr. Jerbo, Trial Chamber IV, 4 Oct. 2013.

⁷³ *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-512-Red, Decision Terminating the Proceedings Against Mr. Jerbo, Trial Chamber IV, 4 Oct. 2013, para. 16. In the case of M. Gaddafi, no Defence had been appointed to represent the suspect and in the case of Lukwiya, the Court had appointed *ad hoc* Defence to represent and protect the interests of the defence in proceedings relating to victim participation only (see *Prosecutor v. Kony et al.*, ICC-02/04-01/05-134, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre-Trial Chamber II, 1 Feb. 2007, paras. 14–15).

principle has been accepted by the Court in article 19 para. 2 jurisdictional challenges brought by an accused⁷⁴. As to the standard of proof, jurisdictional challenges suffer from the same lack of clarity as admissibility challenges as alluded to above. None of the decisions relating to jurisdictional challenges have adequately addressed this matter, with one Pre-Trial Chamber explicitly refusing to engage with the issue⁷⁵. Whatever the correct standard, unless convincing reasons are presented, it should apply equally in both admissibility and jurisdictional challenges.

3. Right to challenge

- 20 Paragraph 2 provides that two types of persons and two groups of States may challenge admissibility of a case on the grounds referred to in article 17 or the jurisdiction of the Court over a case, although the grounds on which each may make such challenges are not exactly the same. These categories are based upon, but slightly different from, those in the ILC Draft Statute.
- 21 a) **Accused or persons sought.** Subparagraph (a) authorizes '[a]n accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58' to challenge jurisdiction or admissibility. As in the *Statutes of the ICTY and ICTR*, there is no definition of an accused in the *Rome Statute*, but paragraph 2 (a) distinguishes an accused from a person for whom an arrest warrant or summons has been issued, making clear that either may challenge jurisdiction or admissibility pursuant to article 19⁷⁶. During the Diplomatic Conference, the majority of States preferred limiting the right to challenge jurisdiction and admissibility to the accused (a person for whom charges had been confirmed). However, some States argued that suspects should have the right to challenge admissibility before the charges were confirmed and it may be that the wording of subparagraph (a) reflects a compromise between the two positions⁷⁷.

⁷⁴ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, Decision on the 'Defence Challenge to the Jurisdiction of the Court', Pre-Trial Chamber I, 26 Oct. 2011, para. 4.

⁷⁵ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, Decision on the 'Defence Challenge to the Jurisdiction of the Court', Pre-Trial Chamber I, 26 Oct. 2011, para. 5.

⁷⁶ Earlier versions of this procedure, at a time when the process would have involved confirming charges in an indictment, also permitted suspects to make such challenges. Article 34 of the ILC Draft Statute provided that challenges could be made to jurisdiction 'prior to or at the commencement of the hearing, by an accused or any interested State' and, 'at any later stage of the trial, by an accused'. The ILC Draft Statute also provided that the Court might, 'on application by the accused or at the request of an interested State, at any time prior to the commencement of the trial, or on its own motion, decide, having regard to the purposes of this Statute, that a case before it is inadmissible' on grounds which are now found, in a more detailed and modified form, in article 17 of the *Rome Statute*: ILC Draft Statute, article 35. The term 'accused' was not expressly defined, but it is clear that a suspect became an accused when the indictment was confirmed pursuant to article 28 para. 3 of the ILC Draft Statute, which occurred *before* the Prosecutor sought a warrant for that person's arrest (however, that person could have been previously subject to provisional arrest pursuant to article 28 para. 1). The 1996 Preparatory Committee's compilation of proposals included a variety of alternative proposals concerning challenges, but all of them provided that an accused could challenge either admissibility or jurisdiction. See 1996 Preparatory Committee II, pp. 157–164. Article 36 in the Preparatory Commission's Dec. 1997 report provided that challenges could be made by an accused or, in square brackets, 'a suspect', who was defined in a footnote as including 'a person who is the subject to [sic] an investigation', but it noted that another option would be 'to limit the right to challenge to a suspect arrested on the basis of a pre-indictment arrest warrant'. Preparatory Committee Decisions Aug. 1997, p. 34 note 15. Identical formulations were included in article 12 [36] in the Zutphen Draft, p. 44 note 63 and in article 17 para. 2 of the New York Draft, p. 52 note 48.

⁷⁷ It is difficult to discern the reasons for the two positions since none of those who favoured extending this right to suspects explained their position in the Committee of the Whole and only two of those favouring limiting it to the accused gave any reasons and they are not particularly enlightening. UN Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC, Rome, 15 June – 17 July 1998, Official Records, Vol. 2; United States, 22 June 1998, p. 215 (would complicate the Court procedures); Philippines, 22 June 1998, p. 216 (would be pointless). However, one of those involved in the drafting of article 19 has informed the authors that the reason for including persons for whom an arrest warrant or summons had been issued was to permit jurisdictional and admissibility challenges before the confirmation hearing, but not when a person had simply been identified as a suspect (a person for whom there are grounds to believe that he or she committed a crime).

The First Edition of this Commentary, published a year before the Preparatory Commission adopted the draft Rules of Procedure and Evidence, stated that it would be consistent with the structure of the *Rome Statute*, as well as with the approach at the time of the *Rules of Procedure and Evidence of the ICTY and ICTR*, to define a person as an accused when he or she was identified in the document containing the charges referred to in article 61 para. 3(a), which must be provided to the person concerned at ‘a reasonable time before the [confirmation] hearing’⁷⁸. It was suggested that this moment would appear to be a better reference point than the later stage when the charges are confirmed in accordance with article 61 para. 7(a). Thus once a person was identified he or she should then be considered as an accused under the *Statute* unless the charges are not confirmed or the person is acquitted or convicted⁷⁹.

However, it appears that the drafters of the *Rules of Procedure and Evidence*, noting that the first instance in the *Rome Statute* that the person charged is called an ‘accused’ is in article 61 para. 9 (after the charges have been confirmed), have identified the person charged simply as a ‘person’ or ‘person charged’ pending confirmation of the charges, and as an ‘accused’ thereafter⁸⁰. This exact matter arose in the Court’s first confirmation of charges hearing in *Lubanga*, when on the opening day Defence counsel objected to his client being referred to as ‘the accused’ in an official ICC newsletter. The following day the Pre-Trial Chamber clarified in court that Lubanga was *not* an accused but rather a suspect.⁸¹ A suspect only becomes an accused upon the charges being confirmed.

‘[A] person for whom a warrant of arrest [...] has been issued under article 58’ must be a person for whom ‘[t]here are reasonable grounds to believe [...] has committed a crime within the jurisdiction of the Court’ and whose arrest ‘appears necessary’ on specified grounds (article 58 para. 1). ‘[A] person for whom [...] a summons to appear has been issued under article 58’ is someone who the Pre-Trial Chamber believes would appear upon such a summons being served upon him or her. As a practical matter, if the arrest warrant is sealed, the person subject to the warrant will not be able to avail himself or herself of the right to challenge jurisdiction or admissibility until he or she is in the custody of the Court or national authorities.

⁷⁸ The document containing the charges is similar to an indictment outlining the charges submitted in a common law system either to a grand jury or to a judge for confirmation, but with more information than included in the arrest warrant.

⁷⁹ Rule 2(A) of the ICTY Rules previously defined an accused as ‘[a] person against whom an indictment has been submitted in accordance with Rule 47’. Due to an amendment on 25 Jul. 1997, an accused is now defined as ‘[a] person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47’. Rule 47 distinguishes the submission of the indictment by the Prosecutor to a Judge for confirmation from the confirmation of the indictment. The ICTR Rules have also adopted the latter definition of an accused in its rule 2(A) and have maintained the general structure of the ICTY’s rule 47 in its own rule 47. Rules 2(A) and 47 of the Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone and rules 2(A) and 68 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon are similar. Rule 2(A) of the Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals defines an accused as ‘[a] person indicted by the ICTY, the ICTR or the Mechanism in accordance with Article 1 of the [MICT] Statute’.

⁸⁰ Articles 58 and 59 use ‘the person’. With respect to the *Rules*, see, e.g., up to the confirmation hearing: rule 117 sub-rule 1 (‘the person’) and sub-rule 2 (‘the person arrested’); rule 118 sub-rule 1 (‘the person’), sub-rule 2 (‘a person’) and sub-rule 3 (‘the detained person’); rule 119 sub-rule 1 (‘the person’) and sub-rule 2 (‘[t]he person concerned’); rule 120 (‘the person in the custody of the Court’); rule 121 sub-rule 1 (‘[a] person subject to a warrant of arrest or a summons’), sub-rule 2(a) (‘[t]he person concerned’) and sub-rule 4 (‘the person’); rule 122 (title) (‘the person charged’); rule 123 (title) (‘the person concerned’) and (‘a person’); rule 124 sub-rule 1 (‘the person concerned’) and sub-rule 3 (‘the person’); rule 125 sub-rule 1 (‘the person concerned’); rule 126 (‘the person concerned’); rule 128 (‘the person concerned’) and, after the confirmation hearing: rule 128 (Amendment of the charges) (‘the accused’). However, the use of the terms is not entirely consistent. Rule 129 uses both ‘accused’ and ‘the person concerned’.

⁸¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-32-EN, Transcript, Pre-Trial Chamber I, 10 Nov. 2006, p. 36, lines 15–22:

‘[T]he Presiding Judge would like to recall that it is inadmissible that, in this newsletter[] [...] the term ‘accused’ was used to refer to Thomas Lubanga Dyilo [...]. [T]he Chamber orders the Registrar to draft an explanatory note as soon as possible to inform the public that the status of Mr Thomas Lubanga Dyilo [...] is a suspect, not an accused person.’

- 25 A witness or any other person, such as a person accused of an ‘offence against the administration of justice’ under article 70, would not be authorized under article 19 to challenge the admissibility of a case or the Court’s jurisdiction over a case because they would neither be accused nor believed to have committed ‘a crime within the jurisdiction of the Court’, as identified in article 5⁸². The Court has therefore on a number of occasions denied article 19 para. 2(a) standing for *ad hoc* defence counsel and the Office of Public Counsel for the Defence when no arrest warrant or summons to appear had been issued⁸³.
- 26 **b) Investigating or prosecuting States.** ‘A State which has jurisdiction over a case’ may challenge the Court’s jurisdiction over a case or the admissibility of a case ‘on the ground that it is investigating or prosecuting the case or has investigated or prosecuted’⁸⁴. This formulation is narrower and more precise than the one used during the drafting of this provision⁸⁵. Given the text’s plain language, paragraph 2(b) can only include those States that have vested their courts with jurisdiction under national law over the relevant case. Such

⁸² Article 70 has been implemented by rule 163 sub-rule 2, which provides that ‘[t]he provisions of Part 2 [of the *Rome Statute*], and any rules thereunder, shall not apply, with the exception of article 21 [concerning applicable law]’. However, since under article 19 para. 1 the Court has a duty to decide whether it has jurisdiction over a case and may, on its own motion, determine whether a case is admissible, there is nothing that prevents it from considering any information relevant to these questions in proceedings ancillary to a case where the prosecution of offences against the administration of justice are involved. Thus, in *Bemba et al.* the Pre-Trial Chamber confirmed *proprio motu* that it did indeed have jurisdiction over the case in their decision on the confirmation of charges: *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-749, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 11 Nov. 2014, para. 8. In contrast to article 17, which provides that a case is inadmissible when a State is able and willing to investigate or prosecute genuinely a crime within the Court’s jurisdiction, article 70 para. 4(b) requires States Parties to submit offences against the administration of justice to their competent authorities for the purpose of prosecution on request by the Court ‘whenever it deems it proper’, leaving little scope for any admissibility challenge when the Court decides to prosecute the case itself.

⁸³ See *Situation in the Democratic Republic of the Congo*, ICC-01/04-93, Decision Following the Consultation held on 11 October 2005 and the Prosecution’s Submission on Jurisdiction and Admissibility Filed on 31 October 2005, Pre-Trial Chamber I, 9 Nov. 2005, p. 4; *Situation in Darfur, Sudan*, ICC-02/05-34, *Décision relative aux conclusions aux fins d’exception d’incompétence et d’irrecevabilité*, Pre-Trial Chamber I, 22 Nov. 2006, pp. 3–4; *Situation in Darfur, Sudan*, ICC-02/05-111-Corr, *Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07*, Pre-Trial Chamber I, 14 Dec. 2007, para. 25.

⁸⁴ In contrast, article 18 para. 1 uses a different formulation when it requires notice to all States Parties and to ‘those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned’.

⁸⁵ Article 34 (Challenges to jurisdiction) of the ILC Draft Statute provided that ‘[c]hallenges to the jurisdiction of the Court may be made, in accordance with the Rules: (a) prior to or at the commencement of the hearing, by an accused or any interested State’. This provision did not define the term ‘any interested State’, but the ILC explained in the 1994 ILC Report, commentary on article 34 that:

‘The court can be called on to exercise its powers under article 34 either by the accused or by any interested State. The term ‘interested State’ is not defined but is intended to be interpreted broadly. For example a State which has lodged an extradition request with respect to an accused would be an ‘interested State’ for this purpose, as also a State whose cooperation had been sought under part seven of the statute’.

Similarly, article 35 (Issues of admissibility) of the ILC Draft Statute provided that ‘an interested State’ could request the Court to determine that a case was inadmissible, but gave no further definition and it required no connection with the case. There does not seem to be any significant difference intended between the two provisions regarding which interested States might challenge jurisdiction and which ones might challenge admissibility, simply because the first article uses ‘any’ and the second uses ‘an’.

In the Preparatory Commission’s 1996 discussions, it was suggested that the term ‘any interested State’ be defined and several possibilities were advanced during the discussions, including: the State of the accused’s nationality, the State of the victim’s nationality, the State with custody of the accused, the territorial State or any other State which could exercise jurisdiction, however other States said that any State should be able to make such a challenge. 1996 Preparatory Committee I, p. 39. However, only one of the compilation of proposals regarding article 35 (and none regarding article 34) suggested a definition. See 1996 Preparatory Committee II, p. 161 (French proposal limited challenges to any State party).

Article 36 para. 2 (Challenges to the jurisdiction of the Court or the admissibility of a case) of the draft proposed by the Preparatory Committee at its December 1997 session provided that admissibility and jurisdiction challenges could be made by ‘[A State] [An interested] [State Party] which has jurisdiction over the crime’. Preparatory Committee Decisions Dec. 1997, p. 34. This formulation was retained without change in article 12

jurisdiction can take the form of any of the different recognised jurisdictional bases: the territorial principle (or objective territorial principle), the nationality or active personality principle, passive personality principle, the protective principle, or the universality principle. It should be noted that attempts during the negotiations of this article to limit the right to make challenges to only States Parties failed⁸⁶. It would thus appear that *any* State – so long as it has jurisdiction over the relevant case – can file challenges under article 19 para. 2(b), including those States that are not States Parties to the *Rome Statute*.

The second limitation on States that may challenge the Court's jurisdiction or the admissibility of a case is inelegantly drafted, since whether a State is investigating or prosecuting a case has no bearing on the Court's *jurisdiction*, only on the *admissibility* of the case⁸⁷. Although the chapeau of paragraph 2 refers to '[c]hallenges to the admissibility of a case on the grounds referred to in article 17', subparagraph (b) appears to limit these grounds to those listed in article 17 para. 1 (a) and (b) (genuine State investigation or prosecution)⁸⁸ and para. (c) (*ne bis in idem*) (since a trial would necessarily have involved a prosecution), thus excluding para. (d) (insufficient gravity)⁸⁹. However, nothing in paragraph 2 prevents States that have referred a situation in their own territory to the Prosecutor from making an admissibility or jurisdictional challenge. Nevertheless, the State would have to demonstrate that circumstances have changed and that it is now able and willing to investigate and, if there is sufficient admissible evidence, to prosecute. It must also be noted that as per article 95, pending a ruling by the Pre-Trial or Trial Chamber, a State that submits an admissibility challenge may postpone complying with co-operation and judicial assistance

para. 2(b) [36] (Challenges to the jurisdiction of the Court or the admissibility of a case) of the Zutphen Draft and article 17 para. 2(b) of the New York Draft.

⁸⁶ Those who favoured limiting the right to challenge to only States Parties argued that States who were not Parties 'did not share the burden of obligations under the Statute, to share the privilege of challenging the jurisdiction of the Court' (Italy), UN Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC, Rome, 15 June – 17 July 1998, Official Records, Vol. 2, 23 June 1998, p. 220; and that the Court would not be able to determine whether they observed the principles of the *Statute* (Philippines). *Ibid.*, p. 216. Those who favoured extending the right to States who were not Parties asserted that 'if a State that was not a party was carrying out an effective prosecution in its own territory, there was no reason for the Court to intervene and also conduct a prosecution' (United Kingdom), *ibid.*, p. 215, and that it was more consistent with complementarity (Singapore). *Ibid.*, p. 219.

⁸⁷ One of those involved in the drafting of this provision explained that the limitation to challenges by States with jurisdiction 'was intended to forestall situations where a State could challenge (and delay) the Court from proceeding with a case on the ground that it was investigating when in fact the investigation or prosecution was sure to fail because the State lacked jurisdiction even as far as its own courts were concerned'. Holmes, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations – Results* (1999) 41, 67. However, whether the State concerned is investigating or prosecuting or has done so is not a ground to challenge the Court's jurisdiction, only the admissibility of the case.

⁸⁸ Paragraph 2(b), in contrast to article 17 para. 1(a) and (b), omits the qualifier 'genuinely'. However, the omission was probably inadvertent and in any event, in practice neither Pre-Trial Chamber I nor the Appeals Chamber omitted it in its analysis of the challenge by Libya (where genuineness was at issue). See *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-344-Red, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 31 May 2013; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 Oct. 2013; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi', Appeals Chamber, 21 May 2014; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the Admissibility of the Case Against Abdullah Al-Senussi', Appeals Chamber, 24 Jul. 2014.

⁸⁹ However, one Pre-Trial Chamber, instead of holding that a State cannot invoke gravity in an article 19 para. 2(b) challenge, has simply stated that: '[a]s to the second limb (gravity), since [...] Kenya does not contest this element, the Chamber shall confine its examination to [...] whether there are actually ongoing domestic proceedings (complementarity)'. See *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-96, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011, para. 45; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011, para. 49.

(Part IX) requests unless the Prosecutor has obtained specific authority from the Court under article 19 para. 8⁹⁰. As of 31 May 2015, three States – Kenya, Libya and Côte d’Ivoire have made challenges pursuant to article 19 para. 2 (b)⁹¹.

- 28 c) **Article 12 States.** Even if a State does not satisfy the requirements of subparagraph (b) (it is investigating or prosecuting the case or has done so) for making a challenge under article 19, it may still be able to do so if it is ‘[a] State from which acceptance of jurisdiction is required under article 12’. Such State acceptance is clearly not required if the Security Council refers a situation to the Prosecutor pursuant to article 13 para. (b). However, it is a prerequisite to a situation being referred to the Prosecutor by a State under article 13 para. (a) or to the Prosecutor initiating an investigation pursuant to articles 13 para. (c) and 15 para. 1. Such acceptance occurs pursuant to an article 12 para. 3 declaration by a State that is not a Party to the *Rome Statute* or when the State joins the Court (thereby accepting the Court’s jurisdiction). In turn, this makes them subject to articles 12 para. 2(a) and (b). However, it must be noted that article 12 para. 2(b) refers to an ‘*accused*’ person who is a national of a State Party or of the State that has lodged an article 12 para. 3 declaration. Since, as discussed in the context of article 19 para. 2(a), a suspect does not become an accused until the charges are confirmed, this suggests that a State can only challenge admissibility or jurisdiction under article 19 para. 2(c) upon that eventuality. This perhaps explains why Kenya did not file its challenge under this provision in the *Ruto et al.* and *Muthaura et al.* cases and instead opted for article 19 para. 2(b)⁹². On the other hand, Côte d’Ivoire’s challenge in the *S. Gbagbo* case before Pre-Trial Chamber I invoked article 19 para. 2(c) (in addition to article 19 para. 2(b)) when the confirmation of charges proceedings had not even begun⁹³. Unfortunately, in its decision, the Chamber did not address article 19 para. 2(c) but instead only relied upon article 19 para. 2(b)⁹⁴. Nevertheless, it should be noted that, as the Kenya example shows, a State capable of bringing forth an article 12 para. 2(c) challenge will also, by definition, be able to bring a challenge under article 12 para. 2(b). However, in contrast to paragraph 2(b), paragraph 2(c) is not drafted in a limiting fashion and thus a State could challenge admissibility on any ground under article 17, including insufficient gravity (article 17 para. 1(d)). It would be wise for the Court to adopt a liberal interpretation of the word ‘accused’ in this particular context. To adhere to a strict interpretation would incur the odd result that States that are not States Parties to the *Rome Statute* would be able to challenge admissibility whilst the relevant person is a suspect (although not on gravity grounds), whilst States Parties (or States that have filed an article 12 para. 3 declaration) would have to wait until charges are confirmed before they are able to file a challenge under paragraph 2(c).

⁹⁰ Article 95, however, has no application in article 19 appellate proceedings: *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-387, Decision on the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, para. 27.

⁹¹ Côte d’Ivoire originally submitted an article 12 para. 3 declaration accepting the Court’s jurisdiction (subsequently becoming a State Party) and thus its filing refers both to article 19 para. 2(b) and para. 2(c): *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-11-Red, Requête de la République de Côte d’Ivoire sur la recevabilité de l’affaire le Procureur c. Simone Gbagbo, et Demande de sursis à exécution en vertu des Articles 17, 19 et 95 du Statut de Rome, Government of Côte d’Ivoire, 30 Sep. 2013, paras. 16–17.

⁹² See *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-19 and ICC-01/09-02/11-26, Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, Government of Kenya, 31 Mar. 2011, para. 1.

⁹³ See *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-11-Red, Requête de la République de Côte d’Ivoire sur la recevabilité de l’affaire le Procureur c. Simone Gbagbo, et Demande de sursis à exécution en vertu des Articles 17, 19 et 95 du Statut de Rome, Government of Côte d’Ivoire, 30 Sep. 2013, paras. 16–17.

⁹⁴ See *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 11 Dec. 2014, para. 26. This matter remained unaddressed on appeal: *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-75-Red, Judgment on the Appeal of Côte d’Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo’, Appeals Chamber, 27 May 2015.

As with subparagraph (b), States that fall within subparagraph (c) may also take advantage of article 95 and postpone the execution of co-operation and judicial assistance (Part IX) requests whilst the Pre-Trial or Trial Chamber consider an admissibility challenge unless the Court has specifically authorized the Prosecutor to collect evidence pursuant to article 19 para. 8⁹⁵.

d) **Certain aspects of the procedure for considering challenges.** A request or application made under article 19 must be made in writing and must ‘contain the basis for it’ as per rule 58 sub-rule 1⁹⁶. Where a filing is devoid of the basis for a challenge, the Court has held that ‘no admissibility challenge has been made as required by rule 58 of the Rules’⁹⁷. Regulation 38 sub-regulation 1(c) stipulates that a challenge pursuant to article 19 para. 2 must not exceed 100 pages in length unless otherwise ordered⁹⁸. Rule 58 sub-rule 2 gives the Chamber (the Pre-Trial Chamber, unless a Trial Chamber has been designated) considering a challenge or question concerning jurisdiction or admissibility or when acting on its own motion, the discretion to ‘decide on the procedure to be followed’ and to ‘take appropriate measures for the proper conduct of the proceedings’. This includes the holding of a hearing and joining this matter with ‘a confirmation or trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first’⁹⁹. In light of this broad discretionary mandate, the Appeals Chamber has upheld various exercises of discretion including decisions not to hold hearings¹⁰⁰, to decide challenges prior to

⁹⁵ As pointed out earlier on, article 95 ceases to apply once the Pre-Trial or Trial Chamber has disposed of the admissibility challenge: *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 11 Dec. 2014, para. 80. Article 95 has no application in article 19 appellate proceedings: *Prosecutor v. Gaddafi and Al-Senussi*, Case No. ICC-01/11-01/11-387, Decision the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, para. 27.

⁹⁶ There does not appear to be any difference between a request or an application under article 19. The term ‘request’ in that article appears only in paragraphs 10 (Prosecutor request to review a decision that a case is inadmissible) and 11 (Prosecutor request to a State for information about its investigation or prosecution). However, rule 58 sub-rule 2, which was drafted to make sure that both terms used in article 19 were covered, makes no distinction between requests or applications raising a challenge or question concerning jurisdiction or admissibility.

⁹⁷ *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-165, Decision on the Schedule for the Confirmation of Charges Hearing, Pre-Trial Chamber I, 22 Sep. 2014, para. 7 (where the Defence merely expressed its intention to raise an admissibility challenge).

⁹⁸ See *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-886-tENG, Decision on Urgent Application by Germain Katanga’s Defence for an Extension of the Page Limit, Trial Chamber II, 10 Feb. 2009, para. 2.

⁹⁹ Nevertheless, where a challenge is initiated in close proximity to the beginning of the confirmation of charges hearing, the Court has previously refused to entertain oral arguments relating to the challenge at that hearing: *Prosecutor v. Blé Goudé*, ICC-02/11-T-5-Red-ENG, Transcript, Pre-Trial Chamber I, 29 Sep. 2014, p. 5, lines 10–14. Several rules clarify the procedure to be followed at each successive stage. ‘If a question or challenge concerning jurisdiction or admissibility arises’ at a confirmation hearing, rule 122 (2) provides that ‘rule 58 applies’. Rule 60 provides:

‘If a challenge to the jurisdiction of the Court or to the admissibility of a case is made after a confirmation of the charges but before the constitution or designation of the Trial Chamber, it shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated in accordance with rule 130’.

Rule 133 provides that ‘[c]hallenges to the jurisdiction of the Court or the admissibility of the case at the commencement of the trial, or subsequently with the leave of the Court, shall be dealt with by the Presiding Judge and the Trial Chamber in accordance with rule 58’ (for the sole ground for a challenge permitted at this stage, see discussion of article 19 para. 4, margin No. 42 below).

¹⁰⁰ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, paras. 110–114; *Prosecutor v. Muthaura et al.*, Case No. ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, paras. 108–112.

determining requests for assistance¹⁰¹, to deny further time for the parties to submit additional evidence¹⁰², to deny Defence requests for unredacted evidence¹⁰³, and with respect to the participation of the concerned person in proceedings¹⁰⁴. In determining appeals on such matters, the Appeals Chamber has spoken clearly:

‘[It] will not interfere with the [...] Chamber’s exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. [...] [T]he Appeals Chamber will not interfere with the [...] Chamber’s exercise of discretion [...] save where it is shown that [the] determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions’¹⁰⁵.

- 31 Rule 58 sub-rule 3 requires the Court to transmit the request or application to the Prosecutor and (when the request or application has been made by a State) to ‘the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons’. The relevant Chamber must then ‘allow them to submit written observations to the request or application within a period of time determined by the Chamber’. This right to submit observations ‘extends to all the evidence provided in support of the challenge, irrespective of whether it was filed together with the challenge or submitted thereafter in the course of the admissibility proceedings’¹⁰⁶. However, the wording of rule 58 sub-rule 3 is unfortunate, because it does not explicitly require the Court, as confirmed by the Appeals Chamber¹⁰⁷, to inform a person who has been arrested and is being detained by national authorities but has not yet been surrendered to the Court,

¹⁰¹ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, paras. 122–124; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, paras. 120–122.

¹⁰² *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, paras. 97–101; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, paras. 95–99; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi’, Appeals Chamber, 21 May 2014, paras. 159–180.

¹⁰³ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on Admissibility of the Case Against Abdullah Al-Senussi’, Appeals Chamber, 24 Jul. 2014, paras. 78–81.

¹⁰⁴ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on Admissibility of the Case Against Abdullah Al-Senussi’, Appeals Chamber, 24 Jul. 2014, paras. 145–158 (where Al-Senussi had not been able to meet or instruct the Defence).

¹⁰⁵ *Prosecutor v. Kony et al.*, ICC-02/04-01/-5-408, Judgment on the Appeal of the Defence Against the ‘Decision on the Admissibility of the Case under Article 19(1) of the Statute’ of 10 March 2009, Appeals Chamber, 16 Sep. 2009, paras. 79–80.

¹⁰⁶ *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 11 Dec. 2014, para. 38 (but holding that in the specific circumstances before it, submissions from the Prosecution on the additional evidence presented by Côte d’Ivoire was not necessary to ensure the fairness of the admissibility proceedings nor would it assist in disposing of the challenge).

¹⁰⁷ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on Admissibility of the Case Against Abdullah Al-Senussi’, Appeals Chamber, 24 Jul. 2014, para. 146: ‘[t]he right to participate under rule 58(3) [...], however, does not extend to any person in respect of whom a warrant of arrest or summons to appear has been issued; it only applies to suspects who have either surrendered to the Court or who have appeared before it’ (emphasis in original).

or a person subject to a summons who has not yet purchased an airline ticket to the seat of the Court, that the request or application has been made or afford them a right to file submissions. Rule 58 sub-rule 3 is in marked contrast to rule 59 sub-rules 1 and 3, which require that those who referred a situation and victims be informed of the challenge or question (see margin No. 33 below).

Nevertheless, as the Appeals Chamber has also made clear, '[s]ave for these express stipulations [in rule 58 sub-rule 3], the [...] Chamber enjoys broad discretion in determining how to conduct the proceedings relating to challenges to the admissibility of a case'¹⁰⁸. Thus in practice, the Court has permitted suspects who technically fall outside of rule 58 sub-rule 3 to be notified of challenges and to submit written filings.¹⁰⁹ But the wording of this rule has also had, arguably, a negative effect. In the *Gaddafi and Al-Senussi* case – where the suspect had not been afforded the chance to communicate with or to instruct his Defence by the State authorities detaining him – the Appeals Chamber was able to point out, in dismissing his appeal, that the suspect did not have the *right* to submit his observations under the rule and that therefore the matter fell within the broad discretion of the Pre-Trial Chamber which had not exercised it erroneously¹¹⁰. This particular outcome is most unsatisfactory. Whilst correct in law on the most technical of grounds, both common sense and due process concerns indicate that such persons should be able to participate effectively and in a meaningful way in article 19 challenges by submitting written observations. Unfortunately, until the rule is amended, it has the potential to lead to further breaches of procedural fairness.

Sub-rule 4 requires that the Court (the relevant Chamber) 'rule on the challenge or question of jurisdiction first and then on any challenge or question of admissibility'. This had led one Pre-Trial Chamber to opine that it 'must dispose of the challenge to the admissibility of the case prior to [...] determin[ing] [...] whether to confirm or not the charges under article 61(7) of the Statute'¹¹¹. Additionally, rule 59 sub-rule 1 requires the Registrar to inform the

¹⁰⁸ *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 Aug. 2011, para. 87 and *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 Aug. 2011, para. 89. See also *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi', Appeals Chamber, 21 May 2014, para. 160; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on Admissibility of the Case Against Abdullah Al-Senussi', Appeals Chamber, 24 Jul. 2014, para. 149.

¹⁰⁹ See *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-40, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, Pre-Trial Chamber II, 4 Apr. 2011, para. 12 (where the suspects had not yet made their initial appearances before the Court); *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-131, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, Pre-Trial Chamber II, 4 Apr. 2011, para. 12 (where the suspects had not yet made their initial appearances before the Court); *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-134, Decision on the Conduct of the Proceedings Following the 'Application on Behalf of the Government of Libya Pursuant to Article 19 of the Statute', Pre-Trial Chamber I, 4 May 2012, para. 11 (where the suspect was in custody in Libya); *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-325, Decision on the Conduct of the Proceedings Following the 'Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the Statute', Pre-Trial Chamber I, 26 Apr. 2013, para. 8 (where the suspect was in custody in Libya); *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-15, Decision on the Conduct of Proceedings Following Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 15 Nov. 2013, para. 8 (where the suspect was in custody in Côte d'Ivoire).

¹¹⁰ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on Admissibility of the Case Against Abdullah Al-Senussi', Appeals Chamber, 24 Jul. 2014, paras. 145–158.

¹¹¹ *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-185, Decision on the Defence Challenge to the Admissibility of the Case Against Charles Blé Goudé for Insufficient Gravity, Pre-Trial Chamber I, 12 Nov. 2014, para. 10 (incorrectly citing rule 58 sub-rule 1).

Security Council or State Party that referred a situation to the Court pursuant to article 13 and 'victims who have already have communicated with the Court in relation to that case or their legal representatives' of any challenge or question concerning jurisdiction or admissibility under article 19 paras. 1–3. In making that notification, sub-rule 2 requires the Registrar to do so 'in a manner consistent with the duty of the Court regarding confidentiality of information, the protection of any person and the preservation of evidence' and shall provide with the notification 'a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged'. As the Appeals Chamber has found, this rule (together with other provisions) reflect 'an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court'¹¹². Since such considerations will vary greatly from case to case, so too will its application. Thus in the *Gaddafi and Al-Senussi* case, the Court was content with notifying victims and the Security Council of Libya's admissibility challenge to Gaddafi's case in its public redacted form together with its public annexes¹¹³. Yet, when Libya challenged the admissibility of the case against Al-Senussi, the Security Council was only notified of the public redacted version together with its public annexes, whereas the victims had access to the confidential redacted version¹¹⁴. Sub-rule 3 permits those notified to 'make representation in writing to the competent Chamber within such time limit as it considers appropriate'. Such deadlines are obviously subject to the Chamber's wide discretion. However, where victims have not participated in jurisdiction and admissibility proceedings either before the Pre-Trial or Trial Chamber, they will be constrained from doing so in appeal proceedings under article 19 para. 6¹¹⁵.

III. Paragraph 3: Right to seek rulings and to submit observations

- 34 The right of the Prosecutor to 'seek a ruling from the Court regarding a question of jurisdiction or admissibility' permits the Prosecutor to obtain a prompt ruling from the Court on these questions at any stage¹¹⁶ and however many times it may be necessary, whether the question related to an entire situation (in certain circumstances described below) or to an individual case¹¹⁷. Pursuant to Regulation 38 sub-regulation 2(b), a request under this article

¹¹² *Prosecutor v. Katanga*, ICC-01/04-01/07-475, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statement', Appeals Chamber, 13 May 2008, para. 54.

¹¹³ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-134, Decision on the Conduct of the Proceedings Following the 'Application on Behalf of the Government of Libya Pursuant to Article 19 of the Statute', Pre-Trial Chamber I, 4 May 2012, para. 14.

¹¹⁴ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-325, Decision on the Conduct of the Proceedings Following the 'Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the Statute', Pre-Trial Chamber I, 26 Apr. 2013, para. 14.

¹¹⁵ *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-400, Decision on 'Observations on the 'Directions on the Submission of Observations Pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence', Appeals Chamber, 20 Feb. 2012, paras. 12–15; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-390, Decision on 'Observations on the 'Directions on the Submission of Observations Pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence', Appeals Chamber, 20 Feb. 2012, paras. 12–15.

¹¹⁶ Where a case is found to be inadmissible by the Court, subsequent proceedings by the Prosecutor that seek to revisit the issue should proceed under article 19 para. 10 and not article 19 para. 3.

¹¹⁷ Neither article 34 (Challenges to jurisdiction) nor 35 (Issues of admissibility) of the ILC Draft Statute contained any provision expressly authorizing the Prosecutor to challenge admissibility or jurisdiction. Similarly, none of the Preparatory Commission's 1996 compilation of proposals regarding these articles included such a provision. See 1996 Preparatory Committee II, pp. 152–164. However, apparently after the Office of the Prosecutor of the ICTY and the ICTR brought concerns to the attention of States, article 36 para. 2(b) (Challenges to the jurisdiction of the Court or the admissibility of a case) of the draft proposed by the Preparatory Committee at its Dec. 1997 session provided that '[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility'. Preparatory Committee Decisions Dec. 1997, p. 34. This formulation was retained without change in article 12 para. 2(b) [36] (Challenges to the jurisdiction of the Court or the admissibility of a case) of the Zutphen Draft and article 17 para. 2(b) of the New York Draft.

must not exceed 50 pages in length unless otherwise ordered¹¹⁸. The Prosecutor has not, as of 31 May 2015, made a formal article 19 para. 3 request. Nevertheless, in accordance with the general principle of law that the party making allegations concerning a matter in dispute has the burden of proof (see margin No. 15 above), the Prosecutor would often have the burden of proof regarding jurisdiction and admissibility. However, in many instances the State or person concerned would have the exclusive, or almost exclusive, knowledge of the matters at issue and, therefore, the burden would appropriately shift towards that State or person under the equally important general principle of law that when the matters in issue are exclusively or largely within the exclusive knowledge of one party, the burden of proof may be regarded as resting on that party to provide a satisfactory and convincing explanation (see margin No. 15 above). In proceedings relating to admissibility challenges by States the Appeals Chamber has accepted such burden shifting¹¹⁹; there is no apparent reason why it should not apply equally in article 19 para. 3 proceedings. If either the State or the person concerned declined to provide the Prosecutor with information that was relevant to the existence or non-existence of jurisdiction or admissibility, and such information was not readily available from other sources, then jurisdiction and admissibility should be presumed¹²⁰.

Even if the ruling on the Prosecutor's motion did not have a *res judicata* effect on subsequent challenges, it would, as a practical matter, likely limit the scope of subsequent situation or case challenges (at least with respect to admissibility) to newly discovered information which could not have been discovered with due diligence or to significantly changed circumstances. If the Pre-Trial and Trial Chamber were to require that all challenges to jurisdiction or admissibility before the commencement of the trial had to be heard together with any application by the Prosecutor (see discussion below of paragraphs 4 and 5), this procedure could minimize the possibilities of delay and discourage frivolous State challenges made for the purpose of delay.

In contrast to the wording in paragraphs 1 and 2, the Prosecutor's ability under paragraph 3 to 'seek a ruling regarding a question of jurisdiction or admissibility' is not limited to a 'case'. Therefore, in certain circumstances, the Prosecutor could attempt to seek a ruling that the Court has jurisdiction over an entire situation or that the situation was admissible, although this view is not universally accepted¹²¹. In other words, the Prosecutor could perhaps seek a prompt determination that the Court has *jurisdiction* over crimes committed within a situation or, in certain clear-cut instances, that investigations and prosecutions were *admissible* in a situation where there is no doubt that the State's judicial system was unable or unwilling to genuinely investigate or prosecute, thus conserving the Court's resources so that these issues do not have to be relitigated case by case. Thus, the State concerned may still subsequently demonstrate to the Court that it is indeed able to investigate and prosecute genuinely in courts that function fairly and effectively. However, the Prosecutor has so far proceeded very cautiously and has not sought an early ruling pursuant to paragraph 3 on admissibility or jurisdiction with regard to any of the Court's situations. As a result, in the majority of cases it has been either a State or the accused that has challenged admissibility or jurisdiction.

The right guaranteed in the second sentence of paragraph 3 to those who have submitted a situation to the Prosecutor pursuant to article 13, as well as victims, to submit observations to the Court '[i]n proceedings with respect to jurisdiction or admissibility' ensures that all relevant points of view are heard (provided that the person subject to the proceedings is

¹¹⁸ See *Prosecutor v. Lubanga*, ICC-01/04-01/06-717, Reasons for the Appeals Chamber's Decision of 16 November 2006 on the 'Prosecution's Request for an Extension of the Page Limit', Appeals Chamber, 17 Nov. 2006, para. 8.

¹¹⁹ See *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on Admissibility of the Case Against Abdullah Al-Senussi', Appeals Chamber, 24 Jul. 2014, para. 167.

¹²⁰ See *supra* note 56.

¹²¹ Ideally, such a possibility should have been provided for in article 18. In any event, article 19 as a whole – as is apparent from its title – at least with respect to admissibility, applies to 'case[s]'.

informed, see discussion of rules 58 and 59 at margin Nos. 31–32 above)¹²². This includes the direct and *verbatim* views of individual victims, even where they make substantive or factual assertions relating to the merits of the crimes alleged (although these are only considered for the purposes of the jurisdiction or admissibility challenge)¹²³. This right is reinforced by rule 59 sub-rule 1, which requires the Registrar to inform ‘[t]hose who have referred a situation pursuant to article 13’ and ‘[t]he victims who have already communicated with the Court in relation to that case or their legal representatives’¹²⁴ about ‘any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3’. However, in cases when it is not the State or the Security Council that referred the situation and the Prosecutor commences proceedings *proprio motu*, the Appeals Chamber has held that this rule does not apply. Nevertheless, the Chamber has also opined that soliciting the views of the relevant State or the Security Council falls within the Court’s discretion pursuant to rule 58 sub-rule 2¹²⁵. When informing those entitled to receive such information, rule 59 sub-rule 2 requires the Registrar to do so ‘in a manner consistent with the duty of the Court regarding the confidentiality of the information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged’. Where jurisdiction or admissibility matters arise at the arrest warrant stage, where proceedings and filings are under seal and *ex parte* (Prosecutor only), the Appeals Chamber has rightly held that the second sentence of paragraph 3 should have no application, as it would produce absurd results¹²⁶.

38 Although nothing in article 19 para. 3 limits observations to being submitted in written form, rule 59 sub-rule 3 provides only for written representations in article 19 proceedings. Nevertheless, in the exercise of their wide discretion under rule 58 sub-rule 2, some Chambers have held hearings (in addition to receiving written submissions), and have permitted oral presentations by the person(s) concerned, victims and States¹²⁷. The term

¹²² One should bear in mind that although this provision appears – somewhat awkwardly – in a provision that permits the Prosecutor to request a ruling on jurisdiction and admissibility, its application is not limited to only such a circumstance. Rather, the Court has consistently applied it in the context of challenges pursuant to article 19.

¹²³ See *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-185, Decision on the Defence Challenge to the Admissibility of the Case Against Charles Blé Goudé for Insufficient Gravity, Pre-Trial Chamber I, 12 Nov. 2014, paras 13–15 (where the victims had made such assertions in their observations to the suspect’s admissibility challenge after the end of the confirmation of charges hearing).

¹²⁴ These victims encompass: ‘a) those victims who have been admitted to participate in the Case or their legal representatives; and b) those applicants who have submitted applications to be admitted to participate with respect to the Case or their legal representatives[.]’ *Prosecutor v. Kony et al.*, ICC-02/04-01/05-320, Decision Initiating Proceedings under Article 19, Requesting Observations and Appointing Counsel for the Defence, Pre-Trial Chamber II, 21 Oct. 2008, p. 7. With respect to the latter group, the practice of the Court has been to appoint the Office of Public Counsel for Victims to make submissions on their behalf whilst their applications are considered. In addition, unlike article 68 para. 3 which permits victim participation ‘[w]here the[ir] personal interests [...] are affected’, article 19 para. 3 is not so constrained, thus ‘accord[ing] a specific right of participation to victims’: *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-tENG-Corr, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 Jan. 2006, para. 62.

¹²⁵ *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-321, Judgment on the Appeal of Mr Laurent Koudou Gbagbo Against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, Appeals Chamber, 12 Dec. 2012, paras. 38–43 (holding that the Pre-Trial Chamber nevertheless erred by not further applying rule 103). See also *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-340, Decision on ‘Request by the Government of Kenya in Respect of the Confirmation of Charges Proceedings’, Pre-Trial Chamber II, 20 Sep. 2011, para. 9.

¹²⁶ *Situation in the Democratic Republic of the Congo*, ICC-01/04-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, Appeals Chamber, 13 Jul. 2006, paras. 30–31.

¹²⁷ See for example, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1163-tENG, Order to Convene a Hearing (Rule 58(2) of the Rules of Procedure and Evidence), Trial Chamber II, 22 May 2009; *Prosecutor v. Bemba*, ICC-01/05-01/08-T-22-tENG, Transcript, Trial Chamber III, 27 Apr. 2010; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-207, Order Convening a Hearing on Libya’s Challenge to the Admissibility of the Case Against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 14 Sep. 2012. While the Security Council has yet to be asked to appear in a hearing, the language of this provision is wide enough to include its participation should the

‘proceedings with respect to [...] admissibility’ is arguably broad enough to include proceedings dealing with preliminary challenges to admissibility under article 18. However, the linear approach to articles 15, 18 and 19, the placement of the provision in article 19 (but not in article 18), and the drafting history of article 18 suggest that this provision applies exclusively to article 19 proceedings¹²⁸.

IV. Paragraph 4: Limits on the number of challenges

Paragraph 4 limits persons or States referred to in paragraph 2 to one challenge to jurisdiction or to admissibility. However, a challenge by the concerned person does not preclude a State with jurisdiction from mounting its own challenge; and vice versa. In other words, both the person and the State have at least one chance to bring a challenge independent of each other. Neither is the concerned person nor a State precluded under this paragraph from filing one challenge on jurisdiction and another subsequent separate challenge on admissibility¹²⁹. As Pre-Trial Chamber II has stated (which is equally applicable to jurisdictional challenges):

[T]he Statute does not rule out the possibility that multiple determinations of admissibility may be made in a given case. Whilst as a general rule the accused may only raise issues of admissibility once, and that is at the commencement of the trial or prior to it, the power to bring a challenge under this heading is vested with the accused and a State which has jurisdiction over the case or whose acceptance of jurisdiction is required under article 13 of the Statute. Nowhere is it said that a challenge brought by either of the parties forecloses the bringing of a challenge by another equally legitimate party, nor that the right of either of the parties to bring a challenge is curtailed or otherwise affected by the Chamber’s exercise of its *proprio motu* powers [under article 19 para. 1]¹³⁰.

Similarly, article 19 para. 4 does not preclude States from filing separate admissibility challenges with respect to multiple persons in the same case, as occurred in the Libya situation. Thus, Libya’s first challenge was ‘understood to only concern the case against Mr Gaddafi’, expressly excluding Al-Senussi¹³¹. In the second challenge which concerned Al-Senussi, the Pre-Trial Chamber emphasised that the challenge was independent from that concerning Gaddafi, noting ‘that the unfolding of the proceedings following the Admissibility Challenge [concerning Al-Senussi] cannot be made dependent upon procedural steps in, or

relevant Chamber deem it necessary. On the other hand, other Chambers have rejected holding a hearing altogether: *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, Pre-Trial Chamber I, 26 Oct. 2011, paras. 62–63; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011, paras. 36–42; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-96, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011, paras. 32–38.

¹²⁸ Proposals expressly authorizing victims to participate in admissibility proceedings conducted pursuant to article 18 were not adopted by the Preparatory Commission. See Fernández de Gurmendi and Friman (2000) 3 *YblHumL* 289, 315 note 160. However, the failure to provide such express authorization is, to some extent, offset by article 68 para. 3, which provides that ‘[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court’, although this provision leaves the determination to the discretion of the Court.

¹²⁹ See *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-212, Decision on the ‘Corrigendum to the Challenge to the Jurisdiction of the International Criminal Court on the basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-01/11-01/11-129)’, Pre-Trial Chamber I, 15 Aug. 2012 (resolving Gbagbo’s jurisdictional challenge); *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-436-Red, Decision on the ‘Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut’, Pre-Trial Chamber I, 11 Jun. 2013 (resolving Gbagbo’s admissibility challenge).

¹³⁰ *Prosecutor v. Kony et al.*, ICC-02/04-01/05-377, Decision on Admissibility of the Case under Article 19(1) of the Statute, Pre-Trial Chamber II, 10. Mar. 2009, para. 25.

¹³¹ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-134, Decision on the Conduct of the Proceedings Following the ‘Application on Behalf of the Government of Libya Pursuant to Article 19 of the Statute’, Pre-Trial Chamber I, 4 May 2012, para. 8.

conclusion of, proceedings [in the Gaddafi case] that, although related, are distinct'¹³². Kenya, on the other hand, took a different path. Rather than filing separate admissibility challenges for each of the accused, it filed one challenge that encompassed two separate cases involving multiple suspects¹³³.

40 Paragraph 4 also requires that a challenge 'take place prior to or at the commencement of the trial'¹³⁴. The Second Edition of this Commentary suggested that the Court should develop clear, easy to administer guidelines in their jurisprudence in this area. To date the Court has not been able to do so. The matter first arose in the *Katanga and Ngudjolo* case, where the accused filed his challenge after the Trial Chamber had been constituted but before the parties had made their opening statements, thereby raising the question of what 'commencement of the trial' means. The Trial Chamber, after a lengthy analysis, held that these words referred to the time when the Presidency constitutes a Trial Chamber¹³⁵. However, the Appeals Chamber declined to rule on the correctness of this determination, holding that the Trial Chamber's findings were mere *obiter dicta*. The Chamber nevertheless stressed that this 'd[id] not necessarily mean that [...] it agree[d] with the Trial Chamber's interpretation'¹³⁶. Without any clear guidance from the Appeals Chamber, another Trial Chamber, when faced with the same situation opted for a different interpretation, 'namely, that the commencement of the trial occurs when the opening statements are made, immediately before the beginning of the evidence'¹³⁷. Which of these two positions is correct will ultimately depend

¹³² *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-325, Decision on the Conduct of the Proceedings Following the 'Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the ICC Statute', Pre-Trial Chamber I, 26 Apr. 2013, para. 10.

¹³³ See *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-19 and ICC-01/09-02/11-26, Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, Government of Kenya, 31 Mar. 2011.

¹³⁴ The first proposals contained no limit on the number of challenges or their timing. Article 34 of the ILC Draft Statute did not expressly limit the number of jurisdictional challenges by interested States, but it did require that they be made 'prior to or at the commencement of the hearing', apparently, the trial. Article 35 of the ILC Draft Statute also did not expressly limit the number of admissibility challenges by interested States, but did require that they be made 'at any time prior to the commencement of the trial'. The Preparatory Commission's 1996 compilation of proposals regarding articles 34 and 35 did not contain any proposal expressly limiting the number of challenges. See Preparatory Committee II, pp. 152 -164 (as a practical matter, the French proposal requiring challenges by States Parties to be made within one month after notification of the Prosecutor's intent to investigate would have limited them to one such challenge). However, article 36 para. 3 (Challenges to the jurisdiction of the Court or the admissibility of a case) of the draft proposed by the 1996 Preparatory Committee at its Dec. 1997 session limited the number and timing of challenges:

'The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge must take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial'.

Preparatory Committee Decisions Dec. 1997, p. 34. This formulation was retained without change in article 12 para. 3 [36] (Challenges to the jurisdiction of the Court or the admissibility of a case) of the Zutphen Draft and article 17 para. 3 of the New York Draft.

¹³⁵ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 Jun. 2009, para. 49. For academic criticism of this decision see Dov Jacobs, 'The Importance of Being Ernest: The Timeliness of the Challenge to Admissibility in *Katanga*' (2010) 23(2) *LeidenJIL* 331-342.

¹³⁶ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 Sep. 2009, para. 38.

¹³⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, 24 Jun. 2010, para. 210 (relying on *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-1084, Decision on the Status Before the Trial Chamber of the Evidence Heard by the Pre-Trial Chamber and the Decisions of the Pre-Trial Chamber in Trial Proceedings and the Manner in which Evidence shall be Submitted, Trial Chamber I, 13 Dec. 2007, para. 39 (where the same issue had arisen in the context of article 61 para. 9)). The Appeals Chamber was not asked to rule on the matter: *Prosecutor v. Bemba*, ICC-01/05-01/08-962-Corr, Corrigendum to Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges', Appeals Chamber, 19 Oct. 2010.

on the context of the relevant case; there is certainly support within the *Statute* for both positions as articulated by the two Trial Chambers. However, until the Appeals Chamber makes a definitive ruling on the issue, this area of the law remains uncertain.

Since article 19 para. 2(b) can encompass a number of States, the Chamber considering an admissibility challenge, which requires the Prosecutor, pursuant to paragraph 7, to suspend the investigation, should rule on it as rapidly as possible (see discussion of article 19 para. 7, margin Nos. 54–55 below). Any other approach could lead to endless delays, particularly where the relevant Chamber is seized of multiple or successive challenges by different States to the admissibility of a case¹³⁸. Although the possibility for States to delay, and, therefore, to undermine the effectiveness of investigations and prosecutions is a potential danger to the Court, the long-standing failure of States to investigate and prosecute international crimes committed since the Second World War suggests that the chances of a large number of such challenges is minimal. Indeed, as of 31 May 2015, not a single State in the world that is able to exercise domestic jurisdiction over such crimes committed in any of the situations currently before the Court – other than the situation State itself – has filed any such challenges.

Paragraph 4 further requires that challenges must be made only once and before or at the commencement of trial so as to ensure a degree of finality. The paragraph nonetheless permits the Court ‘in exceptional circumstances’ to ‘grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial’. These circumstances are not spelled out and since, as of 31 May 2015, no State or individual has attempted a second challenge, the Court has yet to clarify the matter. Nevertheless, it would be consistent with judicial economy and with due process to limit ‘exceptional circumstances’ in a challenge to *admissibility* by adopting a standard similar to that in article 84 para. 1(a) for revision of convictions or sentences. It would require that the challenge be based on newly discovered information, that the failure to discover that information was not the fault of the State making the new challenge and that the information be sufficiently important so that the decision on admissibility would have been different¹³⁹. Given that both the State and the Court have concurrent jurisdiction over the crimes, if the Court has determined that a case is admissible, the right of the accused to a prompt trial would appear to outweigh the State’s interest in trying the case; a transfer of the case to the State’s court would lead to delay¹⁴⁰. Therefore, the closer a case is to trial the more exceptional the circumstances would have to be to permit a second challenge to admissibility under article 17 para. 1(a) or (b). It is possible to imagine a situation where records of a previous trial in a State where the judicial system has broken down were not available through no fault of the person concerned at the time of the first challenge based on article 17 para. 1(c) (which provides that cases are inadmissible when the person concerned has already been tried unless that trial was designed to shield the person or was not independent or impartial (as per article 20 para. 3)). On the other hand, it is difficult to imagine exceptional circumstances which would permit a second

¹³⁸ In addressing such successive challenges, the relevant Chamber should bear in mind that States will have had an opportunity to make a challenge to admissibility if the Prosecutor, pursuant to article 18 para. 1, had notified them that a situation has been referred to the Court, and should limit successive challenges to raising newly discovered information or significantly changed circumstances. It should also be pointed out that two of the key participants in the drafting of the *Rules* noted that ‘[t]he most contentious question’ regarding rules to implement article 19 ‘was whether the Court, for the purpose of efficiency, could prompt all those who are eligible to submit a challenge to do so at one and at the same time. No such mechanism could be developed, however, due to the fact that the Statute only allows very specific limitations to the right to make a challenge’ Fernández de Gurmendi and Friman (2000) 3 *YblHumL* 289, 328.

¹³⁹ A less satisfactory, but still relatively strict standard to minimize the possibility of abusive successive challenges which Chambers could employ would be that contained in article 18 para. 7, which permits a State that has unsuccessfully challenged admissibility under article 18 to make a second challenge under article 19 ‘on the grounds of additional significant facts or significant change of circumstances’.

¹⁴⁰ It is true that some persons would prefer a trial in a national court, thinking that such a court might be more likely to acquit. That ground, absent an improbable showing that the Court would be biased, would not be a valid reason for granting the challenge.

challenge pursuant to article 17 para. 1(d), where a suspect would have originally alleged that a ‘case was not of sufficient gravity to justify further action by the Court’. This is owing to the reality that, as the Appeals Chamber has rightly pointed out, ‘a Chamber determines the gravity of a case only once in the course of the proceedings because the facts underlying the assessment of gravity are unlikely to change and a party may therefore be unable to raise the same issue again in future admissibility challenges’¹⁴¹. Furthermore, since the Court lacks the power to consider a case over which it has no *jurisdiction* and since it is under a continuing duty to satisfy itself that it has jurisdiction (as per article 19 para. 1), it would make less sense to read ‘exceptional circumstances’ more broadly in the case of a challenge to jurisdiction than to admissibility, particularly since such jurisdictional challenges cannot be used to force the Prosecutor to defer or suspend an investigation (see discussion of article 19 para. 7, margin Nos. 54–55 below).

43 The final sentence of paragraph 4 limits, to some extent, the possibility of successive frivolous challenges to admissibility at the commencement of the trial or at later stages by providing, first, that such challenges ‘may be based only on article 17, paragraph 1(c)’ (*ne bis in idem*) and, second, by reiterating that after the commencement of the trial such challenges may only be made ‘with the leave of the Court’¹⁴². Thus, at this stage, a State making a challenge would not merely have to demonstrate that it had genuinely opened an investigation or commenced a prosecution, but also that it had obtained a final judgment of conviction or acquittal. In addition, the relevant Chamber would have discretion to refuse even to entertain such a belated challenge. These limitations make considerable sense to ensure finality, effectiveness and certainty in the Prosecutor’s investigations and prosecutions. They further serve to minimize disruptions, including the transfer of proceedings to a completely different jurisdiction particularly at the trial stage, which would seriously impede efforts to secure justice without undue delay¹⁴³.

44 Notwithstanding, it should be noted, as outlined earlier, that in the *Katanga and Ngudjolo* case the Trial Chamber found that an accused’s challenge was filed out of time, since it had held that a trial commenced when a Trial Chamber had been constituted. Ordinarily, such a challenge would have required leave, but due to the uncertainty surrounding the meaning of the words ‘commencement of the trial’ the Chamber exercised its discretion and proceeded to consider the challenge on its merits even though they did not concern article 17, paragraph 1(c) matters¹⁴⁴.

V. Paragraph 5: Prompt challenges by States

45 Paragraph 5 requires States which are permitted to make challenges to jurisdiction or admissibility pursuant to paragraph 2(b) (investigating or prosecuting State) and (c) (article 12

¹⁴¹ *Prosecutor v. Kony et al.*, ICC-02/04-01/5-408, Judgment on the Appeal of the Defence Against the ‘Decision on the Admissibility of the Case under Article 19(1) of the Statute’ of 10 March 2009, Appeals Chamber, 16 Sep. 2009, para. 85.

¹⁴² Rule 133 provides that challenges at either stage ‘shall be dealt with by the Presiding Judge and the Trial Chamber in accordance with rule 58’.

¹⁴³ The same considerations restricting the scope of challenges at each stage of the proceedings and particularly after the commencement of a trial would apply to determinations by the relevant Chamber on its own motion concerning the admissibility of a case pursuant to article 19 para. 1, a request by the Prosecutor for a ruling on admissibility at any stage pursuant to article 19 para. 3 or a reconsideration by the Prosecutor pursuant to article 53 para. 2(b).

¹⁴⁴ See *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 Jun. 2009, paras. 56–58. See also *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 Sep. 2009, para. 38: ‘the Trial Chamber did not dismiss the admissibility challenge on the basis that it had not been made in time. Instead, the Trial Chamber considered the merits of the challenge and found the case to be admissible’.

State) to ‘make a challenge at the earliest opportunity’¹⁴⁵. Whilst, regrettably, the provision itself does not provide further guidance, does not spell out any sanctions for dilatory challenges and a State challenge has yet to be rejected on these grounds, the Court has nonetheless issued some instructions for future cases where this possibility may arise.

The underlying rationale behind article 19 para. 5 was aptly articulated by a Trial Chamber 46 as being ‘clearly aimed at avoiding challenges to admissibility needlessly hindering or delaying the proceedings, which means that they must be brought as soon as possible, preferably during the trial phase’¹⁴⁶. This should occur ‘once [the State] is in a position to actually assert a conflict of jurisdictions’ and thus ‘[t]he provision does not require a State to challenge admissibility just because the Court has issued a summons to appear’ or a warrant of arrest; it ‘must be seen in the context of the other provisions on admissibility, in particular article 17(1) of the Statute’¹⁴⁷. ‘Therefore, as soon as a State can present its challenge in such a way that it can show a conflict of jurisdictions, it must be submitted’¹⁴⁸. In other words, a

¹⁴⁵ Article 34 para. (a) of the ILC Draft Statute required that jurisdictional challenges by an accused or by any interested State be made ‘prior to or at the commencement of the hearing [apparently, the trial]’, but article 34 para. (b) then permitted an accused to make such a challenge ‘at any later stage of the trial’. The ILC explained in the 1994 ILC Draft Statute, commentary on article 34:

‘Challenges under article 34 may be made, in accordance with procedures laid down in the rules, at any time after confirmation of an indictment up to the commencement of the hearing. In addition the accused may challenge the jurisdiction at any later stage of the trial, in which the court would have the discretion to deal with the challenge as a separate issue or to reserve it to be decided as part of its judgement at the conclusion of the trial’. Article 35 of the ILC Draft Statute provided that ‘[t]he Court may on application by the accused or at the request of an interested State at any time prior to the commencement of the trial [...] decide [...] that a case before it is inadmissible’. The ILC stated that ‘[i]ssues arising under article 35 should normally be dealt with as soon as possible after they are made’: 1994 ILC Draft Statute, Commentary to article 35 (presumably, it should have read: ‘after they arise’).

‘As for the time of raising the issue of admissibility’, during the 1996 discussions in the Preparatory Committee, ‘it was generally agreed that it should be prior to, or at the beginning of the trial and not later’. 1996 Preparatory Committee I, p. 39. However, the Preparatory Commission’s 1996 compilation of proposals with regard to article 35 (Issues of admissibility) contained only one proposal, by France, imposing a deadline for challenges. See 1996 Preparatory Committee II, p. 161 (this proposal, requiring a State Party wishing to make such a challenge to do so within one month after receiving notice from the Prosecutor that he or she was planning to initiate an investigation, dropped out of the article 19 drafting process, but reappeared in a modified form in the US proposal which became article 18).

Article 36 para. 3 (Challenges to the jurisdiction of the Court or the admissibility of a case) of the draft proposed by the Preparatory Committee at its Dec. 1997 session limited the number and timing of challenges:

‘The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge must take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial’.

Preparatory Committee Decisions Dec. 1997, p. 35. Paragraph 2(b) listed a variety of definitions of States who could make jurisdictional or admissibility challenges. In addition, newly added article 36 para. 3bis provided that ‘[a] State referred to in paragraph 2 (b) of the present article shall make a challenge at the earliest opportunity’ *Ibid*. These formulations were retained without change in article 12 paras. 3 and 3bis [36] (Challenges to the jurisdiction of the Court or the admissibility of a case) of the Zutphen Draft and article 17 paras. 3 and 4 of the New York Draft.

¹⁴⁶ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1213-TENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 Jun. 2009, para. 44.

¹⁴⁷ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, paras. 46, 100; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Appeals Chamber, 30 Aug. 2011, paras. 45, 98. See also *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-75-Red, Judgment on the Appeal of Côte d’Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo’, Appeals Chamber, 27 May 2015, para. 35.

¹⁴⁸ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the Admissibility of the Case Against

State that is otherwise in a position to bring a challenge should not sit back, or vacillate and let proceedings before the Court continue, at cost in terms of time, human and financial resources, only to later come forward and abort them. States must act with due diligence.

- 47 In order to avoid such problems, the Court has a variety of approaches available, such as requiring that challenges be made by a particular date or before it considers an application by the Prosecutor under paragraph 3 for a ruling ‘regarding a question of jurisdiction or admissibility’. It would also be appropriate if the relevant Chamber determined that the longer the delay between notification of an investigation and the challenge, the less likely that it would be considered timely. Without effective criteria and procedures, States, particularly States hostile to the Court, could attempt to frustrate Court investigations and prosecutions by last-minute challenges to jurisdiction. And then, after such challenges are rejected, they may file new challenges to admissibility. Such challenges result in unwarranted delays and, ultimately, in a denial of justice. The dangers that a State could use such challenges prior to the arrest of a suspect to delay or prevent the arrest have been minimized by the provisions in article 19 para. 8.

VI. Paragraph 6: Allocation of responsibility and appeals

- 48 Article 36 para. 2 of the ILC Draft Statute envisaged that proceedings concerning jurisdiction and admissibility would ‘be decided by the Trial Chamber, unless it considers, having regard to the importance of the issues involved, that the matter should be referred to the Appeals Chamber’. The drafters of paragraph 6 decided, instead, that these matters would be decided by the Pre-Trial or Trial Chamber, with an automatic right to an interlocutory appeal to the Appeals Chamber¹⁴⁹. Paragraph 6 provides that prior to the confirmation of the charges (pursuant to article 61), challenges to the admissibility of a case or to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber and that after the charges are confirmed, challenges on these grounds are to be referred to the Trial Chamber¹⁵⁰. Thus, in the *Bemba* case, the Pre-Trial Chamber held that since it ‘ha[d] decided to confirm some of the charges against [...] Bemba [...] the Defence ha[d] no more *locus standi* to challenge the admissibility of the case at the pre-trial level’ given that the Prosecutor’s leave to appeal that decision had been denied¹⁵¹. In conjunction with rule 60, the Chamber rejected the Defence’s motion for the disclosure of material for the purpose of an admissibility challenge.
- 49 Paragraph 6 also provides that ‘[d]ecisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82’. Such decisions would include

Saif Al-Islam Gaddafi’, Appeals Chamber, 21 May 2014, para. 84. See also *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-354, Decision on Libya’s Postponement of the Execution of the Request for Arrest and Surrender of Abdullah Al-Senussi Pursuant to Article 95 of the Rome Statute and related Defence Request to Refer Libya to the UN Security Council, Pre-Trial Chamber I, 14 Jun. 2013, para. 31:

‘The Chamber understands this reference [“at the earliest opportunity”] to indicate that a State shall seize the Chamber of an admissibility challenge as soon as there are grounds on the basis of which the case would be inadmissible before the Court. Indeed, a State is required to challenge admissibility without delay once in a position to demonstrate the inadmissibility of the case before the Court’.

¹⁴⁹ Article 36 para. 4 (Challenges to the jurisdiction of the Court or the admissibility of a case) of the draft proposed by the Preparatory Committee at its December 1997 session provided:

‘Prior to the confirmation of the indictment, challenges to the admissibility of a case or challenges to the jurisdiction of the Court, shall be referred to the Pre-Trial Chamber. After confirmation of the indictment, they shall be referred to the Trial Chamber’.

Preparatory Committee Decisions Dec. 1997, p. 35. The concept of confirmation of an indictment in article 28 of the ILC Draft Statute was replaced with the concept of confirmation of charges in article 61. Proposals by Australia, the Netherlands and by France introduced the interlocutory appeal. 1996 Preparatory Committee II, pp. 160-161.

¹⁵⁰ As noted in *supra* note 99, rule 60 provides that a challenge made after a confirmation of the charges, but before the Trial Chamber is constituted or designated, must be addressed to the Presidency, which will refer it to the Trial Chamber as soon as it is constituted or designated.

¹⁵¹ *Prosecutor v. Bemba*, ICC-01/05-01/08-529, Decision on the ‘Requete aux fins divulgation des elements pertinents relatifs a l’admissibilite’, Pre-Trial Chamber II, 18 Sep. 2009, para. 14.

any decision with respect to challenges under article 19 and decisions on the Prosecutor's requests pursuant to paragraph 10 seeking review of an inadmissibility decision in the light of facts that have newly appeared. Article 82 para. 1(a) provides that "[e]ither party may appeal [...] (a) A decision with respect to jurisdiction or admissibility"¹⁵². Although the term 'party' generally refers to the Prosecutor and the Defence¹⁵³, the Court has permitted States to appeal rulings on their jurisdictional or admissibility challenges. The Appeals Chamber has:

'underst[ood] from the phrase "decision with respect to" that the operative part of the [impugned] decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility. [...] [T]he specific reference [in article 19 para. 6] to article 82 of the Statute and the use of identical language in articles 19(6) and 82(1)(a) of the Statute indicate that the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case'¹⁵⁴.

This does not mean that the decision being appealed has to exclusively concern admissibility or jurisdictional matters. In one instance, '[a]lthough the impugned decision [wa]s a decision on an application for warrants of arrest, the decision by the Pre-Trial Chamber to reject the Prosecutor's application in respect of [...] Ntaganda was based on a ruling of the admissibility of the case against him'. As the Appeals Chamber held, 'to th[at] extent, the impugned decision [wa]s a decision 'with respect to [...] admissibility', as required by article 82(1)(a)'¹⁵⁵. In other words:

'it is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a) of the Statute. Even if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of cases, that fact would not, in of itself, render the decision a 'decision with respect to [...] admissibility' under article 82(1)(a)'¹⁵⁶.

The Court has also clarified that since the scope of appeals proceedings is determined by the scope of the proceedings before the Pre-Trial or Trial Chamber, '[f]acts which postdate the [i]mpugned [d]ecision fall beyond the possible scope of the proceedings before the Pre-

50

¹⁵² As discussed earlier, the Court has ruled that arguments relating to human rights violations or to the definition of crimes are not matters relating to jurisdiction or admissibility. See *supra* notes 48, 70, 71.

¹⁵³ See for example, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Appeals Chamber, 11 Jul. 2008, para. 93 (in the context of article 69 para. 3).

¹⁵⁴ *Situation in the Republic of Kenya*, ICC-01/09-78, Decision on the Admissibility of the 'Appeal of the Government of Kenya Against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence', Appeals Chamber, 10 Aug. 2011, paras. 15–16. See also *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-270, Decision on the 'Appeal Against the Single Judge's Decision on the "Request by Ms. Moraa Gesicho to Appear as Amicus Curiae"', Appeals Chamber, 17 Aug. 2011, para. 4; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-250, Decision on the 'Appeal Against the Single Judge's Decision on the "Request by Ms. Moraa Gesicho to Appear as Amicus Curiae"', Appeals Chamber, 17 Aug. 2011, para. 4; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-74, Decision on the Admissibility of the 'Appeal Against Decision on Application under Rule 103' of Ms Mishana Hosseinioun of 7 February 2012, Appeals Chamber, 8 Mar. 2012, paras. 10–11; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-126, Decision on 'Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi'' of 10 April 2012, Appeals Chamber, 25 Apr. 2012, paras. 12–16; *Prosecutor v. Katanga*, ICC-01/04-01/07-3424, Decision on the Admissibility of the Appeal Against the 'Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350', Appeals Chamber, 20 Jan. 2014, paras. 32–34.

¹⁵⁵ *Situation in the Democratic Republic of the Congo*, ICC-01/05-169, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', Appeals Chamber, 13 Jul. 2006, para. 18.

¹⁵⁶ *Situation in the Republic of Kenya*, ICC-01/09-78, Decision on the Admissibility of the 'Appeal of the Government of Kenya Against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence', Appeals Chamber, 10 Aug. 2011, para. 17.

Trial [or Trial] Chamber and therefore beyond the scope of the proceedings on appeal'¹⁵⁷. With respect to victims, it has been held that '[t]he legal instruments of the Court do not set out any specific procedure regarding the participation of victims in appeals brought under articles 19(6) and 82(1)(a) of the Statute'¹⁵⁸. However, the Court has adopted a scheme whereby 'only those victims who have made observations before the Pre-Trial or Trial Chamber are invited to make observations before the Appeals Chamber'¹⁵⁹. Therefore, unless victims have participated in the earlier jurisdiction or admissibility proceedings before a first-instance Chamber they will not be entitled to participate for the first time at the appeal stage.

51 Rule 154 sub-rule 1 requires that an appeal under article 82 para. 1(a) be filed 'not later than five days from the date upon which the party filing the appeal is notified of the decision'. As a general rule, the party making the appeal would have the burden to demonstrate that the decision should be reversed¹⁶⁰. As per rule 156 sub-rule 3, such appeals are conducted in writing (unless the Appeals Chamber decides to convene an oral hearing). They are subject to regulation 38 sub-regulation 1(c) (not regulation 37 sub-regulation 1), which therefore means that appeals and responses in article 19 appellate proceedings must not exceed 100 pages in length unless otherwise ordered¹⁶¹. While the Court's regulations do

¹⁵⁷ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-234, Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal Against the Pre-Trial Chamber's Decision on Admissibility', Appeals Chamber, 28 Jul. 2011, para. 13; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-202, Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal Against the Pre-Trial Chamber's Decision on Admissibility', Appeals Chamber, 28 Jul. 2011, para. 12. See also *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi', Appeals Chamber, 21 May 2014, paras. 40-44; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on Admissibility of the Case Against Abdullah Al-Senussi', Appeals Chamber, 24 Jul. 2014, paras. 55-59, 193, 244(g); *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-75-Red, Judgment on the Appeal of Côte d'Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo', Appeals Chamber, 27 May 2015, paras 33, 43-45.

¹⁵⁸ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-390, Decision on the 'Observations on the "Directions on the Submission of Observations Pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence"', Appeals Chamber, 20 Feb. 2012, para. 13; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-400, Decision on the 'Observations on the "Directions on the Submission of Observations Pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence', Appeals Chamber, 20 Feb. 2012, para. 13. But see the separate opinions of Judge Song: *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-390, Decision on the 'Observations on the "Directions on the Submission of Observations Pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence"' – Separate Opinion of Judge Sang-Hyun Song, Appeals Chamber, 20 Feb. 2012, paras. 2-4; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-400, Decision on the 'Observations on the "Directions on the Submission of Observations Pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence"' – Separate Opinion of Judge Sang-Hyun Song, Appeals Chamber, 20 Feb. 2012, paras. 2-4.

¹⁵⁹ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-390, Decision on the 'Observations on the "Directions on the Submission of Observations Pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence"', Appeals Chamber, 20 Feb. 2012, para. 13; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-400, Decision on the 'Observations on the "Directions on the Submission of Observations Pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence"', Appeals Chamber, 20 Feb. 2012, para. 13.

¹⁶⁰ See Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007) 227.

¹⁶¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-717, Reasons for the Appeals Chamber's Decision of 16 November 2006 on the 'Prosecution's Request for an Extension of the Page Limit', Appeals Chamber, 17 Nov. 2006, paras. 6-9. However, where the Appeals Chamber invites observations under rule 103 (and responses thereto) or the appeals proceedings arise from a *proprio motu* decision of the Chamber pursuant to article 19 para. 1, then the page limit under regulation 37 sub-regulation 1 is applicable, that is, no more than 20 pages in length: *Prosecutor v. Kony et al.*, ICC-02/04-01/-5-408, Judgment on the Appeal of the Defence Against the 'Decision on the Admissibility of the Case under Article 19(1) of the Statute' of 10 March 2009, Appeals Chamber, 16 Sep. 2009, paras. 20-21; *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-266, Decision on Requests Related to Page Limits and Reclassification of Documents, Appeals Chamber, 16 Oct. 2012, para. 8; *Prosecutor v. L. Gbagbo*, ICC-02/11-01/11-268, Decision Further to the 'Directions on the Submissions of Observations' Issued on 31 August 2012 and on the Clarification Request of Mr Gbagbo, Appeals Chamber, 18 Oct. 2012, para. 4.

not foresee the filing of replies to responses pursuant to rule 154 sub-rule 1, the Appeals Chamber has previously exercised its discretion under regulation 28 to allow the relevant participants to do so in article 19 appellate proceedings¹⁶². In contrast to article 18 para. 4 which states that '[t]he appeal may be heard on an expedited basis', paragraph 6 contains no similar language. However, rule 156 sub-rule 4 (which governs the procedure for an appeal pursuant to rule 154) requires that '[t]he appeal shall be heard as expeditiously as possible', thereby correcting a weakness and inconsistency in paragraph 6¹⁶³.

A practice has emerged in cases where a Pre-Trial Chamber makes an admissibility or jurisdiction decision in the course of proceedings relating to the Prosecutor's application for a warrant of arrest or summons to appear. It is that the person concerned or the relevant State files an independent admissibility or jurisdictional challenge and, if aggrieved by the Pre-Trial Chamber's decision, files an appeal. Whilst an appeal against a ruling on jurisdiction or admissibility in an arrest warrant or summons to appear decision is possible (once the person concerned or the relevant State learns of its existence), it would be a most ill-advised endeavour. This is because such a decision would have been made without the participation of the concerned party and any appeal at that point in time would deprive the appellants of the chance to make their full case before the Pre-Trial Chamber; it would also entail tight filing deadlines hanging over the preparation of submissions (which, as aforementioned, is limited to five days)¹⁶⁴.

¹⁶² *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-442, Decision on the Libyan Government's Request to File Further Submissions, Appeals Chamber, 12 Sep. 2013, para. 12; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-508, Decision on Mr Al-Senussi's Request to File Further Submissions and Related Issues, Appeals Chamber, 6 Feb. 2014, para. 17.

¹⁶³ In this respect, the fastest time in which an admissibility appeal has been issued by the Court was two months and eleven days from the time when the decision was rendered (on 3 Oct. 2006) by the Pre-Trial Chamber in the *Lubanga* case: *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006. In stark contrast, the longest time in which an admissibility appeal has been issued by the Court was just shy of one year(!) from the time when the decision was rendered (on 31 May 2013) by the Pre-Trial Chamber in the *Gaddafi and Al-Senussi* case: *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi', Appeals Chamber, 21 May 2014. In the latter case, the delay was of such concern that the Defence was compelled to file an urgent request seeking that a decision be issued by the Appeals Chamber: *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-537, Urgent Request for the Immediate Issuance of the Judgment on Libya's Appeal Against the 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi' with Public Annex A, Defence, 30 Apr. 2014.

¹⁶⁴ The experience in the *Lubanga* case is a good case study of the problems that can ensue by choosing this route. There, the suspect discovered the admissibility determination in his arrest warrant decision by the Pre-Trial Chamber after his arrival at the Court. Duty counsel treated this as notification of the decision pursuant to rule 154 sub-rule 1, triggering the five day deadline for the filing of an appeal and applied to the Pre-Trial Chamber for the disclosure of further information in order to prepare the appeal and for an extension of time in which to file the appeal. The Pre-Trial Chamber held that it was not competent to entertain the application: *Prosecutor v. Lubanga*, ICC-01/04-01/06-50, Decision on the Application by the Duty Counsel for the Defence dated 20 March 2006, Pre-Trial Chamber I, 22 Mar. 2006. The suspect then approached the Appeals Chamber but was denied an extension of time and was ordered to provide reasons in support of his appeal and to respond to the Prosecutor's submission that it was questionable whether the appeal should have been brought at that stage of the proceedings: *Prosecutor v. Lubanga*, ICC-01/04-01/06-129, Decision on the Appellant's Application for an Extension of the Time Limit for the Filing of the Document in Support of the Appeal and Order Pursuant to Regulation 28 of the Regulations of the Court, Appeals Chamber, 30 May 2006. The suspect then sought to discontinue the appeal without waiving his right to subsequently challenge the admissibility of the case and sought a formal acknowledgement of this position from the Appeals Chamber. The Appeals Chamber declined to treat this as a discontinuance because he sought to impose reservations, something that was not foreseen in the *Statute* or *Rules* and declined to grant an extension of time: *Prosecutor v. Lubanga*, ICC-01/04-01/06-176, Decision on Thomas Lubanga Dyilo's Brief Relative to Discontinuance of Appeal, Appeals Chamber, 3 Jul. 2006. Finally, the Appeals Chamber decided that it had no power to transfer the suspect's appeal back to the Pre-Trial Chamber, declined to rule on whether article 82 para. 1(a) gives a right to appeal an *ex parte* decision, deemed the appeal abandoned and dismissed it because the suspect's discontinuance still did not comply with the *Rules*: *Prosecutor v. Lubanga*, ICC-01/04-01/06-393, Decision on Thomas Lubanga Dyilo's Application for Referral to the Pre-Trial Chamber/In the Alternative, Discontinuance of Appeal, Appeals Chamber, 9 Sep. 2006.

53 In contrast to paragraph 7, which provides that in case of a State's challenge to admissibility the Prosecutor must suspend the investigation pending a decision by the Court, article 82 para. 3 provides that '[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence'. Rule 156 sub-rule 5 provides that, '[w]hen filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3'¹⁶⁵. For this reason 'it is preferable that [the] request [...] be presented in the appeal together with the reasons in support of the request'¹⁶⁶. Whether or not the request will be granted is a matter within the discretion of the Appeals Chamber. 'Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances'¹⁶⁷. Such considerations include: that the impugned decision '(i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the appeal'¹⁶⁸. Unless the Appeals Chamber decides otherwise, if the relevant Chamber has rejected the challenge, the Prosecutor would resume the investigation immediately, pending an appeal. However, the suspension of domestic or other proceedings that are independent of those before the Court will exceed the scope of a request for suspensive effect.¹⁶⁹ The Appeals Chamber has also held that a pending appeal does not have any implications for surrender requests. Therefore a State would continue to be obliged to surrender a suspect into the custody of the Court, should he or she be in their

¹⁶⁵ The draft Rules of Procedure and Evidence prepared by Australia, and submitted to the first session of the Preparatory Commission before the First Edition of this Commentary, did not refer to article 82 para. 3.

¹⁶⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08-499, Decision on the Request for Suspensive Effect, Appeals Chamber, 3 Sep. 2009, para. 10. See also *Prosecutor v. Bemba*, ICC-01/05-01/08-817, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges', Appeals Chamber, 9 Jul. 2010, para. 10; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-387, Decision the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, paras. 13–14.

¹⁶⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08-499, Decision on the Request for Suspensive Effect, Appeals Chamber, 3 Sep. 2009, para. 11. See also *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-12, Decision on the Request of the Prosecutor of 19 December 2012 for Suspensive Effect, Appeals Chamber, 20 Dec. 2012, para. 19; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-387, Decision the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, para. 22; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-480, Decision on the Request for Suspensive Effect and the Request to File a Consolidated Reply, Appeals Chamber, 22 Nov. 2013, para. 14.

¹⁶⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-817, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges', Appeals Chamber, 9 Jul. 2010, para. 11. See also *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-391, Decision on the Requests of Mr Ruto and Mr Sang for Suspensive Effect, Appeals Chamber, 29 Feb. 2012, paras. 9–10; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-401, Decision on the Request of Mr Kenyatta and Mr Muthaura for Suspensive Effect, Appeals Chamber, 29 Feb. 2012, paras. 9–10; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2953, Decision on the Admissibility of the Appeals Against Trial Chamber I's 'Decision Establishing the Principles and Procedures to be Applied to Reparations' and Directions on the Further Conduct of Proceedings, Appeals Chamber, 14 Dec. 2012, para. 82; *Prosecutor v. Katanga*, ICC-01/04-01/07-3344, Decision on the Request for Suspensive Effect of the Appeal Against Trial Chamber II's Decision on the Implementation of Regulation 55 of the Regulations of the Court, Appeals Chamber, 16 Jan. 2013, para. 6; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-56, Decision on Côte d'Ivoire's Request for Suspensive Effect of its Appeal Against the 'Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo' of 11 December 2014, Appeals Chamber, 20 Jan. 2015, para. 13.

¹⁶⁹ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-480, Decision on the Request for Suspensive Effect and the Request to File a Consolidated Reply, Appeals Chamber, 22 Nov. 2013, paras. 15–17 (where a request for the suspension of domestic criminal proceedings against the suspect was held to 'exceed[] the scope of an order for suspensive effect'). See also *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-56, Decision on Côte d'Ivoire's Request for Suspensive Effect of its Appeal Against the 'Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo' of 11 December 2014, Appeals Chamber, 20 Jan. 2015, para. 14: 'Côte d'Ivoire does not explain why the surrender of Ms Gbagbo to the Court would necessarily result in a suspension of the domestic proceedings'.

detention, during an appeal of an admissibility decision¹⁷⁰. It cannot claim that surrender defeats or frustrates the purpose of the appeal in that it would prevent domestic criminal processes from proceeding¹⁷¹. Given the need for criminal investigations to proceed expeditiously so as to obtain evidence while it is still fresh and thereby ensure its preservation as well as other considerations, the Appeals Chamber has tended to reject requests for suspensive effect¹⁷².

VII. Paragraph 7: Suspension of investigation

Paragraph 7 was introduced at the Diplomatic Conference to replace a bracketed provision in the New York draft in article 54 (Investigation of alleged crimes) which would have *prevented* the Prosecutor from even *initiating* an investigation where it was challenged within one month after the Prosecutor notified States that he or she had received a referral from the Security Council, a State complaint or information from an individual¹⁷³. In contrast, this paragraph simply requires the Prosecutor to *suspend* an investigation *after it has been initiated* when an investigating or prosecuting State (paragraph 2 (b)) or an article 12 State (paragraph 2 (c)) has made a challenge until the relevant Chamber makes a determination in accordance with article 17;¹⁷⁴ the provision has no effect on domestic

¹⁷⁰ See *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-387, Decision on the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, paras. 24–27 (holding that the Chamber had not been provided with information as to why the surrender of the suspect to the Court would prevent Libya from continuing with its domestic investigations and that article 95 did not apply to appellate proceedings); *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-446, Decision on the ‘Request for an Immediate Finding of Non-Compliance and Referral to United Nations Security Council’, Appeals Chamber, 17 Sep. 2013, para. 8.

¹⁷¹ See *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-387, Decision the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, para. 24; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-56, Decision on Côte d’Ivoire’s Request for Suspensive Effect of its Appeal Against the ‘Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo’ of 11 December 2014, Appeals Chamber, 20 Jan. 2015, para. 17.

¹⁷² See *Prosecutor v. Bemba*, ICC-01/05-01/08-817, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’, Appeals Chamber, 9 Jul. 2010 (where the Trial Chamber rejected the accused’s admissibility challenge); *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-391, Decision on the Requests of Mr Ruto and Mr Sang for Suspensive Effect, Appeals Chamber, 29 Feb. 2012, paras. 9–10 (where the Pre-Trial Chamber rejected the accused’s jurisdictional challenges); *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-401, Decision on the Request of Mr Kenyatta and Mr Muthaura for Suspensive Effect, Appeals Chamber, 29 Feb. 2012 (where the Pre-Trial Chamber rejected the accused’s jurisdictional challenges); *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-387, Decision on the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, (where the Pre-Trial Chamber rejected the State’s admissibility challenge); *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-480, Decision on the Request for Suspensive Effect and the Request to File a Consolidated Reply, Appeals Chamber, 22 Nov. 2013 (where the Pre-Trial Chamber accepted the State’s admissibility challenge); *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-56, Decision on Côte d’Ivoire’s Request for Suspensive Effect of its Appeal Against the ‘Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo’ of 11 December 2014, Appeals Chamber, 20 Jan. 2015 (where the Pre-Trial Chamber rejected the State’s admissibility challenge).

¹⁷³ Preparatory Committee (Consolidated) Draft, article 54 para. 3. That provision was based on article 26 para. 1*bis* (Investigation of alleged crimes) in the draft adopted by the Preparatory Committee at its Aug. 1997 session, which did not contain such a bar. Preparatory Committee Decisions Aug. 1997, p. 14.

¹⁷⁴ See *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1213-ENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 Jun. 2009, para. 45; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi’, Appeals Chamber, 21 May 2014, para. 166. See also *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)*, Office of the Prosecutor, 16 May 2012, para. 30; *Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)*, Office of the Prosecutor, 7 Nov. 2012, para. 12; *Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)*, Office of the Prosecutor, 8 May 2013, para. 15; *Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)*, Office of the Prosecutor, 14 Nov. 2013, para. 14.

investigations¹⁷⁵. Paragraph 7 in conjunction with paragraph 5, and in contrast to article 18 para. 2, does not impose any time limit for making such a challenge (but does mandate that it be filed ‘at the earliest opportunity’¹⁷⁶), thus leaving the Prosecutor and the relevant Chamber with a certain degree of uncertainty about whether an investigation might be suspended at any moment. Moreover, in further contrast to article 18 para. 2, there is no provision expressly authorizing the relevant Chamber to lift the suspension at the request of the Prosecutor pending a decision on the challenge. The possibility that a State might make a frivolous challenge to an investigation within this period is likely to encourage the Prosecutor to gather as much information as possible during the preliminary examination if he or she considers that there is a serious risk that the territorial State or another State might take this step¹⁷⁷. Of course, the adverse impact of a suspension on the investigation will encourage the relevant Chamber to reach a decision as quickly as possible on any challenges¹⁷⁸. The use of the word ‘suspend’, rather than ‘defer’, as in article 18 paras. 2 and 6, does not seem to have any significance (see discussion of article 19 para. 11, margin Nos. 69–70 below)¹⁷⁹.

- 55 The restrictive impact of this paragraph is mitigated in at least five significant respects. First, since article 17 addresses only admissibility, not jurisdiction, it is clear that any State challenge limited to jurisdiction¹⁸⁰ would not require the Prosecutor to suspend the investigation. Any other reading would mean that the Prosecutor would have to suspend the investigation until the Court makes a determination in accordance with article 17 – in effect indefinitely, since the Court would not be considering the question of admissibility (unless it did so on its own motion). The distinction can be explained, as governments would be more concerned with suspending an investigation that would be seen as disrupting past or current proceedings in their own courts than an investigation where the State had not taken any action. In any event, it is likely that in many cases where a State challenges the jurisdiction of the Court it would also challenge the admissibility of the case (unless it was seeking to delay the investigation or prosecution by successive frivolous challenges as noted above). Second, State challenges to jurisdiction or to admissibility do not require the Pre-Trial Chamber to suspend any investigative measures that it is taking on its own initiative pursuant to article 56 para. 3 relating to a unique investigative opportunity, since paragraph 7 expressly applies only to the Prosecutor¹⁸¹.

¹⁷⁵ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-480, Decision on the Request for Suspensive Effect and the Request to File a Consolidated Reply, Appeals Chamber, 22 Nov. 2013, para. 16.

¹⁷⁶ For the Court’s jurisprudence on the meaning of ‘at the earliest opportunity’, see the above commentary to article 19 para. 5.

¹⁷⁷ Too much reliance on the sentiment that other non-territorial States might file a challenge, however, would be misplaced. As of 31 May 2015 only three States – Kenya, Libya and Côte d’Ivoire – have challenged the admissibility of cases before the Court and in all of these instances they were the same situation States from which the cases had arisen. That is, every admissibility challenge that has been lodged with the Court has come from territorial States.

¹⁷⁸ See *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi’, Appeals Chamber, 21 May 2014, para. 166.

¹⁷⁹ The drafting history of articles 18 and 19 suggests that terms like ‘suspend’ and ‘defer’ were used interchangeably or without any significant differences in meaning. For example, the term ‘suspend’ was first used before the first draft of article 19 or before the much later draft of article 18 was tabled. During the *Ad Hoc* Committee discussion in 1995 about the procedure for determining jurisdiction and admissibility, it was suggested that ‘if a case was being investigated or was pending before a national court, the international criminal court should suspend the exercise of its jurisdiction, even though it might subsequently resume consideration of the case in accordance with article 42 of the draft statute’. *Ad Hoc* Committee Report, para. 51 (the rest of the reported discussion dealt primarily with substantive issues of admissibility and jurisdiction, see paras. 29–52). It could be argued that the word ‘defer’ refers to leaving a crime to the State to investigate and prosecute and that ‘suspend’ means dropping an investigation without the State taking any further action. However, the word ‘defer’ is used in article 18 to apply both when the challenging State ‘is investigating’ and when it ‘has investigated’ a crime and then closed the investigation without any intent to continue proceedings.

¹⁸⁰ As of 31 May 2015, no State has filed a challenge relating to the jurisdiction of the Court in any case.

¹⁸¹ Article 56 para. 1 provides that the Pre-Trial Chamber may authorize the Prosecutor to ‘take such measures as may be necessary to ensure the efficiency and integrity of the proceedings’. However, article 56 para. 3

Third, paragraph 8 (discussed below) permits the Prosecutor to seek permission from the Court to pursue a number of investigative steps pending a decision on admissibility. Fourth, challenges by the individual concerned do not require the Prosecutor to suspend an investigation. Fifth, suspension applies only to investigations, not prosecutions. As Pre-Trial Chamber II has stated, ‘under the Court’s statutory framework, lodging an admissibility challenge only results in the suspension of the Prosecutor’s investigation related to the case’. It does not stop the judicial proceedings before the Court¹⁸². A late challenge once a prosecution has begun would not suspend such a prosecution¹⁸³.

VIII. Paragraph 8: Permitted steps

If a State has made a timely challenge to *admissibility*, thus forcing the Prosecutor under paragraph 7 to suspend an investigation, paragraph 8, which was introduced at the Diplomatic Conference, expressly authorizes the Prosecutor, ‘[p]ending a ruling by the Court’ to ‘seek authority from the Court’ to continue to take the three types of significant investigative measures described below¹⁸⁴ (as demonstrated above, a challenge to *jurisdiction* does not require the Prosecutor to suspend an investigation). In marked contrast to the somewhat similar safeguard provision in article 18 para. 6 with respect to admissibility challenges, paragraph 8 does not limit the Prosecutor by requiring that he or she seek such measures only ‘on an exceptional basis’. This suggests that the granting of an article 19 para. 8 request is a less onerous affair than under article 18 para. 6¹⁸⁵. In addition, paragraph 8 is an exception to a State’s ability to postpone requests under Part IX of the *Statute* as per article 95. The *Rules* provide that the application by the Prosecutor shall be considered *ex*

provides that when the Prosecutor has failed to seek to take such measures and the Pre-Trial Chamber determines that ‘such measures are required to preserve evidence that it deems would be essential for the defence at trial’ and that the Prosecutor’s failure is ‘unjustified’, ‘the Pre-Trial Chamber may take such measures on its own initiative’. Had the drafters intended that a State’s challenge would require suspension of measures that were ‘required to preserve evidence that [...] would be essential for the defence at trial’, they would have said so. It would be inconsistent with the scheme of article 19 para. 8, which is designed to permit the Prosecutor to take essential investigative steps during the suspension of an investigation pending a determination of a State challenge, to require a suspension of measures that the Pre-Trial Chamber had determined were essential and that the Prosecutor’s refusal to undertake them was ‘unjustified’. The measures that the Pre-Trial Chamber can take under article 56 para. 3 are not limited simply to measures safeguarding the rights of the defence during activities of the Prosecutor; they expressly include under article 56 para. 2(f), ‘such other action as may be necessary to collect or preserve evidence’. As explained in the First Edition of this Commentary, this provision is ‘an open-ended clause that empowers the Pre-Trial Chamber to create new measures or to expand the existing ones’.

¹⁸² *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-62, Decision on the ‘Prosecution’s Application Requesting Disclosure After a Final Resolution of the Government of Kenya’s Admissibility Challenge’ and Establishing a Calendar for Disclosure Between the Parties, Pre-Trial Chamber II, 20 Apr. 2011, paras. 8–9; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-64, Decision on the ‘Prosecution’s Application Requesting Disclosure After a Final Resolution of the Government of Kenya’s Admissibility Challenge’ and Establishing a Calendar for Disclosure Between the Parties, Pre-Trial Chamber II, 20 Apr. 2011, paras. 8–9.

¹⁸³ The moment when a prosecution begins is not spelled out in the *Rome Statute*, but since a suspect becomes an accused upon the confirmation of charges (see *supra* notes 80, 81), once that occurs any challenge cannot stop the subsequent prosecution and the proceedings before the Court.

¹⁸⁴ See *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-62, Decision on the ‘Prosecution’s Application Requesting Disclosure After a Final Resolution of the Government of Kenya’s Admissibility Challenge’ and Establishing a Calendar for Disclosure Between the Parties, Pre-Trial Chamber II, 20 Apr. 2011, paras. 8, 19; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-64, Decision on the ‘Prosecution’s Application Requesting Disclosure After a Final Resolution of the Government of Kenya’s Admissibility Challenge’ and Establishing a Calendar for Disclosure Between the Parties, Pre-Trial Chamber II, 20 Apr. 2011, paras. 8, 19.

¹⁸⁵ But note the view of one Pre-Trial Chamber that appears to suggest (erroneously) that the ‘exceptional’ criterion applies in both circumstances: *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-163, Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute, Pre-Trial Chamber I, 1 Jun. 2012, para. 34 (emphasis added): ‘the Prosecutor may be *exceptionally* authorised to collect [evidence] pursuant to articles 18(6) and 19(8)(a) and (b) of the Statute’.

parte, in camera and on an expedited basis¹⁸⁶. The evidence collected pursuant to such an application is liable to disclosure to the Defence¹⁸⁷.

57 In the first edition of this Commentary it was stated that, given the possibilities for delay, it was to be hoped that the Pre-Trial or Trial Chamber would decide admissibility challenges under articles 18 and 19 as a matter of priority and that the *Rules* would facilitate the rapid resolution of such challenges. The *Rules*, however, do not do so directly, but do go part way to addressing the problems that result from suspensions of investigations pending a determination of admissibility. First, they require that the Pre-Trial Chamber must rule on the application by the Prosecutor to take investigative steps pursuant to paragraph 8 ‘on an expedited basis’ (rules 61 and 57)¹⁸⁸. Second, the *Rules* permit the relevant Chamber to set time limits for the submission of written observations (rule 58 sub-rule 3) and representations (rule 59 sub-rule 3). Third, they provide that appeals, including appeals of article 19 determinations, ‘shall be heard as expeditiously as possible’ (rule 156 sub-rule 4). However, they do not expressly require that decisions on admissibility challenges or questions by the Pre-Trial or Trial Chamber under article 19 must be reached expeditiously¹⁸⁹.

58 Although paragraph 8 expressly authorizes the Prosecutor to seek three specified measures, the Prosecutor may have an inherent right to seek authority from the relevant Chamber to take additional measures not expressly listed in this paragraph which are necessary to preserve the Court’s jurisdiction or its ability to render a fair decision¹⁹⁰. In deciding whether to grant the Prosecutor’s request for authorization to take steps under paragraph 8, the relevant Chamber should bear in mind that delays in investigations are almost always detrimental to justice from the perspectives of the victims, the suspects and the accused. Here it is also relevant to note that investigations that are undertaken after charges are confirmed would also cease. To address these concerns in a manner consistent with the object and purpose of the *Rome Statute*, the relevant Chamber should give an expansive interpretation of the scope of the measures that can be taken by the Prosecutor. Further, it should attempt to resolve the challenge as expeditiously as possible so as to minimize the harm to the investigation necessarily caused by a suspension. A speedy determination will enable the Prosecutor to continue the investigation with minimal damage if the challenge is

¹⁸⁶ Rule 61 provides that when the Prosecutor applies to the relevant Chamber to take measures pursuant to paragraph 8, rule 57 applies. That rule states that ‘[a]n application to the Pre-Trial Chamber in the circumstances provided for in article 18 para. 6, shall be considered *ex parte* and *in camera*. The Pre-Trial Chamber shall rule on the application on an expedited basis’. Pursuant to regulation 38 sub-regulation 2(c) the application is limited to no more than 50 pages in length unless otherwise ordered.

¹⁸⁷ See *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-62, Decision on the ‘Prosecution’s Application Requesting Disclosure After a Final Resolution of the Government of Kenya’s Admissibility Challenge’ and Establishing a Calendar for Disclosure Between the Parties, Pre-Trial Chamber II, 20 Apr. 2011, para. 19; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-64, Decision on the ‘Prosecution’s Application Requesting Disclosure After a Final Resolution of the Government of Kenya’s Admissibility Challenge’ and Establishing a Calendar for Disclosure Between the Parties, Pre-Trial Chamber II, 20 Apr. 2011, para. 19.

¹⁸⁸ A French proposal to require that the Chamber rule within three days was rejected on the ground that it would be better to leave flexibility to the Chamber and to avoid having an application fail because the time limit was not met. Holmes, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 321, 344.

¹⁸⁹ A key participant in the drafting of the *Rome Statute* and the *Rules* has claimed that ‘[t]he procedures at the jurisdiction and admissibility stage are intended to be expedited ones, and this objective is reflected in the *Rules*’. See Holmes, *Jurisdiction and Admissibility*, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 348. However, this intent is not always expressly stated in the *Rome Statute* or the *Rules* and it is up to the relevant Chamber to ensure that challenges to jurisdiction and admissibility are resolved as expeditiously as possible to prevent a series of frivolous challenges by States from delaying proceedings.

¹⁹⁰ In addition, as with regard to deferrals at the request of the Security Council pursuant to article 16, the Prosecutor may have the same power, as explained in the First Edition of this Commentary in the comment on that article (see margin No. 27), to apply article 54 para. 3(f) ‘to take steps for the necessary preservation of evidence’.

rejected and will enable the State to further continue with its investigation or prosecution as rapidly as possible if the challenge is successful¹⁹¹.

1. Necessity

The Court (Pre-Trial or Trial Chamber) may authorize the Prosecutor ‘[t]o pursue necessary investigative steps of the kind referred to in article 18, paragraph 6’. However, the power of the Prosecutor to take investigative steps during a suspension of an investigation pursuant to article 19 para. 8(a) is considerably greater than under article 18 para. 6¹⁹². First, under article 18 para. 6 the Prosecutor may only seek authority from the Pre-Trial Chamber or Trial Chamber to take investigative steps ‘on an exceptional basis’; article 19 para. 8 contains no such limitation and so the Prosecutor may seek authority to pursue such steps whenever he or she has to suspend an investigation pending determination of a State’s challenge to admissibility. Second, since paragraph 8(a) speaks of ‘investigative steps of the kind referred to in article 18 para. 6’ rather than ‘the same investigative steps’ referred to in that provision, the steps identified in this subparagraph could be seen as broader than those in article 18 para. 6. Third, the necessary investigative steps identified in article 18 para. 6, are subject to two conditions that, significantly, have been omitted in article 19 para. 8(a). Those measures under article 18 para. 6 must be either: ‘for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available’. Although these conditions are similar to those listed in article 56 para. 1 (which spells out the role of the Pre-Trial Chamber with respect to a unique investigative opportunity), they are not identical, and should be seen as an independent basis for the Prosecutor – as opposed to the Pre-Trial Chamber – to act¹⁹³. The broad wording of article 19 para. 8(a), together with the powers identified in subparagraphs (b) and (c), suggest that the Prosecutor is authorized to use most of the powers which he or she would have under article 54 and other articles to continue the investigation during a suspension pending a determination on the admissibility of a case¹⁹⁴.

2. Taking statements and completing prior steps

The Court (Pre-Trial or Trial Chamber) may also authorize the Prosecutor ‘[t]o take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge’. As in subparagraph (a), there is no requirement in subparagraph (b) that there be a unique investigative opportunity or a significant risk that evidence will be unobtainable. Given the separation by the word ‘or’, the Prosecutor appears authorized to take a statement or testimony from a witness at *any time*, even if the statement or testimony did not begin before the challenge. When the Prosecutor is relying only on subparagraph (b), the completion of the collection and

¹⁹¹ It should be emphasised that an admissibility challenge does not affect a State’s sovereign right to undertake its own investigation and prosecution: *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-480, Decision on the Request for Suspensive Effect and the Request to File a Consolidated Reply, Appeals Chamber, 22 Nov. 2013, para. 16.

¹⁹² The provision of broader powers to the Prosecutor under article 19 para. 8 to take investigative steps during the suspension of an investigation than under article 18 para. 6 makes perfect sense since the relevant Chamber will not have the same option under article 19 to lift the suspension pending a determination of the admissibility challenge that it does under article 18 para. 2.

¹⁹³ Despite the similar wording, there are significant differences between the two provisions. The first condition in article 18 para. 6 is that there be a unique opportunity to obtain evidence, but that evidence must be ‘important’; there is no such requirement in article 56 para. 1. The alternative condition in article 18 para. 6 is that there be a significant risk that evidence (which need not be ‘important’) may not be subsequently available; article 56 para. 1 requires that the information may not be available for trial, but without requiring that this unavailability be a significant risk.

¹⁹⁴ Indeed, it is difficult to envisage any of the powers that the Prosecutor has under article 54 para. 2 that he or she could not have under paragraph 7(a). The only requirement is that they be ‘necessary’, but that is implicit in the exercise of most powers.

examination of other types of evidence, however, must have *begun before* the challenge. Nevertheless, the investigative steps that the Prosecutor may take under subparagraph (a) are so broad that they would necessarily include collection and examination of such other evidence and subparagraph (b). The purpose of subparagraph (b), which was added somewhat hastily in the later stages of the Rome Conference, along with the other safeguards in paragraph 7 and in article 18 para. 6, seems simply to be to clarify that the specific evidence it mentions can be collected by the Prosecutor. Since statements or testimony of a witness would normally be completed in a matter of hours or days, it is unlikely that a challenge would interrupt them. As it will not be known until the relevant stage of pre-trial proceedings or the trial whether a particular person will be called as a witness, the term ‘witness’ in the context of an investigation should be read broadly. This should include anyone who *might* be called to testify during the pre-trial proceedings or at trial, even if the Prosecutor *does not* call them. Additionally, persons who provide ‘written or oral testimony’ pursuant to article 15 para. 2 and persons whose testimony or statements lead to other persons who do testify or to relevant information which could be used at trial should also be encompassed¹⁹⁵.

- 61 To minimize the disruption of an investigation, which could be harmful to a prosecution by the Prosecutor or by a State, if the relevant Chamber upholds the admissibility challenge, the term ‘complete the collection and examination of evidence’ under this subparagraph should be given a broad reading. For example, if the Prosecutor has been able to excavate one grave site among many in a single massacre, the Prosecutor should be able to complete the excavation of all the grave sites where victims of that massacre might be located and to conduct forensic examinations of all the bodies. Since it will not be known until the relevant point in the pre-trial preparations or even the trial itself whether information that has been gathered and examined with the intention that it would be submitted as evidence will actually be submitted, this provision should be read to mean information that was being gathered and examined with the view to possible submission as evidence. A necessary corollary would be that the Prosecutor should be able to take any measures under this subparagraph, with the assistance of Court requests or orders if necessary, which are needed to protect such evidence pending the determination by the relevant Chamber whether the case is admissible or not. The potentially expensive and cumbersome deployment of protective and evidence-gathering measures, as well as the need to minimize disruption to victims and witnesses, calls for such an approach.

3. Preventing of the absconding of persons

- 62 The Prosecutor may also be authorized, ‘[i]n cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58’. The authorization under this subparagraph thus appears to apply even if the person absconded after an application, but before the arrest warrant could be issued¹⁹⁶. This express grant of authority is limited to persons for whom an *arrest warrant* has been requested under article 58 and does not cover persons for whom the Prosecutor requested only a *summons* to appear. The First and Second Edition of this Commentary speculated that it was likely that the Prosecutor would, as a precautionary measure, always request arrest warrants in the alternative, even when a summons might otherwise be appropriate (to ensure that effective measures could be taken during the suspension of the investigation if the person absconded). This has not come to pass in

¹⁹⁵ While the term ‘witness’ is not defined in the *Rome Statute* or in the *Rules*, a broad reading of the term with regard to paragraph 8 is consistent with the object and purpose of the *Statute* and paragraph 8 in particular.

¹⁹⁶ Since a State can only challenge a ‘case’ before the Court under article 19 (which suspends the Prosecutor’s investigation pursuant to article 19, para. 7 and triggers potential recourse to article 19 para. 8), this provision appears to suggest that a ‘case’ begins upon the Prosecutor’s *request* to the Pre-Trial Chamber to issue a warrant of arrest or summons to appear (otherwise the State would not be able to submit a challenge). Such a position would have to be reconciled with the Court’s existing jurisprudence that appears to indicate the contrary. See *supra* note 14.

practice¹⁹⁷. Nevertheless, should this be a concern for the Prosecutor, the Pre-Trial or Trial Chamber could issue a request to States Parties under article 87 para. 1(a) for cooperation and a request to States not Parties to the *Statute* under article 87 para. 5 to assist in locating the fugitive. While in a number of cases the request for an arrest warrant has been made confidentially and, although the relevant Chamber is not be able to request that the person concerned be arrested during its deliberation, it certainly can request that the person be located and subjected to surveillance or other measures short of arrest sufficient to ensure arrest as soon as it determines that the case is admissible and issues a warrant. All States Parties have an obligation under article 86 to ‘cooperate fully with the Court in its investigation and prosecution of crimes’ and this obligation would necessarily include an investigation which was continuing in a limited way pending a determination of an admissibility challenge.

Another reading of subparagraph (c) suggests that it can also potentially apply in cases where the relevant person is in State custody. This was raised during debates on whether Libya was obliged to hand over or retain the suspects in its custody during the duration of its admissibility challenges in the *Gaddafi and Al-Senussi* case. It is noteworthy that arrest warrants had in fact already been issued by the Court. Still, subparagraph (c) could be read to apply in such instances, since the Prosecutor would already have requested and obtained a warrant of arrest under article 58 as well. However, should a State wish to maintain a suspect in its custody while the Court considers its admissibility challenge, then the more appropriate approach would be to make use of article 95 to postpone such surrender¹⁹⁸ (at least during the initial consideration of the challenge by the Court¹⁹⁹). On the other hand, should the Prosecutor desire to have the suspect handed over to the Court, then he or she may overcome the article 95 postponement by invoking subparagraph (c). 63

IX. Paragraph 9: Acts of the Prosecutor or warrants not affected

Paragraph 9, which was introduced at the Diplomatic Conference, provides that ‘[t]he making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge’. This means 64

¹⁹⁷ Indeed, the Prosecutor has only submitted one article 58 request where warrants of arrest were requested as an alternative to summonses to appear: *Prosecutor v. Harun and Abd-Al-Rahman (Kushayb)*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 Apr. 2007, para. 110. In two other cases, the Prosecutor requested summonses to appear with no arrest warrants as alternatives (but reserved the right to recommend such action): *Situation in the Republic of Kenya*, ICC-01/09-01/09-30-Red2, Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Office of the Prosecutor, 15 Dec. 2010, paras. 218, 220, 223; *Situation in the Republic of Kenya*, ICC-01/09-31-Red, Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Office of the Prosecutor, 15 Dec. 2011, paras. 207, 209, 212. Further, the Prosecutor has submitted two other article 58 requests where summonses to appear were requested as alternative to arrest warrants: *Prosecutor v. Abu Garda*, ICC-02/05-02/09-15-AnxA, Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber I, 7 May 2009, para. 30 (but subsequently submitted that a summons to appear would be sufficient); *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-1, Second Decision on the Prosecutor’s Application under Article 58, Pre-Trial Chamber I, 27 Aug. 2009, para. 33 (but subsequently submitted that a summons to appear would be sufficient). For all other accused, the Prosecutor has submitted requests for warrants of arrest alone.

¹⁹⁸ See *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-163, Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute, Pre-Trial Chamber I, 1 Jun. 2012, paras. 23–41; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-354, Decision on Libya’s Postponement of the Execution of the Request for Arrest and Surrender of Abdullah Al-Senussi Pursuant to Article 95 of the Rome Statute and related Defence Request to Refer Libya to the UN Security Council, Pre-Trial Chamber I, 14 Jun. 2013, paras. 18–40; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-15, Decision on the Conduct of the Proceedings Following Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 15 Nov. 2013, paras. 16–19.

¹⁹⁹ The Appeals Chamber has held that Article 95 does not apply to the appellate phase of admissibility challenges: *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-387, Decision the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, para. 27.

that a prior order or warrant (issued before the challenge), including a warrant based on a sealed application, can still be executed after the challenge, thus preventing uncooperative States – which could include States not Parties to the *Statute* – from frustrating the investigation and obstructing international justice. However, it should be noted in this context that a State which would otherwise be obligated to hand over a suspect on the basis of an arrest warrant may rely on article 95 of the *Statute* to request for the postponement of its execution. Nevertheless, as the Pre-Trial Chamber has stated:

[T]he arrest warrant remains valid in accordance with article 19(9) of the *Statute*, and accordingly [the relevant State] must ensure that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution [...] should the case be found admissible²⁰⁰.

The obligation to surrender is reactivated where the Pre-Trial or Trial Chamber rules that a case is admissible²⁰¹. It is also noteworthy in this regard that article 95 does not apply to appellate proceedings²⁰². For the reasons noted above, this paragraph encourages the Prosecutor to take actions and seek orders and arrest warrants at the earliest possible time.

X. Paragraph 10: New facts for review

65 Paragraph 10 provides that the Prosecutor may seek a review of a decision that a case is *inadmissible* under article 17 when ‘he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible’²⁰³. ‘Thus, [article 19 para. 10] is clear evidence that the *Statute* assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory’²⁰⁴. In the absence of paragraph 10, the Prosecutor would have been able to seek a new ruling on the ‘question of [...] admissibility’ pursuant to article 19 para. 3, which does not restrict the time or number of such requests. Under general principles of law (see margin No. 15 above), the Prosecutor would have the burden of proof under paragraph 10 to demonstrate admissibility, unless the relevant information is exclusively or largely within the control of the State or

²⁰⁰ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-163, Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute, Pre-Trial Chamber I, 1 Jun. 2012, para. 40. See also *Prosecutor v. Gaddafi and Al-Senussi*, Decision on the ‘Urgent Application on Behalf of Abdullah Al-Senussi for Pre-Trial Chamber to Order the Libyan Authorities to Comply with their Obligations and the Orders of the ICC’, Pre-Trial Chamber I, 6 Feb. 2013, para. 29; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-354, Decision on Libya’s Postponement of the Execution of the Request for Arrest and Surrender of Abdullah Al-Senussi Pursuant to Article 95 of the Rome Statute and related Defence Request to Refer Libya to the UN Security Council, Pre-Trial Chamber I, 14 Jun. 2013, para. 40; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-15, Decision on the Conduct of the Proceedings Following Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 15 Nov. 2013, para. 19.

²⁰¹ See *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 11 Dec. 2014, para. 80.

²⁰² *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-387, Decision on the Request for Suspensive Effect and Related Issues, Appeals Chamber, 18 Jul. 2013, para. 27.

²⁰³ This provision appears to have originated in a French proposal regarding articles 34 and 35 of the ILC Draft *Statute* included in the Preparatory Committee’s 1996 compilation of proposals. That proposal provided that if the Court had determined that a case was inadmissible, ‘the Prosecutor of the Court may, if new facts arise, submit a request to the Court for a review of the decision of inadmissibility’. 1996 Preparatory Committee II, p. 161. At its Dec. 1997 session, the Preparatory Committee included article 35 para. 5 (in brackets) which read: ‘If the Court has decided that a case is inadmissible pursuant to article 35, the Prosecutor, may, at any time, submit a request for a review of the decision, on the grounds that conditions required under article 35 to render the case inadmissible no longer exist or that new facts arose’. Preparatory Committee Decisions Dec. 1997, p. 37. Apart from renumbering the references to what is now article 17, this formulation was retained without change in article 12 para. 5 [36] (Challenges to the jurisdiction of the Court or the admissibility of a case) of the Zutphen Draft and article 17 para. 6 of the New York Draft.

²⁰⁴ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 Sep. 2009, para. 56. See also *Prosecutor v. Kony et al.*, ICC-02/04-01/05-377, Decision on Admissibility of the Case under Article 19(1) of the *Statute*, Pre-Trial Chamber II, 10. Mar. 2009, para. 27.

person concerned²⁰⁵. Rule 62 sub-rule 1 provides that the request for review is to be made to the Chamber that made the latest ruling on inadmissibility and that rules 58, 59 and 61 – those that concern proceedings under article 19 generally – will apply. Pursuant to those rules, the Prosecutor’s request must be in writing and must contain the basis for it. The relevant Chamber will have a wide discretion as to the modalities of the proceedings and may hold a hearing. One matter that is left uncertain is whether Rule 62 sub-rule 1 also requires the Prosecutor to approach the Appeals Chamber directly should it have issued a final ruling that a case was inadmissible before the Court. A plain reading would suggest that that is indeed the case. However, this would entail the Appeals Chamber engaging in factual determinations that is not normally its function, which in turn would complicate appeals proceedings after a decision is rendered. Therefore, the more sensible and proper course would be for the Prosecutor to approach either the Pre-Trial or Trial Chamber, depending on the stage of proceedings at which the case sits at the relevant time²⁰⁶. Rule 62 sub-rule 2 requires notification to the State or States that made the successful challenge and permits them to make representations within a time limit to be determined, presumably by the relevant Chamber. This would appear to exclude the person concerned as well as victims. However, since rules 58 and 59 are also applicable, it would be within the Chamber’s power to allow their views to be heard after being informed of the proceedings.

Although paragraph 10 is inelegantly worded, it appears to impose three requirements. 66
First, the Prosecutor be fully satisfied – largely a subjective test – that the other two requirements have been met. *Second*, it requires that ‘new facts have arisen’. A comparison with the French text, which requires that the Prosecutor be certain that ‘*des faits nouvellement apparus*’ (facts newly appeared), and the Spanish text, which requires that the Prosecutor be fully convinced ‘*de que han aparecido nuevos hechos*’ (that new facts have appeared)”, suggests that this means that the facts *became known after* the initial decision rather than that the facts *had to have occurred since* the initial decision²⁰⁷. This would be consistent with the approach taken with respect to reviews of convictions and sentences under article 84 para. 1 (‘[n]ew evidence has been discovered’). *Third*, these new facts must ‘negate the basis on which the case had been previously found inadmissible’. The standard of proof should, at the very least, be higher than that for admissibility determinations under article 19 para. 1, as the Prosecutor must not only be satisfied that that new facts have arisen, but must be *fully satisfied*²⁰⁸.

There is no provision in paragraph 10 expressly authorizing the Prosecutor to seek review 67
of a decision by the Court that it had *no jurisdiction* over a case. Presumably, this omission

²⁰⁵ One authority on complementarity has contended that, although the Prosecutor normally would bear the burden of proof under article 10, that rule might have to be qualified. He argues that Part IX (International cooperation and judicial assistance) of the *Rome Statute* would not apply once the investigation which had been opened was then suspended and that, therefore, States (which would include States Parties) were under no obligation to respond positively to requests pursuant to article 19 para. 11: Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007) 227–228 (for the argument that an obligation to cooperate fully with the Court in its investigations applies to investigations in suspension, see discussion of article 19 para. 11, mn 69–70 below).

²⁰⁶ But see El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008) 272 (suggesting that rule 62 sub-rule 1 ‘leaves room for the Appeals Chamber to rule on a request based on the emergence of new facts’).

²⁰⁷ Indeed, an Austrian proposal that was not accepted contained the following formulation: ‘by an accused or any State concerned only upon production of new relevant facts’. 1996 Preparatory Committee II, p. 158.

²⁰⁸ Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007) 231. But see Safferling, *International Criminal Procedure* (2012) 212: ‘[t]he hurdle to be passed by the Prosecutor in order to reapply is rather high’. It has been asserted that ‘the standard of ‘fully satisfied’ should also be higher than the standard of proof under article 19 para. 2, because the standard for a successful request for review under article 19 para. 10 should be more demanding than the one applicable to the earlier finding of inadmissibility, which such a request seeks to have reviewed’. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007) 237. However, it must be borne in mind that the reason the Prosecutor is seeking such a review is because the new facts which have appeared may well have been concealed by the State or the person concerned.

was an oversight. Notwithstanding, nothing in the *Rome Statute* prevents the Prosecutor, if he or she discovered information after the initial decision which could not have been expected to be found at the time of the litigation – for example, when an uncooperative State concealed information or evidence – from seeking a new ruling on the question of jurisdiction. This could be achieved pursuant to article 19 para. 3, which contains no restriction on the time for making the request or the number of times that such a request may be made by the Prosecutor. Otherwise, States which concealed relevant evidence or information could frustrate the Court’s exercise of jurisdiction. In any event, the Court is under an ongoing obligation under article 19 para. 1 to assure itself that it has jurisdiction over all cases before them. Thus, it may be enough for the Prosecutor to simply call to the Court’s attention new facts or matters that will trigger this obligation and invite it to make a ruling on jurisdiction *proprio motu*²⁰⁹.

- 68 As of 31 May 2015, there has been only one instance where a case has been held to be inadmissible by the Court (and upheld on appeal) (relating to the suspect Al-Senussi), and it was noted that the Prosecutor could seek a review of this decision pursuant to paragraph 10²¹⁰. The Prosecutor has to date not filed a paragraph 10 review request. As such, the Court is yet to be afforded the opportunity to explore this provision’s intricacies and application.

XI. Paragraph 11: Information after a deferral

- 69 If the Prosecutor defers an investigation based on article 17 (concerning admissibility), then paragraph 11, permits him or her to request ‘information on the proceedings’ from the relevant State. Paragraph 11 has several sources²¹¹. The scope of the information which can be requested under this provision appears to be more focused than the information expressly required to be provided under article 18 para. 5, which relates to ‘the progress of [the State’s]

²⁰⁹ This would be similar to the practice of the Defence in the *Banda and Jerbo* case whereby it merely informed the Court of the reported death of their client (Jerbo) (rather than file a jurisdictional challenge), after which the Court noted article 19, para. 1 in terminating the proceedings: *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-512-Red, Decision Terminating the Proceedings Against Mr. Jerbo, Trial Chamber IV, 4 Oct. 2013, para. 16.

²¹⁰ See *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 Oct. 2013, para. 312; *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on Admissibility of the Case Against Abdullah Al-Senussi’, Appeals Chamber, 24 Jul. 2014, para. 201. See also *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-567, Decision Following the Declaration of Inadmissibility of the Case Against Abdullah Al-Senussi before the Court, Pre-Trial Chamber I, 7 Aug. 2014, para. 6.

²¹¹ This provision appears to have originated in a French proposal in the Preparatory Committee in 1996 regarding article 36 (Procedure under articles 34 and 35) of the ILC Draft Statute. It provided, first, in paragraph 5, that, ‘[i]n every case, the State or person challenging a submission to the Court under paragraph 2 of this article [providing for challenges by a State party wishing to prosecute the same case] shall provide all information concerning the conduct of the investigations and the judicial procedures which may support a finding of inadmissibility in the case submitted to the Court’. Second, in paragraph 6, that if the Court determined provisionally that a case was inadmissible on the ground of article 35 para. (a) [that the case had been properly investigated], then ‘the Prosecutor may question the State proceeding with the prosecution as to the status of the investigation and the action that will be taken on it’. 1996 Preparatory Committee II, p. 161.

The Preparatory Committee did not include such a provision in articles 34, 35 or 36, dealing with challenges to jurisdiction and admissibility, but included something similar in provisions governing the initiation and deferral of investigations. At the Aug. 1997 session of the Preparatory Committee, a somewhat similar provision was included in article 26*bis* para. (a), which supplemented article 26 (Investigation of alleged crimes) of the ILC Draft Statute. This provision stated:

‘In the event that the Prosecutor defers investigation on the ground that a State is proceeding with a national investigation, then the Prosecutor may request that the relevant State make available to the Prosecutor, either periodically or on a reasonable request, a report on the progress of its investigation, which shall be confidential to the extent necessary. The Prosecutor shall notify the complainant State of the decision to defer to a State and shall notify the complainant State of any known outcome of such national investigation or prosecution’.

Preparatory Committee Decisions Aug. 1997, p. 19. At its Dec. 1997 session, the Preparatory Committee included a similar provision in article 26*ter* (Deferral of an investigation by the Prosecutor). That article provided:

investigations and any subsequent prosecutions'. This makes sense since the Prosecutor would be seeking information concerning an individual case, rather than a situation²¹². Even though paragraph 11 does not expressly require a State to respond to the Prosecutor's request for information 'without undue delay', as in article 18 para. 5, if that State is a State Party to the *Statute*, it has an implicit obligation to respond positively and without undue delay. It would have made no sense to provide that the Prosecutor may request a State to make available information on the proceedings and yet exempt a State Party of any obligation to comply or to comply promptly. This provision would trigger the obligation of States Parties under article 26 of the Vienna Convention on the Law of Treaties and customary international law to comply with the request in good faith²¹³. However, save in the case of a Security Council referral (depending on the wording of the relevant resolution), a State that is not a State Party would not be under an obligation under the *Statute* to cooperate with the Court, but could nonetheless be approached pursuant to article 87 para. 5. Such information is essential for the Prosecutor to make an informed determination as to whether to continue the deferral.

The Prosecutor has a duty to keep the information confidential at the request of the 70 investigating State so that the State's investigation is not undermined by the release of sensitive information, such as sealed indictments. Presumably, the Prosecutor could share this information with the other organs of the Court. The Prosecutor also has a duty to inform the investigating State if he or she resumes the investigation. It is not entirely clear whether paragraph 11 addresses only a *voluntary deferral* by the Prosecutor of an investigation based on an assessment that the factors listed in article 17 exist, or also a *suspension of an investigation pursuant to paragraph 7* after an admissibility challenge. In this context, it should be recalled that the provisions authorizing the Prosecutor to request States to provide information concerning their investigations and prosecutions, which were largely disconnected from the provisions that became articles 18 and 19, were drafted and adopted in haste during the closing days of the Diplomatic Conference. Given this fact, it is quite possible that the deferral mentioned in paragraph 11 was also intended to cover suspensions pursuant to article 19 para. 7. Such an interpretation would be consistent with the roughly parallel structure of articles 18 and 19 and the object and purpose of the *Statute*. It would not make sense to authorize the Prosecutor to seek such information from States only in mandatory deferrals under article 18 and when the Prosecutor voluntarily deferred an investigation

¹ In the event that the Prosecutor, having regard to the matters in article 35, defers an investigation, the Prosecutor [may request that] [may seek an order of the Court that] the relevant State shall make available to the [Prosecutor] [Court] information on the proceedings.

2. Any information so provided will, to the extent necessary, be kept confidential.

3. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of whose proceedings deferral has taken place].

Preparatory Committee Decisions Dec. 1997, p. 27. In addition, at this session the Preparatory Committee included a completely different provision (subsequently abandoned) in article 26*bis*, which imposed a requirement on States Parties to keep the Prosecutor informed of all investigations and prosecutions of crimes within the Court's jurisdiction, permitted the Prosecutor to act on the basis of that information and then required States Parties to keep the Prosecutor regularly informed about national prosecutions of such crimes. *Id.*, p. 26. The formulations in articles 26*ter* and 26*bis* were retained respectively and without change in article 49 and article 48 of the Zutphen Draft and articles 56 and 55 of the New York Draft.

²¹² But see El Zeidy, *The Principle Of Complementarity In International Criminal Law* (2008) 273, who argues that, *inter alia*, '[t]he fact that the required information is related to a case stage does not necessarily mean that the scope of information required under Article 19(11) is broader than that under Article 18(5), as this will depend on the circumstances of each situation and case'.

²¹³ A State Party also has a duty to cooperate with the Court under article 86, which necessarily incorporates a good faith obligation to respond without delay. The request is directly related to an investigation, albeit one that has been temporarily suspended, since the information requested is necessary to determine whether the provisionally suspended investigation, while investigative steps pursuant to paragraph 8 could be taking place, should remain in suspension or be resumed. But see Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007) 212, who contends that under paragraph 11 'a State [including a State party] would seem to be under no obligation to respond positively to request(s) to make available information on its domestic proceedings'.

under article 19, but not when there was a mandatory suspension of an investigation pursuant to article 19 para. 7. Such a situation would be particularly odd given that the Prosecutor could be authorized to take far more intrusive investigative steps under paragraph 8. In any event, the Prosecutor, the Pre-Trial Chamber or the Trial Chamber could request States, during an article 18 para. 2 deferral or an article 19 para. 7 suspension, to cooperate with the Court by providing information on the proceedings²¹⁴. This approach ensures that the appropriate Chamber can make an informed decision on admissibility with respect to the investigation based on all the relevant evidence and information²¹⁵.

²¹⁴ See for example *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-239, Decision Requesting Further Submissions on Issues Related to the Admissibility of the Case Against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 7 Dec. 2012; *Prosecutor v. S. Gbagbo*, ICC-02/11-01/12-44, Decision on Further Submissions on Issues Related to be Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I, 28 Aug. 2014.

²¹⁵ An authority on complementarity has argued that 'it appears reasonable to allow inferences in favour of admissibility to be drawn when States fail entirely to respond to requests of the Prosecutor to furnish information on their proceedings in accordance with Article [...] 19 (11), or to provide information, which is incomplete or too unspecific to assess admissibility'. He further suggests the converse is true when 'a State is forthcoming with comprehensive information or even invites the OTP to attend the domestic proceedings, etc.'. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2007) 229. However, while the first approach is an excellent way to constrain States from preventing a determination that a case is admissible (on that approach, see also Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008) 178), the willingness of a State to provide information or access has no bearing on the question of whether it is able or willing to investigate. For example, as Amnesty International and other organizations conducting trial observations have frequently discovered, many States that provide information and access to courts conduct unfair trials.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Literature: AIDP (ed), 'Resolution of Section IV Concurrent National and International Criminal jurisdiction and the Principle "Ne bis in idem"', adopted by the XVII. International Congress of Penal Law, 12–19 September 2004 in Beijing', (2004) 75 *RIDP* 802; Amar, A.R., 'Double Jeopardy Law Made Simple', (1997) 106 *YaleLJ* 1807; Bartsch, H.-J., 'Ne bis in idem: The European Perspective', (2002) 73 *RIDP* 1163; Bassiouni, M.C., *International Extradition and World Public Order*, iv (Oceana Publications 4th ed, 2002); Baum, L.M., 'Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court', (2001) 19 *WisconsinLLJ* 197; Benzing, M. and Bergsmo, M., 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court', in: Romano C.P.R., Nollkamper, A. and Kleffner, J.K. (eds), *Internationalized Criminal Courts* (OUP 2004) 407; Bernard, D., "'Ne Bis in Idem": Protector of Defendants' Rights or Jurisdictional Pointsmen?', (2011) 9 *JICJ* 863; *id.*, *Juger et juger encore les crimes internationaux. Etude du principe ne bis in idem* (Larcier 2014); Biehler, A., Knibühler, R., Lelieur-Fischer, J. and Stein, S. (eds), 'Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union' (2002) 73 *RIDP* 1185, available also at: <http://www.mpicc.de/shared/data/pdf/fa-ne-bis-in-idem.pdf> (accessed 1 September 2014); Birklbauer, A., 'Der Grundsatz "Ne bis in idem" in der Rechtsprechung europäischer Instanzen und die Auswirkung auf den Tatbegriff der öStPO', in: Moos, R., Jesionek, U. and Müller, O.F. (eds), *Strafprozessrecht im Wandel, Festschrift für Roland Miklau*, iii (StudienVerlag 2006) 45; Bogensberger, W., 'Die Anwendung des transnationalen Ne-bis-in-idem-Prinzips in Europa – und the Oscar for the development of standards goes to ... the Court', in: Moos, R., Jesionek, U. and Müller, O.F. (eds), *Strafprozessrecht im Wandel, Festschrift für Roland Miklau*, iii (StudienVerlag 2006) 91; Bohlander, M., 'Ne bis in idem', in: Bassiouni, M.C. (ed), *International Criminal Law* 541, iii (Nijhoff 2008); Burchard, C. and Brodowski, D., 'The Post-Lisbon Principle of Transnational Ne Bis in Idem: On the Relationship Between Article 50 Charter of Fundamental Rights and Article 54 Convention Implementing the Schengen Agreement: Case Note on District Court Aachen, Germany, (52 Ks 9/08 – 'Boere'), Decision of 8 December', (2010) 1 *NJECL* 310; Campanella, S., 'Il Ne bis in idem nella giustizia internazionale penale: riflessioni su un principio in itinere', in: Cassese, A., Chiavario, M. and De Francesco, G. (eds), *Problemi attuali della giustizia penale internazionale* (G. Giappichelli Editore 2005) 253; Carter, L.E., 'The Principle of Complementarity and the International Criminal Court: the Role of Ne Bis in Idem', (2010) 8 *SantaClaraJIL* 165; Conway, G., 'Ne Bis in Idem in International Law', (2003) 3 *ICLRev* 217; *id.*, 'Ne bis in idem and the International Criminal Tribunals', (2003) 14 *CLF* 351; Costa, J.E., 'Double Jeopardy and Non Bis in Idem: Principles of Fairness', (1998) 4 *University of California Davis JIL&Policy* 181; de la Cuesta, J.L., 'Concurrent National and International Criminal Jurisdiction and the Principle "ne bis in idem". General Report', (2002) 73 *RIDP* 707; Eicker, A., 'Der Grundsatz "ne bis in idem" – eine internationale menschenrechtliche Garantie?', in: Sutter, P. and Zelger, U. (eds), *30 Jahre EMRK-Beitritt der Schweiz: Erfahrungen und Perspektiven* (Stämpfli 2005) 105; El Zeidy, M.M., 'The Doctrine of double jeopardy in International Criminal and Human Rights Law', (2002) 6 *MediterraneanHumRts* 183; *id.*, 'Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court', (2006) 19 *LeidenJIL* 741; *id.*, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2002) 23 *MichJIL* 869; Endriss, R. and Kinzig, J., 'Eine Straftat – zwei Strafen. Nachdenken über ein erweitertes "ne bis in idem"', (1997) *Strafverteidiger* 665; Epp, H., 'Der Grundsatz "ne bis in idem" im internationalen Rechtsbereich', (1979) *ÖJZ* 36; di Federico, G. (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011); Eser, A., 'Non bis in idem', (1993) 11 *NEP* 48; Finlay, L., 'Does The International Criminal

Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute', (2012) 15 *University of California Davis JIL&Policy* 221; Henzlin, M., "'Ne bis in idem", un principe à géométrie variable', (2005) 123 *SchwZStR* 345; Friedland, M., *Double Jeopardy* (Clarendon Press 1969); Heugas-Darraspen, E., 'Article 20' in: Fernandez, J. and Pacreau, X. (eds), *Statut De Rome de la Cour Penale Internationale* (Pedone 2012) 749; Holmes, J.T., 'Complementarity: National Courts versus the ICC', in: Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 673; Holmes, J.T., 'The Principle of Complementarity' in: Lee, R.S. (ed), *The International Criminal Court. Making of the Rome Statute* (Kluwer 1999) 41; Jung, H., "'Zur Internationalisierung" des Grundsatzes "ne bis in idem"' in: Albrecht, P.A. et al. (eds), *Festschrift für Schüler-Springorum* (Heymann 1993) 499; Kielwein, G., 'Der Verbrauch der Strafklage im englischen Strafverfahren', (1956) *ZStW* 163; Kleffner, J.K. and Nollkamper, A., 'The Relationship Between Internationalized Courts and National Courts', in: Romano, C.P.R., Nollkamper, A. and Kleffner, J.K. (eds), *Internationalized Criminal Courts* (OUP 2004) 359; Kleffner, J.K., *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (OUP 2008); Klip, A. and van der Wilt, H., 'National Report of the Netherlands', (2002) 73 *RIDP* 1091; Lagodny, O., 'Teileuropäisches "ne bis in idem" durch Art. 54 des Schengener Durchführungsübereinkommens (SDÜ)', (1997) *NStZ* 265; Lehouck, R.G., 'A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition,' (1981) 90 *YaleLJ* 632; Law Commission of England and Wales (ed), *Double Jeopardy*, consultation paper No. 156 (1999), www.lawcom.gov.uk/wp-content/uploads/2015/03/lc267_Double_Jeopardy_Report.pdf (accessed 1 September 2014); Liebau, T., 'Ne bis in idem' in *Europa* (NWV 2005); Mansdörfer, M., *Das Prinzip ne bis in idem im europäischen Strafrecht* (Duncker & Humblot 2004); Mayer, M., *Ne-bis-in-idem-Wirkung europäischer Strafentscheidungen* (Peter Lang 1992); Morosin, M.N., 'Double Jeopardy and International Law: Obstacles to Formulating a General Principle', (1995) 64 *NordicJIL* 261; Muhammad, N., 'Due Process of Law for Persons Accused of Crime', in: Henkin, L. (ed), *The International Bill of Rights* (Columbia University Press 1981) 136; Neagu, N., 'The Ne Bis in Idem Principle in the Interpretation of European Courts: Towards Uniform Interpretation', (2012) 25 *LeidenJIL* 955; Neuhaus, R., *Der strafverfahrensrechtliche Tatbegriff – 'ne bis in idem'* (Bochum 1985); Olusanya, O., *Double Jeopardy Without Parameters: Re-characterization in International Criminal Law* (Intersentia 2004); Pralus, M., 'Étude en droit pénal internationale et en droit communautaire d'un aspect du principe non bis in idem: non bis', (1996) *RSC* 551; Pierini, JP, 'Il principio del ne bis in idem nello Statuto della Corte', in: Argiró, F. (ed), *La Corte Penale Internazionale: organi, competenza, reati, processo* (Milano 2006) 1361; Renaud, A., 'Nouveaux instruments contre la fraude et la principe: Ne bis in idem' (1996) 12 *Agon* 9; Roth, R., 'Non bis in idem transnational: vers de nouveaux paradigmes?', in: Braum, S and Weyembergh, A. (eds), *Le contrôle juridictionnel dans l'espace pénal européen = The judicial control in EU cooperation in criminal matters* (Parution 2009) 121; Scheschonka, E., *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das IStGH-Statut* (Lit-Verlag 2004); *id.*, 'Konkurrierende nationale und internationale Strafgerichtsbarkeit und der Grundsatz "Ne bis in idem"', in: Arnold J et al. (eds), *Festschrift für Albin Eser* (C.H. Beck 2005) 829; *id.*, 'Internationales "ne bis in idem" nach Art. 54 SDÜ', (1997) *StV* 383; *id.*, 'Strafrecht und Rechtshilfe im Geltungsbereich von Schengen II', (1995) *NJW* 1931; Schroeder, F.-C., 'Die Rechtsnatur des Grundsatzes "ne bis in idem"', (1997) *JuS* 227; Sedman, D., 'Article 20 ICCSt and the Principle of Ne bis in idem', in: Burchard, C., Triffterer, O. and Vogel, J. (eds), *The Review Conference and the Future of the International Criminal Court: Proceedings of the first AIDP Symposium for Young Penalists in Tübingen, Germany, co-organized by the AIDP YP Committee* (Wolters Kluwer/Carl Heymanns Verlag 2010) 277; Stein, S., *Zum europäischen ne bis in idem nach Artikel 54 des Schengener Durchführungsübereinkommens* (Peter Lang 2004); Specht, B., *Die zwischenstaatliche Geltung des Grundsatzes ne bis in idem* (Springer 1999); Spinellis, D., 'The ne bis in idem principle in "global" instruments', (2002) 73 *RIDP* 1149; Theofanis, R., 'The Doctrine of Res Judicata in International Criminal Law', (2003) 3 *ICLRev* 195; Van der Beken, T, Vermeulen, G. and Ongena, T., 'National Report of Belgium', (2002) 73 *RIDP* 811; Vervaele, J.A.E., 'The transnational ne bis in idem principle in the EU. Mutual recognition and equivalent protection of human rights', (2005) 1 *UtrechtLRev* 100; Walther, S., 'Cumulation of Offences', in: Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 475; Wilkitzki, P., 'Völkerrechtliche Verbrechen und nationales Strafrecht, Tagungsbericht vom XIV. Internationalen Strafrechtkongress der Association Internationale de Droit Pénal' (1990), 102 *ZStW* 681; Wills, H.S., 'Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR', (2003) 17 *EmoryILRev* 341; Wise, E.M., 'Part 2: Non bis in idem and applicable law', (1998) 13*bis* *NEP* 43; Van den Wyngaert, C. and Stessens, G., 'The International non bis in idem Principle: Resolving Some of the Unanswered Questions', (1999) 48 *ICLQ* 779; Van den Wyngaert, C. and Ongena, T., 'Ne bis in idem Principle, Including the Issue of Amnesty', in: Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 705; Zapatero, L.A. (ed), *El principio de 'ne bis in idem' en el derecho penal europeo e internacional* (Univ de Castilla La Mancha 2007); Zilli, M., "'Ne bis in idem' e coisa julgada fraudulenta: a posição da Corte Interamericana de Direitos Humanos', in: K. Ambos et al. (eds), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional* (Konrad-Adenauer-Stiftung 2011) 393, http://www.kas.de/wf/doc/kas_31766-1522-4-30.pdf?121011222421 (accessed 1 September 2014).

Content

A. General remarks	1
1. Introduction	1
2. Protected interests	5
3. <i>Ne bis in idem</i> in comparative, European and international law	7
4. The development up to the Rome conference	18
B. Analysis and interpretation of elements	20
I. Paragraph 1	20
1. 'Except as provided in this Statute'	21
2. 'conduct which formed the basis of crimes'	22
3. 'convicted or acquitted by the Court'	23
II. Paragraph 2	25
1. 'by another court'	25
2. 'for a crime referred to in article 5'	27
3. 'convicted or acquitted by the Court'	29
III. Paragraph 3	30
1. 'has been tried'	35
2. 'by another court'	39
3. 'for conduct also proscribed under article 6, 7 or 8 [...] with respect to the same conduct'	40
4. 'the proceedings in the other court'	43
5. The different subparagraphs	45
a) 'for the purpose of shielding from criminal responsibility for crimes within the jurisdiction of the Court'	46
b) 'not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice'	47
IV. Application	49
V. Consequences in cases of violation	50
VI. Conclusion	51
C. Special remarks	53
1. The minimum content of <i>ne bis in idem</i> : the principle of deduction	53
2. Relevance of genuine enforcement of sentences	54
3. Offences against the administration of justice	57

A. General remarks

1. Introduction

The core idea of the *ne bis in idem* principle is that nobody should be judged twice for the same offence. *Ne bis in idem* corresponds to most aspects of the common law prohibition against 'double jeopardy'¹. The content and scope of the principle are not uniformly defined. In particular, ways to interpret the two decisive factors '*idem*' and '*bis*' vary considerably. This relates to identifying what is 'the same', defining the finality of a decision as well as the question, at what stage a subsequent procedure shall be barred. The consequences of *ne bis in idem* are twofold. From a substantive point of view it shields a person from being punished twice. With regard to procedure, it blocks a new prosecution². Depending on the context, *ne bis in idem* can be referred to in such areas as recharging an accused with the same or

¹ From the several distinct protections for criminal defendants embodied in 'double jeopardy', the pleas of *autrefois acquit* and *autrefois convict* and prohibition of multiple punishment are referred to as the closest counterparts of *ne bis in idem*. This conceptual and terminological discussion has to be left aside here. See, e.g., Mayer, *Ne-bis-in-idem-Wirkung europäischer Strafsentscheidungen* (1992) 15; Lehouck (1981) 90 *YaleLJ* 632–3; Friedland, *Double Jeopardy* (1969) 15–17.

² De la Cuesta (2002) 73 *RIDP* 710; Spinellis (2002) 73 *RIDP* 1149–50. One commentator recently concluded that the continuing discussion whether *ne bis in idem* has to be considered as part of substantive or procedural law should be closed with a clear 'as well as' (Mansdörfer, *Das Prinzip ne bis in idem im europäischen Strafrecht* (2004) 244). For an in-depth analysis see Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das ISIGH-Statut* (2004) 12 *et seq.*, 30 *et seq.*

another offence upon the same facts, framing an indictment, continuing offences, convicting and sentencing on multiple counts, new trials, appeals, revision, the relationship between courts in and between States, and the recognition of criminal judgements. It has, however, traditionally been held to be in force inside one jurisdictional regime only³.

- 2 In the negotiations of the Statute of the International Criminal Court, *ne bis in idem* had to be considered in a *sui generis* context. On the one hand, as the jurisdiction of the ICC is added to the existing mechanisms of national and international jurisdiction, the various competencies cumulate⁴. On the other hand, however, the risk of cumulating jurisdictional claims needs to be observed against the general perception that the enforcement of international criminal law lacks comprehensiveness, suffering from the historical pattern of impunity. The particularity underlying the ICC jurisdiction lies in the fact that the relationship between the ICC and States is not the same as between States; equality of sovereigns and, in cases of competing claims, the presumption of concurrency. The ICC's complementary jurisdiction prevails over States that are unable or unwilling to genuinely exercise their jurisdiction on behalf of the international community as a whole (indirect enforcement model). As a consequence, *ne bis in idem* applies fully only with regard to the decisions of the ICC. In case of national decisions, a retrial may, in exceptional circumstances, take place. *Ne bis in idem* has, therefore, been linked with the discussion on jurisdiction from early on. Article 20 partly mirrors the provisions on jurisdiction and admissibility. Whether a case goes as far as *bis in idem* depends on the stage at which the cumulative interests of the national and international jurisdiction become concrete.
- 3 The substantively identical provisions of the Statutes of the ICTY and ICTR served as important models for the formulation of *ne bis in idem* in the ILC Draft Statute. Their jurisdictional model is, however, decisively different from the Rome Statute. The *ad hoc* Tribunals have concurrent but primary jurisdiction with regard to national courts⁵. The ICC is deemed to be *complementary* to national courts, as expressed in paragraph 10 of the Preamble and in article 17. The ICC will attempt to gain universality and permanence, whereas the *ad hoc* Tribunals, by definition, exercise jurisdiction strictly limited in time and territory. In drafting the ICC Statute, it became evident that most States were not willing to accept the *ad hoc* solutions as permanent ones. As a result, article 20 differs considerably from the Statutes of the *ad hoc* Tribunals.
- 4 Article 20 was amended by the Kampala Review Conference⁶. Different from article 20 paras 1 and 2, which generically refer to crimes within the jurisdiction of the Court in accordance with article 5, article 20 para. 3 explicitly enumerates the relevant articles of the Rome Statute defining the core crimes. Originally this list only referred to articles 6, 7 and 8. In order to provide full *ne bis in idem* protection to a person who 'has been tried by another court for conduct also proscribed' by the definition of the crime of aggression, a reference to article 8*bis* was included in the chapeau of article 20 para. 3.

2. Protected interests

- 5 *Ne bis in idem* protects two kinds of interests. Firstly, it protects an *individual* who was once prosecuted for an offence from being further troubled upon the same grounds (*nemo debet bis vexari pro una et eadem causa*) and being subject to punishment several times (*ne*

³ See e.g. Decision of the Human Rights Committee of 16 July 1986 in the case of *A.P. v. Italy* (Communication No.204/1986, CCPR/C/31/D/204/1986, para. 7.3.). For details see mn 8, 13.

⁴ See, e.g., Pralus (1996) RSC 552–554; Oehler, *Internationales Strafrecht* (1983) mn 906, concerning the crimes under the universality principle.

⁵ See article 9 of the ICTY Statute, article 8 of the ICTR Statute. The Secretary-General states in his Report on the creation of the ICTY, however, that the Security Council did not intend to 'preclude or prevent the exercise of jurisdiction by national courts [...] Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures'. UN Doc. S/25704 (3 May 1993), p. 1176, para. 64. See also Bassiouni and Manikas (eds), *The Law of the Criminal Tribunal for the Former Yugoslavia* (1996) 306–319; Weckel (1993) *Annuaire Francais de Droit Internationale* 232.

⁶ Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Resolution RC/Res.6 adopted by consensus on 11 June 2010, Annex I, para. 7.

poena in idem). ‘The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty’⁷. This protection of the individual from State abuse and *ad infinitum* prosecutions is also the rationale behind the international recognition of the principle of *ne bis in idem* as a human right. Secondly, *ne bis in idem* has a function in protecting the authority and integrity of the legal system by confirming the finality of penal judgements. It thereby serves the ideal of legal certainty and helps prevent inconsistent results. A moot case must not be reopened (*factum praeteritum*) and a decision by a criminal court must not be obstructed by other criminal courts (*res iudicata pro veritate habetur*)⁸. It is to the first trial, therefore, that all efforts should be directed⁹. Lastly, the application of *ne bis in idem* serves the interest of judicial economy, by saving resources and court facilities.

The rationale of the principle changes when it is applied in a transnational context. State interests become more dominant while the individual has long been seen as the ‘object’ of interstate cooperation¹⁰. Also when examined with regard to international criminal jurisdiction, the *bis in idem* situation reflects a more general confrontation between domestic and international competencies. From the point of view of individuals, the internationalization of criminal justice creates paradoxical effects. On the one hand, an individual can – relying on his or her emerging legal competence under international law – refer to international instruments when challenging the judicial decisions or legislation of his or her own State. On the other hand, international jurisdiction may deprive the individual of the protection so far granted by his or her State of nationality. One example of this is the possibility of a second trial in the ICC after national criminal proceedings.

As a result, the principle of *ne bis in idem* occupies a central but controversial role in the ICC Statute. It can be viewed as the last safeguard in allocating the tasks of national and international criminal justice according to the notion of complementarity¹¹. As *ne bis in idem* is considered as absolute solely when it comes to the decisions of the ICC, the possibility of exceptions granted in paragraph 3 with regard to national decisions is the channel of the ‘international community’ for verifying the performance of national criminal justice. The explicit rationale is to avoid impunity, as stated in the Preamble of the ICC Statute, for example. Applying and interpreting the exceptions will draw the borderline between sufficient, *bona fide* criminal justice and ineffective or *mala fide* proceedings. It is clear that article 20 will be of different importance and acceptability to the parties concerned. The individual facing a second trial, the victim who was offered no justice or only a sham process nationally but who also bears the risk of re-victimisation; the State where the first trial was conducted and the ICC are destined to have contradicting views on the application of article 20.

3. *Ne bis in idem* in comparative, European and international law

National laws distinguish several aspects of *ne bis in idem*: the negative authority of judgements passed within the State, the reaction to judgements from other national jurisdic-

⁷ Justice Black for the U.S. Supreme Court, *Green v. United States* (1957) 355 U.S. 187–8. See also *Crist v. Bretz* (1978) 437 U.S. 34 *et seq.* A retrial increases the possibility that the accused will be found guilty: the person will not always have the stamina or the financial resources to effectively fight a second charge.

⁸ For the rationales of *ne bis in idem* see, e.g. de la Cuesta (2002) 73 *RIDP* 710; van den Wyngaert and Stessens (1999) 48 *ICLQ* 781 *et seq.* see also Conway (2003) 3 *ICLRev* 222 *et seq.*; Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das IStGH-Statut* (2004) 11 *et seq.*; Liebau, ‘*Ne bis in idem*’ in *Europa* (2005) 46 *et seq.* More with respect to ‘double jeopardy’, see Friedland, *Double Jeopardy* (1969) 3–5.

⁹ See Friedland, *Double Jeopardy* (1969) 4.

¹⁰ Van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 708. For developments towards a triangular relationship see e.g. Reisinger Coracini, in: Sluiter et al. (eds), *International Criminal Procedure* (OUP 2013) 95, 111–2.

¹¹ See Tallgren (1998) 67 *NordJIL* 107.

tions (horizontal or transnational *ne bis in idem*) and to those of international courts and tribunals (vertical *ne bis in idem*). These elements are shaped not only by a State's legal tradition but have become increasingly subject to international standardization. On the international level *ne bis in idem* is enshrined as a human right in regional and international documents and constitutes an important protection with regard to interstate cooperation in criminal matters, in particular extradition law. Against the background of the proliferating international adjudicating bodies, a further aspect has gained more and more importance, that of horizontal *ne bis in idem* between judgements of international courts and tribunals.

- 8 *Ne bis in idem* is part of most national legal systems. It is usually included in the 'general part' of substantive penal codes, codes of penal procedure, the constitution, or acknowledged as a general principle confirmed by case law¹². The roots of the principle can be traced back to antiquity. Its multifarious incarnations thereafter cannot be elaborated here in detail¹³. Some conceptual similarities can be frequently found in States affiliated either with the civil or common law tradition. In this context, the prohibition of appeals to the detriment of the accused in common law, the definition of *idem* on the basis of historic facts (conduct; *ipsum factum*) in civil law countries, and legal qualification (offence or charge; *idem crimen*) in the common law tradition are well known examples¹⁴. But also within these major legal systems differences in the domestic application of the principle exist. Jeopardy may attach at the stage when the jury is empanelled in jury trials, when the court starts to hear evidence, after termination of a trial – by a judgement on the merits of a case or also by other decisions – or only when all ordinary remedies have been exhausted. A *res iudicata* may bar the opening of subsequent procedures, permit a second judgement or may oblige to take into account previously served sentences when determining the punishment (principle of deduction)¹⁵. Exceptions to the principle also differ considerably¹⁶.
- 9 The recognition by a State of the negative authority of a judgement rendered abroad limits one of its most genuine, sovereign competences: the exercise of criminal jurisdiction according to its national law. States, therefore, are hesitant to accord general international validity to *ne bis in idem*. Its application is limited so far and, if recognized, varies decisively in different domestic legal systems, despite international attempts towards harmonization and regional integration¹⁷. States are parties to different, partly overlapping, bi- and multi-

¹² See de la Cuesta (2002) 73 RIDP 710. For an overview of constitutions guaranteeing *ne bis in idem* see Bassiouni (1993) 3 *DukeJComp&IL* 262; see also the various country reports in (2002) 73 RIDP 773 *et seq.*

¹³ For the origins of the principle '*bis de eadem re ne sit actio*' and the motion '*exceptio rei iudicatae*' ('*exceptio rei in iudicium deductae*') in Roman or even Attic law see e.g. Liebau, '*Ne bis in idem*' in *Europa* (2005) 67; Mansdörfer, *Das Prinzip ne bis in idem im europäischen Strafrecht* (2004) 54 *et seq.*, Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das IStGH-Statut* (2004), 3 *et seq.* with further references. On the history, see also Friedland, *Double Jeopardy* (1969) 5–16; Mayer, *Ne-bis-in-idem-Wirkung europäischer Strafscheidungen* (1992) 15–17; Kielwein (1956) ZStW 163.

¹⁴ See van den Wyngaert and Ongena (1999) 48 *ICLQ* 710 *et seq.*, 714; see also Amar (1997) 106 *YaleLJ* 1807, 1813 *et seq.*, Conway (2003) 14 *CLF* 359 *et seq.*, 363 *et seq.*, 368 *et seq.*; El Zeidy (2002) 6 *MediterraneanJHumRts* 187 *et seq.*; Morosin (1995) 64 *NordJIL* 268, all with further references.

¹⁵ For examples see de la Cuesta (2002) 73 RIDP 711 *et seq.*; Costa (1998) 4 *University of California Davis JIL & Policy* 186; Sadat, *The International Criminal Court and the Transformation of International Law* (2002) 187, note 53 with further references. See also comparative studies in Liebau, '*Ne bis in idem*' in *Europa* (2005) 67 *et seq.*, 237 *et seq.*; Mansdörfer, *Das Prinzip ne bis in idem im europäischen Strafrecht* (2004) 57 *et seq.*, 274 *et seq.*; Stein, *Zum europäischen ne bis in idem nach Artikel 54 des Schengener Durchführungsübereinkommens* (2004) 197 *et seq.*; Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das IStGH-Statut* (2004), 156 *et seq.* With regard to the theory of 'continuing jeopardy', see e.g. Amar (1997) 106 *YaleLJ* 1838 *et seq.*

¹⁶ On exceptions see e.g. de la Cuesta (2002) 73 RIDP 714; Vander Beken et al. (2002) 73 RIDP 814.

¹⁷ For details see de la Cuesta (2002) 73 RIDP 715 *et seq.*; Amnesty International, too, seems more inclined to make a contribution towards criminal repression than the rights of the individual, stating categorically that *ne bis in idem* 'applies only to retrials by the same jurisdiction', see Amnesty International, *The International Criminal Court: Making the Right Choices – Part V* (1998) 39. As Pralus observes, the application is far easier in question of the subsidiary competences. On the contrary, in the case of a competence regarded exclusive in the national law, like that of trying own national or crimes committed on the own territory, the recognition presupposes a

lateral treaties providing detailed obligations, which are not uniform in substance. Generally, the acknowledgement of transnational *ne bis in idem* is limited to final foreign judgements; pending criminal proceedings do not block subsequent proceedings in another State. The actual enforcement of a penalty is normally taken into consideration. *Ne bis in idem* is commonly excluded for foreign judgements with regard to conduct for which a State can establish territorial jurisdiction itself, although in such cases, the initiation of national proceedings may depend on a special permit by national organs. Particular State interests or the commission of certain types of offences may further limit the authority granted to a foreign judgement. Some States basically deny the application of transnational *ne bis in idem*. Nevertheless, in such cases, the principle of deduction is generally acknowledged¹⁸.

With regard to vertical *ne bis in idem*, national standards are assumingly less divergent, since they derive directly from distinct international obligations. The Statutes of the ICTY and the ICTR as well as the Rome Statute comprise regulations regarding the *res iudicata* effect of judgements of the international adjudicating body vis-à-vis domestic courts (downward *ne bis in idem*) as well as regarding the effect of national judgements on the international court or tribunal (upward *ne bis in idem*). By way of their establishment through Security Council Resolution, the Statutes of the ICTY and the ICTR are binding upon all member States of the United Nations. The same is true for the Rome Statute regarding its States parties. Nevertheless, these international obligations remain rudimentary and not fully enforceable if they are not supplemented by substantive as well as procedural implementation on the national level¹⁹.

Ne bis in idem is reflected in several regional multilateral treaties. The 7th Additional Protocol of the *European Convention of Human Rights* contains the principle, declaring it a fundamental right which cannot be derogated even in times of war or public emergency²⁰, as well as the *American Convention of Human Rights*²¹ and the *Arab Charter of Human Rights*²². The *African Charter on Human and People's Rights* does not mention *ne bis in idem*, however²³. Article 4 of the 7th Additional Protocol protects a person from being 'tried or punished again ... for an offence for which he has already been finally acquitted or convicted'²⁴. Its scope of application is expressly limited to criminal proceedings. Article 8

remarkable confidence in foreign judgment(s), Pralus (1996) *Rev. Science Criminelle* 565. But see the rather – exceptional – case of the Netherlands, where foreign judgements are generally accepted as *res iudicata*, Klip and van der Wilt (2002) 73 *RIDP* 1100 *et seq.* See in this regard also e.g. the English common law tradition (for details see Conway (2003) 3 *ICLRev* 233); Law Commission of England and Wales (ed), Double Jeopardy, consultation paper No. 156 (1999), www.lawcom.gov.uk/wp-content/uploads/2015/03/lc267__Double_jeopardy_Report.pdf (accessed 1 September 2014) paras. 9.10–9.15; Vervaele (2005) 1 *UtrechtLRev* 100 and Egypt, El Zeidy (2002) 6 *MediterraneanJHumRts* 199.

¹⁸ For examples see de la Cuesta (2002) 73 *RIDP* 722 *et seq.*, 724; Liebau, 'Ne bis in idem' in *Europa* (2005) 171 *et seq.*; van den Wyngaert and Stessens (1999) 48 *ICLQ* 782 *et seq.*, 797 *et seq.*

¹⁹ In this regard AIDP (ed) (2004) 75 *RIDP* 805.

²⁰ Article 4 para. 3 Protocol No. 7 E.T.S. No. 117, article 15 ECtHR. The 1950 ECtHR does not explicitly refer to *ne bis in idem* but the European Commission for Hum. Rts. has suggested application of article 6 of the Convention under certain circumstances, see Frowein and Peukert, *Europäische Menschenrechtskonvention. EMRK-Kommentar* (1996) Article 6, mn 173; Mayer, *Ne-bis-in-idem-Wirkung europäischer Strafscheidungen* (1992) 48–49.

²¹ San José, Costa Rica, 1969, 9 *ILM* 673 (1970).

²² Adopted by the League of Arab States on 15. Sep. 1994, see 18 Hum. Rts. L. J. 151 (1997); the Charter has not yet entered into force.

²³ Banjul 1981, 21 *ILM* 58 (1982).

²⁴ The ECtHR's jurisprudence on what constitutes an *idem* has not been coherent. Despite the wording, it applied a broad interpretation of the term 'offence', based on the 'same conduct' in *Gradinger v. Austria* (application no. 15963/90, judgment of 23 Oct. 1995, para 55). Later on, the court relied on the legal qualification of the underlying facts as the relevant criterion for establishing identity (*Oliveira v. Switzerland*, application no. 25711/94, judgment of 30 July 1998, para. 26). The ECtHR undertook to clarify its seemingly 'contradictory' jurisprudence in the case *Fischer v. Austria* (application no. 37950/97, judgement of 29 May 2001, para. 23). It confirmed the view that article 4 of Prot. No. 7 was not infringed by the fact that a single criminal act was split up into two separate offences and judged subsequently by two different courts. Nevertheless, the ECtHR was free to closely examine 'cases where one act, at first sight, appears to constitute more than one offence, whereas a closer

para. 4 of the American Convention prohibits an accused ‘acquitted by a nonappealable judgment’ from becoming ‘subjected to a new trial for the same cause’²⁵. Article 16 of the Arab Charter states ‘no one shall be tried twice for the same offence’. A few conventions on international cooperation in criminal matters also make reference to the principle²⁶.

- 12 In the European Union context further parallel tracks of development still have to be considered. *Ne bis in idem* is enshrined in the Charter of Fundamental Rights of the European Union, which gained the status of primary law with the entry into force of the Lisbon Treaty²⁷. Its article 50 protects persons from being ‘tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted’. As all provisions of the Charter, article 50 is ‘addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*’ (article 51.1 of the Charter, emphasis added). It must be highlighted that *ne bis in idem* as referred to in article 50 ‘applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States’²⁸. This corresponds to the *acquis* in Union law: The Schengen Convention introduced a transnational *ne bis in idem* into the common area of its States Parties²⁹. Its article 54 protects ‘[a] person whose trial has been finally disposed of’ from

examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others. ... Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court has to examine whether or not such offences have the same essential elements’ (*ibid.*, para 25). For an analysis see e.g. Birkbauer, in: Moos et al. (eds), *Strafprozessrecht im Wandel, Festschrift für Roland Miklau* (2006) 45, 47 *et seq.*; Mansdörfer, *Das Prinzip ne bis in idem im europäischen Strafrecht* (2004) 99 *et seq.* With regard to determining the finality of a judgement, article 4 of Prot. No. 7 relies on domestic ‘law and penal procedure’. But the Explanatory Report to Prot. No. 7 also refers to the definition underlying the European Convention on the International Validity of Criminal Judgments, E.T.S. No. 70. Thus, a decision is final ‘if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them’ (Explanatory Report to Prot. No. 7 paras. 22 and 29).

²⁵ The IACtHR interprets the expression ‘the same cause’ as a much broader term in the victim’s favour than the notion ‘same offence’ as used for instance in article 14 para. 7 ICCPR, see IACtHR, Case of *Loayza-Tamayo v. Perú*, series C no. 33 para 66, Judgment, 17 Sep. 1997. With regard to ‘acquitted by a nonappealable judgment’ the Inter American Commission of Hum. Rts. held that the acquittal must be a final judgment, implying that ‘someone who, having been charged with a crime, has been exonerated from all criminal responsibility, since he has been acquitted because his innocence has been demonstrated, because his guilt has not been proven, or because it has been determined that the acts of which he is accused are not defined as crimes’. The term ‘nonappealable judgment’ is interpreted according to domestic law. However, any procedural act that is fundamentally jurisdictional in nature, and acquires the immutability and incontestability of *res judicata*, qualifies, *García v. Perú*, Case 11.006, Decision, 17 Feb. 1995, Report No. 1/95.

²⁶ Among the most important ones in Europe are the 1957 European Convention on Extradition, E.T.S. No. 24 and its two additional protocols, E.T.S. Nos. 86 and 98, the 1970 European Convention on the International Validity of Criminal Judgments, E.T.S. No. 70, and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters, E.T.S. No. 73. See, e.g., Bartsch (2002) 73 *RIDP* 1166; Dugard and van den Wyngaert (1998) 92 *AJIL* 188; Epp (1979) *ÖJZ* 3. For the Americas, see e.g., the 1992 Inter-American Convention on Mutual Assistance in Criminal Matters (A-55, OAS Treaty Series No. 75) and the 1993 Inter-American Convention on Execution of Criminal Sentences Abroad (A-57, OAS Treaty Series No. 76). See also article V para. 1 of the extradition treaty of the League of Arab States, Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das IStGH-Statut* (2004) 59 *et seq.*

²⁷ Article 6.1 Treaty on European Union (OJ C 83, 30 March 2010). For details see di Federico, in: di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011) 15 *et seq.*

²⁸ Explanations relating to the Charter of Fundamental Rights, p. 32 (O J C 303, 14 December 2007).

²⁹ Convention of 19 June 1990, applying the Schengen Agreement of 14 June 1985, Schengen, *ILM* 84 (1991). For details e.g. Lagodny (1997) *NStZ* 265; *in extensu*: Stein, *Zum europäischen ne bis in idem nach Artikel 54 des Schengener Durchführungsübereinkommens* (2004). The Schengen Convention has meanwhile been incorporated into the European Union framework by a Protocol attached to the Treaty of Amsterdam and forms part of the *acquis communautaire*. On the substantive differences between Art. 50 of the Charter of Fundamental Rights of the European Union and Art. 54 SDÜ see Ambos, *Internationales Strafrecht* (2014) 533*et seq.*

being ‘prosecuted in another Contracting Party for the same acts’³⁰. The Schengen Convention has meanwhile been incorporated into the European Union framework by a Protocol attached to the Treaty of Amsterdam³¹. It should also be mentioned that in the framework of the European Political Cooperation, the member States of the (former) European Communities have concluded a convention on double jeopardy³². Furthermore, the accumulation of administrative and penal sanctions to be imposed by national and community organs has generated regulation of *ne bis in idem*, for example, in the context of the protection of the financial interests of the Union³³. Other legal acts adopted within the area of freedom, security and justice, former third pillar, also refer to the *ne bis in idem* principle³⁴. Article 3 para. 2 of the 2002 Framework Decision on the European Arrest Warrant, for instance, allows a refusal of the execution of a European arrest warrant with regard to a person who has been finally judged by a member State³⁵.

Ne bis in idem was not included in the *Universal Declaration of Human Rights*, unlike 13 some other minimum guarantees on criminal procedure. The *UN Covenant on Civil and Political Rights* covers *ne bis in idem* in its article 14 para. 7. According to this provision, ‘[n]o one shall be liable to be *tried or punished* again for an *offence* for which he has already been *finally convicted or acquitted*’³⁶. A few international instruments on crime prevention

³⁰ Regarding the notion ‘finally disposed of’, the ECJ ruled that article 54 *Schengen Convention* applies to certain out of court settlements, final acquittals based on statutory limitation or lack of evidence (*Gözütok et Brügger*, Case C-187/01 et C-385/01, Judgement, 11 Feb. 2003, para. 48; *Gasparini*, Case C-467/04, Judgement, 28 Sep. 2006, para. 33; *van Straaten*, Case C-150/05, Judgement, 28 Sep. 2006, para 61) but not to a Prosecutor’s decision not to ‘pursue the prosecution on the sole ground that criminal proceedings have been started in another member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case’. (*Miraglia*, Case C-469/03, Judgement, 10 Mar. 2005, para 34). *Idem* has to be understood in a broad way, ‘as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected’ (*van Esbroeck*, Case C-436/04, Judgement, 9 Mar. 2006, paras. 36 and 42). For details see e.g. Birkbauer, in: R. Moos et al. (eds), *Strafprozessrecht im Wandel, Festschrift für Roland Miklau* (2006) 54 et seq.; Bogensberger, in: Moos et al. (eds), *Strafprozessrecht im Wandel, Festschrift für Roland Miklau* (2006) 91, 95 et seq.; Schomburg, in: Arnold et al. (eds), *Festschrift für Albin Eser* (2005) 835; Stein, *Zum europäischen ne bis in idem nach Artikel 54 des Schengener Durchführungsübereinkommens* (2004) 73 et seq.; Vervaele (2005) 1 *UtrechtLRev* 110 et seq. for exceptions to the application of *ne bis in idem* see article 55 *Schengen Convention*.

³¹ On its relationship to article 50 of the Charter of Fundamental Rights see ‘The Post-Lisbon Principle of Transnational Ne Bis in Idem: On the Relationship Between Article 50 Charter of Fundamental Rights and Article 54 Convention Implementing the Schengen Agreement: Case Note on District Court Aachen, Germany, (52 Ks 9/08 – ‘Boere’), Decision of 8 December’ (2010) 1 *New Journal of European Criminal Law* 310.

³² See Bulletin of the European Communities, Year 20. No. 5, 113 (1987). It has been ratified by few States, has not entered into force but is provisionally applicable in some EU member States. The Convention, largely identical to the Schengen Convention, can be seen as a first attempt to introduce Schengen into the framework of the European Communities, Bartsch (2002) 73 *RIDP* 1169.

³³ See *Corpus Iuris* introducing Penal Provisions for the Protection of the Financial Interests of the European Union (1997); Renaud (1996) 12 *Agon* 9; Vervaele (2005) 1 *UtrechtLRev* 106 et seq.; article 7 of the Convention on the Protection of the European Communities’ Financial Interests (OJ C 316, 27 November 1995); article 10 of the Convention on the fight against corruption (OJ C 195, 25 June 1997).

³⁴ Article 4 of the Treaty of the Functioning of the European Union, C 83/47, 20 March 2010; Articles 9 of Protocol No. 36 on transitional provisions OJ 115, 9 May 2008, p. 322.

³⁵ Council Framework Decision on the European Arrest Warrant and the Surrender Procedure between member States of 13 June 2002 (OJ L 190, 18 July 2002, p. 1). See e.g. Bartsch (2002) 73 *RIDP* 1170, Schomburg, in: Arnold et al. (eds), *Festschrift für Albin Eser* (2005) 840; Vervaele (2005) 1 *UtrechtLRev* 116 et seq. See also the Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ‘*ne bis in idem*’ principle, OJ C 100, 26 Apr. 2003, p. 24; and the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem*, Criminal Proceedings COM(2005) 696 final of 23 Dec. 2005, p. 3, neither of them having led to new legislation. For details see e.g., Bogensberger, in: Moos et al. (eds), *Strafprozessrecht im Wandel, Festschrift für Roland Miklau* (2006) 104 et seq.

³⁶ The last requirement ‘finally convicted or acquitted’ is to be judged ‘in accordance with the law and penal procedure of each country’ M. Nowak, *article 14*, UN CCPR Commentary mn 99 (2005). A deviating proposal requiring for the term ‘finally convicted or acquitted’ that all ordinary methods of judicial review and appeal have been exhausted and that all waiting periods had expired, was suggested but not adopted (*id.* mn 98).

refer to the principle³⁷. The United Nations Model Treaty on Extradition declares it a mandatory ground for refusal of an extradition when a final judgement has been rendered against the same ‘person in the requested State in respect of the offence for which the person’s extradition is requested’³⁸. Article 86 Geneva Convention III and article 117 para. 3 Geneva Convention IV prohibit the double punishment of prisoners of war and civilian internees ‘for the same act or on the same charge [count]’³⁹. Article 75 para. 4 (h) Add. Prot. I contains a more detailed regulation: ‘no one shall be *prosecuted or punished by the same Party* for an *offence* in respect of which a *final judgement acquitting or convicting* that person has been previously pronounced under the same law and judicial procedure’. The question whether *ne bis in idem* could be regarded as a general principle of international law or a customary norm has to be left aside here⁴⁰.

- 14 The fact that *ne bis in idem* is included in national laws, and in regional and international conventions could be seen as evidence of its internationally recognized position. It could also be seen as evidence of the way human rights ideology has influenced criminal law since World War II. The *ne bis in idem* principle differs, however, decisively from the other cornerstones of a criminal trial such as the principle of legality or the presumption of innocence: it is generally held to be in force inside one jurisdictional regime only. With the exception of European Union law, the relevant provisions of the international human rights conventions, the regional as well as the universal ones do ‘not guarantee *ne bis in idem* with regard to the national jurisdictions of two or more states’⁴¹. They provide for an international guarantee of the principle but not for its international application⁴². This ‘nationalisme pénal, soucieux de souveraineté plus que d’équité’ has been the target of considerable criticism⁴³.
- 15 Against this background, the principle of *ne bis in idem* has undergone a distinct development in the context of international criminal law enforcement. In the doctrine following the establishment of the ICC, international and national courts, when prosecuting crimes under international law, are sometimes seen to exercise the *ius puniendi* of the ‘international community’ as a whole to defend its highest values, ‘the peace, security and well-being of the world’ (Preamble para. 3). Final decisions taken within this system of

³⁷ See e.g. rule 30 para 1, Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Res. 663 C (XXIV) of 31 July 1957 and Res. 2076 (LXII) of 13 May 1977; article 36 para. 2 *lit. a* (iv) Single Convention on Narcotic Drugs. For further references see M. Pralus (1996) RSC 565–566.

³⁸ Article 3 *lit. d*. Adopted by GA Res. 45/116, subsequently amended by GA Res. 52/88.

³⁹ For details see El Zeidy (2002) 6 *Mediterranean JHumRts* 227.

⁴⁰ See in this regard e.g. Cassese, analysing that ‘[w]hile the ‘internal’ *ne bis in idem* principle may be held to be prescribed by a customary rule of international law, the legal status of the ‘international’ equivalent principle is still controversial’. However, although a customary rule with regard to all crimes has not yet crystallized, he ascertains that such a rule arguably has evolved with regard to international crimes, Cassese, *International Criminal Law* (2003) 319–20. On the question whether or not *ne bis in idem* can be regarded as a ‘general principle of law recognized by civilised nations’ according to article 38 ICJ Statute see e.g. Conway (2003) 3 *ICLRev* 229 *et seq.* (238); Morosin (1995) 64 *NordJIL* 262 *et seq.*; Theofanis (2003) 3 *ICLRev* 195. For both aspects see also Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das IStGH-Statut* (2004) 113 *et seq.* (145), 146 *et seq.* (205).

⁴¹ *A.P. v. Italy*, above note 3, § 7.3 of 2 Nov. 1987. See, e.g., Muhammad, in: Henkin (ed), *The International Bill of Rights* (1981) 136, 156. For a critical voice, see Nowak, above note 36, article 14, mn 99 with further references. On the discussion concerning the European Convention, see, e.g., Mayer, *Ne-bis-in-idem-Wirkung europäischer Strafscheidungen* (1992) 47–50; Pralus (1996) RSC 566–568. But see Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das IStGH-Statut* (2004) 63 *et seq.* interpreting article 8 American Convention on Hum. Rts. including a transnational protection.

⁴² See Bartsch (2002) 73 *RIDP* 1164.

⁴³ See Jung, who regards the avoidance of multiple judgements as ‘aus international-strafrechtlicher Sicht inzwischen als ein vorrangig zu lösendes Problem’, in: Albrecht *et al.* (eds), *Festschrift für Schüler-Springorum* (Heymann 1993) 500; Pralus (1996) RSC 564. See in this regard also the recommendation of the AIDP to incorporate international *ne bis in idem* as a human right into international and regional conventions (for references see de la Cuesta (2002) 73 *RIDP* 710; AIDP (ed.) 75 *RIDP* 803, II 1.2).

international criminal justice establish *ne bis in idem* as long as the *ius puniendi* of the international community is properly administered; national decisions are thereby ultimately under the scrutiny of organs of the international community⁴⁴. A vertical *res iudicata* effect has been subsequently acknowledged in statutes of international courts and tribunals. The acceptance of a general, transnational, *ne bis in idem*, however, is still *de lege ferenda*.

In the early efforts to exercise criminal jurisdiction internationally, not much concern was expressed on possible violations of *ne bis in idem*. Article 11 of the Nuremberg Charter expressly allowed for retrials and additional punishment of persons convicted by the international military tribunal for membership in a criminal group or organization for any other crime⁴⁵. Article 51, 1951 ILC Draft Statute and article 50, 1953 ILC Draft Statute provided that '[n]o person who has been *tried and acquitted or convicted* before the Court shall be *subsequently tried for the same offence*'. But this downward *ne bis in idem* was limited to courts within the jurisdiction of those States which have conferred jurisdiction upon the Court with respect to the offence in question⁴⁶.

The Statutes of the *ad hoc* Tribunals establish *ne bis in idem* for a person who 'has been 16
tried' for 'acts constituting serious violations of international humanitarian law'⁴⁷. These points of reference are identical regarding national judgements and those of the *ad hoc* Tribunals. Downward *ne bis in idem* is fully acknowledged by the Statutes⁴⁸. In cases of non-compliance by a national court, rule 13 authorizes a Trial Chamber to 'issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council'. Regarding upward *ne bis in idem*, a subsequent trial before an *ad hoc* tribunal is permissible in two cases. The 'ordinary crime exception' foresees that acquittals or convictions upon the same facts but for different crimes do not bar proceedings before an *ad hoc* tribunal⁴⁹. The second exception allows a

⁴⁴ Triffterer, 2nd edition, *Preliminary Remarks*, mn 39 *et seq.*; *id.* (2006), in: Austrian Federal Ministry for Foreign Affairs/Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law (eds), *The Future of the International Criminal Court – Salzburg Retreat* (2006) 26, 32, For an emerging customary rule on transnational *ne bis in idem* regarding international crimes, see Cassese, *International Criminal Law* (2003) 319-20.

⁴⁵ *Argumentum a contrario* it was argued that a conviction would have barred a retrial for the same crime before another court, see van den Wyngaert and Ongena, (1999) 48 *ICLQ* 718. The risk of multiple trials was not regarded as a problem to be focused on in the context of the earlier international prosecutions, see Lombois, *Droit Pénal Internationale* (1979) No. 41. Occasional references to the principle were made in the Nuremberg trials, see, e.g., *Der Prozess gegen die Hauptkriegsverbrecher vor dem Internationalen Militärgerichtshof*, Vol. XXII, 569 (1948). In the trial against the industrial leaders of Germany, the Tribunal stated: 'We conceive the only purpose of this Tribunal is to bring to trial war criminals that have not already been tried'. TWC before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. VI, 1213 (1952). In the trial against German jurists criticism was raised that a case was 'again tried in violation of the fundamental principles of justice that no man should be tried twice for the same offence', *ibid.*, Vol. III, 1147-8 (1951).

⁴⁶ Article 50, 1953 ILC Draft Statute 'Double jeopardy'. The previous text of article 51, 1951 ILC Draft Statute, though then titled 'Subsequent Trial', had not been altered except for minor redactional chances.

⁴⁷ See article 10 ICTY Statute and article 9 ICTR Statute respectively.

⁴⁸ The *ad hoc* Tribunals have not yet explicitly ruled on the scope of *idem*, defined as 'acts constituting serious violations of international humanitarian law'. The Secretary-General understood that '[a]ccording to the principle of *non-bis-in-idem*, a person shall not be tried twice for the same crime. In the present context, given the primacy of the International Tribunal, the principle of *non-bis-in-idem* would preclude subsequent trial before a national court'. See Report of the Secretary-General, note 5, para. 66. This guideline seems to support a narrow interpretation of *idem* relating to the same offence (see e.g. Bassiouni and Manikas (eds), *The Law of the Criminal Tribunal for the Former Yugoslavia* (1996) 319; Spinellis (2002) 73 *RIDP* 1155-6; see also rule 13 ICTY Rules of Procedure and Evidence referring explicitly to criminal proceedings 'instituted against a person before a court of any State for a *crime* for which that person has already been tried by the Tribunal'. However, with a view to the primacy of the *ad hoc* Tribunals a wide interpretation referring to the underlying conduct has also been advocated (see e.g. Schomburg, in: Arnold *et al.* (eds), *Festschrift für Albin Eser* (2005) 839-40; Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das ISIGH-Statut* (2004) 224).

⁴⁹ For Court practice see e.g. *Prosecutor v. Bagosora*, Case-No. ICTR-96-7-D, Decision on the Application by the Prosecutor for a Formal Request for Deferral, Trial Chamber, 17 May 1996; *Prosecutor v. Musema*, Case-No. ICTR-96-5-D, Decision on the Formal Request for Deferral presented by the Prosecutor, 12 March 1996. See

substantive review of national proceedings and a retrial, if the former were ‘not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted’. Upward *ne bis in idem* obliges the *ad hoc* tribunals to ‘take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served’.

As for court practice, in the *Tadić* case before the ICTY the defence tried to establish a *bis in idem* situation because proceedings had already commenced in Germany. The claim was dismissed by the Trial Chamber, reasoning that ‘the accused has not yet been the subject of a judgement on the merits on any of the charges for which he has been indicted’⁵⁰. Since only a final judgement on the merits of the case establishes *res iudicata*, decisions not to prosecute, termination of proceedings on procedural or formal grounds or interlocutory decisions do not bar further proceedings⁵¹. In the *Ntuyahaga* case, the ICTR dismissed the Defence’s request to render an acquittal on formal grounds, arguing that ‘an acquittal can only be considered at the stage where the Prosecutor has presented all her evidence, and the Chamber finds that the evidence is insufficient to sustain a conviction on any one count’. Lacking a judgement of the Tribunal, a subsequent national prosecution would not have been barred⁵².

Ne bis in idem also plays a role with regard to cumulative convictions, when one act of criminal conduct constitutes more than one separate offence (concoirs idéal d’infractions). Earlier decisions of the *ad hoc* tribunals did not oppose cumulative convictions and dealt with the issue of cumulative penalties at the sentencing stage, although jurisprudence was not fully consistent⁵³. Clarifying the issue, the Appeals Chamber in *Delalić* concluded ‘that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other’⁵⁴. Where this test is not met, the Chamber will convict under the more specific provision: ‘Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision’⁵⁵.

- 17 The *ne bis in idem* of the Statutes of the *ad hoc* tribunals largely correspond to the respective provisions of the 1993 and 1994 ILC Draft Statutes. They were also exemplary for article 9 of the Statute of the Special Court for Sierra Leone, while section 11 of the Statute of the Special Panels with exclusive jurisdiction over serious criminal offences in East Timor is

thereto e.g. van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 719; Vander Beken et al. (2002) 73 RIDP 837.

⁵⁰ *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, Trial Chamber, 14 November 1995, para. 24.

⁵¹ De la Cuesta (2002) 73 RIDP 729, 730. But see *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on the Prosecutor’s Request for Review or Reconsideration, Appeals Chamber, 31 March 2000, where the Appeals Chambers held that a final judgement in the sense of article 25 ICTR Statute and rule 120 ICTR Rules of Procedure and Evidence is one which terminates the proceedings, including one dismissing an indictment (*ob. cit.* para 49); thereto Theofanis (2003) 3 ICLRev 204 *et seq.*

⁵² *Prosecutor v. Ntuyahaga*, Case No. ICTR-98-40-T, Decision on the Prosecutor’s Motion to Withdraw the Indictment, Trial Chamber, 18 March 1999. See thereto van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 720; Vander Beken et al. (2002) 73 RIDP 814.

⁵³ For a discussion of the jurisprudence, see *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para. 395 *et seq.*, 402 *et seq.* See also Conway (2003) 14 CLF 363, 369 *et seq.* Walther, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 475; Werle, *Principles of International Criminal Law* (2005) mn 527 *et seq.*; Wills (2003) 17 EmoryILRev 341.

⁵⁴ See *Delalić et al.*, above note 53, para. 412, applying the ‘Blockburger-test’ (*Blockburger v. United States*, 284 U.S. 299, 304 (1932), para. 409). In the same decision, the Appeals Chamber confirmed the validity of the practice of cumulative charges (*ibid.*, para. 400).

⁵⁵ *Delalić et al.*, above note 53, para. 413. For a detailed analysis of the speciality test see Ambos, *Treatise on International Criminal Law*, ii (2014) 254 *et seq.*

based on article 20 Rome Statute⁵⁶. The 1996 ILC Draft Code contains an interesting article 12 on *ne bis in idem*⁵⁷. Its paragraph 1 contains an absolute *ne bis in idem* provision with regard to final acquittals and convictions of the international criminal court ‘for a crime against the peace and security of mankind’. Paragraph 2 provides that ‘[a]n individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court’. This regulation does not only concern upward *ne bis in idem*, but also constitutes a codification of transnational *ne bis in idem*⁵⁸. It contains exceptions similar to the Statutes of the *ad hoc* Tribunals, allowing a retrial before an international criminal court. In addition, with regard to national courts, an individual tried by a State could be retried for a crime under the Draft Code by the territorial State or by a State that had been the main victim of the crime. The commentary envisages even the right of both of them to institute subsequent proceedings⁵⁹. Since such retrials are not restricted to exceptional cases of miscarriage of justice (as with regard to the ICC), *ne bis in idem* is nullified to a large extent. However, the ILC Draft Code is the first international document that tackles the problem of multiple trials for crimes under international law on the national level and enshrines a provision respecting transnational *ne bis in idem*.

4. The development up to the Rome conference

Four aspects of article 20 attracted major interest during the preparation work. The *first* 18 concerns the article’s relationship with the notion of complementarity. Starting with the report of the *Ad Hoc* Committee in 1995, a frequent concern was that the article ‘conferred upon the ICC a kind of supervisory role vis-à-vis national courts’⁶⁰. The *second* aspect of great interest had to do with the drafting of the exceptions to the principle, which raised the issue of subjectivity versus objectivity of language. The distinction between ordinary crimes and crimes of international concern, used in article 42 para. 2 (a) ILC Draft Statute, proved particularly problematic, since such a distinction ‘was not common to all legal systems and could cause substantial legal problems’⁶¹. As for the *third*, the scope of the principle was controversial. The commentary of the 1994 ILC Draft Statute states that the first condition for the application of the principle would be that ‘the first court actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime’; and the second condition would require there to be ‘a sufficient measure of identity between the crimes which were the subject of the successive trials’⁶². Discussion was devoted to the question of what, exactly, should be seen as the same act, conduct, offence or crime⁶³. A further problem

⁵⁶ It should be noted that article 9 para. 1 Statute of the Special Court for Sierra Leone as well as section 11 para 2 of the Statute of the Special Panels limit downward *ne bis in idem* protection to retrials before a national court of Sierra Leone and East Timor, respectively. This is due to the establishment of these adjudicating bodies by a treaty between the United Nations and the government of Sierra Leone, which cannot impose obligations on third parties, and, respectively, by a regulation of the United Nations transitional administration in East Timor; nonetheless, the Statutes’ protection of the individual is significantly reduced. For case law see e.g. *The Deputy General Prosecutor for Serious Crimes v. Wiranto et al.*, Case No. 05/2003, Legal Ruling Concerning the Applicability of *Ne bis in Idem* at the Arrest Stage of the proceedings. See also Kleffner and Nollkaemperin, in: Romano et al. (eds), *Internationalized Criminal Courts* (2004) 359, 373 *et seq.*

⁵⁷ 1996 ILC Draft Code. For the discussion on the 1991 version, see 1991 ILC Draft Code. For the changes in the Report of the Special Rapporteur, see Thirteenth Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, 24 Mar. 1995, UN Doc. A/CN.4/466.

⁵⁸ For a further analysis see Swart (1993) 11 *NEP* 173 *et seq.*; Specht, *Die zwischenstaatliche Geltung des Grundsatzes ne bis in idem* (1999) 66 *et seq.* 87 *et seq.*; Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das IStGH-Statut* (2004) 54 *et seq.* See also Morosin (1995) 64 *NordJIL* 266.

⁵⁹ 1996 ILC Draft Code, p. 71. Article 55 of the Schengen Convention contains comparable exceptions to the general *ne bis in idem* expressed in article 54, see mn 11.

⁶⁰ *Ad Hoc* Committee Report, p. 9, para. 43.

⁶¹ *Ibid.*, see also para. 179.

⁶² 1994 ILC Draft Statute, p. 118.

⁶³ For an analysis of the concept of the ‘same act’ in a national context, see Neuhaus, *Der strafverfahrensrechtliche Tatbegriff – ‘ne bis in idem’* (1985); Friedland, *Double Jeopardy* (1969) 89–115.

concerning the scope of *ne bis in idem* was caused by the differences between legal systems with regard to prosecutorial appeal and revision. Finally, the placement of the principle was debated: was it to be regarded as a general principle of criminal law, part of the procedural rules or part of the jurisdictional mechanism of the ICC⁶⁴.

- 19 As already mentioned above, article 42 '*Non bis in idem*' 1994 ILC Draft Statute was largely based on the corresponding regulations of the Statutes of the *ad hoc* Tribunals. It consisted of three paragraphs dealing with the *res iudicata* effect of judgements of the ICC with regard to other courts and *vice versa* (paragraphs 1 and 2). For the latter, it formulated exceptions relating to the legal qualification of a conduct as an 'ordinary crime' as well as with a view to proceedings that were not conducted impartially or independently, or with the purpose of shielding a person from international criminal responsibility (paragraph 2 *literae* a and b). Paragraph 3 permits the ICC to take into account served sentences when considering the penalty in a retrial. The 1995 *ad hoc* Committee underlined the paramount importance of the concepts of admissibility and *non bis in idem* for implementing the principle of complementarity⁶⁵. The most decisive phases of the preparatory work for the formulation of the *ne bis in idem* principle in the Rome Statute were the sessions of the Preparatory Committee in 1996 and 1998⁶⁶. The 1996 Preparatory Committee I discussed technical aspects of *non bis in idem* in the context of complementarity⁶⁷. In the compilation of all proposals, Preparatory Committee II 1996 the principle appears firstly as article D under 'General Principles of Criminal Law' and secondly as article 42 under 'The Trial'⁶⁸. Article 13 [42] of the Zutphen Draft, which was the basis for the discussions in the sixth session of the Preparatory Committee in 1998, reproduced article 42 of the ILC Draft Statute and the majority of the proposals contained in the Preparatory Committee II 1996 in the section on jurisdiction⁶⁹. During the final session of the Preparatory Committee in 1998, the article was largely rewritten and consolidated as well as renamed '*ne bis in idem*' (article 18)⁷⁰. At the Diplomatic Conference, the compromise of article 18 Preparatory Committee Draft was successfully maintained. No remarkable discussion on the substance of the provision took place. The draft article remained unchanged except for the editorial modifications in the references to crimes; a qualifier was added to paragraph 3 (b), and a minor addition was made to the chapeau of paragraph 3, as will be discussed below. Article 19 Preparatory Committee Draft, allowing for retrials by the ICC in cases where sentences were not properly enforced, was not included in the final package⁷¹.

Before analysing the elements of article 20 in detail, it shall be noted that while departing from a rather uniform language with regard to the constituent elements of *ne bis in idem* in all cases ('for acts constituting a crime', 'has [already] been tried') in article 42 of the 1994

⁶⁴ The 1994 ILC Draft Statute had placed its article 42 on *ne bis in idem* in 'Part 5. The Trial'. The 1996 Preparatory Committee II additionally listed the principle as article D under 'Part 3bis General Principles of Criminal Law'. The article was finally moved to 'Part 2. Jurisdiction, Admissibility and Applicable Law' in the Zutphen Draft. See e.g. Saland, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 213.

⁶⁵ *Ad Hoc* Committee Report, p. 20, para. 92.

⁶⁶ A French proposal was introduced in August 1996 (Draft Statute of the ICC, UN Doc. A/AC.249/L.3). It dealt with aspects of the jurisdictional model and *ne bis in idem* in a different setting. France proposed that it should always be possible to indict again based on new evidence. Major parts of the French proposal were endorsed by the various compilation papers prepared by informal groups during the August session that had been collected in the Preparatory Committee II 1996.

⁶⁷ Preparatory Committee I 1996, paras. 170–174.

⁶⁸ Preparatory Committee II 1996, pp. 86 and 202. During the August 1997 session of the Preparatory Committee the principle of *ne bis in idem* was marginally touched upon informal consultations on issues of admissibility (see Preparatory Committee Decisions Aug. 1997, p. 10–12, Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 56.

⁶⁹ Zutphen Draft, pp. 46–47.

⁷⁰ See article 18 Preparatory Committee Draft, pp. 45–46.

⁷¹ For details see mn 51 *et seq.* See also Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 51–56, 59–60.

ILC Draft Statute, the compromise established during the final session of the Preparatory Commission and subsequently adopted by the Rome Conference provides for evident variations in the wording regarding *idem* ('conduct which formed the basis of crimes', 'crime referred to in article 5', 'conduct also proscribed under article 6, 7 or 8') as well as *bis* ('has [already] been convicted or acquitted', 'has been tried').

B. Analysis and interpretation of elements

I. Paragraph 1

The 1994 ILC Draft Statute had not foreseen an express regulation prohibiting the Court from trying somebody already convicted or acquitted by the Court itself. In the 1998 Preparatory Committee, some delegations expressed concern about this lack of a general statement according to which the ICC would be bound by the *ne bis in idem* principle in relation to earlier decisions of its own. Although this was understood as self-evident by other delegations, the general feeling was that it would provide clarification and would do no harm⁷². Drafting was proposed by Portugal: '1. No person shall be tried before the Court without prejudice to article 75 [revision, footnote omitted] or before another court for acts constituting a crime of the kind referred to in article 5 (20) for which that person has already been tried by the Court'⁷³. The U.S. delegation put forward the following proposal: 'Except as provided in this Statute, no person shall be tried before the Court for acts for which he has already been convicted or acquitted by the Court'⁷⁴. Their proposals were deemed useful and a paragraph was added to the draft article.

1. 'Except as provided in this Statute'

This is a catch clause to avoid listing the provisions in the Statute enabling subsequent proceedings in a case, such as appeal and revision (on the reformulation of charges, see mn 24). Some delegations believed that no further drafting would have been needed to state that the means expressly provided for the ICC by the Statute do not contradict *ne bis in idem*. The substantive discussion on what exactly should be provided was conducted in the negotiations on Part 8 (Appeal and Revision) of the Statute. It reflected the general differences between the continental law and common law views on the acceptability of appeals by the prosecutor and of revision in general. The right of appeal was granted almost identically to the accused and the prosecutor, see article 81. This would not constitute an 'exception' to *ne bis in idem* for many civil law countries, where appeals are often considered as part of a proceeding and *ne bis in idem* only applies after all ordinary remedies have been exhausted (see also *infra* mn 23). However, although the Rome Statute allows for prosecutorial appeal, which is generally prohibited in common law systems, the language of this paragraph labelling it 'exceptional' seems at least to reflect the restraint of common law⁷⁵. It should be noted in this context that the Appeals Chamber may either reverse or amend a judgement itself, thereby enjoying all

⁷² Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 58.

⁷³ Portugal also argued that the title of the article should be changed from '*non bis*' to '*ne bis*' in *idem*, and that it should be in the part on 'the General Principles of Law', see UN Doc. A/AC.249/1998/WG.2/DP.6 (25 Mar. 1998), notes 1 and 2. This follows the commentary of Wise (1998) 13*bis* NEP 43 as well as the systematic of the 1996 ILC Draft Code. See also Eser (1993) 11 NEP 48, note 16.

⁷⁴ U.S. Delegation, 3/8/981.

⁷⁵ van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 722. See also e.g. Costa (1998) 4 *University of California Davis JIL&Policy* 198 *et seq.*; Baum (2001) 19 *WisconsinILJ* 222 argues that the absence of jury trials before the ICC may justify the ICC Prosecutor's right to appeal acquittals even from a double jeopardy perspective. For an analysis of relevant international provisions see e.g. Brady and Jennings, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 294.

powers of the Trial Chamber, or order a new trial before a different Trial Chamber, see article 83 para. 1 and 2 *lit.* a and b. Revision of a conviction or sentence may be claimed by or on behalf of a convicted person, if new evidence has been discovered, decisive evidence was false, forged or falsified, or in case of a serious misconduct of serious breach of duty by a judge, article 84, *lit.* a–c. A proposal to permit the prosecutor to seek revision on the basis of newly discovered evidence also to the detriment of the accused was met with strong criticism for being contrary to *ne bis in idem* and was omitted.

2. ‘conduct which formed the basis of crimes’

- 22 When should a second prosecution for a different offence be barred? It became evident in the negotiations that no single, mechanical test could cope with the variety of situations that might arise. Each of the paragraphs of article 20 contains a different formulation to describe the scope of *ne bis in idem*⁷⁶. The wording of paragraph 1, defining *idem* by the same historical facts, leaves room for a broad interpretation of the protection. Accordingly, a subsequent trial for a different qualification based on the same historical facts would be prohibited. If a person was acquitted for genocide, a new trial for crimes against humanity with respect to the same conduct would constitute an *idem*. Certainly, this broad protection is inherently confined to the subject matter jurisdiction of the ICC⁷⁷. The Court has no competence to try crimes other than those listed in article 5 and defined in its Statute. In order to avoid acquittals on the ground of wrong legal qualification of the facts, the Prosecutor benefits from the fact that the categories of crimes under the jurisdiction are partly overlapping. It was standard practice of the prosecutor of the *ad hoc* Tribunals to include several types of charges for each alleged incident and leave the classification to the judges. One might wonder whether this policy does not complicate the work of the defence and prolong the trials considerably. Forthcoming case law might slowly ease the problem as the definitions of the crimes become more concrete and the borders between the categories become more established⁷⁸

3. ‘convicted or acquitted by the Court’

- 23 The application of *ne bis in idem* involves determining the point in time and the circumstances in which it can be said that the first ‘jeopardy’ has been attached. Even proceedings terminated before judgement might raise the question of a *bis in idem* in the same court. The drafters of the ICC Statute, however, did not think that the protection should cover such cases⁷⁹. Paragraph 1 restricts the scope of the protection to a person ‘convicted or acquitted by the Court’. It targets the final decision of the ICC⁸⁰. However, the Rome Statute gives no clear indication of whether a conviction or acquittal rendered by the first instance is regarded as such a final decision or whether only a non-appealable judgment can establish *res iudicata*. The latter would be in conformity with the application of *ne bis in idem* by regional human rights organs, as well as the civil law tradition who consider a judgment as final only

⁷⁶ Critical Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 58 who comments that ‘[t]he rationale of this difference was never fully explained’.

⁷⁷ ‘The broad and the narrow interpretation coincide’, Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 722.

⁷⁸ The judges of the ICC expressed the view that they are bound by the facts underlying the charges against an accused but not by their legal qualification (*iura novit curia*): ‘In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges’. (Regulation 55 para. 1). For the practice of the ICTY see above note 53.

⁷⁹ Similarly also the Trial Chamber of the ICTY: ‘there can be no violation of *non-bis-in-idem*, under any known formulation of that principle, unless the accused has already been tried’, *Tadić*, above note 50.

⁸⁰ See 1996 Preparatory Committee I, p. 39, para. 170.

after all ‘ordinary remedies’ have been exhausted⁸¹. According to this view, only decisions of the Appeals Chamber and those of a Trial Chamber against which no appeal has been filed within a period of 30 days (extendable) after notification of the appealing party could be considered as final (see rule 150). But relying on the wording and the discussion during the drafting process, it seems arguable that not only revision but also appeal is an exceptional measure with regard to the prohibition of a retrial after conviction or acquittal by the Court⁸². Hence, a Trial Chamber’s judgement on the merits of the case may suffice to trigger *ne bis in idem*. Appeal and revision before the ICC would still be in conformity with article 20 due to their exceptional character, but any other proceedings would be already barred through the Trial Chamber’s judgement. The latter interpretation is more favourable to the individual, in particular regarding its application under para. 2 (*infra* mn 29).

Before the final decision is taken, however, paragraph 1 is not applicable. It covers neither a ruling on inadmissibility nor decisions on amendment, withdrawal, reclassification⁸³ or non-confirmation of charges, see, e.g., article 61 para. 7 (c) (ii) and article 53 para. 4. Furthermore, it was made clear during the negotiations that *res iudicata* should not apply for proceedings discontinued for technical reasons⁸⁴. As there are no provisions on statutory limitations, it seems that new evidence found any time after such proceedings may reactivate investigation and lead to a new surrender and procedure on the confirmation of the charges⁸⁵.

II. Paragraph 2

1. ‘by another court’

Paragraph 2 establishes that a decision by the ICC is final with regard to any other proceeding before any other national or international court. This protection is absolute in terms of opening no exceptions⁸⁶. The focus during the negotiations was exclusively on national courts. The wording encompasses all civilian and military courts, be they permanent or *ad hoc*. At the Preparatory Committee 1998, attention was drawn to the fact that ‘by another court’ could mean courts of States parties only, as the Statute as a whole can in any case address parties only⁸⁷. This can, understandably, lead to unsatisfactory results from the point of view of the individual. There is, however, hardly anything the Statute could have done about it. It depends on the general respect for the ICC judgements whether an individual is – after conviction or acquittal by the ICC – to face secondary proceedings in a non-State party⁸⁸. It should be kept in mind that the notion ‘any other court’ is in not limited

⁸¹ See above notes 25 and 26. This was also the approach adopted by the 1996 ILC Draft Code, p. 68–9 ‘finally convicted or acquitted’ applies ‘only to a final decision on the merits of the charges against the accused which was not subject to further appeal or review’. See also AIDP (ed) (2004) 75 RIDP 802, I 5.2.

⁸² See mn 21; van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 722; Klip and van der Wilt (2002) 73 RIDP 1121; Staker, *article 81*, mn 7. See also e.g. *travaux préparatoires*, above note 36, the CCPR and *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on the Prosecutor’s Request for Review or Reconsideration, Appeals Chamber, 31 March 2000, para. 49.

⁸³ A reclassification may even occur at the latest possible time of the proceedings, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Trial Chamber II (21 November 2012).

⁸⁴ See e.g. 1996 Preparatory Committee I, article 42, para 170, p. 39; 1996 ILC Draft Code, p. 69.

⁸⁵ Critical e.g. Costa (1998) 4 *University of California Davis JIL&Policy* 199; Conway (2003) 3 *ICLRev* 382 arguing for a strict construction of the provisions on prosecutorial appeal and revision.

⁸⁶ De la Cuesta (2002) 73 RIDP 732, van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 723.

⁸⁷ The same is true with regard to States that have accepted the jurisdiction of the Court with respect to a situation by declaration (article 12 para. 3, rule 44, see thereto e.g. Bassiouni (1999) 32 *CornellILJ* 443, 453–4 and States involved in a situation, which is referred to the ICC by the Security Council under Chapter VII of the Charter of the United Nations (article 13 *lit. b*).

⁸⁸ See also e.g. Palmisano, in: Lattanzi and Schabas, *Essays on the International Criminal Court* (1999) 391, 415. On the evolution of a customary *ne bis in idem* rule with regard to international crimes see Cassese,

per se. Its restrictive application only to States parties derives from the international law maxim *pacta tertiis nec nocent nec prosunt*, also enshrined in article 34 VCLT. Therefore, in a reversed situation, namely a first trial in a non-State party, the ICC will have to conform to paragraph 3 and exercise jurisdiction only if the criteria for exceptions of that paragraph are fulfilled⁸⁹. Truth and reconciliation commissions, even if organised as quasi-judicial bodies, do not qualify as courts in the sense of article 20⁹⁰.

- 26 As already mentioned, ‘by another court’ also encompasses international or internationalized courts. Courts in this context are to be understood as international adjudicating bodies, including, *e.g.*, the *ad hoc* international criminal tribunals, other mixed or hybrid courts and tribunals⁹¹ and potential regional criminal courts⁹². As a result of their distinctly temporary jurisdiction, jurisdictional conflicts between the ICC and the ICTR are categorically excluded, but with regard to the ICTY, at least theoretically possible⁹³. Due to the particular nature of the ICTY, established by Security Council Resolution under Chapter VII of the Charter of the United Nations, as well as its speciality, the ICTY would prevail already at the stage of establishing jurisdiction⁹⁴. Therefore, it is most unlikely that the question of the *res iudicata* effect of an ICC decision towards the ICTY would come up in practice. If such a case occurred, the ICTY Statute, since it was drafted before the establishment of an international criminal court, does not acknowledge any *ne bis in idem* protection from ICC judgements. The same is true *e.g.* with regard to the Statute of the Special Court for Sierra Leone. It has been suggested in this regard that the ICC, based on the interpretation of its complementary jurisdiction as an extended national jurisdiction, should be treated the same way as a national court⁹⁵. However, this practical solution may not completely capture the particular nature of the ICC jurisdiction. To avoid loopholes, it would be advisable to include reference to the *res iudicata* effect of ICC judgements in Statutes of international, regional, mixed or hybrid courts and tribunals, should they be established

2. ‘for a crime referred to in article 5’

- 27 Until the last session of the Preparatory Committee in 1998, the draft on this part read as follows: ‘for conduct constituting a crime referred to in article 5’⁹⁶. During the discussions,

International Criminal Law (2003) 320. A related problem on whether a conviction or acquittal on the merits by a court without jurisdiction bars subsequent proceedings, is recognized in and between States, see Friedland, *Double Jeopardy* (1969) 77–86.

⁸⁹ See *e.g.* Klip and van der Wilt (2002) 73 *RIDP* 1123, referring to Lattanzi, in: Politi and Nesi (eds), *The Rome Statute of the International Criminal Court. A Challenge to Impunity* (2002) 181; Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 70; Palmisano, in: Lattanzi and Schabas, *Essays on the International Criminal Court* (1999) 39, 395 *et seq.* See also articles 18 and 19 Rome Statute providing a possibility for non States-parties to challenge the admissibility of a case before the ICC. For details see *e.g.* Broomhall, *International Justice and the International Criminal Court* (2003) 88; El Zeidy (2006) 19 *LeidenJIL* 741; Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 77.

⁹⁰ Scharf (1999) 32 *CornellILLJ* 507, 525; see also Dugard, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 702.

⁹¹ A classification of mixed or hybrid courts and tribunals as rather international or national is not necessary with regard to article 20, but may be relevant in the context of article 17. See thereto *e.g.* Benzing and Bergsmo, in: Romano et al. (eds), *Internationalized Criminal Courts* (2004) 407, 411 *et seq.*

⁹² See *e.g.* efforts of the African Union to establish a criminal chamber at the (proposed) African Court of Justice and Human Rights, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights as adopted by the African Union: Summit 2014, Doc. No. Ex.CL/846 (xxv) Annex 5.

⁹³ The temporal jurisdiction of the ICTR is limited to violations committed between 1 Jan. 1994 and 31 Dec. 1994 while the ICC’s jurisdiction *ratione temporae* concerns crimes committed after the entry into force of the Rome Statute on 1 July 2002. The ICTY’s jurisdiction for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, on the other hand, is open-ended.

⁹⁴ See Bohlander, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 688 *et seq.* Given the absence of a respective provision in the Rome Statute as well as in the ICC Rules Bohlander *op. cit.* 690 suggested an amendment to the Rules to this effect.

⁹⁵ De la Cuesta (2002) 73 *RIDP* 735.

⁹⁶ This formulation was introduced by a Chairman’s working paper. Article 12[42] Zutphen Draft, p. 46 had used the formulation ‘acts’ instead of ‘conduct’, see also mn 39.

the question arose of whether this paragraph prohibited a national court from prosecuting somebody for murder or injury if the ICC had previously acquitted the same person for genocide, *e.g.* because of insufficient proof of his or her genocidal intent. If that was the proper interpretation, the reduction of wording was necessary. According to this view, a State should always have the right to charge for, *e.g.*, murder or injury afterwards. References to various national legislations were made, emphasizing that they widely recognize the right to prosecute a person tried abroad. As a further justification it was supposed that the sentence imposed in the earlier trial is usually taken into account. In addition, it was suggested that the wording 'conduct constituting a crime' would restrict the right of interpretation by national courts, in a manner that contradicts the notion of complementarity. The fear was expressed that loopholes were inserted in the system of criminal repression because a national court could not try anew even if new evidence were found. This logic is, of course, somewhat in contradiction with the consequence of complementarity, according to which the ICC will only have jurisdiction if the national courts are unwilling or unable to prosecute. If the State obtains evidence and conducts a trial, the ICC has no jurisdiction to start with. The proposed scenario might become plausible only in cases where the domestic attitude or capability towards prosecution changes, after the ICC has already tried the case.

A proposal was made to improve the draft, but several delegations were of the view that additional drafting would just complicate matters. The result was to be achieved by merely interpreting the paragraph as it was: national courts can try crimes outside the jurisdiction of the ICC. Some delegations suggested that the proposed additions would undermine the protection of *ne bis in idem* completely. It was also pointed out that the accused should not be forced to bear the consequences of the fact that evidence was not found early enough. After elaborate discussions, the compromise 'for a crime referred to in article 5' was accepted. The idea is that since the ICC does not have jurisdiction over crimes under *national* law, there is a need to ensure that a person who commits such a crime does not escape responsibility simply because in the ICC trial it is not proven beyond reasonable doubt that the acts amounted to a crime under the jurisdiction of the ICC⁹⁷. As a result of this change, however, a person convicted by the ICC may consequently also be tried for crimes under national law for the same conduct⁹⁸. The wording even allows retrials for 'a crime referred to in article 5' that was not subject to the final judgement of the ICC. Furthermore, the Rome Statute is silent with regard to multiple subsequent procedures in different national systems. Considering the international character of the crimes in question, different States may be able to establish jurisdiction. The protection of the individual in these cases solely lies on the domestic acceptance of transnational *ne bis in idem*, which is limited⁹⁹.

⁹⁷ Amnesty International, above note 17, 39, supporting the drafting.

⁹⁸ Critical thereto, demanding that downward '*idem*' also has to be determined by the same facts, barring a national court to retry the accused on the basis of the same conduct which constituted the basis of the trial before the ICC, AIDP (ed) (2004) 75 RIDP 806 at III 2.1.; van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 724 also referring to the missing obligation to deduct the sentence imposed by the ICC; de la Cuesta (2002) 73 RIDP 732. In this line also Baum (2001) 19 *WisconsinILJ* 197, 223–4 claiming that the ICC downward *ne bis in idem* opens a loophole, although it is to be seen in conformity with the US Double Jeopardy Clause's dual sovereignty exception. Relying on a teleological interpretation Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das ISiGH-Statut* (2004) 270 argues against the possibility of a national retrial after conviction by the ICC: the purpose of the provision was only to avoid impunity of a perpetrator acquitted by the ICC *e.g.* for lack of genocidal intent although the *actus reus* was beyond reasonable doubt.

⁹⁹ Although the Rome Statute is arguably not the proper instrument to encounter shortcomings in the general acceptance of transnational *ne bis in idem*, it is unfortunate that the chance to regulate at least issues directly linked to the prosecution of core crimes has not been taken up. It has been suggested that national implementation acts comprise a detailed regulation regarding *ne bis in idem* to counter such shortcomings and provide for a complete protection of the individual. See *e.g.* de la Cuesta (2002) 73 RIDP 733; AIDP (ed) 75 RIDP 804 *et seq.*, I 1, III 4 and 806, III 2.1.

3. ‘convicted or acquitted by the Court’

- 29 The term ‘convicted or acquitted by a final judgement of the Court’ was introduced by a proposal in the 1996 Preparatory Committee II¹⁰⁰ with regard to paragraph 2 as an alternative to the wording ‘has already been tried’ originally foreseen in the 1994 ILC Draft Statute. The implications of this change in language will be discussed in the context of paragraph 3 (*infra* mn 34). The term is to be understood identically as in paragraph 1, referring to a final decision on the merits of the case¹⁰¹. Before this decision has been rendered, *ne bis in idem* does not apply. An interpretation proposed by the U.S. Delegation suggested that ‘convicted or acquitted’ in the context of paragraph 2 means that national criminal systems can act also when the case has been withdrawn or stayed in the ICC. This would mean that in addition to the general right of States to always try the same conduct as crimes not falling under the jurisdiction of the ICC, they could also try a crime referred to in article 5, unless a conviction or acquittal was issued by the Court. This reveals a major imbalance with regard to article 17. A case will be inadmissible before the ICC as long as it is being investigated or prosecuted by a State (para. 1) or if a State has conducted an investigation and decided not to prosecute the person in question (para. 2). Besides, neither proceedings before the ICC, nor the ICC Prosecutor’s decision not to proceed bar the opening of national investigations and prosecution¹⁰².

III. Paragraph 3

- 30 Paragraph 3 contains the most complicated and controversial part of article 20. Providing the possibility of exceptions to *ne bis in idem*, it confirms that the protection does not cover national and international decisions equally. In the case of national decisions, the presumption of the application of *ne bis in idem* can be overruled by the ICC. The core idea is that certain criteria concerning the quality of criminal justice need to be fulfilled by national proceedings. This thesis contains an implication of the primacy of the ICC and was vehemently contested by some delegations. Others held it as an indispensable element if the system of international repression is to gain any credibility. The *credo* was: If criminal justice is said to be done, it is to be done properly.
- 31 The exceptions to *ne bis in idem* were difficult to define. It has been suggested that they will also be burdensome to prove. The most frequent question during the negotiations was: who has the competence to decide on the exceptions? Who has the burden of proof on whether the national decision is flawed in the way described? How to overcome the fears that exceptions expose national jurisdictions to unauthorized and summary evaluation by an international organ? How to define the exceptions in a way that is not ‘subjective’ but ‘objective’¹⁰³?
- 32 As noted earlier, article 42 of the ILC Draft Statute was built on the model of the *ad hoc* tribunals. Its paragraph 2 contained the exceptions: ‘(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of

¹⁰⁰ 1996 Preparatory Committee II, article D, p. 86; article 42, p. 202. It may be noteworthy that at the same time the 1996 ILC Draft Code, referring in its *non bis in idem* provision uniformly to ‘convicted or acquitted’, was released and might have been a source of new language, see above mn 17.

¹⁰¹ For further consideration with regard to the finality of a judgment by the Court see above mn 23.

¹⁰² Klip and van der Wilt (2002) 73 *RIDP* 1121. See under this aspect also the possibilities of States to retry a person after ICC proceedings, whereas the ordinary crime exception was deleted also because of *ne bis in idem* arguments (see mn 33); Conway (2003) 14 *CLF* 358.

¹⁰³ The discussion seemed to take it for granted that objectivity of language as such could be achieved, if only the correct wording were found. See 1996 Preparatory Committee I, p. 39, paras. 172 and 174; ‘article 42 (b) should not include any wording which could be conducive to subjective interpretation’. See also Triffterer, 2nd edition, *Preliminary Remarks*, mn 50; Holmes, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 673 *et seq.*

the Court; or (b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted'. These grounds resemble to a great extent the grounds of deferral of a case in the Statutes of the *ad hoc* tribunals¹⁰⁴. Both the deferrals and the exceptions to *ne bis in idem* seem to stem from the basic *raison d'être* of international jurisdiction: it is to step in when national justice fails.

Subparagraph (a) was contested throughout the preparatory work¹⁰⁵. As pointed out in the ILC report, many legal systems do not recognize the distinction between 'ordinary' and other crimes. In many cases 'ordinary' crimes include very serious crimes subject to the most serious penalties¹⁰⁶. The exception boldly seemed to obligate a State to qualify these acts as 'international crimes'. It was held by some delegations that, according to the notion of complementarity, national and international courts must have the right to evaluate the facts differently without ICC interference. It was also not accepted that the person concerned should bear the risk of being tried twice because of the categorization of the crime in his or her trial¹⁰⁷. In the Preparatory Committee 1998, a deletion or modification of the wording of the exception was generally requested¹⁰⁸. A redrafting of *litera a* was proposed, based on the Commentary of the ILC Draft¹⁰⁹. Another proposal made the severity of the sentence imposed in the first trial an indicator of its appropriateness. As the only plausible compromise, the exception was deleted completely. Nevertheless, significant undercharging of conduct also proscribed under article 6, 7 and 8 as well as inadequacy of the sentence may be regarded as falling under one of the exceptions of paragraph 3¹¹⁰.

As for the remaining two exceptions, both previously contained in *litera b*, it was deemed that the least controversial way to define them was to adopt the language of complementarity in article 17, already agreed upon¹¹¹. The emphasis of the paragraph was reversed so as to underline the generality of the *ne bis in idem* principle and the marginality of the exceptions. A simple reference to article 17 was also proposed but rejected as it would have meant also

¹⁰⁴ According to article 9 of the ICTY Statute, its Prosecutor may formally request that the national courts defer where it appears to him (rule 9 ICTY Rules of Procedure and Evidence) 'that in any such investigations or criminal proceedings instituted in the courts of any state (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime; (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; ...'.

¹⁰⁵ *Ad Hoc* Committee Report, para. 43; 1996 Preparatory Committee I, para. 171, which records some support for the formulation as well. See also Amnesty, inquiring whether 'the ICC should not be able to retry a person who killed 500 people and was convicted in a national court or manslaughter, for which the maximum sentence is much shorter than for genocide?', above note 17 and 42.

¹⁰⁶ See 1994 ILC Draft Statute, p. 118.

¹⁰⁷ Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 57 *et seq.*; Conway, (2003) 14 *CLF* 358; Morosin, (1995) 64 *NordicJIL* 264 *et seq.* See also mn 32.

¹⁰⁸ See Wise (1998) 13*bis* *NEP* 44, who believes that this exception 'seems to put too much weight on labels. If the first sentence was sufficiently severe, why should it matter, for instance, that a soldier who unlawfully killed civilians was prosecuted for murder rather than a violation of the laws of war?' The problem of this example is that the ICC was denied any explicit competence to determine whether the sentence was 'sufficiently severe'. The proposals to that effect were deleted. The severity of the penalty must be, however, one element in deciding whether the 'proceedings [...] were for the purpose of shielding the person', article 20 para. 3 (a). Critical with regard to the abolition of the ordinary crime exception, see e.g. AIDP (ed) (2004) 75 *RIDP* 806, III 3.

¹⁰⁹ On the reasons of the ILC to include this exception, see 1994 ILC Draft Statute, p. 118, para. 6. The redrafting was proposed already in Preparatory Committee in 1996, see 1996 Preparatory Committee I, p. 39, para. 171. See also the Updated Siracusa Draft, pp. 87–88. See in this regard still Preparatory Committee Draft, p. 45, fn. 59.

¹¹⁰ Mn 46; van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 725 *et seq.*; Vander Beken et al. (2002) 73 *RIDP* 842–3. The ILC, using a comparable formulation in its 1996 Draft Code saw the possibility of fraudulent administration of justice as falling under the exception: 'The failure to impose a punishment that is proportional to the crime or to take steps to enforce a punishment may indicate an element of fraud in the administration of justice', see 1996 ILC Draft Code, p. 69.

¹¹¹ On the discussion on article 42 para. 2 (b) of the 1994 ILC Draft Statute, see 1996 Preparatory Committee I, p. 39, paras. 172–174; *Ad Hoc* Committee Report, p. 35, paras. 177–8 and 180.

including the additional complementarity criteria, such as delay and inability. Several delegations supported the idea that the compromise of August 1997 on complementarity should be introduced for article 20 as well, so as to avoid the reopening of endless debates. The interpretation of the exceptions under article 20 para. 3 was consequently meant to be in accordance with article 17 para. 2 *lit.* a and c. Point of reference with regard to establishing the threshold for exceptions will be the usual national practice in comparable cases¹¹². The exceptions are discussed below.

1. 'has been tried'

35 In contrast to paragraphs 1 and 2, both referring to 'convicted or acquitted by the Court', paragraph 3 provides *ne bis in idem* for a person who 'has been tried by another court'. The different wording suggests a different meaning, taking into account not only another court's final decision on the merits of the case, an acquittal or a conviction, but also other decisions terminating criminal proceedings¹¹³. With reference to interpreting the clause in conformity with the notion of complementarity, it was proposed that a *bona fide* effort by national authorities to prosecute would suffice in order to bar the ICC from exercising jurisdiction. A national decision not to proceed because of insufficient evidence or because prosecution would not serve the interest of justice would suffice¹¹⁴. But would this satisfy the requirement that a trial in fact has been conducted and a final decision has been reached?

To clarify which court decisions, other than acquittals or convictions, may fall under the notion 'has been tried', a closer look at article 17 where the same notion is used in *litera c* could be helpful. It is assumed that the three situations described in article 17 *literae a* to *c* cover a State's complete range of activities with regard to criminal procedure from the opening of an investigation until the final judgement, leaving no loopholes¹¹⁵. Ongoing criminal procedures at whatever stage fall under *litera a* ('is being investigated or prosecuted')¹¹⁶. *Litera b* covers situations where a procedure has come to an end ('has been investigated ... and ... decided not to prosecute'). The wording suggests that *e.g.* a decision not to proceed to trial falls under *litera b*¹¹⁷. *Litera c* therefore deals with procedures that have been terminated after reaching the trial stage. In this regard, the transfer of the decision-making competence from the prosecuting authority to the judicial organ has been identified as the decisive element¹¹⁸. Following this approach, any Court decision terminating proceedings according to the respective domestic criminal procedural law would fall under the notion 'has been tried'. This suggestion seems plausible under article 20 as well as under article 17¹¹⁹. It has further been suggested that a national decision is to be regarded as final even before all possible remedies are exhausted¹²⁰.

¹¹² In this regard also *e.g.* Holmes, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 679.

¹¹³ In this regard see *e.g.* de la Cuesta (2002) 73 *RIDP* 732, Klip and van der Wilt (2002) 73 *RIDP* 1121; Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 78.

¹¹⁴ See I. Tallgren, *Article 20*, First Edition of this Commentary, mn 26.

¹¹⁵ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 77.

¹¹⁶ For the requirement of criminal proceedings see *e.g.* Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 77; Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 76; Scharf (1999) 32 *CornellILJ* 507.

¹¹⁷ In this regard *e.g.* Broomhall (1999) 13 *quarter NEP* 146.

¹¹⁸ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 77. The author further argues that there are no reasons why any decision by a prosecuting authority not to proceed should suffice under article 17 *lit.* b but not a Court's decision terminating proceedings under *litera c* (*id.*, 78).

¹¹⁹ The issue is not yet finally solved See *e.g.* de la Cuesta (2002) 73 *RIDP* 732 referring *i.a.* to plea-bargains, diversion and out-of-court settlements.

¹²⁰ Klip and van der Wilt (2002) 73 *RIDP* 1121; El Zeidy (2002) 23 *MichJIL* 869, 939. For a comparable proposal regarding the reverse situation see above mn 23.

However, the view that ‘convicted or acquitted’ and ‘has been tried’ differ in substance, is not uncontested¹²¹. This alternative interpretation has also been voiced and is supported by the drafting process, which seems to have used the two notions interchangeably. The 1994 ILC Draft Statute had originally foreseen similar wording ‘has [already] been tried’ defining the ‘bis’ with regard to national decisions as well as those of the ICC. In its Commentary the ILC expressly refers to situations ‘where the first court actually exercised jurisdiction and made a determination on the merits’. With regard to the Court it further explained that either acquittal or conviction should be regarded a final decision barring any subsequent prosecution¹²². The ICTY jurisprudence backs this approach. In the *Tadić* case, expressly referring to article 42 para. 2 1994 ILC Draft Statute, the ICTY held that ‘there can be no violation of *non-bis-in-idem*, ... unless the accused has already been tried. Since the accused has not yet been the subject of a judgement on the merits on any of the charges for which he has been indicted, he has not yet been tried for those charges’¹²³. The ILC used the same line of argument with regard to article 12, 1996 Draft Code when determining the scope of ‘convicted or acquitted’¹²⁴. On this basis, the 1996 Preparatory Committee I emphasized that the protection ‘should apply only to *res iudicata* and not to proceedings discontinued for technical reasons’¹²⁵. The notion ‘convicted or acquitted’ with regard to paragraph 2 was introduced by an alternative proposal and made its way into the Zutphen Draft, finally being decided upon in the concluding session of the Preparatory Committee¹²⁶. Paragraph 3 on the other hand remained with the originally proposed language. This may also be due to the delegations’ desire not to reopen the compromise reached for article 17 para. 1 (c) which confirms that ‘a trial by the Court is not permitted under article 20, paragraph 3’ when ‘the person concerned has already been tried for conduct which is the subject of the complaint’¹²⁷.

Whatever approach the Court will follow, it is clear that the ICC will be barred from exercising jurisdiction as soon as national authorities will undertake a *bona fide* effort to prosecute. This follows from the rules of admissibility implementing the principle of complementarity in article 17. Whether the Court’s jurisdiction will be precluded on grounds of *ne bis in idem* will depend on its interpretation of the notion ‘has been tried’. The ICC will need to carefully scrutinize the national decision in question, also taking due account of domestic provisions regarding the finality of decisions and judgements (article 21 para. 1 *lit.*

¹²¹ For Broomhall ‘previous trial’ means ‘a previous investigation and prosecution has taken place and led either to conviction or acquittal’, Broomhall (1999) 13*quarter* NEP 146; see also Bassiouni (2000) 71 *RIDP* 1, 21; Werle, *Principles of International Criminal Law* (2005), mn 546. Further in this line above note 18, AIDP (ed.) (2004) 75 *RIDP* 806, III 2 (referring to article 20 para. 2); Spinellis, (2002) 73 *RIDP* 1155 (interpreting the notion ‘has been tried’ in the context of the Statutes of the *ad hoc* tribunals); Bernard (2011) 9 *JICJ* 863, 877.

¹²² 1994 ILC Draft Statute, p. 118.

¹²³ *Tadić*, above note 50, para. 24.

¹²⁴ ‘The phrase ‘finally convicted or acquitted’ is used in paragraphs 1 and 2 to indicate that the *non bis in idem* principle would apply only to a final decision on the merits of the charges against an accused which was not subject to further appeal or review. In particular, the word ‘acquitted’ is used to refer to an acquittal as a result of a judgement on the merits, not as a result of a discharge of proceedings’, 1996 ILC Draft Code, pp. 68-9.

¹²⁵ 1996 Preparatory Committee I, p. 39, para. 170. This view on the other hand contradicts note 21, introduced in the Preparatory Committee Decisions Aug. 1997, article 35 (results of informal consultations on article 35), p. 11, identically still to be found in the Preparatory Commission Draft, article 15 (Issues of Admissibility), p. 41, note 42. This note relating to the article on issues of admissibility stated that it ‘should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 42 [*ne bis in idem*], as currently worded, did not adequately address these situations for [purpose] of complementarity. It was agreed that these questions should be revisited in light of further revisions to article 42 to determine whether the reference to article 42 was sufficient or whether additional language was needed in article 35 to address these situations’.

¹²⁶ 1996 Preparatory Committee II, Article D, p. 86 *et seq.*; see also Zutphen Draft, article 13 [42], p. 46.

¹²⁷ See above note 111. Backing the view that the two notions are being used interchangeably, see article 42, paragraph 2 *bis lit. c.*, 1996 Preparatory Committee II, p. 203, where a proposal relating to what is now article 17 uses the notion ‘acquitted or convicted’ where today we read ‘tried’. See also article 13 [42] Zutphen Draft, p. 47.

c). The distinction of the different notions used in articles 17 and 20 will be of relevance, e.g. with regard to article 19 para. 4 limiting '[c]hallenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court' to article 17 para. 1 *lit. c*.¹²⁸ ICC jurisprudence has so far concentrated on distinguishing *ne bis in idem* from other complementarity scenarios under article 17. Occasional references to the substance of the principle's elements emphasized 'decision on the merits' and 'final decision or acquittal' aspects of the notion 'has been tried'¹²⁹. While the exceptional relevance of other decisions was not categorically excluded, the ICC underlined that a trial was intrinsically related to a competent organ and decisions taken during pre-trial proceedings would not trigger article 20¹³⁰.

- 38 As already mentioned above, truth and reconciliation commissions do not qualify as courts in the sense of article 20. Furthermore, procedures before truth and reconciliation commissions, even those designed to be quasi-judicial, independent investigation commissions, fall short of the notion 'has been tried'¹³¹. Blanket amnesties granted without formal investigation or prosecution do in no way bar the ICC from exercising its jurisdiction¹³²; for amnesties at the enforcement level after the conduct of national criminal proceedings, see *infra* mn 54.

2. 'by another court'

- 39 The term 'by another court' is to be understood as in paragraph 2. With regard to the particularities of upward *ne bis in idem*, some points should be underlined. As elaborated above, another court refers to national courts of States parties, as well as those of non-States parties¹³³. The court, however, is assumed to be of a penal nature, conducting procedures with a view to 'bringing the person concerned to justice'¹³⁴. It also comprises international, internationalized and regional courts and tribunals. Due to the primacy of *ad hoc* tribunals

¹²⁸ See e.g. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, No. ICC-01/04-01/07-1213-tENG, Reasons for the oral decision on the Motion challenging the admissibility of the Case, Trial Chamber II (16 June 2009) paras. 49–50. Broomhall (1999) 13 *quarter NEP* 147; mn 48.

¹²⁹ Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-802, Decision on the admissibility and abuse of process challenges, Bemba Gombo, Trial Chamber III (24 June 2010) para. 248. Article 20 ICCSt has so far not been at the core of an ICC decision. An initially introduced admissibility challenge on *ne bis in idem* was eventually not followed up, see Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, No. ICC-01/04-01/07-T-33, Initial Appearance of Mathieu Ngudjolo Chui (11 February 2008) p. 22–3. For a summary account see Carter (2010) 8 *Santa Clara Journal of International Law* 165, 185–6.

¹³⁰ Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-802, Decision on the admissibility and abuse of process challenges, Bemba Gombo, Trial Chamber III (24 June 2010), para. 248.

¹³¹ See e.g. Dugard, above note 90, 702; van den Wyngaert and Ongena, in: Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 727; Vander Beken *et al.* (2002) 73 *RIDP* 844; Scharf (1999) 32 *CornellILJ* 525. Even the question of whether the procedure before quasi judicial truth and reconciliation commissions might be considered relevant for the admissibility of a case according to article 17 paras. 1 and 2 is judged rather sceptically. Restorative justice therefore may be best taken into account at an earlier stage, when the Prosecutor decides not to initiate an investigation because it would not serve the interest of justice (article 53 para. 1 *lit. c*) see e.g. Dugard, in: Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 701–2; Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 77; Scharf (1999) 32 *CornellILJ* 524; van den Wyngaert and Ongena, in: Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 726–7. For a wide discretion of national decisions not to prosecute (article 17 para. 1 *lit. b*) including for reasons of national reconciliation see e.g. Nseroko (1999) 10 *CLF* 87, 119.

¹³² E.g. Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 77; Nseroko (1999) 10 *CLF* 119; van den Wyngaert and Ongena, in: Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 726. With regard to a customary law prohibition of amnesties for certain crimes see *in extenso* above Dugard, above note 90, 695 *et seq.* But see on this question also e.g. Schabas (2004) 11 *University of California Davis JIL&Policy* 145.

¹³³ See above mn 24, text before note 88.

¹³⁴ See in this regard article 17 para. 2 (b) and (c), as well as preambular paragraph 10 and article 1: the ICC 'shall be complementary to national criminal jurisdictions' (emphasis added); see also Scharf (1999) 32 *CornellILJ* 525..

established by Security Council Resolution under chapter VII and the speciality of mixed and hybrid courts, it is unlikely that a case falling under the jurisdiction of these adjudicating bodies would be tried before the ICC. If that was the case, article 20 para. 3 would apply.

3. ‘for conduct also proscribed under article 6, 7 or 8 [...] with respect to the same conduct’

At the Preparatory Committee 1998 the Chairman’s working paper stated: ‘A person who has been tried by another court for conduct constituting a crime referred to in article 5 [...]’. As in paragraph 2, an issue was raised with regard to ‘conduct constituting a crime’. Some States emphasized that conduct can constitute a crime only if a court has determined that that conduct constitutes a crime. This would not be logical in the case of an acquittal. The chairman proposed reintroducing the language of the ILC Draft Statute ‘acts constituting a crime of the kind referred to in [...]’ (article 42 para. 2). It was also proposed that the word ‘offence’ should be introduced; or that ‘constituting a crime’ should just be deleted. Some delegations preferred the original version, explaining that ‘conduct constituting a crime’ was not problematic as the estimation would be first ‘purely qualification *de facto*’, and only thereafter qualification *de jure* in the trial. The compromise proposal, ‘conduct also proscribed’, was a way out of the debate. The term is to be understood broadly¹³⁵. If a national trial has taken place for the conduct – falling under the jurisdiction of the ICC – the person shall not be tried again by the ICC. The categorization used in the national trial, *i. e.*, whether it relied on definitions derived from international law or crimes under national law, e.g. murder or rape, is not relevant. It is accepted that specific elements defining the international character of the crime may not be fully reflected under national law¹³⁶. Another issue is that reducing the national charge to a minimum so that it does not correspond to the conduct in question might fall under the exceptions in *lit. a* or *lit. b*.

The proposal submitted by Japan at the Conference¹³⁷, and modified to read: ‘with respect to the same conduct’, was added to the chapeau. This seems to clarify the obvious: a person could be tried before the ICC for conduct other than the one for which the national proceedings had been taken against him or her. Following the same rationale in the context of challenges to the admissibility of a case, ICC jurisprudence relies on a ‘same person, same conduct’ test also when determining ‘a case’ in accordance with Article 17 para. 1 *lit. a* and *b*¹³⁸.

At the Rome Conference, the originally proposed formulation ‘conduct constituting a crime referred to in article 5’ was changed to ‘conduct also proscribed under article 6, 7 or 8’¹³⁹. The

¹³⁵ Spinellis (2002) 73 RIDP 1159. For an approach understanding ‘conduct also proscribed under article 6, 7 or 8’ as holding an intermediate position between the notions ‘conduct which formed the basis of crimes’ and ‘crime referred to in article 5’ see Scheschonka, *Der Grundsatz ne bis in idem im Völkerstrafrecht unter besonderer Berücksichtigung der Kodifizierung durch das ICTY-Statut und das ISiGH-Statut* (2004) 272 *et seq.*

¹³⁶ For a different approach see e.g. Broomhall, *International Justice and the International Criminal Court* (2003) 91–2 supporting the admissibility of a case when a State has exercised its jurisdiction on narrower grounds; El Zeidy (2002) 23 *MichJIL* 933–4. With a view to the jurisprudence of other international courts, e.g. the ECtHR developing an ‘essential element’ test (above note 25), or the ICTY applying the Blockburger-test (above note 54), it will be interesting to observe in what way the ICC will take into account the contextual elements of ‘conduct also proscribed under articles 6, 7 and 8’ when evaluating national prosecutions for ‘ordinary crimes’ under the viewpoint of *ne bis in idem*.

¹³⁷ UN Doc. A/CONF.183/C.1/L.18 (24 June 1998), proposing ‘for the same conduct’.

¹³⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-262, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant Arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I (6 July 2007), para 21; *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-8-Corr 17-03-2006, Decision on the Prosecutor’s Application for an Arrest Warrant, Article 58, Pre-Trial Chamber I (10 February 2006) para. 31; most recently *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11-565, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, Appeals Chamber (24 July 2014) paras. 98 *et seq.*

¹³⁹ The question of this change has never been made clear (Van der Beken *et al.* (2002) 73 RIDP 842). One explanation could be that since upwards *idem* is defined by ‘conduct constituting a crime’ meaning the historical

latter language evidently differs from paragraph 2 which maintains a reference to article 5. While paragraph 3 refers to genocide, crimes against humanity and war crimes, it manifestly calls upon its lacuna on the crime of aggression. This silence of the Statute may give the impression that national judgments on charges of aggression would never become *res iudicata* vis-à-vis the ICC. In other words, the ICC would have a higher power to control and reopen national proceedings regarding charges of aggression, even if none of the exceptions applied. This presumption may support the – rarely expressed – opinion that there should be no national proceedings involving the crime of aggression. Nevertheless, to assume such intent behind the formulation would go too far¹⁴⁰. The lack of reference could simply go back to the fact that the exercise of jurisdiction over the crime of aggression was postponed at the Rome Conference. States parties addressed this imbalance in an amendment adopted at the first Review Conference¹⁴¹. Considering the adoption of the amendments on the crime of aggression in accordance with article 5 para. 2 and their entry into force for ratifying or accepting states as foreseen in article 121 para. 5, this intended unification will only be accomplished when all states parties have ratified the amendments¹⁴². Until that time, the two versions of Article 20 para. 3 will co-exist.

4. ‘the proceedings in the other court’

- 43 This phrase contains the core reference for the ICC to determine whether a State is shielding a person from criminal responsibility or whether norms of due process recognized by international law have been violated. Not only the decision terminating a national proceeding, be it a final judgement on the merits or a decision not amounting to a conviction or acquittal, is under scrutiny. Emphasis is put on the conduct of a procedure in the other court as such¹⁴³. If one of the exceptions applies, the other court’s decision does not trigger *ne bis in idem* vis-à-vis the ICC and the Court may retry the person concerned

The drafting history of article 20 shows that the origin of this phrase is to be found in article 17 para. 2, where ‘[t]he term ‘proceedings’ covers both investigations and prosecutions’¹⁴⁴. Being specified as ‘court proceedings’, however, the question may arise whether the same broad understanding can be maintained with regard to article 20. On the one hand, a literal reading of the phrase might suggest a narrower view¹⁴⁵. While prosecution is

facts relevant for subsumption under the legal qualification, the reference to those articles precisely defining the conduct elements which constitute criminal behaviour might have seemed more appropriate than referring to the article merely listing the groups of crimes. On the different notions see also Klip and van der Wilt (2002) 73 *RIDP* 1122 *et seq.*

¹⁴⁰ See also van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 725. Even more, considering the fact that a number of States have implemented the customary crime of aggression into national criminal law, see Reisinger Coracini, in: Bellelli (ed), *International Criminal Justice* (2010) 547 *et seq.*

¹⁴¹ See the amended chapeau of Article 20 para. 3, Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Resolution RC/Res.6 adopted by consensus on 11 June 2010, Annex I, para. 7.

¹⁴² The Kampala compromise submits all amendments related to the crime of aggression to a uniform amendment regime. It is based upon the exceptional status of the crime of aggression in the unamended Rome Statute and the wide discretion provided under article 5 para. 2 for adopting a provision on the crime of aggression and defining the conditions for the Court’s exercise of jurisdiction. For details see Zimmermann on Art. 8bis and 15bis, *ter.* In this context, changes to the reference to articles 6, 7 and 8 in articles 9 and 20 were considered as ‘consequential amendments’ of the introduction of a new article 8bis. See Report of the Special Working Group on the Crime of Aggression, February 2009, Report of the Seventh Resumed Session of the Assembly of States Parties of the International Criminal Court, ICC-ASP/7/20/Add.1, Annex II, heading of para. 26. It remains to be seen whether this approach might have an impact on potential future additions to the list of crimes in article 5. Literally, amendments to article 20 on the basis of article 121 para. 5 seem to transgress the boundaries of the three distinct amendment procedures foreseen in articles 121 paras. 4 and 5 and article 122.

¹⁴³ Klip and van der Wilt (2002) 73 *RIDP* 1121.

¹⁴⁴ Preparatory Committee Draft, p. 41, note 45; for the drafting history see above mn 18.

¹⁴⁵ See El Zeidy (2002) 23 *MichJIL* 935 for such a scenario.

necessarily a procedure before a court¹⁴⁶, only particular types or stages of an investigation – if at all – are governed by a court, depending on domestic criminal procedure. On the other hand, with a view to the structure of article 17, embracing article 20 para. 3, as well as the object and purpose of the rules on admissibility, it seems unjustifiable that the investigation stage should be excluded from the ICC's scrutiny. In particular, since the evidence produced by such an investigation will be used during the court procedure¹⁴⁷.

Court procedures usually end with a judgment and the determination of the sentence in case of conviction. The question whether or not the term proceedings also cover the stage of enforcement of penalties is questionable. The Rome Statute does not give a clear answer. Considering the drafting history, it needs to be recalled that article 19 Preparatory Committee Draft was deliberately not included in the final text¹⁴⁸. However, a broad interpretation is not fully excluded by the wording. National proceedings at the enforcement level therefore might be taken as a reference for determining whether a State is unable or unwilling to bring a person to justice¹⁴⁹. But considering the fact that national proceedings have indeed taken place, it has been underlined that the 'onus will be higher on the Prosecutor' in such cases¹⁵⁰. 44

5. The different subparagraphs

The 'sham proceedings' exception to the application of *ne bis in idem* with respect to national and international criminal courts had already been envisaged at the XIV International Congress of Criminal Law in Vienna in 1989¹⁵¹. Apart from the 'ordinary crimes' exception, the ILC considered three possibilities for a retrial before an international criminal court, if the national court proceedings were 'not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted'¹⁵². In the commentary to its 1994 Draft Statute, the ILC explained how the exception in article 42 para. 2 (b) was designed 'to deal with exceptional cases only'¹⁵³. Furthermore, the words 'the case was not diligently prosecuted' were 'not intended to apply to mere lapses or errors on the part of the earlier prosecution, but to a lack of diligence of such a degree as to be calculated to shield the accused from real responsibility for the acts in question.'¹⁵⁴. The ILC draft thus had a comprehensive view of the different aspects that were later separated in the ICC Statute. 45

The exception is justified as follows: 'the court should be able to try an accused if the previous criminal proceeding for the same acts was really a 'sham' proceeding, possibly even designed to shield the person from being tried by the court'¹⁵⁵. The 1996 Draft Code of Crimes names 'the abuse of power or improper administration of justice by the national authorities' as examples of such a sham¹⁵⁶.

¹⁴⁶ See e.g. the definition of prosecution in Black's Law Dictionary, 6th edition, 1221 (1997): 'A criminal action, a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime'.

¹⁴⁷ See in this regard also El Zeidy (2002) 23 *MichJIL* 937. The author further notes that 'any other construction [than a wide interpretation of 'proceedings'] might lead to a complete blocking of the Court's jurisdiction'.

¹⁴⁸ See mn 53.

¹⁴⁹ See e.g. van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 727; reluctant e.g. El Zeidy (2002) 6 *Mediterranean JHUMRts* 239.

¹⁵⁰ Holmes, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 678.

¹⁵¹ See Wilkitzki (1990) 102 *ZStW* 681.

¹⁵² Article 42 para. 2 (b) of the 1994 Draft Statute, Article 12 para. 2 (b) of the 1996 Draft Code of Crimes.

¹⁵³ See 1994 ILC Report p. 119, para. 7.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ See ILC Commentary on article 12, para. 11, 1996 ILC Draft Code, p. 70. See also Amnesty International, above note 17, 39, criticizing that by requiring a 'purpose' to shield a person from criminal responsibility, the provision would not cover proceedings where a prosecutor, acting in good faith, was unable to secure a

This comprehensive provision was separated into two subparagraphs only during the last session of the Preparatory Commission in 1998, when its original co-exception on retrials after national proceedings for charges of ‘ordinary crimes’ was deleted. Still, their common root is evident in the exceptional character of both paragraphs. Also with a view to detecting sham trials, any deviations from usual national procedures, extraordinary jurisdictions or martial courts might more easily than regular proceedings draw attention under both *literae* a and b¹⁵⁷. The same is true with regard to even stronger indicators, such as the appointment of special investigators politically aligned with the accused or the establishment of secret tribunals¹⁵⁸.

46 a) ‘for the purpose of shielding from criminal responsibility for crimes within the jurisdiction of the Court’. Shielding a person from criminal responsibility is one way of not bringing that person to justice. Insofar as subparagraphs a and b overlap in their scope of application, subparagraph a may serve as a catch clause for situations where the purpose of shielding a person from criminal responsibility is realized without fulfilling the criteria listed under (b). It is difficult to decipher what kind of situations fall under this clause. An example of an exception under (a) might be a case where an atrocity amounting to genocide is charged as an evidently disproportionate ordinary crime, such as an assault¹⁵⁹. In this case, the process would be a ‘sham’, even if the court were acting independently, impartially and in accordance with due process rights.

Subparagraph (a) has been under strong criticism for the subjectivity involved in determining a ‘purpose of shielding’ from the preceding proceedings, as well as the difficulties and costs related to providing evidence on an eventual ‘sham’¹⁶⁰.

47 b) ‘not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice’. This exception combines two elements. First, a lack of independence or impartiality as determined in accordance with the due process norms and second, a general appreciation on whether the manner in which the procedures were conducted was consistent or not with an intent to bring the person concerned to justice. The difficulties in interpreting this provision, in particular regarding the required ‘intent’ to bring a person to justice are similar to those mentioned under (a) above.

48 It was the proposal of Mexico concerning article 17 to qualify the words ‘independently and impartially’ with the phrase ‘in accordance with the norms of due process recognized by international law’¹⁶¹. As the formulations of article 17 were agreed to be taken to article 20 as well, the amendments of Mexico followed accordingly. No discussion took place on this addition in article 20. It seems to anchor the margin of appreciation of the ICC on human rights law and on the practice of the bodies interpreting that law. Most likely the ICC would have searched for practice and arguments from that direction anyway when determining the more detailed content of ‘independently and impartially’. The addition may in any case ease the worries by Amnesty that the terms ‘independently’ and ‘impartially’ could be read so narrowly as to exclude cases where the independence of the prosecutors and judges was not

conviction because the court, in practice, lacked the powers to seize evidence or compel witnesses to testify, for example, because of unsettled conditions in the country.

¹⁵⁷ See Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (2008), note 249; Holmes, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 675.

¹⁵⁸ Holmes, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 675.

¹⁵⁹ See mn 33.

¹⁶⁰ See Bernard, *Juger et juger encore les crimes internationaux. Etude du principe ne bis in idem* (2014) 248–249, providing analysis on some of these criticisms.

¹⁶¹ UN Doc. A/CONF.183/C.1/L.14 (22 June 1998).

threatened and they acted impartially, but the procedures fell far short of international standards for a fair trial¹⁶².

As mentioned above, the indications of lack of independence or impartiality have to be read cumulatively with the rest of the subparagraph: ‘conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice’. In 1998, Amnesty worried that the term ‘intent’ could be read narrowly, so as to exclude those outside the proceedings. As a consequence, the provision would fail to address situations of threats to the prosecutor, the judges, lawyers, victims and witnesses, directly or indirectly, by external persons¹⁶³. This kind of restrictive reading does not seem plausible. A wide margin of appreciation remains for the Court, however, to decide what content it will give to this exception. This has provoked concern about the Court potentially turning into ‘a body for the protection of individuals and their basic human rights against States’¹⁶⁴.

As potential examples falling under this exception, one could think of a biased court that seems to act properly, the charge being adequate and the proceedings efficient. However, the members of the court have a preset opinion of the outcome of the trial. In such an example, the difference to the exception under subparagraph (a) is not clear-cut. One could further think of a State official exercising pressure on the court conducting the trial or of a biased investigative authority. A ‘sham’ proceeding ‘inconsistent with an intent to bring the person concerned to justice’ could go both ways: a bias in favour of the accused, ‘for the purpose of shielding the person concerned from criminal responsibility’, as well as a bias against the accused in a ‘show trial’.

IV. Application

Article 17 para. 1 (c) determines the duty of the Court itself to take into account *ne bis in idem*¹⁶⁵. Article 19 determines the right of any person or State to challenge the admissibility of a case or the jurisdiction of the Court. Contrasting with other grounds for inadmissibility according to article 17, a challenge on grounds of *ne bis in idem* can be brought before the Court not only at the pre-trial phase but also thereafter (see article 19 para. 4)¹⁶⁶.

Article 89 para. 2 discusses the possibility that the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem*. After immediate consultation with the Court to determine if there has been a relevant ruling on admissibility, the requested State shall proceed with the execution of the request, if the case is admissible. ‘If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility’. Rule 181 further elaborates that ‘the Chamber dealing with the case, if the admissibility ruling is still pending, shall take steps to obtain from the requested State all the relevant information about the *ne bis in idem* challenge brought by the person’. Article 95

¹⁶² Amnesty International, above note 17, 39–40.

¹⁶³ *Ibid.*

¹⁶⁴ van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 725 referring to the fact that the separation of the exemptions originally combined e.g. in article 10 para 2 *lit. b* ICTY Statute widens the margin of interpretation; see also Nsereko (1999) 10 *CLF* 87, 116; Spinellis (2002) 73 *RIDP* 1160; Bernard, *Juger et juger encore les crimes internationaux. Etude du principe ne bis in idem* (2014) 242-7. The human rights emphasis of this provision has also been underlined in early ICC jurisprudence, see e.g. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-1213-tENG, Reasons for the oral decision on the Motion challenging the admissibility of the Case, Trial Chamber II (16 June 2009), para. 85.

¹⁶⁵ See also article 19 para. 1 first sentence: ‘The Court shall satisfy itself that it has jurisdiction in any case brought before it’.

¹⁶⁶ Mn 37. See also Sadat and Carden (2000) 88 *GeorgetownLaJ* 420 *et seq.* Generally see Hall, Nsereko and Ventura on Art. 19.

also enables a requested State to postpone the execution of a request for cooperation while an admissibility challenge is under consideration¹⁶⁷.

Article 20 might find application also in cases of competing requests. In article 90 para. 6 *lit. c* '[t]he possibility of subsequent surrender between the Court and the requesting State' appears as an inducement for cooperation with the ICC. When determining whether to surrender a person to a non-State party after its own trial, the ICC should, however, pay attention to *ne bis in idem*. Article 108 protects a person sentenced by the Court and in custody of the State of enforcement from becoming subject to prosecution, punishment or extradition to a third State without approval by the ICC.

V. Consequences in cases of violation

- 50 No explicit provision addresses violations of article 20. All that can be said here derives from article 87 paras. 5 and 7: If a State fails to comply with the requests by the Court, the matter may be referred to the Assembly of States Parties or to the Security Council. This relates to States parties and States who have entered into an *ad hoc* arrangement or arrangement with the Court¹⁶⁸.

VI. Conclusion

- 51 Article 20 confirms the important position of *ne bis in idem* as a judicial guarantee in the context of international criminal law. It covers three distinct situations involving the ICC. Paragraph 1 enshrines a general protection of a person convicted or acquitted by the Court from retrials before the Court itself. It defines *idem* by conduct (*idem factum*) and thereby implements a broad interpretation, which, however, is inherently limited by the subject matter jurisdiction of the Court. Only acquittals and convictions by the ICC establish *res iudicata*, whereby the Rome Statute leaves some flexibility with regard to interpreting the finality of such a judgment on the merits of a case. Paragraph 2 implements a downward *ne bis in idem* protection from subsequent national prosecution also upon convictions and acquittals of the ICC. This protection is absolute in terms of opening no exceptions, but its application is narrowly confined by 'crimes referred to in article 5'. Relying on the same legal qualification seems understandable, since an ICC judgment cannot establish *ne bis in idem* for crimes over which the Court does not have jurisdiction. However, as a consequence, an individual may face – even multiple – trials in third States as well as in States parties for the same conduct after having been finally judged by the ICC. This possibility is even more regrettable from the point of view of the individual, considering the absence of a prescription to deduct potential ICC sentences. Paragraph 3 relates to upward *ne bis in idem*. *Idem* is again broadly defined by the same conduct. A national *bona fide* prosecution bars subsequent proceedings before the ICC, if one of the exceptions does not apply. *Res iudicata* is established for a person who 'has been tried'. This formulation arguably encompasses not only judgments on the merits of a case but also other final court decisions. The protection is not absolute but subject to exceptions regarding the proper administration of international justice under the scrutiny of the Court. Again, also with regard to subsequent trials before the ICC, no mandatory deduction of sentences is prescribed.

¹⁶⁷ On the applicability of Article 95 to requests for arrest and surrender, see Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Seussi, No. ICC-01/11-01/11-163, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, Pre-Trial Chamber I (1 June 2012), para. 37.

¹⁶⁸ See also Regulation 109; for details see Reisinger Coracini, above note 10, 105 *et seq.* The Rules of the *ad hoc* tribunals contain a particular procedural provision on this issue. Rather than making a finding and referring the matter, rule 13 ICTY Rules of Procedure and Evidence requests a Trial Chamber to issue a reasoned order requesting the other court to permanently discontinue its proceeding.

Article 20 serves not only as an important guarantee of individual rights in criminal proceedings. Closely linked to questions of admissibility according to article 17, the provision has to primarily be seen in a jurisdictional context, distributing and balancing the competences of the ICC and those of national courts according to the principle of complementarity. Judging article 20 from the perspective of the protection of human rights and state sovereignty, the latter has prevailed. 52

C. Special remarks

1. The minimum content of *ne bis in idem*: the principle of deduction

The principle of *ne bis in idem* is sometimes understood to have two aspects; the prohibition of a retrial, and the prohibition of a punishment for the same conduct that does not take into account the previous punishment already served. The principle of deduction forms part of most national legal systems. It usually finds application between States that do not acknowledge transnational *ne bis in idem* (mn 8). It is also included in the Statutes of the *ad hoc* tribunals, in the ILC Draft Code and Draft Statute¹⁶⁹. 53

The Preparatory Committee Draft, however, omitted paragraph 3 of the draft article on *ne bis in idem* suggested in the 1994 ILC Draft Statute as superfluous¹⁷⁰. It confined the matter to Part 7 of the Statute dealing with penalties. Article 78 para. 2 mandates that the ICC deduct any time ‘previously spent in detention in accordance with an order of the Court’. But the duty to ‘take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served’ (article 42 para. 3, 1994 ILC Draft Statute) was watered down to optional deduction. This solution was criticised strongly by many delegations in the Preparatory Committee in 1998¹⁷¹. No return to the more definitive expression of the principle of deduction, however, took place. Article 78 para. 2, sentence 2 reads: ‘The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime’. The provision leaves too wide a margin of appreciation for the ICC. It must be expected that the ICC will apply this provision in accordance with the other international instruments referred to above. In the exceptional cases of a retrial by the ICC, a denial to deduct at least any deprivation of liberty fully would be difficult to justify.

2. Relevance of genuine enforcement of sentences

Criminal proceedings that have been conducted in a wholly appropriate manner may turn into a *de facto* sham trial at the stage of enforcement. A national judgement can be made a mockery of by an action which makes the sentence non-existent in practice. This issue was discussed already in the Siracusa Draft¹⁷², and referred to in the 1996 Preparatory Committee Report¹⁷³. At the March – April Preparatory Committee in 1998, Portugal proposed additions to paragraph 3, whereby a concluded trial before another court would not bar the ICC from exercising its jurisdiction when: ‘(c) the sentence was manifestly disproportionate to the gravity of the crime; (d) there was a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of sentence’¹⁷⁴. Likewise, the ILC believed in the Commentary to the Draft Code that ‘[t]he failure to impose a 54

¹⁶⁹ See articles 10 para. 3 and 9 para. 3 of the ICTY and ICTR Statutes, article 12 para. 3 of the 1996 ILC Draft Code and article 42 para. 3 of the 1994 ILC Draft Statute.

¹⁷⁰ The Zutphen Draft suggested giving further consideration as to whether paragraph 3 was already covered by article 70[BCE] (2) (Determination of the sentence). This article at the time provided only for optional deduction of ‘any time otherwise spent in detention in connection with conduct underlying the crime’.

¹⁷¹ See in this regard also Preparatory Committee Draft, p. 45 footnote 60.

¹⁷² It proposed ‘to clarify that the exception [...] for sham proceedings extends beyond trial, and includes clemency, parole, amnesty, pardon, and other proceedings ...’, see the Siracusa Draft, p. 45.

¹⁷³ See 1996 Preparatory Committee I, p. 39, paras. 173–4.

¹⁷⁴ See the Portuguese proposal, above note 73.

punishment that is proportional to the crime or to take steps to enforce a punishment may indicate an element of fraud in the administration of justice¹⁷⁵.

- 55 The comparison of the severity of sentences as a clear-cut rule was deemed too ambitious and controversial because of the differences of criminal policies internationally. Consequently, Portugal and Belgium put forward a renewed proposal to include at least the (d) of the earlier Portuguese proposal, containing the enforcement aspect. Several States supported the core idea of the proposal. It was also met with strong criticism, however. The application of the provision would have entailed stronger cooperation from States and their officials than many of them were ready to commit themselves to. The discussion resulted in a draft article 19 which was also included in the Preparatory Committee Draft:

‘Without prejudice to article 18, a person who has been tried by another court for conduct also proscribed under article 5 may be tried by the Court if a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty’.

Not surprisingly, a considerable number of delegations contested the inclusion of this article in the Rome Statute. Upon recommendation of the Coordinator the article was deleted in Rome on account of being too controversial¹⁷⁶. It remains to be seen whether the ICC will ever extend the temporal scope of its consideration of the exceptions in paragraph 3 (a) and (b) beyond the judgement by a national court¹⁷⁷.

- 56 Another open issue is the application and scope of *ne bis in idem* in relation to the definition of crimes. It needs to be asked whether the combined weaponry of the national and the ICC prosecutors might be too powerful from the perspective of the accused. In the field of the large-scale crimes within the jurisdiction of the ICC, the factual situation might be very complex and obscure. There are diverse national and international offences which may apply to a given course of conduct. In a national system there might already be two applicable systems: civil courts and military courts. In addition, it needs to be considered that the national ways to break the offences down into various degrees of participation are different from those of the ICC Statute. It is against the background of frequent impunity for international crimes that the ICC will have the difficult task of reflecting these genuine concerns.

3. Offences against the administration of justice

- 57 According to article 70 the ICC has jurisdiction over offences against its administration of justice when committed intentionally. These offences, *e.g.* giving false testimony or presenting false or forged evidence, are exclusively listed in article 70 para. 1 *literae* a to f. At the same time, paragraph 4 mandates each State Party to extend its criminal laws penalizing the listed offences when committed on its territory or by one of its nationals¹⁷⁸. Prosecution by competent States Parties is foreseen upon request by the ICC. To avoid retrials and double punishment also with regard to these offences¹⁷⁹, Rule 168 was introduced:

¹⁷⁵ See 1996 ILC Draft Code, p. 69.

¹⁷⁶ For details see Holmes, in: Lee (ed), *The International Criminal Court. Making of the Rome Statute* (1999) 60. He mentions in particular that some delegations ‘argued that the proposal was not absolutely necessary, as the provisions on admissibility could give the Court sufficient breadth to examine cases of pardons or amnesties made in bad faith’.

¹⁷⁷ For such a possibility see *e.g.* Holmes, in: Lee (ed), *The International Criminal Court* (1999) 76 *et seq.*; Scheschonka, *Der Grundsatz ne bis in idem* (2004) 289; van den Wyngaert and Ongena, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 727. See also *mn* 44.

¹⁷⁸ Klip and van der Wilt (2002) 73 *RIDP* 1119 refer to the particular position of the host country in this regard.

¹⁷⁹ While it might be argued that offences according to article 70 may be subsumed under the wording of article 20 para. 1 (‘crimes’) it is literally excluded with regard to paras. 2 and 3 (‘crime referred to in article 5’, ‘conduct also proscribed under article 5, 7 or 8’). But even with regard to paragraph 1, the purpose of this provision as comprising article 70 is rather questionable.

‘In respect of offences under article 70, no person shall be tried before the Court with respect to conduct which formed the basis of an offence for which the person has already been convicted or acquitted by the Court or another court’.

In substance, this rule provides for a wide *ne bis in idem* based on ‘conduct’, which is acknowledged for convictions and acquittals by the ICC as well as for those of other courts. On the other side, this broad protection is inherently limited to offences listed in article 70, since the granted protection relates exclusively to retrials before the Court. The rule lacks a provision regarding downward *ne bis in idem*. This may be reasoned by the fact that national prosecution is foreseen ‘upon request’ (article 70 para. 4 *litera* b). However, this obligation to prosecute upon request does not interfere with a State’s right to prosecute without such a request according to its national laws. Retrials of offences against the administration of justice before another court after a proceeding before the ICC are not expressly excluded. Furthermore, despite constituting a competence to prosecute for at least two State Parties, the rule does not prevent both States from using their jurisdiction subsequently. The regulation of these competing competences is left to the laws of inter-state cooperation.

Article 21 Applicable law

1. The Court shall apply
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion, or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Literature: Arsanjani, M.H., 'The Rome Statute of the International Criminal Court', (1999) 93 *AJIL* 22; Bitti, G., 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in: Stahn C. and Sluiter G. (eds.), *The Emerging Practice of the International Criminal Court* (2009); Bitti, G., 'Article 21 of the Statute of the International Criminal Court and The Respect for the Hierarchy of Sources of Law Before the ICC', in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (forthcoming 2014); Cassese, A., 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *EJIL* 144; Cheng, B.B., *General Principles of Law as Applied By International Courts And Tribunals* (1987); Cryer, R., 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources', (2009) 12 *NCLRev* 390; D'Amato, A.A., *The Concept of Custom in International Law* (1971); Danilenko, G.M., *Law-making in the International Community* (1993); Darcy S. and Powderly J. (eds), *Judicial Creativity at the International Criminal Tribunals* (2010); Degan, V.D., *Sources of International Law* (1997); Edwards, G.E., 'International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy', (2001) 26 *Yale JIL* 323; Fan, M., 'Custom, General Principles, and the Great Architect Cassese', (2012) 10 *JICJ* 1063; Heinze, A., *International Criminal Procedure and Disclosure* (Duncker and Humblot 2014); Henkin, L. *et al.*, *International Law: Cases and Materials* 51–148 (3rd ed. 1993); Edwards, G.E., 'International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy', (2001) 26 *YaleJIL* 323; Grover, L. *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014); Herczegh, G., *General Principles of Law and the International Legal Order* (1969); Jennings, R. and Watts, A. (eds.), *Oppenheim's International Law*, vol. 1 (9th ed. 1992); Pellet, A., 'Applicable Law', in: A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* 1051, ii (2002); Rosenne, S., 'Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute', (2000) 41 *VandJIL* 164; Sadat, L.N., *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium* (2002); id., 'Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute', (2000) 35 *DepaulLRev* 909; Saland, P., 'International Criminal Law Principles', in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 189; Schabas, W.A., *An Introduction to the International Criminal Court* (2001); id., *The International Criminal Court: A Commentary on the Rome Statute* (2010); Schachter, O., *International Law in Theory and Practice*, in: L. Damrosch *et al.* (eds.), *International Law: Cases and Materials* (2001) 118.; Simma, B. *et al.* (ed.), *The Charter of the United Nations: A Commentary* (3rd ed., 2012); Stephens, P.J., 'Collective Criminality and Individual Responsibility: The Constraints of Interpretation', (2014) 37 *FordhamLLJ* 501; Stephens, P.J., 'Collective Criminality and Individual Responsibility: The Constraints of Interpretation', (2014) 37 *FordhamLLJ* 501; Triffterer, O., 'Acts of Violence and International Criminal Law – A New Position of Power to Fight Abuse of Power?', (1997) 4 *CroatianAnnCL&Prac* 811, at 838; id., *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrecht seit Nürnberg* (1966); id., 'Can the Elements of Crimes Narrow or Broaden Responsibility for Criminal Behavior Defined in the Rome Statute', in: C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2008).

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	11
I. Paragraph 1: 'The Court shall apply'.....	11
1. 'In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence'.....	11
2. 'In the second place, where appropriate'.....	19
a) 'applicable treaties'.....	20
b) 'principles ... of international law'.....	23
c) 'rules of international law'.....	28
d) Established principles of the international law of armed conflict.....	33
2. Sources applicable in the absence of (a) or (b).....	34
a) 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime'....	34
b) 'provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'.....	42
II. Paragraph 2: 'The Court may apply principles and rules of law as interpreted in its previous decisions'.....	43
III. Paragraph 3: 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender ...'.....	48

A. Introduction/General remarks

Article 21 establishes a hierarchy of applicable law for the judges of the ICC to apply in adjudicating cases. The sources of law elaborated in article 21 derive generally from those contained in article 38 of the ICJ statute, which represents the most authoritative statement of the sources of general international law¹. Article 38 lists as sources: treaties, custom, general principles recognized by 'civilized' nations, and, as a subsidiary means for determining the law, judicial decisions and scholarly publications. Article 21 is generally modeled on this list, with modifications to account for the particularities of criminal law, in particular the need for clarity and specificity. For instance, article 21 departs from article 38 in establishing a hierarchy among sources of law.

Article 21 also reflects compromises reached in the negotiations. The principal issue at stake in drafting article 21 was how much discretion should be granted to the ICC's judges in light of the conflicting demands of the principle of legality on the one hand, and, on the other, the inevitability of lacunae in a nascent legal system. Two principal schools of thought emerged at the Preparatory Committee meetings regarding the appropriate degree of judicial discretion in discerning applicable law. A minority of states took the position that the principle of legality requires that judicial discretion be limited strictly in the criminal law context². Any doubt as to the relevant legal provision should be resolved, according to this view, by direct application of the appropriate national law. The majority position, on the other hand, sought to accommodate the unique nature of the international legal order by allowing the judges to discern and apply general principles of international criminal law. Article 21 represents a compromise between these two approaches: when all other sources fail, the Court must apply general principles derived from national laws, including, as the Court deems appropriate, those of the states that would normally exercise jurisdiction over the crime.

The negotiating history of article 21 reveals an evolution that led to the adoption of this compromise. The ILC's final Draft Statute for an International Criminal Court listed three

¹ While article 38 is binding only with respect to cases before the ICJ, it is considered evidence of customary law. See Jennings and Watts (eds.), *Oppenheim's International Law*, vol. 1 (9th edition 1992).

² See 1996 Preparatory Committee II, p. 105 ('It was stated by some delegations ... that the Court should not be empowered to legislate principles of criminal law').

sources of law, without specifying a hierarchy of application. The Court was to apply (a) the statute; (b) treaties and principles and rules of general international law; and (c) applicable rules of national law³. No guidance was provided as to which national laws should be considered applicable. The 1996 Report of the Preparatory Committee noted the extensive discussion of ‘whether the Court should be empowered to elaborate/legislate further the general principles of criminal law that are not written in the Statute’⁴. Among the proposals favouring wide judicial latitude was one that would have empowered the judges to elaborate elements of crimes and principles of liability and defences not included in the Statute⁵. These elements and principles would then be submitted to the States Parties for approval⁶. Some delegations, however, rejected the notion that the judges should be empowered to ‘legislate’ general principles of criminal law⁷. One delegation proposed that where the Statute itself did not contain the relevant law, the Court should apply directly the national law of the territorial state, the state of nationality of the accused, or the custodial state – in that order⁸.

- 4 At the Rome Conference, as in the earlier negotiations, contentious debate surrounded paragraph 1 (c) – the final source of law, which was divided into two vastly different options in the final draft of the Statute⁹. Option 1, broadly supported at the Conference¹⁰, provided that the Court would apply general principles of law derived from national laws of the legal systems of the world. Option 2, endorsed by a substantial minority¹¹, provided that the Court would apply national laws directly, and specified a hierarchy for determining which State’s laws would apply¹².
- 5 The compromise reached essentially melding the two options. On 8 July, the Working Group on Applicable Law issued a Working Paper stating: ‘Most delegations favoured option 1, but some still favour option 2. A view was expressed that the laws indicated in option 2 could be given as examples of the national laws referred to in option 1, so that the two options be combined’¹³. On 11 July, the Working Group transmitted to the Committee of the Whole the text of what was to become article 21, with the exception of paragraph 3, which was still under discussion¹⁴. The final text of paragraph 1 (c) reflects the compromise proposed in the Working Paper – options 1 and 2 are combined.
- 6 The Report of the Working Group shows that neither side of the debate felt completely vindicated by this solution. The Report notes that ‘[s]ome delegations were of the view that the phrase ‘including, as appropriate’ should be replaced by the word ‘especially’¹⁵. On the other hand, ‘[s]ome delegations express the view that, as a matter of principle, no reference to any national laws of States should be made. The Court ought to derive its principles from a general survey of legal systems and their respective national laws’¹⁶. Despite these lingering objections, the Committee of the Whole endorsed the Working Group’s compromise, adopting paragraph 1(c) without modification¹⁷.

³ See 1994 ILC Draft Statute, article 33, p. 103.

⁴ 1996 Preparatory Committee II, p. 104.

⁵ See *ibid.*, pp. 104–05.

⁶ See *ibid.*

⁷ See *ibid.*, p. 105.

⁸ See *ibid.*

⁹ In contrast, the first two sources in paragraphs 1 (a) and (b) were generally uncontroversial and paragraphs 2 and 3 were completely without brackets in the Final Draft. See Preparatory Committee Draft, article 20, p. 54. Note that article 20 became article 21 in the Rome Statute.

¹⁰ See Author’s notes of debate, Committee of the Whole (23 June 1998) (on file with author).

¹¹ See *id.*

¹² The Court would apply first the law of the State where the crime was committed, second, the law of the State of nationality of the accused, and finally, the law of the custodial state. See Preparatory Committee Draft, article 20, p. 54.

¹³ Working Paper on article 20, UN Doc. A/CONF.183/C.1/WGAL/L.1 (8 July 1998), p. 2, para. 3.

¹⁴ Report of the Working Group on Applicable Law, UN Doc. A/CONF.183/C.1/WGAL/L.2 (11 July 1998).

¹⁵ *Ibid.*, p. 2, para. 3.

¹⁶ *Ibid.*, p. 2, para. 4.

¹⁷ Compare *id.*, with Rome Statute, article 21.

Article 21 constitutes the first codification of the sources of international criminal law. The sources of general public international law have become well established since the adoption of the ICJ statute¹⁸. However, until the ICC was created, international criminal law lacked a permanent international forum. Moreover, the statutes of the ICC's predecessor international criminal tribunals contain no provisions specifying the applicable law. Hence, when the ICC Statute was adopted, limited relevant precedent or scholarly analysis existed regarding the sources of international criminal law.

In practice, the *ad hoc* international criminal tribunals generally apply first their statutes and rules of procedure and evidence, and, if those sources prove inconclusive, customary international law and general principles derived from the legal systems of the world.¹⁹ Although the U.N. Secretary General decreed that the ICTY should apply only rules 'which are beyond any doubt part of customary law',²⁰ the tribunals have unquestionably effectuated significant developments in international criminal law. These include, notably, the ICTY's holding that war crimes can be committed in internal armed conflict.²¹ Some commentators have been critical of the tribunals in this regard, arguing that they are insufficiently respectful of the principle of legality.²² In fact, some participants in the Rome Conference apparently feared that the ICC would follow what they called the 'Cassese approach', referring to the judge responsible for many of the ICTY's legal innovations.²³

Such fears stemmed not only from concerns about fairness to defendants, but also from the reluctance of some states to relinquish control over the law that could be applied to their nationals.

Some delegations preferred to safeguard this aspect of their sovereignty by mandating that, when faced with lacunae in the applicable statutory and customary law, the Court would apply directly the national law of relevant states. Other delegations felt strongly, however, that it would be inappropriate for an international court to apply anything other than international law. They argued that direct application of national law would involve inconsistent justice and would hinder the development of a coherent body of international criminal law.

Article 21 resolves this debate by requiring that the judges apply international law exclusively but granting them discretion to consider the national law of the states that would normally exercise jurisdiction in ascertaining general principles of law. This is an awkward compromise because of the inconsistency inherent in determining 'general principles' by references to specific national laws.

B. Analysis and interpretation of elements

I. Paragraph 1: 'The Court shall apply'

1. 'In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence'

The primacy of the Statute and Rules was never questioned in the negotiations. The Court has confirmed the hierarchy, holding that when faced with a lacuna in paragraph 1(a), the ICC must first seek to fill it by applying the Vienna Convention's rules of treaty interpreta-

¹⁸ See Statute of the ICJ, article 38; see also Triffterer, 2nd edition, Preliminary Remarks, mn 64 *et seq.*

¹⁹ See, e.g., *Prosecutor v. Erdemović*, IT-96-22-A, Judgment, Appeals Chamber, 7 October 1997, para. 40, at 28 (Joint Separate Opinion of Judge McDonald and Judge Vohrah). See Fan (2012) 10 *JICJ* 1063.

²⁰ See, e.g., ICCPR, entered into force 23 Mar. 1976, 999 UNTS 171, 6 *ILM* 368 (1967), article 15 para. 1 ('No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed').

²¹ *Prosecutor v. Tadić*, IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, paras. 96-137, available at <http://www.legal-tools.org/doc/866e17/>.

²² Fan (2012) 10 *JICJ* 1063, 1065 (citing Degan (2005) 4 *Chinese JIL* 45).

²³ *Id.* 1068.

tion and article 21(3)'s admonition to remain compliant with human rights norms. Only if this approach proves inadequate may the Court turn to the sources listed in paragraphs 1(b) and (c)²⁴. However, the hierarchy is less rigid than it appears because the rules of treaty interpretation enable the Court to refer to general principles and customary law in interpreting provisions of the Statute.²⁵ Hence, as William Schabas has noted, '[i]n practice, all of the sources listed in article 21 will be helpful to the Court in its effort to interpret the Statute'.²⁶

- 12 The most controversial aspect of this provision in the negotiations was whether elements of crimes should be elaborated for the Court or developed through the jurisprudence.²⁷ The delegation from the United States argued strongly for the elaboration and codification of elements on the grounds that they would serve the principle of *nullum crimen sine lege*²⁸. Many delegations opposed this proposal, preferring to afford the judges greater discretion to develop the elements of crimes. Ultimately, an accommodation was reached whereby Elements of Crimes would be adopted to 'assist' the Court rather than as binding supplements to the Statute.
- 13 This compromise resulted in an inconsistency in the Statute's references to the Elements. While article 9 defines the purpose of the Elements as merely to 'assist the Court in the interpretation and application of articles 6, 7, and 8',²⁹ article 21 states that the Court 'shall apply' the Elements. These provisions should be reconciled by reading them together. That is, the Court 'shall apply' the Elements *for the purpose of* 'assisting the Court ...'. This interpretation of the Statute comports with the intent of the majority of delegations that the Elements should not bind the Court, but should instead be used to assist the Court in interpreting the Statute.
- 14 However, even this reading of the Statute does not provide the judges with clear guidance with regard to Elements that add to, rather than clarifying, the definitions of crimes in the Statute. This issue arose in the *Bashir* case. In deciding whether to issue an arrest warrant for Sudanese president Omar Al Bashir for genocide, Pre-Trial Chamber I considered the elements of that crime. The Elements of Crimes for genocide include a contextual element that is not present in the Statute or in other definitions of the crime. This element requires that the conduct in question 'took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'.³⁰ The Chamber was unable to agree about how to address this element. The majority held that the Court must apply the Elements of Crimes unless it finds 'an irreconcilable contradiction' between the Elements of crimes and the Statute.³¹ Since the contextual element does not contradict the Statute, the majority held that it must be applied. A dissenting judge, however, took the position that '[s]ince article 9(3) of the Statute requires that the Elements of Crimes be consistent with the Statute, it can be inferred that only the Statute outlines the operative definition of the crime'.³² She did not reach the question of whether the contextual element is consistent with the Statute because she found that, in any event, the contextual element was met.³³

²⁴ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Al Bashir, Pre-trial Chamber I, 4 March 2009, para. 126, available at <http://www.legal-tools.org/doc/d66468/>.

²⁵ Cryer (2009) 12 *NCLRev* 390, 393.

²⁶ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 385.

²⁷ See Gadirov, revised by Clark, *article 9*.

²⁸ See U.S. Reference Paper: Elements of Offenses for the International Criminal Court, submitted to Preparatory Committee (27 March 1998) (on file with author) ('We believe criminal elements can give teeth to the concept of *nullum crimen sine lege*').

²⁹ This inconsistency has been cited as a failure in the drafting of the Rome Statute. See Rosenne (2000) 41 *VandJIL* 164, 167–68.

³⁰ Elements of Crimes, Genocide.

³¹ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Al Bashir, Pre-trial Chamber I, 4 March 2009, para. 128, available at <http://www.legal-tools.org/doc/d66468/>.

³² *Id.* paras. 17–18.

³³ *Id.* para. 20.

Robert Cryer has criticized the majority's approach, arguing that the Court should have interpreted the Statute in line with the customary international law definition of genocide and found that the contextual element is inconsistent with that definition.³⁴ He points out that the majority's approach effectively renders the Elements of Crimes binding, contrary to the will of the majority of the drafters.³⁵ While Cryer is correct that the drafters did not intend the Elements to be binding, the judges are understandably reluctant to decline to apply Elements of Crimes that do not contradict the statutory definitions. As a result, where the Elements of Crimes add requirements not present in customary international law, as they do for genocide, the Court's jurisprudence will likely contribute to the fragmentation of international criminal law.

Although paragraph 1 (a) does not specify a hierarchy for the application of these three sources, other articles of the Statute make clear that the Statute takes precedence over the Elements of Crimes and Rules. Article 9 paragraph 3 states that '[t]he Elements of Crimes and amendments thereto shall be consistent with this Statute'. Similarly, article 51 paragraph 5 provides that '[i]n the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail'. The relationship is further clarified in an explanatory note to the Rules, which provides that the Rules are 'subordinate in all cases' to the Statute.³⁶

Interestingly, although both the Rules and the Elements rank below the Statute, the Court has, in a sense, treated the Rules as more subordinate to the Statute than the Elements. As explained above, the Court has held that the Elements of Crimes can be applied in a way that restricts the definitions of crimes. On the other hand, the same Pre-Trial Chamber of the Court has held that the Rules cannot be interpreted 'in such a way as to narrow the scope of an article of the Statute'.³⁷ On that basis the Chamber rejected the prosecutor's argument that the language of one of the Rules of Procedure implicitly excludes victims from participating during the investigation stage of a situation.³⁸

Paragraph 1 (a) also encompasses unlisted sources created under the Statute and Rules of Procedure and Evidence, such as the Court's regulations and codes of conduct. Thus, for instance, the Appeals Chamber has noted that the Code of Professional Conduct for Counsel, which is mandated in the Rules, is 'part of the Court's applicable law under article 21 (1) (a) of the Statute'.³⁹ Some of these instruments specify their position in the hierarchy of sources, but for others the judges will have to decide where they rank when conflicts arise.⁴⁰

The Court has sometimes taken the view that the law and procedures provided for in the Statute and Rules represent the universe of applicable law and procedures. For instance, the Appeals Chamber relied on this position to deny the prosecutor's request for 'extraordinary review' of the above-mentioned decision regarding victim participation.⁴¹ The prosecutor had argued that the absence from the Statute of a mechanism for review of a decision

³⁴ Cryer (2009) 12 *NCLRev* 390, 396-7.

³⁵ *Id.* 400.

³⁶ *International Criminal Court, Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1, Explanatory Note (2000)*.

³⁷ *Situation in the Democratic Republic of Congo*, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-trial Chamber I, 17 January 2006, para. 47, available at <http://www.legal-tools.org/doc/2fe2fc/>.

³⁸ *Id. para.* 49.

³⁹ *Prosecutor v. Muthaura & Kenyatta*, ICC-01/09-02/11-365 OA3, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence', Appeals Chamber, 10 November 2011, para. 48.

⁴⁰ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 387 (noting that 'the relationship between these different forms of subordinate legislation has not been clarified, and in the event of conflict judges will have to find solutions based upon general principles of interpretation of legal texts ...'); Bitti, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Brill 2009) 285, 291-92.

⁴¹ *Situation in the Democratic Republic of Congo*, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, 13 July 2006, para. 39, available at <http://www.legal-tools.org/doc/004842/>.

denying leave to appeal is a lacuna that should be remedied by applying general principles of law as provided in article 21 (1) (c). The Appeals Chamber rejected this argument, holding that the Statute exhaustively sets forth when parties may appeal decisions of the Pre-Trial and Trial Chambers.⁴² The Appeals Chamber also applied this reasoning to reject a defendant's argument that his case should be found inadmissible under the doctrine of 'abuse of process' because he was 'unlawfully detained and ill-treated' by the national authorities that arrested him.⁴³ The Chamber held that 'abuse of process' is not a ground for finding a case inadmissible under article 17.⁴⁴ Although the Chamber recognized that some powers not explicitly granted in the Statute inhere in the judicial function, it held that the power to stay proceedings based on abuse of process is not such a power.⁴⁵

In other circumstances, however, the Court has taken a more liberal approach to applying its primary sources of law. For instance, a Trial Chamber has held that the Court has the implied power to subpoena witness testimony, even though the Statute only refers to the voluntary appearance of witnesses.⁴⁶ The Appeals Chamber has also controversially held that an accused need not be present during his or her trial under some circumstances⁴⁷ even though the Statute states that '[t]he accused shall be present during the trial'.⁴⁸ Some scholars have criticized the Court for such broad interpretations of the Statute.⁴⁹

2. 'In the second place, where appropriate'

- 19 The inclusion of the phrase 'where appropriate' serves to emphasize the discretion the Court enjoys in determining when treaties or principles and rules of international law are applicable.
- 20 a) 'applicable treaties'. The debate with regard to this provision surrounded whether to include 'relevant' treaties or to limit the source to 'applicable' treaties⁵⁰. In particular, the delegates debated whether the Vienna Convention on the Law of Treaties and the Convention Against Torture are applicable or merely relevant⁵¹. The drafters have been criticized for ultimately settling on the term 'applicable'⁵². As one commentator has pointed out, '[a] narrow reading of the term could prevent the Court from referring to the ICCPR or the European Convention on Human Rights on the grounds they are not 'applicable', but only relevant'⁵³. However, this fear is somewhat allayed by the requirement in paragraph 3 that

⁴² *Id.*

⁴³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, available at <http://www.legal-tools.org/doc/1505f7/>.

⁴⁴ *Id.* para. 34.

⁴⁵ *Id.* para. 35.

⁴⁶ *Prosecutor v. Ruto and Arap Sang*, ICC-01/09-01/11-1274-Corr2, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, Trial Chamber V(A), 17 April 2014.

⁴⁷ *Prosecutor v. Ruto and Arap Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', Appeals Chamber, 25 October 2013, para. 56, available at <http://www.icc-cpi.int/iccdocs/doc/doc1669852.pdf>.

⁴⁸ Rome Statute art. 63.

⁴⁹ See e. g., Bitti, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 285.

⁵⁰ Saland, in: Lee (ed.), *The International Criminal Court: The Making Of The Rome Statute: Issues, Negotiations, Results* (1999) 215.

⁵¹ See *id.*

⁵² See Pellet, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1067–70; Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) 177, para. 12.

⁵³ Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* 177.

the application of law under the Statute must be consistent with internationally recognized human rights.

Applicable treaties include, for instance, the Geneva Conventions of 12 August 1949, 21 which are incorporated into the definition of war crimes. Moreover, the Court has held that the Vienna Convention on the Law of Treaties applies to its interpretation of the Rome Statute.⁵⁴ Other applicable treaties include those to which the Court is a party, such as the treaty governing the Court's relationship with the Netherlands.⁵⁵ The Court should avoid following the practice of the *ad hoc* tribunals, which have applied international agreements that are binding on the states that would normally have jurisdiction over the offence. Given the ICC's wide-ranging jurisdiction, this approach would contribute to the fragmentation of international criminal law.⁵⁶

In practice, the choice of the term 'applicable' may be less important than the drafters 22 believed because the Court is free to refer to all treaties in its search for the principles and rules of international law referenced in paragraph 1 (b). While treaties that are merely 'relevant' to the work of the Court cannot be applied directly, therefore, they can nonetheless provide evidence in support of the other sources. This makes sense because, as Leila Sadat has noted, it is unlikely that the drafters wished to deprive the Court of the possibility of referring to international treaties to assist them in deciding novel issues⁵⁷.

b) 'principles ... of international law'. The inclusion of 'principles ... of international 23 law' in paragraph 1 (b) as a source of law distinct from 'general principles' derived from national laws in paragraph 1 (c) has generated confusion. The Statute clearly defines the source of paragraph 1 (c)'s 'general principles': they are derived 'from national laws of legal systems of the world'. However, the Statute fails to identify the provenance of 'principles ... of international law' in paragraph 1 (b), raising the question of how these principles differ from the general principles in paragraph 1 (c).

There is widespread agreement that paragraph 1 (b) at a minimum includes customary 24 international law. The drafters may have used this formulation, rather than a direct reference to customary law, out of concern that the latter is insufficiently precise in the context of criminal law.⁵⁸ Commentators have taken different views of the meaning of 'principles' in this provision, however. Allain Pellet asserts that the inclusion of 'principles' in paragraph 1 (b) was a mistake, a 'verbal tic', and that subparagraph (b) is simply an awkward reference to customary international law⁵⁹. William Schabas, on the other hand, interprets this provision as encompassing not only custom but also general principles of law derived from the national legal systems of the world.⁶⁰ He finds support for this position in the drafting history. The 1993 draft Statute of the ILC contains a commentary explaining that 'principles and rules of general international law' includes 'general principles of law'.⁶¹ According to Professor Schabas, paragraph 1 (c)'s 'general principles' refer not to the general principles of international law but to principles derived from comparative law.⁶²

A third possibility, and the one that is most supported by the Court's case law, is that 25 paragraph 1 (b) includes both customary international law principles and other kinds of

⁵⁴ DRC (Appeals Chamber Judgment on Prosecutor's Application), *note 41*, para. 33.

⁵⁵ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 390.

⁵⁶ See *id.*, 1069, para. 104 (citing decisions of the ICTY and criticizing this approach as 'open[ing] the way to an 'à la carte' jurisdiction').

⁵⁷ Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) 177, para. 12.

⁵⁸ *Id.* 384.

⁵⁹ Pellet, in: Cassese, Gaeta, and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1072.

⁶⁰ *Id.*

⁶¹ *Id.* citing ILC, 'Report of the International Law Commission on the Work of its 45th Session (3 May-23 July 1993) UN Doc A/CN.4/SER.A/1993/Add.1 (Part 2) 111 para. 2.

⁶² Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 391.

principles that are not derived from national laws.⁶³ Oscar Schachter has identified five categories of general principles reflected in international legal discourse:

- (1) The principles of municipal law 'recognized by civilized nations'.
- (2) General principles of law 'derived from the specific nature of the international community'.
- (3) Principles 'intrinsic to the idea of law and basic to all legal systems'.
- (4) Principles 'valid through all kinds of societies in relationships of hierarchy and coordination'.
- (5) Principles of justice founded on 'the very nature of man as a rational and social being'⁶⁴.

The first category corresponds roughly to article 38 paragraph 1 (c) of the ICJ Statute, although the latter does not refer expressly to national laws but rather to 'the general principles of law recognized by civilized nations'. Article 38 (1)(c) has given rise to much controversy and a vast literature⁶⁵. The debate primarily pits those who believe general principles are derived exclusively from national laws against those who view this provision as encompassing principles derived from the international legal conscience, not linked to any particular domestic system⁶⁶. The travaux préparatoires reveal divergent views on this question among the drafters of the ICJ Statute⁶⁷.

The other four categories reflect general principles that are not derived from national laws. The second category – principles derived from the nature of the international community – includes such principles of coexistence as *pacta sunt servanda*, territorial integrity and self-defence⁶⁸. Similarly, the third category – principles intrinsic to the idea of law – includes principles of interpretation such as the maxim that later law supersedes earlier law if both have the same source⁶⁹. Finally, the last two categories reflect natural law doctrine and encompass such 'natural justice' concepts as equity and respect for human rights⁷⁰. The inclusion of 'principles ... of international law' as a source of law distinct from 'general principles' seems to reflect the drafters' intention to enable the Court to apply such principles even when they are neither derived from national laws nor part of customary international law.

- 26 Although the Court has yet to address directly whether the principles in subparagraph (b) extend beyond those contained in custom and national laws, there is some indication that the Court may answer this question affirmatively. For instance, in determining the meaning of 'sufficient gravity' for admissibility under article 17, Pre-Trial Chamber I considered under the heading 'principles and rules of international law' the rules and practice of the *ad hoc* tribunals concerning case selection.⁷¹ The Chamber made no attempt to establish that the rules and practices of the *ad hoc* tribunals in this regard are part of custom. Instead, the discussion suggests that the *ad hoc* tribunals are following principles derived from the nature of the legal system – in this case, principles that require international courts to prosecute only senior leaders responsible for widespread or systematic criminality. Although the Appeals

⁶³ Ambos, *Treatise on International Criminal Law* (2013) 76.

⁶⁴ Schachter, in: Damrosch et al. (eds.), *International Law: Cases and Materials* (2001) 118.

⁶⁵ See, e.g., Danilenko, *Law-making in the International Community* (1993) 174, para. 1; Jennings and Watts (eds.), *Oppenheim's International Law* 37.

⁶⁶ See Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) 2–4; Danilenko, *Law-making in the International Community* (1993) 173–76; Degan, *Sources of International Law* (1997) 14–15; Bernhardt (ed.), *Encyclopedia of Public International Law* (1995) 512. The view that principles may be derived from the international legal conscience is also reflected in the Martens Clause. See Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, entered into force 26 January 1910, preamble, para. 8, 36 Stat. 2277 ('principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience').

⁶⁷ Schachter, in: Damrosch et al. (eds.), *International Law: Cases and Materials* (2001) 118.

⁶⁸ See *id.*, 121.

⁶⁹ See *id.*, 122.

⁷⁰ See *id.*, 122–23.

⁷¹ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-8-US-Corr, Decision Concerning Pre-trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Pre-trial Chamber I, 24 February 2006, paras. 55–60, available at <http://www.legal-tools.org/doc/c60aaa/>.

Chamber overturned the decision, it did not address the Pre-Trial Chamber's approach to principles and rules as a source of law.⁷²

Likewise, in deciding on an application for participation from victims, one judge held that it is a general principle of law 'that the burden of proof of elements supporting a claim lies on the party making the claim' and that 'indirect proof' is admissible.⁷³ This decision also indicates that general principles may derive from the nature of the legal system and not only from custom or national laws.

The case law also indicates that the prosecutor and judges believe that article 38's 'general principles,' are reflected in paragraph 1 (c), rather than in paragraph 1 (b) as Professor Schabas has suggested. For instance, in requesting 'extraordinary review' of the denial of a request to appeal, the Prosecutor cited article 21(1)(c) as the relevant source of the alleged 'general principle' that such review is permitted; and the Appeals Chamber likewise cited paragraph 1 (c) in rejecting the argument.⁷⁴

c) 'rules of international law'. Paragraph 1 (b)'s reference to 'rules of international law' is curious in that it omits the word 'customary,' even though custom is the primary source of international law rules other than treaties. As already noted, the drafters may have eschewed the term out of concern that the concept of gradually evolving custom is too imprecise for the purposes of international criminal law. Oppenheim describes the crystallization of a customary rule in the following terms: 'Wherever and as soon as a line of international conduct frequently adopted by States is considered by States generally legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law'⁷⁵. As Oppenheim asserts, '[c]ustom is the oldest and the original source of international law ...'⁷⁶. As such, the phrase 'rules of international law' must be interpreted as a reference to customary rules.

The Court has not made significant use of customary rules as a source of law to date. In one case, a Pre-Trial Chamber found the customary law regarding modes of liability to be inapplicable because the Statute contains a provision directly on point.⁷⁷ With regard to the decision of the ICTY to follow the customary rule on the question, the Chamber noted: 'This is a good example of the need not to transfer the ad hoc tribunals' case law mechanically to the system of the Court'.⁷⁸

The Court has also resisted arguments that it should follow procedural rules adopted at the *ad hoc* tribunals when the ICC Statute is silent on a matter. Thus, in the *Lubanga* case, Trial Chamber I rejected the prosecutor's argument that the ICC should permit 'witness proofing' because it is common practice at the other tribunals. The Chamber asserted that the procedural rules and ICC jurisprudence of the ad hoc tribunals is not 'automatically applicable to the ICC' and that the Statute 'created a procedural framework which differs markedly from the ad hoc tribunals'.⁷⁹

⁷² See *Situation in the Democratic Republic of Congo*, ICC-01/04-169 23-09-2008 1/49 CB PT OA, Judgment on the Prosecutor's appeal against the decision of Pre-trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', Appeals Chamber, 13 July 2006, available at <http://www.legal-tools.org/doc/87f8fe/>.

⁷³ *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision on Victims' Applications for Participation a/0010/06, a/006406 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre-trial Chamber II, 10 August 2007, paras. 13, 15, available at <http://www.legal-tools.org/doc/957bbf/>.

⁷⁴ DRC (Pre-trial Chamber Judgment on the Prosecutor's Application), note 72, para. 39.

⁷⁵ Jennings and Watts (eds.), *Oppenheim's International Law* 30. For the admissibility of customary rules as sources of international criminal law see Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrecht seit Nürnberg* (1966) 35 *et seq.*; id. (1997) 4 *CroatianAnnCL&Prac* 811, at 838.

⁷⁶ Jennings and Watts (eds.), *Oppenheims's Internatonal Law* 25.

⁷⁷ *Prosecutor v. Germain Kantanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, Pre-trial Chamber I, 30 September 2008, paras. 506–508.

⁷⁸ *Id.* para. 508.

⁷⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Trial Chamber I, 30 November 2007, paras. 43–45, available at <http://www.legal-tools.org/doc/ac1329/>.

- 31 The Court has been somewhat more willing to cite the precedent of the other international tribunals with regard to substantive questions not addressed in the ICC Statute.⁸⁰ For instance, in the *Lubanga* Confirmation of Charges decision, Pre-Trial Chamber I adopted a number of holdings from the ICTY jurisprudence, including the ‘overall control’ test for determining when a conflict is international in nature.⁸¹
- 32 Interestingly, while article 21 enables the Court to use customary international law as a source of law, the drafters also provided for the development of a body of international law that would exist alongside the Statute⁸². Article 10 states that nothing in Part 2 of the Statute ‘shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than [the] Statute’. The drafters’ intent in including this provision was apparently to ensure that the Statute is not treated as the definitive codification of international criminal law such that it operates to limit the application or development of international law outside the Statute⁸³. However, this provision is likely to have limited practical effect⁸⁴. In spite of article 10, other international courts look to the Rome Statute and jurisprudence to elucidate and apply customary international law⁸⁵.
- 33 d) **Established principles of the international law of armed conflict.** Some of the law of international armed conflict is directly applicable under paragraph 1 (a) because the Geneva Conventions are incorporated into the definition of war crimes as noted above. This paragraph serves to ensure that customary international law concerning armed conflict is also a source of law for the Court. The Court has yet to make significant use of this provision.

3. Sources applicable in the absence of (a) or (b)

- 34 a) ‘**general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime**’. As discussed in the introduction, this provision was the most controversial aspect of article 21 during the drafting process. The language of the article represents a compromise between delegates who argued that the Court should apply national laws directly and those who felt that ‘general principles’ ought to be entirely divorced from any reference to particular national systems. This compromise is rather awkward. As Per Saland, chairman of the Working Group that negotiated article 21 in Rome, has noted: ‘There is of course a certain contradiction between the idea of deriving general principles, which indicates that this process could take place before a certain case is adjudicated, and that of looking also to particular national laws of relevance to a certain case; but that price had to be paid in order to reach a compromise’⁸⁶. Although this compromise raises the spectre that the Court will apply inconsistent law in different cases, that danger may be largely averted through the exercise of the Court’s broad discretion to decide when it is ‘appropriate’ to refer to particular national laws. The less often the Court considers such reference appropriate, the more likely it will be to develop a cogent body of international law⁸⁷.
- 35 Furthermore, paragraph 1 (c) is clear that the ICC judges are not to apply the national laws of any particular State directly, but rather, to apply the principles underlying the laws of ‘the

⁸⁰ Bitti, in: C. Stahn & G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009).

⁸¹ *Prosecutor v. Lubanga Dyilo*, No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 541.

⁸² See Sadat (2000) 49 *DepaulLRev* 909, 918.

⁸³ See Triffterer, *article 10*.

⁸⁴ Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) 923.

⁸⁵ See *id.* 920–22.

⁸⁶ Saland, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 189, 215.

⁸⁷ The Conference rejected the view of some delegations that the phrase ‘including, as appropriate’ should be replaced with ‘especially’. See note 15 and accompanying text. The weight to be accorded to any particular national laws is therefore entirely in the discretion of the judges.

legal systems of the world'. This provision reflects the practice of other international courts, in particular the ICJ. As one ICJ judge explained: 'In my opinion, the true view of the duty of international tribunals [respecting the application of 'general principles'] is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions'⁸⁸. Judges of the *ad hoc* Tribunals have taken a similar approach to deriving general principles of law. In the *Erdemović* case, two ICTY judges described their task as follows: '[O]ur approach will necessarily not involve a direct comparison of the specific rules of each of the world's legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal'⁸⁹.

The ICJ has only rarely resorted to general principles as a source of law⁹⁰. Nonetheless, a number of international tribunals, treating article 38 as declaratory of customary law, have relied on general principles in deciding cases⁹¹. The general principles of law referred to in article 21 include such widely recognized principles as the principle of legality (*nullum crimen sine lege*)⁹² and the principle of proportionality⁹³. 36

The drafters of the ICJ Statute described the role of article 38's provision regarding 'general principles' as, in part, to avoid a situation of *non liquet*⁹⁴. Paragraph 1 (c) similarly serves to address the unavoidable occurrence of interstices in international criminal law. As a developing body of law, international criminal law does not currently contain answers to every legal question likely to arise in a criminal trial. One area in which the drafters anticipated such lacunae is the law governing grounds for excluding criminal responsibility. While the Statute elaborates some defences in article 31, it also specifies that: 'the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21'⁹⁵. In developing the international criminal law relating to defences, it will be important for the judges to draw on principles of criminal law derived from national legal systems. 37

⁸⁸ *South West Africa Case*, Advisory Opinion, 1950 ICJ 28, at 148 (11 July) (separate opinion of Judge McNair).

⁸⁹ *Prosecutor v. Erdemović*, IT-96-22-A, Judgment Appeals Chamber, para. 57, at 40.

⁹⁰ Jennings and Watts (eds.), *Oppenheim's International Law*, 37–38. For citations to cases where this source has been applied, see *id.*, 37–38, para. 5.

⁹¹ See *id.*, 39.

⁹² The ICCPR specifies that the notion of general principles does not conflict with the principle of *nullum crimen sine lege*, stating that the principle of legality 'shall [not] prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'. note 20, ICCPR, article 15 para. 2.

⁹³ As discussed above in reference to paragraph 1 (b), the inclusion of both 'principles ... of international law' and 'general principles of law' in the Statute leaves open to debate whether particular principles fall under paragraph 1 (b) or paragraph 1 (c). For example, while most of the world's legal systems recognize the principles of equity and legality, one could also argue that these principles are derived from natural law or the 'legal conscience of humanity'.

⁹⁴ *Prosecutor v. Erdemović*, IT-96-22-A, Judgment, Appeals Chamber, para. 57, at 39, citing P.C.I.J., Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, 16 June – 24 July, 336 (1920).

⁹⁵ Rome Statute, article 31 para. 3. In including this provision, the drafters may have been influenced by the experience of the ICTY when it addressed the defence of duress in the *Erdemović* Judgement. In that case, the ICTY found that 'no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings'. *Prosecutor v. Erdemović*, No. IT-96-22-A, Judgment Appeals Chamber, para. 55, p. 38. Furthermore, after a survey of relevant national laws, the court found that '[i]t is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons'. *Ibid.*, para. 72, p. 63. Although the Statute provides for the defence of duress in article 31, the drafters anticipated that similar questions would arise with regard to the availability of other grounds for excluding criminal responsibility under international law.

- 38 The language of article 21 leaves a great deal of discretion to the judges in determining which national laws to consider in deriving ‘general principles’. ICJ article 38 limits the relevant principles to those ‘recognized by civilised nations’. This provision was probably originally intended to refer to the most ‘developed’ nations, though it is now taken to refer to all States⁹⁶. Article 21 similarly includes all of the world’s legal systems within its scope. Nonetheless, it is clear that an applicable principle need not be accepted unanimously by all the world’s legal systems⁹⁷. Rather, ‘[t]here must be evidence that it is applied by a representative majority’, including the world’s principal legal systems⁹⁸. In identifying general principles, therefore, the judges of the ICC are required to engage in comparative law analysis, but have broad discretion to decide which national laws to include in that analysis.
- 39 In particular, the judges have discretion to make the important decision of when to refer to the laws of the States that would normally exercise jurisdiction over the crime. Article 21 provides no guidance as to which States should be considered to fall into this category⁹⁹. Earlier proposals to apply national laws directly were more specific in this regard, directing the Court first to the national law of the State where the crime was committed, second to the laws of the State of nationality of the accused, and third to the laws of the custodial State¹⁰⁰. The first two represent widely recognized grounds of jurisdiction – territoriality and nationality – and the Court can be expected to refer to the law of these States when applying article 21 paragraph 1 (c). With respect to other less accepted bases of jurisdiction, including custody of the defendant and nationality of the victim, the Court will have to decide whether such States would ‘normally exercise jurisdiction’.

At least one commentator has argued that since the crimes in the Rome Statute are crimes of universal jurisdiction, any state can be considered one that ‘would normally exercise jurisdiction over the crime.’¹⁰¹ The legislative history shows that this was not what the statute’s drafters intended and it is unlikely that the Court will take this approach.

- 40 There is little jurisprudence applying paragraph 1(c) to date. In a few cases, the Court has rejected arguments based on this provision. In the *Lubanga* case, Trial Chamber I rejected the prosecutor’s argument that a general principle exists permitting ‘witness proofing’ noting that the practice is only accepted in two common law systems, and that the prosecutor had not cited any evidence of the practice in Romano-Germanic systems.¹⁰² Likewise, the Appeals Chamber rejected a request to disqualify defense counsel who previously worked for the prosecutor’s office, noting that the prosecution had cited only five jurisdictions in support of its claim that a general principle exists supporting such disqualification.¹⁰³

In a dissenting opinion, one judge has criticized his colleagues for their heavy reliance on German law to support the conclusion that the statute includes the ‘control theory’ of co-perpetration. Although the majority’s holding does not rest on paragraph 1(c), Judge Fulford asserts that the decision’s effect is to import a national law doctrine without determining ‘whether the policy considerations underlying the domestic legal doctrine are applicable at [the ICC] ...’.¹⁰⁴

⁹⁶ Bernhardt (ed.), *MPEPIL* (2003) 517.

⁹⁷ See *id.*; Heinze, *International Criminal Procedure and Disclosure* (2014), 48–50.

⁹⁸ *Id.*

⁹⁹ This issue arises in a number of places in the Rome Statute including, for example, articles 17–19.

¹⁰⁰ See notes 8, 12 and accompanying text.

¹⁰¹ See e.g., Edwards (2001) 26 *YaleJIL* 323, 408.

¹⁰² *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Judgment, Trial Chamber I, 14 March 2012, para. 41, available at <http://www.legal-tools.org/doc/677866/>.

¹⁰³ *Prosecutor v. Nourain and Jerbo Jamus*, ICC-02/05-03/09-252 OA, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber IV of 30 June 2011 entitled ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’, Appeals Chamber, 11 November 2011, para. 33, available at http://www.legal-tools.org/uploads/tx_ltpdb/doc1266895_06.pdf.

¹⁰⁴ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Judgment, Trial Chamber I, 14 March 2012, Separate Opinion of Judge Adrian Fulford, para. 10, available at <http://www.legal-tools.org/doc/677866/>.

The Court has also been reluctant to engage the law of the state that would normally exercise jurisdiction. For instance, in the Kenya situation, defendants requested an oral hearing, relying on Kenyan legal instruments. In declining the request, the Appeals Chamber noted that it is not permitted to apply national laws directly and that it has discretion to decide whether to consider the national laws of the states that would normally exercise jurisdiction. The Chamber found no reason to depart from Rule 156's presumption against an oral hearing.¹⁰⁵

b) 'provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'. Assuming that the Court conducts broad comparative law analysis in arriving at general principles, this provision should prove relatively unimportant since such general principles will inherently conform with international law, norms, and standards.¹⁰⁶

However, if the Court decides in the future to apply principles derived from the national systems that would normally exercise jurisdiction it will have to be careful to ensure that those principles are compatible with the Statute and with other relevant international norms.

II. Paragraph 2: 'The Court may apply principles and rules of law as interpreted in its previous decisions'

This paragraph provides for the discretionary use of precedent by the Court. The Court is not obligated to adhere to its prior decisions through a binding rule of *stare decisis*. Rather, paragraph 2 permits the judges, in their discretion, to accord precedential value to principles and rules of law identified in prior decisions. This provision represents a compromise between the common law approach to judicial decisions as binding precedent, and the traditional civil law view that judicial pronouncements in specific cases bind only the parties before the court.

The language of paragraph 2 stands in contrast to that of article 59 of the ICJ Statute, which specifies that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'. Article 59 evidenced the reluctance on the part of the international community when drafting the ICJ Statute to accord a significant law-making role to the judges. In practice, however, the ICJ has looked to its prior holdings as evidence of relevant rules and principles of law. By explicitly suggesting the judges of the ICC may consider the Court's prior holdings, article 21 indicates an evolution in the attitude of the world community in this area¹⁰⁷. As a developing body of law, without the benefits of legislative guidance, international criminal law requires a certain amount of judicial discretion. In suggesting the judges may take into account their prior holdings, article 21 paragraph 2 contributes to the development of a consistent and predictable body of international criminal law, and thus serves the principle of legality.¹⁰⁸

The Court has frequently cited its prior decisions as important authority. For instance, in deciding on victims' applications to participate in proceedings, one judge explained that he

¹⁰⁵ *Prosecutor v. Muthaura, Kenyatta, and Hussein Ali*, ICC-01/09-02/11 OA 4, Decision on the 'Request to Make Oral Submissions on Jurisdiction under Rule 156(3)', Appeals Chamber, 1 May 2012, para. 11, available at http://www.legal-tools.org/uploads/tx_ltpdb/2012-05_1406077_01.PDF.

¹⁰⁶ In fact, this provision was in brackets in Option 1 of the Draft Statute debated in Rome. See note 9, Preparatory Committee Draft, article 20.

¹⁰⁷ Another commentator has perceived in this change simply a recognition that the difference between precedential and non-precedential systems of law is less significant in practice than in theory. See Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* 179.

¹⁰⁸ There is some controversy in the scholarship on this point. Compare Cassese (1999) 10 *EJIL* 144, 164 (arguing that the judges can and should adopt *stare decisis*) with Pellet, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1066 (rejecting this view).

would ‘whenever appropriate, take into account the principles established and the practices followed so far by the Court in the area of victims’ participation.’¹⁰⁹ The Appeals Chamber used even stronger language when it declined to disqualify defense counsel who previously worked for the prosecution, relying on its prior interpretation of the relevant provision of the Code of Professional Conduct for counsel.¹¹⁰ The Appeals Chamber held that the question of what ‘privy to confidential information’ means was ‘resolved’ by its early decision.¹¹¹

In confirming charges against Katanga and Chui Pre-Trial Chamber I relied on many of its holdings in its decision confirming charging against Lubanga.¹¹² Chambers have also relied on decisions of other chambers. For instance, in a decision considering whether to grant the prosecutor leave to appeal a decision concerning victim participation, Pre-Trial Chamber I referred extensively to the relevant holdings of Pre-Trial Chamber II.¹¹³ Pre-Trial Chamber III likewise followed the holdings of Pre-Trial Chamber II with regard to the meaning of ‘policy’ in the definition of crimes against humanity.¹¹⁴

46 In other instances, however, the Court has departed from its prior holdings. This has been the case, for instance, with regard to the question of whether counsel may prepare witnesses for trial. While several trial chambers have disallowed the practice, Trial Chamber V has permitted witness preparation.¹¹⁵

47 As some scholars have argued, it is probably advisable for the judges of the pre-trial and trial chambers generally to follow holdings of the Appeals Chamber to promote consistency and coherence in the development of the law.¹¹⁶ It remains unclear, however, whether the ICC judges will accord special deference to the case law of the Appeals Chamber. In determining when leave to appeal should be granted, the Trial Chamber in the *Bemba* case asserted that it was ‘guided by the established jurisprudence of this Chamber and of the Court, citing appellate jurisprudence for the latter.’¹¹⁷ It gave no indication, however, that Appeals Chamber jurisprudence is entitled to special deference.

¹⁰⁹ *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision on Victims’ Applications for Participation a/0010/06, a/006406 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre-trial Chamber II, 10 August 2007, para. 5, available at <http://www.legal-tools.org/doc/957bbf/>.

¹¹⁰ *Prosecutor v. Nourain and Jerbo Jamus*, ICC-02/05-03/09 OA, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber IV of 30 June 2011 Entitled ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’, Appeals Chamber, 11 November 2011, para. 32, available at http://www.legal-tools.org/uploads/tx_ltpdb/doc1266895_06.pdf.

¹¹¹ *Id.*

¹¹² *Prosecutor v. Katanga and Chui*, ICC-01/04-1/07-717, Decision on the Confirmation of Charges, Pre-trial Chamber I, 30 September 2008, para. 65, available at <http://www.legal-tools.org/doc/67a9ec/> (the evidentiary standard of ‘substantial grounds to believe’) para. 249 (‘national armed forces’) para. 250 (‘active participation in hostilities’) para. 520 (‘co-perpetration’).

¹¹³ *Situation in the Democratic Republic of Congo*, ICC-01-04-135-tEN, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, Pre-trial Chamber I, 31 March 2006, para. 18, available at <http://www.legal-tools.org/doc/902494/>.

¹¹⁴ *Situation in the Côte d’Ivoire*, ICC-02/11-14-Corr, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, Trial Chamber III, 15 November 2011, paras. 43–6, available at <http://www.legal-tools.org/doc/e0c0eb/>.

¹¹⁵ See *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-588, Decision on witness preparation, Trial Chamber V, 2 January 2013, para. 30 and fn. 7, available at <http://www.legal-tools.org/doc/d907bd/>.

¹¹⁶ See, e.g., Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 395; Gideon Boas (ed.), *International Criminal Law: Developments in the Case Law of the ICTY* (2003) 8.

¹¹⁷ *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-2487-Red, Public Redacted Version of ‘Decision on ‘Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines’ of 11 January 2013, Trial Chamber III, 16 January 2003, para. 12, available at <http://www.legal-tools.org/doc/91962c/>.

III. Paragraph 3: ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender ...’

Although this paragraph was included without brackets in the Final Draft Statute debated in Rome¹¹⁸, it became one of the more contentious provisions of the Statute at the Conference. There was virtual unanimity among delegations as to the desirability of stipulating that the interpretation of law ‘must be consistent with internationally recognized human rights’¹¹⁹. The need for the Court to adhere scrupulously to international human rights standards in exercising its functions is beyond question. In particular, the rights of the accused must be strictly respected¹²⁰.

The debate regarding this paragraph centred instead on the desirability of specifying the prohibited grounds of discrimination. This elaboration may be technically unnecessary since the prohibition of discrimination on the listed grounds is clearly encompassed in ‘internationally recognized human rights’. Most instruments related to human rights and humanitarian law, however, have included such a non-discrimination clause. Many delegations therefore felt strongly that it was important to reaffirm the international community’s commitment to the principle of non-discrimination in the context of the international criminal court.

The most contentious issue to emerge at the Conference with respect to this provision concerned the use of the term ‘gender’. This debate affected not only article 21, but also several other articles where the term gender is used. A number of delegations argued adamantly that the term ‘gender’ is imprecise and should not be employed in the Statute¹²¹. In particular, a few delegations felt that the term gender incorporated a reference to homosexuality¹²². In order to avoid use of the term ‘gender’, some delegations favoured ending the paragraph with the words ‘human rights’¹²³. However, many other delegations felt equally strongly about the importance of reaffirming in the Statute the prohibition against gender discrimination¹²⁴. An intense debate followed regarding whether the term ‘gender’ should be replaced with the more traditional term ‘sex’. On one occasion the debate became so heated that the Chairman closed the meeting and reconvened it without the presence of non-governmental organizations for the only time during the conference¹²⁵. The majority view, which ultimately prevailed, was that the term ‘gender’ should be employed in order to clarify that sex is not simply a biological matter but involves the social construction of roles and power disparities¹²⁶. A definition of the term ‘gender’ was included in article 7, the first place where the term appears, stating: ‘The term “gender” refers to the two sexes, male and female, within the context of society’¹²⁷. Thus, the

¹¹⁸ Preparatory Committee Draft, article 20, note 9.

¹¹⁹ See Zutphen Draft, p. 64, para. 117 (noting support for a proposal stating: ‘The application and interpretation of the general sources of law must be consistent with international human rights standards and the progressive development thereof, which encompasses the prohibition on adverse discrimination of any kind, including discrimination based on gender’).

¹²⁰ The Final Draft Statute contains a footnote stating: ‘It was generally agreed that consistency with internationally recognized human rights would require that interpretation by the Court be consistent with the principle of *nullum crimen sine lege*’. Preparatory Committee Draft, article 20, note 9, para. 63.

¹²¹ Part of the problem appears to have been related to translation – there is no exact translation for ‘gender’ in Arabic. See ‘Gender Dispute Haunts Rome Conference to the End’ (11 July 1998) 1 *On the Record*, issue 18 (Whereas the French and Spanish translation for gender is ‘male and female’, the Arab translation reportedly comes out as a ‘type of sex’).

¹²² Saland, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 189, 216.

¹²³ See, e.g., Proposal Submitted by Guatemala, Option 1, UN Doc. A/CONF.183/C.1/WGAL/L.4 (14 July 1998).

¹²⁴ See Author’s personal notes of debate, Working Group on Applicable Law (13 July 1998) (on file with author).

¹²⁵ Saland, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 189, 216.

¹²⁶ See Author’s personal notes of debate, Working Group on Applicable Law (13 July 1998) (on file with author).

¹²⁷ Rome Statute, article 7 para. 3. For an interpretation of this provision, see the commentary of Ch. K. Hall.

conference ultimately adopted the view that in applying and interpreting the law, the Court should be concerned not only with discrimination based on ‘sex’ but also with any discrimination related to socially constructed roles and power differentials.

51 This provision has the potential to broaden the Court’s powers significantly¹²⁸. As written, the provision applies to all sources of law in article 21. Thus, the Court could, for example, refuse to apply one of the Elements of Crimes or a Rule of Procedure and Evidence, if it found the provision to be inconsistent with the standards in paragraph 3¹²⁹. This paragraph is therefore one of the more important provisions of the Rome Statute. Indeed, Gilbert Bitti argues that the effect of the provision is to make internationally recognized human rights an additional source of law for the Court.¹³⁰

52 The ICC’s jurisprudence references this provision frequently, particularly with respect to the human rights of defendants and victims. Such references have occurred in the context of both interpreting and applying the law. In the Lubanga case, after declining to interpret the statute to include ‘abuse of process’ as a ground of inadmissibility, as discussed above, the Appeals Chamber nonetheless asserted that article 21 paragraph 3 requires the dismissal of any case in which a fair trial has become impossible due to breaches of the rights of the accused.¹³¹ Likewise, the Appeals Chamber has used this provision to interpret provisions of the statute in ways that protect people within the Court’s orbit. For instance, the Appeals Chamber interpreted Rule 81(4), which protects the identities of ‘witnesses, victims and members of their families’ prior to trial, to also include ‘persons at risk on account of the activities of the Court.’¹³² The Chamber cited jurisprudence of the European Court of Human Rights and held, ‘that the circumstances under consideration in the present appeal may give rise to a situation in which the withholding of certain information from the Defence may be necessary so as to preserve the fundamental rights of an individual put at risk by the activities of the ICC.’¹³³

One Trial Chamber has even declined to apply an article of the Statute, citing article 21 paragraph 3, although the decision was overturned on appeal. In the Katanga case, the trial chamber decided not to implement article 93(7)(b)’s requirement that witnesses transferred from state custody be returned when the purpose of the transfer has been fulfilled on the basis that the witnesses had asylum claims pending in the Netherlands.¹³⁴ The Chamber held that transferring them would violate in their human right to apply for asylum.¹³⁵ The Appeals Chamber disagreed, however, asserting that it was up to the Netherlands to determine whether the witness’ asylum claims required the Netherlands to intervene to take control of the witnesses until their claims were adjudicated.¹³⁶ Nonetheless, this decision and others indicate that the judges are willing to use this provision to reach outcomes they believe conform to human rights norms, even if this requires interpreting the Court’s sources of law expansively or even disregarding them entirely.

¹²⁸ See Arsanjani (1999) 93 *AJIL* 22, 29.

¹²⁹ See *id.*

¹³⁰ Bitti, in: Stahn (ed.), *The Law and Practice of the International Criminal Court* (forthcoming 2014).

¹³¹ Lubanga (Appeals Chamber Judgment on Jurisdiction Appeal) note 43, para. 37.

¹³² *Prosecutor v. Katanga*, ICC-01/04-01/07-475 OA, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’, Appeals Chamber, 13 May 2008, para. 57, available at <http://www.legal-tools.org/doc/4042e3/>.

¹³³ *Id.* para. 58.

¹³⁴ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-3003-tENG, Decision on an Amicus Curiae Application and on the ‘Requête Tendante à Obtenir Présentations des Témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux Autorités Néerlandaises aux fins d’asile’ (Articles 68 and 93(7) of the Statute), Trial Chamber II, 9 June 2011, para. 73, available at <http://www.legal-tools.org/doc/e411d5/>.

¹³⁵ *Id.*

¹³⁶ *Prosecutor v. Ngudjolo Chui*, ICC ICC-01/04-02/12-158, Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of Congo concluded pursuant article 93 (7) of the Statute, Appeals Chamber, 20 January 2014, para. 29, available at <http://www.legal-tools.org/doc/d554f7/>.

PART 3
GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Literature: Acquaviva, G., 'At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the *Nullum Crimen* Principle in the Nuremberg Judgment', (2011) 9 *JICJ* 881; Ambos, K., 'General Principles of Criminal Law in the Rome Statute', (1999) 10 *CLF* 1; id., 'Current Issues in International Criminal Law', (2003) 14 *CLF* 225; id., 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism Under International Law?', (2011) 24 *LeidenJIL* 655; Bassiouni, M.C., 'Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind', (1993) 11 *NEP*; id., 'The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications', (1997) 13 *NEP*; Broomhall, B., *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press 2003); Cassese, A., 'Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law: The *Kolk and Kislyiy v. Estonia* Case Before the ECHR', (2006) 4 *JICJ* 410; Catenacci, M., 'The Principle of Legality', in: F. Lattanzi and W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I (il Sirente 1999) 85; Currat, P., 'L'interprétation du Statut de Rome', (2007) 20 *RQDI* 137; Di Filippo, M., 'Terrorist Crimes and International Co-Operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes', (2008) 19 *EJIL* 533; Gallant, K., *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009); Glaser, S., '*Nullum Crimen Sine Lege*', (1942) 24 *JCLIL* 29; Glennon, M., 'The Blank-Prose Crime of Aggression', (2010) 35 *YaleJIL* 71; Henckaerts, J.-M., and Doswald-Beck, L. (eds.), *Customary International Humanitarian Law* (ICRC and Cambridge University Press 2005); Hogg, P.W. and Zwibel, C.F., 'The Rule of Law in the Supreme Court of Canada', (2005) 55 *TorontoLJ* 714; Jeffries, J.C., 'Legality, Vagueness and the Construction of Penal Statutes', (1985) 71 *VirgLRev* 189; Kirsch, S. and Oehmichen, A., 'Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon', (2011) 1 *DurhamLRev* 1; Kreß, C., '*Nulla Poena Nullum Crimen Sine Lege*', in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008-), <<http://www.mpepil.com>>; Lamb, S., '*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law', in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford University Press 2002) 733; Meron, T., 'Revival of Customary Humanitarian Law', (2005) 99 *AJIL* 817; Milanović, M., 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)', (2011) 9 *JICJ* 25; id., 'Aggression and Legality: Custom in Kampala', (2012) 10 *JICJ* 165; Nilsson, J., 'The Principle *Nullum Crimen Sine Lege*', in: O. Olusanya (ed.), *Rethinking International Criminal Law: The Substantive Part* (Europa Law Publishing 2007) 37; Paulus, A., 'Second Thoughts on the Crime of Aggression', (2010) 20 *EJIL* 1117; Robinson, P.H., 'Fair Notice and Fair Adjudication: Two Kinds of Legality', (2005) 154 *UPALRev* 335; Saul, B., 'The Special Tribunal for Lebanon and Terrorism as an International Crime: Reflections on the Judicial Function', (2012) *Legal Studies Research Paper* No. 12/64; Shahabuddeen, M., 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?', (2004) 2 *JICJ* 1007; Triffterer, O., 'Efforts to Recognize and Codify International Crimes (General Report, Part I)', in: *International Crimes and Domestic Criminal Law*, (1989) 60 *RIDP* 29; Van Schaack, B., '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals', (2008-2009) 97 *GeorgetownLJ* 119.

Content

A. Introduction/general remarks	1
I. Historical development	2
II. Purpose.....	9

III. Scope	14
IV. Sources	23
B. Analysis and interpretation of elements	28
I. Paragraph 1	28
1. Criminal responsibility ‘under this Statute’	28
2. ‘conduct in question’	31
3. ‘the time it takes place’	32
4. ‘a crime within the jurisdiction of the Court’	33
II. Paragraph 2	36
1. ‘The definition of a crime shall be strictly construed’	36
2. No extensions by analogy	40
3. Case of ambiguity	46
III. Paragraph 3	49
C. Special remarks	52
I. Relationship between articles 11 para. 1, 22 para. 1 and 24 para. 1	52
II. Application of <i>nullum crimen</i> to treaty crimes	54
III. Aggression and terrorism	59

A. Introduction/general remarks

- 1 Article 22 sets out the application to the Statute of *nullum crimen sine lege* (‘no crime without law’). This maxim, along with that of *nulla poena sine lege* (‘no penalty without law’) reflected in article 23, comprises the principle of legality, a fundamental component of any criminal justice system aspiring to conform to the rule of law.¹ The article sets out the core prohibition of retroactive application of the criminal law, as well as two major corollaries of this prohibition, namely the rule of strict construction (including the forbidding of extension by analogy of the definitions of crimes) and the requirement that ambiguities be construed in favour of the suspect or accused.

I. Historical development

- 2 The 1994 Draft Statute of the International Law Commission² applied the *nullum crimen* principle so as to reflect that Draft’s proposed jurisdictional distinction between crimes under general international law and treaty crimes. With respect to the latter, see mns 54–58. With respect to the former, article 39 (a) provided that an accused would not be held guilty of genocide, aggression, serious violations of the laws and customs applicable in armed conflict or crimes against humanity unless the act or omission in question constituted a crime under international law at the time it occurred. It therefore does no more than apply the prohibition against retrospective application of the criminal law. Provided the conduct was criminal under international law at the time of its occurrence, the ICC would be able to exercise jurisdiction, even where national courts, because of a failure to incorporate the relevant prohibitions into national law³ or because of national laws contrary to them, could not.
- 3 As a constraint on law-making, the principle of legality was relied upon by those seeking to have the crimes within the jurisdiction of the Court defined expressly in the Statute, rather than leaving the Court to interpret general international law. The rationale was that general international law might not set out the elements of the offences with sufficient precision, particularly where the crime in question was not defined by treaty (as with aggression).⁴ The

¹ Cf. Ambos, *Treatise ICL I* (2013), pp. 88 *et seq.*

² International Law Commission, ‘Draft Statute for an International Criminal Court’, in: *Report of the International Law Commission on the Work of its Forty-Sixth Session*, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994), 43, p. 112; reprinted in: Bassiouni, *Compilation* (1998) 721, 734. Bassiouni omits the ILC’s running commentary to its Draft Statute.

³ Commentary to article 39, ILC Draft, note 1, paras. 2 and 4, pp. 113–114.

⁴ That international law does in fact meet *nullum crimen* standards has often been asserted, and incorporation by reference of definitions under international law (as proposed in the ILC Draft), has been allowed under

result was a move towards the vision, finally affirmed in the Rome Statute, of a Court of which the subject-matter jurisdiction is exhaustively defined in its constitutive instrument. Motivated in part by legitimate uncertainty as to customary international law's definitions of the offences in question, the move also resulted from the awareness of governments that they were designing an institution which could possibly bring indictments against even their highest-ranking officials. This awareness put a premium on the clear delimitation of the Court's jurisdiction.

Responding to such pressures, the ILC replaced its earlier proposal to define the Court's jurisdiction by reference to 'crimes under general international law'⁵ with a list specifying four such crimes (as well as treaty crimes).⁶ Despite acceding to Sixth Committee criticisms on this point, the ILC maintained that the Statute should be primarily adjectival and procedural, and was not intended to codify or define crimes.⁷

Thus, the Court would determine the exact contents of the listed prohibitions by resorting to the relevant sources of international law. Concerns about this approach were raised in the 1995 Ad Hoc Committee, where the view was expressed that the principle of legality required the definition and not merely the enumeration of crimes, and indeed that it required definitions of general principles, defences and the applicable procedural and evidentiary law as well.⁸ At the 1996 Preparatory Committee, there was widespread agreement that 'the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*)' and that the fundamental principles of criminal law and the 'general and most important rules of procedure and evidence' should be clearly set out in the Statute for the same reason.⁹

The 1996 Preparatory Committee text contained three proposals. The first changed little of the content of the ILC Draft,¹⁰ but introduced the precursor to present article 22 para. 3 and a stipulation that the more lenient law would apply in case of an amendment between the commission of the offence and final judgment. It also introduced the requirement that any commission of a 'core' crime occur after the entry into force of the Statute. The second and third proposals also contained this latter requirement.¹¹ The second proposal contained a further prohibition on the use of analogy in construing punishable conduct or imposing sanctions.

With the moving of the provisions on jurisdiction *ratione temporis* into a separate provision, the February 1997 Preparatory Committee text reflected a modified version of the first 1996 proposal, with a two-pronged paragraph on non-retroactivity of 'core' crimes and treaty crimes, a bracketed paragraph prohibiting analogy and a precursor to article 22 para. 3.¹² This version, the basis for the present article, appeared without significant changes in the text

both national and international law: see Paust, in: Bassiouni, *Observations* (1997) 275, 275-276 and 282-288; also *mn* 15.

⁵ For the previous Draft to emerge from the ILC, see 'Report of the Working Group on the Draft Statute for an International Criminal Court', Annex to *Report of the International Law Commission on the Work of its Forty-Fifth Session*, UN GAOR, 48th Sess., Supp. No. 10, UN Doc. A/48/10 (1993), reprinted in: 33 *ILM* 256 (1994).

⁶ 1994 ILC Report, note 1, para. 60, p. 36; Commentary to ILC Draft, note 1, paras.5-6, 66-67 and para. 1, p. 71.

⁷ Commentary to article 20, ILC Draft, note 1, para. 4, p. 71.

⁸ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), paras. 52 and 57, pp.10 and 12; reprinted in: Bassiouni, *Compilation* (1998) 667, 677 and 678.

⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996), 2 Vols., paras. 52, 180 and 185, pp. 16, 41 and 42 (Vol. I), reprinted in: Bassiouni, *Compilation* (1998) 363, 383-384 and 408-409. For contemporary commentary, see Wise, in: Bassiouni, *Observations* (1997) 267. The extent to which the principle of *nullum crimen* would require such a codification of the general part is controversial.

¹⁰ 'Article A' of Part 3bis of the 1996 Preparatory Committee Report was compiled by an informal group and did not represent a text agreed by delegates: *ibid.*, Vol. 2, p. 79; Bassiouni, *Compilation* (1998), 500.

¹¹ The third proposal was the precursor of current article 11 (Jurisdiction *ratione temporis*).

¹² Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5 (1997), article A (*Nullum crimen*) and article *Abis* (Jurisdiction *ratione temporis*, as it was to

prepared at the inter-sessional Zutphen meeting in January 1998.¹³ The same wording appeared with insubstantial changes in the final Preparatory Committee Draft which was placed before the Diplomatic Conference.¹⁴

- 8 At the Diplomatic Conference, the basic structure devised for article 22 by the Preparatory Committee underwent little change. The suggested text of Per Saland, Chair of the Working Group on General Principles of Criminal Law,¹⁵ added to the prohibition on analogy in the second paragraph the requirement of strict construction and disallowed the proscription of conduct not clearly prohibited by the Statute.¹⁶ A note pointed out that the principle of legality would apply equally to all crimes within the jurisdiction of the Court, including crimes against the integrity of justice.¹⁷ The Working Group report which followed¹⁸ incorporated the strict construction requirement and, with the changes made by the Drafting Committee subsequently,¹⁹ resulted in the wording of the Bureau's Draft Statute²⁰ and finally of the adopted text. The Working Group, Drafting Committee and Bureau versions reflected the growing sense that treaty crimes would not be included in the initial Statute, and so omitted provision for them.

II. Purpose

- 9 The principle of legality reinforces a legal system's legitimacy by limiting the interventions of the criminal justice process to those which have been clearly prescribed by law in advance. It assumes a rational, autonomous legal subject and a known or knowable law. It posits that the deterrent effect of the law, which is its power to influence the decision-making of individuals in a socially constructive way, arises from its rational and knowable character. Where legal subjects make choices relying on the apparent sense of the law, and nonetheless find themselves tried and convicted, the law has effectively been applied *ex post facto* to them, and the administration of justice is accordingly brought into disrepute.²¹ A system supporting retroactivity and vagueness in definition lends increasing discretion to the judiciary and (in national systems) the police. In its extreme form, neglect of this principle coincides with an abandonment of the rule of law and is a characteristic of unfettered authoritarianism.²²
- 10 The principle plays a 'constitutional' role in maintaining the separation of powers as well. As a principle of legislation, *nullum crimen sine lege* constrains lawmakers to set out their intentions clearly and in advance of the conduct over which they wish the courts to exercise jurisdiction.²³ It thereby seeks to protect the subjects of the law from indeterminate executive

become known); Bassiouni, *Compilation* (1998) 343, 355. Article *Abis* included the proposal to apply the more lenient version in the event of amendment.

¹³ Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13 (1998), article 15[A], p. 51; reprinted in: Bassiouni, *Compilation* (1998) 143, 173.

¹⁴ Draft Statute for the International Criminal Court, Part 1 of the Addendum to the Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (1998), article 21, p. 57; reprinted in: Bassiouni, *Compilation* (1998) 7, 39.

¹⁵ Chairman's suggestions for articles 21, 26 and 28, UN Doc. A/CONF.183/C.1/WG.GP/L.1 (15 June 1998).

¹⁶ This stipulation was dropped, presumably as being superfluous, from subsequent versions.

¹⁷ Article 22 does not apply to article 70 (Offences against the administration of justice) as such: see mn 34–35.

¹⁸ Report of the Working Group on General Principles of Criminal Law, UN Doc. A/CONF.183/C.1/WGGP/L.4 (18 June 1998), article 21, p. 2.

¹⁹ Draft report of the Drafting Committee to the Committee of the Whole, UN Doc. A/CONF.183/C.1/L.65/Rev.1 (14 July 1998), article 21, p. 1.

²⁰ Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/C.1/L.76/Add.3 (16 July 1998), p. 1.

²¹ See the discussion in Ashworth and Horder, *Principles* (2013) 57–61 and in Jeffries (1985) 71 *VirgLR* 189, 205–210.

²² See Bassiouni, *Crimes* (2011) 320–322, for a description of how the National Socialist government reversed Germany's traditional affirmation of the principles of legality.

²³ This constraint is constitutionally enforced in some jurisdictions, such as the United States and Canada, where judges are empowered to strike down legislation for vagueness and retroactivity: see Hogg and Zwibel (2005) 55 *TorontoLJ* 714, 722–723; Robison (1995) 154 *UPALRev* 335, 356–359.

interference. The principle reflected in article 22 of the Statute reminds States Parties of the need for care in drafting amendments or additions to the crimes within the jurisdiction of the Court, as the Court will have only such scope of jurisdiction as the reasonably ascertainable and non-retroactive meaning of the words defining it (on the crime of aggression, see mn 60).

As a principle of interpretation, *nullum crimen* aims to limit the power of the (unelected) judiciary to interfere with liberty beyond the extent that a reasonable individual could understand from the words of the relevant prohibition. Just as legal subjects are presumed capable of knowing and have a duty to obey the law, so too is the lawmaker responsible for making the law clear and ascertainable, while the judiciary is obliged in principle to refrain from penalizing conduct not made criminal by the legislator through the wording of the law in question,²⁴ and is thus confined to interpreting and applying, but not making the law.²⁵

In the case of the ICC, the principle aims to provide certainty to both individuals and States. Individuals face the possibility of prosecution only with respect to the crimes which States Parties have clearly and exhaustively provided for in the Statute. For their part, States Parties are under an obligation to cooperate with the Court and to surrender jurisdiction to it in accordance with the complementarity provisions only in clearly delineated statutory circumstances. This is not because the provisions relating to the obligation to cooperate (for example) are subject to the rule of strict construction (mns 36–39), but because such provisions will only come into play when crimes within the jurisdiction of the Court, which are so subject, are being addressed. It was largely because of this ability to clarify and to limit the obligations of States, and because of the likelihood that many defendants will be State agents, that the principle of legality was incorporated into the Statute as explicitly as it was during negotiations.

The principle derives in part from a consciousness of the serious consequences for the accused that may flow from the criminal justice process, and therefore of the need to protect relatively powerless individuals from the interference of State (or inter-State) legal machinery.²⁶ In international law, the principle adds to this the certainty it provides to States as to the extent of the obligations they have undertaken.

III. Scope

The principle of *nullum crimen sine lege* as it exists under general international law can be distinguished from its manifestation in article 22 of the Statute.

As to the former (mn 25–27), *nullum crimen sine lege* has long been recognized as a principle of international law, and has had considerable influence on the process leading up to the adoption of the Rome Statute (see mn 2–8 and 27).²⁷ As a principle of general international law, *nullum crimen* is frequently referred to in asserting that a given form of conduct does or does not give rise to the criminal responsibility of individuals under international law. Such reference has been made notably in the jurisprudence of the ICTY and of the Special Court for Sierra Leone.²⁸ In this role, the principle is adapted to the

²⁴ See Ashworth and Horder, *Principles* (2013) 58 and Wise, in: Bassiouni, *Observations* (1997) 267, 272. The line between the ‘legislative’ and the ‘judicial’ is a matter of judgement and is never fixed however: Jeffries (1985) 71 *VirgLR* 189, 189 and 202–205.

²⁵ Ashworth and Horder, *Principles* (2013) 69.

²⁶ The same policy motivation pertains to the presumption of innocence and the standard of proof beyond a reasonable doubt: Ashworth and Horder, *Principles* (2013) 71.

²⁷ For a summary history of the development of the principle at international law, see Lamb, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 733, 735–742; see also Cassese, *International Criminal Law* (2013) 22–36.

²⁸ In the context of the ICTY, ‘...the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law....’: Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (3 May 1993), para. 34. The ICTY has examined the customary basis of various crimes cases that include *Prosecutor v. Duško Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal

particular means of establishing norms under international law, determining the existence (or non-existence) of crimes by reference to treaties, declarations, jurisprudence and other indicia of State practice and *opinio juris*, rather than simply by reference to legislative acts, as typically suffices at the national level. The principle is broader and considerably more tolerant of imprecision under general international law than it is under the Rome Statute and, *a fortiori*, under national law.²⁹ Professor Bassiouni asserts that it encompasses a broader allowance for prohibitions by analogy than do most domestic systems and is, in general, less rigid than its article 22 manifestation.³⁰ The reasons for this comparative breadth of the international principle lie both in the nature of international law, and in the fundamental interests being protected by international criminalization – namely, the protection of international peace and security and the affirmation of ‘the collective conscience of mankind’ – that require a different balance to be struck between substantive justice and the demands of legality at the international level.³¹ Thus, while continental jurists have a tendency to speak of the requirement that the law (usually meaning national law) be foreseeable (*lex praevia*), precise (*lex stricta*) and set down in writing (*lex scripta*),³² care must be taken to apply this articulation of the principle only *mutatis mutandis* to the Rome Statute and to general international law, where each of these requirements may be satisfied only in a comparatively broad sense.³³

- 16 Furthermore, to ensure the effective safeguard of these interests, the *nullum crimen* principle permits the prosecution of the acts of individuals regardless of whether national

on Jurisdiction, Appeals Chamber, 2 October 1995; *Prosecutor v. Zejnil Delalić et al.*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001; and *Prosecutor v. Enver Hadžihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003. For the Sierra Leone Special Court, see *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14-AR72, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child recruitment), Appeals Chamber, 31 May 2004; *Prosecutor v. Brima*, SCSL-2004-16-A, Judgment, Appeals Chamber, 22 February 2008, paras. 197–198 (determining forced marriage as the crime against humanity of ‘other inhumane acts’). For a discussion of the methods applied in assessing customary law in the jurisprudence of the ICTY, see Lamb, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 733,742–746; Nilsson, in: Olusanya (ed.), *Rethinking* (2007) 37; Meron (2005) 99 *AJIL* 817.

²⁹ ‘International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the events. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth’: *Prosecutor v. Milan Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, 21 May 2003, para. 39, quoting *United States of America v. Altstötter et al.*, Trials of War Criminals Before The Nuremberg Tribunals Under Control Council Law No. 10, vol. III (‘the Justice case’), 974–975.

³⁰ [‘International criminal law’] as it is now, and certainly as it was in 1945, requires the existence of a legal prohibition arising under conventional or customary international law, which is deemed to have primacy over national law and which defines certain conduct as criminal, punishable or prosecutable, or violative of international law. This minimum standard of legality has permitted the resort to the rule *ejusdem generis* [‘permitting analogy’] with respect to analogous conduct, as well as permits the application of penalties by analogy...’: Bassiouni, *Crimes* (2011) 306.

³¹ Cassese, *International Criminal Law* (2013) 24–27. See also Broomhall, *International Justice and the International Criminal Court* (2003) 9–62. As Bassiouni has stated, ‘... the principles of legality in [international criminal law] ... are necessarily *sui generis*, because they must balance between the preservation of justice and fairness for the accused and the preservation of world order, taking into account the nature of international law, the absence of international legislative policies and standards, the *ad hoc* processes of technical drafting, and the basic assumption that [international criminal law] norms will be embodied into the national criminal law of the various states’: *Crimes* (2011) 304–305. Outside of the ICC regime, this state of affairs cannot be expected to change very quickly.

³² Ambos (1999) 10 *CLF* 1, 4; id. (2003) 14 *CLF* 225, 229–233; Cassese, *International Criminal Law* (2013) 23. See note 38 for the reference made to these terms in the confirmation of charges decision by Pre-Trial Chamber I in the case against Thomas Lubanga before the ICC.

³³ For example, Ambos discusses the application of the civil law-derived fourth element of ‘*lex certa*’ to Article 22 in a supple manner, notably because of the relative imprecision of certain crimes (e.g. ‘widespread, long term and severe damage’ to the environment (Article 8(2)(iv)): *Treatise* (2013), 92.

law required, permitted, or was silent as to the relevant conduct. Any objection based on prior legality or on the fact that national law did not prohibit the international crime in question at the time it was committed can only be the result of misunderstanding the principle's proper scope.³⁴ The international criminal law that has pertained to the 'core crimes' from the Charter and Judgment of the Nuremberg Tribunal through the Rome Statute and up to the present is based on the principle that individual responsibility arises directly under international law. As such, the international principle of *nullum crimen*,³⁵ at least with respect to these crimes, does not require prohibition by national law. To allow otherwise would allow States to legislate their own agents out of their international responsibilities – something that the international community has deemed to be intolerable ever since Nuremberg.

Regarding the Statute's manifestation of the *nullum crimen* principle, article 22 is of limited application, and its scope is to be determined above all by reference to its wording. The article requires that conduct under consideration by the Court come within the definition of 'crimes within the jurisdiction of the Court' (mns 33) as interpreted narrowly in light of the corollary principles listed in article 22 (strict construction and the prohibition of extension by analogy),³⁶ and in principle bars a finding of criminal responsibility if it does not (mns 28). It does not apply to the rest of the Statute (e.g. to offences against the administration of justice, mns 34–35, or to article 87 para. 7 findings of non-cooperation), nor does it apply to the definition of crimes under international law outside the Statute (article 22 para. 3, mns 49–51). It should be noted, however, that the broader *nullum crimen* principle as it exists under general international law (mns 15–16) may come to bear before the ICC, as part of its applicable law defined by article 21, for purposes of interpreting other parts of the Statute (offences against the administration of justice, notably).³⁷

Like its counterpart under general international law, article 22 does not require that conduct be defined as criminal under the *national* law of any given State in order to give rise to criminal responsibility before the Court. Such a requirement would make the Court hostage to the legislative (in-)activity of States Parties, contrary to the fundamental conception of the ICC as a 'jurisdiction of last resort' in cases where States are ineffective.

Regarding the customary international law status of 'crimes within the jurisdiction of the Court', the situation is more complex. On the one hand, article 22 para. 1, in requiring that a given crime be within the jurisdiction of the Court, does not require that the Court determine that the crime in question gave rise to individual responsibility as a matter of customary international law at the time of its alleged commission, nor is any such duty imposed elsewhere in the Statute. On its face, article 22 requires only simple inclusion of a given crime in the Statute and the finding of temporal and other requisite aspects of jurisdiction. Indeed, Pre-Trial Chamber I, in its decision confirming the charges against Thomas Lubanga, found that the principle of legality was satisfied by the way in which the relevant crimes were included in the Statute.³⁸ Thus, one might anticipate that the ICC would not need to build on

³⁴ See Triffterer (1989) 60 *RIDP* 29, 60 for statements to the effect that national prohibition is required even with respect to 'core' international crimes in order for *nullum crimen* to be satisfied.

³⁵ On the application of the international principle of *nullum crimen* to any 'treaty crimes' incorporated into the Statute in future, see mn 54–58.

³⁶ Each of these corollaries is in turn subject to limited application (mn 36 *et seq.* and 40 *et seq.*).

³⁷ It has also been argued that international law allows criminalization of individual conduct by analogy in broader circumstances than does national law: Bassiouni, *Crimes* (2011) 306. This could affect the application of *nullum crimen* as a principle of international law outside the scope of the Statute where it comes into play in accordance with article 21 (Applicable law) (see mn 50 *et seq.*).

³⁸ 'Having regard to the principle of legality, the terms enlisting, conscripting and using children under the age of fifteen years to participate actively in hostilities are defined with sufficient particularity in articles 8(2)(b)(xxvi) and 8(2)(e)(vii), 22 to 24 and 77 of the Rome Statute and the Elements of Crimes, which entered into force 1 July 2002, as entailing criminal responsibility and punishable as criminal offences. ... Accordingly, there is no infringement of the principle of legality if the Chamber exercises its power to decide whether Thomas Lubanga Dyllo ought to be committed for trial on the basis of written (*lex scripta*), pre-existing criminal norms approved by States Parties to the Rome Statute (*lex praevia*), defining prohibited conduct and setting out the related

the jurisprudence developed in other international and hybrid courts and tribunals since the seminal 1995 *Tadić* decision.³⁹

- 20 Such a conclusion would be misleading, however. First, the need to determine the customary law basis for the crimes contained in the Rome Statute might arguably be derived from the ‘treaty crime’/‘core crime’ distinction (mns 54–58) that led to the exclusion of the former from the Statute. The Statute was confined to the latter on the assumption that these would already be applicable to the accused, i.e. on the basis of custom. Moreover, as a matter of fairness, the need to determine the customary nature of Rome Statute crimes would arise where the Court was called upon to exercise its jurisdiction over crimes allegedly committed on the territory and by the nationals of non-States Parties, in the case either of a Security Council referral under article 13 para. b, or of an *ad hoc* acceptance of ICC jurisdiction under article 12 para. 3. In such scenarios, the only legitimate basis for establishing the criminal responsibility of individuals would presumably – in the absence of relevant national criminal prohibitions at the time of the alleged conduct – be that of customary law. In future, therefore, the Court may well consider the customary law nature of Statute crimes in such cases.⁴⁰ In so doing, the Court will presumably begin by reviewing the criteria developed for such an examination, most influentially by the International Criminal Tribunal for the Former Yugoslavia.⁴¹ While the Statute does not expressly require this, the interests of justice, the human rights of the accused and the reputation of the Court all arguably rely upon it.
- 21 It is noteworthy that, while the *nullum crimen* principle under general international law is normally understood to include an element of notice (permitting an accused to have real or constructive knowledge that certain conduct was prohibited before the act alleged against him or her was committed) it appears that in the context of the Rome Statute this notice will arise under the separate provision on error of law (article 32).⁴²
- 22 Finally, given that *nullum crimen* acts as a principle of legislation as well as of interpretation (mn 10–11), it may be interesting to note that the Court is not given the power to strike down crimes of indeterminate scope. There is no ‘void for vagueness’ doctrine in the ICC. The absence of such a remedy for vagueness is presumably the result of both the general tendency towards limiting rather than expanding the power of the ICC judges *vis-à-vis* States Parties, and the feeling that States Parties as legislators could be trusted to delineate clearly the crimes which might ultimately be charged against their own agents.⁴³ The latter feeling is

sentence (*lex certa*), which cannot be interpreted by analogy in *malam partem* (*lex stricta*)’, *Prosecutor v. Lubanga Dyilo*, No. ICC-01/04-01/06, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, paras. 302–303, citing Ambos, in: Haveman and Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law* (2006) 17–22.

³⁹ See the sources at note 28.

⁴⁰ Indeed, while the Lubanga confirmation of charges decision relied primarily on inclusion of a sufficiently clear definition of the relevant crime within the Statute, it also went on to demonstrate that the relevant prohibition had emerged as a matter of international customary and treaty law before the alleged crimes of the accused had taken place: note 38, paras. 308–311. See also Schabas, *Introduction* (2011), 73–74; Meron (2005) 99 *AJIL* 817, 832; and in particular, Milanović (2011) 9 *JICJ* 25, 36–38.

⁴¹ The Appeals Chamber of the ICTY held that, in order for an offence to become subject to prosecution under article 3 of its Statute (Violations of the laws and customs of war), the following conditions had to be fulfilled: ‘(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met ...; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. ...; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule’: *Tadić*, note 28, para. 94. This formulation remains the starting point for subsequent discussions, with the fourth criterion being determinative. In *Tadić*, the Appeals Chamber analysed the latter by looking at ‘State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals’: *ibid.*, para. 128 *et seq.* On the relationship between international treaty norms and individual criminal responsibility, see mn 54–58.

⁴² Lubanga (Confirmation of Charges), note 36, paras. 294–316.

⁴³ As one commentator has pointed out, this state of affairs has not prevented international judges from stepping in, as a matter of fact, to ‘legislate’ through gap-filling in the face of unclear norms: Van Schaack (2008–2009) 97 *GLJ* 199, 137, fn. 73 (discussing the first edition of this commentary).

given weight by the exhaustive attention paid to definitions during negotiations – a product, in large measure, of *nullum crimen* arguments (see mns 2–8). Proper judicial application of article 22 para. 2 should ensure, in any case, that vagueness is substantially reduced.

IV. Sources

As with most criminal law doctrine, the principle of legality and its corollaries originated 23 in domestic law. Its lineage can be traced back to Roman law, although in its modern manifestation it is a product of the Enlightenment. Its entrenchment as a cornerstone of national law took place over the course of the late 18th and 19th centuries.⁴⁴ By the start of the First World War, it was recognized in the legal systems of all developed countries and their dependent territories, although not always in the same way.

In particular, there was a major difference between common law jurisdictions – in particular 24 the United Kingdom – and Civil Code-based systems. For the former, the rule against retroactivity was a presumption which could be refuted by clear statutory wording. In the latter, the principle was more firmly adhered to. In the former, crimes could be developed by analogy as part of the gradual development of the law, while in the latter, such development was strictly limited to minor infractions. Its Constitution made the United States an exception among the common law systems, since retroactivity was constitutionally prohibited.⁴⁵

The movement from being a principle primarily of national law to being one clearly and 25 firmly entrenched in international law was a product of the Second World War and its aftermath. Between the wars, the principle was retreated from in some jurisdictions as totalitarian governments sought to extend the powers of a politicized judiciary by recognizing broad powers to criminalize by analogy.⁴⁶ The Nuremberg Tribunal, however, rejected defence arguments that ‘there can be no punishment of crime without a pre-existing law,’ holding that ‘the maxim *nullum crimen sine lege* is not a limitation on sovereignty [i.e. a binding rule of international law], but is in general a principle of justice,’ even as it justified its own proceedings on the basis that the defendants ‘should have known’ that they would be held accountable for their role in serious violations of international law.⁴⁷ Against this background, the War’s end led to the recognition of the principle of legality in the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950) and, later, in the International Covenant of Civil and Political Rights (1966) as well as other instruments.

Article 15 para. 1 of the ICCPR recognizes *nullum crimen* in its usual form as protecting 26 against retroactivity, and echoes article 11 para. 2 of the UDHR.⁴⁸ Article 15 para. 2 emphasizes that absence of criminal prohibition under national law is no bar to prosecution for conduct

⁴⁴ ‘Although there may have been ancient antecedents, the categorical insistence on advance legislative crime definition is clearly a modern phenomenon. In fact, the legality ideal is an explicit and self-conscious rejection of the historic methodology of the common law’: Jeffries (1985) 71 *VirgLR* 189, 190. For the development, see also Glaser (1942) 24 *JCLIL* 29, and Triffterer, *Untersuchungen* (1966) 35 *et seq.* with further references.

⁴⁵ See generally Bassiouni, *Crimes* (2011) 296–301; Krefß, in: Wolfrum (ed.), *Max Planck Encyclopedia* (2008-) para. 12.

⁴⁶ See Glaser (1942) 24 *JCLIL* 29, 32–33; Krefß, in: Wolfrum (ed.), *Max Planck Encyclopedia* (2008-) paras. 13–14.

⁴⁷ International Military Tribunal (Nuremberg), *Judgment* (1 October 1946), reprinted in (1947) 41 *AJIL* 172, 217 *et seq.* For analysis of this passage and the Nuremberg Tribunal’s approach to questions of non-retroactive punishment, see Van Schaack (2008–2009) 97 *GLJ* 199, 125–130; as well as Acquaviva (2011) 9 *JICJ* 881, who argues that the French version of the Nuremberg Judgment affirms, or comes close to affirming, *nullum crimen* as an international legal rule.

⁴⁸ The first sentence of ICCPR article 15 para. 1 reads: ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, *under national or international law*, at the time when it was committed [emphasis added]’. But for using the word ‘penal’ instead of ‘criminal’, article 11 para. 2 of the UDHR is the same.

criminal under international law at the time of its commission.⁴⁹ Regional human rights instruments are similar in formulation to the ICCPR and UDHR,⁵⁰ with the European system providing the most elaborate jurisprudence.⁵¹ This stems from complaints related to the application of national criminal-law prohibitions and, like its ICTY counterpart,⁵² rests upon the fundamental requirements of the accessibility and reasonable foreseeability of the prohibitions in question.⁵³

- 27 When *nullum crimen* was brought to bear as a principle of legislation upon the processes of both the Preparatory Committee and Diplomatic Conference (mns 2–8), it offered negotiating States a means both of limiting exposure to the obligations imposed by the Statute and of fostering codification and development of the law, encouraging clear stipulation of procedural detail, exhaustive definitions of crimes, movement of general principles from the proposed Rules to the Statute, and much else.⁵⁴ This function of the principle was merely a continuation of its role in driving efforts to codify international criminal law through the work of the International Law Commission from 1946 onwards.⁵⁵ It similarly reflected a desire to forestall any repetition of the criticisms aimed at the Nuremberg Tribunal, which had already been taken into account in the establishment of the ICTY and ICTR.⁵⁶

⁴⁹ Article 15 para. 2 reads: ‘Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations’.

⁵⁰ The ACHR, article 9, reads in part: ‘No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed’. Article 7(2) of the African Charter of Human and Peoples’ Rights reads in turn: ‘No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed’.

⁵¹ ECHR, article 7 para. 1: ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed...’. Article 7 para 2 is substantially the same as article 15 para. 2 of the ICCPR, note 49. For the jurisprudence, see in particular European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Judgment (18 July 2013), application nos. 2312/08 and 34179/08, paras.65–76; European Court of Human Rights, *Kononov v. Latvia*, Judgment (17 May 2010), application no. 36376/04, paras.185–246; European Court of Human Rights, *Streletz, Kessler and Krenz v. Germany*, Judgment (22 March 2001), application nos.34044/96, 35532/97 and 44801/98, paras.49–107; European Court of Human Rights, *C.R. v. the United Kingdom*, Judgment (22 November 1995), Ser. A 335-C (1995), para. 34.

⁵² ‘The Tribunal ... must be satisfied that the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the heading of responsibility selected by the Prosecution’: *Milutinović et al.*, Decision on Dragoljub Ojdanić’s Motion, note 28, para. 37.

⁵³ For a concise discussion of the European jurisprudence from the point of view specifically of the ‘precision’ factor, with comparison to the case law of the ICTY, see Nilsson, in: Olusanya (ed.), *Rethinking* (2007) 37; for a discussion of the European Court’s approach to article 7 para. 2 of the ECHR and the allegedly retroactive prosecution of international crimes, see Cassese (2006) 4 *JICJ* 410; see also Schabas, *The International Criminal Court* (2010) 403.

⁵⁴ Wise, in: Bassiouni, *Observations* (1997) 267, 271, concedes that *nullum crimen* may not require the definition of general principles in addition to those of crimes, but arrives at the same effect by speaking of more general ‘requirements of precision and certainty expected in criminal proceedings’. Criminal prohibitions under general international law have often been declared sufficiently precise and their incorporation by mere reference into national law satisfactory for purposes of the *nullum crimen* principle: see Paust, in: Bassiouni, *Observations* (1997) 275, esp. 275–276 and 282–288. Article 22 para. 3 (mn 49–50) makes clear that the Statute will not affect such prohibitions (which will continue to apply, notably, to the agents of non-States Parties).

⁵⁵ Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996), paras. 30–46, pp. 9–13. For the ICC process to 1996 in this context, see Wise, in: Bassiouni, *Observations* (1997) 267. For views from a wide range of countries on codification efforts as they stood at the time, see generally Triffterer (1989) 60 *RIDP* 29.

⁵⁶ See Morris and Scharf, *Insider’s Guide* (1995) 39–42 and esp. 124–132, demonstrating that the ICTY Statute, being based on acknowledged customary law, satisfied the *nullum crimen* principle at the time of its establishment, and that the ICTR Statute, although initially less certain, soon did no more than reflect such custom.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Criminal responsibility ‘under this Statute’

This clause indicates the consequences that will flow from a finding that any given conduct did not constitute, at the time it took place, a crime within the jurisdiction of the Court. Such a finding would prevent conviction by acting as a bar to the imposition of criminal responsibility as defined in article 25, whether after an admission of guilt under article 65 or following a full trial, as provided for in Part 6. 28

Although article 22 para. 1 makes criminal responsibility the reference point with respect to the rule of non-retroactivity, objections based on the *nullum crimen* principle will in the normal course of events first be raised long before the conviction stage. The majority of article 22 para. 1 challenges are likely to be brought when the jurisdiction of the Court is being decided, either in challenges under article 19 or during hearings for the confirmation of charges under article 61.⁵⁷ 29

As for article 70 (Offences against the administration of justice), see mns 34–35. 30

2. ‘conduct in question’

‘Conduct’ may include both acts and omissions, as appropriate. An example of the latter can be found in article 28 para. 1 on command responsibility. Conduct will ‘constitute’ a crime when it comprises all the necessary elements of the crime, including the mental element under article 30. 31

3. ‘the time it takes place’

This stipulation requires that the Court determine that the conduct and the relevant prohibition (‘a crime within the jurisdiction of the Court’) existed simultaneously. In the case of crimes arising from a continuing course of conduct, it will have to be shown that all the elements of the crime were present during the period in which the prohibition applied. 32

4. ‘a crime within the jurisdiction of the Court’

A ‘crime within the jurisdiction of the Court’ is a crime listed in article 5, defined in articles 6–8 respectively (and to include article *8bis* on the crime of aggression, once this enters into force), as interpreted in accordance notably with article 22 para. 2, article 9 (Elements of crime) and article 30 (Mental element).⁵⁸ The word ‘jurisdiction’ in the heading to article 5, is to be understood in its full sense as encompassing all articles that the Court would consider in making a jurisdictional ruling under article 19, including articles 10–13, 22, 24 and others (such a ruling might also include a determination as to whether given 33

⁵⁷ As was done in the Lubanga case: Lubanga, (Confirmation of Charges), note 36, paras. 290–216.

⁵⁸ Pre-Trial Chamber I has held that the Elements ‘[further] the *nullum crimen sine lege* principle ... by providing a *a priori* legal certainty on the content of the definition of the crimes provided for in the Statute’: *Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 131. Pre-Trial Chamber II has specified that its restrictive interpretation of article 30 – excluding ‘*dolus eventualis*, recklessness or any lower form of culpability’ from its scope – ‘aims to ensure that any interpretation given to the definition of crimes is in harmony with the rule of strict construction set out in article 22(2) of the Statute’ *Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute of the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 369.

charges constituted crimes under customary international law at the time of their alleged commission, mn 19–20).

- 34 A question arises whether article 22 applies only to crimes under article 5, or whether it encompasses offences against the administration of justice under article 70. The use of the words ‘criminally responsible’ and ‘crime’ in article 22 para. 1 makes clear that it includes only crimes under article 5. ‘Criminal responsibility’ is treated in article 25, where it expressly applies to ‘crimes within the jurisdiction of the Court’. A ‘crime’ in this sense is one of those prohibited acts listed under article 5 (Crimes within the jurisdiction of the Court) and defined in articles 6–8 as well as *8bis* once it enters into force. The acts under article 70 (Offences against the administration of justice) are distinguished as ‘offences’ rather than ‘crimes’. Article 22 is therefore applicable by its own terms only to the crimes listed under article 5.
- 35 The non-applicability of article 22 to the offences against the administration of justice listed in article 70 should not be understood to imply that the Court will allow itself considerably greater latitude in interpreting these offences than it does with the crimes under article 5. As a principle of general international law (mn 15–16), *nullum crimen* applies to the article 70 offences by virtue of article 21 (applicable law). Moreover, the aims of justice served by the principle of legality (see mn 9–13) are just as applicable to situations involving such offences. As such, it is to be expected that the ICC judiciary will apply the more supple *nullum crimen* rule under general international law to proceedings under article 70 as well.

II. Paragraph 2

1. ‘The definition of a crime shall be strictly construed’

- 36 The requirement of strict construction of criminal statutes is said to form part of the *nullum crimen* principle. To that extent, its express inclusion here simply reassures States as to the moderation with which the Court will interpret its Statute.
- 37 The rule of strict construction aims to protect the person subject to investigation or prosecution by ensuring that the potential of infringing their liberty is restricted to legislatively and not to judicially defined crimes (see mns 10–11).
- 38 However, the formulation and status of the rule in common law jurisdictions is not free from uncertainty, and it has been irregularly applied.⁵⁹ Like the principle requiring the resolution of ambiguities in favour of the defence (see mns 46–48), which is sometimes treated as a part of the rule of strict construction, the rule is based on notions of fair warning to the subjects of potential criminal sanction and on an awareness of the inequality of power between the individual and (under municipal law) the State.⁶⁰ Strict construction does not, however, stand in the way of progressive judicial clarification of the contents of an offence.⁶¹
- 39 This paragraph applies only to the definitions of crimes in articles 6–8 (and *8bis*, once it enters into force). The judges of the Court will therefore be entitled in other instances to apply more liberal methods of construction in giving effect to the object and purpose of the Statute. It should be noted, however, that the absence of a rule of strict construction applicable to the grounds for excluding criminal responsibility under article 31 does not mandate a boundless ‘liberal’ approach that would render admissible defences excluded by

⁵⁹ The rule is said to be applied in confirmation of decisions reached on other grounds: Jeffries (1985) 71 *VirgLR* 189, 198–200, who adds (p. 219): ‘The rule [of strict construction] is still invoked, but so variously and unpredictably, and it is so often conflated with inconsistencies, that it is hard to discern widespread adherence to any general policy of statutory construction’. See also Ashworth and Horder, *Principles* (2013), 67–69.

⁶⁰ Ashworth and Horder, *Principles* (2013) 67.

⁶¹ European Court of Human Rights, *C.R.*, note 49, para. 34: ‘Article 7 [of the ECHR, note 51,] cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen’. See the discussion in Cassese, *International Criminal Law* (2013) 30–33.

the Statute or by fundamental principles of international criminal law, such as the defence of prior legality under national law or that of superior orders beyond the terms of article 33. A rule of interpretation generous to the accused might arguably apply to other grounds for excluding criminal responsibility where, in particular, a reasonable person might rely upon such ground in deciding their course of conduct before the fact. The justification of self-defence may be the chief example.⁶²

2. No extensions by analogy

The prohibition on extension by analogy is shared by most modern legal systems. 40 Historically, it has been less rigorously observed in common law than in Civil Code-based jurisdictions, but there is apparently more convergence at present.⁶³ The rule arose during the era of liberal reform of criminal law doctrine in the early nineteenth century. It is today largely taken for granted.⁶⁴ It was the product of the perception that the common law had been unjust in allowing judges to define criminal acts by analogy to existing crimes, absent a statute or common law crime covering the conduct. It was felt that such a practice violated the *nullum crimen* principle, failed to give fair notice to potential accused, was retrospective and robbed the criminal law of its power to deter.

These policy grounds continue to define the purpose and scope of the rule. For the 41 Prosecutor to bring charges on previously unknown crimes on the basis of their similarity to known ones, and for the judges to confirm them, would be to apply the law retroactively against the individual concerned. The rule against analogy prevents *nullum crimen* being interpreted – as it has been – so as to allow this.

The prohibition on analogy bars its use as a basis for imposing criminal responsibility in 42 what amount to substantially new crimes. The intention of the drafters of the Statute was that additional crimes be brought within the jurisdiction of the Court only by the Assembly of States Parties; it was apparently the perceived willingness of the ICTY to engage in liberal reasoning-by-analogy that contributed, in part, to the adoption of article 22 para. 2.⁶⁵ That the ICC States Parties are slow to modify the definitions of crimes contained in the Statute, even in the face of pressing international need, does not give the judges the power to supplant the authoritative law-maker. While the scope of crimes at customary or treaty law beyond the realm of the Statute may potentially change (mns 49–50), the scope of the Court’s jurisdiction *ratione materiae* should not, barring deliberate action of the Assembly of States Parties.

The rule does not, however, bar *all* use of analogy in the process of interpretation. While 43 judges cannot properly pre-empt the decision of legislators by deciding what conduct is criminal and what is not, ‘where the judicial innovation is smaller, less controversial, and consistent with the pattern of legislative action, there is less risk of frustrating considered legislative choice’.⁶⁶ Analogy therefore remains a valid and indeed necessary tool with which to construe the definition of crimes within the Statute.

Like the rule of strict construction, analogy is in this respect an interpretative technique 44 used as the last in a series of steps. A judge will not assume that a statutory definition

⁶² For the argument that the rationale does not extend to excuses such as mental disease or intoxication, on the grounds that these are not based on the reasonable reliance of the putatively rational and autonomous legal subject, see Ashworth and Horder, *Principles* (2013) 60; and Wise, in: Bassiouni, *Observations* (1997) 267, 272.

⁶³ See Bassiouni, *Crimes* (2011) 299, fn.13. The United States has constitutional protections against *ex post facto* legislation, as well as against vagueness and ambiguity. Nevertheless, a residual judicial power to create offences was employed, with decreasing frequency, up to 1900. Judicial creation of new offences all but disappeared in the 20th century: Jeffries (1985) 71 *VirgLRev* 189, 190–193. Canada eliminated common law offences (but for contempt of court) through 1955 reforms to its *Criminal Code*.

⁶⁴ ‘Penal legislation exists in such abundance that wholesale judicial creativity is simply unnecessary’: Jeffries (1985) 71 *VirgLRev* 189, 202 (speaking of the United States).

⁶⁵ Schabas, *Introduction* (2011) 94.

⁶⁶ Jeffries (1985) 71 *VirgLRev* 189, 205. See also Cassese, *International Criminal Law* (2013) 34–35; as well as Currat (2007) 20 *RQDI* 137, 152 (citing the first edition of this commentary).

contains gaps. If a reading of the ordinary meaning of the text in its context and in light of the object and purpose of the Statute reveals such a gap, however, she or he may use analogy to fill it by reference to other articles or to other paragraphs of the same article. Such a need might arise, for example, where a non-exhaustive list is provided, or where the Statute and the Elements of Crimes do not provide a clear explanation of the elements to be found on a particular set of facts. Such situations are bound to arise, and a narrow use of analogy is a standard interpretative tool with which to deal with them, without prejudice to the rights of the defence. The Statute expressly anticipates such a controlled use of analogy when it refers to ‘other inhumane acts of a similar character’ (article 7(1)(k)), and to ‘any other form of sexual violence of comparable gravity’ (article 7(1)(g)).⁶⁷

- 45 As with the strict construction rule (see mn 39), the prohibition on extension by analogy applies only to the definitions of crimes. Whether its use will be appropriate in other circumstances will depend upon judicial interpretation of the terms of the Statute, the applicable law, and the principles to be applied in a given situation.

3. Case of ambiguity

- 46 That ambiguities be read in favour of the accused is an accepted consequence of the rule of strict construction (and of the overlapping maxim, *in dubio pro reo* – ‘when in doubt, favour the accused’). It is said to have had its origin in the presumption of common law judges *in favorem vitae*, used to ameliorate the effect of statutes requiring the death penalty. Like the rule of strict construction in general, the rule relating to ambiguities is neither uniformly held to nor clearly defined in national systems.⁶⁸
- 47 As with strict construction generally, the rule regarding ambiguities is one to be applied not as a first but as a final step in an interpretative sequence. Ordinary rules of interpretation apply with a presumption that negotiating States would not have intended an ambiguity. Once such a reading has revealed an ambiguity, the present rule will resolve it in favour of the defence.⁶⁹
- 48 Like the rule of strict construction and the prohibition on extension by analogy (mns 39 and 45), the requirement that ambiguities be resolved in favour of the person being investigated or prosecuted applies only with respect to the crimes in articles 6–8. Its application outside this context will depend upon the judges’ interpretation of the applicable law and relevant principles.

III. Paragraph 3

- 49 By ensuring that article 22 will not affect the characterization of any conduct as criminal under international law independently of the Statute, this paragraph makes clear that, while the *nullum crimen* principle is one of general international law, the effects of its particular embodiment in this article are limited to the Statute. This need not have been said, inasmuch as article 22 para. 1 clearly states that it applies to findings of criminal responsibility ‘under this Statute’. Nonetheless, article 22 para. 3 prevents any misconceptions that might arise as to whether the Statute exclusively codifies or exhausts international criminal prohibitions.

⁶⁷ For the application of the *eiusdem generis* principle to determine the contents of the crime against humanity of ‘other inhumane acts’ in the jurisprudence of the ICTY, see Nilsson, in: Olusanya (ed.), *Rethinking* (2007) 37, 58–59; see also *Prosecutor v. Germain Katanga et al.*, No. ICC-01/04-01/07, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008, para. 448; Ambos, *Treatise* (2013) 91; Cassese, *International Criminal Law* (2013), 34; Schabas, *The International Criminal Court* (2010) 409; and Van Schaack (2008–2009) 97 *GLJ* 199, 138–139.

⁶⁸ Jeffries (1985) 71 *VirgLR* 189, 219: ‘Some instances of exculpatory construction are necessary to avoid dangerous openness in the criminal law; others are not’. This commentator adds (pp. 220–222) that judges should consider resolving ambiguities so as to maximize the certainty of the law in question.

⁶⁹ Ashworth and Horder, *Principles* (2013) 68.

It will therefore remain the case that individual responsibility arises directly under international law as it did before the entry into force of the Statute, and that the principle of legality, as a principle of international law apart from article 22, will be applied with respect to the relevant crimes to determine their existence and their scope (mn 15 and 16). The existence of such prohibitions will be determined by national courts or international tribunals through the kind of reasoning developed in recent years in particular by the ICTY (and which will, mn 20, be adapted *mutatis mutandis* and in limited circumstances by the judges of the ICC). 50

Although the purpose of article 22 para. 3 is similar to that underlying article 10, the two provisions are clearly distinct in their scope and effect. Article 22 para. 3 applies to limit any perceptions as to the impact of article 22 alone; article 10 does so with respect to all of Part 2. Article 22 para. 3 applies only to the characterization of conduct as criminal under international law; article 10 applies to all existing and developing rules of international law insofar as the Statute might be thought to impact on them. Finally, article 10 is limited by the words ‘for purposes other than this Statute’. This merely emphasizes the mutual independence of the Statute and the general international law with respect to which it creates a kind of semi-autonomous regime establishing the ICC. Articles 10 and 22 para. 3 were inserted to prevent the perception that the Statute would rob general international law of its power to criminalize behaviour, or would narrow the scope of any such criminalization outside the ICC regime, such that non-States Parties could then claim a greater degree of impunity than would be the case had the Statute not been adopted at all. 51

C. Special remarks

I. Relationship between articles 11 para. 1, 22 para. 1 and 24 para. 1

The wording of article 22 para. 1 bears a close resemblance to that in article 24 para. 1,⁷⁰ and the sense of each is to some degree coextensive with that of article 11 para. 1.⁷¹ Given the clear overlap in the sense of these provisions, there is little point in seeking out distinctions in application among them. Article 22 para. 1 focuses on the finding of criminal responsibility with respect to given conduct, which must constitute, ‘at the time it takes place, a crime within the jurisdiction of the Court’. If ‘criminally responsible’ and ‘conduct’ invoke the Court’s jurisdiction *ratione personae* and *ratione materiae*, the reference to ‘time’ and ‘jurisdiction’ summon up other aspects. Article 24 para. 1 forbids imposition of criminal responsibility *under the Statute* for conduct prior to its entry into force. This reference to the non-retroactivity of the Statute is obviously encompassed by article 22 para. 1’s words ‘within the jurisdiction’. Article 24 para. 1 therefore has the virtue only of emphasizing the obvious. Moreover, articles 22 and 24 are contained in Part 3 (General principles of criminal law) of the Statute, while article 11 is under the logically prior Part 2 (Jurisdiction, admissibility and applicable law), and is therefore the definitive clause relative to temporal jurisdiction. 52

Although they are unlikely ever to make it onto the agenda of a Review Conference convened in accordance with article 123, in principle these overlapping provisions should eventually be harmonized. 53

II. Application of *nullum crimen* to treaty crimes

In the unlikely event that the Statute were amended at some future date to incorporate crimes set out in international treaties, *nullum crimen* as a principle of general international 54

⁷⁰ ‘No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute’.

⁷¹ ‘The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute’.

law may be interpreted so as to impose special requirements with respect to such crimes. These latter requirements might then in turn call for the amendment of article 22 (mn 58).

55 The ILC Draft adapted *nullum crimen* to the particular needs of treaty crimes in its article 39 (b). This provided that no accused would be held guilty of one of these crimes unless the treaty in question was applicable to his or her conduct at the time of the relevant act or omission. Thus, a specification of applicability was added to the prohibition on retrospectivity that article 39 (b) shared with article 39 (a) (mn 2). The ILC understood that for the *nullum crimen* principle to be satisfied in the case of treaty crimes, the conduct in question would not only have to come within the words of the treaty's prohibition, but the treaty itself would have to apply to the conduct of the accused through the relevant state(s) being party to the instrument and, crucially, through the prohibition having been made a part of the law of the relevant State Party.⁷²

56 This acknowledges that not all treaties which call for the prohibition of certain conduct also entail the internationally enforceable criminal responsibility of individuals, absent some form of incorporation of the international agreement into national law.⁷³ Agreements to prohibit conduct are relatively common between States, with the parties agreeing to penalize certain behaviour in their national legal systems and otherwise to cooperate in its suppression. Such 'suppression conventions' create law of a different sort from prohibitions directly entailing individual responsibility under general international law. With respect to treaty crimes, the ILC Draft intended in essence to provide international enforcement for national prohibitions. Under this vision, States would agree to the ICC as a supplementary enforcement mechanism, with no intention of creating – through the mere fact of inclusion of these crimes in the Rome Statute – international responsibility as such. Where the latter exists – for example, in the case of the 'core crimes' or 'international crimes *sensu stricto*' which originated in the Nuremberg Charter⁷⁴ – there is no need for the prohibition to be made applicable to the accused under national law (mn 16). But such a requirement does exist for many conventions including, to name but one, the 1988 Vienna Convention on Narcotic Drugs.⁷⁵

57 Thus conduct falling within a treaty prohibition may not entail individual criminal responsibility if the prohibition did not apply *as law* to the accused. The Court would have to decide in a given case whether the treaty in question was applicable to the individual. There is no single means by which international agreements come so to apply. Ratification and the passage of implementing legislation carrying the prohibition into national law is one, but not the only method. A State might not be party to a treaty or, being party, might not have made it part of domestic law.⁷⁶ A treaty prohibition may become applicable to an individual through the action of custom or through the application of 'general principles of law'. It may be applicable to an accused on more than one basis of jurisdiction (national, territorial, etc.), and the Court would have to examine each case individually to construe the intention of the drafters and to determine whether the treaty provisions were applicable to the conduct of the individuals in question either directly (through the intention of the parties

⁷² See the commentary to article 39 (b), ILC Draft, note 2, paras. 3–4, pp. 113–114.

⁷³ While international criminal law is in large measure derived from conventions, the majority of these 'do not meet the test of legality under contemporary standards of Western European legal systems' owing, *inter alia*, to the fact that it was foreseen that the prohibitions called for would be promulgated into national law in accordance with the principles of legality applicable under that law: Bassiouni, *Crimes* (2011) 303–304.

⁷⁴ The distinction between 'international crimes *sensu stricto*' entailing individual responsibility directly under international law (essentially the 'core' or 'Nuremberg' crimes) and 'international crimes *sensu largo*' not doing so (crimes under 'suppression conventions') was generally accepted at the meetings of the Association Internationale de Droit Pénal, reported in: Triffterer (1989) 60 *RIDP* 29, 40, 42, 52–53 and 69–70.

⁷⁵ 1994 ILC Report, note 1, para. 8, p. 68. The ILC gives the opinion that cases where a treaty definition of a crime is insufficient to make the treaty applicable to individuals, thereby giving rise only to State responsibility, are 'likely to be rare, and may be hypothetical ...': *ibid.*, para. 4, pp. 113–114. This appears to be overstated: see note 77. The ILC acknowledged that it proposed to include in its Draft Statute '... treaties which explicitly envisage that the crimes to which the treaty refers are none the less crimes under national law': *ibid.*, para. 3, p. 104.

⁷⁶ *Ibid.*, para. 3, p. 113.

that the treaty so apply) or through the national implementing law or constitutional principles of the relevant states.⁷⁷ In the case that the treaty was intended only to entail State responsibility (*i. e.* for any failure to prohibit the conduct under national law),⁷⁸ and where the State or States in question failed to fulfil their obligation to make the norms in question applicable to individuals within their jurisdiction, the individual could not in principle be held criminally responsible on the basis of the treaty. In arriving at such a finding, ICC judges may have had to engage in extensive review of national law and constitutional principles, and might at least strongly imply that a given State had not fulfilled a treaty obligation to implement a given norm into national law. One can readily see how States would be disinclined to confer such a role on judges of the ICC.⁷⁹

In any event, article 22 in its present form is better suited to the ‘core crimes’ now listed in article 5 of the Statute. In the (unlikely) event that treaty crimes are ever incorporated into the Statute, article 22 will have to be amended to give expression to the requirement that the treaty be ‘applicable’ to the conduct of the accused, as foreseen in the International Law Commission (mn 55–56). Article 21 (Applicable law) might also have to be amended to provide an expanded role for national law where treaty crimes are concerned.

III. Aggression and terrorism

Two major developments regarding the substantive scope of international criminal law *stricto sensu* have recently occurred. One is the adoption of amendments to the Rome Statute adding the crime of aggression to the ‘crimes within the jurisdiction of the Court’ listed in article 5.⁸⁰ The other is the controversial assertion by the Appeals Chamber of the Special Tribunal for Lebanon that terrorism now constitutes a ‘core crime’ giving rise to individual responsibility under customary international law (and not merely a ‘treaty crime’ requiring implementation into national law).⁸¹ Both developments raise questions relating to the nullum crimen principle.

Debate has arisen as to whether the amendments to the Rome Statute relating to the crime of aggression and adopted at the 2010 Kampala Review Conference are in conformity with the nullum crimen principle enunciated in Article 22.⁸² For some, the definition is unconscionably vague, with questions raised about the firmness and determinacy of the crime of aggression under customary law and of the *jus ad bellum* norms that underlie it; about the precision of the crime’s definition as formulated at Kampala, in particular with regard to its requirement that the ‘act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations;’ and about its potential *ex post facto* application to nationals of non-States Parties.⁸³ For others, the Kampala definition rests upon

⁷⁷ Such difficulties, as well as the fact that ‘in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalization, or the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise’ may lead a court to prefer searching for a customary law basis either as well as or rather than an ‘applicable’ treaty, as the ICTY has done: see *Prosecutor v. Stanislav Galić*, No. IT-98-29-A, Judgment, Appeals Chamber, 30 November 2006, para. 83; *Prosecutor v. Dario Kordić & Mario Čerkez*, No. IT-95-14/2-A, Judgment, Appeals Chamber, 17 December 2004, paras. 41–42, 59–66; see also Nilsson, in: Olusanya (ed.), *Rethinking* (2007) 37, 57.

⁷⁸ 1994 ILC Report, note 2, para. 3, p. 113.

⁷⁹ For a critique of the ICTY jurisprudence treating the notion, first presented in *Tadić* (note 41), that individual criminal responsibility might arise from applicable treaty law alone (without it being a reflection of custom), see Milanović (2011) 9 *JICJ* 25, 42–45.

⁸⁰ ‘The Crime of aggression’, in: Review Conference of the Rome Statute of the International Criminal Court, *Official Records* (Kampala, 31 May–11 June 2010), ICC Doc. No. RC/9/11, Part II: Resolutions and declarations adopted by the Review Conference, Resolution RC/Res.6, 17. For the details of these complex amendments, and the modalities governing their eventual entry into force, see the commentary elsewhere in this volume.

⁸¹ Special Tribunal for Lebanon, No. STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, 16 February 2011, para. 85.

⁸² See the discussion in Ambos, *Treatise ICL II* (2014), at 184 *et seq.*, esp. 196–211.

⁸³ Glennon (2010) 35 *YaleJIL* 71; Paulus (2010) 20 *EJIL* 1117. The citation is from ‘The Crime of aggression’, note 80, at Annex II *Amendments to the Elements of crimes*, Element 5.

a customary basis to which State practice sufficiently attests, and its acknowledged vagueness is not so great that it cannot be left to judges for clarification.⁸⁴ One way of resolving the debate would be to demonstrate that the ‘manifest violation’ requirement – however vague in itself – merely serves to narrow the Rome Statute definition of aggression compared to that under customary law, thereby rendering it acceptable in terms of the ‘legality rights’ of defendants. Such an affirmation – with its assumption of agreement on the scope and status of the underlying customary crime – is most unlikely to generate consensus in the foreseeable future, however.⁸⁵ Given the remoteness of this crime’s eventual entry into force and prosecution, further comment at this time would only be speculative.

61 The argument of the Special Tribunal for Lebanon that terrorism now constitutes a ‘core crime’ of international criminal law rests largely on ‘*nullum crimen*’ assertions about the alleged clarity and determinacy of the offence. Writing for the Appeals Chamber, President Cassese repeated arguments developed in his respected textbook.⁸⁶ He asserts essentially that, in light of State practice (adoption and ratification of international treaties, adoption and application of national laws, international declarations, etc.) acts of international terrorism now give rise to international criminal responsibility directly under international law. Moreover, the persistent inability of States to adopt a general definition of this crime in negotiations on a proposed Comprehensive Convention against terrorism under United Nations auspices has not, in Cassese’s eyes, prevented the emergence of a general criminal norm prohibiting a clearly-defined set of conduct when committed in times of peace and with a transnational element.⁸⁷ If widely accepted, this argument would allow States Parties, if they so choose, to amend the Rome Statute to include an agreed-upon definition of the crime of terrorism (with consequential amendments as appropriate), without needing to confront the issues of ‘applicable law’ (mn 54–58) that were assumed to arise with respect to this crime when its inclusion was first proposed during the negotiation of the Statute.

62 The existence of an international ‘core crime’ of terrorism is far from attracting consensus, however. Commentators object in essence that international disagreement about the scope and content of an offence of terrorism is sufficient to prevent it from joining the ranks of the other ‘core crimes’ under customary international criminal law, that the Appeals Chamber lacked clear evidence of State will to impose individual criminal responsibility for a general crime of terrorism, and that it underestimated the implications of persistent disagreement over how to address crimes committed by those engaged in self-determination struggles (‘freedom fighters’) and by State forces.⁸⁸ It should be noted in conclusion that the Assembly of States Parties has not yet agreed on how to proceed on the issue of an eventual crime of terrorism. It set aside as premature the proposal of the Netherlands – made in the run-up to the 2010 Kampala Review Conference and ‘in light of the absence of a generally accepted definition of terrorism’ – to follow path taken with respect to the crime of aggression (listing of the crime of terrorism in article 5 para. 1 of the Statute and establishment of a working group to flesh out its definition).⁸⁹ As of mid-2012, the Assembly of States Parties has yet to adopt a process for dealing with this crime amidst ongoing concern that no agreed definition exists. In this light, the better view remains that the existence of international consensus on a ‘core’ crime of terrorism cannot be affirmed.

⁸⁴ Milanović (2012) 10 *JICJ* 165, responding to Glennon and Paulus, *ibid.*, *inter alia*.

⁸⁵ See Milanović: *ibid.*, 183–186.

⁸⁶ Cassese, *International Criminal Law* (2013) 146–157.

⁸⁷ Special Tribunal for Lebanon, Interlocutory decision, note 81, paras.85 (basic elements of supposed crime), 90 (transnational element), and 107 (times of peace).

⁸⁸ Ambos (2011) 24 *LJI* 655; Kirsch and Oehmichen (2011) 1 *DurhamLRev* 1; Saul (2012) Legal Studies Research Paper No. 12/64. See also Di Filippo (2008) 19 *EJIL* 533.

⁸⁹ ‘Report of the Working Group to the Review Conference’, Annex I of Assembly of States Parties to the Rome Statute of the International Criminal Court, *Official Records* (eighth session, 18–26 November 2009), ICC Doc. No. ICC-ASP/8/20, Vol.I, paras.40–51 and Appendix III, *Netherlands*.

Article 23

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Literature: D’Ascoli, S., *Sentencing in International Criminal Law – The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Oxford, Portland: Hart, 2011); Henham, R., ‘Developing Contextualized Rationales for Sentencing in International Criminal Trials – A Plea for Empirical Research’, (2007) 5 *JICJ* 757–778.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	5

A. Introduction/General remarks

The prohibition of retroactive penalties, known by the Latin phrase *nulla poena sine lege*, is usually approached in tandem with the prohibition of retroactive offences, *nullum crimen sine lege*. Together, the two are usually described as the ‘principle of legality’, although the two principles have to be distinguished in that *nullum crimen* refers to the existence of a – clearly and strictly defined – penal provision at the time of the commission of the respective conduct, while *nulla poena* to the punishment to be provided for by this penal provision. Thus, in other words, punishment (*poena*) presupposes a crime (*crimen*) and, therefore, the *nulla poena* principle is predicated on the *nullum crimen* principle¹. Article 23 provides for the *nulla poena* principle while the *nullum crimen* principle is dealt with in Articles 22 and 24 of the Statute and therefore commented upon in these provisions.

While it is generally agreed that *nulla poena* requires less than *nullum crimen* it is unclear what exactly is required by *nulla poena*. International law does not provide for precise guidance.² The international human rights instruments, in a non-derogable provision, prohibit the imposition of a criminal sanction that is heavier than the one applicable at the time the offence was committed,³ thereby establishing *non-retroactivity* regarding the punishment. Article 15(1) second clause ICCPR complements the prohibition of a retroactive (heavier) penalty with the *lex mitior* principle, i. e., the offender’s right to have the new penalty applied if it is lighter than the previous one. Human rights law is relatively silent, however, with regard to the precise determination of sentences. The International Covenant on Civil and Political Rights does not prohibit the death penalty in the case of ‘the most serious crimes ...’⁴. The European Court of Human Rights has ruled that capital punishment as well as a sentence of life imprisonment without any possibility of release constitutes inhuman or degrading treatment prohibited by article 3 of the European Convention on Human Rights.⁵ Thus, the other elements of *nullum crimen*, especial the *lex certa* element, are absent from *nulla poena*⁶.

¹ Cf. Ambos, *Treatise on ICL II* (2014), p. 271.

² Cf. Ambos, *Treatise on ICL II* (2014), pp. 271 *et seq.*

³ On the death penalty, *Al Nashiri v. Poland*, no. 28761/11, § 577, 24 July 2014. On life imprisonment: *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, § 113, 9 July 2013; *Öcalan v. Turkey* (No. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, § 197, 18 March 2014; *László Magyar v. Hungary*, no. 73593/10, § 58, 20 May 2014.

⁴ Article 6(2) ICCPR, Article 2(1) ECHR.

⁵ International CCPR, 999 UNTS 171, entered into force 23 Mar. 1976, article 15 para. 1; ECHR, 213 UNTS 221, entered into force 3 Sept. 1953, article 7 para. 1; American Convention on Hum. Rts., 1144 UNTS 123, entered into force 18 July 1978, article 9. Also: Universal Declaration of Hum. Rts., GA Res. 217 A (III), UN Doc. A/810 (1948), article 11 para. 2.

⁶ For a different maximalist position see Dana, in: Klip *et al.*, *Liber Amicorum Prakken* (2004), pp. 350 *et seq.* (applying the four attributes of *nullum crimen*, including *lex certa* and *stricta*, to *nulla poena*); see for this view also Ambos, *Treatise on ILC II* (2014), pp. 276-7.

- 3 This uncertainty is also confirmed by the customary law of war crimes. It recognizes that penalties may include death or such lesser punishment as a court might deem appropriate⁷. The principle was codified in the IMT Charter, which authorized the Nuremberg court to impose upon a convicted war criminal ‘‘death or such other punishment as shall be determined by it to be just’’⁸. Given that the offences set out in article 6 of the *Rome Statute* correspond by and large to customary law, it would seem relatively clear that there can be no problem with the *nulla poena* rule, as far as war crimes, crimes against humanity (including genocide) and aggression (crimes against peace) are concerned. The ICTY Appeals Chamber has rejected arguments that claim the *nulla poena* principle is violated because the ICTY Statute does not set out precise sentences, as is the case in some national codes. According to the Chamber, the Statute

‘does not require that the law prescribes a precise penalty for each offence depending on the degree of gravity. Be it a common law system or a civil law system, it is not the case that national legislation anticipates every possible offence with a prescribed sentence. On the contrary, it is a fact that a penal code frequently prescribes a range for sentencing with regard to an offence; that is, it often sets out both the maximum and minimum sentences. Within the range, judges have the discretion to determine the exact terms of a sentence, subject, of course, to prescribed factors which they have to consider in the exercise of that discretion’⁹.

Moreover, there is no need to prescribe a minimum penalty because ‘‘an accused must have been aware that the crimes for which he is indicted are the most serious violations of international humanitarian law, punishable by the most severe of penalties’’¹⁰. In the only sentencing judgments of the ICC so far the Lubanga Trial Chamber only mentions *nulla poena* but does not elaborate on it¹¹; the Appeals Chamber does not even mention the principle.¹² In *Katanga*, the majority of the Trial Chamber refers to the ‘principle of legality’ as a principle to be followed in imposing sentence, citing article 23 of the Statute in the footnote.¹³

- 4 During early efforts by the ILC and the General Assembly to draft a statute for an international criminal court, it was sometimes argued that precise sentencing norms were required, similar to those often found in domestic penal codes. A 1951 proposal from the ILC for the Draft Code of Offences Against The Peace and Security of Mankind that said the penalty ‘shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence’¹⁴ was challenged as being contrary to the principle *nulla poena sine lege*¹⁵. The Romanian jurist Vaspașian V. Pella said that the

⁷ Levie, *Terrorism In War – The Law Of War Crimes* (1992) 264–266; Schabas (1997) 60 *Albany LJ* 736; *id.*, *The Abolition of the Death Penalty in International Law* (3rd ed., 2003) 235–258.

⁸ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 Aug. 1945, 8 UNTS 279, Annex, Charter of the International Military Tribunal (8 Aug. 1945), article 27.

⁹ *Prosecutor v. Kunarać et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, para. 372.

¹⁰ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 681. Also: *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, Appeals Chamber, 20 Feb. 2001, paras. 817–818. Issues concerning the *nulla poena sine lege* principle have arisen before the International Criminal Tribunal for the former Yugoslavia in the context of referral proceedings of cases to the courts of Bosnia and Herzegovina as part of the Tribunal’s completion strategy. The law in force at the time the alleged acts were committed provided for maximum sentences of twenty years’ imprisonment, or capital punishment. New legislation, enacted in 2004, and upon which the national prosecutions are based, allows for a maximum sentence of forty-five years’ imprisonment. Judges at the International Criminal Tribunal for the former Yugoslavia have rejected arguments based upon the principle of legality, saying this is a matter to be dealt with by the courts of Bosnia and Herzegovina: *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11bis, 17 May 2005, paras. 42–45; *Prosecutor v. Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11bis, 22 July 2005, paras. 27–32.

¹¹ ICC, TC I, *Prosecutor v. Lubanga*, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, ICC-01/04-01/06-2901, para. 18.

¹² ICC, AC, *Prosecutor v. Lubanga*, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute’, 1 December 2014, ICC-01/04-01/06 A 4 A 6.

¹³ *Prosecutor v. Katanga*, Décision relative à la peine (article 76 du Statut), 23 May 2014, ICC-01/04-01/07, para. 39.

¹⁴ 2 YbIL C 134 *et seq.* (1951), UN Doc. A/1858, para. 59. Also: 1951 Draft Statute Report, paras. 110–111.

¹⁵ 1953 Draft Statute, para. 118.

nulla poena sine lege principle applied to international criminal law as much as to domestic law ‘par la force de l’équité et de la raison’¹⁶. However, a General Assembly committee was unimpressed with the criticism although it agreed ‘that it would be desirable that the court, in exercising its power to fix penalties, should take into account the penalties provided in applicable national law to serve as some guidance for its decision’¹⁷.

B. Analysis and interpretation of elements

The Draft Statute submitted by the ILC to the General Assembly in 1994 contained a general 5 sentencing provision, allowing for terms of detention up to life imprisonment, a specified period of incarceration, and a fine. In fixing the sanction, the Court was invited to consider the law of the State of which the offender was a national, the State where the crime was committed, and the State with custody of and jurisdiction over the accused¹⁸. These references to national law echoed provisions in the Statutes of the *ad hoc* Tribunals¹⁹ that had been inserted out of consideration for the *nulla poena* rule²⁰. The reference to national legal standards was eventually dropped by the Working Group on Penalties during the drafting of the Rome Statute²¹. The ILC’s 1996 Draft Code of Crimes Against the Peace and Security of Mankind was somewhat more laconic, and did not specify any precise penalties, saying only that ‘punishment shall be commensurate with the character and gravity of the crime’²². The accompanying commentary explained that it was ‘not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Nürnberg Judgment and in article 15 para. 2 of the International Covenant on Civil and Political Rights’²³ (and, we can add, in Article 7(2) ECtHR, the so-called Nuremberg clause).

In the *Ad Hoc* Committee of the General Assembly, which met during 1995, the view was 6 expressed that a procedural instrument enumerating rather than defining the crimes might not respect *nulla poena sine lege*²⁴. Article 47 of the ILC Draft Statute was criticized as being in conflict with *nulla poena*, some delegates stating that minimum as well as maximum penalties were required²⁵. There was also a suggestion that the Statute include detailed provisions concerning sentencing of minors, aggravating or attenuating circumstances, cumulative penalties for multiple crimes, although some delegations expressed support for the more flexible approach reflected in the ILC Draft Statute²⁶. The Working Group on General Principles of the Preparatory Committee, which met in February 1997, proposed a text recognizing the norm *nullum crimen sine lege*. It did not speak directly to the *nulla poena* portion of the principle of legality except indirectly, stating that ‘[c]onduct shall not be construed as criminal and sanctions shall not be applied under this Statute by a process of analogy’²⁷.

¹⁶ 2 YbIL C 314 (1950). See also: Pella (1952) *RGDIP* 337.

¹⁷ *Supra* note 16. See also: Draft Code of Offences Against the Peace and Security of Mankind, Troisième rapport de J. Spiropoulos, rapporteur spécial, UN Doc. A/CN.4/85; UN Doc. A/CN.4/SR.268, paras. 45, 52.

¹⁸ ILC Report on the Work of its Forty-Sixth Session, UN Doc. A/CN.4/SER.A/1994/Add.1, Vol. II, article 47.

¹⁹ Statute of the ICTY, UN Doc. S/RES/827, Annex (1993), articles 24 and 25. See: Schabas (1997) *DukeJComp&IL* 461.

²⁰ Corell *et al.*, *Proposal for an International War Crimes Tribunal for the Former Yugoslavia* (1993) 68–69.

²¹ Report of the Working Group on Penalties, UN Doc. A/CONF.183/C.1/WGP/L.14, p. 4.

²² 1996 ILC Draft Code, pp. 29–30.

²³ *Ibid.* See also Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (1966) 92 *et seq.*, in particular 139.

²⁴ *Ad Hoc* Committee Report, para. 57, p. 11.

²⁵ *Ibid.*, para. 187, p. 36.

²⁶ 1996 Preparatory Committee I, para. 304, p. 63. Also: *ibid.*, para. 180, p. 41; *ibid.*, para. 189, p. 43.

²⁷ Preparatory Committee Decisions Feb. 1997, Annex II, p. 18, para. 1; UN Doc. A/AC.249/1997/WG.2/CRP.1.

- 7 Midway through the Diplomatic Conference, on 1 July, Mexico proposed that the Working Group on Penalties adopt a provision stating the *nulla poena* rule: ‘No penalty shall be imposed on a person convicted of a crime within the jurisdiction of the Court, unless such penalty is expressly provided for in the Statute and is applicable to the crime in question’²⁸. Mexico felt that the provision could be placed either in Part 2, in tandem with the *nullum crimen* provision (article 21 in the Draft, which was renumbered to article 22 in the *Rome Statute*), or in Part 6, as part of the sentencing provision (article 74). The Mexican text was subsequently reformulated by the chair of the Working Group, who felt it belonged with article 21: ‘*Nulla poena sine lege*. A person convicted by the Court may be punished only as provided under this Statute’²⁹. The proposal appeared to be uncontroversial and enjoyed broad support. However, its adoption was stalled for some time by the debate on capital punishment. The text proposed by the Chair was adopted by the Working Group on Penalties accompanied by a footnote: ‘The Working Group draws the attention of the Drafting Committee to the possibility of including this provision as a separate article or as a provision of article 21’³⁰. The Drafting Committee agreed that the *nulla poena* text belonged in the general principles section, and that it should be placed immediately after the *nullum crimen* provision³¹.
- 8 Concern with the *nulla poena* principle is expressed in the *Rome Statute* not only in the specific provision, article 23, but also throughout the sentencing provisions of Part 7. The *Statute* does not set specific penalties for the four offences, opting instead for a series of general provisions applicable to the four crimes that make up the Court’s subject matter jurisdiction. Thus, the *Statute* specifies the terms of imprisonment and the criteria for their imposition, as well as the possibility of fine and forfeiture of proceeds, the role of time served prior to sentencing, and the treatment of multiple sentences. Aggravating and mitigating circumstances have been developed in the Rules of Procedure and Evidence. With this the *Statute* offers more than the law of the Ad Hoc Tribunals and, *a fortiori*, meets the standards of international law (cf. *supra* mn. 3).
- 9 Article 23 serves as a limit on the discretionary powers of the Court, which cannot impose punishment that is not set out in the Statute, or provided in accordance with its delegated legislation, and specifically the Rules of Procedure and Evidence. It also prevents States Parties from imposing additional punishment upon those who have already been convicted by the Court. The ramifications of this remain to be determined, but offenders may argue that civil sanctions such as deprivation of the right to vote, or prohibition of holding office, constitute additional punishment and are therefore prohibited by article 23³². Thus, in sum, Article 23 reaffirms the international practice in that it contains the *lex praevia* and *lex scripta* attributes of the principle of legality but it does not demand certain (*lex certa*) and strictly construed (*lex stricta*) sentences³³.

²⁸ Proposal submitted by Mexico, UN Doc. A/CONF.183/C.1/WGP/L.4.

²⁹ Chairman’s Working Paper on Article 21*bis*, UN Doc. A/CONF.183/C.1/WGP/L.8. See also: UN Doc. A/CONF.183/C.1/SR.24, para. 33; UN Doc. A/CONF.183/C.1/SR.26, para. 31.

³⁰ *Supra* note 21, Report of the Working Group on Penalties, Add.1, p. 1, fn. 1.

³¹ UN Doc. A/CONF.183/C.1/L.65/Rev.1, p. 2.

³² A square-bracketed provision in the Preparatory Committee (Consolidated) Draft, p. 120 contemplated allowing the Court to impose disqualification from public office, but was dropped by the Working Group on Penalties at an early stage of its work (note 21, p. 2).

³³ cf. Ambos, *Treatise on ICL II* (2014), p. 273.

Article 24

Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Literature: Meltzer, B.D. ‘War Crimes: The Nuremberg Trial And The Tribunal For The Former Yugoslavia’, (1996) 30 *ValULRev* 895; Shklar, J., *Legalism: Law, Morals and Political Trials* (Harvard University Press 2nd edition 1986).

Content

A. General remarks	1
1. Functions in relation to articles 22 and 23	3
2. History	9
B. Analysis and interpretation of elements	12
I. Paragraph 1	12
1. Acts and omissions prior to the entry into force	12
2. Moment of occurrence and ‘continuing violations’	13
II. Paragraph 2	21
1. ‘Change in the law’; rationale	21
2. Persons entitled to the benefit of more favorable law	23

A. General remarks

Article 24 forms part of the provisions establishing the requirements of legality as a ‘General Principle of Criminal Law’ governing the Court. The other provisions are article 22, principle *nullum crimen sine lege*, and article 23, principle *nulla poena sine lege*. As one author has summarized:

‘Articles 22– 4 of the ICC Statute go beyond the generally recognized *lex praevia* and *lex certa* components of the principle of legality. These articles provide a comprehensive conceptualization of *nullum crimen*, including all four of its elements generally recognized in civil law jurisdictions As a result, one can only be punished for a certain conduct if this conduct has been criminalized by written law (*lex scripta*) in a clear and unambiguous manner (*lex certa*) at the time of commission (*lex praevia*); the law must not be applied to similar conduct by analogy (*lex stricta*).’¹

Article 24 para. 1 embodies the element of *lex praevia*. The Draft Statute prepared by the ILC subsumed these elements together under the broader title ‘Principle of legality (*nullum crimen sine lege*)’², reflecting the ‘centrality of the *nullum crimen* principle in the debates about international criminal jurisdiction’³. The difficulty in applying this principle in international law has been recognized, in contrast to domestic law where the sources of law are more determinate⁴. In the present Statute, its several aspects have been unbundled,

¹ Ambos, *Treatise ICL I* (2013) 90.

² 1994 ILC Draft Statute (Part 2), in: 2 *YbILC* (1994), Part Two. See Advisory Opinion No. 65, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 1935 *P.C.I.J.* (Ser. A/B), No. 65 (holding the *nullum crimen* principle as required under domestic constitutional law). See, generally, Shklar (1986); Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* (1994) 19, 132; Rehnagel, *The Maxim of Nulla Poena Sine Lege: A Historical and Comparative Legal Study* (1959); Fisch (1997) 110 *HarvLRev* 1055; Borchers (1997) 60 *AlbLRev* 653.

³ Crawford (1995) 89 *AJIL* 404.

⁴ Meltzer (1996) 30 *ValULRev* 895. Recalling the plea against the ‘strict and automatic application of the principle against retroactivity’, he states that the ‘rule has flourished in comparatively well-developed legal systems but not in primitive or immature one’.

namely ascertaining the legally binding character of the norm itself, article 22; the specificity of the obligation and of the consequences of its breach, articles 22 and 23; and, finally, its applicability to the acts in question or its opposability *vis-à-vis* the defendant *ratione temporis*, article 24, or the *lex praevia*.

- 2 The Court's jurisdiction *ratione personae* is established generally in article 1, 'jurisdiction over persons', and article 25, 'jurisdiction over natural persons'. Its jurisdiction *ratione temporis* is established in article 11, 'only with respect to crimes committed after the entry into force of this Statute' and, *vis-à-vis* a State that becomes a Party after the Statute has entered into force, 'only with respect to crimes committed after [its] entry into force ... for that State'. As will be discussed below, the *ratione temporis* requirements have also been referred to by international criminal tribunals as the rule against *ex post facto* laws, which embodies the prohibition against the retroactive application of laws, recognized in domestic constitutions as an indispensable element of the right of the accused to the due process of law⁵. The difference, however, is that these tribunals, and the Statute as well, cast the rule as a requirement of legality – which focuses on whether a norm has been embodied by the community in valid laws and enforced through legitimate institutions – and not as a right of the accused⁶ – which focuses on whether the individual is treated fairly and is able to know beforehand whether his acts are lawful⁷.

1. Functions in relation to articles 22 and 23

- 3 Accordingly, the rationale of article 24 para. 1 is distinct from that of articles 22 and 23. This distinction can be drawn from judgments of earlier international criminal tribunals, all of which significantly have been *ad hoc* in character and established *ex post facto*. Consistently, it has been held that the *nullum crimen sine lege* principle was satisfied as long as the act for which the defendant is charged was punishable as a crime by law at the time it was committed, and that the *ex post facto* exercise of jurisdiction was deemed merely a question of procedure that did not detract from the legality of the proceedings.
- 4 The International Military Tribunal at Nuremberg was established in 1945⁸, yet the Indictments⁹ all pertained to acts prior to its establishment¹⁰. The Tribunal, responding to the *ex post facto* argument, stated that the 'maxim *nullum crimen sine lege* is not a limitation of sovereignty but is in general [merely] a principle of justice'. This principle was deemed satisfied as long as there was no criminalization *ex post* of acts already committed, thus focusing on the *lex scripta* requirement of the principle of legality but construing it rather liberally.¹¹

'The Charter is not an arbitrary exercise of power on the part of the victorious nations, but ... the expression of international law existing at the time of its creation, and to that extent is itself a contribution to international law. [...]

In interpreting the words of the pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements ... have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be

⁵ See, e.g., Kobrick (1987) 87 *ColumbiaLR* 1515–1538 (stating the 'fair warning' and the safeguard against 'legislative vindictiveness' rationales).

⁶ These are covered elsewhere in the Statute, *inter alia* in articles 55 and 67.

⁷ See also *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, Trial Chamber, 16 Nov. 1998, paras. 402–407, which affirms this requirement ('*nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world's major criminal justice systems as being fundamental principles of criminality') but distinguishes national from international law ('different methods of criminalisation of conduct in national and international criminal justice systems').

⁸ Charter of the International Military Tribunal (6 Oct. 1945), annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (8 Aug. 1945), 82 UNTS 279 (London Agreement).

⁹ Indictment, International Military Tribunal, Nuremberg, U.S. Dept. of State, TWC 23, Dept. of State Pub. No. 2420 (1945).

¹⁰ The Indictments included for all Counts include wording like, '... during a period of years preceding 8th May, 1945' or 'between 1st September, 1939, and 8th May, 1945' or 'since 1st September, 1939'. *Ibid.*

¹¹ Ambos, *Treatise ICL I* (2013) 89 ('in a somewhat loose fashion' through 'judicial creativity').

found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing¹².

The jurisdiction of the Tokyo War Crimes Tribunal¹³ was likewise challenged on the 5 ground that the 'provisions of the Charter [were] *ex post facto*' legislation and therefore illegal¹⁴. The Tribunal rejected the challenge, stating that the 'law of the Charter is decisive and binding on the Tribunal'¹⁵ and stating its 'unqualified adherence'¹⁶ to the Nuremberg reasoning. Even the dissenting opinion, which found the Charter inconsistent with the *nullum crimen* principle, would ask only whether the acts were already punishable by law at the time they were committed but not the power of the Tribunal to try acts committed prior to its creation¹⁷. The dissent refers to the Charter which 'clearly intended to provide a court for the trial of offenses ... in respect of past acts' – asking '[w]hether it is within the competence of the [Charter] so to define the crimes'¹⁸. It concludes: 'If however, it refers to the right to 'define the law "such 'court is to administer", I respectfully [dissent]'¹⁹.

The Tribunal's verdict was subsequently challenged before the U.S. Supreme Court, and 6 was upheld²⁰. The dissenting opinions focused on whether the offenses charged constituted a crime recognized by law²¹. These tribunals thus focused on the *lex scripta* pertaining to existence of the rule that criminalizes an act, but not the *lex praevia* element pertaining to when the act was committed.

More recently, however, the ICTY has been presented with the issue. Its Statute similarly 7 provides for retroactive jurisdiction²², but the *travaux préparatoires* merely reaffirm the principle that *nullum crimen sine lege* required the Tribunal to apply only such 'rules of international humanitarian law which are beyond any doubt part of customary law'²³, and was silent on retroactive jurisdiction. This issue, however, was confronted in one preliminary study which, affirming the established notion on the *nullum crimen* principle, suggests the test of foreseeability²⁴ which is central to the fairness approach²⁵. But the authors proceeded to distinguish the element of *lex* from the mere 'procedural' question of which court may try the acts²⁶. They concluded that *nullum crimen* is satisfied provided 'no act is criminal unless

¹² *The Trial of Major War Criminals: Proceedings of the International Military Tribunal- Nuremberg* (HMSO, London, 1950, Pt. 22).

¹³ International Military Tribunal for the Far East (Judgment, 1 Nov. 1948), implementing the Cairo Declaration of 1 Dec. 1943, the Declaration of Potsdam of 26 July 1945, the Instrument of Surrender of 2 Sept. 1945, and the Moscow Conference of 26 Dec. 1945.

¹⁴ International Military Tribunal for the Far East (Judgment, 1 Nov. 1948), in: Pritchard and Zaide, (eds.), 20 *The Tokyo War Crimes Tribunal* 48 (1981) 436 a.

¹⁵ *Id.*, 48, 435.

¹⁶ *Id.*, 48, 439.

¹⁷ The Dissenting Opinion of the Member from India (B. Pal Rabhabinod), note 14, 21 *The Tokyo War Crimes Tribunal*.

¹⁸ *Id.*, 33.

¹⁹ *Id.*, 51–53.

²⁰ *Hirota v. MacArthur*, 338 U.S. 197 (20 Dec. 1948). The jurisdiction of military commissions to try Japanese war criminals was challenged in *Yamashita v. Styer*, 327 U.S. 757 (4 Feb. 1946).

²¹ See for instance, Murphy, note 15, *dissenting*, and J. Rutledge, *dissenting*, in *Yamashita*.

²² Statute of the ICTY, annexed to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Res. 808 (1993), at article 1, 'committed in the territory of the former Yugoslavia since 1991', and article 8, 'The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991'.

²³ Report of the Secretary-General, note 20.

²⁴ Proposal for an International War Crimes Tribunal for the Former Yugoslavia under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia (by Rapporteurs Corell/Turk/Thune), UN Doc. S/25307 (9 Feb. 1993).

²⁵ *Ibid.*, p. 52, citing the Rapporteurs' earlier report on Croatia.

²⁶ *Ibid.*, pp. 54–55.

this is laid down by law and no act be punished unless punishment is prescribed by law²⁷. Finally, this issue was squarely addressed by the ICTY itself, which reconciled retroactive jurisdiction with *nullum crimen* using the ‘fair trial guarantees’ under article 14 of the International Covenant on Civil and Political Rights²⁸. ‘[W]hat is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness’²⁹.

- 8 In conclusion, the dominant approach is to emphasize the prospective character of legislative power, while accepting the retroactive character of judicial power. Hence the focus of the decisions on the *lex scripta* element of the *nullum crimen sine lege* principle, which is covered in articles 22 and 23, rather than the *lex praevia*, which is covered in article 24 para. 1. Stated otherwise, while these related articles all have a temporal aspect, articles 22 and 23 pertain to the punishability of crime, while article 24 para. 1 pertains to the occurrence of the conduct itself. While articles 22 and 23 preclude the retroactive application of legislative power, article 24 para. 1 limits the retroactive exercise of judicial power to the applicable date of entry into force.

2. History

- 9 The principle of the non-retroactivity of criminal law, broadly construed, is embodied in a number of international instruments, including the Universal Declaration of Human Rights³⁰, the ICCPR³¹, the European Convention on Human Rights³², and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War³³. The requirement of a ‘competent, independent and impartial tribunal established by law’ has been codified in the ICCPR³⁴ and the Human Rights Committee, in interpreting this clause, has recognized ‘serious problems’ with ‘special courts’ – though referring solely to the trial of civilians – that allow ‘exceptional procedures’ that fall below the ‘strict guarantees of the proper administration of justice’³⁵.
- 10 Two antecedent documents contain articles that closely track the current article 24 para. 1. The ILC Draft Code³⁶ contains an article on ‘Non-retroactivity’ as regards ‘acts committed before its entry into force’³⁷. However, the clause appears in a criminal code, making non-retroactive legislation rather than a court’s exercise of jurisdiction. As stated above, the ILC Draft Statute contains a separate article entitled ‘Principle of legality (*nullum crimen sine lege*)’. Consistent with the established pattern, the Commentary³⁸ on this article addresses the retroactivity of legislation but not of the exercise of jurisdiction.
- 11 The Preparatory Committee’s Draft Statute³⁹ contains articles on ‘Temporal Jurisdiction’ (which barred jurisdiction unless the ‘crime was committed after the date of entry into

²⁷ *Ibid.*, p. 41.

²⁸ *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995. See also *Prosecutor v. Krajisnik*, Case No. IT-00-39-PT, Decision on Motion Challenging Jurisdiction—with Reasons, Trial Chamber, 22 Sept. 2000; *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-PT, Decision on the Accused’s Requests for an Advisory Opinion of the International Court of Justice, 15 Dec. 2004.

²⁹ *Id.* See also *Proposal for an International War Crimes Tribunal for the Former Yugoslavia under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia*, UN Doc. S/25307 (1993), citing Articles 14 and 15 of the ICCPR.

³⁰ Article 11.

³¹ See mn 7.

³² Article 7.

³³ Article 99.

³⁴ See mn 7.

³⁵ General Comment No. 13 of the Human Rights Committee of the ICCPR (Twenty-first session, 1984), in: Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice* (1994) 19, 132.

³⁶ ILC Report on the Work of its Fortieth Session, UN Doc. A/43/10, in: (1988) 2 *YbILC*, Part Two, UN Doc. A/CN.4/SER.A/1988/Add.1 (Part 2).

³⁷ Article 8.

³⁸ 1994 ILC Draft Statute, note 1.

³⁹ Preparatory Committee (Consolidated) Draft.

force⁴⁰) and on 'Non-Retroactivity' (which barred jurisdiction for 'conduct committed prior to its entry into force'⁴¹). Both articles are based on the same concept as the present article 24 and limit the reach of jurisdiction to acts committed as of a certain date.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Acts and omissions prior to the entry into force

Article 24 refers to 'conduct prior to the entry into force', not 'conduct committed ...'. The word 'committed' is not used specifically in order to cover both acts and omissions. The Preparatory Committee's Draft Statute had expressly covered both acts and omissions in a separate article entitled '*Actus reus* (act and/or omission)⁴². Because this draft article has not been included in the Statute, the culpability of omissions has been incorporated into the definition of specific crimes, *i. e.*, as substantive rather than general (or structural) provisions. An example is the principle of command responsibility, which pertains to the 'failure to take all necessary and reasonable measures ... to prevent or repress the [...] commission of crimes'⁴³ or 'failure to exercise control properly over [...] subordinates'⁴⁴.

2. Moment of occurrence and 'continuing violations'

Certain acts may be committed prior to the entry into force but have effects that continue even afterwards. At the same time, certain acts may be commenced prior to the entry into force but may be deemed to be 'continued' afterwards. This issue was addressed, though in the context of state responsibility and not of individual criminal responsibility, by the European Court of Human Rights, which distinguished between a 'continuing situation [and] an instantaneous act' and recognized 'the notion of a *continuing violation* of the Convention and its effects as to temporal limitations of the competence of Convention organs'⁴⁵.

This issue has also arisen before the International Criminal Tribunal for Rwanda, whose Statute provides, in article 7 (Territorial and Temporal Jurisdiction), that its jurisdiction 'shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994'⁴⁶. In several cases, the defendants sought to exclude *ratione temporis* allegations pertaining to the period prior to 1994. The Trial Chamber allowed such pre-1994 allegations that 'provide[d] a relevant background and a basis for understanding the accused's alleged conduct in relation to the Rwandan genocide of 1994'⁴⁷ and which 'may have probative or evidentiary value' to subsidiary or interrelated allegations⁴⁸. However, the Appeals Chamber

⁴⁰ Article 8.

⁴¹ Article 22.

⁴² Article 28, Preparatory Committee (Consolidated) Draft, note 37.

⁴³ Article 28 para. 1.

⁴⁴ Article 28 para. 2.

⁴⁵ *Loizidou v. Turkey*, Judgment (Merits), App. No. 00015318/89, 18 Dec. 1996. See also Case Comment, *Loizidou v. Turkey*, (Merits), No. 40/1993/435/514, ECtHR, 18 Dec. 1996, (1997) 91 AJIL 532.

⁴⁶ UN Doc. S/RES/955, Establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal, 8 Nov. 1994.

⁴⁷ *The Prosecutor v. Ngeze*, Case No. ICTR-97-27-I, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 5 Nov. 1999, para. 3. For a full discussion of this point, see van den Herik, *The Contribution of the Rwanda Tribunal for the Development of International Law* (2005).

⁴⁸ *Prosecutor v. Nahimana*, Case No. ICTR-96-11-T, Decision on the Prosecutor's Request for Leave to File an Amendment Indictment, 5 Nov. 1999, para. 28.

affirmed that ‘an accused [may] not be held accountable for crimes committed prior to 1994’, and that these events may not be referred to ‘except for historical purposes or information’⁴⁹.

Significantly, a concurring opinion by Judge Mohamed Shahabuddeen said that evidence about pre-1994 crimes may be received in the following situations: (a) to draw inferences with regard to intent to commit crimes committed within the limits of the temporal jurisdiction of the Tribunal; (b) to establish a ‘pattern, design or systematic course of conduct by the accused’; and (c) with regard to a conspiracy agreement made prior to but continuing in the period of 1994, to show that the parties constantly renewed their agreement with acts contemplated by the conspiracy⁴⁸. Another separate opinion by Judges Lal Chand Vohrah and Rafael Nieto-Navia interpreted the Tribunal’s temporal jurisdiction restrictively, recognizing that it is difficult to apply restrictions *ratione temporis* to ‘continuing or inchoate’ crimes such as conspiracy of incitement because these are based ‘not just [on] one defined event occurring on a specific date but upon a series of events or acts which [take] place over an extended period of time’⁵⁰.

- 15 In another ICTR case, a Trial Chamber held that ‘inchoate offenses that culminate in the commission of acts in 1994’ fall within the Tribunal’s jurisdiction *ratione temporis* due to the ‘continuing nature of a conspiracy agreement’, and applied this as well to the crime of incitement. The Chamber excluded only those ‘acts completed prior to 1994’⁵¹.
- 16 In 2009, the ICTR Appeals Chamber held that the ‘temporal jurisdiction of the Tribunal do[es] not preclude the admission of evidence on [pre-1994] events’ in the case of continuing crimes. Accordingly, the Chamber may still admit such evidence if these are ‘relevant and of probative value and there is no compelling reason to exclude it.’ However, ‘where [the] conduct commenced before 1994 and continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994’⁵².
- 17 The European Court of Human Rights has held that enforced disappearances are continuing crimes, and persist until such time as the victim’s fate or whereabouts is known. Even if the initial disappearance transpired before the critical date of its *ratione temporis* jurisdiction, the Eur. Ct. H.R. has held that it had jurisdiction so long as the violation continued up until the critical date⁵³. The court further held, however, that even if a complaint is based on a continuing crime, the action must still be brought to court within a reasonable time⁵⁴.
- 18 The Human Rights Committee has recognized that it has jurisdiction over a disappearance, even if it occurred before the critical date of its *ratione temporis* jurisdiction provided the State committed any further action that would constitute ‘a confirmation of the enforced disappearance’. Although the Committee found it had no jurisdiction *ratione temporis* over the actual death of the victim, the state had subsequently failed to investigate the death, and to prosecute those responsible in a just and speedy trial, all of which transpired after the victim’s death⁵⁵.
- 19 The Inter-American Court of Human Rights⁵⁶ has enumerated the human rights violations that were continuing in character, *inter alia*, forced disappearances, the absence of an

⁴⁹ *Prosecutor v. Ngeze and Nahimana*, Decision on the Interlocutory Appeals, 5 Sep. 2000, p. 6. See also *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, Appeals Chamber, 29 July 2004 (affirming *Prosecutor v. Ngeze and Nahimana*).

⁵⁰ Separate Opinion of Judge Shahabuddeen, note 47,.

⁵¹ *Ibid.*, Joint Separate Opinion of Judge Lal Chand Vohrah and Judge Rafael Nieto-Navia, para. 7.

⁵² *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, Trial Chamber, 3 Dec. 2003.

⁵³ *Varnava and others v. Turkey*, Judgment (Merits and Just Satisfaction), App No. 16064/90, European Court of Human Rights, 18 Sept. 2009, affirmed in *Sulygov and others v. Russia*, Judgment, App Nos. 42657/07, 53679/07, 311/08, 424/08, 3375/08, 4560/08, 35569/08, 62220/10, 3222/11, 22257/11, 24744/11, 36897/11, European Court of Human Rights, 9 Oct. 2014.

⁵⁴ *Varnava and others v. Turkey*, n. 53.

⁵⁵ *Sankara et al. v. Burkina Faso*, Communication No. 1159/2003, UN Doc. CCPR/C/86/D/1159/2003, 28 March 2006. See also *Surat Davud Oglu Huseynov v. Azerbaijan*, Communication No. 2042/2011, UN Doc. CCPR/C/111/D/2042/2011, 21 July 2014.

⁵⁶ *Rio Negro Massacres v. Guatemala*, Judgment of 4 September 2012, Preliminary objection, Merits, Reparations and Costs, Series C No. 250, IACtHR, 4 Sept. 2012. See also *Blake v. Guatemala*, Judgment of July 2, 1996,

impartial and effective investigation into the facts of this case, the adverse effects on the personal integrity of the next of kin and survivors in relation to investigation of the facts, and the failure to identify those who were executed and disappeared.

As regards omissions, however, article 24 is not helpful in ascertaining the moment of occurrence for the purpose of determining whether it was ‘prior to the entry into force’ of the Statute. On the other hand, fixing the moment of the omission, as with the problem of defining the omission itself, can be determined in relation to the substantive obligation itself. For instance, as regards the omissions mentioned above, the critical moments are when the crimes were actually committed by the forces under the officer’s command and when the officer should have taken the ‘measures’ or acts of ‘control’ for which he or she is being held accountable.

II. Paragraph 2

1. ‘Change in the law’; rationale

Article 24 para. 2 prohibits the retroactive application of more severe legislation. It derives from the Preparatory Committee’s Draft Statute which states: ‘If the law as it appeared at the commission of the crime is amended prior to the final judgment in the case, the most lenient law shall be applied’. It is akin to articles 22 and 23, which bar the retroactive application of legislation.

While the Nuremberg and Tokyo verdicts used both terms – *nullum crimen* and *ex post facto* – interchangeably, it is this article which is equivalent to the domestic law rule against *ex post facto* laws⁵⁷, which is defined as follows:

‘A law that impermissibly applies retroactively, esp. in a way that negatively affects a person’s rights, as by criminalizing an action that was legal when it was committed’⁵⁸.

Its rationale is that the community may punish persons only for acts which it has declared by law to be evil. That moral judgment must be transformed into a specific obligation with defined consequences for its breach. This article accepts the reality that the community may change that moral judgment. But it can do so only through law, *i. e.*, via legislation of general application. When that more severe morality becomes a law while a person is being tried, and that law is applied to him or her, the community’s judgment in that context loses its general character. The danger therefore is that, when a community decides to punish an offense more sternly, a parliamentary act can effectively ‘target’ an individual and thus partake of a judicial character, and the law, though general on-its-face, becomes a bill of attainder⁵⁹ as applied. On the other hand, focusing on the fairness standard, an *ex post facto* law fails the test of foreseeability⁶⁰ in that the individual is unable to know beforehand the full consequences of his act, and can be held to account only under the terms by which the act was punishable at the time it was committed.

2. Persons entitled to the benefit of more favorable law

However, Article 24 para. 2 actually requires the retroactive application of ‘the law more favourable to the person being investigated, prosecuted, convicted’, embodying the element of *lex mitior*.⁶¹ There are two aspects to the temporal requirements for the application of the

Preliminary Objections, Series C No. 27, IACtHR, 2 July 1996; *Serrano-Cruz Sisters v. El Salvador*, Preliminary Objections, Judgment of November 23, 2004, Series C No. 118, IACtHR, 23 Nov. 2004.

⁵⁷ *E. g.*, U.S. Const., article I § 9.3 states *DukeJComp&IL*: ‘No Bill of Attainder or ex post facto Law shall be passed’. See also Bassiouni (1993) 3 235.

⁵⁸ Garner and Black (eds.), *Black’s Law Dictionary* (Thomson West 9th edition 2009) 661.

⁵⁹ *Id.* defines bills of attainder as: ‘1. A special legislative act that imposes a death sentence on a person without a trial. 2. A special legislative act prescribing punishment, without a trial, for a specific person or group’ (188).

⁶⁰ Preparatory Committee (Consolidated) Draft, note 35.

⁶¹ See Ambos, *Treatise ICL I* (2013) 90.

lex mitior. The first is that there must be ‘a change in the law applicable to a given case prior to a final judgement.’ The second is that, by extending the *lex mitior* to ‘the person being ... convicted’, this provision can be invoked at *any* stage of the proceedings, provided the first requirement is met, that is to say, even after the person has been convicted, provided that the finding of guilt is still susceptible to or, or subject of, an Appeal under article 81.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

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

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3bis. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Literature: Agbor, A. A., 'The Substantial Contribution Requirement: The Unfortunate Outcome of an Illogical Construction and Incorrect Understanding of Article 6(1) of the Statute of the ICTR', (2012) 12 *ICLRev* 155; *id.*, 'The Problematic Jurisprudence on Instigation under the Statute of the ICTR: The Consistencies, Inconsistencies and Misgivings of the Trial and Appeal Chambers of the ICTR', (2013) 13 *ICLRev* 429; Ambos, K., 'Tatherrschaft durch Willensherrschaft kraft organisatorischer Machtapparate', (1998) 145 *GA* 226; *id.*, 'General Principles of Criminal Law in the Rome Statute', (1999) 9 *CLF* 1; *id.*, 'Individual Criminal Responsibility in International Criminal Law', in: McDonald, G.K. and Swaak-Goldman, O. (eds.), *Substantive and Procedural Aspects of International Criminal Law*, Vol. I: *Commentary* (Kluwer Law International 2000) 1; *id.*, 'Beihilfe durch Alltagshandlungen', (2000) 32 *JA* 721; *id.*, 'Verbrechenselemente' sowie Verfahrens- und Beweisregeln des Internationalen Strafgerichtshofs', (2001) 54 *NJW* 405; *id.*, 'Immer mehr Fragen im internationalen Strafrecht', (2001) 21 *NSZ* 628; *id.*, 'Superior Responsibility (Art. 28)', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 805; *id.*, 'Other Grounds for Excluding Criminal Responsibility', in: *ibid.* (OUP 2002) 1003; *id.*, 'Some Preliminary Reflections on the Mens Rea Requirements of the Crimes of the ICC-Statute and of the Elements of Crimes', in: L.C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man – Essays in Honour of A. Cassese* (Kluwer Law International 2003) 11; *id.*, 'Zwischenbilanz im Milosević-Verfahren', (2004) 59 *JZ* 965; *id.*, *La parte general del derecho penal internacional* (Temis 2005); *id.*, 'Remarks on the General Part of International Criminal Law', (2006) 4 *JICJ* 660; *id.*, 'Joint Criminal Enterprise and Command Responsibility', (2007) 5 *JICJ* 159; *id.*, 'Critical Issues in the Bemba Confirmation Decision', (2009) 22 *LeidenJIL*

715; *id.*, 'Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav 'Duch' Dated 8 August 2008', (2009) 20 *CLF* 353; *id.*, 'Command Responsibility and Organisation-sherschaft', in: A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (CUP 2009) 127; *id.*, 'What does "Intent to Destroy" in Genocide Mean?', (2009) 91 *IRevRC* 833; *id.*, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court* (Springer 2010); *id.*, 'The Crime of Aggression after Kampala', (2010) 53 *GYbIL* 463; *id.*, 'Zur Organisation bei der Organisationsherrschaft', in: M. Heinrich *et al.* (eds.), *Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011* (De Gruyter 2011) 837 [in spanish: 'Sobre la "organización" en el dominio de la organización', (julio de 2011) (3/2011) In Dret (Revista para el análisis del derecho) 25 *et seq.*, <www.indret.com>]; *id.*, 'The Fujimori Judgment: A President's Liability for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus', (2011) 9 *JICJ* 137; *id.*, 'Some Considerations on the Eichmann Case', in: K. Ambos *et al.* (eds.), *Eichmann in Jerusalem – 50 Years After* (Duncker & Humblot 2012) 123; *id.*, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues', (2012) 12 *ICLRev* 115; *id.*, 'A Workshop, a Symposium and the Katanga Trial Judgment of 7 March 2014', (2014) 12 *JICJ* 219; *id.*, 'The ICC and Common Purpose: What Contribution is Required Under Article 25(3)(d)?', in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (OUP 2015) 592–607; Ambos, K. and Malarino, E. (eds.), *Jurisprudencia latinoamericana sobre derecho penal internacional* (KAS 2008); *id.*, 'Adolf Eichmann', in: W. Schabas (ed.), *The Cambridge Companion on International Criminal Law* (CUP 2016) 275–294; Ambos, K. and Njikam, O., 'Charles Taylor's Criminal Responsibility', (2013) 11 *JICJ* 789; Ambos, K. and Othman, M. (eds.), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (MPIL 2003); Ambos, K. and Wirth, S., 'The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000', (2002) 13 *CLF* 1; American Law Institute, *Model Penal Code and Commentaries, Part. I, Vol. II* (1985); Ashworth, A., 'The Scope of Criminal Liability for Omission', (1989) 105 *LQRev* 424; *id.*, *Positive Obligations in Criminal Law* (Hart Publishing 2013); Bartel, R., 'Two Cheers for the ICTY Popovic Et Al. Appeals Judgement: Some Words on the Interplay between IHL and ICL', (2015) *EJIL:TALK!*, <<http://www.ejiltalk.org/two-cheers-for-the-icty-popovic-et-al-appeals-judgement-some-words-on-the-interplay-between-ihl-and-icl/>>, accessed 9 February 2015; Berster, L.C., *Die völkerstrafliche Unterlassungsverantwortlichkeit* (Herbert Litz 2008); *id.*, 'Duty to Act and Commission by Omission in International Criminal Law', (2010) 10 *ICLRev* 619; Boed, R., 'Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda', (2002) 13 *CLF* 293; Blumenstock, T. and Pittman, W., 'Prosecutor v. Naser Orić: The International Criminal Tribunal for the Former Yugoslavia Judgment of Srebrenica's Muslim Wartime Commander', (2006) 19 *LeidenJIL* 1077; Burchard, C., 'Ancillary and Neutral Business Contributions to "Corporate-Political Core Crime" – Initial Enquiries Concerning the Rome Statute', (2010) 8 *JICJ* 919; Burghardt, B., *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem* (BWV 2008); Caro, C., 'Prosecuting international crimes in Peru', (2010) 10 *ICLRev* 583; Cassese, A., 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', (2007) 5 *JICJ* 109; *id.* and Members of the Journal of International Criminal Justice, 'Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine', (2009) 20 *CLF* 289; Černić, J.L., 'Shaping the Spiderweb: Towards the Concept of Joint Commission through another Person under the Rome Statute and Jurisprudence of the International Criminal Court', (2011) 22 *CLF* 539; Clapham, A., 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', (2008) 6 *JICJ* 899; Coco, A., and Gal, T., 'Losing Direction. The ICTY Appeal Chamber's Controversial Approach to Aiding and Abetting in Perisic', (2014) 12 *JICJ* 345; Cryer, R., 'Imputation and Complicity in Common Law States. A (Partial) View from England and Wales', (2014) 12 *JICJ* 267; Danner, A.M. and Martinez, J.S., 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', (2005) 93 *CallRev* 75; DeFalco, R.C., 'Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute – Thresholds of Contribution', (2013) 11 *JICJ* 715; Dencker, F., *Kausalität und Gesamttat* (Duncker & Humblot 1996); *id.*, 'Beteiligung ohne Täter', in: C. Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen zum 70. Geburtstag* (2002) 525; Di Martino, A., 'Täterschaft und Teilnahme im Statut des IStGH und Anpassungsbedarf der italienischen Regelung', (2007) 119 *ZStW* 430; Dreher, E., 'Der Paragraph mit dem Januskopf', in: K. Lackner *et al.* (eds.), *Festschrift für Wilhelm Gallas zum 70. Geburtstag* (De Gruyter 1973) 307; Duttwiler, M., 'Liability for Omission in International Criminal Law', (2006) 6 *ICLRev* 1; Eldar, S., 'Indirect Co-Perpetration', (2014) 8 *CrimL&Philos* 605; Eser, A., 'Individual Criminal Responsibility (Art. 25)', in: A. Cassese *et al.* (eds.), *The Rome Statute of the ICC: A Commentary* (OUP 2002) 767; Eser, A., Lagodny, O. and Triffterer, O., *Alternative General Part* <http://www.department-ambos.uni-goettingen.de/index.php/component?option=com_docman&Itemid,56/gid,142/task,cat_view/> accessed 10 February 2014; Farrell, N., 'Attributing Criminal Liability to Corporate Actors – Some Lessons from the International Tribunals', (2010) 8 *JICJ* 873; Finnin, S., *Elements of Accessorial Modes of Liability. Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (Martinus Nijhoff Publishers 2012); Fletcher, G.P., 'New Court, Old Dogmatik', (2011) 9 *JICJ* 179; Fletcher, G.P. and Ohlin, J.D., 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 *JICJ* 539; Gil Gil, A. and Maculan, E., 'Current Trends in the Definition of "Perpetrator" by the ICC: From the Decision of the Confirmation of Charges in the Lubanga case to the Katanga Judgment', (2015) 28 *LeidenJIL* 349; Graven, J., 'Les crime contre l'humanité', (1950) 76 *RCADI* 433; Goy, B., 'Individual Criminal Responsibility before the International Criminal Court', (2012) 12 *ICLRev* 1; Greenawalt, A., 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', (1999) 99 *CollRev* 2259; Greenwood, C., 'Command Responsibility and the Hadžihasano-

vić Decision', (2004) 2 *JICJ* 598; Haan, V., 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia', (2005) 5 *ICLRev* 167; *id.*, *Joint Criminal Enterprise: Die Entwicklung einer mittäterschaftlichen Zurechnungsfigur im Völkerstrafrecht* (Duncker & Humblot 2008); Hale, K. and Cline, D., 'Holding Collectives Accountable', (2014) 25 *CLF* 261; Hamdorf, K., *Beteiligungsmodele im Strafrecht. Ein Vergleich von Teilnahme- und Einheitstätersystemen in Skandinavien, Österreich und Deutschland* (Ed. iuscrim 2002); Heller, K.J., 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', (2007) 18 *EJIL* 477; *id.*, 'The Rome Statute of the International Criminal Court', in: K.J. Heller and M.D. Dubber (eds.), *The Handbook of Comparative Criminal Law* (SUP 2011) 593; Herzig, A., 'Die Täterschaftslehre in der Rechtsprechung des Internationalen Strafgerichtshofs', (2013) 4 *ZIS* 189; Heyer, A.K., *Grund und Grenze der Beihilfstrafbarkeit im Völkerstrafrecht – Zugleich ein Beitrag zur Entwicklung eines Wirtschaftsvölkerstrafrechts* (Books on Demand 2013); Hinek, S., 'The Judgment of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Pavle Strugar', (2006) 19 *LeidenJIL* 477; Jain, N., *Perpetrators and Accessories in International Criminal Law – Individual Modes of Responsibility for Collective Crimes* (Hart 2014); Jakobs, G., *Theorie der Beteiligung* (Mohr Siebeck 2014); Jescheck, H.-H., 'Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht', (1954) 66 *ZStW* 193; Jessberger, F. and Geneuss, J., 'On the Application of a Theory of Indirect Perpetration in Al Bashir', (2008) 6 *JICJ* 853; Jones, J., 'Whose intent is it anyway?', in: L.C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man – Essays in Honour of A. Cassese* (Kluwer Law International 2003) 467; Jones, J.R.W.D., Heller, K.J. and van Sliedregt, E., 'Milestones in International Criminal Justice: Recent Legal Controversies at the UN Yugoslav Tribunal' (2013) <<http://www.chathamhouse.org/sites/files/chathamhouse/public/Meetings/Meeting%20Transcripts/161013Yugo-slavl.pdf>> accessed 22 October 2014; Jordash, W., 'Joint Criminal Enterprise Liability – Result Orientated Justice', in: W.A. Schabas *et al.* (eds.), *The Ashgate Research Companion to International Criminal Law-Critical Perspectives* (Ashgate 2013) 133; Kacker, D., 'Coming Full Circle: The Rome Statute and the Crime of Aggression', (2010) 33 *SuffolkTransatl.Rev* 257; Kearney, M.G., 'Any other Contribution? Ascribing Liability for Cover-Ups of International Crimes', (2013) 24 *CLF* 331; Kolb, R., 'Droit international pénal', in: *id.* and D. Scalia (eds.), *Droit International Penal* (Helbig und Lichtenhahn 2nd edition 2012), 1; Kremnitzer, M., 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law', (2010) 8 *JICJ* 909; Krefß, C., 'Die Kristallisation eines Allgemeinen Teils des Völkerstrafrechts: Die Allgemeinen Prinzipien des Strafrechts im Statut des Internationalen Strafgerichtshofs', (1999) 12 *HuV-I* 4; *id.*, 'Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht', (2006) 153 *GA* 304; *id.*, 'The Darfur Report and Genocidal Intent', (2005) 3 *JICJ* 562; Kunz, J.L., 'The United Nations Convention on Genocide', (1949) 43 *AJIL* 732; Laucci, C., *Digest of Jurisprudence of the Special Court for Sierra Leone 2003–2005* (2007); Lemkin, R., 'Genocide as a Crime under International Law', (1947) 41 *AJIL* 145; Manacorda, S. and Meloni, C., 'Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?', (2011) 9 *JICJ* 159; Mantovani, F., 'The General Principles of International Criminal Law: The viewpoint of a national criminal lawyer', (2003) 1 *JICJ* 26; Marsh, L. and Ramsden, M., 'Joint Criminal Enterprise: Cambodia's Reply to Tadić', (2011) 11 *ICLRev* 137; Marxen, K., 'Beteiligung an schwerem systematischem Unrecht. Bemerkungen zu einer völkerstrafrechtlichen Straftatlehre', in: K. Lüderssen (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?*, iii: *Makrodelinquenz* (Nomos 1998) 220; Meyer, F., 'Multinationale Unternehmen und das Völkerstrafrecht', (2013) 131 *SchwZStR* 56; Milittello, V., 'The personal nature of individual criminal responsibility and the ICC Statute', (2007) 5 *JICJ* 941; Mitgutsch, I., 'Die Beteiligungsregelung des Römischen Statuts im Lichte der jüngsten Rechtsprechung des Internationalen Strafgerichtshofs', in: C. Geisler *et al.* (eds.), *Festschrift für Klaus Geyfert* (De Gruyter 2011) 357; Murmann, U., 'Problems of Causation with Regard to (Potential) Actions of Multiple Protagonists', (2014) 12 *JICJ* 283; Nserere, D.N., 'Aggression under the Rome Statute of the International Criminal Court', (2002) 4 *NordJIL* 497; Obote-Odora, A., 'Complicity in Genocide as Understood through the ICTR Experience', (2002) 2 *ICLRev* 301; Ohlin, J.D., 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', (2007) 5 *JICJ* 69; *id.*, 'Joint Criminal Confusion', (2009) 12 *NCLRev* 406; *id.*, 'Searching for the Hinterman. In Praise of Subjective Theories of Imputation', (2014) 12 *JICJ* 325; Ohlin, J.D., van Sliedregt, E. and Weigend, T., 'Assessing the Control-Theory', (2013) 26 *LeidenJIL* 725; Olásolo, H., 'Joint Criminal Enterprise and its Extended Form: A Theory of Co-Perpetration giving rise to Principal Liability, A Notion of Accessorial Liability, or a form of Partnership in Crime?', (2009) 20 *CLF* 263; *id.*, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing 2009); Osiel, M., 'The Banality of the Good: Aligning Incentives against Mass Atrocity', (2005) 105 *CollRev* 1751; Park, G., *Rechtsnatur, Konkrete Voraussetzungen und Legitimität der Beteiligungsform gemäß Art. 25 Abs. 3 lit. (d) IStGHs* (Duncker & Humblot 2016 [forthcoming]); Pelletier, H. and Perfetti, J., *Code Pénal 1997–1998* (Litec 10th edition 1997); Piacente, N., 'Importance of the JCE Doctrine for the ICTY Prosecutorial Policy', (2004) 2 *JICJ* 448; Provost, R., 'Amicus Curiae Brief on Joint Criminal Enterprise in the Matter of the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" Dated 8 August 2008', (2009) 20 *CLF* 331; Rackow, P., *Neutrale Handlungen als Problem des Strafrechts* (Peter Lang 2007); Radtke, H., 'Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und internationalen Strafrecht', (2006) 153 *GA* 350; Rayfuse, R., 'The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission', (1997) 8 *CLF* 43; Robinson, P.H., 'Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States', (1984–1985) 29 *NYLSchLRev* 101; Rotsch, T., 'Einheitstäterschaft' statt *Täterschaft* (Mohr Siebeck 2009); *id.*, 'Neues zur Organisationsherrschaft', (2005) 25 *NSiZ* 13; Roxin, C., *Strafrecht. Allgemeiner Teil, i: Grundlagen. Der Aufbau der Verbrechenslehre* (C.H. Beck 4th ed. 2007); *id.*, *Strafrecht. Allgemeiner Teil, ii: Besondere Erscheinungsformen der Straftat* (C.H. Beck 2003); *id.*, 'The Dogmatic Structure of Criminal Liability in

the General Part of the Draft Israeli Penal Code – A Comparison with German Law’, (1996) 30 *IsLRev* 60; *id.*, ‘Organisationsherrschaft als eigenständige Form mittelbarer Täterschaft’, (2007) 125 *SchwZStR* 1; *id.*, ‘Organisationssteuerung als Erscheinungsform mittelbarer Täterschaft’, in: K. Amelung *et al.* (eds.), *Festschrift für Volker Krey zum 70. Geburtstag am 9. Juli 2010* (Kohlhammer 2010) 449; *id.*, ‘Crimes as Part of Organized Power Structures’ (2011) 9 *JICJ* 193; Sadat, L.N. and Jolly, J.M., ‘International Criminal Courts and Tribunals – Seven Canons of ICC Treaty Interpretation: Making Sense of Article’s 25 Rorschach Blot’, (2014) 27 *LeidenJIL* 755; Saland, P., ‘International criminal law principles’, in: R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results* (Kluwer Law International 1999) 189; Satō, H., ‘International Criminal Responsibility Concerning “Control over an Organization” and Command Responsibility’, (2012) 12 *ICLRev* 293; Schabas, W.A., ‘General Principles of Criminal Law in the International Criminal Court Statute (Part III)’, (1998) 6 *EJCLCJ* 400; *id.*, *The Crime of Genocide in the Jurisprudence of the ICTY and ICTR*, in: H. Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (Berlin Verlag Arno Spitz 2001) 447; *id.*, *The UN International Criminal Tribunals* (CUP 2006); Schünemann, B., *Grund und Grenzen der unechten Unterlassungsdelikte* (Schwartz 1971); *id.*, ‘Schrumpfende Basis, wuchernder Überbau? – Zum Schicksal der Täterschaftsdoktrin nach 50 Jahren’, in: M. Heinrich *et al.* (eds.), *Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011* (De Gruyter 2011) 799; Sereni, A., ‘Individual Criminal Responsibility’, in: F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998) 139; Spinedi, M. and Simma, B., *United Nations Codification of State Responsibility* (Oceana 1987); Stahn, C., ‘Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment’, (2014) 12 *JICJ* 809; Stegmiller, I., *The Pre-Investigation Stage of the ICC* (Duncker & Humblot 2011); Stewart, J.G., ‘The End of “Modes of Liability” for International Crimes’, (2012) 25 *LeidenJIL* 165; *id.*, ‘The Important New Orthodoxy on Complicity in the ICC Statute’, 21 January 2015, <<http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/>> (last visited 31 January 2015); Stewart, M.J., ‘How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability’, (1998) 25 *AmJCrImL* 385; Stree, W. and Bosch, N., ‘Vorbemerkungen zu den §§ 13 ff.’, in: A. Eser *et al.* (eds.), *Schönke/Schröder Kommentar zum Strafgesetzbuch* (C.H. Beck 29th edition 2014); Stuckenberg, C.-F., ‘Problems of “Subjective Imputation” in Domestic and International Criminal Law’, (2014) 12 *JICJ* 311; Triffterer, O., *Österreichisches Strafrecht. Allgemeiner Teil* (Springer 2nd edition 1994); *id.*, ‘Bestandsaufnahme zum Völkerstrafrecht’, in: Hankel, G. and Stuby, G. (eds.), *Strafgerichte gegen Menschheitsverbrechen* (Hamburger Edition 1995) 169; *id.*, ‘Acts of Violence and International Criminal Law – A New Position of Power to Fight Abuse of Power’, (1997) 4 *CroatianAnnCrimL&Prac* 811; *id.*, ‘Genocide, its Particular Intent to Destroy in Whole or in Part the Group as Such’, (2001) 14 *LeidenJIL* 399; *id.*, ‘Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender “Elements of Crimes” für alle Tatbestände des Völkermords’, in: M. Heinrich *et al.* (eds.), *Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011* (De Gruyter 2011) 1438; *id.*, ‘Command responsibility, Article 28 Rome Statute. An Extension of Individual Criminal Responsibility for Crimes within the Jurisdiction of the Court – Compatible with Article 22, nullum crimen sine lege?’, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (C.F. Müller 2004) 213; *id.*, ‘“Command Responsibility” – Crimen Sui Generis or Participation “as Otherwise Provided” in Art. 28 Rome Statute’, in: J. Arnold *et al.* (eds.), *Menschengerechtes Strafrecht. Festschrift für Albin Eser zum 70. Geburtstag* (C.H. Beck 2005) 901; *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records*, ii (United Nations Publications 1988); *United Nations War Crimes Commission* (ed.), *Law Reports of Trials of War Criminals*, xv (1948); van den Wyngaert, C., ‘The Structure of the Draft Code and the General Part’, in: M.C. Bassiouni (ed.), *Commentaries on the International Law Commission’s 1991 Draft Code of Crimes Against the Peace and Security of Mankind* (Érés 1993); van den Herik, L. and Letnar Cernic, J., ‘Regulating Corporations under International Law – From Human Rights to International Criminal Law and Back Again’, (2010) 8 *JICJ* 725; van der Wilt, H., ‘Genocide v. War Crimes in the Van Anraat Appeal’, (2008) 6 *JICJ* 557; *id.*, ‘The Continuous Quest for Proper Modes of Criminal Responsibility’, (2009) 7 *JICJ* 307; van Sliedregt, E., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (CUP 2003); *id.*, ‘System Criminality at the ICTY’, in: A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (CUP 2009) 183; *id.*, *Individual Criminal Responsibility in International Law* (OUP 2012); Vest, H., ‘Humanitätsverbrechen – Herausforderung für das Individualstrafrecht?’, (2001) 113 *ZStW* 457; *id.*, *Genozid durch organisatorische Machtapparate. An der Grenze von individueller und kollektiver Verantwortlichkeit* (Nomos 2002); *id.*, ‘Business Leaders and the Modes of Individual Criminal Responsibility under International Law’, (2010) 8 *JICJ* 851; *id.*, *Völkerrechtsverbrecher verfolgen* (Nomos 2011); *id.*, ‘Kurswechsel am Jugoslawientribunal’, (2014) 132 *SchZStR* 61; *id.*, ‘Problems of Participation – Unitarian, Differentiated Approach, or Something Else?’, (2014) 12 *JICJ* 295; Weigend, T., ‘Article 3: Responsibility and Punishment’, in: M.C. Bassiouni (ed.), *Commentaries on the International Law Commission’s 1991 Draft Code of Crimes Against the Peace and Security of Mankind* (Érés 1993) 113; *id.*, ‘Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht’, (2004) 116 *ZStW* 999; *id.*, ‘Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges’, (2008) 6 *JICJ* 471; *id.*, ‘Societas delinquere non potest?’, (2008) 6 *JICJ* 927; *id.*, ‘Perpetration through an Organization: The Unexploited Career of a German Legal Concept’, (2011) 9 *JICJ* 91; *id.*, ‘Problems of Attribution in International Criminal Law. A German Perspective’, (2014) 12 *JICJ* 253; Weißer, B., *Täterschaft in Europa: Ein Diskussionsvorschlag für ein europäisches Tätermodell auf der Basis einer rechtsvergleichenden Untersuchung der Beteiligungssysteme Deutschlands, Englands, Frankreichs, Italiens und Österreichs* (Mohr Siebeck 2011); Weltz, K., *Die Unterlassungshaftung im Völkerstrafrecht, eine rechtsvergleichende Untersuchung des französischen, US-amerikanischen und deutschen Rechts* (Edition Iuscrim 2004); Werle, G., ‘Individual Criminal Responsibility in

Article 25 ICC Statute', (2007) 5 *JICJ* 953; *id.*, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in: E. van Sliedregt and S. Vasiliev (eds.), *Pluralism in International Criminal Law* (OUP 2014), 301; *id.*, 'Täterschaft und Teilnahme im Statut des Internationalen Strafgerichtshofs', in: M. Heger, B. Kelker, and E. Schramm (eds.), *Festschrift für Kristian Kühl zum 70. Geburtstag* (C.H. Beck, 2014), 851; Werle, G. and Burghardt, B., 'Die mittelbare Mittäterschaft – Fortentwicklung deutscher Strafrechtsdogmatik im Völkerstrafrecht?', in: R. Bloy *et al.* (eds.), *Festschrift für Manfred Maiwald zum 75. Geburtstag* (Duncker & Humblot 2011) 849; Williamson, J., 'Command Responsibility in the Case law of the International Criminal Tribunal of Rwanda', (2002) 13 *CLF* 365; Wirth, S., 'Co-Perpetration in the Lubanga Trial Judgment', (2012) 10 *JICJ* 971; Wise, E.M., 'Part 3: General Principles of Criminal Law', in: Sadat Wexler, L. (ed.), *Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference* (Érés 1998) 39.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1.....	4
II. Paragraph 2.....	5
III. Paragraph 3.....	6
1. Perpetration, co-perpetration and perpetration by means.....	7
a) 'commits ... as an individual ... jointly with another or through another person'.....	7
b) '... regardless of whether that other person is criminally responsible' ..	16
2. 'orders, solicits or induces' an (attempted) crime.....	18
3. 'For the purpose of facilitating aids, abets or otherwise assists ...'	20
a) 'aids, abets or otherwise assists ... including providing the means'.....	21
b) 'For the purpose of facilitating'.....	27
4. 'In any other way contributes' to the (attempted) commission ... 'by a group ... acting with a common purpose'.....	28
a) General.....	28
b) Objective contribution.....	29
c) Subjective level: intentional contribution.....	30
aa) 'with the aim of furthering the criminal activity or criminal purpose of the group ...'	33
bb) 'in the knowledge of the intention of the group'	34
5. 'directly and publicly incites ... to commit genocide'.....	35
6. 'attempt'.....	40
a) 'by taking action that commences its execution by means of a substantial step...'	40
b) 'a person ... shall not be liable ... for the attempt ... if that person completely and voluntarily gave up the criminal purpose'.....	43
IV. Paragraph 3bis ('in respect of the crime of aggression...')	46
V. Paragraph 4.....	47
C. Special remarks.....	48
I. Issues of delimitation.....	48
II. Complicity after commission.....	51
III. Individual criminal responsibility and omission, in particular command responsibility.....	53

A. Introduction/General remarks

The provision, in particular paragraphs 1 and 2, confirms the universal acceptance of the principle of individual criminal responsibility as recognized by the International Military Tribunal¹ and reaffirmed by the ICTY in the *Tadić* jurisdictional decision with regard to

¹ In *The Trial of the Major War Criminals* (Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, H. M. Attorney General by HMSO, London 1950, Part 22, 447) it was held that individual criminal responsibility has 'long been recognized' and further stated: 'enough has been said to show that individuals can be punished for violations of International Law. Crimes against International Law are committed by men not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced'.

individual criminal responsibility for violations of common article 3 of the Geneva Conventions². The drafting history has been described elsewhere³.

- 2 Subparagraphs (a)–(c) of paragraph 3 establish the basic concepts of individual criminal attribution⁴. Subparagraph (a) refers to three forms of perpetration: on one's own, as a co-perpetrator or through another person (perpetration by means, *mittelbare Täterschaft*). Subparagraph (b) contains different forms of participation: on the one hand, ordering an (attempted) crime, on the other soliciting or inducing its (attempted) commission. Subparagraph (c) establishes criminal responsibility for 'aiding and abetting' as the subsidiary form of participation. Thus, in contrast to the ILC Draft Codes of Crimes against the Peace and Security of Mankind⁵, the Statutes of the *ad hoc* Tribunals and the so-called mixed tribunals (Special Court for Sierra Leone and the Cambodian Extraordinary Chambers)⁶, paragraph 3 distinguishes between perpetration (subparagraph (a)) and other forms of participation (subparagraphs (b) and (c)), with the latter establishing different degrees of responsibility⁷. This approach confirms the general tendency in comparative criminal law to reject a pure unitarian concept of perpetration (*Einheitstätermo*del) and to distinguish, at least on the sentencing level, between different forms of participation⁸. The approach is also followed, albeit less elaborate, by the internationalized panels for East Timor⁹; for example the act of providing the *means* for the commission of a crime is not made explicitly punishable¹⁰. In fact, article 25 differentiates already at the level of allocation of responsibility, at least terminologically, between different forms of participation and thereby follows a unitarian

² *Prosecutor v. Tadić*, No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 128–137 <<http://www.legal-tools.org/doc/866e17/>> (134): 'All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife'. For an analysis on the case law since Nuremberg, see Ambos, *Der Allgemeine Teil* (2004) 78 *et seq.*; *id.*, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of ICL* (2000) 1, 7 *et seq.* See also Triffterer, in: Hankel and Stuby (eds.), *Strafgerichte gegen Menschenverbrechen* (1995) 169, 211–213; Bassiouni, *Introduction to ICL* (2013) 17, 49, 60–1, 66 *et seq.*; Jain, *Perpetrators and Accessories in ICL* (2014), 18 *et seq.* For an analysis of the ICTR's case law, see Boed (2002) 13 *CLF* 293, 296 *et seq.*

³ Cf. Ambos, *Internationales Strafrecht* (2014) § 6 mn. 21; Bassiouni, *Legislative History* (2005) 3–40; Schabas (1998) 6 *EJCLCJ* 400. For a good critique of the misnomer 'modes of liability' Stewart (2012) 25 *LeidenJIL* 165, 166 with fn. 2 (who, however, uses the expression then all over his paper).

⁴ See also Ambos, *Internationales Strafrecht* (2014) § 7 mn. 3. For a comprehensive treatment of article 25(3) see *id.*, *Treatise on ICL I* (2013) 144 *et seq.*

⁵ 1954 ILC Draft Code, article 2 para. 13; 1991 ILC Draft Code, article 3; 1996 ILC Draft Code, article 2.

⁶ See article 7 para. 1 *ICTY Statute* (UN Doc. S/RES/827 (1993)), in: 14 *HRLJ* 211) and (the identical) article 6 para. 1 *ICTR Statute* (UN Doc. S/RES/955 (1994)): 'A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ...'. See also article 6 para. 1 *Special Court for Sierra Leone (SCSL) Statute* in Laucci, *Digest of Jurisprudence* (2007) 63, as well as article 29 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea in Ambos and Othman (eds.), *New Approaches* (2003).

⁷ Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 788 with fn. 86.

⁸ Cf. Triffterer, in: Hankel and Stuby (eds.), *Strafgerichte gegen Menschenverbrechen* (1995) 169, 226; Pradel, *Droit Pénal Comparé* (2008) 317 *et seq.*; Fletcher, *Basic Concepts of Criminal Law* (1998) 188 *et seq.* In a similar vein also Mantovani (2003) 1 *JICJ* 26, 34; Jain, *Perpetrators and Accessories in ICL* (2014), 43–4. There are also different approaches. See e.g. Rotsch, 'Einheitstäterschaft' (2009) who renounces any differentiation between forms of participation and instead advocates, contrary to a traditional unitarian system, a uniform system of imputation that only recognizes the distinction between immediate (direct) and mediate (indirect) violations of legally protected goods. For a even more radically different approach Jakobs, *Beteiligung* (2014) who argues that participation constitutes only a reason of imputation ['Zurechnungsgrund'] and the form of participation – perpetration or secondary participation – only a kind of competence in quantitative terms ['Zuständigkeitsquantitäten']; competence in turns depends on or is linked to certain spheres of organisation ['Organisationskreise'] each person is competent for and must not extend to the detriment of others. This negative duty is complemented by a positive one according to which one has to establish or maintain certain institutions.

⁹ Section 14 of UNTAET Regulation 2000/15 (On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences) of 6 June 2000 in: Ambos and Wirth (2002) 13 *CLF* 1–90.

¹⁰ Unlike article 25, paras.3 (c) and (f) of the *ICC Statute* respectively.

concept of perpetration in a functional sense (*funktionelle Einheitstäterschaft*)¹¹ as known, for example, in Austrian and Swedish law¹².

Subparagraphs (d), (e) and (f) provide for expansions of attribution: contributing to the commission or attempted commission of a crime by a group, incitement to genocide, attempt.

Thus, in sum, article 25 para. 3 contains, on the one hand, basic rules of individual criminal responsibility and, on the other, rules expanding attribution (which may or may not still be characterized as specific forms of participation). A *grosso modo*, an individual is criminally responsible if he or she perpetrates, takes part in or attempts to commit a crime within the jurisdiction of the Court (articles 5–8). It must not be overlooked, however, that criminal attribution in international criminal law has to be distinguished from attribution in national criminal law: while in the latter case normally a concrete criminal result caused by a person's individual act is punished, international criminal law creates liability for acts committed in a collective context and systematic manner; consequently the individual's own contribution to the harmful result is not always readily apparent¹³.

¹¹ Advocating a four-layer-system of participation Werle (2007) 5 *JICJ* 953, 957; *id.* and Burghardt, in: Bloy *et al.* (eds.), *Festschrift für Manfred Maiwald* (2011) 849, 853; *id.*, in: van Sliedregt and Vasiliev (eds.), *Pluralism in ICL* (2014), 301, 315 *et seq.*; *id.*, in: Heger, Kelker, and Schramm (eds.), *Festschrift für Kristian Kühl* (2014), 851, Werle and Jessberger, *Principles* (2014) 197. Vest (2010) 8 *JICJ* 851, 856 with fn. 19 addresses the peculiarity of Article 25 (3) by defining it as 'a differentiating model with uniform (unified) range of punishment'. See also *id.*, *Völkerrechts-verbrecher verfolgen* (2011) 179; *id.* (2014) 12 *JICJ* 295, 305 *et seq.*; conc. Gil and Maculan (2015) 28 *LeidenJIL* 351, 362. The *Lubanga* TC followed this approach *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2842, Judgment, TC, 14 March 2012, paras. 996–9 (998: '...predominance of principal over secondary liability, which, in turn, supports a notion of principal liability that requires a greater contribution than accessory liability') <<http://www.legal-tools.org/doc/677866/>>. In the same vein, the *Lubanga* AC distinguishes (confusing terminologically, however, 'commit' and 'perpetrate') between perpetration and accessorial responsibility, the former being more blameworthy than the latter (para. 462), which makes it necessary to determine the basis of this distinction (para. 463), *cf.* *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-3121-Red, Judgment, AC, 1 December 2014, paras. 462 *et seq.* <<http://www.legal-tools.org/doc/585c75/>>; adopting this view *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 135 <<http://www.legal-tools.org/doc/0536d5/>>. The *Katanga* TC (*Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, TC, 7 March 2014, paras. 1386–7, 1394 *et seq.* <<http://www.legal-tools.org/doc/9813bb/>>) recognizes the inherent distinction between perpetrators and accomplices in the Statute (para. 1387, 1395) and the *control-over-the-act* approach (1394–5), but rejects the normative hierarchy between them (1386–7); *contra* also *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2842, Judgment, TC, Separate Opinion of Judge Adrian Fulford, paras. 6–12, who rejects 'a hierarchy... between the modes of liability' (9), which 'were not intended to be mutually exclusive' (7) <<http://www.legal-tools.org/doc/677866/>>; *Prosecutor v. Ngudjolo Chui*, No. ICC-01/04-02/12-4, Judgment, TC, Concurring Opinion of Judge van den Wyngaert, 18 December 2012, paras. 5–6, 17, 22 *et seq.* 66, 70 (who although recognising 'a conceptual difference between principal and accessorial criminal responsibility', rejects their 'different legal treatment' (22)) <<http://www.legal-tools.org/doc/7d5200/>> and *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3464-AnxI, Judgment, TC, Minority Opinion of Judge van den Wyngaert, 7 March 2014, paras. 279–81 <<http://www.legal-tools.org/doc/9b0c61/>>; *contra* also Ohlin, van Sliedregt and Weigend (2013) 26 *LeidenJIL* 725, 728 *et seq.*, 740 *et seq.*, 745–6; Sadat and Jolly (2014) 27 *LeidenJIL* 755, 758, 775, 782, albeit with a too formalistic, international law based reading of article 25 without going into any substantive discussion of the respective forms of participation (785); descriptive on the whole discussion about the structure of Article 25 (3), Stahn (2014) 12 *JICJ* 809, 822 *et seq.*; conc. with Katanga Gil and Maculan (2015) 28 *LeidenJIL* 364 *et seq.* (rejecting 'hierarchy of blameworthiness' [at 365] and focusing on the 'accessory or autonomous nature of the contribution' [366] as the key distinguishing criterion [cf also 363, 370]). In favour of the unitarian model Stewart (2012) 25 *LeidenJIL* 165, 205 *et seq.* who, however, argues on the basis of some incorrect and imprecise assumptions (most importantly the 'Hitler-as-accomplice' assumption, at 167, which runs through the whole paper), takes the Austrian system as his model of a unitarian system (at 205; apparently, despite fn. 194, not fully grasping its functional unitarian orientation similar to Article 25, see next fn.) and, most importantly, does neither provide an analysis of article 25 (apparently assuming that it is based on the differentiated system) nor further elaborates on his (alternative) 'theory'; previously Kreß (1999) 9 *HuV-I* 4, 12 (interpreting article 25 as a unitarian model). Leaving it open Mitgutsch, in: Geisler *et al.* (eds.), *Festschrift für Klaus Geppert* (2011) 357, 373–4 (concluding that article 25 could be understood either as a unitarian or a differentiated model).

¹² For profound comparative studies see Hamdorf, *Beteiligungsmodelle* (2002) 43 *et seq.*, 75 *et seq.*, 104 *et seq.*; Ambos, *Der Allgemeine Teil* (2004) 543 *et seq.*; Weißer, *Täterschaft in Europa* (2011); on the English and German law Jain, *Perpetrators and Accessories in ICL* (2014), 103 *et seq.* and 166 *et seq.* (perpetrator), 155 *et seq.* and 176 *et seq.* (accessory).

¹³ See – for a first attempt to develop a theory of attribution in international criminal law – Marxen, in: Lüderssen (ed.), *Aufgeklärte Kriminalpolitik* (1998) 220, 226 *et seq.* On the peculiarities on attribution in

B. Analysis and interpretation of elements

I. Paragraph 1

- 4 As far as the jurisdiction over natural persons is concerned, paragraph 1 states the obvious. Already the International Military Tribunal found that international crimes are ‘committed by men not by abstract entities’¹⁴. However, the decision whether to include ‘legal’ or ‘juridical’ persons within the jurisdiction of the court was controversial. The French delegation argued strongly in favour of inclusion since it considered it to be important in terms of restitution and compensation orders for victims¹⁵. The final proposal presented to the Working Group was limited to private corporations, excluding States and other public and non-profit organizations¹⁶. Further, it was linked to the individual criminal responsibility of a leading member of a corporation who was in a position of control and who committed the crime acting on behalf of and with the explicit consent of the corporation and in the course of its activities. Despite this rather limited liability, the proposal was rejected for several reasons, which as a whole are quite convincing. The inclusion of collective liability would detract from the Court’s jurisdictional focus, which is on individuals. Furthermore, the Court would be confronted with serious and ultimately overwhelming problems of evidence. In addition, there are not yet universally recognized common standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems¹⁷. Consequently, the absence of corporate criminal liability in many States would render the principle of complementary (article 17)¹⁸ unworkable. Despite these reasons, there are increasingly voices who advocate the recognition of the responsibility of legal persons in international criminal law and under the ICC Statute¹⁹.

II. Paragraph 2

- 5 The provision repeats the principle of individual criminal responsibility. A person may ‘commit’ a crime by the different modes of participation and expansions of attribution set out in the following paragraph 3. In other words, commission in this context is not limited to perpetration within the meaning of paragraph 3 (a). ‘A crime within the jurisdiction of the Court’ refers to genocide, crimes against humanity, war crimes and the recently defined crime of aggression according to articles 5 to 8*bis*. The possible ‘punishment’ follows from article 77: imprisonment up to a maximum of 30 years or life imprisonment, additionally a fine and forfeiture of proceeds²⁰.

international criminal law see also Ambos, *Der Allgemeine Teil* (2004) 539 *et seq.* and *passim.*; *id.* (2006) 4 JICJ 660, 663; Ambos, *Internationales Strafrecht* (2014) § 7, mn. 11.

¹⁴ See already note 1.

¹⁵ UN Doc. A/CONF.183/C.1/L.3 (1998), article 23 paras. 5 and 6. See also Wise, in: Sadat Wexler (ed.), *Model Draft Statute* (1998) 39, 42; Sereni, in: Lattanzi (ed.), *The ICC: Comments* (1998) 139, 145–6; Schabas (1998) 6 EJCCLCJ 400, 409 *et seq.*

¹⁶ UN Doc. A/CONF.183/C.1/WGGP/L.5 (1998).

¹⁷ Cf. Eser *et al.* (eds.), *Einzelverantwortung und Mitverantwortung* (1998); Pradel, *Droit Pénal Comparé* (2008) 163 *et seq.*

¹⁸ Cf. Schabas and El Zeidy, *article 17*, mn. 1 *et seq.* and 21 *et seq.* (in this volume).

¹⁹ Clapham (2008) 6 JICJ 899, 926; van den Herik and Letnar Cernic (2010) 8 JICJ 725; Farrell (2010) 8 JICJ 873; Kremnitzer, 2010) 8 JICJ 909; crit. Weigend (2008) 6 JICJ 927, 944–5.

²⁰ See also rules 145–148 of the Rules of Procedure and Evidence as finally adopted by the Preparatory Commission, PCNICC/2000/1/Add.1, 2 November 2000. For a study on sentencing in international criminal law see Nemitz, *Strafzumessung im Völkerstrafrecht* (2002).

III. Paragraph 3

The chapeau repeats paragraph 2 and serves as an introduction to the modes of participation and commission set out in subparagraphs (a) to (f). 6

1. Perpetration, co-perpetration and perpetration by means

a) ‘commits ... as an individual ... jointly with another or through another person’. The first part of subparagraph (a) distinguishes between three forms of perpetration: direct or immediate perpetration (‘as an individual’), co-perpetration (‘jointly with another’) and perpetration by means (‘through another person’). 7

The characterization of **direct perpetration** as committing a crime ‘as an individual’ is unfortunate since it does not make clear that the direct perpetrator acts on his or her own without relying on or using another person²¹. As it stands, the formulation only repeats the principle of individual responsibility. While the original French version (‘à titre individuel’) was more precise, the new one (‘individuellement’) is identical to the English one; thus, only the Spanish version (‘por sí solo’) clearly refers to the concept of direct perpetration²². This view was also taken by ACs of the *ad hoc* Tribunals. In *Tadić*, it was held that the word ‘committed’ as used in article 7 para. 1 ICTY Statute means ‘first and foremost the physical perpetration ... by the offender himself’²³. Similarly, in *Celebici* it was stated that ‘commission’ constitutes primary or direct responsibility²⁴. It must not be overlooked, however, that the term ‘committed’ as such is broad enough to include the other forms of perpetration contained in subparagraph (a), especially if they are not explicitly mentioned, as is the case with articles 7 para. 1 and 6 para. 1 of the ICTY and ICTR Statutes respectively²⁵. In fact, the case law of the *ad hoc* Tribunals employs such a broad definition as will be seen below (mn. 9).

²¹ See American Law Institute, *Model Penal Code and Commentaries* (1985) § 2.06 (1): ‘committed by his own conduct’; good introduction by Dubber, *Criminal Law: Model Penal Code* (2002) 1 *et seq.*, Spanish Penal Code (Código Penal, Ley Orgánica 10/1995, de 23 November 1995), article 28: ‘por sí solo’; German Penal Code (trans. by Darby, *Penal Code of the Federal Republic of Germany. The American Series of Foreign Penal Codes* (1987) § 25 (1): ‘selbst ... begeht’ (‘acting himself’).

²² Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 789 with fn. 89.

²³ *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, AC, 15 July 1999, para. 188 <<http://www.legal-tools.org/doc/8efc3a/>>. Conc. *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Judgment, TC, 26 February 2001, para. 376: ‘direct personal or physical participation’ <<http://www.legal-tools.org/doc/d4fedd/>>; *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, para. 73 <<http://www.legal-tools.org/doc/1a994b/>>; *Prosecutor v. Vasiljević*, No. IT-98-32-T, Judgment, TC, 29 November 2002, para. 62 <<http://www.legal-tools.org/doc/8035f9/>>; *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 62 <<http://www.legal-tools.org/doc/f2cfef/>>; *Prosecutor v. Blagojević and Jokić*, No. IT-02-60-T, Judgment, TC, 17 January 2005, para. 694 <<http://www.legal-tools.org/doc/7483f2/>>; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment and Sentence, TC, 12 September 2006, para. 463 <<http://www.legal-tools.org/doc/fa02aa/>>. See recently *Prosecutor v. Haradinaj et al.*, TC, TJ, No. IT-04-84bis-T, 29 November 2012, para. 615 <<http://www.legal-tools.org/doc/1bad7b/>>; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, para. 884 <<http://www.legal-tools.org/doc/445e4e/>>; *Prosecutor v. Sainović et al.*, No. IT-05-87-A, Judgment, AC, 23 January 2014, para. 265 with fn. 761 (referring to the principal perpetrators as the physical perpetrators) <<http://www.legal-tools.org/doc/81ac8c/>>; *Prosecutor v. Karemera and Ntirumpatse*, No. ICTR-98-44-T, Judgment and Sentence, TC, 2 February 2012, para. 1432 <<http://www.legal-tools.org/doc/5b9068/>>.

²⁴ *Prosecutor v. Delalić et al.*, No. IT-96-21-A, Judgment, AC, 20 February 2001, paras. 342 *et seq.* (346) <<http://www.legal-tools.org/doc/051554/>>.

²⁵ See *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, TC, 31 July 2003, paras. 438 *et seq.* <<http://www.legal-tools.org/doc/32ecfb/>>, esp. 439 where ‘committing’ is defined as participating ‘physically or otherwise directly or indirectly’. The AC of *Prosecutor v. Seromba*, No. ICTR-2001-66-A, Judgment, AC, 12 March 2008 <<http://www.legal-tools.org/doc/b4df9d/>>, also clarified, that ‘committing is not limited to direct and physical perpetration’ (para. 161). The correct legal standard has to ask if the actions done were as much ‘an integral part’ of the crime as the direct and physical actions (para. 206), citing *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-A, Judgment, AC, 7 July 2006, para. 60 <<http://www.legal-tools.org/doc/aa51a3/>>. See recently *Prosecutor v. Haradinaj et al.*, TC, TJ, No. IT-04-84bis-T, 29 November 2012, para. 615 <<http://www.legal-tools.org/doc/1bad7b/>>; *Prosecutor v. Stanisic and Simatović*, No. IT-03-69-T, Judgment Vol. II, TC, 30 May 2013, paras. 1254 *et seq.*

- 8 Co-perpetration is no longer included in the complicity concept, but rather is recognized as an autonomous form of perpetration²⁶. It is characterized by a functional division of the criminal tasks between the different (at least two) co-perpetrators, who are normally inter-related by a common plan or agreement. Every co-perpetrator fulfils a certain task which contributes to the commission of the crime and without which the commission would not be possible. The common plan or agreement forms the basis of a reciprocal or mutual attribution of the different contributions holding every co-perpetrator responsible for the whole crime²⁷.
- 9 The ICTY has in the meantime decided a significant number of cases dealing with this form of participation. First and foremost, the *Tadić* AC, *inter alia* referring to article 25 para. 3 Rome Statute, held that co-perpetration is contained in article 7 para. 1 ICTY Statute and constitutes a form of participation that is particularly necessary in order to cope with international crimes since ‘most of ... these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups or individuals acting in pursuance of a common criminal design’²⁸. It further distinguished *three categories* of collective criminality on the basis of the case law thereby, creating the today infamous *Joint Criminal Enterprise* (‘JCE’) liability: *first*, the *basic* form where the participants act on the basis of a ‘common design’ or ‘common enterprise’ and with a common ‘intention’²⁹; *second*, the *systemic* form, *i. e.*, the so-called concentration camp cases where crimes are committed by members of military or administrative units such as those running concentration or detention camps on the basis of a common plan (‘common purpose’)³⁰; *third*, the so called ‘*extended*’ joint enterprise where one of the co-perpetrators actually engages in acts going beyond the common plan, but his or her acts still constitute a ‘natural and foreseeable consequence’ of the realization of the plan³¹. On the basis of these categories and the national law of various States, the objective requirements of the responsibility as a co-perpetrator can be stated as follows³²: There must be a plurality of persons who act on the basis of a – explicit or implicit – common plan or purpose, and the accused must take part in this plan, at least by supporting or aiding its

<<http://www.legal-tools.org/doc/698c43/>>; *Prosecutor v. Djordjević*, No. IT-05-87/1-A, Judgment, AC, 27 January 2014, paras. 25 *et seq.* <<http://www.legal-tools.org/doc/e6fa92/>>; *Karemera and Ngirumpaise*, No. ICTR-98-44-T, Judgment and Sentence, TC, 2 February 2012, para. 1432 <<http://www.legal-tools.org/doc/5b9068/>>; *Prosecutor v. Nahimana*, No. ICTR-01-68-A, Judgment, AC, 16 December 2013, para. 201 <<http://www.legal-tools.org/doc/7034a5/>>.

²⁶ Conc. Vest, *Genozid durch organisatorische Machtapparate* (2002) 185; van Sliedregt, *Criminal Responsibility* (2003) 71 *et seq.*

²⁷ For a similar definition invoking Roxins *opus Täterschaft und Teilnahme* see now *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, TC, 31 July 2003, paras. 440 *et seq.* <<http://www.legal-tools.org/doc/32ecfb/>>. See also Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 789 *et seq.*; Werle and Jessberger (2007) 5 *JICJ* 953, 958; *id.*, *Principles* (2014) 205 *et seq.*

²⁸ *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, AC, 15 July 1999, para. 191 <<http://www.legal-tools.org/doc/8efc3a/>>. In a similar vein most recently *Prosecutor v. Krajisnik*, No. IT-00-39-T, Judgment, TC, 27 September 2006, para. 876: ‘JCE is well suited to cases such as the present one, in which numerous persons are all said to be concerned with the commission of a large number of crimes’ <<http://www.legal-tools.org/doc/62a710/>> Cf. Zahar and Sluiter, *ICL Introduction* (2008) 255–257; on *Tadić* and JCE, see also Jain, *Perpetrators and Accessories in ICL* (2014), 28 *et seq.*

²⁹ *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, AC, 15 July 1999, para. 196–201 <<http://www.legal-tools.org/doc/8efc3a/>>.

³⁰ *Ibid.*, paras. 202–3.

³¹ *Ibid.*, paras. 204–19; *Prosecutor v. Martić*, No. IT-95-11-T, Judgment, TC, 12 June 2007, para. 439 <<http://www.legal-tools.org/doc/06634c/>>; *Prosecutor v. Haradinaj et al.*, No. IT-04-84-T, Judgment, TC, 3 April 2008, para. 138 <<http://www.legal-tools.org/doc/025913/>>; recently *Prosecutor v. Djordjević*, No. IT-05-87/1-A, Judgment, AC, 27 January 2014, para. 906 <<http://www.legal-tools.org/doc/e6fa92/>>. Crit. Eser, in Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 792 with fn. 104; conc. Cassese and Gaeta, *ICL* (2013) 168–172. In *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-A, Judgment, AC, 28 February 2005, para. 86 <<http://www.legal-tools.org/doc/006011/>>, the AC affirmed that an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise (*i. e.* the second category of cases), if they were a natural and foreseeable consequence thereof.

³² *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, AC, 15 July 1999, para. 227 <<http://www.legal-tools.org/doc/8efc3a/>>.

realization³³. Subsequent decisions³⁴ have taken up these considerations and refined the JCE liability.³⁵ In *Brdjanin*, an appeal by the Prosecution was successful since the TC erred in law and adopted a too narrow definition of JCE when it required (1) that physical perpetrators need to be JCE members for JCE liability to attach to high-level officials, (2) that there should be direct agreement between each JCE member regarding the commission of the crimes, and (3) that JCE is appropriate for ‘small’ cases only³⁶. Furthermore, special emphasis was laid on the criminal character of the enterprise: The contours of the common criminal purpose ought to be ‘properly defined’ and ‘supported by the evidence beyond reasonable doubt’³⁷. The JCE doctrine also served as a form of attribution to impute, *inter alia*, to *Slobodan Milošević* the genocide committed by Serb forces in Bosnia-Herzegovina³⁸ and to *Ante Gotovina* the alleged crimes of Croat forces committed during ‘Operation Storm’³⁹.

³³ Similarly Cassese *et al.*, *ICL* (2013) 163; crit. on the low threshold for participation in the common plan, Ambos (2007) 5 *JICJ* 171; conc. Jain, *Perpetrators and Accessories in ICL* (2014), 55–6.

³⁴ See the references in the previous edition and for more recent decisions notes 36 *et seq.*

³⁵ For my view on JCE see Ambos (2007) 5 *JICJ* 159–183 and *id.*, *Treatise on ICL I* (2013) 123 *et seq.* According to Danner and Martinez (2005) 93 *CallRev* 75, 107, 64 % of the indictments submitted in the ICTY between 25 June 2001 and 1 January 2004 relied on this doctrine. On the importance of JCE, also see Piacente (2004) 2 *JICJ* 448; Osiel (2005) 105 *ColLR* 1751, 1786 *et seq.* and Haan (2005) 5 *ICLR* 167–201. See also Cryer, *in: id. et al.*, *Introduction to ICL* (2014) 353, 356 *et seq.*

³⁶ *Prosecutor v. Brđjanin*, No. IT-99-36-A, Judgment, AC, 3 April 2007 <<http://www.legal-tools.org/doc/782cef/>> para. 414 with regard to ground 1 (‘principal perpetrator as a member of JCE’); para. 419 with regard to ground 2, second part (‘requirement of an additional understanding or agreement’), para. 425 with regard to ground 2, first part (‘JCE applicable to small cases only’); see further the declaration of Judge van den Wyngaert, 164, para. 1 *et seq.*; partly dissenting Judge Shahabuddin, 170 *et seq.*, who states that ‘link’ between the accused member and the crime can only be provided by showing that the physical perpetrator was himself a member of the JCE and therefore within the intention of the accused member to take responsibility for certain crimes when committed by fellow members (para. 18).

³⁷ *Ibid.*, para. 424. See also *Prosecutor v. Haradinaj et al.*, TC, TJ, No. IT-04-84bis-T, 29 November 2012, paras. 628 *et seq.* (rejecting the requirement of the ‘existence of a common purpose’ for lack of evidence, paras. 625 and 668) <<http://www.legal-tools.org/doc/1bad7b/>>.

³⁸ *Prosecutor v. Slobodan Milošević*, No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, TC, 16 June 2004, paras. 144 *et seq.* <<http://www.legal-tools.org/doc/d7fb46/>>. See Ambos (2004) 59 *JZ* 956, 966; see also the indictment of *Radovan Karadžić* taking recourse to JCE concerning, *inter alia*, the *Srebrenica* genocide: *Prosecutor v. Radovan Karadžić*, No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009, paras. 5–10, 20–30 <<http://www.legal-tools.org/doc/858aef/>>.

³⁹ *Prosecutor v. Gotovina et al.*, No. IT-06-90-T, Judgment Vol. II, TC, 15 April 2011, paras. 1948 *et seq.*, 2322 *et seq.* <<http://www.legal-tools.org/doc/86922c/>>. The AC acquitted both *Gotovina* and *Markac* since it considered it not to be proved beyond reasonable doubt that the alleged JCE was implemented by way of unlawful military attacks, see *Prosecutor v. Gotovina and Markac*, No. IT-06-90-A, Judgment, AC, 16 November 2012, paras. 91–3, 96–8 <<http://www.legal-tools.org/doc/03b685/>>; See also *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, paras. 1095, 1129 (finding that the accused was responsible for extermination [para. 1183], murder [para. 1187], forcible transfer as an inhumane act [para. 1187], persecution [para. 1193] and deportation [para. 1198] as a member of a JCE to forcibly remove and murder the Bosnian Muslim population [paras. 1095 and 1129] <<http://www.legal-tools.org/doc/445e4e/>>; the Accused was also found responsible for the crime of genocide pursuant to JCE III liability [para. 1173]); *Prosecutor v. Stanišić and Zupljanin*, No. IT-08-91-T, Judgment Vol. 2, TC, 27 March 2013, para. 131 *et seq.* (finding that a common plan to forcibly transfer the non-Serb population existed [para. 313] of which the two accused have been members [para. 520, 729 *et seq.*] so that they are responsible for the crimes of forcible transfer as an inhumane act and as an underlying act of persecution under JCE I and for other crimes under JCE III [paras. 770 *et seq.*, 799 *et seq.*]) <<http://www.legal-tools.org/doc/cbc02a/>>; *Prosecutor v. Stanišić and Simatović*, No. IT-03-69-T, Judgment Vol. II, TC, 30 May 2013, paras. 2337 *et seq.* <<http://www.legal-tools.org/doc/698c43/>> *in casu* acquitting both *Stanišić* and *Simatović* since it could not to be proved beyond reasonable doubt that they shared the intent to further the common criminal purpose; on this Vest (2014) 132 *SchZStR* 86 *et seq.* See also *Prosecutor v. Sainović et al.*, No. IT-05-87-A, Judgment, AC, 23 January 2014, paras. 604 *et seq.* <<http://www.legal-tools.org/doc/81ac8c/>>; *Prosecutor v. Djordjević*, No. IT-05-87/1-A, Judgment, AC, 27 January 2014, paras. 22 *et seq.*, 161 *et seq.* <<http://www.legal-tools.org/doc/e6fa92/>>; *Prosecutor v. Nāhimana*, No. ICTR-01-68-A, Judgment, AC, 16 December 2013, paras. 187 *et seq.* (finding that the accused as the ‘*bourgmestre*’ was responsible for crimes committed by his subordinates, i.e. policemen, under JCE I since he was voluntarily present during a part of the alleged attack [para. 197] with requisite intent of the alleged crimes [para. 195] and committed the alleged crimes through participation in a JCE

As to the *mens rea*, the requirements differ according to the form of the JCE: The basic form requires the shared intent of the (co-) perpetrators. The systemic form derives this shared intent from personal knowledge of the system of ill-treatment⁴⁰. The extended form requires the intention to participate in the criminal purpose and further it and to contribute to the commission of a crime by a group. Responsibility for a crime which was not part of the common purpose arises if the commission of this crime was foreseeable and the accused (willingly) took that risk⁴¹. In particular, the objective foreseeability ('reasonably foreseeable') standard is dubious since it brings JCE III dangerously close to strict liability and thus interferes with the principle of culpability. In fact, it amounts to a 'negligence' standard, which, except for superior responsibility, has not been provided for in the Statutes of International Criminal Tribunals⁴². According to the *Brđjanin* AC, the extended JCE may even give rise to the responsibility of a JCE participant for genocide without having the specific intent to destroy a protected group⁴³.

The JCE doctrine has also been applied by the Special Court for Sierra Leone⁴⁴ and the East Timorese Special Panel for Serious Crimes⁴⁵. In contrast, the ECCC PTC found that the

I by providing moral support to the policemen as physical perpetrators [paras 198 *et seq.*] <<http://www.legal-tools.org/doc/7034a5/>>.

⁴⁰ *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-A, Judgment, AC, 28 February 2005, para. 284 <<http://www.legal-tools.org/doc/006011/>>. Treating JCE II as JCE I without this derivation of intent *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, para. 78 <<http://www.legal-tools.org/doc/1a994b/>>, *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, TC 31 July 2003, paras. 488 *et seq.* <<http://www.legal-tools.org/doc/32ecfb/>>. Criticizing JCE II (as employed in *Kvočka*) for violating the presumption of innocence *cf.* Haan, *Joint Criminal Enterprise* (2008) 274 *et seq.*

⁴¹ *Prosecutor v. Ntakirutimana and Ntakirutimana*, Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, AC, 13 December 2004, para. 467 with further references <<http://www.legal-tools.org/doc/af07be/>>; also *Prosecutor v. Mrksić et al.*, No. IT-95-13/1-T, Judgment, TC, 27 September 2007, para. 542 <<http://www.legal-tools.org/doc/32111c/>>; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, paras. 896, 897, 1130 *et seq.*, 1173 <<http://www.legal-tools.org/doc/445e4e/>>; *Prosecutor v. Stanišić and Zupljanin*, No. IT-08-91-T, Judgment Vol. 2, TC, 27 March 2013, para. 131 *et seq.* <<http://www.legal-tools.org/doc/cbc02a/>>; Crit. as to the negligence standard, Cryer, in: *id. et al.*, *Introduction to ICL* (2014) 353, 381-2.

⁴² See for criticism of JCE III, *i.a.*, Mettraux, *International Crimes* (2005) 215, 264-5, 289. Haan, *Joint Criminal Enterprise* (2008); Vest, *Völkerrechtsverbrecher verfolgen* (2011) 309. Safferling, *Internationales Strafrecht* (2011) § 5 mn. 80; van Sliedregt, in: Nollkaemper and van der Wilt (eds.), *System Criminality* (2009) 183, 197; Vest (2010) 8 *JICJ* 851; Ambos, *Internationales Strafrecht* (2014) § 7 mn. 32 with further references in fn. 180.

⁴³ *Prosecutor v. Brđjanin*, No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, para. 6 <<http://www.legal-tools.org/doc/acb003/>>: '... to establish that it was reasonably foreseeable to the accused that an act specified in Art. 4 (2) [ICTYS] would be committed and that it would be committed with genocidal intent'. Crit., but not clear, the separate opinion of Judge Shahabuddeen, who, on the one hand, takes the view that 'specific intent always has to be shown' (para. 4), but, on the other hand, states 'that intent is shown by the particular circumstances of the third category of joint criminal enterprise' (para. 5 at the end). *Prosecutor v. Slobodan Milošević*, No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, TC, 16 June 2004, para. 219 adopts without more the majority opinion of *Brđjanin* <<http://www.legal-tools.org/doc/d7fb46/>>; on JCE III foreseeability with regard to special intent crimes see also *Prosecutor v. Radovan Karadžić*, No. IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing TC's Decision on JCE III Foreseeability, AC, 25 June 2009 <<http://www.legal-tools.org/doc/af6f4a/>>; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, paras. 898, 1173 <<http://www.legal-tools.org/doc/445e4e/>>; *Prosecutor v. Djordjević*, No. IT-05-87/1-A, Judgment, AC, 27 January 2014, paras. 22 *et seq.*, 73 *et seq.* <<http://www.legal-tools.org/doc/e6fa92/>>. Crit. Jain, *Perpetrators and Accessories in ICL* (2014), 63 *et seq.*

⁴⁴ *Cf. Prosecutor v. Kondewa*, No. SCSL-03-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003, para. 9 <<http://www.legal-tools.org/doc/71a5d3/>>; *Prosecutor v. Brima et al.*, No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 1 April 2004, para. 49 <<http://www.legal-tools.org/doc/80b122/>>; *Prosecutor v. Sesay et al.*, No. SCSL-04-15-A, Judgement, AC, 26 October 2009, paras. 394, 400 <<http://www.legal-tools.org/doc/133b48/>>. *Cf.* also Jain, *Perpetrators and Accessories in ICL* (2014), 66 *et seq.*; as to the indictments before the SLSC invoking JCE III see Danner and Martinez (2005) 93 *CallRev* 75, 155 *et seq.*

⁴⁵ See *Prosecutor v. Perreira*, No. 34/2003, Judgment, Special Panel for Serious Crimes, 27 April 2005, pp. 19-20 <<http://www.legal-tools.org/doc/5ce1a8/>>. Concurring also *ibid.*, Separate Opinion of Judge Phillip Rapoza, pp. 4-5, paras. 17-18, 25. See also *Prosecutor v. de Deus*, No. 2a/2004, Judgment, Special Panel for Serious Crimes, 12 April 2005, p. 13 <<http://www.legal-tools.org/doc/9b1be5/>>; Jain, *Perpetrators and Accessories in ICL* (2014), 69-73.

authorities relied on by *Tadić* with regard to the customary law status of JCE III did not ‘provide sufficient evidence of consistent state practice or *opinio juris* at the time relevant’ to the case before it⁴⁶.

The ICC, interpreting the second alternative of subparagraph (a) (‘jointly with another’), adopted the mode of co-perpetration in its narrow sense explicitly in the *Lubanga* case⁴⁷ and approved especially the German doctrine of ‘functional control over the act’ (‘*funktionelle Tatherrschaft*’)⁴⁸, rejecting both the so called ‘objective’⁴⁹ and ‘subjective’⁵⁰ theories:

⁴⁶ *Prosecutor v. Khieu et al.*, No. 002/19-09-2007-ECCC/OCIJ, Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), PTC, 20 May 2010, para. 77 <<http://www.legal-tools.org/doc/320587/>>. In essence, the Chamber followed this author: Ambos (2009) 20 *CLF* 353, 366 *et seq.*; for the opposite view see Cassese *et al.* (2009) 20 *CLF* 289, 327 *et seq.*; Provost (2009) 20 *CLF* 331, 332 *et seq.*, 346. Against JCE III as a form of co-perpetratorship see also Olásolo (2009) 20 *CLF* 263, 278 *et seq.*; Marsh and Ramsden (2011) 11 *ICLRev* 137, 152 *et seq.* See recently *Prosecutor v. Khieu and Nuon*, No. 002/19-09-2007/ECCC/TC, Judgment, TC, 7 August 2014, para. 691 (holding that JCE III did not exist in customary international or Cambodian law by 1975) <<http://www.legal-tools.org/doc/4888de/>>.

⁴⁷ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, paras. 326 *et seq.* <<http://www.legal-tools.org/doc/b7ac4f/>>. Cf. in detail Olásolo, *Criminal Responsibility* (2009) 291 *et seq.*; Jain, *Perpetrators and Accessories in ICL* (2014), 85 *et seq.*

⁴⁸ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, para. 341 (‘joint control’) <<http://www.legal-tools.org/doc/b7ac4f/>>. This was confirmed by *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2842, Judgment, TC, 14 March 2012, paras. 1003–5 (although not explicitly using the term ‘functional’ control) <<http://www.legal-tools.org/doc/677866/>> and *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-3121-Red, Judgment, AC, 1 December 2014, paras. 469, 471, 473 (requiring ‘a normative assessment of the role of the accused person’) <<http://www.legal-tools.org/doc/585c75/>>; conc. *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 135 <<http://www.legal-tools.org/doc/0536d5/>>; crit. on the (in their view methodologically flawed and too expansive) Lubanga approach Gil and Maculan (2015) 28 *LeidenJIL* 350, 353 *et seq.* See also Roxin, *Strafrecht Allgemeiner Teil II* (2003) § 25 mn. 188 *et seq.*; Satzger, *Internationales Strafrecht* (2013) § 15 mn. 45; *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-A, Judgment, AC, Separate Opinion of Judge Schomburg, 7 July 2006, para. 17 <<http://www.legal-tools.org/doc/aa51a3/>>. Against the application of the control of the act theory see *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, Separate Opinion of Judge Adrian Fulford, paras. 10–12, 21 <<http://www.legal-tools.org/doc/b7ac4f/>> and *Prosecutor v. Ngudjolo Chui*, No. ICC-01/04-02/12-4, Judgment, TC, Concurring Opinion of Judge van den Wyngaert, 18 December 2012, paras. 5–6, 17, 67 <<http://www.legal-tools.org/doc/7d5200/>>. Discussing and essentially rejecting Fulford’s view, at 141–7. Judge van den Wyngaert’s opinion also deserves a more detailed treatment which is impossible here for reasons of space. At this juncture, it suffices to say that, while it is, of course, possible not to read the control over the act theory into Art. 25 (3), a pure or naturalistic ‘plain’ reading of the text encounters the limits pointed out in my critique of Fulford and, above all, does not provide for a theory which allows for the imputation of the ‘crime base’ to the ‘most responsible’ who, normally, belong to the top level of the respective state or organization. Indeed, if van den Wyngaert does not only reject the control over the act theory, in particular *Organisationsherrschaft*, but also JCE, one fails to see how she wants to hold these top level people responsible; summing up Stahn (2014) 12 *JICJ* 809, 822 *et seq.* See also Ambos (2014) 12 *JICJ* 219, 227 with fn. 11; on the persuasiveness of the control theory, which emphasizes the objective approach, but is still ‘broad enough to include subjective elements’, Werle and Burghardt, in: van Sliedregt and Vasiliev (eds.), *Pluralism in ICL* (2014), 301, 316 *et seq.*; *id.*, in: Heger, Kelker, and Schramm (eds.), *Festschrift für Kristian Kühl* (2014), 851, 862–3. Crit. on the incorporation of the control theory also Sadat and Jolly (2014) 27 *LeidenJIL* 755, 757–8, 781.

⁴⁹ The ‘objective approach’, focusing in a naturalistic fashion on the physical perpetration with one’s own hands, is, in the Chamber’s correct view, to be rejected because ‘the notion of committing an offence through another person cannot be reconciled with the idea of limiting the class of principals to those who physically carry out (...) objective elements of the crime.’ (*Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, para. 333 <<http://www.legal-tools.org/doc/b7ac4f/>>; confirmed by *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, 7 March 2014, para. 1391 <<http://www.legal-tools.org/doc/9813bb/>>.

⁵⁰ The ‘subjective approach’, focusing on the mental state of the actor (*animus auctoris*), is, in the Chamber’s view, to be rejected because subparagraph (d) explicitly recognizes *accomplice* liability despite a *mens rea* standard (‘furthering’ or ‘knowledge of the intention of the group’) which, according to this approach, would convert the accomplice into perpetrator (possessing the required *animus auctoris* instead of a mere *animus socii*). Thus, the PTC stated that ‘the latter concept [enshrined in subparagraph d)] – which is closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY – would have been the basis of the concept of co-perpetration within the meaning of article 25(3)(a), had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories’ (*cf. Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I,

‘The concept of co-perpetration based on joint control over the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task’⁵¹.

On an objective level the PTC established two requirements, namely the existence of an *agreement or common plan* between two or more persons⁵² and a co-ordinated *essential contribution* by each co-perpetrator resulting in the realisation of the objective elements of the crime⁵³. This contribution can be made, as now determined by the *Lubanga AC*, not only at the execution stage of the crime, but also at ‘its planning or preparation stage, including when the common plan is conceived’⁵⁴. The agreement might also be inferred from subsequent concerted action of the co-perpetrators⁵⁵. As to the subjective side, the PTC generally states the obvious, *i. e.*, that the suspect must fulfil the subjective elements of the crime in question⁵⁶. More concretely, the suspects must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime⁵⁷; they must be aware of the factual circumstances enabling him or her to jointly

29 January 2007, para. 335 <<http://www.legal-tools.org/doc/b7ac4f/>>; conc. *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, para. 483 <<http://www.legal-tools.org/doc/67a9ec/>>; *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, TC, 7 March 2014, para. 1392 <<http://www.legal-tools.org/doc/9813bb/>>.

⁵¹ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, para. 342 <<http://www.legal-tools.org/doc/b7ac4f/>> quoting *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, TC, 31 July 2003, para. 440 <<http://www.legal-tools.org/doc/32ecfb/>>.

⁵² *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, paras. 343–5 <<http://www.legal-tools.org/doc/b7ac4f/>>. The TC relied heavily on the PTC's decision, especially on its findings with regard to the requirements of co-perpetration; concerning the common plan see *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2842, Judgment, TC, 14 March 2012, paras. 980–8 <<http://www.legal-tools.org/doc/677866/>>. For an analysis of this part of the judgment see Ambos (2012) 12 *ICLRev* 115, 138 *et seq.* The agreement, which ‘may take the form of a “common plan”’, was confirmed by the *Lubanga AC*, cf. *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-3121-Red, Judgment, AC, 1 December 2014, paras. 445 <<http://www.legal-tools.org/doc/585c75/>>; conc. *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 134 <<http://www.legal-tools.org/doc/0536d5/>>.

⁵³ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, paras. 346–8 <<http://www.legal-tools.org/doc/b7ac4f/>>. Arguably, the requirement of ‘ability to frustrate the commission of the crime’ (*ibid.*, para. 347) asks for too much, at least at the second level of collective criminal hierarchies where a co-perpetrator's contribution appears to be more easily replaceable. Thus, instead one may require something less, for example the ‘ability to substantially shape the crime’ (Vest, *Völkerrechtsverbrecher verfolgen* (2011) 351, 359 preferring therefore the concept of *Tatmacht* [power over the act] instead of *Tatherrschaft* [control over the act]). The requirement of an essential contribution was confirmed by *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2842, Judgment, TC, 14 March 2012, para. 999 <<http://www.legal-tools.org/doc/677866/>>, while the ability to frustrate the commission of the crime was not explicitly demanded. Crit. on the *Lubanga TC*'s failure to precisely define the object of the essential contribution (the common plan or the specific crime) Jain, *Perpetrators and Accessories in ICL* (2014), 87–9; crit. on the essential contribution requirement and its expansive interpretation Gil and Maculan (2015) 28 *LeidenJIL* 357–359, 367–68, 369 (even arguing, at 367–68, that the *Katanga TJ* rejected this requirement although the Chamber did not deal with co-perpetration).

⁵⁴ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-3121-Red, Judgment, AC, 1 December 2014, paras. 7, 469, 473 <<http://www.legal-tools.org/doc/585c75/>>; conc. *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 134 <<http://www.legal-tools.org/doc/0536d5/>>. Generally critical regarding the application of co-perpetration to the preparatory stage Gil and Maculan (2015) 28 *LeidenJIL* 355, 363–64, 370 (arguing that a contribution made at this stage is ‘accessory in nature’ and should therefore ‘be charged under accessory liability’).

⁵⁵ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, para. 345 <<http://www.legal-tools.org/doc/b7ac4f/>>. Cf. van der Wilt (2009) 7 *JICJ* 307, 310.

⁵⁶ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, paras. 349–60 <<http://www.legal-tools.org/doc/b7ac4f/>>.

⁵⁷ *Ibid.*, paras. 361–5. The Chamber, at para. 352, extends the volitional element contained in Article 30 to the awareness ‘of the risk that the objective elements of the crime may result from his or actions....and [he/she] accepts such an outcome by reconciling himself or herself with it....’. However, arguably, Article 30 only

control the crime⁵⁸. The *Bemba* Confirmation Decision followed this approach⁵⁹, but at least the last element is questionable since, apart from not being adopted by the *Katanga/Ngudjolo Chui* confirmation decision⁶⁰ and the *Lubanga* TC⁶¹, it demands too much from a co-perpetrator who rarely has full control and thus hardly can be completely aware of the factual circumstances of his control⁶². In addition, some further clarification is required with regard to the ‘common’ plan element: Does the plan encompass both objective and subjective or merely objective components⁶³? Is it really sufficient, as argued by the *Lubanga* PTC⁶⁴, that the plan must only ‘include an element of criminality’ and not be specifically directed at the commission of a crime⁶⁵? The *Lubanga* AC spoke to the latter, holding that it is ‘sufficient for

encompasses the conscious taking of *substantial* risks on the basis of an objective *ex ante* examination (cf. Weigend (2008) 6 *JICJ* 471, 481 *et seq.*). See also *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2842, Judgment, TC, 14 March 2012, paras. 1009 *et seq.* <<http://www.legal-tools.org/doc/677866/>>.

⁵⁸ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, paras. 366–7 <<http://www.legal-tools.org/doc/b7ac4f/>> and *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, paras. 534 *et seq.* <<http://www.legal-tools.org/doc/67a9ec/>>; *Prosecutor v. Kenyatta et al.*, No. ICC-01/09-02/11-382, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 297 <<http://www.legal-tools.org/doc/4972c0/>>; *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 292 <<http://www.legal-tools.org/doc/96c3c2/>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 121 <<http://www.legal-tools.org/doc/5686c6/>>; *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, para. 240 <<http://www.legal-tools.org/doc/5b41bc/>>.

⁵⁹ *Prosecutor v. Bemba Gombo*, No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges, PTC II, 15 June 2009, paras. 348–351 <<http://www.legal-tools.org/en/doc/07965c/>>.

⁶⁰ *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, paras. 534–5 (‘last requirement does not apply’) <<http://www.legal-tools.org/doc/67a9ec/>>.

⁶¹ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2842, Judgment, TC, 14 March 2012, para. 1013 <<http://www.legal-tools.org/doc/677866/>>.

⁶² See Ambos (2009) 22 *LeidenJIL* 715, 719–20, also elaborating on the *dolus eventualis* intricacies of this decision. See also Manacorda and Meloni (2011) 9 *JICJ* 159, 169; Jain, *Perpetrators and Accessories in ICL* (2014), 89 *et seq.*

⁶³ Critical on the *Lubanga* approach qualifying the common plan as a pure objective element Weigend (2008) 6 *JICJ* 471, 480 with fn. 37. See also *Prosecutor v. Ngudjolo Chui*, No. ICC-01/04-02/12-4, Judgment, TC, Concurring Opinion of Judge van den Wyngaert, 18 December 2012, paras. 32–4 who considers the common plan to be a purely subjective element <<http://www.legal-tools.org/doc/7d5200/>>.

⁶⁴ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, para. 344 <<http://www.legal-tools.org/doc/b7ac4f/>>.

⁶⁵ The TC in *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2842, Judgment, TC, 14 March 2012, para. 984 <<http://www.legal-tools.org/doc/677866/>> required ‘a critical element of criminality, namely ... a sufficient risk that ... a crime will be committed’; crit. Ambos (2012) 12 *ICLRev* 115, 140; Herzig (2013) *ZIS* 189, 195; Gil and Maculan (2015) 28 *LeidenJIL* 359–62 (arguing that the *Lubanga* interpretation lowers the mens rea threshold and takes us back to jce III and therefore calling for a restrictive interpretation whereby only the crimes part of the plan are covered and ‘an objective contribution to the *specific crime*’ is required [emphasis in the original]). Cf. also *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, paras. 271 and 291 <<http://www.legal-tools.org/doc/63028f/>>. Unclear in this respect *Prosecutor v. Kenyatta et al.*, No. ICC-01/09-02/11-382, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 399 <<http://www.legal-tools.org/doc/4972c0/>>; *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 301 <<http://www.legal-tools.org/doc/96c3c2/>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 105 with fn. 426 <<http://www.legal-tools.org/doc/5686c6/>>. Recently *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, paras. 230 *et seq.* <<http://www.legal-tools.org/doc/5b41bc/>>, an implicit ‘common plan to maintain Laurent Gbagbo in power at any cost, including through the use of force against civilians’ was inferred from the objective circumstances, *i.e.* Laurent Gbagbo’s close relations with his so-called ‘inner circle’, his public statements and his involvement in the ‘alleged’ preparatory activities of the use of violence (paras. 78 *et seq.* and 231). However, this inference appears circular and it is not clear which concrete crimes have been used by ‘the pro-Gbagbo force against civilians’. Therefore, it is questionable whether the common plan of using force against civilian ‘inherently’ includes the common plan to *intentionally* commit all ‘the crimes charged’, *i.e.* murder, rape, persecution and other inhumane acts. In this respect see Dissenting Opinion of Judge van den Wyngaert, *ibid.*, paras 5–6. Cf. also Ohlin (2014) 12 *JICJ* 325, 331 *et seq.*, who criticizes the approach of the current ICC’s control theory as ‘over-correction’ and as ‘deemphasis of the subjective elements’. In fact, however, in the most

the common plan to involve “a critical element of criminality”⁶⁶, *i. e.* ‘that it [is] virtually certain that the implementation of the common plan led to the commission of the crimes at issue’⁶⁷.

- 11 The **perpetration by means** mode, *i. e.*, as more exactly expressed by the third alternative of subparagraph 3 (a), perpetration ‘through another person’, presupposes that the person who commits the crime (*intermediary, intermédiaire, Tatmittler*) can be used as an instrument or tool (*Werkzeug*) by the indirect perpetrator (*auteur médiateur*) as the master-mind or ‘man in the background’ (*Hintermann*)⁶⁸⁶⁹. The *Hintermann* is also considered a principal in common law⁷⁰. The direct perpetrator is normally an innocent agent, not responsible for the criminal act. A typical example is the case where the individual agent or instrument acts erroneously⁷¹, or is not culpable because he or she is a minor, or because of a mental defect. Additionally, situations in which the direct perpetrator acts under ‘duress’ (Art. 31 (1) (d)) and is therefore excused may give rise to an indirect perpetration by the person who controls this direct perpetrator by way of threats or violence amounting to this situation of duress (*Nötigungsherrschaft*).⁷²
- 12 However, especially in the field of ‘macrocriminality’, *i. e.*, systematic or mass criminality organized, supported or tolerated by the State⁷³, the direct perpetrator or executor normally performs the act with the necessary *mens rea* and is fully aware of its illegality. Thus, the question arises if perpetration by means always presupposes that the direct perpetrator has a ‘defect’, or if it is also possible with a fully responsible or culpable direct perpetrator, *i. e.*, in the case of a ‘(indirect) perpetrator behind the (direct) perpetrator’ (*Täter hinter dem Täter*). This has been affirmed for cases in which the *Hintermann* dominates the direct perpetrators by virtue of a hierarchical organizational structure, *i. e.*, where he or she has ‘*Organisationsherrschaft*’ (*autoría mediata por dominio de la voluntad en aparatos de poder organizados/mittelbare Täterschaft kraft Willensherrschaft in organisatorischen Machtapparaten*).⁷⁴

recent *Katanga* judgment the ICC takes a mixed objective-subjective approach, see Ambos (2014) 12 *JICJ* 219, 226–7.

⁶⁶ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-3121-Red, Judgment, AC, 1 December 2014, para. 446 <<http://www.legal-tools.org/doc/585c75/>>.

⁶⁷ *Ibid.*, para. 451; in a similar vein, for the *Blé Goudé* PTC I, the common plan should be neither any plan nor a fully criminal one, but it suffices that the criminal element is inherent to it, *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 140 <<http://www.legal-tools.org/doc/0536d5/>>.

⁶⁸ The translation of the German ‘*Hintermann*’ as ‘master-mind’ (by Silverman, in: Roxin (1996) 30 *IsLR* 60, 71) may omit cases in which the dominance of the ‘*Hintermann*’ is physical (e.g., by coercion) rather than intellectual. Michael Bohlander employs in his translation of the German Criminal Code (Bohlander, *The German Criminal Code – A Modern English Translation* (2008) § 84) the term ‘*hinterman*’ referring to other words borrowed from German into English terminology, such as ‘*hinterland*’, which suggest that English native-speakers will be familiar with the connotations of the prefix ‘*hinter-*’ and be able to adapt it to new combinations.

⁶⁹ See generally for perpetration by means Fletcher, *Basic Concepts* (1998) 197–200; Jescheck and Weigend, *Strafrecht. Allgemeiner Teil* (1996) § 62, 662 *et seq.* and Ambos, *Treatise on ICL I* (2013) 154 *et seq.* In French criminal law the ‘*auteur médiateur*’ is not codified, but exceptionally recognized if the direct perpetrator is used as a ‘simple instrument’ (cf. Czepluch, *Täterschaft und Teilnahme im französischen Strafrecht* (1994) 30–33). With regard to article 25 see also (conc.) Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 793 *et seq.*; van Sliedregt, *Criminal Responsibility* (2003) 71.

⁷⁰ See American Law Institute, *Model Penal Code and Commentaries* (1985) § 2.06 and comment.

⁷¹ Cf. Ambos, *Der Allgemeine Teil* (2004) 573.

⁷² See, for an exemplary case of duress, *Prosecutor v. Erdemović*, No. IT-96-22-T, Sentencing Judgment, TC, 29 November 1996 <<http://www.legal-tools.org/doc/eb5c9d/>>. However, in this case the liability of the *Hintermann*, *i. e.*, the person forcing *Erdemović* to commit the crimes, was not at stake. Cf. for an analysis of this case Olásolo, *Criminal Responsibility* (2009) 114 *et seq.*; Ambos, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 1003, 1042 *et seq.*; *id.*, *Der Allgemeine Teil* (2004) 263 *et seq.* For a scrutiny of indirect perpetration in situations of duress *ibid.*, 574 *et seq.*, and for the normative reasons of attribution Ambos, *Internationales Strafrecht* (2014) § 7 mn. 24.

⁷³ See Jäger, *Makrocriminalität* (1989).

⁷⁴ See the fundamental work of Roxin, *Täterschaft und Tatherrschaft* (2006) 242–52, 704–17; see also Ambos, *Der Allgemeine Teil* (2004) 590 *et seq.* with further references; with regard to genocide Krefß, *Münchener Kommentar StGB* (2003) § 220a/§ 6 VStGB, mn. 100 *et seq.*; Werle and Jessberger, *Principles* (2014) 207 *et seq.*

Although there are no precedents in the post-WW II case law international case law that refer *explicitly* to this doctrine, it may be argued that the judgment in the *Justice Trial* was *implicitly* based on it since the accused were held responsible because of their ‘conscious participation in a nationwide government-organized system of cruelty and injustice’⁷⁵, *i. e.*, because of their commission of crimes by way of a hierarchical organizational structure⁷⁶. Further, the doctrine has been recognized by national tribunals. In *Eichmann*, the Jerusalem District Court invoked – for the specific macro-crimes in question – a type of *organizational responsibility* or domination of the act by the man at the desk and thereby developed the concept used in the *Justice trial*⁷⁷. In the *Argentinean trial* against the former commanders of the military junta the Appeals Court argued with a form of perpetration based on *Organisationsherrschaft*: ‘The accused *dominated* the acts since they *controlled the organization* which carried them out ... *who dominates the system* dominates the anonymous will of *all the men* who constitute it’⁷⁸. In the *German trials* for shootings at the East German border, the Supreme Court (*Bundesgerichtshof*) employed the doctrine to hold members of the National Defence Council (‘NDC’) and generals of the National People’s Army responsible as indirect perpetrators for the killings directly committed by border guards⁷⁹. The theory has also been applied widely in Latin America, in particular in Colombia and Peru⁸⁰. In 2009, *Alberto Fujimori*, the former president of Peru, was convicted by the Trial and ACs of the Peruvian Supreme Court for serious violations of international human rights law amounting to crimes against humanity which were committed under his presidency in 1991 and 1992⁸¹. The convictions of *Fujimori* as an indirect perpetrator are based on the theory of control/domination of the act by virtue of an organized power apparatus. Both chambers of the Supreme Court set out five requirements for indirect perpetration by virtue of such an organized power structure: as a general requirement the existence of a hierarchical organization and as specific requirements a responsible command (‘*poder de mando*’, ‘*Befehlsgewalt*’) of the indirect perpetrator, the detachment of the organization from the law (‘*desvinculación*’

The doctrine is not uncontroversial, for a critique see Rotsch (2005) 25 *NStZ* 13 *et seq.* With references on this discussion *cf.* Krefß (2006) 153 *GA* 304 *et seq.*; also Radtke (2006) 153 *GA* 350 *et seq.* For a reply Roxin (2007) 125 *SchwZStR* 1, 3 *et seq.* and Schünemann, in: Heinrich *et al.* (eds.), *Festschrift für Claus Roxin* (2011) 799, *passim*. See for a good explanation in English, Osiel (2005) 105 *CollRev* 1751, 1829 *et seq.* See further van Sliedregt, *Criminal Responsibility* (2003) 70; for a more detailed explanation Ambos, in: Nollkaemper and van der Wilt (eds.), *System Criminality* (2009) 127, 142 *et seq.*; *id.* (2011) 9 *JICJ* 137, 145 *et seq.*

⁷⁵ *U.S. v. Altstötter (Justice Trial)*, Judgment, U.S. Military Tribunal, Nuremberg, Germany, 4 Dec. 1947, 4 LRTWC 1 (H.M.S.O. 1947) para. 985: ‘conscious participation in a nationwide government-organized system of cruelty and injustice’ (emphasis added). Critical Werle and Burghardt, in: Bloy *et al.* (eds.), *Festschrift für Manfred Maiwald* (2011) 849, 853 with fn. 15.

⁷⁶ *Cf.* Ambos, *Der Allgemeine Teil* (2004) 93-4; *id.*, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of ICL* (2000) 1.

⁷⁷ Judgment 12 December 1961, 36 *ILR* 5 and 18, at 236-7, para. 197: ‘... the degree of responsibility generally increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher levels of command ...’; for a more detailed analysis see Ambos, *Der Allgemeine Teil* (2004) 184 *et seq.*; *id.*, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of ICL* (2000) 1, 17-8; *id.*, in: Ambos *et al.* (eds.), *Eichmann in Jerusalem* (2012) 123, 125 *et seq.*

⁷⁸ *Cámara Nacional de Apelaciones etc.*, Sentencia 9 December 1985, in: Fallos CSJ Vol. 309-I/II 33, at 1597-8, 1601-2 (emphasis added; own translation from Spanish). For a more detailed analysis see Ambos, *Der Allgemeine Teil* (2004) 234 *et seq.*; *id.*, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of ICL* (2000) 1, 18-9.

⁷⁹ 40 *Bundesgerichtshof-Entscheidungen in Strafsachen*, 218, 237-8 (1994). For a more detailed analysis see Ambos, *Der Allgemeine Teil* (2004) 243 *et seq.*; *id.*, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of ICL* (2000) 1, 20-1; Weigend (2014) 12 *JICJ* 253, 259.

⁸⁰ See Ambos and Malarino (eds.), *Jurisprudencia* (2008) with reports on the case law of the most important Latin American Countries.

⁸¹ Corte Suprema de Justicia de la República del Perú, Sala Penal Especial (Special Criminal Chamber), judgment of 7 April 2009, Exp. No. AV 19-2001 (Cases Barrios Altos, La Cantuta, Sótanos SIE) (for an English translation see (2010) 25 *AmUILRev* 657-842; for a German translation of Part III see (2009) 4 *ZIS* 622-57); CSJ, Primera Sala Penal Transitoria (First Transitory Criminal Chamber), Exp. No. AV 19-2001 (Cases Barrios Altos, La Cantuta, Sótanos SIE), Judgment of 30 December 2009. – The theory was already applied before, *inter alia*, against Shining Path leader *Abimael Guzman*, see Caro (2010) 10 *ICLRev* 583, 598-9.

del derecho, 'Rechtsgelöstheit'), the interchangeability or replaceability ('fungibilidad', 'Fungibilität') of the direct perpetrators and the direct perpetrator's (pre-)disposition to commit the act ('disposición', 'Tatgeneigtheit')⁸².

- 13 At the ICC, the general concept of perpetration 'through another person' was for the first time taken up in the *Lubanga* Confirmation Decision: The PTC recognized that those who have 'control over the commission of the offence' are perpetrators ('auteur') since, *inter alia*, they 'control the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration)'. Further, the PTC affirmed that the most typical manifestation of the 'control over the act theory' is 'the commission of a crime through another person', as explicitly provided for in article 25 para. 3 (a) ICC Statute⁸³. However, the *Lubanga* PTC neither applied this concept to the defendant nor did it contain the notion of perpetration by virtue of an organization. It was only with the case of *Katanga and Ngudjolo Chui*⁸⁴ that the organizational element found its way into the deliberations of the PTC, calling those cases most relevant to international criminal law 'in which the perpetrator behind the perpetrator commits the crime through another by means of 'control over an organization''⁸⁵. As set out by the Chamber, liability for this mode of attribution depends on a hierarchical organization in which the orders of the perpetrator are automatically complied with by interchangeable executors⁸⁶. Regarding the requirement of interchangeability, or *fungibility*, the Chamber is rightly aware of the problem that direct perpetrators acting fully responsible and culpable cannot, from a naturalistic perspective, without further ado be regarded as mere fungible mediators of the criminal acts. In order to overcome this problem, the *fungibility* criterion is substituted by the requirement of 'automatic' compliance. Thus, it suffices, in the PTC's view, that the perpetrator 'secures automatic compliance through intensive, strict, and violent training regimes, for example, by abducting minors and subjecting them to punishing training regimens in which they are taught to shoot, pillage, rape and kill'⁸⁷, or through payment and punishment mechanisms⁸⁸. This criterion arguably captures better the typical lack of institutional autonomy of a direct

⁸² See for a detailed analysis of the relevant facts and the law, Ambos (2011) 9 *JICJ* 137–158.

⁸³ See *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, para. 332 <<http://www.legal-tools.org/doc/b7ac4f/>>.

⁸⁴ For a concise summary of the case cf. Weigend (2011) 9 *JICJ* 91, 92; Olásolo, *Criminal Responsibility* (2009) 318 *et seq.*

⁸⁵ *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, para. 498 <<http://www.legal-tools.org/doc/67a9ec/>>. The Chamber mainly relies on German and Spanish doctrine and the acceptance of this new mode of liability in 'numerous national jurisdictions' (para. 502). Critical in this respect Weigend (2011) 9 *JICJ* 91, 105 *et seq.*; Manacorda and Meloni (2011) 9 *JICJ* 159, 169–70; Werle and Burghardt, in: Bloy *et al.* (eds.), *Festschrift für Manfred Maiwald* (2011) 849, 854 *et seq.*; Ohlin *et al.* (2013) 26 *LeidenJIL* 725, 734 and 742 ('clash of legal cultures'); for an analysis of the development of indirect co-perpetration see Eldar (2014) 8 *Crim. L. and Philos.* 605, 606 *et seq.*

⁸⁶ *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, paras. 512–7 <<http://www.legal-tools.org/doc/67a9ec/>>. The decision does not mention the two requirements 'detachment of the organization from the law' and 'disposition of the direct perpetrator to commit the act', cf. Werle and Burghardt, in: Bloy *et al.* (eds.), *Festschrift für Manfred Maiwald* (2011) 849, 856 *et seq.*; Herzig (2013) *ZIS* 189, 196–7. See on these (and the other) requirements already mn. 12. For the German roots of the doctrine cf. Jessberger and Geneuss (2008) 6 *JICJ* 853, 859 *et seq.*; Weigend (2011) 9 *JICJ* 91, 92, 94 *et seq.* and the seminal article by Roxin (2011) 9 *JICJ* 193–205.

⁸⁷ *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, paras. 518 (in abstract terms) and 547 (on the concrete case) <<http://www.legal-tools.org/doc/67a9ec/>>. See, all concurring with this reasoning, van der Wilt (2009) 7 *JICJ* 307, 312; Manacorda and Meloni (2011) 9 *JICJ* 159, 172; Ambos, in: Heinrich *et al.* (eds.), *Festschrift für Claus Roxin* (2011) 837, 846; see for the necessary elements for non-state organizational hierarchies *ibid.*, 847 *et seq.*

⁸⁸ *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, PTC II, 23 January 2012, paras. 320–3 and 324–36 <<http://www.legal-tools.org/doc/96c3c2/>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 120 <<http://www.legal-tools.org/doc/5686c6/>>; *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, paras. 102–3, 107, 139, 146 <<http://www.legal-tools.org/doc/5b41bc/>>.

perpetrator acting in a macro-criminal context given the institutionalist pressure exercised by the criminal system or organization upon him⁸⁹.

In *Katanga and Ngudjolo Chui*, the PTC merged the concepts of co-perpetration and indirect perpetration to a form of *indirect co-perpetration* (*mittelbare Mittäterschaft*)⁹⁰ which however does not constitute a new (fourth) mode of attribution, but is only the result of the 'factual coincidence of two recognized forms of perpetration'⁹¹. Consequently, this form of perpetration easily fits into subpara. (a), in particular a recourse to international custom is unnecessary⁹². In the case at hand, the PTC found that the defendants had agreed, as commanders of their respective hierarchical organizations (paramilitary groups), on a common plan (the attack on the village of Bogoro) and both had made an essential contribution to the realization of this plan by way of their organizations⁹³. Thus, the PTC extended the criminal responsibility of each defendant, being indirect and co-perpetrator at the same time, to the crimes committed by the members of the other defendant's organization⁹⁴. Of course, the principle of culpability demands in the case of such a reciprocal vertical/horizontal imputation a solid proof of each defendant's *mens rea* towards the criminal acts committed by the other organization respectively.

Arguably, a different form of indirect co-perpetration has been adopted in the *Al-Bashir* arrest warrant decision⁹⁵, and most recently in the *Blé Goudé* Confirmation Decision⁹⁶,

⁸⁹ Cf. Vest, *Völkerrechtsverbrecher verfolgen* (2011) 362 with further references in fn. 42.

⁹⁰ *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, paras. 492, 521–2 and *passim* <<http://www.legal-tools.org/doc/67a9ec/>>.

⁹¹ Cf. Weigend (2011) 9 *JICJ* 91, 110; see also Eldar (2014) 8 *CrimL&Phil* 605, 611–3. This also follows from the very explanation of the PTC speaking of a 'combination of (...) committing crimes through other persons together with the mutual attribution among the co-perpetrators (...)' (*Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, para. 492 <<http://www.legal-tools.org/doc/67a9ec/>>). In the same vein already *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, TC, 31 July 2003, paras. 492–4, 741 <<http://www.legal-tools.org/doc/32ecfb/>>. See also Olásolo, *Criminal Responsibility* (2009) 307–16 (313–4); Černič (2011) 22 *CLF* 539, 558.

⁹² Thus, the fact that the just mentioned *Stakić* TC Judgment was overturned by *Prosecutor v. Stakić*, No. IT-97-24-A, Judgment, AC, 22 March 2006, para. 62 <<http://www.legal-tools.org/doc/09f75f/>> for lack of basis in customary international law is irrelevant in the context of the ICC Statute, see correctly *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, para. 508 <<http://www.legal-tools.org/doc/67a9ec/>>; more recently *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 289 <<http://www.legal-tools.org/doc/96c3c2/>>.

⁹³ *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, paras. 548–60 <<http://www.legal-tools.org/doc/67a9ec/>>. See for the same approach *Prosecutor v. Bemba*, No. ICC-01/05-01/08-14-tENG, Decision on the Prosecutor's Application for a Warrant of Arrest, PTC III, 10 June 2008, paras. 69–72 <<http://www.legal-tools.org/doc/fb80c6/>>. However, in the Confirmation Decision, the Chamber restricted the mode of liability to simple co-perpetration, see *Prosecutor v. Bemba Gombo*, No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges, PTC II, 15 June 2009, para. 348 <<http://www.legal-tools.org/en/doc/07965c/>>.

⁹⁴ Critical Manacorda and Meloni (2011) 9 *JICJ* 159, 174 *et seq.* (arguing that the concept could 'overly broaden' the thresholds of liability for perpetration and therefore would need further clarification in the upcoming case law). Werle and Burghardt, in: Bloy *et al.* (eds.), *Festschrift für Manfred Maiwald* (2011) 849, 861 correctly claim that a correct application of the 'control over the act' theory requires that only the crimes committed jointly by the different organizations (and not also those committed by one organization alone) shall be attributed to the co-perpetrators. Welcoming the Chamber's findings and relating them to the Preamble's call against impunity ('the most serious crimes ... must not go unpunished') Černič (2011) 22 *CLF* 539, 558, 565 (calling this mode 'joint commission through another person'). Against this 'radical expansion of Article 25(3)(a)' in such cases, *Prosecutor v. Ngudjolo Chui*, No. ICC-01/04-02/12-4, Judgment, TC, Concurring Opinion of Judge van den Wyngaert, 18 December 2012, paras. 58–64 <<http://www.legal-tools.org/doc/7d5200/>>.

⁹⁵ Cf. for the relevant findings *Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-1, Decision on the the Prosecution's Application for a Warrant of Arrest, PTC I, 4 March 2009, paras. 209–223 <<http://www.legal-tools.org/doc/814cca/>>, charging Al Bashir as an indirect perpetrator or indirect co-perpetrator; cf. also Eldar (2014) 8 *CrimL&Phil* 605, 610–1.

⁹⁶ *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, paras. 136 *et seq.* <<http://www.legal-tools.org/doc/0536d5/>>; dissenting *ibid.*, Partially Dissenting Opinion of Judge van den Wyngaert, para. 5, with fn. 3 (the 'notion [of indirect co-perpetration] is incompatible with article 25(3)(a) of the Statute').

namely a form of *joint indirect perpetratorship* ('*Mittäterschaft in mittelbarer Täterschaft*')⁹⁷. Accordingly, as opposed to indirect co-perpetration, there exists only one (criminal) organization led and dominated by (various) co-perpetrators acting with a common purpose. In other words, this combination of indirect perpetration with co-perpetration does not encompass cases where various organizations collaborate, but only those cases where various leaders, as indirect perpetrators, exercise joint control over *one* hierarchical organization. That is the case in the *Blé Goudé* decision where '*Blé Goudé* is charged with having committed the alleged crimes jointly with Laurent Gbagbo and the latter's inner circle'⁹⁸, *i. e.*, having 'exercised control, jointly with the other co-perpetrators, over the pro-Gbagbo forces, which were organised and hierarchical in nature and through which the crimes charged were committed'⁹⁹. It is, however, questionable if this combined mode of perpetration can really be inferred from the mentioned *Al-Bashir* decision. For the only paragraph dedicated to indirect co-perpetration in that decision reads that Al Bashir and other 'leaders directed the *branches* of the "apparatus" of the State of Sudan that they led, in a coordinated manner, in order to jointly implement the common plan'¹⁰⁰, *i. e.*, it seems as if the PTC assumes that there are various sub-organizations ('branches') in the broader state organization. Be that as it may, a joint indirect perpetratorship is certainly conceptually possible and has indeed been recognized in other subsequent PTC-decisions¹⁰¹.

The *Katanga* TC, with Judge van den Wyngaert dissenting, confirmed the control over the act theory¹⁰². In fact, the TC does not only acknowledge the importance of this theory, but explicitly recognizes the ensuing forms of control¹⁰³ and, in particular, elaborates on the *Organisationsherrschaftslehre* ('*contrôle sur l'organisation*'), giving extensive credit to its founder Claus Roxin and suggesting two criteria for its application: the nature of the

⁹⁷ Weigend (2011) 9 *JICJ* 91, 92, 111; Werle and Burghardt, in: Bloy *et al.* (eds.), *Festschrift für Manfred Maiwald* (2011) 849, 853, 862 *et seq.*; cf. also Eldar (2014) 8 *CrimL&Philos* 605, 606 *et seq.*, 611-3.

⁹⁸ *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 136. <<http://www.legal-tools.org/doc/0536d5/>>.

⁹⁹ *Ibid.*, para. 149.

¹⁰⁰ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-1, Decision on the Prosecution's Application for a Warrant of Arrest, PTC I, 4 March 2009, para. 216 (emphasis added) <<http://www.legal-tools.org/doc/814cca/>>. Indeed, the alternatively charged mode of pure 'indirect perpetration' seems to capture Al Bashir's responsibility better since he is alleged to have had 'full control of all branches of the apparatus of the State of Sudan' (para. 222). As to the element of 'co-perpetration' (*i. e.*, in the notion of indirect co-perpetration), Judge Anita Usacka expressed doubts whether the alleged co-perpetrators were in full capacity to frustrate the execution of the common plan and therefore only found reasonable grounds to charge *Al-Bashir* as an indirect perpetrator, *cf.* her Partly Dissenting Opinion, *ibid.*, para. 104. *Cf.* for the same doubts Manacorda and Meloni (2011) 9 *JICJ* 159, 169, 175. Preferring either indirect perpetration or co-perpetration van der Wilt (2009) 7 *JICJ* 307, 310, 314.

¹⁰¹ *Prosecutor v. Kenyatta et al.*, No. ICC-01/09-02/11-382, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 408 (referring to the *Mungiki* organization) <<http://www.legal-tools.org/doc/4972c0/>> and *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 315 <<http://www.legal-tools.org/doc/96c3c2/>>; *Prosecutor v. Saif Al-Islam Gaddafi*, No. ICC-01/11-01/11-3, Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011, 6 <<http://www.legal-tools.org/doc/1bcca2/>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 101 <<http://www.legal-tools.org/doc/5686c6/>> and *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, para. 230 <<http://www.legal-tools.org/doc/5b41bc/>>.

¹⁰² *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, TC, 7 March 2014, paras. 1393-5 (arguing that this theory, being objective and subjective at the same time, fits best to Art. 25(3) and makes a distinction between the different forms of participation possible) <<http://www.legal-tools.org/doc/9813bb/>>; for this reason the Chamber retains this theory (*ibid.*, paras. 1382, 1396). The Chamber then applies it to define perpetrators ('auteurs') as persons '*qui ont un contrôle sur la commission dudit crime et qui ont connaissance des circonstances de fait leur permettant d'exercer ce contrôle*' (*ibid.*, § 1396) and the indirect perpetrator ('auteur indirect') as '*celui qui a le pouvoir de décider si et comment le crime sera commis dans la mesure où c'est lui qui détermine la perpétration*' [*ibid.*, emphasis in the original, fn. omitted]) while the accomplice ('complice') '*n'exerce pas un tel contrôle*' (*ibid.*). For the (other) original French quotes see Ambos (2014) 12 *JICJ* 219, 227, 228; see also Stahn (2014) 12 *JICJ* 809, 822-5.

¹⁰³ *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, TC, 7 March 2014, paras. 1402-3 ('*contrôle sur la volonté*' pursuant, *inter alia*, to '*contrainte*' or '*erreur*', and control pursuant to an '*appareil de pouvoir organisé*') <<http://www.legal-tools.org/doc/9813bb/>>.

organisation and its effective control by the persons who employ it for the commission of crimes¹⁰⁴. With the recent confirmation of this theory as ‘a convincing and adequate approach’ by the *Lubanga* AC¹⁰⁵ it is fair to say that this theory is indeed now the guiding principle to distinguish between perpetration and accessorial responsibility (secondary participation) in the Court’s case law¹⁰⁶. The AC’s reasoning starts by recognizing the existence (and liability) of a perpetrator behind direct (physical) perpetrators, even in cases where the latter ‘are themselves fully criminally responsible for that crime’; it calls for ‘a normative assessment of the relationship between the person actually carrying out the incriminated conduct and the person in the background, as well as of the latter person’s relationship to the crime’¹⁰⁷. The Chamber applies the same normative assessment to indirect co-perpetration¹⁰⁸ (given that it is just a special form of indirect perpetration) with a view to distinguish co-perpetration from accessorial responsibility¹⁰⁹.

Of course, the fundamental problem of any theory of indirect perpetration over fully responsible direct perpetrators, including the *Organisationsherrschaftslehre*, remains the convincing explanation of the indirect perpetrator’s control given that the direct perpetrator’s conduct is imputed to the *Hintermann* as though it were his own¹¹⁰. Generally speaking, perpetration by means requires a sufficiently tight control by the ‘*Hintermann*’ over the direct perpetrator, similar to the relationship between superior and subordinate in the case of command responsibility (article 28)¹¹¹. Although it cannot be denied that the ‘man in the

¹⁰⁴ *Ibid.*, paras. 1404–16 with the development of the two criteria in § 1407 *et seq.* These ground-breaking considerations deserve a much more detailed analysis but for reasons of space can only be summarized here as follows: § 1404 (‘*contrôle sur l’organisation*’ with explicit reference to Roxin), 1405 (‘*l’exercice d’un contrôle sur un appareil de pouvoir rend possible un contrôle sur les crimes commis par ses membres*’), 1408 (‘*interchangeabilité*’ of the direct perpetrators and their automatic execution of the crimes), 1409 (‘*automatisme fonctionnel*’), 1410 (general applicability to modern forms of criminal organizations), 1411 (as to the control of the *Hintermann* it is necessary that he uses ‘*au minimum une partie de l’appareil*’ to have the crimes committed), 1412 (effective control over the organization only possible by those ‘*qui contrôlent, effectivement et sans interférence possible*’ at least a part of it; adopting this writer’s position as quoted in fn. 3211; see also Ambos, *Treatise on ICL I* (2013) 159–60, 1413–15 (general subjective requirements with regard to the crimes and knowledge with regard to the ‘*éléments fondamentaux*’ which allow for the exercise of the said organizational control). Against this background, the caveat that the theory of organizational control is not the only ‘*réponse juridique*’ in interpreting Art. 25(3)(a) Alt. 3 (para. 1406) appears as a mere concession to internal disagreements or discussions given Judge van den Wyngaert’s continuing rejection of this theory; discussing her view Jain, *Perpetrators and Accessories in ICL* (2014), 94 *et seq.* More important in this regard is the Chamber’s clarification that other forms of participation may be relevant at the level of the internal structure of the organization (para. 1410). *In casu*, the Chamber rejected the control requirement (paras. 1417 *et seq.*) and convicted *Katanga* pursuant to Art. 25(3)(d) ICC Statute (paras. 1643 *et seq.*). Cf. also Stahn (2014) 12 *JICJ* 809, 824 who holds that the *Katanga* TC invoked a relatively high threshold for indirect perpetration than the *Lubanga* PTC; conc. with the *Katanga* approach Gil and Maculan (2015) 28 *LeidenJIL* 364 *et seq.* (focusing regarding *Organisationsherrschaft* on the effective control, at 367).

¹⁰⁵ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-3121-Red, Judgment, AC, 1 December 2014, paras. 469, 473 <<http://www.legal-tools.org/doc/585c75/>>.

¹⁰⁶ Cf. also *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 135, quoting the *Lubanga* AC Judgment <<http://www.legal-tools.org/doc/0536d5/>>.

¹⁰⁷ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-3121-Red, Judgment, AC, 1 December 2014, paras. 458, 465 (responsibility without personal commission (own hands)) <<http://www.legal-tools.org/doc/585c75/>>.

¹⁰⁸ *Ibid.*, para. 466 (‘it is not required that a person actually carries out directly and personally the incriminated conduct in order to be a co-perpetrator. Rather, in order to determine whether a person is a co-perpetrator, a normative assessment of that person’s role is required.’).

¹⁰⁹ *Ibid.*, para. 469. This assessment should be ‘primarily based on the objective criterion of the accused person’s extent of contribution to the crime’ (468). ‘The contribution of a co-perpetrator must be of greater significance’ than that of accessories (467).

¹¹⁰ Crit. for example Weigend (2011) 9 *JICJ* 91, 92, 103 (disapproving of the concept’s ‘vagueness of dominance’, in essence rejecting the organizational element in Article 25 (3) (a) and instead militating for assessing an indirect perpetrator’s control over the executor on a case-by-case basis, independent from the existence of organizational structures). Focusing on the person controlling the organisation as ‘the *Zentralgestalt* in the course of events leading up to the crimes’, Jain, *Perpetrators and Accessories in ICL* (2014) 141 *et seq.*

¹¹¹ Conc. Eser, in Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 795 with fn. 111; *id.* (2007) 5 *JICJ* 953, 964. On the proximity between command responsibility and *Organisationsherrschaft* see also Vest, *Genozid durch organisatorische Machtapparate* (2002) 300.

background' exercises only limited control over a fully responsible direct perpetrator – he or she may, at any time, decide to abandon the criminal plan – this lack of control is compensated by the control of the criminal organization, which produces an unlimited number of potential willing executors. In other (more 'dogmatic') words, although direct perpetrators acting with full criminal responsibility *cannot* be considered mere 'fungible mediators of the act' (*fungible Tatmittler*), the system provides for a practically unlimited number of replacements and thereby for a high degree of flexibility as far as the personnel necessary to commit the crimes is concerned¹¹². For this 'system' or organizational reason, one can also argue, as already done above (mn. 13), that the individual perpetrator has less institutional autonomy than the one acting outside a system or organization. Another, more normativist explanation of *Organisationsherrschaft* follows, with regard to state organizations, from the state's special duty of protection *vis-à-vis* its citizens which entails its special duty to limit and control its violating power (*Verletzungsmacht*) with regard to citizens' rights. If the state orders to violate these rights or fails to prevent such violations, it does not live up to this special duty and thus its highest representatives incur criminal responsibility being part of the state organization¹¹³.

Still, it is clear that only very few persons command the control necessary to immediately replace one (failing) executor by another, namely only those who belong to the leadership of the criminal organization or who at least control a part of the organization; only they can dominate the unfolding of the criminal plan undisturbed by other members of the organization¹¹⁴. Although these persons are generally far away from the actual execution of the criminal acts and are therefore normally considered indirect perpetrators or even accessories before the fact, they are in fact, from a normative perspective, the main perpetrators while the executors (the direct perpetrators) are merely accessories or accomplices in the implementation of the criminal enterprise¹¹⁵. In contrast, mid-level perpetrators lack unlimited control, their actions might always be 'disturbed' by superiors; therefore, they rather qualify as co-perpetrators than indirect perpetrators assuming that they have an, at least, silent agreement with the direct, low-level perpetrators¹¹⁶.

Thus, it becomes clear that the system of individual attribution of responsibility, as used for ordinary criminality, must be modified in international criminal law aiming at the development of a mixed system of individual-collective responsibility in which the criminal enterprise or organisation as a whole serves as the entity upon which attribution of criminal responsibility is based (so-called *Zurechnungsprinzip Gesamttat*)¹¹⁷. In this sense, the individual criminal contributions of the participants must be assessed in the light of their effect on

¹¹² Cf. Ambos, *Der Allgemeine Teil* (2002/2004) 594 *et seq.* (597–8), 614 with further references; in a similar vein Jain, *Perpetrators and Accessories in ICL* (2014), 141–2.

¹¹³ Cf. for more details Ambos, in: Nollkaemper and van der Wilt (eds.), *System Criminality* (2009) 127, 148 *et seq.* with further references in fn. 98 and Ambos (2011) 9 *JICJ* 137, 155–6.

¹¹⁴ Ambos, *Der Allgemeine Teil* (2002/2004) 602 *et seq.*, 614; *id.*, in: Nollkaemper and van der Wilt (eds.), *System Criminality* (2009) 127, 154; Ambos, in: Heinrich *et al.* (eds.), *Festschrift für Claus Roxin* (2011) 837, 850 *et seq.*

¹¹⁵ Cf. Vest, *Genozid durch organisatorische Machtapparate* (2002) 220, 249; *id.*, *Völkerrechtsverbrecher verfolgen* (2011) 375.

¹¹⁶ For a different view Vest, *Völkerrechtsverbrecher verfolgen* (2011) 430 *et seq.*; *id.* (2014) 12 *JICJ* 295, 304 who considers 'ordering' as the appropriate mode of liability for the top-level perpetrators and applies indirect-perpetration to the mid-level perpetrators since only they (and *not* the top-level agents) dispose of fungible direct executors.

¹¹⁷ On this fundamental concept of attribution for collective criminality see the seminal work of Dencker, *Kausalität und Gesamttat* (1996) 125 *et seq.*, 152 *et seq.*, 229, 253 *et seq.* and *passim*; *id.*, in: Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen* (2002) 525, 534 *et seq.* The concept was further elaborated by Vest, *Genozid durch organisatorische Machtapparate* (2002) 214 *et seq.*, 236 *et seq.*, 303, 304 *et seq.*, 359 *et seq.* (referring in particular to the crime of genocide) and *id.*, *Völkerrechtsverbrecher verfolgen* (2011) 373 *et seq.*, 414 *et seq.*; see also Ambos, in: Heinrich *et al.* (eds.), *Festschrift für Claus Roxin* (2011) 837, 846 *et seq.* For a discussion on the ICC's challenge to develop a consistent system of attribution see also Fletcher (2011) 9 *JICJ* 179–190; *cf.* also Jain, *Perpetrators and Accessories in ICL* (2014) 138–149. On the limitations of the indirect modes of liability *cf.* also Eldar (2014) 8 *Crim. L. and Philos.* 605, 613 *et seq.*

the criminal plan or purpose pursued by the criminal apparatus or organization. Contributions without any effect may be excluded and the contributors exempted from responsibility. One can speak of a system of ‘organizational domination in stages’ (*stufenweise Organisationsherrschaft*), where domination requires, however, at least some form of control over part of the organization¹¹⁸. Thus, taking up the distinction between main perpetrators and accomplices made above, there are in fact *three levels of participation*: the first and highest level is composed of those (main) perpetrators who plan and organize the criminal events as a whole and as such belong to the leadership level (*Führungstäter*); at the second level we find those (still main) perpetrators of at least the mid-level of the hierarchy who exercise some form of control over a part of the organization (*Organisationstäter*); the third and last level consists of the accomplices who merely execute the crimes (*Ausführungstäter*)¹¹⁹. Thus, in a nutshell, the participant’s influence on the macro-criminal event depends, from a normative perspective, on his or her rank and influence within the collective system responsible for the criminal events as a whole.

b) ‘... regardless of whether that other person is criminally responsible’. It is not clear 16
from the English original wording if ‘that other person’ refers to both co-perpetration and perpetration by means or only to the latter. The travaux do not offer an explanation, since the problem was simply not addressed in Rome. The French (*‘celle-ci’*) and Spanish (*‘éste’*) versions indicate, however, that the reference applies only to the intermediary. This is confirmed by a teleological interpretation.

As explained above (mn. 8), in the case of co-perpetration all persons involved fulfil a 17
certain function and are, therefore, criminally responsible. Thus, the reference cannot apply to co-perpetration. On the other hand, in the case of perpetration by means, it is typical that the person used (‘the instrument’) is not criminally responsible. The express recognition of this fact is superfluous. Yet it makes sense in the exceptional case that the instrument is criminally responsible, e. g., in the above mentioned ‘*Organisationsherrschaft*’ by the indirect perpetrator. For in this case the reference confirms that a perpetration by means is even possible if the direct perpetrator is criminally responsible¹²⁰. This was confirmed by the *Lubanga AC*¹²¹ as explained above (mn. 14).

2. ‘orders, solicits or induces’ an (attempted) crime

A number of very different forms of participation are established in this subparagraph. A 18
person who *orders* a crime is not a mere accomplice but rather an indirect perpetrator, using a subordinate to commit the crime¹²². Indeed, the identical article 2 para. 1 (b) of the 1996 Draft Code was intended to provide for the criminal responsibility of mid-level officials who order their subordinates to commit crimes¹²³. The ICTR, in the *Akayesu* judgment, held that ‘ordering implies a superior-subordinate relationship’ whereby ‘the person in a position of

¹¹⁸ See already Ambos (1998) 145 GA 226, 237-8; also available in Spanish: ‘Dominio del hecho por dominio de voluntad en virtud de aparatos organizados de poder’ 37–8 (Bogotá 1998, Universidad Externado) = 3 Revista de Derecho Penal y Criminología (Universidad Nacional de Educación a Distancia, Facultad de Derecho, Spain) 133 (Jan. 1999, 2^{na} Epoca) = 9 Cuadernos de Doctrina y Jurisprudencia Penal (Argentina) 367 (1999). Conc. Vest, *Genozid durch organisatorische Machtapparate* (2002) 239. On the nature of the organization see Ambos, in: Heinrich *et al.* (eds.), *Festschrift für Claus Roxin* (2011) 837 *et seq.* (spanish in <www.indret.com>); cf. also Jain, *Perpetrators and Accessories in ICL* (2014), 144, for whom organisation can have a very broad meaning including ‘informal networks of power with weak links’.

¹¹⁹ Cf. Vest, *Genozid durch organisatorische Machtapparate* (2002) 29–30, 240 *et seq.*, 302; *id.*, *Völkerrechtsverbrecher verfolgen* (2011) 409 *et seq.*

¹²⁰ Conc. van Sliedregt, *Criminal Responsibility* (2003) 71. See recently Roxin, in: Amelung *et al.* (eds.), *Festschrift für Volker Krey* (2010) 449, 451-2.

¹²¹ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-3121-Red, Judgment, AC, 1 December 2014, para. 465 <<http://www.legal-tools.org/doc/585c75/>>.

¹²² Contrary Werle and Jessberger, *Principles* (2014) 214 arguing that ‘ordering’ constitutes a sub-category of instigation; also Satzger, *Internationales Strafrecht* (2013) § 15 mn. 61.

¹²³ 1996 ILC Draft Code, p. 25 (para. 14).

authority uses it to convince (or coerce) another to commit an offence'¹²⁴. Such a – at least *de facto*¹²⁵ – ‘superior-subordinate relationship’ is also the first and basic requirement of command or superior responsibility as first confirmed in the ‘*Celebici*’ case¹²⁶ and adopted by the subsequent case law of the *ad hoc* Tribunals¹²⁷. The ICC case law so far also requires a ‘position of authority’ from which the person responsible has to ‘instruct’ another person to commit a crime¹²⁸, but, apart from that, it does not distinguish ordering from the other forms of accessorial liability of subparagraph (b)¹²⁹. In any case, the first alternative in subparagraph (b) ([o]rders’) complements the command responsibility provision (article 28): in the latter case the superior is liable for an omission, in the case of an order to commit a crime the superior is liable for commission for having ‘ordered’. In conclusion, the first alternative in subparagraph (b) actually belongs to the forms of perpetration provided for in subparagraph (a), being a form of commission ‘through another person’¹³⁰, as a consequence, any additional subjective requirement, such as the ‘intent to destroy’ in Article 6, must be fulfilled¹³¹.

¹²⁴ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 483 <<http://www.legal-tools.org/doc/b8d7bd/>>. In the same vein *Prosecutor v. Krstić*, No. IT-98-33/T, Judgment, TC, 2 August 2001, para. 601 <<http://www.legal-tools.org/doc/440d3a/>>; *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, TC, 31 July 2003, para. 445 <<http://www.legal-tools.org/doc/32ecfb/>>; see also *Prosecutor v. Mrksić et al.*, No. IT-95-13/1-T, Judgment, TC, 27 September 2007, para. 550 <<http://www.legal-tools.org/doc/32111c/>>; *Prosecutor v. Martić*, No. IT-95-11-T, Judgment, TC, 12 June 2007, para. 441 <<http://www.legal-tools.org/doc/06634c/>>; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, para. 905 <<http://www.legal-tools.org/doc/445e4e/>>; *Prosecutor v. Stanisic and Simatovic*, No. IT-03-69-T, Judgment Vol. II, TC, 30 May 2013, para. 1263 <<http://www.legal-tools.org/doc/698c43/>>.

¹²⁵ Cf. for example, *Prosecutor v. Boskoski and Tarculovski*, No. IT-04-82-A, Judgment, AC, 19 May 2010, para. 164 <<http://www.legal-tools.org/doc/54398a/>> and *Prosecutor v. Ntawukulilyayo*, No. ICTR-05-82-T, Judgment and Sentence, TC, 3 August 2010, para. 416 <<http://www.legal-tools.org/doc/dbc983/>>.

¹²⁶ *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, paras. 348 *et seq.* <<http://www.legal-tools.org/doc/6b4a33/>>. Cf. Zahar and Sluiter, *ICL Introduction* (2008) 261 *et seq.*

¹²⁷ Cf. *Prosecutor v. Renzaho*, No. ICTR-97-31-T, Judgment, TC, 14 July 2009, paras. 744 *et seq.* <<http://www.legal-tools.org/doc/9bbd8a/>>; *Prosecutor v. Bizimungu*, No. ICTR-00-56B-A, Judgment, AC, 30 June 2014, para. 73 <<http://www.legal-tools.org/doc/4c5065/>>; *Prosecutor v. Djordjević*, No. IT-05-87/1-T, Judgment, TC, 23 February 2011, para. 1881 <<http://www.legal-tools.org/doc/653651/>>; *Prosecutor v. Gotovina et al.*, No. IT-06-90-T, Judgment Vol. II, TC, 15 April 2011, para. 1963 <<http://www.legal-tools.org/doc/86922c/>>; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, para. 905 <<http://www.legal-tools.org/doc/445e4e/>>; *Prosecutor v. Brima et al.*, No. SCSL-2004-16-PT, Further Amended Consolidated Indictment, 18 February 2005, para. 36 <<http://www.legal-tools.org/doc/c3dc48/>>; see also with regard to ECCC *Prosecutor v. Khieu and Nuon*, No. 002/19-09-2007/ECCC/TC, Judgment, TC, 7 August 2014, para. 715 <<http://www.legal-tools.org/doc/4888de/>>. For a summary of the earlier case law see Ambos, in: Cassese *et al.* (eds.), *The Rome Statute of the ICL* (2002) 815 *et seq.* and Cryer, in: *id. et al.*, *Introduction to ICL* (2014) 353, 375 *et seq.* For case law references since World War II see Finnin, *Accessory Modes of Liability* (2012) 43 *et seq.*

¹²⁸ *Prosecutor v. Mudacumura*, No. ICC-01/04-01/12-1Red, Decision on the Prosecutor’s Application under Article 58, PTC II, 13 July 2012, paras. 63–5 <<http://www.legal-tools.org/doc/ecfae0/>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 145 <<http://www.legal-tools.org/doc/5686c6/>>; conc. *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, paras. 243, 245 <<http://www.legal-tools.org/doc/5b41bc/>>.

¹²⁹ See especially *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, para. 243 <<http://www.legal-tools.org/doc/5b41bc/>> where PTC I puts the forms of liability of subparagraph (b) on an equal footing with the exception of a position of authority as a special element of ordering. In its application to the case it does not distinguish between ordering and (normally) instigating either (esp. para. 246: ‘... instructed or otherwise instigated ...’); in the same vein, *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 159 <<http://www.legal-tools.org/doc/0536d5/>>, holding that ‘soliciting’, ‘inducing’ and ‘ordering’, are all form of instigation, and overlap with each other ‘with the exception of the requirement of a position of authority held by the person vis-à-vis the perpetrator(s) of the crime, which is particular to ‘ordering’ and is not a necessary element of ‘soliciting’ or ‘inducing’.

¹³⁰ In the same vein Eser, in Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 797 who, however, correctly clarifies (in fn. 123) that the *Akayesu* TC considers ‘ordering’ as a form of complicity. See also Satō (2012) 12 *ICLRev* 293, 297–300, who considers ordering within the meaning of Article 25(3)(b) as a form of principal responsibility as recognized by *Katanga and Ngudjolo Chui* PTC by *Organisationsherrschaft*. cf. also Cryer, in: *id. et al.*, *Introduction to ICL* (2014) 353, 379.

¹³¹ Contrary Werle and Jessberger, *Principles* (2014) 215–6.

Soliciting a crime means, *inter alia*, ‘urging, advising, commanding, or otherwise inciting another to commit a crime’¹³². Similarly, *inducing* entails the ‘enticement or urging of another person to commit a crime’¹³³. Thus, both terms basically refer to a situation where a person is influenced by another to commit a crime¹³⁴. In fact, the French version of the Statute speaks of ‘*solicite ou encourage*’, thereby using a form of solicitation to express the English term ‘induce’. In substance, in both cases a person is caused to commit a crime¹³⁵. Such ‘causal’ influence is normally of a psychological nature (persuasion), but may also take the form of physical pressure (coercion) within the meaning of *vis compulsiva*¹³⁶. It may also occur in a chain, *i. e.*, a person induces another to induce a third person to commit a crime¹³⁷. In contrast to cases of ‘ordering’, a superior-subordinate relationship is not necessary¹³⁸. In both cases, however, the conduct must have a ‘direct effect on the commission or attempted commission of the crime’¹³⁹.

3. ‘For the purpose of facilitating aids, abets or otherwise assists ...’

Subparagraph (c) codifies any other assistance not covered by subparagraph (b). Generally speaking, participation as defined by subparagraph (b) implies a higher degree of responsibility than in the case of subparagraph (c).

a) ‘aids, abets or otherwise assists ... including providing the means’. ‘Aiding and abetting’ as the weakest form of complicity covers any act, which contributes to the commission or attempted commission of a crime¹⁴⁰. The difficult task is to determine the minimum requirements of this mode of complicity. Article 2 para. 3 (d) of the 1996 Draft Code requires that the aiding and abetting be ‘direct and substantial’; *i. e.*, the contribution should facilitate the commission of a crime in ‘some significant way’¹⁴¹. The ICTY referred to these criteria in the *Tadić* case and held that the act in question must constitute a direct and substantial contribution to the commission of the crime¹⁴². ‘Substantial’ means that the contribution has an effect on the commission; in other words, it must – in one way or

¹³² Black (ed.), *Black’s Law Dictionary* (1999) 1398; American Law Institute, *Model Penal Code and Commentaries* (1985) § 5.02 (1).

¹³³ Black (ed.), *Black’s Law Dictionary* (1999) 779.

¹³⁴ See also *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, para. 243 (even including ‘ordering’) <<http://www.legal-tools.org/doc/5b41bc/>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 153 (inducing as exerting influence over another person) <<http://www.legal-tools.org/doc/5686c6/>>.

¹³⁵ Cf. Ambos, *Der Allgemeine Teil* (2004) 481 *et seq.* I do not longer follow the view of the First Edition, that a meaningful terminological distinction between both terms can be made. For an ‘umbrella’ function of soliciting also Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 797 with fn. 117. Different Militello (2007) 5 *JICJ* 941, 947. See also Werle and Jessberger, *Principles* (2014) 213-4.

¹³⁶ Unlike *vis absoluta*, *vis compulsiva* leaves the person still a certain freedom to act and decide (cf. Jescheck and Weigend, *Strafrecht. Allgemeiner Teil* (1996) 224).

¹³⁷ Cf. Vest, *Genozid durch organisatorische Machtapparate* (2002) 203 *et seq.*, 238.

¹³⁸ In this sense, see also *Prosecutor v. Nchamihigo*, No. ICTR-01-63-A, Judgment, AC, 18 March 2010, para. 188 (‘a position of authority is not a required element under this mode of liability’) <<http://www.legal-tools.org/doc/4b3598/>>; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, para. 902 <<http://www.legal-tools.org/doc/445e4e/>>; *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 159 (‘the requirement of a position of authority... is not a necessary element of “soliciting” or “inducing”’) <<http://www.legal-tools.org/doc/0536d5/>>; Heller, in: Heller and Dubber, *Handbook* (2011) 593, 607.

¹³⁹ *Prosecutor v. Mudacumura*, No. ICC-01/04-01/12-1Red, Decision on the Prosecutor’s Application under Article 58, PTC II, 13 July 2012, para. 63 (regarding ordering) <<http://www.legal-tools.org/doc/ecfae0/>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, paras. 145, 153 <<http://www.legal-tools.org/doc/5686c6/>>; *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, para. 247 <<http://www.legal-tools.org/doc/5b41bc/>>.

¹⁴⁰ Cf. Finin, *Accessory Modes of Liability* (2012) 73 *et seq.*, 90–1 (‘virtually no limits on the type of act’, 91).

¹⁴¹ 1996 ILC Draft Code, 24 (para. 10).

¹⁴² *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, paras. 674, 688–92 <<http://www.legal-tools.org/doc/0a90ae/>>.

another – have a causal relationship with the result¹⁴³. However, this does not necessarily require physical presence at the scene of the crime. In *Tadić*, TC II followed a broad concept of complicity based on the English ‘concerned in the killing’ theory¹⁴⁴. In fact, the Chamber did not take the ‘direct and substantial’ criterion very seriously since it included within the concept of aiding and abetting ‘all acts of assistance by words or acts that lend encouragement or support’¹⁴⁵. This position was confirmed by a TC in ‘*Celebici*’¹⁴⁶ and, more recently, in *Naletilić and Martinović*¹⁴⁷. The AC stressed that the aiding and abetting must have a substantial effect on the main act¹⁴⁸.

- 22 In *Furundžija* the ICTY took a more sophisticated view¹⁴⁹. The TC distinguished between the nature of assistance and its effect on the act of the principal (main perpetrator). Regarding the former it stated that the assistance need not be ‘tangible’ but that ‘moral support and encouragement’ is sufficient. Mere presence at the scene of the crime suffices if it has ‘a significant legitimizing or encouraging effect on the principals’. The term ‘direct’ – used by the ILC – in qualifying the proximity of the assistance is ‘misleading’ since it implies that the assistance needs to be ‘tangible’¹⁵⁰. Regarding the effect of the assistance the Chamber does not consider a causal relationship in the sense of the *conditio sine qua non* formula necessary but holds that the acts of assistance must ‘make a significant difference to the commission of the criminal act by the principal’. Thus, it is, for example, sufficient that a person continues to interrogate the victim while it is being raped by another person¹⁵¹. The ‘significant’-requirement, however, implies that it would not be sufficient if the accomplice has only ‘a role in a system without influence’¹⁵². With regard to the Rome Statute, the Chamber explicitly states that it is ‘less restrictive’ than the ILC Draft Code 1996 since it does not limit aiding and abetting – as article 2 para. 3 (d) Draft Code does – to assistance which ‘facilitate[s] in some significant way’, or ‘directly and substantially’ assists the perpetrator. Rather, subparagraph (c) contemplates ‘assistance either in physical form or in the form of moral support. ... “abet” includes mere exhortation or encouragement’¹⁵³. In sum, aiding and abetting requires ‘practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime’¹⁵⁴. The AC endorsed this view¹⁵⁵.

¹⁴³ *Ibid.*, para. 688. On the substantial effect as a ‘form of causation’ see also Stewart (2012) 25 *LJIL*165, 203.

¹⁴⁴ *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, para. 687: ‘... not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced’ <<http://www.legal-tools.org/doc/0a90ae/>>. For the ‘concerned in the killing’ doctrine, see: (1948) 15 *LRTWC* 49-51; also: *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, AC, 15 July 1999, para. 691 <<http://www.legal-tools.org/doc/8efc3a/>>.

¹⁴⁵ *Ibid.*, para. 689.

¹⁴⁶ *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, paras. 325-9 <<http://www.legal-tools.org/doc/6b4a33/>>.

¹⁴⁷ *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 726 <<http://www.legal-tools.org/doc/f2cfef/>>, see also *Prosecutor v. Blagojević and Jokić*, No. IT-02-60-T, Judgment, TC, 17 January 2005, para. 726 <<http://www.legal-tools.org/doc/7483f2/>>.

¹⁴⁸ *Prosecutor v. Delalić et al.*, No. IT-96-21-A, Judgment, AC, 20 February 2001, para. 352 <<http://www.legal-tools.org/doc/051554/>>. As to the concrete case the Chamber held that the position as a camp guard is not *per se* sufficient (para. 364).

¹⁴⁹ *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, paras. 190-249 <<http://www.legal-tools.org/doc/e6081b/>>.

¹⁵⁰ *Ibid.*, paras. 199, 232.

¹⁵¹ *Ibid.*, paras. 273-4; confirmed by the AC in *Prosecutor v. Furundžija*, No. IT-95-17/1 A, Judgment, AC, 21 July 2000, para. 126 <<http://www.legal-tools.org/doc/660d3f/>> and *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 63 <<http://www.legal-tools.org/doc/f2cfef/>>.

¹⁵² *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, paras. 217, 233-4 <<http://www.legal-tools.org/doc/e6081b/>>.

¹⁵³ *Ibid.*, para. 231.

¹⁵⁴ *Ibid.*, paras. 235, 249.

¹⁵⁵ *Prosecutor v. Furundžija*, No. IT-95-17/1 A, Judgment, AC, 21 July 2000, paras. 117 *et seq.* <<http://www.legal-tools.org/doc/660d3f/>>.

The subsequent case law of the ICTY has confirmed the broad concept of aiding and abetting developed in *Tadić*, *Celibici* and *Furundžija*¹⁵⁶. The *Aleksovski* TC required an ‘effect important’ on the main act¹⁵⁷ and allowed the act of support to be given at any time¹⁵⁸. In *Prosecutor v. Strugar*¹⁵⁹ the TC declined to enter convictions against *Pavle Strugar* for aiding and abetting on the grounds that there was no settled jurisprudence on whether, and in what circumstances, an omission may constitute the *actus reus* of aiding and abetting. Further, it found that *Strugar’s* failure to carry out an investigation into the offences committed and punish the perpetrators thereof occurred well after the commission of the offences and thus could not have had a requisite direct and substantial effect on them¹⁶⁰. As to the issue of a causal relationship between the aiding and the final criminal result, the TCs in *Aleksovski*, *Blaškić*, *Krnojelac*, *Vasiljević*, and *Naletilić and Martinović* followed *Furundžija* renouncing this requirement¹⁶¹. Presence at the scene of the crime would (only) be sufficient if the accused had an ‘*autorité incontestée*’ that encouraged the direct perpetrator to commit the crime¹⁶². At a minimum, the presence of a superior constitutes a ‘probative indication’ in

¹⁵⁶ *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, TC, 25 June 1999, paras. 60 *et seq.* <<http://www.legal-tools.org/doc/52d982/>>; *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 245 <<http://www.legal-tools.org/doc/e1ae55/>>; *Prosecutor v. Kunarac et al.*, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, TC, 22 February 2001, paras. 391–3 <<http://www.legal-tools.org/doc/fd881d/>>; *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Judgment, TC, 26 February 2001, paras. 395 *et seq.* <<http://www.legal-tools.org/doc/d4fedd/>>; *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, paras. 88 *et seq.* <<http://www.legal-tools.org/doc/1a994b/>>; *Prosecutor v. Limaj et al.*, No. IT-03-66-T, Judgment, TC, 30 November 2005, para. 516 <<http://www.legal-tools.org/doc/4e469a/>>; confirmed by *Prosecutor v. Limaj et al.*, No. IT-03-66-A, Judgment, AC, 27 September 2007, paras. 90 *et seq.* <<http://www.legal-tools.org/doc/6d43bf/>>; *Prosecutor v. Mrksić et al.*, No. IT-95-13/1-T, Judgment, TC, 27 September 2007, paras. 551 *et seq.* <<http://www.legal-tools.org/doc/32111c/>>; *Prosecutor v. Haradinaj et al.*, No. IT-04-84-T, Judgment, TC, 3 April 2008, para. 145 <<http://www.legal-tools.org/doc/025913/>>; *Prosecutor v. Oric*, No. IT-03-68-A, Judgment, AC, 3 July 2008, para. 43 <<http://www.legal-tools.org/doc/e053a4/>>; *Prosecutor v. Mrksić et al.*, No. IT-95-13/1, Judgment, AC, 5 May 2009, paras. 48, 81, 146, 159 <<http://www.legal-tools.org/doc/40bc41/>>; *Prosecutor v. Popović et al.*, No. IT-05-88-T, Judgment, TC, 10 June 2010, paras. 1014, 1018 <<http://www.legal-tools.org/doc/481867/>>; *Prosecutor v. Djordjević*, No. IT-05-87/1-T, Judgment, TC, 23 February 2011, paras. 1873–4 <<http://www.legal-tools.org/doc/653651/>>; *Prosecutor v. Gotovina et al.*, No. IT-06-90-T, Judgment Vol. II, TC, 15 April 2011, para. 1960 *et seq.* <<http://www.legal-tools.org/doc/86922c/>>; *Prosecutor v. Lukić and Lukić*, No. IT-98-32/1-T, Judgment, TC, 20 July 2009, para. 901 <<http://www.legal-tools.org/doc/af5ad0/>>; *Prosecutor v. Perišić*, No. IT-04-81-T, Judgment, TC, 6 September 2011, para. 126 <<http://www.legal-tools.org/doc/f3b23d/>>; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, paras. 907–8 <<http://www.legal-tools.org/doc/445e4e/>>. Regarding the ICTR see *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, Judgment, AC, 28 November 2007, para. 482 <<http://www.legal-tools.org/doc/4ad5eb/>>; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment and Sentence, TC, 12 September 2006, para. 470 <<http://www.legal-tools.org/doc/fa02aa/>>. With regard to the SCSL, *Prosecutor v. Taylor*, No. SCSL-03-01-T, Judgment, TC, 18 May 2012, para. 6904 <<http://www.legal-tools.org/doc/8075e7/>> (for an analysis Ambos and Njikam (2013) 11 *JICJ* 789, 792 *et seq.*, 799 *et seq.*; *Prosecutor v. Taylor*, No. SCSL-03-01-A, Judgment, AC, 26 September 2013, paras. 362 *et seq.*, 401 <<http://www.legal-tools.org/doc/3e7be5/>>).

¹⁵⁷ *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, TC, 25 June 1999, paras. 60–1 <<http://www.legal-tools.org/doc/52d982/>>.

¹⁵⁸ *Ibid.*, para. 62. See also *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 284 <<http://www.legal-tools.org/doc/e1ae55/>>.

¹⁵⁹ *Prosecutor v. Strugar*, No. IT-01-42-T, Judgment, TC, 31 January 2005 <<http://www.legal-tools.org/doc/927ba5/>>.

¹⁶⁰ Cf. Hinek (2006) 19 *LeidenJIL* 477.

¹⁶¹ *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, TC, 25 June 1999, para. 61 <<http://www.legal-tools.org/doc/52d982/>>; *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 284 <<http://www.legal-tools.org/doc/e1ae55/>>; *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, para. 88 <<http://www.legal-tools.org/doc/1a994b/>>; *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 63 <<http://www.legal-tools.org/doc/f2cfef/>>; *Prosecutor v. Vasiljević*, No. IT-98-32-T, Judgment, TC, 29 November 2002, para. 70 <<http://www.legal-tools.org/doc/8035f9/>>; *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, AC, 29 July 2004, para. 48 <<http://www.legal-tools.org/doc/88d8e6/>>; *Prosecutor v. Blagojević and Jokić*, No. IT-02-60-T, Judgment, TC, 17 January 2005, para. 726 <<http://www.legal-tools.org/doc/7483f2/>>.

¹⁶² *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, TC, 25 June 1999, paras. 63 *et seq.* (65) <<http://www.legal-tools.org/doc/52d982/>>; similarly *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, para. 89: ‘significant legitimising or encouraging effect’ <<http://www.legal-tools.org/doc/1a994b/>>; also *Prosecutor v. Vasiljević*, No. IT-98-32-T, Judgment, TC, 29 November 2002, para. 70 <<http://www.legal-tool->

this respect¹⁶³. Most recently, the debate about ‘specific direction’ as a constitutive element of aiding or abetting¹⁶⁴ brought again the question of a reasonable limitation of this form of liability to the fore. While it is controversial whether specific direction has always been, either as part of the *actus reus* or of the *mens rea*, an element of aiding and abetting in the ICTY/ICTR case law¹⁶⁵, it serves as an important qualifier in establishing a culpable link between the assistance provided by the accomplice and the crimes of the principal perpetrators¹⁶⁶. In this sense, specific direction may also be invoked to more precisely determine the relevant assistance or contribution in the context of the discussion about neutral acts, especially with regard to Article 25(3)(d)¹⁶⁷.

- 24 The ICTR defined aiding in *Akayesu* as ‘giving assistance to someone’ and abetting as involving ‘facilitating the commission of an act by being sympathetic thereto’¹⁶⁸. The separate definitions of aiding and abetting do not mean, however, that individual responsibility within the meaning of article 6 para. 1 ICTR Statute is only incurred if both forms of participation – aiding and abetting – have been realized; aiding or abetting is sufficient¹⁶⁹. Subsequent case law, however, does not distinguish between aiding and abetting but requires for both, taking the same approach as the ICTY, any form of physical or moral support which contributes substantially to the commission of a crime¹⁷⁰. Similarly, the ICC PTC in *Blé Goudé* does not

s.org/doc/8035f9/;>; *Prosecutor v. Blagojević and Jokić*, No. IT-02-60-T, Judgment, TC, 17 January 2005, para. 726, fn. 2177: ‘Mere presence’ at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender’ <<http://www.legal-tools.org/doc/7483f2/>>.

¹⁶³ *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 284 <<http://www.legal-tools.org/doc/e1ae55/>>; conc. *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 63 <<http://www.legal-tools.org/doc/f2cfeb/>>; *Prosecutor v. Gotovina et al.*, No. IT-06-90-T, Judgment Vol. II, TC, 15 April 2011, para. 1960 <<http://www.legal-tools.org/doc/86922c/>>. In *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 284 <<http://www.legal-tools.org/doc/e1ae55/>>, the AC explicitly left open the possibility that ‘in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting (para. 47)’.

¹⁶⁴ *Prosecutor v. Perišić*, No. IT-04-81-A, Judgment, AC, 28 February 2013, para. 36 <<http://www.legal-tools.org/doc/f006ba/>> (‘no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly’); para. 73 (‘... where an accused individual’s assistance is remote from the actions of principal perpetrators, specific direction must be explicitly established’). Conc. *Stanisić and Simatović*, No. IT-03-69-T, Judgment Vol. II, TC, 30 May 2013, para. 1264. <<http://www.legal-tools.org/doc/698c43/>>; *Prosecutor v. Ndahimana*, No. ICTR-01-68-A, Judgment, AC, 16 December 2013, para. 147 <<http://www.legal-tools.org/doc/7034a5/>>. *Contra Prosecutor v. Perišić*, No. IT-04-81-T, Judgment, TC, 6 September 2011, para. 126 <<http://www.legal-tools.org/doc/f3b23d/>>; conc. *Taylor*, No. SCSL-03-01-T, Judgment, TC, 18 May 2012, para. 484 with fn. 1141 <<http://www.legal-tools.org/doc/8075e7/>>; *Taylor*, No. SCSL-03-01-A, Judgment, AC, 26 September 2013, paras. 475 *et seq.* <<http://www.legal-tools.org/doc/3e7be5/>>; *Sainović et al.*, No. IT-05-87-A, Judgment, AC, 23 January 2014, paras 1617–51 <<http://www.legal-tools.org/doc/81ac8c/>>; *Popović et al.*, No. IT-05-88-A, Judgment, AC, 30 January 2015, para. 1758 (welcoming this decision Bartels (2015) *EJIL: Talk!*); *Khieu and Nuon*, No. 002/19-09-2007/ECCC/TC, Judgment, TC, 7 August 2014, para. 710 <<http://www.legal-tools.org/doc/4888de/>>. For a discussion see Ambos and Njikam (2013) 11 *JICJ* 789, 804–8; Jones *et al.*, *Milestones* (2013); Coco and Gal (2014) 12 *JICJ* 345, 357 *et seq.*

¹⁶⁵ *Cf.* Ambos and Njikam (2013) 11 *JICJ* 789, 806 with further references.

¹⁶⁶ Crit. of the concept being too imprecise Vest (2014) 132 *SchZSR* 61, 82 *et seq.*

¹⁶⁷ See notes 187 and 217 and main text.

¹⁶⁸ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 484 <<http://www.legal-tools.org/en/doc/b8d7bd/>>. For an analysis of the ICTR’s complicity concept with regard to genocide see Obote-Odora (2002) 2 *ICLRev* 301, 375, in particular on the distinction between aiding and abetting 391–2, 400.

¹⁶⁹ Similarly already Triffterer, in: Hankel and Stuby (eds.), *Strafgerichte gegen Menschenverbrechen* (1995) 169, 229.

¹⁷⁰ *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, Judgment, TC, 6 December 1999, para. 43 <<http://www.legal-tools.org/doc/f0dbbb/>>; *Prosecutor v. Musema*, No. ICTR-96-13-T, Judgment, TC, 27 January 2000, paras. 125–6 <<http://www.legal-tools.org/doc/1fc6ed/>>; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, TC, 7 June 2001, para. 33 <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, TC, 15 May 2003, para. 385 <<http://www.legal-tools.org/doc/7e668a/>>; *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, TC, 22 January 2004, para. 597 <<http://www.legal-tools.org/doc/4ac346/>>; *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgment and Sentence, TC, 13 April 2006, paras. 32 *et seq.* <<http://www.legal-tools.org/doc/694dd8/>>; *Prosecutor v. Karera*, No. ICTR-01-74-T, Judgment and Sentence, TC, 7 December 2007, para. 548 <<http://www.legal-tools.org/doc/7bc57f/>>; *Prosecutor v. Mpambara*, No. ICTR-

distinguish between the different forms of subparagraph (c), and only requires ‘for this form of responsibility ... that the person provides assistance to the commission of a crime and that, in engaging in this conduct, he or she intends to facilitate the commission of the crime’¹⁷¹. Thus, the contribution need neither ‘always’ be ‘tangible’¹⁷² nor need it be indispensable (in the sense of a *conditio sine qua non*)¹⁷³. Although it is not necessary that the aider or abettor be present during the commission¹⁷⁴, presence may indicate moral support, especially if the accused possesses a degree of authority entailing ‘a clear signal of official tolerance’¹⁷⁵. Aiding and abetting may also consist in an omission¹⁷⁶; in such cases it may be interpreted as moral support by encouraging¹⁷⁷.

01-65-T, Judgment, TC, 11 September 2006, para. 16 <<http://www.legal-tools.org/doc/ce61de/>>; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment and Sentence, TC, 12 September 2006, para. 471 <<http://www.legal-tools.org/doc/fa02aa/>>; *Prosecutor v. Seromba*, No. ICTR-2001-66-A, Judgment, AC, 12 March 2008, para. 530 <<http://www.legal-tools.org/doc/b4df9d/>>; *Prosecutor v. Renzaho*, No. ICTR-97-31-T, Judgment, TC, 14 July 2009, para. 742 <<http://www.legal-tools.org/doc/9bbd8a/>>; *Prosecutor v. Bagaragaza*, No. ICTR-2005-86-S, Sentencing Judgment, TC, 17 November 2009, para. 22 <<http://www.legal-tools.org/doc/3d2d48/>>; *Prosecutor v. Munyakazi*, No. ICTR-97-36A-T, Judgment and Sentence, TC, 5 July 2010, para. 417 <<http://www.legal-tools.org/doc/9b9ee3/>>; *Prosecutor v. Kalimanzira*, No. ICTR-05-88-A, Judgment, AC, 20 October 2010, paras. 74, 86 <<http://www.legal-tools.org/doc/fad693/>>; *Prosecutor v. Kanyarukiga*, No. ICTR-02-78-T, Judgment and Sentence, TC, 1 November 2010, para. 621 <<http://www.legal-tools.org/doc/415384/>>; *Prosecutor v. Ntawukulilyayo*, No. ICTR-05-82-A, Judgment, AC, 14 December 2011, para. 214 <<http://www.legal-tools.org/doc/42d81d/>>; *Prosecutor v. Ndahimana*, No. ICTR-01-68-T, Judgment and Sentence, TC, 30 December 2011, paras. 824–32 <<http://www.legal-tools.org/doc/d8e4f2/>>; *Prosecutor v. Karemera and Ngirumpatse*, No. ICTR-98-44-T, Judgment and Sentence, TC, 2 February 2012, paras. 1429–30 <<http://www.legal-tools.org/doc/5b9068/>>; *Prosecutor v. Nzabonimana*, No. ICTR-98-44D-T, Judgment and Sentence, TC, 31 May 2012, para. 1697 <<http://www.legal-tools.org/doc/00cb8e/>>; *Prosecutor v. Nizeyimana*, No. ICTR-2000-55C-T, Judgment and Sentence, TC, 19 June 2012, para. 1466 <<http://www.legal-tools.org/doc/f8cdd9/>>; *Prosecutor v. Ngirabatware*, No. ICTR-99-54-T, Judgment and Sentence, TC, 12 December 2012, para. 1294 <<http://www.legal-tools.org/doc/393335/>>; *Prosecutor v. Ndahimana*, No. ICTR-01-68-A, Judgment, AC, 16 December 2013, para. 147 <<http://www.legal-tools.org/doc/7034a5/>>; *Prosecutor v. Nindiliyimana et al.*, No. ICTR-00-56-A, Judgment, AC, 11 February 2014, paras. 370 *et seq.* <<http://www.legal-tools.org/doc/4c5065/>>.

¹⁷¹ *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 167 <<http://www.legal-tools.org/doc/0536d5/>>.

¹⁷² *Prosecutor v. Kayishema and Ruzindana*, No. ICTR 95-1-T, Judgment, TC, 21 May 1995, para. 200 <<http://www.legal-tools.org/doc/0811c9/>>.

¹⁷³ *Ibid.*, para. 201; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, TC, 7 June 2001, para. 33 <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgment and Sentence, TC, 13 April 2006, para. 34 <<http://www.legal-tools.org/doc/694dd8/>>.

¹⁷⁴ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 484 <<http://www.legal-tools.org/en/doc/b8d7bd/>>; *Prosecutor v. Musema*, No. ICTR-96-13-T, Judgment, TC, 27 January 2000, para. 125 <<http://www.legal-tools.org/doc/1fc6ed/>>; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, TC, 7 June 2001, para. 33 <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, TC, 15 May 2003, para. 385 <<http://www.legal-tools.org/doc/7e668a/>>.

¹⁷⁵ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 484 <<http://www.legal-tools.org/en/doc/b8d7bd/>>; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, TC, 7 June 2001, paras. 34–5 <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, TC, 15 May 2003, para. 386 <<http://www.legal-tools.org/doc/7e668a/>>; *Prosecutor v. Brđjanin*, No. IT-99-36-A, Judgment, AC, 3 April 2007, para. 273 <<http://www.legal-tools.org/doc/782cef/>>; *Prosecutor v. Ndahimana*, No. ICTR-01-68-T, Judgment and Sentence, TC, 30 December 2011, paras. 824–32 <<http://www.legal-tools.org/doc/d8e4f2/>>; cf. Cryer, in: *id. et al.*, *Introduction to ICL* (2014) 353, 372.

¹⁷⁶ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 548: ‘... may consist in failing to act or refraining from action’ (unlike complicity in genocide) <<http://www.legal-tools.org/en/doc/b8d7bd/>>; see also *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, TC, 22 January 2004, para. 597: ‘The act of assistance may consist of an act or an omission’ <<http://www.legal-tools.org/doc/4ac346/>>; *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgment and Sentence, TC, 13 April 2006, para. 34 <<http://www.legal-tools.org/doc/694dd8/>>; *Prosecutor v. Mpambara*, No. ICTR-01-65-T, Judgment, TC, 11 September 2006, para. 22 <<http://www.legal-tools.org/doc/ce61de/>>; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment and Sentence, TC, 12 September 2006, para. 470 <<http://www.legal-tools.org/doc/fa02aa/>>; *Prosecutor v. Ndahimana*, No. ICTR-01-68-A, Judgment, AC, 16 December 2013, para. 147 <<http://www.legal-tools.org/doc/7034a5/>>.

¹⁷⁷ *Prosecutor v. Kayishema and Ruzindana*, No. ICTR 95-1-T, Judgment, TC, 21 May 1995, para. 200 <<http://www.legal-tools.org/doc/0811c9/>> referring to *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC,

- 25 Summing up this case law, aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime, *i.e.*, that constitutes a causal contribution to the main act¹⁷⁸. Thus, the only limiting element is the *substantial effect* or the *specific direction* requirement. This case law, in particular these two requirements, should also be taken into account when defining the *actus reus* of subparagraph (c) of Article 25 (3)¹⁷⁹. The lack of an explicit reference to these requirements in the text of the provision cannot be interpreted as a conscious departure from this standard¹⁸⁰ for Articles 7 (1) ICTY and 6 (1) ICTR Statute do not contain this reference either. The concept of assistance as expressed by the words ‘aids, abets or otherwise assists’ in subpara. (c) or ‘otherwise aided and abetted’ in the ICTY/ICTR Statutes is a general concept in criminal law and thus must be interpreted consistently. Clearly, the ‘ad hoc tribunal jurisprudence can be of assistance’¹⁸¹ in defining such universal concepts notwithstanding the differences in the details of the respective provisions.
- 26 Of course, both standards need to be clarified further in the future case law. The substantiality standard is far from precise, and the case law has not contributed to its clarification, instead leaving the decision to each individual case. If one takes the principle of legality seriously, *i.e.*, the requirements of legal certainty and foreseeability (*nullum crimen sine lege*)¹⁸², a general theory of imputation in international criminal law must be developed in order, *inter alia*, to determine, on an abstract level, when an effect is ‘substantial’ and, thus, when aiding and abetting should entail criminal responsibility¹⁸³. From a theoretical perspective, this is ultimately a normative question, which can best be answered by taking into account the modern theories of attribution¹⁸⁴. Accordingly, to incur criminal responsibility the aider and abettor must, with her contribution, create and increase the risk that the crime will be committed and thereby fundamental legal interests violated (*Risikoerhöhung*)¹⁸⁵. The risk must be realized through the commission of the (main) crime (*Risikorealisation*) or, in other words, the risk-creation or increase must be causal for the commis-

10 December 1998 <<http://www.legal-tools.org/doc/e6081b/>>; *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgment and Sentence, TC, 13 April 2006, para. 34 <<http://www.legal-tools.org/doc/694dd8/>>.

¹⁷⁸ See already mn. 21.

¹⁷⁹ I hereby reaffirm my earlier view in mn. 22 of the second edition (‘... “otherwise assist” would also require a substantial effect on the commission ...’), give up the view expressed in mn. 23 (‘... the word “facilitating” confirms that a direct and substantial assistance is not necessary ...’) and adopt the view argued before the *Mbarushimana* PTC (see *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 281 with reference in fn. 663) <<http://www.legal-tools.org/doc/63028f/>>. For the same view Werle and Jessberger, *Principles* (2014) 216–8; *id.* (2007) 5 *JICJ* 953, 969 (‘... reasonable to interpret the actus reus of assistance in this way.’); Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 801 calling this standard a ‘sort of a monitor’; Vest, *Völkerrechtsverbrecher verfolgen* (2011) 199 (referring to the gravity threshold of Article 17 and arguing that the ‘substantial effect’ might not necessarily influence the outcome, but the way of execution of the crime).

¹⁸⁰ For this view see Schabas, *Introduction to the ICC* (2011) 228.

¹⁸¹ *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 280 <<http://www.legal-tools.org/doc/63028f/>>.

¹⁸² See for the interpretation of article 7 ECHR in this respect *Sunday Times v. UK*, Series A 30 Judgment of 26 April 1979, para. 49; *S.W. v. UK*, Series A 335-b, 27 October 1995, para. 36; *C.R. v. UK*, Series A 335-c, 27 October 1995, para. 34 and most recently *Streletz, Kessler, Krenz v. Germany*, Judgment of 22 March 2001, paras. 77 *et seq.*, 105.

¹⁸³ Stewart (2012) 25 *LeidenJIL* 165, 204 votes for a combination of causation and normative contribution in order to create a ‘defensible notion of complicity’.

¹⁸⁴ See, generally, Roxin, *Strafrecht Allgemeiner Teil I* (2006) para. 11; Jakobs, *Strafrecht Allgemeiner Teil* (1993) 185 *et seq.* Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 801 with fn. 141; Vest, *Völkerrechtsverbrecher verfolgen* (2011) 200 *et seq.*

¹⁸⁵ The theory of risk increase has been applied by the *Bemba* Confirmation Decision in the context of command responsibility, holding the superior liable because his failure to intervene increased the risk with regard to the commission of the crimes: *Prosecutor v. Bemba Gombo*, No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges, PTC II, 15 June 2009, para. 425 <<http://www.legal-tools.org/en/doc/07965c/>>; conc. *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 174 <<http://www.legal-tools.org/doc/5686c6/>>. See also Ambos (2009) 22 *LeidenJIL* 715, 721–2 and *id.*, *Treatise on ICL I* (2013) 164 *et seq.* See also Vest, *Völkerrechtsverbrecher verfolgen* (2011) 253.

sion of this crime (*kausale Risikosteigerung*). Finally, the risk created or increased must be disapproved by the legal order, *i. e.*, it must be a forbidden risk (*Risikomißbilligung*)¹⁸⁶. This approach gains particular importance in identifying liability for the so-called 'neutral' acts, *i. e.*, contributions which are not *per se* criminal, *e. g.*, delivering weapons to a conflict zone or providing food to a detention camp¹⁸⁷. – On the delimitation between co-perpetration and aiding and abetting see *mn.* 48.

b) '**For the purpose of facilitating**'. This wording introduces a subjective threshold which goes beyond the ordinary *mens rea* requirement within the meaning of article 30¹⁸⁸. It is borrowed from the Model Penal Code. While the necessity of this requirement was controversial within the American Law Institute, it is clear that 'purpose' generally implies a specific subjective requirement stricter than mere knowledge¹⁸⁹. The formula, therefore, sets aside the – above quoted – jurisprudence of the ICTY and ICTR, since this jurisprudence holds that the aider and abetter must only know that his or her acts will assist the principal in the commission of an offence¹⁹⁰. Additionally, knowledge may be inferred from all relevant circumstances¹⁹¹, *i. e.*, it may be proven by circumstantial evidence¹⁹².

In sum, the formulation confirms the general assessment that subparagraph (c) provides for a higher subjective than objective threshold (in any case higher than the ordinary *mens*

¹⁸⁶ For a detailed discussion see Ambos, *Der Allgemeine Teil* (2004) 619 *et seq.*, 663-4.

¹⁸⁷ See for the problem of neutral acts in macrocriminal contexts Rackow, *Neutrale Handlungen* (2007) 551 *et seq.* In the *Van Anraat case*, the defendant was convicted for delivering mustard gas to the Iraqi regime, see for a good analysis, especially regarding the issue of imputation van der Wilt (2008) 6 *JICJ* 557, 563 *et seq.* The problem has also been recognized by *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 277 <<http://www.legal-tools.org/doc/63028f/>>. Crit. *vis-à-vis* Art. 25 to cover neutral acts Burchard (2010) 8 *JICJ* 919, 935. In general see Roxin, *Strafrecht Allgemeiner Teil II* (2003) § 26 *mn.* 218 *et seq.* and Ambos (2000) 32 *JA* 721-25. According to *Prosecutor v. Perisic*, No. IT-04-81-A, Judgment, AC, 28 February 2013, para. 44 acts that can be both lawful and unlawful constitute aiding and abetting when 'a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators' can be established <<http://www.legal-tools.org/doc/f006ba/>>; regarding neutral acts and Art. 25 (3)(d) Ambos, in: Stahn (ed.), *Law and Practice* (2015) 604 *et seq.*

¹⁸⁸ See Piragoff and Robinson, article 30, *mn.* 9 *et seq.* and 17 *et seq.* (in this volume); generally about the mental element in international criminal law, cf. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 889; Ambos, in: Vohrah *et al.* (eds.), *Man's Inhumanity* (2003) 11, 12 *et seq.*; *id.*, *Der Allgemeine Teil* (2004) 757 *et seq.*; *id.*, *Treatise on ICL I* (2013) 266 *et seq.*; Triffterer, in: Hankel and Stuby (eds.), *Strafgerichte gegen Menschverbrechen* (1995) 169, 221-4; Goy (2012) 12 *JCLRev* 1, 63; Stuckenberg (2014) 12 *JICJ* 311 *et seq.*

¹⁸⁹ American Law Institute, *Model Penal Code and Commentaries* (1985) § 2.06. Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 801. Satzger, *Internationales Strafrecht* (2013) § 15 *mn.* 62; Schabas, *The ICC* (2010) 436 wants to infer the purpose from abetting conduct, but not from mere physical support.

¹⁹⁰ Cf. *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 281 <<http://www.legal-tools.org/doc/63028f/>>. *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, para. 692 <<http://www.legal-tools.org/doc/0a90ae/>>. *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, paras. 326, 328 <<http://www.legal-tools.org/doc/6b4a33/>>. *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, paras. 236-49 (236, 245-6, 249 <<http://www.legal-tools.org/doc/e6081b/>>. *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, para. 90 <<http://www.legal-tools.org/doc/1a994b/>>. *Prosecutor v. Vasiljević*, No. IT-98-32-A, Judgment, AC, 25 February 2004, para. 102 <<http://www.legal-tools.org/doc/e35d81/>>. *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, AC, 29 July 2004, para. 49 <<http://www.legal-tools.org/doc/88d8e6/>>. *Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, paras. 476-9 <<http://www.legal-tools.org/en/doc/b8d7bd/>>. *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, TC, 15 May 2003, para. 388 <<http://www.legal-tools.org/doc/7e668a/>>. *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, TC, 22 January 2004, para. 599 <<http://www.legal-tools.org/doc/4ac346/>>.

¹⁹¹ *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, para. 676 <<http://www.legal-tools.org/doc/0a90ae/>>. *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, para. 328 <<http://www.legal-tools.org/doc/6b4a33/>>. *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 478 <<http://www.legal-tools.org/en/doc/b8d7bd/>>. *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, TC, 22 January 2004, para. 600 <<http://www.legal-tools.org/doc/4ac346/>>.

¹⁹² Cf. *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, para. 689: 'if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing ...' <<http://www.legal-tools.org/doc/0a90ae/>>. *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, para. 386 with regard to command responsibility: '... such knowledge cannot be presumed but must be established by way of circumstantial evidence' <<http://www.legal-tools.org/doc/6b4a33/>>.

rea requirement according to article 30)¹⁹³. However, it must be noted that the stronger purpose requirement only refers to the act of facilitation, not to the main crime ('such a crime'); insofar the assistant only needs to possess the mental element required by that crime¹⁹⁴. This follows from a literal interpretation and the doctrinal requirement of a double mental element in acts of secondary participation (complicity) – with regard to the actual act of participation and with regard to the main crime – which has been long recognized in criminal law doctrine¹⁹⁵. For questions of delimitation see *infra* mn. 45.

4. 'In any other way contributes' to the (attempted) commission ... 'by a group ... acting with a common purpose'

- 28 a) **General.** The whole subparagraph (d) is an almost literal copy of a 1998 Anti-terrorism convention¹⁹⁶ and presents a compromise with earlier 'conspiracy' provisions¹⁹⁷, which since Nuremberg have been controversial¹⁹⁸. The 1991 ILC Draft Code held punishable an individual who 'conspires in' the commission of a crime, thereby converting conspiracy into a form of 'participation in a common plan for the commission of a crime against the peace and security of mankind'¹⁹⁹. The 1996 Draft Code extends to a person who 'directly participates in planning or conspiring to commit such a crime which in fact occurs'²⁰⁰. Thus, it restricts liability compared to the traditional conspiracy provisions in that it requires a direct participation – already discussed above – and an effective commission of the crime. Subparagraph (d) takes this more restrictive approach even further, eliminating the term conspiracy altogether and requiring at least a contribution to a collective attempt of a crime²⁰¹. The special feature of subparagraph (d) undoubtedly lies in the reference to 'a crime by a group of persons acting with a common purpose'. This ensuing disparity as compared to subparagraph (c) has been elaborated by the ICTY in *Furundžija*, stating that these provisions confirm that international (criminal) law recognizes a distinction between aiding and abetting a crime and participation in a common criminal plan as 'two separate categories of liability for criminal participation'²⁰²

¹⁹³ Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 801 with fn. 145; for a different view Vest (2010) 8 *JICJ* 851, 862 arguing that the purpose standard can be subsumed under article 30 since 'intent' must be interpreted as encompassing this standard. Critical of this requirement as an overly high threshold, which eventually may lead to 'serious underpunishment', see Stewart (2012) 25 *LeidenJIL* 165, 197.

¹⁹⁴ See for a good discussion advancing this 'new interpretation' (although it is not that new) see Stewart, <<http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/>>, especially the reference to Weigend's entry, <<http://jamesgstewart.com/how-to-intepret-complicity-in-the-icc-statute/>> (both last visited 31 Jan. 2015).

¹⁹⁵ See only Roxin, *Strafrecht Allgemeiner Teil II* (2003) § 26 mn. 130 *et seq.*, 267 *et seq.*

¹⁹⁶ International Convention for the Suppression of Terrorist Bombings, UN Doc. A/RES/52/164 (1998), Annex (37 ILM 249 (1998)), article 2 para. 3 (c).

¹⁹⁷ For example: Preparatory Committee Draft, article 23 para. 7 (e) (ii). See Ambos (2007) 5 *JICJ* 159, 168 with further references.

¹⁹⁸ See, for example, Pella (1950) 2 *YbILC* 278–362, 357; Graven (1950) 76 *RCADI* 433–605, 502–3; Jescheck (1954) 66 *ZStW* 193–217, 213; Rayfuse (1997) 8 *CLF* 43, 52; Cassese *et al.*, *ICL* (2013) 201–3; Hale and Cline (2014) 25 *CLF* 261, 265 *et seq.* See also the statement of the German delegate O. Katholnigg at the Diplomatic Conference for the Adoption of the 1988 Drug Convention (*United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records* (1988) para. 52: 'common law concept unknown in civil law systems'). The concept was, however, in principle recognized by the ILC Special Rapporteur Thiam ((1990) 2 *YbILC*, Part 1, 16, para. 66) and also exists today in civil law jurisdictions in a similar form (see, e.g., § 30 para. 2 alt. 3 of the German *Strafgesetzbuch*).

¹⁹⁹ 2 *YbILC*, Part 2, p. 99 (commentary to article 3) (1991).

²⁰⁰ 1996 ILC Draft Code, article 2 para. 3 (e).

²⁰¹ For the drafting history *cf.* Saland, in: Lee (ed.), *The ICC* (1999) 189, 199 *et seq.* According to Heyer, *Beihilfestrafbarkeit* (2013) 450 *et seq.* the distinctive characteristic of Art. 25 (3)(d) is that attribution is based on the common purpose, *i.e.* one of the core crimes (and not the individual act). *Cf.* also Park, *Beteiligungssform* (2015 forthcoming) who interprets subparagraph (d) as a special form of accessory liability which focuses on the contribution to the general criminal activity of a collective entity.

²⁰² *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, paras. 216, 249 <<http://www.legal-tools.org/doc/e6081b/>>; recently *Prosecutor v. Djordjević*, No. IT-05-87/1-A, Judgment, AC, 27 January 2014, paras 56 *et seq.* and 829 *et seq.* <<http://www.legal-tools.org/doc/e6fa92/>>.

(on the issue of delimitation see further *infra* mn. 49). Recently, the application of this form of attribution to business leaders has been discussed²⁰³.

b) **Objective contribution.** The expression ‘in any other way’ seems to suggest that subparagraph (d) displays the lowest *objective* threshold within the different modes of attribution of article 25²⁰⁴. Indeed, this commentator has taken this view earlier²⁰⁵ and recently the Kenya PTC II has called it the correct view²⁰⁶. However, apart from the slight difference in wording between subparagraphs (c) and (d) – assistance ‘otherwise’ vs. ‘in any other way’²⁰⁷ –, upon further reflection I fail to see a normatively convincing reason to distinguish between these two subparagraphs as to the (objective) *contribution* required.²⁰⁸ On the contrary, both the principle of culpability and the gravity threshold embodied in Articles 17 (1)(d) and 53 (1)(b), (c), (2)(b), (c)²⁰⁹ militate against substantially lowering the objective threshold of subparagraph (d) as compared to subparagraph (c)²¹⁰. Thus, in principle, the ‘*substantiality*’ requirement and the theory of risk increase as set out above (mn. 25) should also apply to subparagraph (d).²¹¹ The case law’s newly invented ‘*significance*’ standard²¹², derived from the structurally similar JCE liability²¹³, does not contradict this view. In fact, the *Mbarushimana* PTC I, as the first PTC ever dealing more thoroughly with subparagraph (d), has convincingly

²⁰³ In favour Farrell (2010) 8 *JICJ* 873, 880 *et seq.*; Heyer, *Beihilfestrafbarkeit* (2013) 520 *et seq.* Contra Burchard (2010) 8 *JICJ* 919, 944 (arguing that ‘the most likely scenarios of “ancillary and neutral” business contributions to “corporate-political core crimes” do not fall within the parameters of Article 25(3)(d)(ii)’); Meyer (2013) 131 *SchwZStR* 70-1. For neutral contributions in general see mn. 25 with fn. 174.

²⁰⁴ Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 802 *et seq.*; Satzger, *Internationales Strafrecht* (2013) § 15 mn. 63; van Sliedregt, *Criminal Responsibility* (2003) 107; Werle and Jessberger, *Principles* (2014) 219 calling it the ‘least grave’ mode of participation. Manacorda and Meloni (2011) 9 *JICJ* 159, 176 refer to the ‘lowest degree of responsibility’; Heyer, *Beihilfestrafbarkeit* (2013) 513.

²⁰⁵ See previous edition, mn. 25 p. 758.

²⁰⁶ *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 354 with fn. 560 <<http://www.legal-tools.org/doc/96c3c2/>>.

²⁰⁷ A virtual identical terminology is used in the French, Russian, Chinese and Arabic versions of the Statute: *toute autre forme – toute autre manière; либоинымобразом -- любымдругимобразом; 以其他方式 -- 以任何其他方式; بطريقة اخرى -- اية طريقة اخرى*. In contrast, the Spanish version uses identical terminology (in both subparagraphs ‘*algún modo*’).

²⁰⁸ For detailed analysis see Ambos, in: Stahn (ed.), *Law and Practice* (2015) 596 *et seq.*; Park, *Beteiligungsform* (2015 forthcoming).

²⁰⁹ For the different standard of gravity *cf.* Stegmler, *Pre-Investigation Stage* (2011) 332 *et seq.*, 425 *et seq.*; Ambos, *Colombian Peace Process* (2010) 44 *et seq.* See recently *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 276 <<http://www.legal-tools.org/doc/63028f/>>.

²¹⁰ For the same conclusion *cf.* Vest, *Völkerrechtsverbrecher verfolgen* (2011) 349 who argues that subparagraph (d), due to its lower *subjective* standard as compared to subparagraph (c) (see mn. 49), could even cover contributions which may, in *objective* terms, more serious than those covered by subparagraph (c).

²¹¹ For the application of the theory of risk increase in this context see also Heyer, *Beihilfestrafbarkeit* (2013) 513 *et seq.*

²¹² *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, paras. 283, 285 <<http://www.legal-tools.org/doc/63028f/>>. Not explicitly referring to ‘significance’, but establishing a threshold ‘less than substantial’ *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 354 (with respect to Sang) <<http://www.legal-tools.org/doc/96c3c2/>>; explicitly referring to ‘*contribution significative*’, *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, 7 March 2014, paras. 1632-6 <<http://www.legal-tools.org/doc/9813bb/>>. More recently *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, paras. 158 *et seq.* (161) <<http://www.legal-tools.org/doc/5686c6/>> and *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, paras. 252 *et seq.* (255) did not discuss the ‘substantial contribution’ requirement, but only applied the plain wording of subparagraph (d) <<http://www.legal-tools.org/doc/5b41bc/>>; *contra Gbagbo*, Dissenting Opinion of Judge Christine van den Wyngaert, *ibid.*, para. 8 (failing to see sufficient evidence for a group acting with a common purpose).

²¹³ PTC I argues that both subparagraph (d) and JCE, although not identical modes of liability, focus on group criminality and that JCE requires a lower threshold than a substantial contribution required for aiding and abetting (*Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, paras. 280-2 <<http://www.legal-tools.org/doc/63028f/>>). Critical Park, *Beteiligungsform* (2016 forthcoming).

argued that the contribution ‘cannot be just any contribution’ and thus introduced the significance standard as a minimum threshold ‘below which responsibility (...) does not arise.’²¹⁴ It further found that the contribution must ‘be at least significant.’²¹⁵ As to the concrete assessment of a contribution as ‘significant’ the PTC proposed a case-by-case analysis of the person’s conduct in the given context²¹⁶ taking into account several factors²¹⁷. *In casu*, PTC I held that the defendant’s actions, essentially as the FDLR’s secretary general issuing press releases and directing media campaigns from France, do not amount to significant contributions to the alleged FDLR crimes in the Democratic Republic of Congo²¹⁸. Thus, in essence, PTC I clearly tries, driven by a liberal, culpability based approach, to avoid an overly broad interpretation of the contribution requirement; it only implicitly suggests that the significance standard is lower than the substantiality one²¹⁹. In a similar vein, the *Katanga* TC, taking no position on the comparison of the two standards, requires a *significant* contribution, *i. e.* a contribution that, on the one hand, influences the occurrence of the crime or how it was committed but, on the other, the contribution need not depend on it²²⁰. In contrast, PTC II explicitly compares the two standards and holds that ‘subparagraph (d) is satisfied by a less than “substantial” contribution’²²¹.

²¹⁴ *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 283 <<http://www.legal-tools.org/doc/63028f/>>. See also DeFalco (2013) 11 *JICJ* 715, 728 *et seq.*, 734; Kearney (2013) 24 *CLF* 331, 364 *et seq.*

²¹⁵ *Ibid.* The AC (*Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-514, Judgment on the Appeal of the Prosecutor against the Decision of PTC I of 16 December 2011 entitled ‘Decision on the Confirmation of Charges’, 30 May 2012 <<http://www.legal-tools.org/doc/256bb2/>> did not address this issue for procedural reasons (arguing that even if the PTC erred with regard to the significance of the contribution this would not have materially affected the decision as the PTC found that the group element of art. 25(3)(d) was lacking and that Mr. Mbarushimana did not contribute at all to the alleged crimes and that therefore addressing the merits would lead to ‘a purely academic discussion’, paras. 65–69), but Judge Fernández de Gurmendi disagreed with the ‘significance threshold’ in her Separate Opinion (at paras. 9–15, arguing that esp. the PTC’s arguments with regard to the gravity threshold of art. 17(1)(d) and the recourse to JCE liability were not convincing as they are not supported by the Statute; accordingly, liability under art. 25(3)(d) should not require a minimum threshold with regard to the contribution and the problem of neutral contributions could better be ‘addressed by analysing the normative and causal links between the contribution and the crime’ (para. 12)). *Cf.* Ambos, in: Stahn (ed.), *Law and Practice* (2015) 604 *et seq.*

²¹⁶ *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 284 <<http://www.legal-tools.org/doc/63028f/>>; conc. *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, 7 March 2014, para. 1634 <<http://www.legal-tools.org/doc/9813bb/>>.

²¹⁷ *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 284: ‘(i) the sustained nature of the participation after acquiring knowledge of the criminality of the group’s common purpose, (ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group’s crimes, (iii) whether the person creates or merely executes the criminal plan, (iv) the position of the suspect in the group or relative to the group and (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed.’ <<http://www.legal-tools.org/doc/63028f/>>; *cf.* also *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, Minority Opinion of Judge van den Wyngaert, 7 March 2014, para. 287, arguing that in the context of article 25(3)(d)(ii) specific direction should be a decisive factor to qualify a contribution as significant ‘because there may otherwise be almost no criminal culpability to speak of in case when someone makes a generic contribution with simple knowledge of the existence of a group acting with a common purpose.’ <<http://www.legal-tools.org/doc/9813bb/>>.

²¹⁸ *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, paras. 303, 315, 320, 339 <<http://www.legal-tools.org/doc/63028f/>>. But compare *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 355, confirming the charges against *Sang* for his allegedly broadcasting of hate messages and false news via *Kass FM*, a regional radio station, inflaming the violent atmosphere <<http://www.legal-tools.org/doc/96c3c2/>>.

²¹⁹ *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 282 (discussing JCE and stating that it requires ‘a lower threshold of contribution than aiding and abetting...’) <<http://www.legal-tools.org/doc/63028f/>>.

²²⁰ *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, 7 March 2014, paras. 1632–3 <<http://www.legal-tools.org/doc/9813bb/>>.

²²¹ *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, PTC II, 23 January 2012, para. 354 <<http://www.legal-tools.org/doc/96c3c2/>>.

As to the ‘group of persons’ it is controversial whether the person making the contribution must belong to the respective group,²²² i. e., be an insider (*intraneus*) or could also be a non-member (outsiders, *extraneus*).²²³ The chapeau of para. 3 only refers to ‘that person’ who participates in a crime in one or several of the forms of participation mentioned in the subparagraphs; this does not limit the contributing person in subparagraph (d) to insiders. In addition, such a restrictive view would limit the provision’s scope too far rendering it almost meaningless because normally ‘that person’ does not belong to the group. Indeed, it is the rationale of the provision to extend punishability to contributions from outside of the group since these may otherwise remain exempt from punishment. Thus, the *Mbarushimana* PTC’s broader interpretation²²⁴ followed by subsequent case law,²²⁵ is to be welcomed.

c) **Subjective level: intentional contribution.** The distinction between subparagraphs (c) and (d) gains particular importance on the subjective level. While aiding and abetting generally requires the knowledge that the assistance contributes to the main crime²²⁶ and subparagraph (c) adds to this the ‘purpose of facilitating’ (mn. 26), participation in a group crime within the meaning of subparagraph (d) requires, on the one hand, a ‘common purpose’ of the group²²⁷ and, on the other, an ‘intentional’ contribution of the participant, complemented by alternative additional requirements (lit. (i) and (ii)) to be discussed below (mn. 32 and 33).

As to the ‘intentional contribution’, the intentionality must not be reduced to the conduct²²⁸, but rather ‘include an additional element, linking the contribution with the crimes alleged’,²²⁹ i. e., the contributor’s intent must extend to these crimes. But what is meant by ‘intentional’²³⁰? Does it refer to the traditional use of ‘intent’²³¹ – as *dolus*

²²² For the delimitation to subparagraph (a), see mn. 49.

²²³ For a concise discussion see Ohlin (2009) 12 *NCLRev* 406, 410 *et seq.*, 415.

²²⁴ Cf. *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 274 <<http://www.legal-tools.org/doc/63028f/>>.

²²⁵ Cf. *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, 7 March 2014, para. 1631 (*‘l’accusé soit membre du groupe ou extérieur à celui-ci.’*) <<http://www.legal-tools.org/doc/9813bb/>>; in essence also conc., *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 176, considering the pro-*Gbagbo* forces ‘a group within the meaning of article 25(3)(d)’ and Blé Goudé a non-member, who (among others) was controlling it (63, 176) <<http://www.legal-tools.org/doc/0536d5/>>. Conc. also Goy (2012) 12 *ICLRev* 1, 66.

²²⁶ *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, para. 246 <<http://www.legal-tools.org/doc/e6081b/>>. *Prosecutor v. Vasiljević*, No. IT-98-32-A, Judgment, AC, 25 February 2004, para. 102 <<http://www.legal-tools.org/doc/e35d81/>>; *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, AC, 29 July 2004, paras. 45, 49 <<http://www.legal-tools.org/doc/88d8e6/>>; *Prosecutor v. Brđjanin*, No. IT-99-36-T, Judgment, TC, 1 September 2004, para. 273 <<http://www.legal-tools.org/doc/4c3228/>>; *Prosecutor v. Rutaganira*, No. ICTR-95-1C-T, Judgment and Sentence, TC, 14 March 2005, paras. 92–3, 97 <<http://www.legal-tools.org/doc/cd2a8f/>>; *Prosecutor v. Seromba*, No. ICTR-2001-66-A, Judgment, AC, 12 March 2008, para. 56 <<http://www.legal-tools.org/doc/b4df9d/>>; *Prosecutor v. Popović et al.*, No. IT-05-88-T, Judgment, TC, 10 June 2010, paras. 1014, 1016 <<http://www.legal-tools.org/doc/481867/>>; *Prosecutor v. Kanyarukiga*, No. ICTR-02-78-T, Judgment and Sentence, TC, 1 November 2010, para. 621 <<http://www.legal-tools.org/doc/415384/>>; *Prosecutor v. Gotovina et al.*, No. IT-06-90-T, Judgment Vol. II, TC, 15 April 2011, para. 1960 <<http://www.legal-tools.org/doc/86922c/>>.

²²⁷ Cf. Park, *Beteiligungsforn* (2015 forthcoming) who regards the existence of the ‘common criminal purpose’ as proof of the criminal intentions of the respective group.

²²⁸ Fletcher and Ohlin (2005) 3 *JICJ* 539, 549 warn that, reducing the intent to the conduct, the ‘culpability nexus between the contribution and the ultimate criminal harm’ would remain rather ‘vague’.

²²⁹ Cf. *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 288, demanding that the person must ‘(i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons (...)’ <<http://www.legal-tools.org/doc/63028f/>>; confirmed by *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, 7 March 2014, para. 1639, citing in note 3602 *Mbarushimana* <<http://www.legal-tools.org/doc/9813bb/>>.

²³⁰ For a comparative analysis in the context of the genocidal ‘intent to destroy’ see Ambos (2009) 91 *JRevRC* 833, 842–5. For the different views regarding the subjective elements of Art. 25 (3)(d) Goy (2012) 12 *ICLRev* 1, 67 *et seq.*

²³¹ LaFave and Scott, *Substantive Criminal Law* (1986) § 3.5., 302–3. Satzger, *Internationales Strafrecht* (2013) § 15 mn. 22; Ambos, *Internationales Strafrecht* (2014) § 7 mn. 63. Safferling, *Internationales Strafrecht* (2011) § 5 mn. 19.

(*Vorsatz*)²³² – including knowledge (*Wissen*) and intention or purpose (*Wollen*) or is it limited to the latter, *i. e.*, the first degree *dolus directus*²³³? This view seems to be supported by the Spanish version (*‘intencional’*) since Spanish doctrine, based on German thinking, starts from the general concept of *dolus* (see article 10 of the 1995 *Código Penal*: ‘*dolosas*’) and reserves the notion of ‘*intención*’ or ‘*intencional*’ for the ‘*delitos de intención*’ or the first degree *dolus directus*²³⁴. The French version (*‘intentionnelle’*), however, does not support this restrictive interpretation since in French thinking²³⁵ ‘*l’intention*’ consists of two elements: the foreseeability (element of knowledge) and the wish (element of will) of the criminal act. Thus, although the ‘*faute intentionnelle*’ is characterised by the ‘*volonté orientée vers l’accomplissement d’un acte interdit*’, *i. e.*, rather by will than knowledge, the latter is also contained in the concept of ‘*intention*’; thus, ‘*intentionnelle*’ in this general context is to be understood broadly in the sense of *dolus*. Also the official German translation of this subparagraph reads ‘*vorsätzlich*’, *i. e.*, refers to *dolus* in its general sense²³⁶. Further, the ICTY considers that the *mens rea* of participation in a JCE is ‘*intent to participate*’, *i. e.*, apparently understands intent in the traditional sense²³⁷.

- 32 The correct understanding of ‘*intentional*’ depends in the final analysis on the context in which the notion is used. If it is used as an expression of the general mental element it has to be understood also in a general sense as *dolus*; if it is used in a specific context to express a specific intention, aim or purpose of the perpetrator it has to be understood as first degree *dolus directus*. Thus, article 6 of the Statute, referring to genocide, speaks of ‘*intent to destroy*’ and means first degree *dolus directus*, at least if one follows the still prevailing view that genocide requires a *dolus specialis* (specific intention)²³⁸. Consequently, the French version speaks of ‘*l’intention de détruire*’, the Spanish one of ‘*intención de destruir*’ and the official German translation of ‘*absichtlich*’²³⁹. On the other hand, the general *mens rea* provision (article 30) is based on the distinction between ‘*intent*’ and ‘*knowledge*’ defining the former – in relation to a consequence – as ‘*means to cause that consequence*’ or as being ‘*aware*’ that it will occur; thus, it understands intent in the traditional sense including knowledge²⁴⁰. The word ‘*intentional*’ in the subparagraph under examination is used in the same general sense²⁴¹. This also follows from the fact that lit. (i) and (ii) contain additional specific subjective requirements which put the general notion of ‘*intentional*’ in more concrete terms. On this subjective level subparagraph (d) must also be clearly distinguished from the third,

²³² Cf. Fletcher, *Basic Concepts* (1998) 112.

²³³ To avoid confusion this author uses ‘*intent*’ in the sense of *dolus* in general and ‘*intention*’ in the sense of first degree *dolus*.

²³⁴ Most explicitly Rodríguez Devesa and Serrano Gomez, *Derecho Penal Español. Parte General* (1995) 459 *et seq.*, 460: ‘*El dolo directo comprende aquellos casos en que el resultado ha sido perseguido intencionalmente ... Se habla entonces de un dolo directo de primer grado ...*’. See also Cobo del Rosal and Vives Antón, *Derecho penal. Parte General* (1999) 371, 621 *et seq.*, 625.

²³⁵ See Larguier, *Droit pénal général* (2001) 49, 51; Soyer, *Droit pénal et procédure pénale* (2000) 99.

²³⁶ Bundestag-Drucksache 14/2682 (14 February 2000) = Bundesgesetzblatt p. 1394 (Vol. II 2000).

²³⁷ See *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, para. 249 <<http://www.legal-tools.org/doc/e6081b/>>.

²³⁸ This view, however, has been challenged recently by different authors, see Gil Gil, *Derecho Penal Internacional* (1999) 231 *et seq.*; Greenawalt (1999) 99 *CollRev* 2259, 2265 *et seq.*; Triffterer, in: Heinrich *et al.* (eds.), *Festschrift für Claus Roxin* (2011) 1438 *et seq.*; *id.* (2011) *LeidenJIL* 399, 403 *et seq.*; Vest, *Genozid durch organisatorische Machtapparate* (2002) 101 *et seq.*; *id.*, *Humanitätsverbrechen* (2001) 113 *ZStW* 457, 480 *et seq.*; for a discussion of these views see Ambos, *Der Allgemeine Teil* (2004) 790 *et seq.*; *id.*, in: Vohrah *et al.* (eds.), *Man’s Inhumanity* (2003) 11, 19 *et seq.* More recently also for a broader understanding of the specific intent (*Absicht*) Kreß (2005) 3 *JICJ* 562 *et seq.*

²³⁹ Bundestag-Drucksache 14/2682 (14 February 2000) = Bundesgesetzblatt p. 1394 (Vol. II 2000).

²⁴⁰ For analysis of the ICC’s handling of the intricate article 30 problems such as ‘*dolus eventualis*’ see Ambos (2009) 22 *LeidenJIL* 715–719.

²⁴¹ In the same vein *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 288 <<http://www.legal-tools.org/doc/63028f/>>; van Sliedregt, *Individual Criminal Responsibility* (2012) 145. However, Ohlin (2009) 12 *NCLRev* 406, 418 argues that the inclusion of the term ‘*intentional*’ therefore is ‘*utterly mysterious*’.

extensive category of JCE, since JCE III requires with ‘foreseeability’ a lower subjective standard than article 30²⁴².

The foregoing discussion demonstrates that a provision drafted without regard to basic theoretical (dogmatic) categories will create difficult problems of interpretation for the future ICC case law.

aa) ‘with the aim of furthering the criminal activity or criminal purpose of the group 33 ...’. A contribution to a (attempted) group crime has – first possibility – to be made ‘with the aim of furthering the criminal activity or criminal purpose of the group’ provided that this ‘activity or purpose involves the commission of a crime within the jurisdiction of the Court’. The last part of the phrase does not require further examination since it only states the obvious; namely, that contribution to group crimes may only give rise to individual responsibility if these crimes belong to the subject matter jurisdiction of the Court (articles 5–8). Of course, the fact that this part refers to ‘a’ crime – instead of ‘the’ crime(s) as lit. (ii) – implies that the respective person must only possess a rather general – not specific – knowledge of the group’s criminal purpose;²⁴³ yet, it must not be overlooked that the focus of this lit. is on the volitional side of the person’s mens rea while the following lit. (ii) stresses the cognitive side.

According to the first part of the phrase the participant must pursue the ‘aim’ to further the criminal ‘activity’ or ‘purpose’ of the group. Thus, he or she must act with a specific *dolus, i. e.*, with the specific intention to promote the ideas and acts of the group²⁴⁴.

bb) ‘in the knowledge of the intention of the group’. Alternatively (‘or’), the participant 34 must know the intention of the group to commit the crime, *i. e.*, he or she must know that the group plans and wants to commit the crime. The question is whether positive knowledge with regard to the specific crime is required or whether it is sufficient that the participant is aware that a crime will probably be committed. The latter was considered sufficient with regard to aiding and abetting by a ICTY TC²⁴⁵ but this precedent is only applicable, if at all, to subparagraph (c). Subparagraph (d) clearly requires ‘knowledge of the intention ... to commit the crime’, *i. e.*, the participant must be aware of the specific crime intended by the group²⁴⁶.

²⁴² Cf. Cryer, in: *id. et al., Introduction to ICL* (2014) 353, 374; Schabas, *The ICC* (2010) 436; Gless, *Internationales Strafrecht* (2011) mn. 769, 777; Fletcher (2011) 9 *JICJ* 179, 188; generally distinguishing *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 282 <<http://www.legal-tools.org/doc/63028f/>>; dissenting Vest, *Völkerrechtsverbrecher verfolgen* (2011) 351, 386 who regards subpara. (d) similar to JCE and envisages that *via* subpara.(d), JCE could henceforth even comprise accomplice liability (379). Cassese (2007) 5 *JICJ* 109, 132 on the one hand considers ‘foreseeability’ as sufficient with respect to the intentional element in subparagraph (3) (d) second sentence but on the other hand explicitly separates JCE from this provision, see Cassese and Gaeta, *ICL* (2013) 175. Similarly, on the one hand Ohlin (2007) 5 *JICJ* 69, 78 *et seq.* and on the other (distinction) Ohlin (2009) 12 *NCLRev* 406, 414 *et seq.*

²⁴³ Cf. *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, Minority Opinion of Judge van den Wyngaert, 7 March 2014, para. 288, arguing that by referencing ‘a crime’, a more general understanding of the group’s criminal purpose suffices for liability <<http://www.legal-tools.org/doc/9813bb/>>; in this vein *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, Dissenting Opinion of Judge Sanji Mmasenono Monageng, 16 December 2011, para. 128 <<http://www.legal-tools.org/doc/63028f/>>; *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, para. 252 <<http://www.legal-tools.org/doc/5b41bc/>>; Heyer, *Beihilfestrafbarkeit* (2013) 519; Park, *Beteiligungsforn* (2016 forthcoming).

²⁴⁴ Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 803 with fn. 155. Burchard (2010) 8 *JICJ* 919, 944.

²⁴⁵ *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, para. 246 <<http://www.legal-tools.org/doc/e6081b/>>.

²⁴⁶ Conc. *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, 7 March 2014, para. 1642 (‘La connaissance ... devra être démontrée pour *chacun des crimes spécifiques* et la connaissance d’une *intention criminelle généralene* s’avérera *pas suffisante*’, emphasis added) <<http://www.legal-tools.org/doc/9813bb/>>; *ibid.*, Minority Opinion of Judge van den Wyngaert, para. 288; Schabas, *The ICC* (2010) 434; Burchard (2010) 8 *JICJ* 919; see also Vest (2010) 8 *JICJ* 851, 865 defining the knowledge as ‘the substantial likelihood that a certain crime will be committed’.

5. ‘directly and publicly incites ... to commit genocide’

- 35 The provision criminalizes direct and public incitement but only with regard to genocide. Identical to article III (c) of the 1948 Genocide Convention²⁴⁷ the provision gives rise to the same criticism. Some delegations felt that incitement as a specific form of complicity in genocide should not be included in the ‘General Part’ of the *Statute* but only in the specific provision on the crime of genocide (article 6) in order to make it clear that incitement is not recognized for other crimes²⁴⁸. This argument is questionable since incitement is covered by other forms of complicity, in particular – in the case of the *Rome Statute* – by soliciting and inducing as defined above²⁴⁹. Normally, the difference between an ordinary form of complicity, e. g., instigation, and incitement lies in the fact that the former is more specifically directed towards a certain person or group of persons in private while the latter is directed to the public in general²⁵⁰. The ILC rightly referred to the use of the mass media to promote the commission of genocide in Rwanda to justify the inclusion of direct and public incitement as subparagraph (f) of article 2 para. 3 of the 1996 Draft Code²⁵¹. The ICTR first confirmed the importance of incitement in relation to genocide in *Kambanda*²⁵² and *Akayesu*²⁵³; subsequent judgments have basically followed *Akayesu*²⁵⁴. The *Akayesu* AC, however, distinguished between incitement as a *general* form of participation within the meaning of article 6 para. 1 ICTR Statute and the *specific* form of incitement to genocide within the meaning of article 2 para. 3 (c) ICTR Statute²⁵⁵. Only the latter must be committed publicly and directly while the former does not necessarily require these additional elements²⁵⁶.
- 36 To incite ‘publicly’ means that the call for criminal action is communicated to a number of persons in a public place or to members of the general public at large, in particular by using technical means of mass communication such as radio and television²⁵⁷. The ICTR

²⁴⁷ 78 UNTS 277 (1951). See, e. g., Lemkin (1947) 41 *AJIL* 145; Kunz (1949) 43 *AJIL* 732, 738; Vest, *Genozid durch organisatorische Machtapparate* (2002) 189 *et seq.*; Ambos, *Der Allgemeine Teil* (2004) 415 *et seq.*

²⁴⁸ Similarly Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 804.

²⁴⁹ See *mn.* 19.

²⁵⁰ Cf. Ambos, *Der Allgemeine Teil* (2004) 651, 653–4. The ICTR, however, considers that instigation under article 6 para. 1 ICTR Statute includes the direct and public elements of incitement under article 2 para. 3 (c) ICTR Statute (*Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 481 <<http://www.legal-tools.org/en/doc/b8d7bd/>>).

²⁵¹ 1996 ILC Draft Code 26–7 (para. 16).

²⁵² *Prosecutor v. Kambanda*, No. ICTR 97-23-S, Judgment and Sentence, TC, 4 September 1998, para. 40 (count 3) <<http://www.legal-tools.org/doc/49a299/>>.

²⁵³ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, paras. 672–5 <<http://www.legal-tools.org/en/doc/b8d7bd/>>.

²⁵⁴ *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, Judgment, TC, 6 December 1999, para. 38 <<http://www.legal-tools.org/doc/f0dbbb/>>; *Prosecutor v. Ruggiu*, No. ICTR-97-32-I, Judgment, TC, 1 June 2000, paras. 13 *et seq.* <<http://www.legal-tools.org/doc/486d43/>>; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, TC, 7 June 2001, paras. 51 *et seq.* (55) <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-T, Judgment, TC, 3 December 2003, paras. 1013, 1015 <<http://www.legal-tools.org/doc/45b8b6/>>; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment and Sentence, TC, 12 September 2006, para. 500 <<http://www.legal-tools.org/doc/fa02aa/>>; *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, Judgment, TC, 22 June 2009, paras. 509–10 <<http://www.legal-tools.org/doc/3f8b23/>>; *Prosecutor v. Bikindi*, No. ICTR-01-72-A, Judgment, AC, 18 March 2010, para. 146 <<http://www.legal-tools.org/doc/e112dd/>>.

²⁵⁵ *Prosecutor v. Akayesu*, No. ICTR-96-4-A, Judgment, AC, 1 June 2001, paras. 474 *et seq.* <<http://www.legal-tools.org/doc/c62d06/>>; also *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, Judgment, AC, 28 November 2007, para. 678 <<http://www.legal-tools.org/doc/4ad5eb/>>. Crit. with regard to the jurisprudence of the ICTR in general Agbor (2013) 13 *ICLRev* 429, 458 *et seq.*, who argues that the Chambers erroneously equated ‘instigation’ as a mode of participation (Art. 6 (1) ICTRS) with incitement to commit genocide (Art. 2 (3)(c) ICTRS).

²⁵⁶ *Prosecutor v. Akayesu*, No. ICTR-96-4-A, Judgment, AC, 1 June 2001, paras. 478, 482 <<http://www.legal-tools.org/doc/c62d06/>>; *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, Judgment, AC, 28 November 2007, para. 679 <<http://www.legal-tools.org/doc/4ad5eb/>>.

²⁵⁷ Cf. 1996 ILC Draft Code 26; *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 556 <<http://www.legal-tools.org/en/doc/b8d7bd/>>.

considers the place where the incitement occurred and the scope of the assistance as particularly important²⁵⁸.

To incite ‘directly’ means that another person is concretely urged or specifically provoked to take immediate criminal action; a vague suggestion is not sufficient²⁵⁹. There must be a specific causal link between the act of incitement and the main offence²⁶⁰. The fulfilment of these requirements may also depend on the ‘cultural and linguistic’ context²⁶¹. What, for example, a Rwandan national understands as a ‘direct’ call to commit a crime might not be understood as such by a German and *vice versa*. The qualifier ‘direct’ brings the concept of incitement even closer to ordinary forms of complicity, such as instigation, solicitation or inducement. Thereby, the concept loses its original purpose²⁶², which is the prevention of an uncontrollable and irreversible danger of the commission of certain mass crimes²⁶³. For if an individual urges another individual known to him to take criminal action he or she has the same control over the actual perpetrator as an instigator or any other accomplice causing a crime.

One important difference still remains between subparagraph (e) and the forms of complicity found in subparagraphs (b), (c) and (d): incitement with regard to genocide does not require the commission or even attempted commission of the actual crime, *i. e.*, genocide, and is therefore an inchoate crime²⁶⁴. It only requires the incitement ‘to commit genocide’ without the additional requirement that it ‘in fact occurs or is attempted’ (as, for example, is required in a general manner by subparagraph (b)). Thus, subparagraph (e) breaks with the dependence of the act of complicity on the actual crime, abandoning the accessory principle (*Akzessorietätsgrundsatz*) which governs – at least in the sense of *factual* dependence of the complicity on the main act²⁶⁵ – subparagraphs (b) to (d). A person who directly and publicly incites the commission of genocide is punishable for the incitement even if the crime of genocide *per se* is never actually committed²⁶⁶. This has been confirmed by the ICTR in *Akayesu*, where it was stated that incitement to commit genocide ‘must be punished as such, even where such incitement failed to produce the result expected by the perpetrator’²⁶⁷. This view is convincing since the act of incitement is as such sufficiently dangerous and blameworthy to be punished²⁶⁸.

²⁵⁸ *Ibid.*

²⁵⁹ Cf. 1996 ILC Draft Code 26; *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 557 <<http://www.legal-tools.org/en/doc/b8d7bd/>>; *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, Judgment, AC, 28 November 2007, para. 692 <<http://www.legal-tools.org/doc/4ad5eb/>>.

²⁶⁰ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 557 <<http://www.legal-tools.org/en/doc/b8d7bd/>>.

²⁶¹ *Ibid.*, paras. 557–8. *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, Judgment, AC, 28 November 2007, para. 700 <<http://www.legal-tools.org/doc/4ad5eb/>>.

²⁶² Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 805 with fn. 168.

²⁶³ The specific danger or risk implicit in the act of incitement lies in the possibility to trigger a certain course of events. It has been most convincingly described by Dreher who compares the inciter to a person who throws a torch and does not know if it will catch fire or not (Dreher, in: Lackner *et al.* (eds.), *Festschrift für Wilhelm Gallas* (1973) 307, 312).

²⁶⁴ Cryer, in: *id. et al.*, *Introduction to ICL* (2014) 353, 377. Cf. also Agbor (2012) 12 *ICLRev* 155, 158 *et seq.*

²⁶⁵ See on the accessory principle in a factual, quantitative and qualitative sense Hamdorf, *Beteiligungsmodele* (2002) 17 *et seq.*; Ambos, *Der Allgemeine Teil* (2004) 617–8.

²⁶⁶ Cf. Weigend, in: Bassiouni (ed.), *Commentaries on the ILC’s 1991 Draft Code* (1993) (regarding the 1991 ILC Draft Code, article 2 para. 3) distinguishing between soliciting and aiding on the one hand, and inciting and conspiring on the other.

²⁶⁷ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, paras. 561–2 (562) <<http://www.legal-tools.org/en/doc/b8d7bd/>>. In the same vein *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, Judgment, AC, 28 November 2007, para. 678 <<http://www.legal-tools.org/doc/4ad5eb/>>, explicitly emphasizing that ‘the Statute of the International Criminal Court also appears to provide that an accused incurs criminal responsibility for direct and public incitement to commit genocide, even if this is not followed by acts of genocide’.

²⁶⁸ Conc. Vest, *Genozid durch organisatorische Machtapparate* (2002) 195. See *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, Judgment, AC, 28 November 2007, paras. 771 *et seq.* <<http://www.legal-tools.org/doc/4ad5eb/>>, for examples of articles which constitute direct and public incitement to genocide.

39 On the *subjective* level, the incitement must be accompanied by the intention (purpose) ‘to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging’²⁶⁹. In other words, the person who incites must have the specific intention (*dolus specialis*) to destroy, in whole or in part, a protected group him- or herself, *i. e.*, he or she must possess the same state of mind as the main perpetrator²⁷⁰. According to the ICTR, this requirement also applies to other forms of participation in genocide but not to complicity under article 2 para. 3 (e) ICTR Statute²⁷¹. This differentiation is not convincing²⁷². Indeed, it was not followed by the *Musema* TC, which held that complicity in genocide – independent of its legal basis and form – requires only knowledge of the genocidal intent²⁷³; for aiding and abetting, even possible knowledge, *i. e.*, culpable ignorance (‘had reason to know’), shall be sufficient²⁷⁴. This is correct in that it limits the accomplices’ *mens rea* to positive knowledge; yet it goes too far in admitting the ‘had reason to know’- standard for the aider and abettor since this standard introduces a negligence threshold and thereby violates the principle of culpability. Thus, in general, positive knowledge of the accomplice with regard to the genocidal intent of the (main) perpetrator(s) must be considered necessary but it is also sufficient. A higher threshold, *i. e.*, specific genocidal intent, should only be required for those forms of commission which are similar to direct perpetration, *i. e.*, the other forms of perpetration (co-perpetration, perpetration by means and ordering) and the specific forms of complicity (incitement and conspiracy), since they create a specific and autonomous risk for the protected groups²⁷⁵.

²⁶⁹ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 560 <<http://www.legal-tools.org/en/doc/b8d7bd/>>.

²⁷⁰ Explicitly *Prosecutor v. Ruggiu*, No. ICTR-97-32-I, Judgment, TC, 1 June 2000, para. 14: ‘... must himself have the specific intent to commit genocide ...’ <<http://www.legal-tools.org/doc/486d43/>>. See also *Prosecutor v. Niyitegeka*, No. ICTR-96-14-T, Judgment and Sentence, TC, 16 May 2003, para. 431 <<http://www.legal-tools.org/doc/325567/>>; *Prosecutor v. Kajelijeli*, No. ICTR-98-44A-T, Judgment, TC, 1 December 2003, para. 854 <<http://www.legal-tools.org/doc/afa827/>>; *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, Judgment, AC, 28 November 2007, para. 1012 <<http://www.legal-tools.org/doc/4ad5eb/>>; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment and Sentence, TC, 12 September 2006, para. 505 <<http://www.legal-tools.org/doc/fa02aa/>>; Schabas, *The ICC* (2010) 439.

²⁷¹ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, paras. 485, 540, 546–7 <<http://www.legal-tools.org/en/doc/b8d7bd/>>.

²⁷² For a critical view see also Greenawalt (1999) 99 *CollRev* 2259, 2282 *et seq.*; Schabas, in: Fischer *et al.* (eds.), *Prosecution of Crimes* (2011) 469–70.

²⁷³ *Prosecutor v. Musema*, No. ICTR-96-13-T, Judgment, TC, 27 January 2000, para. 183 <<http://www.legal-tools.org/doc/1fc6ed/>>.

²⁷⁴ *Ibid.*, para. 182. See also *Prosecutor v. Krstić*, No. IT-98-33-A, Judgment, AC, 19 April 2004, paras. 140 *et seq.* <<http://www.legal-tools.org/doc/86a108/>>. The subsequent case law abandoned the ‘had reason to know’- element, requiring ‘awareness’ of the direct perpetrator’s intent: 95-1A-T, Judgment, TC, 7 June 2001, para. 33 <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, TC, 15 May 2003, paras. 388, 394 <<http://www.legal-tools.org/doc/7e668a/>>; *Prosecutor v. Kajelijeli*, No. ICTR-98-44A-T, Judgment, TC, 1 December 2003, para. 768 <<http://www.legal-tools.org/doc/afa827/>>; *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgment and Sentence, TC, 13 April 2006, para. 36 <<http://www.legal-tools.org/doc/694dd8/>>.

²⁷⁵ See for a detailed discussion Ambos, *Der Allgemeine Teil* (2004) 793 *et seq.*; *id.*, in: Vohrah *et al.* (eds.), *Man’s Inhumanity* (2003) 11, 21 *et seq.* (23–4); *id.* (2001) 21 *NSIZ* 628, 632–2. This view is also shared by Vest, *Genozid durch organisatorische Machtapparate* (2002) 243 (with fn. 33), 248, 265 and 385; Werle and Jessberger, *Principles* (2014) 213 *et seq.*, 319 *et seq.*; *id.* (2007) 5 *JICJ* 953, 970 and Kolb, in: *id.* and Scalia (eds.), *Droit International Pénal* (2012) 192 (both with regard to the aider and abettor); Jones, in: Vohrah *et al.* (eds.), *Man’s Inhumanity* (2003) 467, 479 arguing for an analogy with the *mens rea* requirement of crimes against humanity. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 806 only requires that the inciter ‘must merely know and want the incited persons to commit the crime’, but need not herself possess the genocidal intent. It is difficult to see, however, how this position may be reconciled with his – convincing – conclusion that the link between incitement and genocide is ‘a subjective “volitional” one in terms of being directed at the genocidal aim of the inciting act’. (*ibid.*, 805). For a combined structure- and knowledge-based approach with regard to the special intent requirement in genocide (distinguishing according to the status and role of the low-, mid- and top-level perpetrators) and the consequences for participation in genocide see Ambos (2009) 91 *IREVRC* 833, 842–5.

6. ‘attempt’

a) ‘by taking action that commences its execution by means of a substantial step...’.⁴⁰ Although attempt liability was not explicitly and autonomously recognized in Nuremberg or Tokyo or in the Statutes of the ICTY and ICTR it was always implicit in the criminalization of the ‘preparation’ and ‘planning’ of a crime, especially a war of aggression²⁷⁶. With this form of criminalization even conduct still in the attempt stage was made punishable as a complete offence²⁷⁷. Thus, it is not surprising that all ILC Draft Codes contain an attempt provision²⁷⁸. The *Rome Statute* correctly follows this view; yet, it does not limit attempt to certain crimes – as proposed by the ILC²⁷⁹ – but refers to ‘such a crime’, *i. e.*, to any crime within the jurisdiction of the Court (articles 5–8*bis*). This is convincing since the Statute only includes the core crimes which are all equally serious²⁸⁰ so that it would not be justified to admit attempt liability only for some, but not for others. So far the case law has only referred to attempted murders.²⁸¹

An attempted crime is incomplete (inchoate) since it lacks the (complete) objective elements of the respective crime while the subjective elements are complete.²⁸² The respective intent of the attempted crime is generally the same as the one of the respective consummated crime.²⁸³ The Statute defines attempt as the commencement of execution (of ‘such a crime’) by means of a substantial step²⁸⁴. This definition is a combination of French and American Law²⁸⁵ and was already used in the 1991 Draft Code (article 3 para. 3) and the 1996 Draft

²⁷⁶ See generally Ambos, *Internationales Strafrecht* (2014) 233 *et seq.*; crit. with regard to the new Article 8*bis id.* (2010) 53 *GYbIL*. 463, 494–97.

²⁷⁷ Cf. Triffterer, in: Hankel and Stuby (eds.), *Strafgerichte gegen Menschenverbrechen* (1995) 169, 232–4. According to Werle and Jessberger, *Principles* (2014) 264, attempt is part of customary international law.

²⁷⁸ 1954 ILC Draft Code, article 2 para. 13 (iv); 1991 ILC Draft Code, article 3 para. 3; 1996 ILC Draft Code, article 2 para. 3 (g).

²⁷⁹ The ILC could not reach consensus on a list of crimes which can be attempted yet many members and some governments considered an attempt only possible in case of war crimes or crimes against humanity ((1986) 2 *YbILC*, Part 2, 49, para. 128; (1990) 1 *YbILC* 6, 21, 70; (1990) 2 *YbILC*, Part 2, 16 (para. 71); (1991) 1 *YbILC* 188; (1991) 2 *YbILC*, Part 2, 99; (1994) 2 *YbILC*, Part 2, 77, 85 (para. 196); (1994) 1 *YbILC* 110, 121, 145 (para. 10)).

²⁸⁰ See also *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 470 considering that the ICTR Statute does not establish a hierarchy of norms, but rather puts all offences (genocide, crimes against humanity, violations of article 3 common to the Geneva Conventions and of the Add. Prot. II) ‘on an equal footing’ <<http://www.legal-tools.org/en/doc/b8d7bd/>>. Conc. *Prosecutor v. Tadić*, No. IT-94-1-Abis, Judgment in Sentencing Appeals, AC, 26 January 2000, para. 69 <<http://www.legal-tools.org/doc/df7618/>>. For a higher gravity of crimes against humanity *Prosecutor v. Erdemović*, No. IT-96-22-A, Judgment, AC, 7 October 1997, Joint Separate Opinion Mc Donald and Vohrah, paras. 20 *et seq.* <<http://www.legal-tools.org/doc/f91d89/>>; conc. *Prosecutor v. Erdemović*, No. IT-96-22-A, Judgment, AC, 7 October 1997, Separate and Dissenting Opinion Judge Stephen, para. 5, <<http://www.legal-tools.org/doc/f03ecc/>>; *Prosecutor v. Kambanda*, No. ICTR 97-23-S, Judgment and Sentence, TC, 4 September 1998, para. 14 <<http://www.legal-tools.org/doc/49a299/>>; *Prosecutor v. Tadić*, Nos. IT-94-1-S/Tbis-R 117, Sentencing Judgment, TC, 11 November 1999, para. 28 <<http://www.legal-tools.org/doc/b1ca4d/>>. Cf. Ambos, *Der Allgemeine Teil* (2004) 748 with fn. 298 with further references.

²⁸¹ *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, paras. 35 *et seq.* <<http://www.legal-tools.org/doc/5686c6/>>; *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, paras. 17, 197 *et seq.* <<http://www.legal-tools.org/doc/5b41bc/>>; *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 121 <<http://www.legal-tools.org/doc/0536d5/>>; excluding an attempt in the concrete case *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, 7 March 2014, para. 1621 <<http://www.legal-tools.org/doc/9813bb/>>.

²⁸² Cf. Ambos, *Treatise on ICL I* (2013) 240 *et seq.*; also *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, para. 460 <<http://www.legal-tools.org/doc/67a9ec/>>.

²⁸³ *Ibid.*; for a more nuanced treatment Ambos, *Treatise on ICL I* (2013) 243 *et seq.*

²⁸⁴ More detailed on this objective (conduct) element of attempt see Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 809 *et seq.* and Ambos, *Treatise on ICL I* (2013) 245 *et seq.*

²⁸⁵ See, on the one hand, the classical French formulation (‘*commencement d’exécution*’) already in § 2 of the *Code Pénal* of 1810 and now in article 121–5 *Code Pénal*; on the other hand, American Law Institute, *Model Penal Code and Commentaries* (1985) § 5.01 (1) (c): ‘substantial step’. Cf. Wise, in: Sadat Wexler (ed.), *Model*

Code (article 2 para. 3 (g)). The crucial question was and still is when, according to this definition, an attempt actually begins. It is clear that preparatory acts are not included since they do not represent a ‘commencement of execution’. In fact, this was the only issue which was not controversial within the ILC when discussing attempt²⁸⁶. It is not clear, however, whether the German concept of the commencement of attempt by ‘immediately proceeding to the accomplishment of the elements of the offence’ (*unmittelbares Ansetzen zur Tatbestandsverwirklichung*)²⁸⁷ falls within the terms of this subparagraph. At first glance, the German concept seems to differ from the ‘commencement of execution’ since in the case of an ‘immediately proceeding’ the perpetrator must only be very close to the actual execution of a crime but not have partly executed it as apparently required in the case of the ‘commencement of execution’. However, this is only an apparent difference, not a real one²⁸⁸. The ILC commentary explained that ‘commencement of execution’ indicates that ‘the individual has performed an act which constitutes a significant step towards the completion of the crime’²⁸⁹. Consequently, there is no requirement that the crime in question be partly executed, *i. e.*, the person need not have realized one or more elements of the crime. The French version of the Statute also speaks of ‘*un commencement d’exécution*’, employing the wording of article 121–5 of the *Code Pénal*. French legal scholarship has always understood the concept in a broad sense, covering ‘*tout acte qui tend directement au délit*’²⁹⁰. The Spanish version does not even speak of ‘commencement of execution’ but requires ‘*actos que supongan un paso importante para su ejecución*’. Thus, in practical terms, there is no difference between ‘commencement of execution’ and ‘immediately proceeding to the accomplishment of the elements of the offence’²⁹¹. Still, the latter definition is more precise and gives attempt liability *by its wording* much more weight since it is – at least theoretically – clearly distinguishable from liability for a complete crime²⁹².

- 42 At first glance it is difficult to understand the meaning of the last part of the first sentence of article 25 para. 3 (f)²⁹³. That ‘the crime does not occur’ seems already to follow from the concept of attempt as a non-completed (inchoate) offence. Further, the non-completion seems to be logically ‘independent of the person’s intentions’ since he or she intends (wants, desires) to commit the offence. In other words, the perpetrator has the normal *mens rea* (as in the case of a completed offence)²⁹⁴, what is lacking in the case of attempt is a complete *actus reus*, since ‘the harm is absent’²⁹⁵. In fact, however, the complicated wording goes back to the French law which conceives of abandonment as a negative element of the attempt definition²⁹⁶. Accord-

Draft Statute for the ICC (1998) 39, 44; Fletcher, *Basic Concepts* (1998) 171–2; van Sliedregt, *Individual Criminal Responsibility* (2012) 151 *et seq.*; Heller, in: Heller and Dubber, *Handbook* (2011) 593, 609; crit. Werle and Jessberger, *Principles* (2014) 264 *et seq.*; Cryer, in: *id. et al.*, *Introduction to ICL* (2014) 353, 380 (‘compromise’ formulation).

²⁸⁶ (1986) 2 *YbILC* 49 (para. 129).

²⁸⁷ See § 22 German Penal Code; more precisely expressed in § 15 section 2 of the Austrian Penal Code by the formula ‘*eine der Ausführung unmittelbar vorangehende Handlung*’ (an act that immediately precedes the execution of the crime). For the Austrian solution see Triffterer, *Österreichisches Strafrecht. Allgemeiner Teil* (1994) chapter 15, mn. 7 *et seq.*

²⁸⁸ Cf. Safferling, *Internationales Strafrecht* (2011) § 5 mn. 107. Satzger, *Internationales Strafrecht* (2013) § 15 mn. 70.

²⁸⁹ 1996 ILC Draft Code, p. 27 (para. 17).

²⁹⁰ Cf. Pelletier and Perfetti, *Code Pénal 1997–1998* (1997) 20.

²⁹¹ Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 812–3 with fn. 204.

²⁹² See also article 33 g para. 1 of the *Alternative General Part*, prepared by Eser *et al.* which uses the notion ‘substantial step’ instead of ‘commencement of execution’ since the former is more precise.

²⁹³ Crit. also Werle and Jessberger, *Principles* (2014) 265 with fn. 581.

²⁹⁴ Cf. *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 September 2008, paras. 458–64 (defendants had intent to kill civilians, this intent, ‘the dolus that embodies the attempt’, ‘is the same than the one that embodies the consummated act’, para. 460) <<http://www.legal-tools.org/doc/67a9ec/>>. Cf. also Schabas, *The ICC* (2010) 440.

²⁹⁵ Fletcher, *Basic Concepts* (1998) 171.

²⁹⁶ Article 121–5 of the French *Code Pénal* reads: ‘*La tentative ... n’a été suspendue ou n’a manqué son effet qu’en raison de circonstances indépendantes de la volonté de son auteur*’. The French wording of the Statute is

ingly, attempt implies the non-occurrence of the crime *independent* of circumstances intended by the perpetrator; *e contrario* this means that the perpetrator is not punishable if the crime does not occur because of circumstances *intended* by him or her. Thus, what this formulation does is to recognise the possibility of voluntary abandonment using a negative-implicit approach²⁹⁷.

b) ‘a person ... shall not be liable ... for the attempt ... if that person completely and voluntarily gave up the criminal purpose’. The possibility of abandonment was not provided for in the ILC Draft Codes of Crimes but was considered in the Preparatory Committee²⁹⁸. It is recognized in all modern legal systems and can, therefore, be truly considered a general principle of international law²⁹⁹. In theory, it creates an incentive for the perpetrator to withdraw from the commission³⁰⁰. In light of the first clause (mn. 41), however, it is doubtful whether this second clause is indeed necessary. While the first clause provides for an *implicit* formulation, the second one opts for a *positive* and *explicit* approach. It was included in the *Rome Statute* in the last minute, based upon a Japanese proposal and supported by Germany, Argentina and other like-minded States after informal consultations. In the heat of the negotiations, the drafters, including this author, overlooked the fact that the first clause already contained a rule on abandonment, albeit only an implicit one.

The formulation is based on the General Part of the updated Siracusa Draft³⁰¹ and the US-Model Penal Code³⁰². It is, however, less stringent than these provisions. In essence, omitting the redundant, the provision rewards the person if he or she – in objective terms – abandons the effort to commit the crime or otherwise prevents its commission and – in subjective terms – completely and voluntarily gives up the criminal purpose. The reference to the criminal purpose is not indispensable since the *raison d’être* of an exemption from punishment in case of abandonment is that the perpetrator completely and voluntarily abandons the further execution or prevents the completion of the act. This presupposes that he or she has given up the criminal purpose.

The provision does not address the difficult problems related to abandonment, *e.g.*, at what stage of the commission abandonment is still possible, what counter-activity the perpetrator must engage in so as to deserve an exemption from punishment or what the circumstances must be for the abandonment to be deemed engaged in ‘voluntarily’³⁰³. Further, the provision does not distinguish between abandonment in case of one or more than one participants; in the latter case, difficult questions of attribution regarding the act of abandonment of one participant *vis à vis* the other(s) arise³⁰⁴. These and other problems are left to the Court. Given the short time at the Rome Conference and the difficulty in reaching consensus about less complicated issues this was certainly a wise or, at least, practical solution.

almost identical: ‘... en raison de circonstances indépendantes de sa volonté’. For the Spanish law see article 16 para. 1 *Código Penal* and Mir Puig, *Derecho Penal. Parte General* (2011) 365-6.

²⁹⁷ For a more profound discussion see Ambos, *Der Allgemeine Teil* (2004) 709 *et seq.*

²⁹⁸ Preparatory Committee Decisions February 1997, p. 22, fn. 12.

²⁹⁹ Cf. Fletcher, *Rethinking Criminal Law* (1978) 185; *id.*, *Basic Concepts* (1998) 181. On its basic elements see Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 815 *et seq.*

³⁰⁰ See for the different theoretical justifications of abandonment: Fletcher, *Rethinking Criminal Law* (1978) 186 *et seq.*; Jescheck and Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil* (1996) 538 *et seq.*

³⁰¹ Siracusa Draft, articles 33-8. See also article 33 g para. 1 of the *Alternative General Part*, prepared by Eser *et al.* Both rules are based on German law, *cf.* sect. 24 *Strafgesetzbuch*.

³⁰² American Law Institute, *Model Penal Code and Commentaries* (1985) § 5.01 (4).

³⁰³ Cf. Satzger, *Internationales Strafrecht* (2013) § 15 mn. 71.

³⁰⁴ Thereto Cryer, in: *id. et al.*, *Introduction to ICL* (2014) 353, 380, emphasizing that liability for aiding and abetting or participating in a joint criminal enterprise might arise.

IV. Paragraph 3bis ('in respect of the crime of aggression...')

- 46 The provision transfers the *leadership clause* of the newly defined crime of aggression into the framework of Article 25³⁰⁵. While the clause has a solid basis in customary international law, it is not totally clear who is to be considered a person 'in a position effectively to exercise control over or to direct the political or military action of a State' (insider, *intraneus*). Also, it remains to be seen whether and, if so, how the leadership concept, apparently based on a *Weberian* model of organization, can be satisfactorily applied to non-bureaucratic forms of organizations, as they normally exist in paramilitary or terrorist non-State actors. At any rate, taking the wording literally ('effectively'), the leadership concept focuses on *de facto* control rather than on a purely formal status. Thus, paragraph 3bis certainly comprises the senior political as well as other (military, economic) leaders with sufficient effective control over the state apparatus³⁰⁶. In turn, all lower ranking and less-influential actors, such as mid-level bureaucrats, military officers and *a fortiori* mere soldiers, must be regarded as outsiders (*extranei*) who cannot be prosecuted for participating in the crime of aggression³⁰⁷. This wide exemption benefiting a series of important people in an aggressive state apparatus may give rise to criticism if ever a case of aggression will come before the ICC. As to the punishable *intranei* article 25 with all modes of attribution applies; only subparagraph (d) will probably be of little relevance since the *intranei* normally constitute the common purpose group which lies at the heart of this provision and therefore will be liable as (indirect) co-perpetrators.

V. Paragraph 4

- 47 This paragraph repeats a formulation as old as the codification history of international criminal law³⁰⁸. It affirms the parallel validity of the rules of State responsibility, *i. e.*, in particular the rules as embodied in the ILC Draft articles on State Responsibility³⁰⁹.

C. Special remarks

I. Issues of delimitation

- 48 The analysis of paragraph 3, subparagraphs (b) and (c), shows that it is hardly possible to delimitate the different forms of complicity mentioned in these subparagraphs. Thus, it may be sufficient and more reasonable to draft a rule limiting complicity (secondary participation) to inducement/instigation and other assistance ('aiding and abetting'). It is submitted that these forms of secondary participation cover any conduct which should entail criminal responsibility. 'Ordering' a crime should, as already argued (mn. 18), be dealt with under subparagraph (a), *i. e.*, acting through another.
- 49 As to the delimitation of *co-perpetration and aiding and abetting* (assistance), the case law has developed some criteria. With regard to participation in torture, the *Furundžija* TC held

³⁰⁵ Review Conference, Resolution 6., 11 June 2010. The following considerations are based on my more detailed analysis Ambos (2010) 53 *GYbIL* 463, 489-93.

³⁰⁶ Heller (2007) 18 *EJIL* 477, 479 *et seq.* correctly holds that the 'direct or control' criterion is stricter than the 'shape or influence' standard applied in the Nuremberg trials.

³⁰⁷ Kacker (2010) 33 *SuffolkTransnatLRev* 257, 266, arguing that the inclusion of participants would have weakened the leadership character of the crime of aggression.

³⁰⁸ See the 1954 ILC Draft Code, article 1; 1991 ILC Draft Code, article 3 para. 1; 1996 ILC Draft Code, article 2 paras. 1 and 4. See also Weigend, in: Bassiouni (ed.), *ILC's 1991 Draft Code* (1993) 113; Militello (2007) 5 *JICJ* 941, 951.

³⁰⁹ (1980) 2 *YbILC*, Part 2, 30-4; also in Spinedi and Simma, *State Responsibility* (1987) 325.

that it constitutes co-perpetration if the accused takes part in an ‘integral part of the torture and partake(s) of the purpose’; if he or she ‘only’ assists ‘in some way’ in the torture and knows of its existence, the accused is liable as an aider and abettor³¹⁰. According to the *Tadić* AC, the main difference between co-perpetration and aiding and abetting lies in the existence of a common plan in case of the former and the absence of such a plan in the latter. If such a plan exists, any contribution to its realisation constitutes co-perpetration³¹¹. In *Krstić*, TC I held that co-perpetration requires participation ‘of an extremely significant nature and at the leadership level’³¹². In *Kvočka*, the same Chamber made the delimitation using subjective criteria: while co-perpetrator shares the intent of the JCE, the aider and abettor merely has knowledge of the principal offender’s intent³¹³. However, in *Krnojelac*, TC II explicitly rejected this view and instead followed the more simplistic *Tadić* approach, which considers any participant in a criminal enterprise who is not a principal offender an accomplice but refers to him or her, oddly enough, as a co-perpetrator (sic!)³¹⁴. In substance, however, this Chamber pursued the same subjective approach as TC I in *Kvočka*³¹⁵. In the *Vasiljević* Appeal Judgment, the AC draws the following distinction between co-perpetration by means of a JCE and aiding and abetting:

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite mens rea is intent to pursue a common purpose³¹⁶.

This latter approach was confirmed by the AC in the *Kvočka* Appeal Judgment³¹⁷. In sum, however, the case law is still developing and far from uniform.

As to *subparagraph (d)* it is questionable whether – in practical terms – it is really 50 indispensable given the broad liability imposed by *subparagraph (c)*³¹⁸. On the objective level,

³¹⁰ *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, para. 257 <<http://www.legal-tools.org/doc/e6081b/>>; see also mn. 22.

³¹¹ *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, AC, 15 July 1999, para. 229 <<http://www.legal-tools.org/doc/8efc3a/>>.

³¹² *Prosecutor v. Krstić*, No. IT-98-33/T, Judgment, TC, 2 August 2001, para. 642 <<http://www.legal-tools.org/doc/440d3a/>>. Cf. also already mn. 9.

³¹³ *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-A, Judgment, AC, 28 February 2005, paras. 249, 284 <<http://www.legal-tools.org/doc/006011/>>.

³¹⁴ *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, para. 77 <<http://www.legal-tools.org/doc/1a994b/>>.

³¹⁵ *Ibid.*, para. 87 requiring that the accused – as a co-perpetrator – shares the state of mind necessary for the crimes committed as part of the criminal enterprise.

³¹⁶ *Prosecutor v. Vasiljević*, No. IT-98-32-A, Judgment, AC, 25 February 2004, para. 102 <<http://www.legal-tools.org/doc/e35d81/>>. See already *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, AC, 15 July 1999, para. 229 <<http://www.legal-tools.org/doc/8efc3a/>>.

³¹⁷ *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-A, Judgment, AC, 28 February 2005, para. 89 <<http://www.legal-tools.org/doc/006011/>>. See further para. 92, where the AC notes that ‘the distinction between these two forms of participation is important, both to appropriately describe the crime and to fix an appropriate sentence. Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise.’ But see also *Prosecutor v. Oric*, No. IT-03-68-T, Judgment, TC, 30 June 2006, para. 281 <<http://www.legal-tools.org/doc/37564c/>>, incorrectly assuming that (co)-perpetration demands the accused’s physical involvement in the commission of the crime and therefore establishing a too broad notion of aiding and abetting (every non-physical involvement) in cases where the ability to frustrate the crime would consequently lead to liability as (co)-perpetrator in the sense of Article 25 (3) subpara. (a). See on a cumulative conviction on the basis of a same act under both modes of liability *Prosecutor v. Djordjević*, No. IT-05-87/1-A, Judgment, AC, 27 January 2014, paras. 825 *et seq.* <<http://www.legal-tools.org/doc/e6fa92/>>.

³¹⁸ According to Mantovani (2003) 1 *JICJ* 26, 35, subpara. (d) is superfluous. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 803 doubts its necessity and sees only ‘symbolic relevance’ of the provision, due to its ‘group factor’. Schabas, *The ICC* (2010) 436 speaks of its ‘minor role’. Ohlin (2009) 12 *NCLR* 406,

subparagraphs (c) and (d) are quite similar, the only difference being that (c) is concerned with individual responsibility and (d) with group responsibility. A person who contributes to a group crime (or its attempt) will always be liable as an assistant to an individual crime pursuant to subparagraph (c). In other words, the group requirement of subparagraph (d) excludes liability for participation in individual crimes according to subparagraphs (a) to (c) but not *vice versa*. Thus, a significant difference between subparagraphs (c) and (d) lies, if at all, on the subjective level³¹⁹. As pointed out above (mn. 33–34), a participant in a group crime must either aim at furthering the criminal activity or purpose of the group (subparagraph (d) (i)) or must know of its criminal intention (subparagraph (d) (ii))³²⁰. Thus, a person acting without the specific intent of facilitating the commission within the meaning of subparagraph (c) may still be liable under subparagraph (d) (ii)³²¹. In fact, the Rome Statute provides, on the one hand, for a subjective limitation of aiding and abetting by the requirement of facilitating – in contrast, the case law of the *ad hoc* Tribunals only requires knowledge that the assistance contributes to the commission of crimes³²²; but, on the other hand, it takes this limitation away by the low knowledge threshold in subparagraph (d) (ii)³²³.

On another note, delimitating subpara. (d) from subpara. (a), the PTC considers the former as a kind of residual mode of participation in cases in which an alleged co-perpetrator lacks the ability to frustrate the commission of the crime³²⁴. Further, it seems that the Prosecution prefers to apply subpara. (d) (and not (a)), due to its arguably lower (objective) contribution requirement³²⁵. In any case, the increasing popularity of subpara. (d) calls for a careful legal analysis of the contribution requirement (see mn. 29).

II. Complicity after commission

- 51 Article 25 does not explicitly refer to acts of complicity after the commission of the crime. The ILC only wanted to include such acts within the concept of complicity if they were based on a commonly agreed plan; in the absence of such a plan the person would only be liable

416 regards it doctrinally incoherent (as Article 25 does not contain any ‘primary offense of direct participation in a group crime’ but only derivate accomplice liability for contributions to such a group crime) and calls for revision of the whole article. However, contrary to Ohlin’s opinion, the wording ‘jointly with another’ in subparagraph (a) as compared to the ‘common purpose group’ in subparagraph (d) does not render it inconsistent since the two expressions have, as explained above, different meanings.

³¹⁹ In the same vein *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, para. 337 (‘Art. 25(3)(d) provides for a residual form of accessory liability [...], by reason of the state of mind in which the contributions were made.’) <<http://www.legal-tools.org/doc/b7ac4f/>>. Cf. Vest, *Völkerrechtsverbrecher verfolgen* (2011) 379, 381; Park, *Beteiligungsform* (2016 forthcoming).

³²⁰ I thereby modify the view presented in the first edition (mn. 39).

³²¹ Vest (2010) 8 *JICJ* 851 reaching a similar conclusion, refers to subpara. (d) as a ‘rescue clause’. See also Jessberger and Geneuss (2008) 6 *JICJ* 853, 865; Safferling, *Internationales Strafrecht* (2011) § 5, mn. 88.

³²² See mn. 27.

³²³ For a more detailed discussion see Ambos, *Der Allgemeine Teil* (2004) 641 *et seq.* drawing an analogy to *Tadić*. Park, *Beteiligungsform* (2016 forthcoming) subparagraph (d) calls for a mandatory sentence reduction because of the low *mens rea* standard and the lack of precision required with regard to the criminal purpose.

³²⁴ *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 January 2007, para. 337 (as quoted in note 319) <<http://www.legal-tools.org/doc/b7ac4f/>>; *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11-01, Decision on the Prosecutor’s Application for *Summons to Appear*, 8 March 2011, para. 44 (with respect to *Joshua Arap Sang*) <<http://www.legal-tools.org/doc/6c9fb0/>>; *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-2-tENG, Decision on the Prosecutor’s Application for a Warrant of Arrest, PTC I, 28 September 2010, para. 36 <<http://www.legal-tools.org/doc/27b448/>> and *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 279 <<http://www.legal-tools.org/doc/63028f/>>; *Prosecutor v. Katanga*, No. ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, TC, 7 March 2014, para. 283 <<http://www.legal-tools.org/doc/9813bb/>>.

³²⁵ In the arrest warrant against *Harun*, 50 out of 51 counts are based on Article 25(3)(d), see *Prosecutor v. Harun et al.*, No. ICC 02/05-01/07-2, Warrant of Arrest for Ahmad Harun, 27 April 2007, *passim* <<http://www.legal-tools.org/doc/7276ad/>>. Cf. also Stahn (2014) 12 *JICJ* 809, 829 *et seq.* who points out procedural problems in the *Katanga* case in which the majority convicted *Katanga* under article 25(3)(d) by using Regulation 55 at later trial stage.

pursuant to a distinct offence ('harbouring a criminal')³²⁶. During the Preparatory Committee deliberations an explicit provision was deemed necessary³²⁷ but this should not be interpreted to the effect that without such a provision liability for *ex post facto* contributions is a *limine* excluded³²⁸. To be sure, a prerequisite of accomplice liability is an 'attributory' nexus (*Zurechnungszusammenhang*) between the main offence and the act of assistance. Thus, assistance that occurs after the commission of the main offence may only entail criminal responsibility if there is a link to the accomplice's conduct before commission of the main offence, or more exactly, before its completion. In most cases such a link will consist in a prior common agreement which extends beyond the completion of the main offence. As to subparagraph (d) this means, as correctly held by the *Mbarushimana* PTC, that it 'can include contributing to a crime's commission after it has occurred, so long as this contribution had been agreed upon by the relevant group acting with a common purpose and the suspect prior to the perpetration of the crime.'³²⁹

This reasoning is also supported by the principle of culpability. Accordingly, a participant in a crime can only be liable for his or her own contribution to the crime, regardless of the liability of other participants. This implies that the responsibility of each participant has to be determined individually on the basis of his or her factual contribution to the crime in question. A form of vicarious liability of the accomplice for the principal is excluded³³⁰. If the accomplice, on the contrary, is liable only for his or her own contribution, this contribution determines the scope of attribution and guilt³³¹.

III. Individual criminal responsibility and omission, in particular command responsibility³³²

The alleged moral difference between action ('A') and omission ('non A') is the reason that criminal law theorists make criminal liability for an omission dependent upon a (legal) *duty to act* (*Garantenpflicht*)³³³. The person possessing such a duty may be called 'guarantor' (*Garant* in German, *garante* in Spanish); he/she has the respective position (*Garantenstellung*) which, in a way, is the flip side of the respective duty. But how can such a duty arise? The modern doctrine in civil law jurisdictions refers to two different sets of obligations as a basis for such a duty: on the one hand it is imposed on persons who because of his/her special protective position with regard to certain legal interests, e.g. the parents with regard to their children, the bank manager with regard to the money of the bank's clients, have a protective duty towards them (*Schutz-/Obhutspflicht*); they are 'protector guarantors'. On the

³²⁶ (1991) 2 *YbILC*, Part 2, 98; (1991) 1 *YbILC*, 188, para. 21 (Mr. Pawlak, chairman of the Drafting Committee). See also: (1990) 1 *YbILC* 17, 23, 28, 48; (1990) 2 *YbILC*, Part 1, 28 *et seq.* (paras. 28 *et seq.*); Vol. II, Part 2, 12 *et seq.* (para. 50). Cf. also: American Law Institute, *Model Penal Code and Commentaries* (1985) § 2.06; van den Wyngaert, in: Bassiouni (ed.), *ILC's 1991 Draft Code* (1993) 55–56; Weigend, in: Bassiouni (ed.), *ILC's 1991 Draft Code* (1993) 113, 116–7; Triffterer, in: Hankel and Stuby (eds.), *Strafgerichte gegen Menschenverbrechen* (1995) 169, 228.

³²⁷ Cf. Preparatory Committee Decisions March 1997, p. 21, fn. 9.

³²⁸ Cf. *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 286 <<http://www.legal-tools.org/doc/63028f/>>.

³²⁹ *Ibid.*, para. 287; conc. *Prosecutor v. Khieu and Nuon*, No. 002/19-09-2007/ECCC/TC, Judgment, TC, 7 August 2014, para. 713 <<http://www.legal-tools.org/doc/4888de/>>; contrary Kearney (2013) *CLF* 331, 334 *et seq.*, arguing that subparagraph (d) can include *ex post facto* contributions without a prior agreement.

³³⁰ In American law, however, the doctrine of vicarious liability serves as the basis for the formal equivalence of perpetrators and accomplices (cf. Fletcher, *Basic Concepts* (1998) 190 *et seq.*).

³³¹ Cf. Wise, in: Sadat Wexler (ed.), *Model Draft Statute* (1998) 39, 42–3; Sereni, in: Lattanzi (ed.), *The ICC* (1998) 139. See also: Preparatory Committee Draft, article 23 para. 3: 'Criminal responsibility is individual and cannot go beyond the person and the person's possessions'.

³³² See for a more detailed treatment Ambos, *Treatise on ICL I* (2013) 180 *et seq.*

³³³ The duty requirement was apparently first mentioned by the German scholar Pauls Johann Anselm von Feuerbach in his textbook on criminal law of the beginning of the 19th century, see Feuerbach, *Lehrbuch des Gemeinen in Deutschland gültigen Peinlichen Rechts* (1812) 50 § 24.

other hand, it is imposed upon persons with a special responsibility over certain sources of danger, e.g., dangerous products or industrial plants, which entails that they have to secure and supervise them (*Überwachungs-/Sicherungspflicht*); they are ‘supervisor guarantors’³³⁴. These two sets of duties have as a common starting point that the criminal result brought about by the relevant omission is imputed to the guarantor because of his/her control over the relevant dangerous event, i.e., because of his ‘*Kontrollherrschaft*’³³⁵. While common law jurisdictions accept most of the individual duties arising from the twofold civil law approach they rather invoke formal sources (statute, contract, special status, voluntary assumption of care, prior dangerous act/creation of peril) as a basis of a duty to act³³⁶.

- 54 Crimes of omission can appear in *two different forms*. Either an offence of the special part (a special offence) makes a certain conduct constituting an omission punishable, thereby creating a genuine, authentic or separate offence of omission (*délit de pure omission*,³³⁷ *echtes Unterlassungsdelikt*); or there exists a provision in the general part (a general provision) which defines the requirements under which crimes of active conduct can be committed by omission (‘improper’ or ‘inauthentic offence of omission’, *délit de commission par omission*, *unechtes Unterlassungsdelikt*). This twofold distinction prevails in civil law jurisdictions³³⁸, but it is also acknowledged in common law jurisdictions³³⁹. In the case of a *genuine or separate offence of omission* the agent is held responsible for having fulfilled the conduct as defined in the respective offence. Several genuine crimes of omission can be found in criminal law statutes both in civil and common law jurisdictions³⁴⁰. The broadest liability in this regard is created by general failure to rescue offences, well known in most civil law jurisdictions³⁴¹ but traditionally rejected by the common law³⁴². In contrast, liability for genuine or proper offences of omission, liability for *commission by omission*, based on a general omission definition³⁴³, is derived from active result crimes and thus best captured by

³³⁴ Cf. Roxin, *Strafrecht Allgemeiner Teil II* (2003) § 32 mn. 33 *et seq.*, 107 *et seq.* The same twofold distinction is made in Spanish and Italian doctrine (for Spain see Muñoz Conde and García Arán, *Derecho Penal. Parte General* (2010) 246; Mir Puig, *Derecho Penal. Parte General* (2011) 325; for Italy see Pulitanò, *Diritto Penale* (2013) 229 *et seq.*; for Portugal see de Figueiredo Dias, *Direito penal: Parte general* (2007) 938 *et seq.*

³³⁵ This theory has been originally developed by Schünemann, *Unterlassungsdelikte* (1971) 231 *et seq.*

³³⁶ For the English law see Ashworth (1989) 105 *LQR* 424, 439 *et seq.*, *id.*, *Positive Obligations* (2013) 31 *et seq.*; for the US see Kadish *et al.*, *Criminal Law and Its Processes* (2012) 218 *et seq.* See also Duttwiler (2006) 6 *ICLRev* 1, 31–2, 33–4; for a similar approach in Islamic Sharia *ibid.*, 43.

³³⁷ Sometimes also called ‘*délit d’omission simple*’ or ‘*vraies infractions d’omission*’, see e.g. Pradel, *Droit Pénal Comparé* (2008) 66.

³³⁸ See for the German-speaking jurisdictions Roxin, *Strafrecht Allgemeiner Teil II* (2003) § 31 mn. 16 *et seq.*; Jescheck and Weigend, *Strafrecht. Allgemeiner Teil* (1996) 605–8; for France see Pradel, *Droit pénal général* (2012) 312–3 (but note that liability for ‘*commission par omission*’ is not recognized, Ambos (2007) 5 *JICJ* 159, 163 *et seq.* and main text); for the Spanish-speaking jurisdictions Muñoz Conde and García Arán, *Derecho Penal. Parte General* (2010) *et seq.*; Mir Puig, *Derecho Penal. Parte General* (2011) 318 *et seq.*; for Portuguese-speaking jurisdictions see de Figueiredo Dias, *Direito penal: Parte general* (2007) 913; for Italy see Pulitanò, *Diritto Penale* (2013) 221 *et seq.* From a comparative perspective Pradel, *Droit Pénal Comparé* (2008) 66–8. Fletcher, *Rethinking Criminal Law* (1978) 422, fn. 8 is referring to ‘pure’ (*echte*) and ‘impure’ (*unechte Unterlassungsdelikte*) omission, but rejects this terminology for being confusing; from an ICL perspective see Duttwiler (2006) 6 *ICLRev* 1, 4 *et seq.*

³³⁹ See Fletcher, *Rethinking Criminal Law* (1978) 422; *id.*, *Basic Concepts* (1998) 46; conc. Allen, *Textbook* (2013) 26; see also Robinson (1984–1985) 29 *NYLSchLRev* 101–2; organizing his whole paper along the distinction and Ashworth (1989) 105 *LQR* 424, 433 distinguishing between ‘offences of failing to do certain required acts’, ‘offences phrased in terms of acts, for which omissions may suffice’ and, as a third middle-category, ‘hybrid act-omission offences’ (e.g. driving without licence or driving without due care).

³⁴⁰ See for Germany Stree and Bosch, in: Eser *et al.* (eds.), *Schönke/Schröder Kommentar zum Strafgesetzbuch* mn. 134 with an enumeration of the relevant offences); for France Leroy, *Droit Pénal Général* (2012) 203–4 (citing only six genuine offences of omissions: Art. 223–6 (1), (2) and Arts. 223–7, 227–5, 434–1, 434–11); for England see e.g. Allen, *Textbook* (2013) 27–8. For the USA see Stewart (1998) 25 *AJIL* 385, 25 406 *et seq.*

³⁴¹ See e.g. Art. 223–6 French CP; sect. 323c StGB; Art. 195 Spanish CP; Art. 593 Italian CP and Art. 162 § 1 Polish CC (*Kodeksu Karnego*).

³⁴² Kadish *et al.*, *Criminal Law and its Processes* (2012) 219, 222 *et seq.*

³⁴³ For such a definition see e.g. section 13 StGB para. 1; Article 11 Spanish CP; Art. 40 (2) Italian CP; section 2 Austrian StGB; Art. 2 Polish CC; Art. 10 (2) Portuguese CP and Art. 18 Korean Penal Code (for further examples see Duttwiler (2006) 6 *ICLRev* 1, 39–41, 43–5, including Islamic Sharia at 42). However, in some civil

the French concept of ‘commission by omission’ (*commission par omission*). The corresponding offences can rightly be termed ‘improper offences of omission’ for in fact they are punished rather as commissions than omissions, i. e., as the flip side of the active result offence. Take the classical example: A lets B drown and would be liable for homicide by omission if he is the father of B, i. e., has the position of (protector) guarantor vis-à-vis B’s life. It is important to note, however, that this kind of omission conflicts with a strict understanding of the legality principle as for example adopted by the French law as perhaps its most vocal opponent³⁴⁴.

The *Rome Conference* missed the opportunity to propose a *general rule on omission*³⁴⁵, although the final Draft Statute contained a general *actus reus* article³⁴⁶. This article was deleted³⁴⁷, basically, because it was not possible to reach a consensus on the definition of an omission³⁴⁸. Further, it was argued that liability for omission based on article 28 and on the crimes themselves may be sufficient³⁴⁹. However, if the Court takes the *nullum crimen* principle seriously it may have difficulties in basing liability for omission on provisions which do not clearly and explicitly provide for such liability³⁵⁰. While the case law of the *ad hoc* Tribunals has generally accepted that liability under article 7 para. 1 ICTY Statute also encompasses commission by omission³⁵¹ and while such a liability is generally recognized in domestic jurisdictions and thus may amount to a general principle of law, it would make the life for the Court much easier if the States parties were to include a definition in the ICC Statute.

The wide range of liability established in article 25 para. 3 is complemented by a specific rule on command and superior responsibility (article 28)³⁵². Article 28 establishes a – in international criminal law unique – genuine offence of omission as defined above: the superior is punished for failing to prevent his or her subordinates from committing crimes or for failing to punish them for these crimes³⁵³. Thus, this provision establishes a very broad liability of the superior as a direct perpetrator (principal) for the acts of third persons (the

law countries these cases are covered by liability for negligent conduct only, e. g. in Chile (Art. 492 Chilean CP; this is probably due to French influence (see next fn. and main text).

³⁴⁴ Cf. Pradel, *Droit Pénal Comparé* (2008) 312 (‘*interprétation stricte*’, art. 111–4 CP).

³⁴⁵ For a more detailed analysis of liability for omission in international criminal law Wetz, *Unterlassungshaftung* (2004) *passim*; Duttwiler (2006) 6 *ICLRev* 1–61; Berster, *Unterlassungsverantwortlichkeit* (2008) *passim*; *id.* (2010) 10 *ICLRev* 619–46.

³⁴⁶ Preparatory Committee Draft, article 28, reprinted in: Bassiouni, *Legislative History of the ICC* (2005) 195.

³⁴⁷ UN Doc. A/CONF.183/C.1/WGPP/L.4/Add.1 (1998).

³⁴⁸ But see, for example, articles 33–5 Siracusa Draft, article 2 para. 2. *Alternative General Part*, prepared by Eser *et al.* For a general rule also Wise, in: Sadat Wexler (ed.), *Model Draft Statute* (1998) 39, 48–50; see also Mantovani (2003) 1 *JICJ* 26, 32.

³⁴⁹ See Schabas (1998) 6 *EJCLCJL* 400.

³⁵⁰ Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 819 with fn. 237.

³⁵¹ *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, AC, 15 July 1999, para. 188 <<http://www.legal-tools.org/doc/8efc3a/>>; for a conviction cf. *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, paras. 1092–6, 1101–5 <<http://www.legal-tools.org/doc/6b4a33/>>; conc. *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Judgment, TC, 26 February 2001, paras. 375–6 <<http://www.legal-tools.org/doc/d4fedd/>>; *Prosecutor v. Musema*, No. ICTR-96-13-T, Judgment, TC, 27 January 2000, para. 123 <<http://www.legal-tools.org/doc/1fc6ed/>>. For the possibility of aiding and abetting via omission cf. *Prosecutor v. Orić*, No. IT-03-68-T, Judgment, TC, 30 June 2006, para. 283 <<http://www.legal-tools.org/doc/37564c/>>; *Prosecutor v. Mrksić et al.*, No. IT-95-13/1-T, Judgment, TC, 27 September 2007, para. 553 <<http://www.legal-tools.org/doc/32111c/>>; *Prosecutor v. Milutinović et al.*, No. IT-05-87-T, Judgment, TC, 26 February 2009, para. 90 <<http://www.legal-tools.org/doc/9eb7c3/>>; *Prosecutor v. Popović et al.*, No. IT-05-88-T, Judgment, TC, 10 June 2010, paras. 1019–20 <<http://www.legal-tools.org/doc/481867/>>; *Prosecutor v. Djordjević*, No. IT-05-87/1-T, Judgment, TC, 23 February 2011, para. 1875 <<http://www.legal-tools.org/doc/653651/>>.

³⁵² Cf. Ambos (2007) 5 *JICJ* 159, 163 *et seq.*

³⁵³ Cf. *Prosecutor v. Bemba Gombo*, No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges, PTC II, 15 June 2009, para. 405 <<http://www.legal-tools.org/en/doc/07965c/>>; *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, para. 262 <<http://www.legal-tools.org/doc/5b41bc/>>. See for a more detailed analysis Triffterer, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213, 215 *et seq.*; *id.*, in: Arnold *et al.* (eds.), *Menschengerechtes Strafrecht* (2005) 901, 902 *et seq.*; Ambos, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 805; *id.*, *Der Allgemeine Teil* (2004) 666 *et seq.*; *id.*, *Treatise on ICL I* (2013) 197 *et seq.* See also Triffterer and Arnold, *Article 28*; Werle and Jessberger, *Principles*

subordinates), thereby creating a kind of vicarious liability (*responsabilité du fait d'autrui*) that comes very close to strict liability if one lowers the subjective threshold to a standard of mere negligence ('should have known') and infers the potential knowledge not from objective facts but mere presumptions ('constructive knowledge' in its worst form). It further puts liability for the failure to intervene in the commission of crimes on an equal footing with (accomplice) liability for not adequately supervising the subordinates and not reporting their crimes. Finally, the provision fails to distinguish between preventive (supervision, timely intervention) and repressive (reporting the crimes) countermeasures on the superior's part. In fact, liability is so broad that some kind of limitation must be imposed in order to avoid violating the principle of culpability. In the case of *Prosecutor v. Orić*³⁵⁴ the TC's application of the 'reason to know' standard of superior responsibility for the crimes of the subordinates pushed the boundaries of culpability to its farthest limits in the jurisprudence of the Tribunal³⁵⁵. To address the culpability problem, the German International Criminal Law Code (*Völkerstrafgesetzbuch*) distinguishes between liability as a perpetrator (principal) for the failure to prevent subordinates from committing crimes (Sect. 4), on the one hand, and accomplice liability for the (intentional or negligent) failure to properly supervise the subordinates (Sect. 13) and the failure to report crimes (Sect. 14), on the other³⁵⁶.

57 Moreover, although it is conceptually possible to make a clear distinction between liability for ordering (an affirmative or direct act) and for superior responsibility (an omission), these forms of responsibility are not clearly delimited in the case law of the *ad hoc* Tribunals. In fact, there is a tendency to use the superior responsibility doctrine (Articles 7 para. 3 and 6 para. 3 ICTY and ICTR Statutes respectively) as a kind of *default liability* for cases in which an affirmative or direct act (Articles 7 para. 1 and 6 para. 1) cannot be proven³⁵⁷. The issue was implicitly addressed for the first time in *Kayishema and Ruzindana*, where a TC held that article 7 para. 3 only becomes relevant if the accused did not order the alleged crimes³⁵⁸. It was also taken up in *Blaškić*, which held that 'l'omission de punir des crimes passés ... peut ... engager la responsabilité du commandant au titre de l'article 7 (1) ...'³⁵⁹. Only

(2014) 221 *et seq.*; Burghardt, *Vorgesetztenverantwortlichkeit* (2008) 185 *et seq.* Crit. Weigend (2004) 116 ZStW 999 *et seq.* On the ICTR case law Williamson (2002) 13 CLF 365.

³⁵⁴ *Prosecutor v. Orić*, No. IT-03-68-T, Judgment, TC, 30 June 2006, paras. 321–4 <<http://www.legal-tools.org/doc/37564c/>>.

³⁵⁵ Cf. Blumenstock and Pittman (2006) 19 *LeidenJL* 1077. For the subsequent case law cf. *Prosecutor v. Bagosora et al.*, No. ICTR-96-7, Judgment, TC, 18 December 2008, para. 2013 <<http://www.legal-tools.org/doc/6d9b0a/>>; *Prosecutor v. Renzaho*, No. ICTR-97-31-T, Judgment, TC, 14 July 2009, para. 746 <<http://www.legal-tools.org/doc/9bbd8a/>>; *Prosecutor v. Ntwukulilyayo*, No. ICTR-05-82-T, Judgment and Sentence, TC, 3 August 2010, para. 421 <<http://www.legal-tools.org/doc/dbc983/>>; for a less restrictive handling of the criterion 'to be put on notice' cf. *Prosecutor v. Delić*, No. IT-04-83-T, Judgment, TC, 15 September 2008, paras. 63, 65 *et seq.* <<http://www.legal-tools.org/doc/a34f45/>>; *Prosecutor v. Sainović et al.*, No. IT-05-87-T, Judgment, TC, 26 February 2009, para. 120 <<http://www.legal-tools.org/doc/9eb7c3/>> and *Prosecutor v. Popović et al.*, No. IT-05-88-T, Judgment, TC, 10 June 2010, para. 1042 <<http://www.legal-tools.org/doc/481867/>>.

³⁵⁶ *Bundesgesetzblatt* 2002 I 2254; for translations of the text and motives, see <<http://www.department-ambos.uni-goettingen.de/index.php/Forschung/uebersetzungen.html>> accessed 18 December 2012.

³⁵⁷ Cf. Ambos, *Der Allgemeine Teil* (2004) 670 *et seq.* (esp. 672); Ambos, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 835 *et seq.*; in this vein *Prosecutor v. Bemba Gombo*, No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges, PTC II, 15 June 2009, para. 402 <<http://www.legal-tools.org/en/doc/07965c/>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, paras. 99, 100, 165 (in the context of alternative charging) <<http://www.legal-tools.org/doc/5686c6/>>. However, there is a certain inconsistency with regard to alternative charges under article 25(3)(a) or article 28; compare *ibid.*, paras. 99, 100, 165 *et seq.* and *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, paras. 260 *et seq.* <<http://www.legal-tools.org/doc/5b41bc/>>. In the latter case PTC I declined to confirm the alternative charges based on superior responsibility 'because the consideration of Laurent Gbagbo's responsibility under article 28 of the Statute would require the Chamber to depart significantly from its understanding of how events unfolded in Côte d'Ivoire during the post-electoral crisis and Laurent Gbagbo's involvement therein'.

³⁵⁸ *Prosecutor v. Kayishema and Ruzindana*, No. ICTR 95-1-T, Judgment, TC, 21 May 1995, para. 223 <<http://www.legal-tools.org/doc/0811c9/>>.

³⁵⁹ *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 337 <<http://www.legal-tools.org/doc/e1ae55/>>.

recently, however, was the issue addressed explicitly. In *Kordić and Čerkez*, responsibility under article 7 para. 1 was characterized as ‘direct’ as compared to the rather ‘indirect’ responsibility under article 7 para. 3³⁶⁰. As a consequence, article 7 para. 1 constitutes a *lex specialis* that excludes simultaneous conviction on the basis of article 7 para. 3³⁶¹. Similarly, the *Krstić* TC held that ‘any responsibility under article 7 (3) is subsumed under article 7 (1)’, *i.e.*, superior responsibility is only of subsidiary nature³⁶². Last but not least, the *Krnjelac* TC considers that, if responsibility under article 7 para. 1 can be established, conviction should only be entered under this provision and the accused’s position as a superior taken into account as an aggravating factor³⁶³. The TCs in *Naletilić and Martinović*³⁶⁴ and in *Stakić*³⁶⁵ follow this approach, the latter *obiter* adding that it would be a waste of judicial resources to discuss article 7 para. 3 if the accused can be convicted on the basis of article 7 para. 1³⁶⁶. In the meantime this position has been confirmed by the AC in various judgments³⁶⁷.

³⁶⁰ *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Judgment, TC, 26 February 2001, paras. 366 *et seq.* (367, 369) <<http://www.legal-tools.org/doc/d4fedd/>>.

³⁶¹ *Cf. ibid.*, paras. 370-1.

³⁶² *Prosecutor v. Krstić*, No. IT-98-33/T, Judgment, TC, 2 August 2001, para. 605 <<http://www.legal-tools.org/doc/440d3a/>>.

³⁶³ *Prosecutor v. Krnjelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, paras. 173, 496 <<http://www.legal-tools.org/doc/1a994b/>>.

³⁶⁴ *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 81 <<http://www.legal-tools.org/doc/f2cfef/>>.

³⁶⁵ *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, TC, 31 July 2003, paras. 463 *et seq.* <<http://www.legal-tools.org/doc/32ecfb/>>.

³⁶⁶ *Ibid.*, para. 466.

³⁶⁷ *Prosecutor v. Delalić et al.*, No. IT-96-21-A, Judgment, AC, 20 February 2001, para. 745 <<http://www.legal-tools.org/doc/051554/>>; *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, AC, 29 July 2004, paras. 90–2 <<http://www.legal-tools.org/doc/88d8e6/>>; *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-A, Judgment, AC, 17 December 2004, paras. 33–5 <<http://www.legal-tools.org/doc/738211/>>; *Prosecutor v. Brđjanin*, No. IT-99-36-A, Judgment, AC, 3 April 2007, para. 285 <<http://www.legal-tools.org/doc/782cef/>>; *Prosecutor v. Jokić*, No. IT-01-42/1-A, Judgment on Sentencing Appeal, 30 August 2005, para. 27 <<http://www.legal-tools.org/doc/3cafa2/>>; *Prosecutor v. Stakić*, No. IT-97-24-A, Judgment, AC, 22 March 2006, para. 411 <<http://www.legal-tools.org/doc/09f75f/>>; *Prosecutor v. Galić*, No. IT-98-29-A, Judgment, AC, 30 November 2006, paras 411–2 <<http://www.legal-tools.org/doc/c81a32/>>; *Prosecutor v. Krajisnik*, No. IT-00-39-A, Judgment, AC, 17 March 2009, para. 787 <<http://www.legal-tools.org/doc/770028/>>; *Prosecutor v. Dragomir Milosević*, No. IT-98-29/1-A, Judgment, AC, 12 November 2009, para. 302 <<http://www.legal-tools.org/doc/44327f/>>; *Prosecutor v. Sainović et al.*, No. IT-05-87-A, Judgment, AC, 23 January 2014, paras. 1802, 1813, 1823 <<http://www.legal-tools.org/doc/81ac8c/>>; *Prosecutor v. Djordjević*, No. IT-05-87/1-A, Judgment, AC, 27 January 2014, para. 939 <<http://www.legal-tools.org/doc/e6fa92/>>. For a concise summary van Sliedregt, *Criminal Responsibility of Individuals* (2003) 192 *et seq.*; with regard to JCE liability and superior responsibility *Prosecutor v. Kvočka et al.*, No. IT-98-30/1-A, Judgment, AC, 28 February 2005, para. 104 <<http://www.legal-tools.org/doc/006011/>>.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Literature: The European Law Students' Association (ELSA) (ed.), *Handbook on the Draft Statute for an International Criminal Court* 62 (2nd ed. 1998); Crane, D.M., 'Prosecuting Children in Times of Armed Conflict: The West African Experience', (2008) 15 (3) *Human Rights Brief* 11; Frulli, 'Jurisdiction *ratione personae*', in: Cassese, A. et al., *The Rome Statute of the International Criminal Court. A Commentary*, Vol. I (2002) 527; Holmes, J.T., 'The protection of children's rights in the statute of the International Criminal Court', in: Politi, M. and Nesi, G. (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 119; Nill-Theobald, C., 'Defences' bei *Kriegsverbrechen am Beispiel Deutschlands und der USA. Zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrafrechts* (1998) 358 *et seq.*; Ottenhof, R., 'Criminal Responsibility of Minors in National and International Legal Order', (2001), 72 *RIDP* 663; Saland, P., 'International Criminal Law Principles', in: Lee, R.S. (ed.), *The International Criminal Court. The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 189, 200–202; Schabas, W.A., 'General Principles of Criminal Law in the ICC Statute', (1998) 6 *EJCCLCJ* 400; van Sliedregt, E., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 301–306; Triffterer, O., 'The New International Criminal Law – Its General Principles Establishing Individual Criminal Responsibility', in: Koufa, K. (ed.), *Thesaurus Acroasium, the New International Criminal Law*, Vol. XXXII (2003) 639.

Content

A. General remarks	1
1. Historical overview	1
2. Reasons for '[e]xclusion of jurisdiction'	11
B. Analysis and interpretation of elements	16
1. 'person ... under the age of 18'	17
2. 'time of the alleged commission of a crime'	20
C. Special remarks: No exclusion of national jurisdiction over persons under eighteen	23

A. General remarks

1. Historical overview

- 1 Early drafts for the establishment of an international criminal jurisdiction did not pay much attention to regulations concerning the general part¹. Correspondingly the Nuremberg Statute, Control Council Law No. 10 and Ordinance No. 7 did not contain provisions concerning the age when criminal responsibility should start. The Prosecutors perhaps assumed that, under international law, criminal responsibility begins at the age of 18, since in all these instances no one under the age of 18 was charged with any crime under any of these three jurisdictional provisions². Moreover, the 1948 Genocide Convention, the 1950 Nuremberg principles, the 1951 and 1954 ILC Draft Codes, the 1951 and 1953 ILC Draft Statutes as well as the 1949 Geneva Conventions, their 1977 Additional Protocols, and the 1972 Bellagio-Wingspread Drafts did not even mention this aspect³.
- 2 However, the 1979 ILA Draft Statute for an International Criminal Court, confirmed at the Belgrade Conference 1980, included a relevant article 21, contained in Part 3, 'Competence',

¹ For such documents see Triffterer, *Preliminary Remarks* (2008), mn 1 *et seq.*; see also *id.* (2003) *Thesaurus Acroasium, the New International Criminal Law*, Vol. XXXII, 639.

² Information confirmed by Benjamin Ferencz, one of the American Prosecutors at Nuremberg. For background information see Triffterer, in: Heer (ed.), *Der Minsker Prozess II* 3 f dd (forthcoming). Three accused persons (Hetterich, Höchtl, Fischer) were just eighteen at the time they committed the crimes, a fact which the Red Army tribunal hearing the case noted and considered as a partly mitigating circumstance.

³ See for those drafts Triffterer, 2nd edition (2008), *Preliminary Remarks*, fn. 5, 6 and 9.

and headed 'Law to be applied by the Court'. The article referred, in the context of other questions 'concerning general provisions on defences' and 'complicity', to the laws concerning the 'minimum age of criminal responsibility in that country where the offence is alleged to have been committed or, when such country did not confer jurisdiction, in the country of citizenship of the suspect, provided that they are not in conflict with international law'⁴.

More precise in this respect is a 'Draft International Criminal Code', presented by M. Cherif Bassiouni for the AIDP 1980. It contains for the first time in the drafting history of international documents relevant to the establishment of an international criminal jurisdiction, as an Appendix, a comprehensive 'General Part for an International Criminal Court Direct Enforcement Model'. In article 5, 'Responsibility', section 1 on individual responsibility commences with the sentence: 'A person is criminally responsible under this Code when he reaches the age of eighteen'⁵; this proposal is verbally repeated in Bassiouni's 'A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal' 1987⁶ as well as in later publications by that author. Neither Draft mentions whether this age has to be reached at trial or at the time when the act was committed. But since this question is answered by national laws in the sense that, when acting, the perpetrator has to have reached the age on which his or her criminal responsibility depends, it has to be assumed that this is the decisive fact in international criminal law as well.

In 1986 the ILA adopted Protocol II to its 1984 'Statute for an International Criminal Court' and also to its 'Statute for an International Commission of Criminal Inquiry' containing defences. In this Protocol II the ILA mentioned, beneath the heading 'Criminal liability' in section I, subsection (1), 'Immaturity', that '[e]veryone is exempt from criminal liability for his conduct prior to the attainment of 18 years of age'⁷.

It is surprising that even though all relevant proposals by non governmental organizations since 1980 mention immaturity, mostly in the context of other defences, later activities within the UN, like the 1991 ILC Draft Code and its 1994 Draft Statute did not touch upon the question of lack of responsibility of minors. Therefore, a Committee of Experts, commenting in its 'Siracusa Draft' on the 1994 ILC Draft Statute, mentions in a list of 'Open questions and elements of the crime to be regulated in a General Part' under objective elements of a crime (*actus reus*) the 'Age of responsibility', pointing out however, that some members thought this question was better dealt with as a defence (justification or excuse); the majority did not share this opinion⁸.

The *Ad Hoc* Committee on the Establishment of an International Criminal Court, holding its Second Session in August 1995, where the Siracusa Draft was presented, did not include any provisions at all in its Report, but mentioned in its list of open questions the age of responsibility⁹. Responding to this, the Committee of Experts expanded upon its former list early in 1996, proposing in its Updated Siracusa Draft an article 33-3:

1. A person under the age of sixteen at the time of the commission of a crime shall not be responsible under this Statute.
2. A person between the age of sixteen and twenty-one at the time of commission of a crime shall be evaluated as to his maturity whether he is responsible under this Statute¹⁰.

⁴ See L. Kos et al., in: ILA, *Belgrade Conference* (1980), Appendix B, Draft Statute for an International Criminal Court 15.

⁵ See Bassiouni, *International Criminal Law. A Draft International Criminal Code* (1980), Appendix – General Part, article V, section 1.1, 152. See also Triffterer, *Preliminary Remarks* (2008), mn 19 and 34.

⁶ Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) Draft International Criminal Code, Part I, General Part, article V, section 1.1, p. 95.

⁷ ILA Seoul Conference 1986, Annex C, Protocol II, p. 10.

⁸ See Siracusa Draft, General Part, III. Elements of Crime, A. Objective (*actus reus*) No. 1, respectively IV. Defences (Justification and Excuse), p. 41 with fn. 2 there.

⁹ See for the *Ad Hoc* Committee Report, Annex II (Guidelines) B 3, p. 59.

¹⁰ Updated Siracusa Draft II, the relevant parts are reprinted in: Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung* (2002) 942 *et seq.* For a widely corresponding proposal elaborated by Eser, Koenig, Lagodny and Triffterer, presented for consideration by the ILC when discussing its Draft Code 1996 see

6 The lack of agreement in the Preparatory Committee appears very clearly from the profusion of brackets in its proposals presented in 1996 under the heading 'Age of responsibility' and discussed in a Working Group on the General Principles of Criminal Law:

1. A person under the age of [twelve, thirteen, fourteen, sixteen, eighteen] at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute, [unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].
2. [A person who is between the age of [sixteen] and [twenty-one] at the time of the (alleged) commission of a crime shall be evaluated (by the Court) as to his or her maturity to determine whether the person is responsible under this Statute].

In addition, under a slightly different heading, 'Age of persons liable to punishment', an alternative proposal was presented:

[Persons aged 13 to 18 years at the time of the facts shall be criminally responsible but their prosecution, trial sentence and the regime under which they serve their sentence may give rise to the application of special modalities specified in the Statute]¹¹.

7 In a note, the Preparatory Committee pointed out that, especially with regard to the age of responsibility, different views were expressed. It was further mentioned 'that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors'. The discussion, 'whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption' did not (then) lead to any result, for instance on the question, 'as to what would be the criteria for the evaluation process' and if this should 'be left for the Court to develop in supplementary rules or by jurisprudence'. In addition, reference was made to the Convention on the Rights of the Child and the definition in article 1 of a child as 'every human being younger than eighteen years of age and that, in its article 37, it lays down a series of limitations as regards the applicable penalties, ruling out the death penalty and life imprisonment without parole'¹². These proposals and the notes were confirmed at the February Session 1997¹³.

8 At the December 1997 session of the Preparatory Committee, a somewhat different approach was pursued, not in the Working Group on the General Principles of Criminal Law but in the Working Group on Penalties. A proposal had been made there to deal with the sentencing of juveniles. Language drafted primarily by Argentina and Samoa suggested a 'jurisdictional' solution that would avoid the potentially intractable debate over substantive issues, both of criminal responsibility and of sentencing, by simply precluding the trial of any minors at all. As reported by the Committee in a footnote, the basic proposal read:

[The Court shall have no jurisdiction over those who were under the age of 18 years at the time they are alleged to have committed a crime which would otherwise come within the jurisdiction of the Court]¹⁴.

Ambos, *ibid.*, and Triffterer, 'Annex 2: Acts of Violence and International Criminal Law' (1997) 4 *Croatian Ann-CrimL&Prac* 2, 872. It was argued by these authors that in many legal systems the general age of responsibility starts with fourteen and in many wars all over the world soldiers under sixteen could be found. They should not as such *generally* be excluded from responsibility and punishment. To start responsibility with fourteen would not place in jeopardy those 'children', who have been misused as soldiers in a war for instance. This is because when they are 'not mature enough to see the amount of damage they may cause or the illegality of their individual conduct, they are anyhow not responsible' (*id.*). See also *Prosecutor v. Taylor*, Case No. SCSL-2003-01-01, Amended Indictment, 17 Mar. 2003, p. 6.

¹¹ Cf. 1996 Preparatory Committee II, p. 87.

¹² 1996 Preparatory Committee II, pp. 87 and 88.

¹³ Preparatory Committee Decisions Feb. 1997.

¹⁴ Preparatory Committee Decisions Dec. 1997, Annex V (Penalties), fn. 4. The paragraph in the note was introduced by this comment: 'The following proposals were made which should be treated either under age of responsibility or the jurisdiction of the Court'.

To this, States which preferred to keep the possibility of prosecuting minors alive in this part of the Statute insisted on adding:

[; however, under exceptional circumstances, the Court may exercise jurisdiction and impose a penalty on a person aged 16 to 18 years, provided it has determined that the person was capable of understanding the unlawfulness of his or her conduct at the time the crime was committed]¹⁵.

This language, which by the end of the Preparatory Committee's work had significant support both from NGOs and Governments, was carried forward into the Zutphen Draft¹⁶ and the Consolidated Draft submitted by the Preparatory Committee to the Rome Conference¹⁷.

The Zutphen Draft, however, reprinted the proposals on age of responsibility that had 9 been before the Working Group on General Principles unchanged, aside from moving the explanatory note into the footnotes¹⁸. With regard to the framework for penalties, it included newly bracketed sentencing proposals. In the case of '[... a convicted person under the age of 18 years at the time of the commission of the crime, a specified term of imprisonment of no more than 20 years]' was provided as well as an alternative that '[... the Court shall determine the appropriate measures to ensure the rehabilitation of the offender]' under the age of 18. There was also a plea that this article, 68 [A] (a), 'Applicable penalties', 'should be harmonized with article 20 [E] (Age of responsibility)¹⁹. The Consolidated Draft forwarded to Rome corresponded to the Zutphen Draft in respect of the proposals on age of responsibility and penalties²⁰.

There was only a brief discussion of the various aspects of the matter in Rome. The 10 compromise offered by the first part of the footnote which emerged from the Working Group on Penalties in New York migrated both from the footnote into the text (with only minor drafting improvements) and from the Part of the Statute dealing with penalties into the Part dealing with general principles of criminal law²¹. It had apparently been accepted that prosecuting minors, which would inevitably involve trying to provide a special regime for them, was not a good way to use the Court's probably limited resources. This jurisdictional solution had the consequence that proposals in the drafts of the Preparatory Committee to include in Part 7 on Penalties reduced penalties for persons under eighteen became irrelevant. They were deleted²². However, the last word on the age of responsibility in international criminal law has not yet been said. This is shown by the Statute of the Special Court for Sierra Leone in which the age of responsibility starts with fifteen. In theory perpetrators between fifteen and eighteen would be prosecuted but not go to jail if convicted; in practice, the Prosecutor decided not to prosecute any such persons²³. Also, the fact, that article 6 of the

¹⁵ *Ibid.*

¹⁶ Zutphen Draft, p. 127, article 68, fn. 233.

¹⁷ Preparatory Committee (Consolidated) Draft, p. 143, article 75, fn. 3.

¹⁸ Zutphen Draft, p. 56.

¹⁹ *Ibid.*, pp. 127–128.

²⁰ Preparatory Committee (Consolidated) Draft, pp. 61–62, (age of responsibility); *ibid.*, pp. 142–143, (penalties).

²¹ See, generally, Saland, in: Lee (ed.), *The International Criminal Court. The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 189, 201–202.

²² Fife, in: Lee (ed.), *The International Criminal Court. The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 327.

²³ Article 7 Statute of the Special Court for Sierra Leone, available under www.specialcourt.org/documents/Statute.html (internet), See also note 31. For further information see du Plessis, 'Children Under International Law', (2004) 13 *AfricanSecurityRev* 2, 110; Amnesty International, Sierra Leone: *Recommendations on the Draft Statute of the Special Court* (AI Index, AFR 51/083/2000), available under <http://web.amnesty.org/library/print/ENGAFR510832000>; I. Cohn, 'The Protection of Children and the Quest for Truth and Justice in Sierra Leone' (2001) 55 *JLAff* 1; Amann 'Message as Medium in Sierra Leone' (2001) 7 *ILSA JI&CompL* 237; Trittin and Weiß 'Das Sondergericht Sierra Leone', (2003) *Menschenrechtsmagazin* 3, 179, 180. On the decision not to prosecute, explained by the Prosecutor, see Crane (2008) 15 (3) *Human Rights Brief* 11. Those guilty of recruiting and using child soldiers in Sierra Leone were, however, tried and convicted. In the first trial completed before the ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, the accused was convicted in 2012 of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities.

ICTY Statute and article 5 of the ICTR Statute say nothing about the age of responsibility shows that the situation is not yet completely clear.

2. Reasons for '[e]xclusion of jurisdiction'

- 11 The reasons for this exclusion were to avoid a conflict with regulations in different national criminal jurisdictions about the age when criminal responsibility should start and how the period of growing maturity should be dealt with. It was argued that an absolute age of responsibility was equally unsatisfying as a presumptive age that included the possibility of rebutting such a presumption.
- 12 If an evaluation of maturity is needed, it should not be left exclusively with the trial judges. The reason for this is that conducting an investigation procedure concerning juvenile suspects could do as much harm to him or her as a trial. If evaluated at all, the Prosecutor right from the beginning of the case is endowed with the discretion to conclude that there is insufficient basis for a prosecution, owing to the immaturity of the alleged offender, under the same conditions as he could stop or proceed in other cases of doubt²⁴. In practice such an exercise would contribute to alleviating the negative effects caused by criminal proceedings on the rehabilitation of young offenders.
- 13 Besides, an evaluation of maturity strongly depends on the social surrounding in which the offender has grown up. Such investigations together with those concerning the whole scale of his or her behaviour need specific facilities and persons trained in juvenile delinquency and social influences for which the ICC is not likely to have the necessary equipment or the corresponding laws providing special proceedings for juveniles.
- 14 The execution of sentences on perpetrators who were under eighteen when committing the crimes, would require, in addition, specific care to take into consideration their whole behaviour and their former situations, their growing maturity since then as well as the social surrounding to which they will return.
- 15 It may seem – at first glance – contradictory to protect by article 8 para. 2 (b) (xxvi) 'children under the age of fifteen years' (and not all minors under eighteen) against 'conscripting or enlisting ... into the national armed forces or using them to participate actively in hostilities' and not holding those older than fifteen responsible for crimes falling within the jurisdiction of the Court. But taking into consideration that complementarity and thereby the priority of national criminal jurisdiction prevails anyhow, it appears not only justifiable but also preferable to leave the group under eighteen to the national courts. They are much better equipped to take care of the specific situation in which children have been when committing crimes under international criminal law²⁵.

B. Analysis and interpretation of elements

- 16 Article 26, situated in Part 3, General Principles of Criminal Law, regulates an aspect of substantive criminal law from its procedural side, by excluding the jurisdiction of the Court 'over persons under eighteen' thus showing the close connection between these two fields²⁶.

²⁴ See also Bergsmo and Kruger, *article 53*, mn 23 and 29. The age meant in article 53 para. 2 (c) does not refer to article 26. In cases of article 26 there exists no jurisdiction of the Court and therefore the Prosecutor has to proceed according to article 53 para. 1. If the perpetrator was just 18 when committing the crime, there is no discretion of the Prosecutor for a decision based on article 53 para. 2 (c).

²⁵ This opinion does not exclude a statement given by some scholars, including one of the authors of this article, that soldiers under sixteen 'should not as such generally be excluded from responsibility and punishment'. See to this point of view Triffterer 'Annex 2: Acts of Violence and International Criminal Law', (1997) 4 *CroatianAnnCrimL&Prac* 2, 872, for the context and the other authors holding this opinion. See also mn 23 and 24. – For the contrary opinion see Frulli, in: Cassese et al., *The Rome Statute of the International Criminal Court. A Commentary*, Vol. I (2002) 534 who suspects that 'it may happen that adults are brought to trial before the ICC in full respect of their rights whereas youngsters are tried by national courts without their rights being respected'.

²⁶ Triffterer, 2nd edition, *Preliminary Remarks*, mn 14.

1. ‘person ... under the age of 18’

A person is ‘under the age of eighteen’ as long as he or she has not completed the eighteenth year of his or her life. The exact time is at 12.00 p.m. (24.00) of the day before the date of his or her birth appears again, for the eighteenth time. Even when born at the very end of the original birthday, the next birthdays are counted as such and not by the hour. When the day he or she was born begins again after eighteen years have passed, at 00.01 a.m., criminal responsibility starts even for those who have been born later in the day. Those born on 29 February in a ‘leap-year’ are ‘under the age of eighteen’ only until the end of the 28th eighteen years later, because the next day necessarily follows in a non leap-year and, therefore, is already the 1 March.

This time limit is an absolute border completely independent of maturity or immaturity. But responsibility of persons above the age of 18 may be excluded by a defence listed in article 31 para. 1 (a), when their immaturity results from a mental disease²⁷. In addition, the Court is free to mitigate the punishment in cases where the defendant reached this age of 18 very shortly before he committed the crime, by arguing that his or her maturity has not yet stabilized sufficiently. This follows because, included in the criterion ‘... individual circumstances of the convicted person’, mentioned in article 78 para. 1, is his or her status of maturity, which may be even above the age of 18 individually very differently developed.

Article 26 blocks the exercise of the jurisdiction of the Court including the initiating of investigations *proprio motu*, pursuant to article 15, because the exercise of jurisdiction has to be, according to article 13, ‘in accordance with the provisions of this Statute’, which excludes the prosecution of persons under eighteen, according to article 26.

This question also has to be dealt with according to article 19 para. 1 by the Court *ex officio*. In addition, the Prosecutor and the defendants may challenge the jurisdiction of the Court according to article 19 para. 6 at any time ‘prior to the confirmation of the charges’. But this limitation does not mean that later, at trial, evidence on this question may not be brought in irrespective of whether it is new or earlier withheld²⁸.

2. ‘time of the alleged commission of a crime’

A crime is committed at the time when the perpetrator has acted or when he or she has omitted what should have done according to his or her legal duty. When the perpetrator needs more than one act to fulfill all material and mental elements of the crime, the last one is decisive for triggering or not triggering the jurisdiction of the Court. Because this part of the relevant behaviour causes the completion and when at that time he or she was not yet eighteen, they cannot have reached this age before. All earlier acts are insofar preparatory elements, independent whether they are a punishable attempt in the meaning of article 25 para. 3 (f), for which the jurisdiction of the Court is excluded.

The time when the result of the crime appears, is not decisive; neither is an action with which the perpetrator tries – in vain – to withdraw from an attempt²⁹. What in such situations counts is whether the perpetrator was eighteen when ‘taking action that commences its execution by means of substantial step, but the crime does not occur...’ article 25 para. 3 (f).

When during the investigation it appears that the alleged commission perhaps occurred earlier than originally assumed, the case has to be dismissed because of lack of jurisdiction of the Court by all court organs, independent of whatever stage of the proceeding the case may have reached, as already expressed in mn 12.

²⁷ See A. Eser, *article 31*, mn 17 *et seq.*

²⁸ See also mn 22.

²⁹ See also mn 19.

C. Special remarks: No exclusion of national jurisdiction over persons under eighteen

- 23 Only the jurisdiction of the ICC is excluded. As can be seen from the historical development of this article, criminal responsibility may not be excluded for persons under eighteen in general. Therefore, it cannot be assumed that persons under eighteen are not responsible for crimes under international law in general. Quite the opposite. They are responsible for crimes for which the ICC has jurisdiction according to article 5 before national courts under the principle of universality and insofar as national law provides for such a jurisdiction over minors³⁰. This proposition has indeed been acted upon in the creation of the Special Court for Sierra Leone which, on paper, had particular arrangements for juveniles³¹. Excluded according to article 26 is merely the jurisdiction of the ICC.
- 24 However, in the case of youngsters under the age of fifteen years who are conscripted or enlisted into the national armed forces in a criminalized way falling under article 8 para. 2 (b) (xxvi) or (e) (vii) such juveniles are indispensable victims of crimes violating international law and established to protect them; they should not be victimized a second time by being brought before a national criminal jurisdiction.

Persons over fifteen and those younger but not victimized in the sense of article 8 para. 2 (b) (xxvi) and (e) (vii) could be held responsible if the relevant national law so provides. This legal situation has the consequence that States contemplating prosecuting crimes of juveniles between sixteen and eighteen should proceed where the exceptions mentioned in article 17 para. 1 (a) and (b) are not applicable. However in cases where States are unable or unwilling to do so, the Court, nevertheless has no jurisdiction, because this lack of competence is expressly declared by article 26 for all crimes according to the Rome Statute under the jurisdiction of the Court.

³⁰ See also Triffterer, *Preliminary Remarks* (2008), mn 62; Ottenhof 72 *RIDP* 663 *et seq.*, available under www.cairn.info/revue-internationale-de-droit-p%C3%A9nal-2001-3-page-669.htm.

³¹ *Supra* note 23.

Article 27

Irrelevance of official capacity

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

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

Specific Literature: Akande, D., 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', (2009) 7 *JICJ* 333; *id.* and Shah, S., 'Immunities of State Officials, International Crimes and Foreign Domestic Courts', (2011) 12 *EJIL* 815; Ambos, K., 'Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law', (2013) 33 *OJLS* 293; Bantekas, I., 'Head of State Immunity in the light of Multiple Legal Regimes and Non-Self-contained System Theories: Theoretical Analysis of ICC Third Party Jurisdiction against the background of the 2003 Iraq War', (2005) 10 *JCSL* 21; Bassiouni, M.C., *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Martinus Nijhoff Publishers 1987); *id.*, 'Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind', (1993) 11 *NEP* 197; Bianchi, A., 'Immunity versus Human Rights: The *Pinochet* Case', (1999) 10 *EJIL* 237; Burghardt, B. and Geneuss, J., 'Der Präsident und sein Gericht, Die Entscheidung des Internationalen Strafgerichtshofs über den Erlass eines Haftbefehls gegen Al Bashir', (2009) *ZIS* 126; Cassese, A., 'When may Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', (2002) 13 *EJIL* 853; Frulli, M., 'The Question of Charles Taylor's Immunity', (2004) 2 *JICJ* 1118; Gaeta, P., 'Does President Al Bashir Enjoy Immunity from Arrest?', (2009) 7 *JICJ* 316; *id.*, '*Ratione Materiae* Immunities of Former Heads of State and International Crimes: The *Hissène Habré* Case', (2003) 1 *JICJ* 186; Holvoet, M. in: De Hert et al. (eds.), *Code of International Criminal Law and Procedure, Annotated* (Larcier Law Annotated 2013), Article 27; Jescheck, H.H., *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Bonn 1952); Jia, B. B., 'The Immunity of State Officials for International Crimes Revisited', (2012) 10 *JICJ* 1303; Kiyani, A. G., 'Al Bashir & the ICC: The Problem of Head of State Immunity', (2013) 12 *ChineseJIL* 467; Kloth, M., *Immunities and the Right of Access to Court Under Article 6 of the European of Human Rights* (Martinus Nijhof 2010); Kreicker, H., *Völkerrechtliche Exemtionen*, Vol. I and II (Berlin 2007); *id.*, 'Immunität und IStGH, Zur Bedeutung völkerrechtlicher Exemtionen für den Internationalen Strafgerichtshof', (2009) *ZIS* 350; Pedretti, R., *Immunity of Heads of State and State Officials for International Crimes* (Brill Nijhof 2015); Senn, Immunitäten vor dem Internationalen Strafgerichtshof (Nomos 2010); Ssenyonjo, M., 'The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan', (2010) 59 *ICLQ* 205; Tladi, D., 'The ICC Decisions on Chad and Malawi. On Cooperation, Immunities, and Article 98', (2013) 11 *JICJ* 199; *id.*, 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff', (2015) 13 *JICJ* 1; Triffterer, *Dogmatische Untersuchungen zur Entwicklung des Materiellen Völkerstrafrechts seit Nürnberg* (E. Albert 1966); *id.*, 'International Crimes and Domestic Criminal Law. Efforts to Recognize and Codify International Crimes, General Report Part I', (1989) *RIDP* 31; *id.*, 'Irrelevance of Official Capacity' – Article 27 Rome Statute Undermined by Obligations under International Law or by Agreements, Article 98', in: I. Buffard et al. (eds.), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff 2008) 571; Wirth, S., 'Immunities, Related Problems, and Article 98 of the Rome Statute', (2002) 12 *CLF* 429; *id.*, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case', (2002) 13 *EJIL* 877; Van Alebeek, R. *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008); Zappalà, S., 'Do Heads of State Enjoy Immunity from Jurisdiction for International Crimes? The Ghadafi Case Before the French Cour de Cassation', (2001) 12 *EJIL* 595. – Also see the specific bibliography to the annotations to article 98.

Content

A. Introduction/General remarks.....	1
I. Content and context.....	1
II. History and drafting process.....	8
B. Analysis and interpretation of elements.....	16
I. Paragraph 1.....	16
1. The irrelevance of immunity <i>ratione materiae</i> before international courts as an expression of customary international law.....	16

2. Equal application ‘to all persons without any distinction based on official capacity’	17
3. ‘In particular’	19
4. ‘shall in no case exempt ... from criminal responsibility’	21
5. ‘in and of itself’ no ‘ground for reduction of sentence’	22
II. Paragraph 2	23
1. The irrelevance of immunity <i>ratione personae</i> before international courts as an expression of customary international law?.....	23
2. ‘Immunities or special procedural rules ... shall not bar the Court from exercising its jurisdiction’	26

A. Introduction/General remarks*

I. Content and context

- Article 27 advances the rule that **the official capacity of the accused is irrelevant in criminal proceedings before the Court**: Official capacity neither substantively exempts the accused from international criminal responsibility nor mitigates it and does not procedurally bar the Court from exercising its jurisdiction. In other words: Immunities of any kind (see *infra* mn 3) do not apply when the Court investigates, prosecutes or tries an accused itself (this has to be distinguished from the Court requesting state cooperation, article 98; see *infra* mn 5). Especially with regard to the *Al Bashir* scenario (the investigation of an incumbent Head of a Non-Party State after a Security Council Referral), in recent years much has been written on whether this rule must see an exception when the accused enjoys personal immunity granted by a Non-Party State, especially when he or she serves as its acting head of state, head of government or foreign minister;¹ the controversies ultimately pertain to the ‘nature’ of the Court as either a mere treaty based creature (deriving its *ius puniendi* solely from the States Party) or alternatively as an organ of the world community (wielding an independent *ius puniendi*). While theoretically and doctrinally important, this debate must not obfuscate that – at the end of the day – the application of article 27 is not too difficult to establish in case of a Security Council referral and that the truly problematic article 12(2)(a)-scenarios² have not become virulent (on the jurisdictional implications of article 27 see *infra* mn 6). This somewhat attenuates the heated discussions over whether article 27 declaratorily codifies an inherently limited customary international law on immunities in case of the prosecution of core crimes before international courts or whether, in the alternative, article 27 constitutively limits immunities that normally know no inherent limitations (see *infra* mn 16 and 23 et seq.).
- The main **aim of article 27** still is to make explicit the scope of individual criminal responsibility for crimes committed in the name of or for a state under international law. This can only be explained in light of the traditional Westphalian notion that acts of state in general and certain persons representing the state were historically exempt from criminal prosecution outside this state. Without this notion, it would have been unnecessary to recognize or reaffirm that besides private individuals, subordinates and commanders (the subjects traditionally recognized by the laws and customs of war), also persons up to the highest level in the hierarchy of states or governments can and should be held responsible

* Many thanks to cand. iur. Sonja Heimrath for updating and complementing the bibliography.

¹ For the arguably latest synopsis of the debate see Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2015) 257 et seq., 274 et seq. Also see Senn, *Immunitäten vor dem Internationalen Strafgerichtshof* (2010) 125 et seq. Further see, for example and with extensive references, Ambos, *Internationales Strafrecht* (2014) 235 et seq.; Holvoet, in: De Hert et al. (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013), Article 27; Robinson, in: Cryer et al., *Introduction* (2014) 540 et seq.; Werle and Jessberger, *Principles of International Criminal Law* (2014) 270 et seq.; Akande (2009), 7 JICJ 333 et seq.

² For instance: The acting head of state of Non-Party State A commits core crimes on the territory of Party State B.

directly under international criminal law for the most serious violations of the highest values of the community of nations. In the words of TC V:

‘The central principle captured in article 27 then is that the official position of the accused does not shield him against the jurisdiction of the Court for purposes of inquiring into his or her own individual criminal responsibility for crimes proscribed in the Statute. Indeed, the struggle against impunity for crimes that shock the conscience of humanity, being the *raison d’être* of the ICC, is a hopelessly lost cause without that cardinal principle of modern international criminal law.’³

It follows that article 27 does *not* disallow to take the official capacity of the accused into account in other areas, like as an aggravating circumstance during sentencing (see *infra* mn 22) or in decisions to excuse an incumbent head of state ‘from continuous presence in an ongoing trial, when the excuse is recommended by the functions implicit in the office that he or she occupies’⁴.

Article 27 is intrinsically linked to the **international law of immunities**. In a nutshell:⁵ 3 Functional immunity (or immunity *ratione materiae*) exempts those performing acts of state⁶ from criminal⁷ prosecution in foreign courts of law. Functional immunity applies in an *erga omnes* manner, and its rationale was aptly summarized in *Blaškić*:

‘It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions. The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*).’⁸

While immunity *ratione materiae* survives the end of office, immunity *ratione personae* (or personal immunity) does not, i. e. is only enjoyed by those who are currently in office.⁹ Further, other than functional immunity, personal immunity covers every act by those enjoying it, i. e. acts both private as well as official in nature. What is more, international law (both customary and treaty based) only grants immunity *ratione personae* to a limited group of persons: Under customary international law, it is well established that heads of state, heads of government and foreign ministers¹⁰ normally enjoy personal immunity in foreign

³ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11, Decision on Mr Ruto’s Request for Excuse from Continuous Presence at Trial, TC V, 18 June 2013, para. 67 [doc1605793.pdf].

⁴ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11, Decision on Mr Ruto’s Request for Excuse from Continuous Presence at Trial, TC V, 18 June 2013, para. 71 [doc1605793.pdf].

⁵ For an encompassing overview see Kreicker, *Völkerrechtliche Exemtionen* (2007).

⁶ Note that this must not be confused with the Act of State Doctrine, which is neither a rule of customary international law nor treaty law. This doctrine is recognized and adhered to especially by US courts, and one of its central rationales is judicial restraint, namely protecting the US executive’s prerogative in foreign affairs.

⁷ As to state immunity in *civil* matters see ICJ, Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgment, 3 February 2012.

⁸ *Prosecutor v. Blaškić*, No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29 October 1997, para. 41. For further elaborations on the rationale of immunity *ratione materiae* see Werle/Jessberger, *Principles of International Criminal Law* (2014) 271. – As to the doctrinal controversy whether immunity *ratione materiae* prevent individual responsibility from arising, or whether it is a mere procedural defence, see Ambos, *Treatise* (2013) 410 with further references.

⁹ Akande and Shah (2011) 21 *EJIL* 815, 818; Wirth (2002) 12 *CLF* 429, 432.

¹⁰ On the inclusion of foreign ministers see the famous Arrest Warrant or *Yerodia* Case, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ, Judgment, 4 February 2002; for a critique of this Decision see Cassese (2002) 13 *EJIL* 853 *et seq.* On the question of inclusion/exclusion of foreign ministers also see Akande/Shah (2011) 21 *EJIL* 815, 820–825; Jia (2012) 10 *JICJ* 1303, 1310; Wirth (2002) 13 *EJIL* 877 *et seq.* As to ministers other than foreign ministers see e.g. van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (2008) 192 *et seq.*

national criminal courts (outward *erga omnes* immunity)¹¹. In contrast, diplomatic immunity is treaty based, and diplomats only enjoy immunity *ratione personae* in their receiving states (outward *inter partes* immunity)¹². The rationale behind immunities *ratione personae* is not the *par in parem non habet imperium*-principle, but the upholding of functional international relations by guaranteeing that important state personnel can travel safely abroad while they are in office.¹³ – It has to be noted that functional and personal immunity can easily overlap, namely when a state official enjoying personal immunity carries out an official act of state¹⁴. – Finally, immunities (both *ratione materiae* and *ratione personae*) are no (longer¹⁵) personal rights of those enjoying them. Rather, they are privileges granted by the state for which the person concerned is acting or serving as an official; it follows that immunities can be rescinded domestically and waived internationally by said state, be it in advance or retroactively.

- 4 For the sake of doctrinal clarity, and in line with the jurisprudence of TC V¹⁶, the **relationship between paragraphs 1 und 2** can be resolved as follows: article 27(1) implicitly does away with immunities *ratione materiae*; and article 27(2) renders irrelevant immunities *ratione personae* (as procedural bars for the exercise of jurisdiction while an official is in office)¹⁷.
- 5 Article 27 deals with the vertical top-down relationship between the Court and the state granting an immunity *ratione materiae* o *personae* to the accused. In contrast, **article 98** regulates a triangular relationship: the vertical relationship between the Court and a state requested to cooperate with the Court (for instance, in the *Al Bashir* case, a State Party tasked with arresting and surrendering the head of state of a Non-Party State to the Court); and the horizontal relationship between the requested state and the state granting an immunity. Since article 27 and 98 were drafted by different working groups (see *infra* mn 15), they are not easily reconcilable: While article 27 renders immunities irrelevant, article 98 apparently revives their pertinence; after all, the Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person (article 98(1)) or would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that state to the Court (article 98(2)). – Taking both the drafting

¹¹ See Draft Article 5 on ‘Immunity of State officials from foreign criminal jurisdiction’ by the ILC, Report of the International Law Commission. Sixty-fifth session (6 May-7 June and 8 July-9 August 2013), General Assembly Official Records, Sixty-eighth session Supplement No. 10 (A/68/10), at 50: ‘The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.’ – On whether other ministers (like those of defence) are (to be) included as well see e.g. Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2015) 41 with further references.

¹² See Article 29 Vienna Convention on Diplomatic Relations and cf. Ambos, *Internationales Strafrecht* (2014) 237 with further references.

¹³ See *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ, Judgment, 24 May 1980, para. 91: ‘There is no more fundamental prerequisite for the conduct of relations between States [...] than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose.’

¹⁴ Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 747 *et seq.*

¹⁵ As was the case for the Sovereign Prince in Westphalian terms.

¹⁶ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, TC V, 18 June 2013, para. 66 [doc1605793.pdf]: ‘The Chamber is of the view that the main aim of Article 27(1) is to align the ICC Statute with the contemporary norm of international law according to which public officials are no longer entitled to immunity for violation of international criminal law.’

¹⁷ On the doctrinally disputed, but eventually irrelevant relationship between Article 27(1) und (2), see Senn, *Immunitäten vor dem Internationalen Strafgerichtshof* (2010) 136 *et seq.* with further references, also on countervailing views. The distinction advanced here is supported *inter alia* by Gaeta, in: Cassese et al. (eds.) *The Rome Statute of the International Criminal Court*, i. (2002) 990 *et seq.*; Holvoet, in: De Hert et al. (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013), Article 27.

history and the systematic context of article 27 (in ‘Part III: General Principles of [International] Criminal Law’ of the Statute) seriously, and considering that criminal law and the law of international cooperation in criminal matters follow different rationales, articles 27 and 98 should, at the outset, be interpreted independently from each other.¹⁸ This means: That the Court has jurisdiction and is free to exercise it despite the official capacity of the accused (article 27) and that, at the same time, the Court may not proceed with a request for legal assistance in order to honor the horizontal immunity obligations of the requested state (article 98), are no self-contradictory statements. Of course, the former may inform the interpretation of the latter article. Article 98 may hence be interpreted in light of the overarching goal to end impunity (see mn 2). Or, to put it differently, the horizontal immunity obligations mentioned in article 98 would be inherently limited if article 27 were to articulate a general immunity exception for the prosecution of core crimes based on an international division of labor between the Court (as an organ of the international community) and the states (as members of this community). Yet this must primarily be resolved in the context of interpreting article 98.¹⁹ – As was already raised in the previous edition: article 98 excuses states for exceptionally not cooperating with the Court, when in doing so they would violate an international obligation. In such a situation the state also cannot be expected to violate just the same obligation by prosecuting the person concerned before its own courts. It therefore cannot be blamed for not investigating and prosecuting genuinely and thus trigger the jurisdiction of the Court. But by doing so, the circle starts again with the references to cooperate with the Court. Therefore, the legal basis and starting position for the Court is the following: Because article 27(2) regulates that ‘[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’, the Court may start preliminary proceedings, in particular investigation and prosecution. Only if the court needs the presence of the suspect, e.g. for the trial, and does not have him or her ‘available’, article 98 comes into play.

In focusing on the vertical relationship between the Court and the state granting immunity, and by taking into account that this immunity is disposable for said state (see mn 3), it becomes apparent why article 27 is so closely related to (but should not be treated alike)²⁰ the Court’s (basis of) jurisdiction,²¹ especially when it comes to the prosecution of individuals who benefit from immunities granted by Non-Party States:²²

¹⁸ This has not been considered in the Malawi Decision of PTC I in *Al Bashir*, where article 27 was cast as the ‘ruling provision’, thus neglecting the independent significance of article 98. As to this critique see Tladi (2013) 1 *JICJ* 199, 206. As to the aforementioned decision see *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, PTC I, 12 December 2011, para. 44 [doc1287184.pdf], where the Chamber took the unconvincing ‘view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.’

¹⁹ Therefore, see the elaborate annotations by Kreß/Prost, *Article 98*.

²⁰ As, although in a slightly different context, correctly noted by the ICJ in *Yerodia*: ‘jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction’. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ, Judgment, 4 February 2002, para. 59. It is open for discussion whether this was duly considered in *Situation in the Libyan Arab Jamahiriya*, No. ICC-01/11, Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’, PTC I, 27 June 2011, para. 9 [doc1099314.pdf], where PTC I discussed the official position of an individual under the heading of the Court’s jurisdiction *ratione loci* and *ratione personae*.

²¹ Article 27 presupposes that the person in question is available to the Court if he or she is put on trial. In addition, article 27 does not alter the application of the rules on the ‘preconditions to the exercise of jurisdiction’ in article 12 nor does it limit the possibility of challenging ‘the jurisdiction of the Court or the admissibility of a case’ according to article 19.

²² The latter may be the more cumbersome formulation, which is however more precise than the formulation ‘national of a Non-Party State’. Think e.g. of a German national becoming the foreign minister of the United

- Where the Court seeks to try *beneficiaries of State Party immunities*, this can easily be justified on the ground that the States Parties have waived their immunity rights and thus their corresponding protection by ratifying the Rome Statute, including article 27. This line of reasoning can be labeled the ‘*waiver*’-theory (or more precisely: the ‘in advance waiver’-theory). For good or bad, under this theory it is moot whether article 27 constitutively limits the reach of functional or personal immunities before the Court, or whether article 27 declaratorily codifies the limits of such immunities for core crime trials before international courts.
 - A variant of this ‘waiver’-theory also holds water when the Court goes after *beneficiaries of Non-Party State immunities*, if this state formally accepts the exercise of jurisdiction by the Court with respect to the crime in question (article 12(3)). This acceptance can be considered a retroactive waiver of immunities so that, once again, one does not have to probe whether article 27 deviates from customary international law on functional or personal immunities or whether, in contrast, it spells out the inherent limitations of these immunities when it comes to prosecutions before international criminal courts.
 - Only marginally more problematic are cases where the Court wishes to prosecute *beneficiaries of Non-Party State immunities* (e.g. *the head of a Non-Party State*) after a referral by the Security Council acting under Chapter VII of the UN Charter (article 13(b)).²³ Be it that this referral contains the (explicit or implicit) imperative to waive all immunities or that the Security Council constitutively activates the ‘irrelevance of official capacity’-regime under article 27 by referring a situation to the Court in order to uphold international peace, in light of both lines of reasoning functional and/or personal immunities do not hinder the Court from meting out international justice (see *infra* mn 25).
 - The scenario where one finally has to ‘step up to plate’ can be found in article 12(2)(a), i.e. when the Court wants to prosecute the beneficiary of a Non-Party State immunity who allegedly committed core crimes *in the territory (or on a vessel or an aircraft) of a State Party*. In this scenario, because an international treaty like the Rome Statute cannot bind Non-Party States,²⁴ the Court’s (exercise of) jurisdiction can only be reconciled with public international law²⁵ if one accepts the view that articles 27(1) and (2) are but codifications of the current state of customary international law.²⁶ This argument can be termed the ‘*international court limitation of immunities ratione materiae o personae*’, an argument that rests on two aspects: first, on customary international law actually not granting (or foreseeing an exception to) functional and/or personal immunity before an international criminal court; and second, on the Court being such an international criminal court proper, i.e. it being more than a multilateral institution deriving its legitimacy and *ius puniendi* solely from the States Party.²⁷
- 7 The identification of the current state of play of customary international law is a volatile and delicate business at best, especially in light of the recent practice of African States and its legal effect,²⁸ and will be left to the individual annotations to article 27(1) und (2) (see *infra* mn 16 and 23 et seq.). Yet generally, and by way of a final preliminary remark, it has to be noted that we consider **the Court an organ of the international community** and thus an international criminal court proper. As such, it can, on an abstract level, partake in any

States. Only because this individual is German does not allow Germany to dispose of his U.S. immunity *ratione personae* as it sees fit.

²³ As to the *Al Bashir* Case see e.g. Akande (2009) 7 *JICJ*, 333 et seq.; *id.* (2012) 10 *JICJ*, 299 et seq.; Burghardt and Geneuss (2009) *ZIS* 126, 139 et seq.; Kiyani (2013) 12 *ChineseJIL* 467 et seq.; Ssenyonjo (2010) 59 *ICLQ* 205 et seq.

²⁴ See article 34 Vienna Convention on the Law of Treaties.

²⁵ And this should indeed be an imperative for any interpretation of the Statute.

²⁶ See Holvoet, in: De Hert et al. (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013), article 27 at 3.2.2.

²⁷ On the foundation of the ICC’s *ius puniendi* see Ambos (2013) 33 *OJLS* 293, 298 et seq.

²⁸ On the immunity provision in the AU Amendment Protocol see Tladi (2015) 13 *JICJ* 1.

possible international criminal court exceptions to functional or personal immunities. As elaborately argued and concluded by Kreß/Prost in this Commentary:

‘The facts that the ICC Statute has attracted a very significant number of ratifications, that the Security Council has referred two situations threatening international peace and security to the ICC for investigation and that the UN have endorsed the vision behind article 2 of the Statute through the conclusion of the Relationship Agreement with the ICC, add further weight to the view that the ICC on substance, and despite its formal creation by treaty, derives its mandate from the international community. As a matter of principle, it is therefore possible to draw a distinction between national criminal proceedings and proceedings for the ICC with respect to international law immunities.’²⁹

II. History and drafting process

The historical development of article 27 has to be seen in light of the complex **context of individual criminal responsibility under international criminal justice** together with a variety of direct and indirect enforcement mechanisms. Core crimes are typically committed by direct or indirect participation of persons acting in their official capacity, for instance, military commanders, taking an active part in the commission of such crimes or by ordering their subordinates to carry out a criminal act, for instance by killing a prisoner of war or an unarmed civilian. Contrary to an international trend to derogate immunity of state officials, including for acts committed in the name of the state (see mn 9 et seq.), at least Head of State immunity and the immunity of the most senior representatives of the state in criminal proceedings is still very much accepted on the national level, as many cases illustrate.³⁰ Accordingly, article 98 was accepted as a political compromise at the Rome Conference to square the circle so as to, on the one hand, effectively fight impunity and, on the other hand, to honor the rationales of immunities *ratione materiae o personae*.

As to the historic roots of article 27, the killing of a prisoner of war or of an unarmed civilian by a military official had already been recognized in the Hague Conventions, for individuals for instance in article 41 of the 1899 Convention with regard to the violation of conditions of an armistice and with regard to commanders in articles 2 and 6 of the 1907 Convention³¹. – In addition, an International Investigating Commission established by the Carnegie Endowment for International Peace with the task of searching for the causes and the responsibility for the Balkan Wars 1912 and 1913, confirmed the necessity of such regulations. It concluded in its report that with regard to all atrocities committed in these wars, one word from those in power would have stopped all cruelties committed during belligerent struggles³². Against this background it was almost unavoidable that after the First World War the Versailles Peace Treaty provided for the individual responsibility of the former German Emperor William II., a Head of State and Government³³. From that time on it became more and more undisputed that Heads of State and Government, their freedom from criminal responsibility dating from a time when Heads of State personified the state, could no longer hide behind the – at that times – almost absolute sovereignty of the state. This lack of immunity was even accepted for cases in which such persons were acting in their official capacity and therefore ‘in the name and on behalf’ of the state they represented. Even though the former Emperor William II. could not be put to trial, because he was not extradited by the Netherlands, the idea of holding Heads of State or Government responsible

²⁹ Kreß/Prost, *Article 98*, mn 29 (with further references, including to opposing views).

³⁰ For an overview cf. Kloth, *Immunities and the Right of Access to Court Under Article 6 of the European Convention of Human Rights* (2010) 108.

³¹ See Triffterer, *Dogmatische Untersuchungen zur Entwicklung des Materiellen Völkerstrafrechts seit Nürnberg* (1966) 85 et seq.; 1996 ILC Draft Code, commentary (1) to article 6.

³² See Carnegie Endowment for International Peace, Division of Intercourse and Education, *Report of the International Commission to inquire into the causes and conduct of the Balkan Wars*, Publication No. 4 (1914). Online available at <<https://archive.org/details/reportofinternat00inteuoft>> accessed 4 March 2015.

³³ See Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (1952) 41 et seq.

has ever since then been continuously promoted. It is based on the proposition that they are the persons who have the authority to order plans and policies involving crimes of an exceptional gravity and magnitude. They have 'the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes' by abusing 'the authority and power entrusted to' them³⁴. This knowledge based on practical experience was the reason why as early as in the middle of the 1920 s the ILA Draft provided that an official position of an individual as Head of State or Government should not preclude his criminal responsibility under international criminal law.³⁵

10 After the Second World War, the increasing acceptance of this principle was more precisely expressed in VII of the Charter of the Nuremberg Tribunal:

'The official position of defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'

As the IMT famously held:

'The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings'³⁶.

Corresponding provisions are contained in VI of the Charter of the Tokyo Tribunal as well as in article 4 Control Council Law No. 10 even though the first did not make a specific reference to the position of the Head of State, presumably because of the (political) decision not to indict Emperor Hirohito. In accordance with its Charter the Nuremberg Tribunal rejected several times the plea of act of state and that of immunity. The argument that persons carrying out acts of state could not be held individually responsible 'but are protected by the doctrine of sovereignty of the State' was expressly rejected as not being applicable 'to acts which are condemned as criminal by international law'. It was emphasized that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law³⁷.

These judgments were the basis for the Nuremberg principles unanimously confirmed on 11 December 1946 in Resolution 95 (I) of the General Assembly of the UN and in detail formulated and adopted by the ILC in 1950. They differed slightly in wording but not in substance except for the fact that the words 'or mitigating punishment' were no longer included³⁸. Nuremberg principle III was the basis for the recognition of the irrelevance of official position in article IV of the Genocide Convention and for article 3 of the 1951 ILC Draft Code, which recognized this responsibility in the same way except that it substituted a general reference to 'responsibility under international law' with 'any of the offences defined in this code'³⁹. Article 3 of the 1954 ILC Draft Code corresponds textually with the 1951 and in substance with other drafts. This Draft Code, submitted with commentaries to the Sixth

³⁴ See 1996 ILC Draft Code, commentary (1) to article 7.

³⁵ Article 21 of the 1926 ILA Draft. See ILA, *Report of the Thirty-Fourth Conference held at the Imperial Palace and the Chamber of Commerce, Vienna, August 5-11, 1926* (London: Sweet & Maxwell, Ltd., 2 & 3 Chancery Lane, W.C.2., 1927).

³⁶ *In re Goering and others*, IMT, Judgment, 1 October 1946, in: *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22* (22nd August 1946 to 1st October 1946) 447.

³⁷ See 1996 ILC Draft Code, commentary (3) to article 7; see also Triffterer (1989) *RIDP* 61 *et seq.* in the General Report on 'International Crimes and Domestic Criminal Law. Efforts to Recognize and Codify International Crimes'.

³⁸ See Triffterer, *Dogmatische Untersuchungen zur Entwicklung des Materiellen Völkerstrafrechts seit Nürnberg* (1966), 15 *et seq.* and 75 *et seq.*, and for the first formulation of the Nuremberg Principles, (1950) *YbILC* 374 *et seq.*

³⁹ For a commentary to article 3 see (1951) *YbILC* 137.

Session of the General Assembly in 1954 was postponed by the General Assembly until the Special Committee for drafting a definition of aggression had submitted its report. However, it took a further seven years after a definition of aggression has been adopted by consensus in 1974 for the General Assembly to once again invite the ILC to resume its work on the Draft Code. One of the first articles drafted after the special Rapporteur had delivered seven reports concerning the subject of jurisdiction *ratione personae* and *ratione materiae* was a new and relevant article 11⁴⁰. It differed from former drafts mainly because it mentioned heads of state as mere examples ('in particular') in order to broaden the scope of the provision. The Commission referred expressly to 'heads of States or Government, since they have the greatest power of decision'. But the retention of the words 'official position of an individual' should clarify that 'the article also relates to other officials'. The ILC saw in this broadening 'the real effect of the principle' so that the official position of an individual 'can never be invoked as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions'⁴¹. It was further stated that the change from the official position to

[t]he words 'he acts' apply to the exercise of both legal powers and factual powers. If a person was acting as though he were head of State or Government or a government official when in fact he was not, he would incur criminal responsibility just as much, if the acts he committed were criminal acts under the code'⁴².

The wording of article 11 was continued until the 1991 Draft Code was delivered to the General Assembly⁴³. By the early 1990 s, the norm was so sufficiently settled in international law as to be incorporated into the statutes of both the ICTY and the ICTR.⁴⁴

At the same time, mainly during the 1980's, the work of the ILC was accompanied by corresponding NGO endeavors, especially of the AIDP and the ILA. In 1972 the Foundation for the Establishment of an International Criminal Court presented its Bellagio-Wingspread Draft Statute. It contained in article 22 a very comprehensive regulation headed, 'Jurisdiction as to Persons', which covers all relevant aspects with the wording: 'The Court shall be competent to judge persons whether or not they are constitutionally responsible rulers, public officials or private individuals'⁴⁵. M. Cherif Bassiouni on behalf of the AIDP in his Draft Code 1980 emphasized: 'A person who commits a crime is not relieved from responsibility by the sole fact that he was acting in the capacity of Head of State, responsible government official, acting for or on behalf of a state', a formulation which was repeated in his 1987 Draft⁴⁶. In 1986, the ILA at its Seoul Conference dealt with this subject matter, if not expressly, but as an adjunct under the heading 'Execution of public duty', it nominated as indispensable prerequisites for justification: 'acting on reasonable grounds and proportionality between force and purpose' and that '[a]ct under military law – which must of course be properly applied – and the lawful conduct of war are generally justified here'⁴⁷.

⁴⁰ See for this historical development, ILC Report on the Work of its Forty-Second Session, 1 May–20 July 1990, UN Doc. A/45/10 (1990), chapter II with references in fn. 13.

⁴¹ See ILC Report on the Work of its Fortieth Session, 9 May–29 July 1988, UN Doc. A/43/10 (1988); (1988) *YbILC*, Part 2, 71.

⁴² *Ibid.*

⁴³ For the repetition of this Draft during all the years from 1989 to 1991 see 2 *YbILC*, Part 2, 67 (1989); for the 1991 ILC Draft Code see also Bassiouni (1993) 11 *NEP* 197.

⁴⁴ Article 7(2) ICTYSt. provides: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.' An identical provision appears in Article 6(2) ICTRSt., and a similar one in Article 6(2) SCSLSt.

⁴⁵ See 1st and 2nd International Criminal Law Conferences, *The Establishment of an International Criminal Court* (1972) 18.

⁴⁶ Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) 95.

⁴⁷ See *Addendum to the Seventh Interim Report of the International Criminal Law Committee*, Annex C Protocol II, III 4 and Annex D Explanatory Report to Protocol II on Defences, ad III 4, at 12 and 18.

- 12 The 1991 Draft Code and especially its relevant article 13 (formerly 11) received new attention in the context of the discussion of the **1994 ILC Draft Statute**. Since the latter contained no regulation on this question, even though the Statutes for the ICTY 1993 and the ICTR 1994 had meanwhile confirmed the principle of individual criminal responsibility irrespective of official position in their articles 7 and 6 respectively, a group of experts discussing the 1994 ILC Draft Statute proposed in the context of ‘Open questions and elements to be regulated in a General Part’ to deal with this aspect by reference to article 7 of the ICTY Statute. The result was a proposed article 33–2, the second paragraph of which corresponded with article 13 of the 1991 ILC Draft Code⁴⁸. This proposal was aimed at clarifying that criminal responsibility would also attach to the official levels below Heads of State or Government. In addition, the original Nuremberg formulation was emphasized, whereupon it was expressly reiterated that an official position and responsibility could not of itself constitute a ground for mitigating punishment. In this context it should also be kept in mind that those abusing their power are quite often even more culpable than their subordinates who actually only fulfill the demands of their governments or commanders. The 1996 ILC Draft Code emphasizes the historical tendency by substituting ‘particularly’ with the words ‘even if he acted as head of State or Government’ in article 7. The commentary to this article is in substance the most comprehensive, since it refers to many of the aspects mentioned in former drafts and especially to the background against which it was drafted.
- 13 **Broad agreement on the irrelevance of official capacity** made it neither necessary nor advisable to express an opinion on the question of whether immunity for Heads of State or Government under national or international law could influence the application of this principle. It appeared so obviously predominant that reference in some of the international documents to the irrelevance of official capacity for the exercise of jurisdiction of a permanent International Criminal Court was thought to be superfluous. This is the reason why the ILC mentioned rather generally that ‘the official position ... can never be invoked as a circumstance absolving him from responsibility or conferring any immunity upon him’⁴⁹. The 1994 ILC Draft Statute makes no reference either in article 33 or in its commentary to immunity. But from the wording ‘Applicable law’, it appears in article 33(1) that ‘principles and rules of general international law and special treaties’ shall be applicable only ‘insofar as not contradictory to it (the Statute)’. Equally article 7 of the ILC 1996 Draft Code does not mention immunity. However the commentary to this provision reiterates that:

‘[I]t would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security [...]. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence (there fn 56). It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility’⁵⁰.

- 14 The endeavors within and without the UN to draft a Statute for a Permanent International Criminal Court were of great help to the Security Council when it decided to establish the ICTY and the ICTR. *Vice versa*, both *ad hoc* Tribunals promoted the idea of a permanent International Criminal Court. The ILC Draft Statute 1994 – and in a way also the Draft Code 1996 – mark the end of a historical development which partly overlaps with the **immediate drafting process of the Rome Statute**. The latter actually started when the 1995 *ad hoc* Committee on the Establishment of an International Criminal Court reviewed the 1994 ILC

⁴⁸ See the Siracusa respectively the Updated Siracusa Draft; the relevant parts are reprinted in Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 942 *et seq.*

⁴⁹ (1988) 2 *YbILC*, Part 2, 71.

⁵⁰ See for the quotations 1996 ILC Draft Code, commentary (1) and (6) to article 7.

Draft Statute. It merely mentioned ‘irrelevance of official position’ in Annex II to its report, which contained ‘guidelines for consideration of the question of general principles of criminal law’. In addition, it ‘drew attention to the principles of general criminal law addressed in article 7 of that Statute’ (for the ICTY) and to the fact that some delegations ‘indicated that they had not yet taken a final position on this question’⁵¹. When the Preparatory Committee continued this work, it summarized its first two sessions in August 1996 in Vol. I of its Report, expressing broad consensus ‘for the Statute to disallow any plea of official position as head of State or government or as a responsible government official’. It left undecided the question of whether ‘this issue could be included in relation to ‘defences’ and the question of diplomatic or other immunity from arrest and other procedural measures, taken by or on behalf of the Court’⁵². Later, in Vol. II, the Preparatory Committee proposed substituting the introductory wording in article 13 of the ILC Draft Statute, ‘the official position of an individual ...’ with a bracketed sentence according to which the Statute ‘shall be applied to all persons without any discrimination whatsoever’. In addition, a new paragraph denying a ‘plea of immunity for jurisdiction irrespective of whether on the basis of international or national law’ was drafted. The second proposal, headed ‘official capacity of the accused’ included new provisions dealing with ‘an elected representative and ... an agent of the State’ as well as ‘a member of ... parliament’ as additional examples of persons whose official capacity could in no case (per se) relieve them from criminal responsibility. In paragraph 2 it was stated that ‘[t]he special procedural rules, the immunities and the protection attached to the official capacity of the accused and established by internal law or by international conventions or treaties may not be used as a defence before the Court’⁵³. At its third session in February 1997 the Committee combined the two proposals and included an article B (e), ‘Irrelevance of official position’, wherein it eliminated the brackets for sentence 1 and ‘an agent of the State’, and rephrased paragraph 2 to read ‘[a]ny immunities or special procedural rules ... may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person’. The Committee pointed out in a footnote that paragraph 2 needed further discussion ‘in connection with procedure as well as international judicial cooperation’⁵⁴. Early in 1998, the Zutphen Draft repeated this article which it redesignated article 18 and included the same footnotes⁵⁵ as did the Consolidated Draft agreed upon at the sixth (and last) session of the Preparatory Committee in April 1998⁵⁶. How close the exchange of ideas between the UN, the AIDP, for instance, and other non-governmental organizations was can be discerned from the Model Draft Statute presented on behalf of the AIDP 1998 by M. Cherif Bassiouni and Leila Sadat Wexler⁵⁷. This Model Draft Statute eliminated from the above mentioned proposals the words ‘this Statute shall be applied to all persons without any discrimination whatsoever’. It was argued that the existence of a similar more general clause in article 23 – now article 25 – made the words redundant. Besides, those words were ‘inaccurate [...], since application of the criminal law does involve discriminating between persons on the basis of their guilt and innocence’⁵⁸.

The discussion at Rome dealt with all aspects considered during the historical development and the drafting process, including the references in the commentary to the Model Statute which underscored that no distinction ‘based on official capacity’ would be recog-

⁵¹ See Ad Hoc Committee Report, para. 87 and Annex II B 1, p. 58. See for the mutual support of the UN and non-governmental organizations, Triffterer, 2nd edition, *Preliminary Remarks*, mn 8 *et seq.*

⁵² 1996 Preparatory Committee I, § 193, p. 44; reprinted in Bassiouni (ed.), *International Criminal Court Compilation of United Nations’ Documents and Draft ICC Statute before the Diplomatic Conference* (1998) 411.

⁵³ See 1996 Preparatory Committee I, p. 85.

⁵⁴ See Preparatory Committee Decisions Feb. 1997, Annex II, at 22 with fn. 14.

⁵⁵ See Zutphen Draft, at 54 and 55 with fn. 86.

⁵⁶ See Preparatory Committee (Consolidated) Draft, at 60 with fn. 9.

⁵⁷ See Model Draft Statute for the International Criminal Court based on the Preparatory Committee’s text to the Diplomatic Conference, Rome, 15 June–17 July 1998, AIDP, (1998) 13*ter* NEP.

⁵⁸ *Ibid.*, at 44 *et seq.*

nized. The broad scale of examples listed in article 27 was preferred but as a compromise it was accepted that article 27 should only be applicable to ‘criminal responsibility under this Statute’⁵⁹. A compromise with regard to article 27 was rather easy to achieve, because of the excellent and thorough preparation conducted during the whole drafting process. In addition, part of the discussion had been transferred to the working group on Part 9, International cooperation and judicial assistance, which also had to deal in the context of article 98, ‘Cooperation with respect to waiver of immunity and consent to surrender’, with State obligations to respect immunities⁶⁰. Since this working group had to deal with the question of how the duty of States Parties to fulfill requests of the Court corresponded with their duty not to violate international treaties and the rules granting immunity on the domestic level, it was proposed to clarify within the context of article 27 both aspects: excluding exemption from criminal responsibility for crimes listed in this Statute and solving possible conflicts in the duties of states and preventing both from conflicting with each other. Correspondingly and as a compromise to avoid prejudicing principles and immunities applicable within the national criminal justice systems, it was clarified by article 27 that notwithstanding ‘[i]mmunities or special procedural rules’ an individual criminal responsibility for crimes under international law exists for everybody, including all persons acting in an official capacity whatsoever, paragraph 1, and that such ‘[i]mmunities or special procedural rules ... shall not bar the Court from exercising its jurisdiction over such a person’, paragraph 2.

B. Analysis and interpretation of elements

I. Paragraph 1

1. The irrelevance of immunity *ratione materiae* before international courts as an expression of customary international law

- 16 Under article 27(1), ‘official capacity ... shall no in case exempt a person from criminal responsibility under this Statute’. This effectively renders inapplicable any act of state defense or any immunity *ratione materiae* for core crimes committed in the name of a state (be it a Party or a Non-Party State). As rightly noted by Ambos, ‘[t]here is general agreement that [article 27] is only declaratory of international customary law as far as it excludes functional immunity’⁶¹. Indeed, since Nuremberg there is a long line of national (the most prominent of course being the *Pinochet*⁶²) as well as international judicial pronouncements to that end.⁶³ While the core crime exception to immunity *ratione materiae* (state officials do not enjoy functional immunity for crimes committed for or in the name of the state) may not be fully settled with regard to criminal proceedings before national courts,⁶⁴ and may indeed be treated as an open question,⁶⁵ acting as a state official does not relieve an individual of his or her core criminal responsibility before an international court like⁶⁶ the ICC. Customary international law hence knows an exception to the

⁵⁹ See mn 15.

⁶⁰ See Kreß/Prost, *Article 98*, mn 1 *et seq.*

⁶¹ Ambos, *Treatise* (2013) 414.

⁶² *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 3), House of Lords, [2000] AC 147, [1999] 2 All ER 97.

⁶³ As was rightly pointed out by Kreß/Prost, *Article 98*, mn 19. For the latest analysis of case law see Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2015) 167 *et seq.* with extensive references.

⁶⁴ Cf. Kreß/Prost, *Article 98*, mn 20 rightly pointing out that the ICJ has failed to authoritatively settle the issue in the Arrest Warrant Case.

⁶⁵ Cf. Robinson, in: Cryer *et al.*, *Introduction* (2014) 551.

⁶⁶ See mn 7.

traditional immunity protection *ratione materiae*; or perhaps more to the point, because it shifts the ‘burden of proof: customary international law does not provide state officials with functional immunity before an international court like the ICC, i. e. does not, as a default rule, exempt state officials from international criminal responsibility with regard to the most serious offences against international values and interests. Although delicate, because the determination of customary international law should not be overtly policy orientated, all of this is also normatively sound, because an international criminal court acting as an organ of the international community is not in conflict with the *par in parem non habet imperium*-principle.⁶⁷

2. Equal application ‘to all persons without any distinction based on official capacity’

The basic idea that **no one**, including those acting for the state, and also including nationals of Non-Party States, is **exempt from criminal prosecution by the Court** is aptly expressed in the formula that the ‘Statute shall apply equally to all persons without any distinction based on official capacity’. This is also put forward in article 25(1), which stipulates that all persons committing ‘a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute’. It is this endeavor to bring to court all offenders participating in one way or another in the commission of the most serious crimes of concern to the international community as a whole, which has also shaped – in more detail – article 25(3). The principle is addressed by a few other articles, especially article 28 (‘Responsibility of commanders and other superiors’) and article 33 (‘Superior orders and prescription of law’). Together with article 25(3), these articles regulate criminal responsibility for the entire scale of possible crimes under international criminal law and the mode of engagement in their commission article 27 adds a further aspect to this coverage by guaranteeing that such appearances, which include abuse of power, will be brought under the jurisdiction of the Court to avoid impunity. Thus, article 27 is one of the clearest manifestations in the Statute of the determination in paragraph 5 of the Preamble ‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’.

In relating to ‘**all persons**’, article 27(1) is addressed not only to state officials, but also *inter alia* to members of international organizations etc.⁶⁸ Article 27(1) is formulated openly and in a non-exhaustive manner; the second sentence of paragraph 1 only gives examples (see *infra* mn 19) of groups of persons included (like heads of state etc.). – That the Statute shall apply ‘**equally**’ clearly refers to a ‘distinction based on official capacity’ only. The drafting history indicates that this formula does not exclude distinctions based on individual culpability or the intensity of participation etc.⁶⁹. – According to article 27(1), ‘**official capacity**’ does not exempt anyone from criminal responsibility nor does it mitigate this responsibility. Again, the term ‘official capacity’ is formulated in an open manner in order to describe an overall concept (as illustrated by the non-exhaustive examples in paragraph 1 sentence 2). This legislative technique aims at including all official capacities that – according

⁶⁷ *Inter alia* for the reasons put forward by Kreß/Prost, *Article 98*, mn 19, the impeding and notorious Article 46A*bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights does not change this current state of customary international law, the more, since the African Court of Justice and Human Rights is a regional, not an international criminal court acting on behalf of the international community.

⁶⁸ It has to be further kept in mind that the Zutphen text of the corresponding article 18 was drafted a little more narrowly than the present paragraph 1, in that the types of persons with which it was concerned were listed exhaustively. They did, however, not cover the position of the removal of immunities that subsist for persons in respect to their membership of international organisations as well as in respect of States. In Rome, Article 18(2) of the Zutphen Draft was considered to cover such persons. Hence, it now appears that the importance of paragraph 2 relates to its interaction with article 98.

⁶⁹ See mn 15.

to the traditional Westphalian notion of immunity of acts of state – once allowed individuals to hide behind the shield of the sovereignty, and thus to attain impunity for crimes committed in the name of the state. The exercise of ‘official capacity’ encapsulates conduct approved or authorized by an internationally recognized authority (like a state or an international institution). In effect, the concept needs to be interpreted broadly in order to express that no official position derogates personal criminal responsibility for the crimes under the jurisdiction of the Court. For example, all military commanders, from the top to the lower level, are normally acting in official capacity (as long as they do not go ‘rogue’ and act ‘privately’).⁷⁰

3. ‘In particular’ ...

- 19 The ‘In particular’ of paragraph 1 sentence 2 hails that this provision only contains a **non-exhaustive list of examples** for official capacities that are in turn of no relevance when deciding on the criminal responsibility of the accused. This list of examples includes the most typical and those whose political or administrative power makes them most susceptible to grave abuse through the commission, in every imaginable way, of crimes under the Statute. Aiming to express what is in any event irrelevant dispenses with the need to differentiate between legally accepted, *de facto* exercised and mere purported exercise of official capacities. This is the reason why one of the early proposals, to specify that the respective person had to act in his official capacity⁷¹, was finally rejected. It was argued that article 27 was applicable to both, legal and *de facto* powers, because ‘[i]f a person was acting as though he were Head of State or Government or a government official when in fact he was not, he would incur criminal responsibility just as much, if the acts he committed were criminal acts under the code’⁷².
- 20 Article 27(1) mentions the ‘Head of State or Government, a member of a Government or parliament, an elected representative or a government official’: ‘**Head of State or Government**’ presupposes two positions, which often are held by different persons, as in Great Britain, Germany and Austria, but may be also exercised by one person like the president of the USA and France. Both expressions are mentioned alternatively; therefore, if occupied by one person, article 27 is equally applicable. The way in which a person becomes a ‘Head of State or Government’ is not important. Decisive is that he or she holds such a position in a state or government which is either established according to the law of the respective State or, if not, is at least broadly acknowledged by the international community. There can be no doubt that such a position is recognized for all persons heading a state or a government of Member States of the UN. Besides, for reasons given in mn 19, persons purporting to act in an official capacity fall under the jurisdiction of the Court and are included in the concept of article 27.⁷³ – ‘**Members of a Government or parliament**’ includes all persons having a seat in one of these two institutions, be they at a federal, state or local level and independent of whether such a person has been elected or nominated etc. Parliament is in general the expression for the (not necessarily democratically elected) body of representatives of the population of a state on the national level. But the level of any legislative body is not decisive. If it is a national or a state parliament or any other parliament on a local level as in cities or villages, all those persons may be included, because even if accepted as persons with an official capacity, article 27 provides

⁷⁰ Also cf. *Prosecutor v. Blaškić*, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29. October 1997, paras. 38 and 41; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, Trial Chamber, 10 December 1998, para. 140 and *Prosecutor v. Milošević*, Decision on Preliminary Motions, Trial Chamber, 8 November 2001, paras. 26 *et seq.*

⁷¹ See the 1988 ILC Report, (1988) *YbILC*, Part 2, 71.

⁷² *Ibid.*

⁷³ An example for the ‘top level’ is the indictment and trial of the ICTY in the case of the Former President of the FRY, Slobodan Milošević. He was indicted on the basis of individual responsibility (Article 7(1) ICTYSt.) and superior responsibility (Article 7(3) thereof). See *Prosecutor v. Milošević*, Case No. IT-01-54, Indictment, 8 Nov. 2001.

that their capacity is irrelevant. – Including the examples ‘**elected representative or a government official**’ takes care of the development of democratic institutions. These examples do not mark the lowest level but address the lower ranks of the hierarchy.⁷⁴ Both are broad enough concepts to cover all possibilities not falling under the other examples mentioned in paragraph 1. Elected means not only elected by the citizens on the national and on all other state levels but also an election by one of the governmental institutions or organs, for instance of a special Government ambassador to go abroad on a peace keeping mission or a lower ranking state officer. Persons from the last group are only government officials when supplied with the associated functions and powers. The first deals with a group different from the examples of members of parliament by excluding those, who have been appointed. This distinction also assists to differentiate the next category of ‘government official’. The wording clarifies that the limiting adjective ‘elected’ refers only to representative and not to a government official. The government official therefore may have reached his or her official capacity by being elected or appointed. Here again a broad conception poses no danger to the integrity of the criminal justice established under the Statute, because the enumeration in sentence 2 of paragraph 1 has only an exemplifying character and the general rule of sentence 1 states that persons having any ‘official capacity’ on the international or on the domestic level, should be treated equally in the sense that the nature of their capacity is irrelevant with regard to their responsibility under international criminal law.

4. ‘shall in no case exempt ... from criminal responsibility’

This formulation confirms, by way of the very strict wording (‘**in no case**’), that there is no exception to the irrelevance of official capacity: any official capacity a person may have by law or by fact, in reality or purported, is irrelevant as concerns the possible criminal responsibility of that person before the Court for crimes falling under its jurisdiction. The procedural consequence of this rule is that the Court does not have to make certain findings on the facts with regard to the position the defendant has held at the time when he committed the crime (except of course, this position is relevant in any other way, e.g. in order to establish command responsibility or to aggravate a sentence due the high official position of the accused). Rather it is, in cases of doubt, sufficient to state *ex hypothesis* that even if the accused held this or that position (or purported to act in an official capacity) it would not exempt him or her from criminal responsibility⁷⁵. Of course, persons falling under the broad conception of paragraph 1 have to be treated like all other suspects under the Statute and, therefore, may be free from criminal responsibility if, for instance, they lack the mental element required for a specific crime. 21

5. ‘in and of itself’ no ‘ground for reduction of sentence’

Article 27(1) forbids any mitigation of the sentence on the ground alone (‘**in and of itself**’) that the convicted person acted in an official capacity or believed he or she was doing so. On the contrary, the fact that a person abused his or her power may frequently be evaluated as an aggravating circumstance⁷⁶. In effect, article 27(1) leads to the ordinary sentencing process under article 78(1) and rule 145 RPE, where mitigating and aggravating circumstances are to be balanced, including that core criminal conduct was carried out under the flag of official 22

⁷⁴ As an example for a ‘government official’ at the lowest local level can serve the trial against Jean-Paul Akayesu, the mayor of Taba, who was sentenced on 2 October 1998 to twenty years of imprisonment for committing crimes against humanity, by superior responsibility mainly by non interfering to prevent their commission. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, Trial Chamber, 2 October 1998 and *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001.

⁷⁵ See also Triffterer, in: Buffard et al. (eds.), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008) 571 (especially at II.A und II.B.).

⁷⁶ See, for instance, ILC Report on the Work of its Thirty-Eighth Session, 5 May-11 July 1986, UN Doc. A/41/10 (1986), para. 170.

capacity. The sentencing assessments are based on the requirements of justice as far as the gravity of the crime and the individual circumstances of the convicted person are concerned. With respect to the latter, it is conceivable that the individual circumstances of the convicted person' lead to a 'reduction of sentence', e. g. because the official capacity wielded by him or her were overpowering⁷⁷. However, rule 145(2)(b)(ii) RPE explicitly lists 'official capacity' as a possible aggravating circumstance; this holds true all the more when this coincides with an 'abuse of power' (rule 145(2)(b)(ii) RPE). The higher up the convicted person was in a core criminal organization and the more official capacity he or she wielded, has also to be given consideration according to rule 145(1)(c) RPE.

II. Paragraph 2

1. The irrelevance of immunity *ratione personae* before international courts as an expression of customary international law?

- 23 While it is more or less safe to assume that immunity *ratione materiae* (of any incumbent or former state etc. official) is irrelevant before an international court like the ICC,⁷⁸ and that article 27 is thus but a declaration of customary international law, it is very much open for debate whether the same holds true with regard for the irrelevance of immunity *ratione personae* under article 27(2). The notion that personal immunity is irrelevant before international courts in general has been advanced by the SCSL in *Taylor*. In qualifying itself an international criminal court proper, and in drawing inter alia on the ICJ Arrest Warrant decision, the SCSL Appeals Chamber (in-)famously held:

'[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court. We accept the view expressed by Lord Slynn of Hadley that 'there is ... no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or Head of State or other official or diplomatic immunity when charges are brought before international tribunals.' In this result the Appeals Chamber finds that article 6(2) of the [SCSL-]Statute is not in conflict with any peremptory norm of general international law and its provisions must be given effect by this court. We hold that the official position of [Charles Taylor] as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court.'⁷⁹

In deviating from the rationale advanced in the *Al Bashir* Arrest Warrant Decision (see *infra* mn 25), PTC I adopted the *Taylor* approach (i. e. this international court exception to immunity *ratione personae*) in its *Malawi Decision in Al Bashir*. There, the Chamber rejected the argument

'that international law affords immunity to Heads of States in respect of proceedings before international courts' on the ground [on the ground, O.T./C.B.] that the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction.⁸⁰

⁷⁷ Consider, for instance, a case where the convicted person was just eighteen years of age when the crime was committed and that he was completely unprepared for and overawed by the power transferred to him in a position that nevertheless exposed him to a chain of command and the situation envisaged by Article 33.

⁷⁸ Gaeta (2003) 1 *JICJ* 186, 194.

⁷⁹ *Taylor*, SCSL, Rendering of decision on motion made under protest and without waiving immunity accorded to a head of state requesting the Trial Chamber to quash the indictment and declare null and void the warrant of arrest and order for transfer of detention 23 July 2003 (immunity motion), Appeals Chamber, 31 May 2004, paras 51 *et seq.* [SCSL-Doc SCSL-03-01-1-059]. For well-founded critique of this decision see Robinson, in: Cryer et al. (eds.), *Introduction* (2014) 563 with further references; Frulli (2004) 2 *JICJ* 1118 *et seq.*

⁸⁰ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, PTC I, 12 December

The notion that customary international law does not grant the most senior officials of a state immunity *ratione personae* before international courts has found both scholarly acceptance⁸¹ and rejection.^{82, 83} Both positions advance sensible arguments, and as always, the identification of the current state of play of customary international law is delicate. This holds true all the more, since the methodology of identifying the pertinent custom is far from clear as well. Is one to look for custom granting senior state officials immunity *ratione personae* before international courts? Or for custom making it an exception that state officials, who do enjoy personal immunity before national courts, do not do so before international courts?⁸⁴ Even when accepting the latter and predominantly held position, an international court exception for immunity *ratione personae* should be approached with an **open mind**. *First*, it has to be noted that this does not pre-determine article 98; it is thus very well possible to believe that the irrelevance of personal immunity before the Court does not extend to the horizontal relationship between a State requested for cooperation and the Non-Party State granting personal immunity (e.g. to its head of state);⁸⁵ it is thus unnecessary to read article 27(2) or customary international law restrictively in order to uphold the very fabric and working order of inter-national relations between states. *Second*, the Special Rapporteur of the ILC on the subject of ‘Immunity of State officials from foreign criminal jurisdiction’ has supported the idea that ‘(i)mmunity from international criminal jurisdiction appears to be fundamentally different from immunity from national criminal jurisdiction’.⁸⁶ Normatively, this is not so much because the formula *par in parem non habet imperium* cannot be the rationale for personal immunity from international jurisdiction,⁸⁷ but rather because the international prosecution of an incumbent head of state or government or foreign minister, who is accused of core crimes, does not necessarily infringe upon diplomatic inter-state relations. In this respect it has to be noted that article 27(2) is not the place to delve into the peace versus/via justice debate, since the mere possibility to assume jurisdiction over an incumbent senior state official, who may in turn block peace building due to fear of international prosecution, must not be equated with the necessity to do so; an international court exception to immunity *ratione personae* hence does not pre-determine the peace versus/via justice debate. *Third and finally*, ‘[i]f further judicial rulings consistently support the proposition that personal immunity is no barrier before international courts, and that proposition is supported by State practice and *opinio iuris*, then such a rule could certainly become custom’⁸⁸.

As already mentioned in mn 6, the aforementioned debate is theoretically of the utmost importance, but its today’s practical bearing can be doubted as far as article 27 is concerned. Whether article 27(2) is an expression of customary international law is only relevant in an article 12(2)(b)-scenario, i.e. when the Court, without a Security Council referral, wishes to prosecute an individual benefitting from immunity *ratione personae* granted a Non-Party State, which has not accepted the Courts jurisdiction under article 12(3). Where the Court goes after the beneficiary of an immunity granted by a State Party or by a Non-Party State,

2011, paras. 18 and 36 [doc1287184.pdf]. One day later, on 13 December 2011, an identical decision was addressed to Chad [doc1384955.pdf].

⁸¹ See e.g. Gaeta (2009) 7 *JICJ* 315; Bantekas (2005) 10 *JCSL* 21, 41; Bianchi (1999) 10 *EJIL* 237, 261; Krefß/Prost, *Article 98*, mn 28 *et seq.* with further references.

⁸² See e.g. Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2015) 274 *et seq.*, 304 *et seq.*; Robinson, in: Cryer et al. (eds.), *Introduction* (2014) 562 *et seq.* with further references; Zappalà (2001) 12 *EJIL* 595, 605 *et seq.*

⁸³ Note that deciding on the reach of article 27 does not necessarily pre-determine the reach of Article 98.

⁸⁴ On this issue see Kreicker (2009) *ZIS* 350, 355.

⁸⁵ See Gaeta (2009) 7 *JICJ* 315.

⁸⁶ Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, A/CN.4/601, 29 May 2008, para. 103.

⁸⁷ As it was seemingly suggested by Kolodkin, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, A/CN.4/601, 29 May 2008, para. 103.

⁸⁸ As conceded by Robinson, in: Cryer et al. (eds.), *Introduction* (2014) 564.

which has accepted the Courts jurisprudence, the irrelevance of any personal immunity can be explained via its waiver by these states. And where the Court's jurisdiction is based on a **Security Council Referral**, the (fourth and most convincing) reasoning of PTC I in the *Al Bashir* Arrest Warrant Decision is sound in and of itself⁸⁹:

'[B]y referring [a] situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations [accepts] that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole'⁹⁰.

In the alternative, one may also argue that, when obliging all (including state) parties to a conflict to cooperate fully with the Court, the Security Council (at least implicitly) removes all personal immunities from the senior officials.⁹¹ This was indeed adopted by PTC II in a more recent ruling in *Al Bashir*⁹². Whatever the line of reasoning, the reconcilability of article 27(2) with customary international law does not become an issue, either because the Court can draw on the Security Council's activation of the Statute as a whole or because any immunity *ratione personae* is authoritatively waived by the Council acting under Chapter VII of the UN-Charter.

2. 'Immunities or special procedural rules ... shall not bar the Court from exercising its jurisdiction'

26 There is some controversy about the reach of paragraph 2, namely of the phrase the 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law'. As suggested in the previous edition, these immunities may include those *ratione materiae* and *personae*. Or one may distinguish between paragraph 1 capturing the former and paragraph 2 the latter (see mn 3). – In substance, it makes no difference whether such rules exclude criminal responsibility or only protect the respective person by a purely procedural rule against the exercise of domestic jurisdiction like arrest and prosecution before national courts. Since none of these rules are applicable, irrespective of whether they exist in national or in international law. Such rules include all *national* regulations even if they rank as constitutional law and all rules of general and special international law such as those contained in the Vienna Diplomatic Relations Treaty 1961, which deals, besides other Conventions, with the subject of immunities and privileges. It goes without saying that only those are relevant, which are attached 'to the official capacity of a person'. But here again, the structure of article 27 permits the Court to leave open in its finding (should it make a finding at all) the question of what kind of immunity or special procedural regulation may be applicable; all of them are irrelevant and, therefore, not material to the findings and the sentence.

27 All such rules and immunities 'shall not bar the Court from exercising its jurisdiction'. This formula comprehends that an official capacity does not exempt a person from criminal responsibility, nor shall such a position endow the person with impunity founded on procedural reasons. It thereby is, in principle, confirmed that the Court has jurisdiction in all these cases and can exercise it without for instance waiting for a waiver of immunity, which may in *national* jurisdictions be a condition precedent to activities within the criminal

⁸⁹ Concurring Robinson, in: Cryer et al. (eds.), *Introduction* (2014) 562; Holvoet, in: De Hert et al. (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013), Article 27, at 3.2.1, with further references, also to more critical authors.

⁹⁰ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC I, 4 March 2009, para. 45 [doc639096.pdf].

⁹¹ See Ambos, *Treatise* (2013) 416 with further references, including references to authors critical of this argument.

⁹² *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, PTC II, 9 April 2014, para. 29 [doc1759849.pdf].

justice system. This basic concept makes, at least in principle, decisions like the indictment of the ICTY against the former President of the FRY, Slobodan Milošević, inherent also for the Court. The Court has the competence to start an investigation and prosecution in order to find out, whether there is already reasonable ground for a suspicion against an individual person. Because only such an investigation can clarify whether there is a specific suspicion for a certain crime falling within the jurisdiction of the Court and whether – in case there is – the suspect may have acted in an official capacity.

Article 28

Responsibility of commanders and other superiors

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

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take the necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Literature: Abeyratne, R., 'Superior responsibility and the principle of legality at the ECCC', (2012) 44 *GeoWashLLRev* 39; Ambos' K., 'Superior Responsibility', in: A. Cassese *et al.* (eds.), *The Rome Statute of The International Criminal Court: A Commentary*, Vol. I (OUP 2002) 823; *id.*, 'Joint Criminal Enterprise and Command Responsibility', (2007) 5 *JICJ* 159; *id.*, 'Critical Issues in the Bemba Confirmation Decision', (2009) 22 *LeidenJIL* 715; Arnold, R., 'Command Responsibility: A Case Study of Alleged Violations of the Laws of War at Kham Detention Centre', (2002) 7 *JCSL* 191; *id.*, 'The "Means Rea" of genocide under the Statute of the International Criminal Court', (2003) 14 *CLF* 127; *id.*, *The ICC as a new instrument for repressing terrorism*, (Transnational Publishers 2004); *id.*, 'Military Criminal Procedures and Judicial Guarantees: The Example of Switzerland', (2005) 3 *JICJ* 749; *id.*, 'Book Review of Nybondas, M. L., "Command Responsibility and Its Applicability to Civilian Superiors"', (2013) 11 *JICJ* 943; Arnold, R. and Wehrenberg, S., 'Die Verantwortung des Vorgesetzten gemäss Art. 264 k StGB', (2013) 2 *MLLWR* (forthcoming); Aubert, J.F., 'La question de l'ordre supérieur et la responsabilité des commandants dans le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I) du 8 juin 1977', (2000) 770 *RICR* 109; Badar, M.E., 'Mens rea – Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunal', (2005) 5 *ICLRev* 203; Badar, M.E. and Karsten, N., 'Current Developments at the International Criminal Tribunals', (2007) 7 *ICLRev* 163; Bantekas, I., 'Contemporary Law of Superior Responsibility', (1999) 93 *AJIL* 577; *id.*, 'L'intérêt des États par rapport à la doctrine de la responsabilité des supérieurs', (2000) 838 *RICR* 391; *id.*, 'On Stretching the Boundaries of Responsible Command', (2009) 7 *JICJ* 1197; Bonafe, B.I., 'Find a proper role for command responsibility', (2007) 5 *JICJ* 599; Bothe, M., Partsch, K.J. and Solf, W.A., *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff 1982); Burnett, W.D., 'Command Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra', (1985) 107 *MillRev* 71; *id.*, 'Criminal liability for the actions of subordinates – the doctrine of command responsibility and its analogous in United States law', (1997) 38 *HarvLLJ* 272; Ching, A.B., 'Evolution of the command responsibility doctrine in light of the Celebici decision of the International Criminal Tribunal for the Former Yugoslavia', (1999) 25 *NCarolJILCR* 167; Clark, R.S., 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', (2001) 12 *CLF* 291; Crowe, C.N., 'Command Responsibility in the Former Yugoslavia: The Chances of Successful Prosecution', (1994) 29 *URichLLRev* 191; Eckhardt, W.G., 'Command Criminal Responsibility: A Plea for a Workable Standard',

(1982) 97 *MillRev* 1; Feith, K.M.F., 'The Mens Rea of superior responsibility as developed by ICTY jurisprudence', (2001) 14 *LeidenJIL* 617; *id.*, 'Final Report of the Commission of Inquiry Into the Events at the Refugee Camps in Beirut', (1983) 22 *ILM* 473; Fenrick, B., 'Article 28: responsibility of commanders and other superiors', in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer's notes*, by (Nomos 1999) 515; Fiolka, G., 'Kommentar zu Art. 264k', in: M.A. Niggli and H. Wiprächtiger (eds.), *Basler Kommentar zum StGB*, ii (Helbing Lichtenhahn 2013) 2245-2264; Garraway, C.H.B., 'Command Responsibility: Victors' Justice or just Desserts?', in: R. Burchill et al. (eds.), *International Conflict and Security Law: essays in memory of Hilaire McCoubrey* (CUP 2005) 68; *id.*, 'Responsibility of command: a poisoned chalice?', in: R. Arnold and P.A. Hildebrand (eds.), *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges* (Editions interuniversitaires suisses 2005) 117; Green, L.C., 'Superior orders and command responsibility', (1989) 27 *CanYbil* 200; *id.*, 'Command Responsibility in International Humanitarian Law', (1995) 5 *TransnatL&ContempProbs* 320; *id.*, 'War Crimes, Crimes Against Humanity and Command Responsibility', (1997) 50 *NavalWarCollegeRev.* 26; Greenwood, C., 'Command Responsibility and the Hadzihasanovic Decision', (2004) 2 *JICJ* 598; Hart, F.A., 'Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised' (1972) 25 *NavalWarCollegeRev* 19; Herde, R., *Command Responsibility: die Verfolgung der 'Zweiten Garde' deutscher und japanischer Generäle im alliierten Prozeßprogramm nach dem Zweiten Weltkrieg* (Nomos 2002); Howard, K.A., 'Command Responsibility for War Crimes', (1972) 21 *JPubL* 7; Husmann, M., 'Die neuen Bestimmungen in Art. 264k-n StGB zur Umsetzung allgemeiner Grundsätze des Römer Statuts', in: Jusletter, 23rd May 2011 < <http://jusletteradmin.zynex.ch/jusletter/GetJusletter.htm?title=Jusletter+23.+Mai+2011#maillink0> >; Jia, B.B., 'The Doctrine of Command Responsibility Revisited', (2004) 3 *ChineseJIL* 1; Keith, K.M.F., 'Superior responsibility applied before the ICTY', (2001) 14 *JILPAC/HuV* - 1 98; Kelsen, H., *Peace through Law* (UNC Press 1944); Landrum, B.D., 'The Yamashita War Crimes Trial: command responsibility then and now', (1995) *MillRev* 149; Laucci, C., in: J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale internationale, commentaire par*, Vol. I (Pedone 2012) 864; Levie, H.S., 'Command Responsibility', (1997/1998) 8 *JLS* 1; Levine, E., 'Command Responsibility: The Mens Rea Requirement', (2005) *Global Policy Forum* 3; Lippman, M., 'The evolution and scope of command responsibility', (2000) 13 *LeidenJIL* 139; *id.*, 'Humanitarian law: the development and scope of the superior orders defense', (2001) 20 *PennStILRev* 1; Maugeri, A.M., *La responsabilità da comando nello Statuto della Corte Penale Internazionale* (Giuffrè 2007); Métraux, G., *The law of command responsibility* (OUP 2009); Moloto, B.J., 'Command responsibility in International Criminal Tribunals', (2009) 3 *BJILP* 12; Nybondas, M., 'Civilian Superior Responsibility in the Kordić Case', (2003) 59 *NethILRev* 1; *id.*, *Command responsibility and its applicability to civilian superiors* (Asser Press 2010); Parks, W.H., 'Command Responsibility for War Crimes' (1973) 62 *MillRev* 1; Perkins, S., 'The Failure to Protect: Expanding the Scope of Command Responsibility to the United Nations at Srebrenica' (2004) 62 *UTFacLRev* 193; Pilloud, C. et al., *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987); Rogers, A.P.V., *Law on the battlefield* (MUP 1996); Röling B. and Ruter C.F. (eds.), *The Tokyo Judgment* (AUP 1977); Saland, P., 'International criminal law principles', in: R.S. Lee (ed.), *The International Criminal Court, the making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999) 189; Sandoz, Y., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987); Sarooshi, D., 'Command responsibility and the Blaškić case', (2001) 50 *ICLQ* 2; Shamsi, H. and Pearlstein, D., *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (Human Rights First 2006); Von Sliedregt, E., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Asser Press 2003); Smidt, M.L., 'Yamashita, Medina, and beyond: command responsibility in contemporary military operations', (2000) 164 *MillRev* 155; Stuart, E. H., 'Command Responsibility and Superior Orders in the Twentieth Century – A Century of Evolution', (2003) 10 *MurdochUElectronicJL* 1; 111 Tinta, M.F., 'Commanders on Trial: the Blaškić case and the doctrine of Command Responsibility under International Law', (2000) 47 (3) *NethILRev* 293; Trechsel, S., 'Command responsibility as a separate offense', (2009) 3 *BJILP* 26; Triffterer, O., 'Zur Einschränkung der Menschenrechte und zur Anwendbarkeit von Verfahrensgrundsätzen bei freiheitsbeschränkenden Disziplinarmaßnahmen in "besonderen Gewaltverhältnissen"/Anmerkungen zum Engel-Urteil des EGMR vom 8.6.1976 (Teil I)', (1976) *EuGRZ* 363; *id.*, *Die Österreichische Beteiligungslehre, eine Regelung zwischen Einheitstäter- und Teilnahmesystemen?* (Manz 1983); *id.*, in: Landesbericht Österreich zum XII. Internationalen Kongress für Rechtsvergleichung Sydney 1986 Thema V A: Versuch und Rücktritt bei Beteiligung mehrerer an der Straftat, (1986) 27 *ZJRv* 105; *id.*, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?', (2002) 15 *LeidenJIL* 179; *id.*, 'Command Responsibility' – Grundstrukturen und Anwendungsbereiche von Art. 28 des Rom Statutes Eignung auch zur Bekämpfung des internationalen Terrorismus?', in: C. Prittwitz et al. (eds.), *Festschrift für Klaus Lüderssen* (Nomos 2002) 437; *id.*, 'Command Responsibility, Article 28 Rome Statute, an Extension of Individual Criminal Responsibility for Crimes Within the Jurisdiction of the Court – Compatible with Article 22, nullum crimen sine lege?', in: O. Triffterer (ed.), *Gedächtnisschrift für Theo Vogler* (Müller 2004) 213; *id.*, 'Hans Kelsen Bedeutung für die Entwicklung des Völkerstrafrechts und einer Völkerstrafgerichtsbarkeit', in: Walter et al. (eds.), *Hans Kelsen und das Völkerrecht* (Manu 2004) 139; *id.*, 'Command Responsibility – crimen sui generis or participation as otherwise provided?', in: O. Lagodny et al. (eds.), *Festschrift für Albin Eser* (C.H. Beck 2005) 901; Vest, H. and Sager, C., 'Die bundesrätliche Botschaft zur Umsetzung der Vorgaben des IstGH-Statuts – eine kritische Bestandsaufnahme', (2009) 4 *AJP* 423; Vetter, G.R., 'Command responsibility of non-military superiors in the International Criminal Court (ICC)', (2000) 25 *YaleJIL* 1; Wallach, E. and Marcus, M., 'Command Responsibility', in: C.M. Bassiouni, *International Criminal Law: International enforcement* (Martinus Nijhoff 3rd edition 2008) 459; Weigend, T., 'Kommentar zu § 4 VStGB', in: O. Lagodny (ed.), *Münchener*

Kommentar zum Strafgesetzbuch, Band 6/2 (C.H. Beck 2009) 511 (citation: MüKo-Weigend); *id.*, ‘Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht’, (2004) 116 *ZStW* 999; Wenqi, Z., *The doctrine of Command Responsibility as applied to civilian leaders: the ICTR and the ‘Kayishema’ case*, in: S. Yee and W. Tieya, *International Law in the Post-Cold War World* (Routledge 2001) 373; Wu, T. and Kang, Y.S., ‘Criminal liability for the actions of subordinates – the doctrine of command responsibility and its analogues in United States law’, (1997) 38 *HarvLLJ*; Zahar, A., ‘Command Responsibility of civilian superiors for genocide’, (2001) 14 *LeidenJIL* 3.

Content

A. Introduction/General remarks	1
I. Development/Overview	4
1. Changing paradigms: superiors, established and protected authorities gradually called to criminal responsibility also for violations committed by their subordinates	5
2. Silent toleration and failures to influence and interfere – two differently structured appearances and approaches.....	8
3. Slowly towards comprehensive definitions, in particular articles 86 and 87 Additional Protocol I 1977 and 28 Rome Statute.....	10
II. Practical Importance	25
1. Nuremberg, Tokyo and ‘follow up proceedings’ (<i>Nachfolgeprozesse</i>).....	29
2. Continuing to focus primarily on commanders increased the acknowledgement of an inherent superior responsibility, but did not crystallise elements ‘strictly construed’.....	39
3. Command responsibility, dominating the international and the transitional justice regimes up to the top of hierarchically based authorities, requiring more legal guaranties	45
III. Guidelines for investigation and prosecuting superior responsibility.....	76
B. Analysis and interpretation of elements	85
I. Paras (a) and (b): Two alternatives with few deviating elements – general remarks	85
1. Military command (a) or other ‘superior and subordinate relationships’ (b)	86
2. Any of the crimes within the jurisdiction of the Court when – committed by forces under ...effective control ... or ... authority and control’, <i>litera</i> (a), or when – concerning ‘activities that were within the effective responsibility and control of the superior’, <i>litera</i> (b) (ii).....	90
3. Minimum mental element for the second failure: – ‘should have known’, or – ‘consciously disregarded information which clearly indicated that the, subordinates were committing or about to commit such crimes’.....	95
II. Paragraph (a).....	98
1. Qualification: ‘military commander or person effectively acting as a military commander’	98
2. Commanders and subordinates	101
a) Structure of ‘forces’	101
b) ‘[E]ffective command and control’	102
c) ‘[E]ffective authority and control’	103
3. ‘[F]ailure to exercise control properly’	104
a) Passivity and duty to become active.....	105
b) ‘Crimes committed’ as a result	106
aa) Completed or attempted crimes	106
bb) Committed in which modality of article 25 para. 3 ever	107
cc) Causality.....	109
dd) Accountability.....	111
c) Mental element: intent and knowledge	113
4. Failure ‘to take all necessary and reasonable measures’.....	116
a) ‘[K]new or should have known that the forces were committing or about to commit such crimes’	116
b) Dereliction of duty and power to react	117
c) Measures needed to avoid or to compensate ‘the result of’ the ‘failure to exercise control properly’	118
aa) Dependence on the stage of the commission	118
bb) ‘[T]o prevent or repress ... or to submit’	119
aaa) ex post or ex ante evaluation? – The objective comparable commander ‘in the situation at the time’, article 87 para. 2	
Add. Prot. I.....	120
bbb) Hypothetical causation	121

- d) Threshold of unreasonable demands? 122
- III. Paragraph (b) 123
 - 1. '[S]uperior and subordinate relationships not described in paragraph (a)'.. 123
 - 2. Subsidiarity based on a different notion of 'relationship' and 'effective authority and control' 124
 - 3. '[F]ailure to exercise control properly' 126
 - 4. Failure 'to take all necessary and reasonable measures' 127
 - a) '[K]new or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes' 127
 - b) Crimes concerning 'activities that were within the effective responsibility and control of the superior' 128
 - c) The objective comparable superior 'in the situation at the time' 129
 - d) Threshold of reasonable demands?..... 130
- C. Special remarks 131
 - I. Assisting in command responsibility, a participation in the crime committed by subordinates? 131
 - II. Attempted command responsibility, an attempted crime within the jurisdiction of the Court? 133
 - III. Concurring responsibility? 136
 - 1. Authorities in a hierarchial chain all failing to fulfil their duties 136
 - 2. Command responsibility and participation according to article 25 137
 - IV. The customary nature of the doctrine of command responsibility 139

A. Introduction/General remarks

Article 28 contains the longest definition of a single modality concerning individual criminal responsibility under international law, even if the two alternatives, (a) and (b), are looked at separately. Already this and its extremely complicated, unusual and interlocked wording demand an extensive introduction and several 'general remarks', helpful for the interpretation of its structure and its major aspects concerning the application of this article by national and international courts.

In addition, ever since international criminal law started to develop, cases dealt with on an international level and even those handled by national jurisdictions, demonstrate that only very few crimes were committed by subordinated members of armed forces on their own initiative. More often such atrocities show some 'involvement' of superiors like silent toleration or lack of sufficient supervision. This picture and, in particular, the omissions that could be observed, led to the conclusion that at least most of these crimes were predictable or recognizable for military superiors, keeping a 'sharp eye' on the factual and the psychological situations of their subordinates. This is in particular true with regard to (legal or illegal) warfare resulting in war crimes.

Commanders may have other concerns like protecting their subordinates, gaining military advantages or even winning the battle. But this does not relieve them from the duty to observe their subordinates before and on the spot with regard to whether they obey international humanitarian law. This law takes due care of possible conflicts of interest, for instance by including into definitions of war crimes the element 'not justified by military necessity and carried out unlawfully and wantonly', article 8 para. 2 (a) (iv).

The majority of cases reported after the Second World War and those, up till now pending before the ICTY, the ICTR and the ICC, concern superior/subordinate relationships, in which either the communication top down or bottom up is dealing with criminal behaviour or should have been (more) concerned about such issues. This is true, both from the point of view of the prosecution as well as from the defence. The prosecution may claim that though not committed in the sense of executed by the superior, in particular a military commander has the responsibility for certain crimes of subordinates under his effective authority and control. On the other side the defence may claim, that certain crimes, though and just because they are committed not by himself, but by his subordinates, are not accountable to the commander,

who is quite often far removed from the place of the events and, in particular, because he was *de facto* unable to control all forces under his authority at the same time¹.

- 3 These and similar aspects play an important role in the genesis of article 28, showing a rather curved way of development², and, consequently, a highly disputed jurisprudence³. Both, genesis and jurisprudence have to be recalled, since they are equally needed for interpreting article 28 when to be applied on a national or the international level; because quite a few formulations of its wording still have to be clarified in order to establish whether all elements are ‘strictly construed’ in the sense of article 22⁴.

Clarity is, in particular, requested in politically highly ‘explosive’ cases; for instance when the chain of command reaches up to the top of military or government representatives still in power positions in their respective State. Because since their ‘official capacity’ is irrelevant for the ‘criminal responsibility under this Statute’ (article 27) every single one of them can be held, in principle, responsible according to article 28. But in practice such persons still in power or having their supporters still in power positions, may be able to prevent an adequate criminal investigation and prosecution before national, and, sometimes, even before international or ‘internationalized’ courts, for example when surrender to the ICTY is requested and *de facto* refused, as it occurred with regard to Karadžić and Mladić.

This raises the issue of political accountability as overlapping with criminal responsibility, in particular with regard to such appearances as in Guantanamo and Abu Ghraib, of which only the criminal responsibility will be dealt with here⁵.

I. Development/Overview

- 4 Superior responsibility, ‘in addition to other grounds of criminal responsibility under this Statute’, raises not only general questions of whether the individual is a subject under international law, but, as such, has shaped the concept and notion of penal guilt as a requirement for criminal responsibility under international law⁶. It also demonstrates, how early in the history of international humanitarian law a responsibility ‘for crimes committed by others’ started to develop. This new and independent modality of individual responsibility surprises, because it partly neglects and reaches beyond the traditional concept of criminal liability and personal guilt, the well accepted and acknowledged, indispensable basis of criminal law and responsibility for centuries in all major legal systems of the world.

1. Changing paradigms: superiors, established and protected authorities gradually called to criminal responsibility also for violations committed by their subordinates

- 5 Before the individual was accepted as a subject of international law, a comprehensive responsibility of superiors for their subordinates was well known in national military law, but

¹ See Werle, *Principles of International Criminal Law* (2005) 375 *et seq.*

² See e.g. Ambos, in: Cassese et al. (eds.), *The Rome Statute of The International Criminal Court: A Commentary*, Vol. I(2002) 824 *et seq.*; Triffterer (2002) 15 *LeidenJIL* 179 *et seq.* and for the difference between articles 27 para. 1 and 28 Rome Statute *id.*, in: Lagodny et al. (eds.), *Festschrift für Albin Eser* (2005) 901 *et seq.*

³ See, in particular, the controversial interpretation of customary law by the ICTY on the absence of a causal element within the doctrine of command responsibility, *Prosecutor v. Delalić et al.*, ‘Čelebići’, IT-96-21-T, Judgement, Trial Chamber, 16. Nov. 1998, pp. 396 *et seq.*, mn 1159 *et seq.* and Triffterer (2002) 15 *LeidenJIL* 179 *et seq.*

⁴ More to these aspects Triffterer, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 215 *et seq.* and *id.*, in: Lagodny et al. (eds.), *Festschrift für Albin Eser* (2005) 901 *et seq.*

⁵ Note the difference between Bosnia-Herzegovina 2005 (Čelebići), Croatia and the torture in the prison of Abu Ghraib/Iraq 2004, for which U.S. Secretary of Defence Donald H. Rumsfeld took over full responsibility, but only in a political and not in a legal sense <<http://www.washingtonpost.com>>: Rumsfeld testifies before Senate Armed Services Committee (printout: 03.04.2006).

⁶ On this aspect e.g. Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (1966) 141 *et seq.*; Kelsen, *Peace through Law* (1944) 71 *et seq.*

also in other social institutions, called 'besondere Gewaltverhältnisse' (subordination dominated by hierarchical power positions), where subordinates received a high amount of protection, but enjoyed only a limited amount of personal freedom and were obliged to strict obedience, like in some boarding schools and, in particular, in prison⁷. For a long time, an unrestricted general responsibility of superiors was accepted, based on authority granted to such superiors and on their protection against any or at least against unjustified disobedience. The American Francis Lieber Code (1863), for instance, expressed such a model of granting authority over suspects by giving military commanders the right to shoot subordinates on the spot, when not stopping to commit crimes though expressly ordered to do so⁸.

From this starting point it was only a small step to hold commanders responsible for not effectively informing, educating, or, if necessary, ordering their subordinates in advance to obey the laws and customs of war, or for not stopping them at least to continue when the slightest sign for the commission of such crimes became discernable.

In order to contribute to the prevention of crimes by calling superiors to responsibility, it was indispensable to establish their duties by law. Accordingly, superiors should, in particular, 'ensure that members of armed forces under their control are aware of their obligations under the Conventions and this Protocol', article 87 para. 2, Add. Prot. I. At that time, an almost unlimited authority was combined with their duty to report to higher ranks in the military hierarchy

'if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that he (the subordinate) was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach',

article 86 para. 2, Add. Prot. I. This duty was the consequence of the generally acknowledged experience, that grave breaches could 'result from a failure to act when under a (legal) duty to do so', article 86 para. 1 Add. Prot. I.

Mainly these aspects developed the general principle, that the commission of certain crimes 'by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be', article 86 para. 2 Add. Prot. I. A long time before it was defined and acknowledged in 1977, this principle was the basis for the installation of a legal institution called Command Responsibility, though, at the beginning, it was not yet concentrating on and only partly established as a criminal responsibility⁹.

It was a rather parallel appearance in the general concept of criminal law, developed and accepted in major legal systems of the world and international humanitarian law, that everybody who sets a condition for the commission of a certain crime, causes the crime and should be held individually responsible, if the resulting crime appears because of this contribution, though, perhaps in combination with others, in particular for the part of the principal perpetrator, as 'his product'¹⁰. At the same time, the theory of participation in crimes became more and more sophisticated and developed to a system, in which everybody, who initiated, supported or otherwise contributed in the commission of a crime, could be held himself responsible for committing the crime¹¹. This is up till now independent of

⁷ Triffterer (1976) *EuGRZ* 363 *et seq.*

⁸ See IV Hague Convention 1907, Article I of the annexed rules of warfare. For an example on the national level see the 1863 Lieber Code where article 44 states 'A soldier, officer, or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior' and article 71 states, '[w]hoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, ...' (brackets added).

⁹ *Supra* note 8.

¹⁰ See e.g. Triffterer (1986) 27 *ZfRV* 105 *et seq.*

¹¹ See, for instance, Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 543 *et seq.*; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 41 *et seq.*; Triffterer, *Die Österreichische Beteiligungslehre, eine Regelung zwischen Einheitstäter- und Teilnahmesystemen?* (1983).

whether his contribution was an act or an omission and of the responsibility of the principal offender or other accomplices¹².

2. Silent toleration and failures to influence and interfere – two differently structured appearances and approaches

- 8 This variety of cooperation to commit crimes demonstrates the need to clearly define by ‘strictly construed’ elements concerning the borderline between punishable and non punishable cooperation as well as between the principal perpetrator and participation in a specific crime as an accomplice. Such a demand is independent of the fact, whether cooperation in the commission is evaluated as an independent commission of the crime (*‘Einheitstäterschaft’*) or as a mere cooperation in the crime of other persons¹³.

Independent of this theoretical basis, the differentiation by merely what behaviour should be made punishable, was in particular difficult with regard to persons, who had the duty to prevent crimes because of their authority and power over subordinates and failed to prevent such crimes committed by their subordinates. Were they principal perpetrators by merely ‘letting it happen’, what they ought to have prevented or only when they directly supported crimes of subordinates?

A general, well accepted differentiation was made possible by separating and demarcating against each other two criminological appearances: First, superiors who tolerate the commission of crimes by their subordinates in a way that could be interpreted by their subordinates as a tacit consent to the commission. Such a behaviour is supporting crimes of subordinates not expressly, however by conclusive behaviour, which obviously demonstrates the tendency not to interfere. It is participation in the crime, for instance by ‘twinkling eyes’. This was the reason, why ‘toleration’ of crimes committed by subordinates was the first pillar to base command responsibility upon¹⁴, though with another scope and notion as expressed now in article 28.

To a second group belong those superiors who fail to inform, educate or control their subordinates about the law and, in particular, about legal and illegal warfare; they do not support crimes of their subordinates by an active behaviour. But by remaining passive they do not intervene and thus indirectly support what they should have prevented. A crime may well result not only from silent toleration which can correctly be understood as consensus or even psychological support. It may equally ‘result from a failure to act’, as expressed in article 86 para. 1 Add. Prot. I. There the words ‘when under a duty to do so’, do not question the causality of omissions. They rather limit criminal responsibility to those failures, which by violating a (legal) duty of the perpetrators to act in a specific situation let crimes come to the mind of subordinates and develop, in particular from mere planning or preparation to an attempt or a completed crime.

- 9 The main difference of the above grouping therefore is: Silent toleration is active behaviour for which everybody, including superiors, can be held responsible, even if he or she has no special legal duty to react in specific situations in order to prevent crimes. A failure to educate, guide and control, on the opposite, is an omission for which everybody (and, in particular, superiors) can only be held responsible when there is a pre-established legal duty to do precisely what was needed to prevent (further) harm and what by being omitted resulted in the commission of a crime.

¹² On the equivalence of acts and omissions see for instance the jurisdiction of the *ad hoc* Tribunals *Prosecutor v. Tadić*, IT-94-I-A, Judgement, Appeals Chamber, 15. Jul. 1999, pp. 104 *et seq.*, mn 228 and *Čelebići*, note 3, p. 160 mn 437; Badar and Karsten (2007) 7 *ICLRev* 163, 157 *et seq.* under chapter 3.3 Command Responsibility.

¹³ Triffterer, *Die Österreichische Beteiligungslehre, eine Regelung zwischen Einheitstäter- und Teilnahmesystemen?* (1983).

¹⁴ See for example Cassese, *International Criminal Law* (2003) 200 *et seq.* and Werle, *Principles of International Criminal Law* (2005) mn. 503 *et seq.*

3. Slowly towards comprehensive definitions, in particular articles 86 and 87 Additional Protocol I 1977 and 28 Rome Statute

Though articles 86 and 87 have already been briefly referred to when demonstrating under 10
1. above changing paradigms and the latest development before the Rome Statute, we have to keep in mind that there are earlier steps also important for shaping the concept and notion of command responsibility. They started already with article 8 of the 1864 Geneva Convention which demanded that '[t]he implementing of the present Convention shall be arranged by the Commanders-in-Chief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention'¹⁵. By assigning the arrangements for the implementation to 'Commanders-in-Chief', the Convention obliges this group of persons to ensure, though according to pre-established guidelines of their 'superior', that their subordinates know the (new) law and how to obey accordingly. The further elaboration of the codification of the *ius in bello*, culminated 1907 in the Hague Conventions. Of these, No. IV, requires in the annexed Rules of Warfare as the decisive criteria for the acknowledgement as 'armies, but also militia and volunteer corps' to be 'commanded by a person responsible for his subordinate'¹⁶. This rule implies that superiors could be held responsible for crimes of their subordinates. Responsible at that time indicated accountability according to national law and before its jurisdiction, thus covering disciplinary as well as criminal responsibility under national military law.

The most effective political impetus for the development of superior responsibility came shortly thereafter from the Investigating Committee installed by the International Carnegie Foundation for Peace 1913. The Committee was assigned the task, 'to inquire into the causes and conduct' of the Balkan Wars 1912/1913, and the atrocities committed during these wars. The Committee reported in detail and presented, not as an *obiter dictum*, but as one of its major findings, that it would have needed only one word of those in power, and all belligerent struggles as well as the atrocities committed along with them would have stopped immediately. This finding was confirmed by the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented to the Preliminary Peace Conference, March 29, 1919¹⁷.

Partly as a result of these two well based and balanced statements, the Versailles Peace 11
Treaty after the First World War provided in articles 227 and 228 that the German Emperor should be held responsible for 'a supreme offence against international morality and the sanctity of treaties'. Though charged personally for his ordering to commit certain crime, the accusation also included responsibility for all other crimes committed by his subordinates. It, therefore, was a fallback to international criminal law that the Emperor could not be brought to trial because the Netherlands refused to extradite him. In addition, the (new) German government finally convinced the Allied not to prosecute about 800 German suspects, which Germany was obliged to extradite, but to accept for all these cases the competence of the Reichsgericht in Leipzig¹⁸. There, however, under the aspect of international criminal law and the interest of justice the cases were not handled to the credit of post-war German jurisdiction. Command responsibility, in whatever broad concept and notion, though in

¹⁵ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, article 8, 22 August 1864.

¹⁶ The IV Hague Convention 1907, Article I of the annexed rules of warfare.

¹⁷ See Carnegie Endowment for International Peace, *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars* (1914) and see also the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report presented to the Preliminary Peace Conference, 29. Mar. 1919, reprinted in (1920) 14 *AJIL* 95 *et seq.*

¹⁸ Hankel, *Die Leipziger Prozesse, deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (2003) and Wiggenhorn, *Verlierjustiz, die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg* (2005).

theory started to reach persons on the top of the hierarchy, was thus not yet put into practice after the First World War¹⁹.

- 12 The time between the two World Wars did not show any significant new development for command responsibility on the international level. Merely the 1929 Geneva Convention provided that: '[t]he Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles...'²⁰. It thus continued the line of the above mentioned 1864 Convention by increasing the specification of the duties of commanders though not yet in a manner sufficiently 'strictly construed' in the sense of article 22 para. 2 to base criminal responsibility on. But parallel, though highly disputed in its concept and notion, indirect individual responsibility of superiors was slowly accepted and more and more extended by national penal systems, thus preparing the possibility to also hold superiors responsible for crimes of their subordinates under international criminal law²¹.
- 13 According to this background, not well balanced theoretical considerations nor political compromises for drafting regulations led to a break through after the Second World War. Decisive were criminological appearances during and after this war, which made it necessary to handle with more care the different modalities of individual criminal responsibility, to avoid impunity of those persons, who by their own abuse of power and through their subordinates were responsible for all 'core crimes', committed again and again all over the world without being sufficiently investigated and prosecuted. However, though proving the need to call superiors independent of the traditional scope of participation with an additional inherent new theoretical institution to criminal responsibility, no agreement could be achieved about how to 'strictly construe' such responsibility, in order to avoid criticism raised against cases like Yamashita and High Command²².

Consequently, a definition or even hints in one or the other direction on the basic structures of command responsibility are missing in the Nuremberg Statute as well as in the Nuremberg Principles 1948, in the Genocide Convention 1948 and in the four Geneva Convention 1949. Though all confirm individual criminal responsibility directly under international law, and partly expressly even acknowledge criminal responsibility of all persons independent of their different official positions²³, no special modality for commanders concerning crimes committed by their subordinates could be agreed upon.

Consequently the Special Rapporteur of the ILC on a Draft Code devoted considerable effort on summarizing the status quo in the national legislation and the jurisprudence at that time. He, in particular, pointed out, like in a puzzle or a mosaic with uneven pieces, what aspects and issues had to be taken into consideration for establishing a generally accepted definition of command responsibility. In this context he emphasized in detail the historical importance of the responsibility of superiors for omissions resulting in crimes committed by their subordinates till 1950, a clear theoretical structure and the political need for such a possibility, to hold superiors responsible under international law, dealing with available alternatives and drafting definitions. His proposals, though with regard to the elements mentioned similar to the elements contained in article 28, deviated mainly in so far as he did not separate between a failure to control and supervise subordinates and the failure to

¹⁹ See, in particular, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report presented to the Preliminary Peace Conference, 29. Mar. 1919, reprinted in (1920) 14 AJIL 95, 117 and critical thereto the Memorandum of the U.S. Delegation, *ibid.* 127 (135 *et seq.*, 143 *et seq.*).

²⁰ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, article 26.

²¹ *YbILC* 1950, Vol. II, Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur 268 *et seq.*, (A/CN.4/25), and Pilloud *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* (1987) and 1977 Report ILC; See also below II 1.

²² See for a compulsive survey on the different regulations and jurisprudence emphasizing more or less aspects to base command responsibility on, *YbILC* 1950, Vol. II, Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur 269 para. 97, (A/CN.4/25), and 1977 Report ILC.

²³ See Nuremberg Trial Proceedings, Charter of the International Military Tribunal, article 7.

interfere in an already ongoing process²⁴. However, even independent of this aspect, the ILC could not achieve a consensus on what elements in which definition should be the indispensable requirement to justify and apply responsibility of superiors for crimes of their subordinates. Consequently, the same lacuna characterizes not only the 1951 Draft Code but also the 1951 Draft Statute as well as the 1953/1954 Drafts²⁵.

It were those divergent opinions which led quite a few legal scholars like Hans Kelsen and Hans-Heinrich Jescheck to deal with this issue on a scientific basis, more in order to establish its theoretical basis than to decide in detail its requirements for a broadly accepted definition²⁶. Their qualified analysis led, for example, and in accordance with the statements of the 1919 War Crimes Commission, to the unavoidable conclusion that the Act-of-State-doctrine did no longer prevent responsibility of persons in official positions, acting on behalf of the State, at least in so far, as they committed grave violations of the 'laws and customs of war and the laws of humanity'²⁷ which were established as crimes under international law.

This general acknowledgement of a rather comprehensive limitation of the Act-of-State-doctrine was the breakthrough for establishing the criminal responsibility of military and civilian superiors failing to arrange the implementation and obedience to these laws, and, thus violating their already in 1864, 1907 and 1929 established duty to prevent by all means, in particular by information and supervision, that their subordinates violate such regulations by committing such crimes.

Both authors, like some others, opened the way for a more scientific and theoretically structured approach. This may well be the reason, why in the 1954 Draft Code and Draft Statute also not yet a relevant provision was included. In addition, unfortunately, the endeavours to codify international criminal law within the United Nations, came to a preliminary stop at the beginning of the Cold War; this delay was officially scheduled till there was an agreement on the definition of aggression in 1974²⁸.

However, before this aim was, at least partly, achieved the international community formally acknowledged in the 1968 Convention on non-statutory limitations of war crimes and crimes against humanity, the criminal responsibility of 'representatives of the State authority ... who, as principals or accomplices, participate in or who directly incite others to the commission of war crimes and crimes against humanity. Besides these traditional modalities, a responsibility for 'representatives of the State authority was established ... who merely tolerate' the commission of war crimes and crimes against humanity, thereby accepting responsibility not only for conclusive behaviour (= acts) but also for omissions²⁹.

When finally a definition of aggression was agreed upon by consensus of the G.A. in 1974, the time appeared favourable to work again on establishing command responsibility as an inherent, well accepted legal modality of accountability, which should 'contribute to the prevention of such crimes', Preamble paragraph 5. It should extend individual criminal responsibility by holding those accountable, who failed to fulfil their duty to prevent

²⁴ *YbILC* 1950, Vol. II, Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur 268 *et seq.*, (A/CN.4/25).

²⁵ Report ILC, but the Rapporteur had – 1950 already at that time, devoted a broad section of his report to this new institution, *YbILC* 1950, Vol. II, Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur 268 *et seq.*, (A/CN.4/25).

²⁶ See e.g. Triffterer, in: Walter *et al.* (eds.), *Hans Kelsen und das Völkerrecht* (2004) 139 *et seq.*

²⁷ Peace treaty of Versailles, 28. Jun. 1919 <<http://www.lib.byu.edu/~rdh/www/versailles.htm>>.

²⁸ See UN Res. 29th Sess., Supp. No. 19, A/3314 (1974).

²⁹ See article II of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26. Nov. 1968:

'If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission'. See also below III.

subordinates from committing war crimes and those crimes, which since Nuremberg are more and more punishable directly under international law³⁰.

- 16 This tendency was supported by the ICRC, which, always acting as an independent organization, was from its beginning strongly concerned to codify the *ius in bello*. It, therefore, started after 1974 again where it stopped or failed 1949, and afterwards all endeavours within the UN, with only the above under (b) mentioned small exception in 1968, which emphasized in the discussion the additional modality of responsibility for (silent) toleration. Thus, a practical implementation of superior responsibility, its permanent consideration and partly application of one and/or the other aspect of this new modality in quite a few international and national criminal proceedings after the Second World War, shaped the discussion.

All aspects together turned the issue favourable towards the creation of a sophisticated modality of responsibility for staying passive, letting an event occur or continue and, thus, causing and/or by not interfering at least objectively otherwise supporting crimes, committed by other persons, in this case their subordinates. The background in its complexity was demanding a comprehensive regulation in the interest of the rule of law, and, thus, favourable for drafting articles 86 and 87 Add. Prot. I.

- 17 This Article 86 para. 1 creates the basis for anchoring a general responsibility of everybody for breaches, ‘which result from the failure to act when under a duty to do so’. It, thus, in addition presupposes causality by passive behaviour and a legal pre-established duty, not to stay passive in a certain situation, but to become active in order to prevent harm. Of course, paragraph 1 presupposes also that harm can be caused by active behaviour, though this alternative is not expressly mentioned.

This is the first express international, general acknowledgement of criminal responsibility for omissions, a modality of human behaviour, which, in particular after the Second World War, was generally discussed and more and more ‘strictly construed’, also on the national level and finally accepted in its present notion in almost all major legal systems of the world³¹. It is based on the realisation that harm to legally protected values may be caused by and thus ‘result’ equally from acts and omissions, the punishability of the latter however appearing justified and necessary only when the perpetrator by the omission violated a pre-established legal duty to react in a way which would have prevented the result: the omission, thus, by not preventing it, is one of the conditions for and thus causes the harm.

- 18 Paragraph 2 of article 86 Add. Prot. I specifies for a qualified group (superiors) in their relation to their subordinates, a particular failure to act. It clarifies that a commission of a crime by a subordinate ‘does not absolve his superiors from penal and disciplinary responsibility, ... if they knew or had information which should have enabled them to conclude ... that he (the subordinate) was committing or was going to commit such a breach ...’. However this accountability should be triggered only, if the superiors ‘did not take all feasible measures within their power to prevent or repress the breach’. Article 86 para. 2 Add. Prot. I thus establishes responsibility of superiors under certain conditions, for failures to prevent or to repress breaches of the Conventions and Add. Prot. I. In this paragraph 2 not the duty of superiors to interfere in order to prevent or repress is based, but merely the criminal responsibility as a consequence of the violation of an otherwise pre-established legal duty to do exactly what is necessary to hinder or suppress in this specific situation.

Therefore, it was necessary to define and clarify in article 87 Add. Prot. I the ‘duty of commanders’, defined in all paragraphs, partly as an enumerative list, partly as alternatives. While paragraph 1 obliges the Parties to ‘require military commanders, ... to prevent and,

³⁰ This modality is not a *crimen sui generis* but extending expressly and in a way ‘strictly construed’ the modalities for participation amending those mentioned in article 25. See for details see Triffterer, in: Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901, 901 *et seq.*

³¹ Kaufmann, *Die Dogmatik der Unterlassungsdelikte* (1988) 23 *et seq.* and the 6th International Congress on Penal Law, Conference proceedings, AIDP, Rome (1953).

where necessary, to suppress and to report ...’, paragraph 2 clarifies that ‘[i]n order to prevent and suppress breaches’, superiors shall ‘ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol’. This means, that they have to guarantee by all necessary measures such an awareness, in particular by information, education and also by supervision and control.

Paragraph 3 defines, in addition, obligations of a superior in cases where he ‘is aware that subordinates or other persons under his control are going to commit or have committed a breach’. He then is obliged ‘to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof’.

None of these regulations gives a clear indication how to interpret prevention, suppression and repression respectively the adjectives of this three subjective words. They describe a progressing situation, starting with proper control in order to avoid that anything like criminal activities comes to the mind of subordinates and ending with direct or indirect interferences in action, to avoid an attempt or the completion of an attempt³².

At the same time, there is no indication in articles 86 and 87 Add. Prot. I with regard to the issue, whether a non-interference described in articles 86 para. 2 and 87 para. 3 Add. Prot. I triggers superiors responsibility by itself or whether the failure to properly educate, control or supervise is merely one condition, but triggers criminal responsibility only in cases, where, in addition, the commander is aware of the results of his failure or he should and could have known them and nevertheless did not interfere in the necessary modality. The latest international regulation is contained in article 28, but it deviates, at least by the wording, from articles 7 para. 3 ICTY and 6 para. 3 ICTR Statute.

This difference surprises, because all three regulations take over, mainly verbally, formulations contained in articles 86 and 87 Add. Prot. I, though without giving any explanation in the preparatory work. With regard to article 28 Rome Statute this ‘copying’ of articles 86 and 87 Add. Prot. I is the most comprehensive, since two different behaviours are defined in detail: failing to properly control and failing to interfere.

The relationship between the two relevant regulations for the *ad hoc* Tribunals and article 28 Rome Statute needs to be clarified. At present, after the Rome Statute entered into force 1 July 2002, a double competence is still possible, since no time limit is provided in article 1 ICTY Statute. However, the Security Council ‘endorsed the ICTY’s strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010, by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions’³³.

Summarizing, articles 86 and 87 Add. Prot. I could be interpreted that only if a commander fails to make his ‘subordinates or other persons under his control’ sufficiently aware of their obligations so that, as a ‘result’ from this dereliction of duties, they ‘are going to commit or have committed a breach of the Conventions or of this Protocol’, the superior can be held responsible.

Consequently, the Parties ‘shall require any commander who is aware’ of such appearances, because he ‘knew’ or had reasons to know, to initiate the necessary steps ‘to prevent such violations ... and, where appropriate, to initiate ... action against the violators’³⁴.

In practice these elements of command responsibility for a ‘failure to act’ are based on the laws and customs of war and have shaped since then all further definitions up to the Consolidated Draft, which was presented at the Rome Conference as a basis for the

³² See for details Triffterer, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213 *et seq.*

³³ See for more details S/RES/1503 (2003).

³⁴ Article 87 para. 2 Add. Prot. I.

discussion ‘with a view to finalizing and adopting a convention on the establishment of an International Criminal Court’³⁵. The Diplomatic Conference of Plenipotentiaries met five weeks in Rome, in June and July 1998³⁶. Its important, relevant result was to have combined ‘the failure to act’ (to control) in the sense of article 86 para. 1 Add. Prot. I and the several ‘duties of commanders’, as defined in article 87 Add. Prot. I, to serve as a ‘strictly construed’ definition of criminal responsibility, which clearly expresses the triggering basis upon and the framework within which prosecution of superior responsibility is admissible before the ICC³⁷.

- 22 Only the combination of a (first) failure to control, resulting in criminal activities of subordinates with a (second) failure of the superior, to take the necessary measures, averts strict liability for not preventing what occurs, but could have already been avoided by a correct fulfillment of the first obligation of commanders, namely, to take responsibility for their subordinates by, in particular, informing, educating, supervising and controlling them as much as necessary, in order to ensure that they act in conformity with the laws and customs of wars and the laws of humanity. It were the highly disputed precedents after the Second World War which raised the need, to avoid further criticism by lifting the threshold of responsibility in the interest of justice by establishing more and precisely detailed requirements in the interest of the rule of law. To meet the demands of article 22 in the sense of ‘strictly construed’ definitions, was not only necessary for the crimes as such, but also for all modalities listed in articles 25 para. 3 or 28, to hold superiors individually responsible for crimes under international law, committed by their subordinates.

Therefore, it is not surprising, that the structure of article 28 is far more complicated and interwoven than those of earlier comparable regulations like article 7 para 3 ICTY Statute, drafted five years before. These different formulations demonstrate also the difficulties of the major legal systems of the world, to define superior responsibility in accordance with their usual theoretical structures for definitions of crimes and in a way satisfying the needs of the principle *nullum crimen sine lege*³⁸.

- 23 This legal situation raises the question, whether article 28 defines with regard to superior responsibility in the same binding way as all other definitions of crimes and modalities of individual criminal responsibility in the Rome Statute, the minimum requirements of what is the existing law, or whether articles 7 para. 3 ICTY and 6 para. 3 ICTR-Statute, describe the laws and customs of war ‘beyond any doubt’, but differently.
- 24 Before I can deal with this question in more detail (below II. 3.), can a legal situation with separate, differently phrased regulations, be characterised as a case of ambiguity? Is the ambiguity rule applicable though the regulations to be compared are not only different from

³⁵ Final Act para. 1.

³⁶ Already in 1981 the Implementation of the Draft Convention of Apartheid provided for the responsibility of a ‘person in authority in a State, group or organization, if he knew or could have reasonably foresee the commission of such crime and remain a member thereof’. See E/CN.4/1426 (1981), articles 21 para. 5 and 20 paras. 10 and 11.

Command responsibility subsequently made it into the Draft Code of Crimes then discussed within the ILC. The 1988 ILC Report relies on the Add. Prot. I and extends its scope to (all) crimes against the peace and security of mankind (see 1988 ILC Report, article 10); The regulation was then included as article 12 in the 1991 ILC Draft Code and remained with minor changes as article 6 in the 1996 ILC Draft Code.

1996 the Preparatory Committee II in its article C already contained a provision that included all relevant parts of article 28. As alternatives though the separation of military and other superiors was not yet formally established. This regulation including its brackets remained unchanged up till the Consolidated Draft. A more detailed discussion and a decision only took place during the Rome Conference. See also 1996 Preparatory Committee I, paras. 202 and 203, Preparatory Committee Decisions Feb. 1997 article C, Zutphen Draft article 19 (C) and Consolidated Draft article 25.

³⁷ The Statutes of the ICTY and the ICTR have already combined these two aspects, but there the regulation does not apply to the standards of ‘strictly construed’.

³⁸ Triffterer, in: Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen* (2002) 437 *et seq.* See also the new German ‘Völkerstrafgesetzbuch’, 30.06.2002, which uses there different matters of fact to catch all alternatives contained in article 28.

each other and are not defined in one, but in two separate contexts, which, in addition, belong to different codes, though both deal with the same substantive law issue concerning crimes under international law committed in a certain modality? In case this principle is applicable, does not the notion of article 28 deserve priority, not only as *lex posterior*, but because its application requires proof of more elements and, thus, is more favourable to the suspect? Can the question of ambiguity be answered by interpreting article 7 para. 3 ICTY Statute in the sense, that the mere fact that crimes were committed by subordinates in a context where such persons are under the authority and influence of their superiors, implies a failure of the superior to control properly?

This conclusion does not have to be drawn expressly or precisely proven, but can be assumed by circumstantial evidence. It, therefore, can be denied by the defence by presenting relevant evidence. If the ambiguity rule implies also with regard to different regulations and even in cases, when those regulations are contained in different statutes, article 28 prevails; because it is more favourable for suspects, demanding two failures, a lack of control and a lack of interference, while the *ad hoc* Statutes, at least according to the wording, require only a failure to interfere.

II. Practical Importance

The fact that in the history of international humanitarian and criminal law so much attention and energy concentrated rather early on command and superior responsibility is due to the observations that its practical importance for ensuring respect and obedience to humanitarian law and, thereby, its contribution to the prevention of crimes under international law, was obvious right from the beginning. It, therefore, does not surprise, that already in the fifteenth century a definition of command responsibility was issued which L. C. Green described as ‘almost foreshadowing’ Add. Prot. I 1977. The relevant Ordinance of Charles VII of Orleans provides that:

‘Each Captain or Lieutenant be held responsible for the abuses, ills and offences committed by members of his company and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice ... If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the Captain shall be deemed responsible for the offence as if he had committed it himself and be punished in the same way as the offender would have been’³⁹.

This definition contains mainly objective requirements but at least mentions also on the mental side negligence as one cause for letting the subordinates escape and, thus ‘supporting’ the perpetrator after the crime has been committed.

Ever since then, even though this definition does not mention expressly failures to control, supervise or to prevent, but only refers to ‘bring the offender to justice’, commanders, because of their hierarchically established position appeared with regard to subordinates as the multiplying factor. Such an influence could be either in favor or against committing grave and other breaches of the laws and customs of war, depending on the visible attitude of the superior towards such violations. At the same time, their criminal responsibility appeared as a deterrent effect, not only with regard to their own future behaviour and to other superiors, but also for subordinates; because when realizing that their superiors are called to criminal responsibility, they could not expect or rely on going unpunished for their own commission of or contribution to such crimes. On the opposite, impunity of superiors may promote violations of humanitarian law by subordinates; because when such a lack of legal reactions on serious failures of superiors can be observed, subordinates may expect and count on equally not to be held responsible.

³⁹ Emphasis added; quoted from Green (1997) 1 *NavalWarCollegeRev* 26 *et seq.* with further references in footnote 2 there.

- 27 It was this diversity of *de facto* and mental dependency and the practically unlimited power and influence of superiors over ‘forces’, as experienced, in particular, during the already above mentioned Balkan Wars 1912/1913, which had demonstrated that silent toleration or failures of superiors to educate, prohibit, interfere or to stop criminal activities were decisive factors, resulting in or otherwise supporting violations of international humanitarian law. Nevertheless, their responsibility was, despite of the above mentioned excellent historical example, at the beginning not yet shaped in a way, required by principles like *nullum crimen, nulla poena sine lege*. But as criminal sanctions appeared more and more indispensable as *ultima ratio*, also for international criminal law, such basic pillars to install criminal responsibility were needed more precisely defined and, therefore stronger founded according to the rule of law.
- 28 The experience, that crimes under international law were mainly committed because of conclusive (= active) behaviour of superiors, for instance, ‘silent toleration’⁴⁰, or, at least, by omitting to supervise properly or to stop the subordinates, was ever since it has been articulated at the beginning of the last century in the context with the Peace Treaty of Versailles, discussed in connection with the protection of international peace and security of mankind. The debacle of international criminal justice after the First World War and in between the two World Wars, therefore, led to increased endeavours to call those to criminal responsibility, who beyond traditional pattern of participation merely by their position appeared equally responsible for unlawful harm. The experience had demonstrated that superiors by an indifferent attitude may cause crimes by simply letting them appear through the hands of others. Thus, by abusing their political, military and/or *de facto* power, they violated basic rules of the international community as a whole in a way, as if they had themselves committed such crimes. The need to call superiors to responsibility for such passive behaviour had already been promoted and accepted in the 15th century, as mentioned above. It, therefore, surprises that not more of this definition had been acknowledged before it partly appeared 1977 in Add. Prot. I. In particular, its concept and notion ‘as if he had committed it himself’, has since than nowhere else been expressed in any other definition, not even in a comparable way.

1. Nuremberg, Tokyo and ‘follow up proceedings’ (*Nachfolgeprozesse*)

- 29 The Nazi Regime demonstrated worldwide by the dimension of its crimes, committed to establish and maintain its domination in one way or the other, how much the abuse of political, military and administrative power of superiors up to top State levels could violate legally protected values and, in addition, endanger peace and the world legal order⁴¹. This experience made it rather easy to unite the world opinion for the prosecution of superiors as major war criminals in Nuremberg and Tokyo. Responsibility of commanders and other superiors, therefore, predominated in all criminal proceedings after the Second World War. Though command responsibility was not expressly mentioned in either of the Statutes, it was acknowledged that official positions of perpetrators should be irrelevant and that the fact, the crime had been committed by subordinates, should not free their superiors from criminal responsibility and liability to punishment. The Tribunals prosecuted however commanders on the basis of article 1 Hague Convention IV 1907, which (merely) provides that armed forces must ‘be commanded by a person responsible for his subordinates’⁴². There was no definition comparable to the one issued 1439 to which I just have referred to. Convictions in Nuremberg and Tokyo did not need such a reference. They were anyhow rather easy to achieve; because commanders there were mainly charged with active participation

⁴⁰ See also above I. 2.

⁴¹ See for instance Triffterer, 2nd edition, *Preliminary Remarks*, mn 20 *et seq.*

⁴² The IV Hague Convention 1907, note 8, Article I of the annexed rules of warfare and see also ICRC, *Commentary on the Add. Prot. I*, para 3531.

in one of the traditional modalities, quite often for ordering or otherwise ‘aiding and abetting’ the execution of violations of international humanitarian law by their subordinates⁴³.

Only a few cases dealt with responsibility for omissions; and of those none strictly separated between failures of superiors to control their subordinates properly, resulting in the commission of one of the core crimes, and failures to take the necessary measures to prevent what was already on its way to violate legally protected values. But there were careful tendencies towards requiring such a failure as the starting point and also towards a mental element⁴⁴. This at that time still rather unspecified notion of command or superior responsibility demanded, for instance, a failure to take steps ‘as were within their power to prevent the commission of such crimes’, if the superior, in addition, ‘had knowledge that such crimes were being committed’ or, as an alternative to knowledge, the ‘fault in having failed to acquire knowledge’⁴⁵.

While the Nuremberg-Trial against civilians like Krupp did not call on superior responsibility, the IMTFE addressed military and civilian superiors⁴⁶. Subsequent trials conducted by the ‘Besatzungsgerichte’ in Germany and by the US Military Commission of the Far East, though mainly concerned about the responsibility of military commanders, confirmed this tendency to differentiate between military and civilian superiors.

In addition, they emphasized, almost equally for both, two slightly different basic pillars: First, a failure to control subordinates properly. This could be required, because it was generally accepted that those commanders were responsible under international and disciplinary military law and had the duty to control their ‘forces’ properly. But the final step towards the present notion of superior responsibility was not yet done⁴⁷. The failure of a commander to control properly was not established on a subjective, a mental, but on an objective basis, proven by ‘the extensive and widespread atrocities specified’⁴⁸. The Tribunal took, for instance, as *prima facie* evidence, that, by the mere appearance of such crimes, frequently in different areas and widespread, it was proven that the commander must have omitted to fulfill his duties. Thus, it was assumed that such an omission had, most probably, caused the crimes of the subordinates. For the defence, denying such a causal connection, the burden of proof thus was shifted to the accused⁴⁹.

There was however, already at that time, a slowly but more precisely developing second element, concerning the *mens rea*. It established responsibility for not reacting properly though there was information to conclude that something should happen to avoid or to prevent the commission of crimes by subordinates. It was called ‘negligent’ behaviour and as such had to be confirmed by the evidence presented at trial⁵⁰. Already this argumentation

⁴³ On General Tomoyuki Yamashita, see Green (1997) 1 *Naval War College Rev.* 26 *et seq.*, Report by J. Spiropoulos, Special Rapporteur with Reference to Trial of War Criminals IX mn 71 *et seq.* and 1950 *YbILC* Vol. II, see also *Yamashita*, UNWCC, *XXI Law Reports of Trials of War Criminals*, Part I (viii), p. 12 (1948).

⁴⁴ *Yamashita*, UNWCC, *XXI Law Reports of Trials of War Criminals* (1948) Part I, viii 12.

⁴⁵ Quoted from *YbILC* 1950, Vol. II, Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur mn 98., (A/CN.4/25).

⁴⁶ Fenrick in the First Edition of this Commentary (1999), article 28, mn 3. See also Röling and Ruter, *The Tokyo Judgment* (1977) 446 *et seq.*; *The Government Commissioner of the General Tribunal for the French Zone of Occupation in Germany v. Directions of the Roehling Enterprises*, *XIV Law Reports of Trials of War Criminals* (1949) 1116.

⁴⁷ Yamashita would have needed further reasoning to avoid the criticism of vicarious criminal responsibility, see for further information Herde, *Command Responsibility* (2001) 325 *et seq.* and Levine (2005) *Global Policy Forum* 3 *et seq.*

⁴⁸ *Yamashita*, UNWCC, *XXI Law Reports of Trials of War Criminals* (1948), Part I, viii (1948) 43.

⁴⁹ Trial of S.S. Brigadeführer Kurt Meyer (The Abbaye Ardenne Case), UNWCC, *XXII Law Reports of Trials of War Criminals*, Part IV, see under headline 9. Summing up of the Judge advocate, p. 108 (1948).

⁵⁰ In this regard the judge advocate in the Belsen Trial, pointed out that it did not matter ‘whether he [Kramer] acted wilfully or merely with culpable neglect: the question was whether the Prosecution had proved that Kramer did not carry out his duties as far as he was able to do so and that he had caused at any rate physical suffering ...’ See Trial of Josef Kramer and 44 others (The Belsen trial), UNWCC, *X Law Reports of Trials of War Criminals*, Vol. II (1947) Part XI, see under headline K. The summing up of the Judge advocate, p. 120.

shows that responsibility exclusively based on ‘strict liability’ was rejected⁵¹. This requirement, through which the Tribunal refused ‘strict liability’, demands an element of personal guilt on the side of the commander. He could only be held responsible if he knew or should have known about the commission of crimes by his subordinates and, nevertheless, did not interfere with the criminal appearances of a certain behaviour of his subordinates which was on the way to be realized or already producing criminal harm⁵².

- 33 It in this context, up and on a few additional arguments were presented in order to more and more shape superior responsibility as a separate and independent modality of individual criminal responsibility: in the case of Yamashita, for instance, the perpetrator had neither committed nor directed acts that were subject of the judgment. The US Supreme Court based its decision on the sentence: ‘[t]he gist of the charge was that he had committed an unlawful breach of his duty as an army commander to control the operations of the members of his command by “permitting them to commit” the extensive and widespread atrocities specified’⁵³. Describing the relevant behaviour as ‘permitting’, the Supreme Court presupposes a causal link between the passivity of Yamashita and the crimes committed by his subordinates, though, this conclusion was not expressly mentioned anywhere. However, such an interpretation may well be the reason, why the defence argued that Yamashita did not commit a specific violation of a particular duty nor any specific act or omission which could be interpreted as ‘permitting’ the crimes of the troops⁵⁴. The defence, thus, denied any conclusive and express behaviour and thereby not only a causal link, but also any mental attitude of Yamashita with regard to the crimes committed by his subordinates.
- 34 The mental side was, however, emphasized by the prosecution, who blamed Yamashita ‘that he did not make an adequate effort to find out. It was his duty to know what was being done by his troops under his orders’⁵⁵. It was this substitution of knowledge or awareness by the failure to access or collect information to conclude that crimes were committed, which according to the prosecution should be sufficient for personal guilt. But again, the US Supreme Court refers to a causal connection when it argues ‘for his failure to take such measures when violations result’⁵⁶ and thus using once more an objective standard.
- 35 Also in the *Abbaye Ardenne Case* (= Kurt Meyer) the shifting of the burden of proof was confirmed. The prosecution had already charged the evidence that ‘the accused ordered the commission of war crimes, or verbally or tacitly acquiesced in its commission, or knowingly failed to prevent its commission’⁵⁷. In addition, the court emphasized the intentional failure to control properly. It mentions ‘willfully failed in his duty’ and thus practically gives a hint with regard to the first alternative of article 28 Rome Statute, which implies an intentional failure to control; because according to article 30 non-intentional behaviour is only sufficient when mentioned expressly, as later on in article 28 in the context with the failure to take the necessary measures by the wording ‘knew or should have known’⁵⁸.
- 36 The ‘Hostages Case’ equally refers to such an alternative by requiring that the commander ‘knew or ought to have known about’ the criminal behaviour of his subordinates. The Tribunal further emphasized that commanders must in such a situation ‘be held responsible for the acts of his subordinate—commanders in carrying out his orders’⁵⁹.

⁵¹ See for instance Badar (2005) 5 *CLRev* 203, 213 *et seq.* and Clark (2001) 12 *CLRev* 291, 301 *et seq.* on the issue of strict liability compared with *dolus eventualis*.

⁵² See for instance Clark (2001) 12 *CLRev* 205 *et seq.*

⁵³ *Yamashita*, UNWCC, XXI Law Reports of Trials of War Criminals (1948) Part IV, v 43.

⁵⁴ *Yamashita*, UNWCC, XXI Law Reports of Trials of War Criminals (1948) Part III, under the headline 12. The Verdict and Sentence 34 *et seq.*

⁵⁵ *Yamashita*, UNWCC, XXI Law Reports of Trials of War Criminals (1948) Part III, under the headline: 11. The closing address for the Prosecution 30.

⁵⁶ *Yamashita*, UNWCC, XXI Law Reports of Trials of War Criminals (1948) Part IV 43 and 86 *et seq.*

⁵⁷ *The Abbaye Ardenne Case*, note 49.

⁵⁸ *The Abbaye Ardenne Case*, note 49.

⁵⁹ Trial of Wilhelm List *et al.* (Hostages Trial) UNWCC, VII Law Reports of Trials of War Criminals, Part VI, under the headline 2. The extent of the Responsibility of commanding Generals (1949) 89.

The German High Command Tribunal refuses also expressly strict liability by finding that criminal responsibility can ‘not automatically attach to him for all acts of his subordinates. There must be an unlawful act on his part or a failure to supervise his subordinates constituting criminal negligence on his part’. The Tribunal, thus, diminishes the threshold of intent and knowledge, by demanding merely that the mental side must be ‘amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence’⁶⁰.

At the Trial of Takashi Sakai, the Tribunal thought ‘it was inconceivable that he [the commander] should not have been aware of the acts of atrocity committed by his subordinates ...’⁶¹. This argument, however, is not convincing. It comes close to charging the accused with ‘strict liability’; because it assumes the mental element without proving it. What is conceivable for the judges may nevertheless not have come to the mind of the accused. The Court could and should have argued, for instance, that it has not been convinced by the argument of the defence that the superior has not been aware of what the subordinates committed; because such a neglecting of obvious evidence appears inconceivable and, therefore, the Court believes, that the accused has in fact been aware⁶². In the later trial of Kurt Student this argumentation was expressed by the statement that ‘the repeated occurrence of offences by troops under one command [is] ... *prima facie* evidence of responsibility of the commander for those offences’. But this wording still does not point out clearly enough the differentiation between what everybody would and should have known and why the Court does believe that the defendant has had the same awareness as everybody would have had in the same situation, even though the perpetrator denies any such awareness⁶³.

Looking at this small survey on post war decisions presented here, the diversity in describing elements required for an inherent responsibility of commanders surprises⁶⁴. In addition, though many aspects expressed in the regulation of 1439 – except ‘as if he had committed it himself’ – show up in the later discussion, no element of command responsibility was finally sufficiently clear formulated and, consequently, no ‘strictly construed’ definitions became available. It obviously needed more theoretical work and practical experience to come to a satisfying agreement.

2. Continuing to focus primarily on commanders increased the acknowledgement of an inherent superior responsibility, but did not crystallise elements ‘strictly construed’

The relevant comprehensive jurisprudence in the context with the crimes committed during the Second World War reminds us on a puzzle with tiny little mosaic pieces: when you see them isolated, you know they ought to be filled into ‘the picture’ of requirements for superior responsibility, though together with others not yet known. It, therefore, is not so easy to deposit them in the right place; because they are not only shaped very individually, but are also of different size, colour and importance for a ‘strictly construed’ definition of an independent modality for individual criminal responsibility of superiors under international law, which characterizes all its specificities in comparison with the traditional modes of participation.

The relevant but rather small development on the national level after the ‘Nuremberg-era’ did not contribute much to solve the task, to define and structure the minimum requirements for command responsibility as an additional mode of criminal liability beyond traditional

⁶⁰ *YbILC* 1950, Vol. II, Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur mn 97., (A/CN.4/25) and Trial of Wilhelm von Leeb *et al.* (The German High Command Trial), UNWCC, XII Law Reports of Trials of War Criminals (1948) 76 *et seq.*

⁶¹ Trial of Takashi Sakai (Nanking), UNWCC, Law Reports of Trials of War Criminals, under the headline 4. The accused’s guilt as to War Crimes and Crimes against Humanity (1948) 7.

⁶² Triffterer, *Österreichisches Strafrecht Allgemeiner Teil* (1994) 94 *et seq.*

⁶³ Yamashita, UNWCC, XXI Law Reports of Trials of War Criminals (1948) Part VI, v 85 (brackets added).

⁶⁴ See also Weigend (2004) 116 *ZStW* 999, 1001.

boundaries. The main common approach was to also or even mainly address commanders when crimes were committed by their ‘forces’. Therefore it was not surprising that, whenever spectacular war crimes or crimes against humanity were committed after Nuremberg, the public opinion demanded individual criminal responsibility of those commanders, who were ‘in charge’ of the persons, suspected for committing such crimes and, therefore, had to have the responsibility for their behaviour.

But they were primarily accused of direct participation in the execution of such crimes, together with ordering or at least ‘permitting the commission’ in the sense of ‘tolerating them’ by not fulfilling their duty to supervise and guarantee that their subordinates obey to the law. Thus all these alternatives were subsumed under one of the traditional modalities of supporting crimes and therefore, required intentional acts or omissions.

- 40 This rather neutral attitude towards a missing definition became, for instance, obvious in the context with the massacre in My Lai, Vietnam, 1968. The commanding Lieutenant was charged with killing the victims as principal perpetrator. He claimed as a defence to have acted on superior orders⁶⁵. His superior also was charged with a traditional mode, namely to have ordered the massacre. He argued, to have ‘only subsequently learned of the outrage’ but confessed that he ‘decided to hush it up instead of taking steps to report its perpetration or punish those responsible’⁶⁶.

On this occasion the presiding judge gave guidelines to the jury, emphasizing that even after ‘issuing an order a commander must remain alert and make timely adjustments as required by a changing situation’. The judge demanded further ‘actual knowledge plus a wrongful failure to act’, and continues, ‘[t]hus mere presence at [the] scene will not suffice. That is, the commander–subordinate relationship alone will not allow an inference of knowledge’⁶⁷.

Green points out in this context: ‘It might even be felt that lack of knowledge in such circumstances amounts to criminal indifference equivalent to a failure to exercise proper command’. In general, the superior ‘has actual knowledge, or should have knowledge, through reports received by him or through other means’.

- 41 The four elements Green mentions from the information of the presiding judge to the jury are an attempt to structure the charge, however by giving more consideration to the facts than to the legal approaches. He requires as the first element, ‘[t]hat [the] deaths resulted from the omission of the accused in failing to exercise control’, but ‘after having gained knowledge that his subordinate were killing noncombatants’. In addition, ‘this omission must constitute culpable negligence and an unknown number of victims must have been killed by subordinates under his control’⁶⁸.

Green further reports in the context with the My Lai massacre of a Major General who has been held responsible, though he ‘may not have deliberately allowed an inadequate investigation to occur, but he let it happen, and he had ample resources to prevent it from happening’⁶⁹. Green refers in this context also to the demand that ‘the military commander who acts to prevent future war crimes ... is criminally liable only if he did not act promptly enough when he learned of subordinates’ crimes’⁷⁰.

- 42 The case of Eichmann is sometimes reported in this context. But Eichmann was a superior giving orders to organize the transportation of Jews to the concentration camps and thus was one of the principles. He claimed not to have known what happened there to the detainees but the circumstantial evidence obviously appeared to be beyond reasonable doubt sufficient to sentence him⁷¹.

⁶⁵ Green (1997) 1 *NavalWarColleg Rev* 26 *et seq.* with further references in footnote 44.

⁶⁶ *Id.*, with further references in footnote 46.

⁶⁷ *Id.*, with further references in footnote 45.

⁶⁸ For all these quotations see Green (1995) 5 *TransnatL&ContempProb* 320, 354 with other references in footnotes 110 *et seq.*

⁶⁹ *Ibid.* 355 with further references in fn. 114.

⁷⁰ *Ibid.* 356 with further references in fn. 116.

⁷¹ *Ibid.* 356 with further references in footnotes 119 and 120.

The Kafr Qassem ‘incident’ also is an example for traditional responsibility of commanders, but not for a new independent modality. The Court states, for instance, that ‘[t]here is no doubt that the death of all victims who fell at Kafr Qassem was the probable result of M’s order, even though as regards some of them, and perhaps most of them, there was no intention of murder in the sense of [the Criminal Code]. For these reasons we must uphold the conviction for murder’⁷². 43

Besides emphasizing the recklessness of the order, the Kahan Report on the massacre in the refugee camps Sabra and Shatila in Lebanon points out ‘that the Israeli military authorities were aware of the killings that were taking place, but took no step to order the Israeli troops to stop the massacre, nor was any action taken by the Minister of Defence to this end’. The requirement of these two elements comes closer to the regulations of an inherent responsibility for commanders. This assessment is confirmed by the further statement: Finally, ‘no attempt was made to seek out or punish any of those responsible for what happened’⁷³.

Though most of the reported regulations, statements and decisions refer to one or more singular aspects which later have been defined in articles 86 and 87 Add. Prot. I 1977, (and in article 28 Rome Statute) none of them offers not even an approximately comprehensive scope and notion of a consistent definition for command responsibility. However, this small outline (under 2.) confirms in a similar manner as those presented before (under 1. and I. 3.), how strong the theoretical and the practical development, in particular after the Second World War, concentrated to hold superiors more and more responsible, in particular for ordering, committing or participating in the commission of one of the classical Nuremberg Crimes. But on these occasions it quite often became equally obvious, that the cases for the indictments did not catch the complete spectrum of responsibility of superiors. The investigators obviously could get hold of situations, in which superiors merely silently tolerate or ‘letting such crimes just happen’ through their subordinates. Command responsibility as an independent, additional responsibility therefore becomes more and more important, in particular, when none of the traditional modalities of participation could be proven by sufficient evidence. 44

Starting to develop its scope and notion out of this case to case experience, Add. Prot. I finally represents the main results of this development. Articles 86 and 87 define an accepted number of elements in order to have them ‘strictly construed’. They contain a political compromise which did not clearly differentiate command responsibility from traditional modalities of participation, in which superiors are involved together with their subordinates. This task was therefore left, with all due respect to the value of Add. Prot. I, to future developments by international Tribunals and their jurisprudence.

3. Command responsibility, dominating the international and the transitional justice regimes up to the top of hierarchically based authorities, requiring more legal guaranties

Keeping this background in mind, it does not surprise, that since 1977, more than fifteen years not much has been changed or moved in one or the other direction: There were actually no new cases brought before the judiciary to promote solutions for the open questions. It therefore was practically the result of a delayed development, when the Statutes for the ICTY and the ICTR, adopted under time pressure in 1993 and 1994, included some, though not all, of the formulations contained in articles 86 and 87 of Add. Prot. I, as a definition of an additional responsibility for superiors. Concept and notion appeared broadly accepted and quickly available, because provisions were needed, according to which higher ranking superiors could be held responsible even beyond the limits of traditional ordering or 45

⁷² Quoted according to *ibid.* 360 with further references in fn. 130.

⁷³ *Ibid.* 363 *et seq.* with further references in fn. 137.

other participation, and which by its acceptance through the Security Council received an additional worldwide approval.

The situation on the territory of Former Yugoslavia had demonstrated since 1991, what everybody knew since the Balkan Wars 1912/13 and the World Wars, namely that commanders as well as other superiors play the most important role for ongoing atrocities and for stopping them immediately. They, therefore, should be targeted with regard to end their impunity and thus to contribute to the prevention of crimes committed by their subordinates.

- 46 The relevant provisions in articles 7 para. 3 and 6 para. 3 ICTY and ICTR Statutes try to achieve this aim, together with paragraphs 1 and 2, defining all traditional modalities. They were at that time the only binding international definitions applicable in a ‘direct enforcement model’.

Even after article 28 Rome Statute had defined in 1998 a more comprehensive regulation for all superiors who could by their political, military, legal, administrative and de facto power contribute in various ways to one of the core crimes, those new regulations were not yet available, because the Rome Statute came into force only on 1. July 2002 and even then it took more than 3 years before the first cases, from which till now only one is in the trial phase, were pending at the ICC. Therefore the ad hoc Statutes and the jurisprudence of the Tribunals dominated the situation for more than one decade.

In addition, the Tribunals had clearly confirmed again and demonstrated the practical importance of an institution like command responsibility for those persons, not on the spot but pulling the strings from behind and thus taking responsibility for what was beyond the traditional modalities of participation. I recall only the indictments against Milosević, *Mladić* and *Karadžić* as well as the relevant final jurisprudence of the ICTY and, after the first case of Akayesu was pending, also before the ICTR. These decisions are listed above together with the literature and other jurisprudence.

- 47 But it was not only the shortness of the formulations in these Statutes which make them preferable in comparison with article 28 Rome Statute, which is much more extensive. States in transition need worldwide accepted regulations and jurisprudence when looking for an international legal basis upon which to create Special Courts or Commissions to deal with past atrocities (post-conflict justice). They, therefore, rather prefer and copy articles 7 or 6 of the *ad hoc* Statutes instead of article 28 Rome Statute.

This preference was further backed by the fact, that the decisions of the Security Council to accept these regulations represented the legal opinion of all members of the UN, while the Rome Statute is up till now only in force for 105 States.

- 48 It is self evidence, that relevant decisions of the *ad hoc* Tribunals will play an important role for the cases pending and coming up to the ICC. According to article 21 para. 2 Rome Statute the previous decisions of the Court and even more those of other courts or the Tribunals are not binding. But they will play an important role for the interpretation and application of the Rome Statute. It, therefore, is necessary, shortly to deal with the scope and notion of the relevant provisions in the Statutes of the *ad hoc* Tribunals that cover command responsibility.

- 49 When for the first time in history two (‘really’) international *ad hoc* Tribunals were established to prosecute genocide, war crimes and crimes against humanity, it became quite obvious that the Security Council, when referring to the laws and customs of war, used, partly verbally, the concept and notion of articles 86 and 87 Add. Prot. I to define criminal responsibility of superiors in articles 7 para. 3 ICTY and 6 para. 3 ICTR Statute⁷⁴. The Secretary-General in his Report of 23 May 1993 to the Security Council expresses the opinion, that ‘the application of the principle *nullum crimen sine lege* requires that the international Tribunal should apply rules of international humanitarian law, which are beyond any doubt part of customary law⁷⁵.’

⁷⁴ For further information see Res. 808 (1993) and Res. 955 (1994) of the SC.

⁷⁵ Rep. of the Secretary General pursuant to para. 2 of SC Res. 808 (1993), para. 34.

He further emphasizes that ‘virtually all of the written comments received ... draw upon the precedents following the Second World War’, and confirm ‘the irrelevance of official capacities’⁷⁶. Therefore, not only the ‘unlawful order to commit a crime’ should trigger superior responsibility, but also a ‘failure to prevent a crime or to deter the unlawful behaviour of the subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them’⁷⁷.

According to the interpretation suggested above (under I. 3.) two failures are listed in the just mentioned quotations, namely ‘to prevent a crime or to deter ...’ on the one side, and ‘failure to take ... steps to prevent or repress’ on the other side. These two omissions should be separated, at least in theory⁷⁸ though they may be interwoven in praxis. This dependency is needed to establish personal guilt, the indispensable element for all modes of criminal responsibility. Because only when a ‘failure to prevent a crime or to deter the unlawful behaviour’ results in an action, where ‘subordinates were about to commit or had committed crimes’, liability can be triggered. It is further based on the fact that the superior, though he knew or had reasons to know about it, ‘yet failed to take the necessary and reasonable steps to prevent or repress the commission’, which he had not prevented and thus caused, for instance by not ensuring that his subordinates were sufficiently informed and motivated to obey the law. This passive behaviour of the superior appears as a whole to be of sufficient gravity to trigger his responsibility for the crime committed by the subordinates⁷⁹.

However, it has to be admitted that article 7 para. 3 ICTY Statute, as well as 6 para. 3 ICTR Statute, do not express this underlying structure by requiring a link between the failure to exercise control properly and the crimes of the subordinates. Both regulations, therefore, may be interpreted, at first sight, in a way, that the failure to take the necessary and reasonable measures ... or to punish’, may by itself trigger superior responsibility even if the superior has not caused these criminal actions of his subordinates.

To investigate whether such an interpretation is admissible and acceptable under the aspect, that the Secretary-General intended to define ‘laws which are beyond any doubt part of customary law’, is the purpose of the following considerations. They therefore have to deal, for instance, with the issue, whether article 28 Rome Statute also defines what is accepted ‘beyond any doubt’, even though its requirements establish a much higher threshold for superior responsibility which has to prevail. This priority is justified because article 28 is more favourable to the accused than article 7 para. 3 ICTY Statute, at least when both regulations express what is acknowledged in international customary law and only defined in Add. Prot. I as well in the *ad hoc* Statutes and the Rome Statute.

For answering this question and with regard to the general notion of command responsibility in its historical context it has to be kept in mind that the competence of the ICTY and of the ICTR is created by the Security Council. But the law ‘to prosecute persons responsible for serious violations of international humanitarian law, ... in accordance with the provisions of the present Statute’, article 1, is statutory and customary international law, as far as such regulations are generally accepted and acknowledged by the international community as a whole⁸⁰, as referred to above. It is not created by the Security Council because this organ is not the legislative body of the UN. The Security Council merely accepted what has been proposed by the Secretary-General as the already existing law and accepted his formulation.

⁷⁶ *Ibid.* para. 55.

⁷⁷ *Ibid.*

⁷⁸ Triffterer, in: Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen* (2002) 437, 448 *et seq.*

⁷⁹ *Id.*, in: Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901, 912 *et seq.* and *id.*, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213, 228 *et seq.*

⁸⁰ Rep. of the Secretary General pursuant to para. 2 of SC Res. 808 (1993), para. 32.

Created has the Security Council only the *ad hoc* Tribunals and their competence with those regulations to guarantee the getting into operation and the functioning of the Tribunals.

- 53 While article 2 ICTY Statute establishes the right and duty of the Tribunal ‘to prosecute persons committing or ordering to be committed grave breaches’, article 3 defines liability for all persons, violating the laws or customs of war. Genocide, article 4, mentions expressly for these crimes besides committing, conspiracy, complicity as well as direct and public incitement, while article 5 (as 3) does not refer to any mode of participation for crimes against humanity. All these definitions describe either the direct commission or presuppose personal activities, which have at least material contact with or some psychological influence on the commission of the crime, a context, which characterizes participation and complicity in most of the legal systems of the world.
- 54 The enumeration of the crimes in articles 2 to 5 ICTY Statutes puts the main emphasize on describing material elements. A general statement concerning the mental element is missing. This justifies according to general principles of law recognized by all major legal systems the conclusion that, as far as nothing else is otherwise provided in the Statute, these crimes and all their appearances expressly mentioned in the Statutes have to be committed intentionally. Such an interpretation is confirmed by some definitions, using expressly words like ‘wilful’ or ‘wanton’, which exclude negligent behaviour, or tacitly by formulations like ‘compelling’ or ‘plunder’.
- With regard to genocide the requirement of an intentional act becomes evident by the additionally required special mental element, namely the ‘intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such’. Such an intent presupposes that the act as such needs to be committed intentionally; because who kills negligently, cannot intent to destroy a protected group just by his negligent behaviour. Negligent behaviour, therefore, is in principle excluded as basis for international criminal responsibility under these Statutes, equally for committing and for participation, unless ‘otherwise provided’. This principle is clearly expressed also in article 30 Rome Statute.
- 55 With regard to omissions, the situation is similar, though in the outcome different. Omissions are not mentioned either expressly in articles 2–5 ICTY Statute. But the consequences described there, like ‘causing great suffering or serious injury to body or health’, respectively, ‘seriously bodily or mental harm’ can be equally – without difference to the victims – achieved by an act or by an omission; for instance, by denying access to food or information about further cruel treatment by the guards or an execution without any proceeding according to the rule of law.
- 56 The requirement of a legal duty for holding somebody responsible for a failure to act, is acknowledged expressly already in article 86 para. 1 Add. Prot. I. Such an element serves the purpose to establish and to guarantee equality of crimes committed by active or passive behaviour. They have to be comparable not only with regard to the consequences they may trigger. But since an active violation of the law needs a decision to step out of passivity, while an omission is the continuance of an already existing status quo, not all passivity is comparable with an aimed action. To compensate this deficit, a violation of a pre-established legal duty is required, to equalize an omission with active behaviour.
- 57 Article 7 para. 1 ICTY Statute describes, partly repeating or including modalities already mentioned in articles 2–5, all relevant appearances of committing crimes or participating in crimes as accomplices. For all of them the above statements with regard to intent and omission are applicable, as far as, for instance, like with regard to ordering or planning, a commission by omission does not appear per se impossible, because the definition describes an *actus reus* and thus, exclude omissions.
- 58 Article 7 para. 2 ICTY Statute only clarifies, that ‘the official position of any accused person ... shall not relieve such a person of criminal responsibility ...’. This means, all modalities listed in the definitions of the crimes or in article 7 para. 1, are equally applicable on persons with any ‘official position’, thus including superiors as well on the military as on the administrative level.

Article 7 para. 3 ICTY Statute presupposes and is based on these principles, which provide responsibility for different modalities, when committed intentionally and individually, whether by an act or an omission and independent of the official position. None of these regulations, however, is recalled by article 7 para. 3. It, on the opposite, deviates partly from these principles and establishes an additional (new) criminal responsibility for superiors⁸¹, though under certain conditions, which deviate from what is the basis for a general criminal responsibility otherwise provided with regard to all perpetrators in these Statutes. For instance, article 7 para. 1 establishes that ‘a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime’. Individual criminal responsibility means to be personally responsible for his own behaviour and the caused harm. It does not mean responsibility for behaviour of others, unless someone supports the principle perpetrator through, for instance, ‘otherwise aiding or abetting’ in the commission of the crime⁸².

According to these basic rules, the mere fact that any of the crimes referred to in articles 2–5 of the present Statute was committed by a subordinate, does, in principle, ‘relieve his superior of criminal responsibility’. This is true, however, only as long as he does not himself fulfil the requirements of article 7 para. 1 by participating in one of the modalities provided for in this regulation or in articles 2–5 ICTY Statute.

In addition, in its second half article 7 para. 3 ICTY Statute expresses a further exception: Responsibility of a superior for crimes of other persons, his subordinates, if the superior ‘knew or had reason to know’ about their criminal activities and, nevertheless, ‘failed to take the necessary and reasonable measures’ to effectively interfere. Article 7 para. 3, thereby, establishes an additional individual criminal responsibility beyond the traditional modalities mentioned in articles 7 para. 1 or 2–5 ICTY Statute.

Such an extension, transgressing traditional boundaries, creates practically a ‘new crime’ in the sense of an additional modality of the crime committed by the subordinate⁸³. It, therefore, needs to meet the requirements of *nullum crimen, nulla poena sine lege*, as established by customary international law and expressed in article 22 Rome Statute. The ICTY, therefore, had and has to face the question whether this additional modality of criminal responsibility is ‘strictly construed’ in the sense of article 22 Rome Statute. Does article 7 para. 3 ICTY Statute mirror the law ‘beyond any doubt’ – as it was defined in 1993? Or is this law expressed in 1998, when 146 States of the world community drafted and with a great majority adopted article 28 Rome Statute, the correct definition of what is generally acknowledged?

The wording of article 7 para. 3 ICTY Statute is fairly clear, though at the end of the day, finally, it may leave room for doubt. In case it does, the general rule may become applicable, that in case of ambiguity an interpretation in favour of the accused has to prevail, article 22 para. 2 Rome Statute.

The basic law in both regulations, articles 7 para. 3 ICTY Statute and 28 Rome Statute, is beyond doubt: no responsibility of superiors for crimes of their subordinates in principle, but exceptionally yes, if ‘he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof’, article 7 para. 3 ICTY Statute. The difference constitutes an additional requirement, expressly formulated in article 28 Rome Statute, namely an additional failure to control resulting in criminal activities of subordinates, which is not mentioned in article 7 para. 3 ICTY Statute, but perhaps needs to be interpreted into this regulation, in case it is ambiguous.

⁸¹ Triffterer, in: Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901, 902 *et seq.* and *id.*, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213, 230 *et seq.*

⁸² Instead of ‘and’ in the original text, there must be ‘or’, see for further Ambos, *Article 25*, mn 17 *et seq.*

⁸³ See Triffterer, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213, 215 *et seq.*

- 63 One condition for accepting such an extension of individual criminal responsibility is in both regulations clearly formulated: ‘knew or had reason to know’ about a concrete criminal behaviour of his subordinates. This means, that the superior must not intent to support, by what act or omission ever, such behaviour of his subordinates. Because if this is the case, one of the traditional modalities according to article 7 para. 1 ICTY Statute combined with those expressly mentioned in articles 2–5 ICTY Statute would be applicable. ‘Knew’ or ‘reason to know’, therefore, does not mean an intent to participate by an omission. It must be less, which it is, when interpreted as describing only the intellectual part of ‘intent and knowledge’, namely awareness as defined in article 30 Rome Statute⁸⁴, of a criminal situation characterised by the behaviour of his subordinates.
- 64 The failure to take the necessary measures, must as such, as far as concerning the passivity of the superior, be intended. But it is sufficient that the superior did not intend more than just doing nothing, though he should and could have been motivated by the triggering situation to become active. Article 7 para. 3 ICTY Statute specifies the mental approach of the superior to the criminal behaviour of the subordinate in a way, which is different from the mental element needed with regard to all other modes of individual criminal responsibility for perpetrators and accomplices as described in article 25 para. 3 Rome Statute⁸⁵.
- While in so far ‘intent and knowledge’ is required, here obviously awareness of the situation without an emotional, a voluntative decision or a negligent approach to the situation and its demands is sufficient. This means, the superior knew but – for whatever reasons – did not react to get an emotional approach, or had reason to know, but was not aware of the situation requiring ‘to take the necessary and available measures to prevent such acts or to punish the perpetrators thereof’. His state of mind, ‘knew’ or ‘reason to know’, means, though he ‘knew’ or though he had ‘reason to know’, he did not conclude, or did not have the idea, that he could and should take action. The situation was not motivating him to prevent or interfere with the criminal behaviour of his subordinates. Whatever this lack of a mental decision to take action in the necessary and relevant direction means, it is sufficient that the superior draws no conclusion in this direction. He is ‘not open’ for the situation, for being addressed by the situation which triggers his duty to react, and therefore he fails to take the required measures.
- 65 Is this structure comparable with the one underlying ‘direct and public incitement’ in article 4 ICTY Statute? Comparable is that with regard to incitement, the mere act, and with regard to command responsibility, the mere failure to act triggers criminal responsibility. But there is a difference, because in the second case it must be established that the superior had the power, which means, was in fact capable to take the required measures, had he ‘correctly’ reacted on what he ‘knew’ or ‘had reason to know’. Incitement, on the opposite, requires only to address persons in a certain way at all, independent of whether the act has persuaded the addressee, while failures to take necessary measures implies that such actions would have caused a result, if not omitted, namely to prevent or repress the criminal activities of the subordinates.
- 66 Though not mentioned expressly in the definitions of crimes or in the general principles, there are such further elements tacitly included by the structure of the definitions of crimes or of the responsibility according to article 7 para. 3 ICTY Statute. Shall the superior really be responsible for the crime, which the subordinate was about to commit, though the subordinate did not yet reach the state of an attempt, a possibility not excluded in article 7 para. 3 ICTY Statute, though in article 28 Rome Statute? Such a situation may occur, if, for instance, a third person stops the criminal attempt of the subordinate by taking the necessary measures, shortly after the superior failed to do so, or if the subordinate gave up his plan to complete the crime or abandons his activities before he reached the status of a punishable attempt.

⁸⁴ See for more details *id.*, in: Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901, 909 *et seq.*

⁸⁵ See for further information *id.*, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213, 215 *et seq.*

The situation requiring counter-actions of the superior is described in article 7 para. 3 ICTY Statute as the subordinate ‘was about to commit such acts or had done so’, a formulation, corresponding in its first part, ‘about to commit’ with those in article 28 Rome Statute. There it does not mean ‘only’, but includes an attempt which is defined differently to article 25 para. 3 (f) Rome Statute⁸⁶. 67

For the answer it has to be taken into consideration that two different formulations in the same law cannot have the same meaning, because otherwise no two divergent expressions would have been chosen. ‘About to commit’, therefore, does describe first a behaviour very close to the commission, for instance one second before a criminal attempt occurs, but it includes also an attempt, by which, in the ordinary course of events, a crime is about to be completed.

Such an interpretation is convincing independent of whether the attempt is incomplete or finalized, as long as the crime is not yet completed. In all these intermediate, different situations, the superior has ‘to prevent such acts’. This means, he has to prevent further activities of his subordinates, which either are already an attempt or could lead to an attempt, or which could bring an attempted crime to completion. This means, in other words, the superior has to stop all activities by which the subordinates were ‘about to commit’ relevant crimes. Because otherwise his failure to stop the subordinates would cause either the continuance of their ‘criminal’ behaviour and, thereby, further activities leading to an attempt, or cause an already existing criminal attempt to develop towards a completed crime. Is this the requirement of causality to be proven by the Prosecutor before criminal responsibility of superiors can be established? The answer is yes, because only when it can be established that the superior was capable to take the necessary measures and thus could have prevented, or repressed the crime or initiated criminal investigation, he can be blamed for the failure to do so and, thus, for the failure to achieve such an effect, which means for not causing it.

The alternative ‘or had done so’ refers to ‘had committed’ and thus comprehends a final or interrupted attempt and a completed crime. In both cases the criminal activities of the subordinate have already come to an end and the superior, therefore, can no longer by his failure to take action ‘support’ or just ‘let happen’ the criminal activities of the subordinates in a way, which establishes a causal connection between his failure and the perpetration of the crime. This is the reason why the superior in such cases has to take (mere) measures ‘to punish the perpetrator thereof’. 68

While, with regard to the first alternative, ‘to prevent’, what was about to be committed, an action to control or an order to stop may be sufficient to reach impunity of the superior, the second situation, ‘or had done so’, describes a rather static situation which cannot be changed anymore. It, therefore, only has to be evaluated by the superior with regard to its criminal importance in order to trigger preventive influence on future behaviour of the same or other subordinates. 69

There is for both alternatives no word on causality in the *ad hoc* Statute. But this element is inherent to all omissions, because the duty to prevent presupposes and means the power to prevent, since nobody can be obliged by law to do what is for him or her *ultra vires*. The superior therefore must have prevented or at least taken measures which appear to be in principle adequate to achieve such a result⁸⁷. Who fails to take the necessary measures to prevent or to punish is responsible for what occurs in a situation, in which it was his duty to hinder further developments towards the commission of the crime or the impunity of the perpetrator. This hypothetical causality has to be established; because (a) it must have been not *ultra vires*, what was demanded, and (b) the necessity is only proven, when the omission causes what would have been avoided by the omitted act, in case it would have been executed. 70

⁸⁶ Also to the following considerations *id.*, in: Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901, 911 *et seq.* and *id.*, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213, 217 *et seq.*

⁸⁷ To these considerations above and below see *id.*, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213, 238 *et seq.* and *id.*, in: Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901, 917 *et seq.*

71 Even if these considerations are accepted it remains with regard to article 7 para. 3 ICTY Statute still open, whether the superior, in addition, must have caused the departing situation, the criminal behaviour of his subordinates. Triggers merely his former omission to control, educate and inform his subordinates ‘properly’ and its result, illegal activities of his subordinates, the duty of the superior to react, when his subordinates ‘commit or are about to commit crimes’? At first sight, the answer is no. In article 7 para. 3 ICTY Statute no such requirement is mentioned. But is an interpretation of the mere wording sufficient? No, because a teleological interpretation, taking into consideration the historical background and the *ratio legis* of this regulation may close a lacuna, and thus come to a different result.

It can, for instance, be argued that article 7 para. 1 ICTY Statute extends the responsibility for committing crimes by including certain behaviour, which aids or abets the execution as an additional modality. Such an extension broadening the scope and notion of the crimes, needed to be ‘strictly construed’; because otherwise it would violate the principle *nullum crimen sine lege*. In addition, it is self evidence, that since all crimes listed within the above mentioned Statute can be committed only on the mental side intentionally, also participation as being a specific modality of such a crime, equally requires such a mental element.

72 Article 7 para. 3 ICTY Statute contains also such an extension of the responsibility for crimes, but one applicable exclusively for superiors. This means, the superior is responsible, as ‘if he had committed it (the crime) himself’, a formulation, already quoted in mn 25. It implies, in addition, that command responsibility demands as a specific modality of participation, in principle, also an intentional behaviour, unless (and as far) as not otherwise provided.

73 Article 7 para. 3 ICTY Statute is based on articles 86 and 87 Add. Prot. I. Though not expressly referring to these regulations, some of them are quoted more or less verbally. For instance, a superior should be relieved from responsibility, except when ‘he knew or had reason to know’ about the criminal behaviour of his subordinate and nevertheless failed to react. But is such a ‘low’ mental element really sufficient, though for all other modalities a much higher mental threshold closer to the harm, namely an intentional behaviour, mentally ‘dealing’ with and ‘considering’ the harm, whether caused by a failure or an *actus reus*, is required?

Is this special ‘lower’ mental element, required for command responsibility, comparable with negligence? Is it the only one and as such sufficient, while all other modalities for the commission of crimes demand a stronger mental ‘affiliation’ of the mind of the perpetrator to the material elements?

74 Already this aspect makes it desirable and perhaps indispensable, in the interest of equality before the law, to consider at least an equally high threshold for command responsibility, which would otherwise establish a more remote relation to the harm than most of the other modalities for participation.

In addition, a high threshold on the mental side could compensate the fact that superiors are without exception responsible and liable for punishment beyond the traditional modalities, which means, even for such omissions, which do not fulfil the objective or mental requirements for a punishable participation.

This implies that the requirement of ‘strictly construed’ elements needs to be independently established, in particular, when command responsibility reaches the top level of the hierarchy, perhaps located far away from the actual events.

75 All these aspects have led already to a more precise definition in article 28 Rome Statute. It, therefore, seems to be necessary and justified to include the additional element demanded there, namely an ‘intentional failure to control properly’ resulting in criminal activities of their subordinates, in favour of the superior via interpretation also in articles 7 para. 3 ICTY and 6 para. 3 ICTR Statute.

III. Guidelines for investigation and prosecuting superior responsibility

The considerations above have pointed out some aspects which may serve as guidelines 76 when dealing with situations, in which the commission of crimes, falling within the jurisdiction of the Court, is shaped by a hierarchically structured superior/subordinates relationship⁸⁸. In order to locate whether such a relationship is involved, it is recommendable to investigate first, whether a failure of the superior to exercise control properly over his subordinates can be established.

For the concept and notion of such a failure, a list of elements has been published in the 77 First Edition, which still may be helpful to find out, what the commander should have done to fulfil his duties. He must, in particular,

- ensure his forces are adequately trained in international humanitarian law,
- ensure that due regard is paid to international humanitarian law in operational decision making,
- ensure that an effective reporting system is established so that he or she is informed of incidents when violations of international humanitarian law might have occurred,
- monitor the reporting system to ensure it is effective, and
- take corrective action when he or she becomes aware that violations are about to occur or have occurred⁸⁹.

A similar list of relevant aspects is available for finding out, whether the superior ‘knew’ or 78 ‘should have known’ about the criminal activities of his subordinates. In this context it was pointed out by W. Fenrick that ‘actual knowledge may be established by direct or circumstantial means’. But with regard to ‘determining whether or not the commander did have the requisite knowledge’ a variety of indicia may be, in addition, helpful, including

- the number of illegal acts,
- the type of illegal acts,
- the scope of illegal acts,
- the time during which the illegal acts occurred,
- the number and type of troops involved,
- the logistics involved, if any,
- the geographical location of the acts,
- the widespread occurrence of the acts,
- the tactical tempo of operations,
- the modus operandi of similar illegal acts,
- the officers and staff involved, and
- the location of the commander at the time⁹⁰.

With regard to the further elements, in particular the intent covering the failure to control 79 properly, it has to be taken into consideration, that command responsibility is an additional, inherent responsibility ‘for crimes within the jurisdiction of the court’, and not for a *crimen sui generis*⁹¹. Further decisive is the aspect that command responsibility is not merely an extending mode of the traditional responsibility for participation, though it comes close to facilitating or

⁸⁸ For more details concerning basic principles for such guidelines see *id.*, in: Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen* (2002) 437, 438 *et seq.*; *id.*, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213, 229 *et seq.* and *id.*, in: Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901, 919 *et seq.* with references.

⁸⁹ Fenrick in the First Edition of this Commentary (1999), *article 28*, mn 9.

⁹⁰ *Ibid.* *article 28*, mn 10; see also *Čelebići* (Trial Chamber Judgement), note 3, para. 386. See also the *Prosecutor v. Jean-Pierre Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para 444 at 431 <<https://www.legal-tools.org/doc/07965c/>>.

⁹¹ This aspect also has already broadly discussed on another occasion see Triffterer, in: Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901, 903 *et seq.*

supporting crimes of subordinates in a way, similar to ‘otherwise assists in its commission or its attempted commission’⁹².

- 80 When applying these guidelines to locate command responsibility it therefore has in addition to be taken into consideration, that this modality of responsibility is based on omissions only. It combines an intentional omission of the superior, violating pre-established duties with a kind of negligent passivity in a way, that the influence of the first failure shapes the activities of the subordinates. This is the reason why the second failure, to take the necessary measures, aggravates the situation and, therefore, triggers the responsibility of the superior, when he knew or should have known about its criminal character: the superior misses his chance to compensate his first violation by preventing what could and should have been avoided already earlier.
- 81 The last guideline to be mentioned in this non exhausting summary, concerns another trigger mechanism: there must be a ‘crime within the jurisdiction of the court committed by subordinates’ which means at least an attempted crime, to base command responsibility upon. The responsibility then is according to article 28 ‘for crimes within the jurisdiction of the Court’. This means that the commander has to be sentenced for committing, for instance, a specific war crime or for genocide ‘per command responsibility’. The commission of the crime by the subordinates, thus, has to be established beyond any doubt.
- 82 According to the concept and notion developed above, it follows that the commander does not need to have the genocidal intent himself. It is sufficient, when he includes in ‘his mind’ that the crimes possibly resulting from his failure to control properly, could be war crimes, crimes against humanity or even genocide. Later on, when defined and accepted by the Assembly of States Parties, a similar structure will be applicable with regard to aggression.
- 83 With regard to the second failure it is sufficient that the superior is aware (‘knew’), that there are atrocities committed by the subordinates, which possibly are attempted or completed crimes falling within the jurisdiction of the Court, perhaps even genocide, or that he should have known because of available leading information to such conclusions. Command responsibility thus shows on the material and on the mental side lesser ‘involvement’ than traditional participation of superiors, for which a stronger influence in the actual committing of the *actus reus* of the principal perpetrator and a more precise mental element of the superior is required.
- 84 All these aspects should be taken into consideration when a situation of passivity of a superior has to be analysed and interpreted in order to find out, whether article 28 Rome Statute or, still for a while, article 7 para. 3 ICTY or article 6 para. 3 ICTR Statute has to be applied.

B. Analysis and interpretation of elements

I. Paras (a) and (b): Two alternatives with few deviating elements – general remarks

- 85 Article 28 ICC Statute provides for three categories of persons that may fall under the doctrine of command responsibility: (a) military commanders or persons effectively acting as such (so-called military-like commander); and (b) other superiors. Rank and status are of limited relevance,⁹³ the key element is the existence of a superior-subordinate relationship. It is also the first requirement of the three stage test adopted by the ICTY to hold someone accountable under the doctrine:
- (i) the existence of a superior-subordinate relationship;
 - (ii) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and

⁹² This aspect also has already broadly discussed on another occasion see *id.*, in: *id.* (ed.), *Gedächtnisschrift für Theo Vogler* (2004) 213, 236 *et seq.*

⁹³ *Čelebići* (Trial Chamber Judgement), note 3, paras. 647, 704 and 742.

(iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof⁹⁴.

The existence of these different categories of commanders/superiors is not without consequences for the determination of the existence of a superior-subordinate relationship. The distinction is a conscious one, since the underlying assumption is that military and military-like commanders on the one hand, and non-military, i.e. civilian superiors, on the other have different possibilities and ways to control third parties alleged to have committed international crimes. Therefore, different requirements apply and different evidentiary elements may prove the existence of such relationship.

1. Military command (a) or other ‘superior and subordinate relationships’ (b)

Paragraph (a) refers to military commanders or persons effectively acting as such (military-like commanders). Paragraph (b), by default, refers to superiors holding a superior-subordinate relationship not covered by paragraph (a), i.e. civilian superiors. The underlying idea of both is that a person exercising *effective* authority or command over another one can be held responsible for the conduct of the latter, if also the other requirements of the doctrine are met. 86

In case (a), the assumption is that the military, by definition, is organised hierarchically, with a strict chain of command, different levels of command and different levels of subordinates. The commanders’ duty is to lead and control his subordinates and to ensure their disciplined conduct, which is indispensable for the smooth execution of his orders. In the armed forces, everybody has a commander: even the chief of the armed forces is usually subject to another authority, which is often the minister of defence or the President, depending on the applicable political system. 87

The role of the military commander can be compared to that of a ‘guarantor’. Known to civil law systems (e.g. the Swiss, the German) this status is attached to persons who have either the legal obligation to protect a specific object/person under their supervision from the external dangers and to persons who have originated a potential source of danger and who must, therefore, protect third parties from its negative effects. The military commander has a twofold guarantor position: he must take care of his subordinates and, at the same time, the safety of persons protected under the laws of armed conflict (LOAC) from the potential misconduct of his subordinates⁹⁵.

In case (b), proof of the existence of a hierarchical relationship is more complicated, since it cannot be presumed on the same basis as in a military or quasi-military environment (e.g. within the police). The civilian realm is not systematically hierarchical, even though there are some situations, like in the professional world, where hierarchical structures may be found. It is by reference to the professional world, and an analogy to the contractual employer-employee relationship, that the responsibility of non-military and non-military-like superiors for the misconduct of third parties was constructed.⁹⁶ This approach was supported by the ICTR in the *Musema Case*⁹⁷.

⁹⁴ *Čelebići* (Trial Chamber Judgement), note 3, para. 346. These criteria recall the ones established in the Trial of Soemu Toyoda, Official Transcript of Record of Trial, 5005 and 5006. See also Pilloud *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* (1987) para. 3543.

⁹⁵ See Arnold (2002) 7 *JCSL* 191, 207; Ambos, *Treatise on International Criminal Law, Vol. I* (2013) 184.

⁹⁶ According to Swiss criminal law, a person who creates a danger is responsible for the prevention of any possible harm deriving from it. An analogous duty is incumbent upon parents with respect to their children. See Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat* (1996) 408. The responsibility of the firm holder is known as ‘Geschäftsherrenhaftung’ in the continental system. See the decisions of the Swiss Federal Tribunal in the ‘Bührlé’ (BGE 96 IV 155) and ‘Von Roll’ (BGE 122 IV 103) cases. See also, with regard to this analogy, Ambos, in: Cassese *et al.* (eds.), *The Rome Statute of The International Criminal Court: A Commentary* (2002) 844 *et seq.*; *id.*, *Treatise on International Criminal Law, Vol. I* (2013) 184 and 199.

⁹⁷ *Prosecutor v. Musema*, ICTR-96-13-A, Judgement, Trial Chamber, 27 Jan. 2000, para. 880. On the guarantor position. The Trial Chamber held that the accused, the director of an important tea factory, through his power to appoint and remove his employees, had exercised legal and financial control over them. *Musema* was, thus, found

In both cases (a) and (b), however, the pre-requisite is the existence of a *de facto* superior-subordinate relationship⁹⁸. The exercise of command must be effective and the superior-subordinate relationship cannot be derived from the mere fact of belonging to a chain of command: this is not *per se* sufficient⁹⁹. To do otherwise would lead to the application of the old doctrine of strict liability. This was followed in the *Yamashita Case*¹⁰⁰, but was later reversed in the *High Command Case*¹⁰¹. The superior's powers to control and to intervene must be *real*, in order to hold him accountable¹⁰². These must be assessed *ad hoc*. In this regard, distinctions must be drawn for instance between tactical commanders, who are in charge of military operations, and non-operational commanders, who might be in charge of activities such as logistics. This distinction played a crucial role in General Cermak's acquittal by the ICTY in relation to the conduct of Operation Storm in Croatia¹⁰³. Effective command or authority may be also exercised over each other by people holding equal status.¹⁰⁴ However:

‘... substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions’¹⁰⁵.

The doctrine of command responsibility is applicable also to superior-subordinate relationships established across national borders or different armed groups. For instance, where a state relies on guerrilla groups or private subcontractors in order to resort to illegal methods of warfare without incurring into any kind of state liability, the leaders of this state may nevertheless be held accountable as individuals under the doctrine of command responsibility. The lack of a hierarchical and formal superior-subordinate structure does not detract from the possibility of incurring into criminal liability.

88 Thus, where a superior-subordinate relationship can be proven, the doctrine of command responsibility may apply, regardless of the military or civilian status of the person holding effective authority.

guilty under the doctrine of command responsibility for having failed to discharge his supervisory duty over them and having allowed them to commit crimes within the context of their work.

⁹⁸ *Prosecutor v Momčilo Perišić*, IT-04-81-A, Judgement, Appeals Chamber, 28 Feb 2013, paras. 75 *et seq.*

⁹⁹ Burnett (1997) 38 *HarvILJ* 272, 272 *et seq.*; *Prosecutor v. Aleksovski*, IT-94-14/1-T, Judgement, Trial Chamber, 25 Jun. 1999, paras 73 *et seq.*; see Čelebići (Trial Chamber Judgement), note 3, paras. 354 and 647; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 Feb. 2001, para. 369.

¹⁰⁰ *Yamashita*, UNWCC, XXI Law Reports of Trials of War Criminals (1948) Part VI, ii, 84.

¹⁰¹ Trial of Wilhelm von Leeb *et al.* (The German High Command Trial), UNWCC, XII Law Reports of Trials of War Criminals (1948) 76 ‘Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In this latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence’. The case was referred to in *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, Trial Chamber, 3. Mar. 2000, para. 321. The court concluded that there had to be, instead, a causative, overt act or omission from which a guilty intent could be inferred, therefore rejecting the strict liability test.

¹⁰² *Kordić and Čerkez* (Trial Chamber Judgement), note 98, para. 422 and for further information see Ambos, *Treatise on International Criminal Law*, Vol. I(2013) 191.

¹⁰³ *Prosecutor v. Ante Gotovina, Ivan Cermak, Mladen Markac*, IT-06-90-T, Judgment 15 April 2011, para. 147, 149, 164, 166, 2549.

¹⁰⁴ *Prosecutor v. Delalić*, IT-96-21-A, Judgement, Appeals Chamber, 20 Feb. 2001, para. 303:

‘... it is possible to imagine scenarios in which one of two persons of equal status or rank – such as two soldiers or two civilian prison guards – could in fact exercise ‘effective control’ over the other at least in the sense of purely practical ability to prevent the conduct of the other by, for example, force of personality or physical strength’.

¹⁰⁵ *Delalić* (Appeals Chamber Judgement), note 102, para. 266.

2. Any of the crimes within the jurisdiction of the Court when – committed by forces under ...effective control ... or ... authority and control', *litera* (a), or when – concerning 'activities that were within the effective responsibility and control of the superior', *litera* (b) (ii)

Under article 28 (a) command responsibility can only be initiated by the commission of a crime falling within the Court's jurisdiction. There must be a 'nexus' between a commander's failure to properly command and control his subordinates and the latter's commission of crimes. The following two considerations arise:

- (a) The ICC has jurisdiction *exclusively* over the offences *enlisted* under article 5 (genocide, crimes against humanity, war crimes and aggression), as defined in articles 6–8bis ICC Statute (on the special status of the crime of aggression see the commentary to this provision). Therefore, a commander may only be liable in front of the ICC when one of these underlying offences was committed. A caveat, however, is that the war crimes catalogue of art. 8 ICC is not comprehensive of all the existing war crimes provisions pursuant to the LOAC. For instance, the use of biological and chemical weapons was excluded from the ICC Statute for political reasons, in order to achieve consensus and adopt it. Thus, a commander who failed to prevent the use of a chemical weapon by his subordinates may not be charged with war crimes in front of the ICC; this however, does not preclude his prosecution in a domestic court or another international criminal tribunal.
- (b) A controversial issue is the legal character of article 28: *sui generis* independent crime or a special form of participation to the underlying offences?¹⁰⁶ The origins of the command responsibility doctrine are to be found in the overarching notion of 'responsible command', pursuant to which a commander must properly discharge his 'command and control' duties in general. These are not restricted to the duty to prevent serious breaches of international law, but extend to the need to ensure the proper functioning of the military system in general, also by taking action against disciplinary offences and 'ordinary' crimes.¹⁰⁷ The concept of 'command responsibility, as it was developed under the LOAC, was then restricted to the failure to prevent the commission of serious breaches thereof. The underlying idea, however, is the same: the commander is entrusted with this responsibility to properly exercise command and control. Failure to do so will result in criminal charges. The *actus reus*, thus, consists primarily in this failure, not in the commander's participation to the offences he failed to prevent, repress or punish.¹⁰⁸ In the doctrine there are three major lines of thought, as summarized by Maria Nybondas. According to these such conduct shall qualify: (1) as a *sui generis* – independent – crime that punishes the superior for his failure to properly exercise command and that, as such, may also be committed by negligence, even if the primary offence requires intent; (2) as a *sui generis* form of – indirect or derivative – participation to the primary offence, which would as a rule require the commander to share the intent of the other participants; (3) as a mixture of both a *sui generis* act and a *sui generis* form of participation (bifurcated approach), depending on the case. Nybondas opts for the 'bifurcated approach', even though she admits that the ICTY followed the *sui generis* approach (see the *Hadžihasanović* and *Halilović* judgments)¹⁰⁹ Prof. Triffterer, by

¹⁰⁶ For a detailed analysis see Ambos, *Treatise on International Criminal Law*, Vol. I (2013) 207 (discussing different approaches in the literature).

¹⁰⁷ Arnold and Wehrenberg (2013) 2 *MLLWR* 19.

¹⁰⁸ Arnold and Wehrenberg (2013) 2 *MLLWR* 19; Arnold (2013) 11 *JICJ* 943–951.

¹⁰⁹ Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors* (2010) 127 *et seq.*, 133 and 136 *et seq.*; Arnold (2013) 11 *JICJ* 943–951. Also the position under Swiss legislation is very controversial. See Arnold and Wehrenberg (2013) 2 *MLLWR* 19 (forthcoming); Rogers, *Law on the battlefield* (1996) 196; Méttraux, *The law of command responsibility* (2009) 37 *et seq.* Holding the view that it is a genuine act of omission *sui generis*: Fiolka, in: Niggli and Wiprächtiger (eds.), *Basler Kommentar zum StGB* (2013), with reference to Ambos, in: Cassese et al.

contrast, argues that ‘command responsibility’ is a *principle*, as demonstrated by the fact that article 28 is contained in Part III of the ICC Statute (‘general principles of criminal law’), rather than Part II (Jurisdiction, Admissibility and Applicable Law). Moreover, article 28 is neither enlisted as a crime *per se* falling under the jurisdiction of the ICC Statute pursuant to article 5, nor is it mentioned as a specific war crime or crime against humanity under articles 7–8 ICC Statute. In his view, therefore, it is to be considered only as a form of *participation* to the crimes enlisted under article 5. The qualification of breaches of art. 28 as a form of participation to the offences enlisted in article 5 of the ICC Statute may have a serious impact on issues like causality, concurrency to other crimes, double liability as primary perpetrator and commander, and attempt. So far the ICC has not made any judgments on this issue. In the Bemba Case, the Pre-Trial Chamber II of the ICC simply concluded that the accused was criminally responsible within the meaning of article 28(a) for the different war crimes and crimes against humanity charges enlisted in the indictment¹¹⁰.

91 Under the ICC Statute, unless it resulted into the commission of one of the crimes enlisted under article 5, a commander’s failure to exercise proper control over his subordinates is not criminally relevant. The same may not hold true under domestic military criminal law, by contrast, pursuant to which disciplinary measures may be triggered. The nexus to the underlying offence is to be read as a means to distinguish between failures to discharge a commander’s duties leading to the most serious breaches of international law and those with no consequences, for purposes of the determination of the punishment. This reasoning is supported by the fact that in some instances, article 28 has been implemented into domestic legislation as a specific provision contained in a special section dedicated to international crimes, without jeopardising the existence of more generic provisions on the duty to command and control contained in military manuals¹¹¹. Due to this mixed nature, one may conclude that the offence is a *sui generis* independent crime.

92 Another open issue yet to be clarified by the ICC is whether the subordinates must have *committed*, *i.e.* successfully brought to an end the underlying crimes, or whether it is sufficient for the crimes to be attempted¹¹². In contrast to article 25 ICC Statute, article 28 ICC is silent on this. The logics however suggest that if command responsibility is a *sui generis* crime aimed at punishing the commander for his failure to properly discharge his duties, then the correct approach is that whenever a crime is committed in a form that can entail the criminal responsibility of the subordinate, the superior shall be held accountable, too. Thus, if the responsibility for the underlying crimes can be incurred by committing an attempted crime, this may trigger the superior’s responsibility, too. This conclusion is also supported by a teleological interpretation of the doctrine of command responsibility. If the superior shall ensure the maintainance of order and control, in terms of prevention it is required that he intervenes at the earliest stage possible, which implies that the word ‘committed’ does not

(eds.), *The Rome Statute of The International Criminal Court: A Commentary* (2002) 844, 851 *et seq.*; Ambos, *Der Allgemeine Teil des Völkerstrafrechts, Ansätze einer Dogmatisierung* (2004) 667 *et seq.*; Bonafe (2007) 5 *JICJ* 599, 603–604; SCSL, *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Judgment, 20. June 2007, § 783, with reference to ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Judgment, 16. November 2005, §§ 42–54 and ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-T, Judgment, 15. March 2006, § 75. Critical: Weigend (2004) 116 *ZStW* 999–1002, 1006 *et seq.*; Laucci, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale internationale, commentaire article par article* (2012) 864.

¹¹⁰ Bemba (PTC II Decision), note 90, para 444.

¹¹¹ See eg. art. 114 a of the Swiss Military Criminal Code (SR 321.0) on command responsibility for international crimes and Chapter 3 ‘Command’ of the Swiss Military Manual on Military Service of 1994, SR 510.107.0, breaches of which may be prosecuted under art. 72 of the Swiss Military Criminal Code; see also Laucci, in: Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale internationale, commentaire article par article* (2012) 864, 865; Smidt (2000) 164 *MillRev.* 155, 169. See also Triffterer, in: Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901, 913.

¹¹² Under most domestic criminal codes, the question would be whether the underlying offence is either a *result* or an *inchoate endangerment* crime.

require the completion of the crime.¹¹³ Take the following example: the crime of genocide can be objectively fulfilled by the killing of *one* or more persons¹¹⁴. It follows, that a superior who knew or should have known that his subordinates were acting with genocidal intent may be liable even if only one person was killed: no full scale effect (i. e. consummation) of the crime is required.¹¹⁵

The interpretation of the term *committed* is also relevant to determine the temporal 93 framework during which the perpetrator may still change his mind and abandon the commission of the offence. Triffterer observes that, according to article 25 para. 3 (f), which addresses situations in which the crime has been attempted and where the crime does not occur because of circumstances independent of the person's intentions, the primary perpetrator's change of mind and abandonment of the commission of the crime may lead to his acquittal. The same, by contrast, does not necessarily hold true with regard to the superior. The question that arises is what happens when a superior decides to remain passive and the completion of the crimes is prevented by the fact that the primary perpetrator spontaneously abandons his plan. Shall the commander be liable in this case? As said, command responsibility is a *sui generis* crime that requires the *commission* of a crime by the subordinates. Participation is always accessory to the main crime, meaning that it would be unfair to hold a participant more liable than the primary perpetrator. However, since the wrongful conduct criminalised by article 28 is the commander's failure to supervise his subordinates, he shall be liable even though the crime was only attempted.

The second part of the sentence contained in article 28 *lit. a* relates instead to the required 94 kind of control, which has been examined in the previous paragraphs.

3. Minimum mental element for the second failure: – ‘should have known’, or – ‘consciously disregarded information which clearly indicated that the, subordinates were committing or about to commit such crimes’

Different standards have been adopted in the history of the doctrine of command respon- 95 sibility. The controversial *strict liability* test adopted in the *Yamashita Case*¹¹⁶, holding that a superior shall be criminally responsible for acts committed by his subordinates, without it being necessary to prove his criminal intent¹¹⁷, is no longer applicable. It was rejected in the *High Command Case*¹¹⁸, which observed that due to the modern dictates of war, necessitating decentralisation, a high commander could not be kept informed about all the details of a military operation. Therefore it introduced the *knew or should have known* test¹¹⁹. This relies on the concepts of actual (knew) and constructive (should have known) knowledge: a commander may be liable if *‘he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes*

¹¹³ Ambos, *Treatise on International Criminal Law*, Vol. I (2013) 203; Bantekas (2009) 7 *JICJ* 1197, 1199; Métraux, *The Law of Command Responsibility* (2009) 79; Arnold and Wehrenberg (2013) 2 *MLLWR* 19, 28 (forthcoming); Trechsel (2009) 3 *BJILP* 26, 28 *et seq.*

¹¹⁴ UN Doc. ICC-ASP/1/3; Ambos and Cassese, however, argue that there need to be at least two victims. see Ambos, *Treatise on International Criminal Law*, Vol. II (2013) 10; Cassese *et al.*, *International Criminal Law* (2013) 117, 129.

¹¹⁵ This is also the view of the Swiss legislator. See Arnold and Wehrenberg (2013) 2 *MLLWR* 19, 28 (forthcoming); Vest and Sager (2009) 4 *AJP* 423, 443.

¹¹⁶ *Yamashita*, UNWCC, XXI *LRTWC* (1948) Part II, p. 29.

¹¹⁷ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 Sep. 1998, para. 488.

¹¹⁸ Trial of Wilhelm von Leeb *et al.* (The German High Command Trial), UNWCC, XII *LRTWC* (1948) 76 and for further information see also Parks (1973) 62 *MillRev* 1, 90.

¹¹⁹ Trial of Soemu Toyoda, Official Transcript of Record of Trial 5006, referred to in *Čelebići* (Trial Chamber Judgement), note 3, para. 389 and *Blaškić* (Trial Chamber Judgement), note 101, para. 316. For details see Parks (1973) 62 *MillRev* 1, 71 and Burnett (1985) 107 *MillRev* 71, 118 *et seq.* (1985) and Rogers, *Law on the battlefield* (1996) 147.

*criminal dereliction*¹²⁰. Likewise the *Hostage Case* held that the commander of an occupied territory 'is charged with notice of occurrences taking place within that territory'¹²¹. He may fulfil his duty by requiring reports. However, if these are incomplete, he is obliged to require supplementary ones. In the court's words: 'If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence'¹²². The *Toyoda Case* ruled that this (constructive) knowledge may also be presumed when the carrying out of the crimes was so widespread that a reasonable man could come to no other conclusion than that the accused must have known of the facts. Thus, even though a commander cannot possibly keep track of all events, lack of knowledge is no defence when due to negligence in attempting to obtain all possible information.

- 96 In the *Celebici Case* the ICTY held that pursuant to customary law the *knew or should have known* test had been replaced by the *knew or had reason to know* test set forth in article 86 of Add. Prot. I of 1977¹²³. The latter no longer encompasses the liability of a commander for dereliction of duty to obtain information within his reasonable access¹²⁴. This position, which was initially disputed in *Blaškić*¹²⁵, was confirmed by the later jurisprudence of the ICTY¹²⁶. According to the 'had reason to know' test, a superior is only liable if:
- (1) he had actual knowledge (established through direct¹²⁷ or circumstantial¹²⁸ evidence) that his subordinates were committing or about to commit crimes, or,
 - (2) if he 'had reason to know' that crimes were being committed on the basis of information available to him and indicating the need for additional investigation¹²⁹.

¹²⁰ Trial of Wilhelm List *et al.* (Hostages Trial) UNWCC, VII LRTWC, Part IV, p. 71, referred to in, *Čelebići* (Trial Chamber Judgement), note 3, para. 389 and *Blaškić* (Trial Chamber Judgement), note 101, para. 322. For details see Parks (1973) 62 *MillRev* 1, 61 *et seq.*

¹²¹ Trial of Wilhelm List *et al.* (Hostages Trial) UNWCC, VII LRTWC, Part IV, p. 71. For details see Parks (1973) 62 *MillRev* 1, 61 *et seq.*

¹²² Trial of Wilhelm List *et al.* (Hostages Trial) UNWCC, VII LRTWC, Part IV, p. 71, referred to in *Čelebići* (Trial Chamber Judgement), note 3, para. 389.

¹²³ This provision is now part of customary law. See *Čelebići* (Trial Chamber Judgement), note 3, paras 383 and 390 and *Blaškić* (Trial Chamber Judgement), note 101, para. 310.

¹²⁴ *Čelebići* (Trial Chamber Judgement), note 3, para. 393, confirmed in *Delalić* (Appeals Chamber Judgement), note 104, para. 224.

¹²⁵ See *Blaškić* (Trial Chamber Judgement), note 101, para. 314–332 (in particular, para. 324). The Trial Chamber seems to support the view that there is no contradiction between the *mens rea* applied in post Second World War cases and articles 86 and 87 of Add. Prot. I. The Trial Chamber also refers to the findings of the Kahan Commission (para. 331). The latter held that '[t]he absence of a warning from experts cannot serve as an explanation for ignoring the danger of a massacre. The Chief of Staff should have known and foreseen – by virtue of common knowledge, as well as the special information at his disposal – that there was a possibility of harm to the population in the camps at the hands of the Phalangists' (para. 497 of the Report). However it seems to the author that the Commission relied on a 'had reason to know' test, rather than a 'should have known' test requiring him to obtain the information. The Commission namely observed that: 'If it indeed becomes clear that those who decided on the entry of the Phalangists into the camps should have foreseen – from the information at their disposal and from things which were common knowledge – that there was danger of a massacre, and no steps were taken which might have prevented this danger or at least greatly reduced the possibility that deeds of this type might be done, then those who made the decisions and those who implemented them are indirectly responsible for what ultimately occurred, even if they did not intend this to happen and merely disregarded the anticipated danger'. Israel, Final Report of the Israeli Commission of Inquiry into the Events at the Refugee Camps in Beirut, 7.2.1983, (1983) 22 *ILM* 497.

¹²⁶ *Delalić* (Appeals Chamber Judgement), note 104, para. 241 and *Kordić and Čerkez* (Trial Chamber Judgement), note 99, para. 430 and 432 *et seq.*

¹²⁷ *Čelebići* (Trial Chamber Judgement), note 3, para. 386.

¹²⁸ *Čelebići* (Trial Chamber Judgement), note 3, para. 386; *Blaškić* (Trial Chamber Judgement), note 101, para. 307 and *Kordić and Čerkez* (Trial Chamber Judgement), note 99, para 427. The Trial Chamber in *Čelebići* referred to the Final Report of the UN Commission of Experts for the ICTY, which contains a list of elements that may be used as *indicia*. These include the number, type and scope of illegal acts, the time during which these occurred, the number and type of troops involved, the logistics involved, the geographical location of the acts, their widespread occurrence, the tactical tempo of operations, the *modus operandi* of similar illegal acts, the officers and staff involved and the location of the commander at the time. Commission of Experts Report, S/1994/674, p. 17, referred to in Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 343.

¹²⁹ *Čelebići* (Trial Chamber Judgement), note 3, para. 383.

The novelty is that the commander is no longer required to actively search for the information and that he shall only be liable for failure to acknowledge information already available to him. Unfortunately, in the *Celebici Case* the ICTY did not analyse whether current customary law had been modified by article 28 of the Rome Statute¹³⁰, which reintroduced a kind of *should have known* test. This examination was nevertheless undertaken by the ICTR in *Kayishema and Ruzindana*¹³¹. It concluded that a superior is only liable for having failed to *take notice* of information that may have indicated the occurrence of crimes, but not for the failure of *obtaining* that information. It recalled that in article 28 ICC Statute, the *should have known* formula is completed by the phrasing ‘*owing to the circumstances at the time*’, which seems to bring it in line with the *had reason to know* test supported in *Celebici*. Therefore, even though it will be the ICC’s task to define the details of the *mens rea* requirements under its Statute, it may be concluded that, notwithstanding a slightly different wording, the applicable test is still whether someone, on the basis of the available information, *had reason to know* in the sense of Add. Prot. I. This approach seem to be supported, so far, also by the ICC jurisprudence, in particular by the findings in the *Bemba Case*, as will be discussed in detail later.

II. Paragraph (a)

1. Qualification: ‘military commander or person effectively acting as a military commander’

At the Rome Conference in 1998¹³² a broad majority held the view that responsibility should also extend to civilian superiors, notwithstanding the opposition of few delegations, including China. A first draft produced by Canada and consolidated by the UK foresaw the same requirements for both categories. However, the United States raised the important question whether civilian superiors would be in the same position as military commanders to prevent or repress the commission of crimes by their subordinates. The outcome was the drafting of different requirements, but there was agreement that definitely both categories shall be encompassed.

The term ‘military commander’ was defined by the ICC Pre-Trial Chamber in the *Bemba Case*.¹³³ It refers to persons who are formally or legally appointed to carry out a military commanding function (i. e., *de jure* commanders). The concept embodies all persons who have command responsibility within the armed forces, irrespective of their rank or level. A military commander, thus, could be a person occupying the highest level in the chain of command or a mere leader with few soldiers. The term also captures those situations where the superior does not exclusively perform a military function.

The Pre-Trial Chamber held further that the term ‘person effectively acting as a military commander’ covers a distinct and broader category, which ‘refers to those who are not elected by law to carry out a military commander’s role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command.’ This may encompass superiors who have authority and control over regular government forces, such as armed police units, or irregular forces (non-government forces) such as rebel groups,

¹³⁰ *Čelebići* (Trial Chamber Judgement), note 3, para. 393. See also the Prosecutor’s view in *Kordić and Čerkez* (Trial Chamber Judgement), note 99, para. 430.

¹³¹ *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, Trial Chamber, 21 May 1999, paras. 225–228. See also *Prosecutor v. Brdanin*, IT-99-36-T, ‘Trial Judgment’, 1 September 2004, para. 278: Knowledge can only be presumed if a superior had the means to obtain the relevant information of a crime and *deliberately* refrained from doing so.

¹³² Saland, in: Lee (ed.), *The International Criminal Court, the making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999) 202.

¹³³ *Bemba* (PTC II Decision), note 90, para. 4408.

paramilitary units including, inter alia, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command.¹³⁴

There is usually more than one commander in a chain of command. The latter may include, e.g., a section leader, a platoon commander, a company commander, a battalion commander, a brigade commander, a division commander and others in ascending seniority. A commander has thus the authority to issue direct orders to subordinates, including commanders of subordinate units. The significant element is the effective exercise of command, not the fact of holding a particular rank. In the *Celebici Case*¹³⁵ the Trial Chamber of the ICTY clarified that command responsibility could be based on a mere *de facto* position of authority and that ‘the mere absence of formal legal authority to control the actions of subordinates should not be understood to preclude the imposition of such responsibility’¹³⁶. It follows that the doctrine applies to all individuals¹³⁷, as long as these exercised effective control over the offenders and had ‘the material ability to prevent and punish the commission of these offences’¹³⁸. The Appeals Chamber of the ICTY concurred with this view and observed that this standard had been also adopted by article 28 of the ICC Statute¹³⁹.

- 99 The showing of effective control is required for both *de jure* and *de facto* superiors. *Celebici* also drew a distinction between the tactical and executive commander¹⁴⁰. It observed that unlike a tactical commander, who is in charge of troops assigned to him, the latter is in charge of a territory and:

‘is per se responsible within the area of his occupation...regardless of the fact that the crimes committed were due to the action of the state or superior military authorities that he didn’t initiate or in which he didn’t participate’¹⁴¹.

To support this position, in *Celebici*¹⁴² the court referred to the findings of the *Hostage Case*¹⁴³.

- 100 This means further, that the commander of regular troops may be responsible for acts committed by irregular troops or guerrilla movements subordinated to his orders. This is an important alternative in cases where states may decide to rely on guerrilla movements, trained by their regular forces, in order to delegate responsibility for the commission of breaches of the international laws of armed conflict. In this type of situation, in fact, the hidden involvement of a state may be derived by establishing command responsibility of a member of its regular armed forces¹⁴⁴.

¹³⁴ *Bemba* (PTC II Decision), note 90, paras. 409–410, with reference to ICTY and ICTR jurisprudence, in particular *Čelebići* (Trial Chamber Judgement), note 3, para. 354.

¹³⁵ *Čelebići* (Trial Chamber Judgement), note 3, paras. 647, 704 and 742.

¹³⁶ *Čelebići* (Trial Chamber Judgement), note 3, para. 354 *et seq.* Confirmed in *Delalić* (Appeals Chamber Judgement), note 104, para. 195. See *Aleksovski* (Trial Chamber Judgement), note 99, paras. 75 *et seq.* This position was confirmed by *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24. Mar. 2000, paras 74 *et seq.*; *Bemba* (PTC II Decision), note 90, para. 405. See also Arnold (2002) 7 *JCSL* 191, 191.

¹³⁷ See *Čelebići* (Trial Chamber Judgement), note 3, paras 354 *et seq.* and 735. See also *Kordić and Čerkez* (Trial Chamber Judgement), note 99, paras. 416 *et seq.*

¹³⁸ *Čelebići* (Trial Chamber Judgement), note 3, para. 378.

¹³⁹ *Delalić* (Appeals Chamber Judgement), note 104, paras. 196 and 197.

¹⁴⁰ This approach was also followed in the *The German High Command Trial*, note 60, p. 76.

¹⁴¹ Trial of Wilhelm von Leeb *et al.* (The German High Command Trial), UNWCC, *XII Law Reports of Trials of War Criminals* (1948) 76, referred to in Parks (1973) 62 *MillRev* 1, 43 and 44.

¹⁴² *Čelebići* (Trial Chamber Judgement), note 3, paras. 372, 648 and 649 and *Delalić* (Appeals Chamber Judgement), note 104, para. 258 (footnotes omitted). For details see Jia (2004) 3 *Chinese J. I L.* 1, 1.

¹⁴³ Trial of Wilhelm List *et al.* (Hostages Trial) UNWCC, *VII Law Reports of Trials of War Criminals*, Part IV, p. 71. See, Arnold (2002) 7 *JCSL* 191, 191; Parks (1973) 62 *MillRev* 1, 60 *et seq.* The tribunal concluded that there had to be a causative, overt act or omission from which a guilty intent could be inferred, therefore rejecting a theory of strict liability.

¹⁴⁴ For details on this aspect see Arnold (2002) 7 *JCSL* 191, 191.

2. Commanders and subordinates

a) **Structure of ‘forces’.** Armed forces in the international laws of armed conflict are defined in article 43 of Add. Prot. I of 1977¹⁴⁵. According to this, the armed forces of a Party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by the adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. Thus, an intrinsic element is that armed forces be organized under a command responsible to a Party to the conflict for the conduct of its subordinates. The same requirement appears in article 4 A of the III Geneva Convention on Prisoners of War of 1949. According to the latter, belligerents can only be recognized as combatants – *i.e.* the status granted automatically to members of regular armed forces – if they a) either belong to regular armed forces of a state, therefore automatically having a responsible commander, or, b) if they belong to irregular armed forces, which fulfil several criteria, among which that of being led by a responsible commander¹⁴⁶. Therefore, the two notions of armed forces and commander are in symbiosis. The first can only exist with the presence of the latter. The underlying idea is that only those belligerent groups which are organized and have responsible leaders will have the discipline necessary to conduct warfare operations in observance of international humanitarian law.

Forces *per se*, instead, are a wider category, which may also include armed police forces and paramilitary units.

b) **‘[E]ffective command and control’.** As already mentioned, a superior may only be held liable for the crimes committed by a subordinate if he effectively exercised command and control over him. Forces under the effective command and control are those which are subordinate to the commander in either a *de iure* or *de facto* chain of command and to which the superior may give orders. These may be transmitted directly or through intermediate subordinate commanders. When multiple chains of command exist, responsibility is assigned to the chain of command that holds the power to give orders related to the conduct of hostilities or the care or victims of war. The assessment whether the indicted subordinate was under the effective command of a superior is done on the basis of objective criteria, independently from the question of his subjective incompetence. The requirement of ‘effective command and control’ relates primarily to superiors of regular and irregular armed forces with a disciplined and hierarchical internal structure.

c) **‘[E]ffective authority and control’.** This requirement was introduced to take into consideration the situation where someone holds *de facto* authority or command and control

¹⁴⁵ 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

¹⁴⁶ The other criteria are that;

a) They belong to a State
 b) they have a fixed distinctive sign recognizable at a distance;
 c) they carry arms openly;
 d) they conduct their operations in accordance with the Laws and Customs of War.
 For more details see Arnold (2002) 7 JCSL 191, 191.

over third parties who do not belong to his chain of command or armed forces. It particularly comes into play when the commander of a regular armed force may exercise authority and control over members of a paramilitary group which act on its behalf or on its side. As already mentioned, there is then also the case of ‘executive commanders’, who are in charge of a territory¹⁴⁷ and who, in addition to their operational responsibility may give orders to all forces within their occupation zone¹⁴⁸.

In the *Bemba Case* the ICC Pre-Trial Chamber concluded that the expressions ‘effective command’ and ‘effective authority’ have close but distinct meanings, even though the required degree of control is the same¹⁴⁹. ‘Effective authority’ may indicate ‘the modality, manner or nature, according to which, a military or military-like commander exercise ‘control’ over his forces or subordinates.’ It refers to the material ability to prevent or repress the commission of the crimes or submit the matter to the competent authorities. The simple exercise of influence, albeit substantial, is not sufficient¹⁵⁰. The following factors may indicate a superior’s position of authority and effective control: (i) the official position of the suspect; (ii) his power to issue or give orders; (i.e., ensure that they would be executed); (iii) his position within the military structure and the actual tasks that he carried out; (iv) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities; (v) the capacity to re-subordinate units or make changes to command structure; (vi) the power to promote, replace, remove or discipline any member of the forces; (vii) the authority to send forces where hostilities take place and withdraw them at any given moment; and (viii) the capacity to ensure compliance with the orders issued¹⁵¹. Between the ‘effective control’ and the criminal conduct there must be temporal coincidence, i.e. it must have existed at the time of commission of the underlying crime. In this regard, the ICC Pre-Trial Chamber distanced itself from Trial Chamber I of the Special Court for Sierra Leone (SCSL), according to which the ‘superior must have had effective control over the perpetrator *at least* at the time when the crimes were about to be committed’. He must have been in charge of the forces *at least* at the time the crimes were committed¹⁵².

3. ‘[F]ailure to exercise control properly’

- 104 In order to say that a superior failed to ‘exercise control properly’, it must be shown that he had ‘effective control’ over his forces: failure to exercise such control is a scenario of non-compliance with such duties. The underlying crime must be the result of the superior’s dereliction of duty to exercise proper control.¹⁵³ This position, supported in the *Bemba Case*, is in line with article 87 Add. Prot. I, according to which it is the commander’s duty to take all necessary and reasonable measures to ensure his forces’ compliance with international humanitarian law or to punish breaches thereof committed by his subordinates.¹⁵⁴ It is

¹⁴⁷ *Čelebići* (Trial Chamber Judgement), note 3, para. 720.

¹⁴⁸ Trial of Wilhelm von Leeb *et al.* (The German High Command Trial), UNWCC, *XII Law Reports of Trials of War Criminals* (1948) 36 and 76. See also, *Hostages Trial*, Part IV, note 59, at 71; Arnold (2002) 7 *JCSL* 191, 191; Parks (1973) 62 *MillRev* 1, 43 and 44; Noll and Trechsel, *Schweizerisches Strafrecht, Allgemeiner Teil I* (2004) 242 *et seq.* The tribunal concluded that there had to be a causative, overt act or omission from which a guilty intent could be inferred, therefore rejecting a theory of strict liability.

¹⁴⁹ *Bemba* (PTC II Decision), note 90, para. 413.

¹⁵⁰ *Bemba* (PTC II Decision), note 90, para. 414–415; ICTY, *Prosecutor v. Hadzihasanovic, and Kubura*, IT-01-47-T, ‘Judgment’, 15 March 2006, paras 80 and 795.

¹⁵¹ *Bemba* (PTC II Decision), note 90, para. 417.

¹⁵² Situation in the Republic of Côte d’Ivoire in the case of the *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-642-Red, Public redacted version of Prosecution’s final written submissions on the confirmation of charges proceedings, 31 March 2014, ICC-02/11-01/11-642-Conf, 1st May 2014, para. 29; *Bemba* (PTC II Decision), note 90, para. 418–419. Different view: SCSL, *The Prosecutor v. Sesay et al.*, SCSL-04-15-T, ‘Judgment’, 2 March 2009, para. 299.

¹⁵³ *Bemba* (PTC II Decision), note 90, para. 422.

¹⁵⁴ *Aleksovski*, note 98, para. 81 and *Čelebići*, note 3, para. 395.

irrelevant, whether or not the commander had the power to intervene, as long as he did not attempt to do so¹⁵⁵. At operational level this duty requires commanders to:

- ensures that forces are adequately trained in International Humanitarian Law
- ensure that due regard is paid to International Humanitarian Law in operational decision making
- ensure an effective reporting system is established so that he/she is informed of incidents when violations of International Humanitarian Law might have occurred
- monitor the reporting system to ensure it is effective

a) **Passivity and duty to become active.** Responsibility for omission of intervention is explicitly stated in articles 86 and 87 of Add. Prot. I of 1977. The idea is that due to his/her ‘guarantor’ position, a superior shall intervene to prevent the occurrence of a crime he/she has knowledge of, or at least refer the case to the military judicial authorities. The duty to intervene, however, is only attached to perpetrators who qualify as commanders, meaning that the offence can only be committed by a specific category of persons. In this sense, the crime is conceived as a *sui generis* form of so-called genuine omissions liability (‘echtes Unterlassungsdelikt’) as known to civil law systems.¹⁵⁶ As stressed by the ICTY in *Celebici*, omission of intervention may imply an accumulative charge for individual and command responsibility¹⁵⁷. The Court held that although *prima facie* it would be illogical to hold a superior criminally responsible for planning, instigating or ordering the commission of crimes *and*, at the same time, reproach him for not preventing or punishing them, the concurrent application of article 7 para. 1 and 7 para. 3 of the ICTY Statute is acceptable where his failure to intervene allows the commission of *subsequent* crimes. This may occur in relation with the failure to punish¹⁵⁸. The same view was shared in the *Celebici* and *Aleksovski* appeal judgements, ruling that these cases will result in a single but aggravated conviction for command responsibility¹⁵⁹. 105

b) **‘Crimes committed’ as a result.** aa) **Completed or attempted crimes.** Even though command responsibility is a *sui generis* crime that is distinct from the crimes committed by the subordinates, it may only be triggered if an underlying offence was completed (or at least attempted) by the subordinates. The question of attempt is discussed in more details later. 106

bb) **Committed in which modality of article 25 para. 3 ever.** What is the relationship between superior responsibility under article 28 and individual responsibility under article 25? Article 25 para. 3 (a) – (e) defines five groups of conduct. *Litera a* deals with the commission, *litera b* with the instigation of the commission and *litera c* with facilitating the commission of a crime by assisting the principal perpetrator. Pursuant to *litera d*, contribution in any other way to the commission or attempted commission of the crime is only punishable when a ‘group of persons acting with a common purpose’ sets a criminal conduct and the participating perpetrator fulfils additional demands, such as acting intentionally, 107

¹⁵⁵ Bantekas (1999) 93 AJIL 577, 591; Green (1989) 27 *CanYbIL* 200 and *Akayesu* (TC Judgement), note 117, para. 46.

¹⁵⁶ See Arnold and Wehrenberg (2013) 2 *MLLWR* 4 (forthcoming); Fiolka, in: Niggli and Wiprächtiger (eds.) *Basler Kommentar zum StGB, Bd. II* (2013), with reference to Ambos, in: Cassese *et al.* (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 823, 851 *et seq.*; Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung* (2004) 667 *et seq.*; Ambos, *Treatise on International Criminal Law*, Vol. I (2013) 186. Critical: Weigend, (2004) 116 *ZStW* 999, 1006 *et seq.*

¹⁵⁷ See *Blaškić* (Trial Chamber Judgement), note 101, paras 263, 270 and 284. On the understanding of the offence of command responsibility as a so-called ‘echtes Unterlassungsdelikt’, see Arnold and Wehrenberg (2013) 2 *MLLWR* (forthcoming), with reference to art. 264 b of the Swiss Criminal Code, which implements article 28 ICC Statute.

¹⁵⁸ See *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, Trial Chamber Judgement of 3 March 2000, paras 337 and 338.

¹⁵⁹ See, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeals Chamber Judgment of 24 March 2000, para 183; *Delalić* (Appeals Chamber Judgement), note 102, paras 736 and 743 *et seq.* The issue of direct responsibility is beyond the scope of this paper.

aiming to further the criminal activity or criminal purpose of the group and when he acts ‘in the knowledge of the intention of the group to commit the crime’. *Litera e*, instead, establishes individual criminal responsibility for incitement to commit genocide under certain conditions.

108 Command responsibility is primarily constructed on omission of intervention, whereas the forms of participation referred to under article 25 refer to active participation such as incitement. Under article 28 it is enough that because of the failure to control or intervene, crimes are committed which most probably would not have been committed otherwise. As previously mentioned, however, given certain circumstances inactivity by a superior may also consist in a form of direct participation, thereby aggravating the culpability of the superior¹⁶⁰. In such cases the active participation should prevail as *lex specialis*¹⁶¹. Another difference is that whereas direct responsibility requires willful intent, the doctrine of superior responsibility states that the latter may be incurred also on the basis of negligence¹⁶².

109 **cc) Causality.** In the *Bemba Case* the ICC’s Pre-Trial Chamber acknowledged that, in explicit contrast to the existing international jurisprudence¹⁶³, the use of the words ‘as a result of in the chapeau of article 28 ICC Statute suggest that causality is a separate element of superior responsibility¹⁶⁴. This, however, only holds true in relation to the duty to prevent the commission of *future* crimes.¹⁶⁵ With regard to the failure to repress or report past crimes, accountability will depend on whether the act of omission was likely to increase the risk of further crimes¹⁶⁶. Since the effect of an omission cannot be determined with certainty, only a hypothetical causality can be invoked, on the basis of different available tests. The Pre-Trial Chamber in the *Bemba Case* opted for a ‘but for test’, ‘in the sense that, but for the superior’s failure to fulfil his duty to take reasonable and necessary measures to prevent crimes, those crimes would not have been committed by his forces.’¹⁶⁷ It further clarified that: ‘it is only necessary to prove that the commander’s omission increased the risk of the commission of the crimes’.¹⁶⁸ The ICC, thus, seems to favour the so-called theory of risk aggravation/of added peril¹⁶⁹, which was arguably followed also by the ICTY’s Trial Chamber in *Celebici*¹⁷⁰. According to this, it is sufficient to prove that the intervention *may* have prevented the

¹⁶⁰ See *Kordić and Čerkez* (Trial Chamber Judgement), note 98, para. 371 and *Delalić* (Appeals Chamber Judgement), note 104, para. 736: ‘proof of active participation by a superior in the criminal acts of subordinates adds to the gravity of the superior’s failure to prevent or punish those acts and may therefore aggravate the sentence’.

¹⁶¹ See Triffterer (2002) 15 *LeidenJIL* 179, 188.

¹⁶² See *Čelebici* (Trial Chamber Judgement), note 3, para. 383 *et seq.* Rogers, *Law on the battlefield* (1996); Bantekas (1999) 93 *AJIL* 577, 590. By indirect intent he means *dolus eventualis*, i.e. those circumstances in which the prosecuted has no willful intent to perpetrate the acts but nevertheless fails to take preventive measures notwithstanding the knowledge of the risk. On the issue of negligence, see *Čelebici* (Trial Chamber Judgement), note 3, paras. 328 and 392 and *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 Sep. 1998, para. 489 and *Musema* (Trial Chamber Judgement), note 97, para. 131, indicating that negligence may be a basis for prosecuting where this is so serious that is tantamount to acquiescence or even malicious intent.

¹⁶³ *Bemba* (PTC II Decision), note 90, para. 423, fn 550; Ambos, *Treatise on International Criminal Law, Vol. I* (2013) 215.

¹⁶⁴ *Bemba* (PTC II Decision), note 90, paras. 423–424, citing Triffterer and Ambos in FN 551; see also Cryer, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime* (2005) 325; Moloto (2009) 3 *BJILP* 12, 21.

¹⁶⁵ *Bemba* (PTC II Decision), note 90, para 424, with reference to ICTY, ICTY, *Prosecutor v. Halilović*, IT-01-48-T, ‘Judgment’, 16 November 2005, para. 96; *Prosecutor v. Hadžihasanović et al.*, IT-01-47-A, ‘Appeals Chamber Judgment’, 22 April 2008, para. 267.

¹⁶⁶ *Bemba* (PTC II Decision), note 90, para. 424; ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-A, ‘Appeals Chamber Judgment’, 22 April 2008, para. 267.

¹⁶⁷ *Bemba* (PTC II Decision), note 90, para. 425. On this aspect see also Trechsel (2009) 3 *BJILP* 26, 29–30, who is against a separate element of causality.

¹⁶⁸ *Bemba* (PTC II Decision), note 90, para 425.

¹⁶⁹ See Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat* (1996) 156; Ambos, *Treatise on International Criminal Law*, (2013) 215; Ambos (2009) 22 *LeidenJIL* 715, 721–2.

¹⁷⁰ See the 2nd edition of this Commentary to article 28 ICC Statute, para 109 *et seq.*; *Čelebici* (Trial Chamber Judgement), note 3, para. 399.

commission of the crime, i.e. that the commander's inaction increased the risk of the commission of the subordinates' crimes¹⁷¹.

Alternatively one may argue for the application of the – stricter – probability test¹⁷², according to which a crime can only be imputed if the intervention would *most likely* have prevented its occurrence¹⁷³. These questions become particularly relevant when there has been a change in command. According to some, a former commander should only be responsible if a *novus actus interveniens* cannot be established and if the breaches would not have occurred but for his failure to control his men¹⁷⁴. In the *Oric Case*, the ICTY¹⁷⁵ stated that for a superior's duty to punish, it should be immaterial whether he had assumed control over the relevant subordinates prior to their committing the crime. However, since it was bound by the precedent set in the *Hadžihasanović Appeal Case*¹⁷⁶, the *Oric* Trial Chamber followed the view that the superior must have had control over the perpetrators both at the time of its commission and at the time that measures to punish were to be taken¹⁷⁷. In Trechsel's view, the discussion about the applicable test for hypothetical causality is superfluous, in that the text of article 28 requires no causal nexus at all. It is not necessary to establish whether, in the specific case, the necessary and reasonable measures that a commander is supposed to have taken would have actually prevented the crimes. In his view, the commander is not responsible the fact of not having prevented the crimes, but only for not taking all necessary and reasonable measures within his power to prevent or repress their commission. Otherwise, if causality were required as a separate element, the text of article 28 ICC Statute should have read 'failed to prevent...'¹⁷⁸. Thus, in Trechsel's view, a commander who fails to punish those subordinates that perpetrated international crimes prior to the change of command is to be held liable. The argument that a superior should be liable for his dereliction of duty, regardless of whether he contributed to the commission of the underlying crimes, can be at best explained with the theory of inchoate endangerment¹⁷⁹. An analogy can be drawn to the crime of incitement to genocide (article 25 (3)(e), 6 ICC Statute).

In sum, the ICC jurisprudence suggests that with regard to the ex post facto failure to punish or report the crimes the requirement of causality is not a separate element of the doctrine of superior responsibility. Whether this also holds true with regard to the failure to prevent the crimes, is, as mentioned, controversial. 110

dd) Accountability. As already mentioned, a superior shall be held liable only where he (in addition to failure to control properly) failed to comply with his duty to take all possible measures to prevent the commission of a crime that he had or should have had knowledge of, or where he failed to report the facts to the competent authorities. 111

¹⁷¹ See Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat* (1996) 43. See for example the Swiss Supreme Court decisions BGE 101 IV 152, BGE 108 IV 7 *et seq.*

¹⁷² See Noll and Trechsel, *Schweizerisches Strafrecht, Allgemeiner Teil I* (2004) at 252 *et seq.*

¹⁷³ See Noll and Trechsel, *Schweizerisches Strafrecht, Allgemeiner Teil I* (2004) 252 *et seq.* According to Ambos, this is ultimately a policy issue: Ambos, *Treatise on International Criminal Law, Vol. I* (2013) 215.

¹⁷⁴ See Bantekas (1999) 93 *AJIL* 577, 590.

¹⁷⁵ *Prosecutor v. Naser Orić*, IT-03-68-T, Judgment, Trial Chamber, 30 June 2006, para. 335.

¹⁷⁶ *Prosecutor v. Hadžihasanović*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras. 40ss.

¹⁷⁷ *Prosecutor v. Naser Orić*, IT-03-68-T, Judgment, Trial Chamber, 30 June 2006, para. 336. Depending on the standard, various degrees of liability may come into play. For instance, according to Bantekas, a former commander may be held responsible only if a *novus actus interveniens* cannot be established and if the breaches would not have occurred but for his failure to control his men. This position would seem to follow the probability theory test. See Bantekas (1999) 93 *AJIL* 577, 590.

¹⁷⁸ Trechsel (2009) 3 *BJILP* 26, 29–30; *Prosecutor v. Orić*, IT-03-68-T, Judgment, 30 June 2006, § 338; Different opinion: Ambos (2007) 5 *JICJ* 159, 178; Mettraux, *The law of command responsibility* (2009) 82; Moloto, (2009) 3 *BJILP* 12.

¹⁷⁹ See mn 92.

A particular case is the responsibility of a superior for acts committed *prior* to becoming the superior of the perpetrator. This issue arose in the *Hadzihasanovic Case*¹⁸⁰. Amir Kubara was charged with command responsibility for, *inter alia*, the Dusina killings in the Zenica municipality and the destruction and plunder of property in January 1993. Kubara, however, had only taken up his position as acting commander of the 7th Muslim Mountain Brigade of the Bosnian Army 3rd Corps on 1 April 1993. The Trial Chamber held that command responsibility did arise in the case of a superior who assumed command after the events mentioned in the indictment, even though it would be a matter of degree as to when liability attached, depending partly on the length of time that had elapsed between the events and the assumption of command. Where the crimes came to knowledge only after the change of command, it would not be possible to proceed against the original commander if he had had no reason to know that they were being or had been committed by subordinates. In this case, Kubara's liability to take action ceased on his relinquishment of command but, on the Defence reading of the case, would not be transferred to the new superior. The Appeals Chamber observed that there was no practice or *opinio juris* to support the view that a commander can be held responsible for crimes committed by a subordinate prior to his/her assumption of command. Dissenting Judge Hunt, however, referred to the *Kordic* judgment where the Trial Chamber said, albeit *obiter*:

'Persons who assume command after the commission [of the crime] are under the same duty to punish'¹⁸¹.

112 As observed by Charles Garraway, although the majority in the *Hadzihasanovic* opinion pointed out that responsibility is limited to the commander who '*knew, or had information which should have enabled [the commander] to conclude in the circumstances at the time, that [the subordinate] was committing or was going to commit [a crime]*'¹⁸², this does not mean that commanders who discover crimes after the event are not to be held responsible at all¹⁸³. However, a link must be established, so that the commander shall not be subject to strict liability and should incur responsibility only where he/she had power to intervene and failed to do so.

113 c) **Mental element: intent and knowledge.** There are three mental elements mentioned under article 28 Rome Statute:

- the commander shall have either known or should have known that the forces were committing or about to commit such crimes;
- the commander must have failed to take the necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities
- the commander must have consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

Article 30 is a default rule defining the mental elements of crime which apply unless otherwise provided in the ICC Statute. Pursuant to article 25 para. 3, principal perpetrators and accomplices can only be held accountable when acting intentionally. The intent of the accomplice shall moreover encompass the *mens rea* of the principal perpetrator. Pursuant to article 28 Rome Statute, negligence shall lead to liability. It shall apply as a *lex specialis* in relation to article 30.

¹⁸⁰ *Prosecutor v. Hadžihasanović, Alagić and Kubura*, IT-01-47-PT, Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, Appeals Chamber, 27. Nov. 2002. On this see Garraway, in: Arnold and Hildbrand (eds.), *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges* (2005), at 126.

¹⁸¹ Separate and Partially Dissenting Opinion of Judge David Hunt to *Prosecutor v. Hadžihasanović, Alagić and Kubura*, IT-01-47-AR72, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16. Jul. 2003, para. 23, quoting from para. 446 of the Judgment delivered in *Kordić and Čerkez* (Trial Chamber Judgement), note 99.

¹⁸² See the majority opinion to *Hadžihasanović, Alagić and Kubura* (Appeals Chamber Interlocutory Appeal), note 181, para. 47.

¹⁸³ Garraway, in: Arnold and Hildbrand, *International Humanitarian Law and the 21st Century's Conflicts – Changes and Challenges* (2005) 117, 134.

Unlike the principal perpetrator or the accomplice, the superior does not have to know all the details of the crimes planned to be committed. It is sufficient that he believed that one or more of his subordinates may commit one or more crimes encompassed by the ICC Statute. If command responsibility, under article 28 ICC Statute, is to be understood as a separate offence punishing the author's disregard of his or her duties as commander, it follows that a detailed knowledge of the crimes planned by the subordinates on his part is unnecessary.

The 'knew' or 'should have known' element is particular in that it requires only one of the two component elements of the *mens rea*, *i. e.* the intentional and knowledge sides, as known to civil law systems. It is not necessary that the superior shared the intent of the principal perpetrator. Mere knowledge, or failure to acquire knowledge where this would have been required by the circumstances, is *per se* enough. This kind of failure to acquire knowledge may constitute either unconscious negligence or conscious negligence, *i. e.* recklessness, too.

Failure to take all necessary measures may further be classified into an intentional or unintentional (negligent) act. However, as observed by Triffterer, if the superior intentionally decides to remain passive, he may fulfil one of the criteria of article 25 para. 3, such as *e. g.* subpara (c) on assistance to a crime, and thus become liable as a direct participant¹⁸⁴. This may be the case, *e. g.*, where passivity expresses a psychological support to the subordinates. This problem was raised by the ICTY in the *Kordić* and *Blaškić* cases¹⁸⁵.

4. Failure 'to take all necessary and reasonable measures'

a) '[K]new or should have known that the forces were committing or about to commit such crimes'. In the *Bemba Case*, the ICC reiterated that the Rome Statute does not endorse the concept of strict liability and that the suspect must have had knowledge of or should have known that his forces were about to engage or were engaging or had engaged in a conduct constituting the underlying crimes. Two standards of fault element are encompassed by Art. 28: the first, which is 'encapsulated' by the term 'known', requires the existence of actual knowledge. This, however, cannot be presumed. In determining when actual knowledge exists, the ICC referred to the criteria established by the jurisprudence of the UN ad hoc tribunals. These include the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the *modus operandi* of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.¹⁸⁶ According to the ICC, actual knowledge may be also proven *a priori*, a military commander is part of an organized structure with established reporting and monitoring systems. The second, covered by the term 'should have known', requires instead the superior to have merely been negligent in failing to acquire knowledge of his subordinates' illegal conduct.¹⁸⁷ Interestingly, the ICC's Pre-Trial Chamber concluded that this standard 'requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime'.¹⁸⁸ On the basis of the drafting history of this provision, the Pre-Trial Chamber went on to state that the intent was to take a more stringent approach towards commanders and military-like commanders compared to other superiors, an approach 'justified by the nature and type of responsibility assigned to this category of superiors'¹⁸⁹. It then concluded that the 'should have known standard' is different from the 'had reason to know' criterion embodied in the statutes of the ICTR, ICTY

¹⁸⁴ Triffterer (2002) 15 *LeidenJIL* 179, 247.

¹⁸⁵ See Nybondas (2003) 59 *NethILRev* 1, 72 *et seq.*

¹⁸⁶ *Bemba* (PTC II Decision), note 90, para. 430.

¹⁸⁷ *Bemba* (PTC II Decision), note 90, para. 427/432.

¹⁸⁸ *Bemba* (PTC II Decision), note 90, para. 433.

¹⁸⁹ *Bemba* (PTC II Decision), note 90, para. 433.

and SCSL. However, it did not deem it necessary to address the differences in that decision and held that the indicia used by the ad hoc tribunals to meet the ‘had reason to know’ standard may also be useful when applying the ‘should have known’ requirement¹⁹⁰. The question, thus, still remains open as to whether, ultimately, the two standards are really to be interpreted differently. While awaiting for a clarification from the ICC jurisprudence, the suggested way to interpret this provision is in light of the UN ad hoc tribunals. It follows, as previously mentioned, that a superior can no longer be held responsible for having failed to search for information allowing him to become aware of the possibility of crimes being committed by his/her subordinates. However, responsibility will be imputed to him where, owing to the circumstances, he/she should have known that his/her forces were committing or about to commit such crimes.

117 **b) Dereliction of duty and power to react.** Although recent jurisprudence, like the *Hadzihasanovic* Judgment, seems to blur direct individual responsibility (article 25) with superior responsibility (article 28), it should be recalled that the latter’s underlying idea is that a superior shall be liable for having failed to exercise his duty to properly supervise his subordinates: the ‘criminal’ conduct is the dereliction of this duty, assuming the commander’s power to intervene. This additional requirement is important to avoid strict liability. The failure to intervene is not to be confused with participation in the underlying crimes. This was confirmed in the *Bemba case*, in which the ICC’s Pre-Trial Chamber additionally observed that there are three duties that need to be discharged by a superior: duty to prevent, to repress and to report. A failure to properly discharge the first duty cannot be cured by fulfilling the other two.¹⁹¹

118 **c) Measures needed to avoid or to compensate ‘the result of’ the ‘failure to exercise control properly’.** aa) **Dependence on the stage of the commission.** What measures shall be taken by a commander? This depends on the stage of the commission of the crimes. The attempt by the subordinates to commit a crime shall be sufficient to trigger command responsibility¹⁹².

119 **bb) ‘[T]o prevent or repress ... or to submit’.** If the underlying crime is only at its initial stage, *i. e.* it is merely being attempted, the superior has the duty to intervene to impede it. Alternatively, where it has already been committed and it is too late to prevent it, the commander shall take measures to repress it. The superior shall remark to the other subordinates that such conduct was wrong, thereby interrupting a possible ‘chain effect’. If a superior lack the power to take disciplinary measures or where these appear to be insufficiently severe – which shall always be the case with regard to the crimes outlawed by the ICC Statute – he shall submit the case to the competent authorities.

In assessing the appropriate conduct in preventing the crimes, the ICC’s Pre-Trial Chamber considers it appropriate to be guided by relevant factors such as measures: (i) to ensure that superior’s forces are adequately trained in International Humanitarian Law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior’s command.¹⁹³

¹⁹⁰ *Bemba* (PTC II Decision), note 90, para. 434. For an analysis of the jurisprudence of the ICTY on the indicia suggesting knowledge, see Maugeri, *La responsabilità da comando nello Statuto della Corte Penale Internazionale* (2007) 395 *et seq.* In Prof. Ambos’ view, both the had reason to know and the should have known standards essentially constitute negligence standards: ‘If one really wants to read a difference in these two standards considering that the ‘should have known’ standard ‘goes one step below’ the ‘had reason to know’ standard, it would be the ICC’s task to employ a restrictive interpretation which brings the former standard in line with the latter.’ (Ambos (2009) 22 *LeidenJIL* 715, 722).

¹⁹¹ *Bemba* (PTC II Decision), note 90, paras. 436. and 405. For a critical position see Ambos (2009) (2009) 22 *LeidenJIL* 715, 721.

¹⁹² Arnold and Wehrenberg (2013) 2 *MLLWR* 27, 30.

¹⁹³ *Bemba* (PTC II Decision), note 90, para. 438.

With regard to the duty to repress, in *Bemba* the ICC stated that this encompasses two separate duties arising at two different stages: First, the duty to repress includes a duty to stop ongoing crimes from continuing to be committed, in order to ‘interrupt a possible chain effect, which may lead to other similar events’. Second, the duty to repress encompasses an obligation to punish forces after the commission of crimes.¹⁹⁴

The duty to punish, instead, which is a part of the duty to repress, may be fulfilled by the superior taking the necessary and reasonable measures to punish his forces, or, if he does not have the ability to do so, by referring the matter to the competent authorities. Thus, it constitutes an alternative to the third duty, i.e. the duty to submit the matter to the competent Authorities¹⁹⁵.

aaa) *ex post* or *ex ante* evaluation? – The objective comparable commander ‘in the situation at the time’, article 87 para. 2 Add. Prot. I. It would be too simplistic to judge a situation, in particular the possibility of intervention of a commander, *ex post*. A commander’s position and possibility to intervene shall rather be assessed on the basis of what any commander, in such a situation, would have objectively done at the time of the facts. 120

bbb) **Hypothetical causation.** Causation is hypothetical insofar as the question that needs to be assessed is whether, in the hypothesis that the commander had intervened to prevent the occurrence of crimes, the crimes would have been prevented or whether they would have nonetheless occurred. Reference can be made to what has been said previously in relation to the probability and risk aggravation theories. 121

d) **Threshold of unreasonable demands?** In some situations, a commander may have little power to intervene. For this reason it is always important not to confuse moral with legal obligations. A practical difficulty may, for example, be the rigidity of the chain of command. A middle officer in charge of subordinates who have committed a crime may have to refer the case to a commander – without the guarantee that the case will be considered any further – without having the chance to report it directly to the judicial military authorities. However, in this case, the mere fact of having reported the occurrences to the competent superior shall exempt him from liability.¹⁹⁶ In some cases, however, even this possibility may be precluded. In the *Krstić Case*, e.g., the Appeal’s Chamber of the ICTY held that the accused, in his position as a commander, would not have been able to prevent or punish because his superiors were involved ‘in the plot’.¹⁹⁷ 122

In *Krnojelac*, the ICTY held that an analogous situation may occur to a commander charged with crimes against humanity, which require a widespread and systematic attack, meaning that the top of the hierarchy is also very likely to be involved, thus making it very difficult for anyone in a middle position to do anything. It is therefore very important to understand what kind of commanding position was held by the accused, what his *de facto* and legal powers to intervene were.¹⁹⁸

III. Paragraph (b)

1. ‘[S]uperior and subordinate relationships not described in paragraph (a)’

Paragraph (a) refers to military or quasi-military relationships in which persons exercise command over forces. However, the recent occurrences in Rwanda and the former Yugoslavia raised awareness about the fact that in some cases civilians – who are not *de facto* enrolled in the military – may exercise a similar authority over forces, in which case they should incur 123

¹⁹⁴ *Bemba* (PTC II Decision), note 90, para 439.

¹⁹⁵ *Bemba* (PTC II Decision), note 90, para. 440.

¹⁹⁶ Nybondas (2003) 59 *NethILRev* 1, 170; Arnold (2013) 11 *JICJ* 943–951.

¹⁹⁷ *Prosecutor v. Krstić*, IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004, para. 143, fn. 250.

¹⁹⁸ *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Chamber, Judgment, 15 March 2002, para. 127.

a responsibility similar to that of military commanders. Reference is made in particular to non-military members of governments, political parties, or business companies¹⁹⁹.

2. Subsidiarity based on a different notion of ‘relationship’ and ‘effective authority and control’

124 Paragraph (b) is subsidiary to paragraph (a). Therefore, it only comes into play where a hierarchy of a military or quasi-military nature cannot be established. The essence is that the superior shall have *de jure* or *de facto* authority enabling him to control his subordinates. In *Akayesu* the Trial Chamber of the ICTR confirmed the applicability of the doctrine of command responsibility to non-international conflicts and its extension to civilians holding *de facto* positions of authority²⁰⁰.

125 However, the assessment – and the underlying criteria – of whether someone is to be considered as exercising a military or a quasi-military function, or whether he has civilian status, is a matter that will have to be assessed by the ICC’s jurisprudence. In the *Kordić Case*, the Trial Chamber concluded that the accused could not be considered a military commander because:

‘while he played an important role in military matters, even at times issuing orders, and exercising authority over HVO forces, he was, and remained throughout the indictment period, a civilian, who was not part of the formal command structure of the HVO’²⁰¹.

This motivation, however, is quite superficial. For the purposes of the ICTY Statute, the question whether someone was a military commander or a civilian exercising commanding functions may be less dramatic, since the knowledge requirement is the same. This, however, may have serious impacts under article 28 ICC Statute, since burden of responsibility of a civilian accused is much lower²⁰². Therefore, the assessment criteria under paragraph (b) of article 28 will have to be carefully developed by the ICC.

3. ‘[F]ailure to exercise control properly’

126 As reflected in article 86 Add. Prot I, a superior is under the duty to establish and maintain an effective reporting system to ensure the compliance of his/her subordinates with International Humanitarian Law in the course of their duties. However, under paragraph (b) a superior shall not be responsible for acts committed by subordinates which were not related to their work. If, *e. g.*, the employees of a paint factory engage in genocidal activities beyond the working hours, it is unlikely that the factory manager would be regarded as liable under article 28.

4. Failure ‘to take all necessary and reasonable measures’

127 a) ‘[K]new or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes’. The *mens rea* threshold for civilian superiors was intentionally set below the standard applicable to military commanders. It was deemed that military commanders, because of their position within a strictly hierarchical and organised structure, would have far more possibilities to receive information on the conduct of their subordinates. For non-military commanders, therefore, it is necessary to establish:

- that information clearly indicating a significant risk that subordinates were committing or were about to commit offences existed;
- that this information was available to the superior, and

¹⁹⁹ Situation in the Republic of Côte d’Ivoire in the case of the *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-642-Red, Public redacted version of Prosecution’s final written submissions on the confirmation of charges proceedings, 1 May 2014, para. 26; *Bemba* (PTC II Decision), note 90, para. 409.

²⁰⁰ See, *Akayesu, Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 Sep. 1998, para. 492.

²⁰¹ See *Kordić and Čerkez* (Trial Chamber Judgement), note 99, para. 838.

²⁰² See Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors* (2010) 79.

- that the superior, while aware that such a category of information existed, declined to refer to the category of information;
- b) crimes concerning ‘activities that were within the effective responsibility and control of the superior’.

b) **Crimes concerning ‘activities that were within the effective responsibility and control of the superior’.** As mentioned, a civilian superior shall only be liable for activities that were within his effective responsibility and control. Therefore, a civilian superior shall not be held liable for the misconduct of subordinates that occurred beyond the working hours or which were not related to their working activities. As mentioned, the doctrine of command responsibility is based on the idea of the ‘guarantor position’ of the superior, which shall be limited to the sphere of his competences. To do otherwise would imply a collective punishment.

c) **The objective comparable superior ‘in the situation at the time’.** Further, the responsibility of civilian superiors shall be assessed *ex ante*, on the basis of ‘the situation at the time of occurrence of the facts’.

d) **Threshold of reasonable demands?** Civilian superiors, unlike military commanders, are unlikely to have disciplinary powers. Therefore, what can be reasonably expected from them, is the reporting of misconduct to the competent authorities. Dismissal may be the first step, although care should be taken in assuring that once the employee/subordinate has been dismissed, a criminal proceeding will be opened. This may hold true in particular for NGOs or other institutions engaged in peace support operations, often availing themselves of the support of private subcontractors. There have been cases reported of such subcontractors committing crimes. Very often the first consequence is immediate dismissal and repatriation, according to the employment contract. However, it should be assured that once repatriated the individual will be subject to a criminal investigation procedure.

C. Special remarks

I. Assisting in command responsibility, a participation in the crime committed by subordinates?

Command responsibility can only be incurred by persons holding authority over the principal perpetrator. Thus, someone may be a co-perpetrator under article 28 only if he also holds such authority. A perpetrator may in fact have several commanders in the same chain of command. Participation as ‘co-author’ is conceivable *e.g.* where a commander fails to report to his superior a subordinate’s misconduct and also his own superior, who is the next in the chain of command and who has also acquired knowledge of the facts, fails to investigate or report further the matter. In this case both commanders may incur liability under article 28. If instead a commander, who has acquired information revealing the commission of crimes by subordinates, asks another subordinate to destroy this information, the subordinate, who may not necessarily have authority over the primary perpetrator, may be liable directly and individually under article 25 for having actively supported him.

Any other kind of support to the primary perpetrator (instigation, assistance, or otherwise support, *e.g.* by assisting the commander in his failure to intervene) may also be performed without any particular qualification or guarantor position. In this case, however, the accomplice or instigator will be liable according to Article 25 (3) of the Statute.

II. Attempted command responsibility, an attempted crime within the jurisdiction of the Court?

133 Attempt can only be given in those cases where the perpetrator acts *intentionally* but, for some reasons, his conduct does not lead to the expected results.

With regard to attempt and command responsibility, therefore, two scenarios arise:

- a) the first concerns the situation where a commander ‘attempts’ to incur into liability under the doctrine of command responsibility;
- b) the second concerns the case where the primary perpetrator merely attempts to commit a crime, and the commander, without knowledge of the fact that the acts will not lead to any effects, fails to intervene.

The first case may be given where a commander is unwilling to either report or prevent a crime he has heard rumours about, and in the end it turns out that the subordinates never had any intention to commit a crime. In this case the commander has simply attempted to ‘cover’ his subordinates.

134 In the Germanique doctrine this would be defined as an impossible attempt (*untauglicher Versuch/délit impossible, delitto impossibile*), since the underlying offence was not even attempted. Command responsibility requires at least the attempted commission of an underlying crime by a subordinate. Mere failure to control the subordinates, without any initial phases of the occurrence of the crime (e.g. attempt), does not imply criminal liability. This is due to the fact that even though command responsibility is a *sui generis*, separate offence punishing a commander’s failure to discharge his duties, the gravity of the punishment under art. 28 ICC can only be justified when a nexus to international crimes is proven. Otherwise, as already discussed, alternative provisions may be those addressing the violation of military regulations providing for the duty to properly command and control. Thus, unless the crime has at least been attempted, the commander will not be liable, since command responsibility is a *sui generis* crime that is accessory to the commission of an underlying offence falling within the jurisdiction of the ICC. This qualification, however, does not mean that command responsibility is a form of *participation* in the underlying crime.

135 The second scenario exists where a commander who acquires knowledge of his subordinates’ plan to commit a war crime, decides not to intervene and, for external reasons, the conduct of his subordinates’ does not lead to the expected results. As under art. 28 ICC Statute command responsibility is accessory to the commission of an international crime by the subordinate(s), a commander failing to discharge his duties will only be liable if the underlying crime has been committed or, at least, attempted. Alternatively, the commander could arguably be held accountable for an attempted breach of art. 28 ICC Statute. The *sui generis* approach is supported by international jurisprudence and is to be welcomed, even though a systematic interpretation of art. 28 ICC would justify the (minority view) that this provision corresponds to a form of participation to the underlying offences. A similar conclusion can be reached in the event where the subordinate had a justification for the commission of the underlying crime, but the superior failed to intervene without being aware of the existence of this justification.²⁰³

III. Concurring responsibility?

1. Authorities in a hierarchial chain all failing to fulfil their duties

136 If there is more than one person responsible for the acts of a subordinate in the same chain of command, all of them may be individually responsible under article 28 ICC Statute.

²⁰³ See Ambos, *Treatise on International Criminal Law*, Vol. I(2013) 203.

2. Command responsibility and participation according to article 25

Yamashita was not being punished ‘for a separate offence of failure to control, but for the actual offences committed by his subordinates’²⁰⁴. This conclusion, however, was reached on the basis of a strict liability approach to the doctrine of command responsibility. In the *Hadzihasanovic Case*, judge Shahabuddeen observed, instead, that:

‘Command responsibility imposes responsibility on a commander for failure to take corrective action in respect of a crime committed by another; it does not make the commander party to the crime committed by that other’²⁰⁵.

As observed by Otto Triffterer:

‘The common chapeau for all alternatives contained in Article 28, explicitly mentions that superior responsibility for acts of their subordinates should be ‘in addition to other grounds of criminal responsibility under this Statute.’ It therefore does not substitute, but supplements all forms of participation as listed in Article 25(3) sub a-f. Article 28 thus extends the scope of individual criminal responsibility for perpetrators in the position of superiors’²⁰⁶.

The question whether art. 28 ICC Statute should be considered as a sui generis crime or a sui generis form of participation was previously discussed. Prof. Triffterer’s view is legally correct in light of the text and context of art. 28 ICC Statute. However, if one considers the history of the doctrine of command responsibility and its aim and purpose, a preferred approach would be that of a sui generis crime. It remains to be seen what direction the ICC’s jurisprudence will take.

IV. The customary nature of the doctrine of command responsibility

Generally, the customary nature of the doctrine of command responsibility has been recognised both by the doctrine²⁰⁷ and by the international jurisprudence.²⁰⁸ Debates, however, still revolve around its applicability, out of custom, to military and non-military commanders within the framework of non-international armed conflicts (NIAC). In the *Hadzihasanovic Case*, the Appeals Chamber of the ICTY concluded that the doctrine was applicable to NIAC on the basis of customary law pre-dating the coming into force of the two Additional Protocols of 1977 and that the latter had simply codified already existing customary law²⁰⁹. The AC added that ‘the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts.’²¹⁰ With regard to the application of the doctrine to

²⁰⁴ See Greenwood (2004) 2 *JICJ* 598, 599.

²⁰⁵ Partial Dissenting Opinion of Judge Shahabuddeen to *Prosecutor v. Hadzihasanovic, Alagic and Kubura*, IT-01-47-AR72 d, Decision, Appeals Chamber, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 Jul. 2003, para. 33.

²⁰⁶ See Triffterer (2002) 15 *LeidenJIL* 179, 186.

²⁰⁷ Ambos, in: Cassese et al. (eds.), *The Rome Statute of The International Criminal Court: A Commentary* (2002) 844, 846–847; Fenrick, in: Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s notes, article by article* (2008) 515, 516; Méttraux, *The law of command responsibility* (2009) 21–33. Rule 153 of the ICRC Study on Customary Law: Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. II (2009) 3713 *et seq.*; Laucci, in: Fernandez and Paccreau (eds.), *Statut de Rome de la Cour Pénale internationale, commentaire article par article* (2012) 864, 871–872.

²⁰⁸ *The Prosecutor v. Hadzihasanović et al.*, IT-01-47-AR72, ‘Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility’, 16 July 2003; Appeals Chamber (Judges Meron [Presiding], Pocar, Shahabuddeen, Hunt and Gunëy), at para. 28; *Čelebići* (Trial Chamber Judgment), note 3, paras 354 *et seq.*

²⁰⁹ *The Prosecutor v. Hadzihasanović et al.*, IT-01-47-AR72, ‘Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility’, 16 July 2003; Appeals Chamber (Judges Meron [Presiding], Pocar, Shahabuddeen, Hunt and Gunëy).

²¹⁰ *The Prosecutor v. Hadzihasanović et al.*, IT-01-47-AR72, ‘Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility’, 16 July 2003; Appeals Chamber, para 28.

civilian superiors, in the *Akayesu Case* the Trial Chamber of the ICTR noted that already during the Tokyo trials, certain civilian authorities like Hirota, the former Foreign Minister of Japan, had been convicted of war crimes under this doctrine. The ICTR, after a thorough examination of the existing jurisprudence, concluded that in the application of the principle to civilians remained contentious, but that 'Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.'²¹¹ Ten years later, in the *Celebici Case*, the TC of the ICTY found that already the International Military Tribunal for the Far East had relied on this principle 'in making findings of guilt against a number of civilian political leaders charged with having deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance of the laws and customs of war and to prevent their breach.'²¹²

The question whether the doctrine of command responsibility could apply, out of custom to (a) international armed conflicts, and (b) to non-military commanders in the years prior to 1991, and in particular in the period between 1975–1979, was set in a motion of the defence team of Ieng Sary before the Cambodian EEEC.²¹³ The motion was taken to the Pre-Trial Chamber²¹⁴. In 2011 the Pre-Trial Chamber ruled on Ieng Sary and Ieng Thirith's appeals. It concluded that the doctrine of command responsibility was applicable to both military and civilian superiors during 1975–1979 and that it already formed part of customary law at the time. On this basis, according to the chamber, the accused could have sufficiently foreseen that criminal sanctions were going to be imposed on them for their conduct.²¹⁵

It can be concluded, thus, that article 28 ICC Statute is based on well-founded customary law, inasmuch it relates to the law applicable since the 1990s. Due to the temporal jurisdiction of the ICC, the Court will never be confronted with the question of the applicability of this doctrine to cases submitted to its judgment, since it will only address cases that occurred after the entry into force of the ICC Statute, that is at the earliest on or after 1 July 2002.

²¹¹ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 Sep. 1998, para 491 <<http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>>.

²¹² *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21-T, Judgement, Trial Chamber, 16. Nov. 1998, para. 357.

²¹³ See the Summary of IENG Sary's Appeal Against the OCIJ's Order on IENG Sary's Motion Against the Application of Command Responsibility of 13.10.2010 <<http://www.iengsarydefence.org/summary-of-ieng-sarys-appeal-against-the-ocijs-order-on-ieng-sarys-motion-against-the-application-of-command-responsibility.html>>.

²¹⁴ *Ibid.*

²¹⁵ *Prosecutor v. Ieng Sary*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, paras. 20–21; *Prosecution v. Ieng Thirith*, 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, paras. 28–29. For a discussion see Abeyratne (2012) 44 *GeoWashILRev* 39, 44–45.

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Literature: Van den Wyngaert, C. and Dugard, J., 'Non-applicability of Statute of Limitations', in: A. Cassese, P. Gaeta and J. R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 873; Henckaerts, J.-M. and Doswald Beck, L., *Customary International Humanitarian Law, Vol. I: Rules* (2005) 614.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
C. Special remarks	7

A. Introduction/General remarks

The *Rome Statute* declares that the crimes within the Court's jurisdiction are not subject to a statute of limitations. None of the preceding international instruments concerned with international prosecution of atrocities, from the *Charter of the International Military Tribunal* to the statutes of the *ad hoc* Tribunals, has contained anything similar. This is only logical, because in the absence of texts within the instruments creating a time bar, silence was all that was required. On the other hand, *Control Council Law No. 10* stated that '[I]n any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945'¹. Because *Control Council Law No. 10* was applicable to national prosecutions within Germany, the provision was required in order to neutralize any alleged time bar to trials for Nazi-era crimes.

Many domestic criminal law systems provide for statutory limitation of crimes, even the most serious². Under French law, for example, prosecutions for murder are time barred after ten years³. Codes derived from the Napoleonic model generally have similar provisions. At trial, Eichmann pleaded that prosecution was time barred, but the argument was dismissed. Eichmann invoked a fifteen-year limitation period in force in Argentina. The District Court of Jerusalem ruled that Argentine norms could not apply, adding a reference to applicable Israeli legislation declaring that 'the rules of prescription ... shall not apply to offences under this Law'⁴. During the 1960s, as the application of statutory limitations in national penal codes to Nazi war criminals began to appear possible, there was a movement to amend rules by which such prosecutions could be time barred. Accordingly, there were changes to domestic legislation⁵. On an international level, these developments took the form of

¹ *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 Dec. 1945, Official Gazette Of The Control Council For Germany, No. 3, Berlin, 31 Jan. 1946, 50-55, article II (5).

² See: LaRosa, *Dictionnaire de Droit International Pénal: Termes Choisis* (1998) 50-52.

³ *Penal Code* (France), Article 7.

⁴ *A. G. Israel v. Eichmann*, (1968) 36 ILR 18 (District Court), para. 53.

⁵ Germany seems to have had a twenty-year limitation period on Nazi crimes not contemplated by *Control Council Law No. 10*. On 25 Mar. 1965 the Bundestag extended the limitation date for murder to 31 Dec. 1969, which was the twentieth anniversary of establishment of the German Federal Republic. But this was inadequate and the date was again extended until 31 Dec. 1979. On 3 July 1979 the Bundestag voted to eliminate any limitation date for murder. See: de Mildt, *In the Name of the People: Perpetrators: Perpetrators of Genocide in the*

General Assembly resolutions⁶, and treaties within both the United Nations system⁷ and that of the Council of Europe⁸. Both instruments refer to the crime of genocide and to crimes against humanity as offences for which there shall be no statutory limitation.

- 3 The treaties have not been a great success in terms of signature and ratification; the United Nations instrument still has only forty-five States Parties. The low rate of adherence to the United Nations *Convention* has led some academics to contest the suggestion that this is a customary norm⁹. However, the French Cour de Cassation determined, in the *Barbie* case, that the prohibition on statutory limitations for crimes against humanity is now part of customary law¹⁰. Although the debates surrounding adoption of article 29 of the *Rome Statute* revealed a lack of unanimity on the subject, the final result is a clear demonstration of the *Statute's* contribution to the progressive development of international law.

B. Analysis and interpretation of elements

- 4 There was no reference to statutory limitation in the ILC Draft Statute that was submitted to the General Assembly in 1994¹¹. In the *Ad Hoc* Committee sessions of 1995, it became clear that the principle of the impermissibility of statutory limitations for crimes such as genocide and crimes against humanity was not universally accepted. Some delegations urged that the question be considered 'bearing in mind the importance of the legal principle involved, which reflected the decreasing social importance of bringing criminals to justice and the increasing difficulties in ensuring a fair trial as time elapsed'¹². In the first sessions of the Preparatory Committee, delegations expressed concern about the fairness of 'stale' prosecutions. The possibility that statutory limitations could apply to crimes that are less serious than the core offences of genocide and crimes against humanity was also evoked¹³. According to the 1996 report to the General Assembly, '[s]ome delegations suggested that, instead of establishing a rigid rule, the Prosecutor or the President should be given flexible power to make a determination on a case-by-case basis, taking into account the right of the accused to due process. It was suggested that an accused should be allowed to apply to the Court to terminate the proceedings on the basis of fairness, if there was lack of evidence owing to the passage of many years'¹⁴. One of the issues involved in addressing the matter was the general question of complementarity, in that States with statutory limitations on some or all of the crimes would find themselves 'unable' to prosecute after time had elapsed. A number of formal proposals before the Preparatory Committee contemplated some form of statutory limitation, either for certain specified treaty crimes or for the subject-matter

Reflection of Their Post-War Prosecution in West Germany (1996) 29–30; I. Müller, *Hitler's Justice, the Courts of the Third Reich* (1991) 243–249; Monson (1982) 30 *AJIL* 605; Triffterer (1980) *NJW* 2049 *et seq.*

⁶ GA Res. 3 (I); GA Res. 170 (II); GA Res. 2583 (XXIV); GA Res. 2712 (XXV); GA Res. 2840 (XXVI); GA Res. 3020 (XXVII); GA Res. 3074 (XXVIII).

⁷ *Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 754 UNTS 73 (1970). See: Miller (1971) 65 *AJIL* 476.

⁸ *European Convention on the Non Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes of January 25, 1974*, ETS 82.

⁹ Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy* (1997) 126.

¹⁰ *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, (1984) 78 *I.L.R.* 125, 135. Also: France, Assemblée nationale, *Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*, p. 286 (1999).

¹¹ 1994 ILC Draft Statute.

¹² *Ad Hoc* Committee Report, para. 127, p. 29.

¹³ 1996 Preparatory Committee I, paras. 195–196, p. 45.

¹⁴ *Ibid.*, para. 196.

jurisdiction of the Court as a whole¹⁵. France argued for statutory limitation of ten or twenty years in the case of war crimes¹⁶. Interestingly, of the several draft proposals, non suggested that the statute simply be silent on the subject.

At the Rome Conference, the Working Group on General Principles opted for a text declaring the impermissibility of statutory limitation¹⁷. Testifying to the difficulty with the concept for some delegations, its report included a footnote:

Two delegations were of the view that there should be a statute of limitations for war crimes. One delegation agreed to the above text in a show of flexibility, but stressed that there should be a possibility not to proceed if, due to the time that has passed, a fair trial cannot be guaranteed. The question of statute of limitations will need to be revisited if treaty crimes are included. There must also be a special regime for crimes against the integrity of the Court. The absence of a statute of limitations for the Court raises an issue regarding the principle of complementarity given the possibility that a statute of limitations under national law may bar action by the national courts after the expiration of a certain time period, whereas the ICC would still be able to exercise jurisdiction¹⁸.

But the delegations did not object to the text being sent to the Drafting Committee¹⁹, and it was adopted unchanged in the final version.

C. Special remarks

In sentencing proceedings before the *ad hoc* tribunals it has been argued that the lapse of time between commission of the offence and imposition of penalty should be treated as a mitigating factor. In rejecting the argument, judges have referred to the prohibition on statutory limitation. For example, Trial Chamber 1 of the International Criminal Tribunal for the former Yugoslavia wrote: 'For crimes of a seriousness justifying their exclusion from statutory limitation, the Trial Chamber considers that a lapse of time of almost twelve years between the commission of the crimes and sentencing proceedings is not so long as to be considered a factor for mitigation'²⁰.

The *ad hoc* tribunals have been required to consider statutory limitations as part of the process of referring cases to national courts, pursuant to Rule 11*bis* of the Rules of Procedure and Evidence. For example, in referring a case to the court of Serbia, a Referral Bench of the International Criminal Tribunal for the former Yugoslavia noted that article 95 para. 1, 1 (1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia barred prosecution after twenty-five years. Accordingly, in the case under consideration, of which the alleged acts took place in December 1991, the offence would be time barred in 2016, a situation that the Referral Bench considered acceptable given the prospect of prompt trial within Serbia²¹.

Article 29 as adopted by the Rome Conference is unnecessary, at least to the extent it would be applied to trials before the Court for offences listed in article 5. Obviously, in the absence of a provision actually establishing statutory limitations, the silence of the *Statute* can only mean that there are no statutory limitations. This does not mean that article 29 is superfluous. Its role would appear to be part of the complex relationship between national and international judicial systems. The issue of statutory limitation arose when France was contemplating ratification of the Rome Statute. The French *Conseil constitutionnel* consid-

¹⁵ 1996 Preparatory Committee II, pp. 88-89. Also: Preparatory Committee Decisions Feb. 1997, pp. 24-26; Zutphen Draft, pp. 57-58; 'Draft Statute for the International Criminal Court', UN Doc. A/CONF.183/2/Add.2, pp. 62-64.

¹⁶ UN Doc. A/CONF.183/C.1/SR.2, para. 47.

¹⁷ *Ibid.*, paras. 45-74.

¹⁸ UN Doc. A/CONF.183/C.1/WGPP/L.4, p. 4, fn. 7; UN Doc. A/CONF.183/C.1/WGPP/L.4/Corr. 1, fn. 7.

¹⁹ UN Doc. A/CONF.183/C1/SR.8, paras. 76, 82.

²⁰ *Prosecutor v. Mrđa*, IT-02-59-S, Sentencing Judgment, 31 Mar. 2004, para. 104.

²¹ *Prosecutor v. Kovačević*, IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11*bis*, 17 Nov. 2006, paras. 39, 42. Similarly, in a referral to Bosnia and Herzegovina: *Prosecutor v. Stanković*, IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis*, 17 May 2005, para. 41.

ered that the complementarity provisions of the Rome Statute were incompatible with the French Constitution because they covered crimes that were subject to statutory limitation. According to the *Conseil constitutionnel*, ‘under the Statute, the International Criminal Court could be validly seized on the grounds of an amnesty statute or internal rules on limitation; in such a case, France, even if a State were neither unwell not unable to act, might be required to arrest and surrender to the Court a person accused of conduct covered by an amnesty or limitation period in French law...’²². The result was an amendment to the Constitution: ‘La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998’²³.

- 8 There is ample precedent for States refusing to extradite offenders where crimes are time barred under their own legislation. Many extradition treaties provide explicitly for such an exception. This issue was certainly a live one in the preparatory discussions of the *Rome Statute*²⁴. Consequently, at the very least article 29 operates as an answer to any argument from a State Party whereby extradition might be refused because of a statutory limitation in its own domestic penal code.

A literal reading of article 29 leads to an intriguing result, although one that does not appear in the published record of the *travaux préparatoires* and may not have been contemplated by the drafters. To the extent that the *Statute* does more than simply create a court, and actually imposes obligations on States, can it not be sustained that article 29 in effect constitutes a prohibition in the law of the States Parties on statutory limitations of genocide, crimes against humanity, war crimes and aggression? A State Party to the *Statute* whose legislation allowed prosecutions of these crimes to become time barred would be in breach of the instrument. Certainly on a purely practical level, statutory limitations in national law will be unable to shelter offenders. Should the national courts grant exceptions based on statutory limitation, the complementarity provisions of the *Statute* will grant the ICC jurisdiction. A State Party which allowed such an obstacle to a prosecution would, in effect, concede jurisdiction to the ICC. When States undertake revisions of their legislation as part of the process of accession to or ratification of the *Statute*, they should be advised to eliminate provisions that are incompatible with article 29. In most States, judges might even apply article 29 directly in order to supersede contrary penal legislation.

²² Décision n° 98–408 DC du 22 janvier 1999, para. 34. Translation available on the website of the *Conseil constitutionnel* at <http://www.conseil-constitutionnel.fr/langues/anglais/a98408dc.pdf>, cited in Barrat, in: Lee (ed.), *State’s Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (2005) 60.

²³ Loi constitutionnelle n°99–568 du 8 juillet 1999 (article 52 para. 2).

²⁴ 1996 Preparatory Committee I, note 13, para. 324, p. 68.

Article 30 Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.

Literature: Ambos, K., ‘Critical Issues in the Bemba Confirmation Decision’, (2009) 22 *LeidenJIL* 715; Badar, M. E., ‘Dolus Eventualis and the Rome Statute Without It?’, (2009) 12 *NCLRev* 433; *id.*, ‘Mens rea – Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals’, (2005) 5 *ICLRev* 203; Clark, R.S., ‘The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Crime’, (2001) 12 *CLF* 291; *id.*, ‘Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the International Criminal Court’, (2008) 6 *NZYbilL* 209; Eser, A., ‘Mental Elements – Mistake of Fact and Mistake of Law’, in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. I* (OUP 2002) 889; Kelt, M. and von Hebel, H., ‘General Principles of Criminal Law and the Elements of Crimes’, in: R.S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure* (Transnational 2001); Triffterer, O., ‘The new International Criminal Law – Its General Principles establishing Individual Criminal Responsibility’, in: K. Koufa (ed.), *Thesaurus Acroasium, The new International Criminal Law* 639, xxxii (Sakkoulas 2003) 639; *id.*, ‘“Command Responsibility” – crimen sui generis or participation as ‘otherwise provided’ in Article 28 Rome Statute?’, in: J. Arnold *et al.* (eds.), *Menschengerechtes Strafrecht, Festschrift für Albin Eser zum 70. Geburtstag* (CH Beck 2005) 91; Saland, P., ‘International Criminal Law Principles’ in: R.S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 189; Smith, J.C. and Hogan, B., *Criminal Law* (Butterworths 4th edition 1978); Roxin, C., *Strafverfahrensrecht* (CH Beck 25th edition 1998); Weigend, T., ‘Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation Charges’, (2008) 6 *JICJ* 471.

Content

A. Introduction/General remarks.....	1
1. Historical development	1
2. Purpose.....	2
3. Scope	3
4. Protected values	4
B. Analysis and interpretation of elements.....	5
I. Paragraph 1	5
1. ‘criminally responsible and liable for punishment’	5
2. ‘material elements’	6
3. ‘committed’	7
4. ‘intent and knowledge’	9
5. ‘Unless otherwise provided’	14
II. Paragraph 2	16
1. ‘For the purposes of this article’	16
III. Sub-paragraph 2 (a).....	17
1. ‘conduct’	17
2. ‘means to engage in the conduct’	19
IV. Sub-paragraph 2 (b).....	20
1. ‘consequence’	20
2. ‘means to cause that consequence’	21
3. ‘aware that it will occur in the ordinary course of events’	22
V. Paragraph 3	24
1. ‘For the purposes of this article’	24
2. ‘awareness that a circumstance exists’	25
3. ‘awareness that...a consequence will occur in the ordinary course of events’	27

A. Introduction/General remarks*

1. Historical development

- 1 The *Draft Statute for an International Criminal Court*, contained in the Report of the International Law Commission on the Work of its Forty-Sixth Session, did not contain a provision concerning mental elements nor moral culpability¹. In its 1995 Report, the *Ad Hoc* Committee on the Establishment of an International Criminal Court noted that many delegations expressed support for the inclusion in the Statute of provisions on general principles of criminal law, including provisions on *mens rea*². During the sessions in 1996 of the Preparatory Committee on the Establishment of an International Criminal Court, a number of proposals were made regarding the insertion of a set of general principles, which included various proposals concerning *mens rea* or mental elements³. These proposals included provisions similar to those finally adopted by the Rome Conference, as well as proposals concerning other possible mental elements, such as specific intent, wilful blindness, recklessness and *dolus eventualis*. These proposals were further discussed by the Preparatory Committee at its session in February 1997 and a number of decisions were taken⁴, which resulted in a draft provision of narrower scope that was very similar to that finally adopted by the Rome Conference in 1998⁵.

2. Purpose

- 2 A general view was expressed in the Preparatory Committee on the Establishment of an International Criminal Court that ‘since there could be no criminal responsibility unless *mens rea* was proved, an explicit provision setting out all the elements involved should be included in the Statute’⁶. A clear understanding of the general legal framework in which the court would operate was important for the Court, States Parties and the accused so as to provide guidance, predictability and certainty, and to promote consistent jurisprudence on fundamental questions, including the issue of moral culpability or *mens rea*⁷.

3. Scope

- 3 Despite the desire of the Preparatory Committee that all the mental elements should be set out in the Statute, these elements are not defined in one article. Article 30 only refers specifically to ‘intent’ and ‘knowledge’. With respect to other mental elements, such as certain forms of ‘recklessness’ and ‘*dolus eventualis*’, consensus could not be achieved on their definition nor on their appropriateness for general application in the Statute. It was

* The assistance of Greg Koster, Department of Justice (Canada) and Steve Taylor, Queen’s University Faculty of Law (Canada), is gratefully acknowledged.

¹ Report of the International Law Commission on the work of its forty-sixth session, *Draft Statute for an International Criminal Court*, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994); see also Clark (2001) 12 *CLF* 291, 296–297.

² Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), p. 19; see also Clark (2001) 12 *CLF* 291, 297.

³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, *Compilation of Proposals*, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996), p. 92–93; see also Clark (2001) 12 *CLF* 291, 299.

⁴ Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.9/Rev.1, p. 25.

⁵ For an account of the history of the negotiations on article 30, see: Saland, in: R.S. Lee (ed.), *The International Criminal Court, the Making of the Rome Statute: Issues, Negotiations, Results* (1999) 189; Clark (2001) 12 *CLF* 291, 295–316.

⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, *Proceedings of the Preparatory Committee during March-April and August 1996*, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996), p. 45.

⁷ *Ad Hoc* Committee Report, note 2, p. 19.

decided to leave the incorporation of such mental states of culpability in specific definitions or modes of responsibility, if and where their incorporation was required by the negotiations or by applicable law⁸. Accordingly, the opening words of paragraph 1 of article 30 ('Unless otherwise provided'), recognise that mental elements might also be provided elsewhere. Examples of other relevant mental elements may be found within the specific definition of crimes⁹, general principles of criminal law¹⁰, and in the Elements of Crimes¹¹. As will be discussed below, the drafters concluded, and early case law confirms, that the Elements of Crimes may specify different mental elements, provided that these are consistent with the Statute and applicable law¹².

Paragraphs 2 and 3 of article 30 provide definitions of 'intent' and 'knowledge'. These provisions describe the meaning of these terms and the degree of mental culpability or *mens rea* that is required. For example, in order to intend conduct, a person must 'mean' to engage in conduct; it is not sufficient if the conduct was brought about inadvertently. To know of a circumstance means to have 'awareness' that it exists; mere suspicion is not sufficient (unless it amounts to wilful blindness or some other high degree of awareness or advertence to the existence of the circumstance).

Paragraph 1 of article 30 applies these definitions of 'intent' and 'knowledge' to the material elements of the definitions of crimes in the Statute. The exact scope of this application, however, has to be inferred for each crime depending on the specific material elements set out in the definition of the crime and in light of the proviso to paragraph 1 ('Unless otherwise provided'), and paragraph 2 ('For the purposes of this article').

4. Protected values

Many legal historians are of the view that prior to the twelfth century a person could be held criminally liable merely if the person's conduct caused harm, regardless of any blameworthy state of mind. For example, in the common law and civil law traditions, it was under the influence of Canon law and Roman law that a requirement for some element of moral blameworthiness – a guilty mind – was imposed by the courts. This requirement has been expressed in the Latin maxim *actus non facit reum nisi mens sit rea*¹³. It is now a basic requirement common to contemporary legal systems.¹⁴

B. Analysis and interpretation of elements

I. Paragraph 1

1. 'criminally responsible and liable for punishment'

The modes of commission and of participation by which a person shall be 'criminally responsible and liable for punishment for a crime within the jurisdiction of the Court' are outlined in article 25 para. 3. These various modes of criminal responsibility (such as 'commits', 'orders, solicits or induces', 'aids, abets, or otherwise assists', 'in any other way

⁸ See Clark (2001) 12 *CLF* 291, 299–303.

⁹ See e.g. article 8 para. 2 (a) ('wilful' or 'wilfully').

¹⁰ See e.g. article 25 para. 3 (d) (i) ('with the aim of furthering the criminal activity or criminal purpose of the group'); article 28 *lit.* a (i) ('knew or, owing to the circumstances at the time, should have known'); article 28, *lit.* b (i) ('knew, or consciously disregarded').

¹¹ See e.g. article 8 para. 2 (b) (xxvi) ('should have known' that the child was under the age of 15 in the elements for child soldier provision).

¹² See e.g. *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, PTC I, 29 Jan. 2007, para. 356 <<http://www.legal-tools.org/doc/b7ac4f/>>; see also *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, PTC I, 30 Sep. 2008, para. 532 <<http://www.legal-tools.org/doc/67a9ec/>>.

¹³ Translation: 'An act does not make a person guilty of a crime, unless the person's mind be also guilty'.

¹⁴ Ambos, K., *Treatise On International Criminal Law* (OUP 2014) 93–95.

contributes to the commission', 'incites' and 'attempts') must, by virtue of article 30, be committed with intent and knowledge in order for a person to be criminally responsible and liable for punishment. Despite the apparent assertion in article 25 that a person shall be criminally responsible and liable for punishment if the person's conduct falls within any of the subparagraphs of paragraph 3 of that article, the conditions of article 30 must also be fulfilled in order to attach to that person any criminal responsibility and liability for punishment for a crime within the jurisdiction of the Court. This is in accord with the Latin legal maxim: '*actus non facit reum nisi mens sit rea*'¹⁵.

Early jurisprudence of the Court has explored the relationship between Article 25 and 30. For example, Pre-Trial Chamber I, in declining to confirm charges in the *Mbarushimana* case, held that for an 'intentional contribution' under Article 25(3)(d), the person must mean to engage in the contributing conduct and be aware that his or her conduct contributes to the activities of the group¹⁶.

2. 'material elements'

- 6 The 'material elements' of a crime refer to the non-mental elements of the definition of the crimes as defined in articles 5 to 8. This term refers to the *conduct* described in the definition, any *consequences* that may be specified in addition to the conduct, and any *circumstances* that must exist¹⁷. This is confirmed by paragraphs 2 and 3 of article 30, which define the meaning of 'intent' or 'knowledge'¹⁸ with respect to each of 'conduct', 'consequences' and 'circumstances'¹⁹. Although previous drafts had used the term 'physical elements', the term was changed in the Drafting Committee of the Rome Conference to 'material elements' in order to better reflect and connote that conduct, consequences and circumstances may not always be 'physical' in character²⁰.

The conduct of a crime includes a prohibited action²¹ or prohibited omission²² that is described in the definition of a crime²³. The consequences of a crime can refer either to a

¹⁵ See translation, note 13.

¹⁶ *Prosecutor v. Callixte Mbarushimana*, No. ICC 01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 Dec. 2011, para. 288; see also *Prosecutor v. Lubanga*, No. ICC-01/04-01/06-2482, Judgment pursuant to Article 74 of the Statute, TC I, 14 Mar. 2012, paras. 986–987 <<http://www.legal-tools.org/doc/677866/>>.

¹⁷ See *e.g.* article 8 para. 2 (b) (x), which defines a crime that contains all three types of material elements: conduct ('subjecting persons...to physical mutilation or to medical or scientific experiments'); circumstances ('who are in the power of an adverse power') and consequences ('which cause death to or seriously endanger the health of such person or persons').

¹⁸ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, No. ICC-02/05-03/09-121-Corr-Red, Corrigendum of the Decision on the Confirmation of Charges, PTC I, 7 Mar. 2011, para. 153.

¹⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-424, Decision on the Confirmation of Charges, PTC II, 15 June 2009, para. 355 <<http://www.legal-tools.org/doc/07965c/>>.

²⁰ *E.g.* in the Statute 'conduct' sometimes refers to an omission (*e.g.*, failure to do something), 'consequences' sometimes refers to a risk rather than a physical result (*e.g.*, a risk of harm occurring), and 'circumstances' sometimes refers to a quality or value of a physical object or a situation (*e.g.*, legal status of a person or a building, or degree of harm or deprivation). For specific examples, see the text accompanying notes 14 to 18.

Clark (2001) 12 *CLF* 299, 304–305, queries how the change from 'physical' to 'material' came about, and concludes that it did not convey a change of policy or substance by the Drafting Committee, but only a reflection of drafting consistency. The present author recalls that the change was made for stylistic and consistency reasons, as noted in the text above.

The Elements of Crimes followed this same approach to material elements (conduct, consequences and circumstances), often repeating the exact words of the Statute, and at other times adding elaborations from international instruments or jurisprudence, but they were not intended to alter the overall definition of the crime: see article 9 para. 3.

See also Clark (2008) 6 *NZYBIL* 209.

²¹ See *e.g.* article 6 ('killing', 'causing serious bodily or mental harm', 'inflicting...conditions of life', 'imposing measures' and 'forcibly transferring').

²² See *e.g.*, article 28 *lit. a* (ii) and b (ii) ('failed to take all necessary and reasonable measures').

²³ For greater discussion of the meaning of 'conduct', see Part II, 1, below.

completed result, such as the causing of death²⁴, or the creation of a state of harm or risk of harm, such as endangerment²⁵. The circumstances of a crime qualify the conduct and consequences. They may, for example, describe the requisite features of the persons²⁶ or things²⁷ mentioned in the conduct and consequence elements.

There are four special types of material element that warrant particular comment.

First, some material elements have a 'legal' character: for example, requiring that a victim be a 'protected person' under the Geneva Conventions of 1949²⁸. Article 30 does not require proof that the accused knew the relevant law or that he or she correctly completed such a legal evaluation. Indeed, article 32 para. 2 affirms that a mistake of law as to the scope of the criminal prohibition is not a ground for excluding criminal responsibility²⁹. Accordingly, all that is required is that the accused knew the *factual* elements that established this legal character (for example, that the victim was affiliated with an adverse party)³⁰.

Second, some material elements involve a normative aspect, or a 'value judgment'. Examples include the requirement of 'serious' injury to body or health, 'severe' deprivation of physical liberty, or 'humiliating or degrading' treatment³¹. Such elements are similar to elements of a legal character, as it is not required to show that the accused correctly completed the normative evaluation. Otherwise, the accused's subjective opinions would determine whether a crime had been committed. For example, a perpetrator intentionally amputating the limbs of a victim can hardly escape liability by arguing that he did not consider the bodily harm to be 'serious'³². The Court must decide if the material element is satisfied (including whether the harm was 'serious'), and decide whether the perpetrator had the intent or awareness of the factual character establishing that 'seriousness' (in this case, amputating a limb). This rather obvious proposition accords with the approach of national legal systems³³, and is now confirmed in paragraph 4 of the General Introduction to the Elements, which provides that 'with respect to mental elements associated with elements involve value judgment ... it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated'³⁴.

²⁴ See *e.g.* article 8 para. 2 (b) (vii) (improper use of a flag of truce 'resulting in death or serious personal injury'); article 8 para. 2 (b) (x) (subjecting persons to physical mutilation or to medical or scientific experimentation 'which cause death to ... such person or persons').

²⁵ See *e.g.* article 8 para. 2 (b) (x) (subjecting persons to physical mutilation or to medical or scientific experimentation 'which...seriously endangers the health of such person or persons').

²⁶ *E.g.*, that the victims who are killed must be 'members of the group' (article 6 (a)) or be 'combatants' (article 8 para. 2 (b) (vi)) or that the persons who are forcibly transferred must be 'children of the group' (article 6 (e)) or the persons who are compelled to take part in the operations of war must be 'nationals of the hostile party' (article 8 para. 2 (b) (xv)).

²⁷ *E.g.*, that the attacks or bombardment must be directed against 'towns, villages, dwellings or buildings which are undefended and which are not military objectives' (article 8 para. 2 (b) (v)) or 'buildings dedicated to religion, education, art, science...' (article 8 para. 2 (b) (ix)).

²⁸ Article 8 para. 2 (a).

²⁹ An interesting question arises where the mistake of law is not related to the criminal prohibition itself, but another area of law. For example, a *bona fide* mistake as to the 'ownership' of particular property might negate the mental element for the crime of pillage: see article 32 para. 2.

³⁰ A possible deviation from this approach appears in the Elements of Crimes for article 8 para. 2 (b) (vii) (improper use of a flag of truce), where the regulatory nature of these offences led delegations to include a requirement that the perpetrator 'knew or should have known of the prohibited nature of such use'.

³¹ Article 8 para. 2 (iii), article 7 para. 1 (e), and article 8 para. 2 (b) (xxi), respectively. The demarcation between 'value judgments' and facts can depend on the circumstances; for example, an accused that had been indoctrinated in hate propaganda obviously could not escape liability by arguing that victims from a targeted minority were not considered to be 'persons'.

³² Article 6 (b) of the Statute.

³³ See *e.g.* a case of the Supreme Court of Canada, *R. v. Finta* (1994) 1 SCR 701 at 819 (accused must be aware of the facts or circumstances that bring the acts within the definition of a crime against humanity, but need not know that his actions were 'inhumane').

³⁴ Out of an abundance of caution, several provisions in the Elements nonetheless spell out the application of this principle to particular elements: see, *e.g.* article 7 para. 1 (k), element 3.

Third, some material elements contain an adjectival phrase using a term that sounds like a mental state. Examples include inflicting conditions of life ‘calculated’ to bring about the physical destruction of a group and imposing measures ‘intended’ to prevent births³⁵. Whether these hybrid elements are treated as mental elements or material elements may have a bearing on the determination of culpability³⁶. If what is required is proof that there was such a ‘calculation’ or ‘intent’, then arguably this requirement would be satisfied if it were shown that the accused so calculated or intended (*i. e.*, mental element), or that there was a broader calculation or intent, for example, among the planners, or evident from the nature and scale of the acts (*i. e.*, material element) and that the accused was aware of this material element.

Fourth, in the Elements of Crime some circumstance elements were identified as ‘contextual elements’, because they relate not to the conduct of the accused but rather to the broader ‘context’ that renders the crime an international crime. For war crimes, this is the existence of an armed conflict; for crimes against humanity, it is the widespread or systematic attack against a civilian population; and for genocide, it is the pattern of genocidal conduct³⁷. As will be explained below, reduced mental elements were considered appropriate for contextual elements³⁸.

Finally, in addition to the material elements of a particular offence, preconditions for the jurisdiction of the Court may also have to be proven where contentious³⁹, but neither the Statute nor any principle of international law require a mental element for such preconditions.

3. ‘committed’

7 The term ‘committed’ clearly refers to the mode of participation in crime that is described in sub-paragraph 3 (a) of article 25 (*i. e.*, ‘commits such a crime’). The term, however, is also used generically in a broader sense and also includes all of the other modes of criminal responsibility described in article 25 sub-paras. 3 (b) to (f). This interpretation is supported by the discussion, above, of the term ‘criminally responsible and liable for punishment’.

8 For example, in the case of some modes of criminal responsibility in article 25 (such as inciting others to commit genocide or attempting to commit a crime), not all of the physical or material elements described in the definition of the crimes in articles 5–8 need actually be committed. Nevertheless, there is a form of ‘commission’ in respect of the material elements of the definition of a crime by a person who undertakes one of the modes of criminal responsibility described in article 25 paras. 3 (b) to (f), even if the actual intended, attempted or incited crime is not carried out or completed. Therefore, the term ‘committed’ refers to the commission of a material element of a crime by any of the modes of criminal responsibility described in article 25 (a) to (f).

4. ‘intent and knowledge’

9 Each of the terms ‘intent’ and ‘knowledge’ is specifically defined in paragraphs 2 and 3 of article 30, respectively (see below).

³⁵ Article 6 (c) and (d). See also the elements for article 8 para. 2 (a) (ii)-2 (war crime of biological experiments): ‘the *intent of the experiment* was non-therapeutic’ (emphasis added).

³⁶ See Kelt and von Hebel, in: R.S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure* (2001) at 27.

³⁷ See para. 7 of the General Introduction to the Elements, and the final element of each crime.

³⁸ *Prosecutor v. Bahar Idriss Abu Garda*, No. ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, PTC I, 08 Feb. 2010, paras. 95–96 <<http://www.legal-tools.org/doc/cb3614/>>; Lubanga (PTC I Decision), note 15, para. 360.

³⁹ *E.g.*, the location of the commission of a crime, the nationality of a perpetrator, the fact that a crime was committed after the entry into force of the Statute, or the fact that a particular event falls within the scope of a situation referred to the Court: see articles 11–14. Similarly, requirements for gravity (article 8(1), article 17(1)(d)) are not elements of the crimes.

Prior to the February 1997 session of the Preparatory Committee, there had been some debate as to whether these two terms should be disjunctive ('or') or conjunctive ('and')⁴⁰. At the February 1997 session, a decision was taken to use the conjunctive formulation, which was subsequently adopted by the Rome Conference. This decision was based on the theory that, in general, one cannot perform an action or cause a consequence intentionally unless one also has knowledge of the circumstances in which that action or consequence was committed. For example, one cannot be said to intentionally attack or bombard a civilian target, contrary to article 8 para. 2 (b) (v), unless one is aware of the circumstances that render the civilian buildings 'undefended' or 'not military objectives'. The conjunctive formulation ensures that even where knowledge of a particular circumstance is an element of a crime, a person cannot be criminally responsible and liable for punishment unless the other material elements are also committed with intent. In result, each crime, taken as a whole, necessarily requires both intent (to engage in the relevant conduct) and knowledge (of consequences or circumstances).

This does not mean that each *particular* material element must be committed with both intent and knowledge. Indeed, that would contradict article 30 paras. 2 and 3, which set out the relevant mental elements for each type of material element. The Elements of Crimes confirm this distinction between the crime as a whole and particular elements. With respect to particular mental elements, paragraph 2 of the General Introduction to the Elements refers to 'the relevant mental element, *i. e.* intent, knowledge or both, set out in article 30' (emphasis added).

A question arises as to whether the conjunctive formulation changes existing international jurisprudence⁴¹ that an accomplice (such as an aider and abettor) need not share the same *mens rea* of the principal (*e. g.*, an intent to kill), and that 'a knowing participation in the commission of an offence' or 'awareness of the act of participation coupled with a conscious decision to participate' is sufficient mental culpability for an accomplice. It is submitted that the conjunctive formulation has not altered this jurisprudence, but merely reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation⁴².

A number of the definitions of crime specifically require that the material elements be 'intentional' or be committed 'intentionally'⁴³. This is likely superfluous, given the general rule in article 30. The specific presence of these terms is likely a product of the negotiation process whereby the terms were imported from other international instruments, such as the Geneva Conventions, or where certain delegations wished to make clear the intentional nature of the crimes before they agreed to their inclusion.

The major significance of article 30 is its effect on definitions that do not expressly specify a mental element. Where a particular definition of a crime is silent as to the requisite mental element, article 30 will import intent and knowledge as the corresponding mental elements.

Concerns were expressed by some delegations, particularly during the negotiation of the Elements, as to the potential difficulties of proving mental elements. Paragraph 3 of the General Introduction to the Elements of Crimes, however, re-affirms the elementary proposition that 'the existence of intent and knowledge can be inferred from relevant facts and circumstances'⁴⁴.

⁴⁰ See *e. g.* 1996 Preparatory Committee, Vol. II, note 3, p. 92.

⁴¹ *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, ICTY, Trial Chamber, 10 Dec. 1998, paras. 236-241.

⁴² Even if a strict literal reading of the conjunctive in paragraph 1 were made, such that an accomplice must intend the consequence committed by the principal, the same interpretative result would occur. Article 30 para. 2 (b), makes it clear that 'intent' may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of 'knowledge', as defined in article 30 para. 3. Therefore, if both 'intent' and 'knowledge' are required on the part of an accomplice, these mental elements can be satisfied by such awareness. Therefore, by either interpretation, article 30 confirms the existing international jurisprudence.

⁴³ See *e. g.*, article 7 paras. 2 (b), (e), (f) and (h); article 8 paras. 2 (b) (i), (ii), (iii), (iv), (ix), (xxiv) and (xxv), and paras. 2 (e) (i), (ii), (iii) and (iv).

⁴⁴ See also Bemba (PTC II Decision), note 19, para 137 (existence of intent and knowledge can be inferred from relevant facts and circumstances).

5. 'Unless otherwise provided'

- 14 This term performs two functions: first, it establishes the article 30 standard as the 'default rule' for all material elements, and second, it signals that there may be deviations from that approach where otherwise provided.

The status of article 30 as the default rule was explicitly re-affirmed in the Elements, in order to avoid the necessity of spelling out the mental element for every material element, particularly where the application of article 30 is clear. Accordingly, paragraph 2 of the General Introduction to the Elements explains, '[w]here no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element – *i. e.*, intent, knowledge or both, set out in article 30, applies'. Thus, for each material element listed, article 30 implicitly applies, and mental elements were articulated only where there was a need to depart from the article 30 standard or to clarify a potential ambiguity in its application.

The second function of the phrase is to signal that there may be deviations from the article 30 standard where otherwise provided. An issue that was not settled at the Rome Conference was whether only the Rome Statute could 'otherwise provide', or whether other sources, such as the Elements of Crimes, could also provide for a deviation. This debate continued during the negotiation of the Elements. Some delegations were of the view that the Elements could not call for a deviation from article 30, as the Elements document is subsidiary to the Statute⁴⁵. Other delegations noted that the default rule in Article 30 expressly contemplates that different standards can be 'otherwise provided', and that for some elements a different standard was needed to reflect accurately the applicable law, including the jurisprudence. The latter view was eventually accepted; the General Introduction to the Elements, paragraph 2 states: 'Exceptions to the article 30 standard, *based on the Statute, including applicable law under its relevant provisions*, are indicated below' (emphasis added). This formulation recognizes the primacy of the Statute, and indicates that exceptions must directly or indirectly flow from the Statute, but also recognizes that the Statute itself, through article 21 (applicable law), allows reliance on other sources, including treaties, customary law, general principles and the Elements. Thus, the approach suggests that States Parties could not *legislate* a deviation through the Elements, but they could *codify* a deviation where necessary to reflect their intent when drafting the Statute or to reflect the relevant treaties and jurisprudence⁴⁶. This view has been endorsed in early jurisprudence⁴⁷.

There are various ways in which the Statute, and the elaboration of the Statute contained in the Elements, provide for departures from the article 30 standard. In almost all cases, the effect is to reduce the standard that would otherwise apply.

For example, article 28 (a) of the Statute, on command responsibility, requires that a commander knew 'or should have known' of the commission of crimes. The 'should have known' standard reflects the principle that the commander is under a duty to make arrangements to remain informed of the activities of forces under his or her control. The precise meaning of 'should have known' was dealt with in the *Bemba* confirmation decision, where the Pre-Trial Chamber found that the test is one of (criminal) negligence. The Chamber held that the superior has an active duty to take the necessary measures to secure knowledge of the conduct of his troops⁴⁸. As the Statute is a criminal law instrument, it is

⁴⁵ Article 9 para. 3.

⁴⁶ A subsequent agreement among all treaty parties concerning the application or interpretation of a treaty may be taken into account in interpreting the treaty: article 31 para. 3 of the VCLT.

⁴⁷ See *Lubanga* (PTC I Decision), note 15, paras. 359–360. And to similar effect see Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2014) at 383 and Werle, *Principles of International Criminal Law* (2009) at 157–159.

⁴⁸ *Bemba* (PTC II Decision), note 19, paras. 432–434. See also *Prosecutor v. Bagilishema*, No. ICTR-95-1A-A, Judgement, Appeals Chamber, 3 July 2002, esp. paras. 32–45 (though, in contradistinction, noting that '[i]t is better ... not [to] describe superior responsibility in terms of negligence at all,' para. 36); *Prosecutor v.*

unlikely that a mere civil negligence standard is sufficient; the standard is likely akin to criminal negligence. Similarly, article 28 (b), requires that non-military superiors either knew 'or consciously disregarded information which clearly indicated' the commission of crimes. This standard of culpability is more generous than that imposed on the military commander (as the latter is obliged to maintain a system of military discipline).

Similarly, with the war crime of conscripting or enlisting children under the age of fifteen years⁴⁹, the Elements require only that the perpetrator 'knew or should have known' that the person was under the age of fifteen years. This flexible mental element, regarding the age of the children recruited, reflects the interpretation of delegations that persons recruiting or enlisting young persons are under some degree of obligation to try to verify the age⁵⁰. Again, the precise meaning of 'should have known' remains for the Court to determine⁵¹.

A reduced mental element is also articulated with respect to each of the 'contextual elements', *i. e.* the circumstance elements that describe the surrounding context that renders a crime a matter of concern to the international community as a whole⁵². For war crimes, this is the existence of an armed conflict; for crimes against humanity, it is the widespread or systematic attack against a civilian population; and for genocide, it is the pattern of genocidal conduct⁵³. Since these contextual elements do not relate directly to the conduct of the accused, but rather to the context creating an international dimension, the full application of article 30 was not considered necessary. At the same time, *some* degree of awareness of the context was considered necessary for the perpetrator to be held responsible for an international crime⁵⁴. Therefore the Elements provide for a reduced mental element in relation to the contextual elements. For example, awareness of a widespread or systematic attack does not require detailed knowledge of the attack or its characteristics⁵⁵.

Rather than merely reducing the mental element required, a provision may modify the default rule of article 30 by indicating that no mental element is required at all. For example, for the crime against humanity of persecution, article 7 para. 1 (h) requires that the persecutory conduct be committed in connection with any act in article 7 para. 1 or with any ICC crime. This requirement was inserted to ensure that the Court would deal only with serious cases of criminal severity. Accordingly, during the Elements debates, the provision was regarded as a 'jurisdictional' provision, so the Elements specify that a corresponding mental element is not required⁵⁶.

It is also possible to require an *additional* element of intent or knowledge. For example, 15 some provisions of the Statute require that the impugned conduct (which must be committed

Kamuhanda, No. ICTR-95-54A-T, Judgment, TC II, 22 Jan. 2004, paras. 601–610; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment, TC II, 12 Sep. 2006, paras. 473–475, reversed on other grounds, No. ICTR-2000-55A-A, Appeal Judgment, Appeals Chamber, 29 Aug. 2008.

⁴⁹ Article 8 para. 2 (b) (xxvi). The 'should have known' standard was also adopted in the elements for article 8 para. 2 (b) (vii) (improper use of flag of truce, *etc.*).

⁵⁰ See also the elements for article 6 *lit. e* (genocide by forcibly transferring children).

⁵¹ See eg. Bemba (PTC II Decision), note 19, paras. 432–434 and Lubanga (PTC I Decision), note 15, paras. 357–359.

⁵² Article 5.

⁵³ See paragraph 7 of the General Introduction to the Elements, and the final element of each crime.

⁵⁴ See for example, ICTY cases such as *Prosecutor v. Tadić*, IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, paras. 255–270 and national cases such as *Finta*, note 33, p. 815 and 819.

⁵⁵ For crimes against humanity, the Elements clarify that the perpetrator need not have knowledge of the characteristics of the attack nor of the details of the plan or policy: Elements, Introduction to Crimes Against Humanity. For relevant case law and analysis, see Ambos, *Treatise on International Criminal Law* (2013) 280–283.

For genocide, given that knowledge of the genocidal context would inevitably be established in the course of proving genocidal intent, 'the appropriate requirement, if any, for a mental element regarding this circumstance' was left to be determined by the Court: Elements, Introduction to Genocide. For war crimes, knowledge of the armed conflict is listed as an element, but the introduction to war crimes limits the extent of awareness required, leaving the mental requirement highly ambiguous and for the Court to determine: Elements, Introduction to War Crimes. For relevant case law and analysis, see Ambos, *Treatise on International Criminal Law* (2013) 278–291.

⁵⁶ Clark (2008) 6 *NZYBIL* 209.

with intent and knowledge, by virtue of article 30 para. 1) also be committed for a specific or ulterior intention; *i. e.*, ‘with intent to’ or ‘with the intention of’ achieving certain ends or purposes⁵⁷. In some instances, the Elements of Crimes have added specific intents to further elaborate the definitional elements contained in the Statute⁵⁸. These are specific intents required in addition to the general intent that is to be imported by article 30. They are additional mental elements that are not linked to any material element. They do not require that that which is intended to be achieved, actually results in fact. For example, under article 6 (genocide), any of the various acts listed under (a) – (e) must be committed intentionally (by virtue of article 30), with the additional specific intent to destroy a particular group. This is an ulterior intention, since there is not a corresponding material element that the group was actually destroyed.

Although some early proposals had contemplated making mention of both types of intent⁵⁹, the decision of the Preparatory Committee was that ‘there was no need, however, to distinguish between general and specific intention, because any specific intent should be included as one of the elements of the definition of the crime’⁶⁰. Accordingly, paragraph 1 of article 30 only refers to ‘intent’.

Finally, some Statute provisions may appear to modify the article 30 standard but are not intended to do so. For example, some of the war crimes provisions use terms such as ‘wilful’ or ‘wilfully’⁶¹, and the term ‘deliberately’ appears in one of the forms of genocide⁶². These terms appear because many of the Rome Statute provisions faithfully reproduced definitions in instruments such as the Geneva Conventions or Genocide Conventions, which were considered customary international law. It appears that the intent of the drafters was not to deviate from the default rule of article 30, and this interpretation is now confirmed by the approach in the Elements⁶³.

II. Paragraph 2

1. ‘For the purposes of this article’

- 16 This phrase appears to signify that the definitions in paragraphs 2 and 3 apply directly to article 30 and apply indirectly to the Statute through the operation of paragraph 1, which imports ‘intent’ and ‘knowledge’ as the minimum *mens rea* into all of the crimes within the jurisdiction of the Court, unless otherwise provided. Therefore, other provisions of the Statute could provide for different definitions or meanings of these terms in respect of specific crimes. No specific alternative definitions of these terms, however, are provided in the current Statute.

III. Sub-paragraph 2 (a)

1. ‘conduct’

- 17 Commencing with the August 1996 session of the Preparatory Committee⁶⁴, the Draft Statute had contained a bracketed proposal concerning ‘*Actus reus*’ (act and/or omission),

⁵⁷ See *e.g.* article 6 (‘with intent to destroy’); article 7 para. 2 (h) and (i) (‘with the intention of maintaining’; ‘with the intention of removing’).

⁵⁸ *E.g.*, Elements of Crime concerning article 8 para. 2 (b) (xii) (‘in order to’), and article 8 para. 2 (a) (ii)-1 (‘for such purposes as...’).

⁵⁹ 1996 Preparatory Committee, Vol. II, note 3, p. 92.

⁶⁰ 1996 Preparatory Committee, Vol. I, note 6, p. 45, para. 199.

⁶¹ Article 8 para. 2 (a) (i) and (iii).

⁶² Article 6 *lit. c.*

⁶³ See *e.g.* Elements, article 6 *lit. d.*, element 1; article 8 para. 2 (a) (i), element 1; and article 8 para. 2 (a) (iii), element 1; none of which provide an alternative mental element and therefore rely on article 30.

⁶⁴ Preparatory Committee Vol. I, note 6, p. 45; Preparatory Committee Vol. II, note 3, p. 90.

which was further refined at the February 1997 session⁶⁵ and submitted to the Rome Conference⁶⁶. Paragraph 1 of then article 28 had provided that conduct can ‘constitute either an act or omission, or a combination thereof’. Paragraph 2 of then article 28 attempted to describe the circumstances in which a person could be held criminally responsible for an omission, which included some proposed circumstances that implied mental elements other than intent or knowledge. At the Rome Conference, agreement could not be reached on this proposed article, and it was decided to delete it from the Statute with the understanding that the question of when, and if, omissions might constitute or be equivalent to conduct would have to be resolved in future by the Court.

Therefore, for the purposes of article 30, the term ‘conduct’ denotes positive action as well as intentional omission, where the causal result and moral culpability of the intentional omission is equivalent to the achievement of the same result caused by an intentional act⁶⁷. As for the inclusion of any other type of omissions within the Statute, these would have to be governed by article 30. 18

2. ‘means to engage in the conduct’

This phrase signifies, at a minimum, that conduct must be the result of a voluntary action on the part of an accused. It includes the basic consciousness or volition that is necessary to attribute conduct (*i. e.*, *actus reus*) as being the product of the voluntary will of a person. In this sense, however, the phrase merely distinguishes involuntary from voluntary conduct. Generally, the term ‘intent’ also connotes some element, although even minimal, of desire or willingness to do the action, in light of an awareness of the relevant circumstances or likely consequences. As noted earlier, unless relevant circumstances are known that qualify the action as prohibited conduct, it cannot be said that the person intends the conduct. Therefore, ‘intent’ necessarily includes an element of ‘knowledge’⁶⁸. 19

As was noted above (‘material elements’), where a conduct element involves a legal conclusion or value judgment, it is not required that the accused correctly completed the legal or normative evaluation, but simply that the accused was aware of the relevant facts⁶⁹.

IV. Sub-paragraph 2 (b)

1. ‘consequence’

Some crimes prohibit conduct⁷⁰, other crimes prohibit not only conduct but the consequences that causally occur⁷¹ and other crimes prohibit the causing of consequences without specifying a particular predicate conduct⁷². Often conduct and consequence can be intertwined with little distinction in time or place between the two⁷³. In all situations where a consequence is part of the definition of a crime, paragraph 2 of article 30 defines what is meant when paragraph 1 requires that the consequences (where consequences are material elements) be committed with intent. 20

⁶⁵ February 1997, Preparatory Committee Decisions, note 4, p. 26.

⁶⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 53rd Sess., UN Doc. A/AC.249/1998/CRP. 7 (1998), p. 64–65 (article 28).

⁶⁷ See *e.g.*, article 8 para. 2 (b) (xxv) (‘intentionally using starvation of individuals...’). The omission of intentionally starving individuals results in the achievement of the equivalent result (*i. e.*, death) as would an intentional killing.

⁶⁸ Williams, *Text Book of Criminal Law* (1978) 52 and (1983) 116–117.

⁶⁹ One example of a conduct element involving a value judgment would be the intentional infliction of ‘severe’ pain or suffering: article 7 para. 1 (f).

⁷⁰ See *e.g.* article 8 para. 2 (b) (i) (‘directing attacks against civilian objects’).

⁷¹ See *e.g.* article 7 para. 1 (k) (‘Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’).

⁷² See *e.g.* article 6 (b) (‘causing serious bodily harm or mental harm to members of the group’).

⁷³ See *e.g.* article 8 para. 2 (a) (i) (‘wilful killing’).

As was noted above (‘material elements’), where a consequence element involves a legal conclusion or value judgment, it is not required that the accused correctly completed the legal or normative evaluation, but simply that the accused was aware of the relevant facts⁷⁴.

2. ‘means to cause that consequence’

- 21 This reflects the notion that specified consequences in the definition of a crime must causally follow from the person’s conduct, and that the person desires or means that such consequences occur. The phrase incorporates both the concepts of a desire for the occurrence of consequences (*i. e.*, *dolus directus*) and a causal connection between the person and the consequence.

3. ‘aware that it will occur in the ordinary course of events’

- 22 Traditionally, in most legal systems, ‘intent’ encompasses not only a ‘volitional’ aspect (*ie.* where the outcome is desired) but also a ‘cognitive’ aspect, *i. e.* where there is knowledge that the consequence will occur or will be caused. This cognitive concept of intent is known in several legal systems by various terms, including indirect intent, oblique intent, *dolus indirectus* or *dolus directus* in the second degree.

This raises an important question as to how certain or probable a consequence must be in order to fall within the test (‘will occur in the ordinary course of events’). Few things in life are certain, and certainty is often a question of degree. People generally govern their lives on the basis that common sense or the ordinary course of events would pronounce that the occurrence of a particular consequence flowing from a particular conduct is highly probable, such as to be equivalent to certainty for all practical purposes.

Early jurisprudence offers different views as to the requisite degree of probability. At one end of the spectrum, it seems clear that indirect intent encompasses consequences known to be close to certain – often described with terms such as ‘virtually certain’, ‘practically certain’ or ‘substantially certain’⁷⁵. At the other end of the spectrum, it seems clear that unlikely risks or possibilities would not satisfy the ‘will occur’ standard. In this connection, it is often emphasized that the concepts of recklessness and *dolus eventualis*, which can encompass mere possibilities, were not included in the Statute⁷⁶. Given the vastly different understandings of recklessness and *dolus eventualis* in different systems,⁷⁷ the attempt to map domestic concepts onto Article 30 may be less productive than focusing on the wording of

⁷⁴ One example of a consequence element involving a value judgment would be that the conduct ‘seriously endangered’ the health of the victims (article 8 para. 2 (b) (x)).

⁷⁵ See Bemba (PTC II Decision), note 19, para. 362.

⁷⁶ Ambos (2009) 22 *LeidenJIL* 715, 718 (noting, however, that while the preparatory materials support such an exclusion, they are ‘merely persuasive’ and ‘not decisive in the light of a clear or different literal interpretation’). Similarly, reaching the conclusion that the text appears to exclude mere recklessness or low probabilities, but that this is a normatively undesirable conclusion because it creates a more restrictive standard than customary law or national systems, see both Werle, *Principles of International Criminal Law* (2009) at 154–155 and Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2014) at 382–383. And see Badar (2009) 12 *NCLR* 433 at 451–452; Weigend (2008) *JICJ* 471, 482–484; Eser, in A. Cassese *et al.*, eds, *The Rome Statute of the International Criminal Court: A Commentary* (2002) 902, 915–916. See also Bemba (PTC II Decision), note 19, paras. 357–359; Lubanga (TC I Judgment), note 16, para. 1011.

⁷⁷ The concept ‘*dolus eventualis*’ does not have a monolithic or uniform meaning within all civil law systems. It generally includes awareness of a substantial or high degree of probability that the consequence will occur, and in many systems, it also includes awareness of a serious risk that a consequence will occur, coupled with indifference to that outcome or reconciliation with that outcome. Some systems may also include some forms of inadvertence in this concept. Due to different national conceptions, attempts to define the concepts were abandoned during the negotiations. Whatever may be the merits of the distinction under national legal systems, it was clear that the first-noted meaning of ‘*dolus eventualis*’ is included (*i. e.*, ‘will occur in the ordinary course of events’). The latter meanings of ‘*dolus eventualis*’ or ‘recklessness’ were not incorporated explicitly into article 30, although it may be open to the Court to interpret the provision to include some of these aspects. The concepts may also exist in some specific crimes in the Statute under a different name (*e. g.*, article 28). See Saland, in: R.S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (1999)

the Statute. What remains to be determined in the Court’s jurisprudence is the extent to which probabilities between virtual certainty and mere possibility will suffice.

In the *Lubanga* confirmation of charges decision, Pre-Trial Chamber I argued that risks could satisfy the test if the accused reconciled himself to those risks (a test akin to *dolus eventualis* as conceived in some systems)⁷⁸. However, Pre-Trial Chamber II in the *Bemba* confirmation of charges decisions held that a mere possibility cannot satisfy the standard of ‘will occur in the ordinary course of events’⁷⁹. The Court’s first judgment, in *Lubanga*, indicated that a ‘low risk’ is not sufficient, but that future consequences are always somewhat uncertain and hence some considerations of probability are necessary⁸⁰. The decision appeared to suggest that substantial probabilities may satisfy the test⁸¹. The Court’s second judgment, in *Katanga*, adhered to the ‘virtual certainty’ side of the spectrum.⁸²

Finally, the question of the intent requirement for genocide attracted discussion during the negotiation of the Statute. Many delegations wished to distinguish between ‘responsible decision makers or planners and a general-intent or knowledge requirement for the actual perpetrators of genocidal acts’⁸³. However, the conclusion was that the Statute was not the appropriate forum for amendments to the Genocide Convention and that ‘the question of intent could be addressed under the applicable law or the general provisions of criminal law’⁸⁴. The definition of ‘intent’ in paragraph 2 clearly encompasses both the volitional and cognitive concepts of intention, as described in paragraph 2 (a) and (b) and thus is able to address the concern that the actual perpetrators of genocidal acts, while not specifically intending that their acts destroy an entire group, may nonetheless be aware that such consequence will occur in the ordinary course of events as a result of their acts. Alternatively, it could also be argued that the specific intent referred to in article 6 connotes a more limited meaning of ‘intent’⁸⁵. It will be for the Court to interpret the meaning of ‘intent’ in article 6 in light of its historical antecedents and the effect of article 30 and the Elements of Crimes.

V. Paragraph 3

1. ‘For the purposes of this article’

See discussion of the same phrase in paragraph 2, above. 24

2. ‘awareness that a circumstance exists’

See the discussion of ‘knowledge’ under paragraph 1 and paragraph 2(a), above. Awareness of a circumstance is a question of degree. Some legal systems include within this concept 25

189 at 205; and Clark (2001) 12 *CLF* 291 at 301, 314–315; Ambos, *Treatise on International Criminal Law* (2013) at 276–278.

⁷⁸ *Lubanga* (PTC I Decision), note 12, para. 352.

⁷⁹ *Bemba* (PTC II Decision), note 19, para. 363.

⁸⁰ *Lubanga* (TCI Judgment), note 16, para. 1012.

⁸¹ *Ibid*, paras. 986–987 (sufficient risk), para. 1012 (risk, danger, but not low risks).

⁸² *Prosecutor v. Germain Katanga*, No. ICC-01/04-01/07-3436, Jgement rendu en application de l’article 74 du Statut, 7 March 2014, paras 770–779 <<http://www.legal-tools.org/doc/9813bb/>>.

⁸³ *Ad Hoc* Committee Report, note 2, at p. 13, para. 62; 1996 Preparatory Committee Vol. I, *above* note 6, p. 17, para. 60.

⁸⁴ 1996 Preparatory Committee Vol. I, note 6, p. 17, para. 60.

⁸⁵ The more restrictive meaning was given to the phrase ‘with intent to destroy’ by the ICTR in *Prosecutor v. Jean-Paul Akayesu*, No. ICTR-96-4-T, Judgment, TC I, 2 Sep. 1998, paras. 517–524. Subsequent cases have also indicated a fairly onerous *mens rea* requirement (specific intent or *dolus specialis*) and that the accused must share in this intent: *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, Judgment and Sentence, Trial Chamber I, 6 Dec. 1999, paras. 59–62; *Prosecutor v. Jelisić*, IT-95-10-T, Judgment, Trial Chamber I, 14 Dec. 1999, para. 78, reversed in part, on other grounds, IT-95-10-A, Judgment, Appeals Chamber, 5 July 2001, see paras. 45–52; *Prosecutor v. Krstić*, IT-98-33-T, Judgment, Trial Chamber, 2 Aug. 2001, para. 571.

the state of mind where a person greatly suspects the true state of affairs but deliberately avoids steps to ascertain their validity or deliberately shuts his or her eyes to an obvious means of knowledge. This is often referred to as ‘wilful blindness’, which is tantamount to actual knowledge⁸⁶. It is distinguished from ‘recklessness’ or even ‘negligence’ due to the conscious awareness of the substantial risk of the true state of affairs and the deliberate avoidance of taking steps to find out the truth. Essentially, the person does not want to know and deliberately shuts his or her eyes to the truth. It may be argued that the specific definition in paragraph 3 excludes such concept and that actual awareness or cognizance is required. Alternatively, it may also be open to the Court to interpret ‘awareness’ to include wilful blindness⁸⁷.

- 26 An erroneous appreciation or awareness of the relevant facts by an accused can constitute a defence of mistake of fact, as such mistake is a negation of the requisite ‘knowledge’ or awareness of relevant circumstances. This is specifically acknowledged in article 32 para. 1. As was noted above (‘material elements’), where a circumstance element involves a legal conclusion or value judgement, it is not required that the accused correctly completed the legal or normative evaluation, but simply that the accused was aware of the relevant facts⁸⁸.

3. ‘awareness that...a consequence will occur in the ordinary course of events’

- 27 See discussion of the same concept of ‘awareness’ under article 30 para. 2 (b), discussed above under the heading of ‘Awareness that a circumstance exists’.

⁸⁶ See, for example, Smith and Hogan, *Criminal Law* (1978) 103.

⁸⁷ Eser, in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 902, 931–932 argues, convincingly, that a principled approach to article 30 militates for the inclusion of wilful blindness as a sufficient form of knowledge, lest a perpetrator escape culpability through ‘shutting his eyes to the truth’ despite awareness of ‘facts he merely does not want to see.’

⁸⁸ One example of a circumstance element involving a value judgment would be that the conduct ‘was of a character similar’ to other acts listed in article 7 para. 1 (article 7 para. 1 (k)).

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

- (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
- (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
- (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
- (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - (i) Made by other persons; or
 - (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Literature: Ambos, K., 'Other Grounds for Excluding Criminal Responsibility', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003; *id.*, 'General Principles of Criminal Law in the Rome Statute', (1999) 10 *CLF* 1; *id.*, 'Zur Rechtsgrundlage des Internationalen Strafgerichtshofs – Eine Analyse des Rom-Statuts', (1999) 111 *ZStW* 175; *id.*, 'May a State Torture Suspects to Save the Life of Innocents?', (2008) 6 *JICJ* 261; *id.*, 'Defences in International Criminal Law', in: B.S. Brown (ed.), *Research Handbook on International Criminal Law* (Elgar 2011) 299; *id.*, 'Der Gerechtigkeit einen Dienst erwiesen? Zur Tötung bin Ladens', (2011) 66 *JZ* 763; Blakesley, C., 'Comparing the Ad Hoc Tribunal for Crimes against Humanitarian Law', (1996) 67 *RIDP* 139; Bond, J., and Fourgere, M., 'Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law', (2014) 14 *ICLRev* 471; Boon, K., 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent', (2001) 32 *ColHumRtsLRev* 625; Brady H., 'Disclosure of Evidence', in: Roy S. Lee, *The International Criminal Court* (2001) 403; Cassese, A., 'Justifications and Excuses in International Criminal Law', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 951; *id.*, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *EJIL* 144; Cryer, R., 'Defences/Grounds for Excluding Criminal Responsibility', in: R. Cryer *et al* (eds.), *An Introduction to International Criminal Law and Procedure* (3rd ed. 2014) 398; David, E., 'Self-Defence and State of Necessity in the Statute of the ICC', in: J. Doria, H.-P. Gasser and M.C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court. Essays in honour of Professor Igor Blishchenko* (Nijhoff 2009) 757; Dinstein, Y., 'Defences', in: G.K. McDonald and O. Swaak-Goldman (eds.),

Substantive and Procedural Aspects of International Criminal Law, i: *Commentary* (Kluwer 2000) 371; Eser, A. 'Justification and Excuse: A Key Issue in the Concept of Crime', in: A. Eser and G.P. Fletcher (eds.), *Rechtfertigung und Entschuldigung – Justification and Excuse. Comparative Perspectives*, Vol. I (MPI für ausländisches und internationales Strafrecht 1987) 17, also available at <<http://www.freidok.uni-freiburg.de/volltexte/3906>> accessed 19 September 2014; *id.*, 'The Need for a General Part', in: M.C. Bassiouni (ed.), *Commentaries on the International Law Commissions 1991 Draft Code of Crime against the Peace and Security of Mankind* (Erés 1993) 43, also available at <<http://www.freidok.uni-freiburg.de/volltexte/9727>> *id.*, 'Defences' in *War Crime Trials*, in: Y. Dinstein and M. Tabory (eds.), *War Crimes in International Law* (M. Nijhoff 1996) 251, also available at <www.freidok.uni-freiburg.de/volltexte/3734> accessed 19 September 2014, also published in: (1995) 24 *IsYbHumRts* 201 and A. Eser, *Transnationales Strafrecht/Transnational Criminal Law* (Berliner Wissenschafts-Verlag 2011) 562; *id.*, 'Individual Criminal Responsibility', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 767, also available at <<http://www.freidok.uni-freiburg.de/volltexte/3909>> accessed 19 September 2014; *id.*, 'Mental Elements – Mistake of Fact and Mistake of Law', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 889, also available at <www.freidok.uni-freiburg.de/volltexte/3909> accessed 19 September 2014; *id.*, 'Zwangsendrohung zur Rettung aus konkreter Lebensgefahr', in: F. Herzog and U. Neumann (eds.), *Festschrift für Winfried Hassemer* (Müller 2010) 713; *id.*, 'Rechtmäßige Tötung im Krieg: zur Fragwürdigkeit eines Tabus', in: D. Dölling et al. (eds.), *Verbrechen – Strafe – Resozialisierung. Festschrift für Heinz Schöch* (De Gruyter 2010) 461; *id.*, 'Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY', in: B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 108; *id.*, 'Tötung im Krieg: Rückfragen an das Staats- und Völkerrecht', in: I. Appel, G. Hermes and C. Schönberger (eds.), *Öffentliches Recht im offenen Staat. Festschrift für Rainer Wahl* (Duncker & Humblot) 665 also available at <<http://www.freidok.uni-freiburg.de/volltexte/9714>>, accessed 25 August 2015; *id.*, 'Tötung im Krieg: auf der Suche nach einer Legitimationsgrundlage', in: M. Löhnig, M. Preisner and T. Schlemmer (eds.), *Krieg und Recht* (Gietl Verlage 2014) 239; *id.*, 'Straffreistellungsgründe: aus der Sicht des Bürgers als Normadressat', in: M. Heger, B. Kelker and E. Schramm (eds.), *Festschrift für Kristian Kühn* (C.H. Beck 2014) 173 also available at <<http://www.freidok.uni-freiburg.de/volltexte/9719>>, accessed 25 August 2015; *id.*, 'Zeit der Tat – Ort der Tat', in: A. Schönke and H. Schröder (eds.), *Strafgesetzbuch. Kommentar* (C.H. Beck 29th edition 2014) 105 § 8; Eser, A. and Fletcher, G. (eds.), *Justification and Excuse. Comparative Perspectives*, Vol. I (MPI für ausländisches und internationales Strafrecht 1987); *id.* (eds.), *Justification and Excuse. Comparative Perspectives*, Vol. II (MPI für ausländisches und internationales Strafrecht 1988); Eser, A. and Hecker, B., 'Keine Strafe ohne Gesetz', in: in: A. Schönke and H. Schröder (eds.), *Strafgesetzbuch. Kommentar* (C.H. Beck 29th edition 2014) 31, § 1; Eser, A. and Perron, W. (eds.), *Rechtfertigung und Entschuldigung*, Vol. III (MPI für ausländisches und internationales Strafrecht 1991); Fletcher, G.P. 'The Right and the Reasonable', in: A. Eser and G.P. Fletcher (eds.), *Rechtfertigung und Entschuldigung/justification and excuse*, Vol. I (MPI für ausländisches und internationales Strafrecht 1987) 167; Franck, T., *Recourse to Force: State Action against Threats and armed Attacks* (CUP 2002); Friman, H., 'Investigation and Prosecution', in: Lee, *International Criminal Court* (2001) 493; Frulli M., 'Jurisdiction rationae personae', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002) 527; Greenwood, C., 'Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', in: Fischer et al. (eds.), *International and National Prosecution of Crimes under International Law. Current Developments* (2001) 539; Gaeta, P., 'May Necessity be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?', (2004) 2 *JICJ* 785; *id.*, 'Official Capacity and Immunities', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002) 951; *id.*, 'Ratione Materiae Immunities of Former Heads of State and International Crimes: the Hissène Harbre Case', (2003) 1 *JICJ* 186; Grewal, K., 'The Protection of Sexual Autonomy under International Criminal Law', (2012) 10 *JICJ* 373; Heller, K.J., *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011); *id.*, 'The Rome Statute of the International Criminal Court', in: K.J. Heller and M.D. Dubber (eds.), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2011) 593; Henkel, H., 'Zumutbarkeit und Unzumutbarkeit als regulatives Rechtsprinzip', in: K. Engisch (ed.), *Festschrift für Edmund Mezger* (C.H. Beck 1954) 249; Janssen, S., 'Mental condition defences in Supranational Criminal Law', (2004) 4 *ICLRev* 83; Jescheck, H.-H., 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute', (2004) 2 *JICJ* 38; *id.*, 'Zum Stand der Vereinten Nationen für die Errichtung eines Internationalen Strafgerichtshofs', in: A. Eser (ed.), *Festschrift für Haruo Nishihara* (Nomos 1998) 437; Jescheck, H.-H. and Weigend, T., *Lehrbuch des Strafrechts. Allgemeiner Teil* (Duncker & Humblot 5th edition 1996); Joyner, C.C. 'Terrorizing the Terrorists: An Essay on the Permissibility of Torture', in: L.N. Sadat and M.P. Scharf (eds.), *The Theory and Practice of International Criminal Law* (Nijhoff 2008) 227; Keijzer, N. 'Introductory Observations', in: P. Duyx, R. Haveman and E. van Sliedregt (eds.), 'War Crimes Law and the Staute of Rome: Some Afterthoughts?', (2000) 39 *RDPMDG* 69; *id.*, 'Self-Defence', in: P. Duyx, R. Haveman and E. van Sliedregt, 'War Crimes Law and the Staute of Rome: Some Afterthoughts?', (2000) 39 *RDPMDG* 100; Kahan, D.M., 'Some Realism About Retroactive Judicial Expansion of Criminal Statutes', (1997) 3 *Roger-WilliamsULRev* 95; Kelt, M. and H. von Hebel, 'General Principles of Criminal Law and the Elements of Crimes', in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 19; Knoops, G.J., *Defenses in Contemporary International Criminal Law* (Nijhoff 2nd edition 2008); *id.*, 'The Diverging Position of Criminal Law Defences before the ICTY and the ICC: Contemporary Developments', in: J. Doria, H.-P. Gasser and M.C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court. Essays in honour of professor Igor Blishchenko* (Nijhoff

2009) 779; Korte, M., *Das Handeln auf Befehl als Strafausschließungsgrund* (Nomos 2003); *id.*, 'Die Irrtumsregelung des Art. 32 IStGH-Statut', (2008) 6 ZIS 419 <http://www.zis-online.com/dat/artikel/2008_9_262.pdf> accessed 19 September 2014; Kratzsch, D., '§ 53 StGB und der Grundsatz nullum crimen sine lege', (1971) GA 65; Krent, H.J., 'Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause', (1997) 3 *RogerWilliamsULRev* 35; Kreicker, H., 'Allgemeine Strafbarkeitsvoraussetzungen', in: A. Eser and H. Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. I: *Deutschland* (edition iuscrim 2003) 270; Kreß, C., 'Die Kristallisation eines Allgemeinen Teils des Völkerstrafrechts: Die Allgemeinen Prinzipien im Statut des Internationalen Strafgerichtshofs', (1999) 12 *HuV-I* 7; Krug, P., 'The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation', (2000) 94 *AJIL* 317; Lenckner, T. and Sternberg-Lieben, D., 'Notwehr', in: A. Schöнке and H. Schröder (eds.), *Strafgesetzbuch. Kommentar* (C.H. Beck 28th edition 2010) 567, pre-notes to § 32; Lenckner, T. and Sternberg-Lieben, D., 'Notwehr und Notstand', in: A. Schöнке and H. Schröder (eds.), *Strafgesetzbuch. Kommentar* (C.H. Beck 29th edition 2014), 571 prenotes to § 32; McCormack, T.L.H., 'Self-Defence in International Criminal Law', in: H. Abtahi and G. Boas (eds.), *The Dynamics of International Criminal Justice. Essays in Honour of Sir Richard May* (Brill 2005) 231; Merkel, R., 'Gründe für den Ausschluss der Strafbarkeit im Völkerstrafrecht', (2002) 114 *ZStW* 437; Morrison, T.W., 'Fair Warning and the Retroactive Judicial Expansion of Criminal Statutes', (2001) 74 *SouthCalLRev* 455; Nill-Theobald, C., 'Defences' bei Kriegsverbrechen am Beispiel Deutschlands und der USA. Zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrafrechts (edition iuscrim 1998); Ohlin, J.D., 'The Bounds of Necessity', (2008) 6 *JICJ* 289; Perron, W., 'Schuldunfähigkeit wegen seelischer Störungen', in: A. Schöнке and H. Schröder (eds.), *Strafgesetzbuch. Kommentar* (C.H. Beck 29th edition 2014) 379, 374, § 20; *id.*, 'Rechtfertigender Notstand', in: A. Schöнке and H. Schröder (eds.), *Strafgesetzbuch. Kommentar* (C.H. Beck 29th edition 2014) 687, 677, § 34; *id.*, 'Entschuldigender Notstand', in: A. Schöнке and H. Schröder (eds.), *Strafgesetzbuch. Kommentar* (C.H. Beck 29th edition 2014) 708, 705, § 35; Peschke, K., 'The ICC investigation into the conflict in Northern Uganda: beyond the dichotomy of peace versus justice', in: Brown (ed.), *Research Handbook on International Criminal Law* (Elgar 2011) 178; Radosavljevic, D., 'Scope and Limits of Psychiatric Evidence in International Criminal Law', (2013) 13 *ICLRev* 1013; Randelzhofer, A., 'article 51', in: B. Simma (ed.), *The Charter of the United Nations – A Commentary*, Vol. I (OUP 2nd edition 2002); Roberts, R.C.E., 'The Lubanga Trial Chamber's Assessment of Evidence in Light of the Accused's Rights to the Presumption of Innocence', (2012) 10 *JICJ* 923; Robinson, D., 'The Rome Statute and Its Impact on National Law', in: Casese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002) 849; Rowe, P., 'Duress as a Defence to War Crimes after Erdemović', (1998) 1 *YbHumL* 210; Sadat, L.N., *The International Criminal Court and the Transformation of International Law* (Transnational 2002); Saland, P., 'International Criminal Law Principles', in: R.S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute* (1999) 189; Salton, C.A., 'Mental Incapacity and Liability Insurance Exclusionary Clauses', (1990) 78 *CalLRev* 1027; Scaliotti, M., 'Defences before the international criminal court: Substantive grounds for excluding criminal responsibility, Part 1', (2001) 1 *ICLRev* 111; *id.*, 'Part 2', (2002) 2 *ICLRev* 1; Schabas, W.A., 'National amnesties, truth commissions and international criminal tribunals', in: Bartram S. Brown (ed.), *Research Handbook on International Criminal Law* (Elgar 2011) 373; *id.*, 'General Principles of Criminal Law', (1998) 6 *EJCLCLJ* 400; van Schack, B., 'The Crime of Aggression and International on Humanitarian Intervention on Behalf of Women', (2011) 11 *ICLRev* 407; Viseur Sellers, P., 'The Context of Sexual Violence: Sexual Violence as Violations of international Humanitarian Law', in: G.K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law. Current Developments* (Kluwer Law 2001) 539; van Sliedregt, E., *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T.M.C. Asser 2003); Triffterer, O., 'Acts of Violence and International Criminal Law', (1997) 4 *CroatianAnnCrimL&Prac* 2, 872; Weigend, T., 'Notwehr im Völkerstrafrecht', in: U. Sieber *et al.* (eds.), *Strafrecht und Wirtschaftsstrafrecht. Festschrift für Klaus Tiedemann* (Heymanns 2008) 1439; *id.*, 'Anwendung des allgemeinen Rechts', in: W. Jöckes (ed.), *Münchener Kommentar zum Strafgesetzbuch*, Vol. vi/2: *Nebenstrafrecht III, Völkerstrafgesetzbuch* (C.H. Beck 2009); *id.*, 'Kill or Be Killed. Another Look at Erdemović', (2012) 10 *JICJ* 1219; Werle, G., 'Individual Criminal Responsibility in article 25 ICC Statute', (2007) 5 *JICJ* 953; Wilson, W., *Criminal Law: doctrine and theory* (OUP 2nd edition 2003); van der Wilt, H., 'Justifications and Excuses in International Criminal Law: An Assessment of the Case-law of the ICTY', in: B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 275; Van Schaack, B., 'The Crime of Aggression and Humanitarian Intervention on Behalf of Women', (2011) 11 *ICLRev* 477; Watzek, J., *Rechtfertigung und Entschuldigung im englischen Strafrecht* (edition iuscrim 1997); Wirth, S., 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case', (2002) 13 *EJIL* 877; Wise, E., 'General Principles of Criminal Law', in: L. Sadat Wexler (ed.), *Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee* (Érés 1998) 43; Zimmermann, A., 'Superior Orders', in: Casese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002) 957.

Content

A. General remarks – Scope and genesis of the provision	1
B. Exclusion of criminal responsibility outside of article 31	7
I. Abandonment (article 25 para. 3 (f))	8
II. Exclusion of jurisdiction of persons over 18 (article 26)	9

III. Mistake of fact and mistake of law (article 32)	10
IV. Superior orders and prescription of law (article 33)	11
C. Missing defences	12
I. Explicitly rejected defences to ICC crimes: Official capacity and statutory limitations	13
II. Non-addressed defences	15
D. Analysis and interpretation of elements	17
I. Paragraph 1: Chapeau	17
1. 'Grounds for excluding criminal responsibility'	17
2. 'In addition to' 'other grounds ... provided for in this Statute'	18
3. 'At the time of that person's conduct'	21
II. Paragraph 1 (a): Incapacity	22
1. 'Suffers from a mental disease or defect'	23
2. 'Destroys' the person's 'capacity to appreciate' the unlawfulness or the 'capacity to control' the conduct	26
III. Paragraph 1 (b): Intoxication	30
1. 'State of intoxication'	33
2. 'Destroys' the person's 'capacity to appreciate the unlawfulness' or the 'capacity to control' the conduct	34
3. Unless 'voluntarily intoxicated' in that the person 'knew or disregarded the risk' of being 'likely to engage in conduct constituting a crime within the jurisdiction of the Court'	35
IV. Paragraph 1 (c): Self-defence, defence of another person, and defence of property in war crimes	37
1. 'Person' (not merely) 'involved in a defensive operation'	38
2. 'imminent and unlawful use of force' against (specific) legally protected interests	41
3. 'Reasonably acts to defend in a manner proportionate to the degree of danger'	46
V. Paragraph 1 (d): Duress	49
1. 'Conduct alleged to constitute a crime within the jurisdiction of the Court'	52
2. 'Duress' resulting from a 'threat of imminent death' or of 'continuing or imminent serious bodily harm' against 'that person or another person' whereby the threat is either 'made by other persons' or 'constituted by other circumstances beyond that person's control'	53
3. 'The person acts necessarily and reasonably to avoid this threat'	58
4. 'Provided that the person does not intend to cause a greater harm than the one sought to be avoided'	60
VI. Paragraph 2: The implementation by the Court in the case before it	63
1. 'The Court shall determine the applicability' of the (exclusionary grounds) 'to the case before it'	65
2. Grounds for excluding criminal responsibility 'provided for in this Statute'	67
3. Paragraph 2 in the light of the principle of legality	68
VII. Paragraph 3: Other (international or national) sources for exclusionary grounds	72
1. 'At trial the Court may consider' a ground for excluding criminal responsibility 'other than those referred to in paragraph 1'	73
2. Where such a ground is 'derived from applicable law as set forth in article 21'	75
3. 'The procedures relating to the considerations of such a ground shall be provided for in the Rules of Procedure and Evidence'	76
E. Outlook	77

A. General remarks – Scope and genesis of the provision

1 Although this article of the Rome Statute, as will be seen, certainly has its merits, it must be made clear from the very outset that both its heading is misleading and its contents incomplete. When speaking of 'grounds for excluding criminal responsibility' in such a general way, the provision seems to comprise all defences which may lead to the exclusion of criminal responsibility. This impression is, however, misguided from two countervailing ends: On the one hand, as to be concluded from its paragraph 1, article 31 is not the only place in this Statute where grounds for excluding criminal responsibility may be found

(below B); in this respect, the provision has a supplementary function in that it regulates grounds for excluding criminal responsibility not yet recognized in other provisions of this Statute. On the other hand, article 31 is far from providing a complete supplement of all possible defences to an offence, as may be seen from the missing list (below C). Thus this provision in fact solely deals with incapacity (below D.II), intoxication (below D.III), self-defence and defence of property (below D.IV), and duress (below D.V). Yet, this deficiency as well is consciously taken into account, firstly in paragraph 2 by giving the Court the power to determine the concrete applicability of the grounds for excluding criminal responsibility (below D.VI), and secondly in paragraph 3 by allowing the invocation and development of further grounds for excluding criminal responsibility by reference to other applicable international and national law (below D.VII).

Beyond being merely supplementary and still incomplete, the manner in which these 2 grounds for excluding criminal responsibility are regulated is ambivalent insofar as it leaves open the question as to whether a specific ground may be considered as a 'justification' of the offence or merely as an 'excuse' of the offender, or whether other – more procedural or political – reasons may lead to a discharge. In this respect, by abstaining from a closer differentiation between various types of exclusionary grounds, as known in most continental-European jurisdictions¹, article 31 appears to have been phrased along common law propositions of a rather broad and undifferentiated concept of 'defences'. Although this common law point of departure has to be kept in mind when interpreting the defences of the Statute, the question remains whether the future development could aim at different ends (below E).

With regard to the genesis of article 31, two lines of development are worth remarking: 3 a more principal and a more formal one. The first is concerned with the question of whether the Statute should provide grounds for excluding criminal responsibility at all. In this respect, the development leads from almost zero to considerable heights, finally ending on a middle level². If, by neglecting earlier drafts³, the 1994 ILC Draft Statute may serve as starting point of the Rome Statute, it must be realized that in this Draft grounds for excluding criminal responsibility are not mentioned at all; this, however, may be explained by the fact that the ILC Draft was by any means rather scarce in pronouncing general principles by merely explicitly expressing the principle of legality (article 39). Thus, in that Draft, solely its article 33 which deals with 'applicable law', thereby allowing the application of 'general international law' or 'any (applicable) rule of national law', could have been used as source for excluding criminal responsibility. After this substantial lack of general requirements of and exemptions from criminal responsibility had been met with considerable criticism, supported by constructive proposals⁴, all further proposals and drafts of UN Committees contained a

¹ Cf. Eser, in: Eser and Fletcher (eds.), *Rechtfertigung und Entschuldigung – Justification and Excuse. Comparative Perspectives* (1987) 19 et seq.; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 215 et seq.; cf. also below mn 17.

² In addition to this review cf. also Ambos, *Internationales Strafrecht* (2014) 217 et seq.; id., *Treatise on International Criminal Law* (2013) 301 et seq.; Knoops, in: Doria, Gasser and Bassiouni (ed.), *The Legal Regime of the International Criminal Court* (2009), 779, 793 et seq.; Schabas, *The International Criminal Court* (2010) 482 et seq.; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 239 et seq. – Further cf. on the controversy about an exhaustive or enumerative list of defences Scaliotti (2001) 1 *ICLRev* [111], 119; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 221 et seq.

³ Such as the 1991 ILC Draft Code, in which at least some rudimentary general principles and in rather general terms 'defences and extenuating circumstances' had been recognized: cf. Eser, in: Bassiouni (ed.), *Commentaries on the International Law Commissions 1991 Draft Code of Crime against the Peace and Security of Mankind* (1993) 58 et seq. – As to whether and to what kind and degree defenses had already found consideration and recognition in the Nuremberg trials see Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) 294 et seq.

⁴ In particular cf. the various (private) Siracusa/Freiburg/Chicago-Drafts which, as an alternative to the (official) ILC-Drafts, had been prepared by a working group of the AIDP/ISISC in Siracusa/Italy and the Max Planck Institute for Foreign and International Criminal Law in Freiburg/Germany (article 33; published in: Nill-Theobald, *'Defences' bei Kriegsverbrechen am Beispiel Deutschlands und der USA.* (1998) 454 et seq.); as several of these rules had been phrased differently by Eser, Koenig, Lagodny and Triffterer (reprinted and compared with the version in the Updated Siracusa Draft in: Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 942 et seq.),

certain range of various defences. This new openness can be observed as early as in the *Ad Hoc* Committee Report of 1995, where in Annex II a long list of possible defences can be found⁵. Still more proposals of possible defences were put forward for consideration in a compilation by the Preparatory Committee of 1996⁶. However, in all further recommendations of the Working Group on General Principles of Criminal Law Penalties, solely mistake of fact or of law were left as explicitly recognized⁷. The eventually decisive step was then taken by the Preparatory Committee at its December 1997 session, where it accepted the recommendations of the Working Group on General Principles of Criminal Law, as there the grounds for excluding criminal responsibility appear for the first time in the form in which it is, in principle, still represented in the present article 31⁸.

- 4 After these recommendations had basically been upheld by the Inter-Sessional Meeting of January 1998⁹ and finally found admittance into the Draft Statute of the Preparatory Committee of April 1998¹⁰ as a formal basis of the Rome Conference, all further modifications were less of principal than of marginal and more formal character. Without wishing to go into details at this point, the Final Draft Statute as presented to the Diplomatic Conference was, regarding defences to an offense, basically structured in the following way: Whereas mistake of fact or mistake of law (article 30) as well as superior orders and prescription of law (article 32) were regulated in special provisions and later merely renumbered to articles 32 and 33 respectively, article 31 was at that stage partly broader due to its recognition of a sort of necessity (paragraph 1 (d)), partly narrower due to its not yet containing a defence of property in case of war crimes (originally to be regulated in a specific article 33, now within article 31 paragraph 1 (c)), and by treating the present paragraph 3 of article 31 as ‘other grounds for excluding criminal responsibility’ in a special article 34. Whereas the chapeau of article 31 as well as paragraph 1 (a) and paragraphs 2 and 3 remained almost unchanged in their substance, paragraph 1 (b), (c) and (d) underwent various modifications in the course of the Rome Conference. Why, when and in which way this happened, must be seen in connection with the analysis of the respective grounds for excluding criminal responsibility (below D).

- 5 In the Post-Rome activities of the Preparatory Commission in charge of defining certain ‘Elements of Crimes’ and developing further ‘Rules of Procedure and Evidence’, the subject matter of defences did not play a major role: Whilst the Elements, in abstaining from any further concretization of the Statutory grounds for excluding criminal responsibility, remind the Prosecutor of his or her obligation under article 54 para. 1 to investigate incriminating and exonerating evidence equally¹¹, the Rules foresee only few procedural regulations of when and how to raise grounds for excluding criminal responsibility¹². The minor role of defences equally holds true for the Regulations of the Court¹³.

these rules were also integrated into ‘Proposals to Amend the “Draft Code of Crimes against the Peace and Security of Mankind”’, in: Triffterer, *Acts of Violence and International Criminal Law*, Annex 2, (1997) 4 *Croatian AnnCrimL&Pract* 2 [872]. To the role of these different drafts see also Eser, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 777.

⁵ *Ad Hoc* Committee Report, pp. 18 *et seq.*, 48 *et seq.*

⁶ Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/CRP.9 (4 Apr. 1996), Annex: General Principles of Criminal Law. *Cf.*, in addition, 1996 Preparatory Committee II, pp. 79 *et seq.*

⁷ *Cf.* Preparatory Committee Decisions Feb. 1997, pp. 18 *et seq.*

⁸ See articles L–O, Preparatory Committee Decisions Dec. 1997, pp. 18 *et seq.*

⁹ See Zutphen Draft, pp. 60 *et seq.*

¹⁰ Preparatory Committee (Consolidated) Draft, pp. 66 *et seq.*

¹¹ Elements, General Introduction, paragraph 5 with fn. 1. *cf.* Kelt and v. Hebel, in: Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001) 19, 38.

¹² *Cf.* rule 79 para. 1 (b) (the defence shall notify the prosecutor of intent to raise a defence pursuant to article 31 para. 1), rule 80 (procedures for raising a defence pursuant to article 31 para. 3), rule 121 para. 9 (procedures relating to pre-trial hearings). *Cf.* Brady, in: Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001) 403, 414 *et seq.*, Friman, in: Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001) 493, 521 *et seq.*

¹³ *Cf.* regulation 54 (p): At a status conference, the Trial Chamber may issue any order on the defences, if any, to be advanced by the accused.

Due to the novel nature of how these exclusionary grounds are regulated in article 31, 6 some caution with regard to the appropriate methodology of its interpretation appears advisable. Whereas the interpretation of other parts of the Rome Statute may easily take resort to legal precedents both in international and national criminal law, with regard to this section particular heed must be paid to the wording of these provisions, thus avoiding both an uncritical adoption of the ambiguous and controversial drafting at the Rome Conference and an unreflected implantation from national criminal justice systems.

B. Exclusion of criminal responsibility outside of article 31

As early as in its very first words ‘in addition to’, article 31 indicates that it possesses a 7 supplementary function, firstly in recognizing grounds for excluding criminal responsibility already provided for in other provisions of this Statute, and secondly by additional ones. Thus, in order to get a full view of possible grounds for excluding criminal responsibility, such grounds outside of article 31 must at least be listed, though not commented on here.

I. Abandonment (article 25 para. 3 (f))

According to this provision, a person shall not be held liable for the attempt to commit a 8 crime if he or she abandons the effort to commit the crime or otherwise prevents the completion of the crime, provided that he or she gives up the criminal purpose completely and voluntarily (article 25 para. 3 (f) sentence 2). Although in some countries, such as France, abandonment is considered part of the definition of attempt¹⁴, it is at least a negative and, thus, an excluding factor of criminal responsibility¹⁵.

II. Exclusion of jurisdiction of persons over 18 (article 26)

Although, due to the inability of the delegates to find a consensus on the age of 9 responsibility¹⁶, this exclusion is phrased in procedural terms by excluding jurisdiction, the essential reason behind this is the lack of criminal responsibility under a certain age. Therefore, this exclusion can, in substance, be considered as a ground for excluding criminal responsibility as well¹⁷.

III. Mistake of fact and mistake of law (article 32)

As mentioned, even in phases where the drafters of the Statute were hardly prepared to 10 recognize any grounds for excluding criminal responsibility, at any rate mistake of fact and, to a lesser degree, mistake of law were kept as reasons for excluding, or at least mitigating,

¹⁴ Cf. Bouloc, *Droit pénal général* (2013) 228.

¹⁵ For details of the various requirements of abandonment see Ambos above Art. 25, mn 34; Eser, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 777, 814 *et seq.*; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 147 *et seq.*; Werle (2007) 5 JICJ [953], 972 *et seq.*

¹⁶ Cf., in particular, Preparatory Committee Draft, pp. 60 *et seq.*; in addition Ambos (1999) 10 CLF [1], 22 *et seq.*

¹⁷ In principle agreeing van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 215 fn. 11.- For more details see Triffterer and Clark above Art. 26; Ambos, *Treatise on International Criminal Law* (2013) 430 *et seq.*; Cassese, *International Criminal Law* (2013) 227; Frulli, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 527, 533 *et seq.* If not overlooked, this exclusion is neither mentioned by the other comprehensive monographs of Knoops, *Defenses in Contemporary International Criminal Law* (2008), nor of van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003).

criminal responsibility¹⁸. Remarkably, both mistake of fact and mistake of law are explicitly denoted as grounds for excluding criminal responsibility, albeit under certain conditions: in the case of mistake of fact, if it negates the mental element required by the crime (article 32 para. 1), in the case of a mistake of law, if it negates the mental element or (article 32 para. 2 sentence 2 alternative 1) or if it can be traced back to a superior order or a prescription of law according to article 33 (article 32 para. 2 sentence 2 alternative 2). Although both the structure and contents of these mistake rules may be questionable in various respects¹⁹, it was certainly a decisive step regarding mistake of law to recognize this still worldwide highly controversial ground for excluding criminal responsibility at all²⁰.

IV. Superior orders and prescription of law (article 33)

- 11 Another highly controversial ground for excluding criminal responsibility is obedience to a superior order. Although not recognized in principle, article 33 of this Statute provides certain exceptions under which a person may be relieved of criminal responsibility if he or she acted pursuant to an order of a government or of a superior. Although, again, the structure and scope of this provision may be disputable²¹, it attempts to find a middle way between entirely disregarding and partly recognizing obedience to a superior as a ground for excluding criminal responsibility²².

C. Missing defences

- 12 In comparison to national penal codes and case laws where the fulfillment of the definitional elements of an offense may be negated by a wide range of justificatory, exculpatory or other grounds of excluding punishability²³, the list of possible offenses to international offenses in this Statute is rather limited. This may partly be explained by the fact that crimes penalized and prosecuted by inter- and supranational law are, in principle, of such infeasible dimensions that any attempts to justify or excuse them appear obscene and, therefore, are met with psychological reservations. Nevertheless, in the same way that a suspected murderer's act may be justified by self-defence, a rapist excused by insanity, or a policeman released from personal liability for suppressed resistance of 'superior order', in trials of international crimes it cannot be precluded either from the very outset that the

¹⁸ Cf. above mn 4; in particular referring to sex offenses see Grewal (2012) 10 *JICJ* [373], 389. As to partly divided opinions in the Nuremberg trials see Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) 306.

¹⁹ For alternative phrasing cf. Article 33–15 of the Updated Siracusa Draft (in Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 951).

²⁰ For more details see Eser, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 889, 934 *et seq.*; Triffterer below Art. 32; Korte (2008) 6 *ZIS* [419], 419 *et seq.*; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 269 *et seq.*; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 646 *et seq.*

²¹ As alternatives cf. article 33–16 of the Updated Siracusa Draft, the proposal by Eser, Koenig, Lagodny and Triffterer, article 33 o (in Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 951) and article 11 (in Triffterer, *Acts of Violence and International Criminal Law*, Annex 2, (1997) 4 *Croatian Ann. of Crim.L. and Practice*. 2 [872], 879) respectively.

²² For more details see Triffterer and Bock below Art. 33; Bantekas and Nash, *International Criminal Law* (2007) 56 *et seq.*; Knoops, *Defenses in Contemporary International Criminal Law* (2008) 33, 129 *et seq.*; above note 1, E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 287 *et seq.*; Zimmermann, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court, A Commentary* (2002) 957 *et seq.* As to the partly inconsistent approach in the Nuremberg judgments see Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) 299 *et seq.*

²³ See in general Eser, in: Eser and Fletcher (eds.), *Rechtfertigung und Entschuldigung – Justification and Excuse. Comparative Perspectives* (1987) 17, 46 *et seq.* or, for instance with regard to German Criminal Law, cf. Lenckner and Sternberg-Lieben, in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2014) preliminary remarks 27–133 to § 32, 2t 586 *et seq.*

statutory elements of an offense, although all given, may be counteracted by a valid defence²⁴. Otherwise it would not have been possible at all to recognize grounds for excluding criminal responsibility as described above at B and below at D. Yet the question still remains as to whether or not there might be further grounds for excluding criminal responsibility. The answer requires a distinction between two groups of possible defences:

I. Explicitly rejected defences to ICC crimes: Official capacity and statutory limitations

In declaring *official capacity* irrelevant, particularly that of a Head of State or Government (article 27), the Statute explicitly excludes a defence which was formerly practiced commonly and tacitly almost as a ‘matter of course’, which has been rejected, however, since at least as early back as the Nuremberg trials²⁵. Since more recently again invoked by Pinochet²⁶, this Statute’s explicit exclusion of ‘official capacity’ as a defence will hopefully clarify this controversial question and set a preventive signal towards government-supported crimes²⁷. 13

The same holds true for the non-applicability of the *Statute of Limitations* (article 29). 14
With the explicit rejection of this defence, any speculations on playing with the passage of time are made illusory²⁸.

II. Non-addressed defences

Aside from grounds for excluding criminal responsibility which are either statutorily 15
recognized (above B and below D) or explicitly rejected (above C.I), a wide range of defences remains which may be recognized as grounds for excluding criminal responsibility by various national laws, but which are not explicitly addressed in this Statute, neither in a positive nor in a negative way. Although certain defences recognized by national criminal law, by its very nature may not be acceptable within the context of international crimes, such as for instance educational privileges of parents or teachers, quite a few defences remain which have already been discussed and partly even considered for this Statute²⁹, but which in the final end were neither explicitly recognized nor rejected. Without pretending to be exhaustive, this refers to:

²⁴ See Eser, in: Dinstein and Tabory (eds.), *War Crimes in International Law* (1996) 251, 252 *et seq.*; agreeing Cryer, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 398; v. d. Wilt, in: Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011) 275, 276.

²⁵ For more details see Sadat, L. N., *The International Criminal Court and the Transformation of International Law* (2002) 200 *et seq.*

²⁶ See *id.*, 201.

²⁷ For more details see Triffterer and Buschard above Art. 27; Ambos, *Treatise on International Criminal Law* (2013) 406 *et seq.*; Cassese, *International Criminal Law* (2008) 302 *et seq.*; Gaeta, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 951, 975 *et seq.* – Note, however, that article 27 is only directly applicable to Member States, thus, especially after the so called Arrest-Warrant decision by the International Court of Justice, leaving it controversial whether the Court holds jurisdiction over the head of state or government of non-member states; *cf. Democratic Republic of the Congo v. Belgium*, Judgment, 14 February 2002, 2002 ICJ Rep. 3, para. 61 (<<http://www.icj-cij.org/docket/files/121/8126.pdf>> accessed 23 September 2014). As to this decision *cf. Gaeta* (2003) 1 *JICJ* [186]; Wirth (2002) 13 *EJIL* [877].

²⁸ For more details see Schabas above Art. 29; Sadat, L. N., *The International Criminal Court and the Transformation of International Law* (2002) 220 *et seq.*; for possible conflicts with national statutes of limitation *cf. Ambos, Treatise on International Criminal Law* (2013) 427 *et seq.*

²⁹ *Cf.* the compilation of the Preparatory Committee in Annex, note 6, pp. 19 *et seq.*, and, with special regard to war crimes, Eser, in: Dinstein and Tabory (eds.), *War Crimes in International Law* (1996) 251, 254 *et seq.*; Nill-Theobald, ‘Defences’ bei Kriegsverbrechen am Beispiel Deutschlands und der USA. *Zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrafrechts* (1998) 55 *et seq.*

- consent of the victim³⁰,
- conflict of interests/collision of duties³¹,
- reprisals³²,
- general and/or military necessity³³,
- the *tu quoque* argument³⁴, or
- amnesties and immunities³⁵.

16 As several of these defences are highly controversial, partly in principle and partly at least with regard to the character of international crimes³⁶, it appears understandable that the Statute followed a center line by not explicitly recognizing these defences, and, on the other hand, by leaving the door open for one or the other of these defences in an individual case by means of article 31 para. 3 (see below D.VII).

³⁰ Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 328 *et seq.*; *id.*, *Treatise on International Criminal Law* (2013) 387; Cryer, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 399, 416. It should be noted, however, that the Elements of Crime as well as the Rules of Procedure and Evidence, in precluding consent from certain crimes (Elements 8 para. 2 (b) (x) fn. 48; 8 para. 2 (e) (xi) fn. 68) or by barring the inference of consent from certain facts (rule 70), implicitly recognize consent as a possible defence; for details *cf.* Schabas, *The International Criminal Court* (2010) 493 *et seq.* With particular regard to consent problems in sexual abuse *cf.* Boon (2001) 32 *Columbia HRLR* [625], 667 *et seq.*, and furthermore Visser Sellers, in: Kirk McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (2000) [263], 328 (who interprets the jurisprudence of the ICTR on cases of sexual violence as constricting the availability of consent as a defence).

³¹ *Cf.* Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1008.

³² *Cf.* Ambos, *Treatise on International Criminal Law* (2013) 390 *et seq.*; Cryer, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 417; Eser (1995) 24 *Israel Y.B. Hum. Rts.* [201], 217 *et seq.*; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 291 *et seq.* On the controversy about the legality of reprisals against civilians *cf.* *Prosecutor v. Kupreskic et al.*, IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, paras. 527–536 (rejecting a defence) and (in criticizing this holding) Greenwood, 'Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes under International Law. Current Developments* (2001) 539, 549 *et seq.* and van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 261 *et seq.*

³³ *Cf.* Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 324; *id.*, *Treatise on International Criminal Law* (2013) 388 *et seq.*; Eser (1995) 24 *IsYbHumRts* [201], 219; Knoops, *Defenses in Contemporary International Criminal Law* (2008) 136 *et seq.*; *id.*, in: Doria, Gasser and Bassiouni (ed.), *The Legal Regime of the International Criminal Court* (2009) 779, 786 *et seq.*; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 295 *et seq.*; v. d. Wilt, in: Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011) 275, 285 *et seq.* and, with particular attention to the Nuremberg judgments, see Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) 308 *et seq.* – As to the ill-guided confusion of 'necessity' and 'duress' see below mn 49. *cf.* also below to note 134.

³⁴ The ICTY comprehensively classified the *tu quoque* defence as impermissible in international humanitarian law in *Prosecutor v. Kupreskic et al.*, IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, Trial Chamber, 17 February 1999. *cf.* Also Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 328 *et seq.*, *id.*, *Treatise on International Criminal Law* (2013) 393; Eser (1995) 24 *IsYbHumRts* [201], 218; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 294 *et seq.* As to the denial of this defense as well as of the invocation of 'selective prosecution' in Nuremberg trials see Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) 296 *et seq.*

³⁵ *Cf.* Cassese, *International Criminal Law* (2013) 309 *et seq.*; Eser (1995) 24 *IsYbHumRts* [201], 219 *et seq.*, Peschke, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 178, 183 *et seq.*, 202; Robinson, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1849, 1855 *et seq.*; Schabas, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 373 *et seq.* (2011); Safferling, *Internationales Strafrecht* (2011) 123 *et seq.*

³⁶ *Cf.* Eser, in: Dinstejn and Tabory (eds.), *War Crimes in International Law* (1996) 251, 245 *et seq.*

D. Analysis and interpretation of elements

I. Paragraph 1: Chapeau

1. 'Grounds for excluding criminal responsibility'

When using this language, the Statute is basically, although only half-way, following 17 continental-European rather than common law traditions. In avoiding the common law term of 'defences' that would be open for comprising substantive as well as procedural bars to punishability and prosecution, the Statute is merely addressing *substantive* grounds for excluding criminal responsibility³⁷. Since the term 'defence' was consciously avoided³⁸, it would be inapt to use, as some commentators still do³⁹, defence and grounds for excluding criminal responsibility as interchangeable concepts⁴⁰. When speaking of 'excluding criminal responsibility' without further differentiation, however, the Statute leaves open the question as to whether a given ground is *justifying* the wrongful act or merely *excusing* the perpetrator, or even only *negating punishability* for some other substantive reason⁴¹. In abstaining from such further differentiation, the Statute remains behind jurisprudential development as was achieved particularly in the Germanic and, to some degree, in the Romanic jurisdictions as well⁴². Although the application of this distinction could be helpful for reasoning certain grounds for excluding criminal responsibility in a properly differentiated way, as in particular with regard to necessity and duress⁴³, this conceptual deficiency is not to create a practical

³⁷ This restriction to substantive exclusions of criminal responsibility, however, seems not to be generally recognized as, quite strangely, even *alibi* as a clearly evidentiary bar to finding a defendant guilty is mentioned among possible (although by this provision of the Statute not recognized) defences by certain authors, such as Sadat, L. N., *The International Criminal Court and the Transformation of International Law* (2002) 212 fn. 157; Schabas, *An Introduction to the International Criminal Court* (2001) 88; cf. also Ambos, *Treatise on International Criminal Law* (2013) 388. Incidentally, this narrower understanding of defences seems to be gaining fellowship also among common law scholars; see, e. g., Ashworth and Horder, *Principles of Criminal Law* (2013) 193; cf. also van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 215 et seq.

³⁸ Reported by Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1028 with reference to Saland, in: Lee (ed.), *The International Criminal Court – The Making of the Rome Statute* (1999) 189, 206. cf. also Merkel (2002) 114 ZStW [437], 441.

³⁹ Cf. Kittichaisaree, *International Criminal Law* (2001) 258; Schabas, *An Introduction to the International Criminal Court* (2001) 88.

⁴⁰ Cf. also Ambos, *Internationales Strafrecht* (2014) 218 et seq. – With regard to consequences for the application of paragraph 3 of Art. 31 which allows the development of further grounds for excluding criminal responsibility, see below mn 74.

⁴¹ Cf. the comment by Sadat Wexler, *Model Draft Statute for the International Criminal Court based on the Preparatory Committee's Text to the Diplomatic Conference, Rome June 15 – July 17 (1998)* 56. Apparently due to this lack of clarity Wise, in: Sadat Wexler (ed.), *Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee* (1998) 43, 52, sees in Art. 31 a 'miscellaneous lot of exculpatory grounds' whilst, even more confusing, Krug, (2000) 94 *AJIL*. [317] fn. 2 speaks of 'justification' as providing 'exculpation' for not wrongful acts as to be distinguished from 'excuse' as 'exculpating' a particular defendant from accountability, thereby obviously not recognizing that 'exculpation' (as discharging from 'culpa' in terms of 'culpability') is more synonymous with mere 'excuse' (of the actor) rather than with 'justification' of the act.

⁴² Cf. the contributions to Eser and Fletcher (eds.), *Justification and Excuse. Comparative Perspectives*, Vol. I and II (1987/88); Eser and Perron (eds.), *Rechtfertigung und Entschuldigung* (1991); Watzek, *Rechtfertigung und Entschuldigung im englischen Strafrecht* (1997); furthermore Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 825; Jescheck and Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil* (1996) 332 et seq.; Merkel (2002) 114 ZStW [437], 448 et seq., 454; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 229 et seq., 273, 299, id., *Individual Criminal Responsibility in International Law* (2012) 215 et seq.

⁴³ Cf. below mn 49; furthermore Merkel (2002) 114 ZStW [437], 441, 448 et seq., 454; Sadat, L. N., *The International Criminal Court and the Transformation of International Law* (2002) 214 et seq.; Scaliotti (2002) 2 *ICLRev*[1], 46; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 230, 271 et seq., 299.

impediment as it also seems to be a common view⁴⁴. For as long as ‘criminal responsibility’ is understood in a broad sense, i.e. in terms of not only referring to the (subjective) capability of the actor but as also comprising the (objective) wrongfulness of the act, its exclusion may not only be procured by exculpatory factors, as in the case of incapacity (Paragraph 1 (a))⁴⁵, but also by genuine justifications as in the case of necessary and proportionate self-defence (paragraph 1 (c))⁴⁶.

2. ‘In addition to’ ‘other grounds ... provided for in this Statute’

- 18 By referring to ‘additional grounds’ for the exclusion of criminal responsibility, this article reveals its supplementary, if not even fundamental function as central place for the possible exclusion of criminal responsibility. Taking this route, the article could serve as the main instance of reference in such cases where general issues of these or other grounds for excluding criminal responsibility are in question⁴⁷. This might become relevant, for example, with regard to the time at which a defence must be present: for instance, as neither article 32, concerned with mistake of fact or law, nor article 33, concerned with superior orders, makes any reference to the relevant time, reference to the ‘person’s conduct’ in this paragraph could serve as guideline (see below D. I. 3).
- 19 Although paragraph 1 only refers to additional exclusionary grounds ‘provided for in this Statute’, this may not be interpreted as a ‘closed shop’ against other grounds for excluding criminal responsibility, for, as can be derived from paragraph 3, the Statute does not bar the invocation of other exclusionary grounds found in applicable international and national law according to article 21 (see below D. VII).
- 20 However, although the case of concurrent exclusionary grounds is not expressly addressed, there is no reason why it should not be possible for a defendant to invoke multiple grounds for excluding criminal responsibility if they are given, as in the case in which he or she was misguided by a mistake of fact or law (according to article 32) and additionally acting under duress (according to paragraph 1 (c)).

3. ‘At the time of that person’s conduct’

- 21 In stating the ‘person’s conduct’ as the decisive time at which a ground for excluding criminal responsibility must be given, the Statute takes a rather narrow view by, implicitly, declaring the time at which the statutory result of the conduct occurs as irrelevant. Consequently, for instance, with regard to intoxication (paragraph 1 (b)), a person taking part in genocide who, at the time of giving orders or providing support, had already consumed alcohol, his mind yet not affected, could not claim exculpation by proving that, at the time at which the genocidal act was committed by the principals, he had lost his capacity to appreciate the unlawfulness of his conduct. Nevertheless, this so-called ‘act theory’ – as opposed to the ‘ubiquity principle’, according to which the place and/or the time of the effect of an act is equally relevant as the place or time of the conduct⁴⁸ – appears feasible in that the prohibition as well as permissions and excuses are determinant for the

⁴⁴ Cf. Bantekas and Nash, *International Criminal Law* (2007) 53 *et seq.*; Cassese, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 951, 955; Cryer, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 402, 399 *et seq.*; Scaliotti (2001) 1 *ICLRev*[111], 118.

⁴⁵ Cf. below mn 22, Ambos, *Treatise on International Criminal Law* (2013) 304 *et seq.*

⁴⁶ For instance, to consequences with regard to mistakes of fact or law see Eser, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 889, 934 *et seq.*; cf. also Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 300 *et seq.*

⁴⁷ Agreeing van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 223 *et seq.*; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 620.

⁴⁸ For details to these approaches cf. Eser, in: Schönke and Schröder (eds.), *Strafgesetzbuch* (2014) § 8 mn 2 (with regard to the time of commission) at 105, and § 9 mn 3 *et seq.* (with regard to the place of commission), at 107 *et seq.*

conduct, whereas the occurrence of the statutory result may be accidental or at least no longer influenced by the conduct the respective person is responsible for⁴⁹.

II. Paragraph 1 (a): Incapacity

Different from all other exclusionary grounds of article 31 which underwent various modifications in the course of the promulgation of the Statute, the wording of paragraph 1 (a) has remained unchanged since its elaboration by the Working Group on General Principles of Criminal Law and its adoption by the Preparatory Committee at its December 1997 session⁵⁰. This provision adopts the well-established principle of national criminal justice systems that incapacity or legal insanity serves as a categorical exclusion of criminal responsibility⁵¹. As merely granting a personal excuse, however, and not an objective justification of the crime, the act still remains unlawful⁵². Since in this way excluding criminal responsibility, incapacity is to be distinguished from the inability to stand trial (as regulated in article 64 para. 8 and rule 135).⁵³

As to the contents of paragraph 1 (a), incapacity as ground for excluding criminal responsibility has two basic requirements: a defective mental state in terms of an abnormality of mind⁵⁴ (1), in which the capacity to either appreciate the unlawfulness or to control the conduct is destroyed (2).

1. ‘Suffers from a mental disease or defect’

This component of the insanity defence is a triple one: the defendant has to ‘suffer’ from a certain impairment (‘disease or defect’) that relates to the human mind (‘mental’). In comparison to corresponding regulations in various recent national penal codes⁵⁵ this requirement is narrow in one respect and rather broad in the other.

On the one hand, the regulation of incapacity in subparagraph (a) could be understood as narrow because of solely recognizing ‘*mental*’ deficiencies as ground for excluding criminal responsibility. As suggested in the first edition of this commentary and, indeed, followed by

⁴⁹ Agreeing Ambos, *Treatise on International Criminal Law* (2013) 312; cf. also van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 242 *et seq.*

⁵⁰ Cf. Preparatory Committee Decisions Dec. 1997; article I; Schabas, *The International Criminal Court* (2010) 484 *et seq.*

⁵¹ Cf. Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 672 and 674. For details to national underpinnings and case law on this commonly so-called ‘insanity defence’ cf. Ambos, *Treatise on International Criminal Law* (2013) 315 *et seq.*; Knoops, in: Doria, Gasser and Bassiouni (eds.), *The Legal Regime of the International Criminal Court* (2009) 779, 789 *et seq.*; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 224 *et seq.* – Note that a plea of incapacity raises procedural difficulties that are neither covered by the Rome Statute nor by the Rules of Procedure and Evidence. For example, article 77 does not foresee detention as the appropriate reaction to a successful incapacity plea; in order not to set the defendant free, regulation 106 para 6 – which allows a Chamber of the Court to transfer detained mentally ill persons or persons suffering from serious psychiatric condition to specialized institutions for appropriate treatment – could be construed as providing the appropriate sanction for defendants successfully raising incapacity. It has to be noted, however, that this interpretation is delicate at best, since it would invent a highly intrusive criminal sanction with there being only a very small, if any, basis in the Rome Statute. For an overview over further procedural problems regarding insanity cf. Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 303 *et seq.*; Krug, (2000) 94 *AJIL* [317], 322 *et seq.*

⁵² Cf. above mn 17, Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 301 f.

⁵³ Cf. Ambos, *Treatise on International Criminal Law* (2013) 432 *et seq.* As an example of this kind of a procedural defence at the ICTY see *Prosecutor v. Kovačević*, IT-01-42/2, public version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial, Trial Chamber I, 12 April 2006; Zahar and Sluiter, *International Criminal Law* (2008) 440 *et seq.*

⁵⁴ As understood in *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 16 November 1998, para. 1156 (hereafter *Čelebić*).

⁵⁵ Cf. Ambos, *Treatise on International Criminal Law* (2013) 314 *et seq.*; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 224 *et seq.*

some prominent authors⁵⁶, ‘mental’ might be interpreted as not covering merely ‘psychic’ disturbances as long as they do not affect the cognitive or intellectual capacity of the person concerned. Consequently, other psychic affections or deep emotional disturbances, as they may be taken into consideration in national laws⁵⁷, could only be taken resort to by way of paragraph 3 of this article (below D.VII). At second glance, however, this restrictive reading of ‘mental’ appears neither cogent nor adequate as better arguments speak for a broader concept in which ‘mental’ encompasses impairments both of reason (cognition)⁵⁸ and emotion (volition)⁵⁹. In comparative perspective, this issue resonates the recurring debate in national criminal law as to whether the incapacity defence should be restricted to cognitive inabilities of the defendant to recognize the unlawfulness of his or her conduct or also to comprise uncontrollable, irresistible impulses, though the defendant may still be intellectually aware of the wrongfulness of his or her action⁶⁰. In linguistic terms it is to be taken into account that the (English) term ‘mental’ is highly ambiguous, bearing several connotations that neither point one or another way⁶¹. Thus, with regard to the Statute both the legislative history of paragraph 1 (a) and teleological reasoning as well as comparative analysis advise a broad interpretation of ‘mental’. Not only that a restrictive cognitive understanding would trail recent national penal codes that opted for an inclusion for volitional disturbances and disorders⁶², in particular remembering that the formulation ‘mental disease or defect’ is directly taken from sec. 4.01. U.S. Model Penal Code⁶³ which supplements the cognitive focus of the (in)famous M’Naghten test⁶⁴ with a volitional element. Furthermore, this dualistic approach is normatively warranted since the psychiatric distinction between volitional and cognitive disorders is in a constant flux⁶⁵, so it does not seem sensible to rest the availability of the incapacity defence on hazy labels attached to mental illnesses. Finally, this reasoning evidently motivated the Working Group Chairman’s statement that the effect, not the label, of a certain mental condition should be the pertinent factor⁶⁶.

- 25 On the other hand, however, this component of the insanity defence appears rather broad by not requiring a specific mental ‘disease’, but by being content with any ‘defect’ that destroys the defendant’s relevant capacity. This gate to the insanity defence is, of course, even more opened if ‘mental’ is to be broadly understood in terms of comprising both cognitive

⁵⁶ Such as Knoops, *Defenses in Contemporary International Criminal Law* (2008) 110 *et seq.* and Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 674, and, supposedly in not yet realizing the change of position made here, Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 302; *id.*, *Treatise on International Criminal Law* (2013) 32 with reference to fn. 190.

⁵⁷ As, for instance, according to § 20 German Penal Code. For details see Perron, in: Schönke and Schröder (2014) § 20 mn 6 *et seq.*, at 379.

⁵⁸ In terms of encompassing awareness and understanding; *cf.* Wilson, *Criminal Law: doctrine and theory* (2003) 231.

⁵⁹ As, in particular, suggested by Janssen (2004) *ICLRev* [83], 84; Krug, (2000) 94 *AJIL* [317], 324; Scaliotti (2002) 2 *ICLRev* [1], 26; and as also interpreted by the (German) Gesetzentwurf der Bundesregierung zur Einführung des Völkerstrafgesetzbuches: Deutscher Bundestag Drucksache 14/8524, 37 (Cabinet’s Draft for a German International Criminal Code); similarly Merkel (2002) 114 *ZStW* [437], 443; supposedly to be understood in broad terms *cf.* also van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 225 *et seq.*

⁶⁰ *Cf.* Ormerod, *Smith and Hogan’s Criminal Law* (2011) 304.

⁶¹ *Cf.* *Oxford English Dictionary* (OUP 2004) keyword: mental.

⁶² Beside § 20 German Penal Code of 1975 (already mentioned above note 57), *cf.* in particular article 35 Polish Penal Code of 1998 and article 20 Spanish Penal Code of 1995.

⁶³ Sec. 4.01. U.S. Model Penal Code reads: ‘A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate his criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law’.

⁶⁴ House of Lords, 8 ER 718 (1843). The relevant section reads as follows: ‘... to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong’; *cf.* Schabas, *The International Criminal Court* (2010) 485.

⁶⁵ Krug, (2000) 94 *AJIL* [317], 324, footnote 48.

⁶⁶ Reported by Scaliotti (2002) 2 *ICLRev* [1], 26.

and emotional defects as described before. This obvious danger of opening the insanity defence to almost any psychic affection must be counterchecked by all the more taking the requirement of ‘suffering’ from a relevant disease or defect serious in that not a merely temporary or momentary mental defect may suffice but that it must amount to a disturbance of some duration⁶⁷.

2. ‘Destroys’ the person’s ‘capacity to appreciate’ the unlawfulness or the ‘capacity to control’ the conduct

However narrow or broad the mental deficiencies are construed, the final limits of the insanity defence anyhow depend on the further required effects on the defected mind. 26

With regard to the affected *capacity*, the Statute continues its mild approach in that it suffices that either the (*cognitive*) ‘*appreciation*’⁶⁸ of the unlawfulness or nature of the conduct or the (*volitional*) ‘*control*’ of the conduct to conform to the requirements of law is affected⁶⁹. 27

Thus, the ultimate limitation of the incapacity defence rests with the degree of defection of the relevant capacity: it has to be ‘destroyed’. In this respect, the Statute clearly goes beyond the otherwise very similar sec. 4.01. US Model Penal Code, which only calls for a ‘lack of substantial capacity’⁷⁰. The criterion ‘destroy’ is nonetheless far from self-explaining. If, on the one hand, the mental deficiency goes so far as to completely exclude the person’s ability or awareness of acting as such,⁷¹ criminal responsibility is not only excluded by lack of culpability according to paragraph 1 (a), but eventually even by lack of human conduct or lack of intent (article 32 para. 1). If, on the other hand, from a normative point of view, the destroyed capacity was equated with the utter elimination of volitional control or cognitive reason, the Statute would set unrealistic hurdles, since mental disorders normally do not leave mentally ill people absolutely incapable of self-control or totally disorientated⁷². In order to give testifying expert witnesses an appropriate and workable orientation and to grant mentally ill defendants a fair chance to raise incapacity, ‘destroyed’ mental capacities may reside between the substantial and the absolute impairment of cognitive or volitional abilities⁷³. What, thus, is required for is an extensive and far-reaching loss of self-control or reason⁷⁴. 28

At any rate, however, the level of incapacity must still remain above mere diminished mental *capacity*; for different from various national penal codes, the Statute does not provide a (partial) defence of ‘diminished criminal responsibility’⁷⁵. Therefore, as suggested in the First Edition of this Commentary, taking resort to paragraph 3 seemed to be the only way for 29

⁶⁷ Agreeing Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 302, *id.*, *Treatise on International Criminal Law* (2013) 321; Knoops, *Defenses in Contemporary International Criminal Law* (2008) 110 *et seq.* As to evidentiary aspects of proving a psychic affection see D. Radosavljević (2013) 13 *ICLRev* [1013], 1013-1035..

⁶⁸ As ‘appreciate’ is again borrowed from sec. 4.01. U.S. Model Penal Code, one should be aware of the controversy as to whether using ‘appreciate’ rather than ‘know’ entails a broader understanding than simple cognition; in this case the offender has to be intellectually and emotionally aware of the significance of his conduct. *cf.* *Model Penal Code and Commentaries*, i, General Provisions (1985) §§ 3.01 to 5.07 169.

⁶⁹ For more details of these two different sides of culpability *cf.*, with regard to the almost equivalent version of the German § 20 Penal Code, Perron, in: Schönke and Schröder (2014) § 20 mn 25 *et seq.*, at 392.

⁷⁰ In a similar way, rule 67 lit. A (ii) (b) ICTY refers to ‘diminished or lack of mental responsibility’. This provision was addressed in Čelebići, note 54 but only to the extent of diminished mental capacities.

⁷¹ As according to Janssen (2004) *ICLRev* [83], 85, 96 the Statute deeming to require one hundred percent insanity, thus, however, making a successful insanity plea highly unlikely.

⁷² *Cf.* the comment to sec. 4.01. U.S. Model Penal Code: ‘Disorientation, psychiatrists indicated, might be extreme and still might not be total; what clinical experience revealed was closer to a graded scale with marks along the way’. *Model Penal Code and Commentaries*, i, General Provisions (1985) § 3.01 to 5.07 171. *Cf.* also Salton (1990) 78 *CallRev* [1027], 1042.

⁷³ By no means is this middle course over-stretching ‘the limits of literal interpretation’ as indicated by Ambos, *Treatise on International Criminal Law* (2013) 322 who, in case of a mental defect falling short of ‘destroying’ the actor’s cognitive or volitional capacity, would instead recommend to take resort to mitigation.

⁷⁴ The Statute’s still high requisites are legitimated by the seriousness of the pertinent crimes.

⁷⁵ *Cf.* § 21 German Penal Code, Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 302.

taking a case of diminished responsibility into account⁷⁶. Yet, this is not necessary anymore since rule 145 para. 2 (a) (i) explicitly mentions ‘substantially diminished mental capacity’ which, though ‘falling short of constituting grounds for exclusion of criminal responsibility’, may be taken into account in the determination of sentence. This pragmatic approach⁷⁷, although precluding an independent defence of ‘diminished responsibility’, at least allows for mitigation in the sentencing phase; but as the mental abilities must be ‘substantially reduced’⁷⁸, more than merely minor mental defects are to be required⁷⁹.

III. Paragraph 1 (b): Intoxication

30 This ground for excluding criminal responsibility is world-wide highly controversial, not at least due to the diverging cultural attitudes towards alcohol. Thus, the handling of intoxication differs greatly from nation to nation⁸⁰. So it cannot surprise that the Statute follows a centerline by neither completely disregarding nor unconditionally recognizing lack of capacity by reason of intoxication as a defence. Although the main approach of the present provision can be found as early as in the Report of the Working Group as accepted by the Preparatory Committee in its December 1997 session⁸¹, the Draft Statute of April 1998 still contained quite a few alternatives⁸². Thus, it was not prior to the session of the Working Group of June 29, 1998⁸³ that the final version was accepted⁸⁴, then by attempting to find a balance between completely disregarding and principally recognizing intoxication as a ground of excluding criminal responsibility.⁸⁵

⁷⁶ As criticized by van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 247, resorting to article 31 para. 3 would have been systematically problematic, however, since this norm only deals with full defences, whilst diminished responsibility only serves as a partial defence. Cf. also Cryer, in: Cryer et al. (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 401; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 228; Scaliotti (2002) 2 *ICLRev*[1], 27, considering the option to raise diminished responsibility under article 21.

⁷⁷ Which eventually follows neither the continental-European understanding of diminished responsibility as partial excuse (*i.e.* a partial reduction of the defendant’s culpability) nor the Anglo-American understanding, where diminished responsibilities reduces the charge to a lesser included offense, for example from murder to manslaughter. On the different approaches to diminished responsibility cf. Krug, (2000) 94 *AJIL*[317], 328 *et seq.*

⁷⁸ The qualification ‘substantially’ was already circulated in the Preparatory Committee (Consolidated) Draft, p. 122, fn. 13.

⁷⁹ Note, that interpreting the qualification ‘substantially’ with reference to *Čelebići*, note 54, para. 1166, where the ICTY advanced a substantially impairment test for determining the scope of the diminished responsibility defence of rule 67 lit. A (ii) (b) ICTY, is delicate at best, since the ICTY was prepared, under certain conditions, to understand diminished responsibility as a complete defence (cf. *Čelebići*, note 54, para. 1164).

⁸⁰ Beside this lack of a common approach to dealing with intoxication, as already addressed in the 1996 Preparatory Committee II (see fn. to article M, p. 98), and still in the Preparatory Committee Draft, p. 69, fn. 24, it was even questioned in principle whether voluntary intoxication was at all a defence worth to be discussed in the context of crimes at stake here: see Report of the Working Group of General Principles of Criminal Law of 3 July 1998, UN Doc. A./CONF.183/C.1/WGGP/L.4, Add.1/Rev.1, p. 4, fn. 8; cf. also Ambos, *Treatise on International Criminal Law* (2013) 324 *et seq.*; Ambos (1999) 10 *CLF* [1], 25 *et seq.* For details to national underpinnings of this defence cf. also Schabas, *The International Criminal Court* (2010) 480 *et seq.*; Werle and Jessberger, *Principles of International Criminal Law* (2014) 677 *et seq.*; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 230 *et seq.* As to ICTY cases in which intoxication had – mainly without success – been invoked for excluding criminal responsibility see *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2002, para. 706; *Prosecutor v. Todorović*, IT-95-9/11-S, Sentencing Judgment, Trial Chamber, 31 July 2001, para. 90; *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, Trial Chamber, 29 November 2002, para. 284; *Prosecutor v. Mrđja*, IT-02-59-S, Decision on the defense motion for medical examination and variation of scheduling order, Trial Chamber I, 15 September 2003.

⁸¹ See article L para. 1 (b) Preparatory Committee Decisions Dec. 1997, p. 19.

⁸² See article 31 para. 1 (b) Preparatory Committee (Consolidated) Draft, p. 67 *et seq.*

⁸³ article 31 para. 1 (b) Report of the Working Group on General Principles of Criminal Law, Committee of the Whole, UN Doc. A./CONF.183/C.1/WGGP/L.4/Add.1 (1998).

⁸⁴ According to Saland, in: Lee (ed.), *The International Criminal Court – The Making of the Rome Statute* (1999) 189, 207, as drafter of this provision, this compromise was eventually accepted because it ‘had the benefit of not satisfying anyone’.

⁸⁵ Ambos, *Treatise on International Criminal Law* (2013) 324.

As to the provision's scope, at the Rome Conference it was controversial whether intoxication serves as an excuse only to war crimes or also to genocide and crimes against humanity⁸⁶. According to the Working Group's Chairman it was inconceivable that the Court would accept intoxication with regard to the latter two charges⁸⁷. Following this reasoning, Ambos deems it 'absurd to defend a person who committed genocide or crimes against humanity with the argument that he or she was drunk'⁸⁸. Yet, such an *a priori* limitation of subparagraph (b) can neither be reconciled with the encompassing wording nor is it normatively warranted. Although it seems practically inconceivable that masterminds of a prolonged genocidal engagement or of widespread or systematic attacks against a civilian population raise intoxication, it is not unlikely that an individual genocidal act or a particular crime against humanity is committed by an ordinary low-level person who is actually intoxicated throughout the whole crime and thus should not be precluded from raising subparagraph (b).⁸⁹

This rather lengthy provision can be broken down into two positive elements by requiring a certain state of intoxication (1) by which the person's capacity of appreciation and control is destroyed (2), and a negative element by excluding exculpation if the person was voluntarily intoxicated (3).

1. 'State of intoxication'

Whereas the first drafts had required intoxication to be caused by alcohol or drug consumption⁹⁰, although then opening it to 'other means'⁹¹, the Statute finally rescinded the presupposition of a specific substance or cause by which the intoxication must have been produced. As, however, intoxication by its very meaning implies a sort of toxic impact, it would not suffice that the person acted in a state of excitement or acceleration, as may follow from endogenic causes or external circumstances, though in its effect comparable to drunkenness or drug consumption, rather the intoxication must at least be caused by consumption of an exogenic substance with the effect of an intoxication.⁹²

2. 'Destroys' the person's 'capacity to appreciate the unlawfulness' or the 'capacity to control' the conduct

As in the case of incapacity by mental defect, it would not be sufficient that the intoxication merely diminishes the person's capacity of appreciation and control, but rather it must 'destroy' the personal ability to realize and estimate that he is acting unlawfully or, if the person is still aware of the unlawfulness of the conduct, lacks the ability to control it according to the requirements of law⁹³.

⁸⁶ Cf. Knoops, in: Doria, Gasser and Bassiouni (ed.), *The Legal Regime of the International Criminal Court* (2009), 779, 789; Scaliotti (2002) 2 *ICLRev* [1], 34; Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1030.

⁸⁷ Reported by Scaliotti (2002) 2 *ICLRev* [1], 34.

⁸⁸ Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1030.

⁸⁹ As meanwhile also recognized by Ambos *Treatise on International Criminal Law* (2013) 328; also agreeing Safferling, *Internationales Strafrecht* (2011) 120.

⁹⁰ See article M in the 1996 Preparatory Committee II, p. 98.

⁹¹ Cf. Article 25 (L) para. 1 (b) Zutphen Draft, p. 61.

⁹² Ambos, *Treatise on International Criminal Law* (2013) 328; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 229.

⁹³ van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 229; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 679. For further details to this parallel component of the intoxication and the incapacity defences see above mn 26 et seq.

3. Unless ‘voluntarily intoxicated’ in that the person ‘knew or disregarded the risk’ of being ‘likely to engage in conduct constituting a crime within the jurisdiction of the Court’

35 By excluding exculpation if the person concerned became voluntarily intoxicated, the Statute attempts to prevent a *mala fide* procured state of incapacity, as it would be the case if penal law were to tolerate that a person puts himself into a state of non-responsibility by means of intoxication with the objective of committing a crime and later to invoke his lack of capacity as a ground for excluding responsibility. Instead of denying any voluntary intoxication an exculpation, however, the Statute follows the principle of *actio libera in causa* by presupposing that the person ‘knew’ or ‘disregarded the risk’ of getting involved in criminal conduct at the point of becoming intoxicated. Evidently, this bars intoxication as a ground for excluding criminal responsibility if the defendant *intentionally* sought ‘Dutch courage’ to commit a crime.⁹⁴ Less clear, however, is the exclusion of the defence when the defendant merely *disregarded the risk* of committing a crime under the influence of alcohol or other drugs. Whereas, at first, Ambos seemed to consider *negligence* as sufficient for excluding the defence⁹⁵, other sources require that the person concerned was not only cognitively aware of the likelihood of committing a crime but also anticipatorily approved this (in terms of *dolus eventualis*)⁹⁶. Although this may be doubtful from a systematic point of view, as it means introducing a mental standard that was otherwise carefully avoided in the Statute⁹⁷, it is nevertheless submitted that paragraph 1 (b) establishes a test that resides between negligence and *dolus eventualis*, by precluding the intoxication defence if the defendant acted *recklessly* with regard to getting involved in a crime. This conclusion not only takes into account the provision’s controversial legislative history – as a hard-fought compromise between most Arab States, considering voluntary intoxication as an aggravating circumstance, and most western countries, by precluding conceptualizing even voluntary intoxication as a ground for mitigation if not exculpation; applying a recklessness standard is also supported by the wording since disregarding a risk insinuates that the person concerned is nothing more and nothing less than mentally aware of running the risk of committing a crime. It yet has to be noted that the defendant’s recklessness is not to be determined singularly by the ‘risk’ of engaging in international criminal conduct; rather the recklessness requirement is somewhat moderated by the Statute’s reiteration that the person concerned disregarded the ‘risk’ of ‘likely’ committing a crime. Consequently, intoxication is only then excluded as a defence if (a) the person intentionally became drunk or otherwise intoxicated and (b) knowingly or recklessly took the risk that, due to the intoxication, he would be likely to commit or otherwise get involved in a crime.⁹⁸ Thus, intoxication can be invoked as a defence if and as long as the person was involuntarily intoxicated or, although having voluntarily become drunk or stupefied by drugs, was not aware of the risk that he could engage in criminal conduct as a ramification of the intoxication.

⁹⁴ Ambos, *Treatise on International Criminal Law* (2013) 329, 330; Cryer, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 403.

⁹⁵ Cf. Ambos, *Zur Rechtsgrundlage des Internationalen Strafgerichtshofs – Eine Analyse des Rom-Statuts*, 111 ZStW 189 (1999), contending that a ‘fahrlässige’ *actio libera in causa* is enough for barring the defence (but as of now see also Ambos, note 98).

⁹⁶ As it may in particular be concluded from the Official German translation of ‘disregarding the risk’ in paragraph 1 (b) as ‘in Kauf nehmen’ and as also supported by Merkel (2002) 114 ZStW [437], 444 (holding that paragraph 1 (b) requires ‘*dolus eventualis*’) and Satzger, *Internationales und Europäisches Strafrecht* (2013) 307.

⁹⁷ Cf. Eser, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 889, 932.

⁹⁸ In the final end coming to the same standard of recklessness see for a concurring interpretation Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 682 as well as meanwhile also Ambos, *Internationales Strafrecht* (2014) 222; cf. also *id.*, *Treatise on International Criminal Law* (2013) 328 *et seq.*; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 229 *et seq.*; more strict by identifying recklessness with *dolus eventualis* cf. Safferling, *Internationales Strafrecht* (2011) 120 fn. 137.

Yet, even if the person is aware of such likelihood, he is only barred from exculpation if the conduct he is likely to become involved in would be ‘a crime within the jurisdiction of the court’. This means that even in a case in which a soldier is aware that, due to his drunkenness, he might commit a murder, he could hardly be barred from invoking intoxication as a defence as long as he was not aware of the genocidal or anti-humanitarian character of the murder in terms of article 6 or 7 of this Statute⁹⁹. This requirement must not be taken lightly¹⁰⁰ since committing an international crime should normally be, even in times of war and conflict, an exceptional or, to use the Statute’s term, unlikely event. Thus, if so wanted or not, due to this clause intoxication may well serve as general defence that is only exceptionally precluded if there is an *actio libera in causa*. This especially holds true with regard to intoxication with drugs or alcohol. Although, as a matter of experience, criminal involvement seems more likely to occur in case of voluntary intoxication with these substances, it would turn the provision’s rule-exception-relationship upside down to only leave room for this defence if the intoxication was procured by ‘other means’ than drug or alcohol¹⁰¹.

IV. Paragraph 1 (c): Self-defence, defence of another person, and defence of property in war crimes

‘The principle enshrined in this provision’, as aptly summarized by the ICTY in *Kordic*, ‘reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law’¹⁰². Although, thus, legitimate defence as a ‘classical’ ground of justification had already been contained in the Preparatory Committee’s compilation of 1996¹⁰³, its concept and phrasing remained highly controversial until the very last framing of this provision¹⁰⁴. Whereas the Draft Statute of April 1998 was sent to the

⁹⁹ As this reference and limitation to the ‘jurisdiction of the court’ was added to the last sentence of article 31 para. 1 (b) rather late, namely (according to the available papers) by the Chairman’s (of the Working Group on General Principles of Criminal Law) proposal for article 31 para. 1 (b) Option 3 (UN Doc. A/CONF.183/C.1/WGGP/L.8/Rev.1 (25 June 1998)), it is not quite clear whether this restriction of the responsibility by *actio libera in causa* was made on purpose or whether an interpretation different from that assumed here was intended. Also see Sadat, *The International Criminal Court and the Transformation of International Law* (2002) 213 fn. 160, guessing that in the application of this provision judges coming from legal systems rejecting voluntary intoxication may read the Statute more narrowly on this point.

¹⁰⁰ As rightly stressed in particular with regard to the difficult proof of such an intent by Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1030.

¹⁰¹ As suggested by van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 250 and, as a matter of practice, reiterated van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 230.

¹⁰² *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para. 451; cf. Knoops, in: Doria, Gasser and Bassiouni (eds.), *The Legal Regime of the International Criminal Court* (2009) 779, 788 *et seq.* To national underpinnings of self-defence cf. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 264 *et seq.*, to precedents in post-Second War case law cf. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) 305 *et seq.*; McCormack, in: Abtahi and Boas (eds.), *The Dynamics of International Criminal Justice* (2005) 231, 239 *et seq.*; Schabas, *The International Criminal Court* (2010) 487 *et seq.*

¹⁰³ See article N 1996 Preparatory Committee II, p. 99 with Annex, pp. 15 *et seq.*

¹⁰⁴ See Report of the Working Group of 29 June 1998, UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1, p. 5 note 13. Cf. also the report and criticism of David, in: Doria, Gasser and Bassiouni (eds.), *Legal Regime of the International Criminal Court. Essays in honour of Professor Igor Blishchenko* (2009) 757, 758 *et seq.* Whilst David’s fundamental denial of the usefulness of self-defence in the area of international crimes seems feasible as to genocide and crimes against humanity since those crimes may indeed hardly be justifiable by self-defence (cf. Ambos, *Internationales Strafrecht* (2014) 228; above note 2, Knoops, in: Doria, Gasser and Bassiouni (ed.), *The Legal Regime of the International Criminal Court* (2009) 779, 789), regarding war crimes, however, his absolute preclusion of self-defence appears misguided by the assumption that in war, on the one hand, every (ordinarily penalized) action is permitted as long as it does not amount to a war crime but that, on the other hand, a war crime may be justified only if permitted by international humanitarian law. Both assumptions, however, are questionable: the first one because war does not as *per se* provide a license to kill (as, contrary to common belief,

delegates of the Rome Conference with quite a few undecided alternatives and a lengthy wording¹⁰⁵, the first sentence of the present provision seems to go back to a proposal by the USA of June 1998¹⁰⁶, not yet, however, did it include the defence of property in case of war crimes which in terms of ‘military necessity’ was originally conceived as a separate ground for excluding criminal responsibility¹⁰⁷, but was finally integrated into the first sentence of this provision on proposal of the Working Group¹⁰⁸. The last sentence of the provision, dealing with defensive operations, was finally added in the very last minute by the Drafting Committee¹⁰⁹.

Basically three requirements are essential for the exclusion of criminal responsibility under this provision: a person not merely being involved in a defensive operation (1), a qualified danger to a person or property by unlawful force (2), and an appropriate defence against it (3).

1. ‘Person’ (not merely) ‘involved in a defensive operation’

38 Although unusual, to start with the second sentence of subparagraph (c) is warranted because this clause helps to reveal the scope of the Statute’s self-defence provision¹¹⁰. Most fundamentally, ‘self-defence’ as known in public international law and as used in criminal law is to be distinguished.

39 First, since the Rome Statute is only concerned with the individual criminal responsibility of human actors, subparagraph (c) does not address the defensive use of force by States (or equivalent non-State actors), as left unimpaired by article 51 UN Charter¹¹¹. This distinction between self-defence on the levels of international *criminal* and of *public* international law and their terminological designations is additionally confused by the fact that article 51 UN Charter distinguishes between ‘individual self-defence’ of a Member State (in case of an armed attack) and ‘collective self-defence’ rendered by other Member States (in support of

analysed in more detail by Eser in the contributions referred to below note 120) and, secondly, as there is no international principle which would allow justifications only if provided for by international humanitarian law. This is at least true for the conduct and responsibility of individual actors (while the responsibility of states may be different). Cf. also the counter-criticism to David by Schabas, *The International Criminal Court* (2010) 489 and Weigend, in: Sieber *et al.* (eds.), *Strafrecht und Wirtschaftsstrafrecht. Festschrift für Klaus Tiedemann* (2008) 1439, 1440 *et seq.*

¹⁰⁵ See article 31 para. 1 (d) Preparatory Committee (Consolidated) Draft, p. 68, based on article L para. 1 (d) Zutphen Draft, p. 62.

¹⁰⁶ Article 31 para. 1 (b) Proposal by the United States of America for single provision covering issues currently governed by articles 31, 32, 33 and 34 (UN Doc. A/CONF.183/C.1/WGGP/L.2 (1998)); a similar proposal, although not yet containing defence of property, had been made by Japan (cf. Annex of the 1996 Preparatory Committee II, p. 16).

¹⁰⁷ See article R in the 1996 Preparatory Committee II, p. 103; article 33 Preparatory Committee (Consolidated) Draft, p. 17.

¹⁰⁸ See article 31 para. 1 (c), Report of the Working Group, note 78, pp. 4 *et seq.*

¹⁰⁹ In this sense, as already favored by some delegations (see Report of the Working Group, note 78, p. 5, fn. 12), article 30 para. 1 (c), sentence 2 Draft Report of the Drafting Committee to the Committee of the Whole (UN Doc. A/CONF.183/C.1/L.65/Rev.1 (1998)), p. 7). – To the genesis of this article of the Statute cf. also Ambos (1999) 10 *CLF* [1], 26 *et seq.*; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 235; as to comparative examples in national criminal codes cf. Ambos, *Treatise on International Criminal Law* (2013) 330 *et seq.*

¹¹⁰ Just to the contrary, van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 264 considers the clause as ‘superfluous’, reasoning that ‘a defensive operation does not qualify as a reaction to an “unlawful use of force”. If this is to mean that a defensive operation is either not a ‘reaction’ (but rather an action) or, if to be considered as a reaction, is directed against a not ‘unlawful’ (and thus lawful) use of force, then her statement would not express more than a truism. In fact, however, sentence 2 of subparagraph (c) can truly function as indicating the distinctions between various levels which must be observed in the following and as they are aptly presented by van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 254 *et seq.* as well as by van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 233 *et seq.*, though without taking reference to the clause in question.

¹¹¹ See Ambos, *Treatise on International Criminal Law* (2013) 334 *et seq.*; Scaliotti (2001) 1 *ICLRev* [111], 158 *et seq.*; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 630 *et seq.* cf. also Keijzer (2000) 39 *RDPMDG* [69]; *id.*, (2000) 39 *RDPMDG* [100], 102.

the attacked State)¹¹². Therefore, if one wants to talk of ‘individual’ or ‘collective’ self-defence as performed by a combatant in the context of article 31 para. 1 (c) of the Rome Statute, one must be aware that this provision renders a further distinction with regard to the individual acting in self-defence: by disqualifying individuals ‘involved in a defensive operation’ who, as according to sentence 2, are not *per se* excluded from criminal responsibility, sentence 1 is in fact justifying only ‘private’ self-defence as distinct from ‘operational’ self-defence carried out within or in course of a collective action. Thus, although paragraph 1 (c) by speaking of acts of a ‘person’ obviously concerns ‘individual’ self-defence in terms of criminal law only, the exclusion of criminal responsibility still depends on whether the individual defended himself (merely or also) in his personal (non-official) capacity (‘private self-defence’) or solely in his official capacity as agent of a collective entity, like a State (‘operational self-defence’). This exemption of (purely) ‘operational self-defence’ (in terms of sentence 2) from (at least to some degree also) ‘private self-defence’ (in terms of sentence 1) means that the justification of the concrete defensive act must be distinguished from its possibly collective context in two directions: On the one hand, the self-protecting action of a combatant is not simply privileged because of its embedment in an attack that is legal according to public international law; for this reason, the wide field opened by sentence 1 for defence of qualified property in war crimes can be substantially narrowed¹¹³. On the other hand, ‘private self-defence’ (as described before) is not privileged only because its operational framework is legal, nor is it foreclosed only because the operational context is illegal¹¹⁴ – just as *ius ad bellum* and *actio in bello* are to be kept distinct. In other words¹¹⁵, collective self-defence (by a state against another state) and private self-defence (by an individual soldier) are independent from each other¹¹⁶: the former as a matter of public international law, the latter as a matter of international criminal law¹¹⁷. Consequently, in the same way as, on the one hand, the legality or illegality of a collective defence operation in terms of article 51 UN Charter does not depend on the lawful or unlawful conduct of individual soldiers, is, on the other hand, the justification of individual war crimes by virtue of self-defence not depending on the public legitimacy of the state’s original resort to military force¹¹⁸.

Second, although due to sentence 2 pure ‘operational self-defence’ cannot avail itself of sentence 1, that does not mean that this kind of defensive action remains without any ground for excluding criminal responsibility. For as the reservation by sentence 2 regarding the involvement in a collective defence situation is explicitly limited to subparagraph (c), international criminal responsibility in connection with defensive operations may still be excluded by other provisions, such as under public international law¹¹⁹. If, for example, a head of State orders a military defence operation in order to fight back an enemy State, although he cannot

¹¹² Cf. Nill-Theobald, ‘Defences’ bei Kriegsverbrechen am Beispiel Deutschlands und der USA. Zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrafrechts (1998) 358 *et seq.*; Randelzhofer, in: Simma (ed.), *The Charter of the United Nations – A Commentary* (2002) mn 37 *et seq.*; Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002) 23 *et seq.* Whilst the negotiations on the definition of aggression could have offered the possibility of clarifying the involvement in a ‘defensive operation’, unfortunately this opportunity was not used: cf. Van Schaack (2011) 11 *ICLRev* [477], 486 *et seq.*

¹¹³ Cf. below mn 44.

¹¹⁴ Cf. Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1034.

¹¹⁵ And thereby also revising a statement (made prior to the Rome Statute in: Dinstein and Taborj (eds.), *War Crimes in International Law* (1996) 251, 263) which, by explaining individual self defence as being available only in a ‘derivative manner’, may be considered misleading.

¹¹⁶ Cf. Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 309.

¹¹⁷ Cf. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 234.

¹¹⁸ Cf. Ambos, *Treatise on International Criminal Law* (2013) 334 *et seq.*; McCormack, in: Abtahi and Boas (eds.), *The Dynamics of International Criminal Justice* (2005) 231, 232 *et seq.*; as to potential overflows from the *ius ad bellum* to the *ius in bello*, however, cf. also v. d. Wilt, in: Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011) 275, 277 *et seq.*

¹¹⁹ Cf. Report of the Working Group of 8 July 1998, UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.3 (1998), p. 2 (fn. 1) to ‘accomplishing a military mission’ which declares that ‘the use of force by States is governed by the applicable international law’.

raise self-defence under paragraph 1 (c), he still may take resort to the defences in terms of paragraph 3, as, in particular, to article 51 UN Charter. Accordingly, although a combatant, while not being himself in acute danger, may not be justified by paragraph 1 (c) for eliminating an enemy on the battlefield, he could still refer to the (traditionally) general allowance of killing an enemy combatant under international humanitarian law¹²⁰.

2. 'imminent and unlawful use of force' against (specific) legally protected interests

- 41 a) The exclusion of criminal responsibility in any of the various instances of this provision requires the 'imminent' and 'unlawful' 'use of force'. As force can be exerted in various ways and to a varying degree and no further qualification is required by this provision, force can be understood in a broad way, not necessarily requiring a physical attack, but also including psychic threats, provided that their effects are not only announced for the future but exerting coercion presently¹²¹.

This use of force has to be **imminent**. Although a literal approach to 'immediacy' and a systematic comparison with paragraph 1 (d), where it was deemed necessary to mention 'continuing or imminent' risks, suggests otherwise, there is common agreement that a use of force is imminent if it is immediately antecedent, presently exercised or still enduring¹²². Thus, a defender neither has to wait until a danger has become present, nor is it allowed to use pre-emptive or even preventive means to circumvent a use of force, nor is it permitted to retaliate against an already passed attack.

As a third requirement, the use of force by the attacker must be **unlawful**. This is the case when the use of force is not justified for its part by law or any other legally valid permission or order. On the other hand, however, the unlawful force needs not to be criminal for being averted¹²³. Thus, self-defence will be available against an unlawful attack even if the aggressor may be excused by reason of insanity or because he has not yet reached the age of being criminally responsible. Accordingly, there is no right to defend oneself against someone who is acting lawfully¹²⁴. As to the afore mentioned distinction between 'personal' and 'operational' actions¹²⁵, the unlawfulness of the 'use of force' under paragraph 1 (c) must not be confused

¹²⁰ Whilst on a different way coming to a similar result, see Ambos, *Treatise on International Criminal Law* (2013) 335 with further references. Strangely though, however, if it comes to the killing of enemy combatants on the battlefield, one hardly can find an explicit foundation of its justification, the implicit reason being that acts of war seem to be basically exempted from the 'normal' provisions on murder and manslaughter (like in German terms characterized as 'nicht tatbestandsmäßig' by Merkel (2002) 114 ZStW [437], 450); accordingly, in pre-supposing killing in war as in principle being justified, 'Rules of Engagement' – like similar conventions and rules of war – traditionally are understood as mere restrictions of (rather than foundations) of justifications which, as assumed in customary international law, are not considered to require further legitimization. For details to this issue, which in the past had found less attention than it would have deserved, see – with detailed references – Eser, in: Dölling *et al.* (eds.), *Verbrechen – Strafe – Resozialisierung Festschrift für Heinz Schöch* (2010) 461 *et seq.*; *id.*, in: Appel, Hermes and Schönberger (eds.), *Öffentliches Recht im offenen Staat. Festschrift für Rainer Wahl* (2011) 665 *et seq.*; *id.*, in: Löhnig, Preisner and Schlemmer (eds.), *Krieg und Recht* (2014) 239, *id.*, 'Killing in War: Unasked Questions – Ill-founded Legitimization' (2016), 10 *Criminal Law and Philosophy* (forthcoming).

¹²¹ This broad notion of 'force' is also supported by the fact that stronger alternatives which, for instance, required threat of death or serious bodily harm (see article 31 para. 1 (d) Preparatory Committee (Consolidated) Draft, p. 68), were finally not accepted, nor was ever required force in form of 'violence' (as demanded by Weigend, in: Joecks (ed.), *Münchener Kommentar zum Strafgesetzbuch* (2009) § 2 VStGB, mn 18): such a phrasing would, of course, be more readily open for implying some physical impact. Agreeing with the broad interpretation of 'force' Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1032, *id.*, *Treatise on International Criminal Law* (2013) 339; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 238.

¹²² *Cf.* Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1032; Regierungsentwurf Völkerstrafgesetzbuch, note 59, 34. As in particular regarding the killing of Osama bin Laden, as not being armed at the relevant time, the criterion of an 'imminent' force may be doubted: Ambos (2011) 66 JZ [763].

¹²³ Cryer, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 405.

¹²⁴ *Cf.* Ambos, *Treatise on International Criminal Law* (2013) 339 *et seq.* with further comparative qualifications.

¹²⁵ *Cf.* mn 39.

with the legality or illegality of a collective engagement. Paragraph 1 (c) is concerned with the unlawfulness of the individual attack, whilst it is indifferent to this attack's being part of a legal or illegal collective campaign¹²⁶.

b) Paragraph 1 (c) is limited to the defence of specifically *protected interests*. With respect to all crimes falling under the jurisdiction of the Court, paragraph 1 (c) justifies an accused's action to defend *himself or herself or another person*. As probably recognized world-wide, the concept of legitimate defence is not limited to self-defence but also comprises defence of 'another person' who has been endangered by an unlawful attack. Whereas this requirement certainly precludes mere danger to any property¹²⁷, a person can be endangered with regard to his or her own life, physical integrity and liberty or that of a third person¹²⁸.

c) With respect to the special '*case of war crimes*', the defence clause of paragraph 1 (c) is opened to the protection of '*property*', though only if one of two qualifications is present. One concerns property which is '*essential for the survival of a person*'. This seems to be merely a special case of the general and uncontroversial protection of a person's life: the defended property not only has to ensure that a person continues to exist in a very primordial physical sense ('survival'), it must be indispensable ('essential') in that a human's very continuing existence hinges on said property. The other qualified protection concerns property which is '*essential for accomplishing a military mission*'. As certainly one of the Statute's most intriguing clauses the exact scope of which is yet to be determined, it goes back to defences by reasons of 'military necessity' under international humanitarian law¹²⁹. Since so far international humanitarian law did not entitle the military to commit war crimes in order to repel an unlawful use of force against the property at issue, paragraph 1 (c) is harshly criticized for (purportedly) introducing an according allowance to the laws of war¹³⁰. Further, the notion of essential military property is hard to interpret in the light of its intertwining individual legitimate defence as known in municipal criminal law with the collective dimension of international humanitarian law¹³¹.

In order to prevent this clause from being used as a readily available 'panacea' in any sort of military confrontation, at least three limitations are to be observed. First, with regard to sentence 2 of paragraph 1 (c) which was purposefully inserted so as to stress that justifying 'private self-defence' cannot be invoked simply by reference to a collective 'defensive operation'. Thus, the protection of essential military property is not concerned with a *collective's* defence of collective goods, but merely with the somewhat unprecedented *individual's* defence of collective interests¹³². Second, it is further required that the defended

¹²⁶ Not disentangling the collective use of force from the use of force presupposed in paragraph 1 (c) leads to a confused or at least unclear understanding of the Statute's self-defence provision. At the Rome Conference, the delegation of Mexico intended to add the footnote to the effect that this provision does not apply to the use of force between states (reported by Scaliotti (2001) 1 *ICLRev* [111], 167). What is more, some delegations held that individual self-defence under paragraph 1 (c) presupposes the legality of the collective engagement that the defendant is involved in (reported and discussed by Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1033).

¹²⁷ As it had been proposed by the US without any further qualification: see above note 106 to article 31 para. (b); cf. Ambos, *Treatise on International Criminal Law* (2013) 340 *et seq.*

¹²⁸ Ambos, *ibid.*, 340; Weigend, in: Sieber *et al.* (eds.), *Strafrecht und Wirtschaftsstrafrecht. Festschrift für Klaus Tiedemann* (2008) 1439, 1447; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 624; in particular regarding the defence of liberty see Merkel (2002) 114 *ZStW* [437], 444.

¹²⁹ Cf. 1996 Preparatory Committee II to article R, p. 103.

¹³⁰ Cassese (1999) 10 *EJIL* [144], 154; *id.*, *International Criminal Law* (2008) 230; David, *Principes de droits des conflits armés* (4th, ed. 2008) 902.

¹³¹ Cf. Keijzer (2000) 39 *RDPMDG* [100], 108, complaining that individuals with no legal training might (wrongly) read in paragraph 1 (c) that 'military necessity' serves as a general justification in international criminal law.

¹³² Cf. *Treatise on International Criminal Law* (2013) 341. Insofar it is questionable whether paragraph 1 (c) indeed introduces a new norm to international humanitarian law. For as clarified by its sentence 2, paragraph 1 (c) entitles neither the military as a collective unit nor persons who act as agents for a collective entity to commit war crimes in order to defend property which is essential for accomplishing a military mission against imminent and unlawful use of force.

property is ‘essential’ for ‘accomplishing’ a ‘military mission’. Although ‘mission’ covers all kinds of stand-alone military operations, irrespective of their importance in an overall campaign and independent of the amount of personnel involved, the scope of property being legally protected by paragraph 1 (c) is still rather narrow, since the defended property not only has to ensure that the mission’s objectives can be realized (‘accomplish’), it is also necessary that achieving a mission’s goals hinges on said property, *i. e.* that it is indispensable (‘essential’). If the attacked property is replaceable and its substitution does not infringe the military mission, it is not protected under paragraph 1 (c).¹³³ Finally, it is to be emphasized that the protection of essential military property must not be sweepingly equated with ‘military necessity’ as a ground of excluding criminal responsibility in terms of which it is at present generally not recognized¹³⁴. Paragraph 1 (c) allows for war crimes only as a response to an *unlawful* use of force, whilst military necessity, in not stipulating a similar requirement, is eventually far broader.

45 d) In any case, the use of force as well as the danger to person or property must be *objectively* given and may not only exist in the subjective belief of the defender. Although various proposals were prepared to admit self-defence even in the case that the person merely ‘reasonably believes’ that there is a threat to the person concerned¹³⁵, this expansion of self-defence, as known particularly in common law countries¹³⁶, was not adopted in the end. Therefore, a person who is not actually attacked or endangered but merely believes that to be the case, may resort to mistake of fact according to article 32 for excluding criminal responsibility¹³⁷.

3. ‘Reasonably acts to defend in a manner proportionate to the degree of danger’

46 a) The defensive reaction must be *reasonable* in terms of being necessary as well as able to prevent the danger. This means that the defensive reaction might neither be excessive by causing more harm to the aggressor¹³⁸ than is needed for diverting the attack or a danger nor inapt by implying inefficient or otherwise futile means.¹³⁹ Whether an accused reacted reasonable in case of self-exposure or provocation is not regulated in the Statute and was left for the Court to decide under paragraph 2 of Art. 31.¹⁴⁰

47 b) Furthermore, even as far as the defensive reaction is reasonable in terms of necessary and suitable to divert the force and danger, it still must be performed in a ‘*proportionate*’

¹³³ Agreeing Ambos, *Treatise on International Criminal Law* (2013) 341.

¹³⁴ Cf. above note 33.- Such a confusion of ‘necessities of war’ or of the ‘conflict’ (by which the destruction of an enemy’s property is not considered a war crime according to article 8 (2)(b)(XIII) or 8(2)(e)(XII) respectively) and a ‘ground of excluding responsibility’ (in terms of article 31), however, is unfortunately furthered by the fact that in the Elements of Crimes (article 9) the aforementioned war crimes are interpreted as requiring ‘not (to be) justified by military necessity’. This language, as it can also be found in decisions of the ICTY (*Kordić and Čerkez* (Trial Chamber Judgment), note 102, para. 451) and the ICC (*Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, Pre-Trial Chamber I, 16 December 2011, paras. 172, 175, 176), is misleading by seemingly raising ‘military necessity’ to a justifying ground of excluding criminal responsibility of a war crime (as given by having fulfilled all positive statutory elements) whilst, in fact, the lack of military needs (in the aforementioned crimes) is, both already and merely, a negative element for constituting destruction of property as a war crime at all.

¹³⁵ After this concept had already been expressed in article 33–12 of the Updated Siracusa Draft (in Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 948), it was contained as an alternative in Proposal 1 of article N in the 1996 Preparatory Committee II, p. 99, and still proposed as an alternative in article 31 para. 1 (d) Preparatory Committee (Consolidated) Draft, p. 68.

¹³⁶ Cf. the codes listed by Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1021 *et seq.*, 1032.

¹³⁷ To the same end cf. Ambos, *Treatise on International Criminal Law* (2013) 339; McCormack, in: Abtahi and Boas (eds.), *The Dynamics of International Criminal Justice* (2005) 231, 238; Sadat Wexler, *Model Draft Statute for the International Criminal Court based on the Preparatory Committee’s Text to the Diplomatic Conference, Rome June 15 – July 17 (1998)* 57; cf. also Eser, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 889, 937 *et seq.*

¹³⁸ Note that self-defence is only permissible against the attacker and not against third persons.

¹³⁹ Ambos, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 308.

¹⁴⁰ Cf. Scaliotti (2001) 1 *ICLRev* [111], 166. For details to this paragraph cf. below mn 63 *et seq.*

manner. This means that even self-defence is not an unlimited right¹⁴¹, but restricted by the principle of proportionality. At first glance, the Statute is rather strict in requiring positive proportionality between the defensive reaction and the danger sought to be avoided. Evidently, this would give the Court little leeway in its considerations, far less flexibility than a negative ‘not disproportionate’ test would entail¹⁴². Yet, as solely the ‘*degree of danger*’ to the person or property protected is named as criterion for the proportionality of the defensive reaction, the Court’s estimation is offered a wide range: neither does a waging of different sorts of defended and thereby violated personal or property interests seem to be precluded, nor is deadly defensive reaction, as objected to by some proposals¹⁴³, categorically excluded. Nevertheless, defensive reactions that kill an assailant should be restricted to cases where either death or serious bodily harm is to be prevented.¹⁴⁴

c) Finally, in subjective terms, a defender has to act ‘*to defend*’ himself. This leaves open, however, whether self-defence merely requires the defendant’s awareness of the imminent and unlawful use of force¹⁴⁵, thus justifying him even if he was determined by other motives (such as hatred or vengeance), or whether countering the unlawful attack must be the main, if not sole, purpose of the defender in terms of an ‘*ulterior intent*’¹⁴⁶, thus barring justification if the attack was in fact merely exploited for pursuing other motives than defensive ones. A fair solution may be found in the middle of the road: whereas, on the one hand, the volitional element inherent in ‘*to defend*’ would be missed if mere knowledge of an imminent attack allowed any reaction regardless of the motivation whatsoever, on the other hand, the complexity of motivations in a given situation is a human phenomenon. Therefore countering an unlawful attack needs not exclusively but at least partially (also) be motivated by defensive ends¹⁴⁷.

V. Paragraph 1 (d): Duress

Among the many compromises which had to be made in order to get this Statute accepted, paragraph 1 (d) is one of the least convincing provisions, as in an ill-guided and lastly failed attempt it tried to combine two different concepts: (justifying) ‘*necessity*’ and (merely

¹⁴¹ As it may appear in clauses, such as in the German Penal Code (§ 32), which do not expressly require proportionality of the defence. cf. Satzger, *Internationales Strafrecht* (2013) 303; van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 261.

¹⁴² Merkel (2002) 114 ZStW [437], 453. – Differently, Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1034 seems to equate ‘*proportionate*’ with ‘*not disproportionate*’.

¹⁴³ Cf. Article 31 para. 1 (d) Preparatory Committee (Consolidated) Draft, p. 68 with ft. 95.

¹⁴⁴ In the same vein see Ambos, *Treatise on International Criminal Law* (2013) 342; Weigend, in: Sieber *et al.* (eds.), *Strafrecht und Wirtschaftsstrafrecht. Festschrift für Klaus Tiedemann* (2008) 1439, 1450. As to whether torture may never be proportionate or even absolutely excluded, as commonly submitted (cf. Joyner, in: Sadat and Scharf (eds.), *The Theory and Practice of International Criminal Law* (2008) 227 *et seq.*) or whether and to what degree merely threatening bodily harm for rescuing a victim from being killed may be feasible, see below note 156.

¹⁴⁵ As advanced by Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 831, *id.*, in: Brown (ed.), *Research Handbook on International Criminal Law* (2011) 299, 308 *et seq.*; similar Safferling, *Internationales Strafrecht* (2011) 120.

¹⁴⁶ As perhaps assumed by McCormack, in: Abtahi and Boas (eds.), *The Dynamics of International Criminal Justice* (2005) 231, 238; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 629 and Kreicker, in: Eser and Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen* (2003) 270, 326 with regard to the German term ‘*Verteidigungswille*’. – As to the of ‘*ulterior*’ intent cf. Ormerod, *Smith and Hogan’s Criminal Law* (2011) 136: ‘*an intention ulterior to the actus reus*’. A comparable concept may be found in the German concept of ‘*Finalität*’.

¹⁴⁷ However, even if self-defence may not be available if the defendant was predominantly motivated by other than defensive reasons, as in case that he had even provoked the attack for the purpose of getting a chance to counteract, the fact that the attack, though provoked, remains a wrong which, from an objective point of view, must not be tolerated; nevertheless, by at least being co-motivated finally to avert an (though provoked) attack may lessen the degree of the defender’s wrongdoing so as to be accounted for in sentencing.

excusing) ‘duress’¹⁴⁸. Whereas all Pre-Rome conference proposals and drafts had, more or less, clearly distinguished between necessity and duress¹⁴⁹, it was only in the final stage of the conference that they were mixed up in one provision¹⁵⁰. This reflects (and somewhat continues) a common terminological confusion: In American and English text books, necessity is labeled as duress of circumstances¹⁵¹, the Nuremberg jurisprudence used the term necessity to describe cases of duress¹⁵², ICTY Judge Cassese employs necessity to encompass duress¹⁵³, and the German Criminal Code distinguishes justifying and excusing necessity¹⁵⁴. It is suggested that the distinction between duress and necessity lies with the rationale for excluding criminal responsibility: Here, paragraph 1 (d) blends the justifying *choice of a lesser evil* (necessity) with excusing situations where the defendant’s freedom of will and decision is so severely limited that there is eventually *no moral choice*¹⁵⁵ available (duress).

50 Understanding paragraph 1 (d) accordingly, it is to be distinguished from the defence of ‘superior orders’ (article 33)¹⁵⁶. Though an order might exert sufficient compulsion so as to curtail a defendant’s freedom of will and, thus, rise to duress, this effect would not fall under

¹⁴⁸ Saland, in: Lee (ed.), *The International Criminal Court – The Making of the Rome Statute* (1999) 189, 208; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 632 *et seq.* Cf. also Ambos (1999) 10 *CLF* [1], 27 *et seq.*; Janssen (2004) *ICLRev* [83], 97 and, with a comparative survey of national criminal law and pre- and post-war international developments, Ambos, *Treatise on International Criminal Law* (2013) 342 *et seq.*; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 243 *et seq.* – For a converse evaluation cf. Cassese, *International Criminal Law* (2008) 289, deeming that paragraph 1 (d) ‘rightly lumps necessity and duress together’, whereas his revised edition (2013, p. 216) merely states that this paragraph ‘encompasses both duress by threat and duress by circumstances’.

¹⁴⁹ Starting with these distinction in the Siracusa/Freiburg Draft of AIDP/ISISC/MPI, Draft Statute for an International Criminal Court – Alternative to ILC-Draft, prepared by a Committee of Experts, Siracusa/Freiburg July 1995 (at IV.A.1/2 and 9 to article 34, 39, reprinted in Nill-Theobald, *‘Defences’ bei Kriegsverbrechen am Beispiel Deutschlands und der USA.* (1998) 455), then in the *Ad Hoc* Committee Report, Annex II sub. 5 (b), p. 59, the various proposals in the Updated Siracusa Draft article 33–13.1 and 2 (in Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 951) and in the 1996 Preparatory Committee II, articles O and P, pp. 100 *et seq.*; cf. also the compilation of various proposals in the Annex of the Preparatory Committee of Mar./Apr. 1996, above note 6, pp. 16–18, resulting in the more or less equivalent proposals of the Preparatory Committee Decisions Dec. 1997 (articles L.1 (d) and (e), at p. 19), the Zutphen Draft (articles L.1 (d) and (e), pp. 62 *et seq.*) and the Preparatory Committee (Consolidated) Draft (article 31 para. 1 (d) and (e), p. 68).

¹⁵⁰ Eventually starting with Working Paper on article 31 of 22 June 1998 (UN Doc. A./CONF.183/C.1/WGGP/L.6), with some modifications in the Report of the Working Group of 29 June 1998 (UN Doc. A./CONF.183/C.1/WGGP/L.4/Add.1) and finalized by the Draft Report of the Drafting Committee to the Committee of the Whole, 14 July 1998 (UN Doc./A/CONF.183/C.1/L.65/Rev.1, article 30 para. 1 (d), p. 7).

¹⁵¹ Cf. Wilson, *Criminal Law: doctrine and theory* (2003) 278; Knoops, *Defenses in Contemporary International Criminal Law* (2008) 83. – Generally, it is very common in Anglo-American criminal law to differentiate necessity and duress according to the compulsive source and to classify non-human compulsion as necessity and human compulsion as duress. cf. Kreicker, in: Eser and Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen* (2003) 270, 337 *et seq.*

¹⁵² For a critical overview cf. Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1005, 1023 *et seq.*, 1035 *et seq.* To further international jurisprudence cf. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 279 *et seq.* and, with particular attention to the Nuremberg judgments, Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) 302 *et seq.*, 308 *et seq.*

¹⁵³ Cf. *Prosecutor v. Erdemović*, IT-96-22-A, Judgment, Separate and dissenting opinion by Judge Cassese, Appeals Chamber, 7 October 1997, para. 14 (hereafter *Erdemović*). For a thorough analysis of this case see Ambos, *Treatise on International Criminal Law* (2013) 361 *et seq.*; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) (both with further references) and (with legal policy considerations which under certain conditions may not even exclude justification) Weigend (2012) 10 *JICJ*. [1219].

¹⁵⁴ Cf. § 34 and § 35 of the German Penal Code. – Further cf. Jescheck (2004) 2 *JICJ* [48]; qualifying the merger as mirroring a modern development in national criminal law not to distinguish between necessity and duress. With special regard to torture distinguishing between justifying and excusing necessity see Ohlin (2008) 6 *JICJ* [289]; cf. also below note 178. – For a broader comparative survey see *Treatise on International Criminal Law* (2013) 342 *et seq.*

¹⁵⁵ For the latter definition cf. the Nuremberg jurisprudence in *US v. Krauch et al.* (case 6), in: *Trials of War Criminals before the Nuernberg Military Tribunals*, Vol. III (1952) 1176; as to ‘no moral choice’, however, see also Weigend (2012) 10 *JICJ* [1219], 1234 *et seq.*

¹⁵⁶ Cf. Rowe (1998) 1 *YBIHumL* [210], 216 *et seq.*; Schabas, *The International Criminal Court* (2010) 490.

the purview of the defence of superior order since this one is concerned with the protection of (military) hierarchies rather than with the freedom of will of the order's addressee.¹⁵⁷

For making paragraph 1 (d) more transparent, at least four constituents of this rather complex provision must be distinguished: the type of conduct to be excluded from criminal responsibility (1), the elements of duress on the defendant (2), the requirements for the (re)action to avoid the threat (3), and the mental element that accompanies the defendant's (re)action (4).

1. 'Conduct alleged to constitute a crime within the jurisdiction of the Court'

Why this clause speaks of *conduct 'alleged' to constitute a crime*, is difficult to understand. If it is to express no more than the fact that, by the exclusion of criminal responsibility, a crime has not been constituted but remains merely 'alleged', then the same consequence would be true with all other grounds by which criminal responsibility is excluded. Therefore, this phrase, if to be meaningful, would have to express more than that general matter of course. Without having access to the respective deliberations of the Working Group, an explanation could be found in the reference to *crimes 'within the jurisdiction of the Court'*, to the effect that this novel blending of necessity and duress, by which even the killing of innocents – against the majority in *Erdemović* – may be excluded from responsibility¹⁵⁸, should only be available for crimes according to articles 5–8 of this Statute, thus foreclosing any concessions to national criminal justice systems or the jurisprudence of other international tribunals.

2. 'Duress' resulting from a 'threat of imminent death' or of 'continuing or imminent serious bodily harm' against 'that person or another person' whereby the threat is either 'made by other persons' or 'constituted by other circumstances beyond that person's control'

Within this lengthy phrase four components can be distinguished:

(a) The basic requirement must be a *threat of imminent death* in terms of appearing to occur closely and seriously, or a *threat of continuing or imminent serious bodily harm*, thus, in its exculpating scope narrower than in case of self defence¹⁵⁹, also requiring more than easily healed superficial wounds. In the same vein a merely abstract danger or simply an elevated probability that a dangerous situation might occur would not suffice¹⁶⁰; nevertheless may the imminence of a threat be present in an overall continuing state of emergency¹⁶¹ (as in terms of a 'Dauernotstand'¹⁶²). Like the attack in self-defence, the threat must be objectively given and not merely exist in the perpetrator's mind¹⁶³.

(b) As to its origin, the threat must be either *made by other persons*, as it is the case when the person concerned is the victim of coercion¹⁶⁴, or *constituted by other circumstances*

¹⁵⁷ Furthermore cf. Blakesley (1998) 67 *RIDP* [139], 182 *et seq.* and above Eser, in: Dinstein and Tabory (eds.), *War Crimes in International Law* (1996) 251, 254 *et seq.*

¹⁵⁸ Cf. below note 188.

¹⁵⁹ As, in particular, here excluding the protection of property; cf. above mn 42; Ambos, *Treatise on International Criminal Law* (2013) 357.b.

¹⁶⁰ Cf. Ambos, *Treatise on International Criminal Law* (2013) 357 *et seq.*; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 638, giving the example of the abstract omnipresence of the Gestapo in the Third Reich. The concrete imminence of the threat could become pertinent in a case of coerced recruitment, especially of child soldiers, since an accused cannot raise the duress defence, if he was 'only' coercively enrolled generally but not forced to commit the charged offence.

¹⁶¹ Cf. Bond and Fourgere (2014) 14 *ICLRev* [471], 471 *et seq.*; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 638.

¹⁶² Cf. Perron, in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2014) § 35 mn 12, at 708 with reference to *id.* in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2014) § 34 mn 17, at 687.

¹⁶³ Ambos, *Treatise on International Criminal Law* (2013) 357; Cryer, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 408. cf. above mn 44.

¹⁶⁴ Different from self-defence (article 31 (1) subparagraph (c)), however, in the instance of subparagraph (d) the threat is *not* required to be *unlawful*; were this the case, then the person defending himself against an

beyond that person's control, as is the case of danger which does not result from another person's action, but from other sorts of endangerment by natural forces or technical menaces. The clause 'beyond that person's control' ('indépendants de sa volonté') insinuates that self-induced risks, regardless whether concerning human-made or natural threats, cannot provide an excuse by paragraph 1 (d)¹⁶⁵. However, an exact definition of self-exposure was consciously avoided at the Rome Conference and was left to the Court to decide under paragraph 2 of art. 31.¹⁶⁶

55 (c) The person exposed to the threat can be either the defendant *himself or another person*. This broad approach allows not only the preservation from own endangerment but also emergency assistance for third persons. Different from certain national criminal codes, however, which would limit acting under 'altruistic' duress to relatives or persons similarly close to the defendant¹⁶⁷, this Statute does not explicitly require any special relationship between the defendant and said third person. Nevertheless, averting threats from strangers may for other reasons fail to fulfill paragraph 1 (d) as, for instance, depending on the circumstances of the individual case the threat to a stranger may not be grave enough as to compel a reasonable person to commit an international crime.¹⁶⁸ Therefore, particularly with regard to 'altruistic' actions, the following requirement needs attention:

56 (d) The threat must *result in 'duress' causing the crime*. In this component of the provision, duress functions as mediator between threat and criminal conduct: the threat must cause duress which in turn causes the alleged criminal reaction. In order to be *caused*, however, duress not only implies a certain state of mind in which the defendant's will is overborne, but is also contingent on the threat's capacity to overbear that will. As a brief comparative analysis may show, the latter dimension of duress opens it for normative and, for that matter, objective limitations: Whether one demands, as the Law Commission for England and Wales does, that 'the threat is one which in all the circumstances ... [the defendant] cannot reasonably be expected to resist'¹⁶⁹, or whether, according to the US Model Penal Code, the threat must have been sufficiently great that 'a person of reasonable firmness in the [defendant's] situation would have been unable to resist'¹⁷⁰, all these propositions lastly rest on a concept which in German theory and law has been labeled as 'Unzumutbarkeit'¹⁷¹, finding adoption in Romanic theory in terms of 'no exigibilidad'¹⁷² and 'inesigibilita'¹⁷³ respectively: in recognizing duress as an excuse only if the defendant acted upon threats that the 'normal' person cannot be fairly expected to endure¹⁷⁴. Conversely, threats that are otherwise avertable do not result in 'duress' proper.

unlawful threat of death or bodily harm could even be justified according to paragraph 1 (c); see above mn 41. Regarding the relationship and difference between duress and superior order *cf.* above to notes 156 et seq.

¹⁶⁵ *Cf.* Cryer, in: Cryer et al. (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 408; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 644; disagreeing Heller, in: Heller and Dubber (eds.), *Handbook of Comparative Criminal Law* (2011) 593, 613 by restricting this clause to self-procured natural risks.

¹⁶⁶ *Cf.* Scaliotti (2001) 1 *ICLRev* [111], 153.

¹⁶⁷ As, for instance, § 35 German Penal Code.

¹⁶⁸ *Cf.* Ambos, *Treatise on International Criminal Law* (2013) 357.

¹⁶⁹ See § 42 in: The Law Commission, *A Criminal Code for England and Wales*, Vol. I (1989). Further, the House of Lords answered affirmative to the question: 'Does the defense of duress fail if the prosecution proves that a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant?' *R v Howe and Others* (1987) *CLRev* 480.

¹⁷⁰ Sect. 2.09 (1) US Model Penal Code.

¹⁷¹ As one of the first to develop this concept see Henkel, in: Engisch (ed.), *Festschrift für Edmund Mezger* (1954) 249. As to the implementation of 'Zumutbarkeit' in § 35 German Penal Code see Perron, in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2014) § 35 mn 13 a, et 709.

¹⁷² See Mir Puig, *Derecho Penal. Parte General* (2011) 604 et seq.; Zaffaroni, *Derecho Penal. Parte General* (2003) 744 et seq.

¹⁷³ Fiandaca and Musco, *Diritto Penale. Parte Generale* (2010) 408.

¹⁷⁴ Bundesgerichtshof, 4 StR 140/92, 21.05.1992 (1992) 12 *NStZ* [487]. Also *cf.* Perron, in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2014) § 35 mn 14, at 710. As to the translation of 'Zumutbarkeit' as 'fair expectability' *cf.* Fletcher, in: Eser and Fletcher (eds.), *Rechtfertigung und Entschuldigung* (1987) 167, 171.

Accordingly, paragraph 1 (d) only applies if the defendant cannot be fairly expected to withstand or assume the risk. Thus, a threat results in ‘duress’ only if it is not otherwise avoidable, *i. e.* if a reasonable person in comparable circumstances would not have submitted and would not have been driven to the relevant criminal conduct. It is therefore neither required to show special valor, prowess or heroism, nor does a weak will or a weakness of character exclude the criminal responsibility of a defendant¹⁷⁵. This is not to say that one may simply follow the most convenient way out, rather has the coerced person to seek every reasonable, not too distant evasive alternative for avoiding the commission of a crime¹⁷⁶. Furthermore, if the yardstick for measuring what threats a person may fairly be expected to resist shall not be left entirely to the subjective sentiments and attitudes of the person concerned, fair expectability cannot be determined without regard to this person’s social function and legal obligations; this means that police officers, firemen or soldiers due to their official position can be expected more resistance in enduring dangers than normal citizens¹⁷⁷.

3. ‘The person acts necessarily and reasonably to avoid this threat’

Different from self-defence where reasonableness and proportionality is required (above D. IV. 3), here a ‘necessary’ and ‘reasonable’ act is asked for. This, undisputedly, means that the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect¹⁷⁸.

Beyond this primarily factual test, however, the prevailing opinion would ask for more by interpreting ‘reasonable’ as to entail an *objective proportionality or balancing test*¹⁷⁹, to the effect that the harm sought to be avoided outweighs, from a normative standpoint, the caused harm: accordingly, a defendant is said only to act ‘reasonable’ if his (re)action is proportionate¹⁸⁰. This pursues the choice-of-a-lesser-evil approach as already known from the traditional necessity defence and as summarized by Judge *Cassese* in his meanwhile commonly referred to limitation of the ‘duress’ in his dissent in *Erdemović*, by requiring that ‘the crime committed was not disproportionate to the evil threatened’ (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils¹⁸¹. However, expecting proportionality of the defendants (re)action in *objective* terms is

¹⁷⁵ Cf. Perron, in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2014) § 35 mn 14, at 710.

¹⁷⁶ *Id.*

¹⁷⁷ This criterion, discussed by Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1039, *id.*, *Treatise on International Criminal Law* (2013) 358; Cryer, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 408 can again explicitly be found in the German provision for excusing necessity in § 35 Penal Code. For further details cf. Perron, in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2014) § 35, mn 21–37, at 713 *et seq.*, as to reservations regarding soldiers cf. Weigend (2012) 10 *JICJ* [1219], 1235.

¹⁷⁸ With regard to the question of whether paragraph 1 (d) could serve as a defence to interrogational torture (article 7 para. 1 (f) and article 8 para. 2 (a) (ii) respectively), for example of alleged terrorists to gain relevant information of imminent attacks, cf. above note 141 and Gaeta (2004) 2 *JICJ* [785], 791 *et seq.*, arguing – against the Supreme Court of Israel – that torture is always unreasonable, because of the uncertainty to gain reliable and pertinent information. A more differentiated position is taken by Ambos (2008) 6 *JICJ* [261], 206, and Ohlin (2008) 6 *JICJ* [289], 289 *et seq.* by, while denying justification, granting an excuse. In my view, too, there is a qualitative difference between torturing for gaining a confession of a crime already committed and mere threat of harm for rescuing a victim from otherwise being doomed to die: cf. Eser, in: Herzog and Neumann (eds.), *Festschrift für Winfried Hassemer* (2010) 713.

¹⁷⁹ Cf. Kittichaisaree, *International Criminal Law* (2001) 263 *et seq.*; Knoops, *Defenses in Contemporary International Criminal Law* (2008) 86 *et seq.*; Korte, *Das Handeln auf Befehl als Strafausschließungsgrund* (2003) 193 *et seq.*; Krefß (1999) 12 *HuV-I* [7]; Safferling, *Internationales Strafrecht* (2011) 117; Satzger, *Internationales Strafrecht* (2013) 303 *et seq.*; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 642 and fn. 452.

¹⁸⁰ Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1040.

¹⁸¹ *Erdemović* (Appeals Chamber Judgment), note 153, para 16. The complete definition of duress, as found in Judge Cassese’s separate opinion para. 41, requires: ‘(1) a severe threat to life or limb; (2) no adequate means to

at least questionable. From a systematic point of view, the umbrella term ‘reasonably’, at least in the Statute, does not automatically connote proportionality since in paragraph 1 (c) on self-defence it was deemed necessary to require that the defendant acts both ‘reasonably’ and ‘in a manner proportionate’. Further, the clear cut requirement of paragraph 1 (d) that the defendant ‘does not *intend* (!) to cause a greater harm than the one sought to be avoided’ points to a subjective rather than objective proportionality standard for the defendant’s conduct¹⁸². This terminological argument is bolstered by the historic attempt to blend in one norm the traditional necessity and duress defence, as known in national criminal justice systems, the reason being that only a subjective proportionality test would not eliminate altogether the ‘no moral choice’-element as the central criterion of the duress defence and, thus, would not reduce paragraph 1 (d) to mere necessity. Yet, even when not employing an objective standard, if the pertinent danger and the harm are unreasonably disproportionate – for example: threatening to cut off the defendant’s finger if he did not execute an innocent victim – the threat is already not *unzumutbar*, i. e. the defendant was required to resist.

4. ‘Provided that the person does not intend to cause a greater harm than the one sought to be avoided’

- 60 As already indicated before, this subjective conception of the ‘lesser evil’-principle is an integral element of this defence: different from classical ‘necessity’ which justifies actions that save the greater good at the cost of the minor, and different from classical ‘duress’ which would grant an excuse regardless of the greater or lesser harm, if the person could not be fairly expected to withstand the threat¹⁸³, this phrase could well be understood as drawing a line in-between: on the one hand requiring less than justifying ‘necessity’ would afford, and on the other hand requiring more than excusing ‘duress’ would be satisfied with. Thus, only applying a subjective proportionality test to the accused’s conduct would pursue the unprecedented historic attempt to reconcile necessity and duress in one provision¹⁸⁴.
- 61 In order to valorize that the defendant subjectively endorsed the higher good or deliberately chose the lesser of two evils, this requirement goes beyond the negative requisite that the defendant may merely not act with *dolus malus*.¹⁸⁵ Therefore, the clause that the defendant did ‘not intend to cause a greater harm than the one sought to be avoided’ encapsulates the reasoning in the *Eichmann* case¹⁸⁶: If the defendant, although exposed to a risk not otherwise avoidable, identifies himself with his project or over-accomplishes the extorted tasks, his criminal responsibility is not excluded under paragraph 1 (d).
- 62 It remains to be seen whether a nuanced approach that combines a subjective interpretation of the pertinent (re)action’s proportionality and an objective understanding of the threat causing this reaction (‘Zumutbarkeit’) is superior to the prevailing opinion which

escape the threat; (3) proportionality in the means taken to avoid the threat; (4) the situation of duress should not have been self-induced’.

¹⁸² In similar terms see Ambos, *Treatise on International Criminal Law* (2013) 360; Heller, in: Heller and Dubber (eds.), *Handbook of Comparative Criminal Law* (2011) 593, 613; Weigend (2012) 10 *JICJ* [1219], 1224. Interestingly enough, Merkel (2002) 114 *ZStW* [437], 453 *et seq.*, as well seems to have interpreted the aforementioned citation (note 182), in subjective terms, although leaving open whether he would finally prefer this position.

¹⁸³ Cf. Eser, in: Eser and Fletcher (eds.), *Rechtfertigung und Entschuldigung – Justification and Excuse. Comparative Perspectives* (1987) 19, 54 *et seq.*; *id.*, in: Dinstein and Tabory (eds.), *War Crimes in International Law* (1996) 251, 261 *et seq.*

¹⁸⁴ Instead of interpreting the requirement of proportionality in view of the defendant’s subjective intention, Korte, *Das Handeln auf Befehl als Strafausschließungsgrund* (2003) 198 *et seq.* would rather treat lack of objective proportionality, whilst the defendant had subjectively intended it, as a case of mistake.

¹⁸⁵ Cf. Safferling, *Internationales Strafrecht* (2011) 117.

¹⁸⁶ Attorney General of the Government of Israel v. *Adolf Eichmann* (1968) 36 *ILR* 5 (summary).

either applies only an objective proportionality standard or even goes as far as requiring subjective proportionality additionally¹⁸⁷.

VI. Paragraph 2: The implementation by the Court in the case before it

In face of the fact that the proposals of the ILC did not yet propose grounds for
63 excluding criminal responsibility at all and that also later on it remained uncertain as to
which, and on what way, grounds for excluding criminal responsibility should be regulated
by this Statute¹⁸⁸, it is not surprising that a provision which would give the Court power to
determine the admissibility of reasons excluding punishment in view of the individual
character of a crime was, in principle, proposed as early as in the Updated Siracusa Draft of
1996¹⁸⁹. The first decision to this end was then taken by the Preparatory Committee in its
session of December 1997 and drafted in a version which basically remained unchanged up
to the present provision¹⁹⁰.

The final acceptance of paragraph 2 had been a concession to those delegations which
64 favored a minimalist approach to defences, *i. e.* to those who challenged a (detailed)
codification of grounds for excluding criminal responsibility and rather opted for giving
the Court leeway in finding the appropriate standards for negating a defendant's interna-
tional criminal liability¹⁹¹. This course was also led by the assumption that, even if the
participants of the Rome Conference had been willing to do so, it would have been hardly
possible to completely codify all situations that might exclude international criminal
responsibility. Thus, in order to avoid disagreement on certain situational patterns in terms
of their barring or not barring international criminal responsibility and to solicit a
consensus, these borderline situations were not addressed in the Statute but rather
consciously referred to the Court to decide upon. Of the three ways for the Court to look
for exclusionary grounds beyond the boundaries of paragraph 1, two are opened by para-
graph 2: one by empowering the Court to adjust the codified grounds for excluding crim-

¹⁸⁷ Cf. Ambos, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1003, 1041. - The teleological advantage of discarding objective proportionality and of rather focusing on the threat's 'Zumutbarkeit' might be reasoned with regard to *Erdemović* (above note 153), *i. e.* the coerced killing of innocents: After controversial discussions at the Rome Conference, it was finally agreed that subparagraph (d) is also available to murder (Kittichaisaree, *International Criminal Law* (2001) 264; Scaliotti (2001) 1 *ICLRev* [111], 154; Werle and Jessberger, *Principles of International Criminal Law* (2014) mn 640; cf. also Cassese, *International Criminal Law* (2013) 217 *et seq.*) To explain this conclusion by an appeal to the purported (objective) proportionality of the defendant's action is highly dangerous and appears bluntly utilitarian: Since one has to argue that the harm avoided outweighs the harm caused (in terms of choice of the lesser evil), the innocent's life has to be degraded, whilst the defendant's integrity is cast as the higher good. Yet centering on the phrase 'duress resulting from a [further specified] threat' reveals and radiates an almost humanistic rationale for excluding criminal responsibility even in the case of killing innocents: A defendant cannot be fairly expected to withstand a threat which we would deem irresistible for a reasonable person in comparable circumstances (this seems to be misunderstood by Dinstein, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (2000) 373, 375, apparently due to his confusing duress as absence of moral choice with the proportionality requirement of the choice of a lesser evil). With regard to the exclusion of responsibility in the case of killing innocents, those victims are not degraded to a lesser value, but the accused's human (and fallible) nature has become the focal point of legal reasoning. By not requiring, as a matter of law, that a person defies an overpowering compulsion, criminal justice does not project any expectations of heroism and is thus firmly grounded in humanistic ideals.

¹⁸⁸ Cf. above mn 3.

¹⁸⁹ Cf. article 4, article 33–11 para. 1 Updated Siracusa Draft, p. 74, which was literally adopted both by the ILC (article 14, 1996 ILC Draft Code, p. 73) and the 1996 Preparatory Committee II in its article S Proposal 2, p. 104).

¹⁹⁰ Cf. Article L para. 2 Preparatory Committee Decisions Dec. 1997, p. 22. Even the final wording ('provided for in the Statute'), as phrased at the end by the Drafting Committee (article 30 para. 2, U.N. Doc. A/CONF.183/C.1/L.65/Rev.1 (14 July 1998), p. 8) - instead of grounds 'listed in paragraph 1', respectively 'permitted by this Statute' - was one of various alternatives suggested in the original Draft of the Preparatory Committee.

¹⁹¹ Cf. Saland, in: Lee (ed.), *The International Criminal Court - The Making of the Rome Statute* (1999) 189, 208.

inal responsibility to the case at stake (1), the other by allowing the Court to resort to exclusionary grounds (outside of paragraph 1) within the Statute (2), whereas the third way may even lead to exclusions of responsibility outside of the Statute according to paragraph 3 (below D.VII). In this respect, article 31 can indeed be characterized as ‘acknowledging its own status as a work in progress’¹⁹². As much understandable this evasive action by the makers of the Statute may have been, it leaves doubts with regard to the principle of legality (3).

1. ‘The Court shall determine the applicability’ of the (exclusionary grounds) ‘to the case before it’

- 65 In principle, the power given to the Court to ‘*determine the applicability*’ of exclusionary grounds must mean more than simply to apply the law, as this function would not need to be proclaimed expressly. Therefore, the Court appears to be empowered to adjust available grounds in such a way that they are applicable to the individual case. On this way, the Court may, for instance, solve cases of provocation or of excessive, yet excusing, use of force¹⁹³ by adjusting self-defence (paragraph 1 (c)) or of self-exposure by limiting duress (paragraph 1 (d)).
- 66 This power, however, is not unlimited, but determined by the ‘*case before the court*’. This means that the Court may not pronounce new general definitions, but has to restrict itself to a just solution of the case before it. If it sees need and reason to modify existing exclusionary grounds or to create new ones in a general way, it would have to proceed according to paragraph 3 (below D.VII). However, even in as far as the Court merely adapts an existing ground to the case before it, it is not completely free, as already taken into account by the drafters of this provision¹⁹⁴, but bound by the rules of article 21 regarding applicable law¹⁹⁵.

2. Grounds for excluding criminal responsibility ‘provided for in this Statute’

- 67 Beyond or even instead of adjusting an exclusionary ground within paragraph 1, the Court may even go farther to other grounds ‘*provided for in this Statute*’. For by way of this referral, the determining power of the Court is not limited to adjusting exclusionary grounds of paragraph 1, as it had been proposed in an alternative to the present version¹⁹⁶, but relevant for grounds for excluding criminal responsibility outside of article 31 (above B) as well. Thus, the determining power of the Court goes far beyond the reach of this article.

3. Paragraph 2 in the light of the principle of legality¹⁹⁷

- 68 The plain wording of paragraph 2 suggests that the Court’s power to adapt the codified grounds for excluding criminal responsibility to the case before it is *not* necessarily limited to situational patterns that are connected to, but not addressed by the Statute’s codification; rather, paragraph 2 provides that the Court may alter, in the interest of justice, each and every of the Statute’s codified grounds for excluding criminal responsibility according to the facts of the individual case¹⁹⁸. Obviously, this brings about an inner tension between the

¹⁹² Cf. Sadat, *The International Criminal Court and the Transformation of International Law* (2002) 212.

¹⁹³ Cf. § 33 German Penal Code (granting an excuse if the perpetrator exceeds the limits of proportionate self-defence due to confusion, fear or fright). As to the Rome Statute not addressing excessive self-defence cf. Merkel (2002) 114 *ZStW* [437], 447.

¹⁹⁴ See fn. 11 to article L para. 2 in the Preparatory Committee Decisions Dec. 1997, p. 22. On the other hand regarding the accused, who has no onus of proving the applicability of grounds for excluding criminal responsibility, cf. Roberts (2012) 10 *JICJ* [923], 928.

¹⁹⁵ Cf. below mn 75.

¹⁹⁶ Cf. above note 190.

¹⁹⁷ For drafting this section, I am greatly indebted to *Christoph Burchard*.

¹⁹⁸ Similarly, the Court may easily revoke previous precedents and previous statutory interpretations. Principally disagreeing with such a broad judicial discretion Schabas, *The International Criminal Court* (2010)

attempt of defining specific prerequisites that negate a person's international criminal liability and the leeway granted to the Court under paragraph 2; in other words, paragraph 2 points to the problem of adjudicative retroactivity and, as the Working Group's Chairman has put it almost unnoticed, 'it could be argued that the possibility of denying the applicability to a certain case of a ground for excluding criminal responsibility otherwise provided for runs counter to the principle of legality'¹⁹⁹. Interpreting the scope of paragraph 2 in light of these vastly intriguing implications, some general guidelines seem at place.

First, grounds for excluding criminal responsibility are not subject to the interpretation rules of article 22 (*nullum crimen sine lege*)²⁰⁰; thus, disregarding the plain wording of a provision regulating a defence due to teleological arguments (so called 'teleological reduction') is not formally disqualified. This reflects a popular notion in domestic criminal justice theory: because of their dynamic evolution, an evolution that is driven by ever-changing social needs, the principle of *nullum crimen sine lege* is deemed not to apply fully to defences²⁰¹. On the other hand, domestic criminal law theory also suggests that a court's construing a defence provision directly influences a defendant's criminal liability and thus is hardly different from interpreting a criminal offense provision²⁰². Accordingly, with regard to national criminal justice systems, it is far from clear to what effect and to what extent grounds for excluding criminal responsibility can be altered retroactively and, thus, touch on the legality principle. However, even if the *nullum crimen* requirements – according to the wording of article 22 paragraph 2 – only apply to the 'definition of a crime' and not to grounds of excluding criminal responsibility²⁰³, the determination power of the Court entrusted to it in paragraph 2 of article 31 could be overstretched if in a given case defences granted by the Statute were principally disregarded or narrowed in a way that the very substance of such a ground of excluding criminal responsibility gets lost.²⁰⁴

Second, a potential conflict with the legality principle will predominantly arise only if the Court disregards any possible meaning of the wording and adapts a codified ground for excluding criminal responsibility in a manner detrimental to the defendant. More specifically, illuminating the underlying rationales of the legality principle²⁰⁵, the Court's determination may either withhold fair notice or counteract the accused's protection against arbitrary justice and *ad hoc* punishment. With regard to fair notice, this concept is rooted in liberal rational choice theory and prescribes that an actor consciously adjusts his actions to the codified requirements of (domestic or international) criminal law so that said requirements must not be altered retroactively²⁰⁶. However, this usual "reliance" argument against judicial creativity²⁰⁷ seems frustrated by paragraph 2, as this provision positively allows for a variable and flexible interpretation of the Statute's grounds for excluding criminal responsibility and, thus, in fact, negates any reliance in judicial constancy²⁰⁸. With regard to the accused's

491, obviously led by a minimalist approach to giving leeway to excluding criminal responsibility; however, whereas incriminating elements are certainly subjected to the principle of legality (article 22), this is not necessarily the same with exonerating justifications or excuses as being in favor of the accused (cf. Satzger, *Internationales Strafrecht* (2013) 304). See also below mn 69 *et seq.*

¹⁹⁹ Saland, in: Lee (ed.), *The International Criminal Court – The Making of the Rome Statute* (1999) 189, 208.

²⁰⁰ Cf. Broomhall above Art. 22, mn 31, 39 *et seq.*

²⁰¹ Cf. Roxin, *Strafrecht Allgemeiner Teil* (2006) 158; Lenckner and Sternberg-Lieben, in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2010) pre-note 25 to § 32, at 585 *et seq.*

²⁰² Cf. Eser and Hecker, in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2014) § 1 mn 13, at 31.

²⁰³ As assumed, though, by Ambos, *Treatise on International Criminal Law* (2013) 90, 314.

²⁰⁴ Cf. Cryer, in: Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (2014) 400.

²⁰⁵ Cf. Kratzsch (1971) *GA* [65], 68; Morrison (2001) 74 *SouthCalifLRev* [455], 461 *et seq.*

²⁰⁶ Cf. Kahan (1997) 3 *RogerWilliamsULRev* [95], 95; above note 37, A. Ashworth/J. Horder, *Principles* 57 *et seq.*

²⁰⁷ Ashworth and Horder, *Principles of Criminal Law* (2013) 60.

²⁰⁸ As a consequence, with regard to interpretive limitations of paragraph 2 in light of the legality principle, there is no need to differentiate between justifying and excusing grounds for excluding criminal responsibility. Insofar, retroactive alterations of excuses are normally less troublesome because they constitute rules of adjudications for the courts rather than rules of conduct to guide citizens; cf. Eser, in: Heger, Kelker and

protection against arbitrary justice and *ad hoc* punishment, this second rationale of the legality principle sets institutional restrictions to judicial vindictiveness fuelled by the potential animosity towards the defendant²⁰⁹. It may be guessed that utilizing these restrictions to define the scope of paragraph 2 accounts for the immense pressure that the Court will come to bear and prevents that it will fall prey to an overpowering impression of an individual case. In order to ensure a high degree of accountability and acceptance, adapting grounds for excluding criminal responsibility under paragraph 2 is advisable only if the alterations – according to standards employed by both the European Court of Human Rights²¹⁰ and the US Supreme Court²¹¹ – are reasonably foreseeable and can be reasonably brought under the original concept of the defence²¹². Applying this rational basis inquiry separates the legitimate dynamic evolution of international criminal law from illegitimate judicial reinterpretations animated by capricious and arbitrary impulses.

- 71 Third, even if paragraph 2 confers to the Court a limited power to adapt the law, it might be more suitable not to disregard codified requirements but rather to take advantage of their broad interpretive latitude which naturally inheres legal terms like reasonable etc. This internal approach to solve problematic cases mitigates the impending conflict between paragraph 2, judicial retroactivity and the legality principle²¹³.

VII. Paragraph 3: Other (international or national) sources for exclusionary grounds

- 72 For reasons similar to those finally causal for paragraph 2²¹⁴, it was quite clear from the start that the Statute could and should not provide an exhaustive list of defences; therefore a defence was needed according to which the Court should be empowered to avail itself of defences which might be derived from other recognized legal sources²¹⁵. After the Preparatory Committee had proposed a rule to this end in its session of December 1997²¹⁶ which was still upheld as a separate provision by the Draft Statute of April 1998²¹⁷, it was then, on proposal of the USA, integrated into article 31 as paragraph 3 and phrased as it stands now²¹⁸. The provision contains three rules:

Schramm (eds.), *Festschrift für Kristian Kühl* (2014) 173 *et seq.* What is more, by rejecting the liberal ‘reliance’ argument because of the explicit wording of paragraph 2, it is not necessary to comment on the question of whether international criminal law really guides the actions of potential international criminals.

²⁰⁹ Cf. Krent (1997) 3 *Roger Williams ULRev* [35], 41.

²¹⁰ Cf. *Case of SW v. United Kingdom*, Application No. 00020166/92, Judgement, 22 November 1995, para. 36.

²¹¹ Cf. *Bouie v. City of Columbia* (1964) 378 U.S. 347–368, 353 *et seq.*

²¹² The test applied is objective in nature whereby further differentiations may be necessary. For example, the foreseeability requirement might be more lax if the individual case is comparable, as a matter of law, to a previously decided case, yet took place in a different geopolitical situation. Vice versa, the foreseeability requirement might be more strict if a relevant precedent already accounted for the peculiarities of the geopolitical background of the individual case that is to be decided.

²¹³ Cf. Eser and Hecker, in: Schönke and Schröder (eds.), *Strafgesetzbuch. Kommentar* (2014) § 1 mn 13, at 31.

²¹⁴ See mn 64.

²¹⁵ Here again, the Updated Siracusa Draft (article 33–11 para. 2, p. 74; cf. above note 189) as well as the 1996 Preparatory Committee II (article S Proposal 1, pp. 104 *et seq.*) have made first suggestions on this respect. Cf. also Jescheck, in: Eser (ed.), *Festschrift für Haruo Nishihara* (1998) 437, 447 *et seq.* Referring to this possibility in particular with regards to sex offenses, though not specifying any available defences, see Grewal (2012) 10 *JICJ* [389], 389.

²¹⁶ Art. O in the Preparatory Committee Decisions Dec. 1997, p. 23.

²¹⁷ See article 34 Preparatory Committee (Consolidated) Draft, p. 71.

²¹⁸ See Proposal by the United States of America for single provision covering issues currently governed by articles 31, 32, 33 and 34, note 106. Later changes did not do more than introduce ‘consideration’ instead of ‘assertion and application’ in paragraph 3 sentence 2; cf. Article 31 para. 3 in the Report of the Working Group of 29 June 1998 (UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1), p. 5. Cf. Schabas, *The International Criminal Court* (2010) 492.

1. ‘At trial the Court may consider’ a ground for excluding criminal responsibility ‘other than those referred to in paragraph 1’

This power given to the Court at trial reaches further than that according to paragraph 2 (above D.VI) in that the Court shall not only adjust an existing exclusionary clause to the case before it, but may even employ grounds for excluding criminal responsibility ‘other than those referred to in paragraph 1’ and, as must be added, other than those provided for in the Statute as well; for as paragraph 1 also covers the ‘additional’ grounds (above B) by its chapeau, the power of the Court to look for other grounds for excluding criminal responsibility is not limited to the subparagraphs (a) to (d) of paragraph 1, but even goes beyond this Statute²¹⁹. 73

Yet, as article 31 is concerned with substantive exclusions of criminal responsibility only²²⁰, introducing additional non-substantive defences, like alibi²²¹, ne bis in idem²²², failure of proof or other more procedural defences²²³, could hardly be accomplished by direct application of paragraph 3, as seems to have been envisaged by preparatory proposals²²⁴. However, by way of analogy, as far as favorable to the defendant, an extension of paragraph 3 on non-substantive defences may still be open. 74

2. Where such a ground is ‘derived from applicable law as set forth in article 21’

This clause is both a guideline and a limitation for the Court. For this purpose, it was extensively elaborated in earlier drafts²²⁵, but even in its new trimmed version does it reach the same end by simply referring to article 21. This is due to the fact that the rules for the application of law in and outside of this Statute, as prescribed by article 21, concern grounds for excluding criminal responsibility in the same way as any other law within the jurisdiction of this Court. Thus, even defences which have not been expressly regulated by this Statute (such as those listed above at C. II), can be invoked by the person concerned and considered by the Court, in as far as they are reconcilable with the application rules of article 21.²²⁶ 75

3. ‘The procedures relating to the considerations of such a ground shall be provided for in the Rules of Procedure and Evidence’

In addition to the substantive limitation of sentence 1 binding the Court to certain legal sources, sentence 2 of paragraph 3 provides a certain procedure by which a ground for excluding criminal responsibility not provided for in this Statute may be taken into consideration. The pertaining rule 80, however, regulates scarcely more than the procedural way of how the defence may raise an exclusionary ground according to this paragraph²²⁷. 76

²¹⁹ By acknowledging the Court’s power to adopt new defences, the Statute goes beyond *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para. 583, where it was stated that the ICTY must not adopt new rules constituting new defences. Further note that the Court’s rule-making powers do not conflict with the principle of *nullum crimen sine lege*.

²²⁰ Cf. above mn 17.

²²¹ Cf. above note 37.

²²² Cf. Ambos, *Treatise on International Criminal Law* (2013) 396 *et seq.*

²²³ On further non-substantive defences in the Rome Statute cf. Scaliotti (2001) 1 *ICLRev* [111], 112 *et seq.* For a systematic analysis of the different subgroups of criminal law defences from a common law point of view cf. Robinson, *Criminal Law Defenses* (1984) sections 21–28.

²²⁴ As reported and obviously supported by van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 291.

²²⁵ Such as in article 34 Preparatory Committee (Consolidated) Draft, p. 73.

²²⁶ Cf. Ambos, *Treatise on International Criminal Law* (2013) 386; van Sliedregt, *Individual Criminal Responsibility in International Law* (2012) 223.

²²⁷ For further details see Brady, in: Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001) 403, 417.

E. Outlook

- 77 After the 1994 ILC Draft Statute for a Permanent International Criminal Court had not yet contained any grounds for excluding criminal responsibility, it was certainly fundamental progress that the Statute was prepared to expressly recognize certain grounds for excluding criminal responsibility and, in addition, left the door open for further grounds²²⁸. This is not to say that such abhorrent crimes as those dealt with by the Statute should be easily open for substantive defences; as was already necessary to be said; however, even war criminals cannot be denied the right to be tried according to the rule of law²²⁹. Insofar, the Statute's efforts to transcribe the principal grounds for excluding responsibility into international criminal law, rather than being 'absurd'²³⁰, mark a further step to a comprehensive codification of international criminal law both in founding and excluding criminal responsibility²³¹. This applies not only to substantive law but concerns the procedural position of the defendant as well, in particular with regard to the Court's institutional design²³². Although it is unquestionably desirable to structurally improve the defence side, for example by establishing a permanent defence unit, the main focus should not lie on expanding on the adversarial dichotomy between prosecution and defence but rather on ensuring that an impartial prosecution will indeed collect, evaluate and present evidence that is advantageous for the defendant (article 54 para. 1 (a)).²³³
- 78 Nonetheless it is not to be ignored that article 31 is not yet in the very best of shape, both from substance and format. This holds particularly true with regard to the lack of differentiation between various – justificatory, exculpatory or other extenuating – reasons for which criminal responsibility may be excluded²³⁴. This is a field which needs more refinement, at least in order to make certain exclusionary grounds better understandable and more adequately applicable²³⁵.

²²⁸ Another question, of course, is as to what degree the ICC will be prepared for making use of its power: doubtful, e.g., Janssen (2004) *ICLRev* [83], 97.

²²⁹ Cf. above mn 12.

²³⁰ As Schabas (1998) 6 *EJCLCJ* [400], 423 oddly saw fit to describe the progress with regard to the intoxication defence.

²³¹ To the same end cf. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 299.

²³² Cf. *Fair Trials and the Role of International Criminal Defense* (2001) 114 *HarvLRev* [1982], 1986.

²³³ As to desirable improvements in this respect see Eser, in: Swart, Zahar and Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011) 108, 121 *et seq.*

²³⁴ Cf. above mn 2.

²³⁵ Cf. – with varyingly far-reaching goals and hopes – Eser, in: Dinstein and Tabory (eds.), *War Crimes in International Law* (1996) 251, 263 *et seq.*, 271 *et seq.*; Nill-Theobald, "Defences" bei *Kriegsverbrechen am Beispiel Deutschlands und der USA. Zugleich ein Beitrag zu einem Allgemeinen Teil des Völkerstrafrechts* (1998) 387 *et seq.* and Jescheck, in: Eser (ed.), *Festschrift für Haruo Nishihara* (1998) 437, 448, 451.

Article 32

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Literature: Bothe, M., 'War Crimes', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 379; Clark, R., 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', (2001) 12 *CLF* 291; Badar, M.E., 'Mens Rea, Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals', (2005) 5 *ICLRev* 203; Eser, A., 'Mental Elements – Mistake of Fact and Mistake of Law', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 889; *id.*, "'Defences" in Strafverfahren wegen Kriegsverbrechen', in: K. Schmoller (ed.), *Festschrift für Otto Triffterer* (Springer 1996) 755; Eser, 'Justification and Excuse: A Key Issue in the Concept of Crime', in: A. Eser and G.P. Fletcher (eds.), *Rechtfertigung und Entschuldigung: rechtsvergleichende Perspektiven*, Vol. I (Max-Planck-Institut 1987) 37; Eser, A., Lagodny, O. and Triffterer, O., 'Proposals to Amend the "Draft Code of Crimes against the Peace and Security of Mankind"', in: O. Triffterer (ed.) Annex 2: Acts of Violence and International Criminal Law, (1997) 4 *CroatianAnnCrimL&Prac* 2, 872; Heller, K.J., 'Mistake of Legal Element, the Common Law, and article 32 of the Rome Statute', (2008) 6 *JICJ* 419; Jescheck, H., *Die Verantwortlichkeit der Staatsorgane nach Völkerrecht* (Röhrscheid 1952); Nill-Theobald, C. 'Defences' bei Kriegsverbrechen am Beispiel Deutschlands und der USA: Zugleich ein Beitrag zu einem Allgemeine Teil des Völkerstrafrechts (Edition iuscrim 1998); Reynolds, J.D., 'Collateral Damage on the 21st Century Battlefield – Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground', (2005) 56 *AFLRev* 1; Robinson, P.H., 'Commentary to article 14', in: M.C. Bassiouni (ed.), *Commentaries on the ILC's 1991 Draft Code of Crimes Against the Peace and Security of Mankind* (Eres 1993) 199; Saland, P., 'International Criminal Law Principles', in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Springer 1999) 189; Scaliotti, M., 'Defences Before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility–Part 2', (2002) 2 *ICLRevev* 1; Schabas, W.A., 'General Principles of Criminal Law in the ICC Statute', (1998) 6 *EJCLCJ* 400; Stuckenberg, C-F., 'Problems of "Subjective Imputation" in Domestic and International Criminal Law', (2014) 12 *JICJ* 311–323; Triffterer, O., 'The Object of Review Mechanisms: Statutes' Provisions, Elements of Crimes and Rules of Procedure and Evidence', in: R. Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Ashgate 2010) 355; *id.*, 'Ius in bello: Eskalation durch "Kollateralschäden" wie durch Kriegsverbrechen–Beweisbarkeit und Vermeidbarkeit. Anmerkungen zu dem bewaffneten Konflikt zwischen Israel und der libanesischen Hizbullah Miliz', in: R. Moos, U. Jesionek and O. Müller (eds.), *Festschrift für Roland Miklau zum 65. Geburtstag* (Studien Verlag 2006) 559; *id.*, 'The New International Criminal Law – Its General Principles Establishing Individual Criminal Responsibility', in: K. Kalliopi (ed.), *The New International Criminal Law* (Sakkoulas 2003) 639; *id.*, 'Der ständige Internationale Strafgerichtshof–Anspruch und Wirklichkeit', in: K.H. Gössel and O. Triffterer (eds.), *Gedächtnisschrift für Heinz Zipf* (C.F. Müller 1999) 495; *id.*, 'Bestandsaufnahme zum Völkerstrafrecht', in: G. Hankel and G. Stuby, (eds.), *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (Hamburger Edition 1995) 169; *id.*, *Strafrecht Allgemeiner Teil* (Springer 2nd edition 1994); *id.*, 'Ein rechtfertigender (Erlaubnistatbestands-)irrtum? – Irrtumsmöglichkeiten beim polizeilichen Einsatz und deren Dogmatische Einordnung', in: O. Triffterer and F. von Zezschwitz (eds.), *Festschrift für Walter Mallmann* (Nomos 1978) 373; von Verseveld, A., *Mistake of Law: Excusing Perpetrators of International Crimes* (Springer 2012); Weigend, T., 'Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges', (2008) 6 *JICJ* 471.

Content

A. General remarks	1
I. Historical development	1
II. Need for article 32?	11
III. Conceptual framework	13
IV. Error and lack of awareness	19
B. Analysis and interpretation of elements	20
I. Paragraph 1: Mistake of fact	20
1. Facts	20

a) Descriptive and normative material elements	21
b) Facts as bases for a normative evaluation – value judgment	22
c) Conceptual consequences	24
2. Perception as basis for ‘the mental element required’	25
3. Legal consequences	26
II. Paragraph II: Mistake of law	29
1. Differentiation from mistake of fact	29
2. Aspects to be mistaken	30
a) ‘whether a ... conduct is a crime within the jurisdiction of the Court’	31
b) Other ‘legal elements’	33
aa) Knowledge of the facts	34
bb) Mistaken legal evaluation	35
3. Legal consequences	36
a) Excluding or not ‘excluding criminal responsibility’	37
b) Mitigating circumstances	40
4. Special regulation in article 33	41
C. Special remarks: Scope of practical importance	42
1. ‘Core crimes’ and contempt of court	43
2. Errors and appeal	50
3. Collateral damage as war crime?	51

A. General remarks

I. Historical development

- Part 3 of the Rome Statute contains some – but not all – of the general principles of criminal law to be applied by organs of the Court. According to article 21, other principles may be found in the applicable law, especially in the ‘principles of law’ mentioned in paragraphs 1(c) and 2¹. But there is, in addition, room for extensive interpretation and development of such principles, especially through the jurisprudence of the ICC, as demonstrated by the decisions of the ICTY and the ICTR during the last years².
- It surprises – at first glance – that a Statute aiming to establish a court and its (international criminal) jurisdiction also defines precisely the crimes over which jurisdiction shall be exercised and, in addition, some general principles of criminal law to be applied. However, on a closer analysis, this double structure of the Rome Statute, dealing with substantive and procedural rules in one document is desirable and, especially in the field of international criminal law, also necessary to clarify and thereby help guarantee observance of the rule of law. The fulfilment of the latter presupposes, for instance, that the crimes and defenses are defined in a way ‘strictly construed in the sense of article 22’, which means, sufficiently precise to make criminal justice transparent and thereby acceptable, while also understandable and controllable³.

The Statute’s double orientation becomes understandable when considering its historical development. In addition, it is in accordance with the early development of national and regional criminal law and procedure, where a strict separation between substantive and procedural law also is missing; quite well known codifications, for instance, the *Constitutio Criminalis Carolina* (CCC) of 1532, contain regulations concerning both fields⁴.

¹ See deGuzman, *article 21*, mn 11 *et seq.*, 14 *et seq.* And 20 *et seq.*

² See, for instance, *Prosecutor v. Erdemović*, IT-96-22-A, Judgement, Appeals Chamber, 7 October 1997, paras 12 and 13, and the separate and dissenting opinion of Judge Cassese and Judge Stephen, para 37 and 59 respectively. The majority of the Appeals Chamber found that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime.

³ See, for instance, the Report of the ILC on the Work of its Thirty-Ninth Session (to its Draft Code 1987), UN Doc. A/42/10, reprinted in: (1987) 2 *YbILC*, Part 1 (3), 7, where it was considered that all ‘exceptions of the principle of responsibility’ concern ‘jurisdictional guarantees’. See also Clark, R.S. Article 9, mn 1 *et seq.*

⁴ See, for instance, Triffterer, *Strafrecht Allgemeiner Teil* (1994) chapter 1, mn 13, and for the ‘double character’ of the ICC, Triffterer, in: Gössel and Triffterer (eds.), *Gedächtnisschrift für Heinz Zipf* (1999) 495, 534 *et seq.*

An analysis of the early development in the international field, however, reveals a clear separation of both subject matters. At the beginning, endeavors concentrated on substantive law because there was not yet any international criminal jurisdiction in sight. Instruments dealing with the laws and customs of war, especially the 1907 Hague Conventions, represent this tendency. The Charter for the Nuremberg Tribunal is also typical since it concentrated mainly on substantive law, leaving great parts of the procedural law to be adopted by the Tribunal according to its own Rules of Procedure and Evidence. The question of error was not even mentioned in the Charter. This line was continued in the Nuremberg Principles drafted by the ILC in 1948⁵. The 1948 Genocide Convention equally concentrated on the criminality of such acts and though not referring to the possibility of an error it at least mentioned the procedural aspect and thereby opened the possibility of direct enforcement by an international criminal court⁶.

The UN's work thereafter, through the promulgation of the 1951 and (revised) 1953 Draft Statutes for the Establishment of an International Criminal Court by a special Committee, and the 1951 and 1954 Draft Codes of Offences against the Peace and Security of Mankind by the ILC, only served to widen the separation. The Draft Codes do not even mention that defenses and extenuating circumstances may play a role and that a relevant error of the perpetrator in regard to a necessary element of the crime may fall under one of those categories⁷. This may have been due to the fact that even though they were not mentioned in the Nuremberg Statute or in the Allied Control Council Law No. 10 of 1945, mistakes of law or fact were quite frequently raised as a defense in trials conducted according to these laws. However, in the jurisprudence in the aftermath of WWII, mistake of law was generally declared to be irrelevant while an error of fact was accepted as a ground for excluding criminal responsibility, for instance in the so-called 'Ärzte-Urteil'⁸. This term refers to cases of physicians who were acquitted because they believed that the persons brought to them were sentenced to death and would be pardoned if they survived the medical experiments, during which they were 'at the disposal' of the physicians⁹.

The question was extensively discussed by the ILC in 1986 during its work on a revision of the Draft Code, because in the meantime quite a few drafts from non-governmental organizations had dealt with this particular defense¹⁰. The Special Rapporteur referred to the High Command and the I.G. Farben cases, in which the Nuremberg Tribunal ruled on the misinterpretation of a rule of law and a change in general acceptance of laws and customs of war, thereby altering 'the substantive content of certain of its principles'¹¹. Thereafter the ILC included, in its 1987 Draft, article 9 'Exceptions to the principle of responsibility' (formerly article 8), and referred to in subparagraph (d) as 'error of law or of fact'¹². However, instead of being defined, both were merely mentioned as grounds that would not 'relieve the perpetrator of criminal responsibility unless, in the circumstances in which it (the crime) was committed, it was unavoidable for him'. In addition, for all defenses mentioned in

⁵ The principles were defined by the ILC but never scheduled to be discussed in the General Assembly, see 1991 ILC Draft Code, paras 60 *et seq.*; Triffterer, *Dogmatische Untersuchungen zur Entwicklung des Materiellen Völkerstrafrechts seit Nürnberg* (1966) 76.

⁶ For reference to an international penal tribunal see article IV of the Genocide Convention; for the neglect of rules for a general part see, for instance, Triffterer, 2nd edition, *Preliminary Remarks*, mn 34 *et seq.*; for the limitation of the Genocide Convention to specific rules about participation see article III and also article 86(2) of Add. Prot. I.

⁷ See, for instance, article 2 of the 1951 and of the 1954 Draft Code.

⁸ *United States vs. Karl Brandt et al.*, Judgment of Military Tribunal in Case No. 1, 19 August 1947.

⁹ For details see Nill-Theobald, 'Defences' bei Kriegsverbrechen am Beispiel Deutschlands und der USA: Zugleich ein Beitrag zu einem Allgemeine Teil des Völkerstrafrechts (1998) 342 with references in fn. 1.

¹⁰ ILA Seoul Conference (1986) Annex C and Protocol II to the Statute for an International Criminal Court and to the Statute for an International Commission of Criminal Inspiry containing defences, paras 4 and 5; AIDP, 'A Draft International Criminal Code' (1980), Appendix - General Part, article IX section 7, reprinted in: Bassiouni (ed.), *International Criminal Law: A Draft International Criminal Code* (1980) 47 *et seq.*

¹¹ (1986) 2 YbILC, Part 2, paras 161 *et seq.* with references for the two cases mentioned in fn. 126 and 127.

¹² For the Draft article, see 1987 ILC Report, para 44 *et seq.*

the original article 8, the defense would not exempt the defendant from punishment if his act was ‘a breach of a peremptory rule of international law, ... originated in a fault on his part ...’, or ‘the interest sacrificed is higher than the interest protected’¹³. The new article 9 repeated the principal regulation on ‘error of law or of fact’ without including the limitations mentioned in former article 8¹⁴. The discussion, which canvassed the broadness of the concepts of ‘errors of law or of fact’ (in that order) and mentioned, without attempting to be exhaustive, the variety of possible mistakes, referred expressly to the very basic and still valid decision of the German Federal Court defining ‘the concept of insurmountable error’¹⁵. The cases mentioned and the ensuing discussion illustrated the difficulty of and the sophisticated analysis required to differentiate between errors of fact and law. This may have been the reason why the 1991 ILC Draft Code did not refer to mistake of fact and law. It stated in its article 14 only that ‘defences under the general principles of law’ were applicable and had to be considered in every single case¹⁶. The maximum that can be derived from this article is that the ILC thereby tacitly accepted that errors of fact and law may be defenses, which, if applicable in principle, had to be checked in each case.

- 6 The silence of the ILC is rather surprising. Already the early 1980 AIDP Draft, the 1987 Bassiouni Draft, the 1991 ILA Draft and later on the 1996 Updated Siracusa Draft all accepted **both** mistakes. It was considered that a defense would be permitted where there was a negation of ‘the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements, and provided that the circumstances he reasonably believed to be true would have been lawful’¹⁷. The consequences attaching to a mistake were only mentioned with regard to mistakes of law and were rather concisely summarized; accordingly, a behaviour associated with a mistake of law was either ‘not punishable’ or if the mistake was avoidable ‘the punishment may be reduced’¹⁸.
- 7 It is noteworthy that the Statutes for the ICTY and the ICTR do not contain any regulations concerning relevant mistakes. But by making generally accepted legal rules applicable, they can (and in their practice do) take consideration of both mistake of fact and mistake of law¹⁹. Against this background the ILC – before a ‘revivment’ of its members took place – aimed to conclude its 45 years of work on the Draft Code. On the demand of members, an additional proposal was presented by experts, changing article 33–15 paragraph 1 of the Updated Siracusa Draft and pointing out the consequences of this proposal with the formula: ‘If an individual would not be held guilty of the crime if the circumstances were as he reasonably believed, he is not punishable’²⁰. However, no agreement could be reached on

¹³ (1987) 2 *YbILC*, Part 1, 7 (brackets added).

¹⁴ *Ibid.*

¹⁵ BGHSt 2, 194, 18 March 1952. See also (1987) 2 *YbILC*, part 1, [8]. For its present importance see, for instance, Jescheck and Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (1996) 452.

¹⁶ See Robinson, in: Bassiouni (ed.), *Commentaries on the ILC's 1991 Draft Code of Crimes Against the Peace and Security of Mankind* (Eres 1993) 199 *et seq.*

¹⁷ Appendix – General Part, article IX, section 7 A.I.D.P. Draft 1980, reprinted in: Bassiouni (ed.), *International Criminal Law: A Draft International Criminal Code* (1980) 164; for the ‘Bassiouni Draft’ 1987 see Part I–General Part, article IX, section 7, reprinted in: Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal* (1987) 110; see also Updated Siracusa Draft, article 33–15 para. 1.

¹⁸ The 1991 ILA Report mentions **both** possibilities. An unavoidable mistake of law was accepted as an ‘excuse from criminal liability’ while an avoidable mistake was a reason why ‘punishment may be reduced’. With regard to the mistake of fact there was no regulation contained; see Report of the ILA of the 64th Conference 186 (1991). But this is comparable to national laws like in Austria where such a regulation is missing as well. The legal consequence of such an error is self-evident, because a mental element is required and the lack of perception of these facts logically leads to a lack of the mental element required. See, for instance, note 4, Triffterer, *Strafrecht Allgemeiner Teil* (1994), chapter 17, mn 19 *et seq.* with further references.

¹⁹ This aspect has been expressly mentioned in the *Ad Hoc* Committee Report, para 87. See, for instance, Erdemović (Appeals Chamber Judgment), note 2.

²⁰ See for this Draft Eser, Lagodny and Triffterer, ‘Proposals to Amend the “Draft Code of Crimes against the Peace and Security of Mankind”’, in: Triffterer, Annex 2: Acts of Violence and International Criminal Law, (1997) 4 *CroatianAnnCrimL&Prac* 2 [872], 872 *et seq.*

this question during the work on the 1996 Draft Code, especially since a lack of broad consensus was already apparent during the work on the ILC Draft Statute 1994²¹.

It is not surprising that the *Ad Hoc* Committee on the Establishment of an International Criminal Court did not produce results that the ILC could not achieve either. It only proposed guidelines 'for consideration of the question of general principles of criminal law'. They contained a list of possible defences including 'error of law?' and 'error of fact?' – again using the order adopted in former ILC Drafts – without mentioning any further details or referring to the articles of the 1987 ILC Draft. But the two question marks behind each of the two aspects 'for consideration' indicate that the *Ad Hoc* Committee did not then want to decide, if at all, to what extent each of the mistakes should lead to impunity or needed to be regulated at all²².

Due to this open situation, at its first session the Preparatory Committee discussed proposals by Japan to formulate an article on 'mental element' and by the Netherlands concentrating on avoidability and consistency of errors with the nature of the alleged crimes, as well as the possibility of a provision stating that even if a mistake was avoidable it 'may be considered in mitigating of punishment' or, in other words, 'the punishment may be reduced'. It was this proposal by the Netherlands that led the ILC to change the order and to mention mistake of fact **before** law. This order has been used since then²³.

However, the question was also debated whether these concepts should be included at all in the Statute and if they fell into 'the category of justifying facts ... Are negations of responsibility or a defense'²⁴. The Report on the first and second session of the Preparatory Committee reflects an open discussion in which the majority held the opinion that mistakes should be a defense and not 'a ground for exemption from criminal responsibility'. In addition, it was questioned whether with regard to the 'particular mental elements in order to establish criminal responsibility ... this defense needs to be explicitly mentioned as it is merely one example of the various factors that could negate the existence of the required mental element'²⁵.

In its third session in February 1997, the Committee, in summarizing the discussion and the major proposals, drafted two alternative texts, mentioning in footnote 26 and 27 that 'there were widely divergent views on this matter'. It stated further that according to some delegations a regulation for 'mistake of fact was not necessary because it was covered by *mens rea*'²⁶. The first, the shorter version (A), treated both mistakes equally as a defense if unavoidable and, if avoidable, as mitigating circumstances, adding however, 'provided that the mistake is not inconsistent with the nature of the alleged crime'²⁷.

During the fourth and the fifth session, August and December 1997 respectively, the subject was not dealt with expressly. But in the latter, due to the influence of the Updated Siracusa Draft²⁸, 'general principles of criminal law' were considered by a separate Working Group²⁹. Article 1 of the Working Group's proposal is titled 'Grounds for excluding criminal responsibility' but does not mention mistakes in the Annex II to the Report at all³⁰.

The Zutphen Draft contains in article 24 [K] two options, both including mistakes of fact and of law. They differ from the proposals made during the third session only to the extent

²¹ See 1994 ILC Draft Statute, paras 45 *et seq.*

²² See *Ad Hoc* Committee Report, Annex II B 5 a, p. 58.

²³ See for these proposals Summary of the proceedings of the Preparatory Committee during the period 25 March–12 April 1996, 1st Sess., UN Doc. A/AC.249/1 (7 May 1996), Annex I, p. 22 and mn 17.

²⁴ See 1996 ILC Draft Code.

²⁵ 1996 Preparatory Committee II, p. 96.

²⁶ Preparatory Committee Decisions Feb. 1997, pp. 27–28.

²⁷ *Ibid.*

²⁸ For the influence of the Updated Siracusa Draft as 'a good starting position', see 1996 Preparatory Committee I, para 204.

²⁹ See Preparatory Committee Decisions Dec. 1997, Annex II, pp. 18 and 19.

³⁰ *Ibid.*

that they substituted ‘shall be a defense’ with the words ‘shall be a ground for excluding criminal responsibility’ in both options³¹.

The Consolidated Draft from 14 April 1998, concluding the work of the Preparatory Committee after the sixth session, repeated these two options, noting in footnote 20 that there were still ‘widely divergent views on this article’. In footnote 21 it was again mentioned ‘that mistake of fact was not necessary because it was covered by *mens rea*’. Footnote 22 contains an additional option for paragraph 2 of the second option including, with regard to mistake of law, the observation that ‘whether a particular type of conduct is a crime under the Statute, or whether a crime is within the jurisdiction of the Court, is not a ground for excluding criminal responsibility’³². This formulation was the basis for the later similar wording in the Statute. In the commentary to the proposed article (at that time 30), the reasons for and different aspects of mistakes, their points of reference and the consequences are explained³³.

II. Need for article 32?

- 11 From the outset a point of discussion concerned whether a regulation for mistake of fact was at all necessary in the Statute. According to article 32(1) such an error ‘shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime’. Since according to article 30(1) criminal responsibility and liability for punishment depend on whether ‘the material elements are committed with intent and knowledge’, a person who is not aware of these required elements (which describe typically the nature, any specific circumstances and the consequences of the conduct), does not have the necessary *mens rea*. He or she is, therefore, free from responsibility and liability for punishment because *culpability* depends on the existence of such a (complex) mental element³⁴. In this respect, paragraph 1 expresses only what is self-evident and therefore may serve as a pure clarification of a generally accepted principle of criminal law³⁵.
- 12 With regard to article 32(2) the situation is different. The concept of mistake of law, as well as its consequences, namely, if and under what circumstances it may exclude responsibility or merely serve as mitigating circumstance, are subjects of dispute. Of course, if ‘it negates the mental element required’, the consequence is as self-evident as for an error of fact. On the other hand, the mere belief that a certain conduct is not punishable or does not fall within the jurisdiction of the Court does not concern the **material** elements of which the perpetrator has to be aware before he may build the *mens rea* required³⁶. As expressed in sentence 2, only in exceptional cases may such an error negate this element; therefore, paragraph 2 also clarifies, though without precisely expressing, when and where such a consequence can be drawn. The interpretation and detailed analysis therefore falls to the competence of the ICC.

III. Conceptual framework

- 13 In some civil law countries, criminal law theory has been developed to a rather sophisticated level of perfectionism: every single question has to be placed in a specific context as part of a systematic order of elements of crimes which all have to be fulfilled for a certain conduct to result in criminal responsibility. This approach leads to a diversity of mistakes

³¹ Zutphen Draft, pp. 60–61.

³² Preparatory Committee (Consolidated) Draft, p. 67.

³³ See (1998) 13*ter* NEP [54], 54 *et seq.* To these aspects see mn 25 and 31.

³⁴ At least as far as there exists no criminal responsibility for negligent conduct. See also commentary on article 30, (1998) 13*ter* NEP [54], 55.

³⁵ For this argument see already Preparatory Committee (Consolidated) Draft, article 30, fn. 21.

³⁶ In this regard, see also Ambos, *Treatise ICL I* (2013) 371, who concurs that mistakes regarding jurisdiction are not exculpating.

located in the different areas of such a system³⁷. Common law countries do not differentiate matters in this way; they are more likely looking at the result, namely whether punishment should be excluded or merely mitigated³⁸. Article 32 takes a neutral middle position by acknowledging in paragraph 1, through the emphasis given to ‘shall be a ground for excluding criminal responsibility’, that a mistake may negate the mental element required – in whatever way this may be explained theoretically. Taking into consideration the tendency for a rapprochement between the two legal systems, not only in Europe but worldwide, and especially through the jurisprudence of the ICTY and ICTR, it seems advisable to summarize and locate the different methods of identifying mistakes according to the civil law system.

With regard to the mistake of fact it is undisputed that when its prerequisites are fulfilled, there is no ‘intent and knowledge’ to use the language of article 30. The *mens rea* required for the specific crime is necessarily lacking in such cases and the word ‘only’ is superfluous. Such a mistake is located in the category where the mental element is positioned. 14

On the contrary, persons have the necessary mental element when they assume the existence of a situation in which, if it were as they believed, they would be justified (for example by self-defense). They are, in the same way, mistaken about one or more facts, even though these are not material elements of the crime, but material prerequisites for a justification of the crime. They thus have been inspired to commit a crime by being mistaken in a comparable way to a person who is in error over the existence of a material element: in both cases suspects perceive the reality incorrectly. In both cases they would have avoided behaving (acting or omitting) the way they did, and, thus, criminal responsibility if they had seen or in any other way appreciated the facts correctly instead of wrongly. Therefore, by reasoning based not on legal theory, but on the **similarity of the result**, they should be treated equally: neither should be punished for intentionally committing the crime; the first because he is lacking the mental element required, the second because he does not deserve this punishment, since without the mistake of the (justifying) facts he would not have **intentionally** committed the crime. This comparable structure of the systematically differently located two mistakes is the reason, why, for instance, paragraph 8 Austrian Penal Code provides a corresponding regulation stating that the person who is mistaken about the material prerequisites for justification, like a situation of self-defense, is on the one hand not justified, but on the other cannot be punished for committing the crime ‘**with intent and knowledge**’.

An error of fact in the sphere of other defenses may **excuse** the person, for instance, in situations of necessity/coercion or duress when the perpetrator wrongfully assumes ‘circumstances beyond his control likely to create an otherwise unavoidable private or public harm’³⁹. Because, in a situation that he reasonably believed to exist, **the psychological pressure on the perpetrator** is as strong as if the situation existed in reality. It has to be admitted that, contrary to the similarities in the three conceptual spheres of mistakes mentioned above, they are located in three different places in the systematic structure of crime:

The first concerns the correspondence between material and mental elements.

The second has its basis in a mistaken perception of facts, which if they existed in accordance with the belief, would have established a ground for justification of the act. Such an error is, however, (because of this wrong perception) a mistaken **evaluation** of the

³⁷ This helps to explain – even though only partly – the different categories to which errors have been allocated by the ILC according to the quotations in mn 9. See, for instance, for national legal theory in Austria Triffterer, *Strafrecht Allgemeiner Teil* (1994) chapter 17, mn 17 *et seq.*, and Germany, Jescheck and Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (1996) 456 *et seq.*

³⁸ See, for instance, Eser, in: Schmoller (ed.), *Festschrift für Otto Triffterer* (1996) 763; Eser, in: Eser and Fletcher (eds.), *Rechtfertigung und Entschuldigung: rechtsvergleichende Perspektiven* (1987) 37 *et seq.*

³⁹ Eser, Lagodny and Triffterer, ‘Proposals to Amend the “Draft Code of Crimes against the Peace and Security of Mankind”’, in: Triffterer, Annex 2: Acts of Violence and International Criminal Law (1997) 4 *Croatian Ann-CrimL&Prac* 2 [872], 881. See also Eser, article 31, mn 10.

lawfulness of the conduct and, therefore, by its concept under legal theory, a mistake of law. Such a mistake, though **conceptually** not a mistake of fact, nevertheless has the practical consequence of being treated as if it were one.

The third is a false perception of facts founding an excuse for the perpetrator. However, because of the wrong perception, it is a mistaken evaluation of the lawfulness of the conduct and therefore, by legal theory, a mistake of law. This mistake, though **conceptually** not a mistake of fact, nevertheless has the **practical** consequence of being treated as if it were one⁴⁰. For these three situations, a theoretical differentiation between negating the required mental element, justification, and excuse makes sense, even though it is not necessarily needed to achieve the same result, namely to relieve the perpetrator from punishment.

15 The difference between mistake of fact and mistake of law is that in principle the latter involves a perpetrator not mistaken about the existence of a (purely) material element or fact; therefore, mistakes about legal aspects of a crime in general do not touch the material elements or material prerequisites for justification or excuse. This is the reason why they, as expressed with regard to two such mistakes in paragraph 2 sentence 1, ‘shall not be a ground for excluding criminal responsibility’.

16 However, consider the legal evaluation of elements like ‘inhuman’ or ‘torture’. They are based on facts and thus have a comparable basis with material elements. The latter can be **descriptive** or **normative** in nature. In the second case, facts are legally evaluated and the perpetrator needs only to know the facts but does not have to know their precise legal definition in order to fulfil the mental element required; it is sufficient that he or she is aware of the social meaning of the facts perceived (*‘Parallelwertung in der Laiensphäre’* or laymen’s parallel evaluation test)⁴¹. For example, knowledge of the legality of a Trial Chamber’s order is not an element of the *mens rea* of contempt. Otherwise, this requirement would mean that an accused could defeat a prosecution for contempt by raising a mistake of law defence⁴².

17 A similar structure underlies legal elements, because they all are normative by definition. One of the crimes against humanity according to article 7(1)(e) is ‘imprisonment ... in violation of fundamental rules of international law’. The existence of these rules is a prerequisite for the definition of the crime and therefore has to have been known by the perpetrator with the ‘mental element required’. If the perpetrator did not know the rule, he or she is mistaken in the same way as if he did not know that what he is destroying is, for instance, a (protected) hospital. He is mistaken by an error of fact and treated the same way according to article 32(1).

If, however, he is aware of a legal regulation dealing with this issue and (nevertheless) believes that this rule is either not applicable, not ‘fundamental’, or not ‘international’, he is mistaken about a **legal** concept underpinning the rule.

This is the typical mistake of law for which article 32 provides different consequences than for a mistake of fact. The reason for this differentiation is that the legal assignment to a certain category, or the precise apprehension of a legal definition, is not ‘the job’ of the perpetrator but of the person who has to apply the law. However, the perpetrator cannot be influenced in this process if he does not know, for instance, about the existence of a prohibition to destroy protected historical objects. Without knowing the factual basis for this legal element, the perpetrator cannot decide between right and wrong. Therefore, if he is mistaken in making this value judgement, his responsibility depends on whether he could have avoided the wrong decision or not.

⁴⁰ For details with further references see, for instance, Triffterer, *Strafrecht Allgemeiner Teil* (1994) chapter 17, mn 19 *et seq.*, 31 *et seq.*

⁴¹ For the differentiation see mn 21 and for all aspects mentioned Triffterer, *Strafrecht Allgemeiner Teil* (1994) chapter 9, mn 76 *et seq.*

⁴² See *Prosecutor v. Jović*, IT-95-14 & 14/2-R77-A, Judgment, Appeals Chamber, 15 March 2007. See with regard to value judgements also below Triffterer, ‘The Object of Review Mechanisms: Statutes’ Provisions, Elements of Crimes and Rules of Procedure and Evidence’ (Conference on International Criminal Justice, Turin 14–18 May 2007) 4. E. therein.

Admittedly, differentiating legal elements from normative elements is difficult. The definition of one of the crimes against humanity in article 7(1)(h) contains three legal elements, namely 'persecution' under 'grounds that are universally recognized as impermissible under international law' and a 'crime within the jurisdiction of the Court'. The definition of 'persecution' in article 7(2)(g) refers to another legal element: 'fundamental rights contrary to international law'. In contrast, the crime of apartheid in article 7(1)(j), defined in paragraph 2(h), presupposes an 'institutionalized regime'. But this regime need not be legitimate; a *de facto* institutionalization is sufficient. Therefore, this is not a legal element but a normative (material) one. The same is true for the elements in article 8(2)(b)(iv): 'widespread, long-term and severe' for the damage of the natural environment or the element that such an act 'would be clearly excessive'. Applying article 32(2) sentence 1 to these aspects, it is clear that a mistaken belief about one of these elements ('collateral damage would be clearly excessive' or 'a particular type of conduct' would not constitute 'a crime within the jurisdiction of the Court'), does not relieve the perpetrator from punishment because the conclusion need not be drawn by the perpetrator. If he wrongly believes the condition would not be fulfilled, he undertakes an evaluation that is not an element of the crime; therefore, in relation to this element, no value judgement has to be made by any perpetrator at all for holding him or her responsible for a crime.

This theoretical classification is not necessary, but it may be helpful to allocate a perpetrator's mistaken perception to one of the two models of mistake. Doing so would make it easier to decide whether the mistake should relieve him from punishment and whether this decision about impunity should depend on the avoidability of the mistake.

IV. Error and lack of awareness

The word 'mistake' in article 32 describes the false perception of reality. But a perpetrator may have no perception at all, for instance, of a material element required for the crime. Often he is not aware of a certain element because when committing the act he does not contemplate the situation but rather acts without thinking about anything other than the final aim he wants to achieve. This may be the case if someone shoots without looking whether there is a human being around. This state of mind is often referred to as 'ignorance' rather than 'mistake'.

Both states of mind, however, should be treated equally; the perpetrator not perceiving one or more of the material elements lacks the capacity for the required *mens rea* and, therefore, cannot fulfil this mental element. He lacks the *mens rea* in the same way as a person who assumes a 'wrong' fact (which does not exist in reality), e.g. Aiming at what he thought was a monument that in reality was a human being. Therefore, mistake or error can be defined as a wrong or absent perception (awareness) of reality. Persons without this awareness cannot be mistaken in the technical sense of the word. They merely act without knowledge or awareness, *i.e.* lacking the (right) knowledge or awareness about reality. Therefore, error and mistake, as well as lack of knowledge and awareness, fall under the concept of 'mistake of fact'. They need not be differentiated because both lead to the same result: the capacity for the required *mens rea* is missing and therefore the mental element is missing, which is a ground for 'excluding criminal responsibility'⁴³.

⁴³ For this differentiation see Triffterer, *Strafrecht Allgemeiner Teil* (1994) chapter 17, mn 2 and 3.

B. Analysis and interpretation of elements

I. Paragraph 1: Mistake of fact

1. Facts

20 The facts relevant to the subject matter of article 32 are the basis for all constituent material elements and, therefore, have to be contained in the definition of the crime. They have to exist in the ontological situation, independent of whether they exist outside the sphere of the person, as is normally the case, or inside, like, for instance, the intent to cheat. Another difference is between facts in the past or the present versus fact that will only materialize in the future, like the result to be achieved by shooting at a person or a military target. As already mentioned above, a person who does not realize that the object is a hospital cannot be aware that the building is a protected target and therefore does not have the mental element required for committing a war crime under article 8(2)(b)(ix)⁴⁴.

In these cases, the question of whether criminal liability for negligence is at stake, does not affect the question of mistake of fact. However, for the allocation of an error into one of the two categories, law or fact, another differentiation is decisive⁴⁵.

21 a) **Descriptive and normative material elements.** Seldom is a material element purely descriptive. Most elements have a double nature, both descriptive and normative. Human beings, for instance, are as such visible. But the beginning and the end of human life mark two borders, which have been changed, especially the latter, in recent years by legal (normative) definitions. Therefore, many material elements have, at least in their border regions, a normative character. But, in general, descriptive material elements can be identified with our five senses. Normative elements, however, are legally defined.

22 b) **Facts as bases for a normative evaluation – value judgment.** Nevertheless, normative material elements are not abstract legal definitions but a legal evaluation of facts by a legislator or by the jurisprudence. The underlying facts are facts like the descriptive material elements; a false perception of them falls under the label ‘mistake of fact’ and ‘negates the mental element required’ with the consequences described in paragraph 1.

23 The question is whether and to what extent the perpetrator has to comprehend the legal definition or if he just has to be aware of the social relevance of the facts (*‘Parallelwertung in der Laiensphäre’* or layman’s parallel evaluation test). The prevailing opinion in German law is that the latter is sufficient. Only those applying the law have to submit the required facts, known to the perpetrator, to the legal definition in order to apply the law correctly⁴⁶.

24 c) **Conceptual consequences.** The differentiation between descriptive and normative elements on the one side and facts and their normative evaluation on the other has certain consequences:

Persons mistaken about purely descriptive matters, or about facts forming the factual basis for a normative evaluation fall under the concept of mistake of fact. The same is true for perpetrators who have a false understanding of the social importance of a normative element. It is because it belongs to the concept of normative (material) elements that the underlying facts and their social significance are understood by the perpetrator.

⁴⁴ Cf. Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Discussion paper proposed by the Coordinator, PCNICC/1999/WGEC/RT.4 (9 August 1999), where it is stated in relation to the war crimes listed in article 8(2)(a)(vi) and (vii) that the accused must be aware of the factual circumstances conferring the victim(s) with protected status under the Geneva Conventions.

⁴⁵ See also mn 16 *et seq.*

⁴⁶ *Ibid.*

However, persons who are aware of the factual basis and the social importance but (nevertheless) wrongfully believe that the legal definition is not applicable to their conduct, fall under the category of ‘mistake of law’. They undertake (as already mentioned in mn 17) an evaluation which is not at all demanded but falls exclusively within the competence of those who have to apply the law.

2. Perception as basis for ‘the mental element required’

According to article 30(1), the mental element presupposes ‘for a crime within the jurisdiction of the Court’ that ‘the material elements are committed with intent and knowledge’. A person who is not aware of a certain situation or a single material element cannot exhibit this *mens rea*; nor does the person know of its existence or its coming into existence like, for instance, the results of an act. Perception therefore is the basis for ‘the mental element required’. Where it is lacking, ‘the mental element required’ does not exist and no criminal responsibility can be established⁴⁷.

3. Legal consequences

The consequences from the above considerations about mistakes of fact include the following: anybody mistaken about or not aware of a material element cannot exhibit ‘the mental element required’. Since the mental element is missing, the mistake constitutes ‘a ground for excluding criminal responsibility’. A person who is free from criminal responsibility is free from penal guilt and therefore cannot be punished. Insofar as the Statute does not provide otherwise (like in article 28), he or she has to be acquitted.

To the extent that a provision in the Statute requires a mental element other than intent and knowledge, article 32(1) does not regulate it. But by *argumentum e contrario*, if there exists such a regulation independent of intent and knowledge, e.g. negligence, the mental element required for this different concept of responsibility is not automatically lacking. Rather, it depends on whether the mistake of fact was unavoidable or avoidable. If it was unavoidable, most probably the concept of negligence will not apply. If, however, it was avoidable, the negligent commission of the fact may be punished, provided the Statute or other laws contain a rule punishing such negligent conduct, like in the case of command responsibility under article 28⁴⁸.

When deciding that criminal responsibility is **not** excluded, the Court nevertheless may rule that the mistake of fact was of such a character that it **may** constitute a circumstance calling for the mitigation of punishment. This is because the Court ‘in determining the sentence ... shall ... take into account such factors as the gravity of the crime and the individual circumstances of the convicted person’, according to article 78(1). Even though not specifically mentioned in article 32(1), this possibility is open in all cases falling under article 32. Therefore, even if a situation does not constitute ‘a ground for excluding criminal responsibility’, mistakes belong to the ‘individual circumstances’ of the convicted person and, therefore, have to be taken into consideration. They may even impinge on the judgement of ‘the gravity of the crime’ because this includes not only the harm but also the amount of guilt – personal blame – for committing the crime. Article 78 entails that certain Rules have to be respected, in particular rule 145, since they may determine by what amount such factors reduce the penalty⁴⁹.

A further consequence of paragraph 1 is that a mistake about facts underlying a defense, like self-defense, does not negate the mental element required. If it was unavoidable, such an error may exclude punishment for the respective crime. If it was avoidable, it may lead to

⁴⁷ See also mn 16 *et seq.*

⁴⁸ For the mental element see Piragoff, *article 30*, mn 1 *et seq.*, and with regard to command responsibility see Arnold and Triffterer, *article 28*, mn 1 *et seq.*

⁴⁹ For such consideration see Jennings, *article 78*, mn 2 and 9 and Triffterer and Burchard, *article 27*, mn 25.

negligent responsibility according to the national regulations in Austria and Germany and some other countries, which can be applicable according to article 21(1)(c).

II. Paragraph II: Mistake of law

1. Differentiation from mistake of fact

- 29 The explanation above that an express mistake has to be treated in the same way as lack of awareness is, in principle, also valid for legal elements. The difference between the two mistakes mentioned in paragraphs 1 and 2 is explained by the two examples given in the first sentence of paragraph 2. But these examples are not exhaustive, as can be seen from sentence 2 in this paragraph. Generally, the difference can be characterized by the definition of facts given above and by defining legal elements as those with specific legal content. Examples, in addition to those already given above, include ‘impermissible under international law’ in article 7(1)(h) and ‘a regularly constituted Court’ in article 8(2)(c)(iv)⁵⁰.

2. Aspects to be mistaken

- 30 The concept of paragraph 2 is broad and the examples given in its first sentence can serve only as guidelines for a mistake of law that does not ‘negate[s] the mental element required’.
- 31 a) ‘whether a ... conduct is a crime within the jurisdiction of the Court’. It is unclear whether the wording of paragraph 2 sentence 1 refers to two mistakes of law or just to one that is precisely explained by reference to the jurisdiction of the Court.
 ‘Whether a particular conduct is a crime’ refers to the awareness of the punishability of the act. The perpetrator is aware of all relevant facts but draws the wrong conclusion, namely that his **correctly** perceived conduct, free of error, does not fulfil the prerequisites for ‘a particular type of conduct’ constituting a crime. This mistake is evaluated as an irrelevant error and therefore ‘shall not be a ground for excluding criminal responsibility’. The phrasing ‘shall not’ makes clear that there is no discretion in the Court to come to another judgement.
 If a person evaluates ‘a particular type of conduct’ (correctly) as a crime but believes that this crime does not fall ‘within the jurisdiction of the Court’, he or she is just mistaken about the competence of the ICC to exercise its jurisdiction. This knowledge is, however, **not** an essential element of the crime nor has it any other importance for establishing, in principle, the criminal responsibility of the suspect. Similarly, in national law an error about which court is competent to prosecute the crime is completely irrelevant. Therefore, it does not matter whether the two references ‘whether a ... conduct is a crime’ and ‘within the jurisdiction of the Court’ are treated as one or two separate elements, because in both cases the result is the same: the mistake of law ‘shall not be a ground for excluding criminal responsibility’.
- 33 b) **Other ‘legal elements’**. Paragraph 2 sentence 2 suggests that there are other mistakes of law which shall **not necessarily**, but ‘may ... be a ground for excluding criminal responsibility’ (emphasis added).
- 34 aa) **Knowledge of the facts**. All legal elements have their basis in facts, which have to be known if the perception of the element is to reach the awareness of the perpetrator. Someone who is not aware of the purpose for which ‘a flag of truce’ may be used, cannot comprehend an ‘improper use’ of it under article 8(2)(b)(vii)⁵¹. This serves as an additional example of the close relationship between **normative** (material) and **legal** elements, which have been dealt with under mn 15 and 21 *et seq.* If the word improper is defined as ‘forbidden by law’, it is a legal element; if it refers to mere customs **socially** respected, it would be a normative element.

⁵⁰ See also mn 34.

⁵¹ See mn 15 *et seq.* and 29.

There are few **legal** elements in the Statute about which a mistake of law may arise under paragraph 2 sentence 2. One may be contained in article 8(2)(b)(xx): ‘subject of a comprehensive prohibition’ or ‘by an amendment in accordance with the relevant provisions’. Someone who does not know of any prohibitive rule or ‘relevant provisions’ does not know the relevant facts, *i.e.* the basis on which this legal element is built upon. Therefore, he cannot be aware that his behaviour violates this regulation because his mistake concerns prerequisite constitutive facts for the legal element⁵².

bb) Mistaken legal evaluation. On the contrary, someone who is correctly aware of the situation and knows the constituent circumstances but nevertheless believes that the prohibition is not applicable to his conduct, or the amendment was not ‘in accordance with the relevant provision’ under article 8(2)(b)(xx), evaluates the **legal** situation incorrectly. The same is true for someone who knows of the judicial guarantees in the 1966 UN Covenant on Civil and Political Rights, but wrongly assumes that these rights are not ‘generally recognized as indispensable’ under article 8(2)(c)(iv) or wrongfully believes that this treaty is not valid or valid only between some States. He correctly understands the situation but also evaluates it incorrectly. He makes a **legal** evaluation, a value judgement, which is not necessary as part of his ‘obligation’ and therefore his mistake is of no relevance. 35

3. Legal consequences

It is worth noting that there is a difference in the wording in paragraph 2 between sentence 1 (‘shall’) and sentence 2 (‘may’). This needs clarification with regard to excluding or granting discretion to the Court. 36

a) Excluding or not ‘excluding criminal responsibility’. The alternatives expressed in both sentences of paragraph 2 are very clear. The two mistakes mentioned in the first sentence ‘shall not be a ground for excluding criminal responsibility’. This means there is criminal responsibility upon which a penalty has to be applied. The Court has no discretion with respect to this judgment as to criminal responsibility. 37

However, with regard to other mistakes of law referred to in sentence 2, there is discretion which is expressed by the word ‘may’. There is no obvious hint in article 32 or elsewhere in the Statute about how to exercise this discretion. Since the difference between sentence 1 and 2 must presumably make sense, it may be based on the following reason. The Court has to decide to which category the mistake should be assigned: is it an error regarding the underlying facts or a mistaken legal evaluation? Assuming the first, the consequence is regulated obligatorily by paragraph 1; because the error is factual it falls under this provision. The discretion expressed in paragraph 2 sentence 2 concerns exclusively a mistake of law by a wrongful **legal** (or normative) evaluation. This means, the Court **may** judge that even in these cases a mistake of law may negate the mental element required and thus exclude responsibility, because the error was unavoidable. The ‘unavoidableness’ is not mentioned in article 32, but this criterion is well accepted by general principles of law. 38

The Court, therefore, in cases of paragraph 2 sentence 2, has a twofold task. First, to decide whether this mistake of law concerns the underlying facts including the law or the rule to be applied; a positive answer entails that it has no discretion because paragraph 1 is mandatory. In contrast, when the mistake is based on a wrongful **legal evaluation**, the Court must decide if this was avoidable or not and consequently whether criminal responsibility is excluded or not.⁵³ 39

b) Mitigating circumstances. Even though the alternatives mentioned in article 32(2) are exhaustive, excluding or not excluding criminal responsibility according to sentence 2, 40

⁵² See also mn 14 *et seq.*

⁵³ Contra, see K. Ambos, *Treatise ICL I* (2013) 373–374, who concludes that the term ‘may’ is not a reference to the court’s discretion but rather to the fact that ‘not every mistake of law is relevant – only ones which negate the mental element’.

article 78(1) of the Statute entails that the Court has the same discretion for mistakes of law as it does for mistakes of fact (discussed above in mn 27). The rules should have made clear what criteria should be used for judging the avoidability of the mistake, or they must be decided with the help of the applicable law according to article 21.

4. Special regulation in article 33

- 41 Article 33(1) provides that persons committing crimes ‘pursuant to an order of a Government or of a superior ... shall not relieve ... of criminal responsibility’. However there is a defined exception. One of the three **cumulatively** demanded conditions under which an order may (exceptionally) have criminal relevance refers to an error of law in subparagraph (b): ‘The person did not know that the order was unlawful’. This regulation deviates from the general rule of article 32(2).

Such a person is mistaken about the lawfulness and therefore about a legal element. He or she evaluates the order wrongly with regard to its lawfulness, which normally under article 32(2) does not constitute ‘a ground for excluding criminal responsibility’. But in this exceptional case the Court has no discretion because the word ‘shall’ means that the consequence is obligatory⁵⁴.

Article 33 contains the only case in which a wrongful **legal** evaluation – by express terms in the Statute – ‘relieves ... of criminal responsibility’. This consequence of an error in law follows from the wording ‘shall not relieve ... unless ... [t]he person did not know that the order was unlawful’. This mistaken value judgement may be caused by a lack of knowledge about the facts constituting the unlawfulness or by evaluating these facts incorrectly.

But according to article 33(1)(c), this consequence only applies when ‘the order was not manifestly unlawful’. If it was ‘manifestly unlawful’ under the circumstances, the defence recognized by article 33 is not applicable and it cannot relieve the defendant from responsibility. In such cases the Court is left only with the discretion to mitigate punishment, as mentioned in mn 40 according to the general rule of article 78(1)⁵⁵.

Otherwise, if ‘the order was not manifestly unlawful’ and the mistaken evaluation not ‘automatically’ avoidable, a third condition has to be fulfilled in order to relieve the perpetrator from criminal responsibility: the subordinate must have been ‘under a legal obligation to obey orders’⁵⁶. This is a merely objective, material condition to exclude criminal responsibility; it, therefore, does not have to be comprehended by the *mens rea*, which means that a false perception in relation to the existence of this legal element is in principle irrelevant. But it may be considered as mitigation, because the psychological pressure on the perpetrator is equally strong regardless of whether he really is under the pressure of command under article 33 or he wrongfully assumes it, as referred to under mn 26. For further discussion on value judgements of the perpetrator (see below mn 43 *et seq.* in particular, 49 *et seq.* and 54).

C. Special remarks: Scope of practical importance

- 42 It has already been mentioned above that statutes for the International Military Tribunal at Nuremberg, the ICTY and the ICTR, do not contain regulations similar to article 32 of the Rome Statute. Furthermore, because of the default rules on mental elements contained in article 30, there is no practical need for article 32(1)⁵⁷.

⁵⁴ See also Triffterer and Bock, *article 33*, mn 11 and 14.

⁵⁵ *Id.*, mn 27. But see K. Ambos, *Treatise ICL I* (2013) 381, who argues that article 33 on superior orders does not apply if the defendant falsely believed that he was under a legal obligation to follow an order, in which case the defendant can then rely on the mistake of law defense under article 33. Under Ambos’ view, the legal obligation must *objectively* exist in order for article 33 to be triggered; the defendant’s mere subjective belief in the legal obligation is insufficient to trigger article 33.

⁵⁶ For details see Triffterer and Bock, *article 33*, mn 26.

⁵⁷ See above mn 4, 7 and 11.

1. ‘Core crimes’ and contempt of court

This tendency is confirmed by the jurisdiction of the *Ad hoc* Tribunals. Cases from the tribunals rarely deal in detail with these issues and, when they do, it is primarily regarding mistake of law in connection with Contempt of the Tribunal, and not in the context of core crimes. 43

The reason for the limited practical importance for core crimes is rather simple: Definitions of crimes under international law have been developed in accordance with appearances of behavior, which could be observed on the battlefield or, in the context of other atrocities, committed more or less openly. Deviance from generally acknowledged laws and customs of war, or broadly accepted conventional international humanitarian agreements, was generally apparent for all to see; Fletcher once referred to this as the ‘pattern of manifest criminality’ in the context of domestic criminal law.

These core crimes, such as the Grave Breaches of the Geneva Conventions, were defined by ‘visible’ conduct; there was, therefore, little chance for suspects to deny what was or could have been observed by many persons – including but certainly not limited to victims. When the prosecutor had to prove a mental element such as acting with ‘intent and knowledge’, the mental element could be easily inferred from the objective requirements that were ‘self-convincing’. For example, the required mental element is easily inferred when the defendant killed surrendered soldiers who were disarmed and taken into custody, killed POWs in concentration camps, killed wounded persons on the battlefield, or killed civilians who were not taking an active part in hostilities.

Disputes in court were mainly limited to cases where ‘unusual’ crimes were prosecuted and ‘defended’ with contradictory arguments like in the so called ‘*Ärzte-Urteil*’ at Nuremberg, discussed above in mn 4. The need to deal with false perceptions of the factual situation or of the ‘legal reality’ may occur not only when definitions of crimes contain elements shaped by a legal value judgement, like persecution under article 7(1)(h), or ‘in violation of the international law of armed conflict’ under article 8(2) (b)(XX), but also in cases of violations of an order of the Court or other modalities of Contempt of Court. 44

Contempt of Court is, however, not a crime within the jurisdiction of the Court. It is regulated by article 71 and rules 170 *et seq.* But the General Principles of Criminal Law defined and acknowledged in Part 3, articles 22 *et seq.*, which include article 32, are not limited to crimes within the jurisdiction of the Court. Such a limitation may exist only as far as expressly mentioned, like in articles 22 and 25(2). Otherwise, these principles apply generally, which means also to cases which fall within a ‘side competence’ of the Court, such as ‘Offences against the administration of the Court’ under article 70 and the sanctioning of ‘misconduct before the Court’ under article 71. 45

The so-called *Čelebići Case* dealt with considerations concerning mistake of law. The Appeals Chamber stated, with reference to the Trial Chamber’s findings and the Grave Breaches of the Geneva Conventions: 46

‘Mucić’s submission [which was “that in 1992 he could not have known that there was a possibility that the confinement of persons at Celebici could be construed as illegal under an interpretation of an admixture of the Geneva Conventions and article 2 lit. g of the Statute of the Tribunal”], has no merit because it is clear from the provisions ... from Geneva Convention IV that the detention of those persons was illegal at the very time of their detention’.⁵⁸

The Tribunal only required knowledge of the constituent facts and no value judgement in relation to this factual situation in cases where the illegality of the situation ‘is clear’ by these facts.

⁵⁸ *Prosecutor v. Mucić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, paras 373-75.

Similar wording can be found with regard to violations of orders of the Court. For instance, the Trial Chamber stated:

[i]f mistake of law were a valid defence in such case [Jović argued that the Blaškić Chamber's orders did not bind him], orders would become suggestions and a Chamber's authority to control its proceedings, from which the power to punish contempt in part derives, would be hobbled'.⁵⁹

The Appeals Chamber confirmed this decision, concluding that,

'knowledge of the legality of the Trial Chamber's order is not an element of the mens rea of contempt'.⁶⁰

47 The only ICC case to deal with mistake of law in the context of core crimes is *Lubanga*.⁶¹ The defendant argued that he was unaware that recruiting child soldiers triggered individual criminal responsibility, and even argued that he received insufficient notice that the Rome Statute was in effect during the time and location of the alleged crimes.⁶² The Pre-Trial Chamber first dispensed the legality concerns on factual grounds, noting that the Hema and Lendu communities of Ituri, and Lubanga specifically, were aware of the DRC's ratification of the Rome Statute in 2002 and 'the type of conduct which gives rise to criminal responsibility under the Statute'.⁶³ The Pre-Trial Chamber then discussed the scope of mistake of law under article 32(2), which it described as 'relatively limited'.⁶⁴ In keeping with this statement, the Chamber rejected Lubanga's mistake of law argument. In evaluating his claim, the judges apparently adopted the German 'layman's parallel evaluation test' described above. Though the chamber did not refer to the test in those terms, it did conclude that the mistake of law defense is limited to those situations where the defendant is 'unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning)'.⁶⁵ Applying this standard, Lubanga's argument failed because there was insufficient evidence in the record that he labored under a relevant confusion. The argument might have succeeded if there had been evidence that he misunderstood the concept of 'recruitment' as including forcible conscription but excluding voluntarily enlistment of children, which would have constituted a normative mistake.⁶⁶ In such a case, the normative element could not be understood in purely layman's terms. But no factual basis existed for reaching this conclusion about Lubanga's state of mind.⁶⁷

48 However, the real significance of the discussion in *Lubanga* was the chamber's cryptic adoption of the layman's parallel evaluation test in its interpretation of article 32(2).⁶⁸ The use of a German framework to understand and qualify mistakes of law is in keeping with the use of German criminal law theory by the Pre-Trial Chamber, and the ICC more generally (for example with regard to co-perpetration). At least some commentators have complained that the layman's parallel evaluation test is inconsistent with the common law framework for mistake of law, and also inconsistent with some civil law jurisdictions that regard mistake of

⁵⁹ *Prosecutor v. Jović*, IT-95-14 & IT-95-14/2-R77, Judgement, Trial Chamber, 30 August 2006, para 21.

⁶⁰ *Prosecutor v. Jović*, IT-95-14 & IT-95-14/2-R77, Judgement, Appeals Chamber, 15 March 2007, para 27.

⁶¹ *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para 294. For a discussion, see Ambos, *Treatise on International Criminal Law* 371–372.

⁶² *Id.* At paras 294–296.

⁶³ *Id.* At para 312.

⁶⁴ *Id.* At para 305.

⁶⁵ *Id.* At para 316.

⁶⁶ See Weigend (2008) 6 JICJ [471], 476; Ambos, *Treatise on International Criminal Law* 372 (concluding that 'the defence could have raised a somewhat more sophisticated line of argumentation. If Lubanga had, for example, argued that he was aware of the general prohibition of enlisting and conscripting children but was convinced that this provision was only applicable to the forcible recruitment ("conscripting") of children, the Chamber would have been faced with the difficult question whether an erroneous evaluation of very specific normative elements of a crime... can be a ground for excluding criminal responsibility').

⁶⁷ *Lubanga* (Decision on the confirmation of charges), note 59, para 308, 316.

⁶⁸ See also the discussion of the test with regard to core crimes in Eser, in: Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 889, 925.

law as an excuse negating culpability, which is far different from a negation of mens rea.⁶⁹ These considerations are not, by themselves, an absolute barrier to the ICC's interpretation of article 32(2). It is clear, however, that in *Lubanga* the ICC preferred a reading of the Rome Statute informed by German criminal law theory, and that the layman's parallel evaluation test will help structure future international decisions on mistake of law.

Common to both groups of decisions referred to above is the difference between awareness 49 of facts that shape the definition and an evaluation of these facts by the defendant, which is not required to establish criminal responsibility. For all these aspects it is sufficient that the defendant knows the facts, *i. e.* is aware of them in the sense of article 30(3), and that he nevertheless believes that the situation and/or his behaviour was not unlawful. A legal evaluation of noticed facts is not required from the perpetrator, but is exclusively the task of those who apply the law and decide the fate of the defendant. A false value judgement by the perpetrator himself is not a relevant mistake of law, at least as long as the perpetrator correctly understands the underlying facts of the situation. Such situations and their consequences have been dealt with comprehensively above under mn 17 *et seq.* They may play a role, if at all, as mitigating circumstances according to rule 145(2)(a) of the RPE. The above under mn 41, which considered the special rule concerning article 33, only underlines this general regulation.

2. Errors and appeal

The considerations above, dealing with the difference between mistake of fact and mistake 50 of law as well as value judgements may be helpful also when filing an Appeal to the Court or dealing with Appeal cases before it. Article 81 differentiates between errors (not mistakes) of facts and errors of law in paragraph 1(a) and (b). Such errors concern the factual situation at the Trial, in particular awareness of presented (or still-to-be presented) facts and evidence, as well as false conclusions in the sense of value judgements on which the sentence may have been founded. In these situations, the same assessment to facts and evaluations of law may be relevant for the defendant and the Prosecution. At the Appeals level, both may claim an error or even argue that the error caused an unfavourable decision from the judges.⁷⁰

3. Collateral damage as war crime?

These issues have even more practical importance for differentiating legitimate collateral 51 damage from war crimes. Both are strongly related by empirical appearance, as well as by

⁶⁹ Heller (2008) 6 *JICJ* [419], 437. Heller concludes that the Rome Statute, when properly interpreted, is far too accommodating with regard to mistakes by defendants because he concludes that the layman's parallel evaluation test, and other doctrinal mechanisms to restrict the doctrine of mistake of law, are all inapplicable. Faced with no viable doctrine to limit mistake of law arguments, he urges a legislative amendment to correct the problem. In contrast, Ambos argues the opposite, *i. e.* that the Rome Statute's treatment of mistakes of law 'is unduly strict and may be inconsistent with the principle of culpability'. See Ambos, *Treatise on International Criminal Law* 375 (describing the 'presumption of knowledge of the law' as a 'fiction bordering on the absurd'). The presumption probably holds for obvious war crimes such as intentionally attacking civilians but Ambos is correct to note that some war crimes, eg the notion of 'other inhumane acts', are vague and more indeterminate. Similarly, Stuckenberg (2014) 12 *JICJ* 311, 322, finds it deplorable that 'the Rome Statute did make a step backwards when it broadly excluded' mistake of prohibition defenses, especially because a 'soldier may honestly err about the precise content of one of the numerous and sometimes very intricate and constantly evolving rules of the laws of war'. In addition to Stuckenberg, other scholars recognize at least the possibility of the defense in cases of unavoidable mistakes. See eg Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 505; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 285. The warrant for this conclusion is that it would be a breach of the principle of culpability if the law required the defendant to act in such a way that was impossible for him (in the case of unavoidable mistakes). Under this view, culpability logically presupposes that the defendant has some choice in the matter.

⁷⁰ For the common approach and the differences between errors of facts or law on the one hand, compared with mistakes of facts or law on the other hand, the considerations by Staker and Eckelmanns in this Commentary under article 81, mn 28 *et seq.* and 35 *et seq.*

similar concepts. But, as demonstrated by article 8(2) (b)(iv), they have to be strictly separated because of their different material and mental elements and their consequences. Both may equally violate protected targets, but, due to their different material and/or mental approaches when attacking these targets, they may lead to exoneration or to criminal liability and punishment⁷¹.

The difference between harm caused by war crimes and collateral damage can be understood by scrutinizing the required mental elements. For the latter, ‘collateral damage’ may be ‘calculated’ but need not be; and when it is, it may be comprehended by ‘intent and knowledge’ in the modality of *dolus eventualis* and therefore amount to a war crime. If not, collateral damage does not trigger criminal responsibility, as long as it comes as ‘side effects’ to lawful military actions on military targets and is not ‘clearly excessive’, which means disproportionate ‘in relation to the concrete and direct overall military advantage anticipated’. In other words, the anticipated collateral damage must be weighed against the value of the military aims to be achieved by the military activity, a definition based on article 52(2) Add. Prot. I. War crimes, on the other hand, may be solitary actions violating international law, in particular the laws and customs of war or other rules of humanitarian warfare.

52 As an example, consider the war crime defined in article 8(2)(b)(iv). According to this definition, ‘intentionally launching an attack’ is *per se* admissible. Such an attack, for which intent and knowledge is required under article 30, becomes a war crime not by the consequences caused as ‘incidental loss’. The triggering element is within the *mens rea*, namely ‘the knowledge that such an attack will cause incidental loss’ on civilian targets or the environment. Such loss consequently does not have to appear by being realized and, therefore, does not have to be proven by the Prosecution as caused by the perpetrator. The Elements of Crimes, therefore, refer to this war crime under No. 3 with the phrase ‘would cause’ as well as ‘would be ... clearly excessive’. It is sufficient that the perpetrator foresaw the facts leading to these conclusions and if the result occurred it would ‘be clearly excessive in relation to the concrete and direct overall military advantage anticipated’.

53 With regard to such hypothetical losses, this definition does not trigger attempt liability. Whereas the *mens rea* for attempt liability requires intent and knowledge in relation to all material elements constituting the crime, independent of whether they have been realized or not, the knowledge required for article 8(2)(b)(iv) is only awareness in the sense of article 30(3). Acting ‘in the knowledge’ is only the intellectual part of the ordinary *mens rea*, *i. e.* the mental side. At the same time it implies that the ‘intent to cause’, the volitional part, is missing.

In these cases, the required mental element is associated only with the intellectual approach of the relevant behaviour. Therefore, an error about what damage will occur on protected targets is relevant only if it concerns the factual basis for such a prognosis. And it implies also that the suspect has the ‘correct knowledge’ about these facts, but wrongfully evaluates them as not causing such losses or, if nevertheless they appear, that they would not be ‘clearly excessive’.

54 With regard to other war crimes, article 32 is, in principle, applicable in all its modalities. With regard to collateral damages as for all value judgements, there is a difference: A mistake of fact or law concerning the legality of the underlying military attack is treated as one of the usual mistakes, to which article 32 may be applied. Since the responsible person does not have to have any intent at all with regard to the so-called collateral damages, a false perception about their appearances is no defence. It may only shape the legality or illegality of the underlying military action and thus the criminal responsibility for this behaviour, the attack potentially or in reality causing such damages. Because excessive collateral damage not only makes the harm it causes illegal but also the attack itself illegal, it triggers liability for punishment.

⁷¹ See Triffterer, in: Moos, Jesionek and Müller (eds.), *Festschrift für Roland Miklau zum 65. Geburtstag* (2006) 559, 559 *et. seq.* See also Dörmann and Arnold, *article 8*, mn 31–35 and 58–60. See also Reynolds (2005) 56 *AFLRev* [1], 64 *et. seq.*

It may be argued that article 8(2)(b)(iv) requires, by the phrase ‘in the knowledge that’, a mental requirement additional to the ordinary *mens rea* with which the attack must be launched: awareness that the attack ‘will cause incidental loss’ of civilians or ‘damage to the natural environment’ and that such consequences, if they are realized, ‘would be clearly excessive in relation to the concrete and direct overall military advantage anticipated’. But perhaps this formulation describes only circumstances, characterizing the constituent elements of an attack falling within the scope and notion of this war crime. ‘Knowledge’ would then only emphasize what is already required for ordinary intent in the sense of article 30: awareness of a material circumstance of the attack.

In any event, the formulation ‘in the knowledge that’ refers to facts, which according to the knowledge of the perpetrator may lead to the conclusion that, due to the character of the attack, there is a risk that its targets are protected, which the perpetrator does not have to intend but only has to know. This means that the risk has to be covered by the intellectual, though not the volitional, part of the *mens rea*.

What consequences with regard to criminal responsibility and a mistake of fact or law derive from this proposition? In this case, the word ‘knowledge’ only repeats what is already required by article 30: the perpetrator has to know the facts which lead to the conclusion that ‘collateral damages’ will occur by launching the attack. An error, or the belief that the attack will not cause incidental loss or damage, is a false value judgement and therefore does not relieve the defendant from criminal responsibility. The same is true with regard to a false assessment concerning the requirement that the damage be ‘clearly excessive’⁷².

This result is satisfying and convincing: the attacker has to bear the risk of collateral damages when, for instance, he knows that there are more civilians than soldiers around the targeted building. Military actions are permitted only when the risk for ‘protected targets’ is excluded or, at least, minimized and, therefore, appears ‘negligible’, which even in the latter case is ‘bad enough’ for the victims. But a soldier who knows about the potential or actual ‘clearly excessive’ incidental damage to protected targets (by his awareness of facts which establish this relationship), should not be permitted to attack ‘military targets’. In particular, the experience of 21st century warfare suggests that, in general, the amount of civilian or protected targets destroyed in battle is very high and may not be justified when weighed against the anticipated value of the military objective.

Therefore, an excursus to a diverging opinion. Jefferson D. Reynolds has pointed out that ‘many attacks are launched with the knowledge that they will result in some civilian casualties’⁷³. He further states in his analysis: ‘A defendant would not be criminally liable if an attack was executed under the personal belief that any collateral damage was not excessive compared to the military objective achieved’⁷⁴.

Reynolds backs this opinion by referring in his footnote 301 to the Elements of Crimes. There is an overall principle for all crimes within the jurisdiction of the Court listed under No. 4 in the General Introduction:

‘With respect to mental elements associated with elements involving value judgement, such as those using the terms “inhuman” or “severe”, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated’⁷⁵.

In fact, Element No. 3 for article 8(2)(b) (iv) in its formulation:

‘The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be

⁷² For a different opinion see Bothe, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 379 *et. seq.*, 400. See also Elements of Crime, Annex II in this Commentary, fn. 37.

⁷³ Reynolds (2005) 56 *AFLRev* [1], 70.

⁷⁴ *Id.* at 71.

⁷⁵ Elements, Annex II in this Commentary.

clearly excessive in relation to the concrete and direct overall military advantage anticipated⁷⁶ may be understood as such an exception. And, as to avoid any doubt and opposite interpretation of this Element, because its interpretation according to the scope and structure of crimes in relation to mistake of fact and law, the drafters added to this Element footnote 37 with a specific interpretation, which reads:

‘As opposed to the general rule set forth in paragraph 4 of the General Introduction this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time’⁷⁷.

This interpretation tries to narrow the definitions of all crimes within the jurisdiction of the Court, which use ‘mental elements associated with elements involving value judgement’. If the interpretation of Reynolds were accepted, it would not accord with the spirit of the Rome Statute preamble and its stated goal of preventing impunity, but would instead further impunity for those persons who launch attacks ‘in the knowledge that they will result in some civilian casualties’, as mentioned above.

This approach is dangerous because it frustrates the law’s goal of fostering compliance, as can be seen when Reynolds continues by citing Michael Bothe:

‘Under this interpretation a defendant’s culpability depends entirely and exclusively on that individual’s own value judgement⁷⁸. If the defendant believed the collateral damage was not excessive, then there could not be a finding of guilt⁷⁹. The court’s own evaluation of the defendant’s value judgement as to the excessive character of the damage is irrelevant⁸⁰. Defendants are able to make an independent value judgement that ultimately determines their own criminality and rewards willful ignorance⁸¹. Commanders who teach their subordinates that they should only launch attacks when they have the personal belief that the collateral damage would not be excessive relative to the anticipated military advantage, run the risk that their subordinates will not be sufficiently careful in selecting military targets nor avoiding civilian damage.

The above-mentioned danger to the interests of justice is not diminished when Reynolds admits: ‘Although the ICC appears to adopt this approach in the ICC Elements of Crime, it is also free to disregard it’⁸².

It does not help to emphasize the independence of the Court in relation to the Elements, after they have been approved and acknowledged by the ASP without discussion. Reynolds himself mentions that the Elements are (merely!) guidelines that the Court may or may not apply.

In relation to the war crime defined in article 8(2)(b)(iv), the Court will hopefully not adopt what the ASP has recommended without open consideration and discussion in plenary.

- 57 If the Court would follow what is intended by article 9 to assist its interpretation and application of article 8(2)(b)(iv), the preventive function of International Criminal Law may even collapse. If military personnel can launch attacks in the belief that the expected damage to protected targets will not be ‘clearly excessive’ compared with the anticipated military advantage, they may be tempted to broaden the risk to such targets in almost unlimited ways because they do not risk criminal responsibility and punishment. The value of the military advantage will inevitably be decided first by the military with an optimistically high evaluation, which is difficult to control because of, among other things, the secrecy of military strategy. The higher the anticipated military advantage is calculated, the more loss

⁷⁶ *Ibid.*

⁷⁷ See Annex II in this Commentary.

⁷⁸ Reynolds (2005) 56 *AFLRev* [1], 71, with reference in fn. 301 to Bothe, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 379, 400.

⁷⁹ *Id.* with the same reference to Bothe.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 72.

would be 'allowed' as so-called proportional 'collateral damage'⁸³. Such an approach should not prevail and not shape the intensity and character of attacks launched for whatever military reasons, if International Criminal Law is to provide (as it should) effective protection for the civilian population and the natural environment⁸⁴.

⁸³ See also Triffterer, in: Moos, Jesionek and Müller (eds.), *Festschrift für Roland Miklau zum 65. Geburtstag* (2006) 559.

⁸⁴ For these aspects in the context of the Kampala Review Conference, see also Triffterer, 'The Object of Review Mechanisms: Statutes' Provisions, Elements of Crimes and Rules of Procedure and Evidence' (Conference on International Criminal Justice, Turin 14–18 May 2007).

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Literature: Ambos, K., 'Zur strafbefreienden Wirkung des "Handelns auf Befehl" aus deutscher und völkerstrafrechtlicher Sicht', (1998) *JR* 221; *id.*, 'Defences in International Criminal Law', in: B. S. Brown (ed.), *Research Handbook on International Criminal Law* (Edward Elgar 2011) 299; *id.* and Bock, S., 'Germany', in: A. Reed and M. Bohlander (eds.), *General Defences in Criminal Law – Domestic and Comparative Perspectives* (Ashgate 2014) 227; Bantekas, I., 'Defences in International Criminal Law', in: D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court – Legal and Policy Issues* (Hart 2004) 263; Cryer, R., 'Superior Scholarship on Superior Orders: An Appreciation of Yoram Dinstein's the Defence of "Obedience to Superior Orders" in International Law', (2011) 9 *JICJ* 959; *id.*, 'Defences/Grounds for Excluding Criminal Responsibility', in: *id. et al.* (eds.), *An Introduction to International Criminal Law and Procedure* (OUP 3rd edn. 2014) 398; Dinstein, Y., *The Defence of 'Obedience to Superior Orders' in International Law* (Sijthoff 1965); *id.*, 'Defences', in: G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law*, Vol. I (Kluwer Law International 2000) 369; Dufour, G., 'La défense d'ordre supérieurs existe-t-elle vraiment?', (2000) 82 *IRevRC* 969; Elliot, C., 'France', in: K. J. Heller and M. D. Dubber (eds.), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2011) 209; Eser, A., "'Defences" in Strafverfahren wegen Kriegsverbrechen', in: K. Schmoller (ed.), *Festschrift für Otto Triffterer zum 65. Geburtstag* (Springer 2nd edn. 1998) 755; *id.*, Lagodny, O. and Triffterer, O., 'Proposals to Amend the 'Draft Code of Crimes against the Peace and Security of Mankind"', in: Triffterer, O. (ed.), *Acts of Violence and International Criminal Law – A New Position to Fight Abuse of Power*, (1997) 4 *CroatianAnnCrimL&Prac* 872; Fournet, C., 'Judicial Development of the Law of Defences by the International Criminal Tribunals', in: S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Tribunals* (OUP 2010) 229; Fuhrmann, P., *Der höhere Befehl als Rechtfertigung im Völkerrecht* (Beck 1963); Gaeta, P., 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law', (1999) 10 *EJIL* 172; Garraway, C., 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?', (1999) 81 *IRevRC* 785; Glaser, S., 'L'Ordre hiérarchique en droit international pénal', (1953) 33 *Revue de Droit Pénal et de Criminologie* 283; Grayson, J. W., 'The Defence of Superior Orders in the International Criminal Court', (1995) 64 *NordJIL* 243; Green, L. C., *Superior Orders in National and International Law* (Sijthoff 1976); *id.*, 'The Defence of Superior Orders in the Modern Law of Armed Conflicts', (1993) 31 *AlbertaLRev* 320; *id.*, 'Article 11: Order of a Government or Superior', in: M. C. Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against Peace and Security of Mankind* (Erès 1993) 191; Heller, K. J., 'The Rome Statute of the International Criminal Court', in: K. J. Heller and M. D. Dubber (eds.), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2011) 393; Heugas-Darraspen, E., 'Article 33. Ordre hiérarchique et ordre de la loi', in: F. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article*, Vol. I (Pedone 2012) 945; Jescheck, H.-H., *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Röhrscheid 1952); Knoops, G.-J. A., *Defenses in Contemporary International Criminal Law* (Martinus Nijhoff Publishers 2nd edn. 2008); Korte, M., *Das Handeln auf Befehl als Strafausschließungsgrund* (Nomos 2003); Kos-Rabcewicz-Zubkowski, L., 'Seventh Interim Report', in: ILA (ed.), *Report of the Sixty-Second Conference Held at Seoul* (ILA 1986) 357; Liang, J., 'Defending the Emergence of the Superior Orders Defence in the Contemporary Context', (2010) 2 *GoJIL* 872; McCoubrey, H., 'From Nuremberg to Rome: Restoring the Defence of Superior Orders', (2001) 50 *I&CompLQ* 386; Meyer, F., 'Ausschluss und Minderung strafrechtlicher Verantwortung bei Handeln auf Weisung', (2012) 159 *GA* 557; Mezzetti, E., 'Grounds for Excluding Criminal Responsibility', in: Lattanzi, F. (ed.), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998) 147; Nill-Theobald, C., 'Defences bei Kriegsverbrechen am Beispiel Deutschlands und der USA', (edition iuscrim 1998); Paust, J. J., 'Superior Orders and Command Responsibility', in: M. C. Bassiouni (ed.), *International Criminal Law, Vol III, Enforcement* (Transnational Publishers 1987) 73; Saland, P., 'International Criminal Law Principles', in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) 189; Schabas, W. A., 'General Principles of Criminal Law in the ICC Statute', (1998) 6 *EJCLCJ* 400; Scaliotti, M., 'Defences Before the International Criminal Court: Substantive Grounds for

Excluding Criminal Responsibility – Part 1’, (2001) 1 *JCLRev* 111; Schmoller, K., ‘§ 110. Eigenmächtige Heilbehandlung’, in O. Triffterer, C. Rosbaud and H. Hinterhofer (eds.), *Salzburger Kommentar zum Strafgesetzbuch* (Lexis Nexis 5th supplement 1998); Triffterer, O., *Österreichisches Strafrecht Allgemeiner Teil* (Beck 2nd ed. 1994); *id.*, ‘Bestandsaufnahme zum Völkerstrafrecht’, in: G. Hankel and G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (Hamburger Edition 1995) 169; UNWCC (ed.), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (H. M. Stationery Office 1948); Vogler, T., ‘The Defense of “Superior Order” in International Criminal Law’, in: M. C. Bassiouni and V. P. Nanda (eds.), *A Treatise on International Criminal Law, Vol. I, Crimes and Punishment* (Thomas 1973) 619; Zimmermann, A., ‘Superior Orders’, in: A. Cassese, P. Gaeta and J. R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. I* (OUP 2002) 957.

Content

A. General remarks	1
I. Historical development	1
II. Conceptual framework and article 32	10
B. Analysis and interpretation of elements	13
I. The Heading: ‘Superior orders and prescription of law’	13
II. Paragraph 1	14
1. General rule: ‘shall not relieve’	14
a) ‘crime within the jurisdiction of the Court’	15
b) Committing ‘pursuant to an order’	16
aa) Definition of order	17
bb) ‘of a Government or of a superior’	18
cc) ‘military or civilian’	22
dd) Connection between order and conduct	23
c) Legal consequences	24
2. Exemption	25
a) Conditions	26
aa) ‘legal obligation to obey’	26
bb) ‘did not know that the order was unlawful’	27
cc) ‘not manifestly unlawful’	28
b) Legal consequences	29
III. Paragraph 2: ‘manifestly unlawful’	30
1. Presumptio iuris et de iure	30
2. Additional cases?	31
C. Special remarks: Superior orders and command responsibility, article 28	32

A. General remarks

I. Historical development

Article VIII of the 1945 Nuremberg Charter was the first *international* document dealing expressly with the criminal responsibility of subordinates. It completely excluded superior orders as a valid defence by providing that acting ‘pursuant to order of his Government or of a superior shall not free [...] from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires’¹. The IMT approved the underlying principle of absolute liability of the subordinate and argued that it.

‘is in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the International Law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of punishment. The true test [...] is not the existence of the order, but whether moral choice was in fact possible’².

¹ See UNTS 288 (1951); also Eser, in: Schmoller (ed.), *Festschrift für Triffterer* (1998) 755, 759 and fn. 14. This rule was confirmed in article II para. 4 (b) of the Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity of 20 December 1945, which, however, did not include the words ‘that justice so requires’. See also the overview on the historical development of the superior order defence by McCoubrey (2001) 50 *I&CompLQ* 386, 387–392.

² *The Trial of the Major War Criminals*, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (H. M. Attorney General by HMSO, London 1950), Part 22, 447; *crit.* as ‘the total rejection

Given the 'shocking and extensive' crimes in question which 'have been committed consciously, ruthlessly and without military excuse or justification', however, the IMT deemed a mitigation of punishment to be inappropriate³. In some of the subsequent proceedings, judges have tried to find more flexible solutions giving due regard to the soldier's dilemma who is trapped between the duty to obey the orders of his or her superior and the imperative demands of (international) criminal law⁴. Nevertheless, the issue was highly disputed not only between the parties in these proceedings but also between the judges⁵.

It is surprising that the Genocide and the Geneva Conventions of 1949 did not take any specific position on the (possible) exonerating effects of superior orders. The Genocide Convention provides in article III merely for the punishability of conspiracy and incitement while the four Geneva Conventions of 1949 mention for instance articles 49, 50, 129 and 146 the punishability of *orders to commit* war crimes. Since it is acknowledged that the prevention of such orders is the best measure to avoid such crimes and taking into consideration that the Geneva Conventions have not created new international humanitarian law but merely codified already existing laws and customs of war prohibiting certain behaviour⁶, the silence on this question of accountability is understandable.

- 2 In accordance with its mandate to elaborate a (rather complete) Draft Code of Offences against the Peace and Security of Mankind, the ILC included in its 1951 Draft an article on superior orders (article 4), adhering in principle to the Nuremberg precedent albeit with two modifications⁷: 'shall not free' was replaced by 'does not relieve' and the possibility of mitigating punishment was not expressly mentioned. The main change was that the irrelevance of an order was made dependent on that 'a moral choice was in fact possible'. In its report, the ILC referred expressly to '[p]rinciple IV of the Commission's formulation of the Nuremberg principles, on the basis of the interpretation given by the Nuremberg Tribunal to article 8 of its Charter'⁸. The proposed moral-choice criterion, which passed the Fifth Session of the General Assembly without any substantial modification, was meant to lay 'down the principle that the accused is responsible only if, in the circumstances, it was possible for him to act contrary to superior orders'⁹. Mitigation of punishment was not mentioned but also not excluded; rather it was regulated in the general rule of article 5 of the 1951 Draft Code.

In its revised 1954 Draft Code, the ILC emphasized that article 4 only excludes superior orders as a valid defence 'in international law'; in addition, the wording 'a moral choice was

of the superior order defence was a novelty and went beyond the existing international law', Ambos, *Treatise on ICL I* (2013) 378.

³ *The Trial of the Major War Criminals*, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (H. M. Attorney General by HMSO, London 1950), Part 22, 493.

⁴ The soldier's dilemma was summarized by the Israeli Supreme Court as follows: 'There is also the personal problem of the soldier himself when placed in the dilemma that, if he disobeys the order of his commanding officer, and it later turns out to have been lawful, he will be brought before a court-martial, whereas if he obeys it, and it later transpires that this was not the case, he will be liable to punishment under the general criminal law.', *A-G of Israel v. Eichmann*, Supreme Court Judgment, 29 May 1962, (1968) 36 *ILReporter* 277, 314 para. 15; see also Dinstein, 'Obedience to Superior Orders' (1965) 5–9; Grayson (1995) 64 *NordJIL* 243, 251; Bantekas, in: McGoldrick, Rowe and Donnelly (eds.), *Permanent ICC* (2004) 263, 269; Liang (2010) 2 *GoJIL* 872, 872–874; Ambos, *Treatise on ICL I* (2013) 376 with further references.

⁵ According to the judgement in the Hostage Case, for instance, a subordinate who is unaware of the unlawfulness of the order may claim a mistake of law, *US v. von Listz et al.* (Hostage Case), 19 February 1948, in: US General Printing Office, *Trial of War Criminals*, xi (1997) 1236–1237; thereto Jescheck, *Verantwortlichkeit der Staatsorgane* (1952) 388 *et seq.* In the High Command Case, the Tribunal indicated that in case the pressure exercised by the superior amounted to duress, the subordinate could be excused, *US v. von Leeb et al.* (High Command Case), 27 October 1948, in: US General Printing Office, *Trial of War Criminals*, xi (1997) 508–509; see also the case-law overview by Ambos (1998) *JR* 221, 223–224.

⁶ See Triffterer, *Dogmatische Untersuchungen* (1966) 190; *id.*, in: Hankel and Stuby (eds.), *Strafgerichte* (1995) 169, 177–178.

⁷ See also Green (1993) 31 *AlberiaLRev* 320, 331–333.

⁸ 1951 ILC Draft Code, 137.

⁹ 1951 ILC Draft Code, 137.

in fact possible to him' was replaced by 'in the circumstances at the time, it was possible for him not to comply with that order'. This alteration occurred because of views that 'moral choice' was a difficult concept to define and put too much emphasis on the *moral* and not on the *factual* or the *legal* situation in which the subordinate had committed the crime¹⁰.

The 1986 Draft Code contained a new article 8 on 'Exceptions to the principle of responsibility'. Its subpara. (c) provided that 'the order of a Government or of a superior does not relieve the perpetrator from criminal responsibility unless he acted under the threat of a grave, imminent and irremediable peril'. According to subparagraph (e), this and all other exceptions to criminal responsibility should be inapplicable if there was a 'breach of a peremptory rule of international law', the defence originated in a fault on the part of the perpetrator or 'the interest sacrificed is higher than the interest protected'¹¹. However, these limitations were not contained in the later version of this provision, then named article 9. The latter changed the concept of superior orders by mentioning that it should constitute an exception to criminal responsibility and returned to the 1951 Draft Code's formula of 'provided a moral choice was in fact not possible'¹². In its commentary, the ILC acknowledged that according to the Hostage and High Command Cases¹³ compliance to an order may already be 'justified by coercion and by an error as to the lawfulness of the order'. In the end, it nevertheless confirmed the need for a special regulation on superior orders¹⁴.

The 1991 ILC Draft Code returned to the 1954 Draft and substituted the 'moral choice' criterion with the possibility 'not to comply with that order' in article 11. In addition, it included in article 14 a regulation according to which 'the competent court shall determine the admissibility of defences under the general principles of law' and 'shall, where appropriate, take into account extenuating circumstances'.

Parallel to the endeavour of the ILC, alternative models were developed by the AIDP and the ILA. The 1980 AIDP Draft mentioned superior orders in the context of other defences in article IX section 5 expressing that '[a] person [...] is not relieved from responsibility by the sole fact that he was acting – pursuant to "superior orders", except where the provisions of article IX, Section 5 were applicable'. Article IX section 5 stated that 'a person acting in obedience to superior orders shall not be exonerated from responsibility – if he could have reasonably known that his conduct constituted a crime and he had a moral choice in refusing to obey the order'¹⁵.

The 61st Conference of the ILA adopted in 1984 a resolution which proposed in the annexed Protocol II, section III, Justifications, paragraph 5, a provision similar to the present article 33:

'Every one is justified when he, in engaging in the conduct charged to constitute an offence, does no more than execute an order of *his superior in the armed services* which he does not know to be unlawful or which is not for him obviously unlawful' (emphasis added).

Proposals to include beside armed services, for instance, the police and (other) security forces were rejected. In the Explanatory Report to Protocol II on Defences, Annex D under section Ad III paragraph (5), it was expressly mentioned, that

[t]he minimum prerequisite for the justification of an order is for the subordinate person, that the order is not obviously unlawful. So neither the theory of the "bayonettes intelligentes" nor the one of the total exemption of the subordinate persons from criminal liability for actions on order are laid down here.'

¹⁰ See, e.g., Fuhrmann, *Der höhere Befehl* (1963) 110; Nill-Theobald, 'Defences' (1998) 77.

¹¹ See also in this commentary Triffterer and Ohlin, article 32 mn 5.

¹² See Report of the ILC on the Work of its Thirty-Ninth Session, 4 May–17 July 1987, (1987) 2 *YbILC*, Vol. II, Part 1, 7–9.

¹³ See note 5.

¹⁴ Report of the ILC on the Work of its Thirty-Ninth Session, 4 May–17 July 1987, (1987) 2 *YbILC*, Vol. II, Part 1, 9.

¹⁵ See Bassiouni, *ICL: Draft International Criminal Code* (1980) 141 *et seq.*, 152 and 163.

The underlying consideration was, that for various reasons ‘[t]he obviously possible knowledge of the unlawfulness by the subordinate person can only be assumed for very grave breaches of the law’¹⁶.

6 It was against this background that the ICTY Statute was drafted. Its regulation on superior orders, article 7 para. 4, is in its final version completely comparable with article VIII of the Nuremberg Charter, leaving unconsidered the drafts and the jurisprudence developed in the interim¹⁷. This appears to be understandable, since the aim was to formulate generally accepted international criminal law and the discussion about a more detailed formulation had at that time not led to a widely accepted result and could have led to an undesirable delay in establishing the ICTY.

7 With regard to the legal effects of superior orders, especially the ILA-Draft and the writing of scholars, members of the AIDP, refer to three major discernible opinions. The *traditional theory* called ‘*respondeat superior*’ is based on the notion that, when acting on superior orders subordinates, especially privates in the army, could not decide, if the order was lawful or unlawful because they do not know the relevant circumstances. Besides, it would be at least from their subjective point of view impossible for them to refuse to obey, since they are only tools of those in power¹⁸. The *opposite opinion* favours an ‘*absolute liability*’ of the subordinate arguing that only *lawful* orders can create an obligation to obey¹⁹. But as always in such rigid situations there is also a conciliatory branch of opinions. Some supporters of the ‘*respondeat superior*’ approach argue that orders should not relieve the subordinate of responsibility if they are ‘manifestly unlawful’²⁰. The second theory also has its compromising branch, called the ‘*mens rea principle*’, according to which the mental element may be lacking, if the subordinate mistakenly believes that the order was lawful²¹. The *third* opinion holds superior orders generally irrelevant with regard to the criminal responsibility but concedes that they may constitute *mitigating circumstances*²².

The 1994 ILC Draft Statute did not contain any regulation on superior orders and did not even mention this defence, because of its emphasis on enforcement and jurisdiction. Consequently, the 1995 *Ad Hoc* Committee did not consider this specific question in detail. However, the defence of superior orders was mentioned in the list of possible excuses leaving it to the Preparatory Committee to decide if at all and with what notion a regulation on this subject matter should be included in the Statute of the ICC²³.

8 Even though the Statutes of the ICTY and the ICTR with their identical provisions may – at first glance – raise the impression that the legal concept of superior orders was clarified, the situation was open when the Preparatory Committee started its work. Therefore, proposals published during the interim in the Updated Siracusa Draft and the 1996 ILC Draft Code were highly contentious²⁴. The discussion was structured according to the three

¹⁶ Kos-Rabcewicz-Zubkowski, in: ILA (ed.), *Report* (1986) 357, 374. For the different theories and scholarly views see Bassiouni, *Crimes Against Humanity* (2011) 590 *et seq.*; Eser, in: Schmoller (ed.), *Festschrift für Triffterer* (1998) 755, 760 *et seq.*; van Sliedregt, *Individual Criminal Responsibility* (2012) 287–291, 299–303.

¹⁷ On the adoption of the strict Nuremberg approach of absolute liability in the Statutes of various international and internationalized Tribunals Ambos, *Treatise on ICL I* (2013) 379.

¹⁸ For details see Bassiouni, *Crimes Against Humanity* (2011) 590 *et seq.*; Eser, in: Schmoller (ed.), *Festschrift für Triffterer* (1998) 755, 760, fn. 17 and 18; also Nill-Theobald, ‘*Defences*’ (1998) 69 *et seq.*; Gaeta (1999) 10 *EJIL* 172, 174 *et seq.*; Scaliotti (2001) 1 *ICLRev* 111, 127–129.

¹⁹ See Eser, in: Schmoller (ed.), *Festschrift für Triffterer* (1998) 755, 762 with further references in fn. 28 and 29; also Nill-Theobald, ‘*Defences*’ (1998) 71 *et seq.* (95).

²⁰ See, for example, Vogler, in: Bassiouni and Nanda (eds.), *Treatise on ICL* (1973) 619, 634.

²¹ Dinstein, ‘*Obedience to Superior Orders*’ (1965) 76 *et seq.*, 87 *et seq.*; also Eser, in: Schmoller (ed.), *Festschrift für Triffterer* (1998) 755, 763 fn. 32.

²² See, for example, Jescheck, *Verantwortlichkeit der Staatsorgane* (1952) 268.

²³ See *Ad Hoc* Committee Report, Annex II (Guidelines), 58.

²⁴ See, for instance, Preparatory Committee Decisions 1997, article M with fn. 17: ‘There were widespread doubts about the contents and the placement of this paragraph’; see also Gaeta (1999) 10 *EJIL* 172, 188–9; Saland, in: Lee (ed.), *ICC: Making of the Rome Statute* (1999) 189, 210–212; Zimmermann, in: Cassese, Gaeta and Jones (eds.), *Rome Statute of the ICC* (2002) 957, 966–967.

opinions summarized above (mn 7). In addition, it was considered whether subordinates receiving an order which was not manifestly but ‘just simply unlawful’, should not be relieved of criminal responsibility, ‘if it transpires that their commander was acting illegally in giving the order, and if they should have made further inquiries before obeying the order’. The question of which facts and rules should be decisive for a judgment on the lawful- or unlawfulness of an order was also debated²⁵. Right from the beginning there was a broad agreement that superior orders should not relieve from criminal responsibility in cases of genocide and crimes against humanity. But it was also considered that this defence should be applicable to only a few crimes outside these two groups²⁶.

The decisive break-through came in the *second session* with a proposal not accepting superior orders as a full defence but leaving it to the discretion of the Court to consider them as a mitigating circumstance if ‘justice so requires’. The *second proposal* was to exclude it (only) for genocide, crimes against humanity and aggression but nevertheless accept it as a mitigating circumstance. In cases of grave breaches of the Geneva Conventions and serious violations of the laws and customs of war the subordinate should be relieved of criminal responsibility unless the order was manifestly unlawful or in conflict with the rules of international law or international treaties. It was also suggested that ‘persons who have carried out acts ordered by the Security Council or who have acted on its behalf and in accordance with a mandate issued by it’ shall not be criminally responsible²⁷. This second proposal appeared for the first time under the new heading: ‘Prescription by law, and orders of the legitimate authority’. It was meant to clarify that carrying out ‘an act prescribed or authorized by legislation or regulations or an act ordered by the legitimate authority’ shall not exempt as such from criminal responsibility²⁸.

In the 5th session of the Preparatory Committee it was proposed that superior orders ‘shall 9 relieve the person of criminal responsibility, unless the order appeared to be manifestly unlawful’. It was considered that every order ‘in conflict with the rules of international law applicable in armed conflict’ amounted to an example of such illegality²⁹. In deference to this debate, article 32 of the Consolidated Draft has been phrased similarly but contains, even though in brackets, almost the final version of the Rome Statute: ‘shall not relieve the (that) person of criminal responsibility unless.’³⁰ This variety of opinions and proposals mirrors the whole scale of what has been discussed in and outside the UN since Nuremberg. It therefore is not surprising that the final version of article 33 is a compromise solution which tries to strike a balance between the different approaches³¹:

II. Conceptual framework and article 32

Regulations on responsibility of subordinates appeared necessary or at least advisable after 10 the Act of State doctrine had lost its validity and *individual* responsibility for crimes under international law became more and more accepted after the turn of the century and especially after the First World War. The aim of the drafting process was to clarify that subordinates could no longer hide behind the responsibility of their superiors or their States. To achieve the broadest possible *deterrent* effect, all three groups, State organs or officials, commanders and subordinates, should be equally responsible³². Accordingly, article 25 provides a com-

²⁵ 1996 Preparatory Committee II, article Q, Proposal 1, 102.

²⁶ *Ibid.*, article Q, Proposal 2, 102.

²⁷ *Ibid.*, article Q, Proposal 1 and 2, 102.

²⁸ *Ibid.*, article Q, Proposal 2, 102.

²⁹ See Preparatory Committee Decisions Dec. 1997, Annex II, article M with fn. 20.

³⁰ See Preparatory Committee (Consolidated) Draft.

³¹ See also Dufour (2000) 82 *IREVRC* 969, 986–987; Ambos, *Treatise on ICL I* (2013) 380.

³² 1991 ILC Draft Code, commentary on article 11, pp. 256 *et seq.* And 1996 ILC Draft Code, commentary on article 5.

prehensive list of principles relevant to ‘Individual criminal responsibility’³³. Since article 25 para. 3, listing different kinds of participation in the commission of a crime, does not expressly mention commission by a subordinate, even though this might fall under another subdivision as voluntary or involuntary participation, it appeared necessary to regulate such a situation separately, because there was agreement that being a subordinate should not *by itself* relieve him or her of criminal responsibility, but may, under certain conditions, absolve from or mitigate punishment.

- 11 This is the background in relation to which article 33 has to be seen and was included into the group of ‘defences’ mentioned in Part 3 on ‘General Principles of Criminal Law’. None of them is classified as justification or excuse. Rather they are described in a neutral language as ‘grounds for excluding criminal responsibility’ (article 31) or a fact which relieves a person of criminal responsibility (article 33). Article 32, which links the exonerating effect of mistakes of fact or law to the negation of the required mental element, is the exception³⁴.

The differentiation between justification and excuses may be of little practical relevance with regard to the responsibility of the direct perpetrator because both would result in an acquittal³⁵. It is nevertheless useful as it reflects the different moral rationales of grounds excluding criminal responsibility: A justification bars a person from criminal responsibility for an act which fulfils the elements of the offence definition but is regarded as lawful because the actor acted on the basis of a permissive norm which negates the effect of the *actus reus*. Excuses, to the contrary, do not render the act lawful. Rather, the individual wrongdoer is not blamed for having carried it out since he or she was unable to recognize the unlawfulness of his or her conduct or could not be expected to act lawfully.³⁶ The formulation ‘shall not relieve [...] of criminal responsibility’ in article 33 para. 1 is neutral and does not go in one or the other direction³⁷. But it is worthwhile drawing attention to article 2 para. 3 of the Torture Convention 1984, which provides that superior orders ‘may not be invoked as a justification for torture’³⁸.

- 12 In jurisprudence the opinion prevails that orders to commit any of the crimes punishable under international law are illegal (unlawful) and (therefore) *cannot justify* a corresponding behaviour by the subordinate. They may *excuse* him or her, where ‘a moral choice was not possible’ or where he or she was mistaken about the legality of the demanded behaviour³⁹. That these possibilities come close to the regulation in article 33 appears from its paragraph 1 and the conditions mentioned in subparagraphs (a)–(c). The reason behind this is that orders may cause a conflict of duties, on the one hand not to commit any crime and on the other to obey the order, given within the usual framework. This psychological pressure may be equally strong, whether the order is lawful or the person merely assumes that it is lawful⁴⁰. *In conclusion* it should be kept in mind that whatever conceptual framework is selected in the future, orders to commit a crime can never justify the crime committed in executing the order.⁴¹ However, the

³³ Heading of article 25; see for details in this commentary Ambos, article 25 mn 5 *et seq.*

³⁴ For more details see in this commentary Triffterer and Ohlin, *article 32 mn 14 et seq.*

³⁵ On the importance of this distinction for secondary participants and the right to self-defence, however, see Ambos, *Treatise on ICL I* (2013) 306.

³⁶ Ambos and Bock, in: Reed and Bohlander (eds.), *General Defences* (2014) 227; in more detail and with further references Ambos, *Treatise on ICL I* (2013) 304–307.

³⁷ See also in this commentary Eser, article 31 mn 17.

³⁸ See the commentary of the United Kingdom on the draft, reprinted by Green in: Bassiouni (ed.), *Commentaries on the ILC’s 1991 Draft Code* (1993) 191, 194.

³⁹ See, for instance, UNWCC (ed.), *History of the UNWCC* (1948) 274, especially on the jurisprudence in War Crimes Trials after the First and Second World War at 286 *et seq.*; see also Nill-Theobald, ‘Defences’ (1998) 80 *et seq.*

⁴⁰ See on the soldier’s dilemma already mn 1; see also in this commentary Triffterer and Ohlin, article 32 mn 14 *et seq.*; Triffterer, *Österreichisches Strafrecht* (1994) chapter 12 mn 165 *et seq.* On mistakes concerning the subordinates ‘legal duty to obey’ see mn 26.

⁴¹ See also van Sliedregt, *Individual Criminal Responsibility* (2012) 304; Ambos, in: Brown (ed.), *Handbook on ICL* (2011) 299, 323; *id.*, *Treatise on ICL I* (2013) 385. In France, however, obedience to superior orders is qualified as a justification, see Elliot, in: Heller and Dubber (eds.), *Handbook* (2011) 209, 227.

possibility remains of using this defence *not by itself*, but when the conditions come close to other defences like duress or coercion, as an *excuse* (also mn 14). In addition, even if the subordinate is not relieved of criminal responsibility, the fact that he or she committed a crime pursuant to an order may lead to a mitigation of punishment⁴². This possibility is not mentioned in article 33; but article 78 para. 1 obliges the Chambers to ‘take into account such factors as the gravity of the crime and the individual circumstances of the convicted person’. This general provision is specified further by rule 145 according to which circumstances falling short of constituting grounds for exclusion of criminal responsibility may constitute a mitigating circumstance (see also *infra* mn 24).

B. Analysis and interpretation of elements

I. The Heading: ‘Superior orders and prescription of law’

Headings of legal regulations are in many cases not the expression of a majority opinion of the legislator because they are not directly voted upon. Their wording, therefore, is often not a binding part of the respective articles. However, they may nonetheless have to be taken into consideration when interpreting elements of the respective articles⁴³. This is true with regard to article 33 as well.

When such a comprehensive heading was proposed in the Preparatory Committee, it was expressly stated that, besides orders, prescriptions and authorizations ‘by legislation and regulation’ shall not as such exempt from criminal responsibility⁴⁴. This underlines that regardless of the type of the order, the rank of the superior or the kind of prescription of law that lead to the commission of one of the most serious crimes of concern to the community of nations, they all ‘shall not relieve’ the subordinate ‘from criminal responsibility unless’ the conditions listed in para. 1 (a) to (c) are fulfilled. That reference to national prescriptions cannot relieve the subordinate follows also from article 21 on the applicable law, according to which ‘this Statute’ has priority, especially since *national* law can be applied only as far as it is ‘not inconsistent with this Statute’ (para. 1 [c]).⁴⁵

The heading further expresses that superior orders have to be seen in the light of ‘prescription of law’ and not independent from their lawfulness, thus referring to the fact, that illegal (unlawful) orders, as for instance an order to commit a crime, can generally have no legally binding effect. The *second* part of the heading is mirrored in paragraph 1 (a) by the words ‘under a *legal* obligation to obey orders’. This formula presupposes (only) a *general legal* obligation to obey orders given by the Government or the ‘superior in question’ according to the national law concerned or by a *de facto* commander under the laws and customs of war (in more detail mn 17, 19 and 26).

II. Paragraph 1

1. General rule: ‘shall not relieve’

The first half of paragraph 1 states very clearly, that – *in principle* – superior orders ‘shall not relieve [...] of criminal responsibility’. For psychological reasons and questions of proof this method of first establishing the principle of absolute liability of the subordinate and

⁴² Scaliotti (2001) 1 *ICLRev* 111, 141; Knoops, *Defenses* (2008), 130; Safferling *Internationales Strafrecht* (2011) § 5 mn 59; Ambos, *Treatise on ICL I* (2013) 385; Werle and Jeßberger, *Principles* (2014) mn 671.

⁴³ See, for instance, the headline of § 110 Austrian Penal Code concerning ‘Eigenmächtige Heilbehandlung’ and thereto Schmoller, in: Triffterer, Rosbaud and Hinterhofer (eds.), *Salzburger Kommentar* (1998) mn 22 *et seq.*

⁴⁴ 1996 Preparatory Committee II, article Q, Proposal 2, 102.

⁴⁵ Also Ambos, *Treatise on ICL I* (2013) 380.

then restricting it under exceptional circumstances was selected in preference to the possibility to recognize superior orders as a defence (in principle) and then nominating the exceptions, according to which this defence would *not* be applicable. Obedience to superior orders thus does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case.⁴⁶ In particular, the ‘soldier’s dilemma’ may constitute a mitigating circumstance (*supra* mn 11) and should be considered within the framework of the defences of duress and mistake⁴⁷.

Paragraph 1 as a whole does not express an opinion with regard to all conceivable orders in general. Rather, it narrows the scope of *relevant* orders by describing enumeratively the types of crimes they have to address and, in addition and alternatively, the institution or superior issuing the order thus limiting the applicability of article 33 in two respects. Its scope is even further restricted by paragraph 2 (see *infra* mn 30).

- 15 a) ‘crime within the jurisdiction of the Court’. First of all, the wording clarifies that article 33 is applicable only when a crime has been committed which falls ‘within the jurisdiction of the Court’, *i. e.*, genocide, crimes against humanity, war crimes and the crime of aggression (article 5). The Court’s jurisdiction over these crimes began with the entry into force of the Statute on the 1st July 2002 (article 126), but includes only those crimes committed thereafter. With regard to aggression, however, the ICC may exercise its jurisdiction at earliest after 1 January 2017 (article 15*ter*).

Thus, article 33 does not regulate the question of whether crimes under international law in general (which includes also less serious crimes than those mentioned in article 5) ought to be treated in the same way. It also expresses no opinion on how to deal with the question of superior orders in national law. But if States exercise their jurisdiction over crimes contained in article 5 they *genuinely* proceed only if they give respect to article 33⁴⁸. In other words, States that *in general* accept superior orders as a full defence without differentiation are unable genuinely to carry out the investigations or prosecutions in terms of article 17 para. 1 (a) or (b) and trigger the complementary jurisdiction of the Court. Therefore, even though the Statute cannot prescribe which laws national criminal jurisdictions have to apply with regard to those crimes mentioned in article 5 it nevertheless has an influence on the domestic level.

- 16 b) **Committing ‘pursuant to an order’.** The perpetrator must have committed the crime charged ‘pursuant to an order’ issued by a competent authority, *i. e.*, a Government or a superior, in a military or civilian context.
- 17 aa) **Definition of order.** Orders in the sense of article 33 are all oral or written or otherwise expressed demands, addressing a certain person or groups of persons individually or by describing their functions, for instance as local military commanders, to behave in a specific way, whether by acting or omitting⁴⁹. It is advisable to keep this definition broad in the sense that any sort of explicit or implied communication between a superior and a subordinated person whatsoever is sufficient.⁵⁰ This includes orders given by conclusive

⁴⁶ *Prosecutor v. Erdemović*, IT-96-22-A, Judgement, Joint Separate opinion of Judge McDonald and Judge Vohrah, Appeals Chamber, 7 October 1997, para. 34.

⁴⁷ Ambos, in: Brown (ed.), *Handbook on ICL* (2011) 299, 324; *id.*, *Treatise on ICL I* (2013) 386; also Kittichaisaree, *ICL* (2002) 268; Knoops, *Defenses* (2008) 130; Schabas, *ICC: Commentary* (2010) 511; Meyer (2012) 159 *GA* 557, 566; Cassese and Gaeta, *Cassese’s ICL* (2013) 237–240; Cryer, in: *id. et al.* (eds.), *Introduction* (2014) 398, 415. The close connection between superior orders and duress/mistake is also reflected in the Nuremberg jurisprudence, see fn. 5 and in the case law of the ICTY, *Prosecutor v. Erdemović*, IT-96-22-A, Judge McDonald and Judge Vohrah, 7 October 1997, para. 34; also *Prosecutor v. Češić*, IT-95-10/1-S, Sentencing Judgment, Trial Chamber, 11 March 2004, para. 97; *Prosecutor v. Mrda*, IT-02-59-S, Sentencing Judgement, Trial Chamber, 31 March 2004, para. 65.

⁴⁸ See also in this commentary Triffterer and Burchard, *article 25* mn 5.

⁴⁹ Conc. Ambos, *Treatise on ICL I* (2013) 380; see also the similar definitions by Zimmermann, in: Cassese, Gaeta and Jones (eds.), *Rome Statute of the ICC* (2002) 957, 969; Korte, *Handeln auf Befehl* (2003) 126.

⁵⁰ Ambos, *Treatise on ICL I* (2013) 380, see also Korte, *Handeln auf Befehl* (2003) 126; van Sliedregt, *Individual Criminal Responsibility* (2012) 293.

behaviour, for which the objective expression ('objektiver Erklärungswert') in the given situation is decisive. An order presupposes further that the superior has – at least in principle – a right to demand obedience by the subordinate because their different positions are in one way or another linked. Such a broad starting point does not undermine the *ratio* of article 33, because paragraph 1 contains sufficient additional criteria for excluding, for instance, 'orders' from parents to their children.

Orders may address persons *generally*, for instance, by prohibiting or ordering a certain behaviour requiring everybody to fulfil certain criteria or by demanding or forbidding a *specific* behaviour in *individual* cases such as protecting or attacking a certain person or property.

bb) 'of a Government or of a superior'. Article 33 applies only to orders of a Government 18 or a superior.

Orders of a Government can be issued by all its branches or persons belonging to the Government and in charge of specific functions which permit them to act on behalf or in the name of a Government or one of its branches. Such Government orders can be given with regard to all persons under the power of the respective Government. It is generally accepted that orders of Governments may address all citizens of the respective State and even those of third States who live in a certain territory or are tied by another obligation to this Government. For instance, a legal order to appear and to give evidence before a court is an order of the judicial branch of the Government and not of a superior.

Orders of a Government do not have to address persons individually but may do so. An order of a Government to all civilian and military forces to cleanse a certain territory of a specific ethnic group is an order to every person belonging to one of the mentioned units and thus falls under the scope of article 33. On the other hand, orders may also be especially addressed to individual subordinates in the hierarchy of a Government or generally to all persons in charge of specific functions like commanders of certain military units who have to forward the order to their subordinates. Such a commander may either just pass an order to the next lower level, *i. e.*, to another commander subordinated to him, or address all his subordinates directly.

It appears convincing that orders of a Government must be at least issued by the 19 competent organ (person) and must be formally legitimate. If these (formal) requirements are not fulfilled, the order cannot create a legal obligation to obey. Nevertheless, the subordinate may not be capable of judging this question. Again, a broad interpretation of 'Government orders' does not jeopardize the international criminal justice system, because, in principle, they – like any other orders – do not relieve the subordinate of criminal responsibility.⁵¹ Government therefore means a legally established or *de facto* accepted Government of a State which has issued an order at least formally in accordance with its respective rules of action⁵².

The wording 'order of a Government or of a superior' is not an alternative in the sense 20 that either a Government or a superior from *outside* the Government must have given the order. Rather the term superior clarifies, that article 33 is applicable also if an order is not issued personally by the minister of defence, for example, but by a local military commander. Orders issued by individual persons and not signed in the name or on behalf of the Government may nonetheless be orders of a superior. In any case, superiority presupposes that the person concerned is subordinated to the commanders in such a way that he or she is duty bound to fulfil their instructions.

The differentiation between the two concepts, Government and (other) superiors, does not 21 seem to be of any practical importance as long as it is guaranteed that all relevant cases can

⁵¹ See also Ambos, *Treatise on ICL I* (2013) 381: '[T]he broader the term 'government' is interpreted, the wider the application of article 33's general rejection of the superior order defence becomes.'

⁵² Conc. Ambos, *Treatise on ICL I* (2013) 380; see also in this commentary Triffterer and Ohlin, article 32 mn 18; against the inclusion of *de facto* Governments, however, Liang (2010) 2 *GoJIL* 872, 890; also Zimmermann, in: Cassese, Gaeta and Jones (eds.), *Rome Statute of the ICC* (2002) 957, 968.

be subsumed under either of them. In order to give broad effect to article 33's general rejection of the superior order defence it seems advisable to include *in principle* all superior-subordinate relationships. In particular, article 33 is applicable to legal obligations arising out of a mandate of the Security Council or in the framework of the NATO and may even encompass subordinations within the hierarchy of civil enterprises which can establish a 'legal obligation to obey orders' by valid contracts (see, however, also mn 22). Superior-subordinate relationships within a criminal organisation acting outside the law, to the contrary, are not covered by article 33⁵³. Insofar already the heading 'superior orders and prescription of law' acts as a filter.

- 22 cc) 'military or civilian'. Article 33 equally applies to military and civilian orders, which corresponds to the extension of the concept of command responsibility to civilian superiors⁵⁴. It does not matter, if the specification 'whether military or civilian' is connected to orders of a superior only or equally to orders of a Government. For the latter opinion it has to be mentioned that Governments are in practice divided into military and civilian administrations⁵⁵, as was, for example, the machinery of Nazi Germany in order to administer the large scale commission of crimes against humanity. In sum, the two adjectives 'military or civilian' refer to all branches of Governments and relevant fields in which superiors are acting.

The (possible) extension of article 33 to civilian orders and in particular to instructions of private enterprises given to their employees (see also mn 21), however, is not uncontested. The problem with this broad approach is that 'the superior order defence operates under the presumption of military conditions',⁵⁶ that is, a strict system of discipline demanding absolute obedience safeguarded by harsh (military or criminal) sanctions. In a civilian context, the subordinate acts under less pressing conditions.⁵⁷ However, one must take into account that the applicability of article 33 depends on the existence of an order of a superior in the sense dealt with above (mn 17). Therefore it is necessary that the superiors have effective control over the persons committing the crime. This condition is fulfilled only if civilian superiors exercise a degree of control over their subordinates which is similar to that of military commanders⁵⁸. In such cases, it should make no difference if one of the industrial organizations of the Second World War has given instructions for an inhuman or degrading treatment through its organs and thus to commit crimes against humanity within their hierarchy of subordination or if such orders were given within the different branches of the Government directly. As has been pointed out in the drafting history with reference to the approach of the IMT '[t]he true test [...] is not the existence of the order, but whether moral choice was in fact possible'⁵⁹. Translated into the language of article 33 this means that the true test for the liability of the subordinate is whether or not the exceptional conditions listed in paragraph 1 (a) – (c) are fulfilled.

This understanding of article 33 is confirmed by the fact that its scope has been changed during the drafting process. The Updated Siracusa Draft proposed to limit the provision to

⁵³ For the same result Ambos, *Treatise on ICL I* (2013) 381 according to whom, however, article 33 may be applied to hierarchical relationships within non-states actors in terms of article 1 para.1 Add. Prot.; crit. Zimmermann, in: Cassese, Gaeta and Jones (eds.), *Rome Statute of the ICC* (2002) 957, 969; Cryer, in: *id. et al.* (eds.), *Introduction* (2014) 398, 413.

⁵⁴ Liang (2010) 2 *GoJIL* 872, 889; Ambos, *Treatise on ICL I* (2013) 381.

⁵⁵ van Sliedregt, *Individual Criminal Responsibility* (2012) 294.

⁵⁶ Liang (2010) 2 *GoJIL* 872, 891.

⁵⁷ Liang (2010) 2 *GoJIL* 872, 891; Ambos, *Treatise on ICL I* (2013) 382.

⁵⁸ In the same vein Liang (2010) 2 *GoJIL* 872, 889; Ambos, *Treatise on ICL I* (2013) 381; also Korte, *Handeln auf Befehl* (2003) 131; Heller, in: Heller and Dubber (eds.), *Handbook* (2011) 593, 614. This corresponds to the approach adopted by the ICTY with regard to the extension of the concept of superior responsibility to civilian commanders, see, e.g. *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para. 378.

⁵⁹ See Report of the ILC on the Work of its Thirty-Eighth Session, 5 May–11 July 1986, UN Doc. A/41/10 (1986), para. 165, p. 52.

orders of ‘military or political’ superiors, while the Preparatory Committee suggested referring in the heading to ‘orders of the *legitimate* authority’ (emphasis added)⁶⁰. Ever since the present wording ‘whether military or civilian’ was proposed and put into brackets in the fifth session of the Preparatory Committee, it has been continuously maintained in all following drafts without any explanation. From the whole context, however, it appears that these words serve the purpose of not limiting the applicability of paragraph 33 to *military* orders. Rather all possibilities to refer to a subordination in order to avoid criminal responsibility for an act ordered by a superior should be included⁶¹.

dd) Connection between order and conduct. The crime on which the Court shall exercise its jurisdiction has to be ‘committed [...] *pursuant to an order*’. This implies that the subordinate must have intended to act or omit to act out of concern to obey and hence to execute the order. If he or she commits the crime independently from the order, article 33 is not applicable.⁶² However, obedience to the order does not need to be the only motive of the subordinate. It is sufficient, if the crime was initiated or inspired by the order, even though the subordinate may have expected or even desired that the order provides him or her with a (better or additional) basis or perhaps even a justification (or an excuse) for what he or she was already motivated to do (anticipated obedience).

The causal connection between the order and the crime of the subordinate has to be evaluated on an *ex post* basis, because – according to the rules of natural sciences – there is no connection between a human behaviour and the ‘result’ it may cause *in the mind* of another person that makes such a result predictable in a generalized way aside from the specific situation⁶³.

c) Legal consequences. The Chapeau of paragraph 1 is not to be misunderstood. It prescribes that orders ‘shall not relieve that person of criminal responsibility’. Thus, the general rule is that obedience to superior orders is no defence and that the subordinate has to be punished for the (international) crimes he or she has committed in execution of an order (for exceptions see mn 25 *et seq.*)⁶⁴. As was already pointed out (see mn 12), the ‘soldier’s dilemma’, however, may be taken into account in sentencing. Its mitigating effect depends on the individual circumstances of the case. The *Bralo* Trial Chamber of the ICTY, for example, has emphasized that the accused ‘has taken full personal responsibility for those crimes and has acknowledged that he knew them to be wrong’. While ‘*Bralo* may have been pressured to participate in combat activities, he remained legally and morally obliged to conduct himself in accordance’ with the relevant norms of international humanitarian law. As the Chamber was convinced that *Bralo* ‘did indeed have a choice with regard to his continued participation in the combat activities’ it refused to accept compliance with superior orders as a mitigating factor.⁶⁵ This finding was upheld by the Appeals Chamber⁶⁶.

2. Exemption

There exists *only one* exemption from the liability principle. Its applicability depends on the satisfaction of the three cumulative conditions listed in para. 1 (a) – (c). The first one is phrased in a *positive* way; the second and the third ones in a *negative* way (‘did not know’; ‘not manifestly unlawful’). In the previous edition, it was argued that the wording of article 33

⁶⁰ 1996 Preparatory Committee II, 102.

⁶¹ Bassiouni, *ICL: Draft International Criminal Code* (1980) 152 *et seq.*

⁶² van Sliedregt, *Individual Criminal Responsibility* (2012) 294; Ambos, *Treatise on ICL I* (2013) 380.

⁶³ Triffterer, *Österreichisches Strafrecht* (1994) chapter 16 mn 70 *et seq.* with further references.

⁶⁴ Also Mezzetti, in: Lattanzi (ed.), *ICC: Comments on the Draft Statute* (1998) 147, 155; Dinstein, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of ICL* (2000) 369, 381; Werle and Jeßberger, *Principles* (2014) mn 669.

⁶⁵ *Prosecutor v. Bralo*, IT-95-17-S, Judgement, Trial Chamber, 7 December 2005, paras. 54–55; in a similar vein *Prosecutor v. Mrda*, IT-02-59-S, 31 March 2004, para. 67.

⁶⁶ *Prosecutor v. Bralo*, IT-95-17-A, Judgement, Appeals Chamber, 2. April 2007, paras. 23–25.

indicates that the defence has to prove the existence of the first requirement while the second and third are already fulfilled if it cannot be proven (according to the evidence available) that the subordinate knew that the order was unlawful, respectively that the order was manifestly unlawful. According to this reading, article 33 para. 1 (b) and (c) contain a reversal of the burden of proof in favour of the subordinated person⁶⁷. Article 67 para. 1 (i) of the Statute, however, prohibits any reversal of the burden of proof or onus of rebuttal to the detriment of the accused. If one applies this rule not only to the elements of the offence, but also to defences, the Prosecution is generally obliged to *disprove* the existence of a defence beyond reasonable doubts (article 66 para. 3). According to this approach, the accused carries (regardless of the wording of the defence) only an initial evidentiary burden with regard to the facts supporting the alleged defence.⁶⁸

- 26 a) **Conditions.** aa) ‘legal obligation to obey’. The ‘legal obligation to obey orders of the government or the superior in question’ must have existed at the time when the subordinated person decided to commit the crime. This formula refers to binding orders in general and not to the question of whether there was a legal obligation to obey the specific order to commit a crime. The reason for this interpretation is that only in longer lasting or permanent hierarchical relationships a sort of dependence or pressure may develop to make ‘blind obedience’ understandable and, perhaps, excusable. Moreover, orders to commit international crimes are always unlawful (mn 27) and subordinates are not legally obliged to obey them⁶⁹.

To establish this condition as an *objective* element to exclude criminal responsibility does no harm to the subordinated persons. If they wrongfully believe to be ‘under a legal obligation to obey orders’, which in fact they are not, they may claim a mistake in terms of 32⁷⁰. But since in principle, superior orders ‘shall not relieve [...] of criminal responsibility’, there is not much room for article 32. The main exception may be an assumed ‘legal obligation to obey’ by a false awareness of the factual situation⁷¹.

- 27 bb) ‘did not know that the order was unlawful’. Article 33 para. 1 (b) implies that orders to commit ‘a crime within the jurisdiction of the Court’ are always *unlawful*. To be relieved of criminal responsibility the subordinate person must ‘not know that the order was unlawful’. It is obvious, that the illegality must result from the content of the order, namely to commit ‘a crime within the jurisdiction of the Court’. All other reasons for an order to be unlawful are not decisive in this context.

This condition is fulfilled if it cannot be proven that the subordinate had positive knowledge of the unlawfulness of the order. In cases of doubt he or she has to be treated as if he or she was mistaken (see also mn 25). Article 33 para. 2 (b) thus contains an exception to the strict *ignorantia iuris* rule⁷². It accepts an error regardless of how it was caused and whether or not it was avoidable, *i. e.*, the superior order defence is available even in cases in which the subordinate has neglected important evidence from which he

⁶⁷ See the previous edition of this commentary, Triffterer, article 33 mn 25; also Dufour (2000) 82 *IRevRC* 969, 989.

⁶⁸ In more detail and with further references Ambos, *Treatise on ICL I* (2013) 312–313; see also Garraway (1999) 81 *IRevRC* 785, 791.

⁶⁹ Ambos, *Treatise on ICL I* (2013) 381; see also Meyer (2012) 159 *GA* 557, 569.

⁷⁰ See also Ambos, *Treatise on ICL I* (2013) 381 and in this commentary Triffterer and Burchard article 32 mn 41. More reluctant Cryer, in: *id. et al.* (eds.), *Introduction* (2014) 398, 413, who argues that a mistake about the ‘legal obligation to obey’ can never negate *mens rea* as required by article 33; see, however, on the analogous application of article 33 to (indirect) mistakes about the existence of the factual requirements of a defence Ambos, *Treatise on ICL I* (2013) 374–375 with further references.

⁷¹ In more detail in this commentary Triffterer and Ohlin article 32 mn 41.

⁷² In more detail on the relationship between article 33 and 32 see Liang (2010) 2 *GoJIL* 872, 882–883; Heugas-Darraspen, in: Fernandez and Pacreau, *Statut de Rome* (2012) 945, 951–952; Ambos, *Treatise on ICL I* (2013) 381; Cryer, in: *id. et al.* (eds.), *Introduction* (2014), 398, 415; see also Safferling *Internationales Strafrecht* (2011) § 5 mn 59; crit. Dinstein, in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of ICL* (2000) 369, 379, who deems article 33 to be redundant. In more detail on the differences between Dinstein’s conception of the superior order defence and the approach of the Rome Statute Cryer (2011) 9 *JICJ* 959, 970–971.

could have concluded ‘that the order was unlawful’. The regulation is therefore very favourable to subordinated persons⁷³.

cc) ‘not manifestly unlawful’. A sort of compensation for the strict acceptance of (even avoidable) errors of the subordinates is contained in condition (c): even if condition (a) is fulfilled and the subordinate did not know that the order was unlawful according to (b), he or she is not relieved of criminal responsibility, if the order is *manifestly* unlawful. This again is an *objective* element. As already stated above (mn 25) it has to be proven positively that ‘the order was manifestly unlawful’. As long as there remains doubt about this question, the order was, in favour of the subordinate, not *manifestly* unlawful. 28

The manifestly unlawful criterion establishes a high threshold. In a famous dictum, the Israeli District Court held that ‘the distinguishing mark of a “manifestly unlawful order” should fly like a black flag above the order given, as a warning saying “Prohibited”’⁷⁴. In other words, the unlawfulness of the order must be ‘obvious, self-evident (even to a lay-person) and incontestable’⁷⁵. If the subordinate nevertheless erroneously assumes that the order was ‘not manifestly unlawful’, it has to be differentiated as follows: If he or she is not aware of the ‘real’ facts, underlying and shaping the order, he or she acts under an error of facts and article 32 para. 1 is applicable. If he or she, however, is aware of all facts and only makes a wrong legal assessment, he or she is under an error of law, which does not exclude his or her criminal responsibility⁷⁶.

b) **Legal consequences.** If the subordinate ‘was under a legal obligation to obey orders’ and ‘did not know that the order was unlawful’ and ‘the order was not manifestly unlawful’, he or she is relieved ‘of criminal responsibility’. To be more precise, the subordinate is excused (see mn 11) because he or she was in situation of pressure (para. 1 [a]) in which he or she did not realize that he or she was not legally obliged to obey (para. 1 [b] complemented by the objective manifest unlawful test of para. 1 [c]). Thus, if all exceptional conditions listed in article 33 para. 1 are fulfilled, the subordinate cannot be blamed for having carried out the unlawful orders of the superior. 29

III. Paragraph 2: ‘manifestly unlawful’

1. Presumptio iuris et de iure

Paragraph 2 limits the scope of the superior order defence by the presumption that the unlawfulness of the order in terms of para. 1 (c) is self-evident when crimes of genocide and crimes against humanity are committed in its pursuance. According to the drafters of the Rome Statute such an order would be so obviously ‘manifestly unlawful’ that this fact does not need any proof. The presumption of para. 2 is unrebuttable⁷⁷, which means that article 33 only applies to war crimes and the crime of aggression⁷⁸. 30

⁷³ See also in this commentary Triffterer and Burchard, article 32 mn 41.

⁷⁴ *A-G of Israel v. Eichmann*, District Court Judgement, 12 December 1961, 36 (1968) *ILR* 18, 256 para. 218.

⁷⁵ Ambos, *Treatise on ICL I* (2013) 384; also Korte, *Handeln auf Befehl* (2003) 135; Schabas, *ICC: Commentary* (2010) 511–512.

⁷⁶ See also Schabas (1998) 6 *EJCLCJ* 400, 427; *id.*, *Introduction to the ICC* (2011) 243; in more detail in this commentary Triffterer and Ohlin article 32 mn 41.

⁷⁷ For a different view see Bantekas, in: McGoldrick, Rowe and Donnelly (eds.), *Permanent ICC* (2004) 263, 273, who argues that the presumption of article 33 para. 2 must be rebuttable, because ‘the commission of genocide and crimes against humanity involve large scale action, often requiring minor operations in which the offender cannot always be expected to be aware of the eventual aim’; in the same vein Bantekas and Nash, *ICL* (2007) 61; against this view Ambos, *Treatise on ICL I* (2013) 384.

⁷⁸ Scaliotti (2001) 1 *ICLRev* 111, 140; Ambos, *Treatise on ICL I* (2013) 383; also Werle and Jeßberger, *Principles* (2014) mn 670.

2. Additional cases?

- 31 The wording of para. 2 is clear: Only genocide and crimes against humanity as defined in articles 6 and 7 fall under the *presumptio iuris et de iure*. Orders to commit war crimes and the crime of aggression, to the contrary, are not *per se* manifestly unlawful, but must be evaluated on a case-by-case basis; for all of them the exemption of paragraph 1 is applicable⁷⁹. This differentiation is surprising⁸⁰. Genocide and crimes against humanity on the one hand and war crimes and the crime of aggression on the other do not differ too much in respect of the gravity of the harm they cause. If, nevertheless, none of the most serious war crimes and crimes against peace are excluded from the applicability of article 33 para. 1, the reason appears to be obvious: genocide and crimes against humanity can be committed by everybody, while war crimes and crimes against peace are typically committed by military or paramilitary personnel in whatever armed conflicts they may be involved. To protect them seems to be the reason for paragraph 2's differentiated approach. However, one may argue that most of the war crimes listed in article 8 are so serious that the 'manifestly illegal' criterion of para. 1 (c) will in the majority of cases exclude the superior order defence.⁸¹

C. Special remarks: Superior orders and command responsibility, article 28

- 32 Superiors ordering the commission of 'a crime within the jurisdiction of the Court' are individually responsible pursuant to article 25 para. 3 (b). This provision is complemented by article 28 on command responsibility according to which the superior is liable for omission where he or she fails to take the necessary and reasonable measures to prevent criminal acts of his or her subordinates or to punish them.⁸² The foundation for this extension of responsibility is that the superior triggered criminal behaviour by not controlling properly those persons under his or her hierarchical power which includes the legal obligation to instruct them how to behave and to obey the relevant laws and customs of war. Articles 28 and 33 therefore represent two sides of the same coin,⁸³ even though they do not fit too well together: article 33 regulates the criminal responsibility of subordinates when committing crimes in pursuance of an order of their superiors or government; the responsibility of the person who had given the order is covered by article 25. Article 28 regulates the responsibility of superiors who did *not* order the commission of a crime and did not in any way participate in a specific criminal behaviour of their subordinates. They merely had 'effective command and control' over persons, but did *not* use this power and thereby did not only neglect but violated their duty to supervise their subordinates properly⁸⁴.

⁷⁹ For a different view see Gaeta (1999) 10 *EJIL* 172, 190–191 according to whom orders to commit war crimes are always manifestly illegal. This view, however, ignores the clear decision of the State parties against the absolute liability principle, Ambos, *Treatise on ICL I* (2013) 384.

⁸⁰ Very crit. Gaeta (1999) 10 *EJIL* 172, 190 who argues that article 33 para. 2 'departs from customary international law without any well-grounded motivation'; in the same vein Fournet, in: Darcy and Powderly (eds.), *Judicial Creativity* (2010) 229, 236–237; Cassese and Gaeta, *Cassese's ICL* (2013) 231; cri. also Cryer, in: *id. et al.* (eds.), *Introduction* (2014) 398, 415.

⁸¹ Garraway (1999) 81 *IREvRC* 785, 791; Ambos, in: Brown (ed.), *Handbook on ICL* (2011) 299, 323; *id.*, *Treatise on ICL I* (2013) 383; in a similar vein Grayson (1995) 64 *NordJIL* 243, 252; Gless, *Internationales Strafrecht* (2011) mn 726; Heugas-Darraspen, in: Fernandez and Pacreau (eds.), *Statut de Rome* (2012) 945, 953; Cassese and Gaeta, *Cassese's ICL* (2013) 231.

⁸² In more detail in this volume Ambos, article 25 mn 18.

⁸³ Crit. van Sliedregt, *Individual Criminal Responsibility* (2012) 294.

⁸⁴ See in the first edition of this commentary Fenrick, article 28 mn 7 and 18 *et seq.* See also for more details in this commentary, Triffterer and Arnold, article 28.

PART 4 COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34 Organs of the Court

The Court shall be composed of the following organs:

- (a) The Presidency;
- (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
- (c) The Office of the Prosecutor;
- (d) The Registry.

Literature: Blakesley, C.L., 'Comparing the Ad Hoc Tribunal for Crimes against Humanitarian Law in the Former Yugoslavia & the Project for an International Criminal Court prepared by the International Law Commission', (1996) 67 *RIDP* 139; Burns, P., 'An International Criminal Tribunal: The Difficult Union of Principle and Politics', (1994) 5 *CLF* 2-3; 1996 *YbICTY* (1997); de Zayas, A., 'The Kalshoven Commission', (1993) 6 *LeidenJIL* 131.

Content

A. Introduction/General remarks.....	1
B. The Organs	3
1. The Presidency.....	3
2. An Appeals Chamber, a Trial Division, a Pre-Trial Division	6
3. The Office of the Prosecutor.....	8
4. The Registry.....	9
C. Special remarks	10

A. Introduction/General remarks

In all the turmoil, debate and compromise that gave birth to the Rome Statute, the basic composition of the proposed court remained pretty constant. The International Law Commission's proposal of 1994 was altered but little¹. The two main discussions that arose in the drafting of this article were primarily matters of nomenclature². The components of

¹ See 1994 ILC Draft Statute, article 5.

² For example see: the US proposal that 'Presidency' be replaced by the term 'Administrative Council', 'President' with 'Chief Judge' and 'Vice President' with 'Deputy Chief Judge'; the UK's proposal that 'Procuracy' be replaced with 'Prosecutors Office' and that of France, (albeit of more substance) that the reference to 'other chambers' in the ILC's Draft be replaced with 'a Remand Chamber' in the 1996 Preparatory Committee II, 'Proposals to article 5', p. 7. The nature of these differences and their trivial nature mirrored those present in the drafting of article 11 in the Statute of the ICTY. That article is the equivalent to article 34 of the Rome Statute. During the drafting of article 11 of the ICTY Statute, the French proposed a 'commission' be established to investigate complaints, (see Letter from the Permanent Representative of France to the Secretary-General, 10 Feb. 1993, UN Doc. S/25266 (1993), transmitting a report on the establishment of an International Criminal Tribunal for the Former Yugoslavia), the Italians suggested a 'prosecutor's office' (see Letter from the Permanent Representative of Italy to the Secretary-General, 16 Feb. 1993, UN Doc. S/25300 (1993) transmitting a Draft Statute for an International Criminal Tribunal for the Former Yugoslavia). Previously Bassiouni had recommended a 'Procuracy' for a Permanent International Court (See *Draft Statute - International Tribunal* 3-32, AIDP, (2nd ed.1993) 10 *NEP* 35, 50-51). Commentating on these discussions, Burns (1994) 5 *CLF* 2-3, 357, wryly noted that, 'Nomenclature is of little significance where in each case the same broad functions are to be carried out'. The same comment is apt when considering the debates and drafting of article 34 leading up to the Rome Statute.

the Permanent Court were dictated by functional necessity³ and the basic requirements of justice. Any court system which seeks to investigate, prosecute, administer and determine the guilt or innocence of any person must be capable of giving effect to the basic minimum guarantees that are by now well established in international criminal law⁴. The pragmatics of such an undertaking require that there be an independent judiciary, an independent Prosecutor and a Registry to service both of them as well as to administer the court docket, deal with the press and any court appointed defence counsel.

- 2 The organizational structure of the Court was considerably advanced by the experience of the ICTY and ICTR which had worked under a similar organizational composition⁵. Staffing, as always, will remain an essential and important aspect for the proper functioning and success of the Court.

B. The Organs

1. The Presidency⁶

- 3 The function and role of the Presidency saw quite a change in the period between the ILC's Draft Statute⁷ and the Rome Statute itself. It was initially proposed that in addition to various administrative functions, important legal responsibilities be assigned to the Presidency including supervising and authorising investigations⁸, issuing arrest warrants⁹ and determining the question of pre-trial detention or release¹⁰. The view gained support, however, that this proposed role be modified. It was suggested that the duties of the President be limited to ceremonial and administrative functions and to supervising the Registry. This was thought more appropriate a task for the Presidency than their exercising pre-trial and other procedural functions. The latter functions were thought rather more appropriate for an

³ Presenting his Draft article 11 of what was to become article 11 of the Statute for the ICTY, the Secretary-General stated that:

'The organisation of the International Tribunal should reflect the functions to be performed by it. Since [it] is established for the prosecution of persons responsible for serious violations of international humanitarian law, this presupposes an international tribunal composed of a judicial organ, a prosecutorial organ and a secretariat. It would be the function of the prosecutorial organ to investigate cases, prepare indictments and prosecute persons responsible for committing the violations referred to above. The judicial organ would hear the cases presented to its Trial Chambers, and consider appeals from the Trial Chambers in its Appeals Chamber. A secretariat or Registry would be required to service both the prosecutorial and judicial organs'.

See the Report of the Secretary-General pursuant to Paragraph 2 of Security Council Res. 808 (1993), UN Doc. No. S/25704 and Add.1 (1993), para. 69.

⁴ For example see ICTY Statute article 21, ICTR Statute article 20, 1966 ICCPR article 14.

⁵ See article 11 of the ICTY Statute; article 10 of the ICTR Statute.

⁶ The functions of the Presidency are detailed in article 38 of the Rome Statute. The functions of the Presidency are also fleshed out in the Rules of Procedure and Evidence and the Regulations of the Court. For example, Rule 4 *bis* (2) stipulates that: 'As soon as possible following its establishment, the Presidency shall, after consultation with the judges, decide on the assignment of judges to divisions in accordance with article 39, paragraph 1.' Rule 14(1) stipulates that the Regulations of the Registry must be approved by the Presidency. Rules 21, 26 and 30 variously task the Presidency as the responsible body for determining an appeal of the Registrar's decision declining to appoint a particular counsel for a suspect or accused, receipt of complaints of misconduct against the Prosecutor, Deputy Prosecutor, the Registrar or the Deputy Registrar, and the determination of disciplinary measures for misconduct against a Judge, the Registrar or a Deputy Registrar. Rule 33 empowers the Presidency to determine a request by a Judge, the Prosecutor or a Deputy Prosecutor to excuse him or herself from acting in a particular matter. Regulation 11 of the Regulations of the Court calls for the three-member Presidency to act with unanimity when possible, and addresses circumstances as to when and how the Presidency may act when one or more of its members disqualify themselves with respect to a particular matter or are otherwise unavailable.

⁷ 1994 ILC Draft Statute, note 1, article 8.

⁸ *Ibid.*, article 27.

⁹ *Ibid.*, article 28.

¹⁰ *Ibid.*, article 29.

indictment or investigations chamber¹¹. The result of this is a mainly administratively focused Presidency¹² and an increased role for what became the Pre-Trial Chamber.

The creation of the Presidency, as a separate organ from the rest of chambers was also the result of a bid to reduce costs and to give organizational form to the Court. Though such a body was not included as a separate organ in the Statutes of the ICTY or ICTR, the judges of those Tribunals in effect created one by way of the 'Bureau' established under Rule 23 of their respective Rules of Procedure and Evidence. That body comprises the President, the Vice President and the Presiding judges¹³ of the Trial Chambers. The President is obliged to consult this body on all major questions relating to the functioning of the Tribunal, and to determine any questions regarding disqualification of judges and the like¹⁴. This inner sanctum encourages consensus where possible on matters relating to the administration of the Tribunal and guards against the arbitrary use of authority. The Presidency is the administrative and functional head of the Court, but the principle of *primus inter pares* amongst the judges was both very much in evidence and very much intended by the delegates to the Rome Conference.

The creation of the Presidency as a distinct organ had another intended purpose. It was not anticipated that the full complement of judges permitted under the Statute would be needed from the outset. In order to save costs, it was therefore decided that the judges comprising the Presidency would take up their offices as soon as elected¹⁵ and only call upon their fellow judges to commence their terms as and when needed¹⁶. In this way, the Presidency is to be the heart of the Permanent Court's Judiciary, ensuring that the oxygen of information and the benefits of accumulated experience continue to flow to that organ even when cases are in abeyance, preparation or investigation.

2. An Appeals Chamber, a Trial Division, a Pre-Trial Division¹⁷

The size of the Chambers is set at a minimum¹⁸ and can be increased with the agreement of the Assembly of States Parties upon the recommendation of the Presidency¹⁹. This clause may well be needed if cases on the Rwanda or Yugoslav scale are to be expeditiously disposed of in future, but has not yet been engaged by the Presidency. The experience of both the ICTY and ICTR have shown that flexibility and a willingness to increase the number of judges can frequently be needed²⁰ and a provision to this effect is to be applauded.

Article 5 (b) of the ILC's 1994 Draft Statute provoked some discussion. Whereas the ILC had included an Appeals Chamber and Trial Chambers, it kept the third part of this trinity rather vague by defining it simply as 'other Chambers'. Some delegates to the Preparatory Committee on the Establishment of an International Criminal Court stated that an indictment or an investigations chamber for pre-trial procedures, issuing warrants, indictments

¹¹ See 1996 Preparatory Committee I, pp. 12-13.

¹² See also article 38 and regulation 11, Annex III.

¹³ In the case of the ICTR 'the more senior Presiding judge of the Trial Chambers', rule 23, ICTR Rules of Procedure and Evidence.

¹⁴ See 1996 YbICTY, Chapter 2, p. 12 and also Rule 15 (b) ICTY Rules of Procedure and Evidence; Rule 15(b) ICTR Rules of Procedure and Evidence.

¹⁵ See article 35 para. 2.

¹⁶ See article 35 para. 3.

¹⁷ The composition of Chambers as a whole is dealt with in article 39.

¹⁸ See article 36 para. 1 below.

¹⁹ See article 36 para. 2 (a) and (b) below.

²⁰ See Security Council Res. 1165 of 30 Apr. 1998 adding a third Trial Chamber to the ICTR (amending articles 10, 11 and 12 of ICTR Statute); Letter of the Secretary-General to the United Nations to the Security Council, 5 May 1998, (S/1998/376) advising of the need of an additional Trial Chamber for the ICTY and the subsequent Security Council Res. 1166 of 13 May 1998 adding a further Trial Chamber and amending the corresponding articles of the ICTY Statute. The intention to vigorously pursue a 'completion' strategy with greater vigour also led to the election of *ad litem* judges to supplement the work of the permanent judges. See, for example, rules 13ter and 13quarter of ICTY Rules of Procedure and Evidence.

and the like was needed²¹ and should be a body composed of three judges with the necessary authority to monitor preliminary investigative matters. Others preferred the flexibility of the ILC's Draft²². In finally adopting a Pre-Trial Chamber the delegates appear to have recognised, as have the judges of the ICTY, the need to streamline the functioning of Chambers to ensure that they are able to manage and conduct cases as expeditiously as possible²³. In addition, the creation of the Pre-Trial Division was a function of the decision to require judicial oversight of investigations and the need to separate this from the main trial process²⁴.

3. The Office of the Prosecutor²⁵

- 8 The term 'Procuracy' initially preferred by the ILC was rejected in favour of 'Office of the Prosecutor' on the proposal of the United Kingdom²⁶. This, and the fact that this terminology had become familiar to delegates and gained general usage in the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda ensured that it was adopted.

4. The Registry²⁷

- 9 The need, function and title of this organ remained unchanged and unchallenged. Its inclusion as one of the principal organs of the International Criminal Court mirrored the existence of Registries (or bodies performing the function of a Registry) in almost every State. Given some problems that initially beset the *ad hoc* Tribunal for Rwanda, the importance of an efficient and well-organised Registry to the successful functioning of any Permanent Court should not be underestimated. Failing this, much of the time, energy and attention of both Chambers and the Prosecutor will be wasted.

C. Special remarks

- 10 Article 34 also follows the example of the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda in not catering for a standing office of Defence Counsel. Defence Counsel to the International Criminal Court must be (and seen to be) independent. Such independence is, of course, a pre-requisite to justice and to confidence in the International Criminal Court. It is not clear, however, why such a standing office should necessarily be incompatible with the concept of fully independent defence counsel. Independence of the Prosecutor and his or her staff is also essential, but apparently this was not called into question simply on account of

²¹ Some of the arguments reflected those previously made on the setting up of the ICTY. Various commentators had argued then for a separate Pre-Trial Chamber on the grounds of logistical necessity and administrative efficiency. See Blakesley (1996)67 *RIDP* para. XIV (B), p. 191.

²² 1996 Preparatory Committee I, note 11, p. 11.

²³ A Pre-Trial Judge was created and functions assigned in rule 65*ter* of the ICTY's Rules of Procedure and Evidence adopted on 11 Feb. 1994, in the amendment made to them on 9 and 10 July 1998, IT/32/Rev.13. This Rule delegates to one judge (of the Trial Chamber) the responsibility of coordinating communications between the parties, setting dead-lines, and generally taking such measures as are necessary to prepare the case for a fair and expeditious trial. In a more concrete way, the Rome Statute in article 64 para. 4 allows such matters to be delegated from a Trial Chamber to the Pre-Trial Chamber.

²⁴ See article 39 para. 4 of the Rome Statute expanding upon the principle adumbrated in rule 15 (C) of the ICTY's Rules. The functions and responsibilities of the Pre-Trial Division itself are set out in articles 15, 18, 19, 34 para. 2, 54 para. 2, 57, 61, 64 and 72 of the Rome Statute.

²⁵ The authority, remit, and appointment of the Prosecutor is dealt with in article 42. The Rules of Procedure and Evidence further specify the manner in which the Office of the Prosecutor shall function. See, *e.g.*, Rules 9 ('Operation of the Office of the Prosecutor'), 10 ('Retention of information and evidence') and 11 ('Delegation of the Prosecutor's functions').

²⁶ *Supra* note 2.

²⁷ The Registrar's functions and modalities of appointment are dealt with in article 43, and further addressed in the Rules of Procedure and Evidence (see, *e.g.*, Rules 12 to 22) and the Regulations of the Court (see, *e.g.*, Regulation 77 C 'Office of Public Counsel for the Defence').

their being directly employed by the Court. Many argued for a standing office of Defence Counsel at the time the ICTY was created and the case against this proposal remains by no means conclusive²⁸. Indeed, the trend has been in favour of an autonomous, if not separate, Office of the Defence. Regulation 77 of the Regulations of the Court requires that the Registrar ‘shall establish and develop an Office of Public Counsel for the defence’ (OPCD). The mandatory terms of this Regulation and the requirement to further ‘develop’ the Office is welcome and indeed essential to the fairness of trials before the ICC, the majority of which have been and will likely continue to be legally aided²⁹.

Pursuant to Regulation 77, the OPCD was inaugurated as a functioning office in 2006 and is presently composed of a Principal Counsel as well as four additional staff members (legal assistants, a case manager and support staff). Crucially, Regulation 77 also overcomes some of the difficulties that beset the Office of the Principal Defender (OPD) in the Special Court for Sierra Leone (in that the OPD was subordinate to the Registry and this resulted in several conflicts in responsibility). There were several reported instances where the OPD was directed by the Registry to either desist from making certain submissions, contrary to the Registrar’s stated position, or ‘encouraged’ to modify submissions that were to be made³⁰. Regulation 77 para. 2 leaves no such room for uncertainty providing that ‘[t]he Office ... shall fall within the remit of the Registry, solely for administrative purposes, in accordance with article 43, paragraph 2, and it shall function in its substantive work as a wholly independent office’. Counsel and assistants within the office shall act independently’. In 2011, the judges of the Court amended Regulation 77 to expand and strengthen the mandate of the OPCD. Among other changes, the revised Regulation 77(3) requires that the Office include ‘at least one counsel ... who fulfils the requirements for inclusion on the list of counsel’. Regulation 77(4) now sets out in six sub-paragraphs the duties of the office: (a) ‘Representing and protecting the rights of the defence during the initial stages of the investigation ...’; (b) ‘Providing general support and assistance to defence counsel and to the person entitled to legal assistance, including legal research and advice [...]’; (c) ‘Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues’; (d) ‘Advancing submissions, on the instruction or with leave of the Chamber, on behalf of the person entitled to legal assistance when defence counsel has not been secured ...’; (e) ‘Acting when appointed under regulation 73 [Duty Counsel] or regulation 76 [Appointment of defence counsel by a Chamber]’; and (f) ‘Assisting or representing defence

²⁸ See Report on the International Tribunal to adjudicate War Crimes Committed in the Former Yugoslavia, submitted by a special task force of the American Bar Association Section of International Law and Practice (8 July 1993), p. 19 (cited in Morris and Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995) 138 fn. 393). Also see Blakesley (1996) 67 *RIDP* para. XIV, p. 190. The Practice of the *ad hoc* Tribunals shows that these Defence Counsel are instructed as independent members of the legal profession (either admitted to practice or law professors – rule 44 ICTY Rules of Procedure and Evidence; rule 44 ICTR Rules of Procedure and Evidence).

While recognizing the critical importance of independent defence counsel, the drafters of the Rome Statute were also alive to the dangers of inequality of arms between the OTP and the Defence on account of the latter not being an organ of the Court. This was sought to be ameliorated by article 57 para. 3 (b) of the Rome Statute. See Guariglia and Hochmayr, *article 57* para. 3 (b).

²⁹ However, notwithstanding rule 45 of the Special Court for Sierra Leone Rules of Procedure and Evidence (which also requires the Registrar to ‘maintain and develop’ such an office), institutional problems have remained affecting the Defence. See letter of the Principal Defender stating that the Registry had ‘whittled away’ various rights of the Defence, *Prosecutor v Taylor*, SCSL-03-01-T, Transcript, 4 June 2007, pp 3–5.

³⁰ The Appeals Chamber noted this difficulty in stating ‘the staff of the Defence Office and its head the Principal Defender, are all “support staff”, and have no independent authority to disobey or ignore a direction from the Registrar’, see *Prosecutor v Brima et al.*, ‘Separate and concurring opinion of Justice Robertson on the decision on Brima-Kamara Defence appeal motion against Trial Chamber II majority decision on extremely urgent confidential joint motion for the re-appointment of Kevin Metzger and Wilbert Harris as lead counsel for Alex Tamba Brima and Brima Bazzy Kamara’, 14 Dec. 2005, para. 83, SCSL-040-16- AR73-16906. The learned judge went on to state ‘... in future courts the [Defence] office should be an independent ‘fourth pillar’ alongside the judiciary, the Registrar and the Prosecutor’ (para 88, Rules of Procedure and Evidence 16910).

counsel or defence witnesses who are subject to article 70 proceedings or when rule 74, sub-rule 1, applies, on the instruction of with the leave of the Chamber’.

- 12 In fulfilling its mandate, the OPCD has developed into an important institutional counterweight to the significant institutional resources of the Office of the Prosecutor (i.e. Legal Advisory Section, Appeals Section, Knowledge Base Unit, appointment of Special Advisers). In addition to providing discrete legal research assistance to defence teams upon request, the OPCD, *inter alia*, advises and informs defence teams on issues such as the application of the legal aid policy across different cases and proposals for amendments to Registry and Court policies that impact on the rights and functioning of the defence. The OPCD produces manuals and memos on confirmation and trial practice and specific legal issues. The OPCD also assists the defence on practical matters, such as use of the Court’s electronic evidence management system. Equally important, the OPCD acts as a crucial institutional voice for the defence on the committees and bodies of the Registry on which it has been invited to sit, and with respect to policy documents that have been circulated among the Organs of the Court or within the Registry, for comment.

However, and as noted above, the OPCD is not an organ of the Court, which was the preferred option detailed in the Report of the Secretary-General on the establishment of a Special Tribunal for Lebanon.³¹ The preference of the Secretary-General was accepted and found form in articles 7 and 13 of the STL Statute³². A Defence Office being administratively and functionally independent of the Registry, has much to commend it. The institutional difference (in terms of resources, having a ‘voice’ within the Court and more balanced media reporting) that being an ‘organ’ brings cannot be underestimated by any that are conversant with the history and dynamics of the various *ad hoc* and hybrid Tribunals. Given the organization of the Court, as determined by article 34, much will depend upon the Registrar’s willingness to ‘further develop’ the Defence Office and to create an atmosphere whereby its staff members feel able to operate independently in the interests of justice.

At the time of writing, it seems that change is afoot that may have significant consequences to the existence of the OPCD. The current Registrar of the Court (elected by the judges in 2013) has embarked on a ‘ReVision Project’ further to a general recommendation from the Committee on Budget and Finance that the Court ‘undertake a thorough review of its organizational structure, with a view to rationalizing reporting lines, identifying responsibilities that could be delegated and streamlining functions, processes and structures’.³³ The ‘on-going ReVision project involves a thorough review of both the structure and the operations of the Registry³⁴ for purposes of proposing changes to improve the overall functioning, efficiency (including costs) and effectiveness of the Registry. With respect to the Registry’s mandate and responsibility pursuant to the Statute, Rules, and Regulations of the Court to assist and facilitate the work of the defence, the Registrar has proposed, as part of the ReVision Project, abolishing the OPCD and consolidating some of its functions under a new Defence Office that would additionally be responsible for implementing and managing the legal aid policy and providing administrative support to the defence (tasks presently handled by the Registry’s Counsel Support Section ‘CSS’). The Registrar is currently of the view that such consolidation would allow for the more efficient provision of assistance and services to the defence. The Registrar considers that the OPCD is not well-placed to represent and advocate for the defence as it is not an executive body of the legal profession or subject to democratic oversight (a task, it is said, better suited to an outside association of counsel).

Should the judges accept the Registrar’s proposal and amend or excise Regulation 77, the significance for the defence would be twofold. First, and as highlighted above and at footnote

³¹ S/2006/893, 15 Nov. 2006, para 27.

³² Statute of the Special Tribunal for Lebanon, Annexed to Resolution 1757(2007), S/Res/1757 (2007), 30 May 2007.

³³ ICC-ASP/13/16, para. 1, citing to ICC-ASP/11/20, vol. II, part B.1, para. 29.

³⁴ ICC-ASP/13/16, para. 2.

30, the Defence Office would seemingly revert, more or less, to the structure of the prior defence offices of the ad hoc Tribunals. Second, the defence would, perhaps, lose the current institutional voice that OPCD provides in its attempt to pass on the views and concerns of the defence into the myriad of policy and administrative discussions, plans and decisions within the Court that impact on the rights and functioning of the defence. While an outside association of counsel may very well complement the advocacy work of the OPCD, it may not be able to wholly replace the institutional representation that OPCD provides, including at the earliest stages of policy-making or when the matters under discussion are confidential/non-public. Whatever the judges finally decide, it is important that regard be had to ensuring that the voice of the Defence is properly heard at various levels of the courts administration and operation.

Article 35 Service of judges*

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Literature: Bellelli, R., 'The law of the Statute and its practice under review', in: R. Bellelli et al. (ed.), *International Criminal Justice, Law and Practice from the Rome Statute to its Review* (Ashgate 2010) 410–415; Jones, J. R. W. D., 'Composition of the Court', in: A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, I* (OUP 2002) 235–267; Rwelamira, M. R., 'Composition and Administration of the Court', in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues Negotiations, Results* (Kluwer Law International 1999) 153–167; Schabas, W., 'Article 35. Service of Judges', in: W. Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 520–523; Liera, S. F., 'Single Judge, Replacements, and Alternate Judges', in: R.S. Lee (ed.) *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 310–314.

Content

I. Introduction	1
II. Drafting history	2
III. Paragraph 1 – Full-time service of judges.....	7
IV. Paragraph 1 – Availability to serve full-time.....	9
V. Paragraph 2 – The Presidency	15
VI. Paragraph 3 – Calling judges to serve on a full-time basis	17
VII. Paragraph 4 – Financial arrangements for non-full-time judges	23

I. Introduction

1 Article 35 of the Statute, governing the service of judges, is vital to ensuring the efficient functioning of the judiciary of the Court. This provision is the result of discussions which sought to reconcile two seemingly competing notions: that 'the court, as an institution, must be permanent, but it should not operate on a full-time basis.'¹ The article brings together the two camps in a model of the Court which sees the number of full-time judges increasing as necessary on the basis of workload. Moreover, in conjunction with the articles designed to insulate judges from outside or political influence (for instance, by precluding judicial interference and providing for the financial security of judges and single non-renewable judicial terms),² article 35 of the Statute, requiring, *inter alia*, the full-time service of judges, is an essential guarantee for the independence of judges. Indeed, at the Rome Conference, the provision was recognised by States as having a close connection with the independence of judges (governed by article 40 of the Statute) and the financial arrangements for salaries,

* The views expressed herein are those of the author alone and not of the International Criminal Court.

¹ Report of the International Law Commission on the work of its forty-fifth session, 3 May – 23 July 1993 (A/48/10), paragraph 45.

² See articles 40, 49 and 36(9)(a) of the Statute.

allowances and expenses of judges (governed by article 49 of the Statute and resolutions of the Assembly of States Parties ('ASP')).³

II. Drafting history

It was not always foreseen that judges would serve at the Court on a full-time basis. During the drafting of the Statute, the issue was subject to substantial discussion and there were differing views as to whether the judiciary should serve full-time or part-time. This was linked to the then undecided question of whether the Court, which was to be established as a permanent institution, would sit continuously or be convened only as and when required to consider a case submitted to it, particularly in its nascent stages.⁴

Those advocating a court in continuous session were of the view that a permanent criminal court required judges to carry out their functions full-time in order to guarantee their independence.⁵ It was considered that a court in permanent session with a full complement of judges would ensure the exclusive dedication of those judges to their judicial functions, which would in turn contribute to their impartiality and objectivity.⁶ In contrast, there was concern that the part-time service of judges might be incompatible with and indeed undermine the very permanence, stability and independence required of a true international criminal court.⁷ Proponents of a permanent judiciary also maintained that a body of judges sitting full-time would develop a collective understanding of the aims and working methods of the Court,⁸ and benefit the uniformity and further development of the law.⁹

Supporters of the service of judges on a part-time basis were of the view that since the Court was being established as the first permanent court of its kind, as opposed to a situation-based or *ad hoc* institution, its likely utilisation was unpredictable and there was uncertainty as to when it would be seised of its first case or indeed how heavy its future caseload would be; in that respect, a court in permanent session could not be justified, particularly in the first phase of its operation.¹⁰ The full-time vision of the judiciary also held

³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June – 17 July 1998, Official Records, Volume III, A/CONF.183/13 (Vol. III), Part II, F, Documents of the Committee of the Whole, Part 4. Composition and administration of the Court, Coordinator's rolling text on cluster 1 of part 4 (articles 35(b), 36, 37 and 40), page 260, footnote 80 to article 36. See note 62, for the relevant resolutions of the ASP.

⁴ See Report of the International Law Commission on the work of its forty-fourth session, 4 May – 24 July 1992 (A/47/10), paragraphs 33–34, 103 and its Annex, Report of the Working Group on the question of an international criminal jurisdiction ('Annex'), paragraphs 4(e), 19, 42, 46–47 and 51; A/48/10, see note 1, paragraphs 30 and 45 and Annex, Draft Statute for an international criminal tribunal ('1993 Draft Statute'), commentary to article 4, paragraph 6; Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994 (A/49/10), paragraphs 32 and 49 and Draft Statute for an International Criminal Court ('1994 ILC Draft Statute'), commentary to articles 4 (paragraph 1) and 10. At the Rome Conference the following States expressed support for judges serving full-time from the outset: see note 3, Official Records, Volume II A/CONF.183/13 (Vol. II), Summary records of the meetings of the Committee of the Whole, A/CONF.183/C.1/SR.14 paragraphs 13 (United Kingdom), 56 (Venezuela), 58 (Niger), 59 (Slovakia), 62 (Tunisia), 70 (Qatar) 75 (Czech Republic), 79 (Yemen), 83 (Greece), 88 (Afghanistan), 90 (Senegal), 94 (Israel) 98 (United Arab Emirates). See *ibid*, A/CONF.183/C.1/SR.15 at paragraphs 5 (Togo), 6 (Chile), 8 (Oman), 13 (Kuwait), 16 (Morocco), 17 (Portugal), 18 (Thailand) 20 (Libya), 23 (Cameroun), 26 (Iraq), 28 (Mozambique), 31 (Algeria), 32 (Uruguay) and 34 (Ghana). Whilst the following States advocated a flexible approach or the part-time service of judges: *ibid*, A/CONF.183/C.1/SR.14, paragraphs 19 (Madagascar), 28 (Argentina), 44 (Syria), 49 (Japan), 71 (China), 73 (Colombia) and 85 (Pakistan). See also *ibid*, A/CONF.183/C.1/SR.15, paragraphs 4 (Republic of Korea) and 38 (Russia).

⁵ A/47/10, see note 4, paragraph 103; 1994 ILC Draft Statute, commentary to article 10, paragraph 3; see in particular the comments of the United Kingdom, Venezuela, Qatar, Yemen, Senegal, Togo, Oman, Morocco, Cameroon, Iraq and Algeria at the Rome Conference, see note 4.

⁶ A/47/10, see note 4, paragraph 34.

⁷ 1993 Draft Statute, commentary to article 4, paragraph 6; 1994 ILC Draft Statute, commentary to article 4, paragraph 1.

⁸ A/47/10, Annex, see note 4, paragraph 47.

⁹ 1994 ILC Draft Statute, paragraph 49.

¹⁰ A/47/10, paragraph 11 and Annex, paragraph 4(e).

clearly greater financial implications (with its impact on judicial remuneration and staffing) which were seen as contrary to the aims of cost reduction and flexibility.¹¹ The part-time service of judges at a permanent court was thus seen as a middle ground whereby the Court would have the advantage of existing as a legal entity but without the costly disadvantages of a full-time judiciary.¹²

- 5 This debate is apparent in the development of the Statute. The 1993 Draft Statute prepared by the Working Group of the International Law Commission ('ILC') provided that the Court was a permanent institution that would sit when required to consider a case submitted to it,¹³ and did not expressly foresee the service of full-time judges. Whereas arguments were put forward for the President of the Court to immediately serve on a full-time basis, it was thought that this might unnecessarily restrict the range of candidates for the post and the need for flexibility was stressed.¹⁴ However it was understood that nothing in the draft would prevent the President from becoming full-time if circumstances required it.¹⁵ The 1994 ILC Draft Statute similarly provided that, whilst the Court was a permanent institution, it would act only when required to consider a case submitted to it.¹⁶ That draft provided that judges would work at the Court on a part-time basis, at least at first, but foresaw the possibility of States Parties calling judges to full-time service on the basis of workload, upon the recommendation of the Presidency of the Court.¹⁷ It was the 1998 Draft Statute adopted by the Preparatory Committee,¹⁸ which expressly provided that the judges of the Presidency would serve on a full-time basis immediately from the commencement of their terms of office and, in square bracketed text, that depending on the workload of the Court, other judges may serve on a full-time or part-time basis as required. Paragraph 2 of article 35 of the Statute is identical to the first sentence of the corresponding provision in the 1998 Preparatory Committee Draft Statute, which in full provided:

'The judges composing the Presidency shall serve on a full-time basis as soon as they are elected. [The judges composing [the] [a] Pre-Trial Chamber shall serve on a full-time basis [once the Court is seized of a matter] [when required in the view of the President].] [On the recommendation of the Presidency, the States Parties] [The Presidency] may [by a two-thirds majority] decide that the workload of the Court requires that the judges [composing any of the other Chambers] should serve on a full-time [or part-time] basis.'¹⁹

It should be noted that in the footnotes to the provision, the view was expressed that reference in the first sentence should be made to the 'President' rather than the 'Presidency'. On the other hand, delegations agreed that the reference to 'the Court' meant the whole Court, as set out in article 35 of the Statute.

- 6 The present text of article 35 of the Statute, adopted at the Rome Conference, strikes a balance between the two approaches. It provides a flexible arrangement which sees only the three judges of the Presidency²⁰ serving at the Court, in the initial phase of its operation, on a

¹¹ A/47/10, Annex, see note 4, paragraph 47; 1993 Draft Statute, commentary to article 4, paragraph 6; 1994 ILC Draft Statute, commentary to article 4, paragraph 1.

¹² A/47/10, Annex, see note 4, paragraph 42.

¹³ 1993 Draft Statute, article 4(1), providing: 'The Tribunal is a permanent institution [...] It shall sit when required to consider a case submitted to it'.

¹⁴ 1993 Draft Statute, commentary to article 10.

¹⁵ 1993 Draft Statute, commentary to articles 10 and 17.

¹⁶ Article 4(1) of the 1994 ILC Draft Statute, provided: 'The Court is a permanent institution [...] It shall act when required to consider a case submitted to it'.

¹⁷ 1994 ILC Draft Statute, article 10(4). With particular respect to the President, it was agreed that the provision would not prevent the President from becoming full-time should circumstances so require, 1994 ILC Draft Statute, commentary to article 8, paragraph 2. See note 56.

¹⁸ In respect of the status of the Court, article 4(1) of the 1998 Preparatory Committee Draft Statute provided: 'The Court is a permanent institution open to States Parties in accordance with this Statute. It shall act when required to consider a case submitted to it' (see note 3, Official Records, Volume III, A/CONF.183/13(Vol. III), Part I, B, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court ('1998 Preparatory Committee Draft Statute')).

¹⁹ 1998 Preparatory Committee Draft Statute, article 36.

²⁰ See mn 15.

full-time basis immediately upon their election, whilst envisaging the future possibility of the Court remaining permanently in session through judges being called to full-time service.²¹

III. Paragraph 1 – Full-time service of judges

Paragraph 1 of article 35 of the Statute provides that the judges of the Court are elected as full-time members of the Court. However, pursuant to paragraph 3 of article 35, discussed below from margin 17, the service of judges is staggered so that some judges are called to full-time service immediately whereas others are not. The implication of paragraph 1 is that once called to serve on a full-time basis, judges are not permitted to serve at the Court on a part-time basis during any part of their terms of office. Indeed, article 40(3) of the Statute provides that '[j]udges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature'.²² This paragraph applies to all judges of the Court, whether elected: within the regular election cycle as one of the eighteen judges of the Court in accordance with article 36 of the Statute;²³ to fill a judicial vacancy in accordance with article 37 of the Statute; or in accordance with article 36(2) of the Statute, to increase the number of judges.

The question has arisen as to whether judges whose terms have been extended for the purpose of completing any trial or appeal the hearing of which has already commenced, in accordance with article 36(10) of the Statute, fall within the ambit of articles 37(1) and 40(3) of the Statute, given that their original terms of office have expired; i.e. whether judges serving extended terms to complete a case are equally required to serve on a full-time basis at the Court and refrain from engaging in other occupations of a professional nature. The question has not been definitively settled.

IV. Paragraph 1 – Availability to serve full-time

Paragraph 1 of article 35 requires judges to be available to serve at the Court on a full-time basis from the commencement of their terms of office. This provision thus obliges judges to be on hand to take up their full-time duties at the Court as and when required within their terms of office. It seeks to ensure that the Presidency is not divested of judges with whom to compose Chambers to hear cases and that the Court is thereby in a position to administer justice without delay.

For judges elected on regular mandates, their terms of office commence on the eleventh of March following the date of their election.²⁴ For judges elected to fill judicial vacancies, their

²¹ See 1994 ILC Draft Statute, paragraph 49.

²² For those judges who have not yet been called to serve to on a full-time basis, article 40(2) of the Statute provides that judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

²³ Regular elections refer to the scheduled elections of the ASP to elect judges to the Court, which take place every three years in accordance with article 36(9) of the Statute.

²⁴ At the first judicial election at its first session in 2003, the ASP decided that the terms of office of judges of the Court shall begin to run from the 11 March following the date of the election, *Official Records, First session (first and second resumptions) 3–7 February and 21–23 April 2003* (ICC-ASP/11/3/Add.1), Part I, B, paragraph 31. This is enshrined in regulation 9(1) of the Regulations of the Court, which likewise provides that the terms of office of the judges commence on the eleventh of March following the date of their election. It is not stated when the terms of judges elected to increase numbers, in accordance with article 36(2) of the Statute, would commence. (For further pronouncements of the ASP on the commencement of the terms of office of judges elected within the regular election cycle see *Official Records, Fourth session (resumption) 26–27 January 2006* (ICC-ASP/4/37), Part I, B, paragraph 20; *Official Records, Seventh session (first and second resumptions) 19–23 January and 9–13 February 2009* (ICC-ASP/7/20/Add.1), Part I, B, paragraph 24; *Official Records, Tenth session, 12–21 December 2011* (ICC-ASP/10/20), Vol I, Part I, B, paragraph 44; *Official Records, Thirteenth session, 8–17 December 2014* (ICC-ASP/13/20), Vol I, Part I, B, paragraph 50).

terms of office commence on the date of their election.²⁵ The availability of judges to be called to serve on a full-time basis at the Court could, however, be delayed for reasons such as health/illness, continuing professional obligations or issues of residence/proximity to the Court.

- 11 On the subject of availability of judges and in the context of reporting on the two candidates nominated at the twelfth session of the ASP in November 2013 to fill, in accordance with article 37 of the Statute, the judicial vacancy resulting from the resignation of Judge Anthony Thomas Aquinas Carmona (Trinidad and Tobago),²⁶ the Advisory Committee on Nominations of Judges of the International Criminal Court (mandated to facilitate the appointment of the highest-qualified individuals as judges of the Court ('Advisory Committee')),²⁷ considered it 'important that judges elected to the Court be in good health and prepared to serve the whole term immediately, and that there be no extraneous duties that could delay their assumption of office'.²⁸ The Advisory Committee reiterated the importance of this in relation to the seventeen candidates nominated in the elections for six judicial seats at the thirteenth session of the ASP in December 2014²⁹ and also recalled this in relation to the two candidates nominated in the elections at the resumed thirteenth session of the ASP in June 2015³⁰ to fill the judicial vacancy resulting from the resignation of Judge-elect Senator Miriam Defensor-Santiago (The Philippines).³¹ Further,

²⁵ At the first judicial election at its first session in 2003, the ASP also decided that the term of office of a judge elected to replace a judge whose term of office has not expired shall run from the date of the election for the remainder of that term, *Official Records, First session (first and second resumptions) 2003* (ICC-ASP/1/3/Add.1), Part I, B, paragraph 31. This is equally enshrined in regulation 9(2) of the Regulations of the Court, which provides that the terms of office of judges elected to replace judges whose terms have not expired shall commence on the date of their election and shall continue for the remainder of the predecessors' terms. (For further pronouncements of the ASP on the commencements of the terms of office of judges elected to fill judicial vacancies see *Official Records, Sixth session, 30 November – 14 December 2007*, (ICC-ASP/6/20), Vol I, Part I, paragraph 32; *Official Records, Eighth session, 18–26 November 2009* (ICC-ASP/8/20), Vol I, Part I, paragraph 34; *Official Records, Twelfth session, 20–28 November 2013* (ICC-ASP/12/20), Vol I, Part I, paragraph 24).

²⁶ Effective as of 18 March 2013, following his election as President of Trinidad and Tobago. See ICC Press Release ICC-CPI-20130320-PR885, 20 March 2013.

²⁷ The Advisory Committee, a subsidiary body of the ASP in accordance with article 36(4)(c) of the Statute, was established by resolution of the ASP at its tenth session in December 2011 (*Official Records, Tenth session, 2011* (ICC-ASP/10/20), Vol I, Part III, ICC-ASP/10/Res.5, paragraph 19) with the mandate of facilitating the appointment of the highest-qualified individuals as judges of the Court (see paragraph 5 of the Terms of Reference of the Advisory Committee set out in Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, 30 November 2011, ICC-ASP/10/36 ('Advisory Committee Terms of Reference')). The Advisory Committee is mandated to prepare information and analysis, of a technical nature, on the suitability of the judicial candidates in order to inform the decision making of States Parties in the election process (see paragraphs 9, 11 and 12 of the Advisory Committee Terms of Reference, ICC-ASP/10/36). In examining the scope of its mandate, the Advisory Committee has stated that it is 'required to advise States on whether or not, in its opinion, the candidates meet the requirements of article 36 [of the Statute], taking into account the specific qualifications required under Lists A and B as provided in that article.' See Report of the Advisory Committee on Nominations of Judges on the work of its fourth meeting, 24 April 2015, ICC-ASP/13/46, paragraph 18. The Advisory Committee evaluates the candidates by conducting interviews with regard to their qualifications before preparing its report to the ASP. The President of the Bureau of the ASP has expressed the hope that States Parties would be guided by the conclusions of the reports of the Advisory Committee in casting their votes during judicial elections (Bureau of the ASP, Decisions, Ninth meeting, 30 September 2014, paragraph 3(a)).

²⁸ Report of the Advisory Committee on Nominations of Judges on the work of its second meeting, 29 October 2013, ICC-ASP/12/47, Annex I, paragraph 8.

²⁹ The Advisory Committee 'stressed the importance that judges elected to the Court be in good health and prepared to serve the whole term, and that there be no extraneous duties that could delay their assumption of office or interfere with their discharge of their duties of a judge as provided in article 40, paragraph 3, of the Rome Statute.' Report of the Advisory Committee on Nominations of Judges on the work of its third meeting, 29 September 2014, ICC-ASP/13/22, Annex I, paragraph 8.

³⁰ Report of the Advisory Committee on Nominations of Judges on the work of its fourth meeting, 24 April 2015, ICC-ASP/13/46, Annex, paragraph 8.

³¹ Judge-elect Senator Defensor-Santiago resigned on 3 June 2014 for medical reasons, see note 36. 'Judge-elect' refers to an incoming judge who has been elected to the Court by the ASP but who has not yet made his or her solemn undertaking in accordance with article 45 of the Statute.

the President of the Bureau³² has informed States Parties that in selecting candidates for judicial office it is 'important that the candidates be willing, able and fit to assume office when called to service by the Court'.³³ At its thirteenth session in December 2014, the ASP also 'stress[ed] the importance of elected judges who have made their solemn undertaking being available to take up their full-time service when the Court's workload so requires'.³⁴

These statements have been informed by practice, as the Court has seen judges who have resigned both during, and prior to, full-time service due to reasons of ill-health³⁵ or who have not been sworn in and called to serve on a full-time basis due to reasons of ill-health.³⁶ It is noted that unlike the staff of the Court, the appointment of judges is not subject to clearance from a medical professional following the results of a medical examination³⁷ and, again, unlike the staff of the Court, there is no upper age limit on the service of judges.³⁸ Nonetheless, whereas health is not a relevant criterion in the nomination and election of judges as stipulated in article 36 of the Statute, it has become an essential condition in considering the aptitude of judges for full-time service at the Court. In his address to the ASP at the opening of its twelfth session in November 2013, the President of the Court, in the context of discussing the forthcoming elections of six judges at the thirteenth session of the ASP, declared that '[a]s you know, the Court needs elected officials of the highest quality, with ample professional experience in relevant fields of law. Further, and equally important, they need to be in good and robust health!' The President reiterated this at the thirteenth session of the ASP in December 2014.³⁹ Moreover, the Advisory Committee reported to the ASP that: the two candidates nominated to fill the judicial vacancy at the twelfth session in November 2013 (resulting from the resignation of Judge Carmona);⁴⁰ the seventeen candidates for election at the thirteenth session in December 2014; and the two candidates nominated to fill the judicial vacancy at the resumed thirteenth session in June 2015 (resulting from the resignation of Judge-elect Senator Defensor-Santiago)⁴¹ had stated that they were in good health.⁴²

³² In accordance with article 112(3) of the Statute, the Bureau of the ASP has a representative character. It consists of a President, two Vice-Presidents and eighteen members elected by the ASP for three-year terms and meets at least once a year to assist the ASP in the discharge of its responsibilities.

³³ Letter from President of the ASP to States Parties concerning the work of the Advisory Committee on the Nominations of Judges and the nomination of candidates, ASP/2014/001, 18 February 2014.

³⁴ *Official Records, Thirteenth session, 2014* (ICC-ASP/13/20), Vol I, Part III, ICC/ASP/13/Res.5, paragraph 41.

³⁵ Judge Jorda (France), see ICC Press Release ICC-CPI-20070508-218, 8 May 2007 and Judge Kaul (Germany), see ICC Press Release ICC-CPI-20140630-PR1023, 30 June 2014.

³⁶ Judge-elect Senator Defensor-Santiago (The Philippines), see Bureau of the ASP, Decisions, Fourth meeting, 4 June 2014, paragraph 2. Concerning the resignation of Judge-elect Shahabuddeen (Guyana) (ICC Press Releases ICC-ASP-20090218-PR391, 18 February 2009 and Election of judges to fill two judicial vacancies of the International Criminal Court, 11 November 2009, ICC-ASP/8/21, paragraph 2), see Bellelli, in: Bellelli *et al.* (eds.), *International Criminal Justice* (2010) 413.

³⁷ Rule 104.13 of the Staff Rules of the International Criminal Court, ICC-ASP/4/3, 25 August 2005. For discussion on the issue of an age limit for elected officials see Bellelli, in: Bellelli *et al.* (eds.), *International Criminal Justice* (2010) 410–415.

³⁸ Regulation 9.5 of the Staff Regulations of the Court sets the age limit at 62 years providing: 'Staff members shall not be retained in active service beyond the age of sixty-two years. The Registrar or the Prosecutor, as appropriate, may, in the interest of the Court, extend that age limit in exceptional cases' (*Official Records, Second session, 8–12 September 2003* (ICC-ASP/2/10), Part IV, ICC-ASP/2/Res.2).

³⁹ Statement of Judge Sang-Hyun Song President of the International Criminal Court, at the opening of the 12th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 20 November 2014. Likewise at the thirteenth session of the ASP in December 2014, the President 'stress[ed] once again that the ICC needs judges of the highest quality, with ample professional experience and sound health. In addition, given the heavy casework which will face the Judiciary next year, it will be very important that the newly-elected judges are immediately available to take up full-time service'. Statement of Judge Sang-Hyun Song President of the International Criminal Court, at the opening of the 13th Session of the Assembly of States Parties of the International Criminal Court.

⁴⁰ *Supra* note 26.

⁴¹ *Supra* notes 31 and 36.

⁴² ICC-ASP/12/47, Annex I, see note 28, paragraph 8; ICC-ASP/13/22, Annex I, see note 29, paragraph 8; ICC-ASP/13/46, Annex, see note 30, paragraph 8.

- 13 Continuing professional obligations might also delay the availability of a judge to assume office; consequently the readiness of candidates to take up their positions at the Court has similarly become a relevant consideration. It is noted that judges elected to the Court have still been engaged in other professional duties at the time of election and thereafter which have prevented them from being called to the Court to serve full-time. For example, a judge elected at the tenth session of the ASP in December 2011 was not, until March 2015, called to serve the Court on a full-time basis as he was sitting in the trial of *The Prosecutor v. Radovan Karadžić* (IT-95-5/18-I) before the ICTY.⁴³ Thus, in relation to extraneous commitments, the Advisory Committee, after conducting interviews with the judicial candidates, reported to the ASP that both candidates nominated to fill the judicial vacancy at the twelfth session in November 2013, resulting from the resignation of Judge Carmona, had stated that they were available to serve the remainder of the term of office of the vacant seat immediately.⁴⁴ The Advisory Committee similarly reported that all seventeen judicial candidates for election at the thirteenth session in December 2014 had stated that they were prepared to serve for the full term of nine years and further that, with the exception of one candidate, all seventeen candidates had stated that they would be available from 11 March 2015.⁴⁵ In respect of the resumed thirteenth session in June 2015, the Advisory Committee also reported to the ASP that the two candidates to fill the judicial vacancy left by the resignation of Judge-elect Senator Defensor-Santiago had indicated that they would not be delayed in serving their terms.⁴⁶
- 14 The ability of judges to present themselves at the seat of the Court may also lead to delay. Whereas the place of residence of full-time judges is not expressly addressed in article 35 of the Statute or elsewhere in the Statute, there was discussion during the drafting of the Statute as to whether the President should be compelled to reside at the seat of the Court.⁴⁷ Moreover, previous drafts of the provision during the Rome Conference had implied that serving the Court full-time entailed presence at the seat of the Court in The Hague.⁴⁸ Although this inference was not retained in article 35 of the Statute, it remains in article 40 of the Statute, which refers to 'Judges required to serve on a full-time basis at the seat of the Court'.

The ASP, noting that ultimately the issue of the residence of full-time judges was not explicitly addressed in the Statute adopted at Rome, considered that 'the judges themselves will take a decision as to whether or not residence at the seat of the Court is required for full-time service, bearing in mind the permanent character of the Court'.⁴⁹ However, early on in

⁴³ Referring to Judge Howard Morrison (The United Kingdom).

⁴⁴ ICC-ASP/12/47, Annex I, see note 28, paragraph 8.

⁴⁵ ICC-ASP/13/22, Annex I, see note 29, paragraph 8. The Advisory Committee noted that one of the candidates might not be in a position to serve from 11 March 2015, in view of his engagement in continuing proceedings at the ICTY, referring to Judge Antoine Kesia-Mbe Mindua sitting in the trial of *The Prosecutor v Goran Hadžić* (IT-04-75), *ibid* paragraphs 8 and page 11. It should be noted that the authorities of the Democratic Republic of the Congo subsequently reassured States Parties that Judge Mindua, their nominated candidate, would be available to take up his duties once elected (see Note Verbale of 12 November 2014, 132.44/A1/SJ/920/2014). Judge Mindua was thereafter successfully elected as a judge of the Court at the thirteenth session of the ASP. For the results of the elections see *Official Records, Thirteenth session, 2014* (ICC-ASP/13/20), Vol I, Part I, B, paragraph 44).

⁴⁶ ICC-ASP/13/46, Annex, see note 30, paragraph 8.

⁴⁷ 1993 Draft Statute, commentary to article 10; 1994 ILC Draft Statute, commentary to article 8, paragraph 2.

⁴⁸ A previous draft of the text had provided that: [...] 'The Presidency may, in consultation with the members of the Court, decide from time to time, on the basis of the workload of the Court, to what extent the remaining judges shall be required to be available at the seat of the Court. Any such arrangement shall be without prejudice to the provisions of article 41. The financial arrangements for judges not required to be available full-time at the seat of the Court shall be made in accordance with article 50', see note 4, *Official Records, Volume III, A/CONF.183/13* (Vol. III) Part II, F, Documents of the Committee of the Whole, Part 4, Composition and administration of the Court, (i) Working document, A/CONF.183/C.1/L31/REV and (ii) Recommendation/Report, A/CONF.183/C.1/L.45, article 36. See also A/CONF.183/13 (Vol. II), Summary records of the meetings of the Committee of the Whole, 39th meeting, paragraphs 30–31.

⁴⁹ *Official Records, Second session, 2003* (ICC-ASP/2/10), Part III, A, page 199, footnote 1. In full the footnote to the paragraph 7 on travel/relocation costs provides: 'The Rome Statute does not specifically address the issue of the residence of judges. Article 35 of the Rome Statute provides that full-time judges of the Court 'shall be available to serve on that basis from the commencement of their terms of office'. Moreover, article 40 provides

the life of the Court, the Presidency concluded that practicability required judges to reside in the vicinity of the Court during their terms of office and proposed an amendment to the Conditions of Service and Compensation of Judges of the ICC⁵⁰ to ensure that judges were able to serve the Court on a full-time basis effectively.⁵¹ That amendment was adopted by the ASP and the Conditions of Service and Compensation of Judges of the ICC now provide that 'Judges shall take up residence in The Netherlands within sufficient proximity to the seat of the Court to be available to attend the Court at short notice in order to discharge their duties under the Rome Statute and the Rules of Procedure and Evidence'.⁵²

V. Paragraph 2: The Presidency

Notwithstanding paragraph 1, paragraph 2 of article 35 provides that the judges composing the Presidency shall serve on a full-time basis as soon as they are elected. The Presidency, an organ of the Court pursuant to article 34(a) of the Statute, is comprised of the President and the First and Second Vice-Presidents elected from amongst the judges for a renewable three-year mandate, in accordance with article 38(1) of the Statute. The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor, and for other specific functions conferred upon it in accordance with the Statute.⁵³ It is the responsibilities of the Presidency that dictate the immediate full-time service of its members. 15

An important task of the Presidency in the judicial management of the Court, as set out in the Statute, is deciding when to call judges to serve the Court on a full-time basis, in accordance with article 35(3) of the Statute. Another is excusing a judge from the exercise of a function under the Statute or excusing the Prosecutor or Deputy Prosecutor from acting, in accordance with articles 41(1) and 42(6) of the Statute respectively. Other key functions of the judges of the Presidency warranting their immediate service, set out in the Rules of Procedure and Evidence ('Rules') and Regulations of the Court ('Regulations'), are assigning judges to judicial divisions in accordance with rule 4*bis*(2) of the Rules, selecting candidates for the post of Registrar in accordance with rule 12(1) of the Rules, and constituting Pre-Trial and Trial Chambers in accordance with article 61(11) of the Statute, rule 130 of the Rules and regulation 46 of the Regulations, as well as assigning situations to those Chambers in accordance with regulation 46(2) of the Regulations. Key functions of the President in particular are representing the Court, supervising the functions of the Registrar, in accordance with article 43(2) of the Statute, and convening plenary sessions of judges, in accordance with rule 4(2) of the Rules. 16

VI. Paragraph 3 – Calling judges to serve on a full-time basis

Paragraph 3 provides that the Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. This key provision affords the Court the capacity 17

that judges 'required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature'. The question of the residence of full-time judges and their availability to serve on that basis at the seat of the Court is a matter which the Rome Statute has entrusted to the judges. Article 52 sets out the manner in which the Regulations of the Court are to be elaborated and adopted. In considering the issue of the residence of full-time judges, the judges themselves will take a decision as to whether or not residence at the seat of the Court is required for full-time service, bearing in mind the permanent character of the Court.'

⁵⁰ *Infra* note 62.

⁵¹ Proposal regarding conditions of service and compensation of judges and elected officials, 10 August 2004, ICC-ASP/3/12, Annex I, Part II.

⁵² ICC-ASP/3/Res.3, Annex, Part II, paragraph 1, see note 62. Paragraph 2 of the same provides that 'Residence status is defined as the establishment, through acquisition or long-term lease, of a permanent residence, coupled with the declaration by the judge concerned of resident status'.

⁵³ Article 38(3) of the Statute.

to adapt as required to its caseload and grants the Presidency the necessary flexibility to ensure the effective operation of the Court. As discussed above at margins 2 to 6, the staggered nature of the full-time service of judges was a way to ensure that the Court did not waste precious resources when faced with an unpredictable workload in its initial phase of operation. However, it will have continued relevance during any inactive periods in the life of the Court.

- 18 The Presidency may decide whether to call judges to serve on a full-time basis, in consultation with the members of the Court. In the French version of the Statute, those consultees are specified as being the judges of the Court.⁵⁴ In practice, those members, consulted as to the workload indicators of the Court from their various perspectives, are the judges, the Prosecutor and the Registrar.⁵⁵ Previous drafts of this provision had seen the ASP deciding whether judges should be required to serve on a full-time basis following a recommendation from the Presidency.⁵⁶ The provision adopted at the Rome Conference omits any role for the ASP and leaves the decision firmly in the hands of the Presidency, depending on the volume of work in the Court; thereby underlining the Presidency's autonomy vis-à-vis the ASP over the internal judicial functioning of the Court.
- 19 In its initial phase, due to the nature of the proceedings of the Court, the first judges that the Presidency called to serve on a full-time basis were the judges assigned to the Pre-Trial Division in order to constitute Pre-Trial Chambers, as well as the judges constituting the Appeals Chamber. This was due to the responsibilities of the Pre-Trial Chambers, which deal with the initial stages of judicial proceedings before the Court in terms of *inter alia*, authorising the commencement of *proprio motu* investigations by the Prosecutor pursuant to article 15 of the Statute, hearing challenges to the jurisdiction of the Court or the admissibility of a case in accordance with article 19 of the Statute, hearing applications for the issuance of a warrant of arrest or a summons to appear in accordance with article 58 of the Statute and deciding whether to confirm the charges against a person and commit him or her for trial in accordance with article 61 of the Statute.⁵⁷ Moreover, the judges of the Appeals Chamber need to be in place to hear any interlocutory appeals arising from challenges to decisions of the Pre-Trial Chambers in accordance with articles 82(1) and 82(2) of the Statute. The Trial Division, the pool of judges from which the Presidency composes Trial Chambers, were amongst the last to be called to the Court since the pre-trial stage of proceedings require completion, entailing the confirmation of charges and committal for trial, before the Presidency constitutes a Trial Chamber to hear a case, in accordance with article 61(11) of the Statute.
- 20 Of the judges elected to the Court at the first election in February 2003, whose terms of office began on 11 March 2004, the Presidency had by the end of 2004 called to full-time service the judges of the Pre-Trial Division, constituting the three Pre-Trial Chambers⁵⁸ and

⁵⁴ The French version of article 35(3) of the Statute provides: 'La Présidence peut, en fonction de la charge de travail de la Cour et en consultation avec les autres juges, décider périodiquement de la mesure dans laquelle ceux-ci sont tenus d'exercer leurs fonctions à plein temps.' The English text provides: 'The Presidency may, on the basis of the workload of the Court and in consultation with its members decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis.' Given the definition of 'the Court' in article 1 of the Statute and the organisational structure of the Court set out in article 34 of the Statute, the English text of article 35(3) of the Statute is less precise in its terms than the French text.

⁵⁵ For example, see the Address by Judge Philippe Kirsch President of the ICC at the Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 6 September 2004, page 2.

⁵⁶ The 1994 ILC Draft Statute provided, at article 10(4): 'On the recommendation of the Presidency, the States Parties may by a two-thirds majority decide that the workload of the Court requires that the judges should serve on a full-time basis'. Article 36 of the 1998 Preparatory Committee Draft Statute provided: '[On the recommendation of the Presidency, the States Parties] [The Presidency] may [by a two-thirds majority] decide that the workload of the Court requires that the judges [composing any of the other Chambers] should serve on a full-time [or part-time] basis'. See mn 5.

⁵⁷ The 1998 Preparatory Committee Draft Statute had equally foreseen at article 36, in square bracketed text, that '[The judges composing [the] [a] Pre-Trial Chamber shall serve on a full-time basis [once the Court is seized of a matter] [when required in the view of the President].]' See mn 5.

⁵⁸ Constituted on 23 June 2004, ICC Press Release ICC-CPI-20040625-60, 25 June 2004, Constitution of ICC Pre-Trial Chambers. Excluding the Vice-President who was in the Pre-Trial Division in accordance with article 39(1), six additional pre-trial judges were called to full-time service.

the judges of the Appeals Division who comprised the Appeals Chamber in accordance with article 29(2)(b)(i) of the Statute.⁵⁹ By March 2007, the Presidency had constituted the first Trial Chamber⁶⁰ and called to full-time service all of the judges of the Court elected at the first election, other than those who had resigned. Since then, the large majority of judges have been called to full-time service from the commencement of their terms of office. The Proposed Programme Budget of the Court for 2015 foresees that all seven incoming judges will be required full-time, stating that ‘the anticipated caseload in 2015 will necessitate the calling of all six regular judges to be elected at the thirteenth session of the ASP in December 2014, as well as one additional judge to be elected to replace the previous judge-elect, Senator Miriam Defensor-Santiago of the Philippines, following her resignation in June 2014. The new judges are expected to be called to service immediately upon commencement of their terms of office pursuant to article 35(1) of the Statute.’⁶¹

The Presidency has been relatively conservative in calling judges to full-time service where the body of judges is complemented by judges whose terms have been extended for the purpose of completing any trial or appeal the hearing of which has already commenced, in accordance with article 36(10) of the Statute. The Presidency has underlined its ‘efforts on the one hand to ensure the availability of a sufficient number of judges to meet the requirements of current casework, while on the other hand attempting to limit as far as possible any increase beyond the total of 18 judges normally provided for in the Statute ... thus limiting the impact that extensions [pursuant to article 36(10) of the Statute] have had on the budget.’⁶² 21

Paragraph 3 maintains that the decision of the Presidency to call judges to full-time service is without prejudice to the terms of article 40 of the Statute, which safeguards their independence. This is to ensure that the exigencies of judicial administration do not lead to an inadvertent flouting of the provisions seeking to maintain the independence of judges. 22

VII. Paragraph 4 – Financial arrangements for non-full-time judges

Paragraph 4 of article 35 of the Statute provides that the financial arrangements for judges who are not required to serve on a full-time basis should be made in accordance with article 49 of the Statute. That article in turn provides that judges shall receive such salaries, allowances and expenses as may be decided upon by the ASP. As such, the benefits and allowances of non-full time judges are governed by the Conditions of Service and Compensation of Judges of the ICC (‘Conditions of Service’) adopted by the ASP.⁶³ 23

⁵⁹ Excluding the President, who was in the Appeals Division in accordance with article 39(1), the remaining four appeals judges were called to full-time service.

⁶⁰ Decision constituting Trial Chamber I and referring to it the case of *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-842, 6 March 2007.

⁶¹ Proposed Programme Budget for 2015 of the International Criminal Court, *Official Records, Thirteenth session, 2014* (ICC-ASP/13/20), Vol II, Part A, paragraph 70. The budget for 2015 therefore makes provision for the remuneration of 18 full-time judges, including all of the judges elected at the tenth session of the ASP in December 2011.

⁶² Report of the Bureau on Salary and all allowances for judges, whose terms have been extended in accordance with article 36, paragraph 10, 9 November 2013, ICC-ASP/12/56, paragraph 6. In the Proposed Programme Budget of the Court for 2013, the Presidency also noted that being ‘[m]indful of possible future changes in workload, the Judiciary will exercise its functions in a manner that makes the most efficient possible use of the resources allocated to it.’ *Official Records, Eleventh session, 14–22 November 2012* (ICC-ASP/11/20), Vol II, Part A, Proposed Programme Budget for 2013, paragraph 52.

⁶³ Adopted at the second session of the ASP in September 2003 (*Official Records, Second session, 2003* (ICC-ASP/2/10), Part III) and partly republished in amended form in the annex to resolution ICC-ASP/3/Res.3 adopted at the third session of the ASP in September 2004 (*Official Records, Third session, 6–10 September 2004* (ICC-ASP/3/25), Part III, Annex).

- 24 Pursuant to the Conditions of Service, judges of the Court who have not yet been called to serve on a full-time basis and who have made their solemn undertaking⁶⁴ receive an annual allowance of € 20,000, which is payable monthly.⁶⁵ In addition, a judge who declares to the President of the Court that his or her net income, including the € 20,000 annual allowance, is less than the equivalent of € 60,000 per annum will receive an allowance, again payable monthly, to supplement his or her declared net income up to € 60,000 per annum.⁶⁶ Furthermore, when engaged on the business of the Court, as certified by the Presidency, judges who have not yet been called to serve on a full-time basis are entitled to a special allowance of € 270 per day.⁶⁷ Moreover, non-full-time judges are entitled to a subsistence allowance, at the United Nations rate in Euros, applicable to judges of the International Court of Justice, for each day that they attend meetings of the Court.⁶⁸ As for benefits, a non-full-time judge is also entitled to the costs of travel to official meetings of the Court.⁶⁹ Finally, Judges who have not yet been called to serve on a full-time basis are not entitled to pension benefits until they are full-time and, as with judges serving on a full-time basis, they are not entitled to health insurance.⁷⁰
- 25 As discussed above at margins 7 to 9, judges are required to be available to serve on a full-time basis at the Court from the commencement of their terms of office in accordance with article 35(1) of the Statute. Furthermore, whilst judges who are not serving on a full-time basis at the Court are, unlike their full-time counterparts, entitled to engage in occupations of a professional nature, they shall not, pursuant to article 40(2) of the Statute, engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In light of the foregoing, judges elected to the Court are, on the one hand, in effect obliged to be on standby to be called to serve the Court on a full-time basis, pursuant to article 35(1) of the Statute, and on the other hand, limited in the types of activities in which they might engage, pursuant to article 40(2) of the Statute. This situation might interfere with their professional activities and hence warrant additional remuneration in the interim period between the commencement of their judicial terms of office and full-time service at the Court. In recognition of this, non-full-time judges are thus compensated by the above allowances and expenses to ease any financial hardships that they might incur and to facilitate their attendance at the Court for official meetings, for example plenary sessions of judges of the Court held pursuant to rule 4 of the Rules (which all judges, whether called to full-time service or otherwise, may attend, except for those on extended mandates pursuant to article 36(10) of the Statute (see mn 27)).
- 26 The salaries, allowances and expenses of full-time judges are equally provided for in article 49 of the Statute and set out in the Conditions of Service. They will not be considered in any detail here save for noting the following by way of comparison. The remuneration of a judge working on a full-time basis at the Court is set at € 180,000 net per annum.⁷¹ The President receives a special allowance paid at the rate of ten per cent of the President's annual remuneration of € 180,000, amounting to € 18,000 net.⁷² When acting as President, the two

⁶⁴ Judges who have not made their solemn undertaking pursuant to article 45 of the Statute are not entitled to the allowances and expenses granted to non-full-time judges. See the Proposed Programme Budget of the Court for 2013 and 2014 which made no provision for the entitlements of the judge newly elected at the tenth session of the ASP in December 2011 who had yet to be sworn in (*Official Records, Eleventh session, 2012* (ICC-ASP/11/20), Vol II, Part A, Proposed Programme Budget for 2013, footnote 39 to paragraph 89 and Annex V(c); *Official Records, Twelfth session, 2013* (ICC-ASP/12/20), Vol II, Part A, Proposed Programme Budget for 2014, footnote 31 to paragraph 70 and Annex V(c)).

⁶⁵ *Official Records, Second session, 2003* (ICC-ASP/2/10), Part III, paragraph 9.

⁶⁶ *Ibid*, paragraph 10.

⁶⁷ *Ibid*, paragraph 11.

⁶⁸ *Ibid*, paragraph 12.

⁶⁹ *Ibid*, paragraph 15.

⁷⁰ *Ibid*, paragraphs 13 and 14.

⁷¹ *Official Records, Third session, 2004* (ICC-ASP/3/25), Part III, ICC-ASP/3/Res.3, Annex, Part III, paragraph 1.

⁷² *Ibid*, paragraph 2.

Vice-Presidents, or any other judge assigned to act as President, are entitled to a special allowance of € 100 net per day for each working day so acting, up to a maximum of € 10,000 per annum.⁷³ Full-time judges are also entitled to further allowances and benefits in accordance with the Conditions of Service.

The Conditions of Service make no distinction between judges on regular mandates and judges on extended mandates pursuant to article 36(10) of the Statute, in terms of remuneration and other benefits, with the exception of the accrual of pensions after nine years.⁷⁴ The remuneration of judges whose terms have been extended, pursuant to article 36(10) of the Statute, has been called into question by the ASP. In practice, and in comparison to other judges, a judge on an extended term is limited to sitting solely in the case for which he or she has been extended and does not take part in other judicial activities (such as attending the plenary sessions of judges of the Court, convened pursuant to rule 4 of the Rules). The issue has hence been broached by the ASP as to whether judges on extended mandates, in accordance with article 36(10) of the Statute, should still be entitled to the full salary earned by judges on regular mandates even if they have been extended for the purpose of sitting in one case alone.⁷⁵ However, the Court has reported that the caseloads of judges whose terms have been extended for the purpose of only one case were not significantly lower than those of judges in regular service who could be assigned to two or more cases, due to the fact that the work of judges on extended terms during the closing phase of a case was normally intense prior to the rendering of final decisions and judgements.⁷⁶ This is especially true for the presiding judge. The ASP has not taken any decision on the question and remains seized of the matter.

⁷³ *Ibid*, paragraph 3.

⁷⁴ *Official Records, Third session, 2004* (ICC-ASP/3/25), Part III, ICC-ASP/3/Res.3, Appendix 2, Pension scheme regulations for judges of the International Criminal Court, article 1(4), providing: 'No additional pension shall be paid if the judge has completed more than a full nine-year term.' Article 1(3) of the Amendments to the pension scheme regulations for judges of the International Criminal Court, set out in resolution ICC-ASP/6/Res.6, maintains this limitation.

⁷⁵ *Official Records, Tenth session, 2011* (ICC-ASP/10/20), Vol I, Part III, ICC-ASP/10/Res.5, paragraph 31; *Official Records, Eleventh session, 2012* (ICC-ASP/11/20), Vol I, Part III, ICC-ASP/11/Res.8, paragraph 34; *Official Records, Twelfth session, 2013*, (ICC-ASP/12/20), Vol II, Part B, Report of the Committee on Budget and Finance on the work of its twentieth session, April 2013, paragraphs 35 and 36; Report of the Bureau on Salary and all allowances for judges, whose terms have been extended in accordance with article 36, paragraph 10, 9 November 2013, ICC-ASP/12/56, paragraph 4.

⁷⁶ *Official Records, Twelfth session, 2013* (ICC-ASP/12/20), Vol II, Part B, paragraph 35.

Article 36

Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.
 - (b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.
 - (c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;
 - (ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b).

In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.
3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
 - (b) Every candidate for election to the Court shall:
 - (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
 - (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
 - (c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:
 - (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
 - (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.
- (b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

- (c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.
5. For the purposes of the election, there shall be two lists of candidates:
List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and
List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).
A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.
6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.
(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.
7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
(i) The representation of the principal legal systems of the world;
(ii) Equitable geographical representation; and
(iii) A fair representation of female and male judges.
(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.
9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.
(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.
(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.
10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Literature: Ambos, K., 'Book Review: International Courts and Their Judges', (2012) 23 *CLF* 223; Bohlander, M., 'The International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics', in: *id.* (ed.), *International Criminal Justice – A Critical Analysis of Institutions and Procedures* (2007); *id.*, 'Pride and Prejudice or Sense and Sensibility? A pragmatic proposal for the recruitment of judges at the ICC and other international criminal courts', (2009) 12 *NCLRev* 529; *id.*, 'No Country for Old Men? – Age limits for judges at international criminal tribunals', (2010) 1 *IndianYbIL&Pol* 327; *id.*, 'Language, culture, legal traditions and international criminal justice', (2014) *JICJ* 491; *id.*, 'Criminalising LGBT persons under national criminal law and article 7(1)(h) and (3) of the ICC Statute', (2014) *Global Policy* 401; Bohlander, M. And Findlay, M., 'The use of domestic sources as a basis for international criminal law principles', (2002) 1 *The Global Community: Yearbook of International Law and Jurisprudence* 3

Content

I. Paragraphs 1 and 2: Composition of the Chambers.....	1
II. Paragraph 3: Qualifications of judicial candidates.....	3
III. Paragraph 4: Nomination procedure; Advisory Committee (ACN).....	9
IV. Paragraphs 5 to 8 – Election procedure; gender balance.....	11
V. Paragraphs 9 and 10: Term of office; continuation in office.....	13

I. Paragraphs 1 and 2: Composition of the Chambers*

1 The ICC's regular complement comprises 18 judges to serve in the Trial and Appeals Chambers. This number may be augmented if 'necessary and appropriate' circumstances, presumably mainly¹ the development of the Court's case load (*argumentum e contrario* from paragraph 2(c)(ii)), so require². The procedure for increasing the numbers on the bench is set out in paragraph 2, which is self-explanatory. At the time of writing, however, no such increase had ever been applied for by the Presidency, despite several requests by individual judges to be unassigned from sitting on certain cases because of personal docket overload³. The length of the proceedings before the Trial and Appeals Chambers and especially the time that the accused must spend in custody has reached the levels previously encountered at the ICTY and ICTR, a state of affairs which has persistently caused human rights concerns. There are thus already indications that the current staffing of the ICC bench may not be adequate. The experience from the ICTY and ICTR, firstly with the increase of the number of Trial Chambers and the augmentation of the joint Appeals Chamber and the attendant number of permanent judges, and secondly with the introduction of ad-litem judges in 2001 as part of their completion strategy, should be cause for concern and suggest a pro-active and robust approach to the problem of under-staffing, not least given the fact that even after the increases in judicial numbers just mentioned, both ad hoc tribunals continued to struggle with the case load and length of proceedings⁴.

2 Given that paragraph 2 also allows for decreasing the number of the supernumerary⁵ judges once the circumstances justifying a larger number have ceased to exist, the creation of a rapid response mechanism such as, for example, a reserve pool of qualified candidates⁶ who could be called upon at short notice, would seem advisable. There will be more suitable candidates in almost any election than vacant seats; hence the ASP might consider adding a procedure for the establishment of a reserve list to article 36 under the same criteria

* The views expressed in this book are solely those of the author and do not represent the views of the ECCC, the United Nations or the Government of the Kingdom of Cambodia.

¹ It is, however, imaginable that other reasons might be adduced, such as for example, a need for an injection of specific cultural and linguistic competences for a certain situation or case, similar to the expertise on issues such as violence against women and children in paragraph 8(b).

² The view expressed in the previous edition of this Commentary at marginal number 3 and fn. 12 that this equals a simplified procedure for amending the Statute is herewith abandoned, since the Statute itself already allows for the variation in the number of judges – paragraphs 1 and 2 do not stand in a hierarchical relationship to each other but must be read together: Paragraph 1 is not *amended* by increasing the number of judges under paragraph 2; if anything, the normative reach and content of paragraph 1 is generally qualified *ab initio* by paragraph 2. Similarly, Rwelamira, in: Lee (ed.), *The International Criminal Court – The making of the Rome Statute* (1999) 155.

³ See e.g. *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision replacing a judge in Trial Chamber V(b), 30 January 2014; *The Prosecutor v William Samoei Ruto and Joshua Arap Sang and The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-01/11 & ICC-01/09-02/11, Decision replacing a judge in Trial Chamber V, 26 April 2013; *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08, Decision replacing judges in Trial Chamber III, 20 July 2010; *The Prosecutor v German Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision replacing a judge in Trial Chamber II, 30 September 2009 and ICC-01/05-9-Anx2, Decision on the request to be excused from the exercise of judicial functions in Pre-Trial Chamber III, 22 April 2008.

⁴ It is obvious that the main factors militating against such a pragmatic approach are budget considerations.

⁵ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 531; Rwelamira, in Lee (ed.), *The International Criminal Court – The making of the Rome Statute* (1999) 155.

⁶ See in this context Bohlander (2009) 12 *NethCLRev* 529; *id.* (2010) 1 *IndianYbIL&Pol* 327.

(experience, geographical distribution and sex) that apply to the regular elections. One way of doing so could be to elect (at least) one qualified reserve judge for every permanent seat; this could also at the same time lead to a more efficient way of filling casual vacancies under article 37; unlike the practice at the ad hoc tribunals where the state of the judge whose departure etc. caused the vacancy was given the prerogative of unilaterally nominating the successor, article 37 provides for no such approach.

II. Paragraph 3: Qualifications of judicial candidates

The qualification of judicial nominees has been one of the most contentious aspects at each of the modern international criminal tribunals, starting with the ICTY and ICTR. While ‘moral character’ has so far not been a live issue, as far as can be seen, the criterion of being qualified for the highest judicial offices in the domestic environment has given rise to a number of challenges, albeit not at the ICC. As a preliminary (and admittedly somewhat academic⁷) matter, it bears reminding oneself that since a State Party can nominate a candidate of another State Party⁸ under paragraph 4(b) and (c), there is a possibility that State Party A nominates a candidate from State Party B who may qualify for the highest judicial offices under the latter’s domestic law, but not under the former’s. The meaning of the term ‘qualifications ... for appointment highest judicial office’ also varies rather widely⁹ as is best explained at the example of the first ICC judge from Japan¹⁰. The qualifications need to exist during the entire term of office and according to the case law of the *ad hoc* tribunals their loss will lead to the loss of the judicial seat itself¹¹. There is, however, some uncertainty over the question of whether an elected judge of the ICC who does not meet the criteria can or must be removed from office¹².

The development of the law on the issue of qualifications was highly controversial¹³. Article 6 of the ILC Draft stated that candidates should have ‘in addition: (a) criminal trial experience; (b) recognized competence in international law’, i.e. A cumulative requirement. The ad-hoc committee of the 1996 Preparatory Committee, under para. 20 of its report, stated that ‘concerning the appointment of the prosecutor, expertise in the investigation and prosecution of criminal cases was considered to be an important requirement’, but that insisting on criminal or international law experience with the judges was seen by some as ‘unduly restricting the sources of expertise on which the court should be able to rely’. The meaning of ‘sources of expertise’ may be illustrated by comments made by Algeria, Egypt,

⁷ But see *e.g.* on the circumstances of the judicial candidature in 2013 of the then Chef de Cabinet at the ICTY who had no prior judicial experience at all: www.diplomatmagazine.nl/2013/11/03/gabrielle-mcintyre-election/ and www.sense-agency.com/icty/togolese-judge-elected-to-tribunal%E2%80%99s-appeals-chamber.29.html?news_id=15507.

⁸ This possibility was already considered during the early drafting history of the provision. See Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 529.

⁹ Bohlander, in: *id.* (ed.), *International Criminal Justice – A Critical Analysis of Institutions and Procedures* (2007) 325.

¹⁰ See Bohlander (2009) 12 *NCLRev* 529.

¹¹ See on the related ICTY jurisprudence Bohlander (2010) 1 *Indian Yearbook of International Law and Policy* 327.

¹² Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 532 appears to take the view that an ‘independent removal procedure’ is not provided for in such a case, and also extends that to the language command issue – after all a serious matter in the daily court practice. This is *prima facie* supported by the absence of such an alternative in article 46(1); in any event the rare case of a candidate who intentionally lied about her qualifications may be found to constitute ‘serious misconduct’ under article 46(1)(a). The Statute does not seem to allow for a removal if the deception was, for example, committed by the nominating State authorities without the collusion of the candidate. It is nonetheless disconcerting to think that a judge who does demonstrably not meet the criteria should be allowed to remain in office. The Statute is in need of amendment in this regard.

¹³ See on the following and the relevant sources Bohlander (2009) 12 *NCLRev* 529 from which parts have been excerpted and modified.

Jordan, Kuwait, Libya and Qatar at the 1996 Prep Comm: 'Experience in criminal matters (judicial prosecutorial or defense advocacy) is, in part, necessary, but not to the exclusion of other expertise. The words of article 6 '...for appointment to the highest judicial offices...' are too limiting since most legal systems do not have judicial appointments by career judges. The present formulation means that only career judges are eligible, and therefore, this formulation should be changed'. The United Kingdom argued for the phrase 'criminal trial experience and, where possible, recognized competence in international law', a common-sense approach to the necessities of judging, whether in a domestic context or in the international arena. Many delegates of the 1998 Diplomatic Conference thought that trial experience should be required for the pre-trial and trial chamber judges. The insistence on previous practical experience together with or as an alternative to competence in international law can be found in the proposals of Switzerland, Portugal, Singapore, Trinidad and Tobago, the United States and France at the 1996 Prep Comm. Article 30[6] of the 1998 Zutphen Draft was an expression of the range of opinions which affected the negotiations; draft article 37 submitted to the Rome Conference by the 1998 Prep Comm in A/CONF.183/2/Add.1 read:

3. The judges of the Court shall:
- (a) be persons of high moral character and impartiality [who possess all the qualifications required in their respective States for appointment to the highest judicial offices]; [and]
 - (b) have:
 - (i) [at least ten years'] [extensive] criminal [law] [trial] experience [as a judge, prosecutor or defending counsel]; [or] [and, where possible]
 - (ii) recognized competence in international law [in particular international criminal law, international humanitarian law and human rights law] ; and (c) possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51].'

The text of draft article 37 transmitted by the Drafting Committee to the Committee of the Whole contained a reference to competence in criminal law and procedure gained through judicial or prosecutorial as well as defence experience or a similar capacity, and to competence in international law with reference to extensive professional legal capacity of relevance to the judicial work of the court. Any doubt as to whether these were meant to be cumulative or alternative requirements were dispelled by the final version of article 36 of the Rome Statute, which inserted the word 'or' between them¹⁴.

- 5 It is unclear by what method or on what grounds 'established competence' is determined (see also marginal no. 10 below on the advisory committee), not least since paragraph 4(a) *in fine* requires States Parties to explain how nominees meet the respective criteria. Neither the Statute nor the Rules or Regulations provide any further explanations¹⁵. The distinction between criminal practice experience and competence in international law continues to be unhelpful in this context. Even after over 20 years of modern international criminal justice since the inception of the ICTY, a domestic criminal judge can learn most of what needs to be known about the development of international humanitarian/criminal law in an intensive short course and fill any remaining lacunae by reading the relevant materials in preparation of an individual case¹⁶. However, 20 years of criminal judicial and case management

¹⁴ It is, however, noticeable that in the recent practice of nominations to the international judiciary, emphasis is de facto increasingly placed on judicial experience as the main controlling aspect for selection, a development which is to be welcomed. See also for a critique Ambos, (2012) 23 *CLF* 223.

¹⁵ Other commentaries on the ICC Statute are silent on the matter: Jones, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court - A Commentary*, Vol. I, (2002) 242. - Ingadottir, *The International Criminal Court: Recommendations on Policy and Practice* (2003) at 153-155 gives a slightly more detailed picture but nothing expounding on the substance of the qualifications. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 530 *et seq.* does not expand on the matter, either, but states (at 530) that 'the concerns of most delegations were ensuring geographic representation and experience from the major legal systems rather than the professionalism of the individuals making up the Court'.

¹⁶ Similarly, Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 532 finds that the experience of international criminal tribunals has shown that international law questions were much less frequently relevant than the emphasis in the negotiation stages may have suggested.

experience can only be gained through undergoing 20 years of criminal judicial and case management experience. Countries with career judiciaries usually assign new judges to dockets where their lack of experience will do the least damage, or place them in collegiate panels where they can learn from more experienced colleagues. Countries without a career judiciary require a certain minimum professional experience in the law before they appoint to the bench, although the picture is more blurred there¹⁷. This sensible approach should not be abandoned merely because the post is outside the national judiciary; it is moreover doubtful whether any State Party would favour such an approach in its own national judiciary. It seems particularly questionable when candidates without *any* prior experience as a judge, prosecutor or defence counsel in national or international trials are immediately appointed to an influential Appeals Chamber seat, as happened with one particular example at the ICTY.¹⁸

In October 2011, the International Bar Association's Human Rights Institute passed a resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals¹⁹ which under No. 3 stresses the cumulative criterion of professional experience²⁰.

The question of command of languages has been another issue at all tribunals and courts established after 1993. While all judges have a command of either English or French, one finds that English is by far the most common language spoken by judges. Recent research on all 35 ICC judges who took office since 2002 has shown that all 35 spoke English, yet a mere 22 spoke French. Overall, English made up for 37.6 % of all the languages represented among the judiciary and was at the same time the only language which achieved 100 % coverage across the entire judiciary. French accounted for 23.7 %, Spanish for 8.6 %, German for 7.5 %, Russian for 4.3 %, Italian for 3.2 %, Dutch, Japanese and Kiswahili for 2.2 % each and the remaining 14 native languages (1.1 % each) for 15.4 %. English was thus more than twice as frequent as the 14 languages represented only once each, it accounted for more than the sum of all other multiple languages except French. English and French together were roughly double the percentage of the other multiple languages and still about 15 % above the sum of all other languages²¹. A previous study of ICTY judges disclosed a difference in multiple language capacity between judges from common law backgrounds on the one hand and civil law backgrounds on the other, with the latter on average being the more polyglot of the two²².

While the requirement of speaking one of the working languages²³ is primarily meant simply to ensure ease of internal communication between the judges and their staff (as well

¹⁷ See Bohlander, in: *id.* (ed.), *International Criminal Justice – A Critical Analysis of Institutions and Procedures* (2007) at 357–362.

¹⁸ See ICTY press release of Friday, 23 November 2001 – CVO/P.I.S./639e. – Every appellate judge should have undergone sufficient trial experience, not least in order to avoid unrealistic expectations towards the trial judges on whose decisions the judge is to rule on appeal.

¹⁹ Online at www.ibanet.org/article/Detail.aspx?articleUid=CA79763C-39CC-4B54-8174-DD247A894150 which also contains a link to the background paper.

²⁰ In an email of 18 November 2009 to the author (on file), former UN Legal Counsel Hans Corell provided the following view on the selection criteria for trial and appellate judges in general: 'My own view on who should be elected judge of an international criminal court is very clearly expressed in the Proposal for an International War Crimes Tribunal for the Former Yugoslavia by the Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia of 9 February 1993. Needless to say, as former judge in my own country I feel very strongly about this. In our proposal we made a clear distinction between judges to be elected to serve on the Court of First Instance and the Court of Appeal.' – The relevant articles in that proposal are 7(3) and 18(3). The full text can be found at www.havc.se/res/SelectedMaterial/19930209csceproposalwarcrimtribunal.pdf.

²¹ Bohlander (2014) *JICJ* 491.

²² Bohlander and Findlay (2002) 1 *The Global Community: Yearbook of International Law and Jurisprudence* 3.

²³ Interestingly, this is one of the areas where the Advisory Committee on nominations (ACN – see below at marginal no. 10) may have a salutary effect, especially when it comes to testing the breadth of a candidate's command of legal terminology. See e.g. the 2nd Report of the Advisory Committee on Nominations of Judges on the work of its second meeting of 29 October 2013 (ICC-ASP/12/47) (online at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-47-ENG.pdf) p. 6 para 18, where the ACN stated with regard to one of the

as to some extent with the parties' representatives), it is undeniable that factual language preponderance will also have an impact on source access and collation in the context of the comparative research that is still necessary even at the ICC. This aspect of the judges' language command (and that of their legal assistants) has so far been under-researched. Neither the Statute, nor the Rules or Regulations make provision for ensuring that a sufficiently broad reservoir of languages exists in the working and in particular the research environment of the Court.

- 8 The age of the nominees was a contentious issue²⁴ for international criminal tribunals from the beginning but was never held to be an essential criterion. The Appeal Judgment of 20 February 2001 in *Prosecutor v Delalić et al.* set out the reasoning for the ICTY:

'The intention of article 13 must [] be to ensure [] that the *essential* qualifications do not differ from judge to judge. Those *essential* qualifications are character (encompassing impartiality and integrity), *legal* qualifications (as required for appointment to the highest judicial office) and experience (in criminal law, international law, including international humanitarian law and human rights law). Article 13 was *not* intended to include every local qualification for the highest judicial office such as nationality by birth or religion, or disqualification for such high judicial office such as age. Nor was article 13 intended to include constitutional disqualifications peculiar to any particular country for reasons unrelated to those essential qualifications.'²⁵

In the challenge of Judge Baird's nomination by Radovan Karadzic, a three judge panel decided on 20 October 2009²⁶ that the motion based on the judge's age was unfounded:

'It is plain that the Statute does not limit the ability of Judges to serve at the Tribunal by virtue of age, nor does the Bench find any reason to read such a requirement into article 13. Indeed, a clear distinction must be drawn between the qualifications referred to in article 13 and technical requirements for judicial office. In particular, the qualities a person must possess to be trusted with the highest judicial offices in his or her country is a separate matter from the restrictions local legislation may impose with respect to the age until which a person may hold such office. Accordingly, the Bench finds the Motion to be without merit'²⁷.

For the ICC, the debate about the issue is evident from the history of article 36 ICCS, which was previously Draft article 37. Subsection 9 of the 1998 Preparatory Committee version reads:

'A judge may not be over the age of 65 at the time of election'²⁸.

Article 30(6) of the previous 1996 Zutphen Draft had read under 4.:

'A judge may not be over the age of [61] [66] [65] [?] at the time of nomination. Judges shall retire at the age of [70] [75]'²⁹.

Similar references to age limits (appointment or retirement) can be found in the 1996 statements of some delegations of the Preparatory Committee, namely Algeria, Denmark, Egypt, Finland, France, Jordan, Kuwait, Libya, Qatar and Singapore³⁰. The discussions at the

candidates: 'The Committee questioned whether the candidate's oral proficiency in English, one of the working languages of the Court, while sufficient for the purposes of the interview, met the high standard prescribed under article 36, paragraph 3(c), of the Rome Statute. The candidate told the Committee that his proficiency in French, the other working language of the Court, was limited.' The candidate concerned was withdrawn by the nominating State Party on 21 Nov. 2013: 'Election of a judge to fill a judicial vacancy of the International Criminal Court – Addendum – Withdrawal of candidature' (ICC-ASP/12/45/Add.1-Eng), available online at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-45-Add.1-ENG.pdf.

²⁴ See Bohlander (2010) 1 *IndianYbIL&Pol* 327.

²⁵ *Prosecutor v. Delalić et al.*, Judgement, Case No. IT-976-21-A, of 20 February 2001 at para. 659. – Emphasis in the original.

²⁶ *Prosecutor v Radovan Karadžić*, Decision on motion to recuse Judge Baird and report to Judge Güney, Case No. IT-95-0518-PT, 20 October 2009.

²⁷ *Ibid.*, at para 21.

²⁸ Bassiouni, *The Legislative History of the International Criminal Court*, Vol.2, (2005) 257.

²⁹ *Ibid.*, 259.

³⁰ *Ibid.*, 259–264.

1998 Diplomatic Conference about subsection 9 of then article 37 showed a mixed picture. The following table shows countries opting for an age limit and those against it.

Age limits at the 1998 Diplomatic Conference³¹,

For age limit:

Finland (214), Oman (218), Brunei Darussalam (220), Iraq (220), Mozambique³² (221), Algeria (221)

Against age limit:

Syria (209) Japan (210), Venezuela (210), Turkey (211), Qatar³³ (212), Senegal (213), Togo³⁴ (217), Chile (216), Kuwait (219)

Why the subsection was finally deleted in article 36 ICCS is unclear³⁵.

III. Paragraph 4: Nomination procedure; Advisory Committee (ACN)

The nomination procedure is set out³⁶ in paragraph 4 and largely self-explanatory. The reference in paragraph 4(a)(ii) to the procedure for nominating candidates to the ICJ is to article 4 of the ICJ Statute.

Paragraph 4(c) empowers the ASP to establish an Advisory Committee on nominations (ACN). This committee was created only during the 11th session of the ASP from 14–22 Nov. 2012, over ten years after the coming into force of the Rome Statute³⁷. The report of the working group on the ACN³⁸ is remarkable firstly insofar as it requested the Bureau and the President of the ASP to discourage States Parties from campaigning for candidates for the ACN³⁹, and secondly, in that it put the two principal terms of reference given to it by the ASP, geographical representation, principal legal systems and gender diversity on the one hand and ‘established competence and experience in criminal or international law’ on the other, in a clear selection hierarchy: Only candidates who fulfilled the second criterion could then be scrutinised under the first⁴⁰. The Working Group concluded that ‘it would be important to have a balance between experts in international criminal law and public international law; between persons with a civil law and a common law background; between persons with academic, judicial and diplomatic backgrounds; and, insofar as possible given

³¹ Numbers refer to pages in Bassiouni, *The Legislative History of the International Criminal Court*, Vol.3, (2005) – Table reproduced from Bohlander (2010) 1 *IndianYb/L&Pol* 333.

³² Mozambique supported ‘an age limit of 65 to encourage participation by younger people.’

³³ Qatar made the condition ‘provided a judge was in good health at the time’.

³⁴ Togo tied this to a term of office of five years, stating that ‘Age would then not be a problem.’

³⁵ In an email of 12 November 2009 to the author, M Cherif Bassiouni stated: ‘I do remember this discussion but in the end there was no strong opinion in favor of an age limitation.’ Similarly, Hans Corell wrote on 10 November 2009: ‘In the cases where I had some influence myself, that is to say when I interviewed candidates to discuss with the Secretary-General for special courts, read the Special Court for Sierra Leone, I could of course consider this issue. However, when judges are proposed by countries directly for a vote by an assembly of States it is more difficult’. – Both emails are on file with the author. Rwelamira, in: Lee (ed.), *The International Criminal Court – The making of the Rome Statute* (1999) 157 cites only the age of 65 and states that the idea was dropped because of lack of a coherent national or international practice.

³⁶ See also the supplementary resolutions by the Assembly of States Parties: Resolution ICC-ASP/1/Res.2, ‘Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court’ and Resolution ICC-ASP/1/Res.3, ‘Procedure for the election of the judges for the International Criminal Court’, both of 9 Sep. 2002, ICC-ASP/3/Res.6 ‘Procedure for the nomination and election of judges of the International Criminal Court’, of 10 Sep 2004 and Resolution ICC-ASP/5/Res.5 ‘Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court: amendment to operative paragraph 27 of resolution ICC-ASP/3/Res.6’, of 1 Feb. 2007 – all resolutions are available online at www.icc-cpi.int/en_menus/asp/resolutions/categoricallist/Pages/default.aspx under ‘Elections’.

³⁷ See http://www.icc-cpi.int/en_menus/asp/elections/advisorycommitteenominations/Pages/election%20acn-%202012.aspx.

³⁸ Report of the Bureau Working Group on the Advisory Committee on Nominations (ICC-ASP/11/47) Online at www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-47-ENG.pdf.

³⁹ *Ibid.*, at para 10.

⁴⁰ *Ibid.*, at paras. 7–8.

the status of nominations, between both genders⁴¹. It also expressed its concern that it ‘was keenly conscious of the fact that some of the criteria contained in paragraph 2 of the terms of reference were difficult to assess and therefore subjective in nature. It was noted, for example, that it would be difficult to make a comparative assessment of candidates’ eminence, once a certain threshold was crossed, or to compare the eminence of individuals with different professional backgrounds’⁴². The ACN itself has in the meantime recommended ‘suggested guidelines for the presentation of candidates for election as judge of the International Criminal Court’⁴³; the ICC website now contains a model CV which nominating States Parties are encouraged to use⁴⁴.

IV. Paragraphs 5 to 8 – Election procedure; gender balance

- 11 The election procedure follows the intricate and technical regulations in paragraphs 5 to 8. They have in practice been supplemented by detailed instructions from the Bureau of the ASP on the actual voting process⁴⁵.
- 12 Since the Statute expressly uses the terms ‘male’ and ‘female’ in paragraph 8(3) without any reference to the phrase ‘within their context in society’ as in article 7(3), it would seem that the reference here is only to the biological sex and it may therefore be questionable under the current law to require employing a wider gender-related interpretation in this context. The related discussion about the meaning of the term ‘gender’ in the context of article 7(3) and the debate about sexual orientation would *prima facie* appear to be irrelevant with regard to judicial elections⁴⁶. The voting record of the ASP in this context is, however, so far not indicative of any discernible bias in any event: Judge Adrian Fulford from the UK, who has always been open about his homosexuality, was classified simply as ‘male’ and was elected for a term of nine years in the first election in Feb. 2003⁴⁷, in the 9th round with two votes more (59) than the two-third majority required (57 out of 85)⁴⁸. In the other rounds, other judges were elected with 56 to 65 votes, but mostly with fewer than 60⁴⁹; voting went into 33 rounds at the time, so he seems to have been either uncontroversial or it may have simply been the numerical relation between the majority who had no such concerns, and the critical minority.

⁴¹ *Ibid.*, at para 15.

⁴² *Ibid.*, at para 12.

⁴³ Report of the Advisory Committee on Nominations of Judges on the work of its second meeting, of 29 Oct. 2013 (ICC-ASP/12/47) (online at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-47-ENG.pdf) at p. 8.

⁴⁴ Online at www.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2014/FORM-Judges-CV-ENG.doc.

⁴⁵ See the guidance for the 2014 elections at http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-NV-13-SP-06-ENG.pdf, and Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 532.

⁴⁶ Yet, despite the fact that such a case may appear academic at the moment, even this restrictive interpretation of the Statute could on the face of it include judicial candidates who have undergone a sex change operation. That such cases and hence the potential for candidates are not unimaginable at the highest courts of a country is evidenced by the recent sex change of Jürgen Schmidt-Räntsch, now called Johanna Schmidt-Räntsch, a judge at the German Federal Court of Justice; see www.welt.de/politik/deutschland/article129468131/Bundesrichter-laesst-sich-zur-Frau-umwandeln.html and www.ito.de/recht/nachrichten/n/bgh-richter-schmidt-raentsch-geschlechtsumwandlung/ (links courtesy of Stephan Glantz). Obviously, nothing stops the ASP from taking sexual orientation as part of the commitment to gender diversity in general into account in elections. Given the reluctance of a large minority of states to countenance, leave alone respect, sexual orientation and LGBT rights in general with regard to article 7(3), it is unclear whether this would currently be acceptable to them in the nomination and election context. See for that debate Bohlander, M, *Criminalising LGBT persons under national criminal law and article 7(1)(h) and (3) of the ICC Statute* (2014) Global Policy 401.

⁴⁷ See <http://legal.un.org/icc/elections/judges/fulford/fulford.htm>.

⁴⁸ Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, First session (first and second resumptions), New York, 3–7 Feb. And 21–23 Apr. 2003 (ICC-ASP/1/3/Add.1); available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/341/37/PDF/N0334137.pdf>.

⁴⁹ *Ibid.*, at paras. 15–26. The 56-vote elections were due to two invalid votes in the respective round.

V. Paragraphs 9 and 10: Term of office; continuation in office

Paragraph 9(b) and (c) are now obsolete, as they refer to the first election; all judges eligible at the time went into their second term, if they were re-elected⁵⁰. The 1994 ILC Draft Statute provided for a term of 12 years, which, however, met with opposition and was reduced to nine years, in line with the term of the judges of the International Court of Justice. Lots were drawn at the first election to determine who would receive a term of three or six years⁵¹. 13

ICC Reg. 9(1) states that '[t]he term of office of judges shall commence on the eleventh of March following the date of their election', which followed from the determination made by the ASP at the 6th meeting on 3 February 2003: '[T]he Assembly, on the recommendation of the Bureau, decided that the terms of office of judges ... elected by the Assembly shall begin to run as from the 11 March following the date of the election. The Assembly also decided that the term of office of a judge elected⁵² to replace a judge whose term of office has not expired shall run from the date of the election for the remainder of that term⁵³. The latter was then enshrined in ICC Reg. 9(2).

Paragraph 10 allows judges who have part-heard a case to continue in office until the termination of the proceedings in which they have been involved, a procedure that makes sense pragmatically and is actually required by the principle that only those judges may decide a case who have seen and heard all the evidence. This can lead to quite dramatic extensions, as, for example, in the case of Judge Blattman, who sat on the Trial Chamber in the *Lubanga* case. Judge Blattman had been elected in Feb. 2003 and his term of office, beginning on 11 Mar. 2003, had been decided by lot as running for six years; he was thus not eligible for re-election. This meant that he should have stepped down on 10 Mar. 2009. Judges Fulford and Odio-Benito had been elected for nine years and should have stepped down on 10 Mar. 2012. However, they were still sitting on 7 Aug. 2012 in the decision on reparation proceedings⁵⁴ when the Chamber decided that the present judges no longer needed to remain seized of overseeing the reparation proceedings managed by the Trust Fund for Victims, and that a differently constituted Chamber could perform that task⁵⁵. 14

⁵⁰ See for the election history until 2013 the overview at http://www.icc-cpi.int/iccdocs/asp_docs/Elections/ICC-Election-Judges-History-July-2013-ENG.pdf.

⁵¹ *Ibid.* (fn. 47) at paras. 27–30.

⁵² Pursuant to article 37.

⁵³ *Ibid.* (fn. 47), at para 31.

⁵⁴ *Prosecutor v Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, of 7 August 2012, available online at www.icc-cpi.int/iccdocs/doc/doc1447971.pdf.

⁵⁵ *Ibid.* At paras. 260–261.

Article 37 Judicial vacancies*

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Literature: Bellelli, R., 'The law of the Statute and its practice under review', in: R. Bellelli (ed.), *International Criminal Justice, Law and Practice from the Rome Statute to its Review* (Ashgate 2010) 410–415; Jones, J. R. W. D., 'Composition of the Court', in: A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, I* (OUP 2002) 235–267, Rwelamira, M. R., 'Composition and Administration of the Court', in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues Negotiations, Results* (Kluwer Law International 1999) 153–167; Schabas, W., 'Article 35. Service of Judges', in: W. Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 520–523; Liera, S. F., 'Single Judge, Replacements, and Alternate Judges', in: R.S. Lee (ed.) *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 310–314.

Content

A. Introduction.....	1
B. Analysis and interpretation	2
I. Paragraph 1 – Elections to fill judicial vacancies	2
1. The advent of a vacancy.....	2
2. The procedure for filling a vacancy	6
3. The practice of the Court	10
II. Paragraph 2 – Judges elected to fill vacancies.....	13
1. Judicial replacements	13
2. The terms of office of judges filling vacancies	16

A. Introduction

1 Article 37 of the Rome Statute lays out the procedure to be followed where a seat in the judiciary of the Court is vacated by the death, resignation or removal from office of a judge or where a judge does not make his or her solemn undertaking within a given time-frame. This provision seeks to ensure that unfilled judicial vacancies do not put a strain on the capacity of the Court to administer justice in an expeditious manner and has been applied in several instances. In terms of its drafting history, article 37 of the Statute has largely remained the same since the first draft of the Statute prepared by the International Law Commission, and throughout the Preparatory Committee phase and the Diplomatic Conference in Rome.

B. Analysis and interpretation

I. Paragraph 1 – Elections to fill judicial vacancies

1. The advent of a vacancy

2 Paragraph 1 provides that in the event of a vacancy in the judiciary of the Court, an election shall be held in accordance with article 36 of the Statute. Article 36 in turn sets out the qualifications required of judges of the Court and the process for judicial nominations

* The views expressed herein are those of the author alone and not of the International Criminal Court.

and elections. Whereas the expiration of the term of office of a judge technically leads to a judicial vacancy, an election to replace a judge whose tenure has ended does not fall within the purview of article 37 of the Statute. Those elections are conducted within the regular cycle of judicial elections to the Court, which take place every three years in accordance with article 36(9) of the Statute. Instead, a judicial vacancy in accordance with article 37 arises where the mandate of a judge comes to an end prematurely, before the expiry of the judge's term of office. This may be triggered by the death of a judge as provided for in rule 36 of the Rules of Procedure and Evidence ('Rules'); the resignation of a judge from the Court (due to illness or other reasons) as provided for in rule 37 of the Rules; or the removal from office of a judge for serious misconduct, serious breach of duty¹ or the inability to exercise the functions required by the Statute, in accordance with article 46(1) of the Statute.²

Furthermore, by virtue of an amendment to the Procedure for the Nomination and Election of judges of the International Criminal Court ('Election Procedure'),³ adopted by resolution of the Assembly of States Parties ('ASP') at its twelfth session in November 2013, a judicial vacancy will be declared in accordance with article 37 of the Statute if an elected judge fails to assume his or her duties to the Court by making his or her solemn undertaking, in accordance with article 45 of the Statute,⁴ within six months of election, leading to new elections.⁵ The amendment was adopted to ensure the efficient functioning of the Court, given that elected judges who have not been sworn in pursuant to article 45 of the Statute are ineligible to take up their duties and be called by the Presidency of the Court⁶ to serve on a full-time basis in accordance with article 35(3) of the Statute. It seeks to ensure that the Court is not deprived of a judge for a potential period of nine years (the term of office of a judge in accordance with article 36(9)(a)) if a Judge-elect⁷ refuses to take the oath of office⁸ and was adopted in response to the concrete situation arising from the decision of a judge elected at the tenth session of the ASP in December 2011, whose term of office began on 10 March 2012, to defer making her

¹ Serious misconduct and serious breach of duty are defined in rule 24 of the Rules. For further provisions on removal from office and disciplinary measures, see generally articles 46 and 47 of the Statute, rules 23–32 of the Rules and regulations 119–125 of the Regulations of the Court.

² The procedure for filling judicial vacancies in the Court by way of an election by the ASP should not be confused with the procedure set out in rule 38 of the Rules and regulation 15 of the Regulations of the Court which deals with the replacement of judges within a Chamber by the Presidency, for example in cases of resignation, accepted excuse, disqualification, removal from office or death.

³ As set out in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third session, 6–10 September 2004* (ICC-ASP/3/25), Part III, ICC-ASP/3/Res.6. As amended by resolutions ICC-ASP/5/Res.5 (contained in *Official Records, Fifth session (resumption) 29 January – 1 February 2007* (ICC-ASP/5/35), Part II), ICC-ASP/12/Res.8, Annex II (contained in *Official Records, Twelfth session, 20–28 November 2013* (ICC-ASP/12/20), Vol I, Part III) and ICC-ASP/13/Res.5, Annex II (contained in *Official Records, Thirteenth session, 8–17 December 2014* (ICC-ASP/13/20), Vol I, Part III).

⁴ See rule 5 of the Rules, setting out the text of the solemn undertaking and the procedure to be followed in relation thereto.

⁵ *Official Records, Twelfth session, 2013* (ICC-ASP/12/20), Vol I, Part III, ICC-ASP/12/Res.8 (paragraph 29), Annex II. By virtue of Resolution ICC-ASP/12/Res.8, the Election Procedure now provides (at paragraph 27*bis*) that: 'A judicial vacancy will be declared in accordance with article 37 of the Rome Statute if an elected judge does not make his or her solemn undertaking in accordance with article 45 of the Rome Statute within six months of his or her election.'

⁶ Pursuant to article 34(a) of the Statute, the Presidency is an organ of the Court, which is composed of three judges elected from amongst their peers, in accordance with article 38 of the Statute, to serve as President, First-Vice President and Second Vice-President, for a renewable three-year term, and is responsible for the proper administration of the Court (with the exception of the Office of the Prosecutor) and other functions conferred upon it in accordance with the Statute.

⁷ 'Judge-elect' refers to an incoming judge who has been elected to the Court by the ASP but who has not yet made his or her solemn undertaking in accordance with article 45 of the Statute.

⁸ Report to the Bureau on the review of the procedure for the nomination and election of judges, 15 November 2013, ICC-ASP/12/57, Annex III (Proposals submitted by Belgium regarding the procedure for election of judges, paragraph 3).

solemn undertaking for over two years, until her resignation from the Court in June 2014, effectively preventing the Presidency from calling her to full-time service.⁹

- 4 Although the aforementioned amendment encourages judges to safeguard their elected positions and prevent them from lapsing by making their solemn undertaking within six months, it would not remedy a situation where a judge is sworn in within the given time-frame but still defers taking up his or her duties when called to serve on a full-time basis by the Presidency, and there is no obviously satisfactory answer as to what the Court could do to resolve this. In such cases, reference may be had to the approaches proposed by the Bureau of the ASP ('Bureau')¹⁰ in the situation of Judge-elect Senator Defensor-Santiago to whom the amendment did not apply in accordance with the principle of non-retroactivity (having been adopted subsequent to her election).¹¹ In those circumstances, the Bureau suggested that 'measures such as administrative or persuasion could be undertaken to resolve the matter'.¹² The Bureau did not explain itself further but, given its responsibility for the proper administration of the Court,¹³ it would be expected that such persuasion exercised upon a judge, in those circumstances either to relinquish office and thus create a judicial vacancy or to make his or her solemn undertaking and be called to serve the Court full-time, would fall to be undertaken by the Presidency. It is equally anticipated that similar persuasive measures could be employed by the Presidency to motivate a judge who has made his or her solemn undertaking but deferred full-time service, to either serve the Court full-time or relinquish office.
- 5 Moreover, it has been suggested that such a situation falls within the disciplinary realm,¹⁴ which would, evidently, depend on the legitimacy of the reasons given for such a deferral of full-time service, i. e. whether it is a case of unwillingness or inability for justifiable reasons. Turning to the potentially relevant disciplinary regime, without commenting on its applicability, the Statute and Rules provide for the disciplinary measures of a reprimand¹⁵ or pecuniary sanction¹⁶ to be imposed upon an elected official¹⁷ who is deemed to have committed misconduct of a less serious nature,¹⁸ such as repeatedly failing to comply with or ignoring requests made, *inter alia*, by the Presidency in the exercise of its lawful authority.¹⁹ Furthermore, for more drastic measures, there is provision in article 46(1)(a) of the Statute for an elected official of the Court to be removed from office for a serious breach of duty, which in accordance with rule 24(2) of the Rules, may occur in the case of gross negligence in the performance of duties or knowingly acting in contravention of those duties,

⁹ Referring to Judge-elect Senator Miriam Defensor-Santiago (The Philippines) (mn 11). The five other judges elected at the same session of the ASP in December 2011, made their solemn undertaking on 9 March 2012, ICC Press Release ICC-CPI-20120308-MA120, 8 March 2012.

¹⁰ In accordance with article 112(3) of the Statute, the Bureau of the ASP has a representative character. It consists of a President, two Vice-Presidents and eighteen members elected by the ASP for three-year terms and meets at least once a year to assist the ASP in the discharge of its responsibilities. In practice, the Bureau meets regularly throughout the year.

¹¹ See Note to Resolution ICC-ASP/12/Res.8 (cited at note 5).

¹² Bureau of the ASP, Decisions, Twentieth meeting, 28 November 2013, paragraph 3 b.

¹³ In accordance with article 38(3)(a) of the Statute, see note 6.

¹⁴ Report to the Bureau on the review of the procedure for the nomination and election of judges, 15 November 2013, ICC-ASP/12/57, paragraph 18. The 'administrative measures' proposed by the Bureau in relation to Judge-elect Senator Defensor-Santiago (see note 12) could also be taken to refer to disciplinary measures.

¹⁵ Rule 32(a) of the Rules.

¹⁶ Rule 32(b) of the Rules. In such a case, the pecuniary sanction could be levied against the allowance paid to a non-full time judge pursuant to articles 35(4) and 49 of the Statute. This allowance is only payable to judges who have made their solemn undertaking pursuant to article 45 of the Statute (see *Official Records, Eleventh session, 14–22 November 2012* (ICC-ASP/11/20), Vol II, Part A, Proposed Programme Budget for 2013, footnote 39 to paragraph 89 and Annex V(c); *Official Records, Twelfth session, 2013* (ICC-ASP/12/20), Vol II, Part A, Proposed Programme Budget for 2014, footnote 31 to paragraph 70 and Annex V(c)).

¹⁷ An 'elected official' refers to either a judge, the Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar of the Court.

¹⁸ Article 47 of the Statute and rule 25 of the Rules.

¹⁹ Rule 25(1)(a)(ii) of the Rules.

including repeatedly causing unwarranted delay in the initiation, prosecution or trial of cases, or in the exercise of judicial powers.²⁰ Moreover, there is provision in article 46(1)(b) of the Statute for an elected official to be removed from office where he or she ‘[i]s unable to exercise the functions required by th[e] Statute’. Whilst, the drafting history of the latter provision suggests that the aforementioned inability to exercise functions was, at least initially, contemplated as being attributable to long-term illness or disability,²¹ the provision was not subject to further elaboration in the Rules, and, as the text stands, a judge could be potentially liable to removal from office pursuant to article 46(1)(b) of the Statute for reasons additional to the aforementioned health reasons.

2. The procedure for filling a vacancy

Article 37 of the Statute does not elaborate upon the procedure for conducting elections to fill judicial vacancies, other than stipulating that such elections shall take place in accordance with article 36 of the Statute. Nor does it regulate the timing of such elections, contrary to the procedure in article 36(2)(c)(i) of the Statute for example, which provides that the election of additional judges to the Court shall take place at the next election of the ASP once a proposal for an increase in the number of judges has been adopted.

In practice, the Presidency initiates the process of filling a judicial vacancy by notifying the President of the Bureau of the ASP of the death or resignation of a judge, in accordance with rules 36 and 37 of the Rules.²² The Election Procedure adopted by the ASP further elucidates the process to be followed. It maintains that ‘[w]ithin one month of the occurrence of the judicial vacancy, the Bureau of the ASP shall fix the venue and date of the election, which should not be later than 20 weeks after the occurrence of the vacancy unless the Bureau decides otherwise after consulting the Court’.²³ As such, notwithstanding the terms of article 37(1) of the Statute, it is not mandatory to fill an open judicial vacancy, given that the Bureau may decide to defer filling the vacancy pursuant to the Election Procedure, in consultation with the Court.

Those consultations with the Court are conducted through the Presidency which, in accordance with article 38(3)(a) of the Statute, is responsible for its proper administration and, as such, has a good overview of, and is best placed to assess, the workload, needs and functionality of the judiciary. Significantly, the Election Procedure gives the Presidency the opportunity to shape the decisions of the Bureau and leaves the latter a wide discretion to decide: whether the vacancy shall be filled either during the remainder of the term of office of

²⁰ Rule 24(2)(b) of the Rules.

²¹ The 1994 Draft Statute for an International Criminal Court prepared by the International Law Commission (‘1994 ILC Draft Statute’), provided, at article 15(1): ‘A judge, the Prosecutor or other officer of the Court who is [...] unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office’ (Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994 (A/49/10)). Article 47 of the 1998 Preparatory Committee Statute for the International Criminal Court (‘1998 Preparatory Committee Draft Statute’), on the other hand, referred only to the inability to exercise the functions of the Statute, omitting any reasons therefor. Furthermore, in footnote 135 to the draft provision, long-term illnesses or disability were referred to as examples of reasons for the inability to exercise functions (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June – 17 July 1998, Official Records, Volume III, A/CONF.183/13(Vol. III), Part I, B, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, article 47).

²² In accordance with rule 37(1), a judge notifies the Presidency in writing of his or her decision to resign. This has been the case in all resignations save for that of Judge-elect Shahabuddeen who wrote directly to ASP President (see note 30). Judges are encouraged to give at least six months’ notice and make every effort to discharge their outstanding responsibilities before resigning, pursuant to rule 37(2) of the Rules. However, this is not mandatory and resignations may be given at short notice.

²³ Election Procedure, paragraph 27(a). The current provision is the result of an amendment which entitles the Bureau to disregard the rule that the venue and date of the election shall be fixed within one month of the occurrence of the judicial vacancy and shall not in any case take place later than 20 weeks after the occurrence of the vacancy. This amendment was effected by resolution of the ASP through the addition of the words ‘unless the Bureau decides otherwise after consulting the Court’ (*Official Records, Fifth session (resumption) 2007* (ICC-ASP/5/35), Part II, ICC-ASP/5/Res.5).

the judge concerned or after the expiry of that term of office, within the regular election cycle;²⁴ and, further, if it is to be filled during the remainder of the predecessor judge's term, by what means the vacancy shall be filled (i. e. during an election held at a scheduled session of the ASP or an election held at a resumed session of the ASP convened for that purpose in accordance with article 112(6) of the Statute).

- 9 The relevant considerations in deciding whether, and how, to hold such an election are: the duration of the remaining term of office of the predecessor judge; the urgency of filling the vacancy contingent on the needs of the Court; the financial implications of convening fresh elections, particularly if an election to fill a vacancy cannot be accommodated within the scheduled sessions of the ASP, thereby necessitating a resumed session; the need to allow States Parties sufficient time to identify and nominate qualified candidates;²⁵ the need to allow the Advisory Committee on Nominations of Judges of the International Criminal Court (mandated to facilitate the appointment of the highest-qualified individuals as judges of the Court, ('Advisory Committee')),²⁶ sufficient time to assess the judicial candidates prior to election;²⁷ and, the stipulation that the number of judges of the Court shall not be reduced below eighteen in accordance with articles 36(1) and 36(2)(c)(ii) of the Statute. However, the latter condition has not, in practice, been of relevance where a vacancy has been open for a relatively short period of time or where the requisite number of judges has been satisfied by the extension of the terms of judges for the purpose of completing any trial or appeal the hearing of which has already commenced, in accordance with article 36(10) of the Statute.²⁸

²⁴ Regular elections refer to the scheduled elections of the ASP to elect judges to the Court, which take place every three years in accordance with article 36(9) of the Statute.

²⁵ It is noteworthy that the period within which States Parties may nominate judicial candidates is considerably shorter for elections to fill judicial vacancies in comparison to the nomination period in regular elections due to the presumed urgency of filling the vacant judicial seat. Both nomination periods have been subject to extension by six weeks to allow the Advisory Committee sufficient time to review nominated candidates, taking into account the fact that the nomination periods may be extended several times before an election (see Bureau of the ASP, Decisions, Seventh meeting, 15 August 2014, paragraph 1(a) and *Official Records, Thirteenth session, 2014* (ICC-ASP/13/20), Vol I, Annex II Oral Report of the Bureau, paragraph 17). In the case of regular vacancies, the nomination period opens 32 weeks before the elections and lasts for 12 weeks, having been extended from 26 weeks by resolution of the ASP adopted at its twelfth session in 2013 (see note 3). On the other hand, in elections to fill judicial vacancies, the nomination period opens 18 weeks before the elections and lasts for 6 weeks, having been extended from 12 weeks by resolution of the ASP adopted at its thirteenth session in 2014 (see note 3).

²⁶ The Advisory Committee, a subsidiary body of the ASP in accordance with article 36(4)(c) of the Statute, was established by resolution of the ASP at its tenth session in December 2011 (*Official Records, Tenth session, 12–21 December 2011* (ICC-ASP/10/20), Vol I, Part III, ICC-ASP/10/Res.5, paragraph 19) with the mandate of facilitating the appointment of the highest-qualified individuals as judges of the Court (see paragraph 5 of the Terms of Reference of the Advisory Committee set out in Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, 30 November 2011, ICC-ASP/10/36 ('Advisory Committee Terms of Reference')). The Advisory Committee is mandated to prepare information and analysis, of a technical nature, on the suitability of the judicial candidates in order to inform the decision making of States Parties in the election process (see paragraphs 9, 11 and 12 of the Advisory Committee Terms of Reference, ICC-ASP/10/36). In examining the scope of its mandate, the Advisory Committee has stated that it is 'required to advise States on whether or not, in its opinion, the candidates meet the requirements of article 36 [of the Statute], taking into account the specific qualifications required under Lists A and B as provided in that article.' See Report of the Advisory Committee on Nominations of Judges on the work of its fourth meeting, 24 April 2015, ICC-ASP/13/46, paragraph 18. The Advisory Committee evaluates the candidates by conducting interviews with regard to their qualifications before preparing its report to the ASP. The President of the Bureau of the ASP has expressed the hope that States Parties would be guided by the conclusions of the reports of the Advisory Committee in casting their votes during judicial elections (Bureau of the ASP, Decisions, Ninth meeting, 30 September 2014, paragraph 3(a)).

²⁷ For example, following the resignation of Judge-elect Shahabuddeen (Guyana) in February 2009, the President of the Court informed the President of the ASP in March 2009 that the Court wished his seat to be filled as soon as possible. The Bureau decided not to convene a special session prior to the eighth session of the ASP scheduled for November 2009 in order to avoid the ensuing additional costs and to provide States Parties with sufficient time to identify and nominate highly qualified candidates. Bureau of the ASP, Decisions, Seventh Meeting, 7 April 2009, paragraph 1. ICC Press Release, ICC-ASP-20090218-PR391, 18 February 2009.

²⁸ See Report of the Bureau on Salary and all allowances for judges, whose terms have been extended in accordance with article 36, paragraph 10, 9 November 2013, ICC-ASP/12/56, noting at paragraph 6 that the

3. The practice of the Court

As at November 2015, there have been four elections held pursuant to article 37 of the Statute to fill seven judicial vacancies before the Court. The first was held at the sixth session of the ASP in November/December 2007 to fill three judicial vacancies.²⁹ The second was held at the eighth session of the ASP in November 2009 to fill two judicial vacancies³⁰ and the third election pursuant to article 37 of the Statute was held at the twelfth session of the ASP in November 2013 to fill one judicial vacancy.³¹

The fourth election pursuant to article 37 of the Statute proved more complicated. It was held at the resumed thirteenth session of the ASP in June 2015 to fill the judicial vacancy arising from the resignation of Judge-elect Senator Miriam Defensor-Santiago (The Philippines) for medical reasons in June 2014.³² The modalities for conducting an election to fill this vacancy at the time it arose in June 2014 were initially complicated by the scheduled regular election of six judges to the Court at the thirteenth session of the ASP in December 2014. The Bureau had concerns regarding the possible ramifications that filling the vacancy might have on the regular election, bearing in mind the legal framework for judicial elections established in the Rome Statute and in the Election Procedure of the ASP, notably the proscription in article 36(7) of the Statute that no two judges of the Court may be nationals of the same State, as well as the lack of clarity over the procedure for concurrent nominations to both regular and special elections at the same ASP session by the same State Party.³³ The Bureau furthermore sought to ensure that the Advisory Committee had sufficient time to evaluate all the candidates nominated to fill the judicial vacancy³⁴ and weighed the budgetary implications of convening a resumed session solely to conduct the article 37 election.³⁵

Presidency has underlined its 'efforts on the one hand to ensure the availability of a sufficient number of judges to meet the requirements of current casework, while on the other hand attempting to limit as far as possible any increase beyond the total of 18 judges normally provided for in the Statute...thus limiting the impact that extensions [pursuant to article 36(10) of the Statute] have had on the budget.'

²⁹ Resulting from the resignation of Judge Maureen Harding Clark (Ireland) to serve in the High Court of Ireland, effective as of 10 December 2006, the resignation of Judge Claude Jorda (France) for ill-health, effective as of 12 August 2007, and the resignation of Judge Karl T. Hudson-Phillips (Trinidad and Tobago) for personal reasons, effective as of 30 September 2007 (see ICC Press Releases ICC-CPI-20061211-192, 11 December 2006 (Judge Harding-Clark), ICC-CPI-20070508-218, 8 May 2007 (Judge Jorda) and ICC-CPI-20070319-211, 19 March 2003 (Judge Hudson-Phillips)). See also Election of judges to fill three judicial vacancies of the International Criminal Court, 2 October 2007, ICC-ASP/6/15. Those Judges were replaced by Judges Bruno Cotte (France), Daniel David Ntanda Nsereko (Uganda) and Fumiko Saiga (Japan), *Official Records, Sixth session, 30 November – 14 December 2007*, (ICC-ASP/6/20), Vol I, Part I, B, paragraph 29.

³⁰ Resulting from the 16 February 2009 resignation of Judge-elect Mohamed Shahabuddeen (Guyana) who was not in a position to assume his duties as a judge for personal reasons and the passing away of Judge Fumiko Saiga (Japan) on 24 April 2009 (see ICC Press Releases ICC-ASP-20090218-PR391, 18 February 2009 [Judge Shahabuddeen] and ICC-CPI-20090424-PR407, 24 April 2009 [Judge Saiga]). See also Election of judges to fill two judicial vacancies of the International Criminal Court, 11 November 2009, ICC-ASP/8/21, paragraph 2. Those Judges were replaced by Judges Silvia Fernández de Gurmendi (Argentina) and Kuniko Ozaki (Japan), *Official Records, Eighth session, 18–26 November 2009* (ICC-ASP/8/20), Vol I, Part I, B, paragraph 31.

³¹ Resulting from the resignation of Judge Anthony Thomas Aquinas Carmona (Trinidad and Tobago), effective as of 18 March 2013, following his election as President of Trinidad and Tobago. (See ICC Press Release ICC-CPI-20130320-PR885, 20 March 2013. See also Election of a judge to fill a judicial vacancy of the International Criminal Court, 21 October 2013, ICC-ASP/12/45). He was replaced by Judge Geoffrey Henderson (Trinidad and Tobago). *Official Records, Twelfth session, 2013* (ICC-ASP/12/20), Vol I, Part I, B, paragraph 22.

³² Bureau of the ASP, Decisions, Fourth meeting, 4 June 2014, paragraph 2. Judge-elect Defensor-Santiago was replaced by Judge Raul Cano Pangalangan (The Philippines), *Official Records, Thirteenth Session (resumption), 24–25 June 2015*, (ICC-ASP/13/20/Add. 1), Part I, B, paragraph 20.

³³ *Ibid* and Bureau of the ASP, Decisions, Sixth meeting, 18 July 2014, paragraph 1(b).

³⁴ Bureau of the ASP, Decisions, Fifth meeting, 30 June 2014, paragraph 1(a). The Bureau was concerned that the dates of the scheduled meetings of the Advisory Committee would not also allow it to consider nominations for the judicial vacancy, which would only be submitted after the meeting bearing in mind the nomination periods.

³⁵ Bureau of the ASP, Decisions, Sixth meeting, 18 July 2014, paragraph 1(b).

The Bureau considered three options for filling the vacancy: i) holding an election at the thirteenth session of the ASP, prior to the election of six judges already scheduled for the same session; ii) holding a joint election to fill seven seats altogether, whereby one seat would lead to a mere six-year term (approximately) and six seats would lead to nine-year terms;³⁶ or iii) deferring the election to early 2015, so that the results of the election of six judges at the thirteenth session of the ASP in December 2014 could be taken into account in the calculation of the requisite minimum voting requirements regarding the judicial vacancy.³⁷ Ultimately, the Bureau decided that it would not be possible to hold an election to fill the judicial vacancy at the thirteenth session in December 2014 within the existing legal framework and referred the matter to the ASP with the recommendation that the latter schedule it in 2015.³⁸ Thereafter, at the thirteenth session, during its final plenary meeting, the ASP mandated the Bureau to consider the practicalities of holding a resumed session to fill the remaining judicial vacancy and, if appropriate, convene such a session in the second quarter of 2015, in light of the needs of the Court to be served by a full complement of judges due to its workload.³⁹

- 12 As stated above, vacancies in the judiciary have not always led to special elections in accordance with article 37 of the Statute, particularly where the mandate of a resigning judge is soon to expire. The judicial vacancy resulting from the resignation of Judge Navanethem Pillay (South Africa),⁴⁰ did not lead to an election pursuant to article 37 to fill a judicial vacancy. Instead, a replacement for Judge Pillay, whose mandate was due to expire only seven months later, in March 2009, along with five other judges, was elected during the course of the regular elections which took place at the seventh resumed session of the ASP in January 2009. Similarly, the Bureau decided not to fill the vacancy resulting from the resignation of Judge Hans-Peter Kaul (Germany)⁴¹ with an election pursuant to article 37 of the Statute, as the Court was not seeking to replace the judge given that his term of office was due to conclude only eight months later in March 2015, alongside that of five other judges. An election to fill that judicial vacancy at the thirteenth session in December 2014 (deemed the earliest opportunity) would thus have only allowed a replacing judge to serve in office for just over two months, in accordance with article 37(2) of the Statute,⁴² given the regular elections scheduled at the same session.⁴³ As such, the vacancy resulting from the resignation of Judge Kaul was scheduled to be filled through the regular judicial elections already scheduled for the thirteenth session of the ASP in December 2014.⁴⁴

³⁶ Given that the term of office of Judge-elect Senator Miriam Defensor-Santiago expires on 10 March 2021, whereas the terms of office of the judges elected at the thirteenth session expire on 10 March 2024. See mn 16 regarding the duration of a replacing judge's term.

³⁷ Bureau of the ASP, Decisions, Sixth meeting, 18 July 2014, paragraph 1(b).

³⁸ Bureau of the ASP, Decisions, Seventh meeting, 15 August 2014, paragraph 1(a); *Official Records, Thirteenth session, 2014* (ICC-ASP/13/20), Vol I, Part I, B, paragraph 31 and Annex II Oral Report of the Bureau, paragraph 16.

³⁹ *Official Records, Thirteenth session, 2014* (ICC-ASP/13/20), Vol I, Part I, B, paragraph 69; and Part III, ICC/ASP/13/Res.5, Annex I, paragraph 16(c), which provides 'Concerned by the need for the Court to have a full bench of judges in 2015, as provided by the Rome Statute, further decides to mandate the Bureau to consider the practicalities of holding a resumed session to fill the remaining judicial vacancy, including the location, timing and financial implications, and if appropriate to proceed with the convening of such a resumed session in the second quarter of 2015'. The Bureau decided to schedule that resumed session of the ASP for the election to fill the judicial vacancy in late June 2015. Bureau of the ASP, Decisions, First meeting, 23 January 2015, paragraph 2.

⁴⁰ Effective 31 August 2008, in order to take up her appointment as the United Nations High Commissioner for Human Rights. See ICC Press Release ICC-CPI-20080730-PR344, 30 July 2008.

⁴¹ Effective 1 July 2014, due to health reasons. See ICC Press Release ICC-CPI-20140630-PR1023, 30 June 2014.

⁴² Two months calculated from December 2014, (the date of both the elections at the thirteenth session of the ASP and the commencement of the term of office of the replacing judge (see mn 16)) and 10 March 2015 (the expiration of the term of office of Judge Kaul).

⁴³ Bureau of the ASP, Decisions, Fifth meeting, 30 June 2014, paragraph 1(b).

⁴⁴ For the results of the elections see *Official Records, Thirteenth session, 2014* (ICC-ASP/13/20), Vol I, Part I, B, paragraph 44.

II. Paragraph 2 – Judges elected to fill vacancies

1. Judicial replacements

Article 37 of the Statute does not dictate the manner in which a judicial vacancy is to be filled, save for stating in paragraph 1 that such elections are to be held in accordance with article 36 of the Statute. In comparison, the 1994 ILC Draft Statute had explicitly provided that in filling judicial vacancies, judges ‘shall be replaced by persons nominated as having the same qualification’.⁴⁵ As such, a judge with established competence in criminal law and procedure, in accordance with article 36(3)(b)(i) of the Statute, would be replaced with the same in order to maintain the overall balance within the judiciary of the Court. Whereas the Statute does not maintain any such explicit condition in the election process to fill judicial vacancies, the makeup of the remaining body of judges is relevant to determining the way in which a judicial vacancy is to be filled.

Article 36 of the Statute sets out the key elements. According to articles 36(7) and 36(8)(a) of the Statute respectively, no two judges may be nationals of the same State, and the States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for the representation of the principle legal systems of the world; equitable geographical representation;⁴⁶ and a fair representation of female and male judges. They must also, pursuant to article 36(8)(b) of the Statute, take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children. Article 36(5) of the Statute further provides that of the eighteen judges of the Court at least nine shall have established competence in criminal law and procedure (List A),⁴⁷ at least five shall have established competence in international law (List B)⁴⁸ and that ‘[s]ubsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists’.

Moreover, the Election Procedure of the ASP further elaborates the way in which article 37(2) of the Statute is to be implemented. It seeks to maintain the balance in the expertise, geographical representation and gender representation amongst the judges, as stipulated in articles 36(5) and 36(8) of the Statute. In accordance with the Election Procedure: ‘[i]f the judicial vacancy reduces the number of judges from [L]ist A to below 9 or the number of judges from [L]ist B to below 5, only candidates from the underrepresented list can be nominated’ for election.⁴⁹ Further, ‘[i]f at the time of the election a regional or gender minimum voting requirement is not fulfilled, only candidates that can satisfy any of the underrepresented regional minimum voting requirements as well as the underrepresented gender minimum voting requirement can be nominated’ for election.⁵⁰ The latter provision was applied in the election to fill the vacancies left by the resignation of Judge-elect Shahabuddeen (Guyana) and the death of Judge Saiga (Japan), wherein only candidates from the Group of Latin American and Caribbean States and the Group of Asia-Pacific

⁴⁵ 1994 ILC Draft Statute, article 6(8) and commentary to article 7(2). From the placement of this provision, it would appear to have concerned all judicial elections, including those to fill judicial vacancies.

⁴⁶ Those five regional groupings are: African States, Asia-Pacific States, Eastern European States, Latin American and Caribbean States and Western European and Other States.

⁴⁷ Namely: judges with ‘established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings’ in accordance with article 36(3)(b)(i) of the Statute.

⁴⁸ Namely: judges with ‘established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court’ in accordance with article 36(3)(b)(ii) of the Statute.

⁴⁹ Election Procedure, paragraph 27(c).

⁵⁰ Election Procedure, Paragraph 27(d). Minimum voting requirements are also applicable to regular elections. For example, at the elections to fill six seats at the thirteenth session of the ASP in December 2014, minimum voting requirements were applied in respect of expertise, geographical representation and gender representation (see Fifth election of judges of the International Criminal Court, 2 October 2014, ICC-ASP/13/3, paragraph 5).

States, respectively, could be nominated for election to the Court.⁵¹ In the election to fill the vacancy left by the resignation of Judge Carmona (Trinidad and Tobago), only candidates from the Group of Latin American and Caribbean States could be nominated for election to the Court.⁵² Similarly, in the election to fill the vacancy resulting from the resignation of Judge-elect Senator Defensor-Santiago, only candidates from the Group of Asia-Pacific States were eligible for nomination.⁵³

Thus, the abovementioned provisions of the Statute and the Election Procedure are similar in their combined effect to the 1994 ILC Draft Statute which sought to replace like with like in an effort to maintain a balance within the judiciary of the Court when filling judicial vacancies. Whilst a replacing judge might not strictly require the same qualifications as his or her predecessor (unless the minimum voting requirements of the ASP are not met), the overall balance within the judiciary of the Court has to be maintained in filling a judicial vacancy, taking into account the makeup of the judges still serving.

2. The terms of office of judges filling vacancies

- 16 In relation to the duration of the term of office of a judge elected to fill a vacancy, paragraph 2 of article 37 of the Statute provides that a replacement judge shall serve for the remainder of his or her predecessor's term, which is still running. Due to the presumed urgency of replacing a judge, that term of office commences immediately upon election. As such, prior to the first regular election in 2003,⁵⁴ and thereafter for each election, the ASP decided that the terms of office of the judges elected to fill judicial vacancies shall run from the date of their election for the remainder of their predecessors' terms.⁵⁵ This is enshrined in regulation 9(2) of the Regulations of the Court, which likewise provides that the term of office of a judge elected to replace a judge whose term of office has not expired shall commence on the date of his or her election and shall continue for the remainder of the term of his or her predecessor. This is in contrast to the term of office of a judge elected within a regular election cycle, which commences on the eleventh of March following the date of his or her election.⁵⁶
- 17 Moreover, whereas article 36(9)(a) of the Statute provides that judges elected in regular elections shall ordinarily serve for a nine-year term and shall not be eligible for re-election, article 37(2) of the Statute is an exception to this rule.⁵⁷ It provides that if the predecessor judge's term of office is three years or less, the replacing judge shall be eligible for re-election

⁵¹ Nomination and election of judges, Note Verbale of 13 May 2009, ICC-ASP/8/S/20, page 3. See note 46 for regional groupings.

⁵² ICC-ASP/12/45, paragraph 9 (cited at note 31).

⁵³ Election of a judge to fill a judicial vacancy of the International Criminal Court, 14 April 2015, ICC-ASP/13/44, paragraph 9.

⁵⁴ *Official Records, First session (first and second resumptions) 3–7 February and 21–23 April 2003* (ICC-ASP/1/3/Add.1), Part I, B, paragraph 31.

⁵⁵ *Official Records, Sixth session, 2007* (ICC-ASP/6/20), Vol I, Part I, paragraph 32; *Official Records, Eighth session, 2009* (ICC-ASP/8/20), Vol I, Part I, paragraph 34; *Official Records, Twelfth session, 2013* (ICC-ASP/12/20), Vol I, Part I, paragraph 24.

⁵⁶ *Official Records, First session (first and second resumptions), 2003* (ICC-ASP/1/3/Add.1), Part I, B, paragraph 31; *Official Records, Fourth session (resumption) 26–27 January 2006* (ICC-ASP/4/37), Part I, B, paragraph 20; *Official Records, Seventh session (first and second resumptions) 19–23 January and 9–13 February 2009* (ICC-ASP/7/20/Add.1), Part I, B, paragraph 24; *Official Records, Tenth session, 2011* (ICC-ASP/10/20), Vol I, Part I, B, paragraph 44; *Official Records, Thirteenth session, 2014* (ICC-ASP/13/20), Vol I, Part I, B, paragraph 50; and regulation 9(1) of the Regulations of the Court.

⁵⁷ It is unclear why, in article 36(2)(c)(i) of the Statute concerning an increase in the number of judges, reference is made to article 37(2) of the Statute concerning the term of a judge elected to fill a vacancy of a predecessor judge. If this is not to be interpreted as a defunct cross-reference, then in combination with the fact that elections to increase the number of judges shall take place in accordance with paragraphs 3 to 8 of article 36 of the Statute but not paragraph 9 of article 36 of the Statute (which sets a judge's term of office at nine years) it could imply that judges elected to increase numbers in the judiciary, may be elected for less than nine years and if that period is three years or less shall be eligible for re-election for a full term. However, this provision has not been tested.

for a full term. Providing the possibility of re-election for a judge whose term of office is relatively short is a manner of attracting candidates to fill judicial vacancies and ensuring that the Court is not left wanting.⁵⁸ This provision was applied in respect of the election to fill three judicial vacancies in November/December 2007 at the sixth session of the Assembly, whereafter lots were drawn by the President of the ASP in order to determine which of the three judges elected at that session would serve the remainder of the term of Judge Jorda (approximately one and a half years in duration and due to expire on 10 March 2009).⁵⁹ In contrast, the terms of office of the two other judges who were being replaced at that session were due to expire on 10 March 2012. Pursuant to a drawing of lots, Judge Saiga was selected to serve the remainder of the term of Judge Jorda,⁶⁰ and, as such, was eligible for re-election at the end of her mandate, in accordance with articles 36(9)(a) and 37(2) of the Statute, and was indeed re-elected for a full nine-year term.⁶¹

Article 37(2) of the Statute is principally the same as its forerunner in the 1994 ILC Draft Statute except for the fact that the draft proposed by the ILC anticipated that a judge might be eligible for re-election if his or her predecessor's term was less than five years as opposed to the current three years.⁶² The text was amended to three years following a proposal from France without any extensive discussion.⁶³ The relevant provision in the 1998 Preparatory Committee Draft Statute was sent to the Rome Conference with the question of the entitlement of a replacing judge to stand for re-election after completion of his or her predecessor's term in square brackets.⁶⁴ At the Rome Conference, the Coordinator estimated that '[t]here might be a need to consider...whether a judge elected to fill a judicial vacancy should be eligible for re-election after completing his or her predecessor's term, or whether that should be dependent on the period of the term remaining'.⁶⁵ In the event, there was little debate on the subject⁶⁶ and the current text was adopted. The three-year time-frame is aligned with article 36(9)(c) of the Statute which provides that judges who serve for a three-year term in accordance with article 36(9)(b) of the Statute are eligible for re-election for a full term.

⁵⁸ Jones, in: Cassese *et al.*(eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002) 254.

⁵⁹ The remainder of the predecessor's term is calculated from the date that the resignation becomes effective to the date that the term of office expires, which, in the case of Judge Jorda was 2 August 2007 (ICC Press Release ICC-CPI-20070508-218, 8 May 2007) and 10 March 2009, respectively.

⁶⁰ Consequently, whereas the term of Judge Saiga was to expire on 10 March 2009, the terms of office of Judges Cotte and Nsereko were to expire on 10 March 2012. *Official Records, Sixth session, 2007*, (ICC-ASP/6/20), Vol I, Part I, B, paragraph 32.

⁶¹ Judge Saiga was re-elected at the first resumption of the Seventh session of the ASP in January 2009 (*Official Records, Seventh session (first and second resumptions) 2009* (ICC-ASP/7/20/Add.1) Part I, B, paragraph 18) and passed away on 24 April 2009 resulting in another election to fill a judicial vacancy (see margin 10 and note 30).

⁶² 1994 ILC Draft Statute, article 7(2). In the Draft Statute prepared by the Working Group of the ILC in 1993, a replacing judge serving the remainder of their predecessor's term was eligible for re-election if that period was less than four years, Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993 (A/48/10), article 8(2).

⁶³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/51/22, 1996, Vol II, Compilation of Proposals, article 8.

⁶⁴ Article 38(2) of the 1998 Preparatory Committee Draft Statute provided: 'A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term[, and [if that period is less than three years] is eligible for re-election for a further term]'.⁶⁵

⁶⁵ 1998 Preparatory Committee Draft Statute, paragraph 47.

⁶⁶ *Supra* note 21, Official Records, Volume II, A/CONF.183/13(Vol. II), Summary records of the meetings of the Committee of the Whole, paragraphs 63 (Belgium) 78 (Malawi), 83 (United Arab Emirates and Syria), 110 (Venezuela), 113 (Iran), 125 (Democratic Republic of Congo).

Article 38 The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, which ever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

- (a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and
- (b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Literature: Abtahi, H., Article 38, in: J. Fernandez and X. Pacreau (eds), *Commentaire article par article du Statut de la Cour pénale internationale*, i (Pedone 2012) 983; *id.*, Ogwuma, O. And Young, R., 'The Judicial Review Powers of the Presidency of the International Criminal Court: Safeguards for the Protection of Human Rights', (2013) 12 *LAPE* 281; *id.*, 'The Composition of Judicial Benches, Disqualification and Excusal of Judges at the International Criminal Court', (2013) 11 *JICJ* 379; Abtahi, H., and Koh S.A., 'The Emerging Enforcement Practice of the International Criminal Court', (2012) 45 *CornellILJ* 1; Ambach, P. And Rackwitz, K.U., 'A Model of International Judicial Administration? The Evolution of Managerial Practices at the International Criminal Court', (2014) 76 *L&ContempProbs* 119.

Content

A. Analysis and interpretation of elements	1
I. Paragraph 1	1
II. Paragraph 2	4
III. Paragraph 3	5
1. 'The proper administration of the Court, with the exception of the Office of the Prosecutor'	6
2. 'Other functions conferred upon the Presidency by the Statute'	7
IV. Paragraph 4	8
B. Special remarks	10
I. External relations and cooperation	12
1. General cooperation	13
2. Enforcement cooperation	14
II. Judicial	16
1. Administrative tribunal	17
2. Criminal court	18
III. Administration	1
1. Oversight of judicial proceedings	20
a) Organisation and work of Chambers	21
b) Ethics, professional conduct, privileges and immunities	26
aa) Excusal and disqualification	27
bb) Misconduct	29
cc) Privileges and immunities	32
2. Management, oversight and coordination	33
a) Registry specific	34
b) Court wide	37

A. Analysis and interpretation of elements

I. Paragraph 1

The judges meeting in plenary elect by an absolute majority, in accordance with rule 4 1 paras. 1 and 4 of the Rules, each of the three members of the Presidency, from among their peers, for a three year mandate, with the possibility to be re-elected once¹.

The Rules do not set out in any more detail the procedure for the election, unlike, for 2 instance, the Rules of the International Court of Justice and the Rules of the ICTY and ICTR². However the judges of the Court have adopted internal election rules that they have applied in each election³.

It is not without interest to recall a proposal by the USA to the Preparatory Committee⁴, 3 suggesting adding the following to paragraph 1: ‘The Vice-Presidents and Alternates shall be chosen so as to represent both the Appellate and Trial Judges’. Eventually, this proposal was not retained in the Final Draft of the Statute given the fact that the mechanisms of assignment to divisions bears complexities that may not be reconciled with this draft, as will be seen in the commentary to article 39.

II. Paragraph 2

This text replaces the ILC’s Draft approved verbatim by the Preparatory Committee⁵. This 4 text is more direct and clearer than some earlier proposals, *e.g.*, Singapore⁶, Australia and Netherlands⁷. It is likely that the States Parties wanted to ensure the clarity of the technical operation of this particular feature of the Presidency. Subsequently, the concrete operation of this provision was set out in detail in the Regulations of the Court. Accordingly, the functions of one or more unavailable or disqualified member of the Presidency shall be carried out by another judge in accordance with the precedence of judges under regulation 10 of the Regulations of the Court⁸. Also, the remaining members of the Presidency may, in exceptional circumstances, take the action required⁹. Finally, the members of the Presidency shall attempt to achieve unanimity in their decisions, failing which their decisions shall be taken by majority¹⁰.

¹ The First two Presidents of the Court, Judges Philippe Kirsch and Sang-Hyun Song, served two consecutive mandates as President of the Court from 2003 to 2009 and from 2009 to 2015, respectively.

² Rule 18 *lit. C* ICTY provides in full: ‘The President shall be elected by a majority of the votes of the permanent Judges composing the Tribunal. If no Judge obtains such a majority, the second ballot shall be limited to the two Judges who obtained the greatest number of votes on the first ballot. In the case of equality of votes on the second ballot, the Judge who takes precedence in accordance with rule 17 shall be declared elected’. By virtue of rule 20 *lit. C* ICTY, the same procedure applies to the election of the Vice-President. See also rules 18 and 20 ICTR. In contrast, the Rules of the Special Court for Sierra Leone provide in rule 18 that the presiding judge of the Appeals Chamber shall be the President of the Special Court and that ‘The Presiding Judge of the Appeals Chamber shall be elected by a majority of the votes of the Judges appointed to the Appeals Chamber’; its rule 20 provides that ‘The Vice-Presidency shall rotate in order of precedence amongst the other members of the Appeals Chamber commencing on 7 March 2003’.

³ In the First Edition of this Commentary, which appeared before the first election of the members of the Presidency, Jules Deschênes, a former judge of the Appeals Chamber of the ICTY, expressed the view that: ‘In the writer’s opinion, nominations should be allowed, even sought. If there is only one – prior informal consultations may well show the obviousness of the situation – the election of that candidate will follow automatically. Should there be more than one, the majority on a secret ballot should determine the winner’.

⁴ 1996 Preparatory Committee II, p. 18.

⁵ *Ibid.* p. 17.

⁶ *Ibid.*, p. 18.

⁷ *Ibid.*, pp. 19–20.

⁸ Regulation 11 para. 2 and 4 of the Regulations of the Court.

⁹ Regulation 11 para. 3 of the Regulations of the Court.

¹⁰ Regulation 11 para. 1 of the Regulations of the Court.

III. Paragraph 3

- 5 This paragraph actually establishes the Presidency, which is composed of the President and the two Vice-Presidents. The original Draft of the ILC provided for two alternate Vice-Presidents. But several delegations saw no usefulness in those positions and the idea was finally dropped.

The Presidency has duties to fulfil, which the Statute has classified under two headings:

1. 'The proper administration of the Court, with the exception of the Office of the Prosecutor'

- 6 Given the specificity of the latter exception, the Presidency is granted a wide ambit of authority capable of including almost all activities pertaining to the daily functioning of the Court. Yet it was suggested at the Preparatory Committee that the paragraph should also spell out 'supervision and direction of the Registrar and the staff of the Registry, and security arrangements for the defendants, witnesses and the Court'¹¹. The first part of this suggestion was expressly supported by the USA¹². Ultimately, the Registrar, the 'principal administrative officer of the Court' who is 'responsible for the non-judicial aspects of the administration and servicing of the Court', was placed, pursuant to article 43 para. 2, under the authority of the President, rather than that of the Presidency.

2. 'Other functions conferred upon the Presidency by the Statute'

- 7 A host of such other functions may be found in the Statute and subsequent legal texts of the Court and shall be commented upon in the relevant chapters of this work. Due to their regular overlap with article 38 para. 3(a), their relationship shall be articulated under the special remarks heading.

IV. Paragraph 4

- 8 The original paragraph 4 proposed by the ILC foresaw the exercise by the Presidency of 'pre-trial and other procedural functions'¹³. At the Preparatory Committee, 'doubts were expressed as to the appropriateness of the Presidency exercising (such) functions', with Switzerland successfully moving that paragraph 4 be simply deleted¹⁴.
- 9 The current paragraph 4 rather deals with the relationship between the Presidency and the Prosecutor. By virtue of paragraph 3(a), the responsibility of the Presidency for the proper administration of the Court extends to all parts of the Court with the exception of the Office of the Prosecutor, who, pursuant to article 42 para. 2, has full authority over the management and administration of the Office of the Prosecutor. Article 38 paragraph 4 intends therefore to facilitate the smooth functioning of the Court as a whole by providing that the Presidency shall coordinate with and obtain the Prosecutor's concurrence 'on matters of mutual concern', that is on the proper administration of Court under paragraph 3(a)¹⁵.

¹¹ 1996 Preparatory Committee I, p. 12.

¹² 1996 Preparatory Committee II, p. 18.

¹³ 1994 ILC Draft Statute, article 8.

¹⁴ 1996 Preparatory Committee II, p. 19.

¹⁵ In the First Edition of this Commentary, Jules Deschênes, expressed the view that: 'It is indeed highly desirable, from the point of view of justice in general, that the Prosecutor and the judges hold views which are shared so that the Court may proceed efficiently and without acrimony. ...This does not mean that the Chambers should always uphold, when it comes to law, the views of the Prosecutor: far from it. The experience of the Tribunals for the former Yugoslavia and for Rwanda are living witnesses of the reality of the independence of the judicial organ of those International Tribunals from their common prosecutor....But we

B. Special remarks

The inclusion of the Presidency as one of the organs of the Court, in accordance with article 34, represents a departure from the precedents of the ad hoc and hybrid supranational criminal jurisdictions, the Statutes of which provide for three organs, namely the Chambers, the Prosecutor and the Registry¹⁶. While the Rules of those tribunals do contain a section entitled ‘The Presidency’¹⁷, they do not establish a ‘Presidency’ as a body, but merely contain the provisions relating to the election and functions of the President and the Vice-President of those tribunals¹⁸, although they confer significant functions on the President, some of which resemble those of the Court’s Presidency¹⁹. 10

The administrative scheme of the Court is governed by the Rome Statute system. The Registrar, who is the principal administrative officer of the Court, acts under the authority of the President who, in turn, is a member of the Presidency, the organ of the Court responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor, with which the Presidency shall coordinate and seek the concurrence on matters of mutual concern. To this most challenging management model, one should add the ASP’s management oversight over the Presidency, the Prosecutor and the Registrar in respect of the administration of the Court in accordance with article 112 para. 2(b). As far as the internal functioning of the Court is concerned however, the ‘Report of the Court on measures to increase clarity on the responsibilities of the different organs’ has identified the managerial challenges and devised a number of solutions²⁰. As far as the Presidency is concerned, its functions are scattered across the Statute, the Rules, the Regulations of the Court and the Regulations of the Registry. The core of the functions of the Presidency that are expressly referred to in the Statute is concentrated in Part IV on the composition and administration of the Court and Part X on the enforcement. A more limited number of the functions of the Presidency may be found in other parts of the Statute. However, because of the general nature of the Statute, the implied functions of the Presidency have subsequently been made express, essentially in the Rules, the Regulations of the Court, the Regulations of the Registry and also other documents. The decade long functioning of the Court has not only shed light on many of those functions but also, and most importantly, has blurred the dichotomy of the division in article 38 para. 3(a) and (b). In practice, the Presidency has performed three functions, often overlapping: external relations and cooperation; judicial; and administration²¹. 11

are dealing here with *administrative* matters: there is no reason in the world why judges and prosecutor, being after all persons of good faith who have willingly decided to devote their career to a joint purpose of public interest, should not be able to steer together the administration of the Court into a common satisfactory canal’.

¹⁶ Statute of the ICTY, article 11; Statute of the ICTR, article 10. See also Statute of the SCSL, article 11.

¹⁷ Rules of the ICTY, Part Three, Section 2; Rules of the ICTY, Part Three, Section 2. See also Rules of the SCSL, Part Three, Section 2.

¹⁸ Rules of the ICTY, rules 18–22; Rules of the ICTY, rules 18–22. See also Rules of the SCSL, rules 18–22.

¹⁹ In particular, rule 19 of the ICTY, ICTR and SCSL Rules provides that the President shall ‘coordinate the work of the Chambers and supervise the activities of the Registry as well as exercise all the other functions conferred on the President by the Statute and the Rules’. Furthermore, rule 23 of the ICTY, ICTR and SCSL provide for a ‘Bureau’ or a ‘Council of Judges’, composed of the President and Vice-President, as well as the Presiding Judges of each of the Trial Chambers which, generally, require the President to consult the other members of those bodies on the functioning of the institutions. The Rules of these Tribunals also confer certain specific functions on the Bureau, such as the function of deciding upon certain applications for disqualification of judges; see rule 15 of the ICTY, ICTR and SCSL Rules. These rules also confer to the Bureau the function of making recommendations for the appointment of the Deputy Registrar or other Registry staff Rules of the ICTY, rule 31. See also, e.g., Rules of the ICTY, Rules 28 *lit. A*, 74 *bis*; Rules of the ICTR, rules 22 *lit. A*, 46 *lit. D* and 74 *bis*.

²⁰ Report of the Court on measures to increase clarity on the responsibilities of the different organs, ICC ASP/9/CBF.1/12, 18 March 2010.

²¹ For a comprehensive discussion, see Abtahi Hirad, Article 38, in: Julian Fernandez and Xavier Pacreau (eds), *Commentaire article par article du Statut de la Cour Pénale Internationale*, i (Pedone 2012) 983.

I. External relations and cooperation

12 The Court operates in the form of an intergovernmental organisation. As such, the proper accomplishment of the Court's judicial mandate depends on external relations, and cooperation with external entities, which – for the purposes of the present commentary – may be divided into general cooperation and enforcement cooperation. In addition to the Statute, documents such as the Rules and the Regulations of the Court have clarified those many instances where the President and/or the Presidency intervene.

1. General cooperation

13 The President and the Presidency play an active role in developing and maintaining cooperative relationships between the Court and various external entities. This makes the President the public face of the Court. Article 2 assigns an express role to the President for the conclusion of the relationship agreement with the United Nations. The President, personally or upon delegation, also concludes Court-wide agreements and arrangements with other external entities, such as States, intergovernmental organisations or other applicable entities – without prejudice to the power of the Prosecutor to conclude organ specific agreements²². It is also the President who, in case of a finding of non-cooperation by a State Party under article 87 para. 7, refers the matter to the ASP or UNSC, as applicable²³. On the other hand, it is the Presidency that, in consultation with the relevant Chamber, decides to change the place of the proceedings in a particular case and to sit in a State other than the host State²⁴.

2. Enforcement cooperation

14 Rule 199 of the Rules specifies that enforcement related functions are to be carried by the Presidency. This in practice encompasses the full cycle of enforcement of the sentences of imprisonment as well as many aspects of the enforcement of fines, forfeiture measures and reparation orders, as described in details under Part X of the Statute, Chapter 12 of the Rules and Chapter 7 of the Regulations of the Court.²⁵

15 To carry out the above functions, which espouse essentially features of public international law but also incorporate aspects of diplomatic communication and international relations, the President and the Presidency engage, in speeches, publications, meetings, on both bilateral and multilateral basis, at the seat of Court or anywhere else, with the ASP²⁶, States Parties and States not Parties, inter-governmental organisations; civil society, and academia. Far from being minimal, these activities, which are necessitated by the Court's need for cooperation, require significant attention.

II. Judicial

16 In performing its judicial functions, the Presidency acts to a very large extent as an administrative tribunal and, to a lesser extent, as a criminal court. Firmly grounded in administrative and human rights law, these functions address the protection of fundamental human rights as far as suspects, accused and detained witnesses are concerned, as well as the right to a fair trial with regard to the suspect and/or accused and victims' representation²⁷.

²² Regulation 107 of the Regulations of the Court and article 54 para. 3.

²³ Regulation 109 para. 4 of the Regulations of the Court. While this regulation does not touch upon a finding a non-cooperation by the State not Party, it will still be the President who will make the necessary referral.

²⁴ Rule 100 of the Rules.

²⁵ For a comprehensive discussion, see Abtahi, H., and Koh S.A., 'The Emerging Enforcement Practice of the International Criminal Court', (2012) 45 *CornellILJ*.

²⁶ Article 112 para. 5.

²⁷ For a comprehensive discussion, see Abtahi et al., (2013) 12 *LAPE* 281.

1. Administrative tribunal

In performing its functions as an administrative tribunal, the Presidency is the body responsible for the judicial review of certain decisions of the Registrar. The express foundation of this function lies in rule 21 para. 3 of the Rules, according to which the Presidency may review a decision of the Registrar to refuse a request for assignment of counsel. The Regulations of the Court and the Regulations of the Registry have expanded this function to a wide range of fields, such as the refusal to grant legal aid²⁸. More comprehensively, the Presidency reviews the decisions of the Registrar on the conditions of detention as detailed in regulation 106 of the Regulations of the Court and section 5 of Regulations of the Registry. These concern matters such as medical care²⁹; postal costs³⁰; telephone calls³¹; monitoring of telephone calls³²; telephone cost³³; visits³⁴; monitoring of visits³⁵; segregation³⁶; use of force³⁷; isolation³⁸; as well as disciplinary offence and disciplinary measures³⁹. The Presidency also reviews the decisions of the Registrar concerning the removal, suspension or refusal to include counsel on the list of counsel or to confirm the retention of counsel in the absence of legal aid⁴⁰. The Presidency further reviews the decisions of the Registrar refusing to include in or to remove from the list of professional investigators⁴¹; and the refusal to include applicants in the list of experts⁴². Furthermore, the Presidency may also review complaints by counsel on election procedures for representing counsel in the Advisory Committee on Legal Texts⁴³; and in the Disciplinary Board and Disciplinary Appeals Board, under the Code of Professional Conduct for Counsel⁴⁴.

2. Criminal court

As for its criminal jurisdiction function, the Presidency may extend the sentence of imprisonment of a convicted person who has continuously and wilfully refused to pay the fine imposed on him/her⁴⁵.

III. Administration

The third function of the Presidency mirrors to a large extent the title of Part IV of the Statute: composition and administration of the Court, which may be divided into the oversight of judicial proceeding and management, oversight and coordination.

1. Oversight of judicial proceedings

The oversight of judicial proceedings includes facilitating the organisation and work of Chambers, as well as addressing matters relating to ethics and professional conduct.

²⁸ Regulation 85 para. 2 and 3 of the Regulations of the Court.

²⁹ Regulation 157 para. 9, 11, 12 of the Regulations of the Registry.

³⁰ Regulation 172 of the Regulations of the Registry.

³¹ Regulation 173 of the Regulations of the Registry.

³² Regulations 174 and 175 of the Regulations of the Registry.

³³ Regulation 176 of the Regulations of the Registry.

³⁴ Regulation 180 of the Regulations of the Registry.

³⁵ Regulation 184 of the Regulations of the Registry.

³⁶ Regulations 201 para. 10 and 202 para. 5 of the Regulations of the Registry.

³⁷ Regulation 204 of the Regulations of the Registry.

³⁸ Regulations 212 para. 9 and 213 para. 2 of the Regulations of the Registry.

³⁹ Regulation 216 para. 1, 3 of the Regulations of the Registry.

⁴⁰ Regulation 72 of the Regulations of the Court.

⁴¹ Regulations 137 and 138 of the Regulations of the Registry.

⁴² Regulation 44 of the Regulations of the Court and regulation 56 of the Regulations of the Registry.

⁴³ Regulation 3 of the Regulations of the Registry.

⁴⁴ Regulations 147 and 148 of the Regulations of the Registry, respectively.

⁴⁵ Rule 146 para. 5 and 6 of the Rules and regulation 118 of the Regulations of the Court.

- 21 **a) Organisation and work of Chambers.** The Presidency performs a number of key functions designed to facilitate the organisation and work of Chambers. In accordance with article 35, while the members of the Presidency shall serve on a full-time basis as soon as they are elected, the Presidency itself is the sole body to decide when to call other judges to serve on a full-time basis. The Presidency may also propose an increase beyond and a reduction not below the eighteen judges, in accordance with article 36 para. 2(a) and 2(c)(ii).
- 22 Pursuant to rule 4*bis* of the Rules, the Presidency is responsible for the assignment of the judges to the Appeals, Trial and Pre-Trial Divisions under article 39 para. 1⁴⁶. In accordance with article 39 para. 4, the Presidency may temporarily attach the judges in between divisions.
- 23 The Presidency is responsible for constituting Pre-Trial Chambers and assigning the situations to them as soon as it has been informed by the Prosecutor⁴⁷. Upon confirmation of charges and transfer of the records of the case by the Pre-Trial Chamber to the Presidency, the latter assigns the case to a Trial Chamber in accordance with article 61 para. 11⁴⁸. In accordance with article 74 para. 1, the Presidency may also assign one or more alternate judges to the trial bench⁴⁹.
- 24 Under article 85, the Presidency is also responsible for composing a three judge bench to address requests for compensation in case of unlawful arrest or conviction made following miscarriage of justice⁵⁰.
- 25 Of direct impact on courtroom proceedings, it is noteworthy that the Presidency may authorise the use of an official language of the Court as a working language in the proceedings⁵¹. In terms of facilitating the work of the division, it should also be mentioned that the duty roster of judges and legal officers of the Chambers is established in consultation with the Presidency⁵². Finally, the Presidency approves all standard forms and templates for use before court proceedings⁵³.
- 26 **b) Ethics, professional conduct, privileges and immunities.** The elected officials of the Court, other court proceedings actors, as well as, more generally, the staff of the Court, are all subject to a variety of ethical and professional conduct, privileges and immunities. Appearing all in Part IV of the Statute, they have been expanded and/or elaborated upon in subsequent documents of the Court. These can be grouped into excusal and disqualification; misconduct and privileges and immunities.
- 27 **aa) Excusal and disqualification.** Pursuant to regulation 126 of the Regulations of the Court, the Code of Judicial Ethics of the judges was drawn up by the Presidency and adopted by the judges in plenary⁵⁴. The Statute, Rules and Regulations of the Court provide that questions of judicial ethics, such as judicial independence, impartiality, and integrity are addressed by the Presidency, as the final decision maker or as the organiser of the plenary of judges, depending on the circumstances. These can be broadly divided into two categories: excusal and disqualification as well as disciplinary functions.
- 28 As far as the former is concerned, pursuant to articles 41 para. 2 and 42 para. 6, the Presidency is the competent organ for reviewing the request of a judge or the Prosecutor or a Deputy Prosecutor to be excused from a case before the Court⁵⁵. Where, however, it is the

⁴⁶ Prior to State Parties' proposal and adoption of the amendment of rule 4 into rule 4*bis*, it was the plenary of the judges that assigned the judges to the Divisions.

⁴⁷ Regulations 45 and 46 of the Regulations of the Court.

⁴⁸ Rules 60, 129 and 130 of the Rules.

⁴⁹ Regulation 16 para. 1 of the Regulations of the Court.

⁵⁰ Rule 173 of the Rules.

⁵¹ Rule 41 para. 2 of the Rules.

⁵² Regulations 17 and 18 of the Regulations of the Court.

⁵³ Regulations 23 para. 2 of the Regulations of the Court and regulation 104 para. 2 of the Regulations of the Registry.

⁵⁴ Code of Judicial Ethics, ICC-BD/02-01-05, 9 March 2005.

⁵⁵ As complemented by rules 33 and 35 of the Rules of Procedure and Evidence.

Prosecutor or a person being investigated or prosecuted who are seeking the disqualification of a judge, the matter is to be decided by the plenary of the judge, which is then convened by the President who, beyond chairing the plenary, is also responsible, together with the Vice-Presidents, for drafting the decision of the plenary⁵⁶.

bb) Misconduct. With regard to disciplinary functions, all complaints against a judge, the Prosecutor, the Deputy-Prosecutor, the Registrar and the Deputy-Registrar for serious misconduct under article 46 para. 1 or misconduct of a less serious nature under article 47 shall, in accordance to rule 26 of the Rules, be transmitted to the Presidency, which may also initiate proceedings *proprio motu*. The Presidency is assisted by a panel of judges that it sets up in accordance with Chapter 8 of the Regulations of the Court. If the Presidency finds the complaint against the Prosecutor or Deputy-Prosecutor not anonymous nor manifestly unfounded, it transmits the matter to the Bureau of the ASP in the case of the Prosecutor and to the latter in case of a Deputy-Prosecutor⁵⁷. Where the Presidency decides that a complaint against a judge, the Registrar, or the Deputy-Registrar is not anonymous nor manifestly unfounded, the President convenes the plenary of the judges and⁵⁸, together with the Vice-Presidents, prepares the draft of the final decision. In the case of disciplinary measures against a judge, the Registrar, or the Deputy-Registrar, it is the Presidency that decides on the form of those measures, which may include a reprimand or pecuniary sanctions⁵⁹.

Where the need arises to replace a judge, it is the Presidency that, pursuant to the Rules and Regulations of the Court, is the competent body⁶⁰.

The Presidency shall appoint the Commissioner for investigating complaints of misconduct under the Code of Professional Conduct for Counsel⁶¹. The Presidency shall also sit on the Disciplinary Appeals Board⁶², unless it was under their mandate that the Commissioner was appointed or that they are dealing with the case from which the complaint has arisen⁶³. Finally, where sanctions for misconduct before the Court have been imposed under article 71, the Presiding judge may refer the question of the extension of the period of interdiction to the Presidency which may hold a hearing to order an extension of the interdiction or make it permanent⁶⁴.

cc) Privileges and immunities. Pursuant to article 48 para. 5(b), the Presidency is the competent body to waive the privileges and immunities of the Registrar. The APIC and Headquarters Agreement between the International Criminal Court and the Host State provide that, in addition, the Presidency may also waive the privileges and immunities of counsel and persons assisting defence counsel, witnesses and victims as well as other persons required to be present at the seat of the Court⁶⁵.

2. Management, oversight and coordination

Management, oversight and coordination applies to both the Registrar/Registry, by virtue of the relationship between articles 38 para. 3 and 43 para. 2, as well as to the Court as whole, essentially through the relationship between articles 38 para. 3 and 4, 40, 42, 43 and 112 para. 2(b).

⁵⁶ For a comprehensive discussion, see Abtahi et al. (2013) *JICJ* 379–398,11(2).

⁵⁷ Rule 26 of the Rules and regulations 121 para. 2 of the Regulations of the Court.

⁵⁸ Rule 26 of the Rules and regulation 121 para. 1 of the Regulations of the Court.

⁵⁹ Rules 30 and 32 of the Rules and regulation 122 of the Regulations of the Court.

⁶⁰ Rule 38 of the Rules and regulations 12 and 15 of the Regulations of the Court.

⁶¹ Article 33 of the Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, 2 December 2005 and regulation 149 of the Regulations of the Registry.

⁶² Article 44 para. 4(a) of the Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, 2 December 2005.

⁶³ Article 44 para. 4(a)(i) and (ii) of the Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, 2 December 2005.

⁶⁴ Rule 171 of the Rules.

⁶⁵ Article 26 para. 2 of APIC and article 30 para. 2(b) of the Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008.

- 34 a) **Registry specific.** article 43 para. 4 mandates the judges to elect the Registrar and, where applicable, the Deputy-Registrar. Rule 12 para. 1 mandates the Presidency to establish a list of candidate who satisfy the conditions provided in article 43 para. 3 and to transmit that list to the ASP for any recommendations⁶⁶. Upon receipt of the recommendation, the President shall convene the plenary of the judge to proceed with the election⁶⁷. If the need for a Deputy-Registrar arises, the Registrar shall make a recommendation to the President who shall put the question to the plenary of the judges for decision⁶⁸, which, in the affirmative, would proceed with the election⁶⁹.
- 35 Furthermore, as the person principally responsible for the management of the Court's Detention Centre, the Registrar entertains a close reporting line with the President and Presidency on detention related matters. This includes informing the Presidency of any breach of the procedure for incoming and outgoing mail⁷⁰; active monitoring of telephone calls or of visits and any breach of the rules of safety and security by the detained person⁷¹; cell monitoring⁷²; any incident arising from the use of instruments of restraint⁷³; use of force⁷⁴; temporary segregation⁷⁵; and use of isolation cell⁷⁶. Furthermore, the Presidency may appoint a judge to inspect the Detention Centre and, on a regular basis, an independent inspecting authority for the Detention Centre shall report to the Presidency⁷⁷. In case of serious disturbance or other emergency at the Detention Centre, the Presidency may temporarily suspend the relevant parts of the Regulations of the Court or the Regulations of the Registry⁷⁸. Finally, the Presidency may order an inquiry in the event of death, serious illness or injury of a detained person⁷⁹.
- 36 There are many other areas of oversight of the President/Presidency over the Registrar/Registrar, but as they fall under the Court wide coordination cluster, they shall be covered therein.
- 37 b) **Court wide**⁸⁰. To discuss and coordinate the administrative activities of the organs of the Court in the relevant areas, the Coordination Council has been established, comprised of the President, on behalf of the Presidency, the Prosecutor and the Registrar⁸¹. In practice, the Coordination Council addresses Court-wide matters of strategic significance, ranging from the Strategic Plan of the Court through to human resources, budget and finance, as well as public information, outreach, documentation or any unforeseen new developments. To this end, and in the exercise of the President's and Prosecutor's 'respective oversight responsibilities and ensuring appropriate internal and external control', the Audit Committee has been established through a Presidential Directive⁸². Composed of the President, Prosecutor and Registrar, as well as four external members, the Audit Committee provides strategic advice, to the organs' heads, on organizational matters listed in the Presidential Directives, including 'the financial reporting process; the system of internal control; the risk manage-

⁶⁶ Rule 12 para. 1 of the Rules.

⁶⁷ Rule 12 para. 2 and 3 of the Rules.

⁶⁸ Rule 12 para. 4 of the Rules.

⁶⁹ Rule 12 para. 5 of the Rules.

⁷⁰ Regulation 169 para. 7 of the Regulations of the Registry.

⁷¹ Regulations 175 para. 2 and 9 and 184 para. 2 and 9 of the Regulations of the Registry.

⁷² Regulation 196 para. 1 of the Regulations of the Registry.

⁷³ Regulation 203 para. 3 of the Regulations of the Registry.

⁷⁴ Regulation 204 para. 5 of the Regulations of the Registry.

⁷⁵ Regulation 209 para. 3 of the Regulations of the Registry.

⁷⁶ Regulation 213 para. 1 of the Regulations of the Registry.

⁷⁷ Regulation 94 of the Regulations of the Court and Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, ICC-PRES/02-01-06, 29 April 2006.

⁷⁸ Regulation 96 of the Regulations of the Court.

⁷⁹ Regulation 103 para. 7 of the Regulations of the Court.

⁸⁰ For a comprehensive discussion, see Ambach and Rackwitz (2014) 76 *L&ContempProbs* 119.

⁸¹ Regulation 3 of the Regulations of the Court.

⁸² ICC/PRES/D/G/2009/1, 11 August 2009.

ment system; the internal and external audit processes; and the Court's process for monitoring compliance with regulations and rules approved by the Assembly of States Parties⁸³. In order to facilitate its internal administration, the Court has thus drawn up, in addition to its staff rules⁸⁴, a vast body of administrative issuances, including presidential directives and administrative instructions. The former are designed to facilitate the implementation of the ASP's regulations, resolutions and decisions, such as the promulgation of guidelines for Financial Regulations and Rules; Staff Regulations and rules; regulations and rules governing programme planning, monitoring the implementation and methods of evaluation⁸⁵. Presidential directives are promulgated by the President on behalf of the Presidency, after having coordinated with and sought the concurrence of the Prosecutor⁸⁶. The administrative instructions prescribe procedures for the implementation of presidential directives and regulate the administration of practical and organizational matters of general concerns. They are promulgated by the Registrar following the consent of the President and the Prosecutor⁸⁷. The President shall be the final authority for the interpretation of administrative issuances⁸⁸.

One specific area requiring the Presidency's inter-organ involvement is public information. 38
The Presidency decides, in consultation with the Prosecutor and/or the Registrar, which documents in addition to those listed in the Regulations of the Court should be published in the Official Journal of the Court⁸⁹. The Presidency is also one of the three persons, alongside the Prosecutor and the Registrar, who may decide on the publication on the website of the Court, of material additional to those enumerated in the Regulations of the Court⁹⁰. Together with the Chamber, the Presidency is the body to be consulted by the Registrar for the establishment of the calendar of proceedings⁹¹. Finally, pursuant to article 50 para. 1, in addition to the judgments of the Court, the Presidency shall determine which decisions resolve fundamental issues and, as such, should be published in the official languages of the Court⁹².

Finally, the Presidency is the pivot of the Court's judicial-generated normative activities. 39
Pursuant to the Roadmap to Expedite the Criminal Process that was endorsed by the ASP in 2012, the Working Group on Lessons Learnt of the judges, as chaired by a member of the Presidency, identifies amendment clusters within the Rules which may enhance the efficiency of court proceedings⁹³. The Working Group on Lessons Learnt submits its amendment proposals to the Advisory Committee on Legal Texts, which is the sole Court-wide body with the mandate to consider and report on proposals for amendments to the Rules, Elements of Crimes and the Regulations of the Court. This process ensures that all stakeholders to the criminal proceedings, that is judges, the Prosecutor, defence, victims and the Registry have, under the oversight of the Presidency, the opportunity to consider with great care amendment proposals before they are submitted to the ASP, in accordance to article 51 para. 2⁹⁴, by the Presidency. Where emergency dictates the adoption of amendments to the Rules under article 51 para. 3, or to the Elements of Crimes or to the Regulations of the Court, the Presidency may *proprio motu* or at the request of a judge or the Prosecutor, submit proposals

⁸³ ICC/PRES/D/G/2009/1, 11 August 2009.

⁸⁴ Article 44 para. 3.

⁸⁵ ICC/PRES/D/G/2003/001, 9 December 2003.

⁸⁶ ICC/PRES/D/G/2003/001, 9 December 2003.

⁸⁷ ICC/PRES/D/G/2003/001, 9 December 2003.

⁸⁸ ICC/PRES/D/G/2003/001, 9 December 2003.

⁸⁹ Regulation 7 para. 1(n) of the Regulations of the Court.

⁹⁰ Regulation 8 para. (d) of the Regulations of the Court.

⁹¹ Regulation 36 para. 1 of the Regulations of the Regulations of the Registry.

⁹² Rule 40 of the Rules.

⁹³ ICC-ASP/11/Res.8. The Roadmap was annexed to the Report of the Bureau on the Study Group on Governance, ICC/ASP/11/31. The 'Revised Roadmap' was endorsed by the ASP on 27 November 2013, ICC-ASP/12/Res.8.

⁹⁴ Regulation 4 of the Regulations of the Court.

directly to the plenary of the judges, thus bypassing the ACLT⁹⁵. Furthermore, it is the Presidency that approves the Regulations of the Registry and any amendment thereto, as prepared by the Registrar following his consultations with the Prosecutor on matters affecting the operations of her office⁹⁶. Finally, it should be recalled that on the basis of a proposal made by the Registrar following consultations with the Prosecutor and independent representative body of counsel and legal associations, the Presidency drew up a Code of Professional Conduct for Counsel⁹⁷, which was adopted by the ASP⁹⁸.

⁹⁵ Regulations 5 and 6 of the Regulations of the Court.

⁹⁶ Rule 14 of the Rules and regulation 4 of the Regulations of the Registry.

⁹⁷ Rules 8 and 20 para. 3 of the Rules.

⁹⁸ Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, 2 December 2005.

Article 39 Chambers*

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.
2. (a) The judicial functions of the Court shall be carried out in each division by Chambers;
(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;
(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;
(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;
(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.
3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned;
(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.
4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Literature: Abtahi, H., *Article 38*, in: J. Fernandez Et X. Pacreau (eds.) *Commentaire article par article du Statut de la Cour pénale internationale*, 983-998, Vol. I (2013); *id.*, Ogwuma, O. And Young, R., 'The Composition of Judicial Benches, Disqualification and Excusal of Judges at the International Criminal Court', (2013) 11 *JICJ* 379-398.

Content

I. Paragraph 1.....	1
II. Paragraph 2.....	3
III. Paragraph 3.....	11
IV. Paragraph 4.....	13

* The authors are indebted to the work of Jules Deschênes and Christopher Staker in the first and second editions of this commentary.

I. Paragraph 1

1 Article 36 para. 1 provides that there shall be 18 judges. The judges of the Court are organized into three divisions, as foreseen by article 34 para. b:

- The Appeals Division, to be comprised of five judges including the President,
- the Trial Division, to be comprised of a minimum of six judges; and
- the Pre-Trial Division, to be comprised of a minimum of six judges.

Given that the Appeals Division must always consist of five judges, the 18th judge must be assigned to either the Trial or Pre-Trial Division.

One should remember that judges elected to the Court have established competence in either criminal law and procedure (List A) or international humanitarian law and human rights (List B); with, in both cases, experience in the practice of law.¹ The Presidency has confirmed that the language of this paragraph, echoing as it does that of article 36, indicates that it is the List A and List B competencies which are relevant for the purposes of the assignment of judges to divisions.² The assignment of judges to the various divisions must take into consideration the nature of the work of each division as well as the competence of each judge, in order to strike a proper balance between criminal law and procedure and international law.

2 Article 39 itself does not specifically state who is to conduct the assignment of judges to divisions. At various stages of the drafting process, a number of different opinions were expressed in that regard:

- assignment by the Presidency: ILC Draft of 1994³,
- election by the Court: Preparatory Committee;⁴ and
- choice by lot: France.⁵

This issue is resolved in the Rules of Procedure and Evidence. Rule 4*bis* provides that ‘... the Presidency shall, after consultation with the judges, decide on the assignment of judges to divisions in accordance with article 39, paragraph 1’. Introduced in December 2011 at the 10th session of the Assembly of States Parties, rule 4*bis* was a modification to the original rule 4, paragraph 1 of which had empowered the judges acting in plenary to assign judges to divisions.⁶ In introducing this amendment, the Assembly of States Parties had before it a report of the Study Group on Governance which considered this amendment to be ‘a possible way to strengthen the Presidency’s authority to oversee the administration of judges and minimize, to the extent possible, situations resulting in the extension of judicial mandates and/or the excusal of judges. ... the Study Group considered that the current mechanism to assign judges to divisions could potentially limit the proper administration of the Court, responsibility which [*sic*] lays in the Presidency’.⁷

II. Paragraph 2

3 Judicially the three divisions work through chambers.

The Appeals Chamber is composed of the five judges of the Appeals Division, including the President. The Appeals Chamber is the only chamber of the Court which has a fixed composition in the sense that all members of the Appeals Division are automatically

¹ See M. Bohlander, *Article 36* para. 3.

² Decision concerning the Request of Mr. Germain Katanga of 14 November 2008 for re-composition of the bench of Trial Chamber II, Presidency, 21 November 2008, ICC-01/04-01/07-757, p. 7.

³ 1994 ILC Draft Statute, p. 55.

⁴ 1996 Preparatory Committee I, p. 12.

⁵ *Ibid.*, p. 22.

⁶ Resolution ICC-ASP/10/Res.1, 20 December 2011.

⁷ ICC-ASP/10/33, para. 21.

members of the Appeals Chamber, which must always carry out its functions with all five members.⁸ Trial and Pre-Trial Chambers, on the other hand, are composed by the Presidency as the need arises.⁹ There is little guidance provided as to how the Presidency is to compose chambers. The Presidency thus has a broad discretion to determine how to best achieve the sound and efficient administration of the Court, with it likely being guided by ‘factors such as the availability of judges, the prospective long-term needs of the Court in relation to the case or situation in question and relative judicial workload’.¹⁰

The language of sub-paragraph c provides for a flexible approach in which multiple chambers are constituted as the need arises. For example, as of the beginning of July 2014 there were six Trial Chambers (Trial Chambers I, II, III, IV, V(a) and V(b)) and two Pre-Trial Chambers. In the early practice of the Court, it was most often the case that each Trial Chamber was assigned one case, although with the increase of the caseload, it may be that a Trial Chamber has more than one case before it for a period of time.¹¹ It should be noted that there may be overlapping composition of the various Trial Chambers with one or more judges sitting in multiple chambers simultaneously. In relation to Pre-Trial Chambers, as of the beginning of July 2014, Pre-Trial Chamber I was assigned the situations in Libya, Côte d’Ivoire and the Registered Vessels, while Pre-Trial Chamber II was assigned the situations in Uganda, the Democratic Republic of the Congo, Darfur (Sudan), the Central African Republic (two situations), Mali and Kenya. The numerical disparity between the number of situations assigned to each Pre-Trial Chamber appears to strongly indicate that assignment of situations to Pre-Trial Chambers occurs on the basis of the assessment of actual and anticipated workload at the relevant time, rather than being solely based on alternating assignments.

A Trial Chamber is composed of three judges. The wording of paragraph 2(b)(ii) indicates that this will ordinarily be three judges of the Trial Division, however, this must be read in conjunction with paragraph 4 which allows also for the temporary attachment of a judge of the Pre-Trial Division to the Trial Division by the Presidency, thus allowing for the possibility that a judge of the Pre-Trial Division may also sit in a Trial Chamber (and vice versa). The emphasis on the envisaged structure of simultaneous chambers referred to in sub-paragraph c indicates that it is expected that a judge of the Trial Division may sit simultaneously in multiple differently composed Trial Chambers hearing different cases, where the efficient management of the Court’s work so requires, with this having already occurred regularly at the Court, as well as at the *ad hoc* Tribunals.¹² An amendment to the Rules of Procedure and Evidence introduced by the ASP in November 2012 added rule 132*bis* which specified that certain functions in relation to the preparation of a case for trial could be performed by one or more members of a Trial Chamber as designated by that Chamber, rather than requiring the participation of all three judges.¹³

⁸ Although this does not prevent a member of the Appeals Chamber from being replaced if necessary, see Regulation 12.

⁹ Rule 130; Regulation 46 para. 1.

¹⁰ Abtahi et al. (2013) 11 *JICJ* 379, 384; See generally Report of the Bureau of the Study Group on Governance, ICC-ASP/10/30, 22 November 2011.

¹¹ For example, multiple cases were initially assigned to a single Trial Chamber, Trial Chamber V, before it was later split to form two separate Trial Chambers: V(a) and V(b); Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, Presidency, 29 March 2012, ICC-01/09-02/11-414; Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Presidency, 29 March 2012, ICC-01/09-01/11-406; Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*, Presidency, 21 May 2013, ICC-01/09-01/11-745.

¹² See, e.g., *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Appeals Chamber, 3 June 1999; *Prosecutor v. Nsengiyumva*, Case No. ICTR-96-12-A, Decision on Appeal Against Oral Decision of Trial Chamber II of 28 Sep. 1998, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Appeals Chamber, 3 June 1999.

¹³ ASP Resolution ICC-ASP/11/Res.2, 21 November 2012.

- 6 A Pre-Trial Chamber is comprised of three judges, usually from the Pre-Trial Division, although there are certain functions of a Pre-Trial Chamber which can be performed by only one member of a Pre-Trial Chamber, acting as a single judge. The designation of a single judge is done by the Pre-Trial Chamber itself,¹⁴ based on criteria including seniority of age, criminal trial experience, the circumstances of proceedings before the chamber, as well as workload and proper case management.¹⁵ Rule 7 para. 2 specifies that a single judge may take decisions on questions where the Statute and Rules do not otherwise specify that the full chamber must decide.¹⁶ The Pre-Trial Chamber may at any time may decide that the functions of the single judge should be exercised by the full chamber (rule 7 para. 3), and may designate more than one single judge when the efficient management of the workload of the chamber so requires (regulation 47 para. 2), although it is normally expected that a single judge shall be designated for the duration of a case.
- 7 In practice, the composition of chambers follows a fixed procedure. Regulation 45 requires that the Prosecutor inform the Presidency in writing when a new situation is referred to the Court. In accordance with regulation 46 para. 2, the Presidency immediately assigns the situation to a Pre-Trial Chamber after having received the Prosecutor's notification.¹⁷ This could be either a pre-existing Pre-Trial Chamber or a newly composed one. Any cases which subsequently arise in this situation are thus considered by the Pre-Trial Chamber in question. In respect of the formation of Trial Chambers, it has been usual practice that, upon delivery of a decision confirming charges pursuant to article 61, the relevant Pre-Trial Chamber has remained seized of the case until the decision on the confirmation of charges becomes final. Once either a decision on leave to appeal has been denied or an actual appeal against the confirmation of charges decision has been rendered, the Pre-Trial Chamber then transmits the case file to the Presidency, in accordance with rule 129. Upon receipt of such notification, the Presidency then either constitutes a Trial Chamber and refers the case to it, transmitting the record of proceedings to such Chamber,¹⁸ or assigns the case to a pre-existing Trial Chamber.
- 8 The Court has had the opportunity to consider in detail the principles governing the constitution of chambers in response to a request before the Presidency for the reconstitution of Trial Chamber II.¹⁹ The applicant requested that the Presidency reconsider that Chamber's composition by replacing one Judge on the grounds, *inter alia*, that the Judge lacked qualifications and experience in the area of criminal practice and international criminal law and that the Chamber lacked a judge from the common law tradition.²⁰ The Presidency commenced with the observation that the Court's legal texts do not provide criteria for the constitution of chambers.²¹ According to article 36 para. 8, the Assembly of States Parties must consider the representation of the principal legal systems of the world when electing judges. However, although such factors might be part of the 'qualifications and experience' of the judges relevant to the assignment of judges to divisions in paragraph 1, paragraph 2 does not impose any further requirements regarding the composition of individual chambers. Thus, the common law system does not have to be represented in each chamber.²² The Presidency further specified that in the context of composing chambers it endeavours to

¹⁴ Rule 7 para. 1.

¹⁵ Regulation 47 para. 1.

¹⁶ See *e.g.* Article 57 para. 2 (a) of the Statute which sets out certain matters which must be dealt with by the full Pre-Trial Chamber.

¹⁷ See *e.g.* Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III, Presidency, 19 January 2005, ICC-01/05-1.

¹⁸ See *e.g.* Decision constituting Trial Chamber III and referring to it the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, Presidency, 18 September 2009, ICC-01/05-01/08-534.

¹⁹ Decision concerning the Request of Mr. Germain Katanga of 14 November 2008 for re-composition of the bench of Trial Chamber II, Presidency, 21 November 2008, ICC-01/04-01/07-757.

²⁰ *Ibid.*, p. 3.

²¹ *Ibid.*, p. 4.

²² *Ibid.*, pp. 4–5.

apply the criteria for the election of judges set out in article 36 para. 8 to the extent possible, although it is not required to do so. Yet, in these circumstances, an insufficient availability of judges from the common law tradition made it impossible to have a judge from such background in every Trial Chamber.²³

In respect of the questioning of the Judge's qualifications and experience, the Presidency noted, once again, that the assessment thereof was a matter for the Assembly of States Parties, acting pursuant to article 36.²⁴ The Presidency further noted that the requirements in article 39 para. 1 concerning an appropriate combination of expertise related to the assignment of judges to divisions and not to the composition of individual chambers.²⁵ Nonetheless, despite the lack of any obligation to do so, the Presidency indicated that it sought 'to ensure, where possible, an appropriate combination of expertise in criminal law and procedure and in international law within Chambers'.²⁶ The Presidency noted that the Trial Chamber in question had more judges from list A (i. e. 'established competence in criminal law and procedure') than List B.²⁷ Accordingly, the request for the re-composition was dismissed. This decision demonstrates that although paragraph 2 does not establish criteria for the composition of chambers and the Presidency maintains discretion in this regard, it seeks, wherever possible, to consider the criteria for the assignment of judges to divisions set out in paragraph 1, as well as those governing the elections of judges in article 36.

Although not expressly stated, the power to compose chambers necessarily also entails a power to re-compose them as the need arises.²⁸ Regulation 15 specifies that when the Presidency is replacing a judge in a Trial or Pre-Trial Chamber it shall take into account 'to the extent possible, gender and equitable geographical representation'. The Presidency has also dissolved Pre-Trial Chambers as necessary to ensure the efficient management of the Court's workload.²⁹

Finally, Regulation 14 specifies that each division shall elect a President who shall oversee the administration of that division. Each President is elected for a period of one year. Further, regulation 13 para. 2 provides that each Trial and Pre-Trial Chamber elects a Presiding Judge who performs the tasks specified for such role pursuant to the Court's legal texts.³⁰ Pursuant to regulation 13 para. 1, the Appeals Chamber also elects a Presiding Judge for each appeal coming before it.

III. Paragraph 3

Judges are assigned to the Pre-Trial and Trial Divisions for a term of three years. This term may be extended, should the hearing of a case still be ongoing when the formal end of the term is reached. The reference to 'hearing' has been interpreted as referring to the actual presentation of evidence in session (rather than the preparation of a case). For example, on several occasions a Trial Chamber of a certain composition has commenced the preparation of a case for trial, with the composition then being changed prior to the commencement of the actual hearing of the case.³¹ In reality, the availability of the mechanism of temporary attachment in paragraph 4 makes it difficult to understand the necessity of sub-paragraph (a) because, for example, even if a judge initially assigned to the Trial Division were reassigned to

²³ *Ibid.*, p. 5.

²⁴ *Ibid.*, p. 6.

²⁵ *Ibid.*, p. 7.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ See e.g. Decision replacing judges in Trial Chamber III, Presidency, 20 July 2010, ICC-01/05-01/08-837.

²⁹ See e.g. Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation, Presidency, 19 March 2009, ICC-01/04-560.

³⁰ Article 64 para. 8(b); Rules 122, 133, 141, 143, 170, 171.

³¹ Decision replacing a judge in Trial Chamber IV, Presidency 16 March 2012, ICC-02/05-03/09-308; Decision replacing judges in Trial Chamber III, Presidency, 20 July 2010, ICC-01/05-01/08-837.

the Pre-Trial Division after three years but still had an ongoing hearing in the Trial Division, there is no reason that the judge could not complete such hearing as a Pre-Trial Division judge temporarily attached to the Trial Division. Nonetheless, the reason for this specification is likely the need for absolute clarity in specifying that accused persons are entitled to have a case heard by the same chamber once it has reached the hearing stage, a point similarly emphasized by the provision for the extension of a judicial mandate in article 36 para. 10.

- 12 In the Appeals Division, judges ‘shall serve in that division for their entire term of office’. The judges of the Court have interpreted this to mean that once a judge is assigned to the Appeals Division, that judge is to remain in such division until the end of her or his mandate.³² Thus, a number of judges who have initially been assigned to the Pre-Trial or Trial Division have later been assigned to the Appeals Division to serve the remainder of their mandate.³³

IV. Paragraph 4

- 13 The first sentence of paragraph 4 indicates that a judge assigned to the Appeals Division shall serve only in that division. This stands in contrast to judges assigned to the Trial or Pre-Trial Division who may be temporarily attached to other divisions as the efficient management of the Court’s workload demands. In practice, such temporary attachments have been common place. For example, following the resignation of Judge Jorda, Judge Ušacka, a member of the Trial Division, was temporarily attached to the Pre-Trial Division in order to replace Judge Jorda in a Pre-Trial Chamber.³⁴ A number of judges assigned to the Pre-Trial Division have also sat in Trial Chambers,³⁵ clearly in response to the inability, in view of the Court’s growing caseload, of the maximum of seven judges assigned to the Trial Division to hear all active cases. This mechanism of temporary attachment makes it possible that a judge may simultaneously sit in both a Pre-Trial and Trial Chamber.³⁶

Although this paragraph prohibits absolutely any member of the Appeals Division from sitting in the Trial Division or Pre-Trial Division, it does not expressly prohibit judges of the Trial Division or Pre-Trial Division from sitting in the Appeals Division. Regulation 12 of the Regulations of the Court enables the Presidency to authorize the latter to occur where a member of the Appeals Division is prevented from sitting in a case for a substantial reason. This has been used regularly in order to replace judges who have been excused from particular appeals.

Finally, paragraph 4 makes clear that no judge who has participated in the pre-trial phase of the case may be a member of the Trial Chamber hearing the case, a scenario which would otherwise be possible due to both the practice of the temporary attachment of judges and the possibility of a judge moving between the Trial and Pre-Trial Divisions during their mandate.

³² For further discussion of this aspect see Schabas, ‘Article 39’, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010) 555–556.

³³ See e.g. ICC Press Release: ICC-CPI-20120315-PR778, 14 March 2012; ICC Press Release: ICC-CPI-20091911-PR399, 19 March 2009. This has implications in terms of the excusal of judges, see Abtahi and Young, *article 41*.

³⁴ See discussion in Abtahi, ‘Article 39’, in: Fernandez and Pacreau (eds), *Statut de Rome de la Cour Pénale Internationale Commentaire article Par article*, i (Pedone, 2012) 1001.

³⁵ For example, Judges Van den Wyngaert, Fernández de Gurmendi and Herrera Carbuca.

³⁶ See e.g. the example of Judge Hans-Peter Kaul: Decision replacing a judge in Trial Chamber II, Presidency, 29 April 2009, ICC-01/04-01/07-1086.

Article 40 Independence of the judges

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Content

I. Introduction/General remarks.....	1
II. Analysis and interpretation of elements.....	6
1. Paragraph 1	6
2. Paragraphs 2 and 3	7
3. Paragraph 4	11

I. Introduction/General remarks

This article enshrines the cardinal principle in the administration of justice: that judges must be independent. It ought to go without saying¹. Yet there have arisen so many examples where justice has been subverted to expediency and judges forced or tricked into serving political goals, that the principle bears reasserting.

It is not necessary to go back beyond modern-day international instruments. In 1945 the Statute of the *International Court of Justice*, which ‘forms an integral part of the [...] Charter’ of the United Nations² stated in its article 2:

‘the Court shall be composed of a body of independent judges ...’.

Then in 1948 the *Universal Declaration of Human Rights* proclaimed in its article 10:

‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal ...’.

In 1966 the *International Covenant on Civil and Political Rights*, which entered into force in 1976, provided in the relevant part of its article 14 para. 1:

‘... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.

Regional international instruments have taken a similar approach:

- the *African Charter on Human and Peoples’ Rights*, article 26:
- ‘States Parties to the present Charter shall have the duty to guarantee the independence of the Courts ...’.

¹ ‘The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial’: *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000, para. 177 (see also the Declaration of Judge Shahabuddeen). See also, e.g., *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Appeals Chamber, 3 June 1999, paras. 36–38.

² Article 92 of the Charter.

- The *American Convention on Human Rights*, article 8 para. 1:
 - 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law ...'.
 - The *European Convention on Human Rights*, article 6 para. 1:
'... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...'.
- 2 On the basis of those unanimous statements of principle, the international community has adopted from time to time several *Declarations* which tend further to strengthen the principles. A few examples will suffice for our purposes.
- In 1985 the UN General Assembly endorsed³ and welcomed⁴ the *Basic Principles on the Independence on the Judiciary*⁵, which include the following principles:
1. 'The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary'.
 2. 'The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.
 3. 'There shall not be any inappropriate or unwarranted interference with the judicial process ...'.
 4. 'Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures ...'.
 5. 'The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected'.
- 3 Then in 1989 the UN Commission on human rights approved⁶ the *Draft Universal Declaration on the Independence of Justice* which had been referred to it by the Sub-commission on the prevention of discrimination and protection of minorities⁷. This comprehensive text is too long (72 articles) to be quoted here in full; but a few excerpts should be apposite:
1. 'Judges individually shall be free ...'.
 2. 'In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors ...'.
 3. 'The Judiciary shall be independent of the Executive and Legislature'.
 4. ...
(g) 'No power shall be so exercised as to interfere with the judicial process'.
- 4 There is no necessity or usefulness for further quotations. Let us only take note of various other international documents of a similar nature and intent: the Siracusa Principles on the Independence of the Judiciary (1981), the Noto Principles on the Independence of the Legal Profession (1982), the International Bar Association's minimum standards of Judicial Independence (New Delhi, 1982), the Montréal Universal Declaration on the Independence of Justice (1983).
- Side by side with those repeated statements, a considerable body of doctrine has grown over the last half-century⁸.
- 5 Paragraph 1 of this article therefore stands on an extraordinarily strong footing when it affirms the fundamental principle of the independence of the judges who compose the Court.

³ UN Doc. A/RES/40/32 (29 Nov. 1985).

⁴ UN Doc. A/RES/40/146 (13 Dec. 1985).

⁵ Adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 Aug./6 Sep. 1995.

⁶ RES. 1989/32.

⁷ RES. 1988/25.

⁸ The best overview was probably given in the 700-page work Shetreet and Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985).

This fundamental principle also forms a cornerstone of the ICC's Code of Judicial Ethics. Regulation 126 provides that the Presidency prepare such Code, to be adopted by a majority of judges in plenary session. Such Code was adopted on 9 March 2005⁹. Article 3 thereof specifies, consistently with the above instruments, that:

1. Judges shall uphold the independence of their office and the authority of the Court and shall conduct themselves accordingly in carrying out their judicial functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.'

Article 10 of the Code of Judicial Ethics further specifies that:

1. Judges shall not engage in any extra-judicial activity that is incompatible with their judicial functions or the efficient and timely functioning of the Court, or that may affect or may reasonably appear to affect their independence or impartiality.
2. Judges shall not exercise any political function.'

The following paragraphs of article 40 deal with some aspects of this vexed question, though they do not, by far, exhaust the problem. However, as the case law of the *ad hoc* international criminal tribunals shows, the issue has been so deeply laboured in so many countries that the doctrine and applicable principles must be taken to be generally acknowledged at the national level and capable of a comfortable transfer to the international world.

II. Analysis and interpretation of elements

1. Paragraph 1

It has been pointed out that although many human rights instruments refer to an 6
'independent and impartial' tribunal, 'independence' and 'impartiality' are in fact two different concepts, although they remain closely inter-related¹⁰. The former is dealt with in this article. The latter forms the subject of article 41. As one judicial pronouncement has said:

"*Independence*" means putting judges in a position to act according to their conscience and the justice of the case, free from pressures from governments, funding bodies, armies, churches, newspapers or any other source of power and influence that may otherwise bear upon them. ... "*Impartiality*" on the other hand, is generally regarded as the judicial characteristic of disinterest towards parties and their causes'¹¹.

Judicial independence thus requires that judges be free to exercise their functions, free from external pressures from third parties, and third parties must be under an obligation to respect this independence. This obligation is incumbent particularly on States, whether their nationals be accused, victims, witnesses or judges¹².

⁹ Code of Judicial Ethics, ICC-BD/02-01-05.

¹⁰ Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to Art. 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, Presidency, 13 November 2009, ICC-01/04-01/06-2138-AnxIII, pp. 6-7.

¹¹ *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), Appeals Chamber, 13 Mar. 2004 (the 'Sierra Leone Judicial Independence Appeal Decision'), Separate Opinion of Judge Robertson, para. 2. See also *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Appeals Chamber, 3 June 1999, para. 35.

¹² Cf. *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, Appeals Chamber, 31 Mar. 2000, esp. para. 34 (and see *Declaration of Judge Vohrah*, para. 3; *Declaration of Judge Nieto-Navia*, paras. 1-18).

2. Paragraphs 2 and 3

7 It is impossible to discuss one of these paragraphs separately from the other. They are distinct, but only to the extent of the *nuance* which flows from the power of assignment given to the Presidency by article 35 para. 3 (c).

By virtue of the latter provision, some of the judges may be called to full-time service at the seat of the Court whilst the others remain available on call: hence the distinction between paragraphs 2 and 3 of article 40.

8 Paragraph 2 applies to all judges of the Court irrespective of whether they have yet to be called to serve at the seat of the Court. This paragraph embodies the basic principles governing their independence. It is in this paragraph that judicial independence, at the level of the International Criminal Court, is properly rooted. But the statement is made in a somewhat reverse way: what the judges should *not* do, of which activities they should *not* partake, so that their independence be held beyond doubt.

That is a matter which must be individually decided, when the occasion arises; and the circumstances may be infinite, as human affairs go. A classic example, however, oftentimes arises and each time leads to animated discussions; here is how it was settled in the Preparatory Committee¹³.

‘The view was expressed that judges should not engage in any activities that would prejudice their judicial functions. In this connection, activities such as part-time teaching and writing for publication were considered compatible with such functions’.

Unlike paragraph 3 of this article, paragraph 2 does not prohibit all occupations of a professional nature. This means that judges who have not yet been required to serve on a full-time basis at the seat of the Court remain free to continue to exercise other professional occupations, unless the occupation of itself would ‘interfere with their judicial functions’. As the period of time between the election of a judge and her or his being called to serve on a full-time basis at the seat of the Court may be extended, paragraph 2 takes an eminently practical approach to this reality. Thus, for instance, for a period following their elections to the Court, certain judges have continued to act as a judge of the ICTY and ICTR or perform political roles within national jurisdictions.

9 After having enshrined the principle for all judges in paragraph 2 of article 40, the Statute goes on to deal, in paragraph 3, with those judges – whose number is left to the discretion of the Presidency – who are called upon ‘to serve on a full-time basis at the seat of the Court’. Their obligation is put at a higher level than that of their colleagues who, though members of the same Court, are given some freedom in the use of their time away from the Court. Paragraph 3 of article 40 forbids judges required to serve on a full-time basis at the seat of the Court to ‘engage in any other occupation of a professional nature’.

3. Paragraph 4

10 Assuming circumstances which might raise doubt as to the independence of a given judge, who should decide the issue? Originally the ILC suggested that the decision lie with the Presidency¹⁴. However the Statute of the ICJ already provided, in its article 16 para. 2, that ‘any doubt on this point shall be settled by the decision of the Court’. This course of action was recommended by the Preparatory Committee¹⁵ supported by Singapore¹⁶ and finally incorporated into the Statute. The actual wording of paragraph 4 puts the decision in the hands of ‘an absolute majority of the judges’.

¹³ 1996 Preparatory Committee I, p. 13.

¹⁴ 1994 ILC Draft Statute, p. 56.

¹⁵ See note 14, p. 13.

¹⁶ 1996 Preparatory Committee II, p. 29.

Unlike article 41, dealing with the related concept of judicial impartiality, article 40 does not include a provision for a Party to make a request for the judges to act under this provision. It is likely, in practice, that as judges themselves have the most complete knowledge of their professional activities, it is the judges concerned themselves who will take the responsibility to approach their colleagues under paragraph 4 where they have any doubt as to the applicability of either paragraphs 2 or 3.

Article 41

Excusing and disqualification of judges*

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.
2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.
 - (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
 - (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Literature: Abtahi, H., Ogwuma, O. And Young, R., ‘The Composition of Judicial Benches, Disqualification and Excusal of Judges at the International Criminal Court’, (2013) 11 *JICJ* 379.

Content

I. Paragraph 1	1
II. Paragraph 2	5
1. Sub-paragraph (a)	5
2. Sub-paragraph (b)	11
3. Sub-paragraph (c)	15

I. Paragraph 1

- 1 The language of this paragraph is broad, indicating that excusal is a mechanism potentially available in diverse situations. The Presidency has, for example, acting pursuant to this paragraph, granted requests for excusal on the basis of the workload of judges¹ and in order to address the pending expiration of a judicial mandate.² In considering requests for excusal on the basis of workload, the Presidency has taken into account a range of factors, including the current and anticipated workload of the requesting judge, the degree of overlap of hearings in which the judge is participating, the size and complexity of the cases in which the judge is participating and the availability of other judges.³ For example, the Presidency

* The authors are indebted to the work of Jules Deschênes and Christopher Staker in the first and second editions of this commentary.

¹ Decision on the Renewed Request for withdrawal from the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, Presidency, 30 January 2014, ICC-01/09-02/11-890-AnxI; Decision on the request to be excused from the exercise of judicial functions in Trial Chamber V, pursuant to article 41 of the Rome Statute, Presidency, 26 April 2013, ICC-01/09-01/11-706-AnxII; Decision on the request to be excused from the exercise of judicial functions in Trial Chamber III, pursuant to article 41 of the Rome Statute, Presidency, 15 July 2010, ICC-01/05-01/08-837-Anx2; Decision on the request to be excused from the exercise of judicial functions in Trial Chamber II, pursuant to article 41 of the Rome Statute, Presidency, 30 September 2009, ICC-01/04-01/07-1503-Anx2; Decision on the request to be excused from the exercise of judicial functions in Pre-Trial Chamber III, Presidency, 22 April 2008, ICC-01/05-9-Anx2.

² Decision on the request to be excused from the exercise of judicial functions in Trial Chamber IV pursuant to article 41 of the Rome Statute, Presidency, 6 March 2012, ICC-02/05-03/09-308-Anx2.

³ Decision on the request to be excused from the exercise of judicial functions in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to article 41 of the Rome Statute, Presidency, 21 May 2013,

has granted a request from a Judge who would otherwise have been involved in three trials, the hearings of which would have overlapped considerably.⁴ In contrast, the Presidency initially denied, on two occasions, a request from a Judge who was also sitting in three cases because it was only the hearings of two of those three cases which would have overlapped, with the Presidency considering that such overlap could have been appropriately managed through the scheduling of hearings during alternating periods in the judicial calendar. Eventually, the Presidency reconsidered this request in light of a new development: the election of a judge to fill a judicial vacancy, with the availability of this new Judge enabling the Presidency to grant the request for excusal from one case.⁵

Yet, the most obvious potential use of this provision relates to judges seeking excusal on the basis that their impartiality might reasonably be doubted, thus closely connecting this paragraph to the next. A judge may know of a valid excuse for not sitting on a certain case. Rather than wait for this information to provoke a request for disqualification, the judge is required to approach the Presidency, with the view that he or she be excused from performing that particular function.⁶ Justice and public interest shall then be far better served than through an *éclat*.

Paragraph 1 does not expressly indicate the criteria which the Presidency is to apply when excusing judges. In practice, the Presidency has treated the grounds for the disqualification of judges set out in paragraph 2 as equally applicable to its assessment of requests for excusal, where such requests are based on concerns for the preservation of the appearance of judicial impartiality.⁷

The language of excusal 'from the exercise of a function under this Statute' indicates that this provision applies not only to the excusal of judges from cases as such, but could be broader. For example, it has been used to excuse members of the Presidency from participating in judicial review decisions.⁸

The language of 'at the request of a judge' indicates that judges must take the initiative in approaching the Presidency, consistently with their obligations under the Code of Judicial Ethics to act with impartiality and integrity.⁹ The Presidency has stated, in response to a request from a Judge for advice as to whether excusal was warranted, that it cannot provide prospective advice because paragraph 1 requires that the determination of the existence of a reasonable ground for excusal comes, in the first place, from the judge concerned.¹⁰

The Court's subsidiary texts address a number of practical and procedural matters. Rule 33 specifies that a request for excusal must be presented in writing and include reasons, providing also for the confidentiality of such requests. The presumption of confidentiality in rule 33 necessitates that a judge must always give her or his consent prior to the publication of the

ICC-01/09-02/11-739-AnxII, p. 3; Decision on the Renewed Request for withdrawal from the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, Presidency, 30 January 2014, ICC-01/09-02/11-890-AnxI.

⁴ Decision on the request to be excused from the exercise of judicial functions in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to article 41 of the Rome Statute, Presidency, 21 May 2013, ICC-01/09-02/11-739-AnxII.

⁵ Decision on the Renewed Request for withdrawal from the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, Presidency, 30 January 2014, ICC-01/09-02/11-890-AnxI.

⁶ See rule 35, Annex I.

⁷ See Abtahi, Ogwuma and Young (2013) 11 *JICJ* 379.

⁸ Where a request for excusal has been made by a Judge who was also a member of the Presidency, that Judge has also sought excusal from her or his functions as a Presidency member in determining the relevant application for excusal. See e.g. Decision on the request to be excused from the exercise of judicial functions in the Appeals Chamber pursuant to article 41 of the Rome Statute, 18 June 2013, ICC-01/11-01/11-361-Anx4, pp. 1-2; Decision on the request to be excused from the exercise of judicial functions in Trial Chamber II, pursuant to article 41 of the Rome Statute, Presidency, 30 September 2009, ICC-01/04-01/07-1503-Anx 2, p. 3.

⁹ Code of Judicial Ethics (ICC-BD/02-01-05), adopted by the judges of the Court on 9 March 2005 pursuant to regulation 126, Annex III.

¹⁰ Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, Presidency, 13 November 2009, ICC-01/04-01/06-2138-AnxIII, p. 3.

Presidency's decision on a request for excusal under paragraph 1. Regulation 12 deals with temporary attachment of judges to the Appeals Chamber in the event that, *inter alia*, a member of the Appeals Chamber is rendered unavailable, including by reason of excusal.

II. Paragraph 2

1. Sub-paragraph (a)

- 5 This paragraph is closely linked with article 40,¹¹ as impartiality is closely linked with independence. Each case must be decided on its own merits. It should be noted that under this provision, a judge can only be disqualified from participating in a particular case or cases. A judge who is disqualified under this provision remains a judge of the Court. Removal of a judge from office is only possible under the procedure established by article 46.¹² Moreover, given that judges often serve in multiple cases simultaneously, a disqualified judge ordinarily continues to perform a range of other judicial functions in other cases.
- 6 Paragraph (a) sets out certain circumstances in which a judge will be disqualified from sitting in a case. The words 'inter alia' in paragraph (a) make clear that the listed grounds for disqualification are examples only. The paragraph goes on to state that further grounds for disqualification may be provided for in the Rules. Rule 34 provides that in addition to the grounds set out in article 41 para. 2, the grounds for disqualification of a judge, include, *inter alia*: (a) personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties; (b) involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party; (c) performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned; (d) expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.
- 7 The Court has elucidated the meaning of this sub-paragraph in the context of determining requests for excusal under paragraph 1. The Presidency has observed that sub-paragraph (a) of paragraph 2 is ambiguous and has undertaken a detailed analysis of its elements in the following terms:

"The second sentence ... could be understood as a proscriptive example of the general principle espoused in the first sentence. Accordingly, an example of a situation in which the impartiality of a judge would be reasonably doubted is where that judge has previously been involved in any capacity whatsoever in the relevant case before the Court. Alternatively, the two sentences could be understood to interact in a more holistic manner so that the second sentence is read in conjunction with the general principle of impartiality contained within the first. The capacities with which the second sentence is concerned are those by virtue of which the impartiality of the judge might reasonably be doubted. Thus, this part of article 41(2)(a) would be concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt his or her impartiality.

Noting this ambiguity, the Presidency has considered the meaning to be given to the second sentence of this article in its context and in light of its object and purpose. The Presidency considers the overriding purpose of article 41 (2)(a) to be the safeguarding of the integrity of proceedings of the Court by ensuring that no judge participates in a case in which his or her impartiality might reasonably be doubted on any ground. Such purpose is manifest in the first sentence of article 41(2)(a) itself, but is also confirmed by the interrelationship between articles 40 and 41, with the broader objective of these provisions being the safeguarding of judicial functions and ensuring

¹¹ *Ibid.*, pp. 6-7.

¹² See, e.g., *Prosecutor v. Sesay*, Case No. SCSL-2004-15-AR15, Decision on the Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Appeals Chamber, 13 March 2004.

confidence in the judiciary. Noting also the placement of article 41 in Part IV of the Statute dealing with the composition and administration of the Court, the Presidency considers that a further objective of article 41 is ensuring the overall efficiency of the conduct of proceedings before the Court. As such, the Presidency prefers the latter understanding expressed in the preceding paragraph; namely that the relevant part of article 41(2)(a) is concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt his or her impartiality. The Presidency finds this interpretation most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached, at the same time as ensuring the efficient conduct of proceedings. The Presidency thus accepts the view of the applicant that article 41(2)(a) functions “to certify the integrity and impartiality of the judicial proceedings by ensuring that Judges who have previously participated in the case do not participate as Judges in the present proceedings, if their impartiality might reasonably be doubted”. The language of “previously involved in any capacity in that case before the Court” cannot be considered in isolation but must be understood as closely connected to the first sentence of article 41(2)(a).¹³

The Presidency has had a number of occasions to apply the criteria for disqualification referred to in sub-paragraph (a) in the context of requests for excusal pursuant to the first paragraph of this article. Much of the Court’s practice interpreting this sub-paragraph relates to the movement of judges between divisions creating the possibility of a judge potentially addressing the same case at more than one stage of proceedings.¹⁴ The Presidency has indicated that judicial impartiality demands that a Judge of the Appeals Chamber who has previously issued both a warrant of arrest and a decision on the confirmation of charges in a case could not later sit in appeals in that case.¹⁵ In contrast, however, the Presidency has determined that when a Judge of the Appeals Chamber has previously participated in a case at the pre-trial stage solely through participation in a procedural motion, such limited participation does not constitute a ground on which impartiality in the appeal could be reasonably doubted.¹⁶ In a different decision, the Presidency has also determined that where a Judge of the Appeals Chamber has participated in a case at the pre-trial level, up to and including the issue of a warrant of arrest, excusal is not necessarily warranted.¹⁷ The Presidency noted that as the level of proof required at the arrest warrant stage is *prima facie* only, participation therein does not constitute a basis to doubt the Judge’s impartiality in the case more generally.¹⁸ Of course, when the subject matter of an appeal is directly related to

¹³ Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, Presidency, 13 November 2009, ICC-01/04-01/06-2138-AnxIII, pp. 6–7.

¹⁴ Abtahi and Young, *article 39*.

¹⁵ Decision on the request of 15 July 2010 to be excused from sitting in the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 and from sitting in all future appeals arising in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, Presidency, 20 July 2010, ICC-01/04-01/06-2524-Anx2; Decision on the request of 16 February 2010 to be excused from sitting in the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 20 November 2009 and from sitting in all future appeals arising in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, Presidency, 8 March 2010, ICC-01/04-01/07-1949-Anx2.

¹⁶ Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, Presidency, 13 November 2009, ICC-01/04-01/06-2138-AnxIII, p. 8.

¹⁷ Decision on the request to be excused from the exercise of judicial functions in the Appeals Chamber pursuant to article 41 of the Rome Statute, Presidency, 18 June 2013, ICC-01/11-01/11-361-Anx4; Decision on the request of Judge Akua Kuenyehia of 18 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related to the case of *The Prosecutor v. Bosco Ntaganda* and in all appeals in the case, Presidency, 11 November 2010, ICC-01/04-584-Anx4, p. 5.

¹⁸ Decision on the request of Judge Akua Kuenyehia of 18 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related to the case of *The Prosecutor v. Bosco Ntaganda* and in all appeals in the case, Presidency, 11 November 2010, ICC-01/04-584-Anx4, p. 5; When a Judge has participated in a decision on the confirmation of charges, which applies a higher threshold of proof than is required for a warrant of arrest, that Judge has later been excused from functions in the Appeals Chamber when that decision on the confirmation of charges was subject to appeal: Decision on the request to be excused

issues that a judge has previously addressed in the warrant of arrest in same case, this congruity of issues already decided and those on appeal constitute a reason to grant a request for excusal so as to guarantee judicial impartiality.¹⁹

- 9 The Presidency has thus conducted an assessment of the extent of the congruence between issues that a judge has previously decided in a case and those that she or he is now being asked to decide, indicating that where the legal issues in the latter are distinct from those addressed in any previous decision, the standard of impartiality set out in sub-paragraph (a) is not offended.²⁰ On the congruence of issues, the Presidency has further indicated that sub-paragraph (a) is only concerned with situations where a judge has previously considered the same issue *in the same case*, having considered the same or similar legal issue in the context of a different case does not create any appearance of pre-judgment or bias as it is obvious to a reasonable observer that a judge may have to consider issues of fact and law on multiple occasions, with this not meaning that she or he will not do so with an impartial and unprejudiced mind on each subsequent occasion.²¹
- 10 Although most of the Court's assessment of this sub-paragraph to date has related to previous involvement in the case before the Court, the Presidency has also considered the effect of a judge's work prior to commencing her or his judicial mandate at the Court. One of the requirements for election as a judge of the Court, in the case of judges elected on List B, is that the judge has 'established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court'. Given this requirement, many of the judges of the Court are likely, for instance, to have been members of human rights bodies, or have worked in the human rights field, or have been active in organizations calling for the development and enforcement of international criminal law. The Presidency has determined that the previous role of a Judge of the Court as a Commissioner to the African Commission on Human and Peoples' Rights in the preparation of a fact-finding report concerning Darfur did not prevent that Judge from considering the warrant of arrest in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*.²²

In this decision the Presidency considered that the reference to judicial impartiality in sub-paragraph 2(a) incorporated the notions of subjective and objective bias, noting that the requirement of judicial impartiality demands not only that judges be subjectively free from bias but that there is also no objective appearance of bias.²³ The Presidency provided the following elucidation of the concept of the objective appearance of appearance, by reference to diverse legal sources:

'The Presidency notes that following a survey of the jurisprudence of the European Court [of Human Rights], the United Kingdom, Australia, Canada, South Africa, the United States of America,

from the exercise of judicial functions in the Appeals Chamber pursuant to article 41 of the Rome Statute, Presidency, 15 March 2012, ICC-01/04-01/10-500-Anx2.

¹⁹ Decision on the request to be excused from the exercise of judicial functions in the case of *The Prosecutor v. Bosco Ntaganda*, pursuant to article 41 of the Rome Statute, Presidency, 4 December 2013, ICC-01/04-02/06-162-Anx2; Compare to the different situation without such congruence of issues in: Decision on the request to be excused from the exercise of judicial functions in the Appeals Chamber pursuant to article 41 of the Rome Statute, 18 June 2013, ICC-01/11-01/11-361-Anx4, p. 3.

²⁰ Decision on the request of Judge Monageng to be excused from the exercise of judicial functions in the Appeals Chamber pursuant to article 41 of the Rome Statute, Presidency, 19 April 2012, ICC-01/11-01/11-118-Anx2, pp. 5–6.

²¹ Decision on the request of Judge Ekaterina Trendafilova of 16 March 2012 to be excused from participating in the appeal 'OA4' in the case of *The Prosecutor v. Callixte Mbarushimana*, pursuant to article 41 of the Rome Statute and rules 33 and 35 of the Rules of Procedure and Evidence, Presidency, 21 March 2012, ICC-01/04-01/10-503-AnxII.

²² Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, Presidency, 19 March 2010, ICC-02/05-01/09-76-Anx2.

²³ *Ibid.*, pp. 5–6.

Germany, France, Italy, the Netherlands and Sweden, the Appeals Chamber of the ad hoc tribunals has concluded that the assessment of the appearance of bias requires consideration of whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias. Examples of such circumstances are set out in rule 34(l)(c) and 34(1)(d) of the Rules which concern an objective appearance of impartiality due, inter alia, to extra-judicial activities and the Presidency has found that an objective appearance of impartiality may be denied when a judge previously made determinations of fact based upon consideration of the same issues and evidence, from which it would appear that he or she is not free to depart'.²⁴

In applying this to the situation at hand, the Presidency noted that the function of the Commissioner did not involve the assessment of the individual criminal responsibility of any individual, but rather aimed to gather information generally in order to divert a humanitarian crisis. In addition, the Report made no findings as to whether genocide had been committed in Darfur, a significant issue in relation to the warrant of arrest. The Presidency thus considered that the reasonable observer would understand the capacity of professional judges to decide a case in reliance solely on the evidence provided in a specific case and excluding any information available to them in any other capacity.²⁵ Thus, the Presidency considered that there was no reason to doubt the Judge's impartiality under sub-paragraph (a) in terms of an objective appearance of bias.

2. Sub-paragraph (b)

This sub-paragraph specifies that it is the Prosecutor or the person being investigated or prosecuted who may request the disqualification of a Judge. The Court has interpreted this sub-paragraph as exhaustively setting out the participants entitled to make such request. In response to a request for the disqualification of a Judge made by a legal representative of victims, the plenary of judges considered such request to be inadmissible because this sub-paragraph 'was plain and determinate as to who was entitled to bring an application for the disqualification of a judge. That right was limited to the Prosecutor and the person being investigated or prosecuted'.²⁶ In reaching this finding, the plenary of judges emphasized the exceptional nature of disqualification proceedings and also noted the function of the Prosecutor to act in the general interest of the international community.²⁷

The Presidency has also clarified that requests for disqualification must be made expressly. In one case, the Presidency received from a Party a request for the re-composition of the Trial Chamber, citing as one basis, the alleged 'appearance of bias' given a Judge's statements made in a previous capacity as the Ambassador of Japan to the United Nations. In response to this request, the Presidency asked the applicant whether this request should be treated as a request for disqualification in accordance with article 41, paragraph 2(b), to which the applicant responded negatively. The Presidency then indicated that in the absence of a request for disqualification under this sub-paragraph (or any request for excusal under paragraph 1), it could take no action, noting the absence of any provision allowing the Presidency to take pre-emptive action in respect of the impartiality of judges.²⁸

Rule 34 para. 2 ICC states that 'a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based'. Ideally, this would occur before the proceedings before the relevant Chamber have commenced, so that it is still possible for a replacement judge to be assigned and to participate in the entire proceedings before the Chamber. However, it could occur that the party requesting disqualification only

²⁴ *Ibid.*, p. 6.

²⁵ *Ibid.*, p. 7.

²⁶ Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v. Germain Katanga*, Plenary, 22 July 2014, ICC-01/04-01/07-3504-Anx, p. 10.

²⁷ *Ibid.*

²⁸ Decision concerning the Request of Mr. Germain Katanga of 14 November 2008 for re-composition of the bench of Trial Chamber II, Presidency, 21 November 2008, ICC-01/04-01/07-757, pp. 3,8.

obtains knowledge of the grounds for disqualification after the proceedings before the relevant Chamber have commenced. In such cases, it may be possible for an alternate judge appointed pursuant to article 74 para. 1 and rule 39 to replace the disqualified judge. More broadly, disqualification of a judge constitutes an objective and justified reason justifying the replacement of that judge, in accordance with rule 38.

- 14 In some cases, a party may only acquire knowledge of grounds of disqualification after proceedings before the relevant Chamber have been completed. In such cases, it will be too late to invoke the procedure under this paragraph. However, other remedies may still be available. For instance, the grounds of disqualification might in an appropriate case form the basis of an appeal under article 81, or justify an application for revision under article 84.

3. Sub-paragraph (c)

- 15 Sub-paragraph (c) of this article follows generally the wording of paragraph 4 of article 40. The effect of the second sentence of this sub-paragraph, which states that ‘the challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision’, is that the challenged judge can present his or her views to his colleagues, but cannot otherwise participate in the decision-making process. The mechanism through which the judges take collective decisions such as the one described in this sub-paragraph is a plenary session.²⁹ In practice, upon receipt of a request for disqualification, the Presidency has asked the judge in question to present her or his views in the form of a written response. The plenary session of judges has then convened in the absence of the judge concerned.³⁰ The plenary session has also had before it observations on a request for disqualification made by the other Party or closely interested persons.³¹ The plenary of judges has denied a request by an applicant for leave to reply to the submissions of a challenging judge, indicating that although the possibility of such reply is not excluded, the particular request for leave was not made in a timely manner and was not necessary in the circumstances. The plenary of judges did also note that the principle of ‘equality of arms’, which it understood to ordinarily provide a right to reply, is not to be applied automatically between a party and a judge.³² As a further procedural matter, the Presidency considers itself to have lacked jurisdiction to consider a request to suspend a challenged judge from the case pending the outcome of the request for disqualification before the plenary.³³
- 16 The plenary has set out a number of key principles when considering the disqualification of a judge. The standard applied is whether the circumstances would cause a properly informed reasonable observer to apprehend bias, noting that a high threshold must be satisfied in order to disqualify a judge given the presumption of impartiality and the need to safeguard the interests of the sound administration of justice.³⁴ The plenary has further clarified that the fair-minded observer must be an objective one, not to be assimilated to the

²⁹ Rule 4.

³⁰ See e.g. Decision of the plenary of the judges on the ‘Defence Request for the Disqualification of a Judge’ of 2 April 2012, *Banda and Jerbo*, Plenary, 5 June 2012, ICC-02/05-03/09-344-Anx, pp. 2–3.

³¹ For example, in the event of a request for disqualification from defence counsel in the article 70 (contempt) proceedings related to the *Bemba* case, the plenary accepted observations on the disqualification request from both the Prosecutor and from the defence for Mr. Bemba Gombo: Decision of the Plenary of Judges on the Defense Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Plenary, 20 June 2014, ICC-01/05-01/13-511-Anx.

³² *Ibid.*, p. 3.

³³ *Ibid.*, p. 2.

³⁴ *Ibid.*, p. 4; Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Plenary, 11 June 2013, ICC-01/04-01/06-3040-Anx, pp. 3–4; Decision of the plenary of the judges on the ‘Defence Request for the Disqualification of a Judge’ of 2 April 2012, *Banda and Jerbo*, Plenary, 5 June 2012, ICC-02/05-03/09-344-Anx, p. 4; Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v. Germain Katanga*, Plenary, 22 July 2014, ICC-01/04-01/07-3504-Anx, pp. 8–9.

applicant him or herself, and that such fair-minded and informed observer understands the nature of a judge's profession and takes account of the entire context of the case.³⁵

The Court has undertaken the procedure set out in sub-paragraph (c) on several occasions. 17
The first occasion occurred in relation to a defence request for the disqualification of a Judge on three grounds: (1) his nationality being shared with a number of the alleged victims in the case (Nigerian); (2) the endorsement of his candidacy for election as a judge by both Nigeria and the African Union, given that the case involved attacks on AU peacekeepers, including Nigerian nationals; and (3) comments written by him in a blog post prior to his election as a judge which were alleged to demonstrate and appearance of pre-judgment.³⁶ The plenary session of judges rejected the request for disqualification. They considered that whilst the nationality of a judge may potentially be relevant to disqualification under article 41 para. 2, the co-occurrence of shared nationality with some alleged victims in the present case did not have such effect.³⁷ On the election procedures, the plenary session of judges considered that the exercise of the procedure for the nomination of judges was insufficient to provide a reasonable basis to doubt the Judge's impartiality, as was the customary regional procedure of the endorsement of a candidate by the African Union.³⁸ In respect of blog comments made by the Judge prior to his election, the plenary considered that there was no genuine link between the blog commentary and the case. In essence, 'formations or expressions of opinion tangentially connected to a case did not necessarily give rise to disqualification'³⁹

The next application of this sub-paragraph related to a request to disqualify a Judge from the appeal in the case of *The Prosecutor v. Thomas Lubanga Dyilo* on the basis that: (1) that Judge had made comments in his capacity as the President of the Court which indicated prejudgment of Mr. Lubanga's culpability; and (2) the Judge's involvement as the President of a particular charitable organization (UNICEF/Korea) given that the United Nations' Children's Fund (UNICEF) had participated in the reparations proceedings in the case. The first of these was alleged to give rise to actual bias on the part of the Judge (or, at minimum, a reasonable appearance of bias), whereas the second was said to represent an impermissible conflict of interests.⁴⁰ 18

The general comments made by the President in a number of speeches included referring to the trial judgment in the case as having established 'a crucial precedent in the fight against impunity', describing it as a 'landmark judgment' and referring to the involvement of victims and the operation of the ICC's reparation regime in the case.⁴¹ The plenary of judges found that there was no actual bias, nor the appearance of a reasonable apprehension thereof, when these comments were considered in their proper context, they were clearly not comments regarding the merits of the trial judgment nor related to any particular legal issues under appeal but simply comments related to the wider implications and precedential significance of the decisions.⁴²

In relation to the alleged conflict of interests derived from the Judge's involvement in the organization UNICEF/Korea, the plenary of judges considered that these circumstances were distinguishable from the well-known circumstances of the *Pinochet* case.⁴³ The plenary of judges indicated that the Judge had a less direct relationship with the organization in question than that in *Pinochet*, referring to the fact that the Judge's involvement in the organization was nominal and

³⁵ Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Plenary, 11 June 2013, ICC-01/04-01/06-3040-Anx, pp. 11–12.

³⁶ Decision of the plenary of the judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, *Banda and Jerbo*, Plenary, 5 June 2012, ICC-02/05-03/09-344-Anx, pp. 1–2.

³⁷ *Ibid.*, p. 5.

³⁸ *Ibid.*, pp. 5–6.

³⁹ *Ibid.*, pp. 6–7.

⁴⁰ Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Plenary, 11 June 2013, ICC-01/04-01/06-3040-Anx, p. 2.

⁴¹ *Ibid.*, pp. 5–6.

⁴² *Ibid.*, p. 12.

⁴³ *R v. Bow Street Metropolitan Stipendiary Magistrate Ex. P. Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119.

that another individual functioned as its acting President. Further, UNICEF had not made any submissions before the Appeals Chamber, all of its participation in the case having been before the Trial Chamber. In addition, it was noted that, since the *Pinochet* decision, there has come to be accepted in a number of national jurisdictions a *de minimis* exception tolerating a personal interest so minimal as not to be capable of exerting influence.⁴⁴ Based on these factors, the plenary of judges considered that the threshold for disqualification had not been met.

- 19 In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, multiple defence teams filed requests⁴⁵ for the disqualification of the Single Judge in the case on the grounds: (1) that his interpretation of the law indicated a pre-disposition to deciding matters in favour of the Prosecutor⁴⁶ and (2) based on certain conduct of the Single Judge in the proceedings.⁴⁷ The plenary of judges dismissed the request for excusal. In respect of the first argument above, the plenary considered that the defence failed to demonstrate any pre-disposition of the Single Judge in favour of the Prosecution. The plenary also considered that the request for disqualification was an attempt to convert appellate issues into a request for disqualification, noting it to be entirely unacceptable that judges be subject to disqualification proceedings simply because they had made findings adverse to one party.⁴⁸ In respect of the second argument, the plenary found that none of the examples of conduct cited, assessed individually or as a pattern of conduct, demonstrated bias or the appearance thereof, noting that the defence took many comments by the Single Judge entirely out of context.⁴⁹
- 20 The theme of the extent to which actions undertaken in the fulfillment of judicial functions before the Court may form the basis for a request for disqualification has also been explored indirectly in another request for disqualification. A request was made by a legal representative of victims for the disqualification of a Judge on the grounds that her minority opinion in the Trial Chamber's article 74 decision on the guilt or innocence of the accused revealed a bias, undermining her impartiality to sit during the reparations stage of the proceedings.⁵⁰ This request was found to be inadmissible, however, the plenary of judges noted in passing that it would also have failed on its merits. The plenary of judges 'considered that the entitlement of a judge to express a different opinion from the majority, whether concurring or dissenting, is safeguarded by article 74 of the Statute and the expression of a minority opinion does not render a judge biased or partial in further proceedings'.⁵¹ The plenary of judges further noted the importance of minority opinions and stated it to be 'a paradox that a bastion of judicial independence was being used as a basis for the disqualification of the Judge'.⁵²

⁴⁴ Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Plenary, 11 June 2013, ICC-01/04-01/06-3040-Anx, pp. 13–14.

⁴⁵ These requests were considered jointly: Decision of the Plenary of Judges on the Defense Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Plenary, 20 June 2014, ICC-01/05-01/13-511-Anx, pp. 3–4.

⁴⁶ *Ibid.*, p. 11. The examples cited by the defence teams related to the Single Judge's appointment of an Independent Counsel, the Single Judge's filing of an application to waive the immunity of lead counsel and the case manager, his alleged violation of such immunities prior to the granting of such waiver, the dismissal of crucial defence applications and the dismissal of the majority of defence requests while granting the majority of Prosecution requests.

⁴⁷ *Ibid.*, p. 13; The examples cited by the defence teams included issuing the arrest warrants with undue speed, using language demonstrating a pre-conviction of guilt and publicly admonishing counsel.

⁴⁸ *Ibid.*, pp. 11–12.

⁴⁹ *Ibid.*, p. 13.

⁵⁰ Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v. Germain Katanga*, Plenary, 22 July 2014, ICC-01/04-01/07-3504-Anx.

⁵¹ *Ibid.*, pp. 11–12.

⁵² *Ibid.*, p. 12.

Article 42

The Office of the Prosecutor

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

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, *inter alia*, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

- (a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;
- (b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Literature: Arbour, L., 'The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court', (1999) 17 *Windsor Yearbook of Access to Justice* 207; Arbour, L./Eser, A./Sanders, A./Ambos, K. (eds.), *The Prosecutor of a permanent ICC*, (Freiburg i. Br., ed. iuscrim, 2000); Jones, J. R. W. D., 'The Office of the Prosecutor', in: A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute Of The International Criminal Court: A Commentary*, I (2002) 269; Reydams, L./Wouters, J./Ryngaert, C. (eds.), *International Prosecutors* (Oxford, OUP 2012); Rwelamira, M., 'The Office of the Prosecutor', in: Lee, R.S., (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 259; Wouters, J., Verhoeven, S. And Demeyere, B., 'The ICC's Office of the Prosecutor: Navigating between Independence and Accountability', (2008) 8 *ICLRev* 273.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	8
I. Paragraph 1: Independent and separate organ	8
II. Paragraph 2: Structure of the Office	12
III. Paragraph 3: Qualifications	15
IV. Paragraph 4: Election	16
V. Paragraph 5: Outside activities	20
VI. Paragraph 6: Excuse	23
VII. Paragraph 7: Impartiality	24
VIII. Paragraph 8: Disqualification	29
IX. Paragraph 9: Advisers	32

A. Introduction/General remarks

- 1 Article 34 states that the Office of the Prosecutor is one of the organs which the Court shall be composed of. Article 42, in turn, establishes the main responsibilities and functions of the Office, its independence and management, and provides the procedure for appointment and disqualification of the Prosecutor and the Deputy Prosecutors. Further provisions on the powers and duties of the Prosecutor in the investigation and prosecution processes are included in articles 53 and 54 under Part V of the Statute.
- 2 Article 42 of the Statute was originally drafted as article 12 in the 1994 ILC Draft Statute¹. It was subsequently redrafted by the Preparatory Committee as article 43 of the Draft Statute² which was submitted to the Diplomatic Conference in Rome. With the exception of the removal of a paragraph 10 of draft article 43, on a separate prosecutorial obligation to provide protective measures to witnesses, the Conference only made minor changes in this article before its adoption as article 42 of the Statute.
- 3 The functional *independence* of the Office of the Prosecutor is one essential interest protected by article 42. The article should be interpreted in the light of other statutory provisions which define the jurisdictional parameters of the Court or specify the functions of its Prosecutor³. The exercise of powers by the Court's organs naturally depends on whether the Court has jurisdiction. It was recognised from the outset of the Preparatory Committee's work that the Court would have to be based on a principle of complementarity if it is to enjoy universal support. The complementarity principle is expressed in the Preamble of the Statute⁴ and articles 1 and 17. It essentially entails that the permanent Court shall only have jurisdiction when the national criminal justice systems fail to genuinely investigate and prosecute serious violations of international humanitarian law, and then only if a territorial State or State of nationality has accepted the Court's jurisdiction.
- 4 Given the complementary nature of the Court's jurisdiction, the view emerged in many delegations to the Preparatory Committee and the Diplomatic Conference that the Court's efficacy would largely depend on the powers and independence of its Prosecutor. But considerable controversy surrounded the proposition that the Prosecutor should be empowered to start investigations *ex officio*, regardless of referral by a State Party or the Security Council. A compromise proposal advanced by Argentina and Germany received decisive support by delegations and article 15 now provides that the Prosecutor can independently *initiate* investigations, but he or she needs Pre-Trial Chamber authorisation to actually *start* the investigation. Article 42 would seem to cement the notion of functional prosecutorial independence by expressly prescribing independent action, independence from external instructions, management autonomy, restrictions in engagement of activities which could

¹ See 1994 ILC Draft Statute, II, B, I ('Draft statute for an international criminal court'), pp. 58–60.

² See Preparatory Committee (Consolidated) Draft.

³ See articles 12, 13, 15, 17, 18, 53, 54 and 57.

⁴ See preambular paragraph 10.

affect confidence in independence, and appointment through election by an absolute majority of the Assembly of States Parties.

The view was expressed during the proceedings of the Preparatory Committee in 1996 that it might be useful to look to the two *ad hoc* Tribunals for guidance and experience as regards the independence of the Prosecutor⁵. Article 42, indeed, draws both language and content from article 16 of the ICTY Statute and article 15 of the ICTR Statute. According to these articles, the joint Prosecutor of the Tribunals shall ‘act independently as a separate organ’ of the Tribunals.

The Tribunal Prosecutor ‘shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases’, and he or she ‘shall not seek or receive instructions from any Government or from any other source’. These features are largely reproduced in article 42 of the ICC Statute.

Much as the principle of the Prosecutor’s functional independence stands affirmed in the ICC Statute, the Prosecutor’s powers, however, are still and necessarily judicially curbed and controlled. This is necessary for the Court to enjoy trust and legitimacy in the community of States. Whilst the Security Council itself removed the need for further authorisation for the Prosecutor of the two *ad hoc* Tribunals to start investigations, it is the Pre-Trial Chamber which must authorise that the ICC Prosecutor proceeds with full investigations⁶. This is an important constitutional check in the Statute without which key States would not have supported its adoption. The ICC Pre-Trial Chamber has also replaced the rotating trial Judge in the two *ad hoc* Tribunals for the required judicial confirmation of the indictment transmitted by the Prosecutor, and the *ex parte, in camera* consideration of the proposed indictment in the Tribunals have been replaced by hearings *inter partes* with presentation of evidence and a right of the suspect to challenge the evidence presented by the Prosecutor⁷. Some delegations expressed concern during the work of the Preparatory Committee and the Diplomatic Conference that the procedural and evidentiary regime of the permanent Court should be properly balanced between the different legal traditions of the world, and that it should incorporate more elements from national systems which are based on the inquisitorial tradition than the Rules of Procedure and Evidence of the two *ad hoc* Tribunals do. The early practice of the Court suggests that this tension between common and civil law approaches has influenced the working relationship between the Office of the Prosecutor and Pre-Trial Chambers.

While the Prosecutor’s independence is protected by established statutory safeguards in most international criminal jurisdictions⁸, the same cannot be said of the concept of impartiality, which is mostly articulated in relation to the judiciary rather than the Prosecution. The statutes of the *ad hoc* tribunals lack specific provisions imposing a clear obligation on prosecutors to perform their functions impartially. Article 42 of the ICC Statute, in contrast, explicitly prohibits the participation of the Prosecutor (and his Deputy) ‘in any matter in which their impartiality might reasonably be doubted on any ground’. It not only spells out the general obligation of the Prosecutor to act impartially, but also apprehends the lack of impartiality as a basis for disqualifying the Prosecutor.

In practice, prosecutorial impartiality has been legally challenged on a few occasions before the ICC. Certain out-of-court statements made by the first ICC Prosecutor Moreno Ocampo were first raised on the basis of partiality in the Lubanga case in 2011⁹. One year later, the OPCD filed a request to disqualify the former ICC Prosecutor from participating in the case against Saif Gaddafi for public statements the Prosecutor had made regarding the prosecution against Mr. Gaddafi and the Prosecutor’s alleged allegiance to the Libyan government¹⁰.

⁵ See 1996 Preparatory Committee I, para. 46.

⁶ See article 15 para. 3.

⁷ See article 61.

⁸ Côté, in: Reydam et al. (eds.), *International Prosecutors* (2012) 319.

⁹ *Prosecutor v. Lubanga*, ‘Reacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”’, ICC-01/04-01/06-2690-Red2, 7 March 2011, p 45.

¹⁰ *Prosecutor v. Gaddafi and Al-Senussi*, ‘Request to Disqualify the Prosecutor from Participating in the Case against Mr. Saif Al Islam Gaddafi’, ICC-01/11-01/11-133, 3 May 2012.

On 28 May 2012, in the Kenya situation, Mr. Nyekorach-Matsanga requested to disqualify the former Prosecutor from investigating him for offences against the administration of justice under article 70 of the Statute¹¹. The request raised doubt about the Prosecutor's impartiality on the ground that the then Prosecutor Moreno Ocampo had a direct and personal interest in the outcome of the investigations¹². Such challenges – however harmful to the ICC in its early, formative period – confirm the importance of the principle of prosecutorial independence.¹³

B. Analysis and interpretation of elements

I. Paragraph 1: Independent and separate organ

- 8 This paragraph establishes two important elements: first, that the Prosecutor's Office is an independent and separate organ of the Court, and second, that it is the organ responsible for conducting investigations and prosecutions before the Court.

The Prosecutor's functional independence is essentially an expression of the principle that *impartial justice* requires a separation of the functions and work of the Court and the Prosecutor. Among the implications of functional prosecutorial independence are that the Office of the Prosecutor operates in its own right and cannot be instructed by any other organ of the Court or any external source, to select or prioritise specific cases, to proceed or not proceed with a full investigation or formal charges, or to conduct its investigations and prosecutions in any particular manner, subject only to the frames of action laid down by the Pre-Trial Chamber and the Trial Chambers or postponement through Security Council deferral under article 16. Without functional independence for the Prosecutor's Office, the notion of prosecutorial discretion would be substantially undermined.

- 9 Article 15 of the Statute illustrates the relationship between functional prosecutorial independence and judicial control. It provides that *preliminary* examination may be conducted by the Prosecutor *proprio motu* on the basis of any information received, even in the absence of referral by a State Party, but starting a *full* investigation beyond the initial measures of examination provided for in article 15 para. 2 requires formal authorisation by the Pre-Trial Chamber. The Pre-Trial Chamber may not impose conditions as to how, when or where the investigations are to be carried out, for which alleged offences and against whom. These decisions fall within the purview of the Prosecutor's prerogative. Likewise, article 61 para. 7 on confirmation of indictments grants that the Pre-Trial Chamber may either confirm or dismiss the charges contained in the indictment, or request the Prosecutor to consider providing further evidence or amending a charge, but the Prosecutor remains exclusively responsible for prosecuting the case and cannot be instructed on how to charge. During trial, similarly, the Trial Chamber may order disclosure or production of documents and other information according to article 64 of the Statute, but the Prosecutor is still responsible for prosecuting the case and has the power to do so in the manner he or she finds most conducive to achieving fair justice.

- 10 Furthermore, it may be argued that the notion that the Prosecutor's office is a separate organ of the Court implies a certain prosecutorial independence *vis-à-vis* the Registry and the Assembly of States Parties. Article 42 para. 2 does give the Prosecutor exclusive responsibility for the organization of the Office, including its administration¹⁴.

The independence of the Office of the Prosecutor is further enhanced by the fundamental addition in the last sentence of paragraph 1, which specifies that no member of the Office –

¹¹ Situation in Kenya, 'Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr. David Nyekorach-Matsanga', ICC-01/09-96-Red, 11 July 2012.

¹² *Ibid.*, p. 10.

¹³ Arbour (1999) 17 Windsor Yearbook of Access to Justice 207, 217.

¹⁴ See paragraph 2 below.

the Prosecutor included – is entitled to seek or act on instructions from any external source, *i.e.*, from any source outside the Prosecutor’s Office. This provision accommodates practical concerns, in particular when the Prosecutor decides to employ, in exceptional circumstances, ‘the expertise of gratis personnel offered by States Parties ... to assist with the work’, pursuant to article 44 para. 4. The fact that such experts will normally return to careers in the service of the sending governments may create the perception that those governments can exercise undue influence on the work of the Prosecutor.

The second element of article 42 para. 1 implies that information on alleged crimes within the jurisdiction of the Court is to be addressed to the Prosecutor and not to other organs of the Court. It is only the Prosecutor who has statutory competence to analyse the seriousness of the information received, and to seek additional information as a matter of preliminary examination. Attempts to circumvent the Prosecutor’s authority by seeking assistance from other institutions with regard to the examination of evidence or investigation of crimes could, thus, run contrary to the provisions of this paragraph. 11

II. Paragraph 2: Structure of the Office

Article 42 para. 2 designates the Prosecutor as the single head of the Office. The ICC Prosecutor holds the same position as the Prosecutor common to the two *ad hoc* Tribunals who is responsible for all investigations and prosecutions before the Tribunals, thus ensuring maximum efficiency and consistency. 12

Moreover, the Prosecutor shall have ‘full authority over the management and administration of the Office, including the staff, facilities and other resources thereof’. Concern was expressed by some delegations in the Preparatory Commission that the Prosecutor’s utilisation of personnel and other resources of his or her Office must not be restricted by the Registry in a way which interferes with investigations and prosecutions. Naturally, the Prosecutor’s exercise of authority over the management and administration must be in accordance with the Court’s financial regulations and rules as well as Staff Regulations, as adopted by the Assembly of States Parties. Questions concerning issues such as the organisation of the Office, use of staff members and gratis personnel, recruitment, authorisation of official travel, retention and security of information and physical evidence, and application of all equipment of the Office, would seem to fall under the authority of the Prosecutor¹⁵. Article 43 para. 1 states, accordingly, that the Registry is responsible for the *non-judicial* aspects of the administration and servicing of the Court, *without prejudice to the functions and powers of the Prosecutor* in accordance with article 42. The purpose of article 42 para. 2 is to ensure that the Prosecutor can control the use of the resources of the Office as required by its statutory activities; not that the Prosecutor shall exercise non-prosecutorial, administrative tasks for which the Registrar is responsible. Furthermore, while the Registry is placed under the authority of the President of the ICC when it comes to administrative issues, the Office of the Prosecutor is not subject to the same restriction¹⁶. 13

According to article 112, the Assembly of States Parties shall consider and decide the budget for the Court¹⁷, adopt financial rules and regulations for the Court on the basis of the proposal made by the Preparatory Commission¹⁸, and provide management oversight to the Prosecutor¹⁹.

The *ad hoc* Tribunals have shown that international investigation and prosecution of serious violations of humanitarian law are very resource demanding and sensitive to changes

¹⁵ Wouters et al. (2008) 8 *NCLRev* 273, 288.

¹⁶ Article 38 para. 3(a).

¹⁷ See article 112 para. 2 (d).

¹⁸ See article 112 para. 2 (a), and the Final Act, Annex I, F., (5) (e), p. 10.

¹⁹ See article 112 para. 2 (b).

in the level of resources available. If the Prosecutor is seized of more than one situation, it may be technically possible for the Assembly to indirectly influence, through the adoption of a budget, how resources will be allocated to the investigation of those situations. Likewise, extra-budgetary sources, such as trust funds, may play an important role for certain activities undertaken by the Court. Such sources could provide significant additional resources to the work of the Prosecutor, just as it is reasonable to expect that the referral of situations to the Court by the Security Council would lead to increased resources for the Court. States should exercise caution in light of article 42 para. 2 in the use of budgetary powers, control of extra-budgetary resources or oversight mechanisms. Article 112 para. 5 may have some practical importance in this regard, insofar as it provides that the Prosecutor or his or her representatives ‘may participate, as appropriate, in the meetings of the Assembly and of [its] Bureau’.

- 14 Article 42 para. 2 also provides that the Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the Prosecutor’s functions under the Statute. There has been separate Deputy Prosecutors for the two *ad hoc* Tribunals, and the first ICC Prosecutor moved to have two Deputy Prosecutors elected at the outset of the work of the Office.

The Prosecutor and the Deputy Prosecutors shall be of different nationalities, but not necessarily from different legal traditions²⁰. There is no statutory requirement that the Prosecutor and Deputy Prosecutors are citizens of States Parties or States that have accepted the jurisdiction of the Court pursuant to article 12 para. 3. Whilst no ICC Judges may be citizens of the same State pursuant to article 36 para. 7, there is no provision in the Statute that excludes appointment of a Prosecutor or Deputy Prosecutor from a State which already has one of its citizens serving as a Judge of the Court.

III. Paragraph 3: Qualifications

- 15 The personal qualifications of the Prosecutor and the Deputy Prosecutors must not allow doubts as to their professional competence, integrity and independence. The credibility of the very idea of an independent ICC Prosecutor depends on the personal qualifications and qualities of the Prosecutor. This entails an important responsibility for the States Parties that elect the Prosecutor. Extensive practical experience is required either in prosecution or trial of criminal cases, not necessarily in both. Thus, not only public prosecutors, but also experienced judges or defense counsels from national criminal justice systems may be appointed as Prosecutor or Deputy Prosecutor. The ILC Draft Statute only made reference to experience in prosecuting²¹, whilst the Preparatory Committee’s final Draft Statute only referred to trial experience in brackets, with a footnote indicating that ‘some delegations felt that prosecutorial experience should be of paramount importance’²². Prosecutorial experience may be decisive in the choice between two equally well-qualified candidates. Experience in prosecuting or otherwise working on cases in an international criminal jurisdiction would be particularly valuable. Some international prosecutor’s offices, notably that of the *ad hoc* Tribunals, have been so resourceful that they developed specialized services such as a Legal Advisory Section. There was fierce competition to work in some of these services, the staff of which worked on a broad range of cases and issues, so this experience may be particularly relevant. A requirement of a minimum of 10 years of professional experience was considered by the Preparatory Committee, but this proposal was deleted.

²⁰ See UN Doc. A/AC.249/1998/CRP.10 (1 Apr. 1998), p. 8.

²¹ 1994 ILC Draft Statute, note 1, p. 59.

²² Preparatory Committee (Consolidated) Draft, note 2, p. 80.

IV. Paragraph 4: Election

Appointment of the Prosecutor is a matter for the Assembly of States Parties. Article 42 para. 4 of the Statute provides that the election is to be secret and that an absolute majority of the members of the Assembly is required. Rule 86 of the Rules of Procedure of the Assembly of States Parties simply provide that the 'elections of the Prosecutor and the Deputy Prosecutors shall take place in accordance with article 42, paragraphs 2, 3 and 4'. The wording of paragraph 4 requires an absolute majority, meaning a majority of all members of the Assembly, not just of those voting. 16

The ICC Prosecutor and Judges are elected by the same body, namely the Assembly of States Parties. The Prosecutors of the two *ad hoc* Tribunals, in contrast, are nominated by the UN Secretary General and appointed by the Security Council, whilst the Tribunal Judges are elected by the UN General Assembly upon nomination by all UN Member States and final recommendation by the Security Council. It has been suggested that this difference in the Tribunal election process reflects the notion that Tribunal Judges are exercising international criminal jurisdiction on behalf of the entire international community, whilst the Prosecutor is entrusted with the task of investigating and prosecuting by the Security Council, which created both Tribunals²³. In comparison, the process leading to the adoption of the ICC Statute largely seems to have been based on the aspiration that the Court will gradually come to enjoy universal support, so that the Assembly of States Parties will not only represent a group of member States, but the international community as such. The matter naturally stands in a different light when the Security Council refers situations to the Court pursuant to Chapter VII of the Charter. 17

The Deputy Prosecutors are also to be secretly elected by a majority of member States of the Assembly. The Prosecutor shall nominate three candidates for each position to be filled. The view had been expressed during the work of the Preparatory Committee and the Rome Conference that the position as Deputy Prosecutor should not be time-limited, based on political appointment, but rather be a professional position in the international civil service. This could ensure the continuity which is of such importance in large-scale, complicated investigations against persons in senior leadership positions, as well as contribute to maintaining organisational stability. Leading delegates were, however, of the view that the Prosecutor must be able to have a strong influence on who his or her deputies are, and that the same maximum term of service of nine years should apply to both positions. In setting the maximum term as long as nine years, states gave decisive weight to the interest of continuity in the work of the Office of the Prosecutor. This reinforces the responsibility of States Parties to elect individuals who can best serve the interests of the Court. The Assembly decided to elect the first Deputy Prosecutor for a shorter period than nine years, presumably to contribute to continuity of work. The bar to re-election in paragraph 4 *if*. rests on a notion of prosecutorial independence, but it is questionable whether such a notion would have been undermined if the bar had not applied to the Deputy Prosecutors. 18

The Preparatory Committee first considered setting an age limit of 70 or 65 years for the Prosecutor or the Deputy Prosecutors, but this proposal fell in the end on the assumption that age is not in itself a true indication of the person's mental capacities²⁴. 19

²³ See Morris and Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, I (1995), 161.

²⁴ Preparatory Committee (Consolidated) Draft, note 2, p. 81.

V. Paragraph 5: Outside activities

- 20 The prohibition against the Prosecutor and the Deputy Prosecutors being engaged in any activity which is likely to interfere with their professional functions or to affect confidence in their independence is another manifestation of the principle of functional prosecutorial independence, founded in the fundamental interest of impartial justice. The provision not to be engaged in activity which could actually interfere with prosecutorial functions goes beyond the obligation of members of the Office of the Prosecutor not to seek or act on instructions from any external source, as expressed in article 42 para. 1 *i.f.* Such activity may be governmental or non- governmental, international or domestic. Even activity which is *likely to affect confidence* in the independence is prohibited. The perception of independence is recognised as being important. It is fair to suggest that external activities must be completely neutral to the functions of Prosecutor or Deputy Prosecutor. Giving speeches or presentations at public conferences or taking part in seminars, for instance, would normally not seem to be inconsistent with this provision.
- 21 The prohibition against the Prosecutor or Deputy Prosecutors undertaking any other occupation is limited to those of a professional nature. Other professional activities than being Prosecutor or Deputy Prosecutor would not necessarily amount to an ‘occupation’, and such activities are not by definition incompatible with the functional independence of the Prosecutor, which is the main interest protected by the provision. It would also be relevant whether such professional activities are time-consuming, involve the use of Court resources, or are substantially remunerated.
- 22 No specific sanction is established in this paragraph against the Prosecutor’s or the Deputy Prosecutors’ engagement in such misconduct. Article 46, however, provides for removal from office to be decided by secret ballot by an absolute majority of the members of the Assembly in cases of serious misconduct, breach of duties under the Statute, or inability to execute functions required by the Statute on the part of the Prosecutor. The requirements for removal are the same in instances of a Deputy Prosecutor’s misconduct or breach of duties, except that the Assembly must act upon the recommendation of the Prosecutor. Furthermore, article 47 provides for *disciplinary measures* for misconduct of a less serious nature. Rules 23 through 32 of the Rules of Procedure and Evidence deal with removal from office and disciplinary measures. *Disqualification* of the Prosecutor or a Deputy Prosecutor in a particular case is governed by article 42 para. 8, which is dealt with below.

VI. Paragraph 6: Excuse

- 23 This provision gives the Presidency of the Court a discretionary power to excuse the Prosecutor or a Deputy Prosecutor from acting in a particular case at his or her request. There may be a variety of personal or other reasons behind a request to be excused. The request must be ‘in writing to the Presidency, setting out the grounds upon which he or she should be excused’ according to rule 33 para. 1 of the Rules of Procedure and Evidence. Rule 33 para. 2 provides that the Presidency shall ‘treat the request as confidential and shall not make public the reasons for its decision without the consent of the person concerned’.

VII. Paragraph 7: Impartiality

- 24 Article 42 paras. 7 and 8 deal with the *disqualification* of the Prosecutor or a Deputy Prosecutor by the Appeals Chamber. The criterion for disqualification is spelled out in paragraph 7, with a further elaboration in Rule 34 of the Rules of Procedure and Evidence. If the impartiality of the Prosecutor or a Deputy Prosecutor might be reasonably doubted on any

ground, that shall lead to disqualification. The paragraph mentions two examples. First, the criterion applies to situations where the Prosecutor or a Deputy Prosecutor has previously been involved in any capacity in the case in question. This does not refer to any previous action which the Office of Prosecutor has taken pursuant to the Statute. It entails that the Prosecutor or Deputy Prosecutor shall be disqualified from taking part in a case before the Court if he or she has been involved in any capacity in proceedings against the suspected person in other jurisdictions in connection with the alleged offenses. Such involvement would include criminal cases against the same person at the national level prior to the Prosecutor's or Deputy Prosecutor's appointment with the ICC. Secondly, involvement in a related criminal case at the national level against the person being investigated or prosecuted would also lead to disqualification under article 42 para. 7. Rule 34 para. 1 elaborates the grounds for disqualification by providing a listing in four points of what falls within the standard.

The standard of impartiality was a contentious issue during the negotiations of both this paragraph and the corresponding Rule. The struggle existed between a general approach, which preferred to adopt a provision general enough to include a variety of potentially unforeseeable situations that would serve the grounds for disqualification, and an illustrative approach, which tried to preclude any ambiguity about the standard by way of an exhaustive list of grounds²⁵. Article 12 para. 6 of the ILC draft merely mentioned the disqualification of Prosecutor and Deputy Prosecutor without giving any details. During the 1996 Preparatory Committee discussions, a proposal from Australia and the Netherlands suggested that more guidance be given under the term 'conflict of interest'.²⁶ In the 1998 Zutphen Draft, article 36, para. 5 provided that '[t]hey [the Prosecutor and Deputy Prosecutors] shall not participate in any case in which they are or have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest'.²⁷ The article then enumerated in an exhaustive manner a few cases in which the Prosecutor and Deputy Prosecutors should refrain from participating.²⁸ Although views were expressed that the reasons for doubts should be set out specifically²⁹, the reference to 'actual, apparent or potential conflict of interest' was nevertheless deleted from the subsequent Draft Statute of the Preparatory Committee³⁰ Through the use of 'inter alia', that draft paragraph included a non-exhaustive list with a limited number of examples of grounds for disqualification³¹. The Rome Conference ultimately did not further specify the standard for impartiality. The Preparatory Committee draft paragraph was adopted as article 42 para. 7 of the Rome Statute with a reduction in examples of grounds. Further discussions regarding the rules of disqualification took place in the meetings of the Preparatory Commission Working Group on Rules of Procedure and Evidence. A non-exhaustive list of grounds with four additional examples for the disqualification of the Prosecutor is now provided by Rule 34, para. 1, which also applies to the judges.

Among all the listed examples, of particular relevance to the ICC's recent practice is Rule 34, para. 1(d), which provides that the grounds for disqualification shall include: '[e]xpression of opinions, through the communications media, in writing or in public

²⁵ Rwelamira, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 259, 302.

²⁶ Working paper submitted by Australia and the Netherlands, UN Doc. A/AC.249/L.2, 26 July 1996 (<https://www.legal-tools.org/doc/2e1de0/>).

²⁷ Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, UN Doc. A/AC.249/1998/L.13, 2 April 1998. The language of this paragraph resembles article 16 para. 7 of the French proposal submitted in 1996, see working paper submitted by France, UN Doc. A/AC.249/L.3, 6 August 1996 (<https://www.legal-tools.org/doc/4d28ee/>).

²⁸ *Ibid.*

²⁹ Bassiouni, *The Legislative History of the International Criminal Court*, (2005) 297.

³⁰ Draft Statute of the International Criminal Court, in Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, article 43, para. 7.

³¹ *Ibid.*

actions, that, objectively could adversely affect the required impartiality of the person concerned'. This subparagraph is based on one of the grounds in the Spain and Venezuela proposal, which had used the term 'image of impartiality'.³² The proponents of this proposal argued that it was not only the actual impartiality of the person that was required but also the 'image' of impartiality.³³ Due to its vagueness and subjectivity, the word 'image' did not find its way into the final rule, but this does not mean that the appearance of impartiality would not constitute a ground for disqualification. In the Gaddafi case, the ICC Appeals Chamber has in fact extended the Prosecutor's obligation of impartiality beyond actual bias. The Chamber noted that 'it is not necessary to establish an actual lack of impartiality on the part of the Prosecutor. Rather, the question before the Appeals Chamber is whether it reasonably appears that the Prosecutor lacks impartiality'³⁴. The determination of whether there is such an appearance of impartiality, in the view of the Chamber, 'should be based on the perspective of a reasonable observer, properly informed'.³⁵ The judges did not disqualify the then Prosecutor Moreno Ocampo, holding that '[a] reasonable observer [...] would have understood that the Prosecutor's statements were based on the evidence available to him and that the judges would ultimately take the relevant decisions on the evidence'.³⁶ The decision, however, represents an unequivocal concern of the judges of Court that the former Prosecutor's inappropriate public statements, while not necessarily providing a basis for his disqualification, undermine the 'integrity' of the Court in the eyes of 'observers'.

27 According to rule 34 para. 2 a request for disqualification shall normally be made in writing 'when there is knowledge of the grounds on which it is based'. The paragraph further provides that the request 'shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions'.

28 In the Preparatory Committee, it was further suggested that the Prosecutor and the Deputy Prosecutors should not act in relation to complaints made by their State of nationality or involving a person of their own nationality³⁷, but this proposal was rescinded on the grounds that requests for disqualification, in such cases, could be filed and dealt with under the general provisions.

Neither the Statutes nor the Rules of Procedure and Evidence of the two *ad hoc* Tribunals contain any provision on the disqualification of the Tribunal Prosecutor or the Deputy Prosecutors.

VIII. Paragraph 8: Disqualification

29 This paragraph provides that questions concerning the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber³⁸. Subparagraph (a) grants the person being investigated or prosecuted before the Court the power to request, at any time, the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in article 42. It is unclear from the text of this subparagraph whether the persons who have standing to request disqualification are limited to those being investigated or prosecuted for

³² Proposal by Spain and Venezuela concerning the Rules of Procedure and Evidence, UN Doc. PCNICC/1999/WGRPE/DP.11, 19 July 1999, Ground (11) in Part (C), which initially read '[h]aving expressed, through the communications media, in writing or in public actions, opinions that might tarnish the required image of impartiality in the case'.

³³ Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 305.

³⁴ Prosecutor v. Gaddafi and AL-Senussi, Decision on the Request for Disqualification of the Prosecutor, ICC-01/11-01/11-175, 12 June 2012, pp. 11–12.

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 17.

³⁷ See proposal of Singapore, 1996 Preparatory Committee II, p. 37.

³⁸ The ILC draft initially envisaged that the determination of disqualification should be made by the Presidency. The Zutphen Report presented 'Administrative Council' as an alternative. The options of 'the Appeals Chamber' and 'the Judges of the court' first appeared in the 1998 Preparatory Committee Draft Statute.

the crimes listed under article 5 of the Statute. In the Matsanga case, the ICC Appeals Chamber interpreted that Subparagraph (a) may also be applied to persons being investigated or prosecuted for offences against the administration of justice pursuant to article 70 of the Statute.³⁹ This interpretation resonates to some extent with Rule 77, paragraph c(ii) of the ITCY and ICTR Rules of Procedure and Evidence, which acknowledges possible conflict of interest on the part of the Prosecutor to engage in investigating allegations of contempt of the Tribunal. According to the Rule, where such conflict arises, an *amicus curiae* should be appointed by the Registrar to investigate the matter instead of the Prosecutor. In practice, the *ad hoc* tribunals have on several occasions appointed *amicus curiae* pursuant to this Rule.⁴⁰

The grounds referred to by this paragraph would seem to correspond to the impartiality test set out in article 42 para. 7. The strict wording of subparagraph (a) does not exclude that a request for disqualification may be based on article 42 para. 5. However, that provision refers to external activities and professional occupation which are of a general nature and would often not affect the applicant. If there is a serious breach of the Prosecutor's or a Deputy Prosecutor's obligation to act independently or not to engage in activities which could affect confidence in his or her independence, there are grounds for the Assembly to remove the person from office pursuant to article 46. Disqualification, on the other hand, would normally apply to one particular case where there may be a prejudice, based on specific grounds, against the accused or the suspect. A suspect or an accused may, of course, challenge the Prosecutor's or a Deputy Prosecutor's overall functional independence, and such challenges would have to be referred to the Assembly in accordance with article 46 and the Rules.

Article 42 para. 8 (b) entitles the Prosecutor or the Deputy Prosecutor to present his or her comments on the matter before the Appeals Chamber decides to disqualify. It would not seem necessary to engage the Prosecutor or Deputy Prosecutor if the Chamber finds the disqualification request manifestly ill-founded. In both the Gaddafi and the Matsanga case, comments were submitted by the Prosecutor following the orders issued by the Appeals Chamber.⁴¹

Rule 34 para. 3 of the Rules of Procedure and Evidence provides that questions concerning the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by a majority of the judges of the Appeals Chamber.

IX. Paragraph 9: Advisers

This provision concerns the need to have expertise on specific issues such as sexual and gender violence and violence against children in the Office of the Prosecutor. The provision must be read in light of article 42 para. 2 which gives the Prosecutor authority over the management and administration of the Office of the Prosecutor. Provided that the required expertise is available among the experts appointed as members of the Prosecutor's Office, article 42 para. 9 would seem to be satisfied and the Prosecutor would have full authority over the utilisation of all available positions within his or her Office and gratis personnel, as required by the Statute. It may be useful if the relevant expertise includes experience in working with traumas and psychological or physical disorders in a judicial context.

³⁹ Situation in Kenya, Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr. David Nyekorach-Matsanga, ICC-01/09-96-Red, 11 July 2012, para. 17.

⁴⁰ ICTR, *Prosecutor v. Ngirabatware*, Trial Chamber, 'Decision on Prosecution Oral Motion for Rule 77 Investigation related to Witness ANAF', 30 October 2009, Case No. ICTR-99-54-T. See also ICTR, *Prosecutor v. Nzabonimana*, 'Decision on the Prosecution's Urgent Motion Alleging Contempt of the Tribunal', 15 December 2009, Case No. ICTR-98-44D-T.

⁴¹ *Prosecutor v. Gaddafi*, 'Prosecution's Comments to the Request to Disqualify the Prosecutor from Participating in the Case against Mr. Saif Al-Islam Gaddafi', ICC-01/11-01/11-139, 20 May 2012; *Prosecutor v. Matsanga*, 'Prosecution's Comments on the 'Confidential Application with Confidential Annexes of Dr. David Nyekorach-Matsanga for the Disqualification of the Prosecutor pursuant to article 42(8) of the Statute', ICC-01/09-90-Conf-Exp, 12 June 2012.

Article 43 The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Literature: Clark, R.S., and Tolbert, D., ‘Toward a Permanent International Criminal Court’, in: Y. Danieli, E. Stamatopoulou and C.J. Dias (eds.), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood Publishing Company 1998) 99; Ingadottir, T., Ngendahayo, F., and Viseur Sellers., P, *The Victims and Witnesses Unit (article 43.6 of the Rome Statute), A Discussion Paper*, The Project on International Courts and Tribunals (PICT 2002).

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	6
I. Paragraph 1	6
1. Responsibilities of the Registry.....	6
a) ‘administration and servicing of the Court’	6
b) ‘non-judicial aspects’.....	7
2. Relationship with the Prosecutor.....	8
II. Paragraph 2	10
1. The Registrar: ‘the principal administrative officer of the Court’.....	10
2. Exercise of functions under the authority of the President	11
III. Paragraph 3: Qualifications	12
IV. Paragraph 4: Election.....	13
V. Paragraph 5: Term of office.....	14
VI. Paragraph 6	15
1. Victims and Witnesses Unit.....	15
a) ‘within the Registry’	15
b) ‘in consultation with the Office of the Prosecutor’	16
c) ‘protection measures and security arrangements, counselling and other appropriate assistance’.....	18
d) Persons at risk on account of their testimony.....	20
2. Staff.....	21

A. Introduction/General remarks

The Registry, the Court's primary administrative arm, is established by article 43. In this respect, the Rome Statute follows the basic organizational structure provided for in the Statutes of the *ad hoc* Tribunals¹. However, article 43 is much more detailed than the related provisions of the Statutes of the *ad hoc* Tribunals, with provisions that spell out the role of the Registrar and his or her relationship with the other organs of the Court. Moreover, the relative position of the Registrar *vis-à-vis* the judicial organs and particularly the Prosecutor is different than in the *ad hoc* Tribunals.

The differences between the position of the Registry in the Court and the *ad hoc* Tribunals stem, in part, from the juridical basis of the institutions. As organs of the Security Council, the *ad hoc* Tribunals are a part of the United Nations' system and are subject to the rules and regulations applicable in that system, as well as oversight and funding by the Security Council and General Assembly respectively. Thus, Registrars of the *ad hoc* Tribunals are appointed by the Secretary-General and provide administrative services to the judicial organs, as well as to the Prosecutor. Under the Rome Statute, the Registrar is elected by an absolute majority of the judges and is thus in the more classical position of being the servant of the judges². Moreover, the Registrar's relationship with the Prosecutor is limited in scope, and the Prosecutor has full authority over the administration of his or her own staff and resources³, unlike the arrangements in the *ad hoc* Tribunals.

The ILC Draft Statute contained a provision regarding the Registry that outlined the method of election of the Registrar and Deputy Registrar and their respective terms; it also made reference to the staffing of the Registry and to staff regulations⁴. However, it did not describe the responsibilities of the Registry or the duties of the Registrar. The Preparatory Committee's Working Group on the Composition and Administration of the Court proposed bracketed language which defined the responsibilities of the Registry and alternative means of electing the Registrar and Deputy Registrar⁵. This approach was followed in the Zutphen and Final Drafts. The adoption of the Rules of the ICC have established a number of the Registrar's responsibilities in more detail, *i.e.*, in rule 13 (Functions of the Registrar), rule 14 (Operations of the Registrar), rule 15 (Records), rule 16 (responsibilities of the Registrar relating to victims and witnesses), rule 20 (responsibilities of the Registrar relating to the rights of the defence) and rule 21 (responsibility of the Registrar to propose criteria and procedures for the assignment of counsel and the establishment and maintenance of a list of counsel). The Regulations of the Court elaborate further on some of the Registrar's responsibilities, *e.g.*, regulation 24*bis* (submissions by the Registrar), 40 (language services of the Registry), regulations 69 to 73, 75 to 77, 79, 81, 83 to 85 (responsibilities of the Registrar relating to counsel issues and legal assistance), and regulation 90 (management of the detention centre).

In addition, in the Final Draft Statute, paragraph 6 of article 43 was added to provide that a Victims and Witnesses Unit would be in the Registry; this provision had previously been in another part of the Statute and was moved when it was decided that the Victims and Witnesses Unit should be under the authority of the Registrar. Rule 16 elaborates on the responsibilities of the Registrar relating to the Victims and Witnesses Unit. Moreover, rules 17, 18 and 19 establish the functions, responsibilities and required expertise of the Victims and Witnesses

¹ Statute of the International Criminal Tribunal for the Former Yugoslavia, an Annex to the Report of the Secretary-General Pursuant to paragraph 2 of Security Council Res. 808, ORSC, 48th Sess., UN Doc. S/12504 Ann. (1993), article 17 [hereinafter: ICTY Statute]. For purposes of this discussion, the Statute of the ICTR is similar to that of the ICTY Statute; therefore, references to the ICTY Statute cover both Tribunals' Statutes.

² Article 43 para. 4.

³ Article 42 para. 2.

⁴ 1994 ILC Draft Statute, article 13.

⁵ UN Doc. A/AC.249/1998/WG.7/CRP.1, article 17.

Unit. Moreover, regulation 41 provides the Victims and Witnesses Unit with the possibility to draw ‘any matter to the attention of a Chamber where protective measures under rule 87 or special measures under rule 88 require its consideration’.

- 5 Although articles 42 and 43 appear to imply a complete separation of services between those that are provided to the Prosecutor, of which the Prosecutor is responsible, and those services provided to the rest of the Court by the Registrar, the Court has developed a practice by which the Registrar provides services and facilities common to the judicial branch and the Office of the Prosecutor⁶. These include, *e.g.*, building management, finance, security, procurement, human resources, information technology, translation and communication matters. The step of creating certain common services makes sense from an operational point of view, as there are some services which can be provided more efficiently and with less duplication by one source rather than two. The Committee of Budget and Finance of the Court, as well as the Assembly of States Parties shared this view⁷. Thus, it is economically prudent to pass certain purely administrative services to the Registrar even though they are provided, in part, to the Prosecutor. This arrangement appears to run contrary to the spirit of the Rome Statute, which clearly states in article 42 para. 2 that the Prosecutor ‘shall have full authority over the management and administration of the Office [of the Prosecutor], including the staff, facilities and other sources thereof’. A 2010 report submitted to the Assembly of States Parties addressed these concerns. The report affirmed the independence of the Prosecutor and stressed that ‘neither the Presidency nor the Registry has any authority over the management or administration of the OTP or vice versa’⁸. In addition, the annexed Corporate Governance Statement of the International Criminal Court establishes a system of coordination for the delivery of services by the Registry to the OTP. In the event that a conflict cannot be resolved by agreement, as a last resort the Prosecutor may discuss the matter with the President, or the matter may be brought before Chambers⁹.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Responsibilities of the Registry

- 6 a) ‘administration and servicing of the Court’. Paragraph 1 of article 43 sets forth the principal responsibility of the Registry as administration of the Court¹⁰. As noted above, some of these responsibilities are now set forth in more detail in the Rules. For example, the Rules explicitly state that the Registrar is responsible for the establishment and the operation of a Victims and Witnesses Unit. In addition, the responsibilities of the Registrar relating to the rights of the defence are set forth in rule 20. It should be noted that article 43 uses the same language, *mutatis mutandis*, to describe the Registry’s principal responsibilities as the Statutes of the *ad hoc* Tribunals: ‘The Registry shall be responsible for the administration and servicing of the International Tribunal’¹¹. In the *ad hoc* Tribunals, administration and

⁶ Report of the Court on measures to increase clarity on the responsibilities of the different organs, 18 March 2010, ICC-ASP/9/CBF.1/12, p. 3.

⁷ Official Records of the Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 6–10 Sep. 2004, ICC-ASP/3/25: Report of the Committee on Budget and Finance, paragraph 25, p. 176. In this report the Committee ‘expressed concern over the fragmentation between the organs and the lack of unanimity on a strategy to centralize administrative duties in the Registry, which may result in the possible duplication of activities. [...]’

⁸ *Supra* note 10, p. 2.

⁹ *Supra* note 10, p. 10.

¹⁰ *Supra* note 4, Paragraph 1 was not included in the ILC Draft Statute; Japan, France and Australia during the 1996 Preparatory Committee proposed similar language. 1996 Preparatory Committee I, pp. 39, 41. The relevant language appears in brackets in the Zutphen Draft, p. 79.

¹¹ ICTY Statute, note 1, article 17.

services has meant the traditional services provided by administrations in international organizations, such as building management, finance, security, procurement, human resources, information technology, translation and communication matters, as well as services which are unique to an international court¹². The latter include administration of a detention unit, defence counsel/legal aid matters (particularly as the Court will appoint counsel for indigent defendants¹³) and court management, e.g. scheduling, court clerks, transcript review, plenary sessions¹⁴. Thus, the general areas of responsibility of the Registry under the Rome Statute appear to be roughly the same as that of the Tribunals, subject to limitations noted in the discussion below. In addition to administration and servicing, Australia proposed, during the 1996 session of the Preparatory Committee, that the Registrar serve as the Court's 'channel of communications', which is provided for in the *ad hoc* Tribunals' Rules¹⁵. This proposition did not find its way into the Rome Statute, but it has been included in rule 13, para. 1, which explicitly states that 'the Registrar shall serve as the channel of communication of the Court'.

b) 'non-judicial aspects'. The first limitation placed on the Registry is that its responsibility is only for 'non-judicial' aspects of the Court's administration. This provision was not in the Zutphen Draft or previous reports and first appears in the Final Draft of the Preparatory Committee. It is apparently intended to ensure that the Registry does not interfere with judicial prerogatives. However, it is suggested that this limitation should be read narrowly only to cover any administrative aspects of the Court's judicial decision-making process, such as the judges' deliberations or consultations amongst the judges themselves. It is not intended to affect the Registry's duties to provide for the management of the Court's judicial activities, including scheduling and support services. Matters such as setting up protective measures and security arrangements for victims and witnesses and providing for internal security of the Court will, in accordance with article 43 para. 6 and rule 13 para. 2, remain the responsibility of the Registrar. Moreover, as provided by article 44, it will be the responsibility of the Registrar to recruit personnel to serve the Court, without prejudice to the authority of the Office of the Prosecutor in this regard. These types of support cannot be provided by the judges themselves and thus must be provided by the Registry. 7

2. Relationship with the Prosecutor

The provision that the Registrar's powers are limited by those given to the Prosecutor under article 42 first appears in the Rome Statute itself and was not contained in any of the work of the Preparatory Committee. Although the Statutes of the *ad hoc* Tribunals provide that the Office of the Prosecutor is a separate and independent organ of the respective Tribunals, the Tribunals' Registries are charged with providing administration and servicing to both the Chambers and the Office of the Prosecutor¹⁶. Thus, for example, the *ad hoc* Tribunals' Statutes provide that Prosecutor's staff is 'to be appointed by the Secretary-General on the recommendation of the Prosecutor', which means that the Registrar, who has the Secretary-General's delegation of authority over the appointment of staff, has the ultimate power of appointment. The Rome Statute takes a different approach to the division of administrative responsibilities. Article 42 provides that the Prosecutor will have 'full authority over the Office [of the Prosecutor], including the staff, facilities and other resources'. These are sweeping administrative powers which would appear to have provided the Prosecutor with his or her own administration and administrative staff. However, as 8

¹² See, e.g., YbICTY 66–72 (1996).

¹³ See article 67 (d).

¹⁴ YbICTY, note 16.

¹⁵ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, UN Doc. IT/32, Rev. 48 (November 2012), rule 33.

¹⁶ ICTY Statute, note 1, articles 16 and 17.

mentioned earlier, the Assembly of States Parties expressed concerns that this approach could lead to unnecessary duplication of activities¹⁷. The Prosecutor's authority over the management and administration of the Office of the Prosecutor is emphasized by the caveat in article 43 on the administrative responsibilities of the Registry, that the Registry's responsibilities are 'without prejudice to the functions and powers of the Prosecutor' under article 42. This limitation is reinforced in rule 13 para. 1, which states that 'without prejudice to the authority of the Office of the Prosecutor under the Statute [...], the Registrar shall serve as the channel of communication'.

- 9 The reasons for the separate administrative arrangements under the Rome Statute stem, at least in part, from the different relationship that the Registry has with the judicial organs. The Registrar and Deputy Registrar are both elected by the judges; thus, it seems to be inappropriate for the Registrar, who is elected by the judges, to provide administrative services to the Office of the Prosecutor, which is after all a separate organ of the Court. By deciding that the Registrar is to be elected by the judges, it would appear axiomatic that the Registry primarily serves the judicial organs and that the Prosecutor will need his or her own administration. This arrangement also reflects concerns expressed by commentators that a shared Registry could 'interfere to a degree with the impartiality and legitimacy of 'the Court'¹⁸. On the other hand, the arguments that a shared Registry would increase efficiency and cooperation, which were the basis of the shared administration of the *ad hoc* Tribunals¹⁹, were at least implicitly rejected. Nonetheless, as noted above, in view of the Assembly of States Parties' concerns regarding the duplication of administrative activities, and the Court's developed practice to entrust the Registry with the provision of administrative services to the OTP, the current arrangement appears likely to be maintained for the sake of efficiency and to avoid duplication.

II. Paragraph 2

1. The Registrar: 'the principal administrative officer of the Court'

- 10 Paragraph 2 of article 43 establishes the Registrar as head of the Registry and states that he or she is 'the principal administrative officer of the Court'. This provision was contained in the ILC Draft Statute and was retained and included in the Rome Statute. Although the Statutes of the *ad hoc* Tribunals do not have the same precise wording, the respective Registrars are the chief administrative officers of both of these institutions. However, it must be noted that the Registrar's position under the Rome Statute has been altered substantially by the administrative powers given to the Prosecutor over his or her office by article 42 and expressly reserved in paragraph 1 of article 43. Certainly in view of this arrangement, the Registrar's role is actually limited to being the chief administrative officer for the judicial organs, as well as head of the Registry. However, it appears that there are certain general administrative duties that the Registrar retains, provided these do not interfere with the Prosecutor's powers. As noted above, the Registrar provides certain common services to the Court as a whole, including the Prosecutor. Moreover, under article 44 the Registrar shall propose staff regulations in the first instance, although only with the agreement of the Prosecutor and the President and subject to approval by the Assembly of States Parties²⁰. Such Staff Regulations were adopted by the Assembly of States Parties in 2003 and may be 'supplemented or amended by the Assembly of States Parties, on the proposal of the Registrar, with the agreement of the Presidency and the Prosecutor'.²¹ In 2005 the Assembly

¹⁷ See note 11.

¹⁸ See Morris and Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. I (1995) n.466.

¹⁹ *Id.*

²⁰ See article 44 para. 3.

²¹ Staff regulations for the International Criminal Court, adopted at the 5th plenary meeting on 12 September 2003, ICC-ASP/2/Res.2, Reg 12.1.

of States Parties also adopted the Staff Rules of the International Criminal Court, pursuant to a proposal from the Registry.²²

2. Exercise of functions under the authority of the President

Under the Rome Statute, the Presidency is responsible for the ‘proper administration of the Court, with the exception of the Office of the Prosecutor’²³. In view of this organizational structure, it is appropriate that the Registrar, as the judicial organs’ principal administrative officer, should be under the President’s authority. This approach was suggested by France in the 1996 Preparatory Committee²⁴ and follows rule 33 ICTY. In the *ad hoc* Tribunals, the Registrar is appointed by the Secretary-General and is responsible for implementing various UN rules and regulations, *e.g.* the Registrar makes appointments of staff on behalf of the Secretary-General. In this sense, the Registrar of the *ad hoc* Tribunals, while being under the general authority of the Tribunal’s President, also has responsibilities which run directly to the Secretary-General. Thus, the lines of authority in the Court will differ from that of the *ad hoc* Tribunals, and the Registrar, who is elected by the judges and under authority of the President is, in essence, more clearly the servant of the judicial organs than the Tribunals’ Registrars.

III. Paragraph 3: Qualifications

Article 43 para. 3 sets forth the general qualifications of the Registrar and Deputy Registrar, that they be of ‘high moral character’, ‘highly competent’ and ‘fluent in at least one of the working languages of the Court’. Although there had been some suggestions by delegations in the Preparatory Committee for such qualifications²⁵, no provision was made in this regard in the earlier Drafts until the Rome Conference. The requirements of high moral character and knowledge of a working language are also made with respect to the judges²⁶. High moral character is a general requirement in many jurisdictions for similar positions. Moreover, competence and knowledge of a working language are qualifications essential to the efficient operations of the Registry and the Court.

IV. Paragraph 4: Election

One of the key issues regarding the office of the Registrar is how the incumbent is appointed. It is critical because the method of selection establishes the nature of the relationship of the Registrar with the other organs of the Court and with the Assembly of States Parties. The ILC Draft Statute proposed that the judges elect the Registrar by majority vote using a secret ballot, and this formulation has been maintained in the Rome Statute and applied²⁷ despite some proposals that the position be elected by the States Parties²⁸. There are certainly some arguments in favour of the appointment of the Registrar directly by the States Parties. For example, the Registrar has primary responsibility for administering the funds provided to the Court (except for the Office of the Prosecutor). Thus, it is a bit odd that he or she reports on financial matters to the President, who is a judicial appointee and who will probably have limited administrative and financial experience. On the other hand, under the

²² Staff rules of the International Criminal Court, adopted at the fourth session of the Assembly of States Parties, 28 Nov. – 3 Dec. 2005, ICC-ASP/4/3.

²³ See article 38 para. 3 (a).

²⁴ 1996 Preparatory Committee I, p. 39.

²⁵ *Ibid.*

²⁶ See article 36 para. 3 (a) and (c).

²⁷ On 8 March 2013 the judges of the Court, sitting in a plenary session, elected Herman von Hebel as the Court’s Registrar by an absolute majority, in secret ballot.

²⁸ Preparatory Committee (Consolidated) Draft, p. 82.

Rome Statute the Registrar's principal role is to provide administrative services to the judicial organs, and the judges are perhaps in the best position to determine who can best provide the services they require. Moreover, paragraph 4 of article 43 and rule 12 paras. 1, 2 and 3 do provide for the possibility that the Assembly of States Parties may make recommendations for the position of Registrar, and the judges are to take those views into account. Past elections indicate that the Assembly of States Parties is reluctant to recommend particular candidates. Instead, it has approved the Presidency's shortlist and recommended that it take into account a list of elements, which include the criteria for the election of judges in article 36²⁹. With respect to the Deputy Registrar, this office is only filled if required and thus remained unoccupied until 2008.³⁰ It may in the future also be vacated when the Court's docket is light. The Deputy Registrar is elected in the same manner as the Registrar.

V. Paragraph 5: Term of office

- 14 The Registrar serves a term of five (5) years and may be re-elected once for an additional five (5) years, for a total of ten (10) years, and will serve on a full-time basis. As the President serves a three (3) year term and may also only be re-elected once, it is likely that the Registrar will serve under more than one President. This potentially means that the Registrar will be in a position of having a much greater knowledge of the administration of the Court than the President. The Deputy Registrar, if and when he or she is elected, will serve for five (5) years or shorter, as determined by the judges, and may serve on an as needed basis. This provision is, however, silent on the re-election of the Deputy Registrar. This creates the potentially anomalous situation that the Registrar may have to replace a Deputy Registrar, who is functioning well, during the course of the Registrar's potential ten (10) year tenure, as the Deputy Registrar is limited to five (5) years of service or less. A broader interpretation would be that there is no prohibition of re-election, such as there is for the Prosecutor and Deputy Prosecutor in article 42, and thus re-election would be possible. Paragraph 5 is essentially the same language as was proposed by the ILC Draft Statute, despite various proposals to modify the length of the terms and other technical aspects of the provision³¹.

In case of death of the Registrar or a Deputy Registrar, the Presidency must inform the President of the Bureau of the Assembly of States Parties in writing, in accordance with rule 36. Moreover, rule 37 states that if the Registrar or the Deputy Registrar decide to resign, he or she is to communicate such decision in writing to the Presidency who will convey this information to the Bureau of the Assembly of States Parties.

VI. Paragraph 6

1. Victims and Witnesses Unit

- 15 a) 'within the Registry'. One of the principal issues that the Court faces is how it will deal with victims and witnesses. There are a number of provisions relating to victims and witnesses, including article 68, which addresses protection measures for witnesses, as well as the provisions for reparations under article 75. In the *ad hoc* Tribunals, victims and witnesses matters have principally been dealt with by a Victims and Witnesses Unit in the Registry³². The proposal for a Victims and Witnesses Unit for the Court emerged during the Preparatory

²⁹ Recommendation concerning the election of the Registrar of the International Criminal Court, adopted at the 12th plenary meeting on 23 April 2003, ICC-ASP/1/Recommendation 1; Recommendation concerning the election of the Registrar of the International Criminal Court, adopted at the 7th plenary meeting on 14 December 2007, ICC-ASP/6/Recommendation 1; Recommendation concerning the election of the Registrar of the International Criminal Court, adopted at the 8th plenary meeting on 21 November 2012, ICC-ASP/11/Rec.1.

³⁰ Report of the International Criminal Court, UN Doc. A/64/356 (2009), p. 17.

³¹ Preparatory Committee (Consolidated) Draft, p. 82.

³² See, generally, Clark and Tolbert, in: Danieli *et al.* (eds.), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (1998) 99.

Committee. It was noted that there was support, based on ‘the precedent of the Yugoslavia Tribunal, for a witness and victim unit to be established to provide services and support to victims and witnesses, under the supervision of the office of either the Registrar or the Prosecutor’³³. The Zutphen Draft noted the ‘question of the Victim and Witnesses Unit should be addressed’ in the article on the Registry³⁴. However, in the Preparatory Committee’s Final Draft, it was noted that some delegations were of the view that the Victims and Witnesses Unit should be in the Office of the Prosecutor³⁵. This view did not prevail because it was widely felt that the main purpose of the Victims and Witnesses Unit would be to assist and protect victims and witnesses in their own interest rather than merely facilitate investigations³⁶. It was therefore decided to locate the Victims and Witnesses Unit in the Registry under the Registrar’s supervision³⁷, which is elaborated on in rules 16 through 19 ICC.

b) ‘in consultation with the Office of the Prosecutor’. As a compromise to the propo- 16
 nents of placing the Victims and Witnesses Unit in the Office of the Prosecutor, language was added to this paragraph to provide that the Victims and Witnesses Unit would carry out its duties ‘in consultation with the Office of the Prosecutor’. While other parts of the Rome Statute make it clear that the Office of the Prosecutor will have primary responsibility for the safety and security of witnesses during the investigation phase³⁸, the apparent requirement that the Victims and Witnesses Unit carry out its duties relating to the protection of, and assistance to, witnesses in a cooperative or consultative relationship raises several issues. First, it must be pointed out that at least some of the witnesses and victims who need assistance and/or protection will be defence witnesses. It would be entirely inappropriate for the Victims and Witnesses Unit, which must be rigorously independent to maintain its credibility with those very victims and witnesses, to consult with the Office of the Prosecutor regarding defence witnesses.³⁹ Moreover, there may be instances in which the Office of the Prosecutor will take actions that are more in the interests of prosecution strategy rather than the interests of the victim/witness, and surely the Victims and Witnesses Unit must be able to act independently in such situations. In view of these considerations, it is submitted that the Victims and Witnesses Unit’s obligation to consult with the Office of the Prosecutor should not be interpreted strictly and that this provision does not proscribe similar consultations by the Victims and Witnesses Unit with the defence.⁴⁰ The Registrar’s responsibilities in this regard, which are principally of an advisory nature, are set out in more detail in rule 16 ICC.

The Appeals Chamber, in considering the witness protection system in relation to 17
 ‘preventative relocation’ by the Prosecution, has determined that responsibility for, and authority over, witness protection ultimately rests with the Victims and Witnesses Unit⁴¹.

³³ 1996 Preparatory Committee I, p. 59, para. 281.

³⁴ Zutphen Draft, p. 79.

³⁵ Preparatory Committee (Consolidated) Draft, p. 83, n. 64.

³⁶ Ingadottir, Ngendahayo and Viseur Sellers, *The Victims and Witnesses Unit (article 43.6 of the Rome Statute)*, A Discussion Paper, The Project on International Courts and Tribunals (2002). The rationale of the ICTY for establishing the Victims and Witnesses Unit under the Registry rather than the Office of the Prosecutor ‘shifted the emphasis of its work from ensuring effective investigation and prosecution to sensitive cases to the more human concern of providing counseling, psychological help and support services to victims and witnesses’; see Statement by the President of the Tribunal, A. Cassese, UN Doc. IT/29 (1994).

³⁷ For arguments supporting this position, see Clark and Tolbert, note 35, 99, 109.

³⁸ See article 68 para. 1.

³⁹ *Prosecutor v. Katanga and Chui*, No. ICC-01/04-01/07, (Registrar’s Submissions) Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’, 12 June 2008, para. 48. See also *Prosecutor v. Lubanga Dyilo*, No. ICC-01/04-01/06, Decision on a General Framework concerning Protective Measures for Prosecution and Defence Witnesses, Pre-Trial Chamber I, 19 September 2006.

⁴⁰ This approach appears to be favoured by the Appeals Chamber. *Prosecutor v. Katanga and Chui*, No. ICC-01/04-01/07 OA 7, Judgment on the appeal of the Prosecutor against the ‘Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under article 67(2) of the Statute and Rule 77 of the Rules’ of Pre-Trial Chamber I, Appeals Chamber, 26 November 2008, para. 92. See also rule 18(b).

⁴¹ *Id.*

The Prosecutor's 'general mandate in relation to protection matters' accordingly appears limited to 'general measures that ordinarily might be expected to arise on a day-to-day basis during the course of an investigation or prosecution with the aim of preventing harm from occurring to victims and witnesses'⁴².

- 18 c) 'protection measures and security arrangements, counselling and other appropriate assistance'. The responsibilities of the Victims and Witnesses Unit were addressed extensively in the Preparatory Committee and were generally focused on providing assistance and protection to witnesses, their family members and others at risk⁴³. The provision in the Preparatory Committee's Final Draft differs in significant respects from the text adopted in the Rome Statute on both the measures available to the Victims and Witnesses Unit and to those to whom the services can be delivered, which issue is addressed in the next sub-section. The areas of responsibility of the Victims and Witnesses Unit, like those established in the *ad hoc* Tribunals, fall into two principal categories: protection measures and assistance services. With respect to protection measures – those measures or steps which are taken to protect the witnesses, such as witness anonymity⁴⁴ – the Preparatory Committee's Final Draft provided that the Victims and Witnesses Unit is to provide advice to the 'organs of the Court on appropriate measures'. This seems the correct approach, as the power to provide protection measure rests with the Court to determine the appropriate measure(s). Generally speaking, a unit or organ outside the Court might have standing to raise such issues to the Court, but it would not have the power to grant such protection measures on its own accord. However, the text of article 43, which states that the 'Unit shall provide ... protection measures and security arrangements ... for witnesses', could be read to imply that the Victims and Witnesses Unit has the power itself to order protection measures. It is arguably not within the power of the Victims and Witnesses Unit to order protection measures for witnesses, as it does not have the means to issue such orders or to enforce them. However, the Court's early jurisprudence appears to give the Unit a greater role than this. In a submission to the Trial Chamber, the Registrar adopted the view that the Victims and Witnesses Unit's role is primarily an advisory one. The Trial Chamber appeared to reject this, stating that it is the responsibility of the Unit to provide protective measures to victims once they have lodged an application with the court⁴⁵. Further, as mentioned above, the Appeals Chamber has given the Unit primary responsibility over the system of protective measures, including relocation of witnesses⁴⁶.

It should be noted that the Rome Statute gives the Victims and Witnesses Unit a much stronger mandate regarding the provision of assistance than that established by the Statutes of the *ad hoc* Tribunals, which provide for the protection of witnesses but are silent with regard to support services⁴⁷.

- 19 A wide variety of assistance and support is required by victims, who are far from home testifying about horrendous crimes and subject to often unfamiliar court proceedings featuring cross-examination⁴⁸; this assistance includes logistical support and counselling. These types of assistance do not require any special intervention by the Court, and the text of article 43 para. 6 is clear, unlike the terms used to describe protection matters. Unfortunately, the text of article 68 para. 4 provides that the Victims and Witnesses Unit 'may advise the

⁴² *Id.*, para. 98.

⁴³ Preparatory Committee (Consolidated) Draft, p. 82.

⁴⁴ For discussion of various protection measures, see Clark and Tolbert, note 35, 99, 21.

⁴⁵ *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, (Registrar) Protection of Victims and Mandate of the Victims and Witnesses Unit, 12 December 2007; *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, (Trial Chamber) Decision on victims' participation, 18 January 2008, para. 137.

⁴⁶ *Prosecutor v. Katanga and Chui*, note 43.

⁴⁷ Ingadottir *et al.*, note 39, 21. See also article 21 ICTR Statute and article 22 ICTY Statute. In rule 34 of both *ad hoc* Tribunals' Rules, which refers to article 21 and article 22 respectively, support services are viewed as a form of complementary measures to a substantive program of witness protection.

⁴⁸ For a full description of forms of assistance, see Clark and Tolbert, note 35, 99, 21.

Prosecutor and the Court ... *on appropriate counselling and assistance* as referred to in article 43, paragraph 6'. This is the converse of the drafting difficulty discussed above. It is submitted that unlike protection measures, the Victims and Witnesses Unit does not need court authorization to counsel or provide logistical support to victims/witnesses and that the Victims and Witnesses Unit need not obtain any authorization before rendering such assistance. These provisions should be interpreted broadly, in accordance with the spirit of the Rome Statute, so as to enable the Victims and Witnesses Unit to be a principal actor in the process⁴⁹. In addition to acting as advisor to the Prosecutor and the judicial organs, the Unit should have the power to provide protective measures *proprio motu*, security arrangements and other assistance for victims and witnesses⁵⁰.

d) **Persons at risk on account of their testimony.** The next issue is to whom are these services available. These include witnesses and victims⁵¹ who appear before the Court and others put at risk by the testimony of witnesses. The scope of this subparagraph was narrowed at Rome. The Preparatory Committee's Final Draft provided for assistance and counselling to family members of witnesses, but 'family members' have been left out of the Rome Statute. This deletion would appear to eliminate such services for a victim's family members unless they are put at risk by their family member's testimony. However, the Trial Chamber has held that 'the immediate family or dependents of [the] victim' may be entitled to relevant services.⁵² The question remains whether 'at risk' means at physical risk or whether other risks such as psychological injury could be considered as 'at risk' under this sub-section. Given the purposes of the Victims and Witnesses Unit, *i. e.* to protect and assist victims and witnesses, and the fact that family members in some cases will be accompanying these victims and witnesses to the Court's proceeding, there is at least some room for argument that family members should still be afforded counselling and other forms of assistance. A second interpretive question arises as to whether the Victims and Witnesses Unit is responsible for providing assistance and protection services to victims during the investigative stage, as the text limits the category of victims who may receive the benefits of such services to those 'who appear before the Court'. It is submitted that this provision should be construed broadly, so that it does not exclude assistance by the Victims and Witnesses Unit during the investigation stage as the need for protection and security measures might start as early as the initiation by the Prosecutor of an investigation. In this connection it is noteworthy that article 68 para. 1 specifically calls on the Prosecutor to take measures to protect victims and witnesses during the investigation stage of the proceedings. In view of the consultation that the Victims and Witnesses Unit is required to have with the Office of the Prosecutor, it is also appropriate for the Victims and Witnesses Unit to provide assistance to victims and witnesses in the investigation stage of the proceedings as well. This view is shared by the Trial Chamber, which has interpreted this provision broadly.⁵³ These considerations apply equally to the Victims and Witnesses Unit's work with defence witnesses.

2. Staff

It was recognized at the Preparatory Committee that, in view of the types of crimes over which the Court has jurisdiction, the staff of the Victims and Witnesses Unit would need expertise in areas such as trauma and sexual violence. This has also been recognized by rules

⁴⁹ See *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, (Pre-Trial Chamber) Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006.

⁵⁰ Ingadottir *et al.*, note 39, 21; *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, (Trial Chamber) Decision on victims' participation, 18 January 2008.

⁵¹ Victim is defined in rule 85. See also *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on victims' participation, Trial Chamber I, 18 January 2008, paras. 87–94; *Situation in the Democratic Republic of Congo*, ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 January 2006.

⁵² *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on victims' participation, Trial Chamber I, 18 January 2008.

⁵³ *Prosecutor v. Lubanga Dyilo*, note 48, paras. 136–137.

of the *ad hoc* Tribunals, which provide that ‘due consideration be given to the employment of women’ and note the areas of expertise in which counselling will need to be provided⁵⁴.

The Victims and Witnesses Unit staff will deal with witnesses and victims belonging to various and often unfamiliar societies and cultures on a daily basis. In addition to these humanitarian functions, it will handle highly confidential information on behalf of all parties and collaborate with States that may have a particular interest in the outcome of trial⁵⁵. Moreover, it is difficult to foresee the number of staff required working in the Victims and Witnesses Unit. The *ad hoc* Tribunals relied heavily on *gratis* personnel in their early years, a number of whom worked with the victims and witnesses units⁵⁶. According to article 44 para. 4 Rome Statute, *gratis* personnel offered by States Parties, intergovernmental or non-governmental organizations, may only be employed in exceptional circumstances. Although it is not advisable for the Victims and Witnesses Unit to overly rely on *gratis* personnel, who are after all probably seconded by only a handful of States, in the case of staff performing humanitarian support functions, this restriction should be interpreted liberally so as to allow victims and witnesses the psychological and humanitarian support that they will need. Of course, the use of *gratis* staff will require compliance with to the Rome Statute’s requirements for equal geographical, gender and legal systems representation among the Court’s staff⁵⁷.

⁵⁴ ICTY, note 19, rule 34.

⁵⁵ Ingadottir *et al.*, note 39, 10.

⁵⁶ *Id.*, it should be noted that the United Nations General Assembly, in its Resolution 51/243 of 15 Sep. 1997, requested that the Secretary-General phase out *gratis* personnel.

⁵⁷ *Id.*

Article 44 Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Literature: Amerasinghe, C. F., *The Law of the International Civil Service* (OUP 2nd edition 1994).

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	3
I. Paragraph 1: Appointment of staff.....	3
II. Paragraph 2: Qualifications of staff.....	4
III. Paragraph 3: Staff Regulations.....	5
1. 'agreement of the Presidency and the Prosecutor'.....	5
2. 'approved by the Assembly of States Parties'.....	6
IV. Paragraph 4: Gratis personnel.....	7
1. 'exceptional circumstances'.....	7
2. '[t]he Prosecutor may accept'.....	10
3. 'guidelines established by the Assembly of States Parties'.....	11

A. Introduction/General remarks

The authority to appoint staff as well as the criteria guiding the selection of staff is established in article 44; moreover, this article also addresses the manner in which Staff Regulations are to be promulgated and the issue of gratis personnel. The standards established in this article are generally in line with the recruitment criteria in the United Nations common system and will be subject to the general oversight of the Assembly of States Parties, which will play a role akin to the General Assembly's regarding personnel policies. One of the most controversial aspects of the *ad hoc* Tribunals' relationship with the General Assembly has related to the employment of gratis personnel; this issue is the subject of paragraph 4 of article 44.

Staffing matters were not addressed in the ILC Draft Statute, but were discussed in the Preparatory Committee, particularly the issue of gratis personnel. The Zutphen Draft provided that the Prosecutor and Registrar would appoint staff separately, with separate staff regulations being drawn by each office¹. Provision was also made for gratis personnel who

¹ Zutphen Draft, p. 79.

were requested by the Prosecutor's office, but there was no provision for gratis personnel for any other organ of the Court. The source of gratis personnel was limited to States Parties, and the services of such personnel was limited only to the specific case for which those services were requested 'for the duration of' that case². The Preparatory Committee's Final Draft substantially revised this framework and provided for a single set of staff regulations 'for all the organs of the Court', which was to be proposed by the Registrar with the agreement of the Presidency and the Prosecutor and subject to comment by the Assembly of States Parties³. A bracketed provision relating to gratis personnel would have allowed for gratis personnel from any States Party or international governmental organization to work for any organ of the Court. The Rome Statute adopted this latter draft provision, making several other modifications, which are discussed below.

As it was anticipated that establishing and promulgating the Court's staff regulations would take some time, the Assembly of States Parties, during its first session in September 2002⁴, adopted a resolution⁵ setting forth certain guidelines to be applied in the selection and appointment of staff of the Court until staff regulations were adopted in accordance with the Rome Statute. Moreover, pending the adoption of such staff regulations, the Director of Common Services had, under the authority vested in him by a decision of the Assembly of States Parties⁶, promulgated and implemented provisional staff regulations which entered into force on 1 November 2002 and which had enabled the Court to recruit qualified and competent staff to establish the Court. These provisional staff regulations were based on the United Nations Staff Regulations and were quite similar to staff regulations of other international organizations⁷. The Registrar, with the agreement of the Presidency and the Prosecutor, submitted draft staff regulations⁸ to the Assembly of States Parties for approval during its second session in September 2003⁹. The ASP approved these draft staff regulations¹⁰ proposed by the Registrar, annexed ASP Resolution 10¹¹ to these regulations and decided that this resolution shall continue to apply as an integral part of the Staff Regulations.

² *Ibid.*

³ Preparatory Committee (Consolidated) Draft, p. 83.

⁴ The first session of the Assembly of States Parties was held in New York from 3–10 Sep. 2002. See Report of the Assembly of States Parties, Official Records of the First Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 3–10 Sep. 2002, ICC-ASP/1/3 (2002) as well as in the Report of the Working Group of the Whole, Annex 1.

⁵ Resolution ICC-ASP/1/Res.10: Selection of the staff of the International Criminal Court.

⁶ ICC-ASP/1/Decision 2 dated 3 Sep. 2002: Interim arrangement for the exercise of authority pending the assumption of office by the Registrar.

⁷ Report of the Inter-Sessional Meeting of experts from 11 to 15 Mar. 2002 in The Hague, The Netherlands, PCNICC/2002/INF/2, p. 6. The possibility that the Court would follow the United Nations common system was discussed during the Inter-Sessional Meeting in The Hague in March 2002. There was support for the position that the United Nations Staff Regulations could serve as a useful model for the Court to promulgate its own regulations. It was further noted that if the Court would follow the United Nations common system, consistency on matters such as qualifications of posts, the level of remunerations and social security benefits would need to be ensured. The ASP, by taking the decision to join the United Nations Joint Staff Pension Fund (ICC-ASP/1/Decision 3 dated 9 Sep. 2002: Participation of the International Criminal Court in the United Nations Joint Staff Pension Fund) appeared to have accepted the view that it would be more beneficial for the Court to become part of the United Nations common system rather than establishing a *sui generis* system.

⁸ ICC-ASP/2/6 dated 7 Aug. 2003: Draft staff regulations of the International Criminal Court.

⁹ The second session of the Assembly of States Parties was held in New York from 8–12 Sep. 2003. See Report of the Assembly of States Parties, Official Records of the Second Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 8–12 Sep. 2003, ICC-ASP/2/10 (2003).

¹⁰ ICC-ASP/2/Res.2 dated 12 Sep. 2003: Staff regulations of the International Criminal Court.

¹¹ Resolution ICC-ASP/1/Res.10: Selection of the staff of the International Criminal Court.

B. Analysis and interpretation of elements

I. Paragraph 1: Appointment of staff

The authority for recruitment and appointment of staff for the Registry and the Office of the Prosecutor is placed in the hands of the Registrar and the Prosecutor respectively under article 44 para 1. They are required to appoint ‘qualified’ staff, a provision similar to the United Nations Staff Regulations, which require that vacancies should be filled based on qualifications and experience. In addition, resolution 10 of the Assembly of States Parties¹² annexed to the Staff Regulations provides that the requirements of article 36 para. 8, article 44 para. 2 and article 50 of the Rome Statute shall apply to the recruitment of the entire staff of the Court, without any distinction as to category. Upon commencing employment with the Court, every staff member of the Office of the Prosecutor and the Registry is required to make a solemn undertaking, in accordance with rule 6.

The division of appointment power between the Registrar and the Prosecutor reinforces the separate administration of the Office of the Prosecutor, as provided for in articles 42 and 43. In this regard, it should be noted that the Prosecutor is specifically empowered to appoint investigators. The structure of the Office of the Prosecutor is such that, unlike most national systems but similar to the *ad hoc* Tribunals, the investigators as well as the Prosecutors are under the authority of the prosecuting authority. Thus, there is no division between the police power and the Office of the Prosecutor. While this is justified for practical reasons and operational efficiency, it perhaps makes it more difficult for the Prosecutor to exercise his or her prosecutorial discretion not to pursue a case that will have been prepared by the very investigators the Prosecutor has hired and ultimately supervises.

II. Paragraph 2: Qualifications of staff

The Registrar and Prosecutor are directed to select staff which meet the ‘highest standards of efficiency, competency and integrity’ by article 44 para. 2. This is precisely the same standard as is set forth in article 101 of the United Nations Charter. Moreover, in hiring staff they are also to show due regard for representation of the principal legal systems of the world, equitable geographical representation and gender balance. The latter two factors are consistent with the principles of staff recruitment in the United Nations system and should be taken into account in any public international institution. The concern for representation of the world’s principal legal systems derives from the principle of equitable geographical distribution and is essential for any judicial institution that intends to deliver justice in an international context.

III. Paragraph 3: Staff Regulations

1. ‘agreement of the Presidency and the Prosecutor’

In the United Nations common system, the legal basis for the regulation of staff generally derives from the legislative body, through a system of staff regulations which also provide for the adoption of rules and other administrative guidelines by the organization’s chief administrative officer¹³. Under article 44 para. 3, the task of drafting the Staff Regulations is with the Registrar; however, before the proposed regulations are submitted to the Assembly

¹² Resolution ICC-ASP/1/Res.10: Selection of the staff of the International Criminal Court.

¹³ UN Charter, article 101.

of States Parties for approval, the Presidency and the Prosecutor must agree to the proposal. This procedure is illustrative of the Registrar's role as the Court's principal administrative officer, who is subject to the authority of the President and administratively separate from the Prosecutor. However, it is a much more rational method of drafting staff regulations than proposed in the Zutphen Draft, which provided for staff regulations to be adopted separately for the Registry and the Office of the Prosecutor. The Staff Regulations approved by the Assembly of States Parties cover matters similar to those covered in the United Nations Staff Regulations, including staff entitlements, disciplinary procedures and the contractual rights of staff members¹⁴. The Staff Regulations provide the fundamental conditions of service and the basic rights, duties and obligations of the staff as well as broad principles of personnel policy for the staffing and administration of an organization. The Rome Statute does not directly address the development of staff rules, which were adopted in 2005 and address the conditions of service in greater detail.¹⁵

2. 'approved by the Assembly of States Parties'

- 6 The Preparatory Committee's Final Draft had provided for the Assembly of States Parties to simply comment upon the staff regulations drafted by the Registrar and agreed to by the Presidency and the Prosecutor. This was modified to require that the Assembly of States Parties approve the staff regulations. This approach is more consistent with the proper legal basis for staff regulations as well as with principles of accountability, as the Assembly of States Parties will be providing the funds and the Court officials will ultimately be responsible to the Assembly for matters of administration and finance. However, the rules and administrative guidelines that govern the day-to-day aspects of relations with staff and their entitlements should be left to the Registrar and Prosecutor as is, *mutatis mutandis*, the case in the United Nations common system. While it is appropriate for the Assembly of States Parties to establish the legal framework which applies to staff matters, through the adoption of staff regulations, it would be inefficient and confusing for it to micromanage the day to day operations of staff and administration. There is one legal issue that warrants mention in regard to the adoption of the staff regulations: the Assembly of States Parties shall 'approve' the proposed Staff Regulations, but it is not clear whether they can amend the proposal and then approve it. Given that the proposed staff regulations will have been agreed to by the principal officers of the Court, the better view is that the States Parties must approve the staff regulations as a whole. While the States Parties are free to make comments and suggestions, they should not be able to amend the Staff Regulations and then approve them without the agreement of the Presidency, the Prosecutor and the Registrar; otherwise, the emphasis placed in article 44 para. 3 on the agreement of these officials would be weakened and the purposes for the consultative process undermined. This view has been confirmed in regulation 12 para. 1 of the Staff Regulations¹⁶. In addition, regulation 12 para. 2 of the Staff Regulations sets forth that 'the full text of provisional staff rules and amendments [to the Staff Regulations] shall be reported annually to the Assembly'. Should the Assembly of States Parties find that the provisional staff rules or amendments to the Staff Regulations are inconsistent with the intent and purpose of the Staff Regulations, 'it may direct that the rule/ or amendment be withdrawn or modified'¹⁷.

¹⁴ See, generally, Amerasinghe, *The Law of the International Civil Service* (1994).

¹⁵ ICC-ASP/4/3 dated 25 Aug. 2005: Staff rules of the International Criminal Court.

¹⁶ ICC-ASP/2/Res.2 dated 12 Sep. 2003: Staff regulations of the International Criminal Court.

¹⁷ *Ibid.*, regulation 12 para. 2 of the Staff Regulations.

IV. Paragraph 4: Gratis personnel

1. 'exceptional circumstances'

The issue of gratis personnel – personnel donated and paid by outside governments or organizations to serve as personnel for the Court – has a long and controversial history. While the United Nations has long used personnel donated to it by governments, particularly in the context of peacekeeping, in the start up phase of the *ad hoc* Tribunals a great deal of reliance was placed on such gratis personnel. The *ad hoc* Tribunals, particularly its Prosecutor, had difficulty recruiting the types of investigators and lawyers needed for its work, as the expertise in such matters as forensics and investigation were not readily available in the United Nations system generally, and those individuals with the requisite expertise are generally in the employ of governments. Thus, the *ad hoc* Tribunals encouraged the donation of such gratis personnel, who primarily came from western governments, and eventually had a substantial number of such personnel in important positions. The General Assembly eventually expressed concern about the use of such gratis personnel, citing issues relating to the independence of gratis personnel and the effects on geographical balance, and the use of gratis personnel by the *ad hoc* Tribunals was eventually phased out¹⁸.

As a result of this background, there were concerns on both sides of the gratis personnel debate at the Rome Conference. Some delegations were of the view that gratis personnel is essential to the Court, which will need to respond and investigate quickly in some cases, perhaps after a period of relative inactivity. On the other side, the concerns noted above predominated. The compromise that emerges in the Rome Statute is that gratis personnel can be used 'in exceptional circumstances'. This qualification emphasizes that gratis personnel are not to simply do the jobs for which regular staff can be recruited and that there must be some real exigency that requires such services. On the other hand, the limitations noted in the Zutphen Draft and to a lesser extent in the Preparatory Committee's Final Draft have been removed. Therefore, gratis personnel can assist in the work of any of the organs of the Court, not only the Office of the Prosecutor. Moreover, gratis personnel may be accepted from non-governmental organizations as well as intergovernmental organizations and States Parties. While broader than earlier proposals at the Preparatory Committee¹⁹, this provision continues to exclude gratis personnel from governments that are non-States Parties. It is slightly odd that gratis personnel can be accepted from a non-governmental organization but not from a Member State of the United Nations which has not ratified the Rome Statute, although non-States Parties can make monetary voluntary contributions to the Court²⁰.

Gratis personnel are not staff members of the Court and are not governed by the Court's Staff Regulations. As the Court is a permanent institution and the Rome Statute restricts the use of gratis personnel, it appears unlikely that the Court would use gratis personnel each time it is facing a new situation, as it will have to justify each use under the restrictive provisions of article 44 para. 4. Thus, the Guidelines for the selection and engagement of gratis personnel at the International Criminal Court ('Guidelines'), adopted in 2005, clarify that '[g]ratias personnel may not be sought or accepted as a substitute for staff to be recruited against posts authorized for the Court's regular and normal functions'²¹. This appears to preclude the use of gratis personnel for such reasons as poor planning, as a substitute for authorized positions for the implementation of mandated programs and activities or for

¹⁸ GA Res. 243, 51st Sess., UN Doc. A/RES/51/243 (10 Oct. 1997).

¹⁹ Zutphen Draft, p. 79.

²⁰ Article 116.

²¹ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth session, The Hague, 28 November to 3 December 2005 (International Criminal Court publication, ICC-ASP/4/32), part III, resolution ICC-ASP/4/Res.4, annex II: Guidelines for the selection and engagement of gratis personnel at the International Criminal Court.

positions kept vacant solely for financial reasons. Moreover, budget difficulties by themselves or related reasons would not appear to constitute sufficient grounds for reliance on gratis personnel.

Acceptance of gratis personnel will have certain financial implications for the Court, as the Court will have to provide support to gratis personnel such as office space and equipment. To this end, the Guidelines provide that the ‘donor shall be liable to reimburse the Court for programme support costs related to gratis personnel’²². These costs are calculated at thirteen percent (13 %) of the average cost of a P-3/P-4 staff member²³.

The requirement that gratis personnel be hired only under exceptional circumstances is also indicative of a desire to limit the categories of personnel which the Court can employ on a gratis basis. The Guidelines only apply to gratis personnel whose services are provided outside any other established regime such as interns, or visiting professionals²⁴.

2. ‘[t]he Prosecutor may accept’

- 10 In again emphasizing that the Prosecutor is an independent organ of the Court, with his or her own administration, this provision states that the Prosecutor can accept any offer of gratis personnel. Although the term ‘in exceptional circumstances’ is used in reference to the Court, it is clear when the provision is read as a whole that this requirement applies also to the gratis personnel the Prosecutor may want to accept. In view of the Prosecutor’s greater need for the expertise that gratis personnel can provide and his or her powers over staff in the Office of the Prosecutor, it is appropriate for the Prosecutor to make decisions, in accordance with the criteria and limitations noted above, relating to gratis personnel. Rule 11 also provides that gratis personnel may not represent the Prosecutor or Deputy Prosecutor in the discharge of their official duties.

3. ‘guidelines established by the Assembly of States Parties’

- 11 As noted, in addition to the other limitations the use of gratis personnel is subject to Guidelines promulgated by the Assembly of States Parties. These Guidelines were drafted by an Inter-Organ Working Group and were endorsed by all the Court’s organs²⁵. The Working Group was guided by *inter alia*, the ‘principles set forth in the Statute, such as ensuring the highest standards of efficiency, competency and integrity’²⁶. The Assembly of States Parties adopted the Guidelines at its 4th session on 3 December 2005.

Under section 3.1 of the Guidelines, each organ of the court requests gratis personnel independently, albeit through the Registrar. This mechanism safeguards the independence of the different organs, which is particularly relevant in regard to the Office of the Prosecutor, whose fundamentally independent nature must not be unduly interfered with.

- 12 Nominees are selected by the requesting organ in accordance with recruitment standards established by the Court as well as the criteria set forth in article 36, paragraph 8, of the Statute. There is, of course, tension between gratis personnel’s loyalty to their respective governments, which after all is paying their salary and benefits, and to their function as a *de facto* staff members of the Court. In order to prevent confusion about duties and responsibilities of gratis personnel, the Guidelines preclude gratis personnel from seeking or accepting instructions from any government or any external authority²⁷. Additionally, the Guide-

²² *Ibid*, section 8.3.

²³ *Ibid*.

²⁴ *Ibid*, section 1.

²⁵ ICC-ASP/4/15 dated 2 Sep. 2005: Report on draft guidelines for the selection and engagement of gratis personnel at the International Criminal Court, para. 2.

²⁶ *Ibid*, para. 4.

²⁷ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth session, The Hague, 28 November to 3 December 2005 (International Criminal Court publication, ICC-ASP/4/32), part III, resolution ICC-ASP/4/Res.4, annex II: Guidelines for the selection and engagement of gratis personnel at the International Criminal Court, section 11.2.

lines require a formal agreement between the Court and the donor, which conforms with the guidelines²⁸. Section 6 creates a time limit of one year for the use of gratis personnel, after which the need for such personnel shall be reviewed closely to determine whether it is appropriate for the Court to build up the necessary expertise and recruit staff members to perform the specialized functions. Either party may terminate the services rendered at one month's written notice²⁹. The guidelines also establish that gratis personnel can only perform functions which are strictly in accordance with the conditions of their engagement³⁰ and that they must generally not perform supervisory functions.³¹

If the experience of the *ad hoc* Tribunals in this regard is indicative, the guidelines are likely to be applied in a restrictive manner, particularly if gratis personnel primarily originate from western governments and organizations. The Human Resources Section has overall oversight over the implementation of the Guidelines and must submit an annual report to the Assembly of States Parties³². This allows the Assembly of States Parties to closely monitor compliance with the guidelines and prevent possible abuses.

²⁸ *Ibid*, section 14.

²⁹ *Ibid*, section 6.3.

³⁰ *Ibid*, section 10.

³¹ *Ibid*, section 5.2.

³² *Ibid*, section 15.2.

Article 45

Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	2

A. Introduction/General remarks

- 1 Article 45 provides that before first exercising their functions under the Statute, the principal officials of the Court shall make a public and solemn undertaking to perform their functions impartially and conscientiously. Rule 5 ICC elaborates on article 45 and sets forth the solemn undertaking to be made by the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Deputy Registrar. Article 45 was adopted at the Rome Conference on the basis of article 46 of the Preparatory Committee's Final Draft¹, without changes. Article 45 is very similar in substance to the original draft article proposed by the ILC, with the exception that the ILC Draft² only specifically referred to the judges, the other officials of the Court being covered by a general reference to 'other officers of the Court'. Under article 45 all the principal officers of the Court are required to make a solemn undertaking, whereas the Statutes of the *ad hoc* Tribunals do not address 'solemn undertaking', which is covered in the Tribunals' respective Rules, but only apply to the judges and to the Registrar³.

B. Analysis and interpretation of elements

- 2 The solemn undertaking envisaged in article 45 includes references to the duty of impartiality and of conscientiousness. Its purpose is to emphasize the importance of the responsibilities, duties and powers entrusted in the mentioned officials. These officials are required to undertake publicly to perform their duties in an appropriate manner, thereby signifying that they are conscience bound to do so faithfully and truthfully. The declaration made by the judges of the ICL is also done in public, and more specifically 'at the first public sitting at which the Member of the Court is present'⁴. The Rules of the *ad hoc* Tribunals are more detailed as regards the procedure. Rule 14(B) ICTY RPE, in addition to the oral solemn declaration, requires that the judges sign a written declaration, which is kept in the records of the Tribunal⁵. Rule 32 ICTY RPE provides a specific procedure for the Registrar and the Deputy Registrar, requiring them to undertake to perform their duties 'in all loyalty, discretion and good conscience' and to 'faithfully observe all the provisions of the Statute and the Rules of Procedure and Evidence of the Tribunal'⁶. The Rules of the European Court

¹ Preparatory Committee (Consolidated) Draft, article 46, p. 84.

² 1994 ILC Draft Statute, article 14, p. 61.

³ Rule 14 ICTY RPE.

⁴ Rules of the International Court of Justice adopted 14 Apr. 1978, article 4, contained in: ICJ, Acts and Documents Concerning the Organisation of the Court, No. 5 (1989), UN Sales No. 575.

⁵ Rules 14 B ICTY RPE.

⁶ *Ibid.*, rule 32.

of Human Rights⁷ and the Statute of the Inter-American Court of Human Rights also require the judges to ‘keep secret all deliberations’⁸.

It should be noted that the Rules of the ICJ, as well as the Rules of the *ad hoc* Tribunals, 3 provide that the official concerned must also state that he/she will perform his/her functions ‘honourably’ and ‘faithfully’. These two expressions were also included in a proposal of Australia and the Netherlands at an early stage of the Preparatory Committee’s drafting process⁹. Australia and the Netherlands had also proposed to include a reference to ‘respect’ the provisions of the Statute and Rules of the Court in the undertaking¹⁰. The Zutphen Draft¹¹ contained a more detailed provision, essentially based on a French proposal¹². Paragraph 2 read: ‘In performing their duties, the officers of the Court and the staff of the Court shall not seek or accept instructions from any Government or any authority outside the Court. They shall refrain from any act incompatible with their status and shall be accountable only to the Court’. Paragraph 3 stated that the States Parties ‘undertake to respect the exclusive international character of the duties of the officers [...] and of the staff of the Court, and not to seek to influence them in the performance of their duties’. These additional provisions, which were in brackets, were deleted during the last session of the Preparatory Committee in April 1998, on the ground that the provision was straightforward and that details could be elaborated in the Rules.

The proposal of the Zutphen Draft has not found its way into the Rules of the Court. Instead, an approach similar to the Rules of the ICJ and the Rules of the *ad hoc* Tribunals has been taken. The Rules of the Court go a step further by requiring the principal officers not only to solemnly declare that he/she will perform his/her functions ‘honourably’ and ‘faithfully’ but also ‘impartially’ and ‘conscientiously’.

The duties owed by judges pursuant to the solemn undertaking are further expounded by the Court’s Code of Judicial Ethics¹³. This code explicitly refers to the solemn undertaking at the beginning of its preamble and provides the guidelines on the essential ethical standards required of judges¹⁴ according to the principles of independence, impartiality, integrity, confidentiality and diligence.

The exact formulation of the undertaking required by article 45 is set forth in rule 5. 4 According to this rule, the undertaking to be made by the Prosecutor, the Deputy Prosecutor, the Registrar and the Deputy Registrar differs slightly from the one to be made by the judges. Similar to the Rules of the European Court of Human Rights and the Statute of the Inter-American Court of Human Right rule 5 para. 1 (a) ICC provides that the judges must solemnly declare that they will respect ‘the confidentiality of investigations and prosecutions and the *secrecy of deliberations*’. The solemn declaration of the other principal officers is, for obvious reasons, limited to the requirement to respect ‘the confidentiality of investigations and prosecutions’¹⁵. The undertaking of all principal officers of the Court is signed by the person making it, witnessed by the President or a Vice-President of the Bureau of the Assembly of States Parties, and then filed with the Registry and kept in the records of the Court¹⁶.

Moreover, it should be noted that, while article 45 and rule 5 address the solemn undertaking to be made by principal officers, rule 6 provides for solemn undertakings to be taken by staff of the Office of the Prosecutor and the Registry upon commencing employ-

⁷ Rules of the European Court of Human Rights (Oct. 2002), rule 3.

⁸ Statute of the Inter-American Court of Human Rights, article 11, contained in: *IHumRtsL&Prac* 487 (1997).

⁹ 1996 Preparatory Committee II, p. 43.

¹⁰ *Ibid.*

¹¹ Zutphen Draft, article 38, p. 18.

¹² 1996 Preparatory Committee II, p. 43.

¹³ ICC-BD/02-01-05.

¹⁴ *Ibid.*, article 11.

¹⁵ Rule 5 para. 1 (b).

¹⁶ Rule 5 para. 2.

Article 45 4*Part 4. Composition and Administration of the Court*

ment with the Court as well as by translators and interpreters before performing their duties. Upon signature of this undertaking by the person making it and witnessed by the appropriate principal officer, the undertaking is filed with the Registry and kept in the Court's records.

Article 46 Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

- (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
- (b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

- (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;
- (b) In the case of the Prosecutor, by an absolute majority of the States Parties;
- (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Literature: Amerasinghe, C. F., *The Law of the International Civil Service* (OUP 2nd edition 1994); Rosenne, R., *The Law and Practice of the International Court of Justice* (Martinus Nijhoff 2nd edition 1995).

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	6
I. Paragraph 1	6
1. 'A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office'.....	6
2. Grounds for removal from office	7
a) Serious misconduct or breach of duties under the Statute	7
b) Inability to exercise the functions	11
II. Paragraph 2: The removal procedures for judges, the Prosecutor and Deputy Prosecutors.....	12
III. Paragraph 3: Removal procedure for the Registrar and the Deputy Registrar .	18
IV. Paragraph 4: Guarantees of due process applicable.....	19

A. Introduction/General remarks

Article 46 sets forth the fundamental elements regulating the removal procedure of judges, the Prosecutor, Deputy Prosecutors, the Registrar, and the Deputy Registrar. The procedure established in article 46 and elaborated on in rules 23 to 29 and rule 31, as well as in Court regulations 119 to 125, seeks to provide for the removal of the most senior officials of the Court in appropriate cases but without threatening their independence. It is indeed crucial to ensure that these officials will not be removed for frivolous reasons or on political grounds,

and that the procedure respects the principle of due process. The aforementioned provisions reflect the general institutional principle that appointment by a particular body necessarily results in accountability to that appointing body.

- 2 Although in the ILC Draft Statute¹ and the Preparatory Committee's Final Draft² article 46 was structured somewhat differently, the possible grounds for removal have not changed in substance. During the course of the Preparatory Committee, the following issues were debated: What are the circumstances which should trigger a removal procedure? Where should the authority to remove be vested and how should that authority be exercised? What should be the extent of the guarantees afforded to the official concerned by a removal procedure?
- 3 Prior to the Zutphen Draft, a single provision entitled 'Loss of office' addressed both removal from office and disciplinary measures. The view that there should be a distinction between conduct or situations leading to the removal from office and other conduct or situations requiring less serious measures eventually prevailed, and a separate provision addresses the issue of disciplinary measures (article 47). In the drafts before the Zutphen Draft, only the judges and the Prosecutor were specifically mentioned in the removal provision, the Deputy Prosecutor, the Registrar and the Deputy Registrar presumably being covered by a general reference to 'other officers of the Court'.
- 4 The Statutes of the *ad hoc* Tribunals³ do not address the issue of removal from office. The Tribunals' respective Rules only address the issue of disqualification of a judge in a particular case. It should, however, be noted that the Registrar is appointed by the UN Secretary-General in the *ad hoc* Tribunals, and that the Registrar thus comes under the Secretary-General's authority.
- 5 Article 46 largely reflects relevant international standards concerned with the independence of judges. These standards have subsequently been entrenched in the Court's Code of Judicial Ethics ('Code of Ethics')⁴. This code was adopted in response to the need for general guidelines to contribute to judicial independence and impartiality and with the aim of ensuring the legitimacy and effectiveness of the international judicial process. It was drafted having regard to the United Nations Basic Principles on the Independence of the Judiciary⁵ and other international and national rules and standards relating to judicial conduct⁶. The code provides the guidelines on the essential ethical standards required of judges⁷ according to the principles of independence, impartiality, integrity, confidentiality and diligence. As such it will assist in assessing any complaint of misconduct alleged against a judge of the Court.

During the drafting and negotiation process account was taken of international standards of independence and article 46 provides a strong guarantee against removal from office based on frivolous or personal grounds.

¹ 1994 ILC Draft Statute, article 15.

² Preparatory Committee (Consolidated) Draft, p. 84.

³ Statute of the International Criminal Tribunal for the former Yugoslavia, an Annex to the Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, UNSCOR, 48th Sess., UN Doc. S/25704 (1993). For purposes of this discussion, the Statute of the Rwanda Tribunal is similar to that of the ICTY Statute; therefore, references to the ICTY Statute cover both Tribunals' Statutes.

⁴ ICC-BD/02-01-05.

⁵ United Nations Basic Principles on the Independence of the Judiciary as endorsed by the UN General Assembly in Resolution 40/32 of 29 Nov. 1985.

⁶ Code of Ethics, note 4, preamble.

⁷ Code of Ethics, note 4, article 11.

B. Analysis and interpretation of elements

I. Paragraph 1

1. ‘A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office’

Under article 46, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar, namely the members of the Court and its principal officers, can be removed from office. Rule 23 specifies that these officials can be removed ‘in such cases and with such guarantees as are established in the Statute and the Rules’. They can thus only be removed, if a decision is made pursuant to the procedure set out in paragraph 2 of article 46, on the grounds identified in paragraph 1, and in accordance with rule 29, which establishes the procedural framework for removal from office. The same grounds apply equally to all these officials of the Court. The removal procedure is envisaged only in exceptional circumstances and pursuant to strict conditions. The provision contemplates two very different types of situations: the first type (‘misconduct’) is a less precise standard, frequently associated with a variety of conduct related to, *e.g.*, abuse of office or impropriety, whereas the second standard (‘inability’) appears to address more objective situations. This approach is consistent with relevant international standards, including, *inter alia*, the United Nations Basic Principles on the Independence of the Judiciary⁸, which states that judges ‘shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties’. This contrasts with the less specific standard set forth in article 18 para. 1 of the Statute of the ICJ, which provides: ‘No member of the Court can be dismissed unless [...] he has ceased to fulfil the required conditions’. At least one commentator is of the view that ‘article 18 is flexible in the sense that it does not attempt to spell out what are the required conditions [for removal] ... This is counterbalanced by the requirement of unanimity [amongst the judges in support of a decision to remove] ...’⁹.

2. Grounds for removal from office

a) **Serious misconduct or breach of duties under the Statute.** Earlier Preparatory Committee drafts of this article were more detailed as to the grounds for removal. For example, France originally proposed that ‘misconduct’ be limited to behaviour ‘such as to jeopardise his [the judge’s] independence or impartiality’¹⁰. Concerning the removal of a judge, Japan proposed to include ‘engaged in delinquency, whether officially or privately, which raises serious doubts in public confidence in his capacity as a judge’¹¹.

The formulation eventually adopted gives a certain amount of flexibility for interpretation. Thus, the elements necessary to show ‘serious misconduct’ or ‘breach of duty’ were left to be defined in the Rules.

Not all misconduct or breach of duty warrants a removal from office: the Statute requires that the breach of duty or the misconduct be ‘serious’. Rule 24 para. 1 (a) defines ‘serious misconduct’ as an act or omission which occurs ‘in the course of official duties, is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court’. Rule 24 para. 1 (a) also provides three specific examples of ‘serious misconduct’: 1) the disclosure of facts or information acquired in the course of the principal officer’s duties

⁸ *Supra* note 5.

⁹ Rosenne, *The Law and Practice of the International Court of Justice* (1985) 195.

¹⁰ 1996 Preparatory Committee II, p. 44.

¹¹ *Ibid.*

or on a matter which is *sub judice* and such disclosure is seriously prejudicial to the judicial proceeding or to any person; 2) the concealment of information or circumstances of any nature sufficiently serious to have precluded the principal officer from holding office; and 3) the abuse of judicial office in order to obtain unwarranted favourable treatment from any authorities, officials or professionals. These examples give substance to the rather vague concept of the ‘serious misconduct’ terminology used by the Statute.

Under rule 24 para. 1 (b), ‘serious misconduct’ can also occur ‘outside the course of official duties [if it] is of [a] grave nature that causes or is likely to cause serious harm to the standing of the Court’. Thus, ‘serious misconduct’ covers not only professional conduct in relation to the duties of the office but also personal behaviour in general and is therefore broader than ‘breach of duty’ which relates only to the duties of the office¹². In this sense, a breach of duty is a more limited ground for removal that will specifically be assessed in relation to, *inter alia*, the duties of independence, impartiality and conscientiousness, as referred to in articles 40 and 45. This interpretation is supported by rule 24 para. 2, which defines ‘serious breach of duty’ as conduct ‘where a person has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties’. In this regard, it appears that a positive act (violation) as well as an omission (failure to act) could fall within the purview of a ‘breach of duty’.

- 9 In the case of removal for breach of duty, article 46 para. 1 (a) only envisages removal for a breach of duty ‘under this Statute’. References to removal for breaches of the rules and regulations of the Court¹³, mentioned in earlier drafts, were not retained. However, it is submitted that this provision should be read to cover all duties and responsibilities of the official concerned which flow from the Statute and not only such duties which are explicitly specified in the Statute. This interpretation has allowed for the Rules to articulate more specific standards as discussed above.

Such an interpretation would also allow for the Code of Ethics to be taken into account when considering whether a judge has acted in contravention of articles 46 or 47 of the Statute. Provisions that may be relevant from the code include those which: prohibit activity which interferes with judicial functions or independence¹⁴; require the avoidance of conflicts of interest¹⁵; prohibit the acceptance of any gift advantage, privilege or reward that could be perceived as intended to influence of the judicial function¹⁶; require respecting confidentiality of consultations and secrecy of deliberations¹⁷; require diligence and in particular, the delivery of decisions and rulings without undue delay¹⁸; prohibit racist, sexist or otherwise degrading conduct or comments in the proceedings¹⁹; prohibit public comment on pending cases²⁰; and prohibit the contemporaneous exercise of political function²¹.

- 10 There is a paucity of publically available material on misconduct complaints against judges, prosecutors or registrars. If these complaints are made, they are confidential pursuant to Rule 26(1). However there has been at least one complaint and request for removal of a former Prosecutor of the Court based on allegations of sexual misconduct. The Presidency, acting on the unanimous recommendation from a panel of three judges who had interviewed the alleged victim and the Prosecutor, set aside the complaint as ‘manifestly unfounded’²².

¹² See, generally, Amerasinghe, *The Law of the International Civil Service* (1994).

¹³ Zutphen Draft, pp. 80–81.

¹⁴ Code of Ethics, note 4, article 3(2).

¹⁵ *Ibid*, article 4(2).

¹⁶ *Ibid*, article 5(2).

¹⁷ *Ibid*, article 6.

¹⁸ *Ibid*, article 7.

¹⁹ *Ibid*, article 8(3).

²⁰ *Ibid*, article 9(2).

²¹ *Ibid*, article 10(2).

²² This was revealed in an employee’s proceedings against the ICC before the Administrative Tribunal of the International Labour Organization in *Palme v. ICC*, Judgement No. 2757, 9 July 2008 paras.A, 1–4.

A relevant example of removal arose at the SCSL when an alternate judge made a statement, after the delivery of the official trial judgement, expressing his disagreement with the findings of the other judges. A plenary meeting of SCSL judges resolved that his actions amounted to misconduct rendering him unfit to be an alternate judge and directed him to refrain from further sitting in the proceedings pending a decision from the appointing authority on his status²³.

b) **Inability to exercise the functions.** The text of article 46 does not define what constitutes inability to perform the function of office. Moreover, it should be noted that rather oddly article 46 para. 1 (b) does not refer to the Rules for more details. This omission appears to be the reason that the Rules do not provide for any clarification in this regard. Earlier drafts of the Rome Statute mentioned inability to exercise the functions ‘because of long-term illness or disability’²⁴, with the additional requirement, in the Zutphen Draft, that it should be ‘duly established by at least two experts’. It is thus understood that paragraph 1 (b) refers to health situations, and removal for inability ‘to exercise the functions required by the Statute’ should occur only in the event of mental or physical incapacity. In the Preparatory Committee Final Draft²⁵, it was suggested that a separate procedure be established in case of inability to perform, however, this proposal was not adopted.

II. Paragraph 2: The removal procedures for judges, the Prosecutor and Deputy Prosecutors

First is it important to note that there is an initial threshold beyond which anonymous or unfounded complaints against a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or a Deputy Registration, will not proceed. Rule 26(2) provides that all complaints under articles 46 and 47 must be transmitted initially to the Presidency which will, in accordance with the procedures set out in the Regulations of the Court²⁶, ‘set aside anonymous or manifestly unfounded complaints and transmit the other complaints to the competent organ’.

Article 46, paragraph 2, sets out the procedure to be used to remove a judge, the Prosecutor or a Deputy Prosecutor. Different majorities of the Assembly of States Parties, which is the authority vested with the power to remove, are required, depending on the office concerned. In the ILC Draft Statute, only the Assembly of States Parties could remove the Prosecutor, with the judges deciding in all other cases²⁷. Paragraph 2 refers to paragraph 1, meaning that a removal is only possible on the grounds established in paragraph 2.

During the course of the Rome Conference, the United Arab Emirates proposed to replace the entire paragraph 2 by the following text: ‘A decision as to the loss of office under paragraph 1 shall be made by the same authority and in the same manner as was employed to fill the office’²⁸. This formulation was not accepted, as the delegations present at the Rome Conference chose to set out a more detailed and specific procedure for each of the different senior officials of the Court. This procedure has now been set forth in more detail in rule 29.

Judges can be removed following a two-stage procedure. First, the judges themselves must recommend by a two-third majority that a judge should be removed. A decision to remove is then made by the Assembly of States Parties, also subject to a two-thirds majority. Whether a judge should be removed by a two-thirds majority or simply by an absolute majority was debated at the Rome Conference²⁹. In the Zutphen Draft, a proposal for removal of a judge would originate from the Assembly of States Parties, upon a request by either the judges, the

²³ *Prosecutor v. Taylor*, SCSL-03-01, Trial Transcript 16 May 2012, T. 49682- T. 49683.

²⁴ 1994 ILC Draft Statute.

²⁵ Preparatory Committee (Consolidated) Draft.

²⁶ Regulations 119–125.

²⁷ 1994 ILC Draft Statute.

²⁸ UN Doc. A/CONF.183/C.1/L.21 (25 June 1998).

²⁹ article 18 of the ICJ Statute requires unanimity of the judges.

Presidency or States Parties. The two-stage procedure finally adopted and the requirement of a two-thirds majority by both the judges and the Assembly will make it difficult to remove a judge from office. This is a double safeguard which protects a judge from being subject to potential removal for political reasons by States Parties. At the same time, it also protects a judge from being removed by other judges just because he or she is 'disliked' by his/her colleagues. This is a positive development which protects the independence of judges. This two-stage procedure is further developed in rule 29 paras. 1 and 2.

- 15 A decision as to the removal of the *Prosecutor* or *Deputy Prosecutors* is also taken by the Assembly of States Parties, but a super majority is not required. Article 46 para. 2 (b) requires an absolute majority, *i. e.*, a majority of all the States Parties, not just the ones voting. The ILC Draft Statute required a two-thirds majority to remove the Prosecutor from office³⁰. No mention is made of which official or body is to propose the Prosecutor's removal from office, which is a lacuna in the procedure. Thus, the security of office of the Prosecutor, who will hold a key position in the Court, is not as well protected as that of the judges. A weaker requirement as to the majority to remove the Prosecutor can be explained by the fact that the Prosecutor was given broad powers in the Statute, in particular his/her *proprio motu* powers in article 15. In addition, in most countries, the position of prosecutor is more political than the position of judge, and the Prosecutor's independence is subject to more political control. There is always a delicate balance to be achieved between the independence a Prosecutor must have to perform his/her tasks and appropriate political accountability for carrying out these tasks.
- 16 A Deputy Prosecutor may also be removed by an absolute majority of the Assembly of States Parties. The power to recommend his removal to the Assembly is logically vested with the Prosecutor, which helps ensure that a Deputy Prosecutor is not removed on political grounds. This removal procedure is supplemented by rule 29 para. 3, which states that the Prosecutor must advise the President of the Bureau of the Assembly of States Parties in writing of any recommendation taken in the case of the Deputy Prosecutor.
- 17 The procedural requirements contained in paragraph 2 of article 46 make it very difficult to remove a judge, but less difficult to remove the Prosecutor or a Deputy Prosecutor. There is no provision, however, in the Rome Statute or the Rules regarding, *inter alia*, the quorum required in the Assembly of States Parties for the vote, or establishing an authority that would recommend removal of the Prosecutor. This latter omission results in the lack of a mechanism ensuring that the Prosecutor is not removed solely for political reasons.

In relation to the removal of office, consideration should also be given to the situation where a judge is removed during an ongoing trial. In principle, after a trial has started, due process requires that if one of the judges is not able, for any reason, to continue sitting, a new bench is composed, and the trial starts *de novo*, unless the accused agrees that the judge unable to perform his/her duties should be replaced and that the trial may continue. In this regard, a balance should be found between the rights of the accused, and more generally the right of both parties to a fair trial, the need for expedited proceedings and the interests of justice, taking into account the expected complexity of cases that will be brought under the Court's jurisdiction. This situation is envisaged in the Rules of the *ad hoc* Tribunals. Rule 15bis C of the ICTY RPE provides that if a judge is, 'for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceeding from that point'. However, pursuant to rules 15bis C and 15bis D of the ICTY RPE, if the opening statement has already been made already or the presentation of the evidence has begun, the continuation of the proceedings can only be ordered with the consent of the accused, unless the remaining judges, taking all circumstances into account, determine unanimously that

³⁰ 1994 ILC Draft Statute.

continuing the proceedings before a Trial Chamber with a substitute judge would serve the interests of justice³¹.

It is obvious that the situation of a judge who is not re-elected or who has resigned is somewhat different from that of a judge who is removed from office, especially when he/she is removed pursuant to article 46 para. 1 (a) – serious misconduct or breach of duty. Rule 31 addresses that issue by providing that ‘once removal from office has been pronounced, it shall take effect immediately’ and that ‘the person concerned shall cease to form part of the Court, including for unfinished cases in which he or she was taking part’. In addition, pursuant to rule 38, a ‘judge may be replaced for objective and justified reasons’, such as removal from office but also resignation, accepted excuse, disqualification, or death. As regards the procedure of such a replacement, rule 38 para. 2 simply refers ‘to pre-established procedure in the Statute, the Rules and Regulations’. Neither the Statute nor the Rules of the Court set forth such a procedure. Regulation 15, however, states that ‘the Presidency shall be responsible for the replacement of a judge pursuant to rule 38 and in accordance with article 39 and shall also take into account, to the extent possible, gender and equitable geographical representation’. The replacement of a judge of the Appeals Chamber has to take place in accordance with regulation 12.

In this connection, it is also worth noting that article 74 para. 1 of the Statute, by giving the Presidency the option to designate, on a case-by-case basis, an alternate judge to a Trial Chamber, provides the possibility of pre-empting a situation whereby a trial would have to be reheard in the event one of the trial judges becomes unable to perform his/her duties. Moreover, rule 39 states that alternate judges shall sit through all proceedings and deliberations of the case but shall not actively take part therein, ‘unless and until he or she is required to replace a member of the Trial Chamber if that member is unable to continue attending’. Court regulation 16 elaborates on the procedure of designating an alternate judge pursuant to article 74 para. 1 of the Statute and rule 39. Thus, the right to a fair trial would be protected even when the Trial Chamber continued hearing the case, if an alternate judge had been designated as of the beginning of the trial.

III. Paragraph 3: Removal procedure for the Registrar and the Deputy Registrar

Article 46 para. 3 sets out the procedure applicable to remove the Registrar or Deputy Registrar from office. The same procedure is applicable to both offices. Along the lines of article 46 para. 2, a decision as to the removal of the Registrar or the Deputy Registrar is made by the body that appointed them, namely the judges. The ‘absolute majority’ requirement was added during the Rome Conference. They can thus only be removed if a majority of all the judges are of that view. The provision does not specify which authority is to make a recommendation as to their removal from office. Although article 46 para. 3 does not make reference to the Rules, rule 29 para. 1 provides that removal from office of the Registrar or the Deputy Registrar should be voted upon in a plenary session. In addition, rule 29 para. 2 requires that the Presidency should advise the President of the Bureau of the Assembly of States Parties in writing of any decision adopted in the case of the Registrar or the Deputy Registrar.

³¹ When the Presiding Judge of the Trial Chamber hearing the case of *Prosecutor v. Milošević*, IT-02-54-T, [hereinafter: *Milošević* case] at the ICTY had to resign for reasons of ill-health before the end of the trial proceedings, the remaining Judges of the Trial Chamber noted that in accordance with ICTY Rule 15bis lit. C the continuation of the proceedings with a substitute judge requires the consent of the accused. They also noted that the accused did not consent. They argued, however, that, taking all circumstances into account, it was in the interest of justice to continue the proceedings before the same Trial Chamber with a substitute judge and they unanimously decided to do so pursuant to ICTY Rule 15bis D (*Prosecutor v. Milošević*, IT-02-54-T, Order Pursuant to Rule 15bis lit. D, 29 Mar. 2004). The President of the ICTY subsequently assigned a new judge to the Trial Chamber in the *Milošević* case replacing the Judge who resigned (*Prosecutor v. Milošević*, IT-02-54-T, Order Replacing a Judge in a Case before a Trial Chamber, 10 June 2004).

Rule 28 provides for the possibility of suspending an official from duty pending the outcome of the removal procedure if a complaint is of a ‘sufficiently serious nature’, a term which remains undefined. The Rules thus do not set forth clear conditions in which such a suspension could occur, and they fail to provide that such suspension should not affect the presumption of innocence.

IV. Paragraph 4: Guarantees of due process applicable

- 19 Paragraph 4 essentially establishes guarantees of due process for the person concerned during a removal procedure. These guarantees are applicable to all removal procedures brought under paragraph 1 of article 46. The ILC Draft Statute provided for more restricted guarantees, only mentioning the right to present evidence and to make submissions³². The text adopted establishes the right of an accused in any proceeding to be able to review the evidence used against him/her in order to be able to prepare his/her defence. A person subject to a removal procedure is also entitled to present evidence and to make submissions. The last sentence of the paragraph, *i.e.*, ‘the person in question shall not otherwise participate’ in the matter, is consistent with the general principle that one cannot be a ‘judge’ and a party in the same procedure.
- 20 This paragraph is generally consistent with relevant international standards, such as the United Nations Basic Principles on the Independence of the Judiciary, which state that a complaint for removal from office ‘shall be processed expeditiously and fairly’ and that ‘[t]he judge shall have the right to a fair hearing’³³. Principle 19 provides that ‘[a]ll [...] removal proceedings shall be determined in accordance with established standards of judicial conduct’. However, paragraph 4 does not provide for confidentiality of the matter at least at the initial stage of the procedure (unless otherwise requested by the person concerned) as recommended by the Basic Principles.
- 21 Due process rights are further defined in rule 26 which provides that ‘for the purpose of article 46, paragraph 1, [...] any complaint concerning any conduct defined under rules 24 and 25 shall include the grounds on which it is based, the identity of the complainant and, [...] any relevant evidence’, that such complaints should remain confidential and that all complaints must be transmitted to the Presidency. In addition, rule 27 strengthens due process rights by setting forth that in case of removal from office under article 46 or disciplinary measures under article 47, the person concerned shall be notified in writing, and he/she also has the right to present and receive evidence, to make written submissions and to be represented by counsel during this process.

³² 1994 ILC Draft Statute.

³³ Principle 17, note 5.

Article 47 Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	3

A. Introduction/General remarks

Article 47 of the Rome Statute provides that misconduct of a less serious nature than that envisaged in article 46 warrants disciplinary measures, *i.e.* A lesser measure than removal from office, and that those measures will be addressed in the Rules of the Court. No mention was made in the ILC Draft Statute¹ of such disciplinary measures. Disciplinary measures were briefly addressed afterwards by the Preparatory Committee in the provision concerned with loss of office. It was however noted during the Preparatory Committee that ‘a distinction should be made between conduct triggering loss of office and other kinds of conduct deserving less serious disciplinary measures’². These lesser measures appeared as a separate provision in the Final Draft produced by the Preparatory Committee in April 1998³. The text adopted in Rome is essentially unchanged. Several delegations expressed the view that disciplinary measures should be addressed in the Rules only, and that there was no need for such a provision in the Statute itself⁴. Rules 30 and 32, set forth the procedure in the event of a request for disciplinary measures and establish the type of disciplinary measures that may be imposed. Regulations 119 to 125 elaborate further on the procedural aspects.

It is worth noting that there is no similar provision in the Statute or Rules of the *ad hoc* 2 Tribunals. The Statute and Rules of the ICJ do not address disciplinary measures either.

B. Analysis and interpretation of elements

As in articles 45 and 46, article 47 is concerned with the principal officials of the Court, 3 namely, the judges, the Prosecutor and Deputy Prosecutors, the Registrar and the Deputy Registrar. The Zutphen Draft also contained a bracketed provision concerning loss of office, which mentioned disciplinary measures for the other staff of the Court⁵. Disciplinary measures are to be applied in cases of ‘misconduct of a less serious nature than that set out in article 46’.

Rule 25 para. 1 (a) defines ‘misconduct of a less serious nature’ as conduct that ‘occurs in the course of official duties, [and] causes or is likely to cause harm to the proper administration of justice before the Court or the proper internal functioning of the Court’. Such conduct includes: 1) interference in the exercise of the functions of a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar; 2) repeated failure to comply with or

¹ 1994 ILC Draft Statute.

² 1996 Preparatory Committee I, p. 15, para. 48.

³ Preparatory Committee (Consolidated) Draft, article 48, p. 85.

⁴ See, *e.g.*, *ibid.*, p. 56, n. 70.

⁵ Zutphen Draft, p. 19; Preparatory Committee (Consolidated) Draft, p. 80.

ignoring requests made by the presiding judge or by the Presidency in the exercise of their lawful authority; or, 3) failure to enforce the disciplinary measures to which the Registrar or Deputy Registrar or other officers of the Court are subject when a judge knows or should know of a serious breach of duty on their part. Rule 25 para. 1 (b) adds another example: conduct that ‘occurs outside the course of official duties, [that] causes or is likely to cause harm to the standing of the Court’.

The misconduct of article 47, thus qualified by a lesser threshold, should be interpreted as covering all misconduct not envisaged by article 46. In this regard, it should be noted that rule 25 para. 2 does provide that ‘nothing in [rule 25] precludes the possibility of the conduct set out in sub-rule 1 (a) constituting “serious misconduct” or “serious breach of duty” for the purposes of article 46, paragraph 1 (a)’.

Article 47 may thus be understood as a residual provision to article 46. As with article 46, it is submitted that this provision should be read to cover all duties and responsibilities of the official concerned which flow from the Statute, Rules and Regulations of the Court. Such an interpretation would allow for the Code of Judicial Ethics⁶ to be taken into account when considering whether a judge has acted in contravention of articles 46 or 47 of the Statute, depending on the seriousness of the misconduct. Provisions that may be relevant from the code include those which: prohibit activity which interferes with judicial functions or independence⁷; require the avoidance of conflicts of interest⁸; prohibit the acceptance of any gift advantage, privilege or reward that could be perceived as intended to influence of the judicial function⁹; require respecting confidentiality of consultations and secrecy of deliberations¹⁰; require diligence and in particular, the delivery of decisions and rulings without undue delay¹¹; prohibit racist, sexist or otherwise degrading conduct or comments in the proceedings¹²; prohibit public comment on pending cases¹³; and prohibit the contemporaneous exercise of political function¹⁴.

- 4 Article 47 does not define what type of disciplinary measures will be applicable or which authority will make a decision as to them, referring broadly to the Rules for further elaboration in this regard. Article 48 of the Preparatory Committee’s Final Draft contained in brackets references to both the Rules and the ‘Regulations of the Court’¹⁵. It was eventually decided that it was sufficient to only refer to the Rules. As to the procedure, Japan had proposed at the early stage of the drafting process that disciplinary measures be decided by a two-thirds majority of the other judges excluding him- or herself¹⁶. It is understood that as disciplinary measures originally fell under the scope of the provision dealing with loss of office which established such guarantees, similar established standards of due process should be applicable to a procedure leading to disciplinary measures. Rule 32 establishes two types of disciplinary measures that may be imposed, *i. e.*, reprimand and pecuniary sanction that may not exceed six months of the salary paid by the Court to the person concerned.
- 5 The question remains as to which body or bodies will have the authority to impose such lesser disciplinary measures. Rule 26(2) provides that all complaints under articles 46 and 47 must be transmitted initially to the Presidency which will, in accordance with the procedures set out in the Regulations of the Court¹⁷, ‘set aside anonymous or manifestly unfounded complaints and transmit the other complaints to the competent organ’.

⁶ ICC-BD/02-01-05.

⁷ *Ibid.*, article 3(2).

⁸ *Ibid.*, article 4(2).

⁹ *Ibid.*, article 5(2).

¹⁰ *Ibid.*, article 6.

¹¹ *Ibid.*, article 7.

¹² *Ibid.*, article 8(3).

¹³ *Ibid.*, article 9(2).

¹⁴ *Ibid.*, article 10(2).

¹⁵ Preparatory Committee (Consolidated) Draft, p. 85.

¹⁶ 1996 Preparatory Committee II, p. 44.

¹⁷ Regulations 119–125.

Rule 30 provides for a procedure in the event of a request for disciplinary measures. Under this rule, the Presidency is responsible for disciplinary measures imposed on a judge, the Registrar or Deputy Registrar. In case of the Prosecutor, rule 30 states that ‘any decision to impose a disciplinary measure shall be taken by an absolute majority of the Bureau of the Assembly of States Parties’. The Prosecutor him- or herself has the authority to reprimand a Deputy Prosecutor, but the imposition of a pecuniary sanction requires an absolute majority of the Bureau of the Assembly of States Parties upon the recommendation of the Prosecutor¹⁸. Moreover, ‘reprimands shall be recorded in writing and shall be transmitted to the President of the Bureau of the Assembly of States Parties’.

The official against whom a complaint has been made is accorded due process rights. Rule 26 provides that ‘for the purpose of article 47 [...] any complaint concerning any conduct defined under rules 24 and 25 shall include the grounds on which it is based, the identity of the complainant and, [...] any relevant evidence’ and that such complaints should remain confidential and that all complaints must be transmitted to the Presidency. In addition, rule 27 strengthens due process rights by setting forth that in case of removal from office under article 46 or disciplinary measures under article 47, the person concerned shall be notified in writing, and he/she also has the right to present and receive evidence, to make written submissions and to be represented by counsel during this process. It should be noted that the Rules do not address the imposition of disciplinary measures on staff members other than the officials mentioned above. These matters, however, are dealt with elsewhere, *i. e.*, in article X of the ICC’s Staff Regulations and chapter X of the Staff Rules¹⁹.

¹⁸ Rule 30 para. 3 (b).

¹⁹ See also rule 109.2(k) and rule 109.4.

Article 48 Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

- (a) A judge or the Prosecutor may be waived by an absolute majority of the judges;
- (b) The Registrar may be waived by the Presidency;
- (c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;
- (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Literature: Denza, E., *Diplomatic Law* (OUP 3rd edition, 2008); Möldner, M., 'International Organizations, Privileges and Immunities', in: R. Wolfrum (ed.), *Max Plank Encyclopaedia of International Law* (OUP) <<http://opil.ouplaw.com/home/EPIL>> accessed 1 October 2014; Mochochoko, P., 'The Agreement on Privileges and Immunities of the International Criminal Court', (2002) 25 *FordhamILJ* 638; Nilsson, C., 'Contextualizing the Agreement on the Privileges and Immunities of the International Criminal Court', (2004) 3 *LeidenJIL* 559; Schermers, H. G. And Blokker, N.M., *International Institutional Law* (Martinus Nijhoff Publishers 5th edition 2011); Turner, A., 'Tribunal ambivalence and Rwanda's Rejection of Functional Immunity for the ICTR Defence', (2010) *Revue Québécoise de Droit International* (Hors-série) 109.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	4
I. Paragraph 1: The privileges and immunities of the Court.....	4
II. Paragraph 2	6
1. 'when engaged on ... the business of the Court'	6
2. 'accorded to heads of diplomatic missions'	8
3. 'continue to be accorded immunity'	9
III. Paragraph 3: Privileges and immunities of staff	10
IV. Paragraph 4: Counsel, experts, witnesses and other persons.....	11
V. Paragraph 5: Waiver of privileges and immunities	14

A. Introduction/General remarks

- 1 As a treaty-based international organization, the Court and its officials will need to have sufficient diplomatic status to carry out their responsibilities. However, unlike the *ad hoc* Tribunals, the Court is not an organ of the United Nations, and it and its officials do not fall under the 1946 Convention on the Privileges and Immunities of the United Nations

(‘General Convention’)¹. Article 48 attempts to address this situation, in part, by providing the privileges and immunities to the Court and its officials that are ‘necessary for the fulfilment of [the Court’s] purposes’. Generally speaking, international organizations’ privileges and immunities are determined by the constituent instrument of the organization and are supplemented by a multilateral agreement of the Member States and a headquarters agreement with the host State². In the case of the Court, its Statute provides, in addition to the provisions of article 48, for a headquarters agreement with the host State³, as well as for general international legal personality under article 4. The latter provision essentially adopts the description of international personality set forth by the ICJ in the *Reparation*⁴ case.

The legal status and the juridical personality of the Court are further delineated in article 2 of the Agreement of Privileges and Immunities of the Court (‘APIC’), adopted by the Assembly of States Parties during its first session⁵ and in article 2 of the Negotiated Relationship Agreement between the United Nations and the Court which came into force on 4 October 2004⁶. Both provisions state that the Court, has ‘international legal personality’ and ‘such legal capacity as may be necessary for the exercises of its functions’. In addition, the Headquarters Agreement between the ICC and the Host state (‘Headquarters Agreement’)⁷, which entered into force on 1 March 2008, notes this in its preamble. This international personality in turn provides the basis for establishing, through appropriate agreements, the requisite privileges and immunities for the Court to function⁸.

The ILC Draft Statute took a somewhat unusual approach to the question of privileges and immunities. It provided for the privileges and immunities of a diplomatic agent to apply to the judges, the Prosecutor and his staff and the Registrar and Deputy Registrar, but only functional immunity for the Registry staff and for ‘counsel, experts and witnesses’⁹. This formula would have resulted in the judges having the same diplomatic status as junior staff in the Prosecutor’s office, while senior staff in the Registry would have had only functional immunity. More importantly, this provision did not provide for any privileges and immunities for the Court itself. During the course of the Preparatory Committee, ‘[t]he view was expressed that the privileges and immunities as expressed in the article were too broad and should be limited to official functions’¹⁰. Moreover, the question of which authority should waive the privileges or immunities of each category of officials and staff was also the subject of discussion and of several proposals, and a separate paragraph emerged, with several bracketed provisions, in the Preparatory Committee’s Final Draft¹¹. In the Rome Conference, the provision regarding waiver of privileges or immunities was finalized and paragraph 1 was added, to provide that the Court itself would, on the territory of each State Party, enjoy ‘such privileges and immunities as are necessary for the fulfilment of its purposes’.

In addition to the Court itself, the officials and staff of the Court need the protection of privileges and immunities to perform their work independently. In the case of the United Nations, paragraph 2 of article 105 of the Charter states that UN officials will ‘enjoy such privileges and immunities as are necessary for the independent exercise of their functions ...’.

¹ 1 UNTS 15 (1946).

² Möldner, in: Wolfrum (ed.) *MPEPIL*, paras. 3–9.

³ article 3 para. 2 of the Court’s Statute sets forth that ‘[t]he Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.’

⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion (1949) ICJ Rep. 174.

⁵ ICC-ASP/1/3 (Part. II-E) bis.

⁶ ICC-ASP/3/Res.1.

⁷ ICC-BD/04-01-08.

⁸ See *Reparation* case, note 4, where the ICJ stated: ‘The ‘Convention on the Privileges and Immunities of the United Nations’ of 1946 creates rights and duties between each of the signatories and the Organization (see in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.’

⁹ 1994 ILC Draft Statute, article 16.

¹⁰ 1996 Preparatory Committee I, p. 15, para. 49.

¹¹ Preparatory Committee Draft, pp. 85–86.

This provision is then further developed in the General Convention, which provides for certain specific privileges and immunities. These include, *inter alia*, immunity from legal process in ‘respect of words spoken or written and all acts performed by them in their official capacity’; exemption from income tax; immunity from national service and immigration restrictions; and other financial privileges¹². Article 48 addresses the privileges and immunities of staff in paragraphs 2–4.

Since the General Convention is not applicable to the Court, the privileges and immunities of the Court as well as its representatives had to be addressed. Resolution F of the Final Act¹³ of the Rome Conference gave the Preparatory Commission of the Court the responsibility of preparing, *inter alia*, a draft text of the agreement on privileges and immunities¹⁴. Following considerable discussions focusing on the distribution of privileges and immunities between the respecting agreements, the APIC was adopted by the Assembly of States Parties during its first session¹⁵. APIC entered into force on 22 July 2004¹⁶, thirty days after the date of deposit with the United Nations Secretary-General of the tenth instrument of ratification, acceptance, approval or accession, in accordance with article 35 para. 1 of the Rome Statute¹⁷.

B. Analysis and interpretation of elements

I. Paragraph 1: The privileges and immunities of the Court

- 4 As noted above, the Court is a treaty-based organization and does not come under the umbrella of the General Convention. Therefore, it is necessary to provide for privileges and immunities of the Court and its representatives. The Rome Statute has tied these privileges and immunities to the functions of the Court and is identical, *mutatis mutandis*, to article 105 para. 1 of the UN Charter. However, this is simply a general statement of the Court’s privileges and immunities, and the details of these privileges and immunities are not spelled out in the Statute. In the case of the United Nations, these details have been provided for in the General Convention and in various headquarters and other agreements. The General Convention sets forth a number of provisions governing important aspects of the U.N.’s operations to which these privileges and immunities apply. These include matters such as the organization’s property and assets¹⁸, its communications¹⁹ and various tax exemptions²⁰.

Although many of the above matters are covered *vis-à-vis* the host State in the Headquarters Agreement²¹ provided for under article 3, the headquarters agreement is a bi-lateral agreement that does not apply to other States Parties. In view of the many States in which the Court, particularly the Prosecutor, shall potentially operate, and the necessity for the Prosecutor to work in complete confidence and secrecy in his investigations, it was critical that a general agreement on privileges and immunities be negotiated and adopted.

¹² General Convention, note 1, article V.

¹³ Final Act, Resolution F.

¹⁴ The first session of the Assembly of States Parties was held in New York from 3–10 Sep. 2002. The outcome of this session, *inter alia*, the Agreement on Privileges and Immunities of the International Criminal Court, is set forth in the Official Records of the First Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, September 3–10, 2002, ICC-ASP/1/3 (2002), p. 215.

¹⁵ APIC was opened for signature to all states from 10 Sep. 2002 until 30 June 2004 at the United Nations Headquarters in New York, in accordance with its article 34 para. 1.

¹⁶ ICC-ASP/3/25 Res.3 para. 6.

¹⁷ As of 22 April 2013, 72 states had become party to the APIC (including the Ukraine which was not a party to the Rome Statute) and 51 States Parties were yet to become parties. Report of the Court on Co-operation, 9 October 2013, ICC-ASP/12/35.

¹⁸ General Convention, note 1, article II.

¹⁹ *Ibid.*, article III.

²⁰ *Ibid.*, article II.

²¹ Headquarters Agreement, note 7, articles 5–16.

While there is no express provision in the Statute requiring the APIC, the matter is implicitly raised in paragraphs 3 and 4 of article 48, which each refer to ‘the agreement on the privileges and immunities of the Court’. Given the context of these provisions, they could have been read as a reference to the headquarters agreement, particularly in the case of paragraph 4, which refers to counsel, experts and witnesses ‘required to be present at the seat of the Court’. However, it must be first noted that the Rome Statute makes a specific reference in article 3 to ‘a headquarters agreement’, which is a term of art, while the references in article 48 are to a specific agreement on ‘the privileges and immunities of the Court’. Thus, the drafters of the Statute must have envisaged a separate general agreement on privileges and immunities. Second, with respect to paragraph 4, the reference is to travel arrangements for, *inter alia*, witnesses, who will require the cooperation of States other than the host country to travel, implying that a general agreement, not simply a headquarters agreement, would be necessary. The adoption of the APIC confirms this interpretation.

The APIC sets forth the privileges and immunities of the Court as an independent entity as well as the privileges and immunities of staff, counsel and persons assisting defence counsel²², witnesses²³ and experts²⁴. The fact that APIC explicitly mentions the privileges and immunities of representatives of States participating in the Assembly of States Parties and its subsidiary organs and representatives of intergovernmental organizations²⁵ as well as representatives of States participating in the proceedings of the Court²⁶, other individuals participating in the Court’s proceedings, and particularly victims²⁷ is groundbreaking²⁸.

II. Paragraph 2

1. ‘when engaged on ... the business of the Court’

Paragraph 2 of article 48 provides the judges, the Prosecutor and Deputy Prosecutor and the Registrar with privileges and immunities with respect to ‘the business of the Court’. This formulation differs in significant respects from the provision in the ILC Draft Statute, which stated that these officials would have the ‘privileges, immunities and facilities of a diplomatic agent’ as that term is defined in the Vienna Convention on Diplomatic Relations²⁹. The ILC’s approach would have ensured that these officials would have immunity from jurisdiction, personal inviolability and inviolability of their residence and property. A similar approach has been taken in the Statutes of the *ad hoc* Tribunals, which provided that the judges, Prosecutor and Registrar would have the status of diplomatic envoys, the same status as United Nations Assistant Secretary-Generals and above enjoy under the General Convention³⁰. Under international law, ‘[d]iplomatic envoys and their families are accorded absolute immunity from arrest or criminal prosecution, their private residences are completely inviolable, their personal baggage is generally exempt from inspection, and they are exempt from all forms of taxation. These immunities apply to the International Tribunals’ senior officials whether they are acting within their official duties or in a purely private capacity³¹. Head of mission status is essentially equivalent to that of a diplomatic envoy, with similar privileges and immunities³². These immunities attach to the person of the diplomat and are

²² APIC, note 5, article 18.

²³ *Ibid.*, article 19.

²⁴ *Ibid.*, article 21.

²⁵ *Ibid.*, article 13.

²⁶ *Ibid.*, article 14.

²⁷ *Ibid.*, article 20.

²⁸ Similar provisions are contained in the Headquarters Agreement, note 7, in articles 21–29.

²⁹ 1994 ILC Draft Statute, article 16.

³⁰ General Convention, article V, note 1, section 19.

³¹ Morris and Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. I (1995) 317.

³² Denza, *Diplomatic Law* (2008) 256 *et seq.*

not simply functional, *i. e.*, they do not apply only when he or she is acting in his or her professional capacity but protect the diplomat at all times.

- 7 The approach taken in paragraph 2, however, is based on a similar provision in the Statute of the ICJ, which provides, '[t]he members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities'³³. The language of paragraph 2 of article 48, originally proposed by Israel in the 1996 Preparatory Committee³⁴, is ambiguous. It appears to merge the diplomatic immunity of a head of mission or diplomatic agent with the concept of functional immunity by linking the privileges and immunities of the most senior officials of the Court to the 'business of the Court'. It is unclear whether this formulation would strip away some significant immunities of a head of mission, whose immunities do not depend on acting on official business. Indeed, it is difficult to reconcile the grant of head of mission status, which implies a personal immunity in areas such as civil and criminal jurisdiction, with the language linking that status with the 'business of the Court'. These provisions, if not mutually exclusive, rest very uneasily together. Functional immunity is a distinctly different concept from full diplomatic immunity, and paragraph 2 appears to confuse the two concepts. While these provisions create certain confusion and, at least facially, appear to erode the traditional diplomatic privileges and immunities of heads of diplomatic missions, it is clear these officials are granted the functional privileges and immunities necessary to independently discharge their professional obligations³⁵.

Although article 48 para. 2 is similar to the privileges and immunities provision of the ICJ Statute, it is important to note that the ICJ is not a criminal court and operates almost exclusively in its host State. Thus, it is not generally required to operate outside the host country, and in any event the members of the Court have essentially been granted head of mission status in the Netherlands³⁶. On the other hand, the Court is a criminal court with a Prosecutor who must operate not only in The Hague but also in many other jurisdictions.

2. 'accorded to heads of diplomatic missions'

- 8 Although it does appear to have been the intent of the drafters of the Rome Statute, it remains questionable whether judges, the Prosecutor and the Registrar enjoy the status traditionally accorded to head of missions in the Vienna Convention. Article 48 para. 2 of the Rome Statute, the APIC lacks clarity on this point³⁷. However, the text of paragraph 2 provides for a continuing limited immunity for these senior officials even after their departure from the Court for their words spoken, and acts taken, in their official capacity. Certainly the drafters would not have provided for this post-service immunity unless they intended for it to be narrower than the immunities given to these officials during the course of their actual service, *i. e.*, full head of mission status. In contrast, the Headquarters Agreement clearly provides that Judges, the Prosecutor (and Deputy Prosecutors) and the Registrar enjoy the same privileges, immunities and facilities as are accorded by the host State to heads of diplomatic missions in conformity with the Vienna Convention.³⁸

³³ ICJ Statute, article 19.

³⁴ 1994 ILC Draft Statute, p. 48.

³⁵ See Mochochoko, (2002) 25 *FordhamILJ* 652.

³⁶ Exchange of Letters between the President of the ICJ and the Minister for Foreign Affairs of The Netherlands of 26 June 1946 International Court of Justice: Acts and Documents Concerning the Organization of the Court, No. 5, 201–207, UN Sales No. 575 (1989).

³⁷ It is important to note that the head of mission status/diplomatic immunity status would be limited to the judges, Prosecutor/Deputy Prosecutor and Registrar. See Schermers and Blokker, *International Institutional Law* (2011) 386: 'Immunity for non-official acts is generally open to objection and contrary to the functionality principle, which underlies all international immunities'.

³⁸ Headquarters Agreement, note 7, article 17.2.

3. 'continue to be accorded immunity'

In addition to the immunities enjoyed by the most senior officials of the Court during the course of their appointments to the Court, they will also need continued protection for their acts taken while in office. They will not need full immunity, as they will no longer be officials of the Court, so it is reasonable that they are not provided with full immunity. However, judges, the Prosecutor and the Registrar must be protected from legal proceedings regarding the decisions they took while they were in office or information that they obtained in office. Thus article 48 para. 2 of the Rome Statute and article 15 para. 1 of APIC as well as article 17.5 of the Headquarters Agreement establish a continuing limited immunity for these officials from legal process 'in respect of words spoken or written and acts performed by them in their official capacity'.

III. Paragraph 3: Privileges and immunities of staff

Paragraph 3 establishes the privileges, immunities and facilities for the staff of the Court. These are functional immunities and shall be set forth 'in accordance with the agreement on the privileges and immunities of the Court'. These functional immunities should be similar to those provided in the General Convention. These include immunity from legal process for acts performed in their official capacity; exemption from taxation; immunity from immigration restrictions; repatriation facilities; and importation of personal effects free of duty³⁹. Many of these matters will arise principally in respect of the host country and are consequently addressed in the headquarters agreement⁴⁰. However, in view of the fact that the Prosecutor will have investigators and other staff in various States performing investigations and missions, these matters are also addressed in article 16 of APIC. This article elaborates on the functional immunities and the privileges of the Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry provided for in article 48 para. 3 of the Rome Statute.

IV. Paragraph 4: Counsel, experts, witnesses and other persons

In addition to the senior officials of the Court and its staff, various other persons will have business with, or appear before, the Court, either as counsel, experts, witnesses or in some other capacity, and each of these categories of persons will require special arrangements. This is particularly true in the host country, and the Headquarters Agreement addresses these matters in detail. Articles 25 to 29 of the Headquarters Agreement grant privileges and immunities to these categories specifically, to the extent necessary for the independent performance of their functions or for their presence before the Court.⁴¹

In the case of counsel and persons assisting them, article 25 also provides for inviolability of papers and documents. Witnesses, experts and other persons appearing before the court are guaranteed free movement and limited immunity.

As the Headquarters Agreement, cannot address these issues for other States, the APIC covers the privileges and immunities of the aforementioned categories as well as the privileges and immunities of representatives of States participating in the Assembly of States Parties, its subsidiary organs, representatives of intergovernmental organizations, representatives of States participating in the proceedings of the Court as well as victims and other persons required to be present at the seat of the Court. The explicit coverage of all these

³⁹ General Convention, note 1.

⁴⁰ Headquarters Agreement, note 7, article 18.

⁴¹ Headquarters Agreement, note 7, article 25 (counsel), article 28 (experts), article 26 (witnesses), article 27 (victims), article 29 (other persons required to be present at the seat of the court).

categories substantially facilitates their participation in the proceedings of the Court, particularly for witnesses and victims who might be required to travel to and from, and in some cases through, other States. Not only is the cooperation of officials in those States needed but safe conduct and, in principle, immunity from legal process during the course of their testimony before the Court is essential.

12 In relation to the privileges and immunities accorded to defence counsel and persons assisting them⁴² and in view of the right of the accused to a fair trial, the question arises as to the equality of arms between the defence team and the prosecution. While the Rome Statute provides the Prosecutor and the Deputy Prosecutor with diplomatic immunity and the staff of the Office of the Prosecutor with functional immunity, the protection for counsel to carry out their functions was left to be defined by the APIC⁴³ and the Headquarters Agreement⁴⁴. The APIC and the Headquarters Agreement provide defence counsel and the persons assisting them with ‘(...) privileges, immunities and facilities to the extent necessary for the independent performance of his or her functions (...)’, which appears to be sufficient to assure the proper administration of justice and to allow counsel to conduct investigations in other States, including interviewing of witnesses and collecting documents.

13 The ICTR has confirmed the functional immunity of defence counsel before international Tribunals. The ICTR, to which the General Convention applied, held that defence counsel are to be considered experts on mission for the United Nations and given privileges and immunities accordingly⁴⁵. As such, defence counsel ‘benefit from immunity from personal arrest or detention while performing their duties assigned by the Tribunal and also with respect to words spoken or written and acts done by them in the course of them in the performance of their duties...before the Tribunal, order to allow for the proper functioning of the Tribunal’⁴⁶. Therefore counsel could not be prosecuted for writing an article recounting closing arguments for his client before the ICTR. His functional immunity did not however extend to articles written in a private or academic capacity, even though they were related to the relevant case before the Tribunal⁴⁷.

Similarly, the ICTY has confirmed that defence investigators enjoy functional immunity for acts done in fulfilment of their official functions if they are necessary for the proper functioning of the tribunal⁴⁸. Accordingly, a defence investigator who was given documents by a witness during an interview, should not have been investigated, prosecuted or subjected to the seizure of defence materials by national authorities for the alleged concealment of archived material⁴⁹.

The Presidency of the Court has found that counsel and persons assisting them in accordance with rule 22 of the Rules of Procedure and Evidence are granted immunity to the extent necessary for the performance of their legitimate functions. This immunity applies on the territory of the Host state pursuant to article 25 of the Headquarters Agreement and on the territory of signatory states other than the Host state pursuant to article 18 of APIC. The immunity does not extend to conduct which is allegedly in breach of offences related to

⁴² APIC, note 5, article 18.

⁴³ Mochochoko (2002) 25 *FordhamLLJ* 654.

⁴⁴ Headquarters Agreement, note 7, article 25.

⁴⁵ *Theoneste Bagosora et al. v. The Prosecutor*, ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010, paras.22–23.

⁴⁶ *Ibid*, para 26.

⁴⁷ *Ibid*, paras. 27–29. For the ICTR’s approach to the immunity of defence counsel and investigators up until this decision see Turner, A., ‘Tribunal ambivalence and Rwanda’s Rejection of Functional Immunity for the ICTR Defence’ (2010) *Revue Québécoise de Droit International* (Hors-série) 109.

⁴⁸ *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.5, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Request for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011, paras. 26–36.

⁴⁹ *Ibid*, paras. 5 and 71.

the administration of justice under article 70 of the Statute⁵⁰. Accordingly where there are reasonable grounds to believe that defence counsel and a case manager have intentionally presented evidence that they know is false or forged pursuant to article 70(1)(b) of the Statute and intentionally corruptly influenced a witness or obstructed or interfered with their attendance or testimony pursuant to article 70(1)(c), they do not enjoy immunity from arrest and detention pursuant to a warrant issued by the Court⁵¹.

V. Paragraph 5: Waiver of privileges and immunities

A fundamental precept of the privileges and immunities of international organizations is that they are ‘not for the personal benefit of the individuals themselves’ and that the immunity of any official should be waived when it ‘would impede the course of justice’⁵². Under the General Convention the power to waive is vested in the Secretary-General, who is under a duty to waive immunity if the above criterion is met and there is no prejudice to the United Nations. In the case of the Secretary-General, the power to waive is vested in the Security Council.

Article 48 para. 5 does not establish the criteria to be applied in exercising the power of waiver. Neither does it contain a detailed provision as to which authority should exercise the waiver power. These criteria are set forth in article 26 of APIC and article 30 of the Headquarters Agreement. A systematic approach has been taken whereby the judges, by an absolute majority, may waive the privileges and immunities of another judge; and the Presidency those of the Registrar; the Prosecutor those of the Deputy Prosecutor and the staff of the Prosecutor; and the Registrar those of the Deputy Registrar and the staff of the Registry. Moreover, the privileges and immunities of counsel and persons assisting defence counsel, witnesses and victims may be waived by the Presidency. Those accorded to experts may be waived by the head of the organ of the Court appointing the expert and, in the case of other persons required to be present at the seat of the Court, the Presidency may issue such a waiver. In essence, these arrangements grant supervisory powers the ability to waive the immunities of their subordinates, except in the case of a judge, who quite reasonably will be subject to the decision of his or her fellow judges. However, in the case of the Prosecutor, the power to waive is placed with the judges as well. This may be criticized as it could be seen as an encroachment upon the independence of the Prosecutor. It could thus be argued that the Assembly of States Parties would be the more appropriate authority to waive the Prosecutor’s immunity. This would also be roughly analogous to the approach taken vis-à-vis the Secretary-General under the General Convention.

The Presidency has waived privileges and immunities for defence counsel and a case manager to the extent necessary for their arrest and detention in relation to administration of justice offences under article 70 of the Statute. It has found that it has a duty to waive pursuant to article 30 of the Headquarters Agreement and article 26 of APIC if the grant of privileges and immunities would first, impede the course of justice and second, they can be waived without prejudice to the purposes for which they are accorded⁵³. The first condition was satisfied on the grounds that the grant of immunity would impede justice by permitting persons who presented a serious flight risk to flee and evade investigation or prosecution. The second condition was satisfied because the purposes of immunity are the good administration of justice, the proper functioning of the Court and the independent performance

⁵⁰ *Situation in the Central African Republic*, No. ICC-01/05, Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of immunity of lead defence counsel and the case manager for the defence in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*, Presidency, 20 November 2013 (‘Bemba Decision’), paras. 8–10.

⁵¹ *Ibid*, paras 4,5,10.

⁵² General Convention, note 1, article V, section 20.

⁵³ Bemba Decision, note 50, para. 11.

counsel's functions. These purposes do not include the commission of offences against the administration of justice. As such, waiver does not prejudice the purposes for which immunities are granted⁵⁴.

⁵⁴ *Ibid.*, paras. 12–13.

Article 49 Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	2

A. Introduction/General remarks

Article 49 addresses the salaries, allowances and expenses of the most senior officials of the Court, including the judges, the Prosecutor and Deputy Prosecutors and the Registrar and Deputy Registrar. The ILC Draft Statute provided for the possibility of judges serving on a part-time basis¹ and, in line with this approach, stipulated that judges would receive an allowance if they served on a part-time basis or a salary if they became full-time. During the course of the Preparatory Committee, several delegations took the position that judges should be paid salaries and that proposals simply to pay them a per diem rate or an allowance were ‘offensive to judicial dignity and judicial independence’². The Preparatory Committee subsequently took the position that the judges should serve on a full-time basis and be paid regular salaries and allowances³. The Rome Statute provides for the election of full-time judges, with the proviso in article 35 that the Presidency will decide which judges will actually serve on a full-time basis; thus, provision has been made for the payment of salaries, allowances and expenses as established by the Assembly of State Parties. Moreover, the other senior officials who are elected by the Assembly of States Parties are paid salaries, allowances and expenses as determined by that body. 1

B. Analysis and interpretation of elements

Article 49 is clear and straightforward. The Assembly of States Parties is given the responsibility of setting the salaries, allowances and expense accounts for the officials it directly elects, *i. e.* the judges, Prosecutor and Registrar and their deputies. Unlike the *ad hoc* Tribunals, which are organs of the Security Council and funded by the United Nations, there is no pre-existing salary structure that corresponds to the levels of responsibility of the various offices. However, the Assembly of States Parties should take into account the levels that have been used for the corresponding judges and officers in the *ad hoc* Tribunals⁴. Since the Court is a permanent institution with the gravest of responsibilities, the salaries of the 2

¹ Article 10 para. 4, 1994 ILC Draft Statute, p. 63.

² 1996 Preparatory Committee II, p. 49.

³ Preparatory Committee (Consolidated) Draft, p. 86.

⁴ In the *ad hoc* Tribunals, the judges have served at the equivalent of the Under-Secretary-General level, on the same terms and conditions as the judges of the International Court of Justice. The Prosecutor is appointed at the Under-Secretary-General level while the Registrar is at the Assistant Secretary-General level; the Deputy Prosecutor and the Deputy Registrar are on high levels of the international civil service. Statute of the International Criminal Tribunal for the former Yugoslavia, an Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ORSC, 48th Sess., UN Doc. S/25704 Ann. (1993), articles 13, 16 and 17.

judges, Prosecutor and Registrar and their deputies should be in line with the judges and officials of similar institutions, such as the International Court of Justice and other international and regional judicial bodies.

- 3 The Preparatory Committee's Final Draft contained the additional requirement that the salaries and allowances covered under article 49 'shall not be reduced during their term of office'⁵, which is retained in the Rome Statute. This is a feature of a number of domestic systems and is based on the argument that judicial officials should not be subject to having their salaries reduced due to unpopular decisions⁶; it is essentially a provision to ensure judicial independence⁷. It should be noted that this limitation on the powers of the Assembly of States Parties does not extend to expenses, which by their nature fluctuate and are not actually remuneration.

The seminal document which sets out the conditions and compensation of full time judges at the ICC is Part 4 of the Resolution Strengthening the International Court and Assembly of States Parties ('Resolution')⁸. In that resolution the Assembly of States Parties adopted the conditions of service and compensation of judges annexed to the Resolution ('Annex')⁹.

For the purposes of the Annex, a 'judge' is defined as a judge of the ICC, as specified in article 35 of the Statute, who serves on a full time basis¹⁰. Pursuant to the Annex, judges are required to take up residence in the Netherlands within sufficient proximity to the seat of the Court to be available to attend the Court at short notice in order to discharge their duties¹¹.

- 4 The annual salary of a judge shall be 180,000 Euros. The President receives a special annual allowance of 10 % of her annual remuneration, that is, 18,000 Euros. This brings the President's annual salary to 198,000 Euros. The First or Second Vice-President, or in exceptional circumstances, any other judges assigned to act as President, shall be entitled to a special allowance of 100 Euros net per day for each working day they act as President, up to a maximum of 10,000 Euros per year¹².
- 5 The Code of Judicial Ethics¹³ permits judges to engage in extra-judicial activities that are not incompatible with their functions¹⁴ and also contemplates the participation of judges in public debate pertaining to legal subjects, the judiciary or the administration of justice without commenting on pending cases¹⁵. Furthermore, judges may accept gifts, advantages, privilege or rewards unless they can be reasonable perceived as being intended to influence the performance of their judicial function¹⁶. These ethical guidelines appear to allow judges to accept reimbursement for expenses and honorariums in relation to extra-judicial activities such as public speaking in academic or civil society forums.
- 6 Part IV of the Annex and Appendix 1 of the Resolution set out the entitlements of judges with respect to travel costs and subsistence benefits. The Court is obliged to pay travel expenses of judges necessarily incurred on duly authorized journeys. These include: a trip from the judge's home upon her appointment; a round trip every second calendar year to her home; a trip home upon termination of her appointment; and other journeys on official business undertaken under the authority of the President of the Court¹⁷. Travel expenses shall include the cost of business class travel using the most cost-effective and time-efficient means¹⁸. When

⁵ Preparatory Committee (Consolidated) Draft, p. 86.

⁶ US Constitution, article III, § 1.

⁷ See, e.g., The Federalist No. 79 (Alexander Hamilton).

⁸ ICC-ASP/3/25 Res.3 Adopted at the 6th Plenary Meeting, on 10 Sep. 2004, by consensus.

⁹ ICC-ASP/3/25 Res.3 para. 22.

¹⁰ ICC-ASP/3/25 Res.3 Annex Pt. I para 1.

¹¹ ICC-ASP/3/25 Res.3 Annex Pt. II para 1.

¹² ICC-ASP/3/25 Res.3 Annex Pt. III.

¹³ ICC-BD/02-01-05.

¹⁴ *Ibid*, article 10.

¹⁵ *Ibid*, article 9.

¹⁶ *Ibid*, article 5.

¹⁷ ICC-ASP/3/25 Res.3 Annex, Appendix 1, article I.1.

¹⁸ ICC-ASP/3/25 Res.3 Annex, Appendix 1, article I.2.

judges are on official travel they shall be entitled to a daily subsistence allowance which is the equivalent of 140 % of the rates applicable to United Nations officials¹⁹.

Judges are entitled to 8 weeks leave per year and can accumulate leave provided that no more than 18 weeks are carried forward to the following year²⁰. They are also entitled to an education grant for their children which is the equivalent to that applicable to United Nations officials²¹. However, they must arrange for their own health insurance²².

Judge's pensions are regulated by Part V of the Annex and Appendix 2 to the Resolution subject to amendments to the pension scheme made by the Assembly of States Parties by resolution in 2007²³. These amendments represent a significant cost saving measure for the Court. A judge who has ceased to hold office and who has reached the age of 62 is entitled to a retirement pension. It is payable monthly, for the rest of her life, provided she did not have to relinquish her appointment for reasons other than the state of her health. A judge is entitled to a retirement pension of 1/72 of the annual salary for each year of service. No additional pension is payable if the judge has served more than a full nine year term²⁴. This is a significant reduction from the previous scheme which provided for a retirement pension equal to half of the annual salary if the judge had served a full nine year term.

Judges are precluded from receiving pensions from the Court while serving as a judge at another international court²⁵. Similarly, former judges of the ICJ, ICTY and ICTR are precluded from receiving pensions from the United Nations pension scheme while sitting on the Court²⁶.

According to article II of Appendix 2, a judge found by the Court to be unable to perform her duties because of permanent ill health or disability, will be entitled to a disability pension payable monthly. The amount of the pension shall be equal to the amount of the retirement pension that would have been payable to the judge had she completed the term for which she had been elected. The amendments to the pension scheme set out the entitlements of a judge's spouse and her children in the event of her death²⁷.

The Assembly of States Parties has also considered and decided upon the conditions of service and compensation of non-full-time judges. Non-full-time judges are entitled to an annual allowance of 20,000 euros paid monthly. In addition to this payment, a judge who declares on an annual basis that her net income including this annual allowance, is less than the equivalent of 60,000 euros per annum will receive an allowance, paid monthly, to bring her income to that level. Non-full-time judges are entitled to a full-time allowance of 270 euros a day when they are engaged in the business of the court and a separate subsistence allowance at the United Nations rate for judges of the ICJ, for each day that the judge attends meetings of the Court. Non-full-time judges are entitled to business class travel costs for attending official meetings of the Court. All judges are responsible for their own health insurance²⁸.

In addition to these benefits, paragraph 23 of the Resolution provides that the first judges of the Court elected for three or six year term shall be entitled to the same disability pension as the judges elected for a full nine year term. Further, paragraph 24 of the Resolution states that the first judges of the Court elected for a three year term, who have not served on a full-time basis during their entire term and who are not re-elected, shall be entitled to receive a retirement pension at the end of their service, which is prorated to the length of time that they served on a full time basis.

¹⁹ ICC-ASP/3/25 Res.3 Annex, Appendix 1, article II.1 and 2.

²⁰ ICC-ASP/3/25 Res.3 Annex Pt. XI.

²¹ ICC-ASP/3/25 Res.3 Annex Pt. IX.

²² ICC-ASP/3/25 Res.3 Annex Pt. X.

²³ ICC-ASP/6/Res.6.

²⁴ ICC-ASP/6/Res.6, article I.

²⁵ Resolution ICC-ASP/5/Res.3, para. 27.

²⁶ UN Doc. A/Res/63/259, ICC-ASP/8/Res.3, para. 40 and ICC-ASP/7/Res.3, para. 28.

²⁷ ICC-ASP/6/Res.6, articles III and IV.

²⁸ ICC-ASP/2/10 Part III. A. II.

- 12 In relation to the conditions of service and compensation of the Registrar, the Resolution provides that they will be the same as those of an Assistant Secretary-General in the United Nations common system²⁹.

The conditions of service and compensation of the Prosecutor and Deputy Prosecutors are the same as those of Under-Secretary-General and Assistant Secretary-General in the United Nations common system³⁰.

- 13 Finally, if a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar is suspended from duty because of a complaint of misconduct or breach of duty³¹, their suspension shall not affect their salary and allowances³².

²⁹ ICC-ASP/3/Res.3 para. 27.

³⁰ ICC-ASP/5/Res.3 para. 29.

³¹ Pursuant to article 46 of the Statute and rules 24–26 of the Rules of Procedure and Evidence of the Court.

³² Regulation 124 sub-regulation 2, Regulations of the Court.

Article 50 Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgments of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Literature: Bohlander, M., 'Language, culture, legal traditions and international criminal justice', (2014) 12 *JICJ* 491; Jones, J.R.W.D. And Zgonec-Rozej, M., 'Rights of Suspects and Accused', in: A. Alamuddin, *et al.*, *The Special Tribunal for Lebanon Law and Practice* (OUP 2014) 177; Karton, J, 'Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony', (2008) 41 *VanderbiltTransnatL* 1; Shahabuddeen, M., *International Criminal Justice at the Yugoslav Tribunal A Judge's Recollection* (OUP 2012).

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1.....	4
1. 'official languages'.....	4
2. 'other decisions resolving fundamental issues before the Court'.....	7
II Paragraph 2: Working languages.....	10
III. Paragraph 3.....	15
1. Authorization of a language other than English or French.....	15
2. Authorization adequately justified.....	16
IV. Rules and regulations of general application to article 50.....	20

A. Introduction/General remarks

Article 50 establishes the languages of the Court, both official and working, and sets out the circumstances in which other languages may be used. There are several competing principles that rules regarding the use of languages must address, particularly in the context of an international judicial institution with criminal jurisdiction. First and foremost, the right of the accused to understand the charges against him or her and to defend himself or herself against those charges is a fundamental human rights norm that must be respected¹. In addition, the United Nations has six (6) official languages, and it is important that these languages be used and respected as much as possible. However, in the actual work of the Court, like other international organizations and institutions, account must be taken of the practical and cost implications of attempting to work in multiple languages. Thus, all international organizations have adopted a working language or working languages, in which the day-to-day work of the institution is carried out. Consideration also must be given to the costs of interpretation and translation, particularly since these costs increase with the number

¹ Article 14 ICCPR.

of languages used in the work of the Court and budgets of international organizations in general and the Court specifically, have been severely tightened in recent years.

- 2 The ILC Draft Statute simply provided that the ‘working languages of the Court shall be English and French’². This formula was maintained until the Preparatory Committee’s Final Draft, which added a provision that the Court ‘shall, at the request of any Party, authorize a language other than English or French to be used by that Party’³. Similarly the ICJ Statute designates English and French as official languages but authorizes other languages to be used at the request of parties⁴. During the course of the Rome Conference, a number of delegations, particularly from the Spanish-speaking world, pushed for the use of the official languages of the United Nations in certain aspects of the work of the Court. They argued that the Court should follow the same approach as the United Nations in this regard. The result was that article 50 now provides for the mandatory use of official languages, *i. e.* Arabic, Chinese, English, French, Russian and Spanish, in certain cases, while maintaining English and French as the working languages⁵. Moreover, provision has been made for the use of other languages when the Court finds that the use of another language is adequately justified.

This system of official and working languages in international criminal courts may be traced back to the Nuremberg proceedings. The official documents of the proceedings, including the indictment, rules, written motions, written orders, findings and judgments of the Tribunal were required to be in the English, French, Russian and German languages⁶. This recognized the importance of establishing for history an authentic text of the Trial of major war criminals⁷. In contrast, documentary evidence of exhibits could be received in the language of the document, but a translation in German had to be provided to the defendants⁸. Further each defendant was entitled to receive the Indictment, Charter, any documents lodged with the indictment and a statement regarding the right to the assistance of counsel and a list of counsel, in a language which the defendant understood⁹.

- 3 Rules 40–43 set out the criteria for the use of official languages and the circumstances under which they may be used as working languages. These rules reflect an attempt to strike a balance between potentially competing interests. On one view the official languages should be used as extensively as possible in order to enhance public awareness of ICC practice and jurisprudence through wide dissemination. The other view is that the use of official languages should be limited in order to reduce costs and the potential delays involved in obtaining written translations.

The Rules also entrench the Presidency’s mandatory and discretionary powers in relation to language issues. The discretionary element of the Presidency’s role is a positive step; it provides an important and necessary level of flexibility that will allow the Court to react to changing circumstances.

The Regulations of the Court provide further specificity to these provisions. Regulation 39 contains provisions regarding language requirements and regulations 40 sets out the provisions regarding the language services of the Registry.

The Regulations of the Registry set out the manner in which the language services of the registry provide translation and interpretation services¹⁰. Regulations 57–60 provide the general provisions regarding the provision of interpretation, translation, editing and revision

² Article 18, 1994 ILC Draft Statute.

³ Preparatory Committee (Consolidated) Draft, p. 87.

⁴ Article 39, Statute of the ICJ.

⁵ See the Rules of Procedure and Evidence, adopted rule 51, UN Doc. A/520/Rev.15 (1985) and UN Doc. ST/SGB/212 (1985).

⁶ See rule 9(b) of Rules of Procedure (Adopted 29 Oct. 1945), Trial of the Major War Criminals Before the International Military Tribunal, Vol. I, Nuremberg 14 Nov. 1945–1 Oct. 1946, (1995) 22.

⁷ Trial of the Major War Criminals (1995), note 6, p. vii.

⁸ *Supra* note 6.

⁹ See rules 2(a) and 3 of Rules of Procedure (adopted 29 Oct. 1945), Trial of the Major War Criminals (1995), note 6, pp. 19 and 30.

¹⁰ Chapter 2 section 2, Regulations of the Registry.

services. Court, conference and field interpretation are dealt with in regulations 61– 69 and translations are addressed in regulations 70–75. A number of these language regulations were amended in 2013 to address issues in need of reform that had been identified through their practical application in the preceding years¹¹.

B. Analysis and interpretation of elements

I. Paragraph 1

1. ‘official languages’

Under article 50, the judgments of the Court must be published in all six (6) official 4 languages; moreover, ‘other decisions resolving fundamental issues before the Court’ must also be published in all official languages. The decision as to ‘which decisions may be considered as resolving fundamental issues’ is left to the Presidency, which is to be guided by criteria established in the Rules of Procedure and Evidence.

This situation contrasts with that of the *ad hoc* Tribunals’ Statutes which, following the 5 precedent of the ICJ¹², employed English and French as working languages¹³ but did not designate official languages. Similarly, neither the Special Court for Sierra Leone, nor the Extraordinary Chambers in the Courts of Cambodia have designated official languages. However they provide for working languages being English for the SCSL¹⁴ and Khmer, English and French for the ECCC.¹⁵ The working languages are effectively the official languages of these judicial bodies with judgments and other decisions being published in them.

In addition to its two working languages, the ICTY has interpreted proceedings and translated a number of its decisions and in particular its judgments, into the languages of the former Yugoslavia, including Bosnian/Croatian/Serbian (‘BCS’)¹⁶. This practice is consistent with rule 144 sub-rule 2 of the Rules of Procedure and Evidence of the Court, which provides that certain fundamental decisions, including those regarding the criminal responsibility of the accused, be provided to the accused in a working language of the court and in a language the accused fully understands, if this is necessary to meet the requirements of fairness under article 67, paragraph 1(f). At the ICTY, this practice also facilitated outreach through the dissemination of information regarding the work of the tribunal in the areas in which crimes occurred. Similarly, in addition to working in French and English, the ICTR also interpreted proceedings and published some of its judgments into Kinyarwanda¹⁷.

In contrast to these tribunals and courts, and consistent with the ICC approach, article 14 of the statute of the Special Tribunal for Lebanon expressly differentiates between the official languages of Arabic, French and English and its working languages. However the working languages are not expressly enumerated. At the STL the pre-trial judge or chamber has the discretion to decide that one or two of the official languages may be used as working languages as appropriate on a case by case basis.¹⁸ All STL decisions must be rendered in

¹¹ ICC Press Release, The ICC Presidency approves amendments to the Regulations of the Registry, ICC-CPI-20131205-PR970.

¹² Article 39, Statute of the ICJ.

¹³ Article 33, ICTYS and article 31,ICTRS.

¹⁴ Article 24, Statute of the SCSL.

¹⁵ Article 45 new, Law on the Establishment of the Extraordinary Chambers, with inclusion of the amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

¹⁶ The ICTY has an obligation to provide accused persons with a copy of the judgment in a language they understand pursuant to rule 98 *ter* (D) ICTY RPE.

¹⁷ Kinyarwanda at the ICTR and BCS at the ICTY were so commonly used in translation and interpretation that have been characterized as *de facto* working languages, see Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal A Judge’s Recollection* (OUP 2012) 20.

¹⁸ Also see rule 10(B), STL RPE.

English or French and fundamental decisions including judgments must be translated into Arabic, and a language that the accused understands if he is in custody¹⁹.

- 6 In practice, the judges of international courts and tribunals usually draft joint decisions and judgments in one of the working languages of the court. The original version is then translated into other working and/or official languages. In some cases there have been substantial delays in issuing translations which have been caused or compounded by a lack of resources and qualified translators.

2. 'other decisions resolving fundamental issues before the Court'

- 7 Paragraph 1 of article 50 provides that the Presidency shall determine which other decisions of the Court resolve fundamental issues and these decisions shall also be published in the Court's official languages. The use of the term 'resolving', in relation to the 'fundamental issues' in question is somewhat curious as this provision could be interpreted to apply only in decisions that not only address a 'fundamental issue' but also actually 'resolve' it. Thus, it could be argued that decisions that discuss important issues but which do not resolve those issues do not fall within the ambit of this provision. More significantly, the decision must resolve a 'fundamental issue before the Court'. It is submitted that 'fundamental issue' in this context does not refer necessarily to an important issue in that particular case but is intended to apply to decisions that have a wider impact. For example, those decisions that touch upon the Court's jurisdiction, involve an interpretation of an element of the Statute or establish an important principle. Given that the Court may have many decisions that will involve such routine matters as scheduling, and in view of the costs involved in making such translations, the criteria established in the Rules should be strict, providing for publication only in the instances noted above.

- 8 Apart from judgments, no other specific categories of decisions were designated for publication into the official languages by article 50. Rule 40 amplifies article 50 para. 1 by providing greater specificity in this regard. This rule creates three categories of decisions. Rule 40 sub-rule 1 sets out the first category of decisions that *shall* be considered as resolving fundamental issues and therefore will always be published in the official languages. The list is broad and contains the most important types of decisions from jurisdiction and admissibility to judgments, sentences and appeals. It is noteworthy that the practice of the ICTY has been to publish judgments, sentences and appellate judgments in the BCS language, reflecting the importance of their dissemination in the region to which they relate.

The second category in rule 40 sub-rule 2 relates to two important types of decisions which *may* be considered as resolving fundamental issues: decisions on confirmation of charges and decisions on offences against the administration of justice. In this case the Presidency is granted the discretion to decide on a case by case basis whether they should be published in the official languages. The reason underlying this approach is clear. Decisions on confirmation set out the first public assessment of the Court as to the charges that the accused will face at the trial. Moreover, decisions regarding offences against the administration of justice may also be of fundamental importance (particularly to counsel) because they clarify the types of behavior that can attract sanctions including imprisonment. The deterrence value of such decisions would arguably be enhanced by the widest possible dissemination.

Rule 40 sub-rule 3 is a catch all provision governing other types of decisions not specified elsewhere. It provides the Presidency with the broad discretion to publish other decisions if they concern major issues relating to the interpretation or implementation of the Statute or concerning a major issue of general interest.

Sub-rules 2 and 3 of rule 40 provide for the exercise of discretion by the Presidency. The structure of the rule arguably creates a priority of consideration. Thus the rule may be interpreted as requiring the Presidency to consider confirmation and administration of

¹⁹ Rules 10(E) and 168(C), STL RPE.

justice decisions as a matter of priority and then to consider other decisions not falling into those categories, for publication in the official languages.

Court regulation 40 sub-regulation 1 states that the Registrar shall ensure that the decisions and texts envisaged in article 50 para. 1 and in rule 40, are translated into all the official languages of the Court.

II Paragraph 2: Working languages

Article 50 para. 2 is straightforward. As is the case in the United Nations Secretariat, the Court's working languages are English and French²⁰. This basic provision is reflected in the Court's Regulations. Regulation 39 sub-regulation 1 states that all documents filed with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules or Regulations or authorized by the Chamber or Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation. Sub-regulation 2 states that this provision will not apply to victims who are not represented and do not have a sufficient knowledge of the working language of the Court or an authorized language. In this case the Registrar will be responsible for both interpretation and translation of all documents and materials filed with the Registry pursuant to Court regulation 40 sub-regulation 4. These regulations have the effect of mandating that all Court filings must be in one of the working languages of the Court. If participants in the proceedings cannot file in one of the working languages then they are responsible for obtaining and filing a translation of the filing into one of the working languages.

The fact that Court decisions and judgments are done in English and in French does not signify that both versions will be provided at the time of filing but rather, that there will be a filing in one working language and a translation into the other working language. Extensions of time limits will generally not be granted where a party has timely access to a filing in one working language which is not its language of choice, pending that filing's translation into the other working language, which the party (better) understands. However such extensions may be granted on a case by case basis if good cause is established, particularly if the cause relates to the fairness of proceedings²¹.

Article 50 para. 2 of the Statute allows for the Rules to 'determine' that other official languages be used as working languages. Thus, for example, the Rules could have provided that if the Court's docket included a substantial number of cases from a particular region of the world where one of the official languages is widely spoken, an official language would become a working language. Moreover, if the United Nations were to ever decide to change its working languages by adding an additional working language(s), the Court would likely follow suit.

Paragraph 2 of article 50 can be contrasted with paragraph 3 of the same article. Paragraph 2 is broader in the sense that it applies to the use of an official language as a working language by the Court, its personnel and all the parties to a proceeding. On the other hand paragraph 3 allows a party to use *any* language apart from the working languages of the Court, notwithstanding the designated working language of the Court.

The circumstances under which an official language can be authorized as a working language of the Court under article 50 para. 2 is specified under rule 41. This rule contains

²⁰ *Supra* note 5.

²¹ *Prosecutor v. Lubanga Dyilo*, No. ICC-01/04-01/06, Decision on defence request for extension of time, Trial Chamber I, 22 January 2008, paras.12–16; *Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08 OA 7, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber HI of 27 June 2011 entitled Decision on Applications for Provisional Release, Appeals Chamber, 19 August 2011, paras. 22–24; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 OA 3, Decision on the Central African Republic's request for an extension of the time limit, Appeals Chamber, 8 September 2010; *Prosecutor v. Katanga*, No. ICC-01/04-01/07 A, Decision on the requests of Mr. Germain Katanga and the Prosecution relating to the time limits for their filing on appeal, Appeals Chamber, 4 April 2014. Also see Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 638–640.

both mandatory and discretionary components. The ultimate aim of each of these provisions appears to be the promotion of judicial efficiency and economy.

Under sub-rule 1(a) the Presidency is obliged to authorize the use of an official language as a working language when the language is understood and spoken by a majority of the participants in a proceeding and any of those participants requests its use. Thus, this provision would be applicable where the majority of witnesses and the accused speak and understand an official language. In these circumstances the use of the official language as a working language would promote the conduct of a more efficient proceeding, which could be conducted more economically and expeditiously than a proceeding requiring constant translation into the working languages of French and English.

Sub-rule 1(b) also imposes a mandatory obligation upon the Presidency to authorize the use of an official language as a working language if both the Defence and the Prosecution so request. This provision requires agreement between counsel as to the use of language for some reason other than it is the common language of the majority of the parties. For example this provision could be applied in a case which is based on a large volume of documentary evidence in an official language other than one of the working languages. In these circumstances, using an official language as a working language would save substantial resources and time. This has been an issue in some ICTY leadership prosecutions that have involved thousands of BCS documentary exhibits. The translation of those documents into both working languages of the ICTY has required the dedication of substantial resources and time.

Finally, rule 41 sub-rule 2 contains a residual discretionary provision, granting the Presidency the broad power to authorize the use of an official language as a working language if it considers that it would facilitate the efficiency of proceedings. This provision can be triggered upon the request of the Presidency, parties or counsel and can be distinguished from the preceding provisions which can only be triggered by parties and counsel respectively.

- 14 In practice, the potential efficiency gains that could be derived from the designation of an official language as a working language are heavily dependent on parties, counsel and judges having a working knowledge of that language, and thus reducing the practical necessity for translation into the permanent working languages of French or English. Court regulation 40 sub-regulation 2(a) states that the Registrar shall ensure that interpretation services are provided in all proceedings for English and French and any other official language used as a working language in accordance with rule 41. The Registrar shall also ensure the translation into the other working languages of all decisions or orders taken by the Chambers during proceedings pursuant to regulation 40 sub-regulation 3. A noticeable aspect of these provisions is that they are silent as to who is responsible for the translation of documents or materials which are used as exhibits in the proceedings. This may be indicative of a practice whereby the parties initially translate their exhibits subject to revision by Registry translators. In the case of the OTP, its languages services unit translates documents which are potentially relevant to situations and cases²². If those documents are submitted as exhibits, the Registry's translation section can then revise those translations, as they constitute official court documents²³. The translation of exhibits is a critical issue. High level cases commonly involve hundreds and even thousands of documentary exhibits. Often such evidence will be central to the determination of guilt or innocence. The translations of such documents must be prepared on a confidential basis and they must be ready in a timely fashion. Most importantly they must be accurate. Failure to provide accurate and timely translation of exhibits in a high-level document-based litigation may jeopardize the right of the accused to a fair and expeditious trial and therefore threaten the viability of proceedings themselves.

²² Regulation 10(c) of the Regulations of the OTP. Most of the translation work done for an international prosecution is not introduced as exhibits but is used as working documents during the investigation or as disclosure material, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Second session, New York, 8–12 September 2003 (ICC-ASP/2/10), part II, para. 64.

²³ Section 2, Regulations of Registry.

III. Paragraph 3

1. Authorization of a language other than English or French

As noted in the previous discussion, regardless of the designation of official and working languages, an accused has a right to understand the charges against him/her and to respond to those charges. In order to do so, it is generally necessary for the accused to use his/her own language in the course of the proceeding, *e.g.* to testify. Thus, the *ad hoc* Tribunals have adopted rules that provide that the accused has ‘the right to use his own language’²⁴ and that others appearing before the Tribunal may also use their own languages if they do not have a sufficient knowledge of one of the working languages²⁵. 15

It is notable that SCSL, ECCC and the STL have included official or working languages that are commonly used in a single geographical region where crimes were committed. This means that many accused and a significant proportion of victims, witnesses and affected communities should be able to understand court documents and proceedings without the need for translation and interpretation beyond those official or working languages. In contrast, the situations with which the Court deals concern many different geographic regions in which various languages are used. These can increase with the opening of new investigations. This is illustrated in estimates for 2015 which indicated that, in addition to the official and the working languages of French and English, an additional 11 languages would be used in the court room²⁶.

2. Authorization adequately justified

As discussed above, the Court will have to ensure the protection of the rights of the accused and the fairness of the proceedings generally. In this regard, the approach adopted by the *ad hoc* Tribunals, *i.e.* allowing for the accused and other witnesses to use their own languages, ensures that human rights guarantees are protected. In addition, the Court must provide for interpretation to the accused. This step, which has also been followed in the *ad hoc* Tribunals, is required by the ICCPR: ‘[Everyone charged with a criminal offence shall have the right] ... [t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court ...’²⁷. 16

This right has been enshrined in article 67, paragraph 1(f) of the Statute which provides that an accused must have the assistance of an interpreter and such translations that are necessary to meet the requirements of fairness if the proceedings or documents presented are not in a language they fully understand and speak. Similarly, pursuant to article 67, paragraph 1(a) a suspect has a right to be informed about the charges in a language they fully understand and speak. This right has been incorporated into the Court’s Regulations. Regulation 40 sub-regulation 2(b) states that the Registrar shall ensure that interpretation services are provided in all proceedings for the language of the person to whom article 58 applies (a person who is subject to a warrant of arrest of a summons to appear), the accused, convicted or acquitted person if he or she does not fully understand or speak any of the working languages.

A request for translation into a language the accused fully understands will be granted unless it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing their right under article 67 of the Statute. An accused is considered to fully understand and speak a language when they are completely fluent in the language in ordinary, nontechnical conversation. It is not required that they 17

²⁴ Rule 3(B), ICTY RPE.

²⁵ Rule 3(C), ICTY RPE.

²⁶ Proposed Program Budget for 2015 of the International Criminal Court (ICC-ASP/13/), Annex III.

²⁷ Article 14 ICCPR.

have an understanding as if they were trained as a lawyer or judicial officer. If there is any doubt as to whether a person fully understands and speaks the language of the Court, their request for another language should be accommodated²⁸.

Pursuant to regulation 40 sub-regulation 6 the Registrar shall also ensure translations of all decisions or orders in his or her case however it will be the Defence Counsel's responsibility to inform that person of the other documents in his or her case.

- 18 The import of these provisions taken as a whole is that the Registry will provide interpretation of proceedings and translations of Court decisions for accused persons who do not speak or understand the working languages fully. The Defence will be responsible for providing for interpretation and translations outside these parameters including the translation of exhibits.

Pursuant to Court regulation 40 sub-regulation 6 the Registrar shall also ensure translations of all decisions or orders in the case of suspect questioning pursuant to article 55 para. 2 however it will be Defence Counsel's responsibility to inform that person of the other documents in his or her case. The Prosecution is required to provide interpretation into a language that the person being questioned understands during the questioning²⁹. Presumably the same requirement would apply to a State authority which was conducting such questioning.

- 19 According to Court regulation 39 sub-regulation 3 when a Chamber authorizes the use of a language other than English or French by a participant, and following consultation with the Registrar, the expenses for interpretation and translation shall be borne by the Court. If such an authorization is made, the Registrar is obliged to ensure that interpretation services are provided pursuant to Court regulation 40 sub-regulation 2(c), however there is no such stated obligation in respect of translation.

Regulation 39 sub-regulation 3 requires the Chamber to consult with the Registrar before making such an authorization. This is a sound practical requirement. The Registrar is responsible for the interpretation of the proposed authorized language. Therefore he is in a position to know the practical and resource implications of authorizing a non-working language and can advise the Chamber accordingly. In addition, this regulation provides that should such an authorization be made the costs for both translation and interpretation will be borne by the Court. The budgetary costs of providing translation and interpretation services for pre-trial, trial and appellate proceedings in the ICTY and ICTR have proven to be substantial. In this regard, the ICC's Committee on Budget and Finance has expressed concern at the increasing burden of translation costs on the budget of the Court³⁰. Requiring that these substantial costs be borne by the Court, in contrast to English or French for which staff and resources already exist, will act as a practical barrier to such authorizations. In principle, when making such a decision the Court must weigh the rights of the accused to a fair trial and the interests of justice. In practice this provision could result in such authorizations being made in circumstances where the failure to do so would most probably lead to an unfair trial.

IV. Rules and regulations of general application to article 50

- 20 The abovementioned provisions must be read in light of the general provision in rule 42 which obliges the Court to arrange for translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and Rules. This provision

²⁸ *Prosecutor v. Katanga*, No. ICC-01/04-01/07 (OA 3), Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled Decision on the Defence Request Concerning Languages, Appeals Chamber, 27 May 2008, para. 61. For an example of a refusal to interpret and translate into another language, see *Prosecutor v. Ruto et. AL*, No. ICC-01/09-01/11, Decision on Joshua Arap Sang's Request for Translation and Interpretation into Kalenjin, Pre-Trial Chamber II, 6 April 2011.

²⁹ Regulation 42, Regulations of the OTP.

³⁰ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November – 14 December 2007 (ICC-ASP/6/20), vol. II, part B.2, para. 70.

places a substantial financial burden upon the Court while at the same time granting it the discretion to exercise its power in accordance with its primary obligation to ensure fair and expeditious proceedings. In the ICTY the requirements stemming from the translation of huge volumes of documentary material had, at times, practically overwhelmed the Tribunal's translation services and meant that much of the substantial burden of translation fell upon the parties, particularly the prosecution.

The issue of funding is fundamental in this context. The Court must be provided with and then allocate adequate resources to fulfill its obligations under rule 42. If these resources are not forthcoming and this results in large translation backlogs then proceedings may be delayed. This could potentially undermine the Court's obligation to ensure fair and expeditious proceedings.

Finally rule 43 obliges the Court to ensure that all published documents respect the confidentiality of proceedings and the security of victims and witnesses. The reasons for this rule are apparent. This provision has resource implications. It will in practice require the redaction of documents, transcripts and other official publications. Rule 43 could be interpreted as requiring the Court to order the parties to make appropriate redactions before publication. It could also be interpreted as permitting the Court staff to make those redactions in consultation with the parties. This is consistent with Registry regulation 73 which provides that should a Chamber, party or participant wish to redact a translation of their own filing, it is their responsibility to do so upon the official translation. 21

Article 51

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority; or
- (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Literature: Affolder, N.A., 'Tadić, the Anonymous Witness and the Sources of International Procedural Law', (1998) 19 *MichJIL* 445; Ambos, K., 'International Criminal Procedure: "Adversarial", "Inquisitorial", or Mixed?', (2003) 3 1; Broomhall, B., *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press 2003); Fernández de Gurmendi, S. And Friman, H., 'The Rules of Procedure and Evidence of the International Criminal Court', (2000) 3 *YbIHumL* 289; Friman, H., 'Procedural Law of the International Criminal Court: an Introduction', in: F. Lattanzi and W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, ii (iSirente 2004) 201; Kreß, C., 'The Procedural Law of the International Criminal Court', in: Outline: Anatomy of a Unique Compromise, (2003) 1 *JICJ* 603; *id.*, 'The Procedural Texts of the International Criminal Court', (2007) 5 *JICJ* 537; Nsereko, D.D.N., 'Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia', in: Clark, R.S. And Sann, M. (eds.), *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia* (Trannational Publishers 1996) 213; Triffterer, O., 'Der Ständige Internationale Strafgerichtshof – Anspruch und Wirklichkeit, Anmerkungen zum 'Rome Statute for the International Criminal Court' vom 17. Juli 1998', in: K.H. Gössel and O. Triffterer (eds.), *Gedächtnisschrift für Heinz Zipf* (Müller 1999) 495.

Content

A. Introduction/General remarks	1
I. Historical development to the end of the Rome Diplomatic Conference.....	1
II. Purpose	8
III. Historical development post-Rome	9
1. Major steps in the development of the Rules	9
2. The Scope and final structure of the Rules.....	16
B. Analysis and interpretation of elements	20
I. Paragraph 1	20
1. 'enter into force'	20
2. 'upon adoption'	21
II. Paragraph 2	23
1. 'Amendments ... may be proposed'	23
2. 'shall enter into force'	24
3. 'adoption by a two-thirds majority'	25
III. Paragraph 3	27
1. 'After the adoption'	27
2. 'provisional Rules'	28
IV. Paragraph 4	31
1. 'consistent with this Statute'	31

2. 'not be applied retroactively'	33
V. Paragraph 5: 'conflict between the Statute and the Rules'	34
C. Special remarks	35
I. Binding nature of the Rules	35
II. Statutory references to the Rules	40
III. Summary of amendments made to the rules since their initial adoption	41
IV. 'A Unique compromise': National legal traditions and international norms ...	42

A. Introduction/General remarks

I. Historical development to the end of the Rome Diplomatic Conference¹

The precursor to article 51 first appeared in the Draft Statute prepared by the International Law Commission in 1994.² article 19 ('Rules of Court') of the ILC Draft was designed in the belief that it would be cumbersome and inflexible to include all rules of procedure and evidence in the Statute itself, and that the Rules should be drafted by the judges of the Court, subject to the approval of States Parties.³ They would regulate investigations, procedure, evidence and 'any other matter which is necessary for the implementation of this Statute'. The ILC Draft contemplated that even the initial Rules would be drafted by the judges and submitted to a conference of States Parties (article 19 para. 2). While these initial Rules would be subject to positive State approval, Rules subsequently adopted by an absolute majority of judges would be subject only to a passive approval method whereby they would be transmitted to States Parties and could be confirmed by the Presidency six months thereafter unless a majority of States Parties objected (article 19 para. 3). Such subsequent Rules could be submitted to a conference of States Parties at the judges' discretion (article 19 para. 2). A rule could provide for its provisional application pending approval or confirmation (article 19 para. 4).

The discussions in the 1995 Ad Hoc Committee acknowledged the substantive importance of the Rules, and delegates questioned whether they should not be elaborated by States at the same time as – and even included wholly or partially within – the Statute itself.⁴ Similar concerns were reflected in the 1996 Preparatory Committee Report.⁵ When the Preparatory Committee agreed that the principle of legality required that fundamental principles of criminal law be included either in the Statute or in an annex of equal legal value, some delegates argued that the judges, subject to approval by States Parties, could still include within the Rules detailed or technical specifications that supplemented or elaborated their provisions. This indicated an awareness of the seamless gradient extending between the 'fundamental' or 'substantial', to be contained in the Statute, and the 'technical' or 'procedural', suitable for the Rules.⁶ Opinion was, in essence, divided between those attributing greater weight to the principle of legality and seeking to have all provisions of any weight

¹ See generally Chapter 8, 'International Criminal Law Procedures', and in particular Fernández, in: Lee (ed.), *Making* (1999) 217, 217–293 and 217 respectively.

² ILC Draft Statute for an International Criminal Court, in *Report of the International Law Commission on the Work of its Forty-Sixth Session*, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994) 43, p. 64; reprinted in: Bassiouni, *Compilation* (1998) 721, 727.

³ 1994 ILC Report, *ibid.*, commentary para. 2, p. 65.

⁴ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), para. 26, p. 5 and para. 131, p. 30; reprinted in: Bassiouni, *Compilation* (1998) 667, 672 and 696.

⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996), 2 Vols., para. 50, p. 15 (Vol. I), reprinted in: Bassiouni, *Compilation* (1998) 363, 383. The proposals put forward by France, Finland, and Australia and the Netherlands are found in *ibid.*, Vol. II, pp. 51–53; Bassiouni, *Compilation* (1998) 482–483.

⁶ For the lack of consensus in both national and international law as to the contours of 'procedure' and 'substance', see Affolder (1998) 19 *MichJIL*. 445, 471–474.

included within the Statute, and those seeking instead to avoid turning the Statute into an exhaustive criminal code with the long delays this would entail. For the former, giving ‘legislative power’ to judges was abhorrent to the rule of law; for the latter, it was a welcome sign of institutional adaptability.⁷ The ‘grey zone’ between Statute and Rules, between the ‘basic’ and the ‘subsidiary’, was given ongoing attention as delegates negotiated the attribution of subjects to each category. At stake were the length and complexity of negotiations, the efficiency of the Court, the rights of suspects and the accused (through an exacting interpretation of the principle of legality) and, ultimately, the extent to which States Parties (rather than the judiciary) would determine the procedures and standards by which their agents or those within their jurisdiction would be affected.

- 3 Article 43 of the Zutphen Draft⁸ reflected the differences raised at the Preparatory Committee, retaining the basic structure of the ILC formulation but adding bracketed language conferring on States the right to make or amend Rules after the initial Rules were adopted. This addressed a shortcoming of the ILC Draft whereby *only* judges would be able to make such subsequent Rules. In addition to the ‘passive approval’ method carried over from the ILC Draft, a new paragraph (article 43 para. 5) would have allowed the judges themselves to adopt ‘supplementary rules’ by absolute majority. This reflected the same belief raised during discussions, that the judges should have an independent rule-making power in subsidiary matters, although the word ‘supplementary’ contained the clear potential to create confusion. The Zutphen Draft also included a new bracketed paragraph in article 43 providing simply that the rules of organization, functioning and procedure of the Court not set out in the Statute would appear in the Regulations and the Rules of Procedure. Apart from declaring the existence of the Rules, this emphasized their open-ended character.⁹
- 4 When the Diplomatic Conference convened in Rome on 15 June, it had before it the Draft Statute prepared by the Preparatory Committee at its session of 16 March to 3 April 1998. This contained a substantially rewritten article 52¹⁰ containing elements that were ultimately carried over into the final text. The first paragraph listed two options, one stating that the Rules (and the Elements of Crimes that they, under this formulation, would contain) were an integral part of the Statute, and the other stating simply that they were to enter into force upon adoption by the Assembly of States Parties. A requirement for the consistency with the Statute of both the Rules and any subsequent amendment to them was introduced.¹¹ The power of the Prosecutor, in addition to that of the judges and of States Parties, to propose amendments was added in square brackets.
- 5 Much of article 51 of the Preparatory Committee Draft Statute was reflected in the recommendations put forward to the Committee of the Whole by the Co-ordinator, Professor Medard Rwelamira of South Africa, on 4 July 1998.¹² This formulation was reproduced, with textual changes introduced by the Drafting Committee, in the text proposed by the Bureau on 16 July,¹³ and was adopted without change as article 51 of the final Statute. Article 51 para. 1 retained Option 2 of the Preparatory Committee Draft (‘enter into force’), while Option 1 (‘integral part’) was deleted. In addition to some restructuring and refinement of language, the final text goes beyond the Preparatory Committee Draft in

⁷ 1996 Preparatory Committee Report, paras. 180–185 and para. 214, pp. 41–42 and 47; Bassiouni, *Compilation* (1998) 408–409 and 414.

⁸ Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13 (1998), 83; reprinted in: Bassiouni, *Compilation* (1998) 143, 197.

⁹ See also note 44 and accompanying text.

¹⁰ Draft Statute for the International Criminal Court, Part 1 of the Addendum to the Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (1998), p. 87; reprinted in: Bassiouni, *Compilation* (1998) 7, 57.

¹¹ The Nuremberg Charter contained such an express requirement in its article 13, but its inclusion was thought unnecessary by the drafters of the Statutes of the Yugoslav and Rwanda tribunals: Morris and Scharf, *Insider’s Guide* (1995) 409 and fn. 1446, p. 419.

¹² UN Doc. A/CONF.183/C.1/L.45 (4 July 1998), at p. 11 and Add.1 (7 July 1998), p. 2.

¹³ UN Doc. A/CONF.183/C.1/L.76/Add.4 (16 July 1998), pp. 13–14.

prohibiting retroactive application of amendments or provisional Rules to a person's detriment (article 51 para. 4) and in providing that the Statute prevails over the Rules in case of conflict between them (article 51 para. 5).

The ILC Draft (article 19 para. 2) and the Zutphen Draft (article 43 para. 2) anticipated that the judges would draft the initial Rules, subject to adoption (presumably after review and possible amendment) by the Assembly of States Parties. The Preparatory Committee Draft – completed just over two months after the Zutphen meeting – deletes mention of initial drafting by the judges, retaining only reference to adoption by the Assembly. This is due to the appearance of the Draft Final Act,¹⁴ which included a draft resolution (for approval by the Diplomatic Conference) proposing formally what had frequently been suggested – that the initial Rules be drafted by States rather than the judges. The Draft Final Act called for the establishment of a Preparatory Commission consisting of all States which signed the Final Act and all States invited to participate in the Conference. The Commission would, *inter alia*, prepare the draft text of the Rules 'on a priority basis' for submission to the Assembly of States Parties at its first meeting.¹⁵ The Assembly would then adopt these Rules in accordance with the terms of the final Statute.

At the Diplomatic Conference, the Committee of the Whole appointed Mr S. Rama Rao of India as Co-ordinator of the informal consultations on the Draft Final Act. Mr. Rao's recommended draft resolution was unchanged in relevant respects from that of the Preparatory Committee.¹⁶ In the Bureau proposal of 16 July 1998, the words 'on a priority basis' are replaced by a new paragraph stating that '[t]he draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes shall be finalized before 30 June 2000'¹⁷ – a clarification that aims to ensure that no late adoption of these instruments would endanger the prompt establishment of the Court.¹⁸ Resolution F was adopted without material change at the close of the Conference.¹⁹

II. Purpose

The Rules provide a source of norms aimed at ensuring the effective operation of the Court; they are 'designed to underpin the statutory provisions, harmonize inconsistencies, and fill procedural gaps in the Statute, and to clarify the inter-relationships of all the parties involved in the proceedings before the Court'.²⁰ Together with other subsidiary documents,²¹ the Rules supply the detail which the Statute cannot realistically incorporate and will become a repository for those standards and working methods which only experience will clarify. Clearly, the mere efficiency of the Court cannot be the only consideration for an institution aiming to supply just outcomes while being seen to uphold the highest international standards of fairness. The Rules need to counter-balance their own potential for flexibility with considerations of fairness to suspects and the accused (and of respect for victims and witnesses). While taking into account their practical and subsidiary character, the Rules

¹⁴ Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Part 2 of the Addendum to the Report of the Preparatory Committee, note 10, p. 199; reprinted in: Bassiouni, *Compilation* (1998) 124.

¹⁵ Annex to Draft Final Act, *ibid.*, 204, paras. 2, 4 and 6, pp. 204–205; Bassiouni, *Compilation* (1998) 127–128.

¹⁶ UN Doc. A/CONF.183/C.1/L.49/Rev.1 (6 July 1998), pp. 9–10.

¹⁷ UN Doc. A/CONF.183/C.1/L.76/Add.14 (16 July 1998), para. 6, p. 10.

¹⁸ Kirsch, in: Lee (ed.), *Elements* (2001) xlv, xlvi.

¹⁹ 'Resolution F', Annex I to the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/10 (17 July 1998).

²⁰ Lee, in: Lee (ed.), *Elements* (2001) lv, lv-lvi.

²¹ This considerable corpus of instruments includes the Regulations of the Court; the Regulations of the Registry; the Agreement on Privileges and Immunities of the Court; the Relationship Agreement between the Court and the United Nations; the ICC-Netherlands Headquarters Agreement; the Code of Conduct for Counsel; and the Regulations of the Trust Fund for Victims. For the interrelationships between these various interlocking instruments, see Krefß (2007) 5 *JICJ* 537.

must therefore aspire to the stability and clarity required by the rule of law. The relative ease with which they can be adopted (see mn 23) will allow the Rules to safeguard the relevance and adaptability of the ICC in changing circumstances. Although the ICC Rules are first and foremost a reflection of the will of the Assembly of States Parties, it can be assumed that they will evolve organically over time to meet the needs of the Court, of the participants involved in its processes, and of States Parties, just as the (judge-driven) Rules for the ICTY and ICTR have done for their respective institutions (see mn 42 *et seq.*).

III. Historical development post-Rome

1. Major steps in the development of the Rules²²

- 9 Once the final text of Resolution F was adopted at the end of the Rome Diplomatic Conference (see mn 6–7), the General Assembly duly requested the Secretary-General to convene a Preparatory Commission to hold three sessions in 1999 in order to fulfil the purposes outlined in that resolution.²³ Further sessions followed through 30 June 2000, when the final draft text of the Rules of Procedure and Evidence was adopted by the Commission.²⁴ Meetings then continued work on the remaining items through 12 July 2002, when the Commission concluded its work, just as the Rome Statute entered into force.²⁵
- 10 In negotiating the Rules, States – beyond their bare objective of adopting a text before the deadline – were mindful of the need to respect the Statute, its integrity, and the many delicate compromises that had been adopted in the process leading to its adoption.²⁶ The importance attributed by States to the work of the PrepCom is evidenced by the fact that *all* States, and not only States Parties or States signatories, were invited to participate in the process.²⁷ The negotiation of the Rules, in particular, was always understood to form a key part of the PrepCom’s work, the significance of which had already been recognized by the fact that it would be States, rather than judges, that were to draft this document (mn 2–7). Thus, even States having no intention of becoming Parties to the Statute, but wishing to safeguard their position as non-parties, were given an opportunity to seek to prevent what they might regard as overreaching Court procedures, while undecided States would be able to inform their decisions on whether to sign or ratify the Statute, and how to implement it, in light of the outcome of discussions on the Rules.
- 11 In order for the Preparatory Commission to successfully complete negotiation of the Rules (along with the Elements of Crimes) by 30 June 2000, as mandated by Resolution F of the Diplomatic Conference’s Final Act (mn 7), the 5 sessions available to it had to be used with maximum efficiency. As a consequence, negotiations were intense and highly-structured. Under the overall leadership of the Preparatory Commission’s Bureau,²⁸ the overall work on the Rules was conferred upon a Working Group under the coordination of Sylvia Fernández

²² See generally, Kirsch, in: Lee (ed.), *Elements* (2001) xlix-li; Fernández, in: Lee (ed.), *Elements* (2001) 235; see also Kirsch and Oosterveld, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 93.

²³ GA Res. 53/105, UN Doc. A/RES/53/105 (8 Dec. 1998), para. 4. The dates fixed were 16 to 26 Feb., 26 July to 13 Aug. and 29 Nov. to 17 Dec. 1999.

²⁴ Finalized draft text of the Rules of Procedure and Evidence, Addendum I to the Report of the Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2000/1/Add.1 (2 November 2000).

²⁵ GA Res. 54/105, UN Doc. A/RES/54/105 (9 Dec. 1999), para. 3, fixed a further 3 sessions for 2000 (13 to 31 March, 12 to 30 June and 27 Nov. to 8 Dec.); GA Res. 55/155, UN Doc. A/RES/55/155 (12 Dec. 2000), para. 4, established 26 Feb. to 9 March and 24 Sept. to 5 Oct. As the dates for 2001; and GA Res. 56/85, UN Doc. A/RES/56/85 (12 Dec. 2001), para. 4, identified 8 to 19 April and 1 to 12 July for the final sessions of the PrepCom in 2002.

²⁶ Lee, in: Lee (ed.), *Elements* (2001), lviii; Fernández, in: Lee (ed.), *Elements* (2001) 235.

²⁷ Resolution F, note 19, para 2.

²⁸ Apart from the chairs and coordinators of the Working Groups, as well as various contact points for specific issues, the Bureau of the Preparatory Commission consisted of a Chair (Philippe Kirsch, Canada), three Vice-Chairs (George Winston McKenzie, Trinidad and Tobago; Medard Rwelamira, South Africa; and Muhamed Sacirbey, Bosnia and Herzegovina), and a Rapporteur (Salah Suheimat, Jordan).

de Gurmendi of Argentina, who had been responsible for chairing negotiations on procedural issues at Rome. The management of the process was further ‘decentralized’ with the establishment of Working Groups on Jurisdiction and Admissibility (Part 2 of the Statute), on the Composition and Administration of the Court (Part 4), on Penalties (Part 7), and on International Cooperation and Judicial Assistance, and Enforcement (Parts 9 and 10).²⁹ These sub-working groups frequently established further sub-units that met in informal consultations, where the bulk of the work was accomplished.³⁰ Much of the expertise that had been developed by delegations up to and through the Rome Diplomatic Conference was carried over into the discussions on the Rules (notably at the Coordinator and Bureau levels), ensuring a high level of continuity and procedural memory among participants. In addition, the Coalition of non-governmental organizations for the ICC played a key role in developing proposals and analysis that filtered through to governmental delegations and thus into proposals and texts.³¹

The beginning of the process was marked by the introduction of a broad template proposal by Australia in early 1999.³² This was followed by a detailed General Outline proposed by a leading Romano-Germanic (civil law) jurisdiction, i. e. France.³³ These two proposals served as a basis for the subsequent discussions, which broke up along a series of discrete sub-themes in which a great many more defined proposals were put forward, with progress being reflected in periodic discussion papers issued by the coordinators and sub-coordinators for the various issues. The five formal New York sessions were supplemented by an informal intersessional meeting held at Siracusa, Italy (in June 1999, and particularly significant with respect to evidentiary rules, conduct of trial and offences against the integrity of the Court), an ‘international seminar’ in Paris (in April 1999, and relating to victims’ participation and reparation) and another, smaller meeting in Siracusa (in February 2000, on victims such as children and disabled persons).³⁴ In addition, towards the end of the process, coordinators and sub-coordinators met in Mont Tremblant, Québec, Canada, to review the existing texts of the draft Rules as a whole with a view to identifying gaps and overlaps and making recommendations for delegations on the structure the Rules.³⁵

It was relatively easy to achieve agreement among delegates on certain formal issues, such as that the primacy of the Statute would be respected by avoiding repetition of its provisions in the Rules and, where this was not possible, by avoiding potentially confusing paraphrase.³⁶ But many contentious issues arose in the negotiation of Rules that either reinforced or supplemented the provisions of the Statute, some of which were already familiar from Rome and pre-Rome discussions. Some differences owed their difficulty to the (apparently) incompatible approaches of national legal systems (see mn 46–47): this was the case notably with disclosure and with the participation of victims and their legal representatives. Others were the result of broader value-based conflicts, such as those of privileges (for journalists, religious personnel, the International Committee of the Red Cross, and others), of the incrimination of family members (including the underlying, culturally-specific question of

²⁹ Coordinated by John Holmes of Canada, Medard Rwelamira of South Africa, Rolf Fife of Norway, and Phakiso Mochochoko of Lesotho respectively; Fernández, in: Lee (ed.), *Elements* (2001) 240–241; Kirsch, in: Lee (ed.), *Elements* (2001) II.

³⁰ Fernández, in: Lee (ed.), *Elements* (2001) 241; Lee, in: Lee (ed.), *Elements* (2001) lvii.

³¹ For a detailed discussion of civil society’s role, see Pace and Schense, in: Lee (ed.), *Elements* (2001) 705.

³² Fernández, in: Lee (ed.), *Elements* (2001) 241. The Australian draft was a version of a comprehensive set of Rules proposed prior to the Rome Statute, and updated in light of the latter: Proposal submitted by Australia: Draft Rules of Procedure and Evidence of the International Criminal Court, UN Doc. No. PCNICC/1999/DP.1 (26 January 1999).

³³ Proposal by France: General outline of the Rules of Procedure and Evidence, UN Doc. No. PCNICC/1999/DP.2 (1 February 1999).

³⁴ Fernández, in: Lee (ed.), *Elements* (2001) 242.

³⁵ Fernández, *ibid.*, 242. Outcome of the Intersessional Meeting held at Mont Tremblant, Canada, from 30 April to 5 May 2000, circulated at the request of Canada, UN Doc. No. PCNICC/2000/WGRPE/INF/1 (24 May 2000).

³⁶ Fernández, *ibid.*, 236.

the definition of ‘family’), or of the procedures and principles applicable with respect to allegations of sexual violence.³⁷

- 14 When the General Assembly, in its resolution requesting the Secretary-General to convene the Preparatory Commission, opened the way for the Commission was ‘to discuss ways to enhance the effectiveness and acceptance of the Court’, it formalized what was already the great likelihood that States would attempt to build into the Rules mechanisms addressing the concerns of those dissatisfied in one way or another with the Statute.³⁸ At the same time, the successful work of the Commission depended on taking care neither to increase nor to alter the obligations that had been agreed upon at Rome.³⁹ At the same time, the focus of Like-Minded States was inevitably on how to maximize the effectiveness of the Court while at the same time making concessions or crafting compromises that reduce friction and lead to greater support for the Court. Such an approach was made all the more essential by the fact that, although the Assembly would in principle be able to change whatever draft texts come before it, it was always recognized that in practice it would go to great lengths not to do so. Consensus around the adoption of the Rules (and other instruments prepared by the PrepCom) was viewed as an invaluable means to maximize the perceived legitimacy of the Court. Such contextual factors exerted an important, if essentially conservative, influence on the Bureau, on lead negotiators, and on delegates as a whole.
- 15 Although it came as no surprise to many, it was nonetheless to the credit of the Bureau and of leading delegations that the final draft text of the Rules was adopted by consensus (along with the final draft Elements of Crimes) at the 30 June 2000 meeting of the Preparatory Commission. Likewise, the Assembly of States Parties adopted the Commission’s final text by consensus and without change on 9 September 2002.⁴⁰ The final content and organization of the Rules of Procedure and Evidence is presented in broad outline below (margin Nos. 16 *et seq.*). Noteworthy as reflecting both improvements to the Statute and *rapprochement* between delegations is the integration of article 15 (which was agreed upon late in the Rome process) more clearly into the general pre-trial procedure reflected *inter alia* in article 53 (e.g. Rule 48); and Chapter 4 of the Rules (Provisions relating to Various Stages of the Proceedings), which clarifies that numerous provisions of Part 6 of the Statute (Trial) relating to evidence, disclosure, victims, etc., apply also at the Pre-Trial stage – an affirmation that could only be arrived at following extensive dialogue among delegates from different legal traditions.⁴¹ The successful work of the Preparatory Commission on its priority items on its agenda has been cited as process that deepened State understanding of and sympathy for the Court, and as a contributing factor to increased State support for this (then) emerging institution.⁴²
- Since their adoption, the Rules have been subject to modification on only three occasions, at the tenth (2011), eleventh (2012) and twelfth (2013) sessions of the Assembly of States Parties.⁴³

2. The Scope and final structure of the Rules

- 16 Article 51 neither specifically outlines the subjects proper to the Rules, nor limits them to those matters expressly referred to in the Statute, nor states outright that they may include

³⁷ Fernández, *ibid.*, 253–255; Kirsch, in: Lee (ed.), *Elements* (2001) I.

³⁸ ‘Resolution 53/105’, note 23, para. 4. It is under this heading that one might refer to the way in which proposals or concerns of the United States were variously incorporated, referred to other working groups, broken apart, resisted, or rendered anodyne: Fernández, in: Lee (ed.), *Elements* (2001) 246 (properly citing Rule 44 para. 2 on the effects of an article 12 para 3 declaration as an example of constructive U.S. engagement in the process). For a detailed discussion, see ‘Cornerstone or Stumbling Block? The United States and the ICC’, in: Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003) 163.

³⁹ Fernández, in: Lee (ed.), *Elements* (2001) 240.

⁴⁰ Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002, ICC Doc. ICC-ASP/1/3 (2002), para. 22.

⁴¹ Fernández, in: Lee (ed.), *Elements* (2001) 248–249.

⁴² Kirsch, in: Lee (ed.), *Elements* (2001) III–III.

⁴³ A summary of these amendments is presented under ‘Special Remarks’, at mn 41 below.

any subject relevant to the functioning of the Court.⁴⁴ The only plausible conclusion is that the Rules are free to encompass whatever the required majority of the Assembly of States Parties may feel would benefit from inclusion therein, constrained only by the requirement of compatibility with the Statute (mn 31–32). States opposed to adoption of a given Rule could of course seek to block the formation of a sufficient majority of the Assembly by arguing that a given norm is ‘substantive’ rather than ‘procedural’ and therefore inappropriate for the essentially subsidiary Rules, with their less stringent adoption and amendment procedures (i.e. As compared with those of the Statute, mn 36). Likewise, it is possible although unlikely that a given matter might ‘migrate’ from the Rules to the Statute on the same grounds, after initial inclusion in the former. In general, however, the content of the Rules is driven as much by the lack of time available at the Rome Diplomatic Conference as to a rigid application of any criterion of ‘significance’.⁴⁵

The Rules inevitably include a wide range of essential mechanisms, standards and guarantees. Express statutory references alone dictated that they would treat such vital subjects as, *inter alia*, procedures for removal from office of Court officers for serious misconduct, the participation of victims in the proceedings, and the factors to be considered in sentencing (mn 40). Other topics for discussion were added by footnotes included in various Working Group reports during the Rome Diplomatic Conference,⁴⁶ while many others were simply added by agreement among the delegates. The length at which the Rules treats its subjects varies considerably, sometimes in inverse proportion to the degree of detail found in the Statute.⁴⁷

As finally adopted after discussion of the Mont Tremblant outcome document towards the end of the June 2000 negotiations,⁴⁸ the Rules are divided into the following 12 chapters, broadly tracking the structure of the Rome Statute itself:

- Chapter 1: General provisions;
- Chapter 2: Composition and administration of the Court;
- Chapter 3: Jurisdiction and admissibility;
- Chapter 4: Provisions relating to various stages of the proceedings;
- Chapter 5: Investigation and prosecution;
- Chapter 6: Trial procedure;
- Chapter 7: Penalties;
- Chapter 8: Appeal and revision;
- Chapter 9: Offences and misconduct against the Court;
- Chapter 10: Compensation to an arrested or convicted person;
- Chapter 11: International cooperation and judicial assistance;
- Chapter 12: Enforcement.

⁴⁴ The ILC Draft did so by giving judges the power to ‘make ... rules ... including rules regulating: (a) the conduct of investigations; (b) the procedure to be followed and the rules of evidence to be applied; (c) any other matter which is necessary for the implementation of this Statute’. 1994 ILC Draft, note 2, article 19 para. 1, p. 64; Bassiouni, *Compilation* (1998), 727–728. The Zutphen Draft carried this provision forward and emphasized the potential breadth of the Rules by preceding it with a bracketed article 43 para. 0: ‘The rules of organization, functioning and procedure of the Court not set out in this Statute shall appear in the Regulations and the Rules of Procedure of the Court’. Zutphen Draft, note 8, 83; Bassiouni, *Compilation* (1998), 197.

⁴⁵ Kreß (2007) 5 *JICJ* 537, 539–540.

⁴⁶ Fernández, in: Lee (ed.), *Elements* (2001) 245; these footnotes were gathered together in one document by the UN Secretariat: References to the Rules of Procedure and Evidence found in the Rome Statute of the International Criminal Court and in the relevant documents of the United Nations Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court: Note by the Secretariat, UN Doc. PCNICC/1999/L.2 (26 January 1999).

⁴⁷ Kirsch, in: Lee (ed.), *Elements* (2001) li; Kirsch and Oosterveld, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 93, 100 (citing the very simple Rules relating to the elaborate provisions of Part 9 on cooperation, and the very elaborate Rules relating to the rather sparse Part 10 on enforcement); Fernández, in: Lee (ed.), *Elements* (2001) 246, in the same sense (citing also the example of offences against the integrity of the Court, to which very little time was devoted at Rome, but detailed provisions adopted in the Rules, p. 250).

⁴⁸ Fernández, *ibid.*, 243.

- 19 Part 4, inspired by the insight of France as contained in its General Outline proposal, suspends the general structural tendency of following the Statute in order to bring together elements that apply across all or at least a broad range of ICC procedure (evidence, disclosure, victims, and other).⁴⁹

B. Analysis and interpretation of elements

I. Paragraph 1

1. ‘enter into force’

- 20 Entry into force renders the provisions of the Rules of Procedure and Evidence binding on all those actors that find themselves under a duty to the Court (including the Prosecutor, defence counsel, the judges of the Court, witnesses, and relevant personnel of States Parties) to the extent that their actions are addressed by them (and of course, to the extent that the Rules are not found to be inconsistent with the underlying provisions of the Statute, mn 31–32). The reasoning behind this conclusion is set out in mn 35 *et seq.*

2. ‘upon adoption’

- 21 Article 51 para. 1 foresees the adoption of the initial Rules by the ASP (rather than by judges, as in the ICTY and ICTR).⁵⁰ Such adoption took place at the first session of the ASP in September 2002 upon receipt of the final Draft Rules from the Preparatory Commission (mn 15), although had the Commission failed to finalize its draft prior to the Statute’s entry into force, adoption could have taken place at one of the special or subsequent regular sessions of the Assembly provided for in article 112 para. 6. As with the adoption procedures in article 51 paras. 2 and 3 (mn 23–30), there is no ratification requirement for Rules (as there is for adoption of statutory amendments under article 121) and in the event of a vote even those States Parties dissenting will be bound by the Rules adopted (mn 35 *et seq.*).
- 22 While the initial rules were adopted by consensus (mn 15), review and amendment of the Preparatory Commission Draft Rules was undoubtedly within the powers of the ASP, which has exclusive authority under the Statute to decide on the Rules.⁵¹ This role and responsibility of the Assembly opened up the possibility that the ASP, consisting of States that had taken the concrete step of ratifying the Rome Statute – and indeed, consisting largely of former members of the ‘Like-Minded’ group of States – might have amended provisions formulated by the Commission, which consisted of a broader group of States including those that were neutral or hostile towards the Court. While this difference in composition between the Commission and the Assembly undoubtedly resulted in substantially different dynamics between the two bodies, the ASP is likely in future, as it was when it adopted the initial Rules (mn 15), to remain mindful of the sentiments of non-States Parties in order to attract both new ratifications and their increased cooperation (whether directly, or through regional organizations and the UN Security Council). In all subsequent modifications of the Rules the Assembly will, therefore, have a demanding balancing act to perform.

⁴⁹ Fernández, *ibid.*, 243; note 33 and mn 15.

⁵⁰ The rejection by the Rome Statute drafters of the ICTY/ICTR model of the ‘judge-legislator’ is thoughtfully discussed in Guariglia, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1111, 1115–1123.

⁵¹ See article 112 para 2 alinea a, imposing a duty on the Assembly of States Powers to ‘consider and adopt, as appropriate, recommendations of the Preparatory Commission’, i.e. including its draft Rules of Procedure and Evidence [italics added]. The italicized words appear to imply the Assembly’s power to make amendments.

II. Paragraph 2

1. ‘Amendments ... may be proposed’

Following their initial adoption, the Rules will from time to time require change in order to adapt procedures to unforeseen circumstances or to streamline the practice of the Court in light of its evolving experience. Rather than limiting the right to propose amendments to States (or to judges, as in the *ad hoc* tribunals), article 51 para. 2 allows proposed amendments to arise from three sources. Article 51 para. 2(a) permits a State Party wishing to propose an amendment to do so on its own. Unlike in the case of amendments to the Statute under article 121 para. 2, the proposing State need not win over a majority of the Assembly present and voting in order to have its proposal taken up. Nonetheless, it will have to garner the final two-thirds majority needed for formal adoption of the new rule or rules. Under article 51 para. 2(b), a judge’s proposal to amend the Rules will only come before the Assembly if it garners support from an absolute majority of the judges.⁵² Article 51 para. 2(c) allows the Prosecutor to act alone. In any of these cases, it is entirely possible that proposals would arise indirectly from non-governmental organizations, victims groups, defence counsel or others, who themselves would suggest the proposals to those formally empowered to advance them. 23

2. ‘shall enter into force’

With regard to the position of States dissenting from the adoption of a given rule or amendment, see mn 20 as well as 35 *et seq.* 24

3. ‘adoption by a two-thirds majority’

Unlike the ILC and Zutphen texts,⁵³ the final Statute requires positive approval by the Assembly of States Parties for any amendments to the Rules. Acquiescence or ‘passive approval’ is not enough. 25

The requirement of adoption of the Rules by a two-thirds majority of the *members* of the Assembly indicates an intention that this majority consist of two-thirds of *all* the States that are parties at the time of adoption, as opposed merely to those present and voting.⁵⁴ In any event, article 112 para. 7 requires the Assembly to make every effort to reach a decision by consensus before resorting to a vote. Practice to date reflects this (mn 41 below), and votes are likely to be infrequent. 26

⁵² This would be 10 of the 18 judges which the Court would have initially (article 36 para. 1). Regulation 5 para. 1 of the Regulations of the Court requires judges to submit any proposal for amendment of the Rules to the Advisory Committee on Legal Texts established under Regulation 4(1). The ACLT is comprised of a judge from each of the Court’s three divisions as well as a representative from each of the Office of the Prosecutor, the Registry and the list of counsel. This procedure has been followed on at least one occasion: see Report of the Study Group on Governance, note 59, p. 4 para. 2. Regulation 5 para. 1 also *allows* the Prosecutor to submit his or her proposal to the ACLT, although she or he retains the option of making this proposal directly to the Assembly of States Parties.

⁵³ See ‘Historical development’, mn 1–3 and notes 2 and 8.

⁵⁴ The reference to a two-thirds majority of members in article 51 para. 1 is an example of the kind of derogation anticipated by para. 7 of article 112 (Assembly of States Parties) which, while providing for approval of matters of substance by a two-thirds majority of States *present and voting*, limits this with the words ‘except as otherwise provided in the Statute’. Article 112 does not use the word ‘members’; however, all States Parties having the right to participate in the Assembly and to vote (see article 112 paras. 1 and 7), ‘members’ must by implication refer to all and only States Parties.

III. Paragraph 3

1. ‘After the adoption’

- 27 This wording forestalled any possible judicial formulation and application of a corpus of Rules before the entry into force of the initial Rules.

2. ‘provisional Rules’

- 28 In a system like that of the ICC, provisional Rules are – at least in principle – a necessity. Although the final text of article 51 reflects in many ways the concern of States to give the Assembly of States Parties the ultimate authority with respect to rule-making for the Court, the relative infrequency of Assembly meetings⁵⁵ and the inevitably cumbersome nature of that process made it appear wise to establish the sort of bridge that ‘provisional Rules’ might provide. Without such Rules, damage to the fairness and efficiency of Court process – and to the appearance thereof – appears possible. The alternative, of leaving it to the jurisprudence to develop the rules, sat uneasily both with the relatively rigid conception of the principle of legality favoured during ICC-related negotiations and the desire of the drafters of the Statute to leave final approval of the Rules to States Parties.⁵⁶
- 29 The ability of judges to apply Rules provisionally is circumscribed in four ways by the express terms of article 51 para. 3. First, the need for a new rule will have to be ‘urgent’, and it will be for the judges and the Presidency to determine whether this requirement has been met.⁵⁷ Typically there will have to be some form of prejudice (through loss of evidence, delay, detriment to fairness, etc.) to the proceedings or to those involved in them. Secondly, the Rules will have to be silent with respect to the specific situation before the Court.⁵⁸ Thirdly, two-thirds of all the judges, and not just those of the Chamber in question, will have to agree to the provisional application. Finally, the Assembly of State Parties will have to adopt, amend or reject the rule(s) at its next ordinary or special session. As discussed in mn 21–22, adoption – whether in amended form or not – must be by two-thirds of the total number of States Parties, not just two-thirds of those present and voting. Rejection might be either by default (through inability to reach either consensus or the majority required to carry a vote) or by positive decision of the Assembly. Article 51 does not specify what judges are to do in case of rejection by the Assembly of a rule provisionally adopted; presumably, they would be

⁵⁵ Article 112 para. 6 stipulates that the Assembly will meet once a year and hold special sessions at the request either of the Bureau or of one-third of the States Parties.

⁵⁶ The Nuremberg Tribunal formulated its procedural norms largely through judicial practice; see note 73. That Rules even for urgent, unforeseen cases are subject to the approval of the Assembly of States Parties should also prevent the criticism levied by some against the ICTY’s decision regarding anonymous witnesses in *Tadić* (*Prosecutor v. Duško Tadić*, IT-94-1, Decision on the Prosecutor’s motion requesting protective measures for victims and witnesses, Trial Chamber, 10 August 1995 <<http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm>> accessed 7 September 2014), namely, that the Trial Chamber’s ruling exceeded its competence and should have been left to the judges as a whole in their capacity as the authoritative rule-makers of the tribunal: see *Affolder* (1998) 19 *MichJIL* 445, 467–468.

⁵⁷ The judges, because it is they who ultimately accept or reject a proposed provisional Rule; the Presidency, because Regulation 5 para. 2 of the Regulations of the Court provides that ‘In urgent cases, where the Rules do not provide for a specific situation before the Court, the Presidency, on its own motion or at the request of a judge or the Prosecutor, may submit proposals for provisional rules under article 51, paragraph 3, directly to the judges for their consideration in a plenary session’. This procedure bypasses the usual procedure of submitted proposed amendments to the ACLT: see note 52. Its use of the word ‘may’ also implies a residual discretion on the part of the Presidency as to whether or not to submit a proposed provisional Rule to a plenary session of the judges.

⁵⁸ It would seem sensible that, notwithstanding its wording, judges should be able to apply the procedure set out in article 51, paragraph 3 even where the Rules *do* ‘provide for a specific situation before the Court’, i.e. where the application of an existing Rule to a particular situation would otherwise lead to an absurd or unworkable result: Schabas, *The International Criminal Court* (2010) 647.

free to formulate another provisional rule that aims to address the problem identified while taking into account the factors that led to the Assembly's rejection of the previous version.

No provisional rule has yet been adopted by the judges.⁵⁹ It may be that, rather than adopt provisional rules, judges will prefer to turn to the other sources of applicable law in article 21 to deal with gaps in the Rules of Procedure and Evidence.⁶⁰

IV. Paragraph 4

1. 'consistent with this Statute'

In addition to assuring that the intentions of the contracting parties are respected, the requirement that the Rules, any amendments to them and any provisional Rules be consistent with the Statute ensures the primacy of the Statute over the Rules. The key to this effect lies in the fact that the Statute is more difficult to amend. While amendments to both the Rules (under article 51) and the Statute (under articles 121 and 122) require the affirmative vote of a two-thirds majority of the Assembly, amendments to the Statute (at least with respect to article 121, which will be of the greater interest) do not come into effect until instruments of ratification are deposited by seven-eighths of them.⁶¹ No such requirement applies with respect to the Rules (see mn 35 *et seq.*). In part supporting a certain conception of the principle of legality by preserving for inclusion in the difficult-to-amend Statute the basic principles and fundamental standards that govern the Court's work, the consistency requirement also (and possibly primarily) serves to reassure potentially dissenting States that provisions to which they are likely to have agreed (in the Statute) will predominate over ones with which they may disagree (in the Rules, if they were ever to find themselves within a dissenting minority). As the Assembly will doubtless go to considerable lengths to adopt Rules by consensus (mn 22), this 'safeguard' will probably prove to be rather immaterial in practice. Article 51 para. 4 will have the effect that, when Rules are proposed, the proposing party will doubtless be expected to satisfy the Assembly as to consistency with the Statute before the new Rules are adopted.

It will be the judges of the Court who will ultimately decide whether the requirement of consistency between the Rules and the Statute has been respected by the Assembly of States Parties. This separation between legislator and adjudicator represents an advance on the model of the *ad hoc* tribunals, and a better guarantee for meeting the objective of ensuring

⁵⁹ In July 2011, the Advisory Committee on Legal Texts received from two judges 'an urgent proposal for the adoption of a provisional rule': Report of the Study Group on Governance on Rule 132*bis* of the Rules of Procedure and Evidence, Doc. No. ICC-ASP/11/41 (1 November 2012), p. 4 para. 2. It is unclear why a proposal for a provisional rule would pass through the ACLT, rather than proceed directly to the judges' plenary through the Presidency: see notes 52 and 57. It may be that the Presidency viewed the proposal more as an amendment rather than as a matter for urgent provisional treatment. In any event, following study and consultation, the ACLT referred this to a plenary session of the judges in February 2012. Rather than lead to adoption of a provisional rule, the proposal was then referred to the Assembly of States Parties and became new Rule 132*bis* in November 2012: see note 43, as well as the 'Report of the Study Group on Governance', pp. 4–5.

⁶⁰ This is the view of Schabas, who gives the example of the Pre-Trial Chamber's decision to apply Rule 119 by analogy in the *Abu Garda* proceedings: *The International Criminal Court* (2010) 647. Similarly, in Mathieu Ngujolo's appeal from the Pre-Trial Chamber's decision to join his trial to that of Germain Katanga, the defence argued that the decision violated article 51 para. 3 as well as the principle of legality generally, by applying by analogy article 64 para. 5 and Rule 136 (both of which deal with proceedings before the Trial Chamber) to the preliminary phase. The Appeals Chamber rejected this characterization of the Pre-Trial Chamber's decision, and confirmed the same: *Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, ICC-01/04-01/07 OA 6, Judgment on the Appeal against the Decision on Joinder Rendered on 10 March 2008, Appeals Chamber, 9 June 2008.

⁶¹ Article 121 para. 4. While such an amendment applies even to States Parties which have not accepted it, such States are given the option of immediate withdrawal from the Statute by article 121 para. 6. Article 121 para. 5 provides an exception to the scheme of article 121 para. 4, in that amendments to the crimes within the jurisdiction of the Court or to their definitions will only apply to such States as deposit an instrument of ratification with respect to them.

consistency.⁶² Normal rules of treaty interpretation will lead the Court to seek readings of the Rules which are consistent with the Statute.⁶³ Just as States are presumed to intend agreements consistent with their other obligations at international law, so must the States Parties be assumed to intend that the Rules they adopt be consistent with the Statute.⁶⁴ In the absence of plausible consistent readings, inconsistency will be found, but the party alleging the inconsistency will bear the burden of persuading the Court.

2. 'not be applied retroactively'

- 33 The prohibition on retroactive application of an amended or provisional rule to the detriment of a person who is being investigated or prosecuted or who has been convicted is a straightforward application to the Rules of the general principle of criminal law (both national and international) which is embodied elsewhere in the Statute. See comments to article 22 para. 1, *Nullum crimen sine lege*, article 23, *Nulla poena sine lege*, and in particular article 24 para. 2, Non-retroactivity *ratione personae*. By prohibiting *detrimental* retroactivity, article 51 para. 4 implies that *neutral* or *beneficial* retroactivity will sometimes be permissible.⁶⁵ This is not surprising, given that the rule against non-retroactivity is more applicable to matters of substance than to those of procedure. Whether neutral or beneficial amendments or provisional Rules are applied retroactively will depend on their intent or on the requirements of fairness as understood by the Court. One may assume that where the Court perceives a potential benefit to the person concerned, it might apply a variant of article 24 para. 2 such that in the event of a change in the Rules applicable to a case prior to final judgment, the Rule more favourable to the person being investigated, prosecuted or convicted would be applied.⁶⁶ It would be for the person hoping to benefit to bring this to the Court's attention.

V. Paragraph 5: 'conflict between the Statute and the Rules'

- 34 That the Statute prevails over the Rules in the event of conflict between them is a natural outcome of article 51 para. 4. To that extent, article 51 para. 5 sets out the consequences flowing from a failure to provide the consistency called for by article 51 para. 4. The party seeking to prevent the application of a given rule on the grounds of conflict would bear the burden of persuasion (mn 31). The use of the word 'conflict' rather than 'inconsistency' is curious, but it would seem that nothing can flow from it. The scope of the term 'inconsistency' might seem broader than that of 'conflict', but the subordinate character of the Rules does not allow one to deduce from this that inconsistencies not amounting to conflicts would not be overridden by the Statute. The only conclusion is that all inconsistencies, once ineluctably established (margin No. 32), are conflicts within the meaning of article 51 para. 5 and result in the Rules giving way to the Statute.

⁶² Guariglia, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1111, 1122–1123.

⁶³ The requirement of consistency between rules and statute is general in international law, whether it is expressed in the statute, the rules, the jurisprudence, or all three: Affolder (1998) 19 *MichJIL* 445, 466; see also note 11.

⁶⁴ '... a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it'. Jennings and Watts (eds.), *Oppenheim's International Law* (1996) 1275, quoting the International Court of Justice, *Rights of Passage (Preliminary Objections)* (1957) ICJ Rep. 142.

⁶⁵ ICTY Rule 6 (D), note 74, provides that an amendment on entering into force shall not operate to prejudice the rights of the accused in any pending case.

⁶⁶ Of course, if article 24 para. 2 is read by the Court as including the Rules within the word 'law', then article 24 para. 2 will apply directly to have this effect. Article 24 para. 2 provides: 'In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply'. As the 'law applicable' can only mean the 'applicable law', the Rules should be included within the term. Article 21 (Applicable law) reads in part: '(1) The Court shall apply: (a) In the first place, this Statute ... and its Rules of Procedure and Evidence ...'

C. Special remarks

I. Binding nature of the Rules

Once adopted in accordance with article 51, the Rules are binding upon all States Parties 35 and are not subject to any derogation, exception or reservation. Thus, even States Parties which vote against the adoption of a particular rule will be bound by the Statute (and in particular by Part 9, articles 86, 87 and 93) to comply with any Court request or action taken in pursuit of it.⁶⁷

This result is supported by a reading of article 51 in the context of the Statute as a whole. 36 Reference to entry into force upon approval by a two-thirds majority in article 51 paras. 1–3 is unlike the reference to the adoption of statutory amendments in articles 121 and 122. The latter also stipulate a two-thirds majority requirement, but qualify this by indicating three increasingly stringent means of entry into force. First, amendments under article 122 para. 2 enter into force ‘for all States Parties’ on the basis of Assembly approval alone. Secondly, amendments under article 121 para. 4 enter into force ‘for all States Parties’ after the deposit of instruments of ratification from seven-eighths of them. Finally, amendments under article 121 para. 5 enter into force only ‘for those States Parties which have accepted the amendment’ by deposit of an instrument of ratification. These qualifications are an acknowledgement of the desire of States Parties to make it difficult to bind them in ‘essential’ matters. Article 51’s lack of such qualifications supports the inference that the entry into force of these ‘secondary’ or ‘supplemental’ Rules would not similarly be limited.

Furthermore, article 21 para. 1 requires the Court to apply the Statute, the Elements of 37 Crimes and the Rules of Procedure and Evidence as part of its applicable law. There is nothing in either article 21 or article 51 to imply that this is subject to any derogation, exception, special consent or reservation on the part of any party.⁶⁸ Neither is there anything in article 51 to weaken the character of the Rules’ applicability, as there is in article 9 with respect to the Elements of Crimes which are there expressly intended to ‘assist the Court in the interpretation and application of articles 6, 7 and 8. [emphasis added]’ Thus when provisions of the Statute state, as they frequently do, that a given action will be taken ‘in accordance with the Rules of Procedure and Evidence’ (*inter alia* articles 15 para. 3, 39, 41, 68 para. 3, 93 para. 8), they do not and could not sensibly provide for exceptions.⁶⁹ Some of these provisions touch directly upon the duties of States Parties (*e.g.* article 57 para. 3 (e)).

Finally, the non-derogability of the Rules is supported by their intended subordinate 38 nature (mn 2), as attested to by their simpler amendment procedures (mn 21 and 23) and by the requirement of compatibility with the Statute (mn 31–32 and 34). The serious consequences of allowing differential application of the Rules to different Parties, both logistically and in terms of the impartiality of application required by the rule of law, adds strength to the argument.

In summary, the intended nature of the Rules, the wording in the Statute as to their use by 39 the Court, and the consequences for the effectiveness of the ICC if they were not subject to uniform application, all imply that they, any amendments to them and any provisional Rules

⁶⁷ The question of the binding nature of the Rules would be raised before the Court by a party seeking to limit the scope of a State’s obligation to cooperate, relying in part on the failure of the proposal to include in article 51 reference to the Rules as an ‘integral part’ of the Statute: see ‘Historical development’, mn 4 and 5.

⁶⁸ The Rules being a subordinate form of norm, they are not subject to the law of treaties in the same way that the Statute is. Just as they admit of no reservation, so do they require no ratification on the part of States Parties. This further distinguishes article 51 from article 121. See Hafner, *article 120*.

⁶⁹ This is not to say the Rules rigidly exclude all exceptions any more than the Statute does (see *e.g.* Article 93 paras. 3 and 5, providing modalities of cooperation that take into account the particularities of the State in question). It is merely that legitimate exceptions will be expressly indicated, not dictated by individual States Parties.

are to be binding upon the Court, upon all of its agents, upon all parties before it, and upon the relevant personnel of States Parties (including States Parties that opposed their adoption) as of their entry into force, and are not subject to any exception or reservation. If a State Party has been unable to achieve its goals at the drafting stage, and if the Rule in question is not inconsistent with the Statute, the only remedy open to the State feeling strongly enough about the matter will be to withdraw from the Statute in accordance with the terms of article 127. In this respect, the obligation to comply with the Rules is precisely the same as that to comply with an amendment to a provision of an exclusively institutional nature (article 122), or to comply with an amendment to any remaining provision of the Statute outside articles 5–8 once a year has passed after its entry into force (article 121 para. 6), in that withdrawal is the only option available to dissenting States in both situations. If a consensus existed that a given Rule was too ‘essential’ for this state of affairs to be desirable, it would be open to States Parties to move it into the Statute itself through the amendment procedure of article 121, in which case the added requirement of ratification by seven-eighths of States Parties would apply. Such situations are likely to be of the utmost rarity.

II. Statutory references to the Rules

40 Outside of article 51 itself, the Statute contains 45 express references to the Rules of Procedure and Evidence. These are summarized as follows, with an indication of the Rule of Rules adopted with specific reference to each, where possible:

- article 15 para. 3, Victims may make representations to the Pre-Trial Chamber in accordance with the Rules upon the Prosecutor’s request for an authorization of an investigation: see Rule 50;
- article 21 para. 1 (a), Court shall apply the Statute, the Elements of Crimes and the Rules ‘[i]n the first place’ as part of its applicable law;
- article 31 para. 3, Rules shall contain procedures relating to a ground for excluding criminal responsibility other than those referred to in article 31 para. 1: see Rule 80;
- article 39 para. 2 (b) (iii), Rules to contain provisions relating to whether one or three judges carry out functions of Pre-Trial Chamber: see Rule 7;
- article 41 para. 1 and para. 2 (a), Rules to contain procedures by which the Presidency is to excuse a judge from exercising a function under the Statute, as well as to provide grounds for disqualification: see Rules 33 and 34;
- article 46 para. 1 (a) and para. 4, Rules to provide grounds of serious misconduct and serious breach of duty justifying removal from office, and to provide procedures by which challenged person may present and receive evidence and make submissions: see Rules 23–24 and 26–32;
- article 47, Rules to provide disciplinary measures for misconduct not justifying removal from office: see Rules 23 and 25–32;
- article 50 para. 1 and para. 2, Rules to set out when decisions other than judgements are to be published in the official languages, and when official languages other than English and French may be used as working languages: see Rules 40 and 41;
- article 52 para. 1, Regulations of the Court to be adopted in accordance with Statute and Rules: see Rule 4;
- article 57 para. 2 (b) and para. 3 (e), Rules may require decision by three judges of Pre-Trial Chamber: see Rules 108, 110 and 114; Pre-Trial Chamber may seek cooperation in execution of arrest warrant or summons in accordance with the Statute and the Rules: see Rule 99;
- article 64 para. 1, Trial Chamber to exercise its functions and powers in accordance with the Statute and the Rules see generally Chapter 6 (Trial Procedure), Rules 131–144;
- article 68 para. 3, Court to permit views and concerns of victims to be presented in accordance with the Rules: see Rules 89–93;

- article 69 paras. 1, 2, 4 and 5, Rules to set out undertaking as to truthfulness to be given by witness: see Rule 66; to provide for giving of evidence other than in person, or by technological or written means: see Rules 67 and 68; to set out procedures for determining relevance and admissibility: see Rule 64; and to set out privileges on confidentiality: see Rule 73;
- article 70 paras. 2 and 3, Rules to provide principles and procedures relating to offences against the administration of justice, and to set out fines which may be imposed upon conviction for such an offence: see Rules 162–169;
- article 71 paras. 1 and 2, Rules to set out measures to be imposed as sanction for misconduct before the Court; and procedures governing their imposition: see Rules 170–172;
- article 72 para. 5 (d), Cooperation related to national security interests may include protective measures permissible under the Statute and the Rules;
- article 76 para. 2, Sentencing hearing to be held in accordance with the Rules: see Rule 143;
- article 77 para. 2 (a), Rules to supply criteria for imposition of fine: see Rule 146;
- article 78 para. 1, Rules to set out procedure on the taking into account of factors at sentencing: see Rule 145;
- article 81 paras. 1, 2 (a) and 3 (c) (ii), Rules to provide procedures for appeal of decision of Trial Chamber, of sentence, and of any decision to maintain detention of acquitted person pending appeal: see Rules 150–152, 154, 156–158;
- article 82 paras. 1, 3 and 4, Rules to set out procedures relating to appeal of other decisions, to requests to suspend procedures pending the outcome of these appeals, and to appeal of reparation orders: see Rules 150–158;
- article 84 para. 2, Rules to provide procedures for hearings seeking revision of conviction or sentence: see Rules 159–161;
- article 85 para. 3, Rules to supply criteria for discretionary award of compensation to subject of miscarriage of justice who has been released from detention: see Rules 173–175;
- article 87 paras. 1 (a) and 2, Rules will provide for change in designation both of authority to receive requests for cooperation and of language in which request to be made: see Rule 176;
- article 92, para. 3, Rules to specify time limits for the delivery of a request for surrender and supporting documents relating to a person provisionally arrested: see Rule 188;
- article 93 para. 8 (c), Formerly confidential documents of which a State consents to disclosure may be used as evidence in accordance with the Statute and the Rules;
- article 103 para. 3 (a), Principles of equitable distribution in enforcement of sentences to be set out in the Rules: see Rule 201;
- article 110 paras. 4 (c) and 5, Rules to set out factors justifying reduction of sentence, and criteria for subsequent review where reduction is denied: see Rules 223 and 224; and
- article 112 para. 2 (g), Assembly of States Parties may perform any function consistent with the Statute and the Rules.

III. Summary of amendments made to the rules since their initial adoption

At its Tenth Session, the Assembly of States Parties amended Rule 4 (concerning the plenary sessions of the judges) by consensus.⁷⁰ This amendment replaced the previous Rule 4, para. 1 and added Rule 4*bis*, with the effect of bestowing on the Presidency (and not, as previously, the judges sitting in plenary session) the power to assign judges to divisions in accordance with article 39 para. 1 of the Statute.

⁷⁰ Resolution ICC-ASP/10/Res.1 (20 December 2011), in Assembly of States Parties to the Rome Statute of the International Criminal Court, *Official Records* (tenth session, 12–21 November 2011), ICC Doc. No. ICC-ASP/10/20, vol. I, p. 20.

At its following, Eleventh Session the Assembly adopted by consensus a resolution that added the new Rule 132*bis* (Designation of a judge for the preparation of the trial).⁷¹ To quote the resolution's third preambular paragraph, this Rule allows 'that the functions of the Trial Chamber, in respect of trial preparation, may be exercised by a single judge or single judges in order to expedite proceedings and to ensure cost efficiency'.

Subsequently, at its Twelfth Session, the Assembly of States Parties adopted by consensus a resolution which modified Rule 100 (Place of the proceedings) in order to clarify the conditions under which the Court could sit 'in a State other than the host State', while Rules 134*bis*, *ter* and *quater* were added in order to allow either for the appearance of an accused via video link (*bis*) or for his/her being excused from being present at par or all of his/her trial and for being represented by counsel only on account of 'exceptional circumstances' (*ter*) or of a mandate 'to fulfil extraordinary public duties at the highest national level' (*quater*).⁷² Finally, at the same session, Rule 68 was substantially modified in order to impose a more stringent framework for the use of prior recorded testimony – a framework closely resembling Rules 92 *bis*, *quater* and *quinquies* of the ICTY Rules of Procedure and Evidence.

IV. 'A Unique compromise': National legal traditions and international norms

- 42 While substantially new in many respects, the ICC's Rules of Procedure and Evidence drew their inspiration from a number of sources. In identifying the influences that informed the negotiation of the Rules, it is worth noting in particular (1) the Rules of Procedure and Evidence of the ICTY and ICTR; (2) the criminal procedural law of the major legal systems of the world (and especially of the common law and Romano-Germanic or civil law systems); and (3) the constraints imposed by the Statute itself and by the anticipated practical needs of the (then future) ICC. While the first two leave their traces throughout the final Rules, it is the latter which defines the Rules as a unique – and uniquely significant – instrument in its own right.

With little to emulate in the rudimentary system that characterized Nuremberg – in which the barest of written rules were supplemented largely by *ad hoc* judicial decision-making⁷³ – delegations negotiating the ICC Rules found a major source of ideas and guidance for their structure and normative content in the Rules of Procedure and Evidence of the ICTY and ICTR.⁷⁴ The *ad hoc* tribunals' Statutes, which contained only the most basic procedural

⁷¹ Resolution ICC-ASP/11/Res.2 (21 November 2012), in Assembly of States Parties to the Rome Statute of the International Criminal Court, *Official Records* (eleventh session, 14–22 November 2012), ICC Doc. No. ICC-ASP/11/20, vol.I, p. 25.

⁷² Resolution ICC-ASP/12/Res.7 (27 November 2013), in Assembly of States Parties to the Rome Statute of the International Criminal Court, *Official Records* (twelfth session, 20–28 November 2013), ICC Doc. No. ICC-ASP/12/20, vol.I, p. 51. This action on the part of the Assembly was of course prompted by the case of Uhuru Muigai Kenyatta, who became President of Kenya on 9 April 2013, but against whom charges of crimes against humanity had been confirmed by Pre-Trial Chamber II on 23 January 2012: see generally http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx.

⁷³ Guariglia, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1111, 1112. '[The Nuremberg and Tokyo Tribunals] both had very rudimentary rules of procedure: the rules of procedure of the Nürnberg Tribunal scarcely covered three and a half pages, with a total of 11 rules, and all procedural problems were resolved by individual decisions of the Tribunal; at Tokyo, there were only nine rules of procedure, which formed part of the statute of the Tribunal. Again, all matters were left to the case-by-case ruling of the tribunal': Bassiouni and Manikas, *Law* (1996) 819–820, quoting the First Annual Report of the ICTY (without page numbers). The precedential value of these Rules was negligible.

⁷⁴ ICTY, Rules of Procedure and Evidence, UN Doc. IT/32/Rev.48 (amended to 19 Nov. 2012); ICTR, Rules of Procedure and Evidence (amended to 1 Oct. 2009). The ICTY Rules were the 'first ever international criminal procedural and evidentiary code': Judge A. Cassese, then President of the ICTY, addressing the General Assembly with regard to the Rules, 13 *Bulletin of the International Criminal Tribunal for the Former Yugoslavia* 2 (1996), quoted in Morris and Scharf, *Insider's Guide* (1995) 423. The first code perhaps, but not the first international criminal procedural rules: see the preceding note for the example of Nuremberg. After formulation of the initial ICTY Rules, President Cassese stated '... we have made a conscious effort to make good the flaws of Nuremberg

provisions, were supplemented by detailed Rules drafted by expert judges. The judges' initial product bore the strong imprimatur of a common law accusatorial approach, while numerous subsequent amendments – adopted in light of the tribunals' evolving experience⁷⁵ – did something to introduce a civil law corrective to this.⁷⁶ The tribunals' Rules made a major contribution to the development of a thorough and rigorous international criminal procedural law in the 1990 s.

These tribunals were, however, established by 'executive' action of the United Nations Security Council, applying the powers conferred upon it for purposes of maintaining or restoring international peace and security under Chapter VII of the UN Charter. While the *ad hoc* tribunals took into account international standards and the views of governments and NGOs in formulating their Rules, the judges with responsibility for such formulation had no duty to consult, much less seek approval, whether from the Security Council, from the States most likely to be affected, or from others.⁷⁷ The categorical obligation of States to comply with Chapter VII-related measures of the Security Council (including orders and decisions of the tribunals)⁷⁸ make this judicial rule-making power all the more imposing.

The ICC, for its part, rests primarily upon the agreement and the concerted action of its States Parties. Moreover, the *ad hoc* tribunal experience and the consensual nature of the ICC Statute led the drafters of the latter to be relatively fastidious in keeping matters of substance within the Statute,⁷⁹ owing to the view, widely expressed at the Preparatory Committee, that entrusting to the ICC judges the formulation of its Rules would be inappropriate in a treaty regime based on the consent of States Parties.⁸⁰ Thus emerged the provisions giving States Parties the power to elaborate, adopt and amend the Rules (mn 2–7). The Rome Statute's emphasis on cooperation and State consent was further reflected in the emergence of the initial ICC Rules from the Preparatory Commission process (mn 9–15).

This being said, the ICC Statute and Rules benefited enormously from the experience of the *ad hoc* tribunals as contained both in their Rules and in their jurisprudence. While the fuller diplomatic process behind the ICC Rules' initial adoption has lent them an unparalleled degree of sophistication, they nonetheless bear the trace of the *ad hoc* tribunal Rules throughout. Both in negative and in positive terms (whereby the tribunals provided both 'lessons learned' that the ICC drafters deliberately avoided repeating – as for example with

and Tokyo', Statement by the President of the International Tribunal, UN Doc. IT/29 (1994), quoted in Morris and Scharf, *Insider's Guide* (1995) 417. For a history of the drafting of the Rules of both the ICTY and ICTR, see *ibid.*, 413–418.

⁷⁵ ICTY Tribunal President Cassese justified the tribunal Rules' frequent changes in addressing the General Assembly 19 Nov. 1996: 'It would have been impossible for the first truly international criminal tribunal to have adopted the first ever international criminal procedural and evidentiary code from a first draft dealing perfectly with all the diverse issues with which the Tribunal has to cope ... It would equally have been impossible for the issues ... to have been perfectly anticipated and solved at the beginning of 1994 [before the commencement of the first proceedings] ...' 13 Bulletin of the International Criminal Tribunal for the Former Yugoslavia 2 (1996), quoted in Morris and Scharf, *Insider's Guide* (1995) 423.

⁷⁶ Orie, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1439, 1464; and in general the author's analysis of the traces left by the civil and common law systems in the Rules of the two *ad hoc* tribunals: *ibid.*, 1463–1474.

⁷⁷ See the discussion in Bassiouni and Manikas, *Law* (1996) 822–828. A United States proposal would have required the judges to submit draft Rules to the Security Council, but the Statute of neither tribunal requires this: Morris and Scharf, *Insider's Guide* (1995) 413.

⁷⁸ Article 29 ICTY Statute (and Rules 7bis, 8, 11, 13, 39, 40, 59 and 60); article 28 ICTR Statute. See also Bassiouni and Manikas, *Law* (1996) 775–793, arguing that, contrary to the view of the Secretary-General and that embodied in the Rules, a proper understanding of the powers of the Security Council under the UN Charter cannot lead to the view that orders of the ICTY are obligatory enforcement measures under Chapter VII. See also Morris and Scharf, *Insider's Guide* (1995) 420.

⁷⁹ For substantive matters in the ICTY Rules, see Bassiouni and Manikas, *Law* (1996) 824 and 827.

⁸⁰ 1996 Preparatory Committee Report, note 5, Vol. I., para. 186, p. 42; Bassiouni, *Compilation* (1998) 409. See also article 15 ICTY Statute, Annex to Security Council Res. 827 (25 May 1993), UN Doc. S/RES/827 (1993), and article 14 ICTR Statute, Annex to Security Council Res. 955 (8 Nov. 1994), UN Doc. S/RES/955 (1994).

anonymous witnesses⁸¹ – and models to follow, as with the privilege accorded to the ICRC),⁸² the ICC Rules can be seen in large measure as having built upon and refined the international normative innovation that was commenced at the ICTY and ICTR.

- 46 Turning now to the influence of different legal traditions on the Rules, it should first of all be noted that, while lip-service is often paid to the need to develop norms inspired by the ‘major legal systems of the world’, in fact it is the perceived opposition between common law and Romano-Germanic or civil law systems that defines the frame of reference for virtually all discussion of this question in international criminal procedure.⁸³ Typically, the two traditions are distinguished by their supposedly predominant philosophy with regards to truth-seeking and, in particular, the judge’s role therein.⁸⁴ The common law tradition is characterized as adversarial, in which two parties (prosecution and defence) enjoying a formal equality of arms oppose one another by adducing evidence and argument before a judge who for the most part restricts his role to that of determining the admissibility of the proof presented by the parties (and of finally evaluating that proof, where there is no jury present). For its part, the Romano-Germanic tradition is said to favour an ‘inquisitorial’ approach in which the judge plays a much more active role as truth-finder, being primarily responsible for calling and questioning witnesses, thus shaping the case very actively; the parties (including the victim as *partie civile*) play an essentially supplementary role to that of the judge. Such characterizations of the two systems are subject to numerous nuances and exceptions.⁸⁵
- 47 Many of the major conflicts or inconsistencies between legal traditions had already been aired and compromises forged during the pre-Rome and Rome negotiations. Nonetheless, where the Statute was silent or ambiguous, tensions were able to re-emerge.⁸⁶ In the negotiation of the ICC Rules of Procedure and Evidence, the contrasts between the approaches of the two systems were particularly apparent with respect to investigation and prosecution, pre-trial procedures, disclosure, and fair trial issues.⁸⁷ As a general matter – and in order to minimize the number of issues and to encourage a focus on substance rather than on form – negotiators sought to replace terminology strongly associated with one or the other system (e.g. ‘cross-examination’, ‘investigating magistrate’, etc.) with neutral, ICC-specific formulations.⁸⁸
- 48 Compared to the Rules of Procedure and Evidence of the *ad hoc* tribunals – which had at least initially a predominant common law influence⁸⁹ – the ICC system (Statute and Rules) is widely acknowledged to be far more balanced as between the two systems.⁹⁰ For example,

⁸¹ See article 65 para. 5 and Rule 81 para. 4 regarding possible non-disclosure of a witness’ identity ‘prior to the commencement of the trial’. The assertion that witness anonymity is not permitted at trial is not free of all controversy, however: see the discussions in Guariglia, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1111, 1125; Brady, in: Lee (ed.), *Elements* (2001) 434, 450–453. The ICC Rules provisions on disclosure have also been held up as an improvement over the corresponding scheme of the ICTY: Guariglia, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1111, 1126–1127.

⁸² Rule 73 para. 4: the jurisprudence of the ICTY had a direct impact on the negotiation of the Rules in this regard: see Guariglia, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1111, 1129–1130, and Piragoff, in: Lee (ed.), *Elements* (2001) 349, 365–369.

⁸³ Orie, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1439, is an example, discussing only the common law and civil law models.

⁸⁴ See generally Orie, *ibid.*

⁸⁵ See generally the discussions in Orie, *ibid.*, and in Ambos (2003) 3 *ICLRev* 1. The latter, at 2–5, cogently criticizes the inadequacy of the frequently-used ‘accusatorial’/‘inquisitorial’ terminology.

⁸⁶ Fernández, in: Lee (ed.), *Elements* (2001) 251.

⁸⁷ Fernández, *ibid.*, 251–253; Kirsch, in: Lee (ed.), *Elements* (2001) li; Kirsch and Oosterveld, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 93, 100.

⁸⁸ Kreß (2007) 5 *JICJ* 537, 605; Ambos (2003) 3 *ICLRev* 1, 20.

⁸⁹ Ambos, *ibid.*, 5–6 *et seq.*; Guariglia, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1111, 1112, mentioning predominant influence of U.S. draft rules at the time of drafting; Orie, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1439, 1463–1475. The same could be said of the procedures applied before the Nuremberg and Tokyo Tribunals: Orie, *ibid.*, 1456–1463.

⁹⁰ Ambos (2003) 3 *ICLRev* 1, 6–7, attributes the balance in the Statute in good part to vigorous, early French intervention in the negotiations.

while the ICC enjoys an independent Prosecutor and a trial driven by the submissions of the parties (with the elaborate procedures for disclosure that such a system requires),⁹¹ significant judicial intervention – greater than that which characterizes the *ad hoc* tribunals – is foreseen both at pre-trial and trial stages.⁹² The role of the victim, as well, is an advance on the tribunals and is particularly reflective of a civil law-inspired influence on the negotiations, although the ICC regime of victim participation and reparation is decidedly unique.⁹³ The unprecedented length and intensity of ICC negotiations has given the Rome Statute and its Rules incomparably greater procedural detail than that possessed by either its ICTY or ICTR counterparts.⁹⁴

No discussion of sources should divert attention from the fact that much of what the Rules contain is entirely new, the product of the diplomatic imagination seeking to find the most fair, effective, and efficient solutions to the anticipated procedural needs of the ICC. Experience has shown that neither following a given national system, nor adopting a mere amalgam of national practices, can give an international tribunal the tools it needs to perform its functions.⁹⁵ At the end of the day, the procedures of the ICC had to be tailored to the needs of the Court and the framework of the Statute. The result – already in the Statute and Rules, to be progressively rendered concrete by practice – is a ‘unique compromise’ that borrows inspiration from the major legal traditions without following them subserviently.⁹⁶ Great imagination and adaptability will be required of the jurists who apply the system in practice. In light of ‘the inevitable gaps, the open solutions and constructive ambiguity in some of the Rules’, the precise balance between the systems that have influenced the ICC model and the exact adaptation of its written procedure to concrete cases remain to be determined to a large extent by the judges.⁹⁷

⁹¹ Orie, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1439, 1482–1485; Ambos (2003) 3 *ICLRev* 1, 13–16. As Fernández points out, in: Lee (ed.), *Elements* (2001) 243 and 251–252, when France argued for extensive disclosure prior to the confirmation of charges (a proposal that would create the kind of *dossier* or case-file familiar to civil law practitioners), the scope and purpose of the pre-trial procedure became a point of contention between proponents civil law and common law approaches: see also French General Outline, note 33.

⁹² See Orie, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1439, 1475–1478, also at 1485–1489; Ambos (2003) 3 *ICLRev* 1, 10–34; Kreß (2003) 1 *JICJ* 603, 607–608 (that the handling of ‘unique investigative opportunities’ foreseen by article 56 and of the *propriomotu* powers by the Prosecutor under article 15 are good examples of this judicial-prosecutorial interaction); and Fernández, in: Lee (ed.), *Elements* (2001) 251 (that the very existence of the Pre-Trial Chamber is ‘a major institutional innovation’ and a victory for inter-systemic *rapprochement*).

⁹³ Orie, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1439, 1477–1478; Fernández, in: Lee (ed.), *Elements* (2001) 255–257; see the detailed discussion of Bitti and Friman, in: Lee (ed.), *Elements* (2001) 456.

⁹⁴ This is notable particularly – but not exclusively – in Parts 5 (Investigation and prosecution), 6 (Trial) and 8 (Appeal and Review) of the Statute: see Guariglia, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1111, 1113–1114.

⁹⁵ Guariglia, *ibid.*, 1112.

⁹⁶ See generally the assessment in Kreß (2003) 1 *JICJ* 603. One can only agree with the latter’s assessment (p. 605) that ‘...neither common law nor civil law can be seen as the main reference point for establishing the law governing the procedure before the ICC. Moreover ... there actually is no other major point of reference outside the law of the ICC. ...Taken as a whole, the procedural law of the ICC is, thus, not only new but also *truly unique*’ [italics in the original]. See also Ambos (2003) 3 *ICLRev* 1, 34–35 (‘At the level of international criminal procedure, the traditional common-civil law divide has been overcome. Although most rules can be traced back to a common or civil law origin, they are rendered *sui generis* and unique in their application before the International Criminal Tribunals. Thus, it is not important whether a rule is either adversarial or “inquisitorial”, but whether its assists “the Tribunals in accomplishing their tasks” and whether it complies with fundamental fair trial standards [citation of the original omitted]’).

⁹⁷ Fernández, in: Lee (ed.), *Elements* (2001) 240 and 252; Kreß (2003) 1 *JICJ* 603, 605–606, and *passim* (emphasizing the ‘constructive ambiguity’ that is manifest throughout the Statute and Rules); Orie, in: Cassese, Gaeta and Jones (eds.), *Commentary* (2002) 1439, 1477, 1484, 1493; and Ambos (2003) 3 *ICLRev* 1, 32.

Article 52 Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

Literature: Jacobs, D., 'A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?', in: W. Schabas *et al.* (eds.), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013) 205; *id.*, 'International Criminal Law', in: J. Kammerhofer and J. d'Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (CUP 2014) 451; Roux F., 'La Défense mise à la porte de la Cour pénale internationale?' (2014) *La Gazette du Palais* 262, 9; Skilbeck, R., 'Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone', (2004) 1 *EssexHumRtsRev* 66; Stahn, C., 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55' (2005) 16 *CLF* 1.

Content

A. Introduction/General remarks	1
I. The Regulations in context.....	1
II. The history of this article	5
B. Analysis and interpretation of elements	7
I. Paragraph 1	7
1. 'in accordance with this Statute and the Rules of Procedure and Evidence'	7
2. 'by an absolute majority'	9
3. 'necessary for its routine functioning'	11
II. Paragraph 2	16
1. 'shall be consulted in the elaboration'	16
2. 'any amendments thereto'	17
III. Paragraph 3	18
1. 'any amendments thereto'	18
2. 'shall take effect'	19
3. 'within six months'	21
4. 'no objections from a majority of States Parties'	22
C. Content of the Regulations	27

A. Introduction/General remarks

I. The Regulations in context

1 While the Statute itself is the main instrument regulating the functioning of the Court, the Statute envisages that a range of other legislative instruments will be adopted to regulate the Court's activities in greater detail. As far as the judicial activities of the Court are concerned, the main subsidiary set of rules is the Rules of Procedure and Evidence, adopted by the ASP pursuant to article 51. Other regulatory instruments provided for in the Statute are the Regulations adopted by the judges pursuant to article 52, the Staff Regulations adopted pursuant to article 44, the Financial Regulations and Rules adopted pursuant to article 113, as well as the Elements of Crimes (article 9). Some of these regulatory instruments in turn provide for the adoption of further instruments. For instance, the Rules provide for the

making of regulations by the Prosecutor to govern the operation of the Office of the Prosecutor (rule 9), for the making of regulations by the Registrar to govern the operation of the Registry (rule 14), and for the adoption of a Code of professional conduct for counsel (rule 8). The Regulations further provide for the adoption by the Presidency of a Code of Judicial Ethics (regulation 126). The operation of the Court will thus ultimately be governed by a body of various interrelated legislative instruments. In this respect, the Court is no different from the *ad hoc* Tribunals¹.

Within this system of regulation, there may thus be a hierarchy of rules. In the event of an inconsistency between the Rules and the Statute, the Statute would prevail². A provision of, say, the Prosecutor's regulations, which are made under rule 9, would be required to be consistent with both the Rules and the Statute.

Regulations under article 52 are adopted by the judges of the Court, in contrast to the Rules, which are adopted by the Assembly of States Parties. The position of the Regulations in the hierarchy of legislative instruments is dealt with in article 52 para. 1, which indicates that they must be consistent with both the Statute and the Rules³.

However, the hierarchy is not comprehensively spelled out in relation to all of these instruments. In the event of an inconsistency between the Regulations adopted under article 52 and, say, the regulations made by the Registrar under rule 14, presumably the former would prevail, although this is nowhere expressly stated.

The Statutes of the *ad hoc* International Criminal Tribunals include a provision for the adoption of Rules of Procedure and Evidence, but do not expressly provide for a separate body of Regulations in the way that article 52 does. In this respect, at least, the provision in the Rome Statute for both Rules of Procedure and Evidence and Regulations is a novelty. However, as indicated above, the *ad hoc* international criminal tribunals have adopted a variety of subsidiary regulatory instruments in addition to the Rules⁴. The ICJ has also done something similar. The Statute of the ICJ empowers that Court to 'frame rules for carrying out its functions'⁵. Pursuant to that power, the ICJ has adopted its Rules of Court, which in turn provide for certain subsidiary instruments. Article 28 para. 3 of the ICJ Rules provides that '[i]nstructions for the Registry shall be drawn up by the Registrar and approved by the Court'⁶. Additionally, article 19 of the ICJ Rules provides that '[t]he internal judicial practice of the Court shall, subject to the provisions of the Statute and these Rules, be governed by any resolutions on the subject adopted by the Court'. Pursuant to this provision, the ICJ has adopted a 'Resolution Concerning the Internal Judicial Practice of the Court'⁷. Furthermore, in October 2001 the ICJ adopted certain 'practice directions' for use by the States appearing before it, even though no provision is made for such practice directions in either its Statute or its Rules of Court. These practice directions were said to be 'the result of the Court's ongoing

¹ For instance, in the case of the ICTY, in addition to that Tribunal's Statute, the legislative instruments include (1) the Rules of Procedure and Evidence (made by the Plenary session of the Judges pursuant to article 15 of the Tribunal's Statute), (2) Practice Directions issued by the President pursuant to rule 19 *lit.* B ICTY, (3) Regulations framed by the Prosecutor pursuant to rule 37 *lit.* A ICTY, (4) Rules of Detention (adopted by the Plenary pursuant to rule 24 para. v ICTY), (5) regulations relating to conditions of detention, issued by the Registrar, or the Registrar and the Commanding Officer of the Detention Unit, pursuant to the Rules of Detention (including the Regulations for the Establishment of a Complaints Procedure for Detainees, the Regulations for the Establishment of a Disciplinary Procedure for Detainees, the Regulations to Govern the Supervision of Visits to and Communications with Detainees and the House Rules for Detainees), (6) the Directive on Assignment of Defence Counsel ('set out by the Registrar and approved by the permanent Judges' pursuant to rule 45 *lit.* A ICTY, and (7) the Code of Professional Conduct for Defence Counsel (which the Registrar is required to 'publish', under the supervision of the President, pursuant to rule 46 *lit.* C ICTY).

² See article 51 para. 5.

³ See further mn 10-11 below.

⁴ See note 1 above and accompanying text.

⁵ Article 30 ICJ Statute.

⁶ Article 28 para. 4 of the Rules of Court of the ICJ further provides for the adoption of Staff Regulations and Staff Rules for the staff of the ICJ.

⁷ 5 July 1968, revised 12 Apr. 1976.

review of its working methods – a step justified by the congested state of its List and the budgetary constraints it continues to face⁸. As in the case of the ICC, the most important rules are contained in the Rules of Court of the ICJ, with the other instruments remaining subsidiary thereto and dealing in more detail with routine matters.

- 4 The Regulations pursuant to article 52 were first adopted by the judges at their fifth plenary session on 26 May 2004⁹. They were amended twice in 2007 and once in 2012.

II. The history of this article

- 5 Up to the last session of the Preparatory Committee in March/April 1998, the draft texts named only ‘Rules of the Court’¹⁰ as another body of law to be developed in connection with the Statute. However, article 43 of the Draft Statute submitted to the Preparatory Committee in February 1998 (Zutphen Draft) already mentioned ‘the Regulations and the Rules of the Court’ and thus implied the possibility of having two distinct sets of rules¹¹. The Working Group on the Composition and Administration of the Court, following a proposal by the United States¹², agreed to have separate articles on the Rules of Procedure and Evidence and on what was initially called ‘Rules of Practice’¹³.

The reasoning behind this separation was that the mere internal functioning and organization of the Court should be governed by rules developed by those most closely connected with these processes, *i. e.* the judges. The Rules governing the procedure and evidence before the Court, however, should be agreed upon by the States Parties. In order to make the ‘Rules of practice’ more readily distinguishable from the Rules of Procedure and Evidence, the Working Group decided to call them ‘Regulations’ rather than ‘Rules’¹⁴.

- 6 The text contained in the Draft Statute for the ICC¹⁵ did not differ greatly from the final outcome. The major options were the possibility of requiring a two-thirds majority of the judges for the adoption of the Regulations and a slightly different provision for circulating the Regulations to the States Parties before they could take effect. These are dealt with under B.

B. Analysis and interpretation of elements

I. Paragraph 1

1. ‘in accordance with this Statute and the Rules of Procedure and Evidence’

- 7 This formula indicates the obvious hierarchy between the different sets of rules: The Rules have to conform to the Statute; the Regulations of the Court have to conform both to the Statute and to the Rules. The delegations saw no need to repeat the rule expressed in article 51 para. 5 with regard to the Regulations¹⁶. Whereas the Rules are developed by the States Parties and a conflict between them and the Statute therefore is at least in theory something to be considered in the Statute itself, the status of the Regulations is clearly less than that of the Statute and the Rules. In the event of conflict, the Statute or the Rules will always prevail over the Regulations. The lower normative value of the Regulations is confirmed by article 21

⁸ ICJ, press release 2001/32, 31 Oct. 2001.

⁹ Doc. ICC/BD-01-01-04. The text of the Regulations is reproduced in Annex III to this Commentary.

¹⁰ See 1996 Preparatory Committee II, p. 51.

¹¹ Zutphen Draft, article 43 [19] para. 0.

¹² UN Doc. A/AC.249/1998/DP.1, p. 4.

¹³ See Report of the Working Group on Composition and Administration of the Court, UN Doc. A/AC.249/1998/L.14 and UN Doc. A/AC.249/1998/CRP.2/Add.5 and Add.5/Corr.1.

¹⁴ UN Doc. A/AC.249/1998/CRP.10, p. 14.

¹⁵ Preparatory Committee (Consolidated) Draft, article 53.

¹⁶ Such a rule was, however, contained in *ibid.*, article 53.

of the Statute relating to the applicable law. Indeed, while it stipulates that the Court shall apply ‘in the first place’ the Statute, Elements of Crimes and the Rules of Procedure and Evidence (article 21(1)(a)), there is no mention of the Regulations of the Court.

If a Regulation were to be challenged by a party to the proceedings, the ultimate decision on the conformity of the Regulations lies with the judges themselves. This leaves them a wide margin of discretion in interpreting any contested rule in light of their own interpretation of the Statute, making it unlikely that judges will strike down one of their regulation. This can be illustrated by the discussions that surrounded the use of Regulation 55, which allows a Trial Chamber, when delivering its judgment, to ‘change the legal characterisation of facts to accord under article 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges’ (Regulation 55(1)). In the *Lubanga* case, the defendant challenged this Regulation on the ground that the Statute granted the power to make amendments to the charges to the Prosecutor in application of article 61(9), and that therefore the Regulation, which gave such a possibility to the judges, was contrary to the Statute.¹⁷ However, the Appeals Chamber rejected this argumentation. It claimed that article 61(9) related to the powers of the Prosecutor and was silent on the powers of the Chambers and therefore that ‘the terms of the provision do not exclude the possibility that a Trial Chamber modifies the legal characterisation of the facts on its own motion once the trial has commenced’¹⁸. In addition to that, the Appeals Chamber defended the Regulation on account of the fact that, in light with the general aim of the Statute to ‘put an end to impunity’, it was necessary to fill the ‘accountability gap’ that would be opened if a defendant’s acquittal were ‘merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect’¹⁹.

This reasoning, while finding some support among some commentators, can be challenged on a number of levels. First of all, in relation to the interpretation of article 61(9) one can wonder why the fact that the Statute expressly ascribes the power to amend the charges to the Prosecutor should not logically be interpreted as automatically excluding such a power for other organs of the Court. If the drafters had wanted to grant such discretion to the judges they would have done so. If one follows the Appeals Chamber reasoning, the Regulations of the Court could expand the competence of any organ of the court to cover any function, even if such a function has initially been ascribed to a particular organ by the Statutes or the Rules of Procedure and Evidence, which would not be a satisfactory situation. Second of all, in relation to the ‘accountability gap’ issue, and beyond the general risk of abuse of teleological interpretations of the Statute²⁰, one wonders if it is the judge’s function to fill supposed impunity gaps that would have been left open by the drafters of the Statute. By doing so, judges are arguably acting *ultra vires* and taking on a legislative role that goes beyond their mandate²¹.

2. ‘by an absolute majority’

An absolute majority in this context means the majority of the total number of judges holding office. At the outset, the majority should therefore be 10 (the total number of judges

¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2112-ENG, Defence Appeal against the Decision of 14 July 2009 entitled Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, Defence, 10 September 2009.

¹⁸ *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’, 8 December 2009, para. 77 <<http://www.legal-tools.org/doc/40d015/>>.

¹⁹ *Ibid.*, para. 77.

²⁰ Jacobs, in: Kammerhofer and d’Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (2014) 451, 466–470.

²¹ For an in-depth discussion of Regulation 55, see Jacobs, in: Schabas *et al.* (eds.), *Ashgate Research Companion to International Criminal Law: Critical Perspectives*, (2013) 205.

being 18, according to article 36 para. 1). If a vacancy occurs, the number required for an absolute majority will be less until the vacancy is filled according to article 37. This was not an issue at the time that the Regulations were first adopted, but could become relevant in connection with any future amendments to the Regulations.

- 10 The text contained in the Draft Statute for the International Criminal Court²² included an option which would have required a two-thirds-majority of the judges. This was discarded very early on in the discussions. It was thought that such a requirement was unnecessary and only likely to cause delay.

3. 'necessary for its routine functioning'

- 11 The Rules specify a number of matters that are to be provided for in the Regulations²³. Apart from these specific matters, the Regulations are restricted to regulating the 'routine functioning' of the Court. The States participating in the Rome Conference were unwilling to leave the drawing up of more substantial Rules of Procedure and Evidence to the judges, even though there were precedents for this²⁴. An alternative formulation that was initially favoured by some delegations was 'rules for the day-to-day business of the Court'. This is, however, not any clearer than 'routine functioning'. The United States suggested that the Regulations should contain 'rules governing practice before the Court, administrative matters and internal operating procedures'²⁵.
- 12 In the event that provisions of the Regulations purported to regulate matters going beyond the 'routine functioning' of the Court, they would be *ultra vires*. However, the expression 'routine functioning' is not defined in the Statute, which leaves some flexibility in that respect for the judges. It may be noted in this connection that while rule 19 *lit. B* ICTY provides that practice directions made by the President of that Tribunal may only address 'detailed aspects of the conduct of proceedings before the Tribunal', such practice directions have in fact dealt with some relatively substantial issues²⁶.
- 13 The 'routine functioning' of the Court can be said to have two aspects. The first aspect concerns the judicial activity of the Court, and matters of practice and procedure. Many provisions of the Regulations deal with the minutiae of practice and procedure, establishing for instance the time limits, page limits and mandatory contents of different types of documents filed in proceedings before the Court. The other aspect concerns the internal organisation and administration of the Court as an institution. In relation to the latter aspect, the Regulations establish various bodies, structures and procedures that determine the way that the Court functions as an institution in practice, and the way in which its various organs interact. (See further Part C. below.)
- 14 The difficulty of defining the outer limits of the 'routine functioning' of the Court can once again be illustrated in relation to Regulation 55. As noted previously, this Regulation was challenged in relation to its alleged incompatibility with the Statute. In addition to that, the defence also challenged the Regulation because it was claimed to exceed the 'routine functioning' of the Court. The Appeals Chamber was not convinced by this argumentation. While not defining the concept of 'routine functioning' in any detail, it found, based on academic opinion, notably this publication, that it was a 'broad concept' that could cover

²² *Ibid.*

²³ *E.g.*, rule 21 para. 1 (providing that the criteria and procedures for assignment of legal assistance shall be established in the Regulations).

²⁴ See note 1 and mn 3.

²⁵ UN Doc. A/AC.249/1998/DP.1, p. 4.

²⁶ See, *e.g.*, the Practice Direction on the Procedure for Amending Regulations Issued by the Registrar (IT/173), 12 July 2000; Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal (IT/146), 7 Apr. 1999; Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment, 9 July 1998.

both practice and procedure²⁷. It also relied on the current content of the Regulations to note that Regulation 55 was not at odds with other regulation which might concern the rights of the defence or impact the trial²⁸. In addition to that, the Appeals Chamber considered that, because of disagreement in Rome on whether or not to include an equivalent provision in the Rome Statute, 'the matter was left for determination by the judges of the Court'. Finally, the judges noted the fact that no State Party had raised any objection to the Regulation that might cast on its legality²⁹.

Once again, the reasoning of the Appeals Chamber is not entirely convincing. First of all, it would have been welcome for the judges to take the opportunity to actually define the 'routine functioning' of the Court. Second, the content of other Regulations is hardly decisive in validating the legality of Regulation 55. It might very well be that these other Regulations are equally problematic in relation to article 52. Third, the idea that a disagreement in Rome means that the judges get to decide is somewhat problematic. There was a lot of disagreement in Rome, from the definition of crimes to modes of liability and procedure. This cannot be an adequate basis for judges to consider that they get to do what they want without an explicit provision to that effect in the Rome Statute. The only thing that is clear is that the rule contained in Regulation 55 was not included in the Statute, so the presumption should be that the judges do not have a power to read it in at their discretion. Finally, the fact that States have not objected to the Regulations is not a decisive factor in determining their conformity with the Statute or the Rules of Procedure of evidence, which should be determined solely by reference to the content of these documents exclusively.

In sum, the approach of the Appeals Chamber in relation to Regulation 55 shows that judges have adopted an expansive interpretation of their discretion in deciding the content of the Regulations of the Court. One can however wonder whether the drafters' decision to draft a far more detailed statute than in previous international tribunals as well as the decision to remove from the judge's purview the drafting of the Rules of Procedure and Evidence should not have led the judges to adopt a more cautious approach. Some judicial restraint would lead to the exclusion from the Regulations issues that are explicitly dealt with in the Statute of the Rules of Procedure, or relate to the heart of the judicial proceedings (such as the question of the amendment of the charges). 15

II. Paragraph 2

1. 'shall be consulted in the elaboration'

There is an obligation to consult, but not to obtain the approval of the Prosecutor and the Registrar. Responsibility for the Regulations lies with the judges; however, as a matter of practice and common sense the Prosecutor and the Registrar, as the heads of their respective offices, must have an opportunity to make their views known and to contribute to the process. It was suggested during the discussions to include the need for a formal approval by the Prosecutor and the Registrar, but the Working Group decided that this might lead to unnecessary delay. With a view to having the Court in working order as quickly as possible and recognizing that this kind of regulation will in all probability have to be adapted to the necessities of working together with all the organs of the Court, consultation seemed to be all that was needed. 16

²⁷ *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', 8 December 2009, para. 69 <<http://www.legal-tools.org/doc/40d015/>>.

²⁸ *Ibid*, para. 69.

²⁹ *Ibid*, para. 71.

2. ‘any amendments thereto’

17 There is no explicit rule in the Statute about the adoption of amendments to the Regulations of the Court. From the context, however, it is clear that paragraph 1 applies not only to the adoption of the first Regulations of the Court but also to any amendments. In other words, the judges are free to amend the Regulations of the Court by an absolute majority³⁰; paragraph 2 makes it clear that the Prosecutor and the Registrar are to be consulted in the same way as for the first version.

The manner in which the consultations are to take place is set out in the Regulations themselves. Regulation 6 provides that proposals for amendments to the Regulations are to be presented in writing to the Advisory Committee on Legal Texts. It does not, however, state who is entitled to submit such proposals. Presumably any judge is entitled to do so, but it is less clear whether the Prosecutor and the Registrar are also given the right to present such proposals directly. The Advisory Committee on Legal Texts is established by regulation 4, and consists of three judges (one from each Division), a representative of the Prosecutor, a representative of the Registrar, and a representative of counsel included in the list of counsel. This Advisory Committee is thus the forum in which the Prosecutor and Registrar are consulted. Although the Statute does not require it, the structure of the Advisory Committee on Legal Texts means that Defence counsel are also consulted on proposed amendments to the Regulations. By virtue of regulation 4 para. 3, other interested groups of persons may also be consulted, and the advice of experts may be obtained. Pursuant to regulation 6 para. 4, the Advisory Committee then forwards a written report with its recommendations to a plenary session of the judges.

Regulation 6 para. 2 provides that in urgent cases, the Presidency may submit proposals for amendments to the Regulations directly to a plenary session. While this provision enables the Advisory Committee on Legal Texts to be bypassed in exceptional cases, the obligation under article 52 para. 2 to consult both the Prosecutor and the Registrar will always exist. The Regulations do not specify the procedure for such consultations in cases where regulation 6 para. 2 applies.

III. Paragraph 3

1. ‘any amendments thereto’

18 The wording corresponds with the formula in paragraph 2; and the comments at margin No. 14 are equally applicable.

2. ‘shall take effect’

19 The Regulations should enter into force as soon as possible. As the States Parties may object to them, the words ‘enter into force’ were avoided here and replaced by ‘take effect’. Strictly speaking, they enter into force only when the six month time limit for objections by States expires. In practical terms, there is no difference.

20 Regulation 6 para. 3 adds that amendments to the Regulations shall not be applied retroactively to the detriment of the person to whom article 55 para. 2 or article 58 applies, the accused, or a convicted or acquitted person. The question of when an amendment to the Regulations can be said to be to the ‘detriment’ of such persons will need to be answered in future case law of the Court. The Rules of the ICTY and ICTR contain a similar provision to the effect that any amendments to the Rules of those Tribunals ‘shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case’³¹. The

³⁰ See mn 8.

³¹ Rule 6 *lit.* D ICTY; see also rule 6 *lit.* C ICTR. No such provision is contained in rule 6 of the Rules of the Special Court for Sierra Leone.

case law of those Tribunals has indicated that an amendment to the Rules does not ‘prejudice’ the rights of an accused, for instance, if it merely codifies an existing practice or precedent³².

3. ‘within six months’

The six month time limit will start to run when the Regulations are circulated to the States Parties. It is preferable for the effective functioning of the Court to have a single date for the expiry of the time limit than to have different dates depending on when the Regulations were received by each individual State. The time should still be sufficient for all States Parties to decide about any objections. Any objections must be received by the Court within the six month time limit; the date of reception being the point in time when the objection is formally made known to the other States Parties and the Court³³. It was discussed whether a certain form for the objections should be required, but it was thought unnecessary to go to such detail. Communications of this kind will always be in writing. Objections should be addressed to the President of the Court as the judges are responsible for the Regulations. 21

4. ‘no objections from a majority of States Parties’

This so called ‘emergency brake’ enables the States Parties to object to any Regulation which in the view of the majority of States Parties is inappropriate without taking the initiative and the responsibility for the content of the Regulations away from the judges. 22

From the wording of the text, there is some ambiguity on whether objections must be made to the Regulations as a whole, or may be made in relation to single provisions of the Regulations. However, the fact that the system also applies to amendments gives an indication that States Parties may object to a single provision in the Regulations. If the necessary majority of States Parties objects to a given provision, that provision will cease to be effective. 23

This ‘emergency brake’ provision will apply even if the objections of States Parties are based on different reasons. It is enough that a majority of States Parties does not wish a certain provision to be part of the Regulations. 24

The text contained in the Draft Statute submitted to the Diplomatic Conference included a similar option in paragraph 2. Under that option, the judges were to take any comments made by States Parties into account. During the debates, delegations felt that while such a provision seemed to oblige the judges to give some weight to statements made by States Parties, in fact it did not add anything to the ‘emergency brake mechanism’. Any comments made by States Parties would of necessity become a part of the judges’ deliberations. It was therefore held that the possibility to object to the Regulations was enough. 25

The Statute does not give the States Parties the right to propose new or different regulations. If a State Party objects to a provision, it may, however, propose an alternative formulation. It is then for the judges to decide whether they want to take up that proposal in an amendment. 26

C. Content of the Regulations

The text of the Regulations, as first adopted by the judges at their fifth plenary session on 26 May 2004, and subsequently amended in 2007 and 2012, is set out in Annex III to this Commentary. 27

³² *Prosecutor v. Kunarac et al.*, No. IT-96-23, IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 334. Compare *Prosecutor v. Tadić*, No. IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, para. 28; *Prosecutor v. Blaskić*, No. IT-95-14-ARI08bis, Decision on Prosecution Motion to Set Aside the Decision of the Appeals Chamber of 29 July 1997, Appeals Chamber, 12 Aug. 1997, paras. 12 and 13.

³³ This follows the rules regarding ratification and reservations, see Jennings and Watts (eds.), *Oppenheim’s International Law* (1992) § 609.

- 28 **Chapter 1 of the Regulations ('General Provisions')** contains a number of Regulations of general importance. This Chapter establishes two additional bodies with responsibilities for the functioning of the Court. Regulation 3 creates a 'Coordination Council' comprised of the President on behalf of the Presidency, the Prosecutor and the Registrar³⁴. The role of the Coordination Council is 'to discuss and coordinate on, where necessary, the administrative activities of the organs of the Court'. This body has no basis in the Statute or the Rules, and it is not given any express power to take binding decisions. However, it ensures that there will be discussions on a formal and regular basis between the various organs of the Court, to avoid unnecessary conflict or duplication in the carrying out of their separate administrative activities. Regulation 4 establishes an Advisory Committee on Legal Texts³⁵, composed of three judges (one from each Division), a representative from the Office of the Prosecutor, a representative from the Registry; and a representative of counsel included in the list of counsel. This body has the function of considering and reporting on proposals for amendments to the Rules, Elements and the Regulations. It is noteworthy that the Advisory Committee on Legal Texts is given these functions in relation to three specific legal texts only (the Rules, Elements and the Regulations), and is not given any functions (at least, not expressly) in relation to the adoption or amendment of the various other legal texts adopted under the Statute or Rules³⁶, such as the Code of Professional Conduct for Counsel adopted under rule 8 para. 1³⁷, the Regulations governing the operation of the Office of the Prosecutor adopted under rule 9³⁸, or the Regulations governing the operation of the Registry adopted under rule 14³⁹. The procedures to be followed for amendments to the Elements and the Regulations is spelled out in more detail in regulations 5 and 6. Regulation 7 provides that there shall be an Official Journal of the Court in which the Court's various legal texts are to be published, as well as amendments thereto. Regulation 8 provides that there shall be an official internet site of the Court.
- 29 **Chapter 2 of the Regulations ('Composition and Administration of the Court')** contains provisions (regulations 9–19) dealing with such matters as the terms of office and precedence of judges, the service of judges within the Presidency and the Appeals Chamber, the appointment of a Presiding Judge for each appeal and for each Pre-Trial Chamber and Trial Chamber, for the election of a President of each Division, for replacement and alternate judges, for duty judges, and for duty legal officers of the Chambers and duty officers of the Registry. These provisions complement in particular Chapter 2 (rules 4–43) of the Rules dealing with the composition and administration of the Court.
- 30 **Chapter 3 of the Regulations ('Proceedings before the Court')** contains detailed regulations (regulations 20–66) with respect to the mechanics of legal practice before the Court. The matters covered in this Chapter include publicity of hearings before the court, the format, content and distribution of documents filed before the Court, the page limits and time limits for such documents, the ordering of protective measures for victims, and aspects of the procedure at the pre-trial, trial, appeal and revision stages.

³⁴ See Staker, *Article 38*, mn 8–9.

³⁵ See also mn 14 above.

³⁶ See also mn 1 above.

³⁷ Rule 8 para. 1 provides that '[t]he Presidency, on the basis of a proposal made by the Registrar, shall draw up a draft Code of Professional Conduct for counsel, after having consulted the Prosecutor'. Rule 20 para. 3 adds that '[f]or purposes such as ... the development of a Code of Professional Conduct in accordance with rule 8, the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties'.

³⁸ Rule 9 provides that '[i]n discharging his or her responsibility for the management and administration of the Office of the Prosecutor, the Prosecutor shall put in place regulations to govern the operation of the Office. In preparing or amending these regulations, the Prosecutor shall consult with the Registrar on any matters that may affect the operation of the Registry'.

³⁹ Rule 14 para. 1 provides that '[i]n discharging his or her responsibility for the organization and management of the Registry, the Registrar shall put in place regulations to govern the operation of the Registry. In preparing or amending these regulations, the Registrar shall consult with the Prosecutor on any matters which may affect the operation of the Office of the Prosecutor. The regulations shall be approved by the Presidency'.

Chapter 4 of the Regulations ('Counsel issues and legal assistance') contains provisions (regulations 67–85) dealing with defence counsel, legal representatives of victims, and the scope of legal assistance provided by the Court to the defence and to victims. These regulations supplement the provisions contained in article 67 para. 1 (d) and rules 20–22 and 90–91. 31

One noteworthy feature of this Chapter is regulation 77, which provides for the establishment of an Office of Public Counsel for the Defence ('OPCD'). The role of this Office is to represent and protect the rights of the defence during the initial stages of the investigation, and to provide support and assistance to defence counsel and persons entitled to legal assistance, including by the provision of legal research and advice and appearing before a Chamber in respect of specific issues. In other words, this Office is permanently available to ensure that the rights of the accused are respected before defence counsel have been appointed, and to provide assistance and support to defence counsel in general after they have been appointed⁴⁰. 32

The OPCD is in fact one of two separate authorities that have primary responsibility for defence matters, both located within the Registry, in the Division of Victims and Counsel⁴¹. The other of these authorities, the Defence Support Section ('DSS'), is to be responsible, under the supervision of the Registrar, for implementation of the ICC's legal aid system and for handling requests for the appointment of defence counsel⁴². Unlike the DSS, which operates under the supervision of the Registrar, the OPCD falls within the remit of the Registry solely for administrative purposes and otherwise functions as a wholly independent office⁴³. It should be noted that in the context of the broad reform of the Registry, there are likely to be changes to this institutional set up. Options considered include the fusion of the OPCD and DSS sections as well as the creation of an international bar where the defense section would be removed from the scope of Registry activities⁴⁴.

No office having functions equivalent to those of the OPCD exists in the ICTY or ICTR. At the ICTY for instance, the Office of Legal Aid and Detention Matters (OLAD) exercises functions similar to those of the ICC's DSS, but not generally those of the ICC's OPCD⁴⁵. However, some precedent for this type of office is found in the Special Court for Sierra Leone. Rule 45 of the Rules of the Special Court for Sierra Leone provides for the establishment by the Registrar of a Defence Office, headed by a Principal Defender. This Defence Office, in addition to exercising functions akin to those of the ICC's DSS, also exercises certain functions of the kind exercised by the OPCD at the ICC⁴⁶.

⁴⁰ Regulation 77 paras. 4 and 5. See also paras. 456–473 of the ICC's Proposed Programme Budget for 2006 (ICC-ASP/4/32) <http://www.icc-cpi.int/library/asp/Part_II_-_Proposed_Programme_Budget_for_2006.pdf> (the 'ICC 2006 Proposed Budget'), which was adopted by the Assembly of States Parties (Assembly of States Parties, Fourth session, 28 Nov. to 3 Dec. 2005, Official Records (ICC-ASP/4/32), paras. 24–26). It appears that the ICC previously considered, but rejected, the possibility of establishing a public defender system, under which defence counsel would be salaried employees of the Court: see Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16), 17 Aug. 2004, <http://www.icc-cpi.int/library/asp/ICC-ASP-3-16-_defence_counsel_English.pdf>, at paras. 4, 7–12.

⁴¹ See note 32, the organigram on p. 123 of the ICC 2006 Proposed Budget.

⁴² See note 32, the description in the ICC 2006 Proposed Budget, paras. 420–434.

⁴³ Regulation 77 para. 2. Presumably it was decided that there should be a separation of functions between the DSS and the OPCD on the basis that the administration of the legal aid scheme requires the application and enforcement of administrative rules and should therefore be subject to the supervision of the Registrar, while the function of providing professional legal services to defence counsel or to individual accused should be exercised independently of the Registrar.

⁴⁴ F. Roux, 'La Défense mise à la porte de la Cour pénale internationale?' (2014) *La Gazette du Palais* 262, 9.

⁴⁵ See 12th Annual Report of the ICTY (2005), <<http://www.un.org/icty/rapannu-e/2005/index.htm>>, at paras.

⁴⁶ See the Rules of Procedure and Evidence of the Special Court for Sierra Leone, rule 45; and also the Special Court's Directive on the Assignment of Counsel; and its Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (available at www.sc-sl.org). For judicial consideration of the role of the Defence Office at the Special Court for Sierra Leone, see *Prosecutor v. Brima et al.*, No. SCSL-2004-16-AR73, Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Reappointment of Kevin Metzger and Wilbert

Regulation 81 provides for the establishment within the Registry of an Office of Public Counsel for Victims. This Office provides victims with certain services similar to those provided to defence counsel by the Office of Public Counsel for the Defence, namely to provide support and assistance to the legal representatives of victims and to victims, including through the provision of legal research and advice and appearing before a Chamber in respect of specific issues. This office is an entirely novel innovation in international criminal law, and has no precedent in any of the *ad hoc* courts or tribunals. It remains to be seen what role this office will play in the work of the Court in practice, but it is an innovation of significance.

- 33 Chapter 5 of the Regulations ('Victims participation and reparations') contains three regulations (regulations 86–88). The first two of these regulations deal with the procedures for the participation of victims in proceedings before the Court. The primary provision of the Statute dealing with participation of victims in proceedings is article 68 para. 3. Certain other provisions of the Statute also allow victims to make representations to the Court at certain stages of the proceedings (see article 15 para. 3, and article 19 para. 3). The provisions of the Rules dealing with this subject matter are rules 89–93. The third regulation in this Chapter deals with the procedure in cases of requests for reparations by victims, pursuant to article 75⁴⁷ and rules 94–99.
- 34 Chapter 6 of the Regulations ('Detention matters') contains provisions (regulations 89–106) dealing with 'the detention of persons detained by the Court'. The expression 'persons detained by the Court' would appear to exclude matters concerning persons who are serving sentences of imprisonment imposed by the Court after their transfer to the State of enforcement. The situation of persons serving sentences in a State of enforcement is governed instead by the provisions on enforcement in Part 10 of the Statute, Chapter 12 of the Rules, and Section 2 of Chapter 7 of the Regulations. Furthermore, the expression 'persons detained by the Court' would appear to exclude matters concerning persons who have been detained by the national authorities of a State pursuant to article 59 of the Statute, but who have not yet been transferred to the Court pursuant to article 59 para. 7. If this is so, it remains to be seen whether there are other means by which a person detained by a State pursuant to a request by the Court can challenge the legality of that detention in proceedings before the Court⁴⁸.
- 35 Unlike certain other Chapters of the Regulations, the provisions of Chapter 6 do not merely contain details to supplement provisions of the Statute and Rules. This is because the subject matter of Chapter 6 is not in fact dealt with in the Statute or Rules. Neither the Statute nor the Rules states expressly even that the Court shall have its own detention centre⁴⁹. Rather, the Statute merely implies that the Court must have a detention centre. Article 59 para. 1 states that '[a] State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9', and article 59 para. 7 states that '[o]nce ordered to be surrendered by the custodial State, the person shall be delivered to the

Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, Appeals Chamber, 8 Dec. 2005, paras. 79 *et seq.*; *Prosecutor v. Fofana et al.*, No. SCSL-2004-14-T, Decision on the Principal Defender's Motion for a Review of the Registrar's Decision to Install Surveillance Cameras in the Detention Facility, Trial Chamber, 6 Apr. 2006 (finding that the Principal Defender did not have *locus standi* to file a motion on behalf of accused who were represented by counsel). For more details on the legal aid models adopted by different international criminal courts, see Skilbeck (2004) 1 *EssexHumRtsRev* 66.

⁴⁷ See also Statute, *Article 82 para. 4*, and *Strijards, Article 110 para. 4 (b)*.

⁴⁸ See, for instance, *Prosecutor v. Nikolić*, No. IT-94-2-AR72, Decision on Notice of Appeal, Dissenting Opinion of Judge Shahabuddeen, Appeals Chamber, 9 Jan. 2003, para. 11.

⁴⁹ The situation is the same in the case of, for instance, the ICTY. The Statute of the ICTY contains no express provision that the ICTY is to have its own detention unit. The Rules of the ICTY contain a number of passing references to the detention unit of that Tribunal (rules 40*bis lit. A* and 90*bis lit. A* ICTY). However, these provisions merely assume the existence of the Tribunal's detention unit. They do not provide for its creation, or deal with its operation.

Court as soon as possible'. Article 60 para. 2 of the Statute adds that '[a] person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58 para. 1 are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions'. It is clear from these provisions that the Court must have some facility for detaining persons who are delivered to the Court and who do not satisfy the criteria for interim release.

Chapter 6 of the Regulations is thus the primary legal text governing the operation of the Court's detention centre. The Regulations envisage⁵⁰ that additional provision will be made in the Regulations for the Registry made pursuant to rule 14 para. 1⁵¹. Regulation 90 entrusts the Registrar with overall responsibility for all aspects of management of the detention centre, including security and order, and provides that the Registrar shall make all decisions relating thereto. However, it adds that the day-to-day fulfilment of the functions described in sub-regulation 1 shall be delegated to the Chief Custody Officer, who may delegate specific functions to other persons. Regulation 91 establishes the basic principle that '[a]ll detained persons shall be treated with humanity and with respect for the inherent dignity of the human person', and that there shall be no discrimination of detained persons on grounds of gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. The subsequent regulations in this Chapter deal with matters such as the confidentiality of the detention record, the information that a person is to be provided on arrival at the detention centre, inspections of the detention centre, discipline at the detention centre, and the rights of detained persons and the conditions of detention.

Chapter 7 of the Regulations ('Cooperation and enforcement') consists of two sections. Section 1 ('Cooperation') consists of a number of regulations (regulations 107–112) dealing with cooperation with the Court by States and international organisations. This is the subject matter of Part 9 (articles 86–102) of the Statute and Chapter 11 (rules 176–197) of the Rules. In relation to these provisions, reference should be made to the commentary above to articles 86–102 of the Statute. Section 2 ('Enforcement') contains regulations (regulations 103–118) setting out in greater detail the procedures for ensuring the enforcement of sentences of imprisonment, and of fines, forfeiture orders and reparation orders, imposed by the Court. These regulations supplement Part 10 (articles 103–111) of the Statute and Chapter 12 (rules 198–225) of the Rules. In relation to these provisions, reference should be made to the commentary above to articles 103–111 of the Statute.

Chapter 8 of the Regulations ('Removal from office and disciplinary measures') consists of seven regulations (regulations 119–125) establishing details of the procedures to be followed in proceedings for removal from office or for the taking of disciplinary measures against a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or a Deputy Registrar. Such proceedings are provided for in articles 46 and 47 and rules 23–32. In relation to such proceedings, reference should be made to the commentary above to articles 46 and 47 of the Statute.

Chapter 9 of the Regulations ('Adoption of the Code of Judicial Ethics') consists of a single regulation (regulation 126), which provides that the Presidency shall draw up a Code of Judicial Ethics⁵². This is an interesting provision, in that no mention is made of a Code of Judicial Ethics in the Statute or Rules, or in any other part of the Regulations, except for regulation 7 para. 1 (h), which states merely that the Code of Judicial Ethics is to be

⁵⁰ See Regulations 91 para. 2, 93 para. 1, 95 para. 2, 96 para. 2, 99 para. 2, 100 para. 3, 102 para. 2, 103 para. 4 and 106 para. 2.

⁵¹ A Report from the Court to the Assembly of States Parties in July 2004 stated that discussions with the host State concerning the availability of detention facilities were ongoing, and that relevant policies relating to the operation of a detention centre have been prepared: Report on the activities of the Court, Document ICC/ASP/3/10, 22 July 2004, para. 80.

⁵² The Code of Judicial Ethics (ICC-BD/02-01-05) was adopted by the Judges of the Court on 9 Mar. 2005.

published in the Official Journal of the Court. The legal basis for the Code of Judicial Ethics therefore appears to be the general power conferred by regulation 52 para. 1, read in conjunction with article 38 para. 3 of the Statute. Because there is no other mention of the Code of Judicial Ethics in the basic legal instruments of the Court, it is unclear what the precise effect of this Code is, or what are the consequences of a breach of the Code. Presumably, a breach of the Code of Judicial Ethics could be 'serious misconduct or a serious breach of his or her duties' within the meaning of article 46 para. 1 (a) and rule 24, or 'misconduct of a less serious nature' within the meaning of article 47 and rule 25⁵³.

⁵³ However, article 11 of the Code of Judicial Ethics provides that its principles are 'advisory in nature and have the object of assisting judges with respect to ethical and professional issues with which they are confronted' and that 'nothing in this Code is intended in any way to limit or restrict the judicial independence of the judges'. *Karadžić*.

PART 5 INVESTIGATION AND PROSECUTION

Article 53 Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
 - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - (b) The case is or would be admissible under article 17; and
 - (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
 - (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
 - (b) The case is inadmissible under article 17; or
 - (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
 - (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Literature: Bitti, G., 'article 53 – Ouverture d'une enquête' in: J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale Commentaire article par article*, Vol. II (2012) 1173; Buchanan, R., 'The Mavi Marmara Incident and the International Criminal Court', (2014) 25 *CLF* 465; Danner, A. M., 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *AJIL* 510; deGuzman, M., 'Gravity and the Legitimacy of the International Criminal Court', (2009) 32 *FordhamILJ* 1402, 1432; Goldston, J.A., 'More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court', (2010) 8 *JICJ* 383; Goldstone, R.J. And Fritz, N., "'In the Interests of Justice" and Independent Referral: The ICC Prosecutor's Unprecedented Powers', (2000) 13 *LeidenJIL* 655; Jacobs, D., 'A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase', (2007) 6

LAPE 317; Ntanda Nsereko, D., 'Prosecutorial Discretion before National Courts and International Tribunals', (2005) 3 *JICJ* 124; Olásolo, H., 'The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?', (2003) 3 *ICLRev* 87; *id.*, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff 2005); Razesberger, F., *The International Criminal Court: The Principle of Complementarity* (Peter Lang 2006); Schabas, W.A., 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', (2008) 6 *JICJ* 731; Stegmiller, I., 'The Pre-Investigation Stage of the ICTY and the ICC Compared', in: T. Kreussmann (ed.), *ICTY: Towards a Fair Trial?*, (2008) 322; *id.*, *The Pre-Investigation of the ICC: Criteria for Situation Selection* (Duncker & Humblot 2011); Turone, G., 'Powers and Duties of the Prosecutor', in: A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute Of The International Criminal Court: A Commentary*, Vol. II (2002), 1137; Ventura, M., 'The "Reasonable Basis to Proceed" Threshold in the Kenya and Côte d'Ivoire *Proprio Motu* Investigation Decisions: The International Criminal Court's Lowest Evidentiary Standard?', (2013) 12 *LAPE* 49; Webb, P., 'The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"', (2005) 50 *CrimLQ* 305; Wouters, J., Verhoeven, S. And Demeyere, B., 'The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?', (2008) 8 *ICLRev* 273.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	6
I. Paragraph 1	6
1. Chapeau	6
a) 'shall'	6
b) 'information'	7
c) 'initiate an investigation'	9
d) 'reasonable basis to proceed under this Statute'	10
e) 'shall consider'	13
2. The different subparagraphs	14
a) 'reasonable basis to believe'	14
b) '... is or would be admissible under article 17'	18
c) Elements to be considered under subparagraph 1 (c)	22
aa) 'gravity of the crime'	22
bb) 'interests of victims'	23
cc) 'substantial reasons to believe'	24
dd) 'interests of justice'	25
3. Final subparagraph	26
II. Paragraph 2	28
1. Chapeau	28
2. The different subparagraphs	29
a) 'not a sufficient legal or factual basis to seek a warrant or summons under article 58'	29
b) 'inadmissible under article 17'	30
c) Elements to be considered under subparagraph 2 (c)	31
aa) 'age or infirmity of the alleged perpetrator'	31
bb) 'his or her role in the alleged crime'	32
3. Final subparagraph	33
III. Paragraph 3	35
1. Subparagraph (a)	35
a) 'at the request'	36
b) 'may review'	37
c) 'request the prosecutor'	38
d) 'reconsider that decision'	39
2. Subparagraph (b)	41
IV. Paragraph 4	42

A. Introduction/General remarks

- 1 Article 53 of the Statute, despite its misleading title, does not only govern the processes by which the Office of the Prosecutor decides to start an investigation or prosecution. It also regulates the review by the Pre-Trial Chamber of the decision not to proceed, as well as the power of the Prosecutor to reconsider decisions whether to start an investigation or prosecution based on new facts or information. Article 53 paras. 1 and 2 provide substantive criteria for the consideration of whether to start an investigation or a prosecution, respec-

tively. Paragraph 3 regulates the scope of, and procedural requirements for, the Prosecutor's discretionary power not to proceed with investigation or prosecution and the role of the Pre-Trial Chamber. At the core of the general notion of prosecutorial discretion lies the power to decide whether or not to investigate and prosecute a case. This notion is an important manifestation of the statutory principle of functional prosecutorial independence found in article 42 and is ultimately based on the interest of impartial justice on which the credibility and legitimacy of the criminal justice process depends.

Article 13 of the Statute regulates the exercise of the Court's jurisdiction by the organs of the Court, including the Office of the Prosecutor. It provides that the Prosecutor's power to investigate can be triggered in three different ways. *First*, by a referral of a situation to the Prosecutor by a State Party in accordance with articles 13 (a) and 14; *second*, by a referral of a situation by the Security Council acting under Chapter VII of the United Nations Charter, in accordance with article 13 (b); and, *third*, by an independent initiation of an investigation by the Prosecutor which has then been expressly authorised to proceed by the Pre-Trial Chamber pursuant to articles 13 (c) and 15. For article 53 to come into play, the situation must have been triggered by one of the three trigger mechanisms. If the Prosecutor has initiated a preliminary examination pursuant to articles 13 (c) and 15 paras. 1 and 2, he or she 'shall consider the factors set out in article 53 Para. 1 (a) to (c)' according to Rule 48 in the Rules of Procedure and Evidence. Additionally, if the Prosecutor is seized of a situation through article 13 (a) or (c), in accordance with article 12, the territorial State or one State of nationality must either be Party to the Statute or have accepted the exercise of jurisdiction by the Court with respect to the crime in question. It should be noted that article 53 will eventually also apply to the crime of aggression, whose definition, albeit agreed upon at the first Review Conference in Kampala, Uganda, is not yet in force at the time of completion of this third edition.¹

The drafting history of article 53 of the Statute should be viewed alongside that of the controversial articles 12 and 13, which set the jurisdictional parameters of the Court and its Prosecutor. Drafts from both the Preparatory Committee and the ILC contained references to provisions on the triggering of the jurisdiction of the Court in the article corresponding to final article 53. Article 54 of the Draft Statute proposed by the Preparatory Committee was very lengthy and contained provisions which can now be found in articles 53, 54, 55 and 57 of the Statute.² The provisions relevant to what is now article 53 appeared in draft article 54 paras. 1-3 with multiple brackets and tentative language on several of the issues involved. Article 54 paras. 1-3 reflected draft article 47 paras. 1, *1bis* and *1ter* of the Zutphen Draft Statute.³ Both of these drafts encapsulated the inconclusive and preliminary deliberations at the Preparatory Committee regarding the content article 53. Article 26 paras. 1, 4 and 5 of the ILC Draft Statute had formed the basis of the work of the Committee.⁴ However, the Diplomatic Conference substantially contributed to what was finally adopted in article 53.⁵

The close connection between article 53 and the mechanisms triggering the Court's jurisdiction renders a comparison with the corresponding ICTY Statute provision (article 18) of limited relevance to the interpretation and analysis of article 53. Article 18 para. 1 of the ICTY Statute states that the Prosecutor 'shall initiate investigations *ex-officio* or on the basis of information obtained from any source'. This is a reflection of the Security Council's determination, when it established the Tribunal pursuant to Chapter VII of the United Nations Charter, that the Prosecutor needs no judicial or other authorisation in order to start an investigation. Through the creation of the Tribunal by virtue of a binding Chapter VII Resolution,⁶ the Security Council

¹ See Resolution RC/Res.6 The crime of aggression (<http://www.legal-tools.org/doc/0d027b/>).

² See Preparatory Committee (Consolidated) Draft, pp. 89-95 (<http://www.legal-tools.org/doc/816405/>).

³ See Zutphen Draft, pp. 86-87 (<http://www.legal-tools.org/doc/7ba9a4/>).

⁴ See 1994 ILC Draft Statute, II, B, I, p. 90 (<http://www.legal-tools.org/doc/f73459/>).

⁵ See Bitti, in: Fernandez and Pacreau (eds), *Statut de Rome de la Cour Pénale Internationale Commentaire article par article* (2012) 1174-1178.

⁶ Res. 827 (1993), 25 May 1993 (<http://www.legal-tools.org/doc/dc079b/>).

mandated the Prosecutor to investigate and prosecute. As such, it differs from the ICC regime, which is premised on State acceptance of the Court's jurisdiction, trigger mechanisms and deference on national criminal justice systems in light of complementarity.

Article 18 para. 1 of the ICTY Statute provides that the Prosecutor has prosecutorial discretion to 'decide whether there is sufficient basis to proceed' with an investigation based on his or her assessment of 'the information received or obtained'. This is, however, an *evidentiary* test and not one of *appropriateness*. The latter consideration, which some would be inclined to describe as more political, was exercised by the Security Council when it found that there was a situation involving serious violations of international humanitarian law in the former Yugoslavia justifying international judicial intervention.

- 5 Article 18 para. 4 of the ICTY Statute resembles article 53 para. 2 of the ICC Statute only insofar as it provides that the Prosecutor, 'upon a determination that a *prima facie* case exists, ... shall prepare an indictment'. It follows from the above discussion that the formulation 'initiate an investigation' in article 53 of the ICC Statute must be distinguished from 'initiate investigations' in article 15. The latter, in article 15 para. 6, refers to preliminary examinations, *i.e.*, the preliminary gathering of information in order to determine *whether* to proceed to request the Pre-Trial Chamber to authorise a full investigation. Article 53, on the other hand, refers to the *commencement* of a full investigation with a view to determining whether to prepare an indictment and prosecute.⁷ Article 42 para. 1 makes a distinction between 'examining' (referrals and substantiated information) and 'conducting investigations and prosecutions', which may be a useful indication of the progressive phases of the exercise of the Prosecutor's duties. As regards the fact-finding activities of the Office of the Prosecutor, the Prosecutor must assess the preliminary information provided in order to determine whether or not to embark on a full investigation. This preliminary assessment is a precautionary measure intended to protect the Prosecutor from the obligation of expending resources and time on an investigation which clearly has no chance of leading to a compelling indictment or prosecution. This provision contains one of several safeguards against the abuse of the investigative capacity of the Court by the Prosecutor. Article 53 provides the criteria for the preliminary examination.⁸ The second fact-finding activity, which depends on the outcome of the assessment of the preliminary information to commence, is the launching of an in-depth investigation of the incident or situation to which the preliminary information pertains. This in-depth investigation will determine whether a prosecution should be instituted or not.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Chapeau

- 6 a) 'shall'. The use of the imperative verb 'shall' emphasises that the sole discretion in the chapeau is whether there is a reasonable basis to proceed with a full investigation. If such a reasonable basis is found to exist, the Prosecutor is obliged to proceed with an investigation with a view to formulating an indictment – if the investigation so warrants. The provision does not give the Prosecutor room for arbitrary decision-making if he or she deems that the preliminary information provides a reasonable basis on which to proceed under the Statute. Despite the use of the mandatory 'shall', which indicates that the principle of legality is applicable, there is a lot of debate as to whether the discretion found in the factors to be

⁷ See ICC, Office of the Prosecutor, 'Policy Paper on Preliminary Examinations', November 2013 (<http://www.legal-tools.org/doc/acb906/>), paras 35, 73.

⁸ *Ibid.*

considered by the Prosecutor regarding whether or not to initiate an investigation or prosecution of a case, in fact indicates that the Prosecutor's operation is conducted under the principle of opportunity.⁹

b) **'information'**. The 'information' referred to in this provision primarily concerns that which accompanies the referral of a situation to the Prosecutor by a State Party or by the Security Council pursuant to article 13 (a) and (b), or which the Prosecutor has received under article 15 paras. 1 and 2.

The Prosecutor is not restricted only to the information which accompanies the submission when making his or her analysis; the provision does not impose such a limitation on the Prosecutor's discretion. On the contrary, the wording of the provision simply refers to 'information made available to him', without specifying from whom and when. Under article 15 para. 2¹⁰ the Prosecutor is explicitly authorised by the Statute to seek additional information from a wide variety of sources to supplement the information received so as to enable him or her to undertake a suitable analysis thereof. Rule 104 para. 2 affords the same power to the Prosecutor under article 53 paras. 1 and 2. This is only reasonable insofar as one main interest underlying article 15 para. 2 is to ensure that the Prosecutor has a sufficient basis to consider the seriousness of the information received before taking steps to launch a full investigation. It would, in any event, fall within his or her prosecutorial discretion to seek such additional information in order to come to a fair conclusion on whether there is a reasonable basis to proceed.

In evaluating the information, the Prosecutor shall – in accordance with Rule 104 para. 1 of the Rules of Procedure and Evidence – 'analyse the seriousness of the information received'. This obligation is identical to that spelled out in article 15 para. 2 for the *proprio motu* initiation of investigations. The paragraph illustrates that the relationship between articles 15 and 53 had not been fully thought through at the time of adoption of the Statute.¹¹ The discrepancy between the two provisions has led some to question the applicability of article 53 para. 1 to *proprio motu* investigations.¹² However, given that article 53 para. 1 does not distinguish between the different trigger mechanisms, such an interpretation cannot be warranted.¹³

c) **'initiate an investigation'**. As seen in section a) above, the phrase 'initiate an investigation' has different meanings in article 53 para. 1 and in article 15. In the former it means the launching of activities by the Prosecutor to collect evidence with a view to a possible indictment and prosecution of perpetrators of crimes under the Court's jurisdiction. In article 15 para. 1 it refers to 'preliminary examinations'¹⁴ for the purpose of determining *whether* to take steps to proceed to a full investigation. Article 15 deals with the *initiation* of investigations, while article 53 concerns the decision-making to *start* investigations and prosecutions.

d) **'reasonable basis to proceed under this Statute'**. In the original 1994 ILC Draft Statute the criterion employed was that of 'no possible basis'. The current criterion entered the deliberations during the work of the Preparatory Committee in 1996.¹⁵ The reasonability test

⁹ See De Meester, in: Klamberg (ed.), *The Commentary on the Law of the International Criminal Court* <<http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc>> accessed 11 November 2014; Olásolo (2003) 3 *ICLRev* 87, 131–132; Webb (2005) 50 *CrimLQ* 305, 307–312.

¹⁰ Article 15 para. 2 pertains to *proprio motu* initiation of investigations by the Prosecutor (<http://www.legal-tools.org/doc/7b9af9/>).

¹¹ See, generally, Stegmiller, *Pre-Investigation* (2011).

¹² See Olásolo, *The Triggering Procedure of the International Criminal Court* (2005) 70–72; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 659.

¹³ See Biti, note 5, 1180, who also helpfully explains the issue by reference to the different trigger mechanisms with regard to the crime of aggression.

¹⁴ See article 15 para. 6.

¹⁵ See the options for an article 26 para. 1 (b) (i), 1996 Preparatory Committee II, p. 112 (<http://www.legal-tools.org/doc/03b284/>).

appears in several places in the Statute in the context of assessment of information and evidence. It appears three times in article 15,¹⁶ several times in article 53¹⁷ and again in article 58 para. 1 (a).¹⁸ The question therefore arises as to whether the reasonability tests are essentially the same in all three provisions. Pre-Trial Chamber II in its Decision in the situation in Kenya advocated that the standard in articles 15(3), 53(1) and 15(4) be the same.¹⁹ As these standards are used in the same or related articles, they share the same purpose: the opening of an investigation.

- 11 With the exception of the use in article 58 para. 1 (a), the provisions refer to different aspects of the preliminary evaluation of information, which is meant to enable the Prosecutor to determine whether to proceed to a full investigation. The test provided for in article 58 para. 1 (a) is only activated after an investigation has gathered sufficient evidence to determine whether to proceed with an indictment and prosecution.²⁰ The meaning of ‘reasonable grounds’ within the context of article 58 para. 1 (a) will not be dealt with here, apart from mentioning that the test amounts to an assessment of whether the evidence shows the existence of a *prima facie* case against one or more perpetrators. But ‘reasonable grounds’ is a lower threshold than that of the ‘beyond reasonable doubt’ criterion which applies to the weighing of evidence at trial, as only evidence untested in the specific case under preparation is available prior to the confirmation hearing and the trial. Indeed, a contextual interpretation may be the answer to this conundrum. Article 53(1) requires less certainty than article 53(2).²¹ Similarly, this threshold is lower than that required for an arrest warrant or the ‘substantial grounds to believe’ standard required for the confirmation of charges.²² It is therefore true that the standard becomes stricter in each step of the process.²³
- 12 The information available at the time of the Prosecutor’s preliminary examination is expected to be less comprehensive and conclusive than the evidence gathered by the completion of the investigation. It would therefore seem that the test of ‘reasonable basis’ for preliminary information may constitute a lower threshold than the ‘reasonable grounds’ test to be applied under article 58 para. 1 (a). This is derived from the three factors in subparagraphs (a), (b) and (c) of article 53 para. 1 which the Prosecutor is directed to consider when assessing the information. The ‘reasonable basis’ element of the test requires that the Prosecutor, following due consideration, be satisfied with regard to these three factors. In the *first* place, he or she must be satisfied that a reasonable basis exists to believe

¹⁶ Article 15 para. 3 requires that the Prosecutor has a ‘reasonable basis to proceed with an investigation’. For the Pre-Trial Chamber to authorise the Prosecutor to continue, article 15 para. 4 requires that it considers there to be ‘a reasonable basis to proceed with an investigation’. See article 15 para. 6 as well.

¹⁷ Apart from appearing in the chapeau, article 53 para. 1 (a) requires that the information available to the Prosecutor ‘provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed’. The final subparagraph of article 53 para. 1 concerns what happens if the Prosecutor determines that there is ‘no reasonable basis to proceed’ pursuant to subparagraph (c).

¹⁸ Article 58 para. 1 (a) provides for the Pre-Trial Chamber to have ‘reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court’.

¹⁹ ICC, Pre-Trial Chamber II, Situation in the Republic of Kenya ‘Decision Pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya’, 31 March 2010, ICC-01/09-19 (<http://www.legal-tools.org/doc/338a6f/>) (Kenya Decision) para 21. See also Pre-Trial Chamber III, Situation in the Republic of Côte d’Ivoire, ‘Corrigendum to “Decision Pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire”’, 15 November 2011, ICC-02/11-14-Corr (<http://www.legal-tools.org/doc/e0c0eb/>) (Côte d’Ivoire, 15 November 2011 Decision) para 21 (‘the underlying purpose of the procedure in article 15(4) of the Statute is to prevent unwarranted, frivolous or politically motivated investigations’).

²⁰ In this regard it should be noted that the criterion used in article 53 para. 2 is that of ‘sufficient basis for a prosecution’. As this refers to an assessment of the result of the investigation, the question may be asked whether it would have been better, in the interests of clarity and consistency, to use the same terminology in articles 53 para. 2 and 58 para. 1, using ‘sufficient basis’ in article 58 para. 1 (a) as well.

²¹ See De Meester, note 9.

²² See Ventura (2013) 12 *LAPE* 49, 67.

²³ See Stegmiller, in: Kreussmann (ed.), *ICTY: Towards a Fair Trial?*, (2008) 322; see also Stegmiller, *Pre-Investigation* (2011) 353.

that a crime within the jurisdiction of the Court has been committed. *Secondly*, the Prosecutor must be satisfied that the case is or would be admissible in terms of the criteria laid down in article 17. Finally, having considered the gravity of the crime and the interests of the victims, he or she must be satisfied that there are no substantial reasons to believe that an investigation would not serve the interests of justice.

e) ‘shall consider’. In determining whether to proceed with an investigation, the Prosecutor is required to take certain factors into account. The list of factors is cumulative, so the Prosecutor is obliged to consider all three. The third factor, through the use of the term ‘substantial reasons’, enables the Prosecutor to take additional aspects into consideration. However, as explained above, the test at this stage is not a stringent one. It is not necessary for the Prosecutor to go beyond the listed factors to meet the test of ‘reasonable basis to proceed under this Statute’. It is, however, imperative that each of these factors be satisfied. If one is lacking, no reasonable basis to proceed can be found to exist.

2. The different subparagraphs

a) ‘reasonable basis to believe’. The ‘reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed’ is one of three factors to be considered in determining whether a ‘reasonable basis to proceed under this Statute’ exists. The use of the expression ‘reasonable basis’ twice within a single provision had been flagged at the Inter-Sessional Meeting held in Zutphen in January 1998.²⁴ However, the use of the ‘reasonable basis’ test in the context of subparagraph 1 (a) does not conflict with the test in the chapeau. The former test refers only to one component of the latter test.²⁵

The ‘reasonable basis’ test in subparagraph 1 (a) entails that the Prosecutor assess the information placed before him or her. If it leads to the reasonable belief that a crime within the jurisdiction of the Court has been committed, a reasonable basis for such a belief naturally exists. It is not required that the information conclusively prove all the elements of the crime at this stage. The Court has interpreted ‘reasonable basis’ as requiring ‘a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court “has been or is being committed”’.²⁶

The necessity for the ‘reasonable basis’ test in article 53 para. 1 (a) is questionable. The Zutphen Report opined that it ought not to be retained.²⁷ Whilst draft article 47 para. 1 of the Zutphen text referred to ‘reasonable basis for a prosecution’ (emphasis added), language kept in article 54 para. 1 of the Draft Statute of the Preparatory Committee, final article 53 para. 1 was, on the other hand, appropriately amended to refer to ‘reasonable basis to proceed under this Statute’ (emphasis added). Likewise, Zutphen Draft article 47 para. 1bis (b) (i) and Draft article 54 para. 2 (b) (i) of the Preparatory Committee’s proposed Statute both used the language ‘reasonable basis ... for proceeding with a prosecution’, whereas final article 53 para. 1 (a) is more specific in that it refers to ‘reasonable basis to believe that a crime ... has been ... committed’. The Rome Statute has, in other words, reduced the scope of the convergence between what is now articles 53 para. 1 and 53 para. 1 (a) *vis-à-vis* earlier drafts.

Article 53 para. 1 (a) also makes reference to ‘a crime within the jurisdiction of the Court’. This has been interpreted by the Court to not only require consideration of article 5 para. 1 of the Statute, but also satisfaction of the following conditions: jurisdiction *ratione materiae*;

²⁴ A note was inserted after article 47 para. 1 in the Zutphen Draft, providing that ‘[t]he term “reasonable basis” in the opening clause is also used in the criteria listed in 1bis (i). If the latter is retained, a broader term in the opening clause might be necessary in order to cover all the criteria listed under paragraph 1bis’. See Zutphen Draft, note 3, 86–87.

²⁵ Kenya Decision, see note 19, para 26.

²⁶ *Ibid*, para 35. See also ICC, Pre-Trial Chamber III, Situation in the Republic of Côte d’Ivoire, ‘Decision Pursuant to article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, 3 October 2011, ICC-02/11-14 (Côte d’Ivoire, 3 October 2011 Decision) (<http://www.legal-tools.org/doc/7a6c19/>) para 23.

²⁷ See Zutphen Draft, note 3 (‘If the latter is retained ...’).

jurisdiction *ratione temporis*; jurisdiction *ratione loci* or *ratione personae*.²⁸ It should be noted, however, that individual criminal responsibility has not yet been established at this stage. Based on article 53(1)(a), the ICC decided not to investigate the situations in Venezuela²⁹ and Palestine.³⁰

- 18 b) ‘... is or would be admissible under article 17’. This criterion requires that the Prosecutor consider whether any of the grounds for inadmissibility of the case bar, or would bar, the Court from exercising jurisdiction. If one or more national criminal justice systems are genuinely investigating or prosecuting the crimes in question, the Prosecutor must conclude that there is no reasonable basis to proceed with an investigation. This is the effect of the primacy afforded to national jurisdictions by virtue of the principle of complementarity. Article 18 of the Statute, on preliminary rulings regarding admissibility, places an obligation on the Prosecutor to notify State Parties and other States ‘which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned’. If a State informs the Prosecutor within one month of receipt of the notice that it is investigating the crimes in question and requests the Prosecutor to defer, he or she must do so, unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.
- 19 Article 18 para. 1 explicitly provides that the Prosecutor’s notification obligation is only activated *when* the Prosecutor ‘has determined that there would be a reasonable basis to commence an investigation’, in cases where the situation has been referred to the Court by a State Party pursuant to article 13 (a). This means that the Prosecutor is only obliged to notify States as required by article 18 *after* he or she has made a determination that there is a ‘reasonable basis to proceed’ pursuant to article 53 para. 1. It would seem that this is also the rule when the Prosecutor is acting *proprio motu* on the basis of article 13 (c), albeit article 18 para. 1 is ambiguous in that it says that the same applies when ‘the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15’.
- 20 It has been pointed out that the term ‘case’³¹ in this sub-paragraph is contextually incorrect, given that the Prosecutor at the investigation stage is examining the ‘situation’.³² Pre-Trial Chamber II found that article 53 para. 1 (b) ‘must be construed in its context and accordingly, an assessment of admissibility during the article 53(1) stage should in principle be related to a “situation”’,³³ but did not consider the text mistaken. Rather, it was thought that the Chamber is ‘called upon to construe the term ‘case’ in the context in which it is applied’, i. e. one or more potential cases in the context of a situation.³⁴ In addition, it rightly found that the admissibility assessment cannot occur in the abstract. The need to consider the scope and criteria of a ‘potential case’³⁵ (and gravity thereof) therefore arises.

²⁸ Kenya Decision, see note 19, para 39. See also ICC, Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006’, 14 December 2006, ICC-01/04-01/06-772 (OA 4) (<http://www.legal-tools.org/doc/1505f7/>) paras 21–22.

²⁹ See ICC, Office of the Prosecutor, ‘OTP Response to Communications Received Concerning Iraq’, 9 February 2006, <http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 11 November 2014.

³⁰ See ICC, Office of the Prosecutor, ‘Situation in Palestine’, 3 April 2012 (<http://www.legal-tools.org/doc/f5d6d7/>).

³¹ That which constitutes a ‘case’ has been defined in the Situation in the Democratic Republic of the Congo as including ‘specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects’. See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, Annex 2 to ‘Decision on the Prosecutor’s Application for Warrants of Arrest, article 58’, 10 February 2006, ICC-01/04-01/06-20-Anx2 (*Lubanga*, 10 February 2006 Decision) (<http://www.legal-tools.org/doc/d68b07/>) paras 21, 23, 38.

³² See Schabas, note 12, 660.

³³ Kenya Decision, see note 19, para 45.

³⁴ *Ibid.*, para 48. See also paras 50, 182, 188; Côte d’Ivoire, 3 October 2011 Decision, note 26, paras 190–191, 202–204.

³⁵ *Ibid.*, paras 50–62 – para 58 in particular. See also Côte d’Ivoire, 15 November 2011 Decision, note 19, 202.

Besides complementarity, gravity constitutes the second ground of inadmissibility under article 17 para. 1, the third being *ne bis in idem*.³⁶ The Prosecutor decided not to seek authorisation to initiate an investigation in Iraq.³⁷ In the Situation on Registered Vessels of Comoros, Greece and Cambodia the Prosecutor originally decided not to initiate an investigation, also on the basis of gravity.³⁸ On 16 July 2015, Pre-Trial Chamber I granted an application for review of this decision filed by the Government of the Union of the Comoros, requesting the Prosecutor to reconsider the decision not to initiate an investigation into the situation.³⁹ Pre-Trial Chambers II and III have held that gravity should be assessed on the basis of whether the individuals or groups of persons that are likely to be the object of an investigation capture those who may bear the greatest responsibility for the alleged crimes.⁴⁰ In addition, the context of the alleged incidents is important for an assessment of gravity.⁴¹ Such an assessment entails both quantitative and qualitative criteria, which Pre-Trial Chamber II outlined in the Kenya Decision as follows: '(i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i. e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families'.⁴² Gravity therefore constitutes a threshold necessary so that the determination that article 53 para. 1 (b) might be met. The question therefore arises as to whether the Prosecutor is able to compare situations in making such a determination. It has been suggested that he or she cannot.⁴³ However, in practice, article 53 para. 1 (b) has been interpreted by the Prosecutor as enabling him or her to compare situations⁴⁴ and crimes.⁴⁵

c) Elements to be considered under subparagraph 1 (c). aa) 'gravity of the crime'. 22
 Consideration of the 'gravity' of the case is one of the criteria to be assessed in determining the admissibility of a case before the Court in terms of article 17.⁴⁶ As admissibility pursuant to article 17 has been included in article 53 para. 1 (b) as one of the considerations to be taken into account in ascertaining the existence of a reasonable basis to proceed, the need for repetition may be questioned. Its inclusion may be seen as a reflection of the concern by many of the delegations at the Preparatory Committee and the Rome Conference that the interests underlying the complementarity principle sufficiently permeate the Statute. Preambular paragraph nine refers to 'the most serious crimes of concern to the international community as a whole', whilst article 1 confirms that the Court's jurisdiction covers 'the most serious crimes of international concern'.⁴⁷ Crimes that are not of sufficient gravity for the ICC will be left to possible domestic investigation and prosecution. Regulation 29, para. 2

³⁶ Kenya Decision, see note 19, para 52. See also Côte d'Ivoire, 15 November 2011 Decision, note 19, 192–206.

³⁷ See OTP Response to Communications Received Concerning Iraq, note 29, p. 9.

³⁸ ICC, Office of the Prosecutor, 'Situation on Registered Vessels of Comoros, Greece and Cambodia – article 53(1) Report', 6 November 2014, 142 <http://www.icc-cpi.int/iccdocs/otp/OTP-COM-article_53%281%29-Report-06Nov2014Eng.pdf> accessed 13 November 2014 (*Mavi Marmara* Report). Cf. Buchan (2014) 25 *CLF* 465.

³⁹ See ICC, Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, 'Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation', 29 January 2015, ICC-01/13-3-Red; ICC, Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation', 16 July 2015, ICC-01/13-34.

⁴⁰ Kenya Decision, see note 19, para 60. See also Côte d'Ivoire, 15 November 2011 Decision, note 19, 204.

⁴¹ Kenya Decision, see note 19, para 61.

⁴² *Ibid*, para. 62.

⁴³ See deGuzman (2009) 32 *FordhamILJ* 1402, 1432.

⁴⁴ See OTP Response to Communications Received Concerning Iraq, note 29, pp. 8–9.

⁴⁵ See ICC, Statement by Chief Prosecutor Luis Moreno-Ocampo, 14 October 2005 (<https://www.legal-tools.org/doc/d9b3cb/>) p. 3. See also, for example, *Mavi Marmara* Report, note 38, 145–146.

⁴⁶ See article 17 para. 1 (d).

⁴⁷ The reference to the commission 'as part of a plan or policy or as part of a large-scale commission of such crimes' in article 8 para. 1 can also be read in this light.

of the Regulations of the Office of the Prosecutor stipulates that the factors to be taken into consideration include the scale, nature and manner of the commission of the crimes and their impact.⁴⁸

- 23 **bb) ‘interests of victims’.** Although the victims of the crimes falling within the jurisdiction of the Court, and members of their families, may have a paramount interest in the investigation and prosecution of the perpetrators of the crimes, this provision recognizes that there are factors which may outweigh this interest. The presence of such factors would exclude a finding that there is a reasonable basis to proceed.⁴⁹
- 24 **cc) ‘substantial reasons to believe’.** It would seem that this phrase opens the possibility for using any available ground as a basis for the argument that further investigation would not serve the interests of justice. Although the exact content of the phrase ‘substantial reasons’ is indeterminate, the Prosecutor may not arbitrarily determine the existence of such a reason in order to avoid an investigation by invoking this provision. He or she has to be able to advance convincing arguments to show the existence of such a reason. The discretionary power which this provision grants the Prosecutor is judicially supervised by article 53 para. 1, which requires the Prosecutor to notify the Pre-Trial Chamber of such a determination. In such an event, the Pre-Trial Chamber is empowered to review the determination *ex officio*.⁵⁰ If it decides to do so, the Prosecutor’s decision requires confirmation by the Pre-Trial Chamber.
- 25 **dd) ‘interests of justice’.** Similar to the discussion on ‘substantial reasons’, the exact content of ‘interests of justice’ is not defined in the Statute.⁵¹ This does not, however, open the door for the Prosecutor to avoid investigation by invoking arbitrary grounds under this provision.⁵² In view of the authority of the Pre-Trial Chamber to review such a decision on its own initiative, or at the request of the Security Council or referring State(s) Party, the Prosecutor must exercise the discretion in a reasonable manner and be able to substantiate a decision not to proceed.⁵³ The concept of the ‘interests of justice’ has been controversial.⁵⁴ A Policy Paper outlining the Prosecutor’s understanding of the concept was issued by the Office of the Prosecutor in 2007.⁵⁵ This document emphasises, *inter alia*, the exceptional nature of the Prosecutor’s discretion under this provision, the presumption in favour of investigation or prosecution (provided that the established criteria have been met) and, perhaps most controversially, the difference between the interests of justice and the interests of peace, the latter of which – according to the Policy Paper – fall outside the Prosecutor’s mandate.⁵⁶ Article 53 para. 2 (c) refers to the age and infirmity of the alleged perpetrator as relevant factors in the determination of whether a prosecution is in the interests of justice. The non-inclusion of the

⁴⁸ ICC, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09. See also ICC, Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, ‘Decision on the Confirmation of Charges’, 8 February 2010, ICC-02/05-02/09-243-Red (<http://www.legal-tools.org/doc/cb3614/>), paras 31, 188, 203–204.

⁴⁹ ICC, Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’, September 2007 (<http://www.legal-tools.org/doc/bb02e5/>), p. 5.

⁵⁰ See article 53 para. 3 (b).

⁵¹ See Goldston (2010) 8 *JICJ* 383, 392; Danner (2003) 97 *AJIL* 510, 542, both of whom describe the concept of the interests of justice as ‘elastic’.

⁵² See, generally, Turone, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1137, 1159–1162.

⁵³ *Id.* See also Ntanda Nsereko (2005) 3 *JICJ* 124, 140 (‘While the Prosecutor appears to have a good measure of discretion in this respect, he [or she] exercises it with the Pre-Trial Chamber “looking over his [or her] shoulder”’).

⁵⁴ See Danner, note 50, 542; Goldstone and Fritz (2000) 13 *LeidenJIL* 655, 662–663; Jacobs (2007) 6 *LAPE* 317, 327–330.

⁵⁵ See Policy Paper on the Interests of Justice, note 48. For a critique, see Schabas, note 12, 660–666. See also Schabas (2008) 6 *JICJ* 731, 749.

⁵⁶ See also Policy Paper on Preliminary Examinations, note 8, para 69, where it is clearly stated that ‘the interests of justice provision should not be considered a conflict management tool requiring the Prosecutor to assume the role of a mediator in negotiations’.

two factors in article 53 para. 1 (c) has no significance beyond the fact that it will often not be known at the article 53 para. 1 stage of the process who the suspected perpetrator is.

3. Final subparagraph

As indicated above, a decision by the Prosecutor not to proceed with an investigation based solely on article 53 para. 1 (c) cannot be made on arbitrary grounds. That could amount to abuse of prosecutorial discretion. The Prosecutor is obliged to notify the Pre-Trial Chamber of such a decision promptly in writing and with reasons for the conclusion.⁵⁷ The Pre-Trial Chamber, which has certain powers to function as a safeguard for the responsible exercise by the Prosecutor of his or her powers, is then empowered to review the Prosecutor's decision.⁵⁸ This is an important constitutional check deliberately built into the Statute. If the Prosecutor's finding of no reasonable basis to proceed is based on any of the other two criteria provided for in this provision, it is not required that the Prosecutor inform the Pre-Trial Chamber.

Although the Prosecutor is obliged to inform not only the Pre-Trial Chamber but either the Security Council or the referring State(s) Party pursuant to article 53 para. 2 about his conclusion not to prosecute, a similar extension of the Prosecutor's notification duty is not found in article 53 para. 1 itself, but in rule 105 of the Rules of Procedure and Evidence. This rule obliges the Prosecutor to 'promptly inform in writing the State or States that referred a situation under article 14, or the Security Council in respect of a situation covered by article 13, paragraph (b)'. The notification shall contain the Prosecutor's conclusion and reasons.⁵⁹

II. Paragraph 2

1. Chapeau

Article 53 para. 2 comes into play after the completion of the formal investigation by the Prosecutor, who must consider the evidence gathered, weigh it and determine whether it provides 'a sufficient basis for a prosecution'. In practice, however, there may be no formal conclusion of the investigation, until after the confirmation of charges hearing.⁶⁰ In para. 2, the Statute moves away from the situation and focuses on a case. The 'sufficient basis' test essentially entails considering whether the evidence collected would provide a basis on which a court can convict the suspect. In certain jurisdictions this is referred to as the *prima facie* test. Guidance for the determination of sufficiency is provided for in three criteria listed as subparagraphs (a) to (c) in the provision.⁶¹ The Prosecutor may use any of these three separately or in combination to justify a decision not to proceed with a prosecution.

2. The different subparagraphs

a) 'not a sufficient legal or factual basis to seek a warrant or summons under article 58'. *Subparagraph* (a) is not a mere repetition of the sufficient basis test in the chapeau, insofar as it introduces the 'reasonable grounds' standard in article 58 para. 1 (a). The latter provides that the Pre-Trial Chamber can only issue an arrest warrant if it is satisfied that there are 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'.⁶² In other words, unless the Prosecutor concludes that there are reasonable

⁵⁷ Rule 105 paras. 4 and 5, Annex I (<http://www.legal-tools.org/doc/8bc6ff/>).

⁵⁸ See article 53 para. 3 (b).

⁵⁹ Rule 105 para. 3, Annex I.

⁶⁰ ICC, Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence"', 13 October 2006, ICC-01/04-01/06-568 (OA 3) (<http://www.legal-tools.org/doc/7813d4/>) para 51.

⁶¹ See also regulation 29, para. 5 of the Regulations of the Office of the Prosecutor, note 47.

⁶² Pre-Trial Chamber I has found that this standard reflects article 5 para. 1 (c) of the European Convention on Human Rights. See *Lubanga*, 10 February 2006 Decision, see note 31, paras 11–12.

grounds to believe that the suspect has committed or participated in the commission of a crime within the Court's jurisdiction under articles 25 and 28 of the Statute, there is no sufficient basis for prosecution. This provision entails that the Prosecutor assess the result of the investigation in detail. It must be ascertained whether the evidence collected satisfies the elements of a crime falling within the jurisdiction of the Court and links one or more perpetrators to the crime. If this is the case, a sufficient legal and factual basis exists. The Prosecutor may then, as a first step in the initiation of the actual prosecution, seek the issuance of a warrant of arrest with a view to obtaining the presence of the suspect for prosecution before the Court.

- 30 **b) 'inadmissible under article 17'**. If any of the inadmissibility grounds listed in article 17 para. 1 are engaged, the Prosecutor must conclude that there is not a sufficient basis for prosecution. Typically, this will be the situation where the same case is being investigated or prosecuted genuinely by a State which has jurisdiction. Note that the language of this subparagraph covers actual (i.e. not potential) inadmissibility, which can be explained by the stage of the proceedings,⁶³ and as such, is more specific than the standard found in 53(2)(b).⁶⁴
- 31 **c) Elements to be considered under subparagraph 2 (c). aa) 'age or infirmity of the alleged perpetrator'**. The terms 'interests of justice', 'the gravity of the crime' and 'the interests of victims' referred to in article 53 para. 2 (c) have been considered above in mn 22 *et seq.* As their content in the context of this provision is essentially the same, they will not be dealt with again. Subparagraph 2 (c) does, however, contain an open-ended reference to all circumstances and this differs from article 53 para. 1 which contains an exhaustive list and is therefore broader. In addition, it mentions two criteria that do not appear in the wording of article 53 para. 1 (c). The first is the age or infirmity of the alleged perpetrator. An alleged perpetrator may be so old or ill that it may not serve the interests of justice to proceed to a prosecution.⁶⁵ Each case will have to be determined on its own merits.
- 32 **bb) 'his or her role in the alleged crime'**. This is the second criterion that is not included in article 53 para. 1 (c). As is the case with all the other criteria, this is equally not determinant. It is possible that the role of a suspect, while satisfying all the elements of the crime, was so insignificant as to make it contrary to the interests of justice to proceed with a prosecution. This could be the case where, for instance, it would be possible to institute a prosecution against an abettor of the alleged crime whilst the true perpetrator remained beyond the reach of justice. To proceed with the prosecution of the abettor could lead to the exposure, including exposure to personal danger, of witnesses who are important to the case against the main perpetrator. The Policy Paper on the Interests of Justice also confirms that 'the alleged status or hierarchical level of the accused' or alleged 'implication in particularly serious or notorious crimes' or 'the significance of the role of the accused' in the overall commission of the accused's involvement constitute factors to identify those who bear the greatest responsibility.⁶⁶

3. Final subparagraph

- 33 Under the final part of article 53 para. 2 (c), the Prosecutor is obliged to notify the Pre-Trial Chamber as well as the Security Council or the referring State(s) Party, depending on

⁶³ See De Meester, note 9.

⁶⁴ See ICC, Pre-Trial Chamber II, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arup Sang*, 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to article 19(2)(b) of the Statute', 30 May 2011, ICC-01/09-01/11-101 (<https://www.legal-tools.org/doc/dbb0ed/>), para 50; Safferling, *International Criminal Procedure* (2012) 94; Stegmiller, *Pre-Investigation* (2011), 119–120.

⁶⁵ See Policy Paper on the Interests of Justice, note 48, p. 9.

⁶⁶ *Ibid.*, p. 7.

who referred the situation to the Prosecutor, of his or her determination that there is no sufficient basis for prosecution owing to ‘interests of justice’. By contrast, no such notification obligation exists if the decision not to prosecute is based on any other grounds in article 53(2). Rule 105 para. 1 of the Rules of Procedure and Evidence aims to rectify this.

When notifying the referring body, the Prosecutor must provide reasons for the conclusion, which indicates that the decision must not be arbitrary. The notification must be prompt and in writing.⁶⁷ It should be stressed, however, that no specific time-frame for the notification is envisaged. The notification obligation can in practice be obviated, if the Prosecutor does not render decisions not to investigate or prosecute.⁶⁸ 34

III. Paragraph 3

1. Subparagraph (a)

Subparagraph 3 (a) grants the Pre-Trial Chamber a conditional discretion to review decisions by the Prosecutor not to proceed with investigation or prosecution pursuant to article 53 paras. 1 and 2. Following the review, the Pre-Trial Chamber may request the Prosecutor to reconsider his or her decision. This is a rather controversial provision because it submits prosecutorial discretion to judicial review, while – at the same time – enhancing the transparency of the process. 35

a) ‘at the request’. The power of the Pre-Trial Chamber to review a decision not to investigate or prosecute must be triggered by a request from the entity which originally referred the situation to the Prosecutor, *i. e.*, either the Security Council or a State Party. The request must be in writing and be supported by reasons, and it must be filed within 90 days following the notification given under rule 105 or 106.⁶⁹ However, delays in the start of or during the investigation, or the absence of notification with regard to the preceding paragraphs of this article, may also irreparably affect the application of this provision. 36

b) ‘may review’. Once a request to review a decision by the Prosecutor has been lodged by the referring party, the Pre-Trial Chamber has discretion whether to proceed to a review or not. No guidance is given on which considerations the Chamber must base its decision to accede to the review request or not. 37

In reviewing the Prosecutor’s decision, the Chamber ‘may request the Prosecutor to transmit the information or documents in his or her possession, or summaries thereof, that the Chamber considers necessary for the conduct of the review’.⁷⁰ The Chamber is thus not restricted to the written record of the investigation and the reasons advanced for the Prosecutor’s decision. The Chamber is obliged to take the necessary measures under articles 54, 72 and 93 to protect the information and documents and the safety of witnesses and victims.⁷¹ The Chamber may also seek further observations from a State or the Security Council if they have requested the review of the decision.⁷²

The provision gives no direct guidance as to what the Pre-Trial Chamber should take into consideration when conducting its review. However, Pre-Trial Chamber I has held that it “is

⁶⁷ Rule 106, Annex I.

⁶⁸ Bitti, see note 5, 1208. See also ICC, Pre-Trial Chamber III, Situation in the Central African Republic, ‘Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic’, 30 November 2006, ICC-01/05-6 (<http://www.legal-tools.org/doc/76e607/>) p 4; ICC, Office of the Prosecutor, Situation in the Central African Republic, ‘Prosecution’s Report Pursuant to Pre-Trial Chamber III’s 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic’, 15 December 2006, ICC-01/05-7 (<http://www.legal-tools.org/doc/1dd66a/>) para 10.

⁶⁹ Rule 107 para. 1.

⁷⁰ Rule 107 para. 2.

⁷¹ Rule 107 para. 3.

⁷² Rule 107 para. 4.

not tasked with undertaking *ex novo* the entirety of the Prosecutor’s assessment under article 53(1)(a) of the Statute. Rather, the scope of review is limited to the issues that are raised in the request for review and have a bearing on the Prosecutor’s conclusion not to investigate”.⁷³ It could be expected that the Chamber would consider the same criteria provided for the Prosecutor in article 53 para. 1 when reviewing a decision not to start an investigation. Indeed, in requesting the Prosecutor to reconsider the decision not to initiate an investigation into the situation referred to her by the Union of Comoros, Pre-Trial Chamber I made notable reference to “discrepancy” between the conclusion reached by the Prosecutor regarding the gravity of the alleged crimes and the international attention received by this incident.⁷⁴ Likewise, when reviewing a decision not to proceed with a prosecution, the Chamber can be expected to base its review on the same criteria that are set for the Prosecutor in article 53 para. 2. However, this may prove difficult in practice, given that the Pre-Trial Chamber would not have access to the documents on which the Prosecutor’s decision is based. A request by the Pre-Trial Chamber for information to be provided under rule 107 of the Rules of Procedure and Evidence can assist in this regard.

- 38 c) ‘request the prosecutor’. The only action that the Pre-Trial Chamber may take, ‘if it concludes that the validity of the decision is materially affected by an error, whether it is an error of procedure, an error of law, or an error of fact’⁷⁵, is to request the Prosecutor to reconsider the decision not to prosecute. It cannot replace the Prosecutor’s decision, as the very principle of prosecutorial independence enshrined in the Statute would be at stake.
- 39 d) ‘reconsider that decision’. The provision is silent on whether the Prosecutor is bound by a request of the Pre-Trial Chamber. The intention of the provision, however, is not to infringe on the independence of the Prosecutor. Whilst the Prosecutor will indeed be bound to reconsider his or her decision not to investigate or prosecute, he or she would not, strictly speaking, be obliged to come to a different conclusion. If the reconsideration would lead to the same conclusion as before, this would be a permissible exercise of prosecutorial independence, provided that the Prosecutor had properly applied his or her mind in coming to the conclusion.
- 40 In reconsidering the decision, the Prosecutor would be guided by the same considerations contained in paragraphs 1 or 2 of article 53. The decision arrived at would then be delivered pursuant to a paragraph 3 review. This would mean that it could not be said that the decision upon reconsideration was a decision under paragraphs 1 or 2. As such, neither the Security Council nor the referring State(s) Party would be entitled to request a further review.

Once the Prosecutor has taken a final decision, the Pre-Trial Chamber shall be notified in writing of the conclusion of the Prosecutor with reasons. This shall be communicated to all participants in the review.⁷⁶ The Prosecutor is obliged to reconsider the decision as soon as possible when the Pre-Trial Chamber requests its review.⁷⁷

2. Subparagraph (b)

- 41 This paragraph provides an automatic right for the Pre-Trial Chamber to review a decision of the Prosecutor not to investigate or prosecute, if the decision is based solely on considera-

⁷³ ICC, Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’, 16 July 2015, ICC-01/13-34, para 10.

⁷⁴ ICC, Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’, 16 July 2015, ICC-01/13-34, para 51.

⁷⁵ ICC, Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’, 16 July 2015, ICC-01/13-34, para 12.

⁷⁶ Rule 108 para. 3, *ibid.*

⁷⁷ Rule 108 para. 2, *ibid.*

tions of interests of justice.⁷⁸ This is an essential check and balance in the ICC structure without which many States would not have become Parties to the Statute.

The use of the phrase ‘own initiative’ denotes an automatic right of review for the Pre-Trial Chamber. Although the Provision is couched in discretionary terms, it is questionable whether the Chamber does indeed have real discretion. A decision by the Prosecutor not to start an investigation or prosecution solely based on paragraphs 1 (c) or 2 (c) of article 53 respectively, is not effective *per se*.

In order to be valid, such decisions must be confirmed by the Pre-Trial Chamber.⁷⁹ If the Prosecutor’s decision has no validity unless confirmed by the Pre-Trial Chamber, the Chamber is necessarily bound to review all such decisions of the Prosecutor. A different interpretation would result in the potential paralysis of the Court, were the Pre-Trial Chamber to refrain from reviewing such a decision. Rules 109 and 110 of the Rules of Procedure and Evidence provide further guidance on the Pre-Trial Chamber review and decision. In accordance with regulation 48 of the Regulations of the Court, the Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53 para. 3 (b).⁸⁰ The Chamber is under an obligation to take the necessary measures under articles 54, 72 and 93 to protect the information and documents submitted by the Prosecutor and also to protect the safety of witnesses and victims and members of their families. Victims shall be notified by the Court, in accordance with Rule 92 of the Rules of Procedure and Evidence, of any decision made by the Prosecutor not to initiate an investigation or not to prosecute, in order to present their views and concerns.

IV. Paragraph 4

This provision grants the Prosecutor a discretionary power to resurrect an investigation or prosecution that he or she had previously decided had no reasonable basis or sufficient basis on which to proceed. A prior decision not to proceed does not therefore have the effect of making the Prosecutor *functus officio*. 42

There is no explicit power in article 53 pursuant to which the Prosecutor can decide to indeed prosecute and proceed with the initiation thereof. This power is also not explicitly provided elsewhere in the Statute. The manner in which subparagraph 4 is worded, however, confirms that article 53 is based on the obvious presumption that the outcome of the investigation may be a decision by the Prosecutor to initiate a prosecution.⁸¹

The only requirement for the Prosecutor to be able to reconsider a prior decision is that new facts or information become available. If this is the case, they have to be of such a nature as to eliminate the former shortfall in the information which led to the earlier decision not to proceed. 43

⁷⁸ See article 53 paras. 1 (c) and 2 (c), respectively.

⁷⁹ Cf. Razesberger, *The International Criminal Court: The Principle of Complementarity* (2006) 108 and Wouters, Verhoeven and Demeyere (2008) 8 *ICLRev* 273, at 297, 302, who maintain that the decision not to proceed with an investigation or prosecution gains effect only if the Pre-Trial Chamber reviews the decision of the Prosecutor.

⁸⁰ For examples of the application of this regulation see ICC, Pre-Trial Chamber II, Situation in Uganda, ‘Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of article 53’, 2 December 2005, ICC-02/04-01/05-68 (<http://www.legal-tools.org/doc/1adaf1/>); Office of the Prosecutor, Situation in Uganda, ‘OTP Submission Providing Information On Status of the Investigation In Anticipation of the Status Conference to be held on 13 January 2006’, 11 January 2006, ICC-02/04-01/05-76 (<http://www.legal-tools.org/doc/5d9c37/>); Pre-Trial Chamber II, Situation in Uganda, ‘Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005’, 9 March 2006, ICC-02/04-01/05-147 (<http://www.legal-tools.org/doc/0568f7/>) paras 22, 25.

⁸¹ See the formulation ‘... A decision whether to initiate [a] ... prosecution’.

The provision refers to ‘a decision *whether* to initiate’ (emphasis added), which includes reconsideration by the Prosecutor of positive decisions to investigate and prosecute, not only determinations that there is no reasonable or sufficient basis. In May 2014, for instance, the Prosecutor decided to re-open the preliminary examination of the situation in Iraq.⁸²

⁸² ICC, Office of the Prosecutor, Press Release, ‘Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq’, 13 May 2014 (<https://www.legal-tools.org/doc/d9d9c5/>).

Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:
 - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
 - (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
 - (c) Fully respect the rights of persons arising under this Statute.
2. The Prosecutor may conduct investigations on the territory of a State:
 - (a) In accordance with the provisions of Part 9; or
 - (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).
3. The Prosecutor may:
 - (a) Collect and examine evidence;
 - (b) Request the presence of and question persons being investigated, victims and witnesses;
 - (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
 - (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
 - (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
 - (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Literature: Ambos, K., 'Confidential Investigations (article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law', (2009) 12 *NCLR* 543; Buisman, C., 'The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?', (2014) 27 *LeidenJIL* 205; Cryer, C., 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 *LeidenJIL* 195; Darques-Lane, F., Madec, C. And Godart, S., 'article 54 - Devoirs et pouvoirs du Procureur en matière d'enquêtes' in: J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale Commentaire article par article*, vol. 2 (2012) 1173; Heinze, A., *International Criminal Procedure and Disclosure* (Duncker and Humblot 2014); Whiting, A., 'Lead Evidence and Discovery before the International Criminal Court: the Lubanga Case', (2009) 14 *UCLAJIL&ForeignAff* 207.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	7
I. Paragraph 1.....	7
1. Chapeau.....	7
2. The different subparagraphs.....	8
a) 'to establish the truth'.....	8
b) 'appropriate measures'.....	12
c) 'Fully respect the rights of persons'.....	15
II. Paragraph 2.....	16
1. Chapeau.....	16

2. The different subparagraphs.....	19
a) In accordance with Part 9	19
b) Authorization by the Pre-Trial Chamber.....	24
III. Paragraph 3	27
1. Chapeau	27
2. The different subparagraphs.....	28
a) ‘Collect and examine evidence’	28
b) ‘Request the presence of and question persons’	29
c) and d) ‘Seek the cooperation’ and enter ‘arrangements or agreements’.	30
e) ‘Agree not to disclose’	35
f) ‘to ensure the confidentiality’	41

A. Introduction/General remarks

- Article 54 imposes certain duties on, and affords certain powers to, the ICC Prosecutor with regard to investigations, after he or she has evaluated the information made available and has initiated an investigation in accordance with the provisions of article 53 para. 1. The duties relate to the general approach the Prosecutor must take as regards his or her investigations, while the powers equip the Prosecutor with such tools as he or she may require in order to fulfil the mandate of investigation and prosecution. The powers afforded to the Prosecutor, such as enlisting the assistance of States and entering into agreements with them, are a reflection of the principle of prosecutorial independence, an essential component of any impartial criminal justice system.
- Article 54 attempts to build a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the investigating judge in certain civil law systems. This approach makes good sense in light of the complexity of the cases that the Court adjudicates. Dealing with the most serious crimes of concern to the international community as a whole, the main focus of the Court is to bring to justice those perpetrators at the highest levels of responsibility. To achieve this goal requires considerable investigative effort, involving activities as wide-ranging as exhumation of mass graves and the conduct of forensic work at such sites, locating and interviewing witnesses throughout the world, and accessing and sifting large volumes of governmental records. The Prosecutor is unable to perform these functions successfully without enlisting the assistance of States. Similarly, if suspects or accused had to prepare their own defence, they would in all likelihood also require the assistance of States to gain access to witnesses or evidentiary material. Suspects and accused before international tribunals and courts, however, generally lack the authority and standing to solicit the assistance of States.¹ In this case, the civil law approach of an investigative judge provides a workable solution to the problem of potential inequality between the resources of the Prosecutor and those of the suspect or accused.² The result is a clear and binding mandate for the Prosecutor to investigate both sides of the case equally.
- The influence of the civil law tradition³ is also reflected in the objective that is set for the Prosecutor with regard to his or her investigative activities. Article 54 sets the goal as an

¹ To take a fictitious example, in the prosecution of Slobodan Milošević, the Prosecutor of the ICTY would have had standing to approach the United States’ Department of Defence to request access to classified images taken by defence satellites (for example to locate mass graves), and the request would have stood a good chance of being granted. By contrast, it seems unlikely that a similar request by Milošević for classified material that could assist in his defence would have had any prospect of success.

² See generally, Heinze, *International Criminal Procedure and Disclosure* (2014), 311–322.

³ In the formation of international criminal law it is not overly helpful to label principles as common law or civil law. While it is true that a number of principles do have their origins in these systems, the drafters of the Statute became increasingly aware as the negotiation process proceeded over a period of four years that the evolution of this new discipline of international law requires a pragmatic approach. This means taking the best and most appropriate principles from both legal systems, adapting them where required and creating provisions that are workable and ensure fairness. This same trend can be seen in the International Criminal Tribunal for the former Yugoslavia where the Rules of Procedure and Evidence (<http://www.legal-tools.org/doc/02712ff>) have

effort to establish the truth.⁴ This reflects language used by civil law lawyers with regard to the investigative nature of the criminal law process and the role of the judge. In the common law system, the role of the Prosecutor is not to find the truth – nor, for that matter, is it the ultimate purpose of the criminal law to establish the truth. Rather, in common law jurisdictions, the Prosecutor’s function is more often seen as related to aiding the court in its search for justice.

The duties and powers of the Prosecutor received limited attention in the 1994 ILC Draft Statute. Article 26, titled ‘investigation of alleged crimes’, touched only briefly upon the powers that the Prosecutor would require to perform investigative activities.⁵ The Prosecutor’s duties and powers to investigate were equally afforded little attention during the sessions of the Ad Hoc Committee on the Establishment of an International Criminal Court in 1995.

The first major discussions and developments to this end occurred in 1996 during the first year of the Preparatory Committee on the Establishment of an International Criminal Court. It was here that the view was first expressed that the Prosecutor should collect incriminating and exonerating information to establish the truth of the charges and to protect the interests of justice.⁶ Some of the wording that was to later form the basis for provisions contained in article 54 are seen in proposals contained in Volume II (Compilation of Proposals) of the Report.⁷ These developments are reflected in the Zutphen text,⁸ but are scattered amongst other provisions that were later separated into separate articles. The same occurred with the draft that emerged from the final session of the Preparatory Committee and was sent to the Diplomatic Conference in Rome.⁹

Since the establishment of the ICC, considerable attention has been given to developing the duties and powers of the Prosecutor. Instruments have been created, which elaborate upon these elements, including the Rules of Procedure and Evidence,¹⁰ the Regulations of the Court,¹¹ the Regulations of the Office of the Prosecutor¹² and the Code of Conduct of the Office of the Prosecutor.¹³

undergone 39 revisions so far, importing many civil law aspects into a system that was originally almost exclusively common law.

⁴ See article 54 para. 1 (a).

⁵ See paragraph 2 (<http://www.legal-tools.org/doc/f73459/>), conferring a discretionary power on the Prosecutor to request the presence of suspects, victims and witnesses and question them, collect documentary and other evidence, conduct on-site investigations, taking certain measures to protect confidentiality of information and protect persons, and to seek cooperation from States or the UN.

⁶ See paragraph 226 of Vol. I of the Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22 (<http://www.legal-tools.org/doc/e75432/>).

⁷ See Proposal II.B.5 in regard to article 26 (<http://www.legal-tools.org/doc/03b284/>), note 5, p. 113. See also Proposal II.B.6, p. 114.

⁸ See articles 47 para. 2 (d) and (d)bis, (e), (g), and 47 para. 6bis, and 47 para. 7, Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13 (1998), pp. 88–91 (<http://www.legal-tools.org/doc/7ba9a4/>).

⁹ See articles 54 para. 4 (d), (e) and (h), and 54 para. 12, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Final Act, UN Doc. A/CONF.183/2/Add.1 (1998), pp. 91–92 and 94 (<http://www.legal-tools.org/doc/816405/>).

¹⁰ ICC-ASP/1/3 (<http://www.legal-tools.org/doc/b427fd/>).

¹¹ Regulations of the Court, ICC-BD/01-02-07, 25 May 2004 (<http://www.legal-tools.org/doc/2988d1/>).

¹² Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009 (<http://www.legal-tools.org/doc/a97226/>).

¹³ Code of Conduct for the Office of the Prosecutor, 5 September 2013 (<http://icc-cpi.int/iccdocs/oj/otp-COC-Eng.PDF>). See generally, Heinze, *International Criminal Procedure and Disclosure* (2014), 471–476.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Chapeau

- 7 The use of the imperative ‘shall’ indicates that no discretion exists for the Prosecutor with regard to what follows in subparagraphs (a), (b) and (c) of paragraph (1).

2. The different subparagraphs

- 8 a) ‘to establish the truth’. Article 54 para.1 (a) relates to the investigation of the Prosecutor subsequent to the initial evaluation of information and a finding that a reasonable basis does exist on which to proceed under the Statute. The provision obligates the Prosecutor to be as comprehensive as necessary in his or her investigation to establish whether criminal responsibility exists.
- 9 The aim ‘to establish the truth’ provides the framework within which the Prosecutor should mobilise his or her investigative resources. The establishment of truth has been stated as one of the general standards of the Office of the Prosecutor in article 49 of the Code of Conduct for the Office of the Prosecutor.¹⁴ Needless to say, this does not alter the fact that, once the investigation is concluded, the Prosecutor will weigh the result of the investigation in accordance with the ‘sufficient basis’ standard laid down in article 53 para. 2. At that stage, the sufficiency of the basis, and not whether the Prosecutor has determined the truth in the course of the investigation, will be the determining factor as to whether the Prosecutor will let the case progress to the stage of prosecution. The use of this terminology is an indication that, despite the significant presence of elements from the adversarial system in the Statute, the proceedings should not descend to the level of a competition where winning the case is the only goal. The Prosecutor is obliged to serve the interests of justice impartially. This is further reflected in the later provisions contained in subparagraph (a).
- 10 The obligation to extend the investigation ‘to cover all facts and evidence’ is tempered by the requirement that this information be ‘relevant to an assessment of whether there is criminal responsibility’ under the Statute. Any fact or evidence that would contribute to the ultimate determination of whether or not an individual is criminally responsible for the commission of one or more crimes within the jurisdiction of the Court is relevant, and may not be excluded from the ambit of the Prosecutor’s investigation. A question that may arise in this regard is what the consequences should be if further exculpatory evidence comes to light later in the course of a trial. Each case has to be judged solely on its merits. Decisive weight must be given to whether the Prosecutor has fulfilled his or her investigative obligations in good faith. Due regard must also be given to the broad scope of investigations before international criminal tribunals, where significant amounts of evidence are collected, all of which needs to be organised and evaluated. In this process, it is possible to make errors in determining what is relevant and what is not. Something that may not appear remotely relevant at the commencement of a case might, later in the proceedings, indeed turn out to be highly relevant.
- 11 The requirement to ‘investigate incriminating and exonerating circumstances equally’ has been touched upon in the introduction to the discussion of this article.¹⁵ This provision

¹⁴ *Ibid*, article 49.

¹⁵ It is interesting that this requirement does not appear explicitly in the ICTY Statute. The only requirement in this regard appears in Rule 68, which requires the Prosecutor to disclose to the Defence, as soon as practicable, the existence of evidence which in any way tends to suggest the innocence, or mitigate the guilt of the accused, or may affect the credibility of prosecution evidence; see Annex I (<http://www.legal-tools.org/doc/02712f/>). See also ICC, Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, ‘Decision on the confirmation of charges’,

places a high responsibility on the Prosecutor. He or she must investigate all aspects of the case.¹⁶ This suggests that, once the Prosecutor determines to proceed to a prosecution, this will be a clear indication that the case has substance. This ought to shield the Court from hearing frivolous cases, or cases that have no chance of a successful conclusion at trial.

b) ‘appropriate measures’. As regards taking ‘appropriate measures to ensure the effective investigation’, it falls squarely within the Prosecutor’s discretion to determine which measures are appropriate. Appropriateness will differ from case to case. In general it can be said that any measure that is geared to ‘establish the truth’ will be appropriate. Similarly, it is for the Prosecutor to determine what measures are effective. Article 54 paras. 2 and 3 provide for measures that the Prosecutor may employ in his or her investigative activities. It is up to the Prosecutor to decide which measures in the circumstances best advance the goals of the investigation. 12

Although the title of article 54 states that it deals with investigation, it is clear that its provisions are also relevant to the prosecution stage (‘and prosecution’). Material collected during the investigative phase should be collected with a view to their ultimate utilisation in Court proceedings during the prosecution of the case. If this were not the case, it is conceivable that the Prosecutor could conduct an investigation in full accord with paragraph 1, but be prevented from utilising the material in Court. All investigations must therefore be conducted with the potential prosecution of the case clearly in the mind of the Prosecutor. 13

The latter part of subparagraph (b) deals with practical matters that the Prosecutor should take into account in his or her efforts to conduct appropriate and effective investigation and prosecution. These matters do not necessarily concern the investigative work directly and can relate to matters ancillary to the actual investigation. The provision stresses that the work of the Prosecutor does not take place in a vacuum, but has a backdrop of crimes on a vast scale that may have resulted in severe trauma for individual witnesses and victims. While the Prosecutor should aim at bringing the perpetrators of crimes to justice, this must be done in a manner that is sufficiently sensitive to the needs of witnesses and victims. The investigation and prosecution of crimes is not a mere intellectual exercise, but should be conducted in such a manner as to not add to the trauma suffered by victims.¹⁷ This is why the provision requires the Prosecutor to show ‘respect’ for the matters mentioned. 14

c) ‘Fully respect the rights of persons’. This provision requires that the Prosecutor be cautious in his or her investigations in order not to violate in any manner the rights of any person that are guaranteed by the Statute. The persons referred to include victims, witnesses, suspects and accused.¹⁸ This has also been stated as one of the values and principles of the Office of the Prosecutor in the Code of Conduct for the Office of the Prosecutor.¹⁹ 15

II. Paragraph 2

1. Chapeau

Article 54 para. 2 concerns the Prosecutor’s power to conduct investigations on the territory of States, a function of critical importance to his or her ability to prepare cases and 16

16 December 2011, ICC-01/04-01/10-465-Red (<http://www.legal-tools.org/doc/63028f/>) para 51, which confirms that the objective of article 54(1)(a) of the Statute is to establish the truth by ‘investigating incriminating and exonerating circumstances equally’; Heinze, *International Criminal Procedure and Disclosure* (2014), 257–258.

¹⁶ It has been argued, alternatively, that defence teams are better placed than the Prosecutor to investigate exonerating circumstances. See Buisman (2014) 27 *LeidenJIL* 205, 223–225.

¹⁷ See Regulation 36(3) of the Regulations of the Office of the Prosecutor, note 11.

¹⁸ See ICC, Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Decision on article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing’, 20 June 2008, ICC-01/04-01/07-621 (<http://www.legal-tools.org/doc/0d8508/>).

¹⁹ See Code of Conduct for the Office of the Prosecutor, note 12, Chapter 4, Section 3. See also Regulations 16, 35(3), 36(2), 36(3), and 59(2) of the Regulations of the Office of the Prosecutor, note 11.

conduct prosecutions. Documentary and other physical evidence relevant to crimes within the Court's jurisdiction will be located on the territory of States, particularly in territorial States, where mass graves, former detention facilities and relevant archives may be found. Potential witnesses, whether displaced or not, reside on the territory of States and will generally not be willing to come to the seat of the Court to give a statement to the representatives of the Prosecutor.

Furthermore, the logistical and cost aspects thereof generally make it more practical for the Prosecutor's representatives to travel to the witness for investigative purposes, rather than to bring the witness to the seat of the Court during the investigation. The Office of the Prosecutor has therefore concluded a number of judicial cooperation agreements with States in order to be able to carry out such activities on their territory.²⁰

- 17 Despite the clear value of having Prosecutor-led investigations on State territory, article 54 para. 2 provide that the Prosecutor may only conduct such investigative steps when they are in accordance with Part 9 on State cooperation or article 57 para. 3 (d) of the Statute. As the discussion below and the commentaries to articles 57 and 99 show, the Prosecutor's power to conduct and control investigations on the territory of States is severely curtailed with regard to both articles 57 and 99. Article 99 para. 1 provides the main rule on the execution of requests for assistance from the Court, including investigative steps on the territory of States. It provides that the execution must be 'in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request'. States Parties are obliged under article 88 to ensure that there are procedures *available* under their national law for all of the forms of cooperation which are specified in Part 9 of the Statute, but it is up to States to determine the *nature* of the procedures under national law, as long as all relevant forms of requests are provided for. Although States Parties are under a general obligation under article 86 to fully cooperate with the Prosecutor in his or her investigations, and under article 93 para. 1 to comply with requests to also assist in relation to investigative steps, the requested State may determine through its legal procedures whether representatives of the Prosecutor may be present at, and assist with, the execution of the investigative steps on its territory.

- 18 The use of the word 'may' in the chapeau simply confirms the discretionary power of the Prosecutor to determine how to conduct his or her investigation after it has commenced. 'State' does not necessarily mean State Parties only. Non-State Parties may accept the exercise of jurisdiction by the Court by lodging a declaration with the Registrar pursuant to article 12 para. 3 of the Statute.²¹ Such States are thereby obliged to 'cooperate with the Court without any delay or exception in accordance with Part 9' of the Statute. Insofar as Part 9 is equally binding on States Parties and non-State Parties, there are no compelling reasons why the Pre-Trial Chamber cannot apply article 57 para. 3 (d) to non-State Parties.²²

2. The different subparagraphs

- 19 a) **In accordance with Part 9.** If the Pre-Trial Chamber has not authorised the Prosecutor to take investigative steps within the territory of a State pursuant to article 57 para. 3 (d), his or her power to investigate on the territory of the State depends on the provisions of Part 9 of

²⁰ See, e.g., ICC, Office of the Prosecutor, *Prosecutor v. Jean-Pierre Bemba Gombo*, 'Annex A: Prosecution's Filing of the Judicial Cooperation Agreement with the Government of the Central African Republic into the Record of the Case', 26 March 2010, ICC-01/05-01/08-738-AnxA (<http://www.legal-tools.org/doc/e1207f/>).

²¹ See, for example, the declaration made in 2003 by Côte d'Ivoire: ICC, *Prosecutor v. Laurent Gbagbo*, 'Annexe 16: Déclaration de reconnaissance de la compétence de la CPI datée du 18 avril 2003', ICC-02/11-01/11-129-Anx16 (<http://www.legal-tools.org/doc/101315/>). It is noted that Côte d'Ivoire ratified the Rome Statute on 15 February 2013, thereby becoming a State Party. Article 12 para. 3 declarations have also been made by Ukraine and the Palestinian National Authority. The Office of the Prosecutor found on 3 April 2012 that preconditions for the exercise of jurisdiction had not, however, been met with regard to the latter declaration (see ICC, Office of the Prosecutor, 'Situation in Palestine', 3 April 2012 (<http://www.legal-tools.org/doc/f5d6d7/>)).

²² See article 57 para. 3 (a).

the Statute. As described in the preceding section, article 99 para. 1, on the execution of requests for assistance, provides that the requested State may determine the extent to which the Prosecutor can be present at and assist in the execution of investigative steps on its territory according to the respective procedures under its national law. It was clear during the work of the Preparatory Committee and the Diplomatic Conference that many States prefer to conduct investigative steps on their territory themselves, through their own authorities in accordance with article 93 para. 1.²³ This either serves to keep the ICC Prosecutor entirely out of the investigative process or to reduce the role of his or her representatives to that of mere observers. Article 99 para. 1 ought to apply also to States on whose territory the alleged crimes have been committed, even if there has been no change in regime since the crimes occurred. Needless to say, this has the potential to lead to significant problems for the Prosecution's efforts to investigate in such cases.

Article 99 para. 4 provides a limited exception to the main rule in article 99 para. 1, for 20
investigative steps that can be executed without any compulsive measures. In certain circumstances the Prosecutor may conduct such non-compulsive investigative steps directly on the territory of a State 'where it is necessary for the successful execution of a request' and when it will be '[w]ithout prejudice to other articles' in Part 9. If the requested State is a territorial State, and there has been a determination of admissibility pursuant to article 18 or 19, article 99 para. 4 (a) merely requires that 'all possible consultations with the requested State Party' take place before the Prosecutor may directly execute the requested investigative steps. When the requested State is not a territorial State, article 99 para. 4 (b) provides that the ICC Prosecutor may execute the investigative steps 'following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party'. If a non-territorial State identifies specific problems with the practical execution of the investigative steps requested, it "shall, without delay, consult with the Court to resolve the matter".²⁴

Article 99 para. 4 does not contain an exhaustive list of investigative steps which can be 21
executed without any compulsory measures, but the chapeau mentions three specific examples of such measures in a non-exhaustive manner:²⁵ first, interviewing a person on a voluntary basis; second, taking evidence from a person on a voluntary basis; and, third, examining, without modifying, a public site or other public place. The voluntary interviewing and taking of evidence include "doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed". Witness testimony has proven to be a very important source of evidence in cases before the *ad hoc* Tribunals, and almost all statements from potential witnesses are taken in the country where they reside, whether a territorial State or not. Voluntary interviewing is therefore an investigative step with great practical importance.

While physical evidence is often voluntarily provided by persons interviewed by represen- 22
tatives of the Prosecutor (such as video footage, photographs and documents), a larger portion of documentary evidence is generally obtained by prosecutors acting directly through search and seizure operations conducted on the territory of territorial States.

Finally, it is not clear exactly what is meant in article 99 para. 4 by 'examination without 23
modification of a public site or other public place'. It is for the Court to determine how rigidly 'modification' is to be interpreted. It will be very difficult to consider, for example, chemical searches for blood traces in former detention facilities as 'modification'.

b) Authorization by the Pre-Trial Chamber. In the event a State does not comply with the 24
Prosecutor's request for assistance with investigative steps on its territory pursuant to Part 9, the Pre-Trial Chamber may authorise the Prosecutor, pursuant to article 57 para. 3 (d), to take such steps directly – that is to say without the cooperation of that State. This said, such

²³ See subparagraphs (b), (c), (g) and (h).

²⁴ Article 99 para. 4 (b).

²⁵ See the term 'including'.

authorisation may be granted only if the Pre-Trial Chamber has, having regard to the views of the State if possible, determined in that case that ‘the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9’.

25 This second option for investigation by the ICC Prosecutor on State territory is based on the clear *inability* of the State’s judicial system to comply with the Prosecutor’s request. It does not refer to mere *unwillingness* to comply with a request if the judicial system is otherwise able to execute it. There was not sufficient support during the Diplomatic Conference for the view that this provision should cover both situations of inability and unwillingness. Moreover, as situations of unwillingness are much more likely to occur in practice than those of clear inability, it was suggested during the Diplomatic Conference that at least clear unwillingness by *territorial* States should be covered by the provision. It was argued that it was unrealistic to expect that the permanent Court would not encounter consistently unwilling States with no change in government since the alleged crimes occurred, in the same manner as the *ad hoc* Tribunal for the former Yugoslavia has. Delegations did not seem to give sufficient weight to the obstacle that such reluctant governments may constitute to the Court’s case preparation.

26 What has been developed in the discussion of article 54 para. 2 above applies when the Court’s jurisdiction has been triggered through a State referral pursuant to article 13 (a) or a *proprio motu* initiation of an investigation by the Prosecutor pursuant to article 13 (c). Security Council referrals of situations to the Court pursuant to article 13 (b) are grounded in Chapter VII. In the two Security Council referrals to the Court to date – the situation in Darfur, Sudan²⁶ and the situation in Libya²⁷ – despite the express wording in the respective Security Council resolutions mandating assistance from situation States and urging non-States Parties to the Statute to cooperate with the Court, securing cooperation has been problematic in practice.²⁸ Indeed, the Pre-Trial Chamber has issued a series of decisions reminding States Parties of their obligation to arrest and surrender the accused under Part IX of the Rome Statute and inviting non-States Parties to cooperate pursuant to Security Council Resolutions 1593²⁹ and 1970.³⁰

²⁶ Operative paragraph 2 of Security Council Resolution 1593 (2005) (<http://www.legal-tools.org/doc/4b208f/>), in which the Council, acting under Chapter VII of the Charter, referred the situation in Darfur to the ICC, provides, in relevant part, as follows: ‘The Security Council [...] 2. [d]ecides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully’.

²⁷ Operative paragraph 5 of Security Council Resolution 1970 (2011) (<http://www.legal-tools.org/doc/00a45e/>), in which the Council referred the situation in Libya to the ICC, adopts similar wording to Resolution 1593, *i. e.* ‘The Security Council [...] 5. [d]ecides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor’.

²⁸ Cryer has questioned whether the Council or States acting individually are able to provide the necessary measures to ensure such cooperation. See Robert Cryer (2006) 19 *LeidenJIL* 195, 221–222.

²⁹ For recent findings by Pre-Trial Chamber II to this end, see Office of the Prosecutor, ‘Nineteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593’, paras 21–26, available at <http://www.icc-cpi.int/iccdocs/otp/otp-19th-UNSC-Dafur-06-14-Eng.pdf>, accessed 31 October 2014.

³⁰ For a list of decisions urging compliance with Resolution 1970, see ICC, Pre-Trial Chamber I, *Prosecutor v. Saif-Al Islam Gaddafi and Abdullah al-Senussi*, ‘Decision on matters related to Libya’s duties to cooperate with the Court’, 11 July 2014, ICC-01/11-01/11-563, para 2, footnote 6, available at <http://www.icc-cpi.int/iccdocs/doc/doc1801733.pdf>, accessed 31 October 2014.

III. Paragraph 3

1. Chapeau

Article 54 para. 3 contains a mixed list of investigative steps which the Prosecutor is empowered to take and other prosecutorial action which may assist the case preparation process. The word ‘may’ in the chapeau should be interpreted as ‘shall have the power to’, a term which is also used in article 18 para. 2 of the ICTY Statute. Despite similarities in the basic formulation of the Prosecutor’s investigative powers in the ICC and ICTY Statutes, the systems of execution of investigative steps differ fundamentally in the two jurisdictions, as shown in section II above. Whilst the ICTY Prosecutor may conduct all investigative steps grounded in the ICTY Statute directly on the territory of States, the ICC Prosecutor can only, as a general rule, participate in the execution of requests for investigative steps to the extent permitted by the procedures which the requested State has adopted under its national law. The prosecutorial powers expressed in article 54 para. 3 (a) and (b) must therefore be interpreted in light of the realities of Part 9 and article 57 para. 3 (d) of the ICC Statute.

2. The different subparagraphs

a) ‘**Collect and examine evidence**’. Subparagraph (a) simply confirms the obvious powers to ‘[c]ollect and examine evidence’, the Prosecutor’s actual ability to *collect* evidence being narrowly defined by the Statute’s cooperation regime, as discussed above. The Prosecutor may participate directly in the evidence collection process on the territory of States only if the requirements of either article 99 paras. 1 and 4 or article 57 para. 3 (d) are satisfied. The modalities of the collection of evidence, including, for example, the format of recording evidence, are governed by Section III of the ICC’s Rules of Procedure and Evidence.

b) ‘**Request the presence of and question persons**’. Subparagraph (b) empowers the Prosecutor to ‘[r]equest the presence of and question persons being investigated, victims and witnesses’. In comparison, article 18 para. 2 of the ICTY Statute grants the Prosecutor the power ‘to question suspects, victims and witnesses’. Voluntary interviewing is considered an investigative step ‘which can be executed without any compulsory measures’ pursuant to article 99 para. 4 of the ICC Statute. This explains the limitation in the reference to ‘[r]equest the presence of’ in subparagraph (b), a restriction which would seem to also apply when the Prosecutor wants to receive oral testimony at the seat of the Court (emphasis added).³¹

c) and d) ‘**Seek the cooperation**’ and **enter ‘arrangements or agreements**’. Subparagraph (c) provides that the Prosecutor may ‘[s]eek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate’. The need for such cooperation is self-evident and the ability of the Prosecutor to seek it clearly within his or her inherent power.³²

Ancillary to this is subparagraph (d), which authorises the Prosecutor to ‘[e]nter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental agency or person’.

The scope of this provision has been defined to an extent by regulation 107 of the Regulations of the Court.³³ While the Prosecutor clearly possesses the authority to negotiate a cooperation agreement with a State not party to the Statute, or with an intergovernmental agency, this authority is limited only to cooperation agreements or arrangements regarding

³¹ See also article 15 para. 2.

³² Cf. Safferling, *International Criminal Procedure* (2012), 267.

³³ 26 May 2004, as amended on 14 June 2007, 14 November 2007, and 2 November 2011, Official Documents of the International Criminal Court, ICC-BD/01-03-11.

subject matter falling exclusively within the competency of the Prosecutor. Where the subject matter of the agreement goes beyond this, and extends to cooperation matters falling also within the competence of other organs of the Court, sub-regulation 107(1) clearly provides that only the President may conclude such agreements.³⁴

33 According to sub-regulation 107(2), it appears that the Prosecutor needs to inform the President of any cooperation agreement or arrangement that he or she intends to negotiate with a State or intergovernmental agency, except where it would be ‘inappropriate for reasons of confidentiality’.

34 Within the Office of the Prosecutor, the responsibility for establishing a network of international cooperation, complete with cooperation agreements and arrangements pursuant to article 54 para. 3(d), has been assigned to a Jurisdiction, Complementarity and Cooperation Division.³⁵ This was deemed necessary as a result of the ICC’s lack of a direct enforcement arm that would require cooperation from States and organisations.³⁶

35 e) ‘Agree not to disclose’. Subparagraph (e) concerns the Prosecutor’s right to non-disclosure of ‘documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence,³⁷ unless the provider of the information consents’ to disclosure. Such information may emanate from individuals, governments or organisations. In the case of governments, material is often protected on the basis of national security interests.

36 In the *Lubanga* case, the first case before the ICC, the Prosecutor sought to limit disclosure of evidence collected in the course of the DRC investigation on the basis of evidence obtained from international and non-international organisations with the promise of confidentiality.³⁸ After postponing the beginning of the scheduled trial, the Trial Chamber decided to stay the proceedings in light of the Prosecutor’s failure to disclose exculpatory evidence on the basis of fair trial.³⁹ This was later confirmed by the Appeals Chamber.⁴⁰ However, the trial was ultimately allowed to proceed, after the United Nations and the other information providers

³⁴ ‘All agreements or arrangements with a State not a party to the Statute, or any intergovernmental organization, setting out a general framework for cooperation, on matters within the competency of more than one organ of the Court shall be negotiated under the authority of the President ...’ (emphasis added).

³⁵ These cooperation arrangements include both formal agreements (see, e.g., the judicial cooperation agreement between the Office of the Prosecutor and the Central African Republic, note 19) and informal agreements (e.g. ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ‘Annex 2: Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission In the Democratic Republic of the Congo (MONUC) and the International Criminal Court’ (<http://www.legal-tools.org/doc/e1d7f7f/>)). Operative paragraph 1 of Security Council Resolution 1925 (2010) (<http://www.legal-tools.org/doc/7bdcdd/>), ‘in view of the new phase [...] reached’ in the country, renamed MONUC as the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

³⁶ See the Annex to ‘Paper on some policy issues before the Office of the Prosecutor’ September 2003 (<http://www.legal-tools.org/doc/f53870/>).

³⁷ ICC, Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, 13 June 2008, ICC-01/04-01/06-1401 (<http://www.legal-tools.org/doc/e6a054/>) (*Lubanga*, 13 June 2008 Decision), paras 71–73. See also ICC, Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Decision Requesting Observations concerning article 54 (3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence’s Preparation for the Confirmation Hearing’, 2 June 2008, ICC-01/04-01/07-543 (<http://www.legal-tools.org/doc/1922a9/>) (*Katanga*, 2 June 2008 Decision), paras 9–12 and ICC, Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, 21 October 2008, ICC-01/04-01/06-1486 (<http://www.legal-tools.org/doc/485c2d/>) (*Lubanga*, Appeal Judgment), para 55.

³⁸ See, generally, Ambos (2009) 12 *NethCLRev* 543, 543–556; Heinze, *International Criminal Procedure and Disclosure* (2014), 454–458; Whiting (2009) 14 *JILFAff* 207.

³⁹ See *Lubanga*, 13 June 2008 Decision, note 36, paras 93–95.

⁴⁰ See *Lubanga*, Appeal Judgment, note 36.

consented to the disclosure of the confidential evidence provided.⁴¹ The case highlighted the potential conflict that may exist between article 53(3)(e) and article 67(2) of the Statute. The Chamber rejected the Prosecutor’s argument that article 67(2) does not apply to evidence obtained on the basis of confidentiality and held that, if used appropriately, the tension between the two provisions would be ‘negligible’.⁴² Furthermore, the Appeals Chamber, in setting out the procedure to be followed, found that if confidentiality had been promised, a Chamber could not order disclosure, but the issue would be litigated *ex parte* in the presence of the Prosecutor alone. However, in case the information provider does not provide consent to disclose material to the defence, then ‘the Chamber, while prohibited from ordering the disclosure of the material to the defence, will have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information’.⁴³

Subparagraph (e) recognises a qualified prosecutorial right to non-disclosure, which is 37 binding on the Court as well as the Assembly of States Parties in its adoption or amendment of Rules of Procedure and Evidence.⁴⁴

The binding nature of confidentiality of such material on the Court is recognised in the 38 ICC Rules of Procedure and Evidence. In rules 48, 81 and 107, the Court is placed under an obligation to take steps to protect the confidentiality of article 54 material.

Rule 82 of the ICC Rules of Procedure and Evidence has further elaborated this issue.⁴⁵ 39 The Prosecutor may not subsequently introduce such material into evidence without first obtaining approval from the provider.⁴⁶ If such material is introduced, the Court may not require the production of additional material from the provider, nor may it require the provider to testify about the material.⁴⁷ If the Prosecutor introduces such material through a witness, the Court cannot compel the witness to answer questions regarding the material if the witness declines to answer on grounds of confidentiality of the material.⁴⁸ Except for the limitations imposed by sub-rules 2 and 3, the accused’s right to challenge such material if it is introduced by the Prosecutor remains unaffected.⁴⁹

Rule 83, sub-rule 5 provides that the defence may apply to the Chamber that defence 40 material which it intends to introduce into evidence, and which has been provided to the defence under the same conditions as those set forth in article 54 para. 3 (e), shall *mutatis mutandis* be subject to sub-rules 1, 2 and 3 of Rule 82.

f) ‘to ensure the confidentiality’. The last subparagraph of article 54 authorises the 41 Prosecutor to take or request that necessary measures be taken ‘to ensure the confidentiality of information, the protection of any person or the preservation of evidence’.⁵⁰ Absent subparagraph (f), all three powers listed must have been considered inherent insofar as they are essential to the functioning of an independent Office of the Prosecutor. Without ensuring the confidentiality of information, confidence in the integrity of the Prosecutor’s work would quickly be undermined and the ability of the Prosecutor to prepare and prosecute cases would grind to an early halt. The provision is, of course, subject to disclosure orders by the Court pursuant to the Statute and Rules of Procedure and Evidence.

⁴¹ See ICC, Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, ‘Reasons for Oral Decision lifting the stay of proceedings’, 23 January 2009, ICC-01/04-01/06-1644 (<http://www.legal-tools.org/doc/94e831/>).

⁴² See *Lubanga*, 13 June 2008 Decision, note 36, para 76.

⁴³ See *Lubanga*, Appeal Judgment, note 36, para. 48. See also ICC, Trial Chamber IV, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ‘Decision on article 54(3)(3) documents’, 23 November 2011, ICC-02/05-03/09-259 (<http://www.legal-tools.org/doc/a65c7a/>) paras 15–16.

⁴⁴ See ICTY Rule 70.

⁴⁵ See *Katanga*, 2 June 2008 Decision, note 36, para 20.

⁴⁶ Sub-rule 1.

⁴⁷ Sub-rule 2.

⁴⁸ Sub-rule 3.

⁴⁹ Sub-rule 4.

⁵⁰ See generally Darques-Lane, Madec, Godart, in: Fernandez and Pacreau (eds), *Statut de Rome de la Cour Pénale Internationale Commentaire article par article* (2012).

- 42 The importance of respecting the conditions of confidentiality imposed by a provider of evidence or material has been recognised in the Rules of Procedure and Evidence. Rule 48, sub-rule 2 imposes an obligation on the Pre-Trial Chamber to take measures necessary to protect article 54 material. Sub-rule 3 confirms the primacy of the confidentiality of such material.
- 43 In rule 81, dealing with disclosure, sub-rule 3 specifically provides that material protected under article 54 shall not be disclosed, except as provided in rule 54. Sub-rule 4 provides that the Court must take steps of its own motion, or at the request of the Prosecutor, to protect article 54 material.
- 44 Similarly, in rule 107, dealing with a review of the Prosecutor’s decision not to institute a prosecution, sub-rule 3 imposes an obligation on the Court to protect article 54 material.
- 45 As regards the next power listed in subparagraph (f), ‘the protection of any person’,⁵¹ article 68 of the Statute deals with the protection of victims and witnesses. Article 68 para. 1 provides that the *Court* ‘shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’. It continues: ‘The *Prosecutor* shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’ (emphasis added). Article 68 para. 4 states that the Victims and Witnesses Unit of the Registry ‘may advise the Prosecutor and the Court on appropriate protective measures [and] security arrangements ... As referred to in article 43, paragraph 6’, which in turn provides that the Unit ‘shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses’. The Prosecutor’s *obligation* to take protective measures rests on article 68 para. 1, while his or her *discretionary power* to take such measures is expressed in article 54 para. 3 (f). The Prosecutor is accordingly granted a witness protection authority alongside that of the Court and Victims and Witnesses Unit.
- 46 Subparagraph (f) finally provides that the Prosecutor may take necessary measures to ensure ‘the preservation of evidence’. Rule 10 of the Rules of Procedure and Evidence further confirms this provision.⁵² This is a particularly useful provision, supplementing articles 18 para. 6, 19 para. 8 (a) and 56 in a significant manner. Article 18 para. 6 concerns the need to preserve evidence when the Prosecutor has had to defer an investigation pursuant to article 18 on preliminary rulings regarding admissibility, or pending such a preliminary ruling by the Pre-Trial Chamber. Article 19 para. 8 (a) concerns the need to preserve evidence pending a ruling by the Court on jurisdiction or admissibility pursuant to articles 17 and 19. Article 56 deals with the situation where an investigation presents ‘a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial’ or where investigative measures are required to preserve evidence that would be essential for the defence at trial. Apart from article 56 para. 3 (a), which allows the Pre-Trial Chamber to take steps to preserve evidence *ex officio*, articles 18 para. 6 and 19 para. 8 (a) require that the Prosecutor seek authority from the Pre-Trial Chamber before *he or she* takes the measures, whilst article 56 para. 1

⁵¹ See ICC, Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case’ 13 May 2008, ICC-01/04-01/07-474 (<http://www.legal-tools.org/doc/285b52/>) para 44. See also ICC, Appeals Chamber, *Prosecutor v. Germain Katanga*, ‘Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’ – Dissenting Opinion of Judge Georgios M. Pikis’, 13 May 2008, ICC-01/04-01/07-475 (<http://www.legal-tools.org/doc/a76f99/>), para 11; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘Decision on the Defence Request Concerning Languages’’, 27 May 2008, ICC-01/04-01/07-522 (<http://www.legal-tools.org/doc/62dbba/>).

⁵² ‘The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of the investigations by his or her Office.’ ICC-ASP/1/3.

requires that the Prosecutor has requested measures from the Pre-Trial Chamber before the *Chamber* may take them. Article 54 para. 3 (f), on the other hand, is not restricted to any particular phase of the case preparation or prosecution and does not expressly require that the Prosecutor seek authority from the Pre-Trial Chamber or the Court. Moreover, it is the Prosecutor, not the Court, that is authorised to take the necessary steps to preserve evidence. Read in the light of articles 18 para. 6, 19 para. 8 and 56, as well as the interests of justice and trial efficiency and integrity underlying the provisions, article 54 para. 3 (f) should be interpreted to include evidence preservation measures both for the purpose of best utilising a unique opportunity to obtain important evidence and of countering a significant risk that such evidence may not be subsequently available. One example of evidence preservation under this subparagraph would be the situation where the Security Council requests the Court to defer its investigation and prosecution of a situation pursuant to article 16 of the Statute after the Prosecutor has started the preliminary examination or investigation. The Prosecutor would normally turn to the Pre-Trial Chamber before taking measures pursuant to subparagraph (f).

Article 55

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:
 - (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
 - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
 - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
 - (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
 - (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
 - (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
 - (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
 - (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Directly relevant Rules of Procedure and Evidence: Rules 111, 112 and 113

Literature: The rights of suspects under international law: Amnesty International, *Fair Trials Manual* (Dec. 1998, AI Index: POL 30/02/98); Ayat, M., 'Le silence prend la parole: la percée du droit de se taire en droit international pénal', (2001) *Revue de Droit International et de Droit Comparé* 237; Delmas-Marty, M., *Procès pénal et droits de l'homme* (1992); Harris, D., 'The Right to a Fair Trial in Criminal Proceedings as a Human Right', (1967) 16 *ICLQ* 352; La Rosa, A.-M., *Juridictions pénal internationales* (2003); Noor Muhammad, J.N.A., 'The Due Process Rights of Persons Accused of Crime', in: L. Henkin (ed.), *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (1981) 153; Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 153 et seq., 233 et seq.; Van Dijk, P., *The Right of the Accused to a Fair Trial under International Law* (1983); Rodley, N.S., *The Treatment of Prisoners under International Law* (2nd ed. 1999); UN Centre for Human Rights, Crime Prevention and Criminal Justice Branch, *Human Rights and Pre-Trial Detention* (1994, UN Sales No.E.94.XIV.6); Wladimiroff, M., 'Rights of Suspects and Accused', in: G. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (1993) 419; The rights of suspects under the European Convention on Human Rights: O'Boyle, M. et al, *The Law of the European Convention on Human Rights* (2nd ed. 2005); Murdoch, J.L., *article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person* (1994); The rights of suspects in comparative law: Andrews, J.A., *Human Rights in Criminal Procedure: A Comparative Study* (1982); Bassiouni, M.C., 'Human Rights in the Context of International Criminal Justice: Identifying International Procedural Protections in National Constitutions', (1993) 3 *DukeILJ* 240; Cassese, A. And Delmas-Marty, M. (eds.), *Juridictions nationales et crimes internationaux* (2002); Delmas-Marty, M. (ed.), *Procédures pénales d'Europe* (1995) [Revised English edition: Delmas-Marty, M. And Spencer, J.R. (eds.), *European Criminal Procedures* (2002)]; Livingstone, S. *Towards a Procedural Regime for the International Criminal Court* (2002); Van Den Wyngaert, C. (ed.), *Criminal Procedure Systems in the European Community* (1993); The rights of suspects under the Nuremberg and Tokyo Charters and Allied courts and military commissions: Ferencz, B., 'Nuremberg Trial Procedure and the Rights of the Accused', (1948) 39 *JCL&Criminology* 144; Minear, R., *Victor's Justice: The Tokyo War Crimes Trial* (1971); Morris, V. And Scharf, M.P., *The International Criminal Tribunal for Rwanda* (1998); Ann Tusa, Ann

and Tusa, J., *The Nuremberg Trial* (1995); Wallach, E., 'The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?', (1999) 37 *ColJTransnatL* 864; The rights of suspects under the Yugoslavia and Rwanda Statutes: Beresford, S., 'The International Criminal Tribunal for the Former Yugoslavia and the Right to Legal Assistance', (1998) 2 *IJHumRts* 49; Cassese, A., 'Opinion: The International Tribunal for the Former Yugoslavia and Human Rights', (1997) 9 *EurHumRtsLRev* 329; Mandiaye Niang, M., 'The Right to Counsel before the International Criminal Tribunal for Rwanda', (2002) 13 *CLF* 323; Morris, V. And Scharf, M.P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995) 197 *et seq.*; *id.*, 1 *The International Criminal Tribunal for Rwanda* (1998) 471 *et seq.*; La Rosa, A.-M., 'Réflexions sur l'apport du Tribunal pénal international pour l'ex-Yugoslavie au droit à un process équitable', (1997) 101 *Revue General de Droit Internationale Public* 960; Wladimiroff, M. 'The Assignment of Counsel before the International Criminal Tribunal for Rwanda', (1999) 12 *LeidenJIL* 957. The rights of suspects under the Rome Statute and the statutes of other international criminal courts: Fernández de Gurmendi, S.A. And Friman, H., 'The Rules of Procedure and Evidence of the International Criminal Court', (2000) 3 *YbILHumL* 289; Friman, H., 'Investigation and Prosecution', in: R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 493, 504 *et seq.*, 512 *et seq.*; Gallant, K., 'Individual Rights in a New International Organization: The International Criminal Court', in: M. C. Bassiouni, *International Criminal Law* (2nd ed. 1999) 693; La Rosa, A.-M., *Juridictions pénales internationales – la procédure et la preuve* (2003); Lawyers Committee for Human Rights, *Pre-Trial Rights in Rules of Procedure and Evidence* (1999); Zappalà, S., 'The Rights of Persons during an Investigation', in: A. Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1181.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1: Rights of all persons during investigation.....	4
1. 'not to incriminate himself or herself or to confess guilt'.....	5
2. 'not be subjected to any form of coercion ...'.....	6
3. 'assistance of a competent interpreter and such translations as are necessary'.....	7
4. 'not be subjected to arbitrary arrest or detention'.....	8
II. Paragraph 2: Rights of suspects being questioned.....	10
1. 'grounds to believe that he or she has committed a crime'.....	11
2. 'remain silent, without such silence being a consideration'.....	12
3. 'to have legal assistance of the person's choosing, or ... to have legal assistance assigned'.....	13
4. 'to be questioned in the presence of counsel'.....	15
C. Special remarks.....	16

A. Introduction/General remarks

Little or no attention was given to the rights of suspects or other persons during criminal investigations in any of the proposals for permanent international criminal courts until the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda. They also received similarly short shrift in the proceedings before the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East or Allied Courts and military commissions in the aftermath of the Second World War¹. However, as the International Law Commission recognized in its commentary on article 26 of the ILC Draft Statute, the forerunner of article 55, '[t]he rights of the accused ... would have little meaning in the absence of respect for the rights of the suspect during the investigation, for example, the right not to be compelled to confess to a crime'². Thus, article 55 incorporates developments concerning international courts and codifies recent interpretation by treaty monitoring bodies and long-standing scholarly assessments that many of the rights recognized in these instru-

¹ For the history and the texts of many of the proposals for an international criminal court, see Hall (1998) *IRRC*, No. 322, 57; Memorandum by the Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction (Historical Survey), UN Doc.A/CN.4/Rev.1 (1949). See also Bassiouni (1997) 10 *HarvHumRtsJ* 11.

² See 1994 ILC Draft Statute, commentary to article 26, p. 93.

ments as applying to the accused also apply to suspects (for the definition of this term, which is not used in the Rome Statute, see mn 10)³. Article 55, a mini-human rights convention for the period before trial, breaks new ground by stating that some of these rights also apply to other persons involved in the investigation, such as victims and witnesses⁴. It should be noted that this provision, while important, was not the first to enshrine such protection. Indeed, the regulations which set up the Special Crimes Panels in Timor Leste contained extensive protection for suspects. In many respects, this Regulation went beyond article 55, although many of its provisions are limited in application to suspects from the moment of arrest and accused⁵. Moreover, the Statute of the Special Tribunal for Lebanon has a similar provision which mirrors the content of article 55⁶. Presumably, the Prosecutor should wish, in theory, to act consistently with these broader international standards and the Court could recommend amendment of the Rules of Procedure and Evidence to incorporate such guarantees, to the extent that they provide greater protection than other international standards. However, as will be seen below (mn. 4), in practice, the scope of article 55 has been interpreted rather narrowly by the Chambers.

- 2 In addition to article 55, certain other provisions in the Rome Statute protect the rights of persons during investigations, directly or indirectly, including, in particular, article 54 para. 1 (c) requiring the Prosecutor ‘[f]ully [to] respect the rights of persons arising under this Statute’; article 56, defining the role of the Pre-Trial Chamber in relation to a unique investigative opportunity; article 57 para. 3 (b), seeking cooperation to assist in the preparation of a defence; article 59 para. 2 (c) ensuring that a person’s rights have been respected by national authorities; article 60 para. 1, requiring the Pre-Trial Chamber to determine upon surrender of a person to the Court that he or she was informed of his or her rights; article 66, guaranteeing the presumption of innocence; article 68, protecting victims and witnesses and permitting their participation in the proceedings; and article 69 para. 7, excluding evidence obtained in violation of the Rome Statute or internationally recognized human rights. However, there are a number of important rights which suspects have under international law which are not expressly recognized in article 55 or in other parts of the Rome Statute (see mn 16).
- 3 The provisions of article 55, since they will be directly applicable to States Parties conducting questioning of suspects and other persons during investigations, will inevitably have an impact on national law and practices in other cases involving crimes of lesser magnitude. Indeed, the impact of article 55 on State law and practice may well prove to be one of the more significant aspects of the Rome Statute. All States Parties will need to ensure that the rights of persons questioned by their authorities at the request of the Prosecutor are assured. States have begun to include such provisions in national implementing legislation or draft implementing legislation⁷. However, so far, only a few States have done so. Indeed, the hopes expressed in the First Edition of this Commentary (under Margin No. 3) concerning the implementation of the Rome Statute have been disappointed as much of that draft and enacted legislation is flawed⁸.

³ The right to a fair trial on a criminal charge (*accusation*) ‘does not arise only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person charged’. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993) 245. See also Noor Muhammad, in: Henkin (ed.), *The International Bill of Rights* (1981) 145–146.

⁴ One commentator has stated that article 55 is ‘the most advanced text on the protection of pre-trial rights of persons during international criminal investigations’. Zappalà, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1183.

⁵ Section 6.2 and 6.3 of UNTAET Reg. 2000/25, 14 Sep. 2001, recognizes an extensive number of rights of suspects from the moment of arrest and some ‘[a]t every stage of the proceedings’, which, presumably, applies to suspects not under arrest who are being questioned, although in some respects other international standards provide suspects with greater protection.

⁶ Article 15, Statute of the Special Tribunal for Lebanon.

⁷ The text of draft and enacted legislation implementing the Rome Statute, together with commentaries on that legislation, can be found at: <<http://www.amnesty.org/icc>>.

⁸ For a recent critique of implementing legislation and draft implementing legislation, see Amnesty International, *International Criminal Court: The failure of states to enact effective implementing legislation* (1 Sep. 2004, AI Index: IOR 40/019/2004).

B. Analysis and interpretation of elements

I. Paragraph 1: Rights of all persons during investigation

The chapeau of paragraph 1 states expressly that it applies ‘[i]n respect of an investigation’⁴. There is no indication in the Statute as to what an ‘investigation’ may mean in this context. Two possibilities arise. First of all, it could mean an ‘investigation’, as resulting from a formal decision taken by the Prosecutor under article 53(1). The problem with this approach is that it would create a unjustified distinction between cases arising from referrals from either a State or the Security Council or cases resulting from the opening of a *proprio motu* investigation by the Prosecutor. Indeed, in the former cases there is no formal public decision to open an investigation, whereas in the latter case it is required that a Pre-Trial Chamber authorize the opening of an investigation (Art. 15(4) Statute), thus providing a precise date to trigger the protection of article 55. In those circumstances, it would make sense for the Court to adopt a broad interpretation of what an investigation is in the context of article 55 and to hold that the fundamental rights recognized in article 55 para. 1 apply at other stages of proceedings and even before an investigation is opened, including during a preliminary examination. Given the nature of the fundamental prohibitions and guarantees in paragraph 1, it would be inconceivable if the Court were to say that they were not applicable to investigators conducting preliminary examinations with a view to determining whether to open an investigation. It would also be logical that the Court hold that paragraph 1 applies to investigative steps being taken pursuant to articles 18 para. 7 and 19 para. 8, as well as similar inquiries after the close of the investigation before, during and after trial, including inquiries related to revision of judgment or sentence.

Although the chapeau of paragraph 1, unlike paragraph 2, does not expressly mention that these rights must be respected by the Prosecutor, State authorities and state agents or staff of intergovernmental organizations in peace-keeping missions, it would make sense that all of them must respect these rights during the investigation since in most situations they will be involved in conducting investigations with a view to possible trial before the Court (see articles 53, 54, 86–99). This conclusion is reinforced by rule 111 para. 2, which states that ‘[w]hen the Prosecutor or national authorities question a person, due regard shall be given to article 55’, without restricting the scope of this obligation to paragraph 2 of that article⁹. However, the little case law that there has been so far does not seem to indicate such a broad protection. Indeed, in the *Gbagbo* case, despite some evidence that Ivorian authorities and the OTP were in constant contact regarding the suspected person, Laurent Gbagbo, who was clearly being held in custody for the purposes of being transferred to the ICC, and who was obviously under investigation by the Office of the Prosecutor, the Pre-Trial Chamber found that article 55(1) did not apply because the alleged violations of his rights ‘were not perpetrated by the Prosecutor or by the Ivorian authorities on behalf of the Prosecutor or any organ of the Court’¹⁰. Indeed, because Gbagbo was formally charged with economic crimes which were technically unrelated to ICC proceedings, it did not, according to the Pre Trial Chamber trigger the protection of article 55¹¹. This is obviously a far too restrictive test in terms of human rights protection, especially when there are allegations of arbitrary arrest

⁹ In contrast, the second sentence of rule 111 para. 2 expressly addresses only the requirement to record that a person has been informed of his or her rights under paragraph 2 of article 55. However, Rule 112 para. 4 encourages the Prosecutor to record questioning of persons other than suspects.

¹⁰ *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-212, Decision on the ‘Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’, Pre-Trial Chamber I, 15 August 2012, para. 97.

¹¹ *Ibid.*, para. 97.

and detention or torture. Indeed, it is less than likely that the Prosecutor will directly order a person to be tortured. More likely, the person will be subjected to mistreatment by national authorities without any formal link with the Prosecutor being established. In light of this, it would be more in conformity with the spirit of broad protection enshrined in article 55 for the Court to consider that once a person is under investigation, they fall under the protection of the ICC and that the Prosecutor has a duty to ensure that the rights of that person, especially if they are being detained, are respected by the local authorities¹².

Finally, it should be noted that the chapeau does not expressly provide, in contrast to the chapeau of paragraph 2, that the person concerned must be informed of these rights, although article 26 para. 6 (b) and (c) of the ILC Draft Statute required that suspects be informed of the rights not to incriminate oneself or confess guilt and to interpretations and translations. However, since it is not possible to exercise one's rights effectively if one is unaware of them, it would be logical for the Court to conclude that persons involved in the investigation must be informed of all the rights recognized in paragraph 1, as well as any other relevant rights.

1. 'not to incriminate himself or herself or to confess guilt'

- 5 Article 55 para. 1 (a) is based on the right recognized in article 14 para. 3 (g) of the ICCPR of everyone charged with a criminal offence to enjoy 'in full equality' the right '[n]ot to be compelled to testify against himself or to confess guilt'¹³. This provision in the Rome Statute is an extension of the right to all persons, including witnesses and suspects, not just persons charged with a crime. In article 26 para. 6 (b) of the ILC Draft Statute, this right had been limited to suspects. However, like the similar guarantees in article 21 para. 4 (g) of the ICTY Statute, article 20 para. 4 (g) of the ICTR Statute, Section 6.3(h) of UNTAET Reg. 2000/25, and article 67 para. 1 (g) of the Rome Statute, this provision omits the important requirement that the right be enjoyed 'in full equality'¹⁴.

2. 'not be subjected to any form of coercion ...'

- 6 The scope of the first part of article 55 para. 1 (b), prohibiting coercion, duress and threats, which would address other matters than compulsion to incriminate oneself or to confess guilt covered in article 55 para. 1 (a), is not entirely clear, but it would address the types of human rights violations that have been committed in recent years by members of national law enforcement agencies and intelligence services when questioning persons suspected of 'terrorist' acts. It was not included in article 26 para. 6 of the ILC Draft Statute. However, this right is recognized by Section 6.3 (i) of UNTAET Reg. 2000/25, 14 Sep. 2000¹⁵. Presumably paragraph 1 (b) would not preclude the Court from ordering a witness pursuant to article 64 para. 6 (b) to appear before the Court from testifying and testify or to produce documents and other evidence¹⁶. One impulse behind including the prohibition of coercion,

¹² This would additionally be more respectful of the actual text of article 55(1) which provides for protection of rights without requiring that the violation must be ordered in any way by the Prosecutor or another organ of the Court.

¹³ Article 8 para. 2 (g) of the American Convention on Human Rights provides that every person charged with a criminal offence is entitled 'in full equality ... not to be compelled to be a witness against himself or to plead guilty'.

¹⁴ Rules of Procedure and Evidence of the Special Court for Sierra Leone (Sierra Leone Rules) fail to include any guarantee concerning compelled testimony or confessions by suspects, but article 17 para. 3 (g) of the Statute of the Special Court for Sierra Leone states that the accused is entitled 'in full equality' to the guarantee '[n]ot to be compelled to testify against himself or herself or to confess guilt'.

¹⁵ UNTAET Reg. 2001/25, Section 6.3, 14 Sep. 2001 provides that '[a]t every stage of the proceedings, the suspect and the accused shall be informed by the public prosecutor that he or she has the following rights: ... (i) the right to be free from any form of coercion, duress or threat, torture, or any other form of cruel, inhuman or degrading treatment or punishment'.

¹⁶ The obligation of States to assist the Court in the implementation of such orders is supplemented by the independent obligations in article 93 para. 1 (b) (to assist in the taking and production of evidence), (c) (to assist in the questioning of persons being investigated or prosecuted) and (e) (to facilitate the voluntary appearance of

duress and threats appears to have been to exclude plea bargaining as it is practiced in the United States, but that concern has been addressed in article 65. It has been argued that the protection in article 55 para. 1 (b) 'is very broad and covers every form of compulsion, certainly beyond the prohibition of torture or other similar forms of physical or moral violence (which are specifically forbidden by article 55 para. 1 (b))', and 'the scope of this rule is broad enough to include use of *agents provocateurs*, or other sorts of tricks by investigators indirectly to obtain information against the person with his or her assistance'¹⁷.

Although it is possible that an employee of the Court might mistreat a person during an investigation, whether detained or not, the primary aim of the second part of article 55 para. 1 (b) prohibiting torture or any other form of cruel, inhuman or degrading treatment or punishment appears to be to protect persons during an investigation from State authorities assisting an investigation by the Prosecutor¹⁸.

3. 'assistance of a competent interpreter and such translations as are necessary'

Article 55 para. 1 (c) is a significant improvement over article 26 para. 6 (c) of the ILC Draft Statute, which in turn is based upon article 18 para. 3 of the ICTY Statute and rule 42 *lit. A* (ii) of the ICTY Rules. It provides that any person involved in the investigation, such as a victim or a witness, not just a suspect, '[s]hall, if questioned in a language other than the language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness'¹⁹. Similar provisions apply to other stages of the proceedings²⁰. Rule 42 (Translation and interpretation services) requires the Court to 'arrange for the translation and interpretation of its obligations under the Statute and Rules', but there are no other rules directly relevant to this statutory provision.

Article 55 para. 1 (c) affords significantly more protection than article 26 para. 6 (c) of the ILC Draft Statute, which limited the right to suspects, did not require that the language be one other than the one the person *fully* understands and speaks, and limited the requirement of translation of documents to those on which the suspect was to be questioned. It also is an improvement over article 18 para. 3 of the ICTY Statute and rule 42 *lit. A* (ii) of the ICTY Rules²¹, as well as over the equivalent guarantees in article 14 para. 3 (f) of the ICCPR, article

persons as witnesses or experts before the Court). These obligations are subject to the exceptional rule in article 93 para. 7 governing the specific case of temporary transfer of persons in custody to the Court, an anomalous provision based on mutual legal assistance practice between states, where the State has a particular interest in ensuring the return of such persons.

¹⁷ Zappalà, *Human Rights in International Criminal Proceedings* (2003) 55.

¹⁸ In the light of the widespread practice of torture and ill-treatment of pre-trial detainees by national authorities in many countries, Amnesty International and other non-governmental organizations argued that this provision should be included. See, for example, Amnesty International, *International Criminal Court: Making the Right Choices – Part II: Organizing the Court and Guaranteeing a Fair Trial* (July 1997, AI Index: IOR 40/11/97), at Part IV.B.2.k.

¹⁹ Official languages of the Court are Arabic, Chinese, English, French, Russian and Spanish, but the working languages of the Court are English and French, article 50 Rome Statute. Pursuant to article 50 para. 2, rule 41 (Working languages of the Court) provides that the Presidency may authorize the use of an official language of the Court as working language in three situations: when it is 'understood and spoken by the majority of those involved in a case before the Court and any of the participants in the proceedings so requests', when the Prosecutor or defence request its use and when 'it would facilitate the efficiency of the proceedings'.

²⁰ E.g., article 67 para. 1 (f) guarantees to an accused: 'To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or of documents presented to the Court are not in a language which the accused fully understands and speaks'. Rule 114 para. 2 provides that copies of decisions of the Trial Chamber shall be provided as soon as possible to the accused 'in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67 para. 1 (f)'.

²¹ Article 18 para. 3 of the ICTY Statute provides that a suspect who is questioned has the right 'to necessary translation into and from a language he speaks and understands'. Rule 42 *lit. A* (ii) ICTY supplements this guarantee by providing that a suspect to be questioned by the Prosecutor has 'the right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning'.

17 para. 3 of the ICTR Statute and rule 42 *lit. A* (ii) of the ICTR Rules²², rule 42 of the Sierra Leone Rules²³, section 6.3 (c) of UNTAET Reg. 2000/25²⁴ and article 24 of the Cambodia Extraordinary Chambers Law²⁵ for persons accused of a crime in that it requires interpretation where the person does not *fully* understand the language used for questioning, includes a fairness test to determine which documents should be translated and requires *competent* interpretation. Presumably, the *translations* of documents on which the person is to be questioned, as well as the *interpretation*, must be competent as well. The First Edition of this Commentary (under mn 7) suggested that this point could be clarified in the Rules of Procedure and Evidence, but the Rules and the Regulations have both left the matter unresolved. Like the provisions on translation and interpretation of other international and internationalized criminal courts, article 55 para. 1 (c) does not require translation or interpretation into a person's native language if the person fully understands the language being used²⁶.

4. 'not be subjected to arbitrary arrest or detention'

- 8 There was no equivalent provision to article 55 para. 1 (d) in article 26 para. 6 of the ILC Draft Statute. The first part of article 55 para. 1 (d), prohibiting arbitrary arrest or detention, is based on the right recognized in article 9 of the Universal Declaration of Human Rights of everyone not to 'be subjected to arbitrary arrest, detention or exile' and in article 9 para. 1 of the ICCPR of everyone not to 'be subjected to arbitrary arrest or detention', which the Human Rights Committee recognizes as a peremptory norm²⁷. Therefore, the terms 'arrest' and 'detention' should be given the broader meaning that they receive under article 9 para. 1, as interpreted by the Human Rights Committee and the UN Working Group on Arbitrary Detention, rather than in the relatively narrower definitions section of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment²⁸. The prohibition of arbitrary detention in the first part of paragraph 1 (d), which

²² Article 17 para. 3 ICTR Statute is identical to article 18 para. 3 of the ICTY Statute and Rule 42 *lit. A* (ii) ICTR is identical to the corresponding ICTY rule.

²³ Rule 42 *lit. A* (ii) of the Sierra Leone Rules provides that '[a] suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands ... (ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning'.

²⁴ Section 6.3 (c) of UNTAET Reg. 2000/25 requires the Prosecutor at every stage of the proceedings to inform the suspect his or her right 'to have the free assistance of an interpreter if he or she cannot understand or speak one of the official languages of the Court'.

²⁵ Article 24 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2001 Cambodia Extraordinary Chambers Law), Reach Kram No. NS/RKM/0801/12, 10 Aug. 2001 (available at: <http://www.yale.edu/cgp/KR-Law-trans.06.09.2001.html>), as amended by Reach Kram No. NS/RKM/1004/006, 27 Oct. 2004, published 4 Nov. 2004 (unofficial translation by the Council of Jurists and the Secretariat of the Task Force, revised 5 Oct. 2004, available at: <http://www.cambodia.gov.kh/krt/english/law>) (2004 Extraordinary Chambers Law Amendments). As amended, article 24 provides that '[d]uring the investigation, Suspects shall be unconditionally entitled to ... the right to interpretation, as necessary, into and from a language they speak and understand'. An identical guarantee was included in article 24 of the 2001 Cambodia Extraordinary Chambers Law.

²⁶ See, for example, *Prosecutor v. Delalić*, IT-96-21, Decision on Defence application for forwarding documents in the language of the accused, Trial Chamber, 25 Sep. 1996; *Prosecutor v. Djukić*, IT-96-20-PT, Decision on the Language of Translation, Trial Chamber, 2 June 1996.

²⁷ Human Rights Committee, General Comment No. 24, para. 8, UN Doc. E/1995/49 (1995). The right not to be subjected to arbitrary arrest and detention is also recognized in various formulations in article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article XXV of the American Declaration of Human Rights, article 7 para. 3 of the American Convention on Human Rights and article 6 of the African Charter on Human and Peoples' Rights. For an early study of the scope of the right to be free from arbitrary detention, see Study of the right of everyone to be free from arbitrary arrest, detention and exile, UN Doc. E/CN.4/826/Rev.1 (1964). See also Niemi-Kiesilainen, article 9, in: Alfreðsson and Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 209.

²⁸ For the view of the leading commentator on the scope of article 9 para. 1 of the ICCPR, see Nowak, *Covenant* 158–182. The scope of deprivations of liberty covered by the Body of Principles still is fairly broad.

applies both to the office of the Prosecutor and to national authorities, is a major advance over the ICTY and ICTR Statutes and Rules, which omit this fundamental guarantee.²⁹

The second part of article 55 para. 1 (d), prohibiting the deprivation of liberty ‘except on such grounds and in accordance with such procedures as are established in this Statute’, is based on the right also recognized in article 9 para. 1 of the ICCPR of everyone not to ‘be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law’ and echoes the due process provisions in the fifth and fourteenth amendments to the United States Constitution and in article 39 of the *Magna Carta*. The concept of deprivation of liberty is broader than arrest or detention and could include provisional release of a suspect under restrictions to a particular location or restrictions on the freedom of a witness compelled to attend a hearing pursuant to article 64 para. 6 (b) of the Rome Statute. The prohibition in the second part of paragraph 1 (d) is independent of the prohibition in the first part of arbitrary arrest and detention; an arrest or detention made on grounds and in accordance with procedures established by the Statute could still be arbitrary in certain circumstances. This provision should be read together with article 85 para. 1, which states that ‘[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation’.

II. Paragraph 2: Rights of suspects being questioned

As stated above, it is not possible to exercise one’s rights effectively if one is unaware of them. Therefore, the requirement in the chapeau of paragraph 2 that the person concerned must be informed of these rights is an important safeguard, which has not been expressly included in the chapeau of paragraph 1. Article 26 para. 6 (i) and (ii) of the ILC Draft Statute required that suspects, before they were questioned, be informed that they were considered suspects and that they had the right to silence. Although paragraph 2 expressly identifies only the Prosecutor, which would necessarily include staff of the Office of the Prosecutor, and national authorities and agents, presumably, it would also apply to other persons, such as staff of the UN or other intergovernmental organizations, including staff serving in peace-keeping operations. A particularly important aspect of paragraph 2 is that the rights apply regardless whether the person is deprived of liberty or not. The drafters of the Rome Statute decided not to use the term ‘suspect’, in part because some states thought that it would lead to premature prejudice against the person targeted by an investigation. However, in line with others who have sought to avoid the resulting awkwardness, this Commentary uses the term ‘suspect’ to describe a person with regard to whom ‘there are grounds to believe that [he or she] has committed a crime within the jurisdiction of the Court’ and with respect to whom the Pre-Trial Chamber has not confirmed charges pursuant to article 61 para. 7, at which point a suspect becomes an ‘accused’ (see this Commentary on article 58 at mn 3)³⁰. Paragraph 2 applies ‘when the person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9’. The similarly worded rules of the ICTY and ICTR Rules upon which paragraph 2 is based have been criticized as too restrictive on the ground that some of the rights in that paragraph, ‘such as the right to legal assistance may be needed independently of any questioning’³¹. However, there are many

²⁹ The absence of this prohibition has led to inconclusive and unsatisfactory jurisprudence concerning challenges to the lawfulness of arrests by UN peace-keeping forces in the former Yugoslavia in the *Dokmanović, Todorović, Nikolić* and *Krajsnik* cases (see Lamb, in: May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001) 27, and to the lawfulness of prolonged pre-trial detention by national authorities pursuant to ICTR arrest warrants (see decisions cited in note 44 below).

³⁰ One commentator, while sympathizing with the decision not to use this term, ‘which avoids premature criminalization and prevents a number of problems about the determination of the moment when a person becomes a suspect’, predicted that the term will be used in practice and suggested that the decision not to use the term ‘may have created even more uncertainty’. Zappalà, *Human Rights*, see note 14, 49 note 61.

³¹ Zappalà, *Human Rights*, see note 14, 49, 50 and 52 (suggesting the need for representation by a lawyer during the taking of blood samples and other evidence from a suspect outside the context of questioning).

situations in which the Prosecutor would be likely to conclude that questioning prior to arrest of a person he or she had identified as a suspect would be futile or where the value of any such questioning would be outweighed by the need to obtain an arrest warrant secretly at the close of an investigation in order to avoid the danger of flight. The determination that a person is a suspect is based on an objective test, '[w]here there are grounds to believe, subject to judicial review'³². Independently of article 55 para. 2, the rights of persons who subsequently become suspects are protected by article 56 para. 2 (c), which authorizes the Pre-Trial Chamber to appoint a counsel 'to attend and represent the interests of the defence' when the Prosecutor, or the Pre-Trial Chamber acting on its own initiative, takes measures during a unique investigative opportunity.

1. 'grounds to believe that he or she has committed a crime'

- 11 There is no exact counterpart in international human rights instruments or in the instruments of other international criminal courts or internationalized courts to the right recognized in article 55 para. 2 (a) '[t]o be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court'. Article 26 para. 6 (a) of the ILC Draft Statute required that the person be informed that he or she was a suspect. The right recognized in article 55 para. 2 (a) should be considered as linked to the rights to retain counsel and to remain silent, by informing the suspect that he or she should consider the need for legal advice before continuing to respond to questions in the course of an investigation, as well as of the seriousness of the situation. The effective implementation of this right by staff of the Office of the Prosecutor can pose a number of challenges. Indeed, they have extensive discussions with senior government officials in the course of preliminary examinations concerning possible referrals, declarations pursuant to article 12 para. 3 recognizing the Court's jurisdiction and activities on the territory of the State, as well as on a range of legal and practical matters once an investigation has begun. How would these interactions with state officials be affected should evidence emerge of their possible involvement in the commission of crimes? Since the chapeau uses the term 'grounds to believe', rather than 'reasonable grounds to believe', a relatively low threshold would trigger this obligation, such as press reports suggesting the official's responsibility for crimes. Although it will be awkward to do so, presumably staff of the Office of the Prosecutor advise such government officials of their rights under article 55 before each discussion. Paragraph 2 (a) uses the term 'crime', but ordinary principles of justice would suggest that the rights identified in article 55 should apply to offences against the administration of justice, which under article 70 para. 3 could carry sentences of up to five years' imprisonment, plus a fine, possibly cumulatively imposed, as well.

2. 'remain silent, without such silence being a consideration'

- 12 The right to silence is a component of the presumption of innocence (guaranteed in article and of the right not to be compelled to testify against oneself or to confess guilt (guaranteed in article 55 para. 1 (a) and, with respect to accused persons, by article 67 para. 1 (g)). The ICTY and ICTR Rules the Sierra Leone Rules and UNTAET Reg. 2000/25 require the Prosecutor to inform suspects of their right to silence before questioning. Rule 42 *lit.* A (iii) ICTY provides that a suspect who is to be questioned by the Prosecutor has 'the right to remain silent, and to be cautioned that any statement that he makes shall be recorded and may be used in evidence'³³. Article 55 para. 2 (b) of the Rome Statute provides that a person

³² However, one observer has criticized the similarly worded provisions in ICTY Rule 42 *lit.* A and ICTR Rule 42 *lit.* A, as giving the Prosecutor excessive discretion in determining when a person becomes a suspect, risking possible abuse. Zappalà, *Human Rights*, see note 14, 51. He notes concerns that the ICTY conducted extensive questioning of persons detained as witnesses, one of whom was later charged. *Ibid.*, 52–53.

³³ Rule 42 *lit.* A (iii) ICTR is identical. Rule 42 *lit.* A (ii) of the Sierra Leone Rules is similar: 'A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the

suspected of a crime within the jurisdiction of the Court shall be informed before being questioned either by the Prosecutor or by national authorities pursuant to a request to do so under Part 9 of the right '[t]o remain silent, without such silence being a consideration in the determination of guilt or innocence'. This provision, which is unchanged from article 26 para. 6 (a) (i) of the ILC Draft Statute, affords greater protection of the right to silence than the ICTY and ICTR Rules by expressly stating that exercise of that right may not be a consideration in determining guilt or innocence, but it does not expressly require the warning that any statement may be used in evidence required by the ICTY and ICTR Rules and UNTAET Reg. 2000/25. The First Edition of this Commentary (under mn 12) suggested that this omission would be remedied in the Rules of Procedure and Evidence, but it has not been addressed either by the Rules or by the Regulations of the Court³⁴. However, the Rules provide an elaborate scheme in rules 74 and 75 designed to regulate the right of a witness, which would include an accused who decided to testify, not to incriminate oneself or to incriminate certain family members. This scheme sets out the framework permitting the Court to require a witness to testify, subject to guarantees of confidentiality and immunity from prosecution by the Court, in proceedings before the Court and, therefore, it does not restrict the scope of the guarantee in article 55 para. 2 (b).

3. 'to have legal assistance of the person's choosing, or ... to have legal assistance assigned'

As recognized in the ICTY and ICTR Rules, the Sierra Leone Rules and UNTAET Reg. 2000/25, if the right of a suspect to counsel is to be meaningful, the suspect, whether detained or at liberty, must be able to consult a lawyer when subjected to questioning. Article 18 para. 3 of the ICTY Statute provides that '[i]f questioned, the suspect shall be entitled to be assisted by counsel of his own choice ...'³⁵. The first part of article 55 para. 2 (c) of the Rome Statute, which is similar to the first part of article 26 para. 6 (a) (ii) of the ILC Draft Statute, reflects this principle by providing that the suspect has the right to be informed of the right '[t]o have legal assistance of the person's choosing'. This provision is generally consistent with the right recognized in article 14 para. 3 (d) of the ICCPR of every person charged with a criminal offence 'to defend himself ... through legal assistance of his own choosing', but expressly extends this right to suspects³⁶. The right to counsel of one's own choice under the

Prosecutor prior to questioning, in a language he speaks and understands: ... (iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence'. Section 6.2 of UNTAET Reg. 2000/25 requires that a suspect shall be informed upon arrest that he or she has 'the right to remain silent and not to admit guilt, and that silence will not be interpreted as an admission', and Section 6.3 (h) provides that suspects shall be informed by the Prosecutor at every stage of the proceedings that, if he or she chooses not to speak in the proceeding, such silence will not be held against him or her in the determination of innocence or guilt'.

³⁴ For further analysis of the scope of the right to silence under international law, see Amnesty International's reports, *United Kingdom: Submission to the Royal Commission on Criminal Justice* (1 Nov. 1991, AI Index: EUR 45/17/91); *United Kingdom: Fair trial concerns in Northern Ireland – The right to silence* (1 Feb. 1993, AI Index: EUR 45/01/93); *United Kingdom: The right to silence – Update* (1 Nov. 1993, AI Index: EUR 45/15/93). The right to silence is recognized in the ECHR, adopted in 1950, although this regional treaty has been interpreted more restrictively than contemporary international standards, such as the ICTY and ICTR Rules and the practice of the Yugoslavia and Rwanda Tribunals. See *Saunders v. United Kingdom*, 23 E.H.R.R. 313, 17 Dec. 1996; *Murray v. United Kingdom*, 22 E.H.R.R. 29, 8 Feb. 1996 (finding that the drawing of adverse inferences from the exercise of the right to silence by a court in Northern Ireland did not, on the specific facts of the case, violate the European Convention on Human Rights). However, the Human Rights Committee, the body of experts which monitors implementation of the ICCPR, has 'noted with concern that the provisions of the Criminal Justice and Public Order Act of 1994, which extended the legislation originally applicable in Northern Ireland, whereby adverse inferences may be drawn from the silence of persons accused of crimes, violates various provisions in article 14 of the Covenant'. Comments of the Human Rights Committee: *United Kingdom of Great Britain and Northern Ireland*, 27 July 1995, UN Doc. CCPR/C/79/Add.55, para. 17.

³⁵ Article 17 para. 3 ICTR Statute has an identical guarantee.

³⁶ Article 6 para. 3 (a) of the ECHR provides that '[e]veryone charged with a criminal offence has the following minimum rights: ... (c) to defend himself ... through legal assistance of his own choosing'; article 8 para. 2

Rome Statute also applies whether the suspect is detained or at liberty, which is a significant advance over international instruments which recognize that detainees have this right, but are silent concerning suspects who have not been detained³⁷.

- 14 Suspects have the right to counsel when the interests of justice so require. The second part of article 55 para. 2 (c) of the Rome Statute, which is based on article 26 para. 6 (a) (ii) of the ILC Draft Statute, provides that every suspect has the right to be informed of the right, 'if the person does not have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it'. This provision of the Rome Statute is similar to the guarantee recognized in article 14 para. 3 (d) of the ICCPR of persons charged with a criminal offence 'to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'³⁸. Likewise, the ICTY and ICTR Statutes and Rules, the Sierra Leone Rules, UNTAET Reg. 2000/25 and the Cambodia Extraordinary Chambers Law all recognize that suspects, whether detained or at liberty, who are unable to pay for counsel, have the right to have assigned legal assistance. Article 18 para. 3 of the ICTY Statute provides that '[i]f questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it ...'³⁹.

The decision to include the right to assigned counsel in any case 'where the interests of justice so require' in the Rome Statute, which was omitted from the ILC Draft Statute, even if the suspect could afford counsel, was made because the delegates wished to be sure that persons suspected of the worst possible crimes, who would in many cases be unpopular clients, would be able to obtain counsel⁴⁰. Therefore, this provision should be seen as

of the American Convention on Human Rights provides that, during the proceedings, every persons charged with a criminal offence 'is entitled, with full equality, to the following minimum guarantees: ... (c) the right of the accused to ... be assisted by legal counsel of his own choosing'. These rights are now considered to apply to persons who have been detained, even if they have not yet been formally charged.

³⁷ UN Basic Principles on the Role of Lawyers, Principles 5 to 8; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18.

³⁸ Article 6 para. 3 (c) of the ECHR provides that everyone charged with a criminal offence has the following minimum rights: '... (c) ... if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'; article 8 para. 2 (d) of the American Convention on Human Rights is more limited in scope and provides that, during the proceedings, every persons charged with a criminal offence 'is entitled, with full equality, to the following minimum guarantees: ... (d) the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law'. These rights are now considered to apply to persons who have been detained, even if they have not yet been formally charged.

³⁹ Article 17 para. 3 ICTR Statute is identical. Rule 42 *lit. A* of the Sierra Leone Rules provides: 'A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands: (i) The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it'. Section 6.2 of UNTAET Reg. 2000/25 provides that a suspect shall be informed upon arrest of his or her rights (c) 'to contact a legal representative and communicate with him or her confidentially' and to have a legal representative appointed 'if the suspect is unable to pay for a lawyer'. Section 6.3 (a) of UNTAET Reg. 2000/25 requires the Prosecutor to inform a suspect at each stage of the proceedings that he or she has 'the right to be assisted by and to communicate freely and without supervision with a legal representative of his or her own choosing and to have such legal representation provided to him or her without cost where the suspect does not have sufficient means to pay for it'. Article 24 of the Cambodia Extraordinary Chambers Law Amendments provides that '[d]uring the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it ...'. The amended version of article 24 is an improvement over the 2001 Law, which did not entitle suspects to the assistance of counsel of their own choosing. None of these provisions guarantee suspects to assigned counsel of their own choice. The scope of this right was recently addressed in *Prosecutor v. Milošević*, IT-02-54-AR, Decision on the Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Appeals Chamber, 1 Nov. 2004.

⁴⁰ Amnesty International, *Making the Right Choices – Part II*, and Part IV.B.1.d., see note 15; Harris (1967) 16 *ICLQ* 352, 365.

designed to enhance protection of the suspect, not, as some have suggested, a restriction on the right to assigned counsel⁴¹. Indeed, it will *always* be in the interest of justice for a suspect to be represented by counsel, particularly given the serious nature of the crimes and the sometimes difficult and complex questions of international law that will be before the Court, unless a person is able and willing to represent himself or herself⁴². This point is important to bear in mind because, in view of the prohibitive cost to all but the wealthiest suspects and the absence of public defender offices, the majority of suspects and accused in international criminal courts have been and are likely to continue to be represented by assigned counsel. Article 55 para. 2 (c) does not expressly provide that suspects have the right to choose their own assigned counsel or to refuse the assignment of particular counsel in whom they have no confidence. The First Edition of this Commentary (under mn 14) suggested that it was likely that the Rules of Procedure and Evidence or other rules would, as the ICTY has done in practice with accused persons and suspects, and the German Federal Constitutional Court has guaranteed in a subsequent decision, give suspects a great degree of choice in assigned counsel⁴³. The Rules have done so. Rules 20 to 22 spell out the responsibilities of the Registrar with regard to defence counsel. Rule 21 para. 2 states that a person ‘shall freely choose his or her counsel from [the list of counsel established by the Registrar] or other counsel who meets the required criteria and is willing to be included in the list’. Regulation 75 implements this provision⁴⁴. Rule 21 para. 2 and Regulation 75 are a major advance over all previous international instruments guaranteeing the right to assignment of counsel, as well as the jurisprudence of the ICTR, which has imposed unfortunate restrictions on the initial choice of counsel in addition to addressing the potential for abuse by accused persons in seeking a change of assigned counsel for frivolous reasons⁴⁵.

⁴¹ See, for example, Zappalà, *Human Rights*, note 14, 60 (describing, without further explanation, this requirement as a limitation).

⁴² Regulation 76 para. 1, which provides for the appointment of counsel by a Chamber following consultation with the Registrar, ‘in the interests of justice’ does not provide any further definition of this term.

⁴³ ICTY Rules 45 and 46 do not guarantee the right of suspects or accused to choice of assigned counsel, but in practice, a considerable degree of choice has been permitted. *Prosecutor v. Delalić*, IT-96-21, Decision on Request by Accused Mucić for Assignment of New Counsel, Trial Chamber, 24 June 2005, para. 2 (noting that ‘the practice of the Registry of the International Tribunal has been to permit the accused to select any available counsel from this list [of the Registry] and to add counsel to the list if selected by an accused, provided that such counsel meets the necessary criteria. The Trial Chamber supports this practice, within practical limits’). The ICTY Registry has rejected a recommendation by an expert group to establish a nationality criteria for assignment of counsel, declaring that it ‘would be inappropriate ... to establish a national priority list in this context’. Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group, UN Doc. A/56/853, 4 Mar. 2002, para. 120. The German Federal Constitutional Court declared in a case involving assignment of co-counsel, based on the German Basic Law and article 6 para. 3 (c) of the ECHR, that ‘the desires of the accused must routinely take precedence before any other factors when a court has to decide on counsel to be assigned, unless those other factors are of a serious nature and weigh heavily against that assignment’ (paraphrased in Bohlander, in: Boas and Schabas (eds.), *International Criminal Law: Development in the Case Law of the ICTY* (2003) 35, 51, note 40).

⁴⁴ Regulation 75 (Choice of defence counsel) provides:

1. If the person entitled to legal assistance chooses a counsel included in the list of counsel, the Registrar shall contact that counsel. If the counsel is willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel by the person.
If the person entitled to legal assistance chooses a counsel not on the list of counsel who is willing and ready to represent him or her and to be included in the list, the Registrar shall decide on the eligibility of that counsel in accordance with regulation 70 and, upon inclusion in the list, shall facilitate the issuance of a power of attorney. Until the filing of a power of attorney, the person entitled to legal assistance may be represented by duty counsel in accordance with regulation 73.’

⁴⁵ ICTR Rules 45 and 46 are similar to the rules of the ICTY, but the ICTR Appeals Chamber and Trial Chamber have consistently upheld the unfair restrictions by the Registry of the initial choice of accused persons to assigned counsel even when qualified counsel was able and willing to represent the accused. The Trial Chamber explained that the Registry could treat as reasonable and valid grounds ‘the resources of the Tribunal, competence and recognised experience of counsel, geographical distribution, a balance of the principal legal systems of the world, irrespective of the age, gender, race or nationality of the candidates’. *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on a Preliminary Motion by the Defence for the Assignment of a Co-Counsel to Pauline Nyiramasuhuko, 13 Mar. 1998, para. 17. See also *Prosecutor v. Ntakirutimana*, Decision on

Article 55 para. 2 (c) also does not expressly state that assigned counsel must be competent, but it is increasingly accepted that this is an inherent requirement of the right to assigned counsel. The Rules and Regulations provide a number of safeguards designed to ensure that assigned counsel are competent. Rule 21 para. 1 provides that the Regulations shall establish criteria and procedures for the assignment of counsel, subject to article 55 para. 2 (c) and article 67 para. 1 (d), based on a proposal by the Registrar and following consultations with any independent representative body of counsel or legal association. Regulations 67 through 70 implement this provision by spelling out the criteria to be met by counsel and assistants to counsel, proof and control of these criteria and how lawyers are to be included in the list of counsel⁴⁶. Further safeguards concerning competency are provided in Regulation permitting the Registrar to remove a counsel from the list when the

the Motions of the Accused for Replacement of Assigned Counsel, ICTR-96-10-T & ICTR-96-17-T, Trial Chamber, 11 June 1997, p. 6 (unreported decision cited in note 41, M. Bohlander, *The Defence* 51). What this rule meant in practice was that a temporary moratorium was imposed on the choice by accused of Canadian counsel, which was condemned by the International Criminal Defence Attorneys Association (ICDAA) on 30 Aug. 1998. After the *Nyiramasuhuko* decision, the ICTR Appeals Chamber took a much more restrictive approach than the ICTY Trial Chamber in the *Delalić* case, reaffirming its conclusion in the *Kambanda* case that 'the right to choose counsel applies only to those accused who can financially bear the costs of counsel'. *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, paras. 60-62 and 64. This practice of assignment of counsel by the ICTR and ICTR jurisprudence have been criticized as denying suspects and accused freedom to choose their counsel. Amnesty International, *The International Criminal Tribunal for Rwanda: Trials and Tribulations* (Apr. 1998, AI Index: IOR 40/03/98). One commentator has declared:

'While it is true that resources, experience, competence and irrelevance of race may be reasonable factors to be taken into account, this is in my view clearly not the case as far as the geographical distribution and the balance of the principal legal systems of the world are concerned. Those criteria stem from the recruitment provisions of the United Nations for its own staff, something which defence counsel clearly are not. They are meant as safeguards against institutional nepotism based on national preferences or ignorance and disdain of other legal systems, and in the latter case have a further basis in article 38 of the Statute of the International Court of Justice, which speaks about the sources of international law. An accused could not care less where counsel comes from, as long as that counsel is able to mount an efficient and effective defence'.

Bohlander, *The Defence*, see note 41, 51 (from which this account of ICTY and ICTR practice and jurisprudence is largely drawn). further basis in article 38 of the Statute of the International Court of Justice, which speaks about the sources of international law. An accused could not care less where counsel comes from, as long as that counsel is able to mount an efficient and effective defence'.

Bohlander, *The Defence*, see note 41, 51 (from which this account of ICTY and ICTR practice and jurisprudence is largely drawn).

⁴⁶ Regulation 67 (Criteria to be met by counsel) provides:

1. The necessary relevant experience for counsel as described in rule 22 shall be at least ten years.
2. Counsel should not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court.

Regulation 68 (Assistants to counsel) provides:

Persons assisting counsel as described in rule 22, sub-rule 1, may include persons who can assist counsel in the presentation of the case before a Chamber. The criteria to be met by these persons shall be determined in the Regulations of the Registry.

Regulation 69 (Proof and control of criteria to be met by counsel) provides:

1. A person seeking to be included in the list of counsel shall complete the forms provided by the Registrar for this purpose.
2. A person referred to in sub-regulation 1 shall also provide:
 - (a) A detailed curriculum vitae;
 - (b) A certificate issued by each Bar association the person is registered with, and/or each relevant controlling administrative authority confirming his or her qualifications, the right to practise and the existence, if any, of disciplinary sanctions or ongoing disciplinary proceedings; and
 - (c) A certificate issued by the relevant authority of each State of which the person is a national or where the person is domiciled stating the existence, if any, of criminal convictions.
3. A person referred to in sub-regulation 1 or counsel already included in the list of counsel shall immediately inform the Registrar of any changes to the information he or she has provided that are more than *de minimis*, including the initiation of any criminal or disciplinary proceedings against the person.
4. The Registrar may at any stage take steps to verify the information provided by any person referred to in sub-regulation 1 and by counsel already included in the list of counsel.

Regulation 70 (Inclusion in the list of counsel) provides:

1. On receipt of an application by a person seeking to be included in the list of counsel, the Registrar shall establish whether the person has provided the information required under regulation 69. Thereafter, the

person no longer meets the criteria, has been permanently banned from practicing before the Court as a result of disciplinary proceedings or for refusing to obey an oral or written direction of the Court or has been found guilty of an offence against the administration of justice⁴⁷. Regulation 72 provides that the Presidency can review this decision⁴⁸. These Regulations have been further implemented by Regulations of the Registry⁴⁹. Determination of when it is in the interest of justice to appoint assigned counsel is made by the Chamber concerned⁵⁰.

4. 'to be questioned in the presence of counsel'

In a significant advance in the protection of suspects over previous international instruments, the ICTY and ICTR Rules the Sierra Leone Rules and UNTAET Reg. 2000/25 all prohibit questioning of a suspect in the absence of counsel unless the suspect has voluntarily waived that right⁵¹. Article 55 para. 2 (d) of the Rome Statute includes the same prohibition as in these rules, although it does not contain the express prohibition in these rules on

Registrar shall acknowledge receipt of the application and, where relevant, direct the person to submit additional information.

2. The decision as to whether a person shall be included in the list of counsel shall be notified to that person. If the application is refused, the Registrar shall provide reasons and information on how to apply for review of that decision in accordance with regulation 72.

⁴⁷ Regulation 71 (Removal and suspension from the list of counsel) provides:

1. The Registrar shall remove a counsel from the list of counsel where he or she:
 - (a) No longer meets the criteria required for inclusion in the list of counsel;
 - (b) Has been permanently banned from practising before the Court as a result of disciplinary proceedings held in accordance with the Code of Professional Conduct for counsel;
 - (c) Has been found guilty of an offence against the administration of justice as described in article 70, paragraph 1; or
 - (d) Has been permanently interdicted from exercising his or her functions before the Court in accordance with rule 171, sub-rule 3.
2. The Registrar shall suspend a counsel from the list of counsel where he or she has been:
 - (a) Temporarily suspended in a disciplinary proceeding according to the Code of Professional Conduct for counsel; or
 - (b) Temporarily interdicted from exercising his or her functions before the Court for a period exceeding 30 days in accordance with rule 171, sub-rule 3.

The Registrar shall notify the relevant counsel of his or her decision under sub-regulations 1 or 2. The Registrar shall provide reasons and information on how to apply for review of that decision in accordance with regulation 72.

⁴⁸ Regulation 72 (Review of decisions of the Registrar) provides:

1. Application may be made to the Presidency for review of:
 - (a) A decision under regulation 70, sub-regulation 2, refusing to include a person in the list of counsel
 - (b) A decision under regulation 71, sub-regulation 1, removing counsel from the list of counsel; or
 - (c) A decision under regulation 71, sub-regulation 2, suspending counsel from the list of counsel.
2. Applications as described in sub-regulation 1 shall be set out in accordance with regulation 23 and be filed within 15 days of notification of the relevant decision of the Registrar.
3. The Registrar may file a response within 15 days of notification of the application as referred to in sub-regulations 1 and 2.
4. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency shall be final.

⁴⁹ Regulations of the Registry were published for comments by 10 June 2005 (available at: <http://icc-cpi.int>). The Regulations were adopted and entered into force on 6 Mar. 2006. See Chapter 4 relating to 'Counsel Issues and Legal Assistance'.

⁵⁰ Regulation 76 para. 1 provides: 'A Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require'.

⁵¹ Rule 42 *lit. B* ICTY states:

'Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel'.

Rule 42 *lit. B* ICTR is identical. Rule 42 *lit. B* of the Sierra Leone Rules provides:

'Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel,

continuing questioning of a suspect who, after a previous waiver, subsequently expresses the desire for counsel. Although this would seem to be implicit in the original guarantee, the First Edition of this Commentary (under mn 14) suggested that an express provision to this effect in the Rules of Procedure and Evidence would clarify this point. No such provision has been included in the Rules or in the Regulations of the Court.

In addition to the prohibition of questioning of suspects in the absence of counsel, the ICTY and ICTR Rules and the Sierra Leone Rules provide detailed requirements to make audio or video recordings of the questioning and to transcribe them ‘as soon as practicable after the conclusion of questioning’ and to provide the transcript and the tape to the suspect⁵². These recording requirements are a useful safeguard for ensuring the integrity of the questioning and, as predicted in the First Edition of this Commentary (under mn 15), were included in the Rules of Procedure and Evidence. Rule 111 (Record of questioning in general), based largely upon a French proposal that was modeled on Rule 43 of the ICTY Rules, requires in paragraph 1 that ‘[a] record shall be made of formal statements made by any person who is questioned in connection with an investigation’ and that it be signed by the questioner, the person questioned and, if present, counsel, the Prosecutor and judge⁵³. The record must note the date, time, place and presence of all persons during questioning. Paragraph 2 of the rule requires that ‘[w]hen the Prosecutor or national authorities question a person, due regard shall be given to article 55’ and that the record should indicate when the person was informed of his rights under this article.

Rule 112 (Recording of questioning in particular cases), based on Australian and French proposals, together with an amendment proposed by Italy requiring the recording of a waiver of the right to a recording, provides a detailed guide to the conduct of questioning of suspects pursuant to article 55 para. 2 and includes a number of safeguards to protect the integrity of the transcript and audio or video recordings. These safeguards include requirements that the person to be questioned be informed in a language he or she fully understands and speaks that the questioning is to be audio- or video-recorded, that he or she may object after consulting in private with counsel before making the objection; that in the event of a refusal to be recorded, the procedure in Rule 111 is to apply and the waiver itself is to be recorded; interruptions are to be recorded; an opportunity must be given to persons questioned to make clarifications or additions; a transcript must be made promptly and supplied with a copy of the audio- or video- recording; and the original tape is to be sealed in the presence of the person questioned and his or her counsel. The Prosecutor is to make ‘every reasonable effort to record the questioning in accordance with sub-rule 1’, but when circumstances prevent recording, the reasons must be recorded and rule 111 followed and whenever no audio- or video recording is made, the person questioned is to be given a copy of his or her statement⁵⁴.

In addition, rule 113 (Collection of information regarding the state of health of the person concerned), based largely on Australian and French proposals, contains further safeguards for suspects questioned pursuant to article 55 para. 2⁵⁵. Paragraph 1 provides that the Pre-

questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel’.

Section 6.2 (f) of UNTAET Reg. 2000/25 states that a suspect must be informed upon arrest of his or her ‘right to be questioned in the presence of a legal representative, unless the right is waived’.

⁵² Rule 43 ICTY; rule 43 ICTR; Sierra Leone Rules rule 43, as amended 1 Aug. 2003.

⁵³ A more restrictive Australian proposal, which would have limited the scope of this rule to questioning of suspects by the Prosecutor, was merged with a broader French proposal. For the history of the drafting of rules 111 and 112, see Friman, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 493, 512–515.

⁵⁴ The Prosecutor may follow the procedure in rule 112 when other persons are being questioned, particularly when these procedures could reduce the traumatization of a victim of sexual or gender violence, a child or person with disabilities and the Pre-Trial Chamber may follow this procedure when pursuing a unique investigative opportunity pursuant to article 56 para. 2.

⁵⁵ For the drafting history and rationale for this rule, see Friman, *Investigation*, note 49, 504–506.

Trial Chamber on his or her initiative or upon the request of the Prosecutor, the person questioned or his or her counsel may order that the suspect be given a medical, psychological or psychiatric investigation. In making this determination, the Pre-Trial Chamber must ‘consider the nature and purpose of the examination’, which will vary depending on the circumstances and the status of the person (for example, suspect, victim of crime of sexual violence, child, person apparently suffering from a mental illness or defect, hostile witness, etc.) and ‘whether the person consents to the examination’ (leaving open the possibility that in certain circumstances the person could be compelled to submit to an examination). Paragraph 2 requires that the Pre-Trial Chamber ‘appoint one or more experts from the list of experts approved by the Registrar’, giving it some choice independent of the Registrar, or, based on an Italian proposal, ‘an expert approved by the Pre-Trial Chamber at the request of a party’.

C. Special remarks

There are a number of important rights which suspects or detainees who have not been accused of a crime – such as a witness transferred from a State to the custody of the Court – have under international law which are not expressly included in article 55 or some other provision of the Rome Statute. The expressly recognized rights of suspects under the Rome Statute do not include all the rights of suspects in detention recognized in international instruments such as the ICCPR, the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Rules of Detention of the two International Criminal Tribunals. The First Edition of this Commentary recommended (under mn 16) that these guarantees be included in the Court’s rules of procedure and evidence and its rules of detention for persons detained before trial under order of the Court (Sections 6.2 and 6.3 of UNTAET Reg. 2000/25 provide useful models for such an exercise, although protection should not be limited to suspects deprived of liberty.) For example, the right to have adequate time and facilities for a defence, guaranteed under article 67 of the Rome Statute to an accused is an important aspect of the right to counsel, and should apply to counsel representing a suspect, since effective representation of suspects may require time to provide advice and access to certain documents or other evidence, both to prepare for questioning and in anticipation of possible charges, although this right may not be as extensive as the right of an accused. Perhaps the most important right which has not been expressly recognized in the Rome Statute is the right guaranteed in article 9 para. 4 of the ICCPR and in Section 47 of UNTAET Reg. 2000/25 to have the Court review the lawfulness of detention and, if that detention is unlawful, to be released. Although, based on the case law of the ad hoc tribunals, it might be argued that the Court has the inherent power to provide this remedy, the failure to include it expressly in the Rome Statute is certainly to be regretted⁵⁶.

The failure to include certain rights expressly in article 55, other provisions of the Rome Statute and the Rules of Procedure and Evidence is could be remedied by article 21 para. 1 (b), requiring the Court to apply as a secondary source of law, ‘where appropriate, applicable treaties and the principles and rules of international law, including the established principles

⁵⁶ See, for example, *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, Appeals Chamber, 2 Nov. 1999, para. 88 (right to habeas corpus recognized even though not mentioned in ICTR Statute or Rules of Procedure and Evidence), *ibid.*, Decision (Prosecutor’s Request for Review or Reconsideration), Appeals Chamber, 31 Mar. 2000; *Prosecutor v. Brđjanin*, IT-99-36PT, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđjanin, Trial Chamber, 8 Dec. 1999, paras. 3–7 (relief analogous to habeas corpus can be granted even if not mentioned in Statute or Rules); *Prosecutor v. Semanza*, ICTR-97-20-A, Decision, Appeals Chamber, 31 May 2000 (ordering relief based on application for a writ of habeas corpus); *Prosecutor v. Simić*, IT-95-9-PT, Trial Chamber, 18 Oct. 2000 (Separate opinion, Robinson, J.) (discussing scope ICTY’s powers during review of challenge to the legality of accused’s arrest, a challenge based upon customary international law in the absence of a statutory provision). See also Ch. JSafferling, *Towards an International Criminal Procedure* (2001) 75.

of the international law of armed conflict' and article 21 para. 1 (c), requiring the Court to apply as tertiary source of law, 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'. It should however be noted that these rules are secondary sources which can only be invoked when the Statute or the Rules of Procedure and Evidence do not provide a clear answer to a legal question. They cannot be used to fill perceived gaps in the primary legal documents, when the absence of a provision is a clear choice on the part of the drafters⁵⁷. Furthermore, the application and interpretation of law, including the Rome Statute and the Rules of Procedure and Evidence, pursuant to article 21 'must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'. Again, this is merely a rule of interpretation, and cannot, in principle be used to read into the Statute a substantive right that is not in it.

- 18 Despite the flaws noted above in the scope of protection provided by article 55 and the Rules of Procedure and Evidence, article 55 has the potential to serve as a bulwark of the right to fair trial and against ill-treatment. However, for it to serve this function effectively, not only will it have to be implemented in good faith by the Office of the Prosecutor and by national authorities, but the Chambers will have to make clear that failure to respect the obligations of article 55 strictly will lead to the exclusion of evidence pursuant to article 69 para. 7 as evidence obtained by means of a violation of the Statute and the admission of which 'would be antithetical to and would seriously damage the integrity of the proceedings'.
- 19 Taking things further, the remedy for gross violations of article 55 could very well be a permanent suspension of the proceedings under an abuse of process-type motion. Such a possibility, while not explicitly contained in the Statute, was recognized by the Court's appeal Chamber in the *Lubanga* case⁵⁸ and explicitly entertained as a possibility in relation to article 55 violations in the *Gbagbo* case⁵⁹. However, as noted above (mn. 4), the narrow interpretation adopted by the Chambers on the what triggers the protection of article 55 makes it unlikely that a stay of proceedings would be ordered except in the most egregious cases of violations of the rights of the person under investigation.

⁵⁷ On this, see Situation in the Democratic Republic of Congo, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, 13 July 2006.

⁵⁸ 'Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.' (*Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, para. 37).

⁵⁹ *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-212, Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)', Pre-Trial Chamber I, 15 August 2012.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.
 - (b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.
 - (c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.
2. The measures referred to in paragraph 1 (b) may include:
 - (a) Making recommendations or orders regarding procedures to be followed;
 - (b) Directing that a record be made of the proceedings;
 - (c) Appointing an expert to assist;
 - (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
 - (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
 - (f) Taking such other action as may be necessary to collect or preserve evidence.
3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.
 - (b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.
4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Literature: Fourmy, O., 'Powers of the Pre-Trial Chambers', in: A. Cassese (ed.), *The Rome Statute of the International Criminal Court* (OUP 2002) 1207; Friman, H., 'The Rules of Procedure and Evidence in the Investigative Stage', in: H. Fischer, C. Kreß and S.R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (Arno Spitz 2001) 191; *id.*, 'Investigation and Prosecution', in: R.S. Lee *et al.* (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 493; Guariglia, F., 'Investigation and Prosecution', in: R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (Kluwer Law International 1999) 227; Krefß, C., 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) *JICJ* 603; De Smet, S., 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 405.

Content

A. Introduction.....	1
B. Analysis and interpretation of elements	5
I. Paragraph 1	5
1. Duty to inform the Pre-Trial Chamber	5
2. Decision on measures upon request of the Prosecutor	7
3. Duty to inform the ‘suspect’	10
II. Paragraph 2: Exemplary list of measures.....	11
III. Paragraph 3: Decision on measures proprio motu.....	18
IV. Paragraph 4: Admissibility of evidence	25

A. Introduction

- 1 In the ILC Draft Statute, the investigation of crimes within the jurisdiction of the Court was entirely under the control of the Prosecutor; judicial intervention at the investigative stage was limited to the issuance of warrants and orders, or examination of the indictment filed by the Prosecutor.¹ The Draft did not include any provision directed at assisting an accused person to collect evidence or intervene in investigative acts performed by the Prosecutor. The fact that a suspect or an accused was left on his or her own in relation to the investigative measures required for the preparation of his or her defence, following the ‘adversarial’ tradition, was criticised in the Ad Hoc Committee: ‘Some concern was voiced ... that the Statute drew extensively on the common-law system, even though the civil-law system might afford greater protection to the suspect or the accused at the early stage of investigation or prosecution’.² The reaction to this view can be read on the very same page: ‘Some delegations observed, however, that undue judicial control over the investigation would interfere with the separation of the judicial and prosecutorial functions’.
- 2 The concern that without some form of judicial intervention at the investigation stage, an accused would be incapable of effectively collecting evidence and preparing his or her defence led to the presentation of the first proposals to involve a judicial organ of the Court in an investigation, which were submitted during the August 1996 Preparatory Committee Session. Their aim was to ensure that there was at least partial ‘equality of arms’ between an accused or a suspect and the Prosecutor at the stage of investigation and prosecution. Thus, the prejudice to the accused resulting from the particular nature of the ICC proceedings – conducted away from the country of the defendants and away from where the evidence and witnesses were readily available³ – would be minimized. The initial proposals empowered a judicial organ of the ICC to intervene in the process of gathering evidence in different ways: one proposal granted any person suspected of committing crimes within the jurisdiction of the Court to obtain an order from a Pre-Trial Chamber, addressed to the Prosecutor, instructing him or her to ‘accomplish certain acts, seeking, where necessary, cooperation from any State party’;⁴ other proposals established a duty on the Prosecutor to notify to the

¹ International Law Commission ‘Report of the International Law Commission on the Work of its 46th Session, Draft Statute for an International Criminal Court’ (2 May – 22 July 1994) UNGA 49th Session Supp No 10 UN Doc A/49/10 arts 26 para 4, 27 para 2 and 28.

² UN GA ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’ (1995) 50th Session UN Doc Supp No 22 (A/50/22) 50.

³ Statement contained in the 1995 Ad Hoc Committee Report (n 2) 29.

⁴ UN GA ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (1996) 51st Session UN Doc Supp No 22 (A/51/22) vol II 115: rights of suspect to gather evidence. This approach had also been suggested by the Siracusa Draft, proposed article 26 para 6 (e): ‘A person suspected of a crime under this Statute shall: ... [have the right] (e) to obtain an order from the Court for measures to ensure “equality of arms”; its commentary notes that “The right to request application of the Prosecutor’s powers is an important feature of the “equality of arms” during pre-trial proceedings. Without this facility, it may be impossible to obtain information that is relevant to the defence, notably documents’. A similar conclusion drove the drafters of the Statute to include subparagraph (b) of article 57 para 3. See Guariglia and Hochmayr below article 57 mn 17.

Presidency his or her intention to perform special investigative acts which, because of their nature, could not be subsequently reproduced at trial⁵ and to ask for a judge to be appointed in order to carry out or supervise the act⁶ in question. Both proposals raised concerns among those delegations who feared that excessive judicial interference at the stage of investigation and prosecution would undermine the independence of the Prosecutor.

Despite divergent views at the outset of negotiation, by the August 1997 Preparatory Committee Session delegations were willing to explore different alternatives regarding judicial intervention and supervision during an investigation. A number of delegations engaged in the re-drafting of the existing proposals; the result of this exercise was a new draft provision, then referred to as article 26ter, which, as it can be read in the footnote attached thereto, established that ‘in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the rights of the defence’.⁷ However, the proposal contained different bracketed options, reflecting ‘differing views as to the balance to be struck between the need to ensure the Prosecutor’s independence and the desirability of conferring a limited role on the Pre-Trial Chamber’.⁸ That draft provision constitutes the core of what, after subsequent re-draftings in Rome,⁹ became current article 56 of the Statute.

The explicit goal of article 56 is ‘to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence’.¹⁰ Although paragraph 4 leaves the final determination of admissibility of evidence to the Trial Chamber, the principal purpose of article 56 is to ensure that the evidence obtained during the investigation will be admissible at trial.¹¹

B. Analysis and interpretation of elements

I. Paragraph 1

1. Duty to inform the Pre-Trial Chamber

This subparagraph sets forth the boundaries of the Pre-Trial Chamber’s role during the investigative stage, limiting its role to where acts of investigation that the Prosecutor intends to perform present a ‘unique investigative opportunity’ related to evidence that may not be subsequently available for the purposes of a trial. The concept reflects the civil law category of ‘definitive and unrepeatable acts’ or the so-called ‘anticipated taking of evidence’,¹² but also the common law tradition of ensuring cross-examination in the case of a witness that will not be available at trial (*depositions*). The rationale underlying the provision is that, in the case of the taking of evidence that, because of its nature, cannot be fully reproduced at trial (eg a mass-grave exhumation), but rather a record of the way in which it was obtained will be

⁵ Such as an inspection, a scientific test or the taking of testimony of a witness that would not subsequently be available for trial.

⁶ *Ibid.*, 216.

⁷ ‘Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997’ (1997) UN Doc A/AC.249/1997/L.8/Rev.1 p 20 fn 18.

⁸ *Ibid.*

⁹ See UN Doc A/CONF.183/C.1/WP.GM/L.38, A/CONF.183/C.1/WP.GM/L.38/Rev.1 and A/CONF.183/C.1/WP.GM/L.38/Rev.1/Corr.1.

¹⁰ See para 1 (b).

¹¹ Cf. Kreß (2003) *JICJ* 607: ‘article 56(1)(a) ... offers a tool to take and to test evidence early in the process and to ‘transport’ the result to the trial stage’. See further Schabas, *ICC Commentary* (2010) 692: ‘Although in principle, evidence must be presented at trial, article 56 provides an exceptional mechanism by which it may be collected under judicial oversight and then made available at trial’. De Smet, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 405, 426.

¹² See Maier, *Derecho Procesal Penal* (1996) vol I 589.

relied upon,¹³ there is a need to take extraordinary measures to preserve that evidence and give due weight to the rights of the parties to contest it. The adoption of these measures should not be in the sole hands of the Prosecutor, even despite the clear mandate to investigate incriminating and exonerating circumstances equally (article 54 para 1 (a)), but rather be decided by a neutral organ of the Court, meaning by this an organ with no commitment to the task of investigating and prosecuting crimes within the jurisdiction of the Court. Accordingly, subparagraph (a) establishes a *duty* of the Prosecutor to inform the Pre-Trial Chamber of his or her intention to carry out an act that may fall under the category envisaged in article 56, with a view to a decision as to the adequate protective measures set forth in paragraph 2. An unjustified breach of this duty can lead to the inadmissibility of the evidence at trial. However, article 69 vests the Trial Chamber with the authority to decide in favour of the admissibility of the evidence, on the basis of its consideration of the specific circumstances of the case (eg a case of extreme urgency relieving the Prosecutor from his or her obligation to notify the Pre-Trial Chamber).¹⁴

- 6 Article 56 defines a unique investigative opportunity as ‘a unique opportunity to take ... evidence, which may not be available subsequently for the purposes of a trial’.¹⁵ Such a unique opportunity may arise from the factual impossibility to present the evidence at trial, eg, the Prosecutor’s only temporary access to items,¹⁶ the transitory nature of the evidence (as traces of DNA) or a witness being mortally ill.¹⁷ In the Preparatory Commission in charge of drafting the Rules of Procedure and Evidence a discussion took place as to whether article 56 was applicable to the testimony of vulnerable victims, a question that was ultimately left undetermined.¹⁸ The Court could eventually resort to this option by combining this provision with article 68 para 1,¹⁹ if it concludes that there is an excessive risk of traumatising of a child or a victim of sexual or gender violence, capable of leading to the effective unavailability of the testimony at trial.²⁰

In relation to testimony that becomes subsequently unavailable at trial, it is important to note that a recent amendment to rule 68 of the RPE has expanded the permissible uses of prior recorded testimony at trial. The former text of rule 68 only allowed the use of prior recorded testimony at trial if both parties had had the opportunity to examine the witness during the recording or if the witness, present before the Trial Chamber, did not object to the presentation of the prior recorded testimony and made him- or herself available for

¹³ See Preparatory Committee document UN Doc A/AC.249/L.6 n to rule 89bis.

¹⁴ See commentary to art 57 in Bassiouni (ed.), ‘Model Draft Statute for the International Criminal Court based on the Preparatory Committee’s text to the Diplomatic Conference’ (1998) 13*ter* NEP 89.

¹⁵ As Kreß (2003) *JICJ* 607 *et seq.* has pointed out, a wide or a narrow interpretation of this term ‘will have considerable repercussions for the overall architecture of the proceedings. The broader the interpretation of article 56, the less strong is the Prosecutor’s position in dominating the investigation stage, and the more closely the Pre-Trial Chamber will resemble the French *juge d’instruction*. In addition, a broad interpretation of article 56 may diminish the role of the trial as the climax of the proceedings’.

¹⁶ Cf. *Situation in the Democratic Republic of Congo*, No. ICC-01/04-93, Decision following the Consultation held on 11 October 2005 and the Prosecution’s Submission on Jurisdiction and Admissibility filed on 31 October 2005, Pre-Trial Chamber I (9 November 2005).

¹⁷ Fourmy, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1218; Schabas, *An Introduction to the International Criminal Court* (2007) 254.

¹⁸ See Friman, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes under International Law* (2001) 196.

¹⁹ Pursuant to this provision, the Court and the Prosecutor have to take appropriate measures for the well-being of victims and witnesses, in particular in case of sexual or gender violence or violence against children.

²⁰ For a detailed discussion of this question see Kreß, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 309, 362 *et seq.*, who proposes r 68 sub-r 1 (a) as an alternative legal basis to spare vulnerable witnesses from a repetition of testimony. De Smet, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 427 *et seq.*, considers that art 56 covers situations where ‘evidence may no longer be available in optimal form [...]’. The role of the Pre-Trial Chamber would then be not only to ensure that evidence is preserved but also that it is captured when the quality is still good’. This broad interpretation focuses on the requirement that the evidence ‘may not be available subsequently for the purposes of a trial’ and seems to neglect that intervention by the Pre-Trial Chamber is strictly confined to a ‘unique investigative opportunity’.

examination at trial. This applied '[w]hen the Pre-Trial Chamber had not taken measures under article 56'.²¹ The provision now allows for admission of prior recorded testimony in the absence of the witness, even if both parties could not examine the witness previously, in a number of cases, including situations of death of the witness and/or of witness interference,²² subject to a number of strict criteria for admissibility, including a requirement that the Chamber weigh whether the evidence goes to proof of acts and conduct of the accused. Thus, the Prosecutor has at his or her disposal now two mechanisms to deal with unavailable witnesses: a *prospective* one, namely article 56 para 1 (a), where the Prosecutor can determine *ex ante* that the witness may not be available for trial, and which is only subject to the general admissibility criteria set forth in article 69,²³ and a *retrospective* one, governing situations where the witness has become unavailable at trial and no measures under article 56 have been taken, this one subject to additional requirements for admissibility.

2. Decision on measures upon request of the Prosecutor

The measures that may be taken under paragraph 2 need to be requested, in principle, by the Prosecutor, if he or she considers that they are required for the purposes of ensuring the efficiency and integrity of the proceedings and the protection of the rights of the defence. This means that, whereas the Prosecutor has an obligation to notify the Pre-Trial Chamber of the performance of unique acts of investigation under subparagraph (a), he or she has the *authority* to seek these measures, and therefore retains sufficient discretion not to do so. However, where the Pre-Trial Chamber disagrees with the Prosecutor's decision not to request any of these measures, the Pre-Trial Chamber is given authority to take them on its own initiative pursuant to paragraph 3 (a). In addition, measures under article 56 para 2 can also be triggered by request of a person who has been arrested or has appeared pursuant to a summons under article 58, by virtue of the power contained in article 57 para 3 (b). Finally, it must be noted that it is for the Chamber to determine which measures are appropriate for the purposes of paragraph 1 (b). However, before its decision, the Pre-Trial Chamber is obliged to consult the Prosecutor, who may advise the Chamber that intended measures could jeopardize the proper conduct of the investigation (rule 114). In principle, the Prosecutor must also inform the person arrested or who appeared in response to a summons (subparagraph (c)). If so, the person and his or her counsel have a right to participate in the consultations (rule 114 sub-rule 1). If there has not yet been an arrest or appearance or if the Chamber has authorized the Prosecutor to abstain from informing the defence (subparagraph (c)), the Chamber may hold an *ex parte* consultation with the Prosecutor on the measures to be taken and the modalities of their implementation.²⁴

It must be stressed that article 56 should not be read as creating a *juge d' instruction* in the traditional sense of the term, ie, an investigative judge.²⁵ The role of the Pre-Trial Chamber under this provision is not to make decisions on, for example, which investigative acts ought to be carried out pursuant to the need for an adequate and efficient investigation, which is a matter that falls within the exclusive remit of the Prosecutor. Rather, its role is to ensure that specific investigative acts that he or she has decided to undertake are carried out in a way that guarantees the efficiency and integrity of the proceedings and protects the rights of the defence.²⁶ Furthermore, the article establishes that, as a principle, the intervention of the Pre-

²¹ Rule 68 RPE, chapeau.

²² Witness interference has allegedly happened a number of times in cases before the Court. See, for instance, *Situation in the Central African Republic*, ICC-01/05-01/13, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 11 November 2014.

²³ See art 56 (4).

²⁴ See, e.g., *Situation in the Democratic Republic of Congo*, ICC-01/04-19, Decision to Hold Consultation under Rule 114, Pre-Trial Chamber I (21 April 2005).

²⁵ That is how Blakesley considers the role of the PTC under art 56; see Sadat Wexler (special edn), 'Observations on the consolidated ICC text before the final session of the Preparatory Committee' (1998) 13*bis* NEP 77.

²⁶ For some similar examples in comparative law, see Italian Code of Criminal Procedure, articles 392 *et seq.*, Model Code of Criminal Procedure for Latin America, article 258.

Trial Chamber must be triggered by the Prosecutor (subparagraph (a)), another substantial difference with the *juge d'* instruction, who usually enjoys full investigative powers.²⁷

- 9 Since investigations rely heavily on the cooperation regime under Part 9, the measures taken by the Pre-Trial Chamber may collide with aspects of national law of the requested State. Pursuant to article 99 para 1, the requested State must nonetheless execute the request for assistance, unless prohibited by its national law, 'in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process'. Article 88 ensures that States Parties have procedures available for all the forms of cooperation under Part 9.²⁸

3. Duty to inform the 'suspect'

- 10 Subparagraph (c) establishes the duty of the Prosecutor to provide relevant information regarding the investigative acts to the person arrested or who appeared before the Court in response to a summons. This is a natural consequence of the essential objective of article 56, which is the due protection of the rights of the defence; perhaps the most important measure that can be taken under paragraph 2 vis-à-vis the rights of the defence is the authorization of counsel to participate.²⁹ Moreover, only on the basis of a timely notification to the defence can a person that has been arrested or has appeared before the Court exercise his or her right to make a request under article 57 para 3 (b) to obtain measures enumerated in article 56 from the Pre-Trial Chamber. Accordingly, even if the language in this subparagraph allows the Pre-Trial Chamber to authorize the Prosecutor not to notify the defence, this should only take place in extremely exceptional circumstances and should be balanced by other measures that might equally protect the rights of the defence. The unjustified failure to notify the defence under this subparagraph – including the situation of an erroneous or excessive authorization by the Pre-Trial Chamber – should further lead to inadmissibility of the evidence obtained. Regrettably, the Rules of Procedure and Evidence fail to clarify these issues.

II. Paragraph 2: Exemplary list of measures

- 11 Paragraph 2 contains a non-exhaustive list of possible measures to be taken by the Pre-Trial Chamber in the event of a unique investigative opportunity. As reflected in the bracketed options contained in previous drafts,³⁰ some delegations were reluctant to give the Pre-Trial Chamber, or a judge appointed by it, the power to make 'orders' regarding the procedures to be followed, the collection and preservation of evidence and the questioning of persons. However, later in the negotiation process it was recognized that the Chamber might be faced with situations in which the power to make orders would, indeed, be required, such as the undue refusal of the Prosecutor to make available a certain witness to the defence, or to allow the defence into the site being examined; hence, granting a certain amount of discretion and authority to the Chamber seemed to be necessary.

²⁷ An *ex officio* intervention under para 3 is only possible in the exceptional situation of an 'unjustified' failure of the Prosecutor to request measures provided for in article 56, and is subject to appeal by the Prosecutor. On the scope of the investigative powers of a *juge d'* instruction in some national jurisdictions, see Delmas-Marty (ed.), *Procédures Pénales d'Europe* (1995) 437.

²⁸ For a general authorization of audio- or video-recording or the presence of persons at the request of the Court see eg Austrian 'Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof', § 14 BGBl I 2002/135.

²⁹ Para 2 (d). It has even been stated that the 'only way really to ensure fairness of such a process ... is to have defence counsel oversee the process to protect suspects or potential suspects'; Blakesley, see Sadat Wexler (special edn), 'Observations on the consolidated ICC text before the final session of the Preparatory Committee' (1998) 13*bis* NEP 77. Notification to the defence is also a necessary requirement for a valid taking of evidence in the legal systems, see Italian Code of Criminal Procedure, arts 392 *et seq.*, Model Code of Criminal Procedure for Latin America, article 258.

³⁰ 'Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997' (1997) UN Doc A/AC.249/1997/L.8/Rev.1 p 20 fn 18.

The measures included vary in nature and in substance. The Pre-Trial Chamber needs to satisfy itself that the measure to be adopted is the most appropriate to accomplish the goal pursued by paragraph 1 (b) of this provision. This would rule out, for instance, directing that a record be made of the proceedings as an appropriate measure in the case of a unique opportunity to take testimony of a witness: such a measure would not be adequate to cure the harm that could be caused to the rights of confrontation of the defence at trial. At the same time, the Pre-Trial Chamber should interpret the measures set forth in this paragraph in a way that best favours the efficiency and integrity of the proceedings and the rights of the defence. For instance, the Pre-Trial Chamber could authorize under subparagraph (c) that an expert proposed by the defence be also appointed to assist, unless there are compelling reasons not to do so. It must be emphasized that this paragraph does not include a *numerus clausus* of available measures, as demonstrated by its preliminary wording³¹ and its open-ended clause, which empowers the Pre-Trial Chamber to create new measures or expand the existing ones ‘as may be necessary to collect or preserve evidence’ (subparagraph (f)).³² Rule 114 sub-rule 1 adds unspecified measures to ensure the free communication between the ‘suspect’ and his or her counsel under article 67 para 1 (b) to the exemplary list in paragraph 2.³³

With regard to paragraph 2 (b), rule 112 sub-rule 5 specifies that the Pre-Trial Chamber may order that the questioning of any person shall be audio- or video-recorded according to the procedure under rule 112.

As noted above, the measure mentioned in subparagraph (d) is probably the most important that can be taken in order to fulfil the objectives of article 56: to authorize counsel to participate, and, following similar provisions in national systems,³⁴ to appoint counsel *ex officio* where there has not been yet an arrest or appearance, for example, because it is still unclear who might be implicated in the crime, or where counsel has not been designated yet by a person who has been arrested or has appeared before the Court.³⁵ Moreover, in the situation of a witness that will not subsequently be available for the purposes of trial, allowing defence counsel to participate and cross-examine the witness is the only remedy that adequately compensates the diminution to the accused’s rights of confrontation at trial.

Subparagraph (e) grants the Chamber the power to appoint a judge to assist, to observe and make recommendations or orders regarding the collection or preservation of evidence. The exercise of this power will be essential in the case of depositions, where the appointed judge should act as presiding officer and assure that the act is properly carried out, and that both parties can adequately exercise their rights to cross-examination.³⁶

Finally, the ‘catch-all’ clause in subparagraph (f) authorizes the Chamber to order ‘such other action as may be necessary to collect or preserve evidence’. The formulation ‘*such* other action’ would appear to indicate that these measures must be similar to the measures listed in subparagraph (a) – (e). Therefore, subparagraph (f) would not empower the Pre-Trial Chamber to go beyond the scope of the authority provided by the other sub-provisions of article 56 and, for instance, collect or preserve evidence itself. Rather, the Chamber’s authority appears to be limited to the regulation of the procedures for the collection or preservation of evidence.

³¹ ‘The measures ... *may* include’ (emphasis added).

³² Fourmy, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1219, assumes that the measures listed ‘indicate that the PTC should envisage its role in this respect rather broadly’.

³³ Cf. Friman, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 18; *id.*, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 493, 507.

³⁴ See Code of Criminal Procedure of Costa Rica, art 294.

³⁵ Pursuant to reg 77 of the Regulations, the Registrar shall establish an Office of Public Counsel for the defence. Its tasks include ‘representing and protecting the rights of the defence during the initial stages of the investigation, in particular for the application of article 56, paragraph 2 (d)’.

³⁶ See ICTY Rules of Procedure and Evidence Rule 71 (C).

- 17 Pre-Trial Chamber I's decision in the situation of the Democratic Republic of Congo may serve as an example for the type of applicable measures under article 56. The Chamber authorized the performance of forensic examinations and decided upon the following measures:³⁷ the appointment of an ad hoc counsel to represent the general interests of the defence for the purpose of the forensic examination – a measure according to paragraph 2 (d); an independent laboratory should perform the forensic examinations and it should respond in writing to any additional questions and observations by the Prosecutor or the ad hoc counsel for the defence – measures necessary for the integrity and efficiency of the proceedings and for the protection of the rights of the defence; the laboratory should produce a comprehensive record of its forensic examinations and a report on the conclusions of the examinations – a measure according to paragraph 2 (b); the laboratory should retain in its possession items subject to forensic examination for a certain period³⁸ – a measure necessary to preserve evidence according to paragraph 2 (f). Later on, Pre-Trial Chamber I gave both parties the opportunity to make final observations on the additional report of the laboratory.³⁹

III. Paragraph 3: Decision on measures proprio motu

- 18 This paragraph was drafted anew at the Rome Conference.⁴⁰ It empowers the Pre-Trial Chamber to take any of the measures set forth in paragraph 2 on its own motion or at the request of the defence⁴¹ in the case of failure of the Prosecutor to make a request pursuant to paragraph 1 (b), upon consultation with the Prosecutor. The applicable standard for this determination by the Chamber is more restrictive than the one set forth in paragraph 1: the Pre-Trial Chamber has to satisfy itself that measures under paragraph 2 are required 'to preserve evidence that it deems would be essential for the defence at trial'; moreover, the Chamber needs also to determine that the Prosecutor's failure is unjustified.
- 19 Paragraph 3 does not explicitly regulate whether the Pre-Trial Chamber's intervention needs to be triggered by prior information under paragraph 1 (a) or whether the Pre-Trial Chamber is allowed to take measures proprio motu even if it was not informed of a unique investigative opportunity by the Prosecutor. The literal and systematic interpretation alludes that paragraph 3 is only applicable in case of prior information by the Prosecutor: Paragraph 1 distinguishes clearly between the information of a unique investigative opportunity (subparagraph (a)) and the seeking of measures according to subparagraph (b). The linguistic differentiation leads to the conclusion that paragraph 3 refers to a situation where the Prosecutor has informed the Chamber of a unique investigative opportunity, but has failed to make a request under paragraph 1 (b). This interpretation is supported by the fact that paragraph 1 (a) leaves it to the Prosecutor's discretion to consider whether an investigation presents a unique investigative opportunity. A contrary interpretation would bestow on the Pre-Trial Chamber a more active role than intended in the Rome Conference. Thus, it is for the Prosecutor to decide whether an investigation presents a unique investigative opportunity and for the Pre-Trial Chamber to decide whether measures under paragraph 2 are necessary. If the Prosecutor fails to consider an investigation as a unique investigative opportunity, he

³⁷ *Situation in the Democratic Republic of Congo*, ICC-01/04-21, Decision on the Prosecutor's Request for Measures under article 56, Pre-Trial Chamber I (26 April 2005).

³⁸ Namely until a copy of any additional report produced had been provided to the Registrar.

³⁹ *Situation in the Democratic Republic of the Congo*, ICC-01/04-112, Decision Establishing a Deadline for Final Submissions on the NFI's Additional Report, Pre-Trial Chamber I (8 February 2006).

⁴⁰ See UN Doc A/CONF183/C1/WGPM/L38/Rev1/Corr1.

⁴¹ See art 57 para 3 (b). Victims are not entitled to request measures pursuant to article 56; *Situation in Uganda*, ICC-02/04-112, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Application for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre-Trial Chamber II, paras 31 *et seq.* (19 December 2007) stating that victims have no right to trigger proceedings pursuant to articles 56 and 57. They may only present their views and concerns under evidence gathering procedures according to article 56. See further Schabas, *ICC Commentary* (2010) 693.

or she risks the loss of the evidence, since the Trial Chamber may determine the evidence as inadmissible.⁴² In so far as exonerating evidence is concerned, the Trial Chamber has the authority to take any failure by the Prosecutor to timely trigger article 56 procedures into consideration in its overall assessment of the evidence before it and the fairness of the proceedings.

In an obiter dictum Pre-Trial Chamber II stated that, pursuant to article 56 para 3 (a) and article 57 para 3 (c), ‘the Chamber may even preserve evidence in favour of the defence’.⁴³ As far as article 56 is concerned, this view is controversial⁴⁴. Article 56 para 3 (a) solely deals with *measures* to preserve evidence.⁴⁵ Under this provision, the Chamber may impose conditions on the modalities of taking evidence, even if the Prosecutor has not requested such measures. But this provision does not appear, on its face, to empower the Chamber to take evidence itself.⁴⁶

Rule 114 sub-rule 2 stipulates that a decision under paragraph 3 (a) is to be taken by the full Chamber.

Regulation 48 para 1 of the Regulations vests the Pre-Trial Chamber with added authority to request information from the Prosecutor. When interpreting this much debated provision, it must be kept in mind that the Regulations may only incorporate provisions which are necessary for the routine functioning of the Court.⁴⁷ By no means can the Regulations modify the divisions of functions between Prosecution and Pre-Trial Chambers, as envisaged in the Statute and the Rules. Thus, the Regulations must be interpreted in conformity with the Statute and the Rules. Additional authority granted to Chambers of the Court by virtue of the Regulations should be interpreted in a restrictive manner, and always with the objective of fostering the Court’s routine functioning. This guideline makes clear that under regulation 48 the Chamber may only request additional information, if the consultation with the Prosecutor leaves serious doubts as to whether there was ‘good reason for the Prosecutor’s failure to request the measures’. In this case, the Chamber ‘may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof’.⁴⁸

The Rules of Procedure and Evidence do not explicitly provide for consultations with the defence before a decision by the Pre-Trial Chamber on its own motion. However, since measures according to paragraph 3 aim at the preservation of evidence essential for the defence, it seems advisable to hold consultations not only with the Prosecution, but also with the defence, where appropriate, provided that there is a person arrested or who appeared in response of a summons.

Subparagraph (b) was included to address the concerns of some delegations that feared that an unjustified or excessive intrusion of the Pre-Trial Chamber could jeopardize the

⁴² It must be noted that the Pre-Trial Chamber may, at the request of the defence, request a State Party to preserve the evidence. Alternatively, the Pre-Trial Chamber may provide for the preservation of evidence according to art 57 para 3 (c). For details see Guariglia and Hochmayr below art 57 mn 19 and 29.

⁴³ *Situation of Uganda*, No. ICC-02/04-01/05-90-US-Exp, Decision on Prosecutor’s Applications for Leave to Appeal dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, 10 July 2006, Pre-Trial Chamber II, para 35 (10 July 2006).

⁴⁴ For a discussion, whether article 57 para 3 (c) grants such a power to the Chamber, see Guariglia and Hochmayr below art 57 mn 29.

⁴⁵ See the wording of para 3 (a): ‘measures pursuant to this article’; ‘such measures’.

⁴⁶ Concurring van Heeck, *Die Weiterentwicklung des formellen Völkerstrafrechts* (2006) 210. For a different view, see Krefß (2003) *JICJ* 607, stating that art 56 ‘entrusts the Pre-Trial Chamber with a subsidiary proprio motu role as an investigative body’.

⁴⁷ Article 52 para 1.

⁴⁸ In the situation in the Democratic Republic of Congo, the Prosecutor expressed his opinion that ‘the consultation process enshrined in article 56 (3) and Rule 114 (2), ... necessarily require the provision of details pertaining to the measures being considered’; *Situation in the Democratic Republic of Congo*, No. ICC-01/04-12-Anx, Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference, para 22 (8 March 2005). This seems self-evident, since, in the first place, the Chamber has to work towards the Prosecution seeking the measures.

investigation of crimes within the jurisdiction of the Court. In order to avoid undue delay in the proceedings, it was decided that an appeal brought by the Prosecutor against the Chamber's Decision should be heard on an expedited basis.⁴⁹

IV. Paragraph 4: Admissibility of evidence

- 25 In an important decision, delegations decided not to specify the relative weight to be attached to evidence taken under article 56, but rather to leave the determination of its probative value, as well as its admissibility, to the Trial Chamber under the principles established in article 69. This is consistent with the rationale underpinning article 56, which is to ensure efficiency, integrity and fairness in the collection of specific evidence, but not to create 'sacred' evidence that may not be subsequently challenged or tested at trial, as used to happen in many civil law systems with the evidence collected by the *juge d'* instruction⁵⁰. Accordingly, the Trial Chamber is free to rule on the admissibility and relevance of evidence obtained pursuant to article 56, subject to the criteria set forth in article 69 para 4 and in the Rules of Procedure and Evidence, and even to decide its exclusion in the scenario envisaged by article 69 para 7.

⁴⁹ Under article 56, the defence does not have a right to appeal the decision by the PTC to act on its own initiative. According to article 82 para 1 (c) either party may appeal a decision of the PTC to act on its own initiative under art 56 para 3. Schabas, *ICC Commentary* (2012) 694, suggests to dissolve the discrepancy in favour of the defence.

⁵⁰ See Maier, *Derecho Procesal Penal* (1996) vol I 355.

Article 57

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.
2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.
(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.
3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
 - (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
 - (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;
 - (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;
 - (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.
 - (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Literature: Ambos, K., 'The Legal Basis of the International Criminal Court', in: L. Arbour *et al.* (eds.), *The Prosecutor of a Permanent International Criminal Court* (Max-Planck-Institut 2000) 3; Delmas-Marty, M., 'The ICC and the Interaction of International and National Legal Systems', in: A. Cassese (ed.), *The Rome Statute of the International Criminal Court* (OUP 2002) 1915; Fourmy, O., 'Powers of the Pre-Trial Chambers', in: A. Cassese (ed.), *The Rome Statute of the International Criminal Court* (OUP 2002) 1207; Friman, H., 'The Rules of Procedure and Evidence in the Investigative Stage', in: H. Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (Arno Spitz 2001) 191; Guariglia, F., 'Investigation and Prosecution', in: R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (Kluwer Law International 1999) 227; van Heeck, S., *Die Weiterentwicklung des formellen Völkerstrafrechts* (Duncker & Humblot 2006); de Hemptinne, J. and Rindi, F., 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings', (2006) 4 *JICJ* 342; Jorda, C. and Saracco, M., 'The raisons d'être of the Pre-Trial Chamber of the International Criminal Court', in: E. Decaux *et al.* (eds.), *From Human Rights to International Criminal Law. Studies in Honour of an African Jurist, the Late Judge Laity Kama* (Martinus Nijhoff Publishers 2007) 419; Krefß, C., 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 *JICJ* 603; Marchesiello, M., 'Proceedings before the Pre-Trial Chambers', in: A. Cassese (ed.), *The Rome Statute of the International Criminal Court* (OUP 2002) 1231; Miraglia, M., 'The First Decision of the ICC Pre-Trial Chamber', (2006) 4 *JICJ* 188; Politi, M. and Gioia, F., 'The Criminal Procedure before the International Criminal Court: Main Features', (2006) 1 *LAPE* 103; Rackwitz, K., 'Vom Vertrag zur Realität: Der Aufbau des Internationalen Strafgerichtshofs in Den Haag', in: G. Theissen and M. Nagler (eds.), *Der Internationale Strafgerichtshof. Tagungsdokumentation* (Deutsches Institut für Menschenrechte 2004) 18; Scheffer, D., 'A review of the experiences of the Pre-Trial and Appeals Chambers of the International Criminal

Court regarding the disclosure of evidence' in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Brill 2009) 585; De Smet, S., 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Brill 2009) 405; Stahn, C., Olásolo, H. and Gibson, K., 'Participation of Victims in Pre-Trial Proceedings of the ICC', (2006) 4 *JICJ* 219; Turone, G., 'Powers and Duties of the Prosecutor', in: A. Cassese (ed.), *The Rome Statute of the International Criminal Court* (OUP 2002) 1137; Wladimiroff, W., 'The Prosecutor v. Dusko Tadić', (1998) 13 *AmUILRev* 1447.

Content

A. Introduction.....	1
B. Analysis and interpretation of elements	5
I. Paragraph 1: Exercise of functions	5
II. Paragraph 2: Decision of powers.....	6
1. Orders and rulings by a majority	7
2. Exercise by a single judge	8
III. Paragraph 3: Additional functions	11
1. Orders and warrants for investigations	12
2. Assistance for arrested persons.....	17
3. Protection of persons or national security information and preservation of evidence	26
4. Authorization of the Prosecutor to investigate within the territory of a State Party.....	34
5. Protective measures for the purpose of forfeiture.....	42

A. Introduction

- 1 The Draft Statute prepared by the ILC in 1994 did not envision a Pre-Trial Chamber.¹ Rather, it generally designated the Presidency to carry out most pre-trial functions, with some, such as rulings on admissibility, carried out by a Trial Chamber.² During 1996 and 1997, however, sentiment grew in favour of the establishment of a Pre-Trial Chamber to carry out those judicial functions provided for under the Statute that are exercised prior to the commencement of trial. Thus, by the time of the preparation of the Zutphen text in January 1998, most references to the Presidency as a body to regulate pre-trial matters had been replaced by references to the Pre-Trial Chamber.³
- 2 However, with the Rome Conference rapidly approaching, there had been no formal discussion regarding organizational issues central to the smooth functioning of the Pre-Trial Chamber. For example, there was as yet no regulation of the circumstances in which the Pre-Trial Chamber would be required to act collegially, as opposed to when its functions could be carried out by a single judge. In the Spring of 1998, at the final Preparatory Committee prior to Rome, informal consultations were commenced on the regulation of these issues. Debate continued upon commencement of the Rome Conference, ultimately leading to the final formulation of article 57.⁴
- 3 It has been pointed out that the establishment of the Pre-Trial Chamber was an 'important building block in the bridging of different legal traditions'.⁵ Together with the Pre-Trial

¹ International Law Commission, 'Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court' (2 May-22 July 1994) UN Doc A/49/10 arts 26–36 pp 13–18.

² *Ibid.*

³ 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands' (4 February 1998) UN Doc A/AC.249/1998/L.13 articles 12, 47–54 pp 86–105.

⁴ See 'Report of the Working Group on Procedural Matters' UN Doc A/CONF.183/C.1/WGPM/L.2/Add.4 and A/CONF.183/C.1/WGPM/L.2/Add.6. The following UN documents issued in the Working Group on Procedural Matters at the Rome Conference are also useful in tracing the development of this article: A/CONF.183/C.1/WGPM/L.38; A/CONF.183/C.1/WGPM/L.38/Rev.1; A/CONF.183/C.1/WGPM/L.38/Rev.1/Corr.2; A/CONF.183/C.1/WGPM/L.64.

⁵ Friman, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 191, 192.

Chamber a certain degree of judicial control was introduced at the investigation stage. In this sense, the establishment of a Pre-Trial Chamber stems from the Civil Law tradition, where prosecutorial and investigative activities frequently undergo judicial scrutiny. Nevertheless, it must be emphasized that the Pre-Trial Chamber is not an investigative chamber.⁶ In contrast to the ‘juge d’instruction’ of civil law systems, the Pre-Trial Chamber has no investigative powers of its own nor is it responsible for directing or supervising the investigations of the Prosecutor.⁷ Rather, the Statute establishes a hybrid system of the proceedings which lacks precedents at the international level. Perhaps due to its novelty, certain difficulties have arisen in the determination of the sphere of competence of the Pre-Trial Chamber *vis-à-vis* that of the Prosecutor. The notion that the Pre-Trial Chamber is not an ‘investigative Chamber’ is one that by now appears to have been firmly established in the ICC’s case-law.⁸

The Statute assigns to the Pre-Trial Chamber a set of rather clear defined powers:

4

- authorization of a proprio motu investigation by the Prosecutor, article 15 para 3
- authorization of an investigation by the Prosecutor despite the request of a State for deferral, article 18 para 2
- authorization of preservation of evidence after the Prosecutor’s deferral to a State’s investigation or pending a ruling by the Pre-Trial Chamber, article 18 para 6
- decision on challenges to jurisdiction or on admissibility prior to the confirmation of the charges, article 19 para 6
- review of a decision by the Prosecutor not to initiate or continue an investigation or prosecution, article 53 para 3
- involvement in a unique investigative opportunity, article 56
- issuance of orders or warrants requested by the Prosecutor for the purpose of investigation, article 57 para 3 (a)
- issuance of orders or requests for State cooperation on behalf of the defence, article 57 para 3 (b)
- authorization of the Prosecutor to on-site-investigations without the consent of the State concerned, article 57 para 3 (d)
- ordering of protective measures for the purpose of forfeiture, article 57 para 3 (e)
- issuance of warrants for arrest or summons to appear, article 58
- recommendations as to interim release pending surrender to the Court, article 59
- monitoring of custody and issuance of orders for interim release after surrender, article 60
- informing the person about his or her rights, article 60
- appointing counsel, articles 61 para 2, 67 para 1
- confirmation of the charges before trial, article 61

⁶ See, eg, Cassese, *International Criminal Law* (2008) 373; Delmas-Marty, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1915, 1926; Miraglia (2006) 4 *JICJ* 188, 190. A. Cassese *ibid* observes that ‘the Pre-Trial Chamber plays a major role in scrutinizing and monitoring the action of the Prosecutor, in particular for the purpose of safeguarding both respect for the rights of the suspect or accused and correct conduct of business by the Prosecutor. In many respects this Chamber plays the role that, in some civil law systems which largely borrow from the common law tradition, is entrusted to a judge, who however is not the ‘investigating judge’ of civil law systems. This is a judge deprived of the power to conduct investigations and to order, among other things, the detention of suspects. He only acts as a judicial guarantee of full respect for law by the prosecuting authorities and for the issuing of any order requested by those authorities, which may entail curtailment of the rights of the suspect or other persons’.

⁷ *Prosecutor v. William Samoei Ruto et al*, ICC-01/09-01/11-01, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, 8 March 2011, para 16 <<http://www.legal-tools.org/doc/6c9fb0/>>.

⁸ See, inter alia, *Prosecutor v. William Samoei Ruto et al*, ICC-01/09-01/11-01, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, 8 March 2011, para 16 <<http://www.legal-tools.org/doc/6c9fb0/>>; see also the dissent by Judge Fernández in the 3 June 2013 Decision Adjourning the Hearing on the Confirmation of Charges pursuant to article 61 (7) (c) (i) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432-Anx-Corr, 6 June 2013, para 51 <<http://www.legal-tools.org/doc/9a3b94/>>: ‘[t]he Pre-Trial Chamber is not an investigative chamber and does not have the mandate to direct investigations of the Prosecutor’.

- resolving issues referred to it by the Trial Chamber, article 64 para 4
- participation in the protection of national security information under article 72.

In addition to these powers, article 57 para 3 (c) holds the Pre-Trial Chamber responsible, ‘where necessary’, to provide for the protection of victims, witnesses, persons arrested or who appeared in response to a summons, national security information and for the preservation of evidence. The scope of this general clause has led to differences between Pre-Trial Chambers and the Prosecutor at the initial stages of the Court’s existence about the function and role of the Pre-Trial Chamber during an investigation. At the heart of that tension lies the question of whether paragraph 3 (c) is a sub-provision broadening the scope of Pre-Trial Chambers’ supervisory authority, or simply an internal cross-reference to other provisions in the Statute, such as articles 56 or 72.⁹

B. Analysis and interpretation of elements

I. Paragraph 1: Exercise of functions

- 5 The text of paragraph 1 originates from document A/CONF.183/C.1/WGPM/L.8, the first proposal to concentrate most of the Pre-Trial Chamber’s functions in a single provision. It aims to avoid any inconsistency within the Statute by clearly establishing that in case another article contains a conflicting provision governing pre-trial procedure, that provision shall prevail. At the conclusion of the Conference, the Statute contained no provisions conflicting with article 57.¹⁰ However, future amendments of the Statute could introduce new provisions or amend the existing ones, and provide that certain functions of the Pre-Trial Chamber should be otherwise performed, in which case the proviso would avoid any collision between those new rules and article 57.

II. Paragraph 2: Decision of powers

- 6 By the commencement of the Rome Conference, the Pre-Trial Chamber was anticipated to consist of either one or three judges,¹¹ which would carry out numerous judicial functions. A number of functions to be exercised by the Chamber were of considerable significance¹² and were felt more suitable for consideration by three judges, others (such as notifying a person of his or her rights or appointing counsel) were routine and capable of consideration by a

⁹ For an illustration of this discussion see, *inter alia*, *Situation in the Democratic Republic of Congo*, No. ICC-01/04-9, Decision to Convene a Status Conference, Pre-Trial Chamber I, 17 February 2005 <<http://www.legal-tools.org/doc/236413/>>; *Situation in Uganda*, ICC-02/04-01/05-147, Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, Pre-Trial Chamber II, 9 March 2006 <<http://www.legal-tools.org/doc/0568f7/>>. See also *Situation in the Democratic Republic of Congo*, ICC-01/04-103, Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 23 January 2006, in particular para 27 <<http://www.legal-tools.org/doc/4063c7/>>; *Situation in Uganda*, ICC-02/04-85, Prosecution’s Reply under Rule 89 (1) to the Applications for Participation of Applicants a/0010/06 et al, 28 February 2007, fn 53 <<http://www.legal-tools.org/doc/11f805/>>.

¹⁰ Related provisions in the Statute referring to composition and other functions of the Pre-Trial Chamber are articles 39 para 2 (b) (iii), 61 para 11 and 64 para 4. The first provision establishes that functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division, in accordance with the Statute and the Rules of Procedure and Evidence, and is obviously qualified by the standard adopted in article 57 para 2. Art 61 para 11 provides that once the charges have been confirmed by the Pre-Trial Chamber, its functions are taken over by the Trial Chamber. Finally, art 64 authorizes the Trial Chamber to refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

¹¹ See ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act’ (14 April 1998) UN Doc A/CONF.183/2/Add.1 art 40 para 6 p 66.

¹² See discussion on subpara (a) below mn 7.

single judge, while yet other functions could be either routine or significant depending on the complexity or importance of the case. Given the small size of the Pre-Trial Chamber, it was also necessary to ensure the flexibility to permit a single judge to carry out a sufficient number of functions so that the decision making process would be expeditious. Accordingly, in paragraph 2, the Conference agreed on a bifurcated standard for the carrying out of functions of the Chamber.

1. Orders and rulings by a majority

Subparagraph (a) imposes an absolute requirement that certain functions be exercised by the Chamber only where at least two of its three judges concur. These functions, which were viewed by the Conference as the most significant matters within the Pre-Trial Chamber's competence,¹³ are: approval of the commencement of a proprio motu investigation by the Prosecutor under article 15; ruling on admissibility or jurisdiction under articles 18 and 19; authorization of investigative activity by a Prosecutor on the territory of a State under article 54 para 2 (b); confirmation of charges under article 61 para 7; and the taking of action with respect to the assertion by a State under article 72 that the use of certain evidence by the Court would harm its national security.

2. Exercise by a single judge

In addition to the functions regulated under subparagraph (a), the Pre-Trial Chamber exercises numerous other functions under the Statute.¹⁴ In order to provide the Chamber with greater flexibility and efficiency, subparagraph (b) envisions that the Chamber may consign a single judge to exercise these functions 'unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber'. The Rules of Procedure and Evidence reserve the following functions to the full Chamber: the review of a decision of the Prosecutor not to proceed with an investigation under article 53 (rule 108 sub-rule 1, rule 110 sub-rule 1) and the decision of the Pre-Trial Chamber to take measures on its own initiative in respect of a unique investigative opportunity under article 56 para 3 (rule 114 sub-rule 2). Additionally, even if the Pre-Trial Chamber has appointed a single judge, the Chamber retains discretion to reserve complex or significant matters for consideration by a full bench. According to rule 7 sub-rule 3, the Pre-Trial Chamber may do so 'on its own motion or, if appropriate, at the request of a party'. In the situation of Uganda, Pre-Trial Chamber II decided proprio motu that the functions of the single judge be exercised by the full Pre-Trial Chamber with respect to all aspects of the Prosecutor's application to issue a warrant of arrest.¹⁵ The rule, however, does not vest 'either party with an unqualified right to obtain that the Chamber acts in its full composition upon request'; rather, a party seeking to have the functions of the Single Judge exercised by the full Chamber will have to show that its request is 'appropriate' and justifies such action.¹⁶

The Pre-Trial Chamber may regulate the amount of functions transferred to a single judge.¹⁷ Further, pursuant to regulation 47 para 2 of the Regulations, the Pre-Trial Chamber 'may designate more than one single judge when the efficient management of the workload of the Chamber so requires'. In exercising this option, Pre-Trial Chamber II installed two

¹³ As Ambos has pointed out, these decisions concern 'formal jurisdiction or politically sensitive decisions'; in: Arbour *et al.* (eds.), *The Prosecutor of a Permanent International Criminal Court* (2000) 3, 24 fn 44.

¹⁴ See above mn 4.

¹⁵ *Situation in Uganda*, ICC-02/04-6-US-Exp, Decision on the Exercise of Functions by the Full Chamber in Relation to an Application by the Prosecutor under article 58, Pre-Trial Chamber II, 18 May 2005 <<http://www.legal-tools.org/doc/5950a5/>>.

¹⁶ *Prosecutor v. Bemba, Kilolo et al.*, ICC-01/05-01/13-434, Decision on the 'Defence request for the Exercise of Judicial Functions by the Full Pre-Trial Chamber' Submitted by the Defence for Aimé Kilolo Musamba on 7 May 2014, Pre-Trial Chamber II, 28 May 2014, para 6 <<http://www.legal-tools.org/doc/963ae0/>>.

¹⁷ Implicit in r 7 (3), which grants the Chamber the greater power to resume the functions of the Single Judge.

single judges in the case *Kony and others*: one responsible for issues relating to the unsealing of documents and one responsible for all issues arising in connection with victims' applications for participation.¹⁸

- 10 Regulation 47 para 2 stipulates that, as far as possible, the single judge shall act for the duration of a case. This provision, however, does not prevent time limits for the intervention of a single judge,¹⁹ or the temporarily substitution or the replacement of the single judge²⁰ on the basis of reasons such as the complexity of the case, the interest of expeditious proceedings or an excessive workload. The relevant criteria for the appointment of a single judge are contained in rule 7 sub-rule 1 and in regulation 47 para 1 of the Regulations.

III. Paragraph 3: Additional functions

- 11 In paragraph 3, a number of functions of the Chamber are treated that previously had been either placed elsewhere in the Statute,²¹ or had not been treated in earlier versions of the Statute.

1. Orders and warrants for investigations

- 12 Rather than taking the approach of rule 54 of the ICTY Rules of Procedure and Evidence,²² which bestows general powers upon a judge or Trial Chamber of the Tribunal, the ICC Statute has adopted a more nuanced approach, varying types of orders that may be issued according to the purpose for which they are intended. Article 57 para 3 (a) allows the Pre-Trial Chamber to issue such orders and warrants as may be required for the purposes of an investigation at the request of the Prosecutor.

- 13 At the outset, it should be noted that the term 'subpoena' – contained in earlier proposals²³ – has not been included in the final version of article 57. The practical consequences of this decision will depend on the precise meaning of that term. To the extent that a subpoena is understood to be a command from a judicial authority to appear as a witness, or produce evidence like books, documents or other things, under certain conditions established by that authority, then there was probably no need to use the common law term 'subpoena' in the text of the Statute, as this concept is already covered by the use of the term 'order'.²⁴ However, if the term is construed in the manner the ICTY Appeals Chamber has interpreted it, to mean 'binding orders addressed ... *under threat of penalty*, to individuals acting in their private

¹⁸ *Prosecutor v. Kony et al*, ICC-02/04-01/05-87, Decision appointing a single judge for unsealing of documents, Pre-Trial Chamber II, 30 May 2006 <<http://www.legal-tools.org/doc/870255/>>; *Situation in Uganda*, ICC-02/04-01/05-130, Decision designating a Single Judge on Victims' Issues, Pre-Trial Chamber II, 22 November 2006 <<http://www.legal-tools.org/doc/1a93cb/>>.

¹⁹ For many decisions of this kind, see only *Situation in the Democratic Republic of Congo*, ICC-01/04-123-tEN, Decision designating a Single Judge, Pre-Trial Chamber I, 14 March 2006 <<http://www.legal-tools.org/doc/8dd5d9/>>.

²⁰ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-321, Decision on the Temporary Substitution of the Single Judge, Pre-Trial Chamber I, 11 August 2006 <<http://www.legal-tools.org/doc/c0908b/>> and *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-520, Decision on the Replacement of the Single Judge, Pre-Trial Chamber I, 5 October 2006 <<http://www.legal-tools.org/doc/566eef/>>.

²¹ This restructuring was part of the process by which the articles treating commencement of the investigation through confirmation of the charges were redrafted to provide greater clarity and simplicity. See 'Working Paper on article 54' UN Doc A/CONF.183/C.1/WGPM/L.1.

²² ICTY r 54 reads: 'At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial'.

²³ See Report of the Preparatory Committee, note 11, art 54 para 5 p 92.

²⁴ For the definition of this term see note 32. This interpretation would match the definition of subpoena as set forth in *Prosecutor v. Tihomir Blaskić*, Decision on the objection of the Republic of Croatia to the Issuance of a subpoena duces tecum, ICTY Trial Chamber, 18 July 1997, para 64: 'the issuance of a subpoena duces tecum to a State for the production of government documents is nothing more than an order compelling the production of those documents'. This proposed definition was, however, later rejected by the Appeals Chamber of the ICTY.

capacity',²⁵ then omission of the term appears to have had the effect of limiting the powers of the Court. The Appeals Chamber concluded, under its Statute, that the Tribunal does not have the power to issue subpoenas (meant as binding orders under threat of penalty) either to States²⁶ or to State officials,²⁷ but is empowered to subpoena individuals acting in their private capacity.²⁸ In contrast, under the ICC Statute an order addressed to a person, instructing him or her to appear before the Court as a witness would necessarily be conducted through the Part 9 procedure, and in accordance with its rules and principles. Under article 93, there is no absolute requirement to produce witnesses or items before the Court. While States Parties are obligated to comply with requests of the Court to provide assistance in relation to investigations or prosecutions, including, *inter alia*, the taking of testimony under oath and production of evidence, article 93 para 1 (b), they must only facilitate the *voluntary appearance* of persons and witnesses before the Court, paragraph 1 (e),²⁹ or temporarily transfer a person in custody where the person 'freely gives his or her *informed consent* to the transfer', article 93 para 7 (a) (i).³⁰ Moreover, if the Court attempts to compel from a person or a State production of evidence which relates to the State's national security, the State may object, article 93 para 4; article 72 paras 1, 2. Thus, the ICC Statute does not appear to vest the Court with the power to coercively compel individuals to assist in an investigation or a prosecution;³¹ this is consistent with the intention of the drafters to use the obligations of States Parties under Part 9, rather than the direct exercise of compulsory measures on individuals, as the mean to ensure an adequate investigation and prosecution of the crimes within the jurisdiction of the Court.

Whereas an order is defined as 'a written direction or command delivered by a court or judge', the definition for a warrant is: 'a writ directing or authorizing someone to do an act, esp. one directing a law enforcer to make an arrest, a search or a seizure'.³² Thus, a warrant is a specific type of order that authorizes the executing organ to direct enforcement. The most important type of warrant is the arrest warrant, specifically regulated in article 58. Pursuant to rule 113, an order of the Pre-Trial Chamber is also required for a medical, psychological or psychiatric examination of the 'suspect'.³³ Apart from these examples, there is no provision specifying which investigative measures require an order or a warrant. Thus, the issue is left to the discretion of the Court, and to the specific requirements that States Parties may have for the purposes of executing requests for cooperation.

The orders and warrants may refer to, *inter alia*, the questioning of persons being investigated, the production and service of documents and records, the examination of sites or places, the preservation of evidence and the execution of searches and seizures.³⁴ As already noted, the Rules have not limited the kinds of orders or warrants that may be issued by the Pre-Trial Chamber.³⁵ In general, orders and warrants issued under this article are transmitted

²⁵ *Prosecutor v. Tihomir Blaskić*, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, ICTY Appeals Chamber, 29 October 1997, para 21 *in fine*. Emphasis added.

²⁶ *Ibid.* para 25.

²⁷ *Ibid.* para 38.

²⁸ *Ibid.* paras 46-48. On the concept of 'individuals acting on their private capacity' see paras 49-51.

²⁹ Emphasis added.

³⁰ Emphasis added.

³¹ Moreover, the natural remedy at the ICC level for non-compliance with a subpoena would be the use of the powers of contempt of the Court. However, non-compliance with an order of the Court is not an offence foreseen in the Statute (see the *numerus clausus* of offences against the administration of justice set forth in art 70).

³² Garner (ed.), *Black's Law Dictionary* (2009) 1206, 1722.

³³ Before issuing such an order, the Chamber 'shall consider the nature and purpose of the examination and whether the person consents to the examination'. For details, see Friman, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes under International Law* (2001) 191, 198 *et seq.* In the opinion of Schabas, *ICC Commentary* (2010) 701, 'this authority seems excessive, given that the suspect is not yet charged with a crime'. But for a similar authority in comparative law see Austrian Code of Criminal Procedure § 123 in conjunction with § 48 (1) Z. 1; German Code of Criminal Procedure §§ 81 *et seq.*

³⁴ The rules governing the issuance of a warrant of arrest or a summons to appear are specifically spelled out in art 58.

³⁵ It must be noted that not only art 57 para 3 (a) speaks about 'orders and warrants' generally, but also that art 93 para 1 concludes with an open-ended clause: '(l) Any other type of assistance which is not prohibited by

to States via a request for assistance under Part 9; States Parties are generally obliged by article 93 to comply with them (subject to certain limitations of national law under article 93 para 1 and para 1 subpara (l), and to national security concerns under article 93 para 4). When subparagraph (d) applies, no request for assistance need be made; rather, the warrants and orders issued by the Pre-Trial Chamber may be directly executed by the Prosecutor in the territory of a State Party.³⁶

- 16 Finally, the orders and warrants required by the Prosecutor must be necessary for the purposes of an investigation. Therefore, the Pre-Trial Chamber would be free to reject a request for the résumé of an order or warrant³⁷ on regards that the Prosecutor is embarking in a mere ‘fishing expedition’.

2. Assistance for arrested persons

- 17 This provision establishes the power of the Pre-Trial Chamber to assist the person arrested or who appeared pursuant to a summons in the preparation of his or her defence, thereby giving effect to a right of the accused under article 67 para 1 (b).³⁸ Conversely, it grants the defence a procedural right to obtain such assistance from the Pre-Trial Chamber.³⁹ As the negotiation process advanced, it became clear to delegations that the defence would require assistance for the preparation of his or her case: the defence, not being an organ of the ICC, could often face a disadvantage when attempting to collect evidence.⁴⁰ Not only would the defence have to surmount many practical obstacles, such as distance, costs, or outright refusal of national authorities to allow the defence counsel into their territory; requests for assistance directed at States coming from the defence might also be disregarded by the national authority in charge of its execution or they might be executed less diligently than a request coming from an organ of the Court.⁴¹
- 18 Thus, subparagraph (b) attempts to balance the situations of the accused person and the Prosecutor at the pre-trial stage, by providing – even if incompletely – some degree of ‘equality of arms’ during this procedural phase, rather than obliging the defence to rely solely on his or her right of cross-examination at trial. The defence is entitled to seek orders (not warrants), including an order to involve the Pre-Trial Chamber and the defence in specific acts of investigation under article 56 (unique investigative opportunities).⁴²
- 19 Apart from orders pertaining to unique investigative opportunities, it remains unclear which types of orders the Chamber may issue. H. Friman considers that the Pre-Trial Chamber may even order investigative measures in favour of the defence, if the Prosecutor does not comply with the defence’s request for such measures.⁴³ Against this it can be argued

the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court’.

³⁶ See commentary to subpara (d) below.

³⁷ The ICTY has held that this is an implicit part of a court’s supervisory powers. See the test adopted in *Prosecutor v. Zejnir Delacic et al.*, IT-96-21-T, Decision of the President on the Prosecutor’s motion for the production of notes exchanged between Zejnir Delacic and Zdravko Mucic, 11 November 1996, para 39: ‘(a) an order of the International Tribunal must be necessary for the Prosecutor to obtain such material; and (b) the material being sought must be relevant to an investigation or prosecution being conducted by the Prosecutor. As with any search or seize warrant, the Prosecutor cannot simply conduct a “fishing expedition” through the Registrar’s records’.

³⁸ Since the arrest warrant or summons to appear is considered an accusatory instrument under the Statute, a person arrested or appeared pursuant to a summons under art 58 is already an ‘accused person’, who fully enjoys the rights spelled out in art 67.

³⁹ Prior versions of this subparagraph characterized this measure as a right of a ‘suspect’. See ‘Report of the Preparatory Committee’, note 11, art 54 para 13 and corresponding NB 94–95.

⁴⁰ See the presentation by Wladimiroff, defence counsel before the ICTY, (1998) 13 *AmUILRev* 1447, 1449–51.

⁴¹ It is very easy to imagine, for instance, how the ‘no grounds for refusal’ general principle under art 93 would be applied vis-à-vis a request for assistance coming from a non-organ of the ICC.

⁴² See Guariglia and Hochmayr above art 56 nn 7.

⁴³ Friman, in: Fischer et al. (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 191, 200.

that vesting Pre-Trial Chambers with the authority to instruct the Prosecutor to accomplish investigative acts would undermine the latter's independence. Further, a proposal to provide the Pre-Trial Chamber with the power to order the Prosecutor to perform investigative acts was met with resistance during the negotiating process.⁴⁴ It is not controversial, however, that the Pre-Trial Chamber may order investigative measures on behalf of the defence through the cooperation regime under Part 9. In addition, the Chamber may provide for the preservation of evidence under subparagraph (c) (see mn 29).

Examples of orders in the *Lubanga case* include an order by Pre-Trial Chamber I to the Prosecution to transmit material in its custody or under its control which was necessary for the defence's preparation of the confirmation hearing.⁴⁵ The Chamber also ordered the Registry to assign an interpreter to assist the defence for the purpose of the confirmation hearing⁴⁶ and to appoint an additional legal assistant for the defence.⁴⁷

Rule 113 deals with another kind of order: a suspect may request from the Pre-Trial Chamber an order for his or her medical, psychological or psychiatric examination. This request is possible with regard to grounds excluding responsibility under article 31 or for the purpose of determining whether the person is 'fit' to stand trial.⁴⁸

Rule 82 sub-rule 5 stipulates that, upon application by the defence, the Chamber may order restrictions on disclosure of material and information in the possession of the accused, which has been provided to him or her on the condition of confidentiality and solely for the purpose of generating new evidence.

In addition, sub-paragraph (b) entitles the defence, through the Pre-Trial Chamber, to obtain cooperation from States and intergovernmental organizations pursuant to Part 9. This request for assistance, even if originated by the defence, would emanate from an organ of the Court (the Pre-Trial Chamber), and the requested State would be required to give it the treatment accorded to other requests for cooperation by the Court.⁴⁹

The threshold for an order under article 57 para 3 (b) is lower than that for measures under article 56 para 3 (a). Whereas the latter requires that the measures are 'essential for the defence at trial', for the former it suffices that the orders are 'necessary to assist the person in the preparation of his or her defence'. Rule 116 sub-rule 1 (a) states more precisely that the Pre-Trial Chamber must be 'satisfied that such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person's defence'. The wording of this rule shows clearly that this kind of assistance is not limited to exculpatory or mitigating evidence.⁵⁰ Nor is it limited to the defence's preparation of the pre-trial phase of the case; an interpretation that the requested order must be necessary for the preparation of the confirmation hearing⁵¹ is not

⁴⁴ See Guariglia, in: Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (1999) 227, 237. Concurring De Smet, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2008) 405, 424: 'The Statute does not, however, give the power to the PTC to instruct the Prosecutor to carry out investigations for the benefit of the Defence'.

⁴⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-718, Decision on Defence Requests for Disclosure of Materials, Pre-Trial Chamber I, 17 November 2006 <<http://www.legal-tools.org/doc/fc1b60/>>.

⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-268, Decisions on the Requests of the Defence of 3 and 4 July 2006, Pre-Trial Chamber I, 4 August 2006 <<http://www.legal-tools.org/doc/2f7113/>>.

⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-460, Decision on Defence Request pursuant to Regulation 83 (4), Pre-Trial Chamber I, 22 September 2006 <<http://www.legal-tools.org/doc/3192c8/>>.

⁴⁸ Friman, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 191, 199.

⁴⁹ See, eg, Pre-Trial Chamber I's order to the Registry to send a request for cooperation in order to obtain material for the defence in its Decision on Defence Requests (n 45).

⁵⁰ See Pre-Trial Chamber I's Decision on Defence Requests (n 45) the Chamber stating that it may resort to the cooperation regime under Part 9 even if the materials do not fall within the Prosecution's disclosure obligations pursuant to art 67 para 2 and rr 76 and 77.

⁵¹ See *Prosecutor v. Abdallah Banda Abakaer Nourain et al.*, ICC-02/05-03/09-102, Decision on the 'Defence Application pursuant to article 57 (3) (b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan', Pre-Trial Chamber I, 17 November 2010, paras 3 *et seq.* <<http://www.legal-tools.org/doc/3af3bf/>>.

supported by the wording of the afore-mentioned provisions. Rather, such an interpretation could violate the accused's right 'to have adequate time ... for the preparation of the defence' as guaranteed in article 67 para 1 (b). Regarding a request to seek cooperation from States, rule 116 sub-rule 1 (b) imposes on the defence the obligation to provide the Chamber with sufficient information to comply with article 96 para 2. The Chamber may, however, assist the defence in obtaining the missing information, if the defence meets with disproportional difficulties to obtain it.⁵² Finally, under article 96 para 2 (e) the request for cooperation must contain 'such information as may be required under the law of the requested State in order to execute the request'.

- 25 With the exception of taking measures under article 56 para 3 (a), the Pre-Trial Chamber is not obliged to hear the Prosecutor. Rule 116 sub-rule 2 leaves it to the Chamber's discretion to consult with the Prosecutor before determining on an order or a request for State cooperation. This rule was a compromise between the more civil law-oriented view that it should be an obligatory requirement to hear the Prosecutor and the common law approach that the defence should be able to prepare its own case without the interference or insight of the Prosecutor.⁵³ The conclusion to be drawn from this rule is that the defence is not obliged to request the Prosecutor for investigative measures before its request for assistance of the Pre-Trial Chamber. Of course, the defence is *allowed* to make such a request to the Prosecutor⁵⁴ and, in the normal course of events, should proceed in this way. But if the defence has good reasons not to involve the Prosecutor, it may from the outset resort to the Pre-Trial Chamber.⁵⁵ The Chamber has to decide on a case-to-case basis whether to seek the Prosecutor's views. In making this decision, the Chamber must consider all relevant interests, including the interests of the defence, the protection of victims and witnesses, the integrity of the investigation, and, as far as possible, the avoidance of double requests for State cooperation.

3. Protection of persons or national security information and preservation of evidence

- 26 Subparagraph (c) empowers the Pre-Trial Chamber to take action to enforce a number of other provisions of the Statute. The *protection and privacy of victims and witnesses* is dealt with in article 68, thus the reference in article 57 mainly serves the purpose of clarifying the competence of the Chamber to provide for the applicable measures at the pre-trial stage. Rule 86 further establishes as a general principle that a Chamber, in making any direction or order, 'shall take into account the needs of all victims and witnesses in accordance with article 68'. Rules 87 *et seq.* as well as regulations 92 *et seq.* of the Regulations of the Registry deal in more detail with this issue.⁵⁶ According to regulation 100 para 2 of the Regulations of the Registry, the Registry may advise the Chamber on appropriate protective measures and/or security arrangements.

⁵² For example, it may be too burdensome for the defence to identify the legal requirements of the requested State, art 96 para 2 (e). In such a case, the Chamber should help the defence to seek the missing information.

⁵³ Friman, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 191, 200 *et seq.* In the opinion of Kreß (2003) 1 JICJ 603, 609, r 116 sub-r 2 might serve as a legal basis to 'allow the Prosecutor to insist on a coordination of investigative activities'. But the term 'may' in this provision argues against this suggestion.

⁵⁴ Kreß (2003) 1 JICJ 603, 608.

⁵⁵ Differing *Prosecutor v. William Samoei Ruto et al.*, ICC-01/04-01/07-444, Decision on the 'Defence Application pursuant to article 57 (3) (b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)', Pre Trial Chamber I, 25 April 2008 <<http://www.legal-tools.org/doc/f1a7a4/>>, stating that if the documents are 'likely to be in the possession or control of the Prosecution', the defence 'must first request these documents and information in accordance with rule 77'. But such an obligation cannot be deduced from Rule 77 and it would render Rule 116 para 2 meaningless (see Partly Dissenting Opinion of Judge Usacka). Since the interests of the defence may argue against coordination with the Prosecutor, the PTC should decide on a case-to-case basis whether to involve the Prosecutor.

⁵⁶ For a detailed discussion of this function see Donat-Cattin below art 68 mn 12 *et seq.* There is a string of Court decisions related to the protection of the identity of victims; see, eg, *Situation in the Democratic Republic of Congo*, No. ICC 01/04-73, Decision on Protective Measures requested by Applicants 01/04-1/dp to 01/04-6/dp, Pre-Trial Chamber I, 21 July 2005 <<http://www.legal-tools.org/doc/a15e9d/>>.

Protection of persons arrested or who have appeared in response to a summons is not treated in any other provision of the Statute (having been relocated to this article from provisions dealing with protection of victims and witnesses),⁵⁷ but it should be considered an implicit duty of the Court to provide for the protection, safety and well-being of arrested or summoned persons. Rules 117 *et seq.* and regulations 155 *et seq.* of the Regulations of the Registry, in particular, provide for further specificity as to the treatment to be afforded to persons in the custody of the ICC.⁵⁸

Protection of national security information is specifically covered by article 72, thus the reference here is an express grant of power to the Chamber to issue appropriate orders to protect such interests.⁵⁹

In addition, subparagraph (c) authorizes the Pre-Trial Chamber, where necessary, to provide for the preservation of evidence. The scope of this provision is much debated. Some authors⁶⁰ choose a narrow interpretation. In their opinion, this element of subparagraph (c) is limited to enforce other provisions of the Statute dealing with the preservation of evidence: for example, pursuant to article 18 para 6, pending a ruling by the Chamber, or during the period in which investigation has been deferred, the Prosecutor may seek authority from the Pre-Trial Chamber to perform certain investigative steps⁶¹ for the purposes of preserving evidence. In addition, article 19 para 8 (b) authorizes the Prosecutor ‘to take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge’. Article 56 provides to the Chamber the power to take action necessary to preserve evidence in the case of a unique investigative opportunity.⁶² The opposite view considers the functions in article 57 para 3 (c) to be additional to those already enunciated in the Statute.

The Pre-Trial Chamber may apply all these functions ‘where necessary’. This clause suggests that the aforementioned functions are of a subsidiary nature. During the investigation stage, the protection of victims and witnesses is primarily the task of the Prosecutor.⁶³ The same is true for the preservation of evidence and the protection of national security information.⁶⁴ The Chamber will intervene where it is requested to do so or where it considers that the instant circumstances warrant its intervention.⁶⁵

A comparison with the wording of subparagraphs (a) and (b), which require a request of the Prosecutor respectively of the defence, coupled with the use of the words ‘where necessary’ suggests that the Pre-Trial Chamber may apply at least some of these functions *ex officio* (ie without a request coming from an interested party).⁶⁶ Nonetheless, while any *ex*

⁵⁷ Prior references to the accused in the provision referred to protection of victims and witnesses were finally not included in the final version of art 68. See ‘Report of the Preparatory Committee’, note 11, art 68 p 129.

⁵⁸ The ICTY has developed a set of Rules governing the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal, adopted on 5 May 1995, last amended on 21 July 2005.

⁵⁹ Reg 21 para 8 of the Regulations expressly empowers the Chamber to order that any information ‘likely to be prejudicial to national security interests, shall not be published in any broadcast, audio- or video-recording or transcript of a public hearing’.

⁶⁰ Guariglia and Harris, in the first edition of this commentary art 57 mn 14 *et seq.*; following this opinion van Heeck, *Die Weiterentwicklung des formellen Völkerstrafrechts* (2006) 211.

⁶¹ The cases contemplated in the said provision are: a unique opportunity to obtain important evidence (same language as in art 56) or when there is a significant risk that the evidence may not be subsequently available.

⁶² See para 2 (e) and (f).

⁶³ See art 68 para 1; Politi and Gioia (2006) 1 *LAPE* 103, 121.

⁶⁴ See art 54 para 3 (f).

⁶⁵ See *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-155, Decision on ‘Prosecutor’s Application to attend 12 February hearing’, Pre-Trial Chamber II, 9 February 2007 <<http://www.legal-tools.org/doc/450a92/>>.

⁶⁶ Rules 87 *et seq.* explicitly mention protective measures for victims and witnesses on the Chamber’s own motion. In *Situation in the Democratic Republic of Congo*, ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 January 2006, para 73 <<http://www.legal-tools.org/doc/2fe2fc/>> Pre-Trial Chamber I declares that the Chamber may initiate proceedings under art 57 para 3 (c) proprio motu. See also *Situation in Uganda*, ICC-02/04-01/05-147, Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant

officio power may properly relate to measures pertaining to the protection and privacy of victims and witnesses or protection of an accused, it does not appear applicable to measures relating to the preservation of evidence in the case of a pending ruling as to jurisdiction or admissibility, or after the Prosecutor's deferral of investigation, since the language in articles 18 and 19 indicate that the application of such measures is to be based on a request from the Prosecutor. In contrast, article 56 provides that in limited cases, measures aiming at the preservation of evidence may be ordered by the Chamber on its own initiative.⁶⁷ As for measures to protect national security information, article 72 contemplates that a State will normally make a claim that disclosure or information would be prejudicial, so that the Court ordinarily will not be called upon to intervene *ex officio*.

- 32 In exercising the functions under sub-paragraph (c), the Pre-Trial Chamber depends much on information by the Prosecution. Neither the Statute nor the Rules provide for an exchange of information between the Chamber and the Prosecution in this respect. Only regulation 48 para 1 of the Regulations stipulates that 'the Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b), article 56, paragraph 3 (a), and article 57, paragraph 3 (c)'. The Chamber must specify which function under article 57 paragraph 3 (c) it intends to exercise and which information it requires.⁶⁸ The determination of the necessity of the information lies with the Chamber.⁶⁹
- 33 The scope of the Chamber's authority under article 57 para 3 (c) and regulation 48 has been already the subject of litigation: In the situation in the Democratic Republic of Congo, Pre-Trial Chamber I decided to convene a status conference to allow the Chamber to provide for the protection of victims and witnesses and the preservation of evidence.⁷⁰ The background of this decision was that the Prosecutor had led investigations for seven months on the situation in the Democratic Republic of Congo without informing the Chamber about the progress and results.⁷¹ The Prosecution objected, arguing, *inter alia*, that neither regulation 48 nor any other provision in the Statute or the Rules envision the holding of a status conference during such an early stage of the proceedings,⁷² and that a status conference aims

the Submission Filed by the Registry on 5 December 2005, Pre-Trial Chamber II, 9 March 2006, para 20 <<http://www.legal-tools.org/doc/0568f7/>>; Politi and Gioia (2006) 1 *LAPE* 103, 112 also characterize the Chamber's powers as 'autonomous'.

⁶⁷ See art 56 para 3 (a), (b) and the commentary above.

⁶⁸ See, eg, *Situation in Uganda*, No. ICC-02/04-13-US-Exp, Decision to hold a Hearing on the Protection of Victims and Witnesses in connection with the Prosecutor's Application for Warrants of Arrest and the Prosecutor's Application dated 13 June 2005, Pre-Trial Chamber II, 17 June 2005 <<http://www.legal-tools.org/doc/2c1eal/>>.

⁶⁹ See reg 48 para 1 of the Regulations: 'information or documents ... that the Pre-Trial Chamber considers necessary'. Pre-Trial Chamber II stated that the determination whether a particular matter falls within the scope of the powers of the Chamber 'lies exclusively with the relevant Chamber itself, since it has 'Kompetenz-Kompetenz'; *Kony et al.* (PTC II Decision), see note 65, paras. 22 *et seq.*

⁷⁰ *Situation in the Democratic Republic of Congo*, ICC-01/04-9, Decision to Convene a Status Conference, Pre-Trial Chamber I, 17 February 2005 <<http://www.legal-tools.org/doc/236413/>>. The Chamber refers to reg 30 of the Regulations. But this regulation deals only with the way of holding status conferences. It does not empower the Pre-Trial Chamber to hold such a conference.

⁷¹ Only one month after the status conference, the Prosecutor asked Pre-Trial Chamber I for measures under art 56; see *Situation in the Democratic Republic of Congo*, ICC-01/04-21, Decision on the Prosecutor's Request for Measures under article 56, Pre-Trial Chamber I, 26 April 2005 <<http://www.legal-tools.org/doc/e9b0f4/>>. In the case of *Prosecutor v. Joseph Kony et al.*, Pre-Trial Chamber II decided to hold a status conference, too. The matters of this conference were more specified than in the respective decision of Pre-Trial Chamber I: the status conference aimed at being fully informed of the current security situation in Uganda; *Situation in Uganda*, ICC-02/04-01/05-64, Decision to Convene a Status Conference on Matters related to Safety and Security in Uganda, Pre-Trial Chamber I, 25 November 2005 <<http://www.legal-tools.org/doc/af2784/>>. However, the correct procedural device would have been to hold a hearing.

⁷² In the Rules of Procedure and Evidence, only two rules provide for the holding of a status conference: r 121 sub-r 2 (b) for a status conference held by the Pre-Trial Chamber before the confirmation hearing, r 132 for a

at the efficient organization of judicial proceedings and is, therefore, not an adequate procedural device during an investigation.⁷³

Beyond this dispute, it is clear that since the adoption of regulation 48, Pre-Trial Chambers are vested with the authority to obtain information from the Prosecution via a specific request under that provision. The Pre-Trial-Chamber may make such a request by the way of an ex parte hearing.⁷⁴

4. Authorization of the Prosecutor to investigate within the territory of a State Party

The 1994 ILC's Draft Statute gave the Prosecutor the power to 'conduct on-site investigations',⁷⁵ without regulating under what circumstances this could be undertaken. Debate during the 1996 and 1997 sessions of the Preparatory Committee revealed that many delegations were uncomfortable with a provision that might be interpreted to enable the Prosecutor to – without restriction – take action on the territory of a State without that State's permission. At the same time, most delegations recognized that when a State was unable to respond to the Prosecutor's request to carry out such investigation, it would be useful to empower the Prosecutor to investigate without securing the State's permission.⁷⁶ The outcome of those discussions is current subparagraph (d).

It is important to distinguish on-site investigations under this subparagraph from on-site investigations under article 99 para 4. Under the latter provision, the Prosecutor has no power to take forcible measures on the territory of the State. He or she is only authorized to conduct investigations without any compulsory measures directly on the territory of the requested State Party, eg, taking testimony from a person on a voluntary basis or an examination without modification of a public place. Thus, measures such as searches and seizures are reserved to the requested State. Further, in contrast to subparagraph (d), article 99 para 4 applies where the State's authorities are still able to respond to a request for cooperation.⁷⁷

Subparagraph (d) limits the Prosecutor's ability to 'take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9' in a number of ways. As a threshold matter, such investigation is only contemplated with respect to States Parties.⁷⁸ Moreover, such action may only be taken, if the Pre-Trial Chamber has

status conference held by the Trial Chamber to set the date of the trial or in order to facilitate the fair and expeditious conduct of the proceedings.

⁷³ *Situation in the Democratic Republic of Congo*, ICC-01/04-12-Anx, Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, 8 March 2005 <<https://www.legal-tools.org/doc/764580/>>. Pre-Trial Chamber I dismissed the filing of the Prosecutor's position on procedural grounds, *Situation in the Democratic Republic of Congo*, ICC-01/04-11, Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, Pre-Trial-Chamber I, 9 March 2005 <<https://www.legal-tools.org/doc/9186e3/>>. The Prosecutor's Application for Leave to Appeal, ICC-01/04-13 (11 March 2005 <<https://www.legal-tools.org/doc/d9503c/>>) was rejected, too; *Situation in the Democratic Republic of Congo*, ICC-01/04-14, Decision on the Prosecutor's Application for Leave to Appeal, Pre-Trial Chamber I, 14 March 2005 <<https://www.legal-tools.org/doc/799eaf/>>. For another view of Pre-Trial Chamber I's decision see Miraglia (2006) 4 *JICJ* 188, 188 *et seq.* However, this author concedes that 'the Chamber somewhat shifted the 'equilibrium' between legal traditions reached in Rome, arguably taking on a role more closely resembling an investigating judge than provided for in the Statute and ICC Rules of Procedure and Evidence' (*ibid* 188). See further Stahn *et al.* (2006) 4 *JICJ* 219; Scheffer, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 585, 590 *et seq.*

⁷⁴ See Pre-Trial Chamber II's Decision to hold a Hearing (n 68).

⁷⁵ International Law Commission, 'Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court' (2 May-22 July 1994) UN Doc A/49/10 article 26 para 2(c) p 13.

⁷⁶ Proposals to so limit the authority to conduct 'on-site' investigations were included in the negotiating text as early as 1996. See 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' Supp No 22A UN Doc A/51/22 vol II article 26 para 6(c) p 114; Zutphen Report (n 3) article 47 para 2(c) p 88.

⁷⁷ For details, see commentary on art 99.

⁷⁸ Authorization to conduct such investigations on the territory of a non-State Party could be achieved on the basis of a decision of the UN Security Council to refer a matter to the Court, in which it had bestowed such

authorized it after having determined that the State Party in question ‘is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9’.

- 37 By these terms, the Pre-Trial Chamber must find that the following factors are present prior to authorizing investigative measures: *First*, it must determine that there is no authority or component of the State’s judicial system that can execute a request for cooperation. This is a restrictive condition that would be satisfied only if there were an inability of the State’s authorities to respond to a request for cooperation, for example due to the collapse of public order.⁷⁹ *In addition*, since in some States the judiciary may not necessarily have exclusive (or even any) competence to execute a request for international cooperation, the reference to ‘any authority or any component of its judicial system’ makes clear that the Pre-Trial Chamber must establish that no official of any kind with the competence to effectively execute a request for assistance is available.
- 38 The drafters also specified a high standard of proof to be met before the Pre-Trial Chamber may authorize the investigation: It must be demonstrated, taking into account the above-described criteria, that the State Party is ‘clearly’ unable to execute a request for cooperation under Part 9. In summary, the restrictive wording of subparagraph (d) will result in its application in only a limited number of situations.
- 39 Subparagraph (d) does not provide for an obligatory notification to the State concerned. Some States endeavoured to incorporate such a requirement into the Rules, but to no avail.⁸⁰ Rule 115 makes clear that the Pre-Trial Chamber may authorize on-site investigations even without informing the State in question.⁸¹ The provision does not clarify the circumstances under which the Chamber may decide not to inform the relevant State on the basis that providing such information would not be ‘possible’, within the terms of the same rule. It will be for the Pre-Trial Chamber to determine, on a case-by-case basis, whether there is any reasonable and practicable way to hear the views of the State, without unduly impairing the Prosecutor’s ability to carry out the necessary investigative acts. However, if the State has expressed any views, the Pre-Trial Chamber must take this view into account, according to rule 115 sub-rule 2.
- 40 Rule 115 also deals with specific procedural issues: sub-rule 1 regulates the form of the Prosecutor’s request, which cannot be vague and must include specific measures; sub-rule 3 provides for the form and contents of the authorization by the Pre-Trial Chamber. In particular, the Chamber may order specific procedures to be followed in collecting evidence. To facilitate the decision-making process, the Chamber may decide to hold a hearing⁸² (rule 115 sub-rule 2). If the Chamber authorizes on-site investigations, the State Party concerned is obliged to abide the activities of the Prosecutor.⁸³ But the State may appeal, with the leave of the Pre-Trial Chamber, pursuant to article 82 para 2.⁸⁴

powers pursuant to Chapter VII of the UN Charter. M. Bergsmo and O. Bekou above art 54 mn 18 argue that art 57 para 3 (d) should also apply to non-States Parties who accepted the exercise of jurisdiction by the Court in an individual case pursuant to art 12 para 3, since these States are obliged to cooperate fully with the Court. Naturally, the Prosecutor may conduct investigations on the territory of a non-State Party with the consent of that State; see Turone, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1137, 1168.

⁷⁹ A prior version of this subparagraph had used the formulation ‘the State is unable to execute a request for cooperation due to a total or partial collapse or unavailability of its national judicial system’. See UN Doc A/CONF.183/C.1/WGPM/L1. The fact of the reformulation demonstrates that a partial collapse of a State’s judicial system cannot trigger the power to authorize such an investigation if there is still some authority that could respond to a request for cooperation under Part 9. At the same time, this formulation does not require the collapse of other unrelated parts of the judicial system for the Chamber to make a determination under this subparagraph.

⁸⁰ See Friman, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law* (2001) 191, 196 *et seq.*

⁸¹ Cf. *ibid.* 197.

⁸² On its own motion or upon the request of the Prosecutor or the State Party concerned.

⁸³ See Turone, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1137, 1168.

⁸⁴ In addition, this provision grants the right to appeal to the Prosecutor, subject to the leave of the Pre-Trial Chamber.

As observed in footnote 1 of the Working Group’s report to the Committee of the Whole in Rome, even where such action is authorized by the Chamber, there may be considerable practical difficulties carrying out investigations on the territory of a State whose permission has not been obtained, and in which there has been a significant breakdown of authority.⁸⁵ In this sense, article 87 para 6, which authorizes the Court to ask any intergovernmental organization for cooperation and assistance ‘in accordance with its competence or mandate’ may become particularly relevant. The Court could, for instance, request the assistance of a UN peacekeeping force for the protection of the Prosecutor’s staff, if this cooperation is compatible with its mandate.⁸⁶

Finally, it is important to note that to date the Office of the Prosecutor has not made any request for direct investigation under this provision in any of the situations before the Court.

5. Protective measures for the purpose of forfeiture

The purpose of this provision, which was inserted into the text of article 57 towards the end of the conference,⁸⁷ is to ensure the right to reparation of the victims of a crime within the jurisdiction of the Court (article 75), and the applicability of the penalty of forfeiture foreseen in article 77 para 2 (b),⁸⁸ by means of protective measures directed at the property of persons prosecuted by the Court. These measures must be executed through the mechanism of international cooperation and judicial assistance set forth in Part 9 of the Statute.⁸⁹

Different issues arise from this provision, the first one being the threshold required for the issuance of the protective orders by the Pre-Trial Chamber. The first proposals included no clear evidentiary threshold, an omission that caused discomfort to many delegations.⁹⁰ The final text makes clear that the issuance of an arrest warrant or a summons to appear is a prerequisite; under article 58 the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court is required for the issuance of the warrant or summons.⁹¹

Pre-Trial Chamber I has confirmed that subparagraph (e) is not limited to the protection of forfeiture, but rather must be interpreted in a broad sense including the reparation to victims. The Chamber noted that the wording of the provision is not clear because of the reference to the ‘ultimate benefit of the victims’. However, in the opinion of the Chamber, the contextual interpretation, in particular rule 99 sub-rule 1, and the teleological interpretation endorse that the protective measures mentioned in article 57 para 3 (e) may include protective measures for the purpose of securing the enforcement of a future reparation award.⁹² Trial Chamber V (B) has confirmed the broad nature of the term ‘forfeiture’ for the purposes of article 57 para 3 (e). The Chamber rejected an interpretation whereby protective measures under this provision could only be directed at assets or property which were instrumentalities of a crime or came into the possession of the person upon execution of the

⁸⁵ These difficulties are compounded by the fact that the Rome Statute contains no grant of authority to use compulsory powers in the course of such an investigation. Such a provision, which had been in the Draft Statute in brackets as recently as the Zutphen text, was not retained as part of the final formulation. See Zutphen Report (n 3) art 47 para 2 (c) option 2 subpara (iii) p 88.

⁸⁶ See Rackwitz, in: Theissen and Nagler (eds.), *Der Internationale Strafgerichtshof. Tagungsdokumentation* (2004) 18, 25.

⁸⁷ See an earlier Draft in UN. Doc A/CONF.183/C.1/WGPM/L.38/Rev.1 art 57bis para 3 (e).

⁸⁸ Indirectly, the sanction of forfeiture is also related to the victims’ right to reparation, since the ICC may order money and other property collected through fines or forfeiture to be transferred to the Trust Fund for the benefit of victims (art 79 paras 1 and 2).

⁸⁹ Art 93 para 1 (k).

⁹⁰ See UN Doc A/CONF.183/C1/WGPM/L.38/Rev1 art 57bis para 3 (e) and fn 7 attached thereto.

⁹¹ See art 58 para 1 (a).

⁹² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-20-Anx2, Decision on the Prosecutor’s Application for Warrants of Arrest, article 58, Pre-Trial Chamber I, 10 February 2006, paras 132 *et seq.* included in Annex I of the Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-US-Corr.

crime. Instead, the Chamber held that a Pre-Trial Chamber’s authority to order protective measures was not limited to securing the penalty enshrined in article 77 para 2 (b) (forfeiture of ‘proceeds, property and assets derived directly or indirectly’ from the crime determined in the conviction), but also included protective measures under article 57 para 3 (e) for the purposes of reparations.⁹³

- 45 With regard to a request to take protective measures for the purpose of forfeiture, the reference to article 93 para 1 (k) shows that there is a *numerus clausus* of protective measures that may be ordered by the Chamber via a request for assistance under Part 9: the Court may request the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, nothing else. Since these measures are only of an interim nature, the Pre-Trial Chamber may revoke or modify them.⁹⁴
- 46 Rule 99 sub-rule 1 stipulates that the Pre-Trial Chamber may request the measures on its own motion or on the application of the Prosecutor. Victims or their legal representatives may not apply for protective measures for the purpose of forfeiture.⁹⁵ As in the case of any protective measure that affects rights of an accused person or of third parties, the Chamber needs to assess the evidence at hand and the impact on the rights of the affected persons before making a decision as to whether to apply this provision.
- 47 Since the success of the request depends on its being undisclosed to the person prosecuted by the Court, rule 99 sub-rule 2 provides that prior notification of the request is not a requisite. By way of an exception, the Court⁹⁶ may determine that, in the particular circumstances of the case, there is no danger that notification could jeopardize the effectiveness of the measures requested. In this case, the Registrar has to provide notification of the proceedings to the person concerned and ‘so far as is possible to any interested persons or interested States’. If no prior notification is given, these persons respectively States must be informed of the order *ex post*, namely ‘as soon as is consistent with the effectiveness of the measures requested’. Besides, they must be invited ‘to make observations as to whether the order should be revoked or otherwise modified’ (rule 99 sub-rule 3).

⁹³ *Prosecutor v. Kenyatta*, Decision on the Implementation of the request to Freeze Assets, ICC-01/09-02/11-931, Trial Chamber V(B), 8 July 2014, paras 11 *et seq.*

⁹⁴ *Cf.* r 99 para 3.

⁹⁵ They may only apply for protective measures for the purpose of reparation.

⁹⁶ Whereas sub-r 1 and 3 refer to the relevant Chamber, sub-r 2 refers to the ‘Court’. Arguably, this reference also alludes to the relevant Chamber, comprising the Pre-Trial Chamber.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

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

2. The application of the Prosecutor shall contain:

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

3. The warrant of arrest shall contain:

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

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) The specified date on which the person is to appear;
- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Literature: Ainley, K., ‘The International Criminal Court on Trial’, (2011) 24 *CambridgeRevIAff* 309; Akande, D., ‘The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to cooperate with the ICC’, (2012) 10 *JICJ* 299; Amnesty International, *Fair Trials Manual* (1998, AI Index: POL 30/02/98); Blakesley, C.L., ‘Commentary on Parts 5 & 6’, in: Sadat/A.I.D.P. (ed.), *Observations on the Consolidated ICC Text Before the Final Session of the Preparatory Committee, 13bis*, (1998) *NEP* 69; Blakesley, C.L., ‘Comparing the Ad Hoc Tribunal for Crimes Against Humanitarian Law in the Former Yugoslavia & the Project for an International Criminal Court, prepared by the International Law Commission’, (1996) 67 *RIDP* 139; Blommestein, M. And Ryngaert, C., ‘Exploring the Obligations for States to Act upon the ICC’s Arrest Warrant for Omar Al-Bashir. A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity’, (2010) 5 *ZIS* 428; Bullock, S., ‘Prosecuting President Al Bashir, and the Short Arm of Justice’, (2013) 25 *DenningLJ* 197; Burke-White, W.W., ‘Bargaining for Arrests at the International Criminal Court: A Response to Roper and Barria’, (2008) 21 *LeidenJIL* 477; *id.*, ‘Proactive complementarity: the International Criminal Court and National Courts in the Rome System of International Justice’, (2008) 49 *HarvILJ* 53; Courtney, J. And Kaoutzanis, C., ‘Proactive Gatekeepers: The Jurisprudence of the ICC’s Pre-Trial Chambers’, From the Selected Works of Christodoulos Kaoutzanis (2014); Danner, A. M., ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’, (2003) 97 *AJIL* 510; El Zeidy, M.M., ‘Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court’, (2006) 19 *LeidenJIL* 741; Fourmy, O., ‘Powers of the Pre-Trial Chambers’, in: A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002); Friman, H. and Fernández de Gurmendi, S.A., ‘The Rules of Procedure and Evidence of the International Criminal Court’, (2000) 3 *IHumRtsYb* 289; Friman, H., *Rights of Persons Suspected or Accused of a Crime*, in: R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues- Negotiations – Results* (1999) 247; Frölich, R., ‘Current Developments at the International Criminal Court’, (2011) 9 *JICJ* 931; Gosnell, C., ‘The Request for an Arrest Warrant in Al Bashir: Idealistic Posturing or Calculated Plan’, (2008) 6 *JICJ* 841; Guariglia, F., ‘Investigations and Prosecutions’, in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues- Negotiations – Results* (1999) 227; Hansen, T.O., ‘A Critical Review of the ICC’s Recent Practice Concerning Admissibility Challenges and Complementarity’, (2012) 13 *MelbourneJIL* 217; Hendrickx, M.M.L.A., ‘An Operational Blueprint for Arresting War Criminals; a Low Risk and a High Risk Scenario’, in: W.A.M. van Dijk and Hovens (eds.), *Arresting War Criminals* (Wolf Publishers 2001); Knoops, G.-J.A., *An Introduction to the Law of International Tribunals: A Comparative Study* (2003) 101; Leurdijk, D.A., ‘The Establishment of an International Arresting Team: Fiction, Reality or Both?’, in: W.A.M. van Dijk and Hovens (eds.), *Arresting War Criminals* (Nijmegen, Wolf Publishers 2001); Liolos, J.L., ‘Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes’, (2012) 35 *BCI&CompLRev* 289; Marchesiello, M., ‘Proceedings before the Pre-Trial Chamber’, in: A. Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary*, II (2002) 1231; Nerlich, V., ‘The International Criminal Court 2001–2010 – A View from the Inside’, (2011) 22 *CLF* 199; Paulussen, C., *Male Captus Bene Detentus. Surrendering Suspects to the International Criminal Court* (Intersentia 2010); Peskin, V., *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press 2008); Rastan, R., ‘Testing Co-Operation: the International Criminal Court and National Authorities’, (2008) 21 *LeidenJIL* 431; Rojo, E.C., ‘Standard of Proof Required to Issue an Arrest Warrant for Genocide’, (2010) *Merkourios – Criminal Justice and Human Rights Case Note*, 27, 61; Roper, S.D. And Barria, L.A., ‘State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects’, (2008) 21 *LeidenJIL* 457; Ryngaert, C., ‘The International Prosecutor: Arrest and Detention’, in: Reydams, L. et al. (eds.), *The International Prosecutor from Nuremberg to the Hague* (Oxford University Press 2012) 647; Safferling, C., *Towards an International Criminal Procedure* (2001) 54; Scharf, M.P., ‘The Prosecutor v. Slavko Dokmanović’, (1998) 11 *LeidenJIL* 376; Sheffield, K., ‘Speak Softly and Carry a Sealed Warrant: Building the International Criminal Court’s Legitimacy in the Wake of Sudan’, (2013) 18 *Appeal* 163; Sluiter, G., ‘The Surrender of War Criminals to the International Criminal Court’, (2003) 25 *LoyLAI & CompLRev* 605; Smeulers, A.L., in: A. Klip and Sluiter (eds.), *Annotated Leading Cases of International Criminal*, Vol. XI (Intersentia 2005) 109; Stahn, C., ‘How is the Water? Light and Shadow in the First Years of the ICC’, (2011) 22 *CLF* 175; Swart, B., ‘Arrest and Surrender’ (Chapter 41), in: Cassese, A. et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002); *id.*, ‘Arrest Proceedings in the Custodial State’ (Chapter 30.3), in: Cassese, A. et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002); Ušacka, U., ‘Promises Fulfilled? Some Reflections on the International Criminal Court in its First Decade’, (2011) 22 *CLF* 473; Van Schaack, B., ‘ICC Fugitives: The Need for Bespoke Solutions, Santa Clara University School of Law’, (2014) *Legal Studies Research Series, Paper No. 06-14*; Wald, P.M., ‘Apprehending War Criminals: Does International Cooperation Work?’, (2012) 27 *AmUJLRev* 229; Zhou, H.R. ‘The Enforcement of Arrest Warrants by International Forces’, (2006) 4 *JICJ* 202.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	5
I. Paragraph 1	6
1. Chapeau	6

a) 'any time after the initiation of an investigation ...'	6
b) Examination of application, evidence and other information submitted by the Prosecutor	7
c) Issue of a warrant of arrest	10
2. The different subparagraphs	11
a) Reasonable grounds for a 'crime within the jurisdiction of the Court'	11
b) 'The arrest of the person appears necessary'	15
aa) 'To ensure the person's appearance at trial'	16
bb) 'To ensure that the person does not obstruct or endanger the investigation or the Court proceedings'	17
cc) 'to prevent the person from continuing'	18
aaa) 'the commission of that crime'	18
bbb) 'related crimes within the jurisdiction of the Court arising of the same circumstances'	19
II. Paragraph 2: Minimum requirement for application	20
1. Name and other identifying information	21
2. Specific reference to the alleged crime	22
3. Concise statement of the facts	23
4. Summary of the evidence and any other information	24
5. Reasons for the necessity of the arrest	25
III. Paragraph 3: Minimum requirements for a warrant of arrest	26
IV. Paragraph 4: Duration of effect	27
V. Paragraph 5: Provisional arrest, arrest and surrender on request of the Court	29
VI. Paragraph 6: Amendments of warrants of arrest	31
1. Request of the Prosecutor with regard to the crimes specified	31
2. Decision of the Pre-Trial Chamber	35
VII. Paragraph 7: Summons to appear as an alternative	37
1. Chapeau	37
a) Application of the Prosecutor	37
b) Decision of the Pre-Trial Chamber	40
aa) Reasonable grounds to believe that the person committed the crime alleged and the summons is sufficient to ensure the appearance	40
bb) Conditions under national law	43
2. The different subparagraphs	46

A. Introduction/General remarks*

Article 58 of the *Rome Statute* was developed from article 52 of the Zutphen Draft which was based upon article 28 of the Draft Statute prepared by the ILC¹. The original provision in the ILC Draft Statute dealt with arrest. It provided that the Presidency of the Court may issue a warrant of arrest upon request of the Prosecutor².

While the ILC Draft Statute provided that the Presidency perform pre-trial functions, such as, for instance, the issuance of a warrant of provisional arrest or pre-indictment arrest, a

* Christopher K. Hall has, on the basis of the text written by Angelika Schlunk for the first edition, revised the whole commentary on this article for the second edition. Cedric Ryngaert revised the commentary and added relevant case-law for the third edition. Cedric Ryngaert thanks Raluca Racasan for her research assistance.

¹ The Zutphen Draft was named after the inter-sessional meeting from 19 to 30 Jan. 1998 in Zutphen, The Netherlands under the chairmanship of Adriaan Bos. The Dutch delegation had invited the chairpersons of the various working groups of the Preparatory Committee to draft a new consolidated Draft that would merge the existing proposals to a workable text for the final meeting of the Preparatory Committee before the Rome Conference in the spring of 1998. The result of the deliberations at Zutphen was presented in UN Doc. A/AC.249/1998/L.13 (4 February 1998) (available at: <http://www.iccnw.org/romearchive/zutphenmeeting.html>). It is also published in: Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (1998); *id.* (ed.), *International Criminal Court: Compilation of Documents and Draft ICC Statute Before the Diplomatic Conference* (1998); and Sadat-Wexler (A.I.D.P. 1998) *NEP 155 et seq.* All citations to the Zutphen Draft are to the relevant draft articles. The Zutphen Draft was reorganized and partly revised at the final session of the Preparatory Committee held from 16 Mar. to 3 Apr. 1998 in what is sometimes known as the New York Draft, UN Doc. A/CONF.183/2/Add.2 (1998), which was submitted to the Rome Diplomatic Conference. Although the number of draft article 52 [28], the predecessor of article 58 of the *Rome Statute*, changed to article 59 in the New York Draft, the text remained the same.

² The provisions of the ILC Draft Statute were reproduced in the 1996 Preparatory Committee Report II.

growing number of delegates at the meetings of the Preparatory Committee felt, when the draft developed, that the Presidency should not be overburdened with pre-trial functions since it had numerous administrative duties. The Preparatory Committee Working Group No. 4 on procedural matters eventually created the Pre-Trial Chamber that would be responsible for a number of decisions during the investigation phase³.

In the spring of 1998, after the Preparatory Committee had completed its work and shortly before the Diplomatic Conference took place in Rome from 15 June to 17 July 1998, an informal working group drafted a text on the articles 52 and following of the Zutphen Draft, which it renumbered as articles 58 to 61. The re-draft was introduced as ‘further option’ to the conference text⁴.

- 2 In contrast to the *Statutes for the ICTY and the ICTR*, which contain no statutory provisions on the pre-trial phase, the *Rome Statute* provides specific rules on pre-trial detention and release⁵.

When the *Rules of Procedure and Evidence of the ICTY (ICTY Rules)* were drafted, the absence of a statutory provision on pre-trial detention and release was criticized⁶. However, at that time, the critics were concerned more about the absence of any pre-trial rules in the *ICTY Statute* than about a lack of balance of power between the organs of the Tribunal. The idea of establishing different judicial entities within the Court that would have specific responsibilities in accordance with the different phases of the proceedings only gradually developed during the negotiations of the Preparatory Committee. However, the inclusion of detailed provisions in article 58 governing the issuance of warrants of arrest and summons has been criticized by one commentator who considered that these subjects were more appropriately dealt with in the *Rules of Procedure and Evidence*⁷. The Preparatory Commission decided that no special rules were needed to implement article 58 and the Court did not include any provisions in the *Regulations* specifically referring to article 58. Whether article 58 will unduly restrict the flexibility of the Court in the issuance of arrest warrants remains to be seen. However, it does not seem to have impeded the Court with regard to the first arrest warrants, where the Prosecutor and the Pre-Trial Chamber took steps pursuant to article 68 not expressly required by article 58 to protect victims and witnesses (see footnote 29 below).

- 3 When deciding on the issuance of an arrest warrant (or a summons to appear), the Pre-Trial Chamber has to make an initial determination as to whether the case falls within the

³ The text referred to ‘provisional’ arrest. The term ‘provisional’ was later omitted, because delegations considered the wording too close to the traditional extradition model. See 1996 Preparatory Committee Report I, para. 241.

⁴ The terms ‘Preliminary Investigations Chamber’ and ‘Indictment Chamber’ were also used. For the model of a Pre-Trial Chamber see, in particular, article 54 of the alternative French Draft, UN Doc. A/AC.249/L.3, p. 45.

⁵ UN Doc. A/CONF.183/C.1/WGPM/L.1.

⁶ With respect to the pre-trial phase, article 15 of the *Statute for the ICTY* and article 14 of the *ICTR* only refer to the *Rules*. When the *Statute for the ICTY* was adopted, it was considered that this task could be left to the judges of the Court. The Report of the Secretary General containing the *Statute of the ICTY* of 3 May 1993 explains in paragraph 106 that ‘it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused ...’ (UN Doc. S/25704 (3 May 1993) and S/25704/Corr.1 (30 July 1993)). See also Morris and Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995) 236. *ICTY Rules* 54 and 55 cover the issuance and the execution of a warrant of arrest. Pursuant to Rule 54, a judge or the Trial Chamber are competent for issuing a warrant of arrest. The *ICTR Rules* are modelled on the *ICTY Rules* and the *Rules of Procedure and Evidence of the Special Court for Sierra Leone* are in turn based on the *ICTR Rules*. Article 14 of the *Statute of the Special Court for Sierra Leone* provides that the *ICTR Rules* are to be used by the judges, subject to any necessary modifications made by the judges:

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.
2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.’

⁷ See K. A. A. Khan, *Article 60*, fn 1 with further references.

jurisdiction of the Court⁸. However, it does not normally determine the admissibility of the case in light of the complementarity principle⁹. It has this discretion under article 19 paragraph 1, but will only exercise it where there is an ostensible cause or self-evident factor impelling it to do so, especially where the Prosecution Application is made on a confidential and *ex parte* basis¹⁰.

A case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court¹¹. The parameters of the investigation of a situation can include not

⁸ *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 13; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 11; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 9; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 7; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 7; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 7; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 8; *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 1; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 1; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, paras. 7-9; *Prosecutor v. Uhuru Muigal Kenyatta*, ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, paras. 7-9.

⁹ See, e.g., *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 9; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 13.

¹⁰ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011, para. 12; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, paras. 20-22 (stating that there is nothing to indicate that he is already being prosecuted at the national level for the crimes referred to in the Prosecutor's Application and that on the contrary, it would appear that the CAR judicial authorities abandoned any attempt to prosecute Mr Jean-Pierre Bemba for the crimes referred to in the Prosecutor's Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC); *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 12; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 23; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 51; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 4.

¹¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 16; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 4; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 9; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 9; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 10; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and*

only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation which initially triggered the referral to the Court¹².

The Chamber will analyse whether the crime is one of the crimes set out in article 5 of the *Statute* (jurisdiction *ratione materiae*), whether the crime was committed within the time-frame specified in article 11 of the *Statute* (jurisdiction *ratione temporis*) and whether the crime satisfies one of the two criteria, or both, laid down in article 12 of the *Statute*; namely whether it was committed on the territory of a State Party to the *Statute* or by a national of that State, or whether it was committed on the territory of a State which has made a declaration under article 12 paragraph 3 of the *Statute* or by nationals of that State¹³. Nevertheless, article 12 paragraph 2 does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the UN Charter, pursuant to article 13 (b) of the *Statute*¹⁴. Thus, where a situation is referred to it by the Security Council, the Court may exercise jurisdiction over crimes committed in the territory of States which are not Party to the *Statute* and by nationals of such States¹⁵.

If extensive similarities exist with the Prosecutor's Application in a previous case, the Chamber may adopt its earlier reasoning laid down in its Decision on the Prosecutor's Application Pursuant to article 58 as regards the jurisdictional requirements¹⁶.

Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb'), ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 14; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36; *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 1; *Prosecutor v. Abdallah Banda Abakaer Nourain*, Case No. ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 1; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 14; *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 6.

¹² *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 14; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 6.

¹³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 12; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 11; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 4; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 11; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 10; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/11, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 8; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 8; *Prosecutor v. Laurent Gbagbo and Charle Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 9; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36.

¹⁴ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36.

¹⁵ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36.

¹⁶ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 9; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 9.

In a few cases, the Chamber examined in some depth the admissibility of the case in light of investigations being conducted in the territorial State¹⁷. In particular, it has declared cases admissible on the ground that national proceedings did not encompass both the person and the conduct which was the subject of the case before the Court. By and large, it appears that the Chamber is satisfied as soon as there are *potential* cases that would be admissible due to the absence of national proceedings against those appearing to be most responsible, and in light of the gravity of the acts committed¹⁸.

B. Analysis and interpretation of elements

Article 58 only applies to persons who are suspected of having committed a crime within the jurisdiction of the Court; it does not apply to offences against the administration of justice under article 70¹⁹. By contrast, a witness or an expert cannot be summoned to appear before the Court pursuant to article 58 of the *Statute*²⁰. A summons to appear under this article is an alternative to the issuance of a warrant of arrest in those cases where there are not sufficient grounds to arrest the suspect, article 58 paragraph 1 (b)²¹.

The wording does not distinguish between pre-indictment and post-indictment arrest as did the Zutphen Draft. The provision refers to all warrants of arrest issued by the Pre-Trial Chamber during the investigation phase²².

¹⁷ E.g., *Prosecutor v. Ahmed Muhammand Harun* ('Ahmad Harun') and *Ali Muhammad Ali Abd-al-Rahman* ('Ali Kushayb'), ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 13; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 19.

¹⁸ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, paras. 17–20; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, paras. 17–22; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 11; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 50; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 21; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 11.

¹⁹ Fourmy, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1207.

²⁰ The procedure for offences against the administration of justice is governed by rules 162 to 172 of the *Rules of Procedure and Evidence*.

²¹ Pursuant to article 64 para. 6 (b), however, the Trial Chamber 'may, as necessary: ... (b) Require the attendance and testimony of witnesses ... by obtaining, if necessary, the assistance of States as provided in this Statute'. There is no provision in the *Rules of Procedure and Evidence* expressly implementing article 64 para. 6 (b), but presumably it could be implemented by the issuance of a request to States to compel attendance. It is probable that the Court has the inherent power to issue an arrest warrant or a summons to compel the attendance of witnesses and experts rather than simply issuing a request to States to take this step, but either step would have been taken on another basis than article 58. The obligation of States Parties under article 64 para. 6 (b) to assist the compulsory attendance of witnesses (apart from the exceptional case of persons in custody, where consent of the person and the custodial state is required pursuant to article 93 para. 7, an anomaly reflecting the traditional, inefficient and increasingly outdated extradition regime between States rather than the new system of surrender to international courts) is independent of their separate obligation in article 93 para. 1 (e) to facilitate the voluntary appearance of witnesses and experts.

²² The *Statute* does not use the word 'suspect'. However, for the sake of convenience, this term is used in this chapter to describe any person with respect to whom, within the meaning of article 55 para. 2 'there are grounds to believe ... has committed a crime within the jurisdiction of the Court'. The point at which a suspect becomes an accused will have to be resolved by the Court. It is clear from the *Statute* that once the Pre-Trial Chamber has confirmed charges pursuant to article 61 para. 7 a suspect is an 'accused'. However, there are a number of earlier stages in the proceedings at which a person could become an accused, including the moment the Prosecutor

The provision states the purposes for and the conditions under which the Pre-Trial Chamber can issue an arrest warrant (paragraph 1). The Pre-Trial Chamber will only act upon application by the Prosecutor. It is not in a position to issue an arrest warrant on its own motion under article 58²³.

I. Paragraph 1

1. Chapeau

- 6 a) ‘any time after the initiation of an investigation ...’. The Prosecutor can apply to the Pre-Trial Chamber for a warrant of arrest only once he or she has started the investigation of a case; he or she may not apply for a warrant at an earlier stage.
- 7 b) **Examination of application, evidence and other information submitted by the Prosecutor.** The Pre-Trial Chamber has the right to examine the application put forward by the Prosecutor. The criteria according to which the Pre-Trial Chamber will check the application are laid out in paragraphs 1 and 2 of this article.
- 8 The Pre-Trial Chamber will not initiate investigations by itself. If the Prosecutor does not present sufficient evidence or other information to underpin his or her application for an arrest warrant, the Pre-Trial Chamber is not obliged under article 58 to investigate further²⁴. The basis for its decision under article 58 is ‘the application and the evidence or other information submitted by the Prosecutor’²⁵.
- 9 There are no specific prerequisites as to what type of evidence or information may be presented. In principle, the Prosecutor may decide at his or her discretion what he or she believes necessary and appropriate to serve as evidence or information to convince the Pre-Trial Chamber that a warrant of arrest be issued.
- 10 c) **Issue of a warrant of arrest.** If the Pre-Trial Chamber comes to the conclusion that the evidence or information submitted is sufficient to issue a warrant of arrest and that the warrant is necessary to ensure the presence of the suspect at the trial, it must grant the application of the Prosecutor. The Pre-Trial Chamber is legally bound by the *Statute* in the sense that if the requirements of paragraph 1 are fulfilled, the Pre-Trial Chamber is obliged to issue the warrant of arrest. There is no room for discretion for political or ideological reasons, but it would be required under article 69 paragraph 7 to disregard ‘[e]vidence obtained by means of a violation of this *Statute* or internationally recognized human rights’ if ‘[t]he violation casts substantial doubt on the reliability of the evidence’ or ‘[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’²⁶.

submits an application for a warrant of arrest, which will contain the essence of the charges included in article 61 para. 3 document (see article 19, fn 9).

²³ See, for instance, the wording of article 52 of the Zutphen Draft, note 2.

²⁴ Article 57 para. 3 provides that the Pre-Trial Chamber may, ‘[a]t the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation’.

²⁵ However, the Pre-Trial Chamber has considerable powers under article 56 with regard to unique investigative opportunities and it may take certain measures to preserve evidence on its own initiative if it considers that the Prosecutor’s failure to request such measures are unjustified.

²⁶ However, if the Prosecutor failed to submit relevant material collected by the Pre-Trial Chamber in relation to a unique investigative opportunity pursuant to article 56, article 58 would not preclude the Pre-Trial Chamber from considering that information when reviewing the Prosecutor’s application for an arrest warrant. The *Statute* does not expressly authorize the Pre-Trial Chamber to go beyond the application and the evidence or other information submitted by the Prosecutor and information collected pursuant to article 56, either to seek further information from the Prosecutor or to seek information from other sources on this question. However, nothing in either article would appear to prevent the Pre-Trial Chamber from considering relevant information presented to it by victims. Under paragraph 1 of regulation 48, a controversial regulation adopted by the judges in confidential proceedings without any discussion with civil society, states that ‘[t]he Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or

Although the use of sealed warrants by the ICTY based on confidential *ex parte* applications by the Prosecutor as a technique to increase the chances of being able to arrest persons suspected of crimes was initially controversial, it proved an effective tool and article 58 does not preclude the use of sealed warrants of arrest²⁷. Indeed, the first warrants of arrest issued by the Court were initially sealed pending verification that victims and witnesses were effectively protected²⁸.

The provision does not list as a ground for detention the question of the suspect being harmed or at risk, but the Court could take a range of other less restrictive measures to protect the suspect²⁹.

2. The different subparagraphs

a) Reasonable grounds for a 'crime within the jurisdiction of the Court'. The term 'reasonable grounds' leaves room for interpretation, even though it is a common term in most legal systems³⁰. It is understood to embody objective criteria,³¹ and essentially means that a reasonable conclusion that the person committed a crime within the jurisdiction of the Court can be drawn. It does not mean that this is the only reasonable conclusion that can be drawn from the evidence³². In this respect, in *Al Bashir*, the Appeals Chamber held that the Chamber had acted erroneously in rejecting the application for a warrant of arrest in relation to the counts of genocide on the basis that the existence of genocidal intent of the suspect was *only*

summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in articles 53 para. 3 (b), 56, para. 3 (a), and 57, para. 3 (c)'. However, none of these provisions would be directly relevant to an application for an arrest warrant.

²⁷ For example, the admission of evidence obtained as the result of torture or cruel, inhuman or degrading treatment or punishment would necessarily 'be antithetical to and would seriously damage the integrity of the [article 58] proceedings'.

²⁸ Although one commentator has contended that '[i]t is not clear from the Statute ... whether [the Pre-Trial Chamber] may have recourse to the practice of sealed indictments', Fourmy, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1223, there is nothing on the face of the Statute, its drafting history or the routine practice of the ICTY, ICTR, Special Panels for Serious Crimes and the Special Court for Sierra Leone that would suggest that the use of sealed indictments is precluded. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the new Millennium* (2002) 232.

²⁹ The first application for arrest warrants, with regard to the Uganda investigation, was sealed. The warrants of arrest were issued under seal by Pre-Trial Chamber II on 8 July 2005 to 'ensure the safety or physical or psychological well-being of' and to 'prevent the disclosure of the identity or whereabouts of any victims, potential witnesses and their families'. The Chamber decided on 13 Oct. 2005 to unseal the arrest warrants, noting that 'the overall plan in respect of the situation in Uganda for the security of witnesses and victims in the field has been completed and implemented; and that by the assessment and advice of the Prosecutor and the Victims and Witness Unit the overall plans provides the necessary and adequate protective measures for all concerned at this stage'. *Prosecutor v. Joseph Konv, Vincent Otti and Okot Odhiambo* 16, ICC-02/04-01/05, Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, Pre-Trial Chamber, 13 October 2005.

³⁰ Some delegations at the Preparatory Committee 'favoured addressing situations in which the accused may be harmed or at risk. Other delegations stated that the accused could be adequately protected under article 61 [43]'. *Supra* note 1, Zutphen Draft, article 52 [28], n. 169. However, that draft article [now article 68], which then included an obligation on the Prosecutor to protect the accused, now limits that obligation to protect victims and witnesses and there is no express obligation under the *Rome Statute* to protect suspects or accused.

³¹ The standard is lower than 'substantial grounds to believe that the person committed the crime charged' used in article 61 para. 7 in determining whether to confirm charges. Fourmy, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1219 *et seq.* ('reasonable grounds' constitutes a less strict test than that for a *prima facie* case). Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the new Millennium* (2002) 231. The factors considered in determining whether there are 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court' under article 58 para. 1 (a) are, of course, different from those used by the Prosecutor in determining whether 'there is a reasonable basis to proceed with an investigation' pursuant to article 15 para. 3 and whether 'there is no reasonable basis to proceed' when deciding pursuant to article 53 para. 1 whether to investigate. The term 'reasonable grounds' was chosen in preference to the term 'serious reasons'. See Zutphen Draft, article 52 [28], para. 1, 167.

³² See, e.g., *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 19.

one of several reasonable conclusions available on the materials provided by the Prosecution³³. In the Appeals Chamber's view, requiring that the existence of genocidal intent must be the only reasonable conclusion would amount to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubts³⁴. Imposition of such a standard would be tantamount to the creation of an obligation on the part of the Prosecution to prove genocidal intent beyond reasonable doubt, a higher and more demanding standard than the one required under article 58 paragraph 1 (a) of the *Statute*³⁵. This reasonable conclusion should be drawn on the basis of the present evidentiary record³⁶.

In accordance with article 21 paragraph 3 of the *Statute*, the Chamber has interpreted and applied the expression 'reasonable grounds to believe' in accordance with internationally recognized human rights³⁷. It has been guided in particular by the 'reasonable suspicion' standard under article 5 paragraph 1 (c) of the European Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights on the fundamental right to personal liberty under article 7 of the American Convention on Human Rights³⁸.

In practice, the Chamber first determines whether there are reasonable grounds to believe that the contextual element is present, before considering whether the relevant criminal acts referred to in the Prosecution Application are also present³⁹.

³³ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 1, referring to ICC-02/05-01/09-73, para. 1.

³⁴ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 1, referring to ICC-02/05-01/09-73, para. 33.

³⁵ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 1, referring to ICC-02/05-01/09-73, para. 39.

³⁶ *Prosecutor v. Mathieu Ngujolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012 (Chamber recalling that Pre-Trial Chamber I had found in September 2010 that there were reasonable grounds to believe that the FDLR did have an organizational policy to attack the civilian population in 2009 (*Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 26), but that on the basis of the present evidentiary record which had significantly expanded since September 2010, it did not consider that the existence of an organizational policy is reasonably tenable and therefore finding no reasonable grounds to believe that crimes against humanity were committed, at paras. 28–29).

³⁷ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 16.

³⁸ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 32; *Situation in Darfur, Sudan*, Case No. ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 28; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 24; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 16; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 27.

³⁹ *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 29; *Prosecutor v. Mathieu Ngujolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngujolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 27; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 53; *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para. 7; *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 6; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 6.

The Pre-Trial Chamber is not entitled to issue a warrant of arrest if the evidence presented does not allow qualification of the crime committed as genocide, a crime against humanity or a war crime under the Rome Statute. If the suspect can only be prosecuted for homicide as a crime under national law, the Court has no jurisdiction over the case. It would not be competent to act, with the consequence that the Pre-Trial Chamber would have to refuse to grant the application.

The Prosecutor may present the same facts under different legal characterizations in his application for an arrest warrant⁴⁰, or charge a person with different crimes⁴¹. The Chamber does not decide these issues in its arrest warrant decision, so as not to limit the options that may exist for establishing criminal responsibility under the *Rome Statute*⁴². Instead, it issues a warrant of arrest as soon as it is convinced that there are reasonable grounds to believe that the person has committed at least one crime within the jurisdiction of the Court⁴³, even if the Chamber disagrees with the Prosecutor's legal characterization of the relevant conduct⁴⁴. This characterization is revisited in light of the evidence submitted to the Chamber by the Prosecutor during the period prior to the confirmation of charges, having regard to the rights of the Defence and to the need to ensure a fair and expeditious conduct of the proceedings⁴⁵.

Note that, in reaching its conclusions on whether the 'reasonable grounds to believe' and the 'appearance' standards required by article 58 paragraph 1 of the *Statute* have been met, the Chamber may not only rely on the evidence and information specifically discussed in the decision itself, but also on the overall evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response⁴⁶.

b) 'The arrest of the person appears necessary'. The wording makes it clear that the Pre-Trial Chamber must be satisfied with the evidence and information presented at the time of the application, no matter whether the arrest proves necessary in the end. Three grounds for issuing an arrest warrant are specified⁴⁷. In contrast, the ILC Draft provided for more limited and different grounds for provisional arrest at any point during the investigation of a suspect and for arrest of an accused after confirmation of the indictment. The Prosecutor could request the provisional arrest of a suspect if there was 'probable cause to believe that the

⁴⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 25.

⁴¹ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 42 (Chamber stating that since that was not the only crime attributed by the Prosecution to Germain Katanga, the question of whether criminal liability can arise under article 8 (2) (b) (i) or 8 (2) (e) (i) of the *Statute* for the launching, or attempted launching, of an indiscriminate attack will be better dealt with at the confirmation hearing stage rather than at the stage of issuance of a warrant of arrest).

⁴² *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 27; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 28; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, paras. 74–75.

⁴³ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 28.

⁴⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011, para. 70.

⁴⁵ *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the *Statute*, Pre-Trial Chamber I, 27 April 2007, para. 27; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 25.

⁴⁶ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 26.

⁴⁷ See note 1, Zutphen Draft, article 52 [28], 166.

suspect may have committed a crime within the jurisdiction of the Court' and 'the suspect may not be available to stand trial unless provisionally arrested'⁴⁸. After confirmation of the indictment an arrest warrant for the accused had to be issued unless the accused would 'voluntarily appear for trial' or there were 'special circumstances making it unnecessary for the time being to issue the warrant'.

The Appeals Chamber has determined that in order to justify arrest under article 58 paragraph 1 (b) of the *Statute*, it must appear to be necessary⁴⁹. Therefore, when addressing the risk of further offending, the question revolves around the possibility, not the inevitability, of a future occurrence⁵⁰.

The conditions set forth in article 58 paragraph 1 (b) are presented in the alternative, with it being sufficient that only one of the conditions is satisfied in order to issue a warrant of arrest⁵¹. However, although the Chamber must satisfy of only one of the conditions set forth in article 58 (1) (b) of the *Statute* being met⁵², even after finding that the issuance of an arrest warrant was justified on the basis of one condition being met, it has in most cases analysed whether the other conditions put forward by the Prosecution were also fulfilled.⁵³

In ruling upon the necessity to issue the arrest warrant, the Chamber will take account of internationally recognized human rights in accordance with article 21 paragraph 3 of the *Statute*.⁵⁴

- 16 aa) 'To ensure the person's appearance at trial'. The main reason to detain a suspect is to make sure that the trial can take place with the accused present. Trials *in absentia* are not permitted by the *Statute*, which means that the trial could not be held if the accused was not available. It is up to the Pre-Trial Chamber to determine which circumstances could endanger the appearance of the accused before the Court. The experience of the ICTY with voluntary surrenders and pre-trial releases suggests that warrants of arrest will not always be necessary to secure the appearance of the accused (see article 59, fn 53).

Some of the reasons why the Court has found the issuance of an arrest warrant to be necessary in order to ensure a person's appearance at trial are the person's political position,

⁴⁸ For criticism of these grounds, see note 20, O. Fourmy, *Powers 1220 et. seq.*

⁴⁹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 39; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 39; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 81.

⁵⁰ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 39; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 39; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 81; *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 42.

⁵¹ *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 51.

⁵² *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber II, 13 July 2012, para. 77.

⁵³ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 63; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 50; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 66.

⁵⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 90.

international contacts and/or economic resources⁵⁵, detention⁵⁶, the seriousness of the crimes and the length of the likely to receive sentence⁵⁷, the person's failure to surrender to a national warrant of arrest⁵⁸, the rejection of the Court's jurisdiction⁵⁹ and the State's history of non-cooperation with the Court in executing warrants of arrest⁶⁰.

bb) 'To ensure that the person does not obstruct or endanger the investigation or the Court proceedings'. If there is reason to believe that a suspect would interfere with the investigations of the Prosecutor, he or she can be detained according to the wording of paragraph 1 (b) (ii). The text does not refer to specific actions or types of interference. It is not necessary that the suspect has already attempted to obstruct or endanger the investigation; it is sufficient that the Pre-Trial Chamber has reasonable grounds to believe that such interference could happen. One factor in the assessment could be the gravity of the charges and the presumed consequences for the suspect, but it would not be decisive, since all persons before the Court are likely to face the gravest possible charges and the practice of the ICTY demonstrates that some persons facing the most serious charges can be at liberty pending trial (see article 59 fn 53). More compelling would be convincing information indicating that the suspect might interfere with, destroy or conceal evidence⁶¹, intimidate or

⁵⁵ *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 43; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 85; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 64; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, para. 47; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 13 July 2012, para. 72.

⁵⁶ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 62; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 133.

⁵⁷ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 39; *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12, Decision on the Prosecutor's Application pursuant to article 58 for a warrant of arrest against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 39; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 81; *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 43.

⁵⁸ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15, Decision on the Prosecutor's Application Pursuant to article 58 for a warrant of arrest against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 41; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 63.

⁵⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011, para. 93.

⁶⁰ *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 44; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 228.

⁶¹ See on concealing evidence *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 131; see also *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011, para. 101 (position to instruct troops to destroy evidence).

influence witnesses or victims⁶², engage in collusion with accomplices⁶³, orchestrate the cover-up of crimes committed by the Security Forces⁶⁴.

- 18 cc) 'to prevent the person from continuing'. aaa) 'the commission of that crime'. The Pre-Trial Chamber may issue a warrant of arrest if a person allegedly has committed a crime within the jurisdiction of the Court and if there is reason to believe that he or she will either continue to commit acts that constitute the same crime or if the person attempts to prolong the damage and harm caused by the crime⁶⁵, e.g., by continuing to use his power and absolute control over the State apparatus to continue the commission of crimes⁶⁶. It may seem to be problematic that the Pre-Trial Chamber here acts on the assumption that the suspect has already committed the crime, thereby infringing the presumption of innocence. This is a problem that in fact besets the operation of the entire article, which allows for the issuance of an arrest warrant as soon as '[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court' (article 58 (1) (a)).

To dispel the impression that the Pre-Trial Chamber, by the very issuance of an arrest warrant, presumes the person to be guilty, the drafters of the *Statute* may have wanted to insert a reference to the presumption of innocence in the provisions regarding the pre-trial phase⁶⁷. While this has not occurred, the Pre-Trial Chamber has explicitly held that '[t]he right to be presumed innocent is ... guaranteed by the Statute not only to accused persons, but also to those with respect to whom a warrant of arrest or a summons to appear has been issued, before their surrender to the Court'⁶⁸. It has added that the right to be presumed innocent is enshrined in many international human rights instruments⁶⁹. But the most potent safeguard for the presumption is probably the current *dédoublement fonctionnel* of

⁶² *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010, paras. 45–50; *Prosecutor v. Jean-Pierre Bemba Gombo*, CC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 89; *Prosecutor v. Germain Katanga*, ICC-01/04–01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007, para. 63; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 130; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 233.

⁶³ ILC Draft Statute, article 28 para. 1 (a) and (b).

⁶⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011.

⁶⁵ See the proposed wording for article 52 para. 1 (b), 168 of the Zutphen Draft. These specific examples were proposed in the Zutphen Draft, but the current formulation was adopted in response to suggestions from some delegations that they 'could be merged under a more general formulation such as "obstructing or endangering the investigation or the Court proceedings"'. *Ibid.*

⁶⁶ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application Pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011.

⁶⁷ Compare W.A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)', (1998) 6 *EJCLCJ* 84, 111 (arguing that 'the article dealing with the presumption of innocence appear[ing] in Part 6, concerning trial', 'can also claim a legitimate place in Part 2', and submitting that '[i]n deed, in the early drafting stages of the statute the presumption of innocence text was considered to be part of general principle').

⁶⁸ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, Pre-Trial Chamber I, 31 January 2011, para. 8.

⁶⁹ *Ibid.*, para. 9. Note that the Pre-Trial Chamber has held that the human rights-based presumption of innocence does not oppose the imposition of pre-trial detention following arrest when this is justified in accordance with article 58 (1). See *Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kololo Musamba, Jean-Jacques Magenda Kabongo, Fidele Babala Wandu and Narcisse Arido* 17, ICC-01/05-01/13, Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'', Appeals Chamber, 11 July 2014, para. 68.

the Court, which assigns responsibility for deciding questions regarding arrest warrants to the Pre-Trial Chamber, without prejudice to the Trial Chamber's ability to subsequently decide the question of guilt or innocence *de novo*⁷⁰. The Pre-Trial Chamber's determination at the arrest warrant stage does not even prejudice its determination on the occasion of the confirmation of charges, when the more exacting standard of 'substantial' (as opposed to 'reasonable') 'grounds to believe' applies⁷¹.

bbb) 'related crimes within the jurisdiction of the Court arising of the same circumstances'. A related crime could be any act that falls under the jurisdiction of the Court provided that it is connected to the same historical context⁷². The Pre-Trial Chamber, however, may not issue a warrant of arrest if the suspect has committed a crime and there is reason to believe that he or she is going to commit a crime under national law of fraud or forgery. In a given case, it may be difficult to distinguish between the commission of a related crime and the continuation of the same crime, if the elements that constitute the crime differ or cover several distinct crimes. In practice, the distinction between the continuation of the same crime and the commission of a related crime may not be relevant as long as the crime is within the jurisdiction of the Court.

II. Paragraph 2: Minimum requirement for application

The application needed to issue the warrant of arrest has to encompass the five types of information listed in this paragraph⁷³. There are no provisions in the *Statute* regulating the application and the consequences if the application is lacking. Although the first edition of this Commentary recommended that this paragraph be implemented in the *Rules of Procedure and Evidence*, neither the *Rules* nor the *Regulations of the Court* do so⁷⁴. Paragraph 2 should be read together with articles 91 paragraphs 2 and 4 and 92 paragraphs 1 and 2, which state what is required in a request for arrest, or provisional arrest, and surrender once an application to issue a warrant has been granted.

1. Name and other identifying information

The primary obligation of any authority examining the arrest of a person is to verify that the person arrested is identical with the person described in the warrant issued by the Court⁷⁵.

The notion of the name of the person refers to the name and forename, including any aliases possibly registered or any other name that the person is known to use, such as a *nom de guerre*, for example.

The notion of any other relevant identifying information encompasses size, height, sex, any particular objective and permanent physical features as well as nationality, accent or other identifiable features. A photograph of the person may be attached to the arrest warrant⁷⁶. It

⁷⁰ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, para. 53.

⁷¹ *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010.

⁷² The proposed wording for article 52 para. 1 (b) (v) of the Zutphen Draft was '... continue to commit a crime within the jurisdiction of the Court'.

⁷³ The reference to related crimes was not in the Zutphen Draft and was added in Rome.

⁷⁴ This paragraph, which was not in the Zutphen Draft was added in Rome.

⁷⁵ In the absence of specific rules on the application proceedings, the Pre-Trial Chamber may request, should the information submitted with the application not be complete, additional information in support of the application or deny the issuance of an arrest warrant. If it refuses to issue an arrest warrant on the basis that the application was lacking, the Prosecutor may renew the application.

⁷⁶ See, e.g., *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Prosecutor's Application pursuant to article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, 27 June 2011; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of

falls to the Prosecutor to assess what type of identifying information may be necessary and helpful for the identification of the person sought.

2. Specific reference to the alleged crime

- 22 The subparagraph requires that the Prosecutor apply for a warrant if the crime allegedly committed is within the jurisdiction of the Court. The application shall pertain only to crimes within the jurisdiction of the Court. For example, if a person is suspected to have been actively involved in the commission of genocide, the application would make reference to that crime. It would not refer to any other crime that the suspect may also have committed such as the crimes of burglary or fraud under national law, because those crimes are not within the jurisdiction of the Court. The Prosecutor could not add any crimes that are not within the jurisdiction of the Court to an application referring to genocide, crimes against humanity or war crimes.

It is observed that the Pre-Trial Chamber's legal characterization of the facts or of the modes of liability at this stage is without prejudice to the Chamber's possible reconsideration of such characterization at a later stage of the proceedings⁷⁷.

3. Concise statement of the facts

- 23 The application shall describe the facts on which the Prosecutor bases his or her assessment of the case. Based upon this information about the facts, the Pre-Trial Chamber will examine whether the assessment of the Prosecutor permits that the act or omission be qualified as a crime within the jurisdiction of the Court. If the Pre-Trial Chamber is in doubt that the facts presented by the Prosecutor support his or her assessment, it may deny the application.

4. Summary of the evidence and any other information

- 24 The Prosecutor shall present those pieces of evidence that support his or her case. It is sufficient that the Prosecutor shows that there are reasonable grounds to believe that the suspect has committed the crimes referred to in the application. The notion of reasonable grounds pertains to objective criteria. If the Pre-Trial Chamber is not satisfied with the evidence presented, it may deny the application.

5. Reasons for the necessity of the arrest

- 25 The Prosecutor has to present not only persuasive evidence that the suspect has committed a crime within the jurisdiction of the Court, but also that the suspect should be taken into custody. The reasons for arresting a suspect are laid out in paragraph 1 of this article. However, the Prosecutor is not obliged to present reasonable grounds to support his or her belief that the suspect has to be detained pending trial. It is sufficient that he or she convincingly argues that arrest is necessary for one of the reasons listed in paragraph 1 of this article⁷⁸.

arrest for Germain Katanga, Pre-Trial Chamber I, 5 November 2007; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I, 28 September 2010; *Prosecutor v. Mathieu Ngujolo Chui*, ICC-01/04-02/12, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngujolo Chui, Pre-Trial Chamber I, 6 July 2007; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008.

⁷⁷ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, No. ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 27; *Prosecutor v. Abdel Raheem Muhammad Hussein 15*, ICC-02/05-01/12, Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', Pre-Trial Chamber I, 1 March 2012, para. 39.

⁷⁸ See article 59 para. 2.

III. Paragraph 3: Minimum requirements for a warrant of arrest

The warrant of arrest is the basis for the detention of the suspect⁷⁹. It has to encompass the information contained in the application by the Prosecutor with the exception of the summary of evidence and the reasons why the Prosecutor considers an arrest necessary. If the Pre-Trial Chamber issues a warrant of arrest in accordance with the application by the Prosecutor, the Pre-Trial Chamber will have satisfied itself that the evidence presented is sufficient and that the detention of the suspect is necessary pursuant to paragraph 1 of this article. 26

As to the subparagraphs (a) to (c) of this Paragraph, see remarks under section II.

IV. Paragraph 4: Duration of effect

The Paragraph clarifies that only the Court has the power to lift the arrest warrant⁸⁰. The competent authorities of the custodial State where the suspect has been detained are not in a position to do so. They may decide upon interim release in accordance with article 59 paragraphs 3 and 4 of the *Rome Statute*. 27

The provision refers to the Court but does not name the Pre-Trial Chamber. The reason is that the warrant of arrest may be lifted by the Pre-Trial Chamber as long as the case is still under investigation, but also by the Trial Chamber or the Appeals Chamber once the criminal proceedings have progressed. The competence to lift a warrant of arrest issued by an organ of the Court depends upon what organ of the Court is in charge of conducting the proceedings at the particular time. 28

V. Paragraph 5: Provisional arrest, arrest and surrender on request of the Court

If the Pre-Trial Chamber has issued a warrant of arrest pursuant to this article, it has to base any request to national authorities for provisional arrest (see article 92) and any request for arrest and surrender on this warrant of arrest⁸¹. The purpose of the provision is to make it clear that if a warrant of arrest by the Pre-Trial Chamber exists, the request for provisional arrest or the request for arrest and surrender has to be based upon this arrest warrant. 29

The provision does not specify to what extent the request for provisional arrest or arrest and surrender shall make reference to the contents of the arrest warrant or whether the request shall be accompanied by a copy of the arrest warrant. Such matters are not specifically addressed either in the *Rules of Procedure and Evidence* or the *Regulations of the Court*, so they will be determined in practice. 30

VI. Paragraph 6: Amendments of warrants of arrest

1. Request of the Prosecutor with regard to the crimes specified

The Prosecutor may require the modification of the warrant of arrest at any time during the investigation phase⁸². The provision only applies, however, as long as the Pre-Trial 31

⁷⁹ Article 59 provides that the court of the custodial State will determine whether a person arrested pursuant to a warrant of arrest issued under article 58 should be detained or released pending surrender to the Court. After surrender, the arrested person may apply pursuant to article 60 para. 2 to the Pre-Trial Chamber for interim release pending trial.

⁸⁰ Paragraph 3 was added in Rome.

⁸¹ This paragraph replaces a variety of proposals that set different expiration periods for pre- and post-indictment warrants of arrest. See article 53 [28] paras. 2 and 5 of the Zutphen Draft.

⁸² Article 52 [28] para. 4 of the Zutphen Draft provided that the Court, including all of its organs, 'shall transmit the warrant to any State where the person may be located, along with a request for the provisional arrest, or arrest and [surrender, transfer, extradition] of the person under Part 9 [7]'.

Chamber is competent for issuing a warrant of arrest. Once the criminal proceedings have progressed to the trial phase, article 58 is no longer applicable⁸³.

- 32 The wording leaves open the scope of possible modifications of the warrant. A restrictive reading of this paragraph might suggest the Prosecutor may request only that another crime within the jurisdiction of the Court be added to the list of crimes referred to in the warrant or that the facts of the crimes be modified⁸⁴. However, the provision should be interpreted in a wider sense allowing also for an amendment of the name or any identifiable features as referred to in paragraph 3 (a) of this article.
- 33 The Paragraph does not pertain to a modification of the summary of evidence or the reasons given by the Prosecutor for the need to detain the suspect as referred to in paragraph 2 (d) and (e) of this article, because the warrant of arrest does not contain those pieces of information pursuant to paragraph 3 of this article. An amendment in that respect would be redundant.
- 34 There is nothing in paragraph 6, the *Rules of Procedure and Evidence* or the *Regulations of the Court* concerning the form of the request for amendment or modification. However, the request does not require the same pieces of information as the application as referred to in paragraph 2, notably because the information contained in the application is already contained in the existing warrant of arrest.

2. Decision of the Pre-Trial Chamber

- 35 The Pre-Trial Chamber will amend the warrant of arrest only if the Prosecutor has presented reasonable grounds to believe that the suspect has committed the modified or additional crimes. The wording implies an obligation of the Pre-Trial Chamber to examine the request of the Prosecutor. The notion of ‘reasonable grounds’ entails the same objective criteria as does paragraph 1 (a) of this article.
- 36 The paragraph does not describe any particular proceedings for amendment or modification of the warrant of arrest. If the Pre-Trial Chamber has decided to amend or modify an existing warrant of arrest, it will do so by issuing a warrant of arrest that contains the modifications or additions requested. The provision does not tackle the question what happens to the former warrant of arrest. There are two possibilities: the warrant could either cease to exist automatically with the issuance of the amended warrant of arrest or the Pre-Trial Chamber would have to determine that the former warrant no longer is in force. The question is of practical relevance insofar as a request for provisional arrest or arrest and surrender would be based upon the warrant of arrest issued by the Pre-Trial Chamber⁸⁵. If the former warrant of arrest is not lifted when an amended warrant is issued, there is a risk that the request for provisional arrest or arrest and surrender would be based upon the former warrant instead of the amended warrant.

VII. Paragraph 7: Summons to appear as an alternative

1. Chapeau

- 37 a) **Application of the Prosecutor.** During the discussions at the meetings of the Preparatory Committee, the issue was raised whether a summons to appear could be considered as an alternative to a warrant of arrest. Both the warrant of arrest and the summons to appear before court are compulsory measures. Strictly speaking, however, a summons is less

⁸³ There was no provision in the Zutphen Draft concerning amendment of warrants of arrest.

⁸⁴ However, it is possible that a person who has been summoned or who has been arrested and released pending trial flees after the commencement of the trial. Presumably, the Trial Chamber, acting pursuant to articles 61 para. 11 and 64 para. 6 (a) could issue a warrant of arrest under article 58, as this step would be an exercise of a function of the Pre-Trial Chamber.

⁸⁵ See also the wording of the second sentence of this paragraph which only makes reference to the alternative that the person is suspected to have committed the modified or additional crimes.

restrictive than a warrant of arrest as it does not necessarily constrain the liberty of the person wanted. It is also less constraining than measures of judicial supervision that would control his or her personal freedom. The provision draws upon those cases where the circumstances do not support the issuance of a warrant of arrest pursuant to paragraph 1 of this article. The arrest may not appear necessary, e.g. if there are no grounds to believe that the suspect will disappear before the trial will take place.

The Prosecutor has to determine whether the circumstances of the case require a warrant of an arrest or a summons to appear. The provision does not provide for the application for other measures of judicial supervision in order to ensure that the person wanted will appear before the Court. An earlier version of the Draft Statute provided for the option to issue a warrant for judicial supervision in order to place the person wanted under restriction of liberty other than arrest⁸⁶. The proposal was deleted, because the issue of judicial supervision was dealt with in the following article concerning pre-trial detention or release (now article 60 of the *Rome Statute*)⁸⁷. A similar provision is now contained in paragraph 7, second sentence of this article.

The Prosecutor may apply for a summons to appear alongside an arrest warrant⁸⁸.

b) Decision of the Pre-Trial Chamber. aa) Reasonable grounds to believe that the person committed the crime alleged and the summons is sufficient to ensure the appearance. The Pre-Trial Chamber has the right and the obligation to examine the request of the Prosecutor for a summons to appear. It has to check in the same way as for a warrant of arrest if there are reasonable grounds to believe that the person committed the alleged crime within the jurisdiction of the Court and in addition the assessment of the Prosecutor that an application for a warrant of arrest is not necessary, because there were no grounds to believe that the suspect would not appear before the Court⁸⁹. Eventually, the Chamber needs to be satisfied that a summons to appear would be equally effective as a warrant of arrest to ensure the person's appearance before the Court⁹⁰. To this effect, the Chamber needs to ensure, before issuing a summons to appear, that the Prosecution Application and its supporting material provide sufficient guarantees that the person will appear before the Court⁹¹. The State's willingness to cooperate is an important factor in this respect⁹². Other factors that have been taken into consideration by the Court when deciding that a summons is sufficient to ensure

⁸⁶ Paragraph 5 of this article.

⁸⁷ Article 52 [28] para. 1 (b) of the Zutphen Draft at the bottom of the Paragraph.

⁸⁸ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 4.

⁸⁹ *Prosecutor v. Omar Hassan Ahmed Al Bashir* ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 29; *Prosecutor v. Abdallah Banda Abakaer Nourain* ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009 para. 34.

⁹⁰ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 116.

⁹¹ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 118; *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 29; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 32; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, para. 54; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, para. 53.

⁹² ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, paras. 122–124.

appearance before the Court is that the persons were not perceived to be a flight risk and that nothing indicated that they would evade personal service of the summons or refrain from cooperating if summoned to appear⁹³.

41 A summons to appear is not an option if there are grounds to believe that the suspect may obstruct or endanger the investigation or the court proceedings, paragraph 1 (b) (ii), or if there is a risk that the suspect might continue to commit the crime he or she allegedly has committed or commit a related crime within the jurisdiction of the Court, paragraph 1 (b) (iii). Neither can it be issued for a person currently detained by national authorities, as in the Court's view this would be contrary to the object and purpose of article 58 paragraph 7: indeed, as pursuant to this article the Court can issue a summons to appear with conditions restricting liberty, only a person who is not already being detained can be the addressee of such a summons⁹⁴.

42 The Pre-Trial Chamber may reserve its right to review the finding that a summons to appear is sufficient to ensure the person's presence at trial either *proprio motu* or at the request of the Prosecutor, particularly if the suspect fails to appear on the date specified in the summons or fails to comply with the orders contained in the summons to appear issued by the Chamber⁹⁵.

43 **bb) Conditions under national law.** The decision of the Pre-Trial Chamber can be taken 'with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear'.

The *Statute* does not specify the types of conditions restricting liberty that could be adopted, but refers to national law. The provision offers the opportunity to the Pre-Trial Chamber to make use of judicial instruments that may be available in the State where the person wanted was located. In that respect, the paragraph offers a wide range for flexibility. Such measures, however, should be consistent with the *Rome Statute* and other international law standards.

The Pre-Trial Chamber only is in a position to order restrictions of liberty, if it declines to issue a warrant of arrest on the grounds that a summons to appear is sufficient to ensure the suspect's appearance before the Court. The wording in brackets clarifies that the notion of restrictions of liberty only refers to measures other than detention as detention is regarded as the most restrictive measure of liberty upon arrest.

44 The *Statute* does not provide for rules on how the conditions of restriction of liberty will be conducted or supervised. As a rule, the execution of such measures will be effected pursuant to the law of the State where the person wanted is located. The Court may request the assistance of the national authorities in accordance with the provisions on cooperation of Part 9 of the *Statute* as applicable⁹⁶. The Registrar may be ordered to monitor compliance with the conditions imposed⁹⁷.

⁹³ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, para. 56; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, para. 55.

⁹⁴ ICC-01/04-01/068-Corr, para. 16; *Prosecutor v. Ahmed Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb')*, ICC-02/05-01/07-1, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 120.

⁹⁵ *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, para. 32; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, para. 35; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, para. 56; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, para. 55.

⁹⁶ Article 53 [29] para. 5 of the Zutphen Draft; see also article 52 [28] para. 1, 170.

⁹⁷ *Prosecutor v. Bahir Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 7 May 2009, pp. 18–19; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Second Decision on the Prosecutor's Application under article 58, Pre-Trial Chamber I, 27 August 2009, pp. 19–20.

The summons to appear may order the person to whom it is addressed to not have contact with any person who is or is believed to be a victim or a witness of the crimes for which the summons has been issued, to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution’s collection of evidence, to refrain from committing any crimes set forth in the *Rome Statute*, in addition to attending all required hearings at the Court⁹⁸. 45

2. The different subparagraphs

With respect to the elements referred to in subparagraphs (a), (c) and (d), the same observations can be made as put down with respect to paragraph 3 of this article. 46

In contrast to a warrant of arrest, a summons to appear has to contain the date of the hearing or trial on which the person is to appear. The paragraph does not require the summons to include the address where the person is to appear; but it is self-evident, that the obligation to appear can only be fulfilled by the person wanted if the exact address of the place is given to the person summoned. This provision has been criticized for failing to specify the penalty for non-compliance with a summons, failing to include provisions concerning allowances payable and what travel expenses are reimbursable or pre-paid⁹⁹.

With regard to the last sentence of paragraph 7, ‘[t]he summons shall be served on the person’, the Pre-Trial Chamber may request the State where the person summoned is located to transmit the summons to appear in accordance with the provisions on cooperation in Part 9 of the *Statute*. Paragraph 7 would appear to exclude service by mail, but it will be up to the Court to determine what forms of service under national law constitute service ‘on the person’. 47

⁹⁸ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, Pre-Trial Chamber II, p. 23; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, Pre-Trial Chamber II, pp. 23–24.

⁹⁹ Such a request could be based upon articles 86 and 93 para. 1 (l) (requiring States Parties to provide any type of assistance not listed in article 93 para. 1 (a) – (k) which is not prohibited by the law of the requested State) that does not specify the type of assistance requested.

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- a) The warrant applies to that person;
- b) The person has been arrested in accordance with the proper process; and
- c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Directly relevant Rules of Procedure and Evidence: Rule 117.

Literature: *General:* Abi Saab, G., 'Droits de l'homme et juridictions pénales internationales: Convergences et tensions', in: R.-J. Dupuy, (ed.), *Mélanges en l'honneur de Nicolas Valticos: droit et justice* (Éditions A Pedone 1999) 252; Amnesty International, *Fair Trials Manual* (Amnesty International Publications 1998); Delmas-Marty, M., *Procès pénal et droits de l'homme* (Presses Universitaires de France 1992); Fourmy, O., 'Powers of the Pre-Trial Chambers', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute Of The International Criminal Court: A Commentary*, Vol. II (2002) 1207; Friman, H., 'Rights of Persons Suspected or Accused of a Crime', in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations – Results* (1999) 247; *id.*, 'Investigation and Prosecution', in: R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 516; Gallant, K.S., 'Securing the Presence of Defendants before the International Criminal Tribunal for the Former Yugoslavia: Breaking with Extradition', (1994) 5 *CLF* 557; Green, L.C., 'Erdemović, Tadić, Dokmanović: Jurisdiction and Early Practice of the Yugoslav War Crimes Tribunal', (1997) 27 *IsYbHumRts* 313; Guariglia, F., 'Investigations and Prosecutions', in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations – Results* (1999) 227; Harris, D., 'The Right to a Fair Trial in Criminal Proceedings as a Human Right', (1967) 16 *Id&CompLQ* 355; Knoops, J.G.A., *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (Brill, Nijhoff 2003); Kreß, C. And Broomhall, B., 'Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis', in: C. Kreß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, II: *Constitutional issues, cooperation and enforcement* (Nomos 2005) 515; Marchesiello, M., 'Proceedings before the Pre-Trial Chamber', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002) 1231; Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Engel 1993); Rodley, N.S., *The Treatment of Prisoners Under International Law* (OUP 2nd edition 1999); UN Centre for Human Rights and Crime Prevention And Criminal Justice Branch, *Handbook of International Standards Relating to Pre-Trial Detention* (United Nations 1994); Swart, B., 'Arrest Proceedings in the Custodial State', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*,

Vol. II (2002) 1247; Van Dijk, P., *The Right of The Accused to a Fair Trial Under International Law* (Studie- en Informatiecentrum Mensenrechten 1983).

The rights of suspects under the European Convention on Human Rights: O’Boyle, M., Warbrick, C., Bates, E. And Harris, D., *The Law of the European Convention on Human Rights* (OUP 2nd. edition 2005); Murdoch, J.L., *Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person* (Council of Europe Publishing 1994); Trechsel, S., ‘Liberty and Security of Person’, in: R.S.J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Nijhoff 1993) 277;

The rights of suspects in comparative law: Andrews, J.A., *Human Rights in Criminal Procedure: A Comparative Study* (Nijhoff 1982); Delmas-Marty, M. (ed.), *Procédures pénales d’Europe* (Presses Universitaires de France 1995), english edition: *id.* And Spencer, J.R. (eds.), *European Criminal Procedures* (CUP 2002); Hatchard, J., Huber, B. And Vogler, R. (eds.), *Comparative Criminal Procedure* (British Institute of International and Comparative Law 1996); Livingstone, S., *Towards a Procedural Regime for the International Criminal Court* (Nottingham University Press 2002); Van Den Wyngaert, C. (ed.), *Criminal Procedure Systems in the European Community* (Butterworths 1993); El Zeidy, M., ‘Critical Thoughts on article 59(2) of the ICC Statute’, (2006) 4 *JICJ* 448.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1: Immediate reaction.....	5
II. Paragraph 2.....	7
1. Appearance before the competent judicial authority.....	7
2. The different subparagraphs.....	11
a) The warrant applicable.....	12
b) Arrest ‘in accordance with the proper process’.....	13
c) Rights to be respected.....	14
III. Paragraph 3: The right to apply for ‘interim release’.....	15
IV. Paragraph 4: Conditions.....	19
1. ‘urgent and exceptional circumstances’.....	19
2. ‘necessary safeguards’.....	20
3. No consideration ‘whether the warrant of arrest was properly issued’.....	22
V. Paragraph 5.....	23
1. Notification of the Pre-Trial Chamber and recommendations.....	23
2. Full consideration to recommendations.....	25
VI. Paragraph 6: Periodic reports.....	27
VII. Paragraph 7: Surrender on order.....	28

A. Introduction/General remarks

Article 59 is based upon article 29 of the ILC Draft Statute¹. When discussing paragraph 1, the delegates pondered whether national judicial authorities or the Court, be it the Presidency, the Trial Chamber or the Indictment Chamber or Pre-Trial Chamber, should have control over the legality of the detention of the suspect².

The *Rome Statute* distinguishes between arrest proceedings in the custodial State, governed by article 59, and the proceedings before the Court, governed by article 60. Article 59 is based upon the assumption that, as a rule, a suspect will be located and detained by the local authorities in the territory of a State Party rather than by the Court. At the Preparatory Committee, the proposal was made that the Prosecutor himself or herself should have the authority to execute the warrant of arrest if the competent judicial authority was not available or ineffective. This proposal was abandoned, because a consensus could not be reached on resolving the practical questions concerning arrests by the Prosecutor or where such issues should be addressed in the *Statute*³. Nevertheless, as noted below, the Court will be faced

¹ 1994 ILC Draft Statute; see 1996 Preparatory Committee Report II, p. 139.

² 1996 Preparatory Committee Report II, pp. 139 *et seq.*

³ These issues before the Diplomatic Conference included ‘under what conditions the Prosecutor should be able to exercise such authority, whether the Prosecutor would have adequate resources to do so, and whether such issues should be addressed elsewhere in the Statute’. Article 53 para. 1*bis* no. 177 of the Zutphen Draft, <<http://www.legal-tools.org/en/doc/7ba9a4>> accessed 30 September 2014. It is also published in: M.C. Bassiouni

with a number of novel questions not expressly addressed in article 59, for example, concerning the applicability of this provision to arrests by staff of intergovernmental organizations in peace-keeping operations, as well as to arrests by members of national contingents, both from States Parties and from other States, participating in such operations. Article 59 governs only arrest and surrender proceedings regarding crimes within the Court's jurisdiction⁴.

Article 59 is related to article 92 in Part 9 on cooperation with the ICC. This article mainly concerns the requirements which requests for provisional arrest by the Court should satisfy. Although it is not as such concerned with arrest proceedings in the custodial State, article 92 (3) provides that '[a] person who is provisionally arrested [in accordance with article 59 (1)] may be released from custody if the requested State has not received the request for surrender and the documents supporting the request...' This articles goes on to state that 'the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible'.

- 3 Practice has shown that the custodial State mentioned in article 59 (2) is not necessarily the State where the alleged crime has been committed or of which the sought person is a national. Instead, the custodial State is any State which is in a position to execute the arrest warrant against the sought person who happens to be on its territory, whether this State is a party to the *ICC Statute* or otherwise under an obligation to cooperation with the Court, *e. g.*, under a UN Security Council Resolution. Several suspects were arrested in third countries.⁵ Where cooperation is not forthcoming, the Court may inform the Security Council and the Assembly of State Parties about the presence of the person on the said territory, in order for them to take any measure they deem appropriate.⁶ The non-cooperative State can also be requested by the Court to submit observations concerning its alleged failure to comply with the Cooperation Requests issued by the Court,⁷ after which the Court may make a finding in this regard, which will be transmitted to the Security Council and the Assembly of State Parties.⁸ Furthermore, in case the person has been present on the territory of the third State before and the State has failed on such occasion to proceed to the arrest and surrender of the

(ed.), *The Statute of the International Criminal Court: A Documentary History* (1998); M. C. Bassiouni (ed.), *International Criminal Court: Compilation of Documents and Draft ICC Statute before the Diplomatic Conference* (1998) and L. Sadat Wexler (ed.), *Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee, 13bis NEP* (A.I.D.P. 1998) 155 *et seq.* All citations to the Zutphen Draft are to the relevant draft articles. The Zutphen Draft was reorganized and partly revised at the final session of the Preparatory Committee held from 16 March to 3 April 1998 in what is sometimes known as the New York Draft, UN Doc. A/CONF.183/2/Add.2 (1998), which was submitted to the Rome Diplomatic Conference. Although the number of draft article 52 [28], the predecessor of article 58 of the Rome Statute, changed to article 59 in the New York Draft, the text remained the same.

⁴ Rule 165 para. 2 expressly provides that article 59 and any Rules related to that article do not apply to offences against the administration of justice.

⁵ Callixte Mbarushimana was arrested in France on 11 October 2010, Jean-Pierre Bemba Gombo was arrested in Belgium on 24 May 2008 and between 23 and 24 November 2013, the Dutch authorities arrested Jean-Jacques Mangenda Kabongo, the Belgian authorities arrested Aimé Kilolo Musamba and the French authorities arrested Narcisse Arido. Charles Blé Goude was arrested in Ghana and extradited to the Côte d'Ivoire but he was not arrested with the purpose of being surrendered to the ICC.

⁶ See, *e. g.* *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al Bashir's presence in the territory of the Republic of Kenya, Pre-Trial Chamber I, 27 August 2010; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, Pre-Trial Chamber I, 27 August 2010; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, Pre-Trial Chamber I, 12 May 2011.

⁷ See, *e. g.*, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision requesting observations about Omar Al-Bashir's recent visit to the Republic of Chad, Pre-Trial Chamber I, 18 August 2011.

⁸ See, *e. g.*, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Pursuant to article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued

person, the State will be required to submit observations to the Court regarding any problems which would impede or prevent the arrest and surrender during the upcoming visit and to proceed to arrest and surrender in accordance with its obligations under the *Statute*.⁹

B. Analysis and interpretation of elements

Article 59 expressly applies to States Parties to the *Statute*. However, it would necessarily apply to States that have made declarations recognizing the Court's jurisdiction pursuant to article 12 (3)¹⁰, and to States that are under an obligation to cooperate with the Court by virtue of a UN Security Council Resolution.¹¹ Presumably, it would also apply to a State that had entered into a cooperation arrangement or agreement with the Court pursuant to article 87 paragraph 5 and an intergovernmental organization that had reached an agreement with the Court pursuant to article 87 paragraph 6¹². The wording covers a request for provisional arrest as well as a request for arrest and surrender by the Court¹³. The arrest proceedings will be conducted according to Part 9 of the *Rome Statute* and the national law of the custodial State¹⁴.

The term 'surrender' was chosen in preference to the term 'extradition', because the negotiators were of the opinion that the transfer of suspects to the Court should be considered as distinct from current extradition regimes (see article 102 for the definition of these terms)¹⁵.

by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011.

⁹ See, e.g., *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision requesting observations from the Republic of Kenya, Pre-Trial Chamber I, 25 October 2010.

¹⁰ The Côte d'Ivoire has made such a declaration recognizing the jurisdiction of the Court over crimes committed since 29 September 2002, although as of 31 January 2006, it had not been published by the Registrar.

¹¹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, Pre-Trial Chamber I, 10 December 2014, para. 1, referring to UN Security Council resolution 1970 (2011), UN Doc. S/RES/1970, para. 5; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, Pre-Trial Chamber II, 9 March 2015, paras. 13–15. See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 7 March 2012, paras. 12–13; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, Pre-Trial Chamber I, 28 August 2013, para. 13, finding that Mauritania has no obligations vis-à-vis the Court arising directly from the *Statute* since it is not a State Party to the *Statute*, no ad hoc arrangement or agreement has been concluded between the Court and Mauritania and no other appropriate basis under article 87(5)(a) of the *Statute* imposes an obligation on Mauritania with respect to the arrest and surrender of Mr Al-Senussi to the Court. The decision to cooperate imposed by the Security Council was imposed solely on Libya (*Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, Pre-Trial Chamber I, 28 August 2013, para. 14).

¹² See also Negotiated Agreement between the International Criminal Court and the United Nations.

¹³ In the field of legal assistance, a request for provisional arrest usually is effected automatically when the warrant of arrest is filed with the police information system. If the Court decides to keep a warrant confidential, it may place the request for provisional arrest directly with the State Party where the suspect is presumed to be located.

¹⁴ 1996 Preparatory Committee Report II, para. 240.

¹⁵ The issue of terminology was controversial until the Diplomatic Conference. The terms 'extradition' and 'surrender' were still bracketed in conference working paper UN Doc. A/CONF.183/C.1/WGPM/L.2.

I. Paragraph 1: Immediate reaction

5 The wording makes apparent that States Parties are obliged to comply with a request for provisional arrest as well as a request of arrest and surrender by the Court. In that respect, the paragraph requires that the arrest should be taken both in accordance with their laws and with the provisions on international cooperation of Part 9 of the *Statute*. The obligation spelled out in paragraph 1 falls within the general obligation in article 86 to cooperate with the Court in its investigations and prosecutions and the obligation in article 88 to ensure that there are procedures available under national law for all of the forms of cooperation that are specified in Part 9. The requirement of immediacy laid down in this paragraph, together with the obligation of national authorities in paragraph 2 to bring the arrested person promptly before a judicial authority and in paragraph 7 to surrender a person as soon as possible once a surrender order has been issued suggests that all subsequent steps taken pursuant to article 59 should be taken expeditiously.¹⁶

In addition, international law and standards require that if the person arrested at the request of an international criminal court remains in detention, proceedings in the national court must be prompt¹⁷.

6 The judicial authorities of the requested State Party would decide upon the steps to be taken to arrest the person sought by the Court in accordance with their national law and Part 9 of the *Statute*¹⁸. Of course, the national law at stake must be consistent with international law. In any event, as of the day when the arrest warrant is notified to the national authorities, the obligation to surrender arises. In exceptional circumstances, pursuant to article 95, the requested State is allowed to postpone the execution of the Court's request for surrender until such time as the Court has ruled on an admissibility challenge.¹⁹

II. Paragraph 2

1. Appearance before the competent judicial authority

7 The procedure described in article 59(2) necessarily follows from arresting a person pursuant to a surrender request.²⁰ It is for the law of the custodial State to determine which judicial authority is competent to conduct proceedings concerning the person arrested²¹.

8 Paragraph 2 requires that the arrested person be brought 'promptly' before the judicial authority in the custodial State with competence²². It would be in keeping with normal

¹⁶ Note in this respect also that the Court has held that the obligation to surrender arises as of the day when the arrest warrant is notified to the national authorities. See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 4 April 2012, para. 19.

¹⁷ *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision, Appeals Chamber, 3 November 1999, para. 62, modified with respect to relief granted, 31 March 2000.

¹⁸ 1996 Preparatory Committee Report II, pp. 140 *et seq.*

¹⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, Pre-Trial Chamber I, 1 June 2012, p. 16.

²⁰ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 4 April 2012, para. 19.

²¹ For an explanation of what would constitute a judicial authority, see Amnesty International, *Fair Trials Manual* (1998) sec. 5.1.1 and 12.4.

²² Paragraph 2 reflects international law and standards such as article 9 para. 3 of the International Covenant on Civil and Political Rights; Principle 11 para. 1 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; article 10 para. 1 of the UN Declaration on the Protection of All Persons from Enforced Disappearance; article 5 para. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; article 7 para. 5 of the American Convention on Human Rights; article XI of the Inter-American Convention on Forced Disappearance of Persons; and paragraph M.3 (a) of the Principles

principles of treaty interpretation for the concept of 'promptly' to be assessed in the light of international law and standards, rather than according to how the term is defined in national law or practice²³. The only reference in this paragraph to the national law of the custodial State is to the procedure for determining whether the criteria in subparagraphs (a) to (c) have been met. However, that procedure, necessarily, must be consistent with the *Statute* and other international law. Although paragraph 2 is silent on the question, it would be consistent with the requirement in paragraph 1 that a State take immediate steps to arrest a person and to bring the arrested person promptly before judicial authorities in paragraph 2 to require States Parties to ensure that all legal challenges and appeals of judicial decisions are resolved promptly. Still, it remains unclear what timeframe is precisely denoted by the term 'promptly'. Accordingly, there is a risk that, despite the attempts of the drafters of the *Rome Statute* when designing surrender procedures to avoid the use of the extradition model, with its obstacles and protracted proceedings, surrender proceedings in the custodial State could become protracted. Regrettably, article 59 provides only limited tools for the Pre-Trial Chamber to encourage expeditious proceedings and the Court may be reluctant to resort to article 87 paragraph 7 except in cases involving gross abuses, even though there is no such threshold before the provision can be invoked²⁴.

Paragraph 2 implies that the warrant of arrest issued by the Court be effected by a State Party rather than by an organ of the Court. An earlier proposal provided that the Prosecutor of the Court was to execute the warrant of arrest with the consent of the Pre-Trial Chamber, if the competent judicial authority of the State Party was either not available or ineffective²⁵. The proposal was dropped, however, because the suggested provision raised a number of controversial issues, including, for instance, under what conditions the Prosecutor should be able to exercise such authority, or whether he or she would have adequate resources to do so²⁶. Although this proposal was dropped, it is not clear whether the absence of an express provision in the *Statute* would prevent staff of the Office of the Prosecutor from executing an arrest warrant or serving a summons. For example, it is not clear what the scope of the Prosecutor's powers is when taking specific investigative steps pursuant to article 57 paragraph 3 (d) when a State Party is unable to do so²⁷. Presumably, national legislation could permit staff of the Office of the Prosecutor to carry out arrests. As noted above, however, the Court is likely to be presented with a number of other novel situations not expressly addressed in article 59²⁸.

and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and Peoples' Rights, 33rd Ord. Sess., 15 to 19 May 2003.

²³ In many States there can be considerable delays, both because of law and practice, in bringing arrested persons before a judge. However, a State Party could not successfully argue that the term promptly should be measured by its national law and practice rather than by international law and standards. See Vienna Convention on the Law of Treaties, article 27 ('A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.').

²⁴ Whether the Court could issue a request to a State to expedite proceedings or whether it has any inherent powers to supervise national authorities acting as the Court's agents does not appear to have been explored in any detail by the drafters of the *Statute*.

²⁵ See Zutphen Draft, article 53 para. 1*bis*.

²⁶ See Zutphen Draft, article 53 para. 1*bis*, No. 177.

²⁷ Article 57 para. 3 (d) permits the Pre-Trial Chamber to '[a]uthorize the Prosecutor to take specific investigative steps' when it 'has determined that the State is clearly unable to execute a request for cooperation', but it does not define investigative steps. The most plausible way of interpreting this provision is that it would permit the Pre-Trial Chamber to authorize the Prosecutor to execute any request for cooperation that the requested State is unable to execute, including a request to execute an arrest warrant or to serve a summons. There are other situations when an arrest by staff of the Prosecutor could be authorized. For example, if a suspect for whom a sealed arrest warrant had been issued were to appear on Court premises, permitting such an arrest, perhaps with an immediate transfer to the host State or the State where the Court was sitting pursuant to article 3 para. 3, subject to effective safeguards for the rights of the arrested person, might be consistent with the *Statute*. It is also possible that in situations not covered by article 57 para. 3 (d) the Pre-Trial Chamber could authorize the Prosecutor to seek the assistance of UN peacekeepers to execute a warrant of arrest.

²⁸ For example, an arrest might not be carried out by a State Party, but by a State that had made a declaration pursuant to article 12 para. 3 or which had entered into a special arrangement or agreement with the Court pursuant to article 87 para. 5 or by staff of an intergovernmental organization pursuant to article 87 para. 6. In

- 10 The wording ‘which shall determine’ makes it clear that the State Party where the person sought was arrested, is obliged to ensure that the arrest proceedings are conducted in accordance with the applicable rules of the *Statute* and the law of the State Party²⁹.

The precise contours of the procedure before the competent national judicial authority are determined by the State, ordinarily on the basis of ICC implementation legislation. In one case, a domestic court has held that the right to judicially contest a provisional arrest under national law is based on articles 91 and 92 (2) rather than on article 59³⁰. None of these provisions explicitly provides for a right to contest a decision of a competent national authority, however, arguably because the drafters did not want to be seen too intervening in the domestic judicial structures of States Parties³¹. In that same case, the court ruled that the person could no longer contest his arrest once the (domestic) pre-trial chamber had decided to surrender him to the ICC, at which moment a new basis for detention was created³².

2. The different subparagraphs

- 11 Paragraph 2 identifies only three matters which are to be considered by the competent judicial authority in the custodial State. Thus, there is no role under the *Statute* for executive authorities in the custodial State in making such determinations, in contrast to decisions on interim release, which are to be made by the competent authority in the custodial State (paragraph 3). As discussed below, in addition to these proceedings in the custodial State, parallel proceedings may be taking place in the Pre-Trial Chamber on other matters within its jurisdiction, such as the appointment of counsel for proceedings before the Court, challenges to the issuance of the arrest warrant and challenges to jurisdiction and admissibility³³.
- 12 a) **The warrant applicable.** The judicial authority of the custodial State that is in charge of the arrest proceedings has to verify whether the person arrested is the same as the person sought under the arrest warrant. In making that determination, the judicial authority can rely upon the supporting information and material required by article 91 paragraph 2 in the request for arrest and surrender. In addition, the judicial authority should, after sufficient notice, permit the Office of the Prosecutor, which will have relevant information, and the

addition, military police of a State Party (custodial State) serving in a peace-keeping operation might carry out an arrest in the territory of another State. A literal interpretation of paragraph 2 would suggest that the military police would have to send the arrested person promptly back to a court in the custodial State, both when the courts in the territorial State were open and when the judicial system had collapsed. A degree of flexibility in the implementation of article 59 that is consistent with the purpose of the *Statute* may be possible, such as bringing the person promptly before a court of the custodial State sitting in the State with jurisdiction where the person was arrested or prompt surrender to the Court, provided that the safeguards for the rights of the suspect, as envisaged in article 59, were fully respected and kidnapping in violation of international law was prohibited. In this respect, the Court should reject the approach of the ICTY in *Prosecutor v. Dokmanovic*, IT-95-13a-PT, Decision on the Motion for Release, Trial Chamber, 22 October 1997 (decision not available on ICTY website) and *Prosecutor v. Nikolić*, IT-95-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 2 October 2002, to allegations that the accused was kidnapped in violation of international law. See *Green* (1997) *IsYbHumRts* 313; Abi Saab, in: Dupuy (ed.), *Mélanges en L'honneur de Nicolas Valticos: droit et justice* (1999) 252; see also Kreß and Broomhall, in: Kreß et al. (eds.), *The Rome Statute Of The International Criminal Court And Domestic Legal Orders* (2005) 515, 520 et seq.

²⁹ The elements which the competent judicial authorities have to examine in particular pursuant to that paragraph were agreed upon during the meeting of the Preparatory Committee in August 1997. See Zutphen Draft, article 53 para. 2, p. 102.

³⁰ *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18 June 2008, para. 5.

³¹ See on the balance between the role of State authorities and the ICC in respect of article 59. Preparatory Committee Report Vol. I at 52.

³² *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0971F, ILDC 1116 (BE 2008), Appeal Decision, 1 July 2008, paras. 5 and 10.

³³ Rule 117 para. 2 (appointment of counsel for proceedings in the Court) and para. 3 (challenges to the issuance of the arrest warrant); article 19 (challenges to jurisdiction and admissibility).

Pre-Trial Chamber to participate at all stages of the proceedings and to make recommendations. The determination should be subject to expected appeal³⁴.

b) **Arrest ‘in accordance with the proper process’.** The arrest proceedings are governed by the law of the custodial State³⁵. Article 59 does not address the criteria of proper process. Basically, it means that the warrant be duly served on the person arrested and that the process be consistent with international law and standards³⁶. It may be argued that the right to be arrested ‘in accordance with the proper process’ in article 59(2)(b) is in fact just one of the rights to be respected in accordance with article 59(2)(c), so that in practice both provisions have to be read together.³⁷ 13

c) **Rights to be respected.** The rights referred to in this subparagraph would include both rights under national law and under international law, including the rights recognized in article 55, such as the right to be informed of one’s rights and the right to counsel. They would also include the suspect’s right to be informed about the charges and the grounds for the detention³⁸. The ICTR Appeals Chamber has made clear that arrest and transfer proceedings in a national court must conform to international law³⁹. Article 59 does not state what the judicial authority in the custodial State may do if it determines that the suspect’s rights were not respected, although it should inform the Pre-Trial Chamber promptly of any violations. Nothing in the *Statute* would prevent the judicial authority from awarding reparations, which could include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, for violations of rights under national or international law⁴⁰. In addition, it is not excluded that the national judicial authority releases the person or suspends the proceedings in case of manifest violations. However, a restriction of this authority’s power may be called for when the ICC has already declared a case admissible during arrest warrant proceedings⁴¹. Especially in such a situation neither the determination by the national judicial authority that the suspect’s rights were violated nor the remedies it adopted should be allowed to prevent surrender to the Court. Any further remedy for violations of rights, such as the exclusion of evidence pursuant to article 69 paragraph 7, would need to be sought initially from the Pre-Trial Chamber rather than from the national authority. In addition, article 85 paragraph 1 provides that persons who have been the victim of unlawful arrest or detention are entitled to compensation, which would necessarily include compensation for unlawful arrest or detention on the basis of a warrant of the Court by the 14

³⁴ Ordinarily, the decision by the national courts after exhaustion of all possible appeals would be final. However, if the decision were to amount to a failure to comply with a request of the Court contrary to the *Statute*, for example, because the proceedings were a sham, then the Court could take appropriate steps pursuant to article 87 para. 7.

³⁵ 1996 Preparatory Committee I, para. 240.

³⁶ See article 29 para. 1 of the ILC Draft Statute.

³⁷ El Zeidy (2006) 4 *JICJ* [448], 454.

³⁸ See, for example, article 9 para. 2 of the International Covenant on Civil and Political Rights; principles 10 and 11 para. 2 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the UN Basic Principles on the Role of Lawyers; articles 5 para. 2 and 6 para. 3 (a) of the European Convention on the Protection of Human Rights and Fundamental Freedoms; article 7 para. 4 of the American Convention on Human Rights; article 6 of the African Charter on Human and Peoples’ Rights; Paragraph M.2.(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and Peoples’ Rights, 33rd Ord. Sess., 15 to 19 May 2003; *Barayagwiza* (Appeals Chamber Decision), see note 17, paras. 78–86.

³⁹ *Barayagwiza* (Appeals Chamber Decision), see note 17.

⁴⁰ The scope of the right to reparations for violations of rights is reflected to a large extent in the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Joint Principles), Definitions, B., UN Doc. E/CN.4/Sub.2/1997/20/Rev.1; Draft Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Van Boven-Bassiouni Principles); and Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

⁴¹ El Zeidy (2006) 4 *JICJ* [448], 456.

custodial State or by anyone else. This leaves open the question, however, whether the person could also challenge his unlawful arrest or detention by State authorities with an international human rights supervisory body, such as the European Court of Human Rights, and what the impact of a decision by such body would be on ICC proceedings⁴².

III. Paragraph 3: The right to apply for ‘interim release’

15 Paragraph 3 guarantees the right of the person arrested to apply to the competent judicial authority in the custodial State for interim release pending surrender to the Court. The person arrested can apply for interim release where either he has been provisionally arrested, or where he has been arrested for purpose of surrender to the ICC⁴³. He can do so even if the competent authority has not yet taken a decision for provisional arrest or a decision to surrender⁴⁴.

In contrast to the determination which must be made by the competent judicial authority pursuant to paragraph 2, decisions on interim release pursuant to paragraph 3 are to be made by the competent authority⁴⁵. The procedure in the custodial State for determining pre-trial release would govern applications for release, to the extent that they are consistent with international law, including the *Rome Statute* and general principles of law, such as those reflected in article 9 paragraph 3 of the International Covenant on Civil and Political Rights.

16 Nothing in the *ICTY* or *ICTR Statutes* or *Rules* permits national courts to order provisional release; such determinations can only be made by the Tribunals. Article 29 of the ILC Draft Statute provided that only the Court in the form of the Presidency has the right to decide upon the release of the person arrested pursuant to an arrest warrant by the Court⁴⁶. As alternatives to the Presidency, the representatives at the meetings of the Preparatory Committee named the Trial Chamber or the Indictment Chamber or Pre-Trial Chamber as responsible for the release of the suspect⁴⁷. However, in a dramatic shift, the *Rome Statute* allocated responsibility for determinations on interim release to a competent authority of the custodial State in accordance with the national and international law applicable, as long as the person arrested is within their territory or subject to their jurisdiction⁴⁸. Despite this allocation of responsibility, the Pre-Trial Chamber would probably still have a responsibility as the court that issued the arrest warrant to respond if the competent authority in the custodial State failed to act in accordance with the *Statute*. In

⁴² El Zeidy (2006) 4 *JICJ* [448], 462, who has reasonably argued in this respect that the ICC may ‘be guided by that decision, but not obliged to take it into account’, although possibly making a reservation in case of gross human rights violations, in which the abuse of process doctrine may be applied to stay proceedings.

⁴³ *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18 June 2008, para. 8.

⁴⁴ *Ibid.*

⁴⁵ Most national implementing legislation provides that decisions on interim release will be made by a court. However, at least one State has provided in its implementing legislation that executive authorities can overturn court decisions denying interim release. See, for example, International Criminal Court act 2002, No. 41, 2002, section 25 para. 1 (b) (Australia) (‘The Attorney-General must ... direct a magistrate to order the release from custody of a person remanded by the Division, or the discharge of the recognizance on which bail was granted to the person, as the case requires, if: ... (b) in any case – after considering the matters mentioned in subsection 23 (6) [which repeat the factors in article 59 para. 4 of the Statute], the Attorney-General considers for any other reason that remand should cease’).

⁴⁶ See 1996 Preparatory Committee Report II, p. 139.

⁴⁷ Zutphen Draft, see note 3. Article 53 [29] para. 3 of the Zutphen Draft provided two options for making interim release determinations; either the Pre-Trial Chamber or the competent judicial authority in the custodial State. The reason that the requirement that the competent authority be a judicial one was dropped when it was decided that these decisions should be made at the national level is not clear. It may have been made simply because such determinations are made in some States by executive authorities rather than by a court and those States did not wish to change this practice.

⁴⁸ It is quite possible that the arrested person would be detained by members of the armed forces of the custodial State abroad, for example, during the course of a peace-keeping operation.

addition, it may review the grounds for the detention once the person arrested has been transferred to the Court⁴⁹.

However, the competent authorities of the custodial State are not in a position to lift the arrest warrant issued by the Court. The factors that they may consider in determining whether to grant interim release are specified in paragraph 4. 17

The authors are aware of two instances of a person arrested applying for interim release with the competent judicial authority in the custodial State: Jean-Pierre Bemba, upon his arrest in Belgium⁵⁰, and Callixte Mbarushimana upon his arrest in France⁵¹. 18

IV. Paragraph 4: Conditions

1. ‘urgent and exceptional circumstances’

Paragraph 4 gives guidance to the competent authorities of the custodial State when examining the grounds for a possible interim release of the arrested person. However, this provision must be interpreted in light of the general principles of law applicable to pre-trial release, as reflected, for example, in article 9 paragraph 3 of the International Covenant on Civil and Political Rights, which states that ‘[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial ...’ Paragraph 4 states that when reaching a decision on an application for release, the competent judicial authority ‘shall consider whether, given the gravity of the crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court’. The second factor is discussed below. These factors should not be seen as exclusive. Moreover, national courts will certainly look at the practice regarding pre-trial release of international criminal courts, as well as of national courts that have been conducting proceedings involving crimes under international law. National courts are however not allowed to grant interim release in cases where, objectively speaking, no urgent and exceptional circumstances justifying such interim release are present⁵². 19

An urgent and exceptional circumstance would be that of an arrested person in the advanced stages of a terminal illness, although it is noted that, in most cases of illness an arrested person could be held in custody in a prison hospital or a comparable institution. A more liberal interpretation of ‘urgent and exceptional circumstances’ is however also possible, in accordance with the approach of the international criminal tribunals towards application for provisional release⁵³.

⁴⁹ See article 60 para. 2.

⁵⁰ *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18 June 2008. In Belgium, article 59 (3) was implemented through article 16 (1) of the Cooperation Law for ICC and Tribunals.

⁵¹ *Procureur v. Callixte Mbarushimana*, ICC-01/04-01/10, Recommendations adressées à la Chambre d’Instruction de la Cour d’Appel de Paris en vertu de l’article 69 du Statut de Rome, 29 November 2010.

⁵² *Bemba Gombo (Jean-Pierre) v. Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18th June 2008.

⁵³ See as regards the ICTY notably *Prosecutor v. Sainovic*, IT-99-37-AR65, Decision on Provisional Release, Appeals Chamber, 30 October 2002, para. 6 (‘A Trial Chamber is not obliged to deal with all possible factors which a Trial Chamber can take into account when deciding whether it is satisfied that, if released, an accused will appear for trial. It must, however, render a reasoned opinion. This obliges it to indicate all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. In relation to the present application for provisional release, a reasonable Trial Chamber would have been expected to consider, and thus to list, *inter alia*, the following factors: the fact that the applicants are charged with serious criminal offences; the fact that, if convicted, they are likely to face long prison terms; the circumstances in which they surrendered; the degree of co-operation given by the authorities of the FRY and Serbia; the fact that the government of the FRY and the government of the Republic of Serbia gave guarantees that they would ensure the presence of the accused for trial and guaranteed the observance of the conditions set by the Trial Chamber upon their provisional release; the fact that both accused held very senior positions, so far as it is relevant to the weight of governmental guarantees; the fact that the FRY recently passed a Law on Co-

2. ‘necessary safeguards’

- 20 The second condition for granting interim release is that the custodial State takes appropriate measures to ensure that the transfer of the arrested person to the Court is not put at risk. The wording stresses the obligation of the State Party to surrender a suspect to the Court upon its request for surrender.
- 21 As a rule, the detainee shall be held in an appropriate location for detention that fully satisfies international law and standards concerning detention⁵⁴. If interim release is granted, when the competent authority determines what safeguards are necessary to ensure surrender it should consider to what extent the safeguards used by the Court listed in rule 119 on conditional release would be appropriate, as well as the safeguards required by the ICTY. This step would help to ensure consistency of approach by national and international courts when determining the same issue. Although the factual circumstances of pre-trial release in the host State may be different from those in States where crimes within the Court’s jurisdiction are taking place, it should be borne in mind that the ICTY has permitted accused persons on provisional release in certain circumstances to return to their own countries⁵⁵.

3. No consideration ‘whether the warrant of arrest was properly issued’

- 22 The wording of paragraph 4 makes it clear that the competent authorities of the custodial State shall decide upon detention or interim release pursuant to this article, but may not rule on challenges to the grounds of the issuance of the warrant of arrest. The underlying assumption of this paragraph is that only the authority that has issued the warrant is in a position to lift it. Consequently, the competent authority of the custodial State in charge will not hear, for instance, challenges to the competence of the Court to issue the arrest warrant or to the correctness of the presentation of the facts. The arrested person may bring forward those challenges only before the Pre-Trial Chamber. However, rule 117 paragraph 3, which

operation with the International Tribunal; the fact that the Applicants gave personal guarantees in which they undertook to abide by the conditions set by the Trial Chamber should they be released; the likelihood that, in light of the circumstances prevailing at the time of the decision and, as far as foreseeable, the circumstances as they may turn out to be at the time when the accused will be expected to return for trial, the relevant authorities will re-arrest the accused should he decline to surrender; and the fact that the accused provisionally accepted to be interviewed by the Office of the Prosecutor, thereby showing some degree of co-operation with the Prosecution.’); *Prosecutor v. Markač*, IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release, 2 December 2004.

As far as the ICC is concerned, Jean-Pierre Bemba Gombo has been granted interim release by the Pre-Trial Chamber II on 14 August 2009, after being denied such release on three previous occasions, due to a substantial change of circumstances since the last decision on interim release had been rendered. See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, Pre-Trial Chamber II, 14 August 2009.

⁵⁴ For example, the relevant standards include the 1955 UN Standard Minimum Rules for the Treatment of Prisoners, the 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the 1990 UN Basic Principles for the Treatment of Prisoners. In addition, to the extent that they are consistent with international law and standards, the Court should consider the various instruments concerning detention by the ICTY: Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, Rev. 8, 29 November 1999; Regulations to Govern the Supervision of Visits to and Communications with Detainees, Rev. 3, 22 July 1999; House Rules for Detainees June 1995; Regulations for the Establishment of a Complaints Procedure for Detainees, April 1995; Regulations for the Establishment of a Disciplinary Procedure for Detainees, April 1995; Appointment of Inspecting Authority for the Detention Unit, 28 April 1995; Agreement on Security and Order, 14 July 1994. It should also consider, subject to the same caveat, similar instruments on the same basis adopted by ICTR and the Special Court for Sierra Leone. The Court has yet to adopt any instruments governing detention. On the law and standards governing pre-trial detention, see Rodley, *The Treatment of Prisoners in International Law* (1999).

⁵⁵ See, for example, *Markač* (Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release), note 53.

provides for challenges to the issuance of the warrant, does not restrict such challenges to challenges made after surrender to the Court, so he or she could make such a challenge before the Pre-Trial Chamber while still in the custodial State⁵⁶.

V. Paragraph 5

1. Notification of the Pre-Trial Chamber and recommendations

The provision reflects the underlying assumption of the *Statute* that the organs of the Court and the States Parties will work closely together on all issues of cooperation, although such cooperation may not always be forthcoming from States Parties or from other States. The purpose of the provision is to balance the competence of the local judicial authority of the custodial State to decide upon detention or interim release of the suspect with the control functions of the Pre-Trial Chamber during the investigations of the Court. Paragraph 5 requires that the Pre-Trial Chamber be informed, presumably in a timely manner, of any request for interim release to permit it to make recommendations and requires that the Pre-Trial Chamber make recommendations to the competent authority in the custodial State. Rule 117 paragraph 4 requires that these recommendations be made within the time limits set by the custodial State⁵⁷.

In contrast to rule 117 paragraph 3, which requires the Pre-Trial Chamber to obtain the views of the Prosecutor with respect to a challenge to the issuance of an arrest warrant, neither paragraph 5 nor rule 117, paragraph 4 expressly require the Pre-Trial Chamber to obtain the views of the Prosecutor on a request for interim release. This omission must be an oversight since the Prosecutor will normally be in the best position to provide recommendations concerning such a request. If the Pre-Trial Chamber is to make effective recommendations on interim release, it will need to consult the Prosecutor. Neither paragraph 5 nor rule 117 paragraph 4 specify what recommendations the Pre-Trial Chamber may make, although it is clear from the structure of paragraph 5 that recommendations concerning the request for interim release, ‘including any recommendations on measures to prevent the escape of the person’, are obligatory. The first edition of this Commentary suggested that such recommendations might address security issues, the possible danger to the life of the suspect deriving from his or her involvement in criminal activities or from his or her status in his or her country of residence. The Pre-Trial Chamber or Prosecutor may have confidential information about other inmates of the detention facilities that may endanger the physical integrity of the suspect. Although the Pre-Trial Chamber may not be in a position to share such

⁵⁶ Rule 117 para. 3 provides:

‘A challenge as to whether the warrant of arrest was properly issued in accordance with article 58, para. 1 (a) and (b), shall be made in writing to the Pre-Trial Chamber. The application shall set out the basis for the challenge. After having obtained the views of the Prosecutor, the Pre-Trial Chamber shall decide upon the application without delay’.

A government delegate closely involved in the drafting of this rule has stated: ‘It seems that because no time limits are established for such a challenge, it could also be filed when the person is still in the custodial State’. Friman, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 516. Rule 117 para. 3 would appear to provide a procedure for a challenge by the arrested person while detained in the custodial State to at least some aspects of the lawfulness of detention seeking release if that detention were to be determined unlawful. Although there is no express provision in the *Statute* for such a challenge, it is implicit in the prohibition in article 55 para. 1 (d) of arbitrary arrest and detention. In any event, the Court has the inherent power to entertain such a challenge and provide such relief. See, for example, *Prosecutor v. Semanza*, ICTR-97-20-A, Decision, Appeals Chamber, 31 May 2000, paras. 112 *et seq.*; *Barayagwiza* (Appeals Chamber Decision), see note 17, para. 88.

⁵⁷ Rule 117 para. 4 provides that when the custodial State has notified the Pre-Trial Chamber of a request for release, then ‘the Pre-Trial Chamber shall provide its recommendations within any time limit set by the custodial State’. Although not expressly stated in the *Statute* or the *Rules*, the custodial State should act in good faith by providing such notice promptly, inform the Pre-Trial Chamber of the time limit and ensure that the time limit is a reasonable one.

information, it may recommend that the arrested person be sent to another facility within the custodial State. If the Pre-Trial Chamber or Prosecutor possesses such information, there would be an obligation to recommend appropriate measures to the custodial State, as the use of the term ‘shall’ suggests. In addition, the recommendations should address the extensive list of factors considered in the recent jurisprudence of the ICTY concerning provisional release discussed above and measures that the Pre-Trial Chamber would itself consider pursuant to rule 119 were appropriate guarantees for appearance in proceedings in the Court.

Paragraph 5 simply sets out the requirement that the Pre-Trial Chamber make recommendations concerning interim release; it does not preclude the Pre-Trial Chamber from making recommendations concerning other matters. Given that the Pre-Trial Chamber will have a clear interest under the *Statute* in ensuring that the surrender proceedings are promptly concluded and that the rights of the arrested person, including the rights of access to families, counsel, independent medical attention and to a judge and the right to be free from torture and other ill-treatment, are fully respected at all stages of the proceedings in the custodial State, it may make recommendations concerning such matters.

Neither paragraph 5 nor rule 117 paragraph 4 state how the Pre-Trial Chamber should make these recommendations, but they do not specify that such recommendations need to be in writing. Therefore, these provisions would not prevent a representative of the Pre-Trial Chamber or, more appropriately, a member of the Office of the Prosecutor to appear in person to make these recommendations and to present oral or written evidence relevant to the recommendations, whether they concern interim release or other matters. As indicated above, the custodial State should ensure that the Prosecutor and the Pre-Trial Chamber can appear at all stages of the proceedings.

2. Full consideration to recommendations

- 25 Although the custodial State is required ‘to give full consideration’ to the recommendations by the Court, the measures taken have to be in keeping with the applicable law of the custodial State, to the extent that this law is consistent with the *Statute* and other international law and standards. In that respect, the competent authority would have to take into account any constitutional principles applicable such as, for instance, the principle of proportionality, meaning that the measure recommended should be sufficient to prevent the escape of the person under arrest, but should not restrict his or her freedom more than is necessary.
- 26 If the competent authority decides to grant interim release while the conditions of these Paragraphs are not fulfilled or the necessary safeguards were not provided and the person sought escapes, the decision would amount to a failure ‘to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute’, thus permitting the Court, pursuant to article 87 paragraph 7 ‘to make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council’.

VI. Paragraph 6: Periodic reports

- 27 If the arrested person is released, paragraph 6 states that the Pre-Trial Chamber may ‘request periodic reports on the status of the interim release’. Whether this paragraph is strictly necessary is doubtful since the Pre-Trial Chamber would have the power to issue such a request in any event, but it is a useful reminder to competent authorities in the custodial State that such requests can be made. As a request concerning the investigation and prosecution of crimes within the jurisdiction of the Court, the custodial State must comply with the Pre-Trial Chamber’s request pursuant to article 86. Rule 117 paragraph 5 requires

the Pre-Trial Chamber to 'inform the custodial State how and when it would like to receive periodic reports on the status of the interim release'. The purpose of paragraph 6 is to balance the responsibilities of the custodial State to decide upon detention or interim release and the Pre-Trial Chamber to control the progress of the investigation and to ensure that the criminal proceedings before the Court are not at risk.

Although the decision of the Pre-Trial Chamber to request periodic reports is discretionary, rule 117 paragraph 5 seems to envisage such requests as a matter of course and it is difficult to imagine how it could fulfil its responsibilities effectively without, at a minimum, periodic reports from the custodial State.

VII. Paragraph 7: Surrender on order

If the Pre-Trial Chamber requests that the arrested person be surrendered to the Court, the custodial State has to comply with that request, provided that it is a State Party to the *Statute*, has made a declaration pursuant to article 12 paragraph 3 or has made an arrangement or agreement with the Court pursuant to article 87 paragraph 5. As a request concerning the investigation and prosecution of crimes within the jurisdiction of the Court, the custodial State must comply with that request pursuant to article 86 and it must have procedures in place permitting surrender⁵⁸.

⁵⁸ See article 88.

Article 60

Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Literature: Blakesley, C.L., 'Comparing the Ad Hoc Tribunal for Crimes against Humanitarian Law in the Former Yugoslavia & the Project for an International Criminal Court, prepared by the International Law Commission', (1996) 67 *Revue de Droit Pénal*; Gallant, K.S., 'Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition', (1994) 5 *CLF* Nos. 2-3; NtandaNsereko, D.D., 'Rules of Procedure and Evidence of the International Tribunal for the International Tribunal for the Former Yugoslavia', (1994) 5 *CLF* Nos. 2-3; Blakesley, C.L., 'Commentary on Parts 5 & 6, in: L. Sadat Wexler, A.I.D.P. (ed.), *Observations on the Consolidated ICC Text before the Final session of the Preparatory Committee*, (1998) 13*bis NEP* 69; 1996 Yearbook of the International Criminal Tribunal for the Former Yugoslavia (1997), Sales No. E.97.III.P.1.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	4
I. Paragraph 1: To be 'informed of crimes', of 'rights' and the 'right to apply for interim release'	4
II. Paragraph 2: Grounds for detention	6
III. Paragraph 3: The requirement of periodic review	13
IV. Paragraph 4: The right not to be detained for an 'unreasonable period prior to trial due to inexcusable delay by the Prosecutor'	17
V. Paragraph 5: The power to issue a warrant of arrest to secure attendance of a released person	23

A. Introduction/General remarks

- 1 Article 60 of the Rome Statute deals with various aspects of initial proceedings before the Court. The majority of the article, however, is focused on the question of pre-trial release or detention. This is in contrast to the Statutes of the ICTY and ICTR which do not contain any provisions on pre-trial release. Explaining this omission, it has been said that 'There are various considerations that favour the absence of such a provision, including: the serious nature of the crimes with which the persons would be charged; the possible dangers to the community, particularly victims and witnesses, if the accused is not detained; the distinct risk that the

accused would flee to avoid the possibility of a lengthy prison sentence in the event of a conviction; the difficulties that may be involved in locating and arresting the person for a second time given the possibilities of modern transportation; and the absence of any provision for continuing the trial in the absence of the accused¹. At the same time, it has been correctly noted that the rights of the accused provided for in those Statutes are basic minimum standards that could be enhanced². In drafting and approving Rule 65 of their Rules of Procedure and Evidence³, the judges of the ad hoc Tribunals sought to do just this and confer upon accused persons the right to apply for provisional release. Such a provision was in full conformity with international standards as set out in various international instruments and declarations⁴.

In contrast to this, the right to apply for pre-trial release was expressly provided for from the commencement of ICC's drafting process. The ILC had included such a provision in article 29 of their Draft Statute for an ICC⁵. It sought to combine State involvement on this issue with what would, in effect, have been a determinative role for the Court⁶. The compromise reached satisfied few. By the time of the Ad Hoc Committee's Report in 1995, many had formed the view that the ILC's Draft article should be amended as it did not represent a balanced division of responsibilities between the International Criminal Court and national authorities⁷. In addition, the point was raised that compelling national authorities to disapply domestic legislation in favour of their proposed duties under the Draft Statute would lead to various complications including intricate constitutional problems and other practical difficulties⁸.

This view gained increased support in the Preparatory Committee's Report of 1996⁹. It was felt that the provisions on pre-trial detention and release needed further clarification. It was suggested that the determination of the lawfulness of the arrest or detention, as well as bail, should be made by the relevant national authorities. The view was expressed that what the Court could determine was the lawfulness of the arrest warrants and its requests for the detention of the suspect. It was emphasised, however, that the Statute should provide guidelines governing the grounds for detention and release for those occasions when the Court gained actual custody of the suspect¹⁰.

By the time of the Preparatory Committee's session in December 1997, the question of whether interim release of a person held by a custodial State be determined by that State in accordance with its own laws or by the ICC itself remained a matter of contention resolved only by the inclusion of both options in square brackets¹¹. Notwithstanding this, there was a

¹ Morris and Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. I (1995) 238; also in Morris and Scharf, *An Insider's Guide to the International Criminal Tribunal for Rwanda*, Vol. I (1998) 531.

² See article 21 para. 4 of ICTY/R Statutes, almost verbatim reproductions of article 14 para. 3 of the ICCPR (1966).

³ See ICTY Rules of Procedure and Evidence, adopted 11 Feb. 1994, latest amendment 10 Dec. 1998, UN Doc. IT/32/Rev.13; ICTR Rules of Procedure and Evidence, adopted 29 June 1995, UN Doc. ITR/3/Rev.1 (1995).

⁴ See article 9 paras. 3 and 4 ICCPR, 1966; Human Rights Committee General Comment No. 8; Committee of Ministers of the Council of Europe Resolution 65(11); Rule 6, United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), adopted by G.A. Res. 45/110 of 14 Dec. 1990. In adopting Rule 65 of their Rules of Procedure and Evidence, the judges of the ad hoc Tribunals addressed a concern regarding the absence of any statutory provision catering for pre-trial release which had been expressed by many. For example, Blakesley (1996) 67 *RIDPI* 194, observed that 'There is significant danger of abuse in a Tribunal such as this where there is no strict political accountability. Thus, some sort of pre-trial protection and oversight are necessary'. For similar views see the Report on the International Tribunal to adjudicate war crimes committed in the former Yugoslavia, submitted by a special task force of the ABA section of international law and practice (Hon. Monroe Leigh, Chair), pp. 46-47.

⁵ 1994 ILC Draft Statute.

⁶ *Ibid.*, article 29 para. 1 provided that the judicial officer of the State should determine whether the warrant had been duly served, but (see article 29 para. 2), the question of pre-trial detention or release remained within the province of the Presidency of the ICC.

⁷ See Ad Hoc Committee Report, p. 32, para. 147.

⁸ *Ibid.*, paras. 147-148.

⁹ 1996 Preparatory Committee I, p. 52, paras. 239-245.

¹⁰ *Ibid.*, para. 243.

¹¹ See article 29 para. 3, Preparatory Committee Decisions Dec. 1997, p. 31.

development in that a new paragraph had been added to this article¹² dealing with interim release of a person already transferred to the Court¹³. This proposal was important in that it reserved a person's right to apply to the Pre-Trial Chamber notwithstanding that a previous application for interim release had been rejected by either the custodial State, or (if that option was to be preferred) the Pre-Trial Chamber, at any time prior to transfer. This compromise was built upon¹⁴ and sought to balance the rights of the State and those of the Court. Accordingly, it was a version of this proposal which finally gave birth to the bifurcated interim release procedure agreed upon at Rome¹⁵.

B. Analysis and interpretation of elements

I. Paragraph 1: To be 'informed of crimes', of 'rights' and the 'right to apply for interim release'

- 4 Regardless of how a person comes to be before the ICC, (whether by warrant of arrest, voluntarily or pursuant to a summons) the Statute requires the Pre-Trial Chamber to satisfy itself that the person has been informed of the crimes within the jurisdiction of the Court which it is alleged that person has committed¹⁶. At this stage, what will be required is that the charges and accusations made to the Pre-Trial Chamber under article 58 are clearly notified to that person. Technical language is probably not necessary although the Pre-Trial Chamber should satisfy itself that the person is aware of the crimes alleged against him or her with as much specificity as is then available. In addition, counsel will always be available to explain the allegations to the person both before and after the initial appearance¹⁷. The article 60 para. 1 requirement for the Pre-Trial Chamber to satisfy itself that persons before it are aware of the crimes alleged against them is simply meant to ensure that no person is ignorant of the allegations actually being made.

After doing this, the Pre-Trial Chamber must go on and satisfy itself that the accused is aware of his or her rights under the Statute. At this stage, such a person is still only a suspect and accordingly the relevant rights which the Pre-Trial Chamber must address themselves to are those set out in article 55.

- 5 The right to apply for interim release is included in paragraph 1 as it is not specifically mentioned in article 55 or article 67 of the Rome Statute. Pre-trial detention is the exception to the norm as far as international treaties go and this is clearly the case in many jurisdictions¹⁸. The reason for this flows from the presumption of innocence and that persons (presumed innocent until the contrary is proved beyond reasonable doubt) should be neither incarcerated nor have restrictions imposed upon their liberty except for strong reasons.¹⁹

¹² *Ibid.*, article 29 para. 4.

¹³ Or, in brackets, against whom a decision to transfer had already been made by the custodial State.

¹⁴ The delegates remained divided on the issue of pre-transfer interim release and the article 29 para. 3 proposal agreed upon in: Preparatory Committee Decisions Dec. 1997, see note 11, p.31. That proposal remained unchanged through the Zutphen inter-sessional meeting (see article 59 paras. 3 and 4 Zutphen Draft and into the Rome Conference by way of the Preparatory Committee (Consolidated) Draft, p. 107, article 60 paras. 4 and 5.

¹⁵ By which, of course, I mean article 59 which deals with interim release by the custodial State and article 60 which deals with interim release and other preliminary matters by the Pre-Trial Chamber.

¹⁶ Such a person should already have been made aware of the crimes alleged against him either under article 58 para. 3 (b) if arrested on warrant, or under article 58 para. 7 (c) if that person appears pursuant to a summons.

¹⁷ See article 55 para. 2 (c).

¹⁸ See *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Motion for Provisional release filed by the accused Zejnil Delalic, 25 Sep. 1996, para. 19. The European Parliament has called for the Commission to revisit the case for establishing standards in relation to pre-trial detention through legislative action. 2013/2024(INI).

¹⁹ In *Prosecutor v. Aleksovski*, IT-95-14/1-T, Decision denying a request for provisional release, 23 Jan. 1998, an ICTY Trial Chamber emphasised the 'strictly exceptional, non-binding and subsidiary character of detention prior to sentencing'. They continued, 'Recourse to this measure must always be subject to the principles of necessity, suitability and proportionality. These principles are merely the emanation of the presumption of innocence which

II. Paragraph 2: Grounds for detention

Paragraph 2 flows directly from the articulation of the right expressed in the concluding words of paragraph 1 regarding the accused's right to apply to the Pre-Trial Chamber for interim release. Paragraph 2 sets out the considerations relevant in determining this issue. These are that the conditions set out in article 58 para. 1 continue to exist. If they do, then the person shall continue to be detained²⁰. Article 58 para. 1, as we have seen²¹ requires the Pre-Trial Chamber to find that there are reasonable grounds to show that the person has committed a crime within the jurisdiction of the Court²² and that the arrest of that person is necessary to ensure that the person appears at trial²³, to ensure that person does not obstruct justice, interfere with witnesses or tamper or interfere with evidence²⁴, or to ensure that the person is prevented from continuing with the commission of the alleged crime, or a related crime within the jurisdiction of the Court and arising out of the same circumstances²⁵.

requires that any limits placed on the freedom of the accused prior to the final sentence must be not only socially necessary but also tolerable', p. 4. Decision of the European Court of Human Rights, dated 26 July 2001 in the case *Ilijkov v. Bulgaria*, Application No. 33977/96 'Any system of mandatory detention on remand is per se incompatible with article 5 § 3 of the Convention....Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention.... the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.'

²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Judgement on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Decision sur la demande de mise en liberte provisoire de Thomas Lubanga Dyilo', ICC-01/04-01/06-824, 13 Feb. 2007, para 134; *Prosecutor v. Jean-Pierre Gombo*, Judgement on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', ICC-01/05-01/08 (OA2)', 2 Dec. 2009, para. 89. *Prosecutor v. Jean-Pierre Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido* Decision on the 'Requête de mise en liberte' submitted by the Defence for Jean-Jacques Mangenda, ICC-01/05-01/13-261, 17 Mar. 2014, para. 8, 'Detention is indeed an exception, as stated by the Defence, but one which is necessary, and shall therefore unfailingly apply, when the relevant statutory requirements are satisfied'. (Note, this decision is under appeal). However, see also *Prosecutor v. Laurent Koudou Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the 'Requête de la Défense demandant la mise en liberte provisoire du président Gbagbo'', ICC-02/11-01/11-278-Red, 26 Oct. 2012, para 79. 'It follows from this jurisprudence that if one or more of the risks listed in article 58(1)(b) of the Statute are present – as in the case at hand – the Pre-Trial Chamber nevertheless has discretion to consider conditional release. In this regard the Appeals Chamber observes that the Pre-Trial Chamber's discretion to consider conditional release must be exercised judiciously and with full cognizance of the fact that a person's personal liberty is at stake. [...] The test in paragraph 2 is clearly a different and less stringent test to that required under article 59(4) which requires a domestic court to find 'urgent and exceptional circumstances' before release is ordered. The reason for this disparity is clear. Under article 59, a State is to facilitate the arrest of a person suspected of committing serious violations of international humanitarian law. The guilt or innocence of that person is to be decided by the ICC. The drafters wished the State to have the right to grant pre-trial release in truly exceptional circumstances, but envisioned this being a rare occurrence. The restriction of 'urgent and exceptional circumstances' was meant to emphasise this concern in the clearest terms possible. The concern that without such a threshold clause States would be inclined to offer pre-trial release even where the risk of flight was great was also shared by the drafters of the ICTY Statute. Commenting on this, one Trial Chamber has explained that 'This concern, that once released an accused could escape the International Tribunal's grasp, does not derive from mere imagination. ... the International Tribunal is forced to rely upon the co-operation of national governments or entities, some of which have so far failed to surrender suspects upon request. As such, both the gravity of the offences charged and the unique circumstances in which the International Tribunal operates justify ... the requirements that he show exceptional circumstances to qualify for provisional release'; see *Prosecutor v. Delalić et al.*, note 18, p. 12, para. 20. In the context of the ICC, article 59 para. 4 is meant to help guard against and help expose any risk of bad faith on the part of the custodial State.

²¹ See Schlunck and Hall, *article 58*.

²² Article 58 para. 1 (a).

²³ Article 58 para. 1 (b) (i).

²⁴ Encompassed by the words 'To ensure that the person does not obstruct or endanger the investigation or the court proceedings' in article 58 para. 1 (b) (ii).

²⁵ Article 58 para. 1 (b) (iii).

- 7 Article 59 (detention in the custodial state) effectively creates a presumption in favour of custody by making detention at that stage the norm unless ‘there are urgent and exceptional circumstances to justify interim release’²⁶. The same language, however, is absent from article 60. Very properly, the Court has not sought to read into article 60 the onerous requirements of article 59(4)²⁷. Rather, it has recalled, with regard to article 60, the fundamental principle that deprivation of liberty should be an exception and not a rule²⁸.
- 8 The Pre-Trial Chamber must, therefore, simply be satisfied that the two limbs set out in article 58 para. 1 are met. Firstly, in relation to the requirement that the person have committed a crime within the Court’s jurisdiction, the criminal standard of beyond reasonable doubt is not required. All that is required is that the Prosecution satisfy the Pre-Trial Chamber that it has ‘reasonable grounds to believe’ that the relevant person has committed such a crime²⁹. If this is established, they have to proceed to consider whether an arrest appears ‘necessary’³⁰.

²⁶ Article 59 para. 4.

²⁷ In this regard, it is apt to recall that the ICTY amended rule 65 of its Rules of Procedure and Evidence on November 30, 1999 deleting any requirement of ‘exceptional circumstances’. The ICTR followed suit after its plenary meeting on May 26–27 2003. See Khan and Dixon, *Archbold International Criminal Courts* (4th edition) 7–257 and 7–288.

²⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Application for Interim Release, ICC-01/05-01/08-403 14 April 2009, para. 36; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Application for Interim Release, ICC-01/05-01/08-321, 16 Dec. 2008, para. 31 See also *Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, ‘Decision on the Conditions of the Pre-Trial Detention of Germain Katanga’, ICC-01/04-01/07-426, 21 April 2008, p. 6; *Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, Decision on the powers of the Pre-Trial Chamber to review proprio motu the pre-trial detention of Germain Katanga’, ICC-01/04-01/07-330, 18 March 2008, pp. 6–7; *Prosecutor v. Bosco Ntaganda*, Second Decision on Bosco Ntaganda’s Interim Release, ICC-01/04-02/06-284, 17 March 2014 para. 24; *Prosecutor v. Callixte Mbarushimana*, ‘Decision on the ‘Defence Request for Interim Release’’, 19 May 2011, ICC-01/04-01/10-163, para. 33. *The Prosecutor v. Bosco Ntaganda*, Dissenting Opinion of Judge Anita Usacka, 5 Mar. 2014, ICC-01/04-02/06-271-Anx1, para. 4 ‘[...] In addition to the right to be presumed innocent until proved guilty, the human right to personal liberty, the right to not be detained for an unreasonable period of time and the right to challenge the lawfulness of detention are of particular importance in the context of a decision granting or denying the release of a person being prosecuted [...]’. See also ECtHR case *Ilijkov v. Bulgaria*, Application no. 33977/96, 26 July 2001, at para. 85; ‘Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities’ *Idalov v. Russia*, Application no. 5826/03, 22 May 2012, para. 140.

²⁹ The phrase ‘reasonable grounds to believe’ (used in rule 47 of the ICTY/R Rules of Procedure and Evidence) has been defined in at least one decision of the ICTY. In reviewing the draft indictment against Rajić, IT-95-12-I, 29 Aug. 1995, Judge Sidwa explained that: ‘The word ‘reasonable’ is associated with what is fair, moderate, suitable, tolerable; that which is not immoderate or excessive. The expression ‘reasonable grounds’ is used; not overly convincing, substantial or conclusive grounds. Reasonable grounds, therefore, point to such facts and circumstances as would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime. To constitute reasonable grounds, facts must be such as ... raise a clear suspicion of the suspect being guilty of a crime. It predicates that all the ingredients of the offence are covered. The evaluation is to be made at the pre-trial stage and not what may turn out subsequently in the light of changing facts. ... The evidence, therefore, need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime’. (p. 212).

Related to this concept is that of ‘reasonable suspicion’. The European Court of Human Rights has held that ‘having a ‘reasonable suspicion’ presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence’. See *Fox, Campbell and Hartley v. U.K.*, (1990)182 ECtHR (ser. A) at 16. Noteworthy in this regard is *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgement on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, ICC-02/05-01/09-73, 3 Feb. 2010, para. 31, where the Appeals Chamber considered and did not controvert the Pre-Trial Chamber’s equation of the ‘reasonable grounds to believe’ standard with that of ‘reasonable suspicion’ under ECHR article 5(1)(C), although it subsequently held that the Pre-Trial Chamber had developed and applied the standard erroneously (para. 39). See also *Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor’s Application under article 58, 13 July 2012, ICC-01/04-02/06-36-Red, para. 16. See also note 18, *Prosecutor v. Delalić et al.*, paras. 21–24.

³⁰ The meaning of this phrase within the terms of article 58(1)(b) was considered in *Prosecutor v. Katanga et al.*, Judgement in the Appeal by Mathieu Ngujolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber 1 on the Application of the Appellant for Interim Release, ICC-01/04-01/07-572, 9 June 2008, para. 21, where the Appeals Chamber held that ‘[t]he question revolves around the possibility, not the inevitability, of a future occurrence.’ Detention, it appears, is far too likely to become the norm within such a framework, particularly as

If the Trial Chamber is not so satisfied, they shall release the person with or without conditions³¹. This is a little puzzling. If the Prosecution cannot even establish reasonable

the Appeals Chamber has endorsed the proposition that 'If a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond' (*Prosecutor v. Thomas Lubanga Dyilo*, (see note 20, para. 136). The phrase 'necessary' may require further elaboration by the Court in due course as it is somewhat nebulous in its current context. *Black's Law Dictionary* (6th ed.) states that 'necessary' must 'be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity', but cf. Garner, *A Dictionary of Modern Legal Usage* (OUP 1987): 'necessary' ... means 'essential'. In a different context, (under rule 54 of the ICTY's Rules of Procedure and Evidence, which empowers a judge or Trial Chamber to, inter alia, issue such orders as are 'necessary for the purposes of an investigation or for the preparation or conduct of the trial') the word 'necessary' was distinguished from something which is 'simply useful or helpful'. See *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision of the President on the Prosecutor's Motion for the Production of Notes between Zejnil Delalić and Zdravko Mucić ('Celebici' case), 11 Nov. 1996, para. 38. In the context of article 58, it appears that competing concerns may make the definition of what is considered 'necessary', a ripe area for litigation.). It is suggested that the approach sits uncomfortably with the Court's concurrent emphasis on the detained person's right to be presumed innocent (see *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled 'Decision on the defence's 28 December 2011 "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo"', ICC-01/05-01/08-2151-Red, 5 March 2012, para. 40.) The Appeals Chamber has also held that 'the apparent necessity of continued detention in order to ensure the detainee's appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together' (*Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for Interim release', ICC-01/05-01/08-323 (OA), 16 Dec. 2008, para. 55.)

³¹ The Pre-Trial Chamber is free to impose such conditions as it deems appropriate; it is not bound by national laws as under article 59 para. 7. Rule 119(1) details a non exhaustive list of conditions that the Court may impose. The list allows for the imposition, in appropriate circumstances, of conditions, that 'do not, per se, mitigate the risks described in article 58(1)(b) of the Statute' (*Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', ICC-01/05-01/08 (OA2), 2 Dec. 2009, para. 105).

According to the jurisprudence of the Appeals Chamber, conditional release will only be granted following the identification of a State willing to accept the accused as well as enforce related conditions (Ibid, para. 106). In circumstances where the Chamber is considering conditional release, and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State regarding its ability to enforce specific conditions identified by the Chamber. Further information may be required from the State if those observations do not allow the Chamber to make an informed decision as to whether to grant conditional release (*Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release', ICC-01/05-01/08-1626-Red, 19 Aug. 2011, para. 55).

Rule 119(3) includes a provision ensuring that before 'imposing or amending any conditions' relevant States are heard on the issue of provisional release. This could include both the sending state, as well as the State to which it is sought to provisionally release the person. A strict reading of rule 119 para. 3 reveals that there is no specific duty for the Court to consult in the event that interim release without conditions is imposed. It is suggested that good practice and common sense require that at least the receiving State be heard before interim release is ordered even absent a specific provision to this effect. (For comparative purposes see rule 65 (b) of the ICTY Rules of Procedure and Evidence. The Kingdom of the Netherlands set out its position on matters of provisional release in a letter to the Registrar of the ICTY dated 18 July 1996 (IT-95-14-T, p. 3036)). This is natural if a suspected person is to be released on another State's sovereign territory. The conditions likely to be imposed are constrained only by the imagination of the judges and may be tailored to the specifics of the case falling for consideration. In *Prosecutor v. Miljković et al.*, IT-95-9-PT, Decision on provisional release of the accused in Simić, 26 Mar. 1998, for example, 9 conditions were imposed on the accused to ensure his attendance at trial and to protect others. Of course, not all conditions will satisfy the Bench. In *Prosecutor v. Blaskić*, Order denying a Motion for Provisional Release, in the Blaskić case, for example, it was held that even an offer of a very high bail bond – 1 million dutchmarks in that case – was not sufficient to satisfy the chamber that the accused would appear at his trial 'because of the gravity of the criminal acts of which he stands accused; of the severity of the penalties to which he is liable ...', IT-95-14-T, 20 Dec. 1996, p. 5. It also appears at least arguable that custody could be required for a person's own protection and to ensure his safe surrender at court. A person identified as a criminal suspect, often accused or suspected of committing violent and massive crimes, could very well generate hostility. In the highly charged environment in the midst of conflict, or shortly thereafter, pre-trial arrest might justifiably be imposed for the person's own safety.

grounds that the person will either fail to attend Court as required, commit further offences, or interfere or otherwise obstruct the course of justice, why should that person's liberty be curtailed in any way? Rather, the Prosecution should have to satisfy the Court that the conditions imposed are necessary for one of the reasons stipulated in article 58 para. 1³².

- 10 The Court should, as a matter of principle, impose the least stringent conditions required to ensure the interests identified in article 58 para. 1 are protected. This is an essential corollary to the presumption of innocence³³. Pre-trial detention is not pre-trial or advance punishment. The deprivation or limitations on liberty should only be imposed if necessary in the interests of justice. The Prosecution should be put to proof as to why either pre-trial detention or release with conditions are, in fact, required. Rule 119(2) permits the Pre-Trial Chamber to amend the conditions imposed 'at any time'.
- 11 One final point deserves mention in relation to article 60 para. 2. Situations may well arise in which the Pre-Trial Chamber issues (pursuant to article 58 para. 1) a warrant of arrest and the relevant person is arrested by the custodial State, but granted interim release pending surrender in accordance with article 59 para. 4. That person may then be at liberty (or at least not incarcerated) pending transfer to the ICC.
- 12 Regardless of any decision by the custodial State on the issue of interim release or detention, the Pre-Trial Chamber's warrant of arrest remains active unless expressly withdrawn by them³⁴. Upon transfer, therefore, such a person will be brought before the Court and, still being subject to a warrant of arrest is entitled to apply for interim release pending trial³⁵. Such a person will not be entitled to interim release as of right, however, or simply because pre-transfer release had been granted by the custodial State³⁶.

Of course, such a person's actions whilst on interim release pending surrender may be extremely relevant either to the likelihood of that person surrendering to the ICC for trial, or

This, however, will not always be the case. Witnesses who appear to the court a substantial period after their alleged part in any offence could be released. Indeed, as we see from Serafinowicz (war crimes), Sawoniuk (war crimes) and Pinochet (crimes against humanity and torture) cases in the U.K., it is not impossible for such persons to be granted bail with conditions and for them surrender to court as required. Accordingly, conditional release may be appropriate in a whole host of circumstances.

³² Such a requirement would be consistent with the plain meaning of Rule 65 of the ICTY. Relevant also in this regard is *Prosecutor v. Kupreskić et al.*, IT-95-16-PT, Decision on Motion for Provisional Release, 15 Dec. 1997, para. 14, where it was held that:

'With respect to conditions of provisional release, the Trial Chamber notes that it has the power to impose such conditions upon the release of the Applicants as it deems appropriate in the circumstances. These include ... the imposition of such conditions as are necessary to ensure the presence of the Applicants for Trial and the protection of others'. (emphasis added).

³³ See note 21. Various commentators have justified or explained the more restrictive pre-trial release conditions in the ICTY/R Rules of Procedure and Evidence. For example, Ntanda Nsereko, observes that, 'Considering that the rules subscribe to the presumption of innocence, the provisional release restrictions are quite stringent. The only justification for this stringency that comes to mind is the gravity of the offences over which the Tribunal has jurisdiction and the desire to avoid a public outcry over allowing accused persons to be at large' (in: *Rules* 532). Similarly, Gallant, has stated that 'While such a rule [that pre-trial release is exceptional] would be harsh in a court with jurisdiction over ordinary crimes, it is reasonable given that the only crimes over which the Tribunal has jurisdiction are serious violations of international humanitarian law. The harshness of this rule, however, emphasises the need to ensure that persons are not arrested and detained except on reasonable (or probable) cause' (in: *Securing* 587). Perhaps in light of some of these concerns, Rule 65(b) was amended on 28 Oct 2011 so that, 'the existence of sufficiently compelling humanitarian grounds may now be considered in granting a release.'

³⁴ Article 58 para. 4.

³⁵ See article 60 para. 2.

³⁶ In *Prosecutor v. Kupreskić et al.*, see note 31, one Trial Chamber emphasised the prerogative right of the Chamber to impose pre-trial detention, notwithstanding that an accused may have apparently co-operated and voluntarily surrendered to the jurisdiction of court. They explained that:

'The suggestion that the voluntary surrender of the Applicants to the International Tribunal demonstrates their willingness to cooperate and defend themselves offers no guarantee that the Applicants will not abscond if released. The Trial Chamber is persuaded by the Prosecution's argument that if voluntary surrender were inevitably to lead to provisional release, this would then provide an opportunity for all accused to avail themselves of a 'free' look at the evidence (as well as an opportunity to identify and intimidate key witnesses) before absconding and becoming permanent fugitives'. (at para. 12, p. 7).

to the necessity of incarceration to protect any of the other interests listed in article 58 para. 1 (b). Notwithstanding this, the Trial Chamber will still have to consider whether the conditions set out in article 58 para. 1 continue to exist. If they find they do, and are not persuaded by such additional evidence or information that come to light, they must order that person be detained pending trial.

III. Paragraph 3: The requirement of periodic review

Paragraph 3 is expressed in mandatory terms and requires the Pre-Trial Chamber to periodically review its ruling on release or detention³⁷. It is responsible for reviewing this matter and may, therefore, raise it *proprio motu*, in addition to it being raised by the Parties.³⁸ It must consider any information relevant to the question of detention or release, including information not raised by either party³⁹. The Pre-Trial Chamber is empowered to vary any previous order made if satisfied changed circumstances so require⁴⁰. These changed circumstances could include changes to the nature or quality of the evidence that come to light⁴¹, or a change in the health of the person⁴².

³⁷ The ICTY has held that 'Reasonable suspicion [that a person has committed an offence] at the time of arrest is not, however, enough. To remain lawful the detention of the accused must be reviewed so that the Trial Chamber can assure itself that the reasons justifying detention remain. See ECHR Arts. 5.3, 5.4, ICCPR Arts. 9.3, 9.4, and the United Nations Body of Principles for the Protection of all persons under any form of detention or imprisonment, Principle 39'. See *Prosecutor v. Delalić et al.*, note 20, para. 24. The 'ruling' under review should be construed as the initial decision made under article 60(2) together with any subsequent modifications made to that decision under article 60(3) (*Prosecutor v. Jean-Pierre Bemba Gombo*, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", ICC-01/05-01/08-1019, 19 Nov. 2010, para. 46).

³⁸ The Pre-Trial Chamber also has a power, rather than an obligation, to conduct a *proprio motu* review in the absence of any application by the Defence for interim release (*Prosecutor v. Katanga et al.*, Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga, ICC-01/04-01/07-330, 18 March 2008, pp. 8–9).

³⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, see note 37, para. 52. The Pre-Trial Chamber is, however, obliged to give the parties an opportunity to submit their observations before it makes a decision, including in circumstances where it seeks to add a further ground of detention based on incidents proceeding "an application for interim release (*Prosecutor v. Jean-Pierre Bemba Gombo*, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled "Decision on the accused's application for provisional release in light of the Appeal Chamber's judgement of 19 August 2011", ICC-01/05-01/08-Red, 23 Nov. 2011, para. 64. Also relevant is the fact that, for each periodic review of detention, the Prosecutor is obliged to make submissions and inform the Chamber of any information of which he is aware that has a bearing on the question of detention or release (*Prosecutor v. Jean-Pierre Bemba Gombo*, see note 37, para. 51).

⁴⁰ The requirement of showing of a 'change in circumstances' was to justify the Pre-Trial Chamber varying a previous decision as to detention or conditions of release. It concerns 'either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary' (*Prosecutor v. Jean-Pierre Bemba Gombo*, Judgement on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', ICC-01/05-01/08-631-Red, 2 Dec. 2009, para. 60). It is possible for a ruling on detention made by one Pre-Trial Chamber to be revisited by a differently composed Pre-Trial Chamber under article 60(3). The Appeals Chamber has held that the change in composition does not affect the Pre-Trial Chamber's competence to conduct the review and that there is therefore no need for the reviewing Trial Chamber to make a decision 'de novo' (*Prosecutor v. Jean-Pierre Bemba Gombo*, see note 37, para. 56).

⁴¹ In *Prosecutor v. Delalić et al.*, see note 20, para. 24, the Trial Chamber set out various authorities which illustrate the international obligation for any detention to be periodically reviewed by a judicial body. With regards to any changes to the cogency of the evidence which come to light they stated that 'The Trial Chamber will review in a cursory manner, keeping in mind that this is not the proper time to consider the merits of the case, the strength of the Prosecution's case in determining whether the accused has shown an absence of reasonable suspicion'. The Trial Chamber emphasised the principle identified in various ECHR cases that 'the persistence of such [reasonable] suspicions is a condition sine qua non for the validity of the continued detention of the person concerned' (see for example *Stogmuller v. Austria*, Y.B. VII, 168, 188, (1964) p. 40).

⁴² See note 20, para. 86 to 87. 'Articles 60 and 58 of the Statute and Rule 119 of the Rules of Procedure and Evidence do not refer to the medical condition of the detained person when dealing with interim or conditional

- 14 The Pre-Trial Chamber may also review an earlier decision at the request of the Parties but it does not follow that there is an obligation to always grant an oral hearing. The only requirement is that provided for by Rule 118(3) which requires that a hearing must be heard once a year on the issue of interim release⁴³. The Pre-Trial Chamber's responsibilities are directed to itself. If it determines that the reasons for detention remain unchanged and that there has been no material change of circumstance, it may dismiss any application for interim release summarily.⁴⁴ This is a proper and appropriate safeguard to avoid frivolous or repeated applications being made on this issue by either side.
- 15 No time period for the timings of these periodic reviews are stipulated in the Statute⁴⁵. Rule 118 para. 2 however, requires, that the Pre-Trial Chamber review its decision on release or detention at least every 120 days. The periodic review by the Pre-Trial Chamber of its ruling on the detention of a person subject to a warrant of arrest under article 60 para. 3 'follows from, and is dependent upon, a ruling on a previous application by the detained person for provisional release'⁴⁶. Detention referred to in article 60 para. 3 must not be confused with the issuance of a warrant of arrest referred to in article 58⁴⁷. It is settled, therefore, that the time limits for periodic review run from the first application for interim release not from the issuance of the warrant for arrest. An additional safeguard, of course, is the ability of the Parties to raise the issue with the Bench at any time⁴⁸, and to argue that there has been a material change of circumstances which justifies a reconsideration of any previous ruling made under article 60 para. 2. After the initial appearance, the application for interim release must be in writing⁴⁹.
- 16 It is, perhaps, a little unfortunate that the drafting of article 60 para. 3 does not appear to cater for the possibility of a person appearing on summons before the ICC being subsequently incarcerated if changed circumstances so require. For example, a person may appear on summons and surrender to the jurisdiction of the Court, but, by the time of his initial appearance, (or anytime thereafter), credible information may emerge which discloses that that person is attempting, for example, to interfere with witnesses, destroy or tamper with evidence or preparing to abscond. In such a case, it appears that article 60 para. 3 cannot be used in order to incarcerate, or even impose or vary conditions against such a person. This is because periodic review under paragraph 3 relates to review of the decision arrived at pursuant to article 60 para. 2. Article 60 para. 2, of course, only relates to persons subject to a warrant of arrest issued by the Pre-Trial Chamber. If a person, therefore, appears pursuant to a summons, rather than on warrant, both paragraph 2 and paragraph 3 (being dependent and focused on the periodic review of a paragraph 2 decision) are inapplicable.

In such a case, what would probably be a prudent and appropriate course of action, would be for the Prosecutor to make a *de novo* article 58 para. 1 application for the issue of a

release. Nevertheless, the Appeals Chamber considers that medical reasons can play a role in decisions on interim release in at least two ways. First, the medical condition of a detained person may have an effect on the risks under article 58(1)(b) of the Statute, for instance on his or her ability to abscond, potentially negating those risks. Second, the medical condition of the detained person may be a reason for a Pre-Trial Chamber to grant interim release with conditions. As stated above, the Pre-Trial Chamber enjoys discretion when deciding on conditional release; the ill health of a detained person may be a factor in the exercise of its discretion'.

⁴³ In the ICTY context, there is no requirement to hold a hearing at all. An oral hearing will only be granted upon a showing of 'good cause'. See *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb. 1999, para 65. Also see Khan and Dixon, *Archbold*, note 29, 7–124.

⁴⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled "Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'", ICC-01/05-01/08-2151-Red, 5 Mar. 2012, para. 31; see note 37, para. 53.

⁴⁵ The Model Draft Statute for the ICC had recommended that such periodic reviews should be within a reasonable and clearly specified time. See commentary to article 60 in A.I.D.P., Model Draft Statute 92.

⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, see note 20, para 3 and para 94. Appeals Chamber, *Prosecutor v. Laurent Koudou Gbagbo*, see note 20, para. 23 to 24.

⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo*, see note 20.

⁴⁸ Rule 118 para. 2.

⁴⁹ Rule 118 para. 3.

warrant of arrest⁵⁰. It would be perfectly proper for the Prosecutor and the Pre-Trial Chamber to have recourse to article 58 para. 1 in this manner in order to protect the interests identified therein.

IV. Paragraph 4: The right not to be detained for an ‘unreasonable period prior to trial due to inexcusable delay by the Prosecutor’

Paragraph 4 obliges the Trial Chamber to ensure that no person is detained ‘for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor’⁵¹. Article 60 para. 4 of the Statute is independent of article 60 para. 2 in the sense that even if a detainee is appropriately detained pursuant to article 60 para. 2, the Pre-Trial Chamber shall consider releasing the detainee under article 60 para. 4 if the person is detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor⁵². The ‘unreasonable period’ and ‘inexcusable delay’ requirements are conjunctive in nature. If release is ordered, it will be to protect the rights of the detained person. It is not meant, and should not be used, as a punitive measure to punish the Prosecutor⁵³. Accordingly, even if the Trial Chamber finds that pre-trial detention has continued for an unreasonable period and this is caused by inexcusable delay by the Prosecutor, it is not obliged to release that person. Rather it will consider whether to do so in light of the circumstances of the case as a whole.

It is trite to say that pre-trial detention cannot extend beyond a reasonable period of time⁵⁴. What amounts to an unreasonable period of time, however, will vary according to the circumstances of the case. In this regard, the ICTY has found seven factors enumerated by the European Commission of Human Rights relevant when determining this issue.

⁵⁰ Article 58 para. 1 remains relevant and applicable as it allows such an application to be made by the Prosecutor ‘at any time after the initiation of an investigation’.

⁵¹ This is very different from the proposal present in Zutphen Draft, article 53 para. 6 (b), see note 14, pp. 102–3, which had suggested a limitation on pre-trial detention to a maximum of one year capable of being extended by a further year with the leave of the Pre-Trial Chamber (or Presidency) on the Prosecutor establishing that he or she would be ready for trial within that additional year and upon good cause being shown for the delay. The drafting of paragraph 4 that was finally agreed upon in Rome does not stipulate any definitive maximum period for pre-trial detention. When this text went to the drafting committee of the Rome Diplomatic Conference on 24 June 1994 (UN Doc. A/CONF.183/C.1/WGPM/L.2), it was accompanied by a footnote that stated that ‘this time frame should be addressed in the Rules of Procedure and Evidence’. The drafting in the Statute does have the advantage, however, in that it requires the Pre-Trial Chamber to look to the facts, peculiarities and complications of the case actually before it. It is conceivable that there may be cases, where even a years pre-trial detention may be unwarranted, excessive or unreasonable.

⁵² *Prosecutor v. Thomas Lubanga Dyilo*, see note 20, para 4.

⁵³ Other provisions are available to remove a Prosecutor if found to be in ‘serious breach of his or her duties’ (see article 46 para. 1). In cases where misconduct is less serious than that envisioned as requiring removal, the Prosecutor may be sanctioned (see article 47). The terms and nature of this have to be worked out in the Rules of Procedure and Evidence. It may be possible, therefore, that in an appropriate case, the Prosecutor or one of her staff may be sanctioned or liable for disciplinary measures should that be required. Cf. The Trial Chamber’s Formal Complaint to the Prosecutor concerning the conduct of the Prosecution in the ICTY case of Furundzia, IT-95-17/1-PT, 5 June 1998, para. 12. In regard to the use of article 71 to sanction a prosecutor see also *Prosecutor v. Lubanga*, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively Stay Proceedings Pending Further Consultations with the VWU’, 8 Oct. 2010, ICC-01/04-01/06-2582, para 59 to 60.

⁵⁴ See *Stogmuller v. Austria*, p. 40, cited in note 20, *Prosecutor v. Delalic et al.*, para. 26, where this issue is dealt with in detail. See also the *Prosecutor v. Laurent Gbagbo*, Dissenting Opinion of Judge Anita Usacka, against the Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled ‘Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute’, 29 Oct. 2013, ICC-02/11-01/11-548-Anx2, para. 14, wherein she considers that article 21(3) casts a broader obligation than article 60 (4), and in doing so imposes a requirement on the Pre-Trial Chamber to ensure the reasonableness of a period of pre-trial detention in deciding whether to adjourn the confirmation hearing or to decline to confirm the charges.

‘These factors are: (1) the actual length of detention; (2) the length of detention in relation to the nature of the offence, the penalty prescribed and to be expected in the event of conviction and national legislation on the deduction of the period of detention from any sentence passed; (3) the material, moral or other effects of detention upon the detained person beyond the normal consequences of detention; (4) the conduct of the accused relating to his role in delaying the proceedings and his request for release; (5) the difficulties in the investigation of the case, such as its complexity in respect of the facts or the number of witnesses or accused and the need to obtain evidence abroad; (6) the manner in which the investigation was conducted; and (7) the conduct of the judicial authorities’⁵⁵.

The Court, in contrast, has held that it is appropriate to determine whether the requirement of public interest outweighs the rule of respect for individual liberty when assessing the reasonableness of detention⁵⁶. Arguably, the effect of this is to replicate within article 60, para. 4 the requirements of release found within article 60 para. 2. It is suggested that the approach is inconsistent with the intention that article 60 para. 4 should operate independently of article 60 para. 2.

19 Article 60 para. 4 of the Statute, moreover, does not protect a person from unreasonable lengths of detention, but only unreasonable lengths of detention occasioned by inexcusable delay by the Prosecutor. There is no provision allowing for release to ameliorate a person’s detention for an unreasonable period caused by inexcusable delay occasioned by other factors, such as insufficiency in the number of judges, lack or insufficiency of court rooms, or budgetary and resource problems. This is unsatisfactory. It will not matter to accused persons whether their detention for an ‘unreasonable period’ is the fault of the Prosecutor, the judges, the Registry or any other third party. All organs of the Court should be clearly prohibited from unnecessary, never mind inexcusable delays, and paragraph 4 suffers from the defect of only focusing on inexcusable delay on the part of the Prosecutor.

20 What is inexcusable will depend upon the facts of the case, but could include such matters as failure of the Prosecutor to investigate adequately, or failure to comply with court orders, the Statute, or the Rules of Procedure and Evidence. Some commentators have criticised the requirement of ‘inexcusable delay’ as far too vague and uncertain a standard. The Prosecutor, they argue, should be held to higher standards and ‘delay by the Prosecutor should only be allowed in extremis, if at all’⁵⁷.

Inexcusable delay implies something more than unintentional delay, but it does not appear to be a readily definable term. What may be inexcusable if done by the Prosecutor, may be held to be excusable (or at least not inexcusable) if done by the defence or other third party. What is ‘inexcusable’ is intertwined with the responsibilities stemming from that Office. The Prosecutor brings a prosecution and is expected to pursue it diligently and to the highest standards. As such, whether the delay referred to in paragraph 4 is termed ‘unexcusable’, ‘inexcusable’ or ‘unreasonable’ may really be of little significance.

⁵⁵ Neuminster Case, 8 *ECTHR* (ser. A) pp. 23–24 (1968), cited in note 20, *Prosecutor v. Delalić et al.*, para. 26. Later in that paragraph, the Trial Chamber went on to cite the Schertenleib case, 23 European Commission of Human Rights (1981)137 where the European Commission of Human Rights had held that, on the facts of that case, two and a half years pre-trial detention had not been unlawful. This reasoning was adopted in *Prosecutor v. Kovačević*, IT-97-24-PT, Decision on Defence Motion for Provisional Release in Drljaca and Kovačević, 20 Jan. 1998, where that Trial Chamber cited the holdings in *Ventura v. Italy*, App. No. 7438/76, Commission Report 15.12.80 (European Commission of Human Rights) and *W. v. Switzerland*, 26 Jan. 1993, *ECTHR* (ser. A), No. 254 where periods of pre-trial detention of over four years were held not to be in breach of the European Convention of Human Rights.

⁵⁶ *Prosecutor v. Katanga et al.*, Third Review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07-965, 17 March 2009, para. 11, referring to *Prosecutor v. Thomas Lubanga Dyilo*, Second Review of the Decision on the Application for Interim Release of Thomas Lubanga Dyilo, ICC-01/04-01/06-924, 11 June 2007, p. 7. In the latter case, the Pre-Trial Chamber observed that the circumstances fulfilled the requirement of public interest, ‘in particular in relation to the need to ensure the appearance of the accused at trial and the security and protection of victims and witnesses’ (p. 7).

⁵⁷ See commentary to article 60 in A.I.D.P., Model Draft Statute 92.

That said, prosecuting massive violations of international humanitarian law is particularly difficult and delay can, of course, be occasioned for a variety of reasons. Access to witnesses, conducting site visits, obtaining documents and delays and difficulties in translation are just some of the problems intrinsic to the bid of establishing international criminal justice. Delay in many of the above will have nothing to do with any fault on the part of the Prosecutor, but will be an inescapable corollary to the commencement of an investigation. Some Trial Chambers of the ICTY have shown an understanding of these problems and have accepted that ‘the difficulties inherent in investigating a case thousands of kilometers away’ have to be borne in mind when determining the reasonableness of any continued pre-trial detention⁵⁸.

Paragraph 4 constitutes both the expression of a right for detained persons, and a trial management responsibility for the Pre-Trial Chamber. In cases where delay is approaching a level that may be considered ‘unreasonable’, and is being caused by ‘inexcusable delay’ by the Prosecutor, it is hoped that the Pre-Trial Chamber will notify the parties and order the Prosecutor to be Trial ready and comply with other necessary orders by fixed dates. It is reasonable that the parties be on notice as to the expectations of the Pre-Trial Chamber. In the context of the ICTY/R, status hearings are increasingly held and scheduling orders regularly issued in order to ensure all parties proceed in a prompt, reasonable and professional manner⁵⁹. This type of continuous oversight is the best way to ensure detention remains within the bounds of reasonableness.

V. Paragraph 5: The power to issue a warrant of arrest to secure attendance of a released person

Paragraph 5 allows a Pre-Trial Chamber to issue a warrant of arrest, if necessary, to secure the presence of a person who has been released. This is similar to Rule 65 (h) of the ICTY/R. The ICTY/R Rule, however, is broader in that it allows a warrant to be issued to secure the presence of either a released person, or a person who is otherwise at liberty. Accordingly, it would permit an arrest warrant to be issued where a person has escaped from lawful custody or is at liberty for any other reason. It appears that where a person is ‘for any other reason at liberty’ and a warrant is required, the Prosecutor will have to apply for such warrant under article 58 para. 1.

Rule 119(4) of the ICC Rules of Procedure and Evidence details the standard required before conditional release granted to a suspect is revoked. The Chamber must be ‘convinced’ that the suspect or accused has breached the conditions imposed. It seems that this effectively equates to proof beyond reasonable doubt, rather than the lesser standard of ‘substantial grounds to believe’ that the conditions have been breached.

⁵⁸ *Prosecutor v. Delalić et al.*, see note 20, para. 30.

⁵⁹ ICTY Rules of Procedure and Evidence, see note 3, rules 65*bis*, 65*ter*.

Article 61

Confirmation of the charges before trial*

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

- (a) Waived his or her right to be present; or
- (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

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

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

- (a) Object to the charges;
- (b) Challenge the evidence presented by the Prosecutor; and
- (c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
 - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
 - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

* The views expressed herein are those of the authors alone and do not reflect the views of the International Criminal Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Other relevant provisions: Rules 121 to 130, see Annex I. Regulations 31, 52 and 53 of the Regulations of the Court.

Literature: Ambos, K., 'International Criminal Procedure: "Adversarial", "inquisitorial" or mixed?' (2003) 3 *ICLRev* 1; *id.*, 'Critical Issues in the Bemba Confirmation Decision', (2009) 22 *LeidenJIL* 715; *id.*, 'The first confirmation decision of the International Criminal Court: Prosecutor v Thomas Lubanga Dyilo', in: Kotsalis L., Courakis N. and Mylonopoulos C. (eds.), *Essays in honour of Argyrios Karras* (Ant. N. Sakkoulas 2010) 979; *id.*, 'Confidential Investigations (Article 54(3)(E) ICC Statute) vs Disclosure Obligations: The Lubanga Case and National Law', (2009) 12 *NethCLR* 543; Ambos, K. and Miller, D., 'Structure and Function of the confirmation procedure before the ICC from a comparative perspective', (2007) 7 *ICLRev* 335; Bekou, O. and Bergsmo, M., 'The In-depth Evidence Analysis Charts at the International Criminal Court', in: M. Bergsmo (ed), *Active Complementarity: Legal Information Transfer*, (Torkael Opsahl Academic EPublisher 2011), 313; Bourguiba, L., 'Article 61', in: J. Fernandez, J. and X. Pacreau (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Vol. II (Pedone 2012) 1385; Büngener, L., *Disclosure of Evidence in International Criminal Trials – An Historical Overview* (Philipps-Universität Marburg, 2014), 260–400; Caianiello, M., 'Disclosure Before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?', (2010) 10 *ICLRev* 23; Cotte, B. and Saracco, M., 'Article 64', in: J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Vol. II (Pedone 2012) 1443–1471; de Beco, G., 'The Confirmation of Charges before the International Criminal Court: Evaluation and First Application', (2007) 7 *ICLRev* 469; de Hemptinne J., 'The creation of investigating chambers at the International Criminal Court: an option worth pursuing?', (2007) 5 *JICJ* 402; de Smet, S., 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC', in: C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 405; Fourmy O., 'Powers of the Pre-Trial Chamber', in: Cassese A. et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (OUP 2002) 1207; Friman H., Brady H., Costi M., Guariglia F. and Stuckenberg C.-F., 'Charges', in: G. Sluiter, H. Friman, S. Linton, S. Vasiliev and S. Zappalà (eds), *International Criminal Procedure* (OUP 2013), 381; Guhr A., 'Victim Participation During the Pre-Trial Stage at the International Criminal Court', (2008) 8 *ICLRev* 109; Marchesiello M., 'Proceedings before the Pre-Trial Chambers', in: A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (OUP 2002) 1231; Happold M., 'Prosecutor v Thomas Lubanga Dyilo, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007', (2007) 56 *ICLQ* 713; Heinze, A., *International Criminal Procedure and Disclosure* (Duncker & Humblot 2014) 408–421; Higgins G., 'Fair and expeditious pre-trial proceedings: the future of international criminal trials', (2007) 5 *JICJ* 394; Jackson J., 'Finding the best epistemic fit for international criminal tribunals: beyond the adversarial-inquisitorial dichotomy', (2009) 7 *JICJ* 17; Kreß C., 'The Procedural Law of the International Criminal Court in Outline. The Anatomy of a Unique Compromise', (2003) 1 *JICJ* 603; López Velásquez, 'M.P., 'Situación en la República de Costa de Marfil, caso de Fiscalía c. Laurent Gbagbo, decisión de la Sala De Cuestiones Preliminares I sobre la audiencia de confirmación de cargos en relación con artículo 61(7)(i) Del Estatuto de Roma, de 3 de junio de 2013', (2014) 2 *Anuario Iberoamericano de Derecho Internacional Penal* 153; Mariniello T. and Pons N., 'The confirmation of charges at the International Criminal Court: A Tale of Two Models', in: T. Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, 2015) 217; Miraglia M., 'The first decision of the ICC Pre-Trial Chamber: international criminal procedure under construction', (2006) 4 *JICJ* 188; Miraglia M., 'Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in *Lubanga*', (2008) 6 *JICJ* 489; Narantsetseg O. and Sevgili U., 'Role of the Victims in the Hearing Leading to the Confirmation of Charges in the Lubanga Case Before the International Criminal Court', (2006) 14 *African Yearbook of International Law* 171; Nerlich V., 'The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?', (2012) 10 *JICJ*

1339; Safferling Ch., 'The Rights of and Interests of the Defence in the Pre-Trial Phase', (2011) 9, *JICJ* 651; Safferling Ch., *International Criminal Procedure* (OUP 2012), 316; Scheffer D., 'A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence', (2008) 21 *LeidenJIL* 151; Stahn C., Olásolo H. and Gibson K., 'Participation of Victims in Pre-Trial Proceedings of the ICC', (2006) 4 *JICJ* 219; Stegmiller I., 'Confirmation of Charges', in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP, 2015) 891; Trendafilova E., 'Fairness and expeditiousness in the International Criminal Court's pre-trial proceedings', in: C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 441.

Content

A. Introduction/General remarks	1
I. Historical development	1
II. Purpose of the confirmation procedure	5
III. Confirmation proceedings held to date	9
B. Analysis and interpretation of elements	11
I. Paragraph 1	12
1. Setting the date for the confirmation hearing	12
2. Presence of the person charged	17
II. Paragraph 2: Absence of the person charged	19
III. Paragraph 3: Rights guaranteed to the suspect and obligations of the Prosecutor	25
1. Document containing the charges	29
2. Information of the evidence and disclosure procedure	45
IV. Paragraph 4: Amendment to or withdrawal of charges before the hearing ...	80
V. Paragraph 5: Prosecutor's obligations 'at the hearing'	86
VI. Paragraph 6: Rights of the suspect at the hearing	96
VII. Paragraph 7: The decision of the Pre-Trial Chamber	110
1. The confirmation hearing	111
2. The decision of the PTC – Introductory remarks	118
3. The decision confirming the charges	127
4. The decision declining to confirm the charges	134
5. The decision adjourning the confirmation hearing	136
VIII. Paragraph 8: Subsequent request for confirmation	143
IX. Paragraph 9: Amendment or withdrawal of charges	146
X. Paragraph 10: 'Warrant previously issued'	154
XI. Paragraph 11: Responsibility after the confirmation of charges	161

A. Introduction/General remarks

I. Historical development

- 1 The confirmation process provided for in article 61 is the mechanism by which the PTC determines whether the case should be sent to trial. The closest equivalent before the *ad hoc* tribunals is the so-called Rule 61 Procedure, introduced by the judges early in the work of the ICTY as a mechanism to appease those who felt there should be the capacity of *in absentia* trials.¹ Despite persistent denials,² it had many similarities with an *in absentia* procedure and was, in many respects, an honourable compromise between the different views of jurists from the Romano-Germanic and common law systems with respect to such proceedings.³ Rule 61

¹ On the rule 61 Procedure, see: King (1997) 29 *NYLSchLRev* 523; Quintal (1998) 36 *ColJTransnatL* 723; Thieroff and Amley Jr. (1998) 23 *YaleJIL* 231.

² *Prosecutor v. Rajić*, IT-95-12-R61, Review of the Indictment Pursuant to rule 61 of the Rules of Procedure and Evidence, 13 Sep. 1996: 'A Rule 61 proceeding is not a trial in absentia. There is no finding of guilt in this proceeding'. *Prosecutor v. Nikolić*, IT-95-2-R61, Review of Indictment Pursuant to rule 61, 20 Oct. 1995: 'The Rule 61 procedure ... cannot be considered a trial in absentia: it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal'.

³ The UN itself proposed, in November 2006, the creation of an international tribunal with the power to hold *in absentia* trials. See: Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, paras 32–33.

hearings to confirm indictments were held in 1995 and 1996 by the Yugoslavia Tribunal, but later abandoned, and they were never used at the sister tribunal for Rwanda. This may be because the Prosecutor became too busy with defendants who were actually in custody, and for whom no such confirmation was required. Indeed, the Prosecutor may also have believed that such hearings could only benefit the accused while offering little or no assistance in obtaining a conviction. The *ad hoc* tribunals also provide for judicial authorisation of the issuance of an indictment, but this is really no different in principle from the earlier stage in the proceedings under the Rome Statute by which a warrant of arrest or summons is approved by the PTC.

Establishment of the confirmation procedure within the procedural architecture of the Rome Statute is an important example of the increased judicial control by the judiciary over the Prosecutor that sets the ICC apart from other international criminal justice institutions. The confirmation of charges provision did not exist in the so-called Zutphen text. At the Preparatory Committee meetings held in March-April 1998, a group of delegations submitted a proposal containing an alternative text for procedural matters. The confirmation hearing was comprised in a document entitled 'Further option for articles 58 to 61',⁴ which it was decided would be used as a basis for discussions at the Rome Conference. Article 61 of this text was entitled 'Confirmation of the charges before trial'. The substantial parts of this draft provision were approved by the Rome Conference and became article 61 of the ICC Statute, with the exception of paragraphs 8 and 11, which were added during the Conference.

At the February session of the Preparatory Commission in 1999, article 61 was discussed extensively within the context of the drafting of the Rules of Procedure and Evidence, based upon proposals submitted by Australia and France.⁵ In the course of the debate, discussion papers proposed by the Coordinator of the Working Group on Rules of Procedure and Evidence, entitled 'Part 5 of the Rome Statute: Investigation and Prosecution',⁶ covering confirmation procedure and disclosure of evidence were introduced (hereafter referred to as the 'proposed Rules').

In national legislation, a procedure similar to that of article 61 is found, for example, in the German Criminal Procedure Code (§§ 199–211, 'Das Zwischenverfahren').⁷

II. Purpose of the confirmation procedure

The purpose of the confirmation procedure under article 61 is nowhere defined in the Court's statutory documents. In the first set of article 61 decisions, PTCs have repeatedly explicated their understanding of the purpose of the confirmation of charges process.

The PTC has been ascribed, first and foremost, a 'gatekeeper function' or 'filter function' according to which only those cases for which the Prosecutor has presented 'sufficiently compelling charges going beyond the mere theory of suspicion',⁸ shall proceed to trial. By implication, the article 61 mechanism 'is designed to protect the rights of the Defence against wrongful and wholly unfounded charges'.⁹ Distinguishing the cases that should go to trial

⁴ UN Doc. A/CONF.183/2/Add.1.

⁵ Proposals submitted by Australia – Draft Rules of Procedure and Evidence of the International Criminal Court (UN Doc. PCNICC/1999/DP.1) and Proposals by France concerning the Rules of Procedure and Evidence (UN Doc. PCNICC/1999/DP.7, and DP.8, Add.1 and Add.2).

⁶ UN Doc. PCNICC/1999/WGRPE/RT3 and RT4.

⁷ See, for example, Roxin and Schünemann, *Strafverfahrensrecht* (27th ed. 2012), 333; Rieß, P., *Das Zwischen- oder Eröffnungsverfahren im Strafprozess*, (2002) *JURA* 735.

⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, PTC I, 30 September 2008, para. 39; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, PTC I, 7 March 2011, para. 31; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 41; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 18.

⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tENG, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 37; reaffirmed in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-

from those that should not also ensures judicial economy insofar as it saves the Court's limited resources for those cases which deserve to be discussed at trial.¹⁰ The PTC's commitment to weed out the 'good cases' from the 'bad cases' is supported by the fact that to date proceedings against four suspects, namely *Abu Garda*, *Mbarushimana*, *Kosgey* and *Ali*, did not pass the article 61 stage. Moreover, confirmation of charges hearings have been adjourned twice (*Bemba* and *Laurent Gbagbo*) while the Prosecutor was requested to consider providing either further evidence or proposing a different legal characterization of the facts. This level of judicial scrutiny is in conformity with the intention of the drafters of the Rome Statute.

- 7 But, as formulated by PTC I in the *Banda/Jerbo* case, 'the relationship between the pre-trial phase and the trial phase of the proceedings goes beyond the filtering of cases by the Pre-Trial Chamber for the benefit of the Trial Chamber.'¹¹ When discussing the purpose of the confirmation process, it is also of much significance to point out that the article 61(7)(a) decision confirming the charges delineates the factual scope of the case to be discussed at trial. Indeed, the PTC's enquiry extends to ascertaining whether there is sufficient evidence supporting the facts as alleged by the Prosecutor. Hence, if there is no evidence or the evidence is too weak or irrelevant to support a particular factual allegation, the PTC will simply disregard it and as a result it will 'cut' the factual scope of the case. This rejection may concern a whole set of facts underlying a particular count (e.g. all facts allegedly supporting the crime of murder) but also discrete facts underlying a particular count (e.g. murder in villages X and Z but not in village Y). The facts relied upon and confirmed by the PTC may not be exceeded before the TC. This conclusion is deduced from a combined reading of articles 61(7)(a) and 74(2) as well as regulation 55 of the Regulations of the Court ('Regulations').

Article 74(2) provides that 'the decision at trial shall not exceed the facts and circumstances described in the charges and any amendments to the charges' (emphasis added), thus referring back to the confirmation process under article 61. By the same token, regulation 55 of the Regulations vests the TC with the authority to modify the legal characterisation of facts also 'without exceeding the facts and circumstances described in the charges and any amendments to the charges' (emphasis added). Again this provision draws the link with the confirmation process.

On the one hand, these provisions specify that it is the 'facts and circumstances' appearing in the confirmed charges, and in the confirmed charges alone, that determine the actual

01/04-01/07-717, PTC I, 30 September 2008, para. 63; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, PTC I, 8 February 2010, para. 39; *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, para. 31; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 41; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 40; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 52; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 18.

¹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC II, 15 June 2009, para. 28; *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, para. 31; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 41; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 40; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 52; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 18.

¹¹ *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, para. 32.

ambit of the case for the purposes of the trial. They circumscribe it, thus preventing the TC from exceeding that factual ambit. On the other hand, the specific reference in these same provisions to ‘the facts and circumstances’ makes it clear that it is only the factual, as opposed to the legal elements of the confirmed charges that have a delimiting function *vis-à-vis* the TC. As regulation 55 of the Regulations explicitly states, the TC is vested with unrestricted powers to retain, modify or otherwise amend the legal characterisation of the facts and circumstances appearing in the charges.¹² Finally, in delineating the factual scope of the case, the **accused is also informed** ‘in detail of the nature, cause and content of the charges’, as guaranteed under article 67(1)(a).

There is also a third dimension to the confirmation process relating to the proper **preparation for trial proceedings**. Most decisions taken at the pre-trial stage have an impact beyond the article 61 stage. A most prominent example is the confirmation decision filtering the charges. The article 61 procedure is not an end in itself; while it is a separate stage in the overall case proceedings, it forms a unity with the trial stage, should the charges be confirmed. The identity of the case (not necessarily its scope) remains the same in the pre-trial and trial stages. It is a matter of proper case management to solve as many preliminary questions as possible at the pre-trial stage so as to relieve the TC and the parties from addressing time-consuming issues prior and during the trial. While this function is nowhere expressly stipulated in the Statute, some chambers have alluded to or simply discharged their responsibilities in light of such a function.¹³

III. Confirmation proceedings held to date

To date, 12 confirmation proceedings emanating from five situations have been concluded.¹⁴ The cases listed below concern all suspects in relation to whom an article 61(7) decision was rendered at the time. The length of the confirmation proceedings, starting from the initial appearance until the issuance of the article 61(7) decision, varied, depending on the circumstances of each case. Save for the *Laurent Gbagbo* case, the confirmation proceedings lasted approximately between 8 and 14 months. Compared to the length of trial proceedings, it may be said that the time needed to conclude the confirmation proceedings has been kept

¹² *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the ‘Decision on the Confirmation of Charges’, PTC I, 7 March 2011, paras 32–35.

¹³ *Prosecutor v. Germain Katanga/Mathieu Ngujolo*, ICC-01/04-01/07-307, Decision on the Joinder of the Cases against German Katanga and Mathieu Ngujolo Chui, PTC I, 10 March 2008, 9; *id.*, ICC-01/04-01/07-2259, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’, AC, 12 July 2010, para. 3; *Prosecutor v. Abdallah Abakaer Nourain/Saleh Jerbo Jamus Banda*, ICC-02/05-03/09-169, Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’, TC IV, 1 July 2011, footnote 23; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, para. 25; PTC II in the *Ntaganda* case entertained two redaction requests after having issued the decision confirming the charges, see, for example, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-334-Red2, Redacted Decision on the Prosecutor’s Eleventh and Twelfth Applications for Redactions, PTC II, 17 July 2014. PTC II also requested the Prosecutor to submit progress reports on the status of evidence affected by confidentiality agreements and the consultation process with the information providers as a precautionary measure to anticipate and prevent any disclosure problems to continue past the confirmation stage, see *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-229, Decision Regarding the Non-Disclosure of 116 Documents Collected Pursuant to Article 54(3)(e) of the Rome Statute, PTC II, 27 January 2014; *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 27 February 2015, para. 44.

¹⁴ The proceedings involving *Abdullah Al-Senussi* were declared as inadmissible by PTC I. This decision was confirmed by the AC. As a result, no confirmation proceedings will take place before the ICC, unless the Prosecutor requests the decision to be reviewed in light of new facts (article 19(10)). Proceedings against *Muammar Mohammed Abu Minyar Gaddafi*, *Okot Odhimabo* and *Raska Lukwiya*, were terminated by the competent PTCs as the suspects had died. Confirmation proceedings are in preparation against *Dominic Ongwen*, and *Ahmad Al Fagi Al Mahdi*.

successfully to a level conforming to the nature and purpose of such proceedings. The following factsheet may guide the reader when going through the present commentary.

- *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), PTC I
Initial appearance: 20 March 2006
Charges confirmed: 29 January 2007 (ICC-01/04-01/06-803-tENG)
Victims participating:¹⁵ 4
- *Prosecutor v Germain Katanga/Mathieu Ngudjolo Chui* (ICC-01/04-01/07), PTC I
Initial appearance Katanga: 22 October 2007
Initial appearance Ngudjolo: 11 February 2008
Joinder of the cases (initially separate): 10 March 2008 (ICC-01/04-01/07-307)
Charges confirmed: 30 September 2008 (ICC-01/04-01/07-717)
Victims participating: 57
- *Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), PTC III/II
Initial appearance: 4 July 2008
Confirmation hearing adjourned: 3 March 2009 (ICC-01/05-01/08-388)
Charges confirmed: 15 June 2009 (ICC-01/05-01/08-424)
Victims participating: 54
- *Prosecutor v Bahar Idriss Abu Garda* (ICC-02/05-02/09), PTC I
Initial appearance: 18 May 2009
Charges declined to be confirmed: 8 February 2010 (ICC-02/05-02/09-243-Red)
Victims participating: 87
- *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (ICC-02/05-03/09)¹⁶, PTC I
Initial appearance Banda/Jerbo: 17 June 2010
Charges confirmed: 7 March 2011 (ICC-02/05-03/09-121-Corr-Red)
Victims participating: 89
- *Prosecutor v Callixte Mbarushimana* (ICC-01/04-01/10), PTC I
Initial appearance: 28 January 2011
Charges declined to be confirmed: 16 December 2011 (ICC-01/04-01/10-465-Red)
Mbarushimana released from ICC detention: 23 December 2011
PTC I decision upheld by AC: 30 May 2012 (ICC-01/04-01/10-514)
Victims participating: 130
- *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC-01/09-01/11), PTC II
Initial appearance Ruto/Kosgey/Sang: 7 April 2011
Charges confirmed for Ruto/Sang and declined to be confirmed for Kosgey: 23 January 2012 (ICC-01/09-01/11-373)
Victims participating: 327
- *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11)¹⁷, PTC II
Initial appearance Muthaura/Kenyatta/Ali: 8 April 2011
Charges confirmed for Muthaura/Kenyatta and declined to be confirmed for Ali: 23 January 2012 (ICC-01/09-02/11-382-Red)
Victims participating: 229

¹⁵ The number of victims reflected in this overview is that of victims participating at the confirmation stage. Victims may also apply later to participate at the trial or appeal stage of a case.

¹⁶ Proceedings against Jerbo were terminated post-confirmation by TC IV after having received evidence indicating that Jerbo was dead, see *Prosecutor v. Abdallah Banda Abaker Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-512-Red, Decision terminating the proceedings against Mr Jerbo, TC IV, 4 October 2013.

¹⁷ The Majority of PTC II confirmed the charges against Muthaura and Kenyatta. The Prosecutor withdrew the charges against Muthaura on 13 March 2013 and on 5 December 2014 the Prosecutor withdrew the charges against Kenyatta.

- *Prosecutor v Laurent Gbagbo* (ICC-02/11-01/11), PTC III/I
Initial appearance: 5 December 2011
Confirmation hearing adjourned: 3 June 2013 (ICC-02/11-01/11-432)
Charges confirmed: 12 June 2014 (ICC-02/11-01/11-656-Red)
Victims participating: 199
- *Prosecutor v Bosco Ntaganda* (ICC-01/04-02/06), PTC I/II
Initial appearance: 26 March 2013
Charges confirmed: 9 June 2014 (ICC-01/04-02/06-309)
Victims participating: 1,120
- *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (ICC-01/05-01/13), PTC II
Initial appearance *Bemba/Kilolo/Babala*: 27 November 2013
Initial appearance *Mangenda*: 5 December 2013
Initial appearance *Arido*: 20 March 2014
Charges confirmed: 11 November 2014 (ICC-01/05-01/13-749)
Victims participating: –
- *Prosecutor v Charles Blé Goudé* (ICC-02/11-02/11), PTC I
Initial appearance: 27 March 2014
Charges confirmed: 11 December 2014 (ICC-02/11-02/11-186)
Victims participating: 470

From a practical point of view, as of the moment the person is surrendered to the Court or appears voluntarily, preparations for the confirmation hearing commence. It is of crucial importance that the competent PTC anticipates the issues typically arising in the course of the article 61 proceedings as early as possible with a view to establishing a calendar and providing directions to participants. Some of these issues are set out in this commentary. Proper case management is key to the success of the confirmation process. As stated above, the purpose of the confirmation proceedings is not merely to confirm charges but the process also exists in order to prepare the case for trial. The Prosecutor's continued investigation post-confirmation, the long preparation phase prior to trial and the re-litigation over issues which have already been addressed by the PTC, are therefore factors which impede the commencement of trial in a reasonable time. Thus, an appraisal of the article 61 proceedings cannot be done without assessing the efficiency of the process as a whole, including its trial stage.

B. Analysis and interpretation of elements

Article 61 designs the process leading to the confirmation of charges process. It forms the heart of the pre-trial proceedings and governs the process before (subparagraphs 3 and 4), during (subparagraphs 1, 2, 5 and 6) and after the confirmation hearing (subparagraphs 7 to 11). Article 61 is further supplemented by rules 121 to 129 and regulations 52 and 53 of the Regulations. Victims' participation is regulated by the general provisions article 68(3), rules 85–93 and regulation 86 of the Regulations. Of particular importance is rule 92(3) which stipulates that the Court shall notify victims of the hearing of the confirmation of charges. It reads:

'In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the case in question.'

I. Paragraph 1

1. Setting the date for the confirmation hearing

- 12 Article 61(1) establishes that the confirmation of charges hearing be held ‘within a reasonable time’ after the person’s surrender or voluntary appearance. The date of the confirmation hearing is announced at the initial appearance¹⁸ of the suspect, as foreseen in rule 121(1):

‘A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67. At this first appearance, the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges. It shall ensure that this date, and any postponements under sub-rule 7, are made public.’

- 13 The confirmation hearing must take place ‘within a reasonable time’ after the suspect’s surrender or voluntary appearance before the Court. The same applies if the suspect appeared voluntarily following a warrant of arrest.¹⁹ What is considered ‘within reasonable time’ is not further explained in the Court’s statutory documents. What matters is that the time period until the confirmation hearing is held (as opposed to the entire length of case proceedings) complies with this standard. Having regard to article 67 and ‘internationally recognized human rights’,²⁰ this must be assessed on a case-by-case basis, taking into account the particularities of the case.
- 14 In recent practice, the date of the confirmation of charges was set by the Chamber without seeking in advance any observations. In scheduling the date, the Judges have been guided, most prominently, by the right of the suspect to have adequate time to prepare for the confirmation hearing and to be tried without undue delay. The particularities of the case may also influence the time schedule envisaged by the Chamber, such as its dormancy for several years and the need for the Prosecutor to prepare the case for the hearing,²¹ the number of suspects or the holding of parallel pre-trial proceedings.²² A further consideration may be the completeness of the Prosecutor’s investigation. Although PTCs raised this point only in the context of

¹⁸ Article 60(1). The suspect shall appear ‘promptly’ before the PTC upon arrival at the Court. The time period between the suspect’s arrival at the ICC detention centre to his or her initial appearance before the PTC ranges currently between one (e.g. *Bemba*), three (e.g. *Mbarushimana*), four (e.g. *Lubanga*, *Ntaganda*) to five days (e.g. *Katanga*, *Ngudjolo*, *Ongwen*, *Blé Goudé*, *Laurent Gbagbo*). Suspects ordered to appear following a summons, appear on the date that is set by the PTC.

¹⁹ As indicated in article 60(1), the Court distinguishes between three forms of how a suspect can appear before the Court: (i) arrest and surrender following a warrant of arrest; (ii) voluntary appearance following a warrant of arrest (e.g. *Ntaganda*); (iii) appearance following a summons to appear.

²⁰ The case-law of international human rights courts or the law of human rights bodies may prove to be only of limited assistance on this question as the reasonableness of the length of proceedings is assessed having regard to the entirety of the proceedings and not parts of it. The ECtHR developed criteria, in particular the complexity of the case, the person’s conduct and that of the competent authorities, in light of which this question is examined. They may equally prove useful for the purpose of the reasonableness standard laid down in article 61(1). See ECtHR, *Case of Philis v. Greece* (No 2), Judgment of 27 June 1997, Application no. 19773/92, para. 35; *ibid.*, *Case of Gast and Popp v. Germany*, Judgment of 25 February 2000, Application no. 29357/95, para. 70; Human Rights Committee, General Comment No. 32, 23 August 2007, CCPR/C/GC/32, para. 35; IACtHR, *Case of Genie-Lacayo v. Nicaragua*, Judgment of 29 January 1997, Series C No. 30, para. 77, *ibid.* *Case of Valle Jaramillo v. Colombia*, Judgment of 27 November 2008, Series C No. 192, para. 155.

²¹ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-T-10-ENG, Transcript of Hearing, PTC II, 26 January 2015, 13.

²² *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-T-1-ENG, Transcript of Hearing, PTC II, 7 April 2011, 17; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-T-1-ENG, Transcript of Hearing, PTC II, 8 April 2011, 14.

postponing the hearing pursuant to rule 121(7),²³ this factor may also be considered when setting the date of the hearing in the first place, depending on the circumstances of the case.

As provided in rule 121(7), the date of the confirmation hearing may be postponed upon request of the Prosecutor or the suspect(s). Additionally, the Chamber may on its own motion decide to postpone the hearing.²⁴ In the Court's practice, all confirmation hearings have been postponed, with the exception of those in the two Kenya cases.²⁵ The reasons for postponing were manifold and related to, for example, providing additional time for the Defence or the Prosecutor to prepare for the hearing,²⁶ overcoming disclosure deficiencies,²⁷ inquiring into whether the suspect is fit to take part in proceedings,²⁸ the joinder of two cases,²⁹ the need to review evidence and (re-)investigate due to the unexpected voluntary surrender of the suspect,³⁰ the availability of a Judge,³¹ or that of a courtroom³². The AC explicitly recognized that '[w]here the Prosecutor requires more time to complete the investigation, rule 121(7) of the Rules of Procedure and Evidence permits him [or her] to seek a postponement of the confirmation of charges hearing'.³³

²³ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', AC, 30 May 2012, para. 44; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-73, Decision on the 'Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing' and Setting a New Calendar for the Disclosure of Evidence Between the Parties, PTC II, 17 June 2013, para. 32. *Prosecutor v. Dominic Ongwen*, Decision Postponing the Date of the Confirmation of Charges Hearing, 6 March 2015, ICC-02/04-01/15-206, para. 32. See also, mn 43.

²⁴ In case the hearing was adjourned pursuant to article 61(7)(c), or the Statute does not require a confirmation hearing ('article 70 proceedings', rule 165(3)), a calendar is set by the Chamber according to which the confirmation proceedings are (further) conducted and concluded. The parties may request, or the Chamber may decide on its own motion, to amend the calendar pursuant to regulation 35 of the Regulations. This has been the case, for example, in the *Laurent Gbagbo* case or the *Bemba et al.* case. The PTCs accepted as justification for amending the calendar, *inter alia*, the rendering of a case-related AC judgment (*Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-557, Decision on the 'Prosecution's request pursuant to Regulation 35 for variation of time limit to file updated document containing the charges, list of evidence and consolidated elements-based-chart', PTC I, 8 November 2013, para. 11) or delayed State cooperation (*Prosecutor v. Jean-Pierre Bemba et al.*, ICC-01/05-01/13-255, Decision on the 'Prosecution's request for variation of time limits pursuant to regulation 35 of the Regulations of the Court concerning the confirmation of charges' dated 3 March 2014, PTC II, 14 March 2014).

²⁵ Postponements in numbers: *Lubanga* case: twice; *Katanga/Ngudjolo* case: three times; *Bemba* case: twice; *Mbarushimana* case: twice; *Ntaganda* case: once; *Abu Garda* case: once; *Banda/Jerbo* case: once; *Laurent Gbagbo* case: twice; *Blé Goudé* case: once; *Ongwen* case: once.

²⁶ For example, *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-446, Decision on the Defence Request for Postponement of the Confirmation Hearing, PTC I, 25 April 2008; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-152-Red, Decision on the 'Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012', PTC I, 12 June 2012, para. 40.

²⁷ For example, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-170-tENG, Decision on the Postponement of the Confirmation Hearing, PTC III, 17 October 2008; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-98, Decision on the Prosecutor's requests for extension of time-limit, PTC I, 11 September 2009; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-378, Decision on 'Defence request to deny the use of certain incriminating evidence at the confirmation hearing' and postponement of confirmation hearing, PTC I, 16 August 2011.

²⁸ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-201, Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing, PTC I, 2 August 2012.

²⁹ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-307, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, PTC I, 10 March 2008.

³⁰ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-206, Decision Postponing the Date of the Confirmation of Charges Hearing, PTC II, 6 March 2015.

³¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-304, Decision on the Postponement of the Confirmation Hearing, PTC III, 2 December 2008.

³² *Prosecutor v. Abdallah Banda/Saleh Mohammed Jerbo*, ICC-02/05-03/09-81, Decision postponing the confirmation hearing and setting a deadline for the submission of the suspect's written request to waive their right to attend the confirmation hearing, PTC I, 22 October 2010, para. 2.

³³ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 (OA4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', AC, 30 May 2012, para. 44.

- 16 In principle, the confirmation hearing is held in public,³⁴ but parts of it may take place in closed session (*in camera*)³⁵ or private session³⁶ in order to protect witnesses, victims or other persons at risk, or the privacy of the suspect.

2. Presence of the person charged

- 17 Article 61(1), second sentence, states that the ‘hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel’. Despite its categorical wording, the Statute allows the PTC to hold a hearing without the presence of the person charged under certain conditions, as set out in sub-paragraph 2.
- 18 Victims accepted to participate in the confirmation of charges hearing are also entitled to be present or to be represented by counsel.³⁷ To this end, the Registrar shall notify victims or their legal representative of the date of the hearing and any postponement thereof (rule 92(5)(a)). In the Kenya cases, the **government** of the Republic of Kenya, which challenged the admissibility of the cases prior to the hearing, had requested to be also present during the confirmation hearing. The Chamber rejected this request arguing that the government of Kenya lacked procedural standing.³⁸

II. Paragraph 2: Absence of the person charged

- 19 In principle, it is not permitted to hold a trial in the absence of the accused (see article 63). Nevertheless, the Statute allows the PTC to hold a confirmation hearing under certain conditions, even if the person charged is not present. Paragraph 2 deals with such cases: When (a) the person charged has waived his or her right to be present, namely, after his or her surrender or voluntary appearance, he or she voluntarily decides not to present at the hearing; or (b) he or she has ‘fled or cannot be found’.

The text of paragraph 2 does not require that the suspect has first surrendered or appeared voluntarily before the ICC, and the initial appearance (article 60) has taken place in the presence of the suspect. Rather, it suggests that it is possible to hold a confirmation hearing even if the suspect is not yet arrested.³⁹ Hitherto the Court has not faced a situation as such.⁴⁰

- 20 The PTC may hold the confirmation hearing in the absence of the suspect, either at the Prosecutor’s request or on its own initiative.⁴¹ Such an *ex parte* hearing will be justified where

³⁴ Regulation 20 of the Regulations.

³⁵ ‘Closed session’ means that the hearing is not open to the public and there is no audiovisual stream broadcast outside the Court (regulation 94(e) of the Regulations of the Registry).

³⁶ In ‘private session’, the same regime as in ‘closed session’ applies with the sole difference that the blinds to the public gallery in the courtroom are not lowered. Hence, the audience in the public gallery can see into the courtroom but cannot hear (regulation 94(d) of the Regulations of the Registry).

³⁷ Article 68(3) of the Statute, rule 91(2).

³⁸ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-313, ‘Decision on the “Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings”’, PTC II, 1 September 2011; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-340, ‘Decision on the “Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings”’, PTC II, 20 September 2011.

³⁹ In case the PTC issued a summons to appear, it ordered the suspect to appear on a specified date before the Court (article 58(7)(b)), which is the initial appearance within the meaning of article 60(1). Should the person have been served with the summons and subsequently not appear for the initial appearance, the PTC may decide to issue a warrant of arrest pursuant to rule 119(5), third sentence, in conjunction with rule 119(4) and article 58, as the suspect did not comply with one of the obligations imposed.

⁴⁰ In the pre-trial phase of the *Banda/Jerbo* case, both suspects appeared for the initial appearance following a summons but waived their right to be present at the confirmation hearing. *Prosecutor v. Abdallah Banda/Saleh Mohammed Jerbo*, ICC-02/05-03/09-30, Decision Setting the Date for the Hearing of First Appearance, PTC I, 15 March 2010; *ibid.*, ICC-02/05-03/09-103, Decision on issues related to the hearing on the confirmation of charges, PTC I, 17 November 2010.

⁴¹ A request by the Defence of *Saif Al Islam Gaddafi* for the ‘commencement of the pre-confirmation phase’ (in terms of establishing a calendar for disclosure or processing of redactions and protection requests) in the ‘interests of judicial economy and the good administration of justice’ prior to the surrender of the suspect in The

the suspect has waived the right to be present (sub-paragraph (a)); or where the suspect has fled or cannot be found (sub-paragraph (b)). In the latter case, the PTC is to satisfy itself that all reasonable steps have been taken to secure the person's appearance and to inform him or her of the charges and the fact that such a confirmation hearing is to be held.⁴² If the person concerned is available to the Court but wishes to waive the right to be present at the confirmation hearing, he or she shall submit a written request to the PTC⁴³ which must be personally executed by the suspect;⁴⁴ the PTC may then hold consultations with the Prosecutor and the suspect, assisted or represented by his or her counsel (rule 124(1)). The PTC must satisfy itself that the suspect understands the right to be present at the hearing and the consequences of waiving the right (rule 124(2)). The PTC may also authorize and make provision for the suspect to observe the hearing from outside the courtroom through the use of communications technology, if required (rule 124(3)). Waiving of the right to be present at the hearing does not prevent the PTC from receiving written observations on issues before the Chamber from the suspect (rule 124(4)). If a suspect waives his or her right to be present at the confirmation hearing, this will concern the entirety of the hearing. The suspect may not waive his presence for parts of the hearing and 'pick and choose the days he wishes to attend'.⁴⁵ However, it has been considered possible for a suspect to attend the hearing and to waive his or her right midway causing the hearing to conclude in his absence.⁴⁶

Where the suspect has fled or cannot be found, the PTC is to ensure that a warrant of arrest for the suspect has been issued and, if the warrant of arrest has not been executed within a reasonable period of time after the issuance of the warrant, that all reasonable measures have been taken to locate and arrest the person (rule 123(3)). If the PTC intends to proceed, it may first hold consultations with the Prosecutor, at the request of the latter or on its own initiative, in order to determine whether there is cause to hold a confirmation hearing under the conditions set forth in article 61(2)(b). When the suspect has a counsel known to the Court, the consultations shall be held in the presence of the counsel unless the PTC decides otherwise (rule 123(2)).

Consultations of that kind were held for the first time in the *Kony et al.* case. Warrants of arrest had been issued against initially five suspects in 2005, who remain(ed) at large ever since.⁴⁷ On 16 January 2015, one of the suspects, *Dominic Ongwen* was surrendered to the Court and pre-trial proceedings commenced before PTC II. Shortly after his initial appearance, PTC II, acting on its own initiative, consulted the Prosecutor on whether confirmation

Hague was not considered to fall under the ambit of article 61(2), see *Prosecutor v. Saif Al Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-440, Decision on the 'Request for an order for the commencement of the pre-confirmation phase' by the Defence of Saif Al-Islam Gaddafi, PTC I, 10 September 2013, paras 24–25.

⁴² Rule 123(3).

⁴³ In the *Banda/Jerbo* case, the mere statement by counsel that the suspects are 'willing' to waive their right to be present at the confirmation hearing was not considered as sufficient. *Prosecutor v. Abdallah Banda/Saleh Mohammed Jerbo*, ICC-02/05-03/09-81, Decision postponing the confirmation hearing and setting a deadline for the submissions of the suspects' written request to waive their right to attend the confirmation hearing, PTC I, 22 October 2010, para. 9. As to the content of the written request required by the Chamber, see *ibid.*, para. 10.

⁴⁴ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-670, Mr Katanga's waiver of his right to be present at the Confirmation Hearing pursuant to Rule 124 of the Rules of Procedure and Evidence, Defence, 9 July 2008 (annex A contains Katanga's personal letter waiving his right); *Prosecutor v. Abdallah Banda/Saleh Mohammed Jerbo*, ICC-02/05-03/09-87, Second decision setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing, PTC I, 27 October 2010.

⁴⁵ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-302, Decision on the 'Defence Request pursuant to Rule 124(1) for Mr. William Ruto to Waive his Right to be Present for part of the Confirmation of charges Hearing', PTC II, 29 August 2011, para. 12.

⁴⁶ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-T-46-ENG, Transcript of Hearing, PTC I, 11 July 2008, 24.

⁴⁷ Proceedings against *Raska Lukwiya and Okot Odhiambo* were terminated due to their death; the warrant of arrest for them was rendered without effect. *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-248, Decision to terminate the proceedings against Raska Lukwiya, PTC II, 11 July 2007; *id.*, ICC-02/04-01/05-431, Decision terminating proceedings against Okot Odhiambo, PTC II, 10 September 2015.

proceedings against the other three co-suspects could also be held in parallel to the case against *Dominic Ongwen* and in their absence. Yet, the Prosecutor expressed reservations.⁴⁸ In its decision severing the case against *Dominic Ongwen* from that against *Kony et al.*, PTC II decided that there was no cause to hold a confirmation hearing *in absentia* against *Kony et al.* It added, alongside the reservations of the Prosecutor, that the Court ‘currently [lacked] the necessary resources to proceed against the other co-suspects *in absentia*’ as well as the ‘significant, but unjustified budgetary implications’. The Chamber also made reference to the impact of such course of action on victims participating in the case as only those victims would continue to participate at trial who are linked to the charges against *Dominic Ongwen* causing disappointment to those who would not continue participating in trial proceedings, if charges were to be confirmed.⁴⁹

- 23 If, after holding consultations under rule 123(2) or rule 124(1), the PTC intends to proceed with confirmation proceedings in the absence of the suspect, it shall so decide;⁵⁰ it must also rule on whether the suspect may be represented by counsel. Article 61(2), second sentence, provides that the suspect be represented by counsel where the PTC determines that this is in the ‘interests of justice’. The PTC shall, when appropriate, set a date for the hearing and make the date public (rule 125(1)). The decision must be notified to the Prosecutor and, if possible, to the suspect and his or her counsel (rule 125(2)).
- 24 If the PTC decides not to hold a confirmation hearing in the absence of the suspect, and the suspect is not available to the Court, the confirmation of charges may not take place until the suspect is available to the Court;⁵¹ the PTC may review its decision at any time, at the request of the Prosecutor or on its own initiative (rule 125(3)). If the PTC decides not to hold a confirmation hearing in the absence of the suspect, and the suspect is available to the Court, it shall order him or her to appear (rule 125(4)).

III. Paragraph 3: Rights guaranteed to the suspect and obligations of the Prosecutor

- 25 The Rome Statute carefully avoids using the term ‘accused’ throughout its provisions in Part V (‘Investigation and Prosecution’). Until the charges are confirmed, the person is generally referred to as ‘person’ or ‘suspect’.⁵² At trial, the person is referred to as the ‘accused’.⁵³ Once the person is convicted, he or she is referred to as the ‘convicted person’.⁵⁴
- 26 Rule 121(1), second sentence, clarifies that subject to the provisions of articles 60 and 61, the person shall enjoy the rights of an accused person set forth in article 67. Article 67(1)(a) stipulates that the accused ‘be informed promptly and in detail of the nature, cause and content of the charge’. Having been served with the summons to appear or the warrant of arrest, the suspect is not yet fully apprised of the facts of the case and their legal characterization on the basis of which the Prosecutor seeks to bring the suspect to trial. In

⁴⁸ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-424, Decision Severing the Case Against Dominic Ongwen, PTC II, 6 February 2015, para. 5.

⁴⁹ *Ibid.*, para. 7.

⁵⁰ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-T-46-ENG, Transcript of Hearing, PTC I, 11 July 2008, 24; *Prosecutor v. Abdallah Banda/Saleh Mohammed Jerbo*, ICC-02/05-03/09-103, Decision on issues related to the hearing on the confirmation of charges, PTC I, 17 November 2010.

⁵¹ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-424, Decision Severing the Case Against Dominic Ongwen, PTC II, 6 February 2015.

⁵² The term ‘person’ is referred to, for example, in articles 57(3)(b), 58 or 61. The term ‘suspect’ is a term introduced by and used in the Court’s case-law. During the confirmation hearing in the *Lubanga* case, PTC I admonished the Registry for referring to *Lubanga* as ‘accused’ in a newsletter and ordered that an explanatory note be drafted so as to inform the public about the status of *Lubanga* as a suspect in the proceedings at the time, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-32-ENG, Transcript of Hearing, PTC I, 10 November 2006, 36.

⁵³ Provisions of Part VI (‘The Trial’).

⁵⁴ For example, articles 78(1), 81(1)(b) or 84(1).

fact, prior to the submission of the copy of the document containing the charges (DCC) pursuant to article 61(3) the suspect is not yet officially ‘charged’. In explaining the relationship between the warrant of arrest and the DCC, PTC I in the *Mbarushimana* case stated:

‘There should be no requirement that the formulation of charges in the DCC strictly follow the factual and legal foundations of the warrant of arrest, especially in view of the fact that, in accordance with article 61(4) of the Statute and as the Appeals Chamber has held, the Prosecution can continue his investigations and amend or withdraw charges without the permission of the Pre-Trial Chamber prior to the confirmation hearing’ (footnote omitted).⁵⁵

Article 61(3) instructs the Prosecutor to provide the suspect, within a reasonable time 27 before the confirmation hearing, with two documents: (i) the DCC; and (ii) the list of evidence on which the Prosecutor intends to rely at the confirmation hearing.

Article 61(3) must be read in context with other provisions, in particular articles 67(2) and 28 101, rules 76, 77, and 121(2), (3), (5), (8) and (9) and regulation 52 of the Regulations. As a whole, they provide the legal framework under which the Prosecutor must perform his or her functions prior to the commencement of the confirmation hearing.

1. Document containing the charges

Sub-paragraph (3)(a) states that within a reasonable time before the hearing, the suspect 29 shall be provided with a ‘copy of the document containing the charges on which the Prosecutor intends to bring the person charged to trial’. This provision is further supplemented by rule 121(3) which provides that the ‘detailed description of the charges (together with a list of the evidence which the Prosecutor intends to present at the hearing) shall be submitted ‘no later than 30 days before the date of the confirmation hearing’.

The DCC has been described by the AC as ‘an assertion by the Prosecutor that he [or she] 30 intends to bring a person to trial for the specific crimes set out in the document’ (emphasis added).⁵⁶ The contents of the DCC are set out in the Regulations:

Regulation 52: Document containing the charges

The document containing the charges referred to in article 61 shall include:

- (a) The full name of the person and any other relevant identifying information;
- (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;
- (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

According to regulation 52(a) of the Regulations, the Prosecutor is to provide the full 31 **name of the suspect** (including aliases or different spelling of the suspect’s name) and other identifying information, such as date of birth, place of birth, marital status, nationality, or ethnicity.

Regulation 52(b) of the Regulations instructs the Prosecutor to provide a precise **statement 32 of the facts** in relation to two elements: (i) the crimes and (ii) the Court’s exercise of jurisdiction. The provision of jurisdiction-related facts will allow the PTC to ascertain its competence over the case, in particular with respect to the jurisdiction *ratione temporis* and

⁵⁵ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 88. See also *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-567, Decision on ‘Narcisse Arido’s Request for an Order Rejecting the Prosecution’s Document Containing the Charges (ICC-01/05-01/13-526-AnxB1) and for an Order to the Prosecution to File an Amended and Corrected Document Containing the Charges’, PTC II, 15 July 2014, 4–5. As the summons to appear is an alternative to the warrant of arrest, the same would apply for the description of facts in the summons.

⁵⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 (OA3), Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, AC, 13 October 2006, para. 51.

ratione loci.⁵⁷ The provision of crime-related facts sets out the foundation of the accusation: the alleged crimes, including their time and place (what happened, when and where and by whom). The notion of ‘crime’ within the meaning of regulation 52(b) of the Regulations must be understood broadly, encompassing not only the constitutive elements of the crimes in articles 6, 7, 8 (and *8bis*), *i. e.* the contextual elements and individual underlying acts, but also the form of participation as set out in articles 25 and 28. This interpretation is supported by the consideration that (i) the suspect is entitled to be informed promptly and in detail about the cause of the accusation (article 67(1)(a)) and to prepare his or her defence accordingly; and (ii) the crime and form of participation correlate to and shape each other.⁵⁸ In short, all facts that are necessary to fulfil the legal elements of the crimes and forms of participation, as proposed by the Prosecutor, must be set out in the DCC.⁵⁹ Those are the facts which the Prosecutor must prove against the requisite evidentiary threshold (here: article 61(7)). The inclusion in the DCC of background information or other information not directly supporting one of the legal elements of the crimes or forms of participation may be useful, in the sense that they ‘complete the picture’;⁶⁰ but they will regularly not constitute the ‘facts and circumstances’ of the case and, by implication, must not be proven against the requisite evidentiary threshold.⁶¹ Equally, any analysis of facts or evidence in the DCC is not part of the ‘facts and circumstances’ of the case.

33 The preparation of the statement of the facts in the DCC is the responsibility of the Prosecutor. In the **selection of the ‘facts’**, the Prosecutor is guided by the legal elements of the crimes and forms of participation. He or she will regularly select all those facts which are relevant and apt to prove these legal elements. The description must be as precise and detailed as possible; the mere allegation that a crime took place will not suffice. Lacking a precise description of the facts in the DCC, the suspect will not have been informed properly within the meaning of article 67(1)(a) and the PTC will not be in a position to exercise its functions under article 61(7). Hence, for example, if the Prosecutor purports that the crimes took place in the context of a ‘widespread or systematic attack’ conducted by a particular armed group, an account of all those compound or individual incidents conducted by that particular armed group must be set out in the DCC which will support the existence of a widespread or systematic attack within the meaning of article 7(1). If the Prosecutor alleges the suspect’s criminal responsibility of murder and attempted murder, then incidents of murder *and* attempted murder, where the act was not completed, must be set out in the DCC. In case the Prosecutor alleges that the suspect ordered the commission of crimes within the meaning of article 25(3)(b), such ‘order’ (the suspect said what, when, and where to whom?) must be described in the DCC.

34 Whereas the statement of the facts must be precise and with sufficient clarity, it may not be always possible, depending on the nature of the alleged proximity of the suspect to the events in question, to provide all the particulars. In quoting from the ICTY AC judgment in the *Blaškić* case, the ICC AC in its *Lubanga* judgment accepted different levels of specificity, depending on the proximity of the suspect to the events in question.

⁵⁷ It is to be noted, however, that the PTC will regularly have ascertained its jurisdiction already at the article 58 stage (and in case the Prosecutor activated his or her *proprio motu* powers, already at the article 15 stage).

⁵⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 26.

⁵⁹ In this regard, the specification of ‘material facts’ and ‘subsidiary facts’, as referred to in some PTC decisions and recently reiterated in the *Ongwen* case, is not helpful, as its precise content, when considered in light of regulation 52 of the Regulations, remains unclear. Moreover, such an additional qualification, not foreseen in the Court’s legal texts, is likely to provoke litigation between the parties with the potential to delay the start of the confirmation hearing. See *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-T-6-ENG ET, Transcript of Hearing, PTC II, 19 May 2015, 20–21. This interpretation was also rejected by the AC, see mn 130.

⁶⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 152.

⁶¹ See the explication of the AC, mn 40.

‘The jurisprudence of the *ad hoc* tribunals establishes different levels of specificity required of the charges depending on the form of individual criminal responsibility charged. This is addressed in the *Blaškić* Appeal Judgment in the following terms:

[...]

When alleging that the accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed “with the greatest precision.” However, where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the “particular acts” or “the particular course of conduct” on the part of the accused which forms the basis for the charges in question. [Footnotes omitted.]

In light of the foregoing, the Appeals Chamber finds that, in order to be able to prepare an effective defence, where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan, the accused must be provided with detailed information regarding (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused’s contribution; (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators. With respect to the underlying criminal acts and the victims thereof, the Appeals Chamber considers that the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances. In the view of the Appeals Chamber, the underlying criminal acts form an integral part of the charges against the accused, and sufficiently detailed information must be provided in order for the accused person to effectively defend him- or herself against them.⁶²

While the **degree of specificity** may vary, as seen above, in the circumstances of the case, 35 this does not mean that the Prosecutor can frame the factual allegations openly by using text elements like ‘including but not limited to’ [as if] reserving the right to add factual allegations post-confirmation with a view to providing the missing elements of the case. In several cases, PTCs have rejected such an attempt on the part of the Prosecutor in their decisions under article 61(7) which is instructive in this respect for the preparation of the DCC. PTC I in the *Mbarushimana* case held:

‘The Chamber is concerned by this attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.

For these reasons, the Chamber finds that the words “include but are not limited to” are meaningless in the circumstances of this case. Accordingly, the Chamber will assess the charges only in relation to the locations specified under each count contained in the DCC.⁶³

On the other hand, the reference to ‘Busurungi and surrounding villages’⁶⁴ has been 36 accepted as sufficiently precise given ‘the relatively narrow geographic area involved’.⁶⁵ In the

⁶² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, AC, 1 December 2014, paras 122–123.

⁶³ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, paras 82–83. This was further confirmed by PTC II in both Kenya cases, see *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 99, 101 and 103; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 106.

⁶⁴ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 84.

⁶⁵ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 84.

same vein, temporal references of ‘on or about’ a particular date have also been accepted as sufficiently precise.⁶⁶

- 37 As a result, the ‘facts’ as described in the DCC constitute the **factual scope of the case**. These are the factual allegations which the Prosecutor asks the PTC to confirm; these are the factual allegations against which the suspect will defend him- or herself in the confirmation hearing, and, in case and to the extent the charges are confirmed, at trial. By the same token, the Chamber’s task under article 61(7) is to assess only the facts set out in the DCC against the applicable law and on the basis of the evidence presented. The PTC is **not entitled** to go beyond the factual scope of the case set out in the DCC and add new facts it identified in the evidence with a view to supplementing an, in its view, otherwise incomplete narration of the events or closing the gap of an otherwise deficient DCC. The confirmation process is a review process and not a clarification process. Indeed, the PTC is not an investigative chamber, establishing the case for the Prosecutor. As PTC II pointed out in the *Katanga/Ngudjolo* case: ‘[It] is incumbent upon the Prosecutor to present, during the pre-trial phase, *all of the facts and circumstances relating to his case*’ (see mn 33).⁶⁷
- 38 A carefully drafted and comprehensive statement of facts in the DCC is of crucial importance to the success of the confirmation proceedings. It is incumbent upon the Prosecutor to specify those factual allegations that he or she wishes the PTC to confirm. Imprecisions in the DCC occasionally have translated into imprecision in the PTC decisions confirming the charges under article 61(7)(a); this notwithstanding the fact that the Judges, as judicial guarantors of the proceedings, can address any possible deficiencies in the DCC by either requesting the submission of a new DCC or rejecting the charges which are factually unsupported or imprecise.⁶⁸ In this context, it is worth noting that past attempts on the part of the defence to move the PTC to reject the DCC (or request the submission of an amended DCC) for an apparent lack of precision have regularly been rejected by the PTCs.⁶⁹ Addressing the concerns of the defence, the PTCs advised to read the DCC together with the Prosecutor’s list of evidence.⁷⁰ The same approach was followed in cases where the DCC failed to comply with formatting requirements.⁷¹
- 39 The DCC as such does not limit, however, the Prosecutor’s flexibility to withdraw or amend the charges, possibly in light of new evidence, as the existence of articles 61(4) and (9)

⁶⁶ For example, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC II, 15 June 2009, paras 67–68.

⁶⁷ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, PTC II, 21 October 2009, para. 23.

⁶⁸ Merely expressing ‘regret’ that the Prosecutor did not ‘plead with greater specificity the context in which the crimes (...) occurred’ is not sufficient, see *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 153. A positive development in this regard is the proactive approach of PTC I in the *Laurent Gbagbo* case to provide some directions to the Prosecutor as to the structure of the DCC, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-325, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, PTC I, 14 December 2012.

⁶⁹ See, for example, *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-648, Decision on the Three Defence’s Requests Regarding the Prosecution’s Amended Charging Document, PTC I, 25 June 2008, paras 23 *et seq*; *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-567, Decision on ‘Narcisse Arido’s Request for the Order Rejecting the Prosecution’s Document Containing the Charges (ICC-01/05-01/13-526-AnxB1) and for an Order to the Prosecution to file an Amended and Corrected Document Containing the Charges’, PTC II, 15 July 2014; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-315, Decision on the ‘Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE’ and the ‘Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute’, PTC II, 12 September 2011.

⁷⁰ See, for example, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 150; *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-648, Decision on the Three Defence’s Requests Regarding the Prosecution’s Amended Charging Document, PTC I, 25 June 2008, para. 21.

⁷¹ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-306, Decision on the ‘Defence request to exclude the Prosecution’s amended document containing the charges and amended list of evidence’, PTC I, 22 July 2011.

demonstrates. However, changes (also) to the factual basis of the case will require gradually increasing judicial intervention as proceedings progress so as to ensure the overall fairness and expeditiousness of the proceedings.

The ‘statement of the facts’ must be distinguished from the ‘evidence’ (article 69) which the Prosecutor adduces to *prove the facts* against the applicable law. The evidence is the means to prove the existence or non-existence of a particular fact. Likewise, the ‘statement of the facts’ [shall not] be conflated with the legal characterization of the (proven) facts. These notions, while triangularly interrelated, must be differentiated at all times. As the AC explained, albeit in a footnote:

In the view of the Appeals Chamber, the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67(1)(a) of the Statute.⁷²

The ‘statement of the facts’ in the DCC must be presented together with a **legal characterization** of the facts, pursuant to regulation 52(c) of the Regulations. As stated above, the DCC must not follow the legal characterization of facts as contained in the (request for the issuance of a) warrant of arrest or summons to appear (see mn 26).⁷³ The Prosecutor is free to re-consider the legal characterization of facts anew in light of additional facts surfaced during the ongoing investigation and evidence collected. Considering that the construction of many statutory provisions is not yet fully settled in the Court’s case-law, the legal characterization of facts may be viewed as a proposal by the Prosecutor with which the PTC (and later the TC) may agree or disagree. The legal characterization set out in the DCC is thus preliminary in nature and may change, pursuant to article 61(7)(c)(ii) (or regulation 55 of the Regulations of the Court at trial). What cannot change, however, in the course of the confirmation hearing, is the ‘statement of the facts’ as set out in the DCC.⁷⁴

Finally, the facts *and* their legal characterization together form the ‘charge’.⁷⁵ What the PTC assesses during the confirmation hearing are the facts and circumstances together with

⁷² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205 (OA15 & OA16), Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’, AC, 8 December 2009, footnote 163.

⁷³ In the *Lubanga* case, for example, the Prosecutor had requested and obtained a warrant of arrest for the crimes related to child soldiers committed in both international and non-international armed conflict. But subsequently, in the DCC the Prosecutor maintained that the crimes occurred in the context of a non-international armed conflict, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr, Decision on the Prosecutor’s Application for a Warrant of Arrest, PTC I, 10 February 2006, para. 85; *ibid.*, ICC-01/04-01/06-356-Anx2, Document Containing the Charges, Article 61(3)(a), Office of the Prosecutor, 28 August 2006, para. 7.

⁷⁴ The distinction between ‘facts’ and their ‘legal characterization’ has implications also for the use of regulation 55 of the Regulations of the Court, see *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulations 55(2) of the Regulations of the Court’, AC, 8 December 2009, para. 97.

⁷⁵ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 44; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 56; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-325, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, PTC I, 14 December 2012, para. 25; see also *Prosecutor v. Germain Katanga/Mathieu Ngujolo Chui*, ICC-01/04-01/07-1547-ENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, PTC II, 21 October 2009, para. 19;.

their legal characterisation proposed by the Prosecutor. The PTC's assessment and confirmation or rejection of the charges affects both elements.⁷⁶

- 43 The specificity of the DCC will also depend on the comprehensiveness and depth of the investigation. On several occasions it has been commented that the investigation be concluded at the stage of the confirmation hearing.⁷⁷ This approach will greatly assist in presenting a precise and comprehensive statement of facts in the DCC. This does not entail, however, that the Prosecutor is barred from continuing the investigation post-confirmation in certain circumstances as the ability to amend the charges after the confirmation stage pursuant to article 61(9). However, these investigative activities cannot be the rule but must remain of limited and exceptional nature, considering that, in case the charges are confirmed, the trial is supposed to commence soon thereafter. In other words, the (re-launching) of the investigation after the confirmation of charges may be a delaying factor with detrimental effects on the overall fair and expeditious conduct of the proceedings and the rights of the accused.⁷⁸ Thus adopting a rule stipulating that the investigation should be completed at the stage of the confirmation hearing would assist in expediting and streamlining the proceedings.
- 44 The DCC is notified to the suspect by way of personal service, pursuant to regulation 31(3)(c) and (4) of the Regulations of the Court.

2. Information of the evidence and disclosure procedure

- 45 In order to afford to the person charged a sufficient opportunity to prepare for the hearing, in addition to the notice of the charges in the DCC, he or she shall be 'informed of the evidence on which the Prosecutor intends to rely at the hearing'. This information is contained in a list of evidence which, together with the DCC, must be provided 'within a reasonable time' before the confirmation hearing (article 61(3)). At the Rome Conference, the Working Group considered that the concept of 'reasonable time' should be addressed in the Rules.⁷⁹ For the Prosecutor, such time-limits are provided in rules 121(3), (4) and (5). Accordingly, pursuant to article 61(3)(b) and rule 121(3) the Prosecutor must provide the suspect the DCC and the list of evidence no later than **30 days** prior to the commencement of the confirmation hearing.
- 46 The list of evidence is preceded by the evidence disclosure process between the parties which is a crucial aspect in the preparations for the confirmation hearing. Disclosure of evidence is an *inter partes* process between the Prosecutor and the suspect for whom a warrant of arrest or summons to appear has been issued (rule 121(2)). It is facilitated and implemented through the channel of the Registry. The evidence is then **communicated to the Chamber** (rule 121(2)(c), see mn 71 *et seq.*)⁸⁰ The disclosing party must indicate the level of

⁷⁶ See mn 128.

⁷⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rule of Procedure and Evidence', AC, 13 October 2006, para. 54; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', AC, 30 May 2012 (OA4), para. 44; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Dissenting Opinion by Judge Hans-Peter Kaul, PTC II, 23 January 2012, paras 44–52; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Dissenting Opinion by Judge Hans-Peter Kaul, PTC II, 23 January 2012, paras 49–57. Also arguing against 'two different investigation stages', *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-166, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal, PTC I, 23 June 2006, paras 38–39; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, paras 25 and 35.

⁷⁸ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to 'Decision on the Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', PTCII, 21 March 2013, paras 33–37.

⁷⁹ Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2.

⁸⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, paras 34 and 42; *Prosecutor v.*

confidentiality for each item. Unless otherwise indicated by the disclosing party or ordered by the PTC for reasons of protection, the evidence is public. It is stored in an electronic system, separate from the documents filed by participants and decisions of the Court, and can be accessed by the parties and the PTC at any time. Metadata to each item of evidence provide important information as to, for example, chain of custody or the date of collection. When disclosing, the parties follow the technical guidelines contained in the ‘e-Court protocol’.⁸¹ The evidence, together with the documents, decisions and transcripts of the hearings, constitute the particulars of the case as contained in the case record (rule 15).

As dictated by article 54(1)(a), the Prosecutor shall investigate incriminating and exonerating circumstances equally in order to establish the truth. The evidence collected, may therefore be incriminating or exculpatory or mixed in nature. The nature of the evidence has an impact on the **disclosure obligations** of the Prosecutor.

- Pursuant to rule 76(1), the Prosecutor shall provide the suspect with the statements of those witnesses on whom he or she intends to rely at the hearing together with a copy of any prior statement made by the witness. The statement of the prosecution witness shall be made available in the original and in a language which the suspect fully understands and speaks (rule 76(3)). This latter requirement conforms with the suspect’s right under article 67(1)(f).⁸²
- Pursuant to rule 77, the Prosecutor ‘shall permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or the control of the Prosecutor, which are material to the preparation of the defence⁸³ or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person’.
- Pursuant to article 67(2), the Prosecutor ‘shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence’.

While the Statute and Rules suggest a clear-cut classification of the evidence as ‘incriminating’ or ‘exculpatory’, practice reveals that such a classification, at the time of disclosure, can only be tentative and is subject to the intended use of a particular piece of evidence by either party.

The Rules differentiate between two different modalities according to which disclosure can be effectuated, depending on the nature of the evidence: disclosure *stricto sensu* whereby the disclosing party provides directly to the opposing party the evidence (rules 76, 79); and inspection which imposes on the relevant party the obligation to allow the opposing party to inspect relevant material (rules 77 and 78).⁸⁴ Both forms of disclosure are encompassed in the

William Samoei Ruto et al., ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 6 April 2011, para. 5; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-48, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 6 April 2011, para. 6; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 12 April 2013, para. 9; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-30, Decision establishing a disclosure system and a calendar for disclosure, PTC III, 24 January 2012, paras 14 and 61; *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-57, Decision establishing a system for disclosure of evidence, PTC I, 14 April 2014, para. 4; *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 27 February 2015, para. 10.

⁸¹ See for the latest use of the ‘e-Court protocol’, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 27 February 2015, annex 2. A Court-wide working group developed the unified e-Court protocol currently in use.

⁸² As to the standard of ‘fully understands and speaks’, see *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-522 (OA3), Judgment on the appeal of Mr. Germain Katanga against the decision of PTC I entitled ‘Decision on the Defence Request Concerning Languages’, AC, 27 May 2008.

⁸³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1433 (OA11), Judgment on the appeal of Mr. Lubanga against the Oral Decision of Trial Chamber I of 18 January 2008, AC, 11 July 2008, para. 77.

⁸⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, PTC I, 15 May 2006, 4; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/

notion ‘disclosure’ within the meaning of article 61(3) which does not follow the terminological differentiation of the Rules.⁸⁵

- 49 When the **disclosure process begins** at the earliest is not defined in the Statute or the Rules. Rule 121(2) has been interpreted to imply that the disclosure process begins after the initial appearance of the suspect.⁸⁶ There have been, however, instances where the PTC determined that disclosure of certain specified material to the defence, prior to the surrender of the suspect to the Court, was appropriate to safeguard his or her rights. Those instances were determined on a case-by-case basis, taking into account the circumstances of the case. In the *Gaddafi/Al-Senussi* case, where *Gaddafi* had not yet been surrendered to the Court, PTC I ordered the Prosecutor to disclose certain material to the defence of *Gaddafi*, subject to restrictions of disclosure warranted under rule 81. The material was deemed to fall potentially under article 67(2) or rule 77 and therefore considered to be essential for the exercise of *Gaddafi’s* procedural rights in the context of the proceedings before the Court.⁸⁷ The proposition that the material requested to be disclosed must relate to a particular ‘live issue’ pending before the Court was rejected.⁸⁸ Likewise, PTC I also confirmed that the exercise of the suspect’s rights under the Statute ‘cannot be made contingent upon’ the State’s failure to cooperate with the Court.⁸⁹ In the *Mbarushimana* case, the defence had requested ‘pre-surrender disclosure’ of certain material with a view to, *inter alia*, challenging the admissibility of evidence and the admissibility of the case. Two days after *Mbarushimana* was surrendered to the Court, the request was partly granted by PTC I and the Prosecutor was ordered to disclose material subject to restrictions of disclosure under rule 81 and article 72(1).⁹⁰
- 50 Moreover, the lodging of an admissibility challenge does not **suspend** the disclosure obligations of the parties. As PTC II held in the two *Kenya* cases, the admissibility challenge of the Republic of Kenya suspended the Prosecutor’s investigation related to the case (article 19(7)) but did not prevent the Prosecutor from discharging his disclosure obligations towards the defence.⁹¹
- 51 Disclosure of incriminating evidence upon which the Prosecutor intends to rely in the confirmation hearing is subject to the time-limit set in rule 121(3); it must be disclosed no later than 30 days prior to the date of the confirmation hearing.⁹² Evidence may still be disclosed after that time-limit but cannot be considered for the purpose of the article 61(7) decision

08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, para. 45.

⁸⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, para. 46.

⁸⁶ *Prosecutor v. Saif Al-Islam Gaddafi/Abdullah Al-Senussi*, ICC-01/11-01/11-440, Decision on the ‘Request for an order for the commencement of the pre-confirmation phase’ by the Defence of Saif Al-Islam Gaddafi, PTC I, 10 September 2013, para. 27.

⁸⁷ *Prosecutor v. Saif Al-Islam Gaddafi/Abdullah Al-Senussi*, ICC-01/11-01/11-392-Red-Corr, Corrigendum to Decision on the ‘Defence request for an order of disclosure’, PTC I, 1 August 2013, paras 33–35 and 38.

⁸⁸ *Prosecutor v. Saif Al-Islam Gaddafi/Abdullah Al-Senussi*, ICC-01/11-01/11-392-Red-Corr, Corrigendum to Decision on the ‘Defence request for an order of disclosure’, PTC I, 1 August 2013, para. 36; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-47, Decision on the Defence Request For Disclosure, PTC I, 27 January 2011, para. 14.

⁸⁹ *Prosecutor v. Saif Al-Islam Gaddafi/Abdullah Al-Senussi*, ICC-01/11-01/11-392-Red-Corr, Corrigendum to Decision on the ‘Defence request for an order of disclosure’, PTC I, 1 August 2013, para. 32.

⁹⁰ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-47, Decision on the Defence Request For Disclosure, PTC I, 27 January 2011.

⁹¹ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-62, Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, PTC II, 20 April 2011, paras 8–10; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-64, Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, PTC II, 20 April 2011, paras 8–10.

⁹² Unless rules 121(4) and 121(5) apply.

(rule 121(8)).⁹³ The Statute or the Rules do not establish a particular deadline for the disclosure of **potentially exculpatory evidence**; rather such evidence must be disclosed ‘as soon as practicable’ pursuant to article 67(2). PTC II construed this to be at the ‘earliest opportunity after the evidence comes into the Prosecutor’s possession. Therefore, the Prosecutor shall disclose such evidence immediately after having identified any such evidence, unless some justifiable reasons prevent [the Prosecutor] from doing so’.⁹⁴ In other words, exculpatory evidence must be disclosed on a continuing basis and sufficiently in advance so that the suspect can effectively make use of such evidence in his or her preparation for the confirmation hearing.⁹⁵ Apparently, the Statute provides flexibility to the Prosecutor to withhold exculpatory evidence (at least for a certain while), as there is no mandatory deadline for disclosure of such evidence. However, article 67(2) must be understood, in fact, as establishing an exacting standard instructing the Prosecutor to disclose the evidence ‘as soon as practicable’, namely in a reasonable time before the expiry of the deadline concerning incriminating evidence. Withholding exculpatory evidence constitutes a breach of the Prosecutor’s statutory obligations and may lead to serious disruption of the proceedings.⁹⁶ Chambers, as the judicial guarantors of the fairness of the proceedings, must remain vigilant on this point and ensure that exculpatory evidence is disclosed in a timely manner. The unanimous position of PTCs in recent years has been to interpret these deadlines as indicative of the *minimum* time limits the parties can avail themselves to comply with their disclosure obligations. Accordingly, they consistently urged the Prosecutor (and the defence) to disclose evidence much in advance of the confirmation hearing and ‘not only on the date when the deadline indicated by the statutory documents expires’.⁹⁷ As mentioned above, the nature of a piece of evidence can be mixed, raising the question as to which deadline would apply. Where the nature of a particular item is mixed, considerations of fairness suggest that it is disclosed following the more stringent deadline imposed by the Court’s legal texts.

⁹³ As in the *Ntaganda* case where the Prosecutor disclosed evidence after the confirmation of charges decision was delivered, see *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-334-Red2, Redacted Decision on the Prosecutor’s Eleventh and Twelfth Applications for Redactions, PTC II, 17 July 2014.

⁹⁴ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 27 February 2015, para. 18. See also *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-62, Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties’, PTC II, 20 April 2011, para. 21; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-64, Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, PTC II, 20 April 2011, para. 21; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 12 April 2013, para. 17; ICC-01/04-02/06-64, Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties, PTC II, 17 May 2013, para. 28.

⁹⁵ PTC I in the *Lubanga* case had ordered the parties ‘to make every effort to agree on the frequency of the exchanges’ of exculpatory evidence and set a deadline in advance of the confirmation hearing to disclose such material, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, PTC I, 15 May 2006, 8–9, paras 4–6.

⁹⁶ For a discussion on the belated timing of disclosure of exculpatory evidence on the part of the Prosecutor see *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-233-Red2, Redacted Sixth Decision on the Prosecutor’s Requests for Redactions, PTC II, 3 July 2014, para. 23 and footnote 37 (original decision registered on 28 January 2014). In this case, to remedy the belated nature of disclosure, the defence was permitted to submit an amended list of its evidence for the confirmation hearing, past the time-limit established in rule 121(6). See also in the same case ICC-01/04-02/06-303-Red2, Redacted Decision on the ‘Prosecution’s Ninth Application for Redactions’, PTC II, 3 July 2014 (original decision registered on 14 May 2014).

⁹⁷ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 27 February 2015, para. 17; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 6 April 2011, para. 10; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-48, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 6 April 2011, para. 11; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-64, Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties, PTC II, 17 May 2013, para. 14; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-30, Decision establishing a disclosure system and a calendar for disclosure, PTC III, 24 January 2012, paras 37–38; *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-57, Decision establishing a system for disclosure of evidence, PCT I, 14 April 2014, para. 8.

- 52 In the *Kenya* cases, the Prosecutor challenged the Chamber's ruling to **disclose all article 67(2) or rule 77 evidence** in his possession prior to the confirmation hearing. He complained that such a requirement is overly 'onerous' and 'time- and resource-consuming' which would 'unfairly hamper' the Prosecutor's ability to prepare for the confirmation hearing; it also departs from the 'bulk rule' established in the *Lubanga* and *Katanga/Ngudjolo* cases. PTC II rejected such claims and held that a 'bulk rule' in respect of exculpatory evidence does not exist under the Court's statutory documents and, assuming such rule existed, has not been applied consistently in the case-law of the Court (article 21(2)).⁹⁸ Moreover, it refused to accept the 'onerous'/'time- and resource-consuming' argument as it related to the internal organization of the Office of the Prosecutor. The Chamber highlighted that the Prosecutor would have, in the course of the investigation, progressively analysed and reviewed material collected in order to be fully prepared to fulfil his duties under article 67(2) and rule 77.⁹⁹
- 53 The Defence receives the evidence of the case as disclosed by the Prosecutor or made available at inspection. The Defence has **no general right to access** the 'investigation file of the situation' as such.¹⁰⁰ It may, however, request the Prosecutor to disclose certain material of which it believes is in the possession of the Prosecutor. It may also **request** the Prosecutor to gather certain evidence in the course of the investigation, as it is incumbent upon the Prosecutor to investigate both incriminating and exonerating circumstances equally (article 54(1)(a)). The defence may also prompt the PTC to intervene under articles 56(3), 57(3)(b) and 67(2)¹⁰¹. Importantly, no obligation to investigate is put on the Defence by the Statute. Finally, reports, memoranda or other internal documents prepared by the Prosecutor, his or her assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure (rule 81(1)).
- 54 The pieces of evidence must be disclosed in one of the **working languages** of the Court, namely English or French (article 50(2)), unless otherwise provided in the Statute, the Rules, the Regulations, or authorised by the PTC. In case the document or material submitted is not in one of the Court's working languages, the disclosing party must provide a translation thereof, as stipulated in regulation 39(1) of the Regulations, and within the time limits of disclosure.¹⁰² In case of video material in a language other than the working languages of the Court, the translation requirement was held to be less stringent by accepting the material as visual aid for the purposes of the confirmation hearing.¹⁰³

⁹⁸ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-74, Decision on the 'Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters '(ICC-01/09-01/11-44)', PTC II, 2 May 2011, paras 25–26; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-77, Decision on the 'Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters '(ICC-01/09-02/11-48)', PTC II, 2 May 2011, paras 23–24.

⁹⁹ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-74, Decision on the 'Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters '(ICC-01/09-01/11-44)', PTC II, 2 May 2011, para. 27; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-77, Decision on the 'Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters '(ICC-01/09-02/11-48)', PTC II, 2 May 2011, para. 25.

¹⁰⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, PTC I, 15 May 2006, 16–20, paras 7–15; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, PTC III, 25 August 2008, para. 51.

¹⁰¹ Article 67(2) obliges the Prosecutor to disclose exculpatory evidence by virtue of this provision. The PTC will regularly not issue an order to this effect, unless the Prosecutor fails to comply with his or her obligation under article 67(2), or the Chamber must decide in case of doubt as to the application of said provision. *Prosecutor v. William Samoei Ruto, et al.*, ICC-01/09-01/11-196, Decision on the 'Defence Request for Disclosure of article 67(2) and rule 77 Materials', PTC II, 14 July 2011, para. 9.

¹⁰² For a nuanced approach in case the evidence emanates from the suspect him- or herself, see *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-177, Decision on the 'Defence request for an order requiring the translation of evidence', PTC II, 11 February 2014.

¹⁰³ *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-348, Decision on the 'Prosecution's Request to Exclude Certain Documents Submitted by the Defence', PTC II, 22 September 2011, para. 20.

Pursuant to rule 76(3), the statements of prosecution witnesses shall be made available in original and in the language the suspects fully speaks and understands.¹⁰⁴ **Translating witness statements** into the language which the suspect ‘fully understands and speaks’ has, at times, put the Court before significant logistical challenges, such as in the *Banda/Jerbo* case, where translations had to be effectuated into Zaghawa, a non-written dialect spoken in Darfur, Sudan. Mindful of the time needed to translate the evidence into a language other than the working languages of the Court, which may in turn seriously jeopardize the expeditiousness of the proceedings, PTC II developed the policy that only those portions of the evidence be translated for the suspect which are core to the preparation of the confirmation hearing. To this end, the defence will review the witness statements disclosed and thereafter request the translation of the evidence concerned within a specific time-limit (e.g. two weeks). If such request for translation is not made, PTC II considered this to be a ‘waiver of the suspect’s right to translation of the relevant evidence’.¹⁰⁵

The disclosing party is responsible for ensuring that the evidence disclosed is **complete**. In case the piece of evidence is incomplete, it may be re-disclosed within the time limits of disclosure. After the disclosure time limits, missing parts may not be added, unless the PTC grants an extension of time (see mn 51).¹⁰⁶ Evidence which remains incomplete is, however, not considered automatically as inadmissible, as this would be disproportionate and unfair. Rather, the disclosing part will be able to rely on the evidence as disclosed.¹⁰⁷

The role of the PTC during the disclosure process is that of ensuring that disclosure takes place under satisfactory conditions (rule 121(2)(b), first sentence) with full respect to the rights of the defence to meaningfully prepare for the confirmation hearing. To this end, the PTC may render any necessary decision and hold status conferences concerning disclosure of evidence for the purposes of the hearing. Rule 121(2) states:

‘In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued. During disclosure:

- (a) The person concerned may be assisted or represented by the counsel of his or her choice or by a counsel assigned to him or her;
- (b) The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person;
- (c) All evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.’

Although the Statute does not premise the initiation of the disclosure process on a decision of the PTC, it has been the practice that the PTC, acting under article 61(3) and rule 121(2),

¹⁰⁴ See footnote 82.

¹⁰⁵ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-64, Decision Establishing a calendar for the Disclosure of Evidence Between the Parties, PTC II, 17 May 2013, paras 21–22; and ICC-01/04-02/06-115, Decision on the ‘Demande de la Défense aux fins de traduction en Kinyarwanda de certains des principaux éléments de preuve’, PTC II, 24 September 2013, para. 12. *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 27 February 2015, para. 35. Conversely, there is no absolute right to have all documents and decisions contained in the case record translated, see recently, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 27 February 2015, paras. 31–33. PTC II also once rejected the request of the then suspect *Sang* to be provided with interpretation and translation into Kalenjin, as it was convinced ‘beyond doubt’ that *Sang* fully understood and spoke English, one of the working languages of the Court, see *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-42, Decision on Joshua Arap Sang’s Request for Translation and Interpretation into Kalenjin, PCT II, 6 April 2011.

¹⁰⁶ *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-330, Decision on the Defence Requests for Leave to Resubmit or Add Evidence and Related Requests, PTC II, 15 September 2011, paras 18, 28 and 34.

¹⁰⁷ *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-348, Decision on the ‘Prosecution’s Request to Exclude Certain Documents Submitted by the Defence’, PTC II, 22 September 2011, para. 26. In this case, the defence had disclosed documents in relation to one of which a page and in relation to another an annex were missing.

renders at the beginning of the confirmation proceedings a **framework decision** organizing disclosure and establishing a calendar with **staggered deadlines** for the disclosure of, in particular, incriminating evidence upon which the Prosecutor intends to rely at the hearing.¹⁰⁸ This became necessary to ensure that the defence has adequate time to prepare for the confirmation hearing and to avoid postponement requests by the defence on the grounds that the Prosecutor disclosed all incriminating evidence just 30 days in advance of the confirmation hearing. The staggered deadlines are determined following certain criteria, such as when the evidence was collected,¹⁰⁹ and whether the Chamber must decide on protective measures prior to disclosure (*i.e.* redactions of information) pursuant to rules 81(2) and (4) (see mn 62).

- 59 Full disclosure is the overriding principle; however, the right of disclosure is not absolute and **withholding information** during disclosure from the defence may be necessary, on an exceptional basis, so as to protect other competing interests.¹¹⁰ The Rules distinguish between two regimes: protective measures under **rule 81(2) and rule 81(4)**. Under rule 81(2), the Prosecutor may request to withhold certain material or information which must be disclosed in accordance with the Statute when ‘disclosure may prejudice further or ongoing investigation’.¹¹¹ Importantly, the PTC intervenes on this basis only upon the Prosecutor’s request;

¹⁰⁸ The Prosecutor is under a continuing obligation to disclose evidence of exculpatory nature (article 67(2)). ‘[Article 61(3) and rule 121(2)(b)] give the Pre-Trial Chamber important functions with respect to the regulation of the disclosure process prior to the confirmation hearing, which might involve, within the confines of the applicable law, the issuing of procedural directions to facilitate the disclosure process’, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 (OA3), Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence’, AC, 13 October 2006, para. 39.

¹⁰⁹ In the *Kenya* cases, the deadlines were set depending on when the evidence was collected by the Prosecutor: (i) any evidence collected until the application under article 58 was submitted; (ii) any evidence collected until the Government of the Republic of Kenya challenged the admissibility of the cases and the Prosecutor’s investigation was suspended as a result thereof; and (iii) any evidence collected after the filing of the admissibility challenge. See also *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-62, Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties’, PTC II, 20 April 2011; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-64, Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, PTC II, 20 April 2011. In the *Ntaganda* case, PTC II set two deadlines for disclosure relating to: (i) evidence collected until the Chamber issued the second warrant of arrest for *Ntaganda*; and (ii) evidence collected within approx. one year after the issuance of the decision on the second warrant of arrest for *Ntaganda*, see *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-64, Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties, PTC II, 17 May 2013. In the *Laurent Gbagbo* case, PTC III set three deadlines depending on whether (i) the evidence was collected prior to the submission of the article 58 application; (ii) the evidence was collected until the decision establishing the disclosure system was issued; and (iii) the evidence collected after the issuance of the disclosure decision, see *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-30, Decision establishing a disclosure system and a calendar for disclosure, PTC III, 24 January 2012, para. 39.

¹¹⁰ See also rule 76(4). *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 (OA3), Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, AC, 13 October 2006, paras 1 and 36; *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorization to Redact Witness Statements’, AC, 13 May 2008, para. 70.

¹¹¹ This information must relate to the ongoing or future investigative activities of the Prosecutor and may pertain, for example, to the time and location of interviews taken, names and signatures of investigators, and the identities of intermediaries, (field) interpreters, psycho-social experts or ‘potential prosecution witnesses’. See, for example, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-117-Red3, Redacted First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests, PTC II, 3 July 2014 (original decision registered on 1 October 2013), paras 55–62. As to the non-disclosure of identifying information of ‘potential prosecution witnesses’, see also *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-476 (OA2), Judgment on the appeal of Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorization to Redact Witness Statements’, AC, 13 May 2008, paras 1, 46 and 49. Identifying information of such individuals could be withheld from the defence if the PTC is satisfied that disclosure could lead to the intimidation of or interference with such individuals, thereby prejudicing the Prosecutor’s investigation.

hence it is for the Prosecutor seeking rule 81(2) protective measures to establish that such measures are warranted. Under rule 81(4), the Prosecutor may submit a request to the PTC soliciting the non-disclosure of specific information. In addition, the PTC, in discharging its functions under articles 57(3)(c) and 68(1), may also order protective measures on its own motion within the ambit of rule 81(4). More specifically, protective measures may be adopted to ensure the confidentiality of certain information in accordance with articles 54, 72 and 93, and to protect witnesses and victims,¹¹² and members of their families¹¹³ (article 68(1)). The applicability of rule 81(4) has also been expanded to protect 'any other [third] person put at risk on account of the activities of the Court'.¹¹⁴ As a matter of law, the application of redactions requires **prior judicial authorization**.¹¹⁵

However, when deciding on protective measures, due regard must be paid also to the rights of the defence. As article 68(1), fourth sentence, dictates: 'These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. As a result, '[w]hether any such non-disclosure of information should be authorized on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake'.¹¹⁶ The Court follows a **three-step test** in assessing any rule 81(2) or rule 81(4) request:¹¹⁷ (i) whether the disclosure of the

¹¹² Protecting witnesses or victims may be achieved through authorization that they remain anonymous vis-à-vis the defence. Apart from the name, signature and initials of the person concerned, any other identifying information may be redacted, such as the person's date and place of birth, marital status, name of spouse, number and name of children or other relatives, current and prior occupation, address, and educational background. See, for example, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-117-Red3, Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests, PTC II, 3 July 2014 (original decision registered on 1 October 2013), para. 37.

¹¹³ As is the case for witnesses and victims, any identifying information of family members will regularly be redacted, such as name and initials, address, and place and time of birth. The reason for adopting protective measures in this case is the fact that these individuals are regularly not involved in the Court's activities and may not know that one of their relatives is in contact or collaborates with the Court. See, for example, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-117-Red3, Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests, PTC II, 3 July 2014 (original decision registered on 1 October 2013), para. 46.

¹¹⁴ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorization to Redact Witness Statements', AC, 13 May 2008, paras 1 and 55–56 (see also dissenting opinion of Judge Pikis arguing that a new class of persons was added to rule 81 which was not grounded in law). This information may relate, for example, to the names of non-governmental organisations and their members or any other third person. The reason for protecting these entities or persons is the fact that they may be perceived as collaborating with the Court. Moreover, they will regularly not know that they have been mentioned in Court documents, such as witness statements, and do not benefit from any protection provided by the Court. Whether or not such information must be withheld from the defence will depend on the circumstances of the case and the justification provided by the Prosecutor. See, for example, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-117-Red3, Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests, PTC II, 3 July 2014 (original decision registered on 1 October 2013), paras 50–52.

¹¹⁵ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorization to Redact Witness Statements', AC, 13 May 2008, para. 60 ('The Appeals Chamber emphasizes that, when seeking redactions pursuant to rule 81(4), the Prosecutor may only redact information from material and evidence that it must disclose to the defence after obtaining authorisation from the competent Chamber to do so (...). As stated by the Pre-Trial Chamber, this course is consistent with the role of the Prosecutor as a party to the proceedings, as well as with the significant role of the competent Chamber to ensure that the rights of the suspect are protected'); see also *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-165-Red3, Redacted Third Decision on the Prosecutor's Requests for Redactions, PTC I, 3 July 2014 (original decision registered on 6 December 2013), para. 45.

¹¹⁶ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorization to Redact Witness Statements', AC, 13 May 2008, para. 66. *Ibid.*, ICC-01/04-01/07-521 (OA5), Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9', AC, 27 May 2008, para. 2.

¹¹⁷ The AC clarified that the three-step test applies *mutatis mutandis* to requests advanced under rule 81(2), *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the Appeal of the

information in question to the defence (as opposed to disclosing the information to the general public) would pose an objectively justifiable risk to the protected person (or interest);¹¹⁸ (ii) whether the protective measure is necessary, including whether there it is the least intrusive measure necessary to protect the person (or interest) concerned;¹¹⁹ and (iii) whether any such measure is proportionate in view of the prejudice caused to the suspect and a fair and impartial trial'.¹²⁰ The application of the three-step test is not a rigid mathematical exercise but it calls for a careful balance of the interests at stake. The higher the risk for the protected person, the lesser weight is to be given to the other two elements of the test. The following examples may illustrate this approach: should an 'objectively identifiable risk' be confirmed, for example, for a vulnerable third person, it is likely that the other two considerations of the test will not outweigh these security concerns. Conversely, where the content of the information to be redacted is evidently crucial for the defence, the Chamber will have to carefully balance the competing interests at stake and may consider an appropriate remedy to satisfy the rights of the defence.¹²¹ Of importance to our discussion is also the AC assertion that in the context of article 61 proceedings 'it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charge that could not be withheld prior to trial'.¹²² The standard developed by the AC is high: each individual redaction request must be individually assessed taking into account the specific facts and circumstances of the case.¹²³ Accordingly, the PTCs insist that the Prosecutor provide the necessary justification.¹²⁴ In the same vein, each decision authorizing the non-disclosure of information to the defence must state sufficiently the

Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', AC, 13 May 2008, paras 97–99; *ibid.*, ICC-01/04-01/07-476 (OA2), Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', AC, 13 May 2008, para. 59.

¹¹⁸ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorization to Redact Witness Statements', AC, 13 May 2008, para. 71.

¹¹⁹ This requirement is derived from the use of the word 'necessary steps' in rule 81(4). See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 (OA3), Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', AC, 13 October 2006, para. 37; *ibid.*, ICC-01/04-01/06-773 (OA5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', AC, 14 December 2006, para. 33.

¹²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-773 (OA5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', AC, 14 December 2006, paras 21, and 33–34; *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorization to Redact Witness Statements', AC, 13 May 2008, para. 64.

¹²¹ In this context, the AC added that '[the] Pre-Trial Chamber should carefully assess the relevance of the information in question for the Defence. If, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor, the Pre-Trial Chamber will need to take particular care when balancing the interests at stake'; *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorization to Redact Witness Statements', AC, 13 May 2008, para. 72.

¹²² *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorization to Redact Witness Statements', AC, 13 May 2008, para. 68.

¹²³ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorization to Redact Witness Statements', AC, 13 May 2008, para. 69.

¹²⁴ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-85, Second Decision on the Prosecutor's Requests for Redactions, PTC I, 7 September 2009, para. 7.

reasons upon which the PTC bases its decision.¹²⁵ Finally, due to the nature of the requests, the redaction process is conducted on an *ex parte* basis;¹²⁶ this does not exclude the possibility to notify the other party of the request and its legal basis, where appropriate.¹²⁷

Article 61 proceedings involve large quantities of documentary evidence and audio recordings/video material (see mn 89). Withholding information in documentary evidence means to redact certain information contained in the document.¹²⁸ Withholding information in audio recordings or visual material entails the deletion of the relevant part in the piece of evidence.¹²⁹ In an attempt to make the redaction process more efficient, the Single Judge in the *Laurent Gbagbo* case authorized the Prosecutor to implement redactions in exculpatory evidence without seeking prior approval from the PTC and sequentially to disclose the evidence or material as redacted by the Prosecutor. In order to safeguard the rights of the defence, the suspect is granted the right to challenge the redaction applied. Conversely, redactions in incriminating evidence were subjected to the judicial authorization process.¹³⁰ In the *Blé Goudé* case, this simplified redaction system was extended to incriminating evidence as well.¹³¹ Recently, in the *Ongwen* case, the Single Judge of PTC II, following the evolving practice of TCs, also adopted the approach to allow the immediate disclosure of evidence with redactions, regardless of its classification and without prior approval of the PTC, provided that the information subject to redaction falls into certain standard categories.¹³² In that decision, the Single Judge also set out the justification which will apply for each category concerned, meeting the minimum requirement of legal reasoning. Judicial intervention is only foreseen for redactions of information which do not fall under any of the indicated categories (such as the anonymity of a witness or the non-disclosure of an entire item of evidence) and in case the receiving party challenges a specific redaction, having previously exhausted the *inter partes* consultation process.¹³³ In this case, an application must be lodged with the PTC, while at the same time the evidence is disclosed in redacted form. As

¹²⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-773 (OA5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', AC, 14 December 2006, para. 20; *ibid.*, ICC-01/04-01/06-774 (OA6), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', AC, 14 December 2006, paras 31–33.

¹²⁶ Rule 81(2), second sentence. *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-78-Red3, Redacted Decision on the 'Prosecution's Request To Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses', PTC II, 3 July 2014 (original decision registered on 15 July 2013), para. 18 (with further references to case-law in the footnote).

¹²⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 (OA3), Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, AC, 13 October 2006, paras 66–67. PTC I, for example, ordered the defence to submit a confidential/public redacted versions of its *ex parte* redaction request, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-136, Decision on the 'Requête de la Défense aux fins de prorogation du délai d'expurgation, aux fins d'expurgation et aux fins d'attribution de pseudonymes aux témoins', PTC I, 1 June 2012, para. 9.

¹²⁸ This may extend to any corresponding text element contained in the translation of the evidence concerned or the metadata linked to the evidence.

¹²⁹ This may extend to any corresponding (draft or edited) transcription of the audio recordings presented in any language.

¹³⁰ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-30, Decision establishing a disclosure system and a calendar for disclosure, PTC III, 24 January 2012, paras 49–52.

¹³¹ *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-67, Second decision on issues related to disclosure of evidence, PTC I, 5 May 2014, paras 10–13.

¹³² *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-224, Decision on issues related to disclosure and exceptions thereto, PTC II, 24 April 2015. The recent developments on this matter are owed to the elaboration of so-called redaction protocols adopted by some TCs, the idea of which seemingly crossed over to the PTCs. For a recent adoption of a redaction protocol by TC VII, see *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-959, Decision on Modalities of Disclosure, TC VII, 22 May 2015, paras 7–22 (with further references to TC case-law) and annex.

¹³³ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-224, Decision on issues related to disclosure and exceptions thereto, PTC II, 24 April 2015, paras 6–7.

a result, the authorization of the PTC would be given retroactively,¹³⁴ an approach which was rejected by the existing jurisprudence of the AC and some PTCs. The immediate disclosure of redacted evidence between the parties, while admittedly expediting the disclosure process, has the downside that the PTC will not intervene correctively in the redaction process by ordering *proprio motu* redactions or rejecting unjustified redaction proposals prior to disclosure taking place. Moreover, it remains questionable whether the defence, upon having received the disclosed evidence, can effectively challenge the redactions applied not knowing the information that has been redacted in the first place, even if information concerning the category is provided. Yet, these decisions mark a trend on the part of Chambers to withdraw from the labour-intensive process of redaction authorisation and to shift the responsibility primarily on the shoulders of the disclosing party.¹³⁵

62 Before adopting the expedited redaction system, when establishing the disclosure calendar, PTCs paid attention that the redaction process is completed in due time so that the Prosecutor is in a position to comply with the deadlines for disclosure. Therefore, extra deadlines for submitting redaction requests and implementing redactions were regularly included in the calendar. Moreover, information withheld from the defence was to be kept under review and subsequently disclosed, should circumstances change.¹³⁶ In case evidence was to be re-disclosed due to the lifting of redactions, this was done within the overall time framework under the Statute and the Rules: in case of incriminating evidence, this was to be accomplished no later than 30 days before the commencement of the confirmation hearing; in case of exculpatory evidence, the Prosecutor was allowed to disclose even after the rule 121(3) deadline as he or she is under continuing obligation to disclose such evidence ‘as soon as practicable’.¹³⁷

63 In addition to establishing a disclosure calendar and rendering redaction decisions, the PTCs have occasionally addressed the issue of **confidentiality agreements** within the meaning of article 54(3)(e) which prevented the Prosecutor from disclosing in particular exculpatory evidence to the defence. In the *Lubanga* case, the Prosecutor’s non-disclosure of in particular exculpatory evidence as a result of such confidentiality agreements moved TC I to stay proceedings.¹³⁸ The AC, which upheld in 2008 TC I’s interpretation of the Prosecutor’s statutory obligations under article 67(2), emphasized that ‘whenever the Prosecutor relies on article 54(3)(e) (...) he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial’.¹³⁹ As

¹³⁴ *Ibid.*

¹³⁵ As to the consistency of this approach with existing AC jurisprudence on non-disclosure, see *Prosecutor v. William Samoei Ruto/Joshua Arap Sang*, ICC-01/09-01/11-458, Decision on the protocol establishing a redaction regime, TC V, 27 September 2012, paras 14–15.

¹³⁶ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-475 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorization to Redact Witness Statements’, AC, 13 May 2008, para. 73(c); *ibid.*, ICC-01/04-01/07-476 (OA2), Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’, AC, 13 May 2008, para. 64.

¹³⁷ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-117-Red3, Redacted First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests, PTC II, 3 July 2014 (original decision registered on 1 October 2013), para. 24; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-425, Decision on the Prosecution’s notification of changed circumstances regarding two witnesses, PTC I, 15 September 2011.

¹³⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, TC I, 13 June 2008.

¹³⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, AC, 21 October 2008, para. 44 et seq. As a consequence, PTC II in the *Ntaganda* case requested the Prosecutor to submit reports on the status of

a result, the Prosecutor has been requested in some cases to report regularly on the status of exculpatory evidence or otherwise material for the preparation of the defence, and to inform the PTC of any difficulties in securing the consent of the information providers.¹⁴⁰

Regarding the Prosecutor's statutory disclosure obligations (article 67(2) and rule 77) at the confirmation stage, PTCs explored alternative ways to overcome the prejudice caused to the defence by dint of those confidentiality agreements. PTC I in the *Katanga/Ngudjolo* case rejected the alternative of providing summaries of the article 54(3)(e) documents but accepted that, for the purpose of the confirmation hearing, evidence containing **analogous information** be disclosed *inter partes* and (possibly) relied upon instead. The Single Judge, acting on behalf of PTC I, considered the 'principle of analogous information' to be an effective mechanism for the Prosecutor to comply with the disclosure obligations in light of the limited goal of the confirmation stage. She held that the defence would be in a position to use the information at the confirmation hearing and prepare for trial, if charges were to be confirmed.¹⁴¹ Due to the disclosure system established by PTC I in this case, according to which the Chamber did not have access to exculpatory evidence (see mn 72), the analogy of information was not verified judicially. Moreover, the fact that other material of potentially exculpatory nature had been disclosed to the defence, sufficed, in the view of the Single Judge in this case, to ensure the effective use of the rights of the defence under article 61(6).¹⁴²

The Single Judge of PTC II in the *Ntaganda* case likewise accepted the disclosure of analogous information in case evidence could not be disclosed by virtue of confidentiality agreements. However, she ordered the Prosecutor to provide the Chamber, on an *ex parte* basis, with the article 54(3)(e) documents concerned in order for the Chamber to conduct an independent assessment of these materials and verify whether the analogous information provided to the defence (as also communicated to the Chamber) preserved its rights.¹⁴³ Upon assessment, the Single Judge would take a decision whether or not the non-disclosure of the documents caused prejudice to the rights of the defence for the purposes of the confirmation hearing.¹⁴⁴

evidence obtained under article 54(3)(e) confidentiality agreements, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-229, Decision Regarding the Non-Disclosure of 116 Documents Collected Pursuant to Article 54(3)(e) of the Rome Statute, PTC II, 27 January 2014; *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 27 February 2015, para. 44, as amended by the Single Judge subsequently in a status conference, ICC-02/04-01/15-T-6-ENG, Transcript of Hearing, PTC II, 19 May 2015, 5.

¹⁴⁰ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-259, Decision Establishing a Calendar in the Case against Germain Katanga and Mathieu Ngudjolo Chui, PTC I, 10 March 2008, 12; *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 27 February 2015, para. 44; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-20/06-229, Decision Regarding the Non-Disclosure of 116 Documents Collected Pursuant to Article 54(3)(e) of the Rome Statute, PTC II, 27 January 2014.

¹⁴¹ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, PTC I, 20 June 2008, paras 65–109. At the time, the Prosecutor had informed the Chamber that 255 documents were affected by confidentiality agreements that contained potentially exculpatory evidence for the defence. Of those, 24 documents could be disclosed after having obtained consent of the information provider; for 142 documents, analogous information was provided. Accordingly, the Chamber held that the Prosecutor had complied with disclosing the 'bulk' of exculpatory evidence to the defence.

¹⁴² *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, PTC I, 20 June 2008, para. 121.

¹⁴³ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-210, Order Regarding the 'Prosecution's Information of the Statue of Disclosure', PTC II, 15 January 2014, paras 9–10. The Prosecutor had indicated in a table the items of evidence that contained the analogous information.

¹⁴⁴ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-229, Decision Regarding the Non-Disclosure of 116 Documents Collected Pursuant to Article 54(3)(e) of the Rome Statute, PTC II, 27 January 2014; *ibid.*, ICC-01/04-02/06-247, Decision on the 'Prosecution's Provision of 56 Documents Collected under Article 54(3)(e)', PTC II, 6 February 2014.

66 Neither the Statute nor the Rules foresee a particular **format for the list of evidence**. The way it has been hitherto organized is to simply list, without more, the pieces of evidence on which the Prosecutor intends to rely. Considering the copious amount of evidence disclosed by the Prosecutor, and the absence of any reference to evidence in the DCC, PTCs have been exploring ways to assist the defence to understand the evidentiary basis on which the charges rest.

67 In the *Bemba* case, PTC III at the time observed that a listing of evidence alone does not inform the defence on why the Prosecutor relies on a particular piece and how it relates to the legal element the Prosecutor seeks to prove. Bearing in mind the rights of the suspect to ‘be informed promptly and in detail of the nature, cause and content of the charge’ (article 67(1)(a)) and to ‘have adequate time and facilities for the preparation of the defence’ (article 67(1)(b)), it sought to remedy this shortcoming by ordering the Prosecutor to provide an ‘**in-depth analysis**’ of the incriminating evidence relating the alleged facts with the constituent elements of each crime charged (context and individual act) and form of participation.¹⁴⁵ In addition, the Chamber highlighted that this ‘auxiliary instrument’ would streamline the disclosure process, prevent unnecessary delays that might negatively impact on the commencement of the confirmation hearing, prepare the parties for the discussion at the confirmation hearing and assist the Chamber in its preparation of the article 61(7) decision.¹⁴⁶ As regards the form of the analysis document, the Chamber instructed the Prosecutor that it be presented in form of a summary table, following a ‘law-driven’ approach by quoting the relevant information from the evidence which supports the factual allegations presented under a particular legal element.¹⁴⁷ It is obvious that such a presentation of the evidence reveals instantly the strength and weaknesses of the evidentiary record of the case. In order to be a useful and efficient tool for all concerned, the Chamber expressed its expectation that only *relevant* evidence be included in the analytical chart. The underlying rationale can be found in the following statement of PTC III:

‘In the Chamber’s opinion, the most important factor in both safeguarding the rights of the defence and enabling the Chamber to exercise its functions is not for the Prosecutor to disclose the greatest volume of evidence, but to disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory. In fact, disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings.’¹⁴⁸

¹⁴⁵ In fact, in its first decision ordering the Prosecutor to provide the defence with an ‘in-depth analysis’, the PTC had asked the Prosecutor to analyse *both* incriminating and exculpatory evidence, see *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, paras 68–70. In a later decision, the Single Judge, acting on behalf of the Chamber, limited the analysis to incriminating evidence, on which the Prosecutor would rely, see *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-232, Decision on the Submission of an Updated, Consolidated Version of the In-Depth Analysis Chart of Incriminating Evidence, PTC III, 10 November 2008, para. 8.

¹⁴⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, para. 72; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PCT II, 12 April 2013, para. 31; *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PCT II, 27 February 2015, para. 40. In relation to the decision in the *Ongwen* case, the Prosecutor was granted leave to appeal. The Appeals Chamber reversed the decision ordering an in-depth analysis chart, on the basis that the chamber in that case had not requested observations ‘on the utility’ of said document prior to ordering its submission. Yet, the competence of PTCs to order such documents was confirmed, see *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-251 (OA 3), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’, AC, 17 June 2015.

¹⁴⁷ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PCT II, 12 April 2013, para. 32. Larger portions of information were requested to be succinctly summarized. The Prosecutor was also ordered to include a hyperlink directing the reader to the evidence as uploaded in the electronic system of the Court.

¹⁴⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, para. 67.

The non-reference of certain material in the in-depth analysis chart does not exclude the material concerned from the evidentiary record of the case. Whether or not a piece of evidence can be relied upon by the party or be considered by the PTC must be determined with the assistance of the (amended) list of evidence.¹⁴⁹ In the words of PTC II, the in-depth analysis chart ‘does not have the procedural effect which is attached to the list of evidence’.¹⁵⁰ It is also clear from the reasoning provided by PTC II that the Prosecutor is not in any way impaired in the selection of incriminating evidence or its presentation at the confirmation hearing. Likewise, the defence is not impaired in its selection of evidence it deems apt to exonerate the suspect.

The practice initiated by PTC III/II was endorsed and refined in the *Ruto et al.*,¹⁵¹ *Muthaura et al.*,¹⁵² *Ntaganda*,¹⁵³ and *Ongwen*¹⁵⁴ case.¹⁵⁵ Subsequently, it was also followed by PTC III/I in the *Laurent Gbagbo* case and the *Blé Goudé* case which termed the document ‘Element-based chart’.¹⁵⁶ In the *Bemba et al.* case (article 70 proceedings), the Single Judge, considering that the proceedings were conducted in writing, left it to the discretion of the Prosecutor to decide whether she wishes to make use of the in-depth analysis chart for the presentation of the case.¹⁵⁷

PTC I in the *Abu Garda*, *Banda/Jerbo* and *Mbarushimana* cases pursued another route to assist the defence by instructing the Prosecutor to explain the *exculpatory* evidence. According to PTC I, the defence was likely to face difficulties in relation to the assessment and evaluation of all material disclosed by the Prosecutor under article 67(2) and rule 77.

¹⁴⁹ *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-348, Decision on the ‘Prosecution’s Request to Exclude Certain Documents submitted by the Defence’, PTC II, 22 September 2011, para. 14; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-308, Decision on Admissibility of Evidence and Other Procedural Matters, PTC II, 8 June 2014, para. 32.

¹⁵⁰ *Prosecutor v. Francis Kirimi Muthaura, et al.*, ICC-01/09-02/11-330, Decision on the Defence Requests for Leave to Resubmit or Add Evidence and Related Requests, PTC II, 15 September 2011, para. 25.

¹⁵¹ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PCT II, 6 April 2011, paras 21–23.

¹⁵² *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-48, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PCT II, 6 April 2011, paras 22–24.

¹⁵³ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PCT II, 12 April 2013, paras 29–32.

¹⁵⁴ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PCT II, 27 February 2015, paras 37–42.

¹⁵⁵ The practice of the in-depth analysis chart was also followed at the trial stage in the *Katanga/Ngudjolo* case, *Prosecutor v. Germain Katanga/Mathieu Ngudjolo Chui*, ICC-01/04-01/07-956, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, TC II, 13 March 2009; and the *Bemba* case, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-682, Decision on the ‘Prosecution’s Submissions on the Trial Chamber’s 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart’, TC III, 29 January 2010; for a constructive critique, see Cotte B./Saracco M, ‘Article 64’, in: Fernandez, J. and/Pacreau, X. (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Vol. II (Pedone 2012), 1456–1457; and Bekou, O./Bergsmo, M., ‘The In-depth Evidence Analysis Charts at the International Criminal Court’, in: M. Bergsmo (ed), *Active Complementarity: Legal Information Transfer*, (Torkael Opsahl Academic EPublisher 2011) 313.

¹⁵⁶ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-30, Decision establishing a disclosure system and a calendar for disclosure, PTC III, 24 January 2012, para. 40. In the *Blé Goudé* case, however, the Single Judge left it to the parties’ agreement whether an Element-based chart should be provided by the Prosecutor, *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-57, Decision establishing a system for disclosure of evidence, PTC I, 14 April 2014, para. 18. At the status conference, the parties informed the Single Judge that the Prosecutor would provide an Element-based chart three days after the submission of the DCC, *ibid.*, ICC-02/11-02/11-T-4-Red-ENG, Transcript of Hearing, PTC I, 1 May 2014, 18, lines 11–22. Notably, in the *Blé Goudé* case, the Single Judge also ordered that the relevance of each item of rule 77 and article 67(2) evidentiary material be explained to the defence, *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-67, Second decision on issues related to disclosure of evidence, PTC I, 5 May 2014, para. 14. Also it is worth noting that the PTC I case-law of the *Laurent Gbagbo* and *Blé Goudé* case, the Prosecutor only was instructed to submit an Element-based chart; the defence was under no such obligation.

¹⁵⁷ *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-134, Decision on the ‘Defence request for an in-depth analysis chart’ submitted by the Defence for Mr Jean-Pierre Bemba Gombo, PTC II, 28 January 2014, paras 7–8.

With a view to ensuring that the suspect can prepare adequately for the hearing (article 67(1)(b)), PTC I ordered that the Prosecutor provide a further elaboration of the material concerned by providing a concise summary of the content of each item and an explanation of the relevance of such item as potentially exculpatory.¹⁵⁸ In the view of PTC I, '[it] is hardly debatable that the mere transmission of allegedly exculpatory material, possibly in large amounts, for which no effort of indicating its relevance to the Case has been made, may have an adverse impact on the evaluation of the adequacy of the time given to the defence to prepare for the confirmation hearing'.¹⁵⁹ The same approach was followed by the Chamber in the *Banda/Jerbo* and *Mbarushimana* case.¹⁶⁰

71 The PTC neither collects evidence during the investigation, nor does it direct the Prosecutor (or the defence) as to which evidence to include in the list of evidence and to present at the hearing.¹⁶¹ It is for the Prosecutor to collect the evidence he or she deems best for the purposes of the confirmation hearing.¹⁶² Rule 121(2)(c) stipulates that all evidence disclosed between the Prosecutor and the defence for the purpose of the confirmation hearing shall be **communicated to the PTC**.¹⁶³ However, to this day the extent of such communication remains controversial in the jurisprudence of the PTCs. In essence, two interpretations stand diametrically opposed.

72 In the *Lubanga* and *Katanga/Ngudjolo* case, the Single Judge of PTC I held that only **incriminating evidence** on which the Prosecutor intends to rely should be communicated to the PTC.¹⁶⁴ Conversely, any exculpatory evidence and material falling under rule 77 (evidence 'material to the preparation to the defence') need not be communicated to the PTC.¹⁶⁵ The Single Judge considered this to be grounded in article 61(7) which directs the PTC to base its decision on the 'hearing' during which only certain evidence is presented by the parties.¹⁶⁶ She was also concerned that communication of all evidence would transform the nature of the confirmation hearing and impact the right of the defence to choose its evidence or remain silent. The key argument was the Judge's understanding of the role of the PTC:

'In the view of the single judge, if all materials disclosed by the Prosecution before the confirmation hearing, on which neither party intends to rely, were filed in the record of the case and presented thereat, the nature of the confirmation hearing would be significantly altered and the right of the Defence to decide whether to rely on such materials at the hearing would be infringed on.

¹⁵⁸ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-35, Second Decision on issues relating to Disclosure, PTC I, 15 July 2009, paras 13–15.

¹⁵⁹ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-35, Second Decision on issues relating to Disclosure, PTC I, 15 July 2009, para. 14.

¹⁶⁰ *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-49, Decision on issues relating to disclosure, PTC I, 29 June 2010, para. 5; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-87, Decision on issues relating to disclosure, PTC I, 30 March 2011, para. 11.

¹⁶¹ '[The] concept of 'disclosure' should not be confused with the concept of 'communication' of evidence to the Chamber. The Chamber is not a party to the proceedings and does not take part in the disclosure process', *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, ICC-01/05-01/08-55, para. 42.

¹⁶² *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-206, Decision Postponing the Date of the Confirmation Hearing, PTC II, 6 March 2015, para. 31; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 (O44), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', AC, 30 May 2012, para. 44.

¹⁶³ Communication of evidence means that the PTC has access to the evidence through the electronic system of the Court.

¹⁶⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, PTC I, 15 May 2006, 29, para. 41. The disclosure regime in the *Lubanga* case was applied in the *Katanga/Ngudjolo* case as well, *Prosecutor v. Germain Katanga/Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-12-ENG, Transcript of Hearing, PTC I, 14 December 2007, 4, lines 14–22.

¹⁶⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, PTC I, 15 May 2006, 31, para. 50.

¹⁶⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, PTC I, 15 May 2006, 31–32, paras 52–53.

Second, according to article 61(7) of the Statute, at the confirmation hearing the Pre-Trial Chamber must determine ‘whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged’. Therefore, the Pre-Trial Chamber is not a finder of truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued.

In the opinion of the single judge, it is not the role of the Pre-Trial Chamber to find the truth concerning the guilt or innocence of Thomas Lubanga Dyilo, but to determine whether sufficient evidence exists to establish substantial grounds to believe that he is criminally liable for the crimes alleged by the Prosecution. The single judge considers that it would be contrary to the role of the Pre-Trial Chamber to file in the record of the case and present at the confirmation hearing potentially exculpatory and other materials disclosed by the Prosecution before the hearing, if neither party intends to rely on those materials at that hearing’ (footnotes omitted).¹⁶⁷

This approach was followed in the *Abu Garda, Banda/Jerbo*, and the *Mbarushimana* case, 73 albeit by majority,¹⁶⁸ and later by the Single Judge of PTC III/I in the *Laurent Gbagbo* and *Blé Goudé* case.¹⁶⁹

In contrast to the above, PTC III in the *Bemba* case, in a unanimous decision of the full 74 bench, ordered the communication of **all evidence** disclosed between the parties. In its view, the reference to ‘all evidence’ in rule 121(2)(c) was not limited to the evidence on which the parties rely during the hearing.¹⁷⁰ Its approach was grounded on three arguments. First, the Chamber drew upon its authority to request evidence pursuant to article 69(3), second sentence, which allows the PTC ‘to request the submissions of all evidence that it considers necessary for the determination of the truth’.

‘The Chamber notes that, pursuant to rule 122(9) of the Rules, article 69 of the Statute shall apply *mutatis mutandis* at the confirmation hearing, subject to the provisions of article 61 of the Statute. Thus, the rules concerning evidence in article 69 of the Statute, including the authority of the Chamber to request the submission of further evidence, apply at the pre-trial stage of the proceedings, taking into account the specific purpose and limited scope of the confirmation of the charges. To that end, it needs to be noted that the application of article 69(3) of the Statute at the confirmation phase is restricted since, in contrast to the trial phase, the Chamber does not have to determine the guilt of the person prosecuted beyond reasonable doubt. It has simply to determine whether there are substantial grounds to believe that the person prosecuted committed the crimes charged. Finally, the Chamber considers that the authority it derives from article 69(3) of the Statute at the pre-trial phase is crucial for the determination of the scope of the charges to be retained if the case is sent to trial.

The Chamber further emphasises that the search for truth is the principal goal of the Court as a whole. In contributing to this ultimate goal, the Pre-Trial Chamber, in particular, shall prevent cases which do not meet the threshold of article 61(7) of the Statute to proceed to the trial stage. In order to fulfil its duty, the Chamber considers it vital not only to conduct properly the confirmation hearing but to organise meaningfully the disclosure proceedings’ (footnote omitted).¹⁷¹

Secondly, PTC III referred to its filter function and recalled its power to distinguish those 75 cases that should go to trial (article 61(7)(a)) from those that should not (article 61(7)(b)). As a result of this PTC III argued that it ‘should not be confined to the evidence which the parties intend to rely on for the purposes of the confirmation hearing’ and affirmed that in

¹⁶⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, PTC I, 15 May 2006, 32–33, paras 54–56.

¹⁶⁸ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-35, Second Decision on issues relating to Disclosure, PTC I, 15 July 2009, paras 6–12; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-49, Decision on issues relating to disclosure, PTC I, 29 June 2010, paras 5–6; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-87, Decision on issues relating to disclosure, PTC I, 30 March 2011, paras 9–10.

¹⁶⁹ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-30, Decision establishing a disclosure system and a calendar for disclosure, PTC III, 24 January 2012, paras 15, 19–20; *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-57, Decision establishing a system for disclosure of evidence, PTC I, 14 April 2014, para. 6.

¹⁷⁰ For a contextual interpretation of rule 121(2)(c) and its drafting history, see *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, ICC-01/05-01/08-55, paras 43–44.

¹⁷¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, ICC-01/05-01/08-55, paras 10–11.

order to reach its article 61(7) determination, ‘it must have accurate and in-depth knowledge of the case record’, including of the exculpatory evidence exchanged between the Prosecutor and the defence.¹⁷²

The Chamber observes that, in the absence of exculpatory evidence, it would possess only a partial record, limited to incriminating evidence. As a result, in general terms, the Chamber would be unable to differentiate properly between the cases which warrant being committed for trial and those which do not. The Chamber must be able to exercise this function, which is also essential on the grounds of judicial economy, in particular where the defence decides – as is its right – not to present evidence under article 61(6) of the Statute.¹⁷³

76 Finally, PTC III underscored its responsibility (i) to ensure the rights of the defence under article 61(7)(a) and (b);¹⁷⁴ (ii) to guarantee the effective organization of the confirmation hearing and proper preparation for trial;¹⁷⁵ and (iii) to ensure that disclosure takes place under satisfactory conditions.¹⁷⁶

77 The approach of PTC III in the *Bemba* case was followed by PTC II in the *Ruto et al., Muthaura et al., Ntaganda, Al Fagi Al Mahdi* and *Ongwen* cases.

78 Both disclosure systems remain in place to date. While the Prosecutor challenged the communication of in particular exculpatory evidence to PTC II,¹⁷⁷ no appeal against the final article 61(7) decision has been sought on the grounds that the disclosure process infringed the fairness principle. Likewise, no appeal was sought by the defence against the decisions of PTC I limiting the communication of evidence to the Chamber. More importantly, the two systems are transported into the jurisprudence of the TCs which will either continue with the disclosure system already in place in the case or will amend it.¹⁷⁸

The Prosecutor, who is free to conduct the investigation throughout the pre-trial phase, may come across evidence which (i) he or she intends to use for the purpose of amending the charges, as contained in the DCC, pursuant to article 61(4); or (ii) he or she intends to present as **new evidence** at the confirmation hearing. All of the issues discussed above concerning redactions, confidentiality agreements, analysis of evidence, and communication to the PTC, remain the same for these pieces of evidence. Rule 121 sets out the deadlines within which such evidence must be disclosed:

- ‘1. Where the Prosecutor intends to amend the charges pursuant to article 61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing of the amended charges together with a list of evidence that the Prosecutor intends to bring in support of those charges at the hearing.
2. Where the Prosecutor intends to present new evidence at the hearing, he or she shall provide the Pre-Trial Chamber and the person with a list of that evidence no later than 15 days before the date of the hearing.’

¹⁷² *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, ICC-01/05-01/08-55, paras 16–19.

¹⁷³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, ICC-01/05-01/08-55, para. 29.

¹⁷⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, ICC-01/05-01/08-55, paras 20–23.

¹⁷⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, ICC-01/05-01/08-55, paras 24–25.

¹⁷⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, ICC-01/05-01/08-55, para. 42.

¹⁷⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, PTC III, 25 August 2008, paras 48–58.

¹⁷⁸ See, in this respect, for example, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-959, Decision on Modalities of Disclosure, TC VII, 22 May 2015, para. 27 (‘The Chamber considers that there is no compelling reason to remove its access to all disclosed materials. It is more efficient for this access to be maintained, as removing it requires the Chamber to direct that access be given on an *ad hoc* basis whenever the parties cite to supporting materials which the Chamber cannot review. Chambers in all cases have access to items which are not ultimately considered in its judgment, such as items deemed inadmissible during trial. As professional judges, there is no risk of prejudice being caused by exposing the Chamber to such information’).

Under which conditions a piece of evidence can be considered as ‘new’ within the meaning of rule 121(5) has been interpreted by PTC II to refer to evidence that came into the Prosecutor’s possession after the 30-day deadline of rule 121(3).¹⁷⁹ The rule may, however, also be interpreted to mean that any non-disclosed piece of evidence which is not included in the rule 121(3) list of evidence and which the Prosecutor wishes to present at the hearing can be deemed as ‘new’, regardless of when it has been collected.

IV. Paragraph 4: Amendment to or withdrawal of charges before the hearing

Article 61(4) states: ‘Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal’.

The Prosecutor is free to investigate throughout the pre-trial phase without permission of the PTC. In case he or she intends to present evidence collected at the confirmation hearing, such investigative activities must be concluded sufficiently in advance of the commencement of the hearing so that the Prosecutor can comply with his or her obligations under the time frame set by rule 121 and, possibly, the disclosure calendar established by the Chamber.¹⁸⁰

As the charges against the suspect are presented in the DCC, any amendment to or withdrawal of the ‘charges’ can only take place *after* the submission of the DCC pursuant to rule 121(3), namely 30 days in advance of the confirmation hearing. *Before* the presentation of the DCC, the Prosecutor is at liberty to enlarge the factual scope of the case (within the confines of article 101 in case the person was surrendered to the Court by a State)¹⁸¹, and to (re-)characterize the facts in light of the evidence collected during the investigation;¹⁸² the Prosecutor is not bound by the formulations contained in the warrant of arrest or the summons to appear.¹⁸³ Hence, the applicability of article 61(4) is triggered once the DCC has been presented.

¹⁷⁹ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 12 April 2013, para. 14. The postponement of the confirmation hearing in the *Bemba* case made the application of rule 121(5) obsolete in relation to evidence submitted by the Prosecutor as the 30-day deadline was set afresh, see *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-215-Red, Third Decision on the Prosecutor’s Requests for Redactions and Related Request for the Regulations of Contacts of Jean-Pierre Bemba Gombo, PTC III, 6 November 2008, paras 45–46.

¹⁸⁰ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-206, Decision Postponing the Date of the Confirmation of Charges, PTC II, 6 March 2015, para. 31.

¹⁸¹ As regards the applicability of article 101, see, for example, *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, paras 89–91; *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-567, Decision on ‘Narcisse Arido’s Request for an Order Rejecting the Prosecution’s Document Containing the Charges (ICC-01/05-01/13-526-AnxB1) and for an Order to the Prosecution to File an Amended and Corrected Document Containing the Charges’, PTC II, 15 July 2015, 5; *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-151, Decision on the ‘Defence request to amend the document containing the charges for violation of the rule of speciality’, PTC I, September 2011; *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-260, Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominic Ongwen, PTC II, 7 July 2015.

¹⁸² *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-206, Decision Postponing the Date of the Confirmation of Charges, PTC II, 6 March 2015, para. 32. See also mn. 26.

¹⁸³ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 88; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-1, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, PTC II, 8 March 2011, para. 33; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-1, Decision on the Prosecutor’s Application for Summonses to Appeal for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, PTC I, 8 March 2011, paras 24, 26, 33, and 52; *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-206, Decision Postponing the Date of the Confirmation of Charges, PTC II, 6 March 2015, para. 32. See also mn. 26.

83 The Prosecutor may **withdraw** one or more charges, as contained in the DCC, before the hearing without prior PTC authorization.¹⁸⁴ In this case, the Prosecutor must notify the PTC of the underlying reasons. This notification, if it were to have any meaning, could be seen as allowing the PTC to discharge its functions under article 53(3) as the withdrawal of charges may effectively be considered as a decision not to proceed with the prosecution of the suspect (in relation to certain charges) pursuant to article 53(2).¹⁸⁵ The scope of article 61(4), second sentence, indicates that the suspect be given ‘reasonable notice’ before the hearing of any withdrawal of charges. The notice requirement ensures the suspect’s right to be informed promptly and in detail of the ‘nature, cause and content of the charges’ (article 67(1)(a)) and to properly prepare for the hearing (article 67(1)(b)) in light of the new circumstances occasioned by the withdrawal of charges. What is considered ‘reasonable notice’ in this context must be assessed in the particular circumstances of each case.¹⁸⁶ If need be, a postponement of the date of the hearing could be requested or decided by the PTC on its own motion pursuant to rule 121(7). As a result of the withdrawal, the charges withdrawn will not form part of the discussion at the confirmation hearing. There is no statutory requirement for the Prosecutor to present an amended DCC.

84 In case the Prosecutor intends to **amend** one or more charges, as contained in the DCC, before the hearing, the Prosecutor may also do so without prior PTC authorization.¹⁸⁷ What is considered to be an ‘amendment’ within the meaning of article 61(4) is not explained in the Statute. The ordinary meaning of ‘amendment’ denotes ‘a change made by addition, deletion or correction; especially an alteration in wording’.¹⁸⁸ As the withdrawal of one or more charges is expressly regulated, the amendment must be understood to encompass any adding of new charge(s) or altering of existing charge(s). This course of action may have become necessary in light of new evidence collected during the ongoing investigation. As with withdrawal of charges, the suspect must be given ‘reasonable notice’ before the hearing so as to ensure his or her right under article 67(1)(a) and (b). What is considered ‘reasonable’ in this case, however, is dictated by rule 121(4) which prescribes:

‘Where the Prosecutor intends to amend the charges pursuant to article 4, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing of the amended charges together with a list of evidence that the Prosecutor intends to bring in support of those charges at the hearing.’

85 Accordingly, the Prosecutor is duty-bound to submit 15 days before the date of the hearing an amended DCC and an amended list of evidence (and any other auxiliary document as

¹⁸⁴ See rule 51(A)(i) of the ICTY Rules: ‘The Prosecutor may withdraw an indictment: (i) at any time before its confirmation, without leave’. The same is provided in rule 51(A) of the ICTR Rules.

¹⁸⁵ Similarly Bitti, G., Article 53 in: Fernandez, J. and Pacreau, X. (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Vol. II (Pedone, 2012), 1205.

¹⁸⁶ In the article 70 proceedings, the confirmation proceedings may take place *only* in writing, and as such, a hearing on the matter does not take place. According to rule 165(3), the PTC may rule in accordance with article 61(7), only on the basis of ‘written submissions’, ‘unless the interests of justice’ require otherwise. In these circumstances, it is open to interpretation how the notion of ‘reasonable notice *before the hearing*’ is to be understood. Where the Chamber adopted a calendar of written submissions mirroring the confirmation process of article 5 crimes, such as in the *Bemba et al.* case, one may simply transpose the above interpretation to these proceedings as well. Another view could be to construe ‘reasonable notice before the hearing’ more broadly, capturing the entire duration prior to issuing the decision on the confirmation of charges. This interpretation is in line with the *ratio* underlying this provision namely to enable to the Prosecutor to amend the charges before their confirmation, in so far as such notice of amendment has been given in a reasonable time before issuing the written decision.

¹⁸⁷ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to ‘Decision on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’, PTC II, 21 March 2013, para. 19; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 (OA3), Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’, AC, 13 October 2006, para. 53.

¹⁸⁸ Garner B. (ed), *Black’s Law Dictionary*, (8th edition, 2004, Thompson West), 89.

ordered by the PTC). Depending on the extent of the amendment, the date of the confirmation hearing may be postponed according to rule 121(7) upon request or the Chamber's own motion.

V. Paragraph 5: Prosecutor's obligations 'at the hearing'

The makers of the Statute established progressively higher evidentiary thresholds applicable in the course of the proceedings.¹⁸⁹ Article 61(5), first sentence, dictates that at the confirmation hearing, the Prosecutor shall support each specific charge with 'sufficient evidence to establish substantial grounds to believe that the person committed the crime charged'. The threshold of 'substantial grounds to believe' is the same for the PTC when rendering its decision under article 61(7).

The evidentiary threshold of 'substantial grounds to believe' is higher than the threshold applicable at the article 58 stage when issuing a warrant of arrest or a summons to appear ('reasonable grounds to believe') but lower than the threshold required for conviction of an accused under article 66(3) ('beyond reasonable doubt'). With a view to securing the PTC filter function, the drafters of the Statute deliberately rejected the lowly standard of '*prima facie*'¹⁹⁰ and introduced an intermediate higher evidentiary standard sufficiently high to separate those cases which do not merit proceeding to trial¹⁹¹. This element is crucial for the Prosecutor when preparing for the confirmation hearing.

The *Lubanga* case gave the first opportunity to lend meaning to the term 'substantial grounds'. PTC I emphasized that '[a]fter an exacting scrutiny of all the evidence, the Chamber will determine whether it is *thoroughly satisfied* that the Prosecution's allegations are *sufficiently strong* to commit [the suspect] for trial' (emphasis added).¹⁹² In the view of PTC I, the charges must be 'sufficiently compelling' going beyond mere theory or suspicion.¹⁹³ PTC II in the *Bemba* case explored the literal meaning of the term 'substantial' and understood it to mean 'significant', 'solid', 'material', 'well built', 'real' rather than 'imaginary'.¹⁹⁴ As to how to meet this standard, PTCs have consistently held that the Prosecutor must 'offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations'.¹⁹⁵ To put it simple, the evidence must be sufficiently solid so as to

¹⁸⁹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-73, Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', AC, 3 February 2010, para. 30; *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, PTC II, 31 March 2010, para. 28.

¹⁹⁰ In the procedure of the ICTY, the standard of proof by which a judge is to confirm the indictment is that of a 'prima facie case'. In rule 47(B) of the ICTY Rules, the wording 'reasonable ground for believing' is used, but in this case its standard of proof is considered to be equivalent to 'prima facie case'. See Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998) 94.

¹⁹¹ See also *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', AC, 30 May 2012, para. 43 with further references in the footnotes.

¹⁹² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tENG, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 39. See also, for example, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, PTC II, 9 June 2014, para. 9.

¹⁹³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tENG, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 37. See also, for example, *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, para. 31.

¹⁹⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC II, 15 July 2009, para. 29.

¹⁹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tENG, Decision on the confirmation of charges, PTC I, 29 January 2007, para. 39; *Prosecutor v. Germain Katanga/Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the confirmation of charges, PTC I, 30 September 2008, para. 65; *Prosecutor v. Jean-*

warrant the testing at trial when discussing a possible conviction. The Prosecutor cannot expect the PTC to confirm the charges by engaging in speculations that other additional evidence ‘of high probative value’ *might* be presented at trial. With a view to holding a strong position, the Prosecutor must therefore present to the PTC the strongest possible evidence in his or her possession. This, of course, presupposes that the investigation is completed by the end of the confirmation process (see mn 43).

- 89 The Prosecutor must support each charge, *i. e.* the constitutive elements of the crime(s) (context and individual act) including the form of participation, with sufficient evidence which is apt to prove, against the higher threshold applicable at this stage, that the suspect committed the crime(s). To this end, article 61(5), second sentence, allows the Prosecutor to rely on **documentary or summary evidence**. Indeed, most of the evidence submitted by the Prosecutor at this stage of the proceedings is **documentary** in nature, predominantly statements of witnesses, reports of non-governmental organizations (NGO) or international organizations, press articles, audio and video material. This accords with the fact that the confirmation proceedings are ‘written proceedings’.
- 90 PTC I in the *Katanga/Ngudjolo* case ruled that the Prosecutor may rely on the statement or transcript of interview of a **deceased witness** under article 61(5), provided the witness gave his consent at the time of the interview that the statement or transcript of interview be introduced in judicial proceedings and redactions are implemented, to the extent necessary.¹⁹⁶ Likewise, PTC II in the *Ntaganda* case accepted material from deceased witnesses as documentary evidence falling under article 61(5) but did not make its use dependent on the person’s consent at the time of the interview. The Chamber also added that the defence right to challenge this evidence was not impaired as it could do so through other means.¹⁹⁷
- 91 The use of **summary evidence** is not subject to any condition. There may be instances where security concerns prevent the Prosecutor to disclose the statement of the witness concerned, even in redacted form, because the information contained in the statement will still identify the witness. In this case, the PTC may grant the Prosecutor to withhold the identity of the witness concerned from the defence (rule 81(4)) and the Prosecutor may opt to present a summary of the statement instead of the statement itself, as envisaged in article 68(5).¹⁹⁸ The summary

Pierre Bemba Gombo, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC II, 15 July 2009, para. 29; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, PTC I, 8 February 2010, para. 37; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 40; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 40; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 52; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, PTC II, 9 June 2014, para. 9; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, PTC I, 12 June 2014, para. 19; *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-749, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, PCT I, 11 November 2014, para. 25; *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-186, Decision on the confirmation of charges against Charles Blé Goudé, PTC I, 11 December 2014, para. 12.

¹⁹⁶ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-412, Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12, PTC I, 18 April 2008, 8; *ibid.*, ICC-01/04-01/07-496, Decision on the Defences’ Applications for Leave to Appeal the ‘Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased witness 12’, PTC I, 22 May 2008.

¹⁹⁷ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-308, Decision on Admissibility of Evidence and Other Procedural Matters, PCT II, 8 June 2014, para. 31.

¹⁹⁸ ‘Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.

evidence, in this case, is a form of protective measure.¹⁹⁹ The AC, relying on ECtHR case-law, confirmed that the use of summaries without disclosing the identity of the witness concerned ‘is not *per se* prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.²⁰⁰ Nevertheless, it accepted that the PTC, in weighing the evidence, may take the factor into account that the defence has been provided with only a summary of the statement of a witness who is anonymous. The preparation of summaries is the sole responsibility of the Prosecutor; the summaries must not be approved by the PTC before they are disclosed and presented at the confirmation hearing.²⁰¹ As a result, the PTC does not verify whether the summary disclosed is indeed an accurate synopsis of the witness statement in which both incriminating and exculpatory elements have been reflected appropriately. Finally, rule 81(5) ‘regulates under what conditions the material and information on the basis of which the summaries were compiled may subsequently be introduced into evidence’.²⁰² The provision reads:

‘Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate disclosure to the accused’.

Article 61(5), second sentence, also provides that at the confirmation hearing the Prosecutor need not call the witnesses expected to testify at the trial. Hence, the Prosecutor may present only a witness statement, or transcript of the recorded interview or a summary thereof. In fact, there may be legitimate reasons to decide not to call a witness at this stage of the proceedings, such as logistics or security concerns. The PTCs, from a case management point of view, have been particularly attentive to this element and advised consistently the Prosecutor (and the defence) not to call witnesses, considering the limited scope and nature of the confirmation proceedings and the Chamber’s duty to ensure that the proceedings are conducted in an expeditious manner (see also *mn 103 et seq.*).²⁰³ Indeed, the Court’s statutory provisions do not give precedence to the principle of orality at the pre-trial stage.²⁰⁴ As the AC confirmed:

‘[The] Rules regarding orality in the pre-trial phase are more relaxed than at trial. Pursuant to article 61(5) of the Statute, for the purposes of the confirmation hearing, the Prosecutor ‘may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial’. At the trial, however, the Trial Chamber must respect article 69(2).²⁰⁵

Thus, in the *Ruto et al.* and *Muthaura et al.* case it was held that ‘the parties [rely] on live witnesses only as far as their oral testimony at the hearing cannot be properly substituted by

¹⁹⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-773 (OA5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, AC, 14 December 2006, paras 45–46.

²⁰⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-773 (OA5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, AC, 14 December 2006, para. 50.

²⁰¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-773 (OA5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, AC, 14 December 2006, para. 43.

²⁰² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-773 (OA5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, AC, 14 December 2006, para. 48.

²⁰³ For example, *Prosecutor v. William Samoei Ruto, et al.*, ICC-01/09-01/11-153, Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, PCT II, 29 June 2011; *Prosecutor v. Francis Kirimi Muthaura, et al.*, ICC-01/09-02/11-181, PTC II, 20 July 2011; *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-T-4-Red-ENG, Transcript of Hearing, PTC I, 1 May 2014, 10, lines 12–19.

²⁰⁴ *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-226, Order to the Defence to Reduce the Number of Witnesses to Be called to Testify at the Confirmation of Charges Hearing and to Submit an amended List of *Viva Voce* Witnesses, PTC II, 10 August 2011, para. 18.

²⁰⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, AC, 3 May 2011, para. 80.

documentary evidence or witnesses' written statements'.²⁰⁶ The same approach was adopted in the *Laurent Gbagbo* and *Blé Goudé* case.²⁰⁷ In case the parties opted to call live witnesses, they were required to indicate this sufficiently in advance to the Chamber in order for the necessary logistical arrangements to be made.²⁰⁸ The Single Judge of PTC II in the *Ruto et al.* and *Muthaura et al.* case set a deadline within which the parties could communicate their intention to call witnesses at the hearing. In case no information to that effect was submitted, the Single Judge ruled not to permit any *viva voce* testimony at the hearing.²⁰⁹ Finally, the Prosecutor (and the defence) was ordered to inform the Chamber of the subject-matter and scope of the proposed testimony of each witness so as to allow the Chamber to organize the proceedings, 'including the making of any necessary determinations as to the relevance and admissibility of the evidence to be obtained through the proposed oral testimony'.²¹⁰ As to the Chamber's authority to reduce the number of witnesses proposed to appear at the confirmation hearing, the familiarization process of witnesses, and the probative value of oral testimony, see mn 102, 104 and 107.

94 Rule 122(9) stipulates that the rules of evidence applicable at trial are to apply during the confirmation hearing, subject to the provisions of article 61 of the Statute (see also mn 123).²¹¹

95 Considering that the evidentiary threshold of 'substantial grounds to believe' is relatively high at this stage and that the Prosecutor should have largely completed the investigation by the time of the confirmation hearing, it is upon the Prosecutor to select the 'best pieces of evidence in order to convince the Chamber that the charges brought against the [suspect] shall be confirmed'.²¹² Perhaps the most outspoken comment summarizing the expectations of the Judges as regards the quality of the Prosecutor's evidence at the article 61 stage were made by the PTC I majority in the *Laurent Gbagbo* case:

²⁰⁶ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-153, Decision Requesting the Parties to Submit Information for the preparation of the Confirmation of Charges Hearing, PCT II, 29 June 2011, para. 9; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-181, Decision Requesting the Parties to Submit Information for the preparation of the Confirmation of Charges Hearing, PCT II, 20 July 2011, para. 9.

²⁰⁷ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-107, Decision requesting observations from the parties on the schedule of the confirmation of charges hearing, PTC I, 4 May 2012, para. 11; *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-T-4-Red-ENG, Transcript of Hearing, 1 May 2014, 10, lines 12-19.

²⁰⁸ In the *Ruto et al.* and *Muthaura et al.* case, the Victims and Witnesses Unit (VWU) indicated that a minimum period of 6 weeks prior to the commencement of the hearing was needed to make the necessary arrangements. In the *Laurent Gbagbo* case, the VWU filed on 16 April 2012 in the record of the case the 'Victims and Witnesses Unit's Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony', ICC-02/11-01/11-93-Anx1. This protocol summarizes the practice and to-date existing jurisprudence on familiarization of witnesses appearing before the Court at any stage of the proceedings. According to para. 14 of the Protocol, the calling party is requested to notify the VWU 35 days before the witness is scheduled to appear for testimony.

²⁰⁹ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-153, Decision Requesting the Parties to Submit Information for the preparation of the Confirmation of Charges Hearing, PCT II, 29 June 2011, para. 12; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-181, Decision Requesting the Parties to Submit Information for the preparation of the Confirmation of Charges Hearing, PCT II, 20 July 2011, para. 12.

²¹⁰ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-153, Decision Requesting the Parties to Submit Information for the preparation of the Confirmation of Charges Hearing, PCT II, 29 June 2011, para. 11; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-181, Decision Requesting the Parties to Submit Information for the preparation of the Confirmation of Charges Hearing, PCT II, 20 July 2011, para. 11. Similarly, *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-326, Order requesting the parties to submit views and proposals on the schedule of the confirmation hearing, PCT I, 2 August 2011.

²¹¹ Rule 122(9) reads: 'Subject to the provisions of article 61, article 69 shall apply *mutatis mutandis* at the confirmation hearing'. *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, PTC III, 31 July 2008, para. 10; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-308, Decision on Admissibility of Evidence and Other Procedural Matters, PTC II, 8 June 2014.

²¹² *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-153, Decision Requesting the Parties to Submit Information for the preparation of the Confirmation of Charges Hearing, PCT II, 29 June 2011, para. 8; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-181, Decision Requesting the Parties to Submit Information for the preparation of the Confirmation of Charges Hearing, PCT II, 20 July 2011, para. 8.

[T]he Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute. Even though NGO reports and press articles may be useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.²¹³

VI. Paragraph 6: Rights of the suspect at the hearing

Prior to the confirmation hearing, the defence has the obligation to engage in the *inter partes* disclosure process with the Prosecutor, to the extent foreseen by the Rules. In particular:

- (a) Pursuant to rule 78, the defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.
- (b) Pursuant to rule 79, the defence shall notify the Prosecutor of its intent to: (i) raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or (ii) raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.

The general principles of disclosure and the seeking of protective measures (for example, redactions) as explained in relation to the Prosecutor's disclosure obligations, remain the same for the defence (see *mn 59 et seq.*). In this context, it is worth noting that rule 81(6) explicitly allows the defence to withhold evidence in its possession or control *vis-à-vis* the Prosecutor due to the grave endangerment of the security of a witness or his or her family (article 68(5)). Rule 81(6) reads:

'Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.'

During the disclosure process, the defence must prepare and provide any other auxiliary document as ordered by the Chamber. In the jurisprudence of PTC III/II this concerned mainly the elaboration of an in-depth analysis chart explaining all relevant evidence on which the defence intends to rely at the confirmation hearing.²¹⁴ As for the Prosecutor, reports, memoranda or other internal documents prepared by the defence, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure (rule 81(1)).

²¹³ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PCT I, 3 June 2013, para 35.

²¹⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-232, Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence, PTC III, 10 November 2008; *ibid.*, Decision on the Disclosure of Evidence by the Defence, ICC-01/05-01/08-311, PTC III, 5 December 2008; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 6 April 2011, para. 22; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-48, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 6 April 2011, para. 23; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, PTC II, 12 April 2013, para. 30.

- 98 At the confirmation hearing, the suspect charged has the right to remain silent; he or she is under no obligation to engage actively in the discussion at the hearing.²¹⁵ Rather, the suspect is **entitled**, according to article 61(6), to (a) object to the charges as contained in the (amended) DCC; (b) challenge the evidence presented by the Prosecutor, as contained in the (amended) list of evidence; and (c) present evidence of his or her own. As PTC II held, those rights cannot be denied to the suspect and the Chamber ‘has the responsibility to put the defence in a position to meaningfully exercise them’.²¹⁶
- 99 The defence typically **objects to the charges** at the hearing presenting its arguments on facts and law. It may also choose to make written submissions no later than three days before the hearing on points of fact and on law (rule 121(9)).²¹⁷ Likewise, in case the defence intends to raise the existence of an alibi (rule 79(1)(a)), or a ground for excluding criminal responsibility pursuant to article 31(1) (rule 79(1)(b)), the defence must notify the Prosecutor sufficiently ‘in advance of the hearing to enable the Prosecutor to prepare adequately (rule 79(2)). Rule 121(9) clarifies that the defence must file such written submission with the Chamber no later than three days in advance of the hearing.
- 100 The defence may **challenge the evidence** presented by the Prosecutor which is contained in the (amended) list of evidence. This typically occurs during the hearing in response to the presentation of the evidence by the Prosecutor and the last written submissions after the hearing, if authorized by the PTC (see mn 116). As was argued by the authors of the previous edition, the confirmation hearing provides the suspect with a useful opportunity to be informed of important evidence in the possession of the Prosecutor and to test the value of such evidence, at least in a preliminary way, during a judicial proceeding.
- 101 Lastly, the defence has the right to **present its own evidence**. If it decides to make use of this right, it shall submit a list of evidence no later than 15 days prior to the date of the confirmation hearing (rule 121(6)). By virtue of the same rule, the defence may also present a list of evidence that it intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor (see mn 84–85). Last minute difficulties in the disclosure process prompt at times the defence to request an extension of the rule 121(6) deadline. Such request was authorized based on articles 61(6)(c) and 67(1)(e) and not regulation 35(1) of the Regulations as the latter provision applies exclusively to time limits prescribed by the Regulations or ordered by the PTC.²¹⁸
- 102 Suspects, such as *Abu Garda* and *Muthaura* gave an **unsworn testimony** (article 67(1)(h)) at the confirmation hearing. PTC I ruled to consider an unsworn testimony to be part of the defence submission and not as evidence.²¹⁹ In the *Muthaura et al.* case, then suspect *Kenya-tta* made a **sworn testimony** at the hearing. Noteworthy in this respect is PTC II’s approach

²¹⁵ See, for example, *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-103, Decision on issues related to the hearing on the confirmation of charges, PTC I, 17 November 2010, para. 6.

²¹⁶ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-221, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, PTC II, 25 July 2011, para. 14; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-226, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, PTC II, 10 August 2011, para. 18.

²¹⁷ A similar request of the legal representatives of victims to make written submissions before the hearing on points of facts and law in response to the DCC was rejected by PTC II. The Chamber argued that the hearing had yet to take place and that the statutory procedural regime did not provide the victims with such opportunity. Nevertheless, it clarified that it would consider the arguments of the victims, at the appropriate stage, see *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-274, Decision on the ‘Request by the Victims’ Representative for authorization by the Chamber to make written submissions on specific issues of law and/or facts’, PTC II, 19 August 2011.

²¹⁸ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-267, Decision on the Defence Requests for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol, PTC II, 16 August 2011, paras 12–13.

²¹⁹ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges. PTC I, 8 February 2010, paras 53–55.

not to attach *a priori* any higher probative value to *Kenyatta's* testimony as such but to insist that the probative value of live testimony 'will depend on the Chambers' assessment on a case-by-case basis and in light of the evidence as a whole'.²²⁰ It follows that for PTC II it did not make a difference whether the suspect testified under oath or not, stressing its intention to consider the testimony on a case-by-case basis and in light of the entirety of the evidence.

The person charged may also call witnesses to testify at the hearing. However, as is the case with the Prosecutor, PTCs advised also the defence not to call witnesses considering the limited nature and scope of the confirmation hearing and the impact of calling witnesses on the expeditiousness of the proceedings (see mn 92).

In the *Ruto et al.* case, the defence of the three suspects indicated to call in total 43 witnesses;²²¹ in the *Muthaura et al.* case, the defence of the three suspects indicated to call in total 23 witnesses.²²² The Single Judge, acting on behalf of PTC II in those two cases, deemed the number of live witnesses proposed as 'manifestly excessive and disproportionate to the purpose of the confirmation of charges hearing' pointing out that, if permitted, the confirmation hearing 'would ultimately constitute a mere anticipation of the trial stage of the case'.²²³ Accordingly, she reduced the number of witnesses, noting that

'whilst it falls within the realm of the Defence teams to decide their best strategy in order to serve the interests of the suspects, this does not mean that all the evidence to be presented needs to be obtained through *viva voce* witnesses. This is, in particular, because live testimony has a significant impact on the organization of the confirmation of charges hearing and, more generally, on the expeditiousness of the proceedings.'²²⁴

With a view to determining the number of witnesses permitted, the Single Judge of PTC II drew upon the information furnished by the defence on the subject-matter and scope of the proposed testimony of each witness.²²⁵ Having identified a duplication of the evidence which the defence intended to obtain through the oral testimonies of witnesses, the Single Judge ultimately reduced the number of live witnesses to two per suspect.²²⁶ The choice as to which witness would appear was left to be decided by the defence. While the approach of the Single Judge can be viewed as a proper measure to manage the case and expedite the proceedings,

²²⁰ *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 85.

²²¹ The defence for *Ruto* indicated to call 25 witnesses; the defence for *Kosgey* indicated to call 3 witnesses; and the defence for *Sang* indicated to call 15 witnesses.

²²² The defence for *Muthaura* indicated to call 9 witnesses; the defence for *Kenyatta* indicated to call 4 witnesses; and the defence for *Ali* indicated to call 10 witnesses.

²²³ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-221, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, PCT II, 25 July 2011, para. 9; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-226, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, PCT II, 10 August 2011, para. 13.

²²⁴ *Prosecutor v. William Samoei Ruto, et al.*, ICC-01/09-02/11-221, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges hearing and to Submit an Amended List of *Viva Voce* Witnesses, PTC II, 25 July 2011, para. 15. Similarly *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-226, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, PCT II, 10 August 2011, para. 20.

²²⁵ The suspects in the *Ruto et al.* case had submitted the list of live witnesses together with the information on the subject-matter of their respective expected testimonies to the Chamber only. The Prosecutor was denied access to this 'provisional list' submitted prior to the disclosure deadline provided for in rule 121(6), *Prosecutor v. William Samoei Ruto, et al.*, ICC-01/09-02/11-221, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, PTC II, 25 July 2011, paras 26–28.

²²⁶ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-02/11-221, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges hearing and to Submit an Amended List of *Viva Voce* Witnesses, PTC II, 25 July 2011, paras 17–19; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-226, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, PCT II, 10 August 2011, paras 22–24.

reducing the number of witnesses to two per suspect is arbitrary and is not supported by convincing legal reasoning in the decisions concerned. Admittedly, given the broad wording of article 61(6)(c), it is difficult to deny the defence the right to call live witnesses as a matter of law. However, the *ratio* underlying the confirmation hearing cannot be to turn it into a mini-trial and to anticipate the discussion at trial. The present question is a difficult one for which perhaps no satisfactory answer is available.

105 The same approach was taken in the *Mbarushimana* case around the same time as the *Kenya* cases. The defence had indicated to PCT I that it may call an expert witness, ‘subject to the Chamber’s decision and the expert’s availability’; yet, it also indicated its intention to rely on the written report of same expert witness. Like PTC II, this PTC also drew upon the limited scope of and nature of the confirmation hearing and the need to ensure expeditiousness. Since the defence indicated it would rely on the expert report for the purposes of the hearing, PTC I held that the oral testimony of the expert witness was not necessary.²²⁷

106 Evidence through oral testimony is not accorded automatically a higher **probative value** than documentary evidence. Indeed, the Statute does not establish a hierarchy between types of evidence. Rather, as PTC II attested, ‘the determination of the probative value of each piece of evidence submitted before the Chamber shall be conducted on a case-by-case basis, in light of different criteria, such as its relevance, the source from which it originates, its direct or indirect nature, its credibility, reliability, trustworthiness and genuineness’.²²⁸

107 Witnesses appearing before the Court undergo a **familiarization process** with the assistance of the Victims and Witnesses Unit (VWU). Upon arrival at the seat of the Court, the VWU organizes the courtroom familiarization, including the explanation of the role of a witness and the procedure of examination. A courtesy meeting with representatives of the calling party, the opposing party and legal representatives of victims is held to familiarize the witnesses with those individuals who will examine them. Prior to their testimony, witnesses may re-read their prior statement, if need be, with reading assistance, or listen to the tape recordings of their interview to re-fresh their memory.²²⁹ For the purpose of testimony, the PTC may order protective measures under rules 87 and 88, if necessary. Protective measures may include the use of a pseudonym, voice and face distortion or holding the hearing *in camera*. Before testifying, the witness makes a solemn undertaking (rule 66) and the PTC shall notify the witness about his or her right under rule 74 not to incriminate him- or herself, and of the offence defined in article 70(1)(a). During the testimony, the witness may be assisted by counsel (rule 74(10)).²³⁰ The issue of **witness proofing** by the calling party has to date been addressed at the pre-trial stage only by PTC I in the *Lubanga* case prohibiting such practice.²³¹ However, witness proofing did not take place in any of the cases before PTCs.

²²⁷ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-356, Decision on the schedule of the confirmation hearing, PTC I, 12 August 2011.

²²⁸ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-221, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses, PTC II, 25 July 2011, para. 14; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-275, Decision on the Defence Applications for Leave to Appeal the Single Judge’s Order to Reduce the Number of *Viva Voce* Witnesses, PTC II, 1 September 2011, para. 26.

²²⁹ Details as to the familiarization process can be found, for example, in the latest version of the ‘Victims and Witnesses Unit’s Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony’, filed in the record of the *Laurent Gbagbo* case, ICC-02/11-01/11-93-Anx1.

²³⁰ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-304, Order to the Registrar to Provide Independent Legal Advice to Witnesses, PTC II, 30 August 2011; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-321, Decision on the Schedule for the Confirmation of Charges Hearing, PTC I, 13 September 2011, para. 27.

²³¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing, PTC I, 8 November 2006. The prohibition of the practice of witness proofing was later confirmed by several TCs, see *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, TC I, 30 November 2007; *Prosecutor v. Germain Katanga/Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1134, Decision on

With a view to allowing the PTC to exercise its functions under article 69(4) and the opposing party to prepare adequately for the testimony of the witness, the calling party is required to submit information detailing the subject-matter and **scope of the expected testimony** of the witness.²³² 108

The authors of the previous edition questioned the usefulness of submitting defence evidence during the confirmation hearing. In their view, at the time, while the Statute invites the defence to present evidence at this stage, it is not obvious that contradictory evidence adduced by the defence can have any effect upon the determination of the existence of ‘sufficient evidence’. The confirmation proceedings held up until now may allow a different appraisal. The charges against four suspects (*Abu Garda, Mbarushimana, Kosgey, Ali*) were not confirmed and respective proceedings were terminated. Those suspects did not have to face trial proceedings, extending possibly over several years. This result is (also) owed to the fact that the defence took an active role during the confirmation stage, challenging the evidence of the Prosecutor and presenting evidence of its own. 109

VII. Paragraph 7: The decision of the Pre-Trial Chamber

All efforts during the pre-trial phase culminate in the holding of the confirmation hearing. The confirmation hearing is an ‘evidentiary hearing’ before a PTC with three judges at which the suspect has the right to be present and to contest the evidence (see mn 100 *et seq.*).²³³ Following the hearing, the PTC renders its decision under article 61(7) determining whether the case merits going to trial. Notably, evidentiary weaknesses of the case or interpretative problems of the statutory documents are revealed which may foreshadow the discussion at trial, as the case may be.²³⁴ 110

1. The confirmation hearing

The conduct of the confirmation hearing is, to a certain extent, regulated in rule 122. Regularly, the PTCs decide on the **schedule of the hearing** specifying in detail the conduct of discussion.²³⁵ It may follow a typical adversarial structure or may consist in discussing with 111

a number of procedural issues raised by the Registry, TC II, 14 May 2009, para. 18; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1016, Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, TC III, 18 November 2010; with dissenting opinion of Judge Kuniko Ozaki, ICC-01/05-01/08-1039, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial. *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-1252, Decision on Witness Preparation and Familiarisation, TC VII, 15 September 2015. Only TC V and VI have hitherto allowed the practice of pre-testimony ‘witness preparation’ by the calling party, see *Prosecutor v. William Samoei Ruto/Joshua Arap Sang*, ICC-01/09-01/11-524, Decision on witness preparation, TC V, 2 January 2013; *Prosecutor v. Francis Kirimi Muthaura/Uhuru Muigai Kenyatta*, ICC-01/09-02/11-588, Decision on witness preparation, TC V, 2 January 2013; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-652, Decision on witness preparation, TC VI 16 June 2015.

²³² *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-316, Decision on the Defence Request for Amendment of the List of Viva Voce Witnesses, PTC II, 12 September 2011, para. 11; *ibid.*, ICC-01/09-02/11-331, Decision on the ‘Urgent Request to Replace One Viva Voce Witness due to Unforeseen Circumstances’, PTC II, 15 September 2011, para. 11; *ibid.*, ICC-01/09-02/11-226, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, PTC II, 10 August 2011, para. 28. *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-221, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, PTC II, 25 July 2011, para. 23.

²³³ See also *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 (OA4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’, AC, 30 May 2012, paras 39 and 43.

²³⁴ In case of the confirmation of the indictment at the ICTY, the reviewing Judge may make the following decisions or requests: (i) to request the Prosecutor to present additional material in support of any or all counts, (ii) to confirm each count, (iii) to dismiss each count, or (iv) to adjourn the review so as to give the Prosecutor the opportunity to modify the indictment (rule 47 (F) of the ICTY Rules).

²³⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-678, Decision on the schedule and conduct of the confirmation hearing, PTC I, 7 November 2006; *Prosecutor v. Germain Katanga/Mathieu Ngudgolo Chui*, ICC-

both parties the law and evidence following a topic-oriented approach, anticipating in fact the structure of the article 61(7) decision. Rule 122(1), second sentence, establishes the authority of the Presiding Judge to determine how the hearing is to be conducted, including the order and the conditions under which he or she intends the evidence contained in the record of the proceedings to be presented. With the exception of the *Lubanga* case, in all other cases, the directions as to the hearing were given by the Single Judge.

- 112 At the beginning of the confirmation hearing, the Presiding Judge of the PTC shall ask the officer of the Registry assisting the Chamber to read out the charges as presented by the Prosecutor in the DCC. Before hearing the matter on the merits, the Presiding Judge shall ask the Prosecutor and the suspect(s) whether they intend to raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing (rule 122(3)). At no subsequent point may these objections and observations be raised or made again in the confirmation or trial proceedings (rule 122(4)).
- 113 The hearing on the merits begins with the opening statements of the Prosecutor, the victims participating, and the suspect(s). Thereafter, the discussion on the merits unfolds following the directions of the Presiding Judge (rule 122(7)). After the arguments have been exchanged and the evidence has been heard, the Prosecutor and the victims participating make final observations, followed by those of the suspect(s) (rule 122(8)).
- 114 In case the PTC decides to proceed with the **confirmation hearing in absentia**, rules 121 and 122 regulating the conduct of proceedings shall apply *mutatis mutandis* (rule 126(1)). If the PTC authorizes the hearing in the absence of the person charged, but it authorizes the person to be represented by counsel, the latter shall have the opportunity to exercise the rights of that person (rule 126(2)).
- 115 The **duration** of the hearing is determined by the Chamber and depends on factors, such as the number of suspects, the number of charges to be discussed, whether witnesses will appear, and the availability of courtroom support staff²³⁶. Before deciding on the schedule of the hearing, the parties are usually asked to submit observations on the time needed to present their arguments and evidence. PTCs have endeavored to keep the length of the confirmation hearing to a minimum so as to avoid the impression of a ‘mini-trial’ or an anticipation of the discussion at trial. In the confirmation hearings conducted so far, PTCs spent the following numbers of days in Court: *Lubanga*: 12 days; *Katanga/Ngudjolo*: 11 days; *Bemba*: 4 days; *Abu Garda*: 10 days; *Banda/Jerbo*: 0.5 day; *Mbarushimana*: 4 days; *Ruto et al.*: 7 days; *Muthaura et al.*: 12 days; *Laurent Gbagbo*: 8 days; *Ntaganda*: 5 days; *Blé Goudé*: 4 days. When compared with the number of trial hearings, it is clear that the PTC Judges succeeded in keeping the days in Court to a minimum thus honoring the limited nature of the confirmation proceedings.
- 116 Although not provided for in the statutory documents, all PTCs have allowed the parties and participants to submit, after the confirmation hearing, final **written submissions** on the arguments raised and evidence discussed during the trial. This privilege was first granted in

01/04-01/07-587, Decision on the Schedule for the Confirmation Hearing, PTC I, 13 June 2008; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-336, Decision on the Schedule for the Confirmation of Charges Hearing, PTC III, 29 December 2008; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-182, Decision Amending the Schedule for the Confirmation Hearing, PTC I, 16 October 2009; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-294, Decision on the Schedule for the Confirmation of Charges Hearing, PTC II, 25 August 2011; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-321, Decision on the Schedule for the Confirmation of Charges Hearing, PTC II, 13 September 2011; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-413, Second decision on the schedule of the confirmation hearing, PTC I, 12 September 2011; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-397, Decision on the schedule for the confirmation of charges hearing, PTC I, 12 February 2013; *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-165, Decision on the schedule for the confirmation of charges hearing, PTC I, 22 September 2014; *Prosecutor v. Bosco Ntaganda*. No particular schedule was established for the hearing in the *Banda/Jerbo* case; it lasted only one afternoon.

²³⁶ Worthy of mention in this regard is regulation 64(1), first sentence, of the Regulations of the Registry which prescribes that ‘[a]t hearings, a minimum of four interpreters shall work in two booths, an English and a French one, for up to two periods of two hours separated by a 30-minute break or for three periods of one and a half hours with a break of at least one and half hours between the second and the third period’.

the *Lubanga* case²³⁷ and has been the practice of PTCs ever since. At the end of the hearing, the Presiding Judge will typically determine until when and within which page limit such submissions by participants can be made. Most noteworthy, the 60-day time limit under regulation 53 of the Regulations,²³⁸ within which the decision under article 61(7) is delivered, is effectively varied as the time limit commences as of the moment, the last written submission (regularly that of the defence) has been received (regulation 35 of the Regulations).²³⁹ In this respect, the recent order of the Single Judge in the *Ongwen* case not to allow any written filings after the closure of the hearing, is a welcome development harmonizing the practice of the Court with the wording of regulation 53 of the Regulations. It also forces the parties to be focused in their submissions.²⁴⁰

The confirmation hearings take place at the seat of the Court in The Hague (articles 3(1) and 62), unless otherwise decided by the Court. In the *Kenya* cases, PTC II explored the option whether it would be possible to conduct the confirmation hearings *in situ* with a view to bringing the proceedings ‘closer’ to the affected communities in Kenya.²⁴¹ The observations were sought from the Prosecutor, the suspects and the victims participating in the case.²⁴² With the exception of one suspect, all participants expressed reservations in relation to this proposal for security reasons. As a result, the Chamber ensured that the concerns submitted were forwarded to the competent entities entrusted to take a decision and confirmed, for its part, that it would not consider further the option to hold the hearing in Kenya.²⁴³ In the *Ongwen* case, PTC II recommended to the Presidency to hold the confirmation hearing in Uganda.²⁴⁴

2. The decision of the PTC – Introductory remarks

The early decisions of the PTCs have been criticized for being too long. While this may be true, especially for the first set of decisions, the page number alone is not a suitable argument by way of which the quality of the first article 61(7) decisions can be truly assessed.²⁴⁵ Certainly, PTCs in recent proceedings issued shorter decisions as they were able to rely more and more on previous jurisprudence and established practices. They also embraced the

²³⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-47-ENG, Transcript of Hearing, PTC I, 28 November 2006, 150, lines 2–17. The Presiding Judge also requested that the submissions be made in the French language, presumably with the aim to avoid any translation requests of the filings which could impact the process of rendering the article 61(7) decision. In general, documents and material may be filed with the Registry shall be made in either English or French (regulation 39 of the Regulations).

²³⁸ ‘The written decision of the Pre-Trial Chamber setting out its findings on each of the charges shall be delivered within 60 days from the date the confirmation hearing ends’.

²³⁹ A notable exception to this practice is the course taken by PCT I in the *Lubanga* case which, despite the written submissions of the parties announced at the end of the confirmation hearing that it would render its decision 60 days from the date the confirmation hearing ended.

²⁴⁰ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-T-6-ENG, Transcript of Hearing, PTC II, 19 May 2015, 23, lines 6–13.

²⁴¹ Rule 100 provides the procedure for changing the place of the proceedings. The old version of rule 100 entrusted the decision to sit in a State other than the host State to the judges in plenary session (decision to be taken by two-thirds majority). The rule was amended by resolution ICC-ASP/12/Res.7 and now entrusts the decision to the Presidency.

²⁴² *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-106, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, PTC II, 3 June 2011; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-102, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, PTC II, 3 June 2011.

²⁴³ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-153, Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, PTC II, 29 June 2011, para. 14; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-181, Decision Requesting the Parties to Submit Information for the preparation of the Confirmation of Charges Hearing, PCT II, 20 July 2011, para. 14.

²⁴⁴ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-300, Recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda, PTC II, 10 September 2015.

²⁴⁵ The length of the decisions is also dependent on a number of factors, such as the number of suspects, charges and arguments raised, the factual scope of the case, and whether challenges to jurisdiction or admissibility are ruled upon at the same time (rule 58(2), third sentence).

feedback of some TCs as regards the clarity and format of the confirmation decision and designed the confirmation decisions accordingly.²⁴⁶

- 119 The PTC determination under article 61(7) is made ‘on the basis of the hearing’. This has been interpreted by PTCs to encompass more than the oral submissions at the hearing, namely the submissions of the parties prior to the hearing (DCC, lists of evidence, other auxiliary documents, submissions on points of fact and law), the oral submissions of participants at the hearing and the final written submissions of all participants after the hearing, when available.
- 120 The **evidentiary threshold** against which the PTC must assess the evidence is the same as for the Prosecutor under article 61(5) (see mn 87). The evidentiary standard is relatively high and cannot be reduced to a mere *prima facie* assessment.²⁴⁷
- 121 As regards the evidentiary material on which the PTC bases its article 61(7) decision, the Chamber may rely on any piece of **evidence** presented by the Prosecutor and the defence. In some instances, the PTC has used its authority to request the submission of evidence it considered ‘necessary for the determination of the truth’ (article 69(3), second sentence). This authority has been held not to interfere with the role of neither the Prosecutor nor the defence. In the words of PTC II:

‘The Single Judge also wishes to provide some clarifications on the Prosecutor’s erroneous arguments that the Chamber intrudes into the role of the Prosecutor and the Defence, and assumes control over the presentation of both parties’ cases. By raising these arguments, the Prosecutor disregards the Chamber’s statutory mandate, in particular its filtering function, and its responsibility to *contribute* to the establishment of the truth, which crystallizes ultimately in the final decision on the accused’s innocence or guilt. Such contribution by the Pre-Trial Chamber is made in the framework of the confirmation of charges stage when determining whether or not there are substantial grounds to believe that the suspect has committed the crime(s) charged. Fulfilling its mandate to *contribute* to the establishment of the truth as mentioned above, the Chamber may resort to article 69(3), second sentence, of the Statute, which authorizes the Chamber ‘to request the submission of all evidence that it considers necessary’ for its specific determination at the end of the pre-trial stage, in addition to other evidence which has been presented by the parties. Hence, article 69(3), second sentence, of the Statute implies that such evidence must not have been presented previously by either party, but is known to the Chamber, and could, after it is submitted by dint of article 69(3) of the Statute, be discussed, contested and analyzed by both the Prosecutor and the Defence during the confirmation of charges hearing. Thus, it is entirely for the Chamber to base its determination, or parts thereof, on such evidence namely, after the Chamber has requested its submission at the confirmation of charges hearing and after the parties have made their observations, if any, at the hearing. Against the backdrop of these fundamental principles, the Single Judge considers the Prosecutor’s arguments related to the Third Issue, including the simplistic reference to the possible slow-down of proceedings as wholly hypothetical and in disregard of such principles’ (footnote omitted).²⁴⁸

- 122 When making its determination, the PTC reviews the Prosecutor’s evidentiary material by taking also into account the arguments and evidence presented by the defence. Whether the principle *in dubio pro reo* is applicable at this stage, is discussed controversially in the PTC jurisprudence. While PTC II in the *Bemba* case declared this principle fully applicable at the

²⁴⁶ See, for example, *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1547, Decision on the Filing of a Summary of the Charges by the Prosecutor, TC II, 21 October 2009, paras 29–31; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-836, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, TC III, 20 July 2010, paras 29–31.

²⁴⁷ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 (OA4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’, AC, 30 May 2012, footnote 79 and para. 43.

²⁴⁸ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-74, Decision on the ‘Prosecution’s Application for leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (ICC-01/09-01/11-44)’, PTC II, 2 May 2011, para. 37; see also *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-77, Decision on the ‘Prosecution’s Application for leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (ICC-01/09-02/11-48)’, PTC II, 2 May 2011, para. 34; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, PTC III, 25 August 2008, paras 48–55.

article 61 stage,²⁴⁹ PTC I in the *Abu Garda* case rejected its relevance and expressed its preference to resolve any inconsistency, ambiguity or contradiction as a matter of sufficiency of the evidence.²⁵⁰ The approach of PTC I seems to be more appropriate. It is questionable whether the principle of *in dubio pro reo* is applicable at the confirmation stage, considering that the PTC has not yet assessed the *entirety* of the evidence in the case. However, such comprehensive analysis is a necessary prerequisite for applying the principle in the first place. It follows that the principle of *in dubio pro reo* can only be validly invoked at the end of the trial. Another factor diminishing the strength of the PTC II finding is that, while it stipulated the applicability of this principle, it never applied it in one of the cases before it. On a related matter, the extent to which the PTC may assess the evidence and resolve **inconsistencies or contradictions** has also been a bone of contention at the time. A recurring argument of the Prosecutor has been that the PTC accept as dispositive the Prosecutor's evidence as long as it is relevant and admissible; the PTC should not inquire into any ambiguities or inconsistencies of the evidence and evaluate the strengths and weaknesses of contradictory evidence, but take it 'at face value'. In support of his submission, the Prosecutor relied on jurisprudence of the *ad hoc* tribunals concerning mid-trial acquittals, as provided under rule 98bis of the ICTY Rules of Procedure and Evidence. The PTCs have repeatedly rejected such analogy and a restrictive interpretation of the applicable law under the Rome Statute, highlighting that the procedural regime of the ICC and that of the *ad hoc* tribunals cannot be compared.²⁵¹ Rather, they insisted that they assess the evidence freely (rule 63(2)), having regard to contradictions and inconsistencies in the evidence.²⁵² Ultimately, the AC in the *Mbarushimana* case confirmed the PTCs' uniform approach by drawing upon, *inter alia*, the filter function exercised by the PTC, the right of the suspect to challenge the Prosecutor's evidence (article 61(6)), the principle of free assessment of evidence (rule 63(2)) and the PTCs' discretionary powers to rule on admissibility of evidence under article 69(4).

'In determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses. Any other interpretation would carry the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradiction or doubts as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged.'²⁵³

²⁴⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC II, 15 June 2009, para. 31. Applied by the same Chamber in *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 41; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 53.

²⁵⁰ For example, *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, PTC I, 8 February 2010, para. 43.

²⁵¹ See *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 (OA4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', AC, 30 May 2012, para. 43; *ibid.*, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 45; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2013, para. 58. *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, para. 72.

²⁵² See, for example, *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, paras 45–47; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 55–61; see also Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09-01/11-373, 169–171, paras 53–57; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 67–75; see also Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09-02/11-382-Red, 23 January 2012, 189–191, paras 58–62.

²⁵³ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 (OA4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', AC, 30 May 2012, para. 46.

But the AC also acknowledged limitations to the PTCs' ability to assess evidence freely and cautioned the PTCs to use this authority wisely in light of the purpose of the article 61 stage.

'This is not to say that the Pre-Trial Chamber's ability to evaluate the evidence is unlimited or that its function in evaluating the evidence is identical to that of the Trial Chamber. The Appeals Chamber recalls that the confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial. This limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor must only produce sufficient evidence to establish substantial grounds to believe the person committed the crimes charged. The Pre-Trial Chamber need not be convinced beyond a reasonable doubt, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe. This limited purpose is also reflected in the fact that the Prosecutor may rely on documentary and summary evidence and need not call the witnesses who will testify at trial. (...)

As the Appeals Chamber has acknowledged, the Prosecutor's reliance on documentary or summary evidence in lieu of in-person testimony will limit the Pre-Trial Chamber's ability to evaluate the credibility of witnesses. While it may evaluate their credibility, the Pre-Trial Chamber's determinations will necessarily be presumptive, and it should take great care in finding that a witness is or is not credible. The Prosecutor's reliance on summary evidence may also mean that the Pre-Trial Chamber will not be presented with all details of the evidence in the possession of the Prosecutor. Where the evidence is insufficient in this regard, the Appeals Chamber recalls that the Pre-Trial Chamber need not reject the charges but may adjourn the hearing and request the Prosecutor to provide further evidence' (footnote omitted).²⁵⁴

- 123 Finally, the recent practice of PTCs has been to refrain from ruling explicitly on the relevance and admissibility of every piece of evidence (article 69(4)) submitted for the Chamber's determination under article 61(7). Indeed, as confirmed by PTC I in the *Mbarushimana* case, a comprehensive admissibility analysis of the evidence is inapposite at this stage considering that (i) the Prosecutor may rely on documentary or summary evidence for the purpose of the confirmation of charges and does not need to call witnesses at the hearing; and (ii) this exercise may considerably delay the proceedings and pre-determine evidentiary matters which deserve to be properly decided upon at trial.²⁵⁵ PTC II in the *Ntaganda* case added recently that

'the Chamber is, as a matter of principle, not obliged to undertake a comprehensive assessment of 'relevance' or 'admissibility' of each piece of evidence in accordance with article 69(4) of the Statute, save for the application of article 69(7) of the Statute. The Appeals Chamber has acknowledged the discretion chambers enjoy under article 69(4) of the Statute, which is evidence form the clear wording of said provision (...). Rather, what is required by the Statute is that this Chamber bases its article 61(7) decision on such evidence which it considers relevant and of sufficient probative value. (...)

This approach finds further support in the language used in article 61 of the Statute which does not establish anywhere that the evidence, upon which the Chamber relies in its article 61(7) decision must previously have been 'admitted' or declared as 'relevant' pursuant to article 69(4) of the Statute. Rather, the Chamber is invited in article 61(7)(a) of the Statute to 'confirm those charges in relation to which it has determined that there is sufficient evidence (...)'. Whether the evidence is relevant, sufficiently connected to the charges, or has probative value is determined by the Chamber on a case-by-case basis in the article 61(7) decision' (footnotes omitted).²⁵⁶

²⁵⁴ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 (OA4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', AC, 30 May 2012, paras 47–48; PTC II in the Kenya cases added that inconsistencies within one or amongst several pieces of evidence do not lead to an automatic rejection of the particular evidence; rather, the Chamber is called upon to assess whether potential inconsistencies cast doubt on the overall credibility and reliability of the evidence and affect the probative value, taking into account the nature and degree of the inconsistency and the specific issue to which the inconsistency relates, *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11/382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PCT II, 23 January 2012, para. 92; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PCT II, 23 January 2012, para. 86.

²⁵⁵ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, PTC II, Decision on the confirmation of charges, 16 December 2011, paras. 43–44.

²⁵⁶ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-308, Decision on Admissibility of Evidence and Other Procedural Matters, PCT II, 8 June 2014, paras 25 and 27. Similarly, *Prosecutor v. Jean-Pierre Bemba Gombo*

Rather, the PTCs have confined their analysis to individual challenges related to specific pieces of evidence.²⁵⁷

The article 61(7) decision is rendered within 60 days from the date the confirmation hearing ends or from the date the final written submission of the defence is received (see mn 116). In almost all cases this time limit has been respected. Only in the *Ruto et al.* case, PTC II varied the 60-day deadline and decided to issue the article 61(7) decision later, namely simultaneously with that in the *Muthaura et al.* case, for fears that the issuance of the confirmation decision in only one case could spark violence in the country.²⁵⁸

Decisions under article 61(7) are not directly appealable but may be **appealed** if leave is granted by the PTC pursuant to article 82(1)(d).²⁵⁹ Considerations that the interlocutory appeal would address fundamental questions or would be beneficial for the entire Court do not *per se* warrant granting the appeal. PTCs have adopted a restrictive approach when deciding whether to grant leave to appeal the decision under any of the sub-paragraphs in article 61(7). To date, only two article 61(7) decisions have been reviewed on appeal: the decision rejecting all charges against *Mbarushimana*²⁶⁰ and the adjournment decision in the *Laurent Gbagbo*²⁶¹ case.

A decision under article 61(7) may be based on either sub-paragraphs (a) to (c) or on a **combination** thereof. In case the PTC confirms some of the charges but adjourns the hearing on other charges pursuant to article, 61(7), ‘it may decide that the committal of the person concerned to the Trial Chamber on the charges that it is ready to confirm shall be deferred pending the continuation of the hearing’ (rule 127, first sentence).

3. The decision confirming the charges

The decision confirming the charges paves the way for proceedings to take place before a TC. The decision of the PTC has a **binding effect** on the TC; the latter cannot review or simply alter without more the charges as contained in the decision confirming the charges. TC I in the *Lubanga* case held:

‘[I]n the judgment of the Bench, the Trial Chamber has no authority to ignore, strike down or declare null and void the charges as confirmed by the Pre-Trial Chamber. The power to frame the charges lies at the heart of the Pre-Trial Chamber’s functions, as set out in Article 61 of the Statute. (...)

It follows that the Trial Chamber would be acting *ultra vires* if it (...) attempted to interfere with, or strike down, the decision of the Pre-Trial Chamber on an issue over which it has exclusive control. The Pre-Trial Chamber and the Trial Chamber have separate functions at different stages of the proceedings, and there is no hierarchy of status between them. The Trial Chamber has not been given an appellate jurisdiction over any decision of the Pre-Trial Chamber (...), and most particularly the Trial Chamber has not been given a power to review the only decision of the Pre-

et al., ICC-01/05-01/13-749, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 11 November 2014, para. 14.

²⁵⁷ See, for example, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-749, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 11 November 2014, para. 14.

²⁵⁸ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-357, Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute, PCT II, 26 October 2011.

²⁵⁹ The ground in relation to the confirmation or denial of an indictment was deleted at one stage from Draft Article 81 as it was considered to lead to delays in the proceedings, see Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.I, 14 April 1998, 126–127; see also Brady and Jennings, in: Lee (ed.). *The Making of the Rome Statute* (1999), 300.

²⁶⁰ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 (OA4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2012 entitled ‘Decision on the confirmation of charges’, AC, 30 May 2012.

²⁶¹ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 (OA5), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’, AC, 16 December 2013.

Trial Chamber that is definitely binding on the Trial Chamber: the Decision on the confirmation of charges. Contrary to the submissions of the prosecution, the Trial Chamber has severely limited authority as regards the content of the charges.²⁶²

- 128 The decision under article 61(7)(a) confirming the ‘charges’ comprises both the facts together with their (preliminary) legal characterization (see mn 42); it informs authoritatively the accused of the subject-matter of the upcoming trial. The *legal* characterization of the facts as confirmed is not binding on the TC²⁶³ and may be subject to change, pursuant to regulation 55 of the Regulations. The facts of the case, on the other hand, are ‘frozen’ with the decision of the PTC.²⁶⁴ It follows that the Prosecutor may not add new facts or substitute facts at trial which have not been discussed at the confirmation process (in contrast, the Prosecutor is entitled to present new *evidence* which was not presented at the confirmation stage). Hence, of crucial importance is that the PTC indicates in its decision exhaustively and with sufficient clarity all the facts upon which it confirmed the charges. Equally, facts in relation to which the evidence was considered insufficient should be clearly set out as such; they will not form part of the charges as confirmed. In case the PTC remains silent as to certain facts, it cannot be assumed that the PTC either rejected or confirmed them. In this case, those factual allegations also do not form part of the charges as confirmed. In the past, TCs have expressed their concern that the factual basis upon which the charges had been confirmed was not always clearly set out in the decision and have made concrete proposals as to a possible structure of the article 61(7)(a) decision.²⁶⁵ Consequently, PTCs in recent proceedings, such as the *Ntaganda*, *Laurent Gbagbo*, *Jean-Pierre Bemba Gombo et al.* and *Blé Goudé* case, explored different ways to make the decisions clearer in this respect. Leaving aside for the moment the appropriateness of the different structures chosen for the article 61(7)(a) decisions, it is clear that the Chambers in these decisions took pains to provide only the essence of their assessment and to describe, as precise as possible, the ‘facts and circumstances’ that the TC may not exceed (article 74(2), second sentence). Thus facts which

²⁶² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, TC I, 13 December 2007, paras 39 and 43.

²⁶³ ‘[I]t is only the factual, as opposed to the legal elements of the confirmed charges that have a delimiting function *vis-à-vis* the Trial Chamber’, *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the ‘Decision on the Confirmation of Charges, PTC I, 7 March 2011, para. 35.

²⁶⁴ ‘[A]t the beginning of the trial, its parameters must be clear. The only modification possible under the Court’s legal framework thereafter is a change to the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court’, see recently *Prosecutor v. William Samoei Ruto/Joshua Arap Sang*, ICC-01/09-01/11-1123 (OA6), Decision on the Prosecutor’s appeal against the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’, AC, 13 December 2013, para. 29.

²⁶⁵ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1547, Decision on the Filing of a Summary of the Charges by the Prosecutor, TC II, 21 October 2009, paras 29–31; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-836, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, TC III, 20 July 2010, paras. 29–31. To overcome the ‘information deficit’ of the confirmation decision, the Prosecutor has been requested in some cases to submit an ‘updated DCC’. While the ‘updated DCC’ may serve as an auxiliary document assisting to have additional clarity on the facts, its submission can by no means be viewed as a statutorily prescribed procedural act. This was confirmed by the AC lately in the *Lubanga* case which held: ‘As to where and how the detailed information about the charges is to be provided to the accused, the Appeals Chamber underlines at the outset that, given the Court’s statutory framework and the respective roles of the Prosecutor and the Pre-Trial Chamber in the confirmation process, *there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial*. If it were otherwise, a person could be tried on charges that have not been confirmed by the Pre-Trial Chamber, or in relation to which confirmation was even declined. However, this does not necessarily exclude that *further details about the charges*, as confirmed by the Pre-Trial Chamber, *may, depending on the circumstances, also be contained in other auxiliary documents*’, see *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, AC, 1 December 2014, para. 124; *Prosecutor v. Jean-Pierre Bemba et al.*, ICC-01/05-01/13-992, Decision on the Submission of Auxiliary Documents, TC VII, 10 June 2015: dissenting opinion of Judge Eboe-Osuji registered under No. ICC-01/05-01/13-992-Anx.

are not expressly mentioned in the recent article 61(7)(a) decisions do not form part of the charges as confirmed. The Prosecutor frames the charges in the DCC for the purpose of the confirmation hearing; the PTC frames the charges in its decision for the purpose of trial. The authority to define the parameters of the case shifts at the confirmation stage from the Prosecutor to the PTC. As a result, any queries as to the precise scope of the charges should be addressed to the PTC pursuant to article 64(4).

The term ‘facts and circumstances’ is not defined in the Statute. The Appeals Chamber in the context of the appeal on regulation 55 in the *Lubanga* case coined the distinction between ‘facts’, ‘evidence’ and ‘background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged’ (see mn 40). In the aftermath of this judgment, both PTC I and II occasionally introduced the notions of ‘material facts’ and ‘subsidiary’ facts’ by way of which they asserted to better single out the ‘facts and circumstances’ from within the different facts presented in the DCC: ‘material facts’ are those which underpin a specific charge (and which, accordingly, must be proven against the evidentiary threshold of article 61(7)); a ‘subsidiary fact’ is background information or evidence from which the existence of the ‘material fact’ may be inferred.²⁶⁶ It has been discussed in the context of the DCC, such a distinction does not provide more clarity and is not grounded in the law (see mn 32). Moreover, it is not clear from the PTC decisions concerned which of the facts the PTC considered as ‘material’ or ‘subsidiary’ and how this impacted the confirmed charges. Actually, it seems that such distinction was not necessary for the application of article 61(7). This is so because what matters for confirming one or more charges is to rely on all those facts essential for proving the legal elements of the crime(s) namely, what is proposed as the ‘material facts’.

In the *Laurent Gbagbo* case, the Prosecutor had alleged a number of incidents (45) to constitute an ‘attack directed against any civilian population’ within the meaning of article 7(1), amongst them four so-called ‘charged incidents’. When adjourning the hearing, the Majority Judges and the dissenting Judge were divided over the question whether those 45 incidents were part of the ‘facts and circumstances’ and to what extent they must be proven. While the dissenting Judge opined in essence that such incidents are ‘subsidiary facts’ which merely serve to prove, together with other evidence, the ‘attack’,²⁶⁷ the Majority Judges rejected such qualification and held that the incidents are part and parcel of the ‘facts and circumstances’ supporting the contextual legal elements of the crimes charged and must be proved to the requisite threshold.²⁶⁸ In the following, the AC was given the opportunity to enquire into this issue. Recalling, *inter alia*, articles 61(3), 67(1)(a) and regulation 52 of the Regulations, the AC rejected the proposed distinction between ‘material’ and ‘subsidiary’

²⁶⁶ *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum on the ‘Decision on the Confirmation of Charges’, PTC I, 7 March 2011, paras 36–37; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 47–48; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 59–60; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-325, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, PTC I, 14 December 2012, para. 27. See recently, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-T-6-ENG, Transcript of Hearing, PTC II, 19 May 2015, 21. When providing directions to the Prosecutor as to the expected content of the DCC, the Single Judge remained unclear what he meant by the term ‘subsidiary facts’ (‘In the charges the Prosecutor must include only the material facts as the subsidiary facts, like more generally the evidence, are brought to the attention of the Chamber only as part of the Prosecutor’s argumentation but do not belong to the charges’ [emphasis added]). Indeed, as confirmed by the AC, evidentiary information does not constitute ‘facts and circumstances’ underpinning the charges.

²⁶⁷ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432-Anx-Corr, Dissenting Opinion of Judge Silvia Fernández de Gurmendi, 6 June 2013, para. 41.

²⁶⁸ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, paras 21–23.

facts since the Statute does not provide for such distinction.²⁶⁹ Rather, its yardstick remained whether the facts in question support any of the legal elements of the crimes charged. Hence, in response to the Majority's approach requiring a 'sufficient number' of incidents relevant for the establishment of an alleged 'attack', the AC stated

'that it is for the Pre-Trial Chamber to determine whether those facts, if proven to the requisite threshold, establish the legal elements of the attack. The question of how many of the incidents pleaded by the Prosecutor would suffice to prove an 'attack' in the present case is a matter for the Pre-Trial Chamber to determine. It is not a question that can be determined in the abstract' (emphasis added).²⁷⁰

131 Similarly, past attempts of the Prosecutor to draw a distinction between 'facts of the case' and 'facts constituting the charges' were not accepted by the Court on the grounds that such distinction does not exist under the Statute and would 'constitute a source of ambiguity, confusion and contention at trial'.²⁷¹

132 The allegations of the Prosecutor are verified on the basis of the evidence submitted. Where the Chamber does not find any evidentiary support for a particular factual allegation, it will not confirm it. Thus, the factual allegations for which not sufficient evidence has been presented will not form part of the charges and remain outside the ambit of the trial. In several cases, the factual scope of the case has been significantly reduced, including its temporal²⁷² or territorial²⁷³ scope thereby substantially modifying or 'downsizing' the case, as initially presented by the Prosecutor. One may argue that the control exercised by the PTCs has allowed not only barring totally unmeritorious cases from proceeding to trial but, more importantly, to reduce the (factual) scope of cases where the Prosecutor did not have any or sufficient evidence. In case the Prosecutor decides to re-introduce those facts on the basis of new evidence, he or she may make use of the procedure under article 61(9) (see mn 146 *et seq.*).

²⁶⁹ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 (OA5), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute', AC, 16 December 2013, para. 37.

²⁷⁰ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 (OA5), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute', AC, 16 December 2013, para. 47.

²⁷¹ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1547-t-ENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, TC II, 21 October 2009, para. 19.

²⁷² For example, in the case of the *Muthaura et al.* case, the Prosecutor charged the suspects for the commission of crimes during the period of 30 December 2007 to 31 January 2008 (one month). In the decision on the confirmation of charges, the PTC reduced this period to events which took place overall between 24 and 28 January 2008 (four days), see *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 21 and 428. In the *Ruto et al.* case, the Prosecutor charged the suspects for the commission of crimes during the period of 30 December 2007 until the end of January 2008 (one month). In the decision on the confirmation of charges, the PTC reduced this period to events which took place in Turbo town only to 31 December 2007 (one day); in the greater Eldoret area to the period between 1–4 January 2008 (four days); in Kapsabet town to the period between 30 December 2007 to 16 January 2008 (2 weeks); and in Nandi Hills town between 30 December 2007 to 2 January 2008 (four days). The temporal scope was reduced therefore from one month to selected periods ranging from two weeks to one day(!), see *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 22 and 367.

²⁷³ For example, in the *Muthaura et al.* case, the Prosecutor charged the suspects for the commission of crimes in the locations 'in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province)'. In the decision on the confirmation of charges, the PTC rejected the notion 'in or around locations including Nakuru and Naivasha' but accepted only 'in or around Nakuru' and 'in or around Naivasha' and extended its analysis of the facts only to those two locations for which evidence had been submitted, see *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 21 and 106. Likewise, in the *Ruto et al.* case, the PTC rejected the word 'including' and confined its analysis to those locations which were explicitly referred to in the DCC. It ruled 'the use of the expression 'in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town' shall be understood as encompassing exclusively these locations', see *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 22 and 99.

With a view to expediting the confirmation process, the defence in the *Banda/Jerbo* case informed PTC I that it **did not contest** any of the facts alleged in the Prosecutor's DCC. Importantly, such agreement was limited for the purposes of the confirmation process only. PTC I noted the parties' agreement on the facts set out in the DCC, but when taking its decision, it declared to adopt nonetheless a 'cautious approach' to refer to the evidence whenever appropriate to determine that the requisite evidentiary standard has been met. It grounded its approach on three grounds: (i) the Chamber's independent obligation in article 61(7) to ascertain whether there is sufficient evidence, 'irrespective of whether the parties agreed on the facts of the case';²⁷⁴ (ii) the aim of the procedural framework which allows the charges 'to be presented in full whenever either the interests of justice, which are paramount, or the interests of the victims, which are also critical, so require' (rule 69); and (iii) the fact that the parties failed to specify exactly the uncontested facts they agreed upon, given that the DCC is 'a complex narrative in which issues of fact and issues of law are often intertwined'.²⁷⁵

4. The decision declining to confirm the charges

PTC I and II have declined to confirm all charges against four suspects (*Abu Garda*, *Mbarushimana*, *Kosgey* and *Ali*) based on the insufficiency of evidence. Accordingly, proceedings were terminated against them. This was done without prejudice to the powers of the Prosecutor to approach the relevant PTC under article 61(8).²⁷⁶

Challenges as to the Prosecutor's purported failure to investigate in accordance with article 54(1)(a) do not lead to the rejection of the charges. PTC I determined that **investigative failures** 'may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole' met the requisite threshold of article 61(7).²⁷⁷ On the basis of which criteria this assessment can be achieved is not further explained. PTC II in the *Kenya* cases reacted in the same way and highlighted that 'the scope of the determination under article 61(7) of the Statute relates to the assessment of the evidence available and not the manner in which the Prosecutor conducted the investigations'.²⁷⁸

5. The decision adjourning the confirmation hearing

The decisions taken under article 61(7)(c) differ markedly from those taken under articles 61(7)(a) and (b). While in the latter, the PTC takes a final decision on the merits, either in the affirmative or in the negative,²⁷⁹ in the former case, the PTC is not yet in a position to take such a decision and returns to the Prosecutor with certain queries.²⁸⁰ In other words, the

²⁷⁴ See also, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 10.

²⁷⁵ *Prosecutor v. Abdallah Banda Abakaer Nourain/Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum on the 'Decision on the Confirmation of Charges', PTC I, 7 March 2011, paras 44–47.

²⁷⁶ Notably in a number of cases, such as in the *Bemba*, *Katanga/Ngudjolo* and *Ruto et al.* case, a combination of article 61(7)(a) and (b) led to the partial confirmation of charges, see *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC II, 15 June 2009, 184–185; *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-10/07-717, Decision on the confirmation of charges, PTC I, 30 September 2008, 211–212; *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, p. 138.

²⁷⁷ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, PTC I, 8 February 2010, para. 48.

²⁷⁸ *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 49–53; *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, paras 61–65.

²⁷⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 13.

²⁸⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 14.

PTC renders an intermediate decision before deciding finally whether or not to confirm the charges.²⁸¹ In fact, article 61(7)(c) is a procedural avenue to overcome certain shortcomings in the presentation of the case without rejecting outright the charges; the Prosecutor is given the opportunity to re-consider certain aspects of his or her file and, as the case may be, to present additional arguments and/or material, to the Chamber. This means that the article 61(7)(c) does not conclude the confirmation process.

137 As is the case for articles 61(7)(a) and (b), before rendering a decision the PTC must have evaluated the sufficiency of the evidence to reach the requisite threshold (see mn 87). This is a prerequisite dictated by the chapeau wording of article 61(7). Whether the Chamber is ready to render a final decision on the merits under article 61(7) or wishes to adjourn the hearing is therefore dependent on the PTC's prior assessment of the evidence as a whole.

138 Such analysis, one may assume, has already been conducted in the course of the preparation of the article 61 proceedings so that the PTC ideally invoke article 61(7)(c) before the closure of the hearing. However, both PTC III in the *Bemba* case and PTC I in the *Laurent Gbagbo* case 'adjourned' the hearing after it was actually declared to be closed and within the 60-day time limit within which the written decision of the PTC must be delivered in accordance with regulation 53 of the Regulations. This means that the 'hearing' within the meaning of article 61(7)(c) is understood to include also the period subsequent to the hearing until the delivery of the written decision. Adopting an effective interpretation, PTC III in the *Bemba* case explained:

'Thus, according to a wider interpretation, an adjournment of the Hearing may take place subsequent to the oral sessions and as long as the Chamber has not made its final determination on the merits and issued a decision whether or not to confirm the charges. This interpretation finds support also in the language of rule 127 of the Rules which states that 'if the Pre-Trial Chamber is ready to confirm some of the charges but adjourns the hearing on other charges under article 61, paragraph 7(c), it may decide that the committal of the person concerned to the Trial Chamber (...) shall be deferred pending the *continuation of the hearing* (...)' (emphasis added). The reference to the phrase 'continuation of the hearing' indicates that the notion of 'hearing' may extend beyond the oral sessions of the Hearing.'²⁸²

139 Despite the first impression, the adjournment of the 'hearing' in today's practice did not lead to resume the 'hearing' at a later point. While this option is not excluded, as the Chamber can always hold hearings at it deems necessary, the practice hitherto has been to proceed in writing and to conclude the confirmation stage with the written decision. In this case, it must be assumed that the 'hearing' within the meaning of article 61(7)(c) is definitively closed with the delivery of the article 61(7)(a) or (b) decision.

140 Article 61(7)(c) provides two different grounds for which the hearing is adjourned.

(1) Under option (i), the PTC considers that the **evidence submitted**, viewed as a whole, does not meet the required threshold for confirming the charges but, at the same time, does not consider the evidence to be 'irrelevant and insufficient to a degree that merits declining to confirm the charges'. As a result, the PTC may request the Prosecutor to consider to provide further evidence or to conduct further investigation.²⁸³ The formulation 'with respect to a particular charge' in the context of article 61(7)(c)(i) has been interpreted to encompass one or more charges, including any element within the charge(s) in question.²⁸⁴

²⁸¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 20.

²⁸² *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 37; see also *Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 13.

²⁸³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 16; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 15.

²⁸⁴ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 14.

Any suspect has the right to be tried ‘without undue delay’, as guaranteed in article 67(1)(c). When requesting the Prosecutor to consider conducting further investigation, the Chamber must bear in mind the inevitable prolongation of the confirmation process which may unduly infringe upon the rights of the suspect in detention. ‘Whether or not the activation of article 61(7)(c)(i) (...) unduly infringes the right of the suspect to be tried without undue delay must be determined on a case-by-case basis, taking into account the particularities of the case and in accordance with internationally recognized human rights’.²⁸⁵

In the *Laurent Gbagbo* case, the PTC I Majority was not satisfied that the 45 incidents described by the Prosecutor in the DCC constituted an ‘attack directed against any civilian population’. The Judges therefore requested the Prosecutor to consider providing further evidence in relation to those incidents. With a view to guiding the Prosecutor in remedying the deficiencies detected by the Chamber, a set of issues was provided; however, such list is not binding upon the Prosecutor as the Chamber has no powers to give ‘directives’ to the Prosecutor; this would contravene the request nature of article 61(7)(c) (see mn 141).

(2) Under option (ii), the PTC considers that the evidence submitted ‘appears to establish a different crime within the jurisdiction of the Court’ and, consequently, there may be a need for amending the charge(s) as originally contained in the Prosecutor’s DCC.²⁸⁶ A ‘different crime’ has been interpreted by PTC III to encompass both the crimes as listed in article 5 as well as the form of participation. The reason for considering the mode of criminal liability part of the ‘crime’ within the meaning of article 61(7)(c)(ii) was seen in their correlation: ‘Depending on the mode of participation as set out in articles 25 and 28 of the Statute, the material (objective) elements of the crime are shaped differently. It does have a bearing on the structure of the crime whether the person held liable for committing the crime acted as a principal, as an accomplice or as a superior’.²⁸⁷ In addition, reasons of fairness and the suspect’s entitlement to be informed and in detail about the nature, content and cause of the charges (article 67(1)(a)) also militate in adopting a broader interpretation.²⁸⁸

PTC III also pointed to a specificity of article 61(7)(c)(ii) which stems from the mention of ‘appearance’. In the view of that Chamber, this implies that the (provisional) determination of the PTC under article 61(7)(c)(ii) is reached against a lower standard than ‘substantial grounds to believe’.²⁸⁹ The standard of ‘appearance’ in this context does not require the Chamber to demonstrate that the legal requirements of a ‘different crime’ are ‘definitively satisfied’; rather, it is deemed sufficient that the Chamber makes a *prima facie* finding setting out its doubts as to the legal characterization of facts as proposed by the Prosecutor in the DCC.²⁹⁰

In the *Bemba* case, the suspect was prosecuted as principal perpetrator under article 25(3)(a) but PTC III opined at the time that the evidence regarding Bemba’s criminal

²⁸⁵ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, PTC I, 3 June 2013, para. 39.

²⁸⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 17. PTC III in the *Bemba* case added that a limited review of the evidence pertaining ‘only to the issue at stake is sufficient’ and that a ‘complete and in-depth analysis of all the evidence is unwarranted’ at this stage. This statement may not be transferrable to other cases where the ‘issues at stake’ involve more than one aspect of the case. In any event, it is advisable for any PTC to have thoroughly and comprehensively evaluated the evidence prior to rendering its decision under any of the options listed under article 61(7).

²⁸⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 26. For a different interpretation, albeit in a different context, see *Prosecutor v. Radoslav Brdjanin*, IT-99-36-A, Decision on Interlocutory Appeal, AC, 19 March 2004.

²⁸⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 28.

²⁸⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 18.

²⁹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 25.

responsibility pointed (also) towards the mode of liability under article 28. The Prosecutor agreed to submit an amended DCC adding this mode of liability; ultimately, the Chamber confirmed the charges under article 28 and rejected Bemba's role as a principal under article 25(3)(a), as initially argued by the Prosecutor.

- 141 Under article 61(7)(c), the PTC adjourns the hearing and *requests the Prosecutor to consider* whether to submit further evidence/conduct further investigation or amend a charge. The careful wording of article 61(7)(c) leaves no doubt that the Prosecutor enjoys, in principle, a wide margin of discretion whether and to what extent to react to an article 61(7)(c) decision. The request nature of article 61(7)(c) respects the division of responsibilities between the PTC and the Prosecutor and ensures that the Prosecutor's functions in the confirmation process are not encroached upon.

[T]he Chamber makes it clear that by way of adjourning the hearing it does not purport to impinge upon the Prosecutor's functions as regards the formulation of the appropriate charges or to advise the Prosecutor on how best to prepare the document containing the charges. The Chamber holds the view that it is the responsibility of the Prosecutor to build and shape the case according to his statutory mandate pursuant to article 54(1)(a) of the Statute. The responsibilities of the Chamber lie in exerting judicial oversight during the pre-trial proceedings and rendering its decision in accordance with article 61(7) of the Statute.²⁹¹

- 142 In case the Prosecutor does not decide to follow the Chamber's proposition, the Chamber will resort to rendering a final decision on the merits pursuant to either article 61(7)(a) or (b). In case the Prosecutor agrees to follow the PTC proposition, he or she must submit a new amended DCC, together with a list of evidence, as the case may be.

VIII. Paragraph 8: Subsequent request for confirmation

- 143 If the PTC declines to confirm one or more charge(s), the Prosecutor is not precluded from subsequently requesting its confirmation. The provision was added to article 61 at the Rome Conference on a proposal from Austria.²⁹² The Prosecutor can continue the investigation, and in case he/she obtains additional evidence to support the confirmation of the charge(s) concerned, he/she can request the PTC to confirm the charge(s) again.

- 144 In case all charges have been rejected against the suspect and the Prosecutor intends to request the confirmation of the charge(s) afresh based on additional evidence, he or she must first request the issuance of a new warrant of arrest or summons to appear pursuant to article 58 (see mn 154). This is necessary because according to article 61(10) the warrant of arrest ceases to have any effect, if one or more charges have not been confirmed. Upon surrender or appearance of the suspect, the procedure under article 61(1)-(7) will be rehearsed at the end of which the PTC will address the question whether or not to confirm the charges.

- 145 After the AC confirmed PTC I's decision in the *Mbarushimana* case rejecting the charges, the then Prosecutor Moreno Ocampo revealed his intention to explore whether it was possible to present a new case against *Mbarushimana*.²⁹³ Likewise, after PTCII declined to confirm the charges against *Kosgey* and *Ali* in the Kenya cases, Prosecutor Moreno Ocampo announced to continue his investigation in relation to those two suspects.²⁹⁴ Hitherto article 61(8) remains to be a dead letter.

²⁹¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, PTC III, 3 March 2009, para. 39.

²⁹² Austria: proposal regarding article 61, UN Doc. A/CONF.183/C.1.AVGPM/L.19.

²⁹³ 'The [Office of the Prosecutor] takes note of today's decision by the Appeals Chamber. We are evaluating the decision to see whether it is possible to present a new case against Mr Mbarushimana presenting additional evidence, in accordance with the Judges' ruling', see 'OTP Statement following the Appeals Chamber decision', dated 30 May 2012 (available on the website of the Court).

²⁹⁴ 'We will keep investigating Kosgey and the activities of the police as well as crimes allegedly committed in Kibera and Kisumu', see 'Statement by the Prosecutor of the International Criminal Court on Kenya ruling', dated 24 January 2012 (available on the website of the Court).

IX. Paragraph 9: Amendment or withdrawal of charges

It is apparent that article 61(9) should be read together with 61(4). There is a clear interplay between these two paragraphs as both of them complement one another. While article 61(4) governs amendment to the charges before their confirmation by the PTC, paragraph 9 regulates this procedure post-confirmation and prior to the commencement of the trial. A distinguishable feature between these provisions lies in the extent of discretion provided to the Prosecutor in carrying out an amendment to a charge. In the course of the pre-trial proceedings and before issuing a decision confirming the charges, the Prosecutor enjoys a wide margin of discretion to amend one or more of the charges initially presented in the DCC, subject to providing the Defence with ‘reasonable notice before the hearing’ (see mn 83). At this stage, the process of amendment does not require judicial authorization. However, the Chamber’s intervention may take place in a situation of failure on the part of the Prosecutor to provide such notice sufficiently in advance or her failure to do so at all. In a situation as such, the relevant PTC should either intervene *proprio motu* or in response to an application lodged by the suspect in order to preserve the fairness of the proceedings, including the rights of the defence. 146

The Prosecutor’s discretion regarding the amendment of charges is restricted after charges have been confirmed. In this case, the Prosecutor is not entitled to amend the charges without notifying the accused and being permitted to do so by the relevant chamber.²⁹⁵ In the *Kenyatta* case, PTC II considered that securing the Chamber’s permission is a ‘*conditio sine qua non* for any amendment to the charges’,²⁹⁶ in accordance with article 61(9). According to the Chamber, the insertion of the term ‘permission’ is not useless. It serves a certain aim namely, to ensure that any request for amendment of charges at this stage ‘[is] supported and justified’.²⁹⁷ This calls upon the respective chamber to examine not only the Prosecutor’s request but also other ‘relevant information which [the] chamber could seek if necessary for the purpose of its final determination’.²⁹⁸ This holistic approach assists the relevant chamber ‘in arriving at a proper and balanced decision, taking into consideration diverse factors affecting the [particular] case including its fairness, expeditiousness, the rights of the accused as well as those of the victims’.²⁹⁹ PTC II retained this approach and applied it in a different case five months later. 147

²⁹⁵ ‘Before the confirmation hearing, the Prosecutor may [...], amend or withdraw charges without the permission of the Pre-Trial Chamber. This flexibility of the Prosecutor is more limited after the confirmation of the charges with respect to the amendment, addition or withdrawal of charges; pursuant to article 61(9) of the Statute the Prosecutor may amend the charges after their confirmation only with the permission of the Pre-Trial Chamber [...]’, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 (OA3), Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to rule 81(2) and (4) of the Rules of Procedure and Evidence’, AC, 13 October 2006, para. 53.

²⁹⁶ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, PTC II, 21 March 2013, para. 19.

²⁹⁷ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, PTC II, 21 March 2013, para. 21.

²⁹⁸ *Ibid.* See also rule 128(2) which reads: ‘Before deciding whether to authorize the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law’. This rule makes it clear that the power of the Chamber to rely on a holistic examination may find legal support in this provision.

²⁹⁹ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, PTC II, 21 March 2013, para. 22.

- 148 In the *Ruto et al.* case, the Prosecutor sought an amendment of the charges by way of extending their temporal scope.³⁰⁰ The Prosecutor requested the addition of the dates 30 and 31 December 2007 to all charges confirmed by the PTC.³⁰¹ However, the Prosecutor lodged this request only seven weeks before the actual start of the trial which was scheduled to take place on 10 September 2013 at the time.³⁰² Applying the same approach adopted in the *Kenyatta* case, the PTC considered that the statutory requirement of granting permission to the Prosecutor to amend a charge suggests that the ‘Prosecutor should not benefit from an unfettered right to resort to article 61(9) [...] at her ease, particularly, if such permission will negatively affect other competing interests’.³⁰³ The Chamber engaged into consideration of the time factor, the fact that the Prosecutor had in her possession the necessary evidence several months before the date of filing the request and the potential prejudice to the rights of the accused.³⁰⁴ Upon balancing the competing interests at stake, the Chamber considered that the Prosecutor failed ‘to provide [...] any justification or valid reasons for such procedural conduct and excessive delays’³⁰⁵ and that ‘authorizing an amendment [...] in the absence of any justification as to the belated nature of the Prosecutor’s Request on an issue that has been crucial since the confirmation of charges hearing would result in an unfair burden for the Defence [...] [and would] unduly compromise the rights of the accused [...] as provided in article 67(1)(a)–(c) of the Statute’.³⁰⁶ Having assessed these factors collectively, the Chamber rejected the Prosecutor’s request.
- 149 The validity of this approach has not been considered on appeal. Although the Prosecutor appealed the decision in the *Ruto and Sang* case on 26 September 2013, the AC refrained from entering into the merits.³⁰⁷ Instead, the AC, by majority, dismissed the appeal as inadmissible due to the fact that the Prosecutor’s appeal became moot since the trial in that case had actually commenced and an amendment could no longer take place before the PTC.³⁰⁸ Nevertheless, the AC made a significant pronouncement relating to the timing of lodging requests for amending the charges under article 61(9). It made it clear that even if the Prosecutor’s request was filed before the commencement of the trial, the wording of article 61(9) ‘indicates that not only the request to amend the charges has to be filed before the commencement of the trial, but also the entire process of amending the charges must be completed by that time, including the granting of permission for the amendment’.³⁰⁹ In the words of AC, ‘[t]he purpose of this [interpretation] is obvious: at the beginning of the trial, its parameters must be clear’.³¹⁰
- 150 Depending on the stage of the proceedings, the request of the Prosecutor may target an amendment or a withdrawal of charges.³¹¹ Prior to the start of the trial, the Prosecutor may request an amendment and, as noted above, it shall take place if permitted by the PTC as referred to in the cases cited above. After the commencement of the trial, the Prosecutor is only permitted to request withdrawal of one or more of the charges or institute new proceedings before the PTC. In the former case, this is the responsibility of the TC. The

³⁰⁰ *Prosecutor v. William Samoei Ruto/Joshua Arap Sang*, ICC-01/09-01/11-859, Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, PTC II, 16 August 2013, para. 13.

³⁰¹ *Ibid.*, para. 38.

³⁰² *Ibid.*, paras 8–9.

³⁰³ *Ibid.*, para. 31.

³⁰⁴ *Ibid.*, paras 35–42.

³⁰⁵ *Ibid.*, para. 38.

³⁰⁶ *Ibid.*, para. 42.

³⁰⁷ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11-1123), Decision on the Prosecutor’s appeal against the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’, AC, 13 December 2013.

³⁰⁸ *Ibid.*, 3, 12–13.

³⁰⁹ *Ibid.*, para. 29.

³¹⁰ *Ibid.*

³¹¹ Article 61(9).

decisive factor here is the timing for the start of the trial.³¹² Although the timing factor for the start of a trial was controversial until few years ago,³¹³ the recent language employed by the AC suggests that a trial does not begin before the opening statements. In *Ruto et al.*, the AC noted that ‘opening statements in the present case were made on 10 September 2013 and the first witness was heard on 17 September 2013. Accordingly, irrespective of the precise moment at which the trial begins within the meaning of article 61 (9) (...), in the instant case, the *trial has commenced*’ (emphasis added).³¹⁴ Thus, the fact that the AC focused only on the two respective dates concerning the opening statements and the hearing of the first witness, it is difficult to conclude that the AC meant that a trial begins prior to the opening statements (*i. e.*, in the course of the pre-trial preparation for the actual trial). Rather logic dictates that the trial actually begins after the pre-trial preparations have been concluded and at least with the opening statements, as TC I suggested.³¹⁵

The request for amending the charges may take at least two different forms. It may be a request to make an amendment to an existing charge or to add one or more additional charge(s) or substitute one or more existing charge(s) with more serious charges. The current jurisprudence of the PTCs referred to above only dealt with the first form namely, requesting an amendment within the same set of charges. For this type of amendment, article 61(9) does not require a hearing before authorizing the amendment of the relevant charge. 151

In the *Kenyatta* case, the Prosecutor requested the addition of a limited factual allegation that ‘victims were also killed by gunshot in Naivasha’.³¹⁶ The Chamber considered that ‘the nature of the requested amendment does not aim at adding an additional charge or substituting an existing charge with a more serious one. Rather it is a re-insertion, on the basis of the new evidence presented, of an already known specific factual allegation for an existing charge of murder in Naivasha (...) [and accordingly] [there was no] need to hold a hearing for the purpose of deciding on the Prosecutor’s Request’.³¹⁷ In the *Ruto et al.* case, although PCT II did not rule on the nature of the requested amendment it was clear that the nature of the request to add two days to the existing charges still falls within the first category which does not require a hearing.³¹⁸ 152

Differently is the situation where the Prosecutor’s request goes beyond the existing charges and aims at either adding new charges or replacing the existing ones with more serious charges. This may also take the form of adding new facts and circumstances and new legal 153

³¹² See also *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-696, Decision on the withdrawal of charges against Mr Muthaura, TC V, 18 March 2013, para. 11 where TC V was confronted with a situation where the Prosecutor requested withdrawal of the charges after the confirmation of charges but before the actual trial commenced. In this case, the Chamber still considered that permission should be granted as to the withdrawal of charges, but on the basis of article 64(2) of the Statute.

³¹³ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), TC II, 16 June 2009, paras 30, 36–42; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, TC I, 13 December 2007, para. 39.

³¹⁴ *Prosecutor v. William Samoei Ruto/Joshua Arap Sang*, ICC-01/09-01/11-1123, Decision on the Prosecutor’s appeal against the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’, AC, 13 December 2013, para. 27.

³¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, TC I, 13 December 2007, para. 39; *Prosecutor v. Jean- Pierre Bemba Gombo*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, TC III, 24 June 2010, para. 201.

³¹⁶ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute, PTC II, 21 March 2013, para. 26.

³¹⁷ *Ibid.*, para. 29.

³¹⁸ See also in the *Kenyatta* case, TC V considered, albeit in a different context based on a defence request, that a change in the evidence introduced before the TC does not justify a new confirmation hearing insofar as such a change does not lead to a change to the charges. *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-728, Decision on defence application pursuant to Article 64(4) and related requests, TC V, 26 April 2013, para. 111.

characterizations which were not confirmed by the PTC.³¹⁹ In this case a hearing to confirm these new charges will be required following the same procedural process envisaged under article 61(3), (5), (6)-(7) and the rules related thereto.

X. Paragraph 10: ‘Warrant previously issued’

- 154 Paragraph 10 should be understood in the context of the other related paragraphs of article 61 namely, paragraphs 4, 7 (b), 8 and 9. The question of vacating a warrant of arrest is a corollary to a decision of a PTC to decline to confirm one or more charges pursuant to article 61(7)(b). In the *Mbarushimana case*, PTC I declined to confirm the charges against the suspect, and consequently, declared that the warrant of arrest against him ‘cease[d] to have effect in its entirety’.³²⁰ On appeal, the AC recalling article 61(10), stated that ‘the warrant of arrest cease[d] to have effect [was] therefore an automatic result of the decision declining to confirm the charges’.³²¹
- 155 A year later, PTC II also declined to confirm the charges against two suspects out of six in the *Kenya cases (Kosgey and Ali)*. But this time the PTC refrained from issuing warrants of arrest. Instead it issued summonses to appear. Article 61(10) speaks of ‘[a]ny warrant previously issued’ as opposed to a summons to appear, which may indicate that this paragraph is confined to the former. Although it is true that both articles 58(4) and 61(10) only mention a warrant of arrest, these latter provisions should apply *mutatis mutandis* to summonses to appear. To say otherwise would lead to an absurd conclusion in the sense that the Court could never cease the effect of any conditions previously imposed on a suspect or vacate a summons to appear even if a PTC declined to confirm all charges against him or her.
- 156 Indeed, in the *Ruto et al. case*, PTC II, after declining to confirm the charges against *Kosgey*, decided that the ‘conditions imposed on [him] in the Decision on Summons to Appear cease[d] to have effect’.³²² The Chamber followed the same path in the *Muthaura et al. case*.³²³ Nevertheless, although the Chamber declined to confirm the charge of other forms of sexual violence against the other two suspects (*Muthaura and Kenyatta*),³²⁴ the Chamber failed to note the effect of such finding on the validity of the summons to appear. In particular, the Chamber failed to acknowledge that the conditions imposed on the two suspects also cease to have effect in relation to the declined charge.
- 157 On the other hand, a warrant of arrest or a summons to appear may also cease to have effect if charges have been withdrawn by the Prosecutor. Thus a warrant of arrest which has been issued in the course of the confirmation proceedings will not stand any further if the Prosecutor decided *proprio motu* to withdraw the charges sufficiently in advance of the hearing.³²⁵ After the confirmation of charges and the commencement of the trial, a warrant of arrest shall still cease to have effect provided that the Prosecutor first secures permission from the TC to withdraw the charges.³²⁶

³¹⁹ *Prosecutor v. Germain Katanga/Mathieu Ngudjolo*, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, TC II, 21 October 2009, para. 27.

³²⁰ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, PTC I, 16 December 2011, 149.

³²¹ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-483, Reasons for ‘Decision on the appeal of the Prosecutor of 19 December 2011 against the “Decision on the confirmation of the charges” and, in the alternative, against the “Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana” and on the victims’ request for participation’ of 20 December 2011, AC, 24 January 2012, paras 20–21.

³²² *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, 138.

³²³ *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II, 23 January 2012, 154.

³²⁴ *Ibid.*

³²⁵ Articles 61(4) and 61(10).

³²⁶ Article 61(9) and 61(10).

So far, the Court's jurisprudence has not covered these exact scenarios. However, two TCs 158 permitted the Prosecutor on two occasions to withdraw the charges after the confirmation of charges hearing *but* prior to the actual commencement of the trial – a scenario which is not covered under any of the paragraphs set out in article 61.³²⁷ In the *Muthaura et al.* case, TC V relied on the general powers provided to it under article 64(2) as opposed to article 61(9), and accordingly, granted permission to the Prosecutor to withdraw the charges against the accused.³²⁸ The TC also vacated the summons to appear previously issued against him and noted that the 'conditions imposed on Mr Muthaura in the Decision on Summons to Appear will cease to have effect'.³²⁹ Similarly, in the *Kenyatta* case, TC V(B) also acting pursuant to article 64(2), noted the Prosecutor's withdrawal of the charges³³⁰ based on its prior directions.³³¹ The Chamber further vacated the summons to appear and noted that the '[s]ummons to [a]ppear should now be formally discharged and that the conditions therein will cease to have effect'.³³²

In this regard, it is not clear, however, whether in these cases the withdrawal of charges 159 would still trigger article 61(10) in view of the fact that the TC did not rely on article 61(9) to permit such withdrawal. Rather, it granted permission to the Prosecutor to withdraw the charges on the basis of its general powers under article 64(2). If one accepts that article 61(10) should not be the basis for vacating a warrant of arrest or a summons to appear given that the withdrawal of charges was not premised on article 61(9), then the only alternative legal basis for such a finding (apart from inherent powers) should not be article 64(2) as TC V's approach suggests, rather than article 58(4), which is in this case *lex specialis*.

In this context, it is worth noting a distinguishable feature between vacating a warrant of 160 arrest or a summons to appear as a result of a decision to decline to confirm charges or withdraw these charges and for any other reason such as, the death of a suspect or the inadmissibility of a given case. According to the first two scenarios, the vacation of the warrant or the summons is directly driven from the text of article 61(10), while in the latter scenario, a warrant of arrest or a summons to appear ceases to have effect as a result of an order based on article 58(4).³³³

XI. Paragraph 11: Responsibility after the confirmation of charges

Article 61(11) connects Part 5 and Part 6, insofar as it sketches the way ahead, once the 161 charges have been confirmed. It appears to result from a draft proposal circulated by the United Kingdom during the Rome Conference.³³⁴ If one or more charges are confirmed, 'the

³²⁷ *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-696, Decision on the withdrawal of charges against Mr Muthaura, TC V, 18 March 2013; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-983, Notice of withdrawal of charges against Uhuru Muigai Kenyatta, TC V 5 December 2014; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-1005, Decision on the withdrawal of charges against Mr Kenyatta, TC V(B), 13 March 2015.

³²⁸ *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-696, Decision on the withdrawal of charges against Mr Muthaura, TC V 18 March 2013, paras 10–11.

³²⁹ *Ibid.*, para. 12 and p. 8.

³³⁰ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-1005, Decision on the withdrawal of charges against Mr Kenyatta, TC V(B), 13 March 2015, para. 10, p. 6.

³³¹ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-981, Decision on Prosecution's application for a further adjournment, TC V(B), 3 December 2014, p. 26.

³³² *Prosecutor v. Uhuru Muigai Kenyatta*, (ICC-01/09-02/11-1005), Decision on the withdrawal of charges against Mr Kenyatta, TC V(B), 13 March 2015, para. 10, p. 6.

³³³ For example, *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-248, Decision to Terminate the Proceedings Against Raska Lukwiya, PTC II, 11 July 2007; *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi et al.*, ICC-01/11-01/11-28, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, PTC I, 22 November 2011; *Prosecutor v. Saif Al-Islam Gaddafi et al.*, ICC-01/11-01/11-567, Decision following the declaration of inadmissibility of the case against Abdullah Al-Senussi before the Court, PTC I, 7 August 2014. Notably only the decision of 22 November 2011 explicitly mentions article 58(4) as a legal basis for the withdrawal of the warrant of arrest previously issued against him.

³³⁴ United Kingdom of Great Britain and Northern Ireland: proposal regarding article 61, UN Doc. A/CONF.183/C.1/WGPM/L.20.

Presidency shall constitute a Trial Chamber which, subject to article 61(9) and to article 64(4) shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings'. After the charges are confirmed, the suspect is referred to as the 'accused'.

162 In case the charges are confirmed and the PTC disposed of its last decision, it orders the transfer of the entire case record to the Presidency (rule 129, second sentence).³³⁵ The case record contains all submissions, decisions and orders, transcripts of hearings and the evidence ('all particulars' of the case, rule 15). The transfer is effectuated by the Registrar who is responsible for maintaining a full and accurate record³³⁶ of each case brought before the Court (rule 15, first sentence; rule 121(10)). A transmission filing of the Registrar notifies such transferal. With the transfer of the record to the Presidency, the PTC loses its authority over the case record.

163 As a follow up, the Presidency must constitute a TC or, in the event a previously constituted TC is available, it may refer the case to an existing TC.³³⁷ Upon constitution of a TC (or referral of the case to a previously constituted TC), the Presidency transmits the entire case record to the TC (rule 130). Access to the case record is effectuated by the Registrar. In the *Lubanga* case, the Presidency, while constituting a TC and referring to it the case, suspended the transmission of the case record to the TC as counsel had withdrawn from the case. The suspension was declared to be effective 'until such time as new Defence Counsel is assigned to Mr Lubanga Dyilo'.³³⁸ With decision dated 5 June 2007 the Presidency transmitted the case record to TC I 'considering that the issue of the assignment of defence counsel must be subject to judicial control'.³³⁹

164 As of the moment, the case is referred to a TC it is, in principle, responsible for the conduct of subsequent proceedings. That said, article 61(9) allows the PTC to intervene in the case if the Prosecutor indicated his or her intention to amend the charges post confirmation (see mn 146 *et seq.*). Likewise, according to article 64(4), the TC may refer 'preliminary issues' to the PTC or another available judge of the Pre-Trial Division. In the *Lubanga* case, TC I referred as a preliminary matter the review of detention to PTC I, on the grounds that the TC 'does not have sufficient time prior to the date [of review] to familiarize itself with the record in order to review Mr Thomas Lubanga Dyilo's detention in a fair and effective manner'.³⁴⁰

165 The TC may exercise any function of the PTC 'that is relevant and capable of application in those proceedings'. This authority is restated in article 64(6)(a). In the *Banda* case, TC IV

³³⁵ See recently, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-801, Joint decision on the applications for leave to appeal the 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute', PTC II, 23 January 2015, 21; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-680, Decision on the Defence request for leave to appeal the 'Decision on the Confirmation of Charges against Laurent Gbagbo', PTC I, 11 September 2014, para. 53; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-335, Third Decision on Bosco Ntaganda's Interim Release, PTC II, 17 July 2014. In the *Blé Goudé* case, the transmittal was ordered by email of the Senior Legal Adviser of the Pre-Trial Division, see *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-193-Corr, Corrigendum to the 'Decision referring the case of *The Prosecutor v. Charles Blé Goudé* to Trial Chamber I', Presidency, 20 December 2014.

³³⁶ Regulation 21 of the Regulations of the Registry.

³³⁷ The *Lubanga* case was referred to TC I; the *Katanga/Ngudjolo* case was referred to TC II (which remained the competent Chamber after the charges against the two accused were severed); the *Bemba* case was referred to TC III; the *Banda* case was referred to TC IV; the *Ruto/Sang* case and the *Muthaura/Kenyatta* cases were initially referred to TC V which was later dissolved and the cases were referred to newly constituted TC V(A) and TC V(B), respectively; the *Ntaganda* case was referred to TC VI; the *Laurent Gbagbo* and *Blé Goudé* cases were referred to the previously constituted TC I; the *Bemba et al.* case was referred to TC VII.

³³⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-842, Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v. Thomas Lubanga Dyilo, Presidency, 6 March 2007.

³³⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-920, Decision transmitting the pre-trial record of proceedings in the case of The Prosecutor v. Thomas Lubanga Dyilo to Trial Chamber I, Presidency, 5 June 2007. The appointment of counsel was registered in the record of the case on 22 June 2007 (ICC-01/04-01/06-928).

³⁴⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-921, Request for Review of Detention, TC I, 6 June 2007.

replaced the summons to appear against the accused with a warrant of arrest pursuant to article 61(11) and rule 119(5) and (4).³⁴¹ Article 61(11), however, does not vest the TC with unlimited powers, as the provision makes it clear that the TC's subsequent activity in this regard is 'subject to [article 61] paragraph 9 and to article 64 paragraph 4'. The express limitation mirrored in article 61(11) also demonstrates that the TCs do not have a statutory duty to request the Prosecutor to submit the so-called 'updated DCC'. It is clear from the language of article 61(11) that the Statute does not foresee any debate on the scope of the charges before the TC. Instead, defining the parameters of the trial lies solely in the hands of the PTC.

The TC continues the case proceedings in which a variety of issues have been ruled upon by the PTC. Those decisions remain in effect, unless ordered otherwise by the TC. With a view to facilitating and expediting the familiarization process of the TC with the content of the case record, some PTCs developed the practice of preparing a handover document in which the key issues of the entire pre-trial process are summarized. This would also greatly assist in achieving consistency of rulings and to reject certain objections of the parties on the basis of rule 122(4).

³⁴¹ *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09-606, Warrant of arrest for Abdallah Banda Abakaer Nourain, TC IV, 11 September 2014; *id.*, ICC-02/05-03/09-632-Red, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest, AC, 3 March 2015. See also Bitti, 'Article 64', mn 31.

PART 6 THE TRIAL

Article 62 Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Literature: Bhoke, C., 'The trial of Charles Taylor, Conflict prevention, international law and an impunity-free Africa' (August 2006) *ISS Paper 127* < <http://www.issafrica.org/uploads/Paper127.pdf> > accessed 12 February 2015; Bigi, G., 'The Decision of the Special Court for Sierra Leone to Conduct the *Charles Taylor* Trial in The Hague' (2007) 6 *LAPE* 303; Bos, A., 'Chapter 4.1 – Seat of the Court', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford University Press 2002) 189; Combs, N., 'Chapter 5. Trial Process, section 3.1.1 – Fact-Finding Powers', in: G. Sluiter *et al.* (eds.), *International Criminal Procedure – Rules and Principles* (Oxford University Press 2013) 689; D'Aoust, J., 'The Conduct of Trials', in: J. Doria *et al.* (eds.), *The Legal Regime of the International Criminal Court. Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers 2009) 863; Dukić, D., "Transitional justice and the International Criminal Court – in 'the interests of justice'?" (2007) 89 *IRRC* 691; Kim, Y.S., *The Law of the International Criminal Court* (William S. Hein & Co., Inc. 2007); Klip, A., 'Lockerbie Trial in the Netherlands' (1999) 15 *IELR* 170; Knottnerus, A.S., 'Extraordinary Exceptions at the International Criminal Court: The (New) Rules and Jurisprudence on Presence at Trial' (2014) 13 *LAPE* 261; Meisenberg, S.M., 'Die Anklage und der Haftbefehl gegen Charles Ghankay Taylor durch den Sondergerichtshof für Sierra Leone' (2004) 17 *HuV – I* 30 < http://www.ruhr-uni-bochum.de/ifhv/documents/huvi/huv_2004/1_2004.pdf > accessed 12 February 2015; Okafor, O.C. and Ngwaba, U., 'The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections' (2015) 9 *IJTJ* 90; C. Paulussen *et al.*, 'Chapter 7: Year in Review 2013', in: T.D. Gill (ed.), *YbIHL 2013* (Springer 2014) 147; Rugege, S. and Karimunda, A.M., 'Domestic Prosecution of International Crimes: The Case of Rwanda', in: G. Werle *et al.* (eds.), *Africa and the International Criminal Court* (Springer 2014) 79; Schomburg, W. and Hackner, T., 'Vor § 68 IRG', in: W. Schomburg *et al.* (eds.), *Internationale Rechtshilfe in Strafsachen (International Cooperation in Criminal Matters)* (C.H. Beck 5th edition 2012) 358; Sririm, C.L., 'Tribunals, Legacies, and Local Culture: Lessons from Some African Experiences with International Criminal Justice', in: W. Gephart *et al.* (eds.), *Tribunale – Literarische Darstellung und juristische Aufarbeitung von Kriegsverbrechen im globalen Kontext* (Vittorio Klostermann 2014) 97; Swoboda, S., 'Didaktische Dimensionen internationaler Strafverfahren – dargestellt am Beispiel der UN ad hoc-Tribunale' (2010) 5 *ZIS* 100 < http://www.zis-online.com/dat/artikel/2010_2_409.pdf > accessed 12 February 2015; Terrier, F., 'Chapter 31.2 – The Procedure before the Trial Chamber', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, ii (Oxford University Press 2002) 1277; Triffterer, O., 'Acts of Violence and International Criminal Law – A New Position of Power to Fight Abuse of Power?' (1997) 4 *CroatianAnnCrimL&Prac* 811; UN-General Assembly (ed.), *Historical Survey of the Question of International Criminal Jurisdiction (Memorandum submitted by the Secretary-General)* (International Law Commission 1949) < http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf > accessed 12 February 2015; Williams, S., 'The Extraordinary African Chambers in the Senegalese Courts' (2013) 11 *JICJ* 1139; Woetzel, R.K. *et al.*, *A Report on the First and Second International Law Conferences* (Johnson Foundation 1973); Zimmermann, T., "'Deals" mit Diktatoren? Zur politischen Verhandlungbarkeit völkerrechtlicher Strafansprüche' (2013) 8 *ZIS* 102 < http://www.zis-online.com/dat/artikel/2013_3_738.pdf > accessed 12 February 2015

Content

A. General remarks	1
I. Overview	1
II. Historical development	5
B. Analysis and interpretation of elements	12
I. '[T]he place of the trial'	12
II. '[T]he seat of the Court'	14
III. Competence to decide and conditions	15
IV. Scope of application	20
V. Criteria to be considered	21
1. Preliminary considerations on the decisive standard	21
2. Specific aspects to be considered	25

A. General remarks

I. Overview

- 1 Article 62 has to be read **in conjunction with article 3** and especially with its paragraph 3, according to which '[t]he Court may sit elsewhere, whenever *it considers it desirable*, as provided in this Statute'¹. While article 3 encompasses all organs of the Court mentioned in article 34 and their different functions², article 62 is situated at the beginning of Part 6, dealing with the trial phase, and therefore concerns only this part of the proceedings.
- 2 The **purpose** of article 62 is to open for the 'place *of the trial*' facilities *outside* the seat of the Court for a broad variety of reasons, especially when it may be advisable or even indispensable to the search for the truth to hold a trial, for instance, closer to the events on which a judgement has to be rendered or to any other place where evidence may be available which otherwise could not be obtained.
- 3 A basis for **exceptions similar to article 62** is contained in article 4 para. 2:

'The Court may exercise its functions and powers, *as provided in this Statute*, on the territory of any State Party and, by special agreement, on the territory of any other State'.

'Provided in this Statute' refers to purposes supplementary to article 62, for instance, on-site investigations by the Prosecutor, article 56 para. 2 (f) and 57 para. 3 (d) as well as measures of international cooperation and judicial assistance regulated in Part 9. Such investigations may be made by organs of the requested States but also by those of the Court, especially the Office of the Prosecutor.
- 4 The ICC has not yet made use of its interim removal-power provided in article 62 in order to relocate a trial *in toto*.³ However, an **example** of how such a change in location may function is illustrated by the SCSL, which, while residing in Freetown, has relocated the 'Taylor'-case to the facilities of the ICC in The Hague.⁴

II. Historical development

- 5 Courts sitting for trial in places different from their local seat are well known in **national criminal jurisdictions**, especially when it comes to rather complicated on-site investigations or to obtain evidence from witnesses living abroad. It gained importance after the Second World War when the surviving victims of Nazi crimes living all over the world became older and sometimes unable to travel because of physical handicaps or were unwilling to return to the places where they had suffered brutalities leading to a legacy of continuing physical or mental pain.

The sitting of trial courts outside their regular seat in foreign countries is also a well established part of **state-to-state cooperation** in criminal matters⁵. In the 'Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces' is provided in article VII para. 1 (a) that

'the military authorities of the sending State shall have the right to exercise *within the receiving State* all criminal and disciplinary jurisdiction conferred on them by the law of the *sending State* over

¹ Emphasis added.

² See Strijards and Harmsen, *article 3*, mn. 9 *et seq.* See also for field offices and arrangements of the Office of the Prosecutor Bergsmo, Pejić and Zhu, *article 15*, mn. 15.

³ But see mn. 13 (with regard to the conduct of a site visit) and 18 (negative plenary decision).

⁴ For further information to this case see <http://www.ijmonitor.org/category/charles-taylor/>, and also Bhoke (2006) *ISS Paper 127*; Meisenberg (2004) *17 HuV – I 30*.

⁵ See, e.g., Schomburg and Hackner, in: Schomburg *et al.* (eds.), *Internationale Rechtshilfe in Strafsachen* (2012) IRG Vor § 68, mn. 33 *et seq.* with further references; Combs, in: G. Sluiter *et al.* (eds.), *International Criminal Procedure* (2013) chapter 5, section 3.1.1, 689, 719 *et seq.*

all persons subject to the military law of that State'. The sending State has even the 'exclusive jurisdiction' over crimes 'including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State', article VII para. 2 (a)⁶.

In addition, the two Libyan nationals extradited in April 1999 from The Netherlands as suspects in the bombing of an American plane which crashed in Lockerbie in 1988 have been tried by a Scottish court, which sat on a small piece of Scottish territory established in The Netherlands only for this purpose on a part of the disused United States Air Force base called Camp Zeist close to Utrecht, applying Scottish law⁷.

The (probably) first legal document taking account of this aspect at the **international level** 6 was article 4 of the Convention for the Creation of an International Criminal Court by the League of Nations. It provided, besides the regular seat in The Hague, that

'[f]or any particular case, the President may take the opinion of the Court and the Court may decide to meet elsewhere'.

This formula clearly indicates that the Court and not the Presidency finally decides. The Court at that time, however, consisted only of the judges and their deputies, according to articles 5 and 6 of this Convention⁸.

This line was continued by the UN **endeavours after the Second World War**. The Committee on International Criminal Jurisdiction proposed in article 21 of its 1951 Draft Statute, accepted without elaboration also for the 1953 Revised Draft Statute, a 'permanent seat of the Court' and that 'the Court may, however, sit and exercise its function elsewhere whenever the Court considers it desirable'. The competence was clearly with the Court, which at that time was not 'divided' into organs and therefore no need to be more precise existed.

From thereon the possibility of the Court sitting in a place other than its regular seat was almost continuously mentioned in all relevant documents. It was included, for instance, in the Statute of the so called **Bellagio-Wingspread Drafts 1972** which extended the possibility by proposing

'that the Court or its *subsidiary* organs shall sit and exercise their functions at any other place whenever this is considered desirable in the interests of the sound administration of justice'.

Accordingly not only the Trial Chamber but also each *subsidiary* organ of the Court could act anywhere as long as this appeared to be 'desirable in the interests of the sound administration of justice'⁹.

At this stage of development of the Court, consideration was given to installing **regional** 7 **criminal courts** in order to be closer to the actual appearances of crimes under international criminal law, either as part of a global international criminal court or as an independent tribunal, affiliated with a global institution, for instance, by a common Appeals Chamber. Both possibilities would have enjoyed the advantage of having judges more familiar with the events and backgrounds of the perpetrators and having the accused, the victims and the witnesses closer to the place of the crime. In addition, they would not have to be brought (for instance all from the same continent) to a place whose socio-economic and cultural surrounding they may not be acquainted with. Such a dislocation may influence their well-

⁶ Emphasis added; see, e.g., Schomburg et al. (eds.), *Internationale Rechtshilfe in Strafsachen* (2012) Part V D 1 with further references.

⁷ See, e.g., Klip (1999) 15 *IELR* 170 et seq. See also Strijards and Harmsen, article 3, mn. 4 and fn. 31. See for the 'Lockerbie' case *Prosecutor v. Abdelbaset Ali Mohamed Al Megrahi* et al., Case No. 1475/99, Judgment, High Court, 31 January 2001 and *Prosecutor v. Abdelbaset Ali Mohamed Al Megrahi*, Case No. C104/01, Judgment, Appeal Court, 14 March 2002.

⁸ See for this Convention League of Nations O.J. Spec. in Supp. No. 156 (1936) Doc. C. 547 (I). M.384 (I). 1937. V (1938), reprinted in: Bassiouni (ed.), *International Criminal Law, iii: International Enforcement* (1st edition 1987) 191 et seq. and in UN-General Assembly (ed.), *Historical Survey of the Question of International Criminal Jurisdiction* (1949), 88 et seq.

⁹ See article 17 respectively article 16 for the subsidiary organs, reprinted in: 1st & 2nd International Criminal Law Conferences 1975, *The Establishment of an International Criminal Court*. See also Woetzel et al., *A Report on the First and Second International Law Conferences* (1973); emphasis added.

being and effect their contribution to the truth finding task, necessary to bring peace through justice and avoid impunity for crimes under international law. The 1951 and 1953 Draft Statutes, for instance, provided in their article 55 for special tribunals that:

‘Nothing in the present Statute shall be taken to prejudice the right of two or more States parties thereto jointly to set up special tribunals to try the perpetrators of crimes over which each of such States has jurisdiction according to the general rules of international law’.

It also was proposed to establish **special chambers** having more specialized judges with competence only, for instance, for genocide¹⁰. The ‘Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other international crimes’ provided for such a tribunal not only for this ‘specific purpose’, but also stipulating that this permanent body shall be ‘performing its *chief* functions (only) at the Palace of Justice in the Hague’, thereby assuming that a dislocation of the *other* functions might be admissible, *argumentum e contrario*¹¹.

While the *theoretical* possibility of establishing regional international criminal Courts is also open for *ad hoc* Tribunals or treaty based Courts with a *limited* jurisdiction depending on the States or international organisations of certain regions wishing to establish them, like for Cambodia and for Sierra Leone, there appears to be a rather limited *practical need* for such an arrangement in the future any more. Especially after the establishment of the ICC with its basic decision to divide the power and the right to punish between *national* and *international* criminal jurisdiction in the sense of **complementarity**, only a reduced desirability can be identified after the Court by now came into full operation. In particular the first cases pending because of referrals to the Court according to article 13 demonstrate how the original idea of the direct enforcement model may satisfy the need for a worldwide international Court. Internationalized (national) courts, such as the newly established Extraordinary African Chambers¹², should, therefore, play only a subsidiary role.

A further exception may perhaps later on be considered for **specializing Chambers of the ICC**, e.g. with a jurisdiction limited to the difficult-to-prove crime of aggression. However, the basic rationale behind both methods of working closer to the location of criminal activity paved the way for and recommended itself to leaving the possibility open of conducting proceedings outside the seat of the Court.

- 8 For this reason the ILC returned in article 32 of its **Draft Statute 1994** to the former proposals mentioned above, especially to those made in articles 21 of the 1951 and 1953 UN Draft Statutes. Its commentary to the adapted shorter version summarized the reasons already mentioned but added that a place of trial closer to the scene of the alleged crime

‘may cast a shadow over the proceedings, raising questions concerning respect for the defendant’s right to a fair and impartial trial or it may create unacceptable security risks for the defendant, the witnesses, the judges or the staff of the Court’¹³.

Both **Siracusa Drafts** continued this line, leaving (as the ILC had done) the competence to decide the issue with the Presidency. This appears surprising, since the possibility of sitting outside the seat of the Court was for the first time mentioned in these Drafts where it was originally limited to the place of *the trial* and exclusivity at the discretion of all judges¹⁴.

¹⁰ 1996 Preparatory Committee I, para. 34, p. 11. The Convention for the Creation of an International Criminal Court of the League of Nations 1937 provided in its article 1 a special court for the trial of offences ‘dealt with in the Convention for the Prevention and Punishment of Terrorism’; see mn. 6.

¹¹ See articles 1 and 2 of this Convention UN Doc. E/CN.4/1426 (1981), reprinted also in: Bassiouni (ed.), *International Criminal Court. Compilation of UN Documents and Draft ICC Statute Before the Diplomatic Conference* (1998) 379; emphasis and brackets added.

¹² See, e.g., Williams (2013) 11 *JICJ* 1139 *et seq.*

¹³ 1994 ILC Draft Statute, commentary on article 32, pp. 102, paras. 1–3.

¹⁴ For the Siracusa Draft see AIDP, ISISC and MPI, Draft Statute for an International Criminal Court – Suggested Modifications to the 1994 ILC-Draft – (Siracusa Draft) prepared by a Committee of Experts, Siracusa/Freiburg/Chicago, 31 July. For the Updated Siracusa Draft II (1996), the relevant parts are reprinted in: Ambos,

The *Ad Hoc Committee* for the Establishment of an International Criminal Court did neither report discussion on this question nor make any specific proposals of relevance. But the Preparatory Committee included a remarkable number of proposals under the heading: ‘Competent organ and criteria to decide the place of the trial’. These proposals substituted, for instance, the Presidency with the Assembly of States Parties, the Court with the Trial Chamber, adding a reference to ‘inquiries with the State Party that appears likely to receive the Court’ and proposing that the (at that time) article 32 ‘shall also apply to non-party States’, who should agree ‘to grant the privileges, immunities and facilities provided for in ...’¹⁵. It typifies the situation that the Preparatory Committee in 1997 did not consider the subject matter any further and, correspondingly, this article was just reprinted with the proposals mentioned after the Inter-Sessional Meeting in January 1998 in Zutphen¹⁶ and again in the ‘Preliminary draft consolidated text’ of 27 March 1998, in the Draft Statute of the Preparatory Committee of 1 April 1998 and in the Final Report of 14 April 1998. However, the last three mentioned documents eliminated in the relevant article 62 the words ‘by the Presidency’ which had been retained by the Zutphen Draft¹⁷, thus leaving open the question of competence.

The discussions at the Rome Conference proceeded along the lines of the mentioned proposals and adopted article 3 para. 3, which contains the general rule that

‘the Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute’.

This is the basic legitimation for exceptions to the rule that ‘the seat of the Court shall be established at The Hague in the Netherlands’, article 3 para. 1. The Court, as mentioned in article 3, includes all its organs as provided in article 34.

Nowadays provisions similar to articles 3 para. 3 and 62, permitting a court to meet in a different location than its seat, have become a standard element in the legal bases of international(ized) criminal tribunals. Even before the Rome Statute was established, the SC in Res. 827 of 25 May 1993 decided that the ICTY

‘may sit elsewhere when it considers it necessary for the efficient exercise of its functions.’¹⁸

Similar wording was used in SC Res. 955 with regard to the ICTR.¹⁹ Both *ad hoc Tribunals* thereupon adopted the almost identical rule 4 of their RPE, stating that

‘A Chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorised by the President in the interests of justice.’ (ICTY)

respectively

‘A Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice.’ (ICTR).

The subsequently established tribunals followed these examples. For instance, article 10 second sentence of the ‘Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone’ states that

‘[t]he Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions’.

The same wording appears in article 6 third sentence of the ‘Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual

Der Allgemeine Teil des Völkerstrafrechts (2002/2004) 942 *et seq.* and also in Triffterer (1997) 4 *CroatianAnn-CrimL&Prac* 811, Annex; see also above mn. 5.

¹⁵ See 1996 Preparatory Committee II, article 32, p. 150, reprinting the ILC Draft Statute and especially those proposals mentioned above.

¹⁶ See Zutphen Draft, article 55 [32], and for the lack of consideration in 1997 Preparatory Committee see *ibid.*, N.B.: ‘This article was not considered by the PrepCom in 1997’.

¹⁷ See for these three documents Preparatory Committee Draft.

¹⁸ SC Res. 827 of 25 May 1993, para. 6.

¹⁹ SC Res. 955 of 8 November 1994, para. 6.

Special Court for Sierra Leone’ and in article 8 para. 2 of the ‘Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon’. In addition to that, rule 44 STL-RPE, resembling rule 4 ICTY-/ICTR-RPE, provides that

‘A Judge or Chamber may exercise their functions at a place other than the seat of the Tribunal, if so authorised by the President in the interests of justice.’

The latter wording again – though limited to ‘A Chamber’ whilst omitting ‘A Judge’ – was adopted in rule 4 IRMCT-RPE, referring (probably) to article 8 para. 3 second sentence IRMCTS (‘as decided by the President, the functions [of the judges] may be exercised remotely, away from the seats of the branches of the Mechanism.’).

B. Analysis and interpretation of elements

I. ‘[T]he place of the trial’

12 The contents of the Statute, especially article 60, ‘Initial proceedings before the Court’, and article 61, ‘Confirmation of the charges *before* trial’, indicate that such actions do not belong to Part 6, ‘The Trial’. Article 62 concerns only the trial and, therefore, appears **inapplicable to decisions ‘prior to trial’** as, for instance, mentioned in the chapeau of article 64 para. 6. This may be surprising – at least at first glance – because the need to *prepare* the trial outside the seat of the Court may occur regularly and play an important role in securing the provenance of evidence, an endeavour which may determine whether the trial takes place at all.

However, there is no need to construe article 62 as an exception *for the Trial Chamber* instead of *for the trial* only. Because according to article 64 para. 6 (a) the Trial Chamber can in such a case ‘exercise any **functions of the Pre-Trial Chamber** referred to in article 61 para. 11’ and therefore may decide according to articles 56 para. 2 (f) and 57 para. 3 (d) to make use as well of the possibilities provided in Part 9 for international cooperation and judicial assistance outside the seat of the Court, if additional investigations are desirable or necessary *before* the trial. These possibilities are available through other rules and do not need to be based on article 62 as already mentioned in mn. 3.

The same applies, if the Trial Chamber refers according to article 64 para. 4 ‘[f]or its effective and fair functioning preliminary issues to the Pre-Trial Chamber’ or, if necessary, to ‘another available judge of the Pre-Trial Division’. This chamber or person is not holding a trial proceeding but rather exercising investigative functions to prepare the trial and may therefore set actions in places outside the seat of the Court.

13 Since article 62 opens the possibility of changing the place of the *whole* trial, parts of the trial may also be held in other places, *argumentum a maiore ad minus*.²⁰ In particular, a partial relocation may seem advisable if an **on-site visit by the Chamber** to the places described in the indictment or in a testimony appears necessary in order to obtain first-hand knowledge and an assessment of the topography of the region. Thus, various Trial Chambers of the ICTY and the ICTR have frequently conducted site visits, thereby acting under rule 4 of their RPE.²¹ In January 2012 the ICC’s Trial Chamber II made a site visit to scenes of alleged crimes in the DRC;²² the Chamber, however, did not expressly mention article 62 in

²⁰ Rule 100 para. 1 (current version). Also see Combs, in: Sluiter *et al.* (eds.), *International Criminal Procedure* (2013), chapter 5, section 3.1.1, 689, 718; Kim, *The Law of the ICC* (2007) 211; Terrier, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002), chapter 31.2, 1277, 1279.

²¹ See, e.g., *Prosecutor v. Karadžić*, No. IT-95-5/18-T, Decision on Second Site Visit, Trial Chamber, 10 February 2012, paras. 6 *et seq.* Further references are provided by Schabas, *The UN International Criminal Tribunals* (2006) 590; Combs, in: Sluiter *et al.* (eds.), *International Criminal Procedure* (2013) chapter 5, section 3.1.1, 689, 717 *et seq.*

²² *Prosecutor v. Ngudjolo*, No. ICC-01/04-02/12, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 18 December 2012, paras. 68 *et seq.*

its decision on the visit²³, thereby avoiding the cumbersome procedure prescribed by rule 100 para. 3 (old version). Furthermore, it is possible to organise *in situ* proceedings limited to, e.g., the opening statements and testimonies of specific witnesses.

II. '[T]he seat of the Court'

The seat of the Court is, according to article 3, The Hague, and any place there provided by 'a headquarters agreement with the host State to be approved by the Assembly of States Parties ...'. Therefore, the seat of the Court may be **one or more places at The Hague**. The building now still serving as the seat of the ICTY, part of the organs of the ICTR and the IRMCT was originally and theoretically considered to serve for the ICC as well, because it was speculated that the workload of the ICTY may decline before that of the ICC rises. But this building soon proved to be too small for hosting all the organs of the ICC and their staff members. Anyhow, if the seat of the Court is not generally extended to more than one place in The Hague, article 62 provides, in addition, for the possibility of changing the location of the Court in a specific case for the oral public hearings, for instance, into an **additional courtroom**. 14

III. Competence to decide and conditions

The Statute does not express in article 62 who shall have the competence to 'otherwise decide[d]'. Article 38 does not assign this competence to the Presidency. The words 'by the Presidency' were eliminated from the Drafts dating later than the Zutphen Draft Statute especially from the Consolidated Draft. Article 3 para. 3 is unhelpful, because while it opens the possibility of the Court and its organs sitting elsewhere, the possibilities are limited to those 'as provided in this Statute'. 15

The **history of this provision** shows that in article 4 of the Convention for the Creation of an ICC adopted by the League of Nations it was provided that 'for any particular case, the President may take the opinion of the Court and the Court may decide to meet elsewhere'. 16 Also the 1951 and 1953 Draft Statutes in their articles 21 provided for the possibility of changing location 'whenever the Court considers it desirable'; however, according to other proposals, 'the Court may ... sit and exercise its function elsewhere' without limiting this dislocation to the trial phase.

Nevertheless one of the proposals presented by the Preparatory Committee authorized the TC to leave The Hague 'when travel by the members of the Court is likely to make the proceedings simpler and less costly'. This proposal also appeared in the context of article 32 of the Zutphen Draft, in the later Draft of the Preparatory Committee and in the Consolidated Draft, which had already eliminated the words 'by the Presidency' from the wording of its article 55 [former 32]²⁴. To give the ASP competence over such a decision seemed ill advised. Its function is too removed from the day to day work of the TC and this body with its attendant bureaucracy would be rather slow in deciding issues which may need a quick decision.

In the previous edition of this commentary the position was taken that the Trial Chamber has the right to decide, arguing that the decision about where 'the place of the trial shall be' is 'relevant' to the trial and, therefore, falls within the TC's competence to '[r]ule on any other relevant matters', article 64 para. 6 (f).²⁵ However, it was also stressed that, since the TC has no *administrative* power, for instance, to conclude a special agreement with a State willing to host such a trial, it ultimately depends on the Presidency deciding, if such a demand of a TC 17

²³ *Prosecutor v. Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07, Decision on a judicial site visit, Trial Chamber II, 18 November 2011.

²⁴ See mn. 9.

²⁵ Triffterer, in: *id.* (ed.), *Commentary ICC* (2nd edition 2008), article 62, paras. 13 *et seq.*

can be fulfilled, because the Presidency has to guarantee '[t]he proper administration of the Court', article 38 para. 3 (a). Thus, the previous edition presented a compromise proposal at this point: Since the TC has the responsibility for the 'sound administration of justice' during the trial proceedings, there should be a consultation between the **Chamber and the Presidency**. While no change in location should be made *against* the TC's will, without the approval of the Presidency this Chamber cannot sit outside the seat of the Court; nor can it organize the necessary infrastructure by the Registry separately from the Presidency, because according to article 43 para. 2 second sentence '[t]he Registrar shall exercise his or her functions under the authority of the President of the Court'. He or she, 'together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for: The proper administration of the Court ...', article 38 para. 3 (a). In addition, it has to be considered that besides practical arrangements, the authorities in the State will need to be contacted to ensure proper protection measures for the TC's safety but also to address other issues that would normally be addressed by the headquarters agreement.²⁶

18 This position, however, was to some extent contradicted by **rule 100 (3) second sentence RPE** (original version, as adopted on 9 September 2002), which provided that in lieu of the Chamber/Presidency, 'the decision ... shall be taken by the judges, in plenary session, by a two-thirds majority.'²⁷ But this provision proved inappropriate, when in July 2013 a blocking minority of the judges in plenary session inexplicably rejected the TC's recommendation to hold the commencement and other portions of the Ruto/Sang case either in Kenya or at the premises of the ICTR in Arusha, arguing that there would be a risk of negative press coverage or anti-ICC demonstrations.²⁷ Consequently, soon after that decision the ASP replaced the old rule 100 by a more appropriate and expeditious decision-making procedure.²⁸ The new version of rule 100, being quite similar to the above mentioned compromise proposal, provides a **cooperative two-stage procedure** that empowers the Chamber as well as the Presidency to decide; it states that, after the judges of the Chamber have either unanimous or by majority 'decide[d] to make a recommendation changing the place' (para. 2 first and second sentences), 'the decision ... shall be taken by the Presidency in consultation with the Chamber.' (para. 3 second sentence).

19 According to rule 100 (2) first sentence (current version), the Chamber may make its decision *proprio motu* or at the request of the Prosecutor or the defence.

Though not provided for in the Statute, the current rule 100 (2) third sentence stipulates that the Prosecutor and either the accused or his or her legal representative will have to be heard before the TC takes such a decision in order to ensure that the rights to equality of arms and a **fair trial** are not compromised.²⁹ In the event one of them objects, it may at least be advisable to give them, in cases of doubt, an additional hearing before the Presidency decides³⁰, especially if issues are raised questioning the practicability of such a dislocation from the point of view of the rights of the two parties during the trial. If against such a

²⁶ It was, *i.a.*, due to the argument of 'necessary ... preliminary diplomatic steps', that the AC of the SCSL denied having any decisive power in the matter of a change of venue, *Prosecutor v. Charles Ghankay Taylor*, No. SCSL-2003-01-R72, Decision on Urgent Defence Motion against Change of Venue, Appeals Chamber, 29 May 2006, paras. 6 *et seq.*

²⁷ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11-763, Recommendation to the Presidency on where the Court shall sit for trial, Trial Chamber V(A), 3 June 2013, paras. 10 *et seq.* For the negative plenary decision, see *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, No. ICC-01/09-01/11-875, Notification of the Decision of the Plenary of Judges on the 'Joint Defence Application for a Change of Place where the Court Shall Sit for Trial', The Presidency, 26 August 2013, Annex: Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (Ref. No. ICC-01/09-01/11-875-Anx), para. 24. Also see Paulussen *et al.*, in: Gill (ed.), *YbHumL 2013 (2014)* 147, 177.

²⁸ Res. ICC-ASP/12/Res.7, para. 1 (adopted at the 12th plenary meeting, on 27 November 2013).

²⁹ A less strict position is taken by Bos, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002), chapter 4.1, 189, 202: 'may request the view of ... the defence on this question.'

³⁰ For the need to 'request the views of the Prosecutor and the defence on this question' see 1994 ILC Draft Statute, commentary to article 32, para. 2, p. 103.

motion the Court changes the location of the trial, it may result in a ground for appeal, if the process of finding the truth thereby has been influenced in a negative way.

IV. Scope of application

Article 62 applies to the trial only. It is applicable also when the Appeals Chamber orders ‘a new trial before a different Trial Chamber’, article 83 para. 2 (b). However, it is difficult to imagine, that a reason for a change in location may appear during appeal procedures. But if an Appeals Chamber has the same desire in relation to its proceedings, article 62 may be applied.

Since the Appeals Chamber has according to article 83 para. 1 ‘all the powers of the Trial Chamber’, it may decide according to article 64 para. 6 (f) in connection with article 62, *in principle* in the same way as the Trial Chamber, the question of if and where the appeal proceedings should be held outside the seat of the Court.

V. Criteria to be considered

1. Preliminary considerations on the decisive standard

Article 62 does not mention any criteria relevant to a decision that ‘the place of the trial’ shall not be at the seat of the Court. But article 3 para. 3 expresses that the Court must consider it ‘desirable’ to ‘sit elsewhere’, and rule 100 (1) states that the Court must consider whether the decision to sit in a state other than the host state ‘would be in the interests of justice’. Additionally, various elements that have been proposed during the historical development and the preparation of the Rome Statute can serve as guidelines for such a decision.

Right from the beginning the opinion prevailed that such a decision should be an exception rather than the rule. Thus, article 62 must not be understood as an undefined exception granting unfettered **discretionary power** to the Chamber. Instead, the discretion the Chamber enjoys under article 62 must be exercised with caution and good reason. Therefore, the most frequently mentioned aspect was the one now contained in article 3 para. 3, that a sitting outside the regular seat of the Court must be ‘desirable’³¹. The prerequisite of **desirableness**, however, is not sufficiently precise, for it is a merely subjective criterion that does not constrain the Chamber in order to limit its margin of appreciation to reasonable grounds. More helpful for the purpose of clarification is the expression, ‘desirable in the interests of the sound administration of justice’³² and also the sentiment that such a desire has to be ‘likely to make the proceedings simpler and less costly’ or ‘will ensure the efficient conduct of the trial and is in the interest of justice’³³.

The last aspects clarify that transparent reasons have to be given in order to supervise and control the Trial Chamber in its decision making use of article 62. The reference to issues of **administrative efficiency and economy** refers to practical needs and a sparing use of the limited resources of the court. The legal term ‘in the interests of justice’, as used in various provisions of the Statute, is an umbrella term covering different interests of different parties concerned. According to article 53 para. 1 (c) and para. 2 (c), it encompasses interests of the court, of the defendant, of the victims as well as collective interests of the international community as a whole with regard to the purposes of punishment.³⁴ This assessment may be

³¹ See articles 21 of the 1951 and 1953 Draft Statutes and article 17 of the Bellagio-Wingspread Drafts 1972; see mn. 6.

³² Article 17 of the Statute of the Bellagio-Wingspread Draft 1972.

³³ Quoted from two of the proposals mentioned in the Preparatory Committee’s and in the Consolidated Draft.

³⁴ For an in-depth analyses see, e.g., Dukić (2007) 89 *IRRC* 691, 695 *et seq.*

confirmed by article 8 para. 1 second sentence of the ‘Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon’, stating that

‘[t]he location of the seat shall be determined having due regard to considerations of justice and fairness as well as security and administrative efficiency, including the rights of victims and access to witnesses’.³⁵

- 24 In sum, the determination whether or not an interim removal seems to be in the interests of the sound administration of justice is complex and involves **weighing** several **competing factors**.³⁶ In any case, it should be noted that whatever criteria have to be considered, they do not all have to be fulfilled equally. As long as one of them by itself is strong enough to be convincing it appears to be sufficient. Even if two or more of them are, considered alone, not convincing, but *together* they are, there is reasonable ground for a dislocation of the trial.

2. Specific aspects to be considered

- 25 In particular, the following interests might be regarded decisive within the Chamber’s consideration:

First of all, **security matters** can justify the dislocation of a trial. It is necessary to ensure that neither the trial itself poses a danger to the surroundings of its location (e.g. because the presence of an accused being a former high-ranking state-official causes the danger of political unrest) nor that the premises of the court or individual parties to the proceedings (judges, defendants, defense lawyers, witnesses, visitors *etc.*) are threatened in their safety. Based on similar considerations, the SCSL has relocated the Taylor case from Freetown to the facilities of the ICC in The Hague,³⁷ after the SC had determined ‘that the continued presence of former President Taylor in the subregion is an impediment to stability and a threat to ... peace and security in the region’.³⁸ Yet as to the ICC, this seems to be a rather hypothetical scenario. Even in the event of a Dutch accused before the Court, it is hard to imagine that security risks might pose a serious threat to a trial held in The Hague.

- 26 With regard to the truth finding task of the Court, reasons in the interest of the **collection of evidence** can justify a (partial) relocation of the trial,³⁹ namely if evidence is otherwise not available or that the task of the Trial Chamber to find the truth is more likely to be achieved at a location remote from the seat. It may, for instance, appear advisable or necessary to obtain on-site evidence or to hear a certain group of witnesses outside the seat of the Court. This practice is well accepted in *national* jurisdictions and by the ICTY and ICTR, as already mentioned above⁴⁰. On the other side, this line of reasoning will apply only for the relocation of *parts* of the trial; the necessity for site visits alone barely justifies the relocation of the whole trial.

- 27 The reason mentioned in the last proposals for the Rome Statute ‘to make the **proceedings simpler and less costly**’ may be decisive for a change in location especially in cases where the scene of the alleged crime is literally on the other side of the earth. Instead of costly moving and safeguarding dozens of parties to the proceedings (accused, witnesses and victims) to Europe, it might be easier in terms of logistics to dislocate the whole trial to a suitable courtroom close to the scene of the crimes.⁴¹ Apart from that, the Chamber may deem it

³⁵ Similar considerations have been raised concerning the seats of the ICTY and the ICTR, see SC UN Doc. S/25704, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, para. 131; Bos, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002), chapter 4.1, 189, 192.

³⁶ Cf. *Prosecutor v. Charles Ghankay Taylor*, No. SCSL-03-01-PT, Order Changing Venue of Proceedings, President of the Special Court, 19 June 2006, para. 6.

³⁷ See *Prosecutor v. Taylor*, No. SCSL-03-01-PT, 19 June 2006, paras. 8 *et seq.* For a thorough analyses of the decision see Bigi (2007) 6 *LAPE* 303 *et seq.*

³⁸ SC Res. 1688 of 16 June 2006.

³⁹ See mn. 13.

⁴⁰ See mn. 5 and 13.

⁴¹ According to Bos, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002), chapter 4.1, 189, 193 the UN chose Arusha as the seat of the ICTR not least because of its travel cost-reducing proximity to the crime scenes.

necessary to relocate a trial by reason of sheer practical needs, *e.g.* in case there is not enough courtroom space available at the seat of the ICC.

The **interests of the defendant** also have to be taken into account.⁴² But aside from protection issues, the specific interests of the accused in favour or against relocation should not be given too much weight. This is mainly because the crimes within the jurisdiction of the ICC are those of universal jurisdiction and the accused therefore cannot invoke any right to be tried in a particular location.⁴³ Besides, given the case the defendant wishes to be tried in a location close to his home country because otherwise his or her permanent absence from there would bar him or her from fulfilling an important function of an extraordinary dimension (*e.g.* as a head of state), the Statute provides other possibilities to enable the accused meeting extraordinarily important duties during an ongoing trial.⁴⁴

Furthermore, it must be observed that the decision (not) to relocate a trial may affect victims' and collective interests with regard to the **purpose of punishment** in ICL. Generally speaking, it is controversial whether or not international criminal courts should be sitting close to the scene of the alleged crime. Critical voices raise concerns about the – either real or merely perceived – independence and impartiality of a trial, arguing that

[p]roximity of the trial to the place where the crime was allegedly committed may cast a shadow over the proceedings ...⁴⁵.

Hence, the application of the exception provided in article 62 should not be exercised in order to, literally, *bring* justice to the (alleged) victims.

In contrast to that position, many authors emphasize the importance of the trial's proximity to and visibility within the community that has suffered most from the alleged atrocities. Particularly with regard to cases dealing with situations located outside Europe, the advocates of this view point out that a trial in **The Hague** is **too remote** and foreign to the communities concerned.⁴⁶ Neither are survivors and relatives of the victims given the chance to monitor and participate in the process on a daily basis, nor is there sufficient publicity or local media coverage so that the people of the society concerned most are denied to see, first hand, justice being administered.

Against the background of the **historical precedents**, none of these viewpoints seems to be overall convincing: With the IMT in Nuremberg and the IMTFE in Tokyo tribunals have been sitting in the home country of the accused, with the SCSL in Freetown a tribunal was situated in the country where the atrocities occurred,⁴⁷ and with the ICTY in The Hague and the ICTR in Arusha the UN had deliberately chosen neutral countries as locations for the tribunals' seats⁴⁸. It cannot be said, however, that one of the aforementioned tribunals has 'failed' due to its proximity or remoteness to the crime scenes. Nevertheless, strong arguments indicate that in certain cases a relocation of the trial to a facility closer to the scene of the alleged crime should be seriously considered.⁴⁹ Given the fact that ICL serves, *inter alia*, the purpose of positive general and integrating prevention⁵⁰, the intended didactic,

⁴² See Bigi (2007) 6 *LAPE* 303, 312 *et seq.*

⁴³ *Prosecutor v. Taylor*, No. SCSL-03-01-PT, 19 June 2006, para. 9.

⁴⁴ See, *e.g.*, Knottnerus (2014) 13 *LAPE* 261 *et seq.*; Broomhall, *article 51*, mn. 41.

⁴⁵ See 1994 ILC Draft Statute, commentary to article 32, para. 2, p. 102; also see SC UN Doc. S/25704, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, para. 131.

⁴⁶ See Rugege and Karimunda, in: Werle *et al.* (eds.), *Africa and the International Criminal Court* (2014) 79, 82; D'Aoust, in: Doria *et al.* (eds.), *The Legal Regime of the ICC* (2009) 863, 865; also see *Prosecutor v. Charles Ghankay Taylor*, No. SCSL-2003-01-PT, Civil Society *Amicus Curiae* Brief Regarding Change of Venue of Taylor Trial Back to Freetown, 9 March 2007, paras. 3 *et seq.*

⁴⁷ For the reasons see Sriram, in: Gephart *et al.* (eds.), *Tribunale* (2014) 97, 106 *et seq.*

⁴⁸ See Bos, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) chapter 4.1, 189, 190–193.

⁴⁹ Cf. *Prosecutor v. Ruto and Sang*, No. ICC-01/09-01/11-763, 3 June 2013, para. 10; *Prosecutor v. Ruto and Sang*, No. ICC-01/09-01/11-875-Anx, 26 August 2013, paras. 15–20.

⁵⁰ See, *e.g.*, Ambos, *Treatise on ICL I* (2013) 71 *et seq.*; Zimmermann (2013) 8 *ZIS* 102, 116 (both with further references).

educative function of the trial⁵¹ and its legacy's positive effect on the process of reconciliation can only be fully achieved if the Court proceedings are easily accessible for the communities concerned. On that score, a relocation can be justified particularly in cases where the ICC primarily serves as an instrument of **transitional justice**⁵² (e. g. if a trial is dealing with crimes committed within a single country in the course of a long-standing civil war or dictatorship) and where the affected country is very far away from the Court's seat (perhaps with different time zones making it even more difficult for the affected community to follow the internet live-broadcast of the trial proceedings).

⁵¹ Ambos, *Treatise on ICL I* (2013) 71; Swoboda (2010) 5 *ZIS* 100, 104.

⁵² But see for a critical assessment of the ICC as a transitional justice mechanism Okafor and Ngwaba (2015) 9 *IJJ* 90.

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Literature: Behrens H., 'Trial Proceedings in The International Criminal Court: the making of the Rome Statute', in: Lee (ed.), *The International Criminal Court* (1999) 238; Brown D. J., 'The International Criminal Court and Trial in absentia', (1999) 24 *BrooklynJIL* 763; David E., 'Le tribunal international pénal pour l'ex-Yougoslavie', (1992) 25 *RevBelgeDroitInt'l* 565; Figà-Talamanco N.A., 'Trials in absentia and International Criminal Court', in: Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute*, (1998) 209; Freckelton I. And Karagiannakis M., 'Fitness to stand trial under international criminal law: challenges for law and policy', (2014) *JICJ* 12(4) 705; Friman, H., 'Rights of Persons Suspected or accused of a crime', in: Lee (ed.), *The International Criminal Court* (1999) 247; Gaeta, P., 'Trial In Absentia Before the Special Tribunal for Lebanon', in: A. Alamuiddin et al. (eds.), *The Special Tribunal for Lebanon Law and Practice* (Oxford University Press 2014) 229; Knottnerus A., 'The International Criminal Court on Presence at Trial: The (In)validity of Rule 134quater', (2014) International Crimes Database Brief 5; *id.*, 'Extraordinary Exceptions at the International Criminal Court: The (New) Rules and Jurisprudence on Presence at Trial' (2014) 13(3) *LAPE*, 261; Momeni M., 'Why Barayagwiza is Boycotting his Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics', (2001) 7 *Ilsall&CompL* 315; Pellet A., 'Le tribunal criminel international pour l'ex-Yougoslavie. Poudre aux yeux ou avancée décisive?', (1994) 98 *RGDIP* 7; Schabas W., 'In Absentia Proceedings Before International Criminal Courts', in G. Sluiter and S. Vasiliev (eds.), *International Criminal Procedure: towards a Coherent Body of the Law*, (Cameron May 2009) 335.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1: The principle of presence at trial.....	19
1. article 63(1): The requirement of attendance at trial.....	19
2. Presence by way of video-link.....	25
3. Applicability.....	34
4. Fitness to stand trial.....	36
II. Exceptions: Paragraph 2 and Rules 134ter and quater.....	40
1. Disruption of trial.....	40
2. Excusal from presence at trial.....	41
a) Rule 134ter: Excusal from presence at trial.....	46
b) Rule 134quater: Excusal from continuous presence at trial due to Public Office.....	52
3. Refusal to attend.....	60
4. Absconded accused.....	62
5. Ex parte proceedings.....	65

A. Introduction/General remarks

The right of an accused to be present at trial is recognized in the principal international human rights instruments¹. Although a 'right', the case law of international tribunals and monitoring bodies has not traditionally viewed presence at trial as indispensable. However, under article 63(1) of the Rome Statute the requirement that the accused be present at trial

¹ *France et al. v. Goering et al.*, 23 *Trial of the major war criminals before the international military Tribunal*, 13 I.L.R. 203, 41 *AJIL* 172 (1946).

has been accorded significant importance and the Court has held that it is a requirement that can only be derogated from under specific conditions.

- 2 The practise of domestic justice systems that derive from the Romano-Germanic models, where *in absentia* proceedings are well accepted, is considered compatible with the right to presence at trial, as long as the accused has been duly served with appropriate notice of the hearing². The issue is often presented, erroneously, as one of principled difference with the common law system, which does not allow for *in absentia* trials as a general rule. But the fact that common law jurisdictions make a number of exceptions, and allow for such proceedings where, for example, an accused has absconded after trial has begun, shows that this is not an issue of fundamental values so much as one of different practice and tradition. Indeed, a Trial Chamber of the ICC has opined that:

‘the failure to reach an agreement on trials in absentia had resulted from a misapprehension of the law in significant respects on the part of the common law delegates who had been generally credited with opposition to the idea. They appear to have been under the erroneous impression that such trials were not permissible in common law jurisdictions or in international law, when in fact the opposite is true³.

- 3 At Nuremberg, one of the major war criminals, Martin Bohrman, was tried in his absence and without formal notification, pursuant to article 12 of the *Statute of the International Military Tribunal*⁴. Despite this precedent, the Secretary General’s report on the Draft Statute of the ICTY frowned upon the practice⁵. The ICTY Statute did not formally rule out *in absentia* trials (it merely repeated the terms of article 14 of the *ICCPR*, which recognize the right of the accused to be present)⁶. This provoked the ire of European scholars, who saw a triumph for common law approaches and who argued that *in absentia* trials would prove indispensable if the Tribunal were to accomplish its political role⁷, a concern that has been shown to have been misplaced. Later, the judges of the ICTY developed an original technique of *ex parte* hearings, pursuant to Rule 61, at which prosecution evidence was led and the Tribunal ruled on the sufficiency of the evidence⁸.

² *Mbenge v. Zaire* (No. 16/1977), UN Doc. A/34/40, p. 134; The Right to a Fair Trial, Report to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities by Mr. S. Chernichenko and Mr. W. Treat on The Administration of Justice and the Human Rights of Detainees, UN Doc. E/CN.4/Sub.2/1991/29, paras. 73–76; General Comment No. 13 (21), UN Doc. A/36/40, para. 11: ‘When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary’. For the European human rights system, see: *Colozza and Rubinat v. Italy*, Ser. A, No. 89, 12 Feb. 1985, para. 29; *Stamoulakatos v. Greece*, Ser. A, No. 271, 26 Oct. 1993, Commission Report, para. 61; *Poitrimol v. France*, Ser. A, No. 277-A, 23 Nov. 1993, para. 31; St. Stavros, *The Guarantees for Accused Persons Under article 6 of the European Convention on Human Rights* 262–268 (1993); Tochilovsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts: Procedure and Human Rights Aspects* (2014), 510–617.

³ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, para. 83; See also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, paras. 46, 75–76; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013, paras. 125–182.

⁴ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.), adopted 8 Aug. 1945, 82 UNTS 279.

⁵ UN Doc.S/25704: ‘101. A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials *in absentia* should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence’.

⁶ International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 Mar. 1976.

⁷ David (1992) 25 *RevBelgeDroitInt* 565; Pellet (1994) 98 *RGDIP* 7.

⁸ Pursuant to rule 61, Rules of Procedure and Evidence, UN Doc. IT/32. See: F. Patel King, *Public Disclosure in Rule 61 Proceedings Before the International Criminal Tribunal for the Former Yugoslavia*, 29 *NYUJIL&Pol* 523 (1997); M. Thieroff/E.A. Amley Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 *YaleJIL* 231(1998); see also *Prosecutor v. Mrksić, Radić and Sljivancanin*, IT-95-13-R61, Decision on the Proposal of the Prosecutor for a Request to the Federal Republic of Yugoslavia (Serbia and Montenegro) to Defer the Pending Investigations and Criminal Proceedings to the Tribunal, 10 Dec. 1998.

Despite persistent denials⁹, it had many similarities with the *in absentia* procedure and was, in many respects, an honourable compromise between the Romano-Germanic and common law systems. At the time, President Cassese referred to the ‘Tribunal’s decision not to allow trials *in absentia* by creating a special procedure’, implying that in his view the ICTY was not barred from holding *in absentia* trials¹⁰. The Rule 61 procedure was only used in a handful of cases in 1995 and 1996, and then fell into abeyance. Neither the International Criminal Tribunal for Rwanda nor the Special Court for Sierra Leone has ever held proceedings of this nature. In contrast, the Special Tribunal for Lebanon expressly authorises the practice of both *in absentia* trial proper and trial by default¹¹, that is, a trial against a person who has not been notified of their trial¹². By way of explanation, the Secretary-General said that the provision for trials *in absentia* was a manifestation of the incorporation of ‘civil law elements’ in the institution’s procedural regime. ‘The institution of trials *in absentia* is common in a number of civil law legal systems, including Lebanon’s’, he wrote. ‘In addition, in the present case, where the conduct of joint trials for some or all of the cases falling within the jurisdiction of the tribunal is likely, it would be crucial to ensure that the legal process is not unduly or indefinitely delayed because of the absence of some accused’¹³. The Tribunal is currently hearing the case against five accused *in absentia*¹⁴.

B. Analysis and interpretation of elements

The ILC Draft’s article 37 was entitled ‘[t]rial in the presence of the accused’. It began with the statement that ‘[a]s a general rule, the accused should be present during the trial’, continuing with three exceptions: where the accused was in custody, or had been released pending trial, and for reasons of security or ill health of the accused his or her presence was undesirable; where the accused was disrupting the trial; where the accused had escaped from lawful custody under the statute or absconded while on interim release or bail. In such cases, the court could proceed and was to ensure that the accused’s rights were protected, up to and including appointment of counsel¹⁵. Thus, the ILC Draft ruled out the true *in absentia* trial, admitting only that where a trial could not be held because of the ‘deliberate absence’ of an accused, an indictment chamber of the court could consider evidence and rule on whether a *prima facie* case had been made out. If, subsequently, the accused appeared before the court for trial, the record in the *ex parte* hearing would be admissible. The latter procedure is largely comparable to the Rule 61 procedure of the *ad hoc* Tribunals.

⁹ *Prosecutor v. Rajić*, IT-95-12-R61, Decision: ‘A Rule 61 proceeding is not a trial *in absentia*. There is no finding of guilt in this proceeding’. *Prosecutor v. Nikolić*, IT-94-2-R61, Review of Indictment Pursuant to Rule 61, 20 Oct. 1995: ‘The Rule 61 procedure... cannot be considered a trial *in absentia*: it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal’.

¹⁰ Second Annual Report of the ICTY, UN Doc. A/50/365-S/1995/728, Annex, para. 198. See the discussion in: M. Thieroff & E. A. Amley Jr., Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61, 23 *YaleJIL* 261 (1998).

¹¹ Statute of the Special Tribunal for Lebanon, UN Doc. S/2006/893, Attachment, article 22.

¹² Gaeta, in: Alamuddin *et al.* (eds.), *The Special Tribunal for Lebanon Law and Practice* (2014) 229.

¹³ UN Doc.S/2006/893, para. 32(b). Also, paras. 9, 33.

¹⁴ *Prosecutor v. Ayyash et. Al*, No.STL-11-01; *Prosecutor v. Ayyash et. al.*, STL-II-OIIP/AC/AR126.1, Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial *In absentia* Decision, Appeals Chamber, 1 November 2012; *Prosecutor v. Hassan Habib Merhi*, STL-13-04/1/TC, Decision to hold trial *in absentia*, Trial Chamber, 20 December 2013.

¹⁵ 1994 ILC Draft Statute, article 37, p. 107. Also: Code of Crimes against the Peace and Security of Mankind, UN Doc. A/51/332 (1996), article 11 para. 1 (e): ‘to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it ...’.

- 5 During the 1995 sessions of the *Ad Hoc* Committee, which considered the ILC Draft Statute, the view that the accused should be present at trial was widely endorsed¹⁶. Concerns were expressed that any exceptions to this rule be quite clearly spelled out. As for the *ex parte* procedure proposed by the ILC in cases of deliberate absence, delegates tended to the view that this be confined to the preservation of evidence¹⁷.
- 6 When the informal working group on procedures met during the August 1996 session of the Preparatory Committee, views on this question had crystallized into two basic schools of thought that would inform all subsequent debate¹⁸. Some delegates were opposed in principle to *in absentia* trials¹⁹, admitting exceptions only in extreme cases such as repeated disruption of the hearing by the accused. Others argued that the special context of an international criminal court without any enforcement mechanism to compel attendance before it militated in favour of such trials where an accused was voluntarily absent. However, a person convicted pursuant to such proceedings would be entitled to retrial²⁰. The proposal that a trial be permitted to continue when an accused was absent due to ill health was criticized, delegates arguing that this was really grounds for an adjournment²¹.
- 7 The various approaches were honed into four options in the Zutphen Draft and the final Draft Statute submitted by the Preparatory Committee. Option 1 excluded all manner of trial in the absence of the accused. Option 2 stated a general rule of presence at trial, subject, in cases where the accused had been present at the outset of the hearing, to ‘exceptional circumstances’ such as absconding bail or disruption. Option 3 allowed for an *in absentia* trial on a broader range of exceptions, and in particular where the accused did not appear on the day of hearing. Option 4 also allowed *in absentia* trial, but only in cases where the accused’s absence was deemed to be ‘deliberate’²².
- 8 At the Rome Conference, attempts to reach some compromise on the subject of *in absentia* trials were unsuccessful, despite some new suggestions²³. The Chair endeavoured to simplify the different options by presenting a new working paper²⁴. It began with the general principle of the presence of the accused at trial, and the undisputed exception in cases where the accused is present at the beginning of the hearing but continues to disrupt the proceedings. Option 1 authorized the Trial Chamber to proceed in cases where the accused was present at the outset of the hearings but had fled subsequently. Option 2 permitted *in absentia* trials at the request of the accused, where the accused was in detention and refused to appear, and, finally, where the accused, ‘having been duly informed of the opening of the trial [...] does not appear on the day of the hearing’.
- 9 An important concern of some delegations was with the rights of the accused generally and, specifically, with legal representation and the protection of evidence in cases where the Trial Chamber was to proceed in the absence of the accused, for whatever reason. The Working Group concluded that special provisions were not required, and that these matters

¹⁶ *Ad Hoc* Committee Report, para. 164, p. 34.

¹⁷ *Ibid.*, paras. 165–168, p. 34.

¹⁸ Trial *in absentia* among issues discussed by preparatory committee establishment of criminal court, UN Doc. L/2798(1996).

¹⁹ 1996 Preparatory Committee I, para. 253, p. 54.

²⁰ *Ibid.*, para. 254, pp. 54–55, para. 259, p. 55.

²¹ *Ibid.*, para. 256, p. 55.

²² Zutphen Draft, p. 186; Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Rev.1, pp. 99–103. For a discussion of these options, see: Figa-Talamanca, in: Lattanzi (ed.), *The International Criminal Court* (1998) 209, 209–218.

²³ Proposal for article 63 submitted by Egypt, Iraq, the Libyan Arab Jamahiriya, Oman, Qatar, the Sudan and the Syrian Arab Republic, UN Doc. A/CONF.183/C.1/WGPM/L.15 (25 June); Proposal submitted by Malawi for article 63, UN Doc. A/CONF.183/C.1/WGPM/L.16 (25 June); Proposal for article 63 submitted by Columbia, UN Doc. A/CONF.183/C.1/WGPM/L.17 (25 June).

²⁴ Proposal for article 63, UN Doc. A/CONF.183/C.1/WGPM/L.51 (4 July); Working paper on article 63, UN Doc. A/CONF.183/C.1/WGPM/L.51/Corr.1 (9 July). Also: Working paper on article 63, UN Doc. A/CONF.183/C.1/WGPM/L.67 (9 July).

were adequately addressed in articles 64 (Functions and powers of the Trial Chamber) and 67 (Rights of the accused)²⁵.

The debate consisted of the classic controversies between Romano-Germanic and common law procedural models on the subject of *in absentia* trials. Among opponents of the concept, some delegations took the ‘principled’ view, holding that *in absentia* hearings were inadmissible in all cases, subject to a single exception of disruption of trial by the accused. They feared that these would degenerate into show trials and quickly discredit the new ICC. Others took the more pragmatic view that *in absentia* hearings were of little practical value given the right, which would be included in the proposal, of an accused convicted in his or her absence to demand subsequently a *de novo* trial upon appearance before the court, as is the case in most Romano-Germanic codes. In support, they pointed to the rather limited use made by the ad hoc Tribunals of the Rule 61 procedure. Finally, those delegations favouring *in absentia* trials argued that the nature of the crimes within the subject matter jurisdiction of the Court would mean that it would frequently be impossible to compel the appearance of an accused. For the Court to have its intended influence and role in the promotion of peace, justice and reconciliation, they said, it would often be necessary to hold such trials.

Compromise on these issues proved impossible and, as is often the case, the result is that there is no provision on *in absentia* trials in the Statute, saving the exception where an accused disrupts the proceedings²⁶. When the report of the Drafting Committee was presented, Syria expressed its reservations about the provision²⁷.

In the first nine years of the Court’s effective operation, article 63(1) was largely uncontroversial. In 2013, however, William Ruto²⁸ and Uhuru Kenyatta²⁹ submitted requests for exemption from continuous presence at trial. This triggered significant debate regarding the scope and purpose of article 63(1), specifically whether the provision created an obligation upon the accused to attend trial. Prior to these requests, there had only been a handful of instances at the ICC where an accused was absent from the courtroom and never for more than a very limited amount of time. The absence was negligible and necessary due to practical considerations; the prosecution had not objected³⁰. When Thomas Lubanga was unwell and unable to attend for a few hours, Judge Fulford remarked that ‘the accused has

²⁵ See fn. 1 to Working paper on article 63, UN Doc. A/CONF.183/C.1/WGPM/L.67 (9 July): ‘After having further reflected upon the provisions in articles 64 and 67, it has been concluded that the text of paragraph 1 in A/CONF.183/C.1/WGPM/L.51 should be retained’.

²⁶ Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.8 (15 July), p. 5; UN Doc. A/CONF.183/C.1/L.88, p. 1; UN Doc. A/CONF.183/C.1/L.76/Add. 6, p. 1. Paragraph 2 of the text adopted by the Working Group underwent minor changes in the Drafting Committee. The Working Group version reads:

‘2. If the accused, being present before the Court, is continuing to disrupt the trial, the Trial Chamber may remove the accused and shall provide for him or her to observe and instruct counsel from outside the court room, through the use of communications technology if required. Such measures shall be taken only in exceptional circumstances, and after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required’.

²⁷ UN Doc. A/CONF.183/C.1/SR.41, para. 49.

²⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09–01/11–685, Defence Request pursuant to article 63(1) of the Rome Statute, 17 April 2013.

²⁹ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09–02/11–809, Defence Request for Conditional Excusal from Continuous Presence at Trial, 23 September 2013.

³⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05–01/08–T–183–Red–ENG, Transcript of the Hearing of 7 November 2011, Trial Chamber III, 7 November 2011, pgs 1–2; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05–01/08–T–306–Red–ENG, Transcript of the Hearing of 12 April 2013, Trial Chamber III, 12 April 2013, pg. 62 lines 23–24; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05–01/08–T–324–ENG, Transcript of the Hearing of 17 June 2013, Trial Chamber III, 17 June 2013, pg.16 lines 1–12; Also the following confidential hearings referred to by the Appeals Chamber in *Prosecutor v. Ruto and Sang*, ICC-01/09–01/11–1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013 para. 50 fn. 94, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05–01/08–T–324bis–CONF–ENG, Transcript of the Hearing of 17 June 2013, Trial Chamber III, 17 June 2013 pg 27; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05–01/08–T–331–CONF–ENG, Transcript of the Hearing of 27 June 2013, Trial Chamber III, 27 June 2013 pgs 2–3.

the right to be present, and it is for him to decide whether or not to waive that right³¹. An issue also arose at the pre-trial stage when Germain Katanga refused to attend part of his confirmation hearing in 2008³². However, absence at the Confirmation Hearing is explicitly contemplated under article 61 (2) of the Statute.

- 12 In February 2013, in *Ruto and Sang*, counsel for Joshua Arap Sang requested that a provision be made for the exceptional presence of the accused by way of video-link³³. Subsequently, Uhuru Kenyatta³⁴ and William Ruto³⁵ submitted similar applications. However, these requests were superseded, at least in the case of Mr Kenyatta and Mr Ruto, by requests to be conditionally excused from continuous presence at trial following their election as President and Deputy President of Kenya respectively³⁶. In *Ruto and Sang*, Trial Chamber V(a) held that article 63(1) imposes a ‘duty’ upon the accused to be present at trial, however, the Trial Chamber had the discretion to permit a derogation from this duty, under limited circumstances, on the basis of its residual powers of the Court under article 64(6)(f)³⁷. In *Kenyatta*, Trial Chamber V(B) fully adopted the position in *Ruto and Sang*³⁸, and further substantiated its position with reference to general principles of international law³⁹. Under these terms, the accused in both cases were granted excusal from significant parts of trial, subject to certain conditions⁴⁰.
- 13 While the decision in *Ruto and Sang*⁴¹ was before the Appeals Chamber following an appeal by the Prosecution, and the request in *Kenyatta*⁴² was under consideration by Trial Chamber V(b), a terrorist attack at Westgate mall in Nairobi made the temporary return of Mr Ruto to Kenya necessary. The prosecution and the victims did not object to the Defence request for temporary excusal⁴³, and the Court granted the motion without any reference to a particular provision in the Statute⁴⁴. In *Kenyatta*, Trial Chamber V(b) noted that this incident militated against an overly restrictive interpretation of the Court’s discretion to excuse the accused. The Trial Chamber referred to the event as a ‘veritable ‘early warning sign’ as to what is reasonable in the interpretation of article 63(1)’, cautioning that it was ‘not a sign to be ignored’⁴⁵.

³¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-172-Red3-ENG, Transcript of 12 May 2009, Trial Chamber I, 12 May 2009, pg. 1 lines 17–18.

³² *Prosecutor v. Germaine Katanga*, ICC-01/04-1/07-T-46-ENG, Transcript of the Confirmation of the Charges Hearing of 11 July 2008, Pre-Trial Chamber I, 11 July 2008, pgs. 23–24.

³³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-T-19-ENG, Transcript of the Status conference of 14 February 2013, Trial Chamber V, 14 February 2013, p 6–7.

³⁴ *Prosecutor v. Francis Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-667, Defence Request for Mr Kenyatta to be Present During Trial via Video Link, 28 February 2013.

³⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-629, Joint Defence Submissions on Legal Basis for the Accused’s Presence at Trial via Video Link, 28 February 2013.

³⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-685, Defence Request pursuant to article 63(1) of the Rome Statute, 17 April 2013; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-809, Defence Request for Conditional Excusal from Continuous Presence at Trial, 23 September 2013.

³⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, paras. 38–53, 104.

³⁸ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, paras. 66–67.

³⁹ *Ibid.* paras. 93–111.

⁴⁰ See Section B.I.1 and B.I.2.

⁴¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013.

⁴² *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-809, Defence Request for Conditional Excusal from Continuous Presence at Trial, 23 September 2013.

⁴³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-T-35-ENG, Transcript of Status Conference, Trial Chamber V(a), 23 September 2013, paras. pgs.4–5.

⁴⁴ *Ibid.*, pg. 6 ln 2–6.

⁴⁵ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, para. 62.

During the Appeal proceedings, a Joint Amicus Curiae Brief was submitted pursuant to article 103 by Tanzania, Rwanda, Burundi, Eritrea and Uganda⁴⁶. It contended that article 63 should be interpreted in a ‘broad and flexible manner that encourages State cooperation in the widest possible set of circumstances and without endangering the constitutional obligations of the highest office’⁴⁷. 14

The Appeals Chamber, made no explicit reference to the ‘duty’ of the accused to appear. Instead, the Chamber relied upon a ‘general principle’ of presence under article 63(1) which reflects the centrality of the accused in the proceedings⁴⁸. Nevertheless, the Appeals Chamber held that the accused was required to be present at trial. However, the Court enjoyed a measure of discretion under article 63(1) to excuse the accused, in exceptional circumstances and under specific conditions⁴⁹. The Appeals Chamber determined that the Trial Chamber had construed its discretion too widely and, therefore, overturned the decision conditionally excusing Mr Ruto from presence at significant parts of the trial⁵⁰. In the light of the Appeals Chamber decision, the Trial Chamber in *Kenyatta* revised its own decision and withdrew its excusal⁵¹. 15

Barely a month after the Appeals Chamber Judgment⁵², the Twelfth Session of the Assembly of State Parties adopted Rules 134*bis*, *ter* and *quater*⁵³ which provide, respectively, for the possibility of attendance at trial by video technology⁵⁴, the excusal of the accused from presence at trial in exceptional circumstances⁵⁵, and the excusal of the accused from presence at trial due to extraordinary public duties⁵⁶. The adoption of these rules was, quite clearly, motivated by the developments in the *Ruto and Sang* and *Kenyatta* cases. While the President of the Assembly of State Parties noted that the discussions showed that ‘no one is above the law’⁵⁷, she noted that negotiations on the new rules themselves were ‘intense’⁵⁸ and the final text was the result of a compromise⁵⁹. Strong political undercurrents dominated the discussions and the negotiations took place during a period of tense relations between the States of the African Union and the ICC. Shortly before the session of the Assembly of States Parties, on 15 November 2013, a draft resolution⁶⁰ tabled before the UN Security Council for 16

⁴⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-948, Joint Amicus Curiae Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution’s appeal against the ‘Decision on Mr. Ruto’s Request for excusal from Continuous Presence at Trial’, 17 September 2013.

⁴⁷ *Ibid.*, para. 2.

⁴⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013, para. 49–54.

⁴⁹ *Ibid.*, para 56.

⁵⁰ *Ibid.*; see also Section B.I.1.

⁵¹ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-01/11-863, Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, Trial Chamber V(b), 26 November 2013; *contra Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013.

⁵² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013.

⁵³ ICC-ASP/12/Res.7 adopted by consensus at the 12th plenary meeting, on 27 November 2013.

⁵⁴ See section B.I.2.

⁵⁵ See section B.II.2.a.

⁵⁶ See section B.II.2.b.

⁵⁷ 12th Session of the Assembly of State Parties, Closing remarks of the President Tiina Intelmann at the thirteenth meeting of the Assembly of States Parties, on 28 November 2013, ICC-ASP12-CLOS-PASP-ENG, 28 November 2013, 2.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Tabled by Azerbaijan, Burundi, Ethiopia, Gabon, Ghana, Kenya, Mauritania, Mauritius, Morocco, Namibia, Rwanda, Senegal, Togo and Uganda.

the deferral of the cases against Mr Kenyatta and Mr Ruto under article 16 had failed⁶¹. In her closing statement at the Twelfth Session of the Assembly of States Parties, during which the Rules were adopted, President Tiina Intelmaan noted that the session was not ‘business as usual’ and that the ‘re-examination of the relationship between the African States Parties, the African Union, and the ICC [...] was an opportune moment to address issues [...] that concern political implications of the work of the Court and affect the Rome Statute system as a whole’⁶².

- 17 Prior to their adoption, the proposals had been discussed in the Working Group on Amendments. A special segment of the Assembly requested by the African Union on the indictment of sitting Heads of State and Government, decided that practical solutions, in line with the existing legal framework, were required to address the African Union’s concerns. While changes to the Rome Statute did not seem feasible the possibility of amending the Rules of Procedure and Evidence to ‘ensure the necessary degree of flexibility when dealing with specific circumstances which could not have been foreseen when the Statute’ was considered⁶³.
- 18 The background against which the Rules were agreed to has, ultimately, led to provisions which are, at least in part, case-specific, and which do not indisputably clarify all the issues. Moreover, doubts about the consistency of Rule 134*quater* with articles 63 and 27 of the Statute have been raised⁶⁴. However, Rule 134*quater* withstood its first test when Trial Chamber V(a) acceded to a request for an excusal pursuant to the rule in *Ruto and Sang*⁶⁵.

I. Paragraph 1: The principle of presence at trial

1. article 63(1): The requirement of attendance at trial

- 19 The principle of presence of the accused at trial is set out in paragraph 1: ‘The accused shall be present during the trial’. Article 67 para. 1(d), concerning the rights of the accused, also declares: ‘Subject to article 63, paragraph 2, [the accused has the right] to be present at the trial’.
- There has been some uncertainty about whether article 63(1) merely reiterates the right of the accused under article 67(1)(d) to be present at trial, or whether it also creates a duty or requirement upon the accused to be present. A right can, generally, be waived by the holder. On the other hand, a duty or a requirement is mandatory and needs to be fulfilled unless an excusal thereto is granted.
- 20 The drafting history of the Statute provides little guidance about this particular issue. Article 63(1) was ‘[o]ne of the most controversial legal issues during the negotiation process’⁶⁶. The opinions of States were divided and each draft was effectively a compromise. The negotiating process mainly centred on the more fundamental questions about whether

⁶¹ United Nations Security Council, 7060th meeting, Friday, 15 November 2013, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7060.pdf> accessed on 12 December 2014.

⁶² 12th Session of the Assembly of State Parties, Closing remarks of the President Tiina Intelmann at the thirteenth meeting of the Assembly of States Parties, on 28 November 2013, ICC-ASP12-CLOS-PASP-ENG, 28 November 2013, 2.

⁶³ 12th Session of the Assembly of State Parties, Informal summary by the Moderator, ‘Special segment as requested by the African Union: Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation’, 27 November 2013, ICC-ASP/12/61.

⁶⁴ Heller KJ, ‘Will the New RPE 134 Provisions Survive Judicial Review? (Probably Not.)’ (2013), *Opinio Juris*, <http://opiniojuris.org/2013/11/28/will-new-rpe-134-provisions-survive-judicial-review/>, accessed 10 December 2014; See also Knottnerus (2014) *International Crimes Database Brief* 5; Knottnerus (2014) 13(3) *LAPE* 261, 277–280.

⁶⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1186, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, Trial Chamber V(a), 18 February 2014; *Prosecutor v. William Ruto and Joshua Arap Sang*, ICC-01/09-01/11-T-72-ENG, Status Conference of 15 January 2014, Trial Chamber V(a), 15 January 2014.

⁶⁶ Friman, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 247, 255.

trials *in absentia* could proceed under any conditions or at all, not upon the obligation of the accused to attend trial.⁶⁷

The practice of the ad hoc tribunals is, similarly, of limited assistance; while the Statutes of the tribunals contain provisions guaranteeing the right of the accused to be present under article 67, they do not contain separate provisions analogous to article 63(1). Indeed, the Appeals Chamber at the ICTR has opined that ‘the language of article 63(1) [...] appears to express an obligation of the accused rather than a right’⁶⁸. Moreover, trials *in absentia* are permissible, under very strict conditions, under rule 60(A) of the rules of procedure and evidence of the Special Court of Sierra Leone and rule 82*bis* of the Rules of Procedure and Evidence of the ICTR.

When Trial Chamber V(a) was first called upon to clarify the issue in *Ruto and Sang*, its view was unambiguous that ‘the presence of the accused during trial is not only a right (by virtue of article 67(1)(d)), but also a duty on the accused (by virtue of 63(1))’. If article 63(1) were not intended to create a duty, but merely to guarantee a right, it would be superfluous since it would add little value to article 67(1)(d)⁶⁹. This position was followed in *Kenyatta*⁷⁰.

The Trial Chamber also derived the mandatory nature of article 63(1) from the powers of the Court to issue an arrest warrant under article 58(1)(b) or, where sufficient, a summons to appear under article 58(7), since these imply that the presence of the accused is mandatory⁷¹.

Ultimately, the Trial Chamber identified that article 63(1) aimed at ensuring ‘that a Trial Chamber will maintain judicial control over the accused, from the perspective of making impositions on his time and whereabouts, for the purposes of effective inquiry into his individual responsibility’⁷².

The Appeals Chamber in *Ruto and Sang* did not specifically refer to a ‘duty’ of the accused to be present at trial. The Chamber noted that the *travaux préparatoires* indicate that article 63(1) was, at least partly, intended to protect the integrity of the Court and bolster the right of the accused to be present at trial, particularly by preventing the Court from drawing the inference that an accused had implicitly waived their right to be present under article 67(1) by absconding or failing to appear. The provision had not been discussed in terms of the possibility of proceeding where the accused waives the right not to be present in the courtroom⁷³.

⁶⁷ See mn 3–9; see also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013, paras. 52–53; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, paras. 76–87.

⁶⁸ *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgment, Appeals Chamber, 28 November 2007, para 107, fn. 217.

⁶⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, paras. 38–44, 47–53, 104; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066-Anx, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka, OA5, 25 October 2013, para. 7; See also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777-Anx2, Dissenting Opinion of Judge Herrera Carbuca, Trial Chamber V(a), 18 June 2013, para. 4; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-830- Anx2, Partially Dissenting Opinion of Judge Ozaki, Trial Chamber V(b), 23 October 2013, para. 10.

⁷⁰ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, para. 124.

⁷¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, para. 40; see also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066-Anx, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka, OA5, 25 October 2013, para. 7; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-830- Anx2, Partially Dissenting Opinion of Judge Ozaki, Trial Chamber V(b), 23 October 2013, para. 10.

⁷² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, para. 53; *contra Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-830- Anx2, Partially Dissenting Opinion of Judge Ozaki, Trial Chamber V(b), 23 October 2013, para. 14: ‘I do not agree with the majority that the requirement of the accused’s presence at trial is only a question of judicial control. The fairness and integrity of the proceedings are also implicated’.

⁷³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013, para. 52–54.

At the same time, the Appeals Chamber held that the Statute provides a ‘general principle’ of attendance based upon the centrality of the accused in the proceedings⁷⁴. As such it was a requirement that could only be derogated from in specific exceptional circumstances⁷⁵. Therefore, while recalling the rights-based position of the drafters and not explicitly referring to a ‘duty’ upon the accused to be present, the Court held that the presence of the accused was required and that any derogation could only be granted by the Chamber under strict circumstances. Nevertheless, it seems to be implied that the provision imposes a duty upon the accused; as Judge Eboe-Osuji has observed, ‘the view that article 63(1) is about a right for the accused not a duty negate[s] the very notion of excusal from presence at trial’⁷⁶.

- 24 In considering the requirement of presence at trial, the value accorded to the presence of the accused in the courtroom is important, not only in determining the scope of the provision, but also in identifying to what extent, if at all, the obligation or principle can be derogated from.

The arguments militating in favour of presence at trial include: that it reflects ‘the gravitas of the proceedings’⁷⁷ lending legitimacy thereto and affecting perceptions about the Court and its Judgments⁷⁸; that it provides the victims with the opportunity to face the accused in Court and is important for the morale of the victims and witnesses⁷⁹; that it helps to create a ‘comprehensive record of the relevant events’⁸⁰; that it protects the rights of the accused and ensures that the accused is in a position to identify any incongruities between personal memories and those presented in the testimonial evidence brought by the prosecution⁸¹.

It has also been suggested that it provides judges with ‘the opportunity to observe all the parties, including the accused, as the evidence is presented’⁸². However, the Court is required to assess the guilt or innocence of the accused based on the evidence presented and it would be incompatible with the rights of the accused were the Court to draw any inferences from the accused’s reactions to the evidence.

2. Presence by way of video-link

- 25 Until relatively recently, presence at Trial would have implied physical presence in the court room. However, developments in technology have created the possibility for remote, virtual presence. The provision on the possibility for witnesses to testify, exceptionally, by

⁷⁴ *Ibid.*, para. 49.

⁷⁵ *Ibid.*, para. 62; see section B.II.2.

⁷⁶ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013, para. 35.

⁷⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066-Anx, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka, OA5, 25 October 2013, para. 8.

⁷⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013, para. 49; *contra Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, paras 72–78.

⁷⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013, para. 49; see also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-657-Anx, Common Legal Representative for Victims’ Response on the Joint Defence Submissions on Legal Basis for the Accused’s Presence at Trial via video-link, 19 March 2013; *contra Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, para. 73.

⁸⁰ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013, para 49.

⁸¹ *Ibid.* It is noteworthy that the Appeals Chamber referred to the reasoning of the Court in *ECtHR Demebukov v Bulgaria*, Judgment, 28 February 2008 para. 51; See also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777-Anx2, Dissenting Opinion of Judge Herrera Carbuca, Trial Chamber V(a), 18 June 2013, para. 8.

⁸² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066-Anx, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka, OA5, 25 October 2013, para. 9.

video-link was only first included in the draft of the Rome Statute in the March–April 1998 session⁸³. Moreover, rule 124 provided for the ‘observation’ of (not participation at) the confirmation hearing from outside the court room by technological means. Therefore, while the technology for virtual presence was, indeed, available at the time the Rome Statute was adopted, it is unlikely that it was perceived as sufficient to put the accused in a position comparable to physical presence in Court.

At the ICTY and the ICTR it has been held that in terms of the right to be present, the accused is entitled to be physically present in the court room⁸⁴. Indeed, the Appeals Chamber at the ICTY considered appearance by video-link as a derogation from the right of the accused and held that it could only replace physical presence where other alternatives, which could have ‘potentially secure[d] the accused’s ability to fully exercise his right to be present at trial’⁸⁵, were inadequate. Therefore, presence by video-link was not considered to be a ‘full’ exercise of the right.

At the ICC, while the Court had allowed for the accused to be present in preliminary Status Conferences by video-link, remote presence at trial was first raised in *Ruto and Sang*⁸⁶ and *Kenya*⁸⁷. However, the issue was superseded by requests for excusal from continuous presence at trial, therefore, the Trial Chamber did not examine the matter. Nevertheless, Judge Ozaki did opine that article 63(1) requires physical presence at trial, but that the Court could derogate from this requirement under exceptional circumstances⁸⁸.

The Office of the Prosecutor and Legal Representatives for Victims had strongly objected to the requests by the accused on a number of grounds including: that article 63(1) necessitates the physical presence of the accused, subject to the very restrictive exception related to the disruption of the trial by the accused⁸⁹, and limited circumstances in the confirmation hearing⁹⁰; that the reference to the ‘observation’ of Pre-Trial proceedings in Rule 124(3) implies that there exists a distinction between physical presence and remote observation⁹¹; that it is inconsistent with the traditional Court model and it is unclear how

⁸³ Behrens in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 238, 244.

⁸⁴ *Prosecutor v. Protasis Zigirmayirazo*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, paras 10–13; *Prosecutor v. Edouard Karemera*, ICTR-98-44-AR73/10, Decision on Nzirorera’s Interlocutory Appeal concerning his Right to be Present at Trial, 5 October 2007, para. 11.

⁸⁵ *Prosecutor v. Stanišić and Simatović*, IT-03-69-AR73.2, Appeals Chamber, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, para. 19.

⁸⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-T-19-ENG, Transcript of the Status conference of 14 February 2013, Trial Chamber V, 14 February 2013, p 6–7; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-629, Joint Defence Submissions on Legal Basis for the Accused’s Presence at Trial via Video Link, Trial Chamber V, 28 February 2013.

⁸⁷ *Prosecutor v. Francis Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-667, Defence Request for Mr Kenyatta to be Present During Trial via Video Link, 28 February 2013.

⁸⁸ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-830- Anx2, Partially Dissenting Opinion of Judge Ozaki, Trial Chamber V(b), 23 October 2013, paras. 19–20.

⁸⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11- 657-Anx, Common Legal Representative for Victims’ Response on the Joint Defence Submissions on Legal Basis for the Accused’s Presence at Trial via video-link, 19 March 2013, para 10; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-660, Prosecution’s Observations on Joint Defence Submissions on Legal Basis for the Accused’s Presence at Trial via Video-Link, 22 March 2013, paras. 3–5, 9; *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-686, Victims’ Response to the ‘Defence Request for Mr Kenyatta to be Present During trial via Video Link’, 8 March 2013 paras. 13–23; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 703, Prosecution’s Response to the Defence Request for Mr Kenyatta to be Present During Trial via Video-Link’, 22 March 2013, paras. 2–4.

⁹⁰ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-660, Prosecution’s Observations on Joint Defence Submissions on Legal Basis for the Accused’s Presence at Trial via Video-Link, 22 March 2013, paras. 6, 11; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 703, Prosecution’s Response to the Defence Request for Mr Kenyatta to be Present During Trial via Video-Link’, 22 March 2013, paras. 6, 11.

⁹¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-660, Prosecution’s Observations on Joint Defence Submissions on Legal Basis for the Accused’s Presence at Trial via Video-Link, 22 March 2013, para. 7; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 703, Prosecution’s Response to the Defence Request for Mr Kenyatta to be Present During Trial via Video-Link’, 22 March 2013, para. 7.

the accused would exercise his or her rights during proceedings⁹²; that the legal framework only provides for the testimony of witnesses by video-link for a valid reason and it would be unfair and against the interests of justice for the obligations of the accused to be less onerous than those of the witnesses⁹³; that the presence of the accused is important to the victims⁹⁴ and their absence might indicate indifference to their suffering⁹⁵; that it creates the risk that the accused might abscond⁹⁶; that technological and logistical difficulties which might arise in operating the video-link may have adverse effects not only on the accused but also on other parties and participants⁹⁷.

In November 2013, the issue was settled with the adoption of rule 134*bis* (presence through the use of video technology) in the RPE⁹⁸, upon a proposal tabled by the UK⁹⁹. The rule provides that:

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.
 2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.
- 29 Although, by default, presence implies physical presence, the Chamber can authorise the accused to participate by video-link for part(s) of the trial, as long as a number of conditions are fulfilled. Primarily, and perhaps most importantly, a request can only be submitted by the accused. Therefore, the accused retains the right to be physically present at trial.
- 30 The rule is only applicable to an accused subject to a summons to appear. The value of not allowing a detained person to apply under the same conditions is unclear. Moreover, it might, ultimately, prove to be counter-productive; it appears to prevent a detained accused from following the trial by video link, even where physical presence in the courtroom is not possible. An accused might be unable to attend in court, for instance, due to temporary illness, but content to follow the proceedings by video conference rather than delaying the

⁹² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11- 657-Anx, Common Legal Representative for Victims' Response on the Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via video-link, 19 March 2013, paras. 6, 10; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-660, Prosecution's Observations on Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video-Link, 22 March 2013, para. 19; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 703, Prosecution's Response to the Defence Request for Mr Kenyatta to be Present During Trial via Video-Link', 22 March 2013, para 18.

⁹³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-660, Prosecution's Observations on Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video-Link, 22 March 2013, paras. 8, 18; Also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11- 657-Anx, Common Legal Representative for Victims' Response on the Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via video-link, 19 March 2013, para. 12; *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-686, Victims' Response to the 'Defence Request for Mr Kenyatta to be Present During trial via Video Link', 8 March 2013, para. 19; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 703, Prosecution's Response to the Defence Request for Mr Kenyatta to be Present During Trial via Video-Link', 22 March 2013, paras. 8, 17.

⁹⁴ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11- 657-Anx, Common Legal Representative for Victims' Response on the Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via video-link, 19 March 2013, para. 6; *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-686, Victims' Response to the 'Defence Request for Mr Kenyatta to be Present During trial via Video Link', 8 March 2013, para. 10.

⁹⁵ Also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11- 657-Anx, Common Legal Representative for Victims' Response on the Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via video-link, 19 March 2013, paras. 14, 19.

⁹⁶ *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-686, Victims' Response to the 'Defence Request for Mr Kenyatta to be Present During trial via Video Link', 8 March 2013, paras.10–11, 46–55.

⁹⁷ Also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11- 657-Anx, Common Legal Representative for Victims' Response on the Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via video-link, 19 March 2013, paras. 15–18; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-660, Prosecution's Observations on Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video-Link, 22 March 2013, paras. 18–20.

⁹⁸ Resolution ICC-ASP/12/Res.7.

⁹⁹ Sir Mark Lyall Grant, 'UK abstains on UN Security Council resolution on ICC', Speech, 15 November 2013 available at <https://www.gov.uk/government/speeches/uk-abstains-on-un-security-council-resolution-on-icc>, accessed 10 December 2014.

trial. It is clear that a decision of the Court to allow presence by video link would be consistent with both the interests of justice and the right of the accused to an expeditious trial.

The requirement that trial by video-link is only limited to part or parts of the trial appears to preclude an entire trial being conducted through video technology. At the same time, the Court enjoys discretion in determining how narrowly or widely it interprets this requirement.

Moreover, the rule accords the Trial Chamber significant discretion in deciding whether or not to grant the request. The provision states that the court ‘shall rule’ on the request, not that it ‘shall grant’ the request. It does not specifically compel the Court to limit the application of the provision to exceptional circumstances or oblige the Court to consider whether alternative measures are more appropriate. It simply states that the Trial Chamber is to decide on a case-by-case basis, having due regard to the subject matter of the specific hearings. 31

In deciding what subject matter would require the attendance of the accused, the Court is likely to make an assessment based upon the values that the judges attribute to the presence of the accused at trial. These range from the legitimacy of the trial to the reliability of the evidence and the rights and interests of the parties and participants.

Rule 134bis was first invoked by Mr Kenyatta in September in 2014 in relation to his presence at a status conference. However, Trial Chamber V(b) did not enter into the merits of the provision since the trial had not yet formally commenced. Therefore, the rule was held to be inapplicable. It is, nevertheless, noteworthy that the Trial Chamber required the presence of the accused in person, under the terms of the summons to appear, because the status conference came at a ‘critical juncture in the proceedings’ and could impact the interests of the accused, the victims and the witnesses¹⁰⁰. It can be inferred that a similar assessment might equally apply to a determination regarding whether the subject matter of a hearing requires the presence of the accused under Rule 134bis. Judge Ozaki disagreed with the decision, arguing that although rule 134bis was not applicable, it was, nevertheless indicative of the standard to be applied in the Court’s assessment. Moreover, since the particular status conference concerned matters of procedure, rather than evidence, the presence of the accused could have adequately been satisfied by video-link¹⁰¹. This divergence in opinion is likely to foretell the future variances in the interpretation about whether a particular subject matter requires the presence of the accused at trial. 32

In terms of the modalities of the video-link, the requirements laid down by the ICTY for video conferencing in *Stanišić and Simatović* could assist the Court in addressing some of the concerns regarding this mode of participation. In particular, Trial Chamber I had required that: the video-link be reciprocal, allowing the accused, the parties and participants and the witnesses to see each other at all times; the accused be able to communicate with counsel by telephone link; the accused have access to eCourt systems; a member of the Defence team be able to be present with the accused on location¹⁰². 33

3. Applicability

The right and obligation to be present begins with the outset of the trial, and does not apply to pre-trial proceedings. Indeed, for some pre-trial proceedings it is either implicit or explicit that the accused will not be present. This is the case, for example, in the hearing before the Pre-Trial Chamber on a decision by the prosecutor not to proceed¹⁰³, the taking of 34

¹⁰⁰ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-960, Decision Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014, Trial Chamber V(B), 30 September 2014, paras. 18–20.

¹⁰¹ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-960-Anx, Partially Dissenting Opinion of Judge Kuniko Ozaki, Trial Chamber V(B), 30 September 2014.

¹⁰² *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Annex B, Trial Chamber I ICTY, Corrigendum to Second Decision Amending Modalities for Trial, Trial Chamber, 7 September 2009, para 5.

¹⁰³ Article 53 para. 3.

evidence in the case of a ‘unique investigative opportunity’¹⁰⁴, and the issuance of an arrest warrant or summons¹⁰⁵. A right to be present is specifically provided for in some pre-trial proceedings, such as the confirmation hearing¹⁰⁶. It would seem implicit in some other cases, such as an application for interim release pursuant to article 60.

- 35 The Rules of Procedure and Evidence specify that ‘[d]ecisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused’¹⁰⁷.

4. Fitness to stand trial

- 36 Presence at trial should imply more than mere physical presence. According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, the prohibition of trials *in absentia* ‘would appear to be devoid of any substance if it related to the mere physical presence of the accused in court’¹⁰⁸. The accused should be in a position to understand the proceedings, and this may require interpretation in cases where the two official languages of the Court are not available to the accused¹⁰⁹. The Statute is silent with respect to cases of an accused unfit to stand trial because of mental disorder. A mechanism to address this issue is provided by the Rules of Procedure and Evidence¹¹⁰. In addition, according to the Code of Professional Conduct for Counsel, defence lawyers are under a duty to inform the Registrar and the relevant Chamber ‘where a client’s ability to make decisions concerning representation is impaired because of mental disability or for any other reason [...] Counsel shall also take the steps necessary to ensure proper legal representation of the client according to the Statute and the Rules of Procedure and Evidence’.

The problem of fitness to stand trial should not be confused with the defence of insanity, allowed by article 31 para. 1 (a) of the Statute, and which concerns the accused’s mental condition at the time of the crime. An accused who is unfit to stand trial is not ‘present’ within the meaning of article 63 and therefore the hearing cannot proceed. In most national justice systems, an accused may be held in detention pending a change in his or her condition permitting the court to determine fitness. It often involves an interplay between criminal justice legislation and mechanisms and civil measures relating to internment of the mentally ill. But the Statute lacks the sophistication of national legal systems in this area. The suggestion in the ILC Draft that the Court be permitted to continue proceedings in the case of ‘ill health’ of an accused, a provision that might possibly have allowed the Court to address such situations, was rejected by the Diplomatic Conference. Faced with the problem of an accused who is not ‘present’ in a psychological sense, article 67 prohibits the Court from proceeding. At the same time, nothing in the Statute would appear to allow the Court to remand the accused for examination or to hold the accused, indefinitely, pending a change in circumstances. Certainly any measures that infringe upon the rights of the accused must be necessary and proportionate¹¹¹.

- 37 The situation of an accused who is unfit to stand trial is far from an idle hypothesis. In the *Erdemović* case, the ICTY remanded the accused for psychiatric examination so as to determine whether the plea of guilty had been made by a man who was ‘present’ in all senses of the word. A panel of experts concluded that he was suffering from post-traumatic

¹⁰⁴ Article 56. Note, particularly, article 56 para. 2 (d), by which the Court may authorize legal representation of the accused at such hearings.

¹⁰⁵ Article 58.

¹⁰⁶ *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 32.

¹⁰⁷ Rules of Procedure and Evidence, Document ICC-ASP/1/3, pp. 10–107, rule 144(1), here Annex I.

¹⁰⁸ *Ibid.*, para. 32.

¹⁰⁹ See also article 67 para. 1(f).

¹¹⁰ Rules of Procedure and Evidence, rule 135.

¹¹¹ Freckelton and Karagiannakis (2014) *JICJ* 12(4) 705, 722–723.

stress disorder and that his mental condition at the time did not permit his trial before the Trial Chamber¹¹². The Trial Chamber postponed the pre-sentencing hearing and ordered a second evaluation of the Appellant to be submitted in three months' time¹¹³. A subsequent report concluded that Erdemović's condition had improved such that he was 'sufficiently able to stand trial'¹¹⁴. In the Nuremberg trial, issues were also raised as to the fitness of defendants Rudolf Hess and Julius Streicher to stand trial, but the International Military Tribunal determined that they were¹¹⁵.

'Fitness also arose in the prosecution of Vladimir Kovačević, who was indicted together with Pavle Strugar and Admiral Miodrag Jokić for the December 1991 attack on Dubrovnik. Kovačević was arrested in Belgrade in 2003, but when brought to The Hague he proved to be in a state of mental disorder that prevented him from entering a plea. A medical examination by two experts determined that he was unable to fully understand the charges raised against him, but that he might recover if adequately treated at a mental health institution in a Bosnian/Croatian/Serbian-speaking environment. Upon application from defence counsel, Kovačević was granted provisional release and was returned to Serbia for psychiatric treatment in a mental health institution for an initial period of six months, and subsequently extended, to ascertain whether, after being treated adequately, he could be fit to stand trial. The release was conditional upon the requirement that the accused not leave the mental health facility except as part of treatment and only with the Court's consent¹¹⁶. In 2006, the Court determined that the accused was not fit to stand trial, subject to any future change to his conditions¹¹⁷. At some point following the transfer of the case to Serbia pursuant to rule 11bis of the ICTY Rules of Procedure and Evidence, Mr Kovačević appears to have been discharged from the medical facility. It has been noted that this highlights the difficulties that international courts face in monitoring accused persons who are being detained in national institutions¹¹⁸.

At the ICC the fitness to stand trial was first considered, by Pre-Trial Chamber I, in relation to the proceedings against Laurent Gbagbo. In determining whether Mr Gbagbo was fit to stand trial, the Chamber applied the meaningful participation test that had been established in *Strugar*¹¹⁹, confirmed on Appeal¹²⁰, and adopted by the ICTR¹²¹ and the ECCC¹²². By relying upon article 67(1), the Court held that fitness encompassed 'the broader notion of fair trial' and that an accused would be considered to be unfit 'whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights'¹²³.

Drawing upon the position of the European Court of Human Rights¹²⁴, Pre-Trial Chamber I determined that the right of effective participation does not only include the right to be present at trial but also the capacity to 'hear and follow the proceedings'¹²⁵. The Chamber

¹¹² *Prosecutor v. Erdemović*, IT-96-22-T, Judgment, Trial Chamber, 29 Nov. 1996, para. 5.

¹¹³ *Prosecutor v. Erdemović*, IT-96-22-T, Appeal Judgment, Trial Chamber, 7 Oct. 1997, para. 5.

¹¹⁴ *Prosecutor v. Erdemović*, IT-96-22-T, Judgment, Trial Chamber, 29 Nov. 1996, para. 8.

¹¹⁵ *France et al. v. Goering et al.*, 23 *Trial of the major war criminals before the international military Tribunal*, 13 ILR 203, 41 AJIL 172 (1946).

¹¹⁶ *Prosecutor v. Kovačević*, IT-01-42/2-I, Decision on Provisional Release, Trial Chamber I, 2 June 2004.

¹¹⁷ *Prosecutor v. Kovačević*, IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea to Stand Trial, Trial Chamber I, 12 April 2006.

¹¹⁸ Freckelton and Karagiannakis (2014) *JICJ* 12(4) 705, 715–716.

¹¹⁹ *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 32.

¹²⁰ *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 55.

¹²¹ *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Remand Regarding Continuation of Trial, Trial Chamber III, 10 September 2009, para. 18.

¹²² *Prosecutor v. Ieng Thirith*, 002/19-09-2007/ECCC/TC Decision on Ieng Thirith's Fitness to Stand Trial, Trial Chamber, 17 November 2011, paras. 27, 59.

¹²³ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-286-Red, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, Pre-Trial Chamber I, 2 November 2012, para. 43.

¹²⁴ *SC v. The United Kingdom*, Appl. no. 60958/00, Judgment, ECtHR, 15 June 2004.

¹²⁵ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-286-Red, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, Pre-Trial Chamber I, 2 November 2012, para. 46.

held that the rights contained in article 67(1) imply that the accused has the faculty '(i) to understand in detail the nature, cause and content of the charges; (ii) to understand the conduct of the proceedings; (iii) to instruct counsel; (iv) to understand the consequences of the proceedings; [and] (v) to make a statement'¹²⁶. Therefore, fitness to stand trial was defined as the 'absence of such medical conditions which would prevent the accused from being able to meaningfully exercise his or her fair trial rights'¹²⁷. The Court held that where the accused was not fit to stand trial, the proceedings would have to be adjourned until 'the obstacle ceases to exist'¹²⁸.

Under the terms of rule 135, the obligation falls upon the Court to ensure that proceedings are not held against a person who is not fit to stand trial, therefore, the role of the parties is to assist the Court in making its determination¹²⁹.

II. Exceptions: Paragraph 2 and Rules 134*ter* and *quater*

1. Disruption of trial

40 The trial may proceed in the absence of the accused where he or she disrupts the proceedings. Article 63(2) effectively constitutes an exception to the right of the accused to be present at trial, rather than an exception to the requirement of the presence of the accused at trial. Indeed, the Appeals Chamber has held that 'the continuously disruptive behaviour of the accused may be construed as an implicit waiver of his or her right to be present'¹³⁰.

This exception, set out in article 63(2) clearly requires that the trial shall have already begun. The Statute indicates that the accused must 'continue' to disrupt the trial, indicating that the trouble must be repetitive and persistent. It is, of course, difficult to codify in any detail how judges are to administer such a power. The problem is a familiar one in domestic justice systems, and the Court will rely on national practices in developing its own jurisprudence on this point. It must bear in mind, however, that its case load will be, by its very nature, quite politicized, and that this will increase the likelihood that defendants mount vigorous, energetic and original challenges to the charges. The Court's definition of 'disruption' should not become a tool to muzzle defendants in such circumstances. This is why the Statute also specifies that such measures shall be taken only in exceptional circumstances, after other reasonable alternatives have proved inadequate. Also, exclusion from the hearing is only allowed for such duration as is strictly necessary, requiring the Court to review periodically whether the accused may be permitted to return to the hearing. Where the accused has been excluded from the hearing, the *Statute* requires the Trial Chamber to make provision for the accused to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required.

In the *Milošević* trial, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia considered that disruption of proceedings did not always involve intentional conduct, and might result from the poor health of an accused. The context was a debate about the right of the accused to defend himself, and not about presence at trial, but the Appeals Chamber treated the problem as being similar in nature. It appeared to leave open the question as to whether a trial might proceed in the absence of the accused on the basis of his or her ill health¹³¹.

¹²⁶ *Ibid.*, para. 50.

¹²⁷ *Ibid.*, para. 43.

¹²⁸ *Ibid.*, para. 43.

¹²⁹ *Ibid.*, para. 56.

¹³⁰ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', OA5, 25 October 2013, para. 51 and fn. 97.

¹³¹ *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 Nov. 2004, para. 14. Also: *Prosecutor v. Šešelj*, IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 Oct. 2006, para. 20.

In *Stanišić and Simatović*, the ICTY Appeals Chamber similarly held that ‘substantial trial disruptions that are unintentional in nature’ could qualify as disruptions to trial¹³². However, since this restricts the accused’s right to be present at trial, the measure should be the ‘least intrusive’ solution to the disruption. Therefore, it is necessary to consider reasonable alternatives, including a temporary stay of proceedings. Moreover, the measure needs to be exercised proportionately to the right of the accused and any co-accused to an expeditious trial¹³³. The ICTY Appeals Chamber held that a three day delay due to the illness of one co-accused ‘was [not] sufficient to outweigh the statutory right [...] to be present at his own trial when the absence was due to no fault of his own’¹³⁴.

2. Excusal from presence at trial

Since article 63(1) has been interpreted as requiring the presence of the accused at trial, a question has arisen regarding the extent of the Court’s discretion to excuse an accused who voluntarily requests to be absent from trial. The matter has been settled, at least in part, with the adoption of Rules 134*ter* and *quater* at the Twelfth ASP in 2013, following developments in the *Ruto and Sang* and *Kenyatta* cases. Neither the decisions¹³⁵ nor the judgment¹³⁶ in these cases were unanimous, and the opinions of the judges were so diverse that they have been described as a ‘juristic cacophony about the meaning of the provision’¹³⁷. Both the Trial Chambers and the Appeals Chamber decided that an overly restrictive approach to article 63(1) would hamper the interests of justice and, possibly, the well-being of victims and witnesses¹³⁸. However, the Chambers derived their power to excuse the accused from different provisions in the Statute and, in practical terms, the Appeals Chamber construed the Court’s discretion more narrowly.

The Trial Chamber held that the obligation under article 63(1) is incumbent upon the accused, not the Court, and that the Trial Chamber, therefore, enjoys the discretion to excuse the accused from trial ‘in a reasonable way’¹³⁹. The Trial Chamber warned against a reliance on the *travaux préparatoires* to preclude the discretion of the Chamber¹⁴⁰, and rejected the argument that the exemptions to the accused’s presence contemplated in article 63(2)¹⁴¹ and article 61(2)¹⁴² of the Statute imply that any other grounds for an excusal are

¹³² *Prosecutor v. Stanišić and Simatović*, IT-03-69-AR73.2, Appeals Chamber, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, para. 15.

¹³³ *Ibid.*, paras. 18–19.

¹³⁴ *Prosecutor v. Edouard Karemera*, ICTR-98-44-AR73/10, Decision on Nzirorera’s Interlocutory Appeal concerning his Right to be Present at Trial, 5 October 2007, para. 15.

¹³⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013.

¹³⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013.

¹³⁷ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013 para. 32.

¹³⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, para. 44; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013, para 50; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, para. 90.

¹³⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, para. 43; *contra Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066-Anx, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka, OA5, 25 October 2013, para. 5.; see also Knottnerus (2014) 13(3) *LAPE* 261, 267–268.

¹⁴⁰ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, paras. 76–87.

¹⁴¹ See Section B.II.1.

¹⁴² Providing the possibility for the confirmation hearing to be held in the absence of the person charged where they have, either waived their right to be present or fled.

precluded¹⁴³. Trial Chamber V(b) also made reference to various general principles of international law¹⁴⁴.

- 43 The Trial Chamber, relied upon the residual powers under article 64(6)(f) of the Statute to exceptionally excuse the accused from continuous presence at trial. Assessments should be on a case-by-case basis, guided by the principles of fairness and expeditiousness, the rights of the accused, and the protection of the victims and witnesses under article 64(2)¹⁴⁵. The Trial Chamber required the presence of the accused at a pre-determined set of hearings, as well as other attendance directed by the Chamber¹⁴⁶. In their dissenting opinions, Judge Herrera Carbuccia and Judge Ozaki argued for a more restrictive exercise of the Court's discretion¹⁴⁷.
- 44 The Appeals Chamber rejected the Trial Chamber's finding that the Court's discretion was derived from article 64(6)(f) and decided that the Court enjoyed a 'measure' of discretion under article 63(1) itself. This was limited to the power to excuse an accused from continuous presence at trial on a case-by-case basis, subject to specific, exceptional circumstances¹⁴⁸ and for a limited duration¹⁴⁹. In the light of the general principle of presence at trial and drawing upon the requirements of article 63(2), the Appeals Chamber laid out six requirements to regulate the Court's discretion which later became the basis for rule 134*ter* of the RPE¹⁵⁰:
- (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule;
 - (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial;
 - (iii) any absence must be limited to that which is strictly necessary;
 - (iv) the accused must have explicitly waived his or her right to be present at trial;
 - (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and
 - (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.
- 45 The Appeals Chamber found that the Trial Chamber had applied its discretion too broadly as it had failed to investigate any alternatives and had effectively provided a blanket excusal

¹⁴³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, paras. 54–63; See also *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, para. 83 and *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013, paras. 81–92; *contra* See also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777-Anx2, Dissenting Opinion of Judge Herrera Carbuccia, Trial Chamber V(a), 18 June 2013, paras. 4–5; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-830- Anx2, Partially Dissenting Opinion of Judge Ozaki, Trial Chamber V(b), 23 October 2013, para. 10; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066-Anx, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Usacka, OA5, 25 October 2013, para. 7.

¹⁴⁴ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, paras. 90–111.

¹⁴⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, paras. 49, 104.

¹⁴⁶ *Ibid.* para. 104; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, para. 124.

¹⁴⁷ See also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777-Anx2, Dissenting Opinion of Judge Herrera Carbuccia, Trial Chamber V(a), 18 June 2013, paras. 9–10; *Kenyatta Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-830- Anx2, Partially Dissenting Opinion of Judge Ozaki, Trial Chamber V(b), paras. 16–18.

¹⁴⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', OA5, 25 October 2013, para. 56.

¹⁴⁹ *Ibid.*, para. 50–62.

¹⁵⁰ *Ibid.*, para 62.

without properly exercising a case-by-case examination and by not limiting the duration of the exemption¹⁵¹.

Judges Kourula and Ušacka dissented to the Appeals Chamber Judgment, noting that a more restrictive approach was required by the ‘clear and unambiguous’ terms of article 63(1)¹⁵² and a contextual reading in the light of the other provisions in the Statute¹⁵³, its object and purpose¹⁵⁴ and the *travaux préparatoires*¹⁵⁵. They held that the accused could only be excused, in accordance with the *de minimis* principle, where absence is so insignificant that it does not violate the fundamental principle of presence¹⁵⁶.

a) **Rule 134ter: Excusal from presence at trial.** Rule 134ter of the Rules of Procedure and Evidence provides that:

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.
2. The Trial Chamber shall only grant the request if it is satisfied that:
 - (a) exceptional circumstances exist to justify such an absence;
 - (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
 - (c) the accused has explicitly waived his or her right to be present at the trial; and
 - (d) the rights of the accused will be fully ensured in his or her absence.
3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

Rule 134ter reiterates the importance attached to the presence of the accused in proceedings before the ICC. Indeed, a request can only be submitted by an accused subject to a summons to appear. Moreover, the provision proscribes even temporary absence unless it is absolutely necessary and is exercised under strict conditions. At the same time, the Court enjoys significant discretion in determining whether the conditions themselves have been fulfilled.

Paragraph 2 of rule 134ter states that the Chamber ‘shall only grant the request if it is satisfied that’ the conditions therein are fulfilled. This does not appear to imply an absolute obligation upon the Chamber to grant an exemption if the conditions are satisfied but prevents the Chamber from acceding to a request unless the conditions are fulfilled.

The *a priori* identification of what might constitute ‘exceptional circumstances’ under paragraph 2(a) is difficult and the Court will necessarily be guided by the context. Although the standard applied by the Appeals Chamber in *Ruto and Sang*¹⁵⁷ is informative, the particular circumstances will differ since exemptions on the basis of official position are now specifically catered for in rule 134quater.

In considering what ‘alternative measures’ might be adequate, paragraph 2(b) is not exhaustive. The Court will need to balance competing interests, ensuring the safeguard of

¹⁵¹ *Ibid.*, paras. 61–63.

¹⁵² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066-Anx, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka, OA5, 25 October 2013, para. 6; *contra see Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013; *contra Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013, para. 16–27.

¹⁵³ *Ruto Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066-Anx, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka, OA5, 25 October 2013, para. 8.

¹⁵⁴ *Ibid.* paras. 9–10.

¹⁵⁵ *Ibid.* paras. 12–15 and fn. 16.

¹⁵⁶ *Ibid.* para. 3; see also Knottnerus (2014) 13(3) *LAPE* 261, 268–270.

¹⁵⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, OA5, 25 October 2013, paras. 61–63.

the accused's rights, the interests and well-being of the victims and witnesses, the quality of the evidence and the efficiency and expeditiousness of the proceedings¹⁵⁸.

- 50 The requirement under paragraph 2(c) that accused has expressly waived the right to be present at trial safeguards the rights of the accused and the integrity of the trial. It also precludes a later appeal or request for *de novo* consideration on the basis that the accused was denied this right. Indeed, the standard format of the waiver adopted by the Trial Chamber specifically stipulates that the accused 'forego[s] every complaint and every appeal against any natural consequence of [...] voluntary absence from the courtroom'¹⁵⁹.
- 51 By requiring a case-by-case assessment of the subject matter and emphasising the exceptional nature of the excusal, paragraph 3 of the rule reinforces the view that the presence of the accused at trial is not merely symbolic. It also precludes blanket exemptions. An analysis on the subject matter is likely to consider the importance of the particular hearing to the accused, the victims and witnesses¹⁶⁰, as well as the evidentiary value of the accused at particular hearings¹⁶¹.
- 52 **b) Rule 134quater: Excusal from continuous presence at trial due to Public Office.** The inclusion of rule 134quater is the direct result of the *Ruto and Sang* and *Kenyatta* cases. It was adopted during a period of immense tension between African Union States and the ICC¹⁶² and just a month after the Appeals Chamber reversed the Trial Chamber's decision to conditionally excuse Mr Ruto from presence at significant portions of trial¹⁶³. The provision exceeds the terms of the Trial Chamber's original determination that official position does not automatically trigger an exemption, but that it would depend upon the particular functions of the accused¹⁶⁴.
- 53 Rule 134quater¹⁶⁵ provides that:
1. An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.
 2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.
- 54 Unlike rule 134ter, rule 134quater requires that Trial Chamber grant the request for excusal where the stipulated conditions are fulfilled. Nevertheless, the Chamber still enjoys considerable discretion in deciding whether the requirements of the provision have been satisfied or not.

¹⁵⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1186, Reasons for the Decision on Excusal from Presence at Trial under Rule 134quater, Trial Chamber V(a), 18 February 2014, para. 68.

¹⁵⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777-Anx1, Waiver, Trial Chamber V(a), 18 June 2013; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-830- Anx1, Waiver, Trial Chamber V(b), 18 October 2013; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1151-Anx, Waiver, Trial Chamber V(b), 20 January 2013.

¹⁶⁰ See also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777-Anx2, Dissenting Opinion of Judge Herrera Carbuca, Trial Chamber V(a), 18 June 2013, para. 11.

¹⁶¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', OA5, 25 October 2013, para 49; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777-Anx2, Dissenting Opinion of Judge Herrera Carbuca, Trial Chamber V(a), 18 June 2013, paras. 8, 11.

¹⁶² See mn 15–16.

¹⁶³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', OA5, 25 October 2013, para. 63.

¹⁶⁴ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, para. 50.

¹⁶⁵ Adopted at the 12th plenary meeting, on 27 November 2013, by consensus ICC-ASP/12/Res.7.

The requirements that the excused must perform ‘extraordinary duties at the highest level’ are cumulative; the duties must be both ‘extraordinary’ and ‘at the highest level’¹⁶⁶. It is unclear whether ‘extraordinary’ functions comprise those duties within the regular portfolio of an official that are particularly important, or whether it is simply exceptional duties that will meet the threshold. Trial Chamber V(a) seems to have opted for the first, broader interpretation, relying upon the importance of the role of Deputy President and observing that, while not every duty at the highest level is extraordinary, the particular functions of the accused fulfilled this criterion¹⁶⁷.

The assessment is rendered difficult by the diversity of systems of government. Moreover, while the original excusal decisions in *Ruto and Sang* and *Kenyatta* had emphasised the importance of respecting the democratic will of the people as one of the motivations for excusing the accused from presence at trial¹⁶⁸, rule 134*quater* makes no distinction between officials who have been elected directly and those who have not. It is unclear how the Court will react to the official appointment of an accused who has not been democratically elected in a deliberate attempt to bypass the requirement of presence.

Although the Court can only accede to a request where other measures are inadequate, the Court enjoys a modicum of discretion in its determination of adequacy. Paragraph 2(b) of Rule 134*ter* provides some guidance in this respect, but other measures can also be considered depending, *inter alia*, upon the circumstances of the case, the length of time that the accused needs to be absent from trial and the extent to which the alternative measures adequately conform with the interests of the Court, the parties and the participants. For instance, Trial Chamber V(a) held that regular adjournments due to the frequency of the accused’s engagements would be detrimental to the interests of the victims, witnesses, and co-accused, the quality of the evidence, and the efficiency and expeditiousness of the proceedings¹⁶⁹. The Court is under an obligation to examine the adequacy of other reasonable measures, whether or not they are proposed or properly substantiated by the parties and participants.

Whether an excusal is in the interests of justice will depend upon its effects on: the efficiency, fairness and expeditiousness of the proceedings; the interests and participation of the victims and witnesses; the interests of the State of which the accused is an official; the evidentiary value of the accused’s presence at trial; the rights of the accused, including the ability to react to testimony; and the interests of the prosecution¹⁷⁰. Such balance is achieved when ‘the adverse effects on the interests of justice are not excessive; certainly not such as to negate those interests altogether or unduly compromise the integrity of the proceedings’¹⁷¹.

Although the Court is not explicitly required to consider requests on a case-by-case basis, it is obliged to assess them in light of the subject matter of the specific hearings. The inconsistency in this provision has been glossed over by Trial Chamber V(a), holding that ‘the express omission [...] of the requirement of ruling on a case-by-case basis [...] must allow for the possibility of the decision being taken without the Chamber’s specific knowledge of the subject matter of each hearing from which the accused seeks to be absent’¹⁷². The Chamber identified categories of hearings at which the accused’s presence was necessary and

¹⁶⁶ See *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1186, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, Trial Chamber V(a), 18 February 2014, para. 64.

¹⁶⁷ *Ibid.*, para. 63.; See also Knottnerus (2014) 13(3) *LAPE* 261, 282.

¹⁶⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, para. 81–95; see also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-948, Joint Amicus Curiae Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution’s appeal against the ‘Decision on Mr. Ruto’s Request for excusal from Continuous Presence at Trial’, OA5, 17 September 2013, para 8.

¹⁶⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1186, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, Trial Chamber V(a), 18 February 2014, para. 68.

¹⁷⁰ *Ibid.*, paras. 72–74.

¹⁷¹ *Ibid.* para. 73.

¹⁷² *Ibid.*, para 76.

also required the presence of the accused at future hearings where the Court decided, either at the request of another party or participant, or *proprio motu*, that this was necessary¹⁷³. At the same time, ‘unconditional excusal’ from trial was precluded¹⁷⁴.

- 58 Rule 134*quater* has also been criticised for its inconsistency with, *inter alia*, article 63 of the Statute, since it appears to exceed the limits imposed by the Statute¹⁷⁵, and that an interpretation of the rule as allowing a blanket excusal omits a number of requirements that were clearly stipulated by the Appeals Chamber in its interpretation of article 63(1)¹⁷⁶, namely the exceptional nature of the excusal, its limitation based on necessity and the requirement that exemptions must be assessed on a case-by-case basis¹⁷⁷.

However, Trial Chamber V(a) has held that States Parties have clearly chosen to omit some elements from rule 134*quater*, while including them in rule 134*ter*. In the view of the Trial Chamber, the intention of the States Parties was for the rule to be consistent with the Statute and that, through rule 134*quater*, the Assembly of State Parties had ‘clarified the position [...] in relation of the scope and application of article 63(1) of the Statute’¹⁷⁸ in a manner that constituted a ‘subsequent agreement’ providing clarity about the scope of the Statute under the terms of article 31(3)(a) of the Vienna Convention of the Law of Treaties¹⁷⁹.

- 59 The compatibility of the interpretation of rule 134*quater* as permitting the unconditional excusal of an accused from trial based solely on their official status, has also been questioned in relation to articles 21(3) and 27(1), although Trial Chamber V(a) has held that no inconsistency subsists¹⁸⁰. Leave to appeal the issue has not been allowed and the validity of the rules may arise again in future.

3. Refusal to attend

- 60 The recent decisions of the Trial Chamber and Appeals Chamber in *Ruto and Sang and Kenyatta*, as well as the adoption of rules 134*bis* to *quater* suggest that the requirement, under article 63(1) to be present at trial, can only be derogated from exceptionally. Therefore, an accused cannot simply refuse to attend trial without a valid reason. This reflects the importance that has been attributed to the presence of the accused at trial under the Rome Statute taking into consideration not only the accused’s rights, but also the various other interests which are at stake, including those of the victims.
- 61 The position is different at the *ad hoc* tribunals where it had been determined that the accused could waive the right to be present at trial. Some defendants refused to attend in court as a way of protesting rulings by the bench. For example, several accused at the Special Court for Sierra Leone have boycotted the proceedings.

¹⁷³ *Ibid.*, para. 57 and paras. 77–79.

¹⁷⁴ *Ibid.*, para. 57.

¹⁷⁵ Heller KJ, ‘Will the New RPE 134 Provisions Survive Judicial Review? (Probably Not.)’ (2013), *Opinio Juris*, <http://opiniojuris.org/2013/11/28/will-new-rpe-134-provisions-survive-judicial-review/>, accessed 10 December 2014.

¹⁷⁶ See mn 42.

¹⁷⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1135, Prosecution response to Defence request pursuant to article 63(1) and rule 134*quater* for excusal from attendance at trial for William Samoei Ruto, 8 January 2014, paras. 13–19.

¹⁷⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1186, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, Trial Chamber V(a), 18 February 2014, para. 55; *contra* Knottnerus (2014) 13(3) *LAPE* 261,275–277.

¹⁷⁹ *Ibid.*, paras. 48–58; See also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1186-Anx, Separate Further Opinion of Judge Eboe-Osuji to the ‘Reasons for the Decision on Excusal from Presence at Trial under rule 134*quater*’, Trial Chamber V(a), 19 February 2014.

¹⁸⁰ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1186, Reasons for the Decision on Excusal from Presence at Trial under rule 134*quater*, 18 February 2014, paras. 59–61; *contra* *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1135, Prosecution response to Defence request pursuant to article 63(1) and Rule 134*quater* for excusal from attendance at trial for William Samoei Ruto, 8 January 2014, paras. 3–5, 20–29; See also generally Knottnerus (2014) *International Crimes Database Brief* 5; Knottnerus (2014) 13(3) *LAPE* 261,277–282.

A Trial Chamber of the Court said that

‘... though in essence trial in the absence of an accused person is an extraordinary mode of trial, yet it is clearly permissible and lawful in very limited circumstances. The Chamber opines that it is a clear indication that it is not the policy of the criminal law to allow the absence of an accused person or his disruptive conduct to impede the administration of justice or frustrate the ends of justice. To allow such an eventuality to prevail is tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification’¹⁸¹.

At the ICTR, on the first day of trial of Jean-Bosco Barayagwiza, his counsel told the Trial Chamber that their client would not be attending the trial, and that he had instructed them not to represent him, all of this ‘based on his inability to have a fair trial due to the previous decisions of the Tribunal in relation to his release’. Barayagwiza personally issued a statement ‘refusing to associate himself with a show trial’ and insisting that ‘the ICTR was manipulated by the current Rwandan government and the judges and the prosecutors were the hostage[s] of Kigali’¹⁸². The Trial Chamber said that ‘Barayagwiza was entitled to be present during his trial and had chosen not to do so, and the trial would proceed nonetheless. The Chamber also stated that he would be free to attend whenever he changed his mind’. Counsel were ordered to continue representing Barayagwiza¹⁸³. They attended at court until February 2001, and then informed the Trial Chamber that their mandate had been terminated. A new counsel was soon appointed for Barayagwiza, who represented Barayagwiza for the duration of the trial, but the accused never attended personally¹⁸⁴.

4. Absconded accused

While the possibility of a trial *in absentia* of an accused who absconded was explicitly provided for in some of the drafts to the Rome Statute¹⁸⁵, disagreements on the principle resulted in the absence of provisions in the Statute allowing any type of trials *in absentia*. 62

In *Ruto and Sang* and *Kenyatta*, although the question did not arise directly, the Trial Chamber opined that the issue was not foreclosed in relation to an accused who had appeared before the Court, accepted its jurisdiction and subsequently absconded¹⁸⁶. This position was also strongly submitted by Judge Eboe-Osuji in his dissenting opinion to the *Kenyatta* reconsideration decision¹⁸⁷. There is a fear that if trials *in absentia* are not allowed in these situations, future cases might have to be aborted¹⁸⁸, rendering the Court a ‘hostage to impunity’¹⁸⁹, and running contrary to the object and purpose of the Rome Statute¹⁹⁰.

¹⁸¹ *Prosecutor v. Gbao*, SCSL-2004-15-T, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, 12 June 2004, para. 8. Also: *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings, 1 Oct. 2004; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on the Issue of the Refusal of the Accused Sesay and Kallon to Appear for their Trial, 19 Jan. 2005.

¹⁸² Momeni (2001) 7 *IlsaJl&CompL* 315.

¹⁸³ *Prosecutor v. Barayagwiza*, ICTR-97-15-T, Decision on Defence Counsel Motion to Withdraw, 2 Nov. 2000. Similarly, *Prosecutor v. Gbao*, SCSL-04-15-T, Gbao – Decision on Application to Withdraw Counsel, 6 July 2004.

¹⁸⁴ *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Judgment, 3 Dec. 2003, para. 83.

¹⁸⁵ See mn 3–9.

¹⁸⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, paras. 44–46, 75; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, paras. 64, 83, 90, 108.

¹⁸⁷ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013, paras. 37–189.

¹⁸⁸ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, para. 64.

¹⁸⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, para. 44.

¹⁹⁰ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11- 830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V(b), 18 October 2013, para. 90.

- 63 Moreover, it has been held that there is a strong precedent in both national and international law, including international criminal law, to try *in absentia* an accused who absconds after the commencement of trial¹⁹¹. It has been noted that this is consistent with human rights, as long as the rights of fair trial are guaranteed¹⁹² and it would not affect the integrity of the trial¹⁹³. Moreover Judge Eboe-Osuji has opined that *in absentia* trial of an accused who absconds is not precluded by the plain terms of the Statute and is actually supported by the article 63(2) which prevents the deliberate frustration of the trial by the accused¹⁹⁴. Moreover, some of the more common justifications against trials *in absentia* have been challenged¹⁹⁵. Judge Eboe-Osuji held that trial *in absentia* of an absconding accused is recognised under contemporary common law and civil law and is, therefore, applicable as source of law under the terms of article 38(1)(c) of the ICJ Statute and, consequently, under article 21(1)(c) of the Rome Statute¹⁹⁶. Moreover, it can also be justified, among other reasons, on the basis of the principles of justice, legitimacy and fairness, the preservation of evidence and the logistical value to the Court¹⁹⁷.
- 64 While the arguments are compelling, it is not clear that this is allowed under the terms of the ICC's legal framework with its great emphasis on the presence of the accused at trial. The determination, by the Court, largely endorsed by States Parties in the adoption of rule 134*ter*, is that absence is only permissible in exceptional circumstances, under very strict conditions. At the same time, it is difficult to see how the interests of justice and the integrity of the proceedings are best served by failing to continue proceedings against an accused who has absconded in mid-trial.

5. *Ex parte* proceedings

- 65 Although article 63 presents itself as an exhaustive provision on the subject of presence at trial, something which is confirmed by article 67 (1)(d), portions of the trial may take place in the absence of the accused. Article 72 (7) of the *Statute* allows for a hearing concerning the protection of national security information to take place *ex parte*, that is, in the absence of one or both of the parties¹⁹⁸.
- 66 *Ex parte* proceedings during the trial phase are also authorised under the Rules of Procedure and Evidence. Thus, the Trial Chamber may hear the Prosecutor *ex parte*, and therefore with the accused absent from the courtroom, in order to determine whether an assurance may be given to a witness who may make testify in such a way as to incriminate himself or herself¹⁹⁹. A Trial Chamber may also sit *ex parte* in order to consider whether or not to authorise special measures to facilitate testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence²⁰⁰.

¹⁹¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, para. 46; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013, paras. 107–119.

¹⁹² *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013, paras. 97–106. See also Schabas, in: Sluiter and Vasiliev (eds.), *International Criminal Procedure: towards a Coherent Body of the Law*, (2009), 335; Tochilovsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts: Procedure and Human Rights Aspects* (2014), 510–617.

¹⁹³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, Trial Chamber V(a), 18 June 2013, paras. 74–78.

¹⁹⁴ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863-Anx-Corr, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V(b), 27 November 2013, paras. 69–93.

¹⁹⁵ *Ibid.*, paras. 121–124.

¹⁹⁶ *Ibid.*, paras. 125–182.

¹⁹⁷ See *ibid.* paras.48–68.

¹⁹⁸ Article 72 para. 7.

¹⁹⁹ Rule 74 para. 4.

²⁰⁰ Rule 88 para 2.

The Trial Chamber at the ICC has determined that the requirements of *ex parte* proceedings include that (i) the measures are exceptional and are only used when they are 'truly necessary and when no other, lesser, procedures are available and [...] that their use is proportionate' in the light of potential prejudice to the accused; (ii) unless it is inappropriate, the other party and, potentially the victim participants, are duly notified of the procedure (iii) they include a request to the Chamber 'to make a decision on a relevant issue, rather than being used merely as a means of keeping the Bench informed'²⁰¹.

²⁰¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1058, Decision on the procedures to be adopted for *ex parte* proceedings, Trial Chamber I, 6 December 2007, paras. 12–13.

Article 64

Functions and powers of the Trial Chamber*

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
 - (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
 - (b) Determine the language or languages to be used at trial; and
 - (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.
5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.
6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
 - (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
 - (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
 - (c) Provide for the protection of confidential information;
 - (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
 - (e) Provide for the protection of the accused, witnesses and victims; and
 - (f) Rule on any other relevant matters.
7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.
8.
 - (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford to him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.
 - (b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

* The views expressed in this article are solely those of the author in his personal capacity and do not reflect in any way the views of the International Criminal Court.

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:
 - (a) Rule on the admissibility or relevance of evidence; and
 - (b) Take all necessary steps to maintain order in the course of a hearing.
10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Literature: Ambos, K., ‘International criminal procedure: ‘adversarial’, ‘inquisitorial’ or ‘mixed?’’, (2003) 3 *ICLRev* 1–37; Arbour, L., ‘The Development of a coherent System of Rules of International Criminal Procedure and Evidence before the ad hoc International Tribunals for the Former Yugoslavia and Rwanda’, in: *Comparative Criminal Justice Systems: from Diversity to Rapprochement*, (1998) 17 *NEP* 371; Blakesley, C. L., ‘Commentary on Parts 5 and 6 of the Zutphen Interessional Draft: Investigation, Prosecution and Trial’, in: L. Sadat Wexler (special ed.), *Observations on the Consolidated ICC Text before the final Session of the Preparatory Committee*, (1998) 13bis *NEP* 69; Brady, H. J., ‘Setting the Record Straight: A Short Note on Disclosure and the ‘Record of the Proceedings’’, in: H. Fischer, C. Kress and S. R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law, Current Developments* (2001) 261; Caianiello, M., ‘First Decisions on the Admission of Evidence at ICC Trials, A Blending of Accusatorial and Inquisitorial Models?’’, (2011) 9 *JICJ* 385–410; Converti, A., ‘The Rights of the Accused’, in: F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 219; Cotte, B. And Saracco, M., article 64, in: J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, commentaire article par article*, ii (2012) 1443; Fulford, A., ‘The Reflections of a Trial Judge’, (2011) 22 *CLF* 215–223; Friman, H., ‘Investigation and prosecution’, in: R. S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001) 505; Gallant, K. S., ‘Individual Rights in a new International Organization: the Rome Statute of the International Criminal Court’, in: M. C. Bassiouni (ed.), *International Criminal Law*, iii (2nd ed. 1999); Gallmetzer, R., ‘The Trial Chamber’s discretionary power to devise the proceedings before it and its exercise in the trial of Thomas Lubanga Dyilo’, in: C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court*(2009) 501; Gibson, K. And Rudy, D., ‘A New Model of International Criminal Procedure? The Progress of the DuchTrial at the ECCC’, (2009) 7 *JICJ* 1005–1022; Green, J., Copelon, R., Cotter, P. And Stephens, B., ‘Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique’, (1994) 5:2 *Hastings WomenLJ* 171; Haveman, R., Kavran, O. And Nicholls, J. (eds.), *Supranational Criminal Law: a System Sui Generis* (2003); Heinsch, R., ‘How to achieve fair and expeditious trial proceedings before the ICC: Is it time for a more judge-dominated approach?’’, in: C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009) 479; Heinze, A., *International Criminal Procedure and Disclosure* (Duncker and Humblot 2014); Jones, J.R.W.D (general ed.), *The Practice of the International Criminal Tribunal for the Former Yugoslavia* (2nd ed. 1997); Kirsch, S., ‘The Trial Proceedings before the ICC’, (2006) 6 *Int’l Crim. L. Rev.* 275–292; Kress, C., ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’, (2003) 1 *JICJ* 603–617; Kuschnik, B., ‘International Criminal Due Process in the Making: New Tendencies in the Law of Non-Disclosure in the Proceedings before the ICC’, (2009) 9 *ICLRev* 157–185; Lewis, P., ‘Trial Procedure’, in: R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 539; McLaughlin, C. T., ‘The *Sui Generis* Trial Proceedings of the International Criminal Court’, (2007) 6 *LAPE* 343–354; Swoboda, S., ‘The ICC Disclosure Regime – A Defence Perspective’, (2008) 19 *CLF* 449–472; Terrier, F., ‘Powers of the Trial Chamber’, in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, ii (2002) at 1259; Vasiliev, S., ‘Proofing the Ban on ‘Witness Proofing’: Did the ICC Get it Right?’’, (2009) 20 *CLF* 193–261.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	6
I. Paragraph 1.....	6
1. Functions and powers of the Trial Chamber.....	6
2. ‘in accordance with this Statute’.....	7
3. The Rules of Procedure and Evidence.....	8
II. Paragraph 2: Ensure a fair trial.....	9
III. Paragraph 3: Assignment for trial.....	12
1. ‘confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings’.....	15
2. Determination of language.....	18
3. ‘disclosure of documents or information’.....	19
a) Subject to relevant provisions of the Statute.....	19
b) Sufficiently in advance to enable adequate preparation for trial.....	22
IV. Paragraph 4: Reference to the Pre-Trial Division.....	25

V. Paragraph 5: Joinder or severance	27
VI. Paragraph 6	31
1. 'Exercise any functions of the Pre-Trial Chamber'	31
2. 'Require the attendance and testimony of witnesses'	32
3. 'Provide for the protection of confidential information'	33
4. 'Order the production of evidence'	34
5. 'Provide for the protection of the accused, witnesses and victims'	36
6. 'Rule on any other relevant matters'	37
VII. Paragraph 7: Trial in public	38
VIII. Paragraph 8	39
1. 'commencement of the trial'	39
a) Reading of the charges	39
b) Understanding the nature of the charges	40
c) Plea guilty	42
2. Power of the presiding judge	43
IX. Paragraph 9	50
1. 'Rule on the admissibility or relevance of evidence'	50
2. 'Take all necessary steps to maintain order'	51
X. Paragraph 10: 'record of the trial'	52

A. Introduction/General remarks

1 Article 64 of the Rome Statute¹ defines most of the functions and powers of the Trial Chamber, but not all of them. In the same manner, article 57 does not describe all the functions and powers of the Pre-Trial Chamber.

Article 64 derives from article 38 of the ILC Draft Statute² and it must be pointed out that it is one of the few articles of the Rome Statute, which, even after intensive and difficult discussions, still keeps some elements of the original ILC Draft Statute.

2 During the debates in the Ad Hoc Committee in 1995³, article 38 was not much discussed, although participants agreed that it was necessary to draft more detailed provisions and that an extensive debate would be required about the 'guilty plea procedure', which was provided for in article 38 para. 1 (d) of the ILC Draft Statute.

3 The 1996 Report of the Preparatory Committee⁴ puts forward solutions for these two issues: first, a number of proposals were tabled in order to provide far more detailed provisions for the functions and powers of the Trial Chamber. These proposals were made by both Australia and the Netherlands⁵, but also by France⁶. Second, Argentina and Canada specifically proposed to deal with the 'guilty plea procedure' in a separate article, *scil.* Article 38*bis* entitled 'Abbreviated proceedings on an admission of guilt',⁷ which later became article 65 of the Rome Statute.

Since a great amount of proposals had been put forward on article 38⁸, the matter of 'guilty plea procedure' needed to be discussed separately and in a separate article, before a new and shortened version of the document on other issues could be prepared.

¹ UN Doc. A/CONF.183/9, Rome Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court on 17 July 1998.

² Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July 1994, UN Doc. A/49/10 (1994).

³ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22 (1995).

⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, ii (Compilation of proposals), UN Doc. A/51/22, pp. 170-192.

⁵ UN Doc. A/AC.249/L.2.

⁶ UN Doc. A/AC.249/L.3.

⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, ii (Compilation of proposals), UN Doc. A/51/22, p. 174.

⁸ The compilation of 1996 contains more than 20 pages on article 38 of the ILC Draft Statute!

Thus, in an inter-sessional meeting in Siracusa⁹, the compilation was reduced from 22 to 4 pages; proposals were shortened, deleted or sent for consideration in the Rules of Procedure and Evidence. In a subsequent discussion of the Preparatory Committee¹⁰ in August 1997, article 38 was then reduced to less than two pages. At that point, the text was very close to the ILC Draft, notwithstanding a few additional provisions *inter alia* on the creation of the Pre-Trial Chamber, an element proposed by France and rooted in the Civil Law tradition, contradicting the overall Common Law attitude of the ILC Draft itself. The text was left untouched except two *nota benes* until the Rome Conference¹¹.

During the Conference¹², differences of views appeared between Common Law countries and France on proposals based upon Civil Law. These differences especially appeared with regard to the power of the President of the Trial Chamber to direct the proceedings and the power of the Trial Chamber to order the production of evidence. In addition, another controversial subject turned out to be, with the establishment of the Pre-Trial Chamber, which was not foreseen in the ILC project, when the functions of that Pre-Trial Chamber would end and when those of the Trial Chamber would begin; solutions were found in this regard in paragraphs 4 and 6(a) of article 64, which are discussed below.

The text was finally adopted by the Working Group¹³ and then sent to the Committee of the Whole and the Drafting Committee, which adopted it with some minor changes.

The interpretation of article 64 needs to be in line with other articles of the Statute addressing an action from the Trial Chamber. To that extent, article 64 makes explicit references to articles 61, 65 and 68 of the Statute, and refers explicitly not less than five times (!) to the provisions of the ‘Statute’ in general.

With regard to the scope of application of this article, it is interesting to note that the principles established in article 64 (especially those in paragraphs 2 and 3 (a)), are applicable at the pre-trial stage of the proceedings¹⁴, notwithstanding the fact that the provision was clearly drafted for the Trial Chamber. Moreover, with regard to the appeals stage of the proceedings, rule 149 of the Rules clearly states that ‘[P]arts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber’.

The Appeals Chamber directly refers to article 64¹⁵, when issuing orders on the conduct of the proceedings before it in relation to appeals against decisions of acquittal or conviction or against sentence under article 81.

⁹ Informal Inter-Sessional Group of Experts Meeting in Siracusa, Italy, 29 May–4 June 1997, at the International Institute of Higher Studies in Criminal Sciences.

¹⁰ Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1995, UN Doc. A/AC.249/1997/L.8/Rev.1, pp. 30–32.

¹¹ See Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13, pp. 111–112; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (14 Apr. 1998), pp. 103–105.

¹² Working paper on article 64, UN Doc. A/CONF.183/C.1/WGPM/L.41 (2 July 1998) and UN Doc. A/CONF.183/C.1/WGPM/L.41/Corr.1 (9 July 1998). At that point, sub-headings were included in the text, ‘Preparation for trial’ from paragraph 3 to paragraph 5, ‘Preparation for trial and during the trial’ for paragraph 6 and ‘The trial’ from paragraph 7 to paragraph 11.

¹³ Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.2.

¹⁴ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-365, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, Appeals Chamber, 10 November 2011, para. 46.

¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3097, Further order on matters relevant to the hearing before the Appeals Chamber, 15 May 2014, p. 4; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-210, Order in relation to the conduct of the hearing before the Appeals Chamber, Appeals Chamber, 8 October 2014, p. 3.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Functions and powers of the Trial Chamber

- 6 These functions of course refer to what the Trial Chamber has to do and here one can refer to paragraph 3 of article 64 which describes the Trial Chamber's role in the preparation of a trial; but the most important functions of the Trial Chamber, for example decisions on the guilt of the accused or on sentencing, or decisions on reparations to victims are dealt with in articles 74 to 76.

Powers of the Trial Chamber refer to the multiple actions this Chamber can take on and are partly described in article 64 para. 6, which refers to other parts of the Statute. For example in Part 9, the Trial Chamber has the power under article 93 para. 2¹⁶ to provide for a safe conduct to a witness or an expert appearing before the Court.

2. 'in accordance with this Statute'

- 7 This particular expression is repeated five times in this article, as was stated before. It may be that the intention was to make it very clear that the Trial Chamber had in every case to take first into consideration the provisions of the Statute. But that was stated clearly in article 21 para. 1 (a) '*the Court shall apply in the first place, this Statute ...*'. Undoubtedly more important is the following provision, article 21 para. 3, which states that '*the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights*'; this provision will allow the ICC to take into consideration the ICCPR¹⁷, the European Convention on Human Rights, the Inter-American Convention on Human Rights and also the jurisprudence of those treaty-based organs in the interpretation of the Statute, and, precisely, article 64.

3. The Rules of Procedure and Evidence

- 8 The reference was introduced at the very start in order to avoid repetition all over the article; to this end, there was also a note in the 'working paper on article 64'¹⁸:

'There was general agreement that this article would be supplemented by a number of more detailed provisions in the Rules of Procedure and Evidence, in particular regarding disclosure of documents and information between the parties. But it was thought unnecessary to repeat the reference to 'in accordance with the Rules of Procedure and Evidence'; hence the introduction of the general wording in the paragraph above. This is, however, a wider problem which will need to be addressed throughout the procedures parts.'

Indeed, a lot needed to be addressed in the Rules, not only for article 64 but for the whole Statute which contains more than 40 explicit references to the Rules! Examples of what could be inserted in the Rules could also be found in the documents submitted by France¹⁹, Australia and the Netherlands²⁰. The discussion on the Rules started in 1999 in the framework of the Preparatory Commission and was finalized on 30 June 2000. The Rules were adopted in September 2002 at the first meeting of the Assembly of States Parties²¹. Chapter 6

¹⁶ See article 93 para. 2.

¹⁷ International Covenant on Civil and Political Rights (1966).

¹⁸ UN Doc A/CONF.183/C.1/WGPM/L.41 and UN Doc. A/CONF.183/C.1/WGPM/L.41/Corr.1.

¹⁹ UN Doc. A/AC.249/L.3.

²⁰ UN Doc. A/AC.249/L.2.

²¹ See Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002, doc. ICC-ASP/1/3 at 10. As far as the relationship between the Statute and the Rules is concerned, the Assembly of States Parties decided to add the following explanatory

of the Rules deals specifically with the proceedings to be conducted before a trial Chamber. It is also important to note that Chapter 4 of the Rules dealing with ‘proceedings applicable at various stages of the proceedings’ contains provisions of utmost importance for the Trial Chamber. Finally, on 26 May 2004, the Judges of the ICC adopted the Regulations of the Court²² in accordance with article 52. Chapter 3, Section 3, of those Regulations deals specifically with the proceedings to be conducted before a Trial Chamber. As for the Rules, Chapter 3, Section 1, of those Regulations deals with ‘provisions relating to all stages of the proceedings’ and is of utmost importance for the Trial Chamber. Discussion of the Rules and Regulations will take place following the paragraphs of article 64.

II. Paragraph 2: Ensure a fair trial

In a report issued just after the adoption of the Statute, Amnesty International emphasized the importance of article 64 para. 2: 9

‘the Trial Chamber is not limited to the examining only the rights of the accused guaranteed in the Statute, but may look to other international instruments and jurisprudence in reaching this determination and, even though the Trial Chamber must have due regard for the protection of victims and witnesses, this must not be at the expense of the rights of the accused’²³.

This statement proved to be right. Very early in its jurisprudence, the Appeals Chamber has indeed emphasized the ‘overall role ascribed to the Trial Chamber in article 64(2) of the Statute to guarantee that the trial is fair and expeditious and that the rights of the accused are fully respected’.²⁴ The Appeals Chamber also stated logically that article 64 para. 2, as any other article in the Statute, had to be interpreted and applied consistently with internationally recognized human rights, in accordance with article 21 para. 3 of the Statute²⁵.

Article 64 para. 2 has been used in order to affirm the discretion Trial Chambers enjoy when organizing trial procedures, but also to stress that Trial Chambers had exclusive power with regard to the parties in the conduct of the trial.

With regard first to the discretion Trial Chambers enjoy when organizing trial procedures, article 64 para. 2 has been used by Trial Chambers at the ICC to develop their own trial procedures for each trial. As stated by Trial Chamber V: 10

‘Article 64 of the Statute grants the Chamber flexibility in managing the trial. Its formulation makes it clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness preparation, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims’²⁶.

This ‘significant degree of discretion’ is used by each Trial Chamber to conduct the trial according to the particular views of the bench. There is thus little prospect for a unified trial

note to the Rules: ‘The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court to which they are subordinated in all cases. [...] In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute’.

²² Regulations of the Court adopted by the judges of the Court on 26 May 2004, Fifth Plenary Session, The Hague, 17–28 May 2004, as amended on 14 June and 14 November 2007 and on 2 November 2011, Official Documents of the International Criminal Court, ICC-BD/01-03-11.

²³ Preliminary Report to Membership on outcome of the Rome Diplomatic Conference to establish a Permanent International Criminal Court and proposed follow-up action for next two years (24 July 1998), p. 13.

²⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, Appeals Chamber, 21 October 2008, para. 46.

²⁵ *Ibid.*, para. 76.

²⁶ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-524, Decision on witness preparation, Trial Chamber V, 2 January 2013, para. 27; see also paras 26 and 28–29.

procedure at the ICC, at least in the near future. This should however not come as a surprise as the trial procedure was to a large extent left open by the drafters of the Statute for the judges to decide. This makes it all the more difficult to try to present what trial proceedings are before the ICC.

The Appeals Chamber has also underlined, albeit in slightly different terms, that the duty of each Trial Chamber to do ‘justice in each individual case’, in accordance with article 64 para. 2, implies ‘a measure of flexibility in the management of proceedings’.²⁷

What is however more difficult to justify is that Trial Chambers have also adopted proceedings clearly not foreseen by the Statute and the Rules such as permitting ‘no case to answer’ motions, considering that ‘such motions, in principle, would be consistent with its general obligation, pursuant to article 64(2) of the Statute, to ensure that the trial is fair and expeditious’²⁸, or directing, on the basis of article 64 para. 2, the Office of the Prosecutor to provide the defence, after the decision on the confirmation of the charges, with an ‘updated’ document containing the charges, whereas the Statute only foresees such a document before the decision on the confirmation of the charges²⁹. Such an ‘updated’ document containing the charges is indeed, as clearly affirmed by the Appeals Chamber, ‘not provided for in the Court’s legal instruments’³⁰.

The ‘measure of flexibility in the management of proceedings’, that each Trial Chamber enjoys, may even be used, according to the Appeals Chamber, against the clear wording of other articles of the Statute, such as article 63 para. 1³¹, which states that the ‘accused shall be present during the trial’, article 64 para. 2 allowing Trial Chambers to read ‘shall’ as being ‘may’.

It is difficult to understand what exactly in article 64 para. 2 gives such a broad power to Trial Chambers to enable them to adopt proceedings not foreseen in the Statute and the Rules or even to disregard other articles of the Statute, thereby clearly breaching their obligation under article 21 of the Statute to apply first the Statute and the Rules. Indeed, article 64 para. 2, although constantly portrayed by the jurisprudence as giving a broad discretionary power to Trial Chambers, is actually drafted as an obligation resting upon the Trial Chamber which ‘shall ensure’ that the trial is fair and expeditious. How such an obligation has turned into such a broad discretionary power for Trial Chambers remains a mystery.

- 11 Article 64 para. 2 has also been interpreted as giving Trial Chambers the power to control the way parties should act during the proceedings. With regard to the accused, the Appeals Chamber³² has clearly stated that ‘the Trial Chamber’s power to determine the timeliness of a motion alleging unlawful pre-surrender arrest and detention and seeking a stay of the

²⁷ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, Appeals Chamber, 25 October 2013, para. 50.

²⁸ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1334, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions), Trial Chamber V(A), 3 June 2014, para. 16.

²⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1548, Order for the prosecution to file an amended document containing the charges, Trial Chamber I, 9 December 2008, paras. 13 and 15; see also *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-439, Order for the prosecution to file an updated document containing the charges, Trial Chamber V, 5 July 2012, para. 7.

³⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 131.

³¹ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1066 Judgment on the appeal of the prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, Appeals Chamber, 25 October 2013. See generally Heinze, *International Criminal Procedure* (2014), 411–413.

³² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-2259, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’, Appeals Chamber, 12 July 2010, para. 53.

proceedings during the trial phase derives from article 64(2) of the Statute'. Indeed, in accordance with article 64 para. 2, the 'Trial Chamber has the power to regulate the conduct of the parties and participants so as to ensure, among other considerations, that such conduct does not cause undue delay to the proceedings'³³.

This authority of the Trial Chamber over participants in the proceedings applies equally to the Prosecutor. In fact, Trial Chamber I³⁴, recalling its obligation under article 64 para. 2 to ensure that the trial was conducted with full respect for the rights of the accused, concluded that it was unable to discharge this obligation whilst the Prosecutor refused to accept the authority of the Court as compliance with judicial orders was at 'the heart of the principle of the rule of law'. The Appeals Chamber³⁵ confirmed that 'the ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber (article 64(2) of the Statute) and these responsibilities cannot be delegated by, or removed from, the judges'. This meant that orders issued by Trial Chambers, as well as by any other Chamber, were binding orders for all participants in the proceedings, including the Prosecutor³⁶.

Moreover, article 64 para. 2 has been used by Trial Chambers as a basis to reprimand or express disapproval for the conduct of members of the Office of the Prosecutor. In this respect, in order to ensure that 'the interests of justice' were preserved, Trial Chamber I relied on article 64 para. 2 to express its strongest disapproval with regard to the content of an interview given by a member of the Office of the Prosecutor³⁷. Trial Chamber V relied on its 'broad discretionary powers' under article 64 para. 2 to assert authority in order to issue 'a reprimand and warning for failure to identify and disclosure of materials which may affect the credibility of Prosecution evidence' as a form of sanction against the 'Prosecution'³⁸. Trial Chamber V(B)³⁹, relying on 'its broad discretionary powers' as provided for in article 64 para. 2, decided that it had the power to address misconduct occurring outside of the courtroom, contrary to what seems to suggest article 71⁴⁰. The Chamber then stated that the 'Prosecution' was expected to respect in the case before that Chamber the general ethical guidelines as exemplified, for example, in the 'California Attorney Guidelines of Civility and Professionalism' from the State Bar of California⁴¹; the reference to that particular text seems strange especially when seen in light of the provisions of article 21. This is even more so if one notes that the application of the Code of professional Conduct for Counsel⁴², adopted by the Assembly of States Parties in accordance with rule 8 of the Rules, is excluded with regard to the members of the Office of the Prosecutor⁴³ who are solely under the authority of the Prosecutor in accordance with article 42.⁴⁴

³³ *Ibid.*

³⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2574, Decision on the 'Prosecution's application to take testimony while proceedings are stayed pending decision of the Appeals Chamber', Trial Chamber I, 24 September 2010, para. 22.

³⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2582, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', Appeals Chamber, 8 October 2010, para. 47.

³⁶ *Ibid.*, paras 48 to 54.

³⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2433, Decision on the press interview with Ms Le Fraper du Hellen, Trial Chamber I, 12 May 2010, para. 36.

³⁸ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-728, Decision on defence application pursuant to article 64(4) and related requests, Trial Chamber V, 26 April 2013, para. 89.

³⁹ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-747, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, Trial Chamber V(B), 31 May 2013, para. 14.

⁴⁰ See in this regard, Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 860.

⁴¹ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-747, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, Trial Chamber V(B), 31 May 2013, para. 16 and Annex A1.

⁴² Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, 2 December 2005.

⁴³ *Ibid.*, article 1. See generally Heinze, *International Criminal Procedure* (2014), 469–476.

⁴⁴ A Code of Conduct for the Office of the Prosecutor has been adopted by the Prosecutor on 5 September 2013.

III. Paragraph 3: Assignment for trial

- 12 While article 61 para. 11 refers to the ‘constitution’ of the Trial Chamber, article 64 para. 3 refers to the ‘assignment’ of a case to the Trial Chamber. Indeed, the Working Group on procedural matters stated that the drafting of article 61 para. 11 ‘will need to be reconsidered when a decision has been taken about how, under the Statute, a Trial Chamber is to become seized of a case, whether by way of ‘assignment’ or ‘constituting’ of a Trial Chamber’⁴⁵.

Obviously, nothing was reconsidered, and both concepts remain in the text. This was later clarified by rule 130 of the Rules which states that the Presidency may either constitute a Trial Chamber and refer the case to it, or refer the case to a previously constituted Trial Chamber.

If at the beginning of the existence of the Court, the Presidency constituted a Trial Chamber for each case after the confirmation of the charges and then assigned that case to that Chamber, this has changed with the cases in the Republic of Kenya.

The Presidency has up until October 2014 already constituted not less than seven Trial Chambers, respectively, Trial Chamber I⁴⁶, Trial Chamber II⁴⁷, Trial Chamber III⁴⁸, Trial Chamber IV⁴⁹, Trial Chambers V(A) and V(B) and finally, for the moment, Trial Chamber VI⁵⁰. With regard to Trial Chamber V, which was later dissolved by the Presidency, it is interesting to note that the Presidency first constituted⁵¹ the Chamber for the first case in the Kenya situation for which the charges were confirmed, and then assigned⁵² the second case in the Kenya situation for which the charges were confirmed to that same Trial Chamber. Later, the Presidency decided, being seized of a request by a judge attached to Trial Chamber V to be excused, to dissolve that Chamber and to constitute respectively Trial Chamber V(A) and Trial Chamber V(B)⁵³.

- 13 In all cases, the Presidency shall transmit to the Trial Chamber the decision of the Pre-Trial Chamber on the confirmation of charges and the record of the proceedings. Indeed, according to rule 121 sub-rule 10, the Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber. This record will contain, in

⁴⁵ UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.2.

⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-842, Decision constituting Trial Chamber I and referring to it the case of the Prosecutor V Thomas Lubanga Dyilo, Presidency, 6 March 2007; after the three judges from Trial Chamber I had finished their mandate and left the Court, the Presidency decided to re-constitute Trial Chamber I with new judges for the *Gbagbo* case: see *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-682, Decision re-constituting Trial Chamber I and referring to it the case of The Prosecutor v. Laurent Gbagbo, Presidency, 17 September 2014.

⁴⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-729, Decision constituting Trial Chamber II and referring to it the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Presidency, 24 October 2008.

⁴⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-534, Decision constituting Trial Chamber III and referring to it the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, Presidency, 18 September 2009.

⁴⁹ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed jerboa Jamus*, ICC-02/05-03/09-124, Decision constituting Trial Chamber IV and referring to it the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed jerboa Jamus, Presidency, 16 March 2011.

⁵⁰ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-337, Decision constituting Trial Chamber VI and referring to it the case of *The Prosecutor v. Bosco Ntaganda*, Presidency, 18 July 2014.

⁵¹ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-406, Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Presidency, 29 March 2012.

⁵² *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-414, Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, Presidency, 29 March 2012.

⁵³ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and the *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-01/11-745, Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*, Presidency, 21 May 2013.

accordance with rule 121 sub-rule 2, all evidence disclosed between the Prosecutor and the person against whom a warrant of arrest or a summons to appear has been issued.⁵⁴ According to the Office of the Prosecutor of the International Criminal Court⁵⁵, it is expected that 'the bulk of the disclosure will take place before the confirmation of charges. This will contribute to trial-readiness of the case by the time the charges have been submitted for confirmation'. This will include exculpatory evidence as article 67(2) is applicable in proceedings before the confirmation hearing in accordance with rule 121 sub-rule 1. Indeed, the case should be ready for trial when the Pre-Trial Chamber confirms the charges. In particular, issues relating to disclosure and relevance or admissibility of evidence⁵⁶ should be solved at the pre-trial stage, thus avoiding the start of the trial being delayed by litigation on questions of disclosure or admissibility of evidence as it was the case before the ad hoc Tribunals, a concern which was expressed by many delegations⁵⁷.

The issue of the completion of the Prosecutor's investigation before the confirmation of charges hearing has been the subject of intense debate at the ICC as the Office of the Prosecutor did not really follow what was said in its initial '*Informal Expert Paper*' mentioned above. To the contrary, the Office of the Prosecutor has been constantly arguing for flexibility in the conduct of its investigations, especially with regard to the possibility to conduct investigations post confirmation. In 2006, the Appeals Chamber concluded that the Prosecutor had flexibility to continue his investigation even after the confirmation of charges⁵⁸. This decision has been a catastrophe with regard to the length of judicial proceedings before the ICC as it has considerably delayed the start of trials. In 2012, the Appeals Chamber started to realize the problem and indicated that the investigation 'should largely be completed at the stage of the confirmation of charges hearing' and that if the 'Prosecutor requires more time to complete the investigation, rule 121(7) of the Rules of Procedure and Evidence permits him to seek a postponement of the confirmation of charges hearing'.⁵⁹ It is important in order to shorten the proceedings before the ICC, and therefore to respect the right of the accused to be tried without undue delay, to clearly put an obligation on the Prosecutor to conclude the investigation before the confirmation of charges hearing, save exceptional circumstances which the Prosecutor must demonstrate to the Trial Chamber. This is not done for the moment with the result that the start of trials is delayed whereas trials should start a few months after the confirmation of charges. One solution would be to clearly state in the Rules that the trial has to start at the latest three months after the Trial Chamber is constituted or after the case is assigned to a Trial Chamber already constituted.

The Trial Chamber has at its disposal the full record of the proceedings including all evidence disclosed between the parties and communicated to the Pre-Trial Chamber. There was some controversy during the discussions on the Rules on the possibility for the Trial Chamber to consult the record of the proceedings as for some delegations, especially those from a common law background, the Trial Chamber should remain as 'untainted' as possible⁶⁰. However, it is essential for the Trial Chamber to consult the record of the proceedings in order

⁵⁴ See generally, Heinze, *International Criminal Procedure* (2014), 265–268, 508–518.

⁵⁵ See *Informal expert paper: Measures available to the International Criminal Court to reduce the length of the proceedings*, ICC-OTP 2003, para. 60, available at <http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281982/length_of_proceedings.pdf> accessed. For further references see Heinze, *International Criminal Procedure* (2014), 36, 412–413.

⁵⁶ See rule 64, sub-rule 1.

⁵⁷ See Lewis, in: Lee (ed.), *The International Criminal Court* (2001) 539, 543.

⁵⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', Appeals Chamber, 13 October 2006, para. 53. See generally Heinze, *International Criminal Procedure* (2014), 524–527.

⁵⁹ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', Appeals Chamber, 30 May 2012, para. 44.

⁶⁰ See Brady, in: Fischer et al. (eds.), *International and National Prosecution* (2001), 261, 270.

to have sufficient knowledge of the case to fully control the proceedings;⁶¹ it may be a question of survival for the International Criminal Court to follow the evolution of both ad hoc Tribunals where the Judges have increased their control over the proceedings in order to shorten the trials; it is indeed absolutely vital for the Court not to leave the trial in the hands of the parties to avoid lengthy trials which affect the credibility of international justice. It is also the condition *sine qua non* for the judges to use their power under article 69 para. 3 to search for the truth⁶². In addition, the Statute and the Rules must, in accordance with article 21 para. 3, be interpreted and applied in accordance with internationally recognized human rights; in this respect, the European Court of Human Rights has never ruled that a judge is not impartial because of his or her knowledge of the file containing the evidence:

Furthermore, the mere fact that a judge has already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his impartiality. What matters is the scope and nature of the measures taken by the judge before the trial. Likewise, the fact that the judge has detailed knowledge of the case file does not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudged⁶³.

As a matter of fact, the reality at the ICC is that, in accordance with rule 129 of the Rules, the entire record of the case, including all evidence communicated to the Pre-Trial Chamber, is made accessible by the Registry to the Trial Chamber. Whether or not, and how, this record and the evidence it contains is used, is a matter for each trial judge to decide.

1. 'confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings'

- 15 Rule 132 sub-rule 1 provides for a mandatory status conference promptly after the Trial Chamber is constituted in order to set the date of the trial. Setting the date for the trial often requires however several status conferences, several decisions by the Trial Chamber and multiple observations submitted by all participants to the proceedings⁶⁴. In the first status conference, Trial Chambers⁶⁵ often discuss a rather long list of issues such as: modalities and volume of disclosure both by the Prosecutor and the defence; protection of witnesses and other issues in relation to protection such as redactions; languages to be used in proceedings; victims' applications and the rights of victims during trial proceedings including whether they intend to call evidence; issues regarding documents obtained by the Prosecutor under article 54 para. 3(e); agreed facts between the parties; whether they intend to call experts witnesses and the possibility to jointly instruct them; anticipated length of the trial and the commencement date of the trial; whether the Prosecutor should file a summary of his/her presentation of evidence and eventuality of a trial *in situ*. Before the status conference, the Trial Chamber may, in accordance with article 64 para. 3(a) and regulation 28 of the Regulations of the Court, address multiple questions to the Prosecutor, the defence, the legal representatives of victims and the Registry in order to receive observations for the proper preparation of the status conference⁶⁶.

⁶¹ See also Heinze, *International Criminal Procedure* (2014), 508–535.

⁶² On those issues see Kress, in: Fischer *et al.* (eds.), *International and National Prosecution* (2001) 309–383.

⁶³ ECtHR, *case of Morel v. France*, application n° 34130/96, Judgment of 6 June 2000, para. 45; see also *case of Werner v. Poland*, application n° 26760/95, Judgment of 15 November 2001, para. 43.

⁶⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-999, Décision fixant la date du procès (règle 132–1 du Règlement de procédure et de preuve), Trial Chamber II, 27 March 2009.

⁶⁵ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-339, Order Setting a Status Conference and Setting a Provisional Agenda, Trial Chamber VI, 21 July 2014, para. 5; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-540, Scheduling Order and Agenda for the Status Conference on 6 October 2009, Trial Chamber II, 2 October 2009, paras 3 and 4.

⁶⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-747-tENG, Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute), Trial Chamber II, 13 November 2008.

Rule 132 sub-rule 2 provides for other status conferences in order to facilitate the fair and expeditious conduct of the proceedings.

In case challenges are made to the jurisdiction of the Court or the admissibility of a case, these challenges shall be dealt with first, in accordance with rules 133 and 58.

Other motions relating to the trial proceedings may be presented by the Prosecutor or the defence, in accordance with rule 134. In addition, the legal representatives of victims may present any submission to the Trial Chamber regarding the trial proceedings in accordance with rule 91 sub-rule 2. The Prosecutor and the defence may raise objections or present observations on proceedings conducted since the confirmation hearing. Objections or observations on proceedings before the confirmation hearing must be raised before the Pre-Trial Chamber and cannot be raised later, even with the leave of the Trial Chamber⁶⁷.

In accordance with regulation 30 of the Regulations of the Court, status conferences may be held by way of hearings, including by way of audio- or video-link technology or by way of written submissions.

One interesting example of specific procedures adopted by a Trial Chamber after conferring with the parties is to be found in a decision issued by Trial Chamber IV: In that particular case, the parties reached an agreement to limit the presentation of evidence at trial to three contested issues⁶⁸. The Chamber concluded that the limitation of the trial to the contested issues as proposed in the joint submission made by the parties would 'facilitate the fair and expeditious conduct of the proceedings' and it therefore adopted, in accordance with article 64 para. 3(a), the procedures as proposed by the parties⁶⁹.

With regard to the preparation of the trial, the most interesting innovation is to be found in the Rules with the newly adopted rule 132*bis*.⁷⁰ This new rule was proposed by the judges acting by absolute majority, in accordance with article 51 para. 2(b) and was adopted without modification by the Assembly of States Parties⁷¹. This rule, entitled 'Designation of a judge for the preparation of the trial', allows the Trial Chamber to 'designate one or more of its members for the purposes of ensuring the preparation of the trial'. The objective of the judges in presenting this amendment to the Rules was to 'administer justice more expeditiously and efficiently'⁷². The designation of a single judge was foreseen in the Statute solely for the Pre-Trial Chamber⁷³ and not for the Trial Chamber. Indeed, article 39 para. 2 (b)(ii) states unequivocally that the 'functions of the Trial Chamber shall be carried out by three judges of the Trial Division'. The view was expressed during the discussions preceding the adoption of this rule that it was inconsistent with article 39 para. 2 (b)(ii). Finally, article 64 para. 3(a) was found to be a sufficient legal basis for such a rule although this article only refers to the trial chamber and does not address in any way its composition, contrary to article 39 para. 2 (b)(ii). It would have been better to first amend article 39 para. 2 (b)(ii) before adopting this new rule 132*bis*. This should not have been a huge obstacle as this article is subject to a simplified procedure for amendment in accordance with article 122.

This new rule 132*bis* does not define exhaustively the functions of the single judge for the preparation of the trial and it is likely that this alone will generate litigation. However, the role of the Single Judge at trial is likely to be more limited than the role of the Single Judge at the pre-trial stage of the proceedings. Indeed, Rule 132*bis*, sub-rule 5 d) and e) and sub-rule 6, limit the role of the Single Judge at trial who, for example, cannot set the date of the trial or

⁶⁷ See rule 122, sub-rule 4.

⁶⁸ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus*, ICC-02/05-03/09-227, Decision on the Joint Submissions regarding the contested issues and the agreed facts, Trial Chamber IV, 28 September 2011, para. 24.

⁶⁹ *Ibid.*, para. 44.

⁷⁰ Adopted by the Assembly of States Parties on 21 November 2012, by consensus, Resolution ICC-ASP/11/Res.2.

⁷¹ Report of the Study Group on rule 132 *bis* of the Rules of procedure and Evidence, document ICC-ASP/11/41, 1st November 2012.

⁷² *Ibid.*, p. 5, para. 8.

⁷³ See articles 39 para. 2 (b) (iii) and 57 para. 2.

take any decision which would significantly affect the rights of the accused or of the victims, a limitation which does not exist for the Single Judge at the pre-trial stage. This new rule 132*bis* has for the moment only been used once, by the newly composed Trial Chamber I⁷⁴, since its adoption in November 2012.

2. Determination of language

18 This subparagraph comes from article 27 para. 5 (a) of the ILC Draft Statute⁷⁵, where the Presidency was tasked with the determination of the language or languages to be used at trial.

Several articles of the Statute are applicable here. *First*, article 50 para. 2 states that ‘the working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.’⁷⁶ In accordance with Rule 41 sub-rule 1, the Presidency shall authorize the use of an official language of the Court as a working language in either of the following two circumstances; first, when that language is understood and spoken by the majority of those involved in a case and any of the participants in the proceedings so requests: this seems to cover victims participating in the proceedings in a case where the victims are in majority either Spanish, Russian, Arabic or Chinese speaking; second, when the Prosecutor and the defence so request. So, the Trial Chamber will have to determine the language(s) to be used at trial, in addition to English and French and eventually another official language used as working language in addition to English and French following a decision by the Presidency.

In any case, the accused has a right to use his or her own language according to article 67 para. 1⁷⁷. The Appeals Chamber clearly established that the language requested by the accused should be granted unless there are clear indications that he or she is abusing the right arising out of article 67⁷⁸. This could have important consequences for the conduct of the trial and the length of its preparation, especially when the language the accused fully understands and speaks is not particularly well-known such as the Zaghawa language⁷⁹. A Trial Chamber may seek an expert opinion to ascertain whether interpretation of the proceedings should be provided to the accused and in which language⁸⁰. Before Trial Chamber II, for the *Germain Katanga and Mathieu Ngudjolo Chui* trial, four languages were used: French, English, Swahili and Lingala.

In accordance with regulation 39 of the Regulations of the Court, the observations, submissions or other motions made by participants shall be in English or French, unless otherwise provided in the Statute, Rules or Regulations or authorized by the Chamber or the Presidency. In accordance with rules 22, sub-rule 1 and 90, sub-rule 6, counsel for the defence or legal representatives for victims shall be fluent in at least *one* of the working languages of the Court, which means usually English or French but may also be Russian, Chinese, Arabic or Spanish in case rule 41 applies. As far as the Office of the Prosecutor is concerned, being an organ of the Court in accordance with article 34, it must be able to work *both* in English and French as those languages are the working languages of the Court.

⁷⁴ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-700, Decision designating a Single Judge pursuant to Rule 132*bis* of the Rules of Procedure and Evidence, Trial Chamber I, 23 October 2014.

⁷⁵ UN Doc. A/50/22 (1995). The text was the following: ‘*The Presidency may make any further orders required for the conduct of the trial, including an order: (a) determining the language or languages to be used during the Trial.*’.

⁷⁶ According to article 50 para. 1, ‘*The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish.*’.

⁷⁷ See article 67 para. 1 (a) and (f).

⁷⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-522, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘Decision on the Defence Request Concerning Languages’, Appeals Chamber, 27 May 2008, paras. 59 et 61.

⁷⁹ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus*, ICC-02/05-03/09-214, Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, Trial Chamber IV, 12 September 2011.

⁸⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1300, Order intrusting experts pursuant to regulation 44 of the Regulations of the Court, Trial Chamber II, 14 July 2009.

3. 'disclosure of documents or information'

a) **Subject to relevant provisions of the Statute.** Obviously, the disclosure of evidence goes to the heart of the right of the accused to a fair trial. Nevertheless, the Statute had to take into consideration the concerns of States about the protection of confidential or sensitive information and contains on this point several articles which restrict the possibility for the Trial Chamber to order disclosure.

Concerning confidential information, article 54 para. 3(e) states that the Prosecutor may 'agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents'. This article echoes with article 93 para. 8(b) and (c).

With regard to the duty of the Trial Chamber under article 64 para. 3 (c) to provide for the disclosure of documents or information not previously disclosed, article 54(3)(e) has proven to be a major hurdle in the exercise of such a duty and a major bone of contention between the Prosecutor and Trial Chambers from the very first case before the Court, i. e., the Thomas Lubanga Dyilo case.⁸¹ In June 2008⁸², Trial Chamber I decided to stay the proceedings in that case, as the non-disclosure of certain documents by the Prosecutor to the defence made a fair trial impossible. The decision issued by Trial Chamber I was appealed by the Prosecutor, an appeal which was dismissed by the Appeals Chamber on 21 October 2008⁸³. In that decision, the Appeals Chamber established principles with regard to the ambit of the Prosecutor's use of that article.

First, the Appeals Chamber determined that the Prosecutor could only rely on article 54(3)(e) for the specific purpose of generating new evidence⁸⁴; indeed, the Appeals Chamber reminded the Prosecutor that his investigative activities 'must be directed towards the identification of evidence that can eventually be presented in open court, in order to establish the truth and to assess whether there is criminal responsibility under the Statute'⁸⁵. Therefore reliance on article 54(3)(e) by the Prosecutor should be 'exceptional'⁸⁶.

Second, the Appeals Chamber established that the 'use of article 54(3)(e) of the Statute must not lead to breaches of the obligations of the Prosecutor vis-à-vis the suspect or the accused person'⁸⁷. This was particularly important with regard to the Prosecutor's obligation to disclose exculpatory material to the accused in accordance with article 67(2) of the Statute.

Third, the Appeals Chamber established that the material had to be placed before the Trial Chamber for its final assessment whether or not the material ought to be disclosed to the defence: such an assessment could not be delegated to the Prosecutor⁸⁸. The Appeals Chamber made direct reference to article 21(3) of the Statute and in that respect, relied heavily on the jurisprudence of the European Court of Human Rights⁸⁹.

⁸¹ See generally, Heinze, *International Criminal Procedure* (2014), 454–458; see also commentary for article 54, para. 3 (e) in this volume.

⁸² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Trial Chamber I, 13 June 2008.

⁸³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', Appeals Chamber, 21 October 2008.

⁸⁴ *Ibid.*, para. 41.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, para. 55.

⁸⁷ *Ibid.*, para. 42.

⁸⁸ *Ibid.*, para 46.

⁸⁹ *Ibid.*, paras 46–47.

Indeed, in different cases against the United Kingdom, the European Court of Human Rights had already established a jurisprudence concerning the disclosure of information where ‘public interest immunity’ was raised. In the case of *Rowe and Davis v. The United Kingdom*⁹⁰, the Grand Chamber of the European Court of Human Rights, composed of 17 Judges, stated that: ‘During the applicants’ trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret cannot comply with the above-mentioned requirements of article 6 paragraph 1[...]. In conclusion, therefore, the prosecution’s failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial’. It is clear that disclosure questions should always be ‘under assessment by the Trial Judge’⁹¹ as crucial requirement for the fairness of the proceedings. The European Court of Human Rights has reiterated the ‘importance that material relevant to the defence be placed before the trial judge for his or her ruling on questions of disclosure, namely, at the time when it can serve most effectively to protect the rights of the defence.’⁹²

It seems therefore not possible for the Prosecutor to withhold exculpatory information from the Pre-Trial or Trial Chamber, but the application may be made during *ex parte* and in camera proceedings⁹³.

Fourth, during those *ex parte* proceedings, the Trial Chamber should determine whether the material has to be disclosed to the defence. If the Chamber concludes that this is the case, the Prosecutor must seek the consent of the provider. If the provider does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether, and if so, which counterbalancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information⁹⁴.

The other available option for the Prosecutor would be to withdraw charges; it has to be underlined that the Prosecutor may withdraw charges only before the confirmation hearing⁹⁵; after commencement of the trial, if the Prosecutor wants to withdraw charges, the Trial Chamber may oppose such a withdrawal⁹⁶.

- 20 Concerning national security information, article 72 completely governs this question: in this case it seems impossible for the Trial Chamber to order disclosure except after a rather complex procedure and even after that, disclosure seems to be limited to the case the information is already in the hands of the Court. However, in this case also and according to article 21 para. 3, the Trial Chamber will have to balance the proper interests of the State concerned against the interests of a fair trial⁹⁷.

- 21 Last but not least, disclosure will be subject to the appropriate measures taken by the Trial Chamber for the protection of victims and witnesses as developed in article 68. The work of

⁹⁰ ECtHR, Grand Chamber, case of *Rowe and Davis v. The United Kingdom*, application no. 28901/95, Judgment of 16 February 2000, paras. 63 and 66.

⁹¹ ECtHR, Grand Chamber, case of *Fitt v. The United Kingdom*, application no. 29777/96, Judgment of 16 February 2000, para. 49.

⁹² ECtHR, second section, case of *Dowsett v. The United Kingdom*, application no. 38482/98, Judgment of 24 June 2003, para. 50.

⁹³ See, for exculpatory evidence, rule 83.

⁹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, Appeals Chamber, 21 October 2008, para. 48.

⁹⁵ See article 61 para. 4.

⁹⁶ See article 61 para. 11.

⁹⁷ See for example, ECtHR, *Tinnelly and sons LTD and others v. United Kingdom*, 62/1997/846/1052-1053, 10 July 1998.

Trial Chambers is usually facilitated in this regard by the numerous and voluminous decisions taken by the Pre-Trial Chamber before the confirmation hearing with regard to the multiple requests for redactions⁹⁸ presented by the Office of the Prosecutor on the basis of rule 81(2) of the Rules (redactions for the purpose of protecting further or ongoing investigations) or on the basis of rule 81(4) of the Rules (redactions for the purposes of protecting of witnesses, victims and members of their families). It is to be noted that the redactions granted by the Pre-Trial Chamber are maintained at trial unless a request is made to lift some redactions at trial.

b) Sufficiently in advance to enable adequate preparation for trial. That echoes to article 67 para. 1 (b) and is taken from article 14 para. 3 (b) of the ICCPR and article 6 para. 3 (b) of the European Convention on Human Rights but offers more guarantees to the accused than these two Treaties⁹⁹. 22

According to the jurisprudence, the expression ‘sufficiently in advance’ appearing in article 64 para. 3(c) is of ‘no fixed meaning’¹⁰⁰. The aim of such a provision is to avoid prejudice to the defence ‘which is always an issue that is relative in light of the particular circumstances in which the matter is to be considered’.

Trial Chamber I ordered the Prosecutor to disclose the entirety of his evidence, both incriminatory and exculpatory, to the defence no later than 12 weeks before the start of the trial¹⁰¹. It did so because it concluded that adequate preparation for trial both by the defence and also possibly by the legal representatives of victims could ‘only be completed once there has been full disclosure on the part of the prosecution’¹⁰². Trial Chamber III considered however, although a large part of the evidence had already been disclosed at the pre-trial stage, that five months, following full disclosure by the Prosecutor, were necessary for the defence to prepare adequately for the trial¹⁰³.

In case the Prosecutor wants to disclose incriminatory material to the defence, in order to rely on it at trial, after the deadline established by the Trial Chamber has expired, he or she must apply to the Trial Chamber for an extension of time in accordance with regulation 35 of the Regulations of the Court. As this however is likely to delay the start of the trial, because the defence must have adequate time to prepare, Trial Chambers have been reluctant to accept those additional materials after the expiration of the deadline for disclosure in case ‘the length of time and resources that are reasonably required by the defence to prepare a meaningful response to the new items of evidence are disproportionate to the limited interest of the Chamber in having the additional item of evidence discussed at trial’¹⁰⁴. 23

⁹⁸ Redactions must respect the requirements of proportionality and necessity and are in any case subject to judicial authorisation: see, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, Appeals Chamber, 14 December 2006, paras. 32–34.

⁹⁹ Indeed, under article 67 para. 1 (b), the accused has the right to communicate *freely and in confidence* with his or her counsel.

¹⁰⁰ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01-11-899-Red, Decision on the Prosecution’s Requests to Add New Witnesses to its List of Witnesses, Trial Chamber V(A), 3 September 2013, para 19.

¹⁰¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1019, Decision Regarding the Timing and Manner of Disclosure and the date of Trial, Trial Chamber I, 9 November 2007, paras. 23 and 25; Trial Chamber VI also considered that the Office of the Prosecutor should complete full disclosure to the Defence three months before the start of the trial, see, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-382, Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, Trial Chamber VI, 9 October 2014, para 7.

¹⁰² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1019, Decision Regarding the Timing and Manner of Disclosure and the date of Trial, Trial Chamber I, 9 November 2007, para. 16.

¹⁰³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-598, Decision on the Date of Trial, Trial Chamber III, 5 November 2009, para. 5.

¹⁰⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1515-Corr, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009, Trial Chamber II, 9 October 2009, para 26.

- 24 In addition to disclosure, Trial Chambers have ordered the Office of the Prosecutor to provide additional documents which would assist the defence, the legal representatives of the victims participating in the proceedings and the Chamber to understand the relevance of the material disclosed by the Prosecutor with regard to the charges confirmed by the Pre-Trial Chamber. Trial Chamber I ordered the Prosecutor to submit a ‘summary of presentation of evidence’, explaining his case, by reference to the witnesses he intended to call and the other evidence relied upon, and how this evidence would relate to the charges¹⁰⁵. Trial Chamber II also ordered the Prosecutor to submit ‘a model table linking the charges confirmed by Pre-Trial Chamber I and the modes of responsibility with the alleged acts, as well as with the evidence on which he intends to rely at trial’¹⁰⁶. Trial Chamber III¹⁰⁷ followed the same approach taken by Trial Chamber II.

IV. Paragraph 4: Reference to the Pre-Trial Division

- 25 That comes from a proposal made by the U.S. Delegation in August 1997: The expression ‘preliminary issues’ refers to Part 5 of the Rome Statute, especially articles 56 and 57. It does not refer to Part 2, because article 19 para. 6 expressly states that after the confirmation of the charges, the challenges to the admissibility of the case or the challenges to the jurisdiction of the Court shall be referred to the Trial Chamber.

This decision is subject to the condition that it is necessary for the effective and fair functioning of the Trial Chamber: this is more restrictive than the proposal contained in the Report of the Preparatory Committee¹⁰⁸. It is to be hoped that after the confirmation hearing, few ‘preliminary issues’ will remain. In any case the Trial Chamber itself will be the only ‘judge’ about what is necessary for its effective and fair functioning. In this regard, it will have a discretionary power to decide to refer preliminary issues to the Pre-Trial Chamber which won’t be in a position to refuse to deal with these issues, except if it decides that the issue referred exceeds its competence under the Statute.

It seems that it is the Trial Chamber’s decision to assign the case either to the original Pre-Trial Chamber or to another available judge of the Pre-Trial Division. However, the Trial Chamber will be bound by article 57 para. 2, which states that some preliminary issues shall be dealt with by three judges of the Pre-Trial Chamber¹⁰⁹.

- 26 For the moment, there is only one example of a Trial Chamber referring a preliminary issue to a Pre-Trial Chamber: in June 2007, Trial Chamber I¹¹⁰, the day it received the record of the proceedings from the Presidency, decided to refer to Pre-Trial Chamber I the issue of the review of its ruling on the detention of *Thomas Lubanga Dyilo*. This was justified by the fact that the Trial Chamber did not have sufficient time to familiarize itself with the record of the case prior to issue a ruling on the review of the detention which was due on 14 June 2007 in accordance with article 60 para. 3 and rule 118 sub-rule 2 of the Rules.

On two occasions, Trial Chambers rejected requests to refer preliminary issues to a Pre-Trial Chamber. In the *Bemba* case, the Prosecutor proposed, as an alternative, that his

¹⁰⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1019, Decision Regarding the Timing and Manner of Disclosure and the date of Trial, Trial Chamber I, 9 November 2007, para. 26.

¹⁰⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-788-tENG, Order Instructing the Participants and the Registry to File Additional Documents, Trial Chamber II, 10 December 2008, para. 7; see also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-956, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, Trial Chamber II, 13 March 2009.

¹⁰⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-682, Decision on the ‘Prosecution’s Submissions on the Trial Chamber’s 8 December 2009 Oral Order Requesting Updating of the In-Depth Analysis Chart’, Trial Chamber III, 29 January 2010.

¹⁰⁸ UN Doc. A/CONF.183/2/Add.1, pp. 103–105. The text of the proposed article 64 para. 7, in brackets, was the following: ‘The Trial Chamber may refer pre-trial issues under this article to the Pre-Trial Chamber for resolution.’

¹⁰⁹ See article 57 para. 2.

¹¹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-921, Request for Review of Detention, Trial Chamber I, 6 June 2007.

request to invalidate the appointment of a legal consultant to the defence team be remitted by the Trial Chamber to a pre-trial judge in accordance with article 64 para. 4; this alternative request was not considered by the Trial Chamber which stated that it was ‘the responsibility of the Chamber to resolve the matter pursuant to article 64(2) of the Statute’¹¹¹.

On 5 February 2013, the defence for *Uhuru Muigai Kenyatta* filed an application requesting that the ‘preliminary issue of the validity of the Confirmation Decision be referred to the Pre-Trial Chamber for reconsideration pursuant to article 64(4)’¹¹². The Trial Chamber affirmed its ‘discretionary power’ to refer ‘preliminary issues’ to the Pre-Trial Chamber or another available judge of the Pre-Trial Division. According to the Trial Chamber, three conditions had to be fulfilled in order for the Chamber to exercise such discretionary power: (a) the matter at stake could be qualified as a ‘preliminary issue’; (b) referral of that matter was ‘necessary’ and (c) it was necessary for the ‘effective and fair functioning’ of the Trial Chamber¹¹³. Although the majority of the Trial Chamber found that the question of the validity of the decision on the confirmation of the charges amounted to a preliminary issue, it did not consider that referral of such preliminary issue to a Pre-Trial Chamber was necessary for the fair and effective functioning of the Trial Chamber¹¹⁴. A judge issued a separate opinion coming to the conclusion that ‘it would never be proper for the [Trial] Chamber to refer the case back to the Pre-Trial Chamber pursuant to article 64(4) of the Statute for the purpose of reviewing the validity of the charges’¹¹⁵.

However, as explained above, the Trial Chamber may only refer issues which are within the competence of a Pre-Trial Chamber. It is doubtful that a Pre-Trial Chamber has the power to reconsider its decision on the confirmation of the charges as this is not provided in the Statute or the Rules. The only remedy against a decision on the confirmation of the charges is a request for leave to appeal under article 82 para. 1(d); in case such a request is either not presented or rejected, the decision on the confirmation of the charges becomes definitive and cannot be reconsidered.

V. Paragraph 5: Joinder or severance

This paragraph gives a power *ex officio* to the Trial Chamber to order joinder or severance 27 in respect of charges against more than one accused, after giving notice to the parties, in order to allow them to submit observations to the Court.

In the ICTY’s Decision¹¹⁶ on the motions for separate trial filed by the accused *Zejnir Delalic* and the accused *Zdravko Mucic*, the Chamber held that the fact that the accused seeking a separate trial was accused on the basis of command responsibility for the acts of his co-accused did not in itself make it necessary to order separate trials to avoid conflict of interests. The Chamber added that ‘... *Whatever degree of inconvenience this may involve is no such matter of conflict of interests with which Sub-rule 82 (B) is concerned.*’

In the same case, the Chamber considered that the protection of the interests of justice also did not justify an order for separate trials:

‘6.... separate trials which have been sought would in toto be likely to involve much greater delay, at least for those unfortunate enough not to be the first to be tried. They would also mean considerable repetition of evidence.

¹¹¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-769, Decision on the ‘Prosecution’s Request to Invalidate the Appointment of Legal Consultant to the Defence Team’, Trial Chamber III, 7 May 2010, para. 39.

¹¹² *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-728, Decision on defence application pursuant to article 64(4) and related requests, Trial Chamber V, 26 April 2013, para. 2.

¹¹³ *Ibid.*, para. 83.

¹¹⁴ *Ibid.*, paras. 84–86.

¹¹⁵ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-728-Anx 1, Decision on defence application pursuant to article 64(4) and related requests, Separate opinion of Judge Ozaki, Trial Chamber V, 26 April 2013, para. 3.

¹¹⁶ *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Chamber II, 25 September 1996.

7. ... separate trials would involve much duplication of testimony and great hardship for already traumatised witnesses ...¹¹⁷.

Rule 136 of the Rules provides that those jointly accused shall be tried together unless the Trial Chamber orders separate trials in order to avoid serious prejudice to the accused, to protect the interests of justice or because a co-accused has made an admission of guilt in accordance with article 65. The test aims at avoiding ‘serious prejudice’ to the accused, since many delegations have been concerned about the risks for witnesses in lengthy and traumatic trials¹¹⁸.

28 Article 64 para. 5 and rule 136 of the Rules were only applied once with regard to the joinder of charges, by Pre-Trial Chamber I, in the *Germain Katanga and Mathieu Ngudjolo Chui* cases¹¹⁹. This shows that the principles established in article 64 are also generally applicable at the pre-trial stage of the proceedings¹²⁰. Pre-Trial Chamber I came to the conclusion that ‘the ordinary meaning of article 64(5) of the Statute and rule 136 of the Rules provides that there shall be joint trials for persons accused jointly, and establishes a presumption for joint proceedings for persons prosecuted jointly’¹²¹. The Appeals Chamber confirmed that the ‘phrase ‘persons accused jointly shall be tried together’ is founded on the premise that joinder of more than one person in the same document containing the charges, is the norm’¹²². According to the Appeals Chamber, such an interpretation of article 64 para. 5 and rule 136 of the Rules ‘tallies with the object of the Statute being, in this regard, the assurance of the efficacy of the criminal process, and promotes its purpose that proceedings should be held expeditiously’¹²³.

29 With regard to the severance of charges, there is only one example at the trial stage, again in the *Germain Katanga and Mathieu Ngudjolo Chui* case, where Trial Chamber II ordered the severance of the charges against Mathieu Ngudjolo Chui¹²⁴, in accordance with article 64 para. 5, as it intended to use regulation 55 of the Regulations of the Court only against *Germain Katanga*. The Trial Chamber concluded:

‘However, triggering regulation 55 in respect of *Germain Katanga* clearly has the potential consequence of prolonging the proceedings against him. The Chamber therefore considers that no purpose would be served by deferring the decision on *Mathieu Ngudjolo* until a ruling is made in respect of *Germain Katanga*, and in respect of *Mathieu Ngudjolo*, in the wording of rule 136(1), it is necessary ‘to avoid serious prejudice to’ him, which requires that the proceedings against him be brought to an end promptly.

Consequently, separate treatment of *Mathieu Ngudjolo*’s case, which also meets the dual requirement of fairness and expeditiousness established by article 64 of the Statute, necessarily leads the Chamber to order the severance of the charges against him and to rule separately on their merits [...].’¹²⁵

¹¹⁷ See Jones (general ed.), *International Criminal Tribunal for the Former Yugoslavia* (1997) 152.

¹¹⁸ See Lewis, in: Lee (ed.), *The International Criminal Court* (2001) 539, 543.

¹¹⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-257, Decision on the Joinder of the cases against *Germain Katanga* and *Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 10 March 2008.

¹²⁰ See also *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-365, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, Appeals Chamber, 10 November 2011, para. 46.

¹²¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-257, Decision on the Joinder of the cases against *Germain Katanga* and *Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 10 March 2008, p. 7.

¹²² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-573, Judgment on the Appeal Against the Decision on the Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the *Germain Katanga* and *Mathieu Ngudjolo Chui* Cases, Appeals Chamber, 9 June 2008, para. 7.

¹²³ *Ibid.*, para. 8.

¹²⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3319-tENG/FRA, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Trial Chamber II, 21 November 2012, paras 59 et 60.

¹²⁵ *Ibid.*, paras. 61–62.

The ICTY and the ICTR have not seen a prejudice to the accused in the following circumstances:

‘Concurrent presentation of evidence pertaining to one accused with that pertaining to another accused does not per se constitute a conflict of interests, nor does calling a co-accused to testify during the joint trial constitutes a conflict of interests between them’¹²⁶;

‘The fact that there is evidence which may, in law, be admissible against one accused and not others, is not necessarily a ground for severance in an international tribunal where trial is by judges without a jury, since it is generally assumed that judges can rise above such risk of prejudice and apply their professional judicial minds to the assessment of evidence’¹²⁷.

The Special Court for Sierra Leone¹²⁸ has summarized the key factors articulated in the jurisprudence of both the ICTY and ICTR to be taken into consideration when determining whether the interests of justice would be served by a joinder. These include: (a) the public interest in savings and expenses and time; (b) the interest of transparent justice that there be consistency and fairness with respect to the verdicts of persons jointly tried; (c) the public interest in avoiding discrepancies and inconsistencies inevitable from separate trials of joint offenders; (d) the need for consistent and detailed presentation of evidence; (e) better protection of the victims’ and witnesses’ physical and mental safety by eliminating the need for them to make several journeys; and (f) due regard for judicial economy. 30

The same key factors were taken into consideration by Pre-Trial Chamber I in its above-mentioned decision joining the Germain Katanga and the Mathieu Ngudjolo cases: according to the Chamber, joinder (a) enhanced the fairness as well as the judicial economy of the proceedings; (b) avoided having witnesses testify more than once and reduce expenses related to those witnesses; (c) avoided duplication of evidence; (d) avoided inconsistency in the presentation of the evidence therefore affording equal treatment to the persons prosecuted; and (e) minimised the potential impact on witnesses and better facilitated the protection of the witnesses’ physical and mental well-being¹²⁹.

VI. Paragraph 6

1. ‘Exercise any functions of the Pre-Trial Chamber’

Article 61 para. 11 assigns functions to the Presidency and a Trial Chamber, subject to paragraph 9¹³⁰ and to article 64 para. 4. In case of preliminary issues, the Trial Chamber will have the choice to resolve itself the question or to refer it to the Pre-Trial Chamber in accordance with paragraph 4. 31

The wording used is very broad and covers all the functions of the Pre-Trial Chamber described in Part 5 of the Rome Statute.

¹²⁶ See *Prosecutor v. Kovačević et al.*, IT-97-24-AR73, Decision the motion for joinder of accused and concurrent presentation of evidence, Trial Chamber, 14 May 1998.

¹²⁷ See *Prosecutor v. Barayagwiza*, ICTR-97-19-I, Decision on the request of the defence for severance and separate trial, Trial Chamber I, 26 September 2000.

¹²⁸ See *Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-PT, *Alex Tamba Brima*, SCSL-2003-06-PT, *Morris Kallon*, SCSL-2003-07-PT, *Augustine Gbao*, SCSL-2003-09-PT, *Brima Bazzy Kamara*, SCSL-2003-10-PT, *Santigie Borbor Kanu*, SCSL-2003-13-PT, Decision and order on prosecution motions for joinder, Trial Chamber, 27 January 2004.

¹²⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-257, Decision on the Joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 10 March 2008, p. 8.

¹³⁰ A technical correction was needed here and effected by procès-verbal of corrections to the Rome Statute on 12 July 1999 (C.N.604.1999.TREATIES.618): the reference to paragraph 8 was changed to paragraph 9 in both the English and French versions of the Rome Statute.

The power set forth in article 64 para. 6(a) has been exercised by Trial Chambers, following requests presented by the defence under article 57 para. 3(b), to seek the cooperation of a State¹³¹ or of an international organization¹³².

It was also used to review the sufficiency of a summons to appear previously issued by the Pre-Trial Chamber in accordance with article 58 para. 7¹³³. The Pre-Trial Chamber, although concluding that a summons to appear was sufficient to ensure the appearance of the person prosecuted, indicated that 'this was without prejudice to its power to review the sufficiency of the summons under articles 58(1) and 58(7) of the Statute'¹³⁴. The Trial Chamber ruled that by 'virtue of the transmission of this case to the Trial Chamber and articles 61(11) and 64(6)(a) of the Statute, the review authority reserved by the Pre-Trial Chamber currently rests with this Chamber'¹³⁵. The Trial Chamber then decided to issue a warrant of arrest in accordance with article 58 para. 1 as there were no longer sufficient guarantees that the accused would appear pursuant to the initial summons to appear delivered by the Pre-Trial Chamber¹³⁶.

2. 'Require the attendance and testimony of witnesses'

32 This subparagraph refers to Part 9 of the Statute and especially to article 93. There seems to be an inconsistency between article 64 para. 6(b) and article 93 para. 1(e): article 64 para. 6(b) gives the power to the Trial Chamber to *require* the attendance and testimony of witnesses whereas article 93 para. 1(e) states that

'States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: ... (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court'¹³⁷.

This does not mean that the Trial Chamber cannot summon a witness but simply that a State Party is under no obligation according to article 93 to compel a witness to appear before the Court although it may provide for such a procedure in its implementing legislation if it so wishes. Thus, if a witness, whose attendance and testimony is required by the Trial Chamber, does not want to travel to the seat of the Court, one solution could be for the Trial Chamber to obtain the assistance of the State Party for the testimony to be given before the national authority or by means of video-conference. Indeed, even if States Parties are not under an obligation to force the appearance of witnesses before the ICC, they should be under an obligation to comply with an order of the Trial Chamber requiring the attendance and testimony of a witness and summon that witness to appear before a national Court.

Trial Chamber V(A) came to the conclusion that 'there is no doubt in the Chamber's view that when article 64(6)(b) says that the Chamber may 'require the attendance of witnesses', the provision means that the Chamber may -as a compulsory measure- order or subpoena the appearance of witnesses'¹³⁸. On appeal lodged by the defence, the Appeals Chamber found

¹³¹ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-504-Red, Public Redacted Version of the Decision on the third defence application pursuant to articles 57(3)(b) and 64(6)(a) of the Statute', Trial Chamber IV, 12 September 2013, para. 3.

¹³² *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-170, Decision on 'Defence Application pursuant to articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union', Trial Chamber IV, 1 July 2011, para. 6.

¹³³ *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09-606, Warrant of arrest for Abdallah Banda Abakaer Nourain, Trial Chamber IV, 11 September 2014.

¹³⁴ *Ibid.*, para. 18.

¹³⁵ *Ibid.*, para. 19.

¹³⁶ *Ibid.*, paras 23–24.

¹³⁷ According to UN Doc. A/CONF.183/C.1/WGIC/L.15 (6 July 1998), 'This includes the notion that witnesses or experts may not be compelled to travel to appear before the Court.'

¹³⁸ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1274-Corr2, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, Trial Chamber V(A), 17 April 2014, para. 100.

that 'article 64(6)(b) of the Statute gives Trial Chambers the power to compel a witness to appear before it, thereby creating a legal obligation for the individual concerned'¹³⁹, therefore confirming the conclusion reached by Trial Chamber V(A). The addition by the Appeals Chamber that this power conferred on Trial Chambers creates an obligation on the individual is interesting, but rather strange, as the obligation to cooperate with the Court in Part IX of the Statute is established for States Parties, not for individuals. Although it was argued before the Appeals Chamber that such an obligation on individuals would be without any sanction in the case of non-compliance, the Appeals Chamber concluded that 'any sanction would be provided in domestic law, which would give significant notice to the individual concerned'¹⁴⁰. This could be true, but would probably only apply in case the witness is summoned to appear before a national court, following a request for cooperation made by the ICC. It is not certain that such a sanction would be also applicable in case the witness would be called to testify before the ICC by way of video-link.

The Appeals Chamber then clarified that the requested State Party had an obligation to serve the summonses upon the witnesses¹⁴¹. Finally, the Appeals Chamber found that the 'scope of application of article 93(1)(e) is limited to the facilitation of the voluntary appearance of witnesses *at the seat of the Court*, involving international transfer'¹⁴², clarifying that a witness could not be compelled to travel to the seat of the Court. A witness was however under an obligation to appear before the Court and the requested State Party was thus under an obligation, pursuant to article 93 para. 1(b), to ensure the forced appearance of a witness on the State Party's territory before the Court either sitting *in situ* or by way of video-link¹⁴³. For the purpose and scope of the present commentary on article 64, it shall suffice to point out that such an interpretation of article 93 para. 1(b) may be seen as rather generous.

Paragraph 6(b) refers only to 'witnesses' but a footnote in the Report of the Working Group¹⁴⁴ explains that '*the term 'witness' includes expert witnesses*'.

Furthermore, taking into consideration the jurisprudence of the Appeals Chamber with regard to the scope of application of article 64¹⁴⁵, it would be logical to conclude that the same principles would be applied in case a witness is compelled to appear either before a Pre-Trial Chamber or before the Appeals Chamber¹⁴⁶.

3. 'Provide for the protection of confidential information'

Reference shall be made here to articles 54 para. 3 (e), 68 para. 6 and 93 para. 8 (b) and (c). 33
As was stated before, this could include the possibility for the Trial Chamber, on its own motion or at the request of the Prosecutor, the defence or the State concerned, to order in camera hearings or to decide to restrict the scope of questioning in the case of a witness etc.

¹³⁹ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1598, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', Appeals Chamber, 9 October 2014, paras 107 and 113.

¹⁴⁰ *Ibid.*, para. 110.

¹⁴¹ *Ibid.*, para. 114.

¹⁴² *Ibid.*, para. 123.

¹⁴³ *Ibid.*, para. 130.

¹⁴⁴ See UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.2.

¹⁴⁵ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-365, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence', Appeals Chamber, 10 November 2011, para. 46; see also, with regard to the application of article 64 para. 5 before the Pre-Trial Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-573, Judgment on the Appeal Against the Decision on the Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, Appeals Chamber, 9 June 2008.

¹⁴⁶ For the Appeals Chamber, see rule 149 of the Rules.

4. ‘Order the production of evidence’

34 This subparagraph, which shows the influence of Civil Law on the Statute, gives an *ex officio* power to the Trial Chamber to order the production of further evidence to that already presented by the parties.¹⁴⁷ That gives a very important role to the judges to ascertain the truth; it was indeed impossible for Civil Law Delegations and especially for France to leave all the power on this point in the hands of the parties. Such a power of the Court is essential in order to provide a fair trial to the accused.

It must be pointed out that this subparagraph is similar to Rule 98 of the ICTY’s Rules which states: ‘A Trial Chamber may order either party to produce additional evidence. It may itself summon witnesses and order their attendance.’

This article is usually referred to by Trial Chambers together with article 69 para. 3 which gives the power to the Court to request the submission of all evidence that it considers necessary for the determination of the truth. The general reference to ‘the Court’ in article 69 para. 3 covers all Chambers of the Court, including the Appeals Chamber and the Pre-Trial Chambers. Likewise, the principle established by article 64 para. 6(d) is certainly applicable before all Chambers of the Court.

35 Trial Chamber III decided that it would eventually use its power to call witnesses after the conclusion of the presentation of the evidence by the defence¹⁴⁸. Trial Chamber III effectively used that power to call a witness just after the last witness presented by the defence, deciding that a witness called by the Chamber should be first questioned by the Chamber itself and then, in that order, by the representatives of the Office of the Prosecutor, the legal representatives of the victims and finally the defence, which should have the opportunity to question the witness last in accordance with rule 140 sub-rule 2(d) of the Rules¹⁴⁹.

Trial Chamber II also used its power under article 64 para. 6(d) to call a witness to testify but it used it at the beginning of the trial, before the first witnesses were presented by the Office of the Prosecutor. The Trial Chamber considered ‘it necessary to order the appearance of the person in the Office of the Prosecutor in charge of investigations in this case (‘the Lead Investigator’), in addition to the Prosecution witnesses already due to testify’. The Trial Chamber wanted to give the Lead Investigator the opportunity to explain how the investigation was conducted, how the statements were taken from the various prosecution witnesses and the methods used to investigate exonerating circumstances as required from the Prosecutor by article 54 para. 1(a)¹⁵⁰.

5. ‘Provide for the protection of the accused, witnesses and victims’

36 In this regard, article 68 para. 2 states that ‘the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means’. Of course, the measures taken for the protection of victims or witnesses shall not be ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’¹⁵¹.

¹⁴⁷ See generally, Heinze, *International Criminal Procedure*(2014), 238–249, 501–505.

¹⁴⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2731, Decision on the timeline for the completion of the defence’s presentation of evidence and issues related to the closing of the case, Trial Chamber III, 16 July 2013, para. 26.

¹⁴⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2863-Red, Public Redacted Version of Decision on the presentation of additional testimony pursuant to articles 64(6)(b) and (d) and 69(3) of the Rome Statute, Trial Chamber III, 6 November 2013, paras 4–7.

¹⁵⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1603-tENG, Decision on the Application by the Defence for Mathieu Ngudjolo Chui for Postponement of the Commencement Date for the Hearings on the Merits (Rule 132(1) of the Rules of Procedure and Evidence), Trial Chamber II, 5 November 2009, para. 17.

¹⁵¹ Article 68 para. 1, last sentence.

Trial Chamber I emphasized that ‘the obligation to identify, protect and respect the well-being and dignity of witnesses rests significantly with the party or participant calling the witness, but the other party and the participants, as well as the Court, have responsibilities in this regard’. The Trial Chamber encouraged especially the Victims and Witnesses Unit, which has a particular role in this regard in accordance with article 68 para. 4 and regulation 41 of the Regulations of the Court, to raise with the Chamber, at an early stage, any specific concerns it may have regarding the integrity and well-being of a witness, particularly concerning those who may be traumatized or vulnerable. The Trial Chamber identified the particular measures which could be utilized such as: (a) treating the testimony of vulnerable witnesses as confidential, access being restricted to the parties and participants to the proceedings; (b) allowing evidence in appropriate circumstances to be given out of the direct sight of the accused or the public; (c) allowing a witness to control his or her testimony and, if so, to what extent; (d) allowing eventually breaks in the evidence as and when requested; and (e) allowing a witness to use a particular language¹⁵².

6. ‘Rule on any other relevant matters’

Although article 64 para. 6(f) seems to be an acknowledgment by States negotiating the Statute that they could not foresee all issues which could come before a Trial Chamber, this provision has been used by Trial Chambers, most often in combination with article 64 para. 2, to assert very broad discretionary powers, even outside or contrary to the statutory framework. For example, article 64 para. 6(f) has been used to grant leave to appeal outside of what is provided in the statute in article 82 para. 1(d). Trial Chamber I granted leave to appeal to a State stating that

‘leave to appeal should be granted on an interlocutory basis under article 64(6)(f) when it is arguable that a decision of a Chamber has placed a State Party in the position of having to resolve apparently conflicting obligations to the ICC, on the one hand, and to individuals in the custody of the Court who raise fundamental human rights concerns that require determination by the State Party, on the other’¹⁵³.

This incorrect use of article 64 para. 6(f) instead of article 82 para. 1(d) stems from an incorrect interpretation of the term ‘party’ in article 82 para. 1. It would have been easy, and legally correct, for the Chamber to simply conclude that a State having a particular interest in proceedings before the Court could be qualified as party to those proceedings. The Appeals Chamber rejected the leave to appeal granted by Trial Chamber I as being *ultra vires*¹⁵⁴.

The Appeals Chamber has generally tried to put some limits to the expansive interpretation of article 64 para. 6(f) by Trial Chambers. For example, the Appeals Chamber¹⁵⁵ has criticized a Trial Chamber for using article 64 para. 6(f) as a basis to excuse an accused person from continuous presence at trial, finding instead that the Trial Chamber could find such discretion in article 63 para. 1 which however simply states that the accused ‘shall’ be present during trial.

¹⁵² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1140, Decision on various issues related to witnesses’ testimony during trial, Trial Chamber I, 29 January 2008, paras 35–36.

¹⁵³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2779, Decision on two requests for leave to appeal the ‘Decision on the request by the DRC-D01-WWW-0019 for special protective measures relating to his asylum application’, Trial Chamber I, 4 August 2011, para. 23.

¹⁵⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2799, Decision on the ‘Urgent Request for Directions’, of the Kingdom of the Netherlands of 17 August 2011, Appeals Chamber, 26 August 2011, para. 8.

¹⁵⁵ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, Appeals Chamber, 25 October 2013, para. 56.

VII. Paragraph 7: Trial in public

38 During the Rome Conference, some Delegations expressed the view that the principle in paragraph 7 was sufficiently important to be dealt with in a separate article¹⁵⁶; it is repeated in article 67 para. 1.

An exception to this principle is provided for in article 68 para. 2, but the decision is in any case left to the Trial Chamber: a proposal made by France, ‘In camera proceedings are mandatory when they are requested by an accused who was minor at the time of the commission of the facts or by a victim of sexual violence’¹⁵⁷ was not retained. The same will apply in case of sensitive or confidential information, in accordance with article 64 para. 6(c).

Regulation 20, sub-regulation 2 of the Regulations of the Court, provides that when a Chamber orders that certain hearings be held in closed session, the Chamber shall make public the reasons for such an order.

Trial Chambers¹⁵⁸ have repeatedly reminded parties of the ‘principle of publicity of proceedings enshrined in articles 64(7) and 67(1) of the Statute’ in order either to require the parties to submit public redacted versions of their confidential filings or to reclassify *proprio motu* confidential filings as public¹⁵⁹.

VIII. Paragraph 8

1. ‘commencement of the trial’

39 a) **Reading of the charges.** That refers to article 61 para. 7 (a) and must be understood subject to article 61 para. 9 which provides for the possibility of subsequent changes in the charges previously confirmed by the Pre-Trial Chamber.

Although apparently relatively simple, this provision proved to be very contentious with regard to what should be read to the accused and when it should be read to the accused.

The text is extremely clear in referring to the ‘charges previously confirmed by the Pre-Trial Chamber’ and therefore the document to be read to the accused must be the decision on the confirmation of the charges as issued by the Pre-Trial Chamber in accordance with article 61 para. 7. However, several Trial Chambers¹⁶⁰ have directed, on the basis of article 64 para. 2, the Office of the Prosecutor to provide the defence, after the decision on the confirmation of the charges, with an ‘updated’ document containing the charges, whereas the Statute only foresees such a document before the decision on the confirmation of the charges¹⁶¹. It is then this document which was read to the accused: Trial Chambers V(A) and V(B) decided that ‘only the Charges section’ of this ‘updated’ document containing the

¹⁵⁶ UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.2.

¹⁵⁷ See UN Doc. A/CONF.183/2/Add.1, article 68 para. 1, last sentence (in brackets), p. 108.

¹⁵⁸ Trial Chamber III, *Situation in the Central African Republic, in the case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Order on the ‘Prosecution’s Revised Order of its Witnesses at Trial and Estimated Length of Questioning’, ICC-01/05-01/08-996, 4 November 2010, para. 5; see also Decision on court sitting hours for the testimony of Witness 45, ICC-01/05-01/08-2081, 27 January 2012, para. 9.

¹⁵⁹ See in this regard regulation 23bis (3) of the Regulations of the Court.

¹⁶⁰ Trial Chambers I, III, V and VI requested an ‘updated’ document containing the charges. Trial Chambers II and IV did not.

¹⁶¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1548, Order for the prosecution to file an amended document containing the charges, Trial Chamber I, 9 December 2008, paras 13 and 15; see also *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-439, Order for the prosecution to file an updated document containing the charges, Trial Chamber V, 5 July 2012, para. 7; see also *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-390, Order instructing the Prosecution to prepare an updated document containing the charges, Trial Chamber VI, 30 October 2014; and, see also, for a thorough discussion on this very contested issue, *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-584, Decision on the content of the updated document containing the charges (including two separate opinions), Trial Chamber V, 28 December 2012.

charges shall ‘be read out at the opening of the trial for the purposes of fulfilling the requirement of article 64(8)(a) of the Statute’¹⁶², the ‘opening of the trial’ meaning the commencement of the hearing on the merits (or opening statements) and not the first status conference. However, the practice followed by Trial Chambers is not consistent: Trial Chamber III¹⁶³ decided to have the charges read to the accused both during the first status conference and then at the commencement of the hearing on the merits, although, as will be seen below, the accused was afforded the possibility to make an admission of guilt only at the opening of the trial (meaning the commencement of the hearing on the merits).

After the Appeals Chamber has now ruled that such an ‘updated’ document containing the charges was ‘not provided for in the Court’s legal instruments’¹⁶⁴, it is to be hoped that Trial Chambers will not request anymore such a document. The Appeals Chamber was indeed very clear when it stated that ‘there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial’¹⁶⁵. In many countries, trials are conducted on the basis of the decision taken by (a) pre-trial judge(s) to refer the case to trial. It is difficult to understand why Trial Chambers at the ICC are unable to do the same.

b) Understanding the nature of the charges. In order for the Trial Chamber to be able to discharge its obligation under this subparagraph, rule 135¹⁶⁶ provides that the Trial Chamber may either on its own motion or at the request of a party order a medical, psychiatric or psychological examination of the accused under the conditions set forth in rule 113. This latter rule provides the same for the Pre-Trial Chamber with the proviso that in making its determination, the Pre-Trial Chamber shall consider the nature and purpose of the examination and whether the person consents to the examination. This does not mean that the Trial Chamber cannot order an examination against the will of the person. Especially, if the purpose is only for the Chamber to satisfy itself that the accused understands the nature of the charges, it should not be a problem for the Trial Chamber to eventually impose such an examination to the accused against his or her will¹⁶⁷.

The Trial Chamber may appoint one or more experts from the list of experts approved by the Registrar or an expert approved by the Trial Chamber at the request of a party. In accordance with regulation 44 of the Regulations of the Court, the Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court.

For the moment, there is only one decision in relation to fitness to stand trial which was in fact taken at the pre-trial stage of the *Laurent Gbagbo* case by Pre-Trial Chamber I which stated the following:

‘Neither the Statute nor the Rules contain any provision specifically addressing fitness to stand trial. However, the concept of fitness to stand trial must be viewed as an aspect of the broader notion of fair trial. It is rooted in the idea that whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist. In this sense, fitness to stand trial can be defined as absence of such medical conditions which would prevent the accused from being able to meaningfully exercise his or her fair trial rights’¹⁶⁸.

¹⁶² *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-847-Corr, Decision on the Conduct of Trial Proceedings (General Directions), Trial Chamber V(A), 9 August 2013, para. 5; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-867, Decision on the conduct of trial proceedings, Trial Chamber V(B), 2 December 2013, para. 9.

¹⁶³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-T-14-ENG ET WT, Transcript, Trial Chamber III, 7 October 2009, pages 2 and 3; see also ICC-01/05-01/08-T-32-ENG CT WT, Transcript, 22 November 2010, pages 6 to 8.

¹⁶⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 131.

¹⁶⁵ *Ibid.*, para. 124.

¹⁶⁶ See also, for a similar rule, rule 74bis of the ICTY’s Rules (IT/32/Rev. 49, 22 May 2013).

¹⁶⁷ If the purpose would be to collect incriminating evidence against the accused, this could be more problematic: see Friman, in: Lee (ed.), *The International Criminal Court* (2001) 493, 505.

¹⁶⁸ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-286-Red, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, Pre-Trial Chamber I, 2 November 2012, para. 43.

Therefore, the accused must be able to understand the charges against him and more generally the proceedings being held before the Trial Chamber, and to instruct counsel accordingly¹⁶⁹.

If the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall order the trial to be adjourned. The case shall be reviewed, in accordance with rule 135 sub-rule 4, at least every 120 days or at any time at the request of the Prosecutor, the defence or by the Chamber on its own motion. In accordance with regulation 103 of the Regulations of the Court, the Trial Chamber may order that a detained person who is determined to be mentally ill or who suffers from a serious psychiatric condition be transferred to a specialized institution for appropriate treatment. The Registrar shall ensure the continuous detention of the person both at the place of treatment and when in transit.

To ensure that the accused has read and understood the charges against him or her, Trial Chambers V (A) and (B) directed the defence counsel of the accused to file a certified declaration to this effect before the start of the trial¹⁷⁰.

- 42 c) **Plea guilty.** As explained in the introduction, the ‘guilty plea procedure’ is now developed in article 65. The Trial Chamber shall afford to the accused the possibility to make an admission of guilt; in this regard the Statute does not follow Rule 62 of the ICTY’s Rules which requires a plea of guilty or not guilty. Indeed, it seems enough to allow the accused to make an admission of guilt.

To determine the moment of this admission of guilt will thereby be of vital importance: it seems indeed useless to require the attendance of a lot of witnesses if the accused intends to make an admission of guilt; so it should be preferable to afford such a possibility to the accused at the very first status conference before the Trial Chamber.

However, this has been a debated issue and the practice followed by Trial Chambers is once again not consistent. Trial Chamber II afforded the possibility to the accused to make an admission of guilt pursuant to article 64 para. 8(a) twice: during the first status conference and at the time of the opening statements. This is consistent with the jurisprudence of that Chamber which stated that ‘the drafters of the Statute, who deliberately adopted a hybrid procedure which borrows from different legal cultures and systems, intended the ‘commencement of the trial’ to mean both the start of the proceedings before the Trial Chamber and the commencement of hearings on the merits’¹⁷¹. As stated above, the purpose of allowing the accused to make an admission of guilt at the first status conference before the Trial Chamber was to avoid a lengthy pre-trial process before the Trial Chamber.

Trial Chambers I¹⁷², III¹⁷³ and V(A)¹⁷⁴ afforded such a possibility to the accused only at the commencement of the hearing on the merits. They however underlined that this approach would not prevent the accused from entering a plea at any stage of the proceedings before the commencement of trial.

¹⁶⁹ *Ibid.*, para. 50.

¹⁷⁰ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-847-Corr, Decision on the Conduct of Trial Proceedings (General Directions), Trial Chamber V(A), 9 August 2013, para. 6; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-867, Decision on the conduct of trial proceedings, Trial Chamber V(B), 2 December 2013, para. 10.

¹⁷¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1213-t-ENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (article 19 of the Statute), Trial Chamber II, 16 June 2009, para. 41.

¹⁷² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-50-ENG [4 Sept 2007 CT WT], Transcript, Trial Chamber I, 4 September 2007, open session, p. 3, lines 15–23.

¹⁷³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-T-14-ENG ET WT, Transcript, Trial Chamber III, 7 October 2009, p. 2, lines 9–14; see also ICC-01/05-01/08-T-32-ENG CT WT, Transcript, 22 November 2010, p. 5, lines 4–5.

¹⁷⁴ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-T-27-ENG ET WT, Transcript, Trial Chamber V(A), 10 September 2013, pages 12–13.

2. Power of the presiding judge

As stressed by *Christopher L. Blakesley*, ‘this paragraph implicates the difference between the adversarial and the non-adversarial models’¹⁷⁵. Indeed, this is a proposal made by France and coming from Civil Law. Such a power is potentially very useful in order for the presiding judge to control the manner of questioning the witnesses to avoid any harassment or intimidation. That is certainly very important in case of victims of sexual violence¹⁷⁶ and could also provide the presiding judge with the opportunity to ask a witness if he or she desires to make a general statement prior to the questions of the prosecutor, the defence and the legal representatives for the victims. This enables the judges to get information not subject to an oriented questioning and could finally avoid endless questioning with no hope to ascertain the truth.

During the discussion in the Preparatory Commission on the Rules of Procedure and Evidence, rule 140 on the *Directions for the conduct of the proceedings and testimony* was one of the most controversial rules¹⁷⁷.

Indeed, article 64 para. 8(b) leaves the procedural model to be followed at trial by the ICC completely open and completely in the hands of the Presiding Judge of the Trial Chamber. Some delegations, especially those from a common law background, were afraid that this could lead to completely different trials depending on the Presiding Judge¹⁷⁸. Other delegations felt that the Court would have to develop its own procedural model in the light of its experience.

However, as far as article 64 para. 8(b) does not require the Presiding Judge to give directions¹⁷⁹ but simply gives him or her the power to do so, delegations agreed generally that the Rules should provide some guidance in the unlikely case¹⁸⁰ where the Presiding Judge would not give directions. Thus, rule 140 sub-rule 1, provides that in such a case the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. Such a sub-rule is also unlikely to be possibly applied taking into consideration the intervention of the legal representatives of victims at trial in accordance with rule 91 sub-rule 3; the trial at the ICC is definitively not an adversarial trial between the Prosecutor and the defence, as the strong role given on the one hand to the judges and on the other hand to the victims, makes it impossible to follow a purely adversarial model.¹⁸¹ It is also not desirable to leave the trial proceedings in the hands of the parties if the ICC wants to achieve some procedural consistency over the years as the parties will be different from one trial to the other. Rule 140 sub-rule 1, provides *in fine* that if no agreement can be reached, the Presiding Judge shall give directions.

Rule 140 sub-rule 2 was the object of an intense and heated debate during the Preparatory Commission and one may wonder if this was at all necessary except to provide an opportunity for delegations to champion their own legal traditions.

¹⁷⁵ See Blakesley, in: Sadat Wexler (special ed.), *Observations on the Consolidated ICC Text*, (1998) 13bis NEP 69, 85.

¹⁷⁶ See Green *et al.* (1994) 5:2 *Hastings Women LJ* 171–241. See also rule 88 sub-rule 5.

¹⁷⁷ See Lewis, in: Lee (ed.), *The International Criminal Court* (2001) 539, 543.

¹⁷⁸ *Ibid.*, 548.

¹⁷⁹ For extensive directions given in writing by the Presiding Judge, see *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1665-Corr, Directions for the conduct of proceedings and testimony in accordance with rule 140, Trial Chamber II, 1 December 2009. See also Heinze, *International Criminal Procedure* (2014), 452.

¹⁸⁰ Indeed, Regulation 43, which is almost identical to Rule 90 (F) of the ICTY’s Rules, states that ‘Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to: (a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth; (b) Avoid delays and ensure the effective use of time’.

¹⁸¹ In the same vein Heinze, *International Criminal Procedure* (2014), 305–308.

Indeed, first, this rule, like any other rule, is subject to the Statute in accordance with article 51 para. 5, and article 64(8)(b) in particular; in addition the States themselves have indicated at the time of their adoption that the Rules cannot in any way modify the Statute as they are only an instrument for the application of the Rome Statute to which they are subordinated in all cases¹⁸². Thus, the Presiding Judge of the Trial Chamber remains as free as he or she was before the adoption of this rule.

45 Second, delegations which proposed this rule wanted to set up the ‘sequencing’ to examine witnesses: however, in this regard, rule 140 sub-rule 2, is more interesting for what it does not state than for what it does. Indeed, terms such as examination-in-chief, cross-examination and re-examination are conspicuously absent¹⁸³ from the text of the sub-rule in contrast from what is provided for in the ICTY’s Rules for example¹⁸⁴. This absence of rigid rules of examination makes it possible that the debates during trials at the ICC are much more free and open than it is the case at the ICTY or in an adversarial trial in general. The flexibility of rule 140 entails the following: (i) it allows the judges to put first questions to the witness or ask the witness to commence his or her testimony by presenting a free report before any questioning by the participants in the proceedings takes place; and (ii) it does not prescribe a particular order of the participants questioning the witness depending on who is calling the witness: the witness may be questioned first either by the Prosecutor, the defence or the legal representatives of victims no matter who is calling that witness. This renders it useless for a party presenting a witness to prepare him or her¹⁸⁵, a feature known to common law systems but not to civil law countries which usually follow the system of ‘free witness narration’, as that party will not know in advance how the testimony will be given at trial. Such an absence of rigid rules of examination finally calls for a strong power of direction in the hands of the Presiding Judge.

46 In addition, and maybe more importantly, no reference is found in rule 140 to ‘defence case’ or ‘prosecution case’. Trial Chambers could therefore adopt a single presentation of the case, since the ‘double presentation’ of the case – first the prosecution case and then the defence case – has resulted in unacceptable delays at the ad hoc Tribunals. In addition, such a double presentation of the case is not very appropriate taking into consideration ‘the additional historical dimension and truth-finding mission of the Court’¹⁸⁶, which was crucial for many delegations negotiating the Statute and the Rules. A single presentation of the case should be realizable, if the Prosecutor complies with her duty under article 54, paragraph 1 (a) to investigate incriminating and exonerating circumstances equally in order to establish the truth. In addition, the Pre-Trial Chamber may remedy the lack of compliance by the Prosecutor in accordance with its powers under articles 61(7) and 69(3) during the confirmation proceedings.

What transpires from this debate is that delegations, at least some of them, wanted to reach a greater certainty on how future trials at the ICC would look like. This was obviously a praiseworthy effort although unlikely to succeed. Indeed, uncertainty in how trials are to be conducted was simply unavoidable during the first years of the Court: Judges and participants to the proceedings (defence, Prosecutor and victims) have to determine gradually how trials at the ICC are to be conducted according to the unique needs and features of this institution. Of course such a *sui generis* system may take more than just a decade to build itself.

¹⁸² See explanatory note by the Assembly of States Parties, ICC-ASP/1/3 at 10.

¹⁸³ See Kress, in: Fischer *et al.* (eds.), *International and National Prosecution* (2001) at 352.

¹⁸⁴ See Rules 85 for the presentation of evidence and 90 for the testimony of witnesses; under Rule 90 (H) cross-examination is however limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness. Such rules won’t apply before the ICC.

¹⁸⁵ On this very debated issue and its development in the ad hoc tribunals and at the ICC, see Vasiliev (2009) 20 *CLF* 193–261.

¹⁸⁶ See Preparatory Committee on the Establishment of an International Criminal Court, Report of the Working Group on Procedural Matters, article 44 ‘Evidence’, Document A/AC.249/1997/WG.4/CRP.11/add.2, 11 December 1997, footnote 4.

For the moment, Trial Chambers have applied, unfortunately at the expense of a speedy trial, the model of a 'prosecution case' followed by a 'defence case'. As this is not a legal requirement and Trial Chambers have not been necessarily consistent in many issues related to the conduct of proceedings, one may wonder why they all have followed such a model.

One possible explanation was given by Trial Chamber V(A) which stated that the 'trial in this case has proceeded according to the general practice in the administration of international criminal justice, which involves an arrangement in which the defence presents its own case following the conclusion of the case for the prosecution'¹⁸⁷. If this is only a practice involving an arrangement, it could certainly be possible to change both the practice and the arrangement. The main question is, however, who is going to be the first one to change the practice.

This practice obviously delays proceedings for different reasons: the first one is that although Trial Chambers affirm that they have the power to intervene in the presentation of evidence by the parties, they in fact refrain from intervening and leave it to the parties to organize the way they want the presentation of their case 'unless there is a compelling reason to do so'¹⁸⁸. This lack of intervention by the bench is not very conducive for a speedy trial as parties tend to prolong the trials. It is unlikely that the length of trials at the ICC will diminish if judges do not become more involved in 'driving' the process instead of leaving it to the parties; this, however, requires an in-depth knowledge of the case before the start of the trial and therefore an in-depth study of all evidence to be presented by the parties.¹⁸⁹

A second reason explaining the length of trials due to the sequence 'prosecution case' and then 'defence case' results from the fact that the trial is suspended for several months between the end of prosecution case and the beginning of the defence case, in order for the defence to prepare.

A third reason is that the defence usually requests the same amount of time than the Prosecutor to present its case, although the defence does not bear the burden of proof. This is usually granted by the Trial Chamber for reasons of 'equality of arms' and to avoid criticism:

'The Chamber underlines that the defence does not bear the burden of proof and that it is for the prosecution to prove its case beyond reasonable doubt. However, given that the defence is best placed to know how to best shape its case and that the estimated time of its questioning does not exceed the time used by the prosecution, the Chamber considers that the time requested by the defence for the questioning of its witnesses is appropriate and reasonable'¹⁹⁰.

Although Trial Chambers have followed the sequence 'prosecution case' and then 'defence case', they had also to integrate in this presentation the evidence eventually called by the victims' legal representatives. 47

Trial Chambers V(A)¹⁹¹ and V(B)¹⁹² have decided that the victims' legal representatives should provide 'reasons for a separate presentation of evidence apart from the case presentation by the Prosecution'. In case leave would be granted, such presentation should be made 'at the end of the prosecution case', before the presentation of the defence evidence.¹⁹³ Trial

¹⁸⁷ *Prosecutor v. William Samoei Ruto and Joseph Arap Sang*, ICC-01/09-01/11-1334, Decision no. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), Trial Chamber V(A), 3 June 2014, para. 17.

¹⁸⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2482-Red, Public redacted version of 'Decision on measures to facilitate the continued presentation of evidence by the defence', Trial Chamber III, 14 December 2012, para. 9.

¹⁸⁹ In the same vein Heinze, *International Criminal Procedure* (2014), 501–505, 514–515.

¹⁹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2225, Decision on the 'Submissions on Defence Evidence', Trial Chamber III, 7 June 2012, para. 10.

¹⁹¹ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-847-Corr, Decision on the Conduct of Trial Proceedings (General Directions), Trial Chamber V(A), 9 August 2013, para. 21.

¹⁹² *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-867, Decision on the conduct of trial proceedings, Trial Chamber V(B), 2 December 2013, para. 26.

¹⁹³ This is also the sequence to call evidence provided for in rule 146(B) of the Rules of Procedure and Evidence for the Special Tribunal for Lebanon, see document STL-BD-2009-01-Rev.6-Corr. 1, adopted on 20 March 2009, last corrected on 3 April 2014.

Chamber III also decided that victims suggested to be called by the legal representatives should testify before the commencement of the presentation of the defence evidence¹⁹⁴. Trial Chamber II, in a very elaborated decision rendered by the Presiding Judge of the Trial Chamber and not by the full Chamber as was done by the other Trial Chambers, made a distinction between the possibility for victims' legal representatives to call the victims they represented to testify and the possibility to suggest other witnesses to be called by the Chamber¹⁹⁵. With regard to the victims wishing to testify, their legal representative was to file a written application to that effect before the end of the Prosecution case and those allowed to testify would do so at the end the Prosecution case¹⁹⁶. Victims' legal representatives were not allowed to call other persons than the victims they represented to testify but could make suggestions to the Chamber as to call those other witnesses pursuant to its powers under articles 64 para. 6(d) and 69 para. 3 after the conclusion of the defence case. Trial Chamber II indeed reserved the possibility to call further witnesses at the end of the defence case, including those suggested by the victims' legal representatives¹⁹⁷.

48 With regard to the evidence to be called by the Chamber itself, in accordance with articles 64 para. 6(d) and 69 para. 3, Trial Chambers have either called this evidence at the end of the 'defence case' or before the 'prosecution case' as was explained above¹⁹⁸. As stated by Trial Chamber III, 'the Chamber may intervene at any given time, inter alia, to order the production of such new evidence that it considers necessary for the determination of the truth, in accordance with articles 64(6)(d) and 69(3) of the Statute'¹⁹⁹.

49 Several commentators have argued, unsuccessfully so far, that Trial Chambers at the ICC should follow a different model than the 'traditional prosecution case followed by the defence case' advocating for 'proactive judges'²⁰⁰. Indeed, it would be possible to have the evidence presented in a completely different fashion, following different topics, for example first, hearing evidence on the crimes, contextual elements and then underlying acts, and subsequently evidence on the criminal responsibility of the accused²⁰¹. It is interesting to note that the Extraordinary Chambers in the Courts of Cambodia have followed a topic approach for the *Duch* trial²⁰². So did Pre-Trial Chamber III in the Bemba case with regard to the organization of the hearing on the confirmation of the charges²⁰³.

It is to be hoped that one day Trial Chambers will use the freedom left to them by the Statute and the Rules in order to organize the trial in a different way. This could be an opportunity to test other models which could prove less time consuming than the model 'prosecution case' and then 'defence case', while fully respecting the rights of the accused, models which are used in many countries subject to the scrutiny of international human rights courts.

¹⁹⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1023, Decision on Directions for the Conduct of the proceedings, Trial Chamber III, 19 November 2010, para. 5.

¹⁹⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1665-Corr, Directions for the conduct of proceedings and testimony in accordance with rule 140, Trial Chamber II, 1 December 2009, see paras. 3 to 7 and paras 45 to 48.

¹⁹⁶ *Ibid.*, paras 24–25.

¹⁹⁷ *Ibid.*, paras 7, 43 and 45; Trial Chamber II however also called a witness at the beginning of the trial, before the witnesses called by the Prosecutor (see the developments for article 64 para. 6 (d)).

¹⁹⁸ See commentary for article 64 para. 6 (d) above.

¹⁹⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1023, Decision on Directions for the Conduct of the proceedings, Trial Chamber III, 19 November 2010, para. 5.

²⁰⁰ Heinsch, in: Stahn and Sluiter (eds), *International Criminal Court* (2009) 479, 487; Heinze, *International Criminal Procedure* (2014), 500–505.

²⁰¹ Gallmetzer, in: Stahn and Sluiter (eds), *International Criminal Court* (2009) 501, 506.

²⁰² Gibson and Rudy (2009) 7 *JICJ* 1007.

²⁰³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-336, Decision on the schedule for the Confirmation of Charges Hearing, Pre-Trial Chamber III, 29 December 2008, see in particular para. 20.

IX. Paragraph 9

1. 'Rule on the admissibility or relevance of evidence'

There was a footnote in the Report of the Working Group²⁰⁴ which stated that: 'The Working Group draws the attention of the Drafting Committee to the fact that there may be some duplication of article 69 paragraph 4.' Indeed, article 64 para. 9 duplicates article 69 para. 4, but because of the lack of time, nothing was reconsidered as usual; that was the price to pay to get a Statute in Rome.

Trial Chambers have generally affirmed that they had an 'unqualified power to rule on the admissibility or relevance of evidence'²⁰⁵. This is certainly a power but not an obligation, since the Appeals Chamber has clearly stated that a Trial Chamber may decide not to rule on the admissibility of the evidence according to the criteria established in article 69 para. 4, but instead simply make 'it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person' at the end of the proceedings before that Trial Chamber²⁰⁶. However, so far Trial Chambers have decided to follow a quite cumbersome process of evaluating the admissibility of each piece of evidence, whether presented by the Prosecutor, the defence or the legal representatives of the victims²⁰⁷. Trial Chambers follow a three-stage approach in order to determine the admissibility of evidence other than oral evidence: (a) first, the Trial Chamber determines whether the evidence in question is, *prima facie*, relevant to the trial, in that it relates to matters that are properly to be considered by the Trial Chamber in its investigation of the charges against the accused; (b) second, the Trial Chamber considers whether the evidence has, *prima facie*, probative value and (c) third, the Trial Chamber weighs the probative value of the evidence against its prejudicial effect. Due to the power given to Chambers to assess freely all evidence submitted to them in accordance with rule 63 para. 2 of the Rules, and the *prima facie* standard applied, this three-stage approach appears often as being very artificial and one wonders why Trial Chambers have imposed on themselves to issue such lengthy decisions on admissibility of evidence which are not necessary according to the Statute and the Rules, as reminded by the Appeals Chamber.

2. 'Take all necessary steps to maintain order'

To that end, the Trial Chamber may order the removal of persons from the courtroom – including the accused (see article 63 para. 2) present before it – who commit misconduct, including disruption of the proceedings²⁰⁸. Sanctions for misconduct before the Court are provided for in article 71 which refers to the Rules for the measures to be taken and the procedures to be followed.

²⁰⁴ UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.2.

²⁰⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decision of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, Trial Chamber I, 13 December 2007, para. 4.

²⁰⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', Appeals Chamber, 3 May 2011, para. 36.

²⁰⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2589, Decision on the 'Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to article 64(9)', Trial Chamber I, 21 October 2010, paras 27 and 28; ICC-01/04-01/06-2694-Corr, Corrigendum to Decision on the legal representative's application for leave to tender evidence material from the 'bar table' and on the Prosecution's Application for Admission of three documents from the Bar Table Pursuant to article 64(9), 9 March 2011, paras 10 to 12; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2793, Decision on the admission into evidence of items deferred in the Chamber's 'First Decision on the prosecution and the defence requests for the admission of evidence' (ICC-01/05-01/08-2012), Trial Chamber III, 3 September 2013, para. 9; No. ICC-01/05-01/08-2950, Decision on Maître Douzima's 'Requête de la Représentante légale de victimes en vue de soumettre des documents en tant qu'éléments de preuve selon l'article 64(9) du Statut de Rome', 29 January 2014, para. 7.

²⁰⁸ See also Rule 80 of the ICTY's Rules.

To that effect, rule 170 provides that after a warning, the Presiding Judge of the Chamber may either order a person to leave or be removed from the courtroom, or in case of repeated misconduct, order the interdiction of that person from attending the proceedings. Rule 170 does not set a time limit for this interdiction and it seems that it may cover all proceedings before the Chamber making the order. As far as the accused is concerned, the removal can only be for such duration as is strictly required in accordance with article 63 para. 2 *in fine*. However, in accordance with rule 171, when the misconduct consists of deliberate refusal to comply with an oral or written direction by the Court, not covered by rule 170, and that direction is accompanied by a warning of sanctions in case of breach, the Presiding Judge of the Chamber dealing with the matter may order the interdiction of that person from the proceedings for a period not exceeding 30 days or impose a fine of 2000 euros maximum. The Appeals Chamber has suggested that such a procedure should be used against the Prosecutor, instead of imposing a stay of the proceedings²⁰⁹, when the Prosecutor refuses to comply with an order from the Chamber. A new fine may be imposed every day the misconduct continues and those fines are cumulative. In case the person committing misconduct is an official of the Court, a defence counsel or a legal representative of victims, the Presiding Judge may also order the interdiction of that person from exercising his or her functions for a period not exceeding 30 days. If the Presiding Judge considers that a longer period of interdiction is appropriate, he or she shall refer the matter to the Presidency, which may order a longer or permanent period of interdiction. As far as officials of the Court are concerned, this may then amount to a removal from office; however, as far as the Prosecutor and any Deputy prosecutor are concerned, removal from office may only be decided by the Assembly of States Parties in accordance with article 46 para. 2. It remains to be seen how the Presidency will proceed in case this occurs.

In all cases, the person concerned shall be given an opportunity to be heard before a sanction for misconduct is imposed.

X. Paragraph 10: ‘record of the trial’

- 52 That is very important in case of an appeal or in case of a request for revision under article 84. Rule 137²¹⁰ provides that the Registrar shall take measures to make and preserve a full and accurate record of all proceedings including transcripts,²¹¹ audio- and video-recordings and other means of capturing sound or image.²¹² A record of closed proceedings shall also be made for its possible disclosure when the reasons for confidentiality no longer exist. Taking into consideration that there may be public interest in court proceedings, rule 137 sub-rule 3, provides that the Trial Chamber may authorize other persons than the Registrar to take photographs, audio- and video-recordings and other means of capturing the sound or image of the trial.

²⁰⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2582, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’, Appeals Chamber, 8 October 2010, paras. 59–60. See generally Heinze, *International Criminal Procedure* (2014), 458–464.

²¹⁰ See also, for a similar rule, Rule 81 of the ICTY’s Rules.

²¹¹ See also regulation 27 of the Regulations of the Court on transcripts which shall constitute an integral part of the record of the proceedings.

²¹² See also regulation 21 of the Regulations of the Court on broadcasting, release of transcripts and recording.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

- (a) The accused understands the nature and consequences of the admission of guilt;
- (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
- (c) The admission of guilt is supported by the facts of the case that are contained in:
 - (i) The charges brought by the Prosecutor and admitted by the accused;
 - (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
 - (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of victims, the Trial Chamber may:

- (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
- (b) Order that the trial be continued under the ordinary trial procedures provided in this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Literature: D'Aoust, J., 'The Conduct of Trials', in: J. Doria *et al.* (eds.), *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 863; Behrens, H.-J., 'The Trial Proceedings', in: R.S. Lee (ed.), *The International Criminal Court* (Kluwer Law International 1999) 238; Bohlander, M., 'Plea-Bargaining before the ICTY', in: R. May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer Law International 2001) 151; Bosly, H.-D., 'Admission of Guilt before the ICC and in Continental Systems', (2004) 2 *JICJ* 1040; Burens, L., 'Plea Bargaining in International Criminal Tribunals. The end of truth-seeking in International Courts?', (2013) 7/8 *ZIS* 322; Calvo-Goller, K., *The Trial Proceedings of the International Criminal Court* (Martinus Nijhoff Publishers 2006); Combs, N.A., 'Copping a Plea to Genocide: the Plea Bargaining of International Crimes', (2002) 151 *UPaLRev* 1; Damaška, M., 'Evidentiary barriers to conviction and two models of criminal procedure: a comparative study', (1973) 121 *UPaLRev* 506; *id.*, 'Negotiated Justice in International Criminal Courts' (2004) 2 *JICJ* 1018; Del Ponte, C., 'Investigation and Prosecution of Large-scale Crimes at the International Level', (2006) 4 *JICJ* 539; Dixon, R. and Demirdjian, A., 'Advising Defendants about Guilty Pleas before International Courts', (2005) 3 *JICJ* 680; Friman, H., 'Inspiration from the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court', (2003) 2 *LAPE* 373; Langbein, L., 'Torture and plea bargaining', (1978) 46 *UCLR* 4; Orie, A., 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings before the ICC', in: A. Cassese (ed.), *The Rome Statute of the International Criminal Court* (OUP 2002) 1477; Scharf, M.P., 'Trading Justice for Efficiency. Plea-Bargaining and International Tribunals', (2004) 2 *JICJ* 1070; Schünemann, B., *Absprachen im Strafverfahren? Gutachten B zum 58. Deutschen Juristentag* (C.H. Beck 1990); Terrier, F., 'The Procedure before the Trial Chamber', in: A. Cassese (ed.), *The Rome Statute of the International Criminal Court* (OUP 2002) 1277; Tieger, A. and Shin, M., 'Plea Agreements in the ICTY. Purpose,

Effects and Propriety’, (2005) 3 *JICJ* 666; Tochilovsky, V., ‘Rules of procedure for the International Criminal Court: problems to address in light of the experience of the ad hoc tribunals’, (1999) 46, 3 *NethILRev* 343.

Content

A. Introduction.....	1
B. Analysis and interpretation of elements	14
I. Paragraph 1: Valid admission of guilt.....	14
1. Understanding of nature and consequences	19
2. Voluntary admission after consultation with counsel.....	25
3. Supporting facts	26
II. Paragraph 2: Conviction according to an admission of guilt	31
III. Paragraph 3: Invalid admission of guilt.....	35
IV. Paragraph 4: More complete presentation of facts in the interests of justice..	37
V. Paragraph 5: Non-binding effect of plea agreements	40

A. Introduction

- 1 The text of article 65 left Rome in virtually the same form that it had on arrival, as a result of early consensus reached at the Preparatory Committee. The agreement on the solution provided by the article 65 proceedings as an alternative to the classic guilty plea formula contained in article 38 para 1 (d) of the ILC Draft Statute can be considered a major breakthrough, at a time at which consensus – even on purely technical issues – seemed extremely difficult to obtain.¹ Article 65 is also an example of the constructive approach adopted by various delegations throughout the negotiation process, which were willing to explore new grounds and combine different legal traditions, instead of adhering to the basic principles and rules of their own domestic systems.
- 2 The ILC Draft Statute did not say much about the consequences of a plea of guilty entered at trial. Its article 38 para 1 (d), listing the powers of the Trial Chamber, included a power to call upon the accused to enter a plea of guilty or not guilty, or, if this did not happen, to enter a plea of not guilty on the accused’s behalf. The ILC Commentary stated, however, that the language in article 38 para 1 did not necessarily imply a summary end to the trial or an automatic conviction; rather it would be ‘a matter for the Chamber, subject to the Rules, to decide how to proceed ... In many cases it may be prudent to hear the whole case against the accused; in others, only the key witnesses may need to be called upon to give evidence, or the material before the Court combined with the confession will themselves be certain proof of guilt’.² However, these options were not clearly spelled out in the Statute. The first proposals presented at the Preparatory Committee with the intention of complementing and improving the ILC provision followed the usual common law procedure for pleas of guilty: if a plea was entered, the case would not go to trial, and the proceedings would move directly to the sentencing stage.² This approach was openly rejected by many delegations coming from legal systems that do not allow an admission of guilt made by an accused to have such far-reaching consequences. Moreover, many delegations, particularly those coming from the civil law tradition, feared that the inclusion of such a provision would automatically lead to the practice of plea bargaining being imported into the context of the ICC.
- 3 A quick look at the state of the Preparatory Committee’s discussions by August 1996 is enough to capture the different positions assumed by delegations: a) ‘The view was expressed

¹ The first draft of the current text of art 65 is contained in ‘Working Paper submitted by Argentina’ (13 August 1996) UN Doc A/AC.249/L.6 p 14. It was followed by an amended Argentine/Canadian proposal; see ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (1996) UNGA, 51st Session Supp No 22, UN Doc A/51/22 vol II, as reproduced in Bassiouni (ed.), *International Criminal Court. Compilation of United Nations Documents and Draft ICC Statute before the Rome Conference, No Peace without Justice* (1998) 569.

² ‘Working Paper submitted by the delegations of Australia and the Netherlands’ UN Doc A/AC.249/L.2 Rule 74.

that the accused should be allowed to enter a plea of guilty, which would have the procedural effect of obviating the need for a lengthy costly trial: the accused would be allowed to admit his wrongdoing and accept the sentence; the victims and witnesses would be spared any additional suffering; and the Court would be allowed to take the guilty plea into account in sentencing the convicted person';³ b) '... the view was also expressed that ... the admission should not be the only evidence considered by the Court; the admission should not have any consequences for the trial procedures; the chamber had a duty to determine the guilt or innocence of the accused notwithstanding an admission; and a full trial was necessary given the seriousness of the crimes and the interests of the victims as well as the international community ...';⁴ c) 'Attention was drawn to the need to bridge the gap between different legal systems ... It was suggested that if the accused admitted the facts contained in the indictment, the trial chamber could decide to conduct an abbreviated proceeding to hear a summary of the evidence presented by the prosecution or to continue with the trial if the accused failed to reaffirm the admission or to accept the proceeding ... the trial chamber should determine whether the accused fully understood the nature and consequences of admission of guilt, whether the admission was made voluntarily without coercion or undue influence and whether the admission was supported by the facts contained in the indictment and a summary of the evidence presented by the prosecution before deciding whether to request additional evidence, to conduct an expedited proceeding or to proceed with the trial'.⁵ This last option had already been discussed as a possible bridge between different legal systems in a meeting of experts held at the Institute for Higher Studies in Criminal Sciences (Siracusa) in July 1996.

The discussion on the appropriate procedural consequences of an admission of guilt by an accused raised issues of basic principle, and reflected diverging conceptions of the nature of criminal procedure: 'If proceedings are patterned upon the model of an official determination of the facts of the case, both formal pleadings and stipulations are objectionable ... On the other hand, if proceedings are essentially a contest, and the judgement a decision between the contestants, the logic of this procedural design naturally tends toward accepting formal pleadings and stipulations'.⁶ Nevertheless, this clear-cut distinction between two different approaches to criminal procedure has been substantially eroded during the last decade. Many legal systems that, deeply rooted in the purest civil law tradition, refused to give any effect whatsoever to a plea or a stipulation between the parties have gradually moved towards recognizing significant procedural consequences to agreements or stipulations voluntarily made by the defendant with the prosecutor.⁷ On the other hand, critical voices have been raised in those systems in which negotiations about the charges or the penalty to be imposed are the rule, pointing out at the coercive character of a supposedly 'voluntary' settlement of a dispute between two parties.⁸

Undoubtedly, the most controversial issue remains the one of 'plea bargaining'. The arguments offered against this practice include the arguable erosion of the fact-finding mission of the criminal procedure (including the formation of an historical record), since the presentation of evidence by both parties in a public trial arguably entails a more reliable as well as complete and detailed historical record than a guilty plea.⁹ In addition, if a charge

³ 'Report of the Preparatory Committee', see note 1, vol I 56 para 261.

⁴ *Ibid.* para 262.

⁵ *Ibid.* para 263.

⁶ Damaška (1973) 121 *UPaLRev* 506, 582.

⁷ Probably the best examples are provided by the Italian Code of Criminal Procedure (1989), which includes, under the heading 'special forms of procedure', a summary trial (*giudizio abbreviato*), the agreement between the parties as to the penalty to be imposed (*patteggiamento sulla poena*), the direct trial (*giudizio direttissimo*) and other summary proceedings. See a critic to these tendencies in Europe in Schünemann, *Abstrachen im Strafverfahren? Gutachten B* zum 58. Deutschen Juristentag (1990).

⁸ Langbein (1978) 46 *UCLRev* 4, 12 *et seq.* See further Ashworth, *The Criminal Process: An Evaluative Study* (1998) ch 9; Combs (2002) 151 *UPaLRev* 1, 14 n 13.

⁹ See *Prosecutor v. Momir Nikolić*, IT-02-60/1-S, Sentencing Judgement, Section A, ICTY Trial Chamber I, 2 December 2003, para 61. See also Damaška (2004) 2 *JICJ* 1018, 1031 *et seq.*

bargaining has taken place, ‘the public will not know whether the allegations were withdrawn because of insufficient evidence or because they were simply a “bargaining chip” in the negotiation process’.¹⁰ However, it has also been argued that plea bargaining might be more effective in contributing to the general acceptance of the historical record by expanding the base of criminal cases that have been adjudicated.¹¹

- 6 It has also been argued that guilty pleas are a more sensitive matter with regard to international crimes because of the vagueness of many international crimes. There is still much uncertainty as to the legal prerequisites of international crimes.¹² As M. Damaška has stated, ‘the more uncertain the legal elements of criminal responsibility, the more inappropriate it is to ask defendants to take a stand on them’.¹³
- 7 With regard to victims, it is an undecided question whether a guilty plea is preferable to a full trial. On the one hand, guilty pleas spare some victims the stress of giving, quite often more than once, evidence and being exposed to cross-examination.¹⁴ On the other hand, many victims want to have their voices heard in a public trial,¹⁵ which may help them to overcome mental harm inflicted on them by the accused.
- 8 An argument in favour of plea agreements is that the testimony of the accused as an insider witness can lead to the conviction of other, higher ranking accused.¹⁶ But perhaps the most powerful argument for the promotion of plea bargains is that a guilty plea saves time and resources.¹⁷ This advantage is of even higher importance in international than in national criminal proceedings, since international criminal proceedings are innately very time-consuming. This is due to the complexity of international crimes with elements that are hard to prove,¹⁸ like the ‘chapeau element’ of crimes against humanity (existence of a widespread or systematic attack against a civilian population). Besides, international criminal courts face unique difficulties such as the need for translations into various languages of documents, transportation of victims and witnesses, location of evidence in far-away countries and the protection of victims and witnesses.¹⁹ Thus, a guilty plea before the commencement of the trial can be an effective means of speeding proceedings and saving resources.²⁰ However, the ICTY itself has stressed that such advantage must not compromise

¹⁰ *Nikolić* (Trial Chamber Judgement), see note 9, para 63. See further *ibid.* 65: ‘Once a charge of genocide has been confirmed, it should not simply be bargained away. If the Prosecutor makes a plea agreement such that the totality of an individual’s criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions will inevitably arise as to whether justice is in fact being done.’

¹¹ See Scharf (2004) 2 *JICJ* 1070, 1079. In the opinion of Tieger and Shin (2005) 3 *JICJ* 666, 671 ‘plea agreements can ... make up in breadth what they may lack in depth’, resulting ‘in a greater number of completed cases and, therefore, more additions to the historical record’. It must be noted, however, that this argument may resonate more in the context of the ICTY and ICTR, both under pressure to complete the totality of its cases within a confined time-line (the so-called ‘exit strategy’), than in the context of the ICC, which is a permanent institution.

¹² Damaška (2004) 2 *JICJ* 1018, 1033.

¹³ *Ibid.*

¹⁴ This positive aspect of guilty pleas is stressed in many decisions of the ICTY; see, eg, *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, Trial Chamber II, 17 October 2002, para 84; *Prosecutor v. Predrag Banović*, IT-02-65/1-S, Sentencing Judgement, Trial Chamber II, 28 October 2003, para 68; *Prosecutor v. Miroslav Deronjić*, IT-02-61-S, Sentencing Judgement, Trial Chamber II, 30 March 2004, para 241.

¹⁵ *Nikolić* (Trial Chamber Judgement), see note 9, para 62; Bohlander, in: May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001) 151, 162.

¹⁶ *Nikolić* (Trial Chamber Judgement), see note 9, para 71. The importance of insider witnesses for the prosecution of international crimes is emphasized by Del Ponte (2006) 4 *JICJ* 539, 546 *et seq.*

¹⁷ In the opinion of Damaška (2004) 2 *JICJ* 1018, 1030 this argument is ‘the only persuasive justification for negotiated justice’.

¹⁸ Scharf (2004) 2 *JICJ* 1070, 1077; Tieger and Shin (2005) 3 *JICJ* 666, 668 *et seq.*

¹⁹ See *Prosecutor v. Dražen Erdemović*, IT-96-22-A, Separate and Dissenting Opinion of Judge A. Cassese, 7 October 1997, para 8.

²⁰ See *Simić* (Trial Chamber II Judgement), see note 14, para 84; *Banović* (Trial Chamber II Judgement), see note 14, para 68; *Prosecutor v. Ranko Česić*, IT-95-10/1-S, Sentencing Judgement, Trial Chamber I, 11 March 2004, para 59; *Prosecutor v. Dražen Erdemović*, IT-96-22-Tbis, Sentencing Judgement, Trial Chamber, 5 March

‘the quality of the justice and the fulfilment of the mandate of the Tribunal ... Thus, while savings of time and resources may be a result of guilty pleas, this consideration should not be the main *reason* for promoting guilty pleas through plea agreements’.²¹

In light of the foregoing, the wisdom of the finding included in the ICTY *Nikolic* judgement appears to be beyond dispute: ‘the use of plea agreements should proceed with caution and such agreements should be used only when doing so would satisfy the interests of justice’.²²

The solution adopted in article 65 follows such a cautious approach in adopting a third avenue between the classic ‘common law’ and ‘civil law’ approaches. The model enshrined in the provision has parallels both with the civil law concept of summary or abbreviated procedure, and with the common law rules relating to guilty pleas. The decision to have specific provisions in the Statute dealing with an admission of guilt by an accused, and conferring significant powers of control on the Trial Chamber, was not only the result of a need for consensus, but also of a general perception that, due to the international character of the Court, the gravity and seriousness of the crimes involved, and the diversity of legal backgrounds and traditions that the future judges of the Court would reflect, a clear and precise regulation was indeed required. The problems arising from a defective guilty plea in the ICTY *Erdemović* case, in which the Appeals Chamber found that the suspect had not been sufficiently informed about the guilty plea,²³ and that consequently the agreement was invalid, is a concrete example of the concerns that led to the current text of article 65.

It must be noted that after the *Erdemović* Appeals Chamber decision, the judges of the ICTY amended their Rules in a fashion similar to the language of the ICC Statute.²⁴ Rule 62*bis* establishes a specific procedure for the case of a plea of guilt, instructing the Trial Chamber to determine whether the plea has been made voluntarily, it is not equivocal and whether ‘there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case’.²⁵ A few years after the introduction of rule 62*bis*, rule 62*ter*, dealing with the procedure applicable to plea agreements, was adopted.²⁶ Pursuant to sub-rule (A), the parties may agree that the Prosecutor shall apply to the Trial Chamber to amend the indictment according to the plea agreement, recommend a specific sentence or sentencing range or not oppose a request by the accused for a specific sentence or sentencing range. Whereas these obligations of the Prosecutor indicate that the Prosecutor is bound by a plea agreement,²⁷ sub-rule (B) explicitly stipulates that a plea agreement has no binding effect on the Trial Chamber. According to sub-rule (C), in general, the plea agreement must be disclosed in open session.²⁸

Since the first guilty plea in the *Erdemović* case, the number of guilty pleas before the ICTY had significantly increased. In its Twelfth Annual Report to the General Assembly and the Security Council the ICTY reported that until 31 July 2005 39 persons had been convicted or acquitted after trial and additional 18 persons had been convicted after pleading guilty,

1998, p. 16. See also ‘Tenth Report of the International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991’ UN Doc A/58/279–S/2003/829 para 230 stating that ‘guilty pleas at an early stage save valuable court time because the plea enables the Trial Chamber to avoid the need to conduct a trial. Furthermore, in most instances, appeals do not result from the guilty plea process, thereby saving more court time’.

²¹ *Nikolić* (Trial Chamber Judgement), see note 9, para 67.

²² *Nikolić* (Trial Chamber Judgement), see note 9, para 73.

²³ *Prosecutor v. Dražen Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, paras 14–27.

²⁴ R 62 (ii) only provided that the Trial Chamber should ‘call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf’ and ‘in case of a plea of guilty, instruct the Registrar to set a date for the pre-sentencing hearing’, subpara (v).

²⁵ This rule was adopted at the fourteenth plenary session of the ICTY on 12 November 1997.

²⁶ At the twenty-fifth plenary session of the ICTY (12–13 December 2001).

²⁷ Jones and Powles, *International Criminal Practice* (2003) 642 leave this issue open.

²⁸ Only on a showing of good cause the disclosure may happen in closed session.

including such prominent accused as Biljana Plavsic, the former co-president of the Serb leadership.²⁹ However, in the last years, guilty pleas were less frequent.³⁰ In the great majority of cases a negotiation pertaining to the charges took place: the accused pleaded guilty to one or more charges and the Prosecutor dismissed the remaining counts against the accused.³¹ Only in very few cases the accused pleaded guilty to all charges against him, the Prosecutor offering, in exchange, to recommend to the Trial Chamber a sentence within a given range.³² Most accused accepted to become 'insider witnesses', ie they agreed to co-operate with the Office of the Prosecutor, in particular to give a full and complete interview concerning their knowledge of crimes and to testify in future proceedings before the Tribunal, especially against former co-accused.³³ Usually, the accused waives his or her right to appeal the sentence unless it is above the range agreed upon and recommended to the Trial Chamber by the parties. Although the ICTY judges are not bound by the plea agreement, in the majority of cases the sentence falls within the range agreed by the parties.³⁴ Thus, a guilty plea, in almost all cases, leads to a substantial reduction of sentence compared with a conviction of an accused pleading not guilty.³⁵

- 13 Before the ICTR,³⁶ guilty pleas have never reached the same importance as before the ICTY.³⁷ No admission of guilt has been yet made by a suspect before the ICC, and therefore the procedure envisioned by article 65 remains unused.

²⁹ See 'Annex III to the Twelfth Annual Report of the International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' UN Doc A/60/267-S/2005/532.

³⁰ Only two more guilty pleas; thus, the number of trials concluded per guilty plea is now 20; <www.icty.org/sid/203> accessed 19 May 2015.

³¹ See the critical review of this development by Scharf (2004) 2 *JICJ* 1070, 1070 *et seq.*

³² See Plea Agreement in the case *Prosecutor v. Ranko Cesić*, IT-95-10/1-PT. In the *Jelisić* trial, the accused pleaded guilty to all charges relating to crimes against humanity and violations of the laws and customs of war, but not to the remaining count of genocide which the Prosecution did not withdraw. The Trial Chamber acquitted Jelisić of this count, because it considered that the mens rea for the crime of genocide had not been proven; *Décision orale*, No. IT-95-10, 19 October 1999.

³³ See, eg, *Nikolić* (Trial Chamber Judgement), see note 9, para 17. For an exception see Milan Simić, who even denied the plea agreement to be used against his former co-accused; *Simić* (Trial Chamber II Judgement), see note 14, para 89.

³⁴ For exceptions to this rule, see *Nikolić* (Trial Chamber Judgement), see note 9. The Prosecutor recommended a sentence within the range of 15 to 20 years, the Defence a sentence to not more than 10 years imprisonment. The Trial Chamber imposed a sentence of 27 years, because in its opinion a lower sentence would not have reflected 'the totality of the criminal conduct for which Momir Nikolić has been convicted'; para 180. However, the Appeals Chamber reduced the sentence to 20 years of imprisonment, because the Trial Chamber *inter alia* had erred in double-counting the accused's role in the crime; *Prosecutor v. Vidoje Blagojević et al.*, IT-02-60/1-A, Judgement on Sentencing Appeal, Appeals Chamber, 8 March 2006. Milan Babić was sentenced to 13 years imprisonment, whereas the Prosecution recommended a sentence not exceeding 11 years; *Prosecutor v. Milan Babić*, IT-03-72-A, Judgement on Sentencing Appeal, Appeals Chamber, 18 July 2005. Dragan Nikolić was finally sentenced to 20 years of imprisonment, the Prosecution recommending only 15 years; *Prosecutor v. Dragan Nikolić*, IT-94-2-A, Judgement on Sentencing Appeal, Appeals Chamber, 4 February 2005.

³⁵ According to Dixon and Demirdjian (2005) 3 *JICJ* 680, 681, 'the average sentence for an accused having pleaded guilty before the ICTY is approximately 11 years of imprisonment, whereas the average for cases that go to trial is approximately 17 years of imprisonment'. As Scharf has pointed out, sentence bargaining does not violate the treaty-based duty to prosecute and impose effective sentences in a technical sense, since the international criminal courts are not bound by the Geneva Conventions and the other treaties; (2004) 2 *JICJ* 1070, 1074 *et seq.*

³⁶ The ICTR has adopted nearly identical rules as the ICTY in r 62 sub-r B and r 62bis of its Rules of Procedure and Evidence. For similar provisions see sec 29 (A) of Reg 2000/30 of the East Timor Special Panel for Serious Crimes; Rules 61 and 62 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

³⁷ For details, see the second edition of this Commentary mn 13. As Schabas has pointed out the fact that 'the first person to admit guilt was then sentenced to a term of life imprisonment for genocide' could be the main reason for the minor importance of guilty pleas before the ICTR; Schabas, *ICC Commentary* (2010) 778. For other reasons see Burens (2013) 7/8 *ZIS* 322, 328.

B. Analysis and interpretation of elements

I. Paragraph 1: Valid admission of guilt

Article 64 para 8 (a) of the Statute affords the accused an opportunity to plead not guilty or – instead of entering a ‘guilty plea’, which would be the natural opposite in a number of jurisdictions –,³⁸ to make an ‘admission of guilt’, a hybrid between the common law ‘plea of guilty’ and the civil law formula ‘admission of the facts’ (a prerequisite in some jurisdictions for the applicability of abbreviated or summary proceedings).³⁹ The difference between the two concepts is not a substantial one, since a guilty plea is essentially ‘an accused person’s formal admission in court of having committed the charged offense’.⁴⁰ Nonetheless, the adoption of this language underlines that there is a difference between the procedure under this provision and a common law-style guilty plea, in particular, in that an admission of guilt under this provision is not binding on the Court and does not allow the Trial Chamber to move automatically to the sentencing stage.

The Statute envisions that an admission of guilt takes place at the very beginning of the trial: After the charges have been read and the Trial Chamber has satisfied itself that the accused understands the nature of the charges, the accused faces a choice to make an admission of guilt or to plead not guilty.⁴¹ If the accused admits his or her guilt, the Trial Chamber has to examine whether the prerequisites of paragraph 1 are met. In so doing, the Trial Chamber serves as ‘guarantor of the fairness of the proceedings and protector of the rights of the accused’.⁴²

Although the Statute is based on the concept that an admission of guilt takes place at the commencement of the trial, nothing hinders the accused to make an admission of guilt at a later stage of proceedings,⁴³ thus enabling the Trial Chamber to consider moving to the abbreviated procedure under article 65 para 2 or para 4 (a). If the accused wishes to make an admission of guilt *before* his case reaches the Trial Chamber, however, the procedure appears to be less simple: since under the Statute Pre-Trial Chambers appear to lack jurisdiction to entertain an admission of guilt,⁴⁴ proceedings would have to necessarily move forward – probably in an expeditious fashion, to the extent that the charges brought under article 61 of the Statute can be seen as uncontested – and reach the Trial Chamber, which then, if the admission of guilt is maintained or renewed by the accused, will proceed to make its own determination under article 65.

³⁸ This term is used in the Rules of Procedure and Evidence of the ICTY, ICTR and the Special Court for Sierra Leone. East Timor Regulation 2000/30 has adopted the same wording as the Rome Statute.

³⁹ See Model Code of Criminal Procedure for Latin America, art 371, Spanish Law for Abbreviated Procedure from 28 December 1988, arts 790 *et seq.*, Code of Criminal Procedure of Guatemala, art 464, Code of Criminal Procedure of Paraguay, art 420, Federal Code of Criminal Procedure of Argentina, art 431*bis*. All these provisions refer to an admission of, or conformity about, the facts as described in the charges brought by the Prosecution. However, it must be noted, that in many civil law countries the term ‘confession’ is used for an admission of facts by the suspect. See, eg, Austrian Code of Criminal Procedure, § 164 (4); German Code of Criminal Procedure, § 254.

⁴⁰ Garner (ed.), *Black’s Law Dictionary* (2009) 1268.

⁴¹ Art 64 para 8 (a).

⁴² Cf. *Nikolić* (Trial Chamber Judgement), see note 9, para 49.

⁴³ Concurring Safferling, *International Criminal Procedure* (2012) 444; Schabas, *The International Criminal Court. A Commentary on the Rome Statute* (2010) 777. - Before the ICTY, some accused changed their plea in the middle of trial; Milan Simić pleaded guilty in day 83 of the Prosecution presenting its evidence, when four of the five witnesses to testify against the accused had already been heard. Despite the lateness of the plea, the Trial Chamber gave him ‘some credit for entering a plea of guilty’, because the guilty plea spared the expense for medical facilities the accused needed; *Simić* (Trial Chamber II Judgement), see note 14, paras 85 *et seq.*

⁴⁴ The applicable procedure is enshrined in arts 64 and 65, both only applicable to the Trial Chamber. Further, whereas under art 61 para 11 a Trial Chamber may exercise any function of the Pre-Trial Chamber which can be meaningfully transposed to the former’s own proceedings, the converse is not true: no provision of the Statute empowers Pre-Trial Chambers to exercise functions allocated to Trial Chambers.

- 17 As clearly expressed by article 65 para 1 (b), the admission of guilt has to be made by the accused personally in order to allow the application of the abbreviated proceedings. The personal nature and importance of the rights waived so require and exclude the possibility of an admission presented by defence counsel or by any means other than the personal appearance of the accused before the Trial Chamber.⁴⁵ This is also a logical consequence of the supervisory powers of the Trial Chamber over the admission of guilt, since only through a communicative process with the accused can the Chamber satisfy itself that the accused is fully informed and the admission voluntarily made. Since an admission of guilt may directly lead to the conviction of the accused according to paragraph 2, the Trial Chamber should examine the admission and any plea agreement in an open hearing to avoid any doubts on the voluntariness of the admission of guilt or on the fairness of the proceedings.⁴⁶
- 18 Probably in most cases, an admission of guilt will be based on a plea agreement between the Prosecutor and the accused.⁴⁷ However, such an agreement is not necessary. The accused may make an admission of guilt even without the participation of the Prosecutor. Before the ICTY, plea agreements have been presented to the Trial Chamber in writing and the hearing focuses on the basis of the agreement, together with any supporting material attached to it. The Chamber must make a comprehensive consideration of the admission of guilt and pursuant to rule 139 sub-rule 2, must then give reasons for each decision, which shall be placed on the record.

It is important to keep in mind that while article 65 allows a Trial Chamber to by-pass the full trial and follow the abbreviated procedure foreseen in the provision, there is no equivalent authority conferred on Pre-Trial Chambers. Thus, even in a case where the person named in an arrest warrant or a summons to appear has made clear his or her intentions to admit guilt, a Pre-Trial Chamber must still follow a full confirmation process. Of course, to the extent that the charges brought by the Prosecution are uncontested, this will undoubtedly shorten proceedings.

1. Understanding of nature and consequences

- 19 This is a fundamental requirement, borrowed by the framers from the principles in common law systems governing the plea procedure: ‘What is at stake for an accused facing ... imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence’.⁴⁸ To understand ‘the nature’⁴⁹ and consequences of an admission of guilt, an accused must be properly informed about: a) the nature of the charges brought against him or her, including the elements and legal requirements of the crimes included therein;⁵⁰ b) the rights waived by the admission of guilt, and the consequences of such a waiver.⁵¹
- 20 With regard to the requirement under a) the accused has to understand the distinction between alternative charges, if these have been brought by the Prosecution, including which

⁴⁵ See Italian Corte di Cassazione, sez VI 26 maggio 1993 n 5300. Concurring Terrier, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1277, 1287.

⁴⁶ The Rules of Procedure and Evidence fail to regulate this issue. The ICTY Rules are more elaborate in this respect: R 62ter sub-r (c) stipulates that, in principle, a plea agreement has to be disclosed in open session, unless on a showing of good cause.

⁴⁷ For plea agreements see further below mn 40 *et seq.*

⁴⁸ *Boykin v. Alabama*, 396 US 238; 89 S Ct 1709, 23 L Ed 2 d 274 (1969).

⁴⁹ The particular dimension of the crimes within the jurisdiction of the Court may create particular problems as to this requirement. A clear example is provided by the ICTY case *Prosecutor v. Dragoljub Kunarac*, IT-96-23-I, in which the accused’s guilty plea of one count was deemed not to have been entered: whereas the accused acknowledged his guilt for some of the facts contained in the indictment, notably rape, the Trial Chamber determined that he did not understand the nature and implications of the charges brought by the Prosecutor (crimes against humanity and war crimes) for those facts.

⁵⁰ US Federal Rules of Criminal Procedure, R 11 (c). Joint Separate Opinion of Judge McDonald and Judge Vohrah in *Erdemović*, see note 23, paras. 17–27.

⁵¹ Joint Separate Opinion of Judge McDonald and Judge Vohrah in *Erdemović*, see note 23, para 15.

charge contains a more serious offence and can lead to a heavier penalty.⁵² If the accused lacks the intellectual capacity for understanding the nature of the charges,⁵³ his or her admission of guilt is invalid and the Trial Chamber has to proceed under paragraph 3. The Trial Chamber may also examine whether the legal characterization of the admitted facts is correct. If in its opinion the parties erred in this respect, the Chamber should inform the parties and give them the opportunity to enter a new plea agreement.⁵⁴ If the legal qualification of the facts is doubtful and needs clarification by a Court or if the legal elements of criminal responsibility are uncertain, the Chamber should reject the admission of guilt altogether and proceed under paragraph 3.⁵⁵

With regard to the applicable penalty in the case of a conviction some systems demand 21 that the court inform the defendant about the minimum and maximum penalties that can be imposed, including issues related to parole or supervised term.⁵⁶ Should the Trial Chamber of the ICC provide the accused person with similar information? The Statute does not provide for minimum penalties (article 77), but includes maximum penalties⁵⁷ which should be explained to the accused, as well as the accessory or additional consequences or sanctions set forth in article 77 para 2. The same applies to the criteria set forth in article 78 for the purposes of determining the sentence and the principles governing reduction of sentence by the Court pursuant to article 110 and rule 223. In particular, the Chamber has to satisfy itself that the accused understands that sentence is ultimately a matter for the Trial Chamber to determine, irrespective of the sentence proposed by the Prosecutor or the defence. Only if all this information is provided to an accused person, will he or she be in a position to understand fully the possible and probable consequences of the admission of guilt.

A further issue is linked to the waiver of rights contained in the admission of guilt. An 22 accused who makes an admission of guilt is waiving, at very least, his or her right to a full public hearing, article 67 para 1, to remain silent, article 67 para 1 (g), to be present at trial and to conduct his or her own defence, article 67 para 1 (d), to cross-examine witnesses, to raise defences and to present other evidence, article 67 para 1 (e). In addition, an admission of guilt also implies a waiver of the procedural right to obtain a separate hearing for the purposes of sentencing, where additional evidence or submissions relevant to the sentence may be heard, article 76 para 2. This, however, should not be read as a preclusion of the rights of an accused to present evidence or make submissions related to the penalty to be imposed. On the contrary, since the Trial Chamber, in the case of the proceedings under article 65, is entirely free to determine the appropriate sentence,⁵⁸ it would be inadmissible to deprive an accused person of the fundamental right to seek a specific sentence by means of arguing on the existing evidence or by presenting additional evidence. The rationale underpinning the language of article 76 para 2⁵⁹ is that, since an admission of guilt has been made,

⁵² Joint Separate Opinion of Judge McDonald and Judge Vohrah in *Erdemović*, see note 23, para 19.

⁵³ In this respect, Rule 135 empowers the Trial Chamber to order that the accused be given a psychological or psychiatric examination.

⁵⁴ E.g., in *Babić* the Trial Chamber of the ICTY expressed doubts about the legal characterization of the facts as aiding and abetting to the joint criminal enterprise. In the new plea agreement, Babić pleaded guilty as a co-perpetrator of the joint criminal enterprise; *Prosecutor v. Milan Babić*, IT-03-72, Further Initial Appearance, Trial Chamber I, 27 January 2004, pp. 29 *et seq.*

⁵⁵ This situation has to be distinguished from a mere uncertainty of the defence concerning legal issues. The Trial Chamber should try to clarify the issue, if in its view the legal qualification is clear. Cf. *Prosecutor v. Ranko Česić*, IT-05-10/1-S, Motion Hearing, Trial Chamber, 8 October 2003, pp. 81 *et seq.* where the defence hesitated to follow the Prosecution in considering the forcing of two men to perform fellatio on each other as rape.

⁵⁶ US Federal Rules, R 11 (c) (1); German Code of Criminal Procedure, § 257c (3).

⁵⁷ 30 years of imprisonment or, in the case of extreme gravity of the crime and undefined individual circumstances of the convicted person, life imprisonment, art 77 para 1 (a) and (b).

⁵⁸ Art 65 does not contemplate any possibility of agreements binding on the Court as to the penalty to be imposed. This issue will be further discussed below mn 40 *et seq.*

⁵⁹ '[e]xcept where article 65 applies ... the Trial Chamber ... shall, at the request of the Prosecutor or the accused, hold a further hearing ...'.

there is no danger in a common evaluation of the evidence relevant to the conviction and to the sentence; accordingly, there is no need for a separate pre-sentencing hearing.

- 23 Before the ICTY, plea agreements usually contain the waiver of the accused's right to appeal: the accused 'agrees that he will not appeal the sentence imposed by the Trial Chamber unless the sentence imposed is above the range recommended by the Prosecution'.⁶⁰ The Statute and Rules are silent on these issues, so it is open to the Chambers of the Court to accept or reject waivers of this nature.⁶¹
- 24 In contrast to the ICTY Rules, the Rome Statute does not explicitly provide that the admission of guilt is unequivocal. But this requirement is implicitly included in article 65 para 1 (a), according to which the accused must understand the nature and consequences of the admission of guilt. If, for instance, the accused raises any defences, thereby admitting certain facts, but not his or her guilt, it cannot be held that he fully understood the nature of an admission of guilt.⁶² In this case the Chamber should explore this question thoroughly and eventually hold the admission of guilt as not having been made and proceed according to paragraph 3.⁶³

2. Voluntary admission after consultation with counsel

- 25 In order to be accepted by the Trial Chamber, the admission of guilt needs to be made voluntarily after sufficient consultation with defence counsel.⁶⁴ The Trial Chamber must satisfy itself that the admission of guilt is free from any form of threat, coercion⁶⁵ or duress, and even from any sort of improper promise made to the accused person with the aim of inducing the acknowledgement of criminal responsibility.⁶⁶ A finding that any of these prohibited methods have been used will render the admission of guilt null and void, and will require the case to be sent to trial in the ordinary way, pursuant to paragraph 3 of article 65. There is a clear parallel between these requirements and those governing the questioning of a 'suspect' or an accused, according to articles 55 paras. 1 (a) and 2, and 67 para 1 (g) of the Statute, since in both cases the privilege against self-incrimination (*nemo tenetur se ipsum accusare*) is the crucial principle at stake.⁶⁷ The Trial Chamber has a duty to inquire about the voluntariness of the decision reached by the accused in order to satisfy itself as to whether that particular requirement has been met. Any doubt by the Trial Chamber in this respect should lead to a rejection of the admission of guilt.

3. Supporting facts

- 26 This is a fundamental requirement of the abbreviated proceedings under article 65: the mere admission of criminal responsibility not substantiated by the facts of the case cannot lead to a decision of the Court through the summary procedure set forth in this provision.⁶⁸

⁶⁰ For many plea agreements of that kind, see only Plea Agreement between the Prosecutor and Ranko Cesić; *Prosecutor v. Ranko Cesić*, IT-95-10/1-PT, Plea Agreement.

⁶¹ Cf. the decision on the admissibility of plea agreements of the German Bundesgerichtshof from 3 March 2005, GSSt 1/04 [2005] NJW 1440, 1444 *et seq.* – Actually, neither the Statute nor the Rules regulate whether, in general, a waiver of the accused's right to appeal is admissible before the ICC.

⁶² Cf. *Erdemović* before the ICTY, see note 23, paras 28 *et seq.* However, the accused may raise mitigating circumstances which are not intended as a defence; Cf. *Banović* (Trial Chamber II Judgement), see note 14, para 17.

⁶³ Another kind of an equivocal guilty plea appeared in the Kunarac case before the ICTY, where the accused did not clearly express whether he wanted to plead guilty or not; Third Hearing of the adjourned Initial Appearance of the Accused; *Prosecutor v. Dragoljub Kunarac*, IT-96-23-I, 13 March 1998, 34 *et seq.*

⁶⁴ Consultation with defence counsel is to classify as a mandatory requirement. Anyhow, in practice, a scenario that a self-represented accused wants to admit guilt would seem unlikely; Schabas, *ICC Commentary* (2010) 778.

⁶⁵ As Terrier, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1277, 1287 has pointed out, such a pressure can even arise from third parties who want to impede a public hearing of facts.

⁶⁶ *US v. Pollard*, 959 F 2 d 1011 (D.C. Cir. 1992).

⁶⁷ *Brady v. US*; 397 US 742 (1970).

⁶⁸ This is clarified by the word 'and' in subpara (c) (ii).

How far must the Trial Chamber dig into the factual basis of the admission of guilt in order to be satisfied that it is ‘supported by the facts of the case’? It has been pointed out that in some jurisdictions, courts may approach the issue in different ways: some would be satisfied with a ‘notice-factual-basis procedure’, ie, inform the defendants about the factual shortcomings of their admission or plea, but allow that the plea be entered despite these defects. The clear language of article 65 rules out this possibility: rather, the Trial Chamber is bound to embark on a ‘trial-factual basis-procedure’, and ensure that sufficient facts be shown ‘to warrant a conviction if the defendant were to stand trial’.⁶⁹ In this respect, the Statute is stricter than the Rules of the ICTY and ICTR according to which the mere ‘lack of any material disagreement between the parties about the facts of the case’ may constitute sufficient facts for the crime and the accused’s participation in it.⁷⁰

Article 65 para 1 (c) obliges the Trial Chamber to examine the materials presented by the Prosecutor and other evidence, including testimony of witnesses, presented by the parties. A clear differentiation between these two groups of evidence is essential, since materials presented by the Prosecutor must be accepted by the accused, whereas ‘any other evidence’ may be presented by each party without the approval of the other party.

It must be noticed that the language in article 65 para 1 (c) (ii), according to which the materials presented by the Prosecutor must ‘supplement’ the charges, differs from other provisions which refer to ‘supporting’ material.⁷¹ Despite this linguistic discrepancy, it is to presume that the drafters meant to refer to materials that *support* the charges. This follows from the preliminary sentence of paragraph (c) according to which the admission of guilt must be *supported* by the facts of the case contained in, inter alia, the materials presented by the Prosecutor.⁷²

If the parties, and in particular the Prosecution, fail to provide sufficient evidence or the Trial Chamber considers the presented evidence as insufficient, the Chamber may request the Prosecutor to present additional evidence or it may order the continuation of the ordinary trial procedure as provided in paragraph 4.

II. Paragraph 2: Conviction according to an admission of guilt

The paragraph empowers the Trial Chamber, if it is satisfied that all requirements and conditions for a valid admission of guilt under paragraph 1 have been accomplished, to consider that the crime charged, and admitted by the accused, has been proved beyond a reasonable doubt, according to the standard set forth in article 66 para 3 (presumption of innocence), and accordingly to convict⁷³ the accused. The language ‘may convict the accused of that crime’ refers to the discretionary authority of the Trial Chamber to decide that the trial shall continue under the normal procedures in the scenarios envisaged in paragraphs 3 and 4 (b).

A question remains as to the possibility of an accused admitting guilt for certain charges, but not for others. In this scenario, the Trial Chamber could (a) convict the accused of the crimes in relation to which he has made an admission of guilt and hold a trial for the

⁶⁹ Saltzburg and Capra, *American Criminal Procedure* (1996) 843.

⁷⁰ R 62bis (iv) ICTY Rules of Procedure and Evidence, r 62 sub-r (B) (iv) ICTR Rules of Procedure and Evidence. R 62 (iv) SCSL Rules of Procedure and Evidence is insofar identical. In contrast, East Timor Reg 2000/30, sec 29 (A).1. (c) has adopted almost the same wording as art 65 Rome Statute. – It must be noted, however, that in its practice the ICTY has approached the standard of the ICC; see Damaška (2004) 2 *JICJ* 1018, 1037 *et seq.*

⁷¹ *E.g.*, art 15 para 3, art 89 para 1, r 159. See further art 61 para 5 according to that at the confirmation hearing, ‘the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged’.

⁷² The French version seems more accurate using the phrase ‘qui accompagnent les charges’. *Cf.* the non-binding German translation: ‘welche die Anklage erhärten’ (which confirm the charges).

⁷³ The ICTY and ICTR Rules of Procedure and Evidence use instead the phrase ‘enter a finding of guilt’.

remaining charges,⁷⁴ without prejudice to the Prosecution's right to request permission to withdraw such charges after the commencement of trial under article 61 para 9;⁷⁵ or (b) conclude that it would not be appropriate to disaggregate the charges that have been admitted by the accused in this manner and that a full presentation of the facts is required in the interests of justice, and consequently remand the entire set of charges for trial under article 65 para 4.

- 33 If a person jointly charged has made an admission of guilt and the Trial Chamber proceeds in accordance with article 65 para 2, the Chamber may, at the request of the Prosecutor or the defence or on its own motion, separate trials according to rule 136 sub-rule 1. One of the consequences of separating trials is that the accused having made an admission of guilt can be used as witness against his former co-accused.
- 34 After the Trial Chamber has convicted the accused, it passes into sentencing procedure according to article 76.⁷⁶

III. Paragraph 3: Invalid admission of guilt

- 35 If the requirements set forth in paragraph 1 are not met, the procedures have to return to the status quo ante, ie, to the point at which they were before the rejected admission of guilt was made, which must be mandatorily considered 'as not having been made'. This is an obvious consequence of the very essence of the procedures envisaged in article 65: a waiver of such a significant number of substantive rights by an accused, that is not supported by a solid factual basis, or has not been informed, or has not been voluntarily made, must not only be rejected; it cannot result in any prejudice whatsoever to the accused. It is null and void, and can only be stricken from the record, with no implications adverse to the accused being drawn from it.⁷⁷
- 36 The final version of the provision states that the Trial Chamber 'may remit the case to another Trial Chamber', instead of using the mandatory formula contained as an option in earlier versions,⁷⁸ which was intended to ensure the impartiality of the judges that would hear the case at trial, as guaranteed by article 67 of the Statute and article 14.1 of the ICCPR. The adopted language gives discretion to the Trial Chamber either to remit the case to another chamber or to retain jurisdiction over the case.

IV. Paragraph 4: More complete presentation of facts in the interests of justice

- 37 Paragraph 4 is a compromise between legal systems that do not allow a summary end to the trial or an automatic conviction in case of an admission of guilt and the common law

⁷⁴ Differing Terrier, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1277, 1288, who considers that the Trial Chamber may only in 'special circumstances' dissociate the proceedings on that ground; Safferling, *International Criminal Procedure* (2012) 447 *et seq.*; Schabas, *ICC Commentary* (2010) 779.

⁷⁵ A recent decision by ICC's Trial Chamber I in *Prosecutor v. Thomas Lubanga Dyilo* specifies that such request can only happen once formal trial proceedings have begun; see *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, Trial Chamber I, 13 December 2007, paras 45 and 40 <<https://www.legal-tools.org/doc/257c48/>>, the latter defining 'commencement of the trial' as 'the true opening of the trial, when the opening statements, if any, are made prior to the calling of the witnesses'.

⁷⁶ For details, see mn 22; W. Schabas below art 76 mn 7.

⁷⁷ A similar safeguard is contained in the Codes of Procedure of Costa Rica, art 375, Paraguay, art 421, and Argentina, art 431: the admission of the facts by the accused shall not be considered as a confession. – The Rome Statute and the Rules are silent on the question what is to become of evidence presented by the defence according to Art. 65 para 1 (c) (iii). It has been considered to treat this evidence as non-existent; Schabas, *ICC Commentary* (2010) 779.

⁷⁸ See 'Report of the Preparatory Committee, Draft Statute and Draft Final Act' (1998) UN Doc A/CONF.182/2/Add.1, art 65 paras 3 and 4, p 126, both containing 'shall' as an option.

approach on guilty pleas. The Trial Chamber may request the Prosecutor to present additional evidence or to apply the ordinary trial procedure, if ‘a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of victims’. Due to this paragraph, the Chamber is in a position to consider the quality of justice when deciding if the admission of guilt is acceptable.⁷⁹ The ‘interests of justice’ comprise, in particular, the importance of the facts for the historical record and the interests of victims to be heard in a public trial.⁸⁰

Paragraph 4 (a) gives the Trial Chamber a third option before making a decision whether or not to accept an admission of guilt, namely to broaden the inquiry on the factual basis of the case by asking the Prosecutor to ‘present additional evidence, including the testimony of witnesses’, which, it has been argued, should be done in a public hearing.⁸¹ Even if the provision is silent on the point, it should be accepted that the Trial Chamber retains the powers set forth in article 64 para 6 (b) and (d) to call for supplementary evidence on its own motion.⁸² This is consistent with the fact that abbreviated proceedings under article 65 are not a classical ‘guilty plea’ procedure. Rather, they provide for a higher involvement of the Court in determining the facts underpinning the admission of guilt. However, the Chamber should prudently exercise these powers and avoid an unnecessarily lengthy hearing under article 65, only to later remand the case to the normal trial procedures, under subparagraph (b).

Subparagraph (b) allows the Trial Chamber to retain jurisdiction over the case after deciding that the trial should continue under normal trial procedures, instead of requiring the case to be remitted to another Trial Chamber.

V. Paragraph 5: Non-binding effect of plea agreements

The language of paragraph 5 was not included in the first draft of current article 65⁸³ and was adopted only to ease the concerns of some delegations which wanted to ensure that the procedures under article 65 would not open the way to the introduction of plea bargaining in the context of the Statute. Ironically, the language in paragraph 5 presupposes exactly what it intends to avoid: the existence of discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed.⁸⁴ At the same time, it must be acknowledged that statements of principle of this kind usually fail to reflect what in reality takes place. As pointed out by one commentator, despite the clear statement contained in the first ICTY annual report to the Security Council and the General Assembly, claiming that ‘the practice of plea bargaining finds no place in the rules [of the Tribunal]’, the first valid guilty plea in the history of the ICTY (*Prosecutor v Erdemović*) was the result of a plea bargain agreement between the accused and the Prosecutor.⁸⁵

⁷⁹ In doing so, the Chamber may hear the Prosecutor and the defence; r 139. In the opinion of Schabas, *ICC Commentary* (2010) 779 *et seq.* the representatives of the victims should also be heard.

⁸⁰ See Behrens, in: Lee (ed.), *The International Criminal Court* (1999) 238, 242; Terrier, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1277, 1289; Orié, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1477, 1481.

⁸¹ Cf. Orié, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1477, 1481.

⁸² The necessity to look beyond the evidence presented by the parties was demonstrated in the case against Miroslav Deronjić before the ICTY. The Trial Chamber found discrepancies between the indictment and the agreed factual basis of the plea agreement and, therefore, ordered a continuation of the sentencing hearing. During the hearing, the Chamber admitted transcripts of the accused’s testimony in other cases into evidence; see *Deronjić* (Trial Chamber II Judgement), see note 14, para 3. The Appeals Chamber confirmed this approach; *Prosecutor v. Miroslav Deronjić*, IT-95-9/2-S, Judgement on Sentencing Appeal, Appeals Chamber, 20 July 2005, paras 16 *et seq.*

⁸³ See ‘Report of the Preparatory Committee’, see note 1, 174 article 38*bis*.

⁸⁴ Cf. Friman (2003) 2 *LAPE* 373; 393.

⁸⁵ Tochilovsky, ‘Rules of procedure for the International Criminal Court: problems to address in light of the experience of the ad hoc tribunals’, (1999) 46, 3 *NethILRev* 344.

- 41 As already advanced, the reference to discussions between the Prosecution and the defence regarding ‘modification of the charges’ supports the conclusion that charge bargaining is admissible before the ICC.⁸⁶ However, since after the commencement of trial, withdrawal of charges depends on the permission of the Trial Chamber,⁸⁷ substantial components of the outcome of such bargaining may have to be approved by this Chamber.⁸⁸
- 42 Paragraph 5 underlines the independence of the Trial Chamber vis-à-vis any agreement reached by the parties. Indeed, like the ICTY Prosecutor,⁸⁹ the ICC Prosecutor would have little to offer in a plea bargain, apart from the promise of a recommendation for a less severe sentence, since determination of the sentence is an exclusive power of the Trial Chamber,⁹⁰ or the promise to withdraw or amend the charges filed. If the Prosecutor unduly promises to an accused advantages that he or she is not in a position to guarantee, the admission of guilt would be tainted as to its voluntariness, paragraph 1 (b), and should be rejected by the Trial Chamber.
- 43 Although the Trial Chamber is not bound to plea agreements, the practice before the ICTY shows that judges have generally respected them. Even proposals for a certain sentence or sentencing range are respected in the majority of cases.⁹¹ So whereas in strictly legal terms the Prosecutor is in no position to guarantee a given outcome, the existing practice sends the message to the parties that absent extraordinary circumstances, such agreements will not be disturbed.

⁸⁶ Bohlander, in: May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001) 151, 157; see also Terrier, in: Cassese (ed.), *The Rome Statute of the International Criminal Court* (2002) 1277, 1288.

⁸⁷ Art 61 para 9.

⁸⁸ According to Bohlander, in: May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001) 151, 158, before the commencement of trial, the Prosecutor must seek the permission of the Pre-Trial Chamber for the withdrawal of charges, if the charges have already been confirmed.

⁸⁹ Tochilovsky, ‘Rules of procedure for the International Criminal Court: problems to address in light of the experience of the ad hoc tribunals’, (1999) 46, 3 *NethILRev* 345 fn 9.

⁹⁰ It must also be noticed that no crime within the jurisdiction of the Court is attached to any specific sentencing range, but to the general provisions set forth in Part 7.

⁹¹ See at note 34.

Article 66 Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Literature: Bassiouni, M.C., ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’, (1993) 3 *DukeJComp&IL* 235; *id.* and Manikas, P., *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers 1995); Blakesley, C.L., ‘Commentary on Parts 5 and 6 of the Zutphen Inter-Sessional Draft: Investigation, Prosecution & Trial’ (1998) 13*bis NEP* 69; Harris, D.J., O’Boyle, M., Bates M., and Buckley, C., *Harris, O’Boyle and Warbrick Law of the European Convention on Human Rights*, iii (OUP 2014); Heinze, A., *International Criminal Procedure and Disclosure* (Duncker and Humblot 2014); Klamberg, M., *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Martinus Nijhoff 2013); May, R. and Wierda, M., ‘Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha’ (1999) 37 *ColumbiaJTransnat’IL* 754; McDermott, Y., ‘Inferential Reasoning and Proof in International Criminal Trials’ (2015) 13 *JICJ* 507, Noor Muhammad, H.H., ‘Due Process of Law for Persons Accused of Crime’ in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia UP 1981) 138; Pruitt, R.C., ‘Guilt by Majority in the International Criminal Tribunal for the former Yugoslavia: Does this Meet the Standard of Proof ‘Beyond Reasonable Doubt’? (1997) 10 *LeidenJIL* 557; Stavros, S., *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Brill 1993); Triffterer, O., ‘Sind § 42 und seine Ausformung im Prozeßrecht mit Artikel 6 EMRK vereinbar?’, (1982) *ÖJZ* 617 and Part 2, 647; *id.*, ‘Zur Einschränkungbarkeit der Menschenrechte und zur Anwendbarkeit von Verfahrensgrundsätzen bei freiheitsbeschränkenden Disziplinarmaßnahmen in ‘besonderen Gewaltverhältnissen’’, (1976) *EuGRZ* 363 and Part 2, (1977) *EuGRZ* 136; Vasiliev, S., ‘Closing Arguments’ in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 543; White, R.C.A. and Ovey, C., *Jacobs, White and Ovey: The European Convention on Human Rights* (OUP 2010).

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1	10
1. ‘Everyone’	11
2. ‘the Court’	15
3. ‘in accordance with the applicable law’	16
II. Paragraph 2: Onus of proof.....	18
III. Paragraph 3: Reasonable doubt	24
C. Special remarks	27
I. Non-respect by other bodies.....	27
II. Majority or unanimity?	29
III. Judicial notice	30
IV. Evidence of similar conduct	31
V. Provisional release	32

A. Introduction/General remarks

The French *Déclaration des droits de l’homme et du citoyen* of 1789 recognizes, at article 9, 1 ‘[t]out homme étant présumé innocent jusqu’à ce qu’il ait été déclaré coupable’¹. The same principle was recognized by common law courts. A famous English judgment states that ‘where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt ...’².

¹ ‘Every man being presumed innocent until he has been declared guilty’.

² *Woolmington v. D.P.P.*, [1935] A.C. 462, 25 Cr. App. R. 72 (J.C.P.C.), p. 481 (A.C.).

- 2 What is an undisputed general principle of law³ was included in article 11 para. 1 of the *Universal Declaration of Human Rights*⁴ and echoed in the universal and regional human rights conventions⁵. It imposes the burden of proof upon the prosecution beyond a reasonable doubt, a specialized application in criminal law of a rule that is common to all forms of litigation, namely that the plaintiff has the burden of proof. But the presumption of innocence may have other manifestations, for example in the right of an accused person to interim release pending trial, subject to exceptional circumstances in which preventive detention may be ordered, the right of the accused person to be detained separately from those who have been convicted, and the right of the accused to remain silent during the investigation and during trial. Several of the rules that reflect the presumption of innocence are incorporated within the ICC *Statute*, for example: during an investigation (article 56), including the right '[t]o remain silent, without such silence being a consideration in the determination of guilt or innocence'; interim release (article 59 paras. 3–6, article 60 paras. 2–4); rights of the accused at trial (article 67, particularly para. 1 (g) and (i)); requirement of a two-thirds majority for a finding of guilt (article 74 para. 3); grounds for appeal, which are larger for the defence than for the prosecution (article 81 para. 1)⁶. Nevertheless, it was also felt necessary to affirm the principle generally and explicitly.
- 3 The provision enshrining the presumption of innocence appears in Part 6 of the *Statute*, entitled 'The Trial'. It immediately precedes the provision concerning the rights of the accused at trial. In the international human rights treaties the presumption of innocence is generally contained within the general provision concerning fair trial rights. This was the placement recommended by the International Law Commission (ILC) in its Draft Statute⁷. But during the drafting of the *Statute*, the Preparatory Committee considered as an alternative the positioning of the presumption of innocence provision within the Part dealing with General Principles⁸. The working groups on general principles and on procedures each generated an identical text recognizing the presumption of innocence. The report of the Inter-Sessional meeting at Zutphen recommended that it be placed in Part 6 and this choice was endorsed by the Preparatory Committee in its Final Report.

B. Analysis and interpretation of elements

- 4 The ILC Draft Statute contained the following provision: 'An accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt'⁹. The second sentence, containing

³ Pradel, *Droit Pénal Comparé* (2008) 249–250; Bassiouni (1993) 3 *DukeJComp&IL* 235, 266, n. 143.

⁴ GA Res. 217 A (III), UN Doc. A/810 (1948).

⁵ American Declaration of the Rights and Duties of Man, O.A.S. Doc. OEA/Ser.L.V/I.4 (1948), article XXVI; ICCPR, 999 UNTS 171, *entered into force* 23 Mar. 1976, article 14 para. 2; American Convention on Human Rights, 1144 UNTS 123, *entered into force* 18 July 1978, article 8 para. 2; ECtHR, 213 UNTS 221, *entered into force* 3 Sep. 1953, article 6 para. 2, and on this provision see Triffterer (1982) *ÖJZ* 617 and part II 647; African Charter on Human and People's Rights, OAU Doc.CAB/LEG/67/3 rev. 5, *entered into force* 21 Oct. 1986, article 7 para. 1 (b); Convention on the Rights of the Child, GA Res. 44/25, Annex, *entered into force* 2 Sep. 1990, article 40 para. 2 (b) (i).

⁶ See Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1995) 961, for a similar observation on the Statute of the ICTY, SC Res.827, Annex, and its Rules of Procedure and Evidence, UN Doc. IT/32.

⁷ 1994 ILC Draft Statute, article 40, p. 114.

⁸ 1996 Preparatory Committee I, para. 179, p. 41, article T.

⁹ See note 7, article 40. See also: Code of Crimes against the Peace and Security of Mankind, UN Doc. A/51/332 (1996), 18 *HRLJ* 96, article 11 para. 1: 'An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty...'. The Statutes of the *ad hoc* Tribunals contain the following: 'The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute': Statute of the ICTY, see note 6, article 21 para. 3; Statute of the ICTR, SC Res.955, Annex, article 20 para. 3.

the reference to the 'reasonable doubt' standard had not been included in the 1993 ILC draft. However, that earlier version was accompanied by a commentary that left no doubt about this issue:

'This provision recognizes that in a criminal proceeding the accused is entitled to a presumption of innocence and the burden of proof rests with the prosecution. The presumption of innocence is recognized in article 14, paragraph 2, of the International Covenant on Civil and Political Rights which states that 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. The Prosecutor has the burden to prove every element of the crime beyond a reasonable doubt or in accordance with the standard for determining the guilt or innocence of the accused. If the Prosecutor fails to prove that the accused committed the alleged crime, then the person must be found not guilty of the charges contained in the indictment'¹⁰.

Article 40 of the ILC Draft Statute was one of the very rare provisions on which the *Ad Hoc* Committee that met in 1995 made no comments in its report, perhaps indicating its uncontroversial nature¹¹. However, the *Ad Hoc* Committee did insist on respect, by the court, of 'the highest standards of justice, integrity and due process', which, clearly, comprise the presumption of innocence¹².

During the March-April 1996 session of the Preparatory Committee, an informal group 5 pursued work on general principles following the guidelines set out by the *Ad Hoc* Committee¹³, and in the Committee's report to the General Assembly in late 1996 a section was added to the Draft Statute entitled 'General Principles of Criminal Law'. It consisted of a series of twenty draft articles, including a provision dealing with the presumption of innocence: 'An accused shall be presumed innocent [until] [unless] [proved guilty] [convicted] in accordance with [this Statute] [law]. [The onus is on the prosecutor to establish the guilt of the accused [beyond reasonable doubt]]'¹⁴. Two footnotes were included, indicating that the presumption of innocence was both a procedural and a substantive right¹⁵. The issue was also reviewed by the informal group on procedural matters when it met in August 1997. The group was aware of the work accomplished earlier in the year by the other informal group on the subject¹⁶, but at its August 1996 meeting it developed a new version: 'Anyone [accused] [charged with a criminal offence] [suspected of committing a crime within the meaning of this statute] shall be presumed innocent until proved guilty [in accordance with law]. [The onus is on the Prosecutor to establish the guilt of the accused.] [The accused is declared guilty only when the majority of the Trial Chamber considers that the guilt of the accused has been proved] beyond a reasonable doubt'¹⁷.

The Working Group on General Principles met during the February 1997 session of the 6 Preparatory Committee, but it did not examine the presumption of innocence provision for lack of time¹⁸. At the August 1997 session of the Preparatory Committee, the Working Group on Procedural Matters considered the presumption of innocence provision, and adopted a text that was identical to the ILC Draft, except that the initial words '[a]n accused' were replaced with '[e]veryone'¹⁹. A footnote mentioned that the requirement that guilt be established by a majority of the Trial Chamber could be addressed in article 45²⁰. A second footnote observed

¹⁰ Report of the International Law Commission on the work of its forty-fifth session (3 May-23 July 1993), UN Doc. A/48/10*, p. 119.

¹¹ *Ad Hoc* Committee Report, p. 35.

¹² *Ibid.*, para. 129, p. 29.

¹³ 1996 Preparatory Committee I, see note 112.

¹⁴ 1996 Preparatory Committee II, Part 3*bis*, p. 104; also UN Doc. A/AC.249/CRP.9.

¹⁵ *Ibid.*, Part 3*bis*, p. 104: '[Note 1. The presumption of innocence is also a procedural matter.] [Note 2. Presumption of innocence [also] constitutes a substantive right of the accused]'

¹⁶ *Ibid.*, p. 194, fn.*.

¹⁷ *Ibid.*, p. 194; also UN Doc. A/AC.249/CRP.14. However, there are no explanatory comments on the provision in the Report: 1996 Preparatory Committee I, see note 112, p. 57.

¹⁸ UN Doc. A/AC.249/1997/L.5, Annex II, p. 18, para. 2.

¹⁹ UN Doc. A/AC.249/1997/L.8/Rev.1, p. 33; also UN Doc. A/AC.249/1997/WG.4/CRP.7. A footnote observed that the matter had also been considered by the informal working group on general principles of criminal law.

²⁰ UN Doc. A/AC.249/1997/L.8/Rev.1, p. 33, fn. 12.

that '[r]eservations were expressed regarding the phrases 'in accordance with law' and 'beyond a reasonable doubt' contained in the ILC text'²¹. At the December 1997 meeting of the Preparatory Committee, the Working Group on General Principles returned to the provision, and adopted a text that was identical to that of the Working Group on Procedural Matters²².

- 7 As a result, the Zutphen Draft of January 1998 contained two identical provisions on the presumption of innocence, one in the section dealing with general principles²³, the other in the section dealing with trial²⁴. The Draft opted for the section dealing with trial as the appropriate place within the *Statute* for the provision²⁵. This is what appeared in the Preparatory Committee's final Draft, adopted in April 1998²⁶. Thus, the ILC Draft had survived essentially intact.
- 8 At the Rome Conference, the provision was examined by the Working Group on Procedural Matters, and there the Preparatory Committee Draft underwent substantial modification. A working paper was submitted dividing the text into three distinct paragraphs, each consisting of a single sentence. Several words were underlined, reflecting efforts at compromise within the Committee. But this was obviously an unworkable solution, as the final version could not contain words that were underlined or italicized. The proposal read:

1. Everyone shall be presumed innocent until proved guilty *before the Court* in accordance with the law applicable to it.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court *must* be convinced of the guilt of the accused beyond reasonable doubt'²⁷.

Some argued that the provision should also recognize the right of the accused to raise defences and to present evidence. These views were reflected in a footnote, recommending that this be taken into account in drafting article 67 (rights of the accused) and article 69 (evidence)²⁸.

- 9 The proposed text was adopted by the Working Group with one minor change in the first sentence, removal of the word 'the' in the phrase 'with the law applicable to it'. The word 'must' in the third sentence remained underlined, although all other forms of emphasis were removed in the final version²⁹. The Drafting Committee eliminated the underlining altogether, and reworked the final words of the first sentence so as to read 'in accordance with the applicable law'³⁰.

I. Paragraph 1

- 10 Paragraph 1 consists of a general statement of the presumption of innocence. It is followed by two paragraphs setting out the burden of proof and the standard of proof. The European Court of Human Rights has defined the presumption of innocence as follows:

²¹ *Ibid.*, fn. 13. See also: UN Doc. A/AC.249/1998/L.13, p. 113, fn. 199; UN Doc. A/CONF.183/2/Add.1, p. 106, fn. 9.

²² UN Doc. A/AC.249/1997/L.9, p. 24.

²³ Zutphen Draft, p. 65, article P.

²⁴ *Ibid.*, p. 113, article 59.

²⁵ *Ibid.*, p. 65. This conclusion was not shared by academic commentators, however. See: Sadat Wexler (1998) 13*bis* NEP 40–41, 99.

²⁶ UN Doc. A/CONF.183/2/Add.1, p. 106, article 66.

²⁷ Proposed new text, UN Doc. A/CONF.183/C.1/WGPM/L.37* (29 June, reissued 4 July), p. 1; Working Paper on article 66, UN Doc. A/CONF.183/C.1/WGPM/L.37/Corr.1 (9 July), p. 1.

²⁸ *Ibid.*: 'In connection with this text, it was also suggested that the following provision should be added to article 67 or article 69: "The accused shall have the right to raise defences under the provisions of this Statute, and to present evidence in their support".'

²⁹ Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.2 (4 July), p. 4. Also: Compendium of draft articles referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998, UN Doc. A/CONF.183/C.1/L.58, p. 41.

³⁰ UN Doc. A/CONF.183/C.1/L.88, p. 5. This was the version adopted by the Committee of the Whole and the Plenary on 17 July: UN Doc. A/CONF.183/C.1.

‘It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him’³¹.

1. ‘Everyone’

The original ILC Draft recognized the presumption of innocence to ‘[a]n accused’³² but this was changed to ‘[e]veryone’ by the Preparatory Committee³³. This readily suggests that the presumption avails to protect suspects who have not been accused as well as appellants who have been convicted by the Trial Chamber and who are being sentenced, or whose cases are on appeal. A contrary conclusion is suggested, however, by the placement of the presumption of innocence within Part 6 of the *Statute*, concerning trial, and immediately prior to article 67 dealing with the ‘rights of the accused’.

That the presumption of innocence would apply at the investigation stage requires little explanation³⁴. Its effects are less significant than at the trial stage because issues such as burden of proof do not arise. However, it might give rise to an obligation on the prosecution not to reveal the names of suspects or to comment on their alleged culpability until a formal warrant of arrest is issued by the Pre-Trial Chamber³⁵. The presumption of innocence should also protect a suspect during the investigation stage by ensuring the right to silence³⁶. This is accomplished by a specific provision of the *Statute* protecting a suspect’s right ‘[t]o remain silent, without such silence being a consideration in the determination of guilt or innocence’³⁷. The Strasbourg jurisprudence concludes, however, that the presumption of innocence may not be invoked to obstruct the conduct of blood and similar tests³⁸, identity parades³⁹ or medical examinations⁴⁰, or to challenge an order to produce documents⁴¹.

It seems far less obvious that the presumption of innocence will apply at the sentencing stage. Indeed, the European Court of Human Rights has taken the view that the presumption deals with proof of guilt and that it is therefore inapplicable during the sentencing phase of trial, once guilt has already been determined⁴². It is difficult to conceive of how a person who has been found guilty can at the same time be presumed innocent. As a practical conse-

³¹ *Barberá, Messegué and Jabardo v. Spain*, Series A, No. 146, 6 Dec. 1988, para 77.

³² See note 7.

³³ 1996 Preparatory Committee II, see note 14, p. 194. Actually, it started with ‘anyone’, but this was later changed to ‘everyone’.

³⁴ See: Principle 36 (1) of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 42/173: ‘A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.’ This is the view taken by international human rights authorities. For example: Noor Muhammad, in: Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 138; Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1994) 254. But see: *X. v. Federal Republic of Germany* (App. No. 4483/70), (1971) 38 Coll. 77.

³⁵ *Situation in Libya*, ICC-01/11-17, Decision on the OPCD ‘Requête relative aux propos publics de Monsieur le Procureur et au respect de la présomption d’innocence’, 8 Sept. 2011.

³⁶ This is the view taken by international human rights authorities. For example: H. H. Noor Muhammad, ‘Due Process of Law for Persons Accused of Crime’, in: L. Henkin (ed.), *The International Bill of Rights; the Covenant on Civil and Political Rights* 138 (1981); M. Novak, *CCPR Commentary* 254 (1993). But see: *X v. Federal Republic of Germany* (App. No. 4483/70), (1971) 38 Coll. 77.

³⁷ Rome Statute, UN Doc. A/CONF.183/9, article 55 para. 2 (b).

³⁸ *X. v. Netherlands* (App. No. 8239/78), (1978) 16 D.R. 184.

³⁹ Harris et al., *Harris, O’Boyle and Warbrick Law of the European Convention on Human Rights* (2014) 460–467.

⁴⁰ *X. v. Federal Republic of Germany* (App. No. 986/61), (1962) 5 Y.B. 192.

⁴¹ *Funke v. France*, Series A, No. 256-A, 25 Feb. 1993, Commission Report, para. 69.

⁴² *Engel et al. v. Netherlands*, Series A, No. 22, 8 June 1976. On this decision, see: Triffiterer, (1976) EuGRZ 363 and Part II (1977) EuGRZ; Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (1993) 261; *Albert and Le Compte v. Belgium*, Series A, No. 58, 10 Feb. 1983. See also, Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1994) 254.

quence, this would mean that any evidence considered for the purposes of establishing the appropriate sentence need not be proven beyond a reasonable doubt. Although the *Statute* sets no special rule, general principles of law would suggest that evidence on sentencing be established on a balance of probabilities, with the burden to prove mitigating or aggravating factors resting on the defence and the prosecution respectively.

- 14 For the same reasons, it seems illogical to apply the presumption of innocence to an appeal taken only against the sentence. Similarly, if the appeal is taken by the prosecution against an acquittal, it is equally obvious that the presumption must continue to apply. To the extent that its principal focus is on evidentiary matters, the presumption of innocence must continue to benefit the convicted person on appeal. The appellate tribunal must reassess the sufficiency of evidence based on the same standard as the trial chamber. Where an appellant introduces new evidence on appeal, if it is deemed admissible it need only raise a reasonable doubt of guilt. The European Court of Human Rights has taken the view that the presumption of innocence continues to apply during appeal proceedings⁴³.

2. ‘the Court’

- 15 The term ‘the Court’ can only mean the International Criminal Court⁴⁴. The presumption of innocence is an obligation on all organs of the Court, as indicated by decisions on the statements of prosecution counsel⁴⁵, and a decision ordering the Registry to change a webpage of the Court’s website to indicate that an individual was a suspect, not an accused, prior to the Confirmation of Charges hearing⁴⁶. This follows the approach taken by the ICTY, where a Registry spokesperson’s remark that it would be ‘shameful’ to deny the genocide in Bosnia was deemed ‘inappropriate’ and contrary to the presumption of innocence principle⁴⁷.

3. ‘in accordance with the applicable law’

- 16 Although some writers have suggested a degree of ambiguity associated with the terms ‘in accordance’⁴⁸, it would seem clear enough that the reference is to the application of the law of the *Statute* to trials before the court. The term ‘applicable law’ is defined in article 21 of the *Statute*⁴⁹. It consists of a hierarchy, beginning with the *Statute*, Elements of Crimes and the Rules of Procedure and Evidence. These sources are followed, where appropriate, by applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. Failing that, the applicable law comprises general principles of law derived by the Court from national laws of legal systems of the world. The reference to applicable law provides the Court with the possibility of developing a form of exclusionary rule, by which evidence could be refused if obtained illegally, either by those acting under the authority of the *Statute* or those completely independent of it. This would enlarge its more limited power to exclude evidence pursuant to article 69 para. 7. Thus, evidence obtained illegally would not be evidence obtained ‘in accordance with the applicable law’ and therefore could not form the basis for a finding of guilt.

⁴³ *Nšlkenbockhoff v. Federal Republic of Germany*, Series A, No. 123, 25 Aug. 1987. But see: *Callaghan v. United Kingdom* (App. No. 14739/89), (1989) 60 D.R. 296.

⁴⁴ Rome Statute, see note 36, article 1.

⁴⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2433, Decision on the press interview with Ms Le Fraper du Hellen, 12 May 2010; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-51, Decision on Defence Request for an Order to Preserve the Impartiality of the Proceedings. 1 Feb. 2011.

⁴⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Transcript, 9 Nov. 2006.

⁴⁷ *Prosecutor v. Popović*, IT-05-88-T, Transcript, 26 Mar. 2007.

⁴⁸ Blakesley, (1998) 13*bis* NEP 69, 87.

⁴⁹ A possible argument that the term as used in article 66 should not be confined to the technical meaning given in article 21, but rather receive some broader construction, could rely on the fact that article 31 para. 3, which contains the only other reference in the Statute to ‘applicable law’, reads ‘applicable law as set forth in article 21’. *A contrario*, where there is no reference to article 21, the term is not subject to the statutory definition.

The presumption of innocence clearly interplays with the rights of the accused, and art 67 para. 1(i) confirms that no onus shall be placed on the accused to prove his or her innocence. The presumption also intersects with such issues as the right to provisional release and the right to silence. In the *Ruto* case, it was noted that the accused's request to be continually absent from trial had to be assessed in light of the presumption of innocence:

'In the circumstances of the present litigation, to have 'full respect for the rights of the accused' will necessarily begin with giving the minimum of a reasonable accommodation to the presumption of innocence that the accused enjoys under Article 66(1) of the Statute — also accepted as a 'right' under international human rights law, as noted earlier. To give it full effect in the circumstances now under consideration will require the Chamber to take the path of construction that will accommodate the natural incidence of that right, in a manner that is not unduly inconvenient to the overall purpose'⁵⁰.

II. Paragraph 2: Onus of proof

Evidentiary issues are central to the presumption of innocence⁵¹. That the prosecutor has the burden of proof would seem to be a general principle of law⁵². That being said, the Court has noted its own 'truth-finding' role, meaning that it is not solely reliant on the consent of the parties to request all of the evidence necessary to reach its findings. Pursuant to article 69 para. 3 of the Statute, 'the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth'.⁵³ According to the Appeals Chamber, 'The fact that the onus lies on the Prosecutor cannot be read to exclude the statutory powers of the court, as it is the court that must be convinced of the guilt of the accused beyond reasonable doubt.'⁵⁴ Although the onus is on the prosecution to prove the guilt of the accused, participating victims have been granted permission to introduce incriminating evidence.⁵⁵ There may be issues with this approach, in so far as victims do not share the same disclosure obligations as the Prosecutor has under article 67 para. 2 of the *Statute* and rules 76 to 84 of the Rules of Procedure and Evidence. However, it has been stressed that a Chamber will only authorise the introduction of such evidence if it will not prejudice the fairness and impartiality of the trial and the rights of the accused.⁵⁶

The presumption of innocence may be breached where an accused person is required to produce evidence to counter the charge even in the absence of any direct evidence of guilt. Although an exceptional measure, most legal systems, even those that purport to adhere scrupulously to the presumption of innocence, allow for some exceptions of this sort. The least offensive of such provisions are so-called factual presumptions, where proof of one fact is deemed by the court to constitute proof of another, incriminating fact. An example would be the presumption that a person who is in possession of recently stolen goods is in fact the thief. The prosecution need only establish two facts, that the object was stolen, and that it was in the possession of the accused. In order to avoid conviction for theft (and not just possession of stolen goods), the accused must then rebut the prosecution's case by leading evidence. While ostensibly a violation of the presumption of innocence, this approach is

⁵⁰ *Prosecutor v. Ruto*, ICC-01/09-01/11-777, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, para. 48.

⁵¹ 1996 Preparatory Committee I, see note 8, para. 286, p. 60.

⁵² *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 Nov. 1998, para. 599. See also the remarks of Judge Claude Jorda, presiding over Pre-Trial Chamber I, in *Prosecutor v. Lubanga* (ICC-01/04-01/06), Transcript, 9 Nov. 2006, p. 11.

⁵³ See generally, Heinze, *International Criminal Procedure* (2014), 218–223, 243–250, 499–505.

⁵⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, 11 July 2008, para. 95.

⁵⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, 11 July 2008, para. 112; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, 22 Jan. 2010, para 82.

⁵⁶ *Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial), see note 56, para. 84.

defended by judges as nothing more than a common sense rule, a logical deduction from the facts. More extreme forms of reversal of the burden of proof are effected by specific legislation. A frequent example is the presumption that a person in possession of a substantial quantity of narcotic drugs is more than a simple possessor, but is actually a trafficker, or at least is in possession for the purposes of trafficking. Despite any direct evidence of trafficking, the accused is required to rebut such a presumption. This form of reversal of burden of proof is somewhat academic, as far as the *Statute* is concerned, because there are no such ‘reverse onus’ provisions within the crimes defined by the *Statute*.

- 20 Nevertheless, the drafters of the *Statute* were alive to the issue because they introduced, in article 67 para. 1 (i), a provision that specifically contemplates the problem of reversal of onus of proof: the right of an accused ‘[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal’. Although article 67 is based essentially on existing models, principally article 14 para. 3 of the ICCPR⁵⁷, the reverse onus prohibition in article 67 para. 1 (i) is quite original. Again, its application is problematic, because there are no typical reverse onus provisions in the *Statute*. Thus, its application to judge-made reverse onus provisions would seem to be the real purpose of the provision. Depending on the scope this is given by the Court, these norms may create troublesome hurdles for the prosecution and provide the defence with a wealth of arguments.
- 21 For example, during the so-called *Čelebići* trial before the ICTY, one of the accused raised a plea of lack of mental capacity, or insanity. The Trial Chamber considered that the accused was presumed to be sane, despite an absence of prosecution evidence, and that it was for the accused to establish the contrary. Not only was the accused required to lead evidence of insanity, the Trial Chamber also held that the accused had a burden to prove this according to the preponderance of evidence standard⁵⁸. As the Trial Chamber explained, ‘[t]his is in accord and consistent with the general principle that the burden of proof of facts relating to a particular peculiar knowledge is on the person with such knowledge or one who raises the defence’⁵⁹. Given the combined effect of article 66 para. 2 and 67 para. 1 (i) of the *Statute*, would the ICC not conclude otherwise? At the very least, it would seem appropriate for the Court to rule that the accused is only required to raise a reasonable doubt as to mental condition, an approach that many legal systems have been able to live with⁶⁰. But under a more extreme hypothesis, the Court might apply these rules so as to impose a burden on the prosecution to establish sanity, a result that was surely unintended by the drafters of the *Statute* and one that could wreak havoc with the work of the Prosecutor.
- 22 The provisions of the *Statute* dealing with command responsibility may also, although more indirectly, lead to problems concerning the burden of proof. According to article 28, when individuals under the control of a superior commit crimes within the subject matter jurisdiction of the Court, the superior is deemed responsible for such crimes if he or she ‘should have known that the forces were committing or about to commit such crimes’. It will be argued that the superior is not being charged with the crime itself, but only with negligent supervision of troops or other subordinates. Yet negligence is not a crime within the subject matter jurisdiction of the Court; indeed, the core crimes require proof of the highest level of *mens rea*. The practical effect of article 28, once proof of commission of crimes by subordinates has been made, is to force the accused to testify in order to rebut the presumption of negligence, and to establish that the superior took ‘all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit

⁵⁷ See note 5.

⁵⁸ *Prosecutor v. Delalić et al.*, see note 47, paras. 1157–1160. Also paras. 602–603. The Trial Chamber cites two English cases in support of its conclusion: *R. v. Dunbar*, [1958] 1 Q.B. 1; *R. v. Grant*, [1960] CLR 424.

⁵⁹ *Prosecutor v. Delalić et al.*, see note 47, para. 1172.

⁶⁰ *Davis v. United States*, 160 U.S. 469 (1895); *Re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Jackson v. Virginia*, 443 U.S. 307 (1979). But see: *R. v. Chaulk*, [1990] 3 SCR. 1303, 62C.C.C. (3d) 193.

the matter to the competent authorities for investigation and prosecution⁶¹. Consequently, there is an effective reversal of the onus of proof.

The ICC *Statute* provides for no exceptions to the general principle of the presumption of innocence. This need not necessarily be an obstacle to the Court, which will be required to develop its own doctrine on the subject. By analogy, it may wish to turn to the *European Convention on Human Rights*⁶², which also recognizes the presumption of innocence and without, in the text at least, any possibility of its limitation or restriction. Nevertheless, the European Court of Human Rights has admitted that reverse onus provisions are included in all domestic systems of criminal law. They are not contrary to the presumption of innocence, according to the Court, unless they go beyond ‘reasonable limits’, taking into account what is at stake and the rights of the defence⁶³. The problem with transposing the European jurisprudence is that the *Convention* contains no clause similar to article 67 para. 1 (i), that explicitly rules out such exceptions to the presumption of innocence.

III. Paragraph 3: Reasonable doubt

Human rights law has left the issue of the standard of proof in criminal law in an uncertain state. The European Court of Human Rights has no clear pronouncement on the subject⁶⁴. An amendment specifying the ‘reasonable doubt’ standard of proof was defeated during the drafting of article 14 of the *ICCPR*⁶⁵. However, the Human Rights Committee has been less circumspect, clarifying that the prosecution must establish proof of guilt beyond reasonable doubt⁶⁶. Citing authority from the post-Second World War tribunals, May and Wierda have said that if ‘from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must be taken’. Proof beyond a reasonable doubt means that the accused’s guilt must be proven to a moral certainty⁶⁷. In *Pohl*, the United States Military Tribunal said: ‘It is such a doubt as, after full consideration of all the evidence, would leave an unbiased, reflective person charged with the responsibility of decision, in such a state of mind that he could not say that he felt an abiding conviction amounting to a moral certainty of the truth of the charge’⁶⁸. The International Military Tribunal at Nuremberg applied the standard of reasonable doubt, stating explicitly in its judgment that Schacht and von Papen were to be acquitted because of failure to meet that burden of proof⁶⁹.

As for the *ad hoc* Tribunals, they seem to have had no difficulty with the issue, and there are frequent statements in their initial judgments to the effect that the reasonable doubt standard applies⁷⁰. In the *Čelebići* case, the Trial Chamber said that ‘the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At

⁶¹ Rome Statute, see note 36, article 28 para. 1 (b).

⁶² European Convention on Human Rights, 213 UNTS 221, entered into force 3 Sept. 1953.

⁶³ *Salabiaku v. France*, Series A, No. 141-A, 7 Oct. 1988, para. 28. Also *Pham Hoang v. France*, Series A, No. 243, 25 Sept. 1992; *Duhs v. Sweden* (App. No. 12995/87), (1990) 67 D.R. 204.

⁶⁴ See, from the now defunct ECtHR, *Austria v. Italy*, (1962) 9 Y.B. 740, at p. 784.

⁶⁵ UN Doc. E/CN.4/365, UN Doc. E/CN.4/SR.156.

⁶⁶ General Comment 13/21, UN Doc. A/39/40, pp. 143–147, para. 7.

⁶⁷ May and Wierda (1999) 37 *ColumbiaJTransnat’lL* 754, citing: *United States v. Flick et al.*, (1948) 6 TWC 1, p. 1188 (United States Military Tribunal); *United States v. Brandt et al.*, (1948) 2 TWC 1, p. 184 (United States Military Tribunal); *United States v. von Weizsaecker et al.* (1948) 14 TWC 1, p. 315 (United States Military Tribunal).

⁶⁸ *United States v. Pohl et al.*, (1948) 5 TWC 1, p. 965 (United States Military Tribunal).

⁶⁹ *France et al. v. Göring et al.*, (1946) 22 IMT 203, 13 ILR 203, 41 *AJIL* 302, 318.

⁷⁰ *Prosecutor v. Tadić*, IT-94-1-T, Judgment, 7 May 1997, paras. 234–237, 241–242, 261, 279, 302–303, 316, 341, 369–370, 373–375, 387–388, 397, 426, 435, 448, 451–452, 455, 461, 477, 673, 693, 718, 720–721, 726, 730, 732, 734–735, 737–738, 740, 742, 744, 746, 750, 754, 756–757, 760–761, 763–764; *Prosecutor v. Akayesu*, ICTR-96-4-T, (on appeal), Judgment, 2 Sep. 1998, containing more than ninety references to the reasonable doubt standard; *Prosecutor v. Delalić et al.*, see note 47, paras. 43, 599–600, 603, 622–623, 720, 745, 796, 810, 872, 876, 885, 896, 898, 949, 988, 1008, 1034.

the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved⁷¹. An ICTY Trial Chamber was found to have misapplied the test of ‘reasonable doubt’ when it entertained the remote possibility that five men killed in Jaskici might have been victims of a large force of Serb soldiers rather than the smaller group with which Tadić was associated. But the Appeals Chamber resisted the invitation, from the Prosecutor, to further define the scope of the term ‘reasonable doubt’⁷². In a contempt of court proceeding, an ICTY Trial Chamber concluded that although testimony ‘raised grave suspicions’ about the contact of a lawyer, ‘[n]ot even the gravest of suspicions can establish proof beyond reasonable doubt...’⁷³.

A burden of proof of reasonable doubt contrasts with the standard imposed by article 61 para. 7 of ‘substantial grounds to believe that the person committed each of the crimes charged’. Pre-Trial Chamber I said this imposes a requirement that ‘charges suffisamment sérieuses ont été présentées et sans se limiter à de simples supputations ou soupçons’⁷⁴. It went on to speak of ‘éléments de preuve concrets et tangibles, montrant une direction claire dans le raisonnement supportant ses allégations spécifiques’⁷⁵. Obviously, the ‘beyond a reasonable doubt’ standard is considerably more demanding, as the Appeals Chamber has noted⁷⁶. Other evidentiary standards set out in the *Statute* include that of ‘grounds to believe’, found in article 55 para. 2, and ‘reasonable grounds to believe’, set out in article 58 para. 1 (a). These are less demanding than the ‘substantial grounds’ required at the confirmation hearing in accordance with article 61 para. 7⁷⁷. Many evidentiary issues before the Court will probably require only that certain facts be established on a balance of probabilities, or a preponderance of evidence. The ICTY Appeals Chamber has described this as ‘satisfaction that, more probably than not, what is asserted is true’⁷⁸. It has also been described as an ‘onus of persuasion’⁷⁹ or an ‘onus of establishing’⁸⁰. Generally, it should be presumed that the balance of probabilities standard applies to issues of evidence other than the ultimate question of guilt or innocence, unless there is some special provision.

- 25 Some academics have expressed concern about the meaning that might be given to the Court by the term ‘beyond a reasonable doubt’⁸¹. They have urged that the *Statute* clarify, perhaps in an Annex, the fact that the term means ‘conviction should not occur unless all reasonable hypotheses based on the evidence presented indicate guilt’. However, the precise reference to the standard of proof should dispel any equivocation on the subject. No further clarification about the burden of proof is provided in the Rules of Procedure and Evidence. Indeed, they are striking in the fact that they make no reference whatsoever to ‘burden’, ‘onus’ or ‘reasonable doubt’. Nonetheless, the Court’s interpretation of ‘proof beyond reasonable doubt’ has given rise to some criticism. The prosecution in *Ngudjolo* alleged that the approach taken in acquitting the accused was flawed, because the ‘beyond reasonable doubt’ standard ‘does not require that the Chamber search for and then reject all hypothe-

⁷¹ *Prosecutor v. Delalić et al.*, see note 47, para. 601.

⁷² *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, 181–183. For the proposals of the Prosecutor, see para. 174.

⁷³ *Prosecutor v. Simić et al.*, IT-95-9-R77, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000.

⁷⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Décision sur la confirmation des charges, 29 Jan. 2007, para. 37.

⁷⁵ *Ibid.*, para. 39.

⁷⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, 13 Oct. 2006, para. 56.

⁷⁷ *Situation in Democratic Republic of Congo*, ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 Jan. 2006, para. 98.

⁷⁸ *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, 7 Feb. 2003, para. 17.

⁷⁹ *Ibid.*, para. 14.

⁸⁰ *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 Feb. 2001, para. 590.

⁸¹ Blakesley (1998) 13*bis* NEP 69, 87.

tically possible contrary inferences'.⁸² On the other hand, Judge van den Wyngaert in her dissent to the *Katanga* judgment stated that 'It is ... my firm belief that another reasonable reading of the evidence is possible in this case.'⁸³ This debate seems to centre on whether the requirement of proof beyond reasonable doubt necessitates the exclusion of every other reasonable hypothesis that can be drawn from the evidence.⁸⁴ In the *Ngudjolo* Appeals Judgment, the Appeals Chamber found no error in the Trial Chamber's means of assessing the facts,⁸⁵ although Judges Trendafilova and Tarfusser issued a dissenting opinion where they criticised the Trial Chamber's 'fragmentary' approach to factual findings.⁸⁶

Common law judges have devoted considerable effort to defining the notion of reasonable doubt, generally in an attempt to provide clear instructions for lay jurors. This is surely less important for experienced judges such as those likely to be elected to the Court. In *Delalić* the Trial Chamber of the ICTY adopted a common-law definition:

'A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our mode of trial: to their task of deciding facts they bring to bear their experience and judgment'⁸⁷.

But the Court's judges are not lay jurors, and the reference of the Tribunal in *Čelebići* is puzzling. Simply put, 'reasonable doubt' means a doubt that is founded in reason. It does not mean 'any doubt', 'beyond a shadow of a doubt', 'absolute certainty' or 'moral certainty'⁸⁸. Nor, on the other end of the scale, does it imply 'an actual substantive doubt' or 'such doubt as would give rise to a grave uncertainty'⁸⁹. Courts have, but rarely, endorsed other attempts to explain the notion of reasonable doubt: 'feel sure and satisfied'⁹⁰; 'honest and fair doubt ... a doubt based upon reason and common sense'⁹¹. However, as a general rule, they have warned against attempts to rephrase the standard. According to Lord Goddard: 'By using the words "reasonable doubt" and trying to explain what is reasonable doubt and what is not, judges are more likely to confuse juries than if they told them in plain language: 'It is the duty of the prosecution to satisfy you of the man's guilt'⁹². Similarly, according to Lord Lawton, '... if judges stopped trying to define that which is almost impossible to define there would be fewer appeals'⁹³.

C. Special remarks

I. Non-respect by other bodies

In its General Comment on article 14, the Human Rights Committee has insisted that the presumption of innocence imposes a duty on all public authorities to 'refrain from prejudging the outcome of a trial'⁹⁴. According to the European Commission of Human Rights,

⁸² *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12, Prosecution's Document in Support of Appeal against the 'Jugement rendu en application de l'article 74 du Statut', 3 Apr. 2013.

⁸³ *Prosecutor v. Katanga*, Judgment, Minority Opinion of Judge Christine van den Wyngaert, ICC-01/04-01/07-3436, 7 Mar. 2014, para. 134.

⁸⁴ Klamberg, *Evidence in International Criminal Trials* (2013) 3.

⁸⁵ *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12, Judgment on the Prosecutor's Appeal against the Decision of Trial Chamber II entitled 'Judgment Pursuant to Article 74 of the Statute', 7 Apr. 2015.

⁸⁶ *Prosecutor v. Ngudjolo Chui*, see note 90, Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, para 41; see further, McDermott (2015) 13 *JICJ* 507.

⁸⁷ *Prosecutor v. Delalić et al.*, see note 47, para. 600; citing *Green v. R.*, (1972) 46 *ALJR* 545.

⁸⁸ *Victor v. Nebraska*, 127 L.Ed.2 d 583 (1994).

⁸⁹ *Cage v. Louisiana*, 498 U.S. 39 (1990); *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993).

⁹⁰ *Ferguson v. The Queen*, [1979] 1 All E.R. 877, 882 (P.C.); *Regina v. Allan*, [1969] 1 All.E.R. 91, 92.

⁹¹ *Regina v. Tuckey, Baynham and Walsh*, (1985) 20 C.C.C. (3d) 502 (Ont. C.A.).

⁹² *R. v. Kritz*, [1949] 2 All E.R. 406, 410.

⁹³ *R. v. Yap Chuan Ching*, (1976) 63 Cr.App.R. 7, 11. See also: *Miks v. United States*, 103 U.S. 304, 312 (1880).

⁹⁴ See note 56.

‘It is a fundamental principle embodied in [the presumption of innocence] which protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court. Article 6, paragraph 2, therefore, may be violated by public officials if they declare that somebody is responsible for criminal acts without a court having found so. This does not mean, of course, that the authorities may not inform the public about criminal investigations. They do not violate article 6, paragraph 2, if they state that a suspicion exists, that people have been arrested, that they have confessed, etc. What is excluded, however, is a formal declaration that somebody is guilty’⁹⁵.

- 28 The transposition of these notions, which are related to domestic prosecutions, to the international context, leads to some interesting observations. The ‘authorities’ on the international scene will be such bodies as the Commission on Human Rights, the High Commissioner for Human Rights, the Security Council, the General Assembly and the Secretary General. If, for example, the General Assembly charges that genocide has been committed by the leaders of a given regime, can they invoke this essentially political accusation before the ICC in claiming that the presumption of innocence has been denied⁹⁶? The answer, of course, is that there may well be a denial of the presumption of innocence but that it has not been committed by the Court itself. Nevertheless, the Court may find itself required to adopt innovative solutions in cases where a violation of the presumption of innocence by a body that is not subordinate to or subject to the control of the Court has the effect of compromising the right to a fair trial.

II. Majority or unanimity?

- 29 Arguably, the presumption of innocence may require that decisions by the Court, particularly given the seriousness of the charges and of the available sentences, be unanimous. Certainly where questions of fact are at issue, is it not logical to conclude that where one member of the Court has a reasonable doubt, this should be enough to create a reasonable doubt in the minds of the tribunal as a whole⁹⁷? Compelling as the suggestion may be – and it was argued by some delegates at the Rome Conference – the *Statute* provides clearly that in case of division, a majority of the Court will suffice for a finding of guilt⁹⁸.

III. Judicial notice

- 30 Article 67 para. 6 of the *Statute* authorises the Court to take judicial notice of facts of common knowledge. In some cases, this has gone beyond banal facts whose proof merely consumes valuable judicial time, and has involved judicial notice of issues lying at the core of the prosecution. For example, the International Criminal Tribunal for Rwanda has taken judicial notice of the fact that genocide took place in Rwanda during 1994⁹⁹. By the

⁹⁵ *Krause v. Switzerland* (App. No. 7986/77), (1978) 13 D.R. 73. Also, from the Court: *Alenet de Ribemont v. France*, Series A, No. 308, 10 Feb. 1995, paras. 37, 41. See: White and Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (2010) 289.

⁹⁶ For example, in a resolution denouncing the atrocities in Srebrenica, SC Res.1034 (1995), the Security Council singled out for special mention the Bosnian Serb leaders Radovan Karadžić and Ratko Mladić, noting that they had been indicted by the International Criminal Tribunal for their responsibilities in the massacre. The word ‘alleged’ did not accompany the reference to their responsibilities. The resolution ‘[c]ondemn[ed] in particular in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica ...’. The High Representative for implementation of the Dayton Agreement, Carlos Westendorp, declared that the situation in Bosnia could not be ‘normalized’ until Karadžić was brought before the International Tribunal; such a statement could hardly be made if he was truly presumed innocent (press briefing of 27 July 1998).

⁹⁷ For such a suggestion, see Pruitt (1997) 10 *LeidenJIL* 557.

⁹⁸ Rome Statute, see note 36, article 74 para. 3.

⁹⁹ *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006.

admission of evidence in this manner, some have argued that this creates an evidentiary presumption and requires the defendant to disprove facts, thereby raising issues of compliance with the presumption of innocence. There is some controversy about the legal consequences of judicial notice. Some judgments of international tribunals suggest that it creates a well-founded presumption that the fact in question is accurate, and that it does not have to be proven again at trial, although subject to that presumption it may still be challenged at that trial¹⁰⁰. Judge Hunt of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia disagreed with this proposition, saying that it was inappropriate to impose a reputable presumption in favour of the Prosecutor. This necessarily placed a burden of proof upon the accused, something that is contrary to the presumption of innocence, he said¹⁰¹. Judge Shahabuddeen disagreed, noting that a distinction should be made between facilitating proof and dispensing with proof:

‘It is not said that the accused must prove his innocence; the position still is that the prosecution must prove guilt. All that the law does is that it facilitates proof by allowing a party to adduce required evidence in a certain way. What is the value of that evidence is then a matter for the parties in the ordinary way. In establishing the value of the evidence – including evidence given by judicial notice being taken of adjudicated facts – the accused is entitled to a right of rebuttal’¹⁰².

The Appeals Chamber of the Special Court for Sierra Leone has taken the position that once judicial notice has been taken of a fact, the evidentiary inquiry is concluded and the fact cannot be contested¹⁰³. Judge Robertson explained that facts judicially noticed must be ‘invincible’, because otherwise, ‘the doctrine would serve little purpose’¹⁰⁴.

IV. Evidence of similar conduct

The Rules of Procedure and Evidence make no special provision for admissibility of 31 evidence for the purpose of showing a consistent pattern of conduct relevant to serious violations of international humanitarian law. The Rules of the three United Nations international criminal tribunals allow such evidence in the interests of justice¹⁰⁵. This may threaten the presumption of innocence of the accused, in that evidence of crimes not alleged in the indictment is used to establish guilt for the acts on which the prosecution is based. It is not to be confused with evidence of good character, which the defence may choose to present in an appropriate case¹⁰⁶. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has noted ‘under the so-called principle of ‘similar fact evidence’, courts in England and Wales, Australia and the United States admit evidence of crimes or wrongful acts committed by the defendant other than those charged in the indictment, if the other crimes are introduced to demonstrate a special knowledge, opportunity, or identification of the defendant that would make it more likely that he committed the instant crime as well’¹⁰⁷.

¹⁰⁰ *Prosecutor v. Milošević*, IT-02-54-AR73.5, Decision on the Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 Oct. 2003; *Prosecutor v. Krajisnik*, IT-00-39&40, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Admission of Written Statements of Witnesses Pursuant to Rule 92bis, 28 Feb. 2003, para. 15.

¹⁰¹ *Prosecutor v. Milošević*, IT-02-54-AR73.5, Dissenting Opinion of Judge David Hunt, 28 Oct. 2003.

¹⁰² *Prosecutor v. Milošević*, IT-02-54-AR73.5, Separate Opinion of Judge Shahabuddeen Appended to the Appeals Chamber’s Decision dated 28 October 2003 on the Prosecution’s Interlocutory Appeal against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 Oct. 2003.

¹⁰³ *Prosecutor v. Norman et al.*, SCSL-04-14-AR73, Fofana – Decision on Appeal Against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’, 16 May 2005, para. 32.

¹⁰⁴ *Prosecutor v. Norman et al.*, SCSL-04-14-AR73, Separate Opinion of Justice Robertson, 16 May 2005, para. 9.

¹⁰⁵ Rules of Procedure and Evidence [of the International Criminal Tribunal for the former Yugoslavia], Rule 93(A); Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 93(A); Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 93(A).

¹⁰⁶ *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001, para. 114.

¹⁰⁷ *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgment, 23 Oct. 2001, para. 321.

For example, evidence of various sniping incidents for which the accused, Galić, was alleged to be responsible was presented in evidence in order to establish a consistent pattern of conduct¹⁰⁸. Testimony by a woman who had been victimised by Mlado Radić was also admitted on this basis, although the acts were not mentioned in the indictment.¹⁰⁹ In the same case, similar fact evidence was also admitted against Zoran Žigić¹¹⁰. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia admitted evidence that Drago Josipović had participated in an attack of the same nature, in the same vicinity and during the same time period as the acts charged, in order to establish a pattern indicating guilt for the attack in Ahmici on 16 April 1993¹¹¹. Because there is no provision on similar fact evidence in the *Statute* and in the Rules of Procedure and Evidence of the International Criminal Court, its judges will have to decide in specific cases whether or not such evidence is admissible. In so doing, they need to consider the tension this may create with the presumption of innocence.

V. Provisional release

- 32 Most of the discussion about the presumption of innocence in the case law of international criminal tribunals has concerned applications for provisional release. Article 9 para. 3 of the *International Covenant on Civil and Political Rights*, in what is said to be a corollary of the presumption of innocence, states that '[i]t shall not be the general rule that persons awaiting trial shall be detained in custody'. In an early decision of the International Criminal Tribunal for the former Yugoslavia, President Cassese said he was striking a balance between two main interests, namely 'the right of all detainees to be treated in a human manner in accordance with the fundamental principles of respect for their inherent dignity and the presumption of innocence' and the imperatives of security and order¹¹². In a later debate, following the amendment of the Rules of Procedure and Evidence to remove the 'exceptional circumstances' condition for provisional release¹¹³, Judge Robinson said that '[w]hile the Tribunal's lack of a police force, its inability to execute its arrest warrants in States and its corresponding reliance on States for such execution may be relevant in considering an application for provisional release, on no account can that feature of the Tribunal's regime justify either imposing a burden on the accused in respect of an application under Rule 65 or rendering more substantial such a burden, or warranting a detention of the accused for a period longer than would be justified having regard to the requirement of public interest, the presumption of innocence and the rule of respect for individual liberty'. He said it was a norm of customary international law, based on the presumption of innocence, 'to make pre-trial detention an exception, which is only permissible in special circumstances'¹¹⁴. Another judge said that 'as a general rule, a decision to release an accused should be based on an assessment of whether public interest requirements, notwithstanding the presumption of innocence, outweigh the need to ensure, for an accused, respect for the right to liberty of person'¹¹⁵.

The Appeals Chamber of the Special Court for Sierra Leone has taken a substantially different position, rejecting any relevance of the presumption of innocence to the determination of provisional release. 'Whether a defendant will turn up for trial or intimidate witnesses

¹⁰⁸ *Prosecutor v. Galić*, IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galić, 3 Oct. 2002, fn. 1.

¹⁰⁹ *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, 2 Nov. 2001, paras. 547, 556.

¹¹⁰ *Ibid.*, paras. 652, 663, 664.

¹¹¹ *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgment, 23 Oct. 2001, para. 322.

¹¹² *Prosecutor v. Blaškić*, IT-95-14-T, Decision on Motion of Defence Seeking Modification of Detention of General Blaškić, 9 Jan. 1997.

¹¹³ Rules of Procedure and Evidence [of the International tribunal for the former Yugoslavia], Rule 65 (B).

¹¹⁴ *Prosecutor v. Krajisnik et al.*, IT-00-39 & 40-PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 Oct. 2001, Dissenting Opinion of Judge Patrick Robinson.

¹¹⁵ *Prosecutor v. Jokić et al.*, IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, 20 Feb. 2002.

cannot logically be affected by the burden or standard of proof that will prevail at his trial, nor by presuming him innocent or guilty of the offences charged (since innocent defendants may nevertheless try to avoid a lengthy trial or to threaten those who have made statements against them)¹¹⁶. The Appeals Chamber cited a ruling of the United States Supreme Court in this respect: '[T]he presumption of innocence is a doctrine that allocates the burden of proof in criminal trials... [b]ut it has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun'¹¹⁷.

The first decisions of the International Criminal Court concerning provisional release made no reference to the presumption of innocence¹¹⁸. By 2010, however, the Court had noted that '[t]his procedural safeguard must also be seen in the context of the detained person's right to be presumed innocent'¹¹⁹, and this approach has been followed in later rulings.¹²⁰

¹¹⁶ *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 Mar. 2005, para. 37.

¹¹⁷ *Bell v. Wolfish*, 441 US 520, 533 (1979).

¹¹⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06 (OA 7), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', 13 Feb. 2007; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Application for the interim release of Thomas Lubanga Dyilo, 18 Oct. 2006.

¹¹⁹ *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence', 19 Nov. 2010, para. 49.

¹²⁰ See, for example, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled 'Decision on the Defence's Application for Interim Release', 5 Mar. 2014, Dissenting Opinion of Judge Anita Ušacka, para. 4.

Article 67 Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- (c) To be tried without undue delay;
- (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
- (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
- (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (h) To make an unsworn oral or written statement in his or her defence; and
- (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

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

Literature: Ambos, K., 'The Right of Non-Self-Incrimination of Witnesses Before the ICC', (2002) 15 *LeidenJIL* 155 (2002); *id.*, 'Confidential Investigations (Article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law' (2009) 12 *NethCLRev* 543; Baum, M., 'Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court', (2001) 19 *WisconsinILJ* 197; Beresford, S. and Lahiouel, H., 'The Right to be Defended in Person or Through Legal Assistance and the International Criminal Court', (2000) 13 *LeidenJIL* 949; Conventi, A., 'The Rights of the Accused', in: F. Lattanzi (ed.) *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998) 219; Damaška, M., 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals', (2001) 36 *NCJIL&ComReg* 365; Elberling, B., *The Defendant in International Criminal Proceedings* (Hart 2012); Doswald-Beck, L., and Kolb, R., *Judicial Process and Human Rights: United Nations, European, American and African Systems* (Engel 2004); Friman, H., 'Rights of Persons Suspected or Accused of a Crime', in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, and Results* (Kluwer Law International 1999) 247; Harris, D.J., O'Boyle, M., Bates M., and Buckley, C., *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, iii (OUP 2014); Heinze, A., *International Criminal Procedure and Disclosure* (Duncker and Humblot 2014); Jackson, J., 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy' (2009) 7 *JICJ* 17; Kochavi, A.J., *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment* (UNC Press 1998); La Rosa, A.-M., 'Réflexions sur l'apport du Tribunal pénal international pour l'ex-Yougoslavie au droit à un procès équitable' (1997) 101 *RevGenDroitInt'lPublic* 945; *id.*, 'Défi de taille pour les Tribunaux pénaux internationaux: conciliation des exigences du droit international humanitaire et d'une procédure équitable',

(1997) 828 *RICR* 677; May, R., and Wierda, M., *International Criminal Evidence* (Transnational 2002); McDermott, Y., 'General Duty to Ensure the Right to a Fair and Expeditious Trial' in G. Sluiter *et al.* (eds.) *International Criminal Procedure: Rules And Principles* (OUP 2013) 770; *id.*, 'Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law' in W. A. Schabas *et al.* (eds.), *The Ashgate Research Companion to International Criminal Law* (Ashgate 2013) 165; Stahn, C., 'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?' (2012) 25 *LeidenJIL* 251; Stapleton, S., 'Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation', (1999) 31 *NYUJIL&Pol* 535; Trechsel, S., *Human Rights in Criminal Proceedings* (OUP 2005); Tolbert, D., 'The ICTY and Defence Counsel: A Troubled Relationship' (2003) 37 *NewEnglandLJ* 9751 Weissbrodt, D., *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001); White, R.C.A. and Ovey, C., *Jacobs, White and Ovey: The European Convention on Human Rights* (OUP 2010); Zappalà, S., 'Rights of the Accused', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 1319.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	7
I. Paragraph 1.....	7
1. Chapeau.....	7
a) 'any charge'.....	8
b) 'public hearing'.....	9
c) 'having regard to the provisions of this Statute'.....	14
d) 'fair hearing'.....	15
e) 'conducted impartially'.....	16
f) 'in full equality'.....	18
2. Minimum guarantees.....	19
a) Information about the charge.....	19
b) Time to prepare defence.....	22
c) Trial without undue delay.....	25
d) Rights of the defence.....	27
aa) Presence at trial.....	28
bb) Defend oneself in person.....	29
cc) Choice of counsel.....	30
dd) Free legal assistance.....	32
e) Right to challenge evidence and raise defences.....	36
aa) Examination of witnesses.....	37
bb) Defences.....	39
f) Interpreter.....	41
g) Right to silence.....	44
h) Unsworn statement.....	47
i) Reverse onus.....	49
II. Paragraph 2.....	51
C. Special remarks.....	55
I. Omitted provisions.....	55
II. Role of article 67 in the applicable law.....	56

A. Introduction/General remarks

During the Second World War, Churchill and other Allied leaders flirted with the idea of some form of summary justice for major war criminals¹. The concept now is unthinkable. Indeed, only a few years later, one of the Nuremberg Tribunals held that prosecutors and judges involved in a trial lacking the fundamental guarantees of fairness could be held responsible for crimes against humanity. Such guarantees include the right of the accused to introduce evidence, to confront witnesses, to present evidence, to be tried in public, to have counsel of choice, and to be informed of the nature of the charges². Certainly, the credibility of international justice depends on rigorous respect for the rights of the accused to a fair trial,

¹ Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (1998) 63–91.

² *United States of America v. Alstötter et al.* ('Justice trial'), (1948) 3 TWC 1, 6 LRTWC 1, 14 LLR. 278, p. 97 (LRTWC).

an idea that was frequently expressed during the development of the ICC *Statute*. Nor can the exemplary role of international courts be gainsaid; their treatment of the accused provides a model to domestic justice systems throughout the world in the respect of fundamental human rights.

- 2 The *Statute* might well have omitted a general provision dealing with the rights of the accused. Many specific guarantees are incorporated in other articles of the *Statute* and there can be little doubt that even in the absence of a more general text, the judges would feel bound by internationally recognized norms. Principle 5 of the *United Nations Basic Principles on the Independence of the Judiciary* provides: ‘The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected’³. The *Statute* imposes a duty upon the Trial Chamber to see that ‘a trial is fair and expeditious and is conducted with full respect for the rights of the accused’⁴. Furthermore, there is the constant danger that any codification, left in the hands of conservative judges, may tend to constrict the development of the law rather than enhance it. The original contribution of article 67 may well be that rather than merely restate norms that have already been codified, it elaborates on the relatively laconic provisions of existing texts and, moreover, develops new rights which do not yet appear in human rights treaties and declarations.
- 3 The right to a fair trial is recognized in the *Universal Declaration of Human Rights*⁵, and in the universal and regional human rights conventions that it inspired⁶, as well as in humanitarian law instruments⁷. The model for article 67 of the *Statute* is article 14 of the *ICCPR*⁸, although with some major distinctions. Article 14 of the *ICCPR* applies to civil and administrative proceedings, as well as criminal trials. Article 14 contains provisions dealing with trial of juvenile offenders⁹ which are irrelevant to the work of the ICC because of the Rome Conference’s decision to exclude jurisdiction in the case of suspects who were under eighteen years of age at the time of the offence¹⁰. The *ICCPR* fair trial provision also recognizes some specific rights that are enshrined elsewhere in the *Statute*, notably the

³ UN Doc. A/CONF.121/22/Rev.1, GA Res. 40/146 (1985). The *Basic Principles* are cited in the preamble of the International Criminal Court’s Code of Judicial Ethics, Document ICC-BD/02-01-05.

⁴ Rome Statute, article 64 para. 1.

⁵ GA Res. 217A(III), UN Doc. A/810 (1948). ‘Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11 para. 3. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence’.

⁶ *ICCPR*, 999 UNTS 171, entered into force 23 Mar. 1976, article 14; American Convention on Human Rights, 1144 UNTS 123, entered into force 18 July 1978, article 8; European Convention on Human Rights, 213 UNTS 221, entered into force 3 Sep. 1953, article 6; African Charter on Human and People’s Rights, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force 21 Oct. 1986, article 7; Convention on the Rights of the Child, GA Res. 44/25, Annex, entered into force 2 Sep. 1990, article 40 § 2.

⁷ Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135, entered into force 21 Oct. 1950, articles 84–87, 99–108; Geneva Convention Relative to the Protection of Civilians, entered into force 21 Oct. 1950, article 5, 64–76; Add. Prot. I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts, 1125 UNTS 3, entered into force 7 Dec. 1978, article 75; Add. Prot. II to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non- International Armed Conflicts, 1125 UNTS 3, entered into force 7 Dec. 1978, article 6.

⁸ It was also the model for the provisions dealing with the rights of the accused in the Statute of the International Criminal Tribunal for the former Yugoslavia [ICTY], UN Doc. S/RES/827, Annex, article 21, and the Statute of the International Criminal Tribunal for Rwanda [ICTR], UN Doc. S/RES/955, Annex, article 20. The Secretary-General’s Report, UN Doc. S/25704, para. 106, stated: ‘It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights’.

⁹ See note 6, *ICCPR*, article 14 paras. 1, 4.

¹⁰ See note 4, Rome Statute, article 26.

presumption of innocence¹¹, a right of appeal¹², to compensation in cases of erroneous conviction¹³, and to protection against double jeopardy¹⁴.

The ILC Draft Statute of 1994 contained a provision entitled 'Rights of the Accused' that was essentially a copy of article 14 para. 3 of the *ICCPR*¹⁵. The only significant departure was inclusion of a second paragraph requiring the prosecutor to disclose exculpatory evidence to the defence. In addition, the ILC made the text gender neutral, replacing masculine pronouns with reference to 'the accused'. In 1995, the *Ad Hoc* Committee of the General Assembly examined the ILC Draft Statute, observing that 'in view of the considerable powers [the Court] would enjoy in relation to individuals, [it] should be bound to apply the highest standards of justice, integrity and due process'¹⁶. Its discussion focussed on the issue of mandatory legal assistance, and on the need to establish rules on the qualifications, powers and remuneration of defence attorneys, and on the procedure for their appointment by the Court¹⁷.

Rights of the accused were considered by the informal working group at the August 1996 session of the Preparatory Committee, and a number of detailed comments and suggestions on specific points appear in the report of these discussions¹⁸. The subject was again addressed by the Preparatory Committee in August 1997. By this point, the innovative spirit of the Preparatory Committee was becoming apparent, and there were many departures from the text of article 14 para. 3 of the *ICCPR*, several of them without square brackets, indicating that they had been agreed to by consensus¹⁹. There were also many cross-references to other provisions in the *Statute*, showing the Committee's concern that the rights of the accused not only be recognized generally, but that they be reflected in specific procedural provisions. In addition to 'improved' versions of the rights set out in article 14 of the *ICCPR*, the Committee's 1997 draft also contained several new rights: to make an unsworn statement, to have the Court seek co-operation in gathering evidence, to be protected against any reverse onus or duty of rebuttal, to be free from unjust search and seizure, and a general entitlement to due process. The August 1997 Preparatory Committee's text was reproduced in the Zutphen compilation and the Final Draft of the Preparatory Committee with little modification²⁰.

The Rome Conference quickly agreed on most of the provisions in article 67. It was made quite clear to the delegates that the minimum guarantees enshrined in article 14 of the *ICCPR* were being enlarged, and they were invited to accept or reject such an approach. The Conference adopted the latter route without hesitation. Negotiating difficulties with the provisions concerning appearance at trial, funded counsel and disclosure of evidence by the prosecution took slightly more time to be resolved. The proposals concerning search and seizure and due process were dropped as being redundant.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Chapeau

The *chapeau* provision of article 67 is an amalgam of norms contained in paras. 1 and 3 of article 14 of the *ICCPR*. In effect, it takes the *chapeau* of article 14 para. 3 of the *ICCPR*, with

¹¹ See note 6, *ICCPR*, article 14 para. 2. See: see note 4, Rome Statute, article 66.

¹² See note 6, *ICCPR*, article 14 para. 5. See: see note 4, Rome Statute, articles 81–84.

¹³ See note 6, *ICCPR* article 14 para. 6. See: see note 4, Rome Statute, article 85.

¹⁴ See note 6, *ICCPR*, article 14 para. 7. See: see note 4, Rome Statute, article 20.

¹⁵ 1994 ILC Draft Statute, article 41, pp. 114–115.

¹⁶ *Ad Hoc* Committee Report, para. 129, p. 29.

¹⁷ *Ibid.*, para. 175, p. 35.

¹⁸ 1996 Preparatory Committee I, paras. 270–279, pp. 57–59.

¹⁹ Preparatory Committee Decisions Aug. 1997, pp. 34–36.

²⁰ Zutphen Draft, pp. 114–115; Draft Statute for the ICC, UN Doc. A/CONF.183/2/Rev.1, pp. 126–128.

minor modifications, and adds the notions of a public, fair and impartial hearing that appear in article 14 para. 1. The text differs significantly from the original ILC Draft²¹ and reflects a proposal made at the Rome Conference, on 2 July, by the Chair of the Working Group²².

- 8 a) ‘any charge’. The reference to ‘any charge’ must apply to trials on accusations based on the four core crimes enumerated in article 5 of the *Statute*. The Court is also competent to judge ‘[o]ffences against the administration of justice’, pursuant to article 70, and the rights of an accused would also apply in such proceedings. Some adaptation would appear to be required in proceedings for removal of a Registrar or Deputy Registrar, pursuant to article 46 para. 3 of the *Statute*, as these are not criminal in nature. Where the rights set out in article 67 do not apply necessarily in other proceedings before the Court, for example those relating to a hearing subsequent to a decision by the Prosecutor not to proceed with charges²³ or to conduct an investigation²⁴. Indeed, rights during an investigation are set out in a distinct provision of the *Statute*²⁵. Nevertheless, the phrase ‘in the determination of any charge’ is essentially identical to the wording of the international models, such as article 6 para. 1 of the *European Convention on Human Rights*²⁶.

The European Court of Human Rights considers this to be ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’ or an act that has ‘the implication of such an allegation and which likewise substantially affects the situation of the suspect’²⁷. An individual might become ‘substantially affected’, to borrow the Strasbourg terminology, once a State party has asked that a case be examined²⁸, or upon the application by the Prosecutor to initiate an investigation²⁹. If notions of complementarity are factored in, the right may even be extended to encompass proceedings under domestic law prior to exercise of jurisdiction of the Court.

- 9 b) ‘public hearing’. The principle of a public hearing, stated in the *chapeau* of article 67 para. 1, is developed in the Regulations of the Court. Regulation 20 states:
1. All hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.
 2. When a Chamber orders that certain hearings be held in closed session, the Chamber shall make public the reasons for such an order.
 3. A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.

The Regulations provide for broadcasting and recording of hearings. Subregulation 21 para. 1 says that ‘publicity of hearings may extend beyond the courtroom and may be through broadcasting by the Registry or release of transcripts or recordings, unless otherwise ordered by the Chamber’. According to subregulation 21 para. 2, ‘[i]n order to protect

²¹ See note 15, 1994 ILC Draft Statute, article 41: ‘In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees: ...’.

²² Draft proposal for article 67 submitted by the chairman, UN Doc. A/CONF.183/C.1/WGPM/L.42 (2 July): ‘In the determination of any charge, the accused is entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees in full equality.’ It was adopted by the Committee with the addition of the word ‘and’ before the words ‘to a fair hearing’: Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2 (4 July), pp. 4–5. The Drafting Committee removed the word ‘and’, and made other minor changes, Compendium of draft articles referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998, UN Doc. A/CONF.183/C.1/L.58, pp. 41–42: ‘In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality’.

²³ See note 4, Rome Statute, article 53 para. 3.

²⁴ *Ibid.*, articles 56–58.

²⁵ *Ibid.*, article 55.

²⁶ See note 6.

²⁷ *Corigliano v. Italy*, Ser. A, No. 57, 10 Dec. 1982, para. 34.

²⁸ See note 4, Rome Statute, article 14 para. 1.

²⁹ *Ibid.*, article 15 para. 3.

sensitive information, broadcasts of audio- and videorecordings of all hearings shall, unless otherwise ordered by the Chamber, be delayed by at least 30 minutes³⁰.

The text of article 67 of the *Statute* differs from that of article 14 of the *ICCPR* in that it does not enumerate the exceptions to the right to a public hearing. Article 14 para. 1 of the *ICCPR* allows the exclusion of the press and the public ‘for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’. Moreover, according to the *ICCPR*, the judgment must always be made public ‘except where the interest of juvenile persons otherwise requires’³¹. A detailed enumeration of exceptions to the public hearing principle had been proposed but was rejected by the Preparatory Committee. These derogations included: the deliberations of the Court; protection of public order or of human dignity; the safety and protection of the accused, of the victims or of witnesses. Victims of sexual violence were to be entitled as of right to an *in camera* hearing³².

To the extent there is a residual power to derogate from the norm of a public hearing, it is found in article 64 para. 7: ‘The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence’. That the public hearing requirement of the *chapeau* of article 67 is subordinate to article 64 para. 7 is implied by the words ‘having regard to the provisions of this Statute’ in the *chapeau*. In any case, the exceptions listed in article 64 para. 7 are presented in a more elaborate fashion in articles 68, 69 and 72. According to the Regulations of the Court, ‘[a]t the request of a participant or the Registry, or *proprio motu* ... the Chamber may, in the interests of justice, order that any information likely to present a risk to the security or safety of victims, witnesses or other persons, or likely to be prejudicial to national security interests, shall not be published in any broadcast, audio- or video-recording or transcript of a public hearing’³³.

Article 68 concerns the protection of victims and witnesses. Specifically, article 68 para. 2 provides: ‘As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness’. The already elaborate case law of the *ad hoc* Tribunals in this matter should guide the Court in this difficult area³⁴. A mere glance at the jurisprudence of the Court indicates just how dramatic an impact issues concerning victim and witness protection can have on the general principle of public hearing and access to the record. Many hearings are held totally or partially in camera, and decisions are often published in severely redacted versions.

The second exception allowed by article 64 para. 7 is the protection of confidential or sensitive information³⁵. Confidential or sensitive information may have several sources. There may be claims to confidentiality based on privilege, and the Court is to respect this pursuant to article 69 para. 5, as provided for in the *Rules of Procedure and Evidence*. But the major source of problems with this exception will be information derived from sovereign

³⁰ See also Regulations of the Registry, Document ICC-BD/03-01-06, regulation 42.

³¹ Note that article 76 para. 4 of the *Statute* requires that the judgment be rendered in public.

³² 1996 Preparatory Committee II, pp. 195–196.

³³ Regulations of the Court, Document ICC-BD/01-01-04, subregulation 21 para. 8.

³⁴ For example: *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Prosecutor’s Motion requesting protective measures for victims and witnesses, 10 Aug. 1995; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Decision on the Preliminary Motion submitted by the Prosecutor for Protective Measures for Witnesses, 26 Sep. 1996. See: La Rosa, (1997) 101 *RGDIP* 945, 962–970.

³⁵ Also note 4, Rome Statute, article 64 para. 6 (c).

States. The *Statute* allows a State to apply ‘for necessary measures’ to respect ‘confidential or sensitive information’³⁶. Other exceptions to the rule dictating a public hearing are the possibility of *in camera* and even *ex parte* hearings with respect to the protection of national security information³⁷ and the power of the court to exclude disruptive individuals, including the accused³⁸.

- 13 Article 61 para. 1 specifies the right of the accused to be present at the hearing on the confirmation of charges. But this would clearly seem to be a hearing ‘[i]n the determination of the charge’ of ‘an accused’, and therefore the public hearing rule ought to apply. In other words, not only the accused but also the public should have access to such proceedings. The first confirmation hearing, that of Thomas Lubanga, was accordingly held in public with considerable publicity. Pre-Trial Chamber even made an order authorizing photography by representatives of the media³⁹.
- 14 c) ‘having regard to the provisions of this Statute’. The words ‘having regard to the provisions of this Statute’ suggest that article 67 can be limited by express provisions to the contrary. An example would be article 64 para. 7, which limits the right to a public hearing. The wording in the *chapeau* of article 67 is decidedly unenthusiastic. The Preparatory Committee Draft did not include any such general provision, preferring to enumerate any exceptions to the judicial guarantees recognized to the accused in a specific fashion⁴⁰. A proposal from the United Kingdom submitted at Rome eschewed any equivocation on this point, beginning the text of article 67 with the words ‘[s]ubject to the provisions of this Statute ...’⁴¹. There is a suggestion in the *travaux préparatoires* that the words ‘subject to ...’ put article 67 in a subordinate position, whereas the words ‘having regard to ...’ do not⁴².
- 15 d) ‘fair hearing’. The general right to a ‘fair hearing’ provides defendants with a powerful tool to go beyond the text of the *Statute*, and to require that the Court’s respect for the rights of an accused keep pace with the progressive development of human rights law. The Appeals Chamber has defined the term ‘fair’ as being ‘associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right’ and thus its interpretation and application is subject to international human rights standards.⁴³ The notion of a fair hearing goes back, in international human rights law, to article 10 of the *Universal Declaration of Human Rights*. Of course, it is repeated in article 14 of the *ICCPR* and in the regional instruments. The case law of the Strasbourg organs, established to implement the *European Convention on Human Rights*, has used this residual right to a fair hearing to fill in some of the gaps in the more specific provisions⁴⁴. That the term ‘fair hearing’ invites the Court to go beyond the precise terms of article 67 in appropriate circumstances is confirmed by the reference within the *chapeau* to ‘minimum guarantees’⁴⁵. The term ‘fair hearing’ also suggests that where individual problems with specific rights set out in article 67 do not, on their own, amount to a violation, the requirement of a fair hearing may allow a cumulative view and lead to the conclusion that there is a breach where

³⁶ *Ibid.*, article 68 para. 6.

³⁷ *Ibid.*, article 72 para. 7.

³⁸ *Ibid.*, articles 63 para. 2, 71 para. 1.

³⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Ordonnance autorisant la prise de photographies à l’audience du 9 novembre 2006, 6 Nov. 2006.

⁴⁰ See note 20, Zutphen Draft, p. 114, article 60; see note 20, Draft Statute, article 67, pp. 106–108.

⁴¹ Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, UN Doc. A/CONF.183/C.1/WGPM/L.33 (29 June), p. 1.

⁴² See note 18, 1996 Preparatory Committee I, p. 59, para. 279.

⁴³ *Situation in the DRC*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 01/04-168, 13 July 2006, para. 11.

⁴⁴ Harris et al., *Harris, O’Boyle and Warbrick Law of the European Convention on Human Rights* (2014) 409–433.

⁴⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Décision relative au système définitif de divulgation et à l’établissement d’un échéancier, Annexe I, Analyse de la décisions relative au système définitif de divulgation, 15 May 2006, para. 97.

there have been a number of apparently minor or less significant encroachments on article 67⁴⁶. Although article 67 falls under Part 6, the section of the *Statute* dedicated to ‘The Trial’, it has been held that the duty to ensure fairness extends to the pre-trial stage of proceedings.

The international case law has developed the notion of ‘equality of arms’ within the concept of the right to a fair trial⁴⁷. The ICTY Appeals Chamber has described the principle of equality of arms ‘as being only one feature of the wider concept of a fair trial’⁴⁸. In *Tadić*, the ICTY Appeals Chamber explained that ‘the principle of equality of arms falls within the fair trial guarantee under the Statute’. It continued:

[U]nder the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses⁴⁹.

But ‘equality of arms [...] does not necessarily amount to the material equality of possessing the same financial and/or personal resources’,⁵⁰ although the allocation of time and witnesses to both sides must be basically proportional.⁵¹

The concept of ‘equality of arms’ was invoked in early decisions of the International Criminal Court. For example, according to Pre-Trial Chamber II, ‘[f]airness is closely linked to the concept of ‘equality of arms’, or of balance between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour’⁵².

e) ‘conducted impartially’. The *Statute* states that the hearing must be ‘conducted impartially’, whereas article 14 of the *ICCPR* requires that it be conducted ‘by a competent, independent and impartial tribunal’. The Zutphen Draft referred to ‘an independent and impartial tribunal’⁵³. Curiously, the statutes of the *ad hoc* Tribunals impose no requirements in this respect⁵⁴, perhaps because the Security Council considered the matter to be beyond debate, although this did not prevent defendants from raising the issue⁵⁵. At the International

⁴⁶ *Stanford v. United Kingdom*, Ser. A, No. 182-A, 30 Aug. 1990, para. 24.

⁴⁷ *Neumeister v. Austria*, Ser. A, No. 8, 11 Y.B. 822, 27 June 1968; Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1994) 247. For recognition of the principle of ‘equality of arms’ by the ICTY, see: *Prosecutor v. Tadić*, IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, 27 Nov. 1996, pp. 4, 7.

⁴⁸ *Prosecutor v. Kordić et al.*, IT-95-14/2-A, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent’s Brief, 11 Sep. 2001, para. 5.

⁴⁹ *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, para. 52. The United States of America invoked the Appeals Chamber’s comments before the Inter-American Commission on Human Rights, in a case dealing with capital punishment, as authority for the proposition that ‘equality of arms’ concerns procedural but not substantive equality: *Garza v. United States of America*, Report No. 52/01, Case 12.243, 4 Apr. 2001, para. 56.

⁵⁰ *Prosecutor v. Kayishema et al.*, ICTR-95-1-A, Judgment (Reasons), 1 June 2001, paras. 63–71; *Prosecutor v. Milutinović et al.*, IT-99-37-AR73. 2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 Nov. 2003.

⁵¹ *Prosecutor v. Orić*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7.

⁵² *Situation in Uganda*, ICC-02/04-01/05, Decision on Prosecutor’s Application for leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 Aug. 2005, para. 30. See also: *Prosecutor v. Lubanga*, ICC-01/04-01/06, Décision sur la demande d’autorisation d’appel de la Défense relative à la transmission des Demandes de participation des victimes, 6 Nov. 2006, p. 7.

⁵³ See note 20, Zutphen Draft, p. 114, article 60.

⁵⁴ See note 8, Statute of the ICTY, article 21; see note 8, Statute of the ICTR, article 20.

⁵⁵ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995.

Criminal Court, not only judges, but also the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar are required to make a solemn undertaking in open court to exercise their functions ‘impartially’⁵⁶.

- 17 Of course, the issue of impartiality of the judiciary is also addressed elsewhere in the *Statute*⁵⁷. Impartiality is also protected by specific provisions in the Court’s Code of Judicial Ethics:

‘Article 4 Impartiality

1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.
2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest⁵⁸.

According to the European Court of Human Rights, ‘impartiality’ means lack of ‘prejudice or bias’⁵⁹. It comprises both a subjective and an objective dimension: ‘[t]he existence of impartiality ... must be determined according to a subjective test, that is, on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, namely, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect’⁶⁰.

The ICTY Appeals Chamber has described judicial impartiality as follows:

‘[A] Judge should not only be subjectively free from bias, but also [...] there should be nothing in the surrounding circumstances that objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

- A. Judge is not impartial if it is shown that actual bias exists.
- B. There is an unacceptable appearance of bias if:
 - (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification from the case is automatic; or
 - (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias⁶¹.

A number of challenges to the independence or impartiality of judges before the ICC have arisen in practice. In *Lubanga*, the defence asked that Judge Song be recused from hearing the appeal, on the basis of remarks he had made in his capacity as President of the Court after the trial judgment was issued. Judge Song had referred to Lubanga’s conviction as a ‘landmark judgment’ and one that ‘set a crucial precedent in the fight against impunity’. The Plenary of Judges held that a fair-minded observer would not see these statements in their context as a comment on the merits of the appeal or on any legal or factual aspect of appeal.⁶² Similarly, the plenary of judges in *Banda and Jerbo* held that a blog post written by Judge Eboe-Osui before his appointment to the ICC, in which he expressed an opinion on a situation before the Court, did not preclude him from later sitting on a case in that situation.⁶³ The former decision seems reasonable given that, as President of the Tribunal at

⁵⁶ See note 4, *Rome Statute*, article 45; Rules of Procedure and Evidence, Document ICC-ASP/1/3, pp. 10–107, Rule 5. *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the press interview with Ms Le Fraper du Hellen, 12 May 2010.

⁵⁷ See note 4, *Rome Statute*, articles 35, 40, 41.

⁵⁸ Code of Judicial Ethics, see note 3.

⁵⁹ *Piersack v. Belgium*, Ser. A, No. 53, 1 Oct. 1982.

⁶⁰ *Hauschildt v. Denmark*, Ser. A, No. 154, 24 Dec. 1989, para. 46.

⁶¹ *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, para. 189.

⁶² *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 11 June 2013.

⁶³ *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09, Decision of the Plenary of the Judges on the ‘Defence Request for the Disqualification of a Judge’, 5 June 2012, para. 19.

the time, Judge Song had a role in the external relations of the Court, pursuant to art. 38 of the *Statute*. Equally, given that judges are elected to the Court on the basis of either their expertise in international law or their experience in criminal law, it would be unreasonable to expect those experts in international law to never have publically commented on aspects of the ICC's work. In the challenge to Judge Eboe-Osuji's impartiality, the blog post in question discussed the relationship between the African Union and the Court, and did not refer to the case at issue itself, nor did it express any bias against the accused.

The *Rome Statute* provides the most advanced and thorough regime in order to ensure both independence and impartiality of its judiciary. It constitutes a dramatic improvement on the norms applicable to the *ad hoc* tribunals. In this respect, the limitation of judges to one term of office, and a clarification of both the grounds for dismissal and the body responsible for doing so constitute major improvements upon earlier models.

f) 'in full equality'. The terms 'in full equality' are imported from article 14 para. 3 of the ICCPR. They complement the initial phrase of article 14, '[a]ll persons shall be equal before the courts and tribunals' for which there is no equivalent in article 67 of the *Statute*. Nevertheless, article 21 para. 1 of the *Statute* comprises a non-discrimination clause applicable to the instrument as a whole. In her dissenting opinion to a decision excusing the defendant Ruto from presence at his trial, Judge Herrera Carbuca argued that this constituted a discrimination contrary to article 21, on the basis of his status as Vice President of Kenya.⁶⁴

The guarantee of full equality before the ICC protects the accused against discriminatory practices and even vexatious prosecution where it appears to be motivated by discriminatory criteria. In the *Čelebići* case, the ICTY Appeals Chamber considered the principle of equality before the law within the context of prosecutorial discretion. It said:

'This provision reflects the corresponding guarantee of equality before the law found in many international instruments, including the 1948 Universal Declaration of Human Rights, the 1966 *International Covenant on Civil and Political Rights*, the *Additional Protocol I* to the *Geneva Conventions*, and the Rome Statute of the International Criminal Court. All these instruments provide for a right to equality before the law, which is central to the principle of the due process of law. The provisions reflect a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law. Thus Article 21 and the principle it embodies prohibits discrimination in the application of the law based on impermissible motives such as, inter alia, race, colour, religion, opinion, national or ethnic origin. The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to this requirement of non-discrimination'⁶⁵.

The Appeals Chamber suggested that there would be a violation of equality before the law if 'the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants'⁶⁶. To show the Prosecutor is proceeding on a selective basis, 'the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy has a discriminatory effect, so that other similarly situated individuals of other ethnic or religious backgrounds were not prosecuted'⁶⁷.

An ICTY Trial Chamber has suggested that the right to equality before the law might be violated in cases of plea-bargaining. For example, it mentioned the possibility that the Prosecutor might seek to make a plea agreement with some accused because of their knowledge of particular events which may be useful in prosecutions of other, more high ranking accused. The Prosecutor could make the terms of such a plea agreement quite

⁶⁴ *Prosecutor v. Ruto*, ICC-01/09-01/11, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, Dissenting Opinion of Judge Herrera Carbuca, 18 June 2013.

⁶⁵ *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 Feb. 2001, para. 605 (reference omitted).

⁶⁶ *Ibid.*, para. 607. Also: *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10 & ICTR-96-17-T, Judgment, 21 Feb. 2003, paras. 870–871.

⁶⁷ *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, paras. 94–96.

generous in order to secure the co-operation of that accused. ‘Other accused, who may not have been involved in the most egregious crimes or who may not have been part of a joint criminal enterprise with more high ranking accused, may not be offered such a generous plea agreement, or indeed any plea agreement’, said the decision⁶⁸.

2. Minimum guarantees

- 19 a) **Information about the charge.** Article 67 para. 1 (a) of the *Statute* complements similar provisions protecting suspects during an investigation⁶⁹ and at the time charges are confirmed⁷⁰. The purpose of the norm is to provide an accused person with the information necessary for the preparation of a defence. The appropriate information required will depend on any questioning the accused has already undergone and on other circumstances of the case⁷¹. But the accused may be expected to show some diligence in seeking information about the charge, for example by insisting upon attendance at the confirmation hearing⁷².
- 20 Article 14 of the *ICCPR* refers only to the ‘nature and cause’ of the charge. The *Statute* goes further than the *ICCPR* and the other human rights models by requiring that this information also include the ‘content’ of the charge⁷³. According to the European Commission on Human Rights, the ‘nature’ of the charge refers to the specific offence, while the ‘cause’ of the charge means the relevant material facts⁷⁴. There may be no meaningful distinction between ‘cause’ and ‘content’, except perhaps a message of exhaustivity⁷⁵. In practice, the European case law has not been very demanding, with the Commission holding that the accused is entitled to material to enable preparation of a defence, ‘without however necessarily mentioning the evidence on which the charge is based’⁷⁶. However, in the *ICC Statute* this provision must be taken in combination with the very thorough disclosure requirements that are imposed upon the Prosecutor⁷⁷. Taken as a whole, these provisions indicate the desire of the Rome Conference that the Prosecutor ensure that the accused is not taken by surprise during the proceedings, and that he or she benefits from a level of information going well beyond the thresholds set by domestic justice systems and endorsed by international human rights tribunals as being acceptable.

Rule 121(3) of the Rules of Procedure and Evidence requires the Prosecutor to provide a detailed description of the charges within a reasonable time before the confirmation of charges hearing. Regulation 52 of the Regulations provides further detail on the required content of the document outlining the charges; this must include, *inter alia*, a statement of the facts which provides a sufficient legal and factual basis to bring the person to trial, and a

⁶⁸ *Prosecutor v. Momir Nikolić*, IT-02-60/1-S, Sentencing Judgment, 2 Dec. 2003, para. 66.

⁶⁹ See note 4, Rome Statute, article 55 para. 2 (a).

⁷⁰ *Ibid.*, article 61 para. 3. Also: see note 33, Regulations of the Court, Regulation 52, which indicates the information that must be included in the document containing the charges: ‘The document containing the charges referred to in article 61 shall include: (a) The full name of the person and any other relevant identifying information; Regulations of the Court; (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28’.

⁷¹ *Kamasinski v. Austria*, Ser. A, No. 168, 19 Dec. 1989, paras. 79–81.

⁷² *Campbell and Fell v. United Kingdom*, Ser. A, No. 80, 28 June 1984. See: see note 4, Rome Statute, article 61 para. 2 (a).

⁷³ At the August 1996 session of the Preparatory Committee it was said that the *ICCPR* provision ‘needed further elaboration in the Statute’: see note 18, 1996 Preparatory Committee I, para. 271, p. 58.

⁷⁴ *Ofner v. Austria* (No. 524/59), (1960) 3 Y.B. 322, 344. See also: *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on defence application for forwarding the documents in the language of the accused (Delalić), 25 Sep. 1996, for determination on the types of materials to be made available to the accused in his or her language.

⁷⁵ See: Amnesty International, *Making the Right Choices, Part V* (1997).

⁷⁶ *X v. Belgium* (No. 7628/76), (1977) 9 D.R. 169.

⁷⁷ See note 4, Rome Statute, articles 61 para. 3 (b), 64 para. 3 (c), 67 para. 2. Also: *Prosecutor v. Delalić et al.*, see note 77.

legal characterisation of the facts to accord both with the crimes under articles 6, 7, or 8 of the Statute, and the precise form of participation under articles 25 and 28 of the Statute. In the *Katanga and Ngudjolo Chui* case, both defendants had been charged with co-perpetration under article 25(3)(a) of the Statute. In 2012, six months after the close of trial but before the judgment was issued, the Trial Chamber opted to recharacterise the mode of liability that Katanga was charged with to common purpose liability under article 25(3)(d)(ii).⁷⁸ The decision raised concerns as regards the defendant's ability to adequately prepare for trial and present his or her defence case, when a fundamental fact could be 'recharacterised' at such a late stage in proceedings.⁷⁹ Nevertheless, the Appeals Chamber upheld this decision, finding that the Trial Chamber could counteract any potential unfairness by taking measures to protect the rights of the accused.⁸⁰ Perhaps as a consequence of this series of events, the Prosecutor moved towards charging alternative modes of liability in later decisions.⁸¹

The requirement that the information be 'in a language which the accused fully understands and speaks' develops article 14 para. 3 (a) of the ICCPR, which requires only that it be 'in a language which [the accused] understands'. A proposal to refer to 'his own language' had been left in square brackets by the Preparatory Committee⁸², and was added at Rome. An amendment at the Rome Conference contained the phrase 'in his or her own language or in a language of his or her choice'⁸³. This prompted the Chair to propose: 'in a language the accused understands or in his or her language'⁸⁴. The matter sparked considerable controversy. The provision that was finally adopted included a footnote: 'It is understood that this expression means the language for which the accused, in good faith, has clearly expressed his or her preference'⁸⁵. To some degree, these are questionable improvements. The purpose served by requiring not only that the accused understand the language but also speak it seems unclear. Note that the ICCPR, in its general provision dealing with the right to an interpreter, presents this in the alternative: 'if he cannot understand or speak the language used in court'. It was surely not the intention of the drafters of the Statute to provide disabled persons who are unable to speak with a pretext to avoid the jurisdiction of the Court. On the other hand, insisting on this detail helps to exclude some Strasbourg case law by which the norm is respected if the language is understood by the accused's lawyer, and not necessarily by the accused personally⁸⁶. It goes without saying that the information must be provided at no cost to the defendant⁸⁷.

b) Time to prepare defence. This provision is modeled on article 14 para. 3 (b) of the ICCPR with the addition of the words 'freely' and 'in confidence'. It was introduced by the

⁷⁸ *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-3319, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, 21 Nov. 2012. The case was severed in this decision and Katanga's co-accused was ultimately acquitted.

⁷⁹ See, *inter alia*, *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-3319, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, Dissenting Opinion of Judge Christine van den Wyngaert, 21 Nov. 2012; *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgment, Minority Opinion of Judge Christine van den Wyngaert, 7 Mar. 2014.

⁸⁰ *Prosecutor v. Katanga*, ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', 27 Mar. 2013, para. 91.

⁸¹ *Prosecutor v. Blé Goudé*, Decision on the 'Defence request to amend the document containing the charges for lack of specificity', ICC-02/11-02/11-143, 2 Sept. 2014.

⁸² See note 19, Preparatory Committee Decisions Aug. 1997, p. 34; see note 20, Zutphen Draft, p. 114, article 60; see note 20, Draft Statute, article 67, pp. 106–108.

⁸³ Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, UN Doc. A/CONF.183/C.1/WGPM/L.36 (29 June), p. 1.

⁸⁴ See note 22, Draft proposal for article 67.

⁸⁵ Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.6 (11 July), pp. 3–4, fn. 5.

⁸⁶ *X. v. Austria* (No. 6185/73), (1975) 2 D.R. 68.

⁸⁷ *Luedicke, Belkacem and Koc v. Germany*, Ser. A, No. 29, 28 Nov. 1978. That these services were free of charge was spelled out in one of the proposals submitted to the Preparatory Committee: 1996 Preparatory Committee II, p. 196.

Preparatory Committee at its August 1997 session⁸⁸, and the text remained unchanged through to the final version adopted in Rome⁸⁹.

23 Adequate time will depend on the circumstances of the case. Here the international case law is not particularly helpful, because it is a given that the types of cases to come before the ICC will be extraordinarily complex and therefore difficult to compare with the more mundane matters of domestic tribunals. The only relevant normative provision, again not particularly helpful, is article 105 of the third *Geneva Convention* which specifies that counsel have ‘a period of two weeks at least before the opening of trial’⁹⁰. According to the ICTY, adequate time is a flexible concept that ‘begs of a definition outside the particular situation of each case. It is impossible to set a standard of what constitutes adequate time to prepare a defence because this is something which can be affected by a number of factors including the complexity of the case, and the competing forces and claims at play, such as consideration of the interests of other accused persons’⁹¹.

24 The word ‘facilities’ refers to ‘documents, records, etc. necessary for preparation of the defence’⁹², a right that is complemented by the *Statute’s* extensive disclosure obligations. According to the European Commission of Human Rights, this means the accused must have ‘the opportunity to organize his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court’⁹³. In the *Kenya* situation, it was held that pursuant to article 93 para. 1 of the *Statute*, states parties were obliged to comply with requests for assistance made by the prosecution in relation to investigations and prosecutions.⁹⁴ Pursuant to the equality of arms principle, it would stand to reason that the same compliance obligations apply to defence requests for documents or other materials necessary for the preparation of the defence case.

With respect to communication with counsel, the addition of the words ‘freely’ and ‘in confidence’ underscore the privileged nature of the communication and the fact that it must be undertaken in secure premises not subject to eavesdropping by the authorities⁹⁵. Access to communication by the accused must be both in person and in writing. The Preparatory Committee considered that the question of privileged communication should not be dealt with in the provision on rights of the accused⁹⁶. Rule 73 of the RPE expressly recognizes the privileged nature of lawyer-client communications. Although it is not explicitly listed as an exception in Rule 73, the Court has held that the right to free and confidential communication with counsel is forfeited ‘whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice’, such as where the lawyer is alleged to have been involved in interfering with witnesses.⁹⁷

⁸⁸ See note 19, Preparatory Committee Decisions Aug. 1997, p. 34.

⁸⁹ See note 20, Zutphen Draft, p. 114; see note 20, Draft Statute, p. 127; see note 22, Draft proposal for article 67; see note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4–5; see note 22, Compendium of draft articles, pp. 41–42.

⁹⁰ Geneva Convention of 12 Aug. 1949 relative to the treatment of prisoners of war, 75 UNTS 135, entered into force 21 Oct. 1950.

⁹¹ *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the applications for adjournment of the trial date, 3 Feb. 1997.

⁹² Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1994) 256.

⁹³ *Can v. Austria*, Ser. A, No. 96, 30 Sep. 1985, Commission Report, para. 53.

⁹⁴ *Prosecutor v. Kenyatta*, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, 31 Mar. 2014.

⁹⁵ See: article 69 para. 5, which indicates that this is a question for the Rules. In the *travaux*, see: 1996 Preparatory Committee II, pp. 196–197; see note 20, Zutphen, p. 114, fn. 203; see note 20, Draft Statute, p. 127, fn. 11. The Rules of the *ad hoc* Tribunals expressly recognize lawyer-client privilege: Rules of Procedure and Evidence, as amended 10 Dec. 1998, UN Doc. IT/32, article 97. The United States of America proposed a draft set of rules of evidence for the Court containing a provision ensuring lawyer-client privilege: Reference Paper Submitted by the United States of America, UN Doc. A/CONF.183/C.1/WGPM/L.21, p. 7, rule 10.

⁹⁶ See note 19, Preparatory Committee Decisions Aug. 1997, p. 34, fn. 48.

⁹⁷ *Situation in Central African Republic*, Decision on the Prosecutor’s ‘Request for judicial order to obtain evidence for investigation under Article 70’, ICC-01/05-52-Red2, 3 Feb. 2014.

c) **Trial without undue delay.** The provision is identical to that of its model in the *ICCPR*. 25
 During the Preparatory Committee sessions, '[t]he point was also made that an expeditious trial process would prevent a guilty person from delaying the proceedings and would secure the early release of an innocent person. What was needed in this regard was a proactive court which would properly manage the case so as to achieve an early resolution of the case'⁹⁸. Here, too, there were attempts to 'improve' the *ICCPR* text, with suggestions that 'undue' be replaced with 'unreasonable' and that the right 'to enjoy a speedy trial' be added⁹⁹. But at Rome, on a proposal from the Chair of the Working Group, the *ICCPR* text was retained¹⁰⁰.

Case law and academic comment on the *ICCPR* provision have considered that the time 26
 limit begins to run at the moment the suspect or the accused is informed that the authorities are taking steps towards prosecution. The period ends with a definitive decision¹⁰¹. What this means specifically will depend on each individual case. In one case, the Human Rights Committee considered the provision had been violated by Canada when the preparation of trial transcripts took twenty-nine months resulting in a three-year delay for an appeal hearing¹⁰². In *Pratt and Morgan v. Jamaica*, a delay of forty-five months between dismissal of an appeal and delivery of a written judgment was held to violate the norm¹⁰³. The Nuremberg trial of the major war criminals set an awesome precedent that the *ad hoc* Tribunals have been unable even to approach. By domestic standards, today's international justice is an incredibly protracted affair. The Appeals Chamber of the International Criminal Tribunal for Rwanda has considered that inexcusable delay attributable to the Prosecutor, in extreme circumstances, entitles the accused to have the charges dropped 'with prejudice' to the Prosecutor, that is, without the possibility of retrial¹⁰⁴. The ICC has refused an application for an 'indefinite adjournment' of a case where the Prosecutor had insufficient evidence to proceed to trial, and could not provide a date on which she would be ready. She said this was owing to difficulties in obtaining evidence from an uncooperative state.¹⁰⁵ Trial Chamber V ordered the Prosecutor to either declare that she was ready to continue to trial, or to withdraw the charges against the accused. The charges were dropped, without prejudice, a short time later.¹⁰⁶

In its Court Capacity Model, the International Criminal Court set out optimistic assessments of the length of proceedings, projecting an average trial to last slightly less than three years from arrest until final judgment, apportioning three months for the confirmation of charges, six months for disclosure and preparation for trial, fifteen months for the trial itself and finally nine months for the appeal¹⁰⁷. The trial of Thomas Lubanga Dyilo, the first completed trial before the Court, lasted somewhat longer, at over eight years from arrest to appeal judgment. The trial of Germain Katanga, which was not appealed by either side, lasted almost seven years from arrest to judgment¹⁰⁸.

d) **Rights of the defence.** Article 67 para. 1 (d) of the *Statute* substantially reflects the 27
 content of article 14 para. 3 (d) of the *ICCPR*, subject to a number of minor drafting changes.

⁹⁸ See note 18, 1996 Preparatory Committee I, p. 58, para. 271.

⁹⁹ See note 78, 1996 Preparatory Committee II, p. 197; see note 19, Preparatory Committee Decisions Aug. 1997, p. 34; see note 20, Zutphen Draft, p. 114; see note 20, Draft Statute, p. 127. Also, at the Rome Conference, see note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

¹⁰⁰ See note 22, Draft proposal for article 67; see note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4–5; see note 22, Compendium of draft articles, pp. 41–42.

¹⁰¹ Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1994) 257.

¹⁰² *Pinkney v. Canada* (No. 27/1978), UN Doc. CCPR/3/Add.1, Vol. II, p. 385, UN Doc. CCPR/C/OP/1, p. 95, 2 HRLJ 344.

¹⁰³ *Pratt and Morgan v. Jamaica*, Nos. 210/1986, 225/1987, UN Doc. A/44/40, p. 222, 11 HRLJ 150.

¹⁰⁴ *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decisions of 3 Nov. 1999 and 31 Mar. 2000.

¹⁰⁵ *Prosecutor v. Kenyatta*, Decision on Prosecution's application for a further adjournment, ICC-01/09-02/11, 3 Dec. 2014.

¹⁰⁶ *Prosecutor v. Kenyatta*, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11, 5 Dec. 2014.

¹⁰⁷ Report on the Court Capacity Model, Document ICC-ASP/5/10, para. 23.

¹⁰⁸ See note 15, 1994 ILC Draft Statute, article 41.

The text is little changed from the ILC Draft. It was approved by the Working Group at the August 1997 Preparatory Committee¹⁰⁹ and was adopted at Rome without change¹¹⁰.

- 28 **aa) Presence at trial.** The right to be present at trial is made subject to article 63 para. 2, which permits the trial to proceed in the absence of an accused who is disruptive. Exceptions exist within the Statute and the Rules of Procedure and Evidence for *ex parte* hearings under very specific circumstances. Article 72 para. 7 of the *Statute* allows for a hearing concerning the protection of national security information to take place *ex parte*, that is, in the absence of one or both of the parties¹¹¹. *Ex parte* proceedings during the trial phase are also authorised under the Rules of Procedure and Evidence. The Trial Chamber may hear the Prosecutor *ex parte* in order to determine whether an assurance may be given to a witness who may make testify in such a way as to incriminate himself or herself¹¹². A Trial Chamber may also sit *ex parte* to consider whether or not to authorise special measures to facilitate testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence¹¹³.

The ICC has had to grapple with the question of whether it would be appropriate to allow an accused to be absent from trial, at his or her own request. Although article 63 para. 1 of the *Statute* uses the words ‘shall be present during the trial’, indicating that the presence of the accused is an obligation as well as a right, the Court has been quite flexible on this question. The continuation of the trial for short durations in the absence of the accused has been permitted where the accused specifically waived their right to be present.¹¹⁴ As Judges Kouroula and Ušacka have noted:

‘Absence from particular hearings or parts of hearings may be considered to be so insignificant that they do not amount to a violation of the fundamental requirement of presence... However, the practical difficulties that may be encountered in enforcing the requirement established in article 63 (1) of the Statute to the strict letter of the law should not be used as a justification for interpreting article 63 (1) of the Statute so that it is found to provide the Trial Chamber with a general discretion to excuse an accused from presence at trial.’¹¹⁵

The Court has also had to rule upon requests for more continuous absence from proceedings, where the defendants’ official functions mandate their presence in their home state. Trial Chamber V(a) initially excused the defendant Ruto, Deputy President of Kenya, from attending all of the trial with the exception of the opening and closing statements, the presentation in person of the views and concerns of victims, the delivery of judgment, and, if applicable, the sentencing hearings, the sentencing, the victim impact hearings, the reparation hearings, and any other attendance directed by the Chamber, at his own request.¹¹⁶ The Appeals Chamber partially overturned that ruling, setting down the following conditions for the absence of the accused:

¹⁰⁹ See note 19, 1996 Preparatory Committee Decisions Aug. 1997, pp. 34–35.

¹¹⁰ See note 20, Zutphen Draft, p. 114; see note 20, Draft Statute, p. 117; see note 22, Draft proposal for article 67; see note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4–5; Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.8 (15 July), p. 6; see note 22, Compendium of draft articles, pp. 41–42.

¹¹¹ See note 4, Rome Statute, article 72 para. 7.

¹¹² See note 54, Rules of Procedure and Evidence, rule 74 para. 4.

¹¹³ *Ibid.*, rule 88(2).

¹¹⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-172-Red3-ENG, Transcript, 12 May 2009, pp. 1–2; *Prosecutor v. Bemba*, ICC-01/05-01/08-T-183-Red-ENG, Transcript, 7 Nov. 2011, pp. 1–2; *Prosecutor v. Bemba*, ICC-01/05-01/08-T-306-Red-ENG, Transcript, 12 Apr. 2013, p. 62; *Prosecutor v. Bemba*, ICC-01/05-01/08-T-324-ENG, Transcript, 17 June 2013, pp. 16–17; *Prosecutor v. Bemba*, ICC-01/05-01/08-T-331-CONF-ENG, Transcript, 27 June 2013, pp. 2–3.

¹¹⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066-Anx, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, Joint Separate Opinion of Judge Erkki Kouroula and Judge Anita Ušacka, 25 Oct. 2013.

¹¹⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, 25 Oct. 2013.

- (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule;
- (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial;
- (iii) any absence must be limited to that which is strictly necessary;
- (iv) the accused must have explicitly waived his or her right to be present at trial;
- (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and
- (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend.¹¹⁷

In an amendment to the Rules of Procedure and Evidence agreed in 2013, the Assembly of States Parties adopted the new Rules 134*bis* and 134*ter*, which permit an accused to make a request in writing to be present through the use of video-link technology only, or to be excused and to be represented by counsel only during part of his or her trial, and provides some guidance for the Trial Chambers in granting this request. The new Rule 134*quater* relates exclusively to those accused persons who are ‘mandated to fulfill extraordinary public duties at the highest national level’. The Trial Chamber shall grant the request for excusal from trial where it is convinced that it is in the interests of justice and not prejudicial to the rights of the accused.¹¹⁸

Article 76 para. 4 of the *Statute* seems to imply that the presence of the accused when sentence is imposed is not indispensable, because it says this should take place ‘wherever possible’. The curious phrase was introduced when the Preparatory Committee was considering the possibility of *in absentia* trials¹¹⁹, and remained in the final version of the *Statute*, although the concept of *in absentia* trials had been abandoned, without any thought being given to the matter¹²⁰. Thus, article 76 para. 4 should not be seen as an attenuation of the principle of presence of the accused at trial.

bb) Defend oneself in person. The accused is entitled to defend himself or herself in person. 29
The most celebrated example of this situation took place during the prosecution of Slobodan Milošević before the International Criminal Tribunal for the former Yugoslavia. In an initial challenge to the accused’s insistence on defending himself, the Prosecutor invoked the fragile medical condition of the defendant. Presiding Judge Richard May wrote: ‘A plain reading of this provision indicates that there is a right to defend oneself in person and the Trial Chamber is unable to accept the Prosecution’s proposition that it would allow for the assignment of defence counsel for the Accused against his wishes in the present circumstances’¹²¹. Judge May noted that the right to defend oneself was especially important in the essentially adversarial-type proceedings of the ICTY. Here he referred to a relevant decision of the United States Supreme Court, which held that ‘forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so’¹²². As Judge May explained:

‘There is a further practical reason for the right to self-representation in common law. While it may be the case that in civil law systems it is appropriate to appoint defence counsel for an accused who wishes to represent himself, in such systems the court is fulfilling a more investigative role in an attempt

¹¹⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, 25 Oct. 2013, para. 2.

¹¹⁸ Resolution ICC-ASP/12/Res.7, Adopted at the 12th plenary meeting on 27 Nov. 2013 by consensus.

¹¹⁹ See note 5, Draft Statute, article 76, fn. 25.

¹²⁰ See note 97, Report of the Working Group on Procedural Matters (15 July), p. 10. In this respect, there is an error in Report of the Drafting Committee to the Committee of the Whole, UN Doc. A/CONF.183/C.1/L.88 (16 July), p. 14, which states that the Committee of the Whole adopted the following: ‘The sentence shall be pronounced in public and in the presence of the accused’, without the words ‘whenever possible’.

¹²¹ *Prosecutor v. Milošević*, IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 Apr. 2003, para. 18.

¹²² *Faretta v. California*, 422 US 806, 817 (1975).

to establish the truth. In the adversarial systems, it is the responsibility of the parties to put forward the case and not for the court, whose function it is to judge. Therefore, in an adversarial system, the imposition of defence counsel on an unwilling accused would effectively deprive that accused of the possibility of putting forward a defence. In this connection, Article 21 (4) (d) of the Statute may be said to be reflective of the common law position¹²³.

another case involving an obstreperous defendant, another Trial Chamber of the ICTY signalled the difference in approach between common law and ‘civil law’ systems, noting that international human rights case law acknowledged that the right to defend oneself was subject to limitations. It also observed that ‘[t]he Accused is in fact increasingly demonstrating a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance’. Consequently, the Trial Chamber ordered the appointment of ‘standby counsel’, who would be mandated to assist the accused, and ‘in exceptional circumstances to take over the defence from the Accused at trial should the Trial Chamber find, following a warning, that the Accused is engaging in disruptive conduct or conduct requiring his removal from the courtroom’¹²⁴. Subsequently, the Trial Chamber attempted to impose counsel on Šešelj, who went on a hunger strike in protest. After he had been without food for many days, the Appeals Chamber overruled the Trial Chamber¹²⁵.

After Judge May withdrew from the *Milošević* case because of a serious illness of his own, his two colleagues, together with the new judge appointed in his place, and inspired by the Šešelj ruling of the other Trial Chamber, revised their earlier decision. Noting the ongoing medical problems of the accused, which had occasioned several adjournments in the course of the two and half years of hearings, the Trial Chamber said: ‘If at any stage of a trial there is a real prospect that it will be disrupted and the integrity of the trial undermined with the risk that it will not be conducted fairly, then the Trial Chamber has a duty to put in place a regime which will avoid that. Should self-representation have that impact, we conclude that it is open to the Trial Chamber to assign counsel to conduct the defence case, if the Accused will not appoint his own counsel’¹²⁶. The Trial Chamber said it ‘was of the opinion that it was necessary to relieve the Accused of the burden of conducting his own case with a view to stabilising his health to ensure, so far as possible, that the trial proceeds with the minimum of interruption in a way that will permit the orderly presentation of the Accused’s case and the completion of the trial within a reasonable time in his interests and the interests of justice: in other words, to secure for the Accused a fair and expeditious trial’¹²⁷.

The ‘assigned counsel’ appealed the decision, which was reversed, in part, by the Appeals Chamber. The Appeals Chamber stated that the right of an accused person to defend himself or herself could indeed be curtailed on the grounds that a defendant’s self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial. It reasoned by analogy with the right to be tried in one’s own presence, which the Tribunal noted was subject to limitation in the event of disruption. ‘If a defendant’s right to be present for his trial – which, to reiterate, is listed in the same string of rights and indeed in the same *clause* as the right to self-representation – may thus be restricted on the basis of substantial trial disruption, the Appeals Chamber sees no reason to treat the right to self-representation any differently’, it said¹²⁸. In the case of disruption, the accused can be said to have consciously and intentionally waived the right to be present at trial, and to act in his or her

¹²³ See note 103, *Prosecutor v. Milošević*, para. 24.

¹²⁴ *Prosecutor v. Šešelj*, IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj With his Defence, 9 May 2003.

¹²⁵ *Prosecutor v. Šešelj*, IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel, 20 Oct. 2006.

¹²⁶ *Prosecutor v. Milošević*, IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 Sep. 2004, para. 33. See also: *Prosecutor v. Milošević*, IT-02-54-T, Order on Future Conduct of the Trial, 6 July 2004.

¹²⁷ *Ibid.*, para. 66.

¹²⁸ *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 Nov. 2004, para. 13.

own defence. The Appeals Chamber said that ‘it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety. How should the Tribunal treat a defendant whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigours of trial work – the late nights, the stressful cross-examinations, the courtroom confrontations – unless the hearing schedule is reduced to one day a week, or even one day a month’¹²⁹?

The Trial Chamber of the Special Court for Sierra Leone has also considered the question of self-representation¹³⁰. Referring to the formulation of the right of self-representation, the SCSL Trial Chamber said that because article 17 (4) (d) of the Court’s *Statute* spoke of ‘the right to have legal assistance assigned’, this proved that ‘the right to defend himself or herself in person’ was only a qualified and not an absolute right. Unlike *Milošević*, the SCSL defendant, Hinga Norman, had no apparent medical problems, nor was he misbehaving in court. The judges simply felt he wasn’t up to the job of defending himself, adding that the problems this might cause would also impact negatively on the right of the other two defendants in the case to a speedy trial¹³¹. Finally, the judges laid emphasis on the ‘time limited mandate of the Court’¹³², a reference to the parsimonious resources allocated by the United Nations. The Trial Chamber concluded with an oxymoron, writing that ‘[t]he right to self-representation in this case ... can only be exercised with the assistance of Counsel’¹³³.

The Rules of Procedure and Evidence of the International Criminal Court do not contemplate this situation, probably because the issues had not yet arisen before the *ad hoc* tribunals when the Rules were drafted. No clear formula has yet emerged at the *ad hoc* tribunals, where the approach sometimes seems rather improvised. Even where the fundamental justification for setting aside the right to self-representation is expediency, it is doubtful whether such a result is in fact achieved.

c) **Choice of counsel.** Although the accused is entitled to choice of counsel, this right cannot be unlimited. The Court may impose ethical, linguistic and other professional requirements in order to establish qualifications for counsel, as under domestic legal systems. The European Commission of Human Rights dismissed claims alleging a violation of the right to counsel on the basis of failure to respect professional ethics¹³⁴, where counsel was also a defence witness¹³⁵, and even for a refusal to wear a gown¹³⁶. There is no right to choice of counsel when a defendant relies upon legal aid. According to the ICTR Appeals Chamber, ‘in the light of a textual and systematic interpretation of the provisions of the Statute and the Rules, read in conjunction with relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one’s counsel’¹³⁷. Nevertheless, the practice of the *ad hoc* tribunals has been to accommodate representation by counsel chosen by the accused, where feasible, and this approach is reflected in the Regulations of the Court:

¹²⁹ *Ibid.*, para. 14.

¹³⁰ *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Ruling on the Issue of Non-Appearance of the First Accused Samual Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings, 1 Oct. 2004, para. 23.

¹³¹ *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Decision on the Application of Sam Hinga Norman for Self-Representation Under Article 17(4)(d) of the Statute of the Special Court, 8 June 2004.

¹³² *Ibid.*, para. 26.

¹³³ *Ibid.*, para. 32.

¹³⁴ *Ensslin, Baader and Raspe v. Federal Republic of Germany*, App. Nos. 7572/76, 7586/76 and 7587/76, (1978) 14 D.R. 64.

¹³⁵ *K. v. Denmark* (No. 19524/92), unreported.

¹³⁶ *X. and Y v. Federal Republic of Germany*, App. Nos. 5217/71 and 5367/72, (1972) 42 COLL. 139.

¹³⁷ *Prosecutor v. Kambanda*, ICTR 97-23-A, Judgment, 19 Oct. 2000, para. 33; *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, paras. 60–61; *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10-T and ICTR-96-17-T, Decision on the Motions of the Accused for Replacement of Assigned Counsel, 11 June 1997.

‘Regulation 75 Choice of defence counsel

1. If the person entitled to legal assistance chooses a counsel included in the list of counsel, the Registrar shall contact that counsel. If the counsel is willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel by the person.
2. If the person entitled to legal assistance chooses a counsel not on the list of counsel who is willing and ready to represent him or her and to be included in the list, the Registrar shall decide on the eligibility of that counsel in accordance with regulation 70 and, upon inclusion in the list, shall facilitate the issuance of a power of attorney. Until the filing of a power of attorney, the person entitled to legal assistance may be represented by duty counsel in accordance with regulation 73’.

The classic problem in domestic legal systems concerning choice of counsel on legal aid is the low tariff, in effect discouraging more senior and expert lawyers from agreeing to take such cases. Remuneration at the international tribunals is however sufficient to attract top notch professionals.

The *ad hoc* Tribunals have adopted a rule requiring that counsel be either admitted to the practice of law in a State or be a university professor of law¹³⁸. The Rules of Procedure and Evidence of the International Criminal Court are somewhat different, and focus on substance rather than form, requiring that ‘counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings’. Counsel must have a minimum of ten years of relevant experience, and shall not have been convicted of ‘a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court’¹³⁹. Defence counsel must also have ‘an excellent knowledge of and be fluent in at least one of the working languages of the Court’¹⁴⁰. In the *Darfur Situation*, the Pre-Trial Chamber instructed the Registrar to appoint *ad hoc* counsel for the defence who was not only fluent in one of the working languages, but who was also capable of working in Arabic¹⁴¹. The Registrar may remove lawyers from the list of counsel for various disciplinary factors¹⁴².

The *Statute* and the Rules of Procedure and Evidence establish norms that apply to defence counsel, including a Code of Professional Conduct for Counsel to be adopted by the Assembly of States Parties pursuant to a proposal from the Registrar, following consultation with the Prosecutor¹⁴³.

- 31 The accused is entitled to be informed of the right to counsel. In practice, this is unlikely to pose any problem.
- 32 **dd) Free legal assistance.** In the *ICCPR*, the right to funded counsel for indigent defendants is subject to the requirement that this be in cases ‘where the interests of justice so require’. Arguably, this will be the situation in all cases before the ICC. Indeed, the ILC removed the condition in its Draft Statute¹⁴⁴, only to have it introduced again by the Preparatory Committee¹⁴⁵. Consequently, the rule is not an absolute one, although it is hard to imagine an example of a matter before the Court where the interests of justice would not require funded counsel for an indigent defendant
- 33 The most far-reaching discussion of this provision took place in the informal working group at the August 1996 session of the Preparatory Committee. There, a number of practical

¹³⁸ See note 85, Rules of Procedure and Evidence, rule 44.

¹³⁹ See note 33, Regulations of the Court, regulation 67.

¹⁴⁰ See note 54, Rules of Procedure and Evidence, rule 22.

¹⁴¹ *Situation in Darfur*, ICC-02/05-12, Décision du Greffier relative à la nomination de Me Hadi Shalluf en qualité de conseil ad hoc de la Défense, 25 Aug. 2006, p. 2.

¹⁴² See note 33, Regulations of the Court, regulation 71; see note 30, Regulations of the Registry, regulation 122 *et seq.*

¹⁴³ See note 54, Rules of Procedure and Evidence, rule 8.

¹⁴⁴ See note 15, 1994 ILC Draft Statute, p. 116. See also: Code of Crimes against the Peace and Security of Mankind, UN Doc. A/51/332 (1996), article 11 (e).

¹⁴⁵ See note 19, Preparatory Committee Decisions Aug. 1997.

recommendations were made, closely following the practice of the *ad hoc* tribunals¹⁴⁶. A detailed codification of principles governing the appointment of counsel was also set out at that time¹⁴⁷.

Administration of the system of legal aid to indigent defendants is the responsibility of the Registrar¹⁴⁸. Legal aid is to encompass all that is necessary for ‘effective and efficient defence, including the remuneration of counsel’¹⁴⁹. The right to counsel includes a right to adequate, qualified counsel. Unlike situations where a defendant chooses and remunerates counsel, when counsel are authorized and funded by the Court, it becomes responsible for their competence¹⁵⁰. The Registrar is afforded a wide margin of discretion when decisions on legal aid are challenged before the Court, and it has been held that a Chamber should only interfere ‘if there are compelling reasons for doing so’.¹⁵¹ This includes circumstances where the Registrar has failed to provide full and complete justification for his or her decision, or where the decision evinces signs of arbitrariness or a misuse of the Registrar’s discretion.¹⁵²

The experience of the *ad hoc* Tribunals shows that it is likely that counsel will be remunerated by the Tribunal in virtually all cases, given the fact that defendants, even if they were once powerful rulers who looted their countries before losing power, become suddenly and mysteriously impoverished at the time of indictment. The first defendant to come before the Court, Thomas Lubanga, was declared indigent and provided with Court-appointed counsel¹⁵³. The Regulations of the Court indicate the criteria for determining eligibility for legal aid¹⁵⁴.

Legal assistance before the *ad hoc* Tribunals has had a turbulent history, and practice appears to differ between The Hague and Arusha. David Tolbert, who has worked in several senior positions with the ICTY over the years, describes the defence counsel and legal aid systems as ‘the ICTY’s Achilles’ heel’¹⁵⁵. In one case before the ICTY, a defendant who had benefitted from legal aid was ordered to reimburse the Tribunal, where it was later found that he had sufficient funds to pay for his own defence.¹⁵⁶

e) Right to challenge evidence and raise defences. The first sentence of article 67 para. 1 (e) is virtually identical, aside from the changes to gender neutral terminology, to the text of article 14 para. 3 (e) of the *ICCPR*. The second sentence, dealing with entitlement to raise defences, is an original contribution.

aa) Examination of witnesses. The ILC attempted to rewrite somewhat the *ICCPR* provision dealing with examination of witnesses, limiting the application of the right to prosecution witnesses, and thereby eliminating witnesses called by the Court on its own motion from the scope of the provision¹⁵⁷. The Preparatory Committee adopted the language

¹⁴⁶ See note 18, 1996 Preparatory Committee I, para. 272.

¹⁴⁷ *Ibid.*, pp. 197–199.

¹⁴⁸ See note 54, Rules of Procedure and Evidence, rule 21; see note 30, Regulations of the Registry, regulation 130 *et seq.*

¹⁴⁹ See note 33, Regulations of the Court, regulation 83.

¹⁵⁰ The Right to a Fair Trial, Report to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities by Mr. S. Chernichenko and Mr. W. Treat on The Administration of Justice and the Human Rights of Detainees, UN Doc. E/CN.4/Sub.2/1991/29, paras. 54–57.

¹⁵¹ *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12-159, Decision on Mr Ngudjolo’s request for review of the Registrar’s decision regarding the level of remuneration during the appeal phase and reimbursement of fees, 11 Feb. 2014, para. 22.

¹⁵² *Prosecutor v. Ntaganda*, ICC-01/04-02/06-389, Reasons for Review of Registrar’s Decision on Defence resources, 29 Oct. 2014, para. 41.

¹⁵³ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Décision du Greffier sur la demande de l’aide judiciaire aux frais de la Cour déposée par M. Thomas Lubanga Dyilo, 31 Mar. 2006.

¹⁵⁴ See note 33, Regulations of the Court, regulation 84.

¹⁵⁵ Tolbert, (2003) 37 *NewEnglandLJ* 975.

¹⁵⁶ *Prosecutor v. Plić et al*, Order On The Registrar’s Application Pursuant To Rule 45(E) Of The Rules, Case No. IT-04-74-A, 13 May 2014.

¹⁵⁷ See note 15, 1994 ILC Draft Statute, p. 116, article 41.

of the ILC¹⁵⁸ but the Rome Conference, in its wisdom, returned to the original *ICCPR* text¹⁵⁹. According to Judge Vohrah, of the ICTY:

The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side ... [T]he European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution¹⁶⁰.

38 It is foreseeable that there be certain limits to this right. The formal provisions governing testimony of victims of sexual crimes is an example. Article 68 para. 2 enables the Court to allow the presentation of evidence by electronic or other special means. Of course, this is not a breach of article 67 para. 1 (e) unless it is read as including a right to cross-examination and to confrontation.

During the Preparatory Committee sessions, the issue was presented as a right to ‘confront and cross-examine all witnesses’¹⁶¹. But the wording of the provision is based on an international model which recognizes the legitimacy of trials without confrontation of witnesses and cross-examination, at least in the sense of common law procedure¹⁶². Article 14 of the *ICCPR* was not intended to impose a common law model on domestic justice systems, and those which do not indulge in cross-examination of witnesses before the Court cannot be considered, *prima facie*, to be in breach of the international norm. Thus, although the defence has the right to examine witnesses on the same basis as the Prosecutor, there is no explicit provision for a full right to cross-examination, as it is understood in the common law. The Regulations further confirm this perspective:

‘Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to:

- (a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth...’¹⁶³.

Under continental or Romano-Germanic legal systems, questions may be posed by the judge at the request of counsel. At trial, the presiding judge may issue directions as to the conduct of the proceedings¹⁶⁴, failing which the Prosecutor and the defence are to agree on the order and the manner in which evidence is to be presented¹⁶⁵. Witnesses are questioned by the party that presents them, followed by questioning by the other party and by the Court. The defence has the right to be the last to examine a witness¹⁶⁶.

Nothing in the Statute provides for compellability of witnesses, for example by issuance of *subpoenae* or similar orders to appear before the Court. In 2014, the Court was held had the power to summon witnesses to appear, and to oblige State parties to serve such summonses and compel the attendance of witnesses¹⁶⁷.

There are limits to the right to examine witnesses. The formal provisions governing the testimony of victims of sexual crimes are an example. In such circumstances, the Statute

¹⁵⁸ See note 78, 1996 Preparatory Committee II, p. 199; see note 19, Preparatory Committee Decisions Aug. 1997, p. 35; see note 20, Zutphen Draft, p. 114; see note 20, Draft Statute, p. 127.

¹⁵⁹ See note 22; Draft proposal for article 67; see note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4–5; see note 22, Compendium of draft articles, pp. 41–42. But see: see note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

¹⁶⁰ *Prosecutor v. Tadić*, IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness statements, 27 Nov. 1996, p. 4.

¹⁶¹ See note 18, 1996 Preparatory Committee I, p. 58, para. 275.

¹⁶² White and Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (2010) 294.

¹⁶³ See note 33, Regulations of the Court, regulation 43.

¹⁶⁴ See note 4, Rome Statute, article 64 para. 8 (b).

¹⁶⁵ See note 54, Rules of Procedure and Evidence, rule 140 para. 1.

¹⁶⁶ *Ibid.*, rule 140 para. 2.

¹⁶⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1274, Decision on Prosecutor’s Application of Witness summonses and Resulting Request for State Party Cooperation, 17 Apr. 2014, para. 193.

authorises the Court to allow the presentation of evidence by electronic or other special means¹⁶⁸. Some questions are out of bounds: the Rules of Procedure and Evidence state that evidence of the prior or subsequent sexual conduct of a victim or witness is not to be admitted¹⁶⁹. It may also disallow questions because they are abusive or repetitive. What is important is that the parties, prosecution and defence, be treated equally and that the trial be fundamentally fair. The Statute also allows the Court to recognise witness privileges. The Assembly of States Parties agreed to confirm a principle already recognised by the International Criminal Tribunal for the former Yugoslavia, by which the International Committee of the Red Cross has a right to non-disclosure of evidence obtained by a former employee in the course of official duties. The Tribunal relied on customary international law in reaching its decision¹⁷⁰. The Rules also recognise solicitor client privilege, and enable the Court to extend privilege to other categories of witnesses¹⁷¹. It has been suggested that on this basis privilege might be extended to other non-governmental organisations with humanitarian purposes, and bodies such as a truth and reconciliation commission.

bb) Defences. The second sentence of subparagraph (e) recognizes the right of the accused 39 to raise defences and to present other admissible evidence. The Preparatory Committee had appended to the provision, in square brackets, a sentence stating: ‘In addition the accused shall also be entitled to present any other evidence’¹⁷². At Rome, the Chair of the Working Group added the reference to raising defences¹⁷³.

These rights must surely be included within the general principle of the right to a fair trial, 40 established in the *chapeau* of article 67 para. 1. Moreover, defences are described in considerable detail in Part 2 of the *Statute*, concerning general principles of law. It should be observed that some defences are formally excluded by Part 2, namely the defence of official capacity¹⁷⁴, lack of knowledge (in the case of command responsibility)¹⁷⁵ and superior orders (in cases of genocide and crimes against humanity)¹⁷⁶.

f) Interpreter. The provision in the ICC *Statute* is considerably more detailed than the 41 corresponding text in the *ICCPR* although it is doubtful whether anything really new has been added. Article 14 para. 3 (f) recognizes the right to ‘free assistance of an interpreter’ if the accused ‘cannot understand or speak the language used in court’¹⁷⁷. Here, too, the ILC attempted to improve on the text of the *ICCPR*, adding the requirement that the interpreter be ‘competent’, specifying extension of the principle to include documents, and modifying the requirement that the accused either understand or speak the language to become a cumulative requirement, ‘understands and speaks’¹⁷⁸. The *Statute* provision is essentially identical to the ILC Draft, except for the order of the phrases. These were reversed at the August 1997 session of the Preparatory Committee¹⁷⁹, and the word ‘fully’ added during the Rome Conference¹⁸⁰.

An accused who does not understand the proceedings is not ‘present’ at trial. Thus, the 42 right to an interpreter seems axiomatic. Supervision of the quality of such interpretation is a

¹⁶⁸ See note 4, Rome Statute, article 68 para. 2.

¹⁶⁹ See note 54, Rules of Procedure and Evidence, rule 71.

¹⁷⁰ *Ibid.*, Rule 73 (3), (4), (5), confirming: *Prosecutor v. Simić et al.*, IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

¹⁷¹ See note 54, Rules of Procedure and Evidence, rule 73.

¹⁷² See note 18, 1996 Preparatory Committee II, p. 199; see note 19, Preparatory Committee Decisions Aug. 1997, p. 35; see note 20, Zutphen Draft, p. 114; see note 20, Draft Statute, p. 127.

¹⁷³ See note 22 Draft proposal for article 67.

¹⁷⁴ See note 4, Rome Statute, article 27.

¹⁷⁵ *Ibid.*, article 28.

¹⁷⁶ *Ibid.*, article 33.

¹⁷⁷ Specific responsibility for ensuring respect of this right lies with the registry: see note 30, Regulations of the Registry, regulation 40.

¹⁷⁸ See note 15, 1994 ILC Draft Statute, p. 115, article 41. For a particularly interesting discussion of the difficulties of trials with interpreters, see *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment of 2 Sep. 1998.

¹⁷⁹ See note 19, Preparatory Committee Decisions Aug. 1997, p. 35; see note 20, Zutphen Draft, pp. 114–115; see note 20, Draft Statute, pp. 114–115; see note 22, Draft proposal for article 67.

¹⁸⁰ See note 76, Report of the Working Group on Procedural Matters (11 July), pp. 3–4; see note 22, Compendium of draft articles, pp. 5–7.

constant difficulty, however, because frequently the accused is the only person who is actually listening to the interpretation. Although the requirement that documents be translated may be cumbersome, time-consuming and costly, it has been recognized by the European Court of Human Rights as a corollary of the right to an interpreter¹⁸¹.

- 43 The provision does not require interpretation into the accused's mother tongue, or into a language of the accused's choice¹⁸². In an interlocutory ruling, the ICTY denied an accused's request for a 'Croatian' interpreter, given that the languages are similar enough and there was regular translation of Serbo-Croatian¹⁸³. The accused is not entitled to a translation of every document in the case; the right extends only to 'such translations as are necessary to meet the requirements of fairness'. The Court has taken quite a restrictive approach to translation, holding that only those documents that are fundamental to ensuring that the accused fully understands the 'nature, cause and content of the charge and thus to adequately defend himself or herself' must be translated.¹⁸⁴ A more expansive approach to interpretation might be required where the accused opts to exercise his or her right to self-representation, as the ability to prepare an effective defence will likely extend to a wider range of documents.
- 44 **g) Right to silence.** The right to silence provision is also based on the norm in article 14 para. 3 of the *ICCPR*, but goes considerably farther. The *ICCPR* says that an accused has the right '[n]ot to be compelled to testify against himself or to confess guilt'. The *Statute* removes the qualification 'against himself', and adds an additional norm that is not at all implicit in the *ICCPR*, namely that the silence of an accused cannot be a consideration in the determination of guilt or innocence.
- 45 The words 'against himself' were removed by the ILC in its Draft Statute, but otherwise the text of article 14 para. 3 (g) remained intact¹⁸⁵. But this is not the same as the general right against self-incrimination found in the Fifth Amendment to the United States Constitution, because the right may only be invoked by an accused¹⁸⁶. The text clarifies the fact that an accused may refuse to testify altogether, and not merely to testify when the evidence is 'against himself'.
- 46 The second arm of the provision, providing that silence includes the right not to have it invoked against an accused, was added during the August 1997 Preparatory Committee¹⁸⁷. Without square brackets, it sailed along effortlessly into the final version of the *Statute*¹⁸⁸, although at the Rome Conference the United Kingdom made an interesting proposal that changed the form without modifying the content¹⁸⁹. The provision reflects concerns with encroachments upon the right to silence in some national justice systems. Specifically, English common law has always prevented any adverse inference being drawn from an

¹⁸¹ See note 79, *Luedicke, Belkacem and Koc v. Federal Republic of Germany*, para. 48; *Kamasinski v. Federal Republic of Germany*, Ser. A, No. 168, 19 Dec. 1989, para. 74.

¹⁸² *Guesdon v. France* (No. 219/1986), UN Doc. A/44/40, p. 222, paras. 10.2, 10.3.

¹⁸³ *Prosecutor v. Delalić et al.*, IT-96-21-T, Order on Zdravko Mucić's Oral Request for Croatian Interpretation, 23 June 1997.

¹⁸⁴ *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-177, Decision on the Defence request for an order requiring the translation of evidence, 11 Feb. 2014, para. 6. See also, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-489, Decision on Mr Gbagbo's request for translation and an extension of time for the filing of a response to the document in support of the appeal, 22 Aug. 2013, para. 12.

¹⁸⁵ See note 15, 1994 ILC Draft Statute, p. 116, article 41.

¹⁸⁶ According to see note 18, 1996 Preparatory Committee I, para. 276, 'The right of the accused not to be compelled to give testimony was supported, as was the right of witnesses to enjoy some degree of protection from giving self-incriminating testimony'. But article 67 does not apply to witnesses, who have no general protection against self-incrimination.

¹⁸⁷ See note 19, Preparatory Committee Decisions Aug. 1997, p. 35; see note 20, Zutphen Draft, p. 117; see note 20, Draft Statute, p. 127.

¹⁸⁸ See note 22, Draft proposal for article 67; see note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4–5; see note 22, Compendium of draft articles, pp. 41–42.

¹⁸⁹ See note 41, Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, p. 1: 'Neither to be compelled to testify nor to confess guilt and to be permitted to remain silent without any inference as to guilt or innocence being drawn from such silence'.

accused's failure to testify. But in recent years, legislation adopted within the United Kingdom now allows prosecutors to propose such conclusions¹⁹⁰.

At the *ad hoc* tribunals, the right to silence has arisen in proceedings concerning provisional release, where prosecutors argued that the silence of the accused is a pejorative factor militating against release. But Trial Chambers have said that 'lack of co-operation of an accused should not, as a rule, be taken into consideration as a factor' that might justify denying an application for provisional release. According to an ICTY Trial Chamber, '[t]he alternative would easily result in infringement of the fundamental right of an accused to remain silent'¹⁹¹.

Cooperation with the Prosecutor may be cited as a mitigating factor at the sentencing stage, and to this extent there may be a price to be paid by an accused for exercising the right to silence. However, Trial Chambers have frequently insisted that the fact the accused does not plead guilty should not be viewed as an aggravating factor, 'since an accused person has no obligation to do so and he has the right to remain silent should he choose that course'¹⁹². In *Niyitegeka*, an ICTR Trial Chamber wrote:

'The Accused chose not to testify in his own defence in the present case. The Defence made submissions concerning the right to remain silent and the right not to testify. The Chamber is mindful of the Accused's rights in this regard and has not drawn any adverse inference in the present case'¹⁹³.

In *Čelebići*, the ICTY Appeals Chamber said there is 'an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules... Similarly, this absolute prohibition must extend to an inference being drawn in the determination of sentence'¹⁹⁴. While the ICC has confirmed that no adverse inference may be drawn from the accused's silence, it has also held that if the accused were to choose to disclose a line of defence at a stage in proceedings that was 'unnecessarily and unjustifiably late', this could have negative consequences for the right to have exculpatory material disclosed by the prosecution.¹⁹⁵ This does suggest that the exercise of the right to silence can bring adverse consequences for the accused who opts not to reveal his or her lines of defence until a later stage in proceedings, as 'the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal ... [the] identities [of exculpatory witnesses] to the accused'¹⁹⁶.

The right to silence can of course be waived. An accused who pleads guilty in effect waives the right to silence, as well as certain other procedural rights¹⁹⁷. This is often spelled out in plea agreements at the *ad hoc* tribunals¹⁹⁸. Many accused before international tribunals have chosen to testify in their own defence. In the case of a defence of alibi, for example, it is virtually essential that the accused take the witness stand in order to explain his or her whereabouts at the time of the crime.

¹⁹⁰ Criminal Justice and Public Order Act (1994), s. 4 (3).

¹⁹¹ *Prosecutor v. Jokić et al.*, IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, 20 Feb. 2002. Also: *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Decisions Granting Provisional Release to Enver Hadžihasanović, Mehmed Alagic and Amir Kubura, 9 Dec. 2001, para. 15.

¹⁹² *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, 29 Nov. 2002, para. 298; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 Feb. 2001, para. 783; *Prosecutor v. Plavšić*, IT-00-39&40/1, Sentencing Judgment, 27 Feb. 2003, para. 64; *Prosecutor v. Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 687.

¹⁹³ *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Judgment and Sentence, 16 May 2003, para. 46.

¹⁹⁴ *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 Feb. 2001, para. 783. Also: *Prosecutor v. Plavšić*, IT-00-39&40/1, Sentencing Judgment, 27 Feb. 2003, para. 64.

¹⁹⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 Jan. 2008, 11 July 2008, para. 44; *Ibid.*, Partly Dissenting Opinion of Judge Georgios M. Pikis, paras. 11–14.

¹⁹⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-71-ENG, Transcript, 18 Jan. 2008, p. 9, lines 4 to 21.

¹⁹⁷ *Prosecutor v. Sikirica et al.*, IT-95-8, Sentencing Judgment, 13 Nov. 2001, para. 17.

¹⁹⁸ See, e.g., *Prosecutor v. Obrenović*, IT-02-60-T, Plea Agreement, para. 17; *Prosecutor v. Momir Nikolić*, IT-02-60-PT, Amended Plea Agreement, para. 5.

- 47 **h) Unsworn statement.** The idea that an accused is entitled to make an unsworn oral or written statement in his or her defence, at least as a fundamental right, is a genuine innovation. There is nothing comparable in any of the international human rights instruments. But it is a practice recognized under many criminal codes throughout the world. In fact, continental European jurists are ‘astonished’ that it could be otherwise, as in their jurisdictions the accused is never sworn¹⁹⁹. The proposal first surfaced during the informal working group of the August 1996 session of the Preparatory Committee²⁰⁰. It was retained, in square brackets, by the Working Group in August 1997²⁰¹, and adopted without difficulty at the Rome Conference²⁰².
- 48 Under common law systems, an unsworn statement would in principle be inadmissible as evidence. If the accused chooses to testify, then he or she must be sworn and, moreover, must submit to cross-examination. Article 69 para. 1 requires every witness to ‘give an undertaking as to the truthfulness of the evidence to be given by that witness’. In so doing, the witness submits to the possibility of prosecution for perjured testimony²⁰³. Although there is a lack of consistency with the terminology used in article 67 para. 1 (h), logically, testimony subsequent to the undertaking as to truthfulness must be the equivalent of a ‘sworn statement’. Therefore, the ‘unsworn statement’ seems to present itself as an exception to the general rule requiring that testimony be accompanied by an undertaking as to truthfulness. Although the judges cannot consider the accused’s decision not to testify as a factor influencing guilt or innocence, pursuant to article 67 para. 1 (g), this surely does not require them to attribute the same weight to the unsworn statement of an accused as they would to sworn testimony. But an alternative view suggests that the unsworn statement is not evidence at all. If it is not, then the Court may not base its judgment on ‘facts’ revealed in the course of the unsworn statement²⁰⁴. An accused who believes the unsworn statement is a way to introduce evidence might have an unfortunate surprise if the Court, in its final judgment, indicates that it does not consider such ‘facts’ as being part of the record. The latter view appears to be supported by the finding that if an accused person elects to make an unsworn statement, he or she cannot be cross-examined on the contents of that statement, as this would contravene the right to silence in article 67 para. 1 (g).²⁰⁵ However, in granting an accused the right to address the Appeals Chamber, the Chamber noted that ‘the opportunity afforded to Mr Ngudjolo to make a personal address does not qualify as an unsworn oral or written statement within the meaning of article 67 (1) (h) of the Statute, which may attract evidentiary weight’.²⁰⁶ The word ‘may’ is instructive here; it indicates that there is no obligation on the Trial Chamber to take the unsworn statement into account when reaching its final judgment.
- 49 **i) Reverse onus.** The prohibition of any reverse onus or duty or rebuttal is really a corollary of the presumption of innocence, protected by article 66 of the ICC Statute. Reverse onus provisions are common to most criminal law systems.²⁰⁷ Upon proof of one fact, the Court is entitled, or in some cases is obliged, to conclude that another fact has been proven. Thus, the prosecution does not in reality prove a decisive fact in the case against the accused. The accused bears the onus of disproving such a fact, sometimes by raising a reasonable

¹⁹⁹ Pradel, *Droit Pénal Comparé* (2008) 449, fn. 1.

²⁰⁰ See note 78, 1996 Preparatory Committee II, p. 117, 200.

²⁰¹ See note 18, 1996 Preparatory Committee I, p. 35; see note 20, Zutphen Draft, p. 117; see note 20, Draft Statute, p. 128.

²⁰² See note 22, Draft proposal for article 67; see note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4–5; see note 22, Compendium of draft articles, pp. 41–42. See also: see note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

²⁰³ See note 4, Rome Statute, article 70 para. 1 (a).

²⁰⁴ *Ibid.*, article 74 para. 2.

²⁰⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on unsworn statement by the accused pursuant to Article 67(l)(h) of the Rome Statute, 1 Nov. 2013, para. 8. See also, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Vidoje Blagojević’s Oral Request, 30 July 2004, 7.

²⁰⁶ *Prosecutor v. Ngudjolo*, ICC-01/04-02/12, Decision on the Prosecutor’s request to establish parameters for Mr Ngudjolo’s personal address at the appeal hearing, 17 Oct. 2014, para. 9.

²⁰⁷ For a discussion see commentary on article 66, particularly mn. 18–22.

doubt as to its existence, and sometimes by actually proving the contrary, according to the principle of preponderance of evidence. Although many offences in national criminal codes are drafted in such a fashion, there are no examples in the ICC Statute. This does not mean that a reverse onus issue may not arise. For example, in the *Čelebići* trial before the ICTY, the Trial Chamber noted that ‘there is a presumption of sanity of the person alleged to have committed the offence’²⁰⁸ and that the accused who raises a defence of insanity or diminished mental capacity ‘is to rebut the presumption of sanity’²⁰⁹. In *Bemba*, the Appeals Chamber found that the Trial Chamber had erroneously reversed the burden of proof when it admitted the totality of prosecution witness statements as a whole, leaving a burden on the accused to disprove the admissibility of items of evidence that had already been admitted.²¹⁰

The provision was not included in the ILC Draft Statute, nor did it form part of the first series of amendments, during the 1996 sessions of the Preparatory Committee. Article 67 para. 1(i) was proposed during the August 1997 meeting, although it was left in square brackets²¹¹. It posed no problem during the debates at Rome and was adopted promptly²¹². 50

II. Paragraph 2

International human rights law is somewhat uncertain as to an obligation on the prosecution to disclose evidence to the defence prior to trial. Although the instruments impose no clear duty in this respect²¹³, the European Court of Human Rights has declared ‘that it is a requirement of fairness ... that the prosecution authorities disclose to the defence all material evidence for or against the accused’²¹⁴. The Rules of the *ad hoc* Tribunals make detailed provision for disclosure of the prosecution case and, according to more recent amendments, for the defence case as well²¹⁵. A duty on the prosecution to disclose its evidence, both exculpatory and inculpatory, is now recognized in many legal systems²¹⁶. Existence of a reciprocal duty on the defence is less common although in some cases, such as a defence of alibi, the credibility of the defence will depend on prompt disclosure of material facts²¹⁷. In an interlocutory decision in the *Tadić* case, Judge Stephen said the defence has ‘no disclosure obligation at all unless an alibi or a special defence is sought to be relied upon and then only to a quite limited extent ...’²¹⁸. It is obvious that the defence can never be required to disclose inculpatory evidence, as this would violate the right against self-incrimination set out in paragraph (g). 51

In an effort to clarify this point, the ILC proposed the following provisions, to comprise a second paragraph in the article on rights of the accused: ‘Exculpatory evidence that becomes 52

²⁰⁸ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 Nov. 1998, para. 1157.

²⁰⁹ *Ibid.*, para. 1158.

²¹⁰ *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, 3 May 2011, para. 73.

²¹¹ See note 19, Preparatory Committee Decisions Aug. 1997, p. 35; also: see note 20, Zutphen Draft, p. 155; see note 20, Draft Statute, p. 128. Note the error in the *nota bene* at the end of article 60 in the Zutphen Draft. The reference is to paragraph 1 in general, and not to subparagraph 1 (j). The error is corrected in the Draft Statute of Apr. 1998.

²¹² See note 22, Draft proposal for article 67, p. 5; see note 22, Compendium of draft articles, p. 42; Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/C.1/L.76/Add.6, p. 5.

²¹³ The closest is Principle 21 of the United Nations Basic Principles on the Role of Lawyers, UN Doc. A/CONF.144/28/Rev.1 (1990): ‘It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients’.

²¹⁴ *Edwards v. United Kingdom*, Ser. A, No. 247B, 16 Dec. 1992.

²¹⁵ See note 85, Rules of Procedure and Evidence, Rule 66. See: La Rosa, (1997) 101 *RGDIP* 945, 974.

²¹⁶ Pradel, *Droit Pénal Comparé* (2008) 414–420; Heinze, *International Criminal Procedure* (2014), 309–499.

²¹⁷ *Williams v. Florida*, 399 U.S. 78 (1970).

²¹⁸ *Prosecutor v. Tadić*, IT-94-1-T, Separate opinion of Judge Stephen on prosecution motion for production of defence witness statements, 27 Nov. 1996.

available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide²¹⁹. At the August 1996 session of the Preparatory Committee, delegates observed that it was fundamental to a fair trial that provision be made for the full disclosure of evidence by the Prosecutor to the defence, and not only exculpatory evidence, as well as a reciprocal duty of disclosure on the part of the defence²²⁰. At Rome, a new version submitted by Australia formed the basis of debate²²¹. The Drafting Committee added, at the beginning of the Australian text, the words '[i]n addition to any other disclosure provided for in this Statute ...'. Australia had left two options as to the body competent for resolving questions about whether or not disclosure was required, the Pre-Trial Chamber and the Trial Chamber. The Preparatory Committee did not choose either, leaving the matter to 'the Court'²²².

- 53 It is perhaps unfortunate that the obligation on the prosecution to disclose all relevant evidence is not explicitly included within the provision concerning rights of the defence. It is surely implicit in the general right to a 'fair hearing' found within the *chapeau* of article 67, especially in light of recent case law of international human rights tribunals. Moreover, article 64 of the *Statute*, entitled 'Functions and powers of the Trial Chamber', requires that the Trial Chamber 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused'. In this context, the *Statute* imposes upon the Trial Chamber assigned to deal with a case the obligation ('the Trial Chamber ... shall'; the ILC Draft had left this to the discretion of the Presidency²²³): '[s]ubject to any other relevant provisions of this Statute, [to] provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial'. The relevant provisions that may qualify somewhat this duty on the prosecution are article 68 para. 5, concerning protection of witnesses, and article 72 para. 1, concerning protection of national security information, which makes express reference to article 67 para. 2.

The Rules of Procedure and Evidence of the ICC establish a thorough regime of disclosure, applicable to both Prosecutor and defence.²²⁴ The prosecution is required to provide the defence with the names of witnesses it intends to call at trial together with copies of their statements, subject to certain exceptions relating to the protection of the witnesses themselves²²⁵. The defence has a corresponding obligation with respect to witnesses, although this is worded slightly more narrowly, applying only to those expected to support specific defences²²⁶. Both sides are required to allow the other to inspect books, documents, photographs and other tangible objects in their possession or control which they intend to use as evidence. The Prosecutor must also disclose any such items that may be 'material to the preparation of the defence', pursuant to Rule 77 of the RPE, although a comparable duty is not imposed upon the defence to disclose items that might assist the prosecution²²⁷. This term has been interpreted quite broadly, and goes beyond those objects that are directly linked to exonerating and incriminating evidence, to include general background information

²¹⁹ See note 15, 1994 ILC Draft Statute, p. 115.

²²⁰ See note 18, 1996 Preparatory Committee I, para. 274, p. 58.

²²¹ Proposal submitted by Australia, UN Doc. A/CONF.183/C.1/WGPM/L.35 (29 June), p. 1: 'The Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the [Pre-Trial Chamber/Trial Chamber] shall decide'. There were other proposals relating to article 67 para. 2: see note 41, Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, p. 1; see note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

²²² See note 22, Draft proposal for article 67; see note 76, Report of the Working Group on Procedural Matters (11 July), pp. 3–4.

²²³ See note 15, 1994 ILC Draft Statute, article 27 para. 5 (b), p. 95.

²²⁴ See generally, Heinze, *International Criminal Procedure* (2014).

²²⁵ See note 54, Rules of Procedure and Evidence, rule 76.

²²⁶ *Ibid.*, rule 79.

²²⁷ *Ibid.*, rules 77–78.

in the Prosecutor's possession.²²⁸ This broad interpretation follows the ICTR's approach in *Bagosora*, where it was held that 'preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution case'.²²⁹ Similarly, the ICTY has concluded that documents and other objects 'material to the preparation of the Defence' consist of material that is '... significantly helpful to an understanding of important inculpatory or exculpatory evidence; it is material if there is a strong indication that ... it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal''.²³⁰

The second sentence of article 67 para. 2 provides for a determination by the Court in cases where the prosecution is not sure of the nature of the evidence. An early amendment described this as a hearing '*ex parte*' and '*in camera*'²³¹. The August 1997 session of the Preparatory Committee included a cross-reference to the provision enabling the Court to make orders for the conduct of the trial (now article 64 para. 3)²³². Given that there are obligations of disclosure at both the pre-trial and the trial phase, and that the obligation set out in article 67 para. 2 must be respected 'as soon as practicable', the appropriate body would be either the Pre-Trial Chamber or the Trial Chamber, depending on the circumstances. It is unclear whether this provision entitles the Prosecutor to seek a ruling in cases of doubt, or whether the defence could also apply where it suspects the Prosecution may have such evidence. There may be circumstances where the Prosecutor cannot seek such a determination without informing the Court of the evidence in question, and it would obviously defeat the purpose of the provision to allow the defence access to such evidence prior to the determination by the Court that it must be disclosed. Yet the defence is entitled to be present at trial, and the trial must be public. Should the Court decide to conduct some form of *ex parte* determination, this must be done with the greatest discretion. The Court might consider appointing an *amicus curiae* to ensure that the rights of the defence are protected and to assess, in appropriate circumstances, the usefulness of an appeal of its decision pursuant to article 81 para. 2 (d) of the *Statute*.

In the *Lubanga* case, two stays of proceedings were ordered owing to non-disclosure by the prosecution.²³³ The first, in 2008, found that the prosecution had erred in its use of article 54 para. 3 (e), which allows the Prosecutor to make agreements not to disclose any documents or information obtained confidentially and solely for the purpose of generating new evidence.²³⁴ Over 200 documents, which had either an undisputed exculpatory value or were material to the preparation of the defence, were obtained in this way and could not be disclosed as a result of the confidentiality agreements in place. The Chamber 'unhesitatingly' concluded that the fundamental right to a fair trial included the disclosure of exculpatory material,²³⁵ and that if one of the preconditions for fairness could not be present at trial, the trial must be stayed.²³⁶ Ultimately, the Prosecutor secured agreement from those information providers permitting him to share the documents with the Trial Chamber, which would in turn decide on disclosure in full, summary or redacted form.²³⁷ In 2010, a second stay of

²²⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 Jan. 2008, 11 July 2008, para. 77.

²²⁹ *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR77.2, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 Sep. 2006, para. 9.

²³⁰ *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 Sep. 1996.

²³¹ See note 78, 1996 Preparatory Committee II, p. 200.

²³² See note 19, Preparatory Committee Decisions Aug. 1997, p. 35; also: see note 20, Zutphen Draft, p. 115; see note 20, Draft Statute, p. 128.

²³³ See further, Ambos, (2009) 12 *NethCLRev* 543; Heinze, *International Criminal Procedure* (2014), 452–464.

²³⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1401, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with Certain Other Issues raised at the Status Conference on 10 June 2008, 13 June 2008.

²³⁵ *Ibid.*, para. 77.

²³⁶ *Ibid.*, para. 91.

²³⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1644, Reasons for Oral Decision Lifting the Stay of Proceedings, 23 Jan. 2009.

proceedings was ordered when the prosecution refused to disclose the identity of an intermediary, who had allegedly encouraged witnesses to provide false testimony.²³⁸ This was ultimately overturned by the Appeals Chamber, which found that stays of proceedings were an exceptional remedy, which should only be granted where it was ‘impossible to piece together the constituent elements of a fair trial’.²³⁹

C. Special remarks

I. Omitted provisions

- 55 The drafts of article 67 that were considered by the Preparatory Committee contained two provisions based rather closely on the United States constitutional model rather than the international instruments. The first concerned the protection against unreasonable search and seizure²⁴⁰, while the second provided a guarantee not to be deprived of life or liberty without due process²⁴¹. Another proposal entitled the accused to invoke the Court’s power to compel state co-operation in order to assist the defence in the preparation of its case²⁴². They were deleted at the Rome Conference²⁴³. The due process proposal is derived from article V of the United States Bill of Rights, which is an anachronistic provision, in that it recognizes the legitimacy of capital punishment, something which is excluded from the Rome Statute²⁴⁴ and prohibited by contemporary human rights norms²⁴⁵. In any case, the notion of ‘due process’ is comprised within that of ‘fair trial’ in the *chapeau* of article 67 para. 1. Search and seizure, too, is governed by other provisions in the Statute. The protection against unreasonable search and seizure in effect enables a court to sanction misconduct at the investigation stage. Here, the Court has the power to exclude evidence, pursuant to article 69 para. 7 (b), where its admission ‘would be antithetical to and would seriously damage the integrity of the proceedings’. Finally, the state co-operation provision is also incorporated in other provisions of the Statute.

II. Role of article 67 in the applicable law

- 56 Article 67 closely resembles article 14 para. 3 of the *ICCPR*, as well as the various fair trial clauses found in national constitutions. It is not, however, a typical provision found within criminal or penal codes as such. In effect, such clauses generally belong in constitution-type

²³⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision to Disclose the Identity of Intermediary 143, 8 July 2010.

²³⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 18, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 Entitled ‘Decision on the Prosecutor’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’, 8 Oct. 2010, para. 55.

²⁴⁰ See note 78, 1996 Preparatory Committee II, pp. 200–201; see note 20, Zutphen Draft, p. 115; see note 20, Draft Statute, p. 128.

²⁴¹ See note 78, 1996 Preparatory Committee II, p. 201; see note 20, Zutphen Draft, p. 115; see note 20, Draft Statute, p. 128.

²⁴² See note 20, Zutphen Draft, p. 115; see note 20, Draft Statute, p. 128.

²⁴³ See also: see note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

²⁴⁴ See note 4, Rome Statute, article 77.

²⁴⁵ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, ETS No. 114, entered into force 30 Mar. 1985; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in all Circumstances, ETS No. 187, entered into force 7 Jan. 2003; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty, GA Res. 44/128, entered into force 7 July 1991; Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, OASTS No. 73, 29 ILM 1447, entered into force 6 Oct. 1993.

instruments, and claim a judicial role which is hierarchically superior to the criminal law texts that they frame and control. It is against the constitutional fair trial standard that provisions of the ordinary criminal law, as well as actions of the authorities in implementing it, including those of the Courts, are to be assessed. In national legal systems, two principal consequences result: where a provision of the ordinary criminal law is in conflict with the fundamental fair trial norm, the former must give way to the latter; where the investigating authorities, the prosecution or the Courts themselves have breached the fair trial rights of the accused, the Courts must grant an appropriate remedy, which may range from compensation to an order for a new trial and even, in some systems, the right to a stay of proceedings.

The application of these concepts to the ICC *Statute* is not obvious, and this raises 57 questions about the role of article 67 itself within the general structure and legal philosophy of the *Statute*. To take the case of a breach of article 67 by the investigating authorities, the prosecution or the Courts, a number of scenarios may be contemplated. Although article 67 applies at the trial stage of the proceedings, it may be threatened by pre-trial events, such as irregular or illegal investigation, either by the national authorities or by the Prosecutor's office. The *Statute* provides the Court with the power to exclude evidence in cases of abuse²⁴⁶ but there may be breaches of article 67 for which this may be an insufficient or inappropriate remedy. For example, what is the Court to do in cases of a violation of the right to a speedy trial, set out in article 67 para. 1 (c)? Jurisprudence from the ICTR suggests that a reduction in sentence in the case of conviction and monetary compensation where the defendant has been acquitted can remedy any prejudice suffered by a breach of this right.²⁴⁷ As discussed above, the Court has granted stays of proceedings where a fair trial has been rendered impossible, even though no explicit power to do so is set out in the *Statute*. The power to grant a stay of proceedings in the event of an abuse of process by the Prosecutor is an inherent power of the Court to protect the integrity of proceedings. The approach of the *Kenyatta* Trial Chamber, where the Prosecutor was ordered to either declare that it had sufficient evidence to proceed to trial or to withdraw the charges is another means through which delays in the pre-trial stage can be remedied.²⁴⁸

Even more difficult is the problem of applicable law that is incompatible with article 67. In 58 some cases, provisions of the *Statute* are explicitly protected from conflict with article 67. For example, article 67 para. 1 (d) employs the words '[s]ubject to article 63, paragraph 2 ...'. In others, it was surely the intent to the *Statute*'s drafters to except other provisions from the scope of article 67. For example, despite the right to 'raise defences' set out in article 67 para. 1 (e), this cannot be unlimited, because other provisions of the *Statute* prohibit or limit the defences of official capacity and superior orders. What if a provision of the applicable law is not sheltered, either implicitly or explicitly, from article 67? Can the Court determine that it is inoperative to the extent that there is an incompatibility with the provisions of article 67? If the Court may indeed make such a determination, does this only cover procedural issues or does it also concern substantive law?

It is suggested that article 67, given its unique formulation and its historical origin, may be 59 entitled to a form of hierarchically superior status within the *Statute*. In appropriate cases, some of which may have been unthinkable in July 1998 but which may become apparent over time, the Court may be required to declare provisions of the *Statute* inoperative because they conflict with article 67. The 'fair trial' norm in the *chapeau* of article 67 para. 1 is a powerful concept and one that will evolve, in keeping with the development of international human rights law. Provisions of the *Statute* that meet the fair trial standard in 1998 may no longer do so at some point in the future.

²⁴⁶ See note 4, Rome Statute, article 69 para. 7 (b).

²⁴⁷ *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on Appropriate Remedy, 31 Jan. 2007; *Prosecutor v. Rwamakuba*, Decision on Appeal against Decision on Appropriate Remedy, ICTR-98-44C-A, 13 Sept. 2007; *Prosecutor v. Mugenzi and Mugiraneza*, Appeals Judgment, ICTR-99-50-A, 4 Feb. 2013, Partially Dissenting Opinion of Judge Robinson, para. 12.

²⁴⁸ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-981, 3 Dec. 2014, para. 62.

But for the sake of argument, even if it is assumed that the other norms in the Statute are either compatible with article 67 or else they are implicit or explicit exceptions to it, it must be born in mind that much of the applicable law remains to be devised. The two other principal sources, the Rules of Procedure and Evidence and the Elements of Crimes, are hierarchically subordinate to the *Statute*. Article 52 para. 5 of the *Rome Statute* declares that in the event of conflict between it and the Rules, the *Statute* shall prevail. Rules of evidence adopted by the Assembly of States Parties may conflict with fair trial rights enshrined in article 67²⁴⁹, and the Court is clearly entitled to disregard them or declare them inoperative in such cases. Moreover, the wording of article 67 – particularly its reference to defences and to onus of proof – suggests that this extends to substantive as well as procedural matters.

²⁴⁹ For an example drawn from the Rules of the ICTY, see: La Rosa, (1997) 828 *RevICR* 677, 680–684.

Article 68

Protection of victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against the children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential and sensitive information.

Literature: Bassiouni, M.C., *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms – Final report of the Special Rapporteur*, UN Doc. E/CN.4/2000/62; van Boven, T., *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4/SUB.2/1993/8; id., *The Basic Principles and Guidelines on the Right to Reparation for Victims of [gross] Violations of Human Rights and International Humanitarian Law*, UN Doc. E/CN.4/1997/104; Clark, R.S., ‘The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’, in: G. Alfredsson and P. Macalister-Smith (eds.), *The Living Law of Nations* (N.P. Engel 1996) 355; Cohen, M., ‘Victims’ Participation Rights within the International Criminal Court: A Critical Overview’, (2009) 27/3 *DenverJILP*, 351; Donat-Cattin, D., ‘The Role of Victims in ICC Proceedings’, in: F.Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I (Editoriale Scientifica 1999) 251; id., ‘Victims’ Rights in the International Criminal Court’, in: M. Natarajan (ed.), *International Crime and Justice* (Cambridge University Press 2011) 373; FIDH, *Enhancing Victims’ Rights before the International Criminal Court* (Paris 2013); Joinet, L., *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, *Final Report Pursuant to Sub-Commission Decision 1996/119*, UN Doc. E/CN.4/Sub.2/1997/20; Impunity Watch, *Discussion Paper – Victims Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?* (The Hague, April 2014); McGo-

nigle Leyh, B., *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011); Mueller, S. D., 'Kenya and the International Criminal Court (ICC): politics, the election and the law', (2014) 1 *Journal of Eastern African Studies* 25; Orentlicher, D., *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Docs. E/CN.4/2005/102 and E/CN.4/2005/102/Add.1; Pérez León Acevedo, J. P., *Victims' Status at International and Hybrid Criminal Court – Victims' Status as Witnesses, Victim Participants/Civil Parties and Reparation Claimants* (Åbo: Åbo Akadmi University Press, 2014); United Nations Commission on Crime Prevention and Criminal Justice, *Handbook on Justice for Victims on the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. E/CN.15/1998/CRP.4/Add.1.

Content

A. Introduction/General remarks	1
1. Victims' protection	1
2. Victims' participation	3
3. Scope of application of article 68	9
4. Developments in legal drafting	11
B. Analysis and interpretation of elements	12
I. Paragraph 1: Victims' protection	12
1. Court measures to protect victims and witnesses	12
2. Measures taken by the prosecutor	14
3. Measures not inconsistent with the rights of the accused and a fair and impartial trial	15
II. Paragraph 2: Exceptions	19
1. Proceedings <i>in camera</i> or presentation of evidence by electronic or other special means	19
2. In particular, cases of victims of sexual violence or children as victims or witnesses	21
III. Paragraph 3: Victims' participation	22
1. Personal interests	22
2. Presentation and consideration of victims' views and concerns	23
3. Stages of the proceedings determined to be appropriate by the Court	24
4. In a manner not inconsistent with the rights of the accused and a fair and impartial trial	26
5. Presentation by legal representatives of victims	27
6. 'in accordance with Rules of Procedure and Evidence'	29
IV. Paragraph 4: 'The Victims and Witnesses Unit'	30
V. Paragraph 5: Endangerment of the security of witnesses or their families	33
VI. Paragraph 6: State application for protection of servants, agents and information	34
C. Special remarks: Implementation of article 68 para. 3 in the Rules of Procedure and Evidence and the Regulations of the Court	35
I. Definition of victims: Rule 85	35
II. Victims' participation through legal representation (Rules 90 and 91)	38
III. Institutional framework to assist victims to exercise their rights: the Victims' Participation and Reparations Section and the Office of the Public Counsel for Victims	40
IV. Notification to victims and their legal representatives (Rule 92)	45
V. Conclusion	47

A. Introduction/General remarks

1. Victims' protection

1 Victims of crime are often left alone in society, even if there is an effective system of justice to bring to adjudication alleged offenders. Victims are alone because their rights are not fully recognised by the law that is applicable to them, and their life, security and privacy are not always protected before, during and after the trial. Indeed, victims and their families may remain vulnerable to intimidation and retaliation as a result of the trial, long after the accused has been convicted or acquitted.

On the contrary, criminal justice systems provide for safeguards for those who – amongst the victims – are instrumental to a criminal prosecution as witnesses. Thus, protective

measures are afforded until the testimony is given and the element of proof is collected. After that, it is much more difficult to find that the interest of the prosecution coincides with the protection of the rights of victims, even if they have given an essential contribution to the discovery of the truth in a given process.

The first three years of the Rwandan Tribunal showed that certain victims had gone back home after having witnessed in Arusha (Tanzania), seat of the Tribunal, and were killed¹. The Yugoslav Tribunal had a significant experience in this delicate field of protective measures: co-operation of States (e.g. Norway and the United Kingdom) went as far as making the granting of a new identity and a refugee status to victims/witnesses in danger in the territories of Bosnia possible. The law and practice of both *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)² prepared a fertile terrain for the insertion of advanced provisions on victims' protection in article 68 paras. 1, 2, 4 and 5 of the Rome Statute³.

The first eleven years of practise of the ICC confirmed the interpretation of article 68 given in the first edition of this *Commentary*, namely, that it affords a non-derogable right to protection to victims and witness and it imposes a corresponding unconditioned obligation on all organs of the Court, at all stages of the proceedings, to protect the life, dignity and the physical and moral integrity ('well-being') of victims and witnesses. The rights and obligations defined in article 68 stem from existing norms of international human rights law, including the right to life, dignity and physical and moral integrity enshrined in universally accepted treaties such as the International Covenant on Civil and Political Rights. The practise established by the Office of the Prosecutor has shown that, when available measures of protection are not sufficient to safeguard a potential witness identified in a pre-trial investigation, the decision of the Office is to move to another witness or victim and/or, as appropriate, to wait for another opportunity, in time and space, to approach the same witness, hence ensuring compliance with the requirements of article 68⁴.

¹ As reported by Morris and Scharf, *The International Criminal Tribunal for Rwanda*, 536: '[t]wo witnesses who testified before the Rwanda Tribunal in the *Jean-Paul Akayesu case* and the *Obed Ruzindana case*, were also killed'. See Second Annual Report of the ICTR covering the period from 1 July 1996 to 30 June 1997, adopted on 6 June 1997, UN Doc. A/52/582-S/1997/868 (1997), para. 51. Subsequent practise of the ICTR focussed extensively on the protection of victims and witnesses, bringing about a uniform and effective methodology of protection.

² The ICTY and ICTR Statutes, respectively annexed to Security Council Resolutions 827 (1993) and 955 (1994), contain in articles 22 and 21 the same provision:

'The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.'

Rule 75 (*Protection of Victims and Witnesses*) of both Tribunals states as follows:

- (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
- (B) A Chamber may hold an *in camera* proceeding to determine whether to order:
- (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related or associated with him by such means as:
 - (a) expunging names and identifying information from the Chamber's public records;
 - (b) non-disclosure to the public of any records identifying the victim;
 - (c) giving of testimony through image- or voice- altering devices or closed circuit television; and
 - (d) assignment of a pseudonym;
 - (ii) closed sessions, in accordance with Rule 79;
 - (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

- (C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.'

³ Paragraph 6 of article 68 is an ancillary norm to the ones contained in article 72 (*Protection of national security information*).

⁴ The Office of the Prosecutor reported on 22 June 2005 and 28 March 2007, during the institutional consultations between the Office and NGOs, that no incident had occurred to victims and witnesses contacted

2. Victims' participation

- 3 Unlike what occurred relating to victims' protection, the inclusion of norms on victims' participation in the Court's proceedings (article 68 para. 3) was the result of widespread and strong criticism against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence of the *ad hoc* Tribunals.

In the aftermath of the Rwandan genocide, victims' participation and legal representation before the ICTR have been identified by some observers and defendants of human rights as a necessary instrument to render that Tribunal closer to Rwandan society. Indeed, the fact that Rwandan public opinion did not often understand that justice was done, because it was not seen to be done, was a major problem for the ICTR, which has been the first jurisdictional body in the history of human-kind to have convicted perpetrators of the crime of genocide, starting with former Prime-Minister Jean Kambanda⁵.

- 4 The movement of NGOs, individuals and Governments supporting the respect and full realisation of victims' rights through criminal justice found in the ICC process a unique opportunity to advocate the further codification of victims' rights in international law.

In a policy perspective, such a codification should lead to the affirmation of victims' rights in all domestic, regional and international jurisdictions. Yet, even if several provisions of the Rome Statute (especially Articles 10 and 80, if interpreted *e contrario*) may allow to identify the standards contained in the Statute as the new emergent standards agreed by States on matters of substantive and procedural law⁶, a literal interpretation of articles 68 and 75 leads to the conclusion that these statutory norms on victims' rights are solely applicable to the

by Court officials in the first years of investigations in Northern Uganda. The OTP and the Presidency of the ICC made similarly positive reports in respect of other situations, with the notable exception of the situation in Kenya. In 2013, a reportedly peaceful electoral process led to an electoral victory of the two main accused of crimes against humanity before the ICC, Mr. Kenyatta and Mr. Ruto, who formed a so called 'Jubilee' coalition through which they united two major 'tribal' factions that had participated in the post-electoral violence of 2007–08 investigated by the Prosecutor. Almost all Kenyan witnesses of the crimes against humanity perpetrated in the post-electoral violence, unless relocated outside Kenya or otherwise effectively protected, are in the problematic position of being called to testify against their elected President and Vice-President. Such a situation is specifically critical in light of the fact that both Mr. Kenyatta and Mr. Ruto conducted a Presidential and post-presidential media campaign narrating the story of two African men resisting the politically-motivated accusations made by a Court in The Hague that was depicted as a neo-colonial enterprise. Therefore, the association of any Kenyan witness with that Court represents, in and of itself, a threat to the witness' safety, security, privacy and well-being, even in the absence of direct attacks or menaces. An impressive summary on intimidation of witnesses in Kenya, starting with individuals who testified before the Waki Commission of Enquiry, can be found in Mueller (2014) 1 *Journal of Eastern African Studies* 25, 33–35.

⁵ The other prime weakness of the ICTR is that it extended its prosecutions and trials to cases of genocide or other crimes related to the 'Rwandan genocide', thus failing to implement its statutory mandate to prosecute crimes against humanity and certain types of war crimes independently of their nexus to genocide. Given that the same selection of cases has been made before Rwandan penal and traditional Courts ('Gacaca'), it is justified to assess the delivery of international and domestic justice in the Rwandan situation as *victors' justice*. This critical reality – as of November 2014 – produces a *denial of justice* for entire categories of victims, and it is poised to become an historical reality in light of the incumbent time-limit of the life-span of the ICTR according to the 'completion strategy' imposed upon it by the UN Security Council through several resolutions (for all, see UNSC resolution 1503 of 28 August 2003). The ICTR's selective practice attests the political interference of the Security Council on the judicial process, particularly in respect of its length and subject-matter jurisdiction: such a politicisation of justice impedes the fulfilment of the rights of entire categories of victims and violates the principles enshrined in the Rwandan Tribunal Statute itself.

⁶ Article 10 of the Rome Statute stipulates expressly that provisions of Part II (on crimes and jurisdiction) are non-prejudicial for the progressive development of international legal rules pertaining to its subject-matters. Article 80 contains an express clause that impedes to consider the penalties for the Statute's core crimes Statute as having a legal impact on the development of universal standards for penalties. These 'non-prejudice' clauses are not present in other Parts of the Rome Statute, which could be interpreted systematically *e contrario* as reflecting an implicit consent given by States to new international legal standards. On the criteria of interpretation of the Statute, which are the same of the Vienna Convention on the Law of Treaties, I refer to my contribution to the Italian commentary on the Statute, Donat-Cattin, in: Lattanzi and Monetti (eds.), *La Corte Penale Internazionale* 269, 302.

Court's proceedings. Therefore, they do not limit or prejudice existing rules adopted at the domestic, regional or international level, although they undoubtedly represent a benchmark for the progressive development of the law in national systems in which the rights of victims are not yet recognised as in the Rome Statute (e.g. the wide majority of 'common-law' countries).

The explanation above is central to the issue of victims' participation in ICC proceedings. 5 Indeed, it is clear that some States (e.g. Austria, France, Germany, Italy, Spain) will continue to have 'higher' standards than the ICC with regard to the participation of victims in the criminal process. On the contrary, other national criminal justice systems (e.g. Australia, Canada, New Zealand, UK) may maintain a more limited access for victims to particular stages of their domestic criminal process (namely, after conviction) or at the trial itself only as witnesses. An exemplary incorporation of the rights of victims of Rome Statute's crimes into a national system has been so far realised only in Uruguay, through the provisions of articles 13 and 14 of the Ley No. 18.026 ('Cooperación con la Corte Penal Internacional en material de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad') of 13 September 2006, which de facto extends to victims' participation, protection and reparation the application of the principle of complementarity.

The 'law of the Court', as well as the law of the *ad hoc* Tribunals, does not reflect the 6 victory of a certain legal model against another legal model ('civil law' prevailing over 'common law' or 'Islamic law' or any other family of legal systems, and *vice versa*). The 'law of the Court' constitutes a new system of rules permitting the effective functioning of the machinery of international justice. Of course, this system may be considered as the 'melting-pot' of some of the most adequate tendencies of criminal procedures stemming from all families of legal systems, forming thus a 'highest common denominator' attainable by all legal models⁷. Against this background, and in light of the specific characteristics of ICC proceedings including the participation of victims, it is submitted that such proceedings should not be predominantly adversarial in nature, and that this characterisation is not prejudicial to the elements of an equitable or fair trial under international law and comparative criminal procedure(s) as such elements are fully incorporated – either expressly or through the hierarchy of sources of law envisaged in Article 21 – in the 'law of the Court'.

The impact of victimisation of entire populations in the context of genocide, crimes against 7 humanity, war crimes and aggression cannot be forgotten or underestimated. International justice must provide redress for these victims⁸ in the name of securing peace, drawing a line between the present and the past and facilitating the healing and forward movement of society. As implicitly or partially affirmed by several UN reports of Theo van Boven, Cherif Bassiouni, Louis Joinet and Diane Orentlicher⁹, the 'right to justice' for victims of international crimes consists of three components: 1. the right to access to justice; 2. the right to know the truth (and have it officially acknowledged); 3. the right to reparation(s)¹⁰. The right to justice is embodied in internationally binding and universally accepted provisions, such as article 2 para. 3 of the ICCPR, which defines the wider notion of effective and available remedy¹¹.

⁷ These considerations were the foundation of the draft rules of procedure – aimed at implementing victims' participation before the Court – proposed by this author at the end of this work as published in its first edition (see 'Article 68', *Triffterer Commentary 1999*, pp. 884–888, mn. 38 *et seq.*) The text of the Rules of Procedure and Evidence of the ICC approved on 30 June 2000 by the UN Preparatory Commission for the ICC and adopted by the Assembly of States Parties at its first session in 2002 addresses almost all the concerns and/or proposals formulated by this author, who attended and contributed to several meetings in which representatives of States discussed the content and drafting of the Rules.

⁸ See the author's commentary on article 75, *Reparations to victims*.

⁹ See literature.

¹⁰ For a general reconstruction of the right to justice under international human rights law and international criminal law, reference is made to the Ph.D. thesis entitled *The Right to Justice: crimes against humanity and the rights of victims in the system of the International Criminal Court* (Teramo, 2000, on file with the author).

¹¹ Article 2 para. 3 of the ICCPR re-affirms the legal principle stating that where a wrong exists there must be a corresponding judicial remedy. Such a principle is enshrined in the UDHR, article 8, which provides that:

8 The participation of victims in the ICC proceedings implements their right to justice before the Court. Article 68 para. 3 of the Rome Statute recognises this legal principle, which is developed and specified in some provisions of the Rules of Procedure and Evidence and the Regulations of the Court, as well as also the Regulations of the Registry. The text of article 68 para. 3 reproduces the content of article 6 (b) of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power annexed to Resolution 40/34 of 29 December 1985 of the UN General Assembly, also included in ECOSOC Resolution 1996/14. The need for victims to be legally represented in the proceedings is a corollary of their right to justice, insofar as high-quality technical legal representation ensures their effective participation in, and understanding of, the penal procedure. This is addressed by the second sentence of article 68 para. 3¹². The first eleven years of practise of the Court in general and the Pre-Trial procedures in the DRC and Central African Republic situations in particular, including the first Court case against an individual (Lubanga), attest the centrality of victims' participation in the ICC proceedings from the earliest stages in which the personal interests of victims are affected. However, in the two trials relating to the situation in Kenya, the relevant Trial Chamber decided, for the first time in the jurisprudence of the Court, to distinguish categories of victims in such a way that does not conform with the letter and spirit of Article 68, para. 3, thereby not allowing de facto the exercise of participatory rights¹³. The unfortunate circumstance that the Kenya trials' decisions on victims' participation could not be appealed has meant that a remedy against this *contra legem* jurisprudence of TC V might be sought only after the conclusion of the respective trial.

3. Scope of application of article 68

9 All the norms contained in article 68 are applicable throughout the entire penal process, which consists of Pre-Trial, Trial and – potentially – Appeal and Review proceedings. The textual analysis that will follow is an attempt to demonstrate such an approach, which prevailed when, at the Rome Conference, international legislators (the States) agreed upon article 68 and its title, significantly related to the Court's 'proceedings' and not limited to the trial. Conversely to a certain practise of the ICC Office of the Prosecutor invoking 'foundational issues'¹⁴ or a

'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law.' Although article 8 of the UDHR refers specifically to the right to a remedy within the domestic jurisdiction, it constitutes *mutatis mutandis* a basic principle of International Human Rights Law applicable before international jurisdictions.

¹² This paper does not address the questions raised by the important provision on victims' representations contained in article 15 (*Prosecutor*) para. 3 of the Rome Statute, which states:

'If the prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. *Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.*' (Emphasis added).

¹³ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-498, Decision on victims' representation and participation, Trial Chamber V, 3 October 2012, and *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-460, Decision on victims' representation and participation, TC V, 3 October 2012. In these decisions, the Chamber determined that applications from victims to participate in the trial did not need to be examined and ruled upon by the Judges, as prescribed by the Statute. All victims who applied were referred to a common legal representative, who was given the responsibility to decide on the harm that these victims might have suffered as a result of the crimes contained in the charges against the accused. The Chamber, therefore, did not recognise individual victims, and organised them into a group without ascertaining whether they were victims or not, and delegated its authority to a common legal representative to be assisted by the Registry's personnel in the field and by the Office for the Public Counsel of Victims through an attorney who was authorised to appear in court in The Hague. See mn. 35 and footnote 67, as well as mn. 37 and footnote 80.

¹⁴ This is the terminology used by the Prosecutor in his *Report on the activities performed during the first three years (June 2003-June 2006)*, 12 September 2006, http://www.icc-cpi.int/NR/rdonlyres/70CB178C-15C7-4BDB-B09E-9E93CEF0E165/143610/3yearreport20060914_English.pdf, accessed on 14 September 2014), which, at its para. 52 reads as follows: 'The Office continues to raise foundational issues with the Pre-Trial Chamber and Appeals Chamber for their consideration. These issues include, inter alia: a. Different forms of victim participation in the investigation phase [...]. Subsequent practice of the OTP appears to have departed from this approach.'

‘constitutional decision’¹⁵ to limit the scope of victims’ participation in the Pre-Trial proceedings, an interpretation ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’¹⁶ does not cast doubts on the correctness of the decision the ICC Pre-Trial Chamber allowing victims to participate in the proceedings from the earliest stages in which their personal interests are affected¹⁷.

If the prosecution and the defence are necessary parties to the Court’s process, victims are ‘potential’ parties, because their participation is not *stricto sensu* essential¹⁸. This does not mean that victims do not have the right (not only an interest¹⁹) to be protected and participate in the ICC proceedings. After a systematic reading of the parts of the Statute on procedural matters, it is clear that the search for the truth – not retribution or punishment of given individuals – is the most significant goal of the ICC proceedings. In this respect, any form of positive contribution from victims/survivors appears indispensable for the accomplishment of the Court’s function. A corollary to the victims’ right to participate is their right to be informed on the development of the proceedings: the Rules of Procedure and Evidence envisage comprehensive modalities of communication between the Court and victims under the legal rubric of notification(s)²⁰.

¹⁵ This inappropriate and unfounded language is contained at page 5 in para. 11 of *Prosecutor v. Lubanga*, ICC-01/04-103, Prosecution’s Application for Leave to Appeal Pre-Trial Chamber 1’s Decision on the Application for Participation in the Proceedings of [victims] VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 23 January 2006.

¹⁶ Article 31, Vienna Convention on the law of the Treaties, done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

¹⁷ *Prosecutor v. Lubanga*, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 January 2006, paras. 36 to 76. The decision of the Pre-Trial Chamber applies the letter of article 68, para. 3, and does not have any ‘impact [that] goes far beyond the issue of victims’ participation in the investigations’ and does not have any ‘general implication for the balance of power between the judiciary and the prosecution in proceedings before the ICC’ as some authors seem to suggest without providing arguments to demonstrate their criticism to the Pre-Trial Chamber decision (*Cf. de Hemptinne and Rindi (2006) 4 JICJ 342, 359*).

¹⁸ Their presence is not *stricto sensu* essential just because the Trial can take place without them: this does not exclude, *lato sensu*, the fundamental importance of victims’ participation for the development of fair, effective and comprehensive proceedings. In the last few years, some commentators, including sociologists (see literature cited by Impunity Watch, *Discussion Paper – Victims Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?* (The Hague, April 2014), at pages 10–12, 20–21, 30 and 35–37) have taken critical positions regarding the presumed ‘meaningfulness’ or importance for ‘the victims’ to have access to justice through the formal judicial avenues provided by the Rome Statute system, which however has not always been clearly understood by these authors as comprising the primary jurisdictions of national Courts and the complementary jurisdiction of the ICC. In this author’s view, while procedural rights afforded by the law are open to ‘all victims’, it is always the case that only a certain number of victims (normally a minority) have the strength and determination to make use of the legal process. Albeit difficult and at times unsatisfactory, this legal process has been chosen by approximately 12,000 victims, who have applied to participate in ICC proceedings, along with over 9000 victims who have applied to have access to reparations, during the first ten years of life of the ICC (*source: ICC, Registry Facts and Figures as of 30 April 2013*, presented in the *Diplomatic Briefing of 29 May 2013*, available at www.icc-cpi.int/iccdocs/db/Registry-Figures-30-April-2013.pdf accessed on 16 October 2014). Additionally, ‘3,106 applications from victims for participation and 2,524 for reparations’ have been received by the ICC in the 2013–14 period covered by the ICC Annual Report to the UN (*Cf. p. 2, Report of the International Criminal Court on its activities in 2013/14*, UN Doc. A/69/321, 18 September 2014). This statistical data demonstrates the significance and importance that individual victims attribute to the ICC proceedings and it represents an achievement for the ICC, especially if confronted with the limited number of cases before it. Yet, the fulfilment of the rights of these approximately 25,000 victims before the ICC are not and shall not be an obstacle to other remedies that victims shall be entitled to obtain under International and domestic law. So, it is not correct to characterise the access to justice given to victims *via* the ICC process as opposed to the victims’ best interests and their right to obtain other means of redress and satisfaction.

¹⁹ See mn 24 et seq.

²⁰ See mn 25 and 45–46.

4. Developments in legal drafting

- 11 Article 43 of the ILC Draft Statute of 1994²¹, entitled ‘Protection of the accused, victims and witnesses’, contained provisions very similar to the above mentioned ones of article 22, ICTY Statute, and article 21, ICTR Statute. The 1996 Preparatory Committee Report ‘hosted’ a number of different proposals, which helped to focus the attention of delegates on the separated issues of victims’ protection on one side, and the rights of the accused (including protection) on the other²². The most important and extensive discussions on the matter took place during the August 1997 session of the UN ICC Preparatory Committee. As a result of it, draft article 43²³ included nine paragraphs envisaging all crucial matters then revised and integrated in the language of article 68 of the *Rome Statute*. A first re-elaboration of those nine paragraphs was reflected in the so-called *Zutphen text* of January 1998 (article 61²⁴). A second draft with minor modifications was contained in article 68 of the Draft Statute transmitted by the Preparatory Committee to the Diplomatic Conference²⁵.

B. Analysis and interpretation of elements

I. Paragraph 1: Victims’ protection

1. Court measures to protect victims and witnesses

- 12 This general provision on victims’ protection resulted from the combination of the first sentences of paragraphs 1 and 3 of article 68 of the ICC Draft Statute²⁶. Its elements were brought to the attention of the Diplomatic Conference’s Working Group on Procedural Matters by the Canadian delegation, which produced two revised drafts leading to the final compromise text on article 68²⁷. According to article 34, the term *Court* is referred to all judicial organs of the ICC. *Appropriate measures* shall be interpreted, inter alia, as entailing all those enlisted in Rules 87 (*Protective measures*), 88 (*Special measures*) and 112.4 (*Recording of questioning in particular cases*) of the Rule of Procedure and Evidence²⁸, in

²¹ Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May–22 July 1994, UN Doc. A/49/10 (1994), p. 119.

²² Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22 (1996), Vol. II, p. 204.

²³ Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, UN Doc. A/AC.249/1997/L.8/Rev.1 (1997), reprinted in: Bassiouni (ed.), *International Criminal Court. Compilation of UN Documents and Draft ICC Statute Before the Diplomatic Conference* (1998) 339–341.

²⁴ Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13, reprinted in: Bassiouni (ed.) (1998), see 223.

²⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Final Act, UN Doc. A/CONF.183/2/Add.1 (1998), p. 108; also reprinted in: Bassiouni (ed.) (1998) see 82.

²⁶ *Ibid.*

²⁷ See UN Doc. A/CONF.183/C.1/WGPM/L.58 and A/CONF.183/C.1/WGPM/L.58/Rev.1 (6 July 1998), *Proposal submitted by Canada (Art. 68)*. After very interesting but long negotiations, the Working Group transmitted to the Drafting Committee of the Diplomatic Conference a compromise-text reflecting many elements of the Canadian proposal in the following documents: A/CONF.183/C.1/WGPM/L.2/Add.6 (11 July 1998), p. 4, and A/CONF.183/C.1/WGPM/L.2/Add.8 (15 July 1998), p. 7. Both these documents are reproduced in: International Criminal Court Society, *Compilation: Footnotes Relevant to the Rules of Procedure and Evidence Transmitted by the Committee of the Whole to the Drafting Committee at the Rome Diplomatic Conference on the Establishment of an International Criminal Court* (1998), 34 and 48.

²⁸ Among the other Rules of Procedure and Evidence addressing modalities of protection, it is worthwhile to mention Rules 16 (*Responsibilities of the Registrar relating to victims and witnesses*), 17, 18 and 19 (all within subsection 2, *Victims and Witness Unit*), 67 (*Live testimony by means of audio or audio-video technology*), 72 (*In camera procedure to consider relevance or admissibility of evidence*), 81 (*Restrictions on disclosure*) and 86 (*General principle*).

Regulations 21, 41, 42 and 101 of the Regulations of the Court, and in Regulations 79 and 100 of the Regulations of the Registry²⁹, as well as any other arrangement that may be made through innovative technology or building upon methods of victims' protection experimented in domestic justice systems. The open-ended character of the provision on appropriate measures is reinforced by the recognition in the paragraph of a series of individuals' rights to be protected, each of them covering a wide spectrum of situations. *Safety, physical and psychological well-being, privacy* and, in particular, *dignity* of the individual victim or witness cover all areas of inalienable human rights defined in international and domestic legal instruments. Through the definition of this high standard of protection for victims and witnesses in article 68 para. 1, the Rome Statute has set a standard for the progressive development of the law relating to effectively functioning systems of criminal justice, not only international criminal justice. The initial jurisprudence of the ICC Pre-Trial and Trial divisions evidenced the centrality of this provision, regarding the interpretation of which there has been extensive litigation in the first eleven half years' of the Court practice.

The second sentence of paragraph 1 orients this general provision on protection towards 13 certain categories of victims/witnesses who are in situations of extreme danger because of: (a) the nature of the crimes (in particular, but not limited to, cases in which the crime involves sexual or gender violence, or violence against children³⁰), and (b) their status, including their age, gender, and health. In this respect, the elements above help us to identify a particular 'group' of vulnerable victims, the survivors, who are always at risk of re-victimisation. Re-victimisation can take place in the forms of the so-called 'secondary victimisation', which is defined by the UN Handbook on Victims' Rights³¹ as 'the harm that may be caused to a victim by the investigation and prosecution of the case or by publicizing the details of the case in the media'.

A decision taken by the ICTY in the 'Tadic case' is enlightening on the meaning of secondary victimisation for survivors of gender crimes:

'The existence of special concerns for victims and witnesses of sexual assault is evident in the Report of the Secretary-General, which states that protection for victims and witnesses should be granted, 'especially in cases of rape and sexual assault' (para. 108). It has been noted that rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent detrimental impact on the victim ... It has been noted further that testifying about the event is often difficult, particularly in public, and can result in rejection by the victim's family and community ... In addition, traditional court practice and procedures have been known to exacerbate the victim's ordeal during trial. Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped a second time.'³²

2. Measures taken by the prosecutor

This provision was contained in a separate paragraph (3) of article 68 in the ICC Draft 14 Statute³³, but it was correctly integrated in para. 1 as it constitutes a specification of the previous provision. It regards pre-trial proceedings, in which it is crucial that all measures of protection available are put in place to ensure proper respect of the above-cited rights of victims and witnesses. In this phase of the proceedings, the Prosecutor must be able to communicate to victims and witnesses the content of their rights and the relevant action to

²⁹ See also Rule 75 of the *ad hoc* Tribunals', reproduced in see note 2.

³⁰ According to article 1 of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by GA Res. 44/25 of 20 Nov. 1989, *entered into force* 2 Sept. 1990, '[...] a child means every human being below the age of eighteen years [...]'. Almost all States in the world have ratified the Convention, with the exemption of Somalia and the United States of America.

³¹ UN Doc. E/CN.15/1998/CRP.4/Add.1, *UN Handbook* 43.

³² Cf. para 46 (references excluded) of *Prosecutor v. Dusko Tadić, a/d/a'Dule*", IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Trial Chamber, 10 August 1995, reproduced in 7 *CLF* (1996) 139. Concerning the gender perspective of victims' protection, see Bedont, in: Lattanzi and Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court, Vol. I* (1999) 183, 210.

³³ See Report of the Preparatory Committee, see note 24.

be taken by the Court. As envisaged in other parts of the Statute (articles 42 and 36 para. 8(b)), the Prosecutor must achieve her goals through the use of personnel/investigators with legal and psychological expertise on trauma and crimes against women and children³⁴.

3. Measures not inconsistent with the rights of the accused and a fair and impartial trial³⁵

- 15 Since the assumed or substantial difference between what is *not prejudicial to and inconsistent with* defendants' rights is discussed with article 67, this commentary is limited on the distinction between 'the rights of the accused' and 'a fair trial', attempting to use the (often underestimated or misperceived) perspective of the victim, which informs the ICC Statute in its entirety³⁶.
- 16 Victims who accept to channel their demand for justice through the legal process do not want to see punishment against 'an accused', but only against the person found guilty beyond a reasonable doubt. These victims' genuine wish is that the **truth** be established and the case solved³⁷. The justice process – expression of society, organised through a legal system – tries

³⁴ Significant excerpt from the UN *Handbook*, sub-para. 2.4.1, p. 43:

'[...] When a victim reports an offence or other victimizing event, for example, to police or public prosecutors, this starts a process that is intended to ascertain whether or not the report of the victim is valid, and if so, to identify the victimizer and bring him or her to justice. The process can be a long and difficult one, and from the legal point of view, the victim is only a 'putative' or *alleged victim*. [Emphasis added, see *below* comments against this definition]. This should not prevent all of those who come into contact with victims from treating them with respect and recognition that all persons deserve. The professional officer, prosecutor or judge should recall to what to them may be one case out of many, is often of central importance to the victim. Granting the victim basic human respect and dignity can provide many benefits. It reassures the victim that the community condemns victimization in general, and is interested in being told that justice is done. This is basic to the victim's recovery. At the same time, treating victims in a respectful manner often contributes to their greater willingness to assist in the investigation and the judicial process.

There are a number of ways in which the justice system can demonstrate its recognition of, and respect for, the victim. One example is in the scheduling of cases. In practice, decisions on such matters as the arrangements for police questioning, the date for Court hearings, and granting of continuances are often made in accordance with system priorities and administrative convenience. In such cases, less attention may be paid to the practical effect of such decisions on the victims, for example, to his or her difficulties in arranging for time off from work, the care for children, and transportation to and from the police station or Court house.'

The considerations above are particularly appropriate in the framework of an international criminal jurisdiction, especially when the seat of the ICC is abroad, in The Hague (*Cf.* article 3), most likely very far from the *locus commissi delicti*.

I do not agree with the approach of regarding as equal the presumption of innocence of the accused/suspect before conviction and the 'putative' or 'alleged' status of victims who are not recognised as such in judicial verdicts. Such a parallelism is unacceptable at least for two reasons. The first is related to the 'historical' event that victimised an individual (*i.e.*, a medically proved killing by a certain weapon), which remains true with or without a decision of conviction against a given perpetrator. The second is represented by the reality of National judicial systems that, on one side, fail to prosecute and punish an impressive number of authors of crimes, and, on the other, admit victims to public recognition and provide for mechanisms to guarantee appropriate forms of reparation, including civil compensation.

³⁵ In the context of victims protection, the same provision is included at the end of paragraph 5 of article 68 dealing with disclosure of evidence. Thus, the following comments should be deemed as relevant – *mutatis mutandis* – also to that paragraph.

³⁶ See Preamble, second *considerando*, which states as follows:

'[...] *Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, [...].'

Victims are mentioned in many articles throughout the entire Statute. For a brief, systematic review, see Donat-Cattin, in: Lattanzi and Schabas (eds.) (1999).

³⁷ The quest for truth and justice by victims of atrocities committed during World War II, Latin American countries' 'dirty war' or other situations of armed conflict or repression has been widely described by the literature: see, for all, Aldana-Pindell, R., 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes', (2002) 35 *VanderbiltJTransL*, 1399, 1437–1438. In respect of African situations, see McDonald, Avril, 'A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law', (1999) *Law, Democracy and Development* 2, 139, available at www.saflii.org/za/journals/LDD/1999/10.pdf (accessed on 30 November 2014). McDonald wrote at pages 139–140: 'While some victims of atrocities committed either by the state or by non-state actors have an extraordinary capacity to forgive, and

to make sure that this goal is achieved without infringing upon the dignity and personal integrity of the suspect/accused, as well as of the victim.

This reasoning brings us to a ‘modern’ concept of ‘interest of justice’, which corresponds to the common interest of (i) society, (ii) victims and (iii) individuals investigated for crimes that they have not committed to know the truth³⁸. The latter category of suspects, together with victims and society as a whole (represented by the Prosecutor), have the same expectation from the criminal process: to establish the responsibility of the guilty and acquit the innocent. Therefore, necessary and potential parties³⁹ to the ICC process are aiming at a ‘fair trial’, which honours this commonly shared object of criminal justice and appears behind the negotiated language of the Rome Statute, especially its Parts 5, 6, and 8.

The ‘traditional’ notion of due process for the defendant⁴⁰ is re-affirmed in light of the paramount need to ensure that justice is fair not only to the accused, but also to ‘the victim’ in a broad sense, which includes ‘humanity’ as a whole⁴¹ when offences under articles 6 and 7 of the Statute are committed. It is therefore clear that the paragraph hereby analysed entails two different, although partially overlapping, concepts. The first concept is the respect for the rights of the accused, as defined in articles 67 and 66 of the Statute. The second is fair trial⁴², which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and the international society as such, thus laying the foundation of all procedural norms of the Statute⁴³.

II. Paragraph 2: Exceptions

1. Proceedings *in camera* or presentation of evidence by electronic or other special means

Publicity of international criminal justice⁴⁴ is an essential guarantee for the accused and a fair trial. Transparency to the general public makes criminal justice a visible mechanism of individual accountability capable to deter future crimes. Yet, protection of victims and witnesses justifies an exemption from the general rule, which was already envisaged in the 1994 Draft Statute of the ILC⁴⁵. Reasons for closed hearings or presentation of evidence through video-link or other electronic devices are the same as those behind the measures of

their demands of their assailants and of society are incredibly modest and do not reflect a desire for retribution [citation in fn. of Dullah Omar, Minister of Justice, Government of South Africa, 8 April 1997], for many other victims the need to see justice done is very real’.

³⁸ On the contrary, it may be often the case that a suspect who knows to be guilty has the conflicting personal interest to maintain the truth unknown. As a guarantee against abuse or potential abuse, this category of suspects have the same right to defence as suspects falling under the other category.

³⁹ See mn. 10.

⁴⁰ Cf. article 14 ICCPR, the content of which has been re-stated and expanded in article 67 (*Rights of the accused*) and article 66 (*Presumption on innocence*) of the Rome Statute.

⁴¹ See the relevant quote from the *Erdemović* and the *Kambanda* Judgments reproduced in note 54.

⁴² It is impossible that a fair trial is not an impartial one: therefore, the word ‘impartial’ inserted in paragraphs 1, 3 and 5 of article 68 does not add anything, and sounds redundant and unnecessary.

⁴³ I agree with Bedont, who writes in an *Internal Report on the Diplomatic Conference of the International Center for Human Rights and Democratic Development* (Excerpt on victims issues in file with the author): ‘[...] It is no coincidence that article 68 appears after the main article laying out the rights of the accused. The point is that the two considerations must be balanced in order to achieve a fair trial. A trial which retraumatizes witnesses [and victims] and prevents a proper presentation of inculpatory evidence is just as unfair as a trial in which the accused is prevented from putting forward a proper defence. Thus, the two articles 67 and 68 must be considered together.’ See also Bedont, in: Lattanzi and Schabas (eds.), *Essays* (1999), 202–207.

⁴⁴ Cf. paragraph 7 of article 64. See also ICCPR, article 14 para. 1, which *inter alia* states as follows: ‘[...] In the determination of any criminal charge [...], everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of the trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the Court in special circumstance when publicity would prejudice the interest of justice [...].’

⁴⁵ See Report of the Preparatory Committee, see note 20.

protection envisaged in paragraph 1 of article 68. However, non-disclosure of identity to the public or to the media is one thing, anonymity of witnesses/victims to the defence is another. The latter is unacceptable, in the light of the right of the defence to examine witnesses presented by the Prosecution (in fact, it is not possible to respond to arguments presented by someone ‘without identity’)⁴⁶. Yet, if anonymity is assessed as the only available measure of protection to comply with the obligation of result posed by article 68 para. 1, the relevant Chamber should order to maintain it⁴⁷ and, at the same time, ensure that the testimony rendered by the anonymous victim or witness shall be weighted against this factor and never be the sole proof that would suffice to convict an individual for any specific charge. In other terms, in these exceptional cases corroboration of testimony will be required through other means, thus introducing a requirement that does not exist in the ICC procedural law.⁴⁸ Alternatively, in cases in which victims-survivors will decide to participate in the proceedings and accept to lose their anonymity before testifying, their access to the Court’s proceedings may limit the unintended negative consequences connected with their vulnerability as witnesses known to the accused. In fact, should the accused threaten them or retaliate against them, their family or their property, these victims will be able to promptly report any incident to the Court, in accordance with article 68 para. 3, for immediate and urgent remedial action⁴⁹. Participating victims may decide, as a matter of fact, that the best way to protect themselves is to reveal their identity while seeking justice and telling their story in the face of the accused, as their objective to contribute to the establishment of the judicial truth outweighs their fear of retaliation and re-victimisation. In its first eleven years of jurisprudence, the Pre-Trial, Appeals and – at times – Trial Chambers, as well as the Office of the Prosecutor, made wide use of anonymity as a protective measure: names of victims and witnesses have been almost systematically expunged from the Court proceedings’ records and the decisions of the Court relating to victims and witnesses have been heavily *redacted* in their public versions to cover the identity and any information that could provide indicia on the whereabouts of the protected persons⁵⁰. Decisions relating to the issuance of arrest warrants and the requests of surrender in

⁴⁶ This position was taken in *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial, Trial Chamber II, 22 January 2010, paras. 92-93. The Trial Chamber did not exclude the possibility of anonymous victims participating in proceedings, but emphasised that it would have not authorised victims willing to remain anonymous to the Defence to testify as witnesses.

⁴⁷ For pre-trial stage decisions pro-anonymity as adequate protective measure not violating the principle of fair trial, see, for all, *Prosecutor v. Lubanga*, ICC-01/04-01/06-568, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, Appeals Chamber, 13 October 2006, and *Prosecutor v. Lubanga*, ICC-01/04-73, Decision on Protective Measures requested by Applicants 01/04-1/dp to 01/04-6/dp, Pre-Trial Chamber, 21 July 2005.

⁴⁸ See Rule 63 para. 4, Rules of Procedure and Evidence. At least three decisions of the ICC Chambers imply that corroboration is required if statements by anonymous witnesses are allowed in Court at Pre-Trial stage: Cf. *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the confirmation of charges, Pre-Trial Chamber II, 30 September 2008, para. 159; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the confirmation of charges, Pre-Trial Chamber I, 8 February 2010, para. 51; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, Pre-Trial Chamber I, 30 May 2012, para. 49.

⁴⁹ Notwithstanding the initial practise of the Pre-Trial and Appeal Chambers of the Court aimed at maintaining anonymity, the identity of victims called to testify at trial has been made known to the defendant, who may have ignored their whereabouts when the crime was committed or the fact that they survived: this happened for the first time when three victims-survivors of sexual violence and other crimes participating in the proceedings under Art. 68(3) decided to testify in the Bemba trial. Two of these victims revealed their full identity in *Prosecutor v. J.P. Bemba*, ICC-01/05-01/08- 2215, Requête de la Représentante légale de victimes en vue de soumettre des pièces en tant qu’éléments de preuve, Trial-Chamber III, 14 May 2012. Once anonymity is not anymore possible, other measures of protection, such as relocation, are available to the Court during and after trial to protect vulnerable victims and/or witnesses.

⁵⁰ On redactions ordered by the Pre-Trial judges to ensure protection see, for example, page 3 of *Prosecutor v. Lubanga*, ICC-01/04-01/06-37 (ICC-01/04-01/06-8-US-Corr.), Decision concerning Pre-Trial Chamber I’s decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr Thomas Lubanga Dyilo, Pre-Trial Chamber I, 24 February 2006. The practice of redactions is so common in ICC decisions, due to the need to protect sources of information that include witnesses and victims, that it is even used in decisions concerning the death of an accused and the consequent termination of proceedings: see, for all,

several cases before the Court have been *sealed* until concerns of safety and well-being of victims were satisfactorily addressed by the Prosecutor: e.g. in the case against Kony and the other 4 leaders of Northern Uganda's Lord Resistance Army after relevant litigation with the OTP⁵¹ and in the Lubanga case when the surrender of the accused to The Hague mitigated security concerns relating to the victims in the Ituri province of the Democratic Republic of the Congo⁵². In the Ntaganda case, one of the reasons that motivated the Prosecutor to request the publicity of the arrest warrant was that 'any potential risk that the unsealing of the Warrant of Arrest against Bosco Ntaganda could have for victims and witnesses [was] under control as protective measures [had] been taken to ensure the adequate security of the witnesses in this case and in the cases of *The Prosecution v. Thomas Lubanga Dyilo* and *The Prosecution v. Germain Katanga and Mathieu Ngujolo Chui*'⁵³.

Paragraph 2 provides for protection not only of victims and witnesses, but also of 'an accused', thus contravening the general approach of article 68. Why should accused be protected through closed proceedings if they have the right to a public hearing as a general guarantee for their rights? If it means protection of physical integrity (e.g., in case of threat of a terrorist attack), other measures of security may be adopted by the Court in order to limit and control the access of the public to the hearings. Perhaps, there could be special cases in which the identity of the accused should not be made known to the public, but – once again – it would appear more appropriate to utilise technological means to alter voices, cover faces and, in general, hide whereabouts to the media and public, instead of closing the trial. In this respect, article 64 para. 7 envisages only the protection of 'confidential and sensitive information to be given in evidence' as a good cause to close proceedings, apart from those set out in article 68⁵⁴.

2. In particular, cases of victims of sexual violence or children as victims or witnesses

In camera hearings and other exceptions to the principle of publicity are mandatory when requested by minors⁵⁵ or victims of sexual violence⁵⁶. This is the norm that negotiators

Prosecutor v. Banda and Jerbo, ICC-02/05-03/09, Public redacted Decision terminating the proceedings against Mr Jerbo, Trial Chamber IV, 13 October 2013, which contains more than 30 redactions.

⁵¹ See *Prosecutor v. Kony et al.*, ICC-02-04-01-05-52, Decision on the Prosecutor's Application for unsealing of the warrants of arrest, Pre-Trial Chamber II, 13 October 2005: the entire reasoning of the Chamber is centered on the issue of verifying that sufficient protections are available to the victims and witnesses before 'unsealing' the arrest warrant against the five leaders of the Lord's Resistance Army.

⁵² See *Prosecutor v. Lubanga*, ICC-01/04-01/06-37, Decision to Unseal the Warrant of Arrest Against Mr. Thomas Lubanga Dyilo and Related Documents, Pre-Trial Chamber I, 17 March 2006.

⁵³ Cf. p. 5, *Prosecutor v. B. Ntaganda*, ICC-01/04-02/06-18, Decision to Unseal the Warrant of Arrest against Bosco Ntaganda, Pre-Trial Chamber, 28 April 2008.

⁵⁴ Bedont, in her above-cited unpublished report on the outcome of the Rome Conference, see note 41, states: 'Article 68 is the main article laying out the provisions for protection of victims and witnesses and their participation in the proceedings. [...] It should be noted that the article was intended to apply exclusively to victims and witnesses. A proposal to include protective measures for the accused under this article had been rejected by the delegates. Unfortunately, at the last working group dealing with this article, a last minute deal resulted in the addition of the word "accused" in subparagraph 2. [A delegation of a State from the Middle-East] proposed that closed hearings be mandatory in cases of sexual violence because of its belief that these cases would corrupt social morals if they were accessible to the public. Other countries were opposed to this proposal. Canada made several suggestions for compromise language which were resisted by the [delegation from the Middle-East]. Canada proposed adding "the accused" to subparagraph 2. While this proposal does not address that Arab State's concern, it was accepted nonetheless. The fact that such a superfluous word was included in the subparagraph says more to the personal egos involved in the negotiations. On certain issues, the delegates felt compelled to extract symbolic concessions in order to allay their egos even if the compromise language did not further their objectives. The addition of "the accused" in subparagraph 2 was a prime example of this.' (Bracketed language inserted by author).

⁵⁵ From the first trial involving child-soldiers as victims, the Court's judges have made frequent use to this norm: see, for all, the following hearing of the first ICC trial, *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-59-ENG [30Oct2007 WT] 1–14 SZ T, Transcript, Trial Chamber I, 30 July 2007 (available at www.icc-cpi.int/iccdocs/doc/doc364195.PDF, visited on 26 September 2014).

⁵⁶ Even if the practice of the ICC is generally aligned with this presumption of in camera hearings in cases of gender-based and sexual violence (see, for all, *Prosecutor v. Bemba*, ICC-01/05-01/08-3157-Red, Public Redacted

agreed upon in the Rome Conference by using the phrase ‘such measures *shall be implemented vis-à-vis* the language ‘Chambers of the Court may [...] conduct any parts of the proceedings in camera’ of the first sentence (emphasis added).

However, such an interpretation may be modified by a careful reading of the last words of paragraph 2, which were designed to soften (and even contradict) the previous provision, thus assigning wide discretionary power to the judges. The end of paragraph 2 reads: ‘[measures of protection shall be implemented ...] unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness’. This is one of the best examples of ‘creative ambiguity’ of the *Rome Statute*, as inferred in such an open-ended clause.

III. Paragraph 3: Victims’ participation

1. Personal interests

- 22 It appears self-evident that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct. Offences of an immense magnitude such as the ones within the jurisdiction of the Court are victimising not only individuals, but also identifiable groups (genocide) and the International Community as a whole (crimes against humanity⁵⁷, including genocide). Thus, without prejudice to the collective interest of identifiable groups and of human-kind, the adjective ‘personal’ ensures that this provision is specifically addressed to individual victims of a given crime. The finding of the personal interests of victims during the investigation and at the stage of the hearing on the confirmation of charges has been essential in the procedure that led the relevant ICC Chambers to allow the participation of victims in the first proceedings, namely, those relating to the situation of the DRC and the case of Mr. Lubanga, as well as the case against the five leaders of the Lords’ Resistance Army of Northern Uganda⁵⁸. The substantive approach of

Version of Decision on the modalities of the presentation of additional evidence pursuant to Articles 64(6)(b) and (d) and 69(3) of the Rome Statute, Trial Chamber III, 8 October 2014), Judges have been reluctant to allow wide and unqualified exceptions to the principle of a public trial, as exemplified by a significant decision in a case with a large number of victims of rape and other gender-based crimes, *cf. Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on Directions for the Conduct of the Proceedings, Trial Chamber III, 19 November 2010, paras. 22–23.

⁵⁷ The thesis of human-kind as victim of crimes against humanity (including genocide) is reflected in the important *dictum* of the *ad hoc* Tribunals’ early jurisprudence in the *Erdemović* (ICTY) and *Kambanda* (ICTR) cases. The most relevant part of that *dictum* is hereby reproduced:

‘Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perform demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.’

Excerpt from para. 28 of *Prosecutor v. Erdemović*, IT-96-22-T, Sentencing Judgement, 26 November 1996, and from para. 15 of *Prosecutor v. Jean Kambanda*, ICTR 97-23-S, Judgement, 4 September 1998.

On the *ad hoc* Tribunals practice, see Jones, J., *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (Transnational Publishers, 1997) 56. On the definition of crimes against humanity in the Rome Statute, see Article 7 in this Commentary, as well as Robinson, in: Lattanzi and Schabas (eds.), *Essays* (1999) 139. On the definition of this category of crimes before the Diplomatic Conference, see Donat-Cattin, in: Lattanzi (ed.), *The International Criminal Court. Comments to the Draft Statute*, 49.

⁵⁸ See relevant decisions allowing victims to participate in: *DRC Situation*, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 January 2006; *Prosecutor v. Lubanga*, ICC-01-04-01-06-228, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the *Prosecutor v. Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of the Congo, Pre-Trial Chamber I, 28 July 2008; *Prosecutor v. Lubanga*, ICC-01-04-01-06-601, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 [...], Pre-Trial Chamber I, 20 October 2006; *Prosecutor v. Kony et al.*, ICC-02-04-01-05-134, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre

the Rome Statute to the phenomenon of victimisation has been confirmed by the States Parties when they adopted a definition of victims in the Rules of Procedure and Evidence that is centred on the notion of harm (Rule 85⁵⁹) and not on the restrictive nexus between the crime and the person directly targeted by it, as reflected in the restrictive ICTY Rule 2, which marked a retrogressive development of the law vis-à-vis the relevant UN minimum standard. In its initial practise, the Office of the Prosecutor utilised the redundant notion of 'judicially recognisable personal interest in the case' in an apparent effort to limit the intervention of victims in ICC Pre-Trial proceedings. Obviously the 'personal interests' have to be found in each specific case of victimization by the relevant Chamber to permit the exercise of the victims' right to participate. However, the Office of the Prosecutor was wrong when it characterised the relevant procedure as a 'two-stage process' in which a victim may be recognised as such in the first place, with the necessity of a second judicial decision concerning whether her or his personal interests are affected⁶⁰. Conversely, the language of article 68, para. 3, plainly states that victims are recognised as such for the purpose of participation 'where their personal interests are affected', which means in the cases in which ('where') there is a link between the criminal conduct investigated and/or adjudicated in given proceedings and the harm that they suffered, unless it could be proved that these victims would have no interests in investigations or prosecutions of individuals who allegedly caused harm to them. The latter is an illogic and improbable situation, especially considering the burdensome effort that victims must have already made in applying to access to justice through the ICC, a Court based far away from the place in which they were allegedly victimised⁶¹.

Trial Chamber II, 1 February 2007. Reference is also made to the decisions not allowing victims to participate in *Prosecutor v. Lubanga*, ICC-01/04-01/06-172, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, 29 June 2006.

In the first judicial decision on victims' participation, '[t]he Chamber consider[ed] that the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.' *Cf.* para. 63, ICC-01/04-101, 17 Jan. 2006 (cited in this footnote).

⁵⁹ See below mn 35–37.

⁶⁰ 'The Prosecution submits that Article 68(3) of the Statute and Rule 85, viewed together, establish a two-stage process for the Chamber to determine if an individual qualifies as a victim with standing to participate in proceedings: first, the applicant must fulfil the criteria set out in Rule 85, then the Chamber must be satisfied that the personal interests of the victim are directly affected by the proceedings in which he or she is applying to participate.' *Cf. Prosecutor v. Lubanga*, ICC-01-04-01-06-390, Prosecutor's 25 August Observations on the Application for Participation of Applicants a/0047/06 – a/0052/06, Pre-Trial Chamber I, 6 September 2006, para. 10. The approach of the Prosecutor has been partially adopted by the Appeals Chamber in respect of a specific appeal of the defence against pre-trial detention, which however saw the active participation of the victims' legal representative: see *Prosecutor v. Lubanga*, ICC-01/04-01/06-824, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', Appeals Chamber, 13 February 2007. The same judgement contains an interesting dissenting opinion of Judge Sang Hyun Song that aims at simplifying the procedural requirements relating to victims' interventions in appeals procedures. Judge Song reiterated his view in various other decisions, e.g. *Prosecutor v. Bemba*, ICC-01/05-01/08-623, Decision on the Participation of Victims in the Appeal against the Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa – Dissenting Opinion of Judge Sang-Hyun Song, Appeals Chamber, 27 November 2009.

⁶¹ The practice of the second trial before the ICC, in re Katanga (the only one that has become *res judicata* at the time of writing [26 November 2014]), appears to be substantially aligned with this interpretation, even if litigation on 'personal interests' continues to flourish in each ICC case. In its pivotal decision admitting 'pre-trial participating victims' to participate in the trial, the Judges stated:

'in the interest of the proper administration of justice, victims authorised to participate in the proceedings at the pre-trial stage must, in principle, and subject to the considerations set forth below, automatically be authorised to participate in the proceedings at the trial stage, without the need for their applications to be registered and assessed a second time.'

Cf. para. 10, *Prosecutor v. G. Katanga and M. Ngudjolo Chui*, ICC-01/04-01/07-933-tENG, Decision on the treatment of applications for participation, Trial Chamber II, 26 February 2009.

2. Presentation and consideration of victims' views and concerns

23 Individual victims have the right to participate in the proceedings in order to make sure that their views and concerns are presented to, and properly considered by, the judges. The broad terms 'views and concerns' – taken from the 1985 UN Declaration on Victims' Rights, as all the language of the first sentence of article 68 para. 3 – is inclusive enough to allow victims (or their representatives) to bring before the Court elements of evidence upon which they wish to express views or concerns. As we anticipated in the first edition of this Commentary, this would have had repercussions on the system of evidence to be adopted by the ICC Assembly of States Parties upon proposal by the Preparatory Commission⁶². Yet, the most important procedural feature that could positively impact on the needs of victims vis-à-vis *the trial* could be the practise to allow victims-survivors to present a narrative-testimony of the alleged crimes that they suffered under the careful and respectful direction of the Presiding Judge, thus leaving the questioning of the Parties to a stage that will follow their spontaneous presentation. Such a procedural feature is made possible by article 64 para. 8(b) and by the lack of specific and mandatory procedural rules on cross-examination of witnesses in the 'law of the Court', as well as by the extremely significant content of Rule 86 on '*General principle [relating to victims]*', which reads as follows: 'A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.' Narrative testimony and avoidance of aggressive examination of victims-witnesses through rigorous control of the Judges on the parties are important procedural devices to minimize the risk of re-traumatization of victims in the Court-room.

Victims are 'potential-parties' (or participants) to the process, insofar as their power of intervention to express views and concerns covers all stages of it: from the first hearing of confirmation of the charges (article 61) or – albeit with limitations – particular stages of the investigation, to the entire course of the Trial, Appeal and Review proceedings. Notwithstanding the fact that article 68 is placed in Part 6 of the Statute on 'the Trial', provisions related to victims' protection and participation have been envisaged by the legal drafters as applicable throughout all the 'open' procedures of the Court. The wording 'stages of the proceedings' reflects such an approach, which is not limited to trial proceedings. Furthermore, other norms of the Statute affirm that victims have: (i) the conditioned right to make representations before the Court even in the beginning of the Pre-Trial procedure envisaged in article 15 para. 3 and (ii) the unconditioned right to submit observations 'in proceedings with respect to jurisdiction or admissibility' ex article 19 para. 3⁶³, as well as (iii) the right to

⁶² See, in particular, Rule 63 (*General provisions relating to evidence*), para. 2, RPE, establishing the principle of 'freedom' of evidence, in conformity with the procedural law of romano-germanic legal systems, as well as Rule 140 (*Directions for the conduct of the proceedings and testimony*), which allows the Trial Chamber to play an important role in the questioning of witnesses (para. 2 (c)) and in evaluating the weight of a testimony rendered by a witness who heard other witnesses in the same proceedings, thus encompassing the case of victims admitted to exercise their right of participation. The latter situation is defined with the notion of a dual status of a victim-witness. The dual status has been consistently addressed in the jurisprudence of the Court since the first trial by striking a careful balance between the right to participate, applicable rules of evidence and the rights of the accused: see, for all, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, Decision on victims' participation, Trial Chamber I, 18 January 2008, para. 132 to 137.

⁶³ See articles 15 para. 3 and 19 para. 3. The Pre-Trial Chamber I recognized the right of victims to intervene in art. 19 para. 3 proceedings in its first decision on this matter, namely, *Prosecutor v. Lubanga*, ICC-01/04-01/06-228, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, Pre-Trial Chamber I, 28 July 2006. The same Pre-Trial Chamber affirmed in an *obiter dictum* that 'articles 15 (3) and 19 (3) of the Statute [...] accord a specific right of participation to victims.' Cf. para. 62, *Prosecutor v. Lubanga*, ICC-01-04-101, Decision on Applications [...], see note 16. This statement equals two very distinct situations, namely, the legitimate expectation that victims have to intervene at an early stage

be heard before decisions on reparation under article 75 para. 3, and (iv) the right to intervene on appeals concerning reparations orders under article 82 para. 4. These provisions are to be interpreted as particular specifications of the general right of participation envisioned in article 68 para. 3, even if the Appeals' Chamber interpreted the *locus standi* of victims in reparations' proceedings as entailing the notion of parties, not participants, in the relevant post-conviction hearings⁶⁴. Proceedings relating to reparations may, or may not at all, take place, in accordance with Article 75.3 and Rule 143. But once reparations' orders become a matter *sub judice*, the statutory framework leaves open both the possibilities of (i) post-conviction hearings on reparations or (ii) assessment of reparations' requests during trial hearings, where victims are present in accordance with their Article 68(3) status.

3. Stages of the proceedings determined to be appropriate by the Court

Victims have the right to intervene in the proceedings before the ICC. Indeed, the Rome Conference adopted specific language in this direction: '... the Court *shall* permit their views and concerns to be presented and considered ...', thus rejecting the thesis that it was simply an interest of the victims to participate. Such a thesis was reflected in the alternative textual option *may*⁶⁵. The first eleven years of practise of the ICC is in line with this literal interpretation of the text. In fact, since its first decision allowing victims to participate in the proceedings on the situation in the Democratic Republic of the Congo, Pre-Trial Chamber I affirmed: 'With regard to article 68 (3), the Chamber considers that it imposes an obligation on the Court vis-à-vis victims. The use of the present tense in the French version of the text ('*la Cour permet*') makes it quite clear that the victims' guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on one hand, to allow victims to present their views and concerns, and, on the other, to examine them'⁶⁶.

The judges must ensure that victims, normally *via* their representatives, make a correct use of their right to intervene. Such form of control, however, shall orient the decision towards the appropriate phase in which victims are to intervene, without denying to victims the exercise of their right⁶⁷. The practise of the Pre-Trial Chamber I in the Lubanga case shows, for example,

(art. 15) unless the Prosecutor decides that they shall not receive notification of his decision to use *proprio motu* powers when the victims' knowledge of such a decision 'would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses' (cf. Rule 50, para. 1), and the right to submit observations to the Court in proceedings in which the victims' interests are affected by the intervention of third parties challenging the jurisdiction of the Court or the admissibility of a case (art. 19). However, given the absence of relevant litigation on art. 15 as of 2014, it is foreseeable that the Chamber(s) may depart from this *dictum*.

⁶⁴ Cf. *Prosecutor v. Lubanga*, ICC-01/04-01/06-2953, Decision on the admissibility of the appeals against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, Appeals Chamber, 14 December 2012, para. 67, which is hereby reproduced in its entirety due to its significance: 'As to the appeals brought by the legal representatives of victims and by the OPCV, the Appeals Chamber notes at the outset that, under article 82 (4) of the Statute, victims are entitled to bring an appeal. They are therefore parties to the proceedings and not, as is the case at other stages of the proceedings, participants who, under article 68 (3) of the Statute, may present their views and concerns where their personal interests are affected. Furthermore, the Appeals Chamber notes that the right to appeal lies with the victims, not with the legal representatives of victims. In this regard, article 82 (4) of the Statute provides that victims may only appeal with the assistance of a legal representative, as is the case in these appeals.' See also footnote 55 and corresponding text at mn 22, Donat Cattin, 'Article 75'.

⁶⁵ See the relevant double-bracketed-text included in the ICC Draft Statute transmitted by the Preparatory Committee to the Rome Conference: '[... the Court [shall] [may] permit their views and concerns ...]', see note 24.

⁶⁶ Cf. para. 71, *Prosecutor v. Lubanga*, ICC-01-04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 January 2006. As we had written in the first edition of this *Commentary* at mn 38, 'Article 68', footnote 52, p. 885: 'given the open nature of the 'appropriateness' standard, this criteria must not constitute grounds for outright denial of the victims right of intervention, but rather justify a postponement of the intervention to a more suitable appropriate stage.'

⁶⁷ See mn. 38 *et seq.* Regrettably, a *de facto* denial of participatory rights has taken place in two cases before the ICC, the Kenyatta and Ruto cases, due to the TC's decision to avoid to recognise victims, as such, on the basis of

that participation might be temporally deemed incompatible with protective measures, as in the cases of victims/applicants a/0047/06 to a/0052/06, who were denied participation to the hearing for the confirmation of charges because the Chamber had ‘afforded [them] specific protective measures’⁶⁸, the situation in the DRC was considered as ‘deteriorated’ and increased contacts between victims and their legal representatives would have had the potential to further endanger the security and well-being of the concerned victims⁶⁹.

4. In a manner not inconsistent with the rights of the accused and a fair and impartial trial

26 If appropriateness of the stage of the proceedings is a criterion of judgement that may only justify a postponement of the intervention of the victim, either *via* his/her representative or in person, the requirements of respect for the rights of the accused and a fair trial constitute pre-conditions for the exercise of the victims’ right to intervention⁷⁰. As affirmed above, respect for the rights of the accused is an essential component of a fair trial, which is implemented when the rights of victims and society as such (represented by the Prosecutor) are implemented too.

To give an example, the judges may not allow a certain intervention of the victims’ representative when its content would consist of arguments already integrally presented by the Prosecutor: fairness and expeditiousness of the proceeding would be at risk of prejudice⁷¹. In addition, the statement of the victims (or of his/her representative) are always submitted to the rules governing questioning of witnesses and presentation of evidence, including limitations related to ‘protective measures’ under article 68 and the general principle that the defence shall always be allowed to be the last to question any witness⁷². Taking into account that victims-survivors participating in the ICC proceedings may be called by the Prosecution or the Defence to testify at trial, Rule 140 of the Rules of Procedure and Evidence contains the fundamental provision stating that ‘a witness who has heard testimony of another witness shall not for that reason alone be disqualified from testifying’. Should this situation occur, it ‘shall be noted in the record [of the proceedings] and considered by the Trial Chamber when

their identity and in connection with the harm that they declared to have suffered as a result of crimes allegedly committed during Kenya’s post electoral violence of 2007-08. In *Prosecutor v. Kenyatta*, ICC-01/09-02/11-498, Decision on victims’ representation and participation, Trial Chamber V, 3 October 2012, and *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-460, Decision on victims’ representation and participation, TC V, 3 October 2012, at para. 29 and 30 respectively, Judges wrote exactly the same following text: ‘In cases involving crimes that allegedly caused harm to a large number of victims, the process of assessing their applications is time consuming.’ Quite astonishingly, this was the single most important cause for departing from established ICC practise based on a literal interpretation of the two sentences of article 68(3) in a situation that had a lower number of victims than others within the Court’s docket. The absence of recognised individual victims has been certainly only one of the anomalies of the Kenya situation cases, which may have contributed to the most controversial proceedings carried out before the ICC in the first eleven years of Court praxis.

⁶⁸ See pages 10 and 11 of *Prosecutor v. Lubanga*, ICC-01-04-01-06-601, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, 20 October 2006.

⁶⁹ The Pre-Trial Chamber therefore concluded that ‘having carefully considered each case, the Chamber is of the opinion that granting Applicants a/0047/06 to a/0052/06 the status of victims with standing to participate would be inappropriate at this particular stage in the proceedings’ (*ibid.*, page 11). In this respect, it must be noted that the Chamber did not decide on the basis of whether the personal interests of the victims were affected, as the Prosecutor had mistakenly requested (see see mn 22), but restated that ‘the Chamber may determine at its discretion the appropriateness of the stage of the proceedings at which the views and concerns of the victims may be presented’, thus reiterating the letter of para. 3, article 68 (*ibid.*, page 10).

⁷⁰ See mn 15 *et seq.*

⁷¹ The practise of the ICC Chambers has been consistent in impeding duplication and overlap between victims and the Prosecutor. In an exemplary statement, the presiding judge in *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Transcripts, Trial Chamber II, 15 July 2008, at 70, affirmed: ‘we cannot allow a second Prosecutor in this process’ with respect to the fact that victims’ legal representatives cannot introduce duplicative evidence on the accused’s guilt: cited by McGonigle Leyh (2011) 284–285, footnotes 357 and 358, and by Pérez León Acevedo (2014), 389, footnote 2425. See also Ambos (2012) *ICLRev* 115, 116.

⁷² See the norm for the trial (and appeals) posed by Rule 140, para. 2(d), Rules of Procedure and Evidence.

evaluating the evidence.’ Rule 140 resolves a problem that has been raised by some commentators⁷³, which the Office of the Prosecutor addressed citing several external authorities⁷⁴, but not the ICC Rules! The lack of specific provisions on this matter in article 68, para. 3, has been appropriately resolved by Rule 140, to be read in conjunction with the other rules pertaining to victims, in conformity with the ratio and scope of Article 68: and it is not a coincidence that the first three victims admitted to participate in an ICC case were all witnesses of the (alleged) crimes to which they survived⁷⁵.

5. Presentation by legal representatives of victims

The second sentence of article 68 para. 3 was added to the original draft text of the paragraph. 27 It derives from a French proposal, which was conceived in the special framework of reparations to victims⁷⁶, and not attached to a general provision on victims’ participation, which was lacking in the French proposal of Statute released at the Preparatory Committee session of August 1996⁷⁷. In respect to the right to justice for victims – and effective participation in the justice process as an essential element of, and preliminary to, the realisation of the other elements of that right (to know of the truth and to obtain reparations⁷⁸) –, reference is appropriately made to legal representation. The domestic practice of ‘continental-law’ jurisdictions clearly stresses

⁷³ Jorda and de Hemptinne, in Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002): at p. 1409, the authors mention ‘outstanding issues awaiting resolution’ including the fact that ‘[t]he Rules do not state whether the parties may subsequently call a victim who intervenes in the proceedings in his personal capacity as witness. In order to fully safeguard the rights of the accused, it will be necessary to ensure that a victim may not simultaneously be a witness and a party in one of the same cases (with reference in footnote to the jurisprudence of the French Cour de Cassation: Cass crim. 6 November 1956, B.709.)’ See also p. 1416.

⁷⁴ In its submission to the Pre-Trial Chamber I of 6 September 2006 (ICC-01-04-01-06-390, seenote 58), the Prosecutor affirmed ‘that since the Court’s texts do not address the issue of individuals having both the status of witness and victim throughout the proceedings, such a possibility cannot be excluded.’ (*Ibid.*, para. 26.) Hence, the Prosecutor enlisted a number of sources, including principles stemming from UNGA resolutions and national laws, which led him to the determination ‘that there is no incompatibility with an individual’s joint status as victim and witness.’ (*Ibid.*, para. 25.) Inter alia, the Prosecutor stated that ‘[a] number of European texts equally reveal that European institutions do not see a contradiction with between participating as a victim and also being relied upon or asked to testify at trial by a party as a witness, even in systems where victims have acquired the status of a full party. [...] [T]he EU Council Framework Decision on the Standing of Victims in Criminal Proceedings [...] shows that, according to European legislation, an individual’s status as a victim does not categorically preclude him or her from holding simultaneously the status of a witness (2001/220/JHA, Official journal of the EU, L82/1, 22/03/2001).’ (*Ibid.*, paras. 25 and 27).

⁷⁵ Pre-Trial Chamber I *Decision...*, ICC-01-04-01-06-228, see note 56.

⁷⁶ A final bracketed paragraph of article 68 of the ICC Draft Statute, see note 24, corresponding to language included in the August 1997 PrepCom draft and in the January 1998 *Zutphen text*, stated as follows: ‘Legal representatives of victims of crimes have the right to participate in the proceedings with a view of presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue reparations.’ (Translation from the original French text: the original English text contained the non-inclusive terms ‘civil compensation’).

⁷⁷ See UN Doc. A/AC.249/L.3, Preparatory Committee on the Establishment of an International Criminal Court (12–30 Aug. 1996), *Draft Statute for an International Criminal Court – Working paper submitted by France*. Instead, the general provision of article 68 para. 3 originated (in the Preparatory Committee of August ‘97) from an NGO proposal, that was brought by the author of these comments to the attention of some governments delegates and to other NGOs (especially the European Law Students’ Association and the Women Caucus for Gender Justice). New Zealand was the delegation that worked on the suggested language of article 68 para. 3 – at that time, article 43 para. 3 – and formally proposed it for inclusion in the ICC Draft Statute (*New Zealand proposal, Non-Paper/WG.4/No. 19* (13 Aug. 1997), UN/ICC Preparatory Committee, on file with author). New Zealand was immediately supported by statements of other 13 countries, including Italy that proposed to amend the title of the article and insert the wording ‘and their participation’ after ‘Protection of victims [...]’. In a policy-oriented writing that preceded the controversial decisions of Trial Chamber V on victims’ participation in the Kenya cases of 3 October 2012, a Judge of that Chamber misleadingly referred to the origins of Art. 68 para. 3 as follows: ‘It was mainly France and some civil law countries that insisted on the introduction of a participatory regime that resembled the French *partie civile* system.’ Cf. Van den Wyngaert (2012) 44 *CaseWesternReserveJIL* 475, 478.

⁷⁸ See mn 7 *et seq.*

the indisputable function of empowerment provided for victims by advocates of their rights. There is no effective access to justice without skilful and responsible legal representation. However, the language of article 68 is clear in affirming that ‘views and concerns *may* be presented by the legal representatives’ whereby victims themselves have the right (*shall*) to express such views and concerns. To the contrary, some commentators and the Office of the Prosecutor, albeit only in its initial practise, seem to have misunderstood the relationship between the two sentences included in paragraph 3 of article 68 and interpreted the second as limiting the right of victims to access to the new system of international criminal justice⁷⁹. One Trial Chamber has read more in this provision than its literal meaning and has conceptualized two categories of victims derived from two types of participation, namely participation via a common legal representative and individual victims’ direct participation⁸⁰: This departs from the statutory framework because representation is ancillary to victims’ participation and it can exist only if there is an individual victim or several individual victims, as part of a group, to be represented in Court.

- 28 The *UN Handbook on Victims’ Rights* indicates that legal counselling should be accompanied by psychological and – if necessary – medical assistance, as part of a victims’ assistance programme that States are called to implement in line with the recommendations contained in the 1985 UN Declaration on Victims’ Rights. Hence, legal counsels of victims before the ICC have a delicate role in facilitating access to justice by their ‘assisted persons’, which has in itself a psychological impact, especially on survivors of crime. Transparency of the proceedings is an essential component of a legal process, which is designed to serve the needs of those who directly or indirectly suffered from a given act; namely, the victims, their families, dependants and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation⁸¹. Even if the views and concerns of the victims may be presented also directly by themselves, it is difficult for them to have the capacity to deal with the very technical procedures of the Court without the assistance of a legal expert⁸². The design of the ICC facilities and Court-rooms must also consider the availability of space and procedures to accommodate victims when they decide to sit close to their legal representatives, who are legitimised to participate in the proceeding *on behalf of* the victims⁸³. While

⁷⁹ See, in particular, footnote 50 at para. 32, *Prosecutor v. Lubanga*, ICC-01-04-01-06-390, Prosecution’s Observations on the Applications for Participation of Applicants a/0047/06-a/0052/06 [public redacted and formatted version], Office of the Prosecutor, 6 September 2006, see note 58.

⁸⁰ The last sentence of the identical paras. 25 and 26 of the Kenyatta and the Ruto Victims’ Participation Decisions of 3 October 2012 (ICC-01/09-02/11-498 and ICC-01/09-01/11-460) contain language that has no foundation in the letter of the Rome Statute, namely: ‘The basic principle, contained in Article 68(3), and arguably one of the key innovations of the Statute, is that victims are allowed to address the Court in their own name. This implies that victims may, at appropriate stages of the proceedings to be determined by the Chamber, appear individually, so that their voice may be heard directly. However, Article 68(3) of the Statute also provides that the views and concerns of victims may equally ‘be presented by the legal representatives of victims’. Article 68(3) thus envisages both direct individual participation and participation through a common legal representative.’ The Chamber fails to consider that legal representation stems from the right of victims to be represented and, therefore, be empowered to participate in the complex ICC proceedings.

⁸¹ Cf. article 1, UN Declaration on Victims’ Rights. See also mn 35 *et seq.*

⁸² For the characteristics and qualifications of these jurists, reference is made to mn 40 *et seq.* The initial practise of the legal representatives of victims before the ICC confirmed the importance of the complex role of the lawyers of victims, as lucidly documented by Luc Walleyn, legal representative of several victims’ survivors (former child soldiers) in the Lubanga case, in his paper entitled “*Incorporating Victims’ Views in Reparation Cases: A Challenge for Lawyers*”, Redress Conference, The Hague, 1 March 2007. But since 2010, the lawyers of the Office for the Public Counsel of Victims (OPCV) of the ICC have been increasingly tasked with the mandate of serving as Common Legal Representatives of groups of victims in an apparent effort to ensure efficiency and cost-effectiveness of the proceedings while maintaining an appropriate level of expertise in legal representation. In 2011, the plenary of the ICC Judges amended Regulations 80 and 81 on the OPCV (Cf. ICC-BD/01-03-11, Amendments to the Regulations of the Court, Presidency, 2 November 2011, available at www.icc-cpi.int/NR/rdonlyres/AE097EAF-B849-482B-A766-CF76DA4D6AFF/0/ENexplanatoryNotes.pdf) to reflect this problematic jurisprudential trend.

⁸³ For general observations on how the ICC court-room may be designed to comply with the requirements of Art. 68, para. 3, see Donat-Cattin, ‘Victims’ Rights in the International Criminal Court’ (2011), 376–277.

the Court had set up an administrative structure within the Registry to assist and support victims and their legal representatives (the Office of Public Counsel for Victims, OPCV), the personnel of this quasi-independent structure has progressively replaced the legal representative, as *partially* envisaged in Regulation 81, which permitted legal representation by the OPCV only temporarily and ‘in respect of specific issues’⁸⁴ and was amended by the Judges in early 2011. The amended Regulation 80(2) stipulates expressly that the OPCV can perform the function of legal representation, upon appointment by the relevant Chamber. However, these regulations should be interpreted restrictively and applied in compliance with articles 21 and 52⁸⁵ of the Rome Statute, which require compliance of the Regulations with the Rules of Procedure and Evidence such as Rule 90 on the right of victims to choose a legal representative, unless a ‘number of victims’ would be unable to choose a common legal representative. The performance of principal legal representation is a significant departure from the original mandate of the OPCV, namely to provide ‘general support and assistance to the legal representative of victims and to victims, including legal research and advice’ and to ‘appear[...], on the instruction or with the leave of the Chamber, in respect of specific issues’⁸⁶ under exceptional circumstances, for example in cases in which an unpredictable event would impede the presence of a victims’ lawyer in the ICC Court-room at a given hearing.

6. ‘in accordance with Rules of Procedure and Evidence’

In line with several aspects of the ICC procedure, the Statute confers to the Rules the task of specifying its general principles. Consequently, common legal representation of multiple victims, notification of information to victims and their legal representatives and other procedural matters have been disciplined in the Rules, particularly Rules 85 to 99 falling under Chapter 4 (*Provisions relating to various states of the proceedings*), Section III (*Victims and Witnesses*). These rules provide the practitioner with a detailed and coherent implementation of article 68 para. 3⁸⁷, as outlined in margins 35 to 46 of this Comment. Rule 89 and Regulation 86 are integrative and innovative vis-à-vis the Statute: they have been adopted to govern the procedure through which victims apply to participate. The approach of these provisions is to treat victims as individuals seeking for recognition. Due to the inevitably serious workload in analysing and deliberating on multiple individual applications, proposals have been made to adopt a collective approach to applications⁸⁸. These are however not

⁸⁴ Cf. Regulation 81, para. 4 (b), ICC-BD/01-01-04, Regulations of the Court, Presidency, 26 May 2014.

⁸⁵ Article 52 defines the Regulations of the Court as ‘necessary for its routine functioning’, hence excluding that the Regulations may modify the provisions of the Statute or the Rule of Procedure and Evidence.

⁸⁶ Cf. Regulation 81, para. 4(a) and (b), as amended in 2011.

⁸⁷ It is unfortunate that the misinterpretation of the contours of these linear provisions gave rise to several challenges of the Prosecutor on victims’ participation and protection in the initial years of ICC practice. While the decisions taken by the Pre-Trial and Appeals Chambers of the ICC complied with the requirements of the Statute and the Rules, it seems that considerable time was spent by the organs of the Court in the first years of its activities to interpret ‘complex legal provisions’ (cf. p. 3, ICC President Address to the UN General Assembly, II Annual Report, 9 October 2006, http://www.icc-cpi.int/NR/rdonlyres/53692E4E-2B35-41BD-8B90-91828D55880A/278543/PK_20061009_en.pdf, accessed on 26 October 2014) and ‘highly complex filing[s]’ (cf. para. 12(ii), *Prosecutor v. Lubanga*, ICC-01/04-01/06-458, Request for Extension of Time, Office of the Prosecutor, 22 September 2006), in situations in which a plain interpretation of the law, in accordance with the criteria of the Vienna Convention on the Law of Treaties, could have avoided most complications.

⁸⁸ See *Assembly of States Parties*, ICC-ASP/11/22, Report of the Court on the review of the system for victims to apply to participate in proceedings, 5 November 2012, sections V(b) and V(c). At para. 41, the Report reads as follows: ‘As the fully collective application options are untested it is uncertain whether they would require amendments to the legal framework, especially Article 68(3) RS, Rules 85 and 89 of the RPE and Regulation 86 of the RoC.’ In this author’s view, *rebus sic stantibus* collective applications are *ultra vires*. Conversely, partly collective applications have been deemed compatible with the ICC legal framework in so far as simplified individual forms have been integrated by collective ones describing situations in which a group of victims suffered individual harm as a consequence of the same alleged conduct contained in the charges of the case: See *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-86, Second decision on issues related to the victims’ application process, Pre-Trial Chamber I Single Judge, 5 April 2012, para. 30.

compatible with a criminal justice process as the one before the ICC, which is not a civil Court that can receive class-actions or collective complaints. Hence, there is no short-cut to the hard work that Judges and their staff must (continue to) devote in analysing and accepting or respectfully rejecting applications from victims, bearing in mind that they must have suffered harm as a consequence of specific crimes charged to the alleged responsibility of the accused in a given case⁸⁹. Victims are individual rights' bearers and their applications are to be treated as such, notwithstanding the possible outcome of common legal representation on behalf of each of them, as part of a specific group who—in most if not all ICC cases—are a minority within the victims' community.

IV. Paragraph 4: 'The Victims and Witnesses Unit'

- 30 The inclusion in the ICC Statute of comprehensive provisions on protection of victims and witnesses was promoted by the delegation of New Zealand at the August 1997 session of the Preparatory Committee. The content of the New Zealand proposal enriched the Draft Statute, because it envisaged the creation of a 'Victims and Witnesses Protection Unit [... that] shall provide counselling and other assistance to victims and witnesses and advise the Prosecutor and the Court on appropriate measures of protection and other matters affecting their rights'⁹⁰. In line with the law and practice of the *ad hoc* Tribunals, the Unit plays an essential role in discharging the Court's functions in the area of assistance to victims.
- 31 However, the mandate of the Unit of the ICC is no longer defined exclusively in article 68 para. 4, which includes reference to the surprisingly discriminatory language of article 43 para. 6. Its essence – negotiated by the Diplomatic Conference's Working Group on *Composition*, Part IV of the Statute – has been strongly criticised during the Rome Conference by some NGOs and governments' delegates attending the Working Group on *Procedural Matters*. Indeed, while the Court is empowered under article 68 para. 1 to take appropriate measures to protect victims which are the target of retaliation from offenders, the Unit appears to be able to provide such measures only with respect to victims who witness before the Court or whose identity and whereabouts have been made known in the course of testimonies before the Court. Yet, an individual can become 'at risk' even if he/she survived a mass murder, no one witnessed his/her presence amongst the victims of the extermination, and he/she is not called before the Court. In such a situation, once that there is reliable information concerning a plan of a suspect to kill that survivor, the Court or the Prosecutor 'shall' order measures of protection ex article 68 para. 1, but the Unit may not be in the position to execute them.
- 32 This discriminatory situation against a significant portion of victims must be avoided through a systematic interpretation of the Statute. In fact, according to article 68 para. 4 the

⁸⁹ *Prosecutor v. B. Ntaganda*, ICC-01/04-02/06-211, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, PTC II Single Judge, 15 January 2014: '65. With regard to Group 1, the Single Judge has decided to accept 97 victim applicants as victims and to reject none. With regard to Group 2, the Single Judge has decided to accept 825 victim applicants, to reject 48 applications and to defer 12 applications, pending additional information to be obtained by the VPRS.' [922 Victims allowed to participate.] [...] 67. Moreover, some applications have been rejected, in whole or in part, because the victim applicants: (i) provided an account of events that fall outside either the temporal scope or the geographical scope of the case presented by the Prosecutor in the DCC; (ii) provided insufficient information to assess whether the events described amount to a crime with which the suspect is charged; (iii) provided highly inconsistent information in the narrative of the events that cast doubts on the veracity of their applications and on the credibility of the victim applicants.' In order to ensure the manageability of the victims' individual applications and establish the nexus of causality between the crimes and the harm suffered by the applicants, 'the Single Judge' developed a simplified one-page individual application form (the "Simplified Form")' [citing ICC-01/04-02/06-67, paras 17–25, of the same Single Judge].

⁹⁰ Cf. paragraph 4 of the *New Zealand proposal*, see note 74. More important, the provisions in paragraph 1 and 2 addressed fundamental issues of protection of victims, especially those of 'gender crimes', then incorporated in the other paragraphs of article 68. These norms were all included with some ameliorative amendments proposed by the delegate of Samoa (R.S. Clark) in the revised text of article 43 (UN Doc. A/AC.249/1997/WG.4/CRP.9).

Unit may advise the Prosecutor or the Court on appropriate protective measures ... as referred to in article 43 para. 6: this means that the mandate of the Unit is limited by the language of article 43 only when it makes recommendations to the Prosecutor or the Court. In addition, article 43 para. 6 states that the Unit shall provide protective measures on its own motion solely for witnesses, victims and potential victims as defined in that article (namely, *witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses*). Thus, there is no express derogation to the general obligation under article 68 para. 1 – which regards all organs of the Court, including the Registrar and its Unit – to implement Court’s decisions on protective measures, as far as the general nature of the obligation of 68 para. 1 goes beyond the limited scope of the Unit’s mandate under 43 para. 6. Such a mandate is applicable only to the *motu proprio* activities of the Unit (*lex specialis derogat lex generalis*) and to the advisory function of the Unit envisaged in 68 para. 4.

V. Paragraph 5: Endangerment of the security of witnesses or their families

During the Pre-Trial stages of the proceedings, it is neither necessary nor wise that the Prosecutor be required to supply all the evidence she/he has collected. Nor would this undermine the rights of the accused. To require submission of all evidence collected would conflict directly with the Prosecutor’s duty, outlined in article 54 paras. 1 (b), (c) and 3 (f), to guarantee confidentiality and ensure the protection of victims and witnesses. The Prosecutor should therefore be able to submit necessary evidence in such a way as to protect the confidentiality and, if possible, anonymity of witnesses at this stage⁹¹. Most legal systems permit the presentation of summaries of evidence in the course of investigation, as far as evidence must be preserved for the trial. This entails protection of the physical and psychological well-being of witnesses, who are extremely vulnerable when they are victims, especially if they survived crimes of sexual violence. The practice of the ICC is fully in line with this interpretation of article 68, para. 5, which is correctly seen as a specification of the general principle of para. 1⁹².

For the meaning of ‘not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’ see mn. 15 et seq.

VI. Paragraph 6: State application for protection of servants, agents and information

Paragraph 6 is not related to the protection and participation of victims, but is connected to witnesses, whether State’s agents or private citizens, who could be in the position to disclose confidential or sensitive information, including information capable to endanger the integrity and status of State officials themselves. The subject matter is indeed regulated by article 72 (Protection of national security information) of the Statute, the first paragraph of which clearly stresses that the procedural scenarios of article 68 para. 3, as well as those of articles 56 paras. 2 and 3, 61 para. 3, 64 para. 3, 67 para. 2, 87 para. 6 and 93, are to be disciplined according to the rules of article 72. The latter ‘applies in any case where the

⁹¹ Cf. Women’s Caucus for Gender Justice in the ICC, *Proposal for Rome Diplomatic Conference* (on file with the author). For further considerations on the prosecutor’s prerogatives (article 54) and rights of the suspect (article 55), see sections of this Commentary on Part 5 of the Statute. On anonymity as a measure of protection especially in pre-trial proceedings, please see mn 19.

⁹² On the role of the Victims’ and Witness Unit, see for all *Prosecutor v. Kony, Otti, Odhiambo and Ongwen*, ICC-02/04-01/05-147, Decision on the Prosecutor’s Application that the Pre-Trial Chamber disregard as irrelevant the submission filed by the Registry on 5 December 2005, Pre-Trial Chamber II, 9 March 2006, paras. 36–42 (in particular, the latter). On the matter of anonymity of victims and witnesses in the Pre-Trial phase, including the hearing on confirmation of charges, see for all *Prosecutor v. Lubanga*, ICC-01/04-01/06-568, Judgment [...], Appeals Chamber, 13 October 2006, at para. ii of the judgment (page 2).

disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests⁹³. Therefore, reference is made to the comments concerning article 72.

C. Special remarks: Implementation of article 68 para. 3 in the Rules of Procedure and Evidence and the Regulations of the Court

I. Definition of victims: Rule 85

35 Justice can only be obtained when wrongs are redressed in a just and fair manner. The realisation of justice for the victims of gross violations of international humanitarian law and human rights can only be achieved when victims are able to access justice.

The concept of a victim in Rule 2 of the ICTY and ICTR Rules of Procedure and Evidence has been unduly restricted to ‘a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed’. This definition excludes dependants of the victims and their relatives. It does not conform to the existing definition of a victim contained in the UNGA Resolution 40/34 on 1985 of the Declaration of Basic Principles for Justice for Victims of Crimes and Abuse of Power. The latter instrument – adopted unanimously by the United Nations General Assembly – extends the definition of a victim to include ‘where appropriate the immediate family, dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress to prevent victimisation’ (cf. article 1).

36 The Declaration – although not binding in nature – provided guidance for the drafters of the Rules of the ICC, in order to expand the *ad hoc* Tribunals definition so as to avoid a situation discriminating certain victims. Furthermore, ICC States Parties were bound to respect the general agreement reached within the Rome Conference’s Working Group on Procedural Matters concerning the following interpretative footnote to article 68, which was included in the relevant report to the Drafting Committee:

‘In the exercise of its powers under this article, the Court shall take into consideration the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.’⁹⁴

37 Therefore, the following definition of victims was incorporated in the Rules of the ICC:

- (a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’

This definition is centered on the harm suffered by the victim as a result of the crime, and not on the crime itself. The difference between direct and indirect victims has therefore no substantive relevance, as affirmed in the 1985 UN Declaration on Victims’ Rights and in the ‘Bassiouni-van Boven principles’. The causal link to be established is between the criminal conduct and the victimisation, and not simply between the crimes and the direct individual victim⁹⁵. The latter category of victims, the survivors, have special needs that differentiate

⁹³ Cf. article 72, para. 1.

⁹⁴ UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.8, p. 7, reproduced in: International Criminal Court Society, see note 27, 48.

⁹⁵ According to the practice of the Court on the recognition of the victims’ right to participate, ‘the causal link required by rule 85 of the Rules with regard to the stage of the case is demonstrated once the victim, and, if applicable, the immediate family or dependents of that victim, provide sufficient evidence to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant or that that person has suffered harm by intervening to assist the direct victims in the case or to prevent these victims from becoming victims as a result of these crimes being committed’. Cf. page 9, *Prosecutor v. Lubanga*, ICC-01-04-01-06-228, *Decision* [...], see note 56.

their contribution to the proceedings and interest in the justice process vis-à-vis other victims who have lost a family member as a result of murder or extermination. Differences also exist between dependants who are minors, in light of the harm inflicted on them, and dependents who are adult. But, notwithstanding the different approaches to categories of victims, all individual victims have access to the same rights afforded to them by the Rome Statute upon recognition of the harm that they suffered and, in most cases, continue to suffer. In its jurisprudence, the Court has consistently interpreted the notion of victim under Rule 85⁹⁶, even if at times it added the qualifier ‘personal’ to the term ‘harm’ in an apparent effort to be precise and specific⁹⁷. ‘Harm’ has been interpreted as including ‘physical injury, emotional suffering and economic loss’⁹⁸.

The inclusion of legal entities under the conditions established in section (b) of Rule 85 within the definition of victim does not detract the focus of Rome Statute system from individual victims, given that the rights enshrined in article 68 and 75 of the Statute are primarily applicable to natural persons. However, symbolic or collective means of reparation may be a proper remedy for legal entities, while participation of such entities in the proceedings may in turn strengthen the position of victims or groups of victims participating under article 68, para. 3. The standard of proof to establish the phenomenon of victimisation is the same applicable to the decisions to be taken at a given stage of the proceedings: for example, the ‘reasonable grounds to believe’ that an individual incurred in emotional and/or physical suffering as a result of a crime under investigation is sufficient to recognise victims in Pre-Trial proceedings⁹⁹.

⁹⁶ See, for all, the decisions of Single Judges Trendafilova and Fernandez de Gurmendi on the participation of victims in the pre-trial proceedings against Mr. Ntaganda and Mr. Blé Goudé respectively, in which they wrote: ‘a victim applicant qualifies as “victim” in the present case, provided that: (i) his or her identity as a natural person is duly established; (ii) the events described in the application for participation constitute the crime(s) within the jurisdiction of the Court with which the suspect is charged; and (iii) the victim applicant has suffered harm “as a result” of the crime(s) charged. [Fn. 32: The Single Judge notes that various Chambers have interpreted this as four requirements, but considers that, in substance, their understanding of the requirements of rule 85(a) does not depart from that taken in the present decision.]’ Cf. para. 18, *Prosecutor v. B. Ntaganda*, ICC-01/04-02/06-211, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, PTC II Single Judge, 15 January 2014; ‘At the outset, the Single Judge clarifies that for the purpose of assessing the 277 applications for victims’ participation, she refers to the *established jurisprudence* of the Court with regard to the requirements to be fulfilled under rule 85 of the Rules [fn. 11: See ICC-02/11-02/11-83, para. 13 and the jurisprudence referred to in footnote 19]’. Cf. para. 6, *Prosecutor v. C. Blé Goudé*, ICC-02/11-02/11-111, Second Decision on victims’ participation in the pre-trial proceedings and related issues, PTC I Single judge, 1 August 2014 [Emphasis added].

⁹⁷ Cf. *Prosecutor v. Ntaganda*, ICC-01/04-02/06-211, Decision [...], see note 94, in which the Single Judge redundantly affirms at para. 29: ‘According to rule 85(a) of the Rules the harm must: (i) ensue from the crime(s) with which the suspect is charged; and (ii) be personal, *i. e.* it must have been personally suffered by the victim applicant.’.

⁹⁸ See, for all, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432, Judgment on the appeals of the Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Appeals Chamber, para. 32, cited in para. 18, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-211, see note 94.

⁹⁹ This standard of proof is contained in article 58, Rome Statute. In the first decision not allowing three victims to participate in the Lubanga pre-trial proceedings, Pre-Trial Chamber I wrote: ‘considering that in the particular circumstances the Chamber holds that there are *reasonable grounds to believe* that Applicant a/0001/06 and those that she represents have suffered emotional suffering as a result of the latter being enrolled into the UPC militias; that there are *reasonable grounds to believe* that the two children represented by Applicant a/0001/06 have suffered physical harm as a result of their enlistment in the UPC militias; that these three persons have provided sufficient evidence to allow the Chamber to hold that there are *reasonable grounds to believe* that they are victims of the crimes listed in the arrest warrant issued against Thomas Lubanga Dyilo and that they must be granted the status of victim in the case of *The Prosecutor v. Thomas Lubanga Dyilo*’ [emphasis added]: Cf. page 10, *Prosecutor v. Lubanga*, ICC-01-04-01-06-228, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, Pre-Trial Chamber I, 28 July 2008.

II. Victims' participation through legal representation (Rules 90 and 91)

38

'Rule 90 – Legal Representation of Victims

1. A victim shall be free to choose a legal representative.
2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.
3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.
4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.
5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.
6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1.'

Although the idea of victims' participation in the ICC proceedings may appear problematic at first sight in view of the large numbers of the victims and the nature of the crimes being dealt with, the Statute reflects the thesis that the right of the victims to participate in the trial is too fundamental to be sacrificed due to mere 'logistical difficulties'. This is especially so, as these difficulties are resolvable and they are only potential. On the procedural plain, the above-reproduced Rule 90 provides with a technical solution to give effect to the norm of article 68 para. 3 of the *Rome Statute* in situations in which 'there are a number of victims' and one or more common legal representatives may be appointed by the relevant Chamber. On the factual plain, the initial practise of the Court shows that only a relatively limited number of victims have the ability to apply to accede to the ICC given the distance between the seat of the Court and the crimes' scenes, the extreme poverty affecting most victims and the compelling priorities that victims generally have in conflict or post-conflict situations¹⁰⁰.

- 39 The procedure for victims' participation is characterised by the following steps: victims must submit an application to the Registry containing, *inter alia*, '[...] a description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court, or, in case of a victim being an organization or institution, a description of any direct harm as described in Rule 85 (b); A description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm as described in Rule 85; Any relevant supporting documentation, including names and addresses of witnesses [...]'¹⁰¹. While taking into account the distinct interests of the victims, the Registrar may compile in a single report a series of applications pertaining to the same case of situation for presentation to the relevant Chamber¹⁰². The Chamber shall decide on the matter of participation after having heard the parties, prosecution and defence, in the relevant proceeding¹⁰³. Most of this procedure

¹⁰⁰ These observations are sufficient to persuasively rebut the arguments of some States that were opposing the inclusion of victims' participation in the ICC Statute and Rule of Procedure on the basis of the argument that hundreds of thousand alleged victims would have attempted to participate in, and thus delayed, the justice process in The Hague.

¹⁰¹ Regulation 86 (2): this regulation was adopted by the Judges to implement the general provisions of Rule 89.

¹⁰² Regulation 86 (5) and (6).

¹⁰³ Rule 89, para. 1. But, in a significant decision that led to the admission of 922 victims in the Pre-Trial proceedings against Mr. Ntaganda, the Single Judge acting on behalf of the Pre-Trial Chamber underscored that 'observations to be submitted by the parties under rule 89(1) of the Rules are *not mandatory* and serve the

develops in a written form. The decision allowing victims to express their views and concerns, according to para. 8 of Regulation 86, ‘shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with Rule 91, sub-rule 1’, which provides flexibility as it states that ‘a Chamber may modify a previous ruling under Rule 89’ concerning participation. As the first eleven years of practice of the ICC demonstrates, starting with the first hearing on the confirmation of charges, the modalities of participation for victims were defined by the Pre-Trial and Trial Chambers in such a way as to effectively permit victims to express their views and concerns via their legal representatives who made opening and closing remarks at the confirmation hearings and at trials. Legal representatives interacted and intervened in relevant proceedings upon leave by the Judges¹⁰⁴. The competent and balanced interventions of the victims’ legal representatives in the Pre-Trial and Trial proceedings of the Lubanga and Katanga cases confirmed that victims are ‘guardians’ of the fairness of the proceedings with respect to their personal interests, and are not ‘agents’ in search of retribution. The possibility of intervention in the most crucial stages of the proceedings may represent an important step in the rehabilitation process of the victims¹⁰⁵.

III. Institutional framework to assist victims to exercise their rights: the Victims’ Participation and Reparations Section and the Office of the Public Counsel for Victims

Regulation 86 (*Participation of victims in the proceedings under rule 89*), para. 9: ‘There shall be a specialised unit dealing with victims’ participation and reparations under the authority of the Registrar. This unit shall be responsible for assisting victims and groups of victims.’ 40

Within the framework of the Victims and Witness Unit, Rule 86 para. 9 provided the legal basis for the creation of the Victims’ Participation and Reparations Section (VPRS), which assists the Registrar in taking all the necessary measures to communicate and consult with, as well as assist – upon application – the participation of, victims in the proceedings, thus giving effect to article 68 para. 3. Among the functions to be fulfilled by the Registrar, those enlisted in Regulations 86, 87 and 88 requires expertise in victims-related issues and are de facto within the scope of activities of the VPRS.

Owing to the practical difficulties of having victims represented at all stages of the proceedings, the Regulations of the Court provide with the establishment of a quasi-independent body, the Office of the Public Counsel for Victims (OPCV), which is specifically devoted to the facilitation of the legal representation of victims. The safeguards contained in Regulation 81, paras. 2 and 3, stems from the consideration that the interests and rights of 41

purpose of assisting the Single Judge in her determination as to whether or not each victim applicant qualifies as victim pursuant to rule 85 of the Rules’ (emphasis added): *Cf.* para. 34, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-211, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, PTC II Single Judge, 15 January 2014. The Single Judge implicitly admitted that the Rules have complicated the procedure relating to victims’ applications. In the same decision, the Single Judge implicitly criticized the initial practice of the ICC relating to the application form for victims, which she reduced to a single page while fulfilling the requirements of the Statute and Rule 85 (*ibid.* at para. 6).

¹⁰⁴ *Cf.* *Prosecutor v. Lubanga*, ICC-01-04-01-06-462, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, Pre Trial Chamber I, 22 September 2006. In this pivotal decision, the PTC determined modalities for victims’ participation deemed ‘compatible with anonymity’: anonymity was allowed in light of an evaluation of the worsened security situation on the ground and the connected inadequacy of any other protective measure. This condition led to some restrictions for victims a/0001 to a/0003, who were not allowed to add any elements of fact to the case when expressing their views and concerns, were given access solely to public documents in the case-file and permitted to participate in public hearings only, while the Chamber reserved the right to make exceptions to these limitations in exceptional circumstances. Victims were allowed under Rule 89(1) to intervene at the beginning and the end of the hearing, and victims’ legal representatives had the possibility to request permission to intervene in public sessions on the confirmation of charges.

¹⁰⁵ ‘Rehabilitation’ is a form of reparations under article 75.

the victim would be best protected by an autonomous and neutral body which regards the victims' needs as paramount. The parties to the proceedings naturally place emphasis on prosecution and defence, not necessarily taking into account the perspective of the victim: Hence, the usefulness of the OPCV. However, these safeguards of quasi-independence are not sufficient to allow that a lawyer of the OPCV – who is recruited by, and receives remuneration exclusively from, the Court – would be able to act as independently as a lawyer outside the ICC institutional structure. Therefore, the norm of Regulation 80 para. 2, which states that '[t]he Chamber may appoint counsel from the Office of Public Counsel for victims' as common legal representative of a group of victims ex Rule 90 para. 3, contravenes the spirit of the principle of legal representation, and should have not been applied by the relevant Chamber beyond the limited scope of Regulation 81 para 4(b)¹⁰⁶.

42 In the first edition of this commentary, we had advocated for the establishment of one quasi-independent victims' office that would have served multiple functions, namely:

- a) acting as a liaison between the victim and the Courts' operations, inter alia
 - (i) facilitating the selection of the representative by the victims,
 - (ii) appointing capable and well-qualified persons to represent the victims during the proceedings (after having consulted with the relevant victims),
 - (iii) supporting her/his work at the seat of the Court, and
 - (iv) facilitating the communication between the representative and the victims (and vice versa);
- b) informing the general public and victims about the proceedings of the Court.

The functions listed under letter a) are partially conferred by the Regulations and the Rules to the Registrar, assisted by the VPRS, and partially attributed by Regulation 81 to the OPCV. However, no single provision of these instruments covers the function under letter b) concerning the provision of information to the general public, which may include large number of victims of Rome Statute's crimes who have a right to be informed and access to justice, whereby communications to individual victims or identified groups of victims are covered in several regulatory provisions on notification (see below) and on protection/assistance.

43 The legal representatives of victims, either those freely appointed by the victims (Rule 90, para. 1) or those designated by the Registrar upon request of the relevant Chamber (Rule 90, para. 3), shall have the same qualifications as the counsel for the defence set out in Rule 22, para. 1. In respect to the practitioners appointed by the Court, it is submitted that priority should be given to experts in the field of human rights, international humanitarian law and international criminal law capable of offering both legal and psychosocial assistance and support, including psychological comprehension of trauma in the appropriate context of gender and culture¹⁰⁷.

44 Rule 91, para. 5 provide for legal aid to indigent victims in case of designation of a legal representative by the Court: 'A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.' The first decision to provide legal aid (*aide judiciaire*) was taken by the Pre Trial Chamber I in the Lubanga case.¹⁰⁸ In light of efficiency concerns, Rule 91, para. 5 has not been applied in several cases in which the

¹⁰⁶ See above mn. 28. Contrary to this opinion, ICC Chambers often deliberated on common legal representation through appointments of lawyers from the OPCV: see, for all, the decision on the two groups of the 922 victims admitted to participate in *Prosecutor v. Ntaganda*, ICC-01/04-02/06-211, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, PTC II Single Judge, 15 January 2014.

¹⁰⁷ The expertise of legal representatives of victims should interface with, and directly refer to, the ability to provide for alternative modes of testimony, because part of the work of the victims representative will be to seek for the application of protective measures in order to ensure a psychological atmosphere conducive to their clients' involvement (including, but not limited to, testimony) in the proceedings, as well as adequate protection against physical and moral coercion (*cf.* article 68 paras. 1, 2, 3 and 5, and the relevant Rules).

¹⁰⁸ *Cf. Prosecutor v. Lubanga*, ICC-01/04-01/06-650, Décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par la victime a/0105/06, Pre-Trial Chamber I, 3 November 2006. It is noteworthy to

relevant Chamber assigned a lawyer from the ICC-OPCV as common legal representative to one or more groups victims.

IV. Notification to victims and their legal representatives (Rule 92)

1. This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2. 45
2. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. The Chamber may order the measures outlined in sub-rule 8 if it considers it appropriate in the particular circumstances.
3. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the case in question.
4. When a notification for participation as provided for in sub-rules 2 and 3 has been given, any subsequent notification as referred to in sub-rules 5 and 6 shall only be provided to victims or their legal representatives who may participate in the proceedings in accordance with a ruling of the Chamber pursuant to rule 89 and any modification thereof.
5. In a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of: (a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision; (b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.
6. Where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings.
7. Notifications as referred to in sub-rules 5 and 6 shall be in writing or, where written notification is not possible, in any other form as appropriate. The Registry shall keep a record of all notifications. Where necessary, the Registrar may seek the cooperation of States Parties in accordance with article 93, paragraph 1 (d) and (l).
8. For notification as referred to in sub-rule 3 and otherwise at the request of a Chamber, the Registrar shall take necessary measures to give adequate publicity to the proceedings. In doing so, the Registrar may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations.

Rule 92 takes due regard of the importance of transmitting information to victims and their legal representatives in order to ensure that victims are aware of the development of the proceedings at all stages. Notification is instrumental to the realisation of the right enshrined in article 68 para. 3.

Para. 2 of Rule 92 serves as a check on the wide discretionary powers of the Prosecutor: all decisions 'not to initiate an investigation or not to prosecute pursuant to article 53', shall be notified to victims, who could file with the judges a request to express their views and concerns¹⁰⁹. Any decision on the withdrawal of charges (after confirmation before the Pre-

mention that this decision applied to a legal representative of individual victims (of minor age) and not to a common legal representative appointed by the Court for a group of victims.

¹⁰⁹ The legal representatives of Congolese victims of crimes allegedly committed by troops of Jean-Pierre Bemba's Movement for the Liberation of Congo (MLC), who were participating in ICC proceedings on the

Trial Chamber) will have to be notified to victims under the inclusive provision of para. 5, while a specific duty of notification is enlisted in para. 4 concerning the hearing on the confirmation of charges ex article 61, which is one of the most important stages of the ICC procedure. Para. 5 of Rule 92 covers all the procedural acts of the parties and the Judges that may affect the rights and interests of victims participating in the proceedings. The subsequent para. 6 instead regards the duty of notification by the Registrar of all decisions taken by the relevant Chamber that governed the proceedings (Pre-Trial, Trial, Appeals or Review) to which the victims participated.

The *Handbook on Justice for Victims on the use and application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* of the United Nations Commission on Crime Prevention and Criminal Justice includes victim notification amongst the ways in which the justice system can demonstrate its recognition of, and respect for, the victim. At paragraph 2.4.1 it states:

[...] Notification entails that criminal justice authorities keep victims informed of the developments in their case. Research indicates that victims who are kept informed by authorities of the developments in their case are more likely to judge the justice procedure as fair and feel that they were treated by authorities with dignity and respect.¹¹⁰

Rule 92 and other provisions on notification to victims in the Rules and the Regulations of the Court implicitly re-affirm the existence of two types of parties in the ICC process: the *necessary parties*, namely, the prosecution and the defence, and the *potential parties* (or participants), the victims through their legal representatives: victims are right-bearers and they participate after a free choice. Such a free choice may not be possible in the absence of information made available through notification.

V. Conclusion

47 The norms of the Rules of Procedure and Evidence reflect a compromise between two conflicting needs, the rationale of which is embedded in article 68: (i) the right of the victims to participate and be represented in the proceedings, and (ii) the practical requirements of an expeditious and efficient process, namely, a fair and impartial trial.

In cases in which the representation of large groups of victims is necessary, the victims' representative(s) face the hard task of developing a relationship of trust and confidence with individuals and groups seeking redress for harm suffered as a result of serious crimes adjudicated before the Court. The main tool to ensure that communities of victimised individuals trust the judicial institution is the ability of the latter to communicate with its constituencies, the victims; hence, the centrality of outreach and communication to fulfil the mandate of the Rome Statute.

In this respect, both the institutional structures established within the Registry and individual representative(s) have to ensure that victims at all levels are constantly kept informed and have ready access to information on both pending trials and the work of the Court as a whole. This will render effective the victims' right to apply for reparations under article 75 by enabling them to intervene in the appropriate time and manner. Reparations include restitution, compensation and rehabilitation¹¹¹.

situation in the DRC, asked the Prosecutor in June 2010 to explain his apparent decision not to prosecute Jean-Pierre Bemba, facing charges in the situation in CAR, for crimes committed on Congolese territory. Pre-Trial Chamber I decided in October 2010 to dismiss the victims legal representatives' request on the ground that, in the absence of an explicit decision not to prosecute Bemba for crimes committed in Ituri 'in the interests of justice', it was considered that the Prosecutor's investigation was still open: Cf. *Situation in the DR Congo*, ICC-01/04-582, Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, PTC I, 25 October 2014.

¹¹⁰ Cf. UN Doc. E/CN.15/1998/CRP.4/Add.1, UN *Handbook* 43.

¹¹¹ See Article 75 in this Commentary.

In order to achieve ‘rehabilitation’ of the victims and their re-integration into society it is vital that justice is not merely done, but also ‘seen to be done’. Therefore, victims are recognised as victims throughout all stages of the judicial process on the basis of relevant charges, and they are granted the right to participate in it: this allows them to make a contribution to a transparent and fair trial.

Article 69 Evidence*

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

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

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

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

Content

A. Introduction/General remarks	1
I. Historical development.....	1
1. Paragraph 1 (an undertaking as to truthfulness).....	1
2. Paragraph 2 (testimony shall be given in person).....	2
3. Paragraph 3 (submission of evidence)	4
4. Paragraph 4 (relevance or admissibility)	7
5. Paragraph 5 (privileges on confidentiality).....	10
6. Paragraph 6 (judicial notice)	11
7. Paragraph 7 (mandatory exclusion of evidence)	12
8. Paragraph 8 (application of national law).....	19
II. Purpose.....	22
B. Analysis and interpretation of elements	23
I. Paragraph 1	23
1. 'Before testifying'	23
2. 'undertaking'	24
II. Paragraph 2	25

* The original version of this article was co-authored with Hans-Jörg Behrens in 1999. The current version was revised by Donald Piragoff with the assistance of Paula Clarke, of the Canadian Department of Justice. The opinions expressed here are solely that of the authors and do not necessarily reflect the views of the Government of Canada.

1. 'The testimony of a witness at trial shall be given in person'	25
2. 'except to the extent provided by the measures set forth in article 68'	26
3. 'or in the Rules of Procedure and Evidence'	27
4. 'viva voce (oral) or recorded testimony of a witness by means of video or audio technology'	28
5. 'introduction of documents or written transcripts'	29
6. 'subject to this Statute and in accordance with the Rules of Procedure and Evidence'	30
7. 'not be prejudicial to or inconsistent with the rights of the accused'	31
III. Paragraph 3	32
1. 'The parties may submit'	32
2. 'evidence relevant to the case'	33
3. 'in accordance with article 64'	34
4. 'authority to request the submission of evidence'	35
5. 'it considers necessary for the determination of the truth'	36
IV. Paragraph 4	37
1. 'the relevance or admissibility of any evidence'	37
2. 'the probative value of the evidence'	42
3. 'fair trial'	44
4. 'fair evaluation of the testimony of a witness'	50
5. 'inter alia'	53
6. 'in accordance with the Rules of Procedure and Evidence'	54
7. 'The Court'	55
V. Paragraph 5	56
1. 'respect and observe'	56
2. 'privileges on confidentiality'	57
VI. Paragraph 6	58
1. 'facts of common knowledge'	58
2. 'judicial notice'	59
VII. Paragraph 7	60
1. Chapeau	60
a) 'Evidence obtained by means of'	60
b) 'a violation of this Statute'	61
aa) Statute	61
bb) Rules	62
c) 'internationally recognized human rights'	65
d) 'shall not be admissible'	67
2. The different subparagraphs	68
a) 'The violation casts substantial doubt on the reliability of the evidence, or'	68
b) 'The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings'	69
VIII. Paragraph 8	73
1. 'deciding on the relevance or admissibility of evidence'	73
2. 'collected by a State'	74
3. 'shall not rule on the application of the State's national law'	75

A. Introduction/General remarks

I. Historical development

1. Paragraph 1 (an undertaking as to truthfulness)

Apart from the addition of the words 'of Procedure and Evidence' after the word 'Rules', paragraph 1 remained unchanged from article 44 para. 1 of the International Law Commission Draft Statute. However, the ILC Draft Statute did not grant the Court itself the power to punish false testimony before the Court¹. Article 70 para. 1 (a) of the Statute now gives the Court the jurisdiction to punish the giving of false testimony when an undertaking under article 69 para. 1 has been given. There was little discussion of this provision after the

¹ 1994 ILC Draft Statute, article 44, p. 120.

Preparatory Committee on the Establishment of an International Criminal Court decided to leave the form of the undertaking and any supplementary rules, such as the question of undertakings by children, to the Rules of Procedure and Evidence². In the drafting of sub-rule 66(2), consensus was reached on giving discretion to the Court to allow children or persons with an impairment to testify absent an undertaking. This was viewed as preferable to creating an arbitrary bar on such testimony or requiring corroboration. Consensus was achieved by making explicit reference to the 'beyond a reasonable doubt' standard for conviction in article 66, such that the Court could consider such evidence in the context of evaluating all of the evidence admitted.

2. Paragraph 2 (testimony shall be given in person)

- 2 Paragraph 2 did not have any counterpart in the 1994 ILC Draft Statute³. Following a general discussion of a number of procedural law issues at the March–April 1996 session of the Preparatory Committee, a number of proposals were made at its August 1996 session, which are the origins of paragraph 2. These included a proposal that witnesses shall in principle be heard directly and in person, unless a Chamber orders that the witness be heard by means of a deposition⁴, and a proposal that

‘a document, audio recording, or video recording containing a statement of a person other than the accused, which was given before a judge of the court of a State Party, is admissible in evidence when that person is not able to testify before the Court because of death, illness, injury, old age or other good cause’⁵.

The proposed article 44 was not considered again until the December 1997 session when a paragraph 1*bis* was added:

‘The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 43 or in the rules of evidence. These measures shall not be [prejudicial to] [inconsistent with] the rights of the accused’⁶.

- 3 Debate in the Committee concerned the possibility of witnesses testifying without revealing personal data, and the Committee therefore added the link to the proposed article on protection of victims and witnesses but with a caveat regarding the rights of the accused. Shortage of time prevented any further discussion. At the March–April 1998 session, the second sentence of the present paragraph 2 was added to permit the reception of testimony through live or recorded video and audio technology, as well as the introduction of documents or written transcripts. Although some delegations had wanted to include in the Statute a list of the justifications or limitations concerning when electronic technologies could be used (*e.g.*, illness, injury, age or other justifiable reason), the decision was taken that these matters could be left for the Rules of Procedure and Evidence, or the jurisprudence of the Court. At the Rome Conference, there was again some discussion about including within the Statute the justifications for the use of technologically transmitted or recorded testimony, but the final decision was to confirm that these were matters of detail for the Rules or the Court to elaborate. The two options regarding the phrases ‘prejudicial to’ and ‘inconsistent with’ the rights of the accused were resolved uniformly in a disjunctive manner in a number of articles throughout the Statute where the same issue arose.

The debate over the optimal balance between the rights of the accused and the rights of victims and witnesses continued during the development of the Rules by the Preparatory Commission. The result was an approach to the use of protective measures in rule 87 that

² See Report of the Working Group on Procedural Matters, UN Doc. A/AC.249/1998/L.17, and UN Doc. A/AC.249/1998/WG.4/CRP.2.

³ See 1994 ILC Draft Statute, see note 1.

⁴ 1996 Preparatory Committee Report II, pp. 217 and 220.

⁵ *Ibid.*, p. 217.

⁶ Preparatory Committee Decisions Dec. 1997, p. 37.

emphasized protection of the identity or personal matters of witnesses and victims from press and public exposure rather than protection from disclosure to the accused. However, an element of ambiguity on the possible use of anonymous witnesses was preserved in rule 88 on special measures. While this rule is generally designed to assist vulnerable witnesses rather than protect them, the list of special measures available to the Court was made non-exhaustive and the rule permits *ex parte* and *in camera* hearings on the adoption of special measures.

Rule 68 on prior recorded testimony emerged from the Preparatory Commission in a form that would preclude the use of recorded testimony in the absence of a meaningful opportunity by the defence to directly examine the witness. This places more stringent conditions on the use of prior recorded testimony at the ICC compared to the practice of the *ad hoc* Tribunals.

3. Paragraph 3 (submission of evidence)

The original ILC Draft Statute had no provision similar to paragraph 3. During the 1996 Preparatory Committee, Germany proposed a new paragraph to what was then article 44⁷. When the Preparatory Committee debated the article for the first time, Germany reworded its proposal to read as follows:

‘The Court has the authority and duty to call all evidence that it considers necessary for the determination of the truth. The Court’s decision shall be based on its evaluation of the evidence and the entire proceedings’.

Some delegations believed, however, that the emphasis on the Court’s duty to call additional evidence was too strong. As the main point for the civil law countries was to ensure that the Court was not restricted to consider only that which was offered by the parties and could itself call evidence, the reference to ‘duty’ was dropped. While the first sentence was incorporated with this change in the Draft Statute for an ICC as article 69 para. 3⁸, the second sentence was thought to be better placed in the article dealing with quorum and judgment. It was incorporated there as the first sentence of article 72 para. 2⁹.

The issue of judicial authority to call evidence was often regarded as one of the main differences between civil and common law jurisdictions. In reality, the concepts in the two systems are not all that different. Even in common law jurisdictions judges have the authority to call evidence. Given the adversarial nature of the proceedings, however, they rarely exercise this authority. The difference is one of legal tradition and the perception of the role of the judge, rather than a strict difference of legal authority. In the context of the Statute, this paragraph became an indicator regarding the role that delegations wanted to give to the judges in trial proceedings. In the Preparatory Committee, it became clear that the majority of delegations were prepared to accept that the judges should have a more active role than in traditional adversarial proceedings.

During the Rome Conference, the emphasis of the paragraph shifted from the apparent controversy between civil and common law to the specific question of whether the Court should be allowed to call evidence or rather have the authority to order the parties to submit additional evidence. As the main effect of the provision was to confirm the Court’s ability to play an active part in that stage of the proceedings, the civil law countries accepted the change in the wording to authorize the Court to request the parties to submit additional evidence. In addition, Canada proposed a new first sentence to assist in clarifying the roles of the Court and the parties in the submission of evidence, which was added in the Conference¹⁰.

⁷ 1996 Preparatory Committee Report II, p. 207. The proposal read: ‘In order to determine the truth, the court shall, *ex officio*, extend the taking of evidence to all facts and evidence that are important for the decision. The court will decide on the taking of evidence according to its [free] conviction obtained from the entire trial’.

⁸ Preparatory Committee (Consolidated) Draft, article 69.

⁹ *Ibid.*, para. 72; in the final text the article was renumbered 74.

¹⁰ UN Doc A/CONF.183/C.1/WGPM/L.23.

- 6 The Rules of the ICTY have also recognized the need to incorporate some of the guiding principles of the civil law system into what is predominantly a common law framework in the Tribunal's procedure¹¹. Rule 98 ICTY provides as follows: 'A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance'¹². It is unlikely that the lack of a similar *proprio motu* power for the judges of the ICC will make any practical difference, given the Court's power to order the production of evidence from the parties.

4. Paragraph 4 (relevance or admissibility)

- 7 Articles 19 and 20 of the *Nuremberg Charter* provided that the Tribunal shall admit any evidence which it deemed to have probative value, shall not be bound by technical rules of evidence and may require the parties to inform it of the nature of the evidence before ruling on its relevance¹³. This source appears to be the origin of the proposed article 44 para. 3 of the 1994 draft of the ILC's *Draft Statute* which provided: 'The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility'¹⁴.

During the Preparatory Committee, a number of proposals were made to recognise that relevancy should not be the sole determinant of admissibility and that other factors needed to be considered, including a fair trial, the rights of the defence and a fair evaluation of the testimony of a witness¹⁵. As early as 1996, there was also a commonly shared view that 'fundamental or substantive principles of evidence should figure in the Statute itself while secondary and subsidiary rules could appear in the Rules of the Court or other instrument. This approach would be more flexible since the latter could be more easily amended than the Statute and would also allow the Court the flexibility to adopt rules according to its practice and requirements'¹⁶.

Given the vast number of articles that needed to be debated, it was not until the Preparatory Committee session in March–April 1998 that this view was put into effect with a much simpler formulation that left all of the detail to be determined in the Rules of Procedure and Evidence. Proposed paragraph 4 provided that the 'Court may rule on the relevance or admissibility of any evidence in accordance with the Rules of Procedure and Evidence'¹⁷. However, it was by no means unanimous that this formulation was sufficient as many delegations were of the view that other fundamental principles should be included in the Statute, such as the non-admissibility of 'evidence where its probative value is substantially outweighed by its prejudice to a fair trial of an accused or to a fair evaluation of the testimony of a witness, including any prejudice caused by discriminatory beliefs or bias', and the 'exclusion of evidence of prior sexual conduct of a witness, evidence protected by the lawyer-client privilege, as well as other grounds of exclusion'. Additionally, 'many delegations also felt that the Rules should provide sufficient flexibility to enable the Court to rule on the relevance and admissibility of evidence where no other rule provides guidance on the standards to be applied'¹⁸.

¹¹ Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 955.

¹² Rules of Procedure and Evidence, as amended (adopted 11 Feb. 1994), International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 2nd Sess., UN Doc. IT/32 (14 Mar. 1994) [hereinafter ICTY Rules].

¹³ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 Aug. 1945, 82 UNTS 280.

¹⁴ 1994 ILC Draft Statute, p. 122.

¹⁵ 1996 Preparatory Committee Report II, pp. 214–217; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 53rd Sess., UN Doc. A/AC.249/1998/CRP.7 (1998), p. 131, fn. 15 [hereinafter: Report of the Preparatory Committee (1998)].

¹⁶ 1996 Preparatory Committee Report I, p. 60; Report of the Preparatory Committee (1998), see note 15, p. 131.

¹⁷ Report of the Preparatory Committee (1998), see note 15, p. 131.

¹⁸ Report of the Preparatory Committee (1998), see note 15, p. 131, fn. 15.

At the Rome Conference, the decision of the Preparatory Committee to leave everything to the Rules was revisited, and a number of the matters that had earlier been proposed for inclusion were added, but in a flexible manner which stated the underlying fundamental principles while leaving the detail to be determined in the Rules. A decision was made that some statements of principle were necessary to guide both the development of the Rules and the adjudication of the Court. For example, a particular provision on privilege was added as paragraph 5, with the details to be determined in the Rules. Paragraph 4 was amended to read as it is currently provided in the Statute, which provides a general principle that relevance is not the sole determinant of admissibility and that other factors need to be considered as well, such as *inter alia* the degree of probative value of the evidence and any prejudice that such evidence may cause to a fair trial or fair evaluation of the testimony of a witness. No specific or rigid standard such as 'substantially outweighed' was included, due to the desire to state principles, permit flexibility and leave the details for the Rules or the Court's own jurisprudence.

Maintaining the Statute's delicate balance in the development of the ICC Rules was a challenge. An initial French draft of rule 63, setting out the general provisions relating to evidence, would have established an overarching principle of admissibility for all evidence, effectively undoing the compromise reached in Rome¹⁹. After a June 1999 drafting meeting, the pendulum swung in the other direction, with a proposed version of the rule that would have obligated the Court to assess all evidence for the purpose of admissibility. At the second session of the Preparatory Commission, the current form of the rule was developed, which authorizes rather than obligates a Chamber 'to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69'. At the fifth session of the Preparatory Commission, an attempt was made to include reliability as a factor to be freely assessed by a Chamber in determining relevance or admissibility. No consensus was reached on this proposal, with the result that the Rules are silent on the issue²⁰. ICTY judicial decisions, however, provide support for the view that an assessment of the *prima facie* reliability of evidence can form part of an inquiry into probative value²¹.

Rule 64 was drafted to clarify the procedure for challenging relevance or admissibility and to clearly state that a Chamber was not to consider evidence found to be irrelevant or inadmissible. It provides that such challenges must be made when the evidence is submitted to a Chamber or, exceptionally, immediately after the issue has become known. The Chamber can require that any challenge be made as a written motion, which must be communicated to all participants in the hearing unless the Court orders otherwise. A Chamber must give its reasons for any ruling on evidentiary matters.

The admissibility of evidence in cases of sexual violence was one of the most contentious issues for the Preparatory Commission in formulating the draft Rules, requiring months of extensive negotiations. Agreement was finally achieved in the form of rule 70 that prohibits the drawing of certain inferences based on sexual stereotypes, and rule 71, that makes evidence of prior or subsequent sexual conduct by a victim or witness inadmissible²². A special procedure for considering any evidence falling under rule 70 was elaborated in rule 72.

Rules 70-72 emerged after a sharp debate over what could constitute evidence of consent in circumstances that were inherently coercive. There was a parallel debate in the negotiation of the Draft Text of the Elements of Crimes. There also, drafters raised serious concerns about the relevance of consent to any charge of sexual violence in the context of war crimes or crimes against humanity.

¹⁹ See Piragoff, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 349, 351-352.

²⁰ Finalized draft text of the Rules of Procedure and Evidence, Report of the Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2000/1/Add.1 (2 Nov. 2000), rule 63.

²¹ *Prosecutor v. Stakić*, IT-97-24, Provisional Order on the Standards Governing the Admission of Evidence and Identification, Pre-Trial Judge, 25 Feb. 2002.

²² Rules 70 and 71 ICC. See also see note 19 for a history of the negotiations.

In the final version of the *Draft Text of the Elements of Crimes*, lack of voluntary consent was not directly incorporated as an element for either crimes against humanity or war crimes. This provided additional support for delegations arguing that it was inappropriate and damaging to engage in an inquiry about purported consent in that such inquiries tend to blame and re-traumatise the victim. The final draft of the Rules created an approach that broadly prohibits this type of inquiry, while leaving a circumscribed discretion to the Court under rule 72 to admit some evidence of consent in exceptional circumstances.

The related issue of evidence of prior or subsequent sexual conduct of victims and witnesses is dealt with in rule 71. This rule provides that the Court shall not admit such evidence, subject to article 69 para. 4. The reference to article 69 may seem redundant, but in fact was inserted to signal a constructive ambiguity in the Rules. The drafters of the Rules did not want to create any explicit exceptions to this rule out of concern that any exception would invite abuse. However, by making the rule subject to the statutory provision, the Court retains a narrowly defined discretion to not apply the rule should they determine, in some exceptional circumstance, that it was impossible to reconcile the rule with their obligations under article 69 para. 4. In effect, the reference to article 69 is a subtle reminder to the Court that article 51 para. 4 requires the Court to prefer the Statute over the Rules in the event of an irreconcilable conflict and, in such case to conduct an analysis of the proffered evidence in the manner set forth in article 69 para 4. Rule 72 provides that evidence of prior or subsequent sexual conduct cannot be admitted except through the procedural screening mechanism set out in the rule even though rule 72 makes no mention of rule 71. This is the case because rule 72 references sub-rule 70(d), which covers evidence of prior or subsequent sexual conduct.

In order to reach agreement on the approach taken in rules 70–72, negotiators included a provision in the explanatory note to the Rules indicating that the Rules do not affect the procedural rules for any national court or legal system for the purpose of domestic proceedings²³.

Returning to the more general issues involving probative value and relevance, it should be noted that the ICTY has extensively interpreted the meaning of these terms in the context of rule 89 *lit. C* and DICTY. Rule 89 *lit. C* of the ICTY provides that a ‘Chamber may admit any relevant evidence which it deems to have probative value’. Rule 89 *lit. D* specifically acknowledges that relevancy is not the sole determinant of admissibility and provides that a ‘Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial’²⁴. ICTY decisions regarding relevance and probative value will likely prove influential with judges of the ICC and are referred to extensively in this chapter.

5. Paragraph 5 (privileges on confidentiality)

- 10 The discussions in the Preparatory Committee and in the Diplomatic Conference mainly focussed on the lawyer-client privilege. Several Delegations urged the recognition of other established privileges, such as the privilege on confidentiality with respect to the medical profession or to priests. There were attempts at finding a suitable definition that would include all these privileges²⁵. The Holy See proposed wording to the effect that all ‘classic privileges on confidentiality’ should be respected²⁶. In the end, it was felt that the term ‘classic’ privileges would add nothing to the rather shorter, but still open definition now contained in the text.

The Preparatory Commission extensively considered the parameters of the lawyer-client privilege in the development of rule 73. Sub-rule 73 para. 1 establishes that communications between the accused and his or her legal counsel are privileged, where made in the context of

²³ For a full discussion of the negotiating history of rules 70, 71 and 72, see Piragoff, *Evidence*, see note 19, 369.

²⁴ Rules 89 *lit. C* and 89 *lit. D* ICTY.

²⁵ Proposal submitted by the Holy See, UN Doc. A/CONF.183/C.1.AVGPIM/L.14; Proposal submitted by the SyrianArabRepublic, UN Doc. A/CONF.183/C.1.AVGPM/L.22.

²⁶ UN Doc. A/CONF.183/C.1.AVGPM/L.14.

their professional relationship, and where the accused has not already voluntarily consented to disclosure, either to the Court or a third party. In the latter case, the communication may be introduced through the testimony of the third party.

The Preparatory Commission continued the work begun in Rome of expanding the notion of privilege beyond the lawyer-client relationship. The final form of rule 73 creates a hybrid approach of listing specific additional privileges concerning communications while providing the Court with a principled framework for establishing the parameters of listed privileges and recognizing additional privileges beyond those enumerated. The criteria for a finding of privilege are outlined in sub-rule 73 para. 2 and require that the relationship in question in which the communication was made: 1) involve a reasonable expectation of privacy and non disclosure, 2) that confidentiality be essential to the type of relationship concerned, and 3) that recognition of the privilege would further the objectives of the Statute and Rules.

The listed classes of professional relationships in sub-rule 73 para. 3 benefit from a presumption of privilege. The listed categories comprise professional relationships with 1) a medical doctor, 2) a psychiatrist, 3) a psychologist or counsellor or 4) a member of a religious clergy. The professional privileges as a whole (excluding lawyer-client) require a finding by a Chamber that they are part of a class of relationships that meet the general criteria for privilege articulated in sub-rule 73 para. 2. This was intended to provide a Chamber with adequate discretion to define certain classes appropriately, especially that of 'counsellor'. A specific reference in sub-rule 73 para. 3 to relationships involving victims was included in order to highlight the particular importance of privilege in the context of support to victims.

The clergy privilege, while included in the list of professional privileges subject to judicial discretion, becomes mandatory, unless waived, if a Chamber finds that the communication took place in a context where sacred confession is an integral part of the practice of the religion concerned.

Another specific issue that preoccupied the Preparatory Commission was the privilege that should be accorded to the ICRC with respect to its operations under its statutes. Privilege for the ICRC was a live issue before the ICTY during the development of the Rules and had been the subject of an ICTY Trial Chamber decision that recognized the ICRC's right to confidentiality under international law²⁷. The Preparatory Commission accepted the existence of the privilege, but did not want to foreclose the possibility of obtaining evidence from this important source. The solution was to include a complex consultation procedure in the rule that recognized the privilege, but placed the onus on the ICRC to positively assert any privilege if the Court should request consultations with it on a particular request for ICRC information.

6. Paragraph 6 (judicial notice)

The wording of this paragraph has remained unchanged from article 44 para. 4 of the ILC Draft Statute. The provision is derived from article 21 of the Statute of the International Military Tribunal at Nuremberg. The only difference is that the Court 'may' take judicial notice whereas under the Nuremberg Statute the Court 'shall' do so²⁸. The Preparatory Commission did not draft any rules on judicial notice *per se*, although the provision for agreements as to evidence under rule 69 provide a vehicle for admitting facts and evidence that are not contested by either party.

It should be noted that rule 69 allows the Court to insist on a complete presentation of evidence, even where there is no dispute between the parties. Rule 69 reflects the role of the Court in establishing the historical record and, in particular, providing victims with a full

²⁷ *Prosecutor v. Simić et. al.*, IT-95-9, Decision of the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

²⁸ There is no general standard for judicial notice in international adjudication. The International Court of Justice is silent on the issue in its rules. The ICTY has adopted the Nuremberg wording ('shall') in its rule 94 on judicial notice.

understanding of what occurred. This ‘truth commission’ role is a distinctive feature of the ICC and requires a Chamber to balance its concern for judicial efficiency with its responsibility for establishing the historical record. Such a balancing process may prompt a Chamber to take judicial notice in one context and decline to do so in another, even when the same facts are at issue.

7. Paragraph 7 (mandatory exclusion of evidence)

- 12 Neither the *Charters for the International Military Tribunals at Nuremberg* nor of the *Far East* contained any provisions for the formal exclusion of evidence, the collection of which violated human rights or the Charters²⁹. It appears that relevance and probative value were the determinants of admissibility³⁰.
- 13 The *Statute of the ICTY* also did not contain any formal exclusionary rule, but its *Rules* adopted by the judges contained a rule that provided that ‘A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial’³¹. The *ICTY Rules* underwent a number of revisions, and in 1995 an additional exclusionary rule was added to permit the exclusion of evidence that was ‘obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings’³².
- 14 The ILC in its *Draft Statute for an International Criminal Court* and its *Commentaries* also provided for an exclusionary rule. The 1993 Draft provided an exclusionary rule triggered by the obtaining of evidence ‘directly or indirectly by illegal means which constitutes a serious violation of internationally protected human rights’³³. The 1994 Draft dropped the references to direct or indirect means and to internationally protected human rights, and instead founded a broader rule that evidence shall not be admissible if obtained ‘by means of a serious violation of this statute or other rules of intentional law’³⁴, presumably on the basis that human rights were incorporated by reference to both the statute and rules of international law.
- 15 During the sessions of the *Ad hoc* Committee on the Establishment of an International Criminal Court, a number of delegations expressed support for the ILC’s provision, but others expressed the view that ‘careful attention should be paid to the way in which the provision would operate in practice and it was suggested that the grounds for inadmissibility of evidence should be more narrowly circumscribed’³⁵. During the early debate in the Preparatory Committee, no firm theoretical basis or expression for the rule was evident. Proposals ranged from the ILC proposal, the rule of the *ICTY* to a number of variations thereof³⁶, as well as specific proposals concerning the obtaining of confessions³⁷. Concerns were also raised about the inter-relations between any exclusionary rule and whether the evidence had been obtained in accordance with national rules³⁸.
- 16 The issues were again considered at the Preparatory Committee’s session in December 1997 and four (disjunctive or conjunctive) philosophical bases for exclusion were posited: the means of collection of the evidence constituted a serious violation of the Statute or other rules of international law; substantial doubt would be cast on the reliability of the evidence

²⁹ Agreement 1945, see note 13; Proclamation by the Supreme Commander for the Allied Powers, 19 Jan. 1946, T.I. A.S. No. 1589.

³⁰ See Report of the International Law Commission to the General Assembly on the Work of its Forty-Fifth Session, UN GAOR, 48th Sess. Supp. No. 10, UN Doc. A/45/10 (1993), p. 122.

³¹ Rule 89 *lit.* DICTY.

³² *ICTY Rules*, UN Doc. IT/32/Rev.3 (as revised 30 Jan. 1995), rule 95.

³³ 1994 ILC Report Draft Statute, article 48 para. 5, p. 123.

³⁴ *Ibid.*

³⁵ *Ad hoc* Committee Report, p. 36 at para. 84.

³⁶ 1996 Preparatory Committee Report II, p. 218.

³⁷ *Ibid.*, pp. 215 and 216.

³⁸ 1996 Preparatory Committee Report I, pp. 60–61, and Vol. II, p. 208.

due to the manner of its collection; the detrimental effect on the integrity of the proceedings that would result by the admission of the evidence; and/or the means of collection constituted a serious violation of internationally protected human rights or a violation of the rights of the defence³⁹. There was, therefore, no consensus on whether the basis of the rule should be the manner by which the evidence was collected (*i. e.* a violation of the Statute, a violation of rules of international law or a breach of internationally protected human rights) or the effects of such collection on other values such as the reliability of the evidence or the integrity of the proceedings. Neither was there consensus on how human rights should be defined or referenced. Several concerns were expressed about the inter-relation between the Court's adjudication and national law; in particular, whether the Court could or should consider national law in determining relevance or admissibility of evidence collected in a state. The ensuing debate resulted in a separate paragraph being proposed to address this particular concern (*i. e.* paragraph 8, *infra*)⁴⁰.

During the March–April 1998 session of the Preparatory Committee, debate continued primarily in informal sessions. A small informal working group, chaired by Canada, was established to develop consensus on the outstanding issues within article 69 and to report back to the Committee. After significant discussion, consensus emerged that the predicate event to the exclusion of evidence should be the means by which it was obtained (*i. e.* a violation of the Statute or internationally recognized human rights [or other relevant rules of international law]), but that the evidence should not be excluded unless the means of collection also had a detrimental effect on the reliability of the evidence or the integrity of the proceedings. The phrase ‘internationally protected human rights’ was also changed to ‘internationally recognized human rights’⁴¹.

This formulation was subsequently adopted by the Rome Conference, but with the deletion of a reference to the phrase ‘other relevant rules of international law’ as being a predicate event to exclusion. Concerns were expressed that this phrase was too vague and might incorporate many rules of public international law that had little to do with human rights or the provisions of the Statute. Some discussion also occurred over the qualifiers to the reference to human rights. The basic philosophical structure of the provision, however, was not altered in light of the consensus achieved in the Preparatory Committee in March–April 1998⁴².

Another change that took place at Rome broadened the scope of the exclusionary rule. Up until the Rome Conference, the draft language required that any violation have the effect of both casting substantial doubt on the reliability of evidence AND damaging the integrity of the proceedings. At the Rome Conference, these effects requirements were made disjunctive, making it possible to invoke the exclusionary rule if either 7(a) or 7(b) alone was the effective result of the violation.

8. Paragraph 8 (application of national law)

During the course of debate in the Preparatory Committee on article 44 para. 5 [now article 69 para. 7], the question was raised regarding the inter-relation between the Court's ability to exclude evidence on the basis of a violation of the Statute or human rights and the fact that the evidence may have been obtained in accordance with the national law of the state in which it was collected, likely by the state's own authorities. A few delegations raised the question of whether the Court would be required to inquire whether such evidence had been obtained in accordance with national law, which might necessitate the Court to adjudicate the national law. ‘It was suggested that a mechanism should be created whereby the Court, in cases of allegations of evidence obtained by national authorities by illegal

³⁹ Preparatory Committee Decisions Dec. 1997, p. 38.

⁴⁰ *Ibid.*

⁴¹ See discussion under Part B, mn. 65 *et seq.*

⁴² *Ibid.*

means, could decide on the credibility of the allegations and the seriousness of the ‘violations’⁴³. On the other hand, it was also suggested that the Court should presume that the national authorities acted in accordance with their own domestic provisions, but that such presumption could be challenged and, if so, the Court could refer the question of compliance to the national courts for a decision with a transmission of that decision back to the Court⁴⁴. A proposal giving effect to part of this suggestion was included into the Statute, within brackets, at the December 1997 session of the Preparatory Committee⁴⁵.

- 20 According to another view which was widely supported, ‘the Court should not get involved in intricate inquiries about domestic laws and procedures and it should rather rely on ordinary principles of judicial co-operation’⁴⁶. It should apply international law and should exclude evidence on the basis of a violation of international standards, regardless of what the national standards might be concerning the manner of its collection. In support of this view, a concern was raised that the Court would be interfering with the sovereignty of a State if it were to adjudicate a question of national law, as opposed to applying its own law (*i. e.* the applicable law pursuant to article 21) to the facts regarding the manner of collection of the evidence. This view gained support and in the March–April 1998 session of the Preparatory Committee the previous proposal was deleted and replaced by a proposal which provided that, ‘when deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on [, but may have regard to,] the application of the State’s national law’⁴⁷. The outstanding issue was whether the Court may, nevertheless, have regard to the application of the national law in making its decision on relevance and admissibility.
- 21 At the Rome Conference the bracketed reference to having regard to national law was deleted. While some delegations argued that it might assist the Court to understand why the national authorities acted in the manner in which they did, especially if they acted in accordance with national law, other delegations believed that this could be considered by the Court as a factual matter without any express reference to the Court being able to have regard to the national law. Concerns were also expressed that any explicit references to, or applications of, national law should be governed only by the process outlined in article 21 para. 1 (c). A reference to national law in article 69 could lead to specialized interpretations of applicable law in the evidentiary context, a result that was not desired by the drafters of the Statute.

II. Purpose

- 22 As noted in the section on historical development, a decision was taken that the Statute should only contain the fundamental principles governing evidence, and that the details, secondary and subsidiary rules should be further elaborated in the Rules and through the interpretations and adjudication of the Court. ‘This approach would be more flexible since the latter could be more easily amended than the Statute and would also allow the Court the flexibility to adopt rules according to its practice and requirements’⁴⁸.

In the course of drafting the Rules, the Preparatory Commission faced a similar dilemma in deciding what needed to be included in the Rules and what would be better left to practice directions and any regulations of the Court. Here again, the goal of flexibility precluded the creation of a comprehensive rule book. Instead, the Preparatory Commission sought to provide additional guidance primarily in those areas where discussion at Rome and within the Preparatory Commission had revealed unresolved tensions touching on basic principles and judicial values. As a result, the rules that relate to article 69 provide detailed evidentiary

⁴³ 1996 Preparatory Committee Report I, p. 60.

⁴⁴ 1996 Preparatory Committee Report II, p. 208.

⁴⁵ Preparatory Committee Decisions Dec. 1997, p. 38.

⁴⁶ 1996 Preparatory Committee Report I, pp. 60–61.

⁴⁷ Report of the Preparatory Committee (1998), see note 15, p. 132.

⁴⁸ 1996 Preparatory Committee Report I, p. 60.

rules in a select number of areas and are silent in others where Commission members were prepared to rely on the discretion of the Court.

B. Analysis and interpretation of elements

I. Paragraph 1

Rule Cross-Reference: rule 66 (solemn undertaking), rule 171 (refusal to comply).

1. ‘Before testifying’

The witness shall give the undertaking before starting to give evidence. The scope of the provision is to enhance the reliability of the testimony. The failure to give the undertaking before testifying does not render the evidence inadmissible. The witness will, however, not be under an obligation as mentioned in article 70 para. 1 (a) and will therefore not be liable for punishment for giving false testimony. The probative value of the statement will thus be diminished and the Court will be entitled to take this into account when considering the value and weight of the evidence. Refusal to give the undertaking without good reason may also amount to misconduct under article 71 para. 1 of the Statute. 23

2. ‘undertaking’

The form of the undertaking is provided by rule 66: ‘I solemnly declare that I will speak the truth, the whole truth and nothing but the truth’. This form is identical to that of the ICTY (rule 90 *lit.* A) and takes into account the fact that some religious beliefs do not recognize the taking of an oath. National legislation of many States accommodate this concern by providing for an affirmation of the truth of testimony in a way that still alerts the conscience of the witness to the seriousness of the occasion⁴⁹. The solemn declaration to speak the truth also enables the Court to punish a witness who gives false testimony. The Court must inform the witness of the offences under article 70 in order to establish its authority to punish a witness who gives false testimony. Offenders are liable to imprisonment for up to five years under article 70 or a fine of not more than € 2,000 per occurrence based on rule 171. 24

A child or a person with an impairment may testify without an undertaking so long as they are able to communicate their evidence and understand the meaning of a duty to speak the truth. Unlike sub-rule 90 *lit.* C ICTY, rule 66 does not prohibit a Chamber from convicting based solely on child testimony or the testimony of impaired persons admitted without an undertaking, so long as the judges are convinced of guilt beyond a reasonable doubt.

II. Paragraph 2

Rule Cross-Reference: rule 65 (compellability), rule 67 (audio or video-link technology), rule 68 (prior recorded testimony), rule 69 (evidence by agreement), rule 86 (general principle – victims and witnesses), rule 87 (protective measures), rule 88 (special measures), rule 91 (participation by victim’s representatives in proceedings).

1. ‘The testimony of a witness at trial shall be given in person’

The requirement for testimony in person reflects the desire that the primary source of evidence of a witness (*i. e.* his or her own testimony presented before the Court) should be available for the purposes of the trial. This permits the best opportunity for the parties to 25

⁴⁹ 1994 ILC Draft Statute, article 44, p. 120. Examples of national legislation are the United Kingdom, Oaths Act § 5 (1); Germany, *Code of Criminal Procedure* § 66 d.

examine the witness and for the Court to ask questions and evaluate the demeanour and credibility of the witness. It also furthers the right of the accused ‘to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her own behalf under the same conditions as witnesses against him or her’, as guaranteed in article 67 para. 1 (e). Indeed, as confirmed by the Trial Chamber in *R. v. Lubanga*, ‘[t]he statutory framework of the Court establishes the clear presumption that the evidence of a witness at trial will be given orally’.⁵⁰

In the *Prosecutor v. Jean-Pierre Bemba Gombo*⁵¹, Trial Chamber III ruled that a presumption of orality does not preclude the admission of non-oral evidence.

Furthermore, the Majority is of the view that nothing in the ICC legal framework prevents the Chamber from *prima facie* admitting non-oral evidence, whether written, audio, visual. According to the Statute and the Rules, a Chamber can rely on all types of evidence, as several legal provisions facilitate evidence being given in writing, orally or by means of video or audio technology. In the view of the Majority, the Statute only envisages a presumption in favour of oral testimony, but no prevalence of orality of the procedures as a whole. According to the Trial Chamber III, although it might be argued that such a prevalence of orality could be inferred from the first sentence of Article 69(2) of the Statute, the Majority stressed that the rule has several exceptions, and the same Article gives the Court the discretion (‘may also’) to permit the giving of recorded testimony or the introduction of documents or written transcripts.

The Court’s authority to require the attendance of witnesses is provided by article 64 para. 6 (b) and (d). Rule 65 acknowledges the exceptions to the power of the Court to compel testimony, which are set out in rules 73, 74, and 75 on privileges. It also asserts the Court’s authority to impose fines on individuals present before it who refuse to testify without legitimate excuse (not to exceed € 2,000 per day, as provided in article 71 and rule 171).

2. ‘except to the extent provided by the measures set forth in article 68’

- 26 The general requirement for live-testimony in the courtroom is subject to exceptions. The first involves the implementation of protective measures authorized in article 68. Indeed these exceptions to the presumption of orality were also noted by the Trial Chamber in the *Lubanga* decision cited above.⁵² Under article 68 para. 1, the Court is under a general obligation to ‘take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’. As an exception to the principle of public hearings, paragraph 2 of that article specifically authorizes a Chamber of the Court to allow the presentation of evidence by electronic or other special means, particularly in the case of a victim of sexual violence or a child who is a victim or a witness. Paragraph 1 does not specify any particular measures, leaving it to the discretion of the Court to order protective measures that it considers appropriate, pursuant to paragraph 1 and article 64 para. 6(e). The Court must take into account the Rules, applicable law, and any advice received from the Victims and Witnesses Unit under article 68 para. 5.

Indeed, in another decision by the Trial Chamber III in the *Gombo* trial, it was confirmed that the presumption of orality does not require that it be given by way of live testimony and that the Statute and the Rules afford the Court a broad discretion, subject to Rule 67, to use audio or video technology.⁵³ The Trial Chamber III also confirmed that one of the relevant criteria for whether or not a person may give *viva voce* evidence by means of audio or video technology is the witness’s well-being and personal circumstances.

⁵⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Prosecution’s Application for admission of four documents from the bar table pursuant to Article 64(9), 16 December 2010 at para 12.

⁵¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, 19 November 2010.

⁵² See note 50 at para 12.

⁵³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08,, ‘Public redacted decision on the ‘Prosecution request to hear Witness CAR-OTP-PPPP-0036’s testimony via video-link’, 3 February 2012 at para 5.

To implement article 68 in the evidentiary context, rule 67 allows witnesses to testify by audio or video link. The technology used must allow the Court and all parties to examine the witness, and the venue of the witness must be conducive to the needs of the witness and the giving of truthful and open testimony. Rule 87 para. 3 (c) permits the alteration of the visual or sound presentation of a witness. Such distortions may dilute the right of accused persons to confront their accuser and can only be used in situations where the safety and privacy rights of a witness are in question and after the accused has had an opportunity to be heard on the issue.

Rule 87 establishes the procedure for implementing appropriate protective measures for witnesses. It permits the withholding of the identity of witnesses from the public and holding some proceedings *in camera*, departing from the principle of a public trial in order to safeguard the privacy and security rights of the witnesses. The protective measures contemplated in rule 87 are intended to shield the identity or personal matters of a victim or witness from exposure to the public and the media rather than from disclosure to the accused. This analysis is supported by the procedure in rule 87 that prohibits the *ex parte* consideration of a motion for protective measures. The involvement of the accused in any decision on protective measures under rule 87 would likely reveal to him or her the identity of the victim or witness concerned.

The Rules do not, however, completely forbid protective measures that might diminish the capacity of the accused to confront witnesses, including the possible use of anonymous witnesses. Rule 88 allows the Court to impose 'special measures' following a motion that can be served under seal and considered in a hearing that may be held *in camera* and/or *ex parte*. While the special measures referred to in rule 88 do not include withholding the identity of a witness from the accused, they are not an exhaustive listing, nor does the rule explicitly rule out such a measure. On the other hand the measures included in rule 88 are clearly focused on assisting vulnerable witnesses to testify rather than protecting them as is the case with rule 87. The ambiguity surrounding this issue was purposeful. The Preparatory Commission was divided on the issue, with some countries, notably the Netherlands and Italy, supporting the use of anonymous witnesses under controlled conditions. On the other hand, a large number of other participants in the Preparatory Commission vehemently objected to the notion of anonymous witnesses⁵⁴.

Since any procedure to shield the identity of a witness from the accused will be a protective measure, it is open to the defence to argue that the procedure under rule 87 must be used. However, an ICTY Trial Chamber has ruled that 'as a matter of practice and in accordance with common sense, applications by either party for protective orders are determined on an *ex parte* basis where the persons to be protected would otherwise be identified'⁵⁵. A similar rationale could be used to justify using the special measures procedure under rule 88 where the witness has significant cause to fear disclosure to the accused.

The evidentiary measures in the Rules for the implementation of article 68 must be considered in light of the jurisprudence of the ICTY. The ICTY, in the *Tadić* case, initially took an expansive approach to witness protection, even approving the use of anonymous witnesses. The test outlined in *Tadić*⁵⁶ continues to be applied by the ICTY, but in its more recent judgements, particularly in the *Blaskić* trial, it has moved away from anonymous witness testimony. The *Blaskić* Trial Chamber articulated the following approach to competing rights:

⁵⁴ See Fernandez de Gurmendi, *Victims and Witnesses*, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 427, 351.

⁵⁵ *Prosecutor v. Simić et al*, IT-95-9, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, 28 Feb. 2000.

⁵⁶ This test requires first, that there must be a real fear for the safety of the witness. Second, the Prosecutor must demonstrate the importance of the witness to proving the counts of the indictment to which the evidence relates. Third, there must be no evidence to suggest that the witness is untrustworthy. Fourth, the Tribunal itself is not in a position to offer protection to the witnesses or their families after receiving their testimony. *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 Aug. 1995, para. 77.

[T]he victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the public and the media⁵⁷.

In the *Brdanin & Talić* case, the ICTY noted that ‘the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one’⁵⁸. The judges in this case also raised the standards for what could be considered exceptional circumstances sufficient to warrant witness anonymity, making it clear that a general climate of intimidation was insufficient justification.

3. ‘or in the Rules of Procedure and Evidence’

27 The second general exception to the requirement for in-person testimony is the Rules. In addition to their role in implementing article 68 (rules 67, 68, 87, 88), the Rules also promote judicial economy and the greatest possible access to evidence of probative value consistent with the rights of the accused (rules 67, 68 and 69).

Rule 69, allowing the admission of evidence by agreement between the parties, covers witness testimony, documents and physical evidence. It will be an important tool for the Court to use in ensuring an expeditious trial and promoting judicial economy. One of the major problems in the case management by the Yugoslavia and Rwanda Tribunals has been the extensive time taken by the parties to prove matters of fact in a particular case that should not really have been in dispute.

However, in recognition of the role of the Court in establishing the historical record as well as judging the individual case, rule 69 permits the Court to require a complete presentation of evidence despite any agreement. It should also be noted that victims may also be represented at trial and may, with permission from the Court under sub-rule 91 para. 3, question witnesses or have the witnesses questioned by the Chamber on their behalf. The discretion given to a Chamber by both rules 69 and 91 suggest that agreements as to evidence will not automatically rule out in-person testimony relating to agreed facts.

A major barrier to in-person testimony occurs when a witness is prevented from participating in a proceeding by his or her state of residence. It should be noted that both the ICTY and the ICTR have placed significant restrictions on the use that can be made of deposition evidence in such cases, even where defence counsel is provided with an opportunity to question the witness⁵⁹. The ICTR has also required that parties exhaust all their options before requesting testimony by deposition⁶⁰. At the ICC, access to testimony in these circumstances will be even more restrictive. Article 56 (unique investigative opportunity) and rules 67, 68 and 69 are the only explicit provisions that allow for the introduction of testimony from such witnesses.

⁵⁷ *Prosecutor v. Blaskić*, IT-95-14-PT, Judgement, 3 Mar. 2000, para. 50.

⁵⁸ *Prosecutor v. Brđanin & Talić*, IT-99-36, Decision on the Motion by the Prosecution for protective Measures, Trial Chamber, 3 July 2000, para. 20.

⁵⁹ See *Prosecutor v. Naletilić and Martinović*, IT-98-34-PT, Decision on Prosecutor’s Motion to Take Depositions for Use at Trial (rule 71), 10 Nov. 2000. The Trial Chamber in the ICTY noted that judicial discretion to use depositions would be exercised where ‘the witness proposed for deposition will not present eyewitness evidence directly implicating the accused in the crimes charged, or alternatively, their evidence will be of a repetitive nature in the sense that many witnesses will give evidence of similar facts’. See also *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Decision On The Prosecutor’s Amended Extremely Urgent Motion For The Deposition Of A Detained Witness Pursuant To Rule 71, 4 Oct. 2002, [hereinafter *Niyitegeka*, Decision on the Deposition of a Detained Witness, 4 Oct. 2002].

⁶⁰ See *Niyitegeka*, Decision on the Deposition of a Detained Witness, 4 Oct. 2002: In such cases, the Chamber should hear the direct testimony of the witness in order to assess the witness’s demeanour. In addition, such evidence should be given in the presence of the Accused; the presence of Accused’s Counsel is insufficient in this regard.... Even if ‘exceptional circumstances’ were found to exist, the Chamber is not inclined, in the present case, to receive by way of deposition evidence directly incriminating the Accused, given in his absence and without his consent.

The third general exception to in-person testimony is testimony imported from an article 56 procedure. The absence of a reference to this exception in article 69 may have been an oversight or it may imply that testimony admitted under article 56 is deemed to be in-person testimony for trial purposes by operation of the Statute.

4. ‘*viva voce* (oral) or recorded testimony of a witness by means of video or audio technology’

The second sentence of article 69 para. 2 specifically provides that either live or recorded testimony of a witness can be presented by means of video or audio technology. This specific authority is separate from the authority provided in the exceptions in the first sentence of paragraph 2, which refers to protective measures for victims and witnesses in article 68. This redundancy clarifies the availability of this type of technology for circumstances where the protection of vulnerable victims and witnesses is not at issue. Concerns for illness, injury, age or other justifiable reasons for not being present physically at the trial location are thereby included. The Trial Chamber has held that one of the relevant criteria to be considered is the witness’s personal circumstances, including logistical difficulties in arranging for the witness to testify in person.⁶¹ It also permits the giving of recorded testimony, which could be applicable in situations where the witness dies prior to trial or is incapable of testifying at the time of trial. This provision should be read with special regard to article 56 (unique investigative opportunity), rule 67 on audio and video links, and rule 68 on prior recorded testimony. Article 56 specifically provides for the taking of evidence under the direction of the pre-trial Chamber where there is a unique opportunity to take testimony or a statement from a witness who may not be available subsequently for the purposes of trial. Article 56 includes its own procedural safeguards, which are not identical to those provided by rule 68. For example, the Pre-Trial Chamber has the discretion in an article 56 procedure to appoint counsel to represent defence interests during depositions. Rule 68 reserves this role for the defence itself during the trial.

The article 56 procedure comes into play when a potential witness is ill or, for whatever reason, may not be available for trial. The Rules for the ICTY and ICTR do not have a comparable procedure, but allow the admission of prior statements of such witnesses where there are adequate indicia of reliability. Rule 92*bis* ICTY gives the tribunal broad discretion to introduce prior recorded testimony without the opportunity for cross-examination, subject to the right of all parties to be heard on the matter. In general, the ICTY restricts the use of such evidence to matters other than the acts or conduct of the accused, although this restriction does not apply in the case of recorded testimony by a deceased, disappeared or disabled witness⁶².

In a clear departure from the approach of the *ad hoc* Tribunals, the ICC Rules do not include any alternative route for admitting prior recorded testimony outside the protections of article 56 or rules 68 and 69. Recorded witness statements can only be admitted pursuant to rule 68 if both the Prosecutor and defence had the opportunity to examine the witness at the time they were recorded or if the witness adopts the testimony at trial and is available for examination by the parties. Examination by someone of like interest is not sufficient under the ICC Rules. In contrast, the ICTY takes into account whether or not testimony given in a separate proceeding was subject to examination by an accused with ‘like interests’ in deciding whether or not to admit such testimony. A fuller discussion of this difference between the *ad hoc* Tribunals and the ICC is provided below at mn. 30 *et seq.*

Rule 67 provisions for audio and video link testimony can be used by the Court to overcome logistical problems. It requires that the Prosecutor, the defence and the Chamber itself be able to examine the witness at the time of testimony and must ensure that the venue

⁶¹ See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01.05-01.08, Decision on the ‘Submission on the remaining Defence evidence’ and the appearance of Witnesses D04-23, D04-26, D04-25, D04-36, D04-29, and D04-30 via video-link, 15 August 2013, para 10.

⁶² Rule 92*bis* ICTY.

for the testimony is appropriate. While the preference for in-Court testimony is explicit, the Court has the discretion to use audio or video links to overcome logistical problems.

The ICTY established general conditions and guidelines for the use of audio or video link technology which will provide the Court with important guidance beyond that contained in the Statute and Rules. Given the preference for in-person testimony, the ICTY has required that the defence or prosecution satisfy certain threshold requirements before using such technology. These include: a) the testimony of the witness is shown to be sufficiently important to make it unfair to proceed without it; b) the witness is unable or unwilling for good reasons to come to the tribunal; and c) the accused will not thereby be prejudiced in his or her right to confront the witness⁶³. The Tribunal has also prescribed guidelines to ensure that testimony given by video-link is practicable and reliable. These guidelines include matters such as the choice of venue for the recording and transmission, the appointment and attendance of officers to ensure the testimony is given freely and voluntarily, the ability for the witness and the questioner to see each other, and subjecting the witness to the solemnity of the proceedings, including liability for perjury, as if the witness had given evidence within the courtroom⁶⁴.

The ICTY has held that 'video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness' and 'the accused is therefore neither denied his right to confront the witness, nor does he lose materially from the fact of the physical absence of the witness'. The procedure permits the parties to examine and cross-examine the witnesses, and the judges can ask questions and observe the demeanour of the witness. However, the ICTY has acknowledged that 'the evidentiary value of testimony provided by video-link is not as weighty as testimony given in the courtroom' due to the lack of proximity of the witness to the solemnity of the courtroom and the inability to view persons or parts of a room outside the focus of the camera⁶⁵.

5. 'introduction of documents or written transcripts'

- 29 Explicit authority in the Statute to permit the introduction of documents and written transcripts is in accord with the general philosophy of article 69 to avoid overly technical rules of evidence, such as those relating to the admissibility of documents in a common law system⁶⁶. This paragraph permits their introduction and their relevance and admissibility is governed by paragraph 4, subject to the Rules.

There is no general rule prescribing how documents or physical evidence are to be placed in evidence. The Court is thus left to apply its discretion under article 69 para. 4, as to the relevance or admissibility of such evidence. The *ad hoc* Tribunals have required, as a condition of introduction that documents be said or adopted by a witness capable of vouching for the documents' authenticity. An ICTY Trial Chamber has ruled that concern about the authenticity of a document goes to weight rather than admissibility unless the document lacks probative value⁶⁷. Prosecution and defence counsel appearing before the ICC will be able to challenge a document through examination of the adopting witness or by

⁶³ *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21, Decision on the Motion to allow K, L, and M to give their Testimony by Means of video-link Conference, 28 May 1997, para. 17 [hereinafter *Delalić et al.*, Decision on video-link, 28 May 1997]. See also *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Defence motions to summons and protect defence witnesses, and the giving of evidence by video-link, 25 June 1996, para. 19 [hereinafter: *Tadić*, Decision on video-link, 25 June 1996].

⁶⁴ *Delalić et al.*, Decision on video-link, 28 May 1997, see note 58, paras. 15 and 18. See also *Tadić*, Decision on video-link, 25 June 1996, see note 58, para. 21.

⁶⁵ *Delalić et al.*, Decision on video-link, 28 May 1997, see note 58, para. 21. See also *Tadić*, Decision on video-link, 25 June 1996, see note 58, para. 22.

⁶⁶ E. g. rules relating to hearsay and the best evidence rule. The ICTY Appeals Chamber noted in the *Aleksovski* decision that 'it is well settled in the practice of the Tribunal that hearsay evidence is admissible'. This will also be true of the ICC Trial Chamber.

⁶⁷ See *Prosecutor v. Blaskić*, IT-95-14, Decision on the Defence Motion for Reconsideration of the Ruling to exclude from Evidence authentic and exculpatory Documentary Evidence, 30 Jan. 1998, paras 10–11.

requesting a ruling on admissibility or relevance under the procedure created by rule 64. At this hearing, the Court can apply article 69 para. 4, and take into account any circumstances surrounding the origins, contents and/or chain of custody.

Rule 68 governs the introduction of written transcripts and other documented evidence of prior testimony. It creates a requirement that both the prosecution and defence must have an opportunity to examine the witness who provided the testimony, either at the time the testimony was taken or at the point the recorded testimony is introduced into evidence. As noted above, an exception to rule 68 is the procedure under article 56 for taking testimony when a unique investigative opportunity arises. Transcripts from article 56 proceedings will be admitted according to the safeguards provided in article 56 itself.

In the *Prosecutor v. Lubanga* trial, the Trial Chamber I discussed the introduction of evidence other than oral evidence, in particular, written statements such as prior written testimony, taken in accordance with Rules 111 and 112. The Trial Chamber recognized that while oral testimony is generally preferable, there are material advantages in having evidence read, in whole or in part, especially in terms of efficiency and unnecessary repetition of evidence. However, in any analysis, the right of the accused to a fair trial must not be undermined by the admission of prior written testimony, and this right will always trump other concerns such as efficiency.⁶⁸ Rule 68 ICC does not make any concessions for relaxing the standards for admission of transcripts from other trials even where the evidence will be used to prove issues other than the acts or conduct of the accused. The Preparatory Commission could not achieve consensus on this point. A proposal was drafted that would have allowed transcripts to be admitted on consent by the parties. However, this was deleted during the June 2000 meeting of the Commission because the consent requirement made it redundant with the provisions of rule 69 (evidence by agreement). Rule 69 and article 69 para. 6 (judicial notice) do provide vehicles for bringing uncontroversial transcripts.

Rule 68 is more restrictive than the comparable rules of the ICTY. The ICTY Rules provide for a number of specific exceptions to the principle of live testimony. Examples of these exceptions include prior statements by deceased witnesses and the use of transcripts from other trials that go to the proof of a matter other than the acts and conduct of the accused⁶⁹. Transcripts from other trials have been used before the *ad hoc* Tribunals to address such issues as whether or not a state of war existed at a particular place and time, troop movements and the like⁷⁰. The negotiations in the Preparatory Commission make it clear that the stricter standard incorporated in rule 68 was deliberate.

The possibility exists that a Chamber of the ICC could use its power of judicial notice (article 69 para. 6) or its general discretion to consider all relevant and admissible evidence (rule 63) to circumvent the strict standard in rule 68. However, this is unlikely. In the first place, the Court would have to satisfy itself that the rights of the accused would be respected⁷¹. In the second place, as a general rule of law, a court cannot use a broad discretionary power to circumvent the specific requirements of a relevant rule. An ICTY Appeals Chamber has noted that this renders the safeguards in the more restrictive rule meaningless⁷². This same Appeals Chamber did not dispute that non-compliance with 'technical-procedural' requirements should not categorically preclude admissibility, but it did find that procedural requirements are not presumptively technical and are a necessary

⁶⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009 at paras 18- 21.

⁶⁹ Rule 92bis lit. C and D ICTY. The ICTY's approach to prior recorded testimony has evolved over time and generated significant debate. Rule 92bis was adopted at the 23rd Plenary Session held on 12 Jan. 2001 to replace rule 94ter which was deleted.

⁷⁰ However, the ICTY significantly restricts the use of such transcripts in cases where the accused is charged on the basis of command responsibility or for his or her role in a joint criminal enterprise. See *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002.

⁷¹ See *Blaskić and Lubanga*, see notes 67 and 74 and accompanying text.

⁷² *Prosecutor v. Kordić*, IT-95-14/2, Decision on Appeal Regarding the Admission Into Evidence of seven Affidavits and one Formal Statement, 18 Sept. 2000.

element to a fair trial. This distinction between substantive and technical procedural rules may play an important role in future proceedings before the ICC⁷³.

6. 'subject to this Statute and in accordance with the Rules of Procedure and Evidence'

30 As the second sentence of article 69 para.2, does not specify the justifications or conditions when electronic evidence, documents, or written transcripts may be presented, the sentence provides that the Court shall exercise these powers subject to the Statute and the Rules. Relevant statutory provisions include articles 56, 67 and 68 and the relevant rules include 63, 67, 68, 69, 87, 88. The applicable provisions of the Statute and Rules have already been discussed in detail. However, these are not the last word, as many procedures remain to be developed by the Court. This will continue to occur through practice directions, any regulations created by the Court and jurisprudence. The *ad hoc* Tribunals will provide a fertile source for this further evolution, just as they played a critical role in the development of the Statute and Rules themselves.

For example, the Statute and the Rules do not explicitly provide for the use of prior witness statements, which are not otherwise admissible in relation to their assertive contents, for the sole purpose of challenging a witness' credibility. The ICTY, in the *Naletilić* case, endorsed the use of prior statements to test the credibility of witnesses, but ruled that the evidence was the reaction of the witness to being confronted with the prior statement and not the contents of the prior statement⁷⁴. The ICTY in that case referred to statements used for this purpose as 'aids' to distinguish them from 'evidence'. The regulation of exhibits, aids, re-creations, evidence summaries and expert testimony are not specifically dealt with in the Rules of the ICC⁷⁵.

The relative weight appropriate for different types of evidence may also be an area where the ICC looks to the jurisprudence of the *ad hoc* Tribunals. Recorded testimony (audio or video), for example, is unlike live, transmitted evidence in that the Court cannot examine the witness and the full examination of the witness must either be recorded or take place some time later (when the recording is placed into evidence). as noted above, the ICC Rules are more rigorous than the *ad hoc* Tribunals in requiring that such testimony always be subject to examination by the opposing party, either at the time it is recorded or at the point that it is adopted by the witness and entered into evidence⁷⁶. There is, nevertheless, some loss of immediacy to recorded testimony. For this reason, an ICTY Trial Chamber has ruled that such testimony, even when subject to examination by the defence when recorded, may be given less weight than live testimony⁷⁷.

Regarding ICC jurisprudence, in the case of *Prosecutor v. Jean-Pierre Bemba Gombo*, the Appeals Chamber confirmed that the Trial Chambers have the discretion to receive testimony of witnesses by means other than in-court testimony, as long as it does not violate the Statute and is in accordance with the Rules of Procedure and Evidence. Nonetheless, the

⁷³ DeFrancia, *Due Process In International Criminal Courts: Why Procedure Matters* (2001) 87 *VirginiaLR* 1381, 1429.

⁷⁴ See *Prosecutor v. Naletilić*, IT-98-34, Decision on the Admission of Witness Statements into Evidence, 14 Nov. 2001. See also *Prosecutor v. Simić et al.*, IT-95-9, Decision on Prosecution Interlocutory appeals on the use of statements not admitted into evidence pursuant to Rule 92 *bis* as a basis to challenge credibility and to refresh memory, 23 May 2003.

⁷⁵ In regards to summary evidence, the ICTY has ruled that the evidence being summarized must, itself, be admissible before the summary can be admitted. See *Prosecutor v. Slobodan Milošević*, IT-02-54, Decision on Admissibility of Prosecution Investigator's Evidence, 30 Sep. 2002.

⁷⁶ The use of recorded testimony in conjunction with live testimony can relieve some of the pressure on children or other vulnerable witnesses, minimizing their exposure to the courtroom.

⁷⁷ *Prosecutor v. Naletilić and Martinović*, IT-98-34-PT, Decision on Prosecution Amended Motion for Approval of Rule 94ter Procedure (Formal Statements) and on Prosecutor's Motion to take Depositions for Use at Trial (rule 71), both decisions issued 10 Nov. 2000.

Appeals Chamber urged the Trial Chambers to exercise this discretion with caution so as not to prejudice the rights of the accused or the fairness of the trial generally⁷⁸.

In contrast, however, in the *Prosecutor v. Chui*, the Trial Chamber II did not allow the admission of a prior recorded statement of a witness and stated that “[t]he simple assertion that a written statement of a witness who has appeared for testimony provides the broader context in which a specific statement was made, or allegedly corroborates the oral testimony given at trial, does not qualify as a sufficient reason for admitting it into evidence.”⁷⁹

7. ‘not be prejudicial to or inconsistent with the rights of the accused’

The primary right of an accused that is affected by article 69 para. 2, is the right to confront witnesses. This is specifically guaranteed in article 67 para. 1 (e), which guarantees the right ‘to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her’.

Substantive rights for the accused to challenge and test testimony are incorporated into each of the Rules established under article 69. These rights are necessarily balanced against the rights of victims and witnesses protected by article 68. The requirement of balance is further emphasized by the general principle affirming the rights of victims and witnesses articulated in rule 86. Specific procedures for determining the appropriate balance are provided by rules 64, 87 and 88. Rule 87 on protective measures requires the participation of the accused in any hearing regarding protective measures for victims or witnesses that might have an impact on the presentation of evidence. The rule 88 ‘special measures’ procedure can exclude the participation of the accused, but the ultimate effect of this clause is to ensure that the Court will not order special measures that it determines are prejudicial or inconsistent with the rights of the accused.

In hearings on relevance and admissibility under rule 64, any written submissions must be provided to all parties and a Chamber must provide reasons for all rulings on relevance or admissibility. This procedure ensures the participation of the accused and the availability of a record in the event of an appeal. The opportunity for victims to be represented by counsel at trial in accordance with rule 91 will allow victims to play a far more active role in these proceedings than is the case in domestic courts, including the right to make submissions on the relevance or admissibility of evidence and, with approval of the Chamber, direct questioning of witnesses.

The evolving jurisprudence of the *ad hoc* Tribunals suggests that the rights of an accused to know the identity of his accusers and challenge their testimony will likely take precedence over the interests of victims and witnesses to not have their identities disclosed⁸⁰. However, the victim participation provisions in the Statute will provide opportunities for victims and witnesses to be heard by a Chamber when their interests or safety are affected in order to fashion other protective measures.

The rights of the accused referenced in this paragraph also incorporate internationally recognized human rights by virtue of article 69 para. 7 and those rights of the accused which are recognized elsewhere in the Statute and in the Rules. Particularly important among the Statute rights are those relating to disclosure discussed below.

⁷⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chambers, ‘Judgment on the appeals of Mr Jean-Pierre Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”’, 3 May 2011.

⁷⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Decision on Defence Request to Admit into Evidence Entirety of Document’ DRC-OTP-1017-0572, 25 May 2011 at para 7.

⁸⁰ See *Blaskić*, see note 57.

III. Paragraph 3

Rule Cross-Reference: rule 63 (general provisions) rule 64 (Procedure relating to relevance or admissibility), rule 69 (evidence by agreement), rule 70 (sexual violence), rule 71 (evidence of sexual conduct), rule 72 (in camera procedure), rule 140.2(a) (right to question one's own witness)

1. 'The parties may submit'

32 The issue of whether victims fall within the ambit of article 69(3) and have a right to participate at trial to lead evidence or challenge the admissibility or relevance of evidence was discussed by the Appeals Chambers in the *Prosecutor v. Lubanga*⁸¹. The Appeals Chamber underscored that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, that is, the Prosecution and the Defence. However, the Appeals Chamber also found that this did not preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused. Article 69(3) makes it clear that 'the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth'. Indeed, the Appeal Chamber also noted that Article 68(3) established the right for victim participation, and in order to give effect to the spirit and intention of the article, it must be interpreted as to make participation meaningful. The Appeal Chamber ultimately upheld the decision of the Trial Chamber to allow participating victims the possibility to lead evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of evidence in the trial proceedings.

However in *Prosecutor v. Abdallah Banda Abakaer Nourain*⁸² the Trial Chamber upheld the approach that challenges to the relevance or admissibility of this evidence does not fall under Article 69(3) of the Statute, rather the legal basis upon which this evidence may be challenged extends from combined effect of: (i) the obligation to give effect to the spirit and meaning of Article 68(3) of the Statute; and (ii) the Chamber's power to make rulings on the relevance or admissibility of evidence under Articles 64(9) and 69(4) of the Statute.

The issue of whether the rules considering evidence in article 69(3) apply also to pre-trial stages of the proceedings was discussed in two cases. In *Prosecutor v. Katanga and Chui*⁸³ the Single Judge considered 'that article 69(3) of the Statute is not applicable during the pre-trial proceedings conducted before the Pre-Trial Chamber because: (i) the Pre-Trial Chamber is not a truth-finder; and (ii) according to the literal interpretation of article 69(3) of the Statute, its application is subject to consideration of the competent Chamber that evidence other than that introduced by the Prosecution and the Defence is 'necessary for the determination of the truth.'"

The Pre-Trial Chamber in *Prosecutor v. Jean-Pierre Bemba Gombo* came to a different conclusion. The Pre-Trial Chamber III concluded that article 69(3) establishes a general principle that applies to the various stages of the proceedings. Therefore, the rules concerning evidence in 69(3) also apply at the pre-trial stage of the proceedings, but must take into account the specific purpose and limited scope of the confirmation charges. 'To that end, it needs to be noted that the application of article 69(3) of the Statute at the confirmation phase is restricted since, in contrast to the trial phase, the Chamber does not have to determine the guilt

⁸¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 9 OA 10, 'Judgment on the appeals of the Prosecutor and The Defence against Trial Chamber I's Decision on the Victims' Participation of 18 January 2008' 11 July 2008 at paras 93-9.

⁸² *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, 'Decision on the participation of victims in the trial proceedings', 20 March 2014 at para 29.

⁸³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, 'Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case', 13 May 2008 at para. 110.

of the person prosecuted beyond reasonable doubt. It simply has to determine whether there are substantial grounds to believe that the person prosecuted committed the crimes charged.⁸⁴

2. ‘evidence relevant to the case’

This provision has to be read in conjunction with article 69 para. 4, which provides that 33 the Court may rule on the relevance or admissibility of any evidence. For the meaning of ‘relevant’, see the discussion below concerning article 69 para. 4.

According to paragraph 3, evidence that is irrelevant is not to be submitted. However, views about the relevance of a certain piece of evidence to the case may differ. It must be noted that the text specifies that the evidence must be relevant ‘to the case’. This means that a particular piece of evidence that has been admitted may subsequently be held not to be relevant in connection with the particular fact which it was meant to prove, but may still be relevant to the case as a whole. In such a situation, evidence, though irrelevant for the purpose for which it was originally submitted, has still been submitted in accordance with paragraph 3 if relevant to other issues in the case. The Court will have to decide on the relevance in that sense under paragraph 4⁸⁵.

The ICTY has used a general concern about both relevance and probative value to exclude specific evidence as well as to place limits on the volume of evidence. Relevance has been used to justify limits on evidence about the good character of the accused⁸⁶, historical roots of the underlying conflict⁸⁷, and similar bad acts by opposing forces⁸⁸.

3. ‘in accordance with article 64’

Although the initial proposal mentioned only article 64 para. 3, the text now requires the 34 parties to submit evidence in accordance with article 64 as a whole. Consequently, if the Trial Chamber refers a preliminary question to the Pre-Trial Chamber in accordance with article 64 para. 4, the parties may have to submit evidence before that Chamber. The most important paragraph of article 64, however, will be paragraph 3. The parties will have to submit their evidence in accordance with the decisions that the Trial Chamber has taken regarding the procedures and languages to be used for trial, and, most importantly, any decision regarding disclosure. At the ICTY, admissibility of evidence has been successfully challenged on such bases as the failure of the prosecution to provide a translation of a disclosed document⁸⁹, and failure to disclose complete documents (only excerpts to be used at trial had been provided)⁹⁰. The timing of disclosure has also been a major issue before the *ad hoc* Tribunals. The ICTR Rules required complete disclosure of all witnesses 21 days prior to trial. The ICTY developed a more complex system for disclosure, distinguishing between disclosure of witnesses called to prove basic facts and witnesses who directly implicate the accused⁹¹. Both Tribunals recognized an obligation on the prosecution to immediately disclose any exculpatory evidence to the defence.

The ICC Rules provide significant guidance on the issue of disclosure. Rules 76 through 84 place disclosure requirements on both the prosecution and defence and spell out the circum-

⁸⁴ The *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ‘Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties’, 31 July 2008 at para 10.

⁸⁵ See mn. 37 *et seq.*

⁸⁶ *Prosecutor v. Kupreskić*, IT-95-16, Decision on Evidence of Good Character of the Accused and the Defence of *Tu Quoque*, 17 Feb. 1999.

⁸⁷ See *Prosecutor v. Kunarac et al.*, IT-96-23, Decision on Prosecution’s Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000.

⁸⁸ See *Kupreskić*, see note 86.

⁸⁹ See *Prosecutor v. Milošević*, IT-02-54, Decision on Prosecution Motion for Permission to disclose Witness Statements in English, 19 Sept. 2001.

⁹⁰ *Prosecutor v. Dosen*, IT-95-8, Decision on the Defence Motion to compel Discovery, 11 May 2000.

⁹¹ *Prosecutor v. Brđanin and Talić*, IT-99-36, Decision on Motion by Prosecution for protective Measures, 3 July 2000.

stances and procedures to be used for any restrictions on disclosure. Article 61 para. 3 sets out the disclosure requirements for hearings held prior to trial. Article 67 para. 2 requires exculpatory evidence to be disclosed to the defence ‘as soon as practicable’. Rule 83 allows the Prosecutor to seek the guidance of the Court on an *ex parte* basis where this is an issue under article 67 para. 2. Unlike the ICTR, the ICC Rules do not establish any specific timeframes for disclosure. Instead, they establish a principled approach to disclosure⁹².

4. ‘authority to request the submission of evidence’

- 35 Due to this formulation, the Court will not be allowed to call evidence on its own authority. It may, however, when it believes that the evidence produced by the parties does not suffice to give a full picture of the situation or to reach a decision on a particular point, order the parties to submit further evidence. This follows the Rules of the ICTY⁹³. The effect of this provision is that the parties are not free to withhold evidence that the Court considers to be important. The Court may focus on aspects of the crime that are not covered by the evidence brought forward by the parties. In such a case, the parties may be ordered to submit evidence regarding *e.g.*, a particular conduct occurring at a particular time that neither party has so far seen proper to touch upon. The submission of evidence, therefore, is not a matter to be decided solely by the parties, but also by the Court.

On the other hand, the Statute makes it clear that any evidence will have to be brought forward by the parties. The Court is restricted to its procedural tools (orders) when it wishes to hear additional evidence. It has to rely on the cooperation of the parties, although it may compel them to cooperate. This is different from the procedure in some civil law systems.

5. ‘it considers necessary for the determination of the truth’

- 36 It is for the Court alone to decide whether the parties have submitted sufficient evidence. The phrase ‘determination of the truth’ demonstrates that the point is not just whether the Court has enough material on its hands to reach a decision. The function of the ICC goes beyond that of an ordinary criminal court. Given the kind of situations that might be the subject of a trial, the parties and the Court have the additional duty to clarify as much as possible the historical facts of the case. This does not mean, however, that the Court has to examine every detail of the situation before it when it already has a clear picture of the facts. The individual crime before the Court provides the framework within which the Court has to operate. If the facts of the particular crime are sufficiently clear, the Court will not consider further evidence necessary.

The role envisioned for the Court necessarily means that it is not bound by narrow rules regarding when and how evidence is presented. At the same time, some limits are justified as to when new evidence can be placed before the Court during the trial so as not to prejudice either party. The ICTY established a relevant test for the submission of new evidence at trial outside of the agreed procedure, which requires that the material 1) must be new in the sense of not having been available on the basis of due diligence when it should have been appropriately submitted, 2) not be cumulative and/or repetitious of evidence already given, 3) must be of significant relevance to the core issues in the case, and 4) be of such nature that its admission is in the interests of justice⁹⁴.

⁹² See Brady, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 403 *et seq.*

⁹³ See rule 98 ICTY.

⁹⁴ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Decision on Prosecutor’s Submissions Concerning ‘Zagreb Exhibits’ and Presidential Transcripts, 1 Dec. 2000.

IV. Paragraph 4

Rule Cross-Reference: rule 47.2 (evidence per article 15(2)), rule 63 (general evidence provisions), rule 64 (procedure relating to relevance or admissibility), rule 70 (evidence in cases of sexual violence), rule 71 (evidence of other sexual conduct), rule 72 (in camera procedures to consider relevance or admissibility)

1. ‘the relevance or admissibility of any evidence’

As with all of article 69, para. 4 is an amalgam of both common law and civil law concepts and does not strictly follow the procedures of either. While the article adopts presumptively the civil law procedure of general admissibility and free evaluation of evidence, some common law concepts are incorporated, which results in a hybrid system. The basic principle in both common law and civil law systems is ‘that relevant evidence which has probative value is admissible if such evidence is not affected by an exclusionary virus’⁹⁵. Article 69(4) permits the Court ‘to rule on the relevance or admissibility of any evidence’ before considering the question of weight. The Court can either: 1) rule first whether evidence possesses sufficient relevance to justify its admissibility, taking into account a number of factors mentioned in article 69, para. 4, and evaluate subsequently the weight of any admitted evidence as part of the evaluation process; or, instead 2) admit evidence and consider relevance, admissibility and weight together as part of the evaluation of the admitted evidence, taking into account the same factors. When the Court would choose to proceed by one analytical method or the other would be influenced, *inter alia*, by the need to ensure the protection of other values in the adjudication process, for example, such as the rights of the accused, a fair trial, fair evaluation of the testimony of a witness and the rights of victims.⁹⁶ In some situations, protection of these values would best be served by the exclusion or non-admissibility of the evidence, rather than by admitting it and subsequently according it little or no probative weight⁹⁷. In either case, rule 64 makes it clear that issues about relevance or admissibility should be raised when evidence is submitted and that a Chamber must give reasons for any rulings on evidential matters.

Relevance and admissibility are related but distinct concepts. Relevance is not an absolute concept but is a relationship or nexus that is derived from the proffered item of evidence and the fact in issue or proposition that is sought to be proved or disproved. It is a relation the existence of which makes it more probable than not that the fact or proposition exists or does not exist. The existence of the item of evidence tends to increase or decrease the probability of the existence of the fact in issue. This is often termed the rational probativeness of the evidence; *i.e.* the question is whether the item of evidence is rationally probative to a fact in issue⁹⁸.

Determining whether a rational connection exists or whether evidence has probative value is often a mixture of logic and common sense borne by the experience of life and humankind. In addition to strict logic, the determination of relevance or probative value also involves the application of common sense as to whether the item of evidence tends to make more or less

⁹⁵ *Prosecutor v. Delalić, Mucić, Delić and Landzo*, IT-96-21, Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zradavko Mucic, to provide a Handwriting Sample, 19 Jan. 1998, para. 30 [hereinafter: *Delalić et al.*, Decision on Exhibit 155, 19 Jan. 1998].

⁹⁶ See *Prosecutor v. Lubango Dyilo*, ICC-01/04-01/06, ‘Decision concerning the Prosecution Proposed Summary Evidence’ where the Pre-Trial Chamber I declared ‘as inadmissible some documents submitted by the Prosecution on the grounds that their disclosure would compromise the protection of witnesses’ 4 October 2006.

⁹⁷ Piragoff, see note 19, p. 351.

⁹⁸ See note 83, *Prosecutor v. Delalić et al.*, Decision on exhibit 155, para. 29; *Prosecutor v. Delalić et al.*, IT-96-21, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 Jan. 1998, para. 17 [hereinafter: *Delalić et al.*, (Decision on admissibility of evidence, 19 Jan. 1998)]; see also G.F. James, *Relevancy, Probability and the Law*, 28 *CalifLRev* 689 (1941).

probable the existence of the fact in issue that is sought to be proved or disproved. Common sense is of course dependant not only on the process of logical deduction or induction but on life experience or values, be they individual, societal or as part of humankind. The conclusion to a logical deduction is only as true as is its major premise, which is often derived from an application of one's life experience and values. At times, the validity of the deductive process and the conclusion can be called into question if the validity of the major premise (or the values on which it is based) is questionable, biased or erroneous⁹⁹.

40 There are two aspects to relevancy that may make evidence irrelevant. In the first, the evidence does not tend to prove or disprove the fact in issue; *i. e.* there is no rational connection or probative value or relationship. In the second aspect, there may equally be no rational connection or probative value if the particular fact in issue to which the evidence could be probative is not at issue in the case. In such situations, the evidence is both irrelevant and not admissible¹⁰⁰.

41 However, merely because evidence is strictly relevant in a logical sense does not guarantee its admissibility. Relevance is often a question of the degree of probativeness and, sometimes, while having some probative value it is not sufficiently probative so as to justify its admission into evidence given other considerations. These considerations can include the situation where the particular fact in issue is too collateral or remote to be probative to the main issues to be proved or disproved, or the particular fact in issue is not really at issue in the context of the case due to the overwhelming probative value of other evidence that tends to prove or disprove the fact in issue. It can also include situations where, due to the nature of the evidence or the values upon which probative value is being determined, the evidence may be considered falsely to possess more probative value than it actually does. For example, evidence of prior conduct (sexual, criminal or otherwise) which is not rationally related to the conduct in question in the trial may tend to show that the person is immoral or of bad character (which is a value judgement based on the assessor's own life experience and values) or has been prone to criminality, but without more rational connection to the case, such degree of probativeness might not justify the admission of the evidence. Its prejudicial value obscures its true probative value, which may really be minimal or non-existent¹⁰¹. The admission of such evidence may, therefore, cause prejudice to a fair trial or to a fair evaluation of the testimony of a witness.

Sometimes, even if evidence is sufficiently relevant (*i. e.* of sufficient probative value) other policy considerations outweigh its admission, such as where evidence is subject to a legally recognised privilege or its exclusion is necessary to protect national security interests or a witness from harm¹⁰².

In the case of *R. v. Lubanga* the Trial Chamber I discussed the broad power conferred on the Chamber to make decisions with regards to evidence under Article 69(4), 'it has a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC.'¹⁰³

In *Prosecutor v. Jean Pierre Bemba Gombo*¹⁰⁴, the Trial Chamber III discussed the relationship between the guiding principle of orality set out in Article 69(2) and the Court's

⁹⁹ See note 83, *Delalić et al.*, Decision on exhibit 155, para. 29; see note 85, *Delalić et al.*, Decision on the admissibility of evidence, 19 Jan. 1998, para. 17. See also: see note 98, G.F. James, 694–5; D.K. Piragoff, *Similar fact evidence: probative value and prejudice* (1981) 124–128; M. Eggleston, *Evidence, proof and probability* (1978)24; R. Cross, *Cross on evidence* (4th ed. 1974)16 and 24.

¹⁰⁰ See note 83, *Delalić et al.*, Decision on the admissibility of evidence, 19 Jan. 1998, para. 17. McCormick, *McCormick on evidence* (4th ed. 1992) 338–339.

¹⁰¹ *E. g.*, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21-T, Judgement, 16 Nov. 1998, para. 70, which held that evidence of prior sexual conduct was irrelevant and inadmissible.

¹⁰² *E. g.*, see article 69 para. 5, article 72 and article 68 para. 1.

¹⁰³ *Prosecutor v. Lubanga*, ICC-01/04-01/06, 'Corrigendum to Decision on the admissibility of four documets' 20 January 2011 at para 24.

¹⁰⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 19 November 2010.

discretion to rule on relevance or admissibility of *any* evidence set out in Article 69(4). The Majority determined that there is sufficient legal basis set out in the ICC legal framework to consider *prima facie* admitting into evidence all statements of witnesses to be called to give evidence at trial.

However, the Dissenting Opinion to the Majority decision above written by Judge Ozaki disagreed with these arguments.¹⁰⁵ In her opinion, Article 69(2) is clear that the primacy of the principle of orality must prevail in all proceedings before the Court, and indeed, thus far international criminal tribunals and the ICC have all primarily relied on the oral testimonies of witnesses with written statements having been admitted on an exceptional, case-by-case basis. Moreover, in her opinion, the argument that all written documents are *prima facie* admissible is not founded upon any provision in the ICC legal framework. As well, the Majority's ruling has the effect of creating an 'intermediate state' in the ruling on admissibility, which was not contemplated by the drafters of the Rome Statute.

The Majority Decision was appealed and on May 3, 2011 the Appeals Chamber rejected the argument of the Trial Chamber. The Appeals Chamber ruled that the Trial Chamber's ruling of a '*prima facie* finding of admissibility of the evidence' without assessing the evidence on an item by item basis was incorrect.¹⁰⁶ The Appeals Chambers found that while expeditiousness is an important component of a fair trial, the statutory requirements established by article 69(4) and (7) and rule 71 of the Rules of Procedure and Evidence anticipate that a Chamber's determination of the relevance or admissibility of evidence be made on an item-by-item basis.

2. 'the probative value of the evidence'

The meaning of this term has already been discussed in section 1, above, in relation to the determination of relevance and admissibility. 'There is implicit in 'relevancy' an element of probative value'¹⁰⁷. In applying this concept as one of the factors to be taken into account in determining relevance and admissibility, the Court will likely have regard to the manner by which the evidence derives its probative value and the degree of probativeness.

Likewise, the Court may have regard to the reliability of the evidence, not only as a factor going to its weight, but also to its degree of probative value and even admissibility. As the ICTY Appeals Chamber noted, 'the reliability of a statement is relevant to its admissibility and not just to its weight. A piece of evidence may be so lacking in terms of the indicia of reliability that it is not 'probative' and is therefore inadmissible'¹⁰⁸. Nevertheless, reliability is only a factor to be considered and is not a separate pre-condition to admissibility, as the degree of reliability can also affect the weight to be given evidence once admitted¹⁰⁹. However, an ICTY pre-trial judge has ruled that a Trial Chamber may call upon the parties to provide 'a minimum of proof which would be sufficient to constitute a *prima facie* indicia of reliability if a document so warrants'¹¹⁰. The case in question dealt with identification evidence where the Prosecutor was responsible for the context in which the identification was made. It signals that the Prosecutor can be held to a high standard for ensuring the reliability of evidence where the Prosecutor exercises significant control over the form or content of the evidence in question.

¹⁰⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 'Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 23 November 2010.

¹⁰⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 'Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'', 3 May 2011 at para 57.

¹⁰⁷ *Delalić et al.*, Decision on Exhibit 155, see note 83, para. 29.

¹⁰⁸ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-AR73.5, Decision on Appeal regarding Statement of a Deceased Witness, 21 July 2000, para. 24.

¹⁰⁹ *Prosecutor v. Tadić*, IT-94-I-T, Decision on the Defence motion on hearsay, 5 Aug. 1996, paras. 13–15; See note 83, *Delalić et al.*, Decision on exhibit 155, para. 30–32.

¹¹⁰ See note 21.

However within the ICC, the Pre-Trial Chamber I, in the *Prosecutor v. Chui* distinguished its approach from the approach of other international tribunals as to the question of whether reliability is a separate or inherent component of the admissibility of a particular item of evidence. The Pre-Trial Chamber adopted an alternative approach, 'to consider reliability as a component of the evidence when determining its weight'.¹¹¹

An ICTY Trial Chamber has outlined factors that should be considered in determining the probative value of expert witness statements. The Chamber required, at the admissibility stage, a minimum degree of transparency in the sources and methods used. They also required a degree of specificity and accessibility of sources sufficient to allow opposing counsel to effectively examine the witness¹¹².

On June 13, 2008, Trial Chamber I issued the 'Decision on the admissibility of four documents' in which it set out a general approach to the admissibility of evidence other than direct oral evidence.¹¹³ The Chamber set out a three step approach to be applied: 1) determine whether the evidence in question is, *prima facie*, relevant to the trial; 2) determine whether the evidence has probative value; and 3) weigh the probative value of the evidence against its prejudicial effect. With regard to the probative value of the evidence, the Chamber indicated that 'there should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall'.¹¹⁴ The Chamber also cautioned against imposing artificial limits on its 'ability to consider any piece of evidence freely, subject to the requirements of fairness'¹¹⁵.

- 43 As noted above in section 1, evidence may possess prejudicial value that tends to obscure the true degree of probative value of an item of evidence or tends to offend or prejudice other values that the trial is supposed to protect, such as a fair trial or the fair evaluation or protection of a witness. The evidence may have a disproportionate prejudicial effect as compared to its true probative value. This necessitates a balancing or weighing process. Unlike some proposals made in the Preparatory Committee¹¹⁶, the Statute does not specify the exact nature of the test to be used in the balance, nor do the Rules. However, in cases of sexual violence the Rules provide considerable guidance. Rule 70 prohibits the Court from drawing inferences about the consent of a victim based on any words, conduct or silence by him or her if the act(s) occurred in a coercive setting. It also prohibits the Court from making inferences about the character or sexual availability of a victim or witness by reason of prior or subsequent sexual conduct. Rule 71 directs the Court not to admit evidence of the prior or subsequent sexual conduct of a victim or witness. Rule 72 provides for *in camera* consideration of the admissibility of any evidence suggesting the defence of consent to charges of sexual violence. The elaboration of these Rules by the Preparatory Commission provoked sharp debate during the drafting process. The underlying issues in that debate are dealt with more fully in section 1, above.

The restrictions placed on the defence by rules 70 and 71 in the context of sexual offences are premised on principles of relevance and probative value and, as such, are no more prejudicial to the rights of an accused than any other determination of relevance. Rule 72, moreover, guarantees the right of the defence to present to the Court reasons why evidence caught by Rule 70 should, nonetheless, be admissible.

¹¹¹ *The Prosecutor v. Chui*, ICC 01/04-01/07, 'Decision on the confirmation of charges' 30 September 2008 at para 78.

¹¹² *Prosecutor v. Galić*, IT-98-29-T, Decision on the expert witness statements submitted by the Defence, 27 Jan. 2003.

¹¹³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the admissibility of four documents (13 June 2008).

¹¹⁴ *Ibid*, paragraph 28.

¹¹⁵ *Ibid*, paragraph 29.

¹¹⁶ Report of the Preparatory Committee (1998), see note 15, p. 131, fn. 15 ('probative value is substantially outweighed by its prejudice ...'); see also rule 84*lit.* DICTY ('probative value is substantially outweighed by the need to ensure a fair trial').

3. ‘fair trial’

The concept of ‘fair trial’ is one of the fundamental values inherent in the *ICC Statute*. Article 64 para. 2 mandates that the ‘Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’, article 67 para. 1 entitles an accused ‘to a fair hearing conducted impartially’ and article 68 paras. 1 and 5 refer to ‘a fair and impartial trial’. As the concept of ‘fair trial’ is addressed primarily in article 67 of the Statute and in the *ICCPR*¹¹⁷, discussion here will focus on the manner by which this fundamental value operates as a factor in determining relevance and admissibility, rather than on its meaning.

First, as noted in sections 1 and 3, above, the nature of the evidence or the values upon which probative value is being determined can result in a situation where the evidence may be considered erroneously to possess more probative value than it actually does. The admission of such evidence may have an adverse impact on the fairness of the trial, as it obscures the true probative value of the evidence or ‘the determination of the truth’ by the Court¹¹⁸.

Second, the concept of fair trial has traditionally referred to the fairness of the trial vis-à-vis the accused. Article 67 sets out a number of specific rights of the accused in the context of the trial process, which also inform the meaning of fair trial. Their violation can prejudice a fair trial. Violation of pre-trial rights can also prejudice the fairness or integrity of a subsequent trial¹¹⁹. Other international standards regarding the rights of an accused and fair trial are incorporated through article 21 paras. 1 and 3.

Third, the Statute recognises the importance of victims and witnesses and charges the Prosecutor and all Chambers of the Court with the protection of their rights and interests. This is explicitly dealt with in article 68, but article 64 para. 2 specifically mandates that the ‘Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’. Article 21 would equally apply to the further understanding and elaboration of these concepts. Therefore, a fair trial, and prejudice thereto, may also incorporate or be counter-balanced by some aspects of the fair treatment of victims and witnesses, and not merely fair treatment of an accused, provided that these aspects are not ‘prejudicial to or inconsistent with the rights of the accused or a fair and impartial trial’¹²⁰. The fairness of a trial may encompass considerations that are broader than the rights of an accused and other participants, and may require a balancing process of the factors mentioned in article 64 para. 2 which may be inter-related rather than distinct. Alternatively, if some of these rights and interests are not encompassed within the concept of ‘fair trial’, they may find their expression and protection in the concept of ‘fair evaluation of the testimony of a witness’, which is also included in paragraph 4.

Fourth, the UN Human Rights Committee has held that observance of the minimum guarantees of the *ICCPR* is not always sufficient to ensure the fairness of a hearing¹²¹. This suggests that the admission of some types of evidence may cause prejudice to a fair trial in a manner that does not explicitly breach one of the rights of an accused set out in the Statute or incorporated by reference through article 21. Unlike article 69 para. 7, a breach of the

¹¹⁷ 19 Dec. 1966, 999 UNTS 171 (entered into force 23 Mar. 1976), article 14; and see Ch. Lonsdale and K. Trapp, *The International Criminal Court: Excluding Evidence under Article 69(7)*, unpublished manuscript (1998), Faculty of Law, McGill University, Canada, p. 18, footnote 18, for a list of international instruments that develop the concept of fair trial in international law.

¹¹⁸ The determination of the truth is one of the key purposes of the trial, for the Court itself is authorised to request the submission of evidence; article 69 para. 3.

¹¹⁹ E.g., articles 55, 56 paras. 1 (b) and 4.

¹²⁰ Article 68 paras. 1, 3 and 5. In the *Tadić* case, the ICTY held that ‘a fair trial means not only fair treatment to the defendant but also to the prosecution and to witnesses’; see note 125, paras. 55 and 72.

¹²¹ Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1 (1992), General comment 13.

Statute or internationally recognized human rights is not a prerequisite under paragraph 4 in order to make a ruling that certain evidence is inadmissible.

- 49 Finally, the question arises as to what extent violations of the Statute or internationally recognized human rights find their operation through article 69 para. 7 as opposed to paragraph 4. Clearly, violations of rights that are specifically enumerated in the Statute or recognized internationally find their remedy regarding admissibility in paragraph 7. Therefore, in situations where paragraphs 4 and 7 overlap, paragraph 4 is either a statement of principle to which paragraph 7 provides specific rules in the situations therein outlined, or is a residual means of non-admissibility or exclusion where paragraph 7 does not apply but the fairness of the trial may nonetheless be prejudiced by the admission of the evidence. The relationship between paragraph 4 and 7 in this regard may be clarified through the jurisprudence of the Court.

The failure to comply with decisions of the Trial Chamber may be taken into account when the Trial Chamber rules on the admissibility of the evidence under article 69 para. 4. Evidence will likely only be inadmissible for failure to comply if the failure was so egregious that its impact on the rights of the accused is of such importance as to outweigh the possible value of the evidence for the proceedings¹²².

4. ‘fair evaluation of the testimony of a witness’

- 50 In authorising the Court ‘to request the submission of all evidence that it considers necessary for the determination of the truth’, article 69 para. 3 recognises that the search for truth is a fundamental concern of the trial process. Therefore, it is logical that the Court may, in ruling on the relevance and admissibility of any evidence, take into account any prejudice that such evidence may cause to a fair evaluation of the testimony of a witness. Many of the considerations that are applicable to determining prejudice to a fair trial (discussed above) apply equally to the fair evaluation of a witness.
- 51 First, the nature of the evidence or the values upon which probative value is being determined can result in a situation where the evidence may be considered to possess more probative value than it actually does. The admission of such evidence may have an adverse impact on the fair evaluation of the testimony of a witness, as it obscures the true probative value of the evidence or ‘the determination of the truth’ by the Court. For example, as noted in the discussion on ‘relevance and admissibility’, above, evidence of prior conduct which is not rationally related to the conduct or issue in question, particularly if it is value-laden, can obscure the true probative value of the evidence¹²³. This is the rationale that motivates rules 70 and 71.
- 52 Second, as also noted above, the Statute specifically charges the Prosecutor and the Court ‘to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’¹²⁴. While such protection is important in its own right given the inherent dignity of all human beings, the manner of presentation of evidence, or the lack of sufficient safeguards for the protection of victims and witnesses, can have an adverse impact on the willingness and ability of a witness to testify, especially to testify truthfully and without fear of outside repercussions or threats, thereby prejudicing the fair evaluation of their testimony and the determination of the truth¹²⁵.

¹²² See mn. 37 *et seq.*

¹²³ *E.g., Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21-T, Judgement, 16 Nov. 1998, para. 70, which held that evidence of prior sexual conduct was irrelevant and inadmissible. rule 96 (iv) ICTY specifically addresses this situation.

¹²⁴ See discussion of ‘fair trial’, mn. 44 *et seq.*, and article 68 para. 1.

¹²⁵ In *Prosecutor v. Tadić*, IT-94-1, Decision of the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 Aug. 1995, some witnesses were granted the ability to testify anonymously in order to ensure their protection, thereby excluding evidence of their true identity, as the admission of evidence of identity would prejudice the giving and fair evaluation of their testimony.

5. ‘inter alia’

Paragraph 4 does not set out a specific test or standard as to how relevance is to be balanced with other factors. As noted earlier¹²⁶, formulations similar to that in rule 89 *lit. D ICTY* were not accepted for the purposes of the Statute, in favour of a statement of principle and a listing of some of the factors that may be taken into account. Paragraph 4 does not contain an exhaustive list, and the Rules do not provide a specific test. The Court will have discretion to interpret article 69 para. 4 and can consider other factors, but will have to keep in mind the very clear guidance provided by rules 70 and 71 dealing with cases involving sexual offences, sexual conduct and sexual violence. 53

6. ‘in accordance with the Rules of Procedure and Evidence’

Rule 64 establishes the general procedure for considering relevance or admissibility, requiring that the issue be raised at the earliest practical opportunity and that the Court provide reasons for any ruling it makes on relevance or admissibility. It further clarifies that evidence found to be irrelevant or inadmissible shall not be considered by the Chamber in its judgment. As noted earlier, no explicit test or standard is incorporated in paragraph 4, and neither is the list of factors that should be taken into account exhaustive. 54

A far greater degree of direction is provided through the Rules when it comes to determining the relevance or admissibility of evidence in cases of sexual violence. Any attempt to introduce or elicit evidence of consent to a sexual crime or evidence touching on prior or subsequent sexual conduct of a victim or witness triggers the requirements of rule 72. This rule requires the party seeking to introduce or elicit such evidence to first provide notice to the Court, including the substance of such evidence and its relevance to issues in the case. An *in-camera* will then be held to hear the views of the defence, the Prosecutor and the witness or victim or their representative, if any. The Court must state on the record the specific purpose for which any evidence admitted through this process may be used. Rule 72 spells out clearly the relevant tests and principles it must apply in such a hearing.

7. ‘The Court’

Although article 69 is within ‘Part 6: The Trial’, various paragraphs within article 69 refer to the ‘Court’, which raises the question whether article 69 might be applicable at other stages of the Court’s proceedings given that the term includes all of its chambers under article 34? Although paragraph 7 contains no reference to ‘Court’, paragraph 4 does and is the general provision concerning admissibility of evidence. Can the Pre-Trial Chamber exclude the admission of evidence for its own purposes, such as at the confirmation hearing? If it can, is such decision binding on the Trial Chamber? Can the Pre-Trial Chamber hear a pre-trial motion to exclude evidence for the purposes of the trial? Ought the Pre-Trial Chamber to have any of these powers? A number of these questions have been examined by some authors, and it is suggested that the Pre-Trial Chamber can exclude evidence in the context of its own proceedings. The answers to the other questions are less clear¹²⁷. These matters were resolved in the context of the Rules by creating one chapter on rules relating to various stages of the proceedings (Chapter 4) and a separate chapter for those rules applicable exclusively to the trial procedure (Chapter 6). Since those rules that relate directly to article 69 were included in Chapter 4, it is likely that article 69 is intended to apply beyond the context of the trial itself. 55

¹²⁶ See text at note 31.

¹²⁷ Trapp and Lonsdale, *Excluding Evidence: the Timing of a Remedy*, unpublished manuscript (1998), Faculty of Law, McGill University, Canada.

V. Paragraph 5

Rule Cross-Reference: See rule 73 (Privilege), rule 74 (Self-Incrimination), rule 75 (Incrimination by Family Member), rule 190 (Notice to witnesses), rule 191 (Assurances)

1. 'respect and observe'

56 The main object of this obligation is to prevent disclosure of privileged communications. The practice of the obligation to respect the privilege is provided in the Rules and is similar in principle to the Rules of the ICTY. In general, at the ICTY, privileged communications are not disclosed at trial, unless the accused consents to disclosure or has already voluntarily disclosed the content of the communication to a third party, thereby indicating that he or she did not in fact regard the communication as strictly confidential¹²⁸. In rule 73, the ICC adopted the same high threshold for any waiver of the privilege.

The Court will not be entitled to order the defence to disclose statements given by a witness or the accused under the privilege. Based on the jurisprudence of the ICTY, this may also apply to statements made by the accused prior to being fully informed of the charges against him or her¹²⁹.

2. 'privileges on confidentiality'

57 The privileges to be respected and observed are defined in detail in rule 73 (privileged communications and information). Privileges proposed in the Committee of the Whole at the Rome Conference, but which ultimately were not specifically mentioned in the Statute (lawyer-client, doctor-patient and confessor-penitent), are given particular recognition in the rule.

The lawyer-client privilege in rule 73 is almost absolute and can only be breached if its possessor consents to disclosure in writing or voluntarily discloses a communication to a third party who then provides evidence. The ICTY has viewed lawyer-client privilege as the privilege of the client and not the legal adviser and extended it to cover only confidential communications and documents which come into existence or are generated for the purpose of giving or getting legal advice or in regard to prospective or pending litigation¹³⁰.

Rule 73 uses the term 'legal counsel' in preference to 'lawyer' as the former term is more comprehensive. However, at the same time, it restricts the privilege to communications made in the context of the professional relationship. This ensures maximum flexibility on the part of an accused to appoint counsel of their own choosing, while it prevents an accused from using the privilege to cloak communications that were made for purposes other than the giving or receiving of legal advice.

The doctor-patient privilege is given an expansive treatment in rule 73, with psychiatrists, psychologists and counsellors specifically mentioned. A claim to privilege based on a listed relationship must still satisfy the criteria set out in sub-rule 73(2). The advantage of listing these relationships in the rule is that it creates a presumption in their favour. While some delegates to the Preparatory Commission felt that the reference to counsellor needed greater definition, this issue was resolved by adding a particular reference to relationships involving victims¹³¹.

¹²⁸ See rule 97 ICTY (relating to lawyer-client privilege only).

¹²⁹ *Prosecutor v. Tadić*, (Decision on Prosecution Motion for Production of Defence Witness Statements) 27 Nov. 1996, IT-94-1-T; JRWD Jones (ed.), *Practice of the International Criminal Tribunal for the Former Yugoslavia* 165 (2nd ed. 1997).

¹³⁰ *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on motion for production of documents – Dzonlic Testimony, 11 Mar. 2002.

¹³¹ For a full discussion of the negotiating history of rule 73 see note 19, D. Piragoff, *Evidence*, p. 357.

The clergy privilege is more narrowly defined, restricting the privilege to circumstances where it is an integral part of the practice of the religion concerned. However, unlike the professional privileges, the Court is required to honour the privilege when a communication fits within the definition.

Professional privileges other than lawyer-client will be evaluated on a class basis using the three criteria set out in sub-rule 73(2):1) the existence of a confidential relationship producing a reasonable expectation of privacy/non-disclosure, 2) a finding that confidentiality is essential to the relationship, and 3) a finding that the privilege furthers the objectives of the Statute and Rules¹³². These criteria mirror those used in many States to decide whether a privilege should be recognized¹³³.

The ICTY has ruled that the ICRC enjoys a privilege under international law because the nature of its work requires that it maintain absolute neutrality in conflict situations¹³⁴. Sub-rule 73(4) grants the International Committee of the Red Cross the right to assert an exemption from disclosure requirements regarding information, documents or other evidence that came into its possession in the course of or in consequence of performing its functions. The ICRC privilege is designed to protect its neutrality, covering all its communications as well as shielding its personnel from having to divulge anything they saw, heard or documented in the course of their work. Unlike the professional privileges, the privilege sought by the ICRC was intended to benefit the ICRC rather than a right of the accused or the right of a witness or victim. As a consequence, it is considerably broader than the professional privileges and can be asserted by the ICRC for its own protection. However, the rule places an onus on the ICRC to object in writing to disclosure should the Court determine that evidence in the ICRC's control is of great importance to a case. The rule seeks to promote consultations between the Court and the ICRC while preserving the ICRC's ability to assert its privilege.

The Rules of the ICTY on privilege focus on the lawyer-client relationship¹³⁵, but the tribunal has asserted its right to recognize additional privileges on a principled basis. The ICRC decision is the most notable example of this use of inherent jurisdiction. Recently, the ICTY also acknowledged the existence of a qualified form of journalistic privilege¹³⁶. The ICTY decisions are not precedents in any strict sense, since the ICC does not recognize *stare decisis* and, in any event, the ICC rule governing privileges is quite different from the comparable ICTY rule. However, the exact scope of any new privilege is not determined by the criteria in rule 73 and, in this regard, the decisions of the ICTY on additional privileges are likely to prove helpful.

The ICC Rules establish two important privileges for witnesses: the privilege against self-incrimination in rule 74 and the privilege against incrimination of family members in rule 75.

Rule 74 permits a witness to refuse to provide answers that may incriminate him or her absent assurances from the Court. Only incriminating answers are covered. Assurances can take the form of protective measures and commitments to confidentiality. If assurances are offered prior to attending at the Court, a witness who attends can be required to testify. If a concern about self-incrimination arises during testimony without prior assurances, the Chamber may still require the witness to answer provided it assures the witness that his or

¹³² Sub-rule 73 para. 2 ICC.

¹³³ See, e.g., for Canada: *Wigmore. Evidence, rev. 1961*, Vol. 8, para. 2285; for Germany: Judgment of the Federal Constitutional Court, 19 July 1972, BVerfGE 33, 363 (375).

¹³⁴ *Simić et. al.*, see note 27.

¹³⁵ Rule 97 ICTY.

¹³⁶ See *Prosecutor v. Brđanin and Talić*, IT-99-36-AR73.8, Decision on Interlocutory Appeal, 11 Dec. 2002. The Appeals Chamber in this case indicated that the amount of protection that should be given to war correspondents from having to testify is directly proportional to the harm that forced testimony may cause to the newsgathering function. A two-prong test was proposed: First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.

her answers will remain confidential and will not be disclosed to the public or any State, and will not be used in a subsequent prosecution of the witness, except under articles 70 and 71.

The Chamber must consider the criteria in sub-rule 74(5) before requiring a witness to answer a question. Sub-rule 74(6) gives a Chamber discretion to excuse a witness from answering a question even if assurances have been given and all witnesses must be notified of their privilege under rule 74 prior to giving their testimony. Rule 74 also places a duty on the Prosecutor to advise the Court of any possibility of self-incrimination. Rule 74 further guarantees a witness the opportunity to seek independent legal advice if an issue of self-incrimination arises during the proceedings.

Rule 75 gives a spouse, child or parent of an accused person the option to refuse to answer questions that may incriminate their family member. As is the case with rule 74, only incriminating answers are covered by the privilege. The rule is fairly narrowly drawn, in its focus on incriminating answers and a select number of relationships, but it still raised concerns at the Preparatory Commission for its potential to obstruct efforts to obtain crucial evidence. The solution agreed to was the addition of sub-rule 75(2), providing that the Court may take account of an objection by a witness to a question intended to contradict a previous statement made by the witness or if a witness proves selective in choosing which questions to answer. It needs to be emphasized that the family member privilege is discretionary and attaches to the witness rather than the accused.

VI. Paragraph 6

1. ‘facts of common knowledge’

- 58 Facts of common knowledge are facts which are so notorious that they do not require formal proof. They include the facts of which an informed and reasonable person has knowledge or which he or she can learn from reliable and publicly accessible sources, having regard to the circumstances of the case and, in the context of the ICC, to the parties involved. The question whether a fact is commonly known can only be decided with regard to the setting of the trial, *i.e.* the circumstances of the case¹³⁷. Examples include geographical circumstances, established historical data or possible natural causes of certain events. In the context of the ICC, as well as in the context of the ICTY, UN documents, including resolutions of the Security Council, will also likely be regarded as facts of common knowledge. It is for the Court to decide whether a given fact will require proof or whether it can be regarded as a fact of common knowledge. An important factor will be how widely the document or data in question is available and how widely it has been accepted as common ground.

2. ‘judicial notice’

- 59 The concept of judicial notice is well known in domestic criminal law. It enables the Court to enter facts of common knowledge into the records of the proceedings and to use them as a basis for the judgment without having to take formal evidence. In litigation between governments in the International Court of Justice, the concept can be more freely used than in the context of criminal proceedings against an individual¹³⁸. It is of the very first importance – especially with regard to a possible appeal – to have the facts upon which the decision is based clearly set out in the records and in the decision itself¹³⁹.

Unlike the ICTY and ICTR, the ICC Rules do not address judicial notice, its scope or limitations. The jurisprudence on the subject at the Tribunals will likely have significant weight with the ICC. The general test used by the ICTY was facts not reasonably subject to

¹³⁷ See Prosecutor of the ICTY, Transcript of Hearing in an interlocutory appeal before the Appeals Chamber, 7 Sep. 1995, pp. 107 *et seq.*; quoted in see note 129, JRWD Jones, 162 *et seq.*

¹³⁸ *Id.*, 163.

¹³⁹ See article 74, paras. 2 and 5.

dispute balanced against an accused's right to a fair trial¹⁴⁰. A decision of the ICTR suggests that voluntary admissions by an accused cannot be the subject of judicial notice, because such admissions do not make a fact indisputable, nor do they prove that a fact is generally accepted¹⁴¹.

An important form of judicial notice is notice of adjudicated fact. It provides an efficient way to introduce evidence that speaks to issues other than the acts or conduct of the accused without having to recall witnesses heard in other proceedings for further examination. The ICTY restricted this form of judicial notice to cover only facts explicitly accepted in a judgment which had already been appealed or where the time limit for appeal had already run out and where the general test for judicial notice supports admission¹⁴². Given the specific provisions in rule 68 for the admission of written transcripts, it is unlikely the Court will exercise their authority to admit adjudicated fact under their power of judicial notice. The ICTY has ruled that judicial notice of adjudicated fact does not prevent a party from challenging the fact in question; it only means that the fact does not have to be proved¹⁴³.

VII. Paragraph 7

Rule Cross-Reference: See rule 64 (Procedure to Determine Relevance or Admissibility of Evidence), rule 72 (in-camera procedure to consider relevance or admissibility of evidence)

1. Chapeau

a) 'Evidence obtained by means of'. In light of the negotiating history, the presence of paragraph 8 and the precedential value of the *ICTY Rules*¹⁴⁴, it is clear that paragraph 7 applies to the collection of evidence by either the Prosecutor or national authorities. Paragraph 8 clearly contemplates that the Court may decide on 'the relevance or admissibility of evidence collected by a State'. The phrase 'obtained by means of' contemplates some sort of causal relationship between the violation and the collection of the evidence. It will be up to the Court to determine the degree of causality required. This degree could vary depending on the right or procedure violated (*e.g.*, the collection of evidence in the context of a violation of the right to counsel could require less of a causal link than collection in the context of an illegal search and seizure).

b) 'a violation of this Statute'. aa) **Statute**. A violation of the Statute is a relatively straightforward concept, which could include a violation of any of the rights of an accused¹⁴⁵ or of victims or witnesses¹⁴⁶ or other substantive or procedural provisions of the Statute¹⁴⁷, provided that the violation is causally related to the collection of the impugned evidence.

¹⁴⁰ *Prosecutor v. Simić et al.*, IT-95-09-PT, Decision on Pre-trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 Mar. 1999.

¹⁴¹ *Prosecutor v. Semanza*, ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 Nov. 2000.

¹⁴² *Prosecutor v. Sikirica, Dosen, Kolundžija*, IT-95-8, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 Sep. 2000; See also *Prosecutor v. Kvočka et al.*, IT-98-30-1-T, Decision on Judicial Notice, 8 June 2000, and *Prosecutor v. Kupreskić et al. (a/k/a 'Vlado')*, Decision on the Motions of Drago Josipović, Zoran Kupreskić and Vlatko Kupreskić to Admit Additional Evidence pursuant to Rule 115 and for Judicial Notice to be taken pursuant to Rule 94(B), 8 May 2001, IT-95-16-A.

¹⁴³ *Prosecutor v. Ljubčić*, IT-00-41-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 Jan. 2003.

¹⁴⁴ Commentaries to rule 95 ICTY note that while 'a Trial Chamber is not bound by national rules of evidence, it will refuse to admit evidence – no matter how probative – if it was obtained by improper methods'. Report of the ICTY, UN GAOR, 49th Sess., UN Doc. A/49/342.S/1994/1007 (1994), at para. 26, footnote 9. See also *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21-T, Judgment, 16 Nov. 1998, para. 63.

¹⁴⁵ *E.g.*, articles 55, 67, and article 64, paras. 2 and 6 (e).

¹⁴⁶ *E.g.*, articles 57, 68, and article 64, paras. 2 and 6 (e).

¹⁴⁷ *E.g.*, articles 56, 57, and Part 9 of the Statute.

- 62 **bb) Rules.** During the debates in the Preparatory Committee, the question arose as to whether a violation of the Rules should also be considered in the context of the application of article 69 para. 7 or whether such violation should be addressed by a separate provision in the Statute or the Rules. It was decided at the March–April 1998 session that this question needed to be determined in the context of the consideration of articles 21 and 52 [now article 51]¹⁴⁸. At that time, article 52 para. 1 contained an option 1 that the ‘Rules of Procedure and Evidence ... shall be an integral part of this Statute’¹⁴⁹, and article 20 [now article 21] referred to both the Statute and the Rules, as it does now¹⁵⁰. During the Rome Conference option 1 of article 52 para. 1 was deleted. Did this signal a decision that references to the Statute did not also include a reference to the Rules¹⁵¹?
- 63 As articles 51 and 52 were being considered by a different working group, much of the debate in the working group that considered Parts V and VI, particularly in the early days of the Rome Conference, were premised on the Rules being an integral part of the Statute. Is the singular reference in article 69 para. 7 to ‘Statute’ a clerical error or intentional? One view is that the restriction is intentional. Violations of the Rules are not of the same order as a violation of the Statute. The Statute, for example, contains the fundamental principles governing the Court, the investigation, the trial procedure and the rights of the suspect or accused. Furthermore, the Rules did not exist at the time of the Rome Conference, and it was difficult to contemplate exclusion for their breach when their content was not yet known. Therefore, paragraph 7 applies only to a violation of the Statute. Violations of a lesser instrument, such as rules, might justify a different remedy or exclusion based on different criteria, or even the same remedy and criteria but explicitly addressed in the Rules. The other view is that the Rules are subordinate and derived from the Statute by virtue of article 51 and, despite any specific references to them in other articles, are an integral part of the Statute. Subject to a conflict, the Rules are to be applied by the Court in accordance with article 21. The distinction made between technical and substantive procedural rules in the ICTY *Kordić* decision provides some precedent that a measure of flexibility to tolerate breaches of the rules can be permitted so long as it does not impinge on the rights of the accused¹⁵².
- 64 In any event, article 64 para. 1 provides that the functions and powers of the Trial Chamber set out in that article shall be exercised in accordance with the Statute and the Rules, and paragraph 9 (a) of that article specifically empowers the Trial Chamber to rule on the admissibility or relevance of evidence. Accordingly, the question of the application of article 69 para. 7 to a violation of the Rules or, alternatively, the creation of a separate rule of exclusion for violation of the Rules can be adopted under the process set out in article 51.
- 65 **c) ‘internationally recognized human rights’.** As noted above in Part A, prior proposals had contained references to ‘internationally protected human rights’, the ‘rights of the defence’ or ‘other relevant rules of international law’. One interpretation of ‘international law’ was that it included the *ICCPR*. Some delegations were concerned that it might also include other rules of international law that had little, if anything, to do with human rights or the Statute, despite the qualifier ‘relevant’. Accordingly, the reference to international law was deleted by the Rome Conference. The phrase ‘internationally protected human rights’ was ‘intended to cover non-treaty standards as well and would therefore be broader than “international law”’¹⁵³. It could, for example, include recognised norms and standards developed by the United Nations in the field of criminal justice, as appropriate¹⁵⁴. While accepting that non-treaty rights could also be included, the reference to internationally

¹⁴⁸ Report of the Preparatory Committee (1998), see note 15, p. 131, fn. 17.

¹⁴⁹ ICTY Rules, see note 12, p. 87 (see Option 1).

¹⁵⁰ *Ibid.*, p. 55.

¹⁵¹ See Fernández de Gurmendi, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 235.

¹⁵² See *Kordić*, see note 72.

¹⁵³ Preparatory Committee Decisions Dec. 1997, p. 38, fn. 30.

¹⁵⁴ 1996 Preparatory Committee Report I, p. 61, para. 289.

‘protected’ human rights begged the question of which international human rights were not protected. Accordingly, the reference was changed during the March–April 1998 session of the Preparatory Committee to read ‘internationally recognized human rights’, as the key question was their international recognition. Some delegations had suggested the use of the phrase ‘universal human rights’ or ‘universally recognized human rights’, but this was not accepted either by the Preparatory Committee or the Rome Conference as it was considered to be too limiting. The qualifier ‘internationally recognized’ was considered to give sufficient precision but also flexibility for growth and application. The phrase was also subsequently adopted for use in the context of article 21 para. 3.

The Statute itself contains a number of provisions that afford human rights to a suspect or an accused person¹⁵⁵. The additional and specific reference to ‘internationally recognized human rights’, which encompasses rights not specifically mentioned in the Statute, is a clear intention that these human rights should also be respected, as their violation can result in the invocation of the remedy prescribed in article 69 para. 7. Human rights, the violation of which can trigger the operation of article 69 para. 7 are not limited to those specifically mentioned in the Statute. This interpretation is supported by article 21 para. 3.

d) ‘**shall not be admissible**’. Although article 69 para. 4 provides for a discretionary rule of exclusion, paragraph 7 stipulates a mandatory rule of exclusion if its conditions are met. Paragraph 4 creates a flexible balance in which various factors can be weighed against the probative value of the evidence. Paragraph 7, on the other hand, specifically stipulates specific predicate events regarding the manner of collection of the evidence and detrimental effects on the trial process which, if they are found to exist, justify exclusion. Nevertheless, the determination of the existence of those predicate events or effects necessitates the exercise of evaluation and, thereby, discretion by the Court.

Paragraph 7 makes no distinction between evidence proffered by the Prosecutor or the accused, or requested by the Court. Accordingly, the exclusionary rule could be applied against evidence proffered by any of these sources.

Other sanctions are also available to the Trial Chamber when the rights of the accused have been compromised, including adjournments and, in extreme cases, dismissal of charges. The ICTR has ruled that, before charges will be dismissed, any injustice done to the accused must be balanced against the damage that would result to the administration of justice¹⁵⁶. In the *Baragawiya* case at the ICTR, the Tribunal dismissed the case against the accused because of failures to respect the rights of the accused while in detention. The Appeals Chamber later reversed itself, citing new evidence that showed greater diligence by the Prosecutor than was apparent during the first appeal. The latter decision established the principle that a court must seek to balance any injustice done to the accused against the injustice that might result if his or her case does not proceed to verdict, taking into account all alternative sanctions available¹⁵⁷.

2. The different subparagraphs

a) ‘**The violation casts substantial doubt on the reliability of the evidence, or**’. This basis of exclusion reflects the concern that the manner by which the evidence is obtained, in violation of the Statute or internationally recognized human rights, can adversely affect the reliability of the evidence. Some forms of illegality or violations of human rights create the danger that the evidence, such as a confession obtained from a person during interrogation, may not be truthful or reliable as it may have been proffered as a result of the duress arising from the circumstances of the violation. Other forms of evidence require preservation or collection in a manner that safeguards the integrity and reliability of the evidence from

¹⁵⁵ *E.g.*, articles 55 and 67.

¹⁵⁶ *Barayagwiza v. Prosecutor*, ICTR-97-19, Decision of the Appeals Chamber, 3 Nov. 1999.

¹⁵⁷ *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, Prosecutors Request for Review or Reconsideration, 31 Mar. 2000.

tampering, corruption or tainting¹⁵⁸. Paragraph 7 (a) requires that the effect of the violation of a procedural or substantive right of the Statute, or of internationally recognized human rights, must be of such degree that it ‘casts substantial doubt’ on the reliability of the evidence. Evidence created by the Prosecutor (*e.g.* identifications made under prosecutorial supervision) will likely be held to a high standard of reliability¹⁵⁹.

69 b) ‘The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’. This basis of exclusion includes, but is broader than, issues related to the reliability of the evidence. Despite a violation of the Statute or internationally recognized human rights, the evidence may be reliable or substantial doubt may not be cast on its reliability. Nevertheless, paragraph 7 (b) could afford a remedy. Likewise, the ‘violation’ need not be antithetical to, or damage, the proceedings for the purposes of obtaining the remedy under paragraph 7 (b). The detrimental effect in paragraph 7 (b) is triggered by the ‘admission’ of the evidence, not the ‘violation’ of the Statute or of internationally recognized human rights. A violation must exist as a precondition, as required by the chapeau of paragraph 7. However, it is the admission of that evidence, in light of the violation, that would be antithetical to or damage the integrity of the proceedings. The rationale for this paragraph is that it would be antithetical to the purposes and integrity of a Court, which was created to redress serious violations of international humanitarian law, to admit and use evidence that was obtained by means of a violation of its own Statute or internationally recognized human rights. Essentially, the admission and use of such evidence by the Court would damage the purpose and integrity of its own proceedings, which are to uphold the rule of law and human rights in the world (or, in the words of the preamble to the Statute, ‘respect for the enforcement of international justice’ and ‘peace, security and well-being of the world’).

70 The assessment of ‘antithesis’ or ‘damage’ only has meaning in reference to the meaning to be given to the phrase ‘integrity of the proceedings’. While it can broadly be said that the purpose of the Court is to uphold the rule of law and human rights, that purpose is delinked by the context of the Statute. It has been suggested by one set of authors that ‘the respect for the integrity of the proceedings is necessarily made up of respect for the core values which run through the *Rome Statute*. Clearly no sole value can be singled out as guaranteeing the integrity of the proceedings and the *Rome Statute* represents an attempt to blend competing concerns and values into a coherent whole’¹⁶⁰. These authors have identified and evaluated some of the core values as being ‘respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes’. The authors evaluate how each of these core values is expressed, clash and is balanced throughout the Statute, and suggest that ‘the Court will have regard to the relative weight which should be accorded these values when ruling on the admissibility of evidence under article 69 (7)’¹⁶¹. The Court will be required to balance these abstract competing values within the context of determining whether the admission of a particular item of evidence would be antithetical to, and seriously damage, the integrity of the proceedings.

71 The dual test within paragraph 7 (*i.e.* the requirement for both a violation and a detrimental effect), together with the inherent discretion of the Court in determining the existence of these conditions, has raised the criticism that the paragraph permits the violation of some provisions of the Statute or of human rights, so long as that violation is not of such degree as to produce the detrimental effects set out in paragraphs (a) or (b). To some extent this is a valid criticism, but paragraph 7 is the product of obtaining consensus and

¹⁵⁸ *E.g.*, article 56 prescribes a number of safeguards with respect to the collection of evidence in relation to a unique investigative opportunity, the breach of which could affect the reliability of the evidence.

¹⁵⁹ *Stakić*, see note 21.

¹⁶⁰ Trapp and Lonsdale, see note 106, p. 21.

¹⁶¹ *Id.*, 22.

compromise. It is a balance of competing conceptions as to the basis for a rule of exclusion, as well as a mechanism to resolve the application of competing core values of the Statute within the concrete context of determining the admissibility of evidence in a particular case which, while probative, has been collected in manner that offends other values. As was noted in section 1, the detrimental effects in paragraphs (a) and (b) were listed conjunctively in earlier drafts. By listing these effects disjunctively in the final version of the Statute, drafters have made this exclusionary rule more accessible.

Nevertheless, there are particular guides in the Statute which appear to give pre-eminence to particular values. Article 21 para. 1 (b), which is applicable where the Statute does not clearly resolve a matter, provides that applicable treaties and the principles and rules of international law shall be applied. In all cases, article 21 para. 3 provides that the application and interpretation of the Statute must be consistent with internationally recognized human rights, and be without any adverse distinction founded on a number of grounds therein exemplified. It can be argued, therefore, that there are some violations which, by their nature, are always so egregious or so inconsistent with internationally recognized human rights that the admission of evidence obtained as a result of such violation will always be antithetical to, or damage, the integrity of the proceedings. For example, in light of the clear obligations in the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* to refrain from the use of torture and to exclude any evidence obtained as a result thereof¹⁶², it can be argued that evidence obtained as a result of any amount of torture that is proscribed by the Convention would always be antithetical to, or damage, the integrity of the Court's proceedings. 72

VIII. Paragraph 8

1. 'deciding on the relevance or admissibility of evidence'

Given the historical background, this phrase clearly refers to decision regarding exclusion of evidence under article 69 para. 7, but it also equally applies to decisions of admissibility made under paragraph 4. Paragraph 4 is the general provision concerning the relevance and admissibility of evidence. The procedure for challenging the admissibility or relevance of evidence is provided by rule 64. A Chamber must give its reasons for any ruling on evidentiary matters and evidence ruled irrelevant or inadmissible is automatically excluded. 73

2. 'collected by a State'

Given the historical background to paragraph 8, it is likely that no distinction exists dependant on whether the evidence was collected by a State on its own initiative or at the request of the Prosecutor under Part 9 of the Statute. 74

Paragraph 8 does not address the issue of evidence collected illegally by a party other than the state or in violation of state sovereignty (e.g. evidence collected by U. N. personnel without specific authorization to do so, information collected by third country intelligence agencies or private parties). Given the negotiating history of paragraph 7, such evidence should generally be admissible, subject to the Court's discretion under paragraph 4.

3. 'shall not rule on the application of the State's national law'

This precludes the Court from adjudicating and making a decision about the applicability of a State's national law to a particular factual situation related to the relevance or admissibility of evidence. The Court is not to rule on the validity of a decision of a national court, nor to make a decision as to whether or how a national law might apply. These are 75

¹⁶² 10 Dec. 1984, *ILM* 1027 (1984).

matters of domestic jurisdiction within the sovereignty of the particular State. The Court is to be guided by its own applicable law, as set out in article 21, and the provisions of article 69. It is to apply its law, and not the domestic law, in deciding on the relevance and admissibility of evidence¹⁶³.

76 Nevertheless, given the negotiation history, there is some support that, while the Court may not rule on the application of a State's national law as one of its legal functions, compliance or non-compliance with such law may be treated as a factual matter if relevant to the admissibility or weight of the evidence. Compliance or non-compliance with national law gives some additional factual context. However, it will be difficult for the Court to consider the issue of compliance or non-compliance if this matter is contested, as this would necessitate an adjudication by the Court which is specifically prohibited by paragraph 8.

¹⁶³ This is essentially how the ICTY proceeded in *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21-T, Judgement, 16 Nov. 1998, para. 63, and *id.*, Decision on Zdravko Mucić's motion for the exclusion of evidence, 2 Sep. 1997, paras. 48–53.

Article 70

Offences against the administration of justice*

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
 - (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
 - (b) Presenting evidence that the party knows is false or forged;
 - (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
 - (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
 - (e) Retaliating against an official of the Court on account of duties performed by that or another official;
 - (f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.
2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.
3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.
4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;
- (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	5
I. Paragraph 1.....	5
1. The chapeau.....	5
2. The different subparagraphs.....	6
a) False testimony.....	6
b) Presenting false evidence.....	7
c) Corrupting, obstructing, or retaliating against a witness; destroying or tampering with evidence, or obstructing its collection.....	8
d) Corrupting, impeding or intimidating an official of the Court.....	10
e) Retaliating against an official of the Court.....	11
f) Solicitation or acceptance of a bribe by an official of the Court.....	12
II. Paragraph 2.....	13
III. Paragraph 3.....	16

* The opinions expressed here are solely that of the authors and do not necessarily reflect the views of the governments of Canada and the United States of America. The authors wish to acknowledge the significant assistance of Karine Bolduc, of the Canadian Department of Justice, in the revision of this chapter.

IV. Paragraph 4	17
1. Extension of criminal laws in States Parties	18
2. Submission to competent State authorities upon request of the Court	20
C. Final remarks	21

A. Introduction/General remarks

- 1 Immediately following the provisions governing reception of evidence is article 70, which provides the Court with means for protecting itself against efforts to undermine both the reliability of that evidence and the impartiality of its decision-making process. Initially, article 70 delineates six offences punishing the falsification of testimony or physical evidence; efforts to influence the judicial process by impeding, corrupting, or retaliating against witness or officials of the Court; and efforts to otherwise interfere with the evidence gathering process.
- 2 Second, the framework for cooperation between the Court and the States Parties varies markedly from that regulating cooperation as to core crimes. With respect to offences against the administration of justice, States Parties retain far greater flexibility in their ability to apply their traditional regimes relating to extradition and mutual assistance. Rule 167 of the Rules of Procedure and Evidence further elaborates on the cooperation provision in article 70¹.
 Finally, although article 70 provides that the Court has jurisdiction over offences against the administration of justice, the Court may decide not to exercise it, especially if a State Party is willing to exercise jurisdiction. In fact, the Court has the authority to request States Parties to prosecute such offences if committed on their territory or by one of their nationals. To implement this duty, article 70 obligates States Parties to extend their domestic criminal laws governing offences against the administration of justice to offences against the Court that have been committed on their territory or by their nationals. Rule 162 provides guidance to the Court in exercising its discretion over whether or not to assume jurisdiction².
- 3 The ILC Draft Statute submitted to the General Assembly in 1994 had originally addressed the issue of safeguarding the integrity of the Court's proceedings in article 44, para. 2, which obligated States Parties to extend their perjury laws to cover testimony provided under the Statute, and to cooperate with the Court in investigating and prosecuting such offences³. In the August 1996 meeting of the Preparatory Committee's Working Group on Procedural Matters, proposals were made to provide the Court itself, rather than States Parties, with the power to punish such offences⁴; in addition, detailed proposals were made to regulate other forms of conduct that could harm the integrity of the Court administration of justice^{5,6}.
- 4 The Zutphen text of January 1998 condensed the definitions and provided the Court with jurisdiction to prosecute the expanded set of offences⁷. In the Spring of 1998, at the final Preparatory Committee, the Working Group on Procedural Matters again revised the definitions, reincorporating concepts contained in the 1996 compilation that had been omitted from the Zutphen text⁸. However, the Working Group was unable to resolve the issue of the extent to which exercise of jurisdiction by the Court should be pursuant to the same regime contemplated for core crimes⁹. This was left to the Rome Conference, where the

¹ Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3, rule 167.

² *Ibid.*, rule 162.

³ 1994 ILC Draft Statute, article 44, para. 2, p. 22.

⁴ 1996 Preparatory Committee Report II, pp. 210–213. In the August 1997 Abbreviated Compilation of proposals on Procedural Matters, pp. 44–46, the 1996 proposals were brought forward without modification.

⁵ *Ibid.*, pp. 212–213.

⁶ The proposals included sanctions relating to misconduct before the Court, which were the predecessor to article 71 of the Rome Statute. *Ibid.*, pp. 210–211, 213.

⁷ Zutphen Draft, article 63, p. 119.

⁸ Preparatory Committee Draft, article 70, p. 111.

⁹ *Ibid.*

Working Group on Procedural Matters developed the final texts of articles 70 and 71¹⁰. See the commentary to article 71, (sanctions for misconduct before the Court), following, for a description of the negotiation process that created both articles.

The provisions of the *ad hoc* Tribunals of Rwanda and Yugoslavia addressing contempt and offences against the administration of justice are not found in their statutes, but rather in their Rules of Procedure and Evidence. Article 77 of their Rules of Procedure and Evidence sets out a non-exhaustive list of conduct for ‘those who knowingly and willfully interfere with its administration of justice’¹¹. This has been interpreted to include not only contempt in respect of misconduct immediately before the tribunal, but also ‘conduct which tends to obstruct, prejudice or abuse its administration of justice’¹². Unlike the ICTY and ICTR Rules, the ICC Statute has split ‘offence against the administration of justice’ and ‘contempt’ into two separate articles, being articles 70 and 71, respectively.

B. Analysis and interpretation of elements

I. Paragraph 1

1. The chapeau

Paragraph 1 sets forth the definitions of six offences over which the Court may exercise 5 jurisdiction when the offences are committed in relation to Court proceedings. Although article 70 is contained in Part 6 of the Statute (pertaining to trial), there is no indication that the Conference intended to limit application of these crimes to actions taking place during the trial process alone. To interpret the scope of the article so narrowly would unduly limit the ability of the Court to protect the integrity of its processes. Accordingly, article 70 is most properly interpreted to apply to violations of paragraph 1 committed during other phases of the Court’s proceedings as well¹³.

Although the chapeau of paragraph 1 provides that the ‘Court shall have jurisdiction’ over the six listed offences, paragraph 4 grants concurrent jurisdiction to the State Parties in whose territory the offences were committed or whose nationals committed such offences. (See discussion below).

Paragraph 1 further provides that offences against the administration of justice over which the Court shall have jurisdiction must be committed ‘intentionally’. Does article 30, concerning mental element and, in particular its definition of ‘intent’, apply to article 70? Article 30 provides for a definition of ‘intent’ and ‘knowingly’ and a general rule of application to ‘a crime within the jurisdiction of the Court’. Article 5 refers to ‘crimes under the jurisdiction of the Court’ as being the four ‘core’ crimes. Therefore, on strict interpretation article 30 does not apply to article 70, as the latter concerns ‘offences’ against the

¹⁰ Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7. The following UN documents are also useful in tracing the development of this article: A/CONF.183/C.1/WGPM/L.68; A/CONF.183/C.1/WGPM/L.68/Rev.1 and Rev.2.

¹¹ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/REV.49, rule 77 and Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, as adopted on 29 June 1995 and as amended as of 10 April 2013, rule 77.

¹² *Prosecutor v. Dusko Tadić*, IT-94-1-A-R77, Judgment on allegations of contempt against prior counsel, Milan Vujin, 31 January 2000, paras. 12–26.

¹³ This would include violations committed during the investigation, subsequent pre-trial proceedings (including, in appropriate cases, pursuant to a request of the Court for international cooperation), as well as during sentencing, appeal and revision proceedings. This interpretation is bolstered by the fact that, at the Rome Conference, the Working Group on Procedural Matters deleted language that would have limited application of the article of offences committed in the Court’s presence. See UN Doc. A/CONF.183/C.1/WGPM/L.68/Rev.1. See note 2, rules 63 and 163, provide further support that, subject to specific exceptions, the provisions of the Statute and the Rules apply broadly to each other.

administration of justice. Nevertheless, there are two arguments indicating that the definition of ‘intentionally’ in article 30 should apply to article 70. First, rule 163, sub-rule 1, provides explicitly that ‘the Statute and the Rules shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of offences defined in article 70¹⁴, and none of the exclusions that are set out in the rule are applicable. Second, under the Statute the Court may, pursuant to article 21 (applicable law) be guided by the definition of ‘intent’ in article 30 in developing its interpretation of ‘intentionally’ for the purposes of article 70¹⁵.

2. The different subparagraphs

- 6 a) **False testimony.** Subparagraph (a) proscribes intentionally giving false testimony. The offence is committed whenever a witness gives perjured testimony after having given an undertaking to tell the truth pursuant to article 69, para. 1. Here again, although article 69 is in Part 6, there is no indication that the conference intended to limit use of the undertaking in article 69, para. 1, to solely the trial phase of the proceedings. This is confirmed in rule 63, sub-rule 1, which provides that the ‘Rules of evidence...together with article 69, shall apply in proceedings before all Chambers¹⁶. Thus, the subparagraph should be interpreted to punish perjury committed during any phase of the proceedings carried out pursuant to the Court’s jurisdiction¹⁷.
- 7 b) **Presenting false evidence.** Subparagraph (b) makes punishable ‘[p]resenting evidence to the Court that the party knows is false or forged’. Like the giving of false testimony proscribed by subparagraph (a), the availability of criminal sanctions for this type of conduct is an important means of safeguarding the integrity and reliability of the Court’s proceedings and judgments.
- 8 c) **Corrupting, obstructing, or retaliating against a witness; destroying or tampering with evidence, or obstructing its collection.** Subparagraph (c) makes punishable a number of different forms of conduct aimed at influencing witness testimony or otherwise thwarting the production of reliable evidence. Since this subparagraph essentially condenses several offences proposed during the August 1996 Preparatory Committee, guidance may be derived from the original texts¹⁸. ‘Corruptly influencing a witness’ covers the direct or indirect offer of anything of value (e. g., a bribe) in order to influence the witness’s testimony¹⁹.
- 9 ‘[O]bstructing or interfering with the attendance or testimony of a witness’ addresses other conduct designed to prevent a witness from testifying, including threats, physical force or other forms of intimidation against the witness or a third party in order to discourage the witness from testifying²⁰. ‘Retaliating against a witness for giving testimony’ guards against

¹⁴ Rules of Procedure and Evidence, see note 2, rule 163. In the case of *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, ICC-01/09-01/15, Decision on the Prosecution’s Application under Article 58(1) of the Rome Statute, 10 March 2015, the Single Judge confirmed this interpretation of the role of rule 163, sub-rule 1, in establishing that article 30 should apply to article 70.

¹⁵ This latter argument would not likely apply to an application of article 30’s definition of ‘knowingly’ to rule 70, as it could be argued that the express reference to ‘intentionally’ would invoke the ‘unless otherwise provided’ proviso of article 30.

¹⁶ Rules of Procedure and Evidence, see note 2, rule 63.

¹⁷ See also see note 16.

¹⁸ 1996 Preparatory Committee Report II, see note 5, pp. 210–213.

¹⁹ *Ibid.*, p. 213 article []: (Obstructing the functions of the Court), paragraph 1 (c). In the case of *The Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13, Prosecution’s Response to ‘Warrant of arrest for Walter Osapiri Barasa’, 2 August 2013, while the Single Judge reviewed a number of the arguments put forward by the Prosecutor on the elements of the offence in article 70(1)(c) during the submissions made to issue the warrant of arrest under article 58, the Single Judge ultimately ruled that it was unnecessary to take a definitive position on interpretive issues or the precise scope of article 70(1)(c) of the Statute at the early stages of the proceedings and, instead, this should be determined in the context of proper adversarial proceedings.

²⁰ *Ibid.*, paragraph 1 (a). Such conduct could presumably be carried out against a third party for the purpose of influencing the witness.

physical force, threats or other forms of intimidation²¹. Finally, ‘destroying, tampering with or interfering with the collection of evidence’ penalizes efforts to improperly thwart the collecting of non-testimonial evidence, for example by destroying, altering or concealing relevant evidence of the commission of the core crimes²².

d) Corrupting, impeding or intimidating an official of the Court. Subparagraph (d) 10 punishes conduct aimed at corrupting, or using physical force, intimidation or threats against an official of the Court in order to prevent that person from carrying out his or her duties²³. It thus parallels a number of crimes relating to witnesses set forth in paragraph (c). The term ‘official of the Court’ is not defined in the Statute and was not further elaborated in the Rules of Procedure and Evidence. However, as can be drawn from article 34, it encompasses representatives of all four organs of the Court mentioned there.

e) Retaliating against an official of the Court. Similarly, subparagraph (e) parallels the 11 portion of subparagraph (c) that proscribes retaliation against witnesses. The term ‘on account of duties performed by...another official’ is an element additional to the initial 1996 proposal²⁴, which extends the sanction beyond retaliation against an official due to that particular official’s actions. It was included because retaliation against a Court official on account of another official’s actions would also have an overall chilling effect on the Court.

f) Solicitation or acceptance of a bribe by an official of the Court. Finally, ‘soliciting or 12 accepting a bribe as an official of the Court in conjunction with his or her official duties’ was added as an offence in Rome. The term ‘bribe’ is not defined in either the Statute or the Rules, but presumably includes the improper receipt of things of value other than cash.

II. Paragraph 2

As previously noted above, one issue addressed in Rome was the manner in which 13 prosecution by the Court of article 70 offences would take place. The debate revealed concerns by many delegations that various principles and procedures in the Statute were not appropriate for non-core crimes. For example, a number of delegations were of the view that the admissibility process under articles 17 through 19 was not appropriate for article 70 offences; some delegations thought the process of charging article 70 offences should be more simplified than the procedure for charging violations under articles 58 through 61 of core crimes; yet other delegations were concerned that the stringent obligations to cooperate under Part 9 of the Statute (particularly with respect to surrender of nationals) should not be applied to non-core crimes. There was also uncertainty regarding the extent to which Part 3 of the Statute (General Principles of Criminal Law) should be applied to article 70 offences.

Given the complexity of devising an appropriate procedure for prosecuting these offences and the little time available in Rome to resolve these issues, the conference decided as a general matter to leave elaboration of more detailed standards to the Rules of Procedure and Evidence. Thus, paragraph 2 of article 70 provides that the principles and procedures governing the Court’s exercise of jurisdiction over article 70 offences shall be provided for in the Rules of Procedure and Evidence. The recognition in paragraph 3 that the maximum penalty provided for these offences would be substantially less than for core crimes, and that elaboration and amendment of the Rules of Procedure and Evidence would be a rigorous process requiring approval of States Parties, provided comfort in arriving at agreement on the article.

The inclusion of the term ‘principles and procedure’ in the first sentence of paragraph 2 makes 14 clear that issues of substantive liability, as well as procedure, are to be spelled out in the Rules.

²¹ *Ibid.*, paragraph 1 (b). Such conduct, if left unchecked, might discourage other witnesses from testifying.

²² 1996 Preparatory Committee Report II, see note 5, paragraph 2.

²³ 1996 Preparatory Committee Report II, see note 5, p. 212; article [] (Influencing, impeding or retaliating against an official of the Court), paragraph (b).

²⁴ *Ibid.*

15 Chapter 9 of the Rules of Procedure and Evidence concerns ‘Offences and misconduct against the Court’, and Section I thereof provides eight rules related to ‘offences against the administration of justice under article 70’. Rule 163 explains the relationship between the Statute and the Rules. Sub-rule 1 states that the Statute and Rules shall apply with all necessary changes having been made (*mutatis mutandis*) to the Court’s investigation, prosecution and punishment of offences under article 70, except as otherwise provided by the Rules.

Due to the nature of the offences against the administration of justice, there are, however, some significant differences in how the Statute and Rules will apply with regard to article 70. Sub-rule 2 of rule 163 provides that Part 2 of the Statute, (jurisdiction, admissibility and applicable law) shall not apply, with the exception of article 21. Article 21 (applicable law) outlines the hierarchy that governs the Court’s application of the Statute, the Elements, the Rules and other sources of international law²⁵.

Likewise, sub-rule 3 states that Part 10 of the Statute (enforcement) shall not apply, with the exception of articles 103, 107, 109 and 111. These four articles deal with the role of States in enforcing sentences of imprisonment, transferring of the person upon completion of his or her sentence, enforcing fines and forfeiture measures and surrendering a convicted person who has escaped, respectively.

Rule 164 deals with the limitation period, which applies when the Court exercises jurisdiction in accordance with rule 162. Sub-rule 2 states that offences defined in article 70 shall be subject to a limitation period of five years from the date on which the offence was committed. However, if an investigation or prosecution has been initiated during this period, either before the Court or by a State Party with jurisdiction, the limitation period is interrupted. As per sub-rule 3, the enforcement of sanctions imposed with respect to article 70 offences are subject to a limitation period of 10 years from the date on which the sanction has become final. If the convicted person is detained or the person is outside the territory of the State Parties, the limitation period shall be interrupted²⁶.

Rule 165 governs the investigation, prosecution and trial of offences under article 70. Sub-rule 1 states that the Prosecutor may initiate and conduct investigations with respect to offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source. Sub-rule 2, however, provides that articles 53 (initiation of an investigation) and 59 (arrest proceedings in the custodial State) do not apply to article 70 offences²⁷. Furthermore, determinations can be made under article 61 (confirmation of the charges before trial) on the basis of written submissions without a hearing, unless the interests of justice require otherwise. In terms of trial procedure, the Trial Chamber may, taking into account the rights of the accused, direct that there be a joinder of charges under article 70 with charges under articles 5 to 8²⁸.

Rule 168 states ‘no person shall be tried before the Court with respect to conduct which formed the basis of an offence for which the person has already been convicted or acquitted by the Court or another court’²⁹. This rule fills a gap created by the exclusion of Part 2 (which includes article 20 on *Ne bis in idem*) by rule 163, sub-rule 2. Finally, as per rule 169, the Prosecutor may orally request that a Chamber order the immediate arrest of a person alleged to have committed an offence under article 70 if the offence was committed in the presence of the Chamber³⁰.

Other than the exceptions noted above, the provisions relating to the investigation, prosecution and punishment of core crimes apply *mutatis mutandis* to the offences in article 70.

²⁵ Rules of Procedure and Evidence, see note 2, rule 163.

²⁶ *Ibid.*, rule 164.

²⁷ Instead, pursuant to the second sentence of article 70 para. 2, the procedures for arrest and surrender to the Court of a person charged with an article 70 offence are those provided for by the laws of the State Party in which the person is found.

²⁸ Rules of Procedure and Evidence, see note 2, rule 165.

²⁹ *Ibid.*, rule 168.

³⁰ See note 2, rule 169.

The second sentence of article 70, para. 2 provides an important limitation to the general delegation of authority given to the drafters of the Rules in the first sentence of that paragraph. It states that where the Court seeks international cooperation from a State Party with respect to an article 70 offence that the Court is investigating or prosecuting, ‘the conditions for providing international cooperation...shall be governed by the domestic laws of the requested State’. This formulation provides greater scope for a State to deny cooperation than provided in the provisions of Part 9. It would generally permit the requested State to apply grounds for granting or refusing extradition and mutual assistance provided for in its domestic laws that govern cooperation in criminal matters with other sovereign States. Thus, while nationality is not a ground for refusal of surrender for a core crime under article 89, a State Party in which extradition of nationals is otherwise prohibited would not be obliged to surrender a national to the Court for an article 70 offence³¹.

Although article 70, para. 2, prohibits the Rules from prescribing the conditions for providing international cooperation that are to be applied by States (as this is to be subject to each State’s domestic law), the Rules elaborate conditions for the Court. Rule 167 deals with international cooperation and judicial assistance with regard to article 70 offences. Sub-rule 1 of rule 167 states that the Court may request a State to provide any form of international cooperation or judicial assistance corresponding to the forms of cooperation or assistance provided in Part 9 of the Rome Statute (International Cooperation and Judicial Assistance). When the Court requests such assistance, it must indicate that the basis of the request is an investigation or prosecution of an offence under article 70. Sub-rule 2 reiterates article 70, para. 2, and states that the ‘conditions for providing international cooperation of judicial assistance to the Court with respect to offences under article 70 shall be those set forth in article 70, para. 2’³². Therefore, States Parties can apply their domestic law in determining the manner in which they fulfill these requests. The Court is governed by the procedures set out in the Statute and Rules.

III. Paragraph 3

Article 70 states that in the event of a conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both. While the Statute has imposed a maximum term of imprisonment, other aspects of the sentence have been left to the Rules. Rule 166 addresses sanctions for convictions under article 70³³.

First, rule 166 states that article 77 (the article that governs sanctions over those who have been convicted of a core crime) does not apply to article 70 offences, with the exception of an order for forfeiture under article 77, para. 2(b), which may be ordered in addition to imprisonment or a fine, or both. For all other sanctions, rule 166 applies.

Sub-rule 2 of rule 166 states that each offence may be separately fined and those fines may be cumulative. However, under no circumstances may the total amount of the fine ‘exceed 50 per cent of the value of the convicted person’s identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants’³⁴.

³¹ Since article 86 obligates States to ‘in accordance with the Provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’, and article 88 requires that States Parties ‘ensure that there are procedures available under their national law for all forms of cooperation which are specified under this Part’, each State Party appears obligated to have a legal basis for cooperating with the Court on article 70 crimes. The State Party’s existing laws governing cooperation in criminal matters should suffice, as long as they provide for cooperation with international courts as well as other sovereign States.

³² Rules of Procedure and Evidence, see note 2, rule 167.

³³ *Ibid.*, rule 166.

³⁴ *Ibid.*

The Court must also allow a reasonable period in which to pay the fine and the Court may provide for payment of a lump sum or by way of installments during that period. If the convicted person does not pay the imposed fine, the Court may take appropriate measures pursuant to rules 217 to 222, and in accordance with article 109. Article 109 addresses the enforcement of fines and forfeiture measures and by sub-rule 166 para. 5 its provisions will apply to sanctions under article 70. In case of non-payment of a fine, the Court may impose a term of imprisonment in addition to any term which may have already been imposed. The Court will take into account the amount of the fine already paid in determining this term. Of course, pursuant to article 70 para. 3, the total period of imprisonment may not exceed five years.

IV. Paragraph 4

- 17 While the Rome Conference recognized that it would be impractical to leave the prosecution of article 70 offences exclusively to the jurisdiction of States Parties, it was also mindful of the fact that the Court might have insufficient time and resources to pursue all such offences, or might have difficulty exercising jurisdiction, or that it might otherwise be more appropriate in a particular case for a prosecution to be carried out by the State. For example, prosecution by a State Party might be required where the State will not extradite its national, or where the article 70 offence is so serious (*e. g.*, the retaliatory murder of a witness or Court official) that the maximum penalty under a prosecution by the Court might be insufficient.

1. Extension of criminal laws in States Parties

- 18 Subparagraph (a) is a modification of the original ILC approach³⁵. It requires States Parties to ‘extend its criminal law penalizing offences against the integrity of its own administration of justice to offenses against the administration of justice referred to in the article, committed on its own territory, or by one of its nationals’. This formulation does not require States Parties to enact a law to penalize conduct in a manner as exactly described in article 70, para. 1. Rather, States Parties are obliged to extend their laws applicable to domestic violations to violations against the Court committed on their territory or by their nationals. Some States may decide to extend existing domestic offences, and some may enact new offences modeled on article 70. The obligation on State Parties is that in some manner the conduct described in article 70 be a criminal offence under its domestic law. Thus, the legal framework put in place by each State Party to implement this obligation will not be completely uniform³⁶. In a case in which the State Party, of which the accused is a national or on whose territory the offence is alleged to have been committed, does not have criminal laws proscribing a form of conduct prohibited under paragraph 1, the sole option would be prosecution by the Court.
- 19 In many cases involving violations of paragraphs 1 (a) or (b) of article 70, the State on whose territory the crime was committed will be the Netherlands, the seat of the Court³⁷, but it could be another State if the Court decides to hold a session in that State pursuant to article 62, or when a State Party executes a request for mutual assistance under article 93³⁸. The remaining article 70 violations could also take place in other States. In many cases, the requirement that States make punishable such offences committed by their nationals will enable prosecution to take place where the perpetrator is found, which is particularly important if the State in question has a legal prohibition against the extradition of its nationals.

³⁵ See text accompanying see note 3.

³⁶ If a State has a more extensive regulation of crimes against its administration of justice that contained in paragraph 1, the text appears to require extension to offences committed against the Court.

³⁷ See article 3.

³⁸ See article 93, para. 1 (b), (requiring States to cooperate in the taking of ‘testimony under oath’ for use in Court proceedings).

2. Submission to competent State authorities upon request of the Court

At the time of publication, there have been no article 70 prosecutions at the ICC. However in the Situation in the Republic of Kenya, two Chambers issued warrants of arrest under the ICC jurisdiction³⁹ and, due to the circumstances of the cases, did not consult with a State Party any states over the jurisdiction issue. Both warrants of arrest discussed the factors to be considered in rule 162, sub-rule 2 of the Rules, when determining whether there is a need to consult with any State Party that may have jurisdiction over the offences allegedly committed. In the Situation of the Central African Republic, an arrest warrant⁴⁰ was issued in the latter part of 2013, wherein the Single Judge discussed the issue of expediency when considering whether to consult with a State Party under rule 162 of the Rules. The charges were confirmed in 2014.⁴¹

C. Final remarks

At the time of publishing, there have been no article 70 prosecutions at the ICC. However in the latter part of 2013, warrants of arrest were issued in relation to persons involved in two situations (Kenya and the Central African Republic) for alleged participation in article 70 offences⁴². The confirmation of charges hearings should happen some time in 2014.

Finally, it is interesting to note that in accordance with article 112, para. 4 of the Rome Statute, the Assembly of State Parties have established an Independent Oversight Mechanism⁴³, which has *proprio motu* investigative powers to conduct investigations into certain allegations of misconduct⁴⁴. However, the Independent Oversight Mechanism is explicitly not authorized to investigate offences under article 70⁴⁵.

³⁹ See *Gicheru and Bett*, see note 15, and see *Basara*, see note 20.

⁴⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, 20 November 2013.

⁴¹ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014.

⁴² *The Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13-1-Red2, Warrant of arrest for Walter Osapiri Barasa, 2 August 2013 and *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13-1-Red2, Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 20 November 2013.

⁴³ Resolution ICC-ASP/8/Res.1 (26 November 2009), as amended by Resolution ICC-ASP/12/Res.6 (27 November 2013).

⁴⁴ Resolution ICC-ASP/12/Res.6 (27 November 2013), paras. 28–29. The individuals subjected to the Independent Oversight Mechanism include all elected officials of the ICC, all staff subject to the Staff and Financial Regulations and Rules of the ICC and contractors and/or consultants retained by the court or working on its behalf.

⁴⁵ Resolution ICC-ASP/12/Res. 6 (27 November 2013), para. 30.

Article 71

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Directly relevant Rules of Procedure and Evidence: Rules 170 to 172.

Literature: Ambos, K., “Witness Proofing” before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman’, (2008) 21 *LeidenJIL* 911; Bornkamm, *Pressefreiheit und Fairness des Strafverfahrens. Die Grenzen der Berichterstattung über schwebende Strafverfahren im englischen, amerikanischen und deutschen Recht* (Nomos 1980); D’Ascoli, S., ‘Sentencing Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties’, (2007) 5 *JICJ* 735; Gut, T., *Counsel Misconduct before the International Criminal Court* (Hart Publishing 2012); Hiéramente, M., ‘In the Case Prosecutor v. Defence: Der Haftbefehl gegen Bemba und Mitglieder seines Verteidigungsteams vom 20.11.2013’, (2014) *ZIS* 123; Turner, J.I., ‘Policing International Prosecutors’, (2012) 45 *NYUJIL&Pol* 175; Sluiter, G., ‘The ICTY and Offences against the Administration of Justice’, (2004) 2 *JICJ* 631.

Content

A. General remarks	1
I. Content and context	1
II. Historical overview	4
B. Analysis and interpretation of elements	9
I. Personal scope of application: ‘persons’ present before the Court	10
II. Institutional, temporal and local scope of application: persons ‘present’ ‘before’ ‘the Court’	16
III. Substantive scope of application: ‘misconduct’	19
1. The <i>actus reus</i> of misconduct	19
2. The <i>mens rea</i> of misconduct	24
IV. Sanctions available to the Court: ‘Administrative measures’ ‘such as’ ‘removal from the courtroom’ or a ‘fine’	26
V. Discretion: ‘may’ (including article 71 as <i>prima ratio</i> to ensure a fair trial) ..	30
VI. Procedure	32
1. Sanctioning procedure within the RPE: ‘procedures governing the imposition’ of a sanction ‘shall be those provided for in the RPE’	32
2. Sanctioning procedure without the RPE	33

A. General remarks*

I. Content and context

- 1 Article 71 bestows upon the Court **regulatory powers to sanction** persons present before it with administrative measures for misconduct. The provision’s exact scope of application is yet to be fully determined. According to the (only, and thus) leading Appeals Chamber decision, article 71 powers are *prima ratio*, and serve to ensure compliance with court orders (see mn. 2 and 31).¹ As put forward at the end of article 71(1) as well as in article 71(2), this

* Many thanks to stud. iur. Malena Todt for her proof reading.

¹ *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for

provision has to be read in conjunction with rules 170, 171 and 172 RPE, which spell out more (albeit not all) details and thus bring about some degree of legal certainty about the preconditions, procedures and consequences of a sanctionable misconduct. At minimum, article 71(1) and rules 170, 171 allow for upholding and policing court order during session (also *cf.* the German concept of ‘*Sitzungspolizei*’). Whether (and to what extent) article 71(1) goes beyond this basic notion of upholding order, and whether (and to what extent) article 71(1) is comparable to the ad hoc tribunals’ ‘contempt of court powers’², is open for discussion (see mn. 23 and 26).

Article 71 essentially **protects** the fair, impartial and effective administration of justice of and before the Court. From the history of the few relevant drafts and articles on the international level (see mn. 6) it follows that the dignity and decorum of the proceedings are safeguarded as well. Article 71 avails the Court with the power to enforce the ‘smooth running’ of the case before it, and thus upholds fair as well as effective criminal proceedings by enabling the Court to exercise its jurisdiction properly, i.e. undisturbed by disruptive influences. – The **purpose** of article 71 sanctions are regulatory in nature, which leads to an intersection of repressive as well as preventive, punitive as well as policing sanctioning rationales. As noted by the Appeals Chamber, article 71 provides the Court ‘with a specific tool to maintain control of the proceedings and, thereby, to ensure a fair trial when faced with the deliberate refusal of a party to comply with its directions. The purpose of such sanctions is not merely [...] to punish the offending party, but also to bring about compliance’³.

Article 71 forms part of an overall regime to punish, sanction, repress and prevent, i.e. to **police infringements upon the integrity of the administration of international justice**. The scope and powers of and the exact delineations within this regime are not yet fully explored:

- Article 70 encompasses many ‘classical’ offences against the administration of justice (like *inter alia* perjury and obstruction). Other than under the common law doctrine of ‘contempt of court’ (see mn. 4 *et seq.*), and other than under the RPEs of other international criminal tribunals (ICTY; ICTR; SCSL)⁴, these offences are no procedural offences in the narrower sense, i.e. the ‘victim court’ does not act as *iudex in sua causa*⁵ under the Rome Statute (*cf.* rule 165).
- Articles 46 and 47 foresee special sanctions (removal from office, article 46; disciplinary measures, article 47), if a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar is found to have committed (serious, article 46; or less serious, article 47) misconduct or a breach of her or his duties.
- Articles 30 *et seq.* of the Code of Professional Conduct for counsel contain a special disciplinary regime, especially in case of counsel misconduct. Article 31 of this Code reads:

‘Counsel commits misconduct when he or she:

- (a) Violates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her;
- (b) Knowingly assists or induces another person to commit any misconduct, referred to in paragraph (a) of this Article, or does so through the acts of another person; or
- (c) Fails to comply with a disciplinary decision rendered pursuant to this chapter.’

Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively [...], Appeals Chamber, 8 October 2010, paras. 55 *et seq.* [doc947768.pdf].

² As suggested notably by Ambos (2008) *LeidenJIL* 911, at 916. For the countervailing point of view see Gut, *Counsel Misconduct before the International Criminal Court* (2012) 256 *et seq.*

³ *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively [...]’, Appeals Chamber, 8 October 2010, para. 59 [doc947768.pdf].

⁴ See rule 77 of the respective RPE.

⁵ For more details see Piragoff, Article 70. – As to the different approaches to offences against the administration of justice in common and civil law jurisdictions also *Cf.* Sluiter (2004) 2 *JICJ* 631, 631 *et seq.*

- Section 5 of the Code of Conduct for the Office of the Prosecutor contains rules on ‘Discipline’ within the OTP. *Inter alia*, according to rule 74 of this Code,
 - ‘[a]ny unsatisfactory conduct may result in the Prosecutor imposing appropriate disciplinary measures in accordance with Chapter X of the Staff Rules.’
- Regulation 29 deals with ‘Non-compliance with these Regulations and with orders of a Chamber’ and reads:
 1. In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice.
 2. This provision is without prejudice to the inherent powers of the Chamber⁶.
- Trial Chamber V has recently suggested that the Court enjoys ‘the power to address misconduct occurring *outside the courtroom* by having recourse to its broad discretionary powers to ensure a fair trial and uphold the interests of justice as provided for in article 64(2) of the Statute and to rule on any other relevant matter in performing its functions as provided for in article 64(6)(f) of the Statute.’ This was deduced from ‘the concept of *‘inherent powers’* which provide courts with authority to undertake all acts reasonably required to efficiently perform their function.’⁷ (On this issue see mn. 18).
- Other reactions to misconduct include the exclusion of tainted evidence (brought about *e.g.* by defence misconduct) or, as the most drastic remedy, a stay of proceedings if (esp. prosecutorial) misconduct renders a trial unfair; the latter became prominent twice in *Lubanga*. (On this issue see mn. 31)⁸.

II. Historical overview

- 4 **Contempt of court** is a well-known common law concept used to describe certain offences or (mere) misconduct committed in the face of a court and punishable directly by the court confronted with the act or by another chamber of the same court. Such a reaction by the judiciary is broadly accepted in many legal systems of the world, albeit with differing concepts as to what kind of behaviour falls within the overall notion of contempt of court and where to draw the line between offences against the integrity of the court and less severe misconduct⁹. Contempt of court can be described as ‘means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally’¹⁰.

⁶ As rightly noted by Schabas, *An Introduction to the International Criminal Court* (2011) 156, ‘[i]t is not clear what these inherent powers may be.’

⁷ *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, Trial Chamber V(B), 31 May 2013, para. 14 *et seq.* (emphasis added) [doc1599174.pdf].

⁸ Also see Jacobs, in: De Hert et al. (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013) 355, at 357.

⁹ See for a comparison of the concept of contempt of court in the Anglo-American criminal justice system and relevant regulations especially in Germany Bornkamm, *Pressefreiheit* (1980). See for Austria the applicability of common crimes like perjury committed during the pre-trial proceedings or intimidating witnesses, §§ 233(3)–237 öStPO (Austrian Code of Criminal Procedure) and for offences in the courtroom §§ 277 and 278 dStPO (German Code of Criminal Procedure). See for Germany § 70 (‘Grundlose Zeugnis- oder Eidesverweigerung’; refusal to give evidence or to swear), and § 77 (‘Folgen des Ausbleibens oder der Weigerung’; consequences of non-appearance and refusal), German Code of Criminal Procedure. See also § 176 and especially 177 (‘Maßnahmen zur Aufrechterhaltung der Ordnung’; measures to uphold court order), and § 178 (‘Ordnungsmittel wegen Ungebühr’; sanctions for misconduct) of the Gerichtsverfassungsgesetz.

¹⁰ This was recently confirmed by The [UK] Law Commission (LAW COM No 340), *Contempt of Court (1): Juror Misconduct and Internet Publications* (2013) 1 (available online at <http://lawcommission.justice.gov.uk/docs/lc340_contempt_of_court_juror_misconduct.pdf> accessed 9 February 2015). – It was also favourably quoted in *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgement, Appeals Chamber, 31 January 2000, para. 14 and fn. 14 thereto.

Other international criminal tribunals enjoyed or still enjoy powers very much akin to the common law contempt powers¹¹: The acceptance of this concept as such, especially in common law countries, made it unnecessary to regulate its applicability during the Nuremberg and the follow up trials against Nazi war criminals in the *IMT Statute* or its Rules or in other laws designed for the prosecution of such crimes after the Second World War. The IMT-Charter just stated in Article 18(c) that the Tribunal shall ‘deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges’. Before the IMT itself, no contempt matter arose. But the United States Military Tribunals sitting later in Nuremberg had to deal with three such matters, namely in the cases against *Karl Brandt*, *Joseph Altstoetter* and *Alfried Krupp von Bohlen and Halbach*¹². – Regulations concerning offences against the integrity of the court or contempt of court were not proposed in international documents elaborated within or outside the UN for developing international criminal law and its jurisdiction, like the *ILC Draft Codes* and Draft Statutes expounded in the early fifties. In the seventies and eighties, however, contempt of court received more attention at the *international* level when terrorists all over the world tried more or less successfully to use the trials against them as an opportunity to spread their political ideas and to intimidate or at least to irritate the criminal justice systems responsible for their trial. To avoid such disturbances, regulations at the *national* level were introduced or improved in order to clearly mark the limits of what would not be tolerated. – Against this background, the issue of contempt was ‘only’¹³ included in the RPEs of the ICTY and ICTR in the middle of the 1990s. Up until today, rule 77 regulates contempt of court,¹⁴ and treats the ‘victim court’ as *iudex in sua causa*. Rule 77 summarily encompasses mere regulatory as well as severe substantive offences against the administration of justice that can carry a sentence of up to seven years of imprisonment or a fine up to 100,000 Euros or both (rule 77(G) RPE ICTY). In addition, rules 80(B) RPE ICTY and ICTR (on ‘Control of Proceedings’) provide that persons other than the accused can be removed from the courtroom to guarantee the right of the accused ‘to a fair and public trial’ or ‘to maintain the dignity and decorum of the proceedings’; and under rules 80(B) RPE ICTY/ICTR, the Trial Chamber may remove an accused from the courtroom if he or she ‘has persisted in disruptive conduct following a warning that such conduct may warrant the removal’.

During the immediate **drafting process for the Rome Statute**, the first proposals for ‘Offences against the integrity of the Court’ appeared in the abbreviated compilation drafted by the Preparatory Committee in August 1997 and in its Report on its Fifth Session, of December 1997¹⁵. In both documents an article 44*bis* nominates in four groups offences like perjury, ‘influencing, impeding or retaliating against officials of the Court, obstructing the functions of the Court’ and ‘contempt committed during the course of its proceedings’. It provided for imprisonment not exceeding a still undefined number of months or years or a fine or both. Agreement was expressed that ‘the precise formulation of this article must be further reflected upon’ and ‘that these offences required further definition in the Statute’¹⁶. Article 44*bis* was verbally included with its footnote as article 63 in the *Zutphen Draft* January 1998. In addition, only reference was made to ‘article 5 [20] (Crimes within the jurisdiction of the Court)’, in the context of which it has been noted: ‘It might be necessary to

¹¹ See also the account given in *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgement, Appeals Chamber, 31 January 2000, paras. 12 *et seq.*

¹² See *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgement, Appeals Chamber, 31. Jan. 2000, para. 14 and fn. 14 thereto.

¹³ As to sentencing contempt before the ICTY, ICTR and SCSL being an ‘unforeseen problem’ and as to problems of reconciling it with the principle of legality, see D’Ascoli (2007) 5 *JICJ* 735, esp. 750 *et seq.*

¹⁴ On contempt before the ad hoc tribunals and a discussion on rule 77 RPE ICTY/ICTR see Turner, in: De Hert et al. (eds.), *Code of International Criminal Law and Procedure, Annotated* (2013) 358.

¹⁵ For the abbreviated compilation see Preparatory Committee Decisions August 1997, 44–46. For the Report of the fifth session see Preparatory Committee Decisions December 1997, 31.

¹⁶ See note 32 on Article 44*bis* in the Preparatory Committee Decisions December 1997.

have a cross-reference to article 63 [44bis] (Offences against the integrity of the Court) in this Part', a proposal that was not included in the final Statute¹⁷. The discussion of the Zutphen Draft during the last session of the Preparatory Committee produced a more extensive version in a corresponding article 70, headed 'Offenses *or acts* against the integrity of the Court' (emphasis added), and containing more precise definitions of individual offences or acts of misconduct. However, these proposals did not, as before, with regard to the determination of the 'applicable procedure for these offences' refer exclusively to the rules, recommending instead that only specific questions be solved '*in accordance* with the rules' (emphasis added). In a note it was expressly stated:

It is not contemplated that all the provisions of the Statute and Rules, whether substantive or procedural, regarding the Court's exercise of jurisdiction over article 5 crimes would apply equally to these offenses. Further work to clarify this issue will be essential. Moreover, similar thought must be given to States parties' obligation to surrender persons charged with these offenses, especially when the State Party is pursuing prosecution itself¹⁸.

- 7 During the last week of the **Rome Conference**, when the need for a compromise became more and more urgent, the rather neutral concept of what is now article 71 was agreed upon. It appeared important to have a separate regulation besides articles 70 and 63(2) (i.e. the offenses against the administration of justice and the rather limited possibilities to remove the accused from the courtroom). It was necessary, however, to have an additional article dealing with a broad(er) concept of misconduct before the Court. In order to strike a compromise, it was agreed upon to give only examples in article 71(1) and to leave the finer points for the RPE (see article 71(2)). With this constructive ambiguity, consensus was achieved rather quickly and efforts concentrated on aspects of the Statute that were considered to be more important.
- 8 The drafting history of article 71 gives rise to two **evaluative remarks**: *First*, in contrast to the ad hoc tribunals' approach, the Rome Statute follows its own path. 'Contempt of court' is no longer a catchall formula to describe possible inherent powers of the Court to sanction all possible infringements upon its administration of justice. Rather, by distinguishing between articles 70 and 71, by leaving the details of sanctions for misconduct before the Court to the RPE, and by providing that offenses under article 70(1) lead to an autonomous investigation, prosecution and trial¹⁹, the Statute opted for a more formalized and more precise codification of the offenses²⁰ against the integrity of meting out international criminal justice²¹. One should hence tread lightly when interpreting article 70(1) in light of the jurisprudence of the ad hoc tribunals in particular or even the contempt concept in general. – *Second*, article 71 should be seen for what it is: a (possibly under-reflected, and possibly ambiguous) compromise during the Rome negotiations. The wording of this provision might thus not be the final arbiter of all interpretational disputes.

B. Analysis and interpretation of elements

- 9 Article 71 merely sets the **framework** for sanctioning misconduct before the Court and does not regulate the subject matter in all details. This holds true with regard to the (personal, institutional, temporal, and substantive) preconditions of sanctionable misconduct (see mn. 10 *et seq.*), the sanctions available to the Court (see mn. 26 *et seq.*), and the

¹⁷ See Zutphen Draft, and for article 5[20] there 16 *et seq.*

¹⁸ See Preparatory Committee (Consolidated) Draft, 132. This proposal was slightly amended by including 'retaliation against a witness's family and intimidation of a witness or his family' and by leaving out the brackets of the Consolidated Draft in the Model Draft Statute for the International Criminal Court presented by Bassiouni/Sadat Wexler (1998) 13 *NEP*, at 106 and 107.

¹⁹ Ambos (2008) *LeidenJIL* 911, at 916.

²⁰ Sharing this notion Hiéramente (2014) *Zeitschrift für Internationale Strafrechtsdogmatik* 123, at 123.

²¹ D'Ascoli (2007) 5 *JICJ* 735, at 755. Also *Cf.* Friman, in: Cryer et al., *Introduction ICL* (2014) 478.

sanctioning procedure (see mn. 32 *et seq.*). Rules 170 to 172 supply more details, yet far from exhaustive regulations. There is thus ample room for interpretation.

I. Personal scope of application: ‘persons’ present before the Court

Article 71 protects the fair, impartial and effective administration of justice by and before the Court, and hence **protects every person** involved in meting out justice. This includes *inter alia* judges, prosecutors, counsel, the accused, witnesses, and the general public partaking in a trial session. If, for example, a prosecutor misconducts by harassing a witness, or a witness misconducts by insulting the accused, the defensive personal scope of application of article 71 is established even if Judges are not the focus of the ‘attack’. This is because misconduct against any person before the Court may disturb the proper development of the proceedings before the Court.

At first glance, persons present before the Court are only those not belonging to one of the organs of the Court. This narrow interpretation is supported by the fact that articles 46 and 47 provide specific sanctions for misconduct of Judges, Prosecutors and members of the Registry, indicating in article 47 that disciplinary measures are available for ‘misconduct of a less serious nature’. This restrictive approach, as it was put forward in the previous edition, is however overturned by rules 170 and 171 as well as by the Court’s more recent jurisprudence. Rule 170(a) uses the neutral formulation that ‘a’ (i.e. any) person disrupting the proceedings can be removed from the courtroom. And rule 171(2) explicitly allows for sanctions against ‘an official of the Court, or a defence counsel, or a legal representative of victims.’ This suggests that article 71 **does not contain a ‘special regulatory offense’** (*‘Sonderdelikt’*), and rather aims against misconduct committed by every person factually or legally involved in meting out international justice, with the notable exception of judges active in the trial in question. While active judges are not ‘before’ the Court, but rather ‘are’ the Court, all other persons can be ‘before’ it. Therefore, article 71 *inter alia* applies against the audience and legal representatives of victims as well as against the following groups of persons:

The accused: If the accused ‘continues to disrupt the trial’, article 63(2) is – as the chapeau of rule 170 is also remindful of – the *lex specialis*. For all other forms of misconduct of the accused, article 71 is applicable²².

Counsel²³: Articles 30 *et seq.*, especially article 31 of the Code of Professional Conduct for counsel, do *not* represent absolute *leges speciales*. Rather, they can apply coincidentally, although they follow different procedural regimes.²⁴ This allows, for instance, that a misconduct committed by counsel be sanctioned by a fine under article 71(1), rule 171(1) and (4) as well as by a permanent ban on practicing before the Court under article 42(1)(e) of the Code of Professional Conduct for counsel. However, where article 42(1) of this Code foresees sanctions not covered in rules 170 and 171 (i.e. with regard to an admonishment or a public reprimand with an entry in counsel’s personal file), article 71(1) must not be used to circumvent the special procedures of said Code (see also mn. 29). – When applying article

²² See also Schabas/Caruana, *Article 63*, mn 15 *et seq.* – A more restrictive view is advanced by Elberling, *The Defendant in International Criminal Proceedings* (2012) at footnote 544.

²³ The applicability of article 71 to counsel is confirmed by *Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively [...]’, Appeals Chamber, 8 October 2010, para. 59 [doc947768.pdf], which applies article 71 indiscriminately against ‘the parties’. – For a partially countervailing position Cf. Triffterer, in: Bellelli (ed.), *Turin Conference on International Criminal Justice 14–18 May 2007* (2008), 4.I.1. therein. – For an extensive analysis of counsel misconduct see Gut, *Counsel Misconduct before the International Criminal Court* (2012).

²⁴ See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the ‘Submissions of the Libyan Government with respect to the matters raised in a private session during the hearing on 9–10 October 2012’, Pre-Trial Chamber I, 21 November 2012, para. 29 [doc1511935.pdf].

71(1) against counsel, *special considerations* have to be paid to the fact that counsel enjoy important privileges by law. Although not mentioned in article 34 as organs of the Court, counsel act as independent organs of the international criminal justice system; as such, they are an indispensable part of the administration of justice (*‘Organe der Rechtspflege’*). This means that counsel deserve a high degree of trust, and a high degree of protection against any discretionary regulatory power of the Court in order to exercise their functions properly. Counsel must in other words not be intimidated or scared by the threat of being sanctioned administratively under article 71. Its application must not interfere with their obligation to act with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously (as stated in article 5 of the Code of Professional Conduct for counsel). – However, this does not grant counsel absolute immunity from actions under article 71. As noted by the ICTY:²⁵

Courts and tribunals necessarily rely very substantially upon the honesty and propriety of counsel in the conduct of litigation. Counsel are permitted important privileges by the law which are justified only upon the basis that they can be trusted not to abuse them. It unfortunately happens that counsel occasionally do abuse those privileges or act dishonestly or improperly.²⁶

- 14 **Prosecutors:** Articles 46 and 47 as well as Section 5 of the Code of Conduct for the Office of the Prosecutor do *not* represent absolute *leges speciales*. Although unheard of in many national jurisdictions, sanctioning the OTP for misconduct under article 71 – e.g. because of non-compliance with court orders or because of not following protocols (for instance in the collection of evidence) – may well become the *via regia* to police international prosecutors (see mn. 31)²⁷; the downside of this is of course that motions to initiate article 71 action can be turned into procedural ‘weapons’ by the defense²⁸. There is hence no primacy of disciplinary proceedings against the OTP, and the Court may take matters in its own hands to enforce its orders, the Statute and the demands of international criminal procedure. As the Appeals Chamber has noted:

Given their specific inclusion in the Statute and Rules of Procedure and Evidence, sanctions under article 71 and rule 171 are the normal and proper means to bring about compliance in the face of refusals to follow the orders of a Chamber. Recourse to sanctions enables a Trial Chamber, using the tools available within the trial process itself, to cure the underlying obstacles to a fair trial, thereby allowing the trial to proceed speedily to a conclusion on its merits.²⁹

- 15 **Witnesses:** Victims may be sanctioned for misconduct even if they do not hold the position of a witness. However, the Court ought to take into consideration their special situation, for instance, a traumatization or the sufferings they have been exposed to and which may have to be – at least partly – recalled for reasons of evidence and thus confront the victim again with his or her sufferings. A mere warning, therefore, may be more adequate, especially when victim-witnesses commit misconduct during cross-examination. – Under rule 74(3)(c)(ii), the Chamber may require a witness, who enjoys *nemo tenetur* rights, to answer questions after assuring the witness that the evidence provided in response to the questions will not be used either directly or indirectly against her or him in any subsequent prosecution by the Court, except – and here comes the important point – under articles 70 and 71.

²⁵ As to the ICTY contempt cases, which aimed against several members of the defence, see the case information sheets summarized under <<http://www.icty.org/action/contemptcases/27#casetabs>> accessed 17 September 2015.

²⁶ *Prosecutor v. Tadić*, IT-94-1-A-R77, Appeals Chamber, Judgement, 31 January 2000, paras. 166 *et seq.*

²⁷ Strongly supporting this approach Turner (2012) 45 *NYUJIL&Pol* 175.

²⁸ See e.g. the *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Defence waiver of privilege and request to consider sanctions for misconduct, Defence for Mr. Callixte Mbarushimana, 30 June 2011 [doc1101287.pdf].

²⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively [...]’, Appeals Chamber, 8 October 2010, paras. 59 *et seq.* [doc947768.pdf].

II. Institutional, temporal and local scope of application: persons ‘present’ ‘before’ ‘the Court’

Article 71 confers the power to sanction misconduct to the Court when this misconduct is committed before it. As article 71 is part of Part 6 of the Statute (‘The Trial’), at first glance and in light of a systematic interpretation, the institutional scope of application of article 71 is highly limited and reserved to when a Trial Chamber is in session. However, a teleological analysis leads to a broader reading. The aim of ensuring the fair, impartial and smooth administration of international criminal justice requires that the Court can effectively counter misconduct whenever it convenes in a judicial function (i. e. not when it only convenes in an administrative or even a merely private function). Article 71 thus does not only protect Trial Chambers, but also Pre-Trial as well as Appeals Chambers, since the undisturbed exercise of their functions is as important as the proper functioning of the Court when leading a trial. Article 71 thus encompasses misconduct before any Chamber or Single Judge. 16

The physical site of the misconduct is irrelevant, as long as it takes place before the Court. Article 71 is not limited to public sessions. Misconduct may interfere with the effective work of the Court irrespective of whether it is presented during a public or a closed session. A distinction has to be drawn between an on-site session of a Chamber, where all parties are present ‘before it’ (the Court) and on-site investigations by OTP. Since the investigative powers of the OTP is of such a character that the administration of international criminal justice will not be endangered to a similar extent as misconduct before the Court, prosecutors (esp. at the investigating stage of proceedings) do not enjoy the same protection as the Court itself. One may question whether this was a wise decision. However, at least misconduct solely before the OTP does not infringe upon the decorum of the ICC to the same extent as does misconduct before one of its Chambers. 17

As concerns the temporal and the local scope of application, article 71 only applies against persons present before the Court who commit misconduct. The previous edition comprehensively subscribed to a narrow reading of this passage, effectively limiting article 71 to the time span from the beginning³⁰ to the end of a session and to the place where the Court is in session. This would, as a rule³¹, limit the forum where article 71 is applicable to the courtroom³². From this point of view, persons present in the courtroom prior to the Court appearing or after it has left the courtroom could not commit misconduct under article 71. The same would hold true, for instance, with regard to demonstrations on the way to or at the entrance of the courtroom, as well as when the judges meet for informal consultations in one of their offices.³³ – This narrow reading of article 71 has been sophisticatedly challenged by Turner, who has interpreted this provision more broadly in order ‘to cover even actions outside the courtroom if they disrupt or prejudice ongoing proceedings’³⁴. A literal³⁵ interpretation of article 71 surmises this approach, since all ongoing proceedings under the control or supervision of a Chamber may be counted as happening before the Court so that 18

³⁰ For the commencement of the trial see article 64(8) (a).

³¹ However, when the Court is ‘working’ outside the courtroom like during an on-site investigation or in a separate room for their (secret) deliberations, article 71 would be applicable, too.

³² This is supported by the reference made to ‘the courtroom’ in article 71(1). The courtroom includes the public gallery but not the stairway, the lobby and other rooms in the building of the Court. Under the narrow reading proposed in the previous edition, misconduct outside the courtroom would have to be taken care of by the security forces of the building and the ordinary criminal justice system of where country where the Court convenes (i. e. normally the Netherlands).

³³ Article 71, however, would apply when the Chamber deliberates (officially) outside the courtroom over an intermediate decision or a judgement or sentence.

³⁴ Turner (2012) 45 NYUJIL&Pol 175, at 236. To the same end, Gut, *Counsel Misconduct before the International Criminal Court* (2012) 258 et seq.

³⁵ Yet note that in mn 8 it has been submitted that the wording of article 71 is not necessarily the best arbiter of interpretational disputes.

all persons committing misconduct in this phase may be counted as being present before it. As rightly noted by *Gut*, expressions like before the court are 'routinely used to describe a state where persons enter into a relationship with the Court and, to that effect, figuratively speaking, go before the Court'³⁶. – *Trial Chamber V* has recently opted for a narrow reading. In a highly instructive decision, it maintained the following:

'Article 71 is specifically directed towards conduct occurring within the courtroom referring as it does to 'persons present before' the Court. This narrow interpretation is supported by reference to the French version of the provision which unambiguously refers to 'l'inconduite à l'audience'. It is also consistent with the only Appeals Chamber decision to date in which the provision has been considered. In that decision, issued in the *Lubanga* case in October 2010, the Appeals Chamber reversed a decision of Trial Chamber I to stay the proceedings for failure of the Prosecution to follow its directions reasoning that the Trial Chamber should first have considered sanctions pursuant to Article 71. Although the Appeals Chamber did not directly consider the question of whether article 71 of the Statute is limited to misconduct committed during or in close connection with courtroom proceedings, it is significant that the directions in question had been given orally and in writing during the course of an ongoing trial. Finally, the Chamber notes that equivalent misconduct provisions at other international courts are not limited to persons "present", suggesting that an in-court requirement was purposefully included by the drafters.'³⁷

The Trial Chamber used this restrictive reading of article 71 in order to draw on a 'power source' unfettered by the Statute or the RPE. For the Trial Chamber considered that it had the

'power to address misconduct occurring *outside the courtroom* by having recourse to its broad discretionary powers to ensure a fair trial and uphold the interests of justice as provided for in Article 64(2) of the Statute and to rule on any other relevant matters in performing its functions as provided for in Article 64(6)(f) of the Statute [as part of] the "*inherent powers*" which provide courts with authority to undertake all acts reasonably required to efficiently perform their functions'³⁸.

It remains to be seen whether this view holds water. The fundamental question is one about the correct allocation of law making power. Either the Court itself holds the prerogative to flesh out the law of misconduct outside the courtroom under a flexible (but indeterminate) concept of 'inherent powers', or it is for the Assembly of States Parties to amend the RPE to concretize this body of law pursuant to articles 71, 51(2). If the latter were to prevail, a wide reading of article 71 at least would allow the Court to enforce its concrete orders outside the courtroom, or against persons no longer in its immediate presence, or against persons no longer involved in international criminal justice (for example, if a resigned prosecutor discloses confidential information)³⁹.

III. Substantive scope of application: 'misconduct'

1. The *actus reus* of misconduct

- 19 The Court may sanction persons present before it who (at minimum: objectively⁴⁰) commit **misconduct**. Misconduct is a highly indeterminate term. In light of its ordinary meaning, misconduct encompasses any unacceptable or improper behaviour that violates the dignity of the Court, the decorum of the proceedings or (and most importantly) the fair and effective administration of justice (including the independence and objectivity of the proceedings under the control of the Court). Misconduct must therefore at minimum threaten the Court as a

³⁶ *Gut, Counsel Misconduct before the International Criminal Court* (2012) 260.

³⁷ *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, Trial Chamber V(B), 31 May 2013, para. 13 [doc1599174.pdf].

³⁸ *Ibid.*, paras. 14 *et seq.* (emphasis added).

³⁹ The latter may not have been considered by Sluiter *et al.*, *International Criminal Procedure: Principles and Rules* (2013) 756. On the *Hartmann* situation used as an example in the main text, see the ICTY Case Information Sheet available at <http://www.icty.org/x/cases/contempt_hartmann/cis/en/cis_hartmann_en.pdf> accessed 17 September 2015.

⁴⁰ Mere thoughts of misconduct do not, of course, suffice.

whole, or one of its organs or another person present before it. Paragraph 1 gives only two examples of (especially) serious misconduct: disruption of proceedings and deliberate refusal to comply with the Court's directions (see mn. 21 and 22).

Behaviour is not improper, i. e. **does not constitute misconduct**, if it is **justified**. This may require a careful balancing of conflicting interests and values. For instance, 'using' procedural rights (like the nomination of witnesses) must normally not be counted as 'misconduct' (even if it delays the proceedings or burdens the Court *etc.*). Also basic and fundamental rights come into play; for instance, disobeying a court order not to disclose information must not be counted as misconduct, if (!) this disclosure is (in exceptional cases) protected by the freedom of expression and press.

Article 71(1) and rule 170 allow for sanctions in case of the **disruption of proceedings**. Rule 170 reads:

'Having regard to article 63, paragraph 2, the Presiding Judge of the Chamber dealing with the matter may, after giving a warning:

- (a) Order a person disrupting the proceedings of the Court to leave or be removed from the courtroom; or,
- (b) In case of repeated misconduct, order the interdiction of that person from attending the proceedings.'

A narrow interpretation suggests that a disruption of proceedings requires an actual and factual interruption (or a concrete threat thereof) of a Court session (*e. g.* by way of a physical or verbal attack of a judge *etc.*). In this case, a disruption of proceedings does not necessarily entail that it is physically impossible for the Court to continue its task. It is sufficient that the behaviour clearly interferes with the proper and undisturbed exercise of the functions of the Court (for instance, by shouting or making other noises that make it virtually impossible for other persons present before the Court to make themselves understood). – A literal interpretation of article 71(1), rule 170 also allows for a wider reading; after all, the interference, upsetting, obstruction, hampering, or delaying of proceedings are viable synonyms for the disruption of proceedings. – Yet since rule 170 clearly relates the misconduct of 'disruption' to the sanction of 'removal from the courtroom', this wide reading is not convincing. Disruption (only) occurs if it can be stopped by the removal of the disruptor, i. e. if the physical presence of the disruptor causes the disruption of the proceedings.

Article 71(1) and rule 171 allow for sanctions in case of a **deliberate⁴¹ refusal to comply with the Courts' directions**. As clarified by rule 171(1), this direction can either be given orally or in writing, and has to be accompanied by a warning of sanctions in case of breach. On the one hand, this limits the substantive scope of applicability of article 71, since these 'directions' have to be concrete and specific; vague and general instructions (like: 'observe the rules, or you will be sanctioned'), or no instructions at all, are not sufficient. On the other hand, concrete and specific directions can pertain to every possible subject matter before the Court, thus widening the scope of applicability of article 71(1), rule 171(1) to an extreme level. To only give very few examples:

- Court order addressed to the Prosecutor not to rely heavily on article 54(3)(e) (bearing in mind that the Court has to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial)⁴²;
- Court order addressed to the Prosecutor to disclose the identity of intermediaries⁴³;

⁴¹ On this element, see mn. 25.

⁴² This issue became prominent in *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', Appeals Chamber, 21 October 2008 [doc578371.pdf].

⁴³ This issue became prominent in *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively [...]', Appeals Chamber, 8 October 2010, para. 59 [doc947768.pdf].

- Court order (addressed especially to the parties and the accused) not to disclose classified or confidential information, e.g. about sensitive case information learned as a Prosecutor,⁴⁴ about the identity of protected witnesses⁴⁵ or about witness testimony given under the Court assurance of non-disclosure⁴⁶;
- Court order addressed to Counsel to notify another binding order to the State to whom it is directed⁴⁷;
- Court order addressed to the witness to testify (provided that the witness does not enjoy the protection against self-incrimination, in which case his or her silence is justified, at least as long as the Court does not follow the rule 74(2) procedures). In this respect it has to be noted: Article 70 does not make it an offence for a witness to remain silent (refusing to testify does not constitute an offence under article 70(1)(a), since no 'false testimony' is given)⁴⁸. This allows recourse to article 71, which is the only way to induce witness cooperation, as a special enforcement sanction ('*Beugestrafe*'), as included in some national legal systems, is not provided for in the Rome Statute.

It is still open for debate, whether the Court direction (the violation of which then gives rise to a sanction pursuant to article 71(1), rule 171) has to be lawful or, in contrast, whether it suffices that it is final and conclusive (i.e. that it can no longer be challenged as such). The latter seems more convincing. Article 71 only allows for administrative sanctions; non-compliance with Court orders consequently is but a regulatory offence. At least once the person not complying with the Court direction forfeited the right to challenge the decision as such (e.g. by lapse of time), non-compliance with this direction may be sanctioned even if said direction was unlawful; this does not hold true if the direction was null and void.

- 23 The word 'including' suggests that **other behaviour** may also be considered as **misconduct**. Because of this lack of legal certainty, article 71 appears questionable in light of the legality principle. Yet this critique is unfounded: *First*, it has to be noted that article 71 only allows for regulatory or 'administrative measures', not for criminal punishment in the narrower sense. These regulatory sanctions do not impose harm or deprivation of liberty for particular grave violations of the administration of justice (such violations are exhaustively covered in article 70(1))⁴⁹. Nevertheless, even mere regulatory misconduct should not be decided on an *ad hoc* basis, but be established prior to the potential misbehaviour, and

⁴⁴ See e.g. the ICTY *Hartmann* case, IT-02-54-R77.5. As summarized by the ICTY Case Information Sheet, Hartmann knowingly and wilfully interfered with the administration of justice by disclosing information in violation of an order of the Appeals Chamber dated 20 September 2005 and an order of the Appeals Chamber dated 6 April 2006, through means of authoring for publication a book entitled *Paix et Châtiment*, published by Flammarion on 10 September 2007, and by authoring for publication an Article entitled *Vital Genocide Documents Concealed*, published by the Bosnian Institute on 21 January 2008. See <http://www.icty.org/x/cases/contempt_hartmann/cis/en/cis_hartmann_en.pdf> accessed 17 September 2015.

⁴⁵ See e.g. the ICTY *Haxhiu* case, IT-04-84-R77.5. As summarized by the ICTY Case Information Sheet, Haxhiu knowingly and wilfully interfered with the administration of justice by revealing the identity of a protected witness in an article he wrote and published. See <http://www.icty.org/x/cases/contempt_haxhiu/cis/en/cis_haxhiu_en.pdf> accessed 17 September 2015.

⁴⁶ See rule 74(3)(c)(i), (7)(b) and (c): The Chamber may require a witness, who enjoys *nemo tenetur* rights, to answer the question or questions, after assuring the witness that the evidence provided in response to the questions will be kept confidential and will not be disclosed to the public or any State. In order to give effect to the assurance, the Chamber shall order that the identity of the witness and the content of the evidence given shall not be disclosed, in any manner, and provide that the breach of any such order will be subject to sanction under article 71; the Chamber shall specifically advise the Prosecutor, the accused, the defence counsel, the legal representative of the victim and any Court staff present of the consequences of a breach of the order.

⁴⁷ On this issue, see *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Public Redacted Version of the Leave to Reply to 'Libyan Government's Response to the Saif Al-Islam Gaddafi Addendum to the 'Urgent Defence Request' of 21 January 2013, and Request for Finding of Non-Compliance', Defence for Mr. Saif Al-Islam Gaddafi, 3 June 2013, para. 11 [doc1599622.pdf].

⁴⁸ By contrast, according to rule 77(A)(i) RPE ITCY, the ICTY may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who being a witness before a Chamber, contumaciously refuses or fails to answer a question.

⁴⁹ This holds true even though an administrative fine, at least factually, leads to similar results as a fine for a criminal offence against the administration of justice.

thus requires precise definitions. *Second*, rules 170 to 171 foreclose such ad hoc amendments. These rules do not mention examples of misconduct other than those given in article 71, and do not empower the Court to come up with ‘new’ misconduct other than the disruption of proceedings and the deliberate refusal to comply with a Court direction. The openness of article 71 is thus essentially addressed towards the Assembly of States Parties as the ‘ordinary’ legislator of the RPE (for a comparable interpretation of article 71 as concerns the sanctions available to the Court, see mn. 29). Therefore, at least under article 71, the Court must not sanction (deliberate) non-compliance with international criminal procedure without there being a specific and concrete court order. For example: Smoking in the courtroom must not be sanctioned under the provision, even if a ‘no smoking’ sign is in place. Under article 71(1), rule 170 and 171, the Court first has to issue a warning and has to issue a direct non-smoking order before removing the smoker from the courtroom.

2. The *mens rea* of misconduct

Whether misconduct necessarily requires a mental element is open for academic, but not for practical debate. As to the academic debate: On the one hand, the previous edition argued as follows: According to article 30(1), the Statute requires that ‘[u]nless otherwise provided a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge’. Although article 30 only applies to ‘crimes within the jurisdiction of the Court’, this provision expresses a general principle of criminal law, which has to be applied *mutatis mutandis* to misconduct as well. – On the other hand, one might also consider the following: To the extent that article 71 covers the prevention or interdiction of unacceptable or improper behaviour, i. e. to the extent that a sanction does not retrospectively punish, but prospectively polices misconduct, the wording of article 71(1) also encompasses strict liability misconduct. The ASP would thus be allowed to regulate, in the RPE, misconduct without it containing a mental element.

In practice, however, this academic dispute is moot. Rules 170 and 171 both require a mental element. In case of a disruption of the proceedings, a sanction under rule 170 must only be issued after a warning was given, thus making the person concerned at least *aware* of her or his disruptive behaviour. And under rule 171(1), a sanction may only be issued if the misconduct is a *deliberate* refusal to comply with an oral or written direction by the Court and only if that direction is accompanied by a warning of sanctions in case of breach; such non-compliance is deliberate, if it is done consciously and intentionally. With regard to both, to awareness under rule 170 and to deliberateness under rule 171, one may also loosely draw on the contempt jurisprudence of the ICTY for further clarification. As stated by the ICTY:

‘[I]n most cases where it has been established that the alleged contemnor had knowledge of the existence of the order (either actual knowledge or wilful blindness of its existence), a finding that he intended to violate it would almost necessarily follow. There may, however, be cases where such an alleged contemnor acted with reckless indifference as to whether his act was in violation of the order. In the opinion of the Appeals Chamber, such conduct is sufficiently culpable to warrant punishment as contempt, even though it does not establish a specific intention to violate the order. The Appeals Chamber agrees with the prosecution that it is sufficient to establish that the act which constituted the violation was deliberate and not accidental’⁵⁰.

IV. Sanctions available to the Court: ‘Administrative measures’ ‘such as’ ‘removal from the courtroom’ or a ‘fine’

Article 71(1) is explicit in that the sanctions available to the court only encompass administrative measures other than imprisonment. Misconduct under this provision is thus only a regulatory offence, and the sanctions mentioned therein must not be equated with

⁵⁰ *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Appeals Chamber, Judgement, 30 May 2001, para. 54.

(criminal) punishment. Article 71(1) considers temporary or permanent removal from the courtroom or a fine as administrative measures, and also empowers the Assembly of States Parties to come up with similar measures in the RPE⁵¹. From this one can learn that the RPE are exhaustive as concerns similar measures, and the Court is *not* empowered to explore ‘new’ administrative sanctions when article 71 is applicable; this explains (but does not necessarily legitimizes) why Trial Chamber V has opted for a very restrictive reading of this provision⁵².

- 27 **Removal from the courtroom** is covered by both rules 170 and 171. Rule 170 allows for ordering a person disrupting the proceedings of the Court to leave or be removed from the courtroom, and for ordering the interdiction of that person from attending the proceedings in case of repeated misconduct. Rule 171(1) allows for ordering the interdiction of a person deliberately refusing to comply with a Court direction from the proceedings for a period not exceeding 30 days. Rule 171(3) also allows for a longer and even permanent interdiction, namely when the presiding judge considers that a longer period of interdiction is appropriate, and then refers the matter to the Presidency, which may hold a hearing to determine whether to order a longer or permanent period of interdiction. – ‘Removal’ means physical exclusion, and also encompasses means to hinder the person concerned from reentering the courtroom; this, in turn, does however not include any form of (preventive) detention, since a legitimate curtailing of the freedom to enter does not cover infringements upon the freedom to leave. – The previous edition proposed that the Court may remove the public as a whole or exclude it right from the beginning. However, since this scenario is regulated by article 64(7), which all the more foresees infringements upon the principle of a public trial only in very limited circumstances, one can indeed question whether article 71 allows for the exclusion of the general public; rules 170 and 171 suggest the contrary, as it is not foreseen therein.
- 28 Ordering a **fine** is possible under rule 171(1), but only if the misconduct constitutes deliberate refusal to comply with an oral or written direction by the Court, and only if this misconduct is of a more serious nature and cannot be addressed by interdiction from the proceedings for a period not exceeding 30 days. A fine is thus, according to the RPE, the graver administrative measure (which indeed is a questionable categorization). Pursuant to rule 171(5), a fine imposed under sub-rule 1 shall not exceed 2,000 euros, or the equivalent amount in any currency, provided that in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines shall be cumulative.
- 29 The RPE cover **similar administrative measures** only in rule 171(2). If the person committing misconduct as described in sub-rule 1 is an official of the Court, or a defence counsel, or a legal representative of victims, the Presiding Judge of the Chamber dealing with the matter may order the interdiction of that person from exercising his or her functions before the Court for a period not exceeding 30 days. The sanction thus lies in banning organs of international justice from their exercising their functions before the Court. Pursuant to rule 171(3), the Presidency, where appropriate, may extend this ban over the 30 day period mentioned in sub-rule 1, and may even (theoretically) order a permanent ban. Since the latter is an extreme measure, one may question whether it is similar *e.g.* to a permanent exclusion from the courtroom. At minimum, a permanent ban has to be reserved to extreme cases. What is more, a (temporal or permanent) ban to exercise official functions must not infringe upon the fair trial principle, the principle of effective defence, and indeed the effective administration of international justice in general. Resorting to a ban or even a substitution of (a permanently banned) Counsel during proceedings is thus delicate at best, if not legally impossible. – Although other administrative measures are easily conceivable, they are not regulated in the RPE, and hence are not available to the Court in article 71 procedures.

⁵¹ This rather vague formulation in article 71 is due to the fact that at Rome the task to specify the behaviour to be sanctioned was left to the imagination of the drafters of the RPE and thus eventually to the Assembly of States Parties.

⁵² See see at mn. 18.

V. Discretion: ‘may’ (including article 71 as *prima ratio* to ensure a fair trial)

Article 71(1) only states that the Court ‘may’ impose sanctions against persons committing 30 misconduct before it. This implies a great amount of discretion on the side of the Court.

The Chambers’ discretion to avail or not to avail itself of article 71 is considerably lessened 31 by Appeals Chamber jurisprudence that makes recourse to this provision the *prima ratio* to ensure a fair trial. Generally speaking, inducing compliance with judicial orders or the demands of criminal procedure can be achieved in multiple ways, especially when it comes to prosecutorial malfeasance and misconduct. While some jurisdictions focus on extra-judicial disciplinary action (like the notorious reliance on ‘*Dienstaufsichtsbeschwerden*’ in Germany), other jurisdictions venture to where it ‘really hurts’, requiring the exclusion of illicit evidence or even a stay or bar of proceedings when prosecutorial non-compliance renders a trial unfair. Specifically with regard to the Rome Statute, the Appeals Chamber in *Lubanga* developed a somewhat novel middle ground. On the one hand, it confirmed that article 71 is not suspended by possible disciplinary action against the parties. On the other hand, it postulated that staying the proceedings is *ultima ratio*. Article 71-action thus emerged as the *prima ratio* to steer the proceedings towards the ends of the Chamber:

‘Given their specific inclusion in the Statute and Rules of Procedure and Evidence, sanctions under article 71 and rule 171 are the normal and proper means to bring about compliance in the face of refusals to follow the orders of a Chamber. Recourse to sanctions enables a Trial Chamber, using the tools available within the trial process itself, to cure the underlying obstacles to a fair trial, thereby allowing the trial to proceed speedily to a conclusion on its merits. Doing so, rather than resorting to the significantly more drastic remedy of a stay of proceedings, is in the interests, not only of the victims and of the international community as a whole who wish to see justice done, but also of the accused, who is potentially left in limbo, awaiting a decision on the merits of the case against him by the International Criminal Court or another court. Accordingly, the Appeals Chamber finds that, to the extent possible, a Trial Chamber faced with the deliberate refusal of a party to comply with its orders which threatens the fairness of the trial should seek to bring about that party’s compliance through the imposition of sanctions under article 71 before resorting to imposition of a stay of proceedings⁵³.

Only when ‘all hope is lost’, i. e. when there is a complete loss of control over proceedings and a fair trial already has become irreparably impossible,⁵⁴ are sanctions under article 71 no longer an option to bring the parties back on track of a fair trial. – From a normative point of view, this jurisprudence promises a novel way to police the parties, although it raises many questions⁵⁵ (Who pays for Court fines against the OTP? The Court itself?; Are article 71 sanctions sufficient to induce compliance?; Will article 71 sanctions ‘pollute’ the collegial atmosphere in The Hague? *Etc.*). At first glance, it may indeed be ‘stronger’ than an all too reluctant approach relying on disciplinary action and an all too absolutist and drastic approach encroaching on the expressive aims of international criminal justice.

VI. Procedure

1. Sanctioning procedure within the RPE: ‘procedures governing the imposition’ of a sanction ‘shall be those provided for in the RPE’

Article 71(2) fuels high expectations: Supposedly, the procedures governing the imposition 32 of sanctions pursuant to article 71(1) shall be provided for in the RPE. In reality, however,

⁵³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively [...]’, Appeals Chamber, 8 October 2010, paras. 59 *et seq.* [doc947768.pdf].

⁵⁴ *Ibid.*, para 60.

⁵⁵ On these questions also *cf.* Turner (2012) 45 *NYUJIL&Pol* 175.

the RPE contain only very rudimentary procedural regulations about the sanctioning of misconduct before the Court. The basic notions are:

- Pursuant to rules 170 and 171(1), sanctioning any misconduct before the Court under article 71 requires a prior warning about an impending sanction in case of breach;
- Ordering a ‘normal’ sanction rests with the Presiding Judge of the Chamber (rules 170, 171(1) and (2)). Ordering the ‘exceptional’ interdiction of a person from the proceedings for a period of more than 30 days or even banning that person permanently, rests with the Presidency (rule 171(3)).
- The person to be sanctioned shall be given an opportunity to be heard before a sanction for misconduct is imposed (rule 171(5)).
- If conduct covered by article 71 also constitutes one of the offences defined in article 70, the Court shall proceed in accordance with article 70 and rules 162 to 169 (rule 172).

2. Sanctioning procedure without the RPE

33 The rules thus do in no way manage to fill the gaps or regulate satisfactory what has been left open in the preparatory work, especially as regards the applicability of the Statute and the Rules in cases of article 71. This failure comes as a surprise, because it would have been easy and sufficient to merely confirm the (non) applicability of certain principles and regulations, like those relating to a fair hearing. Where the sanctioning procedures cannot be found within the RPE, one has to do without. This means:

- As concerns **standards of proof**, one may cautiously draw on the contempt jurisprudence of the ICTY (although a mere administrative proceeding may allow for lower standards); as it was noted by the ICTY, the Court ‘must be satisfied beyond reasonable doubt that he [the perpetrator] conducted himself in the way alleged and that such conduct constitutes contempt of the Tribunal’⁵⁶.
- As concerns the **principles of sanctioning** as such: Article 71 deals with ‘administrative measures’ only, and not ‘penalties’ in the sense of Part 7 of the Statute. Therefore, articles 76 (‘Sentencing’) and 78 (‘Determination of the sentence’) are not directly applicable. But *mutatis mutandis*, article 76(1), mentioning ‘the appropriate sentence’ to be imposed, and article 78(1), referring to ‘the gravity of the crime [in our case: misconduct] and the individual circumstances of the convicted [in our case: sanctioned] person’ provide general guidelines for the imposition of a sanction under article 71. – Drawing on general principles of law, one may add that a regulatory sanction under this provision needs to be proportionate, i. e. appropriate, necessary and reasonable to achieve the goal intended (e. g. to induce compliance with a Court order *etc.*). – The principle of proportionality also comes into play with regard the use of force, which only is *ultima ratio*. Only if the sanctioned person does not leave the courtroom voluntarily, she or he may be removed by security, *etc.*⁵⁷
- As concerns **legal recourse against article 71 sanctions**, neither the Statute nor the RPE exclude an appeal against sanctions for misconduct. Rule 77 RPE ICTY/ICTR provide in detail for such an appeal, and there are many good reasons (like the basic idea to guarantee checks and balances) to see such a process implemented at the ICC, too. Article 81 should thus be applied by way of analogy.⁵⁸
- As concerns the **enforcement of sanctions**, Part 10 (‘Enforcement’) is not directly applicable. However, since fines are covered in article 71 and in rule 171, the Court may be dependent on States confiscating these fines; in this respect, article 109 should be applied by way of analogy.

⁵⁶ *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgement, Appeals Chamber, 31 January 2000, para. 131.

⁵⁷ For a discussion of all these principles see Ambos, *Treatise on ICL II* (2014) 277 *et seq.*

⁵⁸ We are not convinced by Gut, *Counsel Misconduct before the International Criminal Court* (2012) 262 arguing that ‘[a]llowing an appeal under article 81 of the Statute similar to criminal convictions would potentially undermine the promise of a rapid sanction because of ensuing satellite litigation.’ Due to the administrative nature of article 71 sanctions, they should be construed as provisionally enforceable so that their appeal would not diminish their regulatory effectiveness.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

- (a) Modification or clarification of the request;
- (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
- (c) Obtaining the information or evidence from a different source or in a different form; or
- (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

- (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:
 - (i) The Court may, before making any conclusion referred to in subparagraph 7 (a)
 - (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

- (ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and
 - (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
- (b) In all other circumstances:
- (i) Order disclosure; or
 - (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Directly relevant Rules of Procedure and Evidence: Rule 81.

Literature: Ambos, K., 'Confidential investigations (article 54(3)(e) ICC Statute) vs. disclosure obligations: The Lubanga case and national law', (2009) 12 *NCLR* 543; id., 'The transnational use of torture evidence' (2009) 42 *IsLRev* 362; id., 'The European Court of Human Rights and extraordinary renditions', (2015) 5 *EuCLR* forthcoming; Behrens, H., 'Protection of National Security Information in the ICC: a Guide to Article 72 of the Rome Statute', in H. Roggemann and P. Šarčević (eds.), *National Security and International Criminal Justice* (2002) 115; Friman, H., 'Procedural Law of the Criminal Court – An Introduction', in: F. Lattanzi and W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, ii (1999, reprint 2000) 229; Heinze, A., *International Criminal Procedure and Disclosure* (Duncker and Humblot 2014); Jacobsen, A. L., *National Security and the Right to Information in Europe* (2013); Keller, H. and Heri, C., 'Enforced Disappearance and the European Court of Human Rights: A 'Wall of Silence', Fact-Finding Difficulties and States as 'Subversive Objectors', (2014) 12 *JICJ* 735; Malanzcuk, P., 'Protection of National Security Interests', in: A. Cassese, P. Gaeta and J. R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, ii (2002), 1371; Piragoff, D.K. 'Protection of National Security Information', in: R. Lee (ed.), *The ICC* (1999), 270; Rastan, R., 'The Responsibility to enforce: Connecting justice with unity', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2008); Rastan, R., 'Review of ICC Jurisprudence 2008', (2009) 7 *NJIHumRts* 229; Schabas, W., 'Article 72: Protection of National Security Information', *The International Criminal Court: A Commentary on the Rome Statute* (2010) 861; Triffterer, O., 'Security Interests of the Community of States, Basis and Justification of an International Criminal Jurisdiction, versus 'Protection of national Security Information', Article 72 Rome Statute', in H. Roggemann and P. Šarčević (eds.), *National Security and International Criminal Justice* (2002) 53

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	3
I. Paragraph 1: Scope of application.....	3
1. 'disclosure of information or documents of a State'	3
2. 'in the opinion of that State'	6
3. 'national security'.....	7
4. 'prejudice to national security'	16
5. Interaction with other statutory provision	17
II. Paragraph 2	19
III. Paragraph 3	22
IV. Paragraph 4	25
V. Paragraph 5	26
1. Modification or clarification of the request	27
2. Ruling on relevance or on obtaining from another source.....	31
3. Obtaining from a different source or in a different form	32
4. Agreement on conditions	33
VI. Paragraph 6	36
VII. Paragraph 7	37
1. Determination of relevance and necessity.....	37
2. Two-track approach depending on who has the material	38
a) Where material resides solely with the State	39
b) Where the material is held by others	44
3. Drawing of inferences	45

A. Introduction/General remarks

Article 72 represents one of the most difficult provisions to draft, interpret and apply. Its negotiating history grappled with the core of the Court's relationship with domestic authorities at the crossroad where national interest, in the protection of national security information, intersects with the interests of the international community as a whole, in ending impunity for the most serious crimes of international concern.¹ Diametrically opposed positions during the negotiations sought, on the one hand, to exclude any scope for judicial review over a State's stated prerogative to refuse cooperation based on a claim of national security prejudice, and on the other, to reduce the scope for abuse by recalcitrant States and the undermining of the Court's authority with respect to its own process. There was common agreement, nonetheless, that a State may well have legitimate concerns over the disclosure of sensitive information that affected its vital interests, making it necessary to devise a scheme that minimized the adverse consequences thereof. There was also the practical recognition of the Court's inability to coercively secure compliance by way of, for example, the issuance of a production order to the national authorities concerned, meaning that the *de jure* obligation of States to cooperate with the ICC might have little consequence *de facto* if a State refused to comply.² Thus, the remedies flowing from a Chamber finding against a State's plea had to be agreed upon. The final result is an elaborately worded provision that seeks to exhaust all reasonable steps to resolve the matter through the combined, creative and collaborative efforts of the State concerned, counsel before the Court and the judges to avoid a stand-off. Failing that, where the information is solely in the hands of the requested State, there is effectively no resolution on the question of access: the State will retain its information even where the Chamber has deemed that it relevant and necessary. The Chamber will then have to determine whether the requested State's actions and explanations, in the circumstances, are contrary to the expected obligations of States Parties and decide whether any inference may be drawn as to the facts being sought to be established from the withheld material. By contrast, where the information is not under the exclusive control of the State concerned, and are in the hands of one of the parties for example, the Chamber can order disclosure over the objection of that State.

Although the specific notion of national security interests does not appear in the 1994 ILC draft Statute, the idea that the Court should protect confidential information, of which national security is a sub-species, appears in provisions of the 1994 draft: including measures that the Prosecutor, the Trial Chamber or the President could take to ensure the confidentiality of information or the protection of persons, or for the conduct of hearings in closed session 'for the purpose of protecting confidential or sensitive information which is to be given in evidence'.³ The earlier 1992 ILC draft Statute had similarly referred, under the draft provisions dealing with international cooperation, to the 'confidentiality of information in the request and provided pursuant to the request'.⁴ During the Ad Hoc and Preparatory Committee discussions topics related to the confidentiality of state materials were generally treated in a disparate manner in various places throughout the text. France did introduce a proposal during the 1996 session of the Preparatory Committee specifically designed to address 'secrecy on defence grounds' which would have granted States wide discretion in withholding information from the Court. However, the Preparatory Committee merely recorded that '[w]hile the view was expressed that national security interests should

¹ Triffterer, in: Roggemann and Šarčević (eds.), *National Security and International Criminal Justice* (2002) 74-75.

² Piragoff, in: Lee (ed.), *ICC* (1999) 282. See below fn. 10.

³ See articles 26(2)(d), 27(5)(d), 38(4), 38(5)(e) and 43, 1994 ILC Draft Statute, A/49/10 (1994); and discussion in Piragoff, in: Lee (ed.), *ICC* (1999) 270-271.

⁴ A/47/10, para. 152 under other provision in the treaty related to cooperation (draft article 11).

constitute a valid exception, as in existing conventions, concerns were expressed about recognizing a broad exception based on public or national security interests. It was suggested that consideration should be given to addressing the legitimate concerns of States regarding requests for information or evidence relating to national security interests or other sensitive information while limiting the possibility of abuse which could impede the effective functioning of the Court'.⁵ As Donald Piragoff, the coordinator of the Working Group on Procedural Matters, summarises, 'the protection of national security information was never directly and comprehensively discussed as a separate item. The issue arose in the context of other subjects related to disclosure of information or documents, or the ability of a State to refuse to provide assistance to the Court if such assistance involved the provision of information that would prejudice its national security interests if disclosed to unauthorized persons'.⁶

Discussions on national security concretised during the March-April 1998 session with the introduction of a separate provision (draft Article 71) containing three options based on proposals made by France, the United Kingdom and the United States. The French proposal allowed a person to invoke national security restrictions to prevent disclosure of information connected with national defence or national security, subject to confirmation by the State of the person's claim to secrecy, similar to current paragraph 2. The lodging of a claim was final and there was no scope for judicial review of the claim.⁷ The United Kingdom text was modelled on the taking of practical steps and procedures, following those outlined by the ICTY Appeals Chamber in its seminal interlocutory appeals judgment in the *Blaškić* case. The judgment had issued the previous October and exerted significant influence over subsequent negotiations.⁸ The UK proposal included a section which directed the attention of the Court to assessing the bone fides of the claim and whether the State had acted in good faith. If it had not, the proposal allowed the Court to make an order for disclosure. The United States text also focused on practical modalities to hear a State's claim and to seek cooperative resolution, but focused instead on the right of the affected State to deny the request, coupled with the possibility for the Court to communicate its views to the Assembly of States Parties or the Security Council, rather than allowing for an order for disclosure.⁹ While the UK text generated broad support, concerns remained as to how exactly the Court would engage in a good faith assessment of a State's motivation. Although the concept sought to mirror the 'genuineness' test to be applied in the context of admissibility assessments under article 17, it remained unclear for many delegations how the Court would assess the bone fides of a State's own perception of a national security prejudice or the results that might flow therefrom.¹⁰

⁵ *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, A/51/22(1996)*, para. 332. The French proposal provided: '1. Any person heard or examined by the Trial Chamber may invoke restrictions provided for in his national law and designed to prevent the divulgation of confidential information connected with national defence./2. The Trial Chamber may ask the State of which the persons being heard or examined are nationals whether it confirms their claim to be bound to secrecy. If the State confirms to the Trial Chamber that an obligation of secrecy exists, the Chamber shall note this fact./3. The provisions of the preceding paragraphs shall also apply to execution of a request for judicial assistance made under article 72'; *ibid*, ii, pp. 220 and 255.

⁶ Piragoff, in: Lee (ed.), *ICC (1999)* 274.

⁷ This was drawn from a French proposal on draft Article 44 *ter* introduced during the December 1997 Preparatory Committee, *A/AC.249/1997/L.9/Rev.1 (1997)* 39–40, which itself was based on the earlier 1996 French proposal.

⁸ *Prosecutor v. Tihomir Blaškić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY Appeals Chamber, 29 Oct. 1997.

⁹ Article 71, PrepCom draft Statute, March-April 1998.

¹⁰ Piragoff, in: Lee (ed.), *ICC (1999)* 281–282, aptly summarising the situation as follows: 'Canada, supported by a number of other delegations, noted that the debate was too philosophical as to which entity had the final word on the issue of disclosure and, further, did not take into account the practical realities and nuances of the situation. The proposal confused the situations of having the final word, *de jure* and *de facto*. If a State possessed the information and the Court was seeking assistance to obtain it from that State, the State always had the final word, *de facto*, regardless of what the Statute might say about grounds of refusal. Even if the Court were to make

In Rome the UK circulated a revised text that incorporated elements from the French and US options and also introduced the right of a State to intervene in the proceedings, similar to current paragraph 4. Croatia, against whom the ICTY judgment had issued, lent support for the approach set out in *Blaškić* of allowing the Court to test the legitimacy of the national security claim.¹¹ A combined French and US text of 1 July 1998, which built on the UK text, included a number of further elements and clarifications, including a provision that ultimately led to current paragraph 2, although the final remedy focussed again on referral to the ASP and the Security Council rather than the ordering of disclosure.¹² As debates continued on the nature of the Court's assessment of the bone fides of a State's national security claim and the remedies available in case of established bad faith, Singapore introduced a proposal to remove any references to good faith assessments. Instead, it distinguished between two different scenarios: (i) where the information was already in the possession of a third party, and (ii) where the Court had sought the information from the State pursuant to Part 9. In the former the Court could order disclosure, whereas in the latter, it could not. Instead, the Court could either refer the matter as one of non-compliance or make 'such inferences that relate to the guilt or innocence of the accused as may be appropriate in the circumstances'.¹³

As the text started to take its final shape, key differences remained over whether the Court should assess the bone fides of a State's national security claim. To break the deadlock, the coordinator of the Working Group on Procedural Matters proposed that the Court's determination as to the level of cooperation rendered by the State in seeking to resolve the matter should return back to those same duties of cooperation set out in Part 9: i. e. whether 'in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute'.¹⁴ As Piragoff explains, 'the key issue was whether a State acted in accordance with its obligations in the circumstances of the case; the manner or motives in refusing to comply with a request could be, but were not necessarily, the determinative considerations in ascertaining whether the State did not act in accordance with its obligations'.¹⁵ With that, the remaining impasse was removed and the text was submitted to the Bureau for finalisation. Much, however, remains open to interpretation and is yet to be applied.

an order for disclosure, and have the final word, *de jure*, a State could always choose to refuse to comply with both the request and the order, and breach its obligations under the Statute. The State would have the final word, *de facto*, although it might be subject to measures decided by the Assembly of States Parties. However, if the information was already in the possession of the Prosecutor (and was not obtained pursuant to an agreement of confidentiality), or in the possession of a third party such as a witness before the Court, the Court had the power to control its own process and make binding orders on the Prosecutor or a witness. In this case, it had the final word on the matter, both *de jure* and *de facto*."

¹¹ A/CONF.183/C.1/WGPM/L.32, 29 June 1998.

¹² A/CONF.183/C.1/WGPM/L.39, 1 July 1998.

¹³ A/CONF.183/C.1/WGPM/L.49, 3 July 1998. The relevant provisions read: '7. Thereafter, where disclosure of the information or document is other than pursuant to a request for cooperation under Part 9, the Court may, if it determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, order disclosure.

8. Where the disclosure of the information or document is sought pursuant to a request for cooperation under Part 9, the Court may, if it determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused: (a) Refer the matter in accordance with article 86, paragraph 6; and (b) Make such inferences that relate to the guilt or innocence of the accused as may be appropriate in the circumstances.'

¹⁴ A/CONF.183/C.1/WGPM/L.76, 13 July 1998.

¹⁵ Piragoff, in: Lee (ed.), *ICC* (1999) 286; See generally Piragoff, in: Lee (ed.), *ICC* (1999) 268–294, for a fuller and more comprehensive treatment of the drafting history of article 72 and the associated provisions related to national security. See also Malanczuk, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, ii (2002) 1371–1386; Behrens, in: Roggemann and Šarčević (eds.), *National Security and International Criminal Justice* (2002), pp. 115–126.

B. Analysis and interpretation of elements

I. Paragraph 1: Scope of application

1. 'disclosure of information or documents of a State'

- 3 Article 72 applies to the “disclosure of information or documents of a State...”. The term ‘disclosure’ as applied throughout the Court legal instruments relates to the process governing the exchange of materials between the parties and/or participants to the proceedings. The term ‘disclosure’ may also logically extend to public submissions by the Prosecutor even where there are no other parties or participants to the proceedings, such as in the context of an article 15 application. However, the term does not apply to the provision of information to a Chamber, whose task rather is to supervise the execution of disclosure obligations.¹⁶ This is brought out by Rule 121(2)(c) which distinguishes between ‘disclosure’, a process that is *inter partes*, and the ‘communication’ of material to the Chamber, and by rules 76–84 which regulate the disclosure obligations of the prosecution and defence, set against the supervisory role of the Chamber. That disclosure does not apply towards the Chamber has also been borne out in practice, with the Court distinguishing disclosure from the ‘provision’ or ‘communication’ of material to the Chamber.¹⁷

An alternative reading would suggest that the term ‘disclosure’ within the meaning of article 72 should be construed broadly to govern the divulging of material to any third party,¹⁸ including the judges. In particular, it might be argued that the intended scope of the provision is to insulate a State against the consequences that may flow from a Chamber decision with respect to the onward handling of its information or documents. However, this would arguably disrupt the ordinary usage of the term throughout the Statute, including those provisions cross-referenced within paragraph 1. Indeed, article 72 locates the term ‘disclosure’ in connection with ‘proceedings’, suggesting that the term should be understood within the context of the Court’s own legal regime and not in a more generic sense. The risk

¹⁶ See Heinze, A., *International Criminal Procedure and Disclosure* (Duncker and Humblot 2014), pp. 37–39.

¹⁷ See e.g., in the *Lubanga* case, where the Appeals Chamber uses the term ‘disclosure’ to refer to the duty of the Prosecutor vis-à-vis the defence under article 67(2) versus the term ‘provision’ to refer to the submission or communication of such material to a Chamber for its review. That ‘provision’ to the Chamber does not equal ‘disclosure’ is further suggested by the finding of the Appeals Chamber that the Prosecutor cannot extend non-disclosure agreements towards a Chamber of the Court, since this would undermine its essential supervisory functions; *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, ICC-01/04-01/06 OA 13 (21 October 2008), para. 48. In line with the distinction contained in rule 121(2)(c), Pre-Trial Chambers have similarly distinguished between inter-parties ‘disclosure’ of evidence, versus ‘communication’ to the Chamber: see e.g. *Prosecutor v. Bemba*, Pre-Trial Chamber III, “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”, 31 July 2008, ICC-01/05-01/08-55 para. 42: “The Chamber observes that the provisions on disclosure, especially rule 121(2)(c) of the Rules, draw a clear distinction between “disclosure” which is *inter partes* and “communication” to the Chamber. Therefore, the Chamber is of the view that the concept of “disclosure” should not be confused with the concept of “communication” of evidence to the Chamber. The Chamber is not a party to the proceedings and does not take part in the disclosure process.” See similarly *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-01/09-01/11-44, 7 April 2011, paras 4–5; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48, 6 April 2011, paras. 4–5; *Prosecutor v. Bosco Ntaganda*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-01/04-02/06-47, 12 April 2013, paras. 8 and 21; *Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-02/04-01/15-203, 27 February 2015, para. 10.

¹⁸ This is how the term ‘disclosure’ is used e.g. in the *Security Regulations of the Council of the European Union* (2001/264/EC), 19 March 2001.

that the Chamber might order disclosure of materials held by a party to the proceedings is, moreover, already foreseen in paragraph 7(2)(b); therefore no heightened risk can be anticipated by the *ex parte* communication of such material to the Chamber. At the same time, the Chamber so receiving materials will be required to protect its confidentiality pending resolution of the article 72 procedure,¹⁹ since the very purpose of the provision is to determination whether disclosure is necessary: thereby negating the risk that the Chamber could pre-empt this procedure without following the steps outlined therein. More importantly, a broad reading would impede the supervisory functions of the Chamber with respect to disclosure issues.²⁰ Indeed, one of the key pillars of the Appeals Chamber's interlocutory decision in the *Lubanga* case on the non-disclosure of exculpatory materials was that the Court must be able to exercise judicial control over decisions restricting the disclosure of evidence (see below mn. 35). The fact that this decision was framed in the context of the specific obligations arising under article 54(3)(e) and article 67(2) does not alter the underlying rationale for such judicial control.²¹ By contrast, were the Chamber required to obtain the permission of a State to enable a party to communicate to it material in its possession or control, the Court's supervisory powers would be subjected to State control, thereby undermining an essential function to ensure that a trial is fair.²²

Accordingly, where the disputed material is not in the exclusive hands of the State concerned, nothing in article 72 appears to prevent a party or participant from providing such material to the Chamber for its *ex parte in camera* review, even while the State's intervention to prevent actual disclosure is in process.

As to the object of a national security claim, article 72 uses interchangeably the terms 'information', 'document' and 'evidence' without apparent distinction. At different points, and sometimes within the same sub-provision, article 72 refers variously to "information or documents", "information", "information or evidence", "evidence".²³ Although the Statute and Rules do not define these terms, the term 'document' may be understood to extend to any medium capable of capturing a record, whether written or diagrammatic, in either physical or

¹⁹ Article 64(6)(c).

²⁰ It would also arguably impede the operation of the Chamber's remedial powers under article 72(7)(b)(i).

²¹ This appears to be supported by the Appeals Chamber's reliance on ECtHR case law in *Rowe and Davis v. United Kingdom*, N° 28901/95, European Court of Human Rights, Judgment, 16 February 2000, and *Jasper v. United Kingdom*, N° 27052/95, European Court of Human Rights, Judgment, 16 February 2000, which both concern judicial review over the non-disclosure of 'sensitive' material on the grounds of public interest pursuant to the Attorney General's 1981 Guidelines – a provision that notably relates, inter alia, to the disclosure of informant identities (at issue in both cases) as well as national security; *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04-01/06 OA 13 (21 October 2008), paras. 46–47.

²² *Ibid.*, paras. 45–48. Arguably this conclusion is not altered by fact that article 72(5)(d) foresees as a possible condition to be agreed upon between the Court and the State the use of *in camera* or *ex parte* proceedings. This is because this sub-provision is framed in the context a Part 9 request for judicial assistance, i. e. where the State has exclusive control of the material concerned, as denoted by the terms "Agreement on conditions under which the assistance could be provided..." (emphasis added); see also below mn. 26. Essentially, the scenario foresees that the State concerned might agree to providing the requested material to the Chamber for its *in camera* or *ex parte* review in order to enable it to rule on issues of relevance and necessity and/or the proportionality of the proposed protective measures.

²³ Arguably the distinction in article 72(2) between 'information' and 'evidence' relates to the difference between oral testimony before the Court, which is *ipso facto* entered into the evidentiary record, and a statement given in the context of an interview during investigations (see article 99(5)). Nonetheless, other parts of the provision appear to use the terms interchangeably: e.g. article 72(4) refers to "information or documents"; the chapeau of article 72(5) refers to "information", while subparagraph (b) of the same sub-provision refers to "information or evidence" and "evidence" interchangeably, and subparagraph (c) refers to "information or evidence"; article 72(6) refers to "information or documents"; and the chapeau of article 72(7) and its accompanying sub-paragraphs use the terms "evidence" and "information or documents". The term 'information', moreover, appears in the title of the article.

electronic form.²⁴ The term ‘information’ may be understood more broadly to encompass any knowledge or data, whether recorded in documentary form or not, whether written, diagrammatic or oral.²⁵ The term ‘evidence’ may embrace both information and documents and governs principally the value of the material, rather than its form, in establishing a particular fact in context of the proceedings.

- 5 The last part of the opening clause of article 72(1) refers to the disclosure of the information or documents *of a State*. Article 72(4) similarly refers to where a State learns that ‘information or documents *of the State* are being, or likely to be, disclosed’. This means that the information or documents at issue must belong to or have originated from the State raising the claim: a State cannot claim that disclosure of information or evidence generally might prejudice its national security interests. Since the information or documents must be those *of the State*, a sufficient link will therefore have to be established between the information or documents in question and the intervening State.²⁶ Article 72 does not extend to information or documents in a State’s custody, possession or control which was disclosed to it in confidence by a third party, which is governed by article 73. It also does not extend to information or documents lawfully in the public domain, since a protective measure is incapable of being given effect.²⁷

In this context, a national security claim may be brought by any State, including by a State not Party to the Statute. Indeed, all of the provisions of article 72 find equal application to non-Party States, with the partial exception of a finding of non-compliance which is treated separately below (see below mn. 42).²⁸

As to information or documents held by private or public institutions within a State’s territory, if the State has been requested by the Court pursuant to Part 9 to assist in producing the information, e.g. by seeking a domestic production order to obtain the information from a broadcaster or a banking institution under a judicial warrant, the State may also deny the request pursuant to articles 72 and 93(4) combined, where the requested material, in its opinion, prejudices its national security. If the Court’s request for cooperation has been sent directly to the private or public institution in question and that institution has agreed to cooperate,²⁹ i.e. the request was not channelled through Part 9 of the Statute, the State might nonetheless intervene after learning about such intended cooperation or, if cooperation has happened, any intended disclosure, pursuant to articles 72(2) and 72(4), as discussed below.

²⁴ See e.g. Regulation 22, Regulations of the Court (in relation to submissions to the Court): “The term ‘document’ shall include any motion, application, request, response, reply, observation, representation and any other submission in a form capable of delivering a written record to the Court.”

²⁵ In contrast see *Security Regulations of the Council of the European Union (2001/264/EC)*, 19 March 2001, Part I, para. 3, which includes oral recordings under the definition of ‘document’ to govern all media by which information is recorded: “by ‘document’ is meant any letter, note, minute, report, memorandum, signal/message, sketch, photograph, slide, film, map, chart, plan, notebook, stencil, carbon, typewriter or printer ribbon, tape, cassette, computer disk, CD ROM, or other physical medium on which information has been recorded”.

²⁶ Dixon *et al.*, *Commentary* (2008) art. 72, mn. 13.

²⁷ A national security claim could conceivably be brought by a State with respect to information or documents which, though publicly accessible, has been unlawfully disclosed in the opinion of the State, particularly where it is seeking judicial measures to limit its dissemination and therefore has an interest to intervene also before the ICC. The Court would have to determine whether such a claim properly falls within the scope of article 72. See also *Janowiec and Others v. Russia*, para. 206, and *Nolan and K. v. Russia*, no. 2512/04, para. 56, cited below at fn. 65 and accompanying text in mn. 16.

²⁸ Although article 93(4) refers to States Parties only, this is because that provision is directed towards the duties and obligations of States Parties under Part 9 to cooperate fully (article 86) and thus governs permissible exceptions to that duty, including right or refusal. The availability of the provision should be understood to extend also to non-Party States who have been requested to cooperate.

²⁹ E.g. under article 54(3)(d) the Prosecutor may ‘[e]nter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person’; the provision is not designed to enable the Prosecutor to avoid Part 9 procedures, as the phrase ‘not inconsistent with this Statute’ suggests, but enables direct interactions with cooperation providers where recourse to judicial assistance from States under Part 9 is not required.

Some inconsistency might be suggested by the wording of article 93(4), which provides that a State Party may deny a request for assistance ‘only if the request concerns the production of any documents or disclosure of evidence *which relates to its national security*’ (emphasis added), suggesting that the pronoun attaches to the State’s generic national security assessment, rather than to its specific documents or evidence. The scope for any such discrepancy is overcome, however, by the express subordination of article 93(4) to article 72 (‘[i]n accordance with article 72...’).³⁰ Thus, article 93(4) does not expand upon the possible range of information, documents or evidence that can be the subject of a national security claim under article 72, nor does it provide an extended right of refusal for cooperation requests that go beyond the purposes which may be invoked in accordance with article 72.

2. ‘in the opinion of that State’

The right to lodge a claim on the basis of national security prejudice is predicated on the ‘opinion’ of the State. The term appears four times in the article, at paragraphs 1, 2, 4 and 5, to emphasize that it is the State’s own perception and subjective assessment as to the cause and impact of the prejudice that serves as the relevant standard to trigger a claim, rather than an objective assessment that can be put to test.³¹ Accordingly, a State cannot be denied the right to intervene because other parties or the Chamber appreciate the assessment of prejudice differently. As the drafting of the Statute shows, there was a concern that the Court should not be empowered to second guess a State’s determination to trigger a claim, since the State itself will be uniquely placed to assess any such prejudice against all other information and variables available to it.³² Nonetheless, while the opinion of the State is sufficient to activate the procedure, it is the Court that will make the final determination on the relevance and necessity of the material at issue and the reasonableness of the actions taken and explanations offered by the State in seeking resolution of the matter (see below, *mn. 37 et seq.*)

3. ‘national security’

While the title of the provision refers to the protection of ‘national security information’,³³ the text of article 72 refers more generically to the concept of ‘national security interests’. Neither term is defined in the Statute, indicative of the reality that States have such varied conceptions as to what impacts on their vital strategic interests.³⁴ This is why the focus of the provision is the ‘opinion of the State’, rather than the content of the assessment as described above.

³⁰ See also Dixon *et al.*, *Commentary* (2008), art. 72, p. 1367, fn. 23 and *mn.* 27.

³¹ As Hall adds ‘but that subjective standard cannot be unreasonable or in bad faith’ (2nd ed., p. 1368). This might conceivably arise where the State decides to explain its national security claim in terms that are manifestly inapplicable, possibly requiring the Chamber to rule upon, or inquire further as to, whether an article 72 claim has been properly brought. The Court could also dismiss a claim that fails to comport with the preconditions of article 72(1), e.g. as described above because the information or document in question is not in fact ‘of the State’, but belongs to a third party and therefore requires recourse to article 73. As the ICTY Appeals Chamber has stated, ‘it is generally for the State to present its argument to the Chamber than [sic] an interest is a national security interest that warrants a Chamber ordering non-disclosure of the material sought. It is then for the Chamber to consider whether that claim is justified and warrants an order of protective measures. It is not the case [...] that a Chamber must accept the qualification presented by a State’; *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-ARISbis.2, ICTY Appeals Chamber, Decision on Serbia and Montenegro’s Request for Review, 20 September 2005 (Confidential), para. 14, cited in *Prosecutor v. Milan Milutinović et al.*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, at fn. 79.

³² Piragoff, in: Lee (ed.), *ICC* (1999) 281–282.

³³ The same phrase appears in art. 57(3)(c).

³⁴ One of the coordinators on procedural matters at the Rome Conference suggests that ‘The term “national security” is meant to somewhat limit the scope of application to serious national interests’; Friman, in: Lattanzi and Schabas (eds.), *Essays on the ICC* (1999/2000) 229.

- 8 The dangers of providing carte blanche discretion to States in withholding information on the basis of national security interests is evident from the scope and variability of domestic practice. For example, a 2013 study surveying reports from national experts from 20 European countries found considerable variation regarding what, exactly, is meant by ‘national security’ – with national laws referring (often interchangeably) not only to ‘national security,’ but also to ‘state security,’ ‘public security,’ ‘public safety,’ ‘national defense,’ ‘national interests,’ ‘state secrets,’ and related terms such as ‘security of the realm,’ ‘security of [the country] or its allies,’ ‘defense of the country,’ ‘national safety,’ and other ‘special public issues’ – while other States did not provide a definition at all for the purpose of justifying the non-disclosure of government-held information, leaving this to be deduced from other domestic legal sources.³⁵ As the report notes, ‘where a definition of national security has been provided in the law, the term tends to be broadly defined to encompass any threats to the independence, sovereignty, or territorial integrity of the nation, as well as to its internal safety or constitutional order’, and encompasses both ‘international relations and protection against domestic security threats (e.g., law enforcement)’.³⁶ Similarly, among the recommendations contained in the 2013 Global Principles on National Security and the Right to Information (‘The Tshwane Principles’) is that the term ‘national security’ as well as the categories of information that may be withheld on national security grounds should be set forth clearly in law.³⁷
- 9 Human rights instruments generally permit States to take measures to legitimately limit the exercise of certain other rights, including the right to a public trial.³⁸ In addition to respecting the principles of equality and non-discrimination, such limitations, however, must be prescribed by law; be in pursuance of one or more specific legitimate purposes; and be ‘necessary in a democratic society’.³⁹ Prescription by law has been interpreted to mean that the law must

³⁵ Jacobsen, *National Security and the Right to Information in Europe* (2013), pp. 7–8.

³⁶ *Ibid.*, p. 8. Unsurprisingly, the same broad scope applies in other regions. The United States Department of Defense, for example, defines ‘national security’ as ‘A collective term encompassing both national defense and foreign relations of the United States with the purpose of gaining: a. A military or defense advantage over any foreign nation or group of nations; b. A favorable foreign relations position; or c. A defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.’ and *national security interests* as ‘The foundation for the development of valid national objectives that define United States goals or purposes’; Joint Publication 1–02, Department of Defense Dictionary of Military and Associated Terms, 8 November 2010 (as amended through 15 March 2015).

³⁷ See Principle 2 and 3, Global Principles on National Security and the Right to Information (‘The Tshwane Principles’), 12 June 2013. The Principles were drafted by 22 organizations and academic centres in consultation with more than 500 experts from more than 70 countries, facilitated by the Open Society Justice Initiative and in consultation with the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media. See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: ‘While the understanding of national security varies among States, it is good practice for national security and its constituent values to be clearly defined in legislation adopted by parliament’; Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, A/HRC/14/46, 17 May 2010, para. 9.

³⁸ Article 14(1) ICCPR e.g. allows for the exclusion of the press and public from all or part of a trial for reasons of ‘morals, public order (ordre public) or national security in a democratic society’, while article 12(3) ICCPR provides ‘[t]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant’. Although the rights enumerated under article 14 are not among the list of non-derogable rights protected by article 4 of the Covenant, the Human Rights Committee has stated that the procedural safeguards of the ICCPR may never be made subject to measures that would circumvent the protection of non-derogable rights (such as imposition of the death penalty during a state of emergency without observing the provisions of articles 14 and 15 of the Covenant); Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 15.

³⁹ See articles 12(3), 14(1), 19, 21 and 22 ICCPR. See also Council of Europe, *Guidelines on human rights and the fight against terrorism* (2002), guideline III(2); and Inter-American Commission on Human Rights, ‘Report on terrorism and human rights’, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., paras. 51 and 55.

be adequately accessible so that individuals have an adequate indication of how the law limits their rights and the law must be formulated with sufficient precision so that individuals can regulate their conduct.⁴⁰ The legitimate purpose criteria may attach to national security, public safety, public order, health, morals, and the human rights and freedoms of others.⁴¹ In this regard, the *Siracusa Principles* on the limitation and derogation provisions of the ICCPR suggests that national security: (i) may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force; (ii) cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order; (iii) cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse; and that (iv) a state responsible for the systematic violation of human rights cannot invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.⁴² The phrase ‘necessary in a democratic society’ may be qualified as relating to limitations that are necessary in the pursuit of a pressing objective legitimately pursued, and whose impact on other rights and freedoms is proportionate to that aim.⁴³ The ECtHR has summarised its own case law thus:

‘... the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the *Doorson v. the Netherlands* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 470, § 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see the *Van Mechelen and Others v. the Netherlands* judgment of 23 April 1997, *Reports* 1997-III, p. 712, § 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see the *Doorson* judgment cited above, p. 471, § 72, and the *Van Mechelen and Others* judgment cited above, p. 712, § 54).’⁴⁴

Responding to the variation in State practice in this field, the three thematic mandate holders on the freedom of expression of the United Nations, the Organisation for Security and Cooperation in Europe and the Organisation of American States issued a Joint Declaration in 2004, stating, *inter alia*: ‘[t]he right to access information held by public authorities is a

⁴⁰ See e.g. *Sunday Times v. United Kingdom*, N° 6538/74, European Court of Human Rights, Judgment, 26 April 1979, para. 49. The *Siracusa Principles on the Limitation and Derogation Provisions of the ICCPR* define ‘proscribed by law’ as requiring: (i) no limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied; (ii) laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable; (iii) legal rules limiting the exercise of human rights shall be clear and accessible to everyone; and (iv) adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights; *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1985/4, Annex (1985).

⁴¹ See articles 12, 13, 14, 19, 21 and 22 ICCPR. Christopher Hall, in *Commentary* (2008), art 72, mn. 7, observes that none of the human rights treaties provide that a state may refuse to supply evidence to a court on the ground that it would prejudice national security. Any such withholding would therefore need to be assessed in the light of the principles of necessity and proportionality.

⁴² *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1985/4, Annex (1985), paras. 29–32. See *ibid* paras 22–37 for working definitions of public safety, public order, health, morals, and the human rights and freedoms of others. See generally *Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996).

⁴³ *Siracusa Principles*, paras 10, 19–21. The Principles define the term ‘democratic society’ as referring, *inter alia*, to a society ‘which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights’; *Siracusa Principles*, para. 21.

⁴⁴ *Rowe and Davis v. United Kingdom*, N° 28901/95, European Court of Human Rights, Judgment, 16 February 2000, para. 61.

fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions'; '[t]he right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions'; '[t]hose requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints'; '[n]ational authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector', and '[c]ertain information may legitimately be secret on grounds of national security or protection of other overriding interests. However, secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label "secret" for purposes of preventing disclosure of information which is in the public interest'.⁴⁵

- 11 More recent high profile revelations in the context of counter-terrorism cases have increased the level of public scrutiny on these issues. Nonetheless, national law continues generally to exhibit deference to the assessment of State authorities over the disclosure of information when national security is invoked. As the 2013 survey on national security and the right to information in Europe demonstrates, this occurs even where such assessments are subject to institutional oversight; while at other times certain public offices and officials, in particular those working in the national security sector, may be exempt, either in law or in practice, from disclosure obligations altogether upon a minimal showing or assertion of national security prejudice.⁴⁶ Moreover, while many States recognize the right of the public to

⁴⁵ *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*, 6 December 2004, available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&IID=1>. The OAS Special Rapporteur on Freedom of Expression, in a framework document on the right to access information, further summarised the requirements of necessity and proportionality thus: 'The limitations imposed upon the right of access to information – like any limitation imposed on any aspect of the right to freedom of thought and expression – must be necessary in a democratic society to satisfy a compelling public interest. Among several options for accomplishing this objective, the one least restrictive to the right must be chosen, and the restriction must: (i) be conducive to the attainment of the objective; (ii) be proportionate to the interest that justifies it; and (iii) interfere to the least extent possible with the effective exercise of the right. With specific regard to the requirement of proportionality, the Inter-American Commission has asserted that any restriction to access to information held by the State, in order to be compatible with the Convention, must overcome a three-part proportionality test: (a) it must be related to a legitimate aim that justifies it; (b) it must be demonstrated that the disclosure of the information effectively threatens to cause substantial harm to this legitimate aim; and (c) it must be demonstrated that the harm to the objective is greater than the public's interest in having the information'; *Right to access to information in the Inter-American legal framework*, Special Rapporteur on Freedom of Expression, Inter American Commission on Human Rights, OEA/Ser.L/V/II, CIDH/RELE/INF. 1/09, 30 December 2009, para. 53. See also *Ricardo Canese v. Paraguay*, IACtHR, Judgment (Merits, Reparations and Costs), 31 August 2004, para. 96; *Palamara Iribarne v. Chile*, IACtHR, Judgment (Merits, Reparations and Costs), 22 November 2005, para. 85; *Gomes Lund et. al. v. Brazil*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2014, para. 229.

⁴⁶ Jacobsen, pp. 9–11, 36–37, 42, noting that States generally do provide for some type of oversight over a public body's national security claim against disclosure with authority to review classification decisions. This may be possible by means of independent judicial review, which may be restricted to only certain courts or judges with special clearance may examine classified information, and who may additionally have the authority to order the release of classified information if they deem that the information does not need to be withheld despite the government's claim to the contrary, although in practice judges normally defer to the public authority's assessment that disclosure would harm national security. Alternatively, review may only be possible via another type of oversight authority, such as parliament, an Ombudsperson, an Information Commissioner, or another national agency or inter-departmental committee, the powers and degree of autonomy of which may vary considerably.

access government-held information, the scope of such access varies considerably, including on the preliminary issue of confirming or denying whether the information sought exists, since this in itself may be classified.⁴⁷

A welcome practice of some States is to list specific categories of information which may be classified on national security grounds and those that may not. For example, in certain States the law either expressly prohibits, or judicial oversight practice prevents, claims of national security prejudice in relation to human rights violations, government corruption, the existence of a government entity, the budget or expenditures of a government entity, the existence of a law (or portion of a law), emergency response plans, accidents and disasters threatening the health and security of the citizens, and the state of the environment, or information which has been classified in order to conceal a criminal offense, abuse of power, or other unlawful behaviour.⁴⁸ However, in many States there is no such restriction.

As emphasised in several decision of regional bodies, executive claims of exemption from the normal rules of disclosure in legal proceedings on national security grounds require independent judicial scrutiny.⁴⁹ Failure may result in a finding of an abuse of power. As the ECtHR observed in *El Masri*, concerning the practice of extraordinary renditions and the failure of the Macedonian authorities to provide satisfactory responses, '[t]he concept of "State secrets" has often been invoked to obstruct the search for the truth'.⁵⁰

Similarly, in *Myrna Mack Chang v. Guatemala*, the Inter-American Court of Human Rights (IACtHR) held in relation to the intentional withholding of documents on the basis of state secrecy: 'in cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding'.⁵¹ The IACtHR went on to recall with approval the following statement of the Inter-American Commission:

[i]n the framework of a criminal proceeding, especially when it involves the investigation and prosecution of illegal actions attributable to the security forces of the State, there is a possible conflict of interests between the need to protect official secret [*sic*], on the one hand, and the obligations of

⁴⁷ *Ibid.*, pp. 11, 15.

⁴⁸ *Ibid.*, pp. 34–35.

⁴⁹ See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/22/52, 1 March 2013, para. 38.

⁵⁰ *El-Masri v. Macedonia*, N° 39630/09, ECtHR, Judgment, 13 December 2012, para. 191. The judgment also cited, at para. 46, the words of Swiss Senator Dick Marty in his 2007 report on extraordinary renditions to the Council of Europe, that secrecy was often invoked in order 'not to provide explanations to parliamentary bodies or to prevent judicial authorities from establishing the facts and prosecuting those guilty of offences'; *Secret detentions and illegal transfers of detainees involving Council of Europe member States: second report*, Council of Europe, Doc. 11302 rev., 11 June 2007, para. 5. See also *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, resolution 1838 (6 October 2011), Parliamentary Assembly of the Council of Europe, adopted on debate of the 2011 Marty Report, at para. 4: '...information concerning the responsibility of state agents who have committed serious human rights violations, such as murder, enforced disappearance, torture or abduction, does not deserve to be protected as secret. Such information should not be shielded from judicial or parliamentary scrutiny under the guise of "state secrecy".'

⁵¹ *Myrna Mack Chang v. Guatemala*, IACtHR, Judgment (Merits, Reparations and Costs), 25 November 2003, para. 180. In that case, the Ministry of National Defense had refused to provide certain documents relating to the operation and the structure of the Presidential General Staff after repeated requests from the Attorney General's Office and federal judges in the investigations of an extrajudicial execution, invoking state secrecy pursuant to article 30 of the Guatemalan Constitution. The IACtHR held this refusal amounted to an obstruction of justice; *Myrna Mack Chang v. Guatemala*, para. 172. In *Gomes Lund et. al. v. Brazil*, recalling its earlier judgment in *Myrna Mack Chang v. Guatemala*, the IACtHR similarly held that State authorities cannot resort to citing State secrecy, the confidentiality of information, or public interest or national security in order to avoid turning over information required by the judicial or administrative authorities responsible for an investigation into human rights violations. In this regard, the Court held that when the information sought relates to a criminal investigation, the decision to classify the information as secret or to refuse to hand it over – or to confirm its existence – cannot stem solely from a State organ whose members are charged with committing the wrongful acts; *Gomes Lund et. al. v. Brazil*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2014, para. 202, citing to *Myrna Mack Chang v. Guatemala*, IACtHR, Judgment (Merits, Reparations and Costs), 25 November 2003, paras. 180–181.

the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other hand.

[...P]ublic authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the “clandestinity of the Executive branch” and to perpetuate impunity.’

Likewise, when a punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act. ‘It is not, therefore, a matter of denying that the Government must continue to safeguard official secrets, but of stating that in such a paramount issue its actions must be subject to control by other branches of the State or by a body that ensures respect for the principle of the division of powers...’ Thus, what is incompatible with the Rule of Law and effective judicial protection ‘is not that there are secrets, but rather that these secrets are outside legal control, that is to say, that the authority has areas in which it is not responsible because they are not juridically regulated and are therefore outside any control system...’⁵²

In *Gomes Lund et. al*, the IACtHR similarly held ‘given the denial of access to determined information under State control, the State must guarantee the existence of a simple, quick, and effective remedy before an independent organ, distinct from the one that denied the request, that can determine if their [*sic*] was a harm to the right to access information, and where applicable, resolve that the corresponding authority present said information’.⁵³

- 14 The ICC will clearly have to develop its own understanding of the scope and content of the term ‘national security’ in the context of specific claims put before it. Nonetheless, if the Court were to follow the practice of some States when using this term it could lead to the absurd result that disclosure of information concerning almost any matter involving an armed conflict or military activity would be considered prejudicial to national security and, therefore, protected from disclosure.⁵⁴ For example, one practice cited with concern by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and recalled in the *El Masri* case, concerns the blanket invocation of State secrets privilege with reference to complete policies, such as the United States’ secret detention, interrogation and rendition programme.⁵⁵ The danger inherent to an overly broad construction of, and deference to, the term ‘national security’ is evident the ICTY interlocutory appeal in *Blaškić*.⁵⁶ Rejecting Croatia’s claim that the Tribunal had no authority to review its claim that information concerning its military operations would harm its national security, the Appeals Chamber observed: ‘to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal’s functions’.⁵⁷ As the Appeals Chamber went on to hold:

‘[T]o grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and “defeat its essential object and purpose”. The International Tribunal was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military

⁵² *Myrna Mack Chang v. Guatemala*, IACtHR, Judgment (Merits, Reparations and Costs), 25 November 2003, para. 181.

⁵³ *Gomes Lund et. al. v. Brazil*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2014, para. 231, recalling *Claude Reyes et al. v. Chile*, IACtHR, Judgment (Merits, Reparations and Costs), 19 September 2006, para. 137.

⁵⁴ Hall, *Commentary* (2008), art 72, mn. 7; Triffterer, in: Roggemann and Šarčević (eds.), *National Security and International Criminal Justice* (2002), pp. 64–69.

⁵⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 4 February 2009, UN Doc. A/HRC/10/3, para. 60; cited in *El Masri v Macedonia*, European Court of Human Rights, Application No. 39630/09, Judgment, 13 December 2012, at para. 103.

⁵⁶ *Prosecutor v. Tihomir Blaškić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY Appeals Chamber, 29 Oct 1997.

⁵⁷ *Ibid.*, para. 64.

operations. It is, therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance, either for the Prosecutor or the defence, to prove or disprove the alleged culpability of an indictee, particularly when command responsibility is involved (in this case military documents may be needed to establish or disprove the chain of command, the degree of control over the troops exercised by a military commander, the extent to which he was cognisant of the actions undertaken by his subordinates, etc.). To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'être* of the International Tribunal would then be undermined.⁵⁸

Framing the parameters that were to guide the negotiations of article 72, the ICTY Appeals Chamber emphasised that rather than allowing States a unilateral right to withhold documents because of national security concerns, the solution lay in an approach that enabled the Tribunal to adopt practical methods and procedures to scrutinise the validity of a State's national security claim, while mindful of legitimate State concerns (see below mn. 26).⁵⁹ 15

4. 'prejudice to national security'

Unlike earlier proposals which included references to documents or information that 'relate to' the national security of a State, the article 72 standard requires that disclosure would, in the opinion of the State, 'prejudice' its national security (see also mn. 5). As such, the provision anticipates that a State must consider the actual harm or 'prejudice' to its national security that would result from the disclosure in question, rather than a mere link between the information and its national security interests.⁶⁰ In this regard, Chambers of the ICTY have held it does not suffice for a State to claim national security in general terms: it must provide specific arguments related to its national security with reference to the particular document affected.⁶¹ 16

In the *Muthuara, Kenyatta and Ali* case before the ICC, Pre-Trial Chamber II rejected for lack of specificity a request by the Government of Kenya to participate in the confirmation hearing based on the concern that 'sensitive information regarding Kenya's security interests within the meaning of article 72 of the Statute may arise in the Hearing'. As recounted by the Chamber, 'The Government of Kenya purports, in particular, that the Prosecutor alleges that the "State House" was involved in the commission of alleged crimes. Therefore, the Government of Kenya advances, it "must be present in the courtroom to hear the [Prosecutor's] submissions and evidence" whether in public or private session so that the "Government can be in a position to determine whether the disclosure of any materials would prejudice its national security interests and to take appropriate steps as provided for in the Statute"'.⁶² Rejecting the application, the Chamber noted that the

⁵⁸ *Ibid.*, para. 65. In the context of the decision at issue, the Appeals Chamber went on to observe that national implementing legislation which permits States to decline to comply with requests of the Tribunal if such requests would prejudice the 'sovereignty, security or national interests' were not compatible with their obligations under the Statute; *Ibid.*, para. 64, citing implementing legislation of Australia and New Zealand.

⁵⁹ *Ibid.*, para. 67 *et seq.* These same principles were recalled by the Trial Chamber in the *Karadžić* case concerning a request to Germany for the production of documents that triggered a national security claim: 'The Trial Chamber first notes that a state does not have a blanket right to withhold the production of documents on the basis that this raises national security concerns ... However, the Rules do not leave the concerned states without any alternative because their concerns may be addressed by recourse to Rule 54 bis (F) to (I), which provide for various protective measures for the documents at issue, should they be requested'; *Prosecutor v. Radovan Karadžić*, Decision on the accused's application for binding order pursuant to rule 54 bis (Federal Republic of Germany), ICTY Trial Chamber, IT-95-5/18-T, 19 May 2010, para. 41. See also *Prosecutor v. Milan Milutinović et al*, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, IT-05-87-PT, 17 November 2005, para. 31.

⁶⁰ Dixon and Duffy, *Commentary* (1999), art. 72, mn. 8. See also above mn. 5 at fn. 30 and accompanying text.

⁶¹ *Prosecutor v. Radovan Karadžić*, Decision on the accused's application for binding order pursuant to rule 54 bis (Federal Republic of Germany), ICTY Trial Chamber, IT-95-5/18-T, 19 May 2010, para. 43.

⁶² *Prosecutor v. Francis Kimiri Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings, ICC Pre-Trial Chamber II, ICC-01/09-02/11-340, 20 September 2011, para. 10.

disclosure of evidence in question had already occurred *inter partes* without the Government of Kenya raising any concerns during the pre-confirmation disclosure phase.⁶³ It also considered Kenya's request to be based on a particular interpretation of the Prosecutor's allegation, which was insufficiently precise to attract a specific national security prejudice.⁶⁴

The burden on the State to provide satisfactory explanations in relation to claimed national security prejudice has been emphasised by both the ECtHR and the IACtHR. In *Husayn (Abu Zubaydah) v. Poland*, the ECtHR observed that while '[t]he judgment by the national authorities in any particular case that national security considerations are involved is one which the Court is not well equipped to challenge', nonetheless in relation to its own powers '... in cases where the Government have advanced confidentiality or security considerations as the reason for their failure to produce the material requested, the Court has had to satisfy itself that there were reasonable and solid grounds for treating the documents in question as secret or confidential'.⁶⁵ In *Janowiec and Others v. Russia*, the ECtHR also took into account whether the document in question was known to anyone outside the secret intelligence services and the highest State officials, after it became clear that lay persons, such as counsel for the claimant in a civil case, could take cognisance of the document in question.⁶⁶ In *Gomes Lund et. al. v. Brazil*, the IACtHR similarly held that 'all denials of information must be motivated and founded, to which the State is responsible for the burden of proof on the impossibility of presenting said information, and given doubts or empty legal arguments, the right to access to information will be favoured'.⁶⁷

5. Interaction with other statutory provision

- 17 The last part of opening paragraph of article 72 specifies that the provision applies to all instances where information or documents may be disclosed during the course of proceedings.⁶⁸ A number of such instances are specified, albeit concluding with the catch-all phrase 'at any other stage of the proceedings where disclosure may be at issue'. The express citation to the most important provisions dealing with the Court's disclosure regime, nonetheless, removes any

⁶³ *Ibid.*, para. 11. The Chamber nonetheless accepted for sake of argument that the Government of Kenya might be only learning now 'at this late stage' of the fact of such disclosure, pursuant to article 72(4); *ibid.*

⁶⁴ *Ibid.*, para. 11: 'The assertion put forth by the Government of Kenya, namely the purported implication of the "State House", seems to be based on a particular reading of the document containing the charges and is not convincing in itself to justify an automatic reference to national security interests. Further, the simple mention of the word "State House" in the document containing the charges cannot compensate the lack of any proper substantiation of the existence of "information or documents of a State" which would satisfy the legal requirements of article 72 of the Statute. Therefore, the argument as presented by the Government of Kenya must fail.'

⁶⁵ *Husayn (Abu Zubaydah) v. Poland* (no. 7511/13), Judgment, 24 July 2014, para. 357. In cases concerning disappearances in the Chechen Republic, where the Russian Government relied on a provision of the Code of Criminal Procedure which, in their submission, precluded the disclosure of documents from the file of an ongoing investigation, e.g., the Court noted that the provision in question did not contain an absolute prohibition but rather set out the procedure for, and limits to, such disclosure; *Janowiec and Others v. Russia*, Judgment (Merits and Just Satisfaction), 21 October 2013, para. 205. The Court also noted that in many similar cases the Russian Government had submitted the documents requested without mentioning that provision, or had agreed to produce documents from the investigation files even though they had initially invoked that provision; *ibid.* In other cases, the ECtHR was not satisfied with a State's explanation according to which regulations relating to the procedure for review of prisoners' correspondence constituted a State secret or, in another instance, that the State concerned could not communicate information classified as a State secret to an international organisation such as the ECtHR because there was no provision in domestic law laying down a procedure to do so; *Ibid.*, para. 206, citing *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, 1 July 2010, para. 170 and *Nolan and K. v. Russia*, no. 2512/04, ECtHR, Judgment, 12 February 2009, para. 56.

⁶⁶ *Janowiec and Others v. Russia*, para. 206, citing *Nolan and K. v. Russia*, no. 2512/04, para. 56.

⁶⁷ *Gomes Lund et. al. v. Brazil*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2014, para. 230.

⁶⁸ The wording of article 72(1) says that it applies 'in any case where... as well as cases at any other stage of the proceedings...'. Nonetheless, the use of the term 'case' here refers properly to the notion of 'instances', 'occurrences or 'occasions', rather than the technical term as used elsewhere in the Statute referring to proceedings instituted against a specific person for particular conduct.

doubt as to the permissible scope of application of a national security claim. As articulated in paragraph 1, this includes article 56(2) and (3), which relate to the measures that may be ordered by the Pre-Trial Chamber pursuant to a unique investigative opportunity. In particular, the taking testimony or a statement from a witness or the examination, collection or testing of evidence during the investigative phase, under the direction of the Chamber and with the participation of the parties, could give rise to national security considerations similar to those arising during ordinary pre-trial or trial proceedings. Referenced is also made to articles 61(3) and 64(3), which include the powers of the Pre-Trial Chamber and the Trial Chamber respectively to issue orders regarding the disclosure of information, as well as article 67(2), which governs the disclosure of potentially exonerating information. This means that the Chamber's authority to issue orders for the disclosure of information or evidence, as well as the Prosecutor's own disclosure obligations towards the Defence, can be made subject to the operation of article 72. The provision further references article 68(6), which relates to measures requested by a State for the protection of its servants or agents or the protection of confidential or sensitive information, and which may intersect with the inter-related provisions of article 72(2) and (4).

Two further provisions related to cooperation are cross-referenced in the opening paragraph. Article 87(6) relates to cooperation that may be requested from an intergovernmental organization, since that organization may have been requested to provide information or evidence which originates from the State concerned.⁶⁹ Intergovernmental organizations will normally refuse to provide classified information which originates from one of its member States, since such information will typically be regarded as belonging to the originating State and not the organisation itself.⁷⁰ Alternatively, the organisation might offer or agree to seek to the views of member State concerned before its release. The other cited cooperation provision is article 93, which governs all possible forms of cooperation that the Court may request of a State, other than arrest, and hence relates to material that has been sought from that State 'pursuant to a request for cooperation under Part 9'. As noted above, article 93(4) likewise contains a cross-reference back to article 72, which governs permissible grounds for refusal of a request.⁷¹

In all of the above instances, as well as in any others where disclosure may be at issue at any other stage in the proceedings, the State concerned has a right to intervene, to be heard and to seek resolution of the matter before the competent Chamber. The term 'proceedings' in this context includes the full range of activities where information, documents or evidence may be disclosed, from preliminary examination and pre-trial to trial, sentencing, appeal, reparations and revision hearings.⁷²

II. Paragraph 2

Article 72(2) treats the situation where an individual, rather than a State, has been requested to give information or evidence. The individual may have refused to provide the

⁶⁹ See also article 73, this volume.

⁷⁰ See e.g. article 3(1) of the *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance*, ICC-PRES/01-01-06, 10 April 2006, which provides: 'This Agreement, including any agreements or arrangements concluded under Article 11, shall not apply to requests for information from the Court which relate to information, other than EU documents including EU classified information, originating from an individual Member State. In such circumstances, any request shall be made directly to the relevant Member State.'

⁷¹ See above mn. 5.

⁷² At the preliminary examination stage, although normally there will be no proceedings until an application is brought for authorization to proceed, disclosure may occur in the context of a decision not to proceed with a referral (article 53(3) review proceedings), see rule 107(3), or possibly in the context of proceedings initiated under Regulation 46(3) of the Regulation of the Court; see e.g. Pre-Trial Chamber II, *Request Under Regulation 46(3) of the Regulations of the Court*, Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', ICC-RoC46(3)-01/14, 12 September 2014.

information in question or, instead of refusing, s/he may have referred the matter to the State concerned for its assessment. In both scenarios the national security claim is only valid if confirmed by the State.⁷³ A State might otherwise intervene in the proceedings pursuant to paragraph 4 of article 72 where it learns that its information or documents might be disclosed, *inter alia*, by the individual referred to in paragraph 2 informing such State in advance.

- 20 Paragraph 2 protects ‘a person who has been requested to give information or evidence’. It may therefore be invoked in the context of any procedure where disclosure might result, including in the course of testimony before the Court or in the context of a unique investigation opportunity (article 56) or a rule 68 procedure. It could also arise in the context of statement taking during investigations, since such statements would later be subject to disclosure pursuant to rule 76 or might otherwise fall within the scope of inspection under rule 77.
- 21 The provision aims to relieve persons so requested of the burden of committing a criminal offence domestically by violating national secrecy laws.⁷⁴ In the context of trial proceedings, it also averts placing such witnesses or experts in potential contempt of court by refusing to comply with a direction of the Chamber.⁷⁵ The onus thus falls on the Court and the State concerned to resolve the matter, and not on the person so questioned; whether by means of the procedures outlined in article 72 or by the State concerned clarifying that its national security interests would not in fact be prejudiced. As discussed below, the Court cannot compel a person before it who falls within the scope of paragraph 2 to provide testimony when s/he has raised a national security objection that has been confirmed by the State, as this falls within the regime of article 72(7)(a) (see below, mn. 39).

III. Paragraph 3

- 22 Paragraph 3 separates out the treatment of national security from the separate confidentiality regimes created by article 53(3)(e), article 53(3)(f) and article 73.⁷⁶ It clarifies that nothing in article 72 prejudices the requirements applicable in those other provisions, meaning that they are neither restricted nor affected by the conditions and procedures stipulated in article 72. Thus, for example, the requirement of confidentiality under article 53(3)(e), article 53(3)(f) and article 73 is not dependent on a claimed national security prejudice. Conversely, the regime created under article 72 for the examination of confidentiality claims by a State with respect to a particular document, including the consequences that may attach where the matter is not resolved, are not directly transferable to the regime of non-disclosure created under those other provisions. Thus, while the Court may choose in its discretion to apply by analogy some of the mechanism described in article 72 in other contexts, or *visa versa*, nothing in article 72 *per se* prejudices the requirements of confidentiality applicable under those other provisions.

In relation to article 54(3)(e), the Appeals Chamber of the ICC has held that a non-disclosure undertaking agreed to between a State and the Prosecutor under that provision is inviolable, holding that any article 54(3)(e) materials provided to a Chamber for its *in camera*, *ex parte* review must be treated in confidence by the Chamber pursuant to own obligation to provide for the confidentiality of information under article 64(6)(c) of the Statute and rule 81(3), and cannot be disclosed without the provider’s consent.⁷⁷ By contrast,

⁷³ Thus, the phrase ‘and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests’ attaches to both scenarios described above.

⁷⁴ Dixon and Duffy, *Commentary* (1999), art. 72, mn. 11.

⁷⁵ See article 71, rules 65 and 171.

⁷⁶ Piragoff notes that the origin of article 54(3)(e) comes from the 1997 Preparatory Committee session in the context of a number of proposals with regard to national security and the disclosure of confidential information (in: Lee (ed.), *ICC* (1999) 272–273).

⁷⁷ *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’.

under article 72(7), under certain conditions, the Chamber can order the disclosure of information over the objections of the State concerned. The ‘without prejudice’ application of paragraph 3 would mean that a Chamber order under article 72(7)(b)(i) for the prosecution to disclose information in respect of which a State has unsuccessfully claimed national security prejudice cannot cause the Prosecutor to breach a confidentiality undertakings separately agreed to with that State pursuant to article 54(3)(e).⁷⁸ Similarly, if the Chamber has taken necessary measures under article 54(3)(f) for the confidentiality of information, the protection of any person or the preservation of evidence, unless those measures are modified, any order by the Chamber under article 72 must be consistent with them.⁷⁹ This includes measures adopted by the Pre-Trial Chamber which remain in force during trial proceedings unless otherwise modified. Moreover, pursuant to article 73, although a State may possess information which was provided to it in confidence by a third party, the Chamber may not order the requested State to disclose such information, but must instead direct its inquiry, via the requested the State, to the third party in question.⁸⁰

The difference in regimes between article 54(3)(e) and article 72, in particular, deserves 23 some additional treatment. As described earlier, while it is for the State concerned to bring a national security claim under article 72, it is the Chamber that will rule on the proportionality of the measures sought by the State (whether to refuse cooperation or prevent disclosure *in toto* or to subject this to proposed protective measures) and the Chamber may ultimately hold the State in breach of its obligations, draw an inference, or, depending on who has possession, order that the material be disclosed. Article 54(3)(e) cannot be applied unilaterally, it requires prior agreement between the information provider and the Prosecutor. However, where such an agreement is in place, article 54(3)(e) enables the State to control thereby the information’s classification level as well as its subsequent use other than as lead information, without needing to either justify its so doing on the basis of national security or having to subject the information’s confidentiality to the review of the Court.⁸¹

The obvious potential for conflict between these two confidentiality regimes, and the possibility for their misuse, was addressed by the ICTY in *Milutinović et al.* In that case, the

ICC-01/04-01/06 OA 13 (21 October 2008), para. 48. See generally Rastan, (2009) 7 *NJIHumRts* 229, 270-276; Ambos (2009) 12 *NCLRev* 543 *et seq.*

⁷⁸ It is doubtful whether the same considerations and underlying logic would apply to non-disclosure obligations that have been unilaterally imposed on the Prosecutor by the requested State pursuant to article 93(8) as opposed to those that have been agreed to in advance under article 54(3)(e). In any event, the provision is not expressly referred to in article 72(3) as enjoying ‘without prejudice’ application. See similarly contrasting ICTY rule 70 with ICTY rule 54*bis*, *Prosecutor v. Milan Milutinović et al.*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, paras. 33–35.

⁷⁹ In this context, Trial Chamber I has confirmed that although article 54 is entitled ‘Duties and powers of the Prosecutor with respect to investigations’, the provision applies also at the prosecution stage; *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, ICC Trial Chamber I, Reasons for Oral Decision lifting the stay of proceedings, ICC-01/04-01/06-1644, 23 January 2009, para. 38.

⁸⁰ See commentary for article 73, mn. 7 *et seq.* Third-party information could not, in any event, form the basis of a national security claim since by definition the information which forms the basis of such a claim must be a State’s own.

⁸¹ See similarly treatment by the ICTY Appeals Chamber of near analogous provisions contained in rule 54*bis*, which allows a Chamber to issue binding orders for disclosure, and rule 70, which relates to non-disclosure agreements entered into by the Prosecutor with an information provider: ‘Under Rule 54*bis*, the application of protective measures to the documents or information produced by a State are at the discretion of a Judge or the Trial Chamber who may impose them only after determining that national security interests warrant them. Furthermore, it is at the discretion of the party requesting the information as to the purposes for which it will subsequently be used in proceedings before a Judge or Trial Chamber. Whereas, under Rule 70, a State controls the confidentiality of the information it provides and makes its own determination that this material should be subject to certain protections – for national security interest reasons or otherwise. In addition, the State has control over how it may be used, whether or evidence generation purposes only or also as evidence at trial. Thus, Rule 70 allows for a State to avail itself of control and protections that it is able to maintain over that material in exchange for assisting parties before the International Tribunal in providing confidential material either of its own volition or at their request.’; *Prosecutor v. Milan Milutinović et al.*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 35.

defendant Dragoljub Ojdanić had sought the production of intercepted communications from NATO and a number of its Member States.⁸² The United States had invoked prejudice to its national security interests against disclosure, but following further consultations with the Defence, offered to disclose certain parts of the requested information for leads purposes only pursuant to rule 70, meaning that the Defence could not adduce the information as evidence at trial without the latter's consent. The Defence rejected the offer and requested the Tribunal to instead order the United States to disclose the information by utilising its rule 54bis powers.⁸³ The Trial Chamber accepted Ojdanić's arguments that the steps it had taken to secure the assistance of the United States were reasonable under the circumstances, and concurred with the defendant that he should not be required to accept information that the States are empowered to prevent from being disclosed at trial. It held that where the material is relevant to and necessary for a fair determination of the issues at trial, an applicant is entitled to seek an order pursuant to rule 54 bis rather than be dependent on the willingness of a State to agree to the use at trial of material over which it has the final say under Rule 70.⁸⁴

The Appeals Chamber reversed this part of the decision, holding that, while it was apparent in the case at hand that the United States wished to retain control over the disclosure of the requested material and to prevent it from being used as evidence at trial, '[r]ule 70 does not presuppose that a State will, in fact, decide to retain all of that control at all times or prevent disclosure of all of the requested information at trial.' In this respect, the Appeals Chamber noted that a State's willingness to have recourse to rule 70 in assisting a party with requested information does not equal that State declining to provide assistance such that seeking mandatory action from the Chamber under rule 54bis was warranted. Specifically it held: 'A party may not bypass a State's cooperative efforts to assist it with gaining access to certain confidential information simply because that party does not want the State to be able to utilize the protections afforded to it through Rule 70'.⁸⁵ Accordingly it reversed the Trial Chamber's finding that Ojdanić had met the reasonable steps requirement in his rule 54bis application. Clearly mindful of the dangers inherent in such an approach, the Appeals Chamber went on to observe, citing the earlier *Blaškić* interlocutory appeal judgement:

"That being said, the Appeals Chamber emphasizes that Rule 70 should not be used by States as "a blanket right to withhold, for security purposes, documents necessary for trial" from being disclosed by a party for use as evidence at trial as this would "jeopardise the very function of the International Tribunal, and defeat its essential object and purpose." Indeed, "those documents might prove crucial for deciding whether the accused is innocent or guilty." Furthermore, such an interpretation of Rule 70 would be contrary to States' obligation to cooperate with the International Tribunal under Article 29 of the Statute."⁸⁶

It is difficult to reconcile the caution expressed in these sentiments with the obvious risk that States may try to avoid judicial scrutiny by seeking to change the confidentiality regime from the national security track to that of non-disclosure. Before the ICC, it is unlikely that a State that found itself in the midst of a national security claim, possibly undergoing the consultation procedures foreseen in articles 72(5)-(7), could unilaterally trump such processes by simply offering to provide the sought document or information under article 54(3)(e), since the latter is conditioned upon an agreement. While the Chamber would be

⁸² *Prosecutor v. Milan Milutinović et al*, Decision on Second Application of Dragoljub Ojdanić for Binding Orders pursuant to Rule 54bis, ICTY Trial Chamber, IT-05-87-PT, 17 November 2005.

⁸³ Canada had responded to the request in similar terms; *ibid*, para. 22.

⁸⁴ *Prosecutor v. Milan Milutinović et al*, Decision on Second Application of Dragoljub Ojdanić for Binding Orders pursuant to Rule 54bis, ICTY Trial Chamber, IT-05-87-PT, 17 November 2005, para. 22.

⁸⁵ *Prosecutor v. Milan Milutinović et al*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 37.

⁸⁶ *Ibid*, para. 38; citing *Prosecutor v. Blaškić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY Appeals Chamber, 29 October 1997, para. 65.

free to consider the proportionality of such an offer to the prosecution in the context of a possible 'agreement on conditions under which the assistance could be provided', pursuant to article 72(5)(d), it would remain within the discretion of the Chamber to consider whether such a proposal would, in the circumstances of the case, suffice. In this content, it is doubtful that the right of the prosecution to pursue the other steps under article 72 would be automatically extinguished were it to decline such an offer.⁸⁷

Moreover, structurally, ICTY rule 54*bis* and ICC article 72 are different in their content and requirements. ICTY rule 54*bis* concerns the making of an order directed to States for the production of documents: the Chamber will only make such an order if, inter alia, the party seeking the order has taken reasonable steps to obtain the document or information from the State concerned. Thereafter, once the order is made, the State may object on the basis of national security. Under the ICC Statute, by contrast, the general power of the Trial Chamber to require the production of documents of other evidence through States assistance resides in its powers under article 64(6)(b), not article 72.⁸⁸ Under the former provision, the Chamber may well require the moving party to demonstrate that a request from the Chamber is necessary.⁸⁹ However, while the article 72 procedure might be triggered as a result of such a request, it may also arise independently thereof. As such, whether the prosecution or defence has taken reasonable steps to obtain the information from the State concerned is not a precondition for the application of article 72, but rather a possible factor to be considered in the resolution of the procedure. Such a reading would mean that whereas an extant agreement under article 53(3)(e) would prevent the Chamber from ordering disclosure of the material in question under article 72(7) in breach of applicable confidentiality obligations, a State could not unilaterally side-step the national security procedure by offering the information under article 54(3)(e). Instead, as discussed, such an offer would need to be considered within the context of the article 72 procedure itself.

Notwithstanding the above, uncertainty might arise if agreement is reached, in the midst of the article 72 procedure, for the State to provide the materials sought under the conditions set out in article 54(3)(e) to enable the Chamber's *ex parte* review.⁹⁰ In theory, the ability of

⁸⁷ As noted above at fn. 78, it is doubtful whether the confidentiality requirements applicable under article 93(8)(b) would similarly be without prejudice to the operation of article 72, notwithstanding their close affinity with the wording of article 54(3)(e). If it was, the danger of such an approach is even more pronounced, since article 93(8) allows a State to unilaterally provide requested documents or information under conditions of strict non-disclosure and its exclusive control without prior notification to or agreement of the Prosecutor.

⁸⁸ Article 64(6) provides, 'In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: ... (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute.' Such a request would be channeled pursuant to article 93(1)(b) or (i).

⁸⁹ *Prosecutor v. Banda and Jerbo*, Situation in Darfur, Sudan, Decision on 'Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan', ICC Trial Chamber IV, ICC-02/05-03/09-169, 1 July 2011, paras. 17, 26–33; *Prosecutor v. Banda and Jerbo*, Situation in Darfur, Sudan, Decision on 'Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union', ICC Trial Chamber IV, ICC-02/05-03/09-170, 1 July 2011, paras. 14, 25–28; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Situation in the Republic of Kenya, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC Trial Chamber V(A), ICC-01/09-01/11-1274-Corr2, 17 April 2014, paras. 185–192.

⁹⁰ Such conditions might be agreed to, e.g., within the framework of para. 5(d) of article 72. The most obvious way would be by way of an agreement with the Prosecutor under article 54(3)(e). The rules foresee that the defence might also enter into similar agreements with information providers to accept materials under the same conditions as those set forth of in article 54(3)(e); see rule 82(5). While these similar agreements would not fall within the scope of article 54(3)(e) as such, the Chamber could conceivably decide to provide for the *mutatis mutandis* application toward them of other provisions related to the operation of article 54(3)(e); see e.g. the procedure in rule 82(5) which provides that the Chamber may order 'upon application of the defence' and if 'in the interest of justice' for the *mutatis mutandis* application of sub-rules 1,2,3 in rule 82 as they relate to particular processes derived from article 54(3)(e). The Chamber would also have the prerogative to decide whether it wished to receive such material from the State directly and under similar conditions, which might be granted by virtue of a decision to regulate its own procedure with respect to the confidentiality of confidential information

the Chamber to so review the materials in closed session might enable it to better assess the relevance or necessity to the trial or to assess the protective measures proposed by the State. The fact that provision of such materials could not occur without the State's consent (a condition of article 54(3)(e)), however, means that the State would control the onward disclosure process and not the Court. This would limit the actions the Chamber could take under article 72. Thus, the Chamber would be unable to proceed with making an order for disclosure under paragraph 7(b)(i) in these circumstances, since it would be bound to respect the confidentiality undertaking agreed to by the Prosecutor in the light of the Chamber's own duty to provide for the protection of confidential information.⁹¹ It might also be unable to make a finding of non-compliance, since it might be held that the State has not denied the request pursuant to article 93(4), but has cooperated under the confidentiality conditions set out in article 54(3)(e).⁹²

Such a procedure might also cause ambiguities for the drawing of an inference as to the existence or non-existence of a fact, since the Chamber will have had cognisance of its actual existence.⁹³ Where the information is exculpatory in nature, the Chamber may be able to explore possible counter-balancing measures similar to the process outlined in the *Lubanga* interlocutory appeal, to resolve the matter.⁹⁴ However, where the information is unique in nature, quality and origin, as may be the case with intelligence sourced material, there may be limited counter-balancing options available short of requiring withdrawal of the count to which the information relates or the making of an appropriate stipulation. The prospect of such an outcome could conceivably persuade a State acting in bad faith to manipulate the process in order to sabotage a case. But it is also possible that in the particular circumstances of the procedure the Chamber might decide that the onus to resolve the matter falls on the State, and not the moving party, since it is the State that has conditioned its cooperation under article 72 on the acceptance of information under the conditions of article 54(3)(e), bearing in mind also its duty to cooperate fully with the Court.

These ambiguities are not resolved where the materials the that Chamber has had access to under article 54(3)(e) conditions is incriminating, since clearly the Chamber cannot rely on secret evidence that is deemed 'necessary and relevant for the establishment of the guilt [...] of the accused' which the accused has not had access to. While the Chamber may decide to set aside such evidence and not take it into consideration as part of its judgment, the material in question may nonetheless be highly relevant to central issues at stake in the case, thereby impinging on the Chamber's truth seeking function.

Furthermore, such a process might be open to abuse by an opposing party, which again could conceivably enter into article 54(3)(e) conditions with the State concerned in order to pre-empt the other party seeking relief from the Chamber under article 72(7); although the

under e.g. article 64(3)(a), 64(6)(c) and/or article 72(5)(d). See e.g. undertaking by Trial Chamber I towards information providers (but ultimately not taken up) in *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, Trial Chamber, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, 13 June 2008, para. 45.

⁹¹ Applying the reasoning of the Appeals Chamber in *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 13 (21 October 2008), para. 48.

⁹² This would be a similar situation to that facing the ICTY Appeals Chamber in *Milutinović et al.*: 'a State's availment of Rule 70 protections in assisting a party with requested information does not equal a State declining to "lend the requested support" such that seeking mandatory action from a Judge or Trial Chamber under Rule 54bis is warranted'; *Prosecutor v. Milan Milutinović et al.*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 37. See discussion above, mn. 23.

⁹³ See similarly Dixon *et al.*, *Commentary* (2008), art. 72, mn. 26.

⁹⁴ *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04-01/06 OA 13 (21 October 2008), para. 48; see also *ibid.*, para. 28.

Chamber could also consider whether such efforts designed to intentionally stymie the article 72 procedure might amount to an abuse of process.⁹⁵

The above considerations suggest that the Court should be highly wary of interjecting the article 54(3)(e) procedure into conditions for the resolution of an article 72 dispute under paragraph 5 of the provision.

By contrast, there appears to be less scope for abuse where the State has offered, but not yet provided the materials under article 54(3)(e) conditions, and the Court has declined to accept the offer. Paragraph 6, which operates as a precursor for the operation of paragraph 7, requires the State to have declared (and the Court to be satisfied) that ‘there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interest’. The State might argue that there are such means and conditions, and that they are to be found in article 54(3)(e). However, for the reasons set out above, conditioning the resolution of a provision dealing with the disclosure of information on an agreement not to disclose such material without the provider’s consent would turn article 72 on its head. The Court might even deem that a State that insisted on limiting its cooperation under paragraph 5 to measures aimed to prevent disclosure was, in the circumstances of the case, acting inconsistently with its cooperation obligations.⁹⁶

IV. Paragraph 4

This paragraph provides an automatic right for States to intervene to raise a national security claim after learning that disclosure is currently or about to occur. In line with paragraph 1, this may occur at any stage of the proceedings where disclosure may be at issue. The State concerned may have been alerted by the person referred to in paragraph 2, or it may have so learned by means of public submissions as to intended testimony of a particular witness or documents the party seeks to tender. The State claiming national security prejudice may believe, for example, that a document obtained from another State, entity, organization or individual properly belongs to it. As the paragraph 4 emphasises, ‘that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article’, meaning that such intervention, properly brought, will have the consequence of halting further disclosure until the Chamber has reached a final determination on the matter. 25

V. Paragraph 5

Paragraph 5 provides an indicative example of practical methods and procedures to enable all those affected by the national security claim – the State, the Court and the parties – to seek amicable resolution of the matter. Several of the steps outlined appear to assume the scenario where the material in dispute is in the exclusive hands of the State concerned and its assistance has been sought pursuant to a request for cooperation under Part 9. Thus, subparagraph (a) refers to modification of clarification ‘of the request’; subparagraph (b) considers whether the Court can ‘obtain’ the material from a source other than ‘the requested State’; subparagraph (c) refers to ‘obtaining’ the material from a different source of in a different form, suggesting it has not been otherwise obtained; while subparagraph (d) refers to agreement on conditions by which ‘the assistance could be provided’, again suggestive of a Part 9 request for judicial assistance. Nonetheless, a number of the steps would also find ready application in circumstances where the State might seek to prevent or limit the scope or manner of disclosure by others. While the list of measures is non-exhaustive, they provide some ready criteria to assess whether all reasonable steps have been taken to resolve the matter through cooperation means pursuant to paragraphs 6 and 7. 26

⁹⁵ See above fn. 90.

⁹⁶ This would be in line with the approach of the ICTY Trial Chamber in *Milutinović et al*, see above mn. 23.

The list draws inspiration in large part from the considerations set out by the ICTY Trial and Appeals Chambers in the *Blaškić* case.⁹⁷ In accordance with the Rome Statute, States Parties must be capable of giving effect to cooperation with the Court, including the possibility of seeking resolution of the matter through the consultative and collaborative means foreseen in paragraph 5.⁹⁸ As set out in the provision, the object of the provision is to enable resolution of the matter by cooperation means. States cannot, from the outset, refuse to explore reasonable steps in order to forestall the matter, nor engage in a mere pretence of consultation without substantive and timely collaboration.⁹⁹ Nor can a State plead structural deficiencies of its domestic law, for example, by arguing that it is impossible to communicate sensitive documents to international jurisdictions; or that there is no established procedure available; or that any such decision requires a special decision by a different agency of the requested State, without the State running afoul of both the Statute and article 27 of the Vienna Convention on the Law of Treaties.¹⁰⁰ A breach of duties might also arise where the State refuses to provide the information *a priori* due to the alleged structural deficiencies of the ICC.¹⁰¹ Nonetheless, this should not preclude a State from being able to seek clarification on how the Court will handle information at the classification level designated by it.¹⁰² This might relate to several ICC Administrative Instructions, including the Court's information protection policy,¹⁰³ its protection policy for protectively marked

⁹⁷ See below mn 33.

⁹⁸ In this regard, it should be recalled that the obligation of States Parties under article 86 to cooperate fully with the Court extends to the Statute as a whole and not just to those provisions set out in Part 9. See also *Gomes Lund et al. v. Brazil*, Inter-Am. Ct. H.R., Judgment (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2014, para. 231, 'the Court highlights the obligation to guarantee the effectiveness of an appropriate procedure for the processing and resolution of the requests for information, that sets the dates for the resolution and presentation of information, and that this is done under the responsibility of officials that are duly qualified'. See similarly *Claude Reyes et al. v. Chile*, IACtHR, Judgment (Merits, Reparations and Costs), 19 September 2006, para. 163.

⁹⁹ On promptness, see the general requirements of consultation set out in article 97 which require States to act 'without delay'. Lack of timeliness might call into doubt the reasonableness of steps being pursued or a State's adherence to its cooperation obligations.

¹⁰⁰ See similarly *Prosecutor V. Uhuru Muigai Kenyatta*, Decision on the Prosecution's revised cooperation request, ICC Trial Chamber V(B), ICC-01/09-02/11-937 29 July 2014, para. 42; *Janowiec and Others v. Russia*, Judgment, para. 207; *Nolan and K. v. Russia*, No. 2512/04, ECtHR, Judgment, 12 February 2009, para. 56. The ECtHR has recalled in this regard that 'Governments are answerable under the Convention for the acts of any State agency since what is in issue in all cases before the Court is the international responsibility of the State'; *Janowiec and Others v. Russia*, para. 211.

¹⁰¹ In the case of *Shakhgiriyeva and Others*, the ECtHR rejected the Russian Government's contention that the procedure of the ECtHR provided no guarantees of the confidentiality of documents in the absence of sanctions for applicants in the event of a breach of confidentiality, and that the applicants were represented by foreign nationals who could not be brought to account in Russia in the event of such a breach; *Shakhgiriyeva and Others v. Russia*, no. 27251/03, ECtHR, Judgment, 8 January 2009, para. 136-140. See also *Husayn (Abu Zubaydah) v. Poland* (no. 7511/13), ECtHR, Judgment, 24 July 2014, para. 364, stating: '[t]he absence of specific, detailed provisions for processing confidential, secret or otherwise sensitive information in the Rules of Court – which, in the Government's view justified their refusal to produce evidence – does not mean that the Court in that respect operates in a vacuum'; going on to cite the experience of Convention institutions over the years in adopting 'sound practice in handling cases involving various highly sensitive matters, including national-security related issues ... by adopting a wide range of practical arrangements adjusted to the particular circumstances of a given case'.

¹⁰² For example, in concluding a cooperation agreement with the ICC, the EU required the Court to ensure that EU classified information released to it keeps the security classification given to it by the EU and for the Court to safeguard such information in accordance with an equivalent level of protection to that foreseen in its own security regulations. See Annex to *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance*, ICC-PRES/01-01-06, 1 May 2006, available on ICC Official Journal. The regulations referred to are contained in the EU Council Decision 2001/264/EC of 19 March 2001, adopting the Council's security regulations, (EU Official Journal L 101, 1.4.2001, p. 1). The ICC-EU cooperation agreement was followed by a further *Security arrangements for the protection of classified information exchanged between the EU and the ICC*, 8349/1/08 REV 1, 15 April 2008, available on ICC Official Journal, which regulates the procedure for the requesting, accessing and release of EU classified information.

¹⁰³ *ICC Information Protection Policy*, Administrative Instruction, ICC/AI/2007/001, 19 June 2007, unclassified on 22 November 2012 under ICC/INF/2012/020.

information provided by governmental and intergovernmental organizations,¹⁰⁴ or its policy on personnel security clearances.¹⁰⁵

Although to date the steps outlined in paragraph 5 have not been put to test before the ICC in the context of an article 72 procedure, Trial Chamber I in the *Lubanga* case adopted a number of similar measures to resolve the stay of proceedings instituted as a result of the non-disclosure by the Prosecutor of information obtained on the basis of article 54(3)(e).¹⁰⁶ Thus, in its decision lifting the stay of proceedings the Trial Chamber recalled the range of protective measures it considered, either singly or in combination, as consisting of: 'a) Non-redacted versions of the documents, save for the identity of the information-provider; b) Redacted versions of the documents, limited to names and identifying information; c) Redacted versions of the documents removing other types of information; d) Summaries instead of the original documentation, and including verbatim quotes of the relevant areas; e) Admissions of fact; f) Alternative evidence; and g) Documents disclosed in full, with restrictions as to the extent of their publication', with explanations given for each modality used.¹⁰⁷ These it considered, in line the requirement of the Appeals Chamber, following an *in camera ex parte* review of the materials at issue in unredacted form, and in tandem with *ex parte* status conferred held with the Prosecution who was requested by the Chamber, on several occasions, to revert to the information provider concerned to obtain relevant updates or clarifications or to provide further particulars.¹⁰⁸

As noted elsewhere in this chapter, outside of national security, other Chambers of the ICC have also entered various rulings with respect to information or evidence sought by national authorities generally where the State authorities have pleaded unavailability of the materials sought, the lack of specificity, necessity or relevance of the request, its burdensome nature, or other restrictions based on national law to deny provision of the materials sought, drawing in part on relevant case law of other courts and tribunals on the disclosure of information for which an official secrecy or national security prejudice has been raised.

1. Modification or clarification of the request

Under this heading, the State concerned may propose that the request is modified or clarified to avoid or minimise the impact on its national security interests. This might be by limiting the scope of the request, by requesting greater specificity as to the location or identification of particular sought items, or by inviting the moving party to identify in greater

¹⁰⁴ ICC Information Protection Policy For Protectively Marked Information Provided By Governmental And Intergovernmental Organizations, Administrative Instruction ICC/AI/2006/002, 20 December 2006, unclassified on 22 November 2012 under ICC/INF/2012/020. According to the Annex A to this Administrative Instruction the ICC's classification system corresponds to that of other international organizations such as EU, NATO and Europol; Annex A to Administrative Instruction ICC/AI/2006/002: ICC mapping table for international security classifications.

¹⁰⁵ ICC Policy on Personnel Security Clearances, Administrative Instruction ICC/AI/2007/006, 19 June 2007, Unclassified on 22 November 2012 under ICC/INF/2012/020.

¹⁰⁶ *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04-01/06 OA 13 (21 October 2008), para. 48, referring to the use of *ex parte*, *in camera* proceedings to review materials obtained under article 54(3)(e) in order to assess their relevance and to thereafter consider possible counter-balancing measures that may be adopted in spite of non-disclosure. Apart from disclosure with redactions, a number of other possible measures are referred to elsewhere in the Judgment as including 'the identification of new, similar exculpatory material, providing the material in summarised form, stipulating the relevant facts, or amending or withdrawing the charge'; *ibid.*, para. 28. See also Rastan (2009), 7 *NJHumRts* 229, 274–276; Ambos, (2009) 12 *NCLRev* 543 *et seq.*

¹⁰⁷ *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, ICC Trial Chamber I, Reasons for Oral Decision lifting the stay of proceedings, ICC-01/04-01/06-1644, 23 January 2009, para. 35.

¹⁰⁸ *Ibid.*, para. 22.

detail the purpose of the request or the essential facts underlying it, corresponding to the general requirements for cooperation requests set out in article 96.¹⁰⁹

In terms of clarification, where the State does not know which exact documents are at issue and for that reason cannot clearly identify the particular national security interest in need of protection, for example because the request is insufficiently precise, the Court, through the moving party, may first need to provide greater clarity as to the parameters of the request.¹¹⁰ In this respect, the ICTY Appeals Chamber has stated that while a request should seek to ‘identify specific documents and not broad categories’ that the use of categories is not prohibited as such. This is because the ‘underlying purpose of the requirement of specificity is to allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requesting party’. Therefore, a category of documents may be requested as long as it is ‘defined with sufficient clarity to enable ready identification’ by a State of the documents falling within that category.¹¹¹ It further found a request is not invalidated because the moving party cannot specify the exact time, place, date or content the sought-after information, holding that a Chamber may consider it appropriate to allow the omission of those details if it is satisfied that the party requesting the order, acting bona fide, has no means of providing those particulars, but has nonetheless identified the specific documents in question in some appropriate manner.¹¹² ICC Trial Chamber IV has endorsed a similar approach

¹⁰⁹ See generally *Prosecutor v. Banda and Jerbo*, Situation in Darfur, Sudan, Decision on ‘Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union’, ICC Trial Chamber IV, ICC-02/05-03/09-170, 1 July 2011, para. 14, setting out the threefold requirements of (i) specificity (ii) relevance and (iii) necessity for the issuance of a Chamber request. The same criteria were recalled by Trial Chamber V(B) in the *Kenyatta* case in the context of a Prosecution request to the Government of Kenya, which characterised them ‘as essential prerequisites for cooperation requests under Part 9 of the Statute’; *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, 31 March 2014, at fn. 216. In relation to requests impacting on national security, the ICTY Appeals Chamber has held that a request should ‘set out succinctly the reasons why such documents are deemed relevant to the trial; if that party considers that setting forth the reasons for the request might jeopardise its prosecutorial or defence strategy it should say so and at least indicate the general grounds on which its request rests’; *Prosecutor v. Blaškić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY Appeals Chamber, 29 October 1997, para. 34.

¹¹⁰ *Ibid.*; *Prosecutor v. Milan Milutinović et al*, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, IT-05-87-PT, 17 November 2005, para. 32. For this purpose, the ICTY Appeals Chamber in the same case stated: ‘a request for production under Rule 54bis should seek to “identify specific documents and not broad categories” but that the use of categories is not prohibited as such. This is because “[the] underlying purpose of the requirement of specificity is to allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requesting party”. Therefore, a category of documents may be requested as long as it is “defined with sufficient clarity to enable ready identification” by a State of the documents falling within that category.’ (footnotes omitted); *Prosecutor v. Milan Milutinović et al*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 15.

¹¹¹ *Prosecutor v. Milan Milutinović et al*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 15, recalling its earlier case law. See also *Prosecutor v. Dario Kordić & Mario Kerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, ICTY Appeals Chamber, Case No. IT-95-14/2-AR108 bis, 9 September 1999, para. 38: ‘The underlying purpose of the requirement of specificity is to allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requesting party. The question then is whether “documents which are only identifiable as members of a class, however clearly defined this may be and however readily the identification of its content may be made”, fall afoul of the requirement of specificity. The requirement of specificity clearly prohibits the use of broad categories, which, of course, in itself is a relative term. It does not, as correctly asserted by the Prosecution, prohibit the use of categories as such.’

¹¹² *Prosecutor v. Blaškić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY Appeals Chamber, 29 October 1997, para. 32; *Prosecutor v. Dario Kordić & Mario Kerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, ICTY Appeals Chamber, Case No. IT-95-14/2-AR108 bis, 9 September 1999, para. 34; *Prosecutor v. Milan Milutinović*

towards cooperation requests generally, holding that for any request for the production of documents issued pursuant to Part 9 of the Statute the request must identify specific documents and not broad categories, meaning that ‘documents must be identified as far as possible and in addition be limited in number’, while citing the ICTY in stating that ‘[a] category of documents may be requested as long as it is ‘defined with sufficient clarity to enable ready identification’ by the requested party of the documents falling within that category.’¹¹³

The ICTY Appeals Chamber has also held that the moving party does not need to establish that the item sought actually exists, as this might prove overly onerous in circumstances where the information was protected, but there were reasons to believe its existence: ‘The necessity requirement obliges the applicant to show that the requested materials, if they are produced, are necessary for a fair determination of a matter at trial. Requiring an additional showing of actual existence would be unreasonable and could impinge upon the right to a fair trial given that these materials are State materials, often of a confidential nature. In many cases, it would be impossible for an applicant to prove the existence of these materials. All that is required is that an applicant make a reasonable effort before the Trial Chamber to demonstrate their existence.’¹¹⁴ Similarly, in *Gomes Lund et. al. v. Brazil*, the IACtHR ruled that State authorities cannot rely on the lack of evidence presented from the victims or their family members that the documents requested exist, but must justify any such denial by ‘demonstrating that it has adopted all the measures under its power to prove that, in effect, the information sought did not exist’.¹¹⁵ It added, based on its earlier case law in *Claude Reyes et al. v. Chile*, that ‘[t]o argue in a judicial proceeding ... the lack of evidence regarding the existence of certain information, without at least noting what procedures were carried out to confirm the nonexistence of said information, allows for the discretionary and arbitrary actions of the State to provide said information, thereby creating legal uncertainty regarding the exercise of said right’.¹¹⁶

As to modification and whether a State may propose, for example, a more limited scope of inquiry, the ICTY Appeals Chamber has observed that a request should also not be unduly onerous, such that ‘a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial’.¹¹⁷ Thus, while the execution of a request might be burdensome, it must not be unduly so. In this regard, referring to cooperation requests generally, ICC Trial Chamber IV in the *Banda & Jerbo* case recalled the same in observing that a request must not be unduly onerous,¹¹⁸ while ICC Trial Chamber V(B) in the *Kenyatta* case nonetheless observed that

et al., Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 17.

¹¹³ *Prosecutor v. Banda and Jerbo*, Situation in Darfur, Sudan, Decision on ‘Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union’, ICC Trial Chamber IV, ICC-02/05-03/09-170, 1 July 2011, paras. 16 and 19.

¹¹⁴ *Prosecutor v. Milan Milutinović et al.*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 23.

¹¹⁵ *Gomes Lund et. al. v. Brazil*, IACtHR, Judgment, 24 November 2014, para. 211.

¹¹⁶ *Ibid.*, recalling without citation *Claude Reyes et al. v. Chile*, IACtHR, Judgment (Merits, Reparations and Costs), 19 September 2006, para. 98. The Court went on to observe that it considered it essential in this context that the public powers act in good faith and diligently carry out the necessary actions to assure the effectiveness of the right to information, particularly, as in *Gomes Lund et. al.*, when it dealt with the right to the truth of what occurred in cases of gross violations of human rights such as those of enforced disappearances and extrajudicial executions.

¹¹⁷ *Prosecutor v. Dario Kordic & Mario Cerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, ICTY Appeals Chamber, Case No. IT-95-14/2-AR108 bis, 9 September 1999, para. 34.

¹¹⁸ *Prosecutor v. Banda and Jerbo*, Situation in Darfur, Sudan, Decision on ‘Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union’, ICC Trial Chamber IV, ICC-02/05-03/09-170, 1 July 2011, para. 16: ‘... a request must not be unduly onerous, in the sense that, a party cannot seek to obtain hundreds of documents,

‘[p]ractical difficulties will also not invalidate a request which otherwise objectively meets the requirements of specificity, relevance and necessity’.¹¹⁹

- 29 Moreover, as the provision indicates, the process leading to possible modification is consultative and cooperative: a State cannot unilaterally narrow the scope of a request. In *Milutinović*, for example, the Trial Chamber (confirmed on appeal) rejected the approach of the United States in deciding to limit its search of requested materials protected by national security to only those that it deemed to be exculpatory for the applicant, on the grounds that only this information would be necessary for a fair hearing. As the Trial Chamber emphasised, a State ‘cannot arrogate to itself the right to limit the request of an applicant to material that it considers to be favourable to the Applicant’s case’, since it is ‘for the Applicant to determine which documents, if any, of those produced should be used in his case’.¹²⁰
- 30 The State might also seek modification in relation to the response time. Nonetheless, ‘this should not authorise any unwarranted delays by that State’, such that reasonable and workable deadlines should be set by the Chamber after consulting the requested State.¹²¹ Any modification in the timelines must in any event respect the new time-limit fixed by the Court, since any further substantial or unexplained delay might lead the Court to treat the State’s explanations with suspicion, which might reflect negatively on its compliance with its cooperation duties.¹²² As observed by ICC Trial Chamber V(B), ‘non-compliance arising from, *inter alia*, unjustified inaction or delay, or a clear failure to have in place appropriate procedures for effecting the cooperation, as required under Article 88 of the Statute, constitutes failure to comply under Article 87(7) of the Statute’.¹²³

2. Ruling on relevance or on obtaining from another source

- 31 The determination of the relevance of information or evidence sought from a State must rest with the Chamber, and not the requested State. For example, in the *Kenyatta* case, the Trial Chamber held that ‘while the Kenyan Government may be in a position to raise arguments relating to the specificity of the requests, it is not – save in cases of seemingly blatant irrelevance – well placed to dispute their relevance or necessity in relation to the Prosecution’s inquiries’.¹²⁴ The ICTY Appeals Chamber has also rejected the contention that the requested State may either comment on relevance of the requested item or to pass opinion on the ability of the Chamber to determine relevance based on lack of alleged

particularly when it is evident that the identification, location and scrutiny of such documents by the requested party would be overly taxing and not strictly justified by the exigencies of the trial’.

¹¹⁹ *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution’s revised cooperation request, ICC Trial Chamber V(B), ICC-01/09-02/11-937 29 July 2014, para. 34, recalling the tripartite test set out by Trial Chamber IV, above at fn. 109.

¹²⁰ *Prosecutor v. Milan Milutinović et al*, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, IT-05-87-PT, 17 November 2005, para. 23, further noting ‘If a specific request is made for the production of material relevant to an issue in the case, then the primary obligation of a State is to cooperate with the Applicant by searching for any material falling within the terms of the Request.’; *Prosecutor v. Milan Milutinović et al*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 27.

¹²¹ *Prosecutor v. Blaškić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY Appeals Chamber, 29 October 1997, para. 32.

¹²² See *Janowiec and Others v. Russia*, Judgment, para. 203, citing Damir Sibgatullin, para. 68; Tahsin Acar, para. 254; and *Enukidze and Girgvliani*, paras. 297 and 301. The ECtHR has observed that States should be expected to cooperate in good faith, to provide timely information on any obstacles and to provide any reasonable or convincing explanations for a failure to comply; *Janowiec and Others v. Russia*, Judgment, para. 208, citing *Davydov and Others*, para. 174; *Nevmerzhitsky v. Ukraine*, no. 54825/00, para. 77, ECHR 2005-II (extracts); and *Ireland v. United Kingdom*, 18 January 1978, para. 210, Series A no. 25).

¹²³ *Prosecutor V. Uhuru Muigai Kenyatta*, Decision on the Prosecution’s revised cooperation request, ICC Trial Chamber V(B), ICC-01/09-02/11-937 29 July 2014, para. 42.

¹²⁴ *Prosecutor V. Uhuru Muigai Kenyatta*, Decision on the Prosecution’s revised cooperation request, ICC Trial Chamber V(B), ICC-01/09-02/11-937 29 July 2014, para. 34.

specificity. In the *Kordić* case it stated: '[t]he Appeals Chamber takes the view that it falls squarely within the discretion of the Trial Chamber to determine whether the documents sought are relevant to the trial. Furthermore, the State from whom the documents are requested does not have *locus standi* to challenge their relevance. Having found that the criterion of specificity has indeed been met, the Appeals Chamber rejects the argument of the Requesting State that the Trial Chamber, because of lack of specificity, was unable to accurately determine the relevance of the documents sought'. Similarly, in *Milutinović*, the Appeals Chamber dismissed the submissions of the United States on relevance, holding, 'a State may not challenge whether, on the basis of the request, the Trial Chamber was able "to accurately determine the relevance of the documents sought". Such a determination is an integral part of the Trial Chamber's competence to determine relevancy. The Appeals Chamber holds that the same rule applies with regard to challenging the necessity of documents or information for a fair determination of the trial.'¹²⁵ In the same vein the ECtHR has held that a State's assessment as to the evidentiary value of material sought cannot justify its non-submission since only the Court may decide on the relevance of calling a particular witness or the production of particular piece of evidence, stating it is sufficient that the Court considers the material relevant for the establishment of the facts in the case before it.¹²⁶

There appears to be some overlap between subparagraph (c) and the possibility for a determination by the Chamber under subparagraph (b) that the information or evidence, though relevant, could be or has been obtained from a source other than the requested State. The distinction in subparagraph (b) appears to rest in the Chamber's determination on whether pursuing the matter with the requested State continues to be necessary since such information or evidence has already been obtained from another source or could be so obtained, leading to the potential application of subparagraph (c).

3. Obtaining from a different source or in a different form

Subparagraph (c) directs the State, the Chamber and the parties to consider other avenues to obtain the same information – whether from a different source or by obtaining from the requested State in a different form. The provision should not be confused with a requirement on the moving party to show that it has exhausted all other possible avenues to access the information sought. Nonetheless, the Chamber could require that the moving party demonstrate that: (i) it has exercised due diligence in obtaining the requested materials elsewhere and has been unable to obtain them; or (ii) the information obtained or to be obtained from other sources is insufficiently probative for a fair determination of a matter at trial.¹²⁷ For example, in the *Banda and Jerbo* case, Trial Chamber IV found that the defence had not explained what steps, if any, it had undertaken to explore whether the specific documents sought or documents of similar value were already in the possession of the Prosecutor, since if this were indeed the case the assistance of the Chamber, and by implication of the information provider, would not be necessary.¹²⁸

Subparagraph (c) also envisages the prospect of the material being obtained in a different form. In some circumstances, there may be analogous or alternative information that is

¹²⁵ *Prosecutor v. Milan Milutinović et al*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 21.

¹²⁶ *Janowiec and Others v. Russia*, ECtHR, Judgment, para. 208; *Dedovskiy and Others v. Russia*, no. 7178/03, ECtHR, Judgment, 15 May 2008, para. 107; *Husayn (Abu Zubaydah) v. Poland* (no. 7511/13), ECtHR, Judgment, 24 July 2014, para. 355.

¹²⁷ The above factors were applied in *Prosecutor v. Milan Milutinović et al*, Decision on request of the United States of America for review, ICTY Appeals Chamber, IT-05-87-ARI08bis.2, 12 May 2006, para. 25, in the context of the necessity criterion under ICTY rule 54bis.

¹²⁸ *Prosecutor v. Banda and Jerbo*, Situation in Darfur, Sudan, Decision on 'Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union', ICC Trial Chamber IV, ICC-02/05-03/09-170, 1 July 2011, para. 27.

available which is assessed by the Chamber as having the same or similar evidential value in establishing the fact in dispute.¹²⁹ In this regard, the State concerned will typically be able to suggest relevant alternative sources or different forms in which the information could be provided. As Trial Chamber V(B) observed in the *Kenyatta* case, the requested State may often be best placed not only ‘to identify potential difficulties in executing the cooperation requests’ but also ‘to advise on the alternative possibilities presented by the [...]domestic framework for obtaining the information sought’, noting ‘[t]he provision of such guidance forms part of the essence of good faith cooperation’.¹³⁰

4. Agreement on conditions

- 33 The final subparagraph of the non-exhaustive steps listed in paragraph 5 outlines a further subset of non-exhaustive conditions that could be agreed upon to enable the provision and disclosure of the requested material: ‘including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence’. It should be recalled in this regard that the object of these provisions is to enable the disclosure, in one form or another, of the substantive underlying facts that have been deemed relevant.

In relation to summarised information, this modality will only serve as an alternative to full disclosure if its content corresponds with sufficient quality to the substantive information contained in the original.¹³¹ Another alternative could be for the State to provide verbatim extracts from portions of the document deemed relevant by the Chamber, while summarising the surrounding text to place the passage in context.¹³² Summarised information that does not contain verbatim extracts might otherwise be complemented by other modalities, such as the availability of analogous or alternative evidence that similarly corresponds to the same content.

Redactions might be sought by the State with respect to irrelevant information concerning, for example, the identity of third persons or other extraneous content. In other instances, the proposed redaction may relate to information that is actually relevant, requiring the Chamber to assess the scope and impact of the redaction on the facts being sought to be established, as well as whether other counter-balancing measures are possible. Requested ‘limitations on disclosure’ might be sought with respect to the public record, requiring that the material is only used in closed session or that pseudonyms are applied. Limitations on disclosure might also extend to the parties or participants, for example in the context of *ex parte in camera* review of the materials by the Chamber to determine relevance.¹³³ On the question of whether there can be disclosure of information to an accused’s counsel which is withheld from the accused, any such request would require highly specific justification based

¹²⁹ In the *Lubanga* case, when considering proposed analogous or alternative information, the Trial Chamber assessed the evidential value of the non-disclosed evidence against the replacement value of the suggested alternative evidence as compared to the original information; see *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, ICC Trial Chamber I, Reasons for Oral Decision lifting the stay of proceedings, ICC-01/04-01/06-1644, 23 January 2009, para. 47.

¹³⁰ *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution’s revised cooperation request, ICC Trial Chamber V(B), ICC-01/09-02/11-937 29 July 2014, para. 42.

¹³¹ See concerns expressed in the second edition by Dixon et al. at mn. 14 if such summaries are prepared by the State concerned without Chamber oversight.

¹³² Such modalities were applied in the *Lubanga* case; see Annex 3 to *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, ICC Trial Chamber I, Reasons for Oral Decision lifting the stay of proceedings, ICC-01/04-01/06-1803-Anx3, 23 March 2009, pp. 32–33.

¹³³ See article 64(6)(c). In *Al Nashiri v. Poland*, no. 28761/11, ECtHR, Judgment, 24 July 2014, paras. 17–19, having regard to the particular circumstances of the case, the alleged involvement of the applicant in terrorist activities, the secrecy of the CIA rendition operations, the fact that many events still remained undisclosed and that a large part of the potentially relevant documentary evidence was classified, and mindful that the evidence requested was liable to be of a sensitive nature or might give rise to national-security concerns, the Court gave the Polish Government an explicit guarantee as to the confidentiality of any sensitive materials they might have produced.

on sufficiently demonstrable risks. For example, the *Lubanga* Trial Chamber rejected the prosecution's contention that, as a general rule, article 8(3) of the Code of Professional Conduct for Counsel, relating to the dissemination of confidential information within defence teams, also restricted defence counsel from revealing to the accused information protected, *inter alia*, by article 72. As the Chamber held, citing to article 67(1)(b), 'there is no sustainable statutory interpretation to support the conclusion that it was contemplated under the Rome Statute framework that the accused could be routinely denied access to relevant confidential, sensitive, privileged or national security material that has been served on his or her counsel'. While the Chamber refrained from delineating the circumstances when exceptions may properly be applied, it recalled in this context the submission made by defence counsel that in exceptional circumstances restrictions may be appropriate, for instance if it is sufficiently demonstrated that an accused has been misusing confidential or protected information to intimidate witnesses or participating victims.¹³⁴

The measures outlined above might be applied in combination, such that, for example, redaction of a relevant passage might be counter-balanced by other satisfactory alternative measures, such as the provision of analogous information. Such measures may, moreover, be explored during *in camera ex parte* consultations between the State concerned and the Chamber to enable the State to submit such clarification and explanations as it is prepared to provide.¹³⁵ Where the State is unable to refer to the actual content of the sought after material, depending on the nature of the information contained therein, it might be able to elaborate on the perceived prejudice that is likely to arise as a consequence of disclosure. Such explanation might enable the Chamber to better assess the proportionality of the measures proposed pursuant to paragraph 5 as well as the reasonableness of steps taken by the State to resolve the matter pursuant to paragraph 6, prior to the Chamber's considerations of further action under paragraph 7.

In the *Blaškić* case, the ICTY Appeals Chamber had approved of a similar *in camera, ex parte* procedure for the review of sensitive documents for which a State asserted national security prejudice. In particular, the Appeal Chamber outlined the following practical steps: designation of a single Judge rather than the full bench; provision by the State of certified translations of documents not in an official language of the Tribunal to avert the need for ICTY translators to view the documents; that transcripts need be kept of the *in camera ex parte* hearings; that any documents deemed irrelevant, as well as those the relevance of which is outweighed by legitimate national security interests, should be returned to the State without being filed with the Registry; and that relevant documents could be redacted by the State, subject to a signed affidavit briefly explaining the reasons for any such redaction. The measures were to be adopted through a process of consultation, while account was to be taken throughout the process of whether the State concerned has acted and is acting *bona fide*. The Appeals Chamber further stated allowance should be made for an exceptional case where a particular document need not be provided at all. This, it stated, might arise 'where a State, acting *bona fide*, considers one or two particular documents to be so delicate from the national security point of view, while at the same time of scant relevance to the trial proceedings'. In such case, the minimum requirement set out by the Appeals Chamber required 'the submission of a signed affidavit by the responsible Minister: (i) stating that he has personally examined the document in question; (ii) summarily describing the content of the documents; (iii) setting out precisely the grounds on which the State considers that the

¹³⁴ *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, ICC Trial Chamber I, oral decision of Trial Chamber I on whether there can be disclosure of information to an accused's counsel which is withheld from the accused, Transcript of 6 May 2010, ICC-01/04-01/06-T-282-Red-ENG, paras. 11-13. Article 8(3) of the Code of Professional Conduct for Counsel provides: 'Counsel may only reveal the information protected under paragraphs 1 and 2 of this article to co-counsel, assistants and other staff working on the particular case to which the information relates and solely to enable the exercise of his or her functions in relation to that case', referring *inter alia* to article 72 under the preceding provision; ICC-ASP/4/Res.1.

¹³⁵ See also Art. 72(7)(a)(i).

document is not of great relevance to the trial proceedings; and (iv) concisely indicating the principal reasons for the desire of the State to withhold those documents'. The Single Judge could assess the grounds offered, including by requesting a more detailed affidavit or a detailed explanation during *in camera*, *ex parte* proceedings, in the light of their validity and persuasiveness, on pain of making a finding of non-compliance as appropriate.¹³⁶ As noted earlier, the approach of the ICTY Appeals Chamber was largely replicated in the UK proposal that provided the framework for negotiations in Rome (see above mn. 2) and was retained as Option 2 in the rolling text of the coordinator of the working group as late as 13 July 1998.¹³⁷

- 34 Finally, in relation to the clause 'other protective measures permissible under the Statute and the Rules of Procedure and Evidence', a number of such permissible measures are foreseen in rule 81(4) which permits the Chamber on its own motion or at the request of the Prosecutor, the accused or any State, to take necessary steps, *inter alia*, to ensure the confidentiality of information in accordance with article 72 and the protection of witnesses in accordance with article 68. In this regard it is worth recalling that article 68(6), whose drafting was connected to that of article 72,¹³⁸ provides: '[a] State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information'. In the context of non-disclosure of information on account of danger to a particular person under rule 81(4), the Appeals Chamber of the ICC has stated, 'the alleged danger must involve an objectively justifiable risk to the safety of the person concerned' and that 'the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large', further holding '[t]he Chamber should consider, *inter alia*, whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, *inter alia*, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions'.¹³⁹

A number of further protective measures with respect to witness testimony are provided in rule 87(3), which permits the ordering of measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*: (a) withholding from public records the name of the witness or other person at risk on account of such testimony or any information which could lead to their identification; (b) prohibiting disclosure of such information to third parties; (c) provision of testimony with visual or

¹³⁶ In so doing, the Appeals Chamber cited to a number of past precedents for the submission of classified documents for judicial scrutiny, including the *Sabotage* cases before the United States-German Mixed Claims Commission in the 1930s (reproduced in: Sandifer, *Evidence Before International Tribunals* (1939) 266); the *Ballo* case decided by the Administrative Tribunal of the International Labour Organization in 1972 (Judgement No. 191, 15 May 1972, ILO, *Official Bulletin*, Vol. LV, Nos. 2, 3 and 4, p. 224); *Cyprus v. Turkey* decided by the European Commission on Human Rights in 1976 (Application 6780/74, Report of 10 July 1976, pp. 21–24); and, the *Godínez Cruz* case decided by the Inter-American Court of Human Rights on 20 Jan. 1989 (Series C, No. 5, Judgement of 20 Jan. 1989, pp. 96–97). See *Prosecutor v. Blaškić*, ICTY Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY Appeals Chamber, 29 Oct 1997, paras. 62–68. See similarly *Husayn (Abu Zubaydah) v. Poland* (no. 7511/13), ECtHR, Judgment, 24 July 2014, para. 357: 'Furthermore, such concerns may, depending on the document, be accommodated in the Court's proceedings by means of appropriate procedural arrangements, including by restricting access to the document in question [...], by classifying all or some of the documents in the case file as confidential vis-à-vis the public and, in extremis, by holding a hearing behind closed doors'.

¹³⁷ See A/CONF.183/C.1/WGPM/L.12, 25 June 1998; A/CONF.183/C.1/WGPM/L.76, 13 July 1998.

¹³⁸ Piragoff, in: Lee (ed.), ICC (1999) 273.

¹³⁹ *Prosecutor v. Germain Katanga*, Situation in Democratic Republic of the Congo, ICC Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled, 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements,' 13 May 2008, ICC- 01/04-01/07-475, paras. 71–72.

audio distortion, audio only, videoconferencing or closed circuit television; (d) use of pseudonyms; or (e) *in camera* proceedings.

In terms of other possible conditions under which assistance could be provided, another option could be to explore whether a requested relating to a category of document could be made more specific through a screening process. This might be done by means of the State allowing an individual, whether a representatives of the requesting party or staff of the Chamber or Registry, or an independent counsel appointed by the Chamber, to have access to the relevant portion of the State archives, or in the case of single items to a particular document, to review its contents for objective relevance in terms of its incriminating or exonerating value. This might allow for the filtering out of material that is irrelevant, to better refine the scope of the request. The use of, for example, independent counsel might prove contentious where issues of relevance are best assessed by the requesting party. However, such a process might prove helpful where the person conducting the review needs to have an appropriate national security clearance that relevant prosecution or defence team members do not have. Such review might also be preceded by a process of consultation to clarify the scope of the materials to be accessed in the first instance.¹⁴⁰

In the various examples described above, the Chamber would need to be able to scrutinise the adequacy of the proposed measure in order to verify that it would appropriately 'resolve the matter'. This might occur, for example, by the Chamber viewing during *ex parte, in camera* session the original document(s) or receiving oral or written submissions from representatives of the State concerned. The inability of the Chamber to suitable supervise in any manner the imposition of redactions and its sole reliance on the discretion of the authorities in question would undermine its ability to control the process and arrive at a satisfactory outcome.¹⁴¹ The ability of the Chamber to perform such supervisory functions was a key element of the Appeals Chamber's decision in the *Lubanga* case concerning the non-disclosure of article 54(3)(e) materials, in that context in relation to the duty of the prosecution to discharge its article 67(2) obligations.¹⁴² In the case of a national security claim, the fact that the Chamber may rule on the level of a State's compliance with its cooperation duties under the Statute, may draw inferences as a result of non-disclosure, or

¹⁴⁰ A similar phased procedure is foreseen in the security arrangements between the ICC and EU for accessing classified information. Under the arrangements: (1) the EU is to a liaison officer who will interact with a designated ICC contact point, to identify documents which may be relevant based on information set out in the ICC's request and any clarifications sought thereon. (2) The ICC contact point will then be invited to consult at EU premises any documents identified as potentially relevant which are classified 'RESTREINT UE' or have been downgraded to 'RESTREINT UE' or declassified. The EU is further able to apply redactions to portions of documents that are deemed not to be relevant for the ICC request, presumably through mutual agreement as to issues of relevance. The ICC contact point is permitted to divulge the content of what s/he has accessed to other staff members on a need-to-know basis. (3) The ICC contact point can then address a request for the release of the materials accessed to the EU, which, if it accedes, will release the documents if it is classified 'RESTREINT UE' or has been downgraded to 'RESTREINT UE' or declassified. For information classified 'CONFIDENTIEL UE' or above, access is only granted to persons in possession of a valid personnel security clearance. See Art 12–20, *Security arrangements for the protection of classified information exchanged between the EU and the ICC*, 8349/1/08 REV 1, 15 April 2008, available on ICC Official Journal. The arrangements do not deal with the scenario where the ICC contact point has accessed materials, has possibly divulged their content to other prosecution staff, but the EU later refuses to accede to a release request. The ICC will have to consider, for example, whether constructive knowledge, as opposed to actual custody, by a prosecution staff member of potential exonerating material that has not been released to the Office of the Prosecutor constitutes possession and control within the meaning of article 67(2).

¹⁴¹ See Hall, *Commentary* (2008), revised art. 72, mn. 14, expressing concerns where the proposed measures are to be left solely in the hands of the proposing State, with the risk, for example, of summaries being incomplete, inaccurate or even biased, as well as other concerns with regard to the publicity and fairness of proceedings.

¹⁴² *Prosecutor v. Lubanga*, Situation in Democratic Republic of the Congo, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04-01/06 OA 13 (21 October 2008), paras. 2,3 and 48.

may order disclosure where the information is not solely in the hands of the State, combine to confirm that the Chamber does play a supervisory role with respect to the behaviour of national authorities during the article 72 procedure. Accordingly the Article 72(5) procedure will need to be applied in a manner that will allow the Court to resolve the potential tension that may arise between a national security claim and the requirements of a fair trial, since it is the Chamber that must conduct the final assessment as to whether the sought after material should have been disclosed, subject to appropriate conditions, notwithstanding the asserted national security prejudice.

VI. Paragraph 6

- 36 Paragraph 6 constitutes an important marker that the consultative process in the search for a solution has ended. This assessment is to be made by the State through a notification to the Prosecutor or the Court where it considers that there are ‘no means or conditions under which the information or document could be provided or disclosed without prejudice to its national security’. The notification must provide the specific reasons for the State’s decision, ‘unless a specific description of the reasons would itself necessarily result in such prejudice to the State’s national security interests’. In this regard, the State is only relieved from providing ‘a specific description of the reasons’, not from providing any reasons at all. Although the structure of the provision requires the State to make a final decision that all steps have been exhausted and so notify the Court, arguably the Chamber should not always be bound by the requirement to receive such notification before it can proceed under paragraph 7. For example where the State effectively withdraws from the proceedings prior to the paragraph 6 stage or refuses to participate in further litigation, it may be deemed to have waived the notification requirement.¹⁴³ Moreover, it is ultimately for the Chamber to assess whether ‘all reasonable steps have been taken to resolve the matter through cooperative means’, and not the State, which might make empty promises of further cooperation to avert proceedings under paragraph 7. Indeed, the Chamber’s assessment of the reasonableness of the steps explored pursuant to paragraph 5 will be an important indicator of whether the State has acted in accordance with its obligations under the Statute, pursuant to paragraph 7.

VII. Paragraph 7

1. Determination of relevance and necessity

- 37 Following the procedure described in paragraph 6, the Court may take a number of actions. In doing so, the Court must have determined that the material ‘is relevant and necessary for the establishment of the guilt or innocence of the accused’. The phrase appears to impose a higher threshold than previously required rulings on relevance under paragraph 5, by suggesting that the withheld material must go to core issues at the heart of the case. Nonetheless, the exact nature of the test remains to be determined (see below mn. 49). Moreover, it may be difficult in practice to distinguish between evidence that is relevant, but is not strictly necessary for establishing guilt or innocence, particularly where the Chamber has already explored other options, including the presentation of analogous, alternative or summary evidence, and concluded that the request remains necessary. Nonetheless, if it has not done so already, paragraph 7 invites the Chamber to dispose of situations where the material sought does not in fact appear to be relevant or necessary to the proceedings.¹⁴⁴

¹⁴³ The comparable provision under the Regulations of the Court allows for the imposition of time limits, which may be extended, after which the Court may proceed with entering a ruling on non-compliance; Regulation 108–109, Regulations of the Court.

¹⁴⁴ As Hall observes, while the provision is geared towards the article 74 judgment, similar considerations will apply for sentencing, in the event of a conviction, for the determination of mitigating or aggravating

2. Two-track approach depending on who has the material

The actions that are available to the Court are distinguished along two tracks. Track A 38 deals with the scenario where the information resides solely with the State concerned and has been sought by means of a request for judicial assistance, or the matter has otherwise been referred to the State in the circumstances described in paragraph 2, and the State has invoked the grounds for refusal referenced in article 93(4). The actions that the Chamber may undertake in the context are threefold: (i) it may hold final last-minute consultations with the State prior to proceedings with non-compliance; (ii) it may move to hold the State in non-compliance; and (iii) it may draw an inference as to the existence or non-existence of a fact. By contrast, under Track B, where the material is not in the sole possession of the State, denoted by the phrase ‘in all other circumstances’, the Chamber may proceed to order disclosure of the material notwithstanding the objections of the State; or if decides not to order disclosure, it may draw an inference. Whereas under Track A the actions may be cumulative, under Track B they are in the alternative. Moreover, Tracks A and B are themselves phrased in the alternative, meaning that the Chamber cannot proceed under both tracks simultaneously, since they represent two different factual scenarios: based on who has actual possession of the materials.

a) **Where material resides solely with the State.** As the result of the two track approach 39 described above, an order for disclosure cannot be directed to a State that has been requested to cooperate pursuant to Part 9 or to whom a national security claim has been referred by a person who has been requested to give information pursuant to paragraph 2. Thus, for example, a person who is on the stand, possibly recalled after the article 72 procedure, cannot be directed by the Chamber to answer a question with respect to an asserted national security prejudice that has been confirmed by the State pursuant to paragraph 2.¹⁴⁵ As a consequence, the only sanctioning power that the Court has in these circumstances is to make a judicial finding to that effect and to refer the matter to the Assembly of States Parties or to the Security Council, as appropriate.

The finding of non-cooperation results from the Chamber finding that the State, by 40 invoking the ground for refusal under article 93(4), in the circumstances of the case, is not acting in ‘accordance with its obligations under this Statute’. As described above (mn. 2), this phrase was introduced to replace a requirement of demonstrated good faith – an assessment that a number of States considered inappropriate in the context of an asserted national security prejudice.¹⁴⁶

As to the content of a State’s obligation towards the Court, it should be recalled that the 41 duty of a State Party to cooperate fully with the ICC is not negated by a claim of national security prejudice.¹⁴⁷ States Parties remain under a general obligation, including under

circumstances, to the extent that such evidence has not already been tendered during the trial in order to establish; *Commentary* (2008), revised art. 72, mn. 21, fn. 36: ‘Despite the fairly comprehensive regulatory scheme of article 72, there would appear to be no express restriction on the Court’s ability under its inherent powers to ensure that justice is done to express the view that information or documents are necessary to determine whether mitigating or aggravating factors are present and to urge the State concerned to disclose them to the Court to prevent an injustice to the accused or harm to the public interest. However, the Court might not in that case be able to invoke the procedures for enforcement in paragraph 7.’

¹⁴⁵ The chapeau text in article 72(7)(a) provides: ‘Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4.’ (emphasis added). See similarly Dixon *et al.*, *Commentary* (2008), art. 72, mn. 22–23.

¹⁴⁶ Piragoff, in: Lee (ed.), *ICC* (1999) 281–285; Dixon *et al.*, *Commentary* (2008), art. 72, mn. 24.

¹⁴⁷ It should also be recalled that the duty of States Parties under article 86 to cooperate fully with the Court in its investigations and prosecutions applies ‘in accordance with the provisions of this Statute’. As such, it applies across the whole Statute and not only to those forms of cooperation listed in Part 9. The same duties apply to non-Party States that have lodged a declaration accepting the exercise of jurisdiction by the Court under article 12(3), pursuant to rule 44. They also apply to non-Party States that are subject to a Security Council Chapter VII

article 72 of the Statute, to consult with the Court without delay in order to resolve any matter which has impeded the execution of a request.¹⁴⁸ Notwithstanding the final phrasing of the provision, that a requirement of cooperation, performed in good faith, prevails is evident from the persisting power of the Court to make a finding of non-cooperation under article 72, linked as it is to the performance of a State's duties under Part 9. Thus, the procedural failure on a State's part to explore 'all reasonable steps' that could resolve the matter could lead the Court to conclude that the State has not acted in accordance with its obligations under the Statute.¹⁴⁹ In turn, the substantive failure of a State to submit such information that is in its sole possession without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the requesting party's allegations concerning the existence or content of the information sought (see below mn. 45).¹⁵⁰ More generally, the duty of States Parties to cooperate fully with the Court under article 72 is a corollary of the undertaking of States Parties not to hinder the effective exercise of the Court's jurisdiction.¹⁵¹

Although the triggering of the procedure relies on a subjective assessment by the State as to the prejudice caused to its national security interests, the steps taken in conjunction with the Chamber to resolve the matter must be objectively reasonable. At the same time, the provision grants considerable discretion for the Chamber to make a case-by-case assessment that considers the particular and possibly complex or unique factors 'in the circumstances of the case', including possibly the nature of the material, the explanations provided by the State, the steps it has taken and its impact on the proceedings.¹⁵²

- 42 The non-compliance mechanism referred to in subparagraph (a)(iii) cross-references article 87(7), which relates to non-cooperation by States Parties.¹⁵³ By contrast, the provision does not refer to article 87(5) which deals with non-Party States that have been invited to cooperate pursuant to an ad hoc agreement, arrangement or any other appropriate basis. It is thus unclear to what extent the non-compliance procedures in article 72 can attach also to non-Party States. In the case of a non-Party State that has lodged a declaration under article 12(3) accepting the exercise of jurisdiction by the Court, article 87(7) would apply since rule 44 clarifies that 'the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply'. A similar situation would arguably arise with respect to States that have been placed by the Security Council under Chapter VII obligations to cooperate fully with the Court, thereby binding the UN Member State so directed to cooperate.¹⁵⁴ In the Darfur and Libya situations, for example, Pre-Trial Chambers have pursued non-cooperation findings under article 87(7), rather than article 87(5), based on the finding that the referral of a situation by the Security Council triggers the application of the entire legal framework of the ICC vis-à-vis the State concerned, including by implication any rules attendant on States Parties.¹⁵⁵ This places a non-Party States obligated under a Security Council Chapter VII

resolution requiring the relevant UN Member State to cooperate fully with the Court. With respect to other 'third-party' non-Party States, they may be invited to cooperate pursuant to article 87(5) and found in breach of such agreement where a failure to cooperate occurs.

¹⁴⁸ See e.g. Article 97, ICC Statute.

¹⁴⁹ The phrase 'all reasonable steps' occurs both in paragraph 5 and 6 of the provision.

¹⁵⁰ Article 72(7)(a)(iii) and Article 72(7)(b)(ii). In similar terms see *Janowiec and Others v. Russia*, Judgment (Merits and Just Satisfaction), 21 October 2013, para. 202, recalling also ECtHR case law from a number of cases against Turkey.

¹⁵¹ See e.g. paragraph 11 of the Preamble to the Statute. See also *Janowiec and Others v. Russia*, Judgment, para. 209, holding that the effective exercise of right protected by the Convention may be thwarted by a State's failure to assist the ECtHR in conducting an examination of all circumstances relating to the case, including in particular by not producing evidence which the Court considers crucial for its task.

¹⁵² See also Dixon *et al.*, *Commentary* (2008), art. 72, mn. 24.

¹⁵³ Similarly, the provision also references article 93(4), which speak of request denial by a 'State Party'.

¹⁵⁴ Article 25 and 103, UN Charter.

¹⁵⁵ See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Situation in Darfur, Sudan, ICC Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, para. 248, foreshadowing possible recourse to a finding of non-compliance against

resolution to cooperate fully with the Court in an equivalent position to a non-Party State that lodges an ad hoc declaration under article 12(3) – a position that promotes internal coherence with respect to non-Party States that have been placed within the jurisdictional scope of the Court, even if such States could equally have been considered to be subject to cooperation obligations under the ‘any other appropriate basis’ clause of article 87(5).¹⁵⁶ However, it remains doubtful whether the Court may respond to non-compliance by third States that are neither States Parties, nor declaring States under article 12(3), nor States subject to Chapter VII cooperation duties.¹⁵⁷ In these circumstances it would appear that the Court does not have the possibility to make a formal finding of non-compliance and refer the matter to the ASP or the Security Council; although the Court could still chose to bring the matter of non-cooperation by third States to the attention of the ASP or the Security Council as an issue that has impeded its work, for example in the context of reports by the President or the Prosecutor to either body.¹⁵⁸

The practical impact of referring a judicial finding to a political body remains uncertain. In particular, it may have little impact on ongoing proceedings before the Court,¹⁵⁹ even though it might remain highly relevant for ongoing investigations into similar conduct or in view of possible revision proceedings. Among the more robust models where non-compliance findings are pursued by the parent political body, the experience of the Committee of Ministers of the Council of Europe, which is entrusted with the enforcement of judgments by the ECtHR, shows that enforcement can take years, where it is effected.¹⁶⁰ In other circumstances, although a judicial finding of non-compliance might not lead to direct enforcement action from the political body to which it has been referred, it may exercise considerable influence in the context of other bi- and multilateral processes aimed to bring about changes in the behaviour of the State concerned.¹⁶¹

Sudan pursuant to article 87(7); and *Prosecutor v. Saif Al-Islam Gaddafi*, Situation in Libya, ICC Pre-Trial Chamber I, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, ICC-01/11-01/11-577, 10 December 2014, paras. 20–22, where the Chamber proceeds to find Libya in non-compliance under article 87(7). See also *Prosecutor v. Banda and Jerbo*, Situation in Darfur, Sudan, Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’, ICC Trial Chamber IV, ICC-02/05-03/09-169, 1 July 2011, para. 15; and *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Situation in Libya, ICC Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, ICC-01/11-01/11-163, 1 June 2012, paras. 28–30, recalling that ‘the Court has consistently held that the legal framework of the Statute applies in the situations referred by the Security Council in Libya and Darfur, Sudan, including its complementarity and cooperation regimes.’

¹⁵⁶ The difficulty with article 87(5)(a) lies in the fact that 87(5)(b) does not provide an express basis for the Court to make a finding of non-compliance in relation to a State that has been invited to cooperate under ‘any other appropriate basis’: a somewhat flawed result of the drafting process, but possibly answered by the logic that in such a scenario the power of the Court to invite the State to cooperate resides in a legal framework outside of its own regime (i.e. not the Statute, nor an ad hoc agreement or arrangement with the Court). The ability of the Court in these circumstances to make a finding of non-compliance could nonetheless be based on an inherent powers approach, given the necessity of the Court to be able to fulfil its mandated duties. See discussion in Kress and Prost, art 87, in this volume, at mn. 37 *et seq.*, on the variable applicability of articles 87(5) and 87(7) to non-Party States.

¹⁵⁷ See also Piragoff, in: Lee (ed.), *ICC (1999) 293–294*, who opines, ‘[T]he remedial action where a request is made to a State not party to the Statute is uncertain in the context of Article 72(7) ...’. By contrast, it does not seem reasonable to propose that if non-Party States fall outside the scope of subparagraph 7(a), they could be ordered to disclose pursuant to the ‘in all other circumstances’ clause of subparagraph 7(b); since the Court could not reasonably enjoy greater powers vis-à-vis non-Party States than States Parties; see Dixon *et al.*, *Commentary* (2008), art. 72, mn. 24.

¹⁵⁸ See similarly Dixon *et al.*, *Commentary* (2008), art. 72, mn. 24. at fn. 43.

¹⁵⁹ See article 87, this volume; Dixon *et al.*, *Commentary* (2008), art. 72, mn. 24.

¹⁶⁰ On general challenges to the enforcement of ECtHR preliminary rulings and final dispositions see Keller and Heri (2014) 12 *JICJ* 735–750.

¹⁶¹ See Rastan, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2008) 165–171, noting in the context of the ICTY that although formal notification of non-compliance seldom led to enforcement action by the Security Council, it did bring about changes in the behaviour of the States of the

44 **b) Where the material is held by others.** Subparagraph (b) of paragraph 7, relates to ‘all other circumstances’. The most obvious import of the provision is to denote that it is with exception to the scenario described in subparagraph (a). The other circumstances that would exclude those set out in subparagraph (a) include situations where the material is already in the hands of the prosecution or the defence or the legal representative of victims. For example, the prosecution may have obtained the information from a State that did not receive it in confidence from the originating State (i.e. not subject to article 73); from intercepted communications; or from a cache of physical or electronic material seized during an arrest operation.

Alternatively, the material may be in the possession of a third party.¹⁶² This may include a witness that has opted not invoke the grounds for refusal set out in paragraph 2 and decided to testify, notwithstanding the State’s objection under paragraph 4. In such circumstances, the Chamber could order for the witness to proceed with the intended testimony, having considered and rejected the State’s claim.

3. Drawing of inferences

45 The final action that the Court may take under both sub-paragraphs (a) and (b) is to ‘make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances’. In subparagraph (a) this inference may be drawn in addition to making a finding of non-compliance, while in subparagraph (b) it can be made only to the extent that the Chamber does not order disclosure (thereby rendering the utility of an inference obsolete).

The provision is based on the proposal by Singapore which provided that the Court could ‘[m]ake such inferences that relate to the guilt or innocence of the accused as may be appropriate in the circumstances’, to be drawn where the State refused a cooperation request and the Court had determined that the evidence was relevant and necessary for the establishment of the guilt or innocence of the accused.¹⁶³ It thereby provided one additional action that the Court could take where it could not order disclosure, to supplement its authority to make a finding of non-compliance. In particular, the addition appears to have been designed to address the substantive aspect of the non-provision of information that the Chamber deems relevant and necessary, by allowing the Court to draw certain conclusions in the case at hand as to contested facts at issue.

The proposal was modified by the coordinator of the Working Group on Procedural Matters towards the end of the negotiations in Rome. First, it was replicated in the separate track reflected in current subparagraph 7(b) to enable the Court to draw an inference also where it declines to order disclosure in deference to the State’s national security claim. Second, the provision was restricted to the drawing of inferences as to ‘the existence or non-existence of a fact’ instead of the guilt or innocence of the accused. This was made in response to concerns that inferences made as to the guilt of an accused person based on information which he or she has had no access to or an opportunity to refute may run counter to the rights of the accused enshrined in the Statute.¹⁶⁴ As Piragoff explains, ‘[i]t seems that such “fact” would likely be those which are relevant to the requested information. The inference should not be to the ultimate issues of guilt or innocence’.¹⁶⁵

former Yugoslavia towards the ICTY by virtue of measures taken by others. This was by means of issue linkage strategies seeking to link a State’s cooperation record with the Tribunal to its participation in other areas of international activity, such as the European Union’s Stabilisation and Association Process, NATO’s Partnership for Peace programme, and with respect to the lifting of economic sanctions and the rendering of multilateral and bilateral assistance, notably by the World Bank and the U.S.

¹⁶² See above fn. 10, citing Piragoff, in: Lee (ed.), *ICC* (1999) 281–282.

¹⁶³ A/CONF.183/C.1/WGPM/L.49, 3 July 1998.

¹⁶⁴ Dixon *et al.*, *Commentary* (2008), art. 72, mn. 25.

¹⁶⁵ Piragoff, in: Lee (ed.), *ICC* (1999) 287.

At the same time, a number of uncertainties remain. As noted in the 2nd edition of this Commentary, it would seem that the correct approach would be that inferences may only be drawn from the absence of information, not from information which the Chamber has in fact had access to (because the Chamber has the information and has chosen not to order its disclosure or because it transpired in the course of an *ex parte* hearings), but which has not been made available to the accused as a result of non-disclosure.¹⁶⁶ However, the drawing of inferences from the absence of information or documents, if adverse to the accused, could prove highly challenging weighed against the fundamental presumption of innocence.¹⁶⁷

As is well known, the drawing of inferences from the lack of information provided by a State, including on the basis of pleas of official secrecy or national security prejudice, has been firmly established in the case law of the ECtHR and the IACtHR. As restated by the ECtHR in the recent case of *El Masri v. Macedonia*, where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. As a result, the burden of proof in such a case may shift on to the authorities to provide a satisfactory and convincing explanations, in the absence of which, the Court may draw the inference against the State that the allegation is proven.¹⁶⁸ For example, this approach has been applied where although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she was officially summoned by the authorities, entered a place under their control and has not been seen since. The ECtHR has stated that in such circumstances, the onus is on the Government to provide a plausible and satisfactory explanation as to what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty.¹⁶⁹ In this context, the ECtHR has required proof in the form of ‘concordant inferences’ before the burden of proof is shifted to the respondent Government.¹⁷⁰ For example, as illustrated by the Court in *Creangă v. Romania*, in the case of alleged deprivation of liberty, the applicant will need to provide *prima facie* concordant evidence capable of showing that he was indeed under the exclusive control of the authorities on the day of the events, that is to say, that he was officially summoned by the authorities and entered premises which were under their control. If that condition is satisfied, the Court will be able to consider that he was not free to leave, particularly when investigative measures were under way. It could therefore require the Government to provide a detailed hour-by-hour report on what happened in the premises and to account for the time spent there by the applicant. The Government would then have to provide satisfactory and convincing written evidence to support their version of the facts. Failure to provide such evidence would enable conclusions to be drawn as to the merits of the

¹⁶⁶ Dixon *et al.*, *Commentary* (2008), art. 72, mn. 26. The authors go on to note that such an approach would be consistent with the result which the change in wording to ‘fact’ sought to achieve, namely, that information cannot be relied upon in the determination of guilt when the accused was denied access to it.

¹⁶⁷ *Ibid.* See similarly Behrens, in: Roggemann and Šarčević (eds.), *National Security and International Criminal Justice* (2002), p. 125; Triffterer, in: Roggemann and Šarčević (eds.), *National Security and International Criminal Justice* (2002) 77–77; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), pp. 868–869.

¹⁶⁸ *El Masri*, para. 152, citing *Çakıcı v. Turkey*, no. 23657/94, para. 85, ECHR 1999-IV; *Salman v. Turkey*, no. 21986/93, para. 100, ECHR 2000-VII; *Rupa v. Romania (no. 1)*, no. 58478/00, para. 97, 16 December 2008; *Orhan v. Turkey*, no. 25656/94, 18 June 2002, para. 274. See thereto Ambos (2015) 5 *EuCLR* forthcoming and previously, *id.* (2009) 42 *Israel L.Rev.* 362, 393–6 (arguing, on the basis of a differentiation between burden and standard of proof, that for a final shifting of the burden of proof regarding human rights violations such as torture the applicant only has to present the injury (or injuries) in a plausible and convincing manner, and the respondent State then has to refute this presentation, with any doubts counting against it).

¹⁶⁹ *El Masri*, para. 154, citing see *Taniş and Others v. Turkey*, no. 65899/01, ECHR 2005–VIII, para. 160; *Yusupova and Zaurbekov v. Russia*, no. 22057/02, 9 October 2008, para. 52; *Matayeva and Dadayeva v. Russia*, no. 49076/06, 19 April 2011, para. 85.

¹⁷⁰ *Öcalan v. Turkey* [GC], no. 46221/99, para. 90.

applicant's allegations.¹⁷¹ The IACtHR has similarly allowed for a shift in the burden of proof in a series of well-known cases concerning enforced disappearance.¹⁷²

In explaining this shifting in burdens and for the drawing of inferences, the ECtHR has drawn a distinction between its role, in supervising State compliance with Convention obligations, and that of a criminal trial:

'In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. It reiterates that, in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake ... Furthermore, it is to be recalled that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*.'¹⁷³

48 The ICC will have to consider whether any of the reasoning applied by the ECtHR and IACtHR for the drawing of inferences from State inaction or silence is applicable in its own context. Clearly, the specific circumstances concerning State responsibility with which both regional courts are engaged are not easily transferable to the criminal law context. While a Trial Chamber may look to whether sufficiently strong, clear and concordant inferences are available or whether un rebutted presumptions of fact exist to enable a finding under paragraph 7(a)(iii) or 7(b)(ii), any inference that relates to the existence or non-existence of a fact in dispute that is relevant and necessary to a determination of guilt or innocence would need to be treated with considerable caution.¹⁷⁴

49 At the same time, the drafting history indicates that the phrase 'relevant and necessary for the establishment of the guilt or innocence of the accused' in the chapeau text of paragraph 7 might not concern the ultimate issues at trial. As noted earlier, the wording of paragraph 7 originates from a proposal of Singapore, which provided in relevant part:

'8. Where the disclosure of the information or document is sought pursuant to a request for cooperation under Part 9, the Court may, *if it determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused*: (a) Refer the matter in accordance with article 86, paragraph 6; and (b) Make *such inferences that relate to the guilt or innocence of the accused* as may be appropriate in the circumstances.'¹⁷⁵

The same formulation was included in Option 1 of the coordinator's rolling text as late as 13 July 1998.¹⁷⁶ As discussed in mn. 45, the phrasing in limb (b) was modified towards the end

¹⁷¹ *Creangă v. Romania*, no. 29226/03, ECtHR, 23 February 2012, para. 90.

¹⁷² *Velasquez Rodriguez v. Honduras*, IACtHR Judgment, 29 July 1988, paras. 147–148; *Neira Alegria et al. v. Peru*, IACtHR, Judgment 19 January 1995, para. 65.

¹⁷³ *El Masri*, para. 151–152. See Keller and Heri (2014) 12 *JICJ* 741–742. On distinguishing between the standard and burden of proof as applied by the IACtHR set against that applied by domestic criminal courts see also *Velasquez Rodriguez v. Honduras*, IACtHR, Judgment, 29 July 1988, paras. 128–138.

¹⁷⁴ As Piragoff aptly observes in: Lee (ed.), *ICC* (1999) 294: 'Given the ambiguities of some of the provisions and their inter-relations, it is an open question whether the storm of the negotiation process in respect of the protection of confidential information, in particular national security information, has left the Court with clear or turbulent skies for the future'.

¹⁷⁵ A/CONF.183/C.1/WGPM/L.49, 3 July 1998, emphasis added.

¹⁷⁶ A/CONF.183/C.1/WGPM/L.76.

of the negotiations in Rome to ensure that the inference would not go to the ultimate issues of guilt or innocence as proposed in the earlier text, but instead would relate to ‘the existence or non-existence of a fact’. By contrast, the formulation in the first part relating to relevance and necessity, which used the same phrase, appears to have been carried over into the final text without detailed discussion. The difference in treatment is noticeable given the strong reservations that motivated the amendment in limb (b) and the equal validity of such concerns for both parts. Indeed, arguably the purpose of the amendment would be negated if the inference as to the existence or non-existence of a fact had to nonetheless constitute the sole factor necessary to establish the guilt or innocence of the accused. The absence of any indication in the drafting history that the distinction in the treatment of the two matching clauses was intentional tends to mitigate the emphasis that should be placed on the qualifier in the chapeau text in paragraph 7. If, instead, the inference is understood to apply in relation to evidence that has been deemed relevant and necessary in view of its potential incriminating or exonerating value, the Chamber could draw an inference ‘as may be appropriate in the circumstances’ in the same way as it would in relation to other circumstantial evidence and assign it, together with other relevant corroborating evidence, such weight and probative value as it may determine in the context of the totality of the evidence at the end of the trial.

Article 73

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Directly relevant Rules of Procedure and Evidence: Rules 73, 81, see Annex 1.

Literature: Peter Malanzuk, *Protection of National Security Interests*, in: Antonio Cassese/Paola Gaeta/John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary* 1371, Vol. 2 (2002); Donald K. Piragoff, *Protection of National Security Information*, in: Roy S. Lee (ed.), *The International Criminal Court: The Making Of The Rome Statute – Issues – Negotiations – Results* 270 (1999).

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	7
1. Requested States Parties	7
2. Disclosure in confidence	9
3. States, intergovernmental and international organizations	12
4. States Parties as originators	13
5. Non-States Parties refusing to consent.....	15
C. Additional remarks	18

A. Introduction/General remarks

- 1 Article 73 seeks to protect the free flow of intelligence and other information between States, and between organizations and States. It ensures that where a State Party has a pre-existing obligation of confidentiality to another State or to an organization, it will not be obliged to violate that confidence in order to comply with its obligations under the treaty. It thus establishes a separate procedure to be followed in the event that a State Party is requested to provide the Court with information which was received by it on a confidential basis. In such cases, the focus shifts from the ‘requested State’ to ‘the originator’ of the information, who effectively becomes the object of the Court’s request. However, to the extent that such information is not subject to a legitimate privilege in the public interest, it remains as problematic as article 72 (concerning protection of national security information) and article 54 para. 3 (d) and (e) (protecting information given in confidence to the Prosecutor) in that it could deny an accused access to exculpatory and mitigating evidence and the Prosecutor incriminating and aggravating evidence. Indeed, unless it is strictly construed, it could seriously limit the ability of the Prosecutor to prosecute cases of genocide, crimes against humanity and war crimes.
- 2 The decision whether the information should be disclosed notwithstanding the pre-existing obligation becomes a matter for determination, not by the requested State Party, but rather by the originator of the information, or the originator and the Court, depending on the nature of the originator’s relationship towards the Court. The article recognizes that the consequences will vary depending on whether or not the originator is a State Party. If the

originator is a State Party, the originator is obliged to consent to the disclosure to the Court or, in the case of information it considers prejudicial to its national security, to resolve the issue of disclosure in accordance with the Statute. If a non-State Party, the originator clearly owes no obligation to the Court under article 73. If it so desires, it can, therefore, rely on the confidential basis on which it provided the information, and refuse to consent to disclosure, although it may be possible in certain circumstances for the State Party to disclose this information to the Court despite the confidential basis on which it was supplied or to do so when it has also obtained the information independently of the confidentiality agreement (see mn. 10 and 19).

The situation is a little bit more complex if the originator is an intergovernmental organization or an international organization. Article 87 para. 6 provides that '[t]he Court may ask any intergovernmental organization to provide information or documents', but it does not impose an obligation on such organizations to cooperate similar to the obligation of States Parties in article 86. Instead, it envisages that '[t]he Court may ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its composition or mandate'¹. The Court has availed itself of this opportunity. For example, the obligations of the United Nations to cooperate with the Court are spelled out in the Relationship Agreement between the International Criminal Court and the United Nations. Article 5 requires that the United Nations and the Court shall, 'to the fullest extent possible and practicable, arrange for the exchange of information and documents of mutual interest'; article 15 contains an undertaking by the United Nations 'to cooperate with the Court and to provide to the Court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute', article 16 contains an undertaking by the United Nations to cooperate with the Court in providing testimony by its officials and article 18 spells out obligations of the United Nations to cooperate with the Prosecutor. The Court has entered into a similar cooperation agreements with the European Union and it is negotiating cooperation agreements with the African Union and other intergovernmental organizations². The term 'international organizations' is not defined, but its juxtaposition with intergovernmental organizations in this article suggests that it means here such special international organizations as the International Committee of the Red Cross (ICRC) and non-governmental organizations. Such non-governmental organizations may have provided information in confidence to States Parties, some of which would be protected independently of this article by a public interest privilege. Such a public interest privilege is recognized in Rule 73³.

Before the ICTY, the protection of third-party information went in an opposite direction at trial, later reversed on appeal to confirm the underlying logic contained in article 73. In the *Milutinović et al* case, the Trial Chamber found that it had the authority under ICTY Rule

¹ It is a separate question whether the Court may compel officials or former officials of an intergovernmental organization pursuant to article 64 para. 6 (b) to attend, testify and produce documents and to what extent they enjoy a public interest privilege or an immunity. For the position of the United Nations on this question, see *Prosecutor v. Brima, Amicus curiae* brief of the United Nations High Commissioner for Human Rights, Appeals Chamber, Special Court for Sierra Leone, filed 16 Dec. 2005.

² The International Criminal Court and the European Union sign an agreement on cooperation and assistance, The Hague, 10 Apr. 2006, ICC-CPI-20060410-132-En.

³ Rule 73 para. 2 provides that 'communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that:

- (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
- (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
- (c) Recognition of the privilege would further the objectives of the Statute and the Rules'.

For the scope of the public interest privilege which can be asserted by non-governmental organizations, see *Prosecutor v. Brima, Amicus curiae* brief of Amnesty International concerning the public interest privilege, Document Number: SCSL-04-16-452, Appeals Chamber, Special Court for Sierra Leone, 16 Dec. 2005.

54bis to issue an order to NATO to provide information which the latter asserted belonged to its Member States. In so doing, it rejected NATO's arguments 'that a "non-originating" State or holder of material is not obliged under Article 29 of the Statute to produce documents or information that it received from an "originating" State, and that "ownership" rather than "possession" triggers the obligation to produce, or that intelligence-sharing agreements with States trump any obligation under Article 29 of the Statute'. Accordingly, the Trial Chamber found: 'The target of such an Order is material that the organisation possesses. Questions of ownership and whether the material was initially obtained by another are irrelevant.'⁴ In separate appeals brought by the United States and NATO, the Appeals Chamber reversed this finding, holding that the Trial Chamber erred in summarily dismissing issues of ownership and origination of information as irrelevant to a Rule 54bis order.⁵ In relation to the appeal by the United States, the Appeals Chamber stated:

'In this case, the Appeals Chamber has no reason to doubt the United States' assertion that it has a strong national security interest in maintaining the absolute secrecy of the intelligence information provided to it by other States and entities. The Appeals Chamber accepts as logical the United States' claim that, were it to divulge this information without the consent of the information providers, this could lead other States to doubt the United States' willingness and ability to keep secrets entrusted to it and therefore make other States less willing to share sensitive information with the United States in the future. Application of protective measures to this information handed-over by the United States would clearly not suffice to protect this national security interest. The Appeals Chamber notes, moreover, that the Trial Chamber issued Rule 54bis orders to other States that might have provided the United States with information responsive to Odžanić's requests. Rule 54bis orders to these States provide Odžanić with an alternate means of obtaining responsive information that may have been provided to the United States.'⁶

Accordingly, it held that a properly tailored Rule 54bis order should have necessarily avoided requiring production of information over which the United States did not have ownership.⁷

⁴ *Prosecutor v. Milan Milutinović et al*, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, IT-05-87-PT, 17 November 2005, paras. 35 and 38. The Trial Chamber relied on the finding of the Appeals Chamber in the *Prosecutor v. Tihomir Blaskić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY Appeals Chamber, 29 Oct 1997, that 'the obligation under consideration [that of Article 29] concerns [inter alia] action that States may take only and exclusively through their organs (this, for instance, happens in case of an order enjoining a State to produce documents in the possession of one of its officials)', observing that '[t]his applies equally to material received by one State from another', although noting '[o]f course, should a third-party holder of sensitive material assert that its legitimate security interests would be adversely affected by an order for production, it may seek appropriate protective measures'.

⁵ *Prosecutor v. Milan Milutinović et al*, Decision on request of the United States of America for review, IT-05-87-ARI08bis.2, 12 May 2006, para. 43; *Prosecutor v. Milan Milutinović et al*, Decision on Request of the North Atlantic Treaty Organisation for review, IT-05-87-ARI08bis.1, 15 May 2006, para. 18. The Appeals Chamber went on to observe: 'Nothing in the text of Rule 54bis or the jurisprudence concerning the International Tribunal's power to issue compelling orders to States precludes consideration of these matters or indicates that the only question of concern for a Trial Chamber is whether or not the State is in possession of the requested information or documents. Furthermore, the Appeals Chamber recalls that the Rules of the International Tribunal have been intentionally drafted to take into account certain State interests and to provide safeguards for them in order to encourage States in the fulfilment of their obligation to cooperate with the International Tribunal under Article 29 of the Statute. Indeed, under Rule 54bis, a Judge or a Trial Chamber is required to consider the national security interests raised by a State in determining whether to issue a Rule 54bis order or whether to direct, on national security interests grounds, protective measures for the documents or information to be produced by a State under a Rule 54bis order.'; *Prosecutor v. Milan Milutinović et al*, Decision on request of the United States of America for review, IT-05-87-ARI08bis.2, 12 May 2006, para. 43.

⁶ *Ibid.*, para. 44. In this respect, the Appeals Chamber held that reliance on the *Blaskić* subpoena appeal decision was inapposite since the Appeals Chamber there 'was not considering the question of whether a State may be enjoined to produce documents in its possession that was shared with it by another State'; *ibid.*, at fn.102.

⁷ Although the Trial Chamber's decision had been issued in relevant part against NATO, not the United States, the Appeals Chamber accepted the United States' standing to challenge the issue given that the holding could directly affect it in two ways: (i) by requiring NATO, as a third-party holder of information originating from the United States, to provide that information to the ICTY, and (ii) because the Trial Chamber generally stipulated that its holding 'applies equally to material received by one State from another' and 'would require the United

Essentially the same findings were issued in response to NATO's complaint with respect to information it held from its Member States. The Appeals Chamber held that 'the Trial Chamber abused its discretion by issuing a Rule 54bis order requiring NATO to produce intelligence information that it did not own'.⁸ In particular, the Appeals Chamber added that 'the bona fide security interest asserted here by NATO is one that ... deserves the utmost consideration', since requiring NATO to produce certain intelligence information of which it is not the originator implicated 'serious security interests held by NATO and its Member States'.⁹ Although the two decisions relied on the prejudice to national security interest (of the United States and the security interests of NATO) in not sharing third-party information,¹⁰ the underlying reasoning is largely consistent with the rationale behind the drafting of article 73 and its inter-relationship with the drafting of article 72.

As noted below (see mn. 9 to 10), the information to which article 73 pertains is not limited to information of an objectively sensitive nature, but to information which was provided confidentially. Moreover, the article does not specify the reason for the confidentiality having been imposed in the first place. The scope of the article goes beyond information considered by a State to prejudice its 'national security' interests, covered by article 72.

It should be noted that articles 72 and 73 are, however, closely interrelated. Third party information provided on a confidential basis may often relate to national security concerns and the procedure embodied in article 73 was thought by negotiators to be particularly important where national security information is involved, in order to facilitate the operation of article 72.

The mechanism in article 73 ensures that when a State party is requested to provide information that was provided to it by a third party, the matter is resolved directly between the Court and the originator of the information, which will then have the opportunity to seek

States to produce any responsive information in its possession that had originated with another State' in the future if served with a Rule 54bis order'; *Prosecutor v. Milan Milutinović et al*, Decision on request of the United States of America for review, IT-05-87-ARI08bis.2, 12 May 2006, para. 42. The United States had argued that even after a State shares information with other States, the originating State 'must control release of their own information' (the 'originator principle'), stating, '[w]hen a State decides to share intelligence or other sensitive information, it typically does so under an express and binding arrangement, with specific conditions on storage, access and use. That is, the originating State does not transmit absolute rights over the information, but retains residual rights and control. It remains the owner of the information'; *ibid.*, para. 39. It further argued that adherence to the originator principle was of 'paramount importance to information sharing' among States and their interests in national security and international relations; was widely shared by the United States, NATO and other States; and was reflected in State practice as demonstrated by its recognition in Article 73 of the Rome Statute; *ibid.*, para. 40.

⁸ *Prosecutor v. Milan Milutinović et al*, Decision on Request of the North Atlantic Treaty Organisation for review, IT-05-87-ARI08bis.1, 15 May 2006, para. 20.

⁹ *Ibid.*, paras.19–20. NATO claimed that the Trial Chamber erred 'because NATO has no independent intelligence gathering capacity and any intelligence information that NATO possesses remains in the control of its member States'; *ibid.*, para. 16. In particular, it argued that the decision negatively affected its ability to conduct relations with its Member States by 'ordering it to produce information which it did not originate and which remains under the control and authority of its Member States'; stating that as a consequence NATO Member States would be prevented from sharing intelligence information with NATO which would 'greatly impair NATO's ability to carry out its mission and to contribute to the maintenance of peace and security.' It further pointed to the Agreement between the Parties to the North Atlantic Treaty for Security where 'it is clear that any intelligence information possessed by NATO remains under the control and authority of the member State that originated it' ('originator principle'), while under the NATO Security Policy, the 'Originator', defined as the 'nation or international organization under whose authority information has been produced or introduced into NATO,' has 'full authority to define the level of security classification and determine to what extent classified information may be disseminated.' It argued that these provisions were necessarily made for 'the mutual protection and safeguarding of any classified information that they may interchange', and thus that 'any binding orders issued in response to' Odjanić's Application 'should be directly addressed to the sovereign individual member States of the Alliance as appropriate'; *ibid.*, paras.14–16.

¹⁰ The same reasoning was recalled by the Trial Chamber in the *Karadžić* case, although there the Chamber observed that Germany, as the requested State, could not simply rely on the general assumption that the documents sought might raise, *inter alia*, third-party ownership issues, but should instead indicate 'which particular documents are owned by third states and thus cannot be disclosed to the Accused without that state's permission'; *Prosecutor v. Radovan Karadžić*, Decision on the accused's application for binding order pursuant to rule 54bis (Federal Republic of Germany), IT-95-5/18-T, 19 May 2010, paras.42–43.

to protect its national security information or documents in accordance with the complex procedure established in article 72. Shifting the focus of the request from requested state to originator in this way reflects that the originator of the document or information will have the greatest interest in its protection, and will be best placed to inform the Court of the reasons for wanting to avoid disclosure. It also ensures that, consistent with the framework of article 72, the relevant question remains whether the provider of the information – as opposed to the recipient of it – is a State Party and owes an obligation to the Court.

- 5 The proponents of article 73 – principally the United States of America and France, and later the United Kingdom – had, distinct, but related, interests in this provision. One objective was to retain a non-State Party’s control over its own information. It has been argued that by so doing,

it serves another important objective, which is to ensure that the current practice of sharing intelligence information between States that would become party to the Statute and others that may not, would not be jeopardized by countervailing obligations owed by States Parties to the Court. However, from the perspective of the Prosecutor, the issue is whether the sharing of such intelligence information on a confidential basis insulated from disclosure to the Court will further the effective investigation and prosecution of genocide, crimes against humanity and war crimes. From the perspective of the defence, one of the issues is whether the accused will be denied access to potentially exculpatory or mitigating intelligence information, such as intercepts of the accused’s statements or statements of witnesses contemporaneous with the alleged crimes. If article 73 had been designed to permit the Prosecutor to obtain such information, subject to the article 72 procedure and on the same basis as a confidentiality agreement under article 54 para. 3 (d) and (3) permitting the Prosecutor to use the information to generate admissible evidence, this claim might be more persuasive, although each of these provisions pose serious problems from the perspective of both the Prosecutor and the accused. An even more serious problem is that article 73 could deny the Court access to evidence of crimes, not just of those committed by nationals of third States, but also of crimes committed by nationals of the originating non-State Party on the territory of a State Party or in a situation referred by the Security Council involving a non-State Party. This problem becomes even more aggravated if the Court were to attempt to address multinational transnational criminality of nationals of both States Parties and non-States Parties, such as trafficking of persons by United Nations peacekeepers¹¹, the torture, enforced disappearances and extrajudicial executions which occurred in the extensive transnational police and military network in Plan Condor in the Southern Cone of Latin America in the 1970s and 1980s¹² or the same crimes committed during recent ‘renditions’ of suspected ‘terrorists’¹³. Often the crucial evidence of the crimes and the conspiracy to commit them will be evidence provided in confidence, where the very confidentiality agreement was a crucial part of the conspiracy.

- 6 In its original incarnation, the principle embodied in article 73 formed part of a proposal by the delegations of France and the United States of America in relation to the protection of national security information (current article 72), submitted on 1 July 1998. The relevant paragraph, which appeared as an amendment to an earlier draft proposal, provided at paragraph 1 (d) that this article should not ‘be interpreted as requiring a state to disclose information obtained under a pre-existing agreement of confidentiality from another State or an inter-governmental organization’¹⁴. On 10 July 1998, the delegation of the United

¹¹ Statement by the President of the Security Council, UN Doc. S/PRST/2005/21, 31 May 2005 (condemning, ‘in the strongest terms, all acts of sexual abuse and exploitation committed by United Nations peacekeeping personnel’).

¹² For an account of one state’s involvement in the multinational Plan Condor, see I. Guest, *Behind The Disappearances: Argentina’s Dirty War Against Human Rights And The United Nations* (1990).

¹³ See, e.g., *El-Masri v Macedonia*, ECtHR, (no. 39630/09), Judgment, 13 December 2012; *Husayn (Abu Zubaydah) v Poland*, ECtHR (no. 7511/13), Judgment, 24 July 2014.

¹⁴ UN Doc. A/CONF.183/C.1/WGPM/L.39.

Kingdom proposed a free-standing article that closely foreshadowed the current provision. It was approved by the working group without controversy¹⁵. Only one minor amendment was made to the U.K. proposal, which reflected the earlier U.S./French proposal, clarifying that the provision might apply to information provided by States as well as intergovernmental and international organizations.

B. Analysis and interpretation of elements

1. Requested States Parties

The provision relates only to requests to States Parties to the Statute, and does not apply to requests that may be made to States not party to the Statute, under article 87 para. 5. This is in large part due to the fact that the provision's objective was to avoid a conflict between the obligations a State Party might owe to a provider of information, and obligations owed by States Parties to the Court under articles 85 and 93 para. 1. The provision would, however, extend to a non-Party State that has lodged a declaration under article 12(3) accepting the exercise of jurisdiction by the Court, since rule 44 clarifies that 'the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply'. The case law of the Court to date suggests that similar obligations would arise with respect to a State that has been placed by the Security Council under a Chapter VII obligation to cooperate fully with the Court, thereby placing the UN Member State so directed under equivalent cooperation obligations as that of States Parties.¹⁶

It is worthy of note that article 73 does not expressly govern the conduct of the Court, only of State Parties. It imposes an obligation on a State Party to seek the consent of the originator before disclosing documents or information provided to it in confidence. However, it does not restrict in any manner what the Court can request or receive. With respect to information from non-States Parties, therefore, the Court remains free to request and to accept such documents or information, should the non-State Parties decide to disclose information to the Court notwithstanding a pre-existing obligation of confidentiality owed to a third party. Article 73 does not, therefore, purport to protect the information as such, or the non-State Party originator's interest in its non-disclosure, but rather the relationship between a requested State Party and sources of information.¹⁷

2. Disclosure in confidence

Article 73 does not specify that the document or information covered by it need be confidential *per se*. Instead, it comes into play as a result of the subjective basis on which the information was provided by the originator, whatever the nature of the information. Alternative formulations, such as that proposed by Singapore during the diplomatic conference which suggested that the provision should apply to information obtained under an agreement to protect 'classified' information, garnered little support¹⁸. Nevertheless, there are significant limitations in the scope of the concept of 'in confidence', both with regard to the nature of the agreement and the legitimacy of the confidentiality under the Rome Statute and other international law.

¹⁵ UN Doc. A/CONF.183/C.1/WGPM/L.49.

¹⁶ See Articles 25 and 103, UN Charter. See ICC Pre-Trial Chambers have pursued e.g. non-cooperation findings against the Sudan and Libya under article 87(7), rather than article 87(5), based on the finding that the referral of a situation by the Security Council triggers the application of the entire legal framework of the ICC, including by implication any rules attendant on States Parties; Rastan, art 72, this edition, at mn. 42.

¹⁷ Although the Court could not find such third States in violation of a cooperation duty towards the ICC, the Court could choose to bring the matter of non-cooperation by third States to the attention of the Assembly of States Parties or the Security Council as an issue that has impeded its work, for example in the context of reports to either body by the President or the Prosecutor; *ibid.*

¹⁸ UN Doc. A/CONF. 183/C.1/WGPM/L.49.

- First of all, concept of ‘in confidence’ under article 73 cannot be broader than the terms of the agreement between the originator and the requested State Party. Second, if either the originator or the requested State Party would provide the information supplied in confidence to a national court or administrative body or to another international body, then the concept of ‘in confidence’ cannot be more restrictive when the information is requested by the Court.
- 10 Third, the originator cannot use the concept of ‘in confidence’ for an illegitimate purpose, such as to protect evidence of crimes under international law committed by its own nationals. On a narrow reading, the application of article 73 is unaffected by the apparent need for or legitimacy of imposing the confidentiality requirement in the first place. Under such a restrictive reading, *vis-à-vis* an originator that is not a State Party, no matter how ill-founded or non-existent its reason for imposing the confidentiality requirement might appear to the Court, or to the requested State Party in possession of the document or information, the condition of confidentiality could not be set aside. However, such a narrow interpretation of the confidentiality agreement would not be consistent with the object and purpose of the Statute¹⁹. First of all, State Parties are bound by the general obligations to act in good faith²⁰ and to cooperate with the Court, as well as the specific obligation to consent to disclosure or, in the case of information covered by article 72, to resolve the matter with the Court. As such, if a State Party sought to prevent disclosure, it would have to convince the Court of the appropriateness of confidentiality, in accordance with the Statute²¹. The moment that a State Party should have known that the confidentiality agreement was designed to or in fact concealed genocide, crimes against humanity or war crimes committed by nationals of the originating non-State Party or of any other State, it could no longer agree to accept such information in the future in confidence in good faith and, if it did, it would breach its obligations under the Statute (indeed, the confidentiality agreement itself might be part of a crime) and the most effective remedy for that breach, particularly if it was unable or unwilling to prosecute the person suspected of these crimes itself or extradite the person to a state able and willing to exercise universal jurisdiction, would be to provide the information to the Court. In this context, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in a passage recalled by the ECtHR in the *El Masri* case, has stated that ‘[t]he blanket invocation of State secrets privilege with reference to complete policies, such as the United States secret detention, interrogation and rendition programme or third-party intelligence (under the policy of ‘originator control’ ...) prevents effective investigation and renders the right to a remedy illusory.’²²
- 11 As a matter of practice, it will fall to the requested State initially to assess whether or not the information was in fact provided to it in confidence and whether it was under an ‘obligation of confidentiality’. If dispute should arise, the determination as to whether such an obligation existed – an issue that relates directly to the judicial functions of the Court – must ultimately be a matter for the Court²³.

¹⁹ The object and purpose of the Rome Statute are reflected in the Preamble, where the States Parties affirm ‘that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’, determine ‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’ and recall ‘that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.

²⁰ A fundamental rule of international law, as recognized in article 26 (*pacta sunt servanda*), is that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’.

²¹ In assessing their obligations under article 73, States Parties, like the Court, will have to take into account article 21 (Applicable law), particularly paragraph 3.

²² *Report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/10/3, 4 February 2009, cited in *El-Masri v Macedonia*, ECtHR (no. 39630/09), Judgment, 13 December 2012, at para. 103.

²³ Under article 119 para. 1, ‘[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court’.

Fourth, the receipt by a State of information of documents ‘in confidence’ should be distinguished from the broader notion of ‘originator consent’ or the ‘originator principle’, whereby a State may need to first obtain the consent of a third State for the onward transmission of material obtained with its assistance without any condition of confidentiality having necessarily existed.²⁴ Nonetheless, information shared between States will typically be subject to express limitations as to its security classification and handling procedure.

3. States, intergovernmental and international organizations

In its earlier incarnation, as draft article 71*bis* presented by the United Kingdom²⁵, this provision provided no specification as to the nature of the ‘originator’. Such a provision could, therefore, have covered all of the entities set out in article 73, plus individuals. The final version mirrors the earlier U.S./French proposal referred to above which did apply specifically to information provided by States, intergovernmental and international organizations. While the greatest concern that article 73 sought to address related to information sharing between States, one of whom is a non-State Party, concern was also expressed in the course of negotiations as to information provided by international organizations that may possess information the confidentiality of which is essential to its ability to continue to fulfil its function. Specific reference was made to the ICRC, for example. There is, however, no definition of the type of ‘international organization’ to which this article might apply, although it would appear to apply to any non-governmental organization (see mn. 2). In any event, the public interest privilege which they can assert with regard to certain confidential information is now partially protected by Rule 73 (see mn. 2).

Since adoption, article 73 has been largely replicated in article 20 of the Relationship Agreement between the International Criminal Court and the United Nations to govern requests concerning third party information provided in confidence to the Organisation by ‘a State or an intergovernmental, international or non-governmental organization or an individual’, thereby extending its specificity and scope.²⁶ Article 73 is also recalled with *mutatis mutandis* application in article 3 of the Cooperation Agreement with the EU.²⁷

4. States Parties as originators

Consistent with the other provisions of the Statute, in particular the obligation of States Parties to cooperate with the Court and to comply with requests for information in

²⁴ Such a formulation is used, e.g., in article 93(10)(b)(ii)(a) with regard to incoming requests for cooperation from States to the Court, in the light of the fact that the originating State will have provided the material to the Court for a specific purpose and therefore has an interest to control how such material may be made available to other entities.

²⁵ UN Doc. A/CONF.183/C.1/WGPM/L.70.

²⁶ Art. 20: ‘If the United Nations is requested by the Court to provide information or documentation in its custody, possession or control which was disclosed to it in confidence by a State or an intergovernmental, international or non-governmental organization or an individual, the United Nations shall seek the consent of the originator to disclose that information or documentation or, where appropriate, will inform the Court that it may seek the consent of the originator for the United Nations to disclose that information or documentation. If the originator is a State Party to the Statute and the United Nations fails to obtain its consent to disclosure within a reasonable period of time, the United Nations shall inform the Court accordingly, and the issue of disclosure shall be resolved between the State Party concerned and the Court in accordance with the Statute. If the originator is not a State Party to the Statute and refuses to consent to disclosure, the United Nations shall inform the Court that it is unable to provide the requested information or documentation because of a pre-existing obligation of confidentiality to the originator’; *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, ICC-ASP/3/Res.1, entry into force 4 October 2004.

²⁷ Art. 3: ‘(1) This Agreement, including any agreements or arrangements concluded under Article 11, shall not apply to requests for information from the Court which relate to information, other than EU documents including EU classified information, originating from an individual Member State. In such circumstances, any request shall be made directly to the relevant Member State. (2) Article 73 of the Statute shall be applied, *mutatis mutandis*, to requests made by the Court to the EU under this Agreement’; *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance*, ICC-PRES/01-01-06, entry into force 1 May 2006.

accordance with articles 86 and 93 respectively, an originating State Party is bound to provide the requisite consent, unless it invokes the terms of article 72. Should it refuse to consent, in violation of its obligations under the Statute as determined by the Court, the requested State Party could not then rely on this violation to withhold information or documents from the Court. The requested State Party must pass the information on to the Court, notwithstanding the pre-existing obligation of confidentiality, if so requested by the Court. It should be noted, therefore, that the condition of confidentiality does not ultimately prevail over the obligations to the Court. The Statute provides no absolute protection of pre-existing obligations of confidentiality, nor insulation against potential conflicts that may arise between States Parties where one of them seeks, inconsistently with the Statute, to withhold information or documents from the Court. What article 73 does ensure is that, where the originator State Party opposes the disclosure of the information to the Court, it has an opportunity to resolve the matter directly with the Court, in accordance with the Statute.

- 14 In setting forth the obligations of the originator State Party, article 73 distinguishes between documents or information subject to article 72 and all other documents or information. The only circumstance in which a State Party may refuse to consent to disclosure is where it invokes the article 72 procedure, on the basis that disclosure would prejudice its national security. In such circumstances the detailed provisions of article 72 take effect.

5. Non-States Parties refusing to consent

- 15 By contrast to the situation of an originator that is a State Party, the provision ensures that originators that are not States Parties retain ultimate control over the information they pass on to States Parties under condition of confidentiality. If they refuse to consent, the Court cannot oblige the requested State Party to disclose the information or document to it, subject to issues related to good faith (see mn. 10).
- 16 With regard to the requirement that the confidentiality be imposed by virtue of a 'pre-existing' obligation, the article does not specify what the obligation to the originator must pre-exist. In other words, must the obligation of confidentiality to the provider of information have pre-existed the State Party's obligation toward the Court, or simply the request from the Court? The use of the term 'pre-existing obligation' might suggest the former: if the comparison is between the obligations owed to the Court and those 'pre-existing' obligations to the originator, the relevant time would be when the obligations were assumed, which *vis-à-vis* the Court would be upon ratification or accession.
- 17 Whatever the interpretation of 'pre-existing', it is clear from the reference to a document or information 'disclosed to [a State Party] in confidence' at the beginning of article 73 that the obligation of confidentiality must be assumed at the time when the originator discloses to the requested State and cannot be assumed subsequently. Article 73 excludes the possibility of agreements of 'confidentiality' being entered into after a request is made by the Court for the purpose of putting information beyond the Court's grasp.

C. Additional remarks

- 18 Article 73 obliges States Parties to seek the consent of the originator. It does not provide that obtaining such consent is a pre-requisite either to passing on the information or document to the Court or to the Court's use of it. If the originator no longer exists, for example, or it cannot or does not respond to the request for consent, article 73 does not impose an impediment to submitting the information or document to the Court, and the Court's use of the material.

Similarly, there is no prohibition on the provision or use of material in circumstances where consent is unlawfully withheld, as noted above. States Parties should seek to avoid

some of the problems with article 73 by requiring that all States, particularly non-States Parties, intergovernmental organizations and international organizations agree when they provide information in confidence to waive that confidentiality whenever that information is requested by the Court, subject to any other provisions of the Statute, such as article 73, or the Rules, such as rule 73.

The article does not specifically address the situation where the request relates to documents or information that was provided to the requested State Party confidentially, but could also be obtained by that State Party by other means. However, consistent with the statutory obligation of State Parties towards the Court, and in line with the approach adopted in article 72, there would be no obligation to seek consent in circumstances where the same document or information was obtained by other means. Otherwise, confidentiality agreements could be used to obstruct or delay access to information or documents to which the Court would otherwise be able to obtain access, which is not the objective of article 73. 19

The applicability of article 73 was also raised in the context of negotiations on the crime of aggression, after doubt was expressed whether a requested State would still be bound by the provision where the State which had disclosed the confidential information was an aggressor State. The discussion noted that if the requested State had referred the situation, it would probably not have difficulties in disclosing third-party information – since the protection in article 73 aims to not disrupt relations between a requested State and a third State, the requested State would presumably be prepared to forego this. It was also observed that if the requested State was not a Party to the Statute, it would not be bound as such by article 73 and could choose how it responded to any ICC request. In the end, the informal inter-sessional meeting of the Special Working Group on the Crime of Aggression recalled that ‘the provisions on national security were the result of a delicate and difficult compromise and were best left unmodified’ and ‘agreed that there was no reason to look at these provisions again in light of the definition of crimes of aggression’.²⁸ 20

²⁸ ICC-ASP/4/32, Annex II, Special Working Group on the Crime of Aggression, Annex II.A, Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 13 to 15 June 2005, paras.54–55, available at: http://crimeofaggression.info/documents//6/2005_Princeton.pdf.

Article 74 Requirements for the decision*

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Literature: Beulke, *Strafprozessrecht* (Müller 12th edition 2012); Engisch, *Einführung in das juristische Denken* (Kohlhammer 10th edition 2005); Esser, R., *Auf dem Weg zu einem europäischen Strafverfahrensrecht* (De Gruyter 2002); Friman, Brady, Costi, Guariglia and Stuckenberg, 'Charges', in: Sluiter et al., *International Criminal Procedures*, (Oxford 2013), 381; Gosnell, Admissibility of Evidence, in: Khan, Buisman and Gosnell, *Principles of evidence in international criminal proceedings* (Oxford 2010) 375; Guerrero Palomares, S., *El principio acusatorio* (Thomson Reuters 2nd ed. 2009); Lozzi, G., *Lezioni di procedura penale* (Giappichelli 7th edition 2007); Maier, J. B.J., '¿Es la intermediación una condición de la condena penal?: un aspecto parcial de la lucha entre inquisición y composición', in: *Jueces para la democracia* (2004) 49, p. 13–20; Nerlich, V. 'The Confirmation of Charges Procedure at the International Criminal Court, Advance or Failure?', (2012) 10 *JICJ* 1339; Peter Rieà, *Die sogenannten Prozessmaximen oder Prozessgrundsätze*, in: Löwe/Rosenberg, *StPO*, intro. (1999) 60; Schauer, F., *Formalism*, (1998) *YaleLJ* 509; Stahn, C. 'Modification of the legal characterization of facts in the ICC system: a portrayal of regulation 55', (2005), 16 *CLF* 1; Terrier, F., 'The Procedure before the Trial Chamber', in: A. Cassese et al. (eds.), *Rome Statute of the International Criminal Court* (OUP 2002), 1313; v. Weber, H., *Internationale Strafgerichtsbarkeit*, (F. Dümmler 1934).

Content

A. Introduction.....	1
I. Historical overview.....	1
II. General remarks.....	9
B. Analysis and interpretation of elements.....	11
I. Paragraph 1:.....	11
1. Presence of the judges at each stage of the trial.....	11
2. Alternate judges.....	19
II. Paragraph 2: Basis for the decision.....	25
1. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings.....	26
2. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.....	39
a) Function.....	39
b) Is a 'factual allegation' part of the facts and circumstances described in the charges?.....	43
c) Where are the facts and circumstances described in the charges to be found?.....	48

* The views expressed by Alejandro Kiss do not necessarily reflect those of the International Criminal Court.

3. The Court may base its decision only on evidence submitted and discussed before it at the trial.....	53
III. Paragraph 3: Unanimity, majority and minority views.....	57
IV. Paragraph 4: Secrecy of deliberations.....	61
V. Paragraph 5.....	65
1. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions.....	65
2. Majority and minority views.....	70
3. Delivery in open court.....	71

A. Introduction

I. Historical overview

Draft Statutes presented *before* the Second World War contain regulations to 'declare the hearing closed', when 'subject to the control of the Court, the case for the prosecution and defence is completed'; further they provided that such deliberations 'shall take place in private and remain secret'¹. For '[a]ll questions' a decision 'by a majority of the Judges present at the hearing' was demanded with the proviso, that '[i]n the case of equality, the Presiding Judge shall have a casting vote', article 42, 1926 Bellot Draft. With regard to the prerequisites for the judgment, article 43 demanded only that it 'shall state the reason on which it is based'. This Draft was revised and adopted by the 1926 ILA Vienna Conference and differentiated in a new article 35 in the sense that '[a]ll questions shall be decided by a majority of the Judges present at the hearing', but for 'the charge and the actual punishment ... a qualified majority of two-thirds of the Judges' was stipulated. With regard to the contents of the judgment it was added in article 36 that the reasons had to state also 'the law applicable', that, besides '[t]he judgment of the Court ... no other judgment shall be pronounced by any other Member of the Court' and that it 'shall be read in open Court'².

The AIDP Draft from the same year was with regard to the requirement for the decision on the same footing; however, it did not differentiate between a simple and a qualified two-third majority³. The same attitude was expressed in the 1937 League of Nation's Convention for the Creation of an International Criminal Court⁴.

Against this background the Nuremberg Charter appears much more detailed and attentive to practical needs. It provided, for instance, in article II for each of the members of the Tribunal to have a specific 'alternate' who in 'case of illness ... or his incapacity for some other reason ... shall take his place'. The reason behind this *personal assignment* of alternate judges was purely political: the four Allied powers each had one judge on the Tribunal and wanted to make sure that his incapacity would not change this composition of the Tribunal. Therefore, according to article III, each of the four Signatory States could replace 'its member of the Tribunal or *his* alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate' (emphasis added).

Article IV (c) demanded 'decisions by a majority vote', which was anyhow 3:1, but in addition 'that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal'. This makes sense only because 'in case the votes are evenly

¹ Article 41 of the 1926 Bellot Draft, reprinted in: von Weber, *Internationale Strafgerichtsbarkeit* (1934) 136, 143.

² For the Vienna Draft see Weber, *Internationale Strafgerichtsbarkeit* (1934) 154.

³ For the AIDP Draft for a 'Projet de statut pour la création d'une Chambre criminelle au sein de la Cour permanente de Justice internationale' see Weber, *Internationale Strafgerichtsbarkeit* (1934) 168 *et seq.*

⁴ See articles 35–38, reprinted in: Bassiouni, *International Criminal Law, Enforcement*, iii (1987) 197.

divided, the vote of the President shall be decisive'; but this possibility was not applicable to convictions and sentences. The judgment 'shall give the reasons on which it is based', article XXVI, but no further details were prescribed in the Charter or the Rules.

- 3 The 1951 Draft *Code*, dealing with substantive international criminal law, did, along with later Draft *Codes* of the ILC, not propose any articles on the subject matter. However, the 1951 ILC Draft *Statute* contains articles 45 to 49, demanding a simple majority for the '[f]inal judgments and sentences of the Court ... of the judges participating in the trial' as well as for 'other decisions of the Court', mentioning in addition that 'the judgment shall state, in relation to each accused, the reasons upon which it is based' and that 'any judge shall be entitled to deliver a separate opinion'⁵.

The 1972 Bellagio-Wingspread Draft *Statute* proposed a two-thirds majority of votes for all questions at the trial under article 41, amounting to 4:2, and stated expressly in article 43 the right 'to deliver a separate opinion'⁶. The 1980 and 1984 ILA Drafts contain no new aspects⁷.

The Bassiouni Draft *Statute* 1987 offers in article (xx), 'Adjudication', a more detailed regulation, partly based on former Drafts as stated in the commentary to this article. It emphasizes *inter alia* that 'equal weight [should be given] to evidence and arguments presented by the Procurator and on behalf of the accused in accordance with the principle of "equality of arms" of the parties' (brackets added). Newly mentioned is also that '[t]he decisions of the Chambers shall be publicly announced orally, in summary or entirely, accompanied by written findings of fact and conclusions of law' and the setting of a deadline of '30 days from the date of pronouncement of the oral decision'⁸.

- 4 Article 23 of the *Statute* for the ICTY and its Rules correspond widely with the regulations in Nuremberg and the various Drafts presented since then. While rule 29 for the ICTY emphasizes the private and secret character of the deliberations, rule 87 states when the hearing shall be closed and that the majority of the Trial Chamber has to be 'satisfied that guilt has been proved beyond reasonable doubt'. Rule 98*ter* outlines the conditions and contents of judgments, permitting expressly under (C) 'separate or dissenting opinions' which have to be translated if necessary for the accused in a language which he understands, (D); because such separate opinion may contain valuable hints to decide upon reasons for and expectation of an Appeal.

The 1994 ILC Draft *Statute* concentrated all former articles in article 45. It clarifies in paragraph 1 that '[a]t least four members of the Trial Chamber must be present at each stage of the trial'. The commentary to this regulation explains that this number could be varied only 'by death or disability of one member'. It continues that '[e]very effort should be made (e.g. through the use of alternate judges under article 9 (6))' to ensure that the Court may not be blocked by a two-to-two-vote and provides in paragraph 3 that in the event of such an outcome the Chamber may 'order a retrial'. Deviating from previous Drafts, Article 45(5) established that 'it shall be the sole judgment issued'. The possibility of dissenting or separate

⁵ See articles 46, 47 and 48, 1951 Draft *Statute*, reprinted in: (1952) 1 *AJIL* 9 *et seq.*; in the 1953 Revised Draft *Statute* these regulations were repeated verbally in articles 45–47, see UN Doc. A/2654 (1954), reprinted in Bassiouni, *International Criminal Law, Enforcement*, iii (1987) 254 *et seq.*

⁶ See 1st and 2nd International Criminal Law Conferences, The establishment of an International Criminal Court (1975), 20 *et seq.*

⁷ See articles 39–42, Draft *Statute* for an International Criminal Court, ILA Belgrade Conference (1980), Third Interim Report, Appendix B, 19; articles 40–43 *Statute* for an International Criminal Court, ILA Paris Conference (1984), Sixth Interim Report, Appendix A1, 15.

⁸ See Bassiouni, *Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1978), Annex, 231, and for the Commentary 231 and 232.

opinions was thereby rejected,⁹ even though the issue was expressly referred to during deliberations of the ILC.¹⁰

The Siracusa Draft reprinted the ILC's article 45 without any changes. However, after more deliberate consideration by the Committee of Experts the *Updated* Siracusa Draft added an article 45*bis* according to which '[t]he Prosecutor may within 30 days of a decision to acquit, petition the Trial Chamber for a rehearing of evidence concerning a miscarriage of justice'. This addition, however, did not seem desirable or justifiable, unless seen as a compensation for the reduction of the original Trial Chamber to '[a]t least four members' and in the event of the Chamber not using its power assigned by paragraph 3, to 'order a new trial'. In particular with regard to these aspects, however, it would have been necessary to include an equal right for the defence in cases where no appeal was admissible.

The Report on the Second Session of the Preparatory Committee 1996, Vol. I, did not comment on article 45 of the ILC Draft Statute 1994. However, by emphasizing that an odd number of judges would be preferable, the need for the last mentioned regulation became obsolete. Besides, it was proposed that:

'the Prosecutor should be present at all stages of the trial in the interests of due process and fair trial (the same judges should be present at all hearings when relevant evidence was given, for example). A temporary absence of a judge should result either in the continuation of the trial with the remaining judges or the suspension of the trial. In case of prolonged absence of a judge, replacement should take place'.

There was also a proposal related to the contents of the judgment, according to which they should be:

'as complete as possible, including the questions of the competence and admissibility, as well as reasons for the judgement. The view was also expressed that the Court should have power to convict the accused on the strength of evidence put forward of a crime different from that included in the indictment provided that the accused had an opportunity to defend himself or herself and that the punishment to be imposed would not be more severe than the punishment which may have been imposed under the original indictment'.

Dissenting or separate opinions were allowed, refusing the opinion that such a possibility 'would undermine the credibility and authority of the Court'¹¹. According to this approach the proposal contained in Vol. II of the Report on the Second Session of the Preparatory Committee amended or changed article 45 of the 1994 ILC Draft *Statute* leaving the final decision open for formal discussions in all directions. There was a new demand for separate reasons for each charge, the reference to detailed regulations to be provided in the Rules and that '[t]he judgement shall not exceed the facts and circumstances described in the indictment or in its amendment, if any'¹².

⁹ In line with Article 44 of the 1943 Draft Convention for the Creation of an International Criminal Court, setting out that '2. The decisions of the Court shall be by a majority of the judges sitting in the case, and the decisions shall be deemed to be the opinion of the Court as a whole. 3. Every judgment or order of the Court shall state the reasons therefore and be read at a public hearing by the Chairman. Only the reasons which carry the decision of the majority shall be included in the sentence, and no dissenting opinion shall be published or divulged in any way'; reprinted in Document-A/CN.4/7/Rev.1, *Historical Survey of the Question of International Criminal Jurisdiction - Memorandum submitted by the Secretary-General* (1949), page 97 *et seq.* <http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf> accessed 18 February 2015.

¹⁰ It was pointed out that 'this was expressly allowed by article 23 (2) of the Statute of the International Tribunal for the Former Yugoslavia' and that 'these opinions would be important in the event of an appeal'; see document A/CN.4/SER.A/1994/Add.I (Part 2), Yearbook of the International Law Commission 1994, Volume II part two, ILC Draft Statute, commentary to article 45, p. 59 paras 3 and 5. <[http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1994_v2_p2_e.pdf](http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1994_v2_p2_e.pdf)> accessed 18 February 2015.

¹¹ See 1996 Preparatory Committee I, paras 290–293, p. 61, reprinted in: Bassiouni (ed), *International Criminal Court Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998) 427.

¹² See 1996 Preparatory Committee II, pp. 222 *et seq.*, reprinted in: Bassiouni (ed.), *International Criminal Court Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998) 599 and 600.

- 6 The Fifth Session of the Preparatory Committee limited the subject matter to the Trial Chamber reference in footnote 36 that '[d]ecisions by the Pre-Trial Chamber ... and by the Appeals Chamber are dealt with elsewhere' and that the present version 'only deals with judgments'. Also new was a suggestion that the 'evidence and the entire proceedings' ought to be evaluated¹³.

The Zutphen Draft 'does not constitute as such a new substantive proposal' but merely served the purpose 'to simplify the existing text and to show more clearly which are the various options'¹⁴. While the opinions of the Preparatory Committee only mentioned the presence of the allocated judges 'at all stages of the trial' later proposals clearly provided that that all judges of the Trial Chamber have to be present also 'throughout its deliberations'.

- 7 The *Consolidated Draft* kept the heading for what was then article 72 instead of 45, 'Quorum and judgment', and included only a few aspects presented in this Sixth and Final Session of the Preparatory Committee in April 1998, proposing in addition, for instance, that one of the judges could be 'for a good cause ... unable to attend'¹⁵.
- 8 During the Rome Conference the whole scale of arguments and proposals were discussed and the value of most of them was not disputed. Nevertheless, in the interest of reaching a compromise over the adoption of the Statute, only the main issues were included in article 74 and some of the disputed ones left to be regulated by the then not yet adopted Rules.

II. General remarks

- 9 The heading of Article 74 reads 'Requirements for the decision'. The Statute does not specify which decisions are covered by this provision. The indication that the decision shall be based on the 'entire proceedings' and on the 'evidence submitted and discussed before [the Court] at the trial' and that it shall contain a 'full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions' suggest that article 74 is applicable to the decision on the guilt or innocence of the accused. This interpretation is confirmed by the term used in the Spanish version of this provision 'fallo', which usually designates the judgment. Convictions following proceedings on admission of guilt, pursuant to article 65(2), are covered by article 74. It also includes acquittals entered as a result of successful 'no case to answer' motions,¹⁶ and thus these acquittals are appealable under article 81. It does not necessarily include the decision on the sentence given the explicit regulation of the sentencing proceedings in article 76 and the language of article 81(1) and (2), which separates for the purposes of an appeal the decision under 'Article 74' from '[a] sentence'. In addition to the decision on the merits of the guilt or innocence of the accused, some procedural decisions may also dispose of the trial proceedings with a degree of finality (i.e. decisions discontinuing or terminating the proceedings and decisions on requests for withdrawal of charges). In these scenarios, the judges may decide to adjust to any applicable requirements set out in article 74.

¹³ See Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997, UN Doc. A/AC.249/1997/L.9/Rev.1, article 45, pp.42 and 43, reprinted in: Bassiouni (ed), *International Criminal Court Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998) 283, 284.

¹⁴ See Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13 (1998).

¹⁵ See Preparatory Committee (Consolidated) Draft, p.138, reprinted in: Bassiouni (ed), *International Criminal Court Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998) 88.

¹⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1334, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), Trial Chamber V(A), 3 June 2014, para. 22. A decision granting a no case to answer motion and acquitting the accused reveals some specific features. In the evaluation of the evidence, the Chamber is required to take the prosecution evidence 'at its highest' and to 'assume that the prosecution's evidence was entitled to credence unless incapable of belief' on any reasonable view. Issues which go to the strength of evidence rather than its existence, especially as regards exhaustive questions of credibility or reliability, are to be weighed in the final deliberations in light of the entirety of the evidence presented (see para. 24). These evidentiary principles will inform the deliberations preceding the acquittal decision.

The heading refers to ‘the decision’ and not to ‘the judgment’, unlike the counterpart provisions in the ICTY and ICTR Statutes.¹⁷ The latter expression has been reserved in the ICC framework to the decisions of the Appeals Chamber, under article 83. The underlying rationale of this denomination is unclear. Final decisions of the Appeals Chamber on the guilt or innocence of the accused may be sufficiently distinguished as ‘final Judgement’, as set out in article 84(1) and notably in article 24(2), which deals with circumstances of changes in the law applicable to a given case prior to a ‘final Judgement’. In practice, all article 74 decisions that have been handed down by the ICC thus far have been denominated ‘Judgment’.¹⁸

B. Analysis and interpretation of elements

I. Paragraph 1:

1. Presence of the judges at each stage of the trial

The Trial Chamber’s decision on the merits, on the guilt or innocence of the accused in relation to the charges brought by the prosecution and confirmed by the Pre-trial Chamber, is one the most important manifestations of the exercise of international jurisdiction over persons. Pursuant to Article 74(1), the decision shall be taken by judges that have been, all of them, present ‘at each stage of the trial and throughout their deliberations’. This safeguard tends to ensure that the trial judges possess the highest level of information and knowledge about the evidence submitted and discussed at trial and the procedural issues that have arisen during the different stages of the trial proceedings.

Article 74 requires that all judges participating in the judgment were present during ‘each stage of the trial’. The ‘[c]onfirmation of the charges before Trial’ pursuant to article 61 is not yet ‘the trial’. Different opinions have been expressed as to the procedural step which marks the ‘commencement of the trial’, ranging from the point in time when the Trial Chamber is constituted¹⁹, through the hearing where the charges are read to the accused according to article 64(8)(a)²⁰, to the commencement of the hearings on the merits.²¹ The notion ‘commencement of the trial’ is elusive and escapes a uniform definition, applicable to all the provisions of the Statute. Importantly, the judgment will be based on the evidence submitted and discussed before the judges at the trial. It is intended that those entrusted with the determination of the truth receive and perceive directly or immediately the information submitted in support of the relevant facts (immediacy principle). Hence, the decisive factor is the point in time when the judges begin their engagement with the evidence upon which they will build their *conviction intime* as to the guilt or innocence of the accused. Therefore, from the commencement of the evidentiary hearings, all judges have to be present when the Trial Chamber exercises its functions according to the Statute and the Rules.

International Trials are lengthy and there may be situations of unforeseen or insurmountable difficulties as a result of which a judge may be unable to be present at a hearing or a status

¹⁷ Articles 23 and 22, respectively.

¹⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012; *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-3-tENG, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 18 December 2012; *Prosecutor v. Katanga*, ICC-01/04-01/07-3464, Jugement rendu en application de l’article 74 du Statut, Trial Chamber II, 7 mars 2014.

¹⁹ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 June 2009, para. 38.

²⁰ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 June 2009, para. 40.

²¹ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-999, Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve), Trial Chamber II, 27 March 2009.

conference. In the *Katanga and Ngudjolo* case, Trial Chamber II decided not to conduct a hearing before a two judge bench in circumstances where one of the judges was unable to be physically present in Court.²² The hearing was scheduled to receive witness's evidence and the (expert) witness had not yet commenced his testimony.²³ Conversely, a two judge bench proceeded to conduct a hearing in the temporary absence of a judge in circumstances where another witness (a former child soldier) had already testified for six days and counsel was expected to complete his cross-examination on that same day.²⁴ The Presiding judge noted that the Chamber was confronted with exceptional circumstances; that the hearing would be recorded using audio and video equipment; and that a transcript would be provided, which would permit the absent judge to become familiar with the entirety of the proceedings conducted in her absence. The Chamber sought the approval of the parties and participants to sit as a two judge bench and upon agreement, the testimony proceeded and concluded before a two judge bench.²⁵ Concerns may be raised from the perspective that the absent judge would be unable to question the witness or otherwise intervene actively in the course of the evidentiary debate.²⁶ However, this reason alone is not persuasive for such prerogative is also not conferred upon alternate judges pursuant to Rule 39 and they are capable of participating in a valid verdict despite their lack of power to actively engage with the evidence, even potentially during the entire trial.²⁷

- 14 In the *Lubanga* case, the issue arose as to whether a two judge bench may validly conduct a status conference scheduled to discuss witnesses' protective measures, a typical trial preparatory issue. A two judge bench heard oral submissions, adjourned the hearing and invited written submissions to later decide that all three members of Trial Chamber I must be present for each hearing and status conference during the period following the confirmation of charges and leading up to the beginning of the trial, and thereafter during the trial and the Chamber's deliberations.²⁸ Therefore it held that 'any urgent issues that arise during

²² *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-89-ENG, Transcript of Trial Hearing, Trial Chamber II, 2 December 2009, p. 1. The witness was an expert witness who was located in The Hague. *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-90-ENG, Transcript of Trial Hearing, Trial Chamber II, 26 January 2010, p. 10.

²³ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-88-Red-ENG, Transcript of Trial Hearing, Trial Chamber II, 1 December 2009, p. 69.

²⁴ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-221-Red-ENG, Transcript of Trial Hearing, Trial Chamber II, 23 November 2010, p. 81-83. The witness in question had participated in the armed conflict and gave evidence about his experience as a child soldier and about the position of command of Germain Katanga. See *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-216-Red-ENG, Transcript of Trial Hearing, Trial Chamber II, 15 November 2010.

²⁵ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-222-Red2-ENG, Transcript of Trial Hearing, Trial Chamber II, 24 November 2010, p. 1-8. The evidence of the witness concluded the following day. Later in the session, the Prosecution sought to have the Chamber continue to receive the evidence of the witness as a deposition, which could be later incorporated as evidence into the record upon the return of the absent judge. The Chamber noted that the suggestion came rather late, and noted that the Chamber would continue its work within the framework of the decision issued earlier in the morning (p. 29-32).

²⁶ Notably, there has been a proposal from the ICC Working Group on Lesson Learnt to introduce a 'rule 140bis' providing that where a Trial Chamber judge is absent for illness or other unforeseen and urgent reasons, the remaining judges of the Chamber may continue hearing the case to complete a specific matter, provided that such continuation is in the interests of justice and the parties consent. Concerns were raised that this provision would infringe the 'principle of immediacy' for the absent judge would not be able to engage with the evidence, parties and participants in the proceedings or interact (question) the witness. Annex I: Report of the Study Group on Governance Cluster I in relation to amendment proposals to the Rules of Procedure and Evidence put forward by the Court, ICC-ASP/13/2828, November 2014, p. 14, para. 18. It was observed that proceedings in the courtroom are audio and video-recorded and that the recordings, as well as transcripts of testimony, would be made available to any judge who is temporarily absent. In addition, the evidence of witnesses can be received in a manner different than the physical location from the witness using video technology. This technology permits them to observe demeanor, body language and assess witness credibility.

²⁷ Other tribunals allow alternate Judges greater prerogatives, Rule 27(B) of the STL Rules sets out that: 'An alternate Judge may pose questions that are necessary to the alternate Judge's understanding of the trial or appeal'.

²⁸ *Prosecutor vs Lubanga*, ICC-01/04-01/06-1349, Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial, Trial

the absence of a judge from the seat of the Court will be dealt with solely on the basis of written representations²⁹.

Later however, Rule 132 *bis* was adopted in 2012 to include the ‘Designation of a judge for the preparation of the trial’. The designated judge may hold status conferences and render orders and decisions, in consultation with the Trial Chamber, on preparatory issues related *inter alia* to disclosure, protective measures, victims’ participation, conditions of detention, etc. Central legal and factual issues in the case and those that significantly affect the rights of the accused or the substantive rights of victims cannot be decided upon by the designated judge. In order to maximize efficiency, more than one judge may be designated to divide the workload.³⁰ The judge adopts an analogous role to that of the single judge of the Pre-Trial Chamber, provided for in Article 39(2)(b)(iii), and in practice it has been denominated ‘Single Judge’.³¹ The designated judge may perform functions before or after the ‘commencement of the trial’. Thus, it may also render decisions for the purposes of any further hearing relevant to the sentence after the conviction of the accused, under Article 76, and certainly during the Reparations stage. By virtue of rule 149, the designation may also apply to Appeals Proceedings.³² During the negotiations of this amendment, a view was expressed that rule 132 *bis* was not consistent with article 39 (2)(b)(ii) and (iii) and that the preparatory work of the trial process involve issues that are as critical as other substantive issues of the trial process. However, it prevailed the opinion that Rule 132 *bis* merely sets out the precise details of one of the procedures that the Trial Chamber may implement in the exercise of its powers to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings under article 64(3)(a).³³

Frequently, witnesses will be heard by the use of video technology. Moreover, although regulating the presence of the ‘accused’, Rule 134 *bis* adopted in November 2013 suggests that the use of video technology is a valid means for an individual to be ‘present’ during the trial.³⁴ Depending on the circumstances, a judge who is not ‘physically’ in the courtroom may be present by the use of video technology. In addition, a physically present judge may be considered to have missed the evidence, and therefore to have been ‘absent’, if for some reason he or she is prevented from providing the necessary attention, as for instance if the judge has fallen asleep.³⁵ The judges are required to giving ‘full attention’ to the proceedings,

Chamber I, 22 May 2008, para. 15. The Chamber noted Article 39(2)(b)(ii), according to which the functions of the Trial Chamber shall be carried out by three judges and Article 74(1), pursuant to which all the judges of the Trial Chamber shall be present at each stage of the trial.

²⁹ *Prosecutor vs Thomas Lubanga*, ICC-01/04-01/06-1349, Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial, Trial Chamber I, 22 May 2008, para. 15.

³⁰ Report of the Study Group on Governance on rule 132 *bis* of the Rules of Procedure and Evidence, ICC-ASP/11/411, November 2012, paras 14.

³¹ *Prosecutor v. Gbagbo*, ICC-02/11-01/11-700, Decision designating a Single Judge pursuant to Rule 132 *bis* of the Rules of Procedure and Evidence, Trial Chamber I, 23 October 2014.

³² Report of the Study Group on Governance on rule 132 *bis* of the Rules of Procedure and Evidence, ICC-ASP/11/41, 1 November 2012, para. 12.

³³ *Ibid*, paras 10 and 11.

³⁴ Rule 134 *bis*, as amended by resolution ICC-ASP/12/Res.7, dealing with the Presence through the use of video technology, sets out that (1). ‘An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial’. See also ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Judgement, 20 February 2001, para. 633.

³⁵ ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Judgement, 20 February 2001, para. 628: ‘The appellants have manifestly failed to establish [...] that [the] Judge [...] “was asleep during substantial portions of the trial”. The Extracts Tapes do, however, demonstrate a recurring pattern of behaviour where [the] Judge [...] appears not to have been fully conscious of the proceedings for short periods at a time. Such periods were usually of five to ten seconds only, but this pattern is repeated over extended periods of ten to fifteen minutes on a number of occasions. On very few occasions, this loss of attention lasted up to thirty seconds. On one occasion only, during the course of an excessively lengthy examination of a medical witness by counsel [...], the judge appeared to be asleep for approximately thirty minutes. On a different occasion, [another] Judge [...] leant over to touch [the] Judge [...] when his head had dropped. [The] Judge [...] can also be heard to be breathing very noisily at times, but such times include occasions where he is obviously very fully conscious of the proceedings’.

and they are under the obligation to seek medical assistance and, if necessary, withdraw from the case if they suffer from some condition which prevents them from providing such attention.³⁶

- 17 The sentence decision will have to be issued by the same judges that pronounced the conviction and were present during any additional hearing convened to receive evidence relevant to the sentence pursuant to Article 76(2). The Presidency of the Court confirmed this interpretation when deciding that the sentencing was a part of the trial for the purposes, set out in Article 36(10), of the extension of the judge's mandate to conclude any trial the hearing of which has already commenced before that Chamber.³⁷ Conversely, the reparations proceedings have not been considered to constitute a stage of the trial *stricto sensu* and thus they need not be addressed by the same Trial Chamber that issued the conviction and the sentence.³⁸
- 18 Attendance is required throughout the judges' deliberations. There is no reference in the Statute or the Rules as to the formalities or procedures to be followed for the purposes of the deliberations, except for the presence requirement, the secrecy of the deliberations and the need to strive at unanimity. Rule 142 states, that 'after the closing statements, the Trial Chamber shall retire to deliberate, in camera' and 'shall inform all those who participated in the proceedings of the date on which the Trial Chamber will pronounce its decision'. Usually, the deliberations occur by a combination of meetings, exchange of drafts and memoranda for written comments. Written voting, in-person conferencing and 'remote video or telephonic-conferencing' have also been considered valid means to conduct deliberations³⁹. A practical and collegial approach needs to be followed by the judges to enhance expeditiousness and favor unanimity. Meetings among two of the judges to discuss particular comments or issues are not prohibited and do not invalidate the decision, to the extent all the judges are generally involved throughout the deliberations of the Chamber.

2. Alternate judges

- 19 The drafting history of Article 74(1), second sentence, suggests that the underlying rationale for designating alternate judges is to ensure that the sudden inability of a member of the Trial Chamber to continue attending the trial does not prevent compliance with the 'principle of immediacy'.⁴⁰ The drafting history of Rule 39 tends to confirm this purpose.⁴¹ Proposals to admit the Presidency's designation of 'substitute judges' to act in cases where an alternate judge was not assigned were discussed during the negotiations,⁴² but were not accepted.
- 20 The designation of an alternate judge is merited on two basic factors, the availability of resources (judges) and the existence of an identifiable risk that a member of the bench may

³⁶ *Ibid*, para. 629.

³⁷ *Prosecutor v. Katanga*, ICC-01/04-01/07-3468-AnXI, Decision replacing two judges in Trial Chamber II, Presidency, 16 April 2014, para. 6.

³⁸ *Ibid*, para. 8. See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-3129, Judgement on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012, Appeals Chamber, 3 March 2015, paras 233 to 236.

³⁹ SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Appeals Judgment, 26 September 2013, para. 619.

⁴⁰ Preparatory Committee on the Establishment of an International Criminal Court, Rules of Procedure: Working Paper, submitted by Argentina, UN Doc. A/AC.249/1.6, 13 August 1996, rules 9 to 13.

⁴¹ Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, Proposal concerning Part 4, Section 2, of the Rules of Procedure and evidence: Inclusion of a new Rule 20 (F): Alternate and substitute Judges, submitted by Denmark, UN Doc. PCNICC/1999/WGRPE(4)/DP.3. 7 August 1999.

⁴² *Ibid*, paragraph 4: 'The present proposal, thus, provides for the possible designation of alternate judges, and for the appointment of substitute judges in case no alternate judge has been designated. In such cases, however, and in particular if presentation and examination of witnesses in Court has begun, there is obviously a risk of violation of the rights of the accused. To cover these situations, the proposal suggests that continuation of the trial after the beginning of the presentation of evidence can only be decided if the accused has given his or her consent'. <https://www.legal-tools.org/doc/26795>.

not be able to complete the trial.⁴³ The competent organ to assign an alternate judge is the Presidency of the Court. It is for the Presidency to conduct the case-by-case analysis on whether the conditions for the designation are met. This organ will have a better overview, compared to the relevant Chamber, as to the availability of judges. Regulation 16 of the Regulations of the Court clarifies that, when the Presidency designates alternate judges, it shall first take into account the availability of judges from the Trial Division and thereafter from the Pre-Trial Division. Although the responsibility rests with the Presidency, the Trial Chamber in charge of the case may receive submissions and recommend the Presidency to consider appointing an alternate judge.⁴⁴

Reading the first and the second sentences of Article 74(1) together it is unclear whether the alternate judges shall be present throughout the *deliberations*. The lack of clarity is however cured by Rule 39, which disposes that the alternate judge shall sit through all proceedings and deliberations of the case. This ensures that, although the judge shall not exercise any functions of the members of the Chamber hearing the case, he or she shall be put in a position to replace any member who becomes unavailable with, if at all, only minimal disruptions in the proceedings. The alternate judge needs to be enabled to participate in a valid verdict which means, critically, that the judge shall be present (immediacy) at the very least in all evidentiary hearings. That the alternate judge shall ‘sit’ through all proceedings and deliberations must be interpreted in accordance with the said underlying principle. The alternate judge is not allowed to formally interfere in the proceedings or influence the deliberations of the Trial Chamber, he is an ‘*observateur*’.⁴⁵ He serves as (‘reserve’) judge and not as a member of the Chamber. The substituted judge is replaced *permanently* for the rest of the trial and not just for a certain part of it. Alternate judges are not to be called upon in situations in which a judge is absent for a temporary period. The replaced judge would be unable ‘to be present at each stage of the trial’ and his position will be taken by the alternate judge.

If the *complete* decision already exists ‘in writing’ and a judge is merely ‘unable to continue attending’ during its delivery ‘in open court’, holding a repetition of the deliberations and preparing a decision that would reflect the views of an alternate judge would be overly formalistic and unnecessary. The same holds for situations where the decision lacks some final editing.

Pre-Trial Chambers need no alternate judges. The confirmation process is not a ‘mini-trial’ or ‘trial before the trial’⁴⁶ and although the confirmation hearing is by its nature an ‘evidentiary hearing’⁴⁷ the Pre-Trial Chamber can be recomposed even to the effect that the judges issuing the confirmation decision are not the same judges before which the confirmation process was conducted.⁴⁸

⁴³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1349, Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial, Trial Chamber I, 22 May 2008, para. 17, requiring that: ‘i) the Court has the resources for this purpose, particularly in terms of a judge who is available to attend the entirety of the trial; and ii) there is an identifiable risk that for reasons such as the length of the trial, or the personal circumstances of one or more of the judges, a member of the bench may not be able to complete the trial’. See also Terrier, F., in: A. Cassese *et al.* (eds.), *Rome Statute of the International Criminal Court* (2002), 1313.; Committee of the Whole, Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/L.2/Add.5, 9 July 1998, page 2 footnote 1.

⁴⁴ *Prosecutor vs Lubanga*, ICC-01/04-01/06-1349, Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial, Trial Chamber I, 22 May 2008, para. 23.

⁴⁵ Fernandez and Pacreau (Dir.), *Statut de Rome de la Cour Pénale Internationale, Commentaire article par article*, ii (2012), p. 1644.

⁴⁶ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, Pre-Trial Chamber I, 1 October 2008, para. 64; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, para. 39.

⁴⁷ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’, Appeals Chamber, 30 May 2012, para. 39.

⁴⁸ Indeed, the Pre-Trial Chamber conducted the confirmation hearing in the case of the Prosecutor vs Bemba from 12 to 15 January 2009; see *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Arti-

- 24 The Rules do not define the phrase ‘unable to continue attending’. Rule 38, dealing with ‘replacements’, mentions that a judge may be replaced for objective and justified reasons, which are *inter alia* resignation, accepted excuse, disqualification, removal from office and death.⁴⁹ The reasons underlying the judge’s inability are deliberately not defined in the Statute and the Rules and a flexible approach in this respect seems apposite. However, although the inability need not necessarily presuppose a *permanent* obstacle, it should be serious enough to justify losing the possibility for a later replacement in the event of a second judge becomes unable to continue. As a lesser measure, the Chamber may adjourn the hearing provided that, for instance, the judge should be absent for two weeks for medical reasons.⁵⁰

II. Paragraph 2: Basis for the decision

- 25 Article 74(2) spells out the procedural, evidentiary and factual parameters of the decision on the guilt or innocence of the accused. Accordingly, evidence that has not been submitted and discussed before the Court at the trial and evaluated by the Trial Chamber cannot properly be the basis for the judgment. Moreover, the Trial Chamber is not restricted to consider the trial proceedings but it is bound to evaluate the entire proceedings. Finally, the facts and circumstances described in the charges and any amendments to the charges shall not be exceeded. Failure to adjust to these parameters is a legitimate ground of appeal.

1. The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings

- 26 In relation to the evidence upon which the decision shall be based, Article 74(2) first and third sentences are sequentially interrelated. The judgment can only be based on evidence submitted and discussed before the Court at the trial and evaluated by the Trial Chamber. In addition, those pieces of evidence which have been ruled irrelevant or inadmissible shall not be considered by the Chamber, pursuant to Rule 64(3). Therefore, at ‘some point in the proceedings’ the Chamber is required to apply the criteria underlying the assessment of the admissibility of evidence.⁵¹ The main provisions, regulating the assessment of the relevance or admissibility of evidence, are reflected in articles 69(4) and (7). In any such determination, the relevance, probative value and the potential prejudice of each item of evidence shall be assessed.⁵² In addition, evidence obtained in violation of the Statute or internationally recognized human

cle 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 12. However, after the passing of one the judges, the Presidency reconstituted the Chamber at a time between the Courtroom hearings and the decision on the confirmation of Charges; see *Prosecutor v. Bemba*, ICC-01/05-01/08-414, Decision reconstituting Pre-Trial Chamber II, Presidency, 29 April 2009.

⁴⁹ Rule 31 states, that ‘once removal from office has been pronounced, it shall take effect immediately’ and that ‘the person concerned shall cease to form part of the Court, including for unfinished cases in which he or she was taking part’. According to rule 37 sub-rule 2 ‘a judge ... shall endeavor to give notice of the date on which his or her resignation will take effect at least six months in advance’. In the meantime, the person concerned ‘shall make every effort to discharge his or her outstanding responsibilities’ before the resignation takes effect.

⁵⁰ The practice of the ICTY and the ICTR has shown that a suspension of up to one month is in most cases sufficient to overcome the need to replace one of the judges with an alternate judge; see Rules 15 (E) and (F) and the ICTY, *Prosecutor v. Blaskić*, IT-95-14, Order of the President for the assignment of a judge to the trial chamber, 29 Jan. 1999 as well as the ICTY *Prosecutor v. Miljković et al*, IT-95-9, Order of the President authorising a trial chamber to conduct a matter in the absence of one of its members, 23 Feb. 1999.

⁵¹ *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, Appeals Chamber, 3 May 2011, para. 37.

⁵² *Ibid.*

rights is not admissible, under the conditions set out in Rule 69(7)(a) and (b).⁵³ Accordingly, the judgment is to be based only on evidence that has been (i) submitted; (ii) discussed; (iii) assessed on relevance, probative value and prejudice; and (iv) evaluated by the Trial Chamber.

Under normal circumstances, the ‘evaluation of evidence’ pursuant to article 74(2) takes place at the end of the trial,⁵⁴ during the deliberations and it is the basis for the decision on conviction or acquittal.⁵⁵ The Statute provides limited guidance as to the manner which evaluation shall be conducted. This guidance includes: (i) the presumption of innocence in article 66(1); (ii) the onus on the prosecution, in article 66(2); (iii) the threshold ‘beyond reasonable doubt’, in article 66(3); (iv) the non-reversal of the burden of proof or onus of rebuttal, pursuant to article 67(1)(i); (iv) the rules of evidence in article 69; and (v) inferences made in the absence of appropriate disclosure of information protected by reason of national security, pursuant to Article 72(7)(a)(3) and (b)(2).

The Rules of procedure and evidence also contain guidance for the evaluation of evidence (Rules 63 to 75). Importantly, Rule 63(2) establishes the principle of ‘free assessment of the evidence’. This emphasizes the fact-finding role of professional judges, weighing the totality of the evidence at the end of the Trial, followed by a reasoned decision whereby they reflect their evaluation.⁵⁶

The evidence may be introduced during the trial in oral, written and audiovisual form either during the oral evidence of witnesses or in the form of a bar table motion. As to the *witnesses’ evidence*, the rule is that it shall be provided orally, personally and in-court, giving effect to the principle of orality.⁵⁷ In exceptional (although not unusual) cases, video link evidence has been admitted and evaluated.⁵⁸ In the evaluation of the witnesses’ testimonies, in order to attach evidentiary weight to their evidence, an assessment of their ‘credibility’ and ‘reliability’ is required.⁵⁹ Importantly, contradictions between the oral evidence of a witness and his prior recorded testimony may be a legitimate part of the assessment of the Trial Chamber, to the extent the relevant portion of the prior statement is in evidence.⁶⁰ His within the discretionary powers of the Trial Chamber to choose which witness to believe, as long as it provides reasons as to why it finds one witness credible the other.⁶¹ Moreover, some accounts of one and the

⁵³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, paras 70 to 90.

⁵⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 207.

⁵⁵ *Ibid.*

⁵⁶ Creyer, Friman, Robinson and Wilmshurst, *An introduction to International Criminal Law and Procedure* (2010), p. 465.

⁵⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, Appeals Chamber, 3 May 2011, para. 76.

⁵⁸ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Trial Chamber II, 8 March 2014, para. 74.

⁵⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 57 and 239. As to the notions of ‘credibility’ and ‘reliability’, according to para. 239: ‘While the Statute and the Rules of Procedure and Evidence do not specifically refer to these concepts, they are part of the evaluation of evidence required of a Trial Chamber by article 74 (2) of the Statute. The Appeals Chamber notes that there is a strong link between the two concepts, as reflected in the jurisprudence of the ad hoc international criminal tribunals. This jurisprudence shows that, while credibility is generally understood as referring to whether a witness is testifying truthfully, the reliability of the facts testified to by the witness may be confirmed or put in doubt by other evidence or the surrounding circumstances. Thus, although a witness may be honest, and therefore credible, the evidence he or she is the primary responsibility of the relevant Trial Chamber, which has heard all the evidences he gives may nonetheless be unreliable because, inter alia, it relates to facts that occurred a long time ago or due to the “vagaries of human perception” [footnotes omitted].’

⁶⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 102.

⁶¹ *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-271-Corr, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’, Appeals Chamber, 7 April 2015, para. 168.

same witness may be accepted while other aspects may be considered unreliable.⁶² As decided by the Appeals Chamber, although the evidence of a witness in relation to whose credibility the Trial Chamber has some reservations may be relied upon to the extent that it is corroborated by other reliable evidence, there may be witnesses whose credibility is impugned to such an extent that he or she cannot be relied upon even if other evidence appears to corroborate parts of the testimony.⁶³ Moreover, the credibility of a witness may be in part assessed by comparing its content with other evidence. However, a witness shall not be credible simply because other evidence appears to confirm the content of aspects of his or her testimony where there are other reasons for doubting the witness's credibility.⁶⁴

- 30 Relevant factors in the evaluation of the testimony of *expert witnesses* include: (i) the established competence of the particular witness in his or her field of expertise; (ii) the methodologies used; (iii) the extent to which the findings made were consistent with other evidence in the case; and (iv) the general reliability of the expert's evidence.⁶⁵ Whoever appointed the expert pursuant to regulation 44 of the Regulations of the Court, the scientific evidence may be considered objective.⁶⁶
- 31 Evidence other than in-court oral testimony of a witness may form part of the basis of the decision. These include written statements, documents and other material such as transcripts of interviews, videos, records of organisations, letters, photographs, maps, etc. The Statute accords a considerable degree of flexibility as regards the *documentary* evidence allowed, and the applicable admissibility criteria have been developed in the jurisprudence.⁶⁷ The chain of custody from the time of the document's creation until its introduction before the Chamber must be taken into account.⁶⁸ UN and NGO reports are not to be considered excluded *ab initio*;⁶⁹ neither hearsay.⁷⁰

⁶² *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 104; *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, 8 March 2014, para. 84.

⁶³ *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-271-Corr, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute', Appeals Chamber, 7 April 2015, para. 168.

⁶⁴ *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-271-Corr, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute', Appeals Chamber, 7 April 2015, para. 170.

⁶⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 112.

⁶⁶ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, 8 March 2014, para. 94.

⁶⁷ *Prosecutor v. Katanga*, ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, Trial Chamber II, 17 December 2010; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 107 to 109.

⁶⁸ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, 8 March 2014, para. 91.

⁶⁹ *Prosecutor v. Bemba*, ICC-01/05-01/08-2721, Decision on the admission into evidence of items deferred in the Chamber's 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' (ICC-01/05-01/08-2299), Trial Chamber III, 27 June 2013.

⁷⁰ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, 8 March 2014, para. 90; see also Gosnell, Admissibility of Evidence, in: Khan, Buisman and Gosnell, *Principles of evidence in international criminal proceedings* (2010) 375, 389. The Appeals Chamber confirmed that low probative value may be attributed to the evidence of a witness, if: (i) most of the testimony was hearsay, (ii) was not actually present in the relevant locations; (iii) provided very little detail, (iv) relates to a crucial point in the Prosecution's case; see *Prosecutor v. Ngudjolo* ICC-01/04-02/12-271-Corr, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute', Appeals Chamber, 7 April 2015, para. 204. In addition, it confirmed that the fact that evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less, 'although even this will depend upon the infinitely variable circumstances which surround hearsay evidence' (para. 226).

As to *circumstantial* evidence, when there is only one reasonable conclusion to be drawn from particular facts based on the evidence, the fact-finders may properly conclude that it has been established beyond reasonable doubt.⁷¹

In instances where the *testimony of the accused* is in evidence, the Trial Chamber may rely on his testimony. It may evaluate that his evidence is credible in certain topics and insufficiently credible in relation to other topics, though dismissing it without any conclusion as to his guilt or innocence.⁷² Statements of the accused not provided under oath are not ‘evidence’ for the purposes of the Judgment – though they may be taken into account under Article 67(1)(h)⁷³ as part of the proceedings.

According to Rule 63(4), the Chamber shall evaluate the evidence without imposing a legal requirement of *corroboration*.⁷⁴ This means that *one piece of evidence standing alone* may be sufficient to prove a fact.⁷⁵

The responsibility for identifying specific pieces of evidence in support of their allegation may be placed on the parties and the participants.⁷⁶ However, in determining whether an allegation has been proved, the evaluation of the Trial Chamber is not restricted to the *evidence explicitly relied on by the parties and the participants* in their briefs. Evidence in the record, even if not referred to explicitly, could properly be evaluated by the fact-finders.⁷⁷

In the determination of the guilt or innocence of the accused, the standard of proof ‘beyond reasonable doubt’ is to be applied only to the facts constituting the elements of the crime and mode of liability of the accused as well as with respect to facts which are indispensable for the conviction.⁷⁸ In relation to the facts at issue, the decision must be based

⁷¹ *Prosecutor v. Al Bashir*, ICC-02/05-01/09-73, Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, Appeals Chamber, 3 February 2010, para. 33; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 111; *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Trial Chamber II, 8 March 2014, para. 109.

⁷² *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Trial Chamber II, 8 March 2014, para. 101 and 105; *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-3-tENG, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 18 December 2012, para. 67.

⁷³ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Trial Chamber II, 8 March 2014, para. 101. Statements of the accused not preceded by a solemn undertaking do not constitute ‘evidence’. In addition, the prosecution was not allowed to the accused based on a potential conflict with the accused’s right not to be compelled to testify or confess guilt and to remain silent pursuant to Article 67(l)(g) of the Statute. *Prosecutor v. Bemba*, ICC-01/05-01/08-2860, Decision on unsworn statement by the accused pursuant to Article 67(l)(h) of the Rome Statute, Trial Chamber III, 11 November 2013, para. 8; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, Pre-trial Chamber I, 8 February 2010, para. 53 to 55.

⁷⁴ In application of this principle, the Appeals Chamber found for instance that there is no strict legal requirement that the video excerpts had to be corroborated by other evidence in order for the Trial Chamber to be able to rely on them; *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 218.

⁷⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 110; *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Trial Chamber II, 8 March 2014, para. 110.

⁷⁶ The parties have been made aware that, if they failed to identify specific pieces of evidence in their final submissions, there is a very real risk that they will not be taken into consideration, see *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 95 and 96.

⁷⁷ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Trial Chamber II, 8 March 2014, para. 81.

⁷⁸ *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-3-tENG, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 18 December 2012, para. 35. See also *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgment, 16 October 2007, para. 125; *Blagojević and Jokić*, IT-02-60-A, Appeal Judgement, 9 May 2007, para. 226; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgement, 7 July 2006, para. 174; *Kupreškić et al.* Appeal Judgement, para. 226. The ICC Appeals Chamber set out the most essential aspects of the “reasonable doubt” test, by reference to the ICTR Appeals Chamber in Rutaganda, as follows: The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence; see *Prosecutor v. Ngudjolo*, No. ICC-01/04-02/12-271-Corr, Appeals Chamber, Judgment on the

on the Trial Chamber's *holistic evaluation* and *weighing of all the evidence taken together*.⁷⁹ It is recognized that the evaluation of evidence cannot proceed by a piecemeal approach.⁸⁰

37 Moreover, the Chamber is required to base its decision on the evaluation of the 'entire proceedings'. Proceedings taking place at stages other than the trial are not excluded from this evaluation. An overall view of the 'entire proceedings' may be more enlightening than the mere addition of single aspects, for instance, the appearance of the accused and his or her defense counsel during the whole trial or the interrelationship of evidence, given separately and perhaps during very different stages of the proceeding. Conclusions may be drawn from the change in strategies, attitude and behavior of the accused, a victim, counsel and the prosecution during the course of the trial.

38 There may be facts upon which the decision is based *requiring no evidence*. These include *facts of common knowledge* which, under article 69(6) of the Statute, the Chamber may take judicial notice of. In addition, in accordance with rule 69 of the Rules, the parties may enter *agreements* as to: (i) facts contained in the charges; (ii) contents of a document; (iii) the expected testimony of a witness; or (iv) other evidence is not contested.⁸¹ The Chamber may find such alleged facts as being proven or the evidence to be admissible.⁸² Moreover, the Chamber may draw conclusions from a *judicial site visit* to conduct, for instance, verifications *in situ* with a view to understanding the context and topography of locations involved. Any such findings may be taken into account in the Chamber's evaluation.⁸³

Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, para 109.

⁷⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 22, referring to the ICTY jurisprudence that: 'It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence'; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgment, 23 October 2001, para. 31.

⁸⁰ *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgment, 16 October 2007, para. 125 quoting the *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgment, 7 July 2006, para. 174: 'At the first stage, the Trial Chamber has to assess the credibility of the relevant evidence presented. This cannot be undertaken by a piecemeal approach. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility. – Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction. – At the final stage, the Trial Chamber has to decide whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven. Even if some of the material facts pleaded in the indictment are not established beyond reasonable doubt, a Chamber might enter a conviction provided that having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts'.

⁸¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 245. The written statements would not have fallen under Rule 68.

⁸² See the *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, 8 March 2014, para. 73, for agreed facts considered 'established'; and *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 245, for agreed written statements considered not credible. See also the *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-2681, Decision on Agreements as to Evidence, Trial Chamber II, 3 February 2011; *Prosecutor v. Banda & Jerbo*, ICC-02/05-03/09-227, Public Decision on the Joint Submission regarding the contested issues and the agreed facts, Trial Chamber IV, 28 September 2011.

⁸³ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, 8 March 2014, para. 108.

2. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges

a) **Function.** The trial can only be fair if the accused had a sufficient opportunity to exercise his right to defence. He will not be able to defend himself if he is not properly and timely informed about the allegations against him. Therefore, the accused has the right to know, through a clear, detailed and precise description, all the information of the facts in order to fully exercise his right and prove his version of the facts,⁸⁴ a right that is essential for the effective exercise of the right to defence.⁸⁵ This protection would not be authentic if the facts supporting the allegations could be exceeded in the decision; and this in turn calls for ‘correlation’ between the charges and the judgment.⁸⁶

According to international human rights instruments, accused persons have the right to be informed of the charges against them, and Article 67 incorporates this right by providing:

‘Rights of the accused 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.’

The right to be informed of the ‘nature’ and ‘cause’ is spelled out in the article 14(3)(a) of the International Covenant on Civil and Political Rights⁸⁷ and article 6(3)(a) European Convention on Human Rights.⁸⁸ The ‘cause’ of a charge has been defined to encompass ‘the acts [the accused] is alleged to have committed and on which the accusation is based’. In turn, the ‘nature’ is the legal characterisation of those alleged acts.⁸⁹ The information does not ‘necessarily [have to set out] the evidence on which the charge is based’.⁹⁰

During the preparatory works of the Rome Statute, it seemed uncontroversial that the facts and circumstances described in the charges and any amendments to the charges, despite all the specific issues arising in practice, provided the outer limit of the judgment. This consensus however was not shared with respect to the legal characterization of the facts. In this arena, a clash of legal cultures took place with delegations from romano-germanic systems advocating for the incorporation of the *jura novit curia* principle, resisted by

⁸⁴ Inter-American Court of Human Rights (‘IACtHR’) *Barreto Leiva v. Venezuela*, Judgment of 17 November 2009, para. 28. In the relevant part, article 8 of the American Convention on Human Rights ‘Pact of San José, Costa Rica’, reads: Right to a Fair Trial (2). During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (b). prior notification in detail to the accused of the charges against him.

⁸⁵ IACHR: *López Álvarez V. Honduras*, C No. 141, Judgment on Merits, Reparations and Costs, 1 February 2006, para. 149; *Palamara Iribarne v. Chile*, C Nho 135, Judgment on Merits, Reparations and Costs, 22 November 2005, para. 225; *Acosta Calderón v. Ecuador*, C No. 129, Judgment on Merits, Reparations and Costs, 24 June 2005, para. 118; *Tibi v. Ecuador*, C No. 114, Judgment on Preliminary Objections, Merits, Reparations and Costs, 7 September 2004, para. 187.

⁸⁶ See about the necessary ‘correlation’ between the accusation and the judgment, Guerrero Palomares, *El principio acusatorio* (2009) p. 71; Armenta Deu, *Lecciones de derecho procesal penal* (2004), p. 56; Cordero, *Procedura Penale* (2006), p. 985; Lozzi, *Lezioni di procedura penale* (2007), p. 553 *et seq.*; Maier, J.B.J., *Derecho Procesal Penal, Fundamentos*, i (1996) p. 568 *et seq.*

⁸⁷ Pursuant to article 14(3). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

⁸⁸ It has been reflected in similar terms in Articles 21 (4) of the ICTY Statute; 20 (4) of the ICTR Statute; 17 (4) (a) of the SCSL Statute, 16(4)(a) of the STL Statute.

⁸⁹ ECtHR, *LH. and others v. Austria*, Judgment of 20 April 2006, para. 30; *Ayçoban and others v. Turkey*, Judgment of 20 October 2005, para. 21; *Sipavilius v. Lithuania*, Judgment of 21 February 2002, para. 27; *Sadak and others v. Turkey*, Judgment of 17 July 2001, para. 48; *Dallos v. Hungary*, Judgment of 1 March 2001, para. 47; *Pélissier and Sassi v. France*, Judgment of 25 March 1999, para. 51; ECommHR, *X v Belgium*, No. 7628/76, Decision of 9 May 1977; *Sacramati v. Italy*, No. 23369/94, Decision 6 September 1995.

⁹⁰ See ECommHR, *X v Belgium*, No. 7628/76, Decision of 9 May 1977; *Sacramati v. Italy*, No. 23369/94, Decision of 6 September 1995.

delegations from common law legal systems.⁹¹ Neither the Statute nor the Rules of Procedure and Evidence have addressed this particular issue. Instead, a Regulation was adopted in 2004, concerning the ‘Authority of the Chamber to modify the legal characterization of facts’, under Regulation 55 of the Regulations of the Court.⁹²

- 43 **b) Is a ‘factual allegation’ part of the facts and circumstances described in the charges?** As set out above, the ICTY, ICTR, SCSL and STL provide for the defence right to be informed promptly and in detail of the ‘nature’ and ‘cause’ of the charges.⁹³ The Prosecutor is under an obligation to prepare an indictment containing ‘a concise statement of the facts’ and the crime or crimes with which the accused is charged.⁹⁴ The pleadings of an indictment will be sufficiently particular when the ‘material facts’ are concisely set out with enough detail to inform the accused clearly of the nature and cause of the charges against him, such that he is in a position to prepare a defence.⁹⁵
- 44 In the Rome Statute framework, the right to be informed of the charges is regulated in Article 67(1)(a) in a manner virtually identical to the Statutes spelled out above, save for the explicit reference to the ‘Content’ of the Charge. The facts and circumstances (cause) and their legal characterization (nature) compose the charges (content).⁹⁶ Reference to the ‘statement of facts’ can be found in Regulation 52(b) of the Regulations, which describes what shall be included in the Document Containing the Charges to be presented before the Pre-Trial Chamber. This Regulation requires *inter alia* ‘a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court’. Regulation 52(c) makes reference to the ‘legal element’. It describes this element as the ‘legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28’.
- 45 Given this legal framework, it is useful to analyze the case law of the Tribunals to explore the principles which have emerged in discussions as to the sufficiency of the statement of facts and the ‘material facts’ to be reflected therein. Bearing in mind that providing an exhaustive overview of such principles is not possible, it follows from the jurisprudence that: the Prosecution must plead the material facts underpinning the charges with enough detail to inform an accused person clearly of the nature and cause of the charges to allow them to prepare a defence;⁹⁷ there is a clear difference between the material facts, which must be

⁹¹ Friman, Bradym Costi, Guariglia and Stuckenberg, *Charges*, in: Sluiter, Friman, Linton, Vasiliev, Zappala, *International Criminal Procedures, Principles and Rules*, (Oxford 2003), p. 381, 431, 467 *et seq.*

⁹² In the jurisprudence of the ICC Appeals Chamber, there are two important decisions setting out the parameters for the use of Regulation 55. These are: *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change’, Appeals Chamber, 16 December 2009 and *Prosecution v. Katanga*, ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’, Appeals Chamber, 27 March 2013. See also Carsten Stahn, *CLF* (2005), 2 *et seq.*

⁹³ See above footnote 85.

⁹⁴ See for instance Article 18(4) of the ICTY Statute.

⁹⁵ *Prosecutor v. Kupreskić*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 88.

⁹⁶ In relation to the notion of ‘charge’, see *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 30 March 2012, ICC-01/04-01/06-2842, para. 2; *Prosecutor v. Katanga*, Trial Chamber II, Judgement rendu en application de l’article 74 du Statut, ICC-01/04-01/07-3436, 18 March 2014, paras 1485 ‘From article 74(2) of the Statute and regulation 52 of the Regulations of the Court taken together, a ‘charge’ must be understood as: a statement of the facts and circumstances including the time and place of the alleged crimes, given that the term ‘fact’ denotes, as aforementioned, factual allegations underpinning each of the legal elements of the crime charged; and a legal characterisation of the facts, which must accord both with the crimes under articles 6, 7 or 8 of the Statute and the precise form of participation therein under articles 25 and 28 of the Statute’.

⁹⁷ ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, paras 61, 147; *Prosecutor v. Kupreskić*, IT-95-16-A, Judgement, 23 October 2001, para. 88; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement,

pleaded, and the evidence proffered to prove them;⁹⁸ the Prosecution is not required to plead the evidence intended to prove the pleaded material facts;⁹⁹ it would be unworkable for an indictment to contain all the evidence the Prosecutor proposes to introduce at the trial;¹⁰⁰ an indictment must be considered as a whole, and select paragraphs should be read in context with the entire document;¹⁰¹ the materiality of a particular fact cannot be decided in the abstract and depends on the nature of the Prosecution's case;¹⁰² the alleged criminal conduct is decisive in determining the degree of specificity required in the indictment;¹⁰³ regarding the identity of perpetrators for whose acts an accused is charged, but without being charged with personally committing the crimes, it is sufficient to identify such perpetrators by category or group in relation to a particular crime site;¹⁰⁴ a date may be considered to be a material fact if it is necessary in order to inform a defendant clearly of the charges so that he may prepare his defence;¹⁰⁵ a reasonable range of dates may be pleaded where precise dates cannot be specified as to when the alleged criminal conduct occurred.¹⁰⁶

The ICC jurisprudence has reflected some of these principles. According to the jurisprudence of the Appeals Chamber, it is for the prosecution to plead the facts relevant to establishing the legal elements.¹⁰⁷ The facts must be identified with sufficient clarity and detail in the confirmation process, meeting the standard in article 67(1)(a) of the Statute. The term 'facts' refers to the 'factual allegations' which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence presented in support a charge as well as from background or other information that does not support the legal elements of the crime charged.¹⁰⁸

29 July 2004, para. 209; *Prosecutor v Stakić*, IT-97-24-A, Judgement, 22 March 2006, para. 116; *Prosecutor v Simić*, IT-95-9-A, Judgement, 28 November 2006, para. 20; see also, *Ntabakuze v. The Prosecutor*, ICTR-98-41A-A, Judgement, 8 May 2012, para. 30; STL, *Prosecutor v. Ayyas et al*, Decision on alleged defects in the form of the amended indictment of 21 June 2013, 13 September 2013, STL-11-01/PT/TC, para. 17.

⁹⁸ *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 210; *Prosecutor v Stakić*, IT-97-24-A, Judgement, 22 March 2006, para. 116;

⁹⁹ *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, paras 61, 147, 153; ICTR, *The Prosecutor v. Ntagerura*, ICTR-99-46-A, Judgement, 7 July 2006, para. 21; *Prosecutor v. Simić*, IT-95-9-A, Judgement, 28 November 2006, para. 20; *The Prosecutor v. Uwinkindi*, ICTR- 01-75-AR72 (c), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 4.

¹⁰⁰ *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 153.

¹⁰¹ *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, para. 304; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, 7 July 2006, para. 123; *Prosecutor v. Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008, para. 27.

¹⁰² *Prosecutor v. Kupreškić*, IT-95-16-A, Judgement, 23 October 2001, para. 89; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 210.

¹⁰³ *Ibid.*

¹⁰⁴ *Prosecutor v. Krnojelac*, IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 218; *Prosecutor v. Simba*, ICTR-01-76-A, Judgement, 27 November 2007, paras 71–72; *Prosecutor v. Renzaho*, ICTR-97-31-A, Judgement, 1 April 2011, para. 64.

¹⁰⁵ *Prosecutor v. Nindabahizi*, ICTR- 01-71-A, Judgement, 16 January 2007, para. 19.

¹⁰⁶ *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Objection by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 22; *Prosecutor v. Nindabahizi*, ICTR- 01-71-A, Judgement, 16 January 2007, para. 19–20.

¹⁰⁷ *Prosecutor v. Gbagbo*, ICC-02/11-01/11-572, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute', 16 December 2013, para. 47.

¹⁰⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change', Appeals Chamber, 16 December 2009, fn. 163. There was a suggestion by the Appeals Chamber that the notion of 'facts and circumstances described in the charges' as a whole may be 'narrowly or broadly understood', *Prosecution v. Katanga*, ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', Appeals Chamber, 27 March 2013, para. 50; The Appeals Chamber also indicated that the Prosecutor's investigation may be continued beyond the confirmation hearing; *Prosecutor v. Lubanga*, ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision

- 47 By reference to the jurisprudence of the *ad hoc* tribunals, it has been accepted that different levels of specificity are required of the charges, depending on the form of individual criminal responsibility charged and the nature of the alleged criminal conduct charged.¹⁰⁹ If the accused is proximate to the events, as in cases of direct perpetration, the identity of the victim, the place, date and description of the events may be material facts and the Prosecution must set out this detail ‘with the greatest precision’.¹¹⁰ In cases of accessorial liability, the Prosecution is required to identify the ‘particular acts’ or ‘the particular course of conduct’. In cases of co-perpetration, the accused must be provided with detailed information regarding: (i) the alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused’s contribution; (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators. The underlying criminal acts form an integral part of the charges, and sufficiently detailed information must be provided in this respect. The Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims *to the greatest degree of specificity possible in the circumstances*.¹¹¹
- 48 c) **Where are the facts and circumstances described in the charges to be found?** The facts and circumstances are to be found in the decision on the confirmation of the charges. This decision defines the factual parameters of the charges at trial.¹¹² If it were otherwise, a person could be tried on charges that have not been confirmed by the Pre-Trial Chamber, or in relation to which confirmation was even declined.¹¹³
- 49 Where the Prosecution requested and obtained from the Pre-Trial Chamber permission to amend a charge, pursuant to article 61(9), it may amend the charges after notice to the accused ‘before the trial has begun’.¹¹⁴ In this situation the scope of the charges, including the amended

of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, Appeals Chamber, 13 October 2006, para. 56 and *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’, Appeals Chamber, 30 May 2012, footnote 89. Naturally, the resulting evidence can properly be submitted at trial and evaluated for the purposes of the judgment and it can generate additional detail as the facts.

¹⁰⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 122–123, quoting *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, paras 210–213.

¹¹⁰ For instance, in the *Banda and Jerbo* case, the charges were confirmed *inter alia* in relation to the war crime of violence to life pursuant to article 8(2)(c)(i) of the Statute. Banda and Jerbo were charged *the killing of twelve AMIS peacekeeping personnel and attempt to kill eight AMIS peacekeeping personnel* in the 29 September 2007 attack at the MGS Haskanita, the Sudan. The attack was allegedly committed together with forces under their command and control, acting pursuant to a common plan and orders issued by them. Moreover, as confirmed by the Pre-Trial Chamber, the suspects personally participated and led the actual attack; see the Corrigendum of the ‘Decision on the Confirmation of Charges’, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 146. This is good test situation to consider whether the identities of the victims may be material facts. If this was the case, the Trial Chamber would not be able to enter a conviction in relation to any additional instance of violence to life without the Prosecution requesting and obtaining permission from the Pre-Trial Chamber. It is useful to compare this circumstances with those described in the *Al Basir* warrant of arrest, where it was decided on reasonable grounds to believe that ‘GoS forces subjected, throughout the Darfur region, (i) *hundreds of thousands of civilians*, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of *forcible transfer*’ *Prosecutor v. Al Bashir*, ICC-02/05-01/09-1, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, page 6 [emphasis added].

¹¹¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, paras 122–123, quoting *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 210–213.

¹¹² *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 124; see also Nerlich, *JICJ* 10 (2012), 1339, 1348.

¹¹³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 124. See also Fernandez and Pacreau (Dir.), *Statut de Rome de la Cour Pénale Internationale, Commentaire article par article*, ii (2012), p. 1646 indicating that if the facts charged are exceeded, the rights of the defence and the prosecution would be profoundly unbalanced.

¹¹⁴ Permission to amend the charges may be requested in circumstances ‘which [...] does not entail the addition of new charges nor the substitution of more serious charges but rather an adjustment to the temporal

elements, will be clarified by the decision of the chamber or any ensuing document filed by the prosecution. If the Prosecution seeks to add additional charges or to substitute more serious charges, the additional or the substitute charges will be addressed in a Confirmation Decision.

In practice, Trial Chambers have experienced difficulties in identifying the facts and circumstances confirmed at the Pre-Trial stage as some Confirmation decisions did not provide a readily accessible statement of the facts underlying each charge.¹¹⁵ The facts and circumstances were reflected in the decision without separation from the narrative, the background information, the evidence put forward by the Prosecutor, or the reasoning which was developed in the consideration of each crime. In cases of ambiguity or silence as to whether certain facts and circumstances spelled out in the Document Containing the Charges were confirmed or not, there was a question on whether these are necessarily excluded from the facts and circumstances of the charges.¹¹⁶ As a reaction, it became common practice that Trial Chambers would request a post confirmation document from the Prosecution where they expect to have the factual parameters of the trial clearly set out; the so called ‘Amended or Updated Document Containing the Charges’.¹¹⁷ This in turn triggers litigation as to the correct understanding of the documents involved.¹¹⁸

The Appeals Chamber has recently condoned that ‘further details about the charges, as confirmed by the Pre-Trial Chamber’, may also be contained in other ‘auxiliary documents’.¹¹⁹ These auxiliary documents include a Pre-Trial brief,¹²⁰ an Updated or Amended DCC,¹²¹ submissions of the prosecution related to factual allegations providing additional detail,¹²² and the summary of evidence.¹²³ These additional details will assist in clarifying the facts and circumstances described in the charges and thus the scope of the trial, though they

scope of some of the alleged incidents underlying the charges by a matter of two days’, see *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-912, Decision on the Prosecutor’s Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859), Pre-Trial Chamber II, 6 September 2013, para. 26.

¹¹⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08-836, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, Trial Chamber III, 20 July 2010, paras 8 and 30.

¹¹⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-522, Decision on the content of the updated document containing the charges, Trial Chamber V, 28 December 2012, para. 19; *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-584, Decision on the content of the updated document containing the charges, Trial Chamber V, 28 December 2012, para. 23. Trial Chamber V has taken the view that the confirmation decision is authoritative on those matters specifically addressed and/or those charges, including the facts, circumstances and their legal characterisation, expressly confirmed or rejected. Conversely, if the Pre-Trial Chamber was silent on certain facts and circumstances contained in the DCC, it does not mean that they were not confirmed. This interpretation was also adopted in *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-450, Decision on the updated document containing the charges, Trial Chamber IV, 6 February 2015, although following a rather stricter approach.

¹¹⁷ Prior to the commencement of the *Lubanga* trial, following disagreement between the parties as to the wording of the charges, Trial Chamber I found that an Amended DCC was ‘necessary to ensure that there is complete understanding of the “statement of facts” underlying the charges confirmed by the Pre-Trial Chamber, and to enable a fair and effective presentation of the evidence (as part of a fair and expeditious trial in accordance with Article 64 of the Statute)’; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1548, Order for the prosecution to file an amended document containing the charges, Trial Chamber I, 9 December 2008, paras 9–10 and 12–13; *Prosecution v. Katanga*, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, Trial Chamber II, 21 October 2009, paras 14–19; *Prosecutor v. Bemba*, ICC-01/05-01/08-836, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, Trial Chamber III, 20 July 2010, para. 30.

¹¹⁸ See for the most recent example, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-450, Decision on the updated document containing the charges, Trial Chamber IV, 6 February 2015.

¹¹⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 124.

¹²⁰ *Ibid.*, 131.

¹²¹ To clearly indicate the material facts and circumstances underlying the charges as confirmed or the provide, *inter alia*, sufficient detail, which was considered relevant, as to the identity of the victims of the attack; *Ibid.*, para. 125 and 126.

¹²² *Ibid.*, para. 130.

¹²³ *Ibid.*, para. 132.

need to stay within the parameters of the Confirmation decision.¹²⁴ To ensure notice, the Prosecution should be requested to point out that it is informing the defence of additional details as to the material facts charged. Adequate notice would not be provided if the Prosecution merely discloses evidence which reflect additional details, even if the evidence is summarized in the Prosecution's submission. Any such document providing additional details must be made available to the defence before the start of the trial hearings. A trial (meaning the evidentiary hearings) must commence based on a set of clearly defined charges. This results from the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to prepare one's defence.¹²⁵ However, the prejudice caused by the lack of detail of the charges may be cured during the trial.¹²⁶

- 52 In order to tackle this same issue, helpful efforts have been made at the Pre-Trial level to identify more clearly the facts and circumstances confirmed.¹²⁷ These efforts include indicating particular sections or paragraphs of the Confirmation decision as reflecting the charges confirmed¹²⁸ and other paragraphs as reflecting the facts not confirmed.¹²⁹ They also include setting out, in a *distinct section* of the decision, the facts and circumstances confirmed which in turn is preceded by an instruction to the Prosecution to properly identify the factual allegations that underlie the charges.¹³⁰

3. The Court may base its decision only on evidence submitted and discussed before it at the trial

- 53 As a manifestation of the immediacy principle,¹³¹ the judgment can only be based on evidence submitted; discussed; assessed on relevance, probative value and prejudice; and evaluated by the Trial Chamber. The Trial Chamber shall not rely, for the purposes of the

¹²⁴ And the parameters of the confirmation decision will necessarily depend on the case brought by the prosecution and the facts and evidence underpinning the case – see the example situations set out above in footnote 107. Clearly, where a Trial Chamber would be unable to enter a conviction in relation to additional instances or details without the Prosecution requesting and obtaining permission from the Pre-Trial Chamber, or the latter confirming additional charges, these requirements cannot be circumvented by including the details or instances in auxiliary documents at Trial – thereby escaping the Pre-Trial filter/authorization. For instance, details specifically rejected in the confirmation decision could not be reintroduced by their reflection in the auxiliary document; such reintroduction would require the permission of the Pre-Trial judge; see *Prosecutor v. Kenyatta*, ICC-01/09-02/11-700-Corr, Corrigendum to Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', Pre-Trial Chamber II, 21 March 2013, where the Chamber had rejected a factual allegation (namely that 'weapons were used in Naivasha') in the confirmation decision by reason of lack of evidence (para. 174) though post confirmation investigations produced evidence that, upon evaluation, did establish the relevant fact.

¹²⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 129.

¹²⁶ *Ibid.*

¹²⁷ Report of the Working Group on Lessons Learnt to the Study Group on Governance Cluster I: Expediting the Criminal Process Progress Report on Cluster B: 'Pre-Trial and Trial Relationship and Common Issues, ICC-ASP/13/28, 28 November 2014, page 43 paras 17 to 19.

¹²⁸ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, p. 63; see the interpretation of the Trial Chamber in the same case, ICC-01/04-02/06-450, Decision on the updated document containing the charges, Trial Chamber IV, 6 February 2015, para. 36 *et seq.*

¹²⁹ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, paras 13, 32, 37, 75 and 98.

¹³⁰ *Prosecution v. Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014, paras 266–277; *Prosecutor v. Blé Goudé*, ICC-02/11-01/11-325, Decision on the confirmation of charges against Blé Goudé, Pre-Trial Chamber I, 11 December 2014, paras 182–193.

¹³¹ See Roxin/Schünemann, *Strafverfahrensrecht* (2014) 395 *et seq.*; Beulke, *Strafprozessrecht* (2012), p. 26. For a discussion of the 'principle of immediacy' (both in its 'formal' and 'material' understandings), in connection with the 'orality' and the 'concentration principle' see Rieß, in: Löwe/Rosenberg, Intro. (1999) mn 60 *et seq.* Maier, J. B.J., *¿Es la inmediación una condición de la condena penal?: un aspecto parcial de la lucha entre inquisición y composición*, in: *Jueces para la democracia* (2004) 49 p. 13–20.

judgment, on items that have come to the Chamber’s knowledge but that have not been submitted and discussed at trial.¹³²

Several provisions of the Statute and the Rules of Procedure and Evidence refer to the ‘submission of evidence’ at trial, including article 69(3),¹³³ Article 64(8)(b),¹³⁴ Rules 140,¹³⁵ and 64(1).¹³⁶ The evidence is ‘submitted’ if it is presented to the Trial Chamber by the parties on their own initiative or pursuant to a request by the Trial Chamber for the purpose of proving or disproving the facts in issue before the Chamber. That the evidence is presented for other purposes such as part of a list of evidence to inform of the materials that are intended to be used at trial or any other ‘case management tool’ does not mean that it is ‘submitted’.¹³⁷ The submission of evidence must conform to the directions of the Presiding judge or the manner agreed upon by the parties. Depending on the manner directed or agreed upon, the submission may also take place outside of the trial hearings; however, in such a case, the procedure for the submission of evidence must be clear.¹³⁸

In relation to the requirement that the Court is called to rely only on evidence ‘discussed before it at the trial’, it seems that in principle the evidence discussed before ‘the Court’ at the trial is the evidence discussed before the ‘Trial Chamber’. However, in adopting such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings pursuant to article 64(3)(a), the Trial Chamber is not prevented from referring ‘preliminary’ evidentiary issues to the Pre-Trial Chamber pursuant to article 64(4)¹³⁹ – although any such evidence will have to be re-evaluated by the Trial Chamber in order to properly become the basis of the judgment.

Oral testimonies, documents and other exhibits such as video recordings may be discussed during the hearings and also in the written submissions at any stage of the trial. In relation to documents introduced by counsel pursuant to a written application the common practice indicates that they will not be discussed orally. However, the documents need to become part of the trial record.¹⁴⁰ In fact, there is no need for the parties and participants to have actually ‘discussed’ the evidence in the sense of effectively advanced arguments about it, but the parties need to have had an opportunity to make submissions as to each item of evidence.¹⁴¹

¹³² *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, Appeals Chamber, 3 May 2011, para. 45.

¹³³ Which provides that: ‘[t]he parties may submit evidence relevant to the case, in accordance with article 64’ and that ‘[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth’.

¹³⁴ Which provides that: ‘[s]ubject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute’.

¹³⁵ According to which, the parties shall agree on the order and manner in which evidence will be submitted to the Trial Chamber if the Presiding Judge does not give directions. If no agreement is reached, the Presiding Judge is required to issue directions on the matter.

¹³⁶ Which stipulates that: ‘[a]n issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber’.

¹³⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, Appeals Chamber, 3 May 2011, para. 44.

¹³⁸ *Ibid.*, para. 43.

¹³⁹ This may be appropriate in order to analyze the admissibility of certain pieces of evidence thereby preventing highly prejudicial evidence from becoming part of the record at trial. Although professional judges should be able to conduct this examination and exclude inadmissible the evidence from consideration in the article 74 decision, the ICC framework is not as rigid as to exclude this type of proceedings.

¹⁴⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para. 98; *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Trial Chamber II, 8 March 2014, para. 78.

¹⁴¹ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Jugement rendu en application de l’article 74 du Statut, Trial Chamber II, 8 March 2014, para. 78.

III. Paragraph 3: Unanimity, majority and minority views

- 57 The drafting history of the Statute shows various instances where the possibility of dissenting opinions was rejected. These include Article 44(2) of the 1943 Draft Convention for the Creation of an International Criminal Court,¹⁴² the 1994 ILC Draft Statute¹⁴³ and the Siracusa Draft. Clearly however, Article 74(3) and (5) does accommodate this possibility.¹⁴⁴
- 58 The Statute provides that '[w]hen there is no unanimity, the ... decision shall contain the views of the majority and the minority' and that 'failing [unanimity] the decision shall be taken by a majority of the judges'. This means that, staying by the text of the law, the views of a majority and a minority are only accepted when there is no unanimous decision – separate or concurrent opinions where the judgment is unanimous are not part of this scheme. In practice however, this scheme has been interpreted flexibly.
- 59 There is a clear obligation in the ICC framework to at least 'attempt to achieve unanimity'. In the deliberations, one or more of the judges may try to convince one or the others to vote together in a proposed way or to find a compromise, accepted by some or by all. Since each judge has to take the responsibility for the decision themselves, none can be forced to vote with the others 'to achieve unanimity'. Therefore, if all endeavors are in vain, the majority of the judges decide. A minority opinion can be filed either together with the majority opinion or at a later stage, since it is not 'the decision' and as such it is not dispositive of the issues. The points of disagreement need to be clearly, and very respectfully (to prevent bringing the Court into disrepute), set out, as well as the outcome the decision would have had, had the dissenting judge prevailed in the voting. It is primarily an opportunity for the dissenting judge to explain how he or she would have dealt with a legal or factual issue rather than an arena to expose why the position of the majority is not agreeable or unconvincing to the dissenting judge.
- 60 Majority means two judges since the Trial Chamber is composed of three judges. Given the numerous legal and factual issues dealt with in judgments of international crimes, it is not uncommon that there will not be unfettered agreement as to each single issue addressed therein. It must be bared in mind that the order and manner the different issues to be considered are sequentially presented for voting may have an important effect on the outcome of the decision.¹⁴⁵ Although there is broad flexibility as to the order and manner of voting, at least two judges must be able to subscribe to the outcome of the decision.

¹⁴² In line with Article 44 of the 1943 Draft Convention for the Creation of an International Criminal Court, setting out that '2. The decisions of the Court shall be by a majority of the judges sitting in the case, and the decisions shall be deemed to be the opinion of the Court as a whole. 3. Every judgment or order of the Court shall state the reasons therefore and be read at a public hearing by the Chairman. Only the reasons which carry the decision of the majority shall be included in the sentence, and no dissenting opinion shall be published or divulged in any way'; reprinted in the 'Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary-General', Document-A/CN.4/7/Rev.1, page 97 *et seq.*

¹⁴³ Article 45(5) established that 'it shall be the sole judgment issued'.

¹⁴⁴ In justification of this mechanism, it has been expressed that it assists the judges to maintain their intellectual integrity and independence of mind; assists in the development of the law; demonstrate to the parties, participants and public at large that a case has been thoroughly assessed; see *Prosecutor v. Katanga*, ICC-01/04-01/07-3504-Anx, Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v Germain Katanga*, Plenary of the Judges, 22 July 2014, para. 51. In addition, it has been considered to help reveal the deliberative process, thereby enhancing transparency, see Jørgsen and Zahar, *Deliberation, Dissent and Judgment*, in: Sluiter, Friman, Linton, Vasiliev, Zappala, *International Criminal Procedures, Principles and Rules*, (2003), p. 1152, 1156 *et seq.* Moreover, it has been considered important in the event of an appeal; See 1994 ILC Draft Statute, commentary to article 45, paras 3 and 5, p. 122; Fernandez and Pacreau (Dir.), *Statut de Rome de la Cour Pénale Internationale, Commentaire article par article*, ii (2012), p. 1648.

¹⁴⁵ For instance, if judge *a.* is of the view that the accused should be convicted of a crime against humanity; judge *b.* believes that although the contextual element and the individual crimes are established, the crimes are not attributable to the accused; and judge *c.* believes that the individual crimes occurred and they can be attributed to the accused however the contextual element is not made out. In the result, two judges believe that

IV. Paragraph 4: Secrecy of deliberations

Paragraph 4 expresses that ‘[t]he deliberations of the Trial Chamber shall remain secret’. 61 What is implied is that all the arguments expressed during deliberations, unless there is an agreement of the Chamber to include them in its ‘reasoned statement’, are not divulged outside the respective Chamber. The purpose of this principle is to ensure that judge’s building of their opinions remains an unhindered process. In the exchange of views, the judges must be able to analyze different perspectives and to freely use available arguments. This principle is of such importance that, pursuant to Rule 5(1)(a), is made explicit part of the solemn undertaking the judges are requested to provide before exercising their functions under the Statute.¹⁴⁶

It has been accepted that, under certain circumstances, when there are improprieties in the 62 deliberative process the parties should be entitled to have the secrecy unveiled. However, a claim that the deliberative process is tainted must be supported by concrete evidence; general allegations are insufficient.¹⁴⁷ It is for the party questioning the propriety of the deliberative process to prove, at least, that evidence thereof exists. While the deliberation process is private and secret in order to ensure judicial independence, the outcome of the deliberative process is public and open. The Judgment itself may unequivocally attest and demonstrate that there were proper deliberations; given the manner the issues were reasoned by the Chamber.¹⁴⁸

The deliberations of the Trial Chambers may take place in the presence of staff members of 63 the Court, whose roles and functions are dependent on the needs of the participating judges – theoretically, their roles may range from passive scribes to active advisors and drafters. Importantly, they are also subject to the rules on the secrecy of deliberations in the sense that they are banned from disclosing any elements of the deliberations.¹⁴⁹

Rule 142 states that the Trial Chamber ‘[a]fter the closing statements, the Trial Chamber 64 shall retire, to deliberate in camera’. That the deliberations must take place after the closing statements which in turn must postdate the submission of the evidence (see Rule 141(1)) does not mean that preparatory work, analysis, memoranda etc. cannot be commenced before the closure of the evidence.¹⁵⁰ To the contrary, given the number of legal issues involved and the volume of evidence usually received in international trials, it is desirable that such preparatory work are advanced during the trial in order to ensure expeditiousness.

the contextual element is made out; two judges believe that the individual crimes have been committed and two judges are convinced that the accused is to be attributed the crimes; should they enter a conviction by majority?

¹⁴⁶ It is also part of the code of judicial ethics; Article 6, Confidentiality: ‘Judges shall respect the confidentiality of consultations which relate to their judicial functions and the secrecy of deliberations’. Notably, it is also referred to in Principle 15 of the 1985 UN endorsed Basic Principles on the Independence of the Judiciary.

¹⁴⁷ See *Prosecutor v. Krajišnik*, IT-00-39-A, Appeal Judgment, 17 march 2009, para. 134; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeal Judgment, 28 February 2005, para. 25. See also SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgement, 26 September 2013, para. 618. It continued: ‘While the deliberation process is private and secret in order to ensure judicial independence, the obligations imposed by Rule 87 are transparent and the outcome of the deliberative process is public and open. The Judgment, pronounced in public and set forth in writing [...], would show whether or not the Trial Chamber deliberated Taylor’s guilt beyond a reasonable doubt and voted for separate convictions as to each count. The Judgment accordingly speaks for itself; see paras 622–623, 625.

¹⁴⁸ *Prosecutor v. Taylor*, SCSL-03-01-A, Judgement, 26 September 2013, para. 621.

¹⁴⁹ Jørgsen and Zahar, *Deliberation, Dissent and Judgment*, in: Sluiter, Friman, Linton, Vasiliev, Zappala, *International Criminal Procedures, Principles and Rules*, (2003), p. 1152, 1156 *et seq.*

¹⁵⁰ Esser, *Auf dem Weg zu einem europäischen Strafverfahrensrecht* (2002) 733 *et seq.* discussing the ECHR precedent *Kremzow v. Austria* where a Judge Reporter of the Supreme Court of Austria had already produced a draft decision before the hearing of a case. The ECHR found no violation to the Convention.

V. Paragraph 5

1. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions

- 65 Article 74(2) establishes the procedural, evidentiary and factual parameters of the decision on the guilt or innocence of the accused. As set out above, the judgment can only be based on evidence submitted; discussed; assessed on relevance, probative value and prejudice; and evaluated by the Trial Chamber. Article 74(5) requires that the judgment contain 'a full and reasoned statement of the Trial Chamber's findings on the evidence'. What is required is that reasons are fully and transparently provided to clearly show how the evidence evaluated by the judges supports all the findings of the Chamber underpinning the decision. The 'reasoned statement' is the basis for the parties' exercise of the right to appeal and for the Appeals Chambers' review.¹⁵¹
- 66 According to international human rights jurisprudence, Courts are required to 'indicate with sufficient clarity the grounds on which they based their decision.'¹⁵² Courts are obliged to give reasons for their decisions, but cannot be required a detailed answer to every argument.¹⁵³ However, where a party's submission is decisive for the outcome of the proceedings, it requires a specific and express reply.¹⁵⁴ The courts are therefore required to examine the litigants' main arguments.¹⁵⁵
- 67 The jurisprudence of the ICC and the ad hoc Tribunals has dealt with this issue in an analogous manner. The facts considered relevant in coming to the decision must be identified.¹⁵⁶ However, providing reasons has been found to be distinct from reciting each and every factor that has been brought before the Chamber.¹⁵⁷ In particular, the parties and participants cannot expect their submissions to be considered in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.¹⁵⁸ Moreover, the Chamber has discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it may dismiss arguments which are evidently unfounded without providing detailed reasoning.¹⁵⁹ In relation to the evidence, often a Trial Chamber's failure to explicitly refer to specific witness testimony will not amount to an error of law (i) where there is significant contrary evidence on the record,¹⁶⁰ or (ii) when the disregarded testimony was confusing, biased, or contradicted by substantial and credible contrary evidence.¹⁶¹ The Trial Chamber is under no obligation to refer to the testimony of every witness or every piece of evidence on the record¹⁶² and it has been

¹⁵¹ See Roxin/Schünemann, *Straverfahrensrecht* (2014) p. 425.

¹⁵² *Hadjianastassiou v. Greece*, No. 12945/87, Judgment, 16 December 1992, para. 32.

¹⁵³ *Van de Hurk v. the Netherlands*, No. 16034/90, Judgment, 19 April 1994, para. 61; *Garcia Ruiz v. Spain*, no. 30544/96, Judgment, 21 January 1999, para. 26; see Frowein/Peukert, *Europäische Menschenrechtskonvention, EMRK-Kommentar* (2009), p. 213 *et seq.*

¹⁵⁴ *Ruiz Torija v. Spain*, 18390/91, Judgment, 9 December 1994, para. 30; *Hiro Balani v. Spain*, 18064/91, Judgment, 9 December 1994, para. 28.

¹⁵⁵ *Buzescu v. Romania*, 61302/00, Judgment, 24 May 2005, para. 67.

¹⁵⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', Appeals Chamber, 14 December 2006, para. 20.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Gotovina and Markač*, IT-06-90-A, Appeal Judgement, 16 November 2012, para. 15; *Bošković and Tarčulovski*, IT-04-82-A, Appeal Judgement, 19 May 2010, para. 17.

¹⁵⁹ *Prosecutor v. Perišić*, IT-04-81-A, Appeals Judgment, 28 February 2013, para. 12; *Gotovina and Markač* Appeal Judgement, para. 15; *Bošković and Tarčulovski* Appeal Judgement, para. 17.

¹⁶⁰ See *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeal Judgement, 28 February 2005, paras 23, 483–484, 487, 582–583; *Prosecutor v. Perišić*, IT-04-81-A, Appeals Judgment, 28 February 2013, para. 95.

¹⁶¹ *Ibid.*

¹⁶² *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Judgment, 28 February 2005, para 23; *Čelebići* Appeal Judgment, para. 498; *Kupreškić et al.* Appeal Judgment, para. 39; *Kordić and Čerkez* Appeal Judgment, para. 382.

noted that where the Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.¹⁶³ This may be particularly relevant where, despite the existence of contrary evidence on the record, such evidence is not invoked by the parties to persuade the Chamber against the relevant factual finding. Nonetheless, there are sufficient instances where a Trial Chamber's insufficient analysis of evidence on the record has been found to amount to a failure to provide a reasoned opinion.¹⁶⁴

The 'conclusions' include those concerning the findings on the evidence and those on questions of law. The Appeals Chamber has previously held, albeit in a different context, that a Chamber must explain with sufficient clarity the basis of its decision. In other words, 'it must identify which facts it found to be relevant in coming to its conclusion'.¹⁶⁵ The conclusion on law is just the application of the law to the facts, which is needed to make the decision understandable and thereby acceptable. In circumstances where the law needs interpretation,¹⁶⁶ such interpretation must be developed in the judgment to the extent necessary. Rule 142 states that 'when there is more than one charge, the Trial Chamber shall decide separately on each charge' and 'when there is more than one accused, the Trial Chamber shall decide separately on the charges against each accused'.

The complete decision has to be handed down in writing. This implies that all parts referring to any charge raised against any accused as well as with regard to all findings and conclusions have to be covered. Without a written decision, the Prosecutor and the defence as well as the Appeals Chamber would be unable to discern whether the decision was materially affected by error of fact or law or procedural error as well as to establish the proportionality of the sentence to the crime.

2. Majority and minority views

The relevant sentence, which reads 'The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority' has been commented on.¹⁶⁷

3. Delivery in open court

The public character of proceedings before judicial bodies protects litigants against the administration of justice in secret with no public scrutiny.¹⁶⁸ It is also a means of maintaining confidence in the courts.¹⁶⁹ In the words of the ECHR:

'By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1 (art. 6–1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society [...].'¹⁷⁰

Decisions of the Trial Chamber concerning the criminal responsibility of the accused shall be pronounced in public (see Rule 144(1)). In sub-rule 2, it is expressly stated that copies of the various decisions mentioned in sub-rule 1 shall be provided 'as soon as possible' to all those who participated in the proceedings in a working language of the Court and to the

¹⁶³ *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Judgment, 28 February 2005, para 23.

¹⁶⁴ *Prosecutor v. Perišić*, IT-04-81-A, Appeals Judgment, 28 February 2013, 95 and 96.

¹⁶⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', Appeals Chamber, 3 May 2011, para. 59.

¹⁶⁶ See Engisch, *Einführung in das juristische Denken* (2005), p. 101 *et seq.*, 123, fn 47; Schauer (1998), 97 *YaleLJ* 538 *et seq.*

¹⁶⁷ See above, Paragraph 3: Unanimity, majority and minority views.

¹⁶⁸ *Fazliyski v. Bulgaria*, No. 40908/05, Judgment, 16 April 2013, para. 69.

¹⁶⁹ *Pretto and Others v. Italy*, 7984/77, Judgment, 8 December 1983, para. 21.

¹⁷⁰ *Ibid.*

accused in a language he or she fully understands. Of course, the latter requirement applies only to the extent the language the accused fully understands is a written language; which is not the case with respect to certain African dialects currently being used before the ICC. The judgment has to be delivered in open court. However, the practice indicates that to save time and not to exhaust the attention of the parties and the audience, the Court may decide to deliver only a summary of its decision and sentence in open court.

- 73 In instances where the decision is issued by a majority of the judges, and since only the majority opinion constitutes ‘the decision’, only the majority opinion is required to be delivered in open Court pursuant to article 74(5). However, the practice indicates that a summary of the dissenting, separate, concurring, etc. views are also read in open court.

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

3. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

4. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

5. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

6. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

7. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Literature: Bassiouni, M.C., *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms – Final report of the Special Rapporteur*, UN Doc. E/CN.4/2000/62; van Boven, T., *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4/SUB.2/1993/8; *id.*, *The Basic Principles and Guidelines on the Right to Reparation for Victims of [gross] Violations of Human Rights and International Humanitarian Law*, UN Doc. E/CN.4/1997/104; Clark, R.S., ‘The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’, in: G. Alfredsson and P. Macalister-Smith (eds.), *The Living Law of Nations* (N.P. Engel 1996) 355; Del Tufo, M., ‘La Riparazione alle Vittime e il Fondo di Garanzia’, in: G. Lattanzi and V. Monetti (eds.), *La Corte Penale Internazionale: Organi-Competenza-Reati-Processo* (Giuffrè 2006) 875; Dwertmann, E., *The Reparation System of the International Criminal Court – Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010); Donat-Cattin, D., ‘The Role of Victims in ICC Proceedings’, in: F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I (Editoriale Scientifica 1999) 251; FIDH, *Enhancing Victims’ Rights before the International Criminal Court* (Paris 2013); McCarthy, C., *Reparations and Victims Support in the International Criminal Court* (Cambridge University Press, 2012); Martínez Ventura, J.E., ‘Análisis del caso Lubanga. El Procedimiento de Reparaciones’, in: Ambos, K., Malarino, E., and Steiner, C. (eds.), *Análisis de la Primera Sentencia de la Corte Penal Internacional: El caso Lubanga* (KAS, 2014) 343; Muttukumaru, C., ‘Reparations to Victims: key issues facing the delegations’, in: F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, 1 (Editoriale Scientifica 1999); Pérez León Acevedo, J. P., *Victims’ Status at International and Hybrid Criminal Court – Victims’ Status as Witnesses, Victim Participants/Civil Parties and Reparation Claimants* (Åbo: Åbo Akademi University Press, 2014); Redress, *Promoting the Right to Reparation of Survivors of Torture: What Role for a Permanent International Criminal Court?* (London 1997); United Nations Commission on Crime Prevention and Criminal Justice, *Handbook on Justice for Victims on the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. E/CN.15/1998/CRP.4/Add.1.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	9
I. Paragraph 1: General provisions.....	9
1. ‘The Court shall establish principles’.....	9

2. Decision of the Court	17
II. Paragraph 2: Orders ‘directly against a convicted person’	19
III. Paragraph 3: Invitation and account of representations	21
IV. Paragraph 4: Necessary ‘measures under article 93, paragraph 1’	23
V. Paragraph 5: Effect of decisions	26
VI. Paragraph 6: No prejudice of ‘rights of victims under national or international law’	28
C. Conclusions and remarks on relevant rules and regulations	30

A. Introduction/General remarks

- 1 The ‘ICC process’ has given a historical possibility to the world community to recognise and enforce the right of victims to reparations, which is a constitutive part of the right to justice¹.
- 2 The obligation for States to make reparations to victims of ‘serious’ violations of humanitarian law and human rights is enshrined in a number of universally binding international instruments, starting with the 1907 Hague Convention IV, article 3². Article 14 of the 1984 Torture Convention³ significantly reads as follows:

‘Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.’
- 3 The European and Inter-American regional mechanisms of human rights protection impose a regime of reparations in favour of the victim and against the State(s) that fails to comply with its human rights obligations⁴.
- 4 Above and beyond all normative standards mentioned, the right to reparations is an essential part of the inalienable right to an effective remedy (*cf. article 2 para. 3 ICCPR*) which has already been referred to elsewhere in this Commentary⁵.
- 5 Conversely, article 75 is addressed only ‘against’ individual perpetrators convicted by the Court, even if the Court itself may make requests of co-operation to States on a case-by-case basis in order to ensure the implementation of its decisions on reparations⁶. It is therefore

¹ See Donat-Cattin, *article 68*, mn. 3. See van Boven, *Study*; Joinet, *Question* (see literature article 68).

² See van Boven, *Study*; Redress, *Promoting*.

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/41 (1984), entered into force on 26 June 1987. For an excellent study on civil remedies against human rights abuses, see Dubinsky, *Proposals of the Hague Conference and their Effect on Efforts to Enforce International Human Rights through Adjudication*, Int. Ass. of Democratic Lawyers, Work. Doc. No. 117, 13 (1998). Concerning jurisprudence on article 14 (and article 16) of the Torture Convention, an exemplary case is represented by the civil action brought by the government of the Philippine in Switzerland to obtain the restitution of the former dictator Marcos’ assets deposited in Swiss banks. The Federal Supreme Court of Switzerland stated that, as a contracting Party under that Convention, Switzerland ‘[...] must ensure that the victim of torture receives indemnification and has an actionable right to fair and reasonable compensation, including the means for rehabilitation that is as complete as possible. These obligations apply accordingly to other forms of cruel, inhumane, or degrading treatment of punishment.’ *Cf. in re Federal Office for Police Matters*, Case IA.87/1997/err (10 Dec. 1997). The Swiss Supreme Court refused to allow the Marcos’ assets to be released without any provision for recovery by the victims of his regime, who had obtained a civil judgement in the United States. Thus, ‘the Court ordered the Marcos’ funds transferred to an escrow fund in the Philippines on the condition that the Philippine government agree to compensate human rights victims from the assets in the fund’. *Cf. Dubinsky, op.cit.*, p. 4.

⁴ See Articles 1, 13 and 41, ECHR, and Articles 1, 25, 44 and 63, IACHR. See also van Boven, *Study*; Redress, *Promoting*.

⁵ See D. Donat-Cattin, *article 68*, mn. 7.

⁶ This discretionary power of the Court may be inferred in the ‘reparations’ regime” of article 75 as such, and the consequent need to implement it by States Parties within the ‘self-contained’ treaty-based system of the *Rome Statute*. However, at least with respect to measures of enforcement – which may just constitute a part of the implementation of the Court’s decisions on reparations – the applicability of article 109 is expressly mentioned in paragraph 5 of article 75 (see below).

necessary to clarify at the outset that article 75 does not deal with any issue relating to States' responsibility, either in the sense of sanctioning the State for the benefit of the individual victim, or in respect of issuing orders against the State. As has been authoritatively stated by a key negotiator of article 75, '[...] the ICC Statute provides a framework conferring power on the judges to establish principles and to develop the jurisprudence of the Court with the view to doing justice before it'⁷. In such a normative procedural system, justice means not only a fair trial for the accused, but also justice for victims⁸.

The ILC decided to delete from its 1994 Draft Statute a provision on reparations, article 47, which was part of its 1993 preliminary draft⁹, with the argument that a criminal court was not the appropriate forum in which to

'order the return of stolen property, a remedy which [some members of the Commission] considered to be more appropriate in a civil than in a criminal case [...]. On balance the Commission considered that these issues were best left to national jurisdictions and to international judicial co-operation agreements [...].'¹⁰

As this author wrote before the Rome Conference¹¹:

'The ILC did not recognise the reality that where national systems have, by definition, been unwilling or unable to administer criminal justice, it is unlikely that those systems will be able or willing to give effect to the victims' right to reparations. Nor would mutual assistance schemes for judicial co-operation work. Therefore, the subsidiary role of an ICC must be affirmed in order to ensure that victims' rights are respected. Consequently, the brackets¹² surrounding article 73 [of the Draft Statute, corresponding to article 75 of the *Rome Statute*] attributing to the ICC the power to 'order reparations' for victims must be deleted.'

Governmental delegations made the same reasoning in Rome, and created the legal conditions for the first 'reparation regime' ever realised in the history of international criminal jurisdiction. It should be noted at the outset that the issue of victims' redress in the ICC has been central to the work of many NGOs participating in the Preparatory Committee and the Rome Conference, and constituting the Victims Rights' Working Group of the Coalition for an ICC¹³.

Concerning proposals of States that substantially contributed to the advancement of the law-making process leading to the *Rome Statute*, it is important to mention certain Preparatory Committee and conference 'papers' on reparations, apart from the sections on reparations in the reports of the relevant Preparatory Committee's sessions and of the Rome

⁷ Notes on file with the author: speech delivered by C. Muttukumar (who represented the UK at the Rome Conference's Working Group on Procedural Matters) on 31 October 1998 at the British Institute of International and Comparative Law (Seminar on the ICC), London.

⁸ As stated by F. McKay (Redress) on behalf of the Victims' Rights Working Group to the Plenary of the Rome Conference, 17 June 1998: 'Punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims for the ICC must be empowered to address their rights and needs.' Statement reproduced in: *The ICC Monitor – The Rome Treaty Conference Monitor*, Issue 5, p. 1 (19 June 1998) and available in the UN website section on the Rome Diplomatic Conference (<http://www.un.org/icc/speeches/>).

⁹ For an analysis of the 1993 ILC project for a Draft Statute, see Flavia Lattanzi, 'Riflessioni sulla competenza di una Corte Penale Internazionale' (1993) 56 *Rivista di Diritto Internazionale* 661.

¹⁰ Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July 1994, UN Doc. A/49/10 (1994).

¹¹ Cf. Donat-Cattin, in: Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998) 251.

¹² Brackets are usually surrounding language upon which there is contention or substantial disagreement amongst negotiators (Governmental delegates) in the framework of a given treaty-making process, such as the Preparatory Committee (1996-1998) leading to the Rome Conference (1998).

¹³ Amongst the position papers of NGOs on reparations, reference is particularly made to: Redress, *Reparation for Victims in the International Criminal Court: Principles, Commentary and Recommendations for the Rome Diplomatic Conference* (London 1998); Women's Caucus for Gender Justice in the International Criminal Court, *Recommendations and Commentary on Penalties and Reparations* (NY 1997); Amnesty International, *The International Criminal Court: Making the Right Choices* (Part II, 40-42; Part III, 31-34) (London 1997); Redress, *Promoting*; International Society for Traumatic Stress Studies/International League for Human Rights, *Suggestions Regarding the Victim's Role in the ICC* (NY 1997).

Conference's Working Group on Procedural Matters¹⁴. At the December 1997 session of the Preparatory Committee, a proposal of France generated the amendment of the text of article 45*bis* entitled 'Reparations to victims'¹⁵, which was already envisaged by the French comprehensive text for the ICC Statute presented at the August 1996 session of the Preparatory Committee¹⁶. As a result of a joint proposal of France and the UK, the last Preparatory Committee before the Rome Conference brought to a preliminary draft consolidated text on reparations¹⁷, then reproduced as article 73 of the Draft Statute transmitted to the Diplomatic Conference¹⁸. Two competing proposals were tabled by France and the UK¹⁹ and by Japan²⁰ at the Rome Diplomatic Conference. After long and extenuating negotiations taking place in the Working Group on Procedural Matters, as well as in a number of informal meetings, the compromise was reached just few days before the conclusion of the Conference and incorporated in the seventh report of that Working Group to the Conference's Drafting Committee²¹.

- 8 The goal of the remaining part of this commentary is not to cover all aspects of the very complex Rome Conference's negotiations on article 75. Rather, these comments will be limited to the letter of this article, although an attempt will be made to reflect on some crucial elements of the Rome compromise as well as to consider the initial interpretation of article 75 that may be found in the first eleven years of practice before the ICC.

B. Analysis and interpretation of elements

I. Paragraph 1: General provisions

1. 'The Court shall establish principles'

- 9 The fact that the ICC is entitled to establish primarily principles relating to reparations constitutes a sufficient limitation to the activities of the Court in this delicate area of adjudication²². The term 'principles' provide the judges with an open-ended standard that permits the necessary flexibility on the consequences of the crimes within the Court's jurisdiction. Any element of redress for victims, including any measure capable of removing – where possible – the effects of the crime and of re-integrating victims in their *status quo*

¹⁴ See the UN documents referred to in footnotes 21, 22, 23 and 24 of the commentary on article 68.

¹⁵ Cf. UN Doc. A/AC.249/1997/WG.4/DP.3 (5 Dec. 1997) (Proposal of France, article 45*bis*).

¹⁶ Cf. UN Doc. A/AC.249/L.3, Preparatory Committee (12–30 Aug. 1996), Draft Statute for an International Criminal Court – Working paper submitted by France.

¹⁷ This heavily bracketed text is contained in UN Doc. A/AC.249/1998/WG.4/CPR.5 (25 Mar. 1998) (article 66. *Reparation to victims*) with Corr.1 (26 Mar. 1998). At the same session of the Preparatory Committee, also the Democratic Republic of Congo submitted a textual proposal for the article on reparations (Cf. UN Doc. A/AC.249/1998/WG.4/DP.38 (27 Mar. 1998)).

¹⁸ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Final Act, UN Doc. A/CONF.183/2/Add.1 (1998), reprinted in Bassiouni (ed.), *International Criminal Court. Compilation of UN Documents and Draft ICC Statute before the Diplomatic Conference* (TP 1998) 339–341.

¹⁹ Cf. UN Doc. A/CONF.183/C.1/WGPM/L.28 (26 June 1998) (Proposal submitted by the Delegations of France and the United Kingdom of Great Britain and Northern Ireland, article 73, Reparations to victims).

²⁰ Cf. UN Doc. A/CONF.183/C.1/WGPM/L.30 (28 June 1998) (Proposal submitted by Japan).

²¹ Cf. UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7 (13 July 1998), reproduced in Donat-Cattin (ed.), *International Criminal Court Society, Compilation: Footnotes Relevant to the Rules of Procedure and Evidence Transmitted by the Committee of the Whole to the Drafting Committee At the Rome Diplomatic Conference on the Establishment of an International Criminal Court* (Rome 1998) 35. A preliminary compromise between different positions of Government delegation was reflected in the conference documents: UN Doc. A/CONF.183/C.1/WGPM/L.63 (8 July 1998), and UN Doc. A/CONF.183/C.1/WGPM/L.63/Rev.1 (11 June 1998). On 10 July 1998, the US delegation presented a proposal/footnote on article 73 para. 1 (UN Doc. A/CONF.183/C.1/WGPM/L.69 (10 July 1998)).

²² In fact, the following part of paragraph 1 states in just a permissive way that the Court 'may ... determine the scope and extent of any damage, loss and injury' on the basis of the principles relating to reparations, whereas the Court shall establish such principles; see mn. 15.

ante, are to be considered part of the principles relating to reparations. The language – originally proposed by France and the UK – indicating that reparations shall be made not only to victims, but also *in respect of* victims, extends the scope of application of article 75 to all categories of victims as defined in the UN Declaration of victims’ rights of 1985²³. Such an interpretation is founded not only on the analysis of the preparatory works leading to the compromise amongst States on the text of article 75, but also on the footnote inserted (by general agreement) in the Working Group’s report and designed at orienting the interpretation of the Statutory language ‘*in respect of victims*’. The footnote²⁴ reads as follows:

‘Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victims’ families and successors. For the purposes of interpretation of the terms ‘victims’ and ‘reparations’, definitions are contained in the text of article 44, paragraph 4 of the Statute [corresponding to article 43.6 of the *Rome Statute*], article 68, paragraph 1, and its accompanying footnote²⁵, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17).’

The Assembly of States Parties confirmed the decisions of the Rome Conference when it adopted a comprehensive and inclusive definition of victims in Rule 85 of the Rules of Procedures and Evidence, thus leaving no doubt as to the interpretation of the wording ‘*in respect to victims*’. And the UN General Assembly adopted the *Basic principles and guidelines on the right to a remedy and reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law* on 16 December 2005 through Resolution 147 (A/Res/60/147), which includes almost the same definitions of reparations and its modalities contained in the basic principles and guidelines.

The Court is obliged to establish principles relating to reparations in each case before it that results in a conviction. Thus, its verdicts shall include prescriptions on the right to restitution, compensation and rehabilitation, even in cases in which the relevant Chamber would not decide to make any determination regarding specific mean(s) of restitution (*i. e.* the return of *certain* stolen property), the *quantum* of compensation or modalities aimed at contributing to rehabilitation. With respect to cases involving large numbers of victims and/or very limited assets of the convicted person(s), the principles established by the Court may be utilised as legal bases for national proceedings and/or *ad hoc* arrangements between National or international entities (*i. e.* the establishment of a claims’ commission), as well as to secure the co-operation of States in which the assets of the perpetrators are located in accordance with the provisions set out in article 109²⁶, without forgetting the subsidiary role that the Trust Fund for Victims can play under article 79 of the Statute.

Principles on fair restitution to victims, their families and assigns ‘should include: 1. the return of property, 2. the payment of the harm or loss suffered, 3. the reimbursement of expenses incurred as a result of the victimisation [including legal and medical assistance], 4. the provision of services and 5. the restoration of rights’²⁷.

²³ It is important to stress that the Rome Conference’s Working Group on Procedural Matters reached general agreement on the text of the following footnote concerning the definition of victims under article 68. The footnote, included in its report to the Drafting Committee (see comments on article 68, mn. 36), reads as follows: ‘In the exercise of its powers under this article, the Court shall take into consideration the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.’ The ICC Draft Statute contained also a footnote to article 73 stating that for the purposes of defining ‘victims’ and ‘reparations’, reference should be made to the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and the *Draft Principles and Guidelines on the Right to Reparation for Victims of Violations of Human Rights and International Humanitarian Law* (see literature). See Donat-Cattin, article 68, margins No. 35 and 37.

²⁴ UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7, p. 5, reprinted in: D. Donat-Cattin (ed.), see note 21, 39.

²⁵ Footnote reproduced in note 23.

²⁶ See mn. 23.

²⁷ See Clark, *Declaration 361*, commenting on the provisions on restitution of the UN Declaration on Victims’ Rights. Regarding the necessary functions to be performed by the competent State(s) in a matter as complex as the restoration of civil, social or economic rights of individual victims, see mn. 13.

- 12 Rehabilitation means any form of assistance to victims as described in paragraphs 14 to 18 of the UN Declaration on victims' rights and in para. 14 (and, as appropriate, para. 15) of the revised basic principles and guidelines on the right to reparations²⁸. Rehabilitation of the individual victims may be attained both through individual or collective reparations, as recognised by the first decision on principles of reparations in the Lubanga case²⁹, which finds its legal basis also in rule 97 entitled 'Assessment of Reparation'. Rule 97 explicitly introduces the terms 'collective basis' for reparations in the ICC legal framework under article 21(1). Measures of rehabilitation should not be left to the very last moment of the

²⁸ See above the footnote reproduced in mn. 9 as approved at the Rome Conference, which contains an authentic interpretation of article 75 para. 1. That footnote refers to the concept of rehabilitation (or assistance) as reflected in paras. 14 to 17 of the 1985 UN Declaration on victims' rights, which are clearly addressed to States and their responsibility towards victims of crimes and abuse of power, and in para. 14 of van Boven's *Basic Principles*. Paras. 14 to 17 of 1985 Declaration read as follows:

- '14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
- 15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
- 16. Police, justice, health social service and other personnel concerned should receive training to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid.
- 17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above [the principle of non-discrimination].'

Para. 14 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17) reads:

'14. *Rehabilitation* shall be provided and will include medical and psychological care as well as legal and social services.'

In addition, para. 15 of the Bassiouni *Basic Principles*, which regards '*satisfaction and guarantees of non-repetition*', may be partially applied by the Court's judges – as appropriate – in the context of rehabilitation. It reads:

- '15. Satisfaction and guarantees of non-repetition shall be provided including, as necessary:
 - (a) Cessation of continuing violations;
 - (b) Verification of the facts and full and public disclosure of the truth;
 - (c) An official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or persons closely connected with the victim;
 - (d) Apology, including public acknowledgement of the facts and acceptance of responsibility;
 - (e) Judicial or administrative sanctions against persons responsible for the violations [author's note: the notion that certain penalties would have been 'appropriate forms of reparation' was rejected at the Rome Conference];
 - (f) Commemorations and paying tribute to the victims;
 - (g) Inclusion in human rights training and in history or school textbooks of an accurate account of the violations committed in the field of human rights and international humanitarian law;
 - (h) Preventing recurrence of violations by such means as:
 - (i) Ensuring effective civilian control of military and security forces;
 - (ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;
 - (iii) Strengthening the independence of the judiciary;
 - (iv) Protecting persons in the legal profession and human rights defenders;
 - (v) Conducting and strengthening, on a priority basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.'

²⁹ Cf. paras. 218–221, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2904, Trial Chamber I, Decision Establishing the Principles and Procedure to be applied in Reparations, 7 August 2012. At para. 220, the Chamber finds that '[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently', while at para. 221 the Chamber stipulates that, '[w]hen collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis. The Court should consider providing medical services (including psychiatric and psychological care) along with assistance as regards general rehabilitation, housing, education and training)' The '[o]ther types of reparations, for instance those with a symbolic, preventative or transformative value' (Cf. para. 222), which the Chamber considers 'appropriate' and not excluded by the language of Article 75, can be subsumed under the broad notion of rehabilitation. In fact, reparative measures such as (i) guarantees of non repetition and (ii) satisfaction (for the communities to which individual victims belong) may have a rehabilitative meaning for victims. Victims may seek such assurances and public acknowledgements of the truth in order to deter the emergence of negationist theories as part of the process of their full rehabilitation as members of a society that respects the Rule of Law and fulfils the political and legal imperative of the never again (*nunca mas*).

proceedings (the sentencing), but should be adopted in conjunction with protective measures ex article 68 throughout the entire procedure before the Court, starting with the Pre-Trial stage. Participation in the proceedings ex article 68(3) may, in and of itself, constitute a form of rehabilitation for those victims who, as right-bearers, freely determine to exercise their right to access to justice. Therefore, rehabilitation cannot be limited to forms of reparations imposed on the convicted persons, but must be also conducted within society at large, in order to help victims to promptly recover from trauma. In this respect, (i) the ICC Assembly of the States Parties correctly attributed an ‘assistance mandate’ to the Trust Fund³⁰, (ii) the Rome Statute allows the Court’s Victims and Witnesses Protection Unit to assist victims, and (iii) any other independent and impartial body of governmental or non-governmental nature may assist victims with programmes of rehabilitation and support, including ‘emergency financial assistance, logistical help and expert advice’³¹.

Reparation is a broad and flexible concept, which has been introduced in the Statute to allow the judges to decide upon the widest possible range of means of remedy to victims’ rights violations. It follows that, especially in cases of mass or collective victimisation, ‘reparation’ may be better achieved through means other than restitution or monetary compensation. Indeed, such measures could be qualified as non-pecuniary forms of compensation or means of rehabilitation, insofar as they have a wider scope than compensating individual victims while they respond to the need to acknowledge publicly and transparently the causes, effects and remedies of international crimes, as well as to restore the dignity of victims in a societal context. Such measures – contained in the sentence of conviction as forms of reparations – may include: apology, commemoration, ‘public insurance’. The 1998 UN Handbook on Justice of Victims of Crime provides for the following descriptions of these means:

‘Apology. In some cultures, the admission of responsibility and an apology to the victim may help to satisfy the interests of justice and the needs of victims’³².

Commemoration. The commemoration of victims has an important moral significance. An example is a commemorative observance of an event (such as Holocaust day in Israel), the erection of a monument, or naming a park or other area in commemoration of the heroism or martyrdom of a victim or victims.

Public Insurance. In many jurisdictions, victims may have access to the basic social, health, mental health, and other public insurance systems for many of their victimisation-related needs. [...]

These types of reparation need either the cooperation of the relevant State(s) or the voluntary collaboration of the convicted person, as recognised by the ICC Appeals Chamber

³⁰ See Khan, *article 79*.

³¹ See Clark, *Declaration 363*. Reference must also be made to the efforts of the ICTR Registry to achieve rehabilitation of victims under the extremely limited mandate of UN Security Council resolution 855/1995 establishing the ICTR. A.U. Okali (ICTR Registrar 1997–2000) presented the concepts of restorative justice and victims’ rehabilitation in the opening remarks of the III session of the Arusha School on International Criminal Law and Human Rights, 23 Feb. 1998. He reiterated them in a document submitted to the Victims Rights Working Group during the March–April 1998 meeting of the Preparatory Committee: Okali, *Note. Rwanda Genocide: Towards a Victims-Oriented Justice. The Case for an ICTR Assistance to Victims Programme* (on file with the author). In 2000, the plenary sessions of the ICTR and ICTY Judges considered a proposal on ‘victims’ compensation and participation’ of the Prosecutor – which was a common organ to both Tribunals until 2003 – and made submissions to the UN Security Council recommending the creation of an appropriate mechanism for the ‘compensation’ of victims within the UN system (Cf. ICTY, *Victims Compensation and Participation – Judges’ Report of 13 September 2000*, on file with the author, also referred to by De Brouwer, A. M., *Senational Criminal Prosecution of Sexual Violence–The ICC and the Practice of the ICTY and ICTR* (Interscentia, 2006), 406). The Security Council failed to consider and support the *ad hoc* Tribunals’ proposals on victims’ rights, thus proving its unwillingness to remedy one of the most serious statutory pitfalls of the Tribunals.

³² An example of public apologies is given by the television-broadcasted apologies made by the President of the Serbian entity (*Repubblika Srbska*) of Bosnia and Herzegovina (at that time, Ms. Biljana Plavšić) to the Bosnian people for the crimes committed by the Serbian side in the Bosnian conflict of 1991–1995. Such a measure was imposed in the framework of the Dayton Peace Agreements and had a strong impact on the increasing isolation of the former Serbian-Bosnian authorities, including the former President, Karadžić, and the former head of the army, Mladić, who had been obliged to leave their public functions by the same Agreements as persons indicted by the ICTY for genocide, crimes against humanity and war crimes.

in connection with the Katanga's decision to apologise for his crimes after conviction³³. With respect to the fundamental rights of the convicted person, it would be unacceptable to oblige him/her to apologise unless the declaration of apology would be genuine and sincere vis-à-vis the victim(s). This is in line with the basic assumption that a Court's judgement may not oblige an individual to repent, thereby infringing upon his/her freedom of determination and inner moral sphere. In addition, orders of such a nature would not be enforceable. Conversely, the Court's decisions establishing principles relating to reparations can facilitate and be conducive to the perpetrators' determination to put in place conduct and behaviours that may bring about some level of satisfaction for, and in respect to, the victims.

- 14 Last, but not least, principles relating to compensation may just refer to the available national procedures under which individual victims may have effective access to an appropriate civil remedy. However, if this is not the case in a given situation (*i. e.*, the domestic legal system concerned is collapsed, or mechanisms of compensations are not available due to lack of political will to support victims), the Court should operate in accordance with the general principle of fairness ('equality of all before the law') and allow the access of victims to other sources of monetary compensation, including the ICC Trust Fund envisaged by article 79 and established, regulated and managed by the Assembly of the States Parties.
- 15 The first decision by a Trial Chamber on principles of reparations³⁴, while re-affirming the broad scope of reparations and their individualised character *vis-à-vis* the needs of the victims³⁵, has failed to directly establish principles for the benefit of the victims participating in the trial. In fact, child-soldiers entitled to participate under article 68(3) as victims of the war crime of 'enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities' obtained a pronouncement on certain principles applicable not only to them, but also to other child-soldiers and other victims who suffered harm as a consequence of the limited crimes for which Lubanga has been convicted: These victims are entitled to make representations in a procedure to be instituted by the Trust Fund for Victims, where ultimately the requests of reparations of Lubanga's trial participating victims will be considered, under the Trial Chamber's supervision. The standard proof to be used in these procedures, in which victims are parties (not participants) who must prove the harm suffered, is the 'balance of probabilities'³⁶, not the 'beyond reasonable doubt' standard

³³ See the Annex A to *Prosecutor v. G. Katanga*, ICC-01/04-01/07-3497, Defence Notice of Discontinuance of Appeal against the 'Judgement rendu en application de l'article 74 du Statut' rendered by Trial Chamber II on 7 April 2014, Appeals Chamber (25 June 2014). The Prosecutor recognised the authenticity of 'Germain Katanga's expression of sincere regret to all those who have suffered as a result of his conduct, including the victims of Bogoro' and decided to discontinue her appeal against the 12 years' sentencing judgement: *Cf. Prosecutor v. G. Katanga*, ICC-01/04-01/07-3498, Prosecutor, Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II date 7 March 2014 in relation to Germain Katanga, Appeals Chamber, 25 June 2014, para. 2. However, the legal representatives of victims expressed profound doubts concerning the validity of Katanga's expression of regret, given that it was formulated a few weeks after he had been found guilty beyond reasonable doubt for atrocity-crimes and had an interest in the discontinuance of the appeal made by the Prosecutor, which occurred on the same day of Katanga's quasi-apologies: *Cf. Prosecutor v. G. Katanga*, ICC-01/04-01/07-3505, Decision on the victims' requests to participate in the appeal proceedings, Appeals Chamber, 24 July 2014, para. 8. A statement of principle on the voluntary nature of apologies is also contained in para. 179 of the Lubanga's Trial Chamber decision summarized at mn 15.

³⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2904, Trial Chamber I, Decision Establishing the Principles and Procedure to be applied in Reparations, 7 August 2012.

³⁵ *Ibid.* at paras. 180 and 181, which read as follows: '180. In the Chamber's view, reparations, as provided in the Statute and Rules, are to be applied in a broad and flexible manner, allowing the Chamber to approve the widest possible remedies for the violations of the rights of the victims and the means of implementation. The Court should have a real measure of flexibility in addressing the consequences of the crimes that Mr. Lubanga committed in this case (*i. e.* enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities). 181. Although in this decision the Trial Chamber has established certain principles relating to reparations and the approach to be taken to their implementation, these are limited to the circumstances of the present case. This decision is not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies.'

³⁶ *Ibid.* at para. 253, including its footnote 439 on the relevant definition, which is reproduced below in fn. 45.

required for conviction in article 66. The theory of ‘proximate cause’³⁷ should replace the causation theory that is required for a sentence of conviction or acquittal. The Trust Fund for Victims should appoint a panel of experts to assess the harm suffered by the victims in a number of different localities, and shall decide on a ‘reparation-plan’. At the end of this procedure, Trial Chamber I retains the prerogative to consider and approve ‘proposals for collective reparations’ presented by the Trust Fund³⁸, which received the instruction to apply and interpret the Chamber’s principles on reparations and procedures, with the view to render reparation orders (margins 17 to 20 below), even if the Chamber anticipated that a newly constituted Chamber shall not ‘issue specific orders to the TFV on the implementation of reparations that are to be funded using voluntary contributions’³⁹. But the Trial Chamber went beyond the establishment of principles, as required by Art. 75, and relevant procedures because it re-stated matters already defined in the legal framework of the Court, such as the definition of victims (paras. 194 to 197), the obligation to respect ‘human dignity, non-discrimination and non-stigmatisation’ (paras. 187 to 192) and the self-evident concept that ‘[v]ictims should receive appropriate, adequate and prompt reparations’ (para. 242). More significantly, the Chamber inferred from the applicable law of the ICC that reparations’ procedures shall ensure ‘accessibility and consultations with victims’ (paras. 202 to 206), including a ‘gender-inclusive approach’ in such procedures (para. 202), which must be ‘multidisciplinary’, ‘gender sensitive’ (paras. 207 to 209) and ‘entirely voluntary’ in nature, hence entailing that ‘the informed consent of the recipient is necessary prior to any award of reparations’ (para. 204). The Chamber also emphasised that reparations’ procedures shall be ‘in the best interests of children’ and shall conform with children rights and needs (paras. 210 to 212). The actual principles established in the respect of Lubanga’s victims are fewer than the above-cited restatements of the law and they may be identified as follows: (i) ‘Reparations should secure, whenever possible, reconciliation between the convicted person, the victims of the crimes and the affected communities’ (para. 193); (ii) most vulnerable victims shall have precedence over others, whereby the most vulnerable are identified with ‘victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized children, for instance following the loss of family members’, in respect of whom the Chamber stated that ‘affirmative action’ may be required to secure participation in reparations’ procedures (para. 200); (iii) children’s reparations must be rehabilitative in nature, along the specific lines prescribed in para. 213⁴⁰ and other sections devoted to child-soldiers’ post-victimisation that, ultimately, can justify the interpretation of this decision given by the Appeals Chamber as entailing a reparations’ order.⁴¹

³⁷ Cf. *ibid.* at paras. 249 (especially footnote 434 that refers to relevant IACtHR jurisprudence and literature) and 250, which stipulates that the TFV should determine that ‘the crimes for which Mr Lubanga was convicted were the ‘proximate cause’ of the harm for which reparations are sought”.

³⁸ Cf. *ibid.* at para. 289(c).

³⁹ Cf. *ibid.* at para. 289(d), to be read in combination with para. 254, which justifies a wider delegation of power to the TFV on the basis of the fact that the convicted person was found indigent and the resources for reparations to be decided by the TFV are expected to originate from voluntary contributions by States or other Parties and not from the convicted person against which the Chamber may make a reparations’ order: see margins 19 and 20.

⁴⁰ Due to its relevance, para. 213 *ibid.* is hereby reproduced: ‘Reparations proceedings, and reparations orders and programmes in favour of child soldiers, should guarantee the development of the victims’ personalities, talents and abilities to the fullest possible extent and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms. For each child, the measures should aim at developing respect for their parents, cultural identity and language. Former child soldiers should be helped to live responsibly in a free society, recognising the need for a spirit of understanding, peace and tolerance, showing respect for equality between the sexes and valuing friendship between all peoples and groups.’

⁴¹ Cf. *Prosecutor v. T. Lubanga Dyllo*, ICC-01/04-01/06-2953, Decision on the admissibility of the appeals against Trial Chamber I’s Decision establishing the principles and procedures to be applied to reparations and directions on the further conduct of proceedings, Appeals Chamber, 14 December 2012, paras. 49–64 that fall under the rubric ‘nature of the Impugned Decision and the admissibility of the appeals’. In these complicated paragraphs, the five Judges’ panel finds that the Trial Chamber implicitly issued an order, without prejudice to the merits of the appeals’ proceedings versus the Trial Chamber’s decision. Given that a reparations’ order must

- 16 The Trial Chamber invited a broad category of victims to participate in a separate procedure to be arranged before the Trust Fund for Victims out of a concern that attributing reparations only to a small number of child-soldiers' victims could have been seen as discriminatory or unfair by other victims not covered by the excessively focussed charges formulated by the Prosecutor. In particular, the Trial Chamber's decision may imply that victims of rape, sexual enslavement, murder and other Rome Statute crimes (materially committed by the child-soldiers as '*instrumenta criminis*' of Lubanga) would have access to reparations' procedures before the Trust Fund, even if they had been excluded from the trial due to the restricted charges. While several elements of this Lubangareparations' decision are still under appeal at the time of completion of this Commentary's III edition, it must be stressed that it is not the role of the ICC to create equal opportunities on access to reparations for all victims in a given situation, as also reflected by the Statute in the unequivocal language of para. 6, article 75, the non-prejudice clause. The mandate of the Court's organs is to apply the law in specific cases, which however should be representative of the 'most serious crimes of concern to the international community as a whole' committed by a given individual. If future ICC trials will regard a wider range of charges than the ones for which Lubanga was prosecuted and convicted in first instance, the relevant Chamber may be more comfortable in establishing principles applicable to, and in respect of, the victims of the crimes adjudicated before it, including the victims who participated in the trial proceedings. This appears to be the direction taken by Trial Chamber II in organising the reparations' hearings after the final conviction of Katanga.⁴²

2. Decision of the Court

- 17 In addition to the general rule, paragraph 1 allows the Court to *determine the scope and extent of any damage, loss and injury*. Thus, on the basis of the evidence obtained, the ICC may go beyond the establishment of principles relating to reparations and identify *in concreto* the means of reparation and make any relevant determination on the *quantum* of damage, loss and injury⁴³. Such a process may be initiated by the Court itself, in exceptional circumstances, or upon request of the parties. *Exceptional circumstances* should be identified by the judges when they examine the concrete situation of victims. Certain victims could suffer the dramatic consequences of criminal conduct, including continued offences (*i. e.*, enforced disappearances constituting crimes against humanity under article 7) or repeated offences. Others may have a non-sufficient level of understanding of their right of 'access' to the Court or any available domestic remedy, in accordance with the principle of complementarity.

be specific, only few elements of the Lubanga's decision on principles of reparation can be interpreted as entailing such an order. These elements of specificity can be found, in the view of this author, only in the following three paragraphs concerning rehabilitation measures, which give effect to para. 213:

'233. Rehabilitation shall include the provision of medical services and healthcare (particularly in order to treat HIV and Aids); psychological, psychiatric and social assistance to support those suffering from grief and trauma; and any relevant legal and social services. 234. Rehabilitation of the victims of child recruitment should include measures that are directed at facilitating their reintegration into society, taking into account the differences in the impact of these crimes on girls and boys. These steps should include the provision of education and vocational training, along with sustainable work opportunities that promote a meaningful role in society. 235. The rehabilitation measures ought to include the means of addressing the shame that child victims may feel, and they should be directed at avoiding further victimisation of the boys and girls who suffered harm as a consequence of their recruitment.'

(*Cf. Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2904, Trial Chamber I, Decision Establishing the Principles and Procedure to be applied in Reparations, 7 August 2012).

⁴² *Prosecutor v. G. Katanga*, ICC-01/04-01/07-3508, Order instructing the Registry to report on applications for reparations, Trial Chamber II, 27 August 2014, paras. 7 to 11, which succinctly anticipates a scenario in which the Trial Chamber may not delegate to the Trust Fund its judicial mandate to decide on reparations.

⁴³ It will be exclusively for the jurisprudence of the Court to set a coherent record of decisions concerning the qualification of concepts such as damage, loss and injury. The Court will make use of the sources of law enlisted in article 21: see deGuzman, *article 21 (Applicable law)* and Donat Cattin, 'Il Diritto Applicabile', in: Lattanzi and Monetti (eds.), *La Corte Penale Internazionale: Organi-Competenza-Reati-Processo* (Giuffrè 2006) 269.

While the first pronouncement on reparations of the Lubanga Trial Chamber has been appealed also on the basis of the fact that the Chamber de facto delegated its authority to take a decision to the Trust Fund for Victims, the second Trial Chamber has taken the view of organising reparations' hearings to ascertain the harm suffered by victims willing to exercise their right to apply for reparations after the definitive conviction of Mr. Katanga.⁴⁴

It goes without saying that all decisions and determinations of the Court on concrete types, modalities and forms of reparation must be fully in line with the principles relating to reparations to be established by the Court itself at the very outset of this adjudication procedure. In line with the *travaux préparatoires* of article 75, the standard of proof concerning the causality-link between the crime for which the person has been found guilty beyond reasonable doubt and the harm suffered by the victim is the 'balance of probabilities', at least in accordance with the first jurisprudence of the Court on reparations.⁴⁵ This stems from a systematic interpretation of the Rome Statute's procedural law that is substantially in line with the prevailing practice in 'civil law' penal jurisdictions.

II. Paragraph 2: Orders 'directly against a convicted person'

Individual convicted persons may be the 'natural target' against whom the Court could make orders concerning restitution, awards of compensation and means of rehabilitation. The statutory language is once again of a permissive nature (the Court *may*), thus underlining the potential application of the provision, as it is deemed appropriate by the Court's judges. This may make sure that expeditiousness in adjudication is not jeopardised by complex decision-making in the area of reparations. Judges have, inter alia, to assess the concrete capacity of the convicted person(s) to provide reparations on the basis of his or her assets and prospective ability to generate income or other immaterial goods.⁴⁶

As affirmed above, the integrative role of the Trust Fund is absolutely essential, especially in light of the exclusion from the Statute of any direct form of State responsibility to provide means for reparations 'on behalf of' the convicted persons, including where the latter was acting in the official capacity of State agent in committing the offence, and he/she is unable to provide victims with reparations⁴⁷. Furthermore, article 79 was drafted precisely in order to integrate article 75, insofar as it affirms that the Trust Fund is *for the benefit of victims* [...]

⁴⁴ See *Prosecutor v. G. Katanga*, ICC-01/04-01/07-3508, Order instructing the Registry to report on applications for reparations, Trial Chamber II (27 August 2014), paras. 7 to 11.

⁴⁵ Due to its relevance and interpretative importance, para. 253 of the Lubanga Reparations' Decision (see note 34) is hereby reproduced in its entirety, including its extremely significant footnote 439:

'253. Given the Article 74 stage of the trial has concluded, the standard of 'a balance of probabilities' is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person.[Footnote] 439: "The term "balance of probabilities" is also described as a "preponderance of proof" or "balance of probability". Black's Law Dictionary defines it as: 'the greater the weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other'. Black's Law Dictionary, Eighth Edition, Garner (ed.), 2004, page 1220. It is important to note that during the Preparatory Commission some delegations suggested that the evidence standard should be based on a 'balance of probabilities', as opposed to the 'beyond reasonable doubt' standard applied in criminal proceedings. Many reparations programmes dealing with mass claims have also adopted flexible evidential standards based on a 'plausibility test' in order to accommodate the situation of the victims, who usually have difficulties in providing the documentation that is required. See Lewis and Friman, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2000) 486.

⁴⁶ Reference is made to the Lubanga Reparations' Decision, see note 34, at para. 269, which states that '[t]he convicted person has been declared indigent and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that Mr. Lubanga is only able to contribute to non-monetary reparations.' The Appeals Chamber decided instead that Lubanga is liable even if found indigent, as he will be obliged to refund the Trust Fund for the 'advance' that the Fund may decide to pay for reparations (paras. 52 and 58), order for reparations (amended) annexed to the Lubanga Reparations' Appeal Decision.

⁴⁷ Article 73 para. 2 (b) of the ICC Draft Statute contained the following heavily bracketed provisions:

and of the families of such victims (cf. Article 79 para. 1), and that the Court may order money and other property collected through fines or forfeiture to be transferred [...] to the Trust Fund (cf. Article 79 para. 2). In fact, the penalties⁴⁸ of fines (cf. Article 77 para. 2 (a)) and forfeiture of proceeds, property or assets derived directly or indirectly from [a] crime (cf. Article 77 para. 2 (b)) have absorbed the so-called exemplary element or punitive element that could have been comprised in the awards of compensation according to the UK proposal on reparations presented at the Preparatory Committee, which was merged with the French proposal in the bracketed text of article 73 of the ICC Draft Statute⁴⁹. The Rules of Procedure and Evidence adopted by the Assembly of States Parties and the other regulatory instruments of the Court and of the Trust Fund have confirmed the functioning of a regime in which the assets collected by the Court must be directed to the victims and their families. In 2011, the ASP adopted a resolution on reparations in which States tried to influence the judicial interpretation of article 75 in order to avoid the unlikely scenario that orders for reparations against a convicted person would imply the use of assessed contributions or other direct financial contributions of States Parties⁵⁰. This resolution is, however, not legally binding for the Judges and other Court organs since ASP resolutions are no source of law within the meaning of article 21.

III. Paragraph 3: Invitation and account of representations

- 21 A literal interpretation of paragraph 3 of article 75 seems not to add anything, in the victims' perspective, to the general rule on victims' participation in the ICC proceedings contained in article 68 para. 3. To a certain extent, paragraph 3 of article 75 appears to reduce the victims' right of intervention into a mere faculty, as far as the particular stage of reparation hearings after conviction is concerned (cf. article 76 para. 3). The verb used is *may* ('the Court may invite [...] victims [...]'), whereas article 68 para. 3 states that 'the

'In accordance with the principles established by the Court: [...] (b) [The Court may also [make an order] [recommend] that an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, be made by a State]: [if the convicted person is unable to do so himself/herself; [and if the convicted person was, in committing the offence, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority]].'

Just before the Rome Conference, I wrote: '[...] the authors of this proposal – namely, the French delegation to the Preparatory Committee – convinced neutral observers and a substantial number of negotiators with comments on the limited nature of the provision of para. 2 (b), article 73. This is strictly connected with the need, for instance, to ensure that rehabilitation for victims/survivors who have been expelled from a public office is fulfilled through the following measures under para 2 (b):

- (i) their re-assignment to that public office by the State,
- (ii) the apology on behalf of the State by the new regime for the crimes committed by the previous leader(s) of the State who was sentenced guilty before the ICC.

It is therefore only in situations in which this form of reparation cannot be made by the individual perpetrator, a former official of the State, that the ICC may request the necessary co-operation of State(s) in order to guarantee that justice for victims is done.' Cf. Donat-Cattin, in Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica, 1998), 251.

Unfortunately, the great majority of States participating in the ICC Statute negotiations firmly opposed any form of 'subsidiary State responsibility' in the framework of reparation to victims. Therefore, para. 2 (b) was deleted by consensus from the text of article 73 (now 75). Yet, the decision of the Court on reparations may still determine the appropriate cooperation of States under article 86 of the Rome Statute and general international law. For the relevant practice of States on responsibility and reparation, see: ICRC, *Customary International Humanitarian Law – Vol. I Rules* (2005) 530.

⁴⁸ Such types of penalties are defined as 'additional', because they may be imposed only after the principle penalties of imprisonment or life imprisonment. See Fife, *article 77*.

⁴⁹ *Ibid.* note 34.

⁵⁰ Cf. operative para. 2, Resolution ICC-ASP/10/Res.3, ICC-ASP/10/20, 20 December 2011, stressing 'that as liability for reparations is exclusively based on the individual criminal responsibility of a convicted person, under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, for funding reparations awards, including in situations where an individual holds, or has held, any official position'.

Court *shall* permit their views and concerns to be presented and considered [...]’⁵¹. Such a contradiction confirms this author’s interpretation of article 68 para. 3, as it stresses that victims have – first of all – a general right to be ‘potential parties’ in the proceedings and may decide to make representations, upon invitation of the Court, in the post-conviction stage, in which the need to protect the interest of the convicted person prevails over the legitimate quest for punishment from victims⁵². It is, indeed, in the course of the trial and pre-trial stages of the penal process that victims or their representatives have the right to inform the Court of their views and concerns related to reparations, elements of evidence and any other issue connected to the crimes allegedly committed against them.

However, there is a substantial difference between this paragraph in the English version of the Statute and the corresponding one of, at least, other two official languages of the UN, namely, French and Spanish. The latter official texts do not include the wording ‘*may invite*’, but limits the content of article 75 para. 3 to the fact that *the Court shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States*⁵³. Thus, serious doubts of interpretation arise as to the invitation by the Court before making an order on reparations. In fact, when the Court decides that representations from persons mentioned in the paragraph or States would be useful for its decisions, the Court may invite them to do so. In any case, once these representations take place, the Court is obliged to take them into account.⁵⁴

Not only victims, but also other interested persons, such as *bona fide* third parties (*i. e.*, 22 owners of property formerly belonging to victims), and the convicted person are entitled to be heard by the Court on measures concerning reparations. Such entitlement stems from the combined reading of article 75 para. 3 and article 76 para. 3, which provides that the potential ‘sentencing hearing’ may become the ‘reparations hearing’ where all representations under article 75 *shall* be heard⁵⁵. Whereas the possibility to grant locus standi to persons appears to be reasonable in the framework of a fair trial to individuals, as far as they could be affected by the Court’s decisions, the possibility for the Court to invite States to make representations is much more restricted, especially because States have a role *stricto sensu* in the penal process only when there is an issue of admissibility of a case before the ICC. Furthermore, the Draft Statute’s provisions related to orders against certain States to make appropriate forms of reparations⁵⁶ were not adopted. Yet, one case in which a State could be

⁵¹ See Donat-Cattin, *article 68*, mn. 24.

⁵² As I have written on several occasions, the role of victims in the proceedings is that of ‘guardians of the fairness of the prosecution, not agents in search for retribution’.

⁵³ The Spanish text, as negotiated and adopted in Rome, reads as follows:

‘La Corte, antes de tomar una decisión con arreglo a este artículo, tendrá en cuenta las observaciones formuladas por el condenado, las víctimas, otras personas o Estados que tengan un interés, o las que se formulen en su nombre.’

The French text, in the same vein, states:

‘Avant de rendre une ordonnance en vertu du présent article, la Cour tient compte de toutes observations formulées par la personne condamnée, les victimes, les autres personnes intéressés ou les Etats intéressés, ou au nom de ces personnes ou de ces Etats.’

⁵⁴ The initial practice of the Court has not been consistent on this point, suggesting that various interpretative avenues are plausible: In Katanga, Trial Chamber II issued an order that may be seen as a preparatory step to victims’ representations on reparations (see paras. 7 to 12 of the Decision cited in see note 42). In Lubanga, Trial Chamber I deferred all applications from, and relevant consultations with, victims to the Trust Fund (see para. 289(b) of the Decision cited in see note 34).

⁵⁵ The post-conviction hearing(s) on reparations are disciplined by rules 143 (‘Additional hearings on matters related to sentence or reparations’), 96 (‘Publication of reparation proceedings’) and 97 (‘Assessment of reparations’) of the Rules of Procedure and Evidence, while rules 94 (‘Procedure upon request’ [of the victims]) and 95 (‘Procedure on the motion of the Court’) regard the commencement of the reparations’ proceedings, which may take place at any stage of the proceedings in which victims have the right to participate. However, in accordance with Regulation 56 (‘Evidence under article 75’) of the Regulations of the Court, ‘*The Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial.*’.

⁵⁶ See the relevant text reproduced in see note 47.

reasonably entitled to intervene in reparations' proceedings may be when the State is a *bona fide* third party. Another instance of State's participation could be when the convicted perpetrator was a public official of such State, and measures of reparations may regard the restoration of rights or the public acknowledgement of the crimes. These measures, although addressed against the convicted person, could be effectively implemented only with the essential co-operation of Governmental institutions, including through judgements against the State by domestic civil Tribunals or regional human rights Courts, judgements that could be also based upon previous decisions on reparations of the ICC.

IV. Paragraph 4: Necessary 'measures under article 93, paragraph 1'

- 23 The apparently superfluous inclusion and repetition of the words *under this article* contained in this paragraph indicate the problematic nature of the compromise reached at the Rome Conference on this provision, aimed at linking reparations to co-operation of States with the ICC. Such a co-operation is particularly important with respect to the *identification, tracing and [above all] freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties* (cf. Article 93 para. 1 (k)). It is obvious that, if appropriate protective measures of a provisional nature are not timely undertaken, the accused has the chance to hide or 'destroy' all means and results of any alleged criminal conduct. Indeed, to freeze assets makes justice effective and reparations possible.
- 24 Notwithstanding these compelling arguments in favour of effective protective measures, several States participating in the ICC negotiations had been extremely cautious in dealing with this matter. On one hand, they based their attitude against protective measures on the strict interpretation of the presumption of innocence, and more broadly, the right of the accused not to be potentially damaged by a provisional measure such as freezing of assets (with all problematic consequences in the area of compensation for damages in the hypothesis of acquittal or pre-trial dismissal of charges). On the other hand, some States' delegates feared that 'non-crime related property'⁵⁷ could have been subject to such measures, thus infringing upon prohibitions related to property rights under their domestic law. Therefore, in the intention of some States the above provision should have limited 'protective measures' to the very advanced procedural phase *after conviction*, and should have not allowed the Court to go beyond an order *under this article*. Conversely, the Draft Statute's article 73 para. 3 did not envisage any procedural threshold after which protective measures were possible, even though it was construed in a sufficiently precise manner to avoid provisional requests on matters not pertaining to reparations as enshrined in the Statute⁵⁸.

There is, however, a statutory norm that makes possible to take protective measures before conviction, namely, article 57 para. 3 (e), which relates to powers and functions of the Pre-Trial Chamber. It states that such a Chamber – 'having due regard to the strength of the evidence and the rights of the parties concerned' – has the power to 'seek the cooperation of States, pursuant to article 93 para. 1 (k), to take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims'. In addition, and most importantly, Rule 99 of the Rules of Procedure and Evidence clarifies that 'the Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations

⁵⁷ Language used in footnote 24 to article 73 para. 3, ICC Draft Statute (1998) referred to in see note 18.

⁵⁸ Article 73 para. 3 of the Draft Statute (1998), read:

'In exercising its power under this article, the Court may determine whether, in order to give effect to any order it may make, it is necessary to request protective measures under article 90, paragraph 1.'

This provision responded to the need of preventing perpetrators from dissolving their assets and properties before any order of confiscation be made by the Court in its final determination on penalties, including fines and forfeiture measures.

or who have given a written undertaking to do so, determine which measures should be requested.’ Rule 99 is therefore providing with an interpretation of article 75 para. 4 that empowers the Trial Chamber on the matter of protective measures.

The initial jurisprudence of the first eleven years of the ICC is confirming this interpretation of para. 4, at least in connection with the pre-trial phase: When confirming the charges as first judicial acts following the execution of the first two arrests, the Pre-Trial Chamber ordered the Office of the Prosecutor to take all necessary steps to identify, trace, freeze or seize the property and assets of Mr. Lubanga and Mr. Katanga⁵⁹. These requests were made for the purpose of preserving the integrity of the assets, which may be utilised for reparative measures in case of conviction of the accused persons. Similar decisions, as revealed by a 2014 order of the Trial Chamber that rendered public Pre Trial Chamber’s pronouncements regarding the *Kenyatta* and – via citation – *Bemba* cases, have been taken in the other cases, but have been kept confidential in accordance with the letter of Art. 87, para. 3. The aim of these decisions was to obtain ‘the cooperation of States pursuant to article 93(l)(k) of the Statute, to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.’⁶⁰

V. Paragraph 5: Effect of decisions

Paragraph 5 describes the right of victims to seek the enforcement by national Courts of the decisions of the ICC, which is binding upon all States Parties according to a systematic reading of its Parts 9 and 10. Such a general rule is implied in the Statute as a whole: States Parties shall give effect to decisions of the Court (including measures on reparations) to fulfil their obligations within the normative framework of the ‘self-contained’ treaty-based system of international criminal justice⁶¹. It is hereby submitted that this is true even if Part 10 of the Statute does not include an explicit norm posing a general obligation for States Parties to

⁵⁹ See, in particular, paras. 140 and 141 of *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-37 (ICC-01/04-01/06-8-US-Corr.), Pre-Trial Chamber I, Decision concerning Pre-Trial Chamber I’s decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo, 24 February 2006. In para. 141, the Pre-Trial Chamber calls for the full cooperation of the Office of the Prosecutor to realise the ‘effectiveness of the reparation system’, which ‘would highly benefit from the Prosecutor’s due consideration’ of measures ‘to identify, trace, and freeze or seize the property and assets belonging to Mr. T. Lubanga D. at the earliest opportunity’. See also: *Prosecutor v. G. Katanga*, ICC-01/04-01/07-3505, Urgent request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of the property and assets of Germain Katanga, Pre-Trial Chamber II, 6 July 2007. Almost identical, or very similar, decisions of the Pre-Trial Chambers have been issued in respect of other cases, at very early stages of each proceeding. Most of these decisions appear to be confidential.

⁶⁰ Cf. para. 6, *Prosecutor v. Kenyatta et al.*, ICC-01/09-02/11-42, Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, 5 April 2011. Para. 7 of this decision, taken by a Single Judge, cites a previous decision relating to the Bemba case and is hereby reproduced, in light of its significance, including its footnote 6: ‘[...] the Single Judge stresses that the identification, freezing and seizure of property and assets ‘[...] is necessary in the best interests of the victims’ to guarantee that, in the event of a conviction, ‘the said victims may, pursuant to article 75 of the Statute, obtain reparations for the harm which may have been caused to them’ ([Footnote] 6: *Prosecutor v. Bemba*, ICC-01/05-01/08-9-US-Exp-tENG,) Decision and Request to the Democratic Republic of Congo for the Purpose of Obtaining the Identification, Tracing, Freezing and Seizure of Property and Assets, [date not available], Pre-Trial Chamber III, para. 7)’. The latter decision is not yet public at the time of writing (3 November 2014). Conversely, the above mentioned Kenyatta et al. 2011 decision has been reclassified as public due to repeated leaks attributed to the responsibility of the Government of Kenya: see *Prosecutor v. Kenyatta*, ICC-01/09-02/11-967, Order concerning the public disclosure of confidential information, Trial Chamber V(B), 21 October 2011.

⁶¹ Draft article 73 para. 5 contained an interesting norm on the relationship between the judgement of the ICC and the duty of enforcement of National jurisdiction: ‘Victims or their successors or assigns may seek enforcement of an order [or judgement] under the present article by competent national authorities [...]’. Notwithstanding the deletion of this language aimed at ensuring the possibility for victims to obtain reparations in a civil proceeding under domestic law, the following para. 6 of article 75 (see below) does not prejudice the right of victims to make civil claims before national Courts on the basis of an ICC verdict.

recognise and enforce Court's judgements⁶². Such an obligation is, however, entailed in the system of co-operation between the Court and its member States enshrined in the Statute⁶³. This interpretation of the legal framework on cooperation has been confirmed by Trial Chamber I in its first decision on principles relating to reparations, where it affirmed that 'State Parties have the obligation, under Parts 9 and 10 of the Statute, of cooperating fully in the enforcement of orders, decisions and judgments of the Court, and they are enjoined not to prevent the enforcement of reparations orders or the implementation of awards'⁶⁴.

- 27 If reparations at the national level have already been granted to the victim (*i. e.*, through civil proceedings), the ICC shall take them into account with the understanding that the Court should only complement domestic criminal justice systems. Therefore, the Court will not order the restitution of stolen property if this was already ordered against the perpetrator and duly enforced under domestic civil law and procedure.

As for the modalities of enforcement, reference is made to article 109.

VI. Paragraph 6: No prejudice of 'rights of victims under national or international law'

- 28 This clause, common in international human rights instruments, was considered necessary because of the potential differing standards provided by national and international law⁶⁵. Reparations' regimes applicable to a given case of victimisation may differ in quality and/or quantity if such a case is examined by the ICC and by a national Tribunal or, in the European, Inter-American and African regional human rights Courts'systems (after the exhaustion of available domestic remedies). In some circumstances, national law might go further than the standards (*principles relating to reparations*) established in the ICC framework. The opposite might also be true. For instance, a national system might provide for compensation but not for other forms of reparation, such as public apologies. Therefore, paragraph 6 responds to the need of affirming that rights under international law (as codified in the law of international courts and human rights bodies, and developed in their evolving practice, as well as in customary norms) are applicable in order to avoid national authorities choosing lower standards, and to ensure that the highest standard of protection prevails⁶⁶. This is true both when: (i) the principles relating to reparations as established by the Court go beyond restrictive domestic measures of reparation; (ii) the concrete forms of reparation

⁶² For a detailed explanation concerning the absence of a general obligation on recognition and enforcement of judgements in the *Rome Statute*, see Marchesi, in: Lattanzi and Schabas (eds.), *Essays vol. I*. Article 58 of the 1994 ILC Draft Statute (*States Parties undertake to recognise the judgements of the Court*) was extensively discussed at the 1996 sessions of the Preparatory Committee. As Marchesi (*op. cit.*) writes: 'the inclusion of a provision of a general character such as the one in article 58 of the International Law Commission's draft was questioned on different grounds. Some [delegations] felt it was unnecessary, being implicit in acceptance by States of the jurisdiction of the Court, unless it was extended to mean that all States Parties were under an obligation to enforce the Court's sentences. Others pointed out that if the Court was to impose only sentences of imprisonment, article 59 of the ILC Draft was sufficient, rendering the provision in article 58 useless [some parts of ILC Draft article 59 corresponds *grosso modo* to provisions contained in article 103, *Rome Statute*]. Draft article 58 was also questioned on the merits, especially by those concerned that it might imply adoption of the continued enforcement approach, as opposed to the conversion approach, based on National procedures of recognition. Cf. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I (*Proceedings of the Preparatory Committee During March-April and August 1996*), GA, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) (paras. 351–355).'

⁶³ The last *considerando* of the Preamble confirms that States Parties are '[r]esolved to guarantee lasting respect for the enforcement of international justice', thus undertaking to implement Court's decisions on reparations to victims.

⁶⁴ Cf. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2904, Trial Chamber I, Decision Establishing the Principles and Procedure to be applied in Reparations, 7 August 2012, para. 256.

⁶⁵ Cf. Redress, *Reparation for Victims in the International Criminal Court: Principles, Commentary and Recommendations for the Rome Diplomatic Conference* (1998) 23.

⁶⁶ *Ibid.*

available at the domestic level translate the Court's principles into a much more comprehensive way than as envisaged by the Court, as far as specific measures of reparation are concerned, or even attribute to victims additional means to recover from trauma. The first Trial Chamber's jurisprudence on reparations in the Lubanga case reaffirmed the importance of this non-prejudice clause⁶⁷.

This norm appears to be perfectly in line with other Statutory provisions aimed at prohibiting the interpretation of the law of the ICC as crystallising developing legal standards and/or codifying existing rules in the area of international criminal law and procedure. Article 75 para. 6 has to be read in conjunction with article 10 – affirming that *nothing* in Part 2 of the Statute *shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law [...]* – and with the complex normative definition of *Applicable law* under article 21. The comparison of these regulatory frameworks results in an unequivocal interpretation of the intention of the ICC legislator; namely, to provide victims with the highest possible degree of protection of their right to reparations, whether within or outside the Court's system⁶⁸.

C. Conclusions and remarks on relevant rules and regulations

The flexible character of article 75 attributes a satisfactory margin of discretion to the judges of the Court regarding the mandatory decision on principles relating to reparations, on one hand, and the possible determination on the 'quality and quantity' of measures of reparation, on the other. This mandatory nature of the decision on principles is reflected in the verb 'shall' of the first sentence of article 75 para. 1, while the permissive nature of the determination on 'modalities' stems from the verb 'may' utilised in the second sentence of the same paragraph.

Article 75 covers a very serious *lacuna* of the Statutes of *ad hoc* Tribunals (Nuremberg, Tokyo, ICTY and ICTR), that did not properly address the issue of 'justice for victims'⁶⁹. Indeed, the punitive and preventative role of the Court *vis-à-vis* the most serious crimes of concern to the International Community as a whole⁷⁰ must not be confined to the prosecution and punishment of perpetrators. Conversely, it must bring about some feasible forms of satisfaction and guarantee of non-repetition⁷¹ for those who directly or indirectly suffered from the commission of such crimes. A 'victims' friendly Court' has been advocated and welcomed by all the most active players in the creation of the Court, including the Secretary General of the United Nations and the Chairperson of the Committee of the Whole of the Rome Conference⁷². The content of article 75, combined with that of article 68 and several

⁶⁷ See paras. 181 (entirely reproduced see note 35) and 201, Lubanga Reparations' Decision see note 64.

⁶⁸ The Court's system is composed of the criminal jurisdictions of States Parties and the complementary jurisdiction of the Court itself.

⁶⁹ See McKay's statement, reproduced see note 8.

⁷⁰ For details see Zimmermann, *article 5*.

⁷¹ See literature (e.g. van Boven, *Basic Principles*).

⁷² On 1 October 1998, at UN Headquarters in New York, Ambassador P. Kirsch of Canada, President of the Preparatory Commission for the ICC envisaged by Resolution F of the Rome Conference's Final Act, said: '[...] As we embark on the future work to try to make the Court as fair as effective as possible, it will be essential to recall that the fundamental objective of the creation of an independent Court was the protection of the victims. The development of the modalities of application of its Statute should not result in protecting, albeit inadvertently, the perpetrators of the truly horrifying crimes that are defined in its Statute: genocide, crimes against humanity, war crimes. It should not result either in extending unconditional protection to the interests of states when those interests may clearly conflict with the interests of the victims. In the context of the ICC, the victims themselves should remain the absolute priority of the international community, and this should be never forgotten.' The entire text of the above speech is reproduced in *No Peace Without Justice (quarterly)* (Rome, 1998) 4, on file with the author.

other statutory provisions⁷³, makes justice of this approach and renders the ICC an institution in which victims are a central element of the penal proceedings.

32 The Rules of Procedure and Evidence adopted by the Assembly of States Parties are a useful instrument to make article 75 fully operational, especially with respect to the list of elements that must be contained in a victim's request for reparation⁷⁴ and to the obligation for the Registry to 'take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States'⁷⁵. More importantly, rules 89, 90, 91, 92 and 93 concerning the modalities of victims' participation in the proceedings under article 68 para. 3 are of essential relevance also for article 75⁷⁶. These rules have a tangible impact on the implementation of the victims' right to apply for reparations, insofar as without an effective mechanism of access to justice and the related right to intervene (through legal representatives), victims may not be in the position to express their *views and concerns* relating to their right to apply for reparations. On a separate but connected plain, the rules and regulations pertaining to the effective functioning of the Trust Fund can have a profound significance for the implementation of the principles relating to reparations that will be produced by the Court's jurisprudence. It is therefore necessary for the Assembly of States Parties, which is the organ entitled to establish and manage the Trust Fund, to perform its function in such a way as to empower the Fund to provide redress and reparations 'for the benefit of victims of crimes within the jurisdiction of the Court'⁷⁷, which encompasses the complementary jurisdiction of the Court itself and the primary jurisdictions of the States Parties to the Rome Statute. Such a function is not simply fulfilled through the adoption of a secondary instrument like the Regulations of the Trust Fund for Victims⁷⁸, but it requires a continued support of the ICC executive body for the Fund as well as an approach to the principle of complementarity that is not limited to the fight against impunity of the perpetrators as it should extend to the struggle for access to justice and reparation of the victims.

⁷³ A comprehensive list of provisions mentioning victims in the *Rome Statute* adopted by the Diplomatic Conference (cf. UN Doc. A/CONF.183/9 (17 July 1998)) reads as follows: article 15 para. 3; article 19 para. 3; article 43 para. 6; article 54 para. 1 (b); article 57 para. 3 (c), (e); articles 68, 75 and 79 in their entirety; article 82 para. 4; article 87 para. 4; article 90 para. 6 (b); article 93 para. 1 (j); article 109; article 110 para. 4 (b). The articles mentioning victims in the ICC Draft Statute, see note 18, were the following: [12]; [13[1]]; 43[10] and fn. 23; 44[4] and fn. 24; 54[2(ii)bis]; 54[4]; 68; [73, and fn. 22, 23 and 24]; 75[(d) and fn. 6 and 7]; 76[(vi)] and fn. 12; 79 and fn. 16; 86 and fn. 3; 88[4] and fn. 25; 89.3; 90.1 (k), 90.7 (2) and fn. 3, 7 and 8 (b); 91[7 (c) and fn. 44 (d)]; 99.1 and fn. 8. Square brackets surrounded provisions upon which there was no general agreement among States participating in the UN/ICC Preparatory Commission (see see note 12).

⁷⁴ Cf. rule 94 ('Procedure upon request'). In the initial practice of the ICC, the requirements of Rule 94 had been further detailed in internal documents of the Court, including extremely complicated standard forms (questionnaires), which were often merging the requirements of victims' participation and reparation. Regulations 86, para 1, and 94, para. 1 mandated the Registry to prepare these forms, respectively on participation and reparation. As we anticipated in the 2nd edition of this Commentary, the day-to-day practise of the ICC has revealed the limited practicality of these regulatory provisions and, in particular, of the forms, which are so cumbersome and detailed for the victims that expert legal assistance is necessary from the very start of the relationship between the victims and the Court.

⁷⁵ Cf. Rule 96 ('Publication of reparation proceedings'), para. 1, which goes beyond the simple obligation of notification to victims who applied to participate in the proceedings and/or submitted requests for reparation in accordance with Rule 94, or victims notified by the Court regarding proceedings 'on the motion of the Court' *ex* Rule 95. In the latter situation, if 'a victim [notified by the Court on its own motion concerning his/her right to reparation] requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim.' Cf. Rule 95, para. 2.

⁷⁶ See mn 39 to 46 of Article 68.

⁷⁷ Cf. article 79, para. 1.

⁷⁸ Cf. ICC-ASP/4/3/Res.3, adopted and entered into force on 3 December 2005.

Article 76 Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

Literature: D'Ascoli, S., *Sentencing in International Criminal Law – The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Oxford, Portland: Hart, 2011); Henham, R., 'Developing Contextualized Rationales for Sentencing in International Criminal Trials – A Plea for Empirical Research', (2007) 5 *JICJ* 757–778.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	2
I. Paragraph 1.....	2
II. Paragraph 2.....	3
1. Distinct sentencing hearing.....	3
2. Procedure in case of guilty plea.....	7
3. Relevant additional evidence.....	8
III. Paragraph 3.....	10
IV. Paragraph 4.....	11

A. Introduction/General remarks

The final provision in Part 6 of the *Statute* establishes the principle of a distinct sentencing phase. The text is derived from a provision in the ILC Draft Statute of 1994 which stated that '[i]n the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed'¹. The adoption of article 76 was almost perfunctory. Briefly considered by the Preparatory Committee in 1996², it was not addressed in any of its Working Groups³ and was adopted by the Rome Conference without difficulty⁴.

¹ 1994 ILC Draft Statute, article 46 para. 1, p. 123. A second sentence in the ILC Draft article concerned aggravating and mitigating factors to be considered in imposing sentence. The Zutphen Draft indicated that the issues were addressed elsewhere (Zutphen Draft, p. 124, *nota bene*). These considerations are now reflected in article 78 para. 1 of the Rome Statute.

² 1996 Preparatory Committee I, p. 46; 1996 Preparatory Committee II, p. 226.

³ See note 1, Zutphen Draft, p. 124.

⁴ Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.2 (4 July), p. 5; UN Doc. A/CONF.183/C.1/SR.24, paras. 203; Compendium of draft articles referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998, UN Doc. A/CONF.183/C.1/L.58, p. 43; Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.8 (15 July), p. 10; UN Doc. A/CONF.183/C.1/L.88, p. 14; UN Doc. A/CONF.183/C.1/L.76/Add.6, p. 13.

B. Analysis and interpretation of elements

I. Paragraph 1

- 2 If the accused is convicted, the Trial Chamber is required to establish the ‘appropriate sentence’. In so doing, the *Statute* instructs it to consider the evidence presented and submissions made during the trial that are relevant to the sentence. Mitigating and aggravating factors relating to the commission of the crime itself, such as the individual role of the offender and of the treatment of the victims, will form part of the evidence germane to guilt or innocence and thus appear as part of the record of the trial. Paragraph 1 was not part of the ILC Draft, and appeared for the first time in the final draft adopted by the Preparatory Committee in April 1998⁵.

II. Paragraph 2

1. Distinct sentencing hearing

- 3 Paragraph 2 creates a strong presumption in favour of a distinct sentencing hearing following conviction. Though not mandatory, it must be held upon the request of either the Prosecutor or the accused, and failing application from either party, the Court may decide to hold such a hearing *proprio motu*. The *Statute* does not say how and when the application is to be made, and within what time limit, if it is at the request of one of the parties, or whether the parties may make representations before the Court should it be considering the convocation of such a hearing on its own motion. The Final Draft text adopted by the Preparatory Committee included the requirement that the request for such a hearing be ‘made before the completion of the trial’⁶, and the phrase was retained in the version adopted by the Working Group⁷. This seems superfluous, which must explain why the Drafting Committee eliminated the words ‘made before the completion of the trial’⁸. Obviously, the trial ends with imposition of sentence, and any application to hold a hearing on such questions must be made before sentence is pronounced. It would be appropriate, then, for the Court to inquire of the parties at the time it issues a verdict of guilt as to whether they seek a sentencing hearing. If one or other of the parties is not yet ready to make such a request, an adjournment could be requested of the Court. Should the Court be impatient, the prudent course would be to ask for a sentencing hearing; the applicant could later withdraw the request. The Court should provide the defence with adequate time to prepare materials, in accordance with article 67 para. 1 (c). The Working Group at the Rome Conference was concerned about notice to the parties of such a hearing, but expressed this in a footnote indicating that the matter should be dealt with in the rules of Procedure and Evidence⁹. The rules make specific provision for the distinct sentencing hearing. rule 143 states that the Presiding Judge is to set the date of the further hearing. The hearing may be postponed, ‘in exceptional circumstances’, by the Trial Chamber acting on its own motion, or upon the application of the Prosecutor, the defence or the legal representatives of the victims participating in the proceedings¹⁰. Given that the Article 76 and rule 143 only refer to the trial stage it follows that there is no separate sentencing hearing at the appeals stage¹¹.

⁵ Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Rev.1, p. 143, article 74.

⁶ *Ibid.*, article 74 para. 2.

⁷ See note 4, Report of the Working Group on Procedural Matters (4 July), p. 5.

⁸ Report of the Drafting Committee to the Committee of the Whole, UN Doc. A/CONF.183/C.1/L.88 (16 July), p. 14.

⁹ See note 4, Report of the Working Group on Procedural Matters (4 July), p. 5, fn. 9.

¹⁰ Rules of Procedure and Evidence, Document ICC-ASP/1/3, pp. 10–107, rule 143.

¹¹ Crit. D’Ascoli, *Sentencing* (2011) 276–7, arguing that it should be compulsory for appeal as well.

Thus, in the first Appeals Judgment against Thomas Lubanga only one hearing has been held by the Appeals Chamber. However, the possibility of a separate sentencing hearing may be inferred from rule 149 according to which the provisions and rules governing the trial procedure shall apply *mutatis mutandis* to the appeals procedure. Of course, a separate sentencing hearing makes less sense at the appeal stage where normally no new evidence is produced. In any case, it remains to be seen how the future practice of the Court will deal with this question.

Before the International and the American Military Tribunals, there appears to have been no practice of holding distinct hearings to address matters concerning the sanction, once guilt had been established, although the British Military Tribunals seem to have followed this procedure in some cases¹². The *ad hoc* Tribunals held separate sentencing hearings and issued distinct sentencing decisions in their initial cases, although this was not mandated either by their statutes or their rules¹³. They have even refused to hear evidence that was germane only to sentencing prior to a verdict being issued. In the *Tadić* case, the Trial Chamber ruled that ‘no information that relates exclusively to sentencing should be presented by a witness during the trial as to the guilt or innocence of the accused. So, if a witness is testifying about guilt or in the sense of the accused, that witness should not be able at the same time to offer evidence exclusively as to sentencing’¹⁴. But in July 1998, the rules of the two *ad hoc* Tribunals were amended in order to eliminate any suggestion of a separate sentencing phase¹⁵. Thus, in the *Celebici* judgment, rendered in November 1998, the accused were found guilty and sentenced immediately, and there is no suggestion that they were ever invited to submit evidence in mitigation of punishment¹⁶. In the ICC’s first trial of Thomas Lubanga the judgment was delivered on 14 March 2012, the additional sentencing hearing took place, at the request of the defence¹⁷, on 13 June 2012 and the sentencing decision was delivered on 10 July 2012¹⁸. It has been confirmed by the Appeals Chamber on 1 December 2014.¹⁹

Failure to hold a separate sentencing hearing may put the accused at a real disadvantage during the trial. He or she may be in a position to submit relevant evidence in mitigation of sentence, for example concerning the individual’s specific role in the crimes *vis-à-vis* accomplices, or efforts by the offender to reduce the suffering of the victim. The only way to introduce such evidence may be for the accused to renounce the right to silence and the protection against self-incrimination. Providing the accused with the right to a separate sentencing hearing, where new evidence and submissions may be presented, thereby enhances the right to silence of the accused at trial. It also gives him/her a ‘second chance’, at least if there is a different sentencing chamber (which is not the case at the ICC). From the prosecutor’s standpoint, there are also advantages to a sentencing hearing. Aggravating evidence, such as proof of bad character or of prior convictions, might well be deemed

¹² *United Kingdom v. Eck et al.* (‘Peleus Trial’), 1 LRTWC 1 (1947), 13; *United Kingdom v. Grumfelt* (‘Scuttled U-Boats Case’), 1 LRTWC 55, 65 (1947); *United Kingdom v. Kramer et al.* (‘Belsen Trial’), 2 LRTWC 1, 122–125 (1947). See Schabas (1997) 7 *DukeJComp&IL* 461.

¹³ *Prosecutor v. Tadić*, IT-94-1-S, Judgment, 14 July 1997; *Prosecutor v. Akayesu*, ICTR- 96-4-T, (on appeal), Judgment, 2 Oct. 1998. The original rule 100 (Rules of Procedure and Evidence, UN Doc. IT/32), entitled ‘Presenting Procedure’, stated: ‘If a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence’. The Tribunal later amended rule 100, eliminating this text. Sentencing is now governed by Rule 98ter, which applies to the judgment on the merits of the case.

¹⁴ *Prosecutor v. Tadić*, IT-94-1-T, Transcript of trial, 3 May 1996.

¹⁵ Cf. rule 85 (A)(vi) (relevant information on sentencing to be presented at trial) and rule 86 (C) (sentencing matters to be addressed in closing arguments); crit. D’Ascoli, *Sentencing* (2011) 124–5.

¹⁶ *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 Nov. 1998, para. 1285.

¹⁷ Cf. Lubanga, Judgment pursuant to Article 74 of the Statute, ICC ICC-01/04-01/06-2842, 14 March 2012, para. 12.

¹⁸ Lubanga Sentencing Judgment, ICC ICC-01/04-01/06-2901, 10 July 2012, para. 4, 11.

¹⁹ *Lubanga Sentencing Appeals Judgment*, ICC-01/04-01/06-3122, 1 December 2014 (stressing the broad discretion of the TC and, consequently, the limited scope of review by the AC, para. 1 *et seq.*).

inadmissible at trial, yet it would possibly pass the relevance test once guilt had been established and the only remaining issue was establishment of a fit penalty²⁰.

- 6 During the drafting, a proposed amendment set out in detail the conduct of the sentencing hearing: presentation by the Prosecutor; presentation by the defence; prosecution rebuttal; defence surrebuttal; argument by the Prosecutor on sentence; argument by the defence on sentence²¹. The suggestion was not incorporated in article 76. The Court might well decide to alter the order of submissions depending on which party had requested the sentencing hearing. In the Lubanga sentencing hearing the Chamber heard first the evidence of two witnesses and after that the submissions of the Prosecutor, the legal representative of victims and finally the defence were made.²² The Katanga Chamber also ordered a separate sentencing hearing but changed the order of the presentations to be made: after the Prosecutor the Defence and then the victims representatives should intervene; witnesses may be heard²³.

2. Procedure in case of guilty plea

- 7 This provision does not operate where article 65, which sets out a special procedure in the case of a guilty plea, applies. However, article 65 establishes no particular mechanism for the presentation of evidence pertinent to sentencing. It is concerned essentially with verification of the legal admissibility of the guilty plea, and a somewhat summary assessment of the facts and any applicable defences, in order to determine whether the accused should stand trial despite the admission of criminal responsibility. Indeed, article 64 suggests that the only relevant evidence to be considered by the Court is that pertaining to the charge itself. Obviously it cannot be the intent of the *Statute* to prevent the accused who has admitted guilt from submitting evidence in mitigation of sentence. Indeed, such evidence will be particularly relevant in cases where there is an admission of guilt²⁴. The final paragraph of article 65 refers to discussions between the Prosecutor and the defence concerning the penalty to be imposed, implying that relevant submissions and evidence on this subject will have been made before the Court in the course of the hearing on the guilty plea.

3. Relevant additional evidence

- 8 The purpose of the sentencing hearing is to provide for submission of additional evidence or submissions relevant to the sentence. The *ad hoc* Tribunals have considered such relevant information to include psychiatric and psychological reports, as well as testimony by the convicted person. In the *Erdemović* case, a commission of three experts was designated, two named by the Tribunal, a third from a list submitted by the defence²⁵. The *Erdemović* sentencing court also heard character witnesses, two of whom were granted protective measures by the Trial Chamber²⁶. Erdemović testified in the course of his own sentencing hearing. In *Tadić*, the Trial Chamber considered oral and written reports, including 'victim impact' statements. The Trial Chamber insisted that 'it will receive only reports, written statements and oral statements which provide relevant information that may assist the Trial

²⁰ In favour of a separate sentencing stage/hearing from a human rights perspective also D'Ascoli, *Sentencing* (2011) 124-5; favouring a 'mono-phase procedure' Henham (2007) 5 *JICJ* 767-9.

²¹ See note 2, 1996 Preparatory Committee II, p. 226, article 46 para. 1bis.

²² Lubanga, Order fixing the date for the sentencing hearing, ICC-01/04-01/06-2871, 24 April 2012, para. 8; Lubanga Sentencing Judgment, ICC-01/04-01/06-2901, 10 July 2012, para. 11.

²³ Katanga, Ordonnance portant calendrier de la procédure relative à la fixation de la peine (article 76 du Statut), ICC-01/04-01/07-3437, 7 mars 2014, para. 7; on the subsequent hearing see <http://www.icc-cpi.int/iccdocs/doc/doc1779796.pdf>.

²⁴ See, for example, the two decisions in the *Erdemović* case: *Prosecutor v. Erdemović*, IT-96-22-T, Sentencing judgment, 29 Nov. 1996; *Prosecutor v. Erdemović*, IT-96-22-T, Sentencing judgment, 5 Mar. 1998. Also: *Prosecutor v. Kambanda*, ICTR-97-23-S, Sentencing judgment, 4 Sep. 1998.

²⁵ *Prosecutor v. Erdemović*, IT-96-22-T, Sentencing judgment, 29 Nov. 1996.

²⁶ *Prosecutor v. Erdemović*, IT-96-22-T, Order for protective measures for witness X, 18 Oct. 1996.

Chamber in determining an appropriate sentence and that it will reject any material relating to the guilt or innocence of Dusko Tadić²⁷.

In the view of the Lubanga Trial Chamber the interplay of paras. 1 and 2 entails that a Chamber may take into account additional evidence going beyond ‘the facts and circumstances set out in the Confirmation Decision, provided that the defence has had a reasonable opportunity to address them’²⁸. However, the Chamber allowed ‘for reasons of efficiency and economy ... that evidence relating to sentence could be admitted during trial’²⁹. In a way this goes against one of the core ideas of a separate sentencing hearing mentioned above (mn. 5), namely to allow the parties to submit additional, specific evidence relevant to sentencing exclusively during the sentencing phase.

III. Paragraph 3

Paragraph 3 extends the subject matter of the post-conviction hearing so that it encompasses reparations issues, in accordance with article 75. Thus, where there is a post-conviction hearing on sentence, the Trial Chamber will also hear evidence concerning reparations as well as possible orders of forfeiture³⁰. The reference to additional hearings was added by the Working Group at the Rome Conference³¹. The Regulations provide that evidence pursuant to article 75 may also be presented to a Trial Chamber ‘at the same time as for the purposes of trial’³². In any case, the representations regarding reparation (Article 75) may be heard during the same sentencing hearing or in an additional hearing. In Lubanga, there was no additional reparations hearing, the Chamber only received the written submissions³³.

IV. Paragraph 4

The trial must be held in public, article 67 para. 1, although there is no requirement that the judgment be read out. Reading the judgment of the Nuremberg Tribunal took two days. Before the *ad hoc* Tribunals, when the judgment is especially lengthy, a practice had developed whereby the Court reads a summary of its findings. This must be particularly important for the didactic effect of the Court’s judgment. For example, when the ICTR issued its judgment in the *Akayesu* case, President Laity Kama read such a summary, which was broadcast live throughout Rwanda, a measure of great positive effect considering the Tribunal’s mission to contribute to ‘the process of national reconciliation and to the restoration and maintenance of peace’³⁴. The same practice has been adopted by the ICC; the summary of the judgment usually appears immediately on the website of the Court and can be seen on the Court’s channel on youtube. With respect to the sentence, this paragraph 4 requires explicitly that it be ‘pronounced’ in *public*.

As a rule, the accused is to be *present* at trial (article 63(1)), except where he or she disrupts the proceedings (article 63(2)) or requests to be represented by counsel due to exceptional circumstances or extraordinary public duties (‘lex Kenyatta’)³⁵. In any case, a

²⁷ *Prosecutor v. Tadić*, IT-94-1-T, Scheduling order, 27 May 1997.

²⁸ Lubanga Sentencing Judgment, ICC ICC-01/04-01/06-2901, 10 July 2012, para. 29.

²⁹ *Ibid.*, para. 20 with reference to the resp. trial decision in fn. 38.

³⁰ See note 10, Rules of Procedure and Evidence, rule 147 para. 1.

³¹ See note 4, Report of the Working Group on Procedural Matters (4 July), p. 5.

³² Regulations of the Court, Document ICC-BD/01-01-04, Regulation 56.

³³ Lubanga, Scheduling order concerning timetable for sentencing and reparations, ICC ICC-01/04-01/06-2844, 14 March 2012, para. 12 (indicating that the Chamber will decide whether to hold a reparations hearing but this decision was not taken).

³⁴ SC Res.955 (1994), preamble.

³⁵ *Cf.* Rules 134*ter* and 134*quater* RPE introduced in the context of the Kenya proceedings, especially to meet the concerns of President Kenyatta (against whom the charges were later dropped); see also Rule 134*bis* providing for the possibility of a virtual presence through the use of video technology.

summary reading of article 76 para. 4 suggests a flexible view of the presence requirement regarding sentencing stating that this should only apply ‘wherever possible’. Such a flexible reading is difficult to reconcile with the *travaux*³⁶. However, the new ‘absentia rules’ mentioned above strengthen the more flexible reading of para. 4 (‘wherever possible’). Indeed, if the State Parties flexibilize the presence requirement during trial by amending the rules, this must, *a fortiori*, apply to the sentencing stage with the pronouncement of the sentence. Thus, at least regarding an excusal from presence due to ‘extraordinary duties’ (rule 134*quater*) the accused/convict’s presence is not required given that he or she will be excused for the whole trial – not only for parts of it as in the case of rule 134*ter* (‘during part or parts’) – and represented by counsel ‘only’.

³⁶ Cf. Schabas in the previous edition, article 76 mn. 11.

PART 7 PENALTIES

Article 77 Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
 - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
 - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
 - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
 - (b) A forfeiture of proceeds, property and assets derived directly or the International Criminal Court, the Making of the Rome Statute: Issues, Ne indirectly from that crime, without prejudice to the rights of bona fide third parties.

Literature: Akhavan, P. 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', (1996) 90 *AJIL* 501; Andenæs, J., *Punishment and Deterrence* (University of Michigan Press 1974); Ashworth, A., *Sentencing and Criminal Justice* (Weidenfeld & Nicolson 1992); Bassiouni, M.C. 'Qesas Crimes', in: M.C. Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publishing 1982) 203; Corell, H., Türk, A. and Thune, S., *Proposal for an International War Crimes Tribunal for The Former Yugoslavia* (CSCE 1993); Delmas-Marty, M., 'L'influence du droit comparé sur l'activité des Tribunaux pénaux internationaux', in: A. Cassese and M. Delmas-Marty (eds.), *Crimes Internationaux et Jurisdictions Internationales* (Presses universitaires de France 2002) 95; Duff, A. (ed.), *Punishment* (Dartmouth 1993); Fife, R.E., 'Penalties', in: Lee (ed.), *The International Criminal Court, the Making of the Rome Statute: Issues, Negotiations, Results* (1999) 319; *id.*, 'Penalties', in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 555; Foucault, M., *Surveiller et Punir (Discipline and Punish)* (Gallimard 1975); Hart, H.L.A., *Punishment and Responsibility* (Clarendon 1968); Jescheck, H.-H and Triffterer, O. (eds.), *Ist die lebenslange Freiheitsstrafe verfassungswidrig? Dokumentation über die mündliche Verhandlung vor dem Bundesverfassungsgericht am 22. und 23. März 1977* (Nomos 1978); La Rosa, A.-M., *Juridictions Pénales Internationales: La Procédure et la Preuve* (Presses universitaires de France 2003); Mansour, A.A., 'Hudud Crimes', in: M.C. Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publishing 1982) 195; Merle, R., *La Pénitence et la Peine* (Editions du Cerf 1985); Morawetz, T. (ed.), *Criminal Law* (Dartmouth 1991); Rodley, N., *Treatment of Prisoners Under International Law* (Clarendon Press 1987); Schabas, W.A., 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 *Duke/Comp&IL* 461; *id.*, 'War Crimes, Crimes Against Humanity and the Death Penalty', (1997) 60 *AlbanyLJ* 736; *id.*, 'Penalties', in: Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 273; *id.*, 'Penalties', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1497; Taylor, T., *The Anatomy of the Nuremberg Trials* (Knopf Doubleday Publishing 1992); Tebbit, M., *Philosophy of Law - An Introduction* (Routledge 2000); United Nations Office at Vienna, Crime Prevention and Criminal Justice Branch, *Life Imprisonment* (United Nations 1994); van Zyl Smit, D. 'Life Imprisonment as the Ultimate Penalty in International Law: a Human Rights Perspective' (1998) 10 *CLF* 1.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	17
I. Paragraph 1.....	17
1. The chapeau.....	17
a) 'person'.....	19
b) 'convicted of a crime referred to in article 5'.....	21
c) The reference to article 110.....	22
2. The different subparagraphs.....	23

a) 'Imprisonment for a specified number of years'.....	23
b) 'A term of life imprisonment'	24
II. Paragraph 2	25
1. The chapeau	25
2. The different subparagraphs.....	26
a) 'A fine under the criteria provided for in the Rules of Procedure and Evidence'	26
b) 'A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties'	31
C. Special Remarks.....	37
1. Relationship with cooperation issues.....	37
2. Relationship with enforcement issues.....	38
3. Likely impact of provisions on review by the Court concerning reduction of sentence on the possibilities to impose fines and forfeiture	39

A. Introduction/General remarks

- Article 77 establishes the power of the ICC to impose penalties on persons convicted by the Court of crimes referred to in article 5. It defines three possible penalties that may be applied by the Court. Imprisonment is the basic punishment, while fines or forfeiture may only be imposed as additional penalties. In accordance with the principle of *nulla poena sine lege* reflected in article 23¹, this list of applicable penalties is exhaustive.
- The article builds on the principle of equality of justice through a uniform penalties regime for all persons convicted by the Court. Accordingly, the article makes no reference to national laws. The application of penalties will be made irrespective of the nationality of the convicted person or the place where the crime was committed. Acknowledging the need for flexibility in that it may be difficult to foresee all possible needs, the penalties provisions are formulated in a general way for all crimes enumerated under article 5, without specifying penalties for different categories of crimes. The approach also reflects the general principle of international law whereby very heavy penalties may be imposed for the most serious crimes against the person². The ordinary penalty to be applied by the Court for crimes under article 5 of the Statute is imprisonment. The possibility of life imprisonment is provided for on certain conditions, including the system for mandatory review specified in article 110. Fines and forfeiture of proceeds and property derived from the crime may be imposed as additional penalties to imprisonment.
- Various purposes of penalties have been put forward in legal theory and practice, also in the particular context of international criminal justice. They include retribution, general prevention or deterrence, individual prevention, reformation of criminals, protection of society, collective reconciliation and reparation to crime victims³. At the Diplomatic Con-

¹ The provision stating the principle of *nulla poena sine lege* emanated from the discussions on article 77 in the Working Group on Penalties at the Diplomatic Conference. Nevertheless, this provision was included in Part 3 of the Statute, rather than in Part 7, because it was deemed to be a general principle of criminal law.

² This was confirmed with regard to crimes against humanity by the reasoning in the judgment of the Trial Chamber of the ICTY in *Prosecutor v. Erdemović*, IT-96-22-T, Judgment, Trial Chamber, 5 March 1998, para. 40. On this issue, see Schabas (1997) 7 *DukeJComp&IL* [479].

³ For a brief overview of the philosophical theories and justifications of legal punishment, see Tebbit, *Philosophy of Law – An Introduction* (2000) 162. On punishment as a concrete expression of society's disapproval of an act that helps to create conscious or unconscious inhibitions against committing crime, see Andenæs, *Punishment and Deterrence* (1974) 7–8. On the emergence of the nineteenth-century European prison, see Foucault, M., *Surveiller et Punir (Discipline and Punish)* (1975). On purposes of penalties in an international criminal law context, see general overviews in La Rosa, *Jurisdictions Pénales Internationales: La Procédure et la Preuve* (2003) 172; Schabas (1997) 7 *DukeJComp&IL* [479], 499. On the influence of comparative law studies on the practice of the international criminal tribunals in the field of penalties, see Delmas-Marty, in: Cassese and Delmas-Marty (eds.), *Crimes Internationaux et Jurisdictions Internationales* (2002) 120–128. In a national criminal law context, traditional criminal law arguments v. modern theories of punishment may be found in Duff, *Punishment* (1993) and Morawetz (ed.), *Criminal Law* (1991). A classical work in the Anglo-

ference, stressing that the penalties under consideration were related to the most serious crimes of international concern including in situations of armed conflict, a number of delegations stressed the importance of severe penalties commensurate to the gravity of the crimes. Against this background they supported the inclusion of the death penalty, or in some cases life imprisonment, as a prerequisite for the credibility of the Court and its deterrent functions. A number of other delegations underlined limitations derived from human rights law on the modes of punishment. They insisted on the paramount need for treating individual criminals humanely and maintaining the possibility for their eventual rehabilitation. On the discussions on the death penalty and life imprisonment, in addition to certain remarks below, see comments made under article 80 of the Rome Statute.

The ICC handed down its first sentence on 10 July 2012 in '*Prosecutor v. Thomas Lubanga Dyilo*' where a conviction for recruitment and use of child soldiers in armed conflict in the Democratic Republic of Congo led to the imposition of imprisonment for 14 years, which was confirmed on appeal on 1 December 2014. In 'considering the purposes of punishment of the ICC' Trial Chamber I notably 'took into account the Preamble of the Statute' and referred to paragraphs 4, 5 and 9 of the latter. These provide, respectively, that 'the most serious crimes of concern to the international community as a whole must not go unpunished', that the States Parties to the Statute are 'determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes' and that the ICC was established 'to these ends and for the sake of present and future generations'⁴. This line of reasoning has been supplemented, *inter alia* in the sentence on 23 May 2014 in '*Prosecutor v. Germain Katanga*', where Trial Chamber II in addition referred to the need to ensure truth and justice for victims and their relatives and emphasized both the aim of social reprobation of the conduct and deterrence⁵.

While international humanitarian law and criminal law treaties provide for individual criminal responsibility for certain violations, they give practically no guidance with regard to the modes of punishment⁶. International human rights law sets certain limitations on the application of the most severe forms of punishment, in particular with regard to the death penalty⁷ and through the prohibitions against torture as well as cruel, inhuman and degrading treatment or punishment⁸. Moreover, certain norms may be derived from human rights law with regard to the objectives of reform and social rehabilitation of prisoners⁹. Such

American tradition is Hart, *Punishment and Responsibility* (1968). In the French civil law tradition, see Merle, *La Pénitence et la Peine* (1985) and Pradel, *Droit Pénal Général* (2012). On purposes of penalties according to Islamic law, see Mansour, in: Bassiouni (ed.), *The Islamic Criminal Justice System* (1982) 195 and Bassiouni, in: Bassiouni (ed.), *The Islamic Criminal Justice System* (1982) 203.

⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, Trial Chamber I, 10 July 2012, para. 16. Judgement on the appeals, Appeals Chamber 1 December 2014.

⁵ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on Sentence Pursuant to Article 74 of the Statute, Trial Chamber II, 23 May 2014, paras. 37–38.

⁶ Article V of the 1948 Genocide Convention requires that national penalties for persons guilty of genocide be 'effective'. Similar requirements apply to national penal sanctions for grave breaches of the 1949 Geneva Conventions, see for instance article 146 of the Geneva Convention relative to the protection of civilian persons in time of war. The requirement of effective punishment of war crimes and crimes against humanity is also reflected in preamble para. 5 of the Convention 26 Nov. 1968 on the non-applicability of statutory limitations to war crimes and crimes against humanity. For a discussion of the above issue, see Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 690–691.

⁷ See comments under article 80.

⁸ For these general prohibitions contained in article 7 of the United Nations Covenant on Civil and Political Rights (CCPR), see M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1994) 133–134. It may be noted that UN Standard minimum rules for the treatment of prisoners, ESC Res. 663 C (XXIV) 31 July 1957, may provide guidance in interpreting the prohibition against cruel, inhuman and degrading punishment in the context of imprisonment, see Rodley, *Treatment of Prisoners Under International Law* (1987) 221–223.

⁹ On the relevance of CCPR article 10 para. 3 and other instruments, see Schabas, in: Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 273, 286.

norms have, however, given room for interpretation as to what extent they constitute a basis for articulating concrete sentencing guidelines¹⁰.

- 6 While the statutes of earlier and existing international tribunals contain provisions on the application of penalties, they have to varying degrees given rise to criticism on the grounds of not meeting the requirements of the principle of legality¹¹. All are implicitly based on the general principle of proportionality, but do not provide for detailed sentencing principles¹². The Nuremberg and Tokyo Tribunals had broad discretion in the application of penalties. Their Statutes provided for the death penalty, life imprisonment or other punishments determined by them to be just. In addition they could order deprivation of stolen property¹³. At Nuremberg, most convicted persons were sentenced to death, while other sentences imposed terms of imprisonment ranging from ten years to life¹⁴. However, with the exception of Rudolf Hess, none of those sentenced to imprisonment actually served more than 21 years¹⁵. The only applicable penalty provided for by the Statutes of the ICTY and ICTR is imprisonment, with the additional possibility of an order for return of property or proceeds¹⁶. The Statutes do not themselves explicitly specify what the heaviest penalty of imprisonment may be, leading in the case of the ICTY to criticism by some commentators¹⁷. This was instead done in the Rules of Procedure and Evidence of both Tribunals, which explicitly include life imprisonment¹⁸. Several life imprisonment sentences have been delivered by the two tribunals¹⁹.

¹⁰ On the general development of human rights law applicable to punishment, see for instance van Zyl Smit (1998) 10 CLF [5], 5–9 and Schabas (1997) 7 *DukeJComp&IL* [461], 467–468, 474 and 505. With regard to the human rights law applicable to prisoners, see Rodley, *Treatment of Prisoners Under International Law* (1987).

¹¹ See Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 689, and Schabas (1997) 7 *DukeJComp&IL* [461], 469.

¹² See Morris and Scharf, *The International Criminal Tribunal for Rwanda* (1998) 584.

¹³ With regard to the Nuremberg Tribunal, article 27 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 states: 'The Tribunal shall have the right to impose upon a defendant on conviction, death or such other punishment as shall be determined by it to be just'. Article 28 states: 'In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany'. Similar provisions are contained in the Charter of the Tokyo Tribunal, see Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 4 Bevans 20, as amended, 4 Bevans 27.

¹⁴ Nuremberg judgement 189. See Taylor, *The Anatomy of the Nuremberg Trials* (1992) 559–611.

¹⁵ On early release of some prisoners, see Taylor, *The Anatomy of the Nuremberg Trials* (1992) 612–618. On the constitutionality of life- imprisonment see, e.g., Jescheck and Triffterer (eds.), *Ist Die Lebenslange Freiheitsstrafe Verfassungswidrig? Dokumentation über die Mündliche Verhandlung vor dem Bundesverfassungsgericht am 22. und 23. März 1977* (1978).

¹⁶ Article 24 para. 1 ICTY Statute states: 'The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia'. Moreover, article 24 para. 3 states: 'In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners'. Analogous provisions are contained in article 23 ICTR Statute, with the sole exception that reference is naturally made to the general practice regarding prison sentences in the courts of Rwanda instead of the former Yugoslavia.

¹⁷ See van Zyl Smit (1998) 10 CLF [5], 11; Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 700; Morris and Scharf, *An Insider's Guide To The International Criminal Tribunal For The Former Yugoslavia: A Documentary History And Analysis* (1995) 274–275; Schabas (1997) 7 *DukeJComp&IL* [479].

¹⁸ Rule 101 (A) of the ICTY Rules states: 'A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life'. A similar provision is contained in Rule 101 (A) of the ICTR Rules.

¹⁹ The ICTR has handed down sentences of life imprisonment in several cases, including for example *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 October 1998; *Prosecutor v. Kambanda*, ICTR-97-23-S, Judgment and Sentence, Trial Chamber, 4 September 1998; *Prosecutor v. Kayishema*, ICTR-95-1-T, Sentence, Trial Chamber II, 21 May 1999 and *Prosecutor v. Musema*, ICTR-96-13-A, Judgment and Sentence, Trial Chamber I, 27 January 2000. The ICTY has imposed terms of imprisonment ranging from 3 years to life imprisonment. Because of conviction for multiple crimes some terms of imprisonment were to be served concurrently. The following total terms of imprisonment constitute examples from the very first cases. In *Prosecutor v. Tadić*, IT-94-1-A, Sentencing Judgment, Trial Chamber, 11 November 1999 the total period imposed by the Trial Chamber was 20 years. In *Prosecutor v. Erdemovic*, IT-96-22, the total period of

The approach adopted by the ILC in its 1994 Draft Statute for an ICC was characterized by flexibility and limited sentencing guidelines. The ILC Draft's Article 47 para. 1 provided in general terms for imprisonment, including the possibility of life imprisonment, and fines²⁰. In 1995, the debates in the *Ad Hoc* Committee revealed important differences in national approaches on this account. Nevertheless, they also revealed a widespread desire for more specificity than what had been suggested in the ILC Draft²¹. In the Preparatory Committee, the main substantive discussions were held in two sessions in August 1996²² and December 1997 in the Working Group on Penalties²³. The two main issues that emerged concerned the type of penalties and the relevant laws for determining penalties. In the ensuing discussions in the Preparatory Committee a number of proposals were made, compiled and to the extent possible consolidated in alternative options and wording in square brackets²⁴. At the Rome Diplomatic Conference all issues related to applicable penalties were dealt with in a Working Group on Penalties.

Widely differing views as to the actual purposes and functions of the penal sanctions to be imposed by the Court were compounded by marked differences in national values, norms, standards and judicial practices. These made the negotiations at the Diplomatic Conference on the issue of modes of punishment difficult and time consuming. Discussions on whether or not to include the death penalty proved particularly contentious. In spite of acute differences in legal cultures and positions taken during the course of the negotiations, a consensually based solution ultimately emerged. The number of delegations who emphasized the relevance of appropriate penalties both to the credibility and to the perceived fairness of the Court was considerable. The main elements in the compromise package are the following:

Essential to the emergence of the overall compromise formula was the understanding that the inclusion of certain specific penalties and the non-inclusion of other penalties would not in any way prejudice the national application of penalties nor national laws. This follows already from the principle of complementarity between the Court and national criminal jurisdictions, whereby the latter retain the primary responsibility for prosecuting and punishing individuals, in accordance with applicable national laws. The compromise included, moreover, the formulation of an explicit non-prejudice provision to that effect in article 80 (see comments under that provision). This understanding was also instrumental in promoting a consensus on not including any reference to national laws in the article, thereby ensuring a uniform penalties regime for all persons convicted by the Court.

The consensus that emerged during the Preparatory Committee for having a single, general provision on imprisonment for all crimes, instead of setting precise maximum penalties for specific crimes, was confirmed during the Diplomatic Conference. Giving such flexibility to judges was not found to be inconsistent with any of the requirements of the principle of legality.

imprisonment imposed by the Trial Chamber was 10 years, reduced to 5 years by the Appeals Chamber. The first sentence of life imprisonment passed by the ICTY was the Trial Chamber Judgment in *Prosecutor v. Stakić*, IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003.

²⁰ The ILC adopted a first draft in 1993, see Report of the ILC on the Work of its Forty-Fifth Session, UN Doc. A/48/10 (1993), para. 84. A revised draft was submitted in 1994, but did not significantly change the penalties provision, see UN Doc. A/49/355 (1994). The latter version of article 47 para. 1 constituted the basis for discussions in the preparatory work before the Conference:

'The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of life imprisonment, or of imprisonment for a specified number of years; a fine'.

²¹ *Ad Hoc* Committee Report, paras. 187-190.

²² For the debates in the August 1996 session, see 1996 Preparatory Committee I, pp. 63-64, paras. 303-309. For compilation of proposals made in August 1996, see 1996 Preparatory Committee II, pp. 227-234.

²³ On the results of the discussions of these issues in the December 1997 session, see Preparatory Committee Decisions Dec. 1997, pp. 81-90, and the Preparatory Committee Draft, pp. 119-124.

²⁴ On various proposals made in the Preparatory Committee, see *inter alia* Schabas, in: Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 273.

- 11 A carefully crafted compromise package is constituted by the inclusion of two alternative subparagraphs (a) and (b) in the article's first paragraph. All delegations agreed on the need to include imprisonment as the main penalty. It is therefore mentioned first. While opinions were sharply divided on the maximum lengths, all nevertheless recognized the need to reach a solution. A number of delegations had insisted on clarity as to maximum sentences. A number of other delegations had instead advocated a degree of flexibility for the judges, in view of the impossibility to foresee all the situations that may arise in practice. The result became that imprisonment may include two alternatives. As opposed to the Statutes of earlier Tribunals a degree of specificity was introduced, by forcing the judges to make a choice between two clear alternatives, namely imprisonment of not more than 30 years²⁵ and life imprisonment. This distinction stems from proposals originally submitted by France and other civil law countries in order to increase legal certainty with regard to the range of imprisonment sentences as compared to earlier international tribunals, while at the same time preserving a degree of discretion for judges.
- 12 An important element in the compromise package was the inclusion of the possibility of life imprisonment, albeit on certain strict conditions. Some delegations had submitted that inclusion of life imprisonment was necessary in order for them to be able to show flexibility as to non-inclusion of the death penalty. Irrespective of their position on the issue of the death penalty, other delegations insisted on the need to allow for the application of life imprisonment where particularly grave crimes were concerned. However, a number of delegations were opposed to this idea, or expressed serious doubts from a human rights perspective as to the acceptability of life imprisonment as the ultimate penalty against infringements of international criminal law²⁶. This issue and the question as to what limitations may derive from human rights principles on the application of life imprisonment, have been discussed in legal theory and judicial practice²⁷. A precondition for consensus on the issue of life imprisonment proved, yet again, to be the understanding on the complementarity principle mentioned above under margin point 9 and reflected in article 80 of the Statute. At the same time, against the background of concerns on the severity of a life sentence or long terms of imprisonment, it was suggested²⁸ to provide for mandatory re-examination of sentences by the Court after a certain period of time in order to consider the possibility of release. Such a mandatory mechanism was included in the part of the Statute dealing with enforcement. Thus, the Court would also ensure the uniform treatment of prisoners regardless of the State where they served their sentence. This approach was adopted at the Conference, and constitutes the background for key provisions in article 110 of Part 10, as well as the reference to the latter article in article 77. The possibility of life imprisonment was thus included on specific conditions, *i. e.* that it be justified by the extreme gravity of the crime and the individual circumstances of the convicted person, but also with a mandatory review mechanism as described. In addition, it was underlined that long terms have to be served before such a review may take place. Strict criteria have to apply for such a review.

²⁵ Proposals during the Preparatory Committee and the Diplomatic Conference for a maximum term of imprisonment for a specified number of years had ranged from 20 to 40 years, to a large extent reflecting maximum terms in different national systems. For proposals compiled during the Preparatory Committee, see references notes 21 and 22.

²⁶ See van Zyl Smit (1998) 10 *CLF* [5], 14–20 for a survey of the diversity of opinion in the ILC on this account.

²⁷ On the discussions within the United Nations on the conditions and treatments of prisoners serving terms of life imprisonment, see United Nations Office at Vienna, Crime Prevention and Criminal Justice Branch, *Life Imprisonment* (1994). On those issues seen from a human rights perspective, see van Zyl Smit (1998) 10 *CLF* [5], and Schabas, in: Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 273, 285. According to van Zyl Smit (1998) 10 *CLF* [5], 4, application of life imprisonment at the international level should be subject to constant reevaluation in light of any future developments of international human rights law.

²⁸ The suggestion was made in December 1997, see Preparatory Committee Decisions Dec. 1997, p. 119, note 1. On the aspect of conditional release see Jescheck and Triffterer (eds.), *Ist Die Lebenslange Freiheitsstrafe Verfassungswidrig? Dokumentation über die Mündliche Verhandlung vor dem Bundesverfassungsgericht am 22. und 23. März 1977* (1978).

Particular weight ought to be given to cooperation by the prisoner with the Court (see article 110 for further details). Lengthy terms of imprisonment are required before a review may take place (in the case of life imprisonment, 25 years). This may actually be longer than what in most cases of life imprisonment ordered by the Nuremberg Tribunal was the actual period of imprisonment before release. However, one should bear in mind that the harshest penalty open to the Nuremberg Tribunal was the death penalty, and that life imprisonment may only be imposed on strict conditions by the ICC²⁹.

Another issue was whether to include minimum periods of imprisonment as proposed during the Preparatory Committee³⁰. Opinions were divided during the negotiations. On the one hand an indication of minimum periods would constitute a signal with regard to the gravity of the crimes concerned. On the other hand, one would in such cases have to consider factors which would lead to a reduction of the minimum period, including, for example, age or subsequent conduct of the convicted person. It was agreed to leave this to the discretion of judges, as the number and importance of possible mitigating and aggravating circumstances may in any case require concrete considerations.

Finally, article 77 reflects broad support for the inclusion of the possibility of fines and certain forfeiture measures, but only as additional penalties. A common rationale behind both is to penalize the convicted person through his or her pocket, and such orders should be regarded as an integral part of the total penalty. With regard to forfeiture, there is in addition the traditional criminal law rationale that the offender should not profit from his wrongdoing³¹. Depriving persons engaged in international crimes under article 5 of the proceeds of their criminal activities may remove an incentive for so doing. It is reasonable to believe that such crimes may in certain cases lead to substantial unlawful profits, for example seizure of real property or valuable assets in cases of 'ethnic cleansing'. On-going work in tracing Jewish gold seized by Nazis before and during the Second World War provides another illustration. At the Conference there was agreement that provision should be made in the Statute for the forfeiture of proceeds and property derived from the commission of the crime. Moreover, collection of fines or forfeiture of property may benefit victims of crime and their families, through transfer to the Trust Fund in accordance with article 79 of the Statute.

This is the first time in international criminal justice that the possibility of ordering fines for international crimes is explicitly provided for³². Such a possibility had been suggested in the ILC Draft Statute³³, as well as in other proposals³⁴. At the Conference, fines were widely considered as inadequate as a separate penalty, when seen in light of the seriousness of the crimes concerned. However, they were ultimately deemed appropriate as a possible supplementary sanction in addition to imprisonment. In order to promote legal certainty in conformity with the principle of legality it was decided to include in the Rules of Procedure and Evidence criteria necessary for the imposition of fines.

The ILC Draft Statute had not proposed any provision on forfeiture or similar penalties. Proposals to include such a provision stem from the August 1996 session of the Preparatory

²⁹ This is further underlined in Rule 145 (3) on Determination of sentence of the Rules of Procedure and Evidence, which also requires evidence of the existence of one or more aggravating circumstances. See Fife, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 555, 558-565.

³⁰ See references in notes 21 and 22.

³¹ For an example of discussion of fines and forfeiture in a national context, see Ashworth, *Sentencing and Criminal Justice* (1992) 252-257 and 293-295.

³² See note 11 for the discretion afforded to the Nuremberg Tribunal, which however never imposed fines. See note 14 for the ICTY and ICTR, whose Statutes do not provide for fines. However, the judges adopted in both cases provisions on fines for procedural crimes such as contempt of the tribunal in the Rules of Procedure and Evidence, rules 77 (B) and 91 (E).

³³ Article 47 para. 1 (b), see note 19.

³⁴ In addition to proposals from delegations, it is noteworthy that such a possibility was suggested by Corell, Türk and Thune (Rapporteurs under the CSCE Moscow Human Dimension Mechanism to Bosnia- Herzegovina and Croatia), *Proposal for an International War Crimes Tribunal for the Former Yugoslavia* (1993) 180.

Committee, and were further discussed at the December 1997 session³⁵. Certain related, albeit not entirely analogous notions, are known from the statutes of the international tribunals. The Nuremberg Tribunal was authorized to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany³⁶. In the later Nuremberg trials, general confiscation of property was considered discriminatory and therefore was not applied by the United States Commissioner for Germany in the case of Alfred Krupp³⁷. Moreover, the ICTY and ICTR may order the return of stolen property or proceeds resulting from the sale of such property³⁸. Provisions of a more general scope, including forfeiture, are known both in international criminal law, particularly in the context of illicit traffic in narcotic drugs³⁹ and, significantly, in the national laws of certain States specifically with regard to crimes against humanity⁴⁰. Among the proposals considered in the Preparatory Committee were orders for forfeiture or seizure of instruments or objects of crime, property and proceeds of crime, and where forfeiture is impossible, collection of a sum of money equivalent thereto. A broad consensus was achieved at the Diplomatic Conference not to provide for the possibility of forfeiture of instruments of crime. The latter was widely considered give rise to a number of difficult legal and practical issues, in particular concerning the identification of title of ownership as regards instruments of crimes. Moreover, instrumentalities for war crimes and crimes against humanity, involving for instance military army equipment, could typically raise issues of State property governed by rules of State immunity. The debates in Rome highlighted furthermore possible constitutional problems and practical challenges, depending on the national legal traditions concerned, with regard to the notion of confiscation, particularly as regards issues of compensation. For such reasons, the notion (in English) of forfeiture was retained. In the consultations some delegations had also raised questions as to whether forfeiture could properly be treated as a penalty. For these and other reasons, some delegations would have preferred to leave the possibility of imposing forfeiture to national jurisdictions. On the other hand, a number of other delegations underlined the potential deterrent element in forfeiture, and stressed that forfeiture could in any case be considered at least as accessory to penalties. Ultimately, all delegations found that they could support the inclusion in the article of forfeiture of proceeds and property derived from the crime, but only as an additional and optional penalty.

B. Analysis and interpretation of elements

I. Paragraph 1

1. The chapeau

- 17 When considering the appropriate sentence to be imposed, the judges must first make a choice between two alternative penalties, namely imprisonment of not more than 30 years and life imprisonment. Reference is in this connection made to the relevant provisions in

³⁵ See in particular the final conference room paper, UN Doc. A/AC.249/1997/WG.6/CRP.8 (10 Dec. 1997).

³⁶ See note 13.

³⁷ This has been noted by Schabas, in: Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 273, 289 fn. 93. See 15 TWC 1180–1191 (1948).

³⁸ See note 14. It is also noteworthy that prior to the establishment of the ICTY, it was suggested to include a provision on ‘confiscation of the proceeds of criminal conduct’ in Corell, Türk and Thune, *Proposal for an International War Crimes Tribunal for the Former Yugoslavia* (1993) 180.

³⁹ See articles 1 para. 1 (f) and 5 of the UN Convention 20 December 1988 against illicit traffic in narcotic drugs and psychotropic substances. With regard to measures in order to deprive criminals of the proceeds from crime, reference is moreover made to articles 1 (d), 2 and 13 of the European Convention 8 November 1990 on laundering, search, seizure and confiscation of the proceeds from crime.

⁴⁰ See, for example, in French law, forfeiture of property as a compulsory additional penalty upon conviction of crimes against humanity, in article 213–1 of the Penal Code (Nouveau Code Pénal).

article 78, in particular with regard to factors in determining the sentence to be imposed and deduction of time previously spent in detention.

The system envisaged by the Rome Statute allows for a division between the phases of trial and sentencing after conviction, see articles 74 and 76. Information pertaining to the sentencing submitted by the parties before the Court may be relevant for the application of penalties under article 77, in addition to the assessment of any aggravating or mitigating circumstances pursuant to article 78. This includes determination of grounds necessary for justifying the imposition of a term of life imprisonment, the testing of criteria to be fulfilled to order a fine and the ordering of forfeiture.

a) ‘person’. As elsewhere in the Statute, the term ‘person’ has to be interpreted in light of article 25 para. 1, which makes it clear that the Court shall only have jurisdiction over natural persons. The term does not cover legal persons. In the preparatory work proposals had been made to include a provision on penalties applicable to the latter. Inclusion of such a provision depended however entirely on the outcome of considerations in the context of individual criminal responsibility for legal persons. It suffices here to note that debates not only showed major differences in national legal systems as to whether such responsibility could or should be applied to legal persons, but also as to which penalties might be applicable in such cases. While the Nuremberg Statute did contain provisions on criminal organizations⁴¹, it did not actually provide for penalties against such organizations. The Yugoslavia and Rwanda Statutes only provide for criminal responsibility for natural persons. In the preparatory work before the Diplomatic Conference particular penalties for legal persons were proposed. Those included fines, dissolution, prohibition of the exercise of activities, closure of premises, forfeiture of instrumentalities of crime and/or of proceeds, property and assets obtained by criminal conduct, and appropriate forms of reparation⁴². On the other hand, it was suggested that such provisions might give rise to issues of enforcement. Moreover, there were suggestions to adopt a unified approach as regards natural and legal persons both in relation to forfeiture and reparation provisions. At the Diplomatic Conference, it was ultimately decided not to include individual criminal responsibility for legal persons in article 25 of the Statute. As a consequence, no provision on penalties for legal persons was included either.

The term ‘person’ has also to be interpreted in light of article 26. This provision excludes persons under the age of 18 at the time of the alleged commission of a crime from the jurisdiction of the Court. In the preparatory work proposals had admittedly been made to include provisions on penalties applicable to juveniles. Inclusion of such provisions was however closely linked to the outcome of discussions on the (minimum) age of criminal responsibility in Part 3 on general principles of criminal law and opinions were deeply divided on this account. Should the Court be given the competency to prosecute minors, it was suggested that particular penalties would have to be provided for. Among proposals made was the setting of a maximum 20 year term of imprisonment for persons under the age of 18 at the time of the commission of the crime. Moreover, some delegations emphasized a particular need for appropriate measures for the rehabilitation of the offender. Difficulties related to the setting of appropriate penalties criteria and mechanisms for juveniles were perceived by some delegations as additional arguments for excluding minors from the jurisdiction of the Court, and setting a high age of responsibility to this end. At the Diplomatic Conference, persons under the age of 18 were excluded from the jurisdiction of the Court in article 26. As a consequence no provision on penalties for juveniles was ultimately included either.

b) ‘convicted of a crime referred to in article 5’. The article does notably not regulate the application of sanctions with regard to so-called offences against the administration of justice

⁴¹ Nuremberg Statute article 9. See Taylor, *The Anatomy of the Nuremberg Trials* (1992) 276.

⁴² See Preparatory Committee Draft, pp. 121–122.

and misconduct before the Court. Such sanctions have a separate regulation, in order to fulfill the requirements of the principle of *nulla poena sine lege*, as expressed in article 23. Reference is made to articles 70 and 71 for such sanctions.

Should the person concerned be convicted of more than one crime, reference is made to the particular rules for determination of the total term of imprisonment in article 78 para. 3. It should be noted that this provision does not address the ordering of fines or forfeiture, which must be considered by the Court in a unified way taking into account all crimes of which the person concerned has been convicted.

- 22 c) **The reference to article 110.** The reference '[s]ubject to article 110' in the chapeau does not signify any automatic early release. Instead the language means that there has to be a mandatory consideration after a specified number of years of whether the required criteria have been met in order to allow such release. This understanding of non-automaticity of result was key to negotiators representing very diverse legal systems and traditions.

2. The different subparagraphs

- 23 a) **'Imprisonment for a specified number of years'.** The order in the listing of penalties, which mentions the above as the first alternative, signifies that such a term of imprisonment of not more than 30 years is the ordinary penalty unless the conditions in the next subparagraph are fulfilled. As noted above, no provision for minimum terms of imprisonment was included in the Statute. Should the ordinary meaning of the terms of the Statute on this point be read in isolation, the wording would seem to indicate, though, that terms of imprisonment have to be expressed in years, rather than months or days, and therefore exclude imprisonment expressed in less than years. Several proponents of heavy penalties reflective of the gravity of the crimes referred to in article 5, including proponents of the death penalty, indicated in the consultations with the Chair of the Working Group that penalties specified in less than years would not be understood in their national systems and would easily give rise to perceptions that the Court was too lenient and therefore lacked legitimacy. Others did not consider that such penalties would be very likely, in light of the gravity of the crimes concerned and the objectives of the Court. There was thus general agreement to reflect the particular gravity of crimes that are of concern to the international community as a whole. This contributes largely to explain the wording chosen. As clearly indicated under margin point 13 above, however, the intention of the drafters was clearly not to impose a minimum period of imprisonment. The Statute is a treaty that has to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, as required by the general rule of interpretation in article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. It may therefore, in spite of the plain wording, be reasonable to assume that the Court might in particular cases also impose imprisonment for less than one year.⁴³
- 24 b) **'A term of life imprisonment'.** The Court is given discretion to impose a term of life imprisonment. This power latter is, however, listed second and requires a particular justification. This signifies that life imprisonment is not ordinarily the main penalty, as also underlined in rule 145 (3) of the Rules of Procedure and Evidence⁴⁴. The nature and the objective circumstances of the crime as well as the individual circumstances of the convicted person must be taken into account in the determination of any sentence in accordance with article 78 para. 1 and rule 145. In order to impose a term of life imprisonment a particular justification must be made by the judges. The Statute establishes two cumulative requirements in this regard. In addition to a justification due to the individual circumstances of the convicted person, there must be a justification due to the 'extreme gravity of the crime'. With

⁴³ See Ambos, *Treatise on International Criminal Law* (OUP 2014) 281, 277, who drew the attention of the author to the need for flexibility.

⁴⁴ See note 29.

regard to the latter requirement, not all acts defined in articles 6 to 8 of the Statute would by their nature potentially fulfill this requirement of comparative gravity. Moreover, the judges must undertake a concrete consideration of the objective circumstances of the individual crime committed. For example, the jurisprudence of the ICTR provided early indications with regard to factors that may justify life imprisonment⁴⁵. As stated in rule 145 sub-rule 3 the above cumulative requirements must be ‘evidenced by the existence of one or more aggravating circumstances’.

II. Paragraph 2

1. The chapeau

This paragraph empowers the Court to impose the two following penalties in addition to imprisonment, either alternatively or in a cumulative way: 25

2. The different subparagraphs

a) ‘A fine under the criteria provided for in the Rules of Procedure and Evidence’. A fine 26 may be defined as an ordinary penalty whereby the convicted person is ordered to pay a sum of money to the Court. Criteria for their imposition are set out in rule 146 of the Rules of Procedure and Evidence. The Rome Statute provides for the possibility of fines, as an optional penalty, but only in addition to imprisonment. The Court thus has a power which has not been conferred on the ICTY and the ICTR. Pursuant to article 79 fines collected will be transferred to a Trust Fund for victims.

At the Diplomatic Conference several delegations stressed the need for some guidance and 27 legal certainty before fines could be applied. Certain concerns raised in this connection shed some light on issues that were later considered in the context of criteria to be included in the Rules of Procedure and Evidence. The first issue was related to the levels or amounts of fines. It would in particular be necessary to ensure that the application of fines would not be excessive. Some delegations stressed during the Conference that nominating amounts in the Statute would lead to difficulties. There would be need for flexibility over time, and one should take into consideration the difficulties in amending the Statute. Moreover, there would be need for having regard to the circumstances and means of the convicted person, and in particular the ability of the convicted person to pay and the burden this may have on dependents of the person.

The other key issue is what to do in cases of non-payment. At the Conference there was, 28 first of all, widespread agreement that sanctions should be limited to cases of wilful non-payment, while recognizing that there may be difficulties in ascertaining whether insolvency or actual lack of will to pay is the reason for non-payment. Several delegations indicated that there should, in cases of wilful non-payment, be the possibility of a sanction consisting in an additional period of imprisonment. Other delegations warned against instituting automatic prison penalties for debt. Among suggestions made in order to provide for the necessary flexibility, while at the same time satisfying the requirements of the principle of legality, were to provide for the possibility of re-sentencing by the Court in cases of intentional non-payment of a fine, in whole or in part. Among grounds upon which the Court may re-sentence the convicted person could be proof on the balance of probability that the person has the means available to satisfy the order

The formulation of rule 146, which was ultimately adopted, reads as follows:

- ‘1. In determining whether to order a fine under article 77, paragraph 2 (a), and in fixing the amount of the fine, the Court shall determine whether imprisonment is a sufficient penalty. The Court shall give due consideration to the financial capacity of the convicted person, including any orders for forfeiture in accordance with article 77, paragraph 2 (b), and, as appropriate, any

⁴⁵ See note 19.

orders for reparation in accordance with article 75. The Court shall take into account, in addition to the factors referred to in rule 145, whether and to what degree the crime was motivated by personal financial gain.

2. A fine imposed under article 77, paragraph 2 (a), shall be set at an appropriate level. To this end, the Court shall, in addition to the factors referred to above, in particular take into consideration the damage and injuries caused as well as the proportionate gains derived from the crime by the perpetrator. Under no circumstances may the total amount exceed 75 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependents.
3. In imposing a fine, the Court shall allow the convicted person a reasonable period in which to pay the fine. The Court may provide for payment of a lump sum or by way of installments during that period.
4. In imposing a fine, the Court may, as an option, calculate it according to a system of daily fines. In such cases, the minimum duration shall be 30 days and the maximum duration five years. The Court shall decide the total amount in accordance with sub-rules 1 and 2. It shall determine the amount of daily payment in the light of the individual circumstances of the convicted person, including the financial needs of his or her dependants.
5. If the convicted person does not pay the fine imposed in accordance with the conditions set above, appropriate measures may be taken by the Court pursuant to rules 217 to 222 and in accordance with article 109. Where, in cases of continued wilful non-payment, the Presidency, on its own motion or at the request of the Prosecutor, is satisfied that all available enforcement measures have been exhausted, it may as a last resort extend the term of imprisonment for a period not to exceed a quarter of such term or five years, whichever is less. In the determination of such period of extension, the Presidency shall take into account the amount of the fine, imposed and paid. Any such extension shall not apply in the case of life imprisonment. The extension may not lead to a total period of imprisonment in excess of 30 years.
6. In order to determine whether to order an extension and the period involved, the Presidency shall sit in camera for the purpose of obtaining the views of the sentenced person and the Prosecutor. The sentenced person shall have the right to be assisted by counsel.
7. In imposing a fine, the Court shall warn the convicted person that failure to pay the fine in accordance with the conditions set out above, may result in an extension of the period of imprisonment as described in this rule.⁴⁶

A number of delegations referring to the need for certainty and predictability, in accordance with the principle of legality, had spoken in favour of clear provisions on a maximum amount for fines, a scale of punishment, and a subsidiary term of imprisonment for wilful non-payment of fines, as formulated in the above rule⁴⁶. Among cases where fines may be a particularly relevant additional penalty, are those where financial gain motivated the crime concerned. In such cases, fines may indeed serve a deterrent purpose in addition to imprisonment. The method of calculation as well as the method of payment are set out in rule 146 (3) and (4)⁴⁷.

- 29 A divisive issue proved to be the question of sanctions in case of non-payment of fines. Reservations were expressed with regard to automatic application of sanctions such as extension of the term of imprisonment. Other delegations maintained that the credibility of fines was contingent on sufficiently harsh sanctions for wilful non-payment. A compromise formula is contained in rule 147 (5–7), providing for the possibility of extending the term of imprisonment as a last resort and within certain limitations, including a maximum ceiling for the total period of imprisonment.

- 30 In its first sentencing by the ICC, in *Lubanga*, the Chamber considered it inappropriate to impose a fine in addition to the prison term, given the financial situation of the convicted person. Despite extensive inquiries by the Court, no relevant funds had been identified.⁴⁸ No fines have been imposed by the Court at the time of writing (2014).

⁴⁶ For a detailed account of the negotiations on the provisions in rule 146 on the imposition of fines, see Fife, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 555, 565–569.

⁴⁷ See La Rosa, *Juridictions Pénales Internationales: La Procédure et la Preuve* (2003) 204; Schabas, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (2002) 1497, 1513.

⁴⁸ *Lubanga* (Decision on Sentence), see note 4, para. 106.

b) ‘A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties’. Article 77 para. 2 (b) of the Rome Statute provides on certain conditions for the possibility, as yet another penalty in addition to imprisonment, of a forfeiture of proceeds, property and assets derived from the crime. Implicitly it excludes the Court from ordering forfeiture of instrumentalities, *i. e.* any property used or intended to be used to commit the crime. Pursuant to article 79 property collected through forfeiture will be transferred to a Trust Fund for victims. Reference is here also made to the provision on reparations to victims in article 75 of the Statute.

Forfeiture may in this context be defined as the divestiture or permanent deprivation from the convicted person of specific property without compensation. At the Diplomatic Conference, since the notion gave rise to difficult questions of translation and legal interpretation in other languages it was ascertained that for the purposes of the Statute the equivalent term in French is ‘confiscation’⁴⁹ and in Spanish ‘decomiso’.

Definitions of ‘proceeds’ or ‘property’ are not contained in the Statute. However, guidance could be drawn from article 1 (a) and (b) of the 1990 European convention on laundering, search, seizure and confiscation of the proceeds from crime. Article 1 (a) defines ‘proceeds’ as any economic advantage from criminal offences. It may consist of any ‘property’ as defined in article 1 (b), which includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property. The inclusion of ‘assets’ underlines the broad scope of the forfeiture provision, and also creates possible overlap with the category of property.

Forfeiture presupposes also causation as to whether and to what extent the offender has benefited from the crime. The formulation ‘derived directly or indirectly from that crime’ is very broad, and lessens the evidentiary burden of the Court. Guidance could be drawn from relevant provisions on forfeiture of property derived from crime to be found in the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (see article 5).

Forfeiture raises issues of determination of ownership⁵⁰. Those may include standards for burden of proof and choice of law in determining ownership⁵¹, and particular challenges may arise in particular in cases where victims, property and third parties are located in different jurisdictions. The Court may have the need to notify the State where the property is located. It may also be relevant for the Court to consider the relationship with national court systems, which may have the advantage of better legal and practical avenues for making such considerations⁵².

The proviso ‘without prejudice to the rights of bona fide third parties’ in article 77 para. 2 differs from the rule of restitution of property in the Statute of the ICTY, which extends the Tribunal’s jurisdiction to property that may be in the hands of third parties, even those not otherwise connected with the crime⁵³. A similar proviso is contained in the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances⁵⁴. Guidance may here be derived from general principles of law recognized by national legal systems with regard to protection of rights of third parties in good faith (*bona fide*), in particular with regard to concrete *bona fide* standards. Such standards may, however, not easily be met in the context of acquisition or possession of certain kinds of property in

⁴⁹ In French law, see, for example, Stefani, Levasseur and Bouloc, *Droit Pénal Général* (1997) 423–426.

⁵⁰ See in particular Morris and Scharf, *The International Criminal Tribunal for Rwanda* (1998) 594.

⁵¹ See Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 704.

⁵² See Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 594.

⁵³ Rule 105 (B). See Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 703.

⁵⁴ Article 5 para. 8 of the Convention states: ‘The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties’.

situations of armed conflict or other situations where gross violations of humanitarian law have taken place. This would significantly be the case for real property or cultural property, more so than for instance certain movable goods whose origin may be difficult to ascertain.

Provisions on orders of forfeiture are contained in rule 147. In accordance with this provision, the Court may order a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties⁵⁵. Rule 147 on orders of forfeiture reads:

1. In accordance with article 76, paragraphs 2 and 3 and rules 63, sub-rule 1, and 143, at any hearing to consider an order of forfeiture, a Chamber shall hear evidence as to the identification and location of specific proceeds, property or assets which have been derived directly or indirectly from the crime.
2. If before or during the hearing, a Chamber becomes aware of any bona fide third party who appears to have an interest in relevant proceeds, property or assets, it shall give notice to that third party.
3. The Prosecutor, the convicted person and any bona fide third party with an interest in the relevant proceeds, property or assets may submit evidence relevant to the issue.
4. After considering any evidence submitted, a Chamber may issue an order of forfeiture in relation to specific proceeds, property or assets if it is satisfied that these have been derived directly or indirectly from the crime.'

C. Special Remarks

1. Relationship with cooperation issues

- 37 The application of penalties by the Court will in many cases presuppose international cooperation and judicial assistance in accordance with the relevant provisions of Part 9 of the Statute. In particular, it is reasonable to assume that the possibility to order forfeiture may to a large degree depend on effective prior assistance from States. In accordance with article 93 para. 1 (k), States Parties shall therefore comply with requests by the Court to provide assistance, *inter alia*, in the identification, tracing and freezing or seizure of relevant proceeds, property and assets. Other illustrations of the close relationship between aspects concerning forfeiture and State cooperation are to be found in article 93 para. 9 (b) concerning property which is subject to the control of a third State or an international organization and in article 98 with respect to the State or diplomatic immunity of property of a third State.

2. Relationship with enforcement issues

- 38 The penalties ordered by the Court are to be given effect through national enforcement by States. Moreover, the application of penalties gives rise to a number of consequences with regard to enforcement. The relevant enforcement provisions are contained in Part 10 of the Statute. Reference is in particular made to article 103 with regard to the role of States in enforcement of sentences of imprisonment and article 109 concerning enforcement of fines and forfeiture measures.

3. Likely impact of provisions on review by the Court concerning reduction of sentence on the possibilities to impose fines and forfeiture

- 39 It should be noted that in accordance with article 110 para. 4 (b) of the Rome Statute the Court may on certain conditions reduce a sentence if it finds that the person has voluntarily assisted the Court in other cases, notably in enabling it to locate assets subject to orders of fine or forfeiture which may be used for the benefit of victims. It may be reasonable to assume that this could in practice become a significant factor in enhancing the possibilities of the Court to impose fines and forfeiture.

⁵⁵ For an account of the negotiations on rule 147 concerning orders of forfeiture, see note 28, R. E. Fife, 569–570. See La Rosa, *Juridictions Pénales Internationales: La Procédure et la Preuve* (2003) 204; Schabas, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (2002) 1497, 1515.

Article 78

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Literature: See literature listed under Articles 76 and 77; Rule 145; D’Ascoli, S., *Sentencing in international criminal law* (Hart Publishing 2011); *Final Report of the Preparatory Committee*, UN Doc A/CONF.183/2/Add.1 (1998)

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	10
I. Preliminary considerations.....	10
1. Facts and circumstances described in the charges.....	10
2. Standard of proof.....	11
3. Double counting.....	12
II. Paragraph 1: Factors in determining sentence to be imposed.....	14
1. ‘gravity of the crime’.....	15
2. ‘individual circumstances of the convicted person’.....	17
III. Paragraph 2.....	18
1. Deduction from sentence of time spent in detention by order of the Court.....	18
2. Deduction from sentence of time otherwise spent in detention.....	19
IV. Paragraph 3.....	20
1. Person ‘convicted of more than one crime’.....	20
2. Length of the joint sentence.....	21
C. Special remarks: Rules of Procedure and Evidence: elaboration of factors listed in rule 145, sub-rules 1 and 2.....	22

A. Introduction/General remarks

Sentencing is as much an art as a science. Despite the provision in Article 78 and its corresponding rule – Rule 145 of the Rules of Procedure and Evidence – it is worth bearing this in mind. That said, Article 78 frames the issue of sentencing and sets out general factors that must be considered by a Trial Chamber when determining sentence. Whilst the adage that ‘the punishment, should fit the crime’ is of general applicability, and frequently heard in national systems, it provides limited guidance when dealing with crimes within the jurisdiction of the ICC which, by their very nature, are limited to crimes at the most serious end of any sentencing tariff. What is clear, however, is that a Trial Chamber has a ‘broad discretion as to which factors it may consider in sentencing and the weight to attribute to them’¹.

¹ *Prosecutor v. Jelisić*, IT-95-10-A, Judgment, 5 July 2001, para. 100; see also *Prosecutor v. Nikolić*, IT-94-2-A, Judgment on Sentencing Appeal, 4 February 2005, para. 27.

2 As with other articles on penalties, aspects of Article 78 generated significant debate in the Preparatory Committee and at the Diplomatic Conference. This debate was driven, in part, by delegations seeking to reflect approaches taken in their national criminal justice systems to sentencing matters.

3 Paragraph 1 of Article 78 does not contain an exhaustive list of aggravating and mitigating factors, nor does it even use those terms. Specific reference is only made to ‘gravity of the crime and the individual circumstances of the convicted person.’ It is left to the Rules of Procedure and Evidence to set out in more detail a list of factors relevant when determining sentence. Rule 145 performs this function and details certain aggravating and mitigating factors that may be considered by a Trial Chamber. Given that Article 78(1) specifically requires recourse to the Rules of Procedure and Evidence it is clear that the factors detailed in Rule 145 will be particularly important when seeking to properly interpret and apply Article 78.

The Preparatory Committee saw a lengthy debate on aggravating and mitigating factors. The Preparatory Committee’s Working Group on Penalties addressed the issue both in formal and informal meetings. Delegations wrestled, *inter alia*, with the question of whether an illustrative or exhaustive list of factors should be included in the Statute. It was finally agreed that only a short illustrative list of factors should be included in the article with further factors to be elaborated in the Rules of Procedure and Evidence.

This position is reflected in footnote 13 on page 122 of the final Report of the Preparatory Committee², which provides as follows:

‘It may be impossible to foresee all of the relevant aggravating and mitigating circumstances at this stage. Many delegations felt that factors should be elaborated and developed in the Rules of Procedure and Evidence, while several other delegations expressed the view that a final decision on this approach would depend upon the mechanism agreed for adopting the Rules. Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person’s conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime’.

4 The matter was not reopened at the Diplomatic Conference, with the text of paragraph 1 being identical to the text submitted by the Preparatory Committee³.

5 Paragraph 1 of Article 78 is drafted in similar, but not identical terms, to Article 46(2) of the Draft Statute prepared by the ILC⁴, Article 24(2) the Statute of the ICTY⁵ and Article 23(2) of the ICTR⁶. Accordingly, the sentencing jurisprudence of the Tribunals may be of additional relevance when considering aggravating and mitigating factors in the context of the Court⁷. What is clear, however, is that when interpreting Article 78, close reference must be had to the express provisions of Rule 145(1) and (2) of the ICC Rules of Procedure and Evidence.

Rule 145(1) provides more detailed direction on determining sentences to the Court than Article 78(1). Sub-rule 1(b) requires the Court to ‘[b]alance all the relevant factors, including any mitigating and relevant factors’ in determining sentences. The word ‘balance’ does not appear in paragraph 1 of Article 78. Sub-rule 1(c) sets out a range of factors to be taken into account by the Court. A number of these factors are drawn from footnote 13 of the Preparatory Committee’s Final Report, for example, the effect of the crime on victims and their families.

² Preparatory Committee (Consolidated) Draft.

³ See article 77 para. 1 of the Preparatory Committee Draft, p. 122.

⁴ UN Doc. A/CN.4/L.491/Rev.2, p. 28.

⁵ Annex to UN SC Res. 827 (1993).

⁶ Annex to UN SC Res. 1168 (1994).

⁷ See, for example, the decision of the ICTY Appeals Chamber in *Prosecutor v. Erdemović*, IT-96-22-A, 7 October 1997.

Rule 145(2) identifies mitigating and aggravating circumstances to be taken into account by the Court. Sub-rule 2 (a), concerning mitigating circumstances, draws on some elements of footnote 13, for example, sub-rule 2 (a) (i) – ‘circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress’. Sub-rule 2(b), dealing with aggravating circumstances, picks up one factor from footnote 13: the motive for the commission of the crime. Sub-rule 2 (b) (v) lists any motive involving discrimination on any grounds referred to in paragraph 3 of article 21 as an aggravating circumstance.

Paragraph 2 of Article 78 generated less debate than paragraph 1 in the Preparatory Committee. Delegations accepted that it was fair to require the Court to take account of time spent in detention, as a result of its order, in determining a sentence of imprisonment. Delegations were also prepared to give discretion to the Court to deduct any time otherwise spent in detention in connection with conduct underlying the crime. This discretion would permit the Court to take into account time spent by a person in detention pursuant to a conviction under national law for conduct constituting a crime within the jurisdiction of the Court. It is necessary to provide the Court with this discretion as national convictions are not an absolute bar to prosecutions before the Court⁸.

The text of paragraph 2 was settled in the Preparatory Committee and not reopened at the Diplomatic Conference⁹. The deduction of time spent in custody by order of the ICTY is governed by Rule 101 (C) of the ICTY Rules of Procedure and Evidence¹⁰ which requires the Trial Chamber in sentencing to give ‘credit’ to the convicted person:

‘... for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal’.

The relevant provision in the ICTR Rules of Procedure and Evidence is Rule 101 (C), which is drafted in identical terms to Rule 101 (C) of the ICTY Rules.

Although the ICTY and ICTR Rules refer to a person being given ‘credit’ for time in custody and paragraph 2 refers to time in detention being ‘deducted’, the practical effect of the ICTY and ICTR provisions and paragraph 2 would appear to be the same. In the Sentencing Judgment of 5 March 1998 in *Erdemovic*¹¹, for example, the Trial Chamber imposed a sentence of imprisonment of five years on the count of a violation of the laws or customs of war, but ruled that the time Erdemovic had spent in custody from 28 March 1996 had to be deducted from the sentence. The Court would be expected to adopt this approach in applying paragraph 2 when sentencing a convicted person who has spent time in detention in accordance with a Court order.

As to time spent in detention because of a conviction under national law, Article 10(3) of the ICTY Statute requires the Tribunal in considering the penalty to be imposed on a convicted person to:

‘... take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served’.

The equivalent provision of the ICTR Statute is Article 9(3).

The text of paragraph 3 could not be settled in the Preparatory Committee. The purpose of the paragraph is to establish a mechanism for the imposition of sentences where a person is convicted of more than one crime. Some delegations supported a single sentence being imposed, with a limitation as to the length of that sentence. Other delegations favoured the approach that had been taken in the ICTY Rules¹², which required the Trial Chamber to determine whether multiple sentences were to be served consecutively or concurrently. The

⁸ See Article 20.

⁹ See Article 77 para. 2 of the Preparatory Committee text, note 1, p. 122.

¹⁰ Rev. 33.

¹¹ *Prosecutor v. Erdemović*, IT-96-22-T.

¹² See also Rule 101 (C) of the ICTR Rules.

views of the former group of delegations were reflected in option 1 under Article 77(3) of the Preparatory Committee text¹³, while the view of the latter group of delegations was reflected in option 2 under Article 77(3) of the Preparatory Committee text¹⁴.

The negotiations on paragraph 3 at the Diplomatic Conference centred on efforts to bridge between the two views outlined in the previous paragraph. These efforts proved fruitful. The final text of paragraph 3 requires a separate sentence to be pronounced for each crime, but a single sentence to be imposed on the convicted person. Conditions are also imposed in relation to the length of the single sentence.

B. Analysis and interpretation of elements

I. Preliminary considerations

1. Facts and circumstances described in the charges

- 10 Article 78 does not limit the factors that are properly to be considered during sentencing to those described in the document containing the charges. The evidence admitted at the sentencing stage can exceed the facts and circumstances set out in the Confirmation of Charges Decision, provided the defence has had a reasonable opportunity to address them¹⁵. Both aggravating and mitigating factors are therefore not limited to the facts and circumstances described in the Confirmation of Charges Decision. This finding departs, partially, from the ICTY jurisprudence which provides that although mitigating factors may include circumstances not directly related to the offence, aggravating factors must be directly related to the offence¹⁶. Regarding mitigating factors, this rule flows particularly from Rule 145(2)(a)(ii) of the Rules which refers to ‘the convicted person’s conduct after the act’¹⁷.

2. Standard of proof

- 11 Neither the Rome Statute nor the Rules of Procedure and Evidence define the applicable evidentiary standard for the factual elements considered at this stage. Following ICTY jurisprudence¹⁸, ICC judges have, in practice, differentiated between aggravating and mitigating circumstances. Thus, while aggravating factors must be established beyond reasonable doubt, mitigating circumstances must only be established on a balance of probabilities¹⁹. This reasoning is based on the appreciation that since aggravating factors may have a significant effect on the overall length of the sentence; they must be established to the criminal standard of proof to concur with the legality of penalties principle²⁰.

3. Double counting

- 12 Any factors that are to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances and *vice-versa*²¹. This

¹³ Preparatory Committee (Consolidated) Draft, p. 122.

¹⁴ *Ibid.*, p. 123.

¹⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision on Sentence pursuant to Article 76 of the Statute’ (*Lubanga Decision*), ICC-01/04-01/06-2901, 10 July 2012, para. 29.

¹⁶ *Prosecutor v. Stakić*, IT-97-24-T, Judgment, 31 July 2003, paras. 911 and 920; *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-T, Judgment, 22 February 2001, para. 850.

¹⁷ *Lubanga Decision*, para. 34.

¹⁸ *Prosecutor v. Babić*, IT-03-72-A, Judgment on Sentencing Appeal, 18 July 2005, para. 43; *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-T, Judgment, 22 February 2001, para. 847.

¹⁹ *Lubanga Decision*, paras. 33–34; *The Prosecutor v. Germain Katanga*, ‘Décision relative à la peine (article 76 du Statut)’ (*Katanga Decision*), ICC-01/04-01/07-3484, 23 mai 2014, paras. 33–34.

²⁰ *Lubanga Decision*, para. 33.

²¹ *Lubanga Decision*, para. 35; *Katanga Decision*, para. 35.

rule is consistent with the law and practice of the *ad hoc* Tribunals²². In *Deronjic*, the Appeals Chamber found that the fact that the Trial Chamber had discussed the gravity of the crime and the relevant aggravating factors in the same section of its judgment was ‘unfortunate’²³. Similarly, in *Jokic*, the Appeals Chamber considered that:

‘[the Trial Chamber’s] consideration of the Appellant’s abuse of his position of authority as an aggravating circumstance may have been inappropriate in the light of the fact that it had convicted the defendant under Article 7(3) of the Statute, which essentially incorporates the Appellant’s authority as an element’²⁴.

It is similarly prohibited to double-count mitigating factors. In the ICTY case of *Limaj et al*, the Appeals Chamber found that the Trial Chamber had erred in considering the subordinate role of the accused Haradin Bala when assessing the gravity of the crimes and when determining the factors in mitigation²⁵. On this ground, the *Lubanga* Trial Chamber rejected the Prosecution’s submission that the young age of the children recruited should be considered as an aggravating factor. The Chamber found that since it already constituted a core element of the offence for which Lubanga had been found guilty, age could not be counted as an aggravating factor.²⁶

In the view of Kai Ambos, the prohibition of double counting flows from the basic rationale of achieving a just and adequate punishment.²⁷ Fairness thus requires double counting to be understood in a broad sense to include any factor, and not merely constituting elements of the offence. That said, distinction between factors belonging to the gravity of the crime and factors considered as mitigating or aggravating remains largely uncertain.²⁸ Such uncertainty is due, in particular, to the complexity of the concept of gravity addressed in section II(1) below.

II. Paragraph 1: Factors in determining sentence to be imposed

Unlike the Statutes of the *ad hoc* Tribunals²⁹, the Rome Statute does not require that recourse be had to the sentencing practice of the territory where the crime was committed. Article 78 (1) only requires the Court to take account of the two factors listed in the paragraph, ‘gravity of the crime’ and ‘individual circumstances of the convicted person’, in determining the sentence to be imposed. The Court must do so in accordance with the Rules of Procedure and Evidence (rule 145).

1. ‘gravity of the crime’

Gravity of the crime will be the critical factor in the determination of any sentence. Although the Court’s jurisdiction ensures that it deals only with the most serious crimes, all crimes will not be of equivalent gravity. The Court will have to consider the nature and scale of crimes in determining their gravity.

The sentencing jurisprudence of the ICTY and ICTR has emphasized the central importance of the gravity of a crime in determining the appropriate sentence for a convicted person. In the *Celibici*³⁰ Judgment, the Trial Chamber stated in paragraph 1225 that:

²² See for example: *Prosecutor v. Nikolić*, IT-02-60/1-A, Appeals Chamber, Judgment on Sentencing Appeal, 8 March 2006, para. 58; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007, para. 35.

²³ *Prosecutor v. Deronjić*, IT-02-61-A, Judgment on Sentencing Appeal, 20 July 2005, para. 106.

²⁴ *Prosecutor v. Jokić*, IT-01-42/1-A, Sentencing Appeal Judgment, 30 August 2005, para. 30.

²⁵ *Prosecutor v. Limaj*, IT-03-66-A, Appeal Judgment, 27 September 2007, para. 143.

²⁶ *Lubanga* Decision, paras. 77–78.

²⁷ See Ambos, K., *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing* (Oxford University Press 2014), p. 265.

²⁸ *Ibid.*, p. 288.

²⁹ Article 23(1) of the ICTR Statute and Article 24(1) of the ICTY Statute.

³⁰ IT-96-21, Judgment, 16 November 1998.

‘the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence’.

This statement was endorsed by the Appeals Chamber in its Judgment in *Aleksovski*³¹ at paragraph 182. Judges of the ICTY moreover considered that, when assessing gravity of the offense, one must consider the crime for which the accused have been convicted, their underlying criminal conduct, and their specific role in the commission of the crime³². The ICTY and ICTR sentencing jurisprudence also provides the Court with useful guidance on the comparative gravity of crimes. In the Judgment and Sentence in *Kambanda*, for example, the Trial Chamber took the view that:

‘...despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as lesser crimes than genocide or crimes against humanity’³³.

In the same paragraph, the Trial Chamber considered the ranking of genocide and crimes against humanity in terms of their respective gravity to be more difficult. In paragraph 17 the Trial Chamber found that the ‘extreme gravity’ of genocide and crimes against humanity requires persons who commit such crimes to be ‘punished appropriately’. This approach is justified by the fact that war crimes, crimes against humanity and genocide are distinguished by the systematic targeting of civilians and their additional contribution to a ‘broader scheme of violence’³⁴.

- 16 Rule 145 of the Rules of Procedure and Evidence provides further guidance when assessing the gravity of the crime, Sub-rule 1(c) contains at least one factor going to the gravity of the crime, namely ‘the extent of the damage caused, in particular the harm caused to the victims and their families’. Rule 145, sub-rule 2(b) also lists a number of aggravating circumstances relevant to the gravity of the crime, for example, ‘[c]ommission of the crime with particular cruelty or where there were multiple victims’.

A fair sentence is one that reflects the gravity of the offence committed by the convicted person³⁵. Thus, in determining the sentence against a convicted person, elements of the crimes should be taken into consideration as long as they are not double-counted³⁶. ‘Gravity’ must not be considered in the abstract, or in isolation but should always be assessed from both a quantitative and a qualitative perspective, in light of the particular circumstances of the case and of the degree of participation of the convicted person³⁷.

Thus, in assessing the gravity of the crimes of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities, the *Lubanga* Trial Chamber took into account several factors, such as the vulnerability of children, their exposure to danger, the risk of being wounded and killed, and the risk of post-traumatic stress and disorder the children have been exposed to³⁸. The Trial Chamber in *Katanga* highlighted the violence and the widespread nature of the crime committed and the discriminatory nature of the attack³⁹. Additionally, the Chamber noted the current situation in the area where the crimes were committed and the consequences of the suffering of the victims on the society⁴⁰.

³¹ IT-95-14/1, Judgment, 24 March 2000.

³² *Prosecutor v. Tadić*, IT-94-1-A, Judgment in Sentencing Appeals, 26 January 2000, para. 55; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 February 2001, para. 847.

³³ *Prosecutor v. Kambanda*, ICTR 97-23-S, Judgment and Sentence, 4 September 1998, para. 14.

³⁴ *Prosecutor v. Erdemović*, IT-96-22-A, Judgment, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 20–22.

³⁵ *Katanga* Decision, para. 42.

³⁶ *Katanga* Decision, para. 45–50.

³⁷ *Katanga* Decision, para. 43.

³⁸ *Lubanga* Decision, paras. 36–44.

³⁹ *Katanga* Decision, paras. 46–54.

⁴⁰ *Katanga* Decision, paras. 55–60.

2. ‘individual circumstances of the convicted person’

Paragraph 1 of article 78 does not specify matters for the Court to consider under the rubric of the ‘individual circumstances of the convicted person’. In this regard, rule 145, sub-rule 1(c) directs the Court to give consideration to ‘the age, education, social and economic condition of the convicted person’. By way of example, the *Lubanga* Trial Chamber found that the level of awareness on part of the convicted person was a relevant factor in determining the appropriate sentence. In the particular circumstances of the case, the fact that Thomas Lubanga was ‘an intelligent and well-educated individual, who would have understood the seriousness of the crimes of which he has been found guilty’ increased the gravity of his crimes⁴¹. *For additional factors, see C. below*

III. Paragraph 2

1. Deduction from sentence of time spent in detention by order of the Court

The first sentence of Article 78(2) requires the Court to deduct from a sentence of imprisonment the time, if any, spent in detention by the convicted person in accordance with an order of the Court. The Court has no discretion as to whether it deducts time spent in detention on its order from a sentence of imprisonment. It is obliged to do so. In order to be deducted, the time spent by a convicted person in detention must be linked to an order by the Court, such as a warrant of arrest issued by the Pre-Trial Chamber under Article 58. Where, for example, such a warrant is acted upon by the national authorities of a State leading to the arrest and detention of the person sought prior to surrender to the Court, the period which he or she spends in detention in that State must be deducted from any sentence of imprisonment imposed on that person. Time spent in custody by the person after surrender to the Court must also be deducted from his or her sentence of imprisonment.

Although this provision does not raise difficulty, it must be noted that issues regarding prior detention are relevant where they are part of the process of bringing the person to justice for the crimes that form the subject-matter of the proceedings before the Court⁴². Thus, the *Katanga* Trial Chamber considered that Katanga was detained by order of the Court only from the time the Congolese authorities became aware that an arrest warrant against the detainee had been issued by the Court⁴³.

Regarding credit granted for time spent in detention during trial, the issue of provisional release, left at the discretion of the judges, remains to be clarified. The Trial Chamber in *Prlic*, for example, considered that time spent in provisional release must be deducted from time spent in detention⁴⁴. The Defence have appealed this finding as the significant periods of release from the United Nations detention Facility in the Hague that were granted to the various accused in that case, after the commencement of trial (during certain periods of court recess) were usually accompanied by a requirement of house arrest/confinement at a particular address. In this regard, the jurisprudence of the European Court of Human Rights provides useful guidance by stating that:

‘to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors

⁴¹ *Katanga* Decision, paras. 54–56.

⁴² *Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’, ICC-01/04-01/06-824, 13 February 2007, para. 121.

⁴³ *Katanga* Decision, ICC-01/04-01/07, 23 mai, para. 158.

⁴⁴ *Prosecutor v. Perlić et al.*, IT-04-74-T, Judgment, Volume 4 of 6, 29 May 2013, paras. 1323–1324.

arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance.⁴⁵

2. Deduction from sentence of time otherwise spent in detention

19 The second sentence of paragraph 2 gives the Court the discretion to deduct from a sentence of imprisonment the time spent by a person in detention because of a conviction under national law for conduct constituting a crime within the jurisdiction of the Court. Although no factors are identified for the Court to take into account in exercising its discretion, the Court would no doubt consider the circumstances of the national conviction and the length of the sentence of imprisonment imposed by the national court. The ICTY jurisprudence moreover emphasised that such decision should be guided by fairness⁴⁶.

The *Lubanga* Trial Chamber held that in order to deduct time spent in national custody, the fact that detention was related to conduct underlying the crimes on the basis of which the person was convicted before the Court must be established on the balance of probabilities⁴⁷. This being said, the Chamber failed to define the notion of ‘conduct underlying the crimes’. In the words of the Trial Chamber, it seems that the accused must be detained for exactly the same crimes charged by the Court, in order for time spent in national custody to be deducted. More clarity would have been helpful, especially in the light of the words ‘in connection with’ in the wording of Article 78(2). Such provision seems to reflect the intent of the drafters to enable the Chamber to deduct from the overall sentence it imposes, periods spent in custody where such detention emanates from ‘substantially the same criminal conduct as that for which he now stands convicted’⁴⁸.

The *Katanga* Trial Chamber also declined to consider the period of time between Katanga’s arrest by the Congolese authorities and the notification of the arrest by the Court⁴⁹ as an Article 78(2) counting period. In the view of the Majority, the documents produced by the Defence did not establish that Katanga was detained for conduct related to the crimes for which the Chamber found him guilty on 7 March 2014⁵⁰. The reasoning of the Chamber is nonetheless ambiguous and has been criticised by Judge Christine Van den Wyngaert in her dissent. In that dissent, the learned judge was of the view that the Majority seemed to confuse the requirements of Article 78(2) and Article 17. The fact that the Congolese authorities were not actively investigating Katanga’s alleged involvement in the attack of Bogoro did not necessarily mean that Katanga was not detained on the basis of his alleged involvement in the attack⁵¹. The fact that national authorities lacked diligence in conducting their investigation should not affect the rights of the convicted person.

IV. Paragraph 3

1. Person ‘convicted of more than one crime’

20 Paragraph 3 deals with the situation where a person has been convicted of more than one crime. In such cases the Court is required to pronounce a separate sentence for each crime and then a joint sentence specifying the total period of imprisonment.

⁴⁵ ECtHR, *Case of H. L. v. United Kingdom*, App. No. 45508/99, Judgment, 5 October 2004, para. 89.

⁴⁶ *Prosecutor v. Tadić*, IT-94-1-A, Judgment in Sentencing Appeals, 26 January 2000, para. 38.

⁴⁷ *Lubanga* Decision, para. 102.

⁴⁸ *Prosecutor v. Tadić*, IT-94-1-A, Judgment in Sentencing Appeals, 26 January 2000, para. 38.

⁴⁹ *Katanga* Decision, para. 167.

⁵⁰ *Katanga* Decision, para. 161.

⁵¹ *Katanga* Decision, Dissenting opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3484-Anx 1, 23 mai 2014, para. 4.

2. Length of the joint sentence

The length of the joint sentence can be no less than the length of the highest individual sentence imposed by the Court. The joint sentence is not to exceed 30 years imprisonment or a sentence of life imprisonment⁵². If, for example, the Court imposes 5 separate sentences of 20 years imprisonment for crimes against humanity, it may not impose a joint sentence which is of a length less than 20 years. It may in such a case, for example, decide to impose a joint sentence of 30 years because of the serious nature and number of the crimes.

As for the rest of Article 78, this provision leaves a broad discretion to the judges. Trial Chambers may thus decide to impose a joint sentence corresponding to the highest individual sentence, a combination of the individual sentences, or none of the above. Although the Rome Statute requires judges to indicate specific penalties for each finding of guilt, the general *quantum* of penalty eventually falls within their discretion.

Rule 145 provide a welcome addition by stating that the totality of the sentence must reflect the culpability of the convicted person. Proportionality between the penalty imposed and the culpability of the person is not only desirable but necessary under the *nulla poena sine culpa* principle. Trial Chambers will, no doubt, provide some further clarity in the way they apply this general provision in the future.

C. Special remarks: Rules of Procedure and Evidence: elaboration of factors listed in rule 145, sub-rules 1 and 2

It is worth recalling that ‘as far as the individualisation of penalties is concerned, the judges of the Chamber cannot limit themselves to the factors mentioned in the Statute and Rules [...] their unfettered discretion to evaluate the facts and attendant circumstances should enable them to take into account any other factor that they deem pertinent’⁵³. Accordingly with this general rule, Rule 145, sub-rules 1 and 2 give scope to the Court to develop, through its jurisprudence, further factors which may be taken into account in sentencing. Rule 145(1)(c) thus provides that in addition to the ‘gravity of the crimes’ and ‘individual circumstances of the convicted person’, the Court shall give consideration to additional factors, such as:

‘the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person’.

The list of factors in Rule 145 (1)(c) is not exhaustive, leaving it open to the Court to identify other factors which may be relevant in a particular case. For example, the *Lubanga* Trial Chamber thus took into consideration the widespread nature of the crimes committed⁵⁴ and the degree of participation and intent of the convicted person⁵⁵. The Chamber nevertheless did not explain how these factors inter-related with the ‘gravity of the crime’ and the ‘individual circumstances of the convicted person’. As demonstrated by Kai Ambos, difficulties arise only with regard to circumstances contemporaneous to the commission of the offence. Pre- or post-offence personal circumstances will always be considered as mitigating or aggravating factors and never affect the gravity of the crime.⁵⁶

⁵² See article 77.

⁵³ *Prosecutor v. Kambanda*, ICTR 97-23-S, Judgment and Sentence, 4 September 1998, para. 30.

⁵⁴ *Lubanga* Decision, paras. 45–50.

⁵⁵ *Lubanga* Decision, paras. 51–53.

⁵⁶ See Ambos, K., *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing* (Oxford University Press 2014), pp. 295–296.

The factors to be taken into account in sentencing must reflect the principle of individualisation of sentences. Sentence must thus always be adapted to the individual circumstances of both the crimes and the convicted person⁵⁷. Regarding the degree of participation and intent of the convicted person, the Chamber further stated that they must be evaluated *in concreto*, depending upon the factual and legal findings of the Trial Chamber while ruling on the guilt of the convicted person⁵⁸.

- 23 The chapeau to sub-rule 2(a) contains the text '[m]itigating circumstances such as'. The use of the words 'such as' indicates that the list of mitigating circumstances provided is only illustrative. Although the chapeau of sub-rule 2(b) does not contain the words 'such as', the list of aggravating circumstances identified in that provision is not closed. Sub-rule 2(b)(vi) requires the Court to take into account, as appropriate, '[o]ther circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned'.

The factors to be taken into consideration as aggravating circumstances thus fall within the discretion of the Trial Chamber. These include *inter alia* the nature of the crime, its effect on the victims, the degree of responsibility of the convicted person as well as premeditation and motive. It is nevertheless to be noted that, pursuant to Rule 145(1)(a) of the Rules, aggravating circumstances may only be taken into account for the purposes of sentence if they can be attributed to the convicted person in a way that reflects his or her culpability⁵⁹. They must moreover be established beyond reasonable doubt⁶⁰.

Regarding mitigating circumstances, it must be noted that they only serve to purposes of reducing the sentence and do not alter in any way the gravity of the crime⁶¹. Additionally, as stated by the *Bralo* Appeals Chamber:

'any modification of sentence needs to be assessed in light of all the circumstances of the case and cannot be limited to a simple mathematical diminution of the sentence otherwise to be imposed'⁶².

The Statute and Rules do not provide for an exhaustive list of factors that may be considered in mitigation. The Trial Chambers will thus have discretion to determine what constitutes a mitigating factor in a particular case. They may take into account circumstances either contemporaneous with the crime or posterior to the crime, such as co-operation with the Court, admission of guilt, expression of remorse, or good behaviour. In the words of the *Babic* Appeals Chamber:

'[Trial Chambers] are not required to 'articulate every step' of their reasoning in reaching particular findings, and failure to list in a judgement 'each and every circumstance' placed before them and considered 'does not necessarily mean that [they] either ignored or failed to evaluate the factor in question'⁶³

⁵⁷ *Katanga* Decision, para. 39.

⁵⁸ *Katanga* Decision, para. 61.

⁵⁹ *Lubanga* Decision, paras 59, 68 and 74.

⁶⁰ *Lubanga* Decision, para. 75; *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgment, 20 February 2001, para. 763.

⁶¹ *Katanga* Decision, para. 77; *Prosecutor v. Erdemovic*, IT-96-22-T, Sentencing Judgment, 29 November 1996, para. 46; *Prosecutor v. Kambandai*, ICTR-97-23-S, Judgment and Sentence, 4 September 1998, para. 56.

⁶² *Prosecutor v. Bralo*, IT-95-17-A, Judgment on Sentencing Appeal, 2 April 2007, para. 85.

⁶³ *Prosecutor v. Babic*, IT-03-72-A, Judgment on Sentencing Appeal, 18 July 2005, para. 43.

Article 79 Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Literature: See literature listed for articles 75 and 77; Rule 98; Regulations of the Trust Fund for Victims; Moffett, L., *Justice for victims before the International Criminal Court* (Routledge Research in International Law, New York, 2014)

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1.....	4
1. Establishment by the Assembly of States Parties.....	4
2. 'for the benefit of victims ... and of the families of such victims'.....	5
II. Paragraph 2: Court orders to transfer fines or forfeiture.....	8
III. Paragraph 3: Management of the Trust Fund.....	10

A. Introduction/General remarks

The Trust Fund and the possibility of reparations for victims constitute an important hallmark of the Rome Statute. The right of victim representation in court proceedings is not only in order that their 'views and concerns' can be presented during the pre-trial and trial stage. Rather, the right of victim participation has a separate aspect which is linked to reparations. Indeed, it has been said that:

'The reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system'¹.

In the light of the opportunity afforded to the victims to obtain reparations for crimes under the jurisdiction of the Court, article 79 provides for a Trust Fund to be established by the Assembly of States Parties for the benefit of victims and their families. Aimed at addressing the harm resulting from the crimes under the jurisdiction of the Court and to assist the victims of such crimes, the Trust Fund for Victims has two mandates: (a) to implement Court-ordered reparations; and (b) to provide physical and psychological rehabilitation or material support to victims.

Article 75 of the Rome Statute is also central to this regime. Article 75 provides that reparation orders may be made against convicted persons. Article 75(2) permits the Court, where appropriate, to order that an award for reparations be made through the Trust Fund. Article 79 should be viewed alongside article 77(2) which provides for the possibility of fines and forfeiture as penalties in addition to imprisonment.

The concept of a Trust Fund received strong support from a range of delegations in the Preparatory Committee. The 1994 Draft Statute prepared by the ILC, which was the starting

¹ *Prosecutor v. Thomas Lubanga Dyilo*, 'Corrigendum of Decision on the Prosecutor's Application for a Warrant of Arrest, article 58', ICC-01/04-01/06, 10 February 2006, para. 150.

point for discussions in the Preparatory Committee, contained a proposal for a Trust Fund. Article 47 of that Draft² addressed the issue of applicable penalties providing, in part, for the imposition of a fine as a penalty. Paragraph 3 of that article dealt with the use which could be made of fines paid, specifying that they could be transferred by order of the Court to one or more of the following:

- The Registrar, to defray the costs of the trial;
- A State, the nationals of which were the victims of the crime;
- A trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.

Article 47(3) survived the debate in the Preparatory Committee in recognisable form (albeit with its fair share of square brackets) to provide the basis of article 79 of the Preparatory Committee text³ which was submitted to the Diplomatic Conference. The debate at the Conference focused on the purpose to which money and other property collected through fines or forfeiture should be put. A strong view emerged that the Trust Fund should be the beneficiary of such money and property. This option was chosen in preference to the other options of (i) the Court receiving the funds or assets in order to defray costs, or (ii) the States of which victims were nationals receiving any such funds or property.

After some debate, delegations also agreed that the detailed operation of the Trust Fund should not be provided for in the Statute. Rather, Delegations accepted that the operation of the Fund could be determined by the Assembly of States Parties in due course. The issues which were thus deferred to the ASP included what role, if any, should be given to the Secretary-General of the United Nations with regard to the establishment and/or functioning of the Fund.

The Assembly of States Parties took up the issue at its first session (3–10 September 2002), adopting two resolutions concerning the Trust Fund. The first resolution established the Fund⁴. The annex to the resolution addresses various matters concerning the operation of the Fund. A Board of Directors with five members of different nationalities was established, being elected by the Assembly for a term of three years (with re-election possible for another term). Members are to be persons of:

‘high moral character, impartiality and integrity and shall have competence in the assistance to victims of serious crimes’⁵.

The Board is charged with directing the activities and projects of the Fund and allocating the property and money available to it. Operative paragraph 3 of the resolution requested the Board to develop further criteria for the Fund’s management for consideration and adoption by the Assembly. The annex charged the Assembly’s Committee on Budget and Finance with examining the Fund’s annual budget.

The second resolution established the procedure for the nomination and election of Board members⁶.

At its second session (8–12 September 2003), the Assembly elected its first Board. It was composed of the following persons: Her Majesty Queen Rania Al-Abdullah (Jordan); Óscar Arias Sánchez (Costa Rica); Tadeusz Mazowiecki (Poland); Archbishop Desmond Tutu (South Africa); Simone Veil (France).

The term of office of three years began to run for each member from 12 September 2003 (date of election). The Board held its first meeting from 20 to 22 April 2004. At the meeting, the Board worked on preparing draft regulations for the Fund’s management, in response to the Assembly’s request⁷. The Board approved draft regulations, which were attached to its

² UN Doc. A/CN.4/L.491/Rev.2, p. 28.

³ Preparatory Committee (Consolidated) Draft, pp. 123–124.

⁴ ICC-ASP/1/Res.6.

⁵ ICC-ASP/1/Res.6, Annex, paragraph 3.

⁶ ICC-ASP/1/Res.7.

⁷ See ICC-ASP/1/Res.6, Operative paragraph 3.

report to the Assembly⁸. At the time of writing the Board is chaired by H.E. Motoo Noguchi of Japan and is composed of Mr. Sayeman Bula Bula (DRC), Mr. Denys Toscano Amores (Ecuador), Ms. Elisabeth Rehn (Finland), and Ms. Vaira Vike-Freiberga (Latvia).⁹

The draft regulations were divided into three parts: Part I – The Management and Oversight of the Trust Fund; Part II – Receipt of Funds; and Part III – The Activities and Projects of the Trust Fund.

Part I proposed that a secretariat be established both for the day-to-day administration of the Fund and to assist the Board¹⁰. Part II charged the Board with contacting governments, international organizations, individuals, corporations and other entities to solicit voluntary contributions to the Fund¹¹. The Board was authorized to refuse voluntary contributions deemed to be inconsistent with the goals and activities of the Fund¹². Part III established a range of processes and procedures to govern the Fund's disbursements to victims.

In relation to reparation orders, the Fund, subject to the Court's order, was directed to take into account, *inter alia*, the following factors in determining the nature and/or size of awards:

‘the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group’¹³.

The Assembly considered the Board's report at its third session (6–10 September 2004), taking action on it by resolution¹⁴. The Assembly established the secretariat for the Fund¹⁵. It decided that Parts I and II of the draft regulations were to be applied provisionally and recognized that Part III provided a reference point for further work¹⁶. Further work on the draft regulations was entrusted to the Assembly's Bureau, with adoption being set for the Assembly's fourth session¹⁷.

At its fourth session (28 November – 3 December 2005), the Assembly of States Parties 3 thus adopted by consensus the Regulations of the Trust Fund for Victims.¹⁸ The Regulations are divided in five parts: Part I – Management and oversight of the Trust Fund; Part II – Receipt of Funds; Part III – The Activities and Projects of the Trust Fund; Part IV – Reporting Requirements; and Part V – Final Provisions.

As proposed in the Draft Resolution, the Trust Fund is managed by a Board of Directors assisted by a Secretariat¹⁹. The Trust Fund is funded by (a) voluntary contributions from governments and other public and private entities; (b) money and other property collected through fines or forfeiture transferred to the Trust Fund pursuant to article 79 of the Rome Statute; and (c) resources collected through awards for reparations pursuant to Rule 98 of the Rules of Procedure and Evidence²⁰. Projects and activities of the Trust Fund are carried out under the supervision of the Court. In conducting its activities, the Board may moreover consult victims and/or their families and legal representatives as well as any competent expert or expert organisation²¹.

The measures set up in the Regulations were in place in 2006, allowing the Fund to start its operations in 2007. To date, the Fund provides support to victims through two targeting strategies: (a) projects tailored to meet the needs of victims of specific crimes; and (b) large-

⁸ ICC-ASP/3/14.

⁹ Elected at the 10th Board Meeting TFV, 19, 20 & 21 March 2013.

¹⁰ Paragraph 18.

¹¹ Paragraph 26.

¹² Paragraph 30.

¹³ Paragraph 59.

¹⁴ ICC-ASP/3/Res.7.

¹⁵ ICC-ASP/3/Res.7., Operative paragraph 1.

¹⁶ ICC-ASP/3/Res.7., Operative paragraph 5.

¹⁷ ICC-ASP/3/Res.7., Operative paragraph 6.

¹⁸ ICC-ASP/4/Res.3.

¹⁹ ICC-ASP/4/Res.3., paragraphs 1–19.

²⁰ ICC-ASP/4/Res.3., paragraph 21.

²¹ ICC-ASP/4/Res.3., paragraph 49.

scale projects to help communities rebuild themselves and establish peace and reconciliation. Up to the summer 2013, the Trust Fund focused its operations on Uganda, DRC and CAR. The Trust Fund moreover established a permanent field office in Northern Uganda²².

B. Analysis and interpretation of elements

I. Paragraph 1

1. Establishment by the Assembly of States Parties

- 4 Paragraph 1 provides for the Assembly of States Parties to establish the Trust Fund. The Trust Fund was established on 3 December 2005.

2. ‘for the benefit of victims ... and of the families of such victims’

- 5 Paragraph 1 makes clear that the Trust Fund can be used not only for the benefit of victims but for the families of victims as well. Article 47(3)(c) of the ILC Draft Statute, which proposed the establishment of a Trust Fund, only provided for victims to benefit from the Fund.

Rule 85 of the ICC Rules of Procedure and Evidence defines ‘victims’ to mean ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court’.

On 7 August 2012, Trial Chamber I further clarified that: ‘it would be inappropriate to limit reparations to the relatively small group of victims that participate in the trial and those who applied for reparations’²³. Chambers thus have a broad discretion in assessing who qualifies as a victim for the purpose of reparations awards. Pursuant to Rule 85, ‘reparations may be granted to direct and indirect victims, including the family members of direct victims; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participate in the trial proceedings’²⁴. Given the widespread nature of the crimes under consideration, such a broad definition will obviously present practical and financial challenges that will have to be addressed by the Trust Fund in due course.

Similarly, the term ‘families’ is not defined under article 79. The concept of ‘family members’ is only defined under Rule 75 of the Rules of Procedure and Evidence which refers to ‘spouse, child or parent’. It is however far from clear whether Rule 75 provides a definition of general applicability or whether that definition is limited to the specific issue of privileged testimony. Whilst the definition of ‘family members’ may receive more attention by the ICC in due course, it would seem that the definition in Rule 75 may provide a starting point – rather than the last word – in the definition of ‘family members’ for the purpose of reparations. Certainly, more clarity is needed. This is especially so bearing in mind national and cultural traditions and notions of ‘family’ and how these can, or should, be given expression to when it comes to reparations. According to the United Nations Human Rights Committee, the term ‘family’, ‘should be given broad interpretation to include all those comprising the family as understood in the society of the State party concerned’²⁵. The Court may therefore decide to adapt the meaning of the term to the tradition of the beneficiary group.

²² Trust Fund for Victims, Report of activities, Summer 2013.

²³ *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision establishing the principles and procedures to be applied to reparations’ (Decision on Reparations), ICC-01/04-01/06-2904, 7 August 2012, para. 187.

²⁴ *Ibid*, para. 194.

²⁵ United Nations Human Rights Committee, *CCPR General Comment No. 16: article 17 (Right to Privacy)*, 8 April 1998, para. 5.

Rule 85 also states that ‘victims’ may include:

‘organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes’.

The inclusion of organizations and institutions within the definition of ‘victims’ expands the role of the Fund beyond providing disbursements to natural persons. The reference to ‘organizations or institutions’ is not qualified, leaving open the question of what types of organizations or institutions may be regarded as victims. For example, could government bodies and private companies fall within the definition? Neither the Regulations of the Trust Fund nor the first Decision on Reparations provide any clarifications in this respect.

Subject to the order of the Court, the Trust Fund shall take into account several factors when determining the nature and/or size of awards to be granted as reparation. These factors include:

‘the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group’²⁶.

One of the core issues to be dealt with by the Board of Directors and Chambers is how to prioritise resources for reparations where available funds are insufficient to redress the totality of harm. Although essential, the process of prioritisation raises a number of issues, in particular the selection of criteria as the basis for which priority is to be determined. In the context of the *Lubanga* case, the Registry addressed this question and examined various modalities of prioritisation.²⁷ The Chamber recognised that ‘priority may be given to certain victims who are in a particularly vulnerable situation or who require urgent assistance’²⁸.

Pursuant to Rule 98 of the Rules of Procedure and Evidence, the Court may order either individual or collective awards to victims. In cases where the Court identifies each beneficiary, the Board of Directors shall draft an implementation plan which sets out the names and locations of victims to whom the award applies²⁹. Where the Court does not identify the beneficiaries of an award, or where the number of victims is such that it is impossible or impracticable for the Secretariat to determine the names and locations of the victims with precision, the Secretariat shall set out all the relevant demographical and statistical data about the group of victims and shall list options for determining missing details. The Secretariat may use the data available to determine the members of the beneficiary group; target outreach to invite any potential members of the group to identify themselves; or develop further options by consulting victims, States and competent experts³⁰.

Regarding awards made to an organisation, the Regulations of the Trust Fund provides that where the Court orders such an award, the draft implementation plan shall set out (a) the concerned organisation(s) and a summary of their relevant expertise; (b) a list of specific functions that the concerned organisation is to undertake in fulfilment of the Court’s order; and (c) a memorandum of understanding and/or other contractual terms between the Board and the organisation setting out roles and responsibilities, monitoring and oversight³¹. The Regulations nevertheless do not provide further details as to what kind of organisation may be eligible for receiving awards.

Article 79 does not state at what stage of the proceedings assistance and reparations should start being provided to victims. The terms ‘convicted person’, in the wording of article 75(3)(4), Rule 98(1)(4) and Regulation 54 implies that reparation orders may only be made after a judgment on guilt. Having in mind that money has already allocated to victims by the

²⁶ ICC-ASP/4/Res.3., paragraph 55.

²⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Second Report of the Registry on Reparations’, ICC-01/04-01/06-2806, 1 September 2011, p. 18–28.

²⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, para. 200.

²⁹ ICC-ASP/4/Res.3., paragraph 59.

³⁰ ICC-ASP/4/Res.3., paragraphs 60–61.

³¹ ICC-ASP/4/Res.3., paragraph 73.

Fund in DRC and Uganda, it nevertheless seems that the Trust Fund can provide assistance to victims without having to wait for conviction or judicial confirmation that a crime within the jurisdiction of the Court had been committed. It may be that the Fund can use the 'other resources' at its disposal to assist victims before the issue of the judicial proceedings engaged by the Court. Care is needed in this regard as awarding victims money prior to the outcome of trial may create undesirable expectations on the part of victims or act as inducements that may possibly infect a trial process. At the same time, it cannot be denied that in many situations open before court, victims are in dire need of support and assistance.

Pursuant to Regulation 50, it is for the Chamber to inform the Board whether a project would 'pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'³². Although this provision is consistent with the principle that victims should receive support without the need for the perpetrator to be convicted³³, it is unclear how this assistance will be provided in a manner consistent with the strictures of ensuring a fair trial. Addressing the concerns of counsel, Pre-Trial Chamber I considered that the activities proposed by the Fund in DRC did not prejudice the proceedings against the accused because, *inter alia*, (a) the Court had already initiated an investigation in DRC; (b) the proposed activities were not related to any national or international proceedings arising out of such investigation; and (c) because the Notification submitted by the Fund had no impact on the outcome of proceedings³⁴. In the light of this interpretation, reparations granted through the Fund appear less related to the crimes than the wording of articles 75 and 79 may suggest. The diversification of the Fund's projects and activities should not result in a lack of clarity as to how they relate with the Court's proceedings and purposes.

II. Paragraph 2: Court orders to transfer fines or forfeiture

- 8 Paragraph 2 permits the Court to order the transfer of money or other property collected through fines or forfeiture to the Fund. The Statute does not provide for States Parties to retain a share of the money or property obtained through the enforcement of fines and forfeitures ordered by the Court. Nor does it provide for the Court to draw on such money and property to defray its own costs. The Fund is intended to be the recipient of this money and property.

Rule 148 of the Rules of Procedure and Evidence provides that, before making an order under paragraph 2 of article 79, a Chamber may request representatives of the Fund to make written or oral submissions to it. This counterpart to this provision is found at paragraph 31 of the Regulations of the Trust Fund.

The financing of the Fund through fines and forfeiture is obviously an uncertain basis upon which to rely. Many accused – especially those granted legal aid themselves – may either be impecunious or have no assets traced or seized in order to be forfeited.³⁵ Bearing in mind the cost of the Fund's administration and operation, it is far from certain that its activities will be sustainable in the long run without significantly more attention being placed on financial crime investigation and asset tracing. If this is not done, it will continue to rely principally on voluntary contributions in a world where there are ever increasing demands for foreign aid and donations.

³² ICC-ASP/4/Res.3., paragraph 50.

³³ Annex to the UN General Assembly Resolution 40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 24 November 1983, para. 2.

³⁴ *Situation in the Democratic Republic of Congo*, 'Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund', ICC-01/04, 11 April 2008, p. 9.

³⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, 'Second Report of the Registry on Reparations', ICC-01/04-01/06-2806, 1 September 2011, para. 10.

Given the limitations on financing the Trust Fund through fines and forfeiture, the reality is that external donations have been the mainstay of the Fund's activities. The Assembly of States permitted this option.³⁶ In July 2014, the total contributions from countries were of 19.2 million euros. The Trust Fund's reparation reserve, which may be used to complement court-ordered awards in the case of a convicted person declared indigent, was of 3.6 million euros.³⁷

Having regard to Regulation 56, it remains unclear whether the Board of Directors is vested with an absolute discretion to use these other resources to complement reparations awards, or whether a Chamber has the authority to require the Fund to make available these resources for the purpose of granting reparations award.³⁸ Pursuant to Regulation 56, the Board of Directors shall only determine whether to complement the resources collected through awards for reparations with 'other resources of the Trust Fund' and shall advise the Court accordingly. The Board of Directors shall moreover make all reasonable efforts to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98 and taking particular account of ongoing legal proceedings that may give rise to such awards.³⁹

Properly considered, it is clear that the Trust Fund is not a mere recipient of money or assets collected through fines and forfeiture. 'Through,' in the context of article 79(2), should not be interpreted as excluding from the Fund other sources of finances. In the case where the convicted person is indigent, reparations awards should be supported by the Fund's own resources if the Chamber deems this appropriate. Rule 98(5) of the Rules of Procedure and Evidence supports such an interpretation by providing that 'other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79'.

Trial Chamber I have considered that the word 'through' in the context of article 79(2) and held that it should be given the meaning 'by means of'. The Court will thus 'be able to draw on the logistical resources of the Trust Fund in implementing an award.'⁴⁰ The Chamber further held that when the convicted person was impecunious, the award can be supported by the Trust Fund's own resources.⁴¹ That said, the Decision on Reparations provides that where reparations are funded by the Fund's own resources, collective reparation should be adopted rather than individual awards. Based on the limited nature of the Fund's incomes and the fact that collective awards 'does not require costly and resource-intensive verification procedures', this finding leaves little hope as to the amount to be awarded to victims in such situations.⁴² In the light of this finding, it must be noted that pursuant to Regulation 50 of the Trust Fund, the Fund may engage in activities outside the context of reparations awarded by the Court. Given the financial challenges faced by the Fund, it may have been more realistic if the activities of the Fund were limited to court-ordered reparations, leaving to Governments, humanitarian institutions and NGOs the role of assisting victims outside this category.

III. Paragraph 3: Management of the Trust Fund

It was agreed at the Diplomatic Conference that the criteria governing the operation of the Fund should not be contained in the Statute, given that the criteria were likely to be complex and to need adjustment over time. The stringent amendment requirements for the Statute

³⁶ ICC-ASP/4/Res.3., paragraph 21.

³⁷ Trust Fund for Victims, Financial information, available at [<http://www.trustfundforvictims.org/financial-info>], accessed 03 October 2014.

³⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, 'Second Report of the Registry on Reparations', ICC-01/04-01/06-2806, 1 September 2011, paras. 2-3.

³⁹ ICC-ASP/4/Res.3., paragraph 56.

⁴⁰ Decision on Reparations, para. 270.

⁴¹ *Ibid.*, para. 271.

⁴² Decision on Reparations, para. 274.

would make such adjustments difficult. Paragraph 3 deals with the issue by requiring the Assembly of States Parties to determine the criteria.

The composition and administration of the Trust Fund is thus governed by the Regulations adopted on 3 December 2005. The Trust Fund is administrated by a Board of Directors assisted by a Secretariat. The members of the Board act in their personal capacity on a *pro bono* basis⁴³. The Registrar participates in sessions of the Board in an advisory capacity⁴⁴.

- 11 As stated above, it seems that the Trust Fund for Victims gained in independence since its creation. On 7 August 2012, Trial Chamber I additionally delegated to the Fund the task of selecting experts, to determine the appropriate forms of reparations and to implement them⁴⁵. Trial Chamber I further increased the autonomous work of the Fund by leaving it the task of assessing harm and identifying victims and beneficiaries of the awards under the oversight of a newly constituted Chamber⁴⁶.

⁴³ ICC-ASP/4/Res.3., paragraph 16.

⁴⁴ ICC-ASP/4/Res.3., paragraph 7.

⁴⁵ Decision on Reparations, paras. 265–266.

⁴⁶ Decision on Reparations, paras. 283–284.

Article 80

Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

Literature: See in addition to article 77: Delmas-Marty, M., *Les forces imaginantes du droit, Vol. I: Le relatif et l'universel* (Seuil 2004); Fife, R.E., 'Penalties', in: Lee (ed.), *The International Criminal Court, the Making of the Rome Statute: Issues, Negotiations, Results* (1999) 319; Merrills, J.G., *The Development of International Law by the European Court of Human Rights* (Manchester University Press 2nd edition 1993); Plawski, S., 'L'abolition de la peine de mort', (1981) *Revue Pénitentiaire et de Droit Pénal* 473; Schabas, W.A., 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 *DukeJComp&IL* 461; id., 'War Crimes, Crimes Against Humanity and the Death Penalty', (1997) 60 *AlbanyLJ* 736; id., 'Punishing International Criminals', (1997) 6 *ICC Monitor* 5, 7; id., 'Penalties', in: Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 273; id., *The Abolition of the Death Penalty in International Law* (CUP 3rd edition 2002); id., 'Penalties', in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1497; Screvens, R., *L'Interdiction Professionnelle en Droit Pénal* (Les Éditions de la Librairie Encyclopedique 1956); United Nations Office at Vienna, Crime Prevention and Criminal Justice Branch, *Life Imprisonment* (United Nations 1994).

Content

A. Introduction/General remarks.....	1
1. Background and contents of the provision	1
2. The controversies surrounding the issue of the death penalty	4
3. Other penalties which were not included in the Statute.....	8
4. The issue of life imprisonment	10
5. The issue of reference to national law	11
B. Analysis and interpretation of elements.....	12
1. 'the application by States of penalties prescribed by their national law'	13
2. 'the law of States which do not provide for penalties prescribed in this Part' ..	14

A. Introduction/General remarks

1. Background and contents of the provision

As noted in the commentary on article 77, the negotiations at the Diplomatic Conference on the issue of modes of punishment proved difficult and time consuming. Particularly contentious were the discussions on whether to include or not to include the death penalty, thus exacerbating differences of views on this subject that had already appeared in connection with the establishment of the ICTR in 1994¹. Other significant differences characterized discussions with regard to life imprisonment and whether to include references to penalties provided in national law.

Nevertheless, as noted under article 77, a consensual solution for the penalties regime was ultimately achieved at the Diplomatic Conference. Essential to its emergence was the understanding that the inclusion of some penalties and the non-inclusion of other penalties would not prejudice the national application of penalties nor national laws. This follows already from the principle of complementarity between the Court and national criminal jurisdictions, whereby the latter retain the primary responsibility for prosecuting and punishing individuals. With regard to the non-inclusion of the death penalty in the Statute, this understanding was reflected in a statement made by the President of the Conference in connection

¹ See Morris and Scharf, *The International Criminal Tribunal for Rwanda* (1998); Akhavan (1996) 90 *AJIL* 501; Schabas, *The Abolition of the Death Penalty in International Law* (2002).

with the adoption of the Statute on 17 July 1998 and which was included in the official records of the Conference:

‘The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principle of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes’.

- 2 However, a number of delegations sought reassurances that the penalties provisions in the Statute would not be interpreted or construed in such a way as to influence national laws or the current state of international law in this field. It is against this background that the Chairman of the Working Group on Penalties introduced, as part of the final compromise package proposal², an explicit non-prejudice provision in article 80. This proposal also proved instrumental in achieving consensus on making no reference to national laws in the penalties provisions, thereby ensuring a uniform penalties regime for all persons convicted by the Court.
- 3 A non-prejudice clause as contained in article 80 is compatible with the purposes of the Rome Statute. As a point of departure, the Statute is not intended to constitute a codification or progressive development of international law. Arguably, its primary aim can best be described as institution building, namely the establishment of an ICC. Article 80 makes it clear that the solutions achieved in the Statute with regard to penalties do not influence national laws, and apply only to the Court. In a somewhat similar vein, it may be noted that article 10 of the Statute contains a non-prejudice provision with respect to Part 2 on jurisdiction, admissibility and applicable law, including, significantly, the definitions of the international crimes under the jurisdiction of the Court.

2. The controversies surrounding the issue of the death penalty

- 4 The provisions on the protection of the right to life that have been set down in international human rights instruments³ reveal a trend toward a progressive restriction and gradual prohibition of the death penalty⁴. As an illustration of this trend on a regional level, reference

² The compromise package is described in the comments under article 77 of the Rome Statute.

³ On article 6 of ICCPR and the 1989 Second Optional Protocol to the ICCPR, see, for example, Nowak, *UN Covenant on Civil and Political Rights, ICCPR Commentary* (1993) 113–122. Moreover, it may be noted that *inter alia* in a European Human Rights context the prohibition against cruel, inhuman and degrading punishment has also been invoked in this connection, see the discussion of the *Soering* case in Merrills, *The Development of International Law by the European Court of Human Rights* (1993) 81–82. One of the issues discussed in that case was whether in view of evolving practice in Western Europe the death penalty could be held to constitute an inhuman and degrading punishment, contrary to article 3 of the 1950 European Convention on Human Rights and Fundamental Freedoms, despite the fact that article 2 para. 1 expressly permits judicial executions. However, Protocol No. 6 to this Convention, which entered into force in 1983 and has been ratified by a large majority of Member States of the Council of Europe, provides for the abolition of the death penalty in peace time. Among other regional human rights instruments restricting or prohibiting the death penalty, reference is *inter alia* made to article 4 of the 1969 American Convention on Human Rights and article 1 of the 1990 Protocol to the American Convention on Human Rights to abolish the death penalty. For other instruments, see references in the next note.

⁴ For a brief introductory survey, see Schabas, (1997) 6 *ICC Monitor* 5 [7]. See also Schabas, *The Abolition of the Death Penalty in International Law* (3rd ed., 2003); Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 698; Plawski, (1981) *Revue Pénitentiaire et Droit Pénal* [473]; Wexler, *Model Draft Statute for the International Criminal Court based on the Preparatory Committee’s text to the Diplomatic Conference, Rome, June 15–July 17 1998* (1998) 111–112. See also Schabas (1997) 60 *AlbanyLJ* [770], who analyzes trends toward the elimination of capital punishment in international criminal law. For

may be made to a recommendation of 1996 from the Parliamentary Assembly of the Council of Europe, which considered that the death penalty has no legitimate place in penal systems and that its application may well be compared to torture⁵. The United Nations Human Rights Commission passed in 1997 and 1998 resolutions on the question of the death penalty. Since 2007, it should however be noted that the United Nations General Assembly has passed several resolutions on a moratorium on the use of the death penalty. The resolutions called on all States that have not yet abolished the death penalty to establish a moratorium on executions, with a view to completely abolishing the death penalty⁶. In the context of international criminal justice, questions had furthermore been raised, *inter alia* in the deliberations of the ILC, as to the absence of the death penalty from the Statutes of the ICTY and ICTR, and whether that absence denoted a progressive development of international law⁷.

At the Diplomatic Conference, stressing that the penalties under consideration were related to the most serious crimes of international concern including in situations of armed conflict, a number of delegations maintained that the death penalty would in many cases be a penalty commensurate with the gravity of these crimes. Moreover, without the possibility to apply the death penalty the Court would have reduced deterrence and credibility. A number of delegations insisted that no comprehensive prohibition against the death penalty could be derived from customary international law, and that they were opposed to penalties provisions in the Rome Statute which would denote any progressive development of international law in favour of abolition. Among forceful proponents of an inclusion of the death penalty for the above reasons, were Rwanda, Saudi Arabia and other Arab States, Sierra Leone, Singapore, Trinidad and Tobago, Jamaica and other Caribbean States – among the latter some States had recently ended their long standing *de facto* moratoria on imposition of the penalty.

On the other hand, a number of States were totally opposed to the inclusion of the death penalty. States Parties to the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights made it clear that they could never support a Court that could impose the death penalty. Moreover, it was pointed out that States Parties to the 1969 American Convention on Human Rights are prohibited from re-establishing the death penalty if they earlier have abolished it⁸. States Parties to the European human rights instruments also referred to treaty obligations that would hinder their co-operation with the ICC, including significantly surrender of persons to the Court, if the death penalty were to be included in the Statute. Reference was in this connection also made to the Model Extradition Treaty between States, which has a death penalty exemption clause⁹. Insurmountable enforcement problems were also cited. It is noteworthy that several States whose national laws provide for the possibility of the death penalty, including the United States of America, did not support inclusion of the death penalty in the Statute.

The above-mentioned controversies had already characterized the preparatory work before the Diplomatic Conference. In the 1995 report of the *Ad Hoc* Committee it was stated that the exclusion of the death penalty was supported by many delegations. Some delegations suggested provisions for such exclusion, while one delegation proposed that the death penalty be included

numbers of States which apply or have renounced the death penalty, see, e.g., note 1; Morris and Scharf, *The International Criminal Tribunal for Rwanda* (1998) 581; Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (as of October 1997).

⁵ Parliamentary Assembly of the Council of Europe, Recommendation 1246 (1994), 4 October 1994.

⁶ See, for example, Res. 1998/9 adopted without a vote on 3 April 1998, contained in the Report on the Fifty-Fourth Session (16 March–24 April 1998) of the Commission on Human Rights, Supp. No. 3, ESC Official Records 1998. For the resolutions in the General Assembly, see A/RES/65/206 (2010), A/RES/63/168 (2008), A/RES/65/206 (2010), A/RES/67/176 (2012) and A/RES/69/186 (2014). Furthermore, on October 2014 Secretary-General Ban Ki-moon remarked that the death penalty has no place in the 21st century.

⁷ Quoted by Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 698, footnote 5 and 691–692. On issues related to harmonisation of domestic legal systems and legal globalization, see Delmas-Marty, *Les forces imaginantes du droit* (2004).

⁸ See American Convention on Human Rights article 4 para. 3.

⁹ 1990 United Nations Model Treaty on Extradition, UN Doc. A/RES/45/116.

in the list of possible penalties¹⁰. Furthermore, in the 1996 report on the proceedings of the Preparatory Committee it was noted that some delegations expressed their strong support for the exclusion of the death penalty from the penalties that the Court would be authorized to impose. At the same time, while the death penalty was ruled out by those delegations, others suggested that the death penalty should not be excluded a priori since it was provided for in many legal systems, especially in connection with serious crimes¹¹. The latter delegations made the following proposal: ‘The death penalty, as an option, in case of aggravating circumstances and when the Trial Chamber finds it necessary in light of the gravity of the crime, the number of victims and the severity of the damage’¹². This proposal was retained in the 1998 final Report of the Preparatory Committee as one option, the other being ‘No provision on death penalty’¹³. Ultimately, no provision on the death penalty was included at the Diplomatic Conference.

3. Other penalties which were not included in the Statute

- 8 In the comments made under article 77 it appears that certain other penalties had been proposed but were not included in the Rome Statute. These include loss or suspension of rights¹⁴, disqualification and disfranchisement, *i. e.* loss of voting rights or right to seek public office. The prevailing view was that such penalties could in some cases raise questions as to limitations deriving from international human rights law, and should rather be dealt with within the context of national law by national courts.
- 9 Proposals were also made to include orders for reparation to victims and their families as a penalty. However, opinions were divided as to whether such orders should be dealt with in the context of penalties, or rather as civil remedies or reparation within the framework of procedural matters and the rules of enforcement. A number of delegations expressed the view that there might be merit in dealing with these issues in a unified way focusing on all the issues related to compensation. At the Rome Conference it was decided to deal with reparation to victims in the context of article 75 in Part 6 on the Trial, and not to include this issue in Part 7.

4. The issue of life imprisonment

- 10 Reference is made to comments concerning the background for the inclusion of life imprisonment made under article 77. It suffices here to note that a number of delegations at the Diplomatic Conference voiced strong opposition to the inclusion of life imprisonment in the Statute. Constraints pursuant to national constitutions as well as concerns derived from international human rights law were invoked. Among the strongest opponents were Portugal and a number of Latin-American States¹⁵. Other delegations indicated, however, that a compromise on the non-inclusion of the death penalty would presuppose an inclusion of life imprisonment. They maintained that the credibility of the Court would otherwise be jeopardized, when considering the gravity of the crimes within the jurisdiction of the Court. As explained in the comments under article 77, the inclusion of the possibility of life imprisonment became a central element of the final compromise package.

¹⁰ *Ad hoc* Committee Report, para. 187, comments on article 47.

¹¹ 1996 Preparatory Committee Report I, para. 306, p. 63.

¹² 1996 Preparatory Committee Report II, p. 229.

¹³ See article 75 *lit. e* of the Preparatory Committee Draft, p. 144.

¹⁴ Draft Statute article 75 *lit. c* (i) included the following proposals:

‘[d]isqualification from seeking public office for the person’s term of imprisonment and any further period of time that may be imposed [in the modality and to the extent that the penalty could be imposed in accordance with the laws of the State in which such a penalty is to be enforced]’.

Earlier drafts had included proposals about: suspension or loss of rights; disqualification, dismissal or suspension from office or employment; disenfranchisement in the modality and to the extent such penalty could be imposed in accordance with (relevant national) laws. See also La Rosa, *Juridictions Pénales Internationales: La Procédure et la Preuve* (2003) 209.

¹⁵ On constitutional restrictions of Portugal and Latin-American States, see van Zyl Smit (1998) 10 *CLF* [1], 23–24, including footnotes 103 and 104.

5. The issue of reference to national law

As opposed to the ICTY and ICTR¹⁶ the penalties provisions of the Rome Statute contain no references to national law. The general issue of relevance of national law among applicable laws for the Court is discussed in the context of article 21 para. 1 (c) in Part 2 on jurisdiction, admissibility and applicable law. Nevertheless, it may be noted that there were particular aspects relating to references to national law with regard to penalties. First of all, this is an area of criminal law where there are particularly sharp differences and no unified standards. Before the Diplomatic Conference a general proposal had been made to allow for references to national law, but this was not included¹⁷. Moreover, in the context of discussions on the inclusion or non-inclusion of the death penalty a specific proposal was submitted by Saudi Arabia and other states, which would leave it to the discretion of the Court to take into consideration penalties provided in national laws¹⁸. In support of the proposal, it was suggested that in keeping with the principle of complementarity, the Court replaces the national courts which are unable to prosecute, and that logically the same law should be applied. Moreover, such an approach would ensure the largest possible degree of respect for different legal cultures. This view met, however, with strong resistance from other States. These held that such an approach would allow for different regimes of penalties to be applied by the Court and would mean the application of a discriminatory system of sanctions. Moreover, it would risk legitimizing certain methods of punishment. A number of States could not accept this approach because it would put the Court in an unsolvable situation with regard to respect for existing treaty obligations. The Court could be confronted with the issue of compatibility of national law in relation to penalties with international law – this would also run counter to the principle of complementarity. The outcome of the discussions was to let the penalties system of the Rome Statute build on an overarching principle of universality.

B. Analysis and interpretation of elements

The scope of this non-prejudice provision is limited to Part 7. 12

1. ‘the application by States of penalties prescribed by their national law’

This provision means that the penalties system in Part 7 only applies to the ICC and does not affect national criminal justice systems, in particular with regard to the application of penalties other than those provided for in the Statute. This is relevant with regard to the non-inclusion in the Statute of provisions concerning the death penalty and other penalties such as loss of rights, disqualification and disfranchisement. This also applies, for example, to the non-inclusion of minimum terms of imprisonment, and the fact that in the Statute orders for reparation are not as such considered as a penalty. On the other hand, the provision in article 80 in no way influences existing or future limitations in international law on the national application of penalties, *inter alia* pursuant to international human rights obligations. The provision does, therefore, not bear on the legitimacy of particular forms of punishment not mentioned in the Statute. 13

¹⁶ See, for example, Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 700.

¹⁷ See comments under article 77.

¹⁸ See UN Doc. A/CONF.183/C.1/WGP/L.11:

‘The Court may impose on a person convicted under this Statute one or more of the penalties provided for by the national law of the State in which the crime was committed.

In cases where national law does not regulate a specific crime, the Court may apply one or more of the following penalties: ...’.

2. ‘the law of States which do not provide for penalties prescribed in this Part’

- 14 This wording is a corollary to the above formulation, and is also fully in keeping with the principle of complementarity between the Court and national criminal jurisdictions. It means that the inclusion of certain penalties and the choice of criteria for their application does not affect national justice systems which do not provide for such penalties. This is particularly relevant with regard to the inclusion in the Statute of the possibility of life imprisonment. It also applies to the maximum terms of imprisonment as well as the minimum periods to be served before release can be considered according to article 110 of the Statute. Moreover, it is relevant with regard to the inclusion of forfeiture in the Statute, as a penalty rather than a civil remedy, or the possibility of ordering fines as additional penalties for such grave crimes.

PART 8 APPEAL AND REVISION

Article 81*

Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
 - (a) The Prosecutor may make an appeal on any of the following grounds:
 - (i) Procedural error,
 - (ii) Error of fact, or
 - (iii) Error of law;
 - (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
 - (i) Procedural error,
 - (ii) Error of fact,
 - (iii) Error of law, or
 - (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.
2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;
 - (b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;
 - (c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).
3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;
 - (b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;
 - (c) In case of an acquittal, the accused shall be released immediately, subject to the following:
 - (i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;
 - (ii) A decision by the Trial Chamber under subparagraph (c) may be appealed in accordance with the Rules of Procedure and Evidence.
4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

* Any views expressed in this contribution are those of the author alone and do not reflect the views of the International Criminal Court or any other institution to which the author is or was attached.

Literature: Bitti, G., 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhof Publishers 2009) 285; Boas, G., Jackson, J., Roche, B. and Taylor III, B.D., 'Appeals, Reviews, and Reconsideration', in: G. Sluiter et al. (eds.), *International Criminal Procedure. Principles and Rules* (Oxford University Press 2013) 939; Bohlander M., *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May Ltd 2007), Book, J.P., *Appeal and Sentence in International Criminal Law*, (Berliner Wissenschafts-Verlag 2011); Brady, H., 'Appeal', in: R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Translational Publishers Inc. 2001) 575; Brady, H. and Jennings, M., 'Appeal and Revision', in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer 2001) 294; De Cesari, P., 'Observations on the Appeal before the International Criminal Court', in: M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Kluwer 2001) 225; Dervieux, V., 'The French System. European Criminal Procedures.', in: M. Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (Cambridge University Press 2002) 218; Drumbl, M. A. and Gallant, K. S., 'Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure and Recent Cases', (2001) 3 *J. Appellate Practice And Process* 589; Eckelmans, F., 'The First Jurisprudence of the Appeals Chamber of the ICC', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhof Publishers 2009) 527; Eckelmans, F., 'The ICC's Practice on Victim Participation', in: T. Bonacker and C.J.M. Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse* (Springer 2013) 189; Elberling B., *The Defendant in International Criminal Proceedings. Between Law and Historiography*, (Hart Publishing, Oxford and Portland, Oregon, 2012); Featherstone, Y. M.O., 'Additional Evidence in the Appeals Proceedings and Review of Final Judgement', in: R. May et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer 2001) 495; Fleming, M. C., 'Appellate Review in the International Criminal Tribunals', (2002) 37(1) *TexasIL* 111; Friman, H., 'Interlocutory Appeals in the Early Practice of the International Criminal Court', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhof Publishers 2009) 553; Hartwig, A. 'Appeal' in: C.J.M. Safferling (ed.) *Towards an international criminal procedure* (Oxford 2012), 532; Hocking, J., 'Interlocutory Appeals Before the ICTY', in: R. May et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer 2001) 460; Karibi-Whyte, A. G., 'Appeal Procedures and Practices', in: G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (Oxford University Press 2000) 627; Galasso, M., 'Appeal and Revision In From of the International Criminal Court', in: F. Lattanzi (ed.), *The International Criminal Court, Comments on the Draft Statute* (Editoriale Scientifica 1998) 301; Jorgensen, N.H.B and Zahar A., 'Deliberation, Dissent and Judgement', in: G. Sluiter et al (eds.), *International Criminal Procedure. Principles and Rules* (Oxford University Press 2013), 1151; Knoops, G.-J. A., *Theory and Practice of International and Internationalized Criminal Proceedings*, (Kluwer 1st Edition 2005); Marshall, P.D., 'A Comparative Analysis of the Right To Appeal' (2011) 22 *DukeJComp&IL* <<http://scholarship.law.duke.edu/djcil/vol22/iss1/1/>> accessed 5 February 2015; Maystre, M., 'Right to appeal', in: L. Carter and F. Pocar (eds.), *International Criminal Procedure. The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar Publishers 2013) 192; Nerlich, V., 'The Status of ICTY and ICTR Precedent in Proceedings Before the ICC', in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhof Publishers 2009) 305; Nieto-Navia, R. and Roche, B., 'The Ambit of Powers under Article 25 of the ICTY Statute: Three Issues of Recent Interest', in: R. May et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer 2001) 473; Oellers-Frahm, K., 'International Courts and Tribunals, Appeals' (2013) *MPEPIL* <<http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e94>> accessed 5 February 2015; Orié, A., 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC', in: A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 1439; Pocar, F., 'Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?', (2010) 49 *SCLR* 437; Re, D., 'Appeal', in: L. Reydamas et al. (eds.), *International Prosecutors* (Oxford University Press 2012) 797; Rohde, C., 'Are Administrative Decisions from the Registry Appealable?', in: R. May et al. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer 2001) 509; Roth, R. and Henzlin, M., 'The Appeal Procedure of the ICC', in: A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 1535; Tochilovsky V., *The law and jurisprudence of the international criminal tribunals and courts* (Intersentia 2014); Vogler, R., 'Criminal Procedure in France', in: J. Hatchard et al. (eds.), *Comparative Criminal Procedure* (British Institute of International Comparative Law 1996) 14; Van den Wyngaert, C., *Criminal Procedure Systems in the European Community*, (Butterworths 1993); War Crimes Research Office, 'Interlocutory Appellate Review of Early Decisions by the International Criminal Court' (2008) 2 *Washington College of Law* <<https://www.wcl.american.edu/warcimes/documents/01-2008InterlocutoryAppeals.pdf>> accessed 5 February 2015; War Crimes Research Office, 'Expediting Proceedings at the International Criminal Court' (2011) 14 *Washington College of Law* <<https://www.wcl.american.edu/warcimes/icc/documents/1106report.pdf>> accessed 5 February 2015.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	7
I. Paragraph 1	7
II. Paragraph 2	10
III. Paragraphs 3 and 4.....	14

C. Special remarks	18
1. Nature of an ‘appeal’	18
a) Introduction	18
b) ‘Corrective’ nature of an appeal	20
2. Dismissal of grounds of appeal	28
a) Substantiation of grounds of appeal	28
b) The ‘waiver’ principle	32
3. Grounds of appeal and standards of review on appeal	34
a) Procedural error vs. error or law	34
b) Error of law	36
c) Procedural error	40
d) Error of fact	46
aa) Introduction	46
bb) Error of fact based on the unreasonableness of the Trial Chamber’s decision	47
cc) Error of fact based on additional evidence presented on appeal	56
e) Violation of the rights to a fair trial	59
f) Appeals against sentence	64
g) Remedies on appeal	69
4. Other aspects of the appeals process	70
a) The raising of new issues by the Appeals Chamber <i>proprio motu</i>	70
b) ‘Issues of general significance’	72
c) Principles of precedent	76
d) Whether other types of appellate proceedings are possible	84
e) Reconsideration by the Appeals Chamber of its own final judgements	90

A. Introduction/General remarks

Provisions for judgments of a court to be appealed to a higher instance are found in national legal systems generally, in both criminal and civil cases. In international courts and tribunals, they have been less common. For instance, article 60 of the Statute of the ICJ states expressly that judgments of that Court are ‘final and without appeal’¹. Even in the case of the criminal trials conducted before the Nuremberg and Tokyo Tribunals, there was no appeal from the Tribunal’s judgment to a higher judicial authority².

However, appeals are provided for in the Statutes of both the ICTY and the ICTR³, as well as in the Statute of the Special Court for Sierra Leone⁴. In proposing the Statute of the ICTY to the Security Council, the Secretary-General of the United Nations observed that a right of appeal ‘is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights’⁵. In the

¹ See also, e.g., Statute of the Permanent Court of International Justice, article 60 (available under <https://www.legal-tools.org/doc/a0bb78/>). In the case of the European Court of Justice, no provision was made for appeals against decisions of that Court in its original jurisdiction, but appeals can be taken to it from the Court of First Instance: see Kapteyn and VerLoren van Themaat, *Introduction to the law of the European Communities* (3rd ed. 1998) 14; Arnall, *The European Union and its Court of Justice* (3rd ed. 1999) 267–268. Since the entry into force on 1 November 1998 of Protocol No. 11 to the ECHR, article 43 and 44 of that Convention provide a mechanism under which a case before the European Court of Human Rights may, following the judgment of a Chamber, be referred to the Grand Chamber for a further judgment (available under <https://www.legal-tools.org/doc/cdc748/>).

² Article 26 of the Charter of the International Military Tribunal (*Nuremberg Tribunal*) (available under <https://www.legal-tools.org/doc/64ffdd/>) provided that ‘[t]he judgment of the Tribunal as to the guilt or the innocence of any defendant ... shall be final and not subject to review’. Article 17 of the Charter of the International Military Tribunal for the Far East (*Tokyo Tribunal*) (available under <https://www.legal-tools.org/doc/a3c41c/>) provided that the record of the trial was to be transmitted directly to the Supreme Commander for the Allied Powers, who could reduce or otherwise alter the sentence, except to increase its severity.

³ Article 25 ICTY Statute, article 24 ICTR Statute.

⁴ Article 20 SCSL Statute. Its para. 3 states that ‘[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone’.

⁵ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (presented 3 May 1993) (S/25704), para. 116 (available under <https://www.legal-tools.org/doc/c2640a/>).

commentary to its original Draft Statute, which also included a provision for appeals, the ILC referred both to article 14 para. 5 of the ICCPR and to article 25 of the ICTY Statute⁶.

The ICCPR refers only to a **right of appeal** by a convicted person. As in the case of the ICTY and the ICTR, and the original ILC Draft Statute⁷, the Rome Statute also allows appeals by the Prosecutor against acquittals, a possibility recognised in some national legal systems, particularly civil law systems⁸, but not others⁹.

2 Articles 81–83 of the Statute are the principal provisions on appellate proceedings before the Court. Article 81 is the primary provision, dealing with appeals against a final judgment or sentence of a Trial Chamber¹⁰. Article 82 allows in addition for appeals to be brought against various interlocutory and other decisions of a Pre-Trial Chamber or Trial Chamber¹¹. Article 83 deals with the powers and procedures of the Appeals Chamber.

3 These three articles must be read together with other provisions in the Statute relating to appeals. Article 34(b) provides that one of the organs of the Court is an ‘Appeals Division’. Under article 39, para. 1, the Appeals Division is composed of the President and four other judges. Article 39, para. 2 (b) (i) further provides that the ‘Appeals Chamber’ is composed of all the judges of the Appeals Division.¹² It seems necessarily implicit from article 82 paras. 1 (d) and 3 and article 83 para. 1, that all appeals under articles 81–83 are heard and determined by the Appeals Chamber¹³.

4 In addition to article 81–83, other provisions of the Statute allow for appeals against certain decisions. Article 18, para. 4 provides for an appeal by the State concerned or the Prosecutor against a ruling of the Pre-Trial Chamber under article 18, para. 2. Under article 19, para. 6, appeals may be brought against decisions of a Pre-Trial or Trial Chamber with respect to jurisdiction or admissibility. Both of these provisions indicate that the relevant appeals are subject to article 82¹⁴.

Additionally, article 42, para. 8 (which provides that any question as to the **disqualification** of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber) appears to confer a form of ‘original’ jurisdiction on the Appeals Chamber, without further recourse to another instance¹⁵. Article 110 and rule 223 RPE confer jurisdiction on three judges of the Appeals Chamber to review whether to **reduce a sentence** imposed by the Court upon two thirds of a sentence being served.

5 Consideration is given below to whether other types of appellate proceedings, that are neither provided for nor envisaged by the Statute, might nonetheless be possible¹⁶.

6 Article 81, paras. 1, 2 (a) and 3 (c) (ii), and article 82, paras. 1, 3 and 4 indicate that appeals under these provisions are to be in accordance with the **Rules**. However, the extent of

⁶ 1994 ILC Draft Statute with commentaries, p. 61 (available under <https://www.legal-tools.org/doc/390052/>).

⁷ See *ibid.*; article 48.

⁸ See, e.g., Vogler, in: Hatchard et al. (eds.), *Comparative Criminal Procedure* (1996) 54, 56.

⁹ For instance, in England and Wales, the prosecution cannot appeal against an acquittal, but can appeal against sentence. A procedure also exists under which the Attorney-General may refer a point of law that has arisen during the trial to the Court of Appeal for its opinion (Criminal Justice Act 1972, section 36, available under <https://www.legal-tools.org/doc/16a896/>). The opinion of the Court of Appeal does not affect the acquittal in that case, but clarifies the law for the future (see, e.g., Hatchard, in: Hatchard et al. (eds.), *Comparative Criminal Procedure* (1996) 204).

¹⁰ See mn 7.

¹¹ See Nerlich, *article 82*, mn 8–21.

¹² See Staker and Eckelmans, *article 83*, mn 29.

¹³ It is, however, curious that article 81 in fact makes no mention of the Appeals Chamber, referring instead to appeal proceedings being heard by ‘the Court’ (see article 81 para. 2(b) and (c)), ‘in accordance with the Rules of Procedure and Evidence’ (chapeau to article 81 para. 1).

¹⁴ See also Nerlich, *article 82*, mn 11.

¹⁵ See the most relevant ICC Appeals Chamber decisions: *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi*, No. ICC-01/11-01/11-175 OA3, Decision on the Request for Disqualification of the Prosecutor, 12 June 2012 (available under <http://www.legal-tools.org/doc/3ea916/>); *Prosecutor v. Jean-Pierre Bemba et al.*, No. ICC-01/05-01/13-648-Red OA, Decision on the requests for the Disqualification of the Prosecutor, Deputy Prosecutor and the entire OTP staff, 22 August 2014 with dissenting and separate opinions.

¹⁶ See mn 84–89.

the matters which may be prescribed by the Rules is not made clear. Article 51 provides merely that the Rules shall be consistent with the Statute¹⁷ and that '[in] the event of conflict ..., the Statute shall prevail'¹⁸. It is uncontroversial that the Rules should deal with matters such as the time limits for an appeal¹⁹, and the manner of instituting appeals. It is less clear whether the Rules potentially could, for instance, impose limitations on the right to have appeals considered by the Appeals Chamber²⁰, or conversely, expand the rights of appeal beyond those provided for in the Statute²¹. The question is at present moot, since the relevant provisions of the Rules dealing with appellate proceedings (rules 149 to 158 RPE) do not appear to expand or restrict the scope of appeals provided for in the Statute. The procedure for appeals is further regulated by regulations 57 to 65 RoC and in more detail addressed below, Staker and Eckelmans, *article 83*, mn 21–60.

B. Analysis and interpretation of elements

I. Paragraph 1

This paragraph provides for appeals against a 'decision under article 74'. The wording of article 74 itself does not state unambiguously whether that article relates only to the final judgment of the Trial Chamber, pronouncing the verdict²², or whether references in article 74 to 'the decision' of the Trial Chamber could extend also to its interlocutory decisions and rulings. However, it seems clear that paragraph 1 of article 81 is in fact intended to apply only to a final judgment of a Trial Chamber, convicting or acquitting the accused. This is apparent from the title to article 81, which refers, in addition to appeals against 'sentence' (which are governed by paragraph 2 of this article), only to appeals against 'conviction or acquittal'. Also, the requirement in article 74 para. 2 that '[t]he Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings' would confirm that the references in article 74 to 'the Trial Chamber's decision' are confined to the Trial Chamber's final judgment²³.

A 'decision under article 74' would also include a final decision in proceedings under article 70 ('Offences against the administration of justice')²⁴. Rules 163, 165 RPE clarify that

¹⁷ Article 51 para. 4.

¹⁸ Article 51 para. 5.

¹⁹ 1994 ILC Draft Statute with commentaries.

²⁰ By way of comparison, it is noted that ICTY/ICTR RPE establish a filter mechanism for certain types of interlocutory appeals, under which an appeal can be brought only in cases where the Trial Chamber has granted certification that 'the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings' (rules 72 *lit.* B (ii) and 73 *lit.* B ICTY; rules 72 *lit.* B (ii) and 73 *lit.* B ICTR). Another provision of the ICTR RPE provides for a different filter mechanism, under which certain interlocutory appeals are permitted only when leave is granted by a bench of three judges of the Appeals Chamber, 'upon good cause being shown' (rule 65 *lit.* D ICTR RPE). This latter type of filter mechanism was used for a period in a variety of provisions in earlier versions of the ICTY RPE. On the other hand, in the case of the ICC, rule 155 RPE requires leave to appeal only in the case of appeals under article 82 para. 1 (d) or article 82 para. 2, where the Statute itself contains a leave requirement.

²¹ See mn 84–89.

²² It would include an appeal against conviction following a plea of guilty: see Hartwig, in Safferling, *Towards an international criminal procedure*, 532, and *cf.* *Prosecutor v. Drazen Erdemović*, IT-96-22-A, Judgement, ICTY Appeals Chamber, 7 October 1997 (available under <https://www.legal-tools.org/doc/f49012/>).

²³ The addition of article 82 also supports this conclusion. However, even if article 81 were interpreted as applying to all decisions of a Trial Chamber, this would not make article 82 redundant, since the latter would provide for appeals against decisions of a Pre-Trial Chamber.

²⁴ See also for the ICTY/ICTR: *Léonidas Nshogoza v. Prosecutor*, ICTR-2007-91-A, Judgement, ICTR Appeals Chamber, 15 March 2010, para. 12 (available under <http://www.legal-tools.org/doc/a65fb0/>); *In the case against Vojislav Šešelj*, IT-03-67-R77.2-A, Judgement, ICTY Appeals Chamber, 19 May 2010 (public redacted version), para. 9.

the investigation and prosecution of conduct under article 70 adheres to the legal framework for the investigation and prosecution of article 5 crimes²⁵. The deviations from the regular procedural framework specifically foreseen in those provisions do not apply to the appeals scheme of article 81 to 83. Nevertheless, they clarify that its application is subject to a *mutatis mutandis* assessment²⁶.

- 8 Paragraph 1 provides three grounds on which the Prosecutor can appeal and four grounds on which an appeal can be brought by the convicted person or the Prosecutor on that person's behalf. It may be noted that the possibility of the prosecution **appealing on behalf of a convicted person** is one that is well-established in some legal systems²⁷, reflecting the prosecution's non-partisan duty to truth and justice²⁸.

The ILC was of the view that the right to appeal should exist equally for the Prosecutor and the convicted person²⁹. At the Preparatory Committee in 1996, there appeared to be a divergence of views on this issue, one view being to keep equality, another being to limit appeals by the Prosecutor to errors of law, and another being to allow the convicted person to appeal on any substantive grounds³⁰. The Zutphen Report included only the first three grounds (in square brackets) for both the Prosecutor and the convicted person, with an alternative square-bracketed proposal that would have allowed appeals by either 'without any specified grounds'³¹. The fourth ground of appeal, available only to the convicted person or the Prosecutor appealing on that person's behalf, was included in the 1998 Preparatory Committee Report³². It is however questionable whether this fourth ground adds significantly to the first three³³.

- 9 The definition of each of the specified grounds of appeal under this paragraph, and the corresponding standards of review on appeal, are considered at mn 34–63.

²⁵ See *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-558 OA2, Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'', Appeals Chamber, 11 July 2014, para. 14 (specifically for article 58 and 60); see also H. Brady, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 576 note 2.

²⁶ Rule 163(1) RPE.

²⁷ E.g., Germany: Code of Criminal Procedure (Strafprozeßordnung), § 296 para. 2 (available under <https://www.legal-tools.org/doc/ef2d9d/>); see also Instituto Iberoamericano de Derecho Procesal, *Código Procesal Penal modelo para Iberoamérica* (Model Code of Criminal Procedure for Latin America) article 332 (1989).

²⁸ See *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Decision on Communication Between the Parties and their Witnesses, Trial Chamber, 21 Sep. 1998 (available under <https://www.legal-tools.org/doc/6e80ec/>) ('... the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting'); *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), Appeals Chamber, 31 March 2000, Separate Opinion of Judge Shahabuddeen, para. 68 (available under <https://www.legal-tools.org/doc/1c0fe7/>) ('The Prosecutor of the ICTR is not required to be neutral in every case; she is a party. But she is not of course a partisan. ... The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice'). See also Staker and Nerlich, *article 84*, mn 6.

²⁹ 1994 ILC Draft Statute with commentaries, 125.

³⁰ Report of the Preparatory Committee on the establishment of an International Criminal Court, i, A/51/22 ('1996 Preparatory Committee Report I'), para. 295 (available under <http://www.legal-tools.org/doc/e75432/>).

³¹ Report on the inter-sessional meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13, 4 February 1998, ('Zutphen Draft') (available under http://www.legal-tools.org/uploads/tx_ltpdb/doc21423.pdf), 134.

³² Report of the Preparatory Committee on the establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, ('1998 Preparatory Committee Draft'), (available under http://www.legal-tools.org/uploads/tx_ltpdb/doc21486.pdf), 125.

³³ See mn 62.

II. Paragraph 2

Subparagraph (a) provides for **appeals against sentence** either by the Prosecutor or the convicted person. In contrast to paragraph 1, there is no express provision for the Prosecutor to bring an appeal on behalf of the convicted person³⁴, although nothing in the wording of paragraph 2 would prevent it.

Only one ground of appeal against sentence is provided for, namely that of ‘**disproportion between the crime and the sentence**’. The definition of this ground of appeal, and the corresponding standard of review on appeal, is considered at mn 64–67.

It seems surprising that no other grounds of appeal were included in this paragraph. In the course of the sentencing process other errors of the kind referred to in paragraph 1 could arise, in particular procedural errors (*e.g.*, failure to hold a hearing under article 76, para. 2 despite a request by the Prosecutor or the defence), errors of fact (*e.g.*, where the Trial Chamber, in determining the sentence, has regard to matters which are factually incorrect) or errors of law (*e.g.*, where the Trial Chamber, in determining sentence, misconstrues a provision of the Statute or the Rules, such as rule 145 RPE). In fact, article 83, para. 2 expressly acknowledges this, empowering the Appeals Chamber to grant an appellate remedy where the ‘sentence appealed from was materially affected by error of fact or law or procedural error’. It may therefore be that any appeal seeking to have the sentence itself reduced or increased on appeal, on any of these grounds, would be an appeal alleging ‘disproportionality’ of sentence within the meaning of article 81, para. 2(a).

Under *subparagraph (b)*, where there is an *appeal against sentence only*, the Appeals Chamber can of its own motion raise the question whether there may be grounds to set aside the conviction itself. *Subparagraph (c)* makes similar provision in cases where there is an *appeal against conviction only*. These provisions, enabling the Appeals Chamber to raise certain issues **on its own motion**, are expressed to operate only to the benefit of the convicted person. It may be that they merely give expression to what would in any event fall within the inherent powers of the Appeals Chamber³⁵. No similar provision is contained in the Statute or Rules of the ICTY, yet a similar power was exercised by the Appeals Chamber of that Tribunal³⁶.

III. Paragraphs 3 and 4

The general principle that execution of a judgment is **suspended** during appeal (subject to possible exceptions), which is familiar particularly to civil law systems³⁷, is given effect subject to the exceptions contained in paragraph 3.

Paragraph 3 establishes a general rule that a person who is convicted will remain in custody notwithstanding that he or she may have appealed against the verdict. Conversely, a person who has been acquitted is to be released immediately, even if the Prosecutor has appealed against the acquittal. These general principles are subject to a contrary order of the Trial Chamber, but in case of **acquittal**, such an order can be made only in ‘exceptional circumstances’, and is itself subject to **appeal** by the person affected³⁸.

³⁴ See mn 8.

³⁵ See mn 70.

³⁶ See *Erdemović* Appeal Judgement, IT-96-22-A, 7 October 1997 (in which the accused, who had pleaded guilty, appealed against his sentence, and the Appeals Chamber, *proprio motu*, raised issues concerning the validity of the plea of guilty).

³⁷ France: Code de Procédure Pénale, article 506, 569 (available under <https://www.legal-tools.org/doc/62c164/>); Germany: Code of Criminal Procedure (Strafprozeßordnung), §§ 316, 343 (available under <https://www.legal-tools.org/doc/ef2d9d/>).

³⁸ See *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-12 OA, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, Appeals Chamber, 20 December 2012, (available under

- 16 *Subparagraph (a)* does not give any indication of the types of orders for release that may be made by the Trial Chamber. Such orders could arguably be made subject to conditions, such as bail, or periodic reporting³⁹. Presumably, under *subparagraph (c)(i)* the Trial Chamber could also, as an alternative to actual detention, order detention with conditional release subject to bail or reporting requirements.
- 17 Apart from the fact that a convicted person will thus normally remain in custody pending an appeal, under *paragraph 4* the effects of the conviction or sentence are **suspended** during the period allowed for appeal and for the duration of any appeal proceedings. The consequences are, for instance, that during this period the convicted person will not be transferred to the State of enforcement designated under article 103, and that no order can be enforced against the convicted person under article 75, para. 2.⁴⁰ There will also be a suspension of any fine imposed under article 77, para. 2(a) and of any order for forfeiture of assets under article 77, para. 2(b).

C. Special remarks

1. Nature of an ‘appeal’

- 18 **a) Introduction.** Although the Statute includes various provisions for appellate proceedings⁴¹, it does not define the concept of an ‘appeal’. In national legal systems, different forms of appellate proceedings may exist. In particular, in civil law systems generally there is a distinction between what in French is called ‘*appel*’ on the one hand⁴², and ‘*cassation*’ on the other⁴³. In the case of an *appel*, reconsideration of both questions of fact and questions of law are possible, and the merits of the case generally may be redetermined. This is usually the form of appeal from the court of first instance to an intermediate court of appeal⁴⁴. *Cassation* on the other hand is a form of appeal confined essentially to issues of law or procedural errors, and is normally the form of appeal to the court of highest instance in such systems⁴⁵.
- 19 The ILC observed, in relation to the position under the ILC Draft Statute, that the Appeals Chamber ‘combines some of the functions of *appel* in civil law systems with some of the functions of *cassation*’ and that this was ‘thought to be desirable, having regard to the existence of only a single appeal from decisions at trial’⁴⁶. The ILC was also of the view that ‘[i]t is not intended that the appeal should amount to a retrial. The Court would have power if necessary to allow new evidence to be called, but it would normally rely on the transcript of the proceedings at the trial’⁴⁷. At the Preparatory Committee in 1996, one view was that the

<http://www.legal-tools.org/doc/3578c4/>) paras. 22–25; cf para. 15 with respect to whether an appeal pursuant to article 81, para. 3(c)(ii) may be subject to a request for suspensive effect pursuant to article 82, para. 3).

³⁹ See article 83 para. 1 in conjunction with article 60 paras. 2–5 and rules 118–119 RPE. But cf. Roth and Henzelin in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1547.

⁴⁰ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2953 A A2 A3 OA21, Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and direction on the further conduct of proceedings, Appeals Chamber, 14 December 2012 (available under <http://www.legal-tools.org/doc/2e59a0/>), para. 86.

⁴¹ See mn 2–5.

⁴² Proceedings of this type in other civil law systems include ‘*Berufung*’ in Germany, ‘*appello*’ in Italy, ‘*hooger beroep*’ in the Netherlands.

⁴³ Proceedings of this type include ‘*Revision*’ in Germany, ‘*ricorso per cassazione*’ in Italy, ‘*Cassatieberoep*’ in The Netherlands.

⁴⁴ See Van den Wyngaert (ed.), *Criminal procedure systems in the European Community* 46 (Belgium), 134 (France), 160 (Germany), 256 (Italy), 314–315 (Netherlands) (1993); Hatchard et al. (eds.), *Comparative Criminal Procedure* (1996) 54–55 (France), 132–133 (Germany).

⁴⁵ See Van den Wyngaert (ed.), *Criminal procedure systems in the European Community* 47 (Belgium), 134–135 (France), 160 (Germany), 256–257 (Italy), 314–315 (Netherlands), 398 (Spain); Hatchard et al. (eds.), *Comparative criminal procedure* (1996) 55–56 (France), 133 (Germany).

⁴⁶ 1994 ILC Draft Statute with commentaries, p. 127.

⁴⁷ *Ibid.*

Appeals Chamber should be able to re-examine the case in its entirety and that the right of appeal should be as broad as possible⁴⁸. The ultimate inclusion in article 81 para. 1 of specified grounds on which an appeal may be brought suggests that this view did not prevail.

The following discussion outlines the principles governing appeals as developed in the recent case law of the ICC, in contrasting juxtaposition with the case law of the *ad hoc* tribunals. Insofar as the ICC case law is not yet conclusive, reference is made to the principles developed by the *ad hoc* tribunals.

b) ‘Corrective’ nature of an appeal. Neither the legal framework of the ICC nor the Statutes and Rules of the ICTY and ICTR do clearly indicate the nature of an appeal in any of these jurisdictions. However, this has been clarified in their case law. The ICC Appeals Chamber in deciding whether to admit additional evidence on appeal held:

‘The Appeals Chamber considers that appellate proceedings significantly differ in their nature and purpose from pre-trial and trial proceedings. Importantly, appellate proceedings at the Court are of a corrective nature, which finds expression in, *inter alia*, the standard of review on appeal ...’⁴⁹

Accordingly, the ICC Appeals Chamber has established that an appeal under article 81, para. 1 does **not require a *de novo*** consideration of the case but a review of the Trial Chamber’s decision under article 74 (on guilt or innocence).

Similarly, the Appeals Chamber of the *ad hoc* tribunals has made clear from the start that it does not operate as a second Trial Chamber, and that an appeal does not involve a trial *de novo*⁵⁰. It is well established jurisprudence that:

‘[o]n appeal, parties must limit their arguments to errors of law that invalidate the decision of the trial chamber and to factual errors that result in a miscarriage of justice.’⁵¹

The ICC Appeals Chamber held further with respect to an appeal against a Trial Chamber’s decision on sentence pursuant to article 76:

‘At the outset, the Appeals Chamber notes that article 83 (2) and (3) of the Statute clarifies that, with respect to appeals against sentencing decisions, the Appeals Chamber’s primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person. The Appeals Chamber’s role is not to determine, on its own, which sentence is appropriate, unless – as stipulated in article 83 (3) of the Statute – it has found that the sentence imposed by the Trial Chamber is ‘disproportionate’ to the crime. Only then can the Appeals Chamber ‘amend’ the sentence and enter a new, appropriate sentence.’⁵²

This quote supports the conclusion that the ICC Appeals Chamber is primarily a chamber of review that analyses the **correctness** of the Trial Chamber’s decisions on the basis of specific grounds of appeal. However, it also shows that its task goes beyond establishing merely the correctness of the Trial Chamber’s decisions under article 74 and/or 76 in respect of ‘errors’ that the Trial Chamber may have committed. Rather, it also needs to decide,

⁴⁸ 1996 Preparatory Committee Report I, para. 295.

⁴⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red A5, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 56 (available under <http://www.legal-tools.org/doc/585c75/>).

⁵⁰ *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Appeals Chamber, 15 October 1998, paras. 41–42 (available under <http://www.legal-tools.org/doc/d360e7/>); *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Judgement, ICTY Appeals Chamber, 21 July 2000, para. 40 (available under <http://www.legal-tools.org/doc/660d3f/>); *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, paras. 203, 724 (available under <http://www.legal-tools.org/doc/051554/>); *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, ICTY Appeals Chamber, 25 February 2004, para. 5 (available under <http://www.legal-tools.org/doc/dbe7c4/>); *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, ICTY Appeals Chamber, 28 February 2005, paras. 424–425 (available under <http://www.legal-tools.org/doc/006011/>).

⁵¹ *Prosecutor v. Vujadin Popović et al*, IT-05-88-A, Judgement, Appeals Chamber, 30 January 2015, para. 16.

⁵² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3122 A4 A6, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute, 1 December 2014, para. 56 (available under: <http://www.legal-tools.org/doc/a9bd07/>).

within its powers, how to proceed with an ‘incorrect’ decision. In that respect, the Appeals Chamber’s powers are arguably more akin to those of a Trial Chamber⁵³.

- 23 **Grounds of appeal** are the basis for the Appeals Chamber’s review. The Statute reinforces this by providing in article 83, para. 2(b) and (c) that, where the Appeals Chamber decides to extend the review of the Trial Chamber’s decisions to either the conviction or the sentencing decision, it is required to seek grounds of appeal in relation to that decision from the parties. Accordingly, only those grounds establish the basis for the Appeals Chamber’s review of that decision⁵⁴.
- 24 In the practice of the ICC and international(ised) tribunals, the Appeals Chambers *dismiss* grounds of appeal if they a) do not meet the requirements of substantiation, or, in the language of the *ad hoc* tribunals, are subject to summary dismissal, see below mn 28–30 or b) fall under the ‘waiver’ principle; see below mn 31–32. When dismissing a ground of appeal, the Appeals Chambers do not consider the merits of the alleged error. The Appeals Chambers use a different terminology when considering the merits of a ground of appeal but finding it to be unfounded. In this case, it is their practice to *reject* a ground of appeal. If a ground of appeal is rejected, it is found not to meet the standard of review applicable to the alleged error.
- 25 The Rome Statute introduces grounds of appeal and the standard of review differently from the statutes of the *ad hoc* tribunals. Article 81, paras 1 and 2, list the grounds of appeal that appellants may raise against decisions pursuant to articles 74 and 76. The standard of review, however, is implicitly dealt with in article 83, para. 2, a provision addressing foremost the powers of the Appeals Chamber⁵⁵. It determines that the Appeals Chamber’s exercise of the powers described therein finds only application if ‘the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of law or procedural error’. On this basis, the ICC Appeals Chamber has described its scope of review for appeals under article 81, paras 1 and 2, in the following terms:

‘Pursuant to article 81 (1) (b) of the Statute, in an appeal against a conviction decision, the convicted person may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law, as well as (iv) ‘[a]ny other ground that affects the fairness or reliability of the proceedings or decision’. Article 83 (2) of the Statute also establishes that the Appeals Chamber may only interfere with a conviction decision if the error of fact or law or a procedural error ‘materially affected’ that decision, and, in respect of unfairness allegations, that the unfairness ‘affected the reliability of the decision’.⁵⁶

It is noteworthy that the ICC Appeals Chamber has applied a **similar standard of review** with respect to **article 82 appeals**, without, however, making explicit reference to article 83, para. 2. The Appeals Chamber has held from the issuance of the first article 82(1) judgment that the alleged (legal) error must ‘materially affect’ the impugned decision⁵⁷. In the first article 81 appeal judgment, the Appeals Chamber has acknowledged that the standards of review for appeals under article 81 and for those under article 82 are – with respect to the requirement that the alleged error must materially affect the impugned decision – the same⁵⁸.

- 26 The ICTY/ICTR Statutes address the grounds of appeal and the standard of review in one single provision requiring ‘an error on a question of law’ to invalidate the decision and ‘an error on fact’ to occasion ‘a miscarriage of justice’⁵⁹. The SCSL Statute adds to this list a ‘procedural error’ but without indicating the applicable standard of review⁶⁰. According to its

⁵³ See mn 36–39; see also Staker and Eckelmans, *article 83*, mn 5–13.

⁵⁴ See mn 71.

⁵⁵ See Staker and Eckelmans, *article 83*, mn 5.

⁵⁶ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 16.

⁵⁷ *Democratic Republic of the Congo*, ICC-01/04-169 OA, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, 13 July 2006, para. 84.

⁵⁸ See *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 17.

⁵⁹ Article 25 ICTY Statute, article 24 ICTR Statute; see also rule 104 ECCC Internal Rules.

⁶⁰ Article 20 SCSL Statute.

jurisprudence, such errors must ‘vitiating the proceedings’⁶¹. In the practice of the ICTY/ICTR Appeals Chambers, procedural errors and errors relevant to the rights of the accused and a fair trial have been treated as ‘errors of law’, thereby stipulating the requirement that the error must invalidate the impugned decision⁶².

While awareness of these statutory differences is helpful, they matter little in detecting the differences in the case law of the international(ised) courts. Rather, before any of the Appeals Chambers, appellants may raise errors of law, errors relevant to the proceedings leading to the impugned decision as well as errors of fact and it is established that these errors must affect the impugned decision for the ground of appeal to be successful. A particular position is reserved in the Statute for unfairness allegations and in the jurisprudence of the *ad hoc* tribunals for issues of general importance/significance⁶³. On the precise standard of review applicable with respect to each of the errors, see below, mn 33–62.

2. Dismissal of grounds of appeal

a) **Substantiation of grounds of appeal.** Non-substantiation of a ground of appeal is a reason for the ICC Appeals Chamber to dismiss such an alleged error: 28

‘The Appeals Chamber notes that its jurisprudence relating to the requirement of substantiation in appeals under article 82 of the Statute adequately addresses the substance of the Prosecutor’s request. The Appeals Chamber recalls that, in appeals pursuant to article 82 (1) of the Statute, the appellant is required to set out the alleged error and how the alleged error materially affected the impugned decision. If an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance. The Appeals Chamber adopts this jurisprudence for appeals pursuant to article 81 (1) of the Statute.’⁶⁴

Accordingly, an appellant must explain how the Trial Chamber erred and how this error materially affected the impugned decision. This requirement applies to **all grounds of appeal**. The substantiation is of utmost importance to alleging an **error of fact** as well as a **procedural error**,⁶⁵ because in relation to both the scope of the Appeals Chamber’s review is limited and usually fully dependent on how the error is alleged and substantiated⁶⁶. In that regard the appellants are required to refer to the parts of the record that are relevant to the allegations raised because the Appeals Chamber will not do so *proprio motu*⁶⁷. The ICC Appeals Chamber has also established that a misnomer of a ground of appeal is inconsequential as long as the error is well-substantiated⁶⁸.

⁶¹ *Prosecutor v. Moinina Fofana and Allieu Kondewa*, SCSL-04-14-A, Judgement, SCSL Appeals Chamber, 28 May 2008, para. 35 (available under <http://www.legal-tools.org/doc/b31512/>) (‘[a]lthough not expressly so stated in Article 20 of the Statute, not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be corrected or waived or ignored [...] without injustice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice’); see also *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, SCSL Appeals Chamber, 4 August 2009, para. 34.

⁶² See mn 34–35.

⁶³ See mn 72–75.

⁶⁴ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 30, by reference to *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-408 OA3, Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009, ICC Appeals Chamber, 16 September 2009, paras. 50–51; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-962 OA3, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’, 19 October 2010, paras. 103–104; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1019 OA4, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’ 5 March 2012, paras. 69–71.

⁶⁵ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 33.

⁶⁶ See mn 43, 53.

⁶⁷ See e.g. *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 134, see also para. 26 in respect of factual errors.

⁶⁸ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 34.

29 The scope of the Appeals Chamber's review is, however, less limited by the submissions of the parties or the considerations of the Trial Chamber in relation to **errors of law**. The ICC Appeals Chamber held:

[T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.⁶⁹

An analysis of the Appeals Chamber's jurisprudence shows that the substantiation requirements for legal errors appear to be **more relaxed** compared to those of factual or procedural errors. While the appellant is required to indicate where in the impugned decision the Trial Chamber erred, for which reasons and how this affected the impugned decision, the ICC Appeals Chamber has accepted that e.g. substantiating an error in the impugned decision may involve repetition of arguments raised earlier in the proceedings⁷⁰. Furthermore, when interpreting article 25, para. 3(a), the Appeals Chambers discussed arguments deriving from academic literature, without being limited in that regard by the parties' submissions⁷¹. Also in article 82 appeals, the Appeals Chamber has often taken an interpretative approach to a solely legal issue. Accordingly, instead of discussing merely the arguments of the parties, it has resolved the legal issue before it by applying principles of statutory interpretation, thereby freely referring, where appropriate, to jurisprudence of other tribunals and domestic courts or to academic literature⁷². Arguably, this approach springs, be it only partly,⁷³ from the principle *iura novit curia* (i.e. the court knows the law). Accordingly, failure of the appellant to detect arguments that are conducive to resolving a purely legal question may not necessarily be fatal to the ground of appeal.

The approach of the ICC Appeals Chamber to the substantiation requirements of legal errors, as well as generally to other errors, is similar to that of the ICTY/ICTY Appeals Chambers. They have held:

'Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law'⁷⁴.

Thus, the ICTY Appeals Chamber accords **no particular deference to findings of law** made by the Trial Chamber, since the Appeals Chamber is as capable as the Trial Chamber of determining what the law is. However, in accordance with the general principle that it is for a party asserting a right or seeking relief to establish the existence of that right or

⁶⁹ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-295 OA2, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation', ICC Appeals Chamber, 17 February 2012, para. 20, referred to in *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 18.

⁷⁰ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 31.

⁷¹ See e.g. *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 445–451, 462–473.

⁷² See as an early example *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 OA3, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, ICC Appeals Chamber, 13 July 2006, paras. 33–34.

⁷³ In civil law jurisdictions, such as e.g. in Germany, the appellants are not required by law to further substantiate an alleged error of law if it concerns the material law ('Sachruege'); see Germany Strafprozeßordnung, § 344.

⁷⁴ *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Judgment, ICTY Appeals Chamber, 21 July 2000, para. 35. See also, e.g., *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Judgment, Appeals Chamber, 23 May 2005, para. 5 (available under <https://www.legal-tools.org/doc/2b7d1c/>); *Prosecutor v. Vasiljević*, IT-98-32-A, Judgment, ICTY Appeals Chamber, 25 February 2004, para. 6.

the entitlement to that relief, an appellant may be said to bear a burden of persuasion⁷⁵. Hence, it has been said that:

[A] party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake. If the party is unable to at least identify the alleged legal error, he or she should not raise the argument on appeal. It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber⁷⁶.

The ICTY/ICTR Appeals Chambers, including the ICTR MICT Appeals Chamber⁷⁷, have established, as part of their long-standing case law⁷⁸, clear requirements to which appellants must adhere in raising their arguments; if not the Appeals Chamber may exercise their inherent discretion to dismiss arguments without considering their merits ('summary dismissal')⁷⁹. The parties are expected to provide focused contributions and to present their case 'clearly, logically, and exhaustively', by precisely referring to 'relevant transcript pages or paragraphs in the decision or document to which the challenges are being made'. Arguments that are 'obscure, contradictory, vague or suffer from other formal and obvious insufficiencies' may be dismissed without the Appeals Chamber providing detailed reasoning⁸⁰.

Foremost with respect to **errors of fact**, the ICTY/ICTR Appeals Chambers have established certain 'types of deficient submissions on appeal which need not be considered on the merits' and allow them to summarily dismiss arguments⁸¹. Since the Appeals Chamber Judgment in *Prosecutor v. Dragomir Milošević*⁸², ten different reasons for summary dismissal have been mentioned, recently summarised as follows:

In particular the Appeals Chamber will dismiss without detailed analysis: (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the trial chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the trial chamber did; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged findings; (iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual findings is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on the record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, or failure to articulate error; and (x) mere assertions that the trial chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.⁸³

⁷⁵ See, *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Appeals Chamber, 15 Oct. 1998, para. 52.

⁷⁶ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 27. See also *Prosecutor v. Kunarać et al.*, IT-96-23 and IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, paras. 43–48; *Prosecutor v. Milorad Krnojelac*, IT-07-25-A, Judgement, ICTY Appeals Chamber, 17 September 2003, para. 10.

⁷⁷ *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, ICTY Appeals Chamber, 30 January 2015, paras. 22–23; *Prosecutor v. Augustin Ngirabatware v. The Prosecutor*, MICT-12-29-A, Judgement, MICT Appeals Chamber, 18 December 2014, paras. 11–12.

⁷⁸ See Staker, *article 81*, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, Second Edition, mn 20.

⁷⁹ *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, ICTY Appeals Chamber, 30 January 2015, para. 22.

⁸⁰ *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, ICTY Appeals Chamber, 30 January 2015, para. 22, see also *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Judgement, ICTY Appeals Chamber, 12 November 2009, para. 16.

⁸¹ *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, ICTY Appeals Chamber, 30 January 2015, para. 23.

⁸² *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Judgement, ICTY Appeals Chamber, 12 November 2009, para. 17.

⁸³ *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, ICTY Appeals Chamber, 30 January 2015, para. 23.

- 31 The jurisprudence of the *ad hoc* tribunals is more specific and appears more limitative than that of the ICC, which is partly due to the *ad hoc* Tribunals' rich practice and a more precise delineation of the scope of the Appeals Chambers' review, especially in respect of factual errors. It is likely that the ICC Appeals Chamber will build on this jurisprudence, as it did, in essence, in the first final appeal judgments, in which it dismissed as unsubstantiated many factual submissions. However, in establishing any strict substantiation requirements, it needs to be kept in mind that under the ICC legal assistance scheme – or that of other international criminal tribunals – counsel need not have specialised in appeal proceedings. In some national jurisdictions, however, only specialised lawyers with specific certificates may address the highest judicial bodies, which facilitates not only the work of the court but also ensures that justified claims are likely to overcome formal hurdles. Having high pleading requirements may therefore make it advisable to include in the defence team, according to the legal assistance scheme, lawyers who are specialised in that specific area of law, or to take other compensatory measures⁸⁴.
- 32 b) **The 'waiver' principle.** The ICTY Appeals Chamber has said in the context of justifying the 'corrective' nature of appeal proceedings that:

'The appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing.'⁸⁵

Accordingly, parties are, in general, under an obligation to raise all relevant issues before the Trial Chamber. The Appeals Chamber of the ICTY has held that:

'The Appeals Chamber accepts that, as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party.'⁸⁶

The same principle has been recognised by the ICTR Appeals Chamber⁸⁷ and has in essence been referred to as one reason for dismissing a ground of appeal by the ICC Appeals Chamber in its first final appeal judgment.⁸⁸

Thus, if a party fails to raise any **objection** to a particular issue before the Trial Chamber, in the absence of any special circumstances, the party is to be taken as having waived its right to present the issue as a valid ground of appeal. A concomitant of this principle is that the accused cannot raise a defence for the first time on appeal⁸⁹. The principle is based in part on judicial economy: if an issue is raised and dealt with at trial, an unnecessary appeal, with the ensuing possibility of a subsequent retrial, may be avoided. The Appeals Chamber has also

⁸⁴ Interesting in this context is the appeal of Kaing Guek Eav before the ECCC, who had dismissed his international co-lawyer and instead chose two national (Cambodian) co-lawyers; the Defence Support Section's *amicus curiae* requests that were meant to strengthen his defence were rejected by the Supreme Court Chamber; see *Case of Kaing Guek Eav (Case 001)*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, Annex 1, paras. 19–23.

⁸⁵ *Erdemović* Appeal Judgement, IT-96-22-A, 7 October 1997, para. 15; *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 408 (available under <http://www.legal-tools.org/doc/c6a5d1/>).

⁸⁶ *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 640 (referring to earlier case law) (also see at para. 351). See also *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 61 (available under <http://www.legal-tools.org/doc/029a09/>); *Prosecutor v. Nalitić and Martinović*, IT-98-34-A, Judgement, Appeals Chamber, 3 May 2006, paras. 21–22 (available under <http://www.legal-tools.org/doc/94b2f8/>). The waiver principle applies also to appeals against sentence: *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, para. 15 (available under <http://www.legal-tools.org/doc/8aae45/>).

⁸⁷ *Kambanda v. Prosecutor*, ICTR-97-23-A, Judgement, ICTR Appeals Chamber, 19 October 2000, paras. 25–28, 55 (available under <http://www.legal-tools.org/doc/9d7f75/>); *Kayishema and Ruzindana* Appeal Judgement, para. 91; *Musema v. Prosecutor*, ICTR-96-13-A, Judgement, Appeals Chamber, 6 November 2001, paras. 127, 341 (available under <https://www.legal-tools.org/doc/6a3fce/>).

⁸⁸ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, 135.

⁸⁹ *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, para. 51 (available under <http://www.legal-tools.org/doc/176f05/>).

indicated that it may be difficult for it to determine precisely what prejudice has been caused to a party if the objection was not raised before the Trial Chamber⁹⁰.

Nevertheless, it appears that the ICTY/ICTR Appeals Chambers have, in exceptional cases, 33 not applied the waiver principle⁹¹.

3. Grounds of appeal and standards of review on appeal

a) **Procedural error vs. error of law.** The ICC Appeals Chamber has held in relation to 34 procedural errors ‘that they may occur in the proceedings leading up to an impugned decision’ and clarified that such errors may be based on ‘events which occurred during the trial proceedings and pre-trial proceedings’⁹². As set out above⁹³, the ICTY/ICTR Statutes do not itemise the ‘procedural’ error. Instead, errors relevant to the procedure have been addressed under the heading ‘error of law’. Hence, the ICTY/ICTY Appeals Chambers have not strictly distinguished between procedural errors and errors of law. **Lack of reasoning** in an impugned decision has been labeled as ‘error of law’ and would also be considered by the ICC Appeals Chamber as an error of law, if the ICC Appeals Chamber limited procedural errors also in future only to those errors that are ‘leading up to an impugned decision’⁹⁴. If this remained the distinguishing criterion between procedural errors and errors of law, the difference between the errors would be of a descriptive nature and would accordingly lie in whether errors relate to the proceedings leading up to the impugned decision or whether they concern the impugned decision itself. To give an example, an alleged error in a decision accepting *amicus curiae* observations included by the first-instance Chamber in the impugned decision, would be characterised as a procedural error and not fall within the category of an error of law.⁹⁵

⁹⁰ *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 641.

⁹¹ In the *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, paras. 51–56, the Appeals Chamber considered a defence raised by a convicted person for the first time on appeal, but very quickly concluded that the new defence had no merit. In *Kambanda v. Prosecutor*, ICTR-97-23-A, Judgement, ICTR Appeals Chamber, 19 October 2000, para. 55, the Appeals Chamber said that it was important for it to consider certain issues raised for the first time on appeal ‘as this is the Chamber of last resort for the Appellant facing life imprisonment ...’, and as the issues raised in this case are of general importance to the work of the Tribunal’. See also *Kamuhandu v. Prosecutor*, ICTR-99-54A-A, Judgement, Appeals Chamber, 19 Sep. 2005, paras. 21–23 (available under <http://www.legal-tools.org/doc/bd4762f/>); *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), Appeals Chamber, 31 March 2000, Separate Opinion of Judge Shahabuddeen, para. 52 (‘Clearly, if the new defence was sound in law and convincing in fact, it would have to be entertained in the higher interests of justice notwithstanding the general rule’). See also *Prosecutor v. Simić*, IT-95-9-A, Judgement, Appeals Chamber, 28 November 2006, para. 25 (available under <https://www.legal-tools.org/doc/28524bf/>) (accepting the general principle, but adding ‘... that the importance of the right of an accused to be informed of the charges against him and the possibility that he will incur serious prejudice if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal’, that where ‘an appellant raises a defect in the indictment for the first time on appeal, he bears the burden of proving that his defence was materially impaired’ and that when an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare a defence was not materially impaired. See further *id.*, paras. 56–74, but see the dissenting opinion of Judge Shahabuddeen. On this point, see also *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, Appeals Chamber, 18 Sep. 2006, para. 42 (available under <http://www.legal-tools.org/doc/13214ff/>).

⁹² *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 20, making reference to *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-408 OA3, Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009, ICC Appeals Chamber, 16 September 2009, paras. 46–47.

⁹³ See mn 26–27.

⁹⁴ On lack of reasoning, see mn 54–55.

⁹⁵ See *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-321 OA2, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of proceedings, ICC Appeals Chamber, 12 December 2012, para. 36 (‘as both errors pertain to the procedure based on a challenge to

Having this in mind, both categories of errors may relate to violations of the **rights of the accused** or of **fair trial** requirements. In addition, both errors need to also ‘materially affect’ the impugned decision as clarified by article 83, para. 2 and the ICC Appeals Chamber⁹⁶. The main distinction lies, as in the practice of the ICTY/ICTR Appeals Chambers, in the **higher substantiation requirements** for procedural errors and the concomitant scope of review that is more limited. As indicated above⁹⁷, the appellant needs to refer to the record of the proceedings in order to substantiate the alleged error and to explain why the alleged error in the proceedings materially affected the impugned decision by showing that, ‘in the absence of the procedural error, the judgment would have substantially differed from the one rendered’⁹⁸. Furthermore, the ‘waiver’ principle is more relevant to procedural errors than to legal errors in the impugned decision itself.

- 35 An alternative way of addressing this matter is that proposed in the previous editions of this commentary on article 81, suggesting that procedural errors fall into two categories – those relevant to the non-compliance with mandatory procedural requirements of the Statute and the Rules including the rights of the accused on the one hand and those relevant to the exercise of discretion on the other.⁹⁹ Accordingly, while not clearly stipulated in those editions, errors of law alleged in decisions under article 74 would only be those relevant to the substantive law of the Court (the crimes and the individual criminal responsibility), while other errors would be defined as procedural errors; a distinction that would allow for a better categorisation of the different errors. However, different from the distinguishing criterion discussed under mn 34, such distinction would not be applicable to article 82 appeals as they usually address errors relevant to the ICC’s procedural law, to the ICC’s jurisdictional limits and interim release provisions. In addition, legal errors in sentencing may e.g. be those relevant to the Trial Chamber’s application of rule 145(1)(c) RPE.¹⁰⁰ Accordingly, such distinction would solely provide assistance in distinguishing between procedural and legal errors for the purposes of appeals against a conviction or an acquittal.

Below, errors relevant to the exercise of the Trial Chamber’s discretion are discussed under the heading ‘procedural errors’, even though such errors might – depending on the distinguishing criterion that is applied – fall within the category of ‘errors of law’¹⁰¹. In addition, having a good perception of errors arising in exercising discretion is also essential to ‘errors of fact’. Errors relevant to the rights of the accused and a fair trial are discussed separately, as they establish arguably a separate (sub-)category of errors. See mn 59 to 63.

- 36 **b) Error of law.** The error of law, as an error distinct from a procedural error, endows the Appeals Chamber with a **broad scope of review**. As discussed above, the Appeals Chamber in determining whether the Trial Chamber erred in its legal analysis is **not bound by the arguments** of the parties or the considerations of the Trial Chamber but will arrive at its own conclusions as to the appropriate law¹⁰². When the Appeals Chamber finds that the Trial Chamber committed such an error, the Appeals Chamber needs to decide whether this error had repercussions on the Trial Chamber’s overall conclusions (**material effect**). As to the material effect, the ICC Appeals Chamber held:

the jurisdiction of the Court pursuant to article 19 (2) of the Statute, they can be raised as errors in an appeal pursuant to articles 19 (6) and 82 (1) (a) of the Statute.’).

⁹⁶ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 20.

⁹⁷ See mn 28.

⁹⁸ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 20.

⁹⁹ Staker, *article 18*, in: O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, (2nd edition), paras. 23–27.

¹⁰⁰ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3122 A4 A6, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute, 1 December 2014, para. 50.

¹⁰¹ In particular in respect of appeals under article 82 that often relate to discretionary decisions of the Pre-Trial or Trial Chamber.

¹⁰² See mn 29.

‘A judgment is ‘materially affected by and error of law’ if the Trial Chamber ‘would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error’.¹⁰³

With respect to article 81 appeals, it is worth noting that the Trial Chamber’s overall conclusions are usually a combination of factual and legal findings, because the Trial Chamber must assess, on the basis of the Trial Chamber’s prior legal analysis, whether its factual findings fall under the elements of the crime and the modes of liability charged. Accordingly, the Appeals Chamber often needs to analyse whether the Trial Chamber’s factual findings meet the correct(ed) legal standard. The Appeals Chamber would confirm the impugned decision if the Trial Chamber’s factual findings (as they stand after the Appeals Chamber’s consideration of the related factual errors) met the correct(ed) legal standard and if the alleged legal errors did not materially affect the legal characterisation of the crime or form of responsibility. However, the Appeals Chamber would usually amend the impugned decision if the factual findings (as they stand after the Appeals Chamber’s consideration of the related factual errors) met the correct(ed) legal standard and if this legal standard related to a different crime or form of responsibility than that entered by the Trial Chamber¹⁰⁴.

If the Trial Chamber’s factual findings (as they stand after the Appeals Chamber’s consideration of the related factual errors) did not meet the correct(ed) legal standard, the error would usually materially affect the impugned decision. In that case, the Appeals Chamber needs to consider on the basis of the charges and the case as a whole whether to reverse and acquit on this charge, whether to reverse and order the hearing of evidence (or hear evidence itself), whether to reverse and order a new trial, or whether it falls within its scope of review to substitute its **own factual conclusions** for those of the Trial Chamber on the basis of a (limited) re-assessment of the evidence that had been presented before the Trial Chamber¹⁰⁵. The ICC Appeals Chamber did not need to directly approach this matter yet. However, the ICTY/ICTR Appeals Chambers have, in respect of final appeals, **case law** on that question:

‘Where the Appeals Chamber finds that there is an error of law in the trial judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly. In so doing, the Appeals Chamber not only corrects the error of law, but when necessary applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal. The Appeals Chamber will not review the entire record *de novo*. Rather, it will in principles only take into account evidence referred to by the trial chamber in the body of the judgment or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.’¹⁰⁶

¹⁰³ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-295 OA2, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’, ICC Appeals Chamber, 17 February 2012, para. 20, referred to in *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 18; see also *Democratic Republic of the Congo*, ICC-01/04-169 OA, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, 13 July 2006.

¹⁰⁴ See Staker and Eckelmans, *article 83*, mn 7, 9; this is in fact a reversal followed by an amendment. Whether this is possible on appeal and in line with the accused’s right to be informed of the charges, depends on the charges that were at issue on trial.

¹⁰⁵ See Staker and Eckelmans, *article 83*, mn 7–9.

¹⁰⁶ *Prosecutor v. Vujadin Popović et al.*, IT-05-88-A, Judgement, ICTY Appeals Chamber, 30 January 2015, para 18, by reference to *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 15; *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-05-14/2-A, Judgement, ICTY Appeals Chamber, 17 December 2004, para. 17; see also *Prosecutor v. Stakić*, IT-97-24-A, Judgement, Appeals Chamber, 22 March 2006, paras. 9, 312 (but see the Partly Dissenting Opinion of Judge Shahabuddeen, paras. 2–7) (available under <http://www.legal-tools.org/doc/09f75f/>); the ICTR MICT has adopted this jurisprudence, see *Prosecutor v. Augustin Ngirabatware v. The Prosecutor*, MICT-12-29-A, Judgement, MICT Appeals Chamber, 18 December 2014, para. 9.

This case law seems to imply that, where there is a legal error, the Appeals Chamber may, within self-imposed limits, re-assess the evidence – and not merely legally reassess the factual conclusions of the Trial Chamber as they stand after the Appeals Chamber’s review. Accordingly, this jurisprudence implies that the Appeals Chamber may – to a degree – step into the shoes of the Trial Chamber, because the assessment of the evidence as well as entering findings beyond reasonable doubt usually are within the primary competence of a Trial Chamber. The appellant has a right to appeal against those findings¹⁰⁷. Arguably, the practice of the ICTY/ICTR Appeals Chambers shows that they have not yet found a common approach to this issue, not least because appeals differ in whether the appellant challenges the Trial Chamber’s underlying factual findings and alleges errors of fact in that respect. The different approaches extend not only to the role of the evidence in e.g. interpreting the (unchallenged) findings of the Trial Chamber,¹⁰⁸ but also to when this power is *not* applied leading e.g. to an acquittal.¹⁰⁹

- 38 In article 82 appeals, the ICC Appeals Chamber has followed different paths in dealing with an error of law. On many occasions, it did not find a legal error although it perhaps sharpened and implicitly corrected the Pre-Trial or Trial Chamber’s interpretation of the law. Accordingly it dismissed such appeals and confirmed the impugned decisions¹¹⁰. On other occasions, it remanded the case to the Pre-Trial or Trial Chamber when it determined that there was an error of law that materially affected the impugned decision¹¹¹. The first-instance Chambers were held to be in a better position, knowing fully the case before them, to apply the correct interpretation of the law to the specific facts. On some occasions, the ICC Appeals Chamber solely reversed the impugned decision without remanding the matter¹¹². In the first

¹⁰⁷ See mn 47; see also Staker and Eckelmans, *article 83*, mn 13.

¹⁰⁸ See e.g. *Prosecutor v. Seromba*, ICTR 2001 66A, Judgement, ICTR Appeals Chamber, paras. 161, 162, 163, that held that this means that, ‘the law should be applied to the factual findings of the Trial Chamber, taken as a whole. ... In cases of ambiguity reference may be made, pursuant to Rules 109 and 118(A) of the Rules, to the record on appeal.’ (para. 162); see also Book, *Appeal and Sentence in International Criminal Law* (2011), p. 248;

¹⁰⁹ *Prosecutor v. Ante Gotovina and Mladen Markač*, IT-06-90-A, Judgement, Appeals Chamber, 16 November 2012, Dissenting Opinion of Judge Agius, paras. 5–27, 83–90, see also Dissenting Opinion of Judge Pocar, paras. 13–14 (concentrating on the legal error); see also Staker and Eckelmans, *article 81*, para. 7.

¹¹⁰ See e.g. *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3363 OA13, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’, Appeals Chamber, 27 March 2013 (available under <https://www.legal-tools.org/fr/doc/9d87d9/>), paras. 48–58; *Prosecutor v. Laurent Koudou Gbagbo*, ICC-02/11-01/11-321 OA2, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, 12 December 2012, paras 72–84; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1432 OA9 OA10, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victim Participation of 18 January 2008, 11 July 2008, paras 107, 109.

¹¹¹ See e.g. *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-501 OA4, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled ‘Decision on the Defence’s Request for Disclosure of Documents in the possession of the Office of the Prosecutor’, 28 August 2013, para. 46; ICC-02/05-03/09-295 OA2, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’, 17 February 2012, para. 28; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-365 OA3, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, 10 November 2011, paras 71–72; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-522 OA3, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘Decision on the Defence Request Concerning Languages’, 27 May 2008, para. 69 with Dissenting Opinion of Judge Pikis on this issue.

¹¹² *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1386 OA5 OA6, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission of evidence of materials contained in the prosecution’s list of evidence’, 3 May 2011, para. 82; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205 OA15 OA16, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’, 8 December 2009, para. 112; see also Staker

reparation proceedings in the *Lubanga* case, the ICC Appeals Chamber amended the Trial Chamber's reparation order upon finding several errors¹¹³.

In relation to the standard of review to be applied in case where there is both an error of law and an alleged error of fact ('**mixed errors of fact and law**'), the ICTY Appeals Chamber has said that it will first examine the applicable law and then determine whether the factual conclusion of the Trial Chamber was one which no reasonable trier of fact could have reached¹¹⁴.

The proper **substantiation** of such combined errors is of particular difficulty. Not only should the appellant explain – to the high substantiation standards – where the factual error lies and how such an error affected the Trial Chamber's overall conclusion based on the Trial Chamber's – allegedly wrong – legal standard. But the appellant should also substantiate how the – allegedly correct – legal standard with and without the allegedly erroneous factual findings affected the overall conclusions. Problematic in respect of the latter is that the Appeals Chamber may possibly perceive the law in a slightly different way than the Trial Chamber on the one hand and the party or parties on the other.

c) **Procedural error.** As addressed above¹¹⁵, procedural errors pertain to the conduct of the trial proceedings. The management of the trial proceedings, however, is, except where **mandatory legal requirements** apply, within the **discretion** of the Trial Chamber that needs to take its decisions within the confines of the requirements of a **fair and expeditious trial** (article 64 (2)), respecting thereby the **rights of the accused** (article 67). The Trial Chamber's procedural decisions may also be based on its assessment of certain materials, e. g. in relation to disclosure, that may also lead to alleging **errors of fact** within a procedural error.

The ICC Appeals Chamber has held that the applicable **standard of review** with respect to **discretionary** decisions – be it in article 82 or article 81 (1) or (2) appeals – is:

'79. The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

80. [...] [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.'¹¹⁶

and Eckelmans, *article 83*, mn 13; *Situation in Darfur*, ICC-01/05-177 OA OA2 OA3, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, 2 February 2009, para. 8.

¹¹³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3129 A A2 A3, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012, 3 March 2015, see e.g. para. 76.

¹¹⁴ *Prosecutor v. Pavle Strugar*, IT-01-42-A, Judgment, ICTY Appeals Chamber, 17 July 2008, paras. 252, 269.

¹¹⁵ See mn 34–35.

¹¹⁶ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-408 OA3, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009, ICC Appeals Chamber, 16 September 2009, paras. 79–80; see *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011, paras. 89–90; see also *Lubanga* Sentencing Judgment, ICC-01/04-01/06-3122 A4 A6, 1 December 2014, paras. 41–42, making this standard applicable to sentencing appeals.

- 42 The ICTY/ICTR Appeals Chambers apply a similar standard. They have held in relation to an alleged erroneous exercise of **discretion** by a Trial Chamber that the issue on appeal is not whether the decision is correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised discretion differently¹¹⁷. The test for determining whether the exercise of discretion by the Trial Chamber does or does not constitute an appealable error has been variously formulated, such as whether the Trial Chamber has ‘abused its discretion’¹¹⁸, or has ‘erred and exceeded its discretion’¹¹⁹, or whether the Trial Chamber’s discretion ‘miscarried’¹²⁰, or whether the Trial Chamber has committed a ‘discernible error’¹²¹, or whether the exercise of the discretion was ‘reasonably open’ to the Trial Chamber¹²². Deference to a Trial Chamber’s discretion is not only relevant to the conduct of the proceedings, but goes beyond that; it is also of the essence to understanding the Appeals Chamber’s more limited scope of review with regard to sentencing as well as with regard to errors alleged in the Trial Chamber’s factual determinations.

The applicable standard of review in respect of **trial management issues** at the *ad hoc* tribunals is:

‘It is well established in the jurisprudence of the International Tribunal that Trial Chambers exercise discretion in relation to trial management. The Trial Chamber’s decision in this case to reduce the time allocated to the Prosecution for the presentation of its evidence was a discretionary decision to which the Appeals Chamber accords deference. Such deference is based on the recognition by the Appeals Chamber of ‘the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case.’ The Appeals Chamber’s examination is therefore limited to establishing whether the Trial Chamber has abused its discretionary power by committing a discernible error. The Appeals Chamber will only overturn a Trial Chamber’s exercise of its discretion where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.’¹²³

- 43 A party alleging an error in the exercise of the Pre-Trial or Trial Chambers’ discretion carries a **high burden of substantiation**. The party must demonstrate that the Trial Chamber

¹¹⁷ See, e.g., *Prosecutor v. Milošević*, IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, Bench of the Appeals Chamber, 16 May 2002, para. 14 (available under <http://www.legal-tools.org/doc/1783bf/>); *Bagosora et al. v. Prosecutor*, ICTR-98-41-A, Decision: Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of ‘Lack of Jurisdiction’, Bench of the Appeals Chamber, 2 May 2002, para. 10 (available under <http://www.legal-tools.org/doc/e88b00/>).

¹¹⁸ *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 533 (‘... the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it’), and see also at para. 564 (finding that there was no abuse of discretion by the Trial Chamber in refusing to admit certain evidence, and in refusing to issue a subpoena that had been requested by a party at trial).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, para. 577.

¹²¹ See *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Judgement, ICTY Appeals Chamber, 12 November 2009, para. 297, wherein it was held that to show a discernible error, the appellant must ‘demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber’s decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly’; see also *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-2004-16-A, Judgment, SCSL Appeals Chamber, 22 February 2008, para. 309.

¹²² *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, paras. 274–275 (see also at para. 292, finding that the decision of the Trial Chamber not to exercise its discretion to grant an application was ‘open’ to the Trial Chamber).

¹²³ *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on prosecution appeal concerning the Trial Chamber ruling reducing time for the prosecution case, ICTY Appeals Chamber, 6 February 2007, para. 8; see also *Gaspard Kanyarukiga v. the Prosecutor*, ICTR-02-78-A, Judgement, ICTR Appeals Chamber, 8 May 2012, para. 26.

‘has misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion’¹²⁴, or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly¹²⁵.

Normally, the question whether the first-instance Chamber committed a procedural error can be determined by the Appeals Chamber from an examination of the pre-trial and trial record. However, a party may seek to introduce additional evidence on appeal to establish that a procedural error occurred at trial¹²⁶.

The ‘waiver’ principle is of particular importance to this category of errors,¹²⁷ insofar as 44 the parties need to raise any issues – of which they are aware – during trial. The Rules provide certain opportunities for the parties to raise objections or observations relevant to the proceedings and require the Trial Chamber to address them.¹²⁸ They also preclude parties from raising matters relevant to the proceedings leading to the confirmation hearing after the start of the confirmation hearing or during trial.¹²⁹ Accordingly, it is doubtful whether such **Pre-Trial Chamber decision** may be the subject of a procedural error in a final appeal. Similarly, objections against the conduct of the trial preparation phase before the Trial Chamber need to be raised at the commencement of the trial, although the Trial Chamber may, and this is also within its discretion, decide to address such issues later.¹³⁰

The ICC Appeals Chamber has not yet resolved whether a party is required to seek leave to 45 appeal against procedural decisions pursuant to article 82, para. 1(d) in order to be able to raise an error in this decision later on appeal. It is noted in this context that the legal texts do not require the parties to seek leave to appeal and that such a requirement would most likely raise the workload of the Trial Chamber in dealing with requests for leave to appeal and may therefore distort the expeditiousness of the proceedings. Where leave to appeal has been granted and the Appeals Chamber decided the appeal on the merits, this matter should be considered *res judicata* and preclude the parties from raising it again in a final appeal.

d) Error of fact. aa) Introduction. There are two main types of errors of fact. The first is 46 where it is alleged that the Trial Chamber erred in reaching the conclusions of fact that it did on the basis of the evidence that was before it (see mn 47–58). The second is where the Trial Chamber was justified in reaching the factual conclusions it did on the evidence presented at trial, but where additional evidence presented on appeal casts doubt on those findings (see mn 59–63).

bb) Error of fact based on the unreasonableness of the Trial Chamber’s decision. In 47 cases where an appellant claims that the Trial Chamber reached erroneous conclusions of

¹²⁴ *Prosecutor v. Milošević*, IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Appeals Chamber, 18 April 2002, para. 5 (also available under <http://www.legal-tools.org/doc/201a8d/>). See also *Prosecutor v. Milošević*, IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, Appeals Chamber, 20 January 2004, para. 7 (available under <http://www.legal-tools.org/doc/8220bc/>); *Prosecutor v. Bizimungu*, ICTR-99-50-AR50, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, Appeals Chamber, 12 February 2004, para. 11 (available under <http://www.legal-tools.org/doc/f25a2c/>); *Prosecutor v. Karemera*, ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment, Appeals Chamber, 19 December 2003, para. 9 (available under <https://www.legal-tools.org/doc/381737/>).

¹²⁵ Cf. *Prosecutor v. Mejakić et al.*, IT-02-65-AR11Bis, Decision on joint defence appeal against decision on referral under rule 11bis, 7 April 2006, para. 10.

¹²⁶ Cf. *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, paras. 620–623; *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 60.

¹²⁷ See, mn 32–33.

¹²⁸ See rules 134(2), (3) RPE.

¹²⁹ Rule 122(4) RPE.

¹³⁰ See rule 134(2) RPE.

fact on the evidence before it, the ICTY/ICTR Appeals Chambers have held that they will not conduct an independent assessment of the evidence admitted at trial, or undertake a *de novo* review of the evidence¹³¹. The standard of review on appeal for an error of fact of this type has been articulated by the ICTY Appeals Chamber as follows:

‘Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is ‘wholly erroneous’ may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

It is initially the Trial Chamber’s task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to ‘admit any relevant evidence which it deems to have probative value’, as well as to exclude evidence ‘if its probative value is substantially outweighed by the need to ensure a fair trial.’ As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses’ testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the ‘fundamental features’ of the evidence. The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.

The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness’ testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber’s duty to provide a reasoned opinion, following from Article 23(2) of the Statute.¹³²

In other words, in an appeal against conviction, the Appeals Chamber does not determine whether it is *itself* satisfied beyond a reasonable doubt of the guilt of the accused. Rather, it applies a ‘deferential standard’ of review, under which it must decide whether a no reasonable Trial Chamber *could* have been satisfied beyond reasonable doubt as to the finding in question¹³³. In addition, the Appeals Chamber must determine whether the error of fact occasioned a miscarriage of justice.

This same standard of unreasonableness, and the same deference to factual findings of the Trial Chamber, applies also when the Prosecution appeals against an **acquittal**¹³⁴. However, the ICTY Appeals Chamber has said that:

¹³¹ E.g., *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, paras. 203–204.

¹³² *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, paras. 30–32 (footnotes omitted), referring to prior case law of the ICTY.

¹³³ See *Prosecutor v. Vujadin Popović et al.*, IT-05-88-A, Judgement, ICTY Appeals Chamber, 30 January 2015, para. 19; *Prosecutor v. Augustin Ngirabatware v. The Prosecutor*, MICT-12-29-A, Judgement, MICT Appeals Chamber, 18 December 2014, para. 10; see also *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 22. In making this determination, ‘[t]he Appeals Chamber does not review the entire trial record *de novo*; in principle, it only takes into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any’ (available under <http://www.legal-tools.org/doc/88d8e6/>).

¹³⁴ *Prosecutor v. Radoslav Brđanin*, IT-00-36-A, Judgement, ICTY Appeals Chamber, 3 April 2007, para. 14; *Prosecutor v. Fatmir Limaj et al.*, IT-03-66-A, Judgement, ICTY Appeals Chamber, 27 September 2007, para. 13; *Prosecutor v. Šefar Halilović*, IT-01-48-A, Judgement, ICTY Appeals Chamber, 16 October 2007, para. 11; *Prosecutor v. Vidjoe Blagojević and Dragan Jokić*, IT-02-60-A, Judgement, ICTY Appeals Chamber, 9 May 2007, para. 9.

‘since the Prosecution must establish the guilt of the accused at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution. This is because it has the more difficult task of showing that there is no reasonable doubt about the appellant’s guilt when account is taken of the Trial Chamber’s errors of fact.’¹³⁵

Hence, considering that the Prosecutor bears the burden of proof in a trial, it held that the Prosecutor need to show that all reasonable doubt of the accused’s guilt has been eliminated.¹³⁶ Accordingly, the ICTY Appeals Chamber held with respect to acquittal appeals that ‘it will reverse only if it finds that no reasonable trier of fact could have failed to make the particular finding of fact beyond reasonable doubt and the acquittal relied on the absence of this finding’¹³⁷.

The ICC Appeals Chamber has adopted the ICTY/ICTR Appeals Chambers’ jurisprudence 48 on the review of errors of fact in its first final appeal judgments, holding:

‘when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber.’¹³⁸

According to the Appeals Chamber’s jurisprudence on article 82 appeals, factual errors have to meet the following standard of review:

‘Regarding factual errors, the Appeals Chamber has held that it will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the ‘misappreciation of facts’, the Appeals Chamber has also stated that it ‘will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.’¹³⁹

While the Statute does not spell out that a factual error should occasion a ‘miscarriage of justice’, as the ICTY/ICTR Statutes do, article 83, para. 2 clarifies that it needs to materially affect the impugned decision. This sounds on the face of it like a lesser standard than that of a ‘miscarriage of justice’, but this remains to be seen on the basis of future case law. 49

The ICTY/ICTR jurisprudence stipulates in the following terms that the alleged factual 50 error can relate to any finding relevant to the case:

‘... a trier of fact is called upon to make findings beyond reasonable doubt based on all of the evidence on the trial record – direct or circumstantial – not only on facts which are essential to proving the elements of the crimes and the forms of responsibility. There might be other facts that need to be proven beyond reasonable doubt due to the way in which the case was pleaded in the indictment and presented during trial to the Defence and to the Trial Chamber. All facts underlying

¹³⁵ *Prosecutor v. Milorad Krnojeleć*, IT-07-25-A, Judgement, ICTY Appeals Chamber, 17 September 2003, para. 14; also *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, ICTR Appeals Chamber, 6 May 2003, para. 24.

¹³⁶ *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, ICTR Appeals Chamber, 6 May 2003, para. 24; *Prosecutor v. Fatmir Limaj et al.*, IT-03-66-A, Judgement, ICTY Appeals Chamber, 27 September 2007, para. 13.

¹³⁷ *Prosecutor v. Vidjoje Blagojević and Dragan Jokić*, IT-02-60-A, Judgement, ICTY Appeals Chamber, 9 May 2007, para. 9; see also with respect to rule 98bis(B) RPE appeals: *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, ICTY Appeals Chamber, 5 July 2001, stating ‘thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence ... but whether it could’; this standard has been accepted by the ICC Appeals Chamber, see *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-271-Corr A, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’, 7 April 2015, para. 26.

¹³⁸ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 27.

¹³⁹ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 21; making reference *inter alia* to *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, 30 August 2011, para. 56.

the elements of the crime or the form of responsibility alleged as well as all those, which are indispensable for entering a conviction, must be proven beyond reasonable doubt.¹⁴⁰

- 51 This conveys that every fact that is necessary to establishing the **elements of the crime and the individual criminal responsibility** of the accused needs to be proved beyond reasonable doubt, even if a certain fact only leads indirectly to the conclusion that a certain other fact (e.g. the death of a person, a certain state of mind) existed. In respect of such **circumstantial evidence**, the ICTY Appeals Chamber has held:

‘The Appeals Chamber also recalls that, in order to successfully challenge the trial chamber’s assessment of circumstantial evidence on appeal, an appellant must show that no reasonable trier of fact could have found that the conclusion reached by the trial chamber was the only reasonable inference.’¹⁴¹

- 52 The ICTY/ICTR Appeals Chambers have also consistently said that a Trial Chamber is entitled to rely, in relation to a crucial fact, on the **uncorroborated testimony** of a single witness¹⁴². However, a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction¹⁴³.
- 53 **Substantiating** a factual error requires the appellant to show that the Trial Chamber’s finding was unreasonable and that this had a material effect on the impugned decision. The Appeals Chambers have taken these requirements very seriously and have dismissed allegations that do not adhere to these requirements without considering, even partly, their merits¹⁴⁴. In that context, it is of the essence for the appellant to demonstrate that the overall conclusion of the Trial Chamber is based, at least to an essential part, on the allegedly erroneous factual finding. Where a plurality of factual errors is alleged that may only as a whole have a material effect on the impugned decision, an appellant may best allege one ground of appeal with different sub-sets of errors, setting out precisely their interrelation and the effect on the overall conclusions of the Trial Chamber.
- 54 Arguably, it is difficult to substantiate a ground of appeal if the Trial Chamber’s factual findings and conclusions are not properly **reasoned**. The Appeals Chamber’s task to review such findings is also harder in such a situation. According to the jurisprudence of the *ad hoc* tribunals, lack of reasoning should be alleged as a separate error, be it a procedural error or an error of law.¹⁴⁵ In this context, it is noted that article 74 establishes as a compulsory requirement that the decision on guilt or innocence shall ‘contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions’. The ICTY Appeals Chamber has held that proper reasoning is part of the fair trial requirements¹⁴⁶. In particular with respect to the requirements of a Trial Chamber’s decision on guilt or innocence, it held:

¹⁴⁰ *Prosecutor v. Sefar Halilović*, IT-01-48-A, Judgement, ICTY Appeals Chamber, 16 October 2007, para. 129; see also *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, ICTY Appeals Chamber, 25 February 2004, para. 131.

¹⁴¹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-A, Judgement, ICTY Appeals Chamber, 4 December 2012, para. 149.

¹⁴² *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, para. 65 (available under <http://www.legal-tools.org/doc/8efc3a/>); *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, paras. 492, 506; *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 33; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, ICTR Appeals Chamber, 6 May 2003, paras. 27–29; see also *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 218.

¹⁴³ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, paras. 34–40; see also *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-A, Judgement, ICTY Appeals Chamber, 4 December 2012, paras. 118–119 on the difference between identification and recognition witnesses and the requirements of a reasoned opinion.

¹⁴⁴ See mn 31.

¹⁴⁵ See mn 34, 35.

¹⁴⁶ *Prosecutor v. Enver Hadžihanović and Amir Kubura*, IT-01-47-A, Judgement, ICTY Appeals Chamber, 22 April 2008, para. 13; *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Judgement, ICTY Appeals Chamber, 21 July 2000, para. 69.

‘With regard to legal findings, this obligation does not require a trial chamber to discuss at length all of the case-law of the International Tribunal on a given legal issue but only to identify the precedents upon which its findings are based. With regard to factual findings, a Trial Chamber is required only to make findings on those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. In short, a Trial Chamber should limit itself to indicating in a clear and articulate yet concise manner, which, among the wealth of jurisprudence available on a given issue and the myriad of facts that emerged at trial, are the legal and factual findings on the basis of which it reached the decision either to convict or acquit an individual. A reasoned opinion consistent with the guidelines provided here allows for a useful exercise of the right of appeal by the Parties and enables the Appeals Chamber to understand and review the Trial Chamber’s findings as well as its evaluation of the evidence.’¹⁴⁷

The ICTY/ICTR Appeals Chambers have said that if a judgment is too vague, they will have to determine themselves whether they are satisfied beyond reasonable doubt in regard to the disputed finding¹⁴⁸. If an appellant omits to allege lack of reasoning as a separate error, the Appeals Chamber may wish to consider whether to nevertheless address it, be it implicitly when considering a related factual error.

cc) Error of fact based on additional evidence presented on appeal. The second type of error of fact arises where the decision of the Trial Chamber based on the evidence presented at trial is perfectly reasonable, but is subsequently shown to be incorrect as a result of additional evidence presented on appeal¹⁴⁹. Strictly speaking, this is not an error of fact by the Trial Chamber, but the Appeals Chamber **adjusts** the Trial Chamber’s factual assessment within the limits of the admissibility of such evidence¹⁵⁰. The criteria for the admissibility of additional evidence are discussed below in Staker and Eckelmans, *article* 83, mn 45 to 58. The ICC Appeals Chamber did not yet express itself on its scope of review of the impugned decision on the basis of admitted additional evidence, because it did not admit additional evidence in its first final appeals¹⁵¹. However, the ICTY/ICTR Appeals Chambers have developed the following case law:

‘Where additional evidence has been admitted, the Appeals Chamber is then required to determine whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice.’¹⁵²

‘... miscarriage of justice may ... be occasioned where the evidence before a Trial Chamber appears to be reliable but, in the light of additional evidence presented upon appeal, is exposed as unreliable. It is possible that the Trial Chamber may reach a conclusion of guilt based on the evidence presented at trial that is reasonable at the time... but, in reality, is incorrect.’¹⁵³

‘... The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant

¹⁴⁷ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-A, Judgement, ICTY Appeals Chamber, 22 April 2008, para. 13; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, ICTY Appeals Chamber, 28 February 2005, para. 23; *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-05-14/2-A, Judgement, ICTY Appeals Chamber, 17 December 2004, para. 382; *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 39; *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 498; *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 41.

¹⁴⁸ *Ferdinand Nahimana et al v. The Prosecutor*, ICTR-99-52-A, Judgement, ICTR Appeals Chamber, 28 November 2007, para. 736; *Naletilić and Martinović Appeal Judgement*, para. 603; *Prosecutor v. Fatmir Limaj et al.*, IT-03-66-A, Judgement, ICTY Appeals Chamber, 27 September 2007, para. 81.

¹⁴⁹ See the discussion in *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, paras. 42–47.

¹⁵⁰ The purpose arguably being an alignment with the real events, i.e. the truth.

¹⁵¹ See *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 65–113; on the admissibility of additional evidence, see Staker and Eckelmans, *article* 83, mn 45–58.

¹⁵² *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 72.

¹⁵³ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 44.

established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.¹⁵⁴

57 This test has been further developed in appeals where the ICTY Appeals Chamber found that in light of the trial evidence and the additional evidence ‘a reasonable trier of fact could reach a conclusion of guilt beyond a reasonable doubt’¹⁵⁵. According to the case law, the Appeals Chamber must in such cases in ‘the interests of justice be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal’¹⁵⁶. Only then can it uphold the guilty verdict.

Accordingly, the guilty verdict can only be upheld ‘on the basis that a reasonable trier of fact could have arrived at a conviction on the evidence on the trial record in two cases: (i) if there is no additional evidence admitted; (ii) if additional evidence is admitted, but upon further review, is found to be not credible or irrelevant, so that it could not have been a decisive factor in reaching the decision at trial’¹⁵⁷.

58 The ICC Appeals Chamber might address the standard of review applicable to facts based on additional evidence in similar terms as the ICTY/ICTR Appeals Chambers, because the standard of review for factual errors appears to be essentially the same.

59 e) **Violation of the rights to a fair trial.** The Trial Chamber’s violations of the rights of the accused and any fair trial violations usually fall within the category of procedural errors or errors of law, as the case may be.¹⁵⁸ Article 83, para. 2 establishes a **specific standard of review** for such errors, in that it stipulates that the proceedings appealed from must have been unfair ‘in a way that affected the reliability of the decision or sentence’¹⁵⁹. Arguably, the standard is **lower** than the requirement that a procedural error or an error of law must have materially affected the impugned decision. Such a material effect may be difficult to establish because the trial proceedings are usually lengthy and effects of procedural decisions on the impugned decision cannot easily be detected, as many other factors may also come into the equation¹⁶⁰. The ‘reliability’ test, on the other hand, requires an assessment by the Appeals Chamber as to whether due to the **unfairness** that occurred in the proceedings, the impugned decision can still be relied upon. Such an assessment might require taking into account also the after-effects of the fair trial violation.

60 Establishing a violation of the right to a fair trial is, according to the jurisprudence of the ICTY/ICTR a **two-step process**. First, the right of the accused must have been infringed and second the violation must have ‘caused such prejudice to it as to amount to an error of law invalidating the judgement’¹⁶¹. ‘Thus, the element of prejudice forms an essential aspect of proof required of an appellant in relation to the appeal alleging a violation of his fair trial rights’¹⁶². In terms of the ICC Statute, it would arguably not be necessary to show that the

¹⁵⁴ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 75, see also para. 76; see also *Alfred Musema v. the Prosecutor*, ICTR-96-13-A, Judgement, ICTR Appeals Chamber, 16 November 2001, paras. 185–186, adopting this standard for the ICTR.

¹⁵⁵ *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 23.

¹⁵⁶ *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, paras. 23, confirmed by *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, ICTY Appeals Chamber, 28 February 2005, para. 426.

¹⁵⁷ *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, ICTY Appeals Chamber, 28 February 2005, para. 428.

¹⁵⁸ See mn 34–35.

¹⁵⁹ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 28.

¹⁶⁰ See e.g. *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-321 OA2, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of proceedings, ICC Appeals Chamber, 12 December 2012, para. 45.

¹⁶¹ *Prosecutor v. Stanislas Galić*, IT-98-29-A, Judgement, ICTY Appeals Chamber, 30 November 2006, para. 21, *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-05-14/2-A, Judgement, ICTY Appeals Chamber, 17 December 2004, para. 119.

¹⁶² *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-A, Judgement, ICTY Appeals Chamber, 22 April 2008, para. 130.

prejudice led to an error of law that ‘invalidates’ the impugned decision. Essential is that the violation led to prejudice and that the unfairness as such (the prejudice suffered arguably being one aspect of it) makes the impugned decision **unreliable**, as required by article 83, para. 2.

If the rights of the accused were **violated only by the impugned decision**, the reliability standard would most likely not find application due to the formulation in article 83, para. 2 that ‘the proceedings appealed from’ needed to be unfair. Nevertheless in respect of such a violation, the formula applied by the *ad hoc* tribunals referred to in the previous margin number would most likely apply in ICC appeal proceedings too.

Arguably, the reliability standard in article 83, para. 1 is not applicable to the **Prosecutor appealing** an acquittal or sentence, because unfairness allegations could arguably only be raised in favour of the accused, as also indicated by article 81, para. 1(b)(iv)¹⁶³.

On the basis of the preceding paragraphs, the phrase in article 81, para 1(b)(iv), ‘any other ground that affects the fairness or reliability of the proceedings or decision’, may add little to the other specified grounds of appeal. The apparent intention was to include a ‘catch-all’ provision in the case of appeals by or on behalf of the convicted person, to ensure that any miscarriage of justice would be capable of correction on appeal. Arguably, the addition may have been out of an abundance of caution, since it is likely that any valid grounds of appeal would fall within one of the other categories. Room for applying this provision might be only where it was not the (Pre-) Trial Chamber that ‘erred’, an implicit precondition for the other ‘errors’ listed in article 81, para. 1, but were the **unfairness was caused e.g. by others**, such as the Prosecutor as a party to the proceedings. Usually, the ‘waiver’ principle would require the accused to raise any such issues during the trial and would thereby trigger a decision of the relevant Chamber. As a consequence, this decision of the first-instance Chamber would then become the focus of the unfairness violations and transform the alleged unfairness violation into an alleged error by that Chamber. Arguably, unfairness allegations that may still fall within this catch-all provision are those that only came to light after the closure of the trial proceedings. Hence, it can be expected that additional evidence be produced in relation thereto.

Finally, unfairness allegations under subparagraph (b)(iv) must be distinguished from requests for a **stay of proceedings** because of breaches of the fundamental rights of the accused.¹⁶⁴

f) **Appeals against sentence**. As set out above,¹⁶⁵ article 81, para. 2 only mentions one ground of appeal, that of ‘**disproportion between the crime and the sentence**’, while article 83, para. 2 clarifies that also errors of law and fact as well as procedural errors may be raised against a sentencing decision. The ICC Appeals Chamber did not even further address this discrepancy but found in the first sentencing judgment that it reviews ‘any errors’ of the Trial Chamber and incorporated in its review errors of law and of fact as well as procedural errors. It held:

‘At the outset, the Appeals Chamber notes that article 83 (2) and (3) of the Statute clarifies that, with respect to appeals against sentencing decisions, the Appeals Chamber’s primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person. The Appeals Chamber’s role is not to determine, on its own, which sentence is appropriate, unless – as stipulated in article 83 (3) of the Statute – it has found that the sentence imposed by the Trial Chamber is ‘disproportionate’ to the crime. Only then can the Appeals Chamber ‘amend’ the sentence and enter a new, appropriate sentence.’¹⁶⁶

¹⁶³ It is noteworthy in this context that the ICC Appeals Chamber in the Prosecutor’s appeal against an acquittal did omit reference to the ‘reliability’-standard in article 83, para. 2; see *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-271-Corr A, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’, 7 April 2015, para. 18.

¹⁶⁴ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 147–149.

¹⁶⁵ See mn 12.

¹⁶⁶ *Lubanga* Sentencing Judgment, ICC-01/04-01/06-3122 A4 A6, 1 December 2014, para. 39.

65 It further established the applicable **standard of review** for sentencing appeals on the basis of article 83 as well as by reference to its own jurisprudence relevant to discretionary decisions¹⁶⁷ and the jurisprudence of the *ad hoc* tribunals. It held:

‘44. Thus, the Appeals Chamber’s review of a Trial Chamber’s exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (i) the Trial Chamber’s exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber’s weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.

45. Finally, Article 83 (2) of the Statute requires that the sentence be ‘materially affected by error of fact or law or procedural error’. The Appeals Chamber considers that the material effect of such an error is only established if the Trial Chamber’s exercise of discretion led to a disproportionate sentence.

46. The Appeals Chamber notes that the above standard of review applicable to a Trial Chamber’s determination of sentence is similar to the standard of review applied by other international tribunals. The Appeals Chamber notes that the ICTY/ICTR and SCSL Appeals Chambers review sentencing decisions as discretionary decisions and that these Appeals Chambers will only revise a sentence where the Trial Chamber has committed a ‘discernible error’ in exercising its discretion.¹⁶⁸

66 This first jurisprudence of the ICC Appeals Chamber has clarified that, as at the ICTY/ICTR, an appeal against sentence is an appeal *stricto sensu*, *i.e.*, a procedure of a ‘corrective nature’ and not a sentencing proceeding *de novo*¹⁶⁹. Furthermore, the ICC Appeals Chamber firmly built its jurisprudence on the ICTY/ICTR Appeals Chamber’s jurisprudence.

67 It is noteworthy that an appellant against sentence cannot simply resubmit arguments presented at trial to the ICTY/ICTR Appeals Chamber, but must **demonstrate**, upon the trial record, that the Trial Chamber made an appealable error¹⁷⁰. Furthermore, similar to the ICC, the *ad hoc* tribunals have held in relation to an appeal against sentence, that:

‘As a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless ‘it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law’. The Appeals Chamber will only intervene if it finds that the error was ‘discernible’. As long as a Trial Chamber does not venture outside its ‘discretionary framework’ in imposing sentence, the Appeals Chamber will not intervene. It there-

¹⁶⁷ See mn 41.

¹⁶⁸ *Lubanga* Sentencing Judgment, ICC-01/04-01/06-3122 A4 A6, 1 December 2014, paras. 39–46; footnotes omitted; referring *inter alia* to *Prosecutor v. Dragan Zelenović*, IT-96-23/2-A, Judgement on Sentencing Appeal, ICTY Appeals Chamber, 31 October 2007, para. 24; *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, 22 February 2008, Judgment, SCSL Appeals Chamber, 22 February 2008, para. 314; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Judgement, ICTY Appeals Chamber, 12 November 2009, para. 316: ‘what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion. The Trial Chamber is endowed with a considerable degree of discretion in making this determination, as well as in deciding how much weight, if any, to be accorded to the mitigating circumstances identified’ (footnotes omitted); *Prosecutor v. Vidjoe Blagojević and Dragan Jokić*, IT-02-60-A, Judgement, ICTY Appeals Chamber, 9 May 2007, para. 321: ‘Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize penalties to fit the circumstances of the accused and the gravity of the crime. As a rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the appealing party to demonstrate how the Trial Chamber erred in imposing the sentence’ (footnotes omitted).

¹⁶⁹ See mn 22; see also *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 408; *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, para. 15, para. 11; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, ICTY Appeals Chamber, 28 February 2005, para. 669.

¹⁷⁰ *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 724; *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, para. 15. Thus, according to the ICTY Appeals Chamber evidence of post-sentence behaviour is irrelevant to whether the Trial Chamber erred in the exercise of its sentencing discretion. It is only where it is established that the Trial Chamber made an appealable error in sentencing that there can be any issue of introducing further evidence relating to the appropriate sentence. The admission of further evidence in those circumstances is within the discretion of the Appeals Chamber, and the exercise of that discretion is dependent mainly upon the nature of the error.

fore falls on each appellant ... to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence it did.¹⁷¹

The ICTY/ICTR Appeals Chambers has also made clear that:

‘Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing. This is largely because of the over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime.’¹⁷²

An appellant therefore cannot merely assert that a sentence was wrong, without demonstrating how the Trial Chamber either failed to follow the applicable law, or how it ventured outside its discretionary framework in imposing the sentence it did¹⁷³. For instance, a Trial Chamber’s decision may be disturbed on appeal if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion¹⁷⁴.

It arguably follows from the ‘corrective’ nature of an appeal¹⁷⁵, and from the ‘waiver’ principle¹⁷⁶, that an appellant cannot raise factors relevant to sentencing for the first time on appeal¹⁷⁷, other, perhaps, than in exceptional circumstances where a miscarriage of justice would otherwise result¹⁷⁸. In cases where the accused stands convicted following the appeal proceedings, but the Appeals Chamber has reversed the Trial Chamber’s verdict in relation to one or some of several crimes, this may affect the sentence that was imposed by the Trial Chamber. Article 83 para. 2(a) suggests that in such cases the Appeals Chamber should itself amend the sentence within the confines of article 83, para. 3¹⁷⁹.

g) Remedies on appeal. On the remedies that can be ordered by the Appeals Chamber in the event of a successful appeal under this article, see below, Staker and Eckelmans, *article 83*, mn 5 to 9.

¹⁷¹ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 408. See also *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, paras. 724–725; *Kambanda v. Prosecutor*, ICTR-97-23-A, Judgement, ICTR Appeals Chamber, 19 October 2000, para. 115; *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Judgement, ICTY Appeals Chamber, 21 July 2000, para. 239; *Serushago v. Prosecutor*, ICTR-98-39-A, Reasons for Judgement, Appeals Chamber, 6 April 2000, para. 32 (available under <http://www.legal-tools.org/doc/bdc6b7/>); *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, paras. 186–187; *Prosecutor v. Tadić*, IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, Appeals Chamber, 26 January 2000, paras. 20–22 (available under <http://www.legal-tools.org/doc/df7618/>). For recent examples of appeal judgments finding that the Trial Chamber committed discernible errors in sentencing, see *Prosecutor v. Nikolić*, IT-02-60/1-A, Judgement in Sentencing Appeals, Appeals Chamber, 8 March 2006, paras. 6–8, 59–63, 98–103, 104–107, 108–111, 112–113 (available under <http://www.legal-tools.org/doc/d25035/>); *Prosecutor v. Stakić*, IT-97-24-A, Judgement, Appeals Chamber, 22 March 2006, paras. 388–393, 414–416, 421–423.

¹⁷² *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 717; see also *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, ICTY Appeals Chamber, 25 February 2004, paras. 9, 21–22.

¹⁷³ *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 725.

¹⁷⁴ See mn 20.

¹⁷⁵ See mn 20.

¹⁷⁶ See mn 21–22.

¹⁷⁷ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001 paras. 410–414 (in which the Appeals Chamber concluded that ‘In these circumstances, the Appeals Chamber considers that no reason has been presented for it to consider and take into account any mitigating factors that, although available at the time, were not raised before the Trial Chamber’). See also *Prosecutor v. Nikolić*, IT-94-2-A, Judgement on Sentencing Appeal, Appeals Chamber, 4 February 2005, para. 107, for confirmation that the ‘waiver’ rule applies also to sentencing appeals (available under <http://www.legal-tools.org/doc/5bab22/>).

¹⁷⁸ See mn 32.

¹⁷⁹ See *Lubanga Sentencing Judgment*, ICC-01/04-01/06-3122 A4 A6, 1 December 2014; see also Staker and Eckelmans, *article 83*, mn 9.

4. Other aspects of the appeals process

- 70 a) **The raising of new issues by the Appeals Chamber *proprio motu*.** The Appeals Chamber of the ICTY has held in one case that there is ‘nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine [the Appeals Chamber’s] consideration of the appeal to the issues raised formally by the parties’¹⁸⁰. In this case, involving an appeal against sentence, the Appeals Chamber *proprio motu* raised the question of the validity of the plea of guilty that had been entered by the appellant before the Trial Chamber¹⁸¹. The ICTR Appeals Chamber has, early in its jurisprudence, endorsed this holding of the ICTY Appeals Chamber and similarly affirmed its power to consider issues *proprio motu*, subject to the requirement that it do so ‘within the framework predefined by the Statute’¹⁸². The meaning of this qualification has not been the subject of further definition by the Appeals Chambers, although one of the judges has said:

‘The cases show that the leading principle is that the overriding task of the Tribunal is to discover the truth. Since this has to be done judicially, limits obviously exist as to permissible methods of search; and those limits have to be respected, for the Appeals Chamber is not an overseer. It cannot gratuitously intervene whenever it feels that something wrong was done: beyond the proper appellate boundaries, the decisions of the Trial Chamber are unquestionable. However, ... the Appeals Chamber can raise issues whether or not presented by a party, provided, I consider, that they lie within the prescribed grounds of appeal, that they arise from the record, and that the parties are afforded an opportunity to respond.’¹⁸³

The subsequent jurisprudence of the *ad hoc* tribunals shows that such powers have only been exceptionally applied; rather the focus of that jurisprudence was whether it would ‘address issues of general significance’, as discussed in the next section¹⁸⁴. Only the ECCC Supreme Court Chamber also found that its scope of review may extend to matters that it raised *proprio motu*¹⁸⁵.

- 71 Nevertheless, in that context, it is recalled that article 81, para. 2 explicitly allows the ICC Appeals Chamber to invite the parties to raise grounds of appeal in relation to either the related conviction or the related sentencing decision, as the case may be¹⁸⁶. The Appeals Chamber did not yet apply this provision. Generally, the ICC Appeals Chamber has been reluctant to raise or decide on appeal issues relevant to its merits *proprio motu* when the parties did not raise them explicitly; a contentious issue in the context of concrete cases¹⁸⁷. By contrast, an Appeals Chamber would routinely consider whether it has competence to consider the merits of an appeal, even where the parties have not contested the admissibility of the appeal¹⁸⁸. Accordingly, it considers *proprio motu* only whether the appeal is admissible. In that respect, the ICC Appeals Chamber has, at times, invited the parties to address specifically the admissibility of the appeal in their submissions, postponing hearing arguments on the merits¹⁸⁹.

¹⁸⁰ *Erdemović* Appeal Judgement, IT-96-22-A, 7 October 1997, para. 16.

¹⁸¹ See further mn 13.

¹⁸² *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgement, ICTR Appeals Chamber, 1 June 2001, para. 17.

¹⁸³ *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), Appeals Chamber, 31 March 2000, Separate Opinion of Judge Shahabuddeen, para. 18.

¹⁸⁴ See mn 71, 72.

¹⁸⁵ *Kaing Guek Eav* (‘Duch’), 001/18-07-2007-ECCC/SCC-F28, Judgment, Supreme Court Chamber, 3 February 2012, 15; see also Eckelmann in: S. Meisenberg and I. Stegmüller (eds), *The Extraordinary Chambers in the Courts of Cambodia* (2015), Chapter 7.

¹⁸⁶ See mn 13.

¹⁸⁷ See e.g. in that respect e.g. the partly separate and dissenting opinions of respectively Judges Kourula and Ušacka, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-560 OA4, Judgement on the appeal of Mr Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled ‘Decision on the ‘Requête de mise en liberté’ submitted by the Defence for Jean-Jacques Mangenda’, 14 July 2014.

¹⁸⁸ See Eckelmann in: Stahn and Sluiter, *The Emerging Practice of the International Criminal Court*, 527, 536–541.

¹⁸⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-800 OA8, Directions and Decision of the Appeals Chamber, 1 February 2007; ICC-01/04-01/06-2923 A A2 A3 OA21, Directions on the conduct of the appeal proceedings, 17 September 2012.

b) ‘Issues of general significance’. The Appeals Chambers of the *ad hoc* tribunals as well as of the ICC have held respectively that they have no ‘advisory jurisdiction’¹⁹⁰ or are no ‘advisory body’¹⁹¹. Nevertheless, the Appeals Chambers of the ICTY/ICTR on the one hand and that of the ICC on the other have divergent approaches as to whether they would address issues that are not immediately relevant to the **invalidation of the impugned decision**.

Early on in its jurisprudence, the ICC Appeals Chamber has excluded such an approach and held in respect to a ground of appeal raised by a party:

‘Thus, even if the Appeals Chamber were to conclude that the Trial Chamber made an error in respect of its interpretation of the term ‘commencement of the trial’ in article 19 (4) of the Statute, this error would not, in itself, be a reason to reverse the Trial Chamber’s decision on the admissibility of the case. It is for these reasons that the Prosecutor correctly states that the findings of the Trial Chamber were mere *obiter dicta*. The Appeals Chamber considers it inappropriate to pronounce itself on *obiter dicta*. To do so would be tantamount to rendering advisory opinions on issues that are not properly before it. In these circumstances, the Appeals Chamber does not consider it necessary to determine the merits of the Appellant’s submissions under the first ground of appeal.’¹⁹²

Exceptionally, however, the Appeals Chamber has addressed issues that were not immediately relevant to the resolution of the appeal or an application before it. An example for that is one of the first judgments of the Appeals Chamber, where the Appeals Chamber interpreted the criteria of article 82, para. 1(d), i.e. those relevant to a Pre-Trial or Trial Chamber’s decision on a request for leave to appeal¹⁹³, although the application was dismissed for lack of jurisdiction.

The ICTY/ICTR Appeals Chamber have included in their appellate competence the power to address ‘**issues of general significance to the Tribunal’s jurisprudence**’, even though the issue ‘would not lead to the invalidation of the Trial Judgement’¹⁹⁴. However, this power is of an **exceptional** character and has been rarely applied¹⁹⁵. The most important example is the Prosecutor’s appeal in the case *Prosecutor v. Jean-Paul Akayesu*, which only turned around grounds of appeal raising issues of general significance¹⁹⁶. As those did not affect the impugned decision, in the operative part of that judgment the Appeals Chamber held that it ‘[f]inds that, with respect to the points of law in the Prosecution’s appeal, this Judgement sets out the relevant legal findings thereon’¹⁹⁷.

¹⁹⁰ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgement, ICTR Appeals Chamber, 1 June 2001, para. 23.

¹⁹¹ *Ibid.*; see also *Situation in Darfur*, ICC-02/05-138, Decision on Victim Participation in the Appeal of the Office of the Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the Appeals of the Prosecutor and the Office of the Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007, 18 June 2008, paras. 18–19; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-873 OA8, Decision of the Appeals Chamber upon the Registrar’s Requests of 5 April 2007, Appeals Chamber, 27 April 2007, para. 6.

¹⁹² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497 OA8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009, para. 38.

¹⁹³ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 OA3, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, ICC Appeals Chamber, 13 July 2006, paras. 6–20.

¹⁹⁴ Recently: *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, ICTY Appeals Chamber, 30 January 2015, para. 16; see also *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, paras. 241, 247, 281; see also *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 221; *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 22; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgement, ICTR Appeals Chamber, 1 June 2001, paras. 16–27; *Prosecutor v. Milorad Krnojelac*, IT-07-25-A, Judgement, ICTY Appeals Chamber, 17 September 2003, paras. 6–9. Note that the MICT made no mention of it, *Prosecutor v. Augustin Ngirabatware v. The Prosecutor*, MICT-12-29-A, Judgement, MICT Appeals Chamber, 18 December 2014, paras. 6–12.

¹⁹⁵ See *Gaspard Kanyarukiga v. The Prosecutor*, ICTR-02-78-A, Judgement, ICTR Appeals Chamber, 8 May 2012, paras 264, 267.

¹⁹⁶ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgement, ICTR Appeals Chamber, 1 June 2001, paras. 23–24.

¹⁹⁷ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgement, ICTR Appeals Chamber, 1 June 2001, 143.

75 The ICTY/ICTR Appeals Chambers have justified their willingness to decide such questions in part on the basis that they are *ad hoc* and temporary tribunals, and that pronouncements on the law by the Appeals Chamber on such issues at an early stage of the Tribunals' development would 'ensure an effective and equal administration of justice' and be consistent with the role of the Appeals Chamber in unifying the law¹⁹⁸. The ICTR Appeals Chamber has however indicated that it will only exercise this power where the legal issue in question is of interest to the legal practice of the Tribunal and has a nexus with the case in question; furthermore, even where these requirements are satisfied, the exercise of this power is within the discretion of the Appeals Chamber¹⁹⁹. It also appears that the ICTY/ICTR Appeals Chambers will only exercise this power where the legal question concerned has been raised in accordance with the Rules of Procedure and Evidence (normally by being formally raised by a party as a ground of appeal), and that it is not open to appellants simply to point out errors in the trial judgement as and when they believe they have been identified²⁰⁰.

76 **c) Principles of precedent.** The Statute of the ICC does not give **binding effect** to the decisions of the ICC Chambers, including the Appeals Chamber. Article 21 para. 2 of the Statute states only that the Court *may* apply 'principles and rules of law as interpreted in its previous decisions'²⁰¹.

77 The ICTY and ICTR Statutes and Rules do not make provision in relation to this question either. Accordingly, the relevant Appeals Chambers have addressed this matter and concluded that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for **cogent reasons in the interests of justice**. Circumstances justifying such a departure from precedent would include cases where the previous decision has been decided on the basis of a wrong legal principle or where a previous decision has been given *per incuriam*. The *ad hoc* Appeals Chambers have further emphasised that departure from a previous decision will be the exception, and only after the most careful consideration has been given to it by the Appeals Chamber²⁰². It has also been said that the duty to follow previous decisions is not a reason for taking leave of the fundamental mission of the Tribunal to apply customary international law²⁰³. The ICTY Appeals Chamber has added that:

'What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.'²⁰⁴

¹⁹⁸ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgement, ICTR Appeals Chamber, 1 June 2001, paras. 21–22.

¹⁹⁹ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgement, ICTR Appeals Chamber, 1 June 2001, paras. 23–24.

²⁰⁰ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 470.

²⁰¹ See Staker and Eckelmans, *article 83*, mn 16.

²⁰² *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, paras. 107–109 (and see the discussion at paras. 89–111 generally). See also *Prosecutor v. Anto Furundžija* IT-95-17/1-A, Judgement, ICTY Appeals Chamber, 21 July 2000, para. 249; *Prosecutor v. Delalić et al. (Celebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, paras. 8, 26, 54–55, 84, 117, 121, 129, 136, 150, 174; *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, paras. 418, 426; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgement, ICTR Appeals Chamber, 1 June 2001, fn. 805; *Musema Appeal Judgement*, para. 15. See also *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, ICTR Appeals Chamber, 6 May 2003, para. 26. For an example of a case in which the Appeals Chamber did depart from its own previous case law, see *Prosecutor v. Laurent Semanza*, ICTR-97-20-A, Judgement, ICTR Appeals Chamber, 20 May 2005, para. 92. For the view that it 'should not happen that due to shifting majorities the Appeals Chamber changes its jurisprudence from case to case', see *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, ICTY Appeals Chamber, 28 February 2005, Separate Opinion of Judge Shahabuddeen, para. 107.

²⁰³ *Prosecutor v. Laurent Semanza*, ICTR-97-20-A, Judgement, ICTR Appeals Chamber, 20 May 2005, Separate Opinion of Judge Shahabuddeen, para. 31.

²⁰⁴ *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, para. 110.

Where previous decisions of the Appeals Chamber are **conflicting**, the ICTY Appeals Chamber has said that it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice²⁰⁵. The ICTY Appeals Chamber applied this approach recently and decided to follow one of the two approaches that had been established previously²⁰⁶. At issue was whether ‘specific direction’ is an essential element of aiding and abetting under customary international law²⁰⁷.

For this purpose, the ICTY Appeals Chamber has also said that there is no reason why interlocutory decisions of the Appeals Chamber should be considered, as a matter of principle, as having any lesser status than a final decision on appeal, since the purpose of an appeal, whether on an interlocutory or on a final basis, is to determine the issues raised with finality²⁰⁸.

The ICTY Appeals Chamber has further held that the *ratio decidendi* of the Appeals Chamber’s decisions is binding on Trial Chambers²⁰⁹, and that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive²¹⁰.

The ICTR MICT Appeals Chamber has held in the following words that it is bound by the jurisprudence of the ICTY and ICTR:

‘The Statute and the Rules of the Mechanism reflect normative continuity with the Statutes and Rules of the ICTR and ICTY. The Appeals Chamber considers that it is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the ICTR and ICTY. Likewise, where the respective Rules or Statutes of the ICTR or ICTY are at issue, the Appeals Chamber is bound to consider the relevant precedent of these tribunals when interpreting them.’²¹¹

It is the practice of the ICC Appeals Chamber to follow its own jurisprudence. Likewise, the Trial and Pre-Trial Chambers usually adhere to the Appeals Chamber’s jurisprudence. However, the Appeals Chamber’s composition is subject to the judge’s terms of office and may, at times, change considerably, which may lead to changes to some aspects of this jurisprudence. ICC Pre-Trial and Trial Chambers usually adhere to each other’s jurisprudence or indicate where they do not. Trial Chambers may, at times, have divergent strategies and may also distance themselves from the case law of the Pre-Trial Chambers²¹².

The ICC is not bound by the **case law of other tribunals**, including that of the *ad hoc* tribunals, as it does not establish an ‘autonomous source’ of law for the ICC²¹³. However, such case law may assist it in ascertaining a principle or rule of international law (article 21,

²⁰⁵ *Ibid.*, para. 111; *Prosecutor v. Anto Furundžija* IT-95-17/1-A, Judgement, ICTY Appeals Chamber, 21 July 2000, paras. 240–243.

²⁰⁶ *Prosecutor v. Sainović et al.*, IT-05-87-A, Judgement, ICTY Appeals Chamber, 23 January 2014, 1622, note 5320; this approach has been followed since, see *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, ICTY Appeals Chamber, 30 January 2015, para. 16.

²⁰⁷ See *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, IT-05-13/1-A, Judgement, ICTY Appeals Chamber, 5 May 2009, paras. 49, 146; *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-A, Judgement, ICTY Appeals Chamber, 4 December 2012, para. 424 on the one hand and *Prosecutor v. Momčilo Perišić*, IT-04-81-A, Judgement, ICTY Appeals Chamber, 28 February 2013, paras. 37–40 on the other hand.

²⁰⁸ *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 122. Compare *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Judgement, Appeals Chamber, 23 May 2005, paras. 202–207.

²⁰⁹ *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, paras. 112–113. For an example where a decision of a Trial Chamber was overturned on appeal on the ground that the Trial Chamber erred in law in failing to follow an earlier decision of the Appeals Chamber, see *Prosecutor v. Blagojević et al.*, IT-02-60-AR65 and IT-02-60-AR65.2, Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, Appeals Chamber, 3 October 2002, paras. 6–8 (available under <http://www.legal-tools.org/doc/a46322/>).

²¹⁰ *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, para. 114.

²¹¹ *Prosecutor v. Augustin Ngirabatware v. The Prosecutor*, MICT-12-29-A, Judgement, ICTR MICT Appeals Chamber, 18 December 2014, para. 6.

²¹² See Triffterer and Heinze, *Article 21*, mn 45–46.

²¹³ Nerlich in: Stahn and Sluiter, *The Emerging Practice of the International Criminal Court*, 305, 316.

para. 1)²¹⁴. Furthermore, the *ad hoc* tribunals rich case law often serves as a source of guidance with regard to the procedural law; while it may form an indispensable aid in interpreting the elements of the crimes²¹⁵.

- 84 d) Whether other types of appellate proceedings are possible. Article 81, and certain other provisions, provide for appeals only against specified types of decisions²¹⁶. The question arises whether it is possible to appeal against other types of decisions, where no appeal is provided for in the Statute.
- 85 At the ICTY and ICTR, the range of possible appeal proceedings has been expanded by the Rules²¹⁷. The Statutes of each of these Tribunals provide only for appeals by the ‘Prosecutor’ and by ‘persons convicted by the Trial Chambers’. Nevertheless, certain interlocutory appeals are provided for in the Rules of Procedure and Evidence of those Tribunals²¹⁸, and the validity of these provisions has always been accepted²¹⁹. The Rules of the Special Court for Sierra Leone have gone further, and provide for a Trial Chamber to refer certain preliminary motions to the Appeals Chamber for decision at the pre-trial stage, without any decision on the matter first being rendered by the Trial Chamber²²⁰. Furthermore, although the wording of the Statutes of these Tribunals suggests that only appeals by the parties are contemplated (*i. e.*, the ‘Prosecutor’ and by ‘persons convicted by the Trial Chambers’²²¹), the Rules of these Tribunals also allow for appeals by certain third parties²²². The STL jurisprudence has

²¹⁴ *Ibid.* 310.

²¹⁵ *Ibid.* 317–324; see also Bitti in: Stahn and Sluiter, *The Emerging Practice of the International Criminal Court*, 285, 299.

²¹⁶ See *mn* 2–5.

²¹⁷ Pursuant to article 15 of the ICTY Statute and article 14 of the ICTR Statute, the Rules of those Tribunals are made by the judges. Rule 6 of the Rules of each Tribunal further regulates the procedure for adoption of amendments to the Rules by the judges.

²¹⁸ Rule 54*bis lit. C* ICTY RPE (appeals against interlocutory decisions of a Trial Chamber relating to requests for orders that a State produce documents or information); rule 65 *lit. D* ICTY RPE (appeals against decisions of a Trial Chamber concerning requests for provisional release); rule 72 *lit. B* and C ICTY RPE (interlocutory appeals against decisions of a Trial Chamber on preliminary motions); rule 73 *lit. B* and C ICTY RPE (interlocutory appeals against decisions of a Trial Chamber on other motions). Rule 65 *lit. D* ICTR v (appeals against decisions of the Trial Chamber concerning requests for provisional release); rule 72 *lit. B, C* and E ICTR v (interlocutory appeals against decisions of a Trial Chamber dismissing an objection based on lack of jurisdiction); Rule 73 *lit. B* and C ICTR v (interlocutory appeals against decisions of a Trial Chamber on other motions).

²¹⁹ *Cf. Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 6 (available under <http://www.legal-tools.org/doc/866e17/>) in which the Appeals Chamber suggested that the higher interest of justice would not be served by delaying an appeal against the Trial Chamber’s rejection of a challenge to jurisdiction until after the accused had undergone what might then have to be branded an unwarranted trial.

²²⁰ Rule 72 *lit. E* and F SCSL RPE (as amended 29 May 2004). The validity of these provisions was upheld by the Appeals Chamber in *Prosecutor v. Norman, Prosecutor v. Kallon and Prosecutor v. Gbao*, SCSL-2003-08-PT, SCSL-2003-07-PT, SCSL-2003-09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, Appeals Chamber, 4 November 2003 (available under <http://www.legal-tools.org/doc/4939a0/>). In that decision, the Appeals Chamber said that Article 20 of the Statute of the Special Court for Sierra Leone ‘does not purport to be an exhausting or limiting definition of the powers of the Appeals Chamber, which may function in many other respects that are important to the working of the Special Court’ (para. 4), and rejected an argument that these provisions violated Article 14.5 of the ICCPR (paras. 18–25).

²²¹ The expression ‘persons convicted by the Trial Chambers’ should not be read as excluding interlocutory appeals by an accused prior to a final judgement of conviction or acquittal: see, *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), Appeals Chamber, 31 March 2000, para. 48.

²²² Rule 77 *lit. J* and K ICTY RPE (appeals by persons held to be in contempt of the Tribunal); rule 77*bis lit. G* ICTY RPE (appeals by persons held to be in contempt of the Tribunal for failure to pay a fine imposed by the Tribunal); rule 91 *lit. I* ICTY RPE (appeals by persons found to have given false testimony under solemn declaration); rule 108*bis* ICTY RPE (allowing a ‘State directly affected by an interlocutory decision of a Trial Chamber’ to request ‘review’ of the decision by the Appeals Chamber if that decision ‘concerns issues of general importance relating to the powers of the Tribunal’). Rule 77 *lit. J* and K ICTR RPE (appeals by persons held to be in contempt of the Tribunal), rule 91 *lit. I* ICTR RPE (appeals by persons found to have given false testimony under solemn declaration).

accorded victims a limited right to appeal interlocutory decisions²²³. However, the ICC Rules do not provide for any appeals not envisaged by the Statute. Hence, the question whether the ICC Rules could expand the types of appellate proceedings available is at this stage moot. In this context, it may be worth mentioning that the Rules and subordinate legislation of other international(ised) Tribunals enable certain other kinds of appeal or review to be requested by a forum other than the Appeals Chamber²²⁴, as does the legal framework of the ICC²²⁵.

On the question raised in this section, one judge of the ICTY has expressed the view that: 86

‘The law relating to appeals in most national jurisdictions is that no appeal lies unless conferred by statute. The right to appeal a decision is part of substantive law and can only be granted by the law-making body by specific enactment. Where the provision for an appeal or some form of review by a higher forum is not regulated by the statute under which an order is passed, there is usually some omnibus statute providing for appeals in such cases. The courts have no inherent powers to create appellate provisions or acquire jurisdiction where none is granted. Where the law provides for an appeal, the court may, by the adoption of reasonable and proper rules, supply deficiencies in the statutory provisions as to practice. Appellate courts have no jurisdiction over incompetent appeals other than dismiss them. It is thus clear that a tribunal or court cannot assume appellate powers under any concept of inherent jurisdiction or by expanding its jurisdiction through any amendment to its rules.’²²⁶

In another case, the ICTY Appeals Chamber rejected an application by a detained witness for leave to appeal against a ruling of the Trial Chamber that he be remanded to the authorities of the State, which had transferred him to the Tribunal. The Appeals Chamber observed that the ICTY had ‘a limited appellate jurisdiction’ which could not be invoked in this case by a non-party, since the relevant provision of the Rules provided only for appeals by parties²²⁷. Another decision of the Appeals Chamber of the ICTY appears to assume that prior to the adoption of rule 108*bis* ICTY, ‘a State whose interests were intimately affected by a Decision of a Trial Chamber could not request that Decision to be submitted to appellate review’²²⁸. In a subsequent case, the Appeals Chamber rejected an application for interlocutory appeal and application for review brought by a State against the decision of a judge to confirm an indictment and issue an arrest warrant, on the ground that such applications by a State did not fall within any of the provisions of the Statute or Rules of the Tribunal²²⁹.

Two decisions of the ICTR are also of some relevance to this question. In one of these cases, the defence sought to appeal against a decision of the Trial Chamber, requiring the Registrar of the Tribunal to have regard to certain criteria when assigning co-counsel to the 87

²²³ See *Prosecutor v. Salim Jamil Ayyash et al.*, STL-11-01/PT/AC/AR126.3, Decision on appeal by legal representative of victims against pre-trial judge’s decision on protective measures, STL Appeals Chamber, 10 April 2013; see also dissenting opinion.

²²⁴ Rule 44 *lit. B* ICTY provides for a review by the President of the Tribunal of a decision of the Registrar relating to the admission of a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. Furthermore, under, for instance, the ICTY’s Directive on Assignment of Defence Counsel (IT/73/Rev.10), article 13, a suspect whose request for assignment of counsel has been denied by the Registrar may seek the President’s review of the Registrar’s decision, and an accused whose request for assignment of counsel has been denied by the Registrar may make a motion to the Chamber before which he or she is due to appear for immediate review of the Registrar’s decision. See also, *e.g.*, the ICTR’s Directive on Assignment of Defence Counsel, article 12.

²²⁵ See *e.g.* rule 21(3) RPE, regulations 72, 83(3), 85 RoC.

²²⁶ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Separate Opinion of Judge Sidhwa, para. 6.

²²⁷ In the case of *Dragan Opacić*, IT-95-7-Misc.1, Decision on Application for Leave to Appeal, Bench of the Appeals Chamber, 3 June 1997.

²²⁸ *Prosecutor v. Blaškić*, IT-95-14-AR108*bis*, Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of *Subpoena Duces Tecum*) and Scheduling Order, Appeals Chamber, 29 July 1997, para. 8.

²²⁹ *Prosecutor v. Bobetko*, IT-02-62-AR54*bis* and IT-02-62-AR108*bis*, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, Appeals Chamber, 29 November 2002 (available under <http://www.legal-tools.org/doc/f1b6bf/>).

accused. The defence sought to rely on the interlocutory appeal provision in rule 72 RPE ICTR, and in the alternative, advanced the theory ‘that higher courts are vested with an inherent power to review *ultra vires* acts of lower courts’. The Appeals Chamber found that the requirements of rule 72 were not satisfied, and added that ‘the Appellant has not shown good cause to merit consideration by the Appeals Chamber of the question of whether it may entertain the present appeal under the doctrine of inherent powers’²³⁰. This question thus appears to have been expressly left undecided.

In the other case, the Prosecutor of the ICTR sought to appeal against a decision of a judge, dismissing an indictment that had been presented by the Prosecutor for confirmation²³¹. No such appeal was expressly provided for in the Statute or Rules. The Appeals Chamber held that the Statute of the Tribunal did not confer an unlimited and unqualified right of appeal on the Prosecutor, and rejected each of the Prosecutor’s arguments why the appeal should be permitted in the circumstances of that case. However, the decision of the Appeals Chamber contained no categorical statement that the only possible appeals are those specifically provided for in the Statute and Rules. The Appeals Chamber did consider that in circumstances where a matter affects the rights of the accused, it would be inconsistent with the principle of ‘equality of arms’ for the Prosecutor to have a greater right of appeal than the defence²³². The Appeals Chamber also rejected an argument by the Prosecutor that a decision of a confirming judge to dismiss an indictment was analogous to a decision finally disposing of a matter, since in the circumstances of this case, there were other avenues available to the Prosecutor to deal with the adverse effects of the decision²³³. In circumstances where a party has no other possible remedy against a decision of a judge or Trial Chamber, and where the appeal would be consistent with the principle of equality of arms, the argument that an appeal should be permitted even though not provided for in the Statute and Rules may thus not be entirely foreclosed by this decision²³⁴.

The Appeals Chamber of the Special Court for Sierra Leone has also held that where the Rules provide that a party can bring an interlocutory appeal if the Trial Chamber gives leave to do so, the Appeals Chamber has no inherent power to entertain such an interlocutory appeal if the Trial Chamber has refused leave to appeal²³⁵. In that decision, the Appeals Chamber noted that it could have recourse to the inherent power of the court ‘when the Rules are silent and such recourse is necessary in order to do justice’, but that the inherent jurisdiction ‘cannot be invoked to circumvent an express Rule’²³⁶.

88 The ICC Appeals Chamber has taken a firm stance on the issue early on in its jurisprudence. It held that ‘the Statute **defines exhaustively the right to appeal** against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers. No gap is noticeable in the Statute with regard to the power claimed [review of the Pre-Trial Chamber’s decision not to grant leave to appeal under article 82, para. 1(d)] in the sense of an objective not being given effect to by its provisions. The lacuna postulated by the

²³⁰ *Prosecutor v. Nyiramasuhuko and Ntahobali*, ICTR-97-21-A, Order Dismissing Appeal, Appeals Chamber, 28 October 1998. *Prosecutor v. Norman et al.*, SCSL-04-14-T, (finding that in circumstances where the RPE require the Trial Chamber to give leave for the bringing of an interlocutory appeal, the Appeals Chamber has no inherent jurisdiction to hear an interlocutory appeal in the absence of the grant of such leave by the Trial Chamber).

²³¹ *Prosecutor v. Bagosora and 28 Others*, ICTR 98-37-A, Decision on the Admissibility of the Prosecutor’s Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others, Appeals Chamber, 8 June 1998 (available under <http://www.legal-tools.org/doc/093636/>).

²³² *Ibid.*, paras. 34–35.

²³³ *Ibid.*, paras. 37, 41.

²³⁴ See also Staker and Nerlich, *article 84*, mn 13.

²³⁵ *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber’s Decision on 2 August 2004 Refusing Leave to File an Interlocutory Appeal, Appeals Chamber, 17 January 2005 (available under <http://www.legal-tools.org/doc/a301a4/>).

²³⁶ *Ibid.*, para. 32.

Prosecutor is inexistent'²³⁷. Accordingly, it has consistently rejected appeals and motions that do not fall within the detailed legal framework of article 81 and 82²³⁸.

In the same vein, the ICC Appeals Chamber rejected appeals that were raised by the Host State in relation to the situation of witnesses in the cases *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* and *Prosecutor v. Thomas Lubanga Dyilo*, who remained in the ICC's detention centre since their transfer to the ICC from detention in the Democratic Republic of the Congo and the filing of their asylum requests before Dutch authorities.²³⁹ It is worth pointing out that one of the first-instance Trial Chambers had specifically granted leave to the Host State to address the Appeals Chamber, but not on the basis of article 82, para. 1(d). About two and half years later, the Appeals Chamber was seised of an appeal by some of the detained witnesses themselves requesting their release from the ICC's detention centre in the case *Prosecutor v. Germain Katanga*; an appeal that was also dismissed as inadmissible by the Appeals Chamber²⁴⁰. On the same day, the Appeals Chamber addressed the situation of the very same witnesses in the parallel case of *Prosecutor v. Mathieu Ngudjolo Chui* on its own motion, ordering their immediate transfer to the Democratic Republic of the Congo. The Appeals Chamber assumed this jurisdiction on the basis that the case was at the stage of an article 81 appeal, where the Appeals Chamber is seised, like a Trial or Pre-Trial Chamber, of all issues arising during the proceedings²⁴¹. Therefore, the Appeals Chamber acted in a capacity akin to a first-instance Chamber and not, as in relation to the dismissed appeals, as a second-instance court²⁴².

Different from the above-described approaches, the ICTY Appeals Chamber has allowed 89 appeals in the absence of any statutory provision in the early days of its existence.

In one case, a defence counsel had been found guilty of contempt of the Tribunal by the Appeals Chamber ruling in the first instance. Although the Rules at that time made no provision for an appeal against such a decision of the Appeals Chamber, such an appeal was in fact entertained by a differently constituted Appeals Chamber²⁴³. In its decision on the appeal, the differently constituted Appeals Chamber observed that the 'preferred course in this case would have been for the contempt trial to have been initially referred to a Trial Chamber, thereby providing for the possibility of appeal, rather than being heard by the Appeals Chamber, ruling in the first instance'²⁴⁴. Nevertheless, it considered that the provisions of the RPE dealing with contempt of the Tribunal were penal in nature, given that contempt was punishable by imprisonment of up to seven years, that article 14, para. 5

²³⁷ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 OA3, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, ICC Appeals Chamber, 13 July 2006, para. 39.

²³⁸ See e.g. *Prosecutor v. Gaddafi and Al Senussi*, ICC-01/11-91/11-74 OA, Decision on the admissibility of the 'Appeal against decision on application under rule 103' of Ms Mishana Hosseinioun of 7 February 2012, ICC Appeals Chamber, 9 March 2012; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2823 OA20, Decision on the 'Registrar's Submissions under regulation 24bis of the Regulations of the Court in relation to Trial Chamber I's decision ICC-01/04-01/06-2800' of 5 October 2011; ICC Appeals Chamber, 21 November 2011.

²³⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, ICC-01/04-01/07-3132 OA12, Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 15 July 2011, ICC Appeals Chamber, 26 August 2011; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2799 OA19, Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 17 August 2011, ICC Appeals Chamber, 26 August 2011.

²⁴⁰ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3424 OA14, Decision on the admissibility of the appeal against the Decision on the application for the interim release of detained witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350', ICC Appeals Chamber, 20 January 2014; see also Dissent of Judge Song.

²⁴¹ *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12-158 A, Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute, ICC Appeals Chamber, 20 January 2014; see Staker and Eckelmans, *article 83*, mn 42-44.

²⁴² It should be noted that at that time the trial proceedings in the parallel case *Prosecutor v. Germain Katanga* were still ongoing.

²⁴³ *Prosecutor v. Tadić*, IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt by Prior Counsel, Appeals Chamber, 27 February 2001 (available under <http://www.legal-tools.org/doc/0216ed/>).

²⁴⁴ *Ibid.*

of the ICCPR therefore required that a person convicted of contempt have a right of appeal, and that due to the special circumstances of this case, it was appropriate for the Appeals Chamber to consider the merits of the appellant's complaints²⁴⁵. However, in a dissenting opinion, one member of the Appeals Chamber said that to allow such an appeal 'goes against the plain language of the Statute and Rules', and that the goal of providing an appeal from all convictions for criminal contempt 'must be accomplished without wrenching all meaning from the constraints on the jurisdiction of the Appeals Chamber as set out in the Statute and Rules'²⁴⁶. Under the legal framework of the ICC, such issue could not arise, because article 70 ('offences against the administration of justice') and the related rules set down a separate legal framework that would not allow the Appeals Chamber to convict a person for offences against the administration of justice.

In another case, a Trial Chamber had issued a subpoena against a journalist. The journalist filed a motion before the Trial Chamber seeking to have the subpoena set aside, asserting a testimonial privilege for journalists. The Trial Chamber rejected this motion. Although there was no provision in the Statute or Rules, which allowed the journalist to bring an appeal, the Appeals Chamber permitted the journalist to appeal against the decision, and ultimately allowed the appeal²⁴⁷.

- 90 e) **Reconsideration by the Appeals Chamber of its own final judgements.** The Appeals Chamber of the ICTY has held that it has an **inherent power to reconsider** any decision that it has given, whether an interlocutory decision, or a final judgment. This power may be exercised where the Appeals Chamber is persuaded that a **clear error of reasoning** in the previous judgement has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or where the previous decision was given *per incuriam*. Whether or not the Appeals Chamber exercises this power is a discretionary matter, and the Appeals Chamber must be persuaded that the judgment sought to be reconsidered has led to an injustice²⁴⁸. The Appeals Chamber has said that this power is an aspect of its inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by the Statute is not frustrated and that its basic judicial functions are safeguarded. The power to reconsider has been held to be necessary to address the prospect of any injustice resulting from the fact that the ICTY has only one level of appeal, which is not a *de novo* hearing²⁴⁹. However, the ICTY

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*, Separate Opinion of Judge Wald. The ICTY/ICTR Rules were subsequently amended to provide expressly that where a decision on contempt of the Tribunal is given by the Appeals Chamber sitting as a Chamber of first instance, an appeal shall be decided by five different Judges as assigned by the President: see present rule 77 *lit.* K.

²⁴⁷ *Prosecutor v. Brđanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, Appeals Chamber, 11 December 2002 (available under <http://www.legal-tools.org/doc/af7b61/>). See also *Prosecutor v. Milošević*, IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, Appeals Chamber, 20 January 2004, paras. 4–5, in which, on an exceptional basis, the Appeals Chamber entertained an interlocutory appeal brought by *amici curiae*, notwithstanding that the Appeals Chamber recognized that '[n]ot being a party to the proceedings, the *amici* are not entitled to use Rule 73 [ICTY] to bring an interlocutory appeal'.

²⁴⁸ *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-*Abis*, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, para. 15, para. 49; and also the Separate Opinion of Judge Shahabuddeen, paras. 10–15 (specifying that a 'clear error' justifying an exercise of this power would be 'something which the court manifestly or obviously overlooked in its reasoning and which is material to the achievement of substantial justice') (but see the Separate Opinion of Judges Meron and Pocar, who considered that it was unnecessary to decide this question in this case). In relation to the ICC, there is also some doctrinal support for the view that other remedies of 'reconsideration' or 'review' could be fashioned in the exercise of the Appeals Chamber's inherent jurisdiction: Schabas, *An Introduction to the International Criminal Court*, (2001) 135.

²⁴⁹ *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-*Abis*, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, para. 15, paras. 50–52, *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Judgement, Appeals Chamber, 23 May 2005, paras. 202–207.

Appeals Chamber has warned against '[o]ver-enthusiastic counsel who file frivolous applications for reconsideration'²⁵⁰.

The ICC Appeals Chamber as well as other ICC Chambers have so far been extremely **reluctant** to grant a request for reconsideration of their decisions²⁵¹. Nevertheless, the Pre-Trial and Trial Chambers developed a standard according to which they would reconsider their prior decision either upon a Chamber's own motion or prompted by a party but also stipulated the exceptionality of the measure²⁵². According to this jurisprudence decisions are reconsidered only when they are manifestly unsound and when their consequences are manifestly unsatisfactory²⁵³. The ICC Appeals Chamber has not yet expressed itself on when it would reconsider a decision²⁵⁴. However, it has not yet been confronted with scenarios similar to those before the ICTY/ICTR Appeals Chambers.

Additionally, the ICTY Appeals Chamber has indicated that it has a power to grant a **91** motion for **clarification** of a decision, but only in exceptional circumstances, for example, where the operative part of the decision is involved, and where the motion does not require a reconsideration of the decision²⁵⁵. The ICC Appeals Chamber has consistently held that it is not an advisory body and rejected such requests, including motions for clarification²⁵⁶. Any Chamber also has a management duty with respect to the proceedings before it. That may, at times, necessitate clarification or further orders and directions²⁵⁷. However, more procedural clarity for the parties may also be achieved, e.g. by amending the Regulations of the Court that address the ICC's routine functioning²⁵⁸.

²⁵⁰ *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, para. 15, para. 53.

²⁵¹ But see *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, Trial Chamber V(B), 26 November 2013; see also Dissenting Opinion of Judge Eboe Osuji.

²⁵² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2705, Decision on the defence request to reconsider the 'Order on numbering of evidence' of 12 May 2010, Trial Chamber I, 30 May 2011, para. 18; *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-863, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, Trial Chamber V(B), 26 November 2013, para. 11.

²⁵³ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-01/11-863, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, Trial Chamber V(B), 26 November 2013, para. 11; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-511, Decision on the request to present views and concerns of victims on their legal representation at the trial phase, Trial Chamber V(A), 13 December 2012, para. 6.

²⁵⁴ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-993 OA5, Decision on Mr Ruto's request for reconsideration of the 'Decision on the request for suspensive effect', Appeals Chamber, 27 September 2013, para. 8.

²⁵⁵ *Prosecutor v. Nikolić*, IT-94-2-AR73, Decision on Motion Requesting Clarification, Appeals Chamber, 6 August 2003 (available under <http://www.legal-tools.org/doc/a49989/>). But see, e.g., *Prosecutor v. Ljubičić*, IT-95-14-A, Decision on Prosecution's Motion for Clarification of the Appeals Chamber's Decision Dated 4 December 2002, Appeals Chamber, 8 March 2004 (available under <http://www.legal-tools.org/doc/40df15/>).

²⁵⁶ See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497 OA8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009, para. 38.

²⁵⁷ See e.g. *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-179 A, Decision on the 'Registry's urgent request for guidance' and further order in relation to the Appeals Chamber's 'Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute', Appeals Chamber, 21 May 2014, paras. 7, 8.

²⁵⁸ Article 52, para. 1.

Article 82 Appeal against other decisions*

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

- (a) A decision with respect to jurisdiction or admissibility;
- (b) A decision granting or denying release of the person being investigated or prosecuted;
- (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;
- (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Literature: See article 81.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	8
I. Paragraph 1	8
1. Chapeau elements	8
2. Subparagraph (a)	11
3. Subparagraph (b)	15
4. Subparagraph (c)	17
5. Subparagraph (d)	18
II. Paragraph 2	21
III. Paragraph 3	22
IV. Paragraph 4	25
C. Special remarks	28

A. Introduction/General remarks

- 1 Interlocutory appeals have the potential to **disrupt the first-instance proceedings**, particularly once trial has actually commenced. In many national jurisdictions, interlocutory appeals are unknown or rare, and parties may be required to defer any appellate proceedings until after final judgment at first instance, by which time, depending on the course that the proceedings have taken, many issues may have become moot or irrelevant. Nevertheless, in some cases, **early resolution of, in particular, a point of law** may render unnecessary a lengthy and costly trial on certain allegations of fact. It may also avoid a situation in which a complex case needs

* The original commentary was written by Christopher Staker whose contribution is greatly acknowledged and served as a basis for this new version of the commentary. The views expressed are those of the author and cannot be attributed to the ICC or the United Nations.

to be retried as a result of the original conviction being overturned in a post-judgment appeal on an issue that might have been dealt with in an interlocutory appeal during the trial¹.

Article 82 is the **central provision** in the Statute regulating **appeals against ‘other decisions’**, i.e. decisions other than acquittals, convictions, and sentences issued by a Trial Chamber at the end of a trial (which are appealable under article 81). Nevertheless, article 81 para. 3 (c) (ii) provides for another appeal against ‘other decisions’, namely against decisions of a Trial Chamber to continue the detention of an acquitted person pending the outcome of the Prosecutor’s appeal against the acquittal. Conversely, the appeal provided for in article 82 para. 4 against reparation orders issued by a Trial Chamber under article 75 is better qualified as a ‘final’ appeal and therefore systematically incorrectly included in article 82.

Article 83 para. 1, which provides that ‘the Appeals Chamber shall have all the powers of the Trial Chamber’,² does not apply to appeals under article 82, leaving the **powers of the Appeals Chamber** under this article to be governed solely by the Rules. In that regard, Rule 149 makes the relevant provisions of the Statute and of the Rules governing proceedings and the submission of evidence before the Trial Chambers applicable *mutatis mutandis* to the proceedings before the Appeals Chamber, including in respect of appeals against ‘other decisions’. In addition, Rules 154–158 sets out the procedure for those appeals, including appeals brought under article 81 para. 3 (c) (ii). Further procedural provisions governing appeals against ‘other decisions’ are to be found in Regulations 64 and 65. As regards appeals against reparation orders under article 82 para. 4, they are treated in the Rules – systematically correctly – as appeals against ‘final decisions’.

Rule 158 para. 1 stipulates that the Appeals Chamber may ‘**confirm, reverse or amend the decision appealed**’. The practice of the Appeals Chamber has established a fourth possibility: the Chamber may, depending on the circumstances, remand a decision that it has reversed to the first-instance Chamber for that Chamber to issue a new decision in light of the Appeals Chamber’s judgment.³

Neither article 82 nor any of the other provisions applicable specifically to appeals against ‘other decisions’ sets out the errors that an appellant may raise on appeal. Nevertheless, the Appeals Chamber has accepted that appellants raise the errors referred to in article 81 para. 1 (a) in relation to ‘final appeals’, namely **errors of law, errors of fact, as well as procedural errors**.⁴ The showing of an error in the impugned decision is not sufficient for a reversal or amendment by the Appeals Chamber: in addition, the error must have ‘**materially affected**’ the decision, in the sense that, without the error, the decision would have been ‘substantially different’.⁵ Appellants are obliged to substantiate in their filings on appeal not only the alleged error of law, fact, or procedure, but also how the alleged error materially affected the impugned decision; failure to do so may lead to a summary rejection of the ground of appeal or indeed the appeal as a whole.⁶

¹ See, e.g., *Prosecutor v. Popović et al.*, IT-02-57-PT, IT-02-58-PT, IT-02-63-PT, IT-02-64-PT, IT-04-80-PT, IT-05-86-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, Trial Chamber, 6 October 2005 (available under <http://www.legal-tools.org/en/doc/8bfac0/>).

² Article 83 para. 1.

³ See, for instance, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-774, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, Appeals Chamber, 14 December 2006, paras. 64–66 (available under <http://www.legal-tools.org/en/doc/2b7ca3/>) in which the Appeals Chamber reversed a decision and directed the Pre-Trial Chamber to decide the matter anew.

⁴ *Situation in the Democratic Republic of the Congo*, ICC-01/04-169 (OA), Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, Appeals Chamber, 16 July 2006, para. 33. (available under <http://www.legal-tools.org/en/doc/8c20eb/>); for a discussion of these errors, see Eckelmans and Staker, article 81, mn 34 et seq.

⁵ Judgment ICC-01/04-01/06-169 (OA), see note 4, para. 84.

⁶ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-408, Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009, 16 September 2009, paras. 48, 51 (available under <http://www.legal-tools.org/en/doc/c40d73/>).

- 6 Except in respect of appeals brought under article 82 para. 1 (a), the initial jurisprudence of the Appeals Chamber found that **participation of victims** in appeals against ‘other decisions’ was not automatic. According to that jurisprudence of the Appeals Chamber, victims have to apply to participate in a given interlocutory appeal, and this within the time limit for the submission of the response to the document in support of the appeal.⁷
- 7 The original ILC **Draft Statute 1994** provided only for appeals against final judgments of conviction, acquittal and against sentence. Proposals for an additional provision dealing with interlocutory appeals had emerged by the 1996 Preparatory Committee.⁸ In the 1997 Preparatory Committee Report and in the Zutphen Report, no such provision was included, and interlocutory appeals were addressed in the proposed article dealing with the functions and powers of the Trial Chamber (which was ultimately adopted as article 64).⁹ In the 1998 Report of the Preparatory Committee, a proposal for this provision was included in the part on ‘Appeal and Review’, with the title ‘Appeal Against Interlocutory Decisions’.¹⁰ The ultimate deletion of the word ‘interlocutory’ from the title reflects the fact that, while most appeals under this article will be taken in the course of the pre-trial and trial proceedings, some may be taken after final judgment has been given by the Trial Chamber.¹¹ Furthermore, some decisions that are appealable under article 82 (for instance, decisions finding a case to be inadmissible) put an end to the proceedings and are therefore not ‘interlocutory’.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Chapeau elements

- 8 Unlike article 81, which provides for appeals by the ‘convicted person’ or the Prosecutor, article 82 para. 1 provides for appeals by ‘**either party**’. The term ‘party’ is not defined in the Statute; the Regulations use the (potentially broader) term ‘participant’. The Court being a criminal court, the accused person and the Prosecutor are the principal parties to the proceedings before it. Nevertheless, depending on the circumstances, ‘either party’ may refer to other participants than the accused person and the Prosecutor and may include, in particular, States.¹² This would explain the need for the separate provisions in article 18 para. 4 and article 19 para. 6, which also enable States to appeal certain decisions. In addition,

⁷ See *Prosecutor v. Laurent Gbagbo and Chales Blé Goudé*, ICC-02/11-01/15-172 (OA 6), Reasons for the ‘Decision on the “Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention”’, Appeals Chamber, 31 July 2015, paras. 16–20 (available under <http://www.legal-tools.org/doc/23da6c/>). The system for victim participation in interlocutory appeals was first established in *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-824 (OA7), Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’, Appeals Chamber, 13 February 2007, paras. 11 *et seq.* (available at <http://www.legal-tools.org/doc/54fec3/>). See also the dissenting opinion of Judge Sang-Hyun Song to this decision, according to Judge Song, victims’ participation is automatic as victims are participants in terms of Regulation 64 of the Regulations of the Court and they are therefore entitled to file a response to the document in support of the appeal, provided that they participated in the first-instance proceedings that gave rise to the appeal. In the Appeals Chamber’s decis of 31 July 2015, it specifica adopted Judge Schg’s vicio to victim participation.

⁸ 1996 Preparatory Committee Report II 1996, pp. 239–240.

⁹ Preparatory Committee Decisions Aug. 1997, p. 31; Zutphen Draft, pp. 111–112 (which stated that the Trial Chamber had the power to ‘rule on any preliminary motions, and such ruling shall not be subject to interlocutory appeal except as provided for in the Rules’).

¹⁰ Preparatory Committee (Consolidated) Draft, p. 151.

¹¹ Notably reparation orders under article 75, which are appealable under article 82 para. 4.

¹² See generally Brady, in: Lee (ed.), *The International Criminal Court/Elements of Crimes and Rules of Procedure and Evidence* (2001), 575 at 593.

in respect of some appeals, the accused person is arguably not entitled to appeal. These peculiarities are noted below, in the discussion of the individual decisions that are subject to appeal under article 82 para. 1.

The chapeau of this article, in referring to ‘**decisions**’, contemplates only appeals against decisions issued by a Pre-Trial or Trial Chamber of the Court. Decisions by other authorities provided for in the Statute (such as a decision of a ‘competent authority’ of a custodial State under article 59) are thus not subject to appeal to the Appeals Chamber under paragraph 1.

Appeals must be brought ‘**in accordance with the Rules of Procedure and Evidence**’. As noted above, the relevant Rules governing interlocutory appeals are Rules 154–158. These Rules set out the time limits for the filing of the notice of appeal or, where applicable, of applications seeking leave to appeal; they are complemented by Regulations 64 and 65. Depending on whether the appeal in question lies as of right or requires the leave of the first-instance Chamber, the appellate procedure varies slightly. In the former case, the first step is the filing of the **notice of appeal** by the appellant within the time limit stipulated in the Rules. According to the jurisprudence of the Appeals Chamber, this time limit cannot be extended.¹³ After the filing of the notice of appeal, the appellant has to set out the arguments on appeal in the **document in support of the appeal**,¹⁴ to which the opposing party may file a **response**.¹⁵ In contrast, for appeals requiring the **leave of the first-instance Chamber**, the first step is the filing of the request for leave to appeal before that Chamber. If leave is granted, the appellant has to file directly the document in support of the appeal, to which the opposing party may respond.¹⁶

2. Subparagraph (a)

The decisions ‘with respect to **jurisdiction or admissibility**’ that are appealable under subparagraph (a) are primarily those taken under article 18 para. 2, second sentence, and article 19 paras 1 to 3. Appeals are expressly provided for in articles 18 para. 4 and 19 para. 6. Other decisions in Part 2 that are potentially appealable under this provision include, for instance, those under article 15 para. 4, and decisions on whether a particular investigation or prosecution falls within the terms of a Security Council resolution under article 13 (b) or article 16¹⁷. Thus far, however, the Appeals Chamber has given the term ‘decision with respect to jurisdiction or admissibility’ a **narrow interpretation**. The Appeals Chamber explained that ‘that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility.’¹⁸ On that basis, the Appeals Chamber rejected as inadmissible¹⁹ an appeal

¹³ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-189 (OA), Decision on the ‘Requête aux fins de suspension des délais prévus par la Règle 154(1) du Règlement de procédure et de preuve et par la Norme 64(5) du Règlement de la Cour jusqu’à la fin des vacances judiciaires, fixée au lundi 6 août 2012’, Appeals Chamber, 19 July 2012, para. 5 (available under <http://www.legal-tools.org/en/doc/8cc4f7/>).

¹⁴ See Regulation 64.

¹⁵ *Ibid.*

¹⁶ See Regulation 65.

¹⁷ But see Brady, note 12, 578–579, indicating that it is uncertain whether this provision extends to decisions under article 53 para. 3 (a) and article 15 para. 4; and *cf.* ICTY, *Prosecutor v. Krizic*, IT-95-14-R77.4-AR72.1, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, Appeals Chamber, 2 March 2006, holding that a challenge to jurisdiction in contempt of court proceedings is not a challenge to ‘jurisdiction’ for the purposes of ICTY Rule 72 (available under <http://www.legal-tools.org/en/doc/61d1bf/>).

¹⁸ *Situation in the Republic of Kenya*, ICC-01/09-78 (OA), Decision on the admissibility of the ‘Appeal of the Government of Kenya against the “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence”’, Appeals Chamber, 10 August 2011, para. 15 (available under <http://www.legal-tools.org/en/doc/872314/>).

¹⁹ The Appeals Chamber has developed the concept of ‘inadmissibility’ of appeals through its jurisprudence. If an appeal does not fall under the Appeals Chamber’s jurisdiction or is otherwise not properly before it, the Chamber will dismiss the appeal as inadmissible. In that case, the Appeals Chamber does not consider the merits

brought by the Republic of Kenya against a decision of a Pre-Trial Chamber that had rejected Kenya's request that the Court and the Prosecutor should provide Kenya assistance in respect of its own investigations of the post-election violence.²⁰

- 12 Similarly, in relation to 'jurisdiction', the Appeals Chamber dismissed as inadmissible an appeal brought by the two accused persons in the *Ruto et al.* case that was directed against the Pre-Trial Chamber's interpretation of the term 'organizational policy' as a component of the contextual element of crimes against humanity (see article 7 para. 2 (a) of the Statute).²¹ The Appeals Chamber noted that the two accused did not question the Court's **temporal, territorial or personal jurisdiction** over the case, nor did they challenge that the Court had **subject-matter jurisdiction** over the crimes in question, and that the 'organizational policy' element was part of the definition of those crimes.²² The Appeals Chamber found that the interpretation of the term 'organizational policy' and whether there was sufficient evidence to find that there was such a policy was not a question of the jurisdiction of the Court, but of whether or not the charges against the accused could be confirmed. It noted that, if it were to consider the merits of the submissions of the accused any further, 'it would, in fact, be assessing the correctness of the decision to confirm the charges against them, insofar as it related to the existence of an "organizational policy"', and this notwithstanding the fact that the accused had neither sought nor obtained leave to appeal the confirmation decision.²³
- 13 Article 19, which governs the procedure for admissibility proceedings, is also relevant to determining the **potential appellants** against decisions with respect to jurisdiction or admissibility. Article 19 para. 2 (b) and (c) grants States the right to challenge, under certain conditions, the Court's jurisdiction or the admissibility of a case. It follows that States must also be entitled to bring an appeal against a decision in respect of jurisdiction or admissibility. Thus, in the context of appeals under article 82 para. 2 (a), 'either party' must be understood as including not only the suspect and the Prosecutor, but also States.²⁴ This is expressly set out in article 18 para. 4. The specific reference to States in that provision suggests that potential suspects of an investigation by the Prosecutor do not have a right to appeal against preliminary admissibility rulings taken pursuant to article 18, even though it is conceivable that suspects will have been identified by the Prosecutor already at the early stages of an investigation.
- 14 The victims' right pursuant to article 19 para. 3 to submit observations in proceedings with respect to jurisdiction and admissibility extends to the ensuing appeals proceedings. Thus, a **specific victim participation regime** applies.²⁵ To facilitate their participation, the Appeals Chamber usually issues a decision at the outset of the proceedings, stipulating the time lines for the submission of the victims' observations and the responses thereto.²⁶ Furthermore,

of the appeal and does not specifically confirm the impugned decision. Furthermore, instead of rendering a 'judgment' on the interlocutory appeal, the Appeals Chamber usually issues a 'decision' to dismiss an inadmissible appeal. On the concept of 'inadmissibility' see Eckelmanns, in: Stahn and Sluiter, *The Emerging Practice of the International Criminal Court* (2009), 527 at 538 *et seq.*

²⁰ Decision ICC-01/09-78 (OA), see note 18, paras 1–2.

²¹ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-414 (OA3, OA4), Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', Appeals Chamber, 24 May 2012 (available under <http://www.legal-tools.org/en/doc/6934fb/>).

²² *Ibid.*, para. 23.

²³ *Ibid.*, para. 29.

²⁴ See Boas *et al.*, in: Sluiter *et al.* (eds.), *International Criminal Procedure/Principles and Rules* (2013) 967; for a differing view see Roth and Henzelin, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court/A Commentary* (2002), Volume II, 1551.

²⁵ See above, margin number 6.

²⁶ See, for example, *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-393 (OA3), Order on the re-filing of the document in support of the appeal and Directions on the filing of observations, Appeals Chamber, dated 8 April 2009 and registered on 9 April 2009, (available under <http://www.legal-tools.org/en/doc/1002ab/>); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, ICC-01/04-01/07-1295 (OA8), Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and

pursuant article 19 para. 3 of the Statute, not only victims, but also ‘those who have referred the situation under article 13’ may make observations. Accordingly, where applicable, the Appeals Chamber has invited the referring State to make observations.²⁷ In relation to the admissibility challenges brought by Libya in relation to the case *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, the Appeals Chamber invited victims to make observations,²⁸ but not the Security Council, which had referred the situation to the Court; while the Pre-Trial Chamber had invited the Security Council to make observations in these cases,²⁹ none were received.

3. Subparagraph (b)

Under subparagraph (b), decisions ‘granting or denying release of the person being investigated or prosecuted’ may be appealed as of right. In the main, these are decisions on requests for interim release and reviewing detention under article 60 paras. 2 to 4. Otherwise, the Appeals Chamber has interpreted the scope of the provision narrowly. Notably, it has rejected attempts to bring appeals against decisions on the confirmation of charges under subparagraph (b). In *Lubanga*, it found that a decision confirming the charges against an accused was not a decision denying his release.³⁰ The Appeals Chamber reasoned that ‘[t]he decision confirming the charges neither grants nor denies release. The effect or implications of a decision confirming or denying the charges do not qualify or alter the character of the decision.’³¹ Similarly, in the *Mbarushimana* case, the Appeals Chamber found that a decision denying the confirmation of charges did not amount to a decision granting the suspect release.³² The Appeals Chamber concluded that neither article 61 para. 10, according to which any warrant ceases to have effect if charges are not confirmed, nor the fact that the Pre-Trial Chamber specifically ordered Mr Mbarushimana’s release changed the character of the decision on the confirmation of charges or made it a decision granting release.³³ In addition, the Appeals Chamber dismissed the Prosecutor’s appeal, also brought under subparagraph (b), against the Pre-Trial Chamber’s decision rejecting the Prosecutor’s request to stay the release of Mr Mbarushimana pending the determination of

Evidence, Appeals Chamber, dated 10 July 2009 and registered on 13 July 2009 (available under <http://www.legal-tools.org/en/doc/76e410/>).

²⁷ See, for example, Decision ICC-02/04-01/05-393, note 26; Decision ICC-01/04-01/07-1295, see note 26.

²⁸ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-383, Order in relation to the filing of victims’ observations and the request pursuant to rule 103 of the Rules of Procedure and Evidence, Appeals Chamber, 16 July 2013 (admissibility challenge in relation to Mr Gaddafi) (available under <http://www.legal-tools.org/en/doc/92a718/>); *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-481, Order in relation to the filing of victims’ observations, Appeals Chamber, 22 November 2013 (admissibility challenge in respect of Mr Al-Senussi) (available under <http://www.icc-cpi.int/iccdocs/doc/doc1686786.pdf>).

²⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-134, Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’, Pre-Trial Chamber I, 4 May 2012 (admissibility challenge in respect of Mr Gaddafi) (available under <http://www.legal-tools.org/en/doc/bfc19d/>); *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-325, Decision on the conduct of the proceedings following the ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’, Pre-Trial Chamber I, 26 April 2013 (admissibility challenge in respect of Mr Al-Senussi) (available under <http://www.legal-tools.org/en/doc/f2522d/>).

³⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-926 (OA8), Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Decision sur la confirmation des charges’ of 29 January 2007, Appeals Chamber, 13 June 2007 (available under <http://www.legal-tools.org/en/doc/d0b8dd/>).

³¹ Decision ICC-01/04-01/06-926, see note 30, para. 15 (footnote omitted).

³² *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-482 (OA3), Reasons for ‘Decision on the appeal of the Prosecutor of 19 December 2011 against the “Decision on the confirmation of the charges” and, in the alternative, against the “Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana” and on the victims’ request for participation’ of 20 December 2011, Appeals Chamber, 24 January 2012 (available under <http://www.legal-tools.org/en/doc/fa1127/>).

³³ Decision ICC-01/04-01/10-482 (OA3), see note 32, paras. 21–22.

the Prosecutor's application for leave to appeal the confirmation decision. The Appeals Chamber found that, even though the granting of a stay would have affected Mr Mbarushimana's release, the decision denying such a stay was merely 'a procedural decision that did not address the substance of whether release should be granted or whether Mr Mbarushimana should remain in detention.'³⁴ In light of this jurisprudence, it is questionable whether other decisions that have a bearing on detention but are not taken under article 60 paras. 2 to 4 are appealable under subparagraph (b). For instance, **decisions on the review of sentence** taken under article 110 arguably do not fall under subparagraph (b), since they are not, strictly speaking, decisions 'granting or denying release', nor are they decisions taken in respect of a person 'being investigated or prosecuted'. In that regard, it must also be noted that, pursuant to Rule 224 para. 1, decisions on the review of the sentence are taken by a panel of three judges of the Appeals Chamber. This suggests that no appeal is possible.

- 16 The Appeals Chamber has developed a specific jurisprudence on appeals relating to interim release. Notably, the Appeals Chamber has adopted a **deferential standard of review**, in particular in view of the fact that whether the (continued) detention of an individual appears necessary for one or more of the grounds listed in article 58 para. 1 (b) of the Statute involves 'an element of prediction'.³⁵ This appears to be appropriate, not least because the first-instance Chamber is more familiar with the case record.

4. Subparagraph (c)

- 17 Subparagraph (c) provides for appeals against decisions of the Pre-Trial Chamber under article 56 para. 3 (b) to take measures on its own initiative in relation to a unique investigative opportunity. Article 56 para. 3 (c) clarifies that only the Prosecutor is entitled to appeal such a decision.³⁶ This stands to reason, as the issue concerns primarily, if not exclusively, the relationship between the Prosecutor and the Pre-Trial Chamber and their respective powers in the investigation of crimes.

5. Subparagraph (d)

- 18 Subparagraph (d) gives the Pre-Trial and Trial Chambers the power to grant leave to appeal their decision if certain criteria are met. Unlike in case of appeals under subparagraphs (a)-(c), an appeal under subparagraph (d) does not lie as of right. It can be brought **only with the leave** of the Chamber that rendered the decision against which it is sought to appeal.³⁷ The jurisprudence of the Court indicates that an application to appeal under this provision must be examined in the light of three principles, namely: 'the restrictive character of the remedy provided for in article 82 (1) (d) of the Statute; the need for the applicant to satisfy the Chamber as to the existence of specific requirements stipulated by this provision; [and] the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal'.³⁸ In particular, this jurisprudence has

³⁴ Decision ICC-01/04-01/10-482 (OA3), see note 32, para. 31.

³⁵ Decision ICC-01/04-01/06-824 (OA7), see note 7, para. 137.

³⁶ See also Brady, note 12, 579–580.

³⁷ The Appeals Chamber has held that the leave of the Trial Chamber 'constitutes the definitive element for the genesis of the right to appeal': *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 (OA 3), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, Appeals Chamber, 13 July 2006, para. 20. See also Rules 154 and 155 (available under <http://www.legal-tools.org/en/doc/a60023/>).

³⁸ *Situation in the Democratic Republic of the Congo*, ICC-01/04-135-tEN, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 Jan. 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 31 March 2006, para. 19 (and see also paras. 25, 29–31) (available under <http://www.legal-tools.org/en/doc/902494/>); *Situation in Uganda*, ICC-02/04-01/05-20, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, Pre-Trial Chamber, 20 August 2005, para. 15 (and see also paras. 22–23) (available under <http://www.legal-tools.org/en/doc/cae449/>).

emphasized that leave to appeal is to be granted only under **limited and very specific circumstances**, and that it is insufficient that the proposed appeal raises an issue of general interest or importance.³⁹ Under subparagraph (d), an applicant for leave to appeal must meet both of two cumulative criteria. The first criterion is that the decision sought to be appealed involves an issue that would significantly affect *either* (1) the fair and expeditious conduct of the proceedings (in the sense that the issue significantly affects the proceedings both in terms of fairness *and* in terms of expeditiousness) *or* (2) the outcome of the trial. The **merits of the eventual appeal** are not a consideration when deciding whether or not to grant leave to appeal.⁴⁰ The second criterion is that an immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings. If the conditions of the first criterion are not met, a Chamber considering an application for leave to appeal under this subparagraph need not examine the second criterion.⁴¹

The Appeals Chamber has defined ‘issue’ in terms of subparagraph (d) as ‘an identifiable subject or topic requiring a decision for its resolution [...] An issue is constituted by a subject the resolution of which is essential for the resolution of a matter arising in the judicial cause under examination. The issue may be legal or factual or a mixed one’.⁴² The issue must arise from the decision that is to be appealed and ‘cannot represent a hypothetical concern or an abstract legal question’.⁴³ In the practice of the Court, the ‘issue’ is not only relevant for the question of whether leave to appeal should be granted, but also for the subsequent appeals proceedings. The Appeals Chamber has refused to consider arguments on appeal that fall outside the ‘issue’ in relation to which leave to appeal was granted, in particular, if the first-instance Chamber has rejected leave to appeal in respect of the argument now raised on appeal.⁴⁴ Nevertheless, while the ‘issue’ therefore limits – at least

³⁹ Decision ICC-01/04-135, see note 38, paras. 21–24; Decision ICC-02/04-01/05, see note 38, paras. 16–18, 55.

⁴⁰ *Situation in Uganda*, ICC-02/04-01/05-20, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, Pre-Trial Chamber II, 19 August 2005, para. 22 (available under <http://www.legal-tools.org/en/doc/cae449/>).

⁴¹ Judgment ICC-01/04-168, see note 37, paras. 6–19; Decision ICC-01/04-135, see note 38, paras. 25–28; Decision ICC-02/04-01/05-20-US-Exp, see note 38, paras. 20–21 (and see also *Situation in the Democratic Republic of the Congo*, ICC-01/04-14, Decision on the Prosecutor’s Application for Leave to Appeal, Pre-Trial Chamber, 14 March 2005 (available under <http://www.legal-tools.org/en/doc/799eaf/>)). As to whether a decision affects the *fairness* of the proceedings, it has been said that fairness includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims; and that, at the investigation phase of a situation, fairness to the Prosecutor means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54 (Decision ICC-01/04-135, see note 38, paras. 38–39, 43; see also Decision ICC-02/04-01/05-20-US-Exp, see note 38, para. 31). It appears that the burden is on the applicant for leave to appeal to produce any necessary evidence to establish that the fairness of the proceedings would be significantly affected by the decision (see note 23, Decision ICC-01/04-135, see note 38, paras. 44, 51), and that it is insufficient to cite merely hypothetical examples of how the fairness of the proceedings may be affected (*ibid.*, para. 48, 55). See also generally Judgment ICC-01/04-168, see note 37, para. 11. As to whether a decision affects the *expeditious conduct* of the proceedings, it has been suggested that this will be the case if failure to provide for an immediate resolution of the issue at stake by the Appeals Chamber would entail the risk that lengthy and costly trial activities are nullified at a later stage (Decision ICC-02/04-01/05-20-US-Exp, see note 38, para. 36 (see also para. 43)). As to whether an issue is one that may affect the *outcome of the trial*, it has been said that this expression does not encompass every issue that may influence the course of the proceedings in general terms, and that only those issues having a bearing on the Trial Chamber’s decision to convict or to acquit are of relevance in this context (*ibid.*, para. 48). As to whether an issue is one for which an immediate resolution by the Appeals Chamber may *materially advance the proceedings*, it has been said that there must be a specific link between the immediate resolution of the issue at stake and the impact on the *current* proceedings, as opposed to merely a potential impact on future proceedings (*ibid.*, paras. 52–55). See also generally Judgment ICC-01/04-168, see note 37, paras. 14–19.

⁴² Decision ICC-01/04-168, see note 37, para. 9.

⁴³ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-464, Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, Pre-Trial Chamber I, 31 July 2013, para. 8 (www.legal-tools.org/en/doc/799eaf <http://www.legal-tools.org/en/doc/56ca30/>).

⁴⁴ See the references cited in *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 (OA5), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’, Appeals Chamber, 16 December 2013, footnote 142 (available under <http://www.legal-tools.org/en/doc/1bffdaf/>). This practice has led parties to discontinue appeals: in the *Banda and Jerbo* case, the Defence, having been granted leave to appeal

in practice – the Appeals Chamber’s consideration, it determines in appeals under subparagraph (d) whether the decision under appeal – in particular, its operative part – can stand, and does not merely decide the ‘issue’ in the abstract.

- 20 Although the decision as to whether to grant leave to appeal lies with the first-instance Chamber, the Appeals Chamber exercises a degree of **control** as to whether **leave was properly granted**. In the *Lubanga* case, the Appeals Chamber rejected an appeal as inadmissible, noting that the Trial Chamber had granted leave to appeal ‘on an exceptional basis’, even though the conditions under subparagraph (d) had not been fulfilled.⁴⁵ Also in the *Lubanga* case, the Appeals Chamber rejected an appeal as inadmissible even though the Trial Chamber had granted leave to appeal under subparagraph (d): it found that, contrary to the Trial Chamber’s own characterization of the decision, the ‘Decision establishing the principles and procedures to be applied to reparations’⁴⁶ was appealable under article 83 para. 4 because it was deemed to be a reparations order, and that, therefore, the appeal brought under article 82 para. 1 (d) was inadmissible.⁴⁷ The Appeals Chamber found that ‘[w]here necessary, the Appeals Chamber itself has to establish the true nature of an impugned decision, in order to ensure that the decision in question is appropriately before it, and that the appeal is determined pursuant to the correct legal basis.’⁴⁸ In contrast, decisions of the Pre-Trial or Trial Chamber rejecting requests for leave to appeal cannot be reviewed by the Appeals Chamber.⁴⁹

II. Paragraph 2

- 21 Under paragraph 2, a Pre-Trial Chamber’s decision under article 57 para. 3 (d) to ‘[a]uthorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9’ may be appealed. Neither the Statute nor the Rules stipulate the **criteria for the granting of leave to appeal**. The procedure and time limits for the application for leave to appeal and the ensuing appeal are the same as for appeals under article 82 para. 1 (d). This paragraph (like articles 18 para. 4 and 56 para. 3 (b)) provides for the relevant appeals to be heard ‘on an expedited basis’. The procedure for ‘expedited’ appeals is not spelled out in the Statute, leaving this to be governed by the Rules.⁵⁰

in relation only to one of two issues in relation to which leave to appeal had been sought, decided not to pursue the appeal, stating that, given that leave to appeal the second issues had been denied, ‘it is prevented from proceeding to explore the adequacy of the Trial Chamber’s decision to proceed to trial and keep the Defence complaints in mind’; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-435 (OA3), Defence Notice to the Registrar of the Discontinuance of the Defence appeal against the Decision on the defence request for a temporary stay of proceedings (ICC-02/05-03/09-410), 21 December 2012, para. 11 (available under <http://www.legal-tools.org/en/doc/9e4e1e/>).

⁴⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2799 (OA19), Decision on the ‘Urgent Request for Directions’ of the Kingdom of the Netherlands of 17 August 2011, Appeals Chamber, 26 August 2011 (available under <http://www.legal-tools.org/doc/88d2f4/>).

⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, 7 August 2012 (available under <http://www.legal-tools.org/en/doc/a05830/>).

⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2953 (A1, A2, A3, OA21), Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings, Appeals Chamber, 14 December 2012, paras. 51 *et seq.* (available under <http://www.legal-tools.org/en/doc/2e59a0/>).

⁴⁸ Decision ICC-01/04-01/06-2953, see note 47, para. 50.

⁴⁹ See Decision ICC-01/04-168, see note 37.

⁵⁰ Rules 154 and 155 impose short time limits for such appeals. Rule 156 provides that such appeals shall be in writing unless the Appeals Chamber decides to convene a hearing, and that the appeal shall be heard ‘as expeditiously as possible’.

III. Paragraph 3

The filing of an appeal suspends the execution of the first-instance decision only if the Appeals Chamber orders, pursuant to article 82 para. 3 read with Rule 156 para. 5, that the appeal should have **suspensive effect**. The application for suspensive effect must be contained in the notice of appeal or, in case of appeals under article 82 para. 1 (d) or para. 2, in the document in support of the appeal.⁵¹ Failure to do so may lead to a rejection of the request for suspensive effect.⁵²

The granting of suspensive effect leads to the ‘non-enforcement of a decision, the subject of the appeal’.⁵³ However, the Appeals Chamber cannot, by granting suspensive effect, order provisional measures to protect the interests of the appellant.

The decision of the Appeals Chamber on the granting of suspensive effect is **discretionary**.⁵⁴ In exercising its discretion, the Appeals Chamber takes into account, in particular, whether the implementation of the decision under appeal would create an irreversible situation that could not be corrected, even if the Appeals Chamber were eventually to find in favour of the appellant.⁵⁵

IV. Paragraph 4

Paragraph 4 provides for appeals against **reparations orders**. As noted above, this type of appeal belongs systematically to the category of ‘final’ appeals. Accordingly, Rules 150 to 153, governing the procedure for ‘final’ appeals, also apply to appeals against reparations orders. Rule 153 fills the gap that arises because of the fact that article 83 para. 2 sets out the powers of the Appeals Chamber only in respect of appeals against acquittals, convictions and sentencing decisions, stipulating that the Appeals Chamber, upon appeal, may ‘reverse or amend’ the impugned decision, or order a new trial before a new Trial Chamber. Under Rule 153, the Appeals Chamber has the same powers in appeals against reparations orders, except that the Appeals Chamber cannot order a new trial. This stands to reason, given the limited scope of an appeal against a reparations order.

The Appeals Chamber has clarified that the **convicted person** has a right to appeal a reparations order, irrespective of whether or not it specifically ordered him or her to pay reparations.⁵⁶ The Appeals Chamber found furthermore that the term ‘**victim**’ in paragraph 4 includes individuals who did not participate as victims in the trial proceedings, but only now claimed reparations.⁵⁷ This includes individuals whose requests for participation were rejected at trial, given that ‘reparations proceedings are a distinct stage of the proceedings

⁵¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-817 (OA3), Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’, Appeals Chamber, 9 July 2010, para. 8 (in relation to appeals that require the filing of a notice of appeal) (available under <http://www.legal-tools.org/en/doc/c4d631/>).

⁵² Decision ICC-01/05-01/08-817, see note 51, para. 10.

⁵³ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-92 (OA), Decision on the Prosecutor’s ‘Application for Appeals Chamber to Give Suspensive Effect of Prosecutor’s Application for Extraordinary Review’, Appeals Chamber, 13 July 2006, para. 3 (available under <http://www.legal-tools.org/doc/c1fc7d/>).

⁵⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1347 (OA9, OA10), Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victims’ participation of 18 January 2008, Appeals Chamber, 22 May 2008, para. 10 (available under <http://www.legal-tools.org/en/doc/093bc1/>).

⁵⁵ See, for example, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1290 (OA11), Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, Appeals Chamber, 22 April 2008, para. 8 (available under <http://www.legal-tools.org/en/doc/86650f/>).

⁵⁶ Decision ICC-01/04-01/06-2953, see note 47, para. 66.

⁵⁷ Decision ICC-01/04-01/06-2953, see note 47, paras. 69–70.

and it is conceivable that different evidentiary standards and procedural rules apply to the question of who is a victim for the purposes of those proceedings.⁵⁸ The Appeals Chamber also clarified that, despite the formulation of paragraph 4, the right to appeal lies with the victims themselves, not their legal representatives, although an appeal may only be brought with the assistance of a legal representative.⁵⁹ Finally, the Appeals Chamber found that the **Prosecutor** was not a party to appeals proceedings under paragraph 4 and therefore not entitled to make submissions before the Appeals Chamber.⁶⁰ In contrast, *bona fide* owners of property affected by a reparations order are entitled to appeal.

- 27 Although this provision only refers to an appeal against an ‘order for reparations’, presumably it would also be possible for victims to appeal against a decision refusing to make an order for reparations.

C. Special remarks

- 28 Article 82 empowers the Appeals Chamber to entertain appeals against certain decision of the Pre-Trial and Trial Chambers. Article 82 does not give the Appeals Chamber any **general power to supervise or intervene** in ongoing proceedings before a Pre-Trial Chamber or Trial Chamber. The Appeals Chamber has held that it does not have the power to entertain an application to stay all proceedings pending before another Chamber of the Court to enable the assignment of new counsel.⁶¹ The Appeals Chamber has also rejected the suggestion that the Pre-Trial and Trial Chambers are ‘inferior courts’ in the sense of English and Welsh law.⁶²

⁵⁸ Decision ICC-01/04-01/06-2953, see note 47, para. 70.

⁵⁹ Decision ICC-01/04-01/06-2953, see note 47, para. 67; for a differing view see Roth and Henzelin, in: Cassese et al. (eds), *The Rome Statute of the International Criminal Court/A Commentary* (2002), ii, 1551.

⁶⁰ Decision ICC-01/04-01/06-2953, see note 47, para. 74.

⁶¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-844, Reasons for ‘Decision of the Appeals Chamber on the Defence application “Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense” filed on 20 February 2007’ issued on 23 February 2007, Appeals Chamber, 9 March 2007 (available under <http://www.legal-tools.org/en/doc/67912e/>).

⁶² Decision ICC-01/04-168, see note 37, para. 30.

Article 83^{*}

Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Literature: Baker M and Greenwood L., 'Dissent – But Only If You Really Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances', 7 No. 1 *DispResJ* 31; Jordash W. and Coughlan J., The right to be informed of the nature and cause of the charges: A potentially formidable jurisprudential legacy, in: S. Darcy and J. Powderly, *Judicial creativity at the International Criminal Tribunals* (2010) 286; Kelemen, K., 'Dissenting Opinions in Constitutional Courts', 14 *GLJ* 1345 (2013); Pikis, G. M., *The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (Brill 2010); Rasmussen H. and Rasmussen L.N., 'Comment on Katalin Keleman', 14 *GLJ* 1373; Smith, H., 'Personal and Official Authority: Turn-of-the-century-lawyers and the Dissenting Opinion', 24 *YaleLJ&Hum* 507; Webb, P., *International Judicial Integration and Fragmentation* (OUP 2013).

For other literature see article 81.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	2
I. Paragraph 1.....	2
II. Paragraph 2.....	5
III. Paragraph 3.....	14
IV. Paragraph 4.....	15
V. Paragraph 5.....	19
C. Special remarks.....	21
I. Standing on appeal.....	22
II. The appeal and its discontinuance.....	25
III. Document in support of the appeal and response to the document in support of the appeal.....	32
IV. Reply.....	33
V. Victim participation in appeals under article 81.....	35
VI. Hearing.....	41

^{*} The views expressed in this contribution are those of the author alone and do not reflect the views of the International Criminal Court or any other institution to which the author is or was attached.

VII. Appeal proceedings.....	42
VIII. Additional evidence	45
1. Admissibility criteria	47
2. Proceedings relevant to the admissibility of additional evidence	57
3. Additional evidence in article 82 appeal proceedings.....	59
IX. Variation of grounds of appeal.....	60

A. Introduction/General remarks

- 1 The relationship of this article to other provisions of the Statute is considered above¹.

B. Analysis and interpretation of elements

I. Paragraph 1

- 2 Para. 1 confers the powers of the Trial Chamber on the Appeals Chamber for the purposes of proceedings under article 81, paras. 1 and 2. Paragraph 1 is not applicable to proceedings under articles 82 and 84 of the Statute².
- 3 The **powers of the Trial Chamber** are laid down in Part 6 of the Statute ('The Trial'). Of particular relevance to appeal proceedings are articles 64, 68 and 69. The ICC Appeals Chamber has relied on the powers of the Trial Chamber in preparing hearings, deciding on disclosure and admitting evidence on appeal³. It did not interpret this provision as conferring power to hold a full re-trial on appeal⁴. Instead, in the *Lubanga* final appeal proceedings, the Appeals Chamber found appeal proceedings to be of a corrective nature⁵. This mirrors the jurisprudence of the *ad hoc* tribunals⁶. The ICTY Appeals Chamber has held that, in addition to the powers conferred on it by the Statute and the Rules, it also has an **inherent power** deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done⁷.
- 4 Article 83, para. 1 is complemented by rule 149 RPE that makes applicable *mutatis mutandis* 'Parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers' to all proceedings before the Appeals Chamber, including those under articles 82 and 84 of the Statute. This rule is similar to rule 107 ICTY/ICTR, adopted first in 1994⁸. Accordingly, subject to a *mutatis mutandis* assessment that may lead

¹ See Staker and Eckelmans, *article 81*, mn 2–6.

² See Nerlich, *article 82*, mn 3; see also *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-568 OA3, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Appeals Chamber, 13 October 2006, paras. 15–18 (available under <http://www.legal-tools.org/doc/7813d4/>).

³ See e.g. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3017 A5 A6, Decision on Mr Thomas Lubanga's request for disclosure, Appeals Chamber, 11 April 2013 (available under <http://www.legal-tools.org/doc/2298fb/>), para. 9; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3067 A4 A5 A6, Scheduling Order for a hearing before the Appeals Chamber, Appeals Chamber, 21 March 2014 (available under <https://www.legal-tools.org/fr/doc/ba87df/>); *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red A5, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 56 (available under <https://www.legal-tools.org/fr/doc/585c75/>), para. 54; see also below mn 21–60.

⁴ See Staker and Eckelmans, *article 81*, mn 20; see also Bohlander, *International Criminal Justice: A Critical Analysis of Institutions and Procedures* 494.

⁵ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 16–28, 56.

⁶ See Staker and Eckelmans, *article 81*, mn 20–27, note that the ICTY/ICTR Statutes do not have a provision similar to article 83, para. 1; see article 25 ICTY Statute, article 24 ICTR Statute.

⁷ *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, paras. 16–19, 50, noting that this inherent power should not be exercised where any of the parties is thereby prejudiced.

⁸ They provide that 'the rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber'.

to certain differences in the applicable law, there is legally little difference between the law applicable to the Appeals Chamber in appeals under article 81 and that under article 82, despite the prominent position of article 83, para. 1. Hence in practice, it may not be necessary to clarify certain minor points, such as whether a) the reference in article 83, para. 1 to article 81 of the Statute includes appeal proceedings pursuant to article 81, para. 3(c)(ii) of the Statute, and b) whether the legal provisions referenced by rule 149 RPE do or may exceed the scope of the powers conferred upon the Appeals Chamber pursuant to article 83, para. 1.

The Appeals Chamber has not interpreted these provisions as requiring it to hold an **appeals hearing**⁹. Nevertheless, in appeals raised pursuant to article 81, the Appeals Chamber has thus far called a hearing¹⁰.

II. Paragraph 2

Paragraph 2 has **three distinct elements**. First, it establishes the standard of review by which the Appeal Chamber is guided during the appeal proceedings and in its decision-making process. Second, it specifies the powers of the Appeals Chamber if the appeal is successful based on this standard of review. Third, it delimits the Appeals Chamber's powers in appeal proceedings raised solely pursuant to article 81, para. 1(b), i.e. by the convicted person or on his/her behalf.

The applicable **standard of review** is discussed in Staker/Eckelmans, *article 81*, mn 34–68.

As just set out, paragraph 2 also establishes the Appeals Chamber's **powers** upon reviewing the Trial Chamber's decision or sentence and allows the Appeals Chamber not merely to reverse such a decision, but also to amend it or to order a new trial before a different Trial Chamber. These powers apply when the Appeals Chamber establishes that one or several errors meet the relevant standard of review.

The *ad hoc* tribunals' Appeals Chambers have on many occasions *amended* a conviction by e.g. substituting a lesser crime or a different form of individual criminal responsibility for those found to exist by the Trial Chamber¹¹. Usually, any such amendment presupposes that the substituted crime or form of responsibility was part of the charges¹². It is an open question whether the ICC Appeals Chamber may change the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court, e.g. in respect of the mode of liability or of a 'lesser' crime and which procedure it would need to adopt¹³. Regarding the additional fact-finding that may be required for an amendment, see below margin number 9.

⁹ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12-199 A, Scheduling Order for a hearing before the Appeals Chamber, Appeals Chamber, 18 September 2014, (available under <https://www.legal-tools.org/fr/doc/203990/>), paras. 12,13.

¹⁰ See below mn 41.

¹¹ See e.g. *Prosecutor v. Radislav Krstić*, IT-98-33-A, Judgement, Appeals Chamber, 19 April 2004, paras. 135–144 (convicted on appeal for aiding and abetting genocide instead of committing genocide); for a full reference to the ICTY/ICTR jurisprudence, see *Prosecutor v. Ante Gotovina and Mladen Markač*, IT-06-90-A, Judgement, Appeals Chamber, 16 November 2012, paras. 106–108; see also Staker/Eckelmans, *article 81*, mn 36–39.

¹² However, with respect to a 'lesser' crime, it was argued in *Prosecutor v. Delalic et al. (Čelebići case)*, IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para. 866, that 'it is a principle of law' that a grave offence includes a lesser offence of the same nature'. Accordingly, where the accused was convicted by the Trial Chamber of the crime charged, the Appeals Chamber might in the event of a defence appeal be able to substitute a conviction for a lesser-included offence.

¹³ As to the scope of a change in the legal characterisation of facts pursuant to regulation 55 of the Regulations of the Court, see *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3363 OA13, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', Appeals Chamber, 27 March 2013 (available under <https://www.legal-tools.org/fr/doc/9d87d9/>), paras. 48–58; and Dissenting Opinion of Judge Tarfusser.

The Appeals Chamber may also fully or partly reverse a conviction and consequently fully or partly **acquit** the accused, e.g. if it finds that amending the conviction would violate the rights of the accused¹⁴.

The ILC Draft Statute did not empower the Appeals Chamber to reverse or amend an *acquittal* by the Trial Chamber, but only to annul the decision of acquittal as a prelude to a new trial¹⁵. Under the provision as finally adopted, the Appeals Chamber can itself enter a guilty verdict instead of an acquittal, but only where an appeal for that purpose is brought by the Prosecutor pursuant to article 81 para. 1(a). The ICTY/ICTR Prosecutors usually appealed partial or full acquittals, but often without success.¹⁶ Noteworthy are two cases, where the ICTY Appeals Chamber found that, although the standard of review was met, it was not appropriate to reverse partial acquittals and enter convictions or order re-trial¹⁷. In others, it substituted partial acquittals by full convictions¹⁸.

- 8 The Appeals Chamber may order a **new trial** under subparagraph 2(b). The new trial needs to be conducted by a newly composed Trial Chamber. The statutory framework of other international tribunals does not specifically provide for the remedy of ordering a new trial, but limits the applicable remedies to affirming, reversing or revising the impugned decisions¹⁹. Nevertheless, the ICTY Appeals Chamber held since its early jurisprudence, in deciding to confirm an acquittal instead of ordering a new trial, that taking this decision lies within its discretion to be “exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case in hand and considerations of public interest”²⁰. The remedy of ordering a new trial, an ‘exceptional measure’²¹, has **rarely been imposed**. On one occasion, the ICTY Appeals Chamber ordered a new trial without even conducting full appeal proceedings²². On another, it remitted a case to a different Trial Chamber when it found the guilty-plea that was the basis for the conviction invalid²³. The **scope of re-trials** was discussed in the case *Prosecutor v. Haradinaj et al*²⁴. Finally, it is noteworthy that the ICTY/ICTR Appeals Chambers, in recent judgments, did not consider on their own motion (i.e. without a relief request of a

¹⁴ See *Gotovina and Markač* Appeal Judgement, IT-06-90-A, 16 November 2012, paras. 154–155; see also generally *Prosecutor v. Kuprešić et al.*, IT-95-16-A, Judgement, Appeals Chamber, 23 October 2001.

¹⁵ 1994 ILC Draft Statute with commentaries, 126 (available under <https://www.legal-tools.org/doc/390052/>).

¹⁶ For a statistical overview in this regard, see Re in: Reydams et al (eds.), *International Prosecutors* (2012), 797, 814–816 for statistics about ICTY appeals, 843–844 for statistics about ICTR appeals, 856 for statistics about SCSL appeals.

¹⁷ See *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, paras. 153–154; *Prosecutor v. Goran Jelišić*, IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001, paras. 73–77.

¹⁸ See *Prosecutor v. Duško Tadić*, IT-94-1-A, Appeals Chamber, 15 July 1999.

¹⁹ Article 25, para. 2, ICTY Statute; article 24 ICTR Statute; article 20, para. 2, SCSL Statute; rule 104(2) ECCC Internal Rules.

²⁰ *Jelišić* Appeal Judgment, IT-95-10-A, 5 July 2001, para. 73, see Partially Dissenting Opinion of Judge Wald, paras. 3, 14.

²¹ See *Tharcisse Muvunyi v. Prosecutor*, ICTR-2000-55A-A, Judgement, Appeals Chamber, 29 August 2008, para. 148, where the Appeals Chamber ordered a re-trial on its own motion; see also Re in: Reydams et al (eds.) *International Prosecutors* (2012), 797, 810.

²² The ICTY Appeals Chamber has suggested that in cases where, during the appellate proceedings, a party presents substantial amounts of new evidence which could have been a decisive factor in reaching the decision at trial, the Appeals Chamber might order a new trial without first conducting any hearing or giving any judgement on the merits of the appeal: see *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Scheduling Order, Appeals Chamber, 31 October 2002; *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Decision on Evidence, Appeals Chamber, 31 October 2003, in which the Appeals Chamber said that ‘... Rule 117(C) of the Rules [of the ICTY] provides that ‘in appropriate circumstances the Appeals Chamber may order that the accused be retried according to law’; ... the decision whether to retain a case or to send it back for a re-trial lies within the discretion of the Appeals Chamber, in light of the circumstances of the case; and ... the interests of justice must be considered in such a decision’.

²³ *Prosecutor v. Drazen Erdemović*, IT-96-22-A, Judgement, Appeals Chamber, 7 October 1997; note the different legal framework re guilty plea at the ICC (article 65 of the Statute).

²⁴ *Prosecutor v. Ramush Haradinaj et al.*, IT-04-84bis-AR73.1, Decision on Haradinaj’s appeal on scope of partial retrial, Appeals Chamber, 31 May 2011, paras. 21–27.

party to that effect), whether ordering a new trial would have been an appropriate remedy; they decided to reverse the conviction and acquit the accused²⁵.

Para. 2 further stipulates certain powers that the Appeals Chamber has ‘for these purposes’, including remanding ‘a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly’ or to ‘itself call evidence to determine the issue’. The phrase ‘for these purposes’ may be most appropriately interpreted as meaning that these powers should only apply where the standard of review is met and the Appeals Chamber needs to determine which of the three remedies it should apply and how. It is therefore arguably distinct from matters relevant to additional evidence; see below, mn 45–59.

If, following the decision on appeal, there is no need to determine **additional facts** in order to reach a final verdict, it may be appropriate for the Appeals Chamber itself to amend the Trial Chamber’s judgment. Similarly, if as a result of the appeal, the final verdict depends only on one or more narrow issues of fact, it may be appropriate for the Appeals Chamber to use the powers laid down in the penultimate sentence of this paragraph, i.e. either to call evidence itself or to remand those issues of fact to the Trial Chamber. The Appeals Chamber is likely to use these powers rarely. On the one hand because the originally composed Trial Chamber may no longer exist as the term of office of some or all of the judges of that Chamber may have expired, as was the case in the *Lubanga* and the *Katanga/Ngudjolo* trials upon delivery of respectively the reparation and sentencing decision. In addition, if the original Trial Chamber were to make such findings, the parties would need to be heard by the Appeals Chamber on whether the Trial Chamber erred in coming to certain factual findings and on the impact of such findings on the outcome of the case. On the other hand, if the Appeals Chamber chose the unusual step²⁶ to itself make findings of fact at first instance, the defence could be considered deprived of any possibility of appeal against those findings; this could be regarded as contrary to article 14, para. 5 ICCPR, to which those provisions are intended to give effect²⁷. In addition, if such fact-finding before the Appeals Chamber was considered appropriate, it may need to be included in a second procedural appeals phase, disclosing to the parties that the appeal was (partly) successful and hearing their submissions. In any case, if wide-ranging new fact-finding was necessary, a new trial may be the more appropriate remedy. It is noteworthy that the ICTY Appeals Chamber remitted limited issues to a Trial Chamber in a sentencing appeal on the basis of its inherent powers²⁸.

Article 83, para. 2 does not spell out the Appeals Chamber’s power for the scenario that the appeal does not meet the standard of review. However, while not specified, the Appeals Chamber also has the power to reject the appeal and **confirm** the appealed decision where the appeal was not successful, rendering the impugned decision final²⁹. It is noteworthy in this context that rules 153 and 158 RPE relevant to article 82 appeals specifically stipulate that the Appeals Chamber may also confirm the impugned decision.

²⁵ See *Gotovina and Markač* Appeal Judgement that does not contain any such consideration, IT-06-90-A, 16 November 2012, see also Augustin Ndingilimimana a. o. r. The Prosecutor, No. ICTR-00-56-A Judgement, 11 February 2014 and dissenting opinion of Judge Tuzmukhamedov, para. 6. Article 83, para. 2 may require a different approach of the ICC Appeals Chamber to reasoning in this respect.

²⁶ For instance, suggestions made by the United States of America in 1993 for the Rules of Procedure and Evidence of the ICTY observed that: ‘In most cases where further fact findings need to be made, it will be appropriate to permit the Trial Chamber which originally considered the case (and which has seen the demeanor of the witnesses) to carry out the fact-finding process. However, the Appeals Chamber has been given the power to hear evidence itself for the rare cases in which this would be more efficient.’ (IT/14, 17 November 1993, reproduced in: Morris and Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol.II (1995), 509, 556).

²⁷ See Staker and Eckelmans, *article 81*, mn 1. See also although in a different context Sidhwa in *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of Judge Sidhwa, Appeals Chamber, 2 October 1995, paras. 121–123 and 124 (4).

²⁸ *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, paras. 7–16.

²⁹ See rule 150(4) RPE.

11 With respect to **sentencing**, the Appeals Chamber has essentially the same remedies as with respect to the verdict. It would usually fully reverse the sentencing decision without any further amendment, if the conviction decision was reversed and the accused acquitted. Article 78 para. 3 provides that, where a person is convicted of more than one crime, the Trial Chamber shall pronounce a separate sentence for each crime, as well as a joint sentence specifying the total period of imprisonment. In cases where one or more convictions are reversed on appeal, but other convictions stand, or where convictions were amended,³⁰ it may be necessary to determine whether this has any impact on the joint sentence, i. e. in terms of article 83, para. 3, whether the sentence is disproportionate due to the amendments or partial reversals of underlying convictions. Beyond that, even where the Appeals Chamber finds certain errors in the Trial Chamber's factual findings but nevertheless confirms the conviction as a whole, the Appeals Chamber may have to determine the impact of such errors on the sentence imposed. Conversely, where the Appeals Chamber reverses acquittals pronounced by the Trial Chamber in relation to one or more crimes, it will be necessary to determine the sentence for each of those crimes, as well as to consider whether these additional convictions have any impact on the joint sentence.

Sub-paragraph (a) clarifies that the Appeals Chamber may also amend a sentence, as the *ad hoc* tribunals did in many appeal judgments. Read together with paragraph 3, the Appeals Chamber will arguably amend a sentence by varying it, but only if it finds the sentence to be disproportionate to the crime. Accordingly, despite determining that the Trial Chamber erred in certain respects, the Appeals Chamber may confirm the sentence imposed if that sentence is ultimately not disproportionate. The Appeals Chamber may also determine that varying the sentence may not be the appropriate remedy and may accordingly **remand** that matter to a Trial Chamber for further sentencing proceedings. There are precedents for such a course of action at the ICTY and ICTR³¹. The relationship between the power to 'order a new trial' and to 'remand' a factual issue to the original Trial Chamber has not yet been addressed by the ICC Appeals Chamber and will depend on how sub-paragraph (b) is interpreted; that is whether it is understood as exclusively referring to the 'trial' as a whole and not also separately to a sentencing hearing³².

12 While not directly mentioned, paragraph 2 is only directly applicable to appeals under article 81, paras. 1 and 2³³. Rule 158(1) RPE is the parallel provision for **appeals under article 82**, paras. 1 and 2 (as well as article 81, para. 3(c)(2)). Rule 153(1) RPE is the parallel provision for appeals under article 82 (4) of the Statute. These provisions set out the power to confirm an appealed decision but do not specifically provide as a remedy the ordering of a new trial before a different Trial Chamber (i. e. in the context of article 82 appeals, ordering new proceedings before a different Pre-Trial or Trial Chamber). That this power is not specifically mentioned might be most relevant to those decisions appealable under article 82 that are not purely of an interlocutory character, such as decisions on admissibility or jurisdiction as well as to the reparation order.

³⁰ *Krstić* Appeal Judgment, IT-98-33-A, 19 April 2004, paras. 266–275.

³¹ Sentencing was remitted to a Trial Chamber in *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, paras. 710–713 and disposition, paras. 2–4; *Tadić* Appeal Judgment, IT-94-1-A, 15 July 1999, paras. 27–28, 327 (3) and (6); *Čelebići* Sentencing Appeal Judgment, IT-96-21-Abis, 8 April 2003, para. 3. Examples of where the Appeals Chamber itself revised the sentence include *Krstić* Appeal Judgment, IT-98-33-A, 19 April 2004, para. 266; *Prosecutor v. Blaškić*, IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 680; *Aleksovski* Appeal Judgment, IT-95-14/1-A, 24 March 2000, paras. 172–173; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, IT-98-34-A, Judgment, Appeals Chamber, 3 May 2006, para. 632.

³² Where limited issues are remanded to the Trial Chamber, the Trial Chamber has no power to go beyond determining those limited issues, and cannot conduct a new trial: *Čelebići* Sentencing Appeal Judgment, IT-96-21-Abis, 8 April 2003, para. 17.

³³ See *Lubanga* OA 3 Judgment, ICC-01/04-01/06-568 OA3, 13 October 2006, (available under <http://www.legal-tools.org/doc/7813d4/>), paras. 15–18.

The Appeals Chamber, in reversing decisions appealed pursuant to article 82, para. 1, often³⁴ **remands** the matter to the first-instance chamber for it to apply the interpretation of the law as corrected by the Appeals Chamber to the concrete facts of the case. In conducting such proceedings, the first-instance Chamber needs to hear at times additional submissions from the parties and participants. While this remedy is not expressly foreseen in the legal texts, it is often a necessary addition to the power to reverse the impugned decision. This is arguably different from article 81, para. 1 appeals because the full reversal of a conviction entails acquittal, which is pronounced by the Appeals Chamber³⁵. The reversal though of an interlocutory decision without substitution may leave a gap in the proceedings if the proceedings were triggered by applications that would otherwise remain unresolved.

Where the appeal is raised only by or for the benefit of the convicted person, the last sentence of para. 2 clarifies that the conviction or sentence cannot be amended to his/her detriment. This incorporates the prohibition of a *reformatio in peius*, which is by reference to the principle of fairness also applied by the *ad hoc* tribunals. The ICTR Appeals Chamber held that this prohibition extends to the outcome of a re-trial if chosen as a remedy by the Appeals Chamber³⁶. According to the wording of this provision and also in line with the jurisprudence of the *ad hoc* tribunals, this prohibition does not apply if the Prosecutor also appeals. It may be mentioned in this context that Judge Pocar of the ICTY/ICTR Appeals Chambers has consistently held that imposing an additional or different conviction or higher sentence on appeal (or upon revision), usually on the basis of the Appeals Chamber's own assessment of the evidence, violates the right of the convicted person to appeal such a decision³⁷.

Detecting a *reformatio in peius* is usually straightforward with respect to sentencing, especially in the context of the ICC because article 78, para. 3 requires imposing a sentence for each crime as well as a joint sentence. Interpreting article 83, para. 3 in favour of the convicted person would arguably require applying this prohibition to each of the individual sentences and not only to the joint sentence. It is more difficult to detect whether a conviction to be entered on appeal is more detrimental than before, because the conviction decisions of international criminal tribunals often only contain a generally formulated operative part. Considering whether a conviction has become more detrimental to the convicted person solely on the basis of whether the operative part of a conviction decision has changed, might arguably not be sufficient for giving full protection to the rights of the convicted person on appeal. Rather, it might occasionally be necessary to consider in detail the findings of the Trial Chamber and compare them to those of the Appeals Chamber. Evidently, this comparison would be facilitated if the operative parts of conviction decisions and consequently of appeals judgments mirrored the detail required of charges laid against the convicted person and were accordingly more comprehensive³⁸.

³⁴ But see an example for a reversal without explicitly remanding the matter to the Trial Chamber: *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1386 OA5 OA6, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission of evidence of materials contained in the prosecution's list of evidence', 3 May 2011, para. 82; *Prosecutor v. Thoams Lubanga Dyilo*, ICC-01/04-01/06-2583 OA17, Judgment on the appeal of Prosecutor against the oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo, 8 October 2010, para. 27; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205 OA15 OA16, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', 8 December 2009, para. 112; see also Staker and Eckelmans, *article 81*, mn 38.

³⁵ See *Prosecutor v. Momčilo Perišić*, IT-04-81-A, Judgment, Appeals Chamber, 28 February 2013, ('Perišić Appeal Judgement') para. 122; *Gotovina and Markač Appeal Judgement*, IT-06-90-A, 16 November 2012, para. 158.

³⁶ *Muvunyi Appeals Judgement*, ICTR-2000-55A-A, 29 August 2008, para. 170, see also fn 382; it is noteworthy that the Appeals Chamber did not include this limitation in the operative part of the judgment but solely in the reasoning.

³⁷ See *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, IT-95-13/1-R.1, Review Judgement, Appeals Chamber, 8 December 2010, Partially Dissenting Opinion of Judge Pocar, paras. 1–13.

³⁸ While at the *ad hoc* tribunals the indictments are moulded in rather specific counts, this is more difficult e.g. at the ECCC that bases the trials on indictments contained in a judicial Closing Order or at the ICC where

III. Paragraph 3

- 14 Para. 3 is dealing with sentencing appeals and connects the ground of appeal in article 81, para. 2(a) with the standard of review and powers of the Appeals Chamber as laid down in article 83, para. 2. See Staker and Eckelmans, *article 81*, mn 64–68.

IV. Paragraph 4

- 15 Para. 4 stipulates that the ‘judgement’³⁹ of the Appeals Chamber needs to be taken by the majority of the Appeals Chamber’s judges and be delivered in open court. It further requires a reasoned judgment and sets out that the judgment “shall” contain the different views of the judges, but also allows for separate or dissenting opinions on questions of law. This provision is applicable to appeals under article 82 by virtue of rules 153(2) and 158(2) RPE⁴⁰.
- 16 The ILC Draft Statute did not provide for dissenting or separate opinions in the Appeals Chamber⁴¹. While some members of the ILC considered the possibility of dissenting or separate opinions ‘essential with respect to appellate decisions which deal with important questions of substantive and procedural law’⁴², the majority did not agree, apparently partly out of concern that they could undermine the authority of the Court and its judgments⁴³. Differences of opinion were also reflected in the 1996 Preparatory Committee Report⁴⁴. The principle of majority decisions was subsequently accepted, although the 1998 Preparatory Commission Report included an additional requirement in square brackets that the judges ‘shall attempt to achieve unanimity’, failing which a majority vote would be taken⁴⁵. This requirement was ultimately retained for Trial Chambers (article 74 para. 3), but, in cases where there is no unanimity, the Trial Chamber must still issue only one decision, which contains the views of both the majority and the minority (article 74 para. 5). Article 83 para. 4 imposes a similar requirement upon the Appeals Chamber, but adds that a judge of the Appeals Chamber may deliver a separate or dissenting opinion on a *question of law* as opposed to questions of *fact*⁴⁶.

It is the practice of the ICC Appeals Chamber that **separate and dissenting opinions** are delivered on all kinds of questions and in different manners, be it in relation to the entire appeal, i. e. as a completely separate opinion, or as an opinion directed only to one specific issue. They are also given on procedural decisions. Contrasting views on a subject have rarely

indictments (documents containing the charges) are not always formulated by counts and are subject to the confirmation of the Pre-Trial Chamber, but see recently *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-186, Decision on the confirmation of charges against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014, (available under <https://www.legal-tools.org/fr/doc/0536d5/>), paras. 115–119, 183–194; on the specificity of indictments generally see Jordash and Coughlan, *The right to be informed of the nature and cause of the charges: A potentially formidable jurisprudential legacy*, in: Darcy, Powderly, *Judicial creativity at the International Criminal Tribunals* (2010), 286.

³⁹ In the practice of the Appeals Chamber the term ‘judgment’ is used instead of the term ‘judgement’. Accordingly, reference is made to ‘judgment’.

⁴⁰ The respective rules state that the judgment shall be ‘delivered in accordance with article 83, paragraph 4’. This reference is arguably best interpreted as not only referring to the delivery in court but also to the presentation of the judgment, i. e. reasoning and separate and dissenting opinions.

⁴¹ 1994 ILC Draft Statute with commentaries.

⁴² *Ibid.*

⁴³ *Ibid.*, 122, 127.

⁴⁴ Report of the Preparatory Committee on the establishment of an International Criminal Court, A/51/22, 297 (available under <http://www.legal-tools.org/doc/e75432/>).

⁴⁵ Report of the Preparatory Committee on the establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, 152 (available under http://www.legal-tools.org/uploads/tx_tpd/ doc21486.pdf).

⁴⁶ See Brady and Jennings, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (2001), 301.

been included into the main body of the judgment or decision⁴⁷. They were usually annexed to the decision or judgement, be it in at the same time as the majority decision or with some delay. This is in line with the practice followed by other tribunals.⁴⁸ Article 83, para. 4 could be read as requiring the Appeals Chamber to always include majority and minority views in the main body of the judgement, because of the use of the term ‘shall’. Nevertheless, annexing the opinions to the judgment could be considered as fulfilling this requirement, on the basis that the provision aims at ensuring that such views be disclosed to the parties and the public including the legal community.

Article 74, para. 5 regulating the delivery of the Trial Chamber’s verdict does not mention separate and dissenting opinions but only the requirement (‘shall’) to include diverging views into the decision. According to the drafting history, this was supposed to exclude separate and dissenting opinions.⁴⁹ Nevertheless, in practice, the views of the minority are not included in the main body of the decisions but are annexed thereto as separate and dissenting opinions. In addition, without any specific provision regulating the matter, ICC Trial and Pre-Trial Chambers include minority views in separate or dissenting opinions that are annexed to any kind of decision⁵⁰.

Reference is made in this respect to article 21, para. 2 that does not adopt the *stare decisis* principle, but leaves it within the discretion of the Court to ‘apply principles and rules of law as interpreted in its previous decisions’. The ICC Appeals Chamber as well as the first-instance Chambers have relied on their own jurisprudence as well as on that of other Chambers to the extent that first-instance decisions were not reversed by the Appeals Chamber. *Pikis* argues that, in relying on the interpretation given in ‘previous decisions’, reference can be made not only to separate opinions, but also, insofar as reason requires, to dissenting opinions⁵¹. It can be added that, as long as different views are not yet directly included in the main body of the judgments and decisions, thereby directly juxtaposing the available arguments, different views that judges hold should be expressed in separate or dissenting opinions in order to enrich the **emerging jurisprudence** of the Court and to contribute to the development of the law generally⁵². As a further point it is noted that article 21, para. 2 does not relate to the factual findings and conclusions of another Chamber⁵³.

Paragraph 4 makes it abundantly clear that **reasoning** of an Appeals Chamber judgment is an important part of the Court’s administration of justice. However, this does arguably not require the Appeals Chamber to provide full reasons or discuss the merits of each argument of the parties and participants. As referred to above in *Staker and Eckelmans*, article 81, mn 24, 28–31, arguments may be dismissed without addressing their merits. Apart from rejecting submissions for such reasons, the Appeals Chambers usually address all arguments of the parties and provide reasons for their findings. As an aside, in the *Lubanga* Appeal Judgment,

⁴⁷ An explicit example for such a course of action can be found in: *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-, Reasons for ‘Decision of the Appeals Chamber on the Defence application ‘Demande de suspension de toute action ou procedure afin de permettre la désignation d’un nouveau Conseil de la Défense’ filed on 20 February 2007’, Appeals Chamber, 23 February 2007, paras. 4–5 (available under <https://www.legal-tools.org/doc/67912e/>).

⁴⁸ Jorgesen and Zahar in: G. Sluiter et al.(eds), *International Criminal Procedure* (2014), 1161–1163, 1196

⁴⁹ Brady and Jennings, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (2001), 301.

⁵⁰ It is the recent practice of the Court to include separate and dissenting opinions as real annexes to the decisions/judgments (separate documents with separate page numbers, Anx1, Anx2 etc.).

⁵¹ *Pikis*, *The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, (2010) 86–87, but see Baker and Greenwood, 7 No.1 *DispRes* 31.

⁵² See also Webb, *International Judicial Integration and Fragmentation* (2013)192–198; Rasmussen and Rasmussen, 14 *GLJ* 1373; Jorgensen and Zahar in: G. Sluiter et al. (eds), *International Criminal Procedure* (2014), 1196. See also generally on dissenting and separate opinions Smith, 24 *YaleJL&Human*. 507 generally on article 21(2), see *Staker and Eckelmans*, article 81, mn. 76–83; de Guzmán, article 2 mn. 43–47.

⁵³ See also *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98032/1-A, Judgement, Appeals Chamber, 4 December 2012, para. 260, accepting that two triers of fact can come to different reasonable conclusions.

the ICC Appeals Chamber did not set out in detail all submissions of the parties and participants⁵⁴, a deviation from its practice in article 82 appeals, but a course similar to that taken by the *ad hoc* tribunals.

- 18 It is the practice of the Appeals Chamber that final as well as article 82 appeal judgments have been **delivered in open court** with only a few exceptions with respect to article 82 appeal judgments⁵⁵.

V. Paragraph 5

- 19 Para. 5 permits the Appeals Chamber to **deliver** its judgment in the absence of the person acquitted or convicted. This paragraph can be contrasted with article 76, para. 4, that is not permissively formulated, that provides that the sentence of the Trial Chamber shall be pronounced 'wherever possible, in the presence of the accused'. It may be concluded from those different formulations that under article 76, para. 4, in a case where the accused is temporarily prevented from attending proceedings, for instance by illness, the pronouncement of sentence would be adjourned until the accused is able to be present. Under article 83, para. 5, there is a presumption that the delivery of judgement would go ahead under such circumstances. Thus, there is no impediment to a judgment on appeal being pronounced in the absence of an acquitted person who, for instance, left the host state. On the other hand, it is within the Appeals Chamber's discretion to require the presence of the convicted or acquitted person. In exercising its **discretion**, the Appeals Chamber will need to take into account the right of the accused to be present during his trial (Article 67, para. 1(d)).
- 20 Para. 5 is not made applicable to **appeals under article 82**, probably due to the diversity of the matters that can be brought before the Appeals Chamber under this provision, which makes regulating presence of specific persons or parties impractical. Whether the suspect or accused or other parties and participants should be present would arguably be determined on the basis of the law applicable to the proceedings appealed from. The requirement for the accused to be present during the trial laid down in article 63, para. 1 of the Statute and his/her corresponding right to be present stipulated in article 67, para. 1(d) arguably extend to the delivery of judgments arising from a decision rendered during the trial hearing.⁵⁶ Apart from that, the Appeals Chamber, in deciding whether to deliver judgment in the absence of the suspect or accused, needs to primarily weigh his/her right to be present against the need to conclude the interlocutory appeal proceedings expeditiously⁵⁷.

C. Special remarks

- 21 The heading of article 83 suggests that it addresses 'Proceedings on appeal'. Except for clarifying in para. 1 that the Appeals Chamber has the powers of the Trial Chamber, this provision regulates primarily the remedies available to the Appeals Chamber in case of a

⁵⁴ See *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 15.

⁵⁵ See e.g. *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-323 OA, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release', 16 December 2008 (available under <https://www.legal-tools.org/fr/doc/5a1931/>), (*inter alia* because of the court recess – explanation given in *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-324 OA, Order concerning notification by way of personal service, Appeals Chamber, 16 December 2008, (available under <https://www.legal-tools.org/doc/9a053b/>); *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1937-Red2 OA 9, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled 'Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011', Appeals Chamber, 23 November 2011, fn. 129 (available under <https://www.legal-tools.org/doc/0195e1/>) (*inter alia* because of the confidential character of the decision, the Appeals Chamber thereby indicating that the requirement to deliver judgment in open court derives from the principle of the publicity of the proceedings).

⁵⁶ See article 63 and rules 134bis and *ter* RPE.

⁵⁷ See rule 156(4) RPE.

successful appeal as well as matters relevant to the content and delivery of judgment. Final **appellate proceedings** are addressed in more detail only in the Rules and the Regulations, in particular in rules 150 to 152 RPE and regulations 57 to 63 RoC. These special remarks concentrate on the main features of final appellate proceedings on the basis of the first article 81 appeal proceedings in the cases *Prosecutor v. Thomas Lubanga Dyilo* and *Prosecutor v. Mathieu Ngudjolo Chui*. While the rules and regulations are also applicable to appeal proceedings triggered by appeals pursuant to article 82, para. 4, the focus of the below discussion lies on appeals under article 81, paras. 1 and 2.⁵⁸

I. Standing on appeal

According to article 81, paras. 1 and 2, the Prosecutor and the convicted person may appeal a decision under articles 74 and 76. They are also the parties to the appeal proceedings. 22

If an appellant claims to be unfit to participate, he/she bears the burden of proving such **unfitness** by a preponderance of the evidence⁵⁹. The ICTY Appeals Chamber held that **unfitness on appeal** is determined according to the same criteria as those applicable on trial. It stressed, however, that it might be sufficient for the appellant to understand the “essentials” of the appeal, stipulating that it is the role of defence counsel to process the wealth of complex information inherent in international criminal proceedings and to assist the client to meaningfully participating in appellate proceedings⁶⁰. 23

As much as international criminal proceedings cannot commence against a **deceased person**, they usually end when the person subject to investigation and prosecution dies.⁶¹ Trial or pre-trial proceedings pending before the ICTY, ICC and ECCC were terminated because of the death of the defendants, as soon as the death was confirmed.⁶² At the two occasions that a convicted person died after the initiation of the appeal proceedings, the ICTY Appeals Chamber terminated the appeal proceedings, but found the conviction to be final, on the basis that the presumption of innocence is not anymore applicable to a person who was convicted on first instance⁶³; a course of action only rarely applied in domestic criminal proceedings⁶⁴. 24

II. The appeal and its discontinuance

The appeal⁶⁵ must be filed within 30 days after the decisions under articles 74 and 76 were notified to the party (rule 150(1) RPE and the document in support of the appeal within 90 days of such notification. The **time limits** are calculated pursuant to regulation 33 RoC. It is recalled in this context that the decision under article 76 is usually rendered in a separate judgment, because the Trial Chamber is obliged to hold a sentencing hearing after the conviction decision has been delivered, when a party so requests (Article 76, para. 2)⁶⁶. 25

⁵⁸ See below Nerlich, *Article 82*, mn 25–27.

⁵⁹ *Prosecutor v. Popović*, IT-05-88-A, Public redacted version of 30 November 2012 Decision on request to terminate appellate proceedings in relation to Milan Gvero, 16 January 2013, para. 21; see rule 135 RPE.

⁶⁰ *Prosecutor v. Popović*, IT-05-88-A, Public redacted version of 30 November 2012 Decision on request to terminate appellate proceedings in relation to Milan Gvero, 16 January 2013, para. 22.

⁶¹ Elberling, *The Defendant in International Criminal Proceedings* (2012), Part I (1) (A).

⁶² *Ibid.*

⁶³ *Prosecutor v. Rasim Delić*, IT-04-83-A, Decision on the outcome of the proceedings, ICTY Appeals Chamber, 29 June 2010, paras. 5–17; *Prosecutor v. Vujadin Pović et al.*, IT-05/88-A, Decision terminating appellate proceedings in relation to Milan Gvero, ICTY Appeals Chamber, 7 March 2013, paras. 5, 6.

⁶⁴ Elberling, *The Defendant in International Criminal Proceedings* (2012), Part I (1) (A) (II), (III).

⁶⁵ See Boas et al., in: Sluiter et al. (eds) *International Criminal Procedure. Principles and Rules* (2013), 939, 956, giving an explanation why the term ‘appeal’ should be used instead of the term ‘notice of appeal’; see also generally on the formalities in appeals, Eckelmans in: Stahn and Sluiter, *The Emerging Practice of the International Criminal Court*, 527, 528.

⁶⁶ See Schabas and Ambos, *article 76* mn. 3.

- 26 At the ICTY/ICTR, the **notice of appeal** must contain the grounds of appeal and the relief sought by the appellant (rule 108 ICTY RPE). The ICC does not require the parties to set out the grounds of appeal but solely the relief sought and an indication as to whether the appeal is directed against the whole decision or only part thereof (reg. 57 RoC).
- 27 It is noteworthy that rule 154 RPE relevant to article 82 appeals does not provide for an **extension of time** to file the appeal, calling in question the applicability of regulation 35 RoC to such documents. The Appeals Chamber has also regularly dismissed requests of appellants for an extension of time to file such appeals⁶⁷. Rule 150(2) RPE, on the other hand, explicitly allows the Appeals Chamber, if good cause is shown, to extend the time limit for filing a final appeal. While this extension is solely with the Appeals Chamber's sphere, Trial Chamber I held in the *Lubanga* proceedings that the decision under article 74 be deemed considered notified at the time of the notification of the translation of the decision into French⁶⁸. While the verdict was rendered in English on 14 March 2012, the French translation was filed on 31 August 2012⁶⁹, which meant that the appeal could only be filed thereafter⁷⁰. In this context, it should be noted that the Appeals Chamber, upon an application for extension of time and good cause being shown, usually provides leeway for translation, in the sense that it makes sure that the content of the relevant decision or document is conveyed to the accused or lawyers; apparently however, it did not yet extend the start of a time limit for the filing of documents to the day of the notification of the fully revised translation of a document or decision⁷¹.
- 28 During the 30-day period foreseen for the filing of the appeal, the decisions under articles 74 and 76 are **not yet final and cannot be executed**, as provided for in rule 150(4) RPE and article 81, para. 4, respectively. These effects are perpetuated by a party filing an appeal. They continue for the duration of the appeal proceedings. Where only the conviction is appealed and not the sentence, arguably the same applies, because a sentence can only be enforced if the person is held guilty for the underlying acts. This is evidenced by e.g. the procedure foreseen in article 81, para. 2(c).
- 29 The appeal is filed before the Appeals Chamber. It is noted that in recent years, the Presidency often needed to **temporarily attach** a pre-trial or trial judge to the Appeals Chamber, because one or two of the judges had worked on the same case in pre-trial proceedings⁷².
- 30 Pursuant to rule 152 RPE, an appeal can be **discontinued** at any time before the delivery of judgment. A notice of discontinuance needs to be filed without conditions, as clarified by the Appeals Chamber in article 82 proceedings⁷³. In the proceedings *Prosecutor v. Germain Katanga*, both parties discontinued their appeals soon after the filing of the notices of appeal⁷⁴.

⁶⁷ See e.g. *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-189 OA, Decision on the 'Requête aux fins de suspension des délais prévus par la Règle 154(1) du Règlement de procédure et de preuve et par la Norme 64(5) du Règlement de la Cour jusqu'à la fin des vacances judiciaires, fixée au lundi 6 août 2012' 11 July 2012.

⁶⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Decision, 15 December 2011; the Trial Chamber also held that, if Mr Lubanga were acquitted, the time limit for the Prosecutor would start to run with the delivery of the English decision.

⁶⁹ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, Annex 3, note 1.

⁷⁰ See Boas et al., in: Sluiter et al. (eds) *International Criminal Procedure. Principles and Rules* (2013), 939, 957, calling this approach of Trial Chamber I into question.

⁷¹ *Prosecutor v. Callixte Mbarushimana*, ICC-01/01-01/10-497 OA4, Decision on Mr Mbarushimana's request for time extension, 9 March 2012, paras 5,6; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12-130, Decision on Mr Ngudjolo's second request for translation and suspension of the time limit, 7 August 2013, para. 13; ICC-01/04-02/12-60, Decision on Mr Ngudjolo's request for translation and suspension of the time limit, 11 April 2013.

⁷² See e.g. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2938 A4 A5 A6, Decision replacing a judge in the Appeals Chamber, Presidency, 11 October 2012 (available under <http://www.legal-tools.org/doc/9f1e05/>).

⁷³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-176 OA2, Decision on Thomas Lubanga Dyilo's Brief Relative to Discontinuance of Appeal, Appeals Chamber, 3 July 2006, para. 14.

⁷⁴ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3497, Defence notice of discontinuance of Appeal against the 'Jugement rendu en application de l' article 74 du Statut' rendered by Trial Chamber II on 7 April 2014,

Where the Prosecutor **appeals on the convicted person’s behalf**, rule 152(2) RPE provides the opportunity for the person to continue the appeal even though the Prosecutor discontinued the appeal and is not, anymore, be involved in the appeal proceedings. The Regulations of the Court do not specifically address the procedural scheme applicable to appeals of the Prosecutor on behalf of the convicted person. Surely, in such proceedings the Prosecutor would not, at the same time as appearing on behalf of the convicted person, also appear as a respondent. In addition, the Appeals Chamber might wish to hear the views of the convicted person too, but also not as a respondent. However, he or she might possibly fall within the realm of a “participant”, as referred to in reg. 59 RoC, a matter that may require procedural guidance from the Appeals Chamber when it arises.

III. Document in support of the appeal and response to the document in support of the appeal

The document in support of the appeal as well as the response thereto should not exceed 100 pages pursuant to reg. 58(5), 59(2) RoC⁷⁵; an extension of this page limit may be sought pursuant to reg. 37(2) RoC⁷⁶. Upon notification of the document in support of the appeal (within 90 days of the notification of the impugned decision⁷⁷), the respondent has another 60 days to file the response thereto (reg. 59 RoC). Reg. 58 RoC requires the appellant to set out clearly each ground of appeal and reasons in support thereof. Adhering to the **format** provided for this regulation assists an appellant in clearly defining the alleged error and in complying with the related **substantiation** requirements as discussed above in Staker and Eckelmans *article 81*, mn 24, 28–31. The respondent needs to follow the same format in developing his/her arguments (reg. 59 RoC).

IV. Reply

Pursuant to reg. 60 RoC, the Appeals Chamber needs to issue an order allowing a participant to file a reply. Although not specifically regulated, this power can be triggered by an application to that effect⁷⁸. According to reg. 60 RoC, the reply should not exceed 50 pages. However, the applicant should best indicate the required space and time frame in the application, because the Appeals Chamber may keep both to a minimum⁷⁹. This scheme is different from that applicable to appeals under article 82 that does not allow for the filing of

25 June 2014; ICC-01/04-01/07-3498, Notice of discontinuance of the Prosecution’s Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga, 25 June 2014.

⁷⁵ Note the Appeals Chamber’s practice requiring the parties to include the following statement in all respects with the requirements of regulation 36 of the Regulations of the Court; see *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565 (OA 6), Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Abdulla Al-Senussi’, 24 July 2014, para. 32; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1598 OA 7 OA 8, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’, 9 October 2014, para. 26.

⁷⁶ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2946 A5, Decision on Mr Lubanga’s request for an extension of the page limit, 28 November 2012 (available under <http://www.legal-tools.org/doc/5d6c5e/>).

⁷⁷ See mn 25.

⁷⁸ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2979 A5 A6, Requête de la Défense aux fins aux fins de solliciter l’autorisation de déposer une réplique, 15 February 2013 (available under <http://www.legal-tools.org/doc/f76f22/>).

⁷⁹ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2982 A5 A6, Order on the filing of a reply under regulation 60 of the Regulations of the Court, 21 February 2013, (available under <http://www.legal-tools.org/doc/43c92d/>).

a reply⁸⁰. In article 82 proceedings, the Appeals Chamber applies reg. 28 RoC, allowing it to seek further submissions on a certain issue. The participants may trigger this power by filing an application to that effect⁸¹.

- 34 In the *Lubanga* appeal proceedings, the Prosecutor requested leave to respond to certain points in the reply of Mr Lubanga. The Appeals Chamber provided for such an opportunity at the oral hearing⁸².

V. Victim participation in appeals under article 81

- 35 The Appeals Chamber's approach to victims' participation in appeals under article 81 has differed in several aspects from its approach in appeals under article 82. In the *Lubanga* final appeal proceedings, it did not await an application of victims to participate, but issued a decision on victim participation soon after having received the documents in support of the respective appeals⁸³. It held in that decision:

“The Appeals Chamber notes that under regulation 86 (8) of the Regulations of the Court, “[a] decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1”. The Appeals Chamber notes that Mr Lubanga was convicted on all charges brought against him and that his appeal against the Conviction Decision is directed against the entirety of the decision. Therefore, the Appeals Chamber finds that the 120 victims who participated in the trial proceedings and whose right to participate in the proceedings was not withdrawn may participate in the appeal proceedings against the Conviction Decision, as their personal interests are affected by the appeal in the same way as during trial. For the same reason, the 120 victims who participated in the sentencing proceedings may participate in the appeal proceedings against the Sentencing Decision.”⁸⁴

- 36 While in appeals under article 82, the Appeals Chamber's majority found that reg. 86(8) RoC is not applicable⁸⁵ – or at least only to a limited extent⁸⁶ – the Appeals Chamber has clarified by this unanimous decision that it applies to appeals under article 81, paras. 1 and 2. This decision simplifies the final appeal proceedings, because it allows the Appeals Chamber to rely on the Trial Chamber's decisions on victim participation. The Appeals Chamber needs to direct its attention primarily to the question whether those victims who participated in the trial proceedings still fall within the scope of the respective appeals.

- 37 In the *Ngudjolo* appeals proceedings, the Appeals Chamber issued a decision to the same effect⁸⁷. Among the victims who participated on appeal, two were anonymous to the

⁸⁰ See Eckelmans in: Stahn and Sluiter (eds.) *The Emerging Practice of the International Criminal Court* (2009), 527, 547.

⁸¹ *Ibid.*

⁸² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3002 A5 A6, Decision on the ‘Prosecution’s request to strike Thomas Lubanga’s Reply or, alternatively, for leave to respond to its new argument’, 26 March 2013 (available under <http://www.legal-tools.org/doc/3898da/>); *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3068 A4 A5 A6, Further order regarding the conduct of the hearing of the Appeals Chamber, 25 March 2014, para. 2(d)(ii).

⁸³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2951 A4 A5 A6, Decision on the participation of victims in the appeals against Trial Chamber I’s conviction and sentencing decisions, 13 December 2012 (available under <http://www.legal-tools.org/doc/9551a4/>).

⁸⁴ *Lubanga* Victims Decision, ICC-01/04-01/06-2951 A4 A5 A6, 13 December 2012, para. 3.

⁸⁵ See the first decision on victim participation, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-824 OA7, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I 13 February 2007, paras. 37–49 and the Dissenting Opinion of Judge Song thereto; see Eckelmans in: Bonacker and Safferling (eds) *Victims of international crimes: An interdisciplinary discourse* (2013), 189, 217–219; reg. 86(8) RoC provides that, “[a] decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1”.

⁸⁶ It is noteworthy that the Appeals Chamber does not consider in article 82 appeal proceedings whether the victims are falling within the scope of rule 85 RPE, but that it relies on the Pre-Trial or Trial Chamber’s assessments in that respect.

⁸⁷ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-30 A, Decision on the participation of victims in the appeal against Trial Chamber II’s ‘Jugement rendu en application de l’article 74 du Statut’, 6 March 2013.

acquitted person. In specifically referring to the limited scope of such participation, the Appeals Chamber allowed them to participate in the proceedings⁸⁸.

A specific feature of the *Lubanga* appeal proceedings was that the Registry brought to the Appeals Chamber's attention that the Trial Chamber had omitted to rule on certain victim applications⁸⁹. The Appeals Chamber held that this had happened by no fault of the applicants and found it to be in the interests of justice to consider their applications, putting itself in the shoes of the Trial Chamber and basing its decision on the Trial Chamber's jurisprudence⁹⁰. Accordingly, it did not itself establish any standards for deciding first-hand on victim applications.

While some of the victims' legal representatives' observations were challenged by the defence as not falling within the scope of the victims' personal interests, the Appeals Chamber did not find it necessary to explicitly rule on those challenges, but held in the *Lubanga* Appeal Judgment that it has only taken the victims' observations into account insofar as they related to their personal interests⁹¹. In the *Ngudjolo* Appeal Judgment, the Appeals Chamber held that it did not address errors alleged exclusively by victims⁹².

In the first article 81 appeals, victims' legal representatives were allowed to participate at the appeals hearings and to advance closing statements; however they were not allowed to question the witnesses heard by the Appeals Chamber⁹³.

VI. Hearing

The Appeals Chamber held appeals hearings in the first final appeal proceedings. It found, however, that calling such a hearing is within its **discretion**, although the Prosecutor had argued that it was mandatory⁹⁴. The hearing in the *Lubanga* proceedings was a combination of an evidentiary hearing and an appeals hearing with closing statements, but also gave the opportunity to the parties to address certain remaining issues that had arisen during the proceedings⁹⁵. In the first reparation appeal proceedings in the *Lubanga* case, the Appeals Chamber did not hold a hearing.⁹⁶

⁸⁸ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-154 A, Decision on further submissions regarding the anonymous victims in the appeal, 11 November 2013, para. 9.

⁸⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2977 A4 A5 A6, Request for guidance regarding applicants for participation in the appeal phase, Registry, 7 February 2013 (available under <http://www.legal-tools.org/doc/2cde3e/>).

⁹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3026 A4 A5 A6, Decision on the request of the Registrar relating to the transmission of applications for participation in the appeal proceedings and on related issues, 6 May 2013, 3–4 (available under <http://www.legal-tools.org/doc/fe7c39/>); *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3045-Red2, Decision on 32 applications to participate in the proceedings, 27 August 2013, paras. 13–15 (available under <http://www.legal-tools.org/doc/af8699/>).

⁹¹ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 35–36.

⁹² See *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-271-Corr A, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute', 7 April 2015, paras 40–41.

⁹³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3083 A4 A5 A6, Scheduling order and decision in relation to the conduct of the hearing before the Appeals Chamber, 30 April 2014 (available under <http://www.legal-tools.org/doc/ea5495/>); *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-210 A, Order in relation to the conduct of the hearing before the Appeals Chamber, 8 October 2014.

⁹⁴ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-199 A, Scheduling Order for a hearing before the Appeals Chamber, 18 September 2014, paras. 12, 13.

⁹⁵ *Lubanga* Hearing Further Order, ICC-01/04-01/06-3068 A4 A5 A6, 25 March 2014, para. 2(d)(ii); *Lubanga* Hearing Decision, ICC-01/04-01/06-3083 A4 A5 A6, 30 April 2014.

⁹⁶ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3129 A, A2 A3, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012, 3 March 2015.

VII. Appeal proceedings

- 42 The appeal proceedings as such are usually rich on filings⁹⁷, because all matters relevant to the case file can only be addressed to the Appeals Chamber. In the *Ngudjolo* appeal proceedings issues arose that were relevant to Mr Ngudjolo as an individual who was released from ICC detention and stayed in The Netherlands pending his application for asylum⁹⁸. Furthermore, a specific feature of the *Ngudjolo* appeal proceedings was that the Appeals Chamber decided to address on its own motion the issue of witnesses who were held in the ICC's detention centre, ordering their immediate transfer to the Democratic Republic of the Congo (DRC) noting that they have been transferred nearly three years earlier from Congolese detention to the ICC detention centre in order to give testimony before Trial Chamber II⁹⁹.
- 43 In the *Lubanga* appeal proceedings, the Appeals Chamber rejected an *amicus curiae* request under rule 103 RPE, re-iterating that such requests should not contain any substantive observations¹⁰⁰.
- 44 While the legal texts do not explicitly provide for the possibility of a **single judge** in charge of certain procedural issues, it may be considered whether the newly amended rule 132*bis* RPE relevant to the single judge for trial preparation purposes could be applicable on the basis of rule 149 RPE also to appeal proceedings.

VIII. Additional evidence

- 45 Additional evidence is subject of a vast case law of the *ad hoc* tribunals. Accordingly their criteria for admitting **additional evidence** on appeal are well-established¹⁰¹. They are based on rule 115 of the ICTY/ICTR RPE, last amended in 2002 that establishes when the Appeals Chamber may find additional evidence admissible (*lit B*)¹⁰²:

‘If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If

⁹⁷ Note the *Lubanga* appeal proceedings (including filings relevant to article 82(4) appeals) started at consecutive number ICC-01/04-01/06-2943 and ended with the judgments on conviction and appeal at consecutive number 3122; the *Ngudjolo* appeal proceedings started at consecutive number ICC-01/04-01/12-12 and were at the time of the scheduling order for the judgment on appeal at number 257.

⁹⁸ See e.g. *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-74-Red, Decision on Mr Ngudjolo's request to order the Victims and Witnesses Unit to execute and the Host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court, Date of the redacted version: 12 June 2013, paras. 11, 13.

⁹⁹ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-158 A, Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant to article 93 (7) of the Statute, 20 January 2014, paras. 2, 5, 12, 13, 19–31.

¹⁰⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3044 A4 A5 A6, Decision on the application by Child Soldiers International for leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence, 16 August 2013, para. 9 (available under <http://www.legal-tools.org/doc/68b9de/>).

¹⁰¹ See most recently Tochilovsky, *The law and jurisprudence of the international criminal tribunals and courts* (2014), Chapter 16.

¹⁰² The current wording of rule 115 *lit. B* ICTY is the result of an amendment made to the rule in July 2002 (see IT/32/Rev.24), and the wording of rule 115 *lit. B* ICTR is the result of an amendment made in May 2003. Earlier versions of rule 115 ICTY and ICTR provided for the presentation on appeal by a party of ‘additional evidence which was not available to it at the trial’ if the Appeals Chamber ‘considers that the interests of justice so require’. The Appeals Chamber interpreted the ‘interests of justice’ requirement to incorporate three conditions, namely (1) that the evidence is relevant to a material issue, (2) the evidence is credible, and (3) the evidence is such that it would probably show that the conviction or sentence was unsafe (*Kupreškić* Appeal Judgement, IT-95-16-A, 23 October 2001, paras. 52–54, 61–69 (observing, at para. 63, that the second of these requirements ‘is linked to the danger that appellate proceedings can be abused by a party presenting evidence to the appeal body that appears to be relevant to a material issue, but that has not been tested in the crucible of a trial’)).

it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.⁷

Rules 115 *lit.* B ICTY/ICTR RPE enable the Appeals Chambers to consider additional evidence on appeal if they find that the additional evidence ‘was not available at trial’, that it is ‘relevant and credible’, and that it ‘could have been a decisive factor in reaching the decision at trial’. In determining whether these criteria are met, the significance of the additional evidence must be considered in the context of the evidence which was given at trial and of that which was admitted on appeal, and not in isolation¹⁰³. According to the jurisprudence of the *ad hoc* tribunals, the Appeals Chamber ‘maintains an inherent power to admit such evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice’¹⁰⁴. However, if the additional evidence was available at trial or could have been discovered through the exercise of due diligence, the Appeals Chamber has held that the moving party will be required to undertake the additional burden of establishing that the exclusion of the additional evidence on appeal would lead to a miscarriage of justice – that is, it would have affected the verdict¹⁰⁵. The ICTY Appeals Chamber has indicated that these limitations apply only to evidence upon matters relating to a fact or issue that was litigated at the trial (in particular, but not exclusively, a fact or issue relating to the guilt or innocence of the accused), and that, when the Appeals Chamber is hearing evidence which relates to matters other than the issues litigated in the Trial Chamber (such as evidence seeking to establish that one of the judges of the Trial Chamber was disqualified from being a judge or was not impartial), the Appeals Chamber is in the same position as a Trial Chamber¹⁰⁶.

¹⁰³ *Prosecutor v. Radislav Krstić*, IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, Appeals Chamber, ICTY Appeals Chamber, 5 August 2003, (*Krstić* Additional Evidence Decision’) para. 3 (available under <https://www.legal-tools.org/doc/e70877/>); *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Decision on Evidence, Appeals Chamber, ICTY Appeals Chamber, 31 October 2003 (available under <https://www.legal-tools.org/doc/79d5f7/>); *Prosecutor v. Miroslav Kvočka et al.*, IT-98-30/1-A, Decision on Appellants’ Motions to Admit Additional Evidence Pursuant to Rule 115, ICTY Appeals Chamber, 16 February 2004 (available under <https://www.legal-tools.org/doc/cfb240/>); *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Decision on Naletilić’s Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, ICTY Appeals Chamber, 7 July 2005, paras. 11–15 (available under <https://www.legal-tools.org/doc/8ef3ae/>).

¹⁰⁴ *Prosecutor v. Goran Jelišić*, IT-95/10-A, Decision on Request to Admit Additional Evidence, 15 November 2000, 3; see also *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 6 (available under <http://www.legal-tools.org/doc/cdd843/>).

¹⁰⁵ *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Decision on Evidence, ICTY Appeals Chamber, 31 October 2003 (available under <https://www.legal-tools.org/doc/79d5f7/>); *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze’s and the Prosecution’s Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, ICTR Appeals Chamber, 8 December 2006, para. 6 (available under <http://www.legal-tools.org/doc/cdd843/>); *Prosecutor v. Vujadin Popović et al.*, IT-05-88-A, Decision on Vujadin Popović’s Motion for Admission of Additional Evidence on Appeal pursuant to Rule 115, ICTY Appeals Chamber, 20 October 2011, para. 10 (available under <http://www.legal-tools.org/doc/eel184/>).

¹⁰⁶ *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Order on Motion of Appellant, Esad Landzo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, Appeals Chamber, 31 May 2000 (available under <https://www.legal-tools.org/doc/e1dad2/>); *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Order in Relation to Witnesses on Appeal, Appeals Chamber, 19 May 2000 (available under <https://www.legal-tools.org/doc/fe2fb2/>); *Kupreskić Appeal Judgement*, IT-95-16-A, 23 October 2001, paras. 55–57. See also *Prosecutor v. Kambanda*, ICTR-97-23-A, Decision on the Appellant’s Motion for Admission of New Evidence, Appeals Chamber, 13 June 2000 (in which the additional evidence on appeal consisted of oral evidence by the convicted person relevant to the question whether his plea of guilty was voluntary, informed, unequivocal and based on sufficient facts for the crime and his participation in it) (available under <https://www.legal-tools.org/doc/eb90a6/>). The raising of facts or issues before the Appeals Chamber that were not litigated at trial would, however, be subject to the ‘waiver’ principle: see Staker and Eckelmans, article 81, mn 32. Furthermore, in the ICTY and ICTR, the possibility of raising totally new facts on appeal may be limited to facts pertaining to the fairness and correctness of the trial proceedings. In relation to facts bearing on the guilt or innocence of the accused, the Appeals Chamber of the ICTY has indicated that where an applicant seeks to present a totally new fact that was not litigated at trial (as

46 The ICC’s legal framework does not contain a similar provision setting out a standard for admissibility of additional evidence, but only a procedural provision, reg. 62 RoC. However, in the *Lubanga* appeal proceedings, the Appeals Chamber has not only clarified the applicable procedure for additional evidence as well as substantiation requirements for an application to that effect but has also established the criteria for the admissibility of additional evidence.

1. Admissibility criteria

47 The ICC Appeals Chamber has found that the basis for the admissibility criteria of evidence on appeal lies in the ICC’s legal texts and not in the first place in the jurisprudence of the *ad hoc* tribunals¹⁰⁷. Nevertheless, it has acknowledged that it may seek guidance from that jurisprudence insofar as the criteria are similar¹⁰⁸.

48 On the basis of article 83, para 4 and rule 149 RPE, it has found that the criteria laid down in article 69, para. 4 for the admissibility of evidence generally, i. e. relevance, probative value and potential prejudicial effect, are also applicable on appeal. The criterion of ‘relevance’ means in the context of appeal proceedings that the ‘proposed additional evidence must be shown to be relevant to a ground of appeal raised pursuant to article 81 (1) and (2) of the Statute’¹⁰⁹.

49 Noting that article 69, para. 4 is not exhaustive, the Appeals Chamber found additional criteria limiting the admissibility of evidence on appeal in the ‘distinct features of the appellate stage of proceedings’¹¹⁰. On the basis of the ‘corrective nature’ of the proceedings in appeals under article 81, paras. 1 and 2,¹¹¹ and the deferential nature of the Appeals Chamber’s review of the Trial Chamber’s factual assessments, it has established that the evidence must not have been available at trial:

‘... the Trial Chamber is much better positioned to assess a piece of evidence in light of all the other evidence presented at trial than the Appeals Chamber. Accordingly, evidence relevant to a decision pursuant to article 74 (2) of the Statute should, with only limited exceptions, be presented before that decision is taken. The Appeals Chamber therefore considers that allowing the admission of additional evidence on appeal, without further restriction, entails a real risk of litigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial or, with due diligence, could have been produced.

It follows from the above that the Appeals Chamber will generally not admit additional evidence on appeal unless there are convincing reasons why such evidence was not presented at trial, including whether there was a lack of due diligence.’¹¹²

50 In order to meet the requirement that the evidence was ‘not available at trial’, the ICTY Appeals Chamber has held that the party seeking to present additional evidence must demonstrate that his or her counsel exercised **due diligence** in seeking to obtain and present all relevant evidence at trial. This is an aspect of the ‘duty to be reasonably diligent’ imposed upon trial counsel under the Statute and Rules. The duty to act with reasonable diligence has

opposed to additional evidence of a fact that was in issue at trial), the appropriate procedure is to seek review (revision) of the trial judgment, rather than to present additional evidence on appeal (*Prosecutor v. Duško Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998 (‘*Tadić* Additional Evidence Decision’) (available under <http://www.legal-tools.org/doc/834222/>), paras. 30, 32; *Kupreškić* Appeal Judgement, IT-95-16-A, 23 October 2001, paras. 48–49). It is suggested that in the ICC, no such distinction may be made, and that under article 81, additional evidence on appeal may relate either to facts that were litigated at trial or facts that were not, subject to the other requirements for the presentation of additional evidence on appeal: see below Staker and Nerlich, *Article 84*, mn 15; see also *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 61.

¹⁰⁷ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 53.

¹⁰⁸ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 63.

¹⁰⁹ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 54.

¹¹⁰ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 55.

¹¹¹ See *supra* Staker and Eckelmans, *Article 81*, mn 20–27.

¹¹² *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 57, 58.

been held to include making ‘appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber’¹¹³. This means, for example, that where a party experiences difficulty in calling a witness to testify at trial, due diligence will not have been exercised unless that party brought the matter before the Trial Chamber so that the Trial Chamber could consider imposing coercive or protective measures¹¹⁴. The **burden of proof** is on the party seeking to present the additional evidence to show that it should be admitted. The party must provide a reasonable explanation as to why it was not available at trial and as to any efforts he or she may have made to try to adduce it¹¹⁵. However, the ICTY Appeals Chamber has also recognised an **exception** to the requirement that the new evidence ‘was not available’ in cases where ‘gross negligence is shown to exist’ on the part of counsel at trial¹¹⁶.

On the basis that this evidence would have been available at trial, the majority of the ICC Appeals Chamber rejected the admissibility of the additional evidence of two witnesses who appeared on video evidence on which the Trial Chamber relied to determine their age.¹¹⁷

The ICC Appeals Chamber has derived a further admissibility criterion from the character of the appeal proceedings, i.e. that ‘the applicant [must] demonstrate the **impact of the additional evidence**’, in the sense that ‘it must be demonstrated that the additional evidence could have led the Trial Chamber to enter a **different verdict, in whole or in part**’¹¹⁸.

This criterion is very similar to that established by the *ad hoc* tribunals and laid down in rule 115 ICTY/ICTR RPE, i.e. that the evidence could have had an impact on the verdict. This means that it must be demonstrated that the additional evidence – considered in the context of the evidence presented at trial – could lead to the result that the verdict was unsafe¹¹⁹.

Additional evidence may not only relate to ‘material concretely relevant to the guilt or innocence of an accused’ but also to **unfairness** allegations.¹²⁰

Having developed these criteria, the ICC Appeals Chamber has nevertheless retained its **discretion** to admit evidence on appeal by holding:

‘The Appeals Chamber finds that, even beyond those criteria, it enjoys discretion to admit additional evidence, which should be done on a case-by-case basis and in light of the specific

¹¹³ *Tadić* Additional Evidence Decision, IT-94-1-A, 15 October 1998, para. 47.

¹¹⁴ See generally *ibid.*, paras. 36–45, 47, 62; *Kupreškić* Appeal Judgement, IT-95-16-A, 23 October 2001, para. 50.

¹¹⁵ *Tadić* Additional Evidence Decision, IT-94-1-A, 15 October 1998, paras. 52–53; *Semanza v. Prosecutor*, ICTR-97-20-A, Decision, Appeals Chamber, 31 May 2000 (*Semanza* Decision), para. 37 (available under <https://www.legal-tools.org/doc/d38ef3/>). The Appeals Chamber of the ICTY has said that counsel have an obligation to report any difficulties in relation to obtaining evidence to the Trial Chamber as a first step in exercising due diligence, and also as a means of self-protection by creating a contemporaneous record of the difficulty: *Krstić* Additional Evidence Decision, IT-98-33-A, 5 August 2003; see also *Prosecutor v. Krstić*, IT-98-33-A, Decision on Applications for Subpoenas, Appeals Chamber, 1 July 2003, paras. 12–17.

¹¹⁶ *Tadić* Additional Evidence Decision, IT-94-1-A, 15 October 1998, paras. 48–50 (pointing out that counsel may have chosen not to present the evidence at trial because of the litigation strategy or because of the view taken of the probative value of the evidence, and that where counsel decides not to call certain evidence at trial, unless gross negligence is shown due diligence will be presumed), 65, 66 (‘Barring exceptional circumstances, which are not made out in this case, it is difficult to think of circumstances which would show that expert witnesses were not available to be called at trial despite the exercise of reasonable diligence’); *Kupreškić* Appeal Judgement, IT-95-16-A, 23 October 2001, para. 51; *Nikolić v. Prosecutor*, IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, Appeals Chamber, 9 December 2004 (*Nikolić* Additional Evidence Decision), paras. 29–41 (available under <https://www.legal-tools.org/doc/d1a1a9/>).

¹¹⁷ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 74–81; see also Dissenting Opinion of Judge Ušacka, Annex 2, para. 56.

¹¹⁸ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 59.

¹¹⁹ See *Popović et al.* Additional Evidence Decision, IT-05-88-A, 20 October 2011, para. 9: ‘A decision will be considered unsafe if the Appeals Chamber ascertains that there is a realistic possibility that the Trial Chamber’s verdict might have been different if the new evidence had been admitted’; see also Dixon and Khan, *Archbold International Criminal Courts: Practice, Procedure & Evidence* (2013), 538–539.

¹²⁰ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 60, by reference to *The Prosecutor v. Gaspard Kanyarukiga*, ICTR-2002-78-T, Decision on Request to Admit Additional Evidence of 1 August 2008, 30 June 2006, para. 9 (available under <https://www.legal-tools.org/doc/27b6b9/>).

circumstances of each case. In this respect, the Appeals Chamber finds that it is within its discretion to admit additional evidence on appeal despite a negative finding on one or more of the above-mentioned criteria, if there are compelling reasons for doing so.¹²¹

- 56 The formulation chosen is different from the corresponding criterion developed by the *ad hoc* tribunals¹²² and time will show whether these differences have any practical impact. It is noteworthy that the ICTR Appeals Chamber puts a lot of emphasis on the substantiation of this exceptional admissibility requirement:

‘[...] where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that the exclusion of it would amount to a miscarriage of justice. That is, it must be demonstrated that had the additional evidence been adduced at trial, it would have had an impact on the verdict.’¹²³

2. Proceedings relevant to the admissibility of additional evidence

- 57 Reg. 62 RoC sets out some main features of the procedure applicable to an application for additional evidence. It establishes in sub-reg. 1 the **substantiation** requirements. The Appeals Chamber has clarified that, even though not mentioned in this legal provision, all admissibility requirements referred to in the previous section need to be substantiated¹²⁴.

According to reg. 62(2) RoC, the Appeals Chamber may deal with an application for admissibility in **two ways**. Either it may – as at the *ad hoc* tribunals – rule on the admissibility of the additional evidence before adducing the evidence, or it may decide ‘to rule on the admissibility of the additional evidence jointly with other issues raised in the appeal’. In the first article 81 proceedings with additional evidence applications, the Appeals Chamber proceeded according to the second avenue.¹²⁵ In the course of the proceedings, it decided to hear the testimony of two additional witnesses but heard, at the same time, additional arguments on the availability of these witnesses at trial.¹²⁶ In the final judgment, the Appeals Chamber by majority rejected all requests for additional evidence on the basis that they did not meet the admissibility criteria.¹²⁷

- 58 The ICC Appeals Chamber has established that **rebuttal** evidence only needs to be considered once the ‘underlying proposed additional evidence is admitted into evidence’¹²⁸. This is similar to the *ad hoc* tribunals’s jurisprudence. Regarding the standard for admissibility, there is no need for a party seeking to present rebuttal material to show that the material was unavailable at trial or that it could have affected the verdict of the Trial Chamber. Instead, the ICTY/ICTR Appeals Chambers held that the ‘rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber and, as such, has a different test of admissibility from additional evidence under Rule 115’¹²⁹.

¹²¹ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 62.

¹²² See mn 45.

¹²³ *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 6 (available under <http://www.legal-tools.org/doc/cdd843/>); *Popović et al.* Additional Evidence Decision, IT-05-88-A, 20 October 2011, para. 10.

¹²⁴ See *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 59.

¹²⁵ See *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 39, 80; Annex 3 see also Dissenting Opinion of Judge Ušacka, Annex 2, paras. 53–56, paras. 5, 16–18.

¹²⁶ See *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 66, 80.

¹²⁷ See *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 81, 95, 105, 113.

¹²⁸ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 64.

¹²⁹ *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Prosecution’s Motion for Leave to Call Rebuttal Material, 13 December 2006, para. 7 (available under <http://www.legal-tools.org/doc/1a5743/>).

3. Additional evidence in article 82 appeal proceedings

The *ad hoc* tribunals apply rule 115 ICTR/ICTY RPE also to interlocutory appeals¹³⁰. The ICC Appeals Chamber has not decided to do so, but held:

In the context of interlocutory appeals pursuant to article 82 of the Statute, the Appeals Chamber recalls that it has considered requests to present additional evidence, namely in the Kenyatta et al. OA and the Ruto et al. OA proceedings, the Bemba OA 3 proceedings, and the Al-Senussi OA 6 proceedings. The Appeals Chamber considers that the Court's current jurisprudence on additional evidence within the context of interlocutory appeals is specific to those appeals, particularly in light of the fact that the above-mentioned requests related to appeals against decisions on the admissibility of the case pursuant to article 82 (1) (a) of the Statute.¹³¹

IX. Variation of grounds of appeal

The procedure relevant to **varying or adding a ground of appeal** is included in reg. 61 RoC. In the normal course of events, it requires the Appeals Chamber, after hearing the parties, to decide on the application for variation, whereupon the parties shall file respectively a document in support of this ground of appeal and a response thereto. The regulation is silent as to the standard applicable for granting an application for a variation of grounds of appeal. The ICC Appeals Chamber has ruled on a first request to add a new ground of appeal and held a) that the variation includes both a new ground of appeal and an amendment of a ground of appeal as also found by the jurisprudence of the *ad hoc* tribunals; b) that granting the request is 'within is discretionary authority'; c) that if the other party does not respond within the time limit stipulated in reg. 61 RoC, the Appeals Chamber may proceed to consider whether to grant the request; and d) that if the application for variation already sets out sufficiently the legal and factual reasons in support of the additional ground of appeal, the Appeals Chamber may direct the other party to submit a response on the substance without getting a further document in support of this ground of appeal.¹³² The Appeals Chamber accordingly found that the proceedings for varying a ground of appeal are within its **discretion**. Similarly, granting such an application is also within the Appeals Chamber's discretion. The jurisprudence of the *ad hoc* tribunals requires a **showing of 'good cause'** as to why the arguments were not advanced at the time the document in support of the appeal was submitted.¹³³ In that respect, it is noteworthy that the later such an application is filed in the course of the appeal proceedings, the more it can be expected that this requirement is interpreted restrictively, in order to avoid changes in the appeal strategy or other interferences with the expeditious administration of justice¹³⁴.

¹³⁰ Rule 115 ICTY has also been held to govern the presentation of additional evidence in an appeal against a decision on provisional release: *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.2, Decision on Lahi Brahimi's Request to Present Additional Evidence Under Rule 115, Appeals Chamber, 3 March 2006, paras. 9–11 (available under <http://www.legal-tools.org/doc/505af8/>). Its application may extend to interlocutory appeals in general: cf. *Prosecutor v. Međakić et al.*, IT-02-65-AR11bis.1, Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, Appeals Chamber, 16 November 2005, para. 6 (available under <http://www.legal-tools.org/doc/94670f/>).

¹³¹ *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 41, making reference to several decisions, the most recent being *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565 OA6, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi', 24 July 2014 (available under <https://www.legal-tools.org/doc/ef20c7/>).

¹³² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3057-Corr, Decision and order in relation to the request of 23 December 2013 filed by Mr Thomas Lubanga Dyilo, 13 January 2014, (available under <http://www.legal-tools.org/doc/49fd51/>).

¹³³ Rule 108 ICTY/ICTR RPE.

¹³⁴ See Tochilovsky, *The law and jurisprudence of the international criminal tribunals and courts* (2014), Chapter 16, 2.6.2.

Article 84 Revision of conviction or sentence*

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

- (a) New evidence has been discovered that:
 - (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
 - (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
- (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
- (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- (a) Reconvene the original Trial Chamber; or
- (b) Constitute a new Trial Chamber; or
- (c) Retain jurisdiction over the matter, with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Literature: Bitti, G., and Fernández de Gurmendi, S.A., 'Revision of Conviction or Sentence', in: R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 596; Boas, G., Jackson, J., Roche, B. and Taylor, D., 'Appeals, Reviews, and Reconsideration', in: G. Sluiter *et al.* (eds.), *International Criminal Procedure/Principles and Rules* (Oxford University Press 2013), 980; Brady, H. and Jennings, M., 'Appeal and Revision', in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer 2001) 294; Featherstone, Y., 'Additional Evidence in the Appeals Proceedings and Review of Final Judgement', in: R. May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle McDonald* (Brill Nijhoff 2001) 495; La Rosa, A.-M., 'Revision Procedure under the ICC Statute', in: A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002).

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	6
I. Paragraph 1	6
1. Revision generally	6
2. Sub-paragraph (a)	15
3. Sub-paragraph (b)	21
4. Sub-paragraph (c)	23
II. Paragraph 2	26

* The views expressed are those of the authors and cannot be attributed to the ICC or the United Nations.

A. Introduction/General remarks

This article provides for the ‘revision’ of a final judgment of conviction or sentence in certain circumstances where new evidence has subsequently been discovered, or where it has emerged that evidence was false or forged, or that one of the judges trying the case committed serious misconduct in the case. Such proceedings are also provided for in the Statutes of the ICTY and ICTR, in the English text of which they are called ‘review’ proceedings (*‘révision’* in French).¹ Article 21 of the Statute of the Special Court for Sierra Leone also contains such a provision.² Nevertheless, review proceedings at the ICTY, ICTR and SCSL differ significantly from revision proceedings before the Court. At the ad hoc tribunals, review proceedings can be brought even if the judgment in question has not become final yet (for instance, because it is on appeal) and are determined by the Chamber that issued the decision in question. At the ICC, revision proceedings relate to *final* judgments only and are *always* heard initially by the Appeals Chamber. Revision proceedings are also known in other international courts and tribunals,³ although the analogy here is less direct, given that those courts and tribunals do not adjudicate criminal matters.

Proceedings of this kind are commonly found in jurisdictions following the **Romano-Germanic tradition**.⁴ In contrast, this type of procedure is not typically found in common law systems, in which proceedings would normally be brought before a court of appeal if fresh evidence is discovered after a conviction.⁵

A provision for revision proceedings was included in the original ILC Draft Statute. The ILC indicated that this provision reflected the provisions of article 14 para. 6 of the ICCPR, as well as article 61 of the Statute of the ICJ, and said that it is ‘a necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal’.⁶

In national legal systems where this type of procedure exists, it is normally regarded as an **extraordinary remedy** that is seldom successfully invoked. In relation to the French legal system, it has for instance been said that:

¹ Article 26 of the ICTYS (*‘Review proceedings’*) provides: ‘Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement’. The procedure for review of judgments is set out in more detail in ICTY Rules 119 to 122. Similar provisions are found in article 25 of the ICTRS, and ICTR Rules 120 to 123. In these Tribunals, there is no express provision for review on the grounds referred to article 84 para. 1 (b) or (c) of the Rome Statute, although the expression ‘new fact’ in article 26 of the ICTYS and article 25 of the ICTRS may well extend to such grounds.

² UN Doc. S/2000/915, 4 October 2000, Annex.

³ See, e.g., Statute of the ICJ, article 61; and *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, (1985) ICJ Rep. 192.

⁴ E.g., Belgium (*‘demandes en révision’*: Code d’Instruction Criminelle, articles 443 *et seq.*); France (*‘demandes en révision’*: Code de Procédure Pénale, articles 622–626); Germany (*‘Wiederaufnahme eines durch rechtskräftiges Urteil abgeschlossenen Verfahrens’*: Strafprozessordnung, §§ 359–373a); Italy (*‘Revisione’*: Codice di Procedura Penale, articles 629–647); Spain (*‘Revisión’*: Ley de Enjuiciamiento Criminal, articles 954–961); see also Instituto Iberoamericano de Derecho Procesal, *Código Procesal Penal modelo para Iberoamérica* (Model Code of Criminal Procedure for Latin America) (1989), articles 359–370 (*‘Revisión’*).

⁵ For instance, in England, Wales and Northern Ireland, a person who believes that he or she has been wrongly found guilty or wrongly sentenced may make an application to the Criminal Cases Review Commission, an independent body responsible for investigating suspected miscarriages of criminal justice. In cases where there is new evidence or some other consideration of substance has emerged since trial, the Commission may refer the case to the relevant Court of Appeal: see Criminal Appeal Act 1995; Taylor, *Taylor on Appeals* (2012), Chapter 12.

⁶ 1994 ILC Draft Statute, p. 128.

‘Since this procedure [*révision*] is exceptional and represents a challenge to the two principles of respect for public order and *res judicata*, successful applications are rare. Historically it has been only *causes célèbres* such as the Dreyfus case which have been considered.’⁷

In relation to the German legal system, it has similarly been said that:

‘In general, [German] courts are very reluctant to recognise new facts as grounds for re-openings ... Case law has determined that it must be shown that a re-trial will materially improve the position of the convicted person. This criterion, which establishes a presumption in favour of finality, makes it very difficult for a defendant to obtain a new trial.’⁸

- 5 The ILC contemplated that this provision would ‘not extend, for example, to alleged errors in the assessment of facts presented at the trial or to errors of law or procedure, which are a matter for the appeals process’.⁹ The precise **relationship** in practice between revision proceedings and **appeal proceedings** may not always be easy to draw,¹⁰ and may require elaboration in the case law. The distinction may be important in practice, since there are prescribed time limits for the bringing of appeals against final judgments of a Trial Chamber,¹¹ whereas there is no time limit for the bringing of an application for revision.¹²

B. Analysis and interpretation of elements

I. Paragraph 1

1. Revision generally

- 6 Only the convicted person, or certain other individuals acting on his or her behalf, can bring revision proceedings. This includes the Prosecutor, who, although he or she cannot seek revision of an *acquittal*,¹³ may seek revision of a *conviction* on behalf of the convicted person.¹⁴ This is consistent with the approach originally taken by the ILC. The ILC considered that revision proceedings should be available only in the case of a conviction, taking the view that it would be a violation of the principle of *ne bis in idem* for an acquittal to be revised on grounds of the discovery of new evidence.¹⁵ Nevertheless, the ILC considered

⁷ Vogler, in: Hatchard *et al.* (eds.), *Comparative Criminal Procedure* (1996) 57.

⁸ Huber, in: Hatchard *et al.* (eds.), see note 7, 136. See also Osner *et al.* (eds.), *The Royal Commission on Criminal Justice: Criminal Justice Systems in Other Jurisdictions*, HMSO (1993) 81 (the revision procedure in Denmark ‘has been rarely used, but is of preventive importance against any tendencies on the part of the courts to weaken the requirements of evidence in criminal cases’), 102–103 (in Germany it is estimated that approximately 150–350 court decisions per year are quashed on ‘*Wiederaufnahme*’), 190 (the number of successful applications for reopenings in Sweden ‘varies between 5 and 10 *per annum*’).

⁹ ILC Draft Statute 1994, article 50.

¹⁰ The ICTY and ICTR Rules envisage that appeal and review proceedings may be brought at the same time, since they provide that where a judgment is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion: ICTY Rule 122 ICTY; ICTR Rule 123.

¹¹ Rule 150 para. 1 imposes a 30-day time limit for the filing of an appeal against a final decision of conviction or acquittal. While the Appeals Chamber is empowered under rule 150 para. 2 to extend this time limit upon the application of the party seeking to appeal, rule 150 para. 4 states that if an appeal is not filed as set out in the previous provisions of that rule, the decision of the Trial Chamber ‘shall become final’. This suggests that an extension of the time limit for the filing of an appeal must be granted before the existing time limit has passed, and that once the Trial Chamber’s judgment has become final, no appeal is possible.

¹² In the ICTY and ICTR, any application for review by the prosecution must be brought within one year of the final judgment being pronounced, but no time limit is imposed on such applications brought by the defence: ICTY Rule 119; ICTR Rule 120.

¹³ This can be contrasted with the position in the ICTY and ICTR, where the Prosecutor can seek revision of an acquittal within one year of the judgment (article 26 of the ICTYS; ICTY Rule 119; article 25 ICTRS; ICTR Rule 120).

¹⁴ See also Eckelmans and Staker, *article 81*, mn 8.

¹⁵ ILC Draft Statute 1994, p 128.

that the right to apply for revision of a conviction should be extended to the Prosecutor in the same way as to the convicted person, 'on the ground that the Prosecutor has an equal interest with the defence in securing a just and reliable outcome in proceedings brought under the Statute'.¹⁶ This corresponds to the Prosecutor's right to appeal a conviction or sentence on behalf of the convicted person.¹⁷

While article 84 does not say so expressly, it is therefore clearly implicit that upon revision, the conviction or sentence cannot be revised to the **convicted person's detriment**. Article 83, paragraph 2, last sentence, of the Statute contains an express provision to that effect for appeals brought by or on behalf of the convicted person, which must be applied by analogy to revision proceedings. The principal purpose of revision proceedings is to correct miscarriages of justice suffered by the convicted person; it would be contrary to this if revision proceedings could lead to a conviction or sentence that is harsher than the original conviction or sentence.

Because revision proceedings may be brought only by or on behalf of a *convicted* person, it would not be possible for a person who has been *acquitted* to bring such proceedings merely in order, for instance, to correct perceived factual inaccuracies in the Trial Chamber's judgment.

There is no definition of what constitutes a '**judgment of conviction or sentence**'. The expression would obviously include a decision of a Trial Chamber under article 74 to convict an accused, or the pronouncement of a sentence by a Trial Chamber. It would similarly include a conviction or sentence as amended on appeal by the Appeals Chamber under article 83 paragraph 2 (a). It includes convictions under article 70, dealing with offences against the administration of justice.¹⁸ On a literal interpretation, at least, the expression would, however, exclude other types of decisions, such as an order for reparations made against a convicted person under article 75 paragraph 2,¹⁹ or a decision under article 85. The wording of the paragraph would allow an application to be brought for revision of the sentence only, without challenging the conviction on which it is based, for instance, where new evidence is discovered that relates solely to factors taken into account in sentencing.

In Romano-Germanic systems, it is common for revision proceedings to be considered as an extraordinary remedy that can be invoked only when all available avenues of appeal have been exhausted. Similarly, by restricting its application to '**final**' judgments, article 84 precludes revision of a judgment of a Trial Chamber that is at the time subject to an appeal.²⁰ A judgment of a Trial Chamber will only be a 'final' judgment if no appeal has been brought against it within the time limit for the bringing of an appeal or if the Appeals Chamber confirms it upon appeal. If the Appeals Chamber reverses or amends the Trial Chamber's judgment under article 83 paragraph 2 (a) upon appeal, it is the Appeals Chamber's judgment that becomes final. If the Appeals Chamber instead orders a new trial before a different Trial Chamber (pursuant to article 83 paragraph 2 (b)), the 'final' judgment will be the judgment of the Trial Chamber at the subsequent trial, or, in the event of an appeal, the subsequent judgment of the Appeals Chamber. If an application for revision is brought before the judgment in question has become final, the application should be rejected as inadmissible. If an appeal is brought against certain aspects of the Trial Chamber's judgment only, the judgment of the Trial Chamber may be the 'final' judgment in relation to some parts of a case, and the judgment of the Appeals Chamber the 'final' judgment in relation to others.

¹⁶ *Ibid.*

¹⁷ See article 81 para. 1 (b). Pursuant to regulation 70 of the Regulations of the Office of the Prosecutor, the Prosecutor shall consult with the convicted person or his or her counsel before appealing on that person's behalf or bringing a request for revision.

¹⁸ This follows from Rule 163 para. 1.

¹⁹ But see below, mn 29.

²⁰ This contrasts with the position in the ICTY and ICTR: see see note 10.

- 10 The ICTY and ICTR have held that a ‘final judgment’ for the purposes of review (revision) proceedings is a decision that puts an end to the proceedings.²¹ Thus, in those jurisdictions, there is in principle no possibility of review (revision) of an interlocutory decision of a Trial Chamber, or of a judgment of the Appeals Chamber in an interlocutory appeal, except in rare cases where the interlocutory decision puts an end to the proceedings.²² This question is unlikely to arise in practice in the context of the ICC, given that revision proceedings can only be brought by or on behalf of a convicted person, and given that an accused would normally have no interest in challenging an interlocutory decision that terminated the proceedings before final judgment.
- 11 Although an interlocutory decision that does not put an end to the proceedings is not subject to revision, in the practice of the ICTY and ICTR it may in some circumstances be open to ‘reconsideration’ by the Chamber that rendered it. Despite some statements to the effect that ‘motions to reconsider do not form part of the procedures of the International Tribunal’,²³ such motions have been entertained by Chambers of those Tribunals, and occasionally allowed, where particular circumstances exist that warrant reconsideration.²⁴

²¹ *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), Appeals Chamber, 31 March 2000 (‘*Barayagwiza* Review Decision’), para. 49 (available at: <https://www.legal-tools.org/en/doc/1c0fe7/>); *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, Decision on Review and/or Reconsideration, Appeals Chamber, 14 September 2000 (available at: <https://www.legal-tools.org/en/doc/452305/>); *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Decision: Motions for Review of the Pre-Hearing Judge’s Decisions of 30 November and 19 December 2001, Appeals Chamber, 6 February 2002 (available at: <http://ictarchive09.library.cornell.edu/ENGLISH/cases/Bagilishema/decisions/060202a.html>); *Prosecutor v. Delić*, IT-96-21-R-R119, Decision on Motion for Review, Appeals Chamber, 25 April 2002 (‘*Delić* Review Decision’), para. 8 (available at: <http://www.legal-tools.org/en/doc/81daad/>). See also *Prosecutor v. Tadić*, IT-94-1-R, Decision on Motion for Review, Appeals Chamber, 30 July 2002 (‘*Tadić* Review Decision’), para. 24 (available at: <http://www.legal-tools.org/en/doc/eb2b62/>). *Prosecutor v. Blaskić*, IT 94-14-R, Decision on Prosecutor’s Request for Review or Reconsideration, Appeals Chamber, 23 November 2006, paras. 22–23 (available at: <http://www.legal-tools.org/en/doc/f50d72/>).

²² See *Barayagwiza* Review Decision, see note 21. In this case, in an interlocutory appeal, the Appeals Chamber had dismissed the indictment with prejudice to the prosecution and directed the immediate release of the accused, on the ground that the rights of the accused had been seriously violated. In subsequent review proceedings, the Appeals Chamber found that new facts presented by the prosecution diminished the intensity of the violation of the rights of the accused, revised its original decision, rejected the application of the accused to be released, and decided that the accused was entitled to a different remedy for the violation of his rights. The prosecution of the accused thereafter continued before the Trial Chamber.

²³ *Prosecutor v. Kovacević*, IT-97-24-PT, Decision on Defence Motion to Reconsider, Trial Chamber, 30 June 1998, preambular para. 2 (available at: <http://www.legal-tools.org/en/doc/a0312e/>). See also, e.g., *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-PT, Decision on Prosecutor’s Motion for Reconsideration, Trial Chamber, 15 February 1999 (available at: <http://www.legal-tools.org/en/doc/76f07b/>); *Prosecutor v. Delalić et al.* (Čelebići case), IT-96-21-T, Order on Esad Landžo’s Request for Definition of Diminished or Lack of Mental Capacity, Trial Chamber, 15 July 1998 (available at: <http://www.legal-tools.org/en/doc/5604e0/>).

²⁴ See, e.g., *Prosecutor v. Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, Bench of the Appeals Chamber, 14 December 2001, para. 13 (‘A Trial Chamber may nevertheless always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realised that the previous decision was erroneous or that it has caused an injustice’) (available at: <http://www.icty.org/x/cases/galic/acdec/en/11214DE317061.htm>); *Prosecutor v. Milošević*, IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, Bench of the Appeals Chamber, 16 May 2002, para. 17 (‘It must be emphasised that a Trial Chamber may always reconsider a decision it has previously made, and not only because of unforeseen circumstances. Whether or not it exercises that power is a discretionary matter’) (available at: <http://www.legal-tools.org/en/doc/810d38/>); *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses, Trial Chamber, 9 May 2002, paras. 7–8 (‘The Rules do not explicitly provide for reconsideration of a previous decision. Nevertheless, according to the jurisprudence of the Tribunal, the Chamber possesses an inherent power to reconsider. ... In light of the principle of finality, which mandates that the parties should be able to rely and act on binding decisions of the Tribunal without fear that the decisions will be lightly overturned, this inherent discretion to reconsider a decision should be sparingly exercised’) (available at: <http://www.legal-tools.org/en/doc/2e0ebe/>); *Prosecutor v. Blaskić*, IT-95-14-T, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, Trial Chamber, 30 January 1998, esp. para. 12 (available at: <http://www.icty.org/x/cases/Blaskic/tdec/en/80130EV113316.htm>); *Prosecutor v. Stakic*, IT-97-24-PT, Order on Prosecution’s Motion for Reconsideration of Prior Motion for Variation of Length of Pre-Trial Brief, Trial Chamber, 15 January 2002 (available at: <http://www.legal-tools.org/en/doc/792d4e/>).

The first-instance Chambers of the ICC initially took a restrictive approach in that regard, finding that ‘outside the specific instances where the Statute and the Rules vest the right to seek review in one or more of the participants, the only remedy of a general nature is an interlocutory appeal against decisions other than final decisions, as set forth in article 82, paragraph 1 (d) of the Statute’.²⁵ In contrast, Trial Chamber I subsequently found that it had the power to reconsider not only ‘administrative’ decisions of a case-management nature, but also more substantive decisions, which ‘can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory’.²⁶

It has been said that in the case of review (or revision) proceedings, in contrast to ‘reconsideration’:

‘... the motion has to be approached on the footing that the earlier findings of the ... Chamber stand, save to the extent to which it can be seen that those findings would themselves have been different had certain new facts been available to the ... Chamber when the original decision was made; under that procedure, it is not therefore possible to challenge the previous holdings of the ... Chamber as incorrect on the basis on which they were made.’²⁷

Paragraph 1 of article 84 provides for **revision in three specified circumstances only**. The negotiating history of this article, in which it was expressly decided to exclude certain other grounds for revision, would appear to indicate an intention that revision on other grounds should not be permitted.²⁸ However, one member of the Appeals Chamber of the ICTR has contemplated that reconsideration of a final judgment may be possible in ‘a case in which the decision, although apparently *res judicata*, is void, and therefore non-existent in law, for the reason that a procedural irregularity has caused a failure of natural justice’,²⁹ and suggested that ‘certainly in the case of a court of last resort, there is inherent jurisdiction to reopen an appeal if a party had been ‘subjected to an unfair procedure’.³⁰

The party applying for revision bears the **burden** of satisfying the Appeals Chamber that the requirements of paragraph 1 of this article are met. There is no burden on the other party to establish that the requirements are *not* met.³¹

2. Sub-paragraph (a)

Sub-paragraph (a) provides for the revision of a final judgment where certain **new evidence** has been discovered. This wording contrasts with that of the Statutes of the ICTY

²⁵ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-60, Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II To Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, Pre-Trial Chamber II, 28 October 2005, para. 20 (available at: <http://www.legal-tools.org/en/doc/9dfa86/>). This decision was relied upon in subsequent decisions. See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-123 (available at: <http://www.legal-tools.org/en/doc/365c0b/>), Decision on the Prosecution Motion for Reconsideration, Pre-Trial Chamber I, 23 May 2006, p. 2; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-166, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal, Pre-Trial Chamber I, 23 June 2006, para. 10 (available at: <http://www.legal-tools.org/en/doc/a2d89a/>); *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1010, Decision on the ‘Requête de la Défense aux fins d’obtenir de la Chambre de Première Instance III des décisions appropriées avant l’ouverture du Procès prévue pour le 22 Novembre 2010’, Trial Chamber III, 16 November 2010, para. 9 (available at: <http://www.legal-tools.org/en/doc/33d173/>).

²⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2705, Decision on the defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010, 30 March 2011, para. 18 (available at: <http://www.legal-tools.org/en/doc/998892/>). This decision was relied upon, for instance, in *Prosecutor v. Uhuru Murgai Kenyatta*, ICC-01/09-02/11-863, Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, Trial Chamber V(b), 26 November 2013 (available at http://www.iccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/chambers/Pages/863.aspx).

²⁷ *Barayagwiza* Review Decision, see note 21, Separate Opinion of Judge Shahabuddeen, para. 2.

²⁸ Brady and Jennings, in: Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (2001) 302–303.

²⁹ *Barayagwiza* Review Decision, see note 21, Separate Opinion of Judge Shahabuddeen, para. 4.

³⁰ *Ibid.*, para. 5.

³¹ *Delić* Review Decision, see note 21, para. 17.

and ICTR,³² and article 21 of the Statute of the Special Court for Sierra Leone,³³ which provide for review proceedings where a ‘new fact’ has been discovered. Rule 115 ICTY and ICTR also make provision for the presentation on appeal of ‘additional evidence’ that was ‘not available at trial’. In the ICTY and ICTR, a body of case law has developed with respect to the distinction between a ‘new fact’ for the purposes of review proceedings and ‘additional evidence’ on appeal for the purposes of rule 115 of the Rules of those Tribunals,³⁴ a distinction which the case law has acknowledged may be difficult to draw.³⁵ The expression ‘new evidence’ in article 84 of the ICC Statute appears to obviate any such distinction, and it would seem that the ‘new evidence’ for the purposes of sub-paragraph (a) could be of any fact, whether it was in issue in the proceedings sought to be revised or not.³⁶ The ICC will have to determine whether there is any difference in the treatment to be given to new evidence in revision proceedings on the one hand, and to new or additional evidence presented by a party during appeal proceedings on the other. The Appeals Chamber has found the criteria for the admission of new evidence on appeal and for bringing revision proceedings under sub-paragraph (a) to be ‘similar’.³⁷ It has also found that ‘that additional evidence brought by a convicted person on appeal that would be considered in revision proceedings should, as a general matter, be admissible on appeal.’³⁸ If it were otherwise, appellants would be forced to bring revision proceedings, rather than presenting the new evidence in the course of an appeal. This is contrary to procedural efficiency.³⁹

- 16 Subsequent developments in the jurisprudence cannot constitute ‘new evidence’ for the purposes of this article. Thus, revision of an earlier judgment could not be sought where the accused was convicted on the basis of a finding of law that was departed from in the later case law of the Court.⁴⁰ A mistake in the appraisal of the evidence presented at trial would also not be a ground for revision.⁴¹ For such an argument would not be based on *new* evidence.
- 17 Sub-paragraph (a) requires that the new evidence was **not available at the time of trial**. This reflects the wording of rule 115 ICTY and ICTR (dealing with the presentation of

³² See see note 1.

³³ See see note 2.

³⁴ A ‘new fact’ has been defined as ‘new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings’ (*Prosecutor v. Jelisić*, IT-95-10-R, Decision on Motion for Review, Appeals Chamber, 2 May 2002 (*Jelisić* Review Decision’), p. 3 (available at: [http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/41bcf2c89e69d10bc12571b500329d64/6c3fb9b07e146a7ac12571fe004be52a/\\$FILE/Jelisić%20ACD%202-05-2002.pdf](http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/41bcf2c89e69d10bc12571b500329d64/6c3fb9b07e146a7ac12571fe004be52a/$FILE/Jelisić%20ACD%202-05-2002.pdf)); *Tadić* Review Decision, see note 21, para. 25 (adding that ‘The requirement that the new fact has not been in issue at trial means that it must not have been among the factors that the deciding body could have taken into account in reaching its verdict’); see also *Delić* Review Decision, see note 21, paras. 10–11. Even if the fact existed before the original proceedings took place, this does not prevent it from being a ‘new fact’ if the relevant Chamber and party did not know of it (see *ibid.*, para. 11; *Barayagwiza* Review Decision, see note 21, Separate Opinion of Judge Shahabuddeen, para. 47). In contrast, where a fact was in issue in the trial proceedings, additional evidence of that fact is not an appropriate basis for review proceedings in the ICTY or ICTR, but may constitute ‘additional evidence’ for the purposes of ICTY and ICTR Rule 115, dealing with the presentation of additional evidence on appeal (*Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Appeals Chamber, 15 October 1998 (*Tadić* Additional Evidence Decision’), paras. 30, 32 (available at: <http://www.legal-tools.org/en/doc/834222/>). See further *Prosecutor v. Niyitigeka*, ICTR-96-14-R, Decision on Request for Review, Appeals Chamber, 30 June 2006, paras. 5–7, 43–48 (available at: <http://www.legal-tools.org/en/doc/f70249/>); *Prosecutor v. Niyitigeka*, ICTR-96-14-R, Decision on Request for Review, Appeals Chamber, 6 March 2007, para. 5 (and see the Separate Declaration of Judge Shahabuddeen and Separate Opinion of Judge Meron) (available at: <http://www.legal-tools.org/en/doc/3dde05/>).

³⁵ *Delić* Review Decision, see note 21, para. 13.

³⁶ But cf. La Rosa, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1566–1577.

³⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, para. 61 (available at: <http://www.icc-pi.int/iccdocs/doc/doc1876833.pdf>).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ See *Jelisić* Review Decision, see note 34; *Tadić* Review Decision, see note 21, para. 41.

⁴¹ La Rosa, see note 36, 1566.

additional evidence on appeal, as opposed to revision or review proceedings). It has been held that this requirement means that the party seeking to present the evidence must demonstrate that the evidence would not have been available at trial through the exercise of **due diligence** by that party or that party's counsel.⁴² This duty to act with reasonable diligence includes making use of all mechanisms of protection and compulsion available under the Tribunal's Statute and Rules to bring evidence on behalf of an accused before the Trial Chamber, so that, for example, if a party experiences difficulty in calling a witness to testify at trial, it must apprise the Trial Chamber so that the Chamber may consider imposing coercive or protective measures.⁴³ An exception may exist where there has been '**gross professional negligence**' on the part of defence counsel,⁴⁴ or where defence counsel was acting in contempt of court without the knowledge of the accused.⁴⁵ In the case of review (revision) proceedings, such a due diligence requirement is expressly incorporated in the Rules of the ICTY and ICTR.⁴⁶ In the case of the ICC, the application of a similar test is further indicated by the requirement in subparagraph (a) (i) that the non-availability of the evidence at trial be 'not wholly or partially attributable to the party making application'.

If counsel for the defence made in the course of the trial a conscious decision not to tender a given piece of evidence at trial, it cannot be said that the evidence is new. For that reason, it cannot be the basis for bringing review proceedings. As defence counsel is acting on behalf of the accused person, he or she must be taken to have acquiesced in the decision of the counsel, at least in the absence of any showing of professional negligence.⁴⁷

However, the Appeals Chamber of the ICTY and ICTR has held that there is an **exception** 18 to this requirement. In 'wholly exceptional circumstances', a Chamber may grant a motion for review (revision) based on the existence of a new fact, even though the fact was known to the moving party or could have been discovered through the use of ordinary diligence. The Appeals Chamber has indicated that it will do so only when the decision to be reviewed was of such a nature in the circumstances of the case as to have led to a miscarriage of justice. In such circumstances, the requirement will be regarded as directory in nature.⁴⁸ According to this jurisprudence, where this exception applies, a new fact can be relied upon as a basis for review of a final judgment of the ICTY or ICTR, not only where the new fact could have been ascertained at trial with due diligence, but also in circumstances where the new fact was actually known to the relevant party at the time of trial.⁴⁹ Furthermore, a Chamber will

⁴² *Tadić* Additional Evidence Decision, see note 33, paras. 36, 44–50; *Prosecutor v. Kupreskić et al.*, IT-95-16-A, Appeal Judgment, Appeals Chamber, 23 October 2001 ('*Kupreskić* Appeal Judgment'), para. 50 (available at: <http://www.legal-tools.org/en/doc/c6a5d1/>). For instance, where a witness statement was disclosed to defence counsel at trial, defence counsel knew or with due diligence could have known of the evidence (*Delić* Review Decision, see note 21, paras. 16–17).

⁴³ *Tadić* Additional Evidence Decision, see note 34, paras. 47, 60, 62; *Kupreskić* Appeal Judgment, see note 42, para. 50.

⁴⁴ *Cf. Tadić* Additional Evidence Decision, see note 34, paras. 48–50, 65; *Kupreskić* Appeal Judgment, see note 42, para. 51.

⁴⁵ *Tadić* Review Decision, see note 21, esp. paras. 45, 52 (and *cf.* paras. 32 and 56).

⁴⁶ ICTY Rule 119 *lit. A*; ICTR Rule 120. The *Delić* Review Decision, see note 21, para. 10, indicates that in the ICTY, the due diligence requirement for review (revision) proceedings is the same as the 'not available at trial' test for the presentation of additional evidence on appeal.

⁴⁷ *Tadić* Additional Evidence Decision, see note 34, para. 65; *Delić* Review Decision, see note 21, para. 15 ('The Appeals Chamber will not intervene because other counsel might have made different decisions as to the conduct of the trial or even because such decisions made at the trial are seen in retrospect to have been wrong. It is only when the decision made was of such a nature in the circumstances of the case as to have led to a miscarriage of justice that this Chamber will not hold the accused accountable for his counsel's conduct').

⁴⁸ *Barayagwiza* Review Decision, see note 21, paras. 65–69 (see also Separate Opinion of Judge Shahabuddeen, paras. 48–54); *Tadić* Review Decision, see note 21, paras. 26–27 (and see also at paras. 36–37, 44). In the former case, Judge Shahabuddeen explained this exception by reference to a more general principle that mandatory language in a statute may be deemed directory if its legislative purpose can best be carried out by adopting a directory construction, and said: 'Here, the overriding purpose of the provision is to achieve justice. Justice is denied by adopting a mandatory interpretation of the text; a directory approach achieves it' (Separate Opinion of Judge Shahabuddeen, para. 53).

⁴⁹ *Tadić* Review Decision, see note 21, paras. 36–37.

consider whether an application for review falls within such a situation of ‘wholly exceptional circumstances’, even where the applicant has not argued this to be the case.⁵⁰

The exception is a narrow one. The ‘wholly exceptional’ circumstances in which it will apply are likely to be confined to cases where the new evidence ‘would clearly have altered [the] earlier decision’,⁵¹ and where to ignore the new evidence would ‘be to close one’s eyes to reality’.⁵² A party seeking to invoke the exception should be required to demonstrate the credibility and probative value of the new evidence, and to explain why it was not called at trial or on any subsequent appeal.⁵³ It remains to be seen whether the ICC will recognize a similar exception; the text of sub-paragraph (a) (i) does not appear to leave room for it. Nevertheless, it would be undesirable if the ICC could not correct a judgment that is clearly wrong.

- 19 Sub-paragraph (a) further requires that the new evidence be ‘sufficiently important that had it been proved at trial it would have been **likely to have resulted in a different verdict**’. This threshold is a high one. As regards conviction decisions, a verdict would have been different if a (partial) acquittal instead of a conviction would have been entered, had the Chamber been aware of the evidence. The provisions of the ICTY and ICTR Statutes dealing with review (revision) proceedings refer instead to new facts that ‘could have been a decisive factor in reaching the decision’.⁵⁴ It is uncertain whether the test of ‘likely to have resulted in a different verdict’ in article 84 of the ICC Statute is a more difficult standard to satisfy than the test in the Statutes of the ICTY and ICTR. In the ICTY, it has for instance been held that subsequent discovery that aspects of witness statements were false would not satisfy the relevant test if the statements did not form part of the evidence upon which the conviction was based, and if the falsity would not have been considered a circumstance favouring the accused.⁵⁵ It has also been held that certain misconduct by defence counsel will not necessarily satisfy the test.⁵⁶
- 20 Arguably, even if the new evidence does not affect the conviction decision, but only the **sentence**, this could be the basis for revision proceedings. This is because proceedings under article 84 may also lead to a revision of the sentence; it would be illogical if new evidence that, had it been presented at trial, would have been likely to have resulted in a more lenient sentence could not lead to revision proceedings. In that regard, however, it must be recalled that a Trial Chamber enjoys broad discretion in its sentencing decision;⁵⁷ this will make it difficult to establish that the threshold has been met.

3. Sub-paragraph (b)

- 21 Sub-paragraph (b) requires a showing that it has been ‘newly discovered that **decisive evidence [...] was false, forged or falsified**’. Sub-paragraphs (a) and (b) differ in that in case of the former, ‘new’ evidence that has not been taken into account at trial has been discovered, while the latter concerns a situation where it is newly discovered that evidence relied upon at trial was, in fact, false. Nevertheless, there is overlap between the two provisions because presumably, in order to establish that evidence was ‘false, forged or falsified’, evidence of this fact will have to be presented. For that reason, it could be argued

⁵⁰ *Prosecutor v. Josipović*, IT-95-16-R2, Decision on Motion for Review, Appeals Chamber, 7 March 2003, paras. 14–15 (citing earlier jurisprudence).

⁵¹ *Barayagwiza Review Decision*, see note 21, para. 66; *Delić Review Decision*, see note 21, para. 19.

⁵² *Ibid.*, para. 69.

⁵³ Cf. *Delić Review Decision*, see note 21, paras. 19–22.

⁵⁴ See see note 1.

⁵⁵ *Tadić Review Decision*, see note 21, paras. 33, 39–40.

⁵⁶ *Ibid.*, paras. 48–50. For an example of a case where this test was satisfied, see *Barayagwiza Review Decision*, see note 21.

⁵⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3122, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute’, Appeals Chamber, 1 December 2014, para. 1 (available at: <http://www.icc-cpi.int/iccdocs/doc/doc1877186.pdf>).

that the evidence relied upon under sub-paragraph (b) must not have been known at the time of the original decision and could not have been discovered through the exercise of due diligence. If the ICC recognized the exception to sub-paragraph (a) referred at mn 17 above, presumably it would also apply to sub-paragraph (b).

The terminology in subparagraph (a) and subparagraph (b) differs: The former refers to new evidence that is ‘sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict’. The latter refers to evidence that is ‘decisive’ and ‘upon which the conviction depends’. This is explained by the fact that the perspective differs: for the determination under sub-paragraph (a), a prediction has to be made as to what might have happened, had the original Chamber been aware of the new evidence; in contrast, for sub-paragraph (b), the actual **importance of the false, forged or falsified evidence for the verdict** has to be determined; arguably, this will be done primarily on the basis of the reasoning of the decision in question. 22

4. Sub-paragraph (c)

Sub-paragraph (c) applies in case of **serious misconduct or a serious breach of duty** on the part of one or more of the judges ‘who participated in conviction or confirmation of the charges’. The judge in question need not have been a member of the Chamber that gave the final judgment in the case. Even if the final judgment was a judgment of the Appeals Chamber;⁵⁸ revision under this paragraph would be possible if there was serious misconduct or a serious breach of duty by a member of the Trial Chamber or of the Pre-Trial Chamber which confirmed the charges. 23

The misconduct or breach of duty must be ‘of sufficient gravity to **justify the removal of that judge or those judges from office** under article 46’.⁵⁹ A decision to remove a judge from office for serious misconduct or serious breach of duty is, pursuant to article 46 paragraph 2 (a), taken by a two-thirds majority of the Assembly of States Parties. However, the words ‘to justify’ in sub-paragraph (c) indicate that it is not necessary that the judge was actually removed from office under that provision, or even that procedures under article 46 have been set in motion. Thus, it should be possible for the Appeals Chamber to determine that the requirements for revision have been met, even if article 46 procedures were never commenced. It is unclear, however, whether an application for revision can also be brought in circumstances where the Assembly of States Parties, in accordance with the statutory provisions for the removal of judges from office, has already assessed and rejected the allegations of misconduct. It could be argued that, as a convicted person has a right to have his or her application for revision heard and determined *judicially* by a Chamber, his or her position should not depend upon a decision taken by the Assembly of States Parties in a non-judicial context. On the other hand, this could lead to the undesirable result that the decision of the Appeals Chamber on an application for revision may be at odds with an earlier decision of the Assembly of States Parties on the same subject. In such a situation the Appeals Chamber would effectively be reviewing the ASP’s decision. 24

Sub-paragraph (c) does not require that the judge’s misconduct or breach of duty affected the result. This would often be impossible to prove, in view of the requirement in article 74 paragraph 4 that ‘[t]he deliberations of the Trial Chamber shall remain secret’. Arguably, even if the judge in question issued a dissenting opinion to the judgment in relation to which revision is sought, the judge’s misconduct would justify revision. If it were otherwise, there would always be a doubt as to the impact that the judge’s misconduct or breach of duty might have had on the other judges of the Chamber. 25

⁵⁸ See mn 9.

⁵⁹ The definition of such misconduct for the purposes of article 46 is further dealt with in Rule 24.

II. Paragraph 2

26 This paragraph establishes a **two-step procedure for revision proceedings**, including a type of ‘filter’ mechanism as the first step. The ILC (which originally proposed conferring this filtering function on the Presidency) indicated that it was intended to prevent ‘frivolous applications’.⁶⁰ In the provision as finally adopted, the initial application for revision is made to the Appeals Chamber. The procedure for the application is further set out in Rule 159. The interplay of Rule 159 with Rules 160 and 161 indicates that the first step will usually be carried out **without the convicted person being present before the Court** (who will usually be serving the sentence in a State other than The Netherlands); transfer of that person to the Court is envisaged only for the second step of the procedure.

The Appeals Chamber ‘shall reject the application if it considers it to be unfounded’. If the Appeals Chamber finds the application to be ‘meritorious’, it may take one of the measures set out in the three sub-paragraphs of paragraph 2. The use of the terms ‘unfounded’ and ‘meritorious’ indicates that the **first step** involves an assessment of whether the **criteria set out in paragraph 1, sub-paragraphs (a) to (c) are actually met**. This is more than a *prima facie* evaluation. If they are, the substance of the matter is then either referred to the original Trial Chamber, or a new Trial Chamber, or may be dealt with by the Appeals Chamber itself. Pursuant to Rule 159, paragraph 2, the Appeals Chamber’s decision ‘shall be supported by reasons’. The application procedure is further set out in Regulation 66 of the Regulations of the Court.

27 If the application for revision is found to be meritorious, the **second step of the procedure** commences, ‘with a view to ... arriving at a determination whether the judgment should be revised’. For the purpose of making this determination the Appeals Chamber may ‘[r]econvene the original Trial Chamber’ (sub-paragraph (a)), ‘[c]onstitute a new Trial Chamber (sub-paragraph (b)),⁶¹ or ‘[r]etain jurisdiction over the matter’ (sub-paragraph (c)). Neither paragraph 2 nor the corresponding Rules provide any guidance as to the **criteria** according to which the Appeals Chamber should choose among the three possible options.

From the ILC’s commentary, it seems to have been originally envisaged that revision proceedings might be dealt with entirely by the Appeals Chamber itself ‘if the truth of the new fact relied on is not in issue’.⁶² Presumably, the Appeals Chamber would also retain jurisdiction over the matter where the revision is of one of the Appeals Chamber’s own decisions. If revision is sought of a judgment of a Trial Chamber, and if facts are in issue, the appropriate course could be to refer the matter to the same or a different Trial Chamber.

By way of comparison, the Rules of the ICTY and ICTR provide that applications for review (revision) shall be by way of motion to the Chamber that pronounced the original judgment. That Chamber is called upon to employ a similar two-stage process involving, first, a determination whether the new fact, if proved, could have been a decisive factor in reaching the original decision, and secondly, if the result of the first stage is affirmative, of a review the judgment and the pronouncement a further judgment after hearing the parties.⁶³ In practice, both stages may be combined into a single hearing and a single judgment on review.⁶⁴ The Appeals Chamber of the ICTY has indicated that where possible, a request for review should be heard by the same judges who originally heard the case, as these judges will

⁶⁰ See note 6.

⁶¹ It is unclear whether in the decision to ‘reconvene’ the original Trial Chamber or to ‘constitute’ a new Trial Chamber the Presidency has a role to play. In that regard, it is recalled that it is usually the Presidency that constitutes Pre-Trial and Trial Chambers (see Regulation 46, para. 1 of the Regulations of the Court and article 61, para. 11.

⁶² *Ibid.*, p. 129.

⁶³ ICTY Rule 120; ICTR Rule 121.

⁶⁴ See, e.g., *Barayagwiza* Review Decision, see note 21.

be familiar with the facts of the case.⁶⁵ That approach would seem equally apt to the circumstances of the ICC, in cases where revision is sought under sub-paragraphs (a) or (b) of paragraph 1 of this article. Revision is not a retrial, and does not involve any suggestion that the Chamber that rendered the original decision erred in deciding as it did on the basis of the material then before it.⁶⁶ There is therefore no reason in principle why the judges who rendered the original judgment should be disqualified from dealing with the revision proceedings.⁶⁷ However, in circumstances where revision is sought under sub-paragraph (c) of paragraph 1, it is evident that the application for revision could not be dealt with by the bench as composed at the time of the original decision.

The hearing in this **second stage is governed by Rules 160–161**. However, although Rule 161 paragraph 2 provides that the relevant Chamber ‘shall exercise, *mutatis mutandis*, all the powers of the Trial Chamber pursuant to Part 6 and the Rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers’, the role of the Chamber in revision proceedings is not to conduct a retrial of the case, but rather, to consider, in the light of the new evidence or newly discovered fact ‘whether the judgment should be revised’. At issue is whether the grounds for revision have any **impact on the conviction or sentence**. In certain cases, however, a complete retrial may be necessary (for instance, where serious misconduct by one of the judges vitiates the entire trial proceedings). As neither article 84 paragraph 2 nor Rule 161 confers on a Chamber conducting revision proceedings a power to order a retrial, the revision proceedings would themselves need to be in effect a new trial.

The role of a Chamber making a determination on revision is ‘to revise the final judgment of conviction or sentence’. Thus, the remedy, if any, to be granted on revision would be an **amended final judgment**, in which, for instance, acquittals are entered on any or all counts for which there were convictions in the original judgment, or in which a more lenient sentence is imposed, or in which fines or forfeitures under article 77 paragraph 2 that were included in the original judgment are omitted or reduced. If the Chamber revises a judgment by substituting one or more convictions with acquittals, it would seem to follow that the Chamber must also have the power to revise any **order for reparations** under article 75, which was based on those former convictions. If this is so, there would appear to be no reason why the Court should not have an independent power under article 84 to revise an order for reparations, even where the convicted person does not challenge the conviction on which it is based.

It is **unclear whether the revised judgment is subject to appeal** under article 81 of the Statute.⁶⁸ Rule 161 para. 3 states that ‘The determination on revision shall be governed by the applicable provisions of article 83, paragraph 4’. This rule thereby appears to equate a determination on revision with a final judgment of the Appeals Chamber (even if the determination on revision is made by a Trial Chamber). This suggests that no appeal from a determination on revision is possible, a result which can be justified by the exceptional character of revision proceedings. This exceptional character is disregarded by the opposing view,⁶⁹ which is based on the consideration that the decision on revision may be taken by a Trial Chamber and should therefore be subject to appeal.

⁶⁵ *Tadić* Review Decision, see note 21, para. 23.

⁶⁶ See mn 11.

⁶⁷ But *cf.* Bitti and Fernández de Gurmendi, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 598.

⁶⁸ ICTY Rule 121 and ICTR Rule 122 provide expressly that the judgment of a Trial Chamber on review may be appealed in accordance with the ordinary appeal provisions.

⁶⁹ See Boas *et al.*, in: Sluiter *et al.* (eds.), *International Criminal Procedure/Principles and Rules* (2013) 986.

Article 85

Compensation to an arrested or convicted person*

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

Literature: Beresford, S., 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals', (2002) 96 *AJIL* 628; Bitti, G., 'Compensation to an Arrested or Convicted Person', in: R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 623; Brady, H. and Jennings, M., 'Appeal and Revision', in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer 1999) 294; Zappalà, S., 'Compensation to an Arrested or Convicted Person', in: A. Cassese, P. Gaeta, and J.R.W.D Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 1577.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	4
I. Paragraph 1	4
II. Paragraph 2	5
III. Paragraph 3	6
C. Special remarks	7

A. Introduction/General remarks

1 The ILC Draft originally contained no provision equivalent to this article. Proposals for such a provision in the Statute were put forward at the 1996 Preparatory Committee.¹

2 Nothing similar to this article was included in the Statute or Rules of the ICTY or ICTR.² In September 2000, the Presidents of the ICTY and ICTR separately submitted proposals to the Secretary-General of the United Nations for the addition of such an article to each Tribunal's Statute, with the request that the proposals be transmitted to the Security Council for consideration.³ However, no such amendments have been made. In December 2001 and

* The views expressed are those of the authors and cannot be attributed to the ICC or the United Nations.

¹ Preparatory Committee Report I 1996, para. 302; Preparatory Committee Report II 1996, p. 206.

² Nor in the Statute of the Special Court for Sierra Leone (UN Doc. S/2000/915, 4 October 2000, Annex). In relation to the trials for genocide, war crimes, crimes against humanity and other serious crimes in East Timor, provision was made for compensation for miscarriage of justice, corresponding to the first two paragraphs of article 85 only (UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, 25 September 2000, section 51; UNTAET Regulation 2001/25 on the Amendment of UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor and UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, 14 September 2001, section 52).

³ See UN Doc. S/2000/904, 26 Sep. 2000; UN Doc. S/2000/925, 6 Oct. 2000. See also text to fn. 15 below.

February 2002, the President of the ICTY received requests for compensation from two persons who had been acquitted on all counts by the Appeals Chamber. The President responded that without any specific provision in the Tribunal's founding texts relating to such compensation, it was not possible for the Judges of the Tribunal to rule on the matter.⁴ He also wrote to the Secretary-General in March 2002 requesting the opinion of the Security Council on the question once again.⁵

Despite the view expressed by the President of the ICTY, the Appeals Chamber of the ICTR has given judgments in two cases envisaging the payment of compensation to accused persons, who had been found to have been detained in violation of their rights under the Statute and Rules.⁶ The Appeals Chamber held that the accused, who had not yet been tried by the Trial Chamber, were entitled to a remedy for the violation of their rights. It decided that if they were found not guilty, they should receive financial compensation, and that if found guilty, the sentence should be reduced to take account of the violation of their rights.⁷

⁴ See Ninth Annual Report of the ICTY (1 August 2001–31 July 2002), UN Doc. A/57/379-S/2002/985, 4 Sep. 2002, para. 28.

⁵ UN Doc. S/2002/304, 25 March 2002.

⁶ *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, *Decision (Prosecutor's Request for Review or Reconsideration)*, Appeals Chamber, 31 March 2000 ('*Barayagwiza Review Decision*') (rights violated because of the length of time that the accused was provisionally detained before being indicted, and the delay in his initial appearance following his transfer to the Tribunal) (available at: <http://www.legal-tools.org/en/doc/1c0fe7/>); *Semanza v. Prosecutor*, ICTR-97-20-A, *Decision*, Appeals Chamber, 31 May 2000 ('*Semanza Decision*') (violation of the accused's right to be informed promptly of the nature of the charges against him) (available at: <http://www.legal-tools.org/en/doc/d38ef3/>).

⁷ *Barayagwiza Review Decision*, see note 6, para. 75 (3); *Semanza Decision*, see note 6, disposition, para. 6. In the former case, the accused was convicted, and the Trial Chamber gave effect to the Appeals Chamber's decision by reducing the sentence from life imprisonment to 35 years: *Prosecutor v. Barayagwiza et al.*, ICTR-99-52-T, *Judgement*, Trial Chamber, 3 December 2003, paras. 1106–1107 (available at: <http://www.legal-tools.org/en/doc/45b8b6/>). In the latter case, the accused was also convicted, and the Trial Chamber reduced the sentence by six months to take account of the violation of his rights: *Prosecutor v. Semanza*, ICTR-97-20-T, *Judgement and Sentence*, Trial Chamber, 15 May 2003, paras. 579–580 (available at: <http://www.legal-tools.org/en/doc/7e668a/>), a remedy which the Appeals Chamber found consistent with its earlier decision: *Semanza v. Prosecutor*, ICTR-97-20-A, *Judgement*, Appeals Chamber, 20 May 2005, paras. 323–329 (available at: <http://www.legal-tools.org/en/doc/a686fd/>). In the *Barayagwiza Review Decision*, Judge Shahabuddeen added that despite authorities to the effect that the remedy for a breach of the principle that a trial is to be held within a reasonable time may take the form of payment of monetary compensation or of adjustment of any sentence ultimately imposed, it is necessary to contemplate a point of time at which the accused indisputably becomes entitled to release and dismissal of the indictment (*Barayagwiza Review Decision, Separate Opinion of Judge Shahabuddeen*, paras. 39–40). On the doctrine of abuse of process generally, see also *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, *Decision*, Appeals Chamber, 3 November 1999, paras. 73–112 (available at: <http://www.legal-tools.org/en/doc/ee7411/>) (a decision which was the subject of review (revision) by the Appeals Chamber in the *Barayagwiza Review Decision*). More recently, a Trial Chamber of the ICTR has held that 'while the Chamber acknowledges the importance of the principle provided for in article 85 para. 3 of the ICC Statute, it does not find that at present customary international law provides for a right to compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice', and that in the absence of a provision in its Statute and Rules or any other applicable source of law in this regard, it therefore had to deny a claim for compensation on this basis: *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, *Decision on Appropriate Remedy*, Trial Chamber, 31 January 2007, para. 31 (available at: <http://www.legal-tools.org/en/doc/7a84f3/>). In that decision, the Trial Chamber concluded, however, in light of instruments on human rights and their applications by human rights bodies, 'that its inherent power to give effect to an accused's or former accused's right to an effective remedy encompasses the power to grant financial compensation where, in the specific circumstances of a case, it constitutes the appropriate remedy to redress a violation of the human right in question' (*ibid.*, para. 58). In that case, the Trial Chamber ordered, *inter alia*, financial compensation of 2,000 US dollars for the moral injury sustained by an acquitted person as a result of a violation of his right to legal assistance.

B. Analysis and interpretation of elements

I. Paragraph 1

4 Paragraph 1 of this article adopts the wording of article 9 paragraph 5 of the ICCPR.⁸ In the context of the ICC, this provision would apply in cases where a person is arrested or detained in **violation of specific provisions of the Statute** (in particular, article 55 paragraph 1 (d)) or the Rules, and presumably, where the arrest or detention was unlawful under **other applicable rules of international law**.⁹ As arrests are executed by States, and in view of the requirement in article 59 paragraph 1 that the arrest of a person by a State shall be ‘in accordance with its laws’, this paragraph could arguably apply also to arrests or detentions by **State authorities** in connection with proceedings before the Court, which are unlawful under the national law of that State.¹⁰ Alternatively, given that the Court has no control over the conduct of the State authorities, it could be argued that in such circumstances requests for compensation must be addressed to the State authorities responsible for the breach of domestic law.

II. Paragraph 2

5 Paragraph 2 is in turn materially identical to article 14 paragraph 6 of the ICCPR.¹¹ This provision could obviously be of potential application in cases where a **conviction is reversed** as a result of a **revision of the final judgment** under article 84. Indeed, as this paragraph only applies where a conviction is actually ‘reversed’, successful proceedings on revision would in fact appear to be a pre-requisite. This paragraph is unlikely to apply in cases where a conviction by a Trial Chamber is overturned on appeal on the basis of new evidence presented in the appeal proceedings, since the conviction in such a case will not have been ‘by a final decision’ as required by the wording of this paragraph.¹² There is no clear definition of the type of circumstances that will amount to a ‘miscarriage of justice’, and in particular, whether the expression would encompass every case in which a final judgment of conviction is reversed upon revision.¹³

III. Paragraph 3

6 Unlike the first two paragraphs of this article, paragraph 3 confers **no right to compensation**, but allows for compensation to be awarded in the Court’s **discretion**. The requirement that the discretion be exercised only in ‘exceptional circumstances’ where there has been a ‘grave and manifest’ miscarriage of justice suggests that ordinarily no compensation will be paid to persons acquitted by the Court (even if only on appeal), or against whom proceedings are terminated before final judgment. Paragraph 3 is a provision without counterpart in the

⁸ See Nowak, *UN Covenant on Civil and Political Rights* (1993), 180–182.

⁹ Cf. the version of this article contained in the 1998 Report of the Preparatory Committee which referred to arrest or detention ‘in violation of the Statute, [the Rules] or internationally recognised human rights law’: Preparatory Committee (Consolidated) Draft, p. 155. See also mn 3.

¹⁰ See further mn 8.

¹¹ See Nowak, see note 8, 269–271.

¹² See Joseph et al., *The International Covenant on Civil and Political Rights* (2000) 336–337 para. 14.120 (referring to *WJH v. Netherlands* (408/90) (UN Human Rights Committee)). However, article 85 para. 3 might apply in this situation.

¹³ See Joseph et al., see note 12, 335 para. 14.118 (noting that ‘[i]t is uncertain whether a ‘miscarriage of justice’ can occur in the absence of some form of State malfeasance, such as police or prosecutorial misbehaviour during relevant investigations or proceedings’).

ICCPR or other major international human rights instruments, but provisions for the compensation of an accused in such circumstances exist in some national systems.¹⁴ In proposing the inclusion of such a provision in the Statutes of ICTY and ICTR, the Presidents of those Tribunals stated that a discretion to award compensation in this situation would be in the interest of the Tribunal and the United Nations in general because of the circumstances in which the Tribunals operate, including the fact that the accused are in pre-trial detention for long periods.¹⁵ More recently, a Trial Chamber of the ICTR found that paragraph 3 ‘reflects the current state of customary law with respect to compensation for acquitted person’.¹⁶

There is no definition of what would constitute a ‘grave and manifest miscarriage of justice’ for the purposes of this paragraph, but the words ‘grave and manifest’ suggest that this expression is narrower in scope than the expression ‘miscarriage of justice’ in paragraph 2.¹⁷ The above-mentioned decision of the ICTR Trial Chamber suggests that the threshold for compensation is indeed a high one.¹⁸

C. Special remarks

The curious feature of this article is its lack of detail. The provisions of the ICCPR to which the first two paragraphs give effect are statements of general principle, which require concrete procedures for their practical implementation in a given legal system. These two paragraphs in particular do not specify how claims for such compensation are to be made, by whom the claims are to be decided, by what criteria the quantum of compensation is to be determined, or by whom the compensation is to be paid.¹⁹ Nor do they even specify how or by whom the machinery for dealing with claims for compensation are to be established. Paragraph 3 is a little more specific, indicating that compensation is to be awarded by ‘the Court’, in accordance with the Rules.

Certain further details are now provided by the Rules of Procedure and Evidence. Rules 173–175 provide for a single mechanism for claiming compensation on *any* of the grounds indicated in article 85, under which claims are decided by a Chamber composed of three judges, who must not have participated in any earlier judgment of the Court regarding the person making the request. The Prosecutor has a right under rule 174 to make observations on requests for compensation. No provision is made for any appeal against such a decision.

The source of the funds from which the compensation is to be paid is not stated – presumably any compensation awarded under this article would form part of the ‘expenses of the Court’ payable from the funds of the Court pursuant to article 114.

As noted above,²⁰ the first paragraph of this article is ambiguous, in that it does not specify whether it is limited to unlawful conduct by Court officials, or whether it also extends to unlawful arrests and detentions by State authorities and other persons in connection with

¹⁴ *E.g.*, Norway: Code of Criminal Procedure (Straffeprosessloven, 22 May 1981, No. 25), articles 444–451; Austria: Strafrechtliches Entschädigungsgesetz, § 2; see also Instituto Iberoamericano de Derecho Procesal, *Código Procesal Penal modelo para Iberoamérica* (Model Code of Criminal Procedure for Latin America) (1989), article 422.

¹⁵ See mn 2 above.

¹⁶ *Protais Zigiranyirazo v. Prosecutor*, ICTR-2001-01-073, Decision on Protais Zigiranyirazo’s Motion for Damages, Trial Chamber III, 18 June 2012, (*Zigiranyirazo Damages Decision*), para. 19 (available at: <http://www.ictcr.org/Portals/0/Case%5CEnglish%5CZigiranyirazo%5Cdecisions%5C120618.pdf>). But see Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights* (2014), 1332–1334.

¹⁷ See note 13 above and accompanying text.

¹⁸ See *Zigiranyirazo Damages Decision*, see note 16, paras. 20–21.

¹⁹ The version of this article contained in the 1998 Report of the Preparatory Committee specified that compensation under paragraph 1 would be ‘from the Court, in accordance with the Rules’, and that compensation under paragraph 2 would be ‘in accordance with the Rules’: Preparatory Committee (Consolidated) Draft, see note 9.

²⁰ Mn 4.

proceedings before the Court. In the event that it extends to the latter, a further issue is whether the lawfulness of an arrest or detention by State authorities is a matter that can be determined by the Court, or whether paragraph 1 merely imposes an obligation on States Parties to establish their own machinery for compensating victims of unlawful arrests and detentions by their authorities in connection with ICC proceedings. If the former is the correct interpretation, presumably any compensation awarded by the Court in respect of unlawful conduct of State officials would be paid by the State concerned, rather than by the Court. Rules 173–175 shed no further light on these questions.

The second and third paragraphs of this article similarly do not address the situation where the miscarriage of justice is attributable to the conduct of a State and cannot be attributed to anything done by the Court. It may be an open question whether the Rules could provide for such compensation to be paid in whole or in part by the State concerned in such circumstances.²¹ No such provision is presently contained in the Rules.

²¹ *Cf.* the version of this article contained in the 1996 Preparatory Committee Report, which provided that ‘Procedures and criteria for compensation shall be provided in the rules including the expenses to be borne by a complainant State if that State lodged a complaint without sufficient reason’: Preparatory Committee Report II 1996, see note 1, p. 206.

PART 9 INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Preliminary Remarks

Literature: A.I.D.P. (ed.), *Les systèmes comparés de justice pénale, session 5 – développement des règles internationales de procédure pénale* (with contributions of Gilbert Bitti, Louise Arbour, Alphonse Orié, Kenneth Harris, Christine Van den Wyngaert and Peter Wilkitzki), (1998) 17 *NEP*; Ambos, K., *The International Criminal Court and the Traditional Principles of International Cooperation in Criminal Matters*, (1998) 9 *FinnishYBIL* 413; Brady, H., 'Australia', in: C. Kreß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 14; Broomhall, B. and Kreß, C., 'Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis', in: C. Kreß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 515; Buchet, A., 'L'intégration en France de la Convention portant Statut de la Cour Internationale. Histoire brève et inachevée', in: C. Kreß and F. Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders. I: General Aspects and Constitutional Issues* (Nomos 2000) 79; Cassese, A., 'On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', (1998) 9 *EJIL* 13; *id.*, 'Reflections on International Criminal Justice', (1998) 61 *MLRev* 1; Cazala, J., *Est-il risqué pour les États de coopérer avec les juridictions pénales internationales?*, (2003) *RSC* 721; Dugard, J. and van den Wyngaert, C., 'Reconciling Extradition with Human Rights', (1998) 92 *AJIL* 187; Furuya, S., 'Legal Effect of Rules of the International Criminal Tribunals and Courts upon Individuals: Emerging International Law of Direct Effect', (2000) 2 *NethLLRev* 130; Harhoff, F. and Mochochoko, P. (eds.), 'International Cooperation and Judicial Assistance', in: R.S. Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure* (2001) 637; Heymann, P.B., 'Two Models of National Attitudes Toward International Cooperation in Law Enforcement', (1990) 31 *HarvJIL* 99; Kaul, H.-P. and Kreß, C., 'Jurisdiction and Cooperation in the Statute of the International Criminal Court', (1999) 2 *YbIHL* 143; Kreß, C., 'Penalties, Enforcement and Cooperation in the Statute of the International Criminal Court', (1998) 6 *EJCLCJ* 442; *id.*, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 *JICJ* 603; *id.*, 'III 26', in: H. Grütznér *et al.* (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (2007 *et seq.*); Kreß, C. and Jarasch, F., 'The Rome Statute and the German Legal Order', in: C. Kreß and F. Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders. i: General Aspects and Constitutional Issues* (Nomos 2000) 91; Kreß, C. and Sluiter, G., 'Enforcement. Fines and Forfeiture Orders', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1751; Lindemann, J. and Thormann, O., 'Switzerland', in: C. Kreß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 432; Maikowski, T., *Staatliche Kooperationspflichten gegenüber dem Internationalen Strafgerichtshof* (2002); Maogoto, J.N., *A Giant Without Limbs: The International Criminal Court's State-Centric Cooperation Regime*, (5 May 2006) Bepress Legal Series, Paper 1350 <<http://law.bepress.com/cgi/viewcontent.cgi?article=6242&context=expresso>>; Markees, C., 'The Difference in Concept between Civil and Common Law Countries as to Judicial Assistance and Cooperation in Criminal Matters', in: M.C. Bassiouni and V.P. Nanda (eds.), *A Treatise on International Criminal Law*, Vol. II: *Jurisdiction and Cooperation* (1973) 171; Massé, M., 'Une nouvelle dimension de la coopération en matière pénale: la coopération "verticale"', (2002) *RSC* 884; Mochochoko, P., 'International Cooperation and Judicial Assistance', in: R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (1999) 305; Mosconi, F. and Parisi, N., 'Cooperation between International Criminal Court and States Parties', in: F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998) 311; Mutuyaba, R., 'An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's Objective in Securing Suspects in its Ongoing Investigations and Prosecutions', (2012) 12 *ICLRev* 937; Oosterveld, V., Perry, M. and McManus, J., 'The Cooperation of States with the International Criminal Court', (2002) 25 *FordhamILJ* 767; Rastan, R., 'Testing Co-operation: The ICC and National Authorities', (2008) 21 *LeidenJIL* 431; Reisinger-Coracini, A., 'Cooperation from States and other Entities', in: Sluiter *et al.*, *International Criminal Procedure* (OUP 2013) 95; Schomburg, W. *et al.* (eds.), *Internationale Rechtshilfe in Strafsachen. International Cooperation in Criminal Matters* (5th ed. 2012); Schrotz, J.-O., *Individualrechtsverletzungen bei der Überstellung an die internationale Strafgerichtsbarkeit. Zu den Rechtsfolgen individualrechtswidrigen Vorverhaltens im internationalen Strafverfahren* (Nomos 2006); Sluiter, G., 'The Surrender of War Criminals to the International Criminal Court', (2003) 25 *LoyLAI&CompLRev* 605; Swart, B., 'International Cooperation and Judicial Assistance. General Problems', in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 1589; Swart, B. and Sluiter, G., 'The International Criminal Court and

International Criminal Co-Operation', in: H.A.M. von Hebel *et al.* (eds.), *Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos* (T.M.C. Asser Press 1999) 91; Vogel, J., 'I 2', in: H. Grütznier *et al.* (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (2007 *et seq.*).

Content

I. The importance of state cooperation.....	1
II. Concept and forms of international cooperation and judicial assistance.....	2
III. Part 9 within the overall framework of the Statute.....	3
IV. Structure of Part 9 and other legal sources on cooperation.....	4
V. Part 9 as a (weak) vertical cooperation regime.....	5
VI. No need to attribute a direct effect to Court requests in the legal order of the requested State.....	6
VII. Part 9 and different national legal traditions on international cooperation in criminal matters.....	7
VIII. Cooperation under Part 9 and human rights.....	8
IX. Enhanced cooperation.....	9

I. The importance of state cooperation

- 1 The first President of the ICTY made the following statement: '[...][T]he ICTY remains very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are State authorities'¹. This holds true for the ICC as well. Neither does the Statute explicitly endow the Court with enforcement powers nor can such a power be regarded as inherent in the Court's functions². At the same time, both suspected persons and indispensable evidence are usually located in territories under sovereign authority of States. This means, that if these States refuse to cooperate, the Court must – to borrow once more the words used by *Antonio Cassese* – turn out to be utterly impotent³. For this simple reason, the issue of cooperation goes to the heart of fair and expedient proceedings before the Court⁴. At the same time, the law on co-operation raises sensitive issues of State sovereignty and individual rights. Against this background it is readily explicable why Part 9 was amongst the Parts of the Statute where consensus was most difficult to achieve and why the finalization of an unbracketed text was only achieved just before the conference came to a close⁵. The first years of practice under the Rome Statute have demonstrated the accuracy of this assessment and unfortunately the frailties of a system dependent on States and external bodies for execution and enforcement. While there has been extensive use of Part 9 by Chambers, the Prosecution and the Defence, with success, there remain glaring cases of non-cooperation particularly with the arrest and surrender of persons sought by the Court. Even more disappointingly, the Assembly of States Parties and the Security Council have failed to undertake any action in response to the situations of non-cooperation despite their clear responsibilities under the Rome Statute and the Charter respectively. The evolution of the ICC in terms of its effectiveness and credibility is dependent in no small measure on enhanced State cooperation and action on the part of the Assembly of States Parties and the Security Council.

¹ Cassese (1998) 9 *EJIL* 13.

² The negative answer of the Appeals Chamber of the ICTY *Prosecutor v. Blaskić*, IT-95-14- AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct. 1997, para. 25, to the question whether an enforcement power can be seen as inherent function is rightly related to any *international judicial body*.

³ Cassese (1998) 61 *MLRev* 1.

⁴ Maogoto (5 May 2006) *Bepress Legal Series* 5, Paper 1350; Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2002) 6; Swart, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1589.

⁵ Mochochoko, in: R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (1999) 317.

II. Concept and forms of international cooperation and judicial assistance

In the inter-State context the term 'international cooperation in criminal matters' denotes the deliberate provision of support for criminal proceedings in a different *forum*. Such support may take different forms. Originally a threefold distinction was made between the *extradition* of a person for the purpose of prosecution or enforcement of a sentence of imprisonment, the *transit* of a person from the extraditing State to the State seeking extradition through a third State, and mutual assistance comprising other forms of support including, most importantly, the gathering of evidence. In the course of the development, the *transfer of the enforcement of sentences* evolved into a separate fourth category of assistance. More recent additions to the spectrum of cooperation measures are the *transfer of criminal proceedings* and the authorization of the execution of procedural acts by the requesting State in the requested State, the so called *passive cooperation*. There has been a lot of debate about the nature of the proceedings conducted by the requested State in order to comply with the request. It has traditionally been a matter of controversy, in particular, whether those proceedings form part of the law of criminal procedure. The prevailing contemporary view would appear to be that the proceedings in question are not formally part of the criminal proceedings in the requesting State and that extradition proceedings are rather administrative than criminal in nature⁶. The better view, though, is to avoid generalizations and to recognize the complex nature of the proceedings in question. This allows for the appropriate differentiated and tailor-made decisions as regards the body of law applicable to the legal issue at stake⁷. At the same time, a more differentiated approach makes it possible to view the proceedings conducted by the requested State also as part of one set of criminal proceedings that are being conducted in the form of an international division of labour.

As in the inter-State context, the international cooperation and assistance under Part 9 constitutes the deliberate provision of support by an international legal person (for most practical purposes: a requested State) for criminal proceedings in a different forum (for most practical purposes: the *forum* of the distinct international legal person 'ICC'). It follows that the above mentioned questions of categorization arise *mutatis mutandis* and that they should, as a rule, receive a similarly differentiated treatment.

Part 9 deals with most of those forms known from the context of inter-State cooperation in criminal matters, but, in doing so, Part 9 in some respects uses different terminology: Most importantly, the term 'surrender' is used instead of that of 'extradition' (see, e.g., articles 89 para. 1 and 102) and 'other forms of cooperation' replace the term 'mutual assistance' (see, e.g., article 93 para. 1). Conversely, the traditional term 'transit' is kept in article 89 para. 3. Article 99 para. 4, which is widely referred to as the provision dealing with on-site investigations by organs of the Court, constitutes the corollary of 'passive cooperation' in the inter-State context.

Part 9 does not contain an equivalent to the inter-State concept of transfer of enforcement. Instead, the issue of enforcement of ICC sentences is dealt with in Part 10 'Enforcement'. In the course of the negotiations, the provisions that eventually became Parts 9 and 10 were for a long time discussed together under the general heading 'international cooperation and judicial assistance'. Towards the end of the debate, however, the discussions on 'international cooperation and judicial assistance' developed separately and, partly, on the basis of a different approach regarding the obligatory nature of the type of interaction concerned. In line with the decision of the drafters to devote a separate Part to the enforcement of the sentences imposed by the Court, the Statute uses the term 'enforcement' as a distinct concept instead of classifying it as a sub-category of the term 'international cooperation and judicial

⁶ Knoop, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (2002) 111.

⁷ Vogel, in: Grützner et al. (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (2007 et seq.) vor § 1, mn 4 et seq.

assistance'. The divorce between Part 9 and 10 is not fortunate in all respects and should not be construed so as to exclude the possibility of drawing analogies between the two areas altogether. This is particularly true with respect to the enforcement of fines and forfeitures: It is reasonable to interpret the regime which has been included in Part 10 (article 109) in light of a number of provisions of Part 9⁸. Therefore, Parts 9 and 10, on a higher level of abstraction, may well be seen as the two branches of legal cooperation between States and the ICC. In light of that fact, it is to be welcomed that the words 'in accordance of the provisions of the Statute' in article 86 include provisions in Part 10.

Neither Part 9 nor any other Part of the Statute touch upon the concept of transfer of proceedings. Other than article 9 para. 2 of the ICTY Statute and article 8 para. 2 of the ICTR Statute, the complementarity regime under the Statute precludes the Court from requesting a State to defer ongoing criminal proceedings to the international level because the conduct of international proceedings is deemed to be the preferable option. Interestingly, though, some States have included provisions on the transfer of proceedings to the Court in cases where it is decided not to challenge the admissibility of the international proceedings or where the Court has determined the international proceedings admissible⁹. Again due to the difference between a system based on the primacy of the international criminal court and a system with a complementary international criminal jurisdiction, neither the Statute nor the Rules include a referral power comparable to Rule 11*bis* of the Rules of Procedure and Evidence of both the ICTY and ICTR. Rule 185 para. 2, however, provides for the transfer of a surrendered person to a State whose investigation or prosecution has formed the basis of a successful admissibility challenge under article 17 para. 1 (a).

New forms of cooperation may be required in the context of the operation of the Statute's complementarity regime. In order to determine the unwillingness or the inability of a State to genuinely carry out an investigation or prosecution within the meaning of article 17, the Court may wish to request information about the conduct of national proceedings. Neither the Statute nor the Rules provide for details in this respect (but see articles 18 para. 5 and 19 para. 11; see also article 86, mn 13).

III. Part 9 within the overall framework of the Statute

- 3 Part 9 is intimately related to other Parts of the Statute. First of all, and seen from the perspective of the Court, Part 9 constitutes the external part of the Court's procedural law and complements the internal part which is largely contained in Parts 4, to 6 and 8¹⁰. The interplay between the internal and the external procedural law is particularly clear with respect to Part 5¹¹. Under the latter Part, the Court decides on the investigative measures to be taken and on the arrest of the suspect. These measures will, as a rule, have to be carried out in accordance with Part 9. To take the example of the arrest of a suspect: The issuance of an arrest warrant is governed by article 58 which is part of Part 5, whereas the provisions concerning the cooperation of the territorial State in the actual arrest of the person concerned and in the latter's surrender are located in Part 9 (see, in particular, article 89). Multiple decisions to date from various Chambers have dealt with the interrelationship of Part 9 and other parts of the Rome Statute most notably Part V as forecasted.¹²

⁸ For a detailed analysis, see Krefß and Sluiter, in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1751, 1831.

⁹ See, e.g., Lindemann and Thormann, in: C. Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders* (2005) 432 *et seq.*

¹⁰ Krefß (2003) 1 *JICJ* 603, 614.

¹¹ A direct link to Part 6 is established in article 93 para. 4 which must be read in conjunction with article 72 (for a detailed analysis *cf.* the commentaries on the respective provisions).

¹² See for example *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-158, Order on the implementation of the cooperation agreement between the Court and the DRC concluded pursuant article 93 (7) of the Statute, Appeals Chamber, 20 January 2014, para. 23 (Article 97(b) and Article 21(3)) <<https://www.legal-tools.org/doc/>

The links between the cooperation regime and Part 2 are equally close. The need to create a set of rules on cooperation under Part 9 which is coherent with the jurisdiction and complementarity regime under Part 2 remained unquestioned throughout the negotiations. Correspondingly, a number of decisions to be taken in Part 9 had been suspended until the final outcome of the relevant negotiations on Part 2 became apparent. Again by way of example, there was a general understanding that it would be pointless to state in Part 2 that it is up to the Court and not to a State Party concerned to authoritatively determine the admissibility of a given case, and, at the same time, to concede to this very State Party a ground to refuse to cooperate with the Court on the basis that this State unilaterally judges the case inadmissible. Consequently, articles 89 para. 2 and 95 reflect the scheme of articles 17 *et seq.* and the same kind of interplay between provisions of Part 9 with such of Part 2 can be found elsewhere. Support for this interpretation is found in the Court's examination of the interplay between articles 19 and 95.¹³

As a matter of treaty interpretation, the following conclusion can be drawn: In so far as a legal problem of cooperation arises that is directly interrelated with issues covered in Parts 2 and 5 and that is not specifically dealt with in Part 9, it appears advisable to resort to a *systematical interpretation* that guarantees the coherency between the solution found in Part 9 and the relevant rule(s) in Parts 2 and/or 5.

IV. Structure of Part 9 and other legal sources on cooperation

Part 9 contains provisions of general scope, provisions relating to the surrender of persons, including one provision on transit, and provisions relating to other forms of cooperation. Unfortunately, there was not enough time at the end of the negotiations to bring the articles in an altogether logical order. Rules of general application can be found not only at the very beginning of Part 9 in articles 86, 87 and 88, but also in articles 95, 97, 98 para. 1, and article 100. The rules dealing exclusively with surrender, again are somewhat spread throughout Part 9. One finds them not only in articles 89 to 92, but also in articles 98 para. 2, 101 and 102. The remainder of Part 9, *i. e.* articles 93, 94, 96 and 99, relate exclusively to other forms of cooperation with the provision on on-site investigations in article 99 para. 4 having the specific nature of passive cooperation. The somewhat scattered organization of Part 9 became relevant in a case which looked at the proper interpretation of article 95¹⁴ and in particular whether its scope of application extended to requests for arrest and surrender as well as other forms of cooperation. While in the end the Court chose not to place any weight on its placement, the case illustrated that Part 9 could benefit from a reorganization which clearly delineates between specialized and general provisions for the two major types of cooperation addressed.

d554f7/;>; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-169, Decision on 'Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan', Trial Chamber IV, 1 July 2011, paras.12–33 (Part 5 and Part 9) <<https://www.legal-tools.org/doc/891c96/>>; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', 01/09-01/11-1598, Appeals Chamber, 9 October 2014, paras 106 -113 (Part 5 and Part 9).

¹³ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, ICC-01/11-01/11-163, Pre-Trial Chamber I, 1 June 2012, paras 27 to 30 <<https://www.legal-tools.org/doc/ae7c48/>>; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No.: ICC-01/11-01/11-354, Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, Pre-Trial Chamber I, 14 June 2013, paras 23–26 <<https://www.legal-tools.org/doc/a400f4/>>.

¹⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, ICC-01/11-01/11-163, Pre-Trial Chamber I, 1 June 2012, paras 27 to 30 <<https://www.legal-tools.org/doc/ae7c48/>>.

Part 9 is complemented by Chapter 11 of the Rules of Procedure and Evidence (Rules 176 to 197) and by Regulations 107 to 112 of the Regulations of the Court. Furthermore, Regulations 76 to 78 of the Regulations of the Registry touch upon cooperation issues. Eventually, a number of bilateral agreements establish cooperation relationships between the Court and International Organizations. Reference can be made, for example, to articles 15 to 20 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations¹⁵ and the agreement between the Court and the European Union on Cooperation and Assistance¹⁶.

V. Part 9 as a (weak) vertical cooperation regime

- 5 In its landmark judgment of 29 October 1997 in *Prosecutor v. T. Blaskić*, the Appeals Chamber of the ICTY described the cooperation regime under its Statute as vertical in nature and contrasted this form of cooperation with the horizontal cooperation between States¹⁷. In the meantime, considerable scholarly thought has gone into the definition of vertical and horizontal cooperation and, as a result hereof, the obligations to cooperate, the degree of reciprocity and the dispute settlement mechanism have been identified as the three decisive factors to locate the place of a given cooperation regime on a sliding scale from horizontalism to verticalism in their purest forms¹⁸.

Throughout the negotiations there was a basic opposition between the adherents of a (more) horizontal and the proponents of a (more) vertical approach. The first group of delegations emphasized State sovereignty, *i. e.* to attribute decisive weight to State interests that may run counter a strict duty to cooperate with the Court and often referred to the *UN Model Treaties* on extradition and mutual assistance in criminal matters¹⁹. The opposed camp started from the assumption that only a cooperation regime that is essentially distinct from traditional inter-State concepts in that it attaches greater weight to the community interest in an international criminal prosecution, fully corresponded to the specific relationship between States Parties and the Court. This basic controversy is clearly reflected in the different terminological and substantive options in the Draft Statute's version of Part 9²⁰: As a matter of terminology the options 'extradition'/'surrender'/'transfer' run throughout the text. And with respect to the crucial question of the degree of rigidity of the obligations to cooperate a list of grounds for refusal sharply contrasts with the option to exclude any such ground. The final outcome of the negotiations on Part 9 must be seen in the light of the said controversy.

Taken as a whole the cooperation regime in Part 9, on the one hand, presents a considerable number of vertical elements that make it appear clearly different from a traditional horizontal

¹⁵ The Agreement entered into force on 4 Dec. 2004; ICC/ASP/3/Res.1, 300. Article 18 of the Agreement provides that more specific arrangements and agreements may be entered into. For the first example, see the Memorandum of Understanding between the United Nations and the International Criminal Court concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of Congo (Monuc) and the International Criminal Court.

¹⁶ ICC-PRES/01-01-06; the Agreement entered into force on 1 May 2006; on the cooperation between the Court and the UN Mission in the Democratic Republic of the Congo (MONUC) on the basis of the Memorandum of Understanding between the ICC and the UN on cooperation from MONUC, see Rastan (2008) 21 *LeidenJIL*431, 445 *et seq.*; for the complete list of cooperation agreements, see <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/index.aspx> accessed 11 December 2014.

¹⁷ *Blaskić* (Judgment), see note 2, paras. 47 and 54.

¹⁸ For a particularly important contribution, see Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002) 82 *et seq.*; see also Krefß, in: H. Grützner *et al.* (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (2007 *et seq.*) mn 205 *et seq.*

¹⁹ UN Doc. A/CONF.144/28/Rev.1, p. 64 *et seq.*, and p. 75 *et seq.* For a pure horizontal approach even in the context of the Statute of the ICTY *cf.* the *amicus curiae* brief of the Government of the People's Republic of China of 15 Sep. 1997 submitted in the *Blaskić* case.

²⁰ UN Doc. A/CONF.183/2/Add.1 (1998), p. 156 *et seq.*

regime as represented in the UN model treaties²¹. On the other hand, Part 9 does certainly not depart completely from traditional concepts and instruments of inter-State extradition and mutual legal assistance in criminal matters. In fact, quite a number of important concessions to the horizontal school had to be made to achieve consensus. On balance, article 91 para. 2 (c) is correct in underlining the ‘distinct nature of the Court’ and this statement of the drafters should be duly reflected in any teleological interpretation of provisions contained in Part 9. At the same time it remains true that the vertical cooperation regime in Part 9 is relatively weak.

The most clear cut vertical elements of Part 9 are the absence of strict reciprocity and the power of the Court to authoritatively settle any dispute with a State Party about cooperation. The absence of strict reciprocity results from the fact that Part 9, by and large, deals with the cooperation duties of States only. The only exception is article 93 para. 10 which is couched in discretionary terms. The power of the Court to authoritatively settle any dispute about cooperation is enshrined in article 87 para. 7 and in article 119 para. 1 of the Statute²². As regards the extent of obligations, the vertical starting point must be stressed that the cooperation regime under Part 9 is an essentially obligatory one which is underlined in article 86. Accordingly, Part 9 does neither leave room for a refusal to cooperate based on political discretion²³ nor does it retain traditional grounds to refuse cooperation such as, in particular, the double criminality requirement, a lack of reciprocity and the political nature of the offense. Moreover, grounds for refusal *stricto sensu* are virtually absent in Part 9²⁴. The Court’s interpretation of Part 9, has, in general, highlighted its vertical strength with decisions that have emphasized the sole responsibility of the Court to decide on issues related to article 98 relying on article 119(1) in support and in emphasizing a State’s obligation to either execute a request or consult with the Court in accordance with article 97.²⁵

At the same time, however, Part 9 reflects horizontal solutions in many respects. This is true, first of all, for the channels of communication because article 87 para. 1 leaves States Parties the option to have requests transmitted through the diplomatic channel. It is true, second, in terms of procedures. Both, article 89 para. 1 and article 93 para. 1 refer to the procedures of the law of the requested State and article 99 para. 1 only contains a half-hearted allusion to the modern principle of *forum regit actum*. As far as the extent of the obligations is concerned, Part 9, on a closer look, does not categorically reject all grounds for refusal of cooperation that one may find in a horizontal setting. Still, Part 9 generally replaces the rather categorical instrument of grounds for refusals *stricto sensu* by more flexible and refined solutions, such as consultation and postponement clauses as can be found, e.g., in

²¹ UN Doc. A/CONF.144/28/Rev.1, p. 64 *et seq.*, and p. 75 *et seq.* For a pure horizontal approach even in the context of the Statute of the ICTY cf. the *amicus curiae* brief of the Government of the People’s Republic of China of 15 Sep. 1997 submitted in the *Blaskić* case.

²² Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002) 86 *et seq.*; see also Krefß, in: H. Grützner *et al.* (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (2007 *et seq.*) mn 220 *et seq.*; Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2002) 20 *et seq.*

²³ In that respect, the Australian implementing legislation is highly problematic; see Brady, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders, Vol. II: Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 13, 14.

²⁴ For a more detailed account see Krefß/Prost, article 89 para. 1 and Krefß/Prost, article 93 para. 1.

²⁵ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014, paras 15, 16, 21 and 22 <<https://www.legal-tools.org/doc/89d30d/>>; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-140, Décision rendue en application de l’article 87-7 du Statut de Rome concernant l’refus de la République du Tchad d’accéder aux demandes de coopération délivrées par la Cour concernant l’arrestation et la remise d’Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011, paras 10,11 <<https://www.legal-tools.org/doc/c33d51/>>; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011, paras 11,12 <<https://www.legal-tools.org/doc/476812/>>.

articles 89 paras. 2 and 4, 90, 91 para. 2 (c) in conjunction with paragraph 4, articles 93 paras. 3, 4, 5 and 9, 94, 95, 96 para. 2 (e) in conjunction with paragraph 3, articles 97 and 98²⁶. Most of these provisions contain elements of a carefully balanced compromise which should be reflected in any *genetical interpretation* of provisions in Part 9. On balance, the provisions regarding the other forms of cooperation are less vertical than those concerning the surrender of persons. In particular, the absence of a power to require State cooperation in compelling a witness to cross borders in order to appear before the Court and the restrictions on the Court powers to conduct on site investigations (article 99 para. 4), have been highlighted as the two most noteworthy shortcomings of Part 9 if judged from the ideal of effective cooperation²⁷.

VI. No need to attribute a direct effect to Court requests in the legal order of the requested State

- 6 The repeated reference to the procedures of the law of the requested State (see articles 88, 89, 93 and 99) means that Part 9 does not call for the attribution of a direct effect of Court requests in the domestic legal order of the requested State²⁸. In that regard, Part 9 does not establish a genuinely supranational cooperation regime. On the other hand, the – albeit limited – powers of the Court under article 99 para. 4 to conduct on site investigations may appear as a supranational element from the perspective of a national constitution²⁹. Furthermore, supranational elements which are situated in the proximity of Part 9 can be found in Parts 5 and 6 of the Statute³⁰; reference is made to the Court's powers to summon the suspect to appear under article 58 para. 7 and to require the attendance of a witness under article 64 para. 6 (b)³¹. Finally, the arrest warrant under article 58 para. 1 may be said to have certain direct legal effects *vis-à-vis* the person sought³² even before the surrender of that person to the Court³³.

VII. Part 9 and different national legal traditions on international cooperation in criminal matters

- 7 In an attempt to clarify fundamental differences of the common law and the civil law approach to extradition and mutual legal assistance *Philip B. Heymann* has contrasted a *Prosecutorial Model of Cooperation* with an *International Law Model*³⁴. Whereas the former entails as free, full and informal cooperation as possible, the latter consists in a carefully designed structure of rules with national sovereignty lying at its core. While recognizing that no State adheres to either model in its pure form, *Heymann* holds the view that the common

²⁶ For a more detailed account see the commentaries on the respective provision.

²⁷ Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002) 346 *et seq.*

²⁸ Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002) esp. 79 *et seq.*

²⁹ For France, see Buchet, in: Krefß and Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders. I: General Aspects and Constitutional Issues* (Nomos 2000) 79.

³⁰ For a useful analysis, see Furuya (2000) 2 *NethLLRev* 130 *et seq.*

³¹ In both cases, a service upon the person concerned under article 93 para. 1 (b) would be required, though, to make the respective international obligation of the individual effective.

³² This is not to question the right of the State that receives a request for arrest and surrender under article 89 para. 1 to 'transform' the international into a national arrest warrant.

³³ In this context, see rule 117 of the Rules of Procedure and Evidence; for the recognition of certain direct legal effects of the international arrest warrant within the German legal order, see Krefß and Jarasch, in: Krefß and Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders. I: General Aspects and Constitutional Issues* (Nomos 2000) 91, 96 *et seq.*

³⁴ Heymann (1990) 31 *HarvLLJ* 99, 102 *et seq.*; cf. also Markees in: Bassiouni and Nanda (eds.), *A Treatise on International Criminal Law, Vol. II: Jurisdiction and Cooperation* (1973) 171 *et seq.*

law world generally leans toward the Prosecutorial Model and the civil law systems tend to the International Law Model. While this basic difference may have made it easier for common law countries to swallow the (limited) powers of the Court to conduct on site investigations pursuant to article 99 para. 4, it is far more interesting to note that the main controversies on the Statute's cooperation regime cannot be equated with a conflict between different legal traditions because both, a more stringent and a more lenient approach to the formulation of state duties to cooperate attracted support from different national legal traditions.

Qualifying differences in national legal traditions as of secondary importance for the final outcome of the negotiations on Part 9 does not mean to deny their relevance completely. At least two important points can be identified where such differences played a more prominent role: Whereas many civil law countries faced constitutional legal problems with an obligation to surrender nationals to the Court, a number of States from the common law family did not find it easy to waive their national evidentiary requirements qualified for the purpose of the most effective cooperation with the Court. While the civil law countries eventually recognized that to insist on a ground for refusal based on the nationality of the person sought would be incompatible with the very purpose of the Statute, common law States such as Canada and the USA held firm to their national evidentiary requirements and conceded only not to formulate the references to those requirements (see article 91 para. 2 (c) in conjunction with paragraph 4, and article 96 para. 2 (e) in conjunction with paragraph 3) in the form of grounds for refusal *stricto sensu*.

VIII. Cooperation under Part 9 and human rights

Traditionally, inter-State cooperation in criminal matters was seen as an essentially 8 bilateral legal relationship between the two States concerned. More recently, however, the acceptance has grown that the relationship is a triangular one which includes the individual or individuals concerned with their individual and, most importantly, their human rights³⁵. Vertical cooperation under Part 9 must also be seen as a triangular legal relationship between the requesting Court, the requested State and the individual or individuals concerned. As part of that triangular relationship the ICC and the requested State have a joint responsibility for the rights of the individual or individuals concerned. While this joint responsibility does not entail an obligation to afford the most favorable treatment to the person or persons concerned, it implies the need to avoid loopholes in the protection of individual rights as a result of the international division of labor in the conduct of the criminal proceedings³⁶. Beyond that statement of principle, the difficulty remains to define the rights that the individual or individual hold at the different stages of the proceedings. In that respect, a difference must be made between the obligations of the Court, on the one hand, and those of the requested State, on the other hand.

In requesting cooperation, the Court is bound by those guarantees of individual rights that are contained in its own legal order, *i.e.*, most importantly, articles 55 and 67. In addition, under article 21 para. 3 the internationally recognized human rights possess the highest place of all applicable legal sources. These human rights obligations prevent the Court from requesting cooperation measures that would infringe upon internationally recognized human

³⁵ For the landmark case in the international human rights law, see ECtHR, *Soering v. UK*, Judgment of 7.7.1989, Series A, No. 161 (on that judgment, see Dugard and van den Wyngaert (1998) 92 *AJIL*. 187; the *Soering* judgment has later been endorsed by the UN Human Rights Committee; for detailed analyses, see Schrotz, *Individualrechtsverletzungen bei der Überstellung an die internationale Strafgerichtsbarkeit. Zu den Rechtsfolgen individualrechtswidrigen Vorverhaltens im internationalen Strafverfahren* (2006) 88 *et seq.*; Ziegenhahn, *Der Schutz der Menschenrechte bei der grenzüberschreitenden Zusammenarbeit in Strafsachen* (2002) 272 *et seq.*

³⁶ Vogel, in: Grützner et al. (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (2007 *et seq.*) I 2, Vor § 1, mn 29 *et seq.*

rights of the person or persons concerned. The Court has faced challenges arising from the interplay between the obligations under article 21(3) and the obligations under 93(7) to return custodial witnesses who have been transferred to The Hague to testify to the Requested State in circumstances where claims for asylum were filed. As discussed in detail under article 93 the Appeals Chamber has clarified that the responsibility to fulfil the international human rights obligation to effective remedy in those circumstances rested with the Netherlands. Thus the Court's obligation under the Statute to return the witnesses to the requested State could be met without an infringement of human rights obligations.³⁷

These human rights obligations will also guide the Court in developing substantive criteria and procedural safeguards governing requests for investigative measures, in particular, where such measures are intrusive in nature. Such criteria, it must be acknowledged, are lacking in the Statute and Rules of Procedure and Evidence to a significant extent³⁸. Finally, the Court will be prevented to request for cooperation where it is clearly foreseeable that the requested State would commit gross violations of fundamental human rights in the execution of the request³⁹. If such violations occur unexpectedly and "are such as to make it impossible for him/her [the accused] to make his/her defence within the framework of its rights, no fair trial can take place and the proceedings can be stayed" again pursuant to article 21 para. 3: "In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice"⁴⁰. The Appeals Chamber, correctly, indicated that a stay of proceedings based on a human rights violation will not be decided upon lightly and that, in particular, not any kind of ill-treatment in the process of the arrest and conveyance of the accused before the Court will suffice⁴¹. This holding will also be relevant for cases of 'illegal alternatives to surrender' which amount to arbitrary arrest and detention⁴².

The requested State is, in the first place, to respect the human rights of the person or persons concerned in the course of the execution of the request. In the case of a request for a form of cooperation other than arrest and surrender, articles 93 para. 3 and 99 para. 1 allow the requested State to rely to that effect on human rights standards that form part of its own legal order. If taken together with the above mentioned duty of the Court to respect the human rights standards that form part of the international criminal procedure, the end result comes close to a standard of most favorable treatment.

Finally, it follows from the international human rights case law originating with the ECHR judgment in *Soering*⁴³ that, in the inter-State context, a requested State is bound to refuse cooperation where it has substantial grounds to believe that grave human rights violations (such as torture or a flagrant denial of a fair trial) will occur in the course of the criminal proceedings in the requesting State⁴⁴. In light of articles 55 and 67 as well as article 21 para. 3

³⁷ Cassese (1998) 9 *EJIL* 13 paras 29, 30.

³⁸ Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002) 109 *et seq.*

³⁹ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2002) 36 *et seq.*

⁴⁰ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-772, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, 14 Dec. 2006, para. 39 <<https://www.legal-tools.org/doc/1505f7/>>.

⁴¹ *Ibid.*, para. 40.

⁴² On such cases, see Sluiter (2003) 25 *LoyLAI&CompLRev* 605, 648 *et seq.* For a useful judicial analysis of the matter by the ICTY Appeals Chamber, see *Prosecutor v. Nikolić*, IT-94-2-AR73, Decision on Interlocutory Appeal concerning Legality of Arrest, 5 May 2003, in which the Chamber correctly distinguishes with the State sovereignty and the human rights aspects of an illegal arrest and also recognizes the collusion of organs of the requesting international criminal jurisdiction as a relevant factor in the latter respect; *ibid.*, paras. 20 *et seq.*, 28 *et seq.*

⁴³ Heymann (1990) 31 *HarvLLJ* 99, 102 *et seq.*; *cf.* also Markees, in: Bassiouni and Nanda (eds.), *A Treatise on International Criminal Law, Vol. II: Jurisdiction and Cooperation* (1973) 171 *et seq.*

⁴⁴ For a recent restatement see ECtHR, *Al Moayad v. Germany*, Application no. 35865/03, Decision of 20 Feb. 2007, para. 58 *et seq.*

of the Statute, one would assume that a similar scenario, in which the international human rights obligations of the requested State and the latter's cooperation duties under the ICC Statute would clash, will not present itself in the cooperation practice between States and the Court⁴⁵.

IX. Enhanced cooperation

In many respects, Part 9 reflects the lowest common denominator. In the course of the negotiations, many States were prepared to go beyond the duties contained in Part 9 and they may well continue to be willing to do so. In fact, in a few cases, the implementing legislation already offers such voluntary cooperation in one or the other respect⁴⁶. It is thus worthwhile to underline, that Part 9, as a rule, does not preclude the capacity of States Parties to provide such voluntary cooperation. States Parties may be prepared to voluntarily grant enhanced cooperation for one or more categories of investigative measures, be it for the purpose of a concrete investigation or generally. For example, a State may be willing to allow the Prosecutor the autonomous taking of voluntary witness testimony without the restrictions contained in article 99 para. 4.

Enhanced cooperation may also be imposed upon States Parties (as well as States not party to the Statute) by way of a Security Council resolution adopted under Chapter VII of the UN Charter. Such action is open to the Council, in particular, in a referral under article 13 para. b. In the two instances of such a referral – resolution 1593 (2005) (Darfur, Sudan) and resolution 1970 (2011) (Libya), the Security Council has specifically imposed such an obligation on Sudan and Libya respectively. However, regrettably the Council has restricted the extension of the obligations in those instances to the two States subject to the referral and has not chosen to place a similar obligation on other non-State parties to cooperate with the Court. This has created significant gaps in the Court's ability to compel evidence and obtain the arrest of suspects despite the fact that the investigations in these cases should properly have the weight of a Security Council Chapter VII decision behind them.

⁴⁵ For a similar view, see Sluiter Sluiter (2003) 25 *LoyLAI&ComplRev* 605, 647 *et seq.* who, however, adds the *caveat* 'that it would go too far [...] to categorically exclude the possibility of the *Soering* ground for refusal to international criminal proceedings'. In *Naletilic v. Croatia*, Application no. 51891/99, ECtHR (4 May 2000), a challenge based on the length of the international criminal proceedings, the alleged lack of impartiality and independence of the ICTY as well as the power of the Tribunal to impose a term of life imprisonment was rejected as manifestly unfounded and therefore inadmissible. In that context, the ECtHR stated that '[i]nvolved here is the surrender to an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of independence and impartiality'.

⁴⁶ For an overview, see Broomhall and Kreß, in: C. Kreß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders, Vol. II: Constitutional Issues, Cooperation and Enforcement* (2005) 515, 540 *et seq.*

Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court.

Literature: Bosnjak, M. and Zagorac, D., ‘Slovenia’, in: C. Kreß et al. (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 320; Condorelli, L., ‘Conclusions Générales’, in: L. Condorelli (ed.), *Les Nations Unies et le droit international humanitaire* (Pedone 1996) 453; Dörr, O., ‘Die Vereinbarungen von Dayton/Ohio. Eine völkerrechtliche Einführung’, (1997) 35 *AVR* 160; Jones, J.R.W.D., ‘The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia’, (1996) 7 *EJIL* 226; Kreß, C. and Broomhall, B., ‘Implementing Cooperation Duties Under the Rome Statute’, in: C. Kreß et al. (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 515.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	2
I. ‘States Parties’	2
II. Full cooperation in accordance with the Statute	8
III. ‘investigation and prosecution’	11
IV. ‘crimes within the jurisdiction of the Court’	15

A. Introduction/General remarks

- 1 Article 86 states the general obligation of States Parties to cooperate with the Court. The wording of this provision resembles article 29 of the Statute of the ICTY¹ and article 28 of the Statute of the ICTR². Article 86 can be contrasted with opening formulas widely used in the interstate context which contain qualifiers such as ‘widest possible measure of assistance’³. In its article 85 the Draft Statute⁴ already contains a largely unbracketed version of what then became article 86. Only two questions remained to be settled, *i. e.* whether reference should be made to the provisions of ‘this Statute’ or of ‘this Part’ and whether the obligation to cooperate should be specified by adding words such as ‘without delay’.

B. Analysis and interpretation of elements

I. ‘States Parties’

- 2 The general obligation to cooperate in article 86 is confined to *States Parties*. The same is true, in principle, for the specific obligations that follow. This is in line with the basic principle of the law of treaties as embodied in article 35 of the Vienna Convention on the Law of Treaties of 23 May 1969⁵. The consequences are as follows.

¹ UN Doc. S/25704.

² UN Doc. S/RES. 955 (1994).

³ Cf. article 1 of the UN Model Treaty on Mutual Legal Assistance in Criminal Matters, U.N. Doc. A/CONF.144/28/Rev.1, p. 77.

⁴ UN Doc. A/CONF.183/2/Add.1 (1998), p. 156.

⁵ UN Doc. A/CONF.39/11/Add.2. Article 35 reads as follows: ‘An obligation arises for a third State from a provision of a treaty if the Parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing’.

States that are not Party to the Statute are under no statutory⁶ obligation to cooperate. As their cooperation may well be of great importance in many instances article 87 para. 5 deals with the possibility to establish a special cooperation regime by way of agreement. This evident point has been considered and affirmed by the Court in the context of a request for cooperation in gathering evidence⁷. The Court further considered the matter in addressing a unique argument advanced by Abdullah Al-Senussi in support of a request for a finding of non-cooperation against the Islamic Republic of Mauritania for its extradition of Mr. Al-Senussi to Libya despite the existence of an ICC arrest warrant⁸. The defence for Al-Senussi had argued that Mauritania should be referred to the Security Council for this ‘non-cooperation’ on three grounds: breach of cooperation obligations to the Court, violation of the travel ban imposed by Security Council resolution 1970 (2011) and a wrongful act contrary to article 14 of the ICCPR. The Court restricted its analysis to the first point, noting that its jurisdiction was restricted to findings of non-cooperation with reference to obligations *vis a vis* the Court. In determining that the obligation under article 86 relates only to State Parties the Court relied on the plain wording of Article 86, the contrasting language in article 87(5), and article 34 of the Vienna Convention on the Law of Treaties.

In the same two decisions⁹, the Court has recognized, however, the possibility for the Security Council to place States which are not Party to the Statute under the obligation contained in article 86 (as well as Part 9 in general) through a resolution adopted under Chapter VII of UN Charter. In these decisions the Court has interpreted the language of the Security Council in the cases of resolutions 1593 (2005) on Darfur (Sudan)¹⁰ and 1370 (2011) on Libya¹¹ to impose obligations under Part 9 on these two Non-State Parties. It is also relevant that the Court in the Sudan context has found that the resolution did not provide for an autonomous legal regime for cooperation, applicable to Sudan, which would replace the ICC regime or represent an alternative to it. Rather any application for cooperation would need to be made in compliance with Part 9 of the Statute¹².

Intergovernmental organizations, too, are not bound by the Statute as such¹³. Again, their assistance can prove to be of decisive value. Article 87 para. 6, therefore, specifically deals with cooperation between such organizations and the Court.

No statutory duty to cooperate with the Court exists for *entities* other than the ones mentioned in mn 2 *et seq.*¹⁴ The Statute does not address at all the issue of possible

⁶ For an indication of possible obligations for non-States Parties under customary international law to cooperate with the Court see article 87, mn 20.

⁷ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-169, Decision on ‘Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of Sudan’, Trial Chamber IV, 1 July 2011, para 14 <<https://www.legal-tools.org/doc/891c96/>>.

⁸ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-420, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, Trial Chamber I, 28 August 2013 <<https://www.legal-tools.org/doc/7342b3/>>.

⁹ Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09-169, TC IV Decision 1 July 2011; Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-420, TC I Decision 28 August 2013.

¹⁰ Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of Sudan, ICC-02/05-03/09-169, paras 14 and 15. <<https://www.legal-tools.org/doc/891c96/>>.

¹¹ Decision on the request made by Abdullah Al-Senussi for a finding of against the Islamic Republic of Mauritania’, ICC-01/11-01/11-420, 28 August 2013, paras 13 and 14. <<https://www.legal-tools.org/doc/7342b3/>>.

¹² *Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-169, TC IV Decision 1 July 2011, para 15.

¹³ Again the situation may be different under customary international law, see article 87, mn 28.

¹⁴ Take the ‘*Republika Srpska*’ as a recent example for such an entity. It is interesting to note, however, that the Security Council has asked repeatedly this entity to cooperate with the ICTY. Arguably, this Security Council practice not only reflects the existing contractual cooperation framework (see *infra* note 9) but also expresses the idea of the extension of the relevant customary obligations to cooperate to such entities (see Condorelli, L. Condorelli (ed.), *Les Nations Unies et le droit international humanitaire* (1996) 453 *et seq.*).

cooperation between such entities and the Court. This *lacuna* does not preclude, however, the possibility to work out solutions on an *ad hoc* basis wherever the need arises¹⁵.

- 6 It is the State Party and *not State officials* individually that are under the obligation to cooperate. The *Appeals Chamber* of the ICTY has pointed out in its *Blaskić subpoena* judgment¹⁶ that any deviation from the ordinary rule of customary international law that international obligations are directed to States and not their officials individually had to be expressly stated. The *Appeals Chamber* added that such a deviation can not be deduced from the fact that the jurisdiction of an international criminal tribunal extends to crimes committed by State officials. Neither article 86 nor any of the subsequent provisions of Part 9 provides for a deviation from the said rule so that State officials as individuals cannot be the addressees of Court's requests for cooperation.
- 7 Finally, article 86 does not extend the obligation to cooperate to *individuals acting in their private capacity*. The same is true for the two basic obligations contained in article 89 para. 1 and article 93 para. 1. Consequently, the Court has no power *under Part 9*¹⁷ to directly *compel* individuals to produce documents or to appear before it¹⁸. The respective reasoning of the *Appeals Chamber* of the ICTY in the *Blaskić subpoena* judgment¹⁹ does not apply in the context of Part 9 of the Statute²⁰.

II. Full cooperation in accordance with the Statute

- 8 Unlike article 29 of the Statute of the ICTY and article 28 of the Statute of the ICTR article 86 does not contain a free-standing obligation to cooperate. Rather, the latter provision must be seen in the context of the subsequent rules in Part 9 which, in turn, may be directly intertwined with rules elsewhere in the Statute. Correspondingly, the reference to 'the provisions of this Statute' in article 86 indicates that the specific duties on cooperation are to be found elsewhere. It is not possible to modify these specific obligations to cooperate by reference to the general obligation in article 86.
- 9 One may therefore wonder whether article 86 is only a symbolic or declaratory provision. Certainly, the word '*fully*' explicitly alludes to the well-recognized principle of good faith²¹ which means in this context that States Parties must act promptly and with all due diligence to ensure proper and effective execution of the Court's requests to comply with their obligations under Part 9. It was, therefore, not necessary to spell out *explicitly* – as did the Draft Statute –, that States have to cooperate without delay.
- 10 Article 86, though, goes beyond a mere declaratory statement. According to the general principle of effective interpretation (*principe de l'effet utile*)²² this article cannot be construed as being redundant, but has to be given a normative impact of its own. The negotional

¹⁵ For a contractual cooperation framework of *non-state-entities* with the ICTY see Jones (1996) 7 *EJIL* 226; Dörr (1997) 35 *AVR* 160.

¹⁶ *Prosecutor v. Blaskić*, IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct. 1997, paras. 41 *et seq.*

¹⁷ Under article 58 para. 7 of Part 5, though, the Court has the power to issue a summons to appear to a person if there are reasonable grounds to believe that this person has committed a crime within the jurisdiction of the Court. Similarly, the Court may, under article 64 para. 6 (b), require the attendance and testimony of witnesses before the Court.

¹⁸ For a more detailed analysis see the commentaries on article 93 and, above all, on article 99 para. 4.

¹⁹ *Blaskić* (Judgment), see note 10, paras. 46 *et seq.*

²⁰ Cf. UN Doc. S/25704, in particular the differences between article 18 para. 2 of the Statute of the ICTY, and article 99 para. 4 of this Statute.

²¹ In *Blaskić* (Judgment), see note 10, the Appeals Chamber of the ICTY has referred in para. 68 to the following passage of the judgment of the ICJ in the *Nuclear Tests* case (1974) ICJ Rep., para. 46): 'one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential'.

²² Reference has been made to this principle by the Appeals Chamber in *Blaskić* (Judgment), see note 10, para. 54.

history of Part 10 also points in this direction. Here, it was finally decided that a general obligation regarding recognition and enforcement of judgment as suggested in the Draft Statute²³ was no longer necessary because it added nothing substantial to the specific enforcement provisions.

There was no equivalent feeling in the context of cooperation which supports an *argumentum e contrario*. The importance of article 86 results from the fact that Part 9 contains several somewhat indeterminate compromise formulas which need to be solidified in practice. Reference can be made by way of example to article 89 para. 4 and article 94. In the end, such consultation clauses leave unanswered the question who has the last word, the State Party or the Court. With respect to such provisions article 86 is of considerable usefulness. It amounts to an overarching *interpretative guideline* pursuant to which, *e.g.*, an obligation to consult must not be seen only as a formality that finally leaves all liberty to the State Party to refuse compliance, but as a joint responsibility to be shouldered in the spirit of *full cooperation*.

III. 'investigation and prosecution'

The term 'investigation' does not extend to the preliminary examination under both article 15 para. 2 and rule 104 conducted in order to find out whether there exists a reasonable basis to proceed with an investigation²⁴. This rather restrictive interpretation is not entirely beyond question because the term 'investigations' in article 15 para. 1 may be read so as to include the preliminary examination under article 15 para. 2. In addition, it may be beneficial for the Prosecutor to be able to rely on the obligatory scheme under Part 9 when applying article 15 para. 2. Article 15 para. 3, however, is equally explicit in its use of the terms 'proceed with' an investigation as article 15 para. 4 is in its use of the terms 'commencement' of the investigation. 11

Furthermore, in the specific case of proceedings triggered *proprio motu* by the Prosecutor, it makes sense, in light of the sensitivities of a number of States vis-à-vis too broad a power of the Prosecutor to assume that the obligatory cooperation scheme comes into play only after the Prosecutor's assessment has been confirmed by the Pre-Trial Chamber. In order to allow the Court to function properly, though, the rather narrow interpretation of the term investigation preferred in this commentary should go hand in hand with the acceptance that the test of 'a reasonable basis to proceed' in article 15 paras. 3 and 4 is so low that it can be met by the Prosecutor without relying on the Court's powers under Part. 9.

The term 'investigation' encompasses both the investigation into a situation and into a case²⁵. 12

The term 'investigation' should be construed so as to extend to the admissibility of the criminal proceedings before the Court²⁶. The Court may therefore use its powers under Part 9 to find out whether a State is unwilling to genuinely carry out an investigation and/or prosecution within the meaning of article 17. This interpretation is supported by the language of article 53 para. 2 (b) and leads to the sensible result that the Court possesses the powers necessary to fulfill its function to make informed rulings on the admissibility issue. 13

On the basis of a systematic and a teleological interpretation, the terms 'investigation and prosecution' also extend to the forfeiture of proceeds, property and assets and to the reparation of victims. As far as forfeiture is concerned this follows both from the listing of 14

²³ Cf. UN Doc. A/CONF.183/2/Add.1 (1998) article 93, p. 180.

²⁴ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 54 *et seq.*

²⁵ On that distinction, see Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04, 17.1.2006, para. 65.

²⁶ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 35.

the latter as an applicable penalty in article 77 para. 2 (b) and from the direct reference to forfeiture in article 93 para. 1 (k). The situation is less clear as regards reparation orders as their belonging to the realm of criminal law is far from obvious and no direct reference to reparation is made within article 93. Article 75 para. 4, however, contains a cross-reference to article 93 para. 1 and this reflects the fundamental decision taken by the drafters of the Statute to consider restorative justice as one goal to be attained through the proceedings before the Court. In light of this decision it would seem odd to keep reparation outside article 86's scope of application.

IV. 'crimes within the jurisdiction of the Court'

- 15 Article 86 clarifies that the obligation of States Parties to cooperate is limited to the area of the Court's jurisdiction. It is crucial to note, however, that States Parties are not in a position to free themselves from their duties under Part 9 by considering a request as falling outside the Court's jurisdiction²⁷. Article 19 leaves it to the Court to authoritatively rule on the issue of jurisdiction. This power of the Court must not be undermined in Part 9²⁸.

²⁷ In that respect, the implementing legislation of Slovenia contains a problematic element as is rightly observed by Bosnjak and Zagorac, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders, Vol. II: Constitutional Issues, Cooperation and Enforcement* (2005) 320; cf. also Krefß and Broomhall, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders, Vol. II: Constitutional Issues, Cooperation and Enforcement* (2005) 521.

²⁸ On the need to construe Part 9 coherently with Part 2 see Preliminary Remarks on Part 9, mn 3.

Article 87

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.
Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.
(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.
2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.
Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.
3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.
4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.
5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.
(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.
6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.
7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Directly Relevant Rules of Procedure and Evidence: Rules 176 to 180.

Literature: See Preliminary Remarks on Part 9. Condorelli, L., 'Conclusions Générales', in: *id.* (ed.), *Les Nations Unies et le droit international humanitaire* (1996); *id.* and Boisson de Chazournes, L., 'Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'', in: C. Swinarski (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de*

la croix-rouge en l'honneur de Jean Pictet (1984) 17; Crawford, J., *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (2002); Ellis, A., Pisani, R.L. and Gualtieri, D.S., 'The United States Treaties on Mutual Assistance in Criminal Matters', in: M. C. Bassiouni (ed.), *International Criminal Law, Vol. II: Procedural and Enforcement Mechanisms* (2nd ed. 1999) 403; Eser, A. and Ambos, K., 'The power of national courts to compel the production of evidence and its limits', (1998) 6 *EJCLCJ* 3; Jones, J.R.W.D., 'The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia', (1996) 7 *EJIL* 226; Pictet, J.S., (ed.), *Les conventions de Genève du 12 août 1949: commentaire* (4 Vols. 1952–60); Sarooshi, D., 'The Powers of the United Nations International Criminal Tribunals', (1998) 2 *MPYbUNL* 141; Simma, B., 'Self-contained Regimes', (1985) *NethYbIL* 111; Vermeulen, G. and Van der Beken, T., 'New Conventions on Extradition in the European Union: Analysis and Evaluation', (1997) 15 *DickJIL* 265.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	4
I. Paragraph 1	4
1. Authority to make requests and ways of transmitting designated by each State Party	4
2. Transmission through the International Police Organization or regional organizations	19
II. Paragraph 2: Language requirements	20
III. Paragraph 3	23
1. Confidentiality	23
2. Exception	25
IV. Paragraph 4: Protection of victims, potential witnesses and their families	26
V. Paragraph 5	31
1. Invitation to States not Parties	31
2. 'assistance under this Part'	34
3. Basis for cooperation and internal competences regarding cooperation treaties	35
4. Obligatory cooperation	36
5. Failure to cooperate despite an obligation to that effect	37
6. Consequences of such a failure to cooperate	38
VI. Paragraph 6: The Court asking intergovernmental organizations for cooperation and assistance	43
VII. Paragraph 7	48
1. States Parties failing to comply with a request	48
2. Dispute regarding the legality of a request	51
3. Finding of a failure to cooperate and its legal consequences	53

A. Introduction/General remarks

- Article 87 contains the most significant general provisions for Part 9. It empowers the Court to make requests for cooperation to States Parties and indicates that the Court may seek the assistance of non-States Parties and intergovernmental organizations. The article contains some general provisions on the channels of communication of requests and the language requirements. It imposes obligations of confidentiality on requested States and recognizes that, in relation to such requests, the Court may take various measures which are necessary for the protection of victims, witnesses or their families. The article also outlines the options available to the Court in the case of non-compliance by a State Party or a non-State Party where the assistance has been sought under an agreement or arrangement entered into by a State.
- In contrast to the very brief and general provision found in the Statutes of the ICTY¹ and the ICTR² on the Tribunals' ability to seek assistance from States, article 87 is quite detailed. In its procedural content on language, communication and confidentiality it is akin to existing instruments for cooperation such as bilateral and multilateral mutual assistance and extradition treaties, the *United Nations Convention against Illicit Traffic in Narcotic Drugs*

¹ See article 29, UN Doc. S/25074, Annex.

² See article 28, UN Doc. S/RES. 955, Annex.

and Psychotropic Substances³ and the UN Model Treaties on Extradition and Mutual Assistance in Criminal Matters⁴. Given the nature of the Court as a permanent creature created by multilateral agreement as opposed to temporary Tribunals established by the UN Security Council, more detailed provisions were essential to ensure a cooperation regime which could function in practice.

The technical aspects of article 87 were basically agreed to at the Preparatory Committee as is evidenced by the similar text found in article 86 paras. 1, 3 and 5 of the Draft Statute⁵. What was left to be negotiated in Rome were the more political issues such as the appropriate remedy in the case of non-cooperation by a State Party, the availability of any remedy with respect to non-States Parties and the allocation of responsibility for the translation of requests and responses. These issues were resolved only after considerable debate and discussion.

Rules 176 to 180 address technical concerns related to the operation of article 87 in particular as to channels of communication and language requirements. These rules also specify which organs of the Court shall be responsible for transmission and receipt of requests and information and other actions that need to be taken under the Article.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Authority to make requests and ways of transmitting designated by each State Party

This paragraph authorizes the submission of requests by the Court to States Parties, for all forms of cooperation.

The use of the term ‘Court’ clearly envisages the presentation of cooperation requests by the individual constituent organs. Practice has reflected this interpretation with the Prosecution submitting requests directly to States Parties and the Chamber instructing the Registry for the presentation of its requests, for example in the context of arrest and surrender⁶.

Where the Prosecution encounters difficulties with the execution of a request, it can bring the matter before the relevant Chamber through an application under article 87(7) for a finding of non-cooperation⁷.

The Court, through the decision of various Chambers, has established that the criteria of relevance, specificity and necessity will be applied in reviewing cooperation requests brought before it for transmission. In the vast majority of cases, this assessment will be relevant to requests presented by the defence pursuant to article 57(3)(b), as most prosecution requests will be transmitted directly. However, the same criteria were used by the Trial Chamber in its decision on a revised cooperation request presented by the Prosecutor in the Kenyatta case⁸. In that instance the request was before the Chamber as a result of an application under article 87(7) and through the subsequent directions of the Chamber in relation to the same. The Trial Chamber in considering the request provided some important guidance with respect to the assessment of the applicable criteria. In considering arguments advanced that

³ UN Doc. E/CONF. 82/15.

⁴ Cf. article 3, article 5 para. 2 and article 9; UN Doc. A/CONF.144/28/Rev.1, pp. 78, 80 and 82.

⁵ Cf. UN Doc. A/CONF.183/2/Add.1 (1998), pp. 157 *et seq.*

⁶ Cf. commentary, on article 89, mn. 4.

⁷ See *Prosecutor v. Uhuru Muigai Kenyatta*, ICC -01/09-02/11-908, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, TC V(b), 31 March 2014.

⁸ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision on the Prosecution’s Revised Cooperation Request, 29 July 2014 1/22 RH T.

the late stage of the proceedings should preclude further action on the request, the Trial Chamber accepted that the stage at which the request is presented can be a relevant consideration. However, it did not agree with the Defence and Kenyan Government submissions that arguments as to relevance and necessity were completely abrogated by the imminent trial date⁹. The Trial Chamber also specifically rejected arguments advanced by Kenya, purportedly on the basis of article 93(3), as to the challenges it faced with execution of the request under domestic law. The Chamber properly drew a clear distinction between fundamental legal principles of general application referenced in article 93(3) and the ‘practical difficulties’ with execution as described by the Kenyan authorities. The Chamber noted that the latter did not constitute a basis for non-compliance with the request. The Chamber also reiterated the findings it previously had made as to the relevance and necessity of the information sought by the Prosecution through the request¹⁰.

- 8 In considering the ‘relevance’ criteria with reference to the time period for which documents were requested, the Trial Chamber noted that investigative inquiries need not be limited to the immediate period of the violence. The Chamber recognized that depending on the facts, information might also be relevant to show preparatory or post violence acts of the accused¹¹.
- 9 The Chamber also recognized that in cases in which the financing of crimes was alleged, it would be relevant to seek information about corporate or other entities in which the accused may have an interest. This could be pertinent to the extent the accused may have acted through such ‘intermediaries’ to lessen traceability¹².
- 10 The Chamber also made an important finding with respect to the voluntary disclosure of information. In the particular case, all of the information provided by the Kenyan government, as of the time of the request, had been with the consent of the accused or provided by the defence. The Chamber recognized this had been done to expedite matters and also noted that unconditional consent to the provision of complete records might well negate the necessity of pursuing alternative avenues. However, the Court emphasized that in most cases, the voluntary disclosure of certain information ‘would not be a satisfactory alternative to obtaining complete and comprehensive information as contained in official records’¹³. The Court also emphasized that the ‘execution of the cooperation provisions in Part 9 of the Statute is not conditioned on the accused’s consent’¹⁴.
- 11 Further, in light of the article 88 obligation to have procedures available under national law for all forms of cooperation, the Trial Chamber was of the view steps should be taken in parallel to use those procedures – including compulsory measures – for a comprehensive response.
- 12 Though not specified in Part 9, article 57(3)(b) provides that upon the request of a person arrested or appearing in response to a summons, the relevant Chamber¹⁵ can order a request be made seeking cooperation from a State as necessary to assist the person in the preparation of a defence. Rule 116 sets out the criteria which must be satisfied notably that the order ‘would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence’. Sub paragraph (b) of Rule 116 mandates that the information provided by the defence must comply with article 96(2), which sets out the requirements for requests for forms of cooperation other than surrender. Sub-paragraph (c) allows the Chamber to seek the views of the Prosecutor.

⁹ *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision 29 July 2014, para 33.

¹⁰ *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision 29 July 2014, para 34.

¹¹ *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision 29 July 2014, para 37.

¹² *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision 29 July 2014, para 39.

¹³ *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision 29 July 2014, para 47.

¹⁴ *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision 29 July 2014, para 47.

¹⁵ The power is vested in the Pre-Trial Chamber under article 57 (3) b but can also be exercised by the Trial Chamber after confirmation of charges in accordance with article 61 (11).

In deciding on one such request, Trial Chamber II had to consider if the Defence request could be categorized as a type of cooperation provided for in Article 93¹⁶. In that instance, part of the defence request sought answers from government officials to specified factual questions related to the issues in the case. Trial Chamber II found that such a request fell outside the types of cooperation enumerated in article 93(1). While the Chamber did not provide extensive reasons for its conclusion¹⁷, it appears consistent with the Part 9 Scheme where States are compelled to assist with the *gathering* of evidence through specified (para. 1 a-k) and general (para 1(l)) measures but are not compelled to *give* evidence as a State. The proper approach for the defence in seeking responses to questions would have been to seek the compelled evidence of specified individuals within the government, capable of responding to the particular questions. The decision is an important one in its restriction of requests to the type of cooperation specified in Part 9. With respect to the remaining Defence requests for documents the Trial Chamber found the assistance fell directly within article 93 (1)(i) (the provision of records and documents, including official records and documents), but went on to conclude that the vast majority of the requested documentation lacked the necessary specificity required by article 96(2) as incorporated through Rule 116(1)(b)¹⁸.

A contrasting successful application was presented by the Defence in the Katanga and Chui case¹⁹. After a revised request for assistance was prepared based on the instructions of a single judge, PTC I was prepared to partially grant²⁰ the defence application and transmit the request to the DRC in accordance with article 87(1). The Chamber considered the defence application *ex parte* without calling on the Prosecution for comment, a finding consistent with the rights of the defence. In assessing the application, the Chamber applied the criteria set out in Rule 116 specifically that the material sought would facilitate the collection of evidence that may be material to the proper preparation by the Defence. The Chamber also found that the requirements under article 96(2), for the content of the request, had been met and the type of assistance requested was provided for under article 93(1). The decision demonstrates the effective use of Part 9 for assistance to the defence. PTC I in the case of Callixte Mbarushimana and TC II in the case of Katanga and Chui, have similarly issued orders at the request of the defence²¹.

¹⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the second motion of the Defence for Germain Katanga seeking the cooperation of the DRC, TC II, 6 December 2010.

¹⁷ *Ibid.*, para 12.

¹⁸ See also *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Decision on the 'Defence Application pursuant to article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan' 17 November 2010, PTC I (Single Judge) dismissing a Defence application for a request to Sudan in the Nourain and Jamus case on the basis of a lack of information showing necessity; see also *Prosecutor v. Charles Blé Goudé*, ICC 02/11-02/11, Decision on the 'Defence Application pursuant to article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan' 17 November 2010, PTC I (Single Judge) dismissing a Defence application for a request to Sudan in the Nourain and Jamus case on the basis of a lack of information showing necessity; see also *Prosecutor v. Charles Blé Goudé*, ICC 02/11-02/11, Decision on the Defence Request for State Party Cooperation, April 10 2014 similarly dismissing a defence request on the basis that necessity had not been established as an application should first be brought to the Prosecutor under Rule 77; see also *Prosecutor v. Charles Blé Goudé*, ICC 02/11-02/11, Decision on Second Defence Request for State Party Cooperation, Pre-TC 1, 17 June 2014 dismissing a defence request on the basis that relevancy had not been established.

¹⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the 'Defence Application pursuant to article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)', PTC I, 25 April 2008.

²⁰ The Pre-Trial Chamber excluded from the request documents which were in the possession of the Prosecution and the Registry.

²¹ Ordonnance relative à la Requête urgente de la Défense visant à obtenir la coopération du Gouvernement de la République démocratique du Congo, 1 avril 2010, ICC-01/04-01/07-2019-Conf-Exp-tFRA (voir aussi ICC-01/04-01/07-2019-Conf-Exp-Red, version confidentielle expurgée, ex parte, réservée au Bureau du Procureur, à la Défense de Germain Katanga et à la Défense de Mathieu Ngudjolo), par. 7 à 9; Décision relative à la requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus, ICC-01/04-01/07-2640-Conf-Exp, TC II, 7 janvier 2011.

- 15 As noted earlier²², the obligation to cooperate in the Statute is structured differently from the Statutes for the ICTY and the ICTR. In this Statute there is also a strong obligation to cooperate. However it is specific in nature so that the States Parties will know what they are required to do and it is created through a combination of provisions, rather than a single general statement. The opening paragraph of article 93 is a central provision and, as is clear from the cases referred to above, must be read together with articles 86, 89, 91, 93 and 96 as well as, for example, article 57(3)(b): The Court is empowered to make requests for cooperation to States Parties (article 87) and the States Parties are obliged to cooperate fully (article 86) and specifically by complying with requests for surrender (article 89) and other forms of assistance (article 93).
- 16 The second sentence gives practical information to the Court about the channels through which the requests should be presented – the diplomatic or a channel designated by the State Party. The provision, while relatively straight forward in content, was the subject of considerable discussion at the *Preparatory Committee* stage. The primary issue was the use of alternate channels to the diplomatic route. Several countries were opposed to the use of any alternatives to that which is traditional in the relations between States. Concerns were expressed about the ability to be certain of the veracity of the request and to maintain control of it outside of the diplomatic channel. There were many other States for which the inclusion of alternative direct channels, such as those found in modern mutual assistance and extradition treaties²³ was important for an effective cooperation regime. The compromise adopted was to maintain the diplomatic channel but to allow States Parties to designate at the time of ratification, acceptance, approval or adoption an alternative channel to the diplomatic channel. Any such designation can be changed in accordance with the process to be outlined in the Rules.
- 17 The compromise achieved was a balanced one in that the Court will always have a channel available for the submission of the request – the diplomatic channel and at the same time if a State Party considers that another routing – perhaps direct communication to a Justice department used in normal mutual assistance and extradition practice – will be more efficient, that will be available to the Court.
- 18 Sub-rules 1, 3 and 5 of Rule 176 obligate the Registrar to gather the relevant information on channels of communication obtained by the Secretary-General and to thereafter receive and distribute any information about changes to the designated channels or language of communication. Sub-rule 2 of Rule 176 dictates that in the case of requests for cooperation by the Chambers the Registrar will transmit them and receive the relevant responses²⁴ while the Office of the Prosecutor will be responsible for its own requests. A similar division of tasks is set out for requests seeking information and cooperation from intergovernmental organizations under sub-rule 4.

Sub-rule 1 of Rule 177 was a practical addition to the general obligation to designate a channel of communication which specifies that the communication should contain all relevant information about the designated authority presumably including contact details. Sub-rule 2 authorizes the Registrar to seek relevant information about channels and language from relevant intergovernmental organizations.

Rule 180 sets out the procedure for a change of designated channel providing that such changes must be communicated in writing to the Registrar as soon as possible. The change will take effect at a time agreed between the Court and the State or if there is no agreement 45 days after receipt. The change however will not affect any requests already presented or in progress.

²² Mn 2.

²³ In the European context see Vermeulen and Van der Beken, *Conventions 285 et seq.*; for the United States Treaties see Ellis *et al.*, *United States Treaties*.

²⁴ For such a case, see article 89 mn 4.

2. Transmission through the International Police Organization or regional organizations

This subparagraph reflects considerable discussion and debate at the Preparatory Committees surrounding the role, if any, for Interpol with respect to requests for cooperation between the Court and States Parties. Interpol, which is used by some States for the transmission of State to State extradition requests, particularly urgent provisional arrest requests, was identified as an important alternative for the Court to use, particularly in urgent circumstances. Interpol authorities were very interested in being involved in the Court's cooperation regime and they advocated for inclusion of an even stronger provision on the transmission of requests. However, there were some States, many of those which were also opposed to any designated channels of communication, which did not want Interpol included in the Statute. Once again, the compromise achieved is likely to be useful on the practical level. The Court can choose to use the Interpol channel in those instances where it is appropriate in the circumstances, so long as it is not inconsistent with subparagraph (a). Thus a State Party is free to indicate if or when requests for cooperation can be transmitted to it through Interpol or a regional organization. The reference to regional organizations was made in recognition of the various other agencies which States may use in their State to State practice which might be useful in this context as well. 19

II. Paragraph 2: Language requirements

Article 87 para. 2 specifies the language for requests for cooperation. By the general reference to requests for cooperation, the language requirement could be interpreted to apply to all requests under Part 9, including those to non-States Parties and intergovernmental organizations. However, given the reference to designation of language upon ratification, accession or approval, as well as the practical ramifications, the better view is that this requirement is specific to requests made to States Parties. The article mandates that not only the request but any supporting material must be provided in the requisite language. The issue of the application to supporting material was resolved only in Rome, but it was easily disposed of once general agreement was achieved on the appropriate approach to the language issue generally. 20

On a very practical note it is recognized that the request and supporting documents may be submitted as written, if they are in the appropriate language or that an appropriate translation may be prepared and submitted with the original document. 21

The most difficult issue with respect to language was whether the Court or the requested State Party would bear the responsibility for translating the documents into an appropriate language, when there was a difference in languages between the Court and the State. There were very strongly held and divided views. Some States supported the position that the Court should be able to present the request and supporting material in one of its working languages, leaving the requested State to translate the material if necessary. Other States believed it to be more equitable to apply the normal practice in international cooperation between States; the requesting party must submit the materials in an official language of the State to which they are directed. This of course would require the Court to bear the responsibility for any requisite translations. The compromise reflected in article 87 Para. 2, while favoring the latter approach, does provide some accommodation for the Court. While the choice of language is left to the State Party, some States with an official language different from the Court may well choose to allow the requests to be submitted in the Court's languages, where that would not impose a significant burden on the State. At the same time, for those States with different languages, for which translation would be difficult or which do not have the necessary resources, the requests can be submitted in the language of that State. 22

Rule 178 clarifies some points that were not evident under the general language of paragraph 2 of article 87. Because paragraph 2 makes reference to the designation of 'an'

official language, sub rule 1 makes it clear that States with more than one official language can indicate that requests may be drafted in any one of the official languages and no choice need be made as between those languages in the designation. Sub-rule 2 deals with the inevitable situation where a State has not specified a language for communication in which case one of the working languages of the Court will be used. Under rule 179 the same approach applies to non State parties which have agreed to cooperate with the Court but have not designated a language.

As with changes to a designated channel of communication (see mn 6), rule 180 provides identical rules for amendments to languages of communication.

III. Paragraph 3

1. Confidentiality

23 Article 87 para. 3 is similar to the provisions in many bilateral and multilateral mutual assistance treaties²⁵. The provision requires the State receiving a request to keep it confidential. Here again the protection applies to the request itself and the supporting material. By use of the term ‘requested State’, as opposed to State Party, it appears this requirement was meant to apply in principle to all requests submitted to States, including non-States Parties. Logically the need for confidentiality would be equally important in the case of a non-State Party. While there are clearly issues of enforceability with respect to non-States Parties, on a practical level, where necessary, the Court could seek some assurances on confidentiality in advance, when dealing with such States.

24 The requirements of paragraph 3 were considered briefly when Trial Chamber V(B) was considering submissions by the Government of Kenya with respect to its cooperation with the Court²⁶. The Prosecution submitted that the Kenyan submissions – filed publically – disclosed the existence and volume of Prosecution requests for assistance, as well as the specific information requested. The Prosecution requested that a caution be given to the Government of Kenya with respect to its confidentiality obligations. As Kenya had acknowledged the inadvertent disclosure in its filings and apologized in its reply, the Chamber considered the Prosecution request to be moot. In the case of Bosco Ntaganda, PTC I relied on this Article in asking the State to keep the request for arrest and surrender confidential²⁷. The Decision on the Prosecutor’s request for non-disclosure in relation to a request for assistance in the Lubanga case²⁸ clarifies that the content of such a request may be the subject of an application for non-disclosure by the Prosecutor, albeit in this case the Appeals Chamber was not satisfied with the factual basis for the requested redactions.

2. Exception

25 The obligation for confidentiality is not absolute. As is the case in similar mutual assistance instruments, it is recognized that in many States the request cannot be executed without some form of disclosure. For example, the request may have to be filed with a public court in order to obtain the requisite court order for arrest or to gather evidence. For this reason, disclosure in the course of the execution is permitted. There are two approaches to

²⁵ It is also similar in content to article 9 of the UN Model Treaty on Mutual Assistance, UN Doc. A/CONF.144/28/Rev.1.

²⁶ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision concerning the Government of Kenya’s Submissions on its cooperation with the Court, TC V(B), 3 July 2013; see also *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision concerning the Government of Kenya’s Submissions on its cooperation with the Court, TC V(A), 3 July 2013 (two decisions, issued the same date are in substance the same).

²⁷ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-13, Request to the Republic of Uganda for the arrest and surrender of Bosco Ntaganda, PTC I, 8 February 2008.

²⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, A 5 A 6, Decision on the Prosecutor’s request for non-disclosure in relation to document ‘OTP/DRC/COD-190/JCCD-pt, AC, 27, May 2013.

confidentiality provisions in the various mutual assistance instruments. The more restrictive approach, found in article 9 of the UN Model Treaty²⁹ is an absolute requirement for confidentiality with the proviso that if the request cannot be executed without disclosure, the requested State will advise the requesting party, which will then decide whether the request should nevertheless be executed. This approach, while providing a more stringent protection, is difficult to apply operationally because for many States it requires subsequent consultation in each and every case. The alternative approach, reflected here, is less cumbersome in practical application but it does not give an absolute protection against disclosure. It is recognized that disclosure may be necessary in the course of execution. Because this latter approach has been adopted, where the Court has particular concerns about confidentiality, it may wish to raise the issue with the requested State before submitting the request.

IV. Paragraph 4: Protection of victims, potential witnesses and their families

This paragraph is related to article 68 which provides for general protections for victims 26 and witnesses within the Court's trial process. It reflects the need to protect witnesses, victims and their families in the course of seeking cooperation during an investigation or prosecution. In the Draft Statute, reference to these protections was repeated throughout Part 9 in article 88 para. 4, article 89 para. 3 and article 90 para. 8³⁰. As a result of the negotiations in Rome, the sections were merged into one general provision which has application to all requests for assistance under Part 9. This language makes it clear that the protection is applicable to all parts of the process for all requests – to States Parties, non-States Parties and international organizations – and in relation to any form of cooperation.

The negotiations at Rome led to the refinement of this provision from the language 27 originally incorporated in the Draft Statute³¹. Rather than a specific reference to the Court withholding information, which was a troublesome reference for many States and which was also unduly limiting, a more general approach was adopted. Under this formulation, the Court has a broader power to take necessary measures, including protecting information, to ensure that the relevant individuals are protected. In practice this will give the Court much more flexibility in dealing with sensitive issues of witness or victim protection. It may choose not to include certain specific information in the request or ask for special steps with respect to confidentiality or choose to communicate information in a secure manner. This new language was viewed as more acceptable both with respect to an effective cooperation process and in allowing for the protection of the individuals concerned.

The latter part of the phrase – reference to safety and both physical and psychological well 28 being of individuals – was drawn from article 68. It reflects the need to consider in the formulation and presentation of the requests not only the safety and physical protection of the person but also potential psychological damage. Thus the Court should also consider whether, for example, the inclusion of specific details of an alleged offence, where not critical to the execution of the request, could be psychologically damaging to the victim.

The second aspect of the protection, relating to the provision and handling of information 29 obtained, remained very similar to that developed during the *Preparatory Committee*. The only substantive change was rather than an unqualified obligation on States in all cases, it is for the Court to identify concerns about protection of victims and witnesses and to request that the information be handled and provided in a specific manner to address this concern. On a practical level this is a much more workable formula in that the Court is in the best position to know the potential dangers to individuals and to highlight that concern to the requested State.

Here again the language has been left general such that the Court and the relevant State or 30 organization have flexibility in deciding what steps should be taken with respect to the

²⁹ UN Model Treaty on Mutual Assistance, UN Doc. A/CONF.144/28/Rev.1.

³⁰ UN Doc. A/CONF.183/2/Add.1 (1998), pp. 168, 169 and 175.

³¹ Cf. references in *ibid.*

information. The language used also makes it clear that protective measures can be taken both in relation to how the information is obtained ('handled') as well as how it is transmitted ('provided'). As an example of its application, PTC I in the case of Bosco Ntaganda, requested that Uganda provide and handle information relating to the request in accordance with article 87(4)³².

V. Paragraph 5

1. Invitation to States not Parties

- 31 Paragraph 5 deals with the cooperation between the Court and non-States Parties. Pursuant to the general principle of the law of treaties, as embodied in article 34 of the *Vienna Convention on the Law of Treaties*³³, the obligations of Part 9 do not – as such – extend to non-States Parties³⁴. From the perspective of the Statute cooperation between the Court and non-States Parties can therefore only be a voluntary one and this is reflected by the basic scheme outlined in this paragraph. But this is without prejudice to legal consequences that may stem from other legal sources in certain cases. The empowering of the Court in this paragraph to contact a non-State Party for the sake of *ad hoc* cooperation should also be seen in the light of the two following hypotheses.
- 32 The Security Council – acting under Chapter VII of the *UN Charter* – may oblige all UN Member States to cooperate with the Court in a given case. The binding nature of such a cooperation regime for States not Parties to the Statute would then stem from the UN Charter which – according to article 103 of the UN Charter – takes priority.
- 33 Article 1 of the four Geneva Conventions on international humanitarian law of 12 August 1949³⁵ contains the very significant obligation to *ensure* respect of international humanitarian law. The implications of this wording are far-reaching. Essentially, the formula entails the obligation for States Parties to react by any appropriate means to any violation of an international humanitarian obligation even though the underlying act is not attributable to the State concerned³⁶. The duty enshrined in common article 1 has been confirmed and supplemented respectively, by articles 1 and 89 of the First Add. Prot. of 8 June 1977 to the four Geneva Conventions³⁷ and the relevant international practice adds weighty support to the view that the duty to ensure international humanitarian law has become part of customary international law³⁸. In the light of this legal development it is conceivable that in a given case some form of cooperation with the Court constitutes the only way for non-States Parties to discharge this obligation³⁹. Cooperation would then no longer be voluntary in character, rather it would assume the character of an obligation under customary international law.

2. 'assistance under this Part'

- 34 The phrase '*to provide assistance under this Part*' indicates that the *ad hoc* cooperation regime between the Court and a non-State Party shall reflect the cooperation regime of Part 9. Ideally the arrangement will contain a general reference to the provisions of Part 9. The phrase

³² *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-13, Request to the Republic of Uganda for the arrest and surrender of Bosco Ntaganda, PTC I, 8 February 2008.

³³ UN Doc. A/CONF.39/11/Add.2.

³⁴ See Krefß and Prost, article 86, mn 3.

³⁵ (1950) 75 UNTS 31.

³⁶ This has already been pointed out by Pictet, *Commentaire* 27, and has been further developed by Condorelli and Boisson de Chazournes, *Quelques remarques* 26.

³⁷ (1979) 1125 UNTS 3.

³⁸ See Condorelli and Boisson de Chazournes, *Quelques remarques* 26 et seq., and for the more recent practice (including the increasingly significant one of the United Nations) Condorelli, *Les Nations Unies* 450 and 461.

³⁹ It deserves a thorough analysis whether the customary obligation 'to ensure respect' remains confined to war crimes or extends to the other crimes within the jurisdiction of the Court.

does not exclude, though, that the non-State Party renders only some of the forms of assistance provided for in Part 9. Paragraph 5 leaves all necessary room for flexibility in this respect.

3. Basis for cooperation and internal competences regarding cooperation treaties

The flexibility of the cooperation between the Court and non-States Parties is underlined 35 further by the phrase ‘ad hoc arrangement, an agreement with such State or any other appropriate basis’. The cooperation pursuant to paragraph 5 can have every appropriate basis. Essentially, this basis can either take the form of a legally binding cooperation regime or retain a wholly informal character. Regulation 107 of the Regulations of the Court elaborates on the negotiation and conclusion of arrangements and agreements on cooperation falling under article 87 paras. 5 and 6. The Regulation draws a three-fold distinction between agreements ‘setting out a general framework for cooperation’, agreements referred to in article 54 para. 3 (d) and other agreements. The first category relates to agreements that establish a cooperation relationship serving as a substitute for (the inapplicable) Part 9 and thus having a broadly similar scope.⁴⁰ Those agreements, in line with the competences accorded to it in article 2 and in article 3 para. 2, will be concluded by the President on behalf of the Court while other competent organs may participate in the negotiation process in some for or the other under the authority of the President. The views of such organs and, importantly, those of one representative of counsel, may also be introduced into the negotiation process by way of consulting the Court’s Advisory Committee of Legal Texts⁴¹. Agreements referred to in article 54 para. 3 (d) will be negotiated and concluded by the Prosecutor and this will be possible also where a general framework for cooperation. Other cooperation agreements will be negotiated by the competent organ or organs and will be concluded by the President or, through delegation, by the organ or organs concerned⁴².

4. Obligatory cooperation

Subparagraph 2 of paragraph 5 deals with the consequences of a failure to cooperate by the non-State Party. At this point the distinction between cooperation on a binding or non-binding basis is crucial. This phrase indicates that this subparagraph covers only the former category. The name which is given to the ad hoc cooperation regime is of secondary importance here such that the references to ‘an ad hoc arrangement or agreement with the Court’ can only serve as examples. What matters is the non-State Party’s intent to assume an international obligation to cooperate with the Court. Subparagraph 2 should also apply – by way of analogy – in the two hypotheses of obligatory cooperation alluded to above⁴³. 36

5. Failure to cooperate despite an obligation to that effect

As paragraph 5 (b) deals exclusively with cases where a non-State Party is under an international obligation to cooperate with the Court the failure to act accordingly entails, in principle⁴⁴, the international responsibility of that State. 37

⁴⁰ For an agreement of that kind, see Agreement of the International Criminal Court and the European Union on Cooperation and Assistance of 10 April 2006, ICC-PRES/01-01-06; the Relationship Agreement between the International Criminal Court and the United Nations of 4 October 2004 (ICC-ASP/3/Res. 1), though being governed by article 2 in the first place, also comes within the scope of Regulation 107 as far as the provisions on cooperation are concerned.

⁴¹ See Regulation 4 of the Regulations of the Court.

⁴² For one example of an agreement falling in this residual category, see the Memorandum of Understanding between the United Nations and the International Criminal Court concerning Cooperation between the United Nations Organization Mission in the Republic of the Congo (MONUC) and the International Criminal Court of 8 November 2005.

⁴³ Mn 19 and 20.

⁴⁴ For the rare possibility of exceptions see the more detailed comments on article 87 para. 7, mn 32 et seq., where the attempt is made to analyze the latter provision within the general legal framework of State responsibility.

6. Consequences of such a failure to cooperate

38 This part has to be read together with article 112 para. 2 (f) pursuant to which the Assembly of States considers any question relating to non-cooperation and, in addition, it must be compared with the wording in paragraph 7 which deals with the failure to cooperate by a State Party. The Court may ‘inform’ (either the Assembly of States or the Security Council) about the State’s failure to cooperate. By contrast the term ‘finding’ to be found in paragraph 7 is not used here. The reason for this difference is the belief of some delegations that weaker language should be used with respect to non-States Parties. It is not easy, though, to find a solid justification for a distinction in substance as the international responsibility of the non-cooperating State is at stake in both hypotheses.

39 If the matter was referred to the Court by the Security Council the latter can be informed of the State’s failure to cooperate. The Security Council will then proceed in accordance with its competences under the UN Charter. Pursuant to article 13 (b) a referral by the Security Council will be made under Chapter VII. Under this chapter the Security Council may, for example, consider the appropriateness of the adoption of sanctions against the responsible State⁴⁵. The phrase can be read as precluding the Court from informing – apart from the Security Council – the Assembly of States Parties. However, the wording does not demand such an interpretation. The more sensible view appears to allow for parallel information of the two bodies concerned⁴⁶.

Paragraph 5, subparagraph b, deals only with the case where the State not party to the Statute has entered into an ad hoc arrangement or an agreement with the Court. It must, however, equally apply where the international obligation of the State not party directly follows from a Security Council resolution adopted under Chapter VII without any subsequent arrangement or agreement between the State concerned and the Court. This is to avoid the absurd result that the Court is precluded to inform the Security Council of a failure to cooperate if the international obligation to cooperate is enshrined (only) in the Security Council resolution and hereby benefits from the legal effect of article 103 of the UN Charter. The early practice under the Statute accords with this view.⁴⁷

40 In the context of the Security Council referral regarding Darfur, Sudan, the Court has faced several instances of non-cooperation on the part of States Parties where the matter has been referred to the Security Council and/or the Assembly of States Parties. On 25 May 2010, PTC I, 3 years after the issuance of arrest warrants, decided to inform the Security Council of the failure of the Republic of Sudan to cooperate with the arrest and surrender of Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman⁴⁸. Factually, the decision details the issuance of the arrest warrant, followed by service and attempted service on Sudanese authorities of the request for cooperation in the arrest and surrender, as well as follow up documents. It notes the absence of any information from Sudan as to the action taken on execution of the request. This decision was the first through which information about non-cooperation by Sudan – a non-State Party – has been brought to the attention of the Security Council. In doing so the PTC did not rely on, or even make reference to article 87(7), which allows for circumstances of non-cooperation to be referred to the ASP and in the case of

⁴⁵ Cf. article 41 of the UN Charter.

⁴⁶ The effect of article 12 of the UN Charter is limited to the relationship between the two UN organs Security Council and General Assembly.

⁴⁷ The Prosecutor has informed the Security Council of a failure of the Government of Sudan contrary to operative paragraph 2 of Security Council Resolution 1593 to cooperate with the Court in the execution of requests for arrest and surrender in the absence of an arrangement or agreement between the Sudan and the Court; Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 5 December 2007.

⁴⁸ *Prosecutor v. Ahmad Muhammad Harun & Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, PTC I, 25 May 2010.

referral by the Security Council, to that body. Presumably – given there is no analysis on the point – the Pre-Trial Chamber considered article 87(7) inapplicable because of its apparent restriction to States Parties only. As a result of this approach, the reasoning of the Pre-Trial Chamber was premised solely on the obligations flowing from article 25 of the UN Charter and resolution 1593(2005) which mandated that the ‘Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution’⁴⁹. The Chamber went on to describe that the Security Council had ‘entrusted the Court with the task of investigating and prosecuting crimes within the Court’s jurisdiction in the situation in Darfur’ a phrasing which does not sit comfortably with the structure of the Court and its relationship to the Security Council. The Court held that because of resolution 1593 (2005), it had an ‘inherent power’ to inform the Security Council of the failure of Sudan to cooperate which was preventing the Court from executing the task entrusted to it by the Security Council. Instead of claiming such an ‘inherent power’ the Chamber should simply have relied on article 87(5), albeit by way of analogy.

In cases which do not involve the Security Council, the Court may inform the Assembly of States Parties only. The question of which options are open to this body and to the States Parties represented therein is not answered in article 112 para. 2 (f). The Statute is not unambiguous as to the precise legal status of the Assembly. One possibility is to see the Assembly as an organ *sui generis* of the Court notwithstanding the fact that it is not mentioned in article 34⁵⁰. On this – admittedly not altogether certain – basis the Assembly of States could – on behalf of the Court – invoke the international responsibility of the State by demanding its cooperation and by condemning its internationally wrongful behaviour⁵¹.

A difficult point remains whether the States Parties could take any action against the non-cooperating State on the basis of an Assembly’s recommendation to this effect. At this point, the question arises, whether the international responsibility of the non-cooperating State exists *vis-à-vis* the States Parties. Otherwise these States would not dispose of *legal* remedies *vis-à-vis* the non-cooperating State, a situation which could not be changed by a decision of the Assembly acting on behalf the Court.

To the extent the non-State Party’s obligation to cooperate can only be based on an international treaty between that State and the Court – as it appears to be envisaged as the standard case in paragraph 5 – the non-cooperating State incurs international responsibility *vis-à-vis* the Court and – given the distinct international legal personality of the Court – not *vis-à-vis* the States Parties, the latter being, from a strictly legal perspective, third States *vis-à-vis* the treaty of cooperation between the Court and the non-State Party. Thus a *right* of the States Parties to demand and – if necessary – to enforce the non-State Party’s cooperation with the Court can be deduced from the cooperation treaty only if this treaty embodies the expression of the intent of both the Court and the non-State Party to create such a right⁵². In the latter hypothesis the regime of State responsibility discussed below⁵³ could apply *mutatis mutandis*.

The same is true to the extent that the non-States Parties’ obligation to cooperate stems from a decision of the Security Council under Chapter VII of the United Nations Charter or from customary international law. In both hypotheses the obligation applies *erga omnes* and as a consequence thereof every UN Member State⁵⁴ or, respectively, every State⁵⁵ has a legal interest in the non-States Parties’ cooperation.

⁴⁹ Security Council resolution 1593(2005) paragraph 2.

⁵⁰ From this perspective article 34 would specify the organs of the Court as judicial body. The Court as the international legal person within the meaning of article 4 para. 1 would have the Assembly of States as an additional – and partly political – organ.

⁵¹ For a more detailed analysis of the relationship between Part 9 and the international law on State responsibility see discussion on paragraph 7, mn 32 *et seq.*

⁵² Cf. article 36 of the Vienna Convention of the Law of Treaties, UN Doc. A/CONF.39/11/Add.2.

⁵³ See paragraph 7 mn 32 *et seq.*

⁵⁴ In the hypothesis of a binding Security Council decision.

⁵⁵ In the hypothesis of a customary obligation to cooperate.

VI. Paragraph 6: The Court asking intergovernmental organizations for cooperation and assistance

- 43 Similar to non-States Parties, intergovernmental organizations are not under the obligation to cooperate pursuant to Part 9⁵⁶. Cooperation between the Court and such organization may be of great use, though, and therefore this paragraph provides for such a possibility. The slightly different wording of the two sentences of paragraph 6 seems to suggest that a distinction has to be drawn between the provision of information or documents and other forms of cooperation and assistance. But in both hypotheses the cooperation, in principle, is a voluntary one as the Court and the intergovernmental organization are placed on the same level as distinct international legal subjects. Thus, in principle, the cooperation needs the consent of the organization concerned in every case. Again, the legal situation changes both, in case of a Security Council decision to cooperate under Chapter VII of the UN Charter⁵⁷ and where it is possible to establish an obligation to cooperate under customary international law⁵⁸.
- 44 In the case of *Nourain and Jamus*, the Defence brought two applications to the TC under 57(3)(b) and 64(6)(a)⁵⁹ seeking the preparation and transmission of a cooperation request to the African Union. With reference to the first application, the Chamber held that it could seek cooperation from an intergovernmental organization pursuant to article 87(6) for the types of assistance available under Part 9 of the Statute. It was further of the opinion that the AU was an intergovernmental organization within the terms of the article. However, the Chamber properly required that the criteria of specificity, relevance, and necessity be met for the transmission of the request. In this instance, only some of the documents sought had been identified to the requisite standard, while others did not meet the requirement of specificity because they were broadly categorized without limitations. Further, only a portion of the sufficiently specific documentation met the relevance criteria. The Chamber also held that while the Defence had exhausted the steps to obtain the material from the African Union, they had not explained what steps were taken, if any, to pursue the material from the Prosecution. As a result, the Chamber concluded that the Defence should first pursue the matter with the Prosecution through an application under Rule 77⁶⁰. The Defence brought a second application after having made a largely unsuccessful application to the Prosecution. In its decision, the TC reiterated its previous findings as to the applicability of article 86(7) and the need for specificity, relevance and necessity. Applying the latter criteria to the outstanding documentation the TC granted the application with respect to a portion of the material which met the specified requirements⁶¹. These two decisions are important in that the TC adopted a pragmatic interpretation limiting the scope of article 87(6) to otherwise unavailable material which is specifically described and relevant. This is parallel to the approach taken with respect to requests to State Parties. The effect of the decisions is to produce focused requests which have a far greater chance of successful execution, particularly in light of the absence of an obligation on intergovernmental organizations to respond.

⁵⁶ See Krefß and Prost, article 86, mn 4.

⁵⁷ The situation is more complex as in the case of *States* not Party to the Statute, discussed above, as the Security Council usually addresses its decisions to States, not to intergovernmental organizations. But see the interesting analysis by Sarooshi, *Powers* 162 et seq. Another way to create an obligation at least for the UNO would be to insert provisions to this effect in the agreement to be concluded pursuant to article 2.

⁵⁸ With respect to the UN see Condorelli, *Les Nations Unies* 460 et seq.

⁵⁹ This section empowers the TC to exercise the functions of a PTC under Article 61(11).

⁶⁰ *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-170, Decision on 'Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union', TC IV, 1 July 2011.

⁶¹ *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Public redacted Decision on the second defence's application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, TC IV, 21 December 2011, paras 12–30.

The reference to the competence or mandate of the organization as a limit for possible cooperation with the Court is by no means self-evident. Although it is clear that any intergovernmental organization must respect its competences when entering into a cooperation arrangement with the Court, this question is part of the internal law of the organization and would not normally concern the international legal relationship between the Court and the organization. The express reference to ‘competence or mandate’ must therefore be construed as attaching legal relevance to the competence structure of the relevant organization: The Court shall not ask an intergovernmental organization to cooperate in a way that would entail an *ultra vires* act.

In Rome there was a lengthy debate whether or not peacekeeping forces should be mentioned explicitly in the Statute. The discussion was focussed on the pertinent provision of Part 5. In article 54 para. 4 (f) of the Draft Statute⁶² there was a bracketed reference to ‘any peacekeeping force that may be present in the territory where an investigation is to be undertaken’. Some delegations objected to this formula without denying the urgent practical need to have such forces included⁶³. The compromise achieved in article 54 para. 3 (c) is to add the term ‘arrangement’ to ‘intergovernmental organization’ to make sure that all peacekeeping forces are included. A corresponding reference is missing in paragraph 6. This omission was not deliberate so that the general rule of systematical interpretation should apply pursuant to which the complementary rules in Part 5 and Part 9 must be coherent⁶⁴. The Court is thus in a position to cooperate with all kinds of peacekeeping forces within the latter’s mandates. This accords with the early practice of the Court.⁶⁵ Such a cooperation may extend, in particular, to the arrest and surrender of a person. While it is implicit in the legal scheme under articles 58 and 59 in conjunction with article 89 that such an arrest and surrender will, under normal circumstances, be carried out by the territorial State, there may be an imperative need to resort to the cooperation of a peace-keeping or peace-enforcement force on the ground in case the territorial State is either unable or unwilling to act pursuant to a request by the Court under article 89 para. 1. Nothing in the text of paragraph 6 or any other provision of the Statute precludes the power to seek such a form of cooperation. In particular, the fact that articles 58 and 59 spell out a detailed legal regime governing the execution of an arrest by a State Party does not yield an argument *e contrario* regarding the execution of an arrest by one of the forces in question. Instead, article 58 para. 5 refers generally to Part 9 as far as this form of cooperation is concerned. The cooperation of the forces concerned may take place with the consent or even upon the request of the territorial State⁶⁶, but where the mandate of the forces concerned so allows paragraph 6 also empowers the Court to seek the cooperation of such forces in cases of failed States or States hostile to the Court.

Paragraph 6 does not deal explicitly with the consequences of a failure of an intergovernmental organization to cooperate with the Court. Correspondingly, article 112 para. 2 (f) does not mention article 87 para. 6. This is somewhat surprising because it is perfectly conceivable that an international organization assumes an international treaty obligation to cooperate⁶⁷ and, consequently, incurs international responsibility in case of failure to cooperate.

⁶² UN Doc. A/CONF.183/2/Add.1, p. 91.

⁶³ On the cooperation between the ICTY and the International Implementing Force see Jones, *Implications* 238 et seq; on the ICTY’s cooperation with the Stabilisation Force, see Henquet, in: Boas and Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2003) 113.

⁶⁴ See Preliminary Remarks on Part 9, mn 3.

⁶⁵ See the Memorandum of Understanding between the United Nations and the International Criminal Court concerning Cooperation between the United Nations Organization Mission in the Republic of the Congo (MONUC) and the International Criminal Court of 8 November 2005.

⁶⁶ This is the legal framework for any cooperation of MONUC in the arrest and surrender of persons to the Court; cf. article 16 paragraph 1 (a) of the Memorandum quoted *ibid*.

⁶⁷ Or, again, is under a corresponding customary obligation or an obligation which results from a Security Council decision under Chapter VII of the UN Charter.

In light of the considerations of the *Appeals Chamber* of the ICTY in the *Blaskić subpoena* judgment⁶⁸ it is submitted that the Court has the inherent power to make a finding as to the organization's failure to cooperate.

VII. Paragraph 7

1. States Parties failing to comply with a request

- 48 Any Court's request to cooperate concretizes and activates the abstract treaty obligations of the States Parties to cooperate pursuant to articles 86, 89 para. 1 and article 93 para. 1. A Court's request is thus binding for the State Party addressed, entailing an international obligation for this State. Conceptually the (abstract) obligations under Part 9 are *primary* treaty law and any (concrete) obligation to comply with a request constitutes *secondary* treaty law. The legal situation thus corresponds with the relationship between Member States and such an intergovernmental organization which is empowered under its Charter to direct binding decisions to its Member States⁶⁹. The legally binding character of the Court's requests cannot be questioned by opposing the terms 'request' and 'order'. Although the term 'order' may sound stronger (even unusually strong in the relationship between an international body and States⁷⁰ so that the sole reference to 'request' may seem more appropriate within the contractual framework of the Statute) it cannot be doubted that the decisive common feature of both, 'order' and 'request' in this specific context is their legally binding force⁷¹.
- 49 A State Party's 'failure to comply with a request by the Court contrary to the provisions of this Statute', in the language of the *2001 Articles of the International Law Commission on State Responsibility (ILC Articles)*⁷² constitutes the breach of an international obligation⁷³. Under customary international law the breach of an international obligation by a State constitutes an internationally wrongful act entailing the State's responsibility if no circumstance precluding wrongfulness can be invoked⁷⁴. It is doubtful whether reference to those circumstances precluding wrongfulness which are listed in articles 20 to 27 of the ILC Articles is at all conceivable in the context of the Statute. One possible view would be to consider the Statute – and more particularly Part 9 – as a so-called *self-contained regime* which offers an exhaustive set of rules concerning the international wrongfulness of

⁶⁸ *Prosecutor v. Tihomir Blaskić*, Judgment of 29 Oct. 1997 on the request of the Republic of Croatia for review of the decision of the Trial Chamber II of 18 July 1997, para. 33.

⁶⁹ This analogy can be pressed further in light of the *dictum* of the Appeals Chamber of the ICTY in the *Blaskić subpoena* judgment (see note 43, para. 28) according to which an international criminal judicial body in requesting the cooperation of States is not exercising its primary judicial function but 'an ancillary mandatory power vis-à-vis States'.

⁷⁰ The Appeals Chamber of the ICTY has pointed out in the *Blaskić subpoena* judgment (see note 43, para. 26) that the use of the term 'order' in article 29 of the Tribunal's Statute constitutes a terminological exception which can be explained by the distinctive nature of Chapter VII of the UN Charter as the Statute's legal basis. In its *amicus curiae* brief of 15 Sept. 1997 submitted in the *Blaskić* case the People's Republic of China appears to question the binding force even of an order under article 29 of the ICTY Statute. This view has been clearly rejected by the Appeals Chamber (*ibid.*).

⁷¹ Cf. the *amicus curiae* brief of the Max Planck Institute for Comparative Public Law and International Law of 11 Apr. 1997 submitted in the *Blaskić* case, at pp. 8 *et seq.*; for a subsequent *amicus curiae* brief of the Freiburg Max Planck Institute for Foreign and International Criminal Law on the power of national courts to compel the production of evidence see *Eser/Ambos*, (1998) 6 *EJCLCJ* 3.

⁷² Crawford, *The International Law Commission's Articles on State Responsibility* (2002) Introduction, Text and Commentaries.

⁷³ Article 2 (b) of the ILC Articles, *ibid.*, p. 61; article 12 of the ILC Draft (Crawford, *ibid.*, p. 63) clarifies that the origin of the breached obligation is irrelevant. Insofar as ILC Articles are quoted in the text they are taken to accurately reflect the current state of customary international law.

⁷⁴ Cf. articles 1, 2 and 20 *et seq.* of the ILC Articles, Crawford, *ILC's Articles on State Responsibility* (2002), pp. 61 and 65 *et seq.*

non-cooperation⁷⁵. The very careful determination of the scope of the obligations to cooperate⁷⁶ during the Rome negotiations certainly points in this direction. No doubt, none of the – in parts very delicate – compromises achieved when replacing possible grounds for refusals to cooperate by other solutions may be undermined by reference to a circumstance precluding wrongfulness under general customary international law. This is true, for example, for the state of necessity as reflected in article 25 of the ILC Articles⁷⁷. Additionally, the obligation to cooperate under Part 9 does not operate on the basis of the principle of reciprocity. Rather does the integral structure of these obligations imply that they have to be discharged ‘in all circumstances’ which would again be in line with common article 1 of the Four Geneva Conventions and exclude the applicability of articles 22 (consent), 22 (countermeasures) and 21 (self-defence) of the ILC Draft to the Statute’s cooperation regime⁷⁸. On the other hand, it may go too far to categorically deny the possibility that in a truly exceptional case the Court accepts that one of the grounds (virtually) excluding the State’s choice and listed in articles 23 (force majeure and fortuitous event) or 24 (distress) of the ILC Articles can be invoked. In conclusion, a ‘failure to comply with the request of a Court contrary to the provisions of this Statute’ should be construed as being tantamount to an internationally wrongful act in the sense of the ILC Articles on State responsibility⁷⁹.

The latter part of this phrase adds a further condition of the Court’s power to make a finding. One may doubt the usefulness of this condition. In any event the condition will normally be fulfilled as it is very hard to think of a case where the non-cooperation would not prevent the Court from exercising its functions and powers.

2. Dispute regarding the legality of a request

In case of a dispute regarding the legality of a request for cooperation under article 93 that has not been solved through consultations⁸⁰ Regulation 108 of the Regulations of the Court recognises the right of the requested State to apply for a ruling from the ‘competent Chamber’⁸¹ and sets up a procedure in that respect.⁸² Regulation 109, sub-regulations 1 and 2, make it clear that in case of such an application the procedure under Regulation 108 must be completed before a finding under paragraph 7 can be made.

⁷⁵ Article 55 of the ILC Articles, Crawford, ILC’s Articles on State Responsibility (2002), p. 73, alludes to the possibility of such a regime. The article is worded: ‘The provisions of the Part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.’ This article appears to confine the concept of a self contained regime to the legal consequences of an internationally wrongful act and it was in this respect that the International Court of Justice made use of this concept in the *Tehran Hostages Case*, United States Diplomatic and Consular Staff in Tehran, Judgment of 24 May 1980, (1980) ICJ Rep. 40. But a derogation by way of *lex specialis* is also possible at the level of circumstances precluding wrongfulness. For a detailed analysis cf. Simma, *Regimes*.

⁷⁶ See Kreß and Prost, article 89, mn 1, 5–13 and Kreß and Prost, article 93, mn 1–6.

⁷⁷ An essential element of this circumstance precluding wrongfulness is the balancing of conflicting interests. This is precisely what has been done in determining the precise scope of the obligations to cooperate under articles 89 and 93.

⁷⁸ For such an interpretation of the formula ‘in all circumstances’ in common article 1 see Condorelli and Boisson de Chazournes, *Quelques remarques 22 et seq.* This aspect of common article 1 may even have to be taken into consideration to the extent that the resulting obligations are congruent with the obligations of Part 9 of the Statute.

⁷⁹ Cf. the *amicus curiae* brief by Condorelli (11 Apr. 1997) submitted in the *Blaskić* case before the ICTY.

⁸⁰ In the case of a request under article 89, article 59 para. 4 in conjunction with rule 117, sub-rule 3 apply.

⁸¹ Which Chamber is competent depends on the relevant stage of the proceedings; it may be the Pre-Trial Chamber or the Trial Chamber and, rarely, even the Appeals Chamber.

⁸² By establishing such a procedure, Regulation 108 fills a lacuna that was left by the drafters of the Statute and the Rules of Procedure and Evidence; Meißner, *Die Zusammenarbeit mit dem internationalen Strafgerichtshof nach dem Römischen Statut* (2002) 258 et seq.; the competence of the Court to authoritatively settle such a dispute is explicitly recognised in article 119 para. 1; Meißner, *ibid.*, 259; Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligation of States* (2002) 88; Ochoa (2007) 7 *ICLRev* 17 et seq.

52 In the course of considering general submissions made by the Government of Kenya with respect to its cooperation with the Court⁸³, TC V(B) specifically noted the requirements of Regulation 109(3) giving Kenya the right to be heard prior to any determination under article 87(7). The Chamber also recognized Kenya's entitlement to be notified of relevant filings and to submit responses in accordance with Regulations 24(1)⁸⁴ and 31⁸⁵ of the Regulations. However, it did not apply any of these Regulations in the circumstances as they were not factually relevant. Notwithstanding this finding, the Chamber went on to find that where allegations of non-cooperation on the part of a State are relied upon in support of a request for relief, hearing from the relevant State (in this case the Kenyan Government) may be of benefit to the Chamber's decision in the case and overall duty to ensure a fair and expeditious trial. The Trial Chamber noted that its finding was without prejudice to requests for confidentiality which may be made with respect to the filings. On this basis the Trial Chamber found that formal notification of filings should be given to Kenya and it went on to direct the parties and participants to do so⁸⁶. Given the Trial Chamber's inherent powers to call for submissions from States, as may be relevant on a case by case basis, the necessity for imposing a blanket requirement of this nature, which appears to benefit the Government of Kenya as opposed to the Court, is unclear.

3. Finding of a failure to cooperate and its legal consequences

53 The relevant phrase – in conjunction with article 112 para. 2 (f) – constitutes the core part of the paragraph as it deals with the consequences of a State Party's failure to cooperate. It is said that the Court may make a finding to that effect. Regulation 109, sub-regulations 1 and 2, of the Regulations of the Court specify the competent chamber or the chamber that has made the request for cooperation as the competent body to make the finding. Pursuant to Regulation 109, para. 3, the Chamber shall hear from the requested State before making the finding. The Appeals Chamber of the ICTY in its *Blaskić subpoena* judgment has elaborated on the meaning of the term 'finding' in the context of article 29 of the Tribunal's Statute⁸⁷ and there is no reason to deviate from its reasoning in the context of the Statute. Hereafter the finding of the Court constitutes the formal⁸⁸ establishment of the existence of an internationally wrongful act⁸⁹ of the non-cooperating State. The Appeals Chamber has added that the ICTY has no power to go beyond such a finding and the consecutive referral of the matter. In particular the Appeals judges held that the finding must not include any recommendations or suggestions as to the course of action the Security Council may wish to take⁹⁰. This, too, should apply *mutatis mutandis* with respect to the Court's finding under this paragraph.

⁸³ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision concerning the Government of Kenya's Submissions on its cooperation with the Court, TC V(B), 3 July 2013.

⁸⁴ While the reference is to 24(1) it is likely intended to as a reference to 24(3) which allows States participating in the proceedings to file a response to any document, subject to any order of the Chamber.

⁸⁵ This regulation provides for notice to participants of documents registered by the Registry.

⁸⁶ *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision 3 July 2013, para. 14.

⁸⁷ *Prosecutor v. Blaskić*, AC Judgment of 29 Oct. 1997, paras. 35 *et seq.*

⁸⁸ The Appeals Chamber (*Blaskić* Judgment of 29 Oct. 1997, para. 35) stresses that the Court in making a finding 'engages in a judicial activity proper'.

⁸⁹ The Appeals Chamber (*Blaskić* Judgment of 29 Oct. 1997, para. 35) uses the language 'breach of an international obligation' which will be for almost all practical purposes equivalent with 'internationally wrongful act'. Still, the latter term seems to be more precise and Condorelli uses it (the translation of the French word 'illicite' by 'unlawful' instead of 'wrongful' is of secondary importance here) in its *amicus curiae* brief of 11 Apr. 1997, *sub* 6., which is quoted affirmatively by the Appeals Chamber.

⁹⁰ *Prosecutor v. Blaskić*, AC Judgment of 29 Oct. 1997, para. 36.

The vast majority of non-cooperation cases have arisen from the travel of President Al-Bashir. Malawi⁹¹, Chad⁹², and Democratic Republic of the Congo⁹³ have all been referred to the Security Council and the Assembly of States Parties for non-cooperation relating to the travel of President Al-Bashir to those States. In each case, the States in question were given an opportunity to be heard and the relevant Chambers went on to make specific findings of non-cooperation in accordance with article 87(7). In one other case relating to Djibouti⁹⁴—which was an early consideration of the issue by a PTC, though not the first— it does not appear that the matter was actually ‘referred’ to the Security Council or the ASP in accordance with article 87(7). In that instance, the decision of the PTC was a summary one which noted the travel of Al-Bashir to Djibouti, and the obligation to cooperate. In these circumstances, the PTC considered it appropriate to ‘inform’ the Security Council and the ASP in order for these bodies to take whatever measures considered appropriate. No specific finding of non-cooperation was made, nor was the term ‘refer’ or ‘referral’ mentioned in the decision. In the DRC case the argument, apart from those based on the immunity right of Sudan, was advanced that the notification of the delegations attending the COMSEA summit was made quite late, leaving the DRC authorities with little time to address what was a very ‘ambiguous and major situation’. The Court rejected that argument noting that the warrants for Mr. Al-Bashir had been communicated to the DRC four years before, such that this issue could not be categorized as a ‘surprise’ to the authorities of that State. Moreover, the Chamber rejected the argument that Mr. Al-Bashir had left the jurisdiction the day after the DRC received the notification of the need to arrest and surrender him. Again, in light of the transmission of the requests four years earlier, the Chamber was of the view that the timing of his departure was irrelevant. The obligation to arrest and surrender already existed as of the transmission of the request four years earlier and the subsequent decision was nothing more than a reminder of an already existing obligation. In so finding the Court expressed doubt as to the argument advanced that the regional organization had not provided advance notice of the delegation lists and that the protocol department was not informed in a timely manner of the visit of a Head of State.

A strikingly distinctive approach was taken by a different PTC in the case of purported non-cooperation by Nigeria. In that instance, the Chamber accepted the explanation proffered by the Member State Nigeria⁹⁵ and did not refer the matter to the Security Council or the ASP. In the particular case, Mr. Bashir had attended an AU summit in Nigeria and had done so without an invitation from Nigeria. The Nigerian authorities asserted that upon learning of his attendance, they were in the process of considering the steps to take to fulfill their international obligations when Mr Al Bashir chose to suddenly leave the country. The Court considered that in these circumstances it was appropriate to use its discretion not to refer the matter. While the circumstances vary slightly, it is difficult to reconcile these two disparate findings.

⁹¹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, PTC I, 12 December 2011.

⁹² *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, PTC I, December 13, 2011; Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, PTC II, 26 March 2013.

⁹³ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, PTC II, 9 April, 2014.

⁹⁴ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir’s recent visit to Djibouti, PTC I, 12 May 2011.

⁹⁵ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-159, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir’s Arrest and Surrender to the Court, PTC II, 5 September, 2013.

- 56 In two cases related to Abdel Raheem Muhammad Hussein⁹⁶, Pre-Trial Chambers opted not to make findings of non-compliance against Chad and the Central African Republic despite Mr. Hussein's travel to those jurisdictions and the failure of the authorities to arrest him. In the case of Chad, the PTC determined that the timing was such that Chad was not in a position to execute the Court's decision⁹⁷. In the case of CAR, the PTC took into account the 'lack of capacity of the relevant authorities to react due to the circumstances prevailing in the country and, more so, their inability to promptly take action, given the short visit of Mr. Hussein'⁹⁸. In both cases the Chambers did not deem it necessary to make a finding on non-compliance and chose to only remind the States of their obligations under the Statute.
- 57 There have been several cases where possible travel by Mr. Al-Bashir implicated a non-member State such that no obligation to cooperate existed as between that State and the Court⁹⁹. Nonetheless, in a decision relating to the USA, the Court considered the matter in light of the Security Council resolution which had referred the situation to the Court. Highlighting the fact that the Council had urged – though not mandated – cooperation from non ICC member States, the Court decided to remind the US of the warrants for Mr. Bashir and to invite his arrest if he entered US territory. In so doing, the Court noted that that 'the ICC has no enforcement mechanism and thus relies on the States' cooperation, without which it cannot fulfil its mandate and contribute to ending impunity'¹⁰⁰. Similar action was subsequently taken by a Pre-Trial Chamber with reference to Ethiopia¹⁰¹, Saudi Arabia¹⁰² and Kuwait¹⁰³. The Appeals Chamber has held¹⁰⁴ that it was not competent to make a finding on non-cooperation with reference to a request for arrest and surrender or a failure to consult contrary to article 97, given that both were pre-trial matters falling within the jurisdiction of the Pre-Trial Chamber.
- 58 In the Kenyatta case, the Trial Chamber was called upon to consider for the first time the issue of a request for a finding of failure to comply pursuant to article 87(7) with respect to a request for cooperation under article 93 (relating to other forms of cooperation rather than arrest and surrender). The TC issued three substantive decisions of note with respect to the Prosecution request for the production of evidence in the case. On 31 March 2014, the TC adjourned the provisional trial date and its consideration of the request for a finding of non-cooperation in order to allow further time for resolution of the cooperation issues¹⁰⁵. In reaching this conclusion, the Chamber made a number of interpretive findings on the Part 9 regime applicable to other forms of cooperation (as distinct from requests for arrest and surrender). After finding that a request for cooperation had been validly issued by the

⁹⁶ *Prosecutor v. Abdel Raheem Muhammad Hussein*, ICC-02/05-01/12, Decision on the Cooperation of the Republic of Chad Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court, PTC II, 13 November 2013(Chad); ICC-02/0501/12, Decision on the Cooperation of the Central African Republic Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court (CAR), PTC II, 13 November 2013.

⁹⁷ The Chad authorities indicated they became aware of the presence of Mr. Hussein at a conference on their territory only on 27 April 2013 and they were not in a position to execute the April 26 2013 order of the Court relating to that visit as Mr. Hussein had left the country before the authorities of Chad became aware of it.

⁹⁸ *Prosecutor v. Muhammad Hussein*, ICC-02/0501/12, Decision, 13 November 2013 para 13.

⁹⁹ The exception being the State of Sudan which the Security Council obligated to provide full cooperation.

¹⁰⁰ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-162, Decision Regarding Omar Al-Bashir's Potential Travel to the United States of America, PTC II, 18 September 2013, para 12.

¹⁰¹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Regarding Omar Al-Bashir's Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia, PTC II, 10 October 2013.

¹⁰² *Ibid.*

¹⁰³ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-169, Decision Regarding Omar Al-Bashir's Potential Travel to the State of Kuwait, PTC II, 18 November 2013.

¹⁰⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 4, Decision on the 'Request for an immediate finding of non-compliance and referral to United Nations Security Council, AC, 17 September 2013.

¹⁰⁵ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/1 1–908, 'Decision on Prosecution's applications for a finding of noncompliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, TC V (B), 31 March 2014.

Prosecution¹⁰⁶, the TC went on to consider the Prosecution request for a finding of non-cooperation under article 87(7) in light of Kenya's protracted non-compliance with the request. The TC noted initially that the procedure for non-cooperation findings and referrals under article 87(7), as set out in regulations 108 and 109(1), had not been followed in the case. However, the Chamber considered it to be in the interests of justice, in the particular circumstances of the case, to proceed with a consideration of the merits of the application¹⁰⁷. The Trial Chamber also dismissed the array of arguments advanced by the Government of Kenya as to why its domestic law did not permit the rendering of the assistance sought. The Chamber stated that 'any purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court, or to undermine any application for non-compliance under article 87(7) of the Statute that may result'¹⁰⁸. This finding is consistent with the intent and structure of Part 9 and in particular article 88, which mandates that States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified in Part 9. Following on from this finding, the Chamber was of the view that Kenya had failed to consult with Court as required by article 97 as to the challenges with execution and with respect to its opinion on the lack of competence of the Prosecutor to present requests. Moreover, it noted with significant concern, the unexplained delay on the part of Kenya in either responding to the request or consulting on the challenges, which delay had led to the necessity for an adjournment of the proceedings¹⁰⁹.

The Chamber went on to consider the issue of an adjournment of the case as sought by the Prosecution, as well as the request for a finding of non-cooperation. In its analysis the Chamber noted the 'fundamental dependence' of the Court on the cooperation of States Parties and the effect of the failure to provide cooperation on the effectiveness of the Court. In this context the Court expressed the need to take all judicial steps possible to ensure cooperation by States Parties before making a finding of non-cooperation and referring the matter to the ASP¹¹⁰. After analysis, the Chamber granted the adjournment sought and at the same time, based on the reasoning as to the importance of State cooperation, deferred resolution of the application for a finding and referral under article 87(7) until after the adjournment period. As discussed above¹¹¹, the Chamber subsequently considered a revised request by the Prosecution, deciding on questions of specificity, relevance and necessity in July 2014¹¹².

The deferred question of the Prosecution request for a finding of non-cooperation and referral was decided upon by the Chamber in December 2014¹¹³. Despite its multiple previous references to the Kenyan government failure to comply and the unresolved cooperation request, the application for a finding and referral was rejected. In an astounding and deeply troubling decision, the TC has read in to Part 9 multiple exceptions to the cooperation obligation, significantly altering the careful balance achieved in the Statute construction and fundamentally undermining the cooperation obligation on State Parties to the Rome Statute.

The Chamber placed considerable emphasis on the discretionary nature of the decision to make a finding of non-cooperation and to refer a matter to the ASP. In its stated view, even if a State Party has failed to cooperate and has thus prevented the Court from exercising its

¹⁰⁶ See discussion under article 93(1).

¹⁰⁷ *Prosecutor v. Kenyatta*, ICC-01/09-02/1 1-908, Decision 31 March 2014, para 45.

¹⁰⁸ *Prosecutor v. Kenyatta*, ICC-01/09-02/1 1-908, Decision 31 March 2014, para 47.

¹⁰⁹ *Prosecutor v. Kenyatta*, ICC-01/09-02/1 1-908, Decision 31 March 2014, paras 48–51.

¹¹⁰ *Prosecutor v. Kenyatta*, ICC-01/09-02/1 1-908, Decision 31 March 2014, para 91.

¹¹¹ *Prosecutor v. Kenyatta*, ICC-01/09-02/1 1-908, Decision 31 March 2014, paras 98–102.

¹¹² *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-937, Decision on the Prosecution's revised cooperation request, TC V (B), 29 July 2014.

¹¹³ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-937, Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, TC V(B), 3 December 2014.

functions and powers under the Statute, the Court still has to positively determine whether a finding under article 87(7) is appropriate in the circumstances¹¹⁴.

62 Further, the the Chamber goes on to ‘read in’ a requirement for non-compliance with a request to cooperate to meet some form of undefined ‘threshold’ before it constitutes a failure to comply under article 87(7). While reference is made to trivial or technical failures, as an example, the analysis leading to the adoption of the requirement is devoid of clarity and appears unsupported by the plain language of article 87(7). More alarming is the Chamber’s suggestion that in the face of some compliance and explanations from a State, a presumption of good faith will apply which would have to be rebutted for a finding of non-cooperation to be made¹¹⁵. This statement undermines fundamentally the vertical structure of Part 9 by allowing a State to offer partial compliance and explanations of its ‘challenges’ in place of the required full cooperation with a request. It is a puzzling proposition in light of the structure and content of Part 9 of the Statute.

63 The Chamber also interprets article 87(7) as allowing for consideration of a demonstrated lack of capacity or ability as a justification for non-compliance with a request¹¹⁶. Given that States voluntarily accept the obligations under the Rome Statute, including Part 9, in becoming State Parties, it is an astonishing proposition that they would then be allowed to plead lack of capacity or ability in response to a breach of their treaty obligation in a particular case.

The Trial Chamber moved on to apply the general principles it had defined to the facts of the case before it. After a lengthy factual discussion which only serves to highlight the extensive non-cooperation on the part of the Government of Kenya, the Chamber makes a clear finding that the approach of the Kenyan Government ‘falls short of the standard of good faith cooperation required under article 93 of the Statute’ and that ‘this failure has reached the threshold of non-compliance required under the first part of article 87(7) of the Statute’¹¹⁷. It also determined that ‘the Kenyan Government’s non-compliance has not only compromised the Prosecution’s ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber’s ability to fulfil its mandate under article 64, and in particular, its truth-seeking function in accordance with article 69(3) of the Statute’¹¹⁸.

64 Nonetheless, relying on its discretion, the Chamber goes on to consider the appropriateness of such a finding in the particular case. It purports to be guided first by the object and purpose of the finding and referral process though it fails to articulate the same beyond veiled references to possible rationales for the provisions¹¹⁹.

65 Examining these possibilities, the Chamber admits a rationale for referral might be to ‘further the proceedings’. However it finds that consideration to be moot in the particular case, given the Chamber’s parallel decision refusing to grant a further adjournment of the trial¹²⁰. This finding was evidently misplaced in that it pre-judged the Prosecution decision whether to withdraw or notify that the evidence supported proceeding to trial¹²¹. Moreover,

¹¹⁴ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, para 39.

¹¹⁵ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, para 40.

¹¹⁶ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, para 41.

¹¹⁷ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, para 78.

¹¹⁸ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, para 79.

¹¹⁹ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, para 82 (‘The Chamber notes that, for the purpose of enhancing the work of the Court, one of the primary rationales for making such a finding and a referral **might be** to further the proceedings in the main case, by, for example, securing compliance with the cooperation requests at issue.’ emphasis added); para 84 (‘The Chamber acknowledges that there **might be** situations where referral as a disciplinary measure is warranted, and that such a referral **might** also indirectly **enhance** the work of the Court by, for example, promoting future cooperation, or cooperation more generally.’) [emphasis added].

¹²⁰ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, paras 82 and 83.

¹²¹ While the Chamber made the statement that this finding was ‘without prejudice to a situation where the Prosecution might notify the Chamber that the evidentiary basis has improved to a degree which would enable the case to now proceed to trial’ it gave no indication how in practice such prejudice would be avoided given the determination on mootness had already been made.

it is difficult to understand the Chamber’s logic in allowing a separate determination as to the state of the proceedings, to influence its decision as to whether the non-cooperation of the Kenyan government should be referred to the ASP. Such an approach appears to make non-cooperation acceptable in certain contexts. The Chamber also significantly minimizes the obvious and important rationale for the finding and referral process – sanctioning non-compliance in order to promote future cooperation by that State and cooperation with the Court generally. The Chamber acknowledged only that ‘there might be situations where referral as a disciplinary measure is warranted, and that such a referral might also indirectly enhance the work of the Court by, for example, promoting future cooperation, or cooperation more generally’¹²². For the Chamber, this would be especially warranted where the non-cooperation and breach of international obligations was of a ‘serious nature’ though it provided no explanation as to how a distinction should be drawn between serious and non-serious conduct. Most astoundingly, without rationale, the Chamber held that an assessment as to whether the referral was merited on this basis should take into account the conduct of the State and that of the party requesting the referral¹²³. As this discretionary assessment takes place after determinations that a request for cooperation was properly made, a State has failed to comply and the non-compliance has prevented the Court from exercising its functions and powers, it is difficult to perceive how the conduct of the party seeking referral could have any possible relevance to the referral decision under article 87(7).

Applying that reasoning on the facts of the case, the TC points to its concerns about the Prosecution’s conduct of the investigation and its pursuit of cooperation under the request, as the primary consideration in assessing whether Kenya’s non-cooperation should be referred. In fact, while the Court purports to have considered the full record in its analysis, the only factors explicitly referenced are those relating to the actions of the Prosecution, making this the central consideration in the Court’s determination not to refer the non-cooperation of the Government of Kenya to the ASP¹²⁴. While an evident purpose of article 87(7) is to sanction non-compliance of States, the Chamber has in essence used the refusal of a referral as a form of sanction against the Prosecution for its perceived failings.

From a practical point of view, whatever the rationale of the Chamber, in the face of the blatant, repeated and lengthy non-cooperation record on the part of the Government of Kenya as detailed by the Chamber itself, the decision constitutes an invitation to that State Party and others to follow a similar obstructive course in future cases. If the decision stands, the damage to the cooperation structure of the Rome Statute, which is central to the investigative capacity of the Prosecutor, will be extensive. On 19 August 2015 in Judgement on Prosecution appeal against TC V(b)’s Decision on Prosecution application for a finding of non-compliance under 87(7) of the Statute (ICC 01/09-11 OA 5, 19 August 2015) the Appeals Chamber referred the matter back to the Trial Chamber for a reconsideration.

If the matter was referred to the Court by the Security Council the comments made above concerning paragraph 5¹²⁵ apply. The Assembly of States Parties would not appear to be precluded from taking action as long as it does not conflict with a Security Council decision. According to Regulation 109, sub-regulation 4, the President is the competent body to refer the matter to the bodies concerned. The President shall so refer; there is thus no discretion once a finding has been made by the competent Chamber.

In all other cases the President shall refer the matter to the Assembly of States Parties only. As in the case of article 87 para. 5 article 112 para. 2 (f) remains silent about the course of action the Assembly of States Parties may wish to take. Given this lack of detailed provisions reference must be made to the general customary international law on State responsibility as reflected in the ILCArticles. The obligations under Part 9 of the Statute (concretized and

¹²² *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, para 84.

¹²³ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, para 84.

¹²⁴ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-937, Decision 3 December 2014, paras 85–88.

¹²⁵ See mn 31, 32.

activated by a Court's request) exist *erga omnes partes*.¹²⁶ As a consequence the Assembly of States Parties is entitled to ask for immediate compliance with the Court's request and may condemn the State Party's failure. It may go beyond this and consider the appropriateness of collective countermeasures, such as economic sanctions, against the non-cooperating State¹²⁷. By contrast, the termination of the treaty *vis-à-vis* the non-cooperating State is not an option given its integral nature and its overall humanitarian goal.

70 To date, neither the ASP nor the Security Council has taken any action in response to the situations of non-cooperation referred by the Court. This inaction represents perhaps the most significant blow to the effectiveness of the cooperation regime of the Rome Statute and correspondingly to the efficacy of the Court itself.

71 It is not an easy to answer the question, whether and to what extent a State Party may react individually to the failure to cooperate. The combined effect of article 87 para. 7 and article 112 para. 2 (f) certainly is to give priority to any collective reaction¹²⁸. The legal situation is less clear, however, in case the Assembly of States Parties does not reach the necessary majority to recommend an adequate collective measure to end the internationally wrongful act. One possible view would be that a State Party individually cannot go beyond the Assembly's recommendations. This would, for instance, exclude an individual countermeasure in the absence of a recommendation of the Assembly to that effect. Part 9 would hereby be construed as a partly self-contained regime as to the legal consequences of the relevant internationally wrongful acts. This interpretation, however, is by no means, a necessary one. It is at least as well arguable that failing the necessary collective response channeled through the Assembly of States Parties general customary international law applies. This would – as a last resort – include the adoption of individual countermeasures.¹²⁹ On the basis of the latter interpretation there would not be any deviation from the cooperation regime under article 89 of the First Add. Prot. to the Four Geneva Conventions. According to this provision States may act 'jointly or individually'.

¹²⁶ Article 48 para. 1 (a) of the ILC Articles (Crawford, ILC's Articles on State Responsibility (2002), p. 276).

¹²⁷ Cf. the *Blaskić subpoena* judgment of the Appeals Chamber (AC Judgment of 29 Oct. 1997, para. 36 (ii)). For the general limitations of countermeasures see articles 49 et seq. of the ILC Articles (Crawford, ILC's Articles on State Responsibility (2002), p. 71 et seq.).

¹²⁸ Cf. the reserved position of the Appeals Chamber in its *Blaskić subpoena* judgment (AC Judgment of 29 Oct. 1997, para. 36).

¹²⁹ The ILC has refrained from taking a stand on this issue; cf. paras. 6 and 7 of the commentary on article 54; Crawford, ILC's Articles on State Responsibility (2002), p. 305.

Article 88

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Literature: Brady, H., 'Australia', in: C. Kreß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 13; Broomhall, B. and Kreß, C., 'Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis', in: C. Kreß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 515; Kreß, C., Lattanzi, F., Broomhall, B. and Santori, V. (eds.), *The Rome Statute and Domestic Legal Orders*. Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005); Paust, J.J., 'The Freeing of Ntakirutimana in the United States and 'Extradition' to the ICTR', (1998) 1 *YbHumL* 205; Prost, K. and Robinson, D., 'Canada', in: C. Kreß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 57; Sluiter, G., 'To cooperate or not to cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal', (1998) 11 *LeidenJIL*383.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
1. Ensurance that there are procedures available under national law.....	4
2. All forms of cooperation specified under this Part.....	5
C. Subsequent practice.....	6

A. Introduction/General remarks

Article 88 was a new provision inserted into the Statute during the Rome negotiations. It was an intricate part of the compromise achieved to resolve a critical issue in Part 9 – whether or not there should be a reference to national law in the cooperation provisions. The division of views on this particular question paralleled the position of States on the fundamental issue of whether the Statute should reflect a *horizontal* or *vertical* approach to cooperation¹. The question of national law was left to be resolved at the Rome negotiations, as is evidenced by the bracketed references to national law, procedures under national law and national procedural law in the Draft Statute articles 87 and 90². It was one of the last issues to be resolved in this Part and it was the subject of lengthy debates within the working group and sub-groups which considered the relevant articles.

States in favour of a *horizontal* approach to cooperation were of the view that compliance with the obligations should be in accordance with and ultimately, subject to national law, giving the requested State control and the 'final say'. States which supported a *vertical* approach, held the view that the requests of the Court should be executed essentially as if the Court was the extension of national authority. Control of the process would rest with the Court. This fundamental dissent underpinned the debate on this issue. On a practical level, most States were prepared to acknowledge that procedures under national law would have to be resorted to in order to meet the obligations of the Statute. However, there was concern that an express reference to national law or procedures could at the same time allow States to provide less than full cooperation to the Court. This concern was not limited to States which might apply the provisions in bad faith but also to those States which might

¹ See Preliminary Remarks on Part 9, mn 5.

² UN Doc. A/CONF.183/2/Add.1 (1998), pp. 159 and 170.

legitimately interpret such a reference as allowing for limitations on the kind or extent of assistance on the basis of national law³.

- 3 The compromise achieved, in the very late stages of the process, was to state in articles 89 and 93 that the obligation to comply with requests would be carried out ‘in accordance with the provisions of this Part and under the procedures of national law’. This phrasing, which was carefully crafted, emphasizes that procedures are to be used to meet, not to defeat, the obligation to comply with requests. In addition, to avoid any misuse or misunderstanding of these references, the compromise mandated the inclusion of article 88. This provision, inspired by article 5 para. 3 of the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*⁴, is intended to ensure that States Parties have procedures under their national law for all the forms of cooperation specified in Part 9. It makes it clear that a State Party cannot use the absence of procedures under national law to refuse a request. Through this combined conclusion, a balance was achieved which recognizes the use of national procedures to effect cooperation but clarifies that the obligation to cooperate is the same for all States Parties and that it cannot be qualified through domestic law.

B. Analysis and interpretation of elements

1. Ensurance that there are procedures available under national law

- 4 This phrase requires States Parties to review their national law and procedures and where necessary, introduce through legislation, treaty implementation or administrative practice, procedures in their domestic regimes to meet the cooperation obligations. Thus while a State can resort to domestic court orders or process to arrest a person for surrender to the Court in response to a request under article 89 or to execute a search in response to a request under article 93, they must have the capacity under their domestic law for the arrest or search. By virtue of this provision, a State Party could not for example refuse to execute a request from the Court on the basis that search and seizure is not recognized or permitted under domestic law or that there is no procedure in place for arrest of a person sought by the Court⁵. The Court has confirmed this view in the following terms:

‘Any purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court, or to undermine any application for non-compliance under Article 87(7) of the Statute that may result.’

This finding is consistent with the intent and structure of Part 9 and in particular article 88 which mandates that States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified in Part 9.⁶

2. All forms of cooperation specified under this Part

- 5 The obligation under article 88 is applicable to all the forms and measures of cooperation specified in Part 9 both with respect to surrender of persons and to the other forms of assistance. The word ‘specified’ was deliberately chosen to include all of the measures detailed in the Part, excluding those which are not particularized, such as the additional assistance provided for in article 93 para. 1 (l).

³ See the analyses by Paust (1998) *YbHumL* 205, and Sluiter (1998) *LeidenJIL*383, of a case of failure to cooperate with the ICTR. Here the failure was clearly not due to an interpretation in bad faith of the pertinent provision of the Tribunal’s Statute but to obstacles on the national level.

⁴ UN Doc. E/CONF.82/15.

⁵ See however article 93 para. 3 which permits a State to raise concerns about a request where in the particular circumstances of the case the action may be prohibited on the basis of a fundamental legal principle.

⁶ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-908, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, para. 47 <<https://www.legal-tools.org/doc/c2209e/>>.

C. Subsequent practice

In the meanwhile a good number of States Parties have adopted legislation implementing Part 9⁷ and, by and large, this legislation is in conformity with the text and spirit of the provisions in Part 9⁸. The one exception of Australia confirms this (positive) rule: the latter State Party's claim to retain 'absolute discretion' in dealing with ICC requests⁹ is fundamentally at odds with the premise that an ICC request under Part 9 is directed at States Parties as a matter of legal right, and therefore cannot be rejected by national authorities either in an unfettered exercise of sovereign discretion or following their own legal reassessment.

The overwhelming majority of States Parties¹⁰ have decided to adopt legislation which in substance clearly distinct from existing laws on inter-State mutual legal assistance in criminal matters. This widespread preference for distinct ICC implementing legislation must be commended since it will, firstly, help national authorities to apply the provisions of such laws in a Court-friendly spirit and because it will, secondly, be easier to improve or adjust such laws in light of ICC case law or any new insights that might arise.

What is less clear at this stage is whether the procedures that states are employing to respond to requests have been simplified to the extent desirable. Some states have chosen to streamline the procedure by eliminating the 'dual' nature of the traditional cooperation procedure i. e. executive and judicial (France, Georgia, Spain, Switzerland).¹¹ This is a good way to ensure a direct process for addressing requests from the ICC. States that choose to stick to a two step procedure should reduce the executive stage to one of coordination so that only one decision remains to be taken. That decision should be judicial in nature and must not include traditional elements of (foreign policy guided) discretion.

⁷ In many cases, however, implementing legislation remains to be enacted.

⁸ See Broomhall and Krefß, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders* (2005) 515.

⁹ Sections 22 and 181 of the ICC Cooperation Act; Brady, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders* (2005) 13, 14.

¹⁰ Canada is the exception; see Prost and Robinson, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders, Vol. II: Constitutional Issues, Cooperation and Enforcement* (2005) 57, 58.

¹¹ Broomhall and Krefß, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders* (2005) 515, 542.

Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.
2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.
3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.
(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:
 - (i) A description of the person being transported;
 - (ii) A brief statement of the facts of the case and their legal characterization; and
 - (i) The warrant for arrest and surrender;
(c) A person being transported shall be detained in custody during the period of transit;
(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;
(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected; provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.
4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Directly relevant Rules of Procedure and Evidence: Rules 181 to 185.

Literature: See Preliminary Remarks on Part 9; Bassiouni, M.C., 'Reflections on International Extradition', in: K. Schmoller (ed.), *Festschrift für Otto Triffterer* (1996) 715; Kushen, R. and Harris, K.J., 'Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda', (1996) 90 *AJIL* 510; Sluiter, G., 'The Surrender of War Criminals to the International Criminal Court', (2003) 25 *LoyLAI&CLRev* 605; *id.*, 'To cooperate or not to cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal', (1998) 11 *LeidenJIL* 383; Tanaka, T., 'Implementation of International Criminal Law – Reconsideration from the Perspective of Japanese Law', (1995) 38 *JapaneseAnnIL* 65; Young, S.N.M., 'Surrendering the Accused to the International Criminal Court', (2000) 71 *BYbIL* 317.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1.....	4
1. Transmission of requests for the arrest.....	4
2. Compliance with requests for arrest and surrender.....	5
3. Accordance with procedure under national law.....	24
4. Surrender arrangements.....	25
5. Post surrender release other than under article 107 and the question of 're-surrender'.....	26
II. Paragraph 2.....	31
1. Immediate consultation with the Court on admissibility.....	31
2. Proceeding with the execution.....	32
3. Postponement of execution.....	35
III. Paragraph 3.....	38
1. Transportation through the territory of another State.....	38
2. Transmission in accordance with article 87.....	42
3. Custody during transit.....	44
4. No authorization for transit.....	45
5. Unscheduled landing on the territory of the transit State.....	46
IV. Paragraph 4.....	52
1. Person being proceeded against or serving a sentence in the requested State.....	52
2. Crimes different from those for which surrender is sought.....	58
3. Consultation with the Court after a decision to grant the request.....	59

A. Introduction/General remarks

Article 89 deals with the surrender of persons to the Court and is certainly one of the key provisions of the Statute. Paragraph 1 contains the pivotal obligation for States Parties to comply with requests by the Court for arrest and surrender of persons. The crucial question in the course of the negotiations was whether this obligation should be qualified by grounds for refusals. In the end no such ground has been retained *stricto sensu*. This makes the obligation to surrender a rigid one. Still, some of the State concerns behind grounds for refusals are met in different ways throughout Part 9 so that article 89 para. 1 has to be read in conjunction with a number of other provisions.

Article 89 paras. 2 and 4 offer examples for alternative techniques of dealing with state interests which may conflict with the duty to surrender a person to the Court. Paragraph 2, a provision which is intimately linked with Part 2 of the Statute, allows the requested State to postpone the execution of a request for surrender in case an admissibility ruling is pending. Paragraph 4 offers the requested State the possibility to enter into consultations with the Court in case of parallel national proceedings for a crime different from that for which surrender to the Court is sought.

Paragraph 3 is not directly related to the obligation of a State to surrender a Person to the Court but deals with a practical question regarding the execution of a request for surrender. More specifically, it covers the situation where the surrender entails the need for transportation of the person sought through another State.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Transmission of requests for the arrest

The first sentence of paragraph 1 must be read in conjunction with article 58 which lays down the requirements for the issuance of a warrant of arrest by the Trial Chamber. As is the

case in article 58 para. 5 the use of the word ‘may’ can be seen as the indication that the Court retains a measure of discretion in whether or not to transmit a request for the arrest and surrender. On the other hand, the sentence continues in saying that the Court ‘shall request’ the cooperation of the State concerned. As a general rule, the Court will transmit a request to any State on the territory of which the person sought may be found once the Trial Chamber has issued a warrant of arrest under article 58¹. Concerning the material supporting the request article 89 para. 1 refers to article 91 as the pertinent provision of the Statute. Finally, the term ‘State’ is used here to recognize that the Court has the power to transmit requests to all States – States Parties and non-States Parties. This is in contrast to the next sentence, which imposes obligations on States and is therefore limited in application to States Parties.

Pursuant to the first sentence of Rule 176, sub-rule 2, the Registrar is the competent organ of the Court to transmit a request for the arrest and surrender, the relevant Pre-Trial Chamber being the competent organ to make the request². While the latter competence is specified neither in article 89 para. 1 nor in article 58 para. 5, it follows from a systematic interpretation of the pertinent provisions. In particular, the Pre-Trial Chamber is the only competent organ to issue and amend a warrant of arrest³ and to deal with the national authorities of the requested State concerning any incident which might affect the surrender of the person to the Court once arrested. The Pre-Trial Chamber is also the only organ of the Court in a position to thoroughly follow up on the execution of cooperation requests for both arrest and surrender of the relevant person.⁴ Furthermore, rule 184 recognizes the Registrar’s competence to deal with the requested State regarding the arrangements of surrender.

2. Compliance with requests for arrest and surrender

- 5 The second sentence of paragraph 1 contains one of the most important obligations for States Parties. At this juncture there was sharp opposition between advocates for the horizontal and vertical approach⁵ about the question of grounds for refusal. Consequently, the negotiations on the precise scope of the obligation to surrender were lengthy and complicated. When the Preparatory Committee concluded its work it had already become clear, though, that some of the traditional inter-state grounds for refusal could not even be conceived of being retained in the Statute. The most obvious example in this respect was probably the political offence exception⁶.

Yet, article 87 para. 3 *Option 2* of the Draft Statute⁷ still contained quite a long list of grounds for refusal. In short, the candidates are as follows: ‘Non acceptance of the Court’s

¹ In *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07-1, Decision on the Prosecution Application Under article 58(7) of the Statute, 27 Apr. 2007, pp. 56 *et seq.*, the Registrar is instructed to transmit the request for arrest and surrender to ‘all States Parties to the Statute’ and to ‘all United Nations Security Council members that are not States Parties to the Parties’; it is neither explained in this decision nor apparent how this broad circulation can be reconciled with the limitation regarding the possible addressees of a request contained in article 89 para. 1.

² Situation in the Democratic Republic of the Congo in the Case of the *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 Feb. 2006, para. 117; the first sentence of rule 176, sub-rule 2, does not suggest that the Pre-Trial Chamber has any discretion to delegate its competence to make the request for arrest and surrender and the ensuing transmission competence of the Registrar to the Prosecutor; yet, Pre-Trial Chamber II held that the delegation to the Prosecutor of the competence to transmit the request is possible in case of ‘specific and compelling circumstances’ (*Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05-1-20, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 Aug. 2005, p. 6). The Chamber did not give reasons for its position, nor did it indicate what could be ‘specific and compelling circumstances’; in para. 119 of its above cited decision, PTC I left open whether it would endorse the exception in question.

³ See article 58 paras. 1 and 6.

⁴ See article 59 para. 6 and rule 117, sub-rules 2 to 5.

⁵ See Preliminary Remarks on Part 9, mn 5.

⁶ Cf. article 3 (a) of the UN Model Treaty on Extradition, UN Doc. A/CONF.144/28/Rev.1, p. 67.

⁷ UN Doc. A/CONF.183/2/Add.1, pp. 159 *et seq.*

jurisdiction by the requested State', 'the person sought is a national of the requested State', 'parallel national proceedings', 'the request does not meet the evidentiary requirements of the requested State', 'conflicting international obligations'. All these candidates were the object of intensive discussion. In every case it was asked whether it was possible to dispose of the respective ground for refusal without any substitute or whether there was a need to meet the State concern behind the respective ground for refusal in some other form.

The solutions finally arrived at vary from one case to the other. It follows that the precise scope of the obligation to surrender can only be ascertained by reading article 89 para. 1 together with article 89 para. 2 and para. 4, article 90, article 91 para. 2 (c) in conjunction with paragraph 4 and article 98. This interrelation is alluded to by the words 'in accordance with the provisions of this Part'.

Article 89 paras. 2 and 4 deal with the problem of parallel proceedings at the national level. Whereas the former paragraph brings the obligation to surrender in line with the principle of *ne bis in idem* as contained in article 20 of the Statute the latter paragraph covers the case of national proceedings for a crime different from that for which surrender to the Court is sought⁸.

Articles 90 and 98 contain the different hypotheses of (real or apparent) conflicting obligations for the requested State⁹.

Article 91 para. 2 (c) in conjunction with paragraph 4 relates to national evidentiary requirements for surrender¹⁰.

None of the cases mentioned gives a ground for refusal *stricto sensu*. Instead, the respective rules, varying in form and degree, provide for means to take State concerns into account without putting the obligation to surrender as such in question.

By contrast to the hypotheses referred to in mn 7 to 9, no means at all was found to be compatible with the principle of effective cooperation that could have accommodated the State concerns behind a ground for refusal to surrender a national. Thus the fact that the person sought is a national of the requested State does not afford that State a ground for refusal; nor does Part 9 provide for any substitute for such ground¹¹.

Finally, the original supporters of the Draft Statute's option of a ground for refusal in case of non acceptance of the Court's jurisdiction did not insist on its inclusion in Part 9 once the decision for a regime of automatic jurisdiction was taken in Part 2 of the Statute¹². In a somewhat less obvious form the problem subsists as article 124 introduces a qualified form of a seven year limited opt-out regime into the Statute. To the extent that this regime applies in a given case, inevitably, no obligation to cooperate exists. It appears, though, this is not so much a question of a ground for refusal to cooperate but rather a consequence from the general limitation of the Court's competence to request the cooperation of States Parties as alluded to in article 86¹³.

The fairly rigid obligation of States Parties to surrender under article 89 para. 1 resulting from the foregoing considerations may be seen as a focal point in a long historical evolution towards what has been called 'a duty to extradite for international crimes' in the state to state context¹⁴. In response to an order by the Pre-Trial Chamber, the Registry in the case of Omar Al Bashir prepared and transmitted a request for his arrest and surrender to all States Parties¹⁵. The Pre-

⁸ For a more detailed account see mn 15 *et seq.* and 33 *et seq.*

⁹ *Cf.* commentary *infra*.

¹⁰ *Cf.* commentary *infra*.

¹¹ For a more detailed account of the negotiations on this difficult question, see Kreß/Prost, *article 102*; for a misunderstanding of the legal situation, see Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (2002) 216–217.

¹² See Zimmermann, *article 5*, mn 1 and Williams and Schabas, *article 12*, mn 1.

¹³ See Kreß/Prost, *article 86*, mn 11.

¹⁴ Bassiouni, in: Schmoller (ed.), *Festschrift für Otto Triffterer* (1996) 728 *et seq.* It is not possible to qualify this duty with respect to certain types of the Statute's core crimes (*cf.* for such an argument in the context of the ICTY T. Tanaka (1995) 38 *JapaneseAnnIL* 80 *et seq.*

¹⁵ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Request to all State Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, Registrar, 6 March 2009.

Trial Chambers have established this practice in the cases relating to Sudan and Libya, apparently as a result of the expectations arising from the Security Council reference and the possible travel of Al-Bashir as a Head of State or other government officials who are the subject of warrants. It appears that for other persons subject to arrest warrants, more targeted requests for arrest and surrender have been transmitted.

- 14 The Court has indicated that generally the States which reply to such requests advise that they have taken the necessary measures to arrest the person subject to an ICC arrest warrant, **in the event** that s/he enters their territory. Some States do not reply but the assumption is made that they too will take such appropriate measures.
- 15 While of limited application, this practice of Pre-Trial Chambers ordering – and the Registry transmitting – requests for arrest and surrender routinely to all States Parties to the Rome Statute, without regard to whether there is a basis to believe that the individual sought is, or will be found, on the territory of that State, is concerning.
- 16 Specifically it is a process which is contrary to the clear intent of article 89 and it is prejudicial to the cooperation structure for arrest and surrender and under Part 9 generally. The first two sentences of paragraph 1 of this Article are interrelated with the aim being that the transmission of a request for arrest and surrender would trigger the obligation on the State Party to comply with the request by locating, arresting and surrendering the individual sought.
- 17 As discussed, one of the most significant achievements in Part 9 was the elimination of all grounds of refusal for a request by the Court for arrest and surrender. The consequential expectation was that the transmission of the request would result in arrest and surrender, unless technical problems were encountered – such as those set out in article 97 – necessitating consultations with the Court. Evidently, however, the aim was not to trigger the obligation and generate consultations with 122 States, which were unable to execute the request because the person sought was not located in, or en route to, that State.
- 18 While some State Parties do respond to these requests, others do not and that is a practice which clearly undermines the strength of the cooperation obligation. It also allows a State which actually has custody of the individual to argue that transmission of the request alone does not trigger any obligations.
- 19 Paralleling State to State extradition practice, the scheme as envisaged was intended to place a real and urgent obligation on the State Party receiving a request to take action to find arrest and surrender the individual sought by the Court. The assumption was that the request would not be transmitted to trigger that requirement unless there was reason to believe the individual sought was present or would soon arrive in that State. Obviously, in cases where the whereabouts of the person sought is unknown, it would be reasonable for the Court to transmit the request to more than one State. However, even in these circumstances, only where there is a realistic prospect that the individual will be found in that State should the obligation be engaged.
- 20 Admittedly, this practice has been of practical value with respect to the situations of non-cooperation which have arisen. For example, in the Decision on the Non-Cooperation of the DRC, the PTC was able to point to the transmission of the requests for arrest and surrender for Al-Bashir years earlier to rebut the argument that there was insufficient time for the DRC to react to his presence in that State¹⁶.
- 21 However, if the aim of the transmission of the request is to put State Parties on notice, there are a number of methods which could be used to accomplish that goal without endangering the scheme under Part 9. The Registry could devise a system for ‘notifications’ of an arrest warrant to be sent to all relevant States. Arrangements could also be made to use the Interpol notice system.
- 22 Further, the entire purpose of the scheme for provisional arrest set out in Article 92 is to address urgent cases where the arrest needs to be carried out on short notice. Even if a State

¹⁶ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, PTC II, 9 April 2014, para 14.

is not put on notice at the time of the issuance of the warrant, an immediate request for a provisional arrest can be made when information comes to light indicating that the individual might be present in that State. All of these approaches would allow for States to be put on notice or be required to take urgent action without the necessity of global transmission of the request for arrest and surrender contrary to the intent of Part 9.

Arguments against this policy were advanced – for similar reasons – by the Prosecution in the case of the arrest warrants for Muammar Gaddafi, Saif Gaddafi, and Abdullah Al-Senussi without success¹⁷. However, in a welcome development, in the case of Warrant of arrest for Abdallah Banda Abakaer Nourain¹⁸ TC IV took a more limited approach in a case related to the situation in Darfur instructing that the warrant be sent to Sudan and any other State which may be appropriate (States where there is a basis to believe the individual might be found) as opposed to all States Parties. The Chamber also specifically directed the the Registry, in coordination with the prosecution, to prepare a request for transit and for provisional arrest which could be transmitted to any relevant state. This approach reflects the content and intent of Article 89 and Part 9 more generally. 23

3. Accordance with procedure under national law

This part of sentence 2 forms part of a compromise package and must be read in close conjunction with article 88. From the wording itself and from the systematic interplay with article 88 the three following points can be deduced. First, this part of the second sentence of paragraph 1 concerns exclusively procedure and not substantive law. Second, national procedures will have to be resorted to in order to execute a request for surrender. This is in no way prejudicial per se to effective cooperation and was, therefore, not questioned even by the adherents of a strict vertical approach to cooperation¹⁹. Third, national procedures must be used to meet, not defeat, the obligation to comply with a request to surrender. This is the necessary result of a combined interpretation of the reference to procedure under national law in point and article 88. 24

4. Surrender arrangements

While article 89 creates the essential obligation for States to comply with requests for arrest and surrender it does not address any of the details concerning the surrender itself and in particular the arrangements for it. This is picked up in rule 184 which sets out the relevant details of the surrender process²⁰. The procedure begins with an immediate notification to the Registrar by the State when the person is ready to be removed. The timing and manner of surrender will be worked out and will proceed as agreed. If for some reason surrender does not take place by the agreed date, new arrangements will be made and proceeded with. There will be ongoing communication by the Registrar throughout the surrender process. 25

5. Post surrender release other than under article 107 and the question of ‘re-surrender’

Rule 185 resulted from one of the most difficult and complex discussions in the negotiation of the Rules of Procedure and Evidence²¹. The challenge with it arose from the fact that 26

¹⁷ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11, Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi and Abdullah Al-Senussi, Prosecutor, 16 May 2011, paras 65–67.

¹⁸ *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, Warrant of arrest for Abdallah Banda Abakaer Nourain, PTC I, 11 September 2014, paras 26 (iv) and (v).

¹⁹ Cf. Preliminary Remarks on Part 9, mn 5.

²⁰ For further details on the negotiations, see Harhoff and Mochochoko in: Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (2001) 651 *et seq.*

²¹ For further details on the negotiations, see note 16, Harhoff and Mochochoko, *International Cooperation and Judicial Assistance* 652 *et seq.*; Gartner, in: Fischer *et al.*, *International and National Prosecution of Crimes under International Law* (2001) 425 *et seq.*

it was designed to overcome some omissions in the Statute itself and its link to article 17 one of the most sensitive provisions of the Rome Statute. The Rome Statute deals with what will happen to a person once he or she has completed the service of a sentence in a state of enforcement under article 107. What is not addressed in the Statute, however, is what arrangements would be made if the person surrendered was released from custody as opposed to being convicted and serving a sentence. This could occur for a whole range of reasons from non confirmation under article 61 or acquittal to a negative ruling on jurisdiction or admissibility by the Court. In all but one circumstance there was general agreement that the principles for transfer arrangements adopted in article 107 should apply equally to a person released from custody, with some necessary modifications. Thus arrangements should be made, taking into account the views of the person, to transfer him or her to a state that is obliged to receive him or her or has agreed to do so or the person could be extradited. However because in this case the person is in the custody of the Court, as opposed to a State of enforcement, prior to his or her release, there was much debate as to who should be responsible to make the arrangements and decision on the transfer of the person. There were a number of difficult technical questions that had to be considered arising from the fact that no explicit provision had been made in the Statute to empower the Court to deal with this scenario. In particular there were serious questions as to what powers the Court would have to continue to hold the person in custody and remove him or her given that they would be *functus* after issuing the ruling leading to the release of the person. Thus some state powers would need to be employed to deal with the situation on a practical level. This left the host state in a very uncomfortable situation. In the end compromise language was inserted into sub rule 1 making the Court responsible for the decision and arrangements but obligating the host State to ‘facilitate’ the transfer in such cases in accordance with the host State agreement. In this way technical problems with custody and removal could be worked out on a case by case basis between the Court and the host State.

- 27 There is a further variation in sub-rule 1 of rule 185 from article 107. While both the Article and the Sub-rule recognize that a person released from custody may be extradited, the Article does not require any consultation with or consent from the state that originally surrendered the person for the extradition to take place. For some states, especially those which do not extradite nationals, this perceived omission in the Statute presented a serious problem. It meant that their nationals surrendered to the Court could end up ultimately being extradited to another state and there would be no way that they could prevent this from occurring. While it was not possible obviously to amend the provisions of article 107 through the rules of procedure and evidence, concerned delegations were determined to at least reduce the impact of the perceived omission in the Statute as much as possible. As a result, procedures were established under rules 213, 214, and 215 to ensure that the original surrendering state would be consulted and those views would be taken into consideration when a decision on prosecution or extradition was to be made. In addition, in the situation where the person is not convicted, sub-rule 1 of rule 185 provides that extradition will be subject to the consent of the original surrendering state.
- 28 There remained one controversial point that fell to be addressed in a separate sub rule which was the case where the person was released from the Court’s custody because of a ruling on admissibility premised on article 17 para. 1(a). In that case the Court would have ruled the case inadmissible because of a determination that a State with jurisdiction was investigating or prosecuting the matter. In such a situation for many states it was not acceptable to apply the general rules on transfer agreed in sub-rule 1. The person is being released from the custody not because of a lack of evidence or because of legal barriers to prosecution such as *ne bis in idem* but rather because he or she is the subject of an investigation or prosecution in a state and the principle of complementarity applies. As a result, some delegations argued that in such scenarios the person should be transferred to the state with the relevant investigation or prosecution. But again other delegations, particularly those for which the extradition of nationals is prohibited were not prepared to agree to any mandatory transfer another State

where the person would face possible prosecution. For them it was not acceptable to surrender a person including a national to the Court only to have him or her transferred to another state for prosecution as a result of an admissibility ruling. Such a procedure would circumvent the relevant protections for that person in the original state. This concern was met by conditioning the ‘re-surrender’ to the State successfully challenging the admissibility under article 17 para. 1 (a) by the proviso ‘unless the State that originally surrendered the person requests his or her return’. This, however, raises the question as to what will happen if the originally surrendering State does not take it upon it to itself institute criminal proceedings against the surrendered person. This hypothesis is by no means a theoretical one because it was only the absence of criminal proceedings in the latter State that allowed for the surrender of the person concerned in the first place. It would seem clear in light of the overarching goal of the Statute to reduce impunity that the release of the returned person by the originally surrendering State is no acceptable solution to the resulting dilemma. Though, on the basis of the applicable legal texts the preferable alternative is not easy to identify.

In light of the unqualified wording of rule 185, sub-rule 2, it is difficult to argue that the originally surrendering State may only prevent the re-surrender if it is willing and able to itself genuinely investigate into the case upon the person’s return. A much better case can be made for the procedural right of the Prosecutor to submit a request for a review of the prior decision on admissibility under article 19 para. 10 of the Statute either after the return of the person or, preferably, before such return if the originally surrendering State advises the Court of its unwillingness or inability to genuinely investigate or prosecute. It is true that a proposal to the effect to explicitly allow for such a review to be carried out before the return of the surrendered person²² was not accepted. This fact, however, can not forestall a sensible interpretation to the same effect if the applicable texts support that result. A strong argument that they do can be derived from rule 186 which deals with a similar scenario that may arise in a case of competing requests for surrender and extradition. In essence this rule recognizes that if precedence is accorded to the extradition request but such extradition ultimately fails, it would be open to the Prosecutor to make an application under paragraph 10 of article 19 for a review of the admissibility ruling taking into account this new information. The same logic would have to apply in the case covered by sub-rule 2 of rule 185.

While the review procedure under article 19 para. 10 can help avoiding the unacceptable result of a release of the person concerned by the originally surrendering State, it remains an extremely cumbersome solution. This leads to the question whether the dilemma underlying rule 185, sub-rule 2, is to arise by necessity where the originally surrendering State refuses a re-surrender. In fact, it does not so arise. Instead, the position of the originally surrendering State on the issue of re-surrender must be duly considered not only after the Court’s ruling on admissibility but before because, where this State objects to a possible ‘re-surrender’ to the State challenging the admissibility of the proceedings, this latter State is in fact precluded and thus unable to conduct criminal proceedings against the person concerned. For this reason this State’s admissibility challenge under article 17 para. 1 (a) must be rejected. Regulation 112 recognizes this legal situation and rightly instructs the Chamber to hear on the position of the originally surrendering State on a possible ‘re-surrender’ before making a decision on the challenge to admissibility.

II. Paragraph 2

1. Immediate consultation with the Court on admissibility

Paragraph 2 deals with the situation of a *ne is in idem* challenge by the person sought for surrender before a national court. This is not intended to recognize national court jurisdiction over the issue. It was accepted that it is *for the Court* to decide the issue of admissibility

²² UN. Doc. PCNICC/2000/WGRPE(9)/DP.5 (Germany).

and that the national laws on *ne is in idem* must be brought in line with the requirements under Parts 2 and 9. Furthermore, the person sought for surrender has a right to challenge the admissibility *before the Court* under article 19 para. 2 (a) as soon as a warrant of arrest has been issued. However, what the first sentence recognizes is that, regardless of the Court's jurisdiction, individuals might well bring applications of this nature in a national court and their ability to do so could not be excluded in many States. Where such a challenge is brought, it is critical that there be consultations between the Court and the authorities in the State to determine if there has been an admissibility ruling already. This opening phrase reflects that requirement. Sensibly, regulation 111 adds on this the obligation of the Registrar to enclose a copy on any relevant admissibility ruling of the Court already when transmitting a request for the arrest and surrender of a person in accordance with article 89 para. 1.

2. Proceeding with the execution

- 32 According to the pertinent rules in Part 2 of the Statute it is for the Court to decide the admissibility of the case. Therefore²³, the words 'if the case is admissible' in this paragraph must be understood to mean 'if the Court has ruled the case admissible'. This aspect of competence is clearly alluded to in the sentence which deals with the situation where an admissibility ruling is pending. The ways in which the Court may arrive at an affirmative ruling on the admissibility of the case are listed in article 19. In such case, the requested State shall proceed with the execution of the request.
- 33 One may wonder what is the situation under article 89 para. 2 if such an affirmative ruling is appealed pursuant to article 19 para. 6 in conjunction with article 82 para. 1 (a). Two interpretations are conceivable. One possibility would be to apply the third sentence of article 89 para. 2 to the effect that the requested State can postpone the execution of the request. The second view would be that this second sentence of article 89 para. 2 is applicable so that the requested State must proceed with the execution of the request irrespective of the appeal. The second view seems preferable.²⁴ The reason for this is that the effect of the affirmative decision on the admissibility is not suspended by the mere fact of the introduction of an appeal. Only if the Court orders under article 82 para. 3 that the appeal shall have suspensive effect should the requested State be in a position to postpone the execution of the request according to the third sentence of article 89 para. 2.
- 34 Article 89 para. 2 does not explicitly cover the situation where the Court decides a case inadmissible. In such a case there can be no obligation for the State Party to execute the request; also one would expect that the Court would usually withdraw its request in such instance. For the only exception see mn 23.

3. Postponement of execution

- 35 The third sentence of paragraph 2 explicitly deals with the hypothesis that the issue of admissibility is not yet clarified by a ruling of the Court. Here, the requested State is entitled to postpone the execution of the request until the Court makes its decision²⁵. It has been argued above²⁶ that this sentence should not normally apply to a situation in which an affirmative determination of the Court is appealed against.
- 36 This sentence should be applied, though, in case of an appeal to a *negative* Court decision on admissibility, if the Court does not withdraw its request. It is submitted, that after a negative ruling on admissibility under article 19, the Court will uphold its request only in

²³ On the need to assure coherency between Part 2 and Part 9 of the Statute see Preliminary Remarks on Part 9, mn 2.

²⁴ For the same view, see Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003) 136.

²⁵ Where, in addition to a national *ne bis in idem* challenge, there is an admissibility challenge under articles 19, 89 para. 2 and 95 apply concurrently to the same effect.

²⁶ Mn 20.

exceptional circumstances. *Mutatis mutandis*, it will have regard, *in particular*, to the criteria contained in article 81 para. 3 (c) (i).

Sub-rule 1 of rule 181 expands slightly on paragraph 2 of article 89 in those cases where an admissibility ruling is pending. It provides that in such cases the Chamber dealing with the case must take steps to obtain all the relevant information about the *ne bis in idem* challenge from the State so that the Chamber can take this into account when ruling on the admissibility question.

III. Paragraph 3

1. Transportation through the territory of another State

Article 89 para. 3 addresses the practical problem of the transit through a third State of a person being surrendered to Court. The issue, which arises often in state to state extradition, is how to obtain authority to bring a person into a third State and maintain custody over them within the jurisdiction of that State, which is uninvolved in the surrender. As there could be many instances where transport to the Court could not be accomplished without stops in other States, a provision on transit was included to avoid any difficult practical problems with the physical surrender.

The provision is framed in mandatory terms, requiring each State Party to authorize the transit. The reference to transportation is general and covers all modes. As indicated above²⁷, reference is at the same time made to national procedural laws indicating States Parties will use their domestic law to authorize the transit. This, too, is subject to the general obligation of article 88, such that States are under an obligation to have such capacity in their domestic law.

The exception, where transit ‘would impede or delay the surrender’ was included in response to concerns raised by some States, that transit through their territory could be particularly problematic. For these States, because of constitutionally protected aspects of domestic immigration law or other fundamental legal concepts, such as principles on *habeas corpus*, even if transit is authorized, the ability of the person to pursue remedies before domestic courts could result in significant delay in the process or perhaps even the release of the person during transit.

In recognition of this problem, the proviso was included to allow a State to advise the Court not to transit through that State because of the potential for delay or other problems during transit. This was felt to be a reasonable compromise because transit may be refused but only where it is beneficial to the Court *and its process for transit not to be effected through that State*.

2. Transmission in accordance with article 87

Subparagraph (b) outlines the basic procedures for transit requests. By reference to article 87, the channels of communication, language and the confidentiality provisions for other requests apply to requests for transit²⁸. As well, by reference to all of article 87, including paragraph 5, the Court could seek permission from a non-State Party albeit on a non-obligatory basis in the absence of an alternative agreement or arrangement.

Subparagraphs (i)-(iii) describe the content of any request for transit. For the request to be effective on a practical level, certain critical information is needed such as particulars of the person, the case and the documents which authorize the detention of the individual. Those are listed here.

3. Custody during transit

This is a critical component of any transit provision. The nature of the surrender process is such that the person must be physically delivered to the Court. To accomplish this with

²⁷ See Kreß and Prost, *article 88*.

²⁸ For the details see Kreß and Prost, *article 87*.

certainly it is necessary that the person be held in custody from departure to arrival and this includes, during any period of transit through a third State. States Parties will have to ensure that their law permits such detention²⁹.

4. No authorization for transit

45 This subparagraph, standard to many bilateral extradition treaties and found in article 15 para. 1 of the UN Model Treaty on Extradition³⁰, is very useful on a practical level. The transportation of a person to the Court could be very difficult, if not impossible, if permission for transit had to be sought from all of the States, through which air space the plane transited. This provision makes it clear that consent to transit is not required unless the plane is scheduled to land in the territory of a State.

5. Unscheduled landing on the territory of the transit State

46 This subparagraph parallels subparagraph (d) by addressing the circumstance of an unscheduled landing on the territory of a State during transit. In such circumstances, because of subparagraph (c), the person will be physically present on the territory of the third State but no consent would have been sought from that State.

47 The phrase ‘that State may require a request for transit from the Court as provided for in subparagraph (b)’ allows that a request for transit *may* be necessary in such circumstances. For practical reasons, the requirement for a request is discretionary, as some States may be in a position to allow the transit without a formal request. This makes the transit as simple as possible in the case of an unscheduled landing.

48 The critical practical problem in such circumstances is addressed in the sentence: ‘The transit State shall detain the person being transported until the request is received and the transit effected.’; the person must be kept in custody pending approval of and actual transit. This provision, which is mandatory, obligates the transit State to have the ability to maintain the person in custody. While reference is made here to States, as opposed to States Parties, the obligation can – as in the case of article 89 para. 1³¹ – only relate to the latter category.

49 While accepting the importance of maintaining custody over the persons during an unscheduled stop, many States were concerned about domestic limitations on detention. For that reason, a proviso was included to place a limit on the time that the State would be obliged to hold the person in custody without a request. The 96 hour period was agreed upon as a reasonable period, taking into account the logistical problems which could arise because of the unexpected nature of the occurrence. At the same time it was viewed as not an overly lengthy period to keep the person in custody; one which could be implemented domestically.

50 Sub-rule 1 of rule 182 adds some procedural detail to the transit process in these urgent situations by specifying that the request may be transmitted by any means capable of delivering a written record recognizing the need to rely on speedy electronic communication.

51 Sub-rule 2 of rule 182 makes it clear that if a person has been released because the 96 hour time limit has expired it will be without prejudice to any subsequent arrest of the person by virtue of a request for arrest and surrender under article 89 or a provisional arrest request under article 92.

²⁹ The inability of a State to guarantee custody during transit because of constitutional or other fundamental legal provisions, is an example of the type of problem which might cause the State to advise the Court under subparagraph (a) (mn 27 *et seq.*) that transit would not be advisable.

³⁰ See note 4, p. 73.

³¹ See mn 4.

IV. Paragraph 4

1. Person being proceeded against or serving a sentence in the requested State

Paragraph 4 was the subject of considerable debate during the Preparatory Committee and in Rome. Once again the division on the fundamental principle of State as opposed to Court control underlay the debate on this particular issue. The question was what would occur in circumstances where there were domestic proceedings³² against the persons sought by the Court. Those States which favored State control advocated for a purely discretionary provision, where surrender could be postponed indefinitely pending completion of the domestic process, either prosecution or service of a sentence. Those of that view were particularly concerned that the orders of domestic courts could not be overridden in favour of a request from the Court. For other States this position was unacceptable, particularly when it related to both service of a sentence, as well as completion of a prosecution. This would have permitted a State to indefinitely postpone surrender, for example, for persons serving a life sentence.

In article 87 para. 8 of the Draft Statute³³ compromise had been achieved, almost, by including the possibility of temporary surrender to the Court (allowing the person to be temporarily surrendered for trial and returned to the State afterwards) as one option. If temporary surrender was not possible, then one of two compromises could form the alternative.

Limit the State's right to postpone to cases of prosecution but not service of a sentence or apply it to both but require the Court's consent.

As consensus could not be achieved on either form of compromise in New York, the matter was left to Rome for resolution. The debate continued. Many draft texts were proposed and debated but no agreement could be reached. Even the option of temporary surrender was redebated and ultimately rejected, as it was too novel a concept for many States. At the end, it was agreed to leave the precise result to be resolved between the State and the Court. The initial phrase makes the provision applicable to both the cases of a pending prosecution and the service of a sentence.

The application of article 89 para. 4 presupposes that the requested State acts genuinely within the meaning of article 17 and article 20 para. 3. While these provisions are not directly applicable to national proceedings for crimes different from those for which surrender is sought, the same logic must apply in the latter case. For there is not a legitimate interest of the requested State to be protected under article 89 para. 4 where this State invokes its national proceedings only to shield the person concerned from the international jurisdiction.

Article 89 para. 4 deals exhaustively with the issue at stake as far as requests for surrender are concerned; article 94 is confined to requests under article 93.

2. Crimes different from those for which surrender is sought

This phrase reflects that the problem arises only where the person is being prosecuted or serving a sentence for a crime different from that for which surrender to the Court is sought. Where the crimes are the same, the issue would be resolved by application of article 89 para. 2 in conjunction with articles 17 *et seq.*³⁴. The interplay between paras. 2 and 4 of article 89 makes it clear that the expression 'crimes different' does not pertain to

³² The term 'proceedings' should, despite some uncertainty in light of the French and Spanish version of article 89 para. 4, be construed broadly so as to include the investigative stage; this interpretation achieves harmony with article 94 para. 1 where specific reference is made to the investigation stage; for the same view, see Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003), 139 *et seq.*

³³ UN Doc. A/CONF.183/2/Add.1, p. 163.

³⁴ See mn 13–18.

the legal qualification, but to a different case as is spelled out in greater clarity in the corresponding provision in article 94 para. 1.

3. Consultation with the Court after a decision to grant the request

- 59 This phrase was included to make it clear that the circumstances of domestic process would not prevent or preclude surrender and that any discussions about resolving the conflict did not relate to whether the request would be granted. Admittedly the language used is somewhat ambiguous, as it suggests that in the case of surrender there is a decision to be made by the requested State to grant the request. As there are no grounds for refusal in the Statute with respect to surrender, this language is somewhat confusing. However it is attributable to the fact that while the issue was resolved in the late stages of the negotiation, the question of inclusion of grounds for refusal was not resolved until the very final stage. In addition, the reference to a decision on the request could be referable to the decisions made under article 90. While not constituting grounds for refusal, that article raises the possibility that the Court's request would not necessarily have priority in the case of competing request³⁵.
- 60 As no consensus could be achieved on what precisely would occur in these circumstances, the decision was to leave the issue, unlikely to be a frequent occurrence, to be resolved on a case by case basis by the Court and the relevant State. Both sides were relatively comfortable since this arrangement gives neither the Court nor the State an automatic priority and presumes reasonableness on both sides³⁶.
- 61 Interestingly the concept of temporary surrender finally received acknowledgement in the Rules of Procedure and Evidence albeit it is not obligatory for States to provide for it. Rule 183 recognizes it as a possible action to be taken after the consultations. The rule does not provide any detail on the procedure for the temporary surrender other than specifying that the person will be kept in custody during his or her time before the Court and will be returned to the requested state when no longer needed with the latest time being at the end of the proceedings. All other details are left to be worked about between the court and the state.
- 62 While article 89 para. 4 does not conclusively answers the question of priority in the absence of agreement between the Court and the requested State, some valuable guidance may be derived from other provisions in Part 9. In particular, the idea underlying article 90 para. 7 (b) suggests that 'special consideration' should be given to the relative nature and gravity of the conduct in question which will, as a general rule, point to the priority of the international proceedings³⁷. Furthermore, the second sentence of article 94 para. 1 marks the outer limit of the requested State's right to postpone. The ultimate decision as to whether or not the requested State remains within these and other boundaries of reasonableness lies with the Court³⁸.

³⁵ See Krefß and Prost, *article 90*.

³⁶ In this context see also Krefß and Prost, *article 86*, mn 10.

³⁷ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003), 141.

³⁸ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003), 141.

Article 90 Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

- (a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
- (b) The Court makes the determination described in subparagraph pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

- (a) The respective dates of the requests;
- (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
- (c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

- (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
- (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting state is refused, the requested State shall notify the Court of this decision.

Directly Relevant Rules of Procedure and Evidence: Rule 186.

Literature: See Preliminary Remarks on Part 9.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	5
I. Paragraph 1	5
1. States Parties receiving requests from the Court for surrender of a person under article 89 from any other State for the extradition of the same person for the same conduct	5
2. Notification of the Court and the requesting State.....	6
II. Paragraph 2	7
1. Chapeau: 'priority to the request from the Court'	7
2. The two subparagraphs.....	8
a) The Court's determination that the case is admissible	8
b) 'determination ... pursuant to the ... notification under paragraph 1'	10
III. Paragraph 3: Intermediate proceeding to deal with the request for extradition from the requesting State.....	11
IV. Paragraph 4: Priority to requests from the Court.....	15
V. Paragraph 5: Cases under paragraph 4 not determined to be admissible by the Court	19
VI. Paragraph 6	21
1. Chapeau	21
a) Cases under paragraph 4 except that the requested State is under an obligation to extradite to a requesting State not Party to this Statute... ..	21
b) Determination to surrender to the Court or extradite to the requesting State	22
c) The different subparagraphs.....	24
VII. Paragraph 7: Competing requests for different conduct	25
1. Priority to the request from the Court.....	26
2. Determination whether to surrender or to extradite	27
VIII. Paragraph 8: Notification of the Court in cases ruled to be inadmissible after subsequent refusal of extradition.....	29

A. Introduction/General remarks

1 While not the most controversial in substance, the negotiation of article 90 was the most complex in the cooperation section, because of the underlying issues addressed. Regardless of the position taken on some of the fundamental questions on cooperation, all States recognized the need to address the issue of competing requests for surrender, comprehensively and in a manner which properly respected the existing or subsequent international obligations of States.

However, there was substantial disagreement as to the proper approach in the case of a conflict between obligations to a State and obligations to the Court. Not surprisingly, one of the central points of dispute was whether the requested State's obligation to the Court was a greater, lesser or equal obligation to that owed to a State. A delegation's position on that fundamental point defined their approach to competing requests.

2 Much of the complexity of this issue resulted from all the variable factors such as whether the competing request was from another State Party or a non-State Party, whether the request was presented on the basis of treaty or other arrangement which imposed an obligation and whether the request was for the same alleged criminal conduct or not. Finally, this issue was directly related to complementarity. In particular, the appropriate action for

the requested State could also vary depending upon whether the Court had already ruled on the admissibility of the case or not.

The Draft Statute¹ attempted to address this difficult issue in various optional texts in article 87 para. 6. Unfortunately, while the alternatives did highlight the differing views to some extent, they did not address the issue either clearly or comprehensively. Further options put forward at the initial stages of the discussions in Rome only served to complicate the matter. In the result, little progress was made in the initial sub-group discussions of this issue. What became evident was the need to first identify all of the issues underlying the article and to negotiate agreement on the applicable principles with respect to those issues, before proceeding further with the negotiation of a text.

This approach proved to be the key to success on this very challenging question. Following a meeting of a small group of interested States brought together by the coordinator of the Working Group on International Cooperation², Singapore prepared a short paper identifying the alternative scenarios. Working from that, consensus was gradually achieved on the appropriate steps to be taken in each case of competing requests. Those scenarios and the consensus achieved were then incorporated into the paragraphs which form article 90.

In the first place, article 90 distinguishes between competing extradition requests for the same and for a different conduct compared to that which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

While paragraphs 2 to 6 deal with former, paragraph 7 deals with the latter hypothesis. Regarding a competition of requests for the same conduct, a sub-distinction is drawn as to whether the request for extradition is made by a State Party or by another State. While paragraphs 2 and 3 deal with the former, paragraphs 4 and 5 deal with the latter scenario.

B. Analysis and interpretation of elements

I. Paragraph 1

1. States Parties receiving requests from the Court for surrender of a person under article 89 from any other State for the extradition of the same person for the same conduct

This paragraph applies to all situations where a State Party receives a request from the Court and a request from any State, for the same person, in relation to the same criminal conduct. The paragraph applies to all such competing requests, irrespective of whether the competing request emanates from a State Party or a non-State Party.

2. Notification of the Court and the requesting State

The obligation imposed is one of notification to both interested Parties. Some States had concerns about placing an obligation on the State Party to notify the Court, being of the view that it is the Court's responsibility to determine if there are conflicting investigations. However, in the end it was agreed that this practical step should be taken in each case, for the benefit of the requested State Party facing conflicting obligations and also to avoid ongoing duplicative process. The provision was drafted keeping in mind the notification provisions of article 18³.

¹ UN Doc. A/CONF.183/2/Add.1.

² Phakiso Mochochoko (Lesotho).

³ This notification provision must be viewed in conjunction with the article 18. Except with respect to Security Council referred cases (article 13 (b)) all States Parties and those non-States Parties which would appear to have jurisdiction over a matter will have received notification of the investigation by the Prosecutor and would have

II. Paragraph 2

1. Chapeau: ‘priority to the request from the Court’

- 7 This paragraph singles out the case of a competing request from a State Party and identifies the circumstances in which priority will be accorded to the request of the Court over that presented by the requesting State. Because the applicable principles of international law can vary, depending on whether the requesting State is a party to the Statute or not, it was important to deal with each scenario separately.

2. The two subparagraphs

- 8 a) **The Court’s determination that the case is admissible.** The paragraph makes reference to determinations on admissibility under articles 18 and 19. Article 18 para. 2 provides that the Prosecutor shall defer to a State’s investigation or prosecution if requested, unless the Pre-Trial Chamber authorizes otherwise. While the paragraph does not make specific reference to a ruling by the Chamber on ‘admissibility’, *per se*, given that articles 17, 18 and 19 embody the principle of complementarity, the intent of this paragraph must be to allow for the Pre-Trial Chamber to authorize the continuation of the investigation, where satisfied that the conditions for admissibility in the face of a State investigation or prosecution have been met. Article 19 addresses rulings on admissibility and refers to article 17 which sets out the grounds upon which the Court can rule the case admissible or inadmissible.

- 9 The grounds for inadmissibility of particular importance here are those detailed in subparagraphs (a) and (b). These provide that the Court must find a case inadmissible where there is an ongoing investigation or prosecution in a State, there has been an investigation and a decision by a State not to prosecute or the person has already been tried and the *ne bis in idem* principle applies. However, there are exceptions to each ground where the State is unwilling or unable to genuinely carry out the investigation or prosecution or the decision not to prosecute was based on one of those factors. In the case of *ne bis in idem*, it will not apply if the proceedings were for the purpose of shielding the person or were not conducted independently or impartially or were conducted in a manner not consistent with an intent to bring the person to justice.

Thus, where the Court has ruled the case admissible⁴, taking into account the investigation or prosecution which is being or has been conducted in the requested State, it would have found one of the exceptions applicable. In those circumstances, the requesting State must accord priority to the request from the Court. Any other result would completely undermine the ability of the Court to proceed with cases found to be admissible. Absent an obligation on the requested State Party to comply with the Court’s request in these circumstances, the requesting State Party would have the ability to indirectly overrule the Court’s determination on admissibility, through an extradition request⁵.

- 10 b) **‘determination ... pursuant to the ... notification under paragraph 1’.** While subparagraph (a) addresses the case where the Court already has made an admissibility ruling before the notification under paragraph 1, sub-para. (b) deals with the case where that determination is made, pursuant to the notice. This would include the situation where the

had an opportunity to advise of a domestic investigation or prosecution and request deferral of the matter by the Prosecutor. Therefore, there should be limited instances where a requested State would be faced with this situation. Some examples would be where notice was not provided to a non-State Party with jurisdiction or a State choose not to advise the Court of its domestic proceeding.

⁴ As noted above, given the reference to both articles this would include where the Pre-Trial Chamber has authorized the continuation of the investigation under article 18 para. 2.

⁵ This result is possible of course where the requested State is not a State Party as there would be no surrender relationship between the Court and the requested State, aside from any *ad hoc* arrangement. See article 87 para. 5.

Court has already ruled the case admissible, without knowledge of the requesting State's investigation or prosecution and then reconsiders the issue in light of the notification of this fact under paragraph 1.

Therefore, paragraph 2 gives the Court priority in all instances where the two States involved are States Parties and the case is ruled admissible by the Court, taking into account the investigation or prosecution in the requesting State Party.

III. Paragraph 3: Intermediate proceeding to deal with the request for extradition from the requesting State

This paragraph recognizes that where the Court has not ruled on the admissibility of a case in accordance with subparagraph 2 (a) and notice is given to the Court under paragraph 1, the Court will need to consider or reconsider the question of admissibility. Even if the Court proceeds expeditiously, as is mandated later in this paragraph, there will be some delay before a determination can be made. In that case, the requested State must decide what to do with the pending request from the other State. 11

There was considerable controversy as to whether this issue should be addressed at all in the Statute. Some delegations felt very strongly that it was a matter for the requested State, regulated only by the law of that State and any applicable obligations flowing from the extradition relationship between the two States. For those States, this was a purely domestic matter which should not be touched upon in the Statute. There were also concerns that any reference to a requested State being able to take action on a request could oblige the requested State to do so, when it might not have any obligation under domestic law to proceed with that request. On the other side, delegations were concerned that without reference to the issue in the Statute, the requested State would not know if acting on the request would put it in breach of its obligations to the Court. 12

Because of these conflicting positions, the compromise achieved was to provide some direction to the requested State but to make it clear that the decision was one for the requested State. For that reason, the words 'at its discretion' were included here.

The formulation 'proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible' struck a necessary balance in response to the differing State concerns on this point. Those States concerned about bilateral obligations and in some instances, domestic law requirements to proceed expeditiously in extradition matters, found comfort in the fact that they could proceed with any relevant domestic proceedings before the Court's decision. At the same time, those delegations which did not want to see the requested State 'pre-empt' the Court's decision on admissibility, were prepared to accept this paragraph, provided that no actual surrender could take place before the Court's ruling. 13

Given the concerns of all delegations for early resolution of this issue, a requirement for the Court to *proceed 'on an expedited basis'*, in these circumstances, was included. While one would presume that the Court would do so in any event, this explicit reference was of particular importance to a number of States, in light of the prohibition on surrender provided for above. 14

IV. Paragraph 4: Priority to requests from the Court

To be properly interpreted, this paragraph must be read within the context of the entire article, which was drafted to consider scenarios in sequence (cf. mn 5). Thus, the conditions outlined in paragraph 1 are applicable to paragraph 4, in that both requests relate to the same conduct and the Court will have received notification. 15

The specific case addressed is where the requested State receives a competing request from a non-State Party, but it is not under any international obligation to extradite to that State. 16

Such an international obligation exists where the requested State is, by way of any bilateral or multilateral treaty or arrangement, bound to act upon the request for extradition without disposing of broad discretion in case of competing extradition requests⁶. In the absence of a so-defined international obligation, the requested State does not face conflicting obligations. Thus, the Statute can mandate priority to the Court, without placing the requested State in breach of international obligations to the non-State Party. At the same time, the obligation to give priority to the Court is limited to those instances where the Court has ruled the case admissible. This proviso was included even though a general obligation to the Court would not have resulted in a breach of international obligations, because it was viewed as consistent with the principles of complementarity. If the Court had not ruled on admissibility and there was a pending investigation or prosecution in the requesting State, the proper avenue for resolution was viewed to be an admissibility ruling, under the provisions of the Statute designed to address this precise issue⁷, as opposed to mandated priority for the Court's request for surrender. Otherwise the effectiveness of the complementarity regime would be impeded.

- 17 Interestingly, this provision does not go so far as to require the ruling on admissibility to have taken into account the particular investigation or prosecution. The difference must be interpreted in the overall context. In the circumstances of paragraph 2, if the Court rules the case admissible the requested State must give priority to the Court, even in the face of a competing international obligation. The only justification for overriding the competing obligation is where the Court has directed its mind to the issue and ruled on the requesting State's investigation or prosecution and that State is bound by the ruling.
- 18 When this paragraph applies, there is no competing obligation and given that the requesting State should have received notification and had a chance to challenge admissibility under article 18, it was viewed as sufficient that the Court has ruled the case admissible. In essence, if a non-State Party has chosen not to advise the Court of its investigation or prosecution, it should not be able to impede the execution of a Court's request for surrender, in a case ruled admissible, through a request for extradition which does not engage any international obligations. The paragraph strikes a delicate balance to protect and not impede the carefully structured complementarity regime established in articles 17, 18 and 19.

V. Paragraph 5: Cases under paragraph 4 not determined to be admissible by the Court

- 19 In situations not covered by paragraph 4, where the Court has yet to determine the admissibility of the case, the circumstances are similar to those underlying paragraph 3. The Court has received notification of the competing investigation or prosecution and either, on the challenge of the State or of its own motion, will consider the admissibility of the case. Similar to paragraph 3, the requested State is free to decide whether to proceed with the request for extradition, pending the determination by the Court.
- 20 However, unlike paragraph 3, the requested State in these circumstances is not precluded expressly from completing execution of the State's request and extraditing the person to that State, before a decision from the Court. That distinction appears to be based upon the principle that a treaty does not create obligations for a third State. Thus, it was viewed as inappropriate to mandate what steps the requested State could not take with respect to a request presented by a third State, not Party to the obligations of the Statute. However, in the

⁶ Many international treaties on extradition provide for such a broad discretion in case of competing requests. Irrespective of the terminology chosen under article 102 'for the purposes of the Statute', those treaty provisions should also be applied to the case of a competing request for surrender under the Statute (for the same view, see Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003) 146 *et seq.*; the resulting broad discretion eliminates the risk for the requested State to find itself in a situation of conflicting legal obligations so that paragraphs 4 and 5 instead of paragraph 6 should apply (for the same view, see *ibid.*).

⁷ See articles 17, 18, 19.

absence of a pre-existing (treaty) right to extradition, no third State can be adversely affected in law by the obligation of the State Party to the Statute not to extradite to such a third State. It follows that also in the absence of an express provision precluding extradition pending a decision from the Court, the combined effect of the obligations to cooperate (article 86) and to comply with requests for arrest and surrender (article 89) will, except perhaps in exceptional circumstances, preclude extradition.

VI. Paragraph 6

1. Chapeau

a) Cases under paragraph 4 except that the requested State is under an obligation to extradite to a requesting State not Party to this Statute. This paragraph deals with a competing request from a non-State Party in circumstances where there is an existing obligation to extradite between the two States. Here, the requested State faces conflicting international obligations while the requesting State, as a non-State Party

is not affected by the obligations imposed under the Statute. However, as the use of the word ‘existing’ already indicates, State Parties are not free to create new possible obstacles to their cooperation duties under Part 9. The international obligation the requested State is facing towards the requesting State must thus be one that predates the date of the requested State’s signature of the Statute⁸.

b) Determination to surrender to the Court or extradite to the requesting State. This was the most difficult scenario upon which to achieve consensus. It was resolved ultimately by resort to precedent within the context of extradition generally. It is not uncommon for States to face competing requests for extradition, within the context of its bilateral or multilateral extradition relations. As a result, the issue is addressed in many extradition treaties and instruments such as the *European Convention on Extradition* and in the *United Nations Model Treaty on Extradition*⁹. By that general practice, the requested State has the discretion to determine which State will be given priority. That solution has been incorporated in the Statute, but only to solve a genuine conflict of legal obligations (cf. mn 16).

While some would argue that this imports a *horizontal* approach to cooperation in Part 9, that is not the case. Unlike the circumstances addressed in paragraph 1, this issue does not relate to the obligation of States Parties to the Court. If the requested State were obliged to give the Court priority over a non-State Party, this would amount to affecting the rights of States not Parties to the Statute. This would be in conflict with the principles reflected in the *Vienna Convention on the Law of Treaties*¹⁰. Instead the obligations owed to the non-State Party are placed on equal footing with those owed to the Court and thereby, while the decision of the requesting State may be in favour of the Court as opposed to the State, nothing in the Statute itself affects the rights of non-States Parties.

c) The different subparagraphs. The paragraph mandates that the requested State must consider all the relevant factors in making its decision. This, while perhaps obvious, was stated to emphasize that the decision will be based on a fair consideration of all the pertinent circumstances of the particular case and not on the basis of according more weight to one requesting Party or another. Consistent with the practice in State to State extradition, the paragraph includes three examples of the relevant factors: ‘(a) The respective dates of the requests; (b) The interests of the requesting State including, where relevant, whether the

⁸ Cf. article 18 of the 1969 Vienna Convention of the Law on Treaties; for the same view, see Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003) 147.

⁹ See for example article 17 of the European Convention on Extradition, 359 UNTS 273 and article 16 of the United Nations Model Treaty on Extradition, UN Doc. A/CONF.144/28/Rev.1.

¹⁰ UN Doc. A/CONF.39/11/Add.2.

crime was committed in its territory and the nationality of the victims and of the person sought; and (c) The possibility of subsequent surrender between the Court and the requesting State'. One additional factor, the requested State must consider is whether the requesting State is willing and able to genuinely pursue the criminal proceedings upon extradition. In the absence of such willingness or ability, there is no legitimate interest of that State to be protected and the discretion of the requested State will be reduced to an obligation to surrender¹¹.

VII. Paragraph 7: Competing requests for different conduct

25 The final scenario contemplated in this article is a competing request for extradition, for different conduct from that which forms the basis of the Court's request. Here, there were no differences in applicable principles dependent upon whether the requesting State was a State Party or not, so it was not necessary to address those issues separately.

1. Priority to the request from the Court

26 If the requested State is not under an existing international obligation to extradite the person to the requesting State it is not faced with any competing international obligations, subparagraph (a). In addition, the principles of complementarity are not engaged where the cases involve different conduct. Thus, there is an obligation in all such instances to give priority to the Court.

2. Determination whether to surrender or to extradite

27 Subparagraph (b) mirrors paragraph 6, except that the requested State is given the discretion to decide, both in relation to a request from a State Party and a non-State Party. During the initial discussions of this scenario, there was general support for an obligation to give priority to the Court, in the case of a State Party competing request, on the assumption that the nature of the crimes within the jurisdiction of the Court should be the overriding consideration. However, it was successfully argued that there could be exceptional situations where the crimes alleged by the requesting State were as serious perhaps more serious, than those alleged by the Court¹². On that basis, it was determined that the competing obligations should be resolved on a case by case basis, in accordance with the same principles as those applicable in State to State extradition relations.

28 Here, again, '[i]n making the decision', the requested State is required to take into account all the relevant factors and examples provided by reference to the enumerated factors in paragraph 6. In addition, particular emphasis is placed on considering the nature and gravity of the alleged conduct. Given the importance of this last factor, it is expected that, given the jurisdiction of the Court, in the overwhelming majority of cases, priority will be accorded to the Court.

VIII. Paragraph 8: Notification of the Court in cases ruled to be inadmissible after subsequent refusal of extradition

29 This paragraph contemplates that extradition to a State may fail. If that occurs in circumstances where the Court has determined a case inadmissible, on the basis of the investigation or prosecution in the State which has now failed to obtain the person, that fact will be brought to the Court's attention. This was viewed as an important requirement as the

¹¹ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003) 150 *et seq.*

¹² For example, if the Court was prosecuting for attacks on property and the State had several charges of murder.

ruling on admissibility may have to be reconsidered in light of this new information. This point is expanded upon in rule 186. The Prosecutor is identified as the authority within the Court who should receive the notification. As well, the rule clarifies that the notification is made in order for the Prosecutor to consider if an application should be made for a review of the admissibility ruling based on this new information following the procedure set out in article 19 para. 10.

Article 91

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

- (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
- (b) A copy of the warrant of arrest; and
- (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

- (a) A copy of any warrant of arrest for that person;
- (b) A copy of the judgement of conviction;
- (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and
- (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Directly Relevant Rules of Procedure and Evidence: Rule 187.

Literature: See Preliminary Remarks on Part 9.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	5
I. Paragraph 1: Requests in writing and urgent cases	5
II. Paragraph 2	8
1. Chapeau: Requests with warrants issued by the Pre-Trial Chamber under article 58	8
2. The different subparagraphs	9
a) Information describing the person sought and to his or her probable location	9
b) A copy of the warrant	11
c) Other necessary documents, statements or information	12
III. Paragraph 3: Cases for persons already convicted	16
IV. Paragraph 4: Consultations with the Court upon its request	22

A. Introduction/General remarks

Article 91 provides essential information as to the content of a request for arrest and surrender. This article was substantially redrafted at the Rome negotiations, in light of the decisions taken with respect to the procedure for issuance of an arrest warrant by the Court¹. As a result of the streamlined procedural provisions, which eliminated the concept of an indictment, article 91 was simplified considerably, to include reference to two types of requests for arrest and surrender – pre and post conviction. There was no longer need for the complicated concept of pre and post indictment requests for arrest. Thus, the provision outlines the content of a request when the person is sought for prosecution, followed by the content of a request in the case of person already convicted.

While primarily a technical provision, designed to ensure complete and consistent requests, subparagraph 2 (c), raised the very controversial issue of evidentiary requirements for requests for surrender. As such, it required considerable debate before a compromise text was accepted.

While some would argue that this issue reflected the debate between horizontal and vertical systems of cooperation, it in fact was more a question of the division between States of differing legal tradition². For some common law States there was serious concern that the surrender of individuals, including nationals, to the Court, without some evidence being produced in support of the request, would violate fundamental legal precepts and in some instances constitutional requirements. While some of those States could accept that the system for surrender to the Court should be distinct from normal extradition, there still remained concerns about the physical removal of a person for prosecution without the production of evidence. Other States, particularly those of a civil law tradition, for which evidence is not necessary even in normal extradition relations, objected strongly to allowing States to require the production of evidence by the Court. This was viewed as an unnecessary and burdensome requirement to place on the Court. In particular, those States which had experienced significant problems in trying to meet evidentiary requirements within the context of extradition practice, did not want to see the Court facing similar onerous burdens with respect to its requests for surrender. In addition, such a requirement had the effect of creating different standards for the Court to meet, depending on the requested State. The debate on this issue, an extremely sensitive one, even in the normal relations between States, was extremely lively and on some occasions, volatile.

In the Draft Statute³, bracketed language had been included in article 88 subparas. 1 (b) (v) and (c) (ii) to reflect the requirement for the production of evidence by the Court, where necessary. However, there remained much opposition at Rome to the inclusion of this provision. After considerable work in informal subgroups, a compromise formula was agreed to, through a great concession by those delegations which did not require the production of evidence.

In recognition of the fundamental nature of the problem for some States, article 91 subpara. 2 (c) was included. It provides that the request contain or be supported by such material as may be required for the surrender process in the requested State. Deletion of any reference to the term evidence or the specific content of those materials made the provision more palatable to States opposed to evidentiary requirements. In addition, the inclusion of the qualification that the requirements should be the least burdensome possible also helped. This subparagraph was accepted on condition that paragraph 4 also be included, to help the Court in understanding what would be required and to obligate the requested State to assist through the provision of specific information.

¹ See article 58.

² See Preliminary Remarks on Part 9, mn 7.

³ UN Doc. A/CONF.183/2/Add.1, pp. 164 *et seq.*

B. Analysis and interpretation of elements

I. Paragraph 1: Requests in writing and urgent cases

5 This paragraph details the form of the request. It sets out the general rule that the Court must submit a *written* request for arrest and surrender.

6 The exception for ‘urgent cases’ is important on a practical level. It addresses situations where immediate transmission of the request may require the use of modern technology, such as a fax machine or electronic communication systems and permits the use of such technology, provided that there will be a written record. The only qualification is that it should be followed by confirmation, through the prescribed channel. This qualification, which is somewhat confusing because of the reference to channel, in essence requires that an original of the request be submitted, after the technological communication. No time period is specified to meet this requirement. It is reasonable to assume, though, that the confirmation will follow without undue delay.

7 Rule 187 links the transmission of a request for surrender with the obligation in article 67 para. 1 (a)⁴, which gives the person the right to be fully informed of the charges in a language understood by him or her. Rule 187 also elaborates on rule 117 sub-rule 1. By virtue of rule 187, the request must be accompanied, as appropriate, by a relevant translation of the warrant or judgment and any text from the Statute. Rule 187 thus imposes the obligation on the Court to translate the warrant of arrest into a language that the person sought fully understands or speaks.

This translation shall, as a rule, accompany the request for arrest and surrender, but the words ‘as appropriate’ allow for a subsequent provision of the translation if circumstances so demand.

II. Paragraph 2

1. Chapeau: Requests with warrants issued by the Pre-Trial Chamber under article 58

8 As noted above, the simplification of the procedures of the Court for the issuance of an arrest warrant⁵ permitted one simple provision on the content of all requests for arrest and surrender, in the case of a person sought for prosecution. Under the procedures agreed to, the arrest and surrender of the person will be sought on the basis of a warrant of arrest issued by the Pre-Trial Chamber. This process received general support amongst delegations, as it parallels the process for State to State extradition, which is uniformly commenced on the basis of an arrest warrant or other similar order. The latter part of the phrase recognizes that the necessary material may form part of the actual request or be attached to it.

2. The different subparagraphs

9 a) **Information describing the person sought and to his or her probable location.** As in the case of State to State extradition, the requested State must receive sufficient detailed information about the person sought, to permit identification. Without proper identification information there can be no arrest or surrender, for both practical and legal reasons.

10 This provision places a balanced obligation on the Court to provide the requested State with information on the probable location of the person. The use of the term, ‘probable’, reduces the nature of the burden, as it recognizes that the Court may not be in a position to

⁴ For an expression of doubt as to whether article 67 para. 1 (a) required such a link, see Gartner, in: Fischer *et al.* (eds.), *International and National Prosecution of Crimes* (2001) 428.

⁵ See article 58.

provide information on location to the level of certainty. On the other hand, the requirement to provide some information on location does mean that the Court cannot simply send requests to all States Parties, without any particular information which would suggest that person's location, within that State. This language also clarifies the intent of article 89 para. 1, which refers to requests being sent to States where the person 'may' be found, importing a need for the Court some information upon which it bases its request to that particular State.

The language of the provision is sufficiently general such that a State could go back to the Court, if the information were not particularly specific, *i. e.* if the only reference was to the person being located in a large State, but without any particularization of which part of the State. Such a request would not meet the requirement of information on 'location'.

b) **A copy of the warrant.** This requirement recognizes that the request for arrest and surrender will be submitted only once a warrant of arrest has been issued. It also acknowledges the practical realities of communication in that there is no requirement for the Court to provide the actual warrant; a copy will suffice. 11

c) **Other necessary documents, statements or information.** As described above, this was a compromise formulation arrived at to permit some States to require the production of evidence in support of the request. The specific reference to documents, statements or information ostensibly limits the form of material that can be sought, preventing a State from seeking the production of actual witnesses or exhibits. In addition, a State is not free to require what ever information it may be interested in. The requirement is limited to that which is necessary to meet the requirements of the surrender process in that State. Thus, in seeking any particular information from the Court, the State must be in a position to demonstrate why that is needed for the surrender process. 12

The phrase '... except that those requirements should not be more burdensome ...' limits the State's ability to require evidence by mandating that any requirements imposed upon the Court cannot be more burdensome than those applicable in the extradition practice of that State. This would prevent a State from creating a separate evidentiary scheme for the Court, more onerous and demanding than that which normally applies in State to State extradition. In case a requested State, while maintaining evidentiary requirements in its domestic extradition Statute, has abolished them in treaties concluded with certain States, that requested State must accord the more favorable treatment to the Court. The same holds true where a requested State requires the production of some evidence in its treaty relations with some States while no longer doing so in treaties concluded with other States.⁶ 13

The phrase '..., if possible, be less burdensome ...' is an exhortation to States Parties to have in place the least burdensome requirements possible, in the case of requests for arrest and surrender from the Court. It emphasizes that the Court is a distinct creature and any evidentiary requirements should be similarly distinct and limited to that which is absolutely essential. This requirement, albeit imposed only to the extent possible, challenges those States Parties with legal and constitutional obstacles to no evidence, to require the bare minimum of evidence necessary to overcome the relevant legal hurdles. 14

A standard practice has been adopted in requests for the arrest and surrender of individuals whereby the PTC asks that the State inform the Court of any requirements for additional documentation under Article 91 (2) (c)⁷. 15

III. Paragraph 3: Cases for persons already convicted

This paragraph sets out the content of a request in the case of person who has already been convicted and is wanted for the imposition or service of a sentence, as opposed to 16

⁶ Swart, in: Cassese (eds.), *The Rome Statute of the ICC, Vol. II* (2002) 1691 et seq.

⁷ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Request to the Republic of Uganda for the arrest and surrender of Bosco Ntaganda, Pre-Trial Chamber I, 8 February 2008, 3.

prosecution. Because there is already a conviction, the type of material which must be supplied is different, necessitating a separate paragraph on content.

- 17 Subparagraph (a) recognizes that there may be circumstances where the Court has issued a *warrant of arrest* for the person – *post conviction*. A copy of any such warrant should be provided to the requested State. Again, for practical reasons only a copy need be submitted.
- 18 Subparagraph (b) requires ‘A copy of the judgment of conviction’. If the person has been convicted the Court will have made a decision pursuant to article 74, which will be in writing. This will be the document which forms the basis of the request in most instances.
- 19 On a practical level, subparagraph (c), ‘Information to demonstrate that the person sought is the one referred to in the judgment of conviction’, shall enable the requested State to connect the person sought to the judgement of conviction by the Court. Thus, the Court is required to provide sufficient information for the requested State to establish that connection. The types of information necessary would include identifying information or other particulars about the offence or offender that will ensure that the person sought is the convicted person.
- 20 Subparagraph (d) takes into account that under the procedures of the Court, the person may be sentenced immediately upon conviction or at a later point in time⁸. This reality is recognized here, in that the convicted person may or may not have been sentenced. If sentenced, it is necessary for the Court to include a copy of the sentence in or with the request⁹. This is standard practice in extradition between States and is information which will be relevant to the requested State in dealing with the request.
- 21 In cases of a sentence for imprisonment, a statement of any time already served and the time remaining to be served, the Court is required to advise the requested State of the length of the sentence imposed and any time remaining to be served. While probably of limited relevance in this context, given the absence of a provision mandating a specified amount of time left to be served before surrender can be effected, this information may still assist the requested State. For example, it may be useful from a security perspective to know the time the person faces in jail, in order to assess the lengths to which the person might go in avoiding arrest¹⁰.

IV. Paragraph 4: Consultations with the Court upon its request

- 22 This consultation clause was included as part of a package compromise in relation to evidentiary requirements. Many different formulations were proposed to try and make the clause a practical one. In recognition of the fact that the Court may not require specific information on the surrender process of a State in each and every case, it is for the Court to request the information, as it considers necessary.
- 23 The general nature of the obligation gives the Court the flexibility to approach a State Party for information either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). The Court can do so at any time; it is not limited to circumstances where there is a request to be made or pending. This is a general obligation on the State Party to discuss this issue with the Court. Thus, it is open to the Court to ask all States Parties about evidence requirements within the surrender process, or to pursue the question with a particular State Party, within the context of a case.

⁸ While article 76 is vague on this point, it appears that as the Court must consider the issue of sentence and can hear additional evidence, the Court might well make a decision at a point in time after conviction.

⁹ Although article 76 makes no reference to a written record of the sentence imposed, from a practical perspective, such a record would be needed for administration of the sentence and for appeal purposes and could be provided for in the Rules of Procedure and Evidence.

¹⁰ In State to State extradition practice there is generally a requirement for States to advise of the time left to be served because the extradition treaty or arrangement may preclude surrender unless there is a prescribed minimum amount of time left to served. See for example article II Treaty of Extradition between Canada and Spain, Canada Gazette, Part 1, Vol. 125, No. 11; UN Model Treaty on Extradition, article 2, note 8.

The consultations would focus on any requirements under the national law for the production of evidence.

As the State Party is only permitted to require such material as is mandated by its surrender process, paragraph 4 places a clear obligation on States Parties to describe to the Court those specific requirements in national law, which make the information necessary. A parallel intention of this paragraph is to ensure that the process is not unduly difficult or complicated for the Court by requiring the requested State to give the Court information, which will assist in the preparation of any request. The information so provided will enable the Court to determine whether the production of evidence demanded by the requested State respects the limits set in para. 2 (c)¹¹.

¹¹ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003) 118.

Article 92 Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

- (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
- (b) A concise statement of the crime for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;
- (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and
- (d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting

- 5. the request are delivered at a later date.

Directly Relevant Rules of Procedure and Evidence: Rules 188 and 189.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	3
I. Paragraph 1	3
1. Urgent cases	3
2. Provisional arrest 'pending the presentation of the request'	4
II. Paragraph 2	5
1. Information describing the person sought and to that person's probable location	7
2. A concise statement of the alleged crimes	8
3. A statement on the founding decision	9
4. Announcement of a request for surrender	10
III. Paragraph 3	11
1. Release from provisional arrest	11
2. Time limits specified in the Rules	12
3. Consent to surrender	13
IV. Paragraph 4: No prejudice for subsequent arrest and surrender	15

A. Introduction/General remarks

- 1 Article 92 was included in the Statute because in some circumstances, it may be necessary for the person to be arrested on an urgent basis, before the submission of the formal request

for arrest and surrender. The provision was included in the Draft Statute¹ and it remained substantially unamended at Rome. While the article did not generate much debate, because of its practical, technical nature, some States which advocated for the elimination of any evidentiary requirements² questioned the need for provisional arrest at all. If there were no evidentiary requirements to be met, a request for arrest and surrender would not differ greatly from a provisional arrest request and thus there would be no need for the two distinct processes. However, when compromise was achieved on the evidentiary issue and it was clear that evidence may have to be adduced in some instances, there was general agreement that a process for provisional arrest was needed.

The article is similar in content to article 9 of the United Nations Model Treaty on Extradition³ and to provisions included in many State to State, extradition agreements⁴. It sets out clearly when such a request can be made, what the request should contain and the consequences of a failure to follow up with a full and complete request for surrender. Other than article 89 para. 1, the article does not spell out that the requested State Party is under a duty to comply with the request. However, this obligation is contained in article 59 para. 1.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Urgent cases

Consistent with general extradition practice, cases where provisional arrest may be sought are limited to circumstances of urgency. While no finite list of urgent circumstances exists, the most common would be where the arrest of the person is necessary to ensure that they will be available for surrender or where they may pose a danger to the community. In this context, the Court will most likely seek provisional arrest in the case of person who has taken steps to conceal his or her location or identity or where the existence of an arrest warrant is suspected or becomes known, such that the person might be motivated to flee. The term 'provisional arrest' is a term of art in international extradition practice. It connotes the interim arrest of the person pending the receipt of a formal request.

2. Provisional arrest 'pending the presentation of the request'

This phrase recognizes that provisional arrest is sought to avoid the delay which might occur in awaiting the preparation of a full request for arrest and surrender, in compliance with the content of request provisions in article 91. As noted above, because the Court may have to submit some documents, statements or information, which cannot be compiled on an immediate basis, the ability to seek the person's detention on an interim basis is an important power for the Court.

II. Paragraph 2

Given the urgent nature of provisional arrest, there is a slight departure from the requirements of article 87. All requests for provisional arrest may be transmitted through any mechanism that leaves a written record *i.e.* fax, electronic communication. In this instance, there is no need for subsequent transmission of an original.

¹ UN Doc. A/CONF.183/2/Add.1, pp. 166 *et seq.*

² See, however, article 91 para. 2 (c).

³ UN Doc. A/CONF.144/28/Rev.1.

⁴ For example article 16, European Convention on Extradition, 359 UNTS 273.

- 6 The content of the request is prescribed in mandatory terms. The subsections which follow outline information which, on a practical level, is essential for the execution of the request.

1. Information describing the person sought and to that person’s probable location

- 7 This subparagraph is identical to subparagraph 2 (a) of article 91 and reflects that this information is essential to the execution of a provisional arrest request.

2. A concise statement of the alleged crimes

- 8 Unlike a request for arrest and surrender under article 91, in the case of provisional arrest, there is no variation between States as to the type of documents or information to be provided in support of the request. It is common extradition practice amongst States to require only a concise description of the crime and underlying facts when seeking provisional arrest. This subparagraph reflects that requirement in language which is similar to that found in article 9 para. 2 of the United Nations Model Treaty on Extradition⁵.

3. A statement on the founding decision

- 9 Again, in recognition of the urgent nature of the process, the Court is only required to state the existence of the relevant document. It is not necessary for time to be lost in obtaining and providing a copy of the warrant or judgment of conviction. This too is consistent with extradition practice⁶.

4. Announcement of a request for surrender

- 10 Provisional arrest is only viable when it is an interim measure to be followed by a full request for surrender. Thus, before any State would be prepared to action such a request, there would need to be an assurance from the Court that the arrest is being sought because of circumstances which make it urgent, pending the presentation of a request as described in article 91.

III. Paragraph 3

1. Release from provisional arrest

- 11 In most instances, a person provisionally arrested on the basis of a request from the Court will be detained in custody⁷. In the absence of a full request, it is recognized that the person cannot be detained indefinitely. Consistent with State to State extradition practice, this paragraph allows for the release of the person from custody where the request for surrender and relevant supporting materials are not received within a prescribed period. Because of the evidentiary requirements of some States, the language makes it clear that the obligation on the Court is to provide both the request and relevant materials outlined in article 91 within the set period.

2. Time limits specified in the Rules

- 12 At Rome, there was division amongst States as to the appropriate time period for submission of the full request. This reflected the fact that there is a variation in State to State extradition practice on this point as well. Ultimately, as the principles underlying this

⁵ UN Doc. A/CONF.144/28/Rev.1.

⁶ See UN Doc. A/CONF.144/28/Rev.1, article 9, United Nations Model Treaty on Extradition.

⁷ In accordance with article 59, there is a possibility that the judicial authorities in the requested State could order the interim release of the person. It is highly unlikely to occur in the case of a provisional arrest executed in urgent circumstances. However, if that were to occur than this provision should be interpreted to require the release of the person from the terms and conditions of release.

subparagraph were not in dispute, it was agreed that the relevant time period should be left to the Rules, which would allow for greater flexibility, permitting a change in the time period much more easily. The difficulties regarding an agreed time period were overcome in the discussions of the rules such that Rule 188 provides for a period of 60 days from the time of arrest within which the documents must be submitted.

3. Consent to surrender

In the interests of practicality, this incorporates the concept of simplified surrender into the cooperation regime. Based on article 6 of the Model Treaty on Extradition⁸, it permits the immediate surrender of the person after provisional arrest, where the person consents and such a process is permitted under the law of that State. Use of this provision avoids the preparation of the materials by the Court and the continued detention of the person in the requested State for a period of time, where the person is prepared to go before the Court immediately. It is beneficial to the Court and the person sought. 13

As simplified surrender is intended to avoid unnecessary delay, the wording makes it clear that where the person consents, surrender should be carried out as soon as possible. In addition Rule 189 notes that the Court is not required to submit the full documentation required for a normal surrender process unless the State involved specifically requests otherwise. 14

IV. Paragraph 4: No prejudice for subsequent arrest and surrender

This paragraph, similar to article 9 para. 5 of the Model Treaty⁹, reflects the principle that the release of a person after provisional arrest, in the circumstances outlined in paragraph 3, will not prevent the reinitiation of surrender proceedings against that person, upon receipt of a full request for extradition. This well accepted principle in State to State practice is incorporated here to prevent an individual from using a problem with respect to provisional arrest to shield himself or herself from facing prosecution before the Court. It provides that the arrest and release does not constitute a bar to subsequent proceedings. However, in recognition of the rights of the individual, it precludes repeated provisional arrests by indicating that a subsequent arrest can be carried out only upon receipt of the full request for surrender, with supporting documents. 15

⁸ UN Doc. A/CONF.144/28/Rev.1.

⁹ UN Doc. A/CONF.144/28/Rev.1.

Article 93

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
 - (a) The identification and whereabouts of persons or the location of items;
 - (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
 - (c) The questioning of any person being investigated or prosecuted;
 - (d) The service of documents, including judicial documents;
 - (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
 - (f) The temporary transfer of persons as provided in paragraph 7;
 - (g) The examination of places or sites, including the exhumation and examination of grave sites;
 - (h) The execution of searches and seizures;
 - (i) The provision of records and documents, including official records and documents;
 - (j) The protection of victims and witnesses and the preservation of evidence;
 - (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
 - (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.
2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that precede the departure of that person from the requested State.
3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.
4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.
5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.
6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.
7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or of obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent to the transfer; and
 - (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.
- (b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.
8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.
- (b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.
- (c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.
9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.
- (ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.
- (b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested State shall so inform the Court and the Court shall direct its request to the third State or international organization.
10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.
- (b) (i) The assistance provided under subparagraph (a) shall include, *inter alia*:
- a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
 - b. The questioning of any person detained by order of the Court;
- (ii) In the case of assistance under subparagraph (b) (i) a:
- a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
 - b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.
- (c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not Party to this Statute.

Directly Relevant Rules of Procedure and Evidence: Rules 190 to 194.

Literature: See Preliminary Remarks on Part 9. De Cesari, P., 'Taking of Evidence and other Forms of Cooperation', in: M. C. Malaguti (ed.), *ICC and International Cooperation in the Light of the Rome Statute* (2007) 55; Goia, F., "Reverse Cooperation" and the Architecture of the Rome Statute: A Vital Part of the Relationship between States and the ICC?', in: M. C. Malaguti (ed.), *ICC and International Cooperation in the Light of the Rome Statute* (2007) 75; Sluiter G., *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (2002).

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	11
I. Paragraph 1	11
1. Chapeau	11
a) 'States Parties shall ... comply with requests by the Court'	11
b) 'accordance with the provisions of this Part and under procedures of national law'	13
c) 'assistance in relation to investigations or prosecutions'	14
2. The different subparagraphs	16
a) 'identification', 'whereabouts of persons' and 'location of items'	16
b) Evidence taking and the production of evidence	18
c) 'The questioning of persons'	22
d) 'The service of documents'	24
e) 'Facilitating the voluntary appearance'	25
f) 'The temporary transfer of persons as provided in paragraph 7'	29
g) 'The examination of places or sites'	30
h) 'The execution of searches and seizures'	31
i) 'The provision of records and documents'	32
j) 'The protection of victims and witnesses' and the 'preservation of evidence'	33
k) 'The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes'	35
l) 'assistance ... not prohibited by the law of the requested State'	37
II. Paragraph 2: Authority to provide an assurance not to be prosecuted, detained or subjected to any restriction of personal freedom by the Court	39
III. Paragraph 3	40
1. Execution of a particular measure of assistance	40
2. Consultations to resolve the matter	45
3. Consideration whether 'assistance can be rendered in another manner or subject to conditions'	46
4. Modification of the request as necessary	48
IV. Paragraph 4: Denial of a request in accordance with article 72	49
V. Paragraph 5: Consideration of assistance subject to specified conditions, or at a later date or in an alternative manner	52
VI. Paragraph 6: 'promptly inform the Court or the Prosecutor of the reasons for such denial'	54
VII. Paragraph 7: Temporary transfer	55
1. Request 'for purposes of identification or for obtaining testimony or other assistance'	55
2. Freely given informed consent to the transfer	56
3. Agreement of the requested State to conditions	57
4. Remaining in custody and returning without delay	58
VIII. Paragraph 8	67
1. Confidentiality of documents and information	67
2. Transmitting 'documents or information to the Prosecutor on a confidential basis'	68
3. Subsequent disclosure of documents or information	69
IX. Paragraph 9	70
1. Competing requests, other than for surrender or extradition	70
a) Consultation to meet both requests	70
b) Resolving 'in accordance with the principles established in article 90' ..	71
2. Information, property or persons subject to the control of a third State or an international organization	72
X. Paragraph 10	73
1. Cooperation with and providing assistance to a State Party	73
2. Scope of cooperation	78
a) Assistance provided under subparagraph (a)	78
aa) Transmission of statements, documents or other types of evidence ..	79
bb) 'questioning of any person detained by order of the Court'	80
b) Assistance under subparagraph (b) (i) a.	81
aa) Documents or other types of evidence obtained with the assistance of a State	82
bb) Evidence provided by a witness or expert 'subject to the provisions of article 68'	83
3. Request for assistance from a State which is not a Party to the Statute	84

A. Introduction/General remarks

Article 93 addresses general assistance between the Court and States Parties, aside from the surrender of persons. 1

These provisions on legal assistance were designed to allow for a broad range of assistance of flexible application. Given the scope and nature of the cases that will be investigated and prosecuted by the ICC, these were essential characteristics for the cooperation regime. 2

The scheme for general assistance is similar to that relating to the surrender of persons with respect to the nature of the obligation imposed on States. Article 86, which creates the general obligation to cooperate, is equally applicable to other forms of cooperation as it is to surrender. Similarly article 87 applies, authorizing the Court to make requests for the whole range of cooperation measures set out in article 93(1). Importantly, with only three limited exceptions, States Parties are under an obligation to comply with article 93 requests for cooperation presented by the Court. In that respect, article 93 creates a rather strong regime for cooperation, essential to the effective operation of the Court. However, as practice has evidenced to date, it is dependent on States fulfilling their obligation to cooperate under the Statute and as in the case of arrest and surrender, it is ultimately reliant on the ASP and, where applicable, the Security Council, taking action in response to failures to cooperate. 3

In this regard, it remains regrettable that agreement could not be reached on the power for the Court to issue an international witness summon or subpoena, whereby States would be obliged to compel witnesses to travel 'cross-border' to testify live before the Court. However, it appears that even if that power had been included the Court would still face challenges in terms of effective enforcement, the same obstacle which prevents Part 9 from achieving its potential as a strong cooperation mechanism. 3 A State Party can deny a request by the Court only in two circumstances, which are narrow in application and scope: *First*, if it concerns interests of national security (article 93 para. 4) and *second*, if the type of assistance requested is *not* specified in the listed types of assistance (paragraph 1 (l)) *and* it is prohibited by the law of the requested State Party. 4

As discussed below, an examination of some of the authorities suggests that there is a lack of clarity surrounding the operation of article 93 and the interrelationship of the various provisions. In accordance with the basic structure of Part 9, assistance is sought by way of a request by the Court. Direct action on the territory of a State is permissible in the circumstances set out in articles 57(3)(d) and 99(4)¹. The counter balance to this – to ensure a strong cooperation regime – is that there is an unqualified obligation to provide the assistance in response to a request when it falls into one of the categories specified in article 93(1)(a) to (k). Where the request is for one of those types of assistance, in accordance with article 88, the State must have the ability under national law to provide it. As a result, in those instances the only possible basis of refusal is that related to national security; no issue of prohibition under domestic law should arise or be considered by the Court.

The one limitation which is applicable does not permit denial of a request for the types of assistance specified in subparas a–k inclusive. Rather, paragraph 93(3) provides that where a particular measure sought in a specific request is prohibited by national law, the requested State would still have to comply with the request, unless it successfully convinces the Court that the requested measure in the particular factual circumstances of the case violates an existing *fundamental* principle of general application with the consequence that the requested

¹ This does not however restrict the Court from directly securing voluntary appearances in The Hague by individuals willing to come to be interviewed or provide testimony where no assistance is required from the State. It also does not prevent voluntary disclosure of documents or materials to the Court. As in State to State cooperation, Part 9 is intended to allow for the use of compulsory or other measures to assist with the gathering of evidence; it is not meant to impair direct access which can be accomplished without a violation of sovereignty of a state.

State and the Court would consult in order to resolve the conflict. The types of situations contemplated under this paragraph were requests which would violate a fundamental privilege, such as a spousal privilege or that applicable in the context of a relationship with a religious authority. The exception was not intended to allow for a State response that its general laws do not allow for the compulsion of certain types of records or that compelled witness testimony is not available. Such a response would be contrary to article 88 and would defeat the intent to require full cooperation with the minute limitation of those situations tied to fundamental societal interests.

- 5 There is also an important distinction to be drawn between the broad types of assistance detailed in article 93(1)(a)–(k) and a request by the Court that the evidence be gathered or obtained in a particular way or manner. For example under article 93(1)(b) the Court can request that the testimony of a witness be obtained for use in a proceeding in the Court. Under the scheme of Part 9 the State must deliver that testimony in a form suitable for use before the Court though it has some discretion as to the manner in which it may choose to execute the request. However, that discretion is also limited by article 99(1) which provides that the Court can specify a manner of execution – for example, in the case of a document that it be certified in a particular manner. In those circumstances, the State must provide the document with the certification requested, unless in accordance with article 99(1) the law of the State prohibits gathering the evidence in the manner specified. However, the fact that a particular form of obtaining the evidence – such as a specific type of certification is prohibited, does not in any way relax the obligation on the State to provide the evidence. It only means that another mechanism will need to be found to deliver useable evidence to the Court. This distinction is essential to the effective operation of the Part 9 scheme for other forms of cooperation.
- 6 The basic structure of Part 9 should also be interpreted to restrict the types of submissions and input which the Court is prepared to receive in considering a request brought before it. For example, in considering the transmission of a request for a type of assistance specified in article 93(1)(a)–(k) no issue as to prohibitions under national law should be considered until after the request has been transmitted. At that point, it would be for the State to establish a prohibition of a fundamental nature with respect to the particular circumstances of the case in accordance with article 93(3) or a prohibition under article 99(1) relating to the manner in which the evidence is to be gathered.

There is a disturbing decision in the Ruto and Sang case² which appears contrary to the structure and intent of article 93. The Prosecution made a request to the Chamber for the issuance of a summons for witnesses within Kenya under article 64(6)(b), and to subsequently secure the attendance of the witnesses in accordance with article 93. Prior to the issuance of the substantive decision³, the Trial Chamber considered, *inter alia*, an application by the Defence for the Chamber to invite submissions from the Government of Kenya with respect to the Prosecution request for the summons. The Chamber – without hearing from the Prosecution on the point – granted this request. The Chamber’s sole justification was the fact that the Prosecution had relied upon article 93(1)(1) of the Statute and thereby had made ‘Kenyan national law an important component of the present litigation.’ The Chamber went on to state: ‘The Chamber considers that it would be of assistance prior to ruling to hear from the Government of Kenya on whether or not the relief sought by the Prosecution is prohibited by national law’. The decision by the Chamber is problematic in many respects. To begin with the application had two components to it – a request for the Court to require the attendance of the witnesses and a request to seek the assistance of Kenya in securing the attendance of the witnesses under Part 9 of the Rome Statute. Neither of these core requests

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-11, Decision on status conference and additional submissions related to Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses, Trial Chamber, January 29, 2014.

³ The substantive decision on the application is considered below.

implicated article 93(1)(l). Evidently the views of a State should not be relevant to the question of whether a summons should be issued for a witness. That falls to be determined under 64(6)(b) on factors such as the relevance and necessity of the expected evidence. Moreover, with reference to assistance from Kenya with the testimony of the witness, there is an unequivocal obligation on Kenya as a State Party to serve a witness summon, as requested by the Prosecution, under article 93(1)(d), and to provide for the taking of the evidence under article 93(1)(b). The reference to national law in the chapeau of article 93(1) is solely a recognition that the procedures for delivering the assistance will be under national law, not an acknowledgement of the capacity for the State to decline the requested assistance on the basis of that law.

The fact that the Prosecution made reference to article 93(1)(l) in support of part of its argument or cited Kenyan law, does not, as the Chamber suggests, make the issue of Kenyan law so central to the Court's decision as to merit the intervention of that State in the proceedings. Given the structure and content of Part 6 and Part 9 of the Statute, the core issues to be adjudicated – whether to issue the summons or seek the assistance of Kenya with specified types of assistance – are not dependent in any way on the national law in the State to which the request is to be transmitted.

If with respect to a request presented by the Court there is a problem with implementation – be it as a result of a prohibition under article 93(1)(l) or article 93(3) or for reasons set out in article 97 – the obligation is on the State to immediately consult. It is only at that stage – after the transmission of the request – that the views of Kenya and any prohibitions under national law should properly be raised, with the onus being on the State to demonstrate their applicability. To do otherwise and allow for premature intervention by the requested State, weakens the structure of Part 9, tipping the delicate balance struck, in favour of States over the Court. There is also a danger that the burden will shift to the Prosecution or Defence (depending on which Party seeks assistance) to rebut the arguments raised by the requested State, prior to the issuance of the request for cooperation. This approach constitutes a fundamental encroachment on the powers of the Court to transmit requests for assistance and it is not consistent with the intent or structure of Part 9 generally or article 93 in particular.

Assistance may not be refused because the offense is characterised as a political, military or fiscal offense⁴ nor is there a general provision allowing for refusal where execution of the request would be contrary to the *ordre public*, sovereignty or public interest of the State, as is often found in traditional mutual assistance treaties⁵.

The debates surrounding the negotiation of article 93 reflected again the division of principle as to whether the Statute should reflect a *horizontal* or *vertical* cooperation regime. In the end, no single approach prevailed in totality, but the scheme reflects a creative and unique scheme for cooperation, primarily of a *vertical* nature.

Article 93 provides a detailed and broad list of the forms of legal assistance, outside of surrender, available to the ICC. In addition, it recognizes the availability of other forms of assistance not specified in the list, subject only to the limitation of a prohibition under the law of the requested State.

The general obligation of any State Party to cooperate with the Court, set out in article 86 of the Rome Statute, clearly applies to article 93. In addition, the opening phrase of article 93 para. 1 requires that States Parties comply with requests from the Court for the assistance outlined in paragraph 1. This obligation, which is part of the overall scheme for cooperation

⁴ Article 2 of the European Convention on Mutual Assistance in Criminal Matters, 472 UNTS 185 for instance, states that a State Party may refuse assistance if the request concerns an offence which the requested Party considers a political or a fiscal offence.

⁵ See, for example, United Nations Model Treaty on Mutual Legal Assistance in Criminal Matters, UN Doc. A/CONF.144/28/Rev.1, p. 75, article 4; Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, 1977, UST 2019. Assistance in Criminal Matters, 1977, UST 2019.

in Part 9⁶, is fundamental to the effectiveness of the cooperation regime, as it details precisely what is included in the full cooperation obligation of article 86. The States Parties are required to comply with requests from the Court for the types of assistance which are listed in paragraph 1 (a)–(k). In addition, the Court can seek other types of assistance, not explicitly referred to in the catalogue in paragraph 1 by virtue of subparagraph (l). This subparagraph recognizes that other forms of assistance may be sought and can only be refused in the circumstance where that assistance is prohibited under the law of the requested State.

- 10 In addition to these fundamental provisions, article 93 covers an array of important practical issues. It provides for specialized procedures such as safe conduct assurances and temporary surrender. It addresses the issue of confidentiality with respect to documents or information received and provides for a procedure in the case of competing requests. Within this article there is also a provision for cooperation by the Court with States.

Overall, article 93, combined with the general obligation of article 86, provides for a comprehensive cooperation regime for the Court to rely upon in gathering evidence and information for its investigations and prosecutions.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Chapeau

- 11 a) ‘States Parties shall ... comply with requests by the Court’. By this phrase, all States Parties are obliged to comply with requests by the Court. This provision does not formulate a general obligation on the States Parties to cooperate with the Court as do articles 29 and 28 para. 1, respectively, of the Statute for the ICTY and ICTR. However it is the combined effect of article 86 (general obligation to cooperate), article 87 (authority for Court to make requests for cooperation) and this phrase mandating compliance, which makes Part 9 a broad scheme for obligatory cooperation with the Court. This phrase also makes it clear that assistance has to be provided on the basis of a request issued by the Court. The Statute does not call for a direct or spontaneous transfer of information from a national authority to the Court or vice versa though such a transfer may be very helpful and is not prohibited by article 93.
- 12 The Court summarily and rightly has dismissed an alarming argument by the Government of Kenya in the *Kenyatta* case⁷ that the Prosecution has no independent authority to issue requests for cooperation under the Statute. The Chamber found that a restrictive interpretation of the term ‘the Court’ in article 93 was not rationally sustainable and would be inconsistent with the division of statutory mandates in the Statute and the efficient and effective functioning of the Court. The Trial Chamber made note of the various relevant statutory provisions, in particular article 34 which defines the constituent organs of the Court to include the Prosecution, as well as the responsibilities of the Prosecutor for investigations and prosecutions under article 54 including paragraph 3 (c) which specifically authorizes the Prosecution to seek the cooperation of States. Turning to article 93(1) which was at issue in the case, the Chamber noted the language used (‘comply with requests by the Court to provide the following assistance in relation to investigations and prosecutions’) and concluded that if ‘read in light of article 34 of the Statute and the explicit mandate of the Prosecution, is sufficiently clear to confirm the independent authority of the Prosecution to make requests for cooperation⁸.’ Support from the drafting history was also referenced. Importantly, the Chamber specifically

⁶ See article 87.

⁷ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-908, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014.

⁸ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-908, Decision 31 March 2014, para 27.

dealt with the argument advanced for the need for judicial intervention in the request for assistance. This argument is particularly troubling given it is reflective of a requirement that flows primarily from one legal tradition (civil law) while the Rome Statute is designed to blend elements of different traditions, as pointed out by the Trial Chamber. The Chamber drew a distinction between articles which require judicial intervention – such as article 89 on arrest and surrender where a warrant must be issued – and article 93 where there is no such requirement. The Chamber also noted the recognition of the authority for different organs of the Court to present the requests including the Prosecution, as reflected in article 93(5) and (6) of the Statute, Rule 176(2) and Regulation 109. Interestingly, the Chamber went on to note that if national procedures relied on in accordance with article 93(1) and article 99(1) of the Statute require judicial intervention that should be engaged at the national level, in a manner which facilitates and does not impede execution of the request.

Having concluded that the request met the specificity requirements factually, the Chamber held that the Prosecution has independent authority to make cooperation requests under article 93(1) of the Statute and the request in the case was validly issued.

b) ‘accordance with the provisions of this Part and under procedures of national law’. For assistance between the Court and the States Parties, Part 9 of the Statute provides the necessary legal framework. Requests for assistance by the Court will be executed in accordance with Part 9 and pursuant to the procedures of the national law of the requested State Party. The phrase the ‘procedures of national law’ was inserted as part of the general compromise on the broad issue in Part 9 of the role of national law⁹. This reference to the *procedures* of national law, in combination with the obligation to comply, was carefully crafted to ensure that process under national law could be used to execute a request but not to refuse it. 13

c) ‘assistance in relation to investigations or prosecutions’. Paragraph 1 (a)-(k) sets up a detailed list of the various types of assistance to be provided to the Court. It is qualified by the words ‘in relation to investigations or prosecutions’ which were included to restrict the specific obligation to comply with the request, to the circumstances where the Court is conducting an investigation or prosecution¹⁰. 14

While the Court may seek assistance on a broader base, for example, for cooperation in protecting witnesses in a particular geographic region, when that request does not relate to an investigation or prosecution and States are obligated by article 86 to cooperate fully in such matters, the specific obligation to comply is limited to the investigation or prosecution context. At the same time, the reference is to both stages, so similar to modern mutual assistances regimes¹¹ the request can be made at the investigative stage, before any charges have been laid or in this instance before any warrant of arrest has been issued.

The list of types of assistance was drawn to a great extent from the UN Model Treaty on Mutual Legal Assistance in Criminal Matters¹² and the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances¹³. The wording does not focus solely on legal assistance but refers broadly to any type of assistance, including measures that are not of a purely legal character such as, for instance, provision of space and the necessary infrastructure to conduct inquiries on the territory of the requested State. 15

2. The different subparagraphs

a) ‘identification’, ‘whereabouts of persons’ and ‘location of items’. The provision refers to the identification of persons and to the investigation of their whereabouts. No distinction is made whether the person is a suspect, a victim or a witness. 16

⁹ For a comprehensive treatment, see commentary on article 88.

¹⁰ Cf. article 86, mn 11–14.

¹¹ See Bassiouni (ed.), *International Criminal Law*, Vol. II: Procedure 159 *et seq.*

¹² UN Doc. A/CONF.144/28/Rev.1, article 1.

¹³ UN Doc. E/CONF.82/15, article 7.

- 17 The obligation of States Parties to comply with requests to identify the location of items is rather vague. The use of the word 'location' suggests a request to check on or find items such as vehicles or objects sought for the purpose of search and seizure. It also appears to cover finding pieces of evidence in investigations and criminal proceedings. The use of the word item restricts this subparagraph to mobile objects only.
- 18 **b) Evidence taking and the production of evidence.** The wording pertains to any form of evidence. It could be the physical examination of a person, the taking of a blood sample, for instance, as well as a more general inquiry. Because of the very broad formulation, the question arises whether the provision operates as a catch-all clause covering also, e.g., intrusive and coercive measures. A systematic interpretation must yield a negative answer. Not only would the specific reference to searches and seizures in *littera h* be superfluous under such a construction, but also, and more importantly, such a wide interpretation would render *littera l* more or less meaningless. In fact, it was the agreed understanding during the negotiations that modern intrusive measures such as, e.g. telephone interception, would fall under the latter provision.
- 19 Given the absence of an international subpoena power, this provision is of particular importance in that it obligates States Parties to assist the Court in obtaining the testimony of witnesses under oath. This type of assistance is specifically referenced making it clear that the Court can request, and States Parties must provide, the testimony of witnesses necessary to the Court. There is also explicit reference to the fact that the production of evidence includes expert opinions and reports necessary to the Court to ensure that such material clearly falls within the scope of the obligation to assist. Both of these specific references are made to alert States Parties to this special form of evidence that may be requested by the Court under the Statute. The duty of States under *littera b* extends to the use of coercive powers, where necessary¹⁴. If evidence is gathered through an interview, in conducting the same the requested State must observe the guarantees enshrined in article 55(1). In terms of the procedures to be followed, article 99(1) would apply and while the procedures of national law would form the legal starting point, the Court could specify the manner in which it would like the request executed *i. e.* compelling testimony to be given via video link, allowing for verbatim transcription, permitting ICC prosecution and defence lawyers to directly question the witness. Such a request would have to be complied with, absent a prohibition under national law.
- 20 Again due to the absence of a State duty to compel witnesses to appear and testify before the Court, it will often wish to avail itself of the possibility to conduct a witness interview through video link from The Hague to the location of the witness. Despite its foreseeable practical importance, this technique to take and to produce evidence has not received an explicit treatment in article 93. In marginal no 33 of the second edition of this commentary, the view was argued that the taking of witness testimony by the Court through the establishment of a video-link from The Hague to the location of the witness falls under *littera (l)* of article 93, but exceptionally without the possibility for the State Party, on whose territory the witness is present, to rely on a prohibition under its national law to conduct a witness interview by video-link. The Appeals Chamber¹⁵ has reached the same result, but it has derived it from *littera b* of article 93(1). According to the AC, this provision covers not only requests that a State Party itself take evidence, but also the taking of evidence on a State Party's territory, either by the Court sitting in situ or by way of video-link. While this broad interpretation of *littera b* instead of recognising *littera l* as *sedes materiae* has perhaps not

¹⁴ The existing implementing legislation confirms this interpretation; see Krefß and Broomhall, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. 2 (2005) 527.

¹⁵ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09.01/11 OA 7 OA 8, Judgement on the Appeals of William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', Appeals Chamber, 9 October 2014, para 130.

been compellingly explained by the AC, its decision is to be accepted. This finding is important not only with respect to the taking of evidence via video-link but also in affirming the obligation on States through the provision of the Statute itself to provide the testimony of witnesses. This convincingly countered submissions made during the proceedings that only voluntary appearances were contemplated in the regime under article 93¹⁶. In that respect, the AC corrected the reasoning adopted by the TC which had premised its analysis and conclusion in favor of a subpoena power on broad references to international law, despite the order of applicable law set out in Article 21¹⁷. The AC, however, considered¹⁸ that it was incorrect to explore ‘implied powers’ or ‘customary international criminal procedure’ with reference to the compulsion of witnesses given that the Court’s legal framework provides for a conclusive legal basis for the same.

This subparagraph makes reference to both the taking of evidence and the production of evidence for very practical reasons. There is no legal difference between the two notions used in the Statute. In practice, however, the distinction is between evidence already existing, such as bank or corporate records, which need only be produced and other evidence, such as a statement or the testimony of witness, which is not pre-existing and has to be ‘taken’. The two phrases make it clear that the Court can request both types of assistance.

c) ‘**The questioning of persons**’. This provision makes it clear that the Court may request the questioning of the suspect or accused. The obligation was carefully crafted to mandate that States Parties must permit the questioning of the person but not to oblige compelled answers from the suspect or accused, in violation of the protection against self incrimination, which is fundamental to many States. Thus, subparagraph (c) uses different language than (b), because the obligation under the latter includes an obligation to actually obtain evidence from the person – through compulsion or otherwise.

This subparagraph does not stipulate how the inquiry should be conducted. There are no rules specifying whether the questioning must be executed in a court before a judge or could be undertaken by the national police or a district attorney. However, the guarantees listed in article 55 and, in particular, in its paragraph 2 must be observed. In terms of the procedures to be followed, article 99(1) would apply and while the procedures of national law would apply, the Court could specify the manner in which it would like the request executed *i. e.* questioning before a judge and that request would have to be complied with, absent a prohibition under national law¹⁹.

d) ‘**The service of documents**’. The word ‘documents’ covers all forms of writs and judicial records, as well as any other documentation. The subparagraph does not refer to the means of transmission of the documents. Regarding current practice in legal assistance²⁰, the service may be effected either by simple transmission to the person to be served or in the manner provided for under the law of the requested State Party, for the service of analogous documents, including regular postal service²¹. Again, it is open to the Court to specify in the request the desired form of transmission. Regulation 31, sub-regulations 3 of the Regulations of the Court introduces the concept of personal service of document for specific important procedural documents including, in particular, warrants of arrest, summonses to appear and documents containing the charges, and Regulation 31, sub-regulation 4 specifies the then

¹⁶ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision 17 April 2014 para 25.

¹⁷ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision 17 April 2014, paras 61 -93.

¹⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11 OA 7 OA 8, Judgement on the Appeals of William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’, Appeals Chamber, 9 October 2014, para 130.

¹⁹ *Cf.* article 99, mn 11.

²⁰ See article 7 para. 1 of the European Convention on Mutual Assistance in Criminal Matters.

²¹ See discussion in the Manual on the Model Treaty on Mutual Assistance in Criminal Matters, United Nations, *IREvCrimPol* Nos. 45 and 46, p. 45 (1995).

applicable requirements of prove. Regulation 110 clarifies that this scheme will have to be implemented in accordance with article 93(1) (d) and article 99(1).

- 25 e) ‘Facilitating the voluntary appearance’. The term ‘to facilitate’ connotes voluntariness and excludes an obligation on the part of the State Party to provide sanctions according to its national law, if a witness or an expert refuses to appear before the Court. This constitutes a serious weakness within a system of international criminal justice wherein the Court lacks direct enforcement power, while being built upon the aspiration that the testimony of a witness a trial shall be given in person (article 69(2))²². However, in such instances, the evidence would still be available to the Court by virtue of subparagraph (b) which permits the taking of evidence in the requested State.
- 26 As discussed, the Appeals Chamber has endorsed the position taken in this commentary in finding an obligation on the part of States to compel the testimony of witnesses in response to a request from the Court²³. Moreover, it is clear from the drafting history that the concern which led to the emphasis on voluntariness in this littera and in article 93(7), was not with the compulsion of witnesses to appear to testify generally, but rather compelling witnesses or others to travel across international borders²⁴.
- 27 The provision leaves open the scope of the obligation of States Parties, to ‘facilitate’ the voluntary appearance of witnesses and experts before the Court. As a rule, it means to encourage a witness or an expert to appear before the Court. This does not include bearing the costs of the trip of a witness or an expert to the ICC. Costs are covered by article 100. Yet, a number of States have taken a very encouraging approach to implement the duty in question and have included special provisions on the facilitation of the voluntary appearance of witnesses which in some cases include the right of the witness to (advance) compensation for losses incurred as a result of his or her travel to the Hague²⁵.
- 28 One of the most controversial rules negotiated was Rule 74 on self-incrimination which goes some way to translate the privilege against self-incrimination along the lines of the ‘immunity from use-approach’²⁶. Part of the compromise achieved through the discussions of that issue is reflected in Rule 190 which mandates that any request under article 93 paragraph 1(e) for the voluntary attendance of a witness before the court must include as an annex an instruction relating to Rule 74. This requirement in rule 190 was motivated by concerns that a person must fully understand the nature of the self-incrimination protection that will be available to him or her before making a decision on attendance.
- 29 f) ‘The temporary transfer of persons as provided in paragraph 7’. This was one of the few subparagraphs of article 93(1) which remained bracketed in the Draft Statute²⁷, primarily because it was not a concept that many states were familiar or comfortable with. In order to allay some of the concerns, a separate paragraph which details the procedure for this type of assistance was included as paragraph 7. The provision covers only those persons who are in custody of the requested State Party. Other persons could not be transferred by the requested State Party, but rather would fall within subparagraph (e).
- 30 g) ‘The examination of places or sites’. States Parties are obligated to comply with requests to examine sites and places on its territory. The specific reference to exhumation and examination of grave sites was included to highlight what is, regrettably, one of the most

²² For a pertinent critique, see Sluiter, *International Criminal Adjudication and the Collection of Evidence* (2002) 346 *et seq.*; see also Krefß (2003) 1 JICJ 616.

²³ *Prosecutor v. Ruto and Sang*, ICC-01/09.01/11 OA 7 OA 8, Decision 9 October 2014, para. 120.

²⁴ *Prosecutor v. Ruto and Sang*, ICC-01/09.01/11 OA 7 OA 8, Prosecution consolidated response to Mr. Ruto and Mr. Sang’s appeals against the ‘Decision on the Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’, Prosecution, 9 October 2014, para 24.

²⁵ *Ibid.*

²⁶ See Krefß, in: Fischer *et al.*, *International and National Prosecution of Crimes under International Law* (2001) 326 *et seq.*

²⁷ A/CONF.183/2/Add.1, p. 170.

important and common types of assistance which the Court may seek. This particular subparagraph was included only at Rome and it was developed during the discussions of the broader issue of on site investigations²⁸.

h) ‘The execution of searches and seizures’. The Court may request searches and seizures. 31
The provision is general in nature, such that the search and seizure can be sought with respect to a variety of locations, including both businesses and residences. Such requests will be executed according to the procedures of the national law of the requested State. However by virtue of article 88, all States Parties must have a procedure in place for search and seizure. Thus, a State Party cannot refuse a request for search and seizure on the basis that the measure is prohibited under the national law of the requested State.

i) ‘The provision of records and documents’. According to this subparagraph, the Court 32
may demand the transmission of records and documents of States Parties. This is a general mandate for the production of all types of documents or records.

j) ‘The protection of victims and witnesses’ and the ‘preservation of evidence’. In cases 33
under investigation or prosecution by the ICC, the protection of victims and witnesses is primarily the responsibility of the Court. However, any such protection may require the assistance of States Parties, in particular, if the victims and witnesses reside or have taken refuge in that State. The provision does not specify what form of protection measures may be requested. Thus, a State Party may be obligated to adopt new measures to protect victims and witnesses, in order to comply with a request, if its national law does not provide for protection programs.

The preservation of evidence refers to steps which may be necessary to ensure that certain 34
evidence will be available for use by the Court. The types of measures that may be requested are not specified, leaving the Court some flexibility. The requested State, by virtue of article 88, must have procedures available for the preservation of evidence generally, but as the particular approach to preservation are not specified, the requested State also has the flexibility to determine the approach to be adopted in preserving the evidence.

k) ‘The identification, tracing and freezing or seizure of proceeds, property and assets 35
and instrumentalities of crimes’. These measures are an essential part of modern international cooperation. This provision obligates States Parties to have mechanisms in place which will allow for the freezing of any of the listed items, to ensure that they are available should the Court ultimately order forfeiture of them. This subparagraph is related to article 77(2)(b) which recognizes forfeiture as a possible Court imposed sanction. In this latter context, the instrumentalities of crimes had been deleted towards the end of the negotiations and while an according change was not made in *littera k*, a harmonious interpretation should be achieved through a systematic interpretation that precludes the Court from making a request for the restraint of instrumentalities. However, it would be open to the Court to apply under this subparagraph as well as subparagraph (j), to have instrumentalities traced and restrained in order that they can be preserved for evidentiary purposes. In addition, given that the Court may interpret the provisions on forfeiture of proceeds of crime to include presumptions with respect to assets and to allow for substituted assets, it is also appropriate to restrain instrumentalities with a view to ultimately fulfilling any such orders²⁹.

According to article 57(3)(e) the issuance of a warrant of arrest or a summons to appear 36
under article 58 constitute the earliest moments in the proceedings as from which on a request under *littera k* may be made. A request under *littera k* may also be made in conjunction with article 75 para. 4 to secure the enforcement of a reparation order to be

²⁸ See article 99 para. 4.

²⁹ [http://www.imolin.org/pdf/imolin/Model_Provisions_accessed 16 December 2014](http://www.imolin.org/pdf/imolin/Model_Provisions_accessed%2016%20December%202014).

made under article 75 para. 2. A request under *littera k* in conjunction with article 75 para. 4 can only be made, though, after the conviction of the person concerned³⁰.

- 37 I) ‘assistance ... not prohibited by the law of the requested State’. In addition to the listed types of assistance, the States Parties are obligated to grant any type of assistance to the ICC that is not prohibited by their national law. This ‘catch all’ provision was included to accommodate emerging or varied types of assistance which might be required in any particular case. However, in fairness to States Parties, as the type of assistance is not specified under this paragraph, it would not be appropriate to place a general obligation on a State to comply with such requests, when the nature of the obligation cannot be specified. Thus, the obligation is limited to that which is not prohibited under national law. TC IV in deciding on a defence application for the transmission of a request for cooperation to Sudan³¹ endorsed this explanation of article 93(1)(l). Assistance under *littera l* includes the intercept of communications, the provision of forensic/DNA and other specialist expertise as well as the freezing of assets for the specific purpose (not covered by *littera k* to secure the arrest of a person sought³². Other possible forms of cooperation may consist in the provision of logistical support, such as the transportation of a suspect.
- 38 As indicated above (see mn 20), the Appeals Chamber has decided that a request by the Court to conduct a witness interview through the establishment of a video-link from the Hague to the location of the witness also falls within *littera b*. In the second edition of this commentary, it had been argued that the same result was more convincingly reached on the basis of a special interpretation of *littera l*. While the Appeals Chamber’s preference for a broad interpretation of *littera b* was perhaps not compellingly explained, the practical result is correct and so there is no point not to accept the course chosen by the Appeals Chamber.

II. Paragraph 2: Authority to provide an assurance not to be prosecuted, detained or subjected to any restriction of personal freedom by the Court

- 39 The provision is similar to articles in bilateral and multilateral mutual assistance treaties³³, which provide that a witness or an expert, appearing in a requesting State Party by virtue of the applicable treaty, shall not be prosecuted or detained or subjected to any restriction of personal liberty in respect of acts or convictions anterior to his or her departure from the territory of the requested State.

Under this paragraph, persons who appear before the Court to provide testimony or other assistance may receive such a protection from the Court. However, unlike other conventions or treaties, the application of the protection is not automatic. The discretion for the Court to decide whether or not to grant safe conduct was inserted in the Statute at Rome, after discussion of the proposed language in article 91 para. 7 (d) of the Draft Statute³⁴. It was determined that there may well be situations where it would be unacceptable for a person to be able to appear before the Court, protected, in the face of outstanding charges against him

³⁰ For this reason, the motivation of the two requests made in *Prosecutor v. Lubanga Dyilo* lends itself to a misunderstanding in that it (also) refers to article 75; cf. Demande adressée à la République démocratique du Congo en vue d’obtenir l’identification, la localisation, le gel et la saisie des biens et avoirs de m. Thomas Lubanga, ICC-01/04-01/06, 9 Mar. 2006, p. 2 *et seq.*; Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of mr. Thomas Lubanga Dyilo, ICC-01/04-01/06, 31 Mar. 2006, p. 2 *et seq.*

³¹ *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan, Trial Chamber IV, 1 July 2011, para 19.

³² For a so motivated request in the context of the ICTY, see *Prosecutor v. Slobodan Milosevic et al.*, IT-02-54, Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999, para. 29.

³³ See, for example, European Convention on Mutual Assistance in Criminal Matters, article 12 para. 1; United Nations Model Treaty on Mutual Assistance in Criminal Matters, article 15.

³⁴ A/CONF.183/2/Add.1, pp. 171 *et seq.*

or her. Thus, it is for the Court to decide if or when to grant the protection. Like other similar provisions this type of immunity, provided by the Court, does not bind the requested State Party.

Rule 191 provides detail on the application of this Article by specifying that it is the Chamber dealing with the case, either on its own motion or upon the request of the prosecutor, defence or the witness shall decide whether or not to issue the assurance. It further specifies that the views of the Prosecutor and the witness should be taken into account before a decision is made.

III. Paragraph 3

1. Execution of a particular measure of assistance

Article 90 para. 2 of Draft Statute³⁵ contained an option of specified grounds of refusal for requests for other types of cooperation; subparagraph (b) of that option allowed refusal in circumstances where the authorities of the requested State would be prohibited by national law from carrying out the requested action in similar circumstances and subparagraph (c) which, in part, recognized refusal where *ordre public* or other essential interests would be prejudiced. Both grounds of refusal were the subject of heated debate. Those in favour of a horizontal approach to cooperation strongly advocated for their inclusion, as a necessary protection for the requested State. Those supporting a vertical system saw such a wide discretion to the requested State as completely contrary to the principle of effective cooperation and fundamentally unacceptable.

As with other grounds of refusal³⁶, the discussion of this issue ultimately focused on the underlying concern which these grounds were designed to address and then on finding an alternative solution to address the concern. What the discussion revealed, in this instance, was the concern of States about requests, which in certain specific circumstances, could come into conflict with fundamental principles of the legal system in the requested State. For example if the request from the Court would require compelled testimony which would violate a fundamental privilege such as that between a solicitor and client.

Paragraph 3 was included as a flexible alternative to the proposed broad, categorical grounds of refusal in the Draft Statute. It was included as a part of a package compromise, conditional on the deletion of the two grounds of refusal mentioned above. Given the strong opposition to grounds of refusal from those States advocating for a vertical system of cooperation, this paragraph was drafted in very circumscribed terms to ensure that it would have narrow application and a limited impact on the effectiveness of the cooperation regime.

The opening phrase acknowledges that a particular request made according to paragraph 1 (a)-(k) may conflict with national law. As the Court has wide discretion in formulating a request and in specifying what measures should be taken, the execution of a measure in certain circumstances could violate national law. Because article 88 requires that States Parties must have procedures available for all forms of cooperation listed in article 93, the provision is carefully drafted to reflect that it must be the *particular* measure asked for in a *specific* request which creates the problem. It cannot be that the form of cooperation generally *i.e.* compelling a witness to testify, is prohibited. Rather, it must be that in the specific circumstances, the measure is prohibited, for example, compelling a solicitor to testify about matters protected by solicitor- client privilege. In addition, it is not an absence of procedure for the particular measure which can form the basis of refusal. The requested State Party must be able to identify an actual prohibition at law.

Finally, the requested State Party may only resort to this paragraph where the requested measure is prohibited on the basis of an *existing, fundamental legal principle of general*

³⁵ A/CONF.183/2/Add.1, p. 169.

³⁶ Cf. article 89, mn 5.

application. This restriction has several related components. The prohibition and underlying legal principle must be in existence already. If there were no such limitations, a State Party could introduce legislation to prohibit certain investigative measures with respect to the Court, for instance, the provision of documents from national archives or the transmission of judicial records. In addition, it must be a *fundamental* principle which underlies the particular prohibition. It is not every prohibition including those which can be easily changed, which can be relied upon, the prohibition must rather possess a constitutional or quasi-constitutional position within the legal order concerned³⁷. While States Parties retain a certain margin of appreciation as regards the fundamental character of any prohibition concerned, the Court will have to decide whether the State's assessment remains within legitimate confines. Finally, the principle must be one of *general* application in the law of that State and not restricted to the context of the Court.

This provision was drafted in this limited way to balance the valid interest of States in preserving the fundamental aspects of their legal systems, with the interest of the Court in receiving a wide measure of assistance from all States, unhampered by the procedural and legal principles of individual States.

- 44 In its decision on a revised cooperation request presented by the Prosecutor in the Kenyatta case, the Trial Chamber importantly found that practical or administrative difficulties with effective execution did not equate to a prohibition on the basis of a fundamental legal principle of general application as contemplated in Article 93(3). While such circumstances might merit a discussion as to other ways in which the request might be executed, it did not justify non execution or invalidate the request³⁸.

2. Consultations to resolve the matter

- 45 Another important limitation of this paragraph is that, even if the requested measure is prohibited by the national law in accordance with the opening phrase, the requested State Party does not have the right to deny a request by the Court. This provision underscores the obligation of States Parties to comply with requests by the Court. The underlying assumption is that requests by the Court in principle cannot be denied. Thus, when these circumstances arise, the requested State Party is obliged to consult with the Court.

3. Consideration whether 'assistance can be rendered in another manner or subject to conditions'

- 46 The wording stresses the wide flexibility of the regime of legal assistance under the Statute. States Parties and the Court are supposed to cooperate in order to make the requested assistance possible. This provision, on consultation and pursuit of options, emphasizes the presumption that both the Court and the State will act in good faith and try to find acceptable solutions. In this particular context, both parties are obligated to try and find a way for overcoming the problem under domestic law. For example, if there is an issue of solicitor client privilege arising from the search of a lawyer's office, it may be that the request for a search can still be executed, with a condition that the documents seized will be vetted for privilege by a judicial authority.
- 47 The Lubanga TC peripherally considered article 93(3) in the course of granting two applications for leave to appeal brought by States – the Netherlands and the DRC. In light of the apparent lack of jurisdiction to grant the appeal of the States in accordance with article 82(1) d, the TC looked to various provisions of the Statute which supported the importance of considering the views of States and resolving conflicts which could impair the international

³⁷ Sluiter, *International Criminal Adjudication and the Collection of Evidence* (2002) 161; the picture emerging from the implementing legislation remains rather unclear; see Krefß and Broomhall, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. 2 (2005) 531.

³⁸ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-937, Decision on the Prosecution's revised cooperation request, Trial Chamber V (B), 29 July 2014, para 34.

cooperation regime of the Court. In that context the TC referenced article 93(3) in support of that general principle. However, the interpretation of article 93(3) applied by the Chamber appears erroneous in two respects. The TC seems to suggest that article 93(3) was applicable to the facts of the case in that the Dutch authorities would be required to render assistance for the return of witnesses to the DRC specifically by transporting them to the airport in contravention of fundamental principles. This view is not supportable given that article 93(3) is limited in application to particular measures of assistance detailed in a request presented under paragraph 1 of Article 93. Nothing on the facts suggested that such a request had been made. Further, the Chamber advanced the view that article 93(3) places an obligation on the Court to consult in the face of a prohibition under an existing fundamental legal principle, despite the plain language of the article which places that responsibility on the State³⁹.

4. Modification of the request as necessary

The text assumes that any request could be modified in order to comply with the requirements of the fundamental legal principles of the national law of the requested State Party and in most instances that will be the case. While the provision does not address directly the rare case where a request for a specific measure cannot be modified, there is an implication that in such a case, the Court may not be able to obtain the evidence from that State or at least, not in the form sought. 48

IV. Paragraph 4: Denial of a request in accordance with article 72

This provision is the only explicit reason for denial in the Statute. However, even if the request impacts on the national security of a State Party, the requested State is not permitted to simply deny compliance with the request. Article 72 of the Statute sets out a detailed procedure to be followed in such cases, before invoking this ground of refusal. In addition, if the Court ultimately concludes pursuant to article 72(7)(a)(ii) that the State is not acting in accordance with its obligations under the Statute in refusing the assistance, the matter may be referred in accordance with article 87(7). Thus, even with respect to this very sensitive area of concern to most States, there is a balanced solution which does not allow for a simple denial of the request. 49

The phrase ‘which relates to its national security’ makes it clear that national security is the only basis for the application of this paragraph. It is up to the requested State Party in first place to determine which issues are related to its national security. In that respect, it disposes of a rather wide margin of appreciation. However, the procedures under article 72 allow the Court an opportunity to assess the denial of assistance and to take some recourse in certain circumstances. 50

In light of the inherent tension between the regime set up in paragraph 4 in conjunction with article 72 and the need to conduct fair and efficient proceedings⁴⁰, it bears emphasizing that nothing prevents States Parties from enhanced cooperation in the context of paragraph 4. Finland provides a first encouraging example for such a principled decision⁴¹. 51

³⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2779, Decision on two requests for leave to appeal the ‘Decision on the request by DRC-D01- WWWW-0019 for special protective measures relating to his asylum application’, Trial Chamber, 4 August 2011, paras 16 and 21.

⁴⁰ For a powerful explanation of this tension, see *Prosecutor v. Tihomir Blaskić*, IT-95-14-AR108bis, Judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 47.

⁴¹ Eerola and Välimaa, in: Krefß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. 2: *Constitutional Issues, Cooperation and Enforcement* (2005) 82 *et seq.*

V. Paragraph 5: Consideration of assistance subject to specified conditions, or at a later date or in an alternative manner

52 The wording makes it clear that, given the legal obligation of a State Party to comply with a request by the Court, apart from the cases referred to in paragraph 4, the only circumstance where a request can be denied is that prescribed in subparagraph 1 (l) *i. e.* a type of assistance not listed in paragraph 1; before denying the execution of a request, the State Party must try to find a means to provide for the assistance as requested by the Court, notwithstanding the prohibition.

The use of conditions or a different approach to gathering the evidence are some of the options to be considered before any refusal.

53 The Court is not obligated to accept any conditions offered by the requested State. However, if the Court agrees to a particular condition it must abide by that condition. As a consequence, the requested State and the Court would negotiate about the measures to be taken, how the request would be phrased so that the requested State can comply with it and steps which the Court may have to take with respect to the evidence once it is provided.

VI. Paragraph 6: ‘promptly inform the Court or the Prosecutor of the reasons for such denial’

54 If the requested State denies compliance with a request on the grounds stated in paragraphs 4 and 1 (l), it has to inform the Court about the reasons for it so that the Court can assess their validity. The underlying assumption is that a request only be denied, after consultations and that both sides have explored all possibilities to solve the problem, before this step was taken.

However, this requirement will ensure that every option is considered, as there could be further consultations after the reasons have been provided.

VII. Paragraph 7: Temporary transfer

1. Request ‘for purposes of identification or for obtaining testimony or other assistance’

55 Provisions on the temporary transfer of persons in custody are found in many mutual assistance instruments, however the process is not a familiar one to all States and in practice such transfers are still relatively rare for most countries⁴². The most common use of this provision will be to transfer persons in custody for the purpose of testimony before the Court.

However, other purposes are included such as identification, which should be broadly interpreted to apply to identification of people through procedures such as line ups, as well as confrontation with other witnesses and the accused. The person may also be transferred for the purpose of physical examination or any other type of assistance.

The most complex part of a request of this nature will generally be the logistical arrangements for the transfer. Evidencing the nature of the challenge, the Court appears to have adopted a practice of employing a written agreement with the relevant State pursuant to article 93(7) which sets out the terms and conditions agreed with respect to the transfer⁴³. Rule 192 assigns

⁴² See article 11 para. 1 European Convention on Mutual Assistance in Criminal Matters; article 13 United Nations Model Treaty on Mutual Assistance; article 7 para. 1 Treaty on Mutual Legal Assistance between the United States of America and the Kingdom of the Netherlands, 1983 T.I.A.S. 10734.

⁴³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute.

the Registrar the responsibility for the physical arrangements and oversight of the transfer to and from the Court as well as for the supervision of the person while in the custody of the Court. It also provides that the transfer should be carried out in liaison with representatives of the host state. The person is given a right under this rule to raise any issues concerning the conditions of his or her detention with the relevant Chamber. This was intended to allow a prisoner an avenue to pursue with respect to his or her physical situation etc. but not to allow for any possibility of release from custody which is obviously a matter governed by the state from which he or she was transferred. Rule 193 fills in a gap that was left in the Statute in that no provision had been made for the transfer of witnesses who may be in a State but serving a sentence imposed by the Court. In such a case it would not be possible for the state to authorize the transfer to the Court. Under rule 193 it is made clear that article 93(7) does not apply. Rather the Chamber dealing with the case is authorized to order the transfer with the Registrar again empowered to oversee all the arrangements for the transfer. The rule further notes that as in the case of other temporary transfers, the person must be kept in custody and the time spent at the seat of the Court will be deducted from the sentence being served.

2. Freely given informed consent to the transfer

The temporary transfer of a person in custody depends upon an informed consent. The Court has required that the consent of the witness be obtained in writing⁴⁴. The requirement of informed consent requires that the person is notified about the purpose of the transfer and its legal and factual consequences. He or she must be given information on the right to object to the transfer. While this constitutes a widespread and sensible requirement in the inter-State context, it is far less evident in the specific context of international criminal proceedings for crimes under international law. In fact, and as already indicated above (see mn 21) the requirement collides with the power of the Trial Chamber under article 64(6)(b) to require the attendance of witnesses at trial so that they can testify in person in line with article 69(2). In line with the overall principle of interpretation to minimize incoherencies in different parts of the Statute as much as possible, a strong case can be made for the admission of an exception of the consent requirement in case of an order made by the Chamber under article 64(6)(b). In any event, it is fallacious to even broaden the scope of paragraph 7(a)(i) into a general individual right not appear before the Court (*cf.* mn 21).

3. Agreement of the requested State to conditions

The requested State may deny the transfer or subject it to conditions. This exception to the general rule that requests cannot be denied, recognizes the very special and sensitive nature of temporary transfers. In particular, the transfer of a person in custody always raises security issues and in some instances, the security risk may be too great to permit the transfer. Also, it is important to note that the denial of this particular form of assistance will not preclude the Court from obtaining the relevant evidence, in most instances, as the Court can request the taking of evidence from the person under paragraph 1 (b), as an alternative.

The Statute does not provide grounds for the denial of transfer; but the general obligation to cooperate would mandate the need for clear and serious reasons for any such refusal.

In the alternative to denial, the Court and the requested State may choose to consult about conditions that would have to apply to the transfer for it to proceed.

4. Remaining in custody and returning without delay

This provision ensures that a person who has been transferred to the Court temporarily will not be released from detention by the Court.

⁴⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Version publique expurgée de ‘Décision relative à la requête de la Défense de Germain Katanga tendant à l’amendement de la décision sur sa requête visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus’, Trial Chamber II, 3 May 2011, para 6.

- 59 The purpose of a temporary transfer is to allow the Court to proceed with its investigation or prosecution, by having a person transferred there even when they are in custody in the requested State. Accordingly, the person has to return to the requested State once his or her presence at the Court is no longer necessary. It is up to the Court to decide when the purpose of the transfer has been fulfilled. However, the wording does not exclude consultations between the requested State and the Court about the period of time within which the person should be sent back⁴⁵.
- 60 There have been several interesting decisions related to temporary transfer arising from the fact that witnesses transferred to testify have brought asylum claims in the Netherlands. The resulting conflict as between the obligation to return under article 93(7), the requirements of article 68 relating to security and the duty under article 21(3) to ensure interpretations consistent with human rights principles have been vexing for the Court.
- 61 In the case of Katanga and Chui, issues related to the asylum request by three witnesses in that case who had been transferred in custody from the DRC to testify were brought to the attention of the TC through *amicus curiae* applications. The Trial Chamber in its decision on the applications⁴⁶ held that through article 68 ‘the Statute unequivocally places an obligation on the Court to take all protective measures necessary to prevent the risk witnesses incur on account of their cooperation with the Court⁴⁷.’ At the time of the decision no agreement had been reached as between the Registry and Counsel for the witnesses as to whether they could be returned to the DRC without undue risk to their security. The Court called for additional information on that issue. Trial Chamber II went on to examine the implications of the asylum claim on the return of the witnesses. The Chamber considered the applicable human rights principles, including the right to an asylum claim, the ‘*non-refoulement*’ principle, and the right to effective remedy as enshrined in several human rights instruments⁴⁸. On the basis of these principles, the Chamber was of the view that with the pending asylum claims, it was unable at that time to apply article 93(7) of the Statute in a manner consistent with internationally recognised human rights principles as required by article 21(3) of the Statute. Specifically, the TC was of the view that the removal of the witnesses would interfere with their right to pursue the asylum claim. Further obliging the Dutch authorities to transport the witnesses to the airport would be requiring them to violate the *non-refoulement* principle. With the Court apparently acting as arbiter, ultimately assurances were obtained from the DRC which satisfied its concerns in relation to its article 68 responsibilities. As a result, on 24 August 2011 the Court issued a second decision⁴⁹ holding that there were no longer security concerns which provided a basis to delay the return of the witnesses to the DRC. At the same time, Trial Chamber II remained of the view that it was legally impossible to do so, because of the pending asylum claim and the human rights obligations related to the same⁵⁰. In its decision, the Chamber called on the Registry to carry out consultations with the Dutch authorities to try and resolve the situation but to no avail. As a result, the Court was caught in the situation where it no longer had a reason to retain custody of the witnesses as they had completed their testimony and security issues were resolved. At the same time, their return to the DRC was not legally possible given the pending asylum claim. In the opinion of Trial

⁴⁵ For similar provision see article 11 para. 1 of the European Convention on Mutual Assistance in Criminal Matters that provides that the requested State and the requesting State stipulate a period of time within the person transferred shall return to the requested State.

⁴⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Amicus Curiae application and on the ‘Requête tendant à obtenir présentation des témoins’, Trial Chamber II, 9 June 2011.

⁴⁷ *Ibid.*, para 61.

⁴⁸ Article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, and article 13 of the European Convention on Human Rights.

⁴⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Decision on the Security Situation of witness DRC-D02-P-0236, DRC-D02-P-0228 and DRCD02, Trial Chamber II, 24 August 2011. P-0350’, ICC-01/04-01/07-3128, 24 August 2011.

⁵⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3128, 24 August 2011, para 15.

Chamber II the appropriate conclusion was for the Court to maintain custody of the witnesses pending the asylum claim.

In January 2012 the witnesses filed a request for convening a Status Conference. The witnesses sought to be released from custody on the basis that the Court no longer had the authority to detain them and indicating that there was no Congolese detention order in place for them. In its decision⁵¹ Trial Chamber II noted that the power to detain flowed from article 93(7) and a combination of the Congolese detention order and the asylum claim pending in the Netherlands. Importantly, the Chamber recognized that it had no ability to review the detention of the witnesses by the DRC. The Trial Chamber correctly relied on the fact that the Congolese authorities had not advised as to any change in detention status and as a result the Court remained under an obligation pursuant to article 93(7) to hold the witnesses in custody. This finding was critical to the effectiveness of article 93(7) in this and future cases.

At the same time the Court recognized that it should facilitate the ability of the witnesses to participate in any Congolese proceedings. Evidently, this was a pragmatic addition by the Trial Chamber, given the unexpected length of detention of the witnesses in the Netherlands. As to the continued detention arising from the asylum proceedings, the Trial Chamber reiterated the need for the same but did recognize that the situation could not be maintained indefinitely. In an effort to move forward the Trial Chamber requested the Dutch authorities to advise if they were prepared to take custody of the witnesses and if there was an obligation to do so under the Headquarters agreement.

In these series of decisions Trial Chamber II had to ‘prioritize’ Statute obligations which could not necessarily be reconciled. Properly, the Chamber interpreted article 68 to place an absolute obligation on the Court to ensure the security of witnesses who have cooperated with the Court, giving that requirement precedence over the obligation to return under article 93(7). While arguably a limitation which could in future weaken potential cooperation in witness transfers, on balance primacy to protection of the security of the witnesses appears appropriate. Less convincing is the Trial Chamber’s analysis as to the requirement for the Court to retain custody in apparent breach of its article 93(7) obligations, premised on principles associated to asylum claims, which were outside of the Court’s purview. Moreover these were claims brought through the action of the witnesses, independent of their status as ICC witnesses and unrelated to their cooperation with the Court. The reasoning of the decisions appears to give insufficient consideration to the direct obligations on the Court under article 93(7) and to the potential resulting damage to that particular cooperation mechanism of temporary transfer.

Ultimately the issue came to the attention of the Appeals Chamber. In February 2013, the witnesses who remained in custody in the Hague filed an application to be released. This post-dated the severance of the Katanga and Ngudjolo cases and the acquittal of Mr. Ngudjolo on 18 December 2012. The Trial Chamber dismissed the request as inadmissible on 1 October 2013⁵² and the Appeals Chamber similarly dismissed the appeal⁵³ However, simultaneously, the Appeals Chamber issued an order of 20 January 2014 to enforce the cooperation agreement with the DRC⁵⁴ Interestingly, the Appeals Chamber considered that as there was an appeal pending before it by the Prosecution with respect to the acquittal of

⁵¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, Trial Chamber II, 1 March 2012.

⁵² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the application for the interim release of detained Witnesses DRC- D02-P-0236, DRC-D02-P-028 and DRC-D02-P-0350, Trial Chamber II, 1 October 2013.

⁵³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 A, Decision on the admissibility of the appeal against the Decision on the application for the interim release of detained Witnesses DRC- D02-P-0236, DRC-D02-P-028 and DRC-D02-P-0350’, Appeals Chamber, 20 January 2014.

⁵⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 A, Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute, Appeals Chamber, 20 January 2015.

Mr. Ngudjolo it had the jurisdiction to deal with any matters related to that appeal, *proprio motu* if necessary, and including the question of the detention of the witnesses. On that basis it went on to issue an order in which it addressed the status of the detention of the witnesses. The analysis of the Appeals Chamber clearly highlights the competing interests which included the obligations under the Statute, the impact on future requests for cooperation in temporary transfers, the adverse effects with the relationship with the host country and the applicable human rights principles relating to asylum and *non-refoulement*. Though recognizing the need to apply and interpret the Statute in conformity with international human rights standards as set out in article 21(3) of the Statute, the Appeals Chamber rejected that this required the Court to violate the requirements of article 93(7) to return the person to the requested State. The Appeals Chamber rightly noted the potential damage to cooperation relationships and the ability to obtain critical witness evidence from such a conclusion. Importantly, the Chamber also recognized its ability to detain must be related to proceedings before the Court and that its powers in that respect did not extend to detention related to an asylum claim. Noting that the transfer of detained persons is a matter to be coordinated with the host state under the Host State agreement and rule 192, the Court was of the view that it was for the Netherlands to determine if it needed to take control of the witnesses in the course of those transport arrangements, until their asylum claims had been fully adjudicated. On this basis the Appeals Chamber ordered the immediate implementation of the requirement in article 93(7)(b) to return the witnesses in consultation with the Dutch authorities.

- 65 The interpretation of the Appeals Chamber is consistent with wording and intention of article 93(7) given that the return of the witness upon fulfillment of the purpose of the transfer – in this case testimony – is an essential component of a temporary transfer arrangement. While the asylum claims evidently complicated the situation, it appears appropriate that the decisions regarding the right to an effective remedy and the principle of *non-refoulement* should rest with the responsible authority which is the Host State, as opposed to the Court. The balance set by the Appeals Chamber is an appropriate one which gives proper weight and consideration to the Court's obligations under article 93(7) and the potential damage to the cooperation regime from failing to fulfil those obligations. It also represented an elegant solution to the apparent conflict between article 93(7) and article 21(3) by properly assigning responsibility for the human rights concerns related to the asylum claim to the responsible authority – the State to which the claim has been presented.
- 66 Four months later, despite the order, the Registry had failed to comply, necessitating a second order from the Appeals Chamber requiring immediate action to return the witnesses to the DRC. As the Registrar's submissions were confidential it is not known what the specific hurdles to implementation were, but the competing interests arising from the refugee claims and the Court's obligations under the agreement must have been at the root of the dilemma.

VIII. Paragraph 8

1. Confidentiality of documents and information

- 67 Documents and information available to the Court can only be used for the purposes of investigations and criminal proceedings⁵⁵. In addition, those documents and any such information have to be kept confidential, except to the extent the material must be disclosed within the context of the investigation or prosecution for which it was requested.

⁵⁵ The limited use of information only for the purposes of investigation and prosecution also pertains to personal data that has been transferred to the Court.

2. Transmitting ‘documents or information to the Prosecutor on a confidential basis’

Upon the request of the Court for the provision of documents, the requested State may 68
require that these documents be kept strictly confidential and not be used as evidence in
court or disclosed in any other manner. But it can be used as a source for pursuing other
leads in the investigation.

3. Subsequent disclosure of documents or information

The purpose of the provision is to allow for the disclosure of confidential data at a later 69
stage, *e. g.*, when the reason why the requested State claimed confidentiality is no longer valid
or if the use of the evidence becomes critical to the prosecution, such that it may now
outweigh the need for confidentiality. The requested State may authorize disclosure either at
its own initiative or upon request of the Prosecutor. In both cases, it is at the discretion of the
requested State whether the data will be disclosed. However, where the requested State is a
State Party, given the general obligation to cooperate with the Court, it is expected that if the
evidence is important, permission for disclosure would be given.

Disclosed data even if originally confidential can be used as evidence in the criminal
proceedings of the Court, in accordance with the Statute and the Rules.

IX. Paragraph 9

1. Competing requests, other than for surrender or extradition

a) **Consultation to meet both requests.** The provision only applies to requests for other 70
forms of assistance, not to requests for extradition or surrender as the latter are exhaustively
dealt with by article 90. It was difficult for the negotiators of the Statute to agree upon a
ranking of competing requests and in the case of other forms of assistance, unlike surrender,
in most instances the matter could be resolved by providing the requisite assistance to both
parties. For example, if a request is made for the production of the same documents, copies
can be provided to both requesting parties. Thus, this paragraph leaves the matter to be
resolved by the requested State, the Court and the requesting State in any single case.

In recognition of practical realities, the requested State shall try and comply with both
requests, in accordance with its international obligations deriving from this Statute and
multilateral or bilateral treaties between the requested State and the requesting State. If this
cannot be accomplished simultaneously, then postponement or conditions may be required.

b) **Resolving ‘in accordance with the principles established in article 90’.** Article 90 of the 71
Rome Statute establishes a detailed mechanism for dealing with competing requests for
extradition and surrender. If the competing requests for other assistance cannot be resolved
through the process outlined in (i), then the detailed provisions of article 90 will apply. For
the content of these provisions, reference is made to the commentary on article 90.

2. Information, property or persons subject to the control of a third State or an international organization

The requested State can only comply with a request, the execution of which is within its 72
responsibility. If the information, person or item required by the Court is subject to the
control of a third State or an international organization, the requested State is not obligated
to comply with the request. Instead it shall advise the Court of the problem and the Court is
then under an obligation to pursue the matter with the third State or international
organization. This provision recognizes that records or evidence sought may be within the

territory of a State, but outside of their control. Similar to article 98, this provision obligates the Court to pursue the request with the relevant controlling party.

X. Paragraph 10

1. Cooperation with and providing assistance to a State Party

73 This paragraph applies the article to requests directed to the Court by a State Party. The Court will provide assistance upon request only. While a State Party is obliged to comply with a request by the Court, the Court is not obligated to cooperate with a State Party. Pre-Trial Chamber II in considering a request for assistance submitted by Kenya to the Court pursuant to this article confirmed this noting ‘a literal reading of article 93(10) of the Statute makes clear that the Court is under no obligation to comply with a cooperation request submitted by a State. This is evident from the usage of the verb ‘may’ in the opening of article 93(10)(a) of the Statute⁵⁶.’ This discretion reflects a balance. States which advocated for mandatory assistance by the Court emphasized that the Court may have significant evidence for domestic cases. Other States noted that a mandatory requirement could place an onerous burden on the resources of the Court and could be used to disrupt the Court. The inclusion of a discretionary provision was a compromise of these two positions. Pre-Trial Chamber II went on to clarify that this interpretation did not mean that such requests would be automatically rejected. Rather, each request and its supporting material would have to be considered with reference to the provisions in the Statute and rules, and determined on its merits, a finding which is completely consistent with the discretionary nature of the power. The government of Kenya appealed the Pre-Trial Chamber decision but the Appeals Chamber dismissed it as inadmissible⁵⁷.

74 The Court will provide assistance only with respect to offenses within its jurisdiction⁵⁸ and to serious crimes under the national law of the requesting State. This is a further limit on the demands which can be made on the Court.

75 Rule 194 provides some procedural detail for the application of this paragraph by specifying that the request must be in or translated into one of the working languages of the Court. The request should be sent to the Registrar who will transmit it to the appropriate body within the Court. If a request is granted insofar as possible steps should be taken to execute it following any procedure outlined by the requesting state and allowing for relevant persons to participate in the evidence gathering process. This mirrors the important principles of cooperation which are captured in respect of State to Court assistance in article 99 para. 1.

Special concern was expressed about situations where the cooperation sought might touch on scenarios where protective measures have been adopted. Sub-rule 2 of Rule 194 addresses this point by requiring that the views of the Chamber that issued the measures and of the relevant witness or victim be taken into account before a decision is made on the request.

76 Pre-Trial Chamber II in considering the application by Kenya pragmatically restricted its capacity to rule on such matters to instances where the request is directed to the Chamber or where the Chamber’s intervention is necessary for statutory reasons such as those set out in rule 194(3) and (4)⁵⁹. In so doing, the Chamber relied on the use of the word ‘Court’ with its

⁵⁶ ICC-01/09-63, Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, Pre-Trial Chamber II, 29 June 2011 para 29.

⁵⁷ Decision on the admissibility of the ‘Appeal of the Government of Kenya against the “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence”’ ICC-01/09 OA, Appeals Chamber, 10 August 2011.

⁵⁸ Goia, *ibid.*, 90 *et seq.*, this should be construed broadly so as to include conduct within the meaning of articles 5 to 8, while remaining outside the Court’s jurisdiction *ratione loci, personae vel temporis*.

⁵⁹ Rule 194 (3) addresses cases where protective measures are applicable to the evidence sought and Rule 194(4) relates to material for which State consent is required.

constituent organs and the specific references to both the Prosecutor and Chambers in rule 194, in finding that a request for cooperation can be properly addressed to either. Logically, the Pre-Trial Chamber went on to restrict its ability to order cooperation to those instances where the material sought is in the possession of the Chamber. The Chamber properly accords full power to the Prosecutor to respond to any request which seeks information which is solely in the possession of the Prosecutor. This appears to be an appropriate and pragmatic approach to the discretionary power arising under article 93(10) as it gives authority over the relevant decisions to the organ of the Court which will be best placed to determine if it is in the interests of the Court to disclose the material. Also in terms of undertakings given to States, it ensures that the relevant part of the Court which received the information from States will be the body responsible to fulfil any commitments made in terms of the subsequent release of the material. Applying these principles to the particular case, the Chamber considered which statements, documents, evidence related to the post-election violence in Kenya – as sought – were actually in its possession. It noted in that regard that material presented by the Prosecution or disclosed to the Pre-Trial Chamber under rule 121(2) c would be material within its possession. In accordance with the plain language of the article, the Court found that for such a request to be granted certain requirements had to be met by the requesting State Party. The State Party must have either conducted an investigation, or be doing so with respect to conduct which constitutes a crime within the jurisdiction of the Court or a serious crime under national law. Also, the request must satisfy the remaining relevant requirements set out in articles 93(10) and 96 of the Statute, and rule 194 of the Rules relating to the requirements for the content of such requests. In the specific case, the Chamber was of the view that the ‘unsubstantiated Cooperation Request’ submitted by Kenya failed to meet the first requirement of demonstrating that an investigation had been or was being conducted. On that basis the request was rejected. As indicated, the analysis of the PTC in the case confirms the discretionary nature of decisions under this article, while calling for a reasoned consideration of the facts in each case. It also properly attributes responsibility to the relevant organs of the Court as discussed. Finally, it accords due and full weight to the statutory language in setting out the specific requirements which must be met by the requesting State before consideration can be given to the exercise of the discretion in favour of the request presented by that State.

Pre-Trial Chamber II entertained a second request for assistance submitted by the Government of Kenya⁶⁰. On this occasion Kenya sought the disclosure of material contained in public annexes or filings before the Court. The Pre-Trial Chamber rightly dismissed these claims, noting no authorization was required for such information which was in the public domain. With reference to the remainder of the request which sought confidential material, the Chamber rejected the request based on the Prosecutor’s update report and the Victims and Witnesses Unit’s security report, both of which supported ongoing security concerns with respect to witnesses and the leakage of confidential material. The Chamber, relying on article 93(10)(b)(ii) and Rule 194(3), specifically recognized that ‘a key requisite for the release or transmission of any documents within the Court’s possession is to ensure that such an act would not, *inter alia*, put at risk the safety and physical well-being of victims and witnesses’. The decision establishes that in the exercise of the discretionary power under article 93(10), a priority consideration will be the protection of victims and witnesses in accord with the overarching responsibility of the Court in that regard.

2. Scope of cooperation

a) Assistance provided under subparagraph (a). The list of types of assistance under subparagraph (b) is not exclusive. In principle, a State Party may request any form of

⁶⁰ Decision on the Second Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09-97, Pre-Trial Chamber II, July 12, 2012.

assistance. The examples mentioned only illustrate the most common forms of assistance that may be needed by a State Party.

79 **aa) Transmission of statements, documents or other types of evidence.** Evidence already gathered by the Court may be of use to a State Party in a domestic investigation or prosecution. This provision, which allows the Court to share such information, will avoid duplication of effort and resources.

80 **bb) ‘questioning of any person detained by order of the Court’.** A State Party may request the questioning of a person detained by the Court in order to use the record of the questioning in its court proceedings or use the statement obtained to further its investigation or prosecution.

The provision does not provide how the questioning should be conducted. The State Party may specify in its request the conditions that are relevant under its national law. In the absence of such specification, the Court will conduct the questioning in accordance with the rules applicable if the person was to be questioned for the purpose of an investigation or prosecution by the Court.

81 **b) Assistance under subparagraph (b) (i) a.** The provision relates to statements or documents obtained by the Court, which are requested by a State Party.

82 **aa) Documents or other types of evidence obtained with the assistance of a State.** If evidence is transmitted to the Court by any State, the Court is obliged under paragraph 8 (a) to keep the documents confidential, except as required for its investigation or prosecution. Thus, the State which has provided the documents has an expectation that the material will not be disclosed by the Court to a third State. This provision recognizes that and requires the consent of the State which provided the documents originally. On a practical level, this provision recognizes that States would not provide the Court with information if it had to fear that this information could be transferred to other States, without its consent. It also allows the Court to meet its obligations under paragraph 8, unless released from them by the original State which transmitted the information.

Sub-rule 4 of rule 194 further clarifies that it is the relevant body responsible to respond to the request – the Prosecutor or the Chamber – that must seek the written consent of the relevant state.

83 **bb) Evidence provided by a witness or expert ‘subject to the provisions of article 68’.** Witnesses and experts who provide the Court with information and documents may need special protection⁶¹. The provision takes into account that they may need the same degree of protection if the information provided is disclosed to a third State for the purpose of investigation and prosecution in that State and applies that protection accordingly.

3. Request for assistance from a State which is not a Party to the Statute

84 This provision is the basis for States not Parties to the Statute to seek assistance by the Court. The Court has the complete discretion to comply with such a request or not.

The Rome Statute does not cover a request for assistance to the Court by international organizations as they do not normally have the power to conduct criminal investigations and proceedings. However, it does not prohibit the Court from disclosing information to an international organization upon its request for the conduct of investigations in relation to an armed conflict. The compliance with such a request is at the discretion of the Court. If the Court agreed to comply, it has to follow the rules laid out in Part 9 and in their Rules as applicable.

⁶¹ See article 68.

Article 94

Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Literature: See Preliminary Remarks on Part 9.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1.....	4
1. Immediate execution interferes with different ongoing investigations or prosecutions.....	4
2. Postponement for a period agreed upon.....	5
3. Time limit.....	6
4. Immediate assistance subject to conditions.....	7
II. Paragraph 2: Preservation of evidence, pursuant to article 93, paragraph 1 (j)	8

A. Introduction/General remarks

As noted, one of the central issues in the Part 9 negotiations was grounds of refusal, with 1
some States advocating for no grounds of refusal; others for enumerated specific grounds.
One of the grounds in issue was reflected in the Draft Statute at article 90 para. 2 option 2
(e)¹, the need for a State to protect its own domestic investigations or prosecutions² by
refusing assistance, where it would interfere with an ongoing domestic matter. Two issues
were raised by this ground of refusal, which were ultimately addressed in this article and
article 95. The first was the appropriate remedy where there was an ongoing domestic matter,
different from that being conducted by the Court; the second the remedy in the case where
the requested State is conducting an investigation or prosecution of the same matter. While
article 95 covers all forms of requests under Part 9, article 94 only pertains to requests for
forms of cooperation other than surrender with article 89 para. 4 being its counterpart as far
as requests for surrender are concerned.

With respect to both issues, there was agreement that the appropriate remedy in either 2
instance would be some form of postponement, as opposed to refusal. As any interference with
an ongoing domestic matter will end upon completion of that matter, it is not appropriate for a
State to refuse assistance, since at a later time execution will not pose a problem. This position
was also consistent with general international mutual assistance practice as evidenced by article
4 para. 3 of the United Nations Model Treaty on Mutual Assistance³.

¹ UN Doc. A/CONF.183/2/Add.1, p. 170.

² As in the case of article 89 para. 4 the national proceedings must be genuine; *cf.* Krefß and Prost, article 89, mn 55.

³ UN Doc. A/CONF.144/28/Rev.1.

- 3 However, the controversial issue which remained was what limitations, if any, should be placed on the requested State's ability to postpone. Again the views diverged as to whether the requested State or the Court should have the ultimate control. In the end, the compromise achieved was, neither or both, depending on perspective, would have an automatic priority. Postponement is for a period of time 'agreed upon with the Court'. This language, specially chosen, connotes that both the Court and the State will take a reasonable approach and will be able to reach an agreement on the length of any postponement. Where the requested State clearly acts unreasonably, the Court may so determine⁴. The provision includes other requirements intended to keep the instances of postponement to a minimum, including a requirement that in no case can postponement extend past completion of the domestic matter and one that encourages the requested State to consider alternatives to postponement.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Immediate execution interferes with different ongoing investigations or prosecutions

- 4 This phrase relates to an instance where the case being dealt with in the requested State is different from the case to which the request by the Court relates. This, of course, raises the scenario of lesser offences permitting postponement. For example, if a person who allegedly has committed the crime of genocide is being investigated by the Prosecutor and is also suspected of having committed a robbery within the jurisdiction of the requested State, the requested State may postpone immediate execution of a request by the Court, if the execution of that request could impede criminal proceedings in the robbery case.

However, if the requested State is a State Party to the Rome Statute, while there is no specific statement in this provision, the general obligation of a State Party under articles 86 and 93 of the Rome Statute, leads to the implication that the requested State Party will seriously examine whether the case under investigation is of such a gravity that it justifies the postponement of the execution of a request by the Court.

2. Postponement for a period agreed upon

- 5 If a State Party is of the opinion that the execution of the request by the Court would interfere with the investigation and prosecution of a case pending in the requested State Party, it may consult with the Court about the postponement of the execution of the request. A State Party is not permitted to simply refuse assistance but is obliged to seek a solution in cooperation with the Court. The use of the term 'agreed upon with the Court' implies that the time of postponement must be agreeable to both Parties acting reasonably.

3. Time limit

- 6 In any event, the postponement of execution of a request by the Court cannot be for a longer period than necessary to complete the investigation and prosecution of the case in the requested State. The wording of sentence two lays out a guideline for the consultations under sentence 1 of the paragraph.

⁴ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003) 238.

4. Immediate assistance subject to conditions

In accordance with its obligation to comply with a request by the Court under article 93(1)(a) requested State Party has to examine all possibilities to execute the request before postponing. It will consult about the conditions with the Court. 7

If the requested State is not a State Party, it is not under an obligation to comply with a request. However, if it has decided to do so in principle, it should postpone the execution of the request only if there are no other options to accommodate its own interest in the investigation and prosecution of its case.

II. Paragraph 2: Preservation of evidence, pursuant to article 93, paragraph 1 (j)

If the immediate execution of a request by the Court is postponed, the risk is that evidence may no longer be available when the request eventually will be executed. In such a case, the Prosecutor may request the preservation of evidence pursuant to article 93(1)(j). While it is not explicitly stated, the very purpose of the provision implies that the requested State Party cannot postpone the execution of that request. The purpose of the provision is to balance out the interest of the Court in collecting valuable evidence by means of legal assistance on the one hand, with the interest of the requested State to conduct its own investigations without interference, on the other hand. 8

Article 95

Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Literature: See Preliminary Remarks on Part 9.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	3
1. Postponement because of an admissibility challenge pursuant to article 18 or 19	3
2. Orders for collection of evidence pursuant to article 18 or 19.....	18

A. Introduction/General remarks

- 1 Article 95 was inserted as part of the overall resolution of the issue of a ground of refusal in the case of a challenge to admissibility or jurisdiction. Reflecting the position of a number of States, the Draft Statute contained as article 90 para. 2 option 2 (e)¹ a ground of refusal in the case of an ongoing domestic investigation or prosecution, into the same matter, unless the case had already been ruled admissible. Other States were strongly opposed to this ground of refusal both generally (being opposed to any grounds of refusal) and particularly, because of the potential for use of such a provision to undermine the effectiveness of the scheme provided for in articles 17, 18 and 19 to address issues of jurisdiction and admissibility. Such a ground of refusal would allow a State to ignore any notification provided to it under article 18, proceed with a domestic investigation or prosecution without advising the Court and then decline to provide assistance in that case to the Court. This could result in significant duplication of effort and would be contrary to the intent of the scheme of the Statute, to have complementarity issues dealt with as expeditiously as possible under the articles designed for that purpose.
- 2 At the same time, all States involved in the debate recognized that it would not be beneficial to the State or the Court to require compliance with a request where admissibility or jurisdiction were an issue and the matter was yet to be determined by the Court. For this reason, article 95 was included to allow for the postponement, as opposed to refusal, of the request in the limited circumstances where an actual challenge is before the Court. However, consistent with the content of articles 18 and 19, postponement will not be possible if the particular assistance sought has been authorized by the Pre-Trial Chamber pursuant to those articles.

B. Analysis and interpretation of elements

1. Postponement because of an admissibility challenge pursuant to article 18 or 19

- 3 The provision does not address the case where the Prosecutor determines that the case is inadmissible, but deals with those cases where the jurisdiction of the Court or the admissibility of the case has been challenged pursuant to article 18 or 19 of the Rome Statute.

¹ UN Doc. A/CONF.183/2/Add.1, p. 170.

While an admissibility or jurisdiction challenge is pending before the Court, the requested State may postpone the execution of a request be it for surrender or for another form of cooperation. The requested State may proceed with its own investigations according to its national law or take no action in the matter, until the question is resolved. This practical provision makes it clear that a State need not invest time and effort into a request, when it may be determined that the case is not admissible or that the Court does not have jurisdiction.

Pre-Trial Chamber I gave detailed consideration to the interpretation of article 95 in its June 2012 decision on an urgent application brought by Mr. Al-Senussi seeking an order to compel Libyan authorities to comply with their obligation to the ICC². The Chamber, relying on previous decisions³, reaffirmed that that the cooperation obligation placed on Libya by Security Council Resolution 1970 (2011) means that the legal framework of the Statute, including Part 9, is applicable to Libya, including in this instance article 95.

The Chamber went on to interpret article 95, addressing an argument advanced, on the basis of its placement⁴, that it was applicable only to ‘other forms of cooperation’. The Chamber convincingly relies on the plain wording of the article – which is general to requests made under this Part – in support of its interpretation that the article encompasses all forms of requests including those for arrest and surrender. Less compelling is the Chamber’s explanation for the reference to ‘such evidence’ in article 95 which, by its plain reading, qualifies the request to be postponed as relating to evidence, as opposed to arrest and surrender. The Chamber’s finding that article 95 simply mirrors the safeguards in articles 18 or 19 would be justified but for the word ‘such’ which qualifies the reference to evidence and clearly relates it to the nature of the request.

Nonetheless, while this reference and the placement provide some support for the limited interpretation, the Chamber’s conclusion is best supported by the policy rationale articulated. The Chamber emphasised the central role of the principle of complementarity in the legal framework of the Rome Statute and adopted an interpretation most consistent with the same:

‘The suspension of the investigation and the corresponding postponement of the cooperation requests is one major consequence of this principle. It would be untenable for the Court to insist on compliance with a request for arrest and surrender, even at the risk of hampering the national proceedings, while its own investigation is suspended⁵.’

Adopting this interpretation the Chamber was of the view that article 95 could be raised with respect to a request for arrest and surrender, as well as other forms of cooperation. It is worth noting the practical benefits of this interpretation which avoids the possible situation where resources are expended – perhaps in very difficult situations because of security concern – to effect an arrest and surrender, only to have a finding that the case is inadmissible and the prisoner needs to be returned.

On the facts of the case, the Chamber was satisfied that Libya had properly presented an admissibility challenge which was pending before the Court and, therefore, execution of the request for arrest and surrender could be postponed. The Chamber cautioned, however, that this was only a temporary postponement such that Libya must be in a position to immediately arrest and surrender Mr. Ghaddafi should the case be ruled admissible and further noted Libya’s continuing obligation to cooperate with the Court.

² *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, Pre-Trial Chamber 1, 1 June 2012.

³ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11, Decision 1 June 2012, para. 12.

⁴ Articles 89 to 92 of Part 9 are all specific to requests for arrest and surrender. Articles 93 and 96 and arguably 94 are specific to requests for other forms of cooperation. Further, the reference in the last line of article 95 ‘the collection of *such* evidence’ also supports the narrower interpretation that the article was intended to be applicable solely to requests for other forms of cooperation and not those related to arrest and surrender.

⁵ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11, Decision 1 June 2012, para. 36.

- 10 Sadly these two admonitions by the Chamber have been without effect. On 31 May 2013 the Pre-Trial Chamber decided that the case against Mr. Ghaddafi was admissible⁶ and this finding was upheld by the Appeals Chamber on 21 May 2014⁷. To date Libya has yet to comply with the obligation to surrender Mr. Ghaddafi. Thus while the interpretation accorded by the Pre-Trial Chamber was strongly supportive of the principle of complementarity underpinning the Rome Statute, the actions of the State have rendered it meaningless in practical application.
- 11 Pre-Trial Chamber I has also affirmed⁸ that article 95 is only applicable on the basis of an admissibility challenge which is under consideration by the Court. Thus, it rejected the arguments advanced by Libya that its intention to present such a challenge in the case of Mr. Al-Senussi, as evidenced by various filings, was sufficient. The Chamber also clarified that particularly in light of the specific argument advanced by Libya at the time, an admissibility challenge advanced with reference to a different individual – Saif Al-Islam Gaddafi – could not form the basis for an article 95 postponement of execution with respect to the request for arrest and surrender relating to Mr. Al-Senussi. On this point, the Chamber also rejected the argument of Libya that there was an admissibility challenge pending against Mr. Al-Senussi (specifically the application made on 1 May 2012 in the case of Mr. Gaddafi) which required the addition of some further details. In support, the Chamber noted the Appeals Chamber decision which requires that States present admissibility challenges which are accompanied by sufficient evidence, without relying on any ‘right’ to supplement the record subsequently. In sum, the Chamber was of the opinion that the actions taken by Libya at that stage with reference to an admissibility challenge were not sufficient to trigger the postponement power in article 95. As a result the Chamber affirmed that Libya was under an obligation to proceed immediately with the arrest and surrender of Mr. Al-Senussi.
- 12 This decision, evidently consistent with the requirements of the Statute, had little practical effect. No action was taken by Libya to comply with the obligation stated by the Court to turn over Mr Al-Senussi. Instead, on 2 April 2013, seven months after Mr. Al-Senussi was extradited to Libya from Mauritania, Libya filed an admissibility challenge in his case. On a defence challenge, the Chamber was required then to consider the question of the applicability of article 95, in light of that development, in Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council⁹.
- 13 The Chamber clarified that a State does not have to seek ‘pre-authorization’ from the Court in order to rely on a statutory presumption – in this case allowing it to defer taking action on a request for surrender. However, postponement is provided for solely where the pre-requisite of an admissibility challenge before the Court is met. The Chamber found that when a dispute arises as to whether these pre-requisites for the application of article 95 of the Statute are met, such dispute cannot be unilaterally settled by the State. It is for the Chamber to determine whether an admissibility challenge has been duly made within the terms of the applicable statutory provisions. As a result, the Chamber, while recognizing the prerogative of the State to postpone surrender, went on to consider whether there was a proper admissibility challenge by Libya under consideration by the Court.

⁶ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, 31 May 2013.

⁷ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11 OA 4, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, Appeals Chamber, 21 May 2014.

⁸ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11, Decision on the ‘Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC’, Pre-Trial Chamber I, 6 February 2013.

⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11, Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, Pre-Trial Chamber I, 14 June 2013.

After a factual analysis, the Court was of the opinion that Libya had brought such a challenge which was pending before the Court¹⁰. Unfortunately, the Chamber summarily dismissed the 7 month delay in bringing the challenge as a factor to be assessed finding that ‘the information before the Chamber does not appear to indicate that Libya, despite being in a position to properly and timely challenge the admissibility of the case against Mr Al-Senussi, unduly failed to do so, in violation of article 19(5) of the Statute.’ There is no factual material referenced in support of this finding making it difficult to determine on what basis the Court considered that the extensive delay was consistent with the obligations on the State to immediately arrest and surrender or to bring an admissibility challenge in a timely manner. Evidently, it may well have been the factual circumstances in Libya at the time which justified this conclusion but it would have been helpful if the Chamber had pointed to the same by way of justification, rather than leaving an unexplained decision which allows States significant leeway in terms of the core obligations of Part 9.

The Chamber went on to address the defence argument that the previous non-cooperation by Libya in obtaining and maintain custody of Mr. Al-Senussi, despite the Court’s request for his arrest and surrender, should affect the availability of an article 95 postponement. The Chamber adopted a narrow and literal interpretation of article 95 noting that, whether the State had previously failed to cooperate was not the issue. Rather the sole question was whether there was now a proper admissibility challenge before the Court which allowed for the postponement under article 95. The Chamber stated that while the non-cooperation ‘might be relevant in another context and for other statutory purposes’ it did not have the potential to preclude the application of article 95 of the Statute on the basis of an admissibility challenge properly made.

Similarly, the Chamber did not consider that the failure of Libya to halt domestic proceedings while the admissibility challenge was pending should prejudice its article 95 submission. It also expressed the view that this did not equate to non-cooperation insofar as such proceedings did not prevent or delay arrest and surrender in future should the case be found admissible. The Chamber further emphasized that the decision with respect to the article 95 application in no way altered Libya’s continuing obligations to cooperate with the Court as mandated by the Security Council and in accordance with the Statute. Finally, the Chamber also rejected the argument advanced on whether Libya was investigating the same case on the basis that it was an issue which was integral to the article 17 determination and best left to be determined in that context.

While the interpretation accorded to article 95 is consistent with the wording of the Statute, it creates a dangerous precedent in terms of the policy behind it. In essence, it opens up the possibility for States to ignore the obligation to arrest and surrender, until such time that an application is brought to compel action. In this case, the facts were even more disturbing in that Libya failed to take any action in response to the Chamber’s finding in February that it was required to immediately arrest and surrender Mr. Al-Senussi to the Court. Instead, only as a result of the second defence application, seeking a finding and referral to the Security Council, did Libya take steps to launch an admissibility challenge. At the least, the cases illustrate the need for the Court to take action immediately in the face of non-compliance. In this instance, it would have been preferable if the Chamber had made a finding of non-compliance and referred the matter to the Security Council in its February decision which found article 95 to be inapplicable.

2. Orders for collection of evidence pursuant to article 18 or 19

This provision constitutes a restriction on the ability of the requested State to postpone assistance in the case of an admissibility challenge. It recognizes that a request which has been presented after the Pre-Trial Chamber or the Court authorizes the preservation or

¹⁰ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11, Decision 14 June 2013, paras 29–33.

collection of evidence pursuant to articles 18 para. 6 and 19 para. 8, cannot be postponed because the admissibility ruling is pending. A request presented in these circumstances will have been determined already by the Court to be necessary for the reasons outlined in the provisions concerned. Therefore, it would be inappropriate to allow the requested State Party to overrule this finding by the Court.

- 19 This provision is distinct from article 94 para. 2 where the prosecutor can request solely the preservation of evidence in the face of postponement for a domestic matter. Here the range of requests is broader¹¹. In the former case, the prosecutor is restricted to a specific request for the preservation of evidence, presumably because the need for a wider range of options is not as pronounced when dealing with postponement in the face of an unrelated domestic investigation. The scope of application of article 95 para. 2 of the Statute extends beyond that to the types of measures outlined in article 19 para. 8.

¹¹ See articles 18 para. 6 and 19 para. 8.

Article 96

Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

- (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
- (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
- (c) A concise statement of the essential facts underlying the request;
- (d) The reasons for and details of any procedure or requirement to be followed;
- (e) Such information as may be required under the law of the requested State in order to execute the request; and
- (f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Directly Relevant Rules of Procedure and Evidence: Rule 190.

Literature: See Preliminary Remarks on Part 9.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	2
I. Paragraph 1: Requests in writing, urgent cases and their confirmation.....	2
II. Paragraph 2: Minimum requirements.....	6
1. Concise statements of the purpose and the assistance sought.....	7
2. 'As much detailed information as possible'.....	8
3. Concise statements of the essential facts.....	10
4. Reasons for and details of procedure or requirement to be followed.....	11
5. Information required to execute the request.....	12
6. Any other relevant information.....	13
III. Paragraph 3: Consultations upon requests and advising the Court.....	14
IV. Paragraph 4: Applications to the Court.....	16

A. Introduction/General remarks

Article 96 is procedural in nature and in content. It provides important practical information for the requests for other forms of cooperation. It is similar in that respect to article 91, which outlines the content of a request for arrest and surrender. This article details what information must be included in a request for other forms of cooperation.

Like article 91, this article recognizes that cooperation will be effected through reliance upon national procedural laws and that therefore it will be necessary for the Court to provide sufficient information to comply with those procedures. Article 96 para. 2 (e), which parallels

article 91 para. 2 (c), requires that the request include such information as may be required by the law of the requested State for the request to be executed. Article 96(2)(e) however is more restricted than article 91(2)(c) in that the requirement is specific to information, in recognition of the practical differences between procedures for the production of evidence and those for the surrender of a person. This subparagraph raised similar concerns to those described under article 91, but here the matter was much less controversial as most States, of all legal traditions, require some minimum information to carry out measures such as a search or to compel a person to provide a testimony.

B. Analysis and interpretation of elements

I. Paragraph 1: Requests in writing, urgent cases and their confirmation

- 2 The provision states that, as a rule, requests for assistance should be in writing.
- 3 In *urgent cases*, a request may be delivered by means of modern telecommunication such as fax or e-mail, under the condition that a written record of the request will be created by that method of communication.
- 4 If the request was transmitted by fax or e-mail or any other means of communication referred to above, it has to be confirmed through the diplomatic channel or those channels that the State Party has designated upon ratification, acceptance, approval of or accession to the Rome Statute pursuant to article 87(1)(a).
- 5 A request submitted by a State Party or a non-State Party to the Court pursuant to article 93(10) of the Statute requires no such confirmation as article 87(1) only deals with requests issued by the Court.

II. Paragraph 2: Minimum requirements

- 6 The provision lists the various types of information that shall be contained in or attached to the request by the Court or by the requesting State¹.

1. Concise statements of the purpose and the assistance sought

- 7 The request has to depict the object of the request and the reason for the assistance sought, as well as the form of assistance and measures of execution required. Although the legal basis for the request is the applicable provisions of the Rome Statute, the request should explicitly refer to those articles.

2. 'As much detailed information as possible'

- 8 In order to facilitate the execution of the request, the Court or the requesting State shall provide as much information available or disclosable about the location or identification of any person or place, where that information is critical for the execution of the request. This is important, on a practical level: it will not be possible to execute a search and seizure, unless the Court describes the precise location, which should be the subject of that search.
- 9 Trial Chamber IV in examining a Defence application for the transmission of a request for cooperation relied on Rule 116² and rejected the request because of its lack of compliance

¹ The provision is much more detailed than the comparable provision on the contents of a request in article 14 para. 1 of the European Convention on Mutual Assistance in Criminal Matters, however it is similar to article 5 of the UN Model Treaty and article 7(10) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

² Rule 116(b) requires that requests for cooperation under Part 9 by the defence must contain sufficient information to comply with article 96, paragraph 2.

with the requirements for specific information as set out in article 96(2)(a) and (b)³. In the case the Defence sought assistance with a visit to a non-exhaustive list of places in Sudan for the purpose of an interview of unspecified witnesses. The Court rightly categorized this request as the defence seeking ‘permission to undertake an open-ended expedition to the Sudan in order to find out whether there might be something or someone potentially useful to the defence case⁴.’

The emphasis placed by the Chamber on the need for specificity provides important guidance with regard to cooperation applications. It is an interpretation which is essential to preserve the integrity and workability of Part 9, which is dependent on requests for cooperation being presented which have sufficient information for practical execution by States. At the same time, the Chamber, recognizing the importance of assisting the defence in gathering evidence for its case, offered the possibility to the defence of either ‘requesting an ex parte hearing to explore the avenues of investigation and details required by article 96(2) of the Statute with the Chamber or to set these out in ex parte submissions⁵’. In so doing the Trial Chamber in this instance sets a proper balance between safeguarding the essential requirements of article 96 and Part 9 generally while supporting the defence efforts to prepare its case.

3. Concise statements of the essential facts

A statement of the essential facts of the case, underlying the request, may enable the requested State to decide which measures are necessary and appropriate for its execution, as well as the appropriate approach to the same⁶. It also may be information required for the applicable procedures in the requested State. The Court or the requesting State may determine how much information can be shared without endangering the investigation or prosecution of the case. 10

4. Reasons for and details of procedure or requirement to be followed

The Court may specify in the request the measures to be taken and the procedures to be adopted for the execution of the request. If it does so, it should also give a reason for demanding such measures and procedures as specified in the request. The same applies to a requesting State, if it formulates specific procedures to be followed by the Court upon a request for assistance pursuant to article 93(10). 11

Pursuant to article 99(1), the requested State would have to follow the measures and procedures required in the request by the Court, unless those requirements are prohibited by its national law. This allows for the evidence to be gathered in a form that is useful for the Court, absent a prohibition at law which prevents execution in that manner.

5. Information required to execute the request

In order for the measures or procedures sought in a request by the Court to be carried out, it may be necessary to meet certain requirements of the law of the requested State. For example, for a search to be executed, the law of the State may require enough information to meet a defined standard, such as probable cause. Subparagraph (e) recognizes that reality and provides that such information will be part of the content of the request. This provision is 12

³ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’, Trial Chamber IV, 1 July 2011.

⁴ *Prosecutor v. Abakaer Nourain and Jerbo Jamus*, ICC-02/05-03/09, Decision 1 July 2011, para. 22.

⁵ *Prosecutor v. Abakaer Nourain and Jerbo Jamus*, ICC-02/05-03/09, Decision 1 July 2011, para. 33.

⁶ Article 14 para. 1 of the European Convention on Mutual Assistance, for instance, does not explicitly require a statement of the facts underlying the request.

similar to that found in article 91(2)(c) relating to requests for arrest and surrender. However, this paragraph was much less controversial than the requirements in relation to the surrender of a person, as there was much less division between States with respect to the requirements for information in this context. While the standard may vary, most States do require some particular information for the relevant evidence to be produced. While not repeated here, the limits in article 91(2)(c) for reliance on national evidentiary requirements should be applied *mutatis mutandis* in the context of article 96(2)(e)⁷.

6. Any other relevant information

- 13 This provision reflects the practical reality that, in many instances, additional information may be necessary to comply with a request for assistance. The requested State and the Court may consult about what additional information may be needed for the execution of the request.

In the specific case of a request pursuant to article 93 para. 1 (e), the instruction concerning rule 74 on self-incrimination as set out in rule 190 is to be annexed to the request. Arguably, rule 190 also applies in case of a request pursuant to article 93 para. 7.

III. Paragraph 3: Consultations upon requests and advising the Court

- 14 This paragraph parallels article 91(4) and was included because of similar concerns that the requirement for the Court to produce certain information in support of a request could become very burdensome and difficult. It obligates a State Party to respond to a request from the Court, either generally or in a specific case, to provide information about the requirements of its national law with respect to information required in support of a request.
- 15 This provision is intended to reduce the burden on the Court in trying to comply with the various requirements of each State. It envisages that the specific requirements of the national law of the requested State may impede the immediate execution of the request. According to this paragraph, the requested State is obligated to advise the Court of those legal requirements, to enable the Court to provide the requisite information for the request to be executed and to determine whether what is being required by the requested State is justifiable.

IV. Paragraph 4: Applications to the Court

- 16 If a State Party requests assistance by the Court, the same rules shall generally apply pursuant to this article. Rather than listing separate requirements for requests from a State to the Court, this paragraph applies the general provisions in this article to requests from the State to the Court. Their application is qualified by the proviso 'where applicable' recognizing that not all the requirements of this article will be applicable in the case of reverse assistance.

⁷ Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003) 210.

Art. 97 Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*:

- (a) Insufficient information to execute the request;
- (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	3
1. Identification of problems and consultations without delay.....	3
2. List of exemplified problems.....	4
a) 'Insufficient information'	5
b) The person sought cannot be located or is not the person named	6
c) Breach of pre-existing treaty obligations.....	8
3. Other problems	9

A. Introduction/General remarks

Article 97 is of practical importance in that it creates a consultative mechanism which should be used to resolve any problems which may arise in relation to a request under this Part. It recognizes that regardless of the detailed nature of the provisions on cooperation and the clear obligation to cooperate, on a practical level there can be various issues and problems affecting the execution of the request.

In the Draft Statute¹ article 87(5) provided for a formal dispute resolution mechanism to address circumstances where there were problems with execution of the request. However, it became evident that it would be difficult, if not impossible, to reach consensus on such a mechanism, as there was no agreement, once again, as to whether the Court or the State should have the final say. In addition, to include or require resort to a formal mechanism was viewed by some States as contrary to the very nature of the obligation in this Part – cooperation.

As an alternative, a text on consultations was proposed by the Chairman of the Working Group on International Cooperation in a discussion paper². The proposal, with minor amendments was adopted ultimately as article 97. It obliges the States Parties to consult with the Court without delay when any execution problems arise. It provides examples of some types of problems but is not restricted in application to those circumstances. Article 97 signals a cooperative approach to the resolution of problems and presumes good faith efforts on the part of the Court and the State. In a case where such a cooperative approach does not yield a result, the Court will have to rely on its power under article 87(7) and article 119(1) of the Statute to authoritatively settle the dispute.

¹ UN Doc. A/CONF.183/2/Add.1, at p. 159.

² UN Doc. A/CONF.183/C.1/WGIC/L.5 (26 June 1998).

B. Analysis and interpretation of elements

1. Identification of problems and consultations without delay

- 3 The provision states the general obligation of a requested State Party to consult with the Court about any problems that may impede or prevent the execution of a request from the Court. The rule applies also to those cases where the denial of the execution of the request is possible in accordance with article 93 paras. 4 and 5.

2. List of exemplified problems

- 4 States Parties shall engage in consultations with the Court in any case where a problem occurs relating to the execution of a request from the Court, no matter what the grounds for the problem. The provision states a few examples of such problems.
- 5 a) **'Insufficient information'**. The paragraph pertains to a lack of factual information and data, as well as information on the legal basis or requirements of the request.
- 6 b) **The person sought cannot be located or is not the person named.** This subparagraph evidences a very practical problem which may arise. That is, despite following up on the information provided, the requested State is unable to locate the person sought for surrender. In such circumstances, compliance with the request is factually impossible and thus the requested State will need to consult with the Court to advise of the problem and determine if there is any additional information available with respect to the location of the person sought.
- 7 If the requested State determines that the person located on its territory is not the same person as named in a warrant issued by the Court, the requested State shall so inform the Court. In this context, consultation with the Court will be critical in order that both parties will be able to ensure that the determination made is the correct one and thus there is no basis for the arrest or continued detention of the person in the requested State.
- 8 c) **Breach of pre-existing treaty obligations.** The provision takes into account that the requested State may be bound by anterior international obligations. In the case of competing obligations, the Rome Statute recognizes that consultations will be necessary to determine how best to address the potential conflict in obligations.

3. Other problems

- 9 Various Chambers have recognized the obligation on States to consult with the Court when an issue arises as to a possible competing international law obligation which falls to be resolved under article 98(1)³. In the specific context of article 98(1), article 97 must be read together with rule 195 ICC RPE. As Pre-Trial Chamber II has put it in its decision of 9 April 2014:

'Moreover, the DRC's claim that the 26 February 2014 Decision placed the State 'in a delicate and unmanageable situation' proves that the Congolese authorities should have consulted or notified the Court in accordance with article 97 of the Statute and rule 195 of the Rules of the existence of a problem related to article 98(1) of the Statute which prevented it from discharging its obligations as a State Party to the Statute prior to and during the visit of Omar Al Bashir and before his departure⁴.'

³ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014, para. 15; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011, paras 11-12.

⁴ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision 9 April 2014, para. 15.

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

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

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Directly Relevant Rules of Procedure and Evidence: Rule 195.

Literature: See Preliminary Remarks on Part 9. Ahlbrecht, H. and Ambos, K., *Der Fall Pinochet(s)* (1999); Akande, D., 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', (2012) 10 *JICJ* 299 *id.*, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', (2009) 7 *JICJ* 333; *id.*, International Law Immunities and the International Criminal Court, (2004) 98 *AJIL* 407; *id.* and Shah, S., 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', (2011) 21 *EJIL* 815; Benzing, M., 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties', (2004) 8 *MPYbUNL* 181; Bianchi, A., 'Immunity versus Human Rights: The Pinochet Case', (1999) 10 *EJIL* 237; Bogdan, A., 'The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98', (2008) 8 *ICLRev* 1; Bosch, J., *Immunität und internationale Verbrechen* (2004); Broomhall, B., *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003); *id.* and Krefß, C., 'Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis', in: C. Krefß *et al.* (eds), *The Rome Statute of the International Criminal Court and Domestic Legal Orders, Vol. II: Constitutional Issues, Cooperation and Enforcement* (2005) 525 *et seq.*; Byers, M., *Custom, Power and the Power of Rules* (1999) 157–160; Cassese, A., 'When may senior State officials be tried for international crimes?', (2002) 13 *EJIL* 853; Crawford, J., *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (2002); *id.*, Sands, P. and Wilde, R., *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute*, (2003) <http://www.amicc.org/docs/Art_98-14une03FINAL.pdf> accessed 23.01.2015; Dominicé, C., 'Quelques observations sur l'immunité de juridiction pénale de l'ancien chef d'état', (1999) 103 *RIDP* 297; Fleck, D., 'Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?', (2003) 1 *JICJ* 651; Frulli, M., 'The Question of Charles Taylor's Immunity', (2004) 2 *JICJ* 1118; Gaeta, P., 'Does President Al Bashir Enjoy Immunity from Arrest?', (2009) 7 *JICJ* 316 (2009); *id.*, 'Official Capacity and Immunities', in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 975; Gartner, I., 'The Rules of Procedure and Evidence on Co-operation and Enforcement', in: H. Fischer, C. Krefß and S. R. Lüder, *International and National Prosecution of Crimes Under International Law* (2001) 431; Gornig, G., 'Immunität von Staatsoberhäuptern', in: J. Ipsen and E. Schmidt-Jortzig (eds.), *Festschrift für Dietrich Rauschnig* (2001) 457; Harhoff, F. and Mochochoko, P., 'International Cooperation and Judicial Assistance', in: R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 666; Henzelin, M., 'L'immunité pénale des ministres selon la Cour internationale de justice', (2002) 120 *SchZStR* 249; Herdegen, M., 'Das "konstruktive Völkerrecht" und seine Grenzen: die Dynamik des Völkerrechts als Methodenfrage', in: P.-M. Dupuy *et al.* (eds.), *Völkerrecht als Wertordnung/Common Values in International Law. Festschrift für/Essays in Honour of Christian Tomuschat* (2006) 899; Iverson, J.M., 'The Continuing Function of Article 98 of the Rome Statute', (2012) 4 *GOJIL* 131; Karl, G., *Völkerrechtliche Immunität im Bereich der Strafverfolgung schwerster Menschenrechtsverletzungen* (2003); Kaul, H.-P., 'The Continuing Struggle on the Jurisdiction of the International Criminal Court', in: H. Fischer, C. Krefß and S.R. Lüder, *International and National Prosecution of Crimes Under International Law* (2001) 21; *id.* and Krefß, C., 'Jurisdiction and Cooperation in the Statute of the International Criminal Court', (1999) 2 *YbHumanL* 143; Keitner, C., 'Crafting the International Criminal Court: Trials and Tribulations in Article 98 (2)', (2001) 6 *UCLAJIL&ForeignAff* 215; Keppler, E., 'Managing Setbacks for the International Criminal Court in Africa', (2012) 56 *AfricanL* 4; Klingberg, V., '(Former) Heads of State Before International(ized) Criminal Courts: The Case of Charles Taylor Before the Special Court for Sierra Leone', (2003) 46 *GYbIL* 537; Kreicker, H., 'Der Präsident des Sudan vor dem Internationalen Strafgerichtshof – ein Verstoß gegen das

Völkerrecht? Überlegungen zur völkerrechtlichen Immunität von Staatsoberhäuptern anlässlich des Haftbefehlsantrages gegen Omar al-Bashir', (2008) *HuV-I* 21157; *id.*, *Völkerrechtliche Exemtionen. Grundlagen und Grenzen völkerrechtlicher Immunitäten und ihre Wirkungen im Strafrecht*, i, Vol. II (2007); Krefß, C., 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in: M. Bergsmo and L. Yan (eds.), *State Sovereignty and International Criminal Law* (2012) 223; *id.*, 'Commentary on Prosecutor against Charles Ghankay Taylor. Decision on Immunity from Jurisdiction of 31 May 2004', in: A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*. ix: *the Special Court of Sierra Leone* (2006) 202; *id.*, 'Der Internationale Gerichtshof im Spannungsfeld von Völkerstrafrecht und Immunitätsschutz – Besprechung von IGH, Urteil vom 14.2.2002 (Kongo gegen Belgien)', (2003) GA 25; *id.*, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice', (2011) 30 *IsYbHumRts* 104–109; Kuc, O., 'The Rome Statute and Legal Limitations to the International Surrender Regime', (2012) 18 *NewEnglandJL&CompL* 265; Lüke, M., *Die Immunität staatlicher Funktionsträger* (2000); Meyer, E.M., 'The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act', (2005) 58 *OklahomaLRev* 97; Pedretti, R., *Immunity of Heads of State and State Officials for International Crimes* (2015); Roberts, A. E., 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', (2001) 95 *AJIL* 757; Roth, B.R., *Sovereign Equality and Moral Disagreement. Premises of a Pluralist International Legal Order* (2011); Scheffer, D., 'Article 98 (2) of the Rome Statute: America's Original Intent', (2005) 3 *JICJ* 333; Seibert-Fohr, A., 'Unity and Diversity in the Formation and Relevance of Customary International Law: Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order', in: A. Zimmermann and R. Hofmann (eds.), *Unity and Diversity in International Law* (2006) 264–270; Sendel, B., 'Bilaterale Nichtüberstellungsabkommen der Vereinigten Staaten und Art. 98 Abs. 2 des Römischen Statuts zur Errichtung eines ständigen Internationalen Strafgerichtshofs', (2007) *ZIS* 118; Simbeye, Y., *Immunity and International Criminal Law* (2004); Szasz, P.C. and Ingadottir, T., 'The UN and the ICC: The Immunity of the UN and Its Officials', (2001) 14 *LeidenJIL* 867; Tallman, D.A., 'Catch 98 (2): Article 98 Agreements and the Dilemma of Treaty Conflict', (2004) 92 *GLJ* 1033; Talmon, S., 'Immunität von Staatsbediensteten', (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 313; Tangemann, C., *Die völkerrechtliche Immunität von Staatsoberhäuptern* (2002); Tladi, D., 'The ICC Decisions on Chad and Malawi. On Cooperation, Immunities, and Article 98', (2011) 11 *JICJ* 199; Uerpman-Witzack, R., 'Immunität vor internationalen Strafgerichten', (2006) 44 *AVR* 33; van der Wilt, H., 'Bilateral Agreements between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?', (2005) 18 *LeidenJIL* 93; van Schaack, B., 'Immunity Before the African Court of Justice & Human & Peoples Rights – The Potential Outlier, Thursday' (July 10, 2010) <<http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/>> accessed 10 January 2015; Villalpando, S., 'L'affaire Pinochet: Beaucoup de bruit pour rien? L'apport au droit international de la décision de la Chambre des Lords du 24 mars 1999', (2004) 104 *RGDIP* 393; Watts, A., 'The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers', (1994/III) 247 *RCADI* 9; Wirth, S., 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case', (2002) 13 *EJIL* 877; Wuert, I., 'Pinochet's Legacy Reassessed', (2012) 106 *AJIL* 731; Zappalà, S., 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation', (2001) *EJIL* 595; Zehnder, B., *Immunität von Staatsoberhäuptern und der Schutz elementarer Menschenrechte – Der Fall Pinochet* (2003); Zimmermann, A., 'Two steps forwards, one step backwards? Security Council Resolution 1593 (2005) and the Council's Power to Refer Situations to the International Criminal Court', in: P. M. Dupuy *et al.* (eds.), *Essays in Honour of Tomuschat* (2006) 691 *et seq*; Zhong, Y., 'Criminal Immunity of State Officials for Core International Crimes Now and in the Future', FICHL Policy Brief Series No. 20 (2014).

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	11
I. Paragraph 1	11
1. Third State	11
2. Obligations under international law	12
3. With respect to the State or diplomatic immunity of property	14
4. With respect to the State or diplomatic immunity of a person	15
a) State or diplomatic immunity of a person	15
b) The third State is a State Party	16
c) The third State is not a State Party	18
aa) Immunity <i>ratione materiae</i>	19
bb) Immunity <i>ratione personae</i>	22
aaa) Customary international law	23
bbb) Security Council Decisions	37
5. Waiver of immunity	40
6. Special missions	42
7. International organizations	43

II. Paragraph 2	44
1. Request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court	44
a) Types of agreements <i>ratione personae</i>	44
b) Types of agreements <i>ratione materiae</i>	47
c) Categories of persons.....	49
d) The time of the conclusion of the agreement	51
e) Legal effect of concluding a non-surrender agreement outside the scope of paragraph 2	56
2. Consent of the sending State.....	57

A. Introduction/General remarks

The subject-matter of article 98 did not hold a prominent place in the negotiations on Part 1
9 for a long time. When the *Ad Hoc* Committee dealt with possible grounds for refusal in the
context of surrender, the immunity issue was not specifically mentioned. Instead, all
emphasis was placed on the competition between surrender and extradition requests¹ which
has received a detailed regulation in article 90. The 1998 Draft Statute then contained, in its
article 87, a bracketed 'Option 2 (e)' for a ground to refuse the execution of a request of
surrender where 'compliance with the request would put it [the State Party] in breach of an
obligation that arises from [a peremptory norm of] general international law [treaty obliga-
tion] undertaken to another State'². This draft, on the one hand, indicates that the issue of
possible conflicting international obligations was now seen as going beyond the competition
of surrender and extradition requests; on the other hand, the series of brackets testify to the
fact that there was no unanimous view regarding this matter.

In fact, the issue of conflicting immunities was rather reluctantly addressed by some 2
delegations, which were of the view that developments in general international law had
substantively reduced, if not eliminated, immunities with respect to crimes under international
law as listed in article 5 of the Statute. However, on the insistence of some other delegations
and without there being time for a sufficiently thorough discussion in the course of the Rome
Conference, a provision on possibly conflicting immunities was included, and hereto was
added another provision referring, in particular (without spelling this out explicitly), to Status
of Forces Agreements³. In this latter respect, there was one additional reason for those States in
favor of an efficient cooperation regime to approach the matter with very considerable
reservation. It was thought that the right of every sending State – *i. e.* not only a sending State
that is a party to the Statute – to use the complementarity regime pursuant to articles 17 to 20
to invoke its primary right to exercise criminal jurisdiction both under the Statute and under
the relevant agreement constituted sufficient protection for such a State's legitimate interests.

The solution found in article 98 is a rather complex one. It was recognized to be both 3
impossible in the time available and undesirable to set up a list of those international
obligations regarding immunities and primary treaty rights to criminal jurisdictions held by
sending States that would indeed conflict with the obligation to surrender under article 89
para. 1. It followed that the determination as to whether a real conflict existed had to be taken
on a case-by-case basis. With a view to the relevant future practice, the drafters once more
wished to emphasize the competence of the Court to authoritatively rule on the matter⁴. Thus

¹ See para. 218 of the *Ad Hoc* Committee Report; reprinted in: Bassiouni (ed.), *The Legislative History of the International Criminal Court*, Vol. II (2005) 654.

² The text and its earlier versions is reprinted in: Bassiouni (ed.), *The Legislative History of the International Criminal Court*, Vol. II (2005) 633.

³ Kaul and Krefß (1999) 2 *YbHumL* 164.

⁴ Benzing (2004) 8 *MPYbUNL* 199; Crawford *et al.*, (2003) [http://www.amicc.org/docs/Art 98-14une03FI-NAL.pdf](http://www.amicc.org/docs/Art%2098-14une03FI-NAL.pdf), para. 23; Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 1385; Meißner, *Die Zusammenarbeit* (2003) 120; Sluiter, *International Criminal Adjudication* (2002) 171.

article 98 places an obligation on the Court not to put a State in the position of having to violate its international obligations with respect to immunities. To the extent necessary to avoid the creation of conflicting international obligations, the Court is obliged to seek cooperation from the third or sending State, before pursuing the request. Rule 195, sub-rule 1, further elaborates on this pivotal role accorded to the Court in that it requires the State Party concerned to provide the Court with ‘any information relevant to assist the Court in the application of article 98’⁵. This competence was given to the Court in full recognition of the fact that the Court’s determination will not bind a State concerned that is not party to the Statute, and that for this reason, any determination by the Court, that no conflicting international obligation exists, will leave the requested State Party with the risk that the Court’s determination of the international legal obligation is wrong⁶. It was felt, however, that this risk is a tolerable one to bear in light of both the judicial expertise united on the bench and the persuasive authority that any relevant determination by the Court is bound to carry with it⁷. The Court’s case law is in full conformity with the foregoing considerations. The Court, in addition, relies on article 119(1) in support of this approach⁸. While it would appear that the implementing legislation of France, Germany⁹, New Zealand and Spain is fully in line with this basic scheme underlying the operation of article 98, the picture is less clear in other States¹⁰.

- 4 Compared to provisions such as, in particular, article 99(4), article 98 did not absorb too much negotiation time in Rome. It is also probably fair to say that the latter article was not considered to be of utmost political sensitivity by most participants in the negotiations. This also explains the rather short commentary devoted to article 98 in the first edition of this volume. This assessment has proven wrong for two reasons. First, shortly after the Rome conference, the U.S.A. made an attempt to use article 98(2) as one component of a more comprehensive strategy to, as it were, renegotiate the compromise on the Court’s jurisdiction that was finally struck in Rome. Second, the Court’s case law regarding the application of article 98(1) in the case of the (at the time: incumbent) head of state of Sudan, al Bashir, has provoked criticisms from African States.
- 5 In the course of the fourth and fifth session of the Preparatory Commission in 2000, article 98 received much unexpected attention because the US-delegation relied on it as part of its comprehensive approach to renegotiate the Statute’s jurisdiction scheme so as to make it more amenable in Washington¹¹. In fact, ‘[o]f all debates that took place in the Working Group on Cooperation, none engendered such interest and controversy as the discussions on rules under article 98’¹². Shortly before the fourth session the United States conveyed to other States a package proposal consisting of the following two parts dealing with cooperation and jurisdiction:

⁵ This sub-rule goes back to a French proposal; for the relatively uncontroversial drafting process on this sub-rule, see Harhoff and Mochochoko, in: Lee (ed.), *The International Criminal Court* (2001) 666.

⁶ This risk is rightly alluded to by Akande (2004) 98 *AJIL* 431.

⁷ Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 1385 et seq.

⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011, para. 11; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014, para. 16.

⁹ The German legislator has introduced a new section 21 into the *Gerichtsverfassungsgesetz* (Law on the Organization of the Judiciary) which makes it clear that German authorities will not enter into an autonomous examination of the international legal issue once the Court has made a request; the purpose of this section to recognize the Court’s decision-making power is correctly identified by Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 1386.

¹⁰ Broomhall and Krefß, in: Krefß et al. (eds), *The Rome Statute*, Vol. II (2005) 525 et seq.

¹¹ For more detailed information on this and on the following text, see Kaul, in: Fischer et al., *International and National Prosecution* (2001) 21–41; Keitner (2001) 6 *UCLAJIL&ForeignAff* 215–264; Scheffer (2005) 3 *IJCJ* 341–344.

¹² Harhoff and Mochochoko, in: Lee (ed.), *The International Criminal Court* (2001) 665.

‘Proposed Text of Rule to Art. 98 of the Rome Treaty

‘The Court shall proceed with a request to surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international agreement.’

Proposed Text to Supplement Document to the Rome Treaty

‘The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a UN Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the UN Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply’.

This initiative, that in some sort revived the United States’ proposal at the end of the Rome Conference for an amendment on official acts¹³, proved unacceptable to the overwhelming majority of delegations that wished to preserve the integrity of the Statute as adopted in Rome rather than seeing it amended through the backdoor of the Rules of Procedure and Evidence¹⁴. At the fifth session the United States introduced the following amended version of the first part of its above cited proposal:

‘The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with international agreements applicable to the surrender of the person’.

Again, the proposal raised widespread and serious doubts regarding its compatibility with article 98(2). Germany summarized its concerns and listed options for a compromise in conformity with the Statute in an analytical paper¹⁵. After some rounds of difficult negotiations the final version of what has become rule 195, sub-rule 2, was agreed upon. The provision reads as follows:

‘The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under Article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court’.

On the insistence of the like-minded States and, in particular, the European Union, the adoption of this sub-rule was complemented by the inclusion of the following proviso in the report of the proceedings of the Preparatory Commission:

‘It is generally understood that Rule 9.19 (*i.e.* the later so adopted rule 195, sub-rule 2) should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or any other international organization or State’.

This was meant to operate as an additional bar against possible attempts to later use the relationship agreement under article 2 of the Statute for indirect jurisdictional changes of the Statute¹⁶. Accordingly, the latter agreement was not so used.

The second US initiative took shape after the failure of that State to have the most questionable Security Resolution 1487¹⁷ renewed. The initiative consists in a world wide campaign conducted by the United States and supported by a massive use of its economic

¹³ Harhoff and Mochochoko, in: Lee (ed.), *The International Criminal Court* (2001) 667.

¹⁴ Gartner, in: Fischer *et al.*, *International and National Prosecution* (2001) 431; Harhoff and Mochochoko, in: Lee (ed.), *The International Criminal Court* (2001) 668; Kaul, in: Fischer *et al.*, *International and National Prosecution* (2001) 33.

¹⁵ The paper is reprinted as an annex to Kaul, in: Fischer *et al.*, *International and National Prosecution* (2001) 42.

¹⁶ Kaul, in: Fischer *et al.*, *International and National Prosecution* (2001) 34.

¹⁷ S/RES/1487 (2003) of 12 June 2003 which in turn constitutes the renewal of S/RES/1422 (2002) of 12 July 2002; for a legal and legal policy critique of this (mis)use of Security Council powers, see Krefß, *The International Criminal Court and the United States, Reflections on Resolution 1422 of the UN Security Council*, in 77 *Art and Thought*, Fikrun Wa Fann 56 *et seq.* (2003).

power¹⁸ to induce States Parties to enter into what may best be called ‘bilateral non-surrender agreements’ with the United States. The head of the United States delegation in Rome describes the content of the agreements in questions as follows:

‘The standard form language of the Bush Administration’s bilateral non-surrender agreements (at least those that have been publicly disclosed) defines the ‘persons’ to be covered by the particular agreement to be ‘current or former Government officials, employees (including contractors), or military personnel or *nationals* of one Party (italics in the original)’¹⁹.

- 7 Seven years after the Rome conference, the head of the US delegation in Rome stated that ‘[t]he US delegation contemplated in its discussions pertaining to article 98(2) that particular agreements – either already in force or that would be negotiated and ratified in the future and which established jurisdictional responsibilities for investigating and prosecuting criminal charges against certain individuals before national courts – could be used to avoid surrender of particular types of suspects to the ICC’²⁰. It is impossible, in the absence of a complete set of published *travaux préparatoires* to either contradict or confirm this assertion. What must be said, though, that these contemplations were not disclosed to all participants in the negotiations and that, if this was indeed ‘America’s Original Intent’, it was most probably articulated very late in the day. For those and other reasons America’s alleged ‘Original Intent’ cannot be equated with ‘the drafters intent’ behind article 98 para. 2²¹.
- 8 A quite considerable number of States Parties have or are reported to have concluded one of the bilateral agreements in question. Many States Parties, however, have refused to enter into such an agreement despite all the pressure to which they had been exposed.
- 9 The second controversy about article 98 in the practice subsequent to its adoption concerns the application of article 98(1) in the case against al Bashir. On 31 March 2005, the Security Council, through resolution 1593, as adopted under Chapter VII of the UN Charter²², had referred the situation in Darfur (Sudan) to the Court. On 4 March 2009, Pre-Trial Chamber I determined that the position of al Bashir as the incumbent head of state of the non-State Party Sudan did not preclude the Court from exercising its jurisdiction in the case against that suspect²³. On 6 March 2009 and 21 July 2010, the Registry adhered to the Chamber’s instruction to request all States Parties to arrest and surrender al Bashir²⁴. In its decision of 12 December 2011, the same (but differently composed) Chamber found that the Republic of Malawi had failed to cooperate with the Court by failing to arrest and surrender al Bashir to the Court²⁵. This finding was based on the convictions that: (1) there is an international customary law exception (even) from incumbent head of state immunity for the purpose of proceedings before the Court²⁶ and (2) that the

¹⁸ Scheffer (2005) 3 *JICJ* 350: ‘The Bush Administration has been negotiating bilateral non-surrender agreements, not only as a reflection of its own reading of Article 98 (2) and the protection it can afford even non-party States (such as the United States), but also as a direct consequence of the conditionality for military, and, as recently amended, economic assistance to foreign governments set forth in extraordinarily punitive fashion in the American Service Members Protection Act (ASPA) (footnote omitted)’; see also Bogdan (2008) 8 *ICLR* 24–27.

¹⁹ Scheffer (2005) 3 *JICJ* 345; for more detailed information about the agreements, see Bogdan (2008) 8 *ICLR* 29–33.

²⁰ Scheffer (2005) 3 *JICJ* 336.

²¹ Both authors of this commentary took an active part in the negotiations of article 98; Krefß was member of the German and Prost was member of the Canadian delegation.

²² S/RES/1593 (2005), 31 March 2005.

²³ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (‘Omar Al Bashir’), ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC I, 4 March 2009, para. 41.

²⁴ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (‘Omar Al Bashir’), ICC-02/05-01/09-7, Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, 6 March 2009; No ICC-02/05-01/09-96, Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, 21 July 2010.

²⁵ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011, *in fine*.

²⁶ *Id.*, para. 18 in conjunction with para. 43.

‘unavailability of immunities with respect to prosecution by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions²⁷. In its decision of 13 December 2011 pertaining to the Republic of Chad and presenting the same legal issues, the Chamber referred back to the decision it had rendered the day before²⁸. In its decision of 9 April 2014, Pre-Trial Chamber II found that the Democratic Republic of the Congo had failed to cooperate with the Court by deliberately refusing to arrest and surrender Omar Al Bashir²⁹. This finding was based on the conviction that, through Resolution 1593 (2005), the Security Council had ‘implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State³⁰’.

The decisions of 12 and 13 December 2011 provoked a vigorous dissent by the African Union Commission (for a detailed account, see mn 34). The press release dated 9 January 2012, by which this dissent was communicated, contains the following passage: ‘Following these Decisions of ICC Pre-Trial Chamber I, the African Union Commission expresses its deep regret that the decision has the effect of: (i) Purporting to change customary international law in relation to immunity *ratione personae*; (2) Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless; (3) Failing to address the critical issue of the removal or non removal of immunities by the UN Security Council resolution 1593 (2005), which referred the situation in Darfur to the ICC.’ In July 2014, the AU members decided to include the following article 46*Abis* in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights: ‘No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office³¹’.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Third State

The reference to ‘third State’ is not altogether clear as, on the basis of a grammatical interpretation, ‘third State’ may mean ‘a State other than the requested State’ or – narrower – ‘a non-State Party’. The better case can be made for the first interpretation³². It is true, though, that article 2 para. 1 (h) of the Vienna Convention on the Law of Treaties defines the concept of ‘third State’ in the sense of ‘State not party to the treaty’. The drafters of the Statute were, however, free to use the same concept in a different way and this is what they did. A rather strong first indication pointing in this direction is the fact that other provisions

²⁷ *Id.*, para. 44.

²⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-140, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, PTC I, 13 December 2011 para. 13.

²⁹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014, *in fine*.

³⁰ *Id.*, para. 29.

³¹ For explanation, see van Schaack (2010) <<http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/>> accessed 10 January 2015.

³² For the same view, see Pedretti, Immunity of Heads of State and State Officials for International Crimes 277 (2015); for an alternative interpretation, see Gaeta, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court* (2002) 991–1000; perhaps the alternative interpretation also underlies the implementing legislation of the United Kingdom (see Lewis, in: Krefß *et al.* (eds.), *The Rome Statute*, Vol. II (2005) 463. This, however, would not appear to represent a strong trend in the subsequent State practice, but rather an isolated minority view; Broomhall and Krefß, in: Krefß *et al.* (eds.), *The Rome Statute*, Vol. II (2005) 525.

of Part 9 (*cf.*, in particular, article 87(5) explicitly speak of ‘a State not party to the Statute’. Apart from that systematical argument, it should be borne in mind that it was the inviolability of diplomatic premises that was at the heart of the debate on article 98(1). As it was widely felt during the negotiations, this inviolability could place an obstacle to the execution of a request for surrender, both *vis-à-vis* a State Party or a non-State Party³³. The term ‘third State’ in this paragraph thus means ‘a State other than the requested State’. Pre-Trial Chamber I has confirmed this interpretation in that it has recognised the possibility of a ‘third State which has ratified the Statute’³⁴.

2. Obligations under international law

- 12 As Pre-Trial Chamber I has confirmed³⁵, paragraph 1 is not concerned with immunities or privileges accorded to a person on the basis of national law. The Court is thus not prevented, on the basis of this provision, to request the arrest and surrender of a person and the search of a place because of provisions in the law of the requested State. The paragraph is relevant only where the requested State can demonstrate that the action sought by the Court would place it in violation of an obligation at international law.
- 13 Paragraph 1 contains an open reference to possible conflicting obligations under international law, but does not in and of itself contain a determination in that respect. In particular, the paragraph can by no means be construed so as to revive immunities that international law no longer accepts. In its application of paragraph 1, the Court must therefore establish the existence of an immunity protection under international law on the basis of the relevant legal sources which are for many parts to be found outside the Statute while including article 27. The case law of the Court confirms this interpretation³⁶.

3. With respect to the State or diplomatic immunity of property

- 14 Perhaps somewhat surprisingly at first sight, it was this type of immunity protection that was the main driving force behind paragraph 1, the paradigm case being the customary inviolability of diplomatic premises as codified in article 22 of the Vienna Convention on Diplomatic Relations³⁷. The reason for this prominence of the concern regarding premises and property is two-fold. First, there is little evidence in State practice that those immunities have suffered from an exception in the special case of investigative or other measures relating to criminal proceedings for crimes under international law. Second, article 27 does not deal with these immunities so that there can be no argument of an anticipated waiver expressed through the acceptance of the latter article by State Parties. It follows that paragraph 1 may well turn out to have some practical relevance in this context³⁸.

4. With respect to the State or diplomatic immunity of a person

- 15 a) **State or diplomatic immunity of a person.** The term ‘State immunity’, as used in article 98(1) covers not only the immunities rights of a State *ratione materiae*, but also those *ratione personae*. As the first Special Rapporteur of the ILC on the subject of ‘immunity of State

³³ Kaul and Kreß (1999) 2 *YbHumanL* 164.

³⁴ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, PTC I, 12 December 2011, para. 18.

³⁵ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 12 December 2011, para. 20.

³⁶ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 12 December 2011, paras. 22 *et seq.*; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014, paras. 29 *et seq.*

³⁷ For a comprehensive contemporary analysis of the applicable international law, see Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 637–705.

³⁸ Concurring Iverson (2012) 4 *GOJIL* 140–141.

officials from foreign criminal jurisdiction' has rightly stated 'the State stands behind both the immunity *ratione personae* of its officials from foreign jurisdiction and their immunity *ratione materiae*'³⁹. It is therefore warranted to construe the term 'State immunity of a person' for the purposes of article 98(1) to include immunity rights *ratione personae* to the extent that they do not already fall under the heading of 'diplomatic immunity of a person'. To do otherwise would have the odd consequence that the most powerful international law immunity which, accordingly, is most likely to give rise to the conflict of duties that article 98(1) seeks to avoid, would, except for the diplomatic immunity *ratione personae*, remain uncovered. The resulting lacuna would then have to be filled by applying by way of analogy either the concept of 'State immunity of a person' or that of 'diplomatic immunity of a person' to, for example, the immunity right *ratione personae* with respect to a Head of State. The suggested broad interpretation of the term 'State immunity' in article 98(1) avoids the need to resort to such an artificial solution⁴⁰.

b) The third State is a State Party. As will be set out below (cf. *infra* mn 21, 36), the non-availability of international immunity rights *ratione materiae et personae* with respect to persons, as articulated in article 27(2), is declaratory of customary international law. But even if this were not the case, there would be no conflicting international obligations, because any (then) necessary waiver of an international immunity right would already be contained in article 27(2)⁴¹. The case law of the Court is in line with this interpretation⁴².

According to one view, any waiver contained in article 27 would, however, be confined to the exercise of the Court's jurisdiction in its narrow, technical sense. Under this view, the arrest by a State Party of a person enjoying an international immunity protection is not covered by article 27 even where such an arrest is based on a request made by the Court. As a consequence hereof, it is held that the arrest of a national of a State Party normally enjoying immunity protection under international law by another and so requested State Party requires a waiver under article 98(1) from the State Party normally entitled to international immunity protection⁴³. This position is unconvincing⁴⁴. It is true, though, that from a technical legal perspective the arrest and surrender by a State Party remains an exercise of its criminal jurisdiction even where it is based on a request by the Court. This technical perspective, however, is not the adequate one in our specific legal context; it fails to capture the substantial difference between the State arrest in a purely national or a traditional inter-State setting and in the context of the direct enforcement of international criminal law *stricto sensu*. Article 27(2) is situated in this latter context and its value in practice would risk to be significantly reduced if not more or less nullified if the general waiver of immunity rights contained therein would not be construed so as to include the State acts of arrest and surrender based on a request by the ICC⁴⁵. Pre-Trial Chamber I has endorsed that interpretation and has stated that 'acceptance of article 27(2) of the Statute, implies waiver of immunities for the purposes of article 98(1) of the Statute with respect to proceedings conducted by the Court'⁴⁶.

³⁹ Kolodkin, Preliminary report on immunity of State officials from foreign criminal jurisdiction, A/CN.4/601, 29 May 2008, para. 94.

⁴⁰ Krefß, in: Bergsmo and Yan (eds.), *State Sovereignty* (2012) 236-238.

⁴¹ Broomhall, *International Justice* (2003) 144 *et seq.*; Kuc (2012) 18 *NewEngJ&CompL* 272-273; Ambos, *Internationales Strafrecht* (2014), § 8 mn. 77.

⁴² *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 12 December 2011, para. 18; *Prosecutor v. Al Bashir*, No ICC-02/05-01/09, Decision 9 April 2014, para. 25.

⁴³ Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 1391 *et seq.*

⁴⁴ For the same view as expressed in this commentary, see, e.g., Robinson, in: Cryer *et al.* (eds.), *Introduction* (2007) 441.

⁴⁵ For a concurring view, see Akande (2004) 98 *AJIL* 424: '[T]he removal of immunity from the exercise of the Court's jurisdiction contained in Article 27 would be nullified in practice if Article 98(1) were interpreted as allowing parties to rely on the same immunities in order to prevent the surrender of their officials to the Court by other states (footnote omitted). This argument is supported by the principle that '[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses of paragraphs of a treaty to redundancy and inutility' (footnote omitted)'.

⁴⁶ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 12 December 2011, para. 18.

- 18 c) **The third State is not a State Party.** In this context, article 27 cannot be relied upon as a general waiver because it has not been accepted by the third State concerned⁴⁷. The Court will thus have to decide the question of possible conflicting international obligations on the basis of the applicable international law outside the ICC Statute. In that respect, a distinction must be drawn between the functional immunity protection of State organs that forms part of State immunity and which is widely referred to as immunity *ratione materiae* and the personal immunity protection (immunity *ratione personae*) enjoyed by a limited number of highest representatives of the State⁴⁸.
- 19 aa) **Immunity *ratione materiae*.** The concept of immunity *ratione materiae* is well captured in the second sentence of article 39(2) of the Vienna Convention on Diplomatic Relations: It relates to the performance of official acts by an organ of a State and continues to exist after the person concerned has gone out of office. Immunity *ratione materiae* under customary international law extends throughout the whole State apparatus. By definition, international criminal law (*stricto sensu*) poses a fundamental challenge to this immunity protection because crimes under international law are very often committed by State organs in the apparent (and abusive) exercise of their official functions. For this reason, the development of international criminal law since the Nuremberg trial is inextricably linked with the recognition of an exception to the traditional immunity protection *ratione materiae* and there is a long line of national⁴⁹ and international (for these, see mn 24) judicial pronouncements that support the view that the said exception is firmly rooted in customary international law both with respect to national and international criminal proceedings. The most recent practice of African States has not changed this legal picture. In July 2014, the members of the African Union decided to include the following article 46*Abis* in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights: ‘No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office’. The words ‘based on their functions’ may be taken to suggest that this provision is meant (among other things) to provide immunity *ratione materiae*. But, first, it remains to be seen whether article 46*Abis* will enter into force. Second, it is unclear whether the adoption of article 46*Abis* implies the legal conviction of African States that the international criminal law exception to the international law immunity *ratione materiae* does not exist. Third, this international criminal law exception is already too firmly grounded in custom to be changed by the practice of States from one region. Accordingly, the widespread scholarly view that article 27(2) is declaratory of customary international law as far as immunities *ratione materiae* are concerned⁵⁰, is and remains correct.

⁴⁷ Akande (2004) 98 *AJIL* 421.

⁴⁸ The distinction between international law immunities *ratione materiae et personae* is, as the present Special Rapporteur of the ILC for the project ‘Immunity of State officials from foreign criminal jurisdiction’ states, ‘unquestionably a distinction that exists in practice’; Preliminary report on the immunity of States officials from foreign criminal jurisdiction. Prepared by Ms. Concepción Escobar Hernández, A/CN.4/654, 31 May 2012, para. 54.

⁴⁹ For a most recent meticulous analysis, see Pedretti, *Immunity of Heads of State* (2015) 167–190; for an earlier thorough study, see Kreicker, *Völkerrechtliche Exemtionen*, Vol. I (2007).

⁵⁰ See Pedretti, *Immunity of Heads of State* (2015) 156–192; Talmon (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 323–329; Kreicker, *Völkerrechtliche Exemtionen*, Vol. I (2007) 175–219; Cassese 13 *EJIL* 853 (2002); Krefß, in: Klip and Sluiter (eds.), *Annotated Leading Cases*, ix (2006) 203; Wirth (2002) 13 *EJIL* 877; Ambos, *Treatise on ICL I* (2013) 414; Robinson, in: Cryer *et al.* (eds.), *Introduction* (2007) 434 (with a small reservation on p. 433 based on the divergences amongst the Law Lords in *re Pinochet*); there is a question-mark, though, as regards diplomatic and consular immunities *ratione materiae*; for an extended argument that no customary international criminal law exception has evolved (and superseded the relevant treaty protections) in that specific respect, see Kreicker, *Völkerrechtliche Exemtionen*, Vol. I (2007) 570–588; for an exceptional scholarly opinion against an international criminal law exception from the immunity right *ratione materiae*, see Wuerth (2012) 106 *AJIL* 768, who does not, however, clearly distinguish between the international criminal law exception, which is the subject matter of this commentary, and a potentially far broader *human rights* exception, on which this commentary does not take a position.

Regrettably, the ICJ has failed to authoritatively settle the issue in the *Yerodia* case. In an *obiter dictum*, completely unsupported by legal reasoning, it said that after a person ceases to hold an office to which immunity *ratione personae* is attached, 20

‘he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister of Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity’⁵¹.

In respect of the commission of crimes under international law during the period of office, 21 this statement is fundamentally ambiguous: If conduct which is criminal under international law is, by definition, considered to be committed ‘in a private capacity for the purposes of the international law of immunity’, it would fall outside the immunity protection *ratione materiae*⁵². If the Court was of this view it should have said so because the said restriction of the term ‘official act’ for the distinct purpose of the international law of immunity is far from evident and subject to a significant amount of scholarly criticism⁵³. If the *dictum* is, accordingly, read with the understanding in mind that the international criminality of a certain conduct of a State official does not, in and of itself, affect the conduct’s official character⁵⁴, the meaning alters drastically: The *dictum* then suggests that the immunity protection *ratione materiae* before national courts prevails even in cases of crimes under international law. Although the *dictum* is confined to national proceedings and is supplemented by another and quite different *dictum* regarding international proceedings, it should be mentioned that the *dictum* in question is at odds both with State practice and with the very idea underlying international criminal law (*stricto sensu*). The point is worth mentioning because there is a widespread recognition of the fact that the issue of an exception from the immunity *ratione materiae* in cases of crimes under international law should receive a uniform treatment before national and international jurisdictions⁵⁵.

The ICJ will therefore be well advised to have a fresh look on the matter. The correct conclusion will be that no immunity *ratione materiae* exists under customary international law in the case of national and international proceedings for genocide, crimes against humanity, war crimes and the crime of aggression. This conclusion encompasses State measures of arrest and surrender of a person sought by the Court. It follows that no conflict of international obligations within the meaning of paragraph 1 exists in the hypothesis in question so that the Court is not precluded from making a request for arrest and surrender under article 98(1)⁵⁶. Pre-Trial Chamber I has endorsed this legal view, while it has confined the reach of its finding to international criminal proceedings⁵⁷. In view of the customary international criminal law exception to the international law immunity *ratione materiae*, there is no such immunity under customary international law to be eliminated by way of a Security Council decision with respect to proceedings before the Court.

bb) Immunity *ratione personae*. The picture is considerably less clear regarding immunities *ratione personae* enjoyed by heads of state, heads of government, foreign ministers, 22

⁵¹ ICJ, Case Concerning the Arrest Warrant of 11 April 2000, *Democratic Republic of Congo v. Belgium*, 14 Feb. 2002, para. 61.

⁵² Cf. in this direction, the Joint Individual Opinion of Judges Higgins, Kooijmans and Buergenthal, Case Concerning the Arrest Warrant of 11 April 2000, *Democratic Republic of Congo v. Belgium*, 14 Feb. 2002, para. 85, and the Dissenting Opinion of Judge van den Wyngaert, *ibid.*, para. 36.

⁵³ For a powerful recent critique, see Kreicker, *Völkerrechtliche Exemtionen*, Vol. I (2007) 120–138; for a shorter statement to the same effect, see Zahar and Sluiter, *International Criminal Law* (2007) 505; Ambos, *Treatise on ICL I* (2013) 417.

⁵⁴ This is the understanding of Judge Al-Khasaweh in his Dissenting Opinion, Case Concerning the Arrest Warrant of 11 April 2000, *Democratic Republic of Congo v. Belgium*, 14 Feb. 2002, para. 6.

⁵⁵ Robinson, in: Cryer *et al.* (eds.), *Introduction* (2007) 434.

⁵⁶ For the same view, e.g., Kreicker, *Völkerrechtliche Exemtionen*, Vol II (2007) 1387 *et seq.*

⁵⁷ *Prosecutor v Al Bashir*, ICC-02/05-01/09, Decision 12 December 2011, para. 36.

and, according to some commentators, the other members of a State cabinet, as well as diplomats, while in office⁵⁸.

- 23 aaa) Customary international law. The ICJ has rightly confirmed the absence of an international criminal law exception to this traditional immunity protection under international customary law for the purpose of national proceedings.⁵⁹ At the same time, the ICJ has opened the door for the recognition of a special exception pertaining to international criminal proceedings. It stated that a person who holds an office to which immunity *ratione personae* is attached ‘may be subject to proceedings before certain international criminal courts, where they have jurisdiction’. The ICJ goes on to specifically mention the ICTY, the ICTR and the ICC as examples of the ‘certain international criminal courts’ referred to⁶⁰. If strictly applied, this *dictum* would support the view that article 27 is declaratory of customary international law not only with respect to the immunity protection *ratione materiae* but also to that *ratione personae* to the extent that beneficiaries of the latter immunity category fall within the jurisdiction of the Court⁶¹. Due to the complete lack of supporting legal analysis, it must, however, remain a matter of speculation whether the ICJ had this far-reaching consequence in mind or whether it simply ‘forgot’ to qualify its legal proposition by an exception pertaining to non State parties in case of a treaty based international criminal court⁶². However, a strong argument against the idea of a ‘forgotten qualification’ or even an ‘implied exception’⁶³ of the kind just alluded to follows from a conjunctive reading of the *dictum* concerning ‘certain international criminal courts’ and the previous statement that persons who hold or formerly hold an office to which immunity *ratione personae* is attached

‘will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity’⁶⁴.

For only in its unqualified form, the ‘international courts *dictum*’ substantially adds to the ‘waiver *dictum*’.

- 24 Pre-Trial Chamber I has determined that an international customary law exception from the international law immunity of States *ratione personae* with respect to their Heads exists

⁵⁸ Unfortunately, the ICJ has not specified those ‘certain holders of high ranking office in a State’ (ICJ, Case Concerning the Arrest Warrant of 11 April 2000, *Democratic Republic of Congo v. Belgium*, 14 Feb. 2002, para. 51) that are beneficiaries of the immunity protection *ratione materiae*; at the time of writing, the ILC does not seem inclined to add State offices to the list of those explicitly recognised by the ICJ; see Draft article 3 of the draft articles on ‘Immunity of State officials from foreign criminal jurisdiction’, as repr. in A/CN.4/L.814, 4 June 2013; for a recent argument to include all members of government into the list of beneficiaries of the international immunity right *ratione personae*, see Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 727–729; for a scholarly pronouncement pointing in the same direction, see Talmon (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 352–353.

⁵⁹ ICJ, Case Concerning the Arrest Warrant of 11 April 2000, *Democratic Republic of Congo v. Belgium*, 14 Feb. 2002, para. 53–58; this determination was confirmed in *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014, para. 25.

⁶⁰ ICJ, Case Concerning the Arrest Warrant of 11 April 2000, *Democratic Republic of Congo v. Belgium*, 14 Feb. 2002, para. 61.

⁶¹ For a similar reading of the formulation of the ICJ’s ‘international court *dictum*’, see Zahar and Sluiter, *International Criminal Law* (2007) 504.

⁶² Klingenberg (2003) 46 *GYbIL* 549, avoids the interpretation of the ICJ *dictum* one way or the other and argues ‘the judgment must be regarded as leaving open the question of whether article 27 para. 2 Rome Statute allows the ICC to derogate from immunities enjoyed by third state nationals’; Talmon, (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 360, prefers a narrow reading of the ICJ’s *dictum*, but he concedes that the formulation may be read differently.

⁶³ For such an implied exception, see Akande (2004) 98 *AJIL* 418, who sums up his view that ‘the statement by the ICJ that international immunities may not be pleaded before certain international tribunals must be read subject to the condition (1) that the instruments creating those tribunals expressly or implicitly remove the relevant immunity, and (2) that the state of the official concerned is bound by the instrument removing the immunity [footnote omitted]’.

⁶⁴ ICJ, Case Concerning the Arrest Warrant of 11 April 2000, *Democratic Republic of Congo v. Belgium*, 14 Feb. 2002, para. 61.

with a view to proceedings before an international court, including the ICC⁶⁵. The Chamber has held further that ‘the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions’ so that the kind of conflict of international legal duties article 98(1) is to avoid does not exist⁶⁶.

In light of the fundamental importance of this decision, the Chamber’s detailed reasoning in support of these two findings deserves to be set out in full. The Chamber has explained the existence of an international customary law exception from the international law immunity of States *ratione personae* with respect to their Heads in international law as follows:

“The Chamber notes that as early as March 1919, in the aftermath of the First World War, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties recommended the establishment of a High Tribunal rejecting the idea of immunities for Heads of States:

“In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based on the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.”

In the aftermath of the Second World War, two international tribunals were established, respectively in Nuremberg and Tokyo. Article 7 of the Charter of the International Military Tribunal states as follows:

“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”

The International Military Tribunal sitting in Nuremberg reaffirmed such a principle in its judgment issued on 1st October 1946:

“The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position to be freed from punishment in appropriate proceedings.”

Article 6 of the Charter of the International Military Tribunal sitting in Tokyo convicted defendant Hiroshi Oshima, the Japanese Ambassador in Berlin, despite his assertion that he was protected by his diplomatic immunity:

“OSHIMA’s special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by Courts of the State to which an Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence.”

In 1950, the United Nations General Assembly adopted the ‘Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal’. Principle III states:

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

Article 7(2) of the International Tribunal for the Former Yugoslavia Statute likewise states:

“The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

In several occasions, especially after the transfer of Slobodan Milosevic, the International Tribunal for the Former Yugoslavia (‘ICTY’) stated that article 7(2) was declaratory of customary international law:

⁶⁵ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 12 December 2011, para. 36.

⁶⁶ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 12 December 2011, paras. 37–43, 44.

“Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Articles 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda (...) are indisputably declaratory of customary international law.”

Article 6(2) of the International Tribunal for Rwanda (‘ICTR’) Statute is identical to article 7(2) of the ICTY Statute.

In its Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission adopted the same principle. Article 7 of the Draft Code, entitled ‘Official position and Responsibility’ indeed states:

“The official position of an individual who commits a crime against the peace and the security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.”

The International Court of Justice (‘ICJ’) held, in the ‘Arrest Warrant Case’, that although customary international law provided for immunity with regard to *national courts*, for certain officials such as the incumbent Minister of Foreign Affairs, and *a fortiori* for Heads of State and Government, even in the case of a suspected commission of war crimes or crimes against humanity, such immunities could not be opposed by a criminal prosecution of an international court:

“Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council Resolutions under Chapter VII of the United Nations Charter, and the Future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in article 27, paragraph 2, that ‘immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.’”

The ICJ in the ‘Arrest Warrant Case’ is concerned solely with immunity across national jurisdictions. The ICJ majority referenced the international tribunal provisions addressing immunity, including article 27 of the Statute, and conceded that these provisions ‘do enable it to conclude that any such an exception exists in customary international law *in regard to national courts*.’ The ICJ majority discussion of customary international law immunity is therefore distinct from the present circumstances, as here an *international court* is seeking arrest for international crimes. This distinction is meaningful because, as argued by Antonio Cassese, the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit a foreign state’s ability to engage in international action. Cassese emphasised that this danger does not arise with international courts and tribunals, which are ‘totally independent of states and subject to strict rules of impartiality.’

Following the ICJ ruling in the ‘Arrest Warrant Case’, the Appeals Chamber of the Special Court for Sierra Leone, applying article 6(2) of its Statute which is identical to article 6(2) of the ICTR Statute and article 7(2) of the ICTY Statute, held that ‘the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court’. As explained by that Court:

“A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.”

Therefore the Chamber finds that the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of State not Parties to the Statute whenever the Court may exercise jurisdiction. (...)

The Chamber considers that the international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that international law immunity applies in the present context.

For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek Head of State’s arrest for the commission of international crimes⁶⁷.

⁶⁷ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 12 December 2011, paras. 23–36, 42–43 (numbers of paragraphs and footnote in the original omitted, emphasis as in the original).

The Chamber goes on to explain why the Court is not precluded by virtue of article 98(1) to request a State Party, on whose territory an incumbent Head of a non-State Party sought by the Court is present, to arrest and surrender that Head of State:

‘Furthermore, the Chamber is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.

Indeed, the cooperation regime between the Court and States Parties, as established in Part IX of the Statute, can not in any way be equated with the inter-state cooperation regime which exists between sovereign States. This is evidenced by the Statute itself which refers in article 91 of the Statute to the ‘distinct nature of the Court’, and in article 102 of the Statute which makes a clear distinction between ‘surrender’, meaning the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

Indeed, it is the view of the Chamber that when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within its jurisdiction⁶⁸.

These findings of Pre-Trial Chamber I are controversial. A significant part of international legal scholarship is of the view that the customary international law immunity *ratione personae* covers not only national proceedings, but also international criminal proceedings, including those for crimes under international law⁶⁹. According to this view, non-State Parties possess a customary immunity right *ratione personae* applicable both *vis-à-vis* the Court and *vis-à-vis* a State Party that receives a request for cooperation as part of proceedings before the Court. Pursuant to article 98(1), the Court would therefore be precluded from issuing a request for State Party cooperation with respect to any beneficiary of the immunity right in question. One argument in support of this position denies the possibility to distinguish between national and international criminal proceedings for the present purposes. A second argument, which may or may not be combined with the first, disputes the existence of a sufficient amount of State practice in support of the international customary law exception from the international immunity right *ratione personae*, as maintained by Pre-Trial Chamber I. 26

Some authors concur with the first finding of Pre-Trial Chamber I, but reject the second⁷⁰. Those authors agree with the proposition of an exception from the international customary law immunity *ratione personae* for the specific purpose of international criminal proceedings, but they believe that this exception does not extend to the international legal relationship between the requested State and the non-State Party to which the beneficiary of the international immunity right *ratione personae* belongs. According to this position, the Court is not precluded by any conflicting immunity right *ratione personae* from exercising its jurisdiction over an incumbent Head of State, Head of Government or Foreign Minister of a non-State Party, but the Court is precluded from issuing a request to a State party for the arrest and surrender of such a person sought unless a waiver to that effect has been obtained by the non-State party concerned. 27

The second edition of this commentary on article 98, however, took the view which was adopted by Pre-Trial Chamber I and the Chamber’s reasoning, by and large, mirrors the considerations set out in that second edition. This third edition maintains this previous position and therefore agrees with both findings of Pre-Trial Chamber I. To this, however, it must be added that the subsequent practice of African States has prevented the law, as set out by Pre-Trial Chamber I, from consolidating. The following analysis proceeds in two steps. First, the argument in support of the findings made by Pre-Trial Chamber I will be summarised. Second, the subsequent practice of African States and its legal effect will be considered. 28

⁶⁸ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 12 December 2011, paras. 44–46.

⁶⁹ Pedretti, *Immunity of Heads of State* (2015) 274–299, 304–307; Talmon (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 359–364; Akande (2004) 98 *AJIL* 421 *et seq.*; Robinson, in: Cryer *et al.* (eds.), *Introduction* (2007) 441; Simbeye, *Immunity and International Criminal Law* (2004) 159.

⁷⁰ Tladi (2013) 1 *JICJ* 206–207, Kreicker (2008) *HuV-I* 162–163; *id.*, *Völkerrechtliche Exemtionen*, Vol II (2007) 759–766; Gaeta (2009) 7 *JICJ* 320–322, 325–326.

29 As was highlighted above (mn 23), the ICJ has given credit to the idea that the international law immunity right *ratione personae* suffers from an exception for international criminal proceedings for crimes under international law. More recently, the first Special Rapporteur of the ILC on the subject of ‘Immunity of State officials from foreign criminal jurisdiction’, lent his support to this idea and stated that ‘(i)mmunity from international criminal jurisdiction appears to be fundamentally different from immunity from national criminal jurisdiction’⁷¹. This, of course, provokes the question why international criminal proceedings should be seen as being ‘fundamentally different’ from their national counterparts. In fact, there would be no real difference at all if international proceedings were simply the collective exercise of State rights to conduct national proceedings. Such a delegation model, however, is not the most convincing manner to conceptualise international criminal justice *stricto sensu*. Instead, international criminal law in the true (and narrow) sense of the word⁷² is ultimately based on the idea of a *ius puniendi* of the international community as a whole⁷³ and, as a matter of principle, the exercise of this *ius puniendi* is therefore primarily entrusted not to States, but to organs of the international community. Those organs constitute the direct embodiment of the ‘collective will’ and offer the best guarantee that the enforcement of international community values does not lead to – notably: hegemonic – abuses. This does not rule out the power of States to exercise the *ius puniendi* of the international community in the case of crimes under international law, but it explains the possibility that an international criminal court, which acts as an organ of the international community in conducting proceedings for crimes under international law, has wider powers than a national criminal court, which acts as a mere fiduciary of the common good⁷⁴. Yet, not every international criminal court qualifies as an organ of the international community and the findings of Pre-Trial Chamber I must be nuanced in that respect. It is fairly clear, for example, that France and Germany cannot create an organ of the international community by setting up a joint criminal court on the basis of a bilateral treaty. The ICJ is likely to have alluded to this fact by confining its ‘international tribunals *dictum*’ to ‘*certain* international criminal courts (emphasis added)’. This brings us to the question which international criminal courts may qualify as organs of the international community. On an abstract level, it can be said that only those courts should count which can make a compelling claim to directly embody the ‘collective will’. This is certainly the case with international criminal tribunals set up by the Security Council and the same should hold true for international criminal tribunals which, as is the case with the Special Court for Sierra Leone, act with that Council’s blessing. The case of the ICC is more difficult whenever this Court’s exercise of jurisdiction has not been triggered by a Security Council referral. The obvious argument not to treat the ICC as an organ of the international community is the lack of (quasi-)universal adherence to the ICC Statute. On the other hand, it is difficult to deny that the ICC Statute constitutes a legitimate attempt to establish an organ to directly exercise the international community’s *ius puniendi*, because the treaty has been negotiated on the universal level, contains a standing invitation for universal adherence and does not display elements lending themselves to a (hegemonic) manipulation of the collective will. The facts that the ICC Statute has attracted a very significant number of ratifications, that the Security Council has referred two situations threatening international peace and security to the ICC for investiga-

⁷¹ Kolodkin, Preliminary report on immunity of State officials from foreign criminal jurisdiction, A/CN.4/601, 29 May 2008, para. 103; China has made a similar statement in the Sixth Committee of the United Nations General Assembly in 2008. The relevant sentence reads as follows: ‘Immunity from criminal jurisdiction of a foreign State was not the same as immunity from international criminal jurisdiction such as that of the International Criminal Court, and the two should not be linked’; A/C.6/63/SR.23, 21 November 2008, para. 35.

⁷² International criminal law *stricto sensu* must ultimately be rooted in customary international law of a general nature; for the full exposition of this view, see Krefß, in: Wolfrum (ed.), *MPEPIL*, Vol. V. (2012) 719- 721 (paras. 10–14).

⁷³ Krefß, *ibid.*

⁷⁴ Concurring Zhong (2014) *FICHL Policy Brief Series* No. 20 2.

tion and that the UN have endorsed the vision behind article 2 of the Statute through the conclusion of the Relationship Agreement with the ICC, add further weight to the view that the ICC on substance, and despite its formal creation by treaty, derives its mandate from the international community. As a matter of principle, it is therefore possible to draw a distinction between national criminal proceedings and proceedings for the ICC with respect to international law immunities. It is important to add that the principles outlined so far are not merely scholarly speculations about 'natural' international law. Instead, the 'international community' is a point of reference not only in the fourth preambular paragraph of the Statute, but also in Art. 53 of the Vienna Convention on the Law of Treaties, in the famous ICJ's dictum on international obligations *erga omnes* in *Barcelona Traction* and in Art. 48(1)(b) of the ILC's Articles on State Responsibility⁷⁵ and there does not appear to be disagreement with the concept that international criminal law *stricto sensu* protects values belonging to the international community as a whole. The theoretical possibility that the ICC possesses wider powers than a national criminal court is therefore to be acknowledged.

It is now necessary to give a closer look to the issue of international law immunities and here again on the level of principles first. Almost by definition, international criminal law *stricto sensu* poses a fundamental challenge to traditional international law immunities. To criminalise what is typically State-related conduct tends to run counter to the old idea of shielding acts of states from foreign judicial scrutiny by means of a procedural bar. The difficulty to reconcile traditional international law immunities with the very idea of international criminal law *stricto sensu* becomes even more apparent once it is recognised that the use of the international criminal law instrument is most important in the cases of those persons who bear the greatest responsibility for what is typically macro-criminality. For, those persons will often be precisely the ones in respect of whom traditional immunity protection is strongest. It is therefore no surprise at all that the International Military Tribunal at Nuremberg addressed the challenge upfront and clearly articulated the idea that the acceptance of an international criminal law *stricto sensu* implies the retreat of traditional international law immunities:

'The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official positions in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares: 'The official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.' On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state authorizing action moves outside its competence under international law⁷⁶.'

Already the Nuremberg precedent therefore clearly sends out the message that international criminal law *stricto sensu* implies an important restriction on the traditional international law concept of State sovereignty. While it has been and continues to be the key function of this concept to allow scope for moral disagreement within a pluralist international legal order and while the international law concept of State sovereignty includes the protection of States against intrusions into their territory even in cases of violations of international law⁷⁷, the rules of international criminal law *stricto sensu* draw the red line beyond which State sovereignty no longer provides an impenetrable shield for those acting on behalf of the State. The very idea of international criminal justice *stricto sensu*, which again is not simply a scholarly speculation about 'natural' international law, but which has been accepted by States at Nuremberg and which has been revitalised by States since the 1990ies, therefore poses a formidable challenge to traditional international immunities. Yet, the ICJ has authoritatively determined in the *Arrest Warrant* case that the traditional international law immunity *ratione*

⁷⁵ James Crawford (ed.), *State Responsibility* (2002) 276.

⁷⁶ International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946, (1947) 41 *AJIL* 221.

⁷⁷ For a recent brilliant exposition of all this, see Roth, *Sovereign Equality and Moral Disagreement* (2011).

personae holds firm in national criminal proceedings for crimes under international law. It is oversimplified to explain the *Arrest Warrant* qualification of the rigorously worded rejection of immunities by the Nuremberg Tribunal on immunities by saying that, in criminal proceedings in a foreign State, the right of the State of the offender to sovereign equality trumps the *ius puniendi* of the international community. A more convincing explanation would refer to the sovereign right of States to be protected against an abusive (hegemonic) use of the criminal law instrument by another State in the name of the international community in those cases where such an abuse would have a seriously destabilising effect on international relations. The message underlying the *ratio decidendi* of the *Arrest Warrant* would seem to be that when it comes to persons enjoying international law immunity *ratione personae*, the State sovereignty interest to be protected against an abusive use of the criminal law instrument by a foreign State carries more weight than the international community's interest in the fiduciary exercise of this community's *ius puniendi* by such a state. At this point, the balance may be struck differently in criminal proceedings before a judicial organ of the international community. Such an organ may, of course, also fail in its attempt to serve the interests of justice, but the institutional safeguards against an abuse of the criminal law instrument are such that the international community's interest weighs heavier. In light of the preceding observations the truth would appear to lie between the two extremes of saying that the principle of sovereign equality has 'no relevance to international criminal proceedings which are not organs of a state but derive their mandate from the international community'⁷⁸ and that '[i]t makes little difference whether foreign states seek to exercise this judicial jurisdiction unilaterally or through some collective body that the state concerned has not consented to. The truth is that there is no 'fundamental' difference between proceedings for crimes under international law conducted by a State as the fiduciary of the international *jus puniendi* and by an international criminal court which qualifies as an organ of the international community. There is, however, an appreciable difference regarding the institutional framework for such proceedings which justifies treating the question of international law immunities differently in both fora.

- 31 The considerations so far were situated at the level of general principles. Although those principles are not the result of scholarly speculation, but could be derived from international practice, they are not sufficient *per se* to demonstrate that an 'international criminal proceedings exception' from the international law immunity *ratione personae* has come into existence through the customary process. More specific practice based on *opinio juris* is needed to crystallise the principles into law. This does not mean, however, that the above highlighted principles are irrelevant to the question whether new customary international law has come into existence. The development of international criminal law since the 1990ies provides clear evidence for the existence of what has been called 'modern custom'⁷⁹, the ascertainment of which usually involves a degree of deduction from broader principles such as those established above⁸⁰. Where such principles clearly point in the direction of new customary law, the latter may crystallise without the need to identify a huge amount of more concrete State practice and verbal State practice, which is almost indistinguishable from *opinio juris*, may largely take the place of 'hard' State practice in the traditional sense. Modern custom may thus come into existence without a solid body of 'hard' practice confirming the respective rule⁸¹. These considerations apply to the 'international criminal

⁷⁸ Special Court for Sierra Leone, SCSL-2003-01-I, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, para. 51.

⁷⁹ For two useful studies of these methodological issues with many further helpful references, see Roberts (2001) 95 AJIL 757; Seibert-Fohr, in: Zimmermann and Hofmann (eds.), *Unity and Diversity in International Law* (2006) 264–270.

⁸⁰ For some insightful reflections on the matter, see Herdegen, in: Dupuy *et al.* (eds.), *Völkerrecht als Wertordnung* (2006) 899. On the crystallization of war crimes committed in non-international armed conflicts, see Krefß (2001) 30 *IsYbHumRts* 104–109.

⁸¹ The methodological considerations set out in the above text form part of the subject-matter of the current ILC project 'Identification of Customary International Law'. In his second report, the Special Rapporteur cautions against the acceptance of the idea that the identification of customary law could be done only on the

proceedings exception' in question. This is all the more so because international criminal proceedings against beneficiaries of the traditional international law immunity *ratione personae* remain comparatively exceptional events and because it is obviously impossible to induce the exception in question from a series of *national* judicial decisions as instances of 'hard' State practice. It must, however, be conceded that an international customary law rule that has come into existence based on a combination of deductive and inductive reasoning will be the more vulnerable to change as a result of the occurrence of contrary 'hard' practice the more limited the amount of prior 'hard' practice in support of the new rule had been⁸².

In its analysis of the State practice in point, Pre-Trial Chamber I, as was done by the Special Court for Sierra Leone before⁸³, refers to article 7 of the Charter for the Nuremberg Tribunal, to article 6 of the Charter for the Tokyo Tribunal, to Principle III of the 1950 Nuremberg Principles, to article 7(2) of the ICTY Statute, to article 6(2) of the ICTR Statute and to article 7 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind (see above mn 25). One may wonder whether the Chamber was justified to rely on those documents despite the fact that they are all framed in terms of substantive law and thus do not directly address the immunity issue as does article 27(2) of the ICC Statute. While it is true that '[i]mmunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts⁸⁴' so that the distinction drawn in the two paragraphs of article 27 of the ICC Statute marks a progress in the clarity of drafting, it is also true that the two concepts have not been neatly distinguished in the earlier practice of international criminal practice. Beginning with the Nuremberg judgment, as can be seen from the above citation (see mn 30), the immunity issue has been addressed in conjunction with the statutory provision that confirms the applicability of the substantive law. It is therefore in line with the historic development that the ILC states in its commentary on article 7 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind that

'the absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence⁸⁵.'

It is also true that the language of the texts cited by the Pre-Trial Chamber seem to extend to incumbent Heads of States etc. without drawing a distinction as to whether the State concerned can be said to have waived its immunity rights before the jurisdiction concerned. In light of this, the Pre-Trial Chamber was justified to refer to the documents as listed as relevant verbal State practice. At the same time, it must be recognised that until the *Charles Taylor* decision, this verbal State practice did not yield any international judicial decision as regards the international immunity *ratione personae* with the one single exception of the ICTY's arrest warrant against the then incumbent Head of State *Slobodan Milošević* and the ICTY's Trial Chamber's decision confirming the jurisdiction of the Tribunal⁸⁶. The precedential value of

basis of ascertaining an *opinio iuris* in certain legal contexts. The Special Rapporteur recognises, however, that the two-element approach (searching for State practice and *opinio iuris*) may be applied differently in different fields (A/CN.4/672, Second report on the identification of customary international law, 22 May 2014, para. 28). While the Special Rapporteur does not demonstrate a particular inclination towards recognising the relevance of deductive reasoning based on broader principles, it is submitted that such an approach is nothing but a particular application of the two-element approach provided that the broader principles are themselves derived from the practice of States.

⁸² On 'relative resistance to change' and customary international law, see Byers, *Custom* (1999) 157–160.

⁸³ Special Court for Sierra Leone, SCSL-2003-01-I, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, paras. 45–47.

⁸⁴ Roman Anatolevich Kolodkin, in International Law Commission *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, 29 May 2008, A/CN.4/601, para 66.

⁸⁵ Para. 6 of the Commentary on article 7, as repr. in: McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law, Vol. II* (2000) part 1 354; in footnote 39, the ILC further notes: 'Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment.'

⁸⁶ ICTY, *Prosecutor v. Milošević*, IT-99-37-PT, Decision on Preliminary Motion, Trial Chamber, 8 November 2001.

the latter decision is somewhat weakened, however, by the fact that the *Milošević* decision did not confront the legal issue of the immunity *ratione personae* of the Federal Republic of Yugoslavia⁸⁷. as a distinct legal problem. To the contrary, the ICTY Trial Chamber placed the pertinent paragraphs of their decision under the title ‘Lack of competence by reason of his status as *former* President (emphasis added)’. As a result, the decision does not clearly recognise that the *Milošević* precedent exceeds the denial of immunity *ratione materiae* concerning the conduct of a former Head of State before a judicial organ of the international community. The only judicial decision that explicitly acknowledges setting such a precedent before the 12 December 2011 Pre-Trial Chamber I Decision, is the Special Court for Sierra Leone’s *Decision on Immunity from Jurisdiction* in the *Charles Taylor* case⁸⁸. Importantly, this precedent has not provoked a protest from the African Union. It is, of course, possible to have different views on these materials depending on the approach to the ascertainment of customary international law one chooses. Under the modern positivist approach to customary international law, as set out for reasons of methodological transparency above (mn 31), Pre-Trial Chamber I has made a convincing case for the crystallisation of a customary international criminal law exception from the international law immunity *ratione personae* in proceedings before a judicial organ of the international immunity. The case builds, as has been developed in the course of the preceding observations, on the combined effect of a set of ‘guiding principles’ pertaining to the concepts of ‘international community’ and ‘international criminal law *stricto sensu*’ as accepted by States over the last decades, on a consistent line of verbal State practice beginning with the Charter for the Nuremberg Tribunal, on the *Milošević* precedent before the ICTY (though with a somewhat limited effect), on the literal formulation of the ‘International Criminal Court *dictum*’ of the ICJ in the *Arrest Warrant* case and on the culmination of all this in the *Charles Taylor* decision by the Special Court for Sierra Leone.

- 33 Pre-Trial Chamber I has also made a convincing case for its second finding that the ‘international criminal proceedings exception’ extends to the triangular legal relationship between the Court, a requested State Party and the non-State Party covered by article 98(1). The argument advanced by the Chamber is situated at the level of principles and at this level it is convincing. While the State of arrest and surrender is formally exercising its national authority, it is on substance acting for the Court to assist the latter in the direct enforcement of the *jus puniendi* of the international community. For this reason, there is an important difference between the factual situation governed by the ICJ’s judgment in the *Arrest Warrant* case, where a State conducts national criminal proceedings against a person suspected of having committed a crime under international law, and the factual situation governed by Pre-Trial Chamber I’s decision in the *al Bashir* case, where a State party to the Statute has been requested by the ICC to arrest and surrender a person suspected of having committed a crime under international law for proceedings before the Court. There was, however, no precedent in the practice of international proceedings and the related vertical cooperation directly covering the extension of the ‘international criminal proceedings exception’ to the realm of vertical cooperation. While there is certainly room for legitimate disagreement, it is submitted that the second finding by Pre-Trial Chamber I did not amount to an inappropriate act of ‘judicial legislation’. The vertical cooperation regime constitutes an external and vitally important part of the international proceedings before the Court as the latter proceedings, in the absence of direct enforcement powers of the Court, cannot be conducted without vertical State cooperation. The extension of the ‘international criminal proceedings exception’ from the international immunity law *ratione personae* to the realm of vertical cooperation is therefore not properly characterised as the acceptance of distinct new customary rule. This extension is better seen as the proper

⁸⁷ Importantly, the Federal Republic of Yugoslavia was not a UN member State at the time of *Milosevic’s* indictment. The case can thus not be explained on the basis of an (indirect) waiver of immunity of the State concerned.

⁸⁸ Special Court for Sierra Leone, SCSL-2003-01-I, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, para. 52.

delimitation of the one and the same ‘international criminal law exception’ in question. It follows that the lack of an international judicial precedent precisely on a vertical cooperation legal relationship such as that established through Part 9 of the ICC Statute does not constitute an insurmountable obstacle to the second finding reached by Pre-Trial Chamber I. This finding rather, and as foreshadowed in marginal no 23 in the second edition of this commentary, crystallised the proper scope of application of the ‘international criminal proceedings exception’ from the international customary law immunity right *ratione personae*.

The proper weight of Pre-Trial Chamber I’s recognition of the ‘international criminal proceedings exception’ must be seen in light of the remarkably vertical manner in which article 98(1) operates (mn 3) and which, from the legal perspective of State parties, implies the Court’s ‘sole authority to decide whether immunities are applicable in a particular case’⁸⁹. In light of this verticality of the Statute’s legal scheme, it may well be asked whether States Parties have agreed that the Court acts on their behalf when it comes to the identification of the ‘international criminal law exception’. In any event, the Statute’s verticality implies the duty for State Parties to be loyal to the Court when the latter has reached an attempt to clarify the relevant customary international law in a manner which is not manifestly mistaken. At the same time, there can be no denial that the ‘international criminal law exception’, as set out by Pre-Trial Chamber I in its two findings, is based in significant parts on deductive reasoning from broader principles. It therefore remains comparatively vulnerable to change as a result of the occurrence of subsequent contrary ‘hard’ practice (see mn 30) of non-State Parties. In that context, the subsequent practice of African States must be considered. The controversy about the ‘international criminal proceedings exception’ can be traced back to the thirteenth Ordinary Session (1–3 July 2009) of the Assembly of the African Union. The Assembly requested:

‘(T)he Commission to convene a preparatory meeting of African States Parties at expert and ministerial levels but open to other Member States at the end of 2009 to prepare fully for the Review Conference of States Parties scheduled for Kampala, Uganda 2010, to address among others, the following issues, (...).

v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute; (...).

The Assembly decided:

‘(...) that in view of the fact that the request by the African Union (to defer proceedings initiated against President Bashir) has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan; (...)’⁹⁰.

It is not entirely clear which *opinio iuris* is implied in these statements. The Assembly’s request to the Commission to prepare a legal analysis does not express a legal position on the issue, but the wish to form such a position at a later stage. It is not easy to harmonise this wish with the decision that AU Member States shall not cooperate with the Court. On close inspection, however, this decision cannot be read as the articulation of precisely that legal position which the request to the Commission was meant to prepare. Instead, the decision is explicitly made ‘in view of the fact that the request by the African Union (to defer the proceedings initiated against President Bashir) has never been acted upon’. It is thus (and somewhat curiously so) drafted as a political reaction to a prior (political) decision by the Security Council. It is therefore not possible to read a sufficiently clear, let alone unambiguous position of the AU Member States (and in particular the Non-State Parties to the ICC Statute among these Member States) into Decision 245 (XIII). This assessment is confirmed by the Report of the Second Ministerial Meeting on the Rome Statute held on 6 November 2009 the pertinent passage of which states:

⁸⁹ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision, 12 December 2011, para. 11; *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 9 April 2014, para. 16.

⁹⁰ Assembly/AU/Dec. 245(XIII) Rev.1, paras. 8 and 10, 3 July 2009.

‘Articles 27 and 98 of the Rome Statute should be discussed by the Assembly of States Parties under the agenda item ‘stock taking’ in order to obtain clarification on the scope and application of these Articles particularly with regard to non State Parties. In this regard, there is need to clarify whether immunities enjoyed by officials of non state parties under international law have been removed by the Rome Statute or not.’

While perhaps not drafted with the utmost legal precision, this passage clearly does not contain the expression of a legal position on the subject matter. Instead, the Ministers once more emphasised the ‘need to clarify’ the law. This may reflect the fact that there appeared to be a lively discussion among AU Member States about the right course of action on the matter. While the subsequent decisions made in 2010 and 2011 sound more like the expression of the legal view that the State of Sudan’s immunity right *ratione personae* precludes the Court from issuing a request for arrest and surrender ‘pursuant to Article 98⁹¹’, the political background remains the same and therefore the practice of the AU Member States before 12 December 2011 did not amount to a sufficiently clear cut legal opposition to the ‘international criminal proceedings exception’.

On 9 January 2012, the AU Commission published its Press Release, as referred to in marginal no 10, criticising the decision of Pre-Trial Chamber I of 12 and 13 December 2011. This Press Release contains a protest against the Chamber’s recognition of the ‘international criminal proceedings exception’ because the Commission expresses its ‘deep regret that the decisions rendered by Pre-Trial Chamber I on 12 and 13 December 2011 have the effect of (...) (p)urporting to change customary international law in relation to immunity *ratione personae*’. This legal position cannot, however, be attributed to the AU Member States, because the African Union possesses an international legal personality which is distinct from that of its Member States, and because nothing in the African Union’s Constitutive Act suggests that the Commission is empowered to formulate and express its legal position on the international law of immunities on behalf of the Union’s Member States⁹². It is also not possible to attribute the conduct of the individual members of the Commission to their national States because the Commission constitutes an integrated (and not an intergovernmental) organ of the African Union. On 30 January 2012, the AU’s Assembly issued a statement pointing in the direction of the Commission’s legal view⁹³, but on 23 January 2012, the High Court of Kenya issued a provisional warrant of arrest against al Bashir and the Court based its decision of the request to arrest and surrender by the ICC⁹⁴. In June 2012, the new President of Malawi, Joyce Banda, announced that the State would not host al Bashir during the AU summit. The Republic Botswana supported Malawi’s change of position and stated:

‘The Government of Botswana is deeply concerned about the pressure exerted by the African Union Commission on the Government of Malawi to commit to hosting President Al Bashir at the forthcoming AU summit in July this year. Unfortunately, this pressure has consequently led to the Summit being moved to Addis Abeba, thus depriving Malawi to host the meeting. Botswana therefore condemns this action as it is inconsistent with the very fundamental principles of democracy, human rights and good governance espoused by the AU, and which Malawi upholds. It is our considered view that Malawi as a sovereign state has the right to make decisions it may deem necessary in fulfilment of her obligations under both the Rome Statute and the AU. In this regard, Botswana will take the opportunity at the forthcoming AU Summit to put its case across on this important matter of principle⁹⁵.’

⁹¹ Assembly/AU/Dec.366(XVII), 1 July 2011, para. 5; Assembly/AU/Dec.296(XV), 27 July 2010, para. 5.

⁹² In fact, as Keppeler (2012) 56 *AfricanL* 4 has shown, the stand taken by the AU Commission was not shared by all Member States of the Union.

⁹³ Assembly/AU/Dec.397(XVIII), 30 January 2012, paras. 7–8.

⁹⁴ A copy of the arrest is on file with the authors.

⁹⁵ A copy of the Press Release of Botswana’s Ministry of Foreign Affairs and International Cooperation of 12 June 2012 is on file with the authors.

In July 2012, the Assembly

‘(e)ndorses the recommendation of the Meeting of Ministers of Justice/Attorneys General to approach the International Court of Justice (ICJ), through the United Nations General Assembly (UNAG), for seeking an advisory opinion on the question of immunities, under international law, of Heads of State and senior state officials from States that are not Parties to the Rome Statute of ICC (sic) and this regard (sic), requests the Commission to undertake a further study on the advisability and implications of seeking such advisory opinion from ICJ (sic) and to report thereon to the Executive Council’⁹⁶.

This decision does no more than to restate the view of the AU Member States that the immunity issue is in need of clarification and to point to a possible way to achieve such clarification. As already mentioned (mn 10), in July 2014, the AU Members decided to include the following article 46Abis in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights:

‘No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office’⁹⁷.

This provision establishes an immunity protection which includes beneficiaries of the international law immunity *ratione personae*, but which by far exceeds beyond the scope of application of the latter international law immunity. If and if yes to what extent this proposed treaty provision implies the expression of an *opinio iuris* contrary to the customary ‘international criminal proceedings exception’ is unclear and at the time of writing article 46Abis has not entered into force.

It is difficult to weigh the above-summarised practice of African States and, in particular, of African non-State Parties, with precision. It follows from the methodological position set out above (mn 31), that the rejection of the ‘international criminal proceedings exception’ to the international law immunity *ratione personae*, as set out by Pre-Trial Chamber I, by the subsequent practice of non-State Parties from one region would suffice to ‘roll back’ the still comparatively vulnerable crystallisation of the exception. But in order to exert this effect, such a practice would have to be unambiguous and consolidated. Clearly, the subsequent practice of African States, including that of non-State Parties to the ICC, has not embraced the findings made by Pre-Trial Chamber I. Instead, African States have doubted the legal validity of the Chamber’s findings and a number of statements made within the framework of the African Union even sound like the rejection of these findings. However, whether these statements can be completely divorced from the AU’s political protest against the proceedings in the case of *Al Bashir* and the political protest against the non-deferral of these proceedings by the Security Council, remains unclear⁹⁸. It should be remembered that the African States had not protested against the findings made in the *Charles Taylor* decision. In light of its ambiguities and its political overtones, the more recent practice of these States cannot be characterised as sufficiently clear and consolidated to ‘roll back’ the ‘international criminal proceedings exception’ as determined by Pre-Trial Chamber I.

In overall conclusion, the ‘international criminal proceedings exception’ to the international law immunity *ratione personae*, as set out by Pre-Trial Chamber I, remains a convincing statement of the existing law, but one that is under pressure and whose future is therefore uncertain.

bbb) Security Council Decisions. Should the customary ‘international criminal proceedings exception’ to the international law immunity *ratione personae*, as set out by Pre-Trial Chamber I, not prevail in the future because of a sufficiently strong subsequent non-State

⁹⁶ Assembly/AU/Dec.529(XXIII), 26–27 June 2014, para. 2(e).

⁹⁷ Assembly/AU/Dec.529(XXIII), 26–27 June 2014, para. 2(e).

⁹⁸ For a similar view, see Pedretti, *Immunity of Heads of State* (2015) 226: ‘Given the circumstances in which these decisions were taken, i.e. the current political campaign of African States against the ICC, the legal significance of these documents is, however, difficult to assess.’

Party practice to the contrary, it would be left to the Security Council to decide situation by situation through a binding resolution whether the international law immunity rights *ratione personae* of one or more States shall suffer from an exception for the purpose of proceedings before the Court. Nothing in the UN Charter and more particularly in its Chapter VII makes the validity of such a decision by the Council dependent on the fact that it has been expressed explicitly. Nor is the Court bound by its Statute and more particularly by article 98(1) to accept a Security Council decision on the non-applicability of an international law immunity right only if this decision has been made explicitly. Whether or not the Security Council has decided that an otherwise existing international law immunity shall not apply with respect to proceedings before the Court, including the vertical cooperation as a part of these proceedings, is therefore a matter of construction of the relevant Security Council resolution(s).

- 38 In the case against al Bashir, Pre-Trial Chamber II has recognised the possibility of an implicit decision by the Security Council to the effect that the international law immunity *ratione personae* of a certain State is inapplicable. The Chamber has found as follows:

‘(B)y issuing Resolution 1593(2005) the SC *decided* that the ‘Government of Sudan (...) shall cooperate fully with a provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution’. Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring Sudan ‘cooperate fully’ and ‘provide any necessary assistance to the Court’ senseless. Accordingly, the ‘cooperation of that State (Sudan) for the waiver of the immunity’, as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests.

(...) (T)he DRC maintains to be bound by the obligation that ‘no serving AU Head of State or Government (...) shall be required to appear before any international court or tribunal during their term of office’. However, it follows from the above that the conflicting obligations which the DRC claims to exist are not merely between the African Union and the Court. Rather, the conflict actually lies between the decision of the African Union to retain the immunity of Omar Al Bashir and the SC Resolution 1593(2005) which removed such immunity for the purpose of proceedings before the Court. In this case, the conflict is resolved by virtue of articles 25 and 103 of the UN Charter. According to article 25 of the UN Charter ‘(t)he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the (...) Charter. In its advisory opinion on *Namibia* the ICJ stated, ‘when the Security Council adopts a decision under article 25 in accordance with the Charter, it is for member States to comply with that decision (...). To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

Further, according to article 103 of the UN Charter ‘in any event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the (...) Charter shall prevail. Considering that the SC, acting under Chapter VII, has implicitly lifted the immunities of Omar Al Bashir by virtue of Resolution 1593(2005), the DRC cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary⁹⁹.’

- 39 The Chamber’s finding accords with the prevailing scholarly view and, assuming that the customary ‘international criminal proceedings exceptions’ does (no longer) exist, it is correct. There is, however, disagreement about the best reasoning to explain that finding. While there is support for the Chamber’s view that the instruction of the State of Sudan ‘to cooperate fully’ may be read so as implicitly to include the elimination of any international immunity law right *ratione personae* of that State with respect to the proceedings before the Court in the given situation¹⁰⁰, this view has also been criticised for reading more in the words ‘cooperate fully’ than Part 9 of the Statute, which includes article 98(1), requires. Instead, so

⁹⁹ *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision 9 April 2014, para. 29–31 (nos of paragraphs and footnotes omitted; emphasis as in the original).

¹⁰⁰ Krefß, in: Bergsmo and Yan (eds.), *State Sovereignty and International Criminal Law* (2012) 241–243.

the critics hold, the inapplicability of international law immunity rights *ratione personae* results from very fact that the Security Council activates the Court's jurisdiction because the Court can only act in accordance with its Statute, including article 27(2). By virtue of conferring jurisdiction on the Court, so this explanation goes, the Security Council has placed the State of Sudan in the same legal position as a State Party to the Statute, including the unavailability of international law immunities pursuant to article 27(2)¹⁰¹. The criticism directed against the Chamber's reasoning is not compelling, because, as the Chamber argues, one may well read the words 'cooperate fully' to the effect that it implies to treat the non-State Party concerned as if it had already given the waiver of the immunity referred to in article 98(1). On the other hand, the alternative explanation appears to be the more straightforward legal avenue to reach the same result. It is therefore to be considered the preferable legal explanation. If the non-State Party concerned is accordingly placed, by virtue of a binding Security Council decision, in a legal position analogous to that of a State Party bound by article 27(2) it follows from the interpretation of that provision, as set out in marginal no 17 above, that the inapplicability of the international law immunity *ratione personae* extends to the realm of vertical cooperation covered by article 98(1)¹⁰².

5. Waiver of immunity

If the Court recognises that a request would conflict with an international obligation of the State concerned, it may either decide not to pursue the request or to engage in negotiations with that third State in order to obtain a waiver of immunity. The provision is framed in mandatory terms such that if the Court wishes to proceed with the request, it is the responsibility of the Court to obtain the requisite waiver from the relevant third State, before approaching the State where the person or place is located. Paragraph 1 does not address specifically the situation, where the Court, for some reason, does not recognise or know about the existence of the immunity and submits the request. Here, as rule 195, sub-rule 1 clarifies, the requested State will bring the matter to the attention of the Court and advise of the necessity for the Court to seek the relevant waiver. It is at the discretion of the Court to attain such a waiver.

As far as third States that are not party to the Statute are concerned, there can be no obligation under the Statute to express a waiver. Nor is there an explicit obligation for third States that are States Parties to waive their immunities. In the latter case, however, a strong argument based on article 86 and the overall purpose of the Statute can be made in favor of an implicit obligation to waive their immunity rights where the State concerned will not use its primary right to exercise criminal jurisdiction. On the basis of the foregoing analysis this implicit obligation has a limited scope of application; it may, in particular, become of some practical relevance regarding the inviolability of diplomatic premises¹⁰³.

6. Special missions

Any international immunity protection for members of special missions may also be considered as a case of a State immunity of a person within the meaning of paragraph 1. The relevant treaty provisions are contained in the 1969 Convention on Special Missions¹⁰⁴, which enjoys a rather limited number of ratifications and accessions¹⁰⁵. The customary status of this convention is controversial, but a careful recent scholarly study has made a strong case in support of the customary law status of the inviolability of members of high-level special

¹⁰¹ Pedretti, *Immunity of Heads of State* (2015) 288–290; Akande (2009) 7 *JICJ* 345–348 (2009).

¹⁰² In the same vein Ambos, *Treatise on ICL I* (2013) 415–6; for the contrary view, see Tladi (2013) 11 *JICJ* 211–212; Gaeta (2009) 7 *JICJ* 324–329.

¹⁰³ Kreicker, *Völkerrechtliche Exemtionen, Vol. II* (2007) 1394 *et seq.*

¹⁰⁴ The convention is in force as of 21 June 1985; for a detailed analysis of this Convention, see Kreicker, *Völkerrechtliche Exemtionen, Vol. II* (2007) 778 *et seq.*

¹⁰⁵ For a detailed analysis, see again Kreicker, *Völkerrechtliche Exemtionen, Vol. II* (2007) 793 *et seq.*

missions of a political nature¹⁰⁶. The point may become of increasing practical relevance in light of reports that United Kingdom has recently been according a ‘special missions protection’ to visiting incumbent and former foreign State officials¹⁰⁷. Assuming that the *noyveau dur* of the Special Missions Convention reflects customary international law, the question arises whether such an international law immunity right is of legal relevance in proceedings before the Court. In light of article 27(2) this must be denied with respect to right holders which are State Parties to the Statute¹⁰⁸. With respect to non-State parties, the ‘international proceedings immunity exception’ (mn 36) would encompass persons on special missions and, failing that, the Security Council would be in a position to lift any such immunity (mn 39).

7. International organizations

- 43 Paragraph 1 does not address possible immunities of members of international organizations. This does not imply the conscious decision of the drafters that no immunity issues may arise. Rather it constitutes a *lacuna* that must be filled by careful consideration of the principles underlying article 98(1). The immunity protections of members of international organizations are functional in nature so that the question arises whether the customary international criminal exception regarding immunities *ratione materiae* referred to above (mn 16–18) applies. Yet, article 19 of the Relationship Agreement between the Court and the UN stipulates the following:

‘If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if, in the circumstances, such person enjoys, according to the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the United Nations, the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law’.

This provision, that may acquire some practical importance in the context of forces of peace-keeping missions, may be seen as a corroboration of the view espoused in the literature¹⁰⁹ that the functional immunity of members of international organizations suffers from no customary international criminal law exception.

II. Paragraph 2

1. Request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court

- 44 a) Types of agreements *ratione personae*. Paragraph 2 only covers inter-State agreements. To such an agreement the requested State must be a party. This follows from the explicit reference to ‘its obligations’, *i. e.* the obligations of the requested State under the agreement in question. Rule 195, sub-rule 2, does not contradict this result for the following reasons: First, while this provision does not repeat the specific reference to ‘its obligations’ and does not specify the inter-state nature of the agreement, it refers back to article 98, paragraph 2 which

¹⁰⁶ Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 822; for a detailed report about the (widely divergent) scholarly opinions regarding the state of customary law, see *id.* 796–800.

¹⁰⁷ Talmon (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 344–347.

¹⁰⁸ Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 844.

¹⁰⁹ Kreicker, *Völkerrechtliche Exemtionen*, Vol. II (2007) 913 *et seq.*

precludes an interpretation at variance with this latter provision¹¹⁰. Second, the intention of the United States to formulate a rule that would widen the scope of agreements under paragraph so as to include agreements concluded by the Court, such as the agreement under article 2 of the Statute was rejected by an overwhelming majority of delegations at the Preparatory Commission (*cf.* mn 5)¹¹¹. Third, had rule 195, sub-rule 2, to be interpreted in line with the intention of the United States, that would create a conflict with paragraph 2, and pursuant to article 51(5) of the Statute, paragraph 2 would prevail.

Paragraph 2 covers bilateral as well as multilateral agreements.

According to one view¹¹², paragraph 2 only covers agreements between a State Party and non-party States because only the latter States can withhold their consent to enable the Court to exercise its jurisdiction. While such a view would certainly yield results conducive to effective cooperation it must be recognised that the wording of paragraph 2 is not so confined. Importantly, even on the basis of a broad construction of agreements within the meaning of paragraph 2 including those to the benefit of States Parties, results that run directly counter the overall purpose of the Statute can be avoided by recognising an implicit obligation of such States Parties to express their consent to the surrender upon being so approached by the Court (*cf. infra* mn 58).

b) Types of agreements *ratione materiae*. While the negotiations on paragraph 2 were conducted with a view to concerns raised by some delegations that the surrender obligation under Part 9 could conflict with obligations arising out of Status of Forces Agreements (SOFAs), the language chosen does not confine the paragraph to this category of agreements. Rather, the agreed upon formulation that refers to a ‘sending’ and, by implication, a ‘receiving’ State also includes treaty provisions on re-extradition and may include other agreements, including an agreement on a special mission, provided that they make use of the technical concept of a ‘sending’ and a ‘receiving’ State and give rise to the same conflict of international obligations¹¹³.

With a view to certain SOFAs it has been questioned whether they may create the conflict of obligations referred to in paragraph 2. The reasoning starts from the fact that the SOFAs concerned confine the primary or exclusive competence of the sending State to acts perpetrated in the performance of official duty. The argument then goes that in light of the recent development of international law it is no longer possible to argue that crimes under international law are perpetrated in that quality¹¹⁴. This reasoning, however, is open to the same kind of objections as the corresponding interpretation of the ICJ’s dictum on immunity *ratione materiae* in the *Yerodia* case (*cf.* mn 17). The widespread reference by States to SOFAs in the course of the negotiations leading to article 98 para. 2 further undermines the reasoning in question¹¹⁵.

c) Categories of persons. The combined effect of the reference to a ‘sending State’ and to ‘a person of that State’ in paragraph 2 is to confine this provision to persons that are present on the territory of a receiving State because they have been sent by a sending State.¹¹⁶ The

¹¹⁰ Benzing (2004) 8 *MPYbUNL* 208 *et seq.*; Gartner, in: Fischer *et al.*, *International and National Prosecution* (2001) 433; Harhoff and Mochochoko, in: Lee (ed.), *The International Criminal Court* (2001) 669; Keitner (2001) 6 *UCLAJIL&ForeignAff* 261 *et seq.*

¹¹¹ In that respect, the formulations in Scheffer (2005) 3 *JICJ* 343 are slightly misleading.

¹¹² Sendel (2007) *ZIS* 121; Akande (2004) 98 *AJIL* 428 *et seq.* holds the same view but it is based on the understanding (rejected in this commentary above mn 9) that article 98 para. 1 also applies only to the benefit of (third) non-party States.

¹¹³ Crawford *et al.* (2003) http://www.amicc.org/docs/Art_98-14une03FINAL.pdf, para. 42; the position taken by Bogdan (2008) 8 *ICLRev* 23, is not entirely clear.

¹¹⁴ Paust (2000) 33 *VandJTransnat’IL* 10 *et seq.*; Fleck (2003) 1 *JICJ* 662; the latter author then argues that the functional immunity of the persons covered by SOFAs fall within article 98 para. 1; this latter position is internally incoherent and at odds with existing international customary law as (*cf.* mn 16–18).

¹¹⁵ For the same view, see van der Wilt (2005) 18 *LeidenJIL* 102.

¹¹⁶ Crawford *et al.* (2003) http://www.amicc.org/docs/Art_98-14une03FINAL.pdf, para. 43–45; Benzing (2004) 8 *MPYbUNL* 210 *et seq.*; van der Wilt (2005) 18 *LeidenJIL* 104; Bogdan (2008) 8 *ICLRev* 22–24.

conclusion of a number of bilateral non-surrender agreements (*cf.* mn 6) that cover a far broader range of persons does not constitute subsequent practice evidencing an agreement to widen the scope of application of paragraph 2. Suffice it to say that the member States of the European Union have rejected this aspect of the US treaty practice. Instead, the EU guiding principles on the matter specify that ‘any solution should cover only persons present on the territory of the requested State because they have been sent by a sending State, *cf.* Article 98, paragraph 2 of the Rome Statute’¹¹⁷.

- 50 While the term ‘person of that State’ may suggest otherwise, it is clear from the context and the purpose of the provision that the persons covered need not be nationals of the sending State¹¹⁸.
- 51 **d) The time of the conclusion of the agreement.** Whether or not the paragraph covers not only pre-existing agreements, but also subsequent agreements is a matter of much controversy. Whereas a strong body of international legal scholarship¹¹⁹ and the Legal Service of the EU Commission¹²⁰ maintain that paragraph 2 does not extend to agreements entered into by the receiving State after the latter’s signature of the Statute or the Statute’s entry into force for the latter, an almost equal number of writers opine¹²¹ that no such time limit exists. In the joint statement of the latter position by J. Crawford, P. Sands and R. Wilde that has received much attention, an important qualification is made, though. Those commentators submit that any new agreement ‘should make clear provision to ensure that the ‘sending’ State subjects the person to effective investigation and, where warranted, prosecution. Additionally, any new agreement ought to also make provision for the re-transfer to the repatriating State of any person who is not subject to effective investigation or prosecution in a third State’¹²².
- 52 The broader construction of paragraph 2 is based on a literal and contextual reading. The point is made that the wording of paragraph 2 does not contain a limitation regarding the time of the conclusion of the agreements. Furthermore, an *argumentum e contrario* is drawn from to the use of the word ‘existing’ in article 90(6) and in article 93(3). More recently, the head of the US delegation in Rome has referred to ‘America’s Original Intent’ to further support the broad interpretation (*cf.* mn 7).
- 53 While the latter argument is weak at best (*cf.* mn 7), the literal and contextual reasoning carry considerable weight. Yet, it is submitted that, on balance, the arguments to the contrary are stronger and must therefore prevail. The concern that guided the negotiations on article 98 was to eliminate any obstacle to ratification that could result from already existing treaty obligations. This ‘original intent’ is evidenced not only by the personal recollection of those who participated in the Rome debates within the working group on Part 9¹²³, but also, and, of course, more importantly, by the fact that the article 87 of the Draft Statute (*cf.* mn 1)

¹¹⁷ General Affairs and External Relations, 2450th Council session, Brussels, 30 Sep. 2002, 12134/02 (Presse 279), Annex.

¹¹⁸ Benzing (2004) 8 *MPYbUNL* 213; Scheffer (2005) 3 *JICJ* 346–349.

¹¹⁹ Benzing (2004) 8 *MPYbUNL* 214–220; Gartner, in: Fischer *et al.*, *International and National Prosecution* (2001) 430; Kreicker, *Völkerrechtliche Exemtionen, Vol. II* (2007) 1383 *et seq.*; Kaul and Krefß (1999) 2 *YbHumL* 165; Meißner, *Die Zusammenarbeit* (2003) 132–134; Ambos, *Internationales Strafrecht* (2014), § 8 mn. 79.

¹²⁰ The Internal Opinion is reprinted in: 23 *HumRtsLJ* 158 (2002).

¹²¹ Crawford *et al.* (2003) http://www.amicc.org/docs/Art_98-14une03FINAL.pdf, para. 38; Scheffer (2005) 3 *JICJ* 340; Sendel (2007) *ZIS* 123; van der Wilt (2005) 18 *LeidenJIL* 100 *et seq.*; Zappalà (2003) 1 *JICJ* 122 *et seq.* (while with some reservations).

¹²² Crawford *et al.* (2003) http://www.amicc.org/docs/Art_98-14une03FINAL.pdf, para. 50.

¹²³ *Cf.*, apart from these commentators, the Austrian delegate, Gartner, in: Fischer *et al.*, *International and National Prosecution* (2001) 430: ‘The idea behind it [article 98 para. 2 of the Statute] was to solve legal conflicts, which might arise because of Status of Forces Agreements which are already in place. But it has to be emphasized that Art. 98, para. 2 was not designed to create an incentive for (future) State parties to conclude Status of Forces Agreements, which would amount to an obstacle to the execution of requests for co-operation issued by the Court’. Scheffer (2005) 3 *JICJ* 340, seeks to downgrade statements of that kind by attributing them to ‘some commentators, reflecting what they describe as the intent of certain delegates to the ICC negotiations’. This characterization of statements made by those who continuously participated in the actual negotiations and actively contributed to them is perhaps not entirely appropriate when at the same time so much is made of

treats the issue of possible conflicting obligations comprehensively and in so doing does not envisage the insertion of a provision that would follow the entirely different logic to provide State Parties with a tool to subsequently limit the Court's power to effectively exercise its jurisdiction. The brackets contained in article 87 of the Draft Statute make it plain that a number of States approached even this narrow issue of possible conflicts due to existing international obligations with reservation (*cf.* mn 2) and did certainly not intend to agree to a provision that would allow States Parties to create a situation of conflicting international obligations after the signature of the Statute and to hereby, in fact, shield broad categories of persons from the exercise of the Court's jurisdiction. This link between the controversy in question and the Court's jurisdiction leads to the most important argument against the broad construction; the argument being of a contextual and purposive character¹²⁴: The Court's jurisdiction was the 'question of questions' in Rome and, as it is generally known, the discussions pertaining to the jurisdiction issues lasted until the very end of the diplomatic conference¹²⁵. One cornerstone of the so hard-fought final solution contained in article 12(2) provides the Court with a limited jurisdiction over nationals of non-party States. The broad interpretation of article 98(2) would allow States Parties to renegotiate, on a bilateral basis, this cornerstone of the compromise on jurisdiction, and this with respect, in particular, to armed personnel, *i.e.* a category of persons the conduct of which is very much in the purview of international criminal law. States Parties would also be given a broad legal avenue to circumvent the development regarding international law immunities *ratione materiae* (mn 20) and *ratione personae* (mn 35) because of the possibilities to conclude bilateral agreements on special missions¹²⁶. Such results are hardly reconcilable with the overall interpretative goal to interpret the Statute as a coherent whole and it was therefore not contemplated in the course of the negotiations leading to the adoption of article 98. It would appear that the systematic point just made is of a much more substantial character than the undisputable fact that the word 'existing', the insertion of which would have clarified the matter, is absent from paragraph 2 while contained in article 90(6) and article 93(3). When measuring the comparable weight of the systematic reasoning set out in the preceding lines against the *argumentum e contrario* drawn from article 90(6) and article 93(3) the well known fact should also borne in mind, that the huge time pressure under which the Statute, including Part 9, had to be adopted in Rome, did not leave sufficient time, neither for the working group nor for the drafting committee, for a thorough consistency check. Eventually, the more narrow interpretation of paragraph 2 supported in this commentary duly reflects the fact that paragraph 2 constitutes an exception to the overarching obligation to cooperate in article 86 and, more specifically, to surrender in article 89(1), and keeps that exception to reasonable confines. It bears emphasising that in so doing, the narrow interpretation does not adversely affect any legitimate interest of a sending State that is not party to the Statute: the latter retains the unfettered right to assert, *vis-à-vis* the Court, its primary criminal jurisdiction through the complementarity scheme. Interestingly, the important qualification made by J. Crawford, P. Sands and R. Wilde and referred to above (mn 30) also, albeit somewhat more implicitly, recognises the fact that the conclusion of a 'non-surrender agreement' by a State Party only after the latter's signature of the Statute of the Statute makes a difference. The qualification advocated for by those three writers certainly is most welcome if the broad interpretation of paragraph 2 is adopted. From the perspective of the contrary view espoused here, one cannot fail to note that Crawford, Sands and Wilde, by qualifying their position on 'new agreements' concede that context and purpose of the Statute justify a distinction

'America's Original Intent' that is said to have been 'contemplated in its [America's] discussions pertaining to Article 98 (2)', but that was never clearly expressed in the working group on Part 9.

¹²⁴ Somewhat regrettably, the broad interpretation is nowhere based on a detailed reasoning and the arguments set out in the following text are not even discussed.

¹²⁵ For a detailed account, see Kaul and Krefß (1999) 2 *YbHumanL* 145–157.

¹²⁶ Talmon, (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 37, demonstrates that this a real possibility.

between old and new agreements even in the absence of an explicit basis in the wording of paragraph 2. If this is true, and this is precisely the position taken here, it is more plausible, however, not to adopt the broad interpretation in the first place.

54 The subsequent practice to paragraph 2 does not reveal an agreement of State Parties that the broad interpretation should prevail. Under the prevailing circumstances of high pressure and often secret negotiations, it is not even clear whether those States Parties, that have concluded a non-surrender agreement with the United States, were of the view to hereby remain within the confines of paragraph 2 or whether they simply hope that any treaty conflict will remain of a theoretical nature. In any event, the fact remains that many States Parties have rejected the conclusion of such an agreement. While the EU Guiding Principles mentioned above¹²⁷ do not confirm the narrow interpretation, they should not be interpreted as the expression of a unanimous *opinio juris* to the contrary, either. Rather, they formulate the lowest common denominator amongst EU member States while implicitly confirming a lack of agreement regarding the controversy about the issue of ‘new agreements’. Finally, the reference in the fourth preambular paragraph of Security Council Resolution 1593¹²⁸ to the ‘existence of agreements referred to in article 98–2 of the Rome Statute’ does not constitute evidence for an agreement on the broad interpretation by way of subsequent practice as it has been made clear at the adoption of the Resolution that this reference was not unanimously understood as the expression of an *opinio juris*, but was also seen as no more than a factual background statement¹²⁹. It remains thus to be seen whether the efforts undertaken by the United States to secure a subsequent agreement on the wide interpretation of paragraph 2 will prevail over the determination of at least a group of State Parties of some significance not to have a backdoor opened in Part 9 to undermine the integrity of the Court’s jurisdiction.

55 In conclusion, paragraph 2 only refers to existing agreements. With a view to the principle enshrined in article 18 of the Vienna Convention on the Law of Treaties, this means more specifically agreements concluded by a State Party before the latter’s signature of the Statute.

56 **e) Legal effect of concluding a non-surrender agreement outside the scope of paragraph 2.** It is difficult to argue that the conclusion by a State Party of a non-surrender agreement after the latter State’s signature of the Statute constitutes *per se* an internationally wrongful act. The better view is that the State Party concerned hereby maneuvers itself into a potential conflict of treaty obligation which will materialize in the case of an actual ICC request for surrender and the assertion of its treaty right to non-surrender by the non-State Party¹³⁰.

2. Consent of the sending State

57 As under paragraph 1, where a request would create a conflict of international obligations, the Court has only two choices – abandon pursuit of the particular request, or seek to obtain the consent of the third State.

58 Similar to what has been said in respect to paragraph 1 (mn 26), where the sending State is a State Party and does not exercise its own criminal jurisdiction, it is bound to give its consent to the surrender if so approached by the Court.

¹²⁷ See note 70.

¹²⁸ S/RES/1593 (2005), 31.3.2005.

¹²⁹ Zimmermann, in: Dupuy *et al.* (eds.), *Essays in Honour of Tomuschat* (2006) 691 *et seq.*

¹³⁰ For a more detailed exposition of the legal situation, see Benzing (2004) 8 *MPYbUNL* 221–235; Tallmann (2004) 92 *GeorgetownLJ* 1053; Bogdan (2008) 8 *ICLR* 41, argues that States Parties that have signed a potentially conflicting bilateral agreement should insist on the latter implying the ‘definitive obligation of the part of the US to investigate and/or prosecute’ with respect to an individual concerned.

Article 99

Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Literature: See Preliminary Remarks on Part 9. Sluiter, G., *International Criminal Adjudication and the Collection of Evidence: Obligation of States* (2002)

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	6
I. Paragraph 1.....	6
1. Requests for assistance.....	6
2. Execution of requests.....	7
3. Accordance with the law of the requested State.....	8
4. Procedural wishes expressed by the Court.....	10
II. Paragraph 2: Urgent requests.....	13
III. Paragraph 3: 'Replies ... in their original language and form'.....	14
IV. Paragraph 4.....	15
1. Chapeau.....	16
a) Without prejudice to other articles and the exclusion of compulsory measures.....	16
b) 'interview of or taking evidence from a person on a voluntary basis' ...	20
c) No 'presence of the authorities of the requested State Party'.....	21
d) 'essential for the request to be executed'.....	22
e) Examination 'of a public site or other public place'.....	23
f) Direct execution on the territory of a State.....	24

2. The different subparagraphs.....	29
a) Determination of admissibility and direct execution following all possible consultations.....	29
b) Other cases subject to any reasonable conditions or concerns.....	31
3. Enhanced cooperation.....	35
V. Paragraph 5: Application of ‘restrictions designed to prevent disclosure of confidential information’.....	36

A. Introduction/General remarks

- 1 While most of the provisions of article 99 were uncontroversial, the issues raised by paragraph 4 made the negotiation of this article difficult, challenging and extremely volatile. While no calculation was done, those present would no doubt attest to the fact that this one paragraph consumed the most time and effort of all of Part 9.
- 2 From early on in the Preparatory Committee, it was clear that one of the most sensitive issues which had to be addressed in Part 9, was the ability of the Prosecutor to conduct on site investigations and in some instances, to do so outside the presence of national authorities. The line on this issue was drawn solidly. There were those States for which any such authority for the Prosecutor would be in conflict with the principles of sovereignty and would present significant problems on a practical level. There were other States which considered this a critical tool for the Prosecutor, necessary for an effective investigation and of sufficient importance to overcome any concerns with respect to sovereignty.
- 3 The critical issue was not so much whether the Prosecutor should have the ability to conduct certain investigative actions directly and on his or her own, but whether that ability should be entrenched as a right in the Statute or left to States Parties to determine on a case by case basis. Those States, which advocated for an entrenched right, feared that unless there was a statutory obligation, in most instances, the Prosecutor would be unable to carry out on site activity. States which were territorial States in relation to the alleged offences would simply refuse to cooperate. States steeled in the tradition that sovereignty precludes official acts, by foreigners, on their territory, would refuse as a matter of principle. Refusals could be particularly damaging in cases where, unless the Prosecutor is able to gather the evidence directly and on his or her own, the evidence simply will not be obtained. Officials from the existing Tribunals were able to provide examples in support of that position.
- 4 At the same time, States which argued against such a provision had concerns about the infringement of sovereignty both on the level of principle and practice. They noted that the requested State Party would have no opportunity to protect its interests or those of its citizens, if such a wide ranging power was given to the Prosecutor, without any requirement for State consent.
Several draft articles were prepared and debated¹. The formulation which was ultimately accepted represented a true compromise – no State liked the text, but a vast majority could support it. The text seeks to achieve a balance between State interests and the interests of the Prosecutor.
- 5 Some key elements to the compromise should be highlighted. The two different scenarios of concern – uncooperative territorial States and States concerned with the principles of sovereignty – are given separate treatment in subparagraphs (a) and (b). This permitted a more precise response in each case.
Secondly, to allay the concerns of some States, the Prosecutor’s capacity to carry out on site investigations is limited to measures which do not require compulsion and cases where it is necessary for the Prosecutor to do so for the successful execution of a request.

¹ See, for example, Proposal by Canada, UN Doc. A/CONF.183/C.1/WGIC/L.12; 6 July, Rolling text of article 91 para. 4, UN Doc. A/CONF.183/C.1/WGIC/L.13; 10 July, Rolling text of article 91 para. 4, UN Doc. A/CONF.183/C.1/WGIC/L.13/Rev.1.

Finally, the Prosecutor's ability to carry out an investigative measure, outside the presence of national authorities, is limited to taking a statement or evidence from a witness. This was a critical proviso, which reduced the concerns of State about a Prosecutor carrying out a wide range of measures within a State, outside the knowledge and control of national authorities. At the same time, the ability for the Prosecutor to meet with witnesses and others, by him or herself, was viewed by States, which supported this power, as the most critical measure; one which had to be protected.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Requests for assistance

The requests referred to in this paragraph are those made under article 93. 6

2. Execution of requests

The provision deals exclusively with the execution of a request while article 93 concerns 7 the respective forms of cooperation as such or, as it has been said², the 'core' of the request. This distinction is of potentially great importance since article 93(3) sets a more stringent threshold for opposing to the execution of a request ('existing fundamental legal principle of general application') than article 99(1) contains with respect to the modalities of execution. Where to draw the line between the two may pose considerable difficulties in the cooperation practice under Part 9. The following example given by one learned commentator may provide some initial guidance: '[I]f the trial forum wishes to obtain testimony from a particular individual, this can be considered the core of the request. If it wishes furthermore that the testimony is obtained in the presence of the counsel of the accused, who should be allowed to submit questions to the witness, these 'wishes' can be preferred modalities of execution'³.

3. Accordance with the law of the requested State

The premise from which this formulation starts is the fact that requests of the Court will 8 be executed by organs of the requested State, except in the cases of article 57(3) (d) and article 99(4). The paragraph starts from the idea that the procedures of the law of the requested State will be used to execute the request. This accord with the traditional principle of *locus regit actum*. However, this requirement must be read in conjunction with article 88, which mandates that States must have procedures under national law for all the forms of cooperation specified. Therefore, there can be no question of general refusal because there is no such procedure under national law.

However, it may be that to carry out a specific measure in accordance with procedures of 9 its law, such as search and seizure, the requested State will need certain particular information *i. e.* enough to meet a domestic standard. This is recognized by the requirement for the Court to provide sufficient information as set out in article 96(2) (e). As well, the requested State is obliged to inform the Court about the requirements of the applicable law, pursuant to article 96(3), upon the request of the Court.

4. Procedural wishes expressed by the Court

The wording clarifies that the Court may specify certain modalities of execution to be 10 followed by the requested State. This constitutes a concession to the principle of *forum regit*

² Sluiter, *International Criminal Adjudication and the Collection of Evidence* (2002) 204.

³ Sluiter, *International Criminal Adjudication and the Collection of Evidence* (2002) 204.

actum which is the alternative to the *lex loci* principle. The Court will very often wish to make use of this option in order to ensure that the evidence collected by way of cooperation can subsequently be introduced into the trial. The provision alludes to one example of when it refers to the permission to be granted by the requested State that persons may be present and may assist in the execution process. In light of the requirement posed in rule 68 (a) this example may well prove to be of paramount practical importance in the context of the taking of witness testimony. For to meet the test in this rule, the Court will have to request not only the prosecutor but also counsel for the defence to be present and to be accorded the opportunity to examine the witness. Although it may thus quite often be highly desirable to follow the principle of *forum regit actum*, the latter's scope of application remains confined to those modalities of the execution of a request which are not prohibited by the law of the requested State. To have the reach of the *lex fori* principle so significantly curtailed, is all the more regrettable as there are instances of recent treaty practice in the field of inter-State judicial assistance where the principle has been embraced to a wider extent, subject only to a conflict with the requested State's *ordre public*⁴.

- 11 The law of the requested State may include provisions in international treaties to the extent that they are directly applicable within the respective legal order. This includes, in particular, article 55. Where this article is not directly applicable in the legal order of the requested State, such a State should still be precluded from invoking a prohibition in law to follow a procedural wish expressed by the Court when such a prohibition is contrary to the standard set in article 55. The reason is as follows: State Parties have accepted the standards set in article 55 'in respect of an investigation under this Statute'. They cannot then rely on national law contrary to these standards to reject a procedural wish expressed by the Court pursuant to article 99(1). It follows, to give one example, that States cannot oppose to the Court's wish that a request under article 93(1) (c) be executed in conformity with article 55(2) (d) even if the procedural law of the requested State conflicts with the latter standard.
- 12 In case of a conflict between a procedural wish expressed by the Court and the procedural law of the requested State, this would be a matter which should form the basis of consultations between the requested State Party and the Court pursuant to article 97, as the provision does not provide for a ground for refusal on this basis. As this relates to the manner in which the request will be executed and not whether or not it will be executed, it should allow for greater flexibility on the part of the State and the Court such that the issue should be resolvable through consultation.

II. Paragraph 2: Urgent requests

- 13 The paragraph states that the requested State has to respond to an urgent request by the Court in the same urgent manner. In such a case, it is not at the discretion of the requested State to decide whether the response should be sent urgently or not.

III. Paragraph 3: 'Replies ... in their original language and form'

- 14 Pursuant to this paragraph, the response to a request has to be sent in the original form. A translation of the documents, statements and records transmitted, into one of the working languages of the Court, is not required. However, the provision does not preclude the transmission of a courtesy translation if the requested State so chooses.

⁴ See, in particular, article 4(1) of the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union; OJ, C 197, 1. In light of the considerations in the text, it is desirable that States reduce possible obstacles to the fulfilment of procedural wishes expressed by the Court to the greatest extent possible. In particular, the right of counsel for the defence to be present during a rogatory commission and to examine the witness should be guaranteed as it is the case in a number of national laws of implementation; see Broomhall and Krefß, in: Krefß *et al.* (eds), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*. Vol. 2 (2005) 528.

IV. Paragraph 4

As is detailed in mn. 1 to 5 above, this paragraph was the most controversial one in the 15 discussions on international cooperation between the Court and the States Parties.

1. Chapeau

a) **Without prejudice to other articles and the exclusion of compulsory measures.** The 16 wording ‘without prejudice to other articles in this Part’ underscores the exceptional character of this provision. Contrary to traditional international cooperation law, the provision offers the possibility for the Prosecutor to conduct on site investigations on the territory of the requested State. At the same time, this wording emphasizes that, even in the case of direct execution by the Prosecutor, there will be a request presented by the Court.

The concept underlying the provision is drawn from article 29 of the Statute of the ICTY 17 and the broad interpretation accorded to it.

For this paragraph to apply, it must be clear that direct execution of the request by the 18 Prosecutor is necessary for the successful execution of a request. It is not because the Prosecutor would like to carry out the particular request on his or her own that this will be authorized.

Application of this exceptional provision is reserved for those circumstances where it is 19 important to the proper execution of the request.

The Prosecutor may conduct on site investigations only as long as no compulsory measures 19 are necessary. It was generally accepted that compulsory measures, such as a search and seizure or the exhumation of a grave site can be executed only by or with the assistance of officials of the requested State⁵. The Prosecutor, however, can request to be present and participate in the execution of such requests and that must be permitted under paragraph 1, unless it is specifically prohibited by national law. In addition, this paragraph does not preclude any State or State Party from empowering the Prosecutor to conduct the execution of requests requiring compulsory measures pursuant to its national law. It is just that the general obligation imposed in this paragraph relates only to assistance which does not require compulsory measures.

b) **‘interview of or taking evidence from a person on a voluntary basis’.** The use of the 20 term ‘including’ makes it clear that the paragraph is not limited to the enumerated examples and the Prosecutor may execute any type of request which does not require compulsory measures, on the territory of the requested State, when necessary to the successful completion of the request. The sentence provides a few examples that are not exclusive, in particular, perhaps the most common scenario, the voluntary interview or examination of a witness.

c) **No ‘presence of the authorities of the requested State Party’.** As noted in the 21 introduction, giving the Prosecutor the ability to carry out a measure in the territory of the requested State, outside the presence of the authorities of that State, was one of the most controversial aspects of this paragraph. As a result, this ability is limited in the text to the interview or examination of witnesses, which was viewed as the most critical measure for direct action by the Prosecutor alone. Witnesses, victims and experts may feel intimidated by the presence of judicial or police authorities of the requested State. In some instances, the presence of anyone outside of the Prosecutor may cause the witness to refuse to participate in the interview. Examples of these problems were well evidenced by the experience of the existing war crimes Tribunals. It was therefore difficult for States to oppose the inclusion of this right given its critical importance on a practical level.

⁵ This is without prejudice to article 57 (3) (d), where the Pre-Trial Chamber orders the Prosecutor to take investigative action on the territory of the State, where a Part 9 request cannot be executed due to the unavailability of an authority or component of the judicial system. In those circumstances, the measures available to the Prosecutor would include those which require compulsion.

The Prosecutor's ability to conduct the interview or examination, without the presence of national authorities, arises when that is essential for execution of the request. Thus, it will most likely be invoked when the witness is not prepared to provide testimony or a statement, if authorities of the State are present or unless only the Prosecutor is present.

As the authorities of the requested State may be excluded from the actual interview, it follows that the Prosecutor can decide not to provide those authorities with access to official records and statements produced during those examinations, particularly where this condition is imposed at the request of the person being interviewed or examined.

- 22 d) **'essential for the request to be executed'**. The phrase does not specify who determines this factor, however, reading the paragraph as a whole and within the context of the intent, on a practical level it will be the Prosecutor, familiar with the case and the particular witness, who will determine whether this is essential for the request to be executed. As it is presumed that the Prosecutor will be acting in good faith, he or she will not invoke this provision, unless there is a basis for proceeding in this manner.
- 23 e) **Examination 'of a public site or other public place'**. The provision does not allow for the on site examination of any public place that would require work on the ground, such as the exhumation of a mass grave. This would require execution of the request under article 93(1) (g) by authorities of the requested State. The notion 'public' in this context refers to sites and places that are open to the public. While it may seem trivial to accord the Prosecutor such a limited capacity, with respect to the examination of sites, as the mere unauthorized presence of the Prosecutor on the territory of a State may have legal and political ramifications, this could prove to be a very important right in some circumstances.
- 24 f) **Direct execution on the territory of a State**. This is a key sentence of the paragraph, giving the Prosecutor the power to take investigative measures on the territory of the requested State directly. During the deliberations in Rome, it was unclear whether the provision was within the scope of legal assistance or rather should be considered as part of the rules on investigation⁶. The fact that eventually the negotiators agreed to insert the provision on site investigations, within the framework of international cooperation and legal assistance, emphasizes that the Prosecutor may exercise those powers, only after a request has been presented. This is consistent with the opening words of the paragraph. Such a request however from the start may be framed as seeking direct execution, hereby being a request for 'passive' cooperation by the requested State. Further while the term 'request' is used this does not import any ability on the part of the state to decide whether or not direct execution will be allowed. Provided there are no general impediments to the request itself under the other aspects of Part 9, the state is obligated to allow direct execution if the request relates to a type of measure recognised under article 99(4).
- 25 In addition this provision is distinct from article 57(3) (d) where the Pre-Trial Chamber can authorize direct action by the Prosecutor on the territory of a State, where the State is unable to execute a request for cooperation due to the unavailability of any authority or component of a judicial system. Under article 99(4) the circumstances in which the Prosecutor can act directly are broader, however, the actions which the Prosecutor may take are more limited.
- 26 As a consequence, the requested State may examine such a request in accordance with its obligation stated in articles 86, 93 and 97. It may not deny such a request unless it conflicts with concerns of national security (article 93(4)) or where the particular measure that the Prosecutor wishes to take, in the particular case, is prohibited by law pursuant to article 93(3) and (1) (l). However, given the very limited nature of the types of assistance which the Prosecutor can directly execute and in particular, the restriction to measures which do not require compulsion, it is very difficult to envisage circumstances where these basis for refusal could be invoked in relation to execution of a request under article 99(4)⁷.

⁶ Kaul and Kreß (2000) 3 *YbIHumL* 168.

⁷ For the same view, see Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2002) 249.

Also, it is important to note that as the ability of the Prosecutor to conduct non compulsory measures on the territory of the State and an interview or examination outside the presence of the authorities of that State, is a specified form of cooperation, article 88 mandates that the requested State cannot refuse on the general basis that there are no procedures under national law for this nor that the procedures of national law prohibit this⁸. 27

Similarly, the requested State may not refer to concerns of national sovereignty in order to deny such a request, because there is no such ground of refusal and this would contradict the obligation of the requested State to comply with requests by the Court, as stated in articles 86 and 93.

The Court has drawn an important distinction between assistance sought pursuant Article 93(1) (and Article 99(1)) and that pursuant to article 99(4)⁹. The Chamber correctly identifies that for the general regime under Part 9 there is a presupposition that the execution of requests will be by ‘States in accordance with national procedures pursuant to articles 93(1) and 99(1) of the Statute and that the direct execution of measures is *lex specialis* to be applied within the terms and conditions of article 99(4)¹⁰’. 28

This was in response to the defence making an ‘indiscriminate request to execute all measures unhindered and unmonitored by the Government of Sudan or any agency of the State¹¹’.

2. The different subparagraphs

a) **Determination of admissibility and direct execution following all possible consultations.** Two alternative situations are set out in these subparagraphs. The first relates to where the requested State Party is a territorial State for the alleged offences, and the Court has ruled the case admissible. It was recognised that in these particular circumstances, the authorities of the State Party may be uncooperative. It is also an instance where it may be particularly important that interviews or examinations take place outside the presence of national authorities. Thus, this set of circumstances merited separate consideration. 29

Given the likelihood that the Prosecutor will face uncooperative and perhaps hostile authorities in this situation, the only obligation imposed with respect to the State Party is for all *possible* consultations. This language was chosen to reflect that the Prosecutor should pursue consultations whenever possible, but at the same time it recognizes that consultations may not be *possible*, in which instance there will be no discussion with the State Party, prior to execution and, by the same token, no need to await that State’s consent to the direct execution.¹² In such case, there can also not be a procedural right for the requested State to apply for a ruling from the competent Chamber regarding the legality of the Prosecutor’s request. Accordingly, Regulation 108, sub-regulation 2 of the Regulations of the Court specifies that the State concerned may seek such a ruling within 15 days from the day on which the requested State is informed of or became aware of the direct execution. However, the State Party will be aware of the matter, generally, as a result of the request presented to initiate the process. A request is needed in every instance as the general provisions of this Part are still applicable because of the opening words of the article ‘without prejudice to other articles’. But the request need not specify details which might defeat the intent of the process such as the time and place of any proposed interviews. 30

The provision tries to balance the interest of the Prosecutor to conduct the investigation without any interference from local authorities, with the interest of the requested State to be involved in the activities taking place on its territory.

⁸ For the same view, see Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2002) 249.

⁹ *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus* Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’, ICC-02/05-03/09-169, Trial Chamber, 1 July 2011.

¹⁰ *Prosecutor v. Abakaer Nourain & Jerbo Jamus*, Decision 1 July 2011, para. 23.

¹¹ *Prosecutor v. Abakaer Nourain & Jerbo Jamus*, Decision 1 July 2011, para. 23.

¹² *Kaul and Krefß* (2000) 3 *YbIHuML* 168.

- 31 **b) Other cases subject to any reasonable conditions or concerns.** This second subparagraph applies to requests directed to States other than the State described in subparagraph (a). With these States Parties there is no reason to anticipate that they will be uncooperative or hostile with respect to the Prosecutor's request. However, for many States the concept of an authority from a foreign State or body conducting official acts on their territory, and doing so in some circumstances outside the presence of national authorities, was revolutionary, contrary to the principles of sovereignty and to accepted practice in international cooperation. Rather than allowing for a refusal of a request on the basis of the application of these traditional principles, this language recognizes that the requested State has an interest in the proceedings. In particular, in a specific case there may be *reasonable* concerns, which they would want to raise or *reasonable* conditions they would like applied to the execution of the request¹³.
- 32 Because the ability to impose conditions or raise concerns can be construed as a restriction on the Prosecutor's ability to directly execute a request, the term *reasonable* is employed to qualify the restriction. Thus, by implication, the Prosecutor could proceed with execution without accepting conditions or in the face of concerns, when the same are not reasonable.
- 33 Although reasonable concerns or conditions are not defined, some examples would be that local authorities be notified of possible danger for victims and witnesses when they testify before officials of the Court, or, that national investigators be provided a record of the statement to be used for the investigation of related cases. However, what is clear is that the requested State Party may not raise a general objection to the process on the basis of sovereignty or normal practice. They are restricted to particular issues which are reasonable.
- 34 The phrase 'Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter' is a parallel to article 97. It was repeated here as a part of the delicate balance that had to be struck to arrive at consensus. Admittedly, a mere reference to that article would have been as effective on a practical level but the intention was to emphasize the need for a consultative, cooperative approach to this sensitive issue.

3. Enhanced cooperation

- 35 In light of the considerable potential utility of the Prosecutor's power to conduct investigations on site, article 99(4) is one of those areas in Part 9 where enhanced cooperation¹⁴ by States would be most beneficial for both the fairness and the efficiency of the international criminal proceedings. Except for some positive examples, the initial implementing practice is not too encouraging in this respect¹⁵. Very regrettably, the legislation of the host State even stands for a rather complete 'failure to implement' article 99(4)¹⁶.

V. Paragraph 5: Application of 'restrictions designed to prevent disclosure of confidential information'

- 36 This paragraph makes it clear¹⁷ that the protections accorded to national security information under article 72 and article 93(4) apply to any evidence gathering process carried by the Prosecutor under this article. Thus, where a witness is to provide testimony or produce documents to the Prosecutor within the territory of a State Party, the witness or the State can raise objections on the basis of national security and the matter will fall to be determined in accordance with article 72.

¹³ For more information on the negotiations, Kaul and Kreß (2000) 3 *YbIHuML* 168.

¹⁴ Cf. Preliminary Remarks on Part 9, mn 9.

¹⁵ Broomhall and Kreß, in: Kreß *et al.* (eds), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*. Vol. 2 (2005) 534 *et seq.*

¹⁶ Sluiter, in: Kreß *et al.* (eds), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*. Vol. 2 (2005) 220–222.

¹⁷ This is in addition to the opening phrase which applies the general provisions of this Part to such circumstances.

Article 100 Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

- (a) Costs associated with the travel and the security of witnesses and experts or the transfer under article 93 of persons in custody;
- (b) Costs of translation, interpretation and transcription;
- (c) Travel and subsistence costs of judges, the Prosecutor, the Deputy Prosecutor, the Registrar, the Deputy Registrar and staff of any organ of the Court;
- (d) Costs of any expert opinion or report requested by the Court;
- (e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
- (f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	2
I. Paragraph 1.....	2
a) Costs associated with the travel, security of witnesses and the transfer of persons.....	3
b) 'Costs of translation, interpretation and transcription'.....	4
c) Travel and subsistence costs of organs and staff of the Court.....	5
d) Costs of expert opinion or report.....	6
e) Costs associated with the transport of persons being surrendered.....	7
f) Consultations on extraordinary costs.....	8
II. Paragraph 2: 'requests from States Parties to the Court'.....	9

A. Introduction/General remarks

While an important article on a practical level, this provision on costs was relatively uncontroversial. In substance it did not change significantly from the text incorporated in the Draft Statute article 91(6)¹. The provision divides responsibility for costs along the same lines as traditional mutual legal assistance between States, with general responsibility on the requesting Party, subject to specific exceptions which are listed. One issue that required some discussion was how to determine if costs would be extraordinary and what the result would be in such circumstances. The approach adopted was a consultative one to ensure that there were no surprises for the Court or the requested State in this area.

B. Analysis and interpretation of elements

I. Paragraph 1

The rule is based upon the principle that the execution of a request for assistance should not entail any refunding of normal expenses on the part of the requested State. This is similar

¹ UN Doc. A/CONF.183/2/Add.1, p. 174.

to the principle found in article 20 of the European Convention on Mutual Assistance in Criminal Matters as well as the United Nations Model Treaty and many bilateral mutual assistance treaties².

- 3 a) **Costs associated with the travel, security of witnesses and the transfer of persons.** Costs associated with the travel of *witnesses, experts and persons in custody* shall be borne by the Court³. This provision is similar to that found in most mutual assistance agreements. Costs associated to travel are generally borne by the requesting Party. Costs that occur to ensure the security of the witnesses or experts to be heard before the Court, shall also be borne by the Court. This provision takes into account that in cases over which the Court will have jurisdiction, the testimony of a witness or the opinion of an expert may conflict with the interest of governments or political groups in a country. In order to guarantee the safety of that person when testifying before the Court, special security arrangements may be necessary. The costs for such arrangements could overburden the requested State or could be considered an impediment to the execution of a request by the Court. Thus responsibility for them is assigned to the Court.
- 4 b) **'Costs of translation, interpretation and transcription'.** Pursuant to article 99(3), replies shall be sent in their original form and language. While a request shall be accompanied by a translation into the language of the requested State in accordance with article 87(2) of the Statute, the reply to that request need not be translated⁴. In addition to those general rules, this subparagraph makes it clear that if translation is required to take the evidence of a witness for example, any such costs will be borne by the Court. Again this is not uncommon to general mutual assistance practice.
- 5 c) **Travel and subsistence costs of organs and staff of the Court.** The costs for personnel of the Court are within the responsibility of the Court. This is the case also when staff members travel to other countries for the purpose of conducting an on site investigation pursuant to article 99 para. 4 or to take part in proceedings in the requested State.
- 6 d) **Costs of expert opinion or report.** The Court may demand expert opinions, either on its own motion during the proceedings or in the form of a request for legal assistance. If the demand is framed as a request for assistance, the Court shall bear the costs; the costs for an expert opinion are not considered ordinary costs of the execution of the request.
- 7 e) **Costs associated with the transport of persons being surrendered.** The provision refers to the costs of surrender, not to the transfer of a person pursuant to article 93(7) which is dealt with under subparagraph (a) of this provision.
- 8 f) **Consultations on extraordinary costs.** The term extraordinary costs refers to expenses occurring in a particular case because of the nature or volume of assistance requested. The opening language mandates that if there are any such extraordinary costs, the issue should be raised first with the Court through consultations.

Only then can the obligation for payment of these costs be relied upon. This avoids a situation where a State proceeds with the expenditure of an extraordinary nature and then advises the Court that they must assume that cost without any prior notice or consultation.

² See also article 7 para. 19 of the UN Convention of 20 Dec. 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

³ See also article 20 of the European Convention on Mutual Assistance in Criminal Matters.

⁴ The provision is in keeping with international usage. Replies to requests for legal assistance are usually transmitted in their original language.

II. Paragraph 2: ‘requests from States Parties to the Court’

The rules on financial burden sharing as laid out in paragraph 1, also apply to the execution of requests by States Parties to the Court. The provision does not cover the costs for the execution of requests by non-States Parties or international organizations. This issue could be part of the *ad hoc* agreement on the basis of which legal assistance could be granted in accordance with article 87(5). 9

The provision clarifies that the Court is in charge of the ordinary costs for the execution of a request by a State Party.

Article 101 Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Directly relevant Rules of Procedure and Evidence: Rules 196 and 197.

Literature: See Preliminary Remarks on Part 9. Bassiouni, M.C., *International Extradition: U.S. Law and Practice* (3rd rev. ed. 1996) 429; Grützner, H., Pötz, P.-G. and Kreß, C. (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (3rd ed., loose-leaf, 2007 *et seq.*); Knoop, G.-J. A., *Surrendering to International Criminal Courts* (2002); Kubiciel, M., *Auslieferung*, in Ambos et al., *Rechtshilfeerecht* (2015) 189; Meißner, J., *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 168–174; Poncet, D. and Gully-Hart, P., ‘The European Approach’, in: M. C. Bassiouni, *International Criminal Law, Vol. II: Procedural and Enforcement Mechanisms* (2nd ed. 1999) 277; Richardson, G.B., ‘The Principle of Speciality in Extradition’, in: *Extradition, Acts of the International Seminar held at the I.S.I.S.C., Siracusa, 4-9/12/1989*, (1991) 62 *Revue Internationale de Droit Pénal* 85; Vogler, T., ‘The Rule of Speciality in Extradition Law’, (1991) 62 *Revue Internationale de Droit Pénal* 231.

Content

A. Introduction/General remarks/Genesis	1
I. Speciality in extradition	1
II. Application on surrender to the Court.....	5
B. Analysis and interpretation of elements	11
I. Paragraph 1: Scope of application.....	11
II. Paragraph 2: Waiver	27
1. Court’s request	28
2. States Parties’ reaction.....	31
C. Related issues	34

A. Introduction/General remarks/Genesis

I. Speciality in extradition

- 1 In the arena of extradition between States, the rule (doctrine, principle) of speciality – outside Europe (and also in some of the UN working documents on the ICC Statute) sometimes referred to as ‘specialty’¹ – constitutes one of the basic principles. It provides that a person surrendered shall only be proceeded against by the requesting jurisdiction for the conduct which specifically furnished the grounds for his or her surrender, and is closely interconnected with other principles such as double criminality and reciprocity, the compliance with which it aims to ensure². Thus it belongs to those extradition principles which

¹ Cf. Bassiouni, *International Extradition: U.S. Law and Practice* (1996) 429; *Ad Hoc* Committee Report, quoted in: Bassiouni (ed.), *International Terrorism: A Compilation of UN Documents (1972–2001)*, Vol. I (2002) 706.

² Poncet and Gully-Hart, in: Bassiouni, *International Criminal Law, ii: Procedural and Enforcement Mechanisms* (1999) 304.

are so commonly recognized in international law and practice that they can be regarded as rules of **customary international law**³.

Consequently, nearly all multilateral and bilateral **extradition treaties** – examples: article 14 of the European Convention on Extradition (1957), recently updated by article 3 of its 4th Additional Protocol, articles 27, 13 (1) European Union Framework Decision on the European Arrest Warrant (2002), article 22 U.S.-German Extradition Treaty (1978), article 14 UN Model Treaty on Extradition (1990) – and **national extradition laws** – example: section 11 German Law on Mutual Assistance in Criminal Matters (IRG, 1982) – contain speciality provisions following the same structure and worded more or less identically.

The speciality rule is linked to the notion of **State sovereignty** as the requesting State cannot exercise its jurisdiction over the person sought were it not for the cooperation granted by the requested State, implying a restriction of this State's sovereignty. If the requested State, by virtue of its sovereignty, had been entitled to refuse extradition for certain offences beforehand, it must also have the right to oppose these offences being included in the proceedings in the requesting State after extradition.

For the **extraditee** the surrender implies a massive infringement into his or her freedom. Thus the limitations of this infringement stemming from the observance of the speciality rule provide an important protection for the surrendered person's rights and interests. The 'classical' speciality concept – mainly based on the contractual nature of the extradition agreement between States and still prevailing in international legal doctrine⁴ – held that speciality provisions do not vest the extraditee with 'subjective rights' but just let him or her profit from a 'reflex' of the requested State's rights and interests. Modern doctrine⁵ however adjudicates rights to individuals by virtue of 'protective' clauses in extradition treaties and domestic laws⁶ without denying the character of the speciality rule as (mainly) being an issue of State sovereignty.

II. Application on surrender to the Court

In the context of this Statute, the crucial question is whether or not the principles governing extradition between foreign States can or must also be applied to the surrender of persons from a State to the ICC.

Insofar as the interests of the **requested State** are at stake, the answer to this question is linked to the basic decision on the nature of state cooperation with the Court, *i. e.* on the adoption of either the 'horizontal' approach which attributes decisive weight to State interests in their relation to the Court, or the 'vertical' approach stressing the 'distinct nature' of the Court (see Kreß and Prost Preliminary Remarks to Part 9, mn 5): If one follows the vertical approach, the requested state's sovereignty loses its importance and thus it could be argued that the speciality principle – which is mainly based on state sovereignty – can not be asserted against the Court's rulings.⁷

³ Bassiouni (1993) 10 *NEP* 95; Vogel and Burchard, in: Grützner *et al.* (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (2007 *et seq.*), § 11, mn 2; Kubiciel, *Auslieferung*, in: Ambos *et al.* (eds.), *Rechtshilfe* (2015), mn 126.

⁴ Vogler, in: Grützner and Pötz (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (2001), § 11, mn 3 and 53; Schultz, *Das schweizerische Auslieferungsrecht* (1953) 358; Gartner, in: Fischer *et al.*, *International and National Prosecution of Crimes under International Law* (2001) 423, 433; Poncet and Gully-Hart, see note 2, 304 *et seq.* with further citations in note 116.

⁵ Schomburg *et al.*, *Internationale Rechtshilfe* (2012); *Einleitung*, mn 43, § 11 IRG, 135, mn 2-3; Vogel and Burchard, see note 2, § 11, mn 16-18, 81; Kubiciel, in: Ambos *et al.* (eds.), see note 3, mn 126; see also Richardson (1991) 62 *Revue Internationale de Droit Pénal* 86 *et seq.*, ('The debate whether an individual is a subject of international law is largely academic ...').

⁶ The author presumes that it is rather a Freudian slip than partisanship to modern doctrine if in Bassiouni (ed.), *Compilation*, see note 1, 739, the rule is baptized 'rule of sociality'!

⁷ Cf. Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) 171; for a very critical assessment of the inclusion of the rule of speciality in Part 9, see Swart, in: Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002) 1700.

- 7 Without doubt, the rights and interests of **persons** to be surrendered have to be taken into consideration by the Statute as well⁸. Even if, however, one favours the horizontal approach and thus the basic principles governing extradition are applied to surrender of a person to an International Court, the rights and interests of that person do not deserve the same weight as in extradition cases between sovereign States, and that independently of whether one prefers the ‘classical’ speciality concept or the doctrine granting own rights to the person concerned (see mn 4): As the mandate of an International Court is, by virtue of its Statute, strictly limited to a catalogue of certain offences committed in a specific historical and geographical context, all of them being of a similar nature and gravity, there is no opportunity for the Court to extend proceedings to conduct that occurred in a totally different context than the one for which surrender was sought, and thus no corresponding risk for the person surrendered to be ‘cheated’ by an unexpected extension of the charges. Interestingly, Amnesty International’s comments on the Draft Statute⁹ – albeit recognizing the speciality principle in extradition practice as ‘an essential human rights enforcement mechanism’ – shared this reasoning and concluded that the Draft’s speciality article should be deleted as the person’s only legitimate interest in this context, *i. e.* the right to have sufficient time to prepare a defence to new charges, will be adequately protected by other provisions of the Statute.
- 8 Thus it comes to no surprise that, since the Court became operational in 2003, the principle of speciality has been invoked in its jurisprudence in very few cases only and in none of these cases it has been regarded as applicable (cf. mn 12, 19–22).
- 9 It seems that the peculiarities of proceedings before an International Court and not so much the stringent character of ‘sweeping’ State obligations under Chapter VII of the UN Charter also were the main reason why the Statutes of the ICTY and the ICTR – insofar differing from preliminary drafts¹⁰ – do not contain provisions on the rule of speciality¹¹.
- 10 The progress of **negotiations** on article 101 differed from the genesis of the *ad hoc* Tribunals’ Statutes. It is true that, as a consequence of the ‘battle’ between the horizontal and the vertical approach, there was an ongoing discussion during the negotiations on whether or not the speciality rule should be applied with respect to the Court. However, already the first and second versions of the ‘Bassiouni Draft’ (the second one edited after the adoption of the Security Council Resolution for the establishment of the ICTY)¹² contained a provision on the speciality rule that was very similar to the one adopted in the end, and none of the major drafts submitted to the ILC’s, Preparatory Committee’s, *Ad Hoc* Committee’s and working groups’ negotiations between 1994 and 1998¹³ proposed to leave out provisions of this kind altogether; the doubts expressed as to whether such provisions should be taken up at all were only reflected by bracketing some of these proposals and including respective remarks in the explanatory notes¹⁴. So, the discussions – and the **compromise** reached in the end – focused on scope and modalities of the principle – *i. e.* on elements of the type that will be dealt with under B. – rather than on its existence.

⁸ See, *e. g.*, *Ad Hoc* Committee Report, quoted in: Bassiouni (ed.), *Compilation*, see note 1, 706, mn 219: ‘Some provision concerning speciality was required in order to safeguard the rights of the accused’. Cf. also mn 17, 21 and 22 with reference to Rules 196, 197 containing indications to the rights of the persons concerned.

⁹ Amnesty International, *The International Criminal Court. Making the Right Choices – Part III: Ensuring Effective State Cooperation* (1997) 46.

¹⁰ See, *e. g.*, the Commission on Security and Cooperation in Europe Rapporteurs’ ‘Proposal for an International War Crimes Tribunal for the Former Yugoslavia’, article 57, p. 215 (1993).

¹¹ See also explanatory remarks to section 3 para. 2 of the respective German laws implementing these Statutes, Bundestag documents 13/57 and 13/7953, p. 9; for a different approach in Austrian implementing legislation see Klip (1997) 5 *EJCLCJ* 144, 154, note 50.

¹² Article XXXVII para. 8; 9 *NEP* (1992) 133 10 *NEP* (1993) 92.

¹³ See Bassiouni (ed.), *Compilation*, note 1, 112 – article 92; 253 – article 84 [57]; 301 – article 57; 634 – article 55; 739 – article 55.

¹⁴ Bassiouni (ed.), *Compilation*, see note 1, 112, mn 47; 254, mn 322; 302, mn 53; 706, mn 219.

B. Analysis and interpretation of elements

I. Paragraph 1: Scope of application

Given that the speciality rule is well-established in extradition law and practice the language of any of the proposals submitted during the negotiations and of the text finally adopted was necessarily inspired by the standards set by existing clauses in treaties and national laws on extradition¹⁵; therefore contents and scope of application of the article correspond *grosso modo* with the examples mentioned in mn 2.

It starts with the clarification that the speciality rule only applies to ‘persons surrendered to the Court’ (article 14 European Convention of Extradition: ‘person who has been extradited’, article 27 (2) EU Framework decision on European Arrest Warrant: ‘person surrendered’). This means that suspects who **appear voluntarily** before the Court following a summons to appear (article 58 (7) RS) do not enjoy the protection of article 101. In the *Muthaura* case, the Defence had argued that the Document Containing Charges was defect due to its ‘impermissible expansion of the temporal scope’ and thus incompatible with article 101. The Single Judge, while agreeing that the rationale of this article is to protect state sovereignty, ruled that it could not be applied in cases of suspects following a summons to appear¹⁶.

In a similar way, the verbs paraphrasing the essence of the limitations to the Court’s powers correspond with those used in extradition instruments: The person surrendered must not be **proceeded against, punished or detained** for other (= alternate or additional) than certain conduct. This language corresponds literally with article 14 of the European Convention on Extradition with the proviso that the latter uses the word ‘sentenced’ instead of ‘punished’, which in fact means no substantial divergence¹⁷. However, article 101 could dispense with including a provision (as, again, found in most extradition instruments) preventing the Court from **otherwise restricting** the surrendered person’s personal freedom, as insofar the Court’s power is, by its nature, anyway limited to the ‘criminal law options’ listed in this paragraph (examples for ‘other’ restrictions of freedom that can be imposed on a person by a State: measures based on the State’s military or civil sovereignty)¹⁸.

Similarly, the provision does not – as some of the respective clauses in extradition treaties and laws do¹⁹ – contain an exception to the extent that the Court may take any measures that can be performed in the **absence** of the person concerned, in particular measures aiming at preventing legal effects of lapse of time. In the context of the Statute, a provision of that kind was redundant because it clearly results from the provisions in Part 5 – ‘Investigation and Prosecution’ – which power is vested in the organs of the Court with respect to measures they can take in the absence of the offender.

Paragraph 1 defines the substantial point of reference of the Court’s power to proceed against, punish or detain the person surrendered as being ‘the **conduct or course of conduct**

¹⁵ See, for the ‘Bassiouni Draft’, mn 10, the explanations on article XXXVII para. 8, pp. 137 (1992), 95 (1993), expressly referring to the European Convention on Extradition.

¹⁶ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*, ICC-01/09-02/11, Decision on the ‘Preliminary Motion Alleging Defects in the DCC...’, Pre-Trial Chamber II, 12 September 2011, para. 16.

¹⁷ Slightly different language is introduced by article 3 of the 4th Additional Protocol to the European Convention on Extradition and by article 27 of the EU Framework Decision on the European Arrest Warrant, cf. mn 2, which does not imply any substantial difference either.

¹⁸ Vogel and Burchard, see note 3, § 11, mn 63.

¹⁹ Cf. article 14 para. 2 European Convention on Extradition and article 3 of its 4th Additional Protocol; article 27 (3)(c),(d) of the EU Framework Decision on the European Arrest Warrant, section 11 (1)(1) German Law on Mutual Assistance in Criminal Matters (1982); see Vogel and Burchard, note 3, § 11, mn 65–69; Poncet and Gully-Hart, see note 4, 305.

which forms the basis of the crimes for which that person has been surrendered'. Again, this language corresponds with speciality clauses in extradition treaties and laws, albeit one important variation was included in paragraph 1 during the last negotiations: Whereas any of the previous drafts of the Statute (mn 10), following the example set by nearly all 'classical' extradition instruments,²⁰ referred to the 'offence', the 'crime' or the 'criminal acts' for which the person has been surrendered, the final version of the Statute deliberately chose the more generic term 'conduct or course of conduct'. Thus it avoids the misunderstanding that the speciality principle was linked to the **legal qualification** of the offender's conduct rather than to the underlying facts, a misunderstanding frequently causing problems – not only in extradition procedures *strictu sensu*, but also in the context of the '*ne bis in idem*' principle – particularly in relation to countries applying a narrow procedural concept of criminal conduct.²¹

- 15 By clearing that divergences between the legal descriptions of the provable and the charged offence do not give rise to a violation of the speciality rule as long as both 'offences' are based on the same set of facts, the reference to 'course of conduct' has the additional advantage of allowing a 'leaner' wording of the provision without the need for a specific provision, as found in many extradition instruments²², stating the non-applicability of the rule of speciality in cases where 'the (legal) description of the offence charged is altered in the course of proceedings' (albeit restricted to cases where the offence under its new description also constitutes an extraditable offence). The latter restriction (extraditable offence) must not be confused with the concept of 'strict' (as opposed to 'classical') speciality developed in modern extradition practice which implies that the conduct must not be subsumed by the requesting state under an offence different from the one underlying its request (e.g. not as murder instead of manslaughter), a concept which has not been adopted by the drafters of the Statute²³.
- 16 The limitations stemming from the speciality rule also have to be distinguished from the specific limitations of the Court's power which are based on its **mandate**: Even if the conduct provable is essentially identical with the conduct for which the offender was surrendered, but it turns out during trial that it can only be qualified as an offence that does not belong to the crimes listed in Part 2 (example: 'normal' murder instead of wilful killing constituting a war crime), the Court has no jurisdiction over the offender – which, however, is not a legal consequence of the speciality rule *strictu sensu*²⁴.
- 17 The question whether, under which conditions, to what extent and at which stage of the proceedings the **legal qualification** of the facts alleged in the charging instrument can be **changed** (cf. Regulation 55) belongs to the issues which are repeatedly and controversially dealt with in the Court's jurisprudence²⁵.

²⁰ E.g., article 14 European Convention on Extradition, article 14 UN Model Treaty on Extradition, article 3 (2) of its 4th Additional Protocol and article 27 of the EU Framework Decision on the European Arrest Warrant. For the meaning of 'offence' in the latter instrument see EU Court of Justice, C-388-08 (case Leymann/Pustovarov).

²¹ As an example of a very wide interpretation, the German doctrine understanding 'offence' ('Tat') within the Code of Criminal Procedure – section 264 – means the totality of the underlying set of facts independently of how they are legally qualified (German Federal Court – Bundesgerichtshof -, NJW 2000, 227: 'a set of facts which, looked at from a natural viewpoint, constitutes a unitary event of life, in particular when several events are so closely linked under substantial, local and temporary aspects that splitting them into different acts would be perceived as unnatural'), in the context of extradition see Vogel and Burchard, note 3, § 11, mn 36; Kubiciel, in: Ambos *et al.* (eds.), see note 3, mn 129–130, *cf.* also Meißner, note 7, 169 and Poncet and Gully-Hart, see note 4, 305.

²² E.g., article 14 (3) European Convention on Extradition and article 3 (4) of its 4th Additional Protocol, 'Complementary Provisions' for the UN Model Treaty on Extradition (1997), article 14 (1) (a) note 10.

²³ *Cf.* Vogel and Burchard, note 3, § 11, mn 10–13. See also article 22 (3) U.S.-German Extradition Treaty (1978): violation of speciality principle if the new legal aspects would result in the applicability of a higher maximum penalty than for the offence underlying the request.

²⁴ Both items seem to be mixed up by Klip, see note 11, 154, note 50.

²⁵ *Cf.* insofar mn 39 *et seq.* to article 74; Ambos and Miller, *Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective*, ICLR 7 (2007), p. 335, 358; Stahn (2005) 55 CLF 16, p. 1.

Here only the following examples shall be mentioned:

- *Prosecutor v. Thomas Lubanga Dyilo*, where the Trial Chamber (Judge *Fulford* dissenting), responding to a victims' submission aiming at qualifying the conduct as sexual slavery etc., determined that the limitation of Regulation 55 did not apply. The Appeals Chamber confirmed the majority's opinion, stating that the possibility of a Trial Chamber to modify the legal characterization of the facts was not incompatible with the Statute nor with general principles of international law nor with the rights of the accused as long as the facts and circumstances described in the charges and amendments were not exceeded. Already at an earlier stage of the proceedings the Pre-Trial Chamber had, without considering a speciality waiver, *sua sponte* amended the legal characterization of the charges (acts committed in an international as opposed to a non-international conflict), stressing that the criminal conduct remained the same.²⁶
- *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, where the Trial Chamber made use of Regulation 55 by dividing the case into two and giving the accused Katanga notice of a possible recharacterization of the facts to accord with a different form of criminal responsibility under article 25. In her dissenting opinion, Judge *Van den Wyngaert* strongly criticised the majority decision which in her mind encroached upon the right of the accused to a fair trial. However, her criticism is not based on the legitimacy of Regulation 55 as such but rather on the fact that it was invoked in a very late stage of proceedings, i.e. after the formal closing of the evidence and the closing arguments of the parties²⁷.

While in all these cases of legal re-characterization of the alleged conduct the speciality principle – rightly – was not invoked at all, in just a few cases the argument was raised by parties that such re-characterization could lead to the applicability of article 101. This argument was however so far rejected in all cases before the Court:

In the case *Prosecutor v. Omar Hassan Ahmad Al Bashir* the Prosecutor in his application for leave to appeal the denial of a charge of genocide in the original arrest warrant invoked the speciality principle, suggesting that if evidence were to emerge at trial justifying amendment of the charges so as to include the crime of genocide, this might delay proceedings while a speciality waiver had to be sought. Neither the Pre-Trial Chamber nor the Appeals Chamber which reversed the Pre-Trial Chamber's decision and confirmed the charges of genocide (based on the argument that the Pre-Trial Chamber had not applied the correct standard of proof under Article 58 RS) elaborated on this argument. (As a result of the Appeals Chamber's judgment, the Pre-Trial Chamber issued a Second Warrant of Arrest for Al Bashir, now including genocide²⁸.)

In the case *Prosecutor v. Callixte Mbarushimana* the Defence raised the argument that the inclusion of 'crimes which were not explicitly described or legally characterized in the warrant of arrest, but are otherwise implicit in the description of the course of conduct' (here: mutilation and pillaging as encompassed in attacks on the civilian population and destruction of property), violated the principle of speciality. The Single Judge declined the motion stressing that the rule of speciality only prevents the Prosecution from including a crime 'which has not been described in any way in the warrant of arrest, on the basis of which the requested State agreed to arrest and surrender the person'²⁹.

²⁶ ICC-01/04-01/06, decisions of Pre-Trial Chamber I, 29 January 2007, para 204, of Trial Chamber I, 14 July 2009, para 25 *et seq.*, and of Appeals Chamber, 8 December 2009, para 64 *et seq.*

²⁷ ICC-01/04-01/07, decisions of Trial Chamber II, 21 November 2012, para 10 *et seq.*, Appeals Chamber, 27 March 2013, para 25, 59 *et seq.*, Trial Chamber II, 7 March 2014, para 1441 *et seq.* (The co-accused *Ngudjolo* was acquitted, see *Prosecutor v. Mathieu Ngudjolo*, ICC-01/04-02/12, Trial Chamber II, decision of 18 December 2012).

²⁸ ICC-02/05-01/09-12, Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest...', 13 March 2009, para 38, 50, Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09-73, 3 February 2010, para 41, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, 12 July 2010.

²⁹ ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, para 89–92.

- 22 Similarly, in the case *Prosecutor v Jean-Pierre Bemba-Gombo et al.* ('Bemba II') the Defence asked for rejection of the Prosecution's Document Containing the Charges with the argument that it listed new charges ('coaching witnesses' as opposed to 'bribing witnesses') under article 70, new modes of liability under article 25 (3) and new courses of conduct which were not contained in the Arrest Warrant and thus violated the speciality principle. Again, the Single Judge, referring, *inter alia*, to the Statute's drafting history, rejected the request as the 'new' charges were based on the same set of facts presented in the Arrest Warrant and thus part of the course of conduct for which the accused had been surrendered³⁰.
- 23 The speciality rule only applies to conduct 'committed prior to surrender' which means that the Court is not subject to speciality limitations when dealing with offences committed after surrender. The ratio for this provision which is another integral part of any speciality clause in extradition treaties and laws, is the fact that neither the requested State nor the extraditee can claim a legitimate interest to be protected against a foreign jurisdiction that could not yet have been exercised when the extraditee was still present on the territory of the requested State³¹.
- However, in the context of the Statute this provision has less relevance than in relations between States, because, as pointed out above (mn 16), the Court's jurisdiction is always limited – within or outside the scope of application of the speciality rule – to the crimes enumerated in Part 2 of the Statute. It is difficult to imagine crimes committed after surrender that could fulfil this condition, all the more so as the Court has no 'own territory' *strictu sensu* (there might be cases where the accused participates after surrender, e.g. by written communication, in such crime committed by third persons). Thus, the only types of offences with regard to which the 'prior-to-surrender' exception may have relevance in practice will consist in the Court's jurisdiction over offences committed on its premises, *i. e.* 'offences against the administration of justice' as listed in article 70 of the Statute³².
- 24 The fact that the Court has no 'territory' (and that the Statute only covers surrender to the Court and not from the Court to State Parties, *cf.* mn 25) also rendered unnecessary a clause as can be found in most extradition instruments according to which protection under the speciality rule ceases to apply if the person surrendered has **not left**, having had the opportunity to do so, the territory of the requesting Party within a certain period of time after final discharge, or if that person voluntarily **returned** to the territory of the requesting Party after leaving it³³.
- 25 Due to the same reasons the drafters of the Statute did not see a need to include provisions generally extending the effects of the speciality principle to cases of **re-extradition** to another State³⁴.

³⁰ ICC-01/05-01/13, 'Narcisse Arido's Request for an Order Rejecting the Prosecution's DCC...', 9 July 2014, para 18, 40, 54, and Decision on this Request, 15 July 2014, p. 5–6.

³¹ Vogel and Burchard, see note 3, mn 47–48.

³² See the case *Prosecutor v. Jean-Pierre Bemba-Gombo et al.* ('Bemba II', ICC-01/05-01/13, *cf.* mn 22): The accused had been surrendered to the Court by Belgium in 2008 under five counts of crimes against humanity and war crimes (ICC 01/05-01/08); in November 2013 an additional warrant of arrest was issued against him and four of his defence lawyers for allegedly having presented false and faked evidence and influenced witnesses. *Cf.* on this case M. Hiéramente/P. Müller/E. Ferguson, *Barasa, Bribery and Beyond...*, *ICLRev* 14 (2014), 1123. On the legislative history, *cf.* *Ad Hoc* Committee Report, quoted in: Bassiouni (ed.), *Compilation*, see note 1, 706, mn 219: '... possibly, the need to distinguish between crimes committed after surrender, to which the rule of speciality did not apply'. In the Preparatory Committee's last draft (*Compilation* 112) the clause 'except when he or she commits the criminal act after ... surrender' was still bracketed.

³³ *Cf.* article 14 para. 1 (b) of the European Convention on Extradition, article 14 (3) and article 3 (1)(b) of its 4th Additional Protocol, para. 3 UN Model Treaty; section 11 (2)(2) of the German Law on Mutual Assistance in Criminal Matters; for analysis see Vogel and Burchard, note 3, § 11, mn 84 *et seq.*, Kubiciel, in: Ambos *et al.* (eds.), note 3, mn. 141–142.

³⁴ For examples in extradition treaties and laws *cf.* article 15 of the European Convention on Extradition, article 4 of its 4th Additional Protocol, article 14 of the UN Model Treaty which directly integrates re-extradition into the speciality principle ('shall not be proceeded against, ... or reextradited'); section 11 (1)(2) German Law on Mutual Assistance in Criminal Matters. In the ICC context, see Bassiouni, note 3, (1992/1993) 9/10 *NEP*, article XXXVII para. 9, and the corresponding suggestion in the *Ad Hoc* Committee Report, quoted in: Bassiouni (ed.), *Compilation*, see note 1, 706, mn 219–220, to expand the speciality rule by encompassing the

The question how protection of the offender against proceedings instituted by the **host State** – The Netherlands – will be ascertained is dealt with by article 51 of the Headquarters Agreement between the ICC and the host State (ICC-ASP/5/32, part III, resolution ICC-ASP/5/Res.3, annex II, p. 350 *et seq.*).

The Statute itself addresses the re-extradition issue in the relations between the Court and States Parties only in connection with the **transfer of execution** of the Court's sentence to a State of enforcement, a transfer that is inevitable as the Court does not possess own prison facilities. It goes without saying that the State which accepts the sentenced person for the purpose of serving the imprisonment sentence must not be subject to less stringent limitations with respect to the speciality rule than the Court itself. This is why Part 10 (Enforcement) of the Statute contains a specific speciality clause on its own – **article 108** – which, as it primarily deals with rights and duties of national States, is structured along the lines of 'classical' extradition provisions much more than article 101, without, however, using the term 'speciality'. (With regard to article 108 see also Rule 214 and Regulation 115, the latter explicitly stating that the Court 'shall have due regard to the principles of international law on re-extradition' which means a direct reference to the classical concept of speciality.)

Not contained in the Statute is a re-extradition clause for cases where the transferred person is **released** from the Court's custody after the Court has determined the case inadmissible under article 17 para. 1. Insofar, Rule 185 states that re-transfer to a State (with regard to the original or to another offence) always requires the consent of the original surrendering State which means that the 'normal' law governing extradition between States will apply³⁵. While Rule 185 para. 1 deals with the cases listed in article 17 para. 1 (b) to (d), Rule 185 para. 2 covers the case of a third State's successful challenge to admissibility (article 17 para 1 *lit.* a). As concerns the latter case, the Rules unfortunately do not address the case that the surrendering State does not consent to the person's transfer to the challenging State and request his or her return although it (= the original surrendering State) is still unwilling or unable to properly carry out the investigation or prosecution³⁶.

The rights of the **person** surrendered are not expressly mentioned in the Statute. Rule 196, however, states that this person has the opportunity to provide the Court with views on a perceived violation of the speciality principle. This seems to indicate that, in accordance with inter-State extradition doctrine, persons who are to be surrendered to international courts at least enjoy a 'reflex' of the requested State's rights³⁷.

II. Paragraph 2: Waiver

Paragraph 2 which provides for the possibility of waiving the rule of speciality, again, corresponds to well-established extradition standards. With very few exceptions³⁸, bi- and multilateral extradition treaties and national extradition laws always include provisions enabling the requested State to either subsequently **extend** its decision by which extradition was granted to other conduct and/or subsequently (or even prior to surrender, *cf.* mn 32) waive the rule of speciality altogether³⁹. To that end, the first sentence of paragraph 2 presents the possibility for

'question of the ability of the court to surrender to a third State according to its own proceedings', including the question of continuing rights 'on the part of the custodial State'.

³⁵ *Cf.* Meißner, note 7, 170; Krefß, in: Grützner *et al.* (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen* (2007 *et seq.*) IV A 1, mn 252.

³⁶ *Cf.* note 35, and Krefß and Prost, art. 89 mn 26 *et seq.*

³⁷ *Cf.* mn 7, Krefß, note 35, IV A 1, mn 251, Meißner, note 7, 174.

³⁸ *E.g.* Brazil, see Grützner and Pötzt (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, Vol. II (2001) 25, mn 20.

³⁹ For subsequent waiver *cf.* article 14 (1) (a) of the European Convention on Extradition and article 3 (1) (a) of its 4th Additional Protocol, article (1) (b) of the UN Model Treaty on Extradition; for waiver prior to surrender article 27 (1) EU Framework Decision on the European Arrest Warrant.

the Court to request a waiver from the surrendering State whereas its second sentence deals with the authority and willingness of this State to provide such waiver to the Court⁴⁰.

1. Court's request

- 28 By allowing the Court to 'request a waiver of the requirements of paragraph 1' from the surrendering State, the provision by itself does not expressly state on the question whether such a request can only be made with respect to **certain** 'other conduct' than the one underlying the original request or whether the Court may also request an all-embracing '**indefinite**' waiver for any other conduct it may deem fit to be included in its proceedings. Indeed, the fact that the second half sentence provides for the Court's request being accompanied by 'additional information in accordance with article 91' – which necessarily includes reference to conduct exactly designated, see mn 29 – seems to indicate that a request for waiver can only be made with regard to certain 'new' crimes. On the other hand, the Court's obligation to provide such additional information is conditioned by the words 'if necessary' which, in the absence of further restrictions on the Court's side, seems to shift the discretion whether or not an unlimited waiver of paragraph 1 can be requested for to the requested State's side: At least in cases where this State under its law has the power to waive observance of the speciality rule with respect to any other conduct⁴¹ the Court may request and obtain such general waiver. It goes without saying that in any case the Court has to observe the limitations stemming from its mandate (*cf.* mn 16).
- 29 As concerns the **formal requirements** for additional information that is – 'if necessary', *cf.* mn 28 – to be provided to the requested State in support of a request for waiver, paragraph 2 refers to article 91. This implies in particular that the request shall be made in writing and contain or be supported by a copy of the warrant of arrest or of the sentence imposed – both with regard to the 'new' offence – and further information as may be necessary under article 91 paras. 2 (c) and 4. Insofar as under the law of the requested State a 'general' waiver without reference to certain other conduct is permitted (*cf.* mn 28), the written request may in itself be sufficient.
- 30 In defining scope and limits of a waiver of the speciality rule, the Statute does not refer to the **consent** or to the interests of the **person** surrendered, although nearly all extradition instruments – independently of whether they follow the 'classical' extradition doctrine relying exclusively on States' rights and conceding only a 'reflex' to the person concerned, or the more recent doctrine adjudicating own 'subjective' rights to individuals stemming from extradition instruments (*cf.* mn 4, 7 and 26) – make such a waiver dependent on the consent of the extradited person or at least on giving him or her the opportunity to be heard on the request for waiver and on submitting a legal record of his or her statement to the requested State⁴².
- The reason for this omission cannot be sought in disregard of the surrendered person's rights and interests. It was repeatedly pointed out during the negotiations that exceptions to

⁴⁰ In the *Ad Hoc* Committee Report, see note 1, quoted in: Bassiouni (ed.), *Compilation* 706, mn 219, reference was also made to the possible need for a waiver by the *custodial* State (?).

⁴¹ *Cf.* section 35 para. 2, in connection with sections 29 and 41 para. 2 of the German Law on Mutual Assistance in Criminal Matters.

⁴² As examples for the latter model, *cf.* article 14 (1) (a), 2nd sentence of the European Convention on Extradition and article 3 (1) (a) 2nd sentence of its 4th Additional Protocol; article 14 para. 2, 2nd half sentence of the UN Model Treaty on Extradition; article 13 EU Framework Decision on the European Arrest Warrant. Similar provisions were contained in paragraph 3 of any of the Preparatory Committee's and Zutphen Draft articles on speciality; see Bassiouni (ed.), *Compilation*, note 1, 635, 302, 254, 112: 'request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence'. On German law *cf.* Vogel and Burchard, note 3, § 11, mn 81, as well as section 35 and – on simplified extradition – section 41 of the Law on Mutual Assistance in Criminal Matters. It is worth mentioning that in the more than 30 years of its existence this provision has proved to be a big success in German extradition practice: According to the official extradition statistics, in between one quarter and one third (in relation to neighbouring States up to one half) of all extradition cases the extraditee is consenting to simplified extradition including a waiver of the speciality rule.

the rule of speciality ‘should be based on the consent or waiver of the accused’⁴³, and **Rule 196** contains some indications concerning the legal position of the person surrendered with regard to the observance of the speciality rule (*cf.* mn 26). However, the Statute proceeds from the assumption that the question whether, to what extent and how the surrendered person is to be protected against violations of own legitimate interests shall insofar be exclusively governed by the laws of the requested State. In most countries these laws will allow for a waiver of the speciality rule in respect to certain ‘new’ offences only if the person concerned has had an opportunity to be heard on these charges, and all the more they will provide for an ‘indefinite’ waiver – if any – only with this person’s consent⁴⁴. As a consequence, **Rule 197** states that, when the Court has requested a waiver of the speciality principle, the requested State may ask the Court to obtain and provide the views of the person surrendered. Respective requirements stemming from the requested State’s domestic law will also be taken into account by the Court when determining the amount of ‘additional information’ to be furnished under paragraph 2, 1st sentence, 2nd half.

2. States Parties’ reaction

As opposed to the 1st sentence which attributes to the Court the power to make a request for waiver, the 2nd sentence deals with States Parties’ reactions on the Court’s request. Firstly, they ‘shall have the **authority** to provide such waiver. As mentioned above (mn 28–30), this refers to the Parties’ domestic legislations in the field of extradition which (with few exceptions, see mn 28) provide for the possibility to waive the speciality rule with respect to certain, exactly designated other conduct and, in more modern laws, also indefinitely with respect to any other conduct. The reference to domestic legislations shows again that substantial requirements and formal modalities of the procedure in the requested State are governed exclusively by the latter’s law.

Although closely connected with the 1st sentence, the 2nd sentence is not expressly limited to cases where the Court has requested a waiver of the speciality rule (which could have easily been accomplished by including the words ‘on request’). It also calls upon States Parties to create or at least make use of provisions according to which the speciality rule can be waived ‘spontaneously’ and prior to surrender⁴⁵. The most recent example for an international instrument providing for such option is article 27 of the EU Framework Decision on the European Arrest Warrant which enables (and encourages) the surrendering State to notify the Council ‘that, in its relations with other Member States that have given the same notification, consent is presumed to have been given’ for prosecution or enforcement with respect to other conduct than the one for which the person has been surrendered. Where a pre-surrender option exists it will also avoid cumbersome extension procedures as provided for under Rule 197.

The 2nd sentence invites States Parties not only to be able to waive the speciality rule but moreover – which is even more important – to ‘endeavour to do so’: This means that they shall not only possess or create the legal tools for a waiver decision but also be ready and willing to apply them in a given case.

At least for ‘classical’ cases where the Court asks a State Party to extend its original decision to certain other conduct, this clause is **less stringent** than corresponding provisions in extradition treaties which usually oblige the requested State to give its consent if only the ‘new’ offence is itself subject to extradition under the treaty⁴⁶. This weakness, however, is a consequence of the fact that a worldwide Convention necessarily has to catch up with a

⁴³ See (concerning speciality rule in respect of use of evidence) Bassiouni (ed.), *Compilation*, note 1, 438, mn 346.

⁴⁴ *Cf.* the instruments mentioned in mn 27; for quotations and waiver provided *prior* to surrender mn 32.

⁴⁵ See, e.g., section 41 (2) of the German Law on Mutual Assistance in Criminal Matters.

⁴⁶ *Cf.* article 14 (1) (a), 3rd sentence of the European Convention on Extradition and article 13 (3)(1)(a) of its 4th Additional Protocol; article 27 (4) EU Framework Decision on the European Arrest Warrant; article 14 (1), 2nd sentence of the UN Model Treaty on Extradition.

variety of very different domestic legislations some of which do not even know a concept of waiver of the speciality rule yet. Under no circumstances, however, the ‘soft’ wording can be interpreted in a sense that it would enable the surrendering State to base its refusal of a waiver on grounds of refusal as contained in classical extradition law but not recognized under the Statute⁴⁷.

Anyway, this problem seems to be rather academic as the Statute, when defining the scope of application of the speciality rule, does not refer to the narrow concept of ‘offence’ or ‘crime’ but uses the broad term ‘course of conduct’ (see mn 14) which means that many of the cases where under extradition treaties between States ‘new offences’ emerging after surrender would necessitate a request for waiver of speciality are solved under the Statute by interpreting the ‘new’ charges as just embracing a different **legal qualification** of the course of conduct for which the person was surrendered, and thus are already covered by the speciality rule. This is the reason why since the existence of the Court there has not been one single case in which a waiver of the speciality rule was requested by the Court nor granted by a State.

C. Related issues

- 34 The difficult question how the requested State can **secure observance** of the speciality rule by the requesting State is normally – unfortunately – not dealt with in extradition treaties⁴⁸. So it would – even if in relations between the Court and States Parties the ‘horizontal approach’ was accepted (see mn 6) – be too ambitious to expect a solution of this problem from the Statute – this all the more as **article 119** of the Statute contains a settlement of dispute clause.
- 35 For application of the speciality rule on **transfer of execution** of the Court’s sentence to third States (article 108 of the Statute: ‘Limitation on the prosecution or punishment of other offences’) *cf.* mn 25.
- 36 In legal doctrine and practice during the last decades, a growing tendency can be observed to use the term ‘speciality’, formerly reserved to the extradition area, also with regard to *other* forms of inter-State cooperation, in particular in the area of **mutual assistance** where it is meant to cover limitations on the use of evidence (furnished to the requesting State in execution of a request or to the requested State in support of a request, the latter clause more frequently referred to as ‘**confidentiality clause**’) for other purposes than those for which it was provided⁴⁹. Consequently, provisions of this kind relating to cooperation were also included in any of the articles on (surrender) speciality drafted during the negotiations on the Statute, interestingly always under the common heading ‘speciality’ which goes beyond the prevailing doctrine acknowledging this kind of limitations as integral part of mutual assistance schemes without, however, extending the term ‘speciality’ to them⁵⁰. The final text of the Statute seems to fall behind that scheme by only including a ‘confidentiality’ clause (directed at the requested State that has to keep request and supporting documents confidential) in the general provision on cooperation (article 87 para. 3) and another

⁴⁷ Meißner, see note 7, 173.

⁴⁸ Vogel/Burchard, see note 3, § 11, margin 28, Kubiciel, in: Ambos *et al.* (eds.), note 3, mn. 143. In extradition practice, the requested State may, if it deems necessary, include a respective condition (transmission of the final decision) in its *note verbale* granting extradition, see the respective provision in article 38 (1)(d) of the Swiss Law on International Mutual Assistance (ISRG). For one of the rare examples in treaty practice see article 28 of the former German-Yugoslav Extradition Treaty of 26 November 1970.

⁴⁹ *Cf.* Lagodny, Schomburg *et al.*, *Internationale Rechtshilfe* (2012), § 59, mn. 16, 19, Vogel/Burchard, note 3, § 11 mn. 3, German Constitutional Court (Bundesverfassungsgericht) *NJW* 2011, 591 (‘not yet customary law in the area of mutual assistance’). For international treaties, see (under the heading ‘limitation on use ...’), *e.g.*, article 8 of the UN Model Treaty on Mutual Assistance in Criminal Matters (1990), article 25 of the (OAS) Inter-American Convention on Mutual Assistance in Criminal Matters (1992), and article 23 European Union Convention on Mutual Assistance in Criminal Matters (2000).

⁵⁰ *Cf.* already Bassiouni, note 3, (1992/1993) 9/10 *NEP*, article XXXVII para. 8 (b), as well as Bassiouni (ed.), *Compilation*, see note 1, 253, 301, 634, 739; in particular 112, 438, mn 346.

‘confidentiality’ clause (directed at the Court) in article 93 para. 8 (‘other forms of cooperation’) – in detail, see commentaries on these provisions. As, however, the risk for data provided to the Court being used for totally different purposes than those underlying the request is, due to the Court’s limited mandate (see mn 16), by far lower than in cases of data provided to a State – typical example in the area of inter-State cooperation: use of data in criminal proceedings concerning another type of offences, in particular fiscal ones, or in non-criminal, in particular taxation, proceedings⁵¹ –, the solution finally found in single cases will, in practical terms, sufficiently preserve the legitimate interests of requested States and of persons concerned.

⁵¹ Cf., e.g., Switzerland’s reservations on article 2 of the European Convention on Mutual Assistance (1959).

Article 102 Use of terms

For the purposes of this Statute:

- (a) 'surrender' means the delivering up of a person by a State to the Court, pursuant to this Statute.
- (b) 'extradition' means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

Literature: See Preliminary Remarks on Part 9. Deen-Racsmany, Z., 'Lessons of the European Arrest Warrant for Domestic Implementation of the Obligation to Surrender Nationals to the International Criminal Court', (2007) 20 *LeidenJIL* 167; Heymann, P.B., 'Two Models of National Attitudes Toward International Cooperation in Law Enforcement', (1990) 31 *HarvJIL* 99; Rinio, C., 'Die Auslieferung eigener Staatsangehöriger', (1996) 108 *ZStW* 354; Safarov, N.A., 'The Commonwealth of Independent States (CIS)', in: C. Kreß et al. (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Cooperation and Enforcement* (Nomos 2005) 485; Vermeulen, G. and Van der Beken, T., 'New Conventions on Extradition in the European Union: Analysis and Evaluation', (1997) 15 *DickJIL* 256.

Content

1. Genesis and purpose	1
2. Content	4
3. Legal significance	7

1. Genesis and purpose

- 1 Article 102 is intimately linked with the question of surrender of nationals. Whether the general obligation of States Parties to surrender persons to the Court¹ should extend to nationals was disputed until the final days of the Rome Conference. A significant number of States², especially from continental Europe³, Latin America and the Arabic world, had pointed to national legal limitations – in almost all cases of constitutional character – on the extradition of nationals.

Some of these States, initially, found it very difficult to conceive of the possibility of overcoming these limitations even in the specific context of the Court. The situation was a delicate one as none could have the slightest doubt that a cooperation regime admitting a ground for refusal to surrender nationals had to be unworkable. In addition such a ground for refusal was in open contradiction with the very concept of the ICC complementary to national jurisdictions. There appeared to be no room for a compromise solution. The proposal⁴ to allow the surrender of nationals to be made conditional on the person's return for the service of the sentence finally did not prove successful.

¹ See Kreß and Prost, article 89, mn 1 *et seq.*

² No such problems existed for the vast majority of the common law countries (see Preliminary Remarks on Part 9, mn 7), one exception being Israel. Heymann (1990) 31 *HarvJIL* 99, 101 suggests as one explanation for the said limitations in civil law countries the lack of strict evidentiary requirements as an alternative means of protection of nationals. For a recent comparative overview see Rinio (1996) 108 *ZStW* 534, 356 *et seq.*

³ In their relations *inter se* these States are moving towards permitting the extradition of nationals; see Vermeulen and Van der Beken (1997) 15 *DickJIL* 256, 294 and especially article 7 of the Convention of 27 Sept. 1996 on extradition between Member States of the European Union; OJ C 313/11 (23 Oct. 1996). Most recently, the latter group of States have agreed even on an obligation to 'surrender' nationals in their relations *inter se* and under certain conditions; see the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190 (18 July 2002); for a detailed comparison between the problem of nationals in this latter context and in the context of the ICC, see Deen-Racsmany (2007) 20 *LeidenJIL* 167–191.

⁴ Tabled by Denmark, Norway, Sweden and Switzerland; A/CONF.183/C.1/WGIC/L.18, 13 July 1998.

When it became apparent that no viable alternative existed to the rejection of a ground for refusal to surrender nationals some delegations expressed the wish to make it very explicit that they did not hereby consent to extradite nationals in general but accepted such an obligation only in the very specific context of the Court. The idea then emerged to clarify that point by contrasting (interstate) extradition and (State to Court) surrender by way of definition. Such a clear distinction at the *terminological* level should, as was the underlying thinking, at the same time contribute to a growing awareness on the national level for the *substantial* differences between *horizontal* and *vertical* cooperation⁵. It was hoped that such an awareness could help mobilize support for implementing legislation, where necessary.

Inserting the terms ‘surrender’ and ‘extradition’ implied putting terminological emphasis on the *vertical* approach. It therefore met with a reluctant response of those which, in principle, favoured a *horizontal* approach. Only after the controversies how to deal with State interests behind possible grounds for refusal had been resolved, the use of the term ‘surrender’ and the inclusion of an article on the use of terms in the Statute could be achieved.

2. Content

The definitions in article 102 clarify the Statute’s terminological distinction between delivering up a person in the interstate context (subparagraph (b)), and in the relationship ‘State to Court’ (subparagraph (a)). In the former situation the traditional term ‘extradition’, in the latter the term ‘surrender’ is used.

In not referring to the term ‘extradition’ in the ‘State to Court’ context the Statute corresponds to the Statutes both, of the ICTY and the ICTR. In article 29(2) (e) of the former⁶ and in article 28(2) (e) of the latter⁷ the terms ‘surrender’ and ‘transfer’ are used instead of ‘extradition’.

The definitions contained in article 102 are incomplete in that they do not specify the purpose of ‘surrender’ and ‘extradition’. It is clear that the Statute uses both terms exclusively with respect to such a person of whom there are reasonable grounds to believe that it has committed a crime within the jurisdiction of the Court⁸. By contrast, the Statute makes use of the term ‘transfer’ when it comes to other types of persons, such as witnesses⁹.

3. Legal significance

In line with its purpose to clarify an important aspect of cooperation terminology the legal significance of article 102 is very limited. Article 102 cannot – and is not meant to – modify in any respect the content of provisions of Part 9. In addition, article 102 does not oblige States Parties to make use of the same terminological distinction in their respective national legislation.¹⁰ This is made clear by the opening wording ‘for the purposes of this Statute’. Finally, it constitutes a matter of interpretation of the respective national constitution whether article 102 is referred to in order not to apply an existing prohibition on the *extradition* of nationals to the surrender of persons to the Court. To point to article 102 as *one* argument in this respect, as it has happened in the emerging constitutional case law on the issue¹¹, would certainly – seen from the perspective of the Statute – be legitimate. Though, the precise value of the statutory clarification of the use of terms in the context of national constitutional exegesis remains ultimately to be determined on the respective national level.

⁵ See Preliminary Remarks on Part 9, mn 5.

⁶ UN Doc. S/25704 (1993), Annex.

⁷ UN Doc. S/Res/955 (1994), Annex.

⁸ Cf. the language in article 58 para. 1 (a).

⁹ Cf. the language in article 93 para. 1 (f) in conjunction with para. 7.

¹⁰ Concurring Deen-Racsmany (2007) 20 *LeidenJIL*167, 168.

¹¹ See the opinion of the Constitutional Court of the Ukraine of 11 July 2001 in the Case of the Rome Statute (for an analysis, see Safarov, in: Kreß *et al.* (eds.), Safarov, in: Kreß *et al.* (eds.), *The Rome Statute of the International Criminal Court and Domestic Legal Orders* (2005) 485) and the opinion of the Constitutional Court of Moldova of 2 Oct. 2007; Monitorul Oficial no 161–161 (12 Oct. 2007).

PART 10 ENFORCEMENT

Article 103

Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.
(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.
2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.
(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.
3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:
 - (a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;
 - (b) The application of widely accepted international treaty standards governing the treatment of prisoners;
 - (c) The views of the sentenced person;
 - (d) The nationality of the sentenced person;
 - (e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.
4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Literature: Broomhall, B., 'The International Court: Overview, and Cooperation with States', in: M.C. Bassiouni (ed.) *ICC Ratification and National Implementing Legislation* (èrè 1999) 45; Joyner, C.C. 'Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia' (1979) 6 *DukeJComp&IL* 79; Oehler, D., *Internationales Strafrecht* (Heymanns 1983); Schutte, J.E.J., 'Legal and Practical Implications, from the Perspective of the Host Country, Relating to the Establishment of the International Tribunal for the Former Yugoslavia' (1994) 5 *CLF* 423; Shelton, D., 'Reparations to Victims at the International Criminal Court', in: The Center on International Cooperation (ed.), *The International Criminal Court, Reparations to Victims of Crimes (article 75 of the Rome Statute) and the Trust Fund (article 79), Recommendations for the Court Rules of Procedure and Evidence* (1999) <<http://www.pict-pcti.org/publications/>

PICT_articles/REPARATIONS.PDF> accessed 11 September 2014, 6; Tolbert, D. 'The International Tribunal for the Former Yugoslavia and the Enforcement of Sentences' (1998) 11 *LeidenJIL* 655.

Content

A. General remarks	1
I. The legal status of the ICC-sentence	1
II. The primacy	7
III. The authority of the sentence	16
IV. Positive and negative recognition	17
V. Willingness decisive	18
VI. System of enforcement agreements	19
VII. Equitable distribution	20
B. Elements and conditions	24
I. Paragraph 1: Conditions of acceptance	24
II. Paragraph 2: Notifications	25
III. Paragraph 3: The designation	26
IV. Paragraph 4: The position of the host State	29
C. Special remarks	30

A. General remarks

I. The legal status of the ICC-sentence

- 1 The first topic to be dealt with under this article is the question of the legal status of the ICC's sentences. In the Rome Statute no operative article is devoted to this basic issue. In the 1994 ILC Draft, article 58 stipulates the principle that States Parties should undertake to recognize the judgements of the Court¹. The content and meaning of this principle was felt to be quite unclear, as turned out especially during the 1996 Preparatory Committee sessions². What should be understood by the verb 'to recognize'? Some delegations were of the opinion that States Parties would be automatically bound to recognize the ICC-sentences as sentences handed down by their own national judiciaries. That obligation would emerge from their mere acceptance of the Court's criminal jurisdiction as having the primacy given the principle of complementarity: ICC should be considered as an emanation of the national legal system of the respective States Parties. In this view it would be incompatible to accept on one hand the ICC jurisdiction and to vindicate on the other any latitude to omit or delay enforcement of the irrevocable ICC sentence on designation by that Court. The yardstick should be: enforcement on the same footing as the enforcement of national irrevocable sentences in criminal matters. Looking at the enforcement issue from this angle, for the States Parties, there would be only room for direct, continued enforcement. Those delegations stressed that, at the national level, the rule of law dictates to the administration to execute sentences handed down in criminal matters without any delay. There is no latitude left to take into consideration whether the execution serves the criminal policy of the executive branch at that moment nor is there any margin for considerations of expediency.
- 2 In principle, it is not with the administrative branch to delay the execution and enforcement of sentences for reasons of logistics or capacity, for example, because of lack of penitentiary facilities. Direct enforcement is mandatory. That is the essence of the *auctoritas rei iudicatae*, the authority, the power of the irrevocable judicial decision in public matters. It would be inconsistent not to vest exactly the same power in the ICC. That should be spelled out in the Statute as the basic assumption for enforcement and the obligation thereof towards

¹ 1994 ILC Draft Statute; this document is also to be found in: Bassiouni (ed.), *International Criminal Court: Compilation of United Nations Documents and Draft ICC Statute Before the Diplomatic Conference* (1998) 721–741. This article 58 ILC Draft runs as follows: 'Recognition of judgments. States Parties undertake to recognize the judgments of the Court'.

² See the 1996 Preparatory Committee I, pp. 73–74; see also the *Ad Hoc* Committee Report, pp. 44–45.

States Parties. Those delegations felt that the ILC Draft failed to do that. Article 58 was merely stating the obvious, by stipulating in abstract that the States Parties should recognize ICC sentences. The principal introductory article to the enforcement part of the Statute should define the legal consequences of the recognition, which could only be that there would be no margin for any State Party to omit the enforcement or even to transform the ICC sentence by an exequatur procedure at the national level. Such should be valid irrespective of the content of the sentence, the nature and modality of the imposed penalty or compulsory measures ordered by the Court, such as restitution to victims, compensation and the like³. Therefore, it was proposed to add to article 58 the sentence: ‘States Parties have to recognize the judgments of the Court as judgments rendered by their national judiciaries’. Later on in the discussions other proposals having principally the same gist and purview were inserted in the text under article 58⁴.

This stand gave rise to intense discussions during the 1996 sessions. The contrasting view – which turned out to be shared by an overwhelming majority of delegations – departed from the assumption that the ICC sentences were to be considered as **foreign** sentences, such by virtue of the legal definition of the Court as judiciary transcending the various national juridical systems, having crossboarding jurisdiction, defined by the principle of complementarity. The obligation incumbent on States Parties to enforce directly ICC sentences on their territory could only be justified if the ICC in any way could be considered as an UN organ, like the ICJ or ICTY and ICTR. One could argue that those entities hierarchically dispose of jurisdictional powers directly penetrating the domestic legal atmosphere. Originally, the ILC conception of an international criminal court with universal jurisdiction could rest upon such an hypothesis, which prompted the wording of article 58 of the ILC drafting, imposing an overall obligation ‘to recognize’ the ICC sentences, without any latitude for States Parties. During the 1995 *Ad Hoc* Committee sessions, some delegations, trying to define the enforcement obligations, could rely on that assumption, advocating the status of ICC as an UN organ⁵. During the subsequent Preparatory Committee sessions however, albeit inarticulately, the overwhelming majority of delegations began to consider the ICC to be a judiciary on its own, only to a certain extent affiliated with the UN – namely, with regard to the triggering mechanisms. As a foreign jurisdiction, the ICC has its own jurisdictional scope, not compatible with any national jurisdiction. This would be incontestable when one would realize that the ICC is supposed to apply its own substantive criminal and procedural law, which both hardly could be asserted to be ‘emanations’ of already existing national systems. That being so, the contention that States Parties should abide by the notion of the ICC as ‘emanation’ of their national judiciaries could not be based on any legal ground. Therefore, those delegations considered article 58 not only to be redundant, but even erroneous and

³ See article 75. During the 1996 Preparatory Committee discussions some delegations were of the opinion that the ICC should have the power to impose on States the obligation to implement and execute measures related to compensations, restitutions, compensations and the like. In their view, this resulted from the hierarchical relationship between the ICC and the States Parties: the latter should be considered as subordinates of the ICC, superseding their national jurisdictions. This, however, is not the current system of article 75. The compensatory orders, made by the ICC, are directed against the convicted **person**. The custodial State may act, on invitation of the ICC, as a facilitating intermediary with a view to the execution of the order. See article 75 para. 3. The ICC may invite that State as ‘interested party’ to give further effect to the order; if the State accepts the request it shall give effect to the order as if the provisions under article 109 were applicable. But as a matter of principle, the subject of the Court’s order is the convictee, not the State. See: Shelton, in: The Center on International Cooperation (ed.), *The International Criminal Court, Reparations to victims of crimes (article 75 of the Rome Statute) and the Trust Fund (article 79), Recommendations for the Court Rules of Procedure and Evidence (1999)* <http://www.pict-pcti.org/publications/PICT_articles/REPARATIONS.PDF> accessed 11 September 2014, 6–18.

⁴ ‘States Parties [shall] [undertake to recognize] [[and to]] enforce directly on their territory] [give effect to] the judgements of the Court [, in accordance with the provisions of this Part]. [The judgements of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted and other forms of reparation ordered by the Court, such as restitution, compensation and rehabilitation]’. See article 85 of the Zutphen Draft.

⁵ See the *Ad Hoc* Committee Report, note 2, p. 3.

misleading, while fielding the idea that automatic recognition was an intrinsic part of the enforcement system of the ICC Statute.

- 4 It should be with the States Parties to scrutinize in each case whether the enforcement of the ICC sentence would be acceptable with certain constitutional bars, which should be done by the national judiciaries. In every case of a sentence of imprisonment, the convictee should have full access to the national habeas corpus-procedures to examine as to whether the detention was based on a *'iusta causa'* according to national jurisprudence. There should also be room for such a re-examination in cases of fines or forfeiture measures, ordered by the ICC, especially with a view to the rights of bona fide third parties. This implied, as a matter of principle, that after the ICC sentencing, States Parties should be entitled to apply, without any limitation whatsoever, a national exequatur procedure. If a State Party would prefer to introduce in its enabling legislation a system of continued enforcement, this would be up to that party. The result of this discussion was the deletion of article 58.
- 5 This final outcome elucidates the hybrid structure of article 103. In case the ICC imposes a sentence of imprisonment, there is no binding obligation on States Parties to enforce this penalty. The enforcement of such a sentence depends completely on the States' 'willingness'. One can hardly argue that this limitation of the authoritative power of the ICC sentences should be considered to be a matter of principle, whereas article 109 provides for a direct binding obligation of enforcement in cases of fines and forfeiture measures. The language of paragraph 1 of that article is a mandatory one, given the verb 'shall' in that part. While article 86 creates a binding obligation on all States Parties to cooperate with a view to the implementation of the ICC jurisdiction, the structure of Part X of the Statute makes clear that the steps for enforcement do not fall within the scope of the obligation to 'cooperate' albeit that, in the traditional framework of interstatal cooperation and assistance in criminal matters, the obligation to enforce is one of the intrinsic and essential parts⁶. Furthermore, the principle of complementarity seems to vest in the ICC a jurisdictional primacy. Completely in line with this, article 106 articulates the penitentiary principle that the Court will have 'the supervision' of the enforcement of sentences of imprisonment, which implies a hierarchical relationship between the ICC and the enforcing party⁷. However, as far as article 103 is concerned, this is certainly not true: States Parties seem to have the autonomous competence to decide whether or not they are willing to enforce. The ICC will be, like the ICTY and the ICTR, in the unenviable position of having to persuade States Parties to recognize the validity of the ICC sentences of imprisonment with a view to their **executability**. The only thing which could be upheld is, that, if a State has accepted the responsibility for the enforcement of such a sentence, it will act as a custodian on behalf of the ICC, which brings along that during the subsequent national transformation procedures it has to respect the underlying ICC factfindings, justifying the imposition of that penalty, and, thereupon, that it may not 'in any way, including by legislative amendment, alter the nature of the penalty to affect its truly international character', the standard laid down by the ICTY Trial Chamber in its judgement in the Erdemovic case⁸.
- 6 Part X as such is, given the structure and system of the Statute itself only directly applicable with regard to the crimes mentioned in article 5, by definition falling within the scope of the principle of complementarity. Nevertheless, in article 70 para. 3 the Court has been provided with the power to impose a sentence of imprisonment, the term of which may not exceed five years, to sanction offences against the integrity of the administration of

⁶ The ICTY Statute treats the enforcement separately from the cooperation and assistance in the respective articles 27 and 29, thus showing the same system of dualism with regard to phenomena which are intrinsically part of the same segment of international criminal law.

⁷ See Tolbert (1998) 11 *LeidenJIL* [655] 659: "Supervision" generally implies a relationship in which one party has authority over the other or at least has the right to decisively intervene'. One could question as to whether one could speak of 'authority', if the party, which has to obey the authority of the other simply could deny to comply with the rulings or orders of the latter.

⁸ *Prosecutor v. Erdemović*, IT-96-22-T, Sentencing Judgment, Trial Chamber II, 5 March 1998.

justice. Article 103, providing for the rules of enforcement of a sentence of imprisonment, does not envisage those ‘collateral crimes’. The Rules of Procedure and Evidence however could contain a provision by virtue of which the enforcement provisions of article 103 are declared to be applicable to the penalty of deprivation of liberty as defined in article 70, under the proviso that this is an applicability *mutatis mutandis*⁹. This has indeed happened, by virtue of Chapter 9, Section I of the Rules of Procedure and Evidence, a specific section has been introduced which deals with the offences against the administration of justice under Article 70¹⁰. From this perspective, Rule 162 paragraph 2 (c), stipulates that the Court, in making a decision whether or not to exercise jurisdiction, may consider ‘[t]he possible joinder of charges under article 70 with charges under articles 5 to 8’¹¹. Interestingly enough, paragraph 3 of Rule 162 mentions the possibility to ‘give favourable consideration to a request from the host State for a waiver of power of the Court to exercise jurisdiction in cases where the host State considers such a waiver to be of particular importance’¹².

II. The primacy¹³

Given that legal background, one could argue that the Court cannot exercise any primacy 7 with a view to the enforcement of its imprisonment sentences. Nevertheless, by glancing through Part X one can easily discover seven features to the contrary, which one has to bear constantly in mind when interpreting article 103.

a) After the acceptance of the responsibility to enforce, the penitentiary part of the ICC 8 sentence shall be binding on the party, which is not competent to modify that part on its own initiative. This principle has been laid down in article 105 para. 1. An example thereof can be found in Article 4 paragraph 1 of the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court (‘Austria Agreement’ or ‘Agreement’), which stipulates that ‘[s]ubject to the conditions contained in this Agreement, the sentence of imprisonment shall be **binding** on

⁹ Document PCNICC/1999/WGP/RT.5 (Preparatory Commission for the International Criminal Court, Working Group on Procedure and Evidence, New York, 26 July-13 Aug. 1999, 1 July 1999) contains a special Rule 6.32 with a view to the further elaboration of the imposition of the penalties mentioned in article 70. Nevertheless, this rule does not encompass a reference declaring article 103 applicable *mutatis mutandis*. A special amendment to that end has been presented on 30 July. On the other hand one could argue that Part III of this document seems to be drafted by authors who departed from the assumption that subsidiary Rules, meant to elaborate the Statute, could be drawn up on the basis of a hypothesis contrary to that on which the terminology and structure of the higher ranked instrument, the Statute itself, has been devised. Rule 6.27 as contained in that document seems to depart from the unarticulated assumption that Part X ICC Statute is straightforwardly, as a matter of course, applicable to the collateral crimes as listed under article 70. This Rule 6.27 runs as follows: ‘Unless otherwise provided in Rules 6.26 to 6.36, the Statute and Rules shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of the offences defined in article 70’. The meaning is unclear. The Statute speaks, with regard to the measures to be taken in connection with the execution as envisaged in Part X of ‘enforcement’ and not of ‘punishment’. The latter noun could refer to the imposition of the penalty, envisaged in article 77. But if this Rule 6.27 is intended to encompass all the regulations laid down in Part X one could question whether one could, by virtue of a subsidiary regulation, come back from a stand clearly underlying a statutory provision of a higher level, which the Statute undoubtedly constitutes in relation to the Rules of Procedure and Evidence. But even when one deems such acceptable, the question remains whether the applicability of Part X on article 70 crimes is recommendable. It is foreseeable that article 70 crimes will occur on a massive scale, given the nature and character of the article 5 crimes to which they are related. For example, the retaliation of witnesses could easily amount to a great number of sentences, given the fact that the nature of a crime as genocide implies that the Prosecutor has to call upon a lot of witnesses. All those collateral sentences would have to be enforced according to the Part X scheme which would overburden the penitentiary ICC-facilities.

¹⁰ Rules of Procedure and Evidence, Chapter 9 Offences and misconduct against the Court, Section I Offences against the administration of justice under Article 70, encompasses Rules 162 till 169. These Rules set the procedure and conditions with regard to Article 70 offences.

¹¹ Rule 162, entitled ‘Exercise of jurisdiction’, of the Rules of Procedure and Evidence.

¹² *Ibidem*, paragraph 3.

¹³ The ICTY Rules of Procedure and Evidence (version IT/32/Rev.13) contain in Part II the title ‘Primacy of the Tribunal’.

Austria, which shall in no case modify it¹⁴. Furthermore, any action that might modify the enforcement in any way, whether positively or negatively, must be communicated to the Court, which will then decide whether or not such modification is acceptable. If the Court decides that such modification does not uphold the object and purpose of the sentence, it may change the designation of the State of Enforcement. A final word on this subject matter is the provision that mentions that **even if** the Enforcement of Sentence Agreement is terminated, that will not 'affect sentences in force at the time of the termination'¹⁵. This seemingly entails that, once a State has accepted to enforce a sentence, the only method to be absolved of the enforcement is if the Presidency decides to change the designation of the State of Enforcement, see Article 104 for more on this subject.

- 9 b) Upon designation to accept enforcement of a sentence of imprisonment, the designated State has to inform the Presidency promptly whether it is willing to accept the sentenced person with a view to measures of detention, paragraph 1 (c). This obligation could be considered as a symptom of subordination of the State to the ICC.
- 10 c) After acceptance, the State Party has to execute the penalty without modification, unless new circumstances appear, which were objectively not existing at the time of the acceptance, albeit that they may have been foreseeable at that time, paragraph 1 (b) to paragraph 2 (a). Those circumstances must be of such a nature that they could materially affect the terms or extent of the imprisonment. Those nova have to be duly notified to the Court. In the Austrian Agreement, this has been codified in Article 6 paragraph 2, which has almost literally copied both paragraphs 2 (a) and (b) in full. An additional Article in the Agreement that expands these principles is Article 16, which stipulates that '[i]f...further enforcement has, for any legal or practical reasons and beyond the control of the competent national authorities, become impossible, Austria shall promptly inform the Presidency'¹⁶.
- 11 d) In the event as described under c, the Court has the competence to decide as to whether it can justify the decision of the administering party that the nova could justify the deductive or commutative penitentiary effect according to the domestic law or legislation of that party. If the Court cannot agree upon that with the administering party, it shall notify accordingly that State. In that case, the Court is entitled to decide to transfer the sentenced person to a third State, to which end the administering party has to provide the Court with due cooperation, paragraph 2 (b) to article 104 para. 1.
- 12 e) Apart from the cases as described under c and d above, the Court is at any time competent to transfer the sentenced person to a third State, in the event of which the administering party is again under the obligation to cooperate to that end, article 104. This principle has been codified in Article 13 of the Austria Agreement, stipulating that the Presidency, acting proprio motu or at the request of the sentenced person or the Prosecutor, may, at any time, decide to transfer a sentenced person to a prison of another State¹⁷.
- 13 f) The Court exercises full penitentiary supervision, article 106 para. 1. This principle has been codified in article 5 of the Austria Agreement, which elaborates the non-exhaustive powers of the Presidency in its role as supervisor of enforcement¹⁸.

¹⁴ Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court. ICC-PRES/01/01/05. Date of entry into force: 26 November 2005, <http://www.legal-tools.org/doc/0f5f9e/>. The International Criminal Court has, thus far, signed Agreements on the Enforcement of Sentences with Austria, Belgium, Columbia, Denmark, Finland, Mali, Serbia, and the United Kingdom. At the time of writing, only the Agreement with Columbia has not yet entered into force. For reasons of expediency, only one Enforcement Agreement will be used as an example, although the other Agreements contain similar provisions in their subsequent texts.

¹⁵ See Austria Agreement, note 14, article 22, entitled 'Termination of the Agreement'.

¹⁶ *Ibidem*, article 16, entitled 'Impossibility to enforce sentences'.

¹⁷ *Ibidem*, article 13, entitled 'Change in designation of State of Enforcement', for more on this subject, see the commentary of article 104 of the Rome Statute.

¹⁸ *Ibidem*, article 5, entitled 'Supervision of enforcement', the first sentence states that: '[i]n order to supervise the enforcement of sentences of imprisonment, the Presidency may, *inter alia*'. Due to this construction, it seems that the Presidency has more means to his disposal than those enumerated in this article.

g) Only the Court has the right of commutation of the sentence itself by reduction of the term of imprisonment, article 110 paras. 1 and 5. This view can be found in article 11 of the Austria Agreement, which elaborates on the conditions for appeal, revision and reduction of sentence¹⁹. 14

The basic conclusion could be that, with a view to the enforcement, the Court enjoys before statal acceptance of the sentenced person no primacy at all, and after acceptance a moderate or diffuse primacy. 15

III. The authority of the sentence

Given this hybridity of the binding force of the sentence to the States Parties, could one maintain that the sentence has the significant *auctoritas* or authority which normally is the main feature of an irrevocable judicial decision at the national level? First and foremost, one has, with regard to this authoritative aspect, to distinguish between the factual part of the decision on one hand and the penitentiary part of it on the other, the latter containing the exact description of the imposed sanction to be enforced. Without any doubt, the factual part containing the Court's factual findings and identifying the sentenced person, is irrevocably authoritative, binding each State Party, at the very moment that no ordinary means of judicial recourse are available to contest the content and nature of the decision. The penitentiary part of the sentence on the contrary is only authoritative at the moment of the statal acceptance of the obligation to enforce. This authority is not an *auctoritas erga omnes*, but only binds the administering party. 16

IV. Positive and negative recognition

Traditionally, with a view to the legal authoritative force of a sentence handed down by a foreign judiciary (which the ICC has to be considered as, see mn 3), dogmatically one can distinguish between the positive and the negative recognition of the decision by a third State²⁰. Is the same distinction applicable to the sentences as defined in article 103? The positive recognition implies that the State, acting as administering State, mostly at request of the sentencing State, has to recognize the decision as a legal title under its domestic law to exercise the statal monopoly to use legitimate force against the individual. The decision automatically provides the recognizing party with a legal ground for a certain encroachment upon the common human rights enjoyed by the persons residing within the territorial jurisdiction of that State. The negative recognition implies the obligation to consider the decision as blocking the right to exercise that monopoly. Given the wording of article 20, rephrasing the consequences of the traditional *ne bis in idem* maxim to the States Parties, all States Parties are under the obligation to recognize negatively the sentence as defined in article 103 both in its factual and penitentiary aspects, irrespective of whether the penalty has been completely executed as imposed by the administering party. Normally, this negative recognition is only mandatory in international relations in case the penalty has been enforced as prescribed in the penitentiary part of the foreign sentence. The penitentiary obligations resulting from the positive recognition are only incumbent on that State Party which actually has accepted its enforcement obligation in conformity with paragraph 1. The recognitory effects of the ICC sentence as defined in article 103 are thus of a relative nature. 17

¹⁹ *Ibidem*, article 11, entitled 'Appeal, revision and reduction of sentence', for more on this subject, see the commentary of article 110 of the Rome Statute.

²⁰ See Oehler, *Internationales Strafrecht* (1983) 571-603.

V. Willingness decisive

18 Only a 'willing party' could be sought to act as a custodian on behalf of the ICC²¹. In this respect paragraph 1 (a) copies the enforcement scheme of article 27 ICTY Statute²². Furthermore, the first chapeau of the Preamble of the Austria Agreement, is written in an almost exact fashion as paragraph 1 (a)²³. This general approach obviously is based on the pragmatic stand that accepting convicted persons raises significant legal and logistical issues for the administering party and will have considerable cost implications. Nevertheless, as has been stated with regard to ICTY, this system, leaving all the imaginable latitude to the States Parties, puts the ICC in a penitentiary predicament²⁴. Article 103 leaves the Court in the position of constantly calling on States to cooperate on enforcement of sentences. It will be necessary for the ICC to make appropriate arrangements with willing States on the basis of special additional enforcement agreements, in which the willing party expresses the conditions to its acceptance. Of course, the Court has to agree upon those conditions, paragraph 1 (b), but whereas the Court will be in a position of relative helplessness, having no penitentiary administration to provide in its own enforcement measures with regard to irrevocable sentences, there will not be much margins within which to reject conditions. Of course, the conditions must be compatible with the object and goal of the Statute itself. They may not substantively affect the nature and modality of the penalty as prescribed in the sentence to be enforced. But the text of article 103 does not provide for criteria which conditions States Parties are entitled to put forward. The corresponding provision in the Rules of Procedure and Evidence, Rule 200, does not mention any specific conditions either, only stipulating that '[t]he Presidency shall not include a State on the list...if it does not agree with the conditions that such a State attaches to its acceptance. The Presidency may request additional information from that State prior to taking a decision'²⁵.

VI. System of enforcement agreements

19 The provisions of Part X only address the principles relevant to the enforcement of sentences. The Statute does not address the exact modalities of penitentiary enforcement. ICTY concludes additional enforcement agreements with willing parties based on the guidelines offered by a Model Agreement developed by the UN, establishing the main framework in which the enforcement of sentences could be carried out²⁶. It is likely that the ICC is to follow the same additional system, based on a number of bilateral agreements, which could enhance the flexibility amongst the willing parties and subsequently their preparedness to accept enforcement on a case bound basis. In this sense, it is interesting to note that Austria has enforcement of sentences agreements with both the ICTY and the ICC²⁷. If one were to compare these enforcement agreements, one can easily see that the agreements are very similar,

²¹ See Broomhall, in: Bassiouni (ed.), *ICC Ratification and national implementing legislation* (1999) 45.

²² This article 27 ICTY Statute runs as follows: 'Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal'.

²³ See Austria Agreement, note 14, 'Recalling Article 103 of the Rome Statute of the International Criminal Court adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries (hereinafter referred to as 'the Rome Statute'), according to which sentences of imprisonment pronounced by the Court shall be served in a State designated by the Court from a list of States which have indicated their willingness to accept sentenced persons;'

²⁴ See Tolbert (1998) 11 *LeidenJIL* [655] 658.

²⁵ Rule 200 of the Rules of Procedure and Evidence, entitled 'List of States of enforcement', paragraph 2.

²⁶ See YbICTY 227 (1996) and Tolbert (1998) 11 *LeidenJIL* [655] 664.

²⁷ See Agreement between the United Nations and the Federal Government of Austria on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia, signed the 23rd of July 1999.

thereby confirming the fact that the ICC follows a similar approach to that of the ICTY. On the other hand, this approach could lead to unjustifiable territorial dissimilarities with, for example, a view to standard minimum rules on detention, early release, conditional release, suspension of enforcement, parole or penitentiary programmes being integral part of the detention scheme of the administering party. Again, if the ICTY is used as an indicator of States willing and able to enforce sentences, all enforcement of sentences is in Europe, not one sentencee has been transferred to another region of the world. An additional note here is that the ICTY gives particular consideration to the proximity of the proposed State to the convicted person's relatives, which might explain why Europe is the main region thereof. However, thus far, the only two States, outside of Europe, that have signed enforcement of sentences agreements with the ICC, have been Columbia and Mali. The ICTY scheme of enforcement agreements shows a certain divergence thus far with regard to pardon or commutation. The UN Model Agreement builds on the provisions of the ICTY Statute. The Model provides that the Registrar, being the executive authority of the Tribunal, will contact the contemplated administering party requesting it to accept the responsibility for enforcement. The request has to contain the relevant information to acknowledge the party of the consequences of an eventual acceptance. These principles have been incorporated in Article 2 of the Austrian Agreement, which explains the procedural elements that will be taken into account between the State and the Court before designation of an enforcement of sentence. The main difference between the ICC and ICTY procedure is that it is the Presidency of the Court, as opposed to the Registrar of the ICTY, that will process the information and request. Each request will be treated on a case bound basis: the willing party is not bound to agree to any particular request. After the compliance with the request the sentenced person will be transferred to the administering party. The bilateral enforcement agreement may provide for special arrangements with a view to the transfer, the responsibility thereof and the travel costs. The costs associated with the imprisonment itself will be borne by the accepting party. Both the transfer – and the costs thereof – have been codified in articles 3 and 18 of the Austrian Agreement. Article 3 bestows upon the Registrar the duty to make appropriate arrangements for the transfer to the territory of Austria. Whereas paragraph 1 of Article 18 stipulates that the ordinary costs for the enforcement of sentence in Austria shall be borne by Austria, paragraph 2 stipulates that other costs, including transport of the sentenced person to and from the seat of the Court, shall be borne by the Court²⁸. That is also the underlying system of article 103, which only in paragraph 4 provides for a special regulation of those costs in case no willing party is prepared to accept in a concrete case. The ICTY enforcement agreements exclude a subsequent exequatur procedure upon acceptance, given the primacy of ICTY as laid down in its Statute and prompted from its status as UN suborgan. As pointed out above this is not true with regard to the ICC which will have to accept such transformation procedures.

VII. Equitable distribution

In exercising its discretion to make a designation under article 103 the Court shall take into account the principle that States Parties should share the responsibility for enforcing sentences, in accordance with principles of equitable distribution. Those principles have to be elaborated in the Rules of Procedure and Evidence which has been done by virtue of Rule 201²⁹. The terminology with regard to those rules of burden sharing has varied from Preparatory Committee session to Preparatory Committee session. Originally, especially geographical criteria were envisaged³⁰. In Rome it was felt that the Statute itself should not

²⁸ See Austria Agreement, note 14, Article 3 entitled 'Delivery' and Article 18, entitled 'Costs'.

²⁹ Rule 201 of the Rules of Procedure and Evidence, entitled 'Principles of Equitable Distribution'.

³⁰ See 1996 Preparatory Committee II, note 2, p. 291, option C, sub 1: '[States Parties shall enforce the judgement of the Court on designation by the Registrar on [geographical] criteria formulated by Rules of the Court in accordance with the rule of burdensharing. (...)]'. Later on it was felt that the drawing up of those criteria should be with the States Parties and not with the judges.

give substantive criteria governing the method of designation. When developing criteria the following could be taken into consideration.

- 21 a) The wealth of the States Parties, *i. e.* their capacity to pay. As already indicated, the acceptance of enforcement under article 103 will incur considerable cost, which will not be reimbursed by the funds as defined in articles 114 and 115. In this regard the rules on the financing of the ICC by contributions are of some relevance. Article 117 provides that the contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the UN for its regular budget and adjusted in accordance with the principles on which that scale is based. One has to take into special consideration the role of the permanent members of the Security Council of the UN, whereas part of the ICC jurisdiction will be based on Security Council referrals. In the area of peacekeeping, permanent SC-members pay a larger share than in the regular UN budget. A final comment is that this has not been codified in Rule 201. Although paragraph 4 of said Rule does stipulate principles of equitable distribution shall include ‘[a]ny other relevant factors’, which indirectly might be a confirmation of this principle.
- 22 b) The penitentiary capacity of the States Parties. This is a question of mere logistics, depending on the number of prison facilities, average number of inmates, and the quality of the penitentiary administration. In this regard, annual reports concerning the respective penitentiary systems made up by UN linked organizations or international Human Rights organizations³¹ could offer some guidance. Although this principle has not been incorporated in Rule 201, paragraphs (b) and (c) state that, on the one side, principles of equitable distribution shall include ‘[t]he need to afford each State on the list an opportunity to receive sentenced persons’ while, on the other side, consideration must be given to ‘[t]he number of sentenced persons already received by that State and other States of enforcement’³².
- 23 c) The geographical location of the States Parties. It is highly recommendable that sentences should not be enforced on the territory of the territorial State, the State where the crimes have been committed. Furthermore, the scheme of designations to be observed by the ICC Registrar and the Presidency should be drawn up in such a way that concentration of enforcement in one geographical area will be avoided. As mentioned in mn 19, the ICTY practice shows that all sentenced persons, thus far, have been sent to penitentiaries within Europe, specifically western Europe and the Scandinavian countries. If this practice is any indicator, a real possibility exists that a somewhat similar distribution will crystallise.

B. Elements and conditions

I. Paragraph 1: Conditions of acceptance

- 24 The willing party may attach conditions to its acceptance in conformity with paragraph 1 (b). After acceptance, the party shall notify the Court whether it is going to exercise any of those conditions. This system of conditional acceptance has been introduced during the 1998 Rome sessions, in order to enhance at the level of acceptance the flexibility of the statutory enforcement scheme. The Statute does not define criteria for those conditions, but the proponents of this conditional acceptance referred to conditions linked with typical prerogatives of the Head of State of the administering party, like the right of pardon, abolition and amnesty. The idea was to devise a system which would be compatible with those prerogatives, thus lowering the threshold to be listed as a potential enforcing party, permitting States Parties to accept enforcement obligations without being obliged thereby to change their respective constitutions with regard to fundamental privileges to set aside the authority

³¹ Think of the European Steering Committee for Human Rights.

³² Rules of Procedure and Evidence, see paragraphs (b) and (c), note 29; paragraph (d) adds ‘[a]ny other relevant factors’ to the equation.

of judicial decisions, privileges, mostly tightly interlinked to a certain balance of power within the administering State. During the 1997 Preparatory Committee sessions proposals had been inserted in the rolling text on the enforcement part, **prohibiting** administering parties to exercise the national rights of pardon or parole, which, in the opinion of the drafters, was felt to be incompatible with the authoritative force of the ICC sentence³³. In Rome, on the contrary, it was felt that this limitation would narrow the potential group of willing parties to such extent that it could undermine the effectiveness of the court considerably. That being so, it is regrettable that the Statute itself does not provide for any guidance with a view to the criteria the authors had in mind, limiting the category of the conditions. As it stands now, parties could formulate conditions of a penitentiary administrative nature, for example, connected with the capacity of a special secured prison facility where the ICC sentenced person is to be placed. A condition could be that, in case that unit is needed for national interests – to transfer seditious inmates from elsewhere, in order to curb tensions within the unit where they used to stay – the administering party is entitled to inform the ICC that it has to transfer its convictee to a prison of another State. Paragraph 1 (b) has never been meant to be interpreted that way, but it could turn out to be abused as an overall escape-clause to withdraw via the backdoor from obligations formulated in enforcement agreements.

II. Paragraph 2: Notifications

Paragraph 2 obliges the State of enforcement and the Court to mutual information. They 25
may result in consultations to find an agreement acceptable for both. In the worst case scenario, if Austria would, for whatever reason envisaged by Article 6 paragraph (2) or Article 16 of the negotiated agreement, be unable to fulfil its enforcement obligations, it shall notify the Court thereof. If the Court, by virtue of the Presidency, cannot accept these changes, the procedure in paragraph 2 (b) will be set into motion. For more on this, see the commentary on Article 104 of the Rome Statute.

III. Paragraph 3: The designation

Rule 199 of the Rules of Procedure and Evidence stipulates that unless provided otherwise, 26
the Presidency shall exercise the functions of the Court under Part 10³⁴. Whereas the establishment and maintenance of the list of States of enforcement will be maintained by the Registrar, thereby following a similar approach as the ICTY, it is the Presidency who decides which States will be placed on the list and whether or not conditions of States will be accepted, as mentioned in paragraph 1 (a)³⁵. The method of designation will be governed by the bilateral agreement between the ICC and the envisaged administering party³⁶. Originally, the Statute articulated rather rigid criteria with regard to this designation, preventing the Registrar from designating the territorial State, the State of the active personality or nationality and the State of the passive personality or nationality, *i.e.* the State where the *locus delicti* is situated, the State the nationality of which the convictee enjoys, or the State of which the victims were nationals, subjects, ordinary residents or inhabitants. The Zutphen

³³ On the other hand, some delegations kept feeling that the exclusion of that prerogative competence on the Statutory level would constitute an insurmountable obstacle to enter into enforcement negotiations; the option that parties might rely on that kind of commutative rights has been upheld in detail until the Zutphen Draft, referring explicitly, with regard to the acceptance conditions, to those prerogatives. See article 86[59], Option 2, bracketed (b).

³⁴ See Rules of Procedure and Evidence, Chapter 12 Enforcement, Section I Role of States in enforcement of sentences of imprisonment and change in designation of State of Enforcement under articles 103 and 104, Rule 199, entitled 'Organ responsible under Part 10'.

³⁵ See Rule 200 of the Rules of Procedure and Evidence, entitled 'List of States of Enforcement', paragraph 2.

³⁶ *Ibidem*, paragraph 5.

Draft shows a wide variety of those abstract criteria³⁷. It seemed the proponents of these kinds of criteria not recommendable to send convicted persons back to the country they originated from. It would be foreseeable that such persons, being considered by their compatriots or countrymen as national heroes, would be submitted to an enforcement regime having all the features of a *custodia honesta*, thus putting the local victims in a position of utter dismay. On the other hand, during the 1997 Preparatory Committee sessions there was a strong feeling that it should be entirely with the Registrar to decide as to whether a transfer to the State of the active nationality could not be preferable under certain circumstances for reasons of social rehabilitation. The Statute itself should not deprive the Registrar, or the Presidency, of adequate flexibility in this respect, to decide on a case bound basis. In the end, the Preparatory Committee decided to skip any criteria except the condition, that the administering party should be capable of coping with ‘the application of widely accepted international treaty standards governing the treatment of prisoners’, paragraph 3 (b).

27 The emphasis should be laid on the noun ‘treaty’ in this context. During the 1997 Preparatory Committee sessions many delegations wanted to refer to ‘internationally recognized minimum standards’, in order to limit the designated discretion of the Registrar to countries actually capable of coping with the UN Standard Minimum Rules for the Treatment of Prisoners³⁸. This was objected to, however, on the grounds that this would set the enforcement threshold so high, that only a very select club of penitentiary paragons would be fit to be designated for forthcoming decades. It was stressed that the UN Minimum Standards were formulated not with a view to be integrated in a multilateral treaty of a penitentiary nature to be implemented and observed by a State majority, but with a view to set standards for the most ideal penitentiary practice a specialist could imagine. In the preamble of the Rules, the founding fathers of the Standard Minimum Rules themselves indicated already the intent to describe ideals not yet ready of realization at short notice, given the social, economic and cultural dissimilarities throughout the world. In Rome it was ultimately decided to rely on standards being part of commonly accepted treaties like the UN Anti-Torture Convention, the ICPHR and the like. However, the wording of the Preamble of the Austria Agreement, 3rd chapeau, seems to create a somewhat open-ended reference to such treaties and conventions, as it is stated that the Court and Austria recall ‘the widely accepted international treaty standards governing the treatment of prisoners **including...**’³⁹. The list is seemingly non-exhaustive and it might depend per State which treaties and conventions are, or are not, of importance.

28 The Presidency has to take into consideration with a view to the actual designation the view of the sentenced person and his nationality⁴⁰. There is no need to have the consent of that person, let alone that his nationality would be a casting factor. The question remains, for the time being, whether or not the proximity of the proposed State to the convicted person’s relatives might play a role, as it has done so at the ICTY.

³⁷ See article 86[59], Option 2, *Ibis*, (a), second bracketed sentence: ‘[However, no such designation shall be made with respect to the State where or against which the crime was committed or the State of which the convicted person or the victim is a national [, unless the [Court] [Presidency] explicitly decides otherwise for reasons of social rehabilitation]]’.

³⁸ Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders on 30 Aug. 1955 at Geneva, approved by the Economic and Social Council in resolutions 663 (XXIV) on 31 July 1957 and 2076 (LXII) of 13 May 1977; see First United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Report by the Secretariat (United Nations Publication Sales No. 1956 IV.4. annex I.A). To the Rules belong a great number of annexes.

³⁹ See Austria Agreement, note 14, Preamble, 3rd Chapeau.

⁴⁰ Rules 203, entitled ‘Views of the Sentenced person’ and 204 ‘Information relating to designation’, of the Rules of Procedure and Evidence’. These provisions can also be found in the Austrian Enforcement Agreement, under Article 2, entitled ‘Procedure’, paragraphs 1 (a) and (d).

IV. Paragraph 4: The position of the host State

If the Registrar fails to find a willing party along the lines as set out in paragraph 3, the host State has to act as residual custodian on behalf of the Court, a price to be paid for having the undeniable privilege of hosting the legal capital of the world as defined in article 3 para. 1⁴¹. The sentence of imprisonment has to be served in a prison facility made available by the host State. In this context it should be noted that the drafters of article 103 para. 4 deliberately used the indefinite article ‘a’ in this sentence (‘a’ prison facility) to indicate clearly that the host State obligations are confined to the availability of the detention facility as defined in the Headquarters Agreement, together with the additional regulation as contained in the Host Arrangement, governing the residual penitentiary obligations of that particular State. It is, however, entirely with the ICC how it wants to use the facilities in this respect. If it deems it to be recommendable to use the detention units for pre-trial detention purposes, it is fully free to do so. The ICTY currently has no detention facilities at its disposal with a view to the enforcement of imprisonment sentences, although in the detention units situated at Scheveningen Prison Complex several irrevocable imprisonment sentences are being or have been executed, with the accompanying detriment to the pre-trial detention capacity. The prison as defined in paragraph 4 will be considered as an extension of the Court’s premises unless the ICC and the host State will contract otherwise. In divergence of the original ILC Draft, in which this residual obligation of the host State has been laid down as from 1994, the current statutory text of article 103 defers the conditions governing the residual penitentiary obligations to the Headquarters Agreement. See the commentary to article 3 para. 3. The costs arising out of this residual permanent obligation shall be borne by the Court. The current ICTY practice shows, that the concrete factors determining the costs will be governed not by the Headquarters Agreement itself, defining only the penitentiary premises set at the Tribunal’s disposal, but by the additional services-contracts regulating the services to be provided for by private personnel (think of psychiatrists, religious ministers, electricians, contractors, catering providers, maintenance personnel) and civil servants (mostly gratis officers) who will be given on loan upon request of the Tribunal on a case bound basis.

C. Special remarks

The new final Seat Agreement, considered in particular *infra* under article 3 para. C.III.2, 30 mn 51 dealing with enforcement obligations incumbent on the host State by virtue of its article 49. However, this article 49 Seat Agreement does not add anything substantial to the Statute and, therefore, is superfluous.

An additional article in the Headquarters Agreement is article 50, which deals with short-term detention arrangements. Paragraph 2 explains two different scenarios in this regard, that relate to a change in designation of the State of enforcement. The first relates to the need for a change in designation to another State of enforcement, and where the period pending transfer to another State of enforcement does not exceed six months; in this case, the Court and the host State shall consult as to whether the sentenced person **may** be transferred to a prison facility made available by the host State under paragraph 4; thereby creating a certain leeway for the host State as to whether or not to accept and facilitate the sentenced person. The second scenario relates to a period exceeding six months; if this were the case, the

⁴¹ See the commentary to this article.

sentenced person shall be transferred to a prison facility made available by the host State under paragraph 4, upon a request by the Court⁴².

A final remark pertains to the Agreement between the ICC and the International Committee of the Red Cross ('ICRC')⁴³. By virtue of article 14 of this Agreement, entitled 'Obligations upon the ICC', it is stated that 'the ICC shall, to the extent possible, include in the agreements with States of Enforcement the possibility of visits by the ICRC according to its standard conditions and procedures'⁴⁴. Interestingly enough, two signatories have not included a provision in their negotiated Agreement, namely, Austria and the United Kingdom.

The Austria Agreement, by virtue of article 7, allows 'the inspection of the conditions of imprisonment and treatment of the sentenced person(s) by the Court, or an entity designated by it...the frequency of visits to be determined by the Court'⁴⁵; the Agreement with the United Kingdom stipulates that '[t]he competent national authorities of the United Kingdom shall allow the inspection of the conditions of imprisonment and treatment of the sentenced person(s)...by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter 'the CPT' at any time and on a periodic basis, the frequency of visits to be determined by the CPT'⁴⁶.

It seems that the provision incorporated in the Austria Agreement entitles the Court to decide which entity may visit, and the frequency of visits thereof, thereby creating a certain executive decision-making power for the Court. This might be explained due to the fact that the Agreement was signed and entered into force before the ICC – ICRC Agreement entered into force. However, the United Kingdom Agreement, entered into force after the ICC – ICRC Agreement, has not opted for the same or a similar provision allowing the ICRC, instead of the CPT to visit; why is not known.

⁴² See Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, <http://www.legal-tools.org/doc/45e340/>, Article 50, entitled 'Short-term detention arrangements'. For a further analysis of the Headquarters Agreement see the Commentary on Article 3 of the Rome Statute.

⁴³ Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, ICC-PRES/02-01-06. Dates of Signature: 29th March 2006 and 13th April. Date of entry into force: 13th April 2006, Publication of the Official Journal.

⁴⁴ ICRC Agreement, see note 43, Article 14, paragraph 1, entitled 'Obligations upon the ICC'.

⁴⁵ Austria Agreement, see note 14, Article 7, entitled 'Inspection, paragraph 1.

⁴⁶ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the enforcement of sentences imposed by the International Criminal Court, ICC-PRES/04-01-07. Date of Entry into Force: 8 December 2007, Official Journal Publication, <http://www.legal-tools.org/doc/d70d91/>.

Article 6 of this Agreement, entitled 'Inspection'.

Article 104

Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.
2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

General remarks

After what has been said with a view to the gist and purview of article 103, this article hardly needs further comment or explanation. For several reasons the Court can deem it opportune to transfer the sentenced person during the term of enforcement to another State. The latter can be a State Party, but this need not necessarily be the case. In case where the ICC decided to transfer to a third party, this would necessitate the conclusion of an additional enforcement agreement, the conditions of which under no circumstances may aggravate the penitentiary position of the sentenced person. This implies that the third party must be capable of answering to the conditions as set out in article 103 para. 3 which will apply *mutatis mutandis*.

The Statute originally did not provide for criteria with regard to this transfer decision. However, according to the negotiated agreements on the enforcement of sentences signed thus far, the main authority to decide on a change in designation will be the Presidency, whereas the Registry will maintain the executive authority of implementing said decision. One of the main reasons to decide for interim transfer will be the notification by the administering party that that State is going to exercise the conditions as set out in article 103 para. 1, materially affecting the terms or extent of the imprisonment. The administering party will be under the obligation to cooperate with a view to the transit of the convict. The State to which the sentenced person is to be brought has to accept the primacy as set out in mn 7 *et seq.* of the commentary to article 103. The convict has the right to ask for the application of the competence laid down in paragraph 1 of this article. This would be true without any specific regulation thereof. The sentenced person may do so ‘any time’, which implies that he may do so repeatedly. The authority to be addressed will be the Presidency.

A variety of articles are dedicated to the change in designation of State of enforcement in the Enforcement of Sentences Agreements that have been codified and entered into force thus far¹. The main Article in the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court (hereinafter the ‘Austria Agreement’ or ‘Agreement’) is article 13. This Article is almost a literal copy of article 104 and consists of three paragraphs. Paragraph 1 stipulates that either ‘[t]he Presidency, acting on its own motion or at the request of the sentenced person or the Prosecutor, may, at any time, decide to transfer a sentenced person to a prison of another State’²; if this is the case, the Presidency shall notify the sentenced person, the Prosecutor, the Registrar and Austria. Paragraph 3 of said article stipulates that

¹ The International Criminal Court has, thus far, concluded enforcement of sentences agreements with Austria, Belgium, Columbia, Denmark, Finland, Mali, Serbia, and the United Kingdom. At the time of writing, the agreement with Columbia and Mali have not yet entered into force. For reasons of expediency, only one Enforcement Agreement will be used as an example, even though the other agreements will have a similar provision in their subsequent texts.

² Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court, ICC-PRES/01/01/05, Date of Entry into force: 26 November 2005, <http://www.legal-tools.org/doc/0f5f9e/>. Article 13, entitled ‘Change in designation of State of enforcement’, paragraph 1.

‘[i]f the Presidency decides not to change Austria as State of enforcement, it shall notify the sentenced person, the Prosecutor, the Registrar and Austria’³ Finally, paragraph 2 is an exact copy of article 104 paragraph 2 specifying that ‘[a] sentenced person shall be entitled, at any time, to apply to the Presidency to be transferred from Austria’⁴. This paragraph can be read in close conjunction with article 8 of the Austria Agreement, requiring that ‘[c]ommunications between a sentenced person and the Court shall be unimpeded and confidential’⁵, seemingly allowing him (or her) to apply at any time, as mentioned in mn 2.

Besides this main Article, there are several provisions that mention the possibility for a change in designation of State of enforcement. Two examples shall be given at this point.

First of all, article 6 paragraph 2 in conjunction with article 16 paragraphs 1 and 2. Article 6 stipulates in paragraph 2 that ‘Austria shall notify the Presidency of any circumstances...which could materially affect the terms or extent of the imprisonment. The Presidency shall be given at least 45 days’ notice of any such known or foreseeable circumstances. During this period, Austria shall take no action that might prejudice its obligations. Where the Presidency can not agree to the aforementioned circumstances, it shall inform Austria and transfer the sentenced person to a prison of another State’⁶. A somewhat similar wording has been included in article 16. Paragraph 1 of said article stipulates that ‘[i]f...further enforcement has...become impossible, Austria shall promptly inform the Presidency’⁷, followed by the second paragraph in which ‘[t]he Court shall make appropriate arrangements for the transfer of the sentenced person’⁸. These provisions can be said to have been included for the sole reason that ‘[s]ubject to the conditions contained in this Agreement, the sentence of imprisonment shall be binding on Austria, which shall in no case modify it’⁹. As the International Criminal Court, embodied by the Presidency, is the only entity that can change or modify a sentence, a derogation thereof, due to for example national laws and legislations, by a State that has accepted a convict, will set in motion the [possible] transfer to another State that would be willing to enforce the sentence as pronounced and envisaged by the ICC.

A second provision in the Austrian Agreement that mentions a possible change in designation of the State of enforcement is article 12. There is always a possibility that a convict escapes. If that were to happen, article 12 paragraph 4, explains the procedure that is set in motion once the convict has been apprehended and surrendered to the Court. Paragraph 4 states that ‘[i]f the sentenced person is surrendered to the Court, then the Court shall transfer him or her to Austria. Nevertheless, the Presidency may, acting on its own motion or at the request of the Prosecutor or Austria, designate another State, including the State to the territory of which the sentenced person has fled’¹⁰. For a further explanation of the Escape provisions, see the Commentary on article 111 of the Rome Statute.

Finally, there are two articles in the Austrian Agreement that absolve Austria of its’ obligations to enforce the sentence for a particular convict, namely articles 14 and 22 of the Agreement. The first is article 14. Paragraph 1 subparagraph (c) of said article stipulates that the enforcement of the sentence shall cease ‘following a decision of the Court to transfer the sentenced person to another State in accordance with the Rome Statute and the Rules’¹¹, thereby absolving Austria of its’ obligations with regard to the convict. The corresponding Rules of Procedure and Evidence that should be taken into account are rules 209 and 210

³ See Austria Agreement, note 2, Article 13 paragraph 3.

⁴ *Ibidem*, Article 13 paragraph 2.

⁵ *Ibidem*, Article 8, entitled ‘Communication’.

⁶ *Ibidem*, article 6, entitled ‘Conditions of Imprisonment’, paragraph 2.

⁷ *Ibidem*, article 16, entitled ‘Impossibility to enforce sentences’, paragraph 1.

⁸ *Ibidem*, article 16, paragraph 2.

⁹ *Ibidem*, article 4, entitled ‘Enforcement’, paragraph 1.

¹⁰ *Ibidem*, Article 12, entitled ‘Escape’.

¹¹ *Ibidem*, Article 14, entitled ‘Termination of Enforcement’, paragraph 1 subparagraph (c).

read in conjunction with Rule 203, sub-rule 3¹². The final Article that points out a change in designation is Article 22 of the Austria Agreement. This article considers that '[u]pon consultation, either party may terminate this Agreement...and the provisions of this Agreement shall continue to apply until...if applicable, the sentenced person has been transferred in accordance with article 13 of this Agreement'¹³.

¹² Rule 209, entitled 'Change in designation of State of Enforcement' and Rule 210, entitled 'Procedure for change in the designation of a State of enforcement' of the Rules of Procedure and Evidence, set the ground procedural rules. From this perspective, Rule 203, entitled 'Views of the sentenced person', explains the procedures in place for the sentenced person.

¹³ See Austria Agreement, note 2, Article 22, entitled 'Termination of the Agreement'.

Article 105

Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	2
I. Paragraph 1	2
1. 'Subject to conditions which a State may have specified in accordance with article 103'	2
2. 'The sentence of imprisonment shall be binding on States Parties, which shall in no case modify it'	3
II. Paragraph 2	4
1. 'The Court alone shall have the right to decide any application for appeal or revision'	4
2. 'The State of enforcement shall not impede the making of any such application by a sentenced person'	5

A. Introduction/General remarks

1 The legislative history and the academic commentary on this article are not especially illuminating in taking the discussion much beyond the literal language. The article is derived by analogy from comparable provisions in prisoner exchange treaties¹. Such provisions make it clear (a) that the sentence carried out in the State of transfer should be substantially that imposed in the place where the trial took place, and (b) that any attack on the underlying conviction or the sentence imposed following it must be made at the place of trial². Here, of course, the conviction and sentence are the product of the ICC and it is crucial that, as an international body, its rulings not be subverted by the State of enforcement. As the language proceeded through the drafting process, the echoes of standard provisions in prisoner transfer treaties became fewer and the *sui generis* nature of the ICC became more pronounced. For example, the ILC Draft had provisions on pardon, parole and commutation obviously derived from such sources³. In the draft that was forwarded from the Preparatory Committee to Rome, there was still a (bracketed) provision in what became article 105 to the effect that a State of imprisonment might make its consent to act dependent upon the 'applicability' of its laws relating to pardon, conditional release and commutation of sentence⁴. These references disappeared in Rome, where the very idea of pardon, commuta-

¹ See, e.g., UN Model Agreement on the Transfer of Foreign Prisoners, Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 Aug.-6 Sep. 1985, Report Prepared by the Secretariat, UN Doc. A/CONF.121/22/Rev.1 (1986), at p. 53. The Model Agreement is discussed in Clark, *The UN Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at Their Implementation* (1994) 205-10. What was then the Crime Prevention and Criminal Justice Division of the UN in Vienna (now UNODC, the United Nations Office on Drugs and Crime) made available to the Preparatory Committee a very useful collection of model treaties and other instruments of relevance to the drafting.

² For the rationale behind such provisions in bilateral exchange treaties, see *Rosado v. Civiletti*, 621 F.2 d 1179 (2nd Cir.1980), cert. denied, 449 U.S. 856 (1980) (considering Mexico-U.S. treaty).

³ Article 60 of 1994 ILC Draft Statute.

⁴ Preparatory Committee (Consolidated) Draft, article 94, Option 2, para. (b) (bracketed text).

tion and conditional release was also expunged. Effectively, all that remains of them is the language of article 110 on ‘Review by the Court concerning reduction of sentence’⁵ which uses none of the concepts just mentioned.

B. Analysis and interpretation of elements

I. Paragraph 1

1. ‘Subject to conditions which a State may have specified in accordance with article 103’

Some remarks have been made in the commentary on article 103 concerning the kinds of conditions that States may wish to impose in agreements with the Court⁶. One suspects that the most likely issues to arise in the present context are conditions concerning length of imprisonment in the case of States that have general constitutional or philosophical objections to life imprisonment. Since the Court is one of the parties to such agreements, it is unlikely that any fundamental assault on the general principle that what the Court says is obligatory will find its way into them.

2. ‘The sentence of imprisonment shall be binding on States Parties, which shall in no case modify it’

This is the key statement of the essential position that the State where the sentence is carried out must have its legislative and administrative house in order so that it can carry out the sentence as ordered (or modified) by the ICC. It will be noticed that, in accordance with its own terms and standard treaty law, the sentence is binding on ‘States Parties’. As we read the reference to ‘States’ in article 103 and to ‘a State’ in the first clause of paragraph 1 of the present article, it is possible that a non-State Party may, in exceptional circumstances, be designated as the State of imprisonment. In such a case, we would expect this to be done by means of a treaty between the State and the ICC and that this instrument would contain among its terms a stipulation to the same effect as paragraph 1.

II. Paragraph 2

1. ‘The Court alone shall have the right to decide any application for appeal or revision’

It will not be possible to litigate issues surrounding the original conviction, or the nature of the sentence itself in the courts of the State of enforcement.

2. ‘The State of enforcement shall not impede the making of any such application by a sentenced person’

The sentence will be that of the ICC and, as a matter of the fundamental rights of the convicted person, he or she is entitled to access to the Court and to the necessary legal representation to make that possible. While this sentence is negatively worded (‘shall not impede’) we see the obligation as functionally a positive one; the obligation on the State of enforcement is to facilitate generally any communications and applications made by the prisoner to the Court.

⁵ See Strijards/Harmsen, *article 110*.

⁶ Strijards/Harmsen, article 103, mn 24. None of the handful of Agreements reached between Member States and the Court at the time of writing late in 2014 (texts in the Court’s Official Journal) appears to contain any unusual conditions.

Article 106

Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Literature: Clark, R.S. *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at their Implementation* (University of Pennsylvania Press 1994).

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	3
I. Paragraph 1	3
1. Sentence subject to the supervision of the Court	3
2. Sentence to be 'consistent with widely accepted international treaty standards governing treatment of prisoners'	4
II. Paragraph 2	5
1. Conditions of imprisonment 'governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners'	5
2. '[I]n no case shall conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement'	6
III. Paragraph 3: 'Communications between a sentenced person and the Court shall be unimpeded and confidential'	7
C. Special remarks	8

A. Introduction/General remarks

- 1 That the supervision of sentences should be under the auspices of the Court itself was a given, right from the time of the ILC Draft¹. It was equally understood from the time of the *Ad Hoc* Committee that prison conditions would need to comply with international standards².
- 2 The only serious question in the negotiations was how to state the second of these propositions. In its Report on its 1996 meetings, the Preparatory Committee³ made specific reference to the need to comply with the Standard Minimum Rules for the Treatment of Prisoners. The Draft Statute forwarded to Rome made several references to 'internationally recognized standards'. Instruments like the Standard Minimum Rules for the Treatment of Prisoners, plainly included in such language⁴, are not treaties, although they are widely

¹ 1994 ILC Draft Statute, article 59.

² *Ad Hoc* Committee Report, para. 241 ('terms and conditions of imprisonment should be in accordance with international standards').

³ 1996 Preparatory Committee Report, para. 357.

⁴ Article 96 paras. 1 and 2, Option 1 ('internationally recognized standards') and para. 2, Option 2 ('internationally recognized minimum standards'). Preparatory Committee Draft.

regarded as reflective of customary law⁵. Our impression was that a number of delegations at Rome shared a general philosophical antipathy to international customary law. In any event, the reference to international standards was modified in Rome by the word ‘treaty’ so that it is international treaty standards that apply. At the very least, treaty standards must include the principles contained in such treaties as the 1984 Torture Convention⁶ and its regional counterparts. Our view, however, is that the essence of the Standard Minimum Rules and similar instruments⁷ is effectively assimilated to general treaty provisions such as the Covenant on Civil and Political Rights. We note, for example, the way in which the Human Rights Committee routinely uses such material in its examination of State reports under the Covenant, utilizing them as ways in which to give concrete content to the generalities of the Covenant language⁸.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Sentence subject to the supervision of the Court

The first part of the paragraph asserts the primacy of the Court and that it is the body to 3 make any important decisions of principle that have to be made in execution of the sentence.

2. Sentence to be ‘consistent with widely accepted international treaty standards governing treatment of prisoners’

Read along with paragraph 2, which seems to relate more to the day-to-day execution of 4 the sentence, this language in paragraph 1 must be referring to conditions that might be laid down in the initial judgment of the Court. To take an extreme example, a sentence from the Court to hard labour wearing a ball and chain would simply not pass muster under such standards as article 7 of the ICCPR. The concept of ‘treaty standards’ has already been discussed in the Introduction of this note.

II. Paragraph 2

1. Conditions of imprisonment ‘governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners’

The first part of this sentence is in part a nod of deference to national law of the State of 5 enforcement, in part an acknowledgment that a State of enforcement must domesticate its commitment to the Court by making appropriate legislative provisions to fulfil its treaty obligations to the Court. The second part of the sentence is another reference to the

⁵ See Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at their Implementation* (1994) 141 *et. seq.*

⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, UN GAOR, 39th Sess., Supp. No. 51, UN Doc. A/39/51 (1985), p. 197.

⁷ See, generally, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, U.N. Sales. No.: E.92.IV.1 (1992). In addition to the Standard Minimum Rules for the Treatment of Prisoners, the enforcement agreements between States and the ICTY and ICTR include references to the UN Basic Rules for the Treatment of Prisoners, GA Res. 45/111 (1990) and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 43/173 (1988). On the ICTY/ICTR practice, see Kress and Sluiter, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: a commentary* (2002) 1757, 1779–80. On the history of the ICC negotiations, see *ibid.* at 1798–99. On the negotiations on the Statute, see also Strijards, article 103.

⁸ Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at their Implementation* (1994), 273.

international treaty standards which were discussed in the Introduction to this note. Paragraph 2 is emphasizing what happens day to day in the State of enforcement rather than what may be specifically contained in any decree of the Court in an individual case, but obviously there is some overlap between the two paragraphs.

2. '[I]n no case shall conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement'

- 6 This non-discrimination clause cuts both ways: conditions may be neither more nor less favourable. The clause is probably best viewed as yet another manifestation of the principle of complementarity. The first line of defence against crimes within the jurisdiction of the Court is national prosecution and those prosecuted either nationally or internationally should be in essentially the same situation. We realize, of course, that in respect of capital punishment, that is not the case. Those prosecuted nationally may well be subject to capital punishment in cases on all fours with those prosecuted before the ICC where that punishment is not available. Nevertheless, where imprisonment is concerned, the effort is at standardization of treatment. We suspect that in some cases, the levelling out that takes place will encourage an improvement of national standards as enforcement States are driven to give more attention to international standards.

III. Paragraph 3: 'Communications between a sentenced person and the Court shall be unimpeded and confidential'

- 7 Paragraph 3 is a procedural restatement of the point made in the opening words of paragraph 1: the Court is in charge of supervising the terms of incarceration. As in the similar case of article 105 para. 2⁹, the requirement that communications be 'unimpeded' perhaps understates the strength of the State of enforcement's obligation to facilitate communication between prisoner and the Court, a theme that is taken up in the Rules.

C. Special remarks

- 8 Two of the Rules of Procedure and Evidence, rules 211 and 212, relate specifically to article 106. Rule 211 spells out in a little more detail than the Statute some of the implications of supervision of sentences by the Court. The rule emphasizes the right of the sentenced person to communicate confidentially with the Court. At the same time, it insists that there be transparency in transmitting everyone's position (and useful information) to everyone else. Rule 212 adds an obligation on an enforcement State which is about to release the sentenced person. It is conceivable that, with release, will come access to funds that may be available for enforcement purposes. Thus the disposition of the person should be made known to the Court. Rule 200 (5) provides that the Court may enter into bilateral arrangements with States with a view to establishing a framework for the acceptance of prisoners sentenced by the Court. Such arrangements must be consistent with the Statute. It is worthwhile noting that in the first bilateral agreement, between Austria and the Court, concluded late in 2005, the nature of the applicable standards governing the treatment of prisoners discussed in the Introduction to this entry is finessed nicely in the following preambular paragraph:

'RECALLING the widely accepted international treaty standards governing the treatment of prisoners including the Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, and the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45/111 of 14 December 1990'.

⁹ Clark, *article 105*, mn 5.

Similar language appears in later Agreements done between 2006 and 2012 with Belgium, Finland, Serbia, Mali and Denmark, while an Agreement with the United Kingdom refers specifically only to obligations under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰

¹⁰ See the Court's Official Journal for the texts of these Agreements.

Article 107

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	2
I. Paragraph 1	2
1. 'in accordance with the law of the State of enforcement'	2
2. 'be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her'	3
3. 'taking into account any wishes of the person to be transferred to that State'	4
4. 'unless the State of enforcement authorizes the person to remain in its territory'	5
II. Paragraph 2: 'If no State bears the costs [of transfer] such costs shall be borne by the Court'	6
III. Paragraph 3	7
1. 'Subject to the provisions of article 108'	7
2. 'the State of enforcement may ... in accordance with its national law'	8
3. 'extradite or otherwise surrender ... to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence'	9
C. Special remarks, relevant rule.....	10

A. Introduction/General remarks

1 Provisions along these lines, dealing with what to do with a sentenced person after completion of the sentence, were first introduced during the Preparatory Committee's 1996 meetings¹. The article has to be read along with article 108², which contains a modified version of the principle of specialty found in bilateral extradition treaties precluding trial for offences other than those for which the extradition took place.

Normally one would expect the now released person to be returned to his or her State of nationality. It is possible, but not highly probable, that the sentencing State and the State of nationality will be the same, so that no transfer will be necessary. Note in this respect that the article's transfer provisions deal with 'a person who is not a national of the State of enforcement'³.

¹ 1996 Preparatory Committee II, p. 293.

² See Schabas, *article 108*.

³ See also *article 103* which does not preclude on its face the designation of the State of nationality as the sentencing State, as did some of the earlier drafts.

B. Analysis and interpretation of elements

I. Paragraph 1

1. 'in accordance with the law of the State of enforcement'

We do not read these words as in any way limiting the general obligation to send the released non-national somewhere else. The international obligation is not subordinated to domestic law. What the words mean here, as in similar provisions in other articles, is that the State of enforcement must have appropriate domestic cooperation legislation to deal with the details.

2. 'be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her'

Normally, the State of nationality will be obliged to receive the person in accordance with the fundamental right to return to one's own country. It may well be the case that, in the kind of national upheavals that are likely to give rise to events within the jurisdiction of the Court, those convicted of the crimes in question will have become effectively stateless, thus not having a place to return. There may in such instances be successor, or other, States who for political or humanitarian reasons are prepared to act. A factor that the parties will have to consider is the maximal way in which to seek the rehabilitation and social reintegration of the offender.

3. 'taking into account any wishes of the person to be transferred to that State'

It is not clear what the antecedent is of the words 'to that State'. It may be that the wishes of the person are to be sought both in the case where the issue is return to a State which is obliged to receive him or her and also in the case where there is some other willing, but not obligated, State. On the other hand, it could be that it is only where a willing 'volunteer' State is in question that the wishes are to be canvassed. Grammatically, the language refers only to the latter case, so that a person may be returned to the State of nationality without any effort to consider that person's wishes. Our impression of the understanding of the drafters was that the wishes should be 'taken into account' in all cases. That does not, as we shall see, mean that those wishes will always triumph.

'Taking into account' does not, as we understand it, mean that the firmly expressed views of the sentenced person will always prevail. They do, however, demand the strongest attention. Given that the sentenced person has now paid for the crime through completing a period of incarceration, there must be a strong presumption in favour of giving effect to that person's wishes. One can imagine situations in a State of nationality where it would be completely unconscionable to return a released person who, for example, stands a real risk of torture or death upon return.

4. 'unless the State of enforcement authorizes the person to remain in its territory'

One possibility that States agreeing to take such prisoners must contemplate is that they might, in the fullness of time, become what amounts to a state of asylum for former criminals. There must be cases where one who has completed a lengthy prison sentence in the State of enforcement will be most comfortably rehabilitated and reintegrated in that environment. On the other hand, it will be noted that the Statute does not obligate the State of enforcement to keep people of whom it would prefer to see the last, at least in those normal situations where someone else can be required to take them, even if the released prisoner might prefer not to go there.

II. Paragraph 2: ‘If no State bears the costs [of transfer] such costs shall be borne by the Court’

- 6 The hope is that the State of nationality will be so happy to receive its criminal back, or the State of enforcement so delighted to be rid of him or her, that they will cheerfully pay the freight. Otherwise the Court pays. We suspect that this paragraph was included out of an abundance of caution by analogy with provisions in Prisoner Transfer treaties that typically make an allocation of costs between the two parties involved in an exchange.

III. Paragraph 3

1. ‘Subject to the provisions of article 108’

- 7 Article 108⁴ generally prohibits prosecution, punishment or extradition to a third State for any conduct engaged in prior to that person’s delivery to the State of enforcement. Only if the Court approves of such action at the request of the State of enforcement is it possible.

2. ‘the State of enforcement may ... in accordance with its national law’

- 8 Again, as in the case of paragraph 1, the reference to national law is not to something which trumps international obligations. The words mean that the State of enforcement must have its legislative house in order.

3. ‘extradite or otherwise surrender ... to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence’

- 9 This paragraph will come into play when the State of enforcement’s bilateral extradition relationships give rise to the possibility of rendition. In many cases there will be bilateral or even multilateral extradition treaties in play; in others there will be mutual legislative provisions, including those giving effect to multilateral non-treaty arrangements such as the Commonwealth Extradition Scheme⁵. These relationships and the relationship with the ICC created under the Rome Statute will sometimes threaten to come into conflict. The intention of this paragraph is that the obligations under the Statute will prevail, and that the Court will have a broad discretionary power that enables it to be the arbiter responsible for doing substantial justice in individual cases.

C. Special remarks, relevant rule

- 10 As noted in the Introduction, a person who has completed a sentence may, in some circumstances, be subject to extradition or surrender to another State. These circumstances are covered by Article 108 of the Rome Statute. They, and the relevant Rules, Rules 214 and 215 to which Rule 213, which refers to article 107, paragraph 3, is merely a cross-reference, are discussed in the analysis of that Article.

⁴ See *infra*.

⁵ See Commonwealth Secretariat, *London Scheme for Extradition Within The Commonwealth* (as amended in 2002).

Article 108

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Literature: Krefß, C. and Sluiter, G., 'Imprisonment', in: A. Cassese, P. Gaeta and J. R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1809; Prost, K., 'Enforcement', in: R. S. Lee et al. (eds.), *The International Criminal Court, Elements Of Crimes and Rules of Procedure and Evidence* (2001) 673.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
I. Paragraph 1	4
II. Paragraph 2	8
III. Paragraph 3	10

A. Introduction/General remarks

This provision is a particular formulation of the rule of specialty that is dictated by the unique circumstances of international criminal prosecution. In bilateral relations between States, the rule of specialty operates to prevent the receiving State from prosecuting an offender for an offence other than the one for which extradition was sought. A norm derived from customary international law, it is codified in virtually all extradition treaties. The rule of specialty does not necessarily create an individual right susceptible of being invoked by the person who has been extradited. Rather, it establishes the right of the extraditing State to require that prosecution and punishment be confined strictly to the substance of the extradition request. However, article 108 of the *Rome Statute* is formulated as an individual right that protects a person whose sentence is being or has been served from prosecution within the enforcement State or extradition to a third State.

Although the situation envisaged by article 108 can also arise within the context of prosecutions before the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda, there is no comparable provision in the Statutes of those institutions and it appears that the matter did not occur to the judges when they drafted the Rules of Procedure and Evidence¹. Article 108 of

¹ Difficulties in this respect arose sooner than might have been expected when the Prosecutor of the Rwanda Tribunal announced that she would not proceed with charges against Bernard Ntuyahaga, who was accused of involvement in the assassination of Prime Minister Agathe Uwilingiyimana and of several Belgian paratroopers in the early days of the Rwandan genocide. The Prosecutor asked the Tribunal to order that Ntuyahaga be transferred to the custody of Belgium, and the government of Belgium intervened in proceedings to support the request. The Tribunal concluded that it had no such power, and that from the moment it accepted the Prosecutor's motion to withdraw charges it was *functus officio*. *Prosecutor v. Ntuyahaga*, ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 Mar. 1999. Although the situation is not strictly comparable to the problem contemplated by article 108, it demonstrates the type of difficulty that may arise downstream, so to speak, when the Tribunal's role ceases and when national justice systems attempt to reassert

the *Rome Statute* is completed by rules 214 and 215 of the Rules of Procedure and Evidence². Rule 214 requires that when the State of enforcement wishes to prosecute or enforce a sentence against a sentenced person for any conduct engaged in prior to that person's transfer, it shall notify its intention to the Presidency and transmit to it a statement of the facts of the case and their legal characterization, a copy of any applicable legal provisions, including those concerning the statute of limitation and applicable penalties, a copy of any sentence, warrant of arrest or similar document, or of any other legal writ which the State intends to enforce, and a protocol containing views of the sentenced person obtained after the person has been informed sufficiently about the proceedings. In the event of a request for extradition made by another State, the State of enforcement shall transmit the entire request to the Presidency with a protocol containing the views of the sentenced person obtained after informing the person sufficiently about the extradition request. The Presidency may in all cases request any document or additional information from the State of enforcement or the State requesting extradition. If the person is surrendered to the Court by a State other than the State of enforcement or the State seeking extradition, the Presidency shall consult with the State that surrendered the person and take into account any views expressed by that State. Any information or documents transmitted to the Presidency in accordance with rule 214 shall be transmitted to the Prosecutor, who may comment. The Presidency may decide to conduct a hearing.

Under rule 215, a determination by the Presidency on a request to prosecute or enforce a sentence shall be made 'as soon as possible', and shall be notified to all parties who participated in the proceedings. If the request concerns enforcement of a sentence, the sentenced person may serve that sentence in the State designated by the Court to enforce the sentence pronounced by it or be extradited to a third State only after having served the full sentence pronounced by the Court, subject to the provisions of article 110. The Presidency may authorize the temporary extradition of the sentenced person to a third State for prosecution only if it has obtained assurances which it deems to be sufficient that the sentenced person will be kept in custody in the third State and transferred back to the State responsible for enforcement of the sentence pronounced by the Court, after the prosecution.

These provisions are made operational through agreements with States concerning detention. The first such agreement, made between the Court and the Federal Government of Austria, contains the following provision:

'Rule of Specialty

1. A sentenced person transferred to Austria pursuant to this Agreement shall not be subject to prosecution, punishment or to extradition to a third State for any conduct engaged in prior to that person's transfer to the territory of Austria, unless such prosecution, punishment or extradition has been approved by the Presidency at the request of Austria.
2. A request for approval shall be accompanied by the following documents:
 - a) A statement of the facts of the case and their legal characterization;
 - b) A copy of any applicable legal provisions, including those concerning the statute of limitation and the applicable penalties;
 - c) A copy of any sentence, warrant of arrest or other document having the same force, or of any other legal writ which the State intends to enforce;
 - d) A protocol containing views of the sentenced person obtained after the person has been informed sufficiently about the proceedings.
3. In the event of a request for extradition made by a third State, Austria shall transmit the entire request to the Presidency with a protocol containing the views of the sentenced person obtained after informing the person sufficiently about the extradition request.
4. The Presidency may, in relation to paragraphs 2 and 3 of this article, request any document or additional information from Austria or the third State requesting the extradition.

jurisdiction over an offender. It is to be noted that the situation contemplated in the *Ntuyahaga* case does not appear to have been envisaged by the *Statute's* drafters at Rome. Under Rule 11*bis* of the Rules of Procedure and Evidence of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as amended, it is now possible to refer cases to national jurisdictions. Debates about the rule of specialty have not arisen yet in the application of Rule 11*bis*.

² Rules of Procedure and Evidence, ICC-ASP/1/3, pp. 10–107, in this vol. Annex I.

5. The Presidency shall make a determination as soon as possible and shall inform the requesting State accordingly. If the request submitted under paragraphs 2 and 3 of this article concerns the enforcement of a sentence, the sentenced person may serve that sentence in Austria or be extradited to a third State only after having served the full sentence pronounced by the Court.
6. Paragraph 1 of this article shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of Austria after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.
7. The Presidency may authorise the temporary extradition of the sentenced person to a third State for prosecution only if it has obtained assurances which it deems to be sufficient that the sentenced person will be kept in custody in the third State and transferred back to Austria, after the prosecution'.

It seems likely that this clause will be a model for other agreements³.

The Draft Statute submitted by the International Law Commission to the General Assembly in 1994 contained a provision entitled the 'rule of specialty' that approached the problem in the more traditional sense. It barred the Court from prosecuting or punishing an individual for a crime other than the one for which the person was transferred⁴. It is the antecedent of the text now found in article 101 of the *Statute*. There is no evidence in the *travaux préparatoires* of concern about prosecution or extradition of an individual by the State of enforcement subsequent to sentencing until the December 1997 session of the Preparatory Committee. A new provision was proposed, labelled article 59*bis* and entitled 'limitation of prosecution/punishment for other offences'⁵. It protected a sentenced person in the custody of the State of enforcement from further prosecution and punishment or extradition to a third State for conduct committed prior to delivery to the State of detention. The provision would not apply if the sentenced person remained more than thirty days on the territory of the State of enforcement after having served the full sentence imposed by the Court. However, the draft article contemplated the waiver of this provision, either by the Court or by the Presidency, at the request of the State of enforcement. The sentenced person was to be entitled to be heard by the Court on the question. Footnotes stressed the relationship between article 59*bis* and the provision concerning the rule of specialty. Essentially the same text appeared in the Zutphen Draft⁶ and in the Final Draft Statute submitted by the Preparatory Committee to the Rome Conference⁷.

At Rome, the provision was considered by the Working Group on Enforcement. A working paper was submitted by the coordinator based on the Preparatory Committee text, but eliminating most of the square brackets⁸. The only unresolved issue was whether the power to waive the principle prohibiting prosecution, punishment or extradition to a third State would lie with the Court or the Presidency. The Working Group opted for the Court as the appropriate organ⁹. A footnote in its report indicates that some delegations had wanted the deletion of the provision altogether, but that they were prepared to accept it in a search for consensus.

Dissatisfaction among some delegations with the provision was linked to a more general opposition to the rule of specialty¹⁰.

³ Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court, Document ICC-PRES/01-01-05, 26 November 2005, article 10. Also relevant is article 15, concerning transfer of the sentenced person upon completion of the sentence. Article 15 para. 2 states: 'Subject to the provisions of Article 10, Austria may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence'.

⁴ 1994 ILC Draft Statute, article 55.

⁵ Preparatory Committee Decisions Dec. 1997, p. 77.

⁶ Zutphen Draft, p. 165.

⁷ Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Rev.1, pp. 183-184.

⁸ Working Paper on Articles 97 and 98, UN Doc. A/CONF.183/C.1/WGE/L.11 (3 July 1998), p. 2.

⁹ Draft Report of the Working Group on Enforcement, UN Doc. A/CONF.183/C.1/WGE/L.13 (4 July 1998), p. 5; Report of the Working Group on Enforcement, UN Doc. A/CONF.183/C.1/WGE/L.14 (7 July 1998), pp. 3-4.

¹⁰ Footnote 2 states: 'Some delegations who had wanted article 98 [article 108] deleted indicated a willingness to accept article 98 [article 108] if necessary to achieve consensus. However, they stressed that their position to

B. Analysis and interpretation of elements

I. Paragraph 1

4 A general rule is set out followed by an exception. The general rule prohibits prosecution, punishment or extradition to a third State for conduct engaged in prior to the person's delivery to the State of enforcement. The exception allows the Court to dispense with this requirement if it is so requested by the State of enforcement.

The term 'State of enforcement' is not defined, but it seems clear enough from article 103 para. 1 (a) of the *Statute* that this refers to the 'State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons' and that has, in accordance with article 103 para. 1 (c), accepted that designation. Use of the term 'delivery' is curious, because in preceding provisions the *Statute* refers to the 'transfer' of the prisoner. However, this terminological anomaly does not seem to have any legal significance. It should be noted that the provision does not provide the sentenced person with total immunity from process. A civil claim, for example, or an administrative-type remedy, could be launched against the prisoner without any problem being posed by article 108.

5 The provision applies to a sentenced person 'in the custody' of the State of enforcement. The concept of 'custody', at least in common law and in the English version of the *Statute*, need not necessarily involve physical detention in prison but is synonymous with the idea of restraint of liberty¹¹. Thus, it is large enough to cover a sentenced person who is at liberty on some form of provisional release, and perhaps even one who has escaped from detention. However, the French version of article 108 uses the term 'détenu', which is considerably narrower and which leaves no doubt that the *Statute* requires physical detention. This raises an interesting problem of interpretation. Article 33 (d) of the *Vienna Convention on the Law of Treaties* states that 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'. Yet general principles of law suggest that the *Statute*, like all criminal legislation, should be interpreted narrowly, to favour the rights of the accused.¹² The term 'custody' must also be understood together with paragraph 3, which indicates that the provision applies to an individual who is on the territory for a thirty-day period subsequent to service of sentence. But in such a case, the sentenced person would no longer be in custody.

6 The Court may exercise its discretion to dispense the State from application of this prohibition. The request must come from the State of enforcement, however. This excludes a State seeking to obtain extradition pursuant to a treaty obligation with the State of enforcement. Nothing in the provision or in the *Statute* indicates the criteria upon which the Court may determine such questions. It has been suggested that these be spelled out in the Rules of Procedure and Evidence and indeed France, in its 'General outline' for the Rules prepared for the February 1999 session of the Preparatory Commission, provided for the possibility of norms on this subject. It proposed three subjects for specific norms: 'Transfer of

delete article 92 [article 101] (also dealing with the rule of specialty) remained unchanged. Some other delegations felt that article 98 [article 108] must be included, but also felt that article 92 [article 101] should be deleted'.

¹¹ *Black's Law Dictionary* (1979) 347.

¹² Early decisions of the International Criminal Court suggest that in interpreting the *Rome Statute*, judges will be guided by the relevant provisions of the *Vienna Convention on the Law of Treaties: Situation in the Democratic Republic of Congo*, ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 Mar. 2006, Decision Denying Leave to Appeal, para. 5. Also: *Prosecutor v. Lubanga*, ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 Feb. 2006, para. 42; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 Nov. 2006, para. 8; *Situation in Uganda*, ICC 02/-4-01/05, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, 9 Mar. 2006, para. 25.

the person sentenced to another receiving State before completion of sentence'; 'Transfer of the sentenced person upon completion of sentence'; and 'Limitation on the prosecution or punishment of other offences'¹³. Australia's proposal for the Rules defined a procedural regime for determining the question, but made no mention of factors to be considered¹⁴.

Although the norm set out in article 108 is to some extent analogous to the rule of speciality,⁷ it should be borne in mind that the *raison d'être* of speciality derives from the fundamental principles of reciprocity and double criminality which are the basis of the international law of extradition. The ICC is not a sovereign State and concepts of reciprocity derived from bilateral treaty rules are not easily applicable. A State that extradites an individual to another State consents to an infringement on its own sovereignty, and it is easy to understand not only why this should be so but also why the extradition must be subject to strict control. The same justification does not exist in the case of the ICC. Moreover, because the ICC is not a court of general jurisdiction but rather one whose subject matter jurisdiction is confined to 'the most serious crimes of concern to the international community as a whole', it may well be the rule rather than the exception that those found guilty of offences by the Court will also be subject to prosecution for other crimes. It can be argued that the ICC, as the competent organ of the community of nations, exercises the *ius puniendi* of the community in a way independent of the power of the national State to punish.

The criteria applied by the Court need to be rooted in its own prerogatives under the *Statute*. Thus, the Court should refuse authorization under article 108 where there is a real danger of abuse of its own process, for example, where the prosecution is politically motivated or is in some way vexatious, or where there appears to be a likely breach of the *ne bis in idem* rule set out in article 20 para. 2. In fulfilling this role, the Court should take into account evolving norms of international human rights law that may be applicable. For example, it should consider the conditions of detention to which the individual might be subject. The Court's complicity in a punishment that is cruel, inhuman and degrading would bring the entire institution into disrepute. The Court might require that conditions be imposed upon its consent in order to ensure that fundamental human rights be ensured, such as an assurance that capital punishment not be inflicted. It would certainly be hard to reconcile the Court's agreeing to prosecution, punishment or extradition involving penalties in excess of those permitted by the *Statute* itself. This suggests that despite the wording of article 108 para. 1, which seems to imply that prosecution, punishment or extradition are the exception, in reality they should be the rule. The Court should only deny the request from the State of execution in exceptional cases.

II. Paragraph 2

The Court can only rule on the request of the State of execution to dispense with the prohibition of article 108 para. 1 'after having heard the views of the sentenced person'. An earlier version of this text spoke of the 'prisoner' rather than the 'sentenced person'. The final language in the provision is not only desirable in the interests of consistency with the first paragraph of the article, it also takes into account the fact that the 'sentenced person' may not in fact be a prisoner.⁸

Article 108 para. 2 underscores the fact that the right set out in the article belongs to the accused, unlike the rule of speciality, which is a norm to be invoked by an extraditing State.

The nature of the hearing is not made explicit by article 108. Reference to a request by⁹ the State of execution may be taken to suggest an adversarial proceeding at which the State of

¹³ Proposal by France, General Outline of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/1999/DP.2.

¹⁴ Proposal submitted by Australia, Draft Rules of Procedure and Evidence of the International Criminal Court, UN Doc. PCNICC/1999/DP.1, p. 66.

execution and the sentenced person are the two parties. Because this may involve an extradition request from a third State, it is not inconceivable that the requesting State's presence might also be helpful in order to resolve the matter, although such participation would be at the discretion of the Court rather than of right, as is the case for the sentenced person. Furthermore, if questions concerning the legitimacy of certain forms of punishment or other treatment arise, the Court ought to consider allowing the intervention as *amici curiae* of non-governmental organizations with recognized expertise, such as Amnesty International. However, the words of paragraph 2 can also bear an interpretation that eschews any adversarial type hearing and only entitles the sentenced person to make submissions to the Court, although use of the word 'heard' would seem to indicate an oral hearing rather than mere written representations. This more narrow conception of a right to make submissions but no right to an adversarial hearing is reflected in the Rules of Procedure and Evidence.

III. Paragraph 3

- 10 The protection of the sentenced person ceases to apply if he or she remains voluntarily in the territory of the State of enforcement for more than thirty days after having served the full sentence imposed by the Court, or if the sentenced person returns to the territory of that State after having left it. This is a norm that is consistent with State practice in application of the rule of specialty as it obtains in bilateral extradition matters. The individual offender is, in effect, deemed to have renounced to any protection provided by the rule of specialty after remaining 'voluntarily' or after returning to the country. It seems relatively straightforward that a sentenced person whose term has been served and who wishes to leave the State of enforcement but who is unable to obtain entry into another State would not be remaining there 'voluntarily'. But this condition of voluntariness does not apply to the person who returns to the territory of the State after having left it. Thus, a sentenced person who had left the State of enforcement for a third State but who has subsequently been expelled from that State and sent back to the State of enforcement would not be able to invoke the protection of article 108 para. 1, even though the return to the State of enforcement could hardly be described as 'voluntary'.

Article 109

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Literature: Krefß, C. and Sluiter, G., 'Fine and Forfeiture Orders', in: A. Cassese, P. Gaeta and J. R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1823; Prost, K., 'Enforcement', in: Roy Lee et al. (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001) 673.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	5
I. Paragraph 1	5
II. Paragraph 2	10
III. Paragraph 3	12

A. Introduction/General remarks

Article 109 deals with the enforcement of penalties that are additional to a sentence of imprisonment. These comprise fines, the regulation of which is delegated to the Rules of Procedure and Evidence by the *Statute*; and forfeitures of proceeds, property and assets derived directly or indirectly from the commission of the crime¹. Fines and forfeitures are described as penalties additional to imprisonment in article 77 para. 2 of the *Statute*. According to article 109, '[s]tates Parties shall give effect to fines or forfeitures ordered by the Court under Part 7 ... in accordance with the procedure of their national law'. Giving effect by States Parties to both fines and forfeitures shall be 'without prejudice to the rights of bona fide third parties'. States which are 'unable to give effect to an order for forfeiture' may, alternatively, according to article 109 para. 2, 'take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited', once again 'without prejudice to the rights of bona fide third parties'. Article 109 para. 3 addresses the destination of the 'property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgment of the Court', indicating that it 'shall be transferred to the Court'. According to article 79, the Court can decide that proceeds of fines and forfeitures go to the Trust Fund for victims.

Thus, the *Statute* lays down a very limited number of rules concerning enforcement of fines and forfeitures. Besides imposing a general obligation on all States Parties to give effect to the Court's orders in this respect, without prejudicing the rights of bona fide third parties, it provides States Parties with an alternative way of enforcing forfeitures and indicates the

¹ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, (1998) 37 *ILM* 999, article 77 para. 2.

destination of all proceeds resulting from the enforcement of fines and forfeitures. These norms are likely to receive further specification in the Rules of Procedure and Evidence. The way in which States enforce fines or forfeitures is, in all events, left to the ‘procedure of their national law’.

Article 109 is completed by several detailed provisions, set out in Rules 217, 218, 220 and 222 of the Rules of Procedure and Evidence. According to Rule 217, the Presidency is ‘to seek cooperation and measures for enforcement in accordance with Part 9, as well as transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person’s assets and property or with which the victim has such connection’. The Presidency shall also inform the State of any third-party claims or of the fact that no claim was presented by a person who received notification of proceedings conducted pursuant to article 75 of the Statute. Rule 218 indicates in detail the information that must be included in orders for forfeiture and requests for cooperation and measures for enforcement. Pursuant to Rule 220, when transmitting copies of judgments with fine orders for the purpose of enforcement, the Presidency is to inform the national authorities that the orders may not be modified. Under Rule 222, the Presidency is required to assist the State in the enforcement of fines, forfeiture or reparation orders, as requested, with the service of any relevant notification on the sentenced person or any other relevant persons, or the carrying out of any other measures necessary for the enforcement of the order under the procedure of the national law of the enforcement State.

- 2 The 1994 ILC Draft Statute authorized the Court to impose fines but did not contemplate the details of enforcement². The *Ad Hoc* Committee that was struck by the General Assembly considered the issue of enforcement under the heading ‘Recognition of the judgments of the court, enforcement of sentences and mutual recognition of judgments’. Views were divided as to whether the *Statute* should provide for direct recognition and enforcement of orders from the Court or whether national authorities should be left to choose their own mechanisms³. In this context, the issue of the rights of third parties was also considered. Views were divided in the *Ad Hoc* Committee as to whether the rights of third parties should be determined by the Court or by national tribunals⁴? As for fines, it was already clear that there was a relationship between the advisability of including fines at all and the issue of enforcement⁵.
- 3 The *travaux préparatoires* indicate that these issues were not reconsidered until the December 1997 meeting of the Preparatory Committee⁶. The draft adopted at that time contained a provision entitled ‘General obligation regarding recognition [and enforcement] of judgments’⁷. States were to undertake to enforce the Court’s judgments directly on their territory. Article 59*ter* adopted at the December 1997 session of the Preparatory Committee, which is the clear ancestor of article 109 of the *Rome Statute*, contained two paragraphs⁸. The

² 1994 ILC Draft Statute.

³ *Ad Hoc* Committee Report, para. 237.

⁴ *Ibid.*, para. 238.

⁵ *Ibid.*, para. 242.

⁶ There was a proposal concerning enforcement of fines and confiscatory measures presented during the 1996 session: 1996 Preparatory Committee II, p. 292.

⁷ Preparatory Committee Decisions Dec. 1997, p. 74, article 58:

‘General obligation regarding recognition [and enforcement] of judgments States Parties [shall] [undertake to recognize] [[and to] enforce directly on their territory] [give effect to] the judgments of the Court [, in accordance with the provisions of this Part].

[The judgments of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted and other forms of reparation ordered by the Court, such as restitution, compensation and rehabilitation].’

⁸ Preparatory Committee Decisions Dec, 1997, see note 7, p. 63. The text was reproduced in the Zutphen Draft (Zutphen Draft), as article 88, and in the final draft statute adopted by the Preparatory Committee (Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Rev.1), as article 99.

debate as to whether the Court's judgments should be directly enforceable or whether there should be some reference to national law persisted. Paragraph 1 imposed a general obligation to enforce fines and forfeiture measures, but the words 'in accordance with their national law' were in square brackets. A second paragraph dealt with the disposal of property, requiring that it be handed over to the Court. A footnote accompanying the draft declared: 'There is a question whether this provision concerns enforcement of sentences, or rather the powers of the Court to order particular measures relating to enforcement of fines or confiscation. If it is meant to refer to States enforcing specific orders relating to fines or confiscation, then paragraph 1 might be amended to make clear that that enforcement by States Parties would include 'giving effect to orders of the Court relating to enforcement of fines or forfeitures, such as the seizure of particular property or the forced sale of property of the convicted person to satisfy a fine'⁹.

At the Rome Conference, the heart of the debate on enforcement concerned the general provision, draft article 93, which was ultimately dropped. There were two options reflecting different philosophical approaches to this provision, which was entitled 'General obligation regarding enforcement of judgments'. The first said that States Parties 'shall enforce directly on their territory the judgments of the Court', while the second said they 'shall give effect to the judgments of the Court in accordance with the provisions of this Part and their national law'¹⁰.

The Working Group ultimately decided to delete article 93¹¹; the philosophy of the second option appears to have prevailed. With respect to the more specific provision concerning enforcement of fines and forfeiture orders, the Chair proposed a reworded paragraph 1 which left the option, at the conclusion of the text, between 'the procedure of the national law' and 'their national law'. The compromise subsequently effected by the Chair was to water down the obligation of States from one 'to enforce' Court orders to one that required them to 'give effect to' such orders. In exchange for this concession, the conclusion of the paragraph read 'in accordance with the procedure of the national law', instead of the vaguer 'in accordance with the national law'¹². The second paragraph was added by the Working Group; it had not appeared in any of the earlier drafts¹³. Paragraph 2 of the Preparatory Committee's final draft was deleted altogether¹⁴. Paragraph 3 was adopted without any significant substantive modifications, although a footnote was included in the report to the Committee of the Whole: 'The Working Group noted that there were a number of potential complex problems which may arise in the implementation of this provision, including questions about the disposition of various types of property, which should be addressed in the Rules'¹⁵.

B. Analysis and interpretation of elements

I. Paragraph 1

The provision contains three elements: an obligation to give effect to fines or forfeitures ordered by the Court as a penalty, a protection of 'bona fide third parties', and the clarification that enforcement of such orders is to be carried out in accordance with the

⁹ *Ibid.*

¹⁰ Working Paper on article 93, UN Doc. A/CONF.183/C.1/WGE/L.12 (3 July 1998).

¹¹ Report of the Working Group on Enforcement, UN Doc. A/CONF.183/C.1/WGE/L.14/Add.1 (11 July 1998), para. 1.

¹² See: Draft Report of the Working Group on Enforcement, UN Doc. A/CONF.183/C.1/WGE/L.13 (4 July 1998), p. 5, esp. fn. 4; Report of the Working Group on Enforcement, UN Doc. A/CONF.183/C.1/WGE/L.14 (7 July 1998), p. 4.

¹³ Report of the Working Group on Enforcement, UN Doc. A/CONF.183/C.1/WGE/L.14 (7 July 1998), p. 4. Apparently Singapore insisted on adding the paragraph out of concerns its domestic system would not allow it to follow paragraph 1.

¹⁴ Report of the Working Group on Enforcement, see note 11, p. 4.

¹⁵ *Ibid.*

procedure of national law. The text clearly rejects a suggestion floated during the Preparatory Committee by which such orders of the Court would be enforceable directly, something that presumably would have required the Court to develop its own procedural regime in this area. The reference to national law confirms that the question of execution of such judgments is in a sense delegated to the national legal system, in the same way as other matters, such as arrest and issues pertaining to judicial cooperation.

- 6 The question that arises is whether paragraph 1 actually requires States to make changes to their domestic legislation in order to provide for execution of fines and forfeiture orders. The reference to ‘in accordance with the procedure of their national law’ could be taken to support such an interpretation by which they do not. It is possible to view an assumption implicit in article 109 by which States generally have adequate systems within their own civil law for the execution of judgments. But the better view should be that States are required to ensure that fine and forfeiture orders be enforceable, and that they are accordingly compelled by the *Statute* to enact the appropriate legislative amendments. Article 109 is thus a specific formulation of the general principle set out in articles 86 and 88, although it does not appear in the same Part of the *Statute*. That the subject matter of article 109 is as much an issue of judicial cooperation (Part 9) as it is of execution (Part 10) is confirmed by the reference to assistance in identification, tracing and freezing for the purpose of eventual forfeiture found in article 93 para. 1 (k), which is entitled ‘other forms of cooperation’¹⁶. Paragraph 2 of article 109, which offers an alternative for States that cannot or will not provide for execution of the Court’s orders, only confirms such an interpretation of paragraph 1.
- 7 The obligation of States Parties set out in paragraph 1 is subject to ‘the rights of bona fide third parties’. Nowhere in the *Statute* are these rights defined, nor is there any indication as to the scope of the concept of bona fide third parties. Article 109 para. 1 implies, then, that the *Statute* defers to national law. The absence of such an exception in the *Statute* might have been taken as the imposition of a rule that the Court’s orders in this area take precedence over any competing claim. An example of the latter might be a judgment debt belonging to an estranged spouse, intended to provide for maintenance of young children. It was surely not the intent of the drafters of the *Statute* to dismiss the significance of such a claim, hence the reference to the rights of bona fide third parties. The alternative would have been for the *Statute* or the Rules to provide detailed norms, a complex and daunting task. Yet the laconic reference to the rights of bona fide third parties is likely to create a situation where the *Statute* is applied unevenly, subject to the different rules that exist in national judicial systems with respect to the priority given various categories of creditors.
- 8 While the case of a debt for maintenance arouses our sympathies, is it so reasonable that claims for tax debts come before the rights of the Court, especially considering that the Court may direct the proceeds to the victims of serious human rights abuses? Furthermore, the ruses and techniques of judgment debtors to avoid execution are legion. One of the more well-known is the fraudulent disposal of assets, to a spouse or an accomplice. This explains the use of the words ‘bona fide’ in article 109. A State in breach of article 109 because it had given priority to a third party not in good faith over the order of the Court would have defaulted in its obligations under the *Statute*, and would be subject to the normal sanctions for such cases. But pursuant to article 109, the Court becomes in a sense a judgment creditor with a justiciable claim before the national courts. Depending on the legislation in force within each State, it is not inconceivable to imagine the Court itself intervening in civil proceedings to contest the priority given to another creditor over its own claim. The Court would invoke article 109 para. 1 and argue that the competing creditor was not in good faith, or that it had no rights to the money or other property in question. Given that those

¹⁶ Note the reference in article 93 para. 1 (k) to seizure of ‘instrumentalities’ of crimes. This must be a drafting oversight, because the Working Group on Penalties decided to exclude the possibility that instrumentalities of crimes be forfeited: Report of the Working Group on Penalties, UN Doc. A/CONF.183/C.1/WGP/L.14 (4 July 1998), p. 3.

convicted by the Court may be high ranking officials, perhaps even heads of State, the sums involved could be considerable.

The reference to the rights of bona fide third parties in article 109 is clearly applicable to both fines and forfeiture orders. Interestingly, the terms of article 77 para. 2 suggest that the rights of bona fide third parties are to be considered in the case of forfeiture, but *e contrario* not in the case of fines. This distinction, however, was not an issue during the debates in the Working Group on Penalties at the Rome Conference and, faced with this minor inconsistency, the clear terms of article 109 para. 1 ought to prevail.

II. Paragraph 2

Paragraph 2 requires a State to take measures to recover the value of proceeds, property or assets ordered forfeited where the State Party is unable to give effect to such an order. The provision does not apply in the case of fines. It may be interpreted in two ways. First, it may be viewed as an exception to the obligation set out in paragraph 1 to give effect to a forfeiture order. Thus, a State that did not provide for the forfeiture of 'proceeds, property and assets derived directly or indirectly' from crime would be required, in the alternative, to recover the value of such proceeds, property and assets. Therefore, the State would be obliged to ensure that its legislation provided for one or the other means of execution of forfeiture orders. The second plausible interpretation does not absolve the State of its obligation under paragraph 1 to enact legislation so as to ensure the execution of forfeiture orders, but it imposes a secondary obligation on all States Parties to provide an additional mechanism when the forfeiture order cannot be executed. A specific case where a forfeiture order cannot be executed is in fact described in paragraph 3, namely, the case of real property.

Whatever interpretation is adopted, the result is to prevent a State from throwing up its hands and refusing to proceed when the items ordered forfeited cannot be realized. This would be the case, for example, where the property right in something belonged to a bona fide third party.

Domestic legal systems may also provide that some forms of property are immune from judicial process or seizure, such as a family residence in which minor children reside. The Court would therefore be unable to insist upon the forfeiture of the proceed, property or asset. However, the Court would be entitled to expect the State to take other measures in order to recover the value, such as ordering a judicial sale of the proceed, property or asset contemplated by the forfeiture order and payment to the Court of the value out of the proceeds of the sale.

III. Paragraph 3

The requirement that property ordered forfeited or the proceeds from the sale of such property be transferred to the Court completes the terms of article 77 para. 2, which speaks of forfeiture orders but does not identify the beneficiary of such an order. The combination of articles 77 para. 2 and 109 para. 3 would seem to exclude a forfeiture order in favour of an individual or corporate body. The exception to this rule is found in article 79 para. 2 which allows the Court to order money and other property collected through fines or forfeiture to be transferred to the Trust Fund set up for the benefit of victims.

Article 110

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

- (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
- (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
- (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

General remarks

1 After what has been said in the commentary to article 103, this provision does not need any further far reaching comment. The article is clearly a symptom of the penitentiary primacy of the ICC during the phase of enforcement. The decision concerning the commutation of sentence is with the Court, although one should remember that administering parties could contract otherwise by virtue of additional enforcement agreements as set out under mn 19 and 24 of article 103.

2 Article 110 para. 3 formulates the minimum enforcement term to be observed by the Court itself. An administering party however is not bound to that minimum, provided only that it has reserved the right to exercise other conditions. The factors which could influence the Court's decisions to reduce sentence are listed non-exhaustively in paragraph 4 of this article.

Various articles have been codified in relation to the review by the Court concerning a possible reduction of sentence. The main provision in the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court (hereinafter 'Austria Agreement' or 'Agreement')¹, embodying Article 110 is Article 11². Article 11 paragraph 1 of the Austria Agree-

¹ The International Criminal Court has, thus far, concluded enforcement of sentences agreements with Austria, Belgium, Columbia, Denmark, Finland, Mali, Serbia, and the United Kingdom. At the time of writing, the agreements with Columbia and Mali have not yet entered into force.

For reasons of expediency, only one Enforcement Agreement will be used as an example, even though the other agreements will have a similar provision in their subsequent texts.

² Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court, ICC-PRES/01-01-05, Date of Entry into Force: 26 November 2005, <http://www.legal-tools.org/doc/0f5f9e/>, Article 11, entitled 'Appeal, revision and reduction of sentence'.

ment stipulates that '[t]he Court alone shall have the right to decide on any application for appeal and revision in accordance with Articles [Sic] 105 of the Statute'³. Paragraph 2 stipulates that '[t]he Court alone shall have the right to decide any reduction of sentence in accordance with Article 110 of the Statute and Rule 223. It shall rule on the matter after having heard the sentenced person and after having received any relevant information from Austria'⁴. Rule 223, entitled 'Criteria for review concerning reduction of sentence', falls within the ambit of the Rules of Procedure and Evidence, Chapter 12. Enforcement, Section V. Review concerning reduction of sentence under article 110, and consists of Rules 223 and 224. Whereas Rule 223 deals with the criteria for review concerning a reduction of sentence, Rule 224 encompasses the procedure for review concerning reduction of sentence⁵. Interestingly, although the chapeau of Rule 223 corresponds with paragraph 4 (a) and (b) of this Article, the subparagraphs of Rule 223 expand the factors that could be taken into account, thereby establishing certain factors as stipulated in paragraph 4 (c), whilst reviewing a possible reduction of sentence.

As mentioned in Article 104, the fact that it is solely for the Court to rule on the matter of review, can be seen by the wording of Article 4 of the Austria Agreement, stipulating that 'subject to the conditions contained in this Agreement, the sentence...shall be binding on Austria, which shall in no case modify it'⁶. Any possible modification or action that might influence the [reduction of the] sentence, must be communicated to the Court, after which it shall decide whether or not to change the designation of the State of enforcement⁷.

It seems that there are two provisions in the Austria Agreement that might influence a possible reduction of the sentence. These two examples can be found in Articles 6 and 12 of the Austria Agreement. A possible positive factor that can be taken into account when conducting a review is Article 6 paragraph 3 of the Agreement. This provision stipulates that '[w]hen a sentenced person is eligible for a prison programme or benefit available under the national law of Austria which may entail some activity outside the prison facilities, Austria shall communicate that fact to the Presidency, together with any relevant information or observation, to enable the Court to exercise its supervisory function'⁸. Although not obligatory, the Court could take into account the fact that the convictee is participating in a programme, thereby demonstrating 'good behaviour', as a possible mitigating factor in it's review under Article 110 paragraph 4 sub-paragraph c and Rule 223 paragraph a of the Rules of Procedure and Evidence.

A possible aggravating factor can be found in Article 12. Although Article 12 paragraph 5 states that 'the entire period of detention in the territory of the State in which the sentenced person was in custody after his/her escape and, where paragraph 4 of this article is applicable, the period of detention at the seat of the Court following the surrender of the sentenced person from the State in which he/she was located shall be deducted from the sentence remaining to be served'⁹. An escape from the prison facility will most likely be seen as an aggravating factor when reviewing a possible reduction of sentence.

A final provision in relation to the review of reduction of sentence is Article 14 of the Austria Agreement. Article 14 paragraph 1 sub-paragraph d stipulates that the enforcement of the sentence shall cease 'upon release following proceedings under Article 11'¹⁰. Although Article 11 does not only correspond to reduction of sentence reviews, it is one of the determining factors of that provision.

³ See note 2, Article 11, paragraph 1.

⁴ *Ibidem*, Article 11 paragraph 2.

⁵ For a concise reading of these Rules, please consult the Rules of Procedure and Evidence.

⁶ For a further detailed account of these provisions, please see the Commentary on Articles 103 and 104.

⁷ *Ibidem*, especially the Commentary on Article 104.

⁸ See note 2, Article 6, entitled 'Conditions of imprisonment', paragraph 3.

⁹ *Ibidem*, Article 12, entitled 'Escape', paragraph 5. For a further discussion of the Escape provision, please see the Commentary on Article 111.

¹⁰ *Ibidem*, Article 14, entitled 'Termination of Enforcement', paragraph 1 (d).

Article 111

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

- 1 In case of escape during the enforcement term, this article provides for some guidance. Most remarkably, the Statute seems to vest in the administering State a certain latitude to try to get the fugitive back within the jurisdictional scope of the ICC framework, given the auxiliary verb 'may' (the enforcing State 'may' request the surrender of the fugitive). If the State is going to request for surrender it will have to rely on the traditional framework of extradition treaties. Of course, the Court itself may request the person's surrender. In this case article 91 para. 3 will be applicable.
- 2 The wording of Article 111, and the corresponding Rule 225 of the Rules of Procedure and Evidence, has almost literally been copied into the co-relating Articles in the Enforcement of sentences agreements. Using the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court (hereinafter 'Austria Agreement') as our example, the corresponding provision is Article 12¹.
- 3 Paragraph 1 of Article 12 states that '[i]f the sentenced person has escaped, Austria shall, as soon as possible, advise the Registrar by any medium capable of delivering a written record'². Not only has the State of enforcement the obligation to notify the Registrar, under Article 17, paragraph 1 sub-paragraph b, Austria shall also immediately notify the Presidency 'if the sentenced person has escaped'³, thereby creating a dual obligation of informing the Court.

If the escaped prisoner is apprehended in another country that is **not** the State of enforcement, two procedures exist for the escapee to be returned to the original State of enforcement.

The first procedure can be found in paragraphs 2 and 3 of Article 12 of the Austrian Agreement. Paragraph 2 stipulates that 'Austria may, after consultation with the Presidency, request the person's extradition or surrender from the State in which the person is located pursuant to any existing bilateral or multilateral arrangements...'⁴. Once Austria has requested the subsequent extradition or surrender, the other State will have to decide whether or not to extradite or surrender the person. In this regard, paragraph 3 of Article 12 stipulates that '[i]f the State in which the sentenced person is located, agrees to surrender him or her to Austria, pursuant to either international agreements or its national legislation, Austria shall so advise the Registrar in writing. The person shall be surrendered to Austria as soon as possible if necessary in consultation with the Registrar, pursuant to Rule 225'⁵.

¹ Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court, ICC-PRES/01-01-05, Date of entry into force: 26 November 2005, <http://www.legal-tools.org/doc/0f5f9e/>, Article 12, entitled 'Escape'. The International Criminal Court has, thus far, concluded enforcement of sentences agreements with Austria, Belgium, Columbia, Denmark, Finland, Mali, Serbia and the United Kingdom. At the time of writing, the agreements with Columbia and Mali have not yet entered into force.

² *Ibidem*, Article 12, paragraph 1.

³ *Ibidem*, Article 17, entitled 'Information', paragraph 1(b).

⁴ *Ibidem*, Article 12, paragraph 2.

⁵ See note 1, Article 12, paragraph 3.

The second procedure can be found in paragraphs 2 and 4 of Article 12 of the Austrian Agreement. Whereas the first part of paragraph 2 allows the State of enforcement to directly request the extradition or surrender from the State in question, the last part of paragraph 2 allows the State of enforcement to seek the assistance of the Court, stipulating that the State of enforcement 'may request that the Presidency seek the person's surrender, in accordance with Part 9 of the Rome Statute'⁶. If this procedure is to be followed, the sentenced person will first fall within the jurisdiction of the Court.

If this is the case, another two procedures are possible; as paragraph 4 states: '[i]f the sentenced person is surrendered to the Court, then the Court shall transfer him or her to Austria. Nevertheless, the Presidency may, acting on its own motion or at the request of the Prosecutor or of Austria, designate another State, including the State to the territory of which the sentenced person has fled'⁷. On the one side, the Presidency may send the prisoner back to the original State of enforcement or, on the other side, the Presidency may designate another State of enforcement altogether. If the latter procedure is followed, the procedures and provisions under Article 104 of the Rome Statute should be followed.

A final comment can be given on the costs of an escape. Codified in the Austrian Agreement under Article 18, paragraph 3 thereof states that '[i]n case of escape, the costs associated with the surrender of the sentenced person shall be borne by the Court if no State assumes responsibility for them'⁸. If this scenario ever occurs, it seems quite likely that the Court will be the entity who will have to pay the costs associated with the subsequent surrender.

⁶ *Ibidem*, Article 12.

⁷ *Ibidem*, Article 12, paragraph 4.

⁸ *Ibidem*, Article 18, entitled 'Costs', paragraph 3.

PART 11 ASSEMBLY OF STATES PARTIES

Article 112* Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.
2. The Assembly shall:
 - (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
 - (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
 - (c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;
 - (d) Consider and decide the budget for the Court;
 - (e) Decide whether to alter, in accordance with article 36, the number of judges;
 - (f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
 - (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.
3.
 - (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.
 - (b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.
 - (c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.
4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.
5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.
6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.
7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:
 - (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

* Mr. Rama Rao wishes to thank Ms. Lolita Breyman, and Mr. Philipp Ambach thanks Ms. Freya Foster for their assistance in researching this contribution.

- (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.
8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.
 9. The Assembly shall adopt its own rules of procedure.
 10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

Literature: Ambach, P., and Rackwitz, K. U., 'A Model of International Judicial Administration? The Evolution of Managerial Practices at the International Criminal Court', (2013) 76 *Law and Contemporary Problems* 119; Ambach, P., 'Assessing the International Criminal Court's major challenges in its 12th year: the "lessons learnt" initiative to increase efficiency of the criminal process', in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, 2015), 1277; Assembly of States Parties to the Rome Statute of the International Criminal Court, *Official Records*; Clark, R. S., 'Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It', in: *EJIL* (2009) 20 (4), 1103; Martinez Vivancos, J., 'The Crime of Aggression Amendment Adopted at the ICC Review Conference in Kampala, Uganda' (AMICC 2010), <http://www.amicc.org/docs/Aggression.pdf> accessed 2 January 2015; O'Donohue, J., 'Financing the International Criminal Court', (2013) 13 *ICLRev* (1), 269; id., 'The International Criminal Court and the Assembly of States Parties', in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, 2015), 105.

Content

A. General remarks	1
B. Analysis and interpretation of elements	5
I. Paragraph 1: 'Each State Party' and 'Other States'	5
II. Functions of the Assembly (Paragraph 2).....	8
1. 'recommendations of the Preparatory Commission'	9
2. 'Management oversight'	13
3. Consideration of activities of the Bureau and appropriate action.....	18
4. 'decide the budget'	19
5. 'to alter the number of judges'	24
a) Increase in the number of judges pursuant to article 36 of the Statute .	24
b) Election of the judges, the Prosecutor and Deputy Prosecutor(s)	27
6. 'non-cooperation'	34
7. 'any other function'	43
III. Paragraph 3: the 'Bureau'	45
1. Members.....	45
2. 'representative character'	48
3. Function and sessions	49
IV. Paragraph 4: 'subsidiary bodies'	52
1. The Committee on Budget and Finance (CBF)	54
2. Oversight Committee:	57
3. Advisory Committee on Nominations (ACN):.....	58
4. Independent Oversight Mechanism (IOM):.....	59
5. Working Group on Amendments (WGA):	68
6. Special Working Group on the Crime of Aggression (SWGCA):.....	73
V. Paragraph 5: Participation of Court organs in the Assembly and the Bureau.	74
VI. Paragraph 6: Regular and special Assembly sessions	76
VII. Paragraph 7: Majority requirements	81
1. General rule	81
2. When 'consensus cannot be reached'	82
3. Chapeau: 'Except as otherwise provided'.....	84
VIII. Paragraph 8: Default to pay contributions	88
IX. Paragraph 9: Assembly's Rules of Procedure	92
X. Paragraph 10: Assembly's working languages.....	93
XI. Legislative decisions	94

A. General remarks

The idea of an Assembly of States Parties did not arise in the ILC during its preparation of the Draft Statute of an International Criminal Court. Nor did it come up before the Ad Hoc Committee on the Establishment of an International Criminal Court (*Ad Hoc* Committee) during the course of its deliberations on the ICC.¹ It was only in 1996 that a French Working Paper on the Draft Statute of the Court submitted to the Preparatory Committee contained for the first time a provision on the establishment of a ‘**general assembly of states parties**’.² It attracted the attention of the Preparatory Committee in 1997, and the first focused discussion took place in the relevant Working Group of the Preparatory Committee in its penultimate session in 1998.

The original proposal of an Assembly of States Parties continued to surface in a number of structural and institutional discussions. In the context of the relationship between the ICC and the UN, the French delegation, in its response to a background note circulated by the UN Secretariat,³ indicated the linkage between an Assembly of States Parties and the **financing** of the Court, and that the financing in turn depended on the **institutional nature** of the Court. The French preference was for the Court to be a specialized agency of the UN.⁴ The United States delegation in the subsequent discussion in the Preparatory Committee considered the Assembly useful as an oversight mechanism.

The draft provision encompassed several issues relating to participants, functions, composition and decision making in the Assembly of States Parties. The Working Group of the Preparatory Committee on the subject produced a draft text and the same was forwarded to the Rome Conference as a part of the Draft Statute.⁵

After a lengthy but a relatively uncontroversial debate, the Rome Conference agreed on article 112 of the Statute in its present form.⁶ Briefly, the salient features of article 112 are as follows. The Assembly is open to States Parties as members and to other States as observers.⁷ It has **seven functions**.⁸ They are: consider and adopt the recommendations made by the Preparatory Commission, conduct management oversight of the operations of the Court, consider the reports and activities of its Bureau, deal with the alteration of the number of judges, non-cooperation or any other function in accordance with the Statute (like the election of judges, article 36) and the Rules of Procedure and Evidence. The Bureau of the Assembly would consist of twenty-one members elected for three-year terms taking into account equitable geographical representation and adequate representation of principal legal systems.⁹ The President, Prosecutor and the Registrar or their representative may participate in the meetings of the Assembly and its Bureau.¹⁰ Every effort should be made to reach decisions in the Assembly by consensus, failing which substantive decisions should be taken by a two-thirds majority of those present and voting provided an absolute majority of the Assembly satisfies the quorum requirement, and procedural decisions should be taken by a simple majority.¹¹ A State Party will lose its right to vote in the Assembly for default of

¹ The *Ad Hoc* Committee heard some comments by delegations on the issue of administration and budget but not on the idea of an Assembly of States Parties as such. See Part F on ‘Budget and Administration’ in the Ad Hoc Committee Report, paras. 244–49.

² UN Doc. A/AC.249/L.3 (1997).

³ UN Doc. A/AC.249/1998/L.10.

⁴ UN Doc. A/AC.249/L.12. See also Ambach, commentary of *article 2*, mn. 12 et seq.

⁵ UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, article 102.

⁶ UN Doc. A/CONF.183/9 (1998).

⁷ *Ibid.*, Part 11 on the Assembly of States Parties, article 112 para. 1.

⁸ *Ibid.*, para. 2.

⁹ *Ibid.*, para. 3.

¹⁰ *Ibid.*, para. 5.

¹¹ *Ibid.*, para. 7.

payment of its contribution for two years or amount equal to it.¹² More than 13 years after its establishment, the Assembly has developed into a **dynamic inter-governmental body** fulfilling its mandates under article 112. In addition, over the years the Assembly has taken over a number of diplomatic and promotional functions that were not explicitly contemplated in the Statute.¹³ A permanent **Secretariat** of the Assembly provides services, legal, administrative and technical assistance to the Assembly, the Bureau and the subsidiary bodies.¹⁴

B. Analysis and interpretation of elements

I. Paragraph 1: ‘Each State Party’ and ‘Other States’

- 5 Paragraph 1 stipulates that each State Party participates in the Assembly with one representative, conferring **equal voting rights** among all States Parties independently from their monetary contribution. The inclusion of ‘alternates and advisers’ in paragraph 1 has led in practice to an increase in delegations’ size during the yearly Assembly meetings. During the negotiations regarding States’ participation in the Assembly, there were **initially two major trends**, the common thread of them being that States Parties have an inherent right to participate in the proceedings of the Assembly. However, there were differences regarding the non-States Parties’ role. One view was that equal entitlement of representation of non-States Parties and States Parties would not be legally fair to States Parties and it would serve as a disincentive to these third States to become parties to the Statute. The other view was that the Court should not be treated as a closed institution and that instead it should be promoted to acquire universality through wider participation of all States. The final position, reflecting a compromise, is contained in paragraph 1 as it enables the participation of the two categories of States in the Assembly but in distinct roles.
- 6 Accordingly, States Parties would be full members and all other States that signed the Statute or the Final Act would be **observers** in the Assembly. There are two implications here. *One*, it may be noted that the Final Act was open to all States that participated in the Rome Conference as well as those who were invited to participate in the Conference even if they could not attend it for any reason.¹⁵ These States not parties to the Statute could be observers in the Assembly. *Two*, the substantive distinction which flows from a cumulative interpretation of all other provisions of this article as well as the practice of similar recent processes in international law such as the Law of the Sea is that only States Parties have a right to vote¹⁶ while non-States Parties would **not be entitled to vote** in the Assembly. This is reflected in Rule 60 of the Rules of Procedure of the Assembly of States Parties.¹⁷
- 7 In addition, there are those States which are **neither States Parties nor observer States** since they have not signed the Statute or the Final Act. While these States likewise have no voting rights they are allowed to participate in the yearly Assembly meetings and may make submissions during the general debate upon invitation by the Assembly on a case-by-case

¹² *Ibid.*, para. 8.

¹³ See ICC Review Conference 2010 – Stocktaking of International Criminal Justice, featuring topics like (i) the impact of the Rome Statute system on victims and affected communities; (ii) peace and justice; (iii) complementarity; and (IV) cooperation, at: http://www.icc-cpi.int/en_menus/asp/reviewconference/stocktaking/Pages/stocktaking.aspx#Cooperation.

¹⁴ ICC-ASP/2/Res. 3, 12 September 2003, Establishment of the Permanent Secretariat of the Assembly of States Parties to the International Criminal Court (see also the Annex to the resolution). See also Rule 37 of the Assembly’s Rules of Procedure for the Secretariat’s specific Assembly-related functions.

¹⁵ UN Doc. A/CONF.183/10 (1998), Annex I, Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. See Resolution F, para. 2.

¹⁶ Law of the Sea Convention, 1982, Annex VI on Statute of an International Tribunal for the Law of the Sea, especially articles 4, 6 and 19.

¹⁷ ICC-ASP/1/3.

basis.¹⁸ The same goes for intergovernmental organisations and other entities that have received a standing invitation from the UN General Assembly to participate as observers,¹⁹ as well as non-governmental organisations.²⁰

II. Functions of the Assembly (Paragraph 2)

The second paragraph of article 112 outlines the major functions of the Assembly. 8

1. 'recommendations of the Preparatory Commission'

Subparagraph (a) establishes the linkage between the Assembly and the Preparatory Commission for the International Criminal Court. The Preparatory Commission was created by Resolution F of Annex I the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998.²¹ This subparagraph is of limited relevance today since the Preparatory Commission held its tenth and final session at United Nations headquarters from 1 to 12 July 2002 upon completion of its mandate.²²

The Assembly and the Preparatory Commission can be **distinguished** along a number of different axes: *One*, there are differences in **legal enablement** between the two. While the Assembly is established by the Statute itself, the Statute does not govern the Preparatory Commission, for it was established in the Final Act of the Rome Conference along the Statute itself. *Two*, there are temporal differences between the two bodies: the Assembly is a permanent body alongside the Court whereas the Commission was a **transient body** with its existence linked to a temporal mandate. *Three*, institutionally, there is a line of succession between the two. The Commission is a **precursor** to the Assembly. The Commission remained in existence only until the conclusion of the first meeting of the Assembly.²³ *Four*, there are obvious **functional differences** between the Assembly and the Commission. The Assembly is an administrative decision-making body for the Court whereas the purpose of the Commission was to prepare proposals for practical arrangements for the establishment and coming into operation of the Court.²⁴ *Five*, there was also a difference in terms of nature and **competence** between the Commission and the Assembly. While the Commission was only a recommendatory body to make proposals and prepare draft texts on the assigned subjects, the Assembly has decision making authority.

Subparagraph 2(a) establishes that the reports made by the Commission to the Assembly at its first meeting were to be considered and adopted by the Assembly '**as appropriate**', meaning with or without changes. This is underlined by the language used in paragraph 5 of Resolution F of Annex I to the Final Act of the Rome Conference, stipulating that the 'Commission shall prepare proposals' for practical arrangements for the establishment of the Court.²⁵

The subject matter of these recommendations was determined by the mandate of the Commission as outlined in Resolution F relating to eight distinct areas.²⁶ These are the Rules 11 12

¹⁸ Rule 94 of the Rules of Procedure of the Assembly of States Parties (in the following: Assembly's Rules of Procedure). At the 13th Assembly meeting in December 2014 in New York, the State of Palestine made remarks during the general debate on 15 December 2014 upon the Assembly's invitation; see http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-Palestine-ENG.pdf.

¹⁹ Rule 92 of the Assembly's Rules of Procedure.

²⁰ Rule 93 of the Assembly's Rules of Procedure.

²¹ See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/10 (1998), Annex I, at: <http://legal.un.org/icc/statute/finalfra.htm>.

²² See <http://legal.un.org/icc/prepcomm/prepfra.htm>.

²³ Resolution F, UN Doc. A/CONF.183/10 (1998), para. 8.

²⁴ This included the preparation of the most essential legal texts of the Rome Statute legal framework. See in this Section and Resolution F, UN Doc. A/CONF.183/10 (1998), para. 5.

²⁵ Resolution F, UN Doc. A/CONF.183/10 (1998), paras. 5, 7.

²⁶ *Ibid.*, para. 5.

of Procedure and Evidence; the Elements of Crimes; the relationship agreement between the Court and the United Nations; basic principles governing a headquarters agreement between the Court and the Netherlands; financial regulations and rules; an agreement on privileges and immunities of the Court; the budget for the first financial year; and Rules of Procedure of the Assembly. In addition, proposals for a criminal provision on aggression were covered.²⁷ The Commission issued its **final report** to the Assembly during its tenth and final session at UN Headquarters from 1 to 12 July 2002 upon the entry into force of the Statute in accordance with article 126(1) of the Statute.

2. ‘Management oversight’

- 13 The oversight function of the Assembly extends to the main representatives of the Court with fundamental management responsibilities, namely the Presidency, the Prosecutor and the Registrar. The Assembly, being a political body of States’ representatives which meets only once per year, is not expected to perform a continuous oversight function in this area. For this purpose paragraph 4 of article 112 vests in the Assembly the power to establish necessary subsidiary bodies, and more specifically an independent oversight mechanism akin to the Office of Internal Oversight Services at the United Nations. Article 112 paragraph 2(b) and paragraph 4 have to be read together in this respect. The Assembly established the **Independent Oversight Mechanism (IOM)** in 2009²⁸ and issued its operational mandate in 2013.²⁹ To date, the IOM has still been not fully operational since the election of the new Head of the IOM still remains to be finalized by the Bureau in 2015, to be followed by the selection of staff.³⁰
- 14 There was some degree of controversy in the preparatory process of the Rome Conference as to whether the term ‘administration’ covers **judicial administration** in addition to the non-judicial operations of the Court. Some delegations strongly opposed this interpretation on the ground that the doctrine of judicial independence would not permit any intrusive oversight into the Court’s judicial administration. In fact, the Draft Statute referred to by the Preparatory Committee to the Rome Conference in a corresponding article 102 employed two alternative terms ‘non-judicial administration’ and ‘operations of the Court’.³¹ The compromise at Rome reflected in the Statute is on the term ‘administration’. In the light of the negotiating history of this article, the term ‘administration’ does not lend itself to a wider interpretation so as to include judicial activities of the Court. This is reflected in the IOM’s mandate as defined by the Assembly, stipulating that ‘the IOM will fully respect the **judicial and prosecutorial independence** and its activities will not interfere with the effective functioning of the Court’.³² This is also consistent with the requirements in the Statute regarding the independence of both the Prosecutor and the Judiciary as enshrined in articles 40 and 42, respectively. However, the extent of the Assembly’s administrative oversight is not defined; it is therefore left to article 112(4) and in particular the IOM with its mandate to conduct inspections, evaluations, and investigations at the ICC.³³ The IOM’s present mandate will be addressed more in detail in paragraph 4 below.

²⁷ *Ibid.*, para. 7.

²⁸ Resolution ICC-ASP/8/Res.1, ‘Establishment of an independent oversight mechanism’, 26 November 2009.

²⁹ Resolution ICC-ASP/12/Res.6, 27 November 2013; the Operational Mandate of the IOM is attached as an annex to said resolution.

³⁰ The task of electing the Head of the IOM remains with States Parties who delegated this task to the Bureau. The 2014 Omnibus Resolution of the Assembly stops short of openly deploring that one year after issuing the operational mandate States Parties have not been in a position to elect a head of the office to fully operationalise the IOM. See Resolution ICC-ASP/13/Res.5, ‘Strengthening the International Criminal Court and the Assembly of States Parties’, 17 December 2014, para. 83.

³¹ UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, article 102 para. 3 (c).

³² Resolution ICC-ASP/12/Res.6, ‘Independent Oversight Mechanism’, 27 November 2013 (ICC-ASP/12/20), Annex ‘Operational mandate of the Independent Oversight Mechanism’, para. 27.

³³ O’Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP, 2015), p. 108.

The Assembly has assumed an important role in supporting transparent policy-setting and strategic planning in particular through a number of topical facilitations as part of its **The Hague Working Group**.³⁴ Examples are the Court's strategic planning process;³⁵ discussions on victims and affected communities, and the participation of victims in the proceedings, leading to the Court's strategy in relation to victims;³⁶ and cooperation. However, the Assembly has also taken slightly more aggressive approaches in areas where administrative oversight and judicial independence can be distinguished less easily, such as the question of principles relating to reparations;³⁷ the Court's obligations to fund family visits of indigent detainees;³⁸ and the Court's initiative to streamline and strengthen its criminal process.³⁹

Other facilitations in this regard include complementarity, universality, legal aid and policy issues.⁴⁰ Of note, the Assembly's **Study Group of Governance**, established in 2010 by the Assembly as a sub-group within the Hague Working Group, has since tackled a number of items of managerial relevance such as the relationship between the Court and the Assembly; the institutional framework within the Court; the Court's budgeting process; and, most importantly, efforts to increase the efficiency of the criminal process.⁴¹ In particular the latter aspect has led to a Court-internal 'lessons learned' project in close coordination with the Study Group of Governance.⁴² This process will be addressed more in detail in paragraph 4 below.

The construction of Court's **permanent premises** as well as the Court's transition in the end of 2015 are handled by the Oversight Committee on the Permanent Premises and will be addressed more in detail in Section IV below.

3. Consideration of activities of the Bureau and appropriate action

The legislative control of the Assembly over the Bureau, its executive body, is general but also specific to its reports and recommendations. For details, the discussion under Section III below of article 112 is pertinent.

³⁴ The Assembly entertains working groups in both New York and The Hague; see Report of the Bureau: Evaluation and rationalization of the working methods of the subsidiary bodies of the Bureau, ICC-ASP/12/59, para. 8: 'institutional questions whose discussion benefit from close interaction with the Court, such as the Court's budget, governance, oversight and host-state related issues are designated to The Hague. On the other hand, questions relating to the United Nations or that require the fullest possible representation on the part of States Parties are designated to New York'. Facilitators are elected by the yearly Assembly meetings.

³⁵ Strategic planning process of the Court, ICC-ASP/5/Res.2; Report of the Bureau on the Strategic Planning Process of the Court, ICC-ASP/7/29; common efforts resulted in the ICC's Strategic Plan 2013–2017 of 18 April 2013 (available at: <http://www.icc-cpi.int/iccdocs/registry/ICC-Strategic-Plan-2013-2017-190413.pdf>) and updated yearly since; this also lead to the ICC Office of the Prosecutor's Strategic Plan – June 2012–2015, 11 October 2013, with an update expected in the first half of 2015. See also the Report of the Bureau on the Strategic planning process of the International Criminal Court, ICC-ASP/13/27, 31 October 2014.

³⁶ Court's Revised strategy in relation to victims, ICC-ASP/11/38, 5 November 2012; see also Report of the Bureau on victims and affected communities, Trust Fund for Victims and reparations, ICC-ASP/13/32, 28 November 2014.

³⁷ See Report of the Court on principles relating to victims' reparations, ICC-ASP/12/39, 8 October 2013; Report of the Bureau on victims and affected communities, Trust Fund for Victims and reparations, ICC-ASP/13/32, 28 November 2014.

³⁸ Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/6/Res.2, para. 14.

³⁹ Study Group on Governance Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1, 31 October 2013. See Ambach, in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 1277.

⁴⁰ See only the list of reports of the different facilitations on the Assembly website for each year's Assembly meeting; for 2014: http://www.icc-cpi.int/en_menus/asp/sessions/documentation/13th-session/Pages/default.aspx.

⁴¹ Resolution ICC-ASP/9/Res. 2, of 10 December 2010, para. 6; Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, 22 November 2011.

⁴² Ambach, in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015).

4. 'decide the budget'

- 19 This is a general clause on the **fiscal authority** of the Assembly to consider and decide the budget of the Court. It may be read together with paragraph 5(g) of Part F to Annex I of the Final Act which specifically deals with the first budget.⁴³ That process required that the Preparatory Commission submitted the draft budget for the first financial year to the Assembly at its first meeting.⁴⁴ Once it was placed before the Assembly, it was for the Assembly to consider and approve that budget in accordance with this general clause.
- 20 An issue that arose in this connection during the Preparatory Committee was whether the Assembly should **consult with the Registrar** in deciding on the budget. Different views were expressed on the merits and demerits of the proposal. Accordingly, the Draft Statute to the Rome Conference included the proviso '[in consultation with the Registrar]'.⁴⁵ However, the final text of the Statute omitted it, at least for two reasons. *One*, by virtue of paragraph 5 of this article, the Registrar, the President, the Prosecutor or their representatives, may participate in the meetings of the Assembly as well as the Bureau. Therefore, the Court's principals anyway had a forum to provide the Court's views. And, *two*, it was felt that the Financial Regulations and Rules and the Rules of Procedure of the Assembly could also be formulated to cover the matter, if necessary. As in the case of other international organizations including tribunals, it was considered reasonable to assume that in practice the draft **budget proposals would originate from the Court**, and the Assembly would perform the legislative function of considering and approving the budget. Hence, it was felt that the role for the Court and the Registrar to provide input on the Court's financial requirements and to have an opportunity to clarify them are adequately built into the Court's legal framework. The Draft Statute of the Preparatory Committee also contained an additional element under this clause, that is, 'rule on any financial issue'. It was deleted in Rome mainly because it was considered superfluous.⁴⁶
- 21 The Financial Regulations and Rules⁴⁷ provide in Regulation 3.1 that '[t]he proposed programme budget for each financial period shall be prepared by the Registrar in consultation with the other organs of the Court referred to in article 34, subparagraphs (a) and (c), of the Rome Statute.' Rule 103.2(2) then provides that upon finalization the draft budget shall be submitted to the **Committee on Budget and Finance (CBF)**, a subsidiary body of the Assembly consisting of financial experts that provide independent expert advice on the ICC's annual budget request and other financial and administrative matters.⁴⁸ The CBF then consults with the Court and subsequently submits its recommendations to the Assembly. Further consultations between the Assembly and States Parties ensue during the budget facilitation in the Hague Working Group and, eventually, during the Assembly sessions. However, the final budgetary authority rests with the Assembly.⁴⁹

⁴³ UN Doc. A/CONF.183/10 (1998), Annex I, Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. See Resolution F, paragraph 5 (g).

⁴⁴ *Ibid.*, also see paragraph 9, which reads 'The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties'.

⁴⁵ UN Doc. A/CONF.183/10 (1998), Annex I, Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. See Resolution F, article 102 para. 2 (d) reads 'consider and approve the budget for the Court [in consultation with the Registrar] [and rule on any financial issue]'.

⁴⁶ *Ibid.*

⁴⁷ See also rule 88(1) of the Rules of Procedure of the Assembly.

⁴⁸ Establishment of the Committee on Budget and Finance, ICC-ASP/1/Res. 4. The Committee is made up of twelve experts of internationally recognized standing and experience in financial matters. It was established at the first session and currently meets twice a year.

⁴⁹ For a more detailed overview see Ambach and Rackwitz (2013) 76 *Law and Contemporary Problems* 119, 147 et seq., 156.

To date, the Assembly has approved 13 annual budgets of the ICC totaling more than €1,1 billion, including €130,665.6 million for 2015.⁵⁰ The Court's steadily increasing yearly programme budgets have in the recent past met criticism by some States Parties. Source of frustration was often times States' perceived lack of oversight over what the Court used its funds for. Increased initiatives of States to receive more detailed information on the Court's activities, strategies, expenditures, budgeting principles and governance threatened to overburden the Court with reporting requirements. At the Assembly's 10th session in 2011 some of the highest contributing members to the ICC budget called for '**zero nominal growth**', regardless of increases in a number of budget items of the Court, and notably the scale of its activities.⁵¹ This was met with strong opposition of other States Parties in the Assembly. Despite the election of six new judges at the 10th session, long debates on the budget became the dominating issue of the session. The compromise agreed upon by States by consensus did not reduce the Court's programme budget to zero nominal growth; however, the approved budget for 2012 included reductions that went significantly below the budget requested by the Court and, as a very rare occasion, even went further than the budget reductions recommended by the Assembly's committee of financial experts, the CBF.⁵²

Following the 10th session, a number of thematic facilitations by States Parties were created due to a perceived need to take stock of the institutional framework of the Rome Statute system and to improve the efficiency and effectiveness of the Court. The Study Group on Governance was created within the Hague Working Group of States Parties,⁵³ focusing on items such as the efficiency of the criminal process and the Court's budgeting process.⁵⁴ The mandate of the Study Group on Governance has been renewed ever since its inception.⁵⁵ As a result of such increased interaction, States' approach in relation to the Court's budget in the years following 2011 was more governed by reliance on the **recommendations of the CBF** and reflected agreements that had previously been prepared by The Hague Working Group budget facilitation in advance of the Assembly's session.⁵⁶ Accordingly, the programme budgets adopted by the Assembly for the years 2013, 2014 and 2015 followed previous recommendations of the CBF. Calls by some States for zero nominal growth did not gain any traction. The reliance on the CBF as the Assembly's most important subsidiary body in terms of financial expertise has two major advantages: first, the logic of budgetary reductions is based on recommendations of an **independent expert body** rather than considerations and discussions among States Parties which inevitably include political considerations;⁵⁷ second, disposing of the budget as a discussion item prior to the Assembly session leaves more space for other relevant issues on the Assembly's agenda such as, amongst others, universality, cooperation, complementarity and the efficiency of the criminal process. In addition, the Assembly honors its duty to 'consider and decide the budget for the Court' during the intense consultations between States Parties and the Court in the two months preceding the Assembly session.

⁵⁰ Resolution ICC-ASP/13/Res.1, 17 December 2014, para. 1; O'Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP, 2015), 114.

⁵¹ See O'Donohue (2013) 13 *ICLRev* 269, 279–81.

⁵² *Ibid.*

⁵³ ICC-ASP/9/Res.2, Establishment of a study group on governance, 10 December 2010. On the study group's mandate to increase the efficiency of Court proceedings see Ambach, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (2015), 1285.

⁵⁴ *Ibid.*; in 2012 and 2013, one of the clusters of the Study Group on Governance dealt with 'enhancing the transparency and predictability of the budgetary process': ICC-ASP/11/31, Report of the Bureau on the Study Group on Governance, 23 October 2012, paras. 8 et seq.; ICC-ASP/12/37, Report of the Bureau on Study Group on Governance, 15 October 2013, paras. 26 et seq.

⁵⁵ For 2015, see ICC-ASP/13/Res.5, annex I, paras. 6 (a), 10(a).

⁵⁶ O'Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (2015), 115.

⁵⁷ *Ibid.*

5. ‘to alter the number of judges’

- 24 a) **Increase in the number of judges pursuant to article 36 of the Statute.** Article 36(1) of the Statute provides that the default number of judges at the Court is 18. Article 36(2) stipulates that the Presidency may propose an increase to States Parties, to be decided upon by the Assembly. Article 112(2)(e) mirrors that provision.
- 25 This clause differs from the relevant provision of the Draft Statute sent to the Rome Conference by the Preparatory Committee. The Draft Statute considered, in addition to the proposal for an alteration of the number of judges, the possibility of the Assembly dealing similarly with the offices of the Registrar and the Prosecutor.⁵⁸ Owing to a lack of agreement on the latter proposition, the Conference dropped its inclusion in the Statute. Of note, the term used in the Statute for such authority of the Assembly to alter the number of judges is ‘decide’ while the Draft Statute suggested the term ‘determine’.⁵⁹ The change indicates recognition of the **finality of the competence** of the Assembly.
- 26 The method and procedure of the alteration of the number of judges of the Court has to be in accordance with the substantive provisions of the appointment of judges contained in article 36 of the Statute.⁶⁰
- 27 b) **Election of the judges, the Prosecutor and Deputy Prosecutor(s).** The Assembly of States Parties has the important responsibility to elect **highly-qualified** senior officials to the ICC, namely judges, the Prosecutor and Deputy Prosecutor(s).⁶¹ In its past thirteen sessions, the Assembly has conducted elections for 45 judges and elected two Prosecutors and three Deputy Prosecutors of the ICC.⁶² It has also provided recommendations for the election of the Registrar by the plenary of judges.⁶³
- 28 **Election of Judges:** In 2003, the Assembly issued a **procedure** for the election of judges at the ICC and developed an innovative voting system to achieve the representation of the **principal legal systems** of the world, **equitable geographic representation** and a fair representation of **female and male** judges, as required by Article 36(8)(a) of the Statute.⁶⁴ Article 36(5) requires that ‘at the first election of the Court, at least nine judges shall be elected from list A,’ which includes judges with established competence in criminal law and procedure, and ‘at least five from list B’, referring to experts in international law, international humanitarian law and law of human rights (article 36(3)(b) of the Statute). Article 36(5) continues that ‘[s]ubsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified to the two lists.’ Following this matrix, the Assembly decided that State Parties were required to vote for a minimum number of candidates from each region, list A and B and a minimum number of women in the first four

⁵⁸ UN Doc. A/CONF.183/10 (1998), Annex I, Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution F, article 102 para. 2 (e) reads as follows: ‘determine whether to alter, as appropriate, the number of judges [or members of the Office of the Prosecutor or the Registry] serving on a full or part-time basis, for such period as it shall determine’.

⁵⁹ *Ibid.*

⁶⁰ UN Doc. A/CONF.183/9 (1998), article 36 deals with ‘Qualifications, nomination and election of judges’. For a detailed discussion of this aspect, see Wen-qi/Chana, above, article 36.

⁶¹ Articles 36, 37, 42(4) of the Statute.

⁶² See the Assembly’s election webpage: http://www.icc-cpi.int/en_menus/asp/elections/Pages/election2014.aspx.

⁶³ ‘Recommendation concerning the election of the Registrar of the International Criminal Court’, ICC-ASP/6/Recommendation 1 (2007); Recommendation concerning the election of the Registrar of the International Criminal Court, ICC-ASP/11/Recommendation 1.

⁶⁴ ICC-ASP/1/Res. 3, Procedure for the election of the judges for the International Criminal Court, 9 September 2002, amended and specified by ICC-ASP/3/Res.6 (2004), Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court – Consolidated version; see also the latest amendment in ICC-ASP/13/Res.5, 17 December 2014, Annex II, inserting new text in paragraph 27(b) of Resolution ICC-ASP/3/Res.6: ‘The nomination period shall open 18 weeks before the elections and shall last 6 weeks.’; see also generally O’Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP, 2015), 126–129.

rounds of an election; the requirements would thereafter be adjusted according to the overall composition of the elected and serving judges.⁶⁵ In its resumed 13th session on 24 and 25 June 2015, the Assembly elected the eighteenth judge, filling a judicial vacancy resulting from the resignation in 2014 of a previously elected judge in 2014.⁶⁶

Over time, a sound balance has emerged. Until recently, women held ten of the 18 judicial positions and States have been required in the 2011 elections to vote for a minimum number of men.⁶⁷ The minimum voting requirements have also contributed to ensuring that the requirements of Article 35(5) to elect at least nine judges from list A and at least five from list B are met. With 2014's elections, however, six male candidates were elected and therefore tilted the balance to a slight male overrepresentation.⁶⁸

In 2011, the Assembly established the **Advisory Committee on Nominations**, an important addition to the framework that examines the qualifications of nominees, helping States to consciously consider judges' qualifications when casting their votes.⁶⁹ The Advisory Committee builds on the work of the **Independent Panel on ICC Judicial Elections**, set up in by the non-governmental organisation Coalition for the International Criminal Court (CICC) in 2010 to raise awareness and assess the qualifications of ICC judicial candidates for the 2011 elections.⁷⁰

The Advisory Committee's first evaluation of candidates for the election of one judicial vacancy occurred at the twelfth session.⁷¹ Subsequently, the Advisory Committee issued recommendations for the election of six judges in 2014;⁷² further recommendations to fill a judicial vacancy pursuant to article 37 of the Statute were submitted in 2015.⁷³

Elections of the Prosecutor and Deputy Prosecutor(s): In the Assembly's first session it was decided that every effort should be made to elect the ICC Prosecutor by consensus despite the mere absolute majority requirement in article 42(4) of the Statute.⁷⁴ The nomination procedure follows *mutatis mutandis* the procedure foreseen for the judges.⁷⁵ The election of Deputy Prosecutors follows a process similarly outlined in article 42(4): the Prosecutor nominates three candidates for each position of Deputy Prosecutor who are presented to the Assembly for an election which follows the same rules as for the Prosecutor.⁷⁶

For the election for the second Prosecutor in 2011, the Bureau of the Assembly established a **Search Committee** mandated to 'facilitate the nomination and election, by consensus, of the next Prosecutor'.⁷⁷ The Search Committee was specifically mandated to: 1) receive

⁶⁵ See ICC-ASP/13/46, Report of the Advisory Committee on Nominations of Judges on 24 April 2015; ICC-ASP/1/Res. 3, 'Procedure for the election of the judges for the International Criminal Court', 9 September 2002, paras. 3 and 7.

⁶⁶ ICC-ASP/13/44, Election of a judge to fill a judicial vacancy of the ICC, 14 April 2015.

⁶⁷ Election of judges for the International Criminal Court: guide for fourth election, ICC-ASP/10/19.

⁶⁸ See for the 2014 election results on the Assembly homepage under: http://www.icc-cpi.int/en_menus/asp/elections/judges/2014/Nominations/Pages/2014-JE-results.aspx.

⁶⁹ See ICC-ASP/10/36, Report of the Bureau on the establishment of an Advisory Committee on nominations of Judges of the International Criminal Court, 30 November 2011.

⁷⁰ The panel operated independently from the CICC or the ICC. Regarding its members see http://www.coalitionfortheicc.org/documents/CICC_PR_Independent_Panel_31Mar2011.pdf.

⁷¹ Report of the Advisory Committee on Nomination of Judges on the work of its second meeting, ICC-ASP/12/47, Annex 1.

⁷² ICC-ASP/13/22, Report of the Advisory Committee on Nominations of Judges on the work of its third meeting, 29 September 2014.

⁷³ ICC-ASP/13/Res.5, Strengthening the International Criminal Court and the Assembly of States Parties, 17 December 2014, para. 44 and Annex I, Mandates of the Assembly of States Parties for the intersessional period, para. 4.

⁷⁴ See ICC-ASP/3/Res.6 (2004), Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court – Consolidated version, para. 33.

⁷⁵ *Ibid.*, para. 28.

⁷⁶ *Ibid.*, paras. 36–42.

⁷⁷ ICC-ASP/9/INF.2, Bureau of the Assembly of States Parties: Search Committee for the position of the Prosecutor of the International Criminal Court: Terms of Reference, 6 December 2010, para. 5.

expressions of interest from individuals, States, regional and international organizations, civil society, professional associations and other sources; 2) actively identify and informally approach individuals who may satisfy the applicable criteria, in particular those contained in Article 42 of the Statute; 3) review any expressions of interest in light of the relevant criteria; and 4) produce a shortlist of at least three suitable candidates for consideration by the Bureau.⁷⁸ From 52 candidates that had been included on the Search Committee's list, eight were interviewed.⁷⁹ A report was submitted to the Assembly containing a shortlist of four candidates on 22 October 2011, just before the tenth session.⁸⁰ At that point, informal consultations began to establish consensus which led to the formal nomination and election by consensus of Mme. Fatou Bensouda. There remains some tension between the wording of article 42(4) of the Statute stipulating an election process by secret ballot requiring an absolute majority of Assembly members, and the Assembly's – political – efforts to achieve consensus.⁸¹

6. 'non-cooperation'

- 34 Initially, different views were held on whether the issue of non-cooperation should be dealt with in the Statute generally as well as specifically in the context of the Assembly. The objections, at least as far as they related to non-States Parties, were based on the well-known doctrine of the law of treaties about the non-binding nature of treaty obligations on third parties unless the latter consent to them.⁸² That apart, in the event that the Assembly should deal with non-cooperation, it was not clear as to whether the Assembly could take up such cases on its own or whether they should be referred by the Court or by the Security Council or by any other body of the UN such as the General Assembly. The Draft Statute contained this provision in square brackets.⁸³
- 35 The Statute resolved the problem by making reference to the power of the Assembly to deal with the matter of non-cooperation, but by **leaving the definition** of the substance to Part 9 of the Statute dealing with cooperation. Consequently, article 112(2)(f) merely refers to article 87 paras. 5 and 7: the Court may refer cases of non-cooperation by States Parties or those non-States Parties that entered into an *ad hoc* arrangement or agreement to cooperate with the Court, to the Assembly, and to the Security Council in respect of those matters referred to it by the Security Council.⁸⁴
- 36 At its tenth session in 2011, the Assembly adopted the '**Assembly Procedures relating to non-cooperation**',⁸⁵ outlining the general procedure on Assembly level in case of a non-

⁷⁸ *Ibid.* para 6.

⁷⁹ Report of the Search Committee for the Position of the Prosecutor of the International Criminal Court, 22 October 2011, para. 31, at: http://www.icc-cpi.int/iccdocs/asp_docs/Elections/EP2011/EP2011-PSC-Report-ENG.pdf.

⁸⁰ *Ibid.* The Search Committee received praise for its work by the then outgoing President of the Assembly, Christian Wenaweser (Liechtenstein): Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Tenth Session, 12–21 December 2011, New York, Closing remarks by Christian Wenaweser as ASP President (2009–2011), under: http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ASP10-ST-PASP-CW-CLRemarks-ENG.pdf.

⁸¹ See, for a critical view, O'Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (2015), 130–31.

⁸² See Art. 59 of the ICJ Statute; Vienna Convention on the Law of Treaties, Section 4, Part III, and Art. 34 in particular. However, also note Art. 38 of said Convention as well as the fact that rights can be conferred on third parties.

⁸³ UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, article 102 para. 2 (f) reads '[consider, upon recommendation [of the Court] [of the Bureau], any question relating to non-cooperation by States Parties [and non-States Parties] and take [necessary] [appropriate] measures, including referring the matter to [the Security Council] [the United Nations General Assembly] as provided in article 86]'

⁸⁴ Art. 87(5) deals with requests of the Court to a non-State Party to cooperate with it on the basis of an *ad hoc* arrangement or an agreement. Paragraph 7 of that article provides for compliance by a State Party with a cooperation request by the Court. See a detailed discussion under article 87 in this Commentary.

⁸⁵ Assembly procedures relating to non-cooperation, annex to ICC-ASP/10/Res.5, Strengthening the International Criminal Court and the Assembly of States Parties, p. 419.

cooperation finding issued by the Court.⁸⁶ The Assembly's procedures on non-cooperation provide for different scenarios of non-cooperation and respective formal and informal measures on the diplomatic and political level to respond to situations of non-cooperation: (i) where the Court has referred a matter of non-cooperation pursuant to article 87(5) or (7) to the Assembly, requiring a formal response;⁸⁷ and (ii) an informal response without a referral from the ICC where 'there are reasons to believe that a specific and serious incident of non-cooperation in respect of a request for arrest and surrender of a person is about to occur or is currently on-going and urgent action by the Assembly may bring about cooperation.'⁸⁸ The above measures are to be taken and led predominantly by the President of the Assembly, in consultation with or as decided by the Bureau.⁸⁹ In the case of referrals from the ICC triggering a formal response procedure, the procedure provides for the possibility for the Bureau to schedule a public meeting on the matter to allow for an open dialogue with the requested State.⁹⁰ Finally, the Assembly can issue a resolution 'containing concrete recommendations on the matter'.⁹¹

The Court has repeatedly made **non-cooperation findings** and referred the matter to either the Assembly⁹² or the UN Security Council.⁹³

Promoting Cooperation: The Assembly recognized in 2007 that 'cooperation between the [ICC] and States Parties, international organizations and non-governmental organizations is an essential basis for the effective functioning of the Court.'⁹⁴ The Assembly has since promoted national implementation of the Rome Statute, cooperation with the United Nations in accordance with the Relationship Agreement,⁹⁵ and cooperation agreements with regional organizations.⁹⁶ In 2007, it adopted 66 recommendations on cooperation which were reviewed in 2015.⁹⁷

Promoting Universality: The Assembly established a **Plan of action for achieving universality and full implementation of the Rome Statute** at its fifth session in 2006. It held that both objectives are 'imperative if we are to end impunity for the perpetrators of the most serious crimes of international concern, contribute to the prevention of such crimes, and guarantee lasting respect for and enforcement of international justice.'⁹⁸ The Plan

⁸⁶ *Ibid.*, paras. 12–20. The focus at the time was the Sudanese President Omar al-Bashir and his travels after the ICC had issued an arrest warrant against him in March 2009. The African Union adopted decisions that its members should not cooperate with the ICC regarding his arrest, see Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13/(XIII), para. 10.

⁸⁷ Assembly procedures relating to non-cooperation, ICC-ASP/10/Res.5, Annex, paras. 7(a), 10.

⁸⁸ *Ibid.* at para. 7(b).

⁸⁹ *Ibid.* paras. 14–20.

⁹⁰ *Ibid.* paras. 14(c) and (d).

⁹¹ *Ibid.* para. 14(f).

⁹² For the latest filing see *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195, 9 April 2014; generally see http://www.icc-cpi.int/en_menus/asp/non-cooperation/Pages/default.aspx.

⁹³ For the latest filing see *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, ICC-02/05-01/09-227, 9 March 2015; see also *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, ICC-01/11-01/11-577, 10 December 2014; generally see http://www.icc-cpi.int/en_menus/asp/non-cooperation/Pages/default.aspx.

⁹⁴ Report of the Bureau on cooperation, ICC-ASP/6/21, para. 1.

⁹⁵ Report of the Bureau on Cooperation, ICC-ASP/6/21, paras. 60–63. For details on the Negotiated Relationship Agreement between the International Criminal Court and the United Nations of 4 October 2004 see Ambach, commentary article 2, mn. 20 et seq.; see also generally ICC-ASP/12/42, Report of the Court on the status of ongoing cooperation between the International Criminal Court and the United Nations, including in the field, 14 October 2013.

⁹⁶ See ICC-ASP/13/29, Report of the Bureau on cooperation, 21 November 2014; see also ICC-ASP/13/Res. 5/, Annex I, Mandates of the Assembly of States Parties for the intersessional period, para. 2. Report of the Bureau on Cooperation, ICC-ASP/6/21, para. 32.

⁹⁷ ICC-ASP/6/21, pp. 7 et seq.; ICC-ASP/13/Res.5, Annex I, para. 2.

⁹⁸ Plan of action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court, ICC-ASP/5/Res.3, Annex, para. 1.

underlines that it is States Parties that have the primary responsibility for promoting the above objectives.⁹⁹ This is a reminder for States regarding one of their most important activities short of cooperation duties under Part 9 of the Statute. The Plan outlines a comprehensive set of essential efforts that States Parties should engage in, going beyond mere diplomatic support and requiring focused action including of technical and financial nature.¹⁰⁰ The Secretariat of the Assembly has been given the role of focal point for information exchange (albeit absent additional resources to fulfil this role) and it is on the Bureau to periodically review the Plan of action.¹⁰¹ States Parties, civil society, academia, international (non-governmental) organizations and professional associations have been promoting the Plan's two main goals through seminars, advocacy, technical and other assistance.¹⁰² Also the Assembly President has taken a rather active role in promoting the goals of the Plan, alongside the President of the Court.¹⁰³ There are also ad country focal points on the Plan appointed by the Bureau (in 2015 Cyprus and Denmark).¹⁰⁴ Despite these efforts, doubts are being expressed whether any actions following the Plan has had a significant positive impact in advancing the goals of universality and full implementation of the Rome Statute.¹⁰⁵ The low, and since the Review Conference in 2010 in fact decreasing, number of States reporting on their activities seems to suggest that States Parties do not consider the implementation of the Plan as a priority – or at least the reporting thereon.¹⁰⁶ The Universal Periodic Review at the Human Rights Council has actually become a main venue for States to make Plan of Action-related recommendations (i. e. on ratification and full implementation) to other States.¹⁰⁷ A more effective and adequately resourced framework with direct incentives for States to engage could lead to greater success in the future.

- 40 **Promoting Complementarity:** As a result from the stocktaking exercise on complementarity at the **Review Conference 2010 in Kampala** (Uganda), the Assembly not only underlined the importance – and, indeed, obligation – of States Parties taking effective domestic measures to implement the Rome Statute, but also stressed the need for additional measures at the national level to enhance capacity and the desirability for States to assist each other.^{108, 109} Interestingly, the Assembly encouraged not only States Parties and other stakeholders but also the Court to further ‘explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern’.¹¹⁰

⁹⁹ *Ibid.*, para. 3.

¹⁰⁰ *Ibid.* para. 6.

¹⁰¹ *Ibid.* paras. 7, 8.

¹⁰² See, e.g. Report of the Bureau on the Plan of action for achieving universality and full implementation of the Rome Statute of the International Criminal Court, ICC-ASP/13/36, 28 November 2014 (with a comprehensive list of activities undertaken by international and other organizations in paras. 27 et seq.), and the previous year's report with identical title, ICC-ASP/12/26, 15 November 2013. This report can be considered a standard item generating yearly Assembly reports also in the coming years.

¹⁰³ Report of the Bureau on the Plan of action for achieving universality and full implementation of the Rome Statute of the International Criminal Court, ICC-ASP/13/36, 28 November 2014, paras. 8 et seq.

¹⁰⁴ See Agenda and Decisions of the Bureau of the Assembly of States Parties, 2 March 2015, at: http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2015-Bureau-02b-02Mar2015.pdf.

¹⁰⁵ O'Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (2015), 134.

¹⁰⁶ For 2014, see the Assembly Secretariat's *note verbale* to States Parties: ICC-ASP/13/PA/45 of 7 July 2014 and responses of altogether 10 States Parties by December 2014; for a general overview see the relevant section on the Plan of action on the Assembly website: http://www.icc-cpi.int/en_menus/asp/sessions/plan%20of%20action/Pages/plan%20of%20action.aspx.

¹⁰⁷ Coalition of the International Criminal Court, *Seeking Universality of the Rome Statute of the International Criminal Court Through the United Nations Human Rights Council*, 22nd session of the UN Human Rights Council Universal Periodic Review (4 to 15 May 2015) at: https://www.iccnw.org/documents/ICC_at_the_22nd_UPR_session_4-5May_2015_WG_outcome01062015.pdf.

¹⁰⁸ Review Conference, Complementarity, RC/Res.1, 8 June 2010, para. 1; ICC-ASP/8/51, Report of the Bureau on stocktaking: Complementarity Taking stock of the principle of complementarity: bridging the impunity gap, 18 March 2010, paras. 5, 12, 28–29.

¹⁰⁹ Review Conference, Complementarity, RC/Res.1, 8 June 2010, paras. 1–5.

¹¹⁰ *Ibid.*, para. 8. See also ICC-ASP/8/51, Report of the Bureau on stocktaking: Complementarity Taking stock of the principle of complementarity: bridging the impunity gap, 18 March 2010, para. 28.

This wording can be understood to provide the Court at least to some degree with a mandate to engage in **positive complementarity**¹¹¹ efforts, however without adding ‘to the functions of the Court or fundamentally chang[ing] the way in which it interacts with domestic jurisdictions’.¹¹² The Bureau clarified in its 2010 report on complementarity that ‘the Court is not a development agency’ and that the Court’s role is one of a ‘catalyst’ of direct State-to-State or other indirect assistance through other actors.¹¹³ Any complementarity efforts would therefore have to be arguably (almost) budget-neutral.¹¹⁴ Cooperation pursuant to article 93(10) of the Statute is one example of such assistance.¹¹⁵

Relevant activities have so far focused on building capacity of States that are **unable** to genuinely investigate and prosecute Rome Statute crimes include support for implementing legislation; rule-of-law activities (also in cooperation with specialised international and regional organisations); identification of donor (States); and an open dialogue between all actors, including the Court and civil society, on how to advance positive complementarity.¹¹⁶ In 2013, the European Union issued a helpful ‘EU complementarity toolkit’, exploring a number of areas of potential intervention.¹¹⁷ Yearly retreats hosted by the International Center for Transitional Justice bring different role players, including the Court, together to explore potential synergies between different development and capacity-building initiatives.¹¹⁸ Many other initiatives by States, international and regional actors exist.¹¹⁹ As regards States **unwilling** to provide adequate national venues and mechanisms of investigation and prosecution of ICC crimes, the EU complementarity toolkit considers that **diplomatic action**, preferably in relevant political and human rights-related fora, ‘offer an excellent opportunity to keep the pressure high’.¹²⁰ The Assembly has not yet explicitly picked up this ‘politically complex’¹²¹ matter other than acknowledging that ‘complementarity has a specific meaning relating to the **admissibility** of cases before the Court’, thus remaining an exclusively **judicial issue**.¹²²

The Secretariat of the Assembly is mandated to **facilitate the exchange of information** between the Court, States Parties and other stakeholders (including international organisations and civil society), albeit within its existing resources and without ‘any major role with regard to coordination and implementation of activities’.¹²³ These efforts include entertaining

¹¹¹ ICC-ASP/9/26, Report of the Bureau on complementarity, 17 November 2010, footnote 1: “positive complementarity” [...] refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute.’.

¹¹² ICC-ASP/8/51, Report of the Bureau on stocktaking: Complementarity Taking stock of the principle of complementarity: bridging the impunity gap, 18 March 2010, para. 4. See also ICC-ASP/9/26, Report of the Bureau on complementarity, 17 November 2010, para. 23, mentioning the activities of the Court as an issue requiring further attention by the Assembly.

¹¹³ *Ibid.*, paras. 4. 42 et seq.; ICC-ASP/9/26, Report of the Bureau on complementarity, 17 November 2010, para. 13.

¹¹⁴ *Ibid.*, paras. 4, 16. See, however, also RC/ST/CM/INF.2, Review Conference of the Rome Statute – Focal points’ compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes, 30 May 2010, Example A, indicating Court efforts to further complementarity which are *not* budget-neutral.

¹¹⁵ See ICC-ASP/13/30, Report of the Bureau on complementarity, 28 November 2014, para. 19.

¹¹⁶ *Ibid.*, paras. 34, 39, and Recommendation f), para. 54. See for further examples RC/ST/CM/INF.2, Review Conference of the Rome Statute – Focal points’ compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes, 30 May 2010.

¹¹⁷ European Commission and the External Action Service, Joint Working Document on Advancing the Principle of Complementarity, SWD (2013) 26, 31 January 2013, at: http://www.icc-cpi.int/en_menus/asp/complementarity/Documents/joint-working-%20complementarity-Toolkit-ENG.pdf.

¹¹⁸ See ICC-ASP/9/26, Report of the Bureau on complementarity, 17 November 2010, para. 8.

¹¹⁹ See ICC-ASP/13/30, Report of the Bureau on complementarity, 28 November 2014, paras. 21 et seq.

¹²⁰ *Ibid.*, p. 10.

¹²¹ O’Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (2015), 137.

¹²² ICC-ASP/13/30, Report of the Bureau on complementarity, 28 November 2014, para. 18; an ‘unwilling’ situation country would therefore have to face judicial consequences as outlined in arts. 17 et seq. of the Statute.

¹²³ *Ibid.*, para. 52; Review Conference, Complementarity, RC/Res.1, 8 June 2010, para. 9. See already ICC-ASP/2/Res.3.

a complementarity website with a dedicated ‘resources page’ to ‘provide information on events relating to complementarity, identify the main actors and their relevant activities, and facilitate contact between donors and recipients.’¹²⁴ Within this mandate, the Secretariat reaches out to States, international and regional organizations and civil society, assists in workshops and seminars and reports thereon periodically to the Assembly.¹²⁵ The President of the Assembly also carries out a number of **complementarity-related initiatives**.¹²⁶

7. ‘any other function’

- 43 The clause is essentially of a **residual nature** and enables the Assembly to undertake any other function consistent with the Statute or the Rules. The other functions specifically discussed during negotiations were *inter alia* appeals for pardon, and review of the Statute or the Rules.¹²⁷ There was no agreement on an inclusion of review powers for the Assembly and the question of review of the Statute was dealt with elsewhere in the Statute.¹²⁸ Thus, the residuary clause is left vague without any specific content and still remains subject to the test of overall compatibility with the Statute.
- 44 The Assembly has some other **functions specified elsewhere** in the Statute. For instance it has the competence to settle disputes between States Parties on the interpretation or application of the Statute as contained in article 119, and to deal with amendments to the Statute and to convene a Review Conference under articles 121 and 122. It has the responsibility under article 79 to establish a Trust Fund for the benefit of victims of crimes covered within the jurisdiction of the Court.¹²⁹ Finally, pursuant to article 116, the Assembly has to adopt criteria governing the receipt and utilization of voluntary contributions towards the funds of the Court.¹³⁰ In the meantime, the Trust Fund for Victims has established regulations which also address the receipt of voluntary contributions from States and other entities.¹³¹

III. Paragraph 3: the ‘Bureau’

1. Members

- 45 The Bureau has a total membership of **twenty-one** representatives of States Parties; a President, two Vice-Presidents and eighteen members, elected by the Assembly for a period of three years.¹³² The wording used is ‘three year terms’ indicating that members of the

¹²⁴ ICC-ASP/14/SP/44, note verbale of the Secretariat pursuant to ICC-ASP/13/Res.5; ICC-ASP/13/30, Report of the Bureau on complementarity, 28 November 2014, Annex II (Report of the Secretariat on complementarity), paras. 27 et seq.; Report of the Secretariat on complementarity, ICC-ASP/10/2, 11 November 2011, para. 10.

¹²⁵ ICC-ASP/13/30, Report of the Bureau on complementarity, 28 November 2014, Annex II (Report of the Secretariat on complementarity), para. 4, section IV; see also RC/1 of 8 June 2010, para. 9, conferring the initial mandate on the Secretariat.

¹²⁶ *Ibid.*, paras. 6 et seq.

¹²⁷ UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, article 102 (g) reads ‘perform any other function or take any other action as specified in this Statute or the Rules of Procedure and Evidence, [including consideration of requests for a review of these instruments] [including consideration of application relating to pardon submitted to it]’. See also fn. 3 to that draft provision.

¹²⁸ UN Doc. A/CONF.183/9 (1998), articles 123 and 124.

¹²⁹ The Assembly has followed up on this duty in Resolution ICC-ASP/1/Res.6, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, 9 September 2002, and Resolution ICC-ASP/4/Res.3, Regulations of the Trust Fund for Victims, 5 December 2005 and last amended by ICC-ASP/6/Res.3, 14 December 2007, on earmarked contributions.

¹³⁰ See also rule 88 of the Rules and regulation 7.2 of the Financial Regulations. See also ICC-ASP/1/Res.11, Relevant criteria for voluntary contributions to the International Criminal Court, however stopping short of establishing any criteria at that stage and leaving it to the Registrar to ‘assure himself/herself that any offered contributions [...] will not affect the independence of the Court [and] fulfil any criteria the Assembly of States Parties may establish’.

¹³¹ ICC-ASP/4/Res.3, Regulations of the Trust Fund for Victims, 3 December 2005, Annex, paras. 22–30 (para. 27 amended by ICC-ASP/6/Res.3, 14 December 2007).

¹³² See also rule 29 of the Rules of Procedure of the Assembly of States Parties, as amended by resolution ICC-ASP/3/Res.2, 9 September 2004, and ICC-ASP/12/Res. 8, 27 November 2013, annex III.

Bureau can be re-elected. An initial proposal made by the Preparatory Committee was to have only one Vice-President.¹³³ But further negotiations moved in the direction of a decision favouring **two Vice-Presidents**. Also, in early stages of negotiations, the question of participation of the Court's President, Prosecutor and the Registrar was considered under this clause but it was subsequently separated¹³⁴ and is now regulated in Rule 34 of the Assembly's Rules of Procedure. In particular during the Hague meetings of the Bureau, Court officials are often invited to and participate in these meetings.

The President, Vice-Presidents and Bureau in its new composition are elected by the Assembly upon recommendation by the Bureau.¹³⁵ The Bureau has a **representative character** and is designed to **assist the Assembly** in the discharge of its responsibilities.¹³⁶ Its membership takes into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.¹³⁷ It meets regularly throughout the year in both New York and The Hague and reports to the Assembly on its activities at each session. During the **intersessional period** it is the most important discussion and decision-making **forum of States Parties** on items of concern of the Rome Statute system as a whole.

In 2004 the Bureau established **two working groups** of equal standing, one based in The Hague and the other in New York.¹³⁸ On 14 February 2006, the Bureau updated its terms of reference. Each working group is headed by one of the two Vice-Presidents who report to the Assembly President on the respective mandated activities. The most prominent sub-cluster of the New York Working Group is the Working Group on Amendments, established for the purpose of considering amendments to the Statute and Rules.¹³⁹ The Hague Working Group comprises a large array of facilitations, ranging *inter alia* from strategic planning over cooperation, complementarity, the permanent premises, and victims and affected communities to the Study Group on Governance.¹⁴⁰ The President calls for and leads the meetings of the Bureau, and chairs Assembly sessions.¹⁴¹

2. 'representative character'

Due to the Bureau's representative character,¹⁴² elections must take into account equitable geographical distribution and adequate representation of the principal legal systems of the world. While the Bureau's representative character was commonly agreed upon in the Preparatory Committee, two different views were held on the application of criteria to realize this objective.¹⁴³ One view was to apply the doctrine of **principal legal systems** and the other was to invoke the principle of **geographical representation**. Even when it was eventually agreed that both criteria could be applied, differences persisted as to which of the two factors

¹³³ UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, article 102 para. 3 (a).

¹³⁴ *Ibid.*

¹³⁵ Rule 29 of the Rules of Procedure of the Assembly of States Parties, as amended by resolution ICC-ASP/3/Res.2, 9 September 2004, and ICC-ASP/12/Res. 8, 27 November 2013, annex III. See for the most recent election of H.E. Sidiki Kaba, Minister of Justice of Senegal, as Assembly President and H.E. Álvaro Moerzinger (Uruguay) and H.E. Sebastiano Cardi (Italy) as Vice-Presidents: Assembly of States Parties to the Rome Statute of the International Criminal Court, Official Records, 13th Session from 8 to 17 December 2014, Volume I, Part I 'Proceedings', paras. 10–12.

¹³⁶ Rule 29(1) of the Assembly's Rules of Procedure.

¹³⁷ Art. 112(3)(b) of the Rome Statute; Rule 29(2) of the Assembly's Rules of Procedure.

¹³⁸ ICC-ASP/3/Res.8, 1 December 2004.

¹³⁹ ICC-ASP/8/Res.6, 26 November 2011. The WGA also represents a 'subsidiary body' pursuant to Art. 112(4) of the Statute. See Section IV.

¹⁴⁰ See paras. 12–15 and Section IV.

¹⁴¹ Rule 30 of the Assembly's Rules of Procedure.

¹⁴² Art. 112(3)(b) of the Statute.

¹⁴³ UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, article 102 para. 3(b). It reads 'The Bureau shall [have a representative character] [be elected on the basis of ensuring its representative character], taking into account, in particular, equitable geographical distribution and bearing in mind the adequate representation of the principal legal systems of the world [as far as possible]'.

should be emphasised. One group proposed the phrase ‘*taking into account, in particular, equitable geographical representation and bearing in mind the adequate representation of principal legal systems of the world*’ (emphasis added). The other group suggested deletion of the phrase ‘bearing in mind’ as a prefix to ‘principal legal systems’ and instead to relate the entire clause with the phrase ‘as far as possible’, with a view to building flexibility in terms of representation of the members of the Bureau. The compromise reflected in this subparagraph places equal emphasis on both the criteria of equitable geographical distribution and the representation of all principal legal systems of the world in the composition of the Bureau.¹⁴⁴

3. Function and sessions

- 49 This subparagraph addresses the question of functional responsibility of the Bureau albeit in general terms. The second sentence sets out that the Bureau should ‘assist the Assembly in the discharge of its responsibilities’. The functions of the Assembly are outlined in paragraph 2 as discussed *supra*. The Bureau has **no independent functions** from that of the Assembly. Nevertheless it has the competence under article 112 paragraph 6 to convene **special sessions** of the Assembly on its own initiative or at the request of one third of the States Parties. But this competence is not exclusive for it is subject to the caveat ‘except as otherwise specified in this Statute’.
- 50 In its 2014 session the Assembly mandated the Bureau ‘to consider the practicalities of holding a resumed session’ to elect the last remaining judge in order to attain the full set of 18 judges as stipulated by article 36(1) of the Statute, and to ‘proceed with the convening of such a resumed session [...]’.¹⁴⁵ This act of **conferring a specific mandate** on the Bureau in the Assembly’s ‘Omnibus Resolution’¹⁴⁶ alongside many other items of strategic importance demonstrates the Bureau’s **increased relevance** as a strategic discussion forum in particular during the intersessional period. An illustrative example is its decision, on 23 June 2015 (during the resumed session of the 13th Assembly meeting), on the selection of the Head of the IOM.¹⁴⁷
- 51 Although the sub-clause states that the Bureau should meet as often as necessary but at least once a year, it is not clear from the Statute where it would meet. The practice of past years has been that the Bureau **meets regularly** throughout the year in both New York and The Hague. Minutes of the meetings are usually distributed to all States Parties; they are also publicly available on the Assembly website.¹⁴⁸ In particular towards the second half of the year Bureau meetings tend to pick up in frequency in preparation of the Assembly meeting. Occasionally, Bureau meetings are held in The Hague when the President of the Assembly visits the Court.

IV. Paragraph 4: ‘subsidiary bodies’

- 52 The authority of the Assembly to establish necessary subsidiary bodies for discharging its functions is well recognized. While the Independent Oversight Mechanism with its core functions of inspection, evaluation and investigation is mentioned explicitly in article 112(4) of the Statute, other, no less important subsidiary bodies have been created since the inception of the Court.
- 53 **Six relevant subsidiary bodies** have been established so far to assist the Assembly’s work:

¹⁴⁴ The Bureau of the Assembly is currently (2014–2017) composed of the following members: Chile, Colombia, Costa Rica, Czech Republic, Germany, Ghana, Hungary, Italy, Japan, Netherlands, Nigeria, Republic of Korea, Romania, Samoa, Senegal, South Africa, Sweden, Uganda, the United Kingdom and Uruguay.

¹⁴⁵ ICC-ASP/13/Res.5, 17 December 2014, Annex I, para. 16(c).

¹⁴⁶ The title of this yearly issued resolution is ‘Strengthening the International Criminal Court and the Assembly of States Parties’; see the most recent resolution under ICC-ASP/13/Res.5, 17 December 2014.

¹⁴⁷ Bureau of the Assembly of States Parties, Fifth meeting 23 June 2015, Agenda and Decisions, para. 3.

¹⁴⁸ See at: http://www.icc-cpi.int/en_menus/asp/bureau/decisions/2015/Pages/Decisions-of-the-Bureau-01.aspx.

1. The Committee on Budget and Finance (CBF)

The CBF was established at the first Assembly session to provide **independent expert advice** on the ICC's annual budget request and other **financial and administrative matters**.¹⁴⁹ The CBF is made up of twelve experts of different nationality, elected by the Assembly for a term of three years, all of whom have recognized standing and experience in financial matters at the international level.¹⁵⁰ The annex to the resolution of the Assembly establishing the CBF grants it a relatively wide mandate, stating that it 'shall be responsible for the technical examination of any document submitted to the Assembly that contains financial or budgetary implications or *any other matter* of a financial, budgetary or administrative nature, as may be entrusted to it by the [Assembly].'¹⁵¹ In recent years the CBF has taken on an **expanding role** within the framework of the Assembly's governance of the Court, beyond the consideration of the budget and directly related items such as audit; for example it has, in the recent past, requested reports from the Court on a number of policies with indirect financial consequences.¹⁵² It also followed up on the progress of the Registrar's '*ReVision*' project in 2014–2015 that has involved a major restructuring of the Registry.¹⁵³ The CBF may also examine proposed amendments to the Court's Financial Regulations and Rules.¹⁵⁴

Particularly noteworthy is the wording of the Assembly's 2013 budget resolution which signaled a desire on the part of States Parties to **increase** their level of **interaction** with the CBF.¹⁵⁵ It is clear that the CBF has become a particularly important and influential subsidiary organ for both the Court and States Parties.

The CBF meets twice a year, in the spring and in the autumn.¹⁵⁶ The Committee frequently makes **requests and recommendations** to the Court on issues it wishes to see addressed, for example regarding reports or proposals to be submitted at its next session.¹⁵⁷ The spring meetings generally deal with governance, review of the Court's performance in relation to the budget for the preceding year¹⁵⁸ and other issues that have financial implications for the Court, and subsequently the States Parties.¹⁵⁹ The autumn meeting of the CBF follows the submission of the Court's proposed budget for the following year. The CBF normally considers the Court's budget proposal, taking into account representations and views of the Court, States and representatives of civil society, and makes recommenda-

¹⁴⁹ ICC-ASP/1/Res. 4, Establishment of the Committee on Budget and Finance, 3 September 2002.

¹⁵⁰ Establishment of the Committee on Budget and Finance ICC-ASP/1/Res.4, Annex para. 1; Procedure for the nomination and election of members of the Committee on Budget and Finance, ICC-ASP/1/Res.5, para. 1.

¹⁵¹ *Ibid.*, Annex, para. 3 (emphasis added). See generally on the CBF's role in the financial management of the Court Ambach and Rackwitz (2013) 76 *L&ContempProbs* 119, 147–153.

¹⁵² See ICC-ASP/13/9, Report of the Court on policy issues (Accruals, anti-fraud and whistleblower, and multi-year project), 23 May 2014.

¹⁵³ Report of the Committee on Budget and Finance on the work of its resumed twenty-fourth session, ICC-ASP/14/5/Add.1, 18 August 2015, paras. 9 et seq.; Report of the Committee on Budget and Finance on the work of its twenty-second session, ICC-ASP/13/5 paras. 42, 48. See also ICC-ASP/13/16, Report of the Court on the organizational structure, 23 May 2014.

¹⁵⁴ Report of the Committee on Budget and Finance on the work of its twenty-second session, ICC-ASP/13/5, para. 15; Report of the Committee on Budget and Finance on the work of its twenty-third session, ICC-ASP/13/15, para. 74.

¹⁵⁵ ICC-ASP/12/Res.1, 27 November 2013, Programme budget for 2014, the Working Capital Fund for 2014, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2014 and the Contingency Fund, p 20, section H, para. 1(b).

¹⁵⁶ O'Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP, 2015).

¹⁵⁷ Report of the Committee on Budget and Finance on the work of its twenty-second session, ICC-ASP/13/5, paras. 50, 57; Report of the Committee on Budget and Finance on the work of its twenty-third session, ICC-ASP/13/15, paras. 27, 74, 94.

¹⁵⁸ See, for instance, Report on activities and programme performance of the International Criminal Court for the year 2014, ICC-ASP/14/8, 4 May 2015.

¹⁵⁹ See, for instance, Report of the Committee on Budget and Finance on the work of its twenty-fourth session, ICC-ASP/14/5, 18 June 2015.

tions for the consideration of the Assembly. Although States Parties are not bound by these recommendations, the autumn report of the CBF normally forms the basis for budget discussions among States Parties at the annual Assembly meeting. Prior to each Assembly session, a working group on the budget is normally established in the Hague Working Group to prepare the budget discussion and resolution for that session.

2. Oversight Committee

- 57 In 2007, the Assembly established the Oversight Committee on the permanent premises of the ICC to provide strategic oversight over the project to construct the permanent premises which the ICC is expected to move into in the last quarter of 2015.¹⁶⁰ The Committee consists of ten representatives of States Parties with at least one member from each regional group, elected by the Assembly upon recommendation by the Bureau for a renewable term of two years.¹⁶¹ It is not only mandated to monitor the financing the construction of the permanent premises and related costs but also the functioning and operations of the governance structure for the project.¹⁶² The Oversight Committee submits periodic progress reports to the CBF and status updates to the Bureau.¹⁶³ It also reports to the Assembly's yearly meetings on its progress.¹⁶⁴

3. Advisory Committee on Nominations (ACN)

- 58 Established in 2012 and composed of nine persons with established competence and experience in criminal or international law, the ACN advises on nominations of judges of the ICC and assesses candidates prior to judicial elections at the Assembly.¹⁶⁵ The Committee's mandate as per its Terms of Reference is 'to facilitate that the highest-qualified individuals are appointed as judges'.¹⁶⁶ It must base its assessment of candidates on the requirements listed in article 36(3) of the Rome Statute.¹⁶⁷ The ACN convenes following the nomination of candidates by States Parties and communicates with the potential nominees, including through conducting interviews.¹⁶⁸ Committee members are designated for three year terms, with the possibility of being re-elected once.¹⁶⁹ Although communications of the ACN are kept confidential, the Committee is required to report to the Bureau regularly, while States Parties are informed of its work both through the Bureau and through briefings to Working Groups in The Hague and New York.¹⁷⁰ Upon completion of its work, the ACN's findings and analysis, which are strictly limited to technical information on the suitability of candidates, are presented to the Bureau.¹⁷¹ The information is made available through the Bureau to States Parties in time for consideration before the elections at the Assembly meeting in order to inform the decisions of States Parties, although they are **not bound** by the findings of the ACN.¹⁷² Elections of six ICC judges during the 2014 Assembly

¹⁶⁰ ICC-ASP/6/Res. 1, 14 December 2007, Permanent premises, para. 5.

¹⁶¹ *Ibid.*, Annex II paras. 4–5.

¹⁶² *Ibid.*, para. 6 and Annex II, paras. 2, 3.

¹⁶³ *Ibid.*, Annex II paras. 14, 15.

¹⁶⁴ See for 2014 Report on the activities of the Oversight Committee, ICC-ASP/13/39, 1 December 2014.

¹⁶⁵ Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res. 5, paras. 19–20; Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, ICC-ASP/10/36, 30 November 2011, Annex paras. 1–2.

¹⁶⁶ Terms of reference for the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, Annex to Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, ICC-ASP/10/36, 30 November 2011, para. 5.

¹⁶⁷ *Ibid.*, para. 7.

¹⁶⁸ *Ibid.*, paras. 8–9.

¹⁶⁹ *Ibid.*, para. 6, as modified through ICC-ASP/13/Dec.2 Decision: Waiver of the impediment of four members of the Advisory Committee on Nominations of Judges to be re-elected, 25 June 2015.

¹⁷⁰ *Ibid.*, paras. 8, 10.

¹⁷¹ *Ibid.*, para. 11.

¹⁷² *Ibid.*, paras. 11–12.

session have demonstrated that States may indeed deviate from the ACN's recommendations when it comes to voting.¹⁷³

4. Independent Oversight Mechanism (IOM)

The IOM was created as a subsidiary body at the 8th session of the Assembly to inspect, evaluate and investigate the Court to ensure 'effective and comprehensive oversight of the Court in order to enhance its efficiency and economy.'¹⁷⁴ Although the IOM was envisaged in the Rome Statute itself, its establishment has been a lengthy process. The most essential steps towards operationalization of the IOM were only taken at the Assembly's twelfth session.¹⁷⁵ The process of selection of the first head of the IOM by the Bureau took over a year to complete and was finalised only in 2015.¹⁷⁶ The IOM will become *de facto* operational in 2016.

Initially, States did not focus much on the mechanism. Discussions in the Assembly on the establishment of an IOM kicked off properly only in 2008. During informal consultations, it was proposed to establish an independent unit with investigative capacity within the Office of Internal Audit to perform the function of oversight; also, it was considered to 'outsource' the investigative capacity to the United Nations Office of Internal Oversight Services (OIOS).¹⁷⁷ Finally, it was decided to meet the requirements of article 112(4) in creating an in-house mechanism with functional independence to any of the organs of the Court enhanced professional investigative capacity situated within the Court's existing internal disciplinary structures.¹⁷⁸ At the outset, the focus was on the independent professional investigative capacity for misconduct in the general understanding that additional elements of oversight such as inspection and evaluation would be added in due course.¹⁷⁹ An especially appointed working group submitted a report containing 10 recommendations to the Assembly in April 2009,¹⁸⁰ following which the Assembly established the IOM during its eighth session in November 2009.¹⁸¹ The IOM's terms of reference followed the working group's recommendations in permitting investigation into misconduct – excluding staff management issues¹⁸² – by ICC elected officials, ICC staff and contractors. The IOM's inspection and evaluation functions were decided to be brought into operation at a later stage.¹⁸³ Concerns raised by

¹⁷³ For the election in 2015 of the 18th judge (Raul C. Pangalangan) however, States Parties indeed followed the ACN's recommendations in that one of the two candidates to fill a judicial vacancy was elected. See Report of the Advisory Committee on Nominations of Judges on the work of its fourth meeting, ICC-ASP/13/46, 24 April 2015.

¹⁷⁴ ICC Statute art. 112(4); ICC-ASP/8/Res.1, Establishment of an independent oversight mechanism, 26 November 2009, para. 1 and Annex para. 6(a); ICC-ASP/12/Res.6, Independent Oversight Mechanism, 27 November 2013, para. 1 and Annex para. 3.

¹⁷⁵ ICC-ASP/12/Res.6, Independent Oversight Mechanism, 27 November 2013. See also ICC-ASP/9/Res.5, Independent Oversight Mechanism, 10 December 2010, and its Annex ('Operational Mandate of the Independent Oversight Mechanism'), operationalizing only the investigation function in the absence of a proper framework of inspection and evaluation functions.

¹⁷⁶ Bureau of the Assembly of States Parties, Fifth meeting 23 June 2015, Agenda and Decisions, para. 3; Independent Oversight Mechanism ICC-ASP/12/Res.6, paras. 5–6; Report of the Committee on Budget and Finance on the work of its twenty-third session, ICC-ASP/13/15, para. 72.

¹⁷⁷ ICC-ASP/8/2, Report of the Bureau on the establishment of an independent oversight mechanism, 15 April 2009, para. 4.

¹⁷⁸ *Ibid.*, paras. 13, 14. A strong preference was expressed by a specially designated Working Group of States' representatives on the matter for a 'lean, cost-effective mechanism which could be expanded on a needs basis' (*ibid.*, para. 16).

¹⁷⁹ *Ibid.*, paras. 43, 44.

¹⁸⁰ *Ibid.*, section G, paras. 41 et seq.

¹⁸¹ ICC-ASP/8/Res.1, Establishment of an independent oversight mechanism, 26 November 2009.

¹⁸² Staff management issues such as underperformance of duties are considered distinct from misconduct and therefore excluded from the IOM's mandate; they are covered by the Court's Staff Regulations. ICC-ASP/8/Res.1, Establishment of an independent oversight mechanism, 26 November 2009, Annex, para. 7 et seq.

¹⁸³ ICC-ASP/8/Res.1, Establishment of an independent oversight mechanism, 26 November 2009, Annex, para. 6, followed by ICC-ASP/9/Res.5, Independent Oversight Mechanism, 10 December 2010, and its Annex

the Office of the Prosecutor that certain elements of the terms of reference of the IOM's three functions risked to infringe its **independence under article 42(2) of the Statute**,¹⁸⁴ however, rendered the process difficult and progress was slow up until 2013.

- 61 In 2012 and 2013, the Bureau's Hague Working Group continued to engage with the ICC with a view to resolving the outstanding issues to operationalize the IOM regarding all three functions. Finally, at the twelfth session of the Assembly in 2013, a comprehensive operational mandate of the IOM was agreed upon by **consensus** also with the organs of the Court, including the Office of the Prosecutor.¹⁸⁵ According to the new operational mandate adopted at that session,¹⁸⁶ the IOM can carry out investigations, inspections and evaluations.¹⁸⁷ Specific to investigations and cognizant of negotiations between the Assembly and the Court over the past years, there are safeguards that the IOM fully respects judicial and prosecutorial independence.¹⁸⁸
- 62 There has been a **clear UN influence** on the establishment of this subsidiary organ; the Assembly seconded personnel from the UN Office of Internal Oversight in the early days of the IOM's establishment, and definitions of 'inspection', 'evaluation' and 'investigation' were inspired by various UN documents.¹⁸⁹ The IOM operates independently from the Court, so that it can deal with misconduct in a manner that is 'objectively credible'.¹⁹⁰ It has the authority to act on a *proprio motu* basis, and may carry out and report 'on any action which it considers necessary to fulfil its responsibilities'.¹⁹¹ IOM staff have significant access rights, including access to a wide range of Court documents and staff who are obliged to cooperate fully, in order to carry out their functions.¹⁹² In the exercise of all its functions, the IOM must have regard for fairness and due process and act in accordance with 'recognised best practices and adhere to the highest ethical standards'.¹⁹³ It reports on its activities to both the Bureau and the Assembly.¹⁹⁴
- 63 The **first function** which the IOM performs is **inspection** of premises or processes. Inspections are 'special, unscheduled, on the spot verifications made of an activity directed towards the resolution of problems' and can be requested by the Bureau or the Head of an Organ of the Court.¹⁹⁵ If the Bureau has made the request for an inspection, the relevant Head of Organ must be notified and consulted and may appoint a representative to witness the inspection.¹⁹⁶
- 64 **Secondly**, the IOM may provide an **evaluation** or coordinate an external evaluation of programmes, projects or policies at the request of the Assembly, the Bureau or a Head of Organ.¹⁹⁷ In the case of a request by the latter, if the IOM has insufficient resources to

('Operational Mandate of the Independent Oversight Mechanism'). See also the Report of the Bureau on the Independent Oversight Mechanism, ICC-ASP/7/28.

¹⁸⁴ For details, see negotiations O'Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP, 2015), 112–113.

¹⁸⁵ Report of the Bureau on the Independent Oversight Mechanism, ICC-ASP/12/27, para. 12.

¹⁸⁶ ICC-ASP/12/Res.6, Independent Oversight Mechanism, 27 November 2013.

¹⁸⁷ ICC-ASP/12/Res.6, Independent Oversight Mechanism, Annex: Operational mandate of the Independent Oversight Mechanism, paras. 6 et seq.

¹⁸⁸ ICC-ASP/12/Res.6, Independent Oversight Mechanism, Annex: Operational mandate of the Independent Oversight Mechanism, paras. 27 et seq.

¹⁸⁹ Establishment of an independent oversight mechanism ICC-ASP/8/Res.1, Annex paras. 3 and 17; Independent Oversight Mechanism ICC-ASP/12/Res.6, Annex fns. 2, 3 and 7.

¹⁹⁰ Report of the Bureau on an Independent Oversight Mechanism, ICC-ASP/7/28, paras. 11 and 15; Independent Oversight Mechanism ICC-ASP/12/Res.6, Annex, para. 2.

¹⁹¹ Independent Oversight Mechanism ICC-ASP/12/Res.6 Annex, para. 4; Independent Oversight Mechanism, ICC-ASP/9/Res.5, Annex, para. 11.

¹⁹² Independent Oversight Mechanism ICC-ASP/12/Res.6, Annex paras. 42–45.

¹⁹³ *Ibid.*, paras. 8, 21, 31 and 59.

¹⁹⁴ *Ibid.*, para. 46.

¹⁹⁵ *Ibid.*, paras. 6–7.

¹⁹⁶ *Ibid.*, paras. 9–11.

¹⁹⁷ *Ibid.*, paras. 16–18; external evaluations can be carried out by a consultancy or by a peer-review panel established by the Assembly, Bureau or a Head of Organ for this purpose.

undertake the evaluation it must provide ‘technical guidance’ for an internal evaluation or suggest options for outsourcing the process.¹⁹⁸ The relevant resolution copies the definition of the evaluation process laid out in the UN Development Programme’s Evaluation Policy: ‘Evaluation is judgement made of the relevance, appropriateness, effectiveness, efficiency, impact and sustainability of development efforts, based on agreed criteria and benchmarks among key partners and stakeholders. It involves a rigorous, systematic and objective process in the design, analysis and interpretation of information to answer specific questions. It provides assessments of what works and why, highlights intended and unintended results, and provides strategic lessons to guide decision-makers and inform stakeholders.’¹⁹⁹

The IOM may also assist an Organ of the Court in establishing or maintaining internal monitoring or evaluation mechanisms and has ‘unrestrained access’ to all internal evaluations conducted by the Court.²⁰⁰

Both inspection and evaluation have similar requirements in terms of **confidentiality** and **reporting** requirements. Requests for action and information gathered in the process of carrying out either an inspection or evaluation must be kept confidential.²⁰¹ Once the action is completed, a report on the inspection or evaluation must be presented to the head of the organ that requested the action or, in the case of Bureau requests, to the President of the Assembly who may forward it to the Assembly or the Bureau.²⁰² The Court must provide the Head of the IOM with a ‘written update’ on the implementation of any IOM recommendations on an annual basis.²⁰³

The **third function** of the IOM, **investigation**, was the first to be formally operationalised in 2010.²⁰⁴ However this was modified by the 2013 resolution which formally operationalised all three of the IOM’s functions.²⁰⁵ The IOM can receive and investigate reports of misconduct and serious misconduct, including illegal acts, by elected officials, ICC staff, contractors or consultants.²⁰⁶ An investigation is defined as ‘a legally based and analytical process designed to gather information in order to determine whether wrongdoing has occurred and, if so, the persons or entities responsible.’²⁰⁷ States Parties were careful to emphasise that the IOM should not interfere with the authority or independence of the organs of the Court and that the IOM’s mandate does not extend to investigation of contractual disputes, issues of human resource management or offences under article 70 of the ICC Statute.²⁰⁸ The detailed procedure for investigations set out by the 2013 Assembly resolution requires that the relevant Head of Organ be notified and in some cases consulted before the investigation commences.²⁰⁹ Then again, the

¹⁹⁸ *Ibid.*, para. 21.

¹⁹⁹ UN Development Programme, Evaluation Policy, UN Doc DP/2011/3, 15 November 2010, para. 9.

²⁰⁰ Independent Oversight Mechanism ICC-ASP/12/Res.6, Annex, paras. 19–20. Note that the Assembly was inspired by the definition of ‘evaluation’ from the UNDP Evaluation Policy which is careful to distinguish ‘evaluation’ and ‘monitoring’ (see UN Development Programme, Evaluation Policy, UN Doc DP/2011/3, 15 November 2010, para. 10); the 2013 IOM mandate includes the ability to assist with internal monitoring of Court projects, policies or initiatives.

²⁰¹ Independent Oversight Mechanism ICC-ASP/12/Res.6, Annex, paras. 12–13 and 23–24.

²⁰² *Ibid.*, paras. 14–15 and 25–26.

²⁰³ *Ibid.*, para. 50.

²⁰⁴ Independent Oversight Mechanism, ICC-ASP/9/Res.5, para. 1.

²⁰⁵ Independent Oversight Mechanism ICC-ASP/12/Res.6, para. 7 and Annex; cf. ICC-ASP/9/Res.5, Annex, paras 2–6.

²⁰⁶ Independent Oversight Mechanism ICC-ASP/12/Res.6, Annex para. 28. Interestingly, resolution ICC-ASP/12/Res.6 refers specifically to rules 25(1)(b) and 24(1)(b) in footnotes 4 and 5 of the Annex regarding definitions of misconduct. However, ‘misconduct’ and ‘serious misconduct’ are defined in rules 24(1) and 25(1) of the Rules, not just the (b) subsections. In contrast, the original resolution establishing the IOM appears to refer to the rules in their entirety (Annex to ICC-ASP/8/Res.1 (2009), para. 11 fns 5 and 6, and also ICC-ASP/9/Res.5 (2010), para. 2).

²⁰⁷ Independent Oversight Mechanism ICC-ASP/12/Res.6, Annex, para. 28 citing UN Office of Internal Oversight Services Investigations Manual, March 2009, available at: http://www.un.org/Depts/oios/pages/id_mar_may2009.pdf, p. 2.

²⁰⁸ Independent Oversight Mechanism ICC-ASP/12/Res.6, Annex, paras. 27, 29–30.

²⁰⁹ *Ibid.*, paras. 32, 34–35.

IOM may proceed with an investigation also without an organ head's consent.²¹⁰ If an organ head believes the proposed investigation is outside of the IOM's legal mandate, it 'shall report such concerns to the bureau and may seek a determination on the matter from the Presidency of the [ICC].'²¹¹ The confidentiality requirements for an investigation by the IOM are somewhat more stringent than those for inspections or evaluations; the IOM must be careful not to identify the source of the initial report of misconduct when notifying the head of organ and the resolution provides detailed procedures designed to maintain confidentiality.²¹² Furthermore, the conclusion of an investigation by the IOM does not result in a report, but rather in a transmission of findings and recommendations to the Court.²¹³ The relevant organ of the Court is required to provide the Head of the IOM with bi-annual updates on how the Court has followed-up on investigations.²¹⁴

5. Working Group on Amendments (WGA)

- 68 At the eighth session of the Assembly, the WGA was established to consider and identify **potential amendments to the Statute and the Rules** in order to submit these to the Assembly for its debate. The WGA's mandate also encompasses to inform the decision of the Assembly as to whether to adopt a proposal and to suggest by which method the amendment should be adopted.²¹⁵ The WGA reports periodically to the Assembly on its discussions and attempts to reach decisions by consensus.²¹⁶ The amendment procedure follows the general lines as established in articles 51, 121 and 122 of the Statute for amendments to the Statute or the Rules.²¹⁷
- 69 The WGA forms one part of the framework designed to streamline and facilitate necessary amendments to the Statute and Rules in order to improve Court procedures. In order to create a comprehensive, stable and sufficiently rigid legal framework, the drafters of the Statute and Rules have conferred the power to modify these instruments to the **Assembly only**.²¹⁸ However this has made it difficult to amend the ICC's procedural framework with a view to improving its efficiency.
- 70 Through the establishment of various subsidiary bodies and groups, the Court and States Parties have attempted to overcome some of the regulatory obstacles to implementing the necessary changes. The **Study Group on Governance** was established by the Assembly to facilitate a structured dialogue between them and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing efficiency and effectiveness at the Court.²¹⁹ Initially established for a period of one year, the Study Group's mandate **continues to be extended**.²²⁰ The Study Group consists of representatives of States Parties;

²¹⁰ *Ibid.*, para. 28.

²¹¹ *Ibid.*, para. 35.

²¹² *Ibid.*, paras. 32, 38–39.

²¹³ *Ibid.*, paras. 40–41.

²¹⁴ *Ibid.*, para. 49.

²¹⁵ ICC-ASP/8/Res.6, Review Conference, 26 November 2009, para. 4; ICC-ASP/11/Res.8 'Strengthening the International Criminal Court and the Assembly of States Parties', para. 80; Report of the Working Group on Amendments, ICC-ASP/11/36, Annex II paras. 1, 6 and 10.

²¹⁶ Report of the Working Group on Amendments, ICC-ASP/11/36, Annex II paras. 5 and 11.

²¹⁷ Report of the Working Group on Amendments, ICC-ASP/11/36, 13 November 2012, para. 6 and Annex II, para. 2; Report of the Working Group on Amendments ICC-ASP/10/32, 9 December 2011; Official Records of the Ninth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, ICC-ASP/9/20 (2010), Volume I, Annex II, para. 1.

²¹⁸ B. Broomhall, article 51 paras. 8, 47, and R S Clark, article 121 para. 4, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd edition 2008).

²¹⁹ Establishment of a study group on governance, ICC-ASP/9/Res.2. See generally on the lessons learnt process at the ICC Ambach, in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (2015), 1277, 1284.

²²⁰ Establishment of a study group on governance, ICC-ASP/9/Res.2, para. 2; ICC-ASP/12/Res.8, Annex I para. 7; ICC-ASP/13/Res.5, para. 53 (referring also to previous mandate extensions in ICC-ASP/10/Res.5 and ICC-ASP/11/Res.8).

representatives of the organs of the Court are regularly invited.²²¹ Stakeholders such as representatives of counsel before the ICC and the NGO-community may also take part as appropriate. To date, it has considered the following issues: the relationship between the Court and the Assembly; strengthening the institutional framework within the Court; increasing the efficiency of the criminal process; and enhancing the transparency and predictability of the budgetary process.²²² The amendment of Rule 4 and the addition of Rule 4*bis* to the Rules resulted from the work of the Study Group, and having been endorsed by the WGA, was adopted at the 10th Session of the Assembly.²²³

In order to facilitate the review of the criminal process, the Court established a ‘**Working Group on Lessons Learnt**’. This working group considers and proposes potential Rule amendments to the Study Group on Governance, which in turn submits it to the WGA.²²⁴ This chain of processes and actors led the Study Group to adopt a ‘**Roadmap**’ regulating the procedure from the Court’s preparation to the assessment by the WGA and final adoption (or not) by the Assembly.²²⁵ The introduction of Rule 132*bis* to the Rules is a prime example of an amendment that went through this system.²²⁶

However the roadmap and the subsidiary bodies are only one of many possible ways to put forward and bring to adoption amendment proposals of the Rules; rules 134*bis*, 134*ter* and 134*quater* were introduced at the 12th Session of the Assembly without the involvement of the WGA, the Working Group on Lessons Learnt, or the Study Group on Governance.²²⁷ These changes were introduced by States Parties at the Assembly in what is generally accepted to have been a reaction to procedural and other developments at the time in one of the cases in the Kenya situation before the ICC.²²⁸ There is a general rule for law-makers not to devise an **abstract-general legal provision** in order to fit the circumstances of a specific case. Events such as the developments at the 12th Assembly in November 2013 could create a precedent devaluing the Roadmap.²²⁹ At the 13th Assembly in December 2014, two Rule amendment proposals that had been submitted by the Court in early 2014 were finally not accepted by the Assembly.²³⁰ The rather complex system established by the Roadmap and the many different actors involved throughout the process render a **more frequent** or dynamic occurrence of **Rule changes improbable**. Since 2014, the Working Group on Lessons Learnt has also focused on procedural **practice innovations** not requiring rule changes;²³¹ the **Pre-Trial Practice Manual** of September 2015 is one example.²³²

6. Special Working Group on the Crime of Aggression (SWGCA)

The Special Working Group on the Crime of Aggression was created by the Assembly in 2002 to prepare and submit proposals for a provision on aggression, in accordance with the

²²¹ Establishment of a study group on governance, ICC-ASP/9/Res.2, para. 5.

²²² Report of the Bureau on Study Group on Governance, ICC-ASP12/37.

²²³ Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, 22 November 2011, para. 21; Report on the Working Group on Amendments, ICC-ASP/10/32, paras. 25–26; Amendments to rule 4 of the Rules of Procedure and Evidence ICC-ASP/10/Res.1.

²²⁴ Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties ICC-ASP/11/31/Add.1, paras. 13–16.

²²⁵ Report of the Bureau on the Study Group on Governance, ICC-ASP/11/31 Annex I paras. 5–9.

²²⁶ Report of the Study Group on Governance on rule 132*bis* of the Rules of Procedure and Evidence, ICC-ASP/11/41, Annex I and Annex II; Amendments to the Rules of Procedure and Evidence ICC-ASP/12/Res.7, para. 3.

²²⁷ Amendments to the Rules of Procedure and Evidence, ICC-ASP/12/Res.7 para. 3.

²²⁸ Situation in the Republic of Kenya, case no. ICC-01/09.

²²⁹ Resolution ICC-ASP/12/Res.8, ‘Strengthening the International Criminal Court and the Assembly of States Parties’, 27 November 2013, para. 39.

²³⁰ Report of the Working Group on Amendments, ICC-ASP/13/31, 7 December 2014, paras. 14 et seq. (as noted in ICC-ASP/13/Res.5, para. 92 albeit without any further evaluation).

²³¹ See Report of the Working Group on Lessons Learnt to the Study Group on Governance Cluster I: Expediting the Criminal Process Progress Report on Cluster B: ‘Pre-Trial and Trial Relationship and Common Issues’, Annex II to ICC-ASP/13/28, Report of the Bureau on Study Group on Governance, 28 November 2014.

²³² Available at: [http://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_\(September_2015\).pdf](http://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_(September_2015).pdf).

previous paragraph 2 of article 5 of the Statute, to the Assembly for its consideration at a ‘Review Conference’ pursuant to article 123 of the Statute²³³ – which was held in Kampala in 2010. The Working Group was **open to all UN member States** on an equal footing, and met periodically throughout the years up until 2009 at Assembly sessions and at informal inter-sessional meetings, known as the **Princeton Process**, to continue efforts to reach an agreement a) on the definition of the crime and b) on the conditions for the exercise of the Court’s jurisdiction. Chaired by the President of the Assembly, the Working Group submitted various reports.²³⁴ In 2009, the Special Working Group was discontinued due to the **completion of its mandate**²³⁵ which resulted in the 2010 Kampala amendments on the crime of aggression.²³⁶

V. Paragraph 5: Participation of Court organs in the Assembly and the Bureau

- 74 While article 112 paragraph 5 provides that the President, Prosecutor or the Registrar may participate in meetings of the Assembly and the Bureau, it does not specify the capacity in which they so partake except to state ‘as appropriate’. In the Preparatory Committee negotiations regarding the participation in Assembly meetings, there was a division of opinion on this between treating them as ‘observers’ and as ‘members’.²³⁷ In Rome, the negotiators agreed to delete both terms, and hence the provision **remains silent** on the issue. The dividing line between the two categories is the **right to vote**. Standard practice since the early days has been to include Court officials in Assembly and Bureau meetings. This is reflected in Rule 34 of the Assembly’s Rules of Procedure.²³⁸ During Assembly meetings, the ICC President is usually given some time for opening remarks and both the Prosecutor and the Registrar are also given time slots to address the Assembly. Further, senior Court officials are admitted to and assist in all working groups and informal discussions. The ICC has **no voting right** during Assembly meetings. This is understandable since States Parties would be reluctant to confer a voting right to the Court in its main (and only) decision-making body. Further, the wording of article 112 itself speaks against such a possibility since it confers, in paragraph 2, a number of decisions to ‘the Assembly’ which excludes the Court.²³⁹
- 75 Regarding the Bureau, a similar logic applies.²⁴⁰ While the Court has no voting rights whatsoever, it is regularly represented through a senior Court official in its meetings both in New York and The Hague.

²³³ ICC-ASP/1/Res.1, Continuity of work in respect of the crime of aggression, 9 September 2002, paras. 2–3; ICC-ASP/7/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, 21 November 2008, para. 60. For the wording of the old Art. 5(2) of the Statute see Resolution RC/Res.6, annex I, of 11 June 2010.

²³⁴ See, for instance, ICC-ASP/6/SWGCA/1, 13 September 2007, and ICC-ASP/7/20/Add.1, Annex II (2009).

²³⁵ See ICC-ASP/7/Res.3, para. 60. But see also ICC-ASP/7/20/Add.1, Annex II (2009), p. 38 (section IV ‘Future work on aggression’).

²³⁶ Resolution RC/Res.6, 11 June 2010, and its annexes.

²³⁷ UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, article 102. The second sentence of paragraph 3 (a) of article 102 reads ‘The President of the Court, the Prosecutor and the Registrar or their representatives may, as appropriate, participate as [observers] [members] in meetings of the Bureau.’

²³⁸ ‘The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and the Bureau in accordance with the provisions of these Rules and may make oral or written statements and provide information on any question under consideration.’

²³⁹ The exclusion of the Court from the definition of ‘Assembly’ follows from article 112(1) which fails to mention the Court as a member; and article 112(5) itself, clearly distinguishing between Court officials and the Assembly.

²⁴⁰ Rule 34 of the Assembly’s Rules of Procedure applies.

VI. Paragraph 6: Regular and special Assembly sessions

The Assembly meets either at the seat of the Court, in the Netherlands, or at the UN Headquarters, in New York. The recent practice has been to hold the session in New York in particular when judges' elections are on the schedule. Accordingly, the 2011 and 2014 Assembly meetings were held in New York whilst 2012, 2013 and 2015 were and will be held in The Hague. 76

When circumstances so require, 'special sessions' of the Assembly can be held. There is little indication in the Statute as to the nature of the 'circumstances' that would require holding such special sessions. Article 51(3) of the Statute foresees that any provisional Rules complementing the Rules of Procedure and Evidence drawn up in order to fill a procedural lacuna shall be put 'before the next ordinary or special session of the Assembly for its decision as to their adoption, amendment or rejection'.²⁴¹ Also regarding the removal from office of a judge, the Prosecutor or a Deputy Prosecutor, Rule 81(3) of the Assembly's Rules of Procedure foresees the holding of a special session. Finally, at the 2014 Assembly meeting, the Assembly mandated the Bureau to 'consider the practicalities of holding a resumed session to fill the remaining judicial vacancy', and to 'proceed with the convening of such a resumed session' if appropriate.²⁴² Neither the Statute nor the Assembly's Rules contain the term 'resumed session'; it can therefore be considered that what is meant by the Assembly in this regard is indeed a special session. 77

Regarding special sessions 'as otherwise specified in the Statute', another relevant area to consider could be Part 13 on Final Clauses.²⁴³ However, that part of the Statute clearly envisages a role for the Assembly in articles 121 and 122 to deal with the amendments to the Statute in a regular session or by convening a 'Review Conference' pursuant to article 123 of the Statute;²⁴⁴ no specific mention is made of a 'special' session. It may be noted that pursuant to article 123 of the Statute it is the Secretary-General of the United Nations that convenes the Review Conference. It is therefore not clear whether Part 13 and the envisaged Review Conference in particular offers any evidence for a 'special session' of the Assembly or should procedurally be treated as such.²⁴⁵ Further practice of the Assembly may clarify the usage of the terms 'resumed session', 'special session' and 'Review Conference' and their procedural handling. 78

The Bureau is the **principal organ to convene** special sessions: either on its own initiative; or at the request of one third of the States Parties; or where 'otherwise specified in this Statute'.²⁴⁶ Rule 8 of the Assembly's Rules of Procedure addresses the issue of special sessions, stating that '[t]he Assembly may hold special sessions and fix the date of commencement and the duration of each such special session.' The provision then continues that special sessions 'may also be convened by the Bureau' in accordance with article 112(6). The wording of the provision is somewhat out of tune with the provision of article 112(6) as it seems to introduce the Assembly as the principal convener *in addition to the Bureau*. However, rule 3 of the Assembly's Rules of Procedure clarifies that special sessions will be held 'in accordance with paragraph 6 of article 112 of the Statute'; the wording of the Rules thus has to be interpreted in the light of article 112(6) of the Statute; the first sentence could therefore be read to merely reflect the 'otherwise specified in this Statute' clause. 79

²⁴¹ Rule 73(3) of the Assembly's Rules of Procedure.

²⁴² ICC-ASP/13/Res.5, para. 95 and Annex I (Mandates of the Assembly of States Parties for the intersessional period), para. 16(c).

²⁴³ For details, see discussion under Part 13 in this commentary.

²⁴⁴ Articles 121(2) and 122(2) of the Statute.

²⁴⁵ The Assembly's Rules of Procedure apply *mutatis mutandis* to a Review Conference, see rule 2 of the Assembly's Rules of Procedure. Since a Review Conference does not represent a regular annual Assembly meeting, it is to be expected that the regulatory framework on special sessions is applicable.

²⁴⁶ Article 112(6), second sentence, of the Statute.

- 80 Rules 14 to 22 of the Assembly’s Rules of Procedure contain further provisions *inter alia* on the provisional agenda of special sessions, the adoption of the agenda and discussions on the deletion or inclusion of items.

VII. Paragraph 7: Majority requirements

1. General rule

- 81 The general rule for decision making in the Assembly is that effort should be made to reach **consensus**.²⁴⁷ This received universal support of all delegations in the preparatory process leading to the Statute. Up to the present, the Assembly has consistently striven for consensus in all its relevant decisions, including in particular amendments of the Statute, the Rules of Procedure and Evidence or the adoption of the budget as well as relevant resolutions.²⁴⁸

2. When ‘consensus cannot be reached’

- 82 There was however difference in views on the method of adopting decisions on matters of substance in the event of failure to achieve consensus. **Several alternatives** were proposed in the Preparatory Committee.²⁴⁹ They included a) ‘a two-thirds majority of those present and voting, representing the absolute majority of States Parties’; b) ‘a two-thirds majority of those present and voting’; and c) ‘an absolute majority of States Parties’. These alternatives were incorporated in paragraph 5 of article 102 of the Draft Statute (today’s article 112) referred by the Preparatory Committee to the Rome Diplomatic Conference. Negotiations in Rome yielded convergence of positions on ‘a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting’. Article 112(7) subparagraph (a) contains this rule. Procedural matters would be decided by simple majority in the absence of consensus, as stated in article 112(7) subparagraph (b).
- 83 The two-thirds majority has also been specifically indicated as a minimum voting requirement in separate Assembly resolutions.²⁵⁰

3. Chapeau: ‘Except as otherwise provided’

- 84 The third sentence of article 112 paragraph 7 also contains the clause ‘except as otherwise provided in the Statute’. Accordingly, specific majority requirements prescribed in provisions of the Statute prevail over the general rule laid down here. There are different provisions in the Statute that provide **different majority requirements** on what are clearly matters of substance. Two examples are the election and removal of judges and the Prosecutor, and the matters concerning amendments to the Statute and a Review Conference.
- 85 For instance, judges shall be elected by the Assembly by the ‘highest number of votes and a two-thirds majority of the States Parties present and voting’, not requiring any specific quorum.²⁵¹ A judge may be removed from office, for reasons specified in the Statute, ‘by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges’.²⁵² Furthermore, the Prosecutor shall be elected by ‘an absolute majority the members of the Assembly of States Parties’; the same majority requirement is applicable to the election of the Deputy Prosecutor.²⁵³ The Prosecutor may be removed from

²⁴⁷ See rule 61 of the Assembly’s Rules of Procedure.

²⁴⁸ See, for 2014, under: http://www.icc-cpi.int/en_menus/asp/resolutions/sessions/Pages/2014%20-%202013th%20session.aspx.

²⁴⁹ UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, article 102 para. 5.

²⁵⁰ ICC-ASP/3/Res.6 (2004), Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court – Consolidated version, para. 15.

²⁵¹ UN Doc. A/CONF.183/9 (1998), see article 36 para. 6 (a).

²⁵² Article 46 para. 2 (a) of the Statute.

²⁵³ *Ibid.*, article 42 para. 4.

office, in accordance with the provisions of the Statute, 'by an absolute majority of the States Parties'.²⁵⁴ In the case of removal of the Deputy Prosecutor, the same majority rule will apply upon the recommendation of the Prosecutor.²⁵⁵

The majority required for adoption of an amendment to the Statute at the Assembly of States Parties or a Review Conference would be 'a two-thirds majority of States Parties', independently of the number of States Parties voting and therefore representing the highest threshold.²⁵⁶ The same majority is also required for amendments to provisions of an institutional nature.²⁵⁷ In respect of convening of a Review Conference, the UN Secretary-General could do so upon a request of a State Party and 'upon approval by a majority of States Parties'.²⁵⁸

A holistic and harmonious interpretation of the chapeau of the third sentence of article 112 paragraph 7 read together with other relevant provisions of the Statute would establish that the two-thirds majority rule based on a quorum of an absolute majority is applicable to the main functions of the Assembly contained in article 112, particularly to decide on the functions outlined in paragraph 2 thereof.

VIII. Paragraph 8: Default to pay contributions

The principle underlying this paragraph is aimed at **promoting financial responsibility** of States Parties towards the Court in order to make the institution viable. The principle is indicated in negative terms. Accordingly, if a State Party does not pay its contribution to the Court, it shall have no vote in the Assembly. The exception recognized to this is if the failure to pay were due to conditions beyond the defaulting State's control.

In the Preparatory Committee there were **different views** as to the need to include the provision and, if it were to be included, regarding the duration of default in order to sanction disenfranchisement to the defaulting State Party.²⁵⁹ Proposals were made ranging from 'two full' to 'three' to 'five' years. The negotiations in Rome recorded a convergence on the inclusion of the provision to insert a threshold of 'two full years'. These need not be necessarily two consecutive years, it suffices 'if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years'.

The **exception** to the principle was made in line with the practice of the UN General Assembly under article 19 of the UN Charter where from time to time the General Assembly adopted conscious decisions permitting voting rights to member States in arrears on grounds of **natural disasters or severe economic hardship** that disabled the otherwise willing member States from payment of their assessed contributions to the UN.

It needs no emphasis that the exception does not cover situations of those States Parties that are economically capable paying their contributions but do not do so for reasons other than fiscal inability or for 'conditions' that are not beyond their control.²⁶⁰ Particularly in the earlier years, States Parties have been forthcoming with their contributions. In light of a slight decline in the more recent general promptness of payments, the 2014 Assembly mandated the Bureau to 'consider additional measures to promote payments by States Parties'.²⁶¹

²⁵⁴ *Ibid.*, article 46 para. 2 (b).

²⁵⁵ *Ibid.*, article 46 para. 2 (c).

²⁵⁶ *Ibid.*, article 121 para. 3.

²⁵⁷ *Ibid.*, article 122 para. 2.

²⁵⁸ *Ibid.*, article 123 para. 2.

²⁵⁹ UN Doc. A/CONF.183/2/Add.1 (1998), Part 11, article 102 para. 6 *inter alia* reads '[A State Party that is in arrears in the payment of its financial contributions to the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding [two full] [five] years]'.

²⁶⁰ The point is unprecedented in reality for under the Charter law and practice, such a consideration has not so far become imminent despite the threat looming large.

²⁶¹ ICC-ASP/13/Res.5, Annex I, para. 13(b).

IX. Paragraph 9: Assembly's Rules of Procedure

- 92 The Assembly's Rules of Procedure were adopted on the 2002 Assembly session²⁶² and have been repeatedly amended since.²⁶³

X. Paragraph 10: Assembly's working languages

- 93 Article 112 paragraph 10 provides that the Assembly's working languages shall be those of the UN General Assembly, and accordingly Arabic, Chinese, English, French, Russian and Spanish.²⁶⁴

XI. Legislative decisions

- 94 In the Assembly's first session, States Parties adopted important supplementary texts required by the Rome Statute—drafted by the Preparatory Commission—including the Rules of Procedure and Evidence (article 51(1)), the Elements of Crimes (article 9(1)), the Financial Regulations and Rules (article 113) and an Agreement on Privileges and Immunities (article 48). The Assembly went on to complete other agreements and texts required by the Rome Statute in its early sessions—this early legislative framework enabled the functioning of the ICC in its first decade and there was no urgency for further legislative changes until the 2010 Review Conference. However, new initiatives have emerged since 2012 to amend the Rules to expedite criminal proceedings and other proposals for Statute amendments have emerged.²⁶⁵
- 95 In the lead up to the **2010 Review Conference of the Rome Statute**, the Assembly played an important role in filtering out more than ten initial proposals for amendments.²⁶⁶ Only those amendments which attained consensus or would carry broad support were taken forward to the Review Conference. It was stressed that it would not be the last opportunity to amend the Rome Statute and that the proposals not considered at the Conference could be taken up at future sessions of the Assembly.²⁶⁷ A Working Group of the Assembly on amendments²⁶⁸ was therefore established to consider proposals not taken forward to Kampala and other proposals to amend the Statute and the Rules.²⁶⁹ This approach ensured that the agenda of the first Review Conference was not overburdened and established mechanisms for the Assembly to consider the remaining proposals.
- 96 The inclusion of the crime of aggression in the Rome Statute in 1998 was part of the effort by the international community to prevent atrocities like the ones committed during World War II from happening again. However, States were unable to agree on a definition for the crime and the exercise of jurisdiction over the crime of aggression in the Rome Statute in 1998 and thus agreed to continue discussions with a view to defining the crime and establishing jurisdictional conditions.²⁷⁰
- 97 To conduct these discussions, the Assembly established the **Special Working Group on the Crime of Aggression (SWGCA)** which existed from 2003 until 2009. In 2009, the SWGCA

²⁶² Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.C.

²⁶³ See for instance Rule 29, last amended in ICC-ASP/12/Res.8, 27 November 2013, Annex III.

²⁶⁴ See Rule 51 of the UN General Assembly's Rules of Procedure, available at: <http://www.un.org/en/ga/about/roppa/lang.shtml>.

²⁶⁵ Report of the Working Group on Amendments, ICC-ASP/13/31, 7 December 2014, paras. 6 et seq.

²⁶⁶ See Report of the Working Group on the Review Conference (n 102).

²⁶⁷ O'Donohue, in: C. Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP, 2015), 16.

²⁶⁸ On the Working Group on Amendments, see above under Section IV.

²⁶⁹ ICC-ASP/8/Res.6, para. 4.

²⁷⁰ See the previous Art. 5(2) of the Statute, amended in Resolution RC/Res. 6, Annex I, 11 June 2010.

proposed an amendment to be considered by the 2010 Review Conference which contained a definition, elements of crimes, and conditions for the exercise of jurisdiction over the crime of aggression.²⁷¹ Following the conclusion of the SWGCA, the Assembly leadership convened several informal meetings which set the stage for the negotiations at the Review Conference.

At the Review Conference in Kampala, Uganda, from 31 May to 11 June 2010, the Assembly achieved many milestones that permanently impact the Court and its Member States. The Conference worked through several proposals in order to bridge the gap between those countries seeking to limit the ways in which aggression could be brought before the Court and those seeking a more expansive approach to the Court's jurisdiction over the crime. The amendments regarding the crime of aggression were adopted by consensus on the last day of the conference, but no country will be affected by the exercise of the Court's jurisdiction over this crime before January 2017 at the earliest.²⁷²

The conditions for the exercise of jurisdiction over the crime of aggression constituted the most controversial and contentious question in the negotiations in the SWGCA leading up to the Review Conference. At the center of the debate was the role of the UN Security Council.²⁷³ On one hand a number of States at Kampala held the view that the Security Council should be denied any role in the ICC's jurisdiction as they believed the role would politicize the Court and compromise its independence and legitimacy. On the other hand, the Security Council's permanent members and some others insisted that all situations about aggression should only go to the Court through the Security Council. After eight years of negotiations in the SWGCA, the participants of the Review Conference were able to reach a final outcome, with many States moving sharply away from their previously declared positions.²⁷⁴

The organization and conclusion of the Kampala Review Conference was the **first major act** in the practice of the Assembly which for the first time operationalized a statutory provision and approved other Statute amendments,²⁷⁵ in addition to an important **stock-taking exercise**.²⁷⁶ This has a **precedent-setting value**. Although the conference dealt primarily with the substantive crime of aggression, there were other proposals made and discussed relating to international terrorism, use of nuclear weapons, other weapons and international drug trafficking. In the future, some of these proposals or any new issues that may arise may lead to convening of similar review conferences pursuant to article 123(2) of the Statute. Such a process may help the Statute become more inclusive regarding the **recent and future developments** of international criminal and humanitarian law.

²⁷¹ On the SWGCA see also above, Section IV.

²⁷² RC/Res. 6, Annex I, sections 3, 4. The amendments included two conditions to the ICC's ability to exercise jurisdiction over the crime of aggression. First, the ICC cannot exercise jurisdiction over this crime until one year after thirty states have ratified the amendment and secondly, States Parties need to authorize the exercise of jurisdiction over the crime of aggression at some point after January 1, 2017, even if the required number of ratifications is achieved before that day. There will be a review of the aggression amendments seven years after the beginning of the Court's exercise of the jurisdiction. See RC/Res. 6.

²⁷³ Clark, 'Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It', in: *EJIL* (2009) 20, 1113.

²⁷⁴ Martinez Vivancos, AMICC (2010), p.1 et seq. The then Assembly President and Liechtenstein's Ambassador to the UN, Christian Wenaweser, noted that '[t]he discussions in Kampala were not easy, but they resulted in what not many had believed was possible: a consensual agreement on all aspects relating to the crime of aggression including on the jurisdictional aspects which had been particularly difficult [...] Part of the agreement was also to delay the activation of the regime until 2017. And, importantly, to make activation conditional on the ratification of 30 States. This seemed to be the appropriate level of political acceptance by States to move forward with a regime that represents such a significant advance for international law.' Statement of H.E. Mr. Christian Wenaweser on the Workshop on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the International Criminal Court, Gaborone, 15 April 2013. Available at: http://crimeofaggression.info/documents/8/Bots_2013-04-15_CW_Opening_Remarks.pdf.

²⁷⁵ RC/Res.5, Amendments to article 8 of the Rome Statute, 10 June 2010.

²⁷⁶ RC/11, Stocktaking of international criminal justice (23 September 2010), on the following core topics: a) the impact of the Rome Statute system on victims and affected communities; b) peace and justice; c) complementarity and d) cooperation. Available at: http://www.icc-cpi.int/en_menus/asp/reviewconference/stocktaking/Pages/stocktaking.aspx.

PART 12 FINANCING

Article 113 Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	4
1. 'all financial matters'.....	4
2. 'governed by this Statute and the Financial Regulations'.....	10
3. 'Except as otherwise specifically provided'.....	11
C. Next budget process.....	12

A. Introduction/General remarks

It is not surprising particularly in the background of current financial situation of the United Nations that the establishment of a new international organization, the ICC, gave rise to a delicate debate on its funding. Financing of the Court was discussed more intensely in the penultimate session of the Preparatory Committee and during the final stage of the Rome Conference.¹

The substantive issues that arose in the negotiations included the following: Who should contribute to the expenses of the Court? Whether the Court should be funded from out of the regular budget of the Court? Should it be provided from the UN but from a special account similar to the budget for peacekeeping operations? Should the United Nations pay when the Security Council refers matters to the Court? Or should it have a separate funding mechanism based on the contributions of its States Parties? Whether voluntary contributions from individuals and private organizations and institutions should be allowed to the funds of the Court? If so, should they be subject to strict conditions? How should the contributions be assessed? That is, what method of assessment should be applied for financing the Court? Should it be the UN scale of assessment or the multi-unit or multi-class system followed in the Universal Postal Unit (UPU) and the International Telecommunication Union (ITU)? Should the accounts of the Court be audited by the UN auditors or by external auditors?

Broadly, on the fundamental issue of sources of funding, two different approaches were recorded in the negotiations.² One school of thought preferred the UN regular budget as the source of funding the Court and consequentially would follow the UN scale of assessment. The other school would have only States Parties pay for the Court. On the issue of voluntary contributions, while one group would encourage them, others would not permit for they are not predictable, and some others could permit them only subject to strict standards governing them.

¹ See the *Ad Hoc* Committee Report, paras. 244 to 249. Also see the 1996 Preparatory Committee I, para. 32.

² *Ibid.*

The Draft Statute referred by the Preparatory Committee to the Rome Conference provided for alternative texts on the divisive issues.³

- 3 The scheme agreed in the Conference and contained in Part 12 of the Rome Statute⁴, articles 113 to 118, provides for a single financial framework for the Court as well as for the Assembly and its organs⁵, and has the following salient features. The funds of the Court would include assessed contributions by the States as well as those provided by the United Nations, particularly to meet the expenses for referrals made by the Security Council⁶. States Parties' contributions would be assessed on the basis of UN scale of assessment and the principles underlying it⁷. Voluntary contributions are permitted subject to relevant criteria laid down by the Assembly of States Parties.⁸ There would be an annual independent audit of the Courts' funds and expenditures⁹.

B. Analysis and interpretation of elements

1. 'all financial matters'

- 4 During the Preparatory Committee, the negotiations focused only on the financing of the Court¹⁰. But in the Conference, the question of finances for the meetings of the Assembly, Bureau and other subsidiary organs of the Assembly arose. The article now provides for a single framework for all the financial matters to be governed by the Statute and the Financial Regulations and Rules¹¹.
- 5 One obvious implication of this would be that this will be different from the Meetings of the States Parties to the Law of the Sea Convention which oversee the International Tribunal for the Law of the Sea. The expenses for those meetings are met from out of the regular budget of the United Nations although the budget of the Tribunal itself is independent of the UN and consists of the assessed contributions of the States Parties to the UN Convention on the Law of the Sea.
- 6 The ICC would also be different from the ICJ in terms of funding and accountability. The ICJ being one of the principal organs of the United Nations is factored into the UN regular budget and hence are subject to the scrutiny of the Committee on Administrative and Budgetary Questions (ACABQ) and the Fifth Committee. The President of the World Court makes annual reporting of the activities of the Court directly to the General Assembly. In addition to the UNGA, the matters relating to the ICJ, including its workload and financial needs, are discussed in the Sixth Committee and on occasion in the Charter Committee.
- 7 As provided in article 113 of the Rome Statute, all financial matters of the Court and the meetings of ASP, including its Bureau and subsidiary bodies, shall be governed by the Rome Statute and the Financial Regulations and Rules adopted by the Assembly. Expenses of the Court and the ASP, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court (article 114). An annual audit of the records, books, and accounts of the Court, including its annual financial statements, shall be done by an independent auditor, pursuant to article 118.¹²

³ Preparatory Committee (Consolidated) Draft, Part 12, 'Financing of the Court', articles 103 to 107.

⁴ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), Part 12, 'Financing', articles 113 to 118.

⁵ *Ibid.*, article 113.

⁶ *Ibid.*, article 115.

⁷ *Ibid.*, article 117.

⁸ *Ibid.*, article 116.

⁹ *Ibid.*, article 118.

¹⁰ *Supra* note 3. The title of Part 12 was 'Financing of the Court'. Article 103 addressed 'Payment of Expenses of the Court'. And article 104 used the terminology 'Funds of the Court'. (Emphasis added).

¹¹ *Supra* note 4. Article 115 is titled 'Funds of the Court and of the Assembly of States Parties'. The title of Part 12 is 'Financing'.

¹² Rome Statute, Retrieved from UN.org: [http://legal.un.org/icc/statute/english/rome_statute\(e\).pdf](http://legal.un.org/icc/statute/english/rome_statute(e).pdf) (p. 61).

The Court has established clear Financial Regulations and Regulations for the running of the court and on financial accountability.¹³ They govern the financial administration of the ICC for a given financial period. The Registrar prepares the programme budget for each of the organs of the Court, in consultation with the concerned and shall submit it to the Committee on Budget and Finance. That Committee submits its comments and recommendations to the Assembly of States Parties which considers takes a final decision on the budget. The Registrar arranges for its publication. Supplementary budget proposals for meeting unforeseen circumstances, if any. Appropriations decided by the Assembly of States Parties constitute authorizations for the Registrar to administer appropriations and incur expenditure and make payments. The basic sources of funds for the ICC are assessed contributions made by States Parties, funds provided by the UN in accordance with article 115(b) of the Statute for the situations referred by it to the Court, voluntary contributions by governments, international organizations, corporations, individuals or other entities in accordance with article 116 of the Statute, and such other funds to which the Court may be entitled to receive.¹⁴

The Registrar has been given the clear responsibility for financial management. By the authority so vested, the Registrar has further delegated authority in 2005 to other concerned officers in the Registry to perform specific functions under his authority such as for procurement purposes, entering into authority. The delegated authority regulations contain provisions of specific authority for concerned officers and with clearly set out financial limits for such contracting. The main purpose of this is to ensure accountability as well.¹⁵

2. 'governed by this Statute and the Financial Regulations'

'This Statute' would mainly mean the provisions in Part 12, especially other articles of this part of the Statute. The Financial Regulations and Rules would deal with the details of all aspects of management of funds as in the case of the United Nations Financial Regulations and Rules. The authority for adopting them rests with the political body that is the Assembly of States Parties to the Statute.

3. 'Except as otherwise specifically provided'

This is more a cautious phrase of the Statute in this case, for there are not many places where financial matters were handled elsewhere in the Statute. Yet another place which could have financial implications is article 79 which provides for establishment of Trust Fund for the victims of crimes.¹⁶

C. Next budget process

The next ASP session will take place on 8–17 December 2014 at the United Nations Headquarters in New York. Regarding finances, the Assembly will consider the Report of the Committee on Budget and Finance on the work of its twenty-second session,¹⁷ Report on Budget Performance of the ICC as at 30 June 2014,¹⁸ the Proposed Programme Budget for

¹³ http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/vademecum/vademecum/Financial%20Regulations%20and%20Rules.pdf.

¹⁴ *Ibid.* Regulation 5.

¹⁵ http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/vademecum/vademecum/Financial%20Regulations%20and%20Rules.pdf.

¹⁶ *Ibid.*, article 79.

¹⁷ Report of the Committee on Budget and Finance on the work of its twenty-second session ICC-ASP/13/5 Retrieved from: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-5-ENG.pdf.

¹⁸ Report on Budget Performance of the International Criminal Court as at 30 June 2014 ICC-ASP/13/8, Retrieved from: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-8-ENG.pdf.

2015 of the Court and its supplementary budget, and financial statements for the period 1 January to 31 December 2013¹⁹.

The Assembly is also scheduled to consider reports submitted to it from the Court, its bodies, and subordinate committees including a report on the activities of the Bureau and of the Board of Directors of the Trust Fund for Victims. The Registry's first, fourth, and sixth quarterly reports on legal aid²⁰ and its report on ways to improve the legal aid procedures will be considered as well as the report of the Court on policy issues, human resources management, cooperation, and organizational structure.²¹ Finally, consideration of the report on activities and programme performance of the International Criminal Court for the year 2013 is on the provisional agenda.

The Proposed Programme Budget for 2015 of the International Criminal Court²² will be proposed by the Registry to the ASP for its approval in December, 2014 at the United Nations Headquarters in New York. The Assembly approves appropriations²³ totaling €135,391,700 in the following scheme (in thousands of euros): Judiciary 12,714; Office of the Prosecutor 41,667.5; Registry 66,257.3; Secretariat of the Assembly of States Parties 3,360.3; Interim Premises 6,000; Secretariat of the Trust Fund for Victims 1,931; Project Director's Office (permanent premises) 1,374.9; and the Independent Oversight Mechanism 463.

The ASP resolves that the Working Capital fund for 2015 shall be established in the amount of €7,405,983 and authorizes the Registrar to make advances from the Fund in accordance with the relevant provisions of the Financial Regulations and Rules of the Court.²⁴ The ASP welcomes continuous contributions of the host State to the rent of the interim premises of the Court in the amount of 50 percent, up to a maximum of €3,000,000 per year for the period of 2013, 2014, and 2015 according to the agreed terms and conditions. The ASP decides that for 2015, the contribution of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the UN for its regular budget applied for 2013–2015, and adjusted in accordance with the principles on which the scale is based. Regarding the financing of appropriations for 2015, the Assembly notes that the contributions to the interim premises by the host States and the payments corresponding to Major Programme VII-2 Permanent Premises Project – Interest will reduce the level of the budget appropriations to be assessed for contributions by States Parties to €130,768,400. Recalling previous resolutions, the Assembly decides to maintain the Contingency Fund at a level consistent with €7 million threshold for 2015.²⁵

Finally, the ASP will decide to establish the special account for the advance of defense costs relating to Mr. Bemba. Taking note that the Court requests that the ASP establish a special account in the amount of €2,067,982, exceptionally funded out of the income generated as a result of the payment of Mr. Bemba's debt to the Court for its advance of his legal fees upon a State Party having implemented a seizure order, and that the Assembly

¹⁹ Financial statements for the period 1 January to 31 December 2013, ICC-ASP/13/12, Retrieved from: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-12-ENG.pdf.

²⁰ Registry's fourth quarterly report on legal aid, ICC-ASP/13/2 Retrieved from: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-2-ENG.pdf.

²¹ ICC Website lists all documentation of relevant reports for the Assembly's thirteenth session: http://www.icc-cpi.int/en_menus/asp/sessions/documentation/13th-session/Pages/default.aspx.

²² Proposed Programme Budget for 2015 of the International Criminal Court ICC-ASP/13/10, Retrieved from: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-10-ENG.pdf.

²³ ICC-ASP/13/10, p. 153; Annex I: Draft Resolution of the Assembly of States Parties on the proposed programme budget for 2015, the Working Capital Fund for 2015, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2015 and the Contingency fund.

²⁴ *Ibid.*

²⁵ Resolutions: ICC-ASP/3/Res.4, establishing the Contingency Fund in the amount of €10,000,000 and ICC-ASP/7/Res.4, requesting the Bureau to consider options for replenishing both the contingency Fund and the Working Capital Fund.

authorize the Court to use the funds in the special account to finance the continued advance of funds to Mr. Bemba.²⁶

The Assembly recognizes potential developments which could impact on the 2015 proposed programme budget – including procedural developments provided for by the Rome Statute, leading to delays in ongoing proceedings, and procedural developments currently unforeseeable.²⁷

²⁶ Cases ICC-01/05-01/08 (main case for Mr. Bemba) and ICC-01/05-01/13 (article 70 case for Mr. Bemba) pending before the Court, as of January 2015.

²⁷ ICC-ASP/13/10, p. 158; Annex IV: List of potential developments which could impact on the 2015 proposed programme budget.

Article 114 Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

- 1 The article lays down the principle that the expense of the Court, the Assembly, including its Bureau and other subsidiary organs, should be paid from the funds of the Court. It is the first time this Part uses the term ‘funds’. It is a redrafting of article 104 of the Draft Statute prepared by the Preparatory Committee to suit the structure of this part,¹ particularly warranted by new article 113 on single framework for all financial matters which was not there earlier.
- 2 Another place in the Statute where the term fund is used is in article 79. But there the term is different in scope and content from the term ‘Funds’ used in this part of the Statute. It refers to the establishment of a Trust Fund for the benefit of victims of crimes.
- 3 The substance and contents of the funds are governed by the next article. It may however be noticed that while the phrase used in article 114 is ‘funds of the Court’, the title of the next article is ‘Funds of the Court and of the Assembly of States Parties’. There is no conflict in the intention and purport of these two articles despite the apparent difference in phraseology. They deserve to be construed harmoniously in the light of negotiating history.
- 4 The thirteenth session of the Assembly of States Parties is scheduled to occur on 8–17 December 2014 at the United Nations Headquarters in New York. Regarding the expenses of the court, the Assembly will consider summary amounts to be paid out of the proposed 2015 budget. The expenses² include (in thousands of euros): Judges 5,727.6; Staff 66,406.9; Consultants, assistance, and overtime expenses 26,193.3; Travel, hospitality, trainings, counsel, furniture, supplies, and other materials and equipment expense 27,063.9. The total amount allocated from the 2015 Budget equals €135,391.7.
- 5 In line with resolution ICC-ASP/9/Res.4,³ IX of the Assembly of States Parties, no resources have been allocated to the African Union Liaison Office (AULO) in the proposed programme budget for 2015. Should the African Union agree to the Court’s request to open a Liaison Office in Addis Ababa, the Court will notify the Committee of the need to access the Contingency Fund up to the amount in the Court’s proposed budget for 2015 of €370,700 in order to proceed with the establishment of the said Liaison Office.⁴

¹ Preparatory Committee (Consolidated) Draft. See article 104.

² Proposed Programme Budget for 2015 of the International Criminal Court, ICC-ASP/13/10, p. 163, Annex VII Summary table by object of expenditure, Retrieved from: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-10-ENG.pdf.

³ Official Records, Ninth Session, 2010, ICC-ASP/9/20, vol. I, part III, ICC-ASP/9/Res.4.

⁴ *Ibid.* at 165, Annex IX Proposed budget for 2015 for the African Union Liaison Office (AULO).

Article 115

Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Literature: Amnesty International, *The International Criminal Court: Making the Right Choices – Part IV: Establishing and Financing the Court and Final Clauses*, AI Index: IOR 40/04/98 (1998); Arsanjani, M.H., ‘Financing’, in: A. Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (OUP 2002) 324–327; Clark, R.S., *The Proposed International Criminal Court: Its Establishment and its Relationship with the United Nations* (Paper prepared for the Society for Reform of Criminal Law Conference, London, 27 July–1 Aug. 1997); Dicke, K., ‘Deciding upon the Budget of the United Nations: A Comparison’, in: R. Wolfrum (ed.), *Law Of The Sea At The Crossroad* (1991) 189; Fletcher, G.P. and Ohlin, J.D., ‘The ICC-Two Courts in One’, (2006) 4 *JICJ* 428–433; O’Donahue, J., ‘Financing the International Criminal Court’, (2013) 13 *ICLRev* (Special Issue: the realities of international criminal justice), 269–296; Reisman, W.M., ‘On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court’, (2005) 99 *AJIL* 615; Schermers, H.G. and Blokker, N.M., *International Institutional Law – Unity In Diversity* (1995) 583–705; Singer, J.D., *Financing International Organization: The United Nations Budget Process* (1961); Stoessinger J.G., *Financing The United Nations System* (1964); Warrick, T.S., ‘Organization of the International Criminal Court: Administrative and Financial Issues’, in: *The International Criminal Court: Observations and Issues before the 1997–98 Preparatory Committee; Administrative and Financial Implications*, (1997) 13 *NEP* 5; Wolfrum, R., *United Nations: Law, Policies And Practice* (1994) 78–86; Provisional Estimates of the Staffing, Structure and Costs of the Establishment and Operation of an International Criminal Court, Preliminary report of the Secretary- General to the Ad Hoc Committee on the Establishment of an International Criminal Court, New York, 3–13 April 1995, UN Doc. A/AC.244/L.2 (20 Mar. 1995)

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	8
1. ‘Funds of the Court and of the Assembly of States Parties’	8
2. ‘the budget decided by the Assembly of States Parties’	9
a) The budget document.....	9
b) The budget period.....	10
c) Stages and responsibilities in the budgetary process.....	11
3. The different subparagraphs	16
a) ‘assessed contributions’	16
b) ‘Funds provided by the United Nations’.....	17

A. Introduction/General remarks

In conjunction with article 114, article 115 sets forth the financing mechanism of the Court. It establishes the two sources of income, identifies the budgetary authority and sets forth the obligation of States Parties to pay contributions to the Court. Moreover, it allows some conclusions to be drawn concerning the budgetary process. This process is examined hereunder in detail, including in light of subsequent decisions taken by the Assembly of States Parties, in particular the adoption of the Financial Regulations and Rules.

Article 114 (which links the funds and the expenses of the Court and the Assembly of States Parties) and article 115 represent the core budgetary and financial provisions of the Statute. They are the two pillars of what can be considered a ‘closed system’ of financing (common to most public international organizations). This system requires that the amount

of funds is determined exclusively by the level of approved expenditures. In other words, income must follow the expenses¹, or: expenses = funds.

- 2 Does this mean that the sources of income of the Court are listed exhaustively in article 115 and that no other means of generating funds are allowed? The answer is not straightforward. There can and most likely will be other types of income such as fines (but see also further below), reimbursement for services rendered, bank interest, rental of premises, etc.² Moreover, savings could be accomplished in the course of a budgetary cycle through favourable changes in exchange rates, the discontinuation of certain activities, or simply because of overly high cost estimates made at the beginning of the cycle. Such income, however, is different in nature from the funds listed in article 115: in the first place, there is no obligation on the part of States Parties to provide them. In addition – with the exception of voluntary contributions, discussed under article 116 – these do not have budgetary implications, only financial ones. That is, they can only affect the cash flow of the Court, not the actual budgeted expenditures made in support of the Court's operation. Other sources of income and savings may be used at the end of a budgetary cycle to reduce the actual amount that will be needed to be transferred by States Parties to the Court's account, but the amount of funds required should always be budgeted for at the level of the approved expenses³.
- 3 It is important to note that the term 'funds' has a much narrower meaning than 'income' or 'revenue'. Article 115 gives the former a defined and exhaustive meaning: 'funds' are those two sources of revenue which are used to pay for the approved expenses. This 'closed' nature of articles 114 and 115 has two important implications. *First*, income other than the funds identified in article 115 will not affect the legal obligation of States Parties to contribute the share for which they have been assessed in order to cover all of the approved expenses (although for bookkeeping purposes the actual payment may be reduced). *Second*, this income cannot increase the total of funds available (and thereby the level of expenses that can be paid for). They are simply not part of the mandatory equation between expenses and funds.

This is not to say that all other forms of revenue will only be of interest to the accountants of the Court. Pursuant to article 116, voluntary contributions may be accepted by the Court and used as additional funds. Voluntary contributions are not 'funds' within the meaning of article 115, but they can be used to pay for additional activities.

- 4 An unusual form of income that is not a 'fund' within the meaning of article 115, nor a voluntary contribution within the meaning of article 116, but which *can* be used for additional activities is provided in Part 7 of the Statute (articles 77 through 80) relating to penalties. Paragraph 2 of article 77 lists two ways of acquiring income: fines and the forfeiture of proceeds, property and assets. Again, given the closed system of articles 114 and 115, any money obtained through such measures will not be considered as 'funds' within the meaning of article 115, and in principle cannot be used to pay for the activities approved in the budget or for any additional activities. This would be different, however, if use is made of the option – provided in article 79 – to transfer money and property collected through fines or forfeiture to the Trust Fund set up for the benefit of victims and their families. Given the way in which these assets are obtained, they cannot be considered as 'voluntary' contributions. Nevertheless, such assets are similar to voluntary contributions in the sense that the Statute allows

¹ Schermers and Blokker, *International Institutional Law – Unity In Diversity* (1995) 583–584.

² For other types of miscellaneous income, see *ibid.*, 669, and Wolfrum, *United Nations: Law, Policies And Practice* (1994) 80.

³ The discussion of the financial mechanisms in this paragraph has been confirmed by the Financial Regulations and Rules, adopted by the Assembly of States Parties at its first session, see PCNICC/2001/1/Add.2 and the Official Records of the first session, ICC-ASP/1/3. Financial regulation 7.1 provides, briefly summarized, that all income other than the contributions reflected in article 115 of the Rome Statute and other than voluntary contributions will be recorded as miscellaneous income. Regulation 5.4 indicates how such miscellaneous income affects the Court's financial flows.

the money in both cases to be used for additional activities. In the case of fines and seizures, there is no reason why this should only benefit States Parties in the form of savings or an increased cash flow. It would therefore seem desirable to make as much use as possible of the option to transfer such funds to the Trust Fund identified in article 79.

The issue of the financing mechanism of the Court was raised in a late stage of the work of the Preparatory Committee, during its last session in March/April 1998. The three bracketed financing options included in the Preparatory Committee's Final Draft in the article relating to the funds of the Court⁴ are reflective of the main considerations on the appropriate financing mechanism. These three options were: a) funding exclusively through assessed contributions of States Parties; b) funding exclusively through the budget of the United Nations; and c) a combination of these two sources, with the proviso that in the initial phase of the Court all expenses would be borne by the UN.

A common concern underlying most of the views expressed during the Preparatory Committee was the impact the financing could have on the effectiveness of the Court. Regardless of the competence and powers given to it, there was a general understanding that its authority would be undermined if hampered by a lack of adequate, long-term and secure funding. The discussion in the Preparatory Committee therefore focused on finding a mechanism that would be able to guarantee the independence and impartiality of the Court, while at the same time avoiding a situation in which the prospective financial burden could be a prohibitive factor for States considering accession to the Statute.

Representatives who focused on the financial security aspect favoured a budget funded primarily through the UN regular budget, as this would present fewer problems of collection. A further argument advanced in favour of UN funding involved the notion that the Court would be acting on behalf of the entire international community⁵. As long as universality of the Court is still a mere aspiration, however, exclusive funding by the UN raises serious issues of state sovereignty and equity, as a (potentially large) number of UN Member States would be funding an organization they do not belong to. Such a financing method, even if it would have been approved by the Diplomatic Conference, is unlikely to have been approved by the UN General Assembly.

If funding through the UN regular budget can be considered as the best or only option for ensuring a consistent source of income, article 115 in its final form indicates that concerns about sovereignty and equity, mixed perhaps with a dose of realism, have prevailed over those of security. Nevertheless, an enforcement mechanism – the potential loss of voting rights – has been included in article 112(2)(d) to meet concerns about secure funding. Moreover, as discussed below, the possibility of UN funding has been retained, although it is clearly of secondary importance. In addition, the formula for determining the proportion of a UN contribution still needs to be worked out.

Finally, it is of interest to note that this article touches implicitly upon certain institutional aspects of the relation between the Court and the Assembly of States Parties. Whereas a terminological distinction is made between the funds and expenses of the Court and those of the Assembly of States Parties, article 115 also suggests that these are covered in one single budget.

The Assembly of States Parties and Bureau are not organs or in any other way part of the Court. Nor are the Court and the Assembly of States Parties part of one overarching legal entity. The budgetary unity of article 115 therefore leads to the peculiar situation that the budget of a particular organization (the Court) also covers the expenses and funds of another – closely linked – entity. This, however, does not need to present any practical problems, but rather seems to be the most viable approach. Although the Court and the Assembly of States Parties are different in nature (the former is an international organization, the latter an

⁴ Preparatory Committee (Consolidated) Draft, article 104.

⁵ See, e.g., Amnesty International, *The International Criminal Court: Making the Right Choices – Part IV: Establishing and Financing the Court and Final Clauses* (AI Index: IOR 40/04/98) (1998).

intergovernmental body with a supervisory and budgetary role) they are inseparable. The establishment of a third entity simply for the sake of a true budgetary unity or the adoption of two completely separate budgetary mechanisms would not have been efficient. Financial regulation 3.1 has since confirmed this budgetary unity in providing that the proposed programme budget of the Court shall include funding for the expenses of the Assembly of States Parties, including its Bureau and subsidiary bodies⁶. Rule 90 of the Rules of Procedure and Evidence also refers to ‘the budget’ as comprising the expenses of both the Court and the Assembly, including its Bureau and subsidiary bodies.

B. Analysis and interpretation of elements

1. ‘Funds of the Court and of the Assembly of States Parties’

- 8 Within the context of the closed financing mechanism established by articles 114 and 115, the limited meaning of the term ‘funds’ has already been examined (see above). The term is therefore an important element in the Court’s budgetary framework.

A minor inconsistency appears in the use of the term in articles 114 and 115. Whereas the title of article 115 suggests two distinct but related funds (‘funds of the Court *and of* the Assembly of States Parties’ (emphasis added)), article 114 only mentions the ‘funds of the Court’. This can only have been an oversight, as article 114 uses this phrase in connection with the expenses of both the Court and the Assembly of States Parties. The budgetary inseparability of the Court and the Assembly of States Parties, now also reflected in financial regulation 3.1, has been addressed above.

2. ‘the budget decided by the Assembly of States Parties’

- 9 a) **The budget document.** The concept of ‘budget’ has been described as ‘the legal act by which the yearly income and expenditure of an organization is estimated’⁷. It is, however, more than simply a list of estimates. The budget provides the legal basis for an organization to incur expenditures and to collect contributions from its members. In the UN system, the development of the budget from an ‘object of expenditure’ budget (in which costs are classified according to the means by which activities are implemented: staff, buildings, equipment and so on) to a programme budget (where costs are listed by field of activity, based on pre-determined programme of work, such as human rights, political affairs, etc.) has increased its importance as a policy orientation document for the Organization and as a basis on which to conduct evaluations of performance. Our assessment, reflected in the first edition of this commentary, that the introduction of programme budgeting for the Court was unlikely has proven to be incorrect. Financial regulation 3.1 refers to the preparation of the proposed *programme* budget for each financial period, and the rules corresponding to this regulation, particularly financial rules 103.2 and 103.3, contain detailed specifications as to the programmatic content of the proposed programme budget. Financial rule 103.3(3) provides that the budget narrative shall set out, where possible, concrete objectives, expected results and key performance indicators, reflecting an orientation towards results-based budgeting that is in keeping with budgetary developments in the UN system of organizations in the period 2003–2008. Introductory remarks in the proposed programme budget for 2004 prepared by the Registrar⁸ also suggest that these concepts have been firmly embraced by the organs of the Court as a means to engage in a planning dialogue with the Assembly of States

⁶ One of the purposes for which the Contingency Fund was established, was to ensure that the Court can meet the costs associated with an unforeseen meeting of the Assembly. See financial rule 6.6 (c).

⁷ Schermers and Blokker, *International Institutional Law* (2005), 678. Singer, *Financing International Organization: The United Nations Budget Process* (1961) 54–55, lists further functions of the budget document.

⁸ Originally issued as ICC-ASP/2/2 and also reflected in the Official Records of the second session of the Assembly of States Parties, ICC-ASP/2/10.

Parties. It is worth noting, however, that the start-up phase of the Court, with its emphasis on institution- and capacity building, may lend itself much better to such programme and results-oriented budgeting than a fully operational phase. At such a later stage, the risk of jeopardizing the Court's independence through programme budgeting would increase, allowing room for efforts to use the budget as a vehicle for mandating specific – and politically opportune – prosecutorial and judicial activities.

b) **The budget period.** The length of the budgetary cycle has been addressed by the Assembly of States Parties in the financial regulations and rules. As article 118 of the Rome Statute on the annual audit already appeared to presage, financial regulation 2.1 provides that the financial period shall consist initially of one calendar year, unless otherwise decided by the Assembly of States Parties for the first-year budget. This regulation also provides that the Assembly shall keep this period under review. At its first session, the Assembly of States Parties resolved that, as an exception to financial regulation 2.1, the first financial period would extend from 1 September 2002 to 31 December 2003⁹. The first programme budget thereafter was prepared for the calendar year 2004, and adopted as such by the Assembly of States Parties¹⁰. Since then, the Assembly has approved the programme budget on an annual basis for the calendar year. No further decisions have been taken by the Assembly with regard to the financial period.

Obviously, an annual budget allows more budgetary flexibility than longer cycles, as it is easier to adapt to increases or reductions in the caseload of the Court, but it is also more labour-intensive for both the Court and the Assembly of States Parties, including its Committee on Budget and Finance. The UN (and specialised agencies) follow a two-year cycle¹¹. Effective 1 January 2002, the two *ad hoc* Tribunals have 'biennialized' their formerly annual budgets, pursuant to decisions of the General Assembly¹².

There has been some occasional discussion in the Assembly's subsidiary body, the Committee on Budget and Finance, and among States Parties on moving to a biennial budget. The Court has faced many challenges in determining its budgetary needs for the following year, so projecting those needs two years in advance poses even greater uncertainties.¹³ The fact that the Court has yet to complete a full judicial cycle was another factor for deferring further consideration of the possible biennialization of the budget.

Having the dates of Assembly sessions fixed for November/December each year allows the Court to prepare its budget on a more accurate basis than would be the case for Assembly sessions taking place earlier in the year.

c) **Stages and responsibilities in the budgetary process.** Article 115 identifies the Assembly of States Parties – the only body in which all contributing States are represented – as the sole budgetary authority of the Court, indicating that it is the Assembly which 'decides' on the budget. This wording is echoed in rule 90 of the Rules of Procedure and Evidence, which provides that the Assembly shall 'decide' on the budget, comprising the expenses of both the Court and the Assembly, including its Bureau and subsidiary bodies. Article 112, on the competence of the Assembly of States Parties, provides a fuller description in paragraph 2 (d), pursuant to which the Assembly shall 'consider and decide the budget for the Court'. This minor discrepancy is not likely to have any practical consequences.

⁹ Res. ICC-ASP/1/Res.12, section A, para. 1.

¹⁰ Res. ICC-ASP/2/Res.1.

¹¹ UN Financial Regulation 1.2, UN Doc. ST/SGB/2003/7.

¹² See General Assembly Resolutions 55/225 of 23 Dec. 2000 and 55/226 of the same date, respectively, both of which cite the use of two-year employment contracts as one of the benefits which this reform would make possible.

¹³ See for example the Report of the Bureau of the Study Group on Governance, annex II, paras. 38 and 39, ICC-ASP/11/31. In para. 39 the Study Group requested the Court to prepare, as a medium term project, a discussion paper on the biennial budgets option articulating fully the implications, both positive and negative, on the option of transitioning from annual to biennial budgets. The Study Group urged the Court to draw also on the lessons learned by other organisations, including other international courts and tribunals.

In the absence of any provisions that indicate otherwise, the decision-making process for approving the budget is that to be followed for all other decisions taken by the Assembly: each State has one vote (*i.e.* no weighted voting corresponding to contribution) and ‘every effort’ shall be made to reach a decision by consensus. Failing that, a decision on the budget – clearly a matter of substance rather than of procedure – will require a two-thirds majority of those present pursuant to article 112(7)(a).

In order to assist it in the consideration and adoption of the budget, the Assembly decided at its first session to establish a Committee on Budget and Finance, and entrusted it with the responsibility to undertake ‘the technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature as may be entrusted to it by the Assembly of States Parties’¹⁴. More specifically, financial regulation 4.7 provides that the Committee shall consider the programme budget proposed by the Registrar and shall submit its comments and recommendations thereon to the Assembly. The Committee resembles the Advisory Committee on Administrative and Budgetary Questions (ACABQ) of the UN General Assembly in its mandate and in the fact that its members serve in their individual capacity rather than as representatives of Member States. The consideration and adoption of the budget forms only one of the stages that constitute a full budgetary cycle or process. An entire cycle generally includes preparation and presentation, consideration and adoption, implementation, monitoring, evaluation and audit (the latter is addressed in article 118). Various aspects of the budgetary process have been addressed by the Assembly of States Parties in the adoption of the Financial Regulations and Rules¹⁵ as well as other decisions, and will be examined here.

- 12 The *Rome Statute* leaves open the question of who or what is responsible for preparing the budget document. In the UN, all budgetary estimates are prepared by the Secretariat and nominally presented by the Secretary-General – as chief administrative officer – to the General Assembly¹⁶. It is ‘his proposed programme budget’¹⁷, and the Secretary-General bears responsibility for the financial estimates. This procedure has also been followed for the two *ad hoc* Tribunals. Estimates are drawn up by the tribunals and, following review by the Secretariat, are presented to the General Assembly as the ‘Secretary-General’s report on the financing of the international tribunals. This unity in presenting financial estimates within the UN ensures consistency and clarity in the lines of accountability *vis-à-vis* the budgetary authority.
- 13 Following the adoption of the *Rome Statute*, the question arose for the Court as to who or which organ would be authorised to prepare and present the budget proposal and consequently bear responsibility for planning and making financial estimates. As already indicated, the Statute does not contain an express provision on this point. The various answers presented different institutional problems. It is evident that the Prosecutor could not have assumed budgetary responsibility for the two other organs. Moreover, entrusting the preparation and presentation to the President (as the nominal head of the Court) or the Presidency (as the entity responsible for the ‘proper administration of the Court’)¹⁸ would have created complications as it would have subjected part of the judiciary to the administrative and political supervision of the States Parties¹⁹. In addition, as is clearly indicated by

¹⁴ Res. ICC-ASP/1/Res.4, Annex, paragraph 3.

¹⁵ For the United Nations, a number of budgetary principles are set out in the Financial Regulations and Rules, while the whole process is elaborated in the Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation (see U.N. document ST/SGB/2000/8). The Assembly of States Parties could adopt similar regulations for the Court in keeping with the practice of the UN, although the wording of article 113 of the *Rome Statute* seems to exclude the possibility of any additional Regulations outside the Financial Regulations.

¹⁶ UN Financial Regulation, see note 33, 2.1.

¹⁷ Article 3.2 para. 5, of the UN Regulations Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation.

¹⁸ Article 38 para. 3 (a).

¹⁹ See in this connection the observations of the Registrar of the ICTY in her address during the March/April 1998 Session of the Preparatory Committee, on 19 Mar. 1998. Highlighting the fact that the Draft Statute

article 38 para. 3 (a), the Presidency could not and would not have been responsible for the administration of the Office of the Prosecutor.

The Financial Regulations and Rules have consequently accorded the authority to prepare and submit the programme budget and monitor its implementation to the Registrar. He or she is, after all, the principal administrative officer of the Court²⁰, responsible for ‘the non-judicial aspects of the administration and servicing of the Court’²¹, performing his or her functions under the authority of the President²². Nevertheless, here too there are institutional questions to address and overcome. Both article 115 and article 112(2)(d) indicate that there is only one budget: the budget for the Court. In practical terms, this budgetary unity would also suggest that one office or official is responsible for its preparation. This budgetary unity, however, needs to be aligned with the strongly developed independence and autonomy of the Prosecutor. According to article 42(2), the Prosecutor shall have ‘full authority over the management and administration of the Office [of the Prosecutor], including the staff, facilities and other resources thereof’. How then have the administrative responsibilities of the Registrar been reconciled with the autonomy of the Prosecutor on the one hand, and the unity of the budget of the Court on the other? Moreover, how has the administrative authority of the President and the Presidency (even though this does not extend to matters concerning the administration of the Office of the Prosecutor²³) been accommodated?

Financial regulation 3.1 simply requires the Registrar to prepare the budget ‘in consultation’ with the Presidency and the Office of the Prosecutor. Financial rule 103.2 indicates that the preparation process starts with a request for budget proposals from the Registrar the Prosecutor and other heads of units or other organs of the Court. The Registrar may prescribe when and how such proposals are to be submitted. On the basis of these proposals, the Registrar then prepares a consolidated draft programme budget and submits it to the Committee on Budget and Finance (on which see further below). The manner in which the consultations referred to in financial regulation 3.1 are to be held, how differences of opinion are to be resolved, and whether the Registrar has a final say as to the level and contents of the consolidated budget, is not further addressed. In practice, an internal Court body called the Coordination Council, which is composed by the three heads of organs (the President of the Court, the Prosecutor and the Registrar), provides a forum for senior level decision-making on the proposed programme budget.

The *Rome Statute* is silent on other budgetary phases identified above: the implementation of the budget approved by the Assembly of States Parties, and the monitoring and evaluation thereof. On implementation issues, financial regulation 4.1 provides that the decisions taken by the Assembly on the budget – also known as appropriations – constitute authorizations to the Registrar to incur obligations and make payments in accordance with those appropriations. Other regulations and rules further underline the central role of the Registrar in budgetary measures, despite articles 48(2) and 38(3)(a) already signaled above. In the same vein, on monitoring and evaluation aspects, financial rule 103.2(3) indicates that the Registrar is responsible for monitoring the achievement of objectives and service delivery during the financial period, and for reporting on actual performance attained in the context of the following budget proposals.

3. The different subparagraphs

a) ‘assessed contributions’. The fact that contributions are ‘assessed’ implies that the share of each State Party is calculated or weighed according to certain principles. The method for

appeared to establish a link of accountability between the Presidency and the States Parties, the Registrar commented that ‘[t]he independence and effectiveness of an international criminal court would be seriously hampered if the judicial organ and individual judges would be made subject to administrative accountability’.

²⁰ Article 43 para. 2.

²¹ Article 43 para. 1.

²² Article 43 para. 2.

²³ Article 38 para. 3 (a).

determining these contributions – the scale of assessment – is provided for in article 117. ‘Assessment’ also implies that the contributions from States Parties are mandatory. The wording of article 115 (‘the expenses [...] shall be provided by [...] assessed contributions’) indicates that if expenses have been approved there is no other option than for States Parties to pay their dues. Moreover, article 112 establishes an enforcing mechanism: States Parties which are in arrears in the payment of their contributions for a period of two or more years lose their right to vote, unless the Assembly of States Parties can be convinced that this situation is due to conditions beyond the control of the State Party in question²⁴. The conclusion is that, although not expressly formulated in article 115, States Parties are under a legal obligation to pay their assessed contributions.

- 17 **b) ‘Funds provided by the United Nations’.** The second source of funds of the Court and of the Assembly of States Parties will be those provided by the United Nations.

The phrase ‘subject to the approval of the General Assembly’ appears to have no legal significance in the sense that it seems to confirm the obvious: budgetary provisions for the payment of expenses by the UN require the General Assembly’s approval. The budgetary primacy of the General Assembly is anchored in the Charter of the United Nations and does not, from a legal point of view, require confirmation whenever funds are to be paid by the United Nations. Nor does ‘approval’ imply a more stringent decision-making process than that applicable to the regular UN budget²⁵. It is possible, therefore, (although the wording is ambiguous) that the purpose of this phrase is to subject the whole *funding modality* provided in paragraph (b) to the approval of the General Assembly. That is, this provision intends to create a general financial obligation on the part of the United Nations but cannot do so, of course, without the approval of the General Assembly²⁶. It is thus not a reference to the UN budgetary process in which the contribution to the Court in any given year or biennium are to be decided upon by the General Assembly (even if such expenses flow from referrals of the Security Council) but a reflection of the fact that an agreement cannot create obligations on behalf of third parties. The Relationship Agreement between the Court and the United Nations,²⁷ which is provided in article 2 of the Statute, contains an article 13 on ‘financial matters’ wherein the UN and the Court agree that ‘the conditions under which any funds may be provided to the Court by a decision of the General Assembly pursuant to article 115 of the Statute shall be subject to special arrangements.’ Other than a number of incidental references which do not provide further details, the Assembly of States Parties has not addressed this funding modality in the Financial Regulations and Rules.

- 18 It is noteworthy that paragraph (b) provides for funds paid by the UN ‘in particular in relation to referrals by the Security Council’. This choice of words implies that there may be other, as yet undefined situations, in which the UN could be called upon or required to contribute to the Court’s funds.

The first question is why the UN should pay at all. One way of analysing this is to consider referrals by the Security Council as services rendered by the Court to the UN. In this light, it is clearly justifiable that expenses incurred due to those services should be borne by the referring organization. For situations other than referrals, the justification for payment by the UN is less evident. An answer may be found in the discussions leading to the financial provisions of the Statute. Views expressed in favour of a budget funded exclusively by the UN were based, among others, on the argument that, since the Court would act on behalf of the entire international community, it was more appropriate that the UN should bear the costs (see the discussion above).

²⁴ Article 112 para. 8 is similar to the procedure provided in article 19 of the UN Charter.

²⁵ Pursuant to article 18 para. 2 of the UN Charter, budgetary questions are to be decided upon by a two-thirds majority. In resolution 41/213 of 19 Dec. 1986, however, the General Assembly agreed to decide budgetary questions, to the extent possible, by consensus.

²⁶ UN Financial Regulations, see note 33, 3.10 and 13.2.

²⁷ UNTS, vol. 2283.

In addition, how could one determine the share of the UN? A formula for establishing the proportion of UN funds to the total funds of the Court cannot be made on the basis of any budgetary or legal principles. This will rather be a matter for negotiation. Nevertheless, it is clear that referrals should be calculated on the basis of the ‘expenses incurred’, although that may still create some difficulties in practice. Standard administrative and other overhead costs may not necessarily increase due to referrals, and certain operating expenses cannot always be linked to a particular case or trial. Nevertheless, it should not be impossible to arrive at adequate approximations. Situations other than referrals, in which a clear link between expenses due to referral and corresponding reimbursement is absent, will be more problematic.

The ill-defined extent of the UN contribution to the Court’s budget suggests that the wording is a compromise between the two main views on the financing mechanism. While exclusive payment through the UN regular budget did not receive sufficient political support, particularly from the largest contributors to the UN budget, a complete exclusion of UN involvement was also not acceptable to many States. There simply was not a sufficient consensus, however, to define the role of UN funding in the Court’s budgetary framework. To a certain degree the matter was addressed by the States Parties, within the general context of the bringing the Court into relationship with the United Nations on the basis of article 2 of the Statute via the Relationship Agreement.

What had previously been a theoretical matter became a reality when the UN Security Council referred the situation in Darfur (Sudan) and in Libya to the Court in 2005 and 2011, respectively. The costs which the Court would incur with regard to those referrals were to be borne by the States Parties to the Rome Statute, as the Security Council resolutions did not provide any funding for the referrals, but rather contained a provision expressly indicating that no such funding would be provided.²⁸ In 2011, the Assembly resolution on the budget included a new section specifically referring to the issue of UN contributions to the Court, with similar language being included in the annual resolution on the budget since then²⁹:

Referrals by the Security Council

‘The Assembly of States Parties,

Noting the financial implications of the situations referred to the Court by Security Council resolutions 1593 and 1970,

Recalling that, pursuant to article 115 of the Rome Statute, expenses of the Court and the Assembly shall be provided, inter alia, by funds of the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council,

Mindful that, pursuant to article 13, paragraph 1, of the Relationship Agreement between the Court and the United Nations, the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations shall be subject to separate arrangements,

Invites the Court to include this matter in its institutional dialogue with the United Nations and to report thereon to the eleventh session of the Assembly.’

The issue of the financing of referrals has been raised in different fora³⁰, including during the consultations on the annual UN General Assembly resolution on the Court, the consultations on the proposed programme budget of the Court³¹ and in the UN Security

²⁸ UN Doc. S/RES/1593 (2005), paragraph 7: ‘that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily’. UN Doc. S/RES/1970 (2011), paragraph 8: ‘Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily; ...’.

²⁹ ICC-ASP/10/Res.4, section G.

³⁰ See for example the 15 July 2011 non-paper which Liechtenstein circulated to UN Member States wherein it called for the UN to fund previous referrals and for the Council to avoid its practice of placing all resulting financial obligations on the Court in the future. http://www.securitycouncilreport.org/atf/cf/{65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9}/Financing_of_situations_referred_to_the_ICC_by_the_UNSC.pdf.

³¹ The budget consultations take place via The Hague Working Group on the Bureau and then continue in the annual Assembly session.

Council.³² Despite such discussions over the course of several years, there has been no substantive progress on the matter. At the UN, only a short paragraph on the issue may be found in the General Assembly resolution on the Court,³³ though some States have continued to encourage discussion on the financing of referrals.³⁴ The issue generates new interest every time a possible new referral is mentioned, as the financial constraints being faced by major contributors to the Court's budget pose challenges to the continued absorption of such costs by the ASP. Nonetheless, it would seem that, at least for the time being, supporters of the Court see the externalization of the costs of referrals as a political reality they are willing to accept if that is necessary for a referral.³⁵

³² Some States made comments during the open debate on 'Peace and Justice with a Special Focus on the Role of the International Criminal Court.', which was held on 17 October 2012.

³³ Operative paragraph 14 of UN General Assembly resolution 69/279 reads: *Recalls* the Relationship Agreement, and notes that expenses related to investigations or prosecutions incurred by the International Criminal Court in connection with situations referred by the Security Council or otherwise continue to be borne exclusively by States parties to the Rome Statute.

³⁴ Statements made on 9 September 2014 when the General Assembly adopted the resolution on the Court may be found in the respective summary record, A/68/PV.107. See also the statements made on 8 May 2015 contained in summary record A/69/PV.89.

³⁵ The 22 May 2014 draft resolution concerning the referral of the situation in the Syrian Arab Republic contained similar language to that found in the two referrals by the Security Council. The resolution was co-sponsored by 65 States; it was vetoed by China and the Russian Federation when put to a vote in the Security Council on that date. Draft operative paragraph 8 of the proposed resolution read as follows: 'Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily and encourages States to make such contributions, noting the need for funding of expenses related to investigations or prosecutions of the International Criminal Court, including in connection with situations referred to the Court by the Security Council, as stated in General Assembly resolution 67/295'; UN Doc. S/2014/348. See also UN Doc. S/PV.7180 for the statement by Argentina on the issue of financing of Security Council referrals.

Article 116

Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Literature: See article 115.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	5
1. 'without prejudice to article 115 ... additional funds'.....	5
2. 'Governments, international organizations, individuals, corporations and other entities'.....	7
3. 'relevant criteria adopted by the Assembly of States Parties'.....	8

A. Introduction/General remarks

In addition to the funds listed in article 115, article 116 provides a third, but distinct, source of income for the Court, allowing States and other interested parties to make donations to the Court outside its main budget. 1

The authority to accept and utilize voluntary contributions is commonplace among international organizations, particularly within the UN system, although the degree of reliance on non-assessed contributions varies. Organizations active in the areas of development, humanitarian aid, technical assistance, etc., are generally more or wholly reliant on such donations (e.g. UNDP, UNRWA, UNHCR, UNICEF). Within the UN itself the total of voluntary contributions is only a fraction of the regular budget funded by assessed contributions. Similarly, although important and large-scale projects of the ICTY and the ICTR have been funded with voluntary contributions, voluntary funds represent a small value relative to their respective regular budgets¹. The International Court of Justice has never accepted voluntary contributions in support of its own work², although a trust fund has been established by the UN to help poorer States defray their own costs ensuing from proceedings before the Court.

As mentioned in the discussion relating to article 115, the way in which the Court was to be funded did not enter the foreground of the discussions until the last session of the Preparatory Committee (March–April 1998). Among the various financing modalities preferred, practically none of the participating States were in favour of a financing mechanism that relied exclusively on voluntary contributions. The Preparatory Committee's Final Draft provided for a separate provision to cover voluntary contributions³. This provision remained virtually the same in the *Rome Statute*. The Assembly of States Parties addressed issues relating to voluntary contributions at its first⁴ (September 2002) and second⁵ (September 2

¹ Tenth Annual Report of the ICTY, UN Doc.A/58/297, S/2003/829 (20 Aug. 2003), pp. 62–65, paras. 292–306. Budget for the ICTR for the biennium 2004–2005: report of the Secretary-General, UN Doc. A/58/269, page 7.

² Peck and Lee (eds.), *Increasing the Effectiveness of the International Court of Justice, Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (1997) 212.

³ Preparatory Committee Draft.

⁴ Peck and Lee (eds.), *Increasing the Effectiveness of the International Court of Justice, Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (1997) 212.

⁵ At its second session, the Assembly adopted resolution ICC-ASP/2/Res.6 on the establishment of a trust fund for the participation of the least developed countries in the activities of the Assembly of States Parties.

2003) sessions. Provisions relevant to voluntary contributions – other than those relating specifically to the Trust Fund for the benefit of victims established pursuant to article 79 of the *Rome Statute* – are discussed throughout this article.⁶

- 3 Obviously, there is no obligation on behalf of the States Parties (let alone the other donors mentioned) to make voluntary contributions, and failure to donate such funds is not penalized, unlike the failure to pay assessed contributions, which is punished by the loss of voting rights in the Assembly, as provided in paragraph 8 of article 112 of the *Rome Statute*. It should also be noted that article 116 refers to contributions in the form of monies (‘funds’) only. This should not, however, be interpreted as an exclusion of other forms of donations, for example contributions in kind, *e.g.* donations of materials, equipment and services. The *ad hoc* Tribunals have greatly benefited from such in kind contributions (including several courtrooms)⁷ and the Court may take advantage of such offers of contributions under article 116. The contribution of *gratis* personnel is, of course, subject to a separate regime.⁸
- 4 In the practice of the UN and the *ad hoc* Tribunals, donations are held in trust funds. Similarly, voluntary contributions to the Court, with the exception of contributions for which no purpose is specified, are to be held in trust funds or special accounts pursuant to financial regulation 7.3⁹. The authority to establish and close trust funds and special accounts funded wholly by voluntary contributions has been granted to the Registrar pursuant to financial regulation 6.5. Moreover, financial regulation 7.2 provides that only the Registrar may accept voluntary contributions, indicating that others, such as the President and the Prosecutor, do not have such authority.

Article 79 of the *Rome Statute* allows money collected through fines to be transferred to a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, but this article appears to use the concept of a trust fund in a different meaning, as article 79 makes no specific mention of voluntary contributions, and, conversely, article 116 does refer to this particular Trust Fund. Nevertheless, our observation, noted in the first edition of this publication, that voluntary contributions could be used in practice to the benefit of victims and witnesses mentioned in article 79¹⁰, and that therefore funding for this Trust Fund would not necessarily be limited to fines, has since been borne out: the terms of reference for the Trust Fund adopted by the Assembly of States Parties provides that it shall be funded by a variety of resources, including voluntary contributions from the same kinds of donors listed in article 116¹¹. Articles 79 and 116 have thereby been aligned with each other.

B. Analysis and interpretation of elements

1. ‘without prejudice to article 115 ... additional funds’

- 5 Voluntary contributions are ‘additional funds’ – additional, that is, to those listed in article 115. Since voluntary contributions are not covered by article 115, they are not ‘funds of the

⁶ A list of voluntary contributions may be found in the annual Financial Statements. See for example Financial Statements for the period 1 January to 31 December 2014, ICC-ASP-14/12, schedule 6.

⁷ See, for example, Fifth Annual Report of the ICTY, UN Doc. A/53/219 – S/1998/739 (10 Aug. 1998), para. 263.

⁸ The ASP adopted guidelines for the selection and engagement of *gratis* personnel in resolution ICC-ASP/4/Res.4, annex.

⁹ Financial regulation 7.3: ‘[v]oluntary contributions accepted for purposes specified by the donors shall be treated as trust funds or special accounts’. Financial regulation 7.4: ‘[v]oluntary contributions in respect of which no purpose is specified shall be treated as miscellaneous income and reported as “gifts” in the accounts of the financial period’.

¹⁰ See also R.S. Clark/D. Tolbert, ‘Toward an International Criminal Court’, in: Y. Danieli et al. (eds.), *The Universal Declaration Of Human Rights: Fifty Years and Beyond* 107 (1998).

¹¹ See resolution ICC-ASP/1/Res.6 on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, paragraph 2.

Court and of the Assembly of States Parties' within the meaning of that article. As discussed under article 115, articles 114 and 115 provide for a 'closed system' of approved expenses and approved funds, with the underlying principle that the resources should follow – and be equal to the costs, rather than the other way around. In this system, voluntary contributions do not form part of the equation between expenses and funds. They are not included in the budget, nor can they affect that budget on either the expenses or the funding side. This is what is meant by the phrase 'without prejudice to article 115'. The generosity of certain parties cannot relieve States Parties of their obligation to pay their assessed contributions, nor can voluntary contributions be used to meet the expenses of the Court within the meaning of article 114. In other words, funds received through voluntary contributions are not used to arrive at lower assessments of the States Parties, but can and should only be used to fund additional activities – additional to those approved in the budget.

Since the adoption of the Financial Regulation and Rules of the Court by the Assembly at its first session, however, these comments require an additional observation. As mentioned above, financial regulation 7.4 distinguishes between voluntary contributions received for purposes indicated by donors and those contributions in respect of which no purpose is specified: while the former shall be held in trust funds to be established by the Registrar, the latter will be treated as miscellaneous income. Pursuant to financial regulation 5.4(c), miscellaneous income (i. e., including the voluntary contributions considered as such pursuant to financial regulation 7.4.) are used to reduce the net amount States Parties need to pay as their assessed contributions, and cannot, therefore, be used to fund additional activities of the Court¹².

In part, excluding voluntary contributions from the correlation between expenses and funds is desirable because of the unpredictable and uncontrollable way donations are generally made. Voluntary contributions cannot provide the guarantee of long-term secure funding. There are also other institutional considerations. A too heavy reliance on voluntary donations could lead or could be perceived to lead to an undue dependence on affluent States or other parties. The underlying argument is that an international organization should be able to carry out all its mandated functions with use of the assessed contributions provided by its members. This argument carries even more weight for an international judicial organ, for which independence and impartiality are crucial. Indeed, these considerations have been taken into account by the Assembly of States Parties in the adoption of criteria governing donations to the Court (see section 3 below).

2. 'Governments, international organizations, individuals, corporations and other entities'

This is perhaps the only example of a constitutive document of an international organization in which the possible sources of voluntary contributions are expressly spelt out. The use of the phrase 'Governments' also allows voluntary contributions from States which are not Party or signatory to the Statute, unlike contributions of gratis personnel, which under article 44 are limited to Governments that are States Parties. Contributions from 'individuals' is a somewhat novel inclusion, and may remain a rare occasion. For obvious reasons, budgets that mainly contain administrative expenses as opposed to substantive or operational costs are less likely to attract contributions from the general public. In general, those organizations relying to a large extent on voluntary contributions (such as UNICEF and UNDP) are more likely to receive donations from individuals. An extensively publicized donation to the UN by an individual was made by Ted Turner in 1998. Contributions by individuals, corporations and other entities also raise the question of whether contributions should be accepted if these

¹² In the practice of the *ad hoc* Tribunals, voluntary contributions in respect of which no purpose is specified by a donor have been rare, most Governments and other donors preferring to support particular activities considered to be of particular value or interest to them. Prospective donors of the Court should, however, be advised of the consequences of not specifying a purpose for their contributions.

are from a source which is obviously trying to influence the Court in some way, or from a source that is suspect for some reason, *e.g.* due to a certain involvement in human rights abuses. These issues may be addressed in the rules governing the acceptance of contributions.

3. 'relevant criteria adopted by the Assembly of States Parties'

- 8 As noted above, in order to ensure that the contributions are in all respects proper, this provision places responsibility on the Assembly of States Parties to develop appropriate criteria to govern such contributions. These criteria could govern, for example, the purposes for which voluntary contributions can be made and the way in which funds are used and accounted for. Such criteria need not be adopted separately, but could be incorporated in the Financial Regulations and Rules of the Court, to be adopted by the Assembly of States Parties pursuant to article 113.
- 9 Two such criteria have since been adopted by the Assembly of States Parties. The first, contained in financial regulation 7.2, stipulates that acceptance of contributions which directly or indirectly involve additional financial liability for the court shall require the prior consent of the Assembly. A similar rule – sometimes formulated as the rule that regular budgetary funds cannot be used to subsidize extrabudgetary activities – applies to the United Nations. In the practice of the UN, the application of this rule has meant that, given that the use of regular budgetary funds in utilizing donations is often inevitable (for example, regular budget-funded posts would be involved in administering and accounting for donations), a certain percentage of voluntary contributions are used to offset those overhead costs that would otherwise be incurred at the expense of the regular budget, rather than requiring approval of the budgetary authority for each donation.

The second criterion was adopted by the Assembly in its resolution ICC-ASP/1/Res.11 on the relevant criteria for voluntary contributions to the International Criminal Court, and requires the Registrar to assure himself/herself that any offered contributions will not affect the independence of the Court. This could be the case, for example, if the prospective donor makes acceptance of the donation subject to conditions that are contrary to the aims of the Court or to the principles of the UN Charter, or that could jeopardize the independence and impartiality of the Court. The same resolution also requires the Registrar to determine whether offered contributions fulfill any other criteria the Assembly of States Parties may establish. The Assembly has not yet adopted such further criteria.

Article 117 Assessment of contribution

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Literature: See article 115.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	3
1. ‘an agreed scale of assessment’.....	3
2. ‘the scale adopted by the United Nations for its regular budget’.....	5
3. ‘adjusted in accordance with the principles on which that scale is based’	7

A. Introduction/General remarks

As noted above, article 115 exhaustively lists the two sources of income or funds of the Court, and sets forth the legal obligation of States Parties to pay assessed contributions (as opposed to voluntary contributions, covered by article 116). Article 117 addresses the question of how the burden of the first source of funding is to be distributed between the States Parties. Assessed contributions are not to be shared equally. Instead, in keeping with the practice of the UN and all major international organizations, a system is to be adopted which apportions a different share to each State Party¹. The wording of article 117 is such that, while it provides for a clear model or basis, it does not pin down the Court by promulgating a pre-defined scale of assessment in its constitutive document.

The Preparatory Committee’s Final Draft² provided two alternate scales of assessment as a model for the Court’s scale. The first, which was adopted in the *Rome Statute*, is examined further below. The rejected option provided that the scale would be based upon ‘a multi-unit class system along the lines of that used in the International Telecommunication Union or the Universal Postal Union’. In these organizations, each member selects one of a limited number of ‘classes’, each class corresponding to a different contribution expressed in units. Moreover, each class can be defined in terms of the contribution of the last class. Thus, States in the first class pay a multiple of the amount paid by States in the last class, States in the second class pay a smaller multiple, and so on. In both organizations each member is free to choose its own class. While the practice of these organizations indicates that such an approach may be viable, it has been pointed out that larger and expensive organizations would not be served by such a class system, as its voluntary element does not provide an incentive for members to pay as much as they can³. In rejecting this second proposal, the drafters of the Statute have opted for a system based on percentages (rather than units, although this distinction does not fundamentally affect the nature of the scale), which provides for an unlimited variation of assessments (rather than a limited number of classes), and in which States are not free to choose their own assessment (although the scale of assessment will, of course, need to be agreed upon). The Assembly of States Parties addressed

¹ Schermers and Blokker, *International Institutional Law* (1995) 607, lists a handful of organizations in which all members pay equal shares. The authors conclude that such a system is not generally acceptable to the international community.

² Preparatory Committee Draft.

³ Schermers and Blokker, *International Institutional Law* (2005), 609.

issues relating to the scale of assessments and to assessed contributions at its first regular⁴ (September 2002) and second⁵ (September 2003) sessions. Both the Financial Regulations and the Rules of Procedure of the Assembly include provisions relating to the role of the Assembly of States Parties in the adoption of the scale of assessment. In addition, the Financial Regulations address how the scale is to be applied in assessing individual contributions and how it can be adjusted (see financial regulations 5.4 and 5.5, discussed below). The Court also submitted a report in 2012 explaining how it calculates the assessments.⁶

B. Analysis and interpretation of elements

1. ‘an agreed scale of assessment’

- 3 Although not specifically provided for in this article or in article 112 relating to the Assembly of States Parties, it is clear that the authority to adopt (and adjust) the scale of assessment vests in the Assembly of States Parties as the sole budgetary authority of the Court. This has subsequently been confirmed by the adoption of the Financial Regulations, specifically financial regulation 5.2, which provides that ‘the scale shall be adopted by the Assembly of States Parties’. A similar provision is now found in rule 91 of the Rules of Procedure of the Assembly. For the adoption of the scale of assessment, every effort should – in view of article 112 of the Statute – be made to reach decisions by consensus. Failing that, such decisions (being a matter of substance) would need to be taken by a two-thirds majority.

Neither the Financial Regulations nor the Rules of Procedure of the Assembly address the possible role of the Committee on Budget and Finance in the adoption of the scale of assessment. The Committee on Budget and Finance, established by resolution ICC-ASP/1/Res.4, is responsible for ‘the technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature as may be entrusted to it by the Assembly of States Parties’⁷. While the adoption of the scale of assessment under financial regulation 5.2 would appear to be a matter of a financial and budgetary nature within the meaning of the terms of reference, the Assembly did not, at either its first or second session, entrust the Committee with an advisory role on this issue. Both scales of assessment for the first (2002/2003) and second (2004) financial periods were agreed upon by the Assembly without reference to the Committee⁸.

- 4 Since States’ contributions are expressed in terms of percentages of the total budget, adjustments will be required to accommodate the subsequent accession (and withdrawal) of each State Party. However, it would be impractical to have the Assembly adopt a new scale of assessment each time a change in membership occurs. Instead, financial regulation 5.4 suggests that a scale of assessment will be adopted for each financial period (the financial period having been set initially at one calendar year, pursuant to financial regulation 2) and not more frequently than that. Pursuant to financial regulation 5.10, new States Parties will be required to make contributions for the year in which they become party, at rates to be determined by the

⁴ In addition to its Rules of Procedure and the Financial Regulations (adopted on the basis of the report of the Preparatory Commission as contained in documents PCNICC/2001/1/Add.4 and PCNICC/2001/1/Add.2, respectively), the Assembly adopted resolution ICC-ASP/1/Res.12 on the financing of appropriations for the first financial period; resolution ICC-ASP/1/Res./ 13 on the Working Capital Fund for the first financial period; resolution ICC-ASP/1/Res.14 on the scales of assessments for the apportionment of expenses of the Court for the period 2002–2003; and decision ICC-ASP/1/Decision 1 on the provision of funds for the Court.

⁵ Resolution ICC-ASP/2/Res.1 C, on the scale of assessments for the apportionment of expenses of the ICC for the year 2004.

⁶ Report of the Court on the methodology for its scale of assessment, ICC-ASP/11/44.

⁷ Resolution ICC-ASP/1/Res.4, Annex, paragraph 3.

⁸ Compare, in contrast, the role of the Committee on Contributions, established by United Nations General Assembly resolution 14(I) (1946), which advises the General Assembly on the apportionment among members of the expenses of the UN, assessments for new members, appeals by members for a change of assessment, and cases of arrears of payment of assessments.

Assembly. Such contributions would then, pursuant to financial regulation 5.4 (b), be offset as credit against assessments paid by States Parties, that is, they would result in a lower net payment for current States Parties, rather than increase the budget available to the Court in that period⁹. The Assembly has not yet taken decisions on such rates at which new States Parties should make contributions under financial regulation 5.10. In practice, the admission of new parties has not posed complications as the Court has based its calculations for new States Parties on the practices of the UN Contributions Service. Accordingly, a new State Party is assessed the full share of the Working Capital Fund when it becomes a Party to the Statute. Contributions to the regular budget are assessed on a pro-rata basis based on remaining months of the year.

2. 'the scale adopted by the United Nations for its regular budget'

The UN scale of assessment for the years 2013–2015 was adopted by the General Assembly in December 2012¹⁰. The application of the principle underlying this scale – see further below – is constrained by floor and ceiling assessments. These floor and ceiling percentages, which have fluctuated over the years, are set at 0,001 % and 22 % respectively¹¹. In 2006, the Assembly introduced a paragraph in its annual budget resolution that referred to the ceiling percentage set by the UN, which was of particular importance as it established the limit to be paid by one major contributor State which became a party in 2007¹². The UN scale of assessment for 2013–2015 is currently applicable. In 2012 the Assembly introduced a specific reference to the maximum ceiling also being applicable to the least developed countries.¹³

The reference to the regular budget is relevant as special accounts exist for UN peace-keeping operations, separate from the regular budget and governed by a different scale of assessment. This scale reflects a different combination of underlying principles, including the principle that the responsibility and authority of the five Permanent Members of the Security Council in the area of international peace and security carries with it a relatively higher financial burden¹⁴.

Other international organizations, particularly those belonging to the UN system of organizations which operate on an assessed, rather than voluntary, budget, also follow the UN scale of assessments.

3. 'adjusted in accordance with the principles on which that scale is based'

Given that not every UN Member State will automatically be State Party to the Statute, the UN scale of assessment cannot be applied directly to the Court as the respective assessments

⁹ In the distribution of such cash surpluses resulting from contributions of new States Parties, the scale of assessments is also relevant: pursuant to financial regulation 4.7, surpluses at the end of the financial period are apportioned to States Parties in proportion to the applicable scale of assessments.

¹⁰ See resolution A/RES/67/238 of 24 December 2012.

¹¹ The major contributors to the UN regular budget in the period 2013–2015 (> 5 %) are: United States (22 %), Japan (10.833 %), Germany (7.141 %), France (5.593 %), the United Kingdom (5.179 %) and China (5.148 %). The major contributors to the regular budget of the ICC in the period 2013–2015 (> 5 %) are: Japan (17.216 %), Germany (11.348 %), France (8.888 %), the United Kingdom (8.230 %) and Italy (7.068 %).

¹² Notes that, in addition, any maximum assessment rate for the largest contributor applicable for the United Nations regular budget will apply to the International Criminal Court's scale of assessments." ICC-ASP/5/Res.4, section C.

¹³ 1. Decides that for 2014 the contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget applied for 2013–2015, and adjusted with the principles on which the scale is based,
2. Notes that, in addition, any maximum assessment rate for the largest contributors and for the least developed countries applicable for the United Nations regular budget, will apply to the Court's scale of assessments.

¹⁴ Under the scale of assessment for the peacekeeping budget, Member States are placed in 10 groups or levels, each level corresponding to a discount that is applied to the respective regular budget assessment rates of Member States in that level in order to calculate the peacekeeping rate. Permanent members of the Security Council – 'level A' – pay at a premium or higher rate, and developed countries – 'level B' – receive no discount on their regular budget rate. See, for more details, the report of the Secretary-General on the implementation of General Assembly resolutions 55/235 and 55/236, contained in document A/57/157 and Add.1.

of States Parties would not add up to 100 per cent. In particular, universality of membership was not to be expected at the time of the adoption of the initial scale of assessment. The Rome Statute therefore foresees the need for an adjustment mechanism¹⁵. Adjustments to the scale of assessments, following the same principles referred to here, are also required at the beginning of each financial period as and when States become parties to the Rome Statute. The connection between differences in membership and the adjustment mechanism is now also spelled out in financial regulation 5.2¹⁶, as well as the annual resolutions on the scale of assessments¹⁷.

- 8 The guiding principle of the UN scale of assessment is the financial capacity of each Member State¹⁸. The capacity to pay is measured by means of estimates of gross national product, adjusted, as applicable, by other elements and criteria, including conversion rates, levels of external debt, and low per capita national income¹⁹. Moreover, as already mentioned, the capacity-to-pay principle is constrained by a maximum (22 %) and a minimum (0,001 %) assessment rate. The plural in article 117 – ‘principles’ – may have been used in this context to refer not only to the main capacity principle but also to the elements and criteria underlying the calculation of this capacity, including the floor/ceiling values.

¹⁵ Dicke, in: Wolfrum (ed.), *Law of the Sea at the Crossroad* (1991) 203–204, on the issue of not reaching universality of membership.

¹⁶ ‘This scale shall be based on the scale adopted by the United Nations for its regular budget, and adjusted in accordance with the principles on which that scale is based, in order to take into account the differences in membership between the United Nations and the Court’.

¹⁷ Resolution ICC-ASP/13/Res. 1 of 17 December 2014.

¹⁸ Principles sometimes used in the apportionment of expenses of other international organizations are based on interest in the work of the organization (measured, for example, by the length of railway lines, gross ship tonnage, share in total trade), the number of subsidiary bodies in which members participate, the total population of each member, or simply no principle at all but rather an outcome of negotiations, see Schermers and Blokker, *supra* note 1, 613–617.

¹⁹ The elements and criteria on which the scales of assessments for the period 2013–2015 are based are listed in UN General Assembly resolution A/RES/67/238 of 24 December 2012.

Article 118 Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

This article lays down the principle of annual audit of the accounts of the Court by an independent auditor. The term 'independent auditor' became a compromise in the context of other proposals in favour of others especially 'UN auditors', 'external auditors' and 'internal auditors'. The wording of this provision remained the same from the stage of the Draft Statute in the Preparatory Committee to the Rome Statute.¹

In its meeting in 2013, the Assembly of States Parties accepted the recommendation of the Committee on Budget and Finance to amend the Financial Rules and Regulations to work towards implementation of International Public Sector Accounts Standards (IPSAS). These areas include discussion and review of accounting policies, review of pro-forma financial statements, discussion of complex accounting areas, and the review of opening balances. The Court was to implement them from the beginning of 2014.

The Registrar of the Court has made the Court's financial statements available to the auditors regularly as required, and the Auditors examined them and made relevant comments and recommendations from time to time for consideration of the Budget and Finance Committee and the Assembly of States Parties. For the year 2013–2014, for instance, the Registrar has included the Statement of Financial Accounts in his Report to the Assembly of States Parties to be held in New York in December 2014.

The same system of auditing is applied to the Trust Fund for Victims.

¹ UN Doc. A/CONF/183/2/Add.1, article 107.

PART 13 FINAL CLAUSES

Preliminary remarks

Literature: Amnesty International, *The International Criminal Court. Making the Right Choices, Part IV: Establishing and Financing the Court and Final Clauses* (1998) 21–38; id., *Making the Right Choices, Part V: Recommendations to the Diplomatic Conference* (1998) 84–7; Clark, R.S., ‘Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute’, (2009) 41 *Case Western Reserve JIL* 413; Gerber, S.J., Commentary on Parts 10 and 11, in: L. Sadat Wexler (special ed.) and M.C. Bassiouni (general ed.), *Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee*, (1998) 13bis *NEP* 105; id., Parts 11, 12 and 13, in: L. Sadat Wexler (special ed.) and M.C. Bassiouni (general ed.), *Model Draft Statute for the International Criminal Court Based on the Preparatory Committee’s Text to the Diplomatic Conference, Rome, June 15- July 17 1998*, (1998) 13ter *NEP* 141; Human Rights Watch, *Commentary for the March-April Preparatory Committee Meeting on the Establishment of an International Criminal Court* (1998) 9; International Commission of Jurists, ‘The Final Clauses and the Final Act’, (1998) *ICJ Brief* No. 3; Lawyers Committee for Human Rights, *Establishing and Financing the International Criminal Court* (1998) 15–16; Neroni Slade, T. and Clark, R.S., ‘Preamble and Final Clauses’, in: Lee, R.S. (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 421.

The draft of what became Part 13 of the Rome Statute, on Final Clauses, was not part of the original material before the Preparatory Committee. The ILC, noting that its standard practice is ‘not to draft final clauses for its draft articles’, had merely suggested that issues that would need to be dealt with included entry into force, administration, financing, amendment and review, reservations and settlement of disputes¹. The Part was first discussed, and then only briefly, on the basis of a Secretariat Draft, at the very last meeting of the Committee before the Rome Conference.

Most of the negotiation, therefore, took place in Rome and there is less discussion of this part of the Draft in the otherwise voluminous literature leading up to the Diplomatic Conference than there is of other parts. In Rome, Ambassador Tuiloma Neroni Slade of Samoa (later elected as a judge of the Court) acted as Coordinator for the negotiations on this part. A number of issues which he was not able to settle, largely because they were contingent on what was decided elsewhere, were resolved by the Bureau of the Committee of the Whole in the final package which it presented to the Diplomatic Conference. This included, in particular, the prohibition of reservations (article 120), the majorities required for amendment (article 121), the transitional opt-out provision for war crimes (article 124), and the number of parties (60) required to bring the Statute into force (article 126).

¹ 1994 ILC Draft Statute, p. 146.

Article 119 Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Literature: Clark, R.S., 'The Case against the Bomb', in: R.S. Clark and M. Sann (eds.), *The Case Against The Bomb: Marshall Islands, Samoa and Solomon Islands Before the International Court of Justice in Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons* (Rutgers University School of Law 1996) 1; Keith, K.J., *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Sijthoff 1971); Leary, V., 'The WHO Case: Implications for Specialised Agencies', in: de L.B. Chazournes and P. Sands (eds.), *International Law, The International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999) 112.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	4
I. Paragraph 1	4
1. 'Any dispute'	4
2. 'concerning the judicial functions of the Court'	5
3. 'shall be settled by the decision of the Court'	7
II. Paragraph 2	8
1. 'Any other dispute ... relating to the interpretation or application of this Statute'	8
2. 'which is not settled through negotiations'	10
3. 'shall be referred to the Assembly of States Parties'	11
4. Assembly may seek to settle	12
5. Assembly may make recommendations on further means of settlement ...	13
6. Referral to ICJ as contentious proceeding	14
7. Referral to ICJ as an advisory proceeding	15

A. Introduction/General remarks

1 There was a strongly expressed belief during the negotiation of this article that, for the Court to be taken seriously, it must have the competence to determine the limits of its own jurisdiction, including issues concerning cooperation with it. For some delegations and NGOs this meant that any disagreement or difference of opinion¹ of any kind concerning the Court was for it alone to decide. This would be the situation whether, for example, the disagreement was one between Prosecution and Defence, or whether it concerned a disagreement between an organ of the Court and a State Party (or even a non-Party). The same principle would apply where the disagreement arose between two or more States Parties to the Statute but in which neither a defendant nor the Court itself could be said to be directly involved.

Others took the view that there might well be different classes of disagreements. For some of these, other modes of settlement than referral to the Court itself might be appropriate. In

¹ I have deliberately used the neutral terms 'difference of opinion' and 'disagreement' here to capture the essence of the way in which 'dispute' is ultimately to be understood in this article. I explore the matter further below under the heading 'disputes', mn 4.

this context, reference was made to article 33 of the United Nations Charter, which is to be found in Chapter VI of the Charter, dealing with the Pacific Settlement of Disputes. It emphasizes the principle of the choice of means for resolution available to parties to a dispute. Paragraph 1 provides:

‘The parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice’².

A number of delegations expressed considerable enthusiasm for having a role for the International Court of Justice (ICJ), at least as one of the choices. Others objected to such a role, for sometimes diametrically opposed reasons: some because they are generally opposed to using that Court, some because they were reluctant to give any impression of undercutting the International Criminal Court (ICC) itself³, and some because of their belief, already noted, in a class of potential disputes that would be of a more political nature, suitable to resolution through the Assembly of States Parties rather than by judicial means.

The result of the negotiations is a nuanced compromise of these various positions which has a strong statement on the power of the Court itself to settle disputes on its ‘judicial functions’ but leaves a flexible role for the Assembly of States Parties and for the ICJ, while leaving open other possibilities. There will inevitably be some hotly debated areas in which it is not clear where the competence lies to resolve a particular difference. There may be some possibilities for demarcation disputes between the ICC judges and the Assembly of States Parties. In making recommendations for means of settlement, the Assembly of States Parties will no doubt consider possibilities like those suggested in article 33 of the Charter⁴.

B. Analysis and interpretation of elements

I. Paragraph 1

1. ‘Any dispute’

Paragraphs 1 and 2 both use the same term ‘dispute’, thus creating a context which suggests that the term is to be viewed broadly. Whether or not there is a ‘dispute’ in a concrete instance, so as to bring a particular dispute-settlement provision into play, has itself sometimes been a subject of great contention, especially in the jurisprudence of the ICJ and its predecessor the Permanent Court of International Justice⁵. Reference is often made in the literature to the Permanent Court’s statement in the Case of the Mavrommatis Palestine Concessions that: ‘A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons’⁶. This definition might be thought to reflect an excessively bilateral approach to disputes. Accordingly, a more recent statement by the ICJ is perhaps more apposite to the range of possibilities that are likely to arise in respect of the ICC. In the East Timor Case, the Court suggested that ‘a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties’⁷. Some of the disagreements that will arise under the Rome Statute will be more of a multilateral nature than the two ‘person’ disagreements the Mavrommatis Palestine definition seems to contemplate as

² UN Charter article 33, para. 1.

³ Some in this group were also troubled by the possibility of conflicting decisions on the same issue between the two courts.

⁴ See note 2.

⁵ For some thoughts on its companion phrase ‘interpretation or application’ see note 34.

⁶ Case of Mavrommatis Palestine Concessions, P.C.I.J., Ser. A, No. 2, 1, 11 (1924).

⁷ Case Concerning East Timor (*Port v. Aust.*) 1995 I.C.J. 90, 99.

the paradigm. Not only may there be more than two parties, the disagreements will often be between ‘persons’ of different legal categories – a prosecutor and a defendant, an organ of the Court and a government – although some could be between two States, or a majority of the States Parties and a State or group of States. The very broad approach of the East Timor Case appears to be consistent with the range of situations the negotiators of article 119 had in mind when using the term ‘disputes’.

2. ‘concerning the judicial functions of the Court’

- 5 In a few instances, the Rome Statute specifically confers jurisdiction to resolve disputed issues either on the Court⁸, or elsewhere⁹. But, for the most part, one is left to try to infer allocation of decision-making in particular instances from the nature of the function being exercised. My understanding, from participating in the drafting process, is that, at the least, anything that could be said to have some relationship, however tenuous, to prosecution of an individual or a group of individuals on the basis of a concrete complaint of a breach of the Statute, would be included in the notion of judicial functions. In the absence of any definitive lists in the preparatory work of the issues to which this language might refer, I have gone through the Rome Statute and made some tentative suggestions on which side of the line various possible sources of disagreement might fall. In the immediately following paragraphs, I suggest some that fall on the ‘judicial functions’ side of the line. In the discussion below of paragraph 2 of article 119, I suggest some that fall on the ‘other’ side¹⁰. Obviously the list is merely suggestive. Since it is quite impossible to foresee all the potential areas of disagreement, the list does not purport to be exhaustive even as a typology of possible disagreements.
- 6 On the judicial functions side of the line are probably:
- questions of jurisdiction and interpretation of the definitions of crimes within the jurisdiction of the Court¹¹,
 - whether the preconditions to the exercise of jurisdiction have been met¹²,
 - issues of admissibility¹³,
 - whether the case is one of *ne bis in idem*¹⁴,
 - questions involving what law applies¹⁵,
 - issues involving the independence of the judges, the compatibility of any of their other activities with their judicial functions, and excusing and disqualifying them in particular cases¹⁶,
 - disqualification of the Prosecutor or a Deputy Prosecutor¹⁷,
 - some issues involving the Registry¹⁸,

⁸ See, e.g., articles 17 and 18 (issues of admissibility), article 19 (challenges to jurisdiction).

⁹ See, e.g., article 46 (whether prosecutors should be removed for cause decided by Assembly of States Parties), article 87 para. 7 (Assembly of States Parties has some, ill-defined, function in respect of failure of a State Party to comply with a request to cooperate with the Court). See also note 29.

¹⁰ See at notes 35–43.

¹¹ See generally articles 5–8, 11, 19 and the whole of Part 3 (General Principles of Criminal Law) of the Statute. This would include interpreting the Elements of Crimes adopted by the Assembly of States Parties (article 9) and determining whether such elements are ‘consistent with [the] Statute’ (article 9 para. 3). On the inherent competence of a tribunal to decide upon its own competence, see *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, Appeals Chamber 2 October 1995, reprinted in: (1996) 7 *CLF* [51].

¹² See article 12.

¹³ See articles 17, 19.

¹⁴ See article 20.

¹⁵ See article 21.

¹⁶ See articles 40 and 41. These issues were among the first to which the judges directed their attention after being sworn in.

¹⁷ See article 42.

¹⁸ See article 43. The judges elect the Registrar and must have some control over him or her. On the other hand, the Assembly of States Parties may recommend candidates (article 43 para. 4), must ultimately approve Staff Regulations drafted by the Registrar with the agreement of the Presidency and the Prosecutor (article 44

- removal of the Registrar or Deputy Registrar from office for serious misconduct, breach of duties or inability to exercise functions¹⁹,
- discipline of a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar²⁰,
- some questions involving privileges and immunities²¹,
- questions involving the Rules of Evidence and Procedure, including their compatibility with the Statute²²,
- interpretation and application of the Regulations of the Court²³,
- review of a decision of prosecutor not to proceed²⁴,
- rulings on various pre-trial situations²⁵,
- making rulings on contentious issues during a trial²⁶, at sentencing²⁷, and in proceedings for appeal or revision²⁸,
- questions concerning cooperation with and judicial assistance to the Court²⁹ and
- questions of the modalities of enforcing sentences (mostly of imprisonment, but perhaps of monetary penalties also)³⁰.
- The broad nature of these possibilities underscores the wide judicial mission of the Court.

3. 'shall be settled by the decision of the Court'

A decision which has been definitively reached by the Appeal Chamber is meant to be final and binding on the parties³¹, as will be one where the losing party chooses not to appeal from the trial level. It may not be reviewed or appealed elsewhere in some other forum. This principle is occasionally spelt out in the Statute in a particular instance. Thus article 105 para. 2, which is in the Part of the Statute dealing with Enforcement, provides:

para. 3) and must establish guidelines for the utilization of gratis personnel (article 44 para. 4). This suggests that the Assembly may have an overlapping, or possibly cooperative, dispute-settlement role in this area.

¹⁹ See article 46 paras. 1 and 3. An absolute majority of the judges is required. In the case of removal of a judge, the Prosecutor or a Deputy Prosecutor, the judges may make a recommendation by a two-thirds majority (not including, in the case of judicial removal, the judge whose removal is sought) which may then be carried out by a two-thirds majority of the States Parties, article 46 para. 2.

²⁰ See article 47. This is to be spelt out further in the Rules.

²¹ See article 48. The judges, the prosecutors, the registrars and the staff are all entitled to various privileges and immunities. Counsel, experts and witnesses are entitled to 'such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court' (article 48 para. 4). There is room for disputes here, which are closely related to the functioning of the Court. There may, on the other hand, be some overlapping with other modes of settlement. Consider a generalized disagreement between the Assembly of States Parties and the Court, or between the Court and the host country, as to what is required. Then the Court might be regarded as a party to the dispute and thus an inappropriate vehicle to resolve it.

²² See article 51.

²³ See article 52.

²⁴ See article 53 para. 3.

²⁵ See articles 56–61.

²⁶ See articles 62–75. Article 70 (Offences against the administration of justice) might be regarded as giving quite broad powers to the Court to rule on disputes about the propriety of the prosecutorial and defence functions, to say nothing of issues of venal corruption.

²⁷ See articles 76–78. See also article 75 (reparations to victims).

²⁸ See articles 81–85.

²⁹ See articles 86–101. In the event that the Court is unable to achieve what it wants from a State Party, some questions may end up before the Assembly of States Parties or the Security Council for 'enforcement'. See article 87 para. 7 (referral to Assembly of States Parties, or Security Council where the Council rather than a State or the Prosecutor made the original referral to the Court, following finding by Court of failure to cooperate). The judges would no doubt take the view that this would not be an opportunity for the Assembly or the Council to resolve the dispute by second-guessing the Court on matters of law. The Prosecutor has made several references in his Reports to the Security Council to the failure of the Government of Sudan to cooperate with the Court's warrants of arrest. The Council had done nothing concrete to assist by late 2014.

³⁰ See articles 103–111.

³¹ It may also have some precedential effect in subsequent cases. See article 21 on 'applicable law'. Article 21 para. 2 provides that 'The Court may apply principles and rules as interpreted in its previous decisions.'

‘The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person’³².

Notwithstanding the specific statement of the principle in such instances, it would appear to be a general principle, applicable even in instances where it is not specifically asserted in the relevant article.

II. Paragraph 2

1. ‘Any other dispute ... relating to the interpretation or application of this Statute’

- 8 Again³³, the term ‘dispute’ appears, its breadth perhaps tempered a little by the modifier ‘relating to the interpretation or application of this Statute’. ‘Interpretation or application’ is something of a term of art in the jurisprudence of the ICJ, creating its own problems of interpretation³⁴.
- 9 The following are some suggestions of disagreements that might fit the category ‘any other dispute ... relating to the interpretation or application’ of the Statute:
- disagreements about whether a particular candidate for election as a judge has the necessary qualifications³⁵,
 - similar questions about potential prosecutors³⁶ or registrars³⁷,
 - decisions on removal from office of a judge, the Prosecutor or Deputy Prosecutor, the Registrar or Deputy Registrar³⁸,
 - some questions of privileges and immunities (?)³⁹,
 - claims to protection of national security information where the State concerned and the Court have reached an impasse⁴⁰,
 - disagreements concerning management of the Trust Fund which is to be created for the benefit of victims⁴¹,
 - a failure by a State to comply with a request to cooperate⁴² and
 - disagreements concerning the finances of the Court⁴³.

³² Article 105 para. 2.

³³ See notes 5–7.

³⁴ See generally the excellent discussion in Judge Higgins’s Separate Opinion in *Oil Platforms (Iran v. U.S.)*, Preliminary Objection, 1996 I.C.J. 803, 847.

³⁵ See article 36. The whole structure of the article seems to place such questions in the hands of the Assembly of States Parties, and note the power in para. 4 (c) to create an Advisory Committee on nominations. This Committee became operational in November 2012. See Terms of reference for the establishment of an Advisory Committee on nomination of judges of the International Criminal Court, ICC-ASP/10/36-annex, adopted by resolution ICC-ASP/10/Res.5.

³⁶ See article 42.

³⁷ See article 43.

³⁸ See article 46. See also note 19 on the role of the judges in recommending removal of a fellow judge before the Assembly may act.

³⁹ See article 48. The question-mark reflects the discussion, see note 21, suggesting that many of such questions belong with the Court itself.

⁴⁰ Author’s characterization of a very complicated process under article 72. See especially paragraph 7 (a) (ii) under which the Court may conclude that the State is ‘not acting in accordance with its obligations under the Statute’ and refer the matter to the Assembly of States Parties. The requirement that the Court specify the reasons for its conclusion suggests, at least weakly, that the Assembly may re-examine the reasons rather than simply trying to give effect to the Court’s conclusion.

⁴¹ See article 79. Paragraph 3 provides that the Fund is to be ‘managed according to criteria to be determined by the Assembly of States Parties’. Some questions involving the application of such criteria might end up before the Court, since it may order money collected by fines or forfeiture to be transferred to the Fund (article 79 para. 2) and thus may have a colourable claim that its judicial functions are involved in dealing with the money. On the other hand, depending upon how the criteria are drafted, the issues may be more suitable for resolution elsewhere.

⁴² See article 87 para. 7, providing for referral to Assembly of States Parties or to the Security Council, as the case may be. See also note 29.

⁴³ See articles 113–118. Most of these issues will be resolved in the Assembly of States Parties which considers and decides the budget for the Court (article 112 para. 2 (d)), or in the General Assembly of the United Nations

The brevity of this list, compared with the length of the list of disputes that are apparently within the jurisdiction of the ICC itself, suggests that for the most part, the Court is master of its own house.

2. 'which is not settled through negotiations'

The words 'which is not settled through negotiations within three months of their commencement' were inserted in an effort to avoid delays caused by arguments about the status of negotiations to resolve a problem. Once the three months are over, only a successful resolution of the difference can prevent one or other of the parties from referring the matter to the Assembly⁴⁴. 10

3. 'shall be referred to the Assembly of States Parties'

The article does not state expressly who is responsible for making a referral to the Assembly. Presumably if the dispute is a bilateral one, each party owes the obligation to refer it, and certainly either *may* do so. The same would be true of disputes involving more than two parties. At least, this seems to be the obvious import of the language in context. 11

The Preparatory Commission was required to draft Rules of Procedure for the Assembly of States Parties⁴⁵ and the Assembly will have power to adapt those rules to the exigencies of experience⁴⁶. I suspect that rules dealing with dispute settlement will emerge with the passage of time; there is nothing relevant in the Assembly's rules as adopted at the first meeting of the Assembly.

4. Assembly may seek to settle

One can perhaps imagine some disputes involving, say, disagreements on financing or the management of the Trust Fund for Victims that can be dealt with at a plenary meeting of the Parties. Other items, such as claims involving protection of national security information, or the fact-finding part of decisions on removal from office lend themselves to consideration by a less cumbersome group. The Assembly of States Parties has explicit powers to 'establish such subsidiary bodies as may be necessary'⁴⁷ which would include committees or working groups for such purposes. It should be added that such groups need not necessarily be created as quasi-judicial entities; they might appropriately be set up in some instances to exercise conciliation or mediation functions. 12

5. Assembly may make recommendations on further means of settlement

In exercising this power, the Assembly will pay careful regard to the range of options suggested by article 33 of the United Nations Charter, to which reference has already been made⁴⁸. 13

which is expected to provide some of the money (article 115). There is also the possibility of third-party examination along the lines of the advisory opinion of the ICJ in *Certain Expenses of the United Nations* (article 17 para. 2 of the Charter), Advisory Opinion, 1962 I.C.J. 151.

⁴⁴ For some discussion of the possible parameters of the obligation (based either on custom or treaty) to negotiate before going to adjudication, see *Case Concerning United States Diplomatic and Consular Staff in Iran (U.S. v. Iran)* (Judgment) 1980. I.C.J. 3, 25–27 and Dissenting Opinion of Judge Morozov, at 52–53; *Nicaragua v. U.S. (Jurisdiction and Admissibility)* 1984 I.C.J. 392, 440; Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), 2012 I.C.J., paras. 56–9.

⁴⁵ See Resolution F. of the Conference of Plenipotentiaries, paragraph 5 (h).

⁴⁶ See article 112 para. 9 ('The Assembly shall adopt its own rules of procedure'). The initial rules are contained in Doc. ICC-ASP/1/3 C (2002).

⁴⁷ See article 122 para. 4.

⁴⁸ See note 2.

6. Referral to ICJ as contentious proceeding⁴⁹

- 14 There is a range of scenarios arising out of article 36 of the Statute of the ICJ which could provide a route for some State against State disputes to find their way into the Court. These possibilities depend, not upon what is specifically in the Rome Statute, but upon the contesting States' own choices and on their existing framework of dispute-settlement obligations. Article 36 para. 1 of the Statute of the ICJ provides that the jurisdiction of that Court comprises all cases which the parties refer to it and all matters provided for in the Charter of the United Nations or in treaties and conventions in force. Article 36 para. 2 permits States to make declarations by which they recognize as compulsory the jurisdiction of the Court in classes of disputes in which the other party to the dispute has made a similar declaration.

Thus, two or more States which are parties to an appropriate dispute involving the ICC might agree to a *compromis* referring the particular issue to the ICJ. This could well be a scenario which the Assembly of States Parties would encourage under its power to make recommendations on further means of settlement. On the other hand, the parties to the dispute may be subject to an existing bilateral or multilateral treaty commitment to take disputes to the Court, including the compulsory clause of article 36 para. 2, that would enable one of them to insist on referring the dispute to the ICJ.

7. Referral to ICJ as an advisory proceeding

- 15 Some States, notably Mexico and Spain, contemplated that the General Assembly of the United Nations would empower the Assembly of States Parties to request advisory opinions from the ICJ. Whether or not a disagreement could find its way to the ICJ in its advisory jurisdiction, in fact, turns out to be controversial.

Article 96 of the United Nations Charter provides that the General Assembly or the Security Council may request the ICJ to give an advisory opinion 'on any legal question'⁵⁰. It goes on to provide that

[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities⁵¹.

- 16 It is not hard to imagine that the Assembly of States Parties would find itself faced under article 119 para. 2 with what could fairly be described as a legal question arising within the scope of its activities on which it might desire legal advice. In the Nuclear Weapons Cases, however, the Court took rather a narrow view of what such a question was in relation to the World Health Organization⁵². This decision may limit the possibilities open to organizations other than the United Nations itself for the use of the advisory opinion option. Another difficulty is whether the Assembly of States Parties (or any other organ of the ICC) can be regarded as an organ of the United Nations or of the specialized agencies within the meaning of article 96 of the Charter. If it is not, then the General Assembly appears to have no power

⁴⁹ See, generally, article 36 Statute of the ICJ.

⁵⁰ UN Charter, article 96 para. 1. See also Statute of the ICJ, articles 65–68 (empowering the Court to render such opinions, and outlining the procedure to be followed).

⁵¹ *Ibid.*, para. 2.

⁵² See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. (Court refuses to respond to question posed by World Health Organization on basis that issues of the legality of nuclear weapons, as opposed to their health effects, are outside the competence of the Organization). The Court made reference to a 'principle of speciality' which is said to keep organizations from moving into the turf of other organizations. I have criticized the Court's decision in: Clark and Sann (eds.), *The Case Against The Bomb: Marshall Islands, Samoa and Solomon Islands Before the International Court of Justice in Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons* (1996) 1, 9–13. See also Leary, in: de Chazournes and Sands (eds.), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 112.

to authorize it to ask directly for advisory opinions on its own behalf. The Preamble to the Rome Statute speaks of an 'independent permanent International Criminal Court in relationship with the United Nations system' and article 2 of the Rome Statute says that the Court 'shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf'⁵³. For most purposes, therefore, it is hard to regard the ICC as a UN organ. It is created by a free-standing treaty rather than by amendment to the UN Charter. It is not, to state the obvious, created by an existing organ of the UN. Its origin is in the action of the States Parties. Further, while the relationship agreement has some similarities with the relationship agreements between the UN and the Specialized Agencies, it was not, like them, entered into with ECOSOC pursuant to articles 57 and 63 of the Charter⁵⁴. Instead, like the arrangements with the International Atomic Energy Agency and the Human Rights Treaty Committees, it was done under the Assembly's inherent powers to enter into arrangements with other organizations to cooperate within the Assembly's broad sphere of activities. Thus, as neither an 'organ' of the United Nations nor a 'specialized agency', understood as terms of art, it is difficult to conceive of any general authority to ask questions being conferred upon the Assembly of States Parties. None is granted in the relationship agreement concluded in 2004.

There is some, as yet inconclusive, practice to be placed alongside these considerations of principle. In 1957, the General Assembly authorized the International Atomic Energy Agency to request advisory opinions of the ICJ⁵⁵. The validity of this authorization has been debated⁵⁶, and the Agency has never tested the waters by seeking an advisory opinion. More recently, the 1993 Chemical Weapons Convention contains in its provisions on Settlement of Disputes the following:

'The Conference and the Executive Council [two organs of the Organization for the Prohibition of Chemical Weapons which is set up under the Convention] are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article VIII, paragraphs 34 (a)'⁵⁷.

I believe that the validity of this provision was debated during the drafting of a relationship agreement between the Organization and the United Nations which was not concluded until 2001. The result was that the United Nations took note of the provision in the Chemical Weapons Convention and the two organizations agreed that 'such request for an advisory opinion shall first be submitted to the General Assembly, which will decide upon the request in accordance with Article 96 of the Charter'⁵⁸.

⁵³ Rome Statute, article 2. Resolution F of the Rome Conference, which created the Preparatory Commission for the ICC, listed the drafting of a relationship agreement as one of the tasks for the Preparatory Commission. The first meeting of the Assembly of States Parties approved a draft relationship agreement between the Court and the United Nations, Doc. ICC-ASP/1/3 G (2002), and a negotiated text was ultimately agreed upon in 2004, ICC-ASP/3/Res. 1, annex.

⁵⁴ UN Charter, article 57 speaks of a category of 'specialized agencies, established by intergovernmental agreement and having wide international responsibilities ... in economic, social, cultural, educational, health, and related fields'. Article 63 empowers the Economic and Social Council to bring such entities into a relationship with the UN, subject to approval by the General Assembly. There was little disposition during the drafting to regard the Court as coming within the categories with which ECOSOC is concerned, so that the only real discussion was of a relationship agreement through the General Assembly alone.

⁵⁵ GA Res. 1146 (XII).

⁵⁶ See Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (1971) 40–41.

⁵⁷ Convention for the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, article 14 para. 5, UN Doc. CD/CW/WP.400/Rev.1 (1993), 32 *ILM* 800 (1993). Article VIII para. 34 (a) empowers the Executive Committee to 'conclude agreements or arrangements with States and international organizations on behalf of the Organization, subject to prior approval by the Conference'.

⁵⁸ Agreement concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons (2001).

18 While a general authorization to request advisory opinions may be a problem, a possible solution thus appears to be for the General Assembly adopt an appropriate resolution in a particular instance asking the Court a question of interest to the ICC under the Assembly's own powers to request.⁵⁹ Article 96 of the Charter, it must be emphasized, empowers the General Assembly to ask for the Court's opinion 'on any legal question'. There is no language suggesting that it may only be on a question within the scope of its own activities, as is the case with the specialized agencies. Hence, it would seem to be open to the General Assembly to ask, in a particular instance, a question which is only of marginal interest to the General Assembly itself, but which may be of crucial interest to an organization which is part of the United Nations family⁶⁰. This is different from giving an open authorization to the ICC Assembly of States Parties to ask its own questions. A decade ago, the Spanish delegation tested the waters on including some appropriate language in the ICC's relationship agreement with the General Assembly,⁶¹ but was unsuccessful in obtaining any language in the final agreement and the matter has not since been pursued.

⁵⁹ Such a course was suggested for the International Atomic Energy Agency, but not carried forward into the relationship agreement. See Study of the Question of the Relationship of the International Atomic Energy Agency to the United Nations, UN Doc. A/3122, para. 15 (1956).

⁶⁰ The ICJ's understanding of the difference between article 96 paras. 1 and 2 (only the latter contains the words 'arising within the scope of their activities') is apparent from the way in which the Court approached the nuclear weapons advisory request from the General Assembly, as opposed to that from the World Health Organization, see note 52. The Court barely hesitated with the question whether there were any limitations on the Assembly's power to ask questions beyond the requirement that the question be a 'legal' one. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J., paras. 11 and 12. It is perhaps theoretically possible that a question is so hypothetical or so remote from any conceivable interest of the United Nations that the Court would refuse to honour the request, but it is hard to imagine such a case getting beyond the General Assembly in the first place.

⁶¹ See statement by delegation of Spain in Doc. ICC-ASP/1/3, Annex I (Working Group of the Whole), para. 10 (2002): '[The delegation] expressed its understanding that the Assembly of States Parties would consider in due time the possibility to request an advisory opinion from the International Court of Justice within the context of article 119, paragraph 2 of the Rome Statute'.

Article 120 Reservations

No reservations may be made to this Statute.

Literature: Barriga, S., 'Exercise of jurisdiction and entry into force of the amendments on the crime of aggression', in: G. Dive, B. Goes and D. Vandermeersch (eds.), *From Rome to Kampala: The first 2 amendments to the Rome Statute* (Bruylant 2012) 31; Horn, F., *Reservations and Interpretative Declarations to Multilateral Treaties* (Elsevier 1988); Imbert, P.-H., *Les Reserves aux Traités Multilatéraux. Evolution du Droit et de la Pratique depuis l'avis consultative donné par la Cour Internationale de Justice le 28 Mai 1951* (Pedone 1979); International Law Commission, 'Guide to Practice on Reservations to Treaties', in: United Nations, Report of the International Law Commission, Sixty-third session (26 April – 3 June and 4 July – 12 August 2011), UN Doc. A/66/10, 19–50 and UN Doc.A/66/10, Add.1.; Krefß, C. and von Holtzendorff, L., 'The Kampala Compromise on the Crime of Aggression', (2010) 8 *JICJ* 1179; Liechtenstein Institute on Self-Determination and the Woodrow Wilson School of Public and International Affairs, Princeton University, *Handbook. Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC: Crime of aggression – war crimes* (Liechtenstein Institute on Self-Determination 2012); Lijnzaad, L., *Reservations to UN-Human Rights Treaties* (Nijhoff 1995); McRae, D.M., 'The Legal Effect of Interpretative Declarations', (1978) 49 *BYBIL* 155; Mendelson, M.H., 'Reservations to the Constitution of International Organisations', (1973) 45 *BYBIL* 137; Pellet, A., 'Second Report on Reservations to Treaties. Bibliography concerning Reservations to Treaties', U.N. Doc. A/CN.4/478; Reisinger Coracini, A., 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression – at Least ... in Reach ... Over Some', (2010) 2 *GoJIL* 745; Ruda, J.M., 'Reservations to Treaties', (1975) 46 *RCD* (Vol. I) 95–218, id., 'Entry into Force and Amendment of the Statute, in: Cassese, A., Gaeta, P., Jones, J.R.W.D. (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 145; Schmalenbach, K., 'Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen', (2010) 15/16 *JZ* 745.

Content

A. Introduction/General remarks.....	1
I. Historical development	1
II. Purpose.....	10
B. Analysis and interpretation of elements.....	15
I. Scope.....	15
II. Meaning of reservations	17
III. Interpretative declarations	18
IV. General international law	22
1. The need of article 120.....	23
2. Reservations to constituent instruments of international organizations.....	24
3. The legal status of inadmissible reservations (declarations)	25
4. The present practice.....	28
5. Declarations with regard to the crime of aggression.....	39

A. Introduction/General remarks

I. Historical development

As the Statute of the ICC is a multilateral treaty the question of reservations inevitably arises. Reservations, a matter which is still subject to intensive discussions despite the regulation in articles 19–23 of the Vienna Convention on the Law of Treaties of 1969 (VCLT¹), stirred up problems in the field of international criminal law relatively early. When just after the adoption of the Convention on the Prevention and Punishment of Genocide²

¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

² Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

the Soviet Union wished to enter a reservation to article 9 of this Convention notwithstanding the absence of any specific provision on reservations, the International Court of Justice was requested to deliver an advisory opinion³ in which it introduced a certain flexibility in the treaty relations insofar as it declared the admissibility of the intended reservation as long as it was compatible with the object and purpose of the treaty⁴.

- 2 This opinion and the regime of the VCLT on reservations stimulated the formulation of a rule on reservations in the ‘Study On Ways And Means Of Insuring The Implementation Of International Instruments Such As The International Convention On The Suppression And Punishment Of The Crime Of Apartheid, Including The Establishment Of The International Jurisdiction Envisaged By The Convention’⁵: Draft article 33 read as follows:

‘Article 33 Reservations

1. States may make any reservations to this Convention but shall not be deemed States Parties for the purposes of representation in the Standing Committee if the reservation is as to a material aspect of the Tribunal’s jurisdiction, competence and the effects of its judgements.
2. The Secretary-General shall keep separate count of signatories making reservations not in conformity of paragraph 1 of this article.⁶

The explanations to this article explicitly stated that the reservations clause ‘though in keeping with the Vienna Convention on treaty interpretation also takes into account the relevant aspects of the ‘Advisory Opinion By The International Court of Justice on Reservations to the Convention on the Prevention and Punishment of Genocide’, 1951 I.C.J., 15’⁷.

- 3 When it elaborated the Draft Statute of the ICC, the ILC pondered over the possibility of reservations despite its normal practice not to deal with final clauses in the drafts of possible codification conventions: It emphasized the particular conditions of a reservation to this Statute because of the latter’s nature being analogous to the constituent instrument of an international organization. In view of the important balances and qualifications relating to the working conditions of the Court incorporated in the text and of the integral nature of the Draft Statute, the Commission already suggested that ‘reservations to the Statute and its accompanying treaty should either not be permitted or should be limited in scope’. Nonetheless, it did not propose any specific text but left the decision on it to the States Parties⁸.
- 4 The ‘Siracusa Draft’, elaborated by a group of NGOs and experts under the chairmanship of M. Cherif Bassiouni in 1995, provided a restricted right to make reservations insofar as it permitted reservations only to the right to allow ‘on-site investigations’ of the Prosecutor either with or without the consent of the national State Party concerned⁹. However, the ‘Updated Siracusa Draft’ of 1996¹⁰, was of less specific nature:

‘(1) Any reservation a Contracting Party may wish to make to this Statute shall be subject to the provisions of the Vienna Convention of the Law of Treaties.

³ GA Res 478 (V).

⁴ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion (1951) ICJ Rep 15.

⁵ UN Doc. E/CN.4/1426, reproduced in: Bassiouni (ed.), *International Criminal Court: Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998) 743.

⁶ *Ibid.*, 777.

⁷ *Ibid.*, 795. The Draft Optional Protocol for the Penal Enforcement of the International Convention for the Suppression and Punishment of the Crime of Apartheid, attached to that Draft Convention, included in article 29 a similar provision:

1. States may make any reservations to this Protocol but shall not be deemed States Parties for the purposes of representation in the Standing Committee if the reservation is as to a material aspect of the Tribunal’s jurisdiction, competence and the effects of its judgement.
2. The Standing Committee shall undertake as its first order of business measures toward election of judges of the Tribunal.’

Ibid., 821. The reasons for this formulation were the same as for article 33 of the Draft Convention.

⁸ 1994 ILC Draft Statute, 147.

⁹ Siracusa Draft, 61.

¹⁰ Updated Siracusa Draft, 119.

(2) No reservation to the applicability of any provision of this Statute can be made with respect to existing international obligations and with respect to any crime defined in the Special part of the International Criminal Code.’

This right embodied in both formulations was nevertheless again of limited value as, like the ILC Draft, both texts proceeded from some sort of opting-in approach insofar as the jurisdiction of the Court should be dependent on additional declarations of the States Parties.

During the deliberations in the *Ad hoc* Committee on the Establishment of an International Criminal Court in 1995, the issue of the reservations did not become a matter of discussion as this matter which was deemed to belong to the final clauses of a future treaty was not considered as one of priority nature¹¹. This reluctance to take a stance on this issue was due to the uncertainty regarding the final nature of the Statute as well as the nature of the jurisdiction of the Court, whether it should become subject to the opting-in approach or should be of inherent, respectively automatic nature.

In the discussions in the Preparatory Committee in 1996, under the item ‘Establishment of the Court and relationship between the Court and the United Nations’, a suggestion was made to exclude the possibility of reservations in ‘order to maintain the treaty as an integral whole’ whereas other States considered this question still premature¹². This issue was only discussed on the basis of a proposal on the Final Clauses submitted by the Secretariat in December 1997. This proposal¹³ followed the suggestion made earlier by stating: ‘No reservations may be made to this Statute.’

The Zutphen text included precisely this formulation in its article 92 lit. B¹⁴. The NGO Human Rights Watch recommended maintaining this text prohibiting reservations to the ICC treaty. In its commentary, it stressed that permitting reservations ‘would undermine the force and moral authority behind the treaty and weaken the nature of the obligations in it’¹⁵. In this context, it referred to the comments of the Human Rights Committee on reservations to the ICCPR and particularly to the ‘General Comment 24’¹⁶ without, however, taking into account the large criticisms it had aroused¹⁷. In the view of Human Rights Watch, a near-universal ratification, albeit being desirable, was not as essential as the need that the Court ‘meet certain benchmarks of fairness and independence, and that the obligations of States Parties vis-à-vis the Court be clear’¹⁸.

On the basis of the Zutphen text, the session of the Preparatory Committee in March 1998 started the first in-depth discussion on reservations. These discussions resulted in a new text on reservations containing three options: the first interdicted reservations, the second declared reservations only to a not yet specified list of articles admissible, the third option proposed to include no provision on reservations so that the general regime of the VCLT would apply¹⁹. The ‘Draft Statute for the International Criminal Court’²⁰ which was submitted to the Conference confirmed these three options and supplemented the second option by a new subparagraph declaring the Court competent to decide a dispute concerning the admissibility of reservations. It added a fourth alternative (*i. e.* option 3 whereas the

¹¹ *Ad hoc* Committee Report.

¹² Preparatory Committee Report, 9.

¹³ Article B, Draft text relating to final clauses, final act and establishment of a preparatory commission, prepared by the Secretariat, UN Doc. A/AC.249/1998/L.11.2.

¹⁴ Zutphen Draft, 169.

¹⁵ Human Rights Watch, *Commentary for the March – April 1998 Preparatory Committee Meeting on the Establishment of an International Criminal Court* (Human Rights Watch 1998) 9.

¹⁶ General comment adopted by the Human Rights Committee under article 40 para. 4, of the ICCPR: Addendum, General Comment No. 24 (52), UN Doc. CCPR/C/21/Rev.1/Add.6.

¹⁷ *Cf., e.g.*, Report of the Human Rights Committee, UN Doc.A/51/40.

¹⁸ Human Rights Watch, see above note 15, 10.

¹⁹ UN Doc. A/AC.249/1998/CRP.4.

²⁰ Preparatory Committee Draft.

former option 3 became option 4) authorising States Parties to make any reservation except to certain – not yet identified – articles or parts of the Statute²¹.

The addition relating to the competence of the Court reflected a preliminary conclusion drawn by the ILC from its discussion of the reservations to multilateral normative treaties: According to this conclusion, treaty bodies of conventions of such kind should be entitled to appreciate or determine the admissibility of reservations²².

- 9 During the Conference, the issue of reservations became subject to negotiations only in the last phase. Beside the suggestion made by the Secretariat in December 1997 no formal proposals or Working papers were presented to the Conference²³. The first version of the Coordinator's rolling text²⁴ left an open space on reservations. The second²⁵ and the third version²⁶ of the Coordinator's rolling text of the main issues as well as the recommendations of the coordinator²⁷ still maintained the four options in article 109. This issue was then briefly discussed in a group coordinated by Ambassador Sloane (Samoa).

Irrespective of the critical voices from several States²⁸, the final text of the Draft of the Statute submitted to the Committee of the Whole on 16 July 1997 for adoption included the version on the inadmissibility of reservations in article 109²⁹ which finally became article 120 of the Statute.

²¹ The various options for draft article 109 were formulated in the following manner:

Reservations

Option 1

No reservations may be made to this Statute.

Option 2

Paragraphs 1 and 2

Option A

1. No reservations other than those made in accordance with paragraph 2 of the present article shall be permitted.

2. Any State may at the time of signature, ratification, acceptance, approval or accession make reservations in respect of the following ...

Option B

1. No reservations to this Statute shall be permitted unless expressly provided for in specific articles of the Statute.

2. No paragraph 2.

3. A State which has made reservations may at any time by notification in writing to the Secretary-General withdraw all or part of its reservations.

4. Option A

In the event of a dispute or legal question arising in connection with the admissibility of reservations made by a State under paragraph 2, the Court shall be competent to decide the admissibility of such reservations.

Option B

No paragraph 4.

[*194] Option 3

1. At the time of signature, ratification, acceptance, approval or accession, any State may make reservations to articles of this Statute except [those in Parts ...] [articles ...].

2. A State which has made reservations may at any time by notification in writing to the Secretary-General of the United Nations withdraw all or part of its reservation.

Option 4

No article on reservations.'

The view was expressed that the same procedure may be used for resolving disputes relating to the admissibility of reservations. It was also observed a cross reference in this article should be made to article 102 (Assembly of States Parties). *Ibid.*, 193.

²² Report of the International Law Commission on the Work of its Forty-Ninth Session, UN GAOR, 52nd Sess., Supp. No. 10, UN Doc. A/52/10 (1997), 127.

²³ See the Draft Report of the Committee of the Whole, UN Doc. A/CONF.183/C.1/L.92, 15.

²⁴ UN Doc. A/CONF.183/C.1/L.54 (7 July 1998).

²⁵ UN Doc. A/CONF.183/C.1/L.54/Rev.1 (9 July 1998).

²⁶ UN Doc. A/CONF.183/C.1/L.54/Rev.2 (10 July 1998).

²⁷ UN Doc. A/CONF.183/C.1/L.61 (11 July 1998).

²⁸ According to Pellet especially the United States, France, Russia and several Arab States objected to the exclusion of any reservation; Pellet, in: Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 145, 159.

²⁹ UN Doc. A/CONF.183/C.1/L.76/Add.13.

II. Purpose

The legal instrument of reservations to international multilateral treaties is deemed to strike a balance between the rigidity and integrity of a multilateral treaty and the objective to bring as many States as possible under the umbrella of this treaty. Already in the course of the elaboration of any multilateral treaty, such as the Statute of the ICC, when the problem of whether and which reservations should be declared admissible has to be resolved, the participants in the elaboration procedure are inevitably confronted with the need to decide whether they wish to preserve the integrity of the treaty or whether they would like to open the treaty also to States which cannot accept all provisions of the treaty. In the latter case, the integral nature of the treaty is sacrificed for a larger participation. In excluding any reservation to the Statute article 120 opts for the first alternative. The exclusion of reservations preserves the integrity of the text which is infringed only by the transitional provision of article 124. 10

Although that solution had already been suggested by the ILC as well as some NGOs³⁰, it now has a different effect than those suggestions because of the different legal context: Whereas the Draft submitted by the ILC or proposed by some NGOs already reflected a certain flexibility through the opting-in approach which granted the States Parties free selection of the crime for which they would accept the jurisdiction of the ICC, this flexibility would have been preserved in the existing Statute only through the right to enter reservations, apart from the transitional provision of article 124. Hence, the question of reservations has gained a totally new weight in the Statute as compared to the former texts. 11

This solution reflects the particular nature of the ICC as a kind of international organization³¹. It particularly results from the character of the Statute as a normative treaty³² such as human rights instruments, *i. e.* as a treaty which does not intend to produce reciprocal rights and obligations among the States Parties, but grants rights to, or imposes obligations on, States vis-à-vis either individuals or the international community represented by international actors such as international organizations or other bodies.

In this regard, the very objective of the exclusion of any reservation has been derived from General Comment No. 24³³ of the Human Rights Committee. In line with these considerations it was argued by Human Rights Watch that 'permitting reservations would undermine the force and moral authority behind the treaty and weaken the nature of the obligations embodied in it'³⁴. Proceeding from the same General Comment, Amnesty International feared that such permission would 'defeat the object and purpose of the statute - to bring justice those responsible for the worst crimes in the world'. Reservations could undermine the Court's inherent jurisdiction over the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law as well as aggression by allowing States to redefine crimes, to add defences not consistent with international law or to avoid obligations to cooperate with the court. It could lead to an unwieldy system in which the Prosecutor and Court would have to review reservations of all relevant States to determine 12

³⁰ See above note 9.

³¹ See Rückert, article 4.

³² According to G.G. Fitzmaurice, 'normative' treaties operate in the absolute, and not relatively to the other parties - '*i. e.* they operate for each party *per se*, and not *between* the parties *inter se*', Fitzmaurice(1953) 2 *ICLQ* 15; UN Doc. A/CN.4/477/Add. 1, 11.

³³ General Comment adopted by the Human Rights Committee under article 40 para. 4 of the ICCPR, General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6.

³⁴ Human Rights Watch, see above note 15, 9; see also Human Rights Watch (H. Duffy), *Justice in the Balance: A Historic Moment. Recommendations for an independent and effective International Criminal Court* (Human Rights Watch 1998) 99.

the extent of the obligations each of the States had accepted³⁵. Similar reasons were also given by the NGO Lawyers Committee for Human Rights³⁶.

13 The reasons given by dissenting judges in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Case are also applicable to the Statute; they argued that it was not universality, but ‘rather the acceptance of common obligations ... in order to attain a high objective for all humanity, that is of paramount importance’³⁷; these reasons were reiterated by Human Rights Watch³⁸.

14 In accordance with the view expressed by the Special Rapporteur in the ILC, Alain Pellet, with regard to normative treaties, the various reasons speaking against the admissibility of reservations to the Statute can be summarized in the following way:

- Permitting reservations would encourage partial acceptance of the treaty,
- the accumulation of reservations could ultimately void the treaty of any substance³⁹,
- and would, in any event, compromise the quasi-legislative functioning of such treaties and the uniformity of their implementation⁴⁰.

Further reasons quoted by Amnesty International are the simplicity of the exclusion clause and the weakening of the deterrent and educational value of the Court⁴¹.

B. Analysis and interpretation of elements

I. Scope

15 The exclusion of reservations laid down in article 120 applies to the Statute as a whole. It also applies to future amendments to the Statute, including those concerning the crime of aggression as mentioned in article 5 para. 2⁴² and adopted at the Kampala Conference in 2010⁴³ or other crimes⁴⁴ to be submitted to the Review Conference. It would also apply to any instrument which is qualified as an integral part of the Statute, unless a different specific provision on reservations exists.

16 Although the meaning of the expression ‘treaty’ does not seem to raise problems in this context, questions may nevertheless arise concerning the extension of this clause to other instruments related to the establishment of the ICC and closely connected to its Statute. The Statute itself already calls for the elaboration of instruments such as the Rules of Procedure and Evidence (article 51), the Regulations of the Court (article 52) and the Elements of Crime (article 9). However, the nature of reservations as an act connected with the conclusion of international multilateral treaties rules out the applicability of this clause to those instruments. Despite some questions concerning their legal nature, these instruments are undoubtedly not concluded as treaties so that they are not subject to a conclusion procedure by the

³⁵ Amnesty International, *The International Criminal Court. Making the right choices – Part IV: Establishing and Financing the Court and Final Clauses* (1998) 23.

³⁶ Lawyers Committee for Human Rights, International Criminal Court Briefing Series, Vol. I, No. 7, 16 (1998): ‘Reservations would not only lead to confusion as to the exact extent of the obligations undertaken by states but could, depending on their scope, defeat the very object and purpose of the ICC treaty. As constant controversies generated by reservations to human rights treaties have shown, similar uncertainty and dilution of the ICC statute must be avoided.’

³⁷ See above note 4, 47 (Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo).

³⁸ Human Rights Watch, Justice, see above note 34, 100.

³⁹ See also Schabas(1995) 41 *Canybill* 39.

⁴⁰ UN Doc. A/CN.4/477/Add.1, 26.

⁴¹ *Ibid.*, 24.

⁴² Cf. article 5 para. 2.

⁴³ Resolution RC/Res.6.

⁴⁴ See also Resolution RC/Res.5 regarding amendments to Article 8 of the Rome statute; cf. also Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 July 1998, Annex I, Resolution E.

individual States. On the contrary, they are conceived as acts which enter into force upon their collective adoption either by the States⁴⁵ or the judges⁴⁶. Consequently, they cannot be considered as instruments to which reservations can be made. However, should they nonetheless be included into the Statute as its integral part, the exclusion of reservations clause would also apply to these parts of the Statute in relation to any State which after the entry into effect of these instruments intends to accede to the Statute according to article 125 para. 3. However, this exclusion clause does not relate to agreements that are connected with the existence of the ICC such as the Agreement on Privileges and Immunities

II. Meaning of reservations

According to article 2 para. 1 (d) of the VCLT a reservation means ‘a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’. Despite the apparently clear definition of reservations in article 2 of the VCLT, certain questions on its precise meaning nevertheless remain. This matter is not only of a theoretical, but also practical nature since the exclusion of reservations does not affect other unilateral declarations made in connection with the consent to be bound by a State so that it could even be argued *e contrario* that such unilateral declarations other than reservations are admissible. Although several international conventions, in particular those on human rights, contain a clause on the prohibition of reservations like this article 120, States Parties nevertheless have not abstained from entering declarations without these declarations being contested by the other States Parties or the relevant treaty body⁴⁷. 17

III. Interpretative declarations

Despite the total exclusion of reservations, it cannot be ruled out from the outset that States were motivated to make declarations. States could be induced to do so by the same reasons which encourage them to make reservations to other normative treaties such as treaties on human rights⁴⁸: 18

- ‘the need for a margin of flexibility in respect of human rights treaties which tend to touch on matters of particular sensitivity to States, particularly when the terms of the convention are backed up by a monitoring mechanism which ensures a dynamic interpretation of the instrument’,
- ‘as a proof that States take their treaty obligations seriously’,
- an ‘opportunity to harmonize their domestic law with the requirements of the convention while obligating them to abide by the most important provisions’.

The most frequent case of such other unilateral declarations are interpretative declarations 19 which, according to Special Rapporteur Alain Pellet, can be defined as unilateral declarations, ‘however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the

⁴⁵ As to the Rules of Procedure and Evidence and the Elements of Crimes, they enter into force upon their adoption by a two thirds majority of the members of the Assembly of States Parties (article 51 para. 1 and article 9 para. 1).

⁴⁶ The Regulations of the Court take effect upon their adoption by the judges, subject, however, to a certain objection procedure involving the States Parties (article 52 para. 3).

⁴⁷ See, e.g., article 21 of the European Convention of 1987 for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to which declarations were made by Germany, Italy, Netherlands and the United Kingdom, or article 6 para. 3 of the Additional Protocol to the European Convention of 1975 on Extradition to which declarations were made, e.g., by Netherlands and Hungary.

⁴⁸ These are the main considerations referred to by Special Rapporteur A. Pellet. See Pellet, ‘Second Report on Reservations to Treaties’, UN Doc. A/CN.4/477/Add.1, 29.

declarant to the treaty or to certain of its provisions⁴⁹. This definition was confirmed by the ILC⁵⁰. From the definition of reservations by the VCLT and this definition of interpretative declarations is to be followed that the particular designation of a declaration as one or the other is of no decisive effect for its qualification, but that this latter is only derived from the intention connected with it. This dispute on the qualification cannot be escaped if the wording leaves doubts on the intention underlying them, in particular whether or not they intend to alter the obligations under a given treaty. Cases occurred already that, if States designated their declarations as ‘interpretative declarations’, other States or judicial bodies treated them as reservations. One instance of this was the decision of the European Court of Human Rights in the *Belilos* case that declarations made by Switzerland to the European Convention for the Protection of Human Rights and Fundamental Freedoms in reality had to be treated like reservations⁵¹, or the European Commission of Human Rights which identified an interpretative declaration as a reservation in the *Temeltasch* case⁵². In view of the general prohibition of reservations, Guideline 1.3.3 as formulated by the ILC applies, according to which such a declaration ‘shall be presumed not to constitute a reservation. Such a statement nevertheless constitutes a reservation if it purports to exclude or modify the legal effect of certain provisions of the treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to its author.’⁵³.

20 Article 120 undoubtedly discards any declaration which intends to modify the extent of obligations and rights for individual States. Hence, if a declaration is made with the clear intention to exclude or modify the legal effect of provisions of the Statute, then it must be treated as an inadmissible reservation⁵⁴.

21 The same cannot be said with relation to other unilateral declarations. They remain under the general regime of international law regarding international treaties. The regime governing unilateral declarations is, however, unclear not the least because of the silence of the VCLT on this subject. According to some authors it resembles the regime governing reservations⁵⁵ whereas in the view of others the two regimes are rather distinct⁵⁶. In practice, such declarations have frequently been treated like reservations insofar as, for instance, they have been objected by other States Parties⁵⁷. What, however, can be considered as unquestionable is that a State making such an interpretative statement is bound by it, once it has not been contested by the other States Parties or by the competent organs of the Court⁵⁸. It must, however, also be borne in mind that they cannot have an effect on the rights and obligations under the Statute with regard to other Parties or to organs of the Court, unless the latter concur in this interpretation.

Since such declarations can neither alter nor exclude the legal effect of provisions of the Statute, they are admissible in relation to the entire Statute.

⁴⁹ Pellet, ‘Third Report on Reservations to Treaties, Addendum’, UN Doc.A/CN.4/491/Add.4, 33.

⁵⁰ Guideline 1.2, Report of the International Law Commission on the Work of its Sixty-Third Session, UN GAOR, UN Doc.A/66/10, Add.1, 62.

⁵¹ Pellet, see above note 49, §§ 293 *et seq.*; Publications of the European Court of Human Rights, Ser. A, Vol. 132, 22.

⁵² Pellet, see above note 49, § 295; European Commission of Human Rights, Decisions and Reports, No. 31, Apr. 1983, paras. 68 *et seq.* and 438 *et seq.*

⁵³ Report of the International Law Commission, see above note 50, § 308.

⁵⁴ Pellet, see above note 49, § 301.

⁵⁵ *Ibid.*, § 241 citing authors like Tomuschat (1967) 27 ZaöRV 465; see also Horn, Reservations 235 and Pellet, above note 49, § 241.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, §§ 284 *et seq.*

⁵⁸ According to D.W. Bowett, interpretative declarations have no legal consequences, Bowett, (1976–77) 48 BYBIL 67, 68.

IV. General international law

Since the Statute constitutes a treaty concluded among States after the entry into force of the VCLT⁵⁹ the latter is applicable to the Statute in relation to States Parties which are also Parties to the VCLT whereas the other States Parties to the Statute have to resort to customary international law which nevertheless has conformed to the regime of the VCLT⁶⁰. The famous advisory opinion of the ICJ in the Genocide Case⁶¹ had paved the way to the regime on reservations embodied in articles 19–23 VCLT which, yet, still contain enough lacunae to engage the ILC again with this issue, 20 years after the adoption of the VCLT⁶². Certainly, in the context of the Statute, the question on the applicability of the VCLT is of less significance not only because of the similarity or even identity of conventional and customary regime, but also in view of the plain and clear wording of article 120 which leaves no doubts on the inadmissibility of reservations in the sense of article 19 (a) VCLT⁶³. Likewise, the widely discussed problem of the legal particularities of reservations to ‘normative treaties’⁶⁴ was certainly a motivation for article 120⁶⁵, but has no significance for the Statute in view of the absolute prohibition of reservations.

Nonetheless, certain other issues connected with reservations still deserve a particular consideration since they permit a broader evaluation of the merits of article 120.

1. The need of article 120

According to article 19 (b) VCLT, a reservation is not permitted if it relates to a provision which does not figure among the provisions to which reservations are explicitly permitted. Hence, if the Statute permits reservations to certain of its provisions, a reservation to any other provision is not permitted and is, therefore, inadmissible. Although the Statute does not explicitly define provisions to which reservations could be made, it could nevertheless easily be argued that some of its provisions authorize States to make declarations having an effect like reservations. The first candidate in this regard is the transitional provision of article 124 which entitles States Parties to declare that they do not accept certain legal effects of article 8. A declaration under this article is undoubtedly one which intends to ‘exclude or modify the legal effect of certain provisions of the treaty in their application to that State’. If article 124 is understood in this sense and a declaration under this article as amounting to a reservation, no other reservations are admissible by virtue of article 19 (b) VCLT even in the absence of a clause excluding reservations; in the light of these considerations article 120 has to be considered redundant. If the proposal of ‘no clause on reservation’ which was proposed in the course of the discussion⁶⁶ had been carried, the legal consequence of that conclusion would have been the same as it is achieved by the existing article 120, namely the exclusion of (other) reservations.

⁵⁹ According to article 4 of the VCLT the latter ‘applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States’; the VCLT entered into force in January 1980.

⁶⁰ Although, with respect to the regime of reservations, the VCLT at the moment of its adoption did hardly reflect customary international law, but rather its progressive development, the States presently refer to the regime on reservations embodied in the VCLT frequently without proving the applicability of the VCLT *strict sensu* to the case in question.

⁶¹ See above note 4.

⁶² Cf. the inclusion of this topic in the Commission’s agenda, in: Pellet, ‘First Report on Reservations to Treaties’, UN Doc. A/CN.4/470, 4.

⁶³ Article 19 (b) VCLT reads: ‘A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty.’

⁶⁴ See the reports by Special Rapporteur A. Pellet to the ILC, UN Doc. A/CN.4/470, A/CN.4/477 and A/CN.4/491 and Add.

⁶⁵ See above note 31.

⁶⁶ See above note 19.

2. Reservations to constituent instruments of international organizations

- 24 When it submitted the Draft Statute to the General Assembly, the ILC already drew attention to the fact that whether or not the Draft Statute would be considered to be ‘a constituent instrument of an international organization’ within the meaning of article 20 para. 3 VCLT, it is certainly closely analogous to a constituent instrument, and the considerations which led the drafters to require the consent of the ‘competent organ of that organization’ under article 20 para. 3 apply in rather similar fashion to it⁶⁷. Article 20 para. 3 VCLT provides that reservations to constituent instruments of international organizations need the acceptance by the relevant organ of the organizations affected by the reservation⁶⁸. This particular requirement results from the need to maintain the integrity of the organization since reservations of individual States to certain provisions, in particular to those provisions which are not of a reciprocal, but of a ‘normative’ nature⁶⁹, would destroy the whole concept of the organization and make it inoperative. It is, e.g., for obvious reasons absurd to allow for reservations to provisions on the composition of organs. According to Mendelson, such reservations would lead to a collapse of the organization and to chaos⁷⁰. This consequence had already been acknowledged by the ILC in the course of the preparation of the VCLT since it considered that ‘in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable’⁷¹. In the discussions in the General Assembly, it had been generally recognized that reservations to constitutions of international organizations were a special case and that the integrity of the organization was the primary consideration⁷². This conclusion was confirmed by the ILC’s comment on Guideline 2.8.8⁷³ of the Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-third session, according to which ‘(t)he constituent instruments of international organizations do not by nature lend themselves to the flexible system’.⁷⁴ The ILC qualified also the Draft Statute ‘as an overall scheme, incorporating important balances and qualifications in relation to the working of the Court’ which is intended to operate as a whole. For these reasons, the ILC supported the exclusion or strict limitation of reservations to the Statute⁷⁵.

3. The legal status of inadmissible reservations (declarations)

- 25 It cannot be excluded that despite the inadmissibility of reservations States will attach declarations to the documents expressing their consent to be bound, which, by their content, amount to reservations and are therefore inadmissible by virtue of article 120. The legal consequences of such inadmissible reservations, respectively declarations, are unclear; at least two schools of thoughts opposing each other exist. According to the first, inadmissible

⁶⁷ Report of the ILC, see above note 8.

⁶⁸ Article 20 para. 3 VCLT reads: ‘When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.’

⁶⁹ Mendelson, Reservations 145.

⁷⁰ *Ibid.*, 148.

⁷¹ Wetzel and Rauschnig (eds.), *The Vienna Convention on the Law of Treaties. Travaux Préparatoires* (1978) 192.

⁷² Mendelson, Reservations 145.

⁷³ This Guideline reads as follows:

‘Acceptance of a reservation to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.’ (Report of the ILC UN Doc. A/66/10, Add.1, 300).

⁷⁴ *Ibid.*, 301.

⁷⁵ 1994 ILC Draft Statute, 147.

reservations affect the consent to be bound and, consequently, destroy the legal effect of the consent to be bound. The second school of thought comes to the conclusion that such declaration has to be considered as not made and as not affecting in any way the consent to be bound⁷⁶. As to the legal consequences of impermissible reservations, Special Rapporteur Alain Pellet already posed the following questions⁷⁷ which singled out the most salient issues and their complex nature, but were differently answered by doctrine and practice:

‘Must the reservation be regarded as void, but the expression of consent to be bound by the treaty as valid?

On the contrary, does the impermissibility of the reservation affect the reliability of the expression of consent itself?

Does the impermissibility of the reservation produce effects independently of any objections which may be raised to it?

At most, have the other contracting States (or international organizations) an obligation in such circumstances to raise an objection to an impermissible reservation?

Or may they, rather, accept such a reservation, either expressly or tacitly?’

In the context of the Statute, such and similar questions could be stirred up if States issue 26 declarations amounting to – impermissible – reservations. According to the final version of the Guide to Practice on Reservations to Treaties as adopted by the ILC invalid reservations are to be considered as null and void, and therefore devoid of any legal effect.⁷⁸ The status of the author of such reservations depends ‘on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty’. Unless the relevant State has expressed a contrary intention or such an intention is otherwise established, ‘it is considered a contracting State or a contracting organization without the benefit of the reservation’.⁷⁹ However, it is not yet established whether this solution can and will gain universal acceptance. In view of the absence of a generally shared view, of the broad spectrum of possible answers to these questions, but also of the need to protect the integrity of the Statute not only because of its nature as the constituent instrument of an international body comparable to an organization, but also as a kind of a normative treaty, a decision on this issue will be required, which would have equal effect for all States Parties and for the ICC itself. In the course of the negotiations, it was proposed to confer the relevant decision on the ICC itself⁸⁰. This view was modelled on certain conclusions drawn by the ILC that monitoring bodies of human rights instruments should be endowed with the competence to decide on the admissibility of reservations⁸¹. However, the total exclusion of reservations and the absence of any provision regarding declarations made this proposal redundant.

⁷⁶ Bowett, see above note 58, 88.

⁷⁷ UN Doc. A/CN.4/470, 52.

⁷⁸ Guideline 4.5.1 reads as follows:

‘A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.’

Report of the ILC, UN Doc. A/66/10, Add.1, 446.

⁷⁹ Guideline 4.5.3 *ibid.*, 524.

⁸⁰ See article 109 Preparatory Committee Draft.

⁸¹ The Commission drafted the following relevant conclusions:

‘5. The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them;

7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation’; Report of the ILC, see above note 22, 126.

This conclusion was later reflected in Guideline 3.2 concerning the Assessment of the permissibility of reservations, which reads:

‘The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

– contracting States or contracting organizations;

27 Despite the silence of the Statute in this regard, as far as declarations regarding its judicial functions are concerned and a case requires a decision, a certain competence of the ICC to decide on this issue can nevertheless be based on its competence-competence as is expressed in article 19 para. 1 and article 119 para. 1⁸². But in view of the complex nature of the Statute such a question on the admissibility of declarations and its legal effect could also surface in the form of a dispute other than one concerning the judicial functions of the Court. In that case article 119 para. 2 would apply according to which the Assembly of States Parties would become competent either to settle the dispute or to make recommendations on further means of settlement, including referral to the International Court of Justice.

4. The present practice

28 Among the 123 States being presently (30 August 2015) party to the Statute, 67 made declarations. These declarations are of different nature: One kind of declarations relates to those provisions which give the states the right to opt for one or the other conduct, others are of the type of interpretative declarations, whereas some relate to the territorial scope of the Statute.

29 Most of these declarations, namely 66, made use of the possibilities offered by article 87 (1) and (2). According to article 87 (1) States shall designate upon ratification, acceptance, approval or accession whether requests addressed by the ICC to States shall be transmitted through the diplomatic channel or any other appropriate channel. According to article 87 (2) States should indicate upon ratification, acceptance, approval or accession in which language requests for cooperation and any documents supporting the request issued by the ICC shall be translated. Nine States also made declarations referring to article 103 (1) (a) and (b) by which they declared their willingness to accept sentenced persons under different conditions.

30 France and Colombia made use of article 124 and excluded the jurisdiction of the Court with respect to the category of crimes referred to in article 8 (war crimes) when a crime was alleged to have been committed by its nationals or on its territory. By a declaration of 13 August 2008, the French Government informed the depositary, the Secretary-General of the United Nations, that it had decided to withdraw the declaration under article 124 made upon ratification⁸³.

31 Other declarations intend to furnish provisions of the Statute with a certain meaning so that they operate as ‘interpretative declarations’ in the sense addressed by the International Law Commission.⁸⁴ France made a general declaration concerning its inherent right of self-defense in accordance with article 51 of the Charter of the United Nations, Egypt subjected the interpretation and application of the Statute to the general principles and fundamental rights which were universally recognized and accepted by the whole international community, with the principles, purposes and provisions of the Charter of the United Nations and the general principles and rules of international law and international humanitarian law. It further declared that it would interpret the two terms fundamental rights and international standards on the understanding that they were accepted by the international community as a whole. Egypt also referred to article 7 in order to ensure the interpretation of all acts mentioned in this provision as being subject to the conditions, measures and rules appearing in the introductory phrase of this provision. Reference was also made to the meaning of the terms ‘the concrete and direct overall military advantage anticipated’ (Egypt) ‘the established

-
- dispute settlement bodies;
 - treaty monitoring bodies.’

The subsequent guidelines address the competence of such bodies in this respect.

⁸² The necessity to endow the ICC with this competence was emphasized by Human Rights Watch, Justice, see above note 34, 100.

⁸³ See UN Treaty Collection, Declarations and Reservations relating to the Rome Statute of the International Criminal Court <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#12> accessed 1 September 2014.

⁸⁴ See above note 48 *et seq.*

framework of international law' (United Kingdom), 'armed conflict', 'military advantage' or 'military objective', to damage to the natural environment (France), as well as to the application of international humanitarian law (Egypt, New Zealand). As to the question of non-retroactivity of the Court's jurisdiction pursuant to articles 11 and 24 of the Statute, Egypt affirmed that this principle should not invalidate the principle of the inapplicability of the statute of limitations to war crimes. Several declarations emphasize the need of an interpretation of the Statute in conformity with the rules of international humanitarian law (Belgium, Colombia, Egypt, New Zealand). The declaration made by Portugal according to which it intended 'to exercise its jurisdictional powers over every person found in the Portuguese territory, that is being prosecuted for the crimes set forth in article 5, paragraph 1 of the Rome Statute of the International Criminal Court, within the respect for the Portuguese criminal legislation', could hardly qualify as an interpretative declaration, but rather a unilateral declaration relating to its future conduct.

A further type of declaration refers to the territory to which the Statute should apply: 32
Denmark excluded the Faroe Islands and Greenland from the Statute, but later declared by a communication to the Secretary-General the withdrawal of its declaration with regard to Greenland, New Zealand excluded Tokelau, whereas Netherlands extended the application to the Kingdom in Europe, the Netherlands Antilles and Aruba. The communication of United Kingdom to extend the application of the statute to, *inter alia*, the Falkland Islands was objected by Argentina that regarded *Islas Malvinas*, *Georgias del Sur* and *Sandwich del Sur* and the surrounding maritime areas as an integral part of the Argentine national territory. Although article 29 of the VCLT provides that a treaty is binding upon each party in respect of its entire territory unless a different intention appears from the treaty or is otherwise established and the Statute does not provide a right to limit the geographical scope of the Statute, the need of these declarations results from the disputed status of these territories. Otherwise problems could arise as to the territorial scope of the Statute.

Several declarations refer to the interpretation of article 8, mainly in connection with the 33
type of prohibited weapons: Some of them include the nuclear weapons among these weapons (Egypt, New Zealand and Sweden) or refer, in particular, to the advisory opinion of the ICJ in *Legality of the Threat or Use of Nuclear Weapons* (1996)⁸⁵, whereas others exclude them unless they are explicitly banned either by a treaty or an amendment to the Statute (France, implicitly United Kingdom).

A particular problem has been raised by the declaration of Uruguay, which states that 34
'Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic'. Some States qualified this declaration as a prohibited reservation (Finland, Germany, Netherlands, Sweden in explicit objections and Ireland, United Kingdom, Denmark and Norway in communications to the Secretary-General) and objected to it. These objections, however, differ in their effect: Finland, Netherlands, Sweden, Denmark and Norway explicitly declared that Uruguay was bound by the Statute, but could not benefit from its reservation, whereas Germany, Ireland and United Kingdom only stated that the Statute entered into force between Germany and Uruguay. In its reply to these objections, Uruguay denied the intention to launch a reservation. In this respect, the question arises whether an inadmissible reservation would have to be considered as null and void, but would not affect the consent to be bound or whether the consent to be bound should be considered as being dependent on the reservation so that, in the case of an inadmissible reservation, the relevant State would not become party. In the present case, in light of the objections according to which Uruguay remained bound by the Statute regardless of its declaration and of the silence of the majority of States, Uruguay must be considered to be bound by the Statute. As to the effect of this declaration, the reply of Uruguay and the view of the objecting States clarified that Uruguay could not resort to the declaration in order to be exempt from

⁸⁵ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996) ICJ Rep 226.

any of the obligations under the Statute. By a communication of 26 February 2008, Uruguay informed the depository, the Secretary-General of the United Nations, that it withdrew this interpretative declaration.

- 35 Several other declarations raise certain doubts about their intention since they are formulated in a manner that cannot exclude the effect of a reservation: Australia declared not to surrender any person without investigations or prosecution and a certificate from the Attorney-General; Colombia stated that its domestic law would not be altered by the Statute; similarly, Jordan declared its law as being fully consistent with the statute; according to Malta's declaration, persons pardoned for a certain offence would not be tried. The United Kingdom only confirmed and drew to the attention of the Court 'its views as expressed, inter alia, in its statements made on ratification of, inter alia, the Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8th June 1977'. The United Kingdom had made several reservations to this Protocol so that it could be asked whether it intended to apply them also to the Statute itself. However, article 120 of the Statute undoubtedly excludes their application to the Statute, notwithstanding their continued application to the Additional Protocol. In this perspective, the purpose of this declaration could also be seen in rebuffing the assumption that the ratification of the Statute would entail the withdrawal of the reservations with relation to the Additional Protocol. Amnesty international qualifies the declarations of Australia, Colombia, France, Malta and the United Kingdom as reservations prohibited under article 120 of the Statute⁸⁶. However, these declarations should first be qualified in the light of Guideline 1.3.3. of the of the Guide to Practice on Reservations to Treaties elaborated so far by the International Law Commission⁸⁷ according to which in the case of prohibition of reservation a declaration should be viewed rather as an interpretative declaration than a reservation.
- 36 Any interpretative declaration could have effect only for the State launching it and only to the extent that they are not opposed. This effect could only relate to the rights and duties that are incumbent upon this State. As far as other rights and obligations are concerned these declarations cannot apply so that the Court is neither bound nor otherwise affected by them. As far as declarations that reflect a certain interpretation of the definition of the crimes falling under the jurisdiction of the Court have not been accepted by the other States Parties, they cannot amount to an authentic interpretation so that they can have effect only for the State making them, but not for the Court when it applies the definitions of crimes in a proceeding. For these reasons, the declarations regarding the use of nuclear weapons do in no way prejudice the decisions of the Court on this issue. However, a problem could arise if a State having made such a declaration denies the cooperation with the Court on the ground that it has no jurisdiction as a result of the interpretation reflected in the declaration. It will then be a matter of the Court to make a finding on the effect of such declarations according to the procedure under article 87 (7).
- 37 Some of the declarations, in particular those that purport to change the obligations under the Statute concerning, e.g., the duty of cooperation by making it subject to domestic legislation, seem to amount already to reservations in the sense of article 2 of the VCLT⁸⁸ so that they would become incompatible with article 120. However, neither by the depository nor by a State Party protests to these reservations have been launched as yet and their admissibility has not been disputed. Any dispute on this question would be subject of the Assembly of States Parties according to article 119 para. 2.
- 38 Israel made a declaration upon signature, which, however, does not purport to provide a certain interpretation of provisions of the Statute, but only to explain its position towards the establishment of the ICC. A declaration under article 12 (3) of the Statute has been made by

⁸⁶ Amnesty International, 'International Criminal Court: Declarations amounting to prohibited reservations to the Rome Statute' (November 2005) AI Index IOR 40/032/200512.

⁸⁷ See above note 53.

⁸⁸ See mn 17.

the Republic of Côte d'Ivoire declaring to accept 'the jurisdiction of the Court for the purposes of identifying, investigating and trying the perpetrators and accomplices of acts committed on Ivorian territory since the events of 19 September 2002' and to cooperate accordingly with the Court. A further declaration of this kind, which, however, aroused certain discussions, was submitted by the Palestine National Authority on 22 January 2009 according to which the Government of Palestine recognized 'the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002'. The Prosecutor did not take a decision on the applicability of Article 12 of the Statute to this declaration due to the undecided status of Palestine as a State, being a matter of the United Nations or the Assembly of State Parties. In the meantime, however, the General Assembly adopted a resolution granting Palestine the status as a Non-Member Observer State⁸⁹, Palestine became a State Party to the Rome Statute by 1 April 2015. Nevertheless, the declaration already raised the question of its retroactive effect regarding the acceptance of jurisdiction.⁹⁰ By means of a declaration under article 12 (3), Ukraine accepted the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Ukraine within the period 21 November 2013–22 February 2014. The Declaration came in force on 25 February 2014 and has been made for an indeterminate duration.⁹¹

5. Declarations with regard to the crime of aggression

A new form of declaration is to be expected under the amendments achieved at the Review Conference in Kampala regarding the crime of aggression. Article 15*bis* (4) that governs the exercise of jurisdiction over the crime of aggression in case of referral by a State Party or *proprio motu* investigations by the Prosecutor provides that a State Party can declare that it does not accept the jurisdiction of the Court with regard to the crime of aggression by lodging a declaration with the Registrar. Such a declaration can be withdrawn at any time and shall be reconsidered by the State party within three years. However, the precise effect of this declaration is not clear: different interpretations have been offered, in particular depending on whether the jurisdiction concerning the crime of aggression should be subject to article 12 or article 121 (5) of the Statute⁹².

⁸⁹ UN Doc.A/RES/67/19.

⁹⁰ Wills, (2014) 12 *JICJ* 407, 408.

⁹¹ See Note Verbale of the Embassy of the Ukraine in The Hague of 9 April 2014, No. 61219/35-673-384; <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationRecognitionJurisdiction09-04-2014.pdf> accessed 28 August 2014.

⁹² See, for instance, Krefß and von Holtzendorff (2010) 8 *JICJ* 1179–1217; Liechtenstein Institute on Self-Determination and the Woodrow Wilson School of Public and International Affairs, Princeton University, *Handbook. Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC: Crime of aggression – war crimes* (2012); Barriga, in: Dive, Goes, and Vandermeersch (eds.) *From Rome to Kampala: The first 2 amendments to the Rome Statute* (2012) 31–53; ReisingerCoracini (2010) 2 *GoJIL* 745, 745; Schmalenbach (2010) 15/16 *JZ* 745, 790.

Article 121 Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Literature: Barriga, S. 'Negotiating the Amendments on the crime of aggression', in: S. Barriga and C. Kress (eds.), *The Travaux Préparatoires of the Crime of Aggression* (CUP 2012) 3; id., 'Exercise of Jurisdiction and Entry into Force [of Amendments relating to the crime of aggression]', Brussels Colloquium, 'From Rome to Kampala' (2012) <http://www.regierung.li/uploads/media/2012-6-5_Stefan_Barriga_-_CoA_Exercise_of_Jurisdiction_and{EIF_-_Brussels_Colloquium_-_paginated_02.pdf> accessed 9 September 2014; Barriga, S. and Grover, L., 'A Historic Breakthrough on the Crime of Aggression', (2011) 105 *AJIL* 3 517; Clark, R. S., 'Building on Article 8 (2) (b) (xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare', (2009) 12 *NCLRev* 3 366; id., 'Ambiguities in Article 5 (2), 121 and 123 of the Rome Statute', (2009) 41 *CaseWesternReserveJIL* 2-3 413; Kress, C. and von Holtendorff, L., 'The Kampala Compromise on the Crime of Aggression', (2010) 8 *JICJ* 5 1179.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	6
I. Paragraph 1: After seven years any State Party may propose amendments ...	6
II. Paragraph 2: Consideration by Assembly of States Parties or Review Conference	7
III. Paragraph 3: Adoption requires two-thirds majority at Assembly or Review Conference	9
IV. Paragraph 4: Entry into force	10
V. Paragraph 5: Amendments to articles setting out the crimes within the jurisdiction of the Court	11
VI. Paragraph 6: Right to withdraw if not accepting amendment	13
VII. Paragraph 7: Secretary-General to circulate amendments	15

A. Introduction/General remarks

Every significant aspect of this article was the subject of hard negotiation. 1

At the core of the debate was when amendments might first be considered. Some States believed that almost as soon as the Statute came into force it would be appropriate to consider improving and expanding upon it. This was particularly true of States who believed that some offences that were important to them, such as terrorism, drug trafficking and the use of weapons of mass destruction, should have been included within the jurisdiction of the Court. They were prepared to defer in the meantime, but only if there would be fair opportunity to raise their items in the future. Some wished for flexibility in amending so that unexpected flaws could rapidly be rectified. Others argued that, given the novel nature of what was being adopted, and the inroads that it entailed on state sovereignty, it was necessary to go slowly, to consolidate and assess the situation in a deliberate fashion before moving further. Five and ten years were the most common candidates for what might be a 'reasonable' time.

The compromise by which most amendments could not even be formally considered until 2 seven years after the Statute comes into force was the best that could be attained¹. It will be noticed that it applies also to the calling of the first Review Conference pursuant to article 123 of the Statute². It was argued in earlier editions of this Commentary that the seven year time-frame should not apply to the conclusion of the negotiations to define the crime of aggression which are a condition precedent to including aggression within the jurisdiction of the Court³. The issue became moot when the negotiations stretched on until the first Review Conference in 2010.

The second question had to do with majorities. There was little support for the position 3 that there must be unanimity of the States Parties before an amendment could take place. Most seemed to accept that a (fairly large) qualified majority would suffice, as is normal for the constitutions of international organizations. Unanimity is almost impossible to achieve where a few obstructionist governments or a few governments suffering from total inertia are in a position to block matters. Then, there is the need, if the organization is to be effective, for structural amendments to apply to all members.

The ultimate resolution in paragraphs 3, 4, 5 and 6 of this article makes amendments 4 extremely difficult, although some will apply to everybody. Paragraph 3 provides that two-thirds of the States Parties (acting at an Assembly of States Parties or at a Review Conference) may 'adopt' amendments. In order to 'come into force', however, the amendments need to be accepted by individual States Parties. Except as provided in paragraph 5, amendments will be effective for everybody once they have been accepted by seven-eighths – a very high threshold⁴. The extreme difficulty that this creates in amending is mitigated a little by article 122 which permits fast track amendments to provisions of an 'institutional' nature on the basis of a two-thirds vote at the Assembly of States Parties or a Review Conference, with no need for further acceptance. On the other hand, there was a price for obtaining the *erga omnes* application of amendments under paragraph 4. Paragraph 6 gives to a State that does not accept an amendment to which seven-eighths have agreed the right to withdraw from the Statute, with immediate effect⁵.

¹ Article 122, discussed there, permitted some technical amendments right from the entry into force, and article 36 para. 2 permitted the consideration of proposals to increase the number of judges without regard to the seven year period. Neither was invoked during the initial period and they have, to date, remained unused.

² Clark, see *article 123*.

³ See Triffterer, Preliminary Remarks, mn 61 (2nd ed. 2008).

⁴ Article 108 UN Charter requires only a two-thirds majority for an amendment to apply to all, although in that instance, the permanent members of the Security Council must all accept. It was inconceivable that a special provision for the permanent members could be negotiated in the ICC process.

⁵ The UN Charter contains no express power of withdrawal but there was an understanding in Committee that it would not 'be the purpose of the Organization to compel a Member to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds

- 5 Paragraph 5 creates a different rule for amendments affecting the substance of the crimes over which the Court has jurisdiction pursuant to articles 5, 6, 7 and 8 of the Statute. In this instance, if a State Party does not accept the amendment, the Court is not able to exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its own territory⁶.

B. Analysis and interpretation of elements

I. Paragraph 1: After seven years any State Party may propose amendments

- 6 There is nothing conceptually difficult about paragraph 1. It prohibits efforts to amend the main parts of the Statute until seven years have elapsed from its coming into force. After that, States Parties (alone)⁷ may propose amendments. The Secretary-General, exercising a typical depositary function⁸, will notify the other States Parties.

II. Paragraph 2: Consideration by Assembly of States Parties or Review Conference

- 7 Amendments are to be taken up by the next meeting of the Assembly of States Parties, but no sooner than three months from the date of notification, thus allowing a reasonable time for States Parties to develop their positions. The Assembly has broad authority then to consider whether to accept or reject the amendment itself, or 'if the issue so warrants', refer it to a Review Conference. The Assembly is the ultimate arbiter of the agenda for a review, and

itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect'. See The United Nations Conference on International Organization (Selected Documents) (1946) 507. The Charter statement thus provides a precedent for the present provision. See also on withdrawal article 56 para. 1 VCLT (withdrawal from treaty which has no withdrawal provision is not possible unless it is 'established that the parties intended to admit the possibility').

⁶ The question whether paragraph 3 alone (adoption by Assembly or Review Conference), or paragraph 3 combined with paragraph 4 or paragraph 5 applies to the 'provision' on aggression contemplated by article 5 (2) of the Rome Statute, became highly controversial. See especially Report of the Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 13-15 June 2005, Doc. ICC-ASP/4/32 at 357 (2005) and Report of the Special Working Group, Doc. ICC-ASP/6/20/Add. 1, Annex II) (2008); R. S. Clark (2009) 41 *CaseWesternReserveJIL* 2-3 [413]. The difference in effect is dramatic: if only paragraph 3 applies, no further action by way of ratification is necessary; if paragraph 4 applies, nobody is bound by the aggression provision until the seven-eighths is reached; once is it, though, everyone is bound (subject to a right for dissenters to withdraw entirely from the Statute); if paragraph 5 applies, when the first acceptance of the provision is received, and a year passes, the provision applies to that State. It applies, similarly, for each subsequent acceptor. But it never applies to the nationals or territory of States which do not accept it. Is the 'provision' an 'amendment'? Is it an 'amendment to articles 5, 6, 7, and 8 of [the] Statute'? Arguably it is a completion of them rather than an 'amendment'. What do the words 'adopted in accordance with articles 121 and 123' mean in article 5 para. 2? There is nothing definitive in the preparatory work and the combined language of the two articles is unclear. The solution adopted in Kampala does not fit precisely into any of the three possibilities. See discussion in article 5 and Barriga, in Barriga and Kress (eds.), *The Travaux Préparatoires of the Crime of Aggression* (2012) 3; Kress, and von Holtendorff (2010) 8 *JICJ* 5 [1179]; Barriga and Grover (2010) 105 *AJIL* 3 [517]; Barriga, 'Exercise of Jurisdiction and Entry into Force [of Amendments relating to the crime of aggression]', Brussels Colloquium, 'From Rome to Kampala' (2012) <http://www.regierung.li/uploads/media/2012-6-5_Stefan_Barriga_-_CoA_Exercise_of_Jurisdiction_and EIF_-_Brussels_Colloquium_-_paginated_02.pdf> accessed 9 September 2014.

⁷ Should others, such as the Prosecutor, the Registrar, a State which is a non-Party, the judges or NGOs, wish to recommend amendments, they may, of course, do so, but in order to set the formal amendment procedure into motion they will need to persuade a State Party to espouse it at least to the extent of having it circulated by the Secretary-General.

⁸ Article 77 para. 1 (e) VCLT describes as one of the functions of a depositary, 'informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty'.

it exercised its gatekeeper role when it declined to forward several proposed amendments to the 2010 Review Conference.

The competence of the Assembly to itself examine and act upon proposed amendments is entirely coextensive with that of a Review Conference. It is within the unfettered discretion of the Assembly how to proceed. Probably not much can be read into the words ‘if the issue so warrants’. There is no suggestion in the language or structure of articles 121 and 123 that any particular types of amendment are more appropriate than others for examination by a Review Conference rather than by the Assembly. Perhaps, in a very general way, the ‘most important’ ones should go before a Review Conference, if only because they will probably have more careful consideration there. According to article 123, the first Review Conference ‘may include, but is not limited to, the list of crimes contained in article 5’, which perhaps suggests that a Review Conference is especially appropriate for matters of substance. The agenda of the Assembly will contain many mundane matters along with potential possibilities of amendment and the time may just not be available to give careful consideration to proposed amendments, whereas a Review Conference has but one object in life.

III. Paragraph 3: Adoption requires two-thirds majority at Assembly or Review Conference

The Assembly of States Parties is exhorted under the Statute to make ‘every effort’ to ‘each decisions by consensus’⁹ in all its endeavours and only after those efforts fail to proceed to a vote. The requirement here in article 121 of a ‘two-thirds majority of States Parties’ in order to adopt an amendment is more stringent than the general rule for the Assembly. The general rule is that decisions on matters of substance made by the Assembly must be approved by a two-thirds majority of those present and voting, provided that an absolute majority of States Parties constitutes the quorum for voting¹⁰. The two-thirds majority required here in paragraph 3 (which of course applies both to amendments made by a Review Conference and those done by the Assembly itself) must mean that at least two-thirds of the Parties at the particular time need to be present and vote affirmatively¹¹. One-third plus one of the States Parties can effectively block adoption of an amendment by some combination of voting no, by abstaining, by not participating in the vote, or even by failing to provide a quorum. At the Kampala Review Conference, all matters requiring decisions were dealt with by consensus, including the contentious provisions on the crime of aggression.

IV. Paragraph 4: Entry into force

After an amendment has been adopted by the Assembly or by a Review Conference, it then awaits ‘ratification or acceptance’ by the States Parties¹². Except for the amendments

⁹ Article 112 para. 7.

¹⁰ Article 112 para. 7 (a) which, according to the chapeau of paragraph 7 applies ‘except as otherwise provided in the Statute’. Article 121 para. 3 provides otherwise. Article 112 para. 7 (a) is supplemented by rule 66 of the Rules of Procedure of the Assembly of States Parties. It provides that, for the purposes of the Rules, the phrase ‘States Parties present and voting’ means States Parties present and casting an affirmative or negative vote. States Parties which abstain shall be considered as not voting.

¹¹ See also rule 76 of the Rules of Procedure of the Assembly of States Parties, headed ‘Amendments to the Statute’. It provides that ‘Amendments to the Statute, proposed pursuant to article 121, paragraph 1, and article 122, paragraph 1 of the Statute, on which a consensus cannot be reached shall be adopted by the Assembly or by a Review Conference, by a two-thirds majority of States Parties’.

¹² In typical modern treaty practice, multilateral treaties are first signed and then the definitive act of becoming party to them is called ‘ratification’. Those States that do not sign (usually because a deadline has passed) may ‘accede’. Some States prefer the terms ‘acceptance’ and ‘approval’ to one or other of ‘ratification’ or ‘accession’. To accommodate such sentiments, these words all appear, for example, in article 125 which is entitled ‘Signature, ratification, acceptance, approval or accession’. In the case of amendments pursuant to article 121, there is no expectation of signature and a sparse reference to ‘ratification’ and ‘acceptance’ suffices to get across the point,

dealing with the substantive crimes within the jurisdiction of the Court (to which paragraph 5 applies), and the relatively minor institutional provisions (to which article 122 applies), paragraph 4 is the applicable rule on entry into force. As has been noted in the Introduction to the article¹³, those amendments to which paragraph 4 applies enter into force for all State Parties once seven-eighths of them accept.

It was understood throughout the negotiations that some special majority would be required for amendments to be effective for those who failed to accept them, but turning this principle into a particular number was a daunting task. The final report of the Coordinator on the Final Clauses¹⁴ had five-sixths and seven-eighths bracketed as options, both of which had supporters. Indeed, many thought that even five-sixths was requiring too much. The Bureau of the Committee of the Whole evidently concluded that the greater number had more support, particularly that of one or more of the major players.

V. Paragraph 5: Amendments to articles setting out the crimes within the jurisdiction of the Court

- 11 In the version of this article that was available for signature in Rome, paragraph 5 referred only to amendments to ‘article 5 of this Statute’. This led some to think that the Bureau of the Committee of the Whole, which established the final form of the paragraph, had intended to draw a distinction between amendments to article 5 of the Statute, which would only become applicable to States which accepted them, and amendments to articles 6, 7 and 8 which would become applicable to all pursuant to paragraph 4. The effect of this would be that the addition of a new crime to the categories of crimes within the jurisdiction of the Court (for example by adding terrorism or drug offences) would apply only to those who agreed. On the other hand, changes to the definitions of the crimes already within the Statute as adopted, namely genocide, crimes against humanity and war crimes, could be made applicable *erga omnes* once the seven-eighths standard was met. This was a conceivable way to break the impasse that had remained on this paragraph after the final efforts of the Coordinator to resolve it. At the time of the final report of the Coordinator of the Final Clauses to the Committee of the Whole, article 5 still contained not only what is now article 5, but also what is now articles 6, 7 and 8. As reported to the Committee of the Whole, the Coordinator’s recommendation read:

[5. Any amendment to article 5 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance [, unless the Assembly or the Conference has decided that the amendment shall come into force for all States Parties once it has been accepted by [5/6] [7/8] of them]]¹⁵.

- 12 The careful reader will notice the brackets within the brackets indicating two levels of the controversial! In the event, the Bureau of the Committee of the Whole insisted that it had not intended to execute a compromise based on a different rule for article 5 than for articles 6, 7 and 8. Apparently (although I can find this nowhere publicly articulated) its intent was merely to drop the second set of bracketed words which would allow the Assembly or the Review Committee to make the amendment applicable to all¹⁶, and of course to remove the brackets around the whole paragraph. In a letter dated 3 September 1998 to Mr. Hans Corell, Under-Secretary-General and The Legal Counsel, The Chair of the Committee of the Whole stated that:

which is one of substance not terminology: A State must lodge an official document with the depositary indicating, whatever verb is used, its consent to be bound by the Statute or its amendments as the case may be.

¹³ See text accompanying, note 4.

¹⁴ UN Doc. A/CONF.183/C.1/L.61 of 11 July 1998.

¹⁵ *Ibid.*

¹⁶ Dropping the last part of the draft was important to at least one of the Permanent Members of the Security Council.

‘As you know, during the elaboration of the Statute, article 5 contained both the list of crimes within the jurisdiction of the Court, as well as their definitions. Article 5 remained undivided until very late in the Diplomatic Conference. References to article 5 elsewhere in the Statute, therefore, necessarily referred to the entire article, that is, the listing of crimes and their definitions. That is the case for article 121 para. 5.

When the Bureau of the Committee of the Whole of the Conference assigned new numbers to the definitions of the crimes, members of my staff made the consequent change to article 121 para. 5, so that it referred to articles 5–8. However, that change was inadvertently not included in the July 17th version of the Statute. The oversight was not noticed by Members of the Bureau or my staff until after the Rome Conference.

I have contacted the members of the Bureau of the Committee of the Whole of the Conference who confirm that a technical error as described above was made. It was not the intent of the Bureau in Rome to make a substantive change to article 121 para. 5 by having it refer only to the new article 5. We would be grateful if you would ensure that the United Nations, as depositary, takes the necessary steps to correct this inadvertent technical error¹⁷.

No objections having been received, the ‘technical error’ was duly corrected¹⁸. The differences have particular significance for the addition of new crimes to the Court’s jurisdiction. If article 5 alone were the subject of paragraph 5, then new categories of crimes (such as terrorism or drug offences) that were added by amendment would apply only to those States that accepted them. On the other hand, amendments to articles 6, 7 and 8 could be applied to all once the seven-eighths and time requirements were met. Once the ‘correction’ was made, amendments to those articles (for example by adding to the collection of crimes in non-international conflict contained in article 8)¹⁹ appear to apply only to those who accept them.

VI. Paragraph 6: Right to withdraw if not accepting amendment

A State which does not accept an amendment which commands the acceptances of seven- 13
eighths of the Parties may withdraw at any time up to one year after the entry into force of the amendment. As a practical matter, the words in the paragraph ‘by giving notice no later than one year’ mean that a State could give notice immediately it realizes that the seven-eighths requirement has been met, even if the amendment is not yet in force. That is to say, it may give its notice during the one year hiatus in paragraph 1 between the time of receipt of the last of the seven-eighths and the actual entry into force. It may also exercise its right up to another year after the entry into force. Effectively this gives a non-accepting State a two-year window to withdraw.

A withdrawal made pursuant to this power is said to have ‘immediate effect, notwith- 14
standing paragraph 1 of article 127’. Paragraph 1 of article 127 makes ordinary withdrawals subject to the condition that they have effect one year after the notice (or such later date that is chosen by the withdrawing party)²⁰. A State which withdraws may, however, have

¹⁷ Letter attached to Note from the Secretary-General, C.N.502.1998.TREATIES-3 (Depositary Notification) dated 25 September 1998.

¹⁸ Procès-Verbal of Rectification of the Rome Statute of the International Criminal Court, dated 10 November 1998. The procedure followed for rectifying the text was that set out in article 79 VCLT which permits the correction of technical errors where there is no objection. It is unclear what ultimately happens if anyone objects; the Vienna procedure stops with the depositary informing the relevant States. The United States had some doubts (which it described as ‘concerns and objections’) about the procedure followed, but did not object to this particular change. See Notes to Rome Statute in United Nations data base of Multilateral Treaties of which the Secretary-General Performs Depositary Functions.

¹⁹ Given the special provisions on forbidden weapons in article 8 (2) (b) (xx), it may be possible to argue that the paragraph 4 regime applies to the addition of crime such as using anti-personnel mines or cluster munitions. See Clark (2009) 12 *NCLRev* 3 [366], 385–9 (2009). The amendment made in Kampala to the non-international armed conflict provisions of the Statute refers expressly to article 121 (5). See Amendments to article 8 of the Rome Statute, ICC Doc. RC/Res. 5 (2010). As of late 2014, this amendment and the aggression amendments were the only amendments to the Statute.

²⁰ See also article 56 para. 2 VCLT, note 5, (providing that, in the case of treaties, to which that article applies, a party shall give not less than twelve months’ notice of its intention to denounce or withdraw).

continuing obligations in respect of events occurring prior to its notice, pursuant to article 127 para. 2²¹. These may include financial obligations and obligations to cooperate in proceedings already commenced before withdrawal²².

VII. Paragraph 7: Secretary-General to circulate amendments

- 15 Paragraph 7 specifically instructs the Secretary-General to circulate copies of amendments that have been adopted by the Assembly of States Parties or by a Review Conference. No doubt the Secretary-General will, in accordance with normal depositary practice, inform Parties of receipt of instruments of ratification or acceptance and of the entry into force of amendments²³.

²¹ Article 121 para. 6 states that a withdrawal under it is 'subject to paragraph 2 of article 127'.

²² See further discussion in Clark *article 127*.

²³ See, generally, article 77 VCLT.

Article 122

Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, the Conference.

Content

A. Introduction/General remarks.....	1
B. Analysis and interpretation of elements.....	3
I. Paragraph 1	3
1. ‘amendments to provisions ... of an exclusively institutional nature’	3
2. Text of proposed amendment to be submitted to Secretary-General or other person	4
II. Paragraph 2	5
1. Adoption by two-thirds majority of Assembly or Review Conference	5
2. No right to immediate withdrawal.....	7

A. Introduction/General remarks

Article 122 was founded on the principle that there are bound to be unexpected develop- 1
ments that require a more rapid response than the leisurely procedures in articles 121 and
123 will permit. Yet, its provisions had not been invoked by 2014, the end of the first dozen
years of the Court’s existence. This was paradoxical, given that the principle that there were
items on which more rapid action could be desirable, the associated principle that ultimately
the majority (albeit a large one) had to rule, and the practical task of agreeing on which the
rapid items were, all demanded hard bargaining in Rome. Actually, the basic principle that
some amendments are special and may require a speedy response was accepted not in the
negotiations on the final clauses, but in the negotiations on what became article 36 dealing
with qualifications, nomination and election of judges. A surge of work would obviously
require more judges and the number 18 that was selected for the initial number of judges has
no special magic to it. Hence it was agreed fairly early on that there would be a special
procedure to be instituted by the Presidency, on behalf of the Court, that would lead to an
increase in the number of judges (or a later return to 18) by a vote at the Assembly of States
Parties, without the need for further ratification or acceptance. A specific procedure to enable
this to occur is contained in article 36 para. 2¹.

Article 122 applied the speedy change principle to a number of other instances. The 2
procedure for increasing (or decreasing) the number of judges will be commenced by a
recommendation from the Presidency of the Court. Article 122 does not specify who can
recommend appropriate amendments to provisions of an institutional measure, but the basic

¹ See Bohlander, *article 36*.

structure of article 122 follows that of article 121 and it must have been understood that the recommendations would come from States Parties. This is consistent with retaining article 36 para. 2 as a separate provision, aimed at the same type of objective but nonetheless subject to its own regime.

B. Analysis and interpretation of elements

I. Paragraph 1

1. ‘amendments to provisions ... of an exclusively institutional nature’

- 3 There is no room for argument about which features of the Statute can be amended by the streamlined procedure. The list is introduced by the word ‘namely’ that makes it clear that it is an exclusive list, no more, no less. The list is as follows:
- article 35, service of judges – while all must be available to serve full time decisions need to be made at least early in the life of the Court about how many and which ones will in fact serve on that basis,
 - article 36 paras. 8 and 9, factors to be taken into account in selecting judges, and term of office,
 - article 37, judicial vacancies,
 - article 38, the Presidency of the Court,
 - article 39 para. 1 (first two sentences), Court to organize itself into Appeals Division of President and four others, Trial Division of not less than six judges and Pre-Trial Division of not less than six judges,
 - article 39 para. 2, Appeals Chamber to be composed of all judges of Appeals Division, Trial and Pre-Trial Chambers to sit in threes,
 - article 39 para. 4, judges of Appeals Division may only sit in that Division, Trial and Pre-Trial judges may be temporarily assigned from Trial to Pre-Trial or *vice versa*,
 - article 42 paras. 4 to 9 (appointment and some of qualifications of Prosecutor and Deputy Prosecutors), the first three paragraphs, evidently regarded as more fundamental, may not be amended by the expedited procedure,
 - article 43 paras. 2 and 3, Registry to be headed by Registrar; qualifications of Registrar and Deputy Registrar,
 - article 44, Staff of Prosecutor and Registrar,
 - article 46, Removal of judges, Prosecutors and Registrars from office and
 - article 47, Disciplinary measures for judges, Prosecutors and Registrars.

For the most part, these provisions concern aspects of administration of the Court on which there may need to be some flexibility in response to the changing needs of the case-load. The power to amend article 46, which deals with the removal of judges, Prosecutors and Registrars, could be viewed as potentially more fundamental in impact than the other provisions.

2. Text of proposed amendment to be submitted to Secretary-General or other person

- 4 Normally, the depositary might be expected to circulate proposed amendments, and this is the case under article 122, the general amendment provision in the Statute. Here, however, the possibility has been left open that the Assembly of States Parties might, as an alternative to relying on the Secretary-General, streamline the process even further by providing for submission of amendments through some other means. It might, for example, provide for circulation by the Registrar, by any bureaucracy that the Assembly might itself set up eventually to manage its affairs, or by any other existing bureaucracy (say in a Foreign Office or another international organization) that it authorizes to act on its behalf.

II. Paragraph 2

1. Adoption by two-thirds majority of Assembly or Review Conference

As is the case with other amendments, the proposed institutional amendments must still 5
be considered by a meeting of the Assembly or by a Review Conference. While it is not
expressly stated, the Assembly of States Parties must have the discretion to determine
whether it will itself consider a matter or whether it will refer it to a Review Conference.
Given the rationale of speedy response to developing situations, one might expect that, unless
a Review Conference is fortuitously available, the Assembly itself would normally deal with
such amendments. If no consensus is reached, a two-thirds majority of Parties is required (all
parties that is, not just those participating in the vote)².

Once the amendment is adopted, there is no need for further reference to Governments or 6
for ratification or accession. It comes into force for all, six months after adoption by the
Assembly or a Review Conference, as the case may be.

2. No right to immediate withdrawal

In the case of amendments to which article 121 paras. 4 and 6 apply, a State Party which is 7
not among the seven-eighths majority accepting the amendment has an immediate right to
withdraw from the Statute³. No such immediate right of withdrawal is contained in article
122. A minority State that objects fundamentally to an amendment made by the article 122
procedure is left to avail itself of the general power to withdraw subject to at least a year's
notice under article 127 of the Statute⁴.

² See also discussion of voting, Clark, *article 121*, para. 3.

³ See Clark, *article 121*, para. 6.

⁴ *Infra*.

Article 123 Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Literature: Clark, R. S., 'Building on Article 8 (2) (b) (xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare', (2009) 12 *NCLR* 366; *id.*, 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010', (2010) 2 *GoJIL* 2 689; Trahan, J. 'Potential Future Rome Statute Amendments' (2012) 18 *NewEngJlCompL* 1 331.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	2
I. Paragraph 1	2
1. First Review Conference seven years after entry into force	2
2. Review 'may include, but is not limited to, the list of crimes contained in article 5'	3
3. 'open to those participating in the Assembly of States Parties'	5
II. Paragraph 2: Subsequent request for Review Conference	6
III. Paragraph 3: Entry into force of amendments	7

A. Introduction/General remarks

1 This article was insisted upon by a number of States who believed it important to have a review procedure over and above the Assembly of States Parties. Such a procedure would ensure that the 'big picture' did not get overlooked among the minutiae of management that will inevitably take up most of the meeting time of the routine annual gatherings of the Assembly. For many of the supporters of a Review structure, having a set time after which the first Review meeting must take place was a crucial feature of such a provision. Such a meeting, they believed, would ensure that adequate attention would be given to re-examining the crimes within the jurisdiction of the Court, with the hope that the jurisdiction would be expanded to include, for example, terrorist and drug crimes¹ and perhaps additional examples of war crimes and crimes against humanity. When it became clear late in the Diplomatic Conference that a consensus would not be reached on a definition of the crime of aggression, setting a firm date for a Review Conference was of some consolation to those disappointed at the failure of this aspect of the negotiations.

¹ On the insistence, in particular, of Trinidad and Tobago and of Turkey, who had been among those arguing strongly for the inclusion of 'treaty crimes' in the Statute, Resolution E of the Final Act of the Rome Conference contains the recommendation that 'a [not necessarily the first] Review Conference ... consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court'. Final Act, Annex I.

The first Review Conference took place in Kampala, 2010. Article 124 of the Statute² supplied the only 'mandatory' part of the agenda, requiring, in its own words, a 'review' of that "Transitional Provision". Having reviewed it, the Conference decided to leave it alone, but to 'further review' it during the fourteenth session of the Assembly of States Parties, which will take place in 2015³. Two amendments to the Statute were, however, adopted in Kampala, one dealing with the crime of aggression and one with forbidden weapons.

The package of amendments on aggression represented the culmination of the effort to complete the Rome negotiations so that the Court can 'exercise' its jurisdiction over the crime, pursuant to article 5 of the Statute⁴.

The 'weapons' amendment⁵ took the language currently in article 8, paragraph (2) (b), of the Statute concerning forbidden weapons in international armed conflict, and applied the same prohibitions in paragraph 2 (e) to non-international armed conflict. Several other proposals for expanding the list of proscribed weapons (including nuclear weapons), both in international and in non-international armed conflict, were before the Assembly of States Parties prior to Kampala, as were proposals to include some terrorism and drug crimes within the jurisdiction⁶. There was no consensus to send them forward and they are being considered at a leisurely pace by a Working Group of the Assembly.

Underscoring the open-ended nature of what might be considered as 'review', the 2010 Review Conference also devoted a significant amount of time to 'stocktaking'. This entailed a rich discussion of the topics of complementarity, cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice. There are some very useful papers on these topics on the Court's website.

B. Analysis and interpretation of elements

I. Paragraph 1

1. First Review Conference seven years after entry into force

The Secretary-General of the United Nations was required to 'convene' the first Review Conference seven years after the entry into force of the Statute, that is, seven years after 1 July 2002. 'Convene' is a little ambiguous; it could refer either to the issue of a notice for a meeting a little in the future, or a firm scheduling of a date within the time-frame. Taking that into account, and bearing in mind the schedule for other international conferences, a date was found in May-June 2010 in Kampala which was regarded as generally acceptable. Some States would have liked the seven-year timing to be much shorter, some longer. Seven years at least ensured that there was some significant practice under the Statute to suggest lines for further development.

2. Review 'may include, but is not limited to, the list of crimes contained in article 5'

As has been noted in the discussion of article 121 on Amendments⁷, the powers of a Review Conference in respect of amendments cover exactly the same field as the powers of the Assembly of States Parties. Paragraph 1 of article 123 states that the first review 'may

² Zimmerman, *article 124*.

³ ICC Doc. RC/Res. 4 (2010).

⁴ The amendments were contained in ICC Doc. RC/Res. 6 (2010). See discussion by Zimmermann in article 5 and Clark, article 121.

⁵ This amendment was contained in ICC Doc. RC/Res. 5 (2010). See generally, Clark (2010) 2 *GoJIL* 2 [689], 707-11.

⁶ See Clark, note 5 at 709-11; Trahan (2012) 18 *NewEngJCompL* 1 [331]; Clark (2009) 12 *NCLRev* 3 [366].

⁷ Clark, *article 121*, mn 8.

include', but not be limited to, the 'list of crimes' in article 5. It could, of course, extend to any other specific article of the Statute as well, or, as happened in Kampala, some general discussion of issues such as complementarity and cooperation with no specific proposals for amendment on the table. The words 'may include' gave the potential agenda for the first Review Conference considerable flexibility. The specific reference to the list of crimes underscored the expectation that the question of expanding the subject-matter jurisdiction of the Court was likely to be of first importance. This was borne out in the event, since the aggression amendments absorbed much of the time and energy of the Conference.

- 4 It will be observed that the reference is to article 5 only, and not to articles 6, 7 and 8 as well. As originally considered in the consultations in Rome carried on by the Coordinator, the reference was to the 'catalogue of crimes contained in article 5'. 'Catalogue' (which perhaps was more appropriate for the detailed items contained in the definitions of war crimes and crimes against humanity) was replaced in the consultations by 'list'. It might, perhaps, have been expected that when the Bureau of the Committee of the Whole broke out the original version of article 5 into articles 5 through 8, they would have intended to change the wording here in article 123 so that it referred to articles 5 through 8. Apparently they did not, since they did not seek to rectify any inadvertent error here⁸. It may well be that they thought the word 'list' went with article 5 better than with all four subject-matter articles. Of course, the power of the Review Conference to discuss 'any amendment' means that the singling out of any particular item is only of historical interest to indicate what, in the drafting process, people thought important.

3. 'open to those participating in the Assembly of States Parties'

- 5 'Membership' of a Review Conference is the same as that for the Assembly of States Parties. Pursuant to article 112⁹, the Assembly of States Parties consists of representatives of each State Party, along with observers from States which have signed the Statute or the Final Act. Observers have a broad right to participate in the work of the Assembly, but only States Parties are entitled to vote. If experience in other international forums is any indication, non-parties, especially from the ranks of the major powers, who take the trouble to participate as observers can have a substantial impact on developments. This is particularly true if they act along with a strong regional group. Rules 92 to 94 expand on the Statute by providing for the participation in the Assembly of various intergovernmental and non-governmental organizations and even States that do not have observer status, upon invitation. As a practical matter, then, all recognized States¹⁰ were invited to participate in the Kampala Review Conference in 2010. Non-parties such as the United States, the Russian Federation, China and Iran, took an active part in the proceedings.

II. Paragraph 2: Subsequent request for Review Conference

- 6 After the first Review Conference has taken place, any State Party may request the calling of a subsequent Conference and this will take place if a majority of (all) the Parties agree. The procedural steps to be taken following the State request are not spelt out in article 123 para. 2. The most obvious course is for the Secretary-General to circulate the request and give a time by which a response is expected. But there is nothing to prevent the Assembly of States Parties considering the request as an agenda item at its next scheduled meeting. Probably the procedure should be addressed ultimately in an addition to the Rules of the Assembly of States Parties. Some States have suggested that Conferences should take place on a regular seven-year cycle but no decision has yet been made either about the timing of the next Review or about any cycle.

⁸ For the correction made to article 121, see *ibid.*, mn 12.

⁹ See Rama Rao, *article 112*.

¹⁰ Clark, *article 125*, note 1.

III. Paragraph 3: Entry into force of amendments

Exactly the same rules apply for the entry into force of amendments done through a Review Conference as is the case with those done through the Assembly of States Parties. 7

It should be noted, however, that the amendments adopted in 2010 to enable the Court to exercise its jurisdiction over the crime of aggression added their own set of hurdles to entry into force. First, 30 ratifications had to be obtained, and then a further decision would need 'to be taken after 1 January 2017 by the same majority of States Parties [an absolute majority of two-thirds] as is required for the adoption of an amendment to the Statute'¹¹.

¹¹ ICC Doc. RC/Res. 6, articles 15 *bis* (3) and 15 *ter* (3) (2010).

Article 124 Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Literature: Kaul, H. P., 'Der Internationale Strafgerichtshof: Das Ringen um seine Zuständigkeit und Reichweite', (1998) *Humanitäres Völkerrecht-Informationsschriften* 138 *et seq.* (in particular 143); Tabak, S., 'Article 124, war crimes, and the development of the Rome Statute' (2009), 40 *GeorgetownJIL*. 1069; Scheers, I., 'From Rome to Kampala: An Analysis of Article 124 of the Statute of the International Criminal Court' (2010) *ICLRev* Volume 10, 3 301–323; Zimmermann, A., 'The Creation of a Permanent International Criminal Court' (1998), *MPYbUNL* 169 (in particular 236).

Content

I. Drafting history	1
II. Relationship with article 12	4
III. Relationship to referrals by the Security Council	8
IV. Effects of a declaration made under article 124 <i>ratione temporis</i>	9
V. Breadth of declarations to be made under article 124	10
VI. Addressee of the declaration	16
VII. Review of article 124	17
VIII. Practice	20

I. Drafting history

- 1 The transitional provision contained in article 124 of the Statute was not contained in the Draft Statute elaborated by the ILC. It was neither discussed during the work of the Preparatory Commission. Accordingly it was not contained in the Draft Statute submitted by the Preparatory Commission to the Rome Conference, the so-called Zutphen Draft. To the contrary, the idea of such a transitional provision only appeared during the very last days of the Conference in order to secure the acceptance of the Statute by certain States, but in particular that of France.
- 2 The content of article 124 is closely linked to the different concepts of exercise of jurisdiction by the Court. In particular France, but also several other permanent members of the Security Council, had during the negotiation process taken the view that in regard of both, war crimes and crimes against humanity, the consent of the State of nationality of the suspect should be required in order for the Court to exercise jurisdiction, unless a situation had been referred to the Court by the Security Council. Only three days before the end of the Conference, France submitted an informal proposal which provided that a State could, either by a general declaration or *ad hoc*, give its consent to the exercise of jurisdiction by the Court in regard of these two groups of crimes. Otherwise the Court should not be able to exercise its jurisdiction.

This proposal then found its place in a slightly amended version submitted by the United Kingdom to a group of interested countries. This British proposal provided first – quite similar to a proposal later formally tabled by the United States¹ – that the ICC should not exercise its jurisdiction over a crime, if the act in question is an act of State of a third State,

¹ UN Doc. A/CONF.183/C.1/L.90.

not party to the Statute and is acknowledged as such by that State. If accepted, it would have made nationals of third States *de facto* immune from any prosecution by the ICC even for acts of genocide, provided that the third State had taken the political risk of declaring such act to constitute an act of State.

Besides, that very same British proposal reiterated the idea of an opting-out procedure in regard of both, war crimes and crimes against humanity. For that purpose, it proposed an optional protocol, reluctant States could ratify, in order for their nationals not being subject to the jurisdiction of the Court in regard of war crimes and crimes against humanity. This optional protocol, as proposed, was supposed to remain in force for a period of ten years and could have been prolonged by a simple majority vote within the Assembly of States Parties. This proposal gathered the support of all five permanent members of the Security Council.

As a reaction, and in order to avoid that the proposal just outlined would find its way into the Statute, it was Germany which, two days before the end of the Conference, submitted a counter-proposal to the member States of the European Union, which – still in the form of an Additional Protocol – suggested that a State Party might, by declaration lodged with the depositary, opt out from the jurisdiction of the ICC in regard of war crimes only. The German proposal also specified that any such opting-out could be limited to one or more of the war crimes listed in the Statute. Finally, the declaration could have only been made for a non-renewable period of three years.

It was against this background that the Bureau of the Conference came, after extensive consultations with interested parties, up with the formula, which is now to be found in article 124 of the Statute.

II. Relationship with article 12

Article 12 para. 1 of the Statute provides for a system of automatic jurisdiction: every contracting party to the Statute by its acceptance of the Statute *ipso facto* accepts the jurisdiction of the ICC with regard to the four core crimes: genocide, crimes against humanity, war crimes and the crime of aggression – though with regard to the later subject to the conditions set out in article 5 para. 2. Under article 124, a State may however opt-out from this automatic jurisdiction for a limited period of seven years.

The legal effects of such an opting-out are not completely clear. This is due to the fact that article 124 does not in itself – unlike the prior proposals leading to the adoption of article 124² – refer to the legal consequences which derive from such an opting-out. In that regard two interpretations of article 124 are possible:

- Under either what may be referred to as a ‘negative understanding’ of article 124 (in line with the same formula used with regard to article 121 para. 5³) the opting-out may be perceived as *completely* barring the exercise of jurisdiction by the Court in regard of alleged war crimes committed either by nationals or on the territory of the State which has made the declaration.
- Alternatively, a ‘positive understanding’ of article 124 (again in line with the parallel formula as used during the drafting of the Kampala compromise on the crime of aggression⁴) would signify that the opting-out would have the sole effect that the State which has made the declaration has simply not accepted the jurisdiction of the Court for its nationals under article 12 para. 2 of the Statute. Notwithstanding, the exercise of jurisdiction by the Court could then still be based on a possible alternative jurisdictional

² See mn 2–3.

³ For a further analysis on the so-called ‘positive’ and ‘negative understanding’ in the context of article 121 para. 5 see Krefß and von Holtzendorff, (2010) 8 *JICJ* 1179; Reisinger Coracini, (2008) 21 *LeidenJIL* 696; Trahan, (2011) *ICLRev* 11 49–104; Van Schaack, (2011) *ColTransnatL* 507 (particularly 529–530); see also see: RC/WGCA/1, p. 7, Annex III, understanding no. 6, Alternative 1.

⁴ *Ibid.*

link⁵, namely that the State on the territory of which the alleged crimes have been committed is a contracting party or has otherwise consented to the exercise of jurisdiction by the Court⁶.

- 6 The drafting history clearly militates in favour of the above-mentioned ‘negative understanding’ since it was the clear intention of the States most involved in the drafting of the provision to grant the declaring State an unequivocal opportunity to make sure that its nationals can, for the period provided for in article 124, not be prosecuted by the ICC for having committed war crimes. On the other hand, article 124 does *not* expressly stipulate that the Court shall under no circumstances exercise its jurisdiction when such a declaration has been made. Instead it simply states that the State concerned is supposed not to have accepted the jurisdiction of the Court. *E contrario*, one might therefore argue that the exercise of jurisdiction could then still be based on the consent by another State provided for in article 12 of the Statute.
- 7 On the whole, the formula ‘does not accept the jurisdiction of the Court’ as contained in article 124 seems to however confirm that an overall exclusion of the exercise of jurisdiction by the ICC was meant when the provision was adopted. Thus, it is submitted that any such declaration does, within the limits of its content, categorically bar the exercise of jurisdiction by the Court with regard to war crimes.

III. Relationship to referrals by the Security Council

- 8 Declarations made under article 124 are only relevant when the Court is exercising its jurisdiction by virtue of a State referral under article 14 or when the Prosecutor has initiated investigations *proprio motu*. Where a situation is referred to the Court by the Security Council, any such declarations are irrelevant since article 12 para. 2 of the Statute expressly stipulates that the acceptance of the jurisdiction of the ICC by either the home State of the suspect or the State on the territory of which the crime has been committed is superfluous. In none of the two Security Council referrals so far the issue of the interrelationship between article 124 and article 13 lit. b) has come up since neither Sudan nor Lybia have been contracting parties of the Rome Statute at all.

IV. Effects of a declaration made under article 124 *ratione temporis*

- 9 The declaration to be made under article 124 may be made for a period of up to seven years. It may, however, be also made for a shorter period of time or may, under article 124 2nd sentence, even before the lapse of such period, be unilaterally terminated.

This seven year (or where applicable shorter) period of time begins to run when the Statute enters into force for that respective State, *i. e.* at the time the Statute becomes binding for it by virtue of ratification, acceptance or approval. Thus the earliest time is the moment at which the Statute entered into force in accordance with article 126 of the Statute, *i. e.* 1 July 2002.

In case of a State becoming a party by virtue of State succession, it seems to be now accepted that such succession becomes effective (either automatically or when a declaration of succession is made) with effect from the time when the respective successor State came into existence⁷. Accordingly, if one takes the view that any declaration made under article

⁵ In that regard, it has to be noted that article 12 para. 2 (a) and (b) indeed provide for two alternative possibilities to grant the ICC jurisdiction to deal with a crime; for details see Schabas and Pecorella, *article 12*, mn 14 *et seq.*

⁶ The same would be true *vice versa*, where the territorial State has made a declaration under article 124, but where the State of which the suspect is a national, is a contracting party.

⁷ See in that regard the decision of the ICJ in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, *ICJ Rep.* 1993, 3, 16, para. 25, where the Court observed ‘that the Secretary-General has

124 is inherited by the respective successor State⁸, the seven-year period also is supposed to have started with the coming into existence of that State.

Once a declaration made under article 124 lapses after seven years (or where applicable beforehand), the Court may then fully exercise its jurisdiction even with regard to war crimes to be eventually committed by nationals of the State that had previously made the declaration or with regard to war crimes to be eventually committed on its territory. Yet, in order to give full effect to article 124 and despite its wording which is not fully clear in that respect, it seems that the Court would still, *i. e.* even after the seven year period has ended, not be able to exercise its jurisdiction with regard to war crimes committed *prior* to this point in time on the territory of the State making the declaration or with regard to such crimes *previously* committed by its nationals.

Given that the French declaration became effective on 1 July 2002 (*i. e.* when the Rome Statute entered into force for France), it would have lost its relevance for those war crimes eventually committed by French nationals or on French soil after 1 July 2009. However, on 13 August 2008, France unilaterally withdrew its declaration regarding article 124, therefore shortening the applicability of the declaration, one year before its expiration⁹. As for Colombia, the seven year period having elapsed as of 1 November 2009, its declaration is no longer in effect either. There are therefore currently no active declarations under article 124.

V. Breadth of declarations to be made under article 124

A declaration under article 124 may either stipulate that crimes committed by its nationals 10 or on its territory should not come within the jurisdiction of the ICC. It seems that this ‘or’ was not meant to be an exclusive ‘or’ since the drafters would have then used an ‘either/or’ formula. Thus a State might also cumulatively exclude *both*, those war crimes committed by its nationals *and* those committed on its territory. This view is by now confirmed by the very wording of both, the French and the Colombian declaration made under article 124¹⁰, which refer to both, crimes allegedly committed by French respectively by Colombian nationals or on French respectively on Colombian soil.

Given the clear wording of article 124 and taking into account the fact that – in clear 11 contrast to article 12 para. 2 (a) – any reference to vessels or aircraft is missing, a State may not, by declaration made under article 124, exclude the jurisdiction of the Court with regard to crimes committed on board a vessel or an aircraft, being registered in the country making the declaration.

Any declaration made under article 124 presupposes that otherwise the Court would have 12 jurisdiction over the relevant crimes by virtue of article 12 para. 2 (a) of the Statute. Thus, article 124 does not come into play where a contracting party has, subject to article 120, validly declared that the Statute would not apply at all to certain parts of its territory¹¹.

Where a war crime has been committed by a person who possesses several nationalities, 13 the making of a declaration by only one of his or her home States does not lead to an exclusion of the jurisdiction of the Court, provided that the other country is a State Party and has not itself made a similar declaration.

treated Bosnia-Herzegovina, not as acceding, but as succeeding to the Genocide Convention, and if this be so the question of the application of articles XI and XIII of the Convention would not arise (...).

⁸ For a thorough discussion of the recent practice in regard of the succession in regard of reservations in the strict sense see Klabbbers, in: Klabbbers and Lefeber (eds.), *Essays on the Law of Treaties* (1998) 107 *et seq.*

⁹ France, Withdrawal of Declaration, C.N.592.2008.TREATIES-5, Depository Notification (August 13, 2008) available at <http://treaties.un.org/doc/Publication/CN/2008/CN.592.2008-Eng.pdf>.

¹⁰ See below mn 20.

¹¹ See *e.g.* the declaration made by Denmark, when ratifying the Statute according to which ‘[u]ntil further notice, the Statute shall not apply to the Faroe Islands and Greenland’.

14 As mentioned¹², the German proposal, which together with others has led to the adoption of article 124, had provided *expressis verbis* that the opting-out might be limited to one or more of the specific war crimes now listed in article 8. The current article 124 does not, however, specifically address this question anymore. *E contrario*, one might therefore argue that a State making a declaration may only *in toto* opt out with regard to the complete list of war crimes. This seems to be further confirmed by the fact that article 124 refers to the ‘category of crimes’ mentioned in article 8 of the Statute. Accordingly, and at least at first glance a partial opt-out, *e.g.* only in regard of war crimes committed in internal armed conflicts, seems to be excluded.

On the other hand, one has to take into account the objective of article 124, which is to limit the derogation from the automatic jurisdiction of the ICC as far as possible. Thus, if a given State only has a specific problem with one or more of the war crimes listed in article 8 of the Statute, it seems to be appropriate to also allow for a more limited opting-out. Similarly, it might be also envisaged that a State making a declaration under article 124 limits its applicability to certain parts of its territory.

15 In addition there appears to be no reason why a State should not be permitted to withdraw its ‘reservation’ by a corresponding declaration *ad hoc* for a specific case.

VI. Addressee of the declaration

16 Notwithstanding the fact that the addressee of the declaration is not expressly mentioned, it seems to be logical that it shall be addressed to the depositary of the Statute, *i.e.* the Secretary-General of the United Nations. This can be derived from the fact that any such declaration has to be submitted at the time of becoming a party to the Statute, the notification of which under article 125 para. 2 is also to be sent to the depositary. As a matter of fact, both States, which so far had made declarations under article 124, *i.e.* France and Colombia, had addressed their respective declaration to the depositary.

VII. Review of article 124

17 Article 124 is the only provision in the Rome Statute, which, given its last phrase, was subject to a legally mandatory review that had to be carried out at the first Review Conference¹³. At the same time this last sentence of article 124 underlines that the regular review procedure, as provided for in article 123, also applies with regard to article 124.

18 Accordingly, during and prior to the first Review Conference held in 2010, discussions took place concerning the future of article 124. Three options were presented: deleting, retaining or redrafting article 124. There were also arguments in favour of introducing a ‘sunset’ clause, which would lead to article 124 expiring, according to a set time period¹⁴. A consensus was not reached regarding the deletion of the article; therefore it was retained in its current form¹⁵. It was also decided that there would be a further review of article 124 during the fourteenth session of the Assembly of States Parties to the Rome Statute¹⁶.

19 Yet, given the strict requirements for such a review, it seems to be quite unlikely that in the future substantive changes with a view of either enlarging the scope of application of article

¹² See mn 3.

¹³ See Review Conference: Scenarios and Options – Progress Report by the focal point, Mr. Rolf Einar Fife, ICC-ASP/6/INF.3, para. 22.

¹⁴ See Resolution ICC-ASP/8/Res. 6 (26 November 2009), Annex II, paras. 5–14.

¹⁵ Report of the working group on other amendments, RC/6/Rev.1 (10 June 2010).

¹⁶ Article 124 of the Rome Statute, RC/Res.4 (10 June 2010).

124 or to completely eliminate it, will take place¹⁷. Notwithstanding article 124 will still (hopefully and most probably) over time lose more and more of its importance given the very scarce practice of States making use of article 124.

VIII. Practice

As a matter of fact, so far, only Colombia and France had in the past made declarations under article 124 which, as mentioned above¹⁸, have however lapsed in the meantime. Said declarations read:

‘(...) the French Republic [the Government of Colombia] declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals [Colombian nationals] or on its [Colombian] territory’¹⁹.

There are no records of any incidents over the use of article 124 nor has article 124 given rise to any practice by the Court so far.

Finally it is worth noting, that Burundi after deliberating to invoke a declaration under article 124 ratified the Rome Statute in September 2004 without doing so²⁰.

¹⁷ Zimmermann, (1998) *MPYbUNL* 236. With regard to this question see also Triffterer (2nd edition, 2008), *Preliminary Remarks*, mn 61. See also the report on the discussion that took place during the Hemispheric Seminar ‘Toward the First Review Conference of the Rome Statute of the International Criminal Court’ Mexico City, 20–21 August 2007, ICC-ASP/INF.4, para. 53.

¹⁸ See mn 9.

¹⁹ It seems that the Colombian declaration had the objective of granting the peace process negotiations in said country at the time a fair opportunity to prosper, see Hemispheric Seminar ‘Toward the First Review Conference of the Rome Statute of the International Criminal Court’ Mexico City, 20–21 August 2007, ICC-ASP/INF.4, para. 51.

²⁰ See Tabak, (2009) 40 *GeorgetownJIL* 1069 (particularly 1094–1095) with further references.

Article 125

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs in Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

- 1 This is a standard-form final clause that requires little discussion. In accordance with normal modern practice for multilateral treaties, the Statute was open for signature by all States. Initially, it was available for signature in Rome and then at United Nations Headquarters, where it remained open for signature until 31 December 2000.

The reference to ‘all States’ has raised some issues. In addition to the 193 Members of the United Nations and the Holy See and Palestine, the two entities that have Observer Status with the organization, the other entities generally regarded by the international community as States are both small island countries in the Pacific: Cook Islands and Niue, formerly non-self-governing territories of New Zealand. The latter are parties to a number of multilateral treaties and members of Specialized Agencies. Cook Islands acceded to the Rome Statute in 2008. The total potential number of parties to the Rome Statute thus currently stands at 197, given the present political status of the World. Kosovo is a further potential member once its ‘statehood’ position becomes less controversial. In April 2012, the Prosecutor declined to proceed further on the basis of a declaration lodged by the Government of Palestine in January 2009 under article 12 (3), accepting the exercise of jurisdiction for ‘acts committed on the territory of Palestine since 1 July 2002’. His reasoning was that in interpreting and applying article 12 it was for the relevant bodies at the United Nations, or for the Assembly of States Parties to make the call whether Palestine is a State for the purposes of that article¹. The General Assembly’s subsequent action later in 2012 in according non-Member State observer status to Palestine would appear to provide a definitive affirmative answer to whether Palestine could accede to the Statute or make an effective article 12 (3) declaration.²

For those 139 States signing the Statute by the end of 2000, the definitive act to become a party is lodging an instrument of ratification. States that did not find it possible to sign within the relevant time period may always ‘accede’ to the Statute. Timor-Leste, for example, which had not achieved its independence at the relevant time, was among those acceding to the Statute. Some States, for domestic or historical reasons, seem to prefer the terms ‘acceptance’ or ‘approval’ rather than ‘ratify’ and some also use one or other of those terms in preference to ‘accede’. The important point is that, regardless of the precise operative verb used, a State must clearly express in writing its intention to be bound. In October 2006, Montenegro informed the Secretary-General that it had succeeded to the 2001 ratification by Serbia and Montenegro and it has since been regarded as a party to the Statute.

¹ Office of the Prosecutor, Situation in Palestine, 3 April 2012.

² Cf. Ambos, *EJILTalk* 6 May 2014, <http://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/>.

The depositary functions in respect of the Statute are to be exercised by the Secretary-General of the United Nations, as is the case with many treaties entered into force under United Nations auspices, and a number entered into force during the life of the League of Nations³.

It should be noted that three of the signatories of the Statute, the United States, Israel and Sudan, subsequently informed the Secretary-General that they did not intend to become a party and accordingly did not regard themselves as having any obligations arising from their signatures⁴. The obvious intention of these, unprecedented, notes is to avoid the obligation on a State which has signed a treaty not to defeat the object and purpose of that instrument⁵.

³ See also Clark, *article 128*.

⁴ Notes from United States (6 May 2002), Israel (28 August 2002) and Sudan (26 August 2008) in End Notes to entry for Rome Statute in data base of Multilateral Treaties Deposited with the Secretary-General, <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY &mtdsg_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en)> accessed 8 September 2014.

⁵ See article 18 VCLT.

Article 126 Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	2
I. Paragraph 1	2
1. Number of parties required for entry into force	2
2. 'the first day of the month after the 60 th day following the date of the deposit of the 60 th instrument'	3
3. 'with the Secretary-General of the United Nations'	4
II. Paragraph 2	5
1. Subsequent parties	5
2. First day of the month	6

A. Introduction/General remarks

1 For the most part, this is a routine provision. The most controversial issue was the number of parties necessary to bring the Statute into force. Some enthusiasts (especially among the NGOs and among the European States) thought that a small number would be sufficient to get the Court up and running and then it would be possible to build from there. Others cautioned that, for the institution to have legitimacy, it needed a respectable number of parties. This was particularly true in those unusual circumstances where the Court, with the consent of the territorial State, would have jurisdiction over the nationals of States which had not become parties¹. A few States thought that a requirement that there should be parties from each of the customary regions would be a useful underpinning of legitimacy, but this proposal did not find general support. The resource implications of creating what could become a fairly substantial organization also pointed in the direction of spreading the costs as widely as possible. In the debates and consultations at Rome, a large cluster of States indicated that somewhere around 60–65 States (or about a third of the United Nations membership) would be acceptable. Some would have gone down to about 30 and others would have preferred a higher number. The Bureau of the Committee of the Whole settled for 60.

The Statute came into force in accordance with this article on 1 July 2002.

¹ See Schabas, *article 12*. (This cautionary argument had even more force when it seemed possible that there would be jurisdiction on a universal theory, or on the basis of the consent of the 'custodial' State.).

B. Analysis and interpretation of elements

I. Paragraph 1

1. Number of parties required for entry into force

As explained in the Introduction, the Statute required a reasonably high number of 2 ratifications, acceptances or approvals, namely 60, in order to come into force. Many observers thought it impressive that this ambitious target had been reached within four years of the Rome Conference.

2. ‘the first day of the month after the 60th day following the date of the deposit of the 60th instrument’

Two months, or sixty days, is a fairly standard time to allow in modern treaty practice 3 between the receipt of the last necessary instrument and the entry into force. It gives time for the paper work to be completed and arrangements set in train for whatever machinery needs to be in place to have the treaty regime up and running. The reference to the ‘first day’ was added in Rome by a delegation that believed this would simplify the accounting steps that would have to be taken nationally and internationally to apportion dues for the part of the year that would be involved here in paragraph 1 and again in paragraph 2 for States who join after the first sixty have brought the Statute into force.

3. ‘with the Secretary-General of the United Nations’

Receiving instruments and notifying other States of their receipt is one of the core 4 functions of a depositary².

II. Paragraph 2

1. Subsequent parties

Obviously there is no expectation that the number of States Parties will be frozen at 60. For 5 subsequent parties there is a similar 60 day hiatus between the deposit of the instrument and the coming into force (for them) of the Statute. The timing might occasionally prove decisive of the existence of obligations to cooperate with the Court or of consent to the jurisdiction of the Court in respect of a State’s nationals or territory.

2. First day of the month

There is a similar first day of the month provision to that in paragraph 1. 6

² On the United Nations as depositary, see, generally, Clark, *article 128*. Article 77 para. 1 (e) VCLT states that one of the functions of a depositary is ‘informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty’.

Article 127 Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Content

A. Introduction/General remarks	1
B. Analysis and interpretation of elements	2
I. Paragraph 1	2
1. Withdrawal by notification to Secretary-General	2
2. Takes effect one year after notification unless the notification specifies a later date.....	3
II. Paragraph 2	5
1. Not discharged from obligations, including financial obligations, which may have accrued	5
2. Cooperation in connection with investigations and proceedings	6
3. Consideration of any matter already under consideration	7

A. Introduction/General remarks

1 Some general comments about the power to withdraw have already been made in the discussion of article 121 concerning amendments. The reader is referred to that discussion which need not be repeated here. While article 121 deals with the right to withdraw in a relatively narrow set of circumstances, namely where there is an amendment to the Statute to which the State objects, article 127 is entirely open-ended. In this respect, it is similar to withdrawal provisions in the constitutive instruments of many of the Specialized Agencies. There is no articulated limitation on the right of States to withdraw on any grounds, 'good' or 'bad'. In the case of the Specialized Agencies, a custom has perhaps developed that States explain why it is that they are withdrawing, in order to give the entity an opportunity to alter any course of action that the withdrawing State finds unacceptable. Whether States will ultimately avail themselves of the right to withdraw from the Statute and under what circumstances is entirely speculative at this stage. No withdrawals took place during the first twelve years of the Court's functioning. Withdrawal of significant parties is a nightmare that everyone fears, particularly those with memories of the ultimate unravelling of the League of Nations.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Withdrawal by notification to Secretary-General

Again, the Secretary-General exercises a standard depositary function in receiving written 2 notifications of withdrawal.

2. Takes effect one year after notification unless the notification specifies a later date

A State may make a notification at any time, but except in those cases to which article 121 3 applies where immediate withdrawal is possible¹, the withdrawal will not be effective for at least one year. A State which is using a threat to withdraw as a tool to try to shape the direction taken by the Court may perhaps offer a longer period than a year before its withdrawal is effective. The power of the withdrawing State to specify some longer period than a year for its withdrawal appears to be legally unfettered and dependent entirely on the discretion of the State concerned, although one might argue that a major contributor which uses a lengthy period as a threat hanging over the Court is behaving unreasonably.

While the article is silent on the matter, it must surely be the case that a State could 4 withdraw its notification at any time before the withdrawal becomes effective.

II. Paragraph 2

1. Not discharged from obligations, including financial obligations, which may have accrued

The first sentence of paragraph 2 states a general proposition about accrued obligations 5 which is then spelt out in more detail in the sentences that follow.

Specifically, the first sentence also refers to financial obligations. The budget of the Court will have been set on the assumption of the continued membership of the State in question and, especially if the State is a major contributor, significant adjustments to the budget may be necessary following withdrawal. Prudent management requires adequate time to deal with such adjustments. A departing State will thus be responsible for its budgetary commitments up until the time of its departure. That responsibility may perhaps extend for a period beyond departure, if the budgeting cycle agreed upon in due course by the Assembly of States Parties means that some obligations have 'accrued' in such a manner as to extend beyond the notification period.

2. Cooperation in connection with investigations and proceedings

Withdrawal is said, in the opening part of the second sentence of paragraph 2, not to 6 'affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective'. There may well be situations in which the obligation to cooperate with the Court is obscure because of the complexities of the legal or factual situation. A State may, nevertheless, agree to cooperate voluntarily without resolving the legal or factual issues. The first part of the second sentence was drafted with such a situation in mind. A State's 'voluntary' actions do not become

¹ See Clark, *article 121*, mn 13 *et seq.*

transformed into 'obligations' as a result of withdrawal. A vigilant Prosecutor who bears pending withdrawals in mind will need to be careful to commence proceedings formally within the relevant time-frame.

3. Consideration of any matter already under consideration

- 7 The scope of the last part of the second sentence overlaps considerably with that of the first part. Perhaps the most important point it makes is that a State whose nationals have been the subject of a referral to the Prosecutor by another State Party or by the Prosecutor acting *proprio motu* is not able to terminate such proceedings by withdrawing². This is the only possible meaning of the words 'nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court'. Moreover, the relevant date by which proceedings must be commenced to render something 'under consideration' is the date on which the withdrawal becomes effective. If there is an ongoing genocide, say, at the time notification is given, so long as the prosecution is commenced during one year notification period, the obligations continue afterwards.
- 8 If the prosecution is not commenced by the effective date of withdrawal, the matter is more complicated. It would appear, however, that paragraph 2 does not cover all of the implications of a withdrawal. There is still room for the application of the general law. In particular, article 70 para. 1 (b) of the Vienna Convention on the Law of Treaties states that unless the parties otherwise agree, termination of a treaty (including withdrawal from a multilateral treaty) 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'. It would seem to follow that if there were breaches of the substantive provisions of the Rome Statute on a State's territory or by its nationals prior to withdrawal, those offenses would still come within the jurisdiction of the Court, even if the prosecution had not been commenced before withdrawal.

² Different considerations apply to proceedings commenced by the Security Council. It is not possible to 'withdraw' from the obligation to answer to such jurisdiction, which will arise as a result of action taken under Chapter VII of the United Nations Charter.

Article 128 Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

On this occasion, no more than general remarks are necessary. This is a standard-form designation of the United Nations Secretary-General as Depository of the Statute¹, accompanied by a reiteration of the equal-authenticity principle concerning multilingual treaties stated in the Vienna Convention on the Law of Treaties². It was perhaps the only provision in the text that caused no controversy whatsoever and was adopted exactly as introduced on the basis of the Secretariat's Draft.

The languages listed are the official United Nations languages.

It will be noted that the depositary is required to send certified copies of the Statute to all 'States', a formula which includes the handful of States that are not United Nations Members³. One of those non-members, the Holy See, participated actively in the formulation of the Statute and another, Cook Islands, acceded to the Statute in 2008.

Fulfillment of the obligation to send certified copies was complicated by the need for the Secretary-General to make some ministerial corrections to the text, as adopted at Rome and established as certified true copies on 29 Sep. 1998. The need for the corrections was occasioned, for the most part, by the massive task of getting out an acceptable text at a late stage of the Conference⁴.

¹ On depositary functions in general, see article 77 VCLT; Jennings and Watts (eds.), *Oppenheim's international law* (1992) 1312–13 and material there cited.

² Article 33 VCLT. When the principle is applied, 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted' (article 33 para. 4).

³ See Clark, *article 125*.

⁴ See Procès-Verbal of Rectification of the Original of the Statute, C.N.577.1998.TREATIES-8 (Depositary Notification) of 10 November 1998. See also the notification of proposed corrections contained in the Secretary-General's Note C.N.502.1998 TREATIES-3 (Depositary Notification) of 25 September 1998. The procedure followed for rectifying the text was that set out in article 79 VCLT. The only significant correction has been discussed under article 121. See also the 'concerns and objections' expressed by the United States concerning the course followed to make the corrections, Notes to the Rome Statute in the United Nations data base on Multilateral Treaties Deposited with the Secretary-General.

Index

A

- Act of aggression **8bis** 88 *et seq.*
- acts by a State **8bis** 91 *et seq.*
 - allowing one's territory to be used for an act of aggression **8bis** 140 *et seq.*
 - annexation by the use of force **8bis** 121 *et seq.*
 - armed forces by private actors **8bis** 92
 - attack **8bis** 109
 - attack by the armed forces of a State **8bis** 111 *et seq.*
 - attack on the land, sea or air forces, or marine and air fleets of another State **8bis** 132 *et seq.*
 - blockade **8bis** 128 *et seq.*
 - blockade of landlocked States **8bis** 130
 - bombardment by the armed forces of a State **8bis** 123 *et seq.*
 - declaration of war **8bis** 104
 - effective control standard **8bis** 92
 - invasion **8bis** 108
 - meaning **8bis** 89
 - meaning 'of the territory of another State' **8bis** 113 *et seq.*
 - meaning of 'against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations' **8bis** 94 *et seq.*
 - meaning of 'means the use of armed forces' **8bis** 90
 - military occupation **8bis** 115 *et seq.*
 - sending of irregular forces **8bis** 144 *et seq.*, *see Irregular forces*
 - UN GA Resolution 3314 **8bis** 99 *et seq.*
 - using any weapons by a State against the territory of another State **8bis** 126
 - violation of stationing agreements and unlawful extension of presence **8bis** 136 *et seq.*
- Additional evidence in appeal proceedings
- admissibility 83 47 *et seq.*
 - interlocutory appeal 83 59
 - proceedings relevant to the admissibility of additional evidence 83 57 *et seq.*
- Administration of the Court
- oversight of ethics, professional conduct, privileges and immunities 38 26
 - oversight of judicial proceedings 38 20 *et seq.*
 - oversight of organisation and work of Chambers 38 21 *et seq.*
 - presidency 38 19 *et seq.*
- Admissibility of a case 17 1 *et seq.*
- Ad Hoc Committee proposal 17 5 *et seq.*
- burden of proof 17 36 *et seq.*
 - challenge of the admissibility of a case 18 37 *et seq.*
 - challenges 19 1 *et seq.*, *see Challenges to the jurisdiction of the Court or the admissibility of a case*
 - collapse or unavailability of national judicial system, *see there*
 - decision not to prosecute 17 44 *et seq.*
 - double jeopardy 17 53
 - ILC Draft 17 5 *et seq.*
 - inactivity 17 27
 - insufficient gravity 17 54 *et seq.*
 - lack of impartiality or independence 17 70 *et seq.*
 - meaning of 'genuinely' 17 41 *et seq.*
 - meaning of 'same case' 17 31 *et seq.*
 - preliminary rulings regarding admissibility, *see there*
 - Preparatory Committee's Draft 17 10 *et seq.*
 - Rome Conference 17 17 *et seq.*
 - shielding the person 17 65 *et seq.*
 - testing impartiality 17 73
 - unjustified delay 17 67 *et seq.*
 - 'unwilling or unable' test 17 38 *et seq.*
- Admission of guilt, *see also Proceedings on admission of guilt*
- admission accompanied by facts 65 26 *et seq.*
 - conviction according to an admission of guilt 65 31 *et seq.*
 - invalid admission of guilt 65 35 *et seq.*
 - presentation of facts in the interest of justice 65 37 *et seq.*
 - understanding nature and consequences of admission 65 19 *et seq.*
 - valid admission of guilt 65 14 *et seq.*
 - voluntary admission after consultation with counsel 65 25
- Adviser to Prosecutor 43 32 *et seq.*
- Advisory Committee on Nominations 112 58
- Aggression, *see Crime of aggression*
- Agreement on conditions for disclosure of national security information 72 33 *et seq.*
- AIDP Draft 1 1
- Alternate judges 74 19 *et seq.*
- presence at trial 74 21
 - Pre-Trial Chamber 74 23
 - Purpose 74 20
- Amendments to provisions of an institutional nature 122 1 *et seq.*
- Amendments to the Rome Statute 121 1 *et seq.*
- Annexation by the use of force act of aggression **8bis** 121 *et seq.*
- Apartheid
- Apartheid Convention 7 93 *et seq.*, 145
 - crimes against humanity 7 92 *et seq.*, 145 *et seq.*
 - definition 7 145
 - historical development 7 92
 - institutionalised regime of systematic oppression and domination 7 146
 - intention to maintain an apartheid regime 1 148
 - meaning 7 92
 - racism 7 147
 - Apartheid Convention 7 46, 93 *et seq.*, 145
- Appeal 81 1 *et seq.*
- against other decisions 82 1 *et seq.*
 - against sentence 81 10 *et seq.*, 64 *et seq.*
 - binding effect of decisions 81 76
 - decisions by Pre-Trial Chamber or Trial Chamber 82 9
 - decisions granting or denying release 82 15

Index

- decisions on jurisdiction or admissibility 82 11 *et seq.*
- dismissal of grounds of appeal 81 28 *et seq.*
- error of fact 81 46 *et seq.*
- error of law 81 36 *et seq.*
- execution while appeal is pending 81 14 *et seq.*; 82 22 *et seq.*
- grounds of appeal 81 34 *et seq.*
- interlocutory appeal 82 1
- issues of general significance 81 72 *et seq.*
- leave to appeal a decision 82 18 *et seq.*, 21
- legal nature 81 18 *et seq.*
- mixed errors of fact and law 81 39
- principle of precedent 81 76 *et seq.*
- procedural errors 81 34 *et seq.*, 40 *et seq.*
- proceedings on appeal, *see there*
- raising of new issues by Appeal Chambers *proprio motu* 81 70
- reconsideration by the Appeals Chamber of its own final judgments 81 90 *et seq.*
- reparation orders 82 15
- scope 81 7 *et seq.*
- standard of review for sentencing appeals 81 65
- standards of review on appeal 81 34 *et seq.*, 41 *et seq.*
- trial management 81 42
- victim participation 82 14
- violation of right to fair trial 81 59 *et seq.*
- waiver principle 81 32, 44
- Appeal against decision of acquittal or conviction or against sentence, *see Appeal, see also Revision of conviction or sentence*
- Applicable law 21 1 *et seq.*
 - applicable treaties 21 20 *et seq.*
 - customary international law principles 21 25
 - discretionary use of precedents 21 43
 - drafting history 21 3 *et seq.*
 - established principles of international law of armed conflict 21 33
 - general principles of law derived by the court from national laws of legal systems of the world 21 34 *et seq.*
 - hierarchy of sources 21 15 *et seq.*
 - interpretation of law 21 48 *et seq.*
 - precedents 21 43 *et seq.*
 - principles of international law 21 23 *et seq.*
 - rules of international law 21 28 *et seq.*
 - *stare decisis* principle 21 43
- Applicable treaties 21 20 *et seq.*
- Appointment of Prosecutor 42 16 *et seq.*
- Armed conflicts
 - between forces of the government and other groups with third States being involved 8 844 *et seq.*
 - exclusively between two or more States 8 837
 - other serious violations of the laws and customs applicable in armed conflicts not of an international character 8 990 *et seq.*
 - without third States being involved 8 838 *et seq.*
- Armed forces by private actors act of aggression 8*bis* 92
- Arrest and surrender, *see Request for arrest and surrender; see also Provisional arrest*
- Arrest or detention 55 8
- Arrest proceedings in the custodial State 59 1 *et seq.*
- Arrest, detention or abduction of persons 7 151
- Article 12 States 19 28 *et seq.*
- Asphyxiating, poisonous or other gases, and all other analogous liquids, materials or devices 8 980 *et seq.*
- Assembly of States
 - approval of relationship agreement 2 17 *et seq.*
 - crime of aggression 5 45 *et seq.*
- Assembly of States Parties 112 1 *et seq.*
 - Advisory Committee on Nominations 112 58
 - alteration of the number of judges 112 24 *et seq.*
 - Assembly Rules of Procedure 112 92
 - Assembly sessions 112 76 *et seq.*
 - Committee on Budget and Finance 112 21, 54 *et seq.*
 - default to pay contributions 112 88 *et seq.*
 - fiscal authority 112 19 *et seq.*
 - functions 112 8 *et seq.*
 - historical development 112 1 *et seq.*
 - Independent Oversight Mechanism 112 13, 59 *et seq.*
 - Independent Panel on ICC Judicial Elections 112 30
 - legislative decisions 112 94 *et seq.*
 - majority requirements 112 81 *et seq.*
 - management oversight 112 13 *et seq.*
 - membership 112 6
 - non-cooperation 112 34 *et seq.*
 - observer 112 6
 - Oversight Committee 112 57
 - participation of Court organs 112 74
 - promoting complementarity 112 40
 - promoting cooperation 112 38
 - promoting universality 112 39
 - recommendations of the Preparatory Commission 112 9 *et seq.*
 - Special Working Group on the Crime of Aggression 112 73, 97
 - Study Group on Governance 112 70
 - subsidiary bodies 112 51 *et seq.*
 - the 'Bureau' 112 44 *et seq.*, *see Bureau*
 - The Hague Working Group 112 15
 - voting rights 112 5
 - Working Group on Amendments 112 68 *et seq.*
 - working languages 112 93
- Assembly Rules of Procedure 112 92
- Assembly sessions 112 76 *et seq.*
- Assessed contributions 115 16; 117 1 *et seq.*
- Assistance in relation to investigations or prosecutions 93 14 *et seq.*
- Assurance not to be prosecuted, detained or subjected to any restriction of personal freedom 93 39
- Asylum proceedings under Headquarters Agreement 3 67 *et seq.*
- Attack
 - attacks on humanitarian assistance or peacekeeping missions in international armed conflict 8 222
 - connected to State or organisational policy 7 109 *et seq.*
 - course of conduct 7 107
 - crimes against humanity 7 105 *et seq.*
 - direction of attack 7 108
 - intentionally directing attacks against civilians not taking direct part in hostilities 8 183
 - multiple act 7 106 *et seq.*
- Attack by the armed forces of a State as act of aggression 8*bis* 111 *et seq.*
- Attack on the land, sea or air forces, or marine and air fleets of another State 8*bis* 132 *et seq.*

- Attacking or bombarding undefended not-military objectives 8 255 *et seq.*
- conditions 8 258
 - customary law 8 256
 - elements 8 255
 - ‘legitimate military objective’ concept 8 264
 - non-defended localities 8 260
- Attacks against cultural objects, places of worship and similar institutions 8 932
- Attacks against installations and personnel using the distinctive emblems 8 923
- Attacks against the civilian population 8 917 *et seq.*
- Attacks against UN and associated personnel 8 924 *et seq.*
- Attacks on humanitarian assistance or peacekeeping missions in international armed conflict 8 217 *et seq.*
- attack 8 222
 - elements 8 221 *et seq.*
 - entitlement to protection given to civilians and civil objects 8 234 *et seq.*
 - humanitarian assistance mission, *see there*
 - ILC Draft Code 1996 8 218
 - intentionally directing attacks 8 243 *et seq.*
 - normative origin and drafting history 8 217
 - peacekeeping mission, *see there*
 - self-defence, *see there*
- Attempt 25 40 *et seq.*
- abandonment of attempt 25 43 *et seq.*; 31 8
 - attempt liability 25 40 *et seq.*
- Attendance and testimony of witnesses in the trial 64 32
- Audit of the Court 118 1 *et seq.*
- Authorization by the Security Council if crime of aggression 8*bis* 80 *et seq.*
- Authentic texts of the Rome Statute 128 1 *et seq.*
- Authority to make cooperation request 87 4 *et seq.*
- Authority to request the submission of evidence 69 34 *et seq.*
- B**
- Beneficiaries of the Trust Fund 79 5 *et seq.*
- Binding effect of decisions 81 76
- BINUCA 2 40
- Biological experiment 8 100 *et seq.*
- *actus reus* 8 103
 - meaning 8 100
- Biological weapons 8 596 *et seq.*, 599
- Blockade
- act of aggression 8*bis* 128 *et seq.*
 - blockade of landlocked states 8*bis* 130
- Bombardment by the armed forces of a state 8*bis* 123 *et seq.*
- Budget
- budget decision 115 9 *et seq.*
 - budget document 115 9
 - budget of Prosecutor 42 13
 - budget period 115 10
 - stages and responsibilities in the budget process 115 11 *et seq.*
- Bullets which expand or flatten easily in the human body 8 600 *et seq.*, 982 *et seq.*
- drafting history 8 600 *et seq.*
 - elements 8 601 *et seq.*
 - mental element 8 605 *et seq.*
- Bureau 112 44 *et seq.*
- function and sessions 112 48
 - members 112 44 *et seq.*
 - representative character 112 47
- C**
- Calling judges to serve full-time 35 17 *et seq.*
- Caroline formula 8*bis* 72
- Causing serious bodily or mental harm 6 23 *et seq.*
- Challenge evidence and raise defence 67 36 *et seq.*
- Challenges
- admissibility of a case 19 1 *et seq.*, *see also Challenges to the jurisdiction of the Court or the admissibility of a case*
 - jurisdiction of the ICC 19 1 *et seq.*, *see also Challenges to the jurisdiction of the Court or the admissibility of a case*
 - limits on the number of challenges 19 39 *et seq.*
 - prompt challenges by states 19 45 *et seq.*
 - right to challenge 19 20 *et seq.*, *see Right also to challenge to the jurisdiction of the Court or the admissibility of a case*
- Challenges to the jurisdiction of the Court or the admissibility of a case 19 1 *et seq.*
- challenge to jurisdiction of the Court 19 17 *et seq.*
 - challenges 19 13 *et seq.*
 - challenges to the admissibility of a case 19 14 *et seq.*
 - determination of jurisdiction by the Court 19 2 *et seq.*
 - *proprio motu* determination 19 6 *et seq.*
 - right to challenge 19 20 *et seq.*, *see Right also to challenge to the jurisdiction of the Court or the admissibility of a case*
 - standard of proof required on admissibility questions 19 16
- Chambers 39 1 *et seq.*
- composition 39 3 *et seq.*
 - judges assigned to the Appeals Division 39 13
 - number of judges 36 1 *et seq.*; 39 1
 - term of assignment 39 11 *et seq.*
- Change in the law 24 21 *et seq.*
- Charter of the United Nations re violation by act of aggression 8*bis* 46 *et seq.*
- Chemical weapons 8 583 *et seq.*
- Children as victims or witnesses 68 21
- Choice of defence counsel 67 30
- Civilians 8 773
- Civilians not taking direct part in hostilities, *see Serious violations of the laws and customs in international conflicts*
- Code of Professional Conduct for Counsel 28 31
- Collapse or availability of national judicial system 17 74 *et seq.*, 76
- Collateral damage 32 51 *et seq.*
- Command responsibility 25 53 *et seq.*; 33 32 *et seq.*
- Commander, *see Responsibility of commanders and other superiors*
- Commander’s failure to exercise control properly 28 104 *et seq.*
- accountability 29 111
 - causality 28 109 *et seq.*
 - completed or attempted crime 28 106
 - duty to become active 28 105
 - mental element 28 113 *et seq.*
 - relation to individual responsibility 28 107 *et seq.*

Index

- Commander's failure to take all necessary and reasonable measures 28 116 *et seq.*
- dereliction of duty and power to react 28 117
- hypothetical causation 28 121
- knowledge about force's actions or planned actions 28 116
- measures needed to avoid or to compensate 28 118
- measures to prevent or repress or to submit 28 119
- perspective for assessment 28 120
- threshold of unreasonable demands 28 122
- Commencement of the trial 64 39 *et seq.*
- medical, psychiatric or psychological examination of the accused 64 40
- plea guilty 64 42
- power of presiding judge 64 43 *et seq.*
- reading of the charges 64 39
- record of the trial 64 52
- ruling on admissibility or relevance of evidence 64 50
- taking steps to maintain order 64 51
- Committee on Budget and Finance 112 54 *et seq.*
- Committee on International Criminal Jurisdiction 1 2
- Communication between Court and sentenced person 106 7
- Compelling a protected person to serve in the hostile forces 8 127 *et seq.*
- Compelling adversary nationals to take part in war operations 8 532 *et seq.*
- compelling 8 537
- elements 8 537 *et seq.*
- normative origin and drafting history 8 532 *et seq.*
- in operations of war against their own country 8 538 *et seq.*
- Compensation to an arrested or convicted person 85 1 *et seq.*
- Court's discretion 85 6
- drafting history 85 1 *et seq.*
- requirements 85 4 *et seq.*
- Competing request re cooperation other than surrender 93 70 *et seq.*
- Competing requests for surrender 90 1 *et seq.*
- competing requests 90 5
- competing requests for different conduct 90 25 *et seq.*
- Court's determination that the case is admissible 90 8 *et seq.*, 19 *et seq.*
- determination to surrender to the Court or extradite to the requesting State 90 22
- drafting history 90 1 *et seq.*
- intermediate proceedings 90 11 *et seq.*
- notification of the Court 90 29
- notification requirements 90 6
- priority to requests from the Court 90 15 *et seq.*
- Complicity after commission 25 51 *et seq.*
- Composition of the Court
- Office of the Prosecutor, *see Prosecutor*
- Registry, *see Registrar*
- Concept of complementarity 1 18 *et seq.*
- Conditions of imprisonment 106 5 *et seq.*
- Conditions of service of judges 35 26 *et seq.*
- Confidential information in the trial 64 33
- Confidentiality and disclosure 2 51
- Confidential information 99 36
- Confirmation hearing 61 1 *et seq.*, 11 *et seq.*
- absence of the person charged 61 19 *et seq.*
- amendment to or withdrawal of charges before the hearing 61 80 *et seq.*, 146 *et seq.*
- conduct 61 112 *et seq.*
- decision adjourning the confirmation hearing 61 136 *et seq.*
- decision by Pre-Trial Chamber 61 110 *et seq.*, 118 *et seq.*
- decision confirming the charges 61 127 *et seq.*
- decision declining to confirm the charges 61 134 *et seq.*
- disclosure procedure 61 47 *et seq.*
- document containing charges 61 29
- drafting history 61 1 *et seq.*
- duration 61 115
- evidence 61 100 *et seq.*
- evidentiary hearing before a Pre-Trial Chamber 61 110 *et seq.*
- evidentiary threshold 61 120 *et seq.*
- information of the evidence 61 45 *et seq.*
- place of hearing 61 117
- presence of the person charged 61 17 *et seq.*
- Prosecutor's obligation 61 25 *et seq.*, 86 *et seq.*
- purpose of confirmation procedure 61 5 *et seq.*
- responsibility after confirmation of charges 61 161 *et seq.*
- rights guaranteed to the suspect 61 25 *et seq.*
- rights of the accused at the hearing 61 96 *et seq.*
- schedule of the hearing 61 111
- setting date 61 12 *et seq.*
- subsequent request for confirmation 61 143 *et seq.*
- summary evidence 61 91
- warrant previously issued 61 154 *et seq.*
- Confirmation procedure
- absence of the person charged 61 19 *et seq.*
- presence of the person charged 61 17 *et seq.*
- purpose 61 5 *et seq.*
- setting date for confirmation hearing 61 12 *et seq.*, *see also Confirmation hearing*
- Conscription or enlistment of children and their participation in hostilities 8 797 *et seq.*
- conscripting or enlisting 8 810 *et seq.*
- drafting history 8 797 *et seq.*
- International Labour Organization Convention No. 182 8 800
- knowledge of age 8 822
- national armed forces 8 813
- nexus to armed conflict 8 814 *et seq.*
- UN Convention on the Rights of the Child 1989 8 800
- using children to participate in hostilities 8 817 *et seq.*
- Consequences of failure to cooperate 37 38 *et seq.*
- Contempt of court, *see Sanctions for misconduct before the Court*
- Content of the request 96 1 *et seq.*
- applications to the Court 96 16
- consultation of request and advising the Court 96 14 *et seq.*
- form 96 2
- requirements 96 6 *et seq.*
- urgent cases 96 2
- Content of the decision of the trial 74 65 *et seq.*
- Continuing crimes 11 16 *et seq.*
- human rights instruments 11 17 *et seq.*
- Rome Statute 11 21 *et seq.*

- Contributions
 - assessment of contributions 117 1 *et seq.*
 - voluntary contributions 116 1 *et seq.*
- Convention against Torture 7 135
- Convention against Transnational Organised Crime 7 121
- Conviction of more than one crime 78 20
- Cooperation and assistance between the Court and the Dutch authorities 3 48
- Cooperation and assistance by international organizations 37 43 *et seq.*
- Cooperation and enforcement pursuant Regulations 2004 52 37
- Cooperation other than surrender 93 1 *et seq.*
 - assistance in relation to investigations or prosecutions 93 14 *et seq.*
 - assistance subject to specified conditions 93 52 *et seq.*
 - assurance not to be prosecuted, detained or subjected to any restriction of personal freedom 93 39
 - competing request 93 70 *et seq.*
 - confidentiality of documents and information 93 67 *et seq.*
 - cooperation with or providing assistance to a State Party 93 73 *et seq.*
 - denial of a request for cooperation 93 49 *et seq.*
 - evidence taken and production of evidence 93 18 *et seq.*
 - examination of places or sites 93 30
 - execution of particular measures of assistance 93 40 *et seq.*
 - execution of request, *see there*
 - facilitating voluntary appearance 93 25 *et seq.*
 - identification of persons, whereabouts and location of items 93 16
 - identification, tracing and freezing of proceeds, property and assets and instrumentalities of crime 93 35
 - information about denial to cooperate 93 54
 - obligation of states to cooperate 93 11 *et seq.*
 - preservation of evidence 93 33
 - protection of victims and witnesses 93 33
 - questioning of persons 93 22 *et seq.*
 - records and documents 93 32
 - searches and seizures 93 31
 - service of documents 93 24
 - subsequent disclosure of documents or information 93 69
 - temporary transfer of persons, *see there*
- Cooperation request 87 1 *et seq.*
 - authority to make request 87 4 *et seq.*
 - confidentiality 87 23 *et seq.*
 - consequences of failure to cooperate 37 38 *et seq.*
 - cooperation and assistance by international organizations 37 43 *et seq.*
 - dispute regarding legality of a request 37 51 *et seq.*
 - failure to cooperate 87 37, 48 *et seq.*
 - finding of a failure to cooperate and its legal consequences 37 53 *et seq.*
 - language requirements 87 20 *et seq.*
 - obligatory cooperation 87 36
 - protection of victims, witnesses and their families 87 26 *et seq.*
 - transmission of request 87 4 *et seq.*, 19
- Cooperation with respect to waiver of immunity and consent to surrender 98 1 *et seq.*
- Cooperation with UN Commission of Inquiry 2 47 *et seq.*
- Co-perpetration 25 8 *et seq.*, 14
- Corrupting, impeding or intimidating an official of the Court 70 10
- Corrupting, obstructing or retaliating against a witness 70 8 *et seq.*
- Costs of execution of request 100 1 *et seq.*
 - costs of transport of persons being surrendered 100 7
 - costs of travel, security of witnesses and the transfer of persons 100 3
 - costs of expert opinion or report 100 6
 - costs of translation, interpretation and transcription 100 4
 - extraordinary costs 100 8
 - request to the costs 100 9
 - travel and subsistence costs of organs and staff of the Court 100 5
- Costs of transport of persons being surrendered 100 7
- Costs of travel, security of witnesses and the transfer of persons 100 3
- Costs of expert opinion or report 100 6
- Costs of transfer of person upon completion of sentence 107 6
- Costs of translation, interpretation and transcription 100 4
- Counsel privileges and immunities 48 11 *et seq.*
- Counsel issues and legal assistance 52 31 *et seq.*
- Counter-terrorist operations 8 860 *et seq.*
- Court
 - administration 34 *et seq.*
 - appeal and revision 81 *et seq.*
 - composition 34 *et seq.*
 - confirmation of the charge before trial, *see Confirmation hearing*
 - division, *see Divisions of the Court*
 - establishment, *see Establishment of the Court*
 - exercise of jurisdiction, *see there*
 - initial proceedings before the Court, *see there*
 - jurisdiction, *see Jurisdiction of the Court*
 - jurisdiction *ratione temporis* 11 1 *et seq.*; 15*bis* 12
 - language, *see Language of the Court*
 - legal personality and capacity of the Court 3 20
 - legal status and powers, *see Legal status and powers of the Court*
 - organs, *see Organs of the Court*
 - preconditions to the exercise of jurisdictions, *see there*
 - privileges and immunities 48 1 *et seq.*
 - Regulations, *see Regulation of the Court*
 - Rules and Procedure of Evidence, *see there*
 - relationship to the UN 2 1 *et seq.*, 3
 - sanctions for misconduct before the Court, *see there*
 - seat 3 1 *et seq.*; 62 14, *see also Seat of the Court, and Headquarters Agreement*
 - service of judges, *see there*
 - structure 39 1
- Court orders to transfer fines or forfeiture 79 8
- Court's Code of Judicial Ethics 46 5; 52 39
- Court's obligation to establish principles on reparations 75 10 *et seq.*
- Crime committed pursuant to an order 33 16
- Crime of aggression 8*bis* 1 *et seq.*
 - Assembly of States 5 45 *et seq.*

Index

- authorization by the Security Council *8bis* 80 *et seq.*
 - Caroline formula *8bis* 72
 - continuous crimes of aggression *15bis* 12
 - definition 5 33
 - domestic jurisdiction *8bis* 159 *et seq.*
 - drafting history *8bis* 3 *et seq.*
 - exercise of jurisdiction 5 30 *et seq.*
 - for the purpose of this Statute *8bis* 14 *et seq.*
 - historical development 5 30 *et seq.*
 - humanitarian intervention *8bis* 77 *et seq.*
 - intervention upon invitation *8bis* 82 *et seq.*
 - jurisdiction of the Court 5 27 *et seq.*; *15bis* 1 *et seq.*, 5, 9 *et seq.*, *see also there*
 - jurisdiction *ratione temporis* *15bis* 12
 - Kampala Review Conference 5 52
 - leadership clause 25 46
 - meaning of 'act of aggression' *8bis* 45
 - meaning of 'by a person' *8bis* 35
 - meaning of 'by a person in a position effectively to exercise control over or to direct the political or military action of a State' *8bis* 33 *et seq.*
 - meaning of 'crime of aggression' *8bis* 17 *et seq.*
 - meaning of 'gravity' and 'scale' *8bis* 62 *et seq.*
 - meaning of 'in a position effectively to exercise control over or to direct the political or military action' *8bis* 36 *et seq.*
 - meaning of 'initiation or execution' *8bis* 31
 - meaning of 'manifest violation' *8bis* 65 *et seq.*
 - meaning of military action 'of a State' *8bis* 43
 - meaning of 'planning, preparation, initiation or execution' *8bis* 32 *et seq.*
 - meaning of 'preparation' *8bis* 28 *et seq.*
 - meaning of 'which, by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations' *8bis* 46 *et seq.*
 - nature of the act of aggression *8bis* 61
 - post-Rome developments 5 40 *et seq.*
 - preconditions 5 53 *et seq.*
 - preventive and pre-emptive self-defence *8bis* 70 *et seq.*
 - ratification or acceptance requirement *15bis* 13 *et seq.*
 - rescue of nationals abroad *8bis* 85 *et seq.*
 - 'responsible to protect' concept *8bis* 78
 - role of Security Council 5 35
 - self-defence against non-State actors *8bis* 74 *et seq.*
 - temporal jurisdiction *15bis* 12
 - Crimes against humanity 7 1 *et seq.*
 - *apartheid*, *see there*
 - attack, *see there*
 - civilian 7 24
 - committed as part of an attack 7 14 *et seq.*
 - definition 7 3 *et seq.*, 105 *et seq.*
 - deportation or forcible transfer of population, *see there*
 - direction of attack 7 23 *et seq.*
 - enforced disappearance of persons, *see there*
 - enforced prostitution, *see there*
 - enforced sterilisation 7 67
 - enslavement, *see there*
 - evidence needed 7 28
 - extermination, *see there*
 - forced pregnancy, *see there*
 - gender, *see there*
 - genocide 6 34
 - historical development 7 1 *et seq.*
 - imprisonment or other severe deprivation of physical liberty, *see also there*
 - jurisdiction of Court 5 21 *et seq.*
 - knowledge of the attack 7 26
 - murder, *see Murder as crime against humanity*
 - nature of the attack 7 18 *et seq.*
 - other inhumane acts, *see Inhumane acts*
 - persecution, *see there*
 - population 7 23
 - prohibited movements of population, *see Deportation and forcible transfer*
 - rape, *see there*
 - sexual violence, *see Rape*
 - systematic attack 7 20
 - torture, *see there*
 - widespread attack 7 19
 - Crimes not included in the Rome Statute 5 1 *et seq.*
 - drug trafficking 5 10 *et seq.*
 - mercenarism 5 13
 - terrorism 5 4 *et seq.*
 - Treaty crimes 5 1 *et seq.*
 - Crimes of omission 25 54
 - duty to act 25 53
 - protective duty 25 53
 - Criminal responsibility grounds for excluding criminal responsibility, *see there*
 - Cruel treatment 8 894
 - Cultural heritage 8 415 *et seq.*
 - Cultural property 8 415 *et seq.*
 - Cultural property under special protection 8 414
 - Customary international law principles 21 25
- ## D
- Decision adjourning the confirmation hearing 61 136 *et seq.*
 - Decision confirming the charges in the confirmation hearing 61 127 *et seq.*
 - Decision declining to confirm the charges in the confirmation hearing 61 134 *et seq.*
 - Decision of the Court on reparation 75 17 *et seq.*
 - Decisions by the Trial Chamber 74 1 *et seq.*
 - alternate judges 74 19 *et seq.*, *see also there*
 - basis 74 25 *et seq.*
 - content 74 65 *et seq.*
 - delivery in open court 74 71
 - evidence considered 74 53 *et seq.*
 - form 74 65 *et seq.*
 - historical overview 74 1 *et seq.*
 - majority and minority views 74 70
 - presence of the judges at each stage of the trial 74 11 *et seq.*
 - secrecy of deliberations 74 61 *et seq.*
 - unanimity, majority and minority view 74 57 *et seq.*
 - Decisive evidence false, forged or falsified leading to revision of conviction or sentence 84 21
 - Declaration of war *8bis* 104
 - Declaration on the Elimination of Violence against Women 7 54
 - Deduction from sentence 78 18 *et seq.*
 - Default to pay contributions to the Assembly 112 88 *et seq.*
 - Defence of another person 31 37 *et seq.*
 - Defence of property 31 37 *et seq.*
 - Defence teams 2 40

- Defences in case of genocide 6 33
- Defend oneself in person 67 29
- Deferral of investigation or prosecution 16 1 *et seq.*
- drafting history 16 2 *et seq.*
 - investigation 16 12 *et seq.*
 - meaning of ‘commenced or proceeded with’ 16 17
 - prosecution 16 12 *et seq.*
 - renewal of request 16 25
 - time limit 16 21
- Delimitation 25 48 *et seq.*
- Delivery in open court 74 71
- Denial of a request for cooperation 93 49 *et seq.*
- Department of Peacekeeping Operations 2 37
- Department of Political Affairs 2 37
- Department of Safety and Security 2 46
- Deportation
- Fourth Geneva Convention 7 126
 - lack of permitted grounds 7 126
 - lawful presence 7 125
 - prohibited movements of population 7 124 *et seq.*
- Deportation or forcible transfer of population 7 46
- Apartheid Convention 7 46
 - crimes against humanity 7 44 *et seq.*
 - deportation 7 45
 - ‘forcible’ and ‘forced’ 7 47
 - forcible transfer of population 7 46 *et seq.*
 - Guiding Principles of Internal Displacement 7 46
 - requirements 7 45
- Deporting or transferring all or parts of the population of the occupied territory 8 386 *et seq.*
- elements 8 398 *et seq.*
 - exceptions from prohibition 8 403 *et seq.*
 - individual transfer 8 402
 - normative origin and drafting history 8 387
- Deprivation of civilians 8 775 *et seq.*
- Deputy Prosecutor 42 14, 18
- Designation of a judge for the preparation of the trial 64 17
- Destroying or tampering with evidence or obstructing its collection 70 8 *et seq.*
- Destruction 8 967 *et seq.*
- Detention matters 52 34 *et seq.*
- Determination of language of the trial 64 18
- Determination of penalties 77 1 *et seq.*
- drafting history 77 7 *et seq.*
 - fines 77 26 *et seq.*
 - forfeiture of proceeds, property and assets derived directly or indirectly from the crime 77 31 *et seq.*
 - imprisonment for a certain number of years 77 23 *et seq.*
 - purpose of penalty 77 3
 - term of life imprisonment 77 24
- Determination of the sentence 78 1 *et seq.*
- conviction of more than one crime 78 20
 - deduction from sentence 78 18 *et seq.*
 - double counting 78 12
 - factors in determining sentence to be imposed 78 14 *et seq.*
 - facts and circumstances described in the charges 78 10
 - length of the joint sentence 78 21
 - preliminary considerations 78 10 *et seq.*
 - standard of proof 78 11
- Disciplinary Appeals Board 28 31
- Disciplinary measures against members of the Court 47 1 *et seq.*
- elements 47 3 *et seq.*
 - type of measures 47 4
- Disclosure in confidence 73 9 *et seq.*
- Disclosure of documents or information in the trial 64 19
- Disclosure of documents or information of a State 72 3
- Disclosure procedure 61 47 *et seq.*
- admissibility challenge 61 50
 - begin 61 49
 - communication of evidence 61 74
 - language 61 54 *et seq.*
- Discontinuance of appeal 83 30
- Discontinuance of investigation 15 34 *et seq.*
- Dispute regarding legality of a cooperation request 37 51 *et seq.*
- Disqualification of a judge 41 6 *et seq.*
- competency to request disqualification 41 11
 - key principles considering disqualification 41 16 *et seq.*
- Disqualification of Prosecutor 43 29 *et seq.*
- Disruption of trial 63 40
- Divisions of the Court 39 1, *see also Chambers*
- assignment to the divisions 39 2
- Doctrine of implied powers 4 14
- Documents in support of appeal 83 32
- Double counting 78 12
- Drug trafficking 5 10 *et seq.*
- Duress 31 49 *et seq.*
- Duties and powers of the Prosecutor 54 1 *et seq.*
- appropriate measures to ensure effective investigations 54 12
 - discretion 54 7 *et seq.*
 - drafting history 54 4 *et seq.*
 - establishing the truth 54 8 *et seq.*
 - power to investigate of the territory of states 54 16 *et seq.*
 - prosecutorial powers 54 27 *et seq.*
 - respect of person’s rights 54 15
- Duty Counsel 34 11
- Duty to act 25 53
- E**
- Economic sanctions or blockades 8 782
- Effect of a decision on reparation 75 26
- Effective control standard re act of aggression 8bis 92
- Election procedure 36 11 *et seq.*
- gender balance 36 12
- Elements of crime 9 1 *et seq.*, 11 *et seq.*
- adoption 9 35
 - amendments 9 36
 - causation 9 23 *et seq.*
 - circumstances 9 17 *et seq.*
 - conduct 9 14 *et seq.*
 - consequences 9 20 *et seq.*
 - inferring knowledge 9 27
 - intent 9 26 *et seq.*
 - intent as to conduct and consequences 9 29
 - interpretation 9 32 *et seq.*; 10 1 *et seq.*
 - knowledge of consequence 9 28
 - knowledge of the causation 9 30
 - material elements 9 13 *et seq.*
 - mental elements 9 25 *et seq.*

Index

- *nullum crimen sine lege* principle 9 1 *et seq.*
- proposition of amendments 9 37 *et seq.*
- Employing gases and analogous liquids, materials or devices 8 480 *et seq.*
- biological weapons 8 596 *et seq.*
- chemical weapons 8 583 *et seq.*
- drafting history 8 580 *et seq.*
- elements 8 583 *et seq.*
- Employing poison or poisoned weapons 8 574 *et seq.*
- Employment of annexed means or methods of warfare 8 609 *et seq.*
- Enemy property 8 502 *et seq.*
- extent of property protected 8 504 *et seq.*
- Enforced disappearance of persons
- arrest, detention or abduction of persons 7 151
- crimes against humanity 7 87 *et seq.*, 150 *et seq.*
- historical development 7 87 *et seq.*
- Human Rights Institute of the Paris Bar Association 7 89
- intention to remove from the protection of law 7 154
- Latin American Federation of Associations for Relatives of the Detained-Disappeared 7 89
- participation of State or political organisation 7 152
- prolonged period of time 7 155
- refusal to acknowledge or to give information 7 153
- Enforced prostitution 8 716
- crimes against humanity 7 63 *et seq.*
- non-contextual elements 7 64
- Enforced sterilisation 8 728 *et seq.*
- *actus reus* 8 729 *et seq.*
- crimes against humanity 7 67
- Enforcement 103 *et seq.*
- enforcement of fines and forfeiture measures 109 1 *et seq.*
- enforcement of sentences of imprisonment, *see there*
- escape 111 1 *et seq.*
- Enforcement cooperation 38 14 *et seq.*
- Enforcement of detention measures 3 33, 59 *et seq.*
- Enforcement of fines and forfeiture measures 109 1 *et seq.*
- Enforcement of sentences of imprisonment 103 1 *et seq.*; 105 1 *et seq.*
- authority of the sentence 103 16
- change in designation of State of enforcement 104 1 *et seq.*
- conditions of acceptance 103 24
- designation 103 26 *et seq.*
- enforcement agreement 103 19
- equitable distribution 103 20 *et seq.*
- Headquarters Agreement 103 30
- legal status of ICC sentence 103 1 *et seq.*
- limitation on the prosecution or punishment of other offences 108 1 *et seq.*
- mutual information 103 25
- position of the host State 103 29
- primacy 103 7 *et seq.*
- recognition by the State 103 17
- Seat Agreement 103 30
- Supervision and conditions of imprisonment 106 1 *et seq.*
- willingness to act as custodian of the ICC 103 18
- Enhanced cooperation **Pre Part** 9 9
- execution of request 99 35
- Enhanced protection 8 413
- Enslavement
- components 7 41
- Convention against Transnational Organised Crime 7 121
- crimes against humanity 7 39 *et seq.*, 119 *et seq.*
- definition 7 119
- European Convention on Action against Trafficking in Human Beings 7 121
- exhaustiveness of definition 7 120
- historical development 7 39 *et seq.*
- nature 7 40
- Palermo Protocol 7 121
- scope 7 119
- Slavery Convention 1926 7 41
- Trafficking Convention 7 121
- trafficking in persons 7 121 *et seq.*
- Women's Caucus for Gender Justice 7 122
- Entry into force of the Rome Statute 126 1 *et seq.*
- Error of fact 81 46 *et seq.*
- Error of facts and error of laws 32 50 *et seq.*
- Error of law 81 36 *et seq.*
- Escape 111 1 *et seq.*
- Established principles of international law of armed conflict 21 33
- Establishment of the Court
- AIDP Draft 1 1
- approval by Assembly of States Parties 2 17 *et seq.*
- Committee on International Criminal Jurisdiction 1 2
- concept of complementarity 1 18 *et seq.*
- Draft Relationship Agreement 2 18 *et seq.*
- entry into force 1 6 *et seq.*
- founding propositions 2 5
- functional independence 2 15
- historical development 1 1 *et seq.*
- ILA Draft 1 1
- ILC Draft Statute 1 3 *et seq.*, 10; 2 3
- independence and authority 2 8 *et seq.*, 15
- International Atomic Energy Agency 2 15
- International Tribunal for the Law of the Sea 2 15
- jurisdictional reach 1 12 *et seq.*
- MICT 1 21
- Organisation for the Prohibition of Chemical Weapons 2 15
- permanent institution 1 9 *et seq.*
- relationship to other criminal courts 1 21 *et seq.*
- Relationship Agreement 2 12 *et seq.*, 18 *et seq.*, 20 *et seq.*
- relationship to the UN 2 1 *et seq.*, 3
- Siracusa Draft 1 4
- subsidiary organs 2 8
- Zuphten Draft 1 3, 10
- Ethnic cleansing 6 20
- EUROJUST 3 43
- European Convention on Action against Trafficking in Human Beings 7 121
- European Convention on Human Rights 3 32, 60
- EUROPOL 3 43
- Evidence 69 1 *et seq.*
- admission would be unethical and would seriously damage the integrity of the proceedings 69 68 *et seq.*

- authority to request the submission of evidence 69 34 *et seq.*
- evidence collected by State 69 73
- exceptions to life-testimony 69 26 *et seq.*
- facts of common knowledge 69 57 *et seq.*
- fair evaluation of the testimony of a witness 69 49 *et seq.*
- fair trial 69 43 *et seq.*
- historical development 69 1 *et seq.*
- judicial notice of facts of common knowledge 69 58
- oral or recorded testimony of a witness via video or audio technology 69 28, 30
- presentation of documents or written transcripts 69 29
- privileged communication 69 55 *et seq.*
- probative value of evidence 69 41 *et seq.*
- purpose 69 22
- ruling on admissibility or relevance of evidence 69 32, 36 *et seq.*, 72
- testimony in person 69 25
- violation casts substantial doubts on reliability 69 67
- Evidence of similar conduct 66 31
- Evidence taken and production of evidence 93 18 *et seq.*
- Evidentiary threshold in the confirmation hearing 61 120 *et seq.*
- Examination of places or sites 93 30
- Examination of witnesses 67 37 *et seq.*
- Exclusion of jurisdiction over persons under eighteen 26 1 *et seq.*
 - Draft International Criminal Code 26 3
 - historical development 26 1 *et seq.*; 31 9
 - national jurisdiction 26 23 *et seq.*
 - person under age of eighteen 26 17 *et seq.*
 - reasons 26 11 *et seq.*
 - Siracusa Draft 26 4 *et seq.*
 - time of the alleged commission of a crime 26 20 *et seq.*
 - Working Group on the General Principles of Criminal Law 26 6
 - Zuipten Draft 26 9
- Exclusion of responsibility 31 7 *et seq.*
 - abandonment 25 43 *et seq.*; 31 8
 - exclusion of jurisdiction of persons under the age of eighteen 26 1 *et seq.*; 31 9
 - mistake of fact 31 10
 - mistake of law 31 10
 - prescription of law 31 11
 - superior orders 31 11
- Excusal from presence at trial 63 41 *et seq.*
- Excusal from presence at trial due to Public Office 63 52 *et seq.*
- Excuse of Prosecutor 42 23
- Excusing and disqualification of judges 41 1 *et seq.*
- Execution of particular measures of assistance 93 40 *et seq.*
- Execution of request 99 1 *et seq.*, 7
 - confidentiality information 99 36
 - costs 100 1 *et seq.*, *see also Costs of execution of request*
 - enhanced cooperation 99 35
 - procedural wishes by the Court 99 10 *et seq.*
 - request for assistance 99 6
 - response to the request 99 14
 - urgent requests 99 13
- Execution while appeal is pending 81 14 *et seq.*; 82 22 *et seq.*
- Exercise of jurisdiction 13 1 *et seq.*
 - Ad Hoc Committee proposal 13 6 *et seq.*
 - drafting history 13 1 *et seq.*
 - Genocide Convention 13 3, 6
 - ILC Draft 13 2 *et seq.*
 - independent prosecutor 13 20
 - Preparatory Committee's Draft 13 9 *et seq.*
 - Relationship Agreement between UN and ICC 13 16
 - Rome Conference 13 11 *et seq.*
 - Security Council referral 13 16 *et seq.*
 - State Party referral 13 15
 - UN SC Resolution 1593 13 16 *et seq.*
- Exercise of jurisdiction over the crime of aggression 15bis 1 *et seq.*
 - act of aggression determined by SC 15bis 37 *et seq.*; 41 42 *et seq.*
 - authorisation of investigations by Pre-Trial Division 15bis 43
 - crime of aggression 15bis 5, 10
 - domestic jurisdiction over the crime of aggression 15bis 47
 - drafting history 15bis 2
 - exclusion of non-parties 15bis 34 *et seq.*
 - independence of the ICC 15bis 45
 - information of the UN 15bis 40
 - jurisdiction *ratione personae* 15bis 21 *et seq.*, *see also there*
 - jurisdiction *ratione temporis* 15bis 20
 - jurisdictional limitations 15bis 3
 - lack of determination by SC 15bis 42 *et seq.*
 - opting-out option 15bis 21 *et seq.*, 27, *see Opt-out declaration*
 - Security Council referral 15ter 1 *et seq.*, *see there*
 - Treaty-based aggression-related jurisdiction 15bis 15 *et seq.*
- Experts privileges and immunities 48 11 *et seq.*
- Explicitly rejected defences to ICC crimes 31 13 *et seq.*
- Extensive destruction and appropriation of property 8 112 *et seq.*
 - forms of destruction 8 118
 - mental element 8 123 *et seq.*
 - scope 8 113 *et seq.*
 - specific elements 8 117
- Extermination
 - crimes against humanity 7 38, 112 *et seq.*
 - definition 7 38
 - direction of extermination activities 7 114
 - elements 7 112
 - extermination by omission 7 115
 - intentional infliction of conditions of life 7 118 *et seq.*
 - *mens rea* 7 116
 - non-contextual elements 7 117
 - number of victims 7 115
- Extradition 102 1 *et seq.*
- Extradition or surrender of person upon completion of sentence 107 7 *et seq.*
- Extra-judicial activities 49 5
- Extraordinary costs 100 8

Index

F

- Facilitating voluntary appearance 93 25 *et seq.*
- Factors in determining sentence to be imposed 78 14 *et seq.*
- Facts of common knowledge 66 30
 - evidence 69 57 *et seq.*
- Failure to cooperate 87 37, 48 *et seq.*
- Fair evaluation of the testimony of a witness 69 49 *et seq.*
- Fair hearing 67 15
- Fair trial 69 43 *et seq.*
- False testimony 70 6
- Financial arrangements for non-full-time judges 35 23 *et seq.*
- Financial Regulations 113 *et seq.*
 - budget process 113 12 *et seq.*
 - historical development 113 1 *et seq.*
 - matters covered 113 4 *et seq.*
- Financing
 - assessment of contributions 117 1 *et seq.*
 - audit 118 1 *et seq.*
 - Financial Regulations, *see there*
 - funds of the Court and the Assembly of States, *see there*
 - payment of expenses 114 1 *et seq.*
 - voluntary contributions 116 1 *et seq.*
- Finding of a failure to cooperate and its legal consequences 37 53 *et seq.*
- Fines 77 26 *et seq.*
- Fitness to stand trial 63 36 *et seq.*
- Flag of truce 8 311 *et seq.*
 - improper use 8 334
- Forced displacement 6 21
- Forced movement of civilians 8 950 *et seq.*
- Forced pregnancy 8 720 *et seq.*
 - crimes against humanity 7 66, 136 *et seq.*
 - definition 8 722 *et seq.*
 - elements 8 725 *et seq.*
 - forcible made pregnant 7 138
 - intentional 7 139
 - unlawful confinement 7 137
- Forcible transfer
 - intention to permanently displace 7 130
 - lack of permitted grounds 7 129
 - lawful presence 7 128
 - prohibited movements of population 7 127 *et seq.*
- Forcibly transferring children 6 28
- Forfeiture of proceeds, property and assets derived directly or indirectly from the crime 77 31 *et seq.*
- Form and content of the notice of appeal 83 16 *et seq.*
- Form of the decision of the trial 74 65 *et seq.*
- Fourth Geneva Convention 7 126
- Free legal assistance 67 32 *et seq.*
- Freedom of communication 3 24
- Function and powers of the ICC on the territory of any State Party 4 9
- Function and powers of the ICC on the territory of third states 4 12 *et seq.*
- Functions and powers of the Trial Chamber 64 1 *et seq.*, 6
 - aim 64 9 *et seq.*
 - attendance and testimony of witnesses 64 32
 - commencement of the trial, *see there*
 - confidential information 64 33
 - designation of a judge for the preparation of the trial 64 17

- determination of language 64 18
 - disclosure of documents or information 64 19
 - joinder or severance of charges 64 27 *et seq.*
 - mandatory status conference 64 15
 - proceedings on admission of guilt, *see there*
 - production of evidence 64 34 *et seq.*
 - protection of the accused, witnesses and victims 64 36
 - reference to Pre-Trial Division 64 25 *et seq.*
 - Rules of Procedure and Evidence 64 8
 - timing of disclosure 64 22
 - trial in public 64 38
- Fundamental principles of IHL 8 10
- Funds of the Court and the Assembly of States 115 1 *et seq.*, 8
 - assessed contributions 115 16
 - budget decision 115 9 *et seq.*
 - budget document 115 9
 - budget period 115 10
 - funds provided by the UN 115 17 *et seq.*
 - stages and responsibilities in the budget process 115 11 *et seq.*
- Funds provided by the UN 115 17 *et seq.*
- Functional immunity 27 16

G

- Gender definition 5 157 *et seq.*; 7 157 *et seq.*
- Gender UN usage 7 158
- Gender violence 7 160
- General principles of criminal law 22 *et seq.*
 - exclusion of jurisdiction over persons under eighteen, *see there*
 - grounds for excluding criminal responsibility, *see there*
 - individual criminal responsibility, *see there*
 - irrelevance of official capacity, *see there*
 - mental element, *see there*
 - mistake of fact, *see Mistake of fact or mistake of law*
 - mistake of law, *see Mistake of fact or mistake of law*
 - non-applicability of statute of limitations 29 1 *et seq.*
 - non-retroactivity *ratione personae*, *see there*
 - *nulla poena sine lege* 23 1 *et seq.*
 - *nullum crimen sine lege*, *see there*
 - responsibility of commanders and other superiors, *see there*
 - superior orders and prescription of law, *see there*
- General principles of law derived by the court from national laws of legal systems of the world 21 34 *et seq.*
- Geneva Convention, common article 3 8 867 *et seq.*
 - armed conflict not of an international character 8 868 *et seq.*
 - cruel treatment 8 894
 - murder 8 889 *et seq.*
 - mutilations 8 893
 - outrages upon personal dignity 8 900 *et seq.*
 - passing of sentences and the carrying out of executions without previous judgment 8 904 *et seq.*
 - persons protected by the provision 8 879 *et seq.*
 - possible offenders 8 886
 - serious violation 8 877 *et seq.*
 - taking of hostages 8 902 *et seq.*
 - torture 8 895 *et seq.*
 - violence to life and person, *see there*
- Geneva law branch of IHL 8 8

- Genocide 6 1 *et seq.*
- acts of genocide 6 19 *et seq.*
 - causing serious bodily or mental harm 6 23 *et seq.*
 - contextual elements 6 9 *et seq.*
 - crimes against humanity 6 34
 - defences 6 33
 - definition 6 7 *et seq.*
 - ethnic cleansing 6 20
 - forced displacement 6 21
 - forcibly transferring children 6 28
 - in whole or in part 6 14 *et seq.*
 - individual responsibility 6 30 *et seq.*
 - inflicting conditions of life 6 25
 - jurisdiction of the Court 5 20
 - killing members of the group 6 22
 - participation 6 30 *et seq.*
 - prevent births 6 26
 - protected groups 6 16 *et seq.*
 - rape and sexual violence 7 69
- Genocide Convention 13 3, 6
- Grave breaches compelling a protected person to serve in the hostile forces, *see there*
- Grave breaches extensive destruction and appropriation of property, *see there*
- Grave breaches taking hostages, *see there*
- Grave breaches torture or inhumane treatment 8 86 *et seq.*
- Grave breaches unlawful deportation, transfer or confinement, *see Unlawful deportation or transfer, and Unlawful confinement*
- Grave breaches
- wilfully causing great suffering, or serious injury to body or health, *see there*
 - Wilfully depriving a protected person of the rights of fair and regular trial, *see there*
 - wilful killing 8 77 *et seq.*, *see also there*
- Greentree process 2 54
- Grounds for excluding criminal responsibility 31 1 *et seq.*, 17 *et seq.*
- applicability determined by the Court 31 65 *et seq.*
 - decisive time 31 21
 - defence of another person 31 37 *et seq.*
 - defence of property 31 37 *et seq.*
 - duress 31 49 *et seq.*
 - exclusion of responsibility, *see there*
 - explicitly rejected defences to ICC crimes 31 13 *et seq.*
 - historical development 31 1 *et seq.*
 - incapacity 31 22 *et seq.*
 - intoxication, *see there*
 - limitation of the capacity defence 31 26 *et seq.*
 - non-addressed defences 31 15
 - official capacity 31 13
 - requirements for exclusion of criminal responsibility 31 38 *et seq.*
 - scope 31 1 *et seq.*
 - self-defence 31 37 *et seq.*
 - sources for exclusionary grounds 31 72 *et seq.*
 - Statute of Limitations 31 14
 - statutory grounds for excluding criminal responsibility 31 67
 - suffering from mental disease or defect 31 23 *et seq.*
- Grounds of appeal 81 34 *et seq.*
- Guiding Principles of Internal Displacement 7 46
- H
- Hague Convention for the protection of cultural property during armed conflict (HCP) 8 409
- Hague law branch of IHL 8 9 *et seq.*
- Hague Regulations 8 128 *et seq.*
- Harbouring a criminal 25 51
- Headquarters Agreement 3 1 *et seq.*, 5 *et seq.*, 43 *et seq.*, *see also Host Arrangement*
- asylum proceedings 3 67 *et seq.*
 - basic principles 3 19 *et seq.*
 - cooperation and assistance between the Court and the Dutch authorities 3 48
 - details 3 43 *et seq.*
 - detentional measures 3 59 *et seq.*
 - ECHR 3 32, 60
 - enforcement of detention measures 3 33
 - enforcement of sentences of imprisonment 103 30
 - EUROJUST 3 43
 - EUROPOL 3 43
 - final seat arrangement 3 39 *et seq.*
 - freedom of communication 3 24
 - historical development 3 5, 30 *et seq.*
 - ICC family 3 63
 - ICC headquarters district 3 9
 - ICC premises 3 53 *et seq.*
 - ICTY Host Arrangements 3 34 *et seq.*
 - immunities of personnel 3 25
 - interim solution 3 30 *et seq.*
 - inviolability of premises 3 22
 - jurisdictional immunity of the Court 3 21
 - legal personality and capacity of the Court 3 20
 - legal status of counsels, experts and witnesses 3 26
 - mandating clause 3 27 *et seq.*
 - obligation incumbent on host 3 51
 - privileges and immunities 3 64
 - purpose and scope 3 44
 - security and operational assistance 3 50
 - settlement of disputes 3 27 *et seq.*
 - Special Court for Sierra Leone 3 65 *et seq.*
 - transit arrangements 3 57 *et seq.*
 - visas, permits and other documents 3 49
 - waiving of immunities, privileges 3 47
- Hearing proceedings on appeal 83 41
- Host Arrangement 3 7 *et seq.*
- instruments concerning the seat 3 8
 - relation to Headquarters Agreement 3 7
- Host State Agreement, *see also Headquarters Agreement*
- Human Rights Institute of the Paris Bar Association on enforced disappearance of persons 7 89
- Humanitarian assistance mission 8 223 *et seq.*
- legal framework 8 224
 - NGO 8 226
 - UN Convention on the Safety of United Nations and Associated Personnel 8 225
- Humanitarian intervention 8bis 77 *et seq.*
- I
- ICC family 3 63
- ICC headquarters district 3 9 *et seq.*
- ICTY Host Arrangements 3 34 *et seq.*
- Identification of persons, whereabouts and location of items 93 16
- Identification, tracing and freezing of proceeds, property and assets and instrumentalities of crime 93 35

Index

- ILA Draft 1 1
- ILC Draft Statute 1 3 *et seq.*, 10; 2 3
- Immunities granted by Non-Party-States 27 6
- Immunities of personnel of the Court 3 25
- Immunities or special procedural rules 27 26
- Impartial conduct of trial 67 16 *et seq.*
- Impartiality of Prosecutor 43 24 *et seq.*
- Imprisonment
 - crimes against humanity 7 50 *et seq.*
 - definition 7 50
 - enforcement, *see Enforcement of sentences of imprisonment*
 - severe imprisonment 7 50
 - supervision and conditions, *see Supervision and conditions of imprisonment*
 - test to be applied 7 50
 - unlawfulness of imprisonment of civilians 7 51
- Imprisonment for a certain number of years 77 23 *et seq.*
- Imprisonment or other severe deprivation of physical liberty 7 48 *et seq.*
 - imprisonment, *see there*
 - UN Working Group on Arbitrary Detention 7 49
- Improper use of distinctive signs
 - elements 98 320 *et seq.*
 - improper use of signs of the adversary 8 340 *et seq.*
 - improper use of signs of the United Nations 8 349 *et seq.*
 - improper use of the distinctive emblems of the Geneva 8 355 *et seq.*
 - improper use of the flag or truce 8 311, 334
 - meaning of ‘improper use’ 8 323
 - mental element 8 329 *et seq.*
 - normative origin and drafting history 8 308
 - resulting in death or serious injury 8 327
- Incapacity 31 22 *et seq.*
- Independence of judges 40 1 *et seq.*, 11 *et seq.*
- Independence of the Court
 - exercise of jurisdiction over the crime of aggression 15*bis* 45
 - Security Council referral 15*ter* 6 *et seq.*
- Independent Oversight Mechanism 112 59 *et seq.*
- Independent Prosecutor 13 20
- Indirect co-perpetratorship 25 14
- Individual criminal responsibility 25 1 *et seq.*
 - abandonment of attempt 25 43 *et seq.*
 - attempt liability 25 40 *et seq.*
 - command responsibility 25 53 *et seq.*
 - complicity after commission 25 51 *et seq.*
 - co-perpetration 25 8 *et seq.*, 14
 - crime of aggression 25 46
 - crimes of omission 25 54
 - delimitation 25 48 *et seq.*
 - directly and publicly incitement 25 35 *et seq.*
 - duty to act 25 53
 - harbouring a criminal 25 51
 - incitement to commit genocide 25 35 *et seq.*
 - indirect co-perpetratorship 25 14
 - intention aiming at furthering the criminal activity or criminal purpose of the group 25 35
 - intentional contribution 25 30
 - joint indirect perpetratorship 25 14
 - knowledge of the intention of the group 25 34
 - leadership clause 25 46
 - meaning of ‘orders, solicits or induces’ an (attempted) crime 25 18 *et seq.*
 - objective contribution to the (attempted) commission 25 29
 - perpetration by means 25 11 *et seq.*
 - perpetration 25 7 *et seq.*
 - principle 25 4
 - protective duty 25 53
 - purpose of facilitating 25 27
 - purpose of facilitating aids, abets or otherwise assists 25 20 *et seq.*
 - soliciting a crime 25 19
- Inflicting conditions of life 6 25
- Information about denial to cooperate 93 54
- Information about the charge 67 19 *et seq.*
- Information from States Parties 73 13 *et seq.*
- Information from states, intergovernmental and international organizations 73 12
- Information required if investigations are discontinued 15 35, 37
 - crimes against humanity 7 95 *et seq.*
 - definition 7 99
 - intentionally causing results 7 101 *et seq.*
- Inhumane treatment 8 95 *et seq.*
 - *actus reus* of inhumane treatment 8 97
 - biological experiments, *see there*
 - grave breaches 8 86 *et seq.*
 - inhumane treatment 8 95 *et seq.*
 - specific elements of torture 8 88
 - torture 8 87 *et seq.*
- Initial proceedings before the Court 60 1 *et seq.*
 - drafting history 60 2 *et seq.*
 - grounds for detention 60 6 *et seq.*
 - periodical review of PTC’s ruling 60 13 *et seq.*
 - rights of the accused 60 4 *et seq.*
 - time length of detention 60 18 *et seq.*
 - time period for review 60 15
 - warrant of arrest to secure attendance of released person 60 23 *et seq.*
- Initiation of investigation 53 1 *et seq.*
 - conclusion of investigations 53 28 *et seq.*
 - discretion 53 6, 42 *et seq.*
 - discretion of Pre-Trial Chamber 53 35 *et seq.*
 - elements to be considered by Prosecutor 53 22 *et seq.*
 - information submitted to the Prosecutor 53 7 *et seq.*
 - interest of justice 53 25
 - reasonability test 53 10
 - reasonable basis for belief 53 14
- Intentionally directing attacks against civilian objects 8 208 *et seq.*
 - definition of ‘military objects’ 8 209 *et seq.*
 - specific elements 8 208
- Intentionally directing attacks against civilians not taking direct part in hostilities 8 180 *et seq.*
 - definition of ‘acts of violence’ 8 185
 - definition of ‘attack’ 8 183
 - definition of ‘direct participation’ 8 189
 - mental element 8 199 *et seq.*
 - specific elements 8 182
- Intentionally directing attacks against objects or personnel using the emblems of the Geneva Convention 8 752 *et seq.*
 - criteria of elements 8 752 *et seq.*
 - persons and objects entitled to display distinctive emblems 8 756 *et seq.*

- Intentionally directing attacks against protected buildings 8 409 *et seq.*
- criteria of elements 8 419 *et seq.*
 - cultural property under special protection 8 414
 - definition 8 415 *et seq.*
 - elements 8 419 *et seq.*
 - enhanced protection 8 413
 - Hague Convention for the protection of cultural property during armed conflict (HCP) 8 409
 - of armed conflict (LOAC) 8 409 *et seq.*
 - ordinary cultural property 8 414
- Intentionally launching an attack in the knowledge of its consequences to civilians or to the natural environment 8 244 *et seq.*
- concrete and direct overall military advantage 8 249
 - elements 8 244 *et seq.*
 - ENMOD 8 253
 - natural environment 8 253
 - principle of proportionality 8 247
- Interlocutory decision re revision of conviction or sentence 84 11
- Internal disturbances and tensions 8 989 *et seq.*
- International Atomic Energy Agency 2 15
- International Centre for Transitional Justice Relationship Agreement between Court and UN 2 54
- International cooperation and judicial assistance 86 *et seq.*
- availability of procedures under national law 88 1 *et seq.*
 - concept and forms Pre Part 9 2
 - consultation with the Court 97 1 *et seq.*
 - content of request, *see there*
 - cooperation other than surrender, *see there*
 - cooperation with respect to waiver of immunity and consent to surrender 98 1 *et seq.*
 - enhanced cooperation Pre Part 9 9
 - importance Pre Part 9 1
 - obligation to cooperate 86 1 *et seq.*
 - postponement of execution of a request in respect of an admissibility challenge 95 1 *et seq.*
 - postponement of execution of a request in respect of ongoing investigation or prosecution 94 1 *et seq.*
 - request for cooperation, *see Cooperation request*
 - surrender of persons to the Court, *see there*
- International Criminal Court, *see Court*
- International humanitarian law (IHL) relating to war crimes 8 2, 4 *et seq.*
- existence of an armed conflict 8 27 *et seq.*
 - fundamental principles 8 10
 - Geneva law branch of IHL 8 8
 - Hague law branch of IHL 8 9 *et seq.*
 - nexus to armed conflict 8 37 *et seq.*
 - principle of distinction 8 10
 - principle of proportionality 8 10
 - threshold of non-international armed conflict 8 31
- International Labour Organization Convention No. 182 8 800
- International Tribunal for the Law of the Sea 2 15
- Interpretation of elements of crime 10 1 *et seq.*
- Interpreter 67 41 *et seq.*
- Intervention upon invitation 8bis 82 *et seq.*
- Intoxication 31 30 *et seq.*
- nature 31 34
 - state 31 33
 - voluntary 31 35
- Investigation
- deferral, *see Deferral of investigation or prosecution*
 - duties and powers of the Prosecutor, *see there*
 - initiation, *see Initiation of investigation*
 - rights of persons during investigation, *see there*
 - role of Pre-Trial Chamber, *see Pre-Trial Chamber's investigatory measures*
- Investigation and Prosecution, *see Investigation*
- Inviolability of premises of the Court 3 22
- Irregular forces 8bis 144 *et seq.*
- armed bands, groups, irregulars or mercenaries 8bis 150 *et seq.*
 - carrying out grave acts of armed forces 8bis 154
 - indirect aggression 8bis 144
 - irregulars 8bis 151
 - meaning of 'sending irregular forces' 8bis 145 *et seq.*
 - mercenary 8bis 152
 - recruitment, use, financing and training of mercenaries 8bis 152
 - substantial involvement 8bis 155 *et seq.*
- Irrelevance of immunity *ratione materiae* 27 16 *et seq.*
- Irrelevance of official capacity 27 1 *et seq.*
- barring the Court from exercising jurisdiction 27 27
 - customary international law 27 16, 23 *et seq.*
 - equal application 27 17 *et seq.*
 - exception 27 21
 - functional immunity 27 16
 - historical development 27 8 *et seq.*
 - immunities granted by Non-Party-States 27 6
 - immunities or special procedural rules 27 26
 - irrelevance of immunity *ratione materiae* 27 16 *et seq.*
 - mitigation of sentence 27 22
 - non-exhausted list of examples for official capacities 27 19
- J
- Joinder or severance of charges 64 27 *et seq.*
- Joint indirect perpetration 25 14
- Judges
- age of nominee 36 8
 - competency to request disqualification 41 11
 - continuation of office 36 14
 - disciplinary measures, *see Disciplinary measures against members of the Court*
 - disqualification of a judge 41 6
 - election 36 1 *et seq.*
 - election procedure, *see there*
 - excusing and disqualification 41 1 *et seq.*
 - extra-judicial activities 49 5
 - independence, *see Independence of judges*
 - judicial vacancy, *see there*
 - key principles considering disqualification 41 16 *et seq.*
 - meaning 40 6
 - nomination 36 1 *et seq.*
 - nomination procedure, *see there*
 - number 36 1 *et seq.*
 - pensions 49 8
 - qualification 36 3 *et seq.*
 - removal from office, *see there*
 - request for excusal 41 7
 - salaries, allowances and expenses 49 1 *et seq.*

Index

- service of judges, *see there*
 - solemn undertaking 45 1 *et seq.*
 - term of office 36 13 *et seq.*
 - Judgment in the absence in appeal proceedings 83 19 *et seq.*
 - Judicial functions 38 16
 - Judicial notice of facts of common knowledge 69 58
 - Judicial replacements 37 13 *et seq.*
 - Judicial vacancy 37 1 *et seq.*
 - advent of a vacancy 37 2 *et seq.*
 - judicial replacements 37 13 *et seq.*
 - procedure for filling a vacancy 37 6 *et seq.*
 - Procedure for the Nomination and Election of Judges of the Court 37 3, 7, 14
 - term of office of judges filling vacancies 37 16 *et seq.*
 - Jurisdiction of the Court 5 1 *et seq.*
 - admissibility of a case, *see there*
 - applicable law, *see there*
 - challenges, *see Challenges to the jurisdiction of the Court or the admissibility of a case*
 - crime of aggression 5 27 *et seq.*
 - crimes against humanity 5 21 *et seq.*
 - crimes not included in the Rome Statute, *see there*
 - exercise of jurisdiction, *see there*
 - exercise of jurisdiction over the crime of aggression, *see there*
 - genocide 5 20
 - jurisdiction *ratione temporis*, *see there*
 - most serious crimes concerning the international community 5 15
 - *ne bis in idem*, *see there*
 - non-applicability of statute of limitations, *see Statute of limitations*
 - offences against the administration of justice, *see there*
 - preconditions to the exercise of jurisdictions, *see there*
 - preliminary rulings regarding admissibility, *see there*
 - Prosecutor, *see there*
 - referral by a State Party, *see there*
 - specific crimes 5 18 *et seq.*
 - State referral 15bis 1 *et seq.*
 - war crimes 5 24 *et seq.*
 - Jurisdiction *ratione personae* 15bis 21 *et seq.*
 - continuing crimes, *see there*
 - drafting history 11 3 *et seq.*
 - entry into force for particular States 11 28 *et seq.*
 - principle of non-retroactivity 11 4 *et seq.*
 - Jurisdictional immunity of the Court 3 21
 - Jurisdiction *ratione temporis* 11 1 *et seq.*; 15bis 12, 20
- K**
- Kampala Review Conference 5 52
- L**
- Language of the Court
- authorization adequately justified 50 16
 - authorization of languages other than English and French 50 15
 - drafting history 50 2
 - fundamental issues 50 7 *et seq.*
 - official and working languages 50 1 *et seq.*, 10 *et seq.*
- official languages 50 4 *et seq.*
 - request for translation 50 17
- Language requirements in cooperation request 87 20 *et seq.*
- Latin American Federation of Associations for Relatives of the Detained-Disappeared 7 89
- Laws of armed conflict (LOAC) 8 409 *et seq.*
- Legal assistance for persons during investigation 55 13
- Legal status and powers of the Court 4 1 *et seq.*, 7 *et seq.*
 - doctrine of implied powers 4 14
 - function and powers on the territory of any State Party 4 9
 - function and powers on the territory of third states 4 12 *et seq.*
 - functional limitation 4 7, 13
 - ILC Draft Statute 4 4
 - international legal personality 4 4 *et seq.*
 - powers and functions through subsequent treaties 4 15
 - powers through customary law 4 16
 - reparation opinion 4 5
 - Security Council referring situations 4 12
- Legal status of counsels, experts and witnesses 3 26
- Legal status of ICC sentence 103 1 *et seq.*
- Legislative decisions by the Assembly 112 94 *et seq.*
- Length of the joint sentence 78 21
- Limitation of the capacity defence 31 26 *et seq.*
- Limitation on the prosecution or punishment of other offences 108 1 *et seq.*
- M**
- Majority and minority views of trial judges 74 70
- Majority requirements in the Assembly 112 81 *et seq.*
- Management of the Court
- by the Court 28 37 *et seq.*
 - oversight and coordination 28 33 *et seq.*
 - public information 28 38
 - Registry specific 28 34 *et seq.*
- Mandatory status conference 64 15
- Manifestly unlawful order 33 30 *et seq.*
- Medical, psychiatric or psychological examination of the accused 64 40
- Memorandum of Understanding 2 43 *et seq.*
 - Department of Safety and Security 2 46
 - MINUSMA 2 44
 - MONUC 2 44
 - UN ICTY Judicial Database 2 46
 - United Nations Office on Drugs and Crime 2 44
 - UNOCI 2 44
- Mental element 30 1 *et seq.*
 - awareness of consequences 30 27
 - awareness of existing circumstances 30 25
 - conduct 30 17 *et seq.*
 - criminal responsible and liable for punishment 30 5
 - default rule 30 14
 - deviations from default rule 30 14
 - historical development 30 1
 - intent 30 9 *et seq.*
 - knowledge 30 9 *et seq.*
 - material element 30 6, 20 *et seq.*
 - meaning of ‘committed’ 30 7 *et seq.*
 - protected values 30 4

- purpose 30 2
 - scope 30 3
 - Mercenarism 5 13
 - MICT 1 21
 - Military occupation 8bis 115 *et seq.*
 - MINUSMA 2 40, 44
 - Misconduct 28 29
 - Misconduct before the Court, *see Sanctions for misconduct before the Court*
 - Mistake of fact 31 10; 32 1 *et seq.*, 20 *et seq.*
 - conceptual consequences 32 24
 - descriptive and normative material elements 32 21
 - legal consequences 32 26 *et seq.*
 - perception 32 25
 - value judgment 32 22
 - Mistake of fact or mistake of law 32 1 *et seq.*
 - collateral damage 32 51 *et seq.*
 - conceptual framework 32 13 *et seq.*
 - contempt of court 32 45 *et seq.*, *see also Sanctions for misconduct before the Court*
 - core crimes 32 43 *et seq.*
 - difference between mistake of fact and mistake of law 32 15
 - error and lack of awareness 32 19
 - error of facts and error of laws 32 50 *et seq.*
 - historical development 32 1 *et seq.*
 - mistake of fact, *see there*
 - mistake of law, *see there*
 - scope of practical importance 32 42 *et seq.*
 - Mistake of law 31 10; 32 1 *et seq.*, 29 *et seq.*
 - aspects to be mistaken 32 30
 - knowledge 32 34
 - legal consequences 32 36 *et seq.*
 - mistaken legal evaluation 32 35
 - Mitigation of sentence 27 22
 - Mixed errors of fact and law 81 39
 - MONUSCO 2 40
 - More favourable law 24 23
 - Murder 8 889 *et seq.*
 - Murder as crime against humanity 7 30 *et seq.*
 - historical development 7 30 *et seq.*
 - mental element 7 33 *et seq.*
 - Mutilations 8 893
- N**
- Nationality of the accused as a precondition to the exercise of jurisdictions 12 18
 - Ne bis in idem* 20 1 *et seq.*
 - crimes covered 20 27 *et seq.*
 - decision by any other national or international court 20 25 *et seq.*
 - drafting history 20 2 *et seq.*, 18 *et seq.*
 - European Union law 20 12
 - exception to the ‘*ne bis in idem*’ principle 20 30 *et seq.*
 - international law 20 13
 - judicial guarantee 20 51
 - meaning of ‘convicted or acquitted by the Court’ 20 29
 - national legal systems 20 8
 - offences against the administration of justice 20 57
 - principle of deduction 20 53
 - protected interests 20 5 *et seq.*
 - regional multilateral treaties 20 11
 - relevance of genuine enforcement of sentences 20 54 *et seq.*
 - requirements 20 20 *et seq.*
 - violation of the ‘*ne bis in idem*’ principle 20 50
 - New evidence in revision of conviction or sentence 84 15, 17 *et seq.*
 - New York Liaison Office 2 34
 - Nomination procedure 36 9 *et seq.*
 - Advisory Committee 36 10
 - Non-retroactivity principle 11 4 *et seq.*
 - Non-retroactivity *ratione personae* 24 1 *et seq.*
 - acts and omissions prior to the entry into force 24 12
 - change in the law 24 21 *et seq.*
 - continuing violations 24 13 *et seq.*
 - historical development 24 9 *et seq.*
 - moment of occurrence 24 13 *et seq.*
 - more favourable law 24 23
 - Non-States Party acceptance as a precondition to the exercise of jurisdictions 12 19
 - Non-States Parties refusing to consent 73 15 *et seq.*
 - Notification to victims and their legal representation 68 45
 - Nuclear weapons 8 599
 - Nulla poena sine lege* 23 1 *et seq.*
 - Nullum crimen sine lege* 9 1 *et seq.*; 22 1 *et seq.*
 - aggression 22 59 *et seq.*
 - ambiguity 22 46 *et seq.*
 - application to treaty crimes 22 54 *et seq.*
 - crime within the jurisdiction of the Court 22 33 *et seq.*
 - criminal responsibility 22 28 *et seq.*
 - definition of crime 22 36 *et seq.*
 - elements 22 28 *et seq.*
 - extension by analogy 22 40 *et seq.*
 - historical development 22 2 *et seq.*
 - principle of international law 22 15, 49 *et seq.*
 - purpose 22 9 *et seq.*
 - scope 22 14 *et seq.*
 - sources 22 23 *et seq.*
 - terrorism 22 59 *et seq.*
- O**
- Obligation of states to cooperate 93 11 *et seq.*
 - Obligatory cooperation 87 36
 - Occupied Territories – unlawful confinement 8 170
 - Offences against the administration of justice 70 1 *et seq.*
 - corrupting, impeding or intimidating an official of the Court 70 10
 - corrupting, obstructing or retaliating against a witness 70 8 *et seq.*
 - destroying or tampering with evidence or obstructing its collection 70 8 *et seq.*
 - drafting history 70 3 *et seq.*
 - false testimony 70 6
 - measures by the Court 70 16
 - presenting false evidence 70 7
 - retaliating against an official of the Court 70 11
 - solicitation or acceptance of a bribe by an official of the Court 70 12
 - Office of Legal Affairs under the Relationship Agreement between Court and UN 2 36
 - Office of Public Counsel for the Defence 34 11 *et seq.*
 - Office of the High Commissioner for Human Rights under the Relationship Agreement between Court and UN 2 37
 - Office of the Prosecutor 34 7, 11

Index

Office of the Public Counsel for Victims 68 40 *et seq.*
Onus of proof 66 18 *et seq.*
Opt-out declaration 15bis 21 *et seq.*, 28
– addressees 15bis 31
– breadth of declaration 15bis 30
– obligation to withdraw 15bis 33
– scope *ratione personae* 15bis 28
– temporal context 15bis 29
– timing and effects 15bis 29
– timing of withdrawal 15bis 32
– withdrawal 15bis 32 *et seq.*
Oral or recorded testimony of a witness via video or audio technology evidence 69 28, 30
Order by Government or of a superior 33 18 *et seq.*
Order by military or civilian authorities 33 22
Order in the trial 64 51
Orders on reparation directly against a convicted person 75 19 *et seq.*
Ordinary cultural property 8 414
Organisation for the Prohibition of Chemical Weapons establishment of the Court 2 15
Organs of the Court 34 3 *et seq.*
– chambers, *see there*
– number of judges 36 1
– presidency, *see there*
– Pre-Trial Division 34 6 *et seq.*
– Trial Division 34 6 *et seq.*
Other serious violations of the laws and customs applicable in armed conflicts not of an international character 8 915 *et seq.*
– armed conflict taken place in the territory of a State 8 990 *et seq.*
– asphyxiating, poisonous or other gases, and all other analogous liquids, materials or devices 8 980 *et seq.*
– attacks against cultural objects, places of worship and similar institutions 8 932
– attacks against installations and personnel using the distinctive emblems 8 923
– attacks against the civilian population 8 917 *et seq.*
– attacks against UN and associated personnel 8 924 *et seq.*
– bullets which expand or flatten 8 982 *et seq.*
– destruction 8 967 *et seq.*
– forced movement of civilians 8 950 *et seq.*
– internal disturbances and tensions 8 989 *et seq.*
– perfidy 8 959 *et seq.*
– physical mutilations 8 965 *et seq.*
– pillage 8 934
– poison or poisoned weapons 8 979
– possible parties to the conflict 8 997 *et seq.*
– prohibited weapons in non-international armed conflict 8 973 *et seq.*
– protracted armed conflict 8 992 *et seq.*
– quarter 8 963
– rape and other forms of sexual violence 8 937 *et seq.*
– recruitment of children 8 942 *et seq.*
– scope 8 988 *et seq.*
OTP 2 40
Outrages upon personal dignity 8 614 *et seq.*
– *actus reus* 8 622 *et seq.*
– drafting history 8 614
– Geneva Convention, common article 3 8 900 *et seq.*

– humanitarian law Treaty basis 8 616
– *mens rea* 8 643 *et seq.*
Outside activities of Prosecutor 42 20 *et seq.*
Oversight Committee 112 57
Oversight of ethics, professional conduct, privileges and immunities 28 26 *et seq.*
– Code of Professional Conduct for Counsel 28 31
– Disciplinary Appeals Board 28 31
– excusal and disqualification 28 27
– misconduct 28 29
– privileges and immunities 28 32

P

Palermo Protocol 7 121
Parachuting from an aircraft 8 299
Participation of Court organs in the Assembly 112 74
Passing of sentences and the carrying out of executions without previous judgment 8 904 *et seq.*
Payment of expenses 114 1 *et seq.*
Peace Conference Report 1919 7 46
Peace enforcement mission 8 229
Peacekeeping mission 8 228 *et seq.*
– definition 8 231
– peace enforcement mission 8 229
– use of force 8 233
Penalties 77 *et seq.*
– determination of penalties, *see there*
– non-prejudice to national application of penalties 80 1 *et seq.*
Pensions of judges 49 8
Perfidious killing or wounding 8 447 *et seq.*
– killing or wounding of individuals belonging to the hostile party 8 465 *et seq.*
– normative origin and drafting history 8 447
– perfidy, *see there*
– principle 8 451
– treacherous 8 452
Perfidy 8 452 *et seq.*, 457 *et seq.*, 463 *et seq.*
– other serious violations of the laws and customs applicable in armed conflicts not of an international character 8 959 *et seq.*
– permitted uses of war 8 460 *et seq.*
– treacherous 8 452
Perpetration 25 7 *et seq.*, 11 *et seq.*, *see also Individual criminal responsibility*
– co-perpetration 25 8 *et seq.*, 14
– indirect co-perpetratorship 25 14
– joint indirect perpetratorship 25 14
– meaning of ‘orders, solicits or induces’ an (attempted) crime 25 18 *et seq.*
– perpetration by means 25 11 *et seq.*
– soliciting a crime 25 19
Persecution
– acts against property 7 142
– acts causing physical or mental harm 7 142
– crimes against humanity 7 70 *et seq.*
– crimes against humanity 7 141 *et seq.*
– definition 7 71
– discriminatory intent 7 143
– grounds for persecution 7 74 *et seq.*
– infringement on freedom 7 142
– intentional and severe deprivation of fundamental rights 7 142 *et seq.*
– objects of persecution 7 72 *et seq.*
Personal qualification of Prosecutor 42 15
Persons having no longer any means of defence 8 291

- Persons *hors de combat* 8 279 *et seq.*
- definition 8 281 *et seq.*
 - persons having no longer any means of defence 8 291
 - persons ‘in the power’ of the adversary party to the conflict 8 293
 - persons parachuting from an aircraft 8 299
 - surrendering persons 8 284 *et seq.*
- Persons ‘in the power’ of the adversary party to the conflict 8 293, 434
- Persons under eighteen, *see Exclusion of jurisdiction over persons under eighteen*
- Physical mutilations 8 436
- other serious violations of the laws and customs applicable in armed conflicts not of an international character 8 965 *et seq.*
- Pillage 8 549 *et seq.*
- addressees of the prohibition 8 561
 - definition 8 553 *et seq.*
 - isolated acts and organised forms 8 555 *et seq.*
 - normative origin and drafting history 8 549 *et seq.*
 - other serious violations of the laws and customs applicable in armed conflicts not of an international character 8 934
 - scope of application 8 562 *et seq.*
 - scope of property protected 8 557 *et seq.*
- Place of trial 62 1 *et seq.*
- drafting history 62 5 *et seq.*
 - scope of application 62 20
 - seat of the Court 62 14
- Plea agreements 65 40 *et seq.*
- Plea guilty 64 42
- procedure in case of guilty plea 76 7
- Poison or poisoned weapons 8 979
- Post surrender release 89 26
- Post-conviction 76 10, 77 *et seq.*
- Postponement of execution of a request in respect of an admissibility challenge 95 1 *et seq.*
- Postponement of execution of a request in respect of ongoing investigation or prosecution 94 1 *et seq.*
- Power of presiding judge 64 43 *et seq.*
- Powers and functions through subsequent treaties 4 15
- Powers of the Appeals Chamber 83 1 *et seq.*, 7 *et seq.*
- Powers through customary law 4 16
- Precedents 21 43 *et seq.*
- Preconditions to the exercise of jurisdictions 12 1 *et seq.*
- Bureau Compromise 12 12
 - drafting history 12 1 *et seq.*
 - German proposal 112 6 *et seq.*
 - ILC Draft 12 3 *et seq.*
 - jurisdiction over crimes 12 13
 - Korean proposal 12 8
 - nationality of the accused 12 18
 - non-State Party acceptance 12 19
 - Preparatory Committee’s Draft 12 4 *et seq.*
 - Rome 1998 options 12 5 *et seq.*
 - State acceptance 12 14
 - State ‘opt-in’ and ‘case-by-case’ proposal 12 11
 - territorial jurisdiction 12 15 *et seq.*
 - UK proposal 12 9
 - US proposal 12 10
- Preliminary examination 15 35
- Preliminary rulings regarding admissibility 18 1 *et seq.*
- appeal against the decision of the Pre-Trial Chamber 18 32 *et seq.*
 - appeal on expedited basis 18 33
 - challenge of the admissibility of a case 18 37 *et seq.*
 - confidential basis 18 20
 - drafting history 18 1 *et seq.*
 - effect of the decision pending appeal 18 34
 - historical development 18 1 *et seq.*
 - meaning of ‘reasonable basis’ 18 14
 - meaning of ‘situation’ 18 13
 - notification requirement 18 15 *et seq.*
 - periodical information of the Prosecutor 18 35
 - preserving evidence 18 36
 - Pre-Trial Chamber’s authorization of investigation 18 15 *et seq.*
 - Prosecutor’s deferral to state’s investigation 18 24
 - Purpose 18 10
 - review of state’s investigations 18 30 *et seq.*
 - scope 18 11
 - source of the rule 18 12
 - state’s response to notification 18 21 *et seq.*
- Prescription of law 31 11
- Presence at trial 63 1 *et seq.*; 67 28
- absconded accused 63 62
 - disruption of trial 63 40
 - drafting history 63 4 *et seq.*
 - ex parte proceedings 63 65
 - excusal from presence at trial 63 41 *et seq.*
 - excusal from presence at trial due to Public Office 63 52 *et seq.*
 - fitness to stand trial 63 36
 - pre-trial proceedings 63 34
 - principle of presence of the accused at trial 63 19 *et seq.*
 - refusal to attend 63 60
 - requirement of attendance at trial 63 19 *et seq.*
 - video link 63 15 *et seq.*
- Presence of a counsel during investigation 55 15
- Presentation of documents or written transcripts 69 29
- Presentation of evidence by electronic or other special means 68 19
- Presenting false evidence 70 7
- Preservation of evidence 93 33
- Presidency 34 3 *et seq.*; 35 15 *et seq.*; 38 1 *et seq.*
- acting as administrative tribunal 38 17
 - acting as criminal court 38 18
 - acting in place of the President 38 4
 - administrative function, *see Administration of the Court*
 - administration scheme of the Court 38 11
 - composition of Presidency 38 5
 - duties 38 6 *et seq.*
 - election 38 1 *et seq.*
 - enforcement cooperation 38 14 *et seq.*
 - external relations and cooperation 38 12 *et seq.*
 - general cooperation 38 13
 - judicial functions 38 16
 - purpose 34 4 *et seq.*
 - relationship between Presidency and Prosecutor 38 8 *et seq.*
 - task 35 16

Index

- Presidency's oversight
 - oversight of ethics, professional conduct, privileges and immunities, *see there*
 - oversight of judicial proceedings 38 20 *et seq.*
 - oversight of organisation and work of Chambers 38 21 *et seq.*
- Presumption of innocence 66 1 *et seq.*
 - definition 66 10 *et seq.*
 - evidence of similar conduct 66 31
 - historical development 66 1 *et seq.*
 - judicial notice of facts of common knowledge 66 30
 - onus of proof 66 18 *et seq.*
 - provisional release 66 32 *et seq.*
 - reasonable doubt 66 24 *et seq.*
- Pre-Trial Chamber
 - confirmation hearing, *see there*
 - function and powers, *see Pre-Trial Chamber's function and powers*
 - investigatory measures, *see Pre-Trial Chamber's investigatory measures*
 - issuance of summonses to appear, *see Summons to appear by Pre-Trial Chamber*
 - Issuance of warrant of arrest, *see Warrant of arrest by Pre-Trial Chamber*
- Pre-Trial Chamber's exercise of discretion 15 29 *et seq.*
- Pre-Trial Chamber's function and powers 57 1 *et seq.*
 - assistance for arrested persons 57 17 *et seq.*
 - authorization of Prosecutor to investigate in the territory of a State Party 57 34 *et seq.*
 - decision of powers 57 6
 - drafting history 57 1 *et seq.*
 - exercise by a single judge 57 8 *et seq.*
 - exercise of functions 57 5
 - orders and rulings by a majority 57 7
 - orders and warrants for investigations 57 12 *et seq.*
 - protection and privacy of victims and witnesses 57 28
 - protective measures for the purpose of forfeiture 57 42 *et seq.*
 - preservation of evidence 57 29
 - protection of national security information 57 28
 - protection of persons arrested 57 27
- Pre-Trial Chamber's investigatory measures 56 1 *et seq.*
 - admissibility of evidence 56 25
 - decision on measures upon request of the Prosecutor 56 7 *et seq.*
 - decision on measures *prorio motu* 56 18 *et seq.*
 - duty to inform the Pre-Trial Chamber 56 5
 - duty to inform the suspect 56 10
 - measures 56 11 *et seq.*
- Pre-Trial Division 34 6 *et seq.* 34 8
- Prevent births 6 26
- Principle of deduction 20 53
- Principle of distinction 8 10
- Principle of equitable distribution 103 20 *et seq.*
- Principle of *ne bis in idem*, *see Ne bis in idem*
- Principle of precedent 81 76 *et seq.*
- Principle of presence of the accused at trial 63 19 *et seq.*
- Principle of proportionality 8 10
 - intentionally launching an attack in the knowledge of its consequences to civilians or to the natural environment 8 247
 - International Humanitarian Law (IHL) relating to war crimes 8 10
- Principles of international law 21 23 *et seq.*
- Privileged communication 69 55 *et seq.*
- Privileges and immunities 28 32; 48 1 *et seq.*, 4 *et seq.*
 - counsel, experts, witnesses and others 48 11 *et seq.*
 - drafting history 48 1 *et seq.*
 - functional immunity 48 13
 - Headquarters Agreement 3 64; 48 4
 - Relationship Agreement between Court and UN 2 31
 - scope of immunities 48 9
 - staff 48 10
 - waiver 48 14 *et seq.*
 - waiving of immunities, privileges 3 47
- Probative value of evidence 69 41 *et seq.*
- Procedural errors 81 34 *et seq.*, 40 *et seq.*
- Procedure for filling a vacancy 37 6 *et seq.*
- Procedure for the Nomination and Election of judges of the Court 37 3, 7, 14
- Proceedings before the Court
 - confirmation of the charge before trial 61 1 *et seq.*
 - Regulations 2004 52 30
- Proceedings in camera 68 19
- Proceedings on admission of guilt 65 1 *et seq.*
 - admission accompanied by facts 65 26 *et seq.*
 - conviction according to an admission of guilt 65 31 *et seq.*
 - drafting history 65 3 *et seq.*
 - invalid admission of guilt 64 35 *et seq.*
 - plea agreements 64 40 *et seq.*
 - presentation of facts in the interest of justice 64 37 *et seq.*
 - understanding nature and consequences of admission 65 19 *et seq.*
 - valid admission of guilt 65 14 *et seq.*
 - voluntary admission after consultation with counsel 65 25
- Proceedings on appeal 83 1 *et seq.*, 42 *et seq.*
 - additional evidence, *see Additional evidence in appeal proceedings*
 - discontinuance of appeal 83 30
 - documents in support of appeal 83 32
 - form and content of the notice of appeal 83 16 *et seq.*
 - hearing 83 41
 - judgment 83 15 *et seq.*
 - judgment in the absence 83 19 *et seq.*
 - powers of the Appeals Chamber 83 1 *et seq.*, 7 *et seq.*
 - reasoning of judgment 83 17
 - *reformatio in peius* 83 13
 - remedies with regard to sentencing 83 11 *et seq.*
 - reply 83 33
 - separate and dissenting opinions 83 16
 - standard of review 81 34 *et seq.*; 83 6
 - standing on appeal 83 22 *et seq.*
 - time limit for appeal 83 25 *et seq.*
 - variation of grounds of appeal 83 60
 - victim participation 83 35 *et seq.*
- Production of evidence in the trial 64 34 *et seq.*
- Prohibited attacks against persons *hors de combat* 8 268 *et seq.*
 - killing or wounding 8 305 *et seq.*
 - *mens rea* 8 301 *et seq.*

- normative origin and drafting history 8 268
- persons *hors de combat*, see *there*
- Prohibited deportations and transfers in occupied territories 8 363 *et seq.*
- deporting or transferring all or parts of the population of the occupied territory, see *there*
- transferring parts of the own population into occupied territory, see *there*
- Prohibited destruction 8 484 *et seq.*
- elements 8 487
- enemy property 8 502 *et seq.*
- Hague Convention Respecting the Laws and Customs of War on Land 8 489, 505
- imperatively demanded by the necessity of war 8 509 *et seq.*
- normative origin and drafting history 8 484 *et seq.*
- prohibition of destruction or seizure 8 507 *et seq.*
- Prohibited weapons 8 565 *et seq.*
- Prohibition in regard to rights and rights of action 8 514 *et seq.*
- elements 8 518 *et seq.*
- normative origin and drafting history 8 514 *et seq.*
- Prohibition of physical mutilation 8 429 *et seq.*
- acts causing death to or seriously endanger the health 8 441 *et seq.*
- consent 8 446
- elements 8 433
- medical or scientific experiments of any kind 8 438
- neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest 8 439
- normative origin and drafting history 8 429
- persons in the power of the adverse party 8 434
- physical mutilation 8 436
- Proprio motu*
- determination 19 6 *et seq.*
- prosecutor 15 11
- Prosecution deferral 16 1 *et seq.*
- Prosecutor 15 1 *et seq.*; 42 1 *et seq.*
- adviser 43 32 *et seq.*
- appointment 42 16 *et seq.*
- budget 42 13
- Deputy Prosecutor 42 14, 18
- disciplinary measures, see *Disciplinary measures against members of the Court*
- discontinuation of investigation 15 34 *et seq.*
- disqualification 43 29 *et seq.*
- duties and powers of the Prosecutor, see *there*
- excuse 42 23
- functional independence 42 3 *et seq.*, 8 *et seq.*
- impartiality 43 24 *et seq.*
- information required if investigations are discontinued 15 35, 37
- meaning of 'initiate' 15 9 *et seq.*
- meaning of 'investigation' 15 10
- meaning of 'on the basis of information' 15 12
- meaning of 'proprio motu' 15 11
- need to 'seek additional information' 15 14
- obligation at the hearing 61 86 *et seq.*
- obligation to analyse the seriousness of the information received 15 13
- outside activities 42 20 *et seq.*
- personal qualification 42 15
- preliminary examination 15 35
- Pre-Trial Chamber's exercise of discretion 15 29 *et seq.*
- procedure for initiating prosecution 15 1 *et seq.*, 8 *et seq.*
- proceed with an investigation 15 23
- reasonable basis 15 21
- refusal of the Pre-Trial Chamber to accept Prosecutor's request for authorisation 15 33
- removal from office 46 1 *et seq.*
- request for authorisation 15 24
- salaries, allowances and expenses 49 1 *et seq.*
- solemn undertaking 45 1 *et seq.*
- staff 44 1 *et seq.*
- structure of the Office 42 12 *et seq.*
- supporting material 15 25 *et seq.*
- victim representation 15 27 *et seq.*
- Prosecutor's independence 42 3 *et seq.*, 8 *et seq.*
- Protection of national security information 72 1 *et seq.*
- agreement on conditions for disclosure 72 33 *et seq.*
- amicable resolution of dispute 72 26
- confidentiality 72 22
- consultative process in search for a solution 72 36
- determination of relevance and necessity 72 37
- disclosure of documents or information of a state 72 3
- information requested from an individual 72 19 *et seq.*
- modification or clarification of the request 72 27 *et seq.*
- national security information 72 8 *et seq.*
- non-disclosure agreement between Prosecutor and state 72 23
- prejudice to national security 72 16
- right of state to intervention in national security cases 72 25
- ruling on relevance or on obtaining from another source 72 31 *et seq.*
- scope of application 72 3
- Protection of the accused, witnesses and victims in the trial 64 36
- Protection of victims and witnesses 93 33
- Protection of victims and witnesses and their participation in the proceedings 68 1 *et seq.*
- definition of victims 68 35 *et seq.*
- drafting history 68 11
- endangerment of the security of witnesses or their families 68 33
- protection of servants, agents and information 68 34
- scope 68 9
- Victims and Witnesses Unit 68 30 *et seq.*
- victims' participation, see *there*
- victims' protection, see *there*
- Protective duty 25 53
- Protracted armed conflict 8 992 *et seq.*
- Provisional arrest 92 1 *et seq.*
- announcement of a request for surrender 92 10
- consent to surrender 92 13
- information on person and whereabouts 92 7
- no prejudice for subsequent arrest and surrender 92 15
- pending the presentation of the request 92 4
- release from provisional arrest 92 11
- statement on the alleged crimes 92 8
- statement on the founding decision 92 9

Index

- time limits 92 12
- urgent cases 92 3
- Provisional release 66 32 *et seq.*
- Public hearing 67 9 *et seq.*

- Q
- Quarter 8 467 *et seq.*
 - declaration, order or threat 8 472, 475 *et seq.*
 - effective command or control of perpetrators 8 480
 - elements 8 472 *et seq.*
 - mental element 8 483
 - normative origin and drafting history 8 467 *et seq.*
 - other serious violations of the laws and customs applicable in armed conflicts not of an international character 8 963
- Questioning of persons cooperation other than surrender 93 22 *et seq.*

- R
- Racism apartheid 7 147
- Raise defence 67 39 *et seq.*
- Rape and other forms of sexual violence 8 652 *et seq.*, 670 *et seq.*
 - coercion 7 60
 - crimes against humanity 7 53 *et seq.*
 - Declaration on the Elimination of Violence against Women 7 54
 - definition 7 56 *et seq.*
 - definition of physical act of rape 8 674, 690
 - drafting history 8 652 *et seq.*
 - elements 8 671
 - enforced prostitution 8 716
 - enforced sterilization, *see there*
 - forced pregnancy, *see there*
 - historical development 7 53 *et seq.*
 - male circumcision 8 736
 - other forms of sexual violence 8 731 *et seq.*
 - other serious violations of the laws and customs applicable in armed conflicts not of an international character 8 937 *et seq.*
 - penile amputation 8 736 *et seq.*
 - physical act of rape 8 672 *et seq.*
 - sexual autonomy 8 678 *et seq.*
 - sexual slavery 7 61 *et seq.*; 8 693 *et seq.*, *see also there*
 - subjective element 8 692 *et seq.*
 - Vienna Declaration and Programme of Action 7 54
 - war crime of rape, *see Rape*
 - World Conference on Human Rights 7 54
- Reading of the charges 64 39
- Reasonable doubt 66 24 *et seq.*
- Reasoning of judgment proceedings on appeal 83 17
- Record of the trial 64 52
- Records and documents 93 32
- Recruitment of children 8 942 *et seq.*
- Reduction of sentence 110 1 *et seq.*
- Referral by a State Party 14 1 *et seq.*
 - definition of 'State Party' 14 9 *et seq.*
 - drafting history 14 1 *et seq.*
 - meaning of 'may refer a situation' 14 21 *et seq.*
 - meaning 'of the purpose of determining' 14 36 *et seq.*
- Reformation in peius 83 13
- Refusal to attend trial 63 60
- Registrar 44 1 *et seq.*
 - administrative officer of the Court 43 10
 - appointment 43 13
 - authority of the President 43 11
 - disciplinary measures, *see Disciplinary measures against members of the Court*
 - drafting history 43 1 *et seq.*
 - qualifications 43 12
 - relationship with Prosecutor 43 8 *et seq.*
 - removal from office 46 1 *et seq.*
 - responsibilities 43 6 *et seq.*
 - salaries, allowances and expenses 49 1 *et seq.*
 - solemn undertaking 45 1 *et seq.*
 - staff, *see Staff of Office of Prosecutor and Registry*
 - term of office 43 14
 - Victims and Witness Unit, *see there*
- Registry 34 8, 11
- Registry's Counsel Support Section 34 12
- Regulation of the Court 52 1 *et seq.*, *see also Regulations 2004*
 - amendments 52 17 *et seq.*
 - content 52 27 *et seq.*
 - hierarchical status 52 7
 - historical development 52 5 *et seq.*
 - majority requirement 52 9
 - objections by States Parties 52 22 *et seq.*
 - participation of Prosecutor and Registrar 52 16
 - scope of regulation 52 11 *et seq.*
 - time limits to amendments 52 21 *et seq.*
- Regulations 2004
 - adoption of the Code of Judicial Ethics 52 39
 - composition and administration of the Court 52 29
 - cooperation and enforcement 52 37
 - counsel issues and legal assistance 52 31 *et seq.*
 - detention matters 52 34 *et seq.*
 - general provisions 52 28
 - proceedings before the Court 52 30
 - removal from office and disciplinary measures 52 38
 - victims participation and reparations 52 33
- Rehabilitation 75 12
- Relationship Agreement between Court and UN 2 20 *et seq.*
 - administrative and logistical partnership 2 25
 - confidentiality and disclosure 2 51
 - content 2 22 *et seq.*
 - cooperation regime 2 24, 27 *et seq.*
 - cooperation with UN Commission of Inquiry 2 47 *et seq.*
 - Department of Peacekeeping Operations 2 37
 - Department of Political Affairs 2 37
 - exculpatory evidence 2 50
 - Greentree process 2 54
 - International Centre for Transitional Justice 2 54
 - Memorandum of Understanding, *see there*
 - nature 2 21
 - New York Liaison Office 2 34
 - Office of Legal Affairs 2 36
 - Office of the High Commissioner for Human Rights 2 37
 - Office of the Prosecutor 2 30
 - privileges and immunities 2 31
 - protection of personnel and operations 2 27
 - purpose 2 20

- regular dialogue 2 34 *et seq.*
- relation to Rome Statute 2 50 *et seq.*
- Special Advisers and Special Representatives of the Secretary-General 2 37
- sustainable effect 2 54
- technical cooperation, *see Technical cooperation between Court and UN*
- testimony of UN officials 2 28
- UN Children's Fund 2 37
- UN Development Program 2 54
- UN Educational, Scientific and Cultural Organisation 2 38
- UN Women 2 37
- World Food Programme 2 37
- exercise of jurisdiction 13 16
- Removal from office 46 1 *et seq.*
- Court's Code of Judicial Ethics 46 5
- drafting history 46 1 *et seq.*
- grounds 46 7 *et seq.*
- guarantee of due process 46 19 *et seq.*
- procedure for judges and Prosecutor 46 12 *et seq.*
- procedure for Registrar 46 18 *et seq.*
- UN Basic Principles on the Independence of the Judiciary 46 5
- Removal from office and disciplinary measures Regulations 2004 52 38
- Reparation orders 82 15
- Reparation to victims 75 1 *et seq.*
- Court's obligation to establish principles on reparations 75 10 *et seq.*
- decision of the Court on reparation 75 17 *et seq.*
- effect of a decision 75 26
- invitation and account of representation 75 21 *et seq.*
- orders directly against a convicted person 75 19 *et seq.*
- post-conviction hearing 76 10
- rehabilitation 75 12
- rights of victims under national law 75 28
- Reply in appeal cases 83 33
- Request for arrest and surrender 91 1 *et seq.*
- consultation with the Court upon its request 91 22 *et seq.*
- copy of the warrant 91 11
- information on person and whereabouts 91 9
- necessary documents, statements or information 91 12 *et seq.*
- persons already convicted 91 16 *et seq.*
- request in urgent cases 91 6
- request in writing 91 5
- requests with warrants by the Pre-Trial Chamber 91 8
- Request to the costs 100 9
- Rescue of nationals abroad *8bis* 85 *et seq.*
- Reservations to the Rome Statute 120 1 *et seq.*
- historical development 120 1 *et seq.*
- interpretative declarations 120 18
- meaning of reservations 120 17
- purpose 120 10 *et seq.*
- scope 120 15
- Responsibility of commanders and other superiors 28 1 *et seq.*
- assisting in command responsibility 28 131 *et seq.*
- attempted command responsibility 28 133 *et seq.*
- categories of persons falling under the doctrine of command responsibility 28 85
- definition of military commander 28 98 *et seq.*
- effective command and control 28 102 *et seq.*
- failure to exercise control properly, *see Commander's failure to exercise control properly*
- failure to influence and interfere 28 8 *et seq.*
- failure to take all necessary and reasonable measures, *see Commander's failure to take all necessary and reasonable measures*
- Francis Liber Code (1863) 28 5
- Guidelines for investigation and prosecuting superior responsibility 28 76 *et seq.*
- historical development 28 4 *et seq.*
- international law 28 4 *et seq.*
- meaning of armed forces 28 101
- military command 28 86 *et seq.*
- minimum mental element 28 95 *et seq.*
- nexus between commander's failure and crime 28 90 *et seq.*
- practical importance 28 25 *et seq.*
- quasi-commanders 28 123
- silent toleration 28 8 *et seq.*
- superior and subordinate leadership 28 86 *et seq.*
- Responsible to Protect' concept *8bis* 78
- Retaliating against an official of the Court 70 11
- Review by the Court leading to reduction of sentence 110 1 *et seq.*
- Review of the Statute 123 1 *et seq.*
- Revision of conviction or sentence 84 1 *et seq.*
- circumstances revision may be based on 84 13
- decisive evidence false, forged or falsified 84 21
- definition 84 8
- interlocutory decision 84 11
- new evidence 84 15, 17 *et seq.*
- procedure 84 26 *et seq.*
- right to bring revision proceedings 84 6
- serious misconduct or breach of duty by the judge 84 23 *et seq.*
- subsequent development in the jurisprudence 84 16
- Right of State to intervention in national security cases 72 25
- Right to challenge to the jurisdiction of the Court or the admissibility of a case 19 20 *et seq.*
- accused or persons sought 19 21 *et seq.*
- acts of Prosecutor or warrants not effected 19 64 *et seq.*
- allocation of responsibilities and appeals 19 48 *et seq.*
- Article 12 States 19 28 *et seq.*
- authority to necessary investigative measures 19 59
- authority to prevent the absconding of persons 19 62
- authority to taking statements and completing prior steps 19 60
- information after a deferral 19 69 *et seq.*
- investigating or prosecuting states 19 26 *et seq.*
- limits on the number of challenges 19 39 *et seq.*
- new facts for review 19 65 *et seq.*
- procedure considering challenges 19 30 *et seq.*
- prompt challenges by states 19 45 *et seq.*
- right to seek rulings and to submit observations 19 34 *et seq.*
- suspension of investigation 19 54 *et seq.*
- Right to remain silent 67 44 *et seq.*
- rights of persons during investigation 55 12

Index

- Right to seek rulings and to submit observations 19
34 *et seq.*
- Rights of persons during investigation 55 1 *et seq.*
- arrest or detention 55 8
 - coercion 55 6
 - confession 55 5
 - legal assistance 55 13
 - presence of a counsel 55 15
 - right to remain silent 55 12
 - self-incrimination 55 5
 - translation and interpretation 55 7
 - UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment 55 16
 - UN Standard Minimum Rules for the Treatment of Prisoners 55 16
- Rights of the accused 67 1 *et seq.*
- challenge evidence and raise defence 67 36 *et seq.*
 - choice of defence counsel 67 30
 - defend oneself in person 67 29
 - examination of witnesses 67 37 *et seq.*
 - fair hearing 67 15
 - free legal assistance 67 32 *et seq.*
 - historical development 67 1 *et seq.*
 - impartial conduct 67 16
 - impartiality 67 17
 - in full equality 67 18
 - information about the charge 67 19 *et seq.*
 - initial proceedings before the Court 60 4 *et seq.*
 - interpreter 67 41 *et seq.*
 - presence at trial 67 28
 - public hearing 67 9 *et seq.*
 - raise defence 67 39 *et seq.*
 - right to remain silent 67 44 *et seq.*
 - rights of the defence 67 27 *et seq.*
 - time for preparation of the defence 67 22 *et seq.*
 - trial without undue delay 67 25 *et seq.*
 - unsworn statement 76 47 *et seq.*
- Rights of the defence 67 27 *et seq.*
- challenge evidence and raise defence 67 36 *et seq.*
 - choice of defence counsel 67 30
 - defend oneself in person 67 29
 - examination of witnesses 67 37 *et seq.*
 - free legal assistance 67 32 *et seq.*
 - interpreter 67 41 *et seq.*
 - presence at trial 67 28
 - raise defence 67 39 *et seq.*
 - right to remain silent 67 44 *et seq.*
 - unsworn statement 76 47 *et seq.*
- Rule of speciality 101 1 *et seq.*
- application on surrender to the Court 101 5 *et seq.*
 - customary international law 101 1
 - scope of application 101 11 *et seq.*
 - transfer of execution 101 36
 - waiver 101 27 *et seq.*
- Rules and Procedure of Evidence 51 1 *et seq.*
- binding nature of the Rules 51 35 *et seq.*
 - conflict between Statute and Rules 51 34 *et seq.*
 - entry into force 51 20
 - historical development 51 1 *et seq.*, 9 *et seq.*
 - prohibition of retroactive application 51 33
 - provisional rules 51 28 *et seq.*
 - purpose 51 8
- Rules of international law 21 28 *et seq.*
- Ruling on admissibility or relevance of evidence 64
50
- evidence 69 32, 36 *et seq.*, 72
- S
- Salaries, allowances and expenses of judges 49 1 *et seq.*
- Sanctions for misconduct before the Court 71 1 *et seq.*
- discretion of the Court 71 30 *et seq.*
 - disruption of proceedings 71 21
 - drafting history 71 6 *et seq.*
 - fine 71 28
 - historical overview 71 4 *et seq.*
 - institutional scope of application 71 16
 - justified behaviour 71 20
 - local scope of application 71 18
 - *mens rea* of misconduct 71 24 *et seq.*
 - misconduct 71 19 *et seq.*
 - misconduct by the accused 71 12
 - misconduct by the counsel 71 13
 - misconduct by the Prosecutor 71 14
 - misconduct by witnesses 71 15
 - personal scope of application 71 10 *et seq.*
 - procedure 71 32 *et seq.*
 - removal from the courtroom 71 27
 - sanctioning procedure within the Rules of Procedure and Evidence 71 32
 - sanctioning procedure without the Rules of Procedure and Evidence 71 33
 - sanctions available to the Court 71 26 *et seq.*
 - substantive scope of application 71 19 *et seq.*
 - temporal scope of application 71 17
- Searches and seizures 93 31
- Seat Agreement concerning enforcement of sentences of imprisonment 103 30
- Seat of the Court 3 1 *et seq.*
- Headquarters Agreement, *see there*
 - historical development 3 1 *et seq.*
 - interim removal 3 6
 - International Rhine Navigation 3 3
 - legal status 3 1; 4 1 *et seq.*
- Secrecy of deliberations of trial judge 74 61 *et seq.*
- Security and operational assistance concerning Headquarters Agreement 3 50
- Security information, *see Protection of national security information*
- Security Council referral 15ter 1 *et seq.*
- drafting history 15ter 2
 - exercise of jurisdiction 13 16 *et seq.*
 - independence of the ICC 15ter 7
 - jurisdiction *ratione temporis* 15ter 6 *et seq.*
 - requirement of previous determination of aggressive act 15ter 4
 - temporal jurisdiction 15ter 5
- Self-defence 8 235 *et seq.*; 31 37 *et seq.*
- attacks on installations, material, units or vehicles 8 237
 - peace-enforcement operations 8 238
 - scope 8 239 *et seq.*
- Self-defence against non-State actors 8bis 74 *et seq.*
- Sentences of imprisonment – enforcement, *see Enforcement of sentences of imprisonment*
- Sentencing 76 1 *et seq.*
- determination of the sentence, *see there*
 - distinct sentencing hearing 76 3 *et seq.*

- enforcement, *see there*
- penalties 77 *et seq.*
- post-conviction hearing 76 10
- procedure in case of guilty plea 76 7
- reduction of sentence, *see there*
- relevant additional evidence 76 8
- transfer of the person upon completion of sentence, *see there*
- Sentencing hearing 76 3 *et seq.*
- Separate and dissenting opinions in appeal cases 83 16
- Serious misconduct or breach of duty by the judge – revision of conviction or sentence 84 23 *et seq.*
- Serious violations of the laws and customs in international conflicts 8 180 *et seq.*
 - attacking or bombarding undefended not military objectives, *see there*
 - attacks on humanitarian assistance or peacekeeping missions in international armed conflict, *see there*
 - bullets which expand or flatten easily in the human body', *see there*
 - compelling adversary nationals to take part in war operations, *see there*
 - conscription or enlistment of children and their participation in hostilities, *see there*
 - employing gases and analogous liquids, materials or devices, *see there*
 - employing poison or poisoned weapons 8 574 *et seq.*
 - employment of annexed means or methods of warfare 8 609 *et seq.*
 - improper use of distinctive signs, *see there*
 - intentionally directing attacks against civilian objects, *see there*
 - intentionally directing attacks against civilians not taking direct part in hostilities, *see there*
 - intentionally directing attacks against objects or personnel using the emblems of the Geneva Convention, *see there*
 - intentionally directing attacks against protected buildings, *see there*
 - intentionally launching an attack in the knowledge of its consequences to civilians or to the natural environment, *see there*
 - outrages upon personal dignity 8 614 *et seq.*
 - perfidious killing or wounding, *see there*
 - pillage, *see there*
 - prohibited attacks against persons *hors de combat*, *see there*
 - prohibited deportations and transfers in occupied territories, *see there*
 - prohibited destruction, *see there*
 - prohibited weapons, *see there*
 - prohibition in regard to rights and rights of action, *see there*
 - prohibition of physical mutilation, *see there*
 - quarter, *see there*
 - rape and other forms of sexual violence, *see there*
 - starvation of civilians as a method of warfare, *see there*
 - utilizing the presence of a protected person to render certain objects immune from military operations, *see there*
- Service of documents 93 24
- Service of judges 35 1 *et seq.*
 - availability to serve full-time 35 9 *et seq.*
 - calling judges to serve full-time 35 17 *et seq.*
 - Conditions of Service 35 26 *et seq.*
 - drafting history 35 2 *et seq.*
 - financial arrangements for non-full-time judges 35 23 *et seq.*
 - full-time service of judges 35 7 *et seq.*
 - remuneration 35 26
- Settlement of disputes 119 1 *et seq.*
 - drafting history 119 1 *et seq.*
 - kind of dispute 119 4 *et seq.*
 - kind of settlement 119 7
 - negotiations 119 10
 - referral to the ICJ 119 14 *et seq.*
 - role of Assembly 119 12
 - re Headquarters Agreement 3 27 *et seq.*
- Sexual slavery 8 693 *et seq.*
 - crimes against humanity 7 61 *et seq.*
 - definition 8 694
 - essential elements 8 702 *et seq.*
 - forced labour 8 711
 - forced marriage 8 715
 - non-contextual elements 7 61
 - Slavery Convention 1926 8 695, 712
 - trafficking in persons 8 713 *et seq.*
- Sexual violence
 - crimes against humanity 7 68
 - non-contextual elements 7 68
- Signature, ratification, acceptance, approval or accession 125 1 *et seq.*
- Siracusa Draft 1 4
- Slavery, *see Sexual slavery*
- Slavery Convention 1926 8 695, 712
- Solemn undertaking of members of the Court 45 1 *et seq.*
- Solicitation or acceptance of a bribe by an official of the Court 70 12
- Soliciting a crime 25 19
- Special Advisers and Special Representatives of the Secretary-General 2 37
- Special Court for Sierra Leone- Headquarters Agreement 3 65 *et seq.*
- Special Working Group on the Crime of Aggression 112 73, 97
- Staff of Office of Prosecutor and Registry 44 1 *et seq.*
 - appointment 44 3
 - drafting history 44 1 *et seq.*
 - gratis personnel 44 7 *et seq.*
 - qualification 44 4
 - Staff Regulations 44 5 *et seq.*
- Staff Regulations 44 5 *et seq.*
- Standard of proof 78 11
- Standard of review 81 34 *et seq.*; 83 6
- Standards of imprisonment 106 4
- Standards of review on appeal 81 34 *et seq.*, 41 *et seq.*
- Standing on appeal 83 22 *et seq.*
- Stare decisis* principle 21 43
- Starvation of civilians as a method of warfare 8 758 *et seq.*, 768
 - civilians 8 773
 - deprivation 8 775 *et seq.*
 - drafting history 8 758 *et seq.*
 - economic sanctions or blockades 8 782
 - elements 8 766 *et seq.*
 - intention to starve 8 791 *et seq.*
 - *mens rea* 8 791 *et seq.*

Index

- objects indispensable to the survival of civilians 8 771 *et seq.*
 - result of starvation 8 790
 - starvation 8 768
 - State acceptance as precondition to the exercise of jurisdictions 12 14
 - State ‘opt-in’ and ‘case-by-case’ proposal 11 11
 - State Party referral – exercise of jurisdiction 13 15
 - Stationing agreement 8*bis* 136 *et seq.*
 - unlawful extension of presence 8*bis* 139
 - violation 8*bis* 137
 - Statute of limitations 29 1 *et seq.*
 - Structure of the Prosecutor’s Office 42 12 *et seq.*
 - Study Group on Governance 112 70
 - Subsequent development in the jurisprudence revision of conviction or sentence 84 16
 - Suffering from mental disease or defect 31 23 *et seq.*
 - Summons to appear by Pre-Trial Chamber 58 1 *et seq.*
 - appearance before the competent authority 59 7 *et seq.*
 - applicable warrant 59 12
 - application of the Prosecutor 58 37 *et seq.*
 - conditions 59 19 *et seq.*
 - decision of Pre-Trial Chamber 58 40 *et seq.*
 - drafting history 58 1 *et seq.*; 59 2 *et seq.*
 - immediate reaction 59 5 *et seq.*
 - interim release 59 15 *et seq.*
 - notification of the Pre-Trial Chamber and recommendations 59 23 *et seq.*
 - periodic reports 59 27
 - proper proceedings 59 11 *et seq.*
 - surrender on order 59 28
 - Superior order defence 33 1 *et seq.*
 - Superior orders 31 11
 - Superior orders and prescription of law 33 1 *et seq.*
 - command responsibility 33 32 *et seq.*
 - conceptual framework 33 10 *et seq.*
 - connection between order and conduct 33 23
 - crime committed pursuant to an order 33 16
 - crime within the jurisdiction of the Court 33 15
 - exemption 22 25 *et seq.*
 - historical development 33 1 *et seq.*
 - legal consequences 33 24
 - manifestly unlawful order 33 30 *et seq.*
 - meaning 33 13, 17
 - order by Government or of a superior 33 18 *et seq.*
 - order by military or civilian authorities 33 22
 - superior order defence 33 1 *et seq.*
 - Supervision and conditions of imprisonment 105 1 *et seq.*
 - communication between Court and sentenced person 106 7
 - conditions 106 5 *et seq.*
 - standards of imprisonment 106 4
 - supervision of the Court 106 3
 - Surrender
 - definition 102 *et seq.*
 - rule of speciality, *see there*
 - Surrender arrangements 89 25
 - Surrender of persons to the Court 89 1 *et seq.*, *see also Request for arrest and surrender*
 - accordance with procedures under national law 89 24
 - competing requests, *see Competing requests for surrender*
 - compliance with requests for arrest and surrender 89 5 *et seq.*
 - consultation with the Court after a decision to grant the request 89 59 *et seq.*
 - consultation with the Court on admissibility 89 31
 - crimes different from those for which surrender is sought 89 58
 - custody during transport 89 44
 - no authorization for transit 89 45
 - person being proceeded against or serving a sentence in the requested state 89 52 *et seq.*
 - post surrender release 89 26
 - postponement of the execution 89 35
 - proceeding with the execution 89 32
 - surrender arrangements 89 25
 - transmission of the request for the arrest 89 4
 - transportation through the territory of another State 89 38 *et seq.*
 - unscheduled landing on the territory of the transit State 89 46 *et seq.*
- ## T
- Taking hostages 8 171 *et seq.*
 - Geneva Convention, common article 3 8 902 *et seq.*
 - specific elements 8 172 *et seq.*
 - Technical cooperation between Court and UN 2 39 *et seq.*, 40
 - ad hoc cooperation 2 40
 - BINUCA 2 40
 - defence teams 2 40
 - MINUSMA 2 40
 - MONUSCO 2 40
 - OTP 2 40
 - UNHAS 2 40
 - UNON 2 40
 - Temporary transfer of persons 93 29, 55 *et seq.*
 - agreement to conditions 93 57
 - freely given informed consent to the transfer 93 56
 - remaining in custody and returning without delay 93 58 *et seq.*
 - request for purposes of identification or for obtaining testimony or other assistance 93 55
 - Term of life imprisonment 77 24
 - Territorial jurisdiction as precondition to the exercise of jurisdictions 12 15 *et seq.*
 - Terrorism 5 4 *et seq.*
 - *nullum crimen sine lege* 22 59 *et seq.*
 - Testimony in person 69 25
 - Third-party information or documents 73 1 *et seq.*
 - disclosure in confidence 73 9 *et seq.*
 - information from States Parties 73 13 *et seq.*
 - information from states, intergovernmental and international organizations 73 12
 - non-States Parties refusing to consent 73 15 *et seq.*
 - requested State Parties 73 7 *et seq.*
 - Time for preparation of the defence 67 22 *et seq.*
 - Time limit for appeal 83 25 *et seq.*
 - Timing of disclosure of documents or information in the trial 64 22
 - Torture 8 87 *et seq.*
 - Convention against Torture 7 135
 - crimes against humanity 7 52
 - exception 7 134
 - inhumane treatment, *see there*

- intent and knowledge 7 131
- persons in custody or under control 7 133
- rape and sexual violence 7 69
- severe pain or suffering 7 132
- specific elements of torture 8 88
- violence to life and person 8 895 *et seq.*
- Trafficking Convention 7 121
- Transfer of persons, *see Enslavement*
- Transfer of execution 101 36
- Transfer of the person upon completion of sentence 107 1 *et seq.*
 - applicable law 107 2
 - costs of transfer 107 6
 - extradition or surrender 107 7 *et seq.*
 - receiving state 107 3
 - staying in the state of enforcement 107 5
 - wishes of transferee 107 4
- Transferring parts of the own population into occupied territory 8 364 *et seq.*
 - attributable to the occupying party 8 384
 - basic rules prohibiting transfers into occupied territory 8 370, 372 *et seq.*
 - belligerent occupation 8 367
 - elements 8 378 *et seq.*
 - government involvement 8 383
 - nature of person transferred 8 379
 - normative framework 8 366 *et seq.*
 - normative origin and drafting history 8 365 *et seq.*
- Transitional provisions 124 1 *et seq.*
- Translation and interpretation during investigation 55 7
- Transmission of cooperation request 87 4 *et seq.*, 19
- Transnational armed conflicts 8 856 *et seq.*
- Travel and subsistence costs of organs and staff of the Court 100 5
- Treaty crimes 5 1 *et seq.*
- Trial 62 *et seq.*
 - disclosure of third-party information or documents, *see Third-party information or documents*
 - evidence, *see there*
 - functions and power of the Trial Chamber, *see there*
 - place of trial, *see there*
 - presence of the accused, *see Presence at trial*
 - presumption of innocence, *see there*
 - protection of national security information, *see there*
 - protection of victims and witnesses and their participation in the proceedings, *see there*
 - reparation to victims, *see there*
 - requirements for the decision by the Trial Chamber, *see Decisions by the Trial Chamber*
 - rights of the accused, *see there*
 - sentencing, *see there*
- Trial Division 34 6 *et seq.*, 7
- Trial management 81 42
- Trial without undue delay 67 25 *et seq.*
- Trust Fund 79 1 *et seq.*
 - beneficiaries 79 5 *et seq.*
 - Court orders to transfer fines or forfeiture 79 8
 - drafting history 79 2 *et seq.*
 - management 79 10
- U
- UN Basic Principles on the Independence of the Judiciary 46 5
- UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment 55 16
- UN Children's Fund 2 37
- UN Commission of Inquiry 2 47 *et seq.*
- UN Convention on the Rights of the Child 1989 8 800
- UN Convention on the Safety of United Nations and Associated Personnel 8 225
- UN Development Program 2 54
- UN Educational, Scientific and Cultural Organisation 2 38
- UN GA Resolution 3314 8*bis* 99 *et seq.*
- UN ICTY Judicial Database 2 46
- UN SC Resolution 1593 - exercise of jurisdiction 13 16 *et seq.*
- UN Standard Minimum Rules for the Treatment of Prisoners 55 16
- UN Women - cooperation with UN 2 37
- UN Working Group on Arbitrary Detention 7 49
- Unanimity, majority and minority views of trial judges 74 57 *et seq.*
- Undertaking as to the truthfulness of the evidence 69 23 *et seq.*
- UNHAS 2 40
- Unlawful confinement 8 156 *et seq.*
 - conditions rendering confinement unlawful 8 169
 - occupied territories 8 170
 - specific elements 8 157
- Unlawful deportation or transfer 8 145 *et seq.*
 - mental element 8 155
 - requirements as to transfer 8 150
 - specific elements 8 146
- UNON 2 40
- Unsworn statement 76 47 *et seq.*
- Using any weapons by a State against the territory of another State 8*bis* 126
- Utilizing the presence of a protected person to render certain objects immune from military operations 8 743 *et seq.*
- V
- Vacancy, *see Judicial vacancy*
- Victim participation
 - appeal 82 14
 - proceedings on appeal 83 35 *et seq.*
- Victim representation 15 27 *et seq.*
- Victims Trust Fund 79 1 *et seq.*
- Victims
 - victims' participation, *see there*
 - victims' protection, *see there*
- Victims and Witness Unit 43 15 *et seq.*
 - persons at risk on account of their testimony 43 20
 - relation to Office of the Prosecutor 43 16
 - relation to Registry 43 15
 - responsibilities 43 18 *et seq.*
 - staff 43 21
- Victims of sexual violence 68 21
- Victims' participation 68 3, 22 *et seq.*
 - legal representatives of victims 68 27, 38
 - notification to victims and their legal representation 68 45
 - Office of the Public Counsel for Victims 68 40 *et seq.*
 - personal interest 68 22
 - Rules of Procedure and Evidence 68 29

Index

- Victims' Participation and Reparation Section 68 40 *et seq.*
 - victims' views and concerns 68 23
 - Victims' Participation and Reparation Section 68 40 *et seq.*
 - Victims participation and reparations in Regulations 2004 52 33
 - Victims' protection 68 1, 12 *et seq.*, 14
 - children as victims or witnesses 68 21
 - exceptions 68 19
 - limits 68 19 *et seq.*
 - measures of the Court to protect victims and witnesses 68 12, 15 *et seq.*
 - presentation of evidence by electronic or other special means 68 21
 - proceedings in camera 68 19
 - victims of sexual violence 68 21
 - Video link in trial 63 15 *et seq.*
 - Vienna Declaration and Programme of Action 7 54
 - Violation of right to fair trial in appeal 81 59 *et seq.*
 - Violation of stationing agreements and unlawful extension of presence act of aggression 8bis 136 *et seq.*
 - Violence to life and person
 - cruel treatment 8 894
 - murder 8 889 *et seq.*
 - mutilations 8 893
 - torture 8 895 *et seq.*
 - Visas, permits and other documents 3 49
 - Voluntary contributions 116 1 *et seq.*
- W**
- Waiver rule of speciality 101 27 *et seq.*
 - Waiver principle 81 32, 44
 - Waiving of immunities, privileges 3 47
 - War crime committed in armed conflict not of an international character 8 823 *et seq.*
 - armed conflict between forces of the government and other groups with third States being involved 8 844 *et seq.*
 - armed conflict without third States being involved 8 838 *et seq.*
 - armed conflicts exclusively between two or more States 8 837
 - classification 8 833 *et seq.*
 - counter-terrorist operations 8 860 *et seq.*
 - internal disturbances and tensions 8 910 *et seq.*
 - non-international conflict 8 909
 - other serious violations of the laws and customs applicable in armed conflicts not of an international character, *see there*
 - scope 8 909 *et seq.*
 - transnational armed conflicts 8 856 *et seq.*
 - violations of common article 3 Geneva Convention, *see Geneva Convention, common article 3*
 - War crimes 8 1 *et seq.*
 - classification 8 48 *et seq.*, 53
 - drafting history 8 19 *et seq.*
 - elements describing the context 8 66 *et seq.*
 - elements of war crimes, *see there*
 - elements related to persons and property 8 74 *et seq.*
 - evolution of the law of war crimes 8 13 *et seq.*
 - Geneva conventions 8 57 *et seq.*
 - grave breaches, *see there*
 - international humanitarian law 8 2, 4 *et seq.*
 - interpretation 8 43 *et seq.*
 - jurisdiction 5 24 *et seq.*; 8 53 *et seq.*
 - maintenance of law and order by legitimate means 8 1001 *et seq.*
 - meaning 8 56 *et seq.*
 - other serious violations of the laws and customs applicable in international conflicts, *see Serious violations of the laws and customs in international conflicts*
 - Warrant of arrest by Pre-Trial Chamber 58 1 *et seq.*, *see also Arrest proceedings in the custodial State*
 - Warrant of arrest by Pre-Trial Chamber
 - amendments of warrants of arrest 58 31 *et seq.*
 - decision of Pre-Trial Chamber on amendment 58 35 *et seq.*
 - drafting history 58 1 *et seq.*
 - duration of effect 58 27 *et seq.*
 - issuance 58 10
 - minimum requirement for a warrant 58 26
 - minimum requirement for application 58 20 *et seq.*
 - preconditions 58 11 *et seq.*
 - procedure 58 7 *et seq.*
 - provisional arrest, arrest and surrender on request of the Court 58 29 *et seq.*
 - purpose 58 16 *et seq.*
 - request of Prosecutor for amendment 58 31 *et seq.*
 - securing attendance of released person 60 23 *et seq.*
 - Wilful killing 8 77 *et seq.*
 - Wilfully causing great suffering, or serious injury to body or health, *see there*
 - scope 8 106 *et seq.*
 - Wilfully depriving a protected person of the rights of fair and regular trial 8 136 *et seq.*
 - guarantees under the Fourth Geneva Convention 8 138 *et seq.*
 - mental element 8 144
 - specific elements 8 137
 - Withdrawal from the Rome Statute 127 1 *et seq.*
 - Witness – privileges and immunities 48 11 *et seq.*
 - Women's Caucus for Gender Justice 7 122
 - Working Group on Amendments 112 68 *et seq.*
 - Working languages in the Assembly 112 93
 - World Conference on Human Rights 7 54
 - World Food Programme 2 37
- Z**
- Zuphten Draft 1 3, 10